AN INTRODUCTION TO THE SOURCES OF ETHIOPIAN LAW FROM THE 13th TO THE 20th CENTURY*

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INTRODUCTION

This paper is an introduction to the sources of Ethiopian law between the 13th and the 20th century.

By an introduction, we mean that the reader must not expect to find in the following pages a definite and comprehensive description of the legal development of Ethiopia. The field we will be dealing with is a relatively new one and its scientific and systematic study has just been begun. We will thus only try in this essay to outline our present knowledge of the sources of Ethiopian law and, as far as possible, to define the prospects of future development in the field.

The sources of Ethiopian law consist of any documentation, mostly written but also oral, which can add to our knowledge of the law of Ethiopia. In other words they are all the means through which the reality of Ethiopian law is expressed. This includes not only legal sources in the narrow sense of the word, i.e. legislative enactments, custom, judgments, legal science and legal documents, but also non-legal sources giving information as to the state of the law, i.e. historical works, travel reports, newspapers, literary works, etc. And obviously both categories can include both written and oral documents, such as recordings on records or magnetic tapes.

For our purpose, we will define law as being those acts and institutions the respect for which is enforced by socially recognized organs in order to safeguard social cohesion and to develop society. A very wide definition has been chosen in order to bring within its limits the greatest possible number of phenomena which can be called law. It puts special stress on the fact that law is a social phenomenon, that law includes institutions as well as acts, that law is enforced by socially recognized organs and finally that law has two main functions: the safeguarding of social cohesion and the development of society.

But, in this paper, our subject will be restricted to only a small area of the law, i.e. the law of Ethiopia. We will consider the law of the country in its present boundaries, although in some cases we will have to refer to foreign legal materials as having influenced the sources of Ethiopian law.[1]

Finally, the chronological limits of our study stretch over eight centuries of

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[1] We will however exclude from this paper that part of the law which cannot be considered as being Ethiopian as it was imposed to the country by foreign rule. This is the case for Italian and British law in either Ethiopia and Eritrea at the time they were subjected to colonial rule.

Ethiopian legal history. The 13th century has been taken as a starting point as it provides us with the first important written documents on the state of the law in the country. Obviously documentation exists for previous periods, but it cannot compare with that of the 13th century and after. On the other end, our survey will extend up to the present time, and so include the most recent developments in the sources of Ethiopian law.

Within these general chronological limits, we will divide the history of Ethiopian law into four main periods:

1) from the 13th century, i.e. from the time of the advent of the so-called Solomonic line of kings, until the accession of Emperor Menilek to the Ethiopian throne in 1889; we will call it the pre-Menilek period.

2) from the beginning of Menilek's reign to the appointment of Ras Täfäri as regent in 1916; we will call it Menilek's period.

3) from the appointment of Ras Täfäri as regent to the Italo-Ethiopian conflict of 1935; we will call it the pre-war period.

4) from the return of His Imperial Majesty Haile Sellassie I in 1941 to the present time, i.e. the contemporary period.

The justification of these divisions can be found only in the development of the sources of Ethiopian law during each of these periods. As we shall see each of them can be characterized by special features in that respect.

THE SOURCES OF ETHIOPIAN LAW

The sources of Ethiopian law, as has been already pointed out, can be divided into two main categories: legal and non-legal sources. The former can be subdivided into legislative enactments, custom, case-law, legal science and legal documents, while the latter consist mainly of scientific and literary works (in which we include travel reports, general studies about Ethiopia, newspapers, and general periodicals). We will now proceed to examine each of these sources in an historical perspective considering successively the different periods of Ethiopian legal history mentioned in the introduction.

A. LEGAL SOURCES

I. LEGISLATIVE ENACTMENTS

Legislative enactments can be defined, for the purposes of this paper, as the formal expression of the will of the governing persons or institutions of a given society, in the exercise of their governing function. This definition excludes those expressions of the will of the governing persons or institutions which constitute the judicial administration of the society; such expressions will fall in the case-law category.

If we consider the first period of Ethiopian legal history, legislative enactments seldom appear as such, isolated from other legal sources. They are to be found, as we shall see, in religious books (i.e. in non-legal sources) or chronicles.

But there is a very important exception to this general rule: the *Serata Mangest* or *Law of the State*, which has been translated into German and Italian.[2] This short collection (it contains altogether twenty-one articles of law) appears to record a continuous legislative activity which started in the 14th century and culminated in the 17th; the first elements are attributed by Guidi to Amda Sion (1314-1344) and the last to Fasilidas (1632-1667), although the eminent Italian scholar was apparently unable to date with precision every element of the collection. It consists mostly of enactments on the organization of the Ethiopian royal Court (including many provisions defining the status of dignitaries recognized as members of that Court), but it also contains some provisions on more general matters such as civil procedure, although these are always connected with members of the royal Court. The following is a good example of the such a provision: "When the Queen accuses somebody or is accused by somebody, the judges shall be called to sit in court in her house."[3]

Apart from this particular collection of legislative enactments (and one cannot exclude the possibility of one day finding other similar collections), laws of the first period are generally found in non-legal texts; there they are reproduced most often by historians.

Examples of statutory legislation by Ethiopian kings are thus found in the chronicles recounting the events of their reign or those of their predecessors. The texts of the laws are generally drafted in a very short and optative form which soothes the imperative character of the command without depriving it of its force. The two texts which follow show both aspects clearly. The first text is from the so-called *Chronicle of Paris*, published by Basset in his *Etudes éthiopiennes*[4] and concerns a very important moment in Ethiopian history: the abdication of king Susenyos (1607-1632) after the re-establishment of the traditional faith in the Empire. It reads as follows: "Let this Faith be re-established and my son Fasil reign." As for the second text, it is taken from the so-called *Abbreviated Chronicle*, published by Beguinot[5] and reproduces an enactment of king Za-Dengel (1603-1604). It reads as follows: "Let all the men be soldiers and the land pay the tribute." Conti Rossini, commenting upon this text, stresses the unusual character of the enactments, as normally land was exempted from taxation as soon as men went to war.[6] And in another study of the same text, he discusses its exact meaning and disputes the position taken by another Italian scholar, Cerulli.[7] The

[2] See J. Varenbergh, "Studien zur abessinischen Reichsordnung", in *Zeitschrift für Assyriologie*, vol. 30 (1915), pp. 1-45 for the German translation of the text, and I. Guidi, "Contributi alla storia letteraria di Abissinia, I. Il Ser'ata Mangest", in *Rendiconti della Reale Accademia dei Lincei, Scienze morale*, vol. XXXI ser. V (1922), pp. 65-89, for the Italian translation.

[3] I. Guidi, cited above, p. 76.

[4] R. Basset, *Etudes éthiopiennes*, (Paris 1881), p. 132.

[5] F. Beguinot, *La cronaca abbreviata d'Abissinia*, (Roma 1901), p. 42.

[6] C. Conti-Rossini, "Due squarci inediti di cronaca etiopica", in *Rendiconti della Reale Accademia dei Lincei, Scienze morale*, vol. II ser. V (1893), pp. 811-812.

[7] Compare C. Conti Rossini, "Sue due frasi della Cronaca abbreviata dei Re d'Etiopia", in *Annali dell'Istituto Orientale di Napoli*, vol. 3 (1949), pp. 284-290, with E. Cerulli, *Etiopia occidentale*, vol. I, (Roma 1930), pp. 138-140.

latter goes so far as to say that ambiguous drafting of the document was deliberate so as to allow whatever interpretation would most favour the Crown in any one instance.[8]

More specialised are the enactments of King Zara Yaqob (1434-1468), which are contained in his work entitled the *Book of Nativity*. It mostly deals with religious affairs, but also contains texts on civil and penal matters, scattered among attacks against heresies of the time.[9]

All the enactments with which we have been dealing until now are general in the sense that they were applicable to the whole of the Ethiopian Empire at the time of their promulgation. But we must also take into consideration particular legislative texts conferring special rights to certain persons or, more often, to institutions. Such is the case, for instance, of the two documents reproduced below, which are generally called privileges or charters. The first is from a very important collection of more than a hundred documents establishing forced financial contributions and announcing gifts to various religious institutions of northern Ethiopia. It was first published in the beginning of this century under the title *Liber Axumae* by Conti Rossini.[10] From it, we have taken as an example from an early period, a text from the end of the 14th or the beginning of the 15th century. It is reproduced here in its English translation by Huntingford,[11] which reads as follows:

"To the glory of the Father, the Son, and the Holy Spirit. I, the Emperor (haṣē) Dawit, have granted by charter to my father Aron of Dabra Hermo: "(then follows the list of the grants)." That it may be for me a conductor to the kingdom of Heaven. If any one violates or infringes (this), may he be cursed by the power of Peter and Paul; and by the mouth of the Father, the Son, and the Holy Spirit; and by the mouth of all the Prophets and Apostles, for ever. Amen."

Such documents can be found all throughout Ethiopian legal history, up to and including the 19th century, although in the case of the latest documents charters are frequently the confirmation of previous privileges, as can be shown by another excerpt from the *Liber Axumae*. It was promulgated by Emperor Yohannes IV between 1868 and 1889, i.e. at the very end of our first period, and reads as follows:

"And I, the king of kings Yohannes, have renewed all the hereditary grants and charters of Dabra Bizan which my fathers the kings Dawit, Zar'a Ya'qob, Lebna Dengel, and Galawdēwos gave. Who so violates or infringes (this), may he be cursed by the mouth of the Father, the Son and the Holy Spirit, be he *Tegrē makuannen* or *bahra nagasi* or *makuannen's* deputy; may he be cursed by the power of Peter and Paul."[12]

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[8] E. Cerulli, cited above note 7, p. 139.

[9] K. Wendt, *Das Mashafa Milad (Liber Nativitatis) und Mashafa Sellase (Liber Trinitatis) des Kaisers Zar'a Ya'quob*, 4 vols., (Louvain 1962) and C. Conti Rossini and L. Rieci, *Il Libro della Luce del Negus Zara Ya'quob (Mashafa Berhan)*, 4 vols., (Louvain 1964-1965).

[10] C. Conti Rossini, *Liber Axumae*, (Paris 1909-1910).

[11] G.W.B. Huntingford, *The land charters of Northern Ethiopia*, (Addis Ababa 1965), p. 33.

[12] Id, p. 79.

Aside from the charters or privileges granted to communities or individuals, another legislative source of Ethiopian legal history can be found in the treaties concluded between Ethiopian sovereigns and foreign powers. These treaties are found at a rather late stage of our first period, the first among them being the Anglo-Ethiopian Agreements of 1841 and 1849, which were concluded by Queen Victoria's Government and Sahle-Selassie as to the first and Ras Ali as to the second.[13] These treaties, generally qualified as friendship and commerce treaties, were to grow more numerous in the following years as Ethiopia became an important element in the politics of European powers in the Red Sea area. In the beginning (as is the case for the 1841 and 1849 treaties and also for the Italo-Ethiopian Treaty of 1883 passed by Menilek) the agreements were concluded between local kings and the foreign powers; it is not until Menilek's reign as Emperor that one may in fact speak of agreement between Ethiopia as such and the other countries.[14]

These agreements deal mostly with public international law problems, although they sometimes include very important provisions influencing directly the legal structure of the country. Such is the case, for instance, for article XVII of the 1849 Treaty which establishes consular courts in Ethiopia (or at least within the limits of Ras Ali's territory) with exclusive jurisdiction over British subjects both in civil and penal matters.[15] The treaties also provide us for the first time with documents which are written in foreign languages and which can be found in foreign ministerial archives outside Ethiopia. Often, however, the text of a treaty differs in its different versions, owing to the fact that it is written in Amharic and in the language of the foreign contracting power; this has sometimes led to serious problems of interpretation, some of which have nearly resulted in *casus belli* between the interested powers.

Finally legislative enactments promulgated by the Catholic Church which were accepted by the Ethiopian Church must be mentioned here. They can be found in collections like the *Senodos*, some parts of which have been published or translated.[16] In the same way the Acts of the Apostles were received in the Ethiopian Church through the *Didascalia Apostolorum* which was also translated into Ge'ez during the first times of Ethiopian legal history.[17]

This brings us to our conclusions on the legislation of this first period of Ethiopian legal history. One may say that apart from some very rare collections of either royal or Church legislative materials or privileges and the few international treaties, legislative enactments of the period are not well known. First

[13] The second of these treaties is published in *Trattati, convenzioni e accordi relativi all'Africa*, 4 vols., Rome 1941-1943, Vol. III, pp. 208-212.

[14] This is written with the full knowledge that treaties binding on Ethiopia as such could have been passed as soon as Theodoros was proclaimed emperor in 1855. It should be noted, however, that there was an Emperor in the country in 1883, when Menilek entered into his agreement with Italy: this was Yohannes IV.

[15] See *Trattati*, cited above in note 13, pp. 211-212.

[16] On the *Senodos*, see the studies by Guerrier and Grebaut, Mauro da Leonessa, Guerrier, Horner, Duensing, Guidi and Conti Rossini in the Bibliography, Legislation (1st period — Church law), to this article.

[17] On the *Didascalia*, see the studies by Pell Platt and Françon, in the same place.

of all, the work of going through all available sources (especially the chronicles) for their legal references has still to be done. Secondly, the materials available at the present time offer no guarantee of the authenticity of the texts quoted by the chronicles. As we have seen, the language of the laws is often not very clear and gives rise to many interpretations. Whether this is due to the deliberate intention of the Ethiopian rulers (as Cerulli maintains) or to the lack of precision on the part of the person in charge of the chronicles (the Tsähäfē T'ezaz or Official Chronicler) has still to be determined[18] and perhaps it never will be, as there were apparently no organized archives at the time of their writing. Moreover, one can be sure that the diffusion of legal instruments was by proclamation as one of our documents clearly shows. We refer to the already mentioned excerpt from the *Abbreviated Chronicle*, containing Za Dengel's law. The excerpt itself is preceded by the following phrase: "In the first year of his reign, he made a proclamation through a herald, saying:..."[19] Finally it must be pointed out that in many cases we do not even have a quotation of the legislative text, but only the simple comment that a text with such and such contents has been passed by a sovereign; in fact this is most frequently the case.[20] A very wide field of study is thus open to legal historians.

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In the field of legislative enactments, the second period of Ethiopian legal history is very different from the first in that we possess evidence of a legislative concept much closer to that to which European legal historians are accustomed. The first of these documents appears in 1908 with a set of proclamations defining the functions of the various Ministers, members of the newly appointed Cabinet.[21] This appointment is the first of Menilek's moves towards the organization of his country on European lines and it was to be followed by some others of which evidence was fortunately preserved in Balambaras Mahtämä Selassie Wolde Meskel's *Zekrä Nägär*.[22]

Apart from the above mentioned laws, one may also mention the proclamations on successions or on the introduction of new currency; even more general imperial declarations closer in content to the ancient laws appear.[23] A very good example of these is a proclamation made in Harrar in 1908 and recorded in *Le Semeur d'Ethiopie* which reads as follows: "You Christians and Muslims be free, each of you, to live according to your faith. If anybody is injured let him know that he has all freedom to come to me. Let everybody avoid spreading news in the country which is such as to trouble public peace."[24]

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[18] On this problem see also D. Levine, *Ambiguity and Modernity* (a paper prepared for the Session on Sociology of Knowledge, Fifth World Congress of Sociology, Washington (1962)).

[19] See C. Conti Rossini, cited above in note 6, p. 811.

[20] See, for instance, the reference to a legislative enactment of King Amda Sion dismissing judges opposing his policies in R. Basset, cited above in note 4, p. 101.

[21] These proclamations will be published as part of an article by Selamu Bekele and J. Vanderlinden in a future issue of the *Journal of Ethiopian Law*.

[22] Addis Ababa 1951.

[23] For the mentioned proclamations, see Balambaras Mahtämä Selassie, cited above, pp. 72 (on successions) and 199 (on new currency).

[24] *Le Semeur d'Ethiopie*, August 1908, 4th year, p. 447.

And finally it seems that some kind of subsidiary legislation is appearing in Ethiopia. We think that such a case is that of public notices originating from the Post Office Department and regulating the postal organization of the country. Such subsidiary legislation was prepared by foreign experts in charge of divisions of the newly created ministries, as would be the case for the Director of Posts and Telegraphs, a man named Guillet who kept the population informed of the postal regulations.[25]

But despite the increase in our knowledge of legislative sources during that period, there are still many enactments only mentioned in documents such as chronicles or travel reports, and of which we have no further account. In this respect the chronicle by Menilek's newly appointed Minister of the Pen, Gäbrä Selassie (the former Tsähäfē T'ezaz) is an example for it offers many hints as to the legislation of that reign, the text of which has apparently not been kept.[26]

Apart from these general enactments, texts of a more special nature can be found from the same period. These are concession agreements and international treaties.

The concession agreements are of the same kind as previous charters or privileges as they give to specific persons or groups, a privilege which will have to be recognized by everybody within the country; an interesting text in that respect is the Lane Concession which refers to "Mr. George William Lane, and to the Englishmen in the City of London who are his company" as being the grantees of a mining concession.[27] Of course traditional privileges and charters still exist, but they do not contain much that is new, while the concessions are totally new documents and provide first hand evidence of attempts to develop Ethiopia economically. The importance of some of these concessions is even such that some of them have been frequently reproduced, either in Ethiopian sources like the *Zekrä Nägär* or in European sources such as Pigli's book on Ethiopia in European politics[28] or Zervos' on the Ethiopian Empire.[29] Such is the case of the highly significant railway concession to the Emperor's influential advisor Alfred Ilg[30] and of the no less important concession of the Bank of Abyssinia to the National Bank of Egypt.[31] Obviously there were less important privileges granted to foreigners (such as the Lane Concession mentioned above), but these two examples show clearly what impact such privileges could have on

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25 *Le Semeur d'Ethiopie*, November 1908, 4th year, p. 493.

26 Guebre Sellassie, *Chronique du règne de Menelik II, roi des rois d'Ethiopie*, 2 vols., (Paris 1932); see, for instance, vol. II, 531-532 on the appointment of judges.

27 Public Record Office Archives, F.O. 1/37, an annex to a letter of January the 5th 1900 from J. L. Harrington, Consul in Addis Ababa to the Marquis of Salisbury.

28 For the *Zekrä Nägär*, cited above in note 22, see for example pp. 452-482, various agreements on the Franco-Ethiopian railway and for M. Pigli, *L'Etiopia nella politica europea*, (Padova 1936), pp. 234-235 (Mining concession to Dr. Ilg), p. 239 (the same to an Italian syndicate).

29 A. Zervos, *L'Empire d'Ethiopie*, (Athens 1936), gives a list of various concession agreements on p. 303.

30 See Pigli, cited above note 28, pp. 215-217 and Zervos, cited above note 29, pp. 294-295.

31 See Pigli, note 28, pp. 243-244, and see Zervos, note 29, pp. 181-182.

the future of the country. The minor concessions will most often be found in European archives, where important research has still to be done.[32]

At the same time that Ethiopia was establishing legal relations in a formal way with foreign individuals or companies, its relations with foreign states were developing at an ever increasing pace. Menilek's openness to the outside world, as much as the vital position of Ethiopia in the horn of Africa, was the origin of an intense diplomatic activity culminating in the many international agreements of the period, some of them being of paramount importance for the contemporary history of this part of the world. We need only mention the famous Wichale Treaty dating from the very first year of our period or, much later, the Klobukowski Agreement with the French government in 1908 which was to be the source of many conflicts arising from its formal acknowledgement (in Article 7) of the existence of foreign consular courts on Ethiopian territory. The interest of these treaties is such that they have often been published in foreign languages, although rarely in Amharic.[33] It is to be hoped that all these documents will be published as soon as possible as they would prove invaluable for the historians of Ethiopian law. This would also close once and for all the many debates over the exact meaning of the different versions, on which each party relied to support its claims.[34]

Thus the second period (especially after 1907) brings great improvements in our knowledge of the legislative sources of Ethiopian law. Not only are more laws known over a shorter period (1907 or 1908 to 1916), which is a quantitative improvement, but they are also better known since we possess fuller texts of the laws, which is a qualitative improvement. And not only do we possess many full texts of legal documents, but also these texts are often available in different languages, the Amharic being nearly always accompanied by a corresponding document in the language of the foreign contracting power or party.[35]

But what is even more interesting is that we may still hope one day to have access to the original legislative instruments. This results from the appointment by Menelik of a Minister of the Pen whose tasks included, according to the proclamation defining his duties, the copying and recording of everything written in the Palace, its careful preservation and the keeping of copies of various government papers.[36] This definition of the functions of the Minister of the Pen was in fact equivalent to a formal establishment of Ethiopian legal archives, even though the importance of this step for the future of Ethiopian legal history may not have been fully realized when the instructions were issued.

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[32] It was a custom for the Consuls or Representatives of foreign powers in Ethiopia to send to their governments a copy of all concessions granted to their nationals by the local authorities. Also, when a problem arose between the conceding power and the foreign person or company, the latter tended to ask for support from their governments, providing them with copies of documents establishing their rights.

[33] This is the case for the examples we have mentioned already in this paper. Neither Pigli, nor the *Trattati*, nor Zervos ever reproduce a treaty in a non-European language. On the contrary, see S. Rubenson, *Wichale XVII*, (Addis Ababa 1964)

[34] Professor Rubenson of the Department of History, Haile Sellassie I University, is preparing such a collection and one hopes that it will be available as soon as possible in a printed form.

[35] Apart from the examples already mentioned in the field of public international law and of privileges granted to foreigners, we unfortunately do not possess versions of legislative documents in another language than Amharic.

[36] See Balambaras Mahtämä Selassie, cited in note 22, p. 646.

As for the origin of the enactments, with the exception of some subsidiary administrative legislation, the Emperor and he alone was still responsible for it. The new ministers seem in fact to have assumed within a new structure and under new names functions which were previously shared by various counsellors of the monarch.

Finally, as concerns the diffusion of the law, there is a basic change through the introduction of printing presses in the country. As early as the first years of the 20th century, a press was functioning regularly in Dire Dawa (on which *Le Semeur d'Ethiopie* was printed) and somewhat later on, in 1911, the first books were printed in Addis Ababa (one of the first books ever printed on these presses is an allegory on the ministries recently created by Menilek).[37] However, if our information is correct,[38] a small printing press exclusively devoted to the printing of proclamations and other official documents was already functioning in the Imperial Palace (in the Ministry of the Pen office) a few years before that time. But this does not mean that the traditional system of proclamations had disappeared. On the contrary, it was maintained throughout this period and was the only way of spreading the laws until about 1908. An excerpt from *Le Semeur d'Ethiopie* of August 1908 shows this clearly when it describes a ceremony of proclamation which took place at that time outside the capital.[39] The herald would come on the market place accompanied by a young lion, "living symbol of the Negus authority," then drums would be beaten and the proclamation read to the population in Amharic; but, and this is very interesting, it would immediately be translated into Harari, Galla and Somali languages. Thus nobody could argue that he did not understand the language of the dominant group and benefit from such ignorance to escape the law.

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As we move into the third period of Ethiopian legal history, differences from the previous periods are more marked than ever before.

First of all the quantitative importance of legislation is increasing. In the twenty years between the appointment of Ras Täfäri as Regent of the Empire and the Italo-Ethiopian war, legislation grew more and more abundant, especially from 1922 onwards. On the basis of the documents which were kept, one can estimate the total amount of that legislation at approximately a hundred proclamations.[40]

But the most significant progress was made in connection with the qualitative aspect of legislation. Not only are nearly all aspects of Ethiopian life considered in the proclamations, but some texts are of paramount importance for the legal development of the country. In addition to the numerous proclamations in commercial matters (on companies, bankruptcy, register of commerce, brokers, etc.),

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37 The article by Selamu Bekele and J. Vanderlinden, referred to in note 21 above, will include the text of the *Allegory*.

38 This information was given to us orally by Balambaras Mahtämä Selassie Wäldä Mäskäl.

39 *Le Semeur d'Ethiopie*, cited in note 24.

40 This estimate is based on a systematic reading of the periodical *Berhanena Selam* by Ato Tadesse Abdi, a law student, the results being compared with data providing by Balambaras Mahtämä Selassie in *Zekrä Nägär* and Zervos in *L'Empire d'Ethiopie*, as well as with other fragmentary evidence given by travel reports or historical studies.

of particular importance were the Constitution of 1931, which for the first time in the history of the country, established on a definite basis its governmental structure, and the Penal Code of 1930, which provided a comprehensive definition of crimes and penalties.[41]

From our point of view, the Constitution of 1931 is also interesting because it introduced for the first time in Ethiopia a difference between various enactments of the legislative power. A difference was thus made between statutes (*lois* in the French text of the Constitution) and decrees (*décrets* in the same text). The first, according to Article 34, are provisions which have been discussed in the two parliamentary Chambers (Chamber of Deputies and Senate) and have been approved by the Emperor, while the second are, according to Article 9, emergency measures taken by the Emperor alone when Parliament is not sitting; the latter, in all cases, must be submitted to Parliament for confirmation and are abrograted if such confirmation is not given. Finally, the Emperor alone, according to Article 10, had the power of issuing orders (*ordres* in the French text) to ensure the execution of existing laws, maintain public order and develop the prosperity of the nation.[42] We have thus three categories of legislative enactments after the promulgation of the Constitution of 1931: statutes, decrees and orders. Most texts published in the five years preceding the war fall within these categories.

But subsidiary legislation also developed in this period and the most noteworthy contribution in that field was perhaps that of the Municipality of Addis Ababa, which on many occasions legislated on topics concerning urban activities; among these topics, we find, to mention but a few: taxes on small retailers, disturbances of peace and order in the town, vehicle registration, censorship of the cinema, theatre and other places of amusement, and even (as the hostilities with Italy were starting) night air attacks.[43] Obviously, apart from the Municipality, Ministries were also very active, each of them in its particular field. There are many Government Notices such as those on hunting licences from the Ministry of Agriculture, on currency exchange rates from the Minister of Finance and on travel in Ethiopia from the Ministry of the Interior.[44]

The increase in the field of general legislation did not prevent the continuation or even the development of more special branches of legislation such as the granting of privileges or concessions to individuals and companies[45] and the conclusion of treaties between Ethiopia and the outside world. In fact the latter part of the legislative activity was the most developed, agreements being made with more

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[41] On the Penal Code of 1930, of which a translation in English was made after the liberation in 1942, see S. Lowenstein, *Materials for the Study of the Penal Law of Ethiopia*, (Addis Ababa 1965), pp. 58-60, with recommended reading on pp. 67-68 and the study by E. Cerulli, *"Il nuovo Codice penale etiopico ed i suoi principi fondamentali"*, in *Oriente moderno*, vol. 12 (1932), pp. 391-405.

[42] *Constitution d'Ethiopie*, (Addis Ababa 1931).

[43] For these municipal regulations, see *Berhanena Selam*, 10 Megabit 1923, 13 Tekemt 1923, 13 Meskeram 1924, 5 Nehasse 1924, and *Aymro*, 24 Meskeram 1928.

[44] For these Notices issued by Ministries, see *Berhanena Selam*, 9 Tahsas 1923, 12 Sene 1920 and 10 Megabit 1923.

[45] For a list of these, of which we cannot ascertain the completeness, see Zervos, cited in note 29 and also the same, p. 302.

and more countries, among which are found, for instance, the Netherlands and Japan.[46] Finally, it much be pointed out that a definite step towards better international relations was taken (although its results were more than disappointing for the Ethiopian government) when Ethiopia asked and obtained in the summer of 1923 admission to the League of Nations.[47]

If we consider some basic points common to the new legislation, we also notice important changes.

First of all, the laws appear now to be published regularly, at least in most cases, either in small pamphlets (as is the case with the most important among them like the Penal Code, the Constitution, and the Laws on Companies, Bankruptcy, and Nationality) or in a newspaper which Regent Täfäri Makonnen founded in 1924 under the title of *Light and Peace* (*Berhanena Selam*). This was a general information newspaper and was not in the strict sense of the term an official gazette; but the personality of its sponsor and the fact that it regularly published official documents such as legislative enactments conferred on it a semi-official character.[48] But this development of written documents (some of which were also printed separately and distributed to the public, as was the case for most urban enactments) did not eliminate the traditional proclamations. In fact one of the first of Ras Täfäri's enactments was to define in a very precise way the procedure which had to be followed for public proclamations, or at least for the most important ones, which were made by the Minister of the Pen from the top of the wall at the Palace gate.[48a] This was obviously still a necessity in Ethiopia at the time.

On the other hand, during that period most legislation was published in two languages, Amharic and French, with the result that we can often manage to get at least one of the two versions when it is difficult to secure the original publications. For example, many legislative enactments have been reproduced in Amharic in Balambaras Mahtämä Selassie's *Zekrä Nägär*[49] while some other documents (often different ones) can be found in Zervos' *L'Empire d'Ethiopie*,[50] this time in the French language.

The result of these material aspects of legislation in this third period of Ethiopian legal history is that we are able to get a fairly good idea of the importance of legislation among the legal sources of the time. Our picture remains incomplete however, since we cannot be sure that everything can be found in either *Berhanena Selam* or the other works devoted totally or partially to the Ethiopian

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[46] See *Berhanena Selam*, 9 Guenbot 1920, for the treaty with the Netherlands and Zervos, cited in note 29, p. 485, for the treaty with Japan.

[47] On this see for example, A. de la Pradelle, *Le conflit italo-éthiopien*, (Paris 1936), pp. 73-107 and following.

[48] A complete collection of that periodical cannot be found even in the National Library in Addis Ababa. From the issues available, one can guess that the periodical was inagurated in January 1925 and was from then on published regularly every week until the end of 1935.

[48a] The cover illustration of the *Zekrä Nägär*, cited in note 22, shows that scene as it was reconstituted by the author from his personal memories.

[49] The core of that book is in fact made up of such enactments.

[50] In some of its parts, this book is more descriptive, but the central part of it is also centered around legislative enactments.

law of the time. One can only hope that some day, through the efforts of all persons interested in that period, it will be possible to complete the picture.[51]

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And so we come finally to the last period of Ethiopian legal history, that starting in 1941 with the return of His Imperial Majesty Haile Sellassie I to Ethiopia. The period is characterized in the field of legislation by even greater changes than the preceding one, changes of which only the most important will be considered here.

First of all, legislation now has a prominent role in the legal development of the country, and there is hardly any area of the law which is not covered by it. The bulk of legislation also has become such that it has been found necessary to prepare consolidated statements on legislative activity in Ethiopia. The first of these *"Consolidated Laws of Ethiopia"* volumes was published in mimeographed form in May 1964 and the whole set of the *Consolidated Laws* contains five such volumes. In these volumes are found "the full text of all laws in force in Ethiopia which have appeared in the Negarit Gazeta from the 1st through the 22nd year of its publication", omitting however special issues available in separately bound editions, such as those containing the Codes (civil, penal, civil procedure, penal procedure and commercial); this practically covers all legislation promulgated between 1941 and 1963 inclusive.[52]

Following the promulgation of the Revised Constitution of 1955, the definition of legislative enactments also became more precise. The text of the Revised Constitution provides for three types of legislative enactment which can be defined as follows:[53]

— Proclamations, which pass through and are approved by Parliament, and are then submitted for the approval of the Emperor (Articles 88, 89 and 90 of the Revised Constitution);

— Decrees, which, under Article 92 of the Revised Constitution, are promulgated by the Emperor alone in case of emergency when Parliament is not in session; these laws have to be submitted to Parliament as soon as it reconvenes;

— Orders, which emanate from the Emperor alone without being submitted to the direct control of Parliament, by virtue of the powers conferred on him by Articles 26, 27, 28, 33, 34 and 36 of the Revised Constitution.

Apart from this principal legislation, there is also subsidiary legislation in the form of legal notices, general notices, or simply notices originating from ministers in their administrative capacity.

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[51] The ideal solution would be to get from the Ethiopian Archives kept in the Ministry of the Pen a copy of all enactments promulgated during that period. This could lead to the publication of a collection of Ethiopian Statutes and such a volume would be invaluable for lawyers as well as for historians.

[52] See *Consolidated Laws of Ethiopia*, 5 vols., (Addis Ababa 1964-1965), and especially p. 1 of Introduction in vol. I.

[53] See *Revised Constitution of Ethiopia* 1955, in the *Consolidated Laws*, cited in note 52, vol. I, pp. 88-113.

Finally, to take the case of more specific legislative enactments, Article 30 of the Revised Constitution states that the Emperor is competent to conclude agreements with foreign powers, provided however that treaties containing some special clauses such as territorial modifications, modifications of existing legislation, requirements of expenditure from state funds, and grants of loans or monopolies must be submitted to Parliament for approval. What is more, these international agreements, together with the Revised Constitution, are considered in Article 122 of the latter as being the supreme law of the land, all future legislation inconsistent therewith being declared null and void.[54]

Although from the technical point of view the Codes do not occupy a special place among other laws, their importance for the future development of the country is such that they deserve particular mention. Between 1957 and 1965, Ethiopia was provided with no less than six codes, the Penal Code of 1957 (on the 23rd of July), the Civil Code, the Commercial Code and the Maritime Code (on the 5th of May 1960), the Criminal Procedure Code (on the 2nd of November 1961) and the Civil Procedure Code (on the 8th October 1965). The history of Ethiopian codification has not yet been written, although some of the drafters have already dropped hints as to various sources. What may be said with certainty is that these codes reflect substantial Ethiopian participation in their elaboration and that such names as those of R. David, J. Escarra, J. Graven and A. Jauffret will be part of Ethiopian legal history for the fact that these scholars provided the codification commission with the preliminary drafts of the codes and with their advice during the process of codification.[55]

A fourth important characteristic of this period is the establishment, as soon as His Imperial Majesty returned to the country after the liberation, of the *Negarit Gazeta*, the first true official gazette of Ethiopia. The *Negarit Gazeta* has been published regularly ever since and one must note that proclamation number 1 of 1941, establishing the Gazette, declares that it shall contain from that time forward all legislative enactments promulgated in Ethiopia.[56] The Gazette is published in both English and Amharic.

In addition to the regular publication of all legislative enactments in the *Negarit Gazeta* and the collection formed in the *Consolidated Laws of Ethiopia*, a special collection including only the proclamations was started in 1951 by the Government.[57] The first volume was published in Amharic and in English and contained proclamations 1 to 114 which were issued in the period from 1942 to 1950.

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[54] See note 53, pp. 95 and 112.

[55] The best known codes, as far as their external history is concerned, are the Penal Code of 1957 and the Civil Code of 1960. See, for example, the studies by J. Graven, cited in S. Lowenstein, cited in note 37, pp. 67-68 and R. David's articles: "Les sources du Code civil éthiopien", in *Revue internationale de Droit comparé*, (1962), pp. 497-506; "Civil Code for Ethiopia", in *Tulane Law Review*, (1963), pp. 187-204, and "Structure et originalité du Code civil éthiopien', in *Zeitschrift fur ausländisches und internationalisches Privatrecht*, (1961), pp. 668-681.

[56] See *Consolidated Laws*, cited in note 52, vol. IV, pp. 159-160.

[57] See Imperial Ethiopian Government, *Negarit Gazeta — Proclamations*, vol. I, (Addis Ababa 1951).

Another characteristic of the contemporary period, as opposed to the preceding one, has been a definite change in the policy concerning the language in which legislation is published. Although the Revised Constitution of 1955 states that Amharic is the national language of the country (Article 125), the practice since the liberation has been to publish all legislative enactments in the *Negarit Gazeta* in both Amharic and English. But on the other hand, it must be stressed that like French in the previous period, English has never been officially recognized as the second language of Ethiopia. The question would perhaps not arise if the original drafts of some of the recent codes (namely the Civil, Penal and Commercial Codes) had not been in French.

As for special legislation (privileges or concessions and treaties), this area of the law continued to develop throughout the period.

On the one hand, enactments granting privileges have generally taken different forms, although a common term "charter" appears to have been used to designate the documents, whatever their strict legal form. Charters were thus granted to various institutions either as simple charters (e.g. to the Chamber of Commerce, the Red Cross Society, the National Ethiopian Sports Confederation) or as Orders (e.g. to the Menelik II Memorial Fund and Trinity Monastery, the Young Men's Christian Association).[58] As for concessions of an economic nature (such as mining concessions, or the railway concession), apparently they are no longer published and it is thus very difficult to know exactly what role they play in the legislative activity of Ethiopia to-day.

On the other hand, as mentioned above, treaties, by virtue of Article 122 of the Revised Constitution, have been given a privileged place within the hierarchy of legislative enactments;[59] they are now considered together with the Revised Constitution itself as the supreme law of the country. By treaties are meant not only bilateral international agreements, but also multilateral agreements such as the Charter of the United Nations and of the Organisation of African Unity, Ethiopia playing a particularly important role in the latter and showing clearly through Article 122 of the Revised Constitution the importance the Empire attaches to that kind of international agreement.[60] Unfortunately not all treaties have been listed in the recent *Consolidated Laws of Ethiopia*. Apart from the Charter of the Organization of African Unity already mentioned and fourteen agreements concerning definite economic arrangements (most of them credit, loan or guarantee agreements), no treaty is mentioned in the consolidation.[61] The reason for that omission is that the *Consolidated Laws* only reflect the contents of the *Negarit Gazeta* and that the latter does not contain treaties which are not submitted for ratification to Parliament. In the case of these agreements, the jurist has to rely upon other non-legal or non-Ethiopian sources if he wishes to find documentation.[62]

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[58] See *Consolidated Laws*, cited in note 52, vol. V, pp. 146-267.

[59] See note 52, vol. I, p. 112.

[60] This is also shown through the fact that the O.A.U. Charter comes immediately after the Constitution and before any other legislative enactment in vol. I of the *Consolidated Laws*, cited in note 52.

[61] See *Consolidated Laws*, cited in note 52, vol. II., pp. 37-54.

[62] This is also the case for some privileges currently granted by the Emperor to persons or communities and known under the name of Golden Edicts. These are not published in the Gazeta and are only known through newspapers.

From this short survey of the available sources of legislative enactments in Ethiopia between the 13th century and to-day, it should be clear that if the most recent period can easily be studied through various sources of documentation, this is not the case for previous periods. A very wide field is still open to lawyers with an interest in history for further exploration and a true appreciation of the contribution of the Ethiopian Emperors or the Ethiopian legislatures to the legal development of their country.

II. CUSTOM

Not much can be said about custom as a source of law in Ethiopia, for although it was until very recently the most important source of that law, it has not been until recently the subject of any systematic study. As will be seen, a clear distinction must be made in that respect between Eritrea and the rest of Ethiopia. But, let us first define custom and present some of its fundamental drawbacks as a source of law.

Custom can be defined as the set of social attitudes which, in a given society, are considered as part of the law and thus are enforced as such. From that definition, it immediately follows that custom is essentially unwritten, being the result of an admitted pattern of behaviour. And, custom being unwritten, it is very difficult for a person who is not a member of the group in which a customary law is in force to be aware of its existence and hence to formulate it. As for members of the group, because custom is an integral part of their daily behaviour and has been transmitted to them as an essential part of their education, they know it without feeling any necessity to write it down. The result is that custom is generally unknown by outsiders unless an external factor assists its diffusion. That external factor can be either a government that feels a need to increase its knowledge of custom (generally with the purpose of controlling it and to provide a firm basis for the administration of justice) or scholars (whose thirst for knowledge pushes them towards anything unknown with the intention of developing understanding). In the first case, governmental action can lead to such important developments as the drafting of customary laws on a systematic basis, as was done in France and Belgium from the 15th and 16th centuries onwards, or in French West Africa in the 1930's, or in Punjab in the 19th century and the Dutch Indies in the 19th and 20th centuries;[63] in the second case, study of customary law is often more empirical, and sometimes leads to more valuable works from a scientific point of view (if one considers for example the contribution of English and American social anthropology to the knowledge of African customary law, one is astounded by the depth reached in studies by Bohannan, Gluckman and Schapera, to mention only three names among the many in the field). It must, however, be emphasized that in the first case, that of state intervention in the recording of customary laws, a prominent role has often been given to men impregnated by their own legal tradition (although such informers often need help in its formulation because they are unable to express something which is so deeply part of themselves), while in

[63] On these various movements, see J. Gilissen, *La rédaction des coutumes dans le passé et le présent*, (Bruxelles 1962).

the second case, the perspective is always that of an external observer (although many of them often spend years with the groups they study). Unfortunately, the result in the first case if often a rough, incomplete or even inaccurate description of custom by members of the society, while in the second, a more comprehensive and intelligible statement by an external observer may lack profound analysis of processes beneath the surface behaviour of the people studied.[64]

In the case of Ethiopia, it must be admitted that custom before the contemporary period, is not very well known. Apart from what can be gathered from travel reports (and these are often a very unreliable source, since their authors were neither members of the local community nor specialized scholars with the necessary scientific background) and some socio-anthropological works,[65] the only interesting documents have been written by Italian scholars either when Eritrea was still under colonial rule (which provide us with information on the northern part of the Empire) or while Ethiopia was subject to the colonial yoke (nearly all studies on Ethiopian customary law were published between 1937 and 1942).[66] From the point of view of legal science, and more specifically of legal history, such ignorance could lead to an irremediable loss as customs slowly give way to modern institutions. An Ethiopian scholar, Dr. Da Maarda, has argued this position very well in a recent article on the legal value of Ethiopian customs.[67]

Among the existing documentation on Eritrea, the masterpiece of C. Conti Rossini, *Principi di diritto consuetudinario dell'Eritrea,* must be cited first, a work which, in spite of its age (it was published in 1916), is still the basis of all research in the field.[68] Next in importance are the more specific accounts which were often the result of governmental interventions of the kind we have previously described and which involved an active participation of the local population (or at least the most educated part of it, the so-called *notabili*) in their drafting. A first group of such accounts was drafted in the first twenty years of the century;[69] then followed an interruption of approximately thirty years extending through the second world war and, at the end of this time, a new set of studies appeared.[70]

As for Ethiopia itself, studies were also prepared during the occupation by Italy on various aspects of customary law.[71] During the post-liberation period, some

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64 This last remark does not concern the above mentioned scholars who exceptionally combine the qualities indispensable in such studies.

65 Alvarez' account of his journey in Ethiopia in the XVIth century, for example, contains many descriptions of local customs. See, for example, pp. 93-95, 105-108, 128, 247, 273 of *The Prester John of the Indies,* vol. I, (London 1961).

66 See the studies of Capomazza, Conti Rossini, Petazzi, Pollera and Roden, plus the anonymous texts of customs published during the same period in Tigrina language, in the Bibliography cited in note 16 under Custom (2d period).

67 See "Valore giuridico delle consuetudini etiopiche", in Atti del Convegno Internazionale di Studi Etiopici, (Roma 1960). pp. 211-222.

68 C. Conti Rossini, *Principi di Diritto consuetudinario dell'Eritrea,* (Rome 1916).

69 See note 66.

70 See the studies by Ostini, Hofner, Conti Rossini and Fusella in the Bibliography cited in note 16, under Custom (3d period).

71 See the studies by Conti Rossini, Masucci, Brotto and others referring to Ethiopia in the Bibliography cited in note 16, under Custom (3d period). See also the *Publications of the Princeton Expedition to Abyssinia by* E. Littmann, vol. II, pp. 101 ff.

very interesting work was done by Italian, British and American anthropologists.[72] But these efforts have been until now too scattered for anybody to try to prepare a synthesis such as that prepared for Eritrea by Conti Rossini in 1916; the only tentative description of Ethiopian legal traditions as a whole, both legal and non-legal, is that of Walker published in 1933.[73]

It is the author's opinion that the main contribution in the field could only come from Ethiopians. Some fragmentary studies on various aspects of custom have already been published in such periodicals as the *Ethnological Society Bulletin* of the University College in Addis Ababa.[74] Unfortunately these studies are not sufficiently known and used. The same is true for a considerable number of unpublished materials devoted to custom which are to be found in several private libraries in Ethiopia. Many educated Ethiopians have in fact felt obliged to record this part of the cultural heritage of their country before it disappeared. Such studies include both first hand accounts and those of the author's relatives and friends, but since they have never been printed, scholars and other persons interested are deprived of first-class materials. It is fervently to be hoped that these studies will soon emerge from their present anonymity and that many authors will follow the example of Balambaras Mahtämä Selassie Wäldä Mäskäl who has recently agreed, in a most generous gesture, to deposit all his manuscripts dealing with legal problems in the Ethiopian Law Archives of the Faculty of Law, Haile Sellassie I University, where they will be accessible to all interested persons.[75]

Apart from the systematic descriptions of customary institutions just mentioned, custom is frequently expressed in a very simple and popular way in the form of proverbs. Anthropologists have always been interested in this unusual way of expressing the law, although European trained jurists have probably had a tendancy to scorn such folk expression of legal relationships. Fortunately, some of these proverbs have been recorded and published recently, in Amharic, by Balambaras Mahtämä Selassie Wäldä Mäskäl, under the title *Culture of the Forefathers*.[76] In that book, the author has collected a few thousand proverbs and, in his preface he stresses the importance of many of them in the legal field.[77] But obviously most of these short texts, even properly translated, would not mean much to young Ethiopians, not to mention foreign jurists. Each of them needs a word of comment to place it in its social and legal context, so as to enable the reader to appreciate its full significance and value. In this respect, the author has kindly accepted to put lawyers interested in the problems of customary law in touch with people in a position to guide them towards a full understanding of that unique source of the law.

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[72] See, among others, the studies by Cerulli, Huntingford, Levine, Messing and Shack in Bibliography cited in note 16, under Custom (4th period).

[73] C. H. Walker, *The Abyssinian at home*, (London 1933).

[74] See, for example, the studies mentioned in the following Bibliography under Custom (4th period) with references to the *Bulletin of the Ethnological Society*.

[75] These manuscripts include a study of the customs (legal and non-legal) of the region of Bulga (Archives catalogue number S 69).

[76] Addis Ababa 1952.

[77] Idem, pp. 6-7.

It is easily concluded even from this short presentation that there is as much research to be done in the field of customary law as in the field of legislation.

The need appears still more pressing when it is remembered that some parts of customary law are still enforceable in Ethiopia to-day, particularly in civil matters, while most of the pre-war legislation is obsolete.

In a recent article,[78] Professor Krzeczunowicz has discussed the degree to which the "repeals" provision of the Ethiopian Civil Code of 1960 has affected customary law. With all his major conclusions, based on article 3347 (1) of the Code concerning the extent to which customary law is still in force in Ethiopia, this author agrees. However, it may be added that what Professor Krzeczunowicz calls the outlets for custom are either special references to custom in the Code (he gives a very useful list of such references), or the possibility of filling vacuums in the law with custom (his example of cooperative savings societies is excellent), or the introduction of custom through judicial interpretation, or, finally, what the author calls para-legal outlets (i.e. the cases in which, although the Code does not refer explicitely to custom, it provides for the intervention of traditional institutions, which is tantamount to an authorisation of the use of custom; such is the case for the fundamental role of family arbitrators in marriage problems). Nevertheless it seems that the author goes too far when he infers from his analysis that the "repeals" provision *severely* limits the field of legal application of custom in Ethiopia.[79] Such is certainly not the case, especially if one considers the area *par excellence* of customary law in Africa to-day, i.e. family law. In fact one is free to marry according to one's custom (Article 577 (2)) and the validity of the union shall be determined partly according to fundamental rules established in the Civil Code and partly by the customary requirements for the subject (although fines or damages can only be allocated and no marriage can be annulled on customary grounds according to rules of the Civil Code) (Articles 580, 606, 623 and 624 of the Civil Code). But then, what is more important, the parties, according to Article 627, are free to settle by a contract of marriage their respective rights and duties not only regarding pecuniary matters, but also, and this can be fundamental, regarding their personal relations (the only limitation to that provision seems to be that the reciprocal duty of respect, support and assistance cannot be altered by the contract of marriage) (Article 636). Finally, all incidents which occur during the union are necessarily submitted to family arbiters i.e., customary authorities whose powers include that of being the only competent authority to pronounce divorce; and their powers in that matter are very wide although the Code, in the case of other than serious grounds for divorce, provides for some conditions. It can therefore be concluded that, if the parties wish it, a marriage can still be governed to a large extent by customary law.

The main objection however to Professor Krzeczunowicz' analysis appears to be that he has neglected a very important provision of Title XXI of the Code, which is Article 3348. It reads as follows:

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[78] "A new legislative approach to customary law: the "Repeals" Provision of the Ethiopian Civil Code of 1960," in *Journal of Ethiopian Studies*, vol. I, No. 1, pp. 57-67.

[79] Idem, p. 65.

[80] This has been argued in discussions with some colleagues in the Faculty of Law.

"(1) Unless otherwise expressly provided, legal situation created prior to the coming into force of this Code shall remain valid notwithstanding that this Code modifies the conditions on which such situations may be created.

(2) Unless otherwise expressly provided, this Code shall not affect the consequences having arisen out of such legal situations prior to the coming into force of this Code."

This article respects the principle of the *status quo ante* for all legal situations existing before the coming into force of the Code, with the consequence that all contracts made according to custom and prior to September 11, 1960 are considered valid. Some have argued that Section (2) of the Article had as a result that all the consequences of such situations were to be regulated by the Code, thus excluding the application of custom (except if a conflict arose concerning the rules governing the establishment of the legal situation in question) after the 11th of September.[80] However it is the opinion of this author that such an interpretation *a contrario* of Section (2) of Article 3348 is not well founded, first of all because nothing in the Code permits such a conclusion, and secondly because it is contradicted by Article 3351 which reads as follows:

"(1) Unless otherwise expressly provided, the provisions of this Code which specify the effects of extra-contractual legal situations shall forthwith apply to legal situations created prior to the coming into force of this Code.

(2) Contracts existing on the coming into force of this Code shall be governed by the provisions of the law under which they have been made, unless the contract is voidable on the ground of mistake, fraud, duress or as being unconscionable in such cases and within such time as are provided in this Code."

These provisions clearly deal, as even the title of the Article, "Effect of existing legal situations," indicates, with the effect of existing legal situations. A distinction is made between situations arising out of contract and other situations, and it is only in the case of the latter that the provisions of the Code always govern the effects arising out of them. As for contractual relations, and this could include marriage relations,[81] their effects are governed by the law under which they have been made (with an exception for the few cases provided for at the end of Section 2), which in many cases is customary law if one refers to the pre-Civil Code period. It is only where a new legal situation is created or a pre-existing legal situation is modified that the effects of that situation will be governed by the Code. The overall result is that there must exist at the present time in Ethiopia many legal situations created before the Code came into force, the effects of which are still and will continue to be governed by custom until the situation is modified. The area of the application of custom in Ethiopia during the contemporary period, if these conclusions are correct, would be much wider than generally thought, and

[81] The theoretical problem of the nature of marriage (be it a contract or an institution) can be discussed at length. We only want to point here the highly contractual aspect of Ethiopian marriage in the light of articles 627 and 632 of the Civil Code.

would constitute another good reason for studying customary law. This however is not to imply a conservative view of legal development. His Imperial Majesty has himself declared, when promulgating the Civil Code, that the rules of law "must reach the heart of those to whom it is intended to apply" and "respond to their needs and customs."[82] It is suggested here that transitory provisions such as Articles 3347 and 3351 provide the practical possibility of responding to the kind of need referred to by His Imperial Majesty. If therefore custom is to be enforced, it will have to be known, and to be known it will have to be studied.

III. CASE-LAW

Case-law may be defined as that part of the law originating from the judicial power, judicial power being understood to include more than the courts of justice, contrary to the traditional much more circumscribed meaning of the phrase. It obviously includes in Ethiopia a jurisdiction such as that of His Imperial Majesty's Chilot, and administrative tribunals set up to deal with special problems such as labour relations. The common characteristic of all formulations of the law in this category is that they arise out of litigation and are, in principle, not normative. In Ethiopia, unlike many other code countries, this last principle is not expressed in a formal way; no Article of the Constitution or of the Codes is an equivalent to Article 5 of the French Civil Code, which reads: "Judges are not allowed to decide cases submitted to them, by way of general rule-making decisions." Yet even in countries which would favour a strict application of this rule, the paramount importance of court decisions and particularly those of the highest courts in the judicial hierarchy cannot be denied.[83] In Ethiopia, the judiciary is capable in the same way of assuming a capital role in the development of the national legal system if the courts respect Article 110 of the Revised Constitution of 1955, which says that "in the administration of justice, they submit to no other authority than that of the law." Law as used here, in the singular, cannot be interpreted only as statutory law; custom, case-law, or even legal science must be included, even if preeminence is always given, in Ethiopia as in European societies, to enactments originating in the exercise of the legislative power as representing the common will of the nation. Such flexibility in the use of judicial power is essential to provide for an harmonious development of the legal system in any country.

Unfortunately, it must quickly be pointed out that in all periods of Ethiopian legal history our information concerning case-law is very limited.

For the first period, no direct source of information is available; the situation here is very similar to the one existing in the field of customary law. It is necessary to rely on travellers' accounts to get an idea of the way in which cases were decided. Chronicles are of practically no use, although one sometimes finds in them mention of important decisions (most often involving the King's justice)

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[82] *Civil Code of the Empire of Ethiopia*, (Addis Ababa 1960), p. V.

[83] See the phrase of Planiol on French law, quoted in G. Krzeczunowicz, "Statutory Interpretation in Ethiopia", in *Journal of Ethiopian Law*, vol. I, 2, p. 316, "in the judgments alone is to be found the law in its living form."

like the famous condemnation to death of Zara Yaqob's sons and daughters by their father for idolatry.[84] But these constitute an exception with the result that the testimony of travellers who have witnessed instances of litigation remain the almost exclusive source of material. Unfortunately witnesses to such occasions appear to have been few, although reports of some cases can be found in Alvarez' Prester John (Muslims who hurt Portuguese in a fight were sentenced to damages amounting to seven ounces of gold in a first instance, and one of them was sentenced to death in a second instance, this time before the Negus; people who tried to escape the Negus' justice by becoming monks were sentenced to flogging)[85] and in Lefebvre's account of his journeys through the country in the middle of the 19th century (a member of his expedition had injured a child playing near a tree by shooting at a bird in a tree and was also sentenced to pay compensation).[86] Obviously all these individual cases mentioned by travellers do not amount to a comprehensive picture of what case-law was in Ethiopia during that period.

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It is not until the end of the second and the third period that the material on Ethiopian case-law really improves, and this is through a most precious work which was only prepared and published during the contemporary period, in the 1950's. That work will be referred to in this paper as the *Digest of Ethiopian Case-law*, for it was not given any title by its authors.[87]

This *Digest* was begun in the late 1940's (presumably 1948) on His Imperial Majesty's instructions with the purpose of preparing a basis for the work of the Civil Code Commission. It was prepared under the direction of Tsähāē T'ezaz Wäldä Giyorgis, Minister of the Pen, by a commission of four members: Blatta Wäldē Kiros, Vice-Governor of Shoa, Fitawrari Däsaläñ Cherinet, a judge in the High Court, Aläqä Täklä Maryam, a scholar working on the *Fetha Negast* and Ato Täklä Maryam Dämisē, a former registrar for mixed jurisdictions. The commission worked for five years, compiling cases previously decided and recorded in what it known as the *Ancient Ethiopian Books of Judgments*, provided that such cases which were originally decided by the *wambers* or imperial judges had been confirmed by the Afa Negus. The result of that considerable work is a set of five volumes containing altogether more than seven thousand decisions ranging over an unknown period of time but going up to 1935. Since the books from which excerpts were taken include more than two hundred *Ancient Ethiopian Books of Judgments*, it can be assumed that some judgments go back as far as the beginning of the century. There is even reason to believe that the records go back to the year 1908 when Menilek, apparently for the first time in Ethiopian legal history, ordered that court records should, from then on, be kept regularly.[88] The excerpts are systematically classified and divided into two main groups, the

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[84] See, for this, J. Perruchon, *Les chroniques de Zar'a Yâcqôb et de Ba'eda Mâryâm*, (Paris 1893), pp. 98-99.

[85] See Alvarez, cited in note 65, vol. I, pp. 383-384, 421-425.

[86] See T. Lefebvre, *Voyage en Abyssinie*, 7 vols., (Paris n.d.), vol. I, pp. 259-261.

[87] 5 vols., (Addis Ababa 1953).

[88] See Gäbrä Selassie, cited in note 26, vol. II, pp. 531-532.

first one occupying the three first volumes and the second one the last two. In both sets the order followed is identical, with the result that the justification for the two distinct sets is not clear unless the second can be considered to be a complement to the first. In all cases the *Digest* provides us with material of inestimable value on Ethiopian case-law during the second and third periods of Ethiopian legal history.

If the *Digest of Ethiopian Case-Law* can be considered as a precious source for these periods, it is obvious that the collection out of which the *Digest* was made is even more precious as it would provide a huge amount of first-class case materials in addition to decisions confirmed by the Afa Negus and contained in the *Digest*. The suggestion that there are more than two hundred and fifty volumes in this collection is in fact a mere guess, calculated on the references to these volumes in the *Digest;* it could very well be that the original collection is even larger. Unfortunately it is kept in the Archives of the Ministry of the Pen and has not yet been made available to scholars in Ethiopia.

Another important source in the field of case-law for the second and third periods is the bulk of consular court decisions handed down between the beginning of the century and 1935. As mentioned above, these jurisdictions were established in Ethiopia as early as 1849, in one of the first treaties concluded between the British government and local kings. But the clause only acquired its real significance in the 20th century when Ethiopia was for the first time opened up to considerable foreign influence. The principle of consular jurisdictions dealing with all conflicts either civil or penal involving a foreigner was repeated in Article 7 of the Franco-Ethiopian Treaty of 1908, better known as the Klobukowski Agreement from the name of the French Plenipotentiary who negotiated it. It was very rapidly extended to other foreigners not benefitting from similar agreements between their governments and the Ethiopian Government on the grounds that all foreigners in the Empire ought to be given equal treatment. The article read as follows:

> "All matters, whatever their nature, criminal or other, between French citizens or protected persons, shall from now on come under French jurisdiction until the legislation of the Ethiopian Empire is in accordance with European legislation.
>
> All matters, whatever their nature, criminal or other, between French citizens or protected persons and the subjects of the Emperor, will come before an Ethiopian magistrate sitting in a special place and who shall judge assisted by the French Consul or his delegate.
>
> If the Ethiopian subject is the defendant, he shall be judged according to Ethiopian law.
>
> If the French citizen or protected person is the defendant, he shall be judged according to French law.
>
> When the judges cannot agree, the case shall be decided in last instance by the Court of His Majesty the King of Kings of Ethiopia."[89]

[89] See Pigli, cited in note 28, p. 260.

These provisions could be interesting owing to the fact that Ethiopian law had to be applied by the Special Court whenever the defendant was Ethiopian. It seems however that the decisions taken by the Court led to serious arguments with the Ethiopian government as to the fairness of some decisions and that, as a result, this source of Ethiopian case-law must be dealt with great precautions. In this regard the 1930's may prove especially illuminating since this was a period when the Special Court was very active (this was particularly true of the sittings in which the British consul was taking part) and sat nearly permanently.[90] Moreover the rules concerning the procedure before the Special Court were drafted at the same time and printed in Amharic and French.[91] Unfortunately the whereabouts of the Archives of the court has not yet been determined. It seems however that copies of the judgments were sent abroad with the consular reports and that there is therefore a good chance of finding that kind of case-law in the archives of European foreign ministries.[92] Finally it is possible that some decisions were kept in the archives of the embassies in Ethiopia.[93]

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For the contemporary period, not much can be said about case-law. Although the bulk of decisions has been steadily increasing since the end of the war at all levels of the new judicial organization established in 1942,[94] the only way to learn about these decisions is to go through the archives of the various courts. Obviously, this course is not open to the public and it is only under a special arrangement that the Faculty of Law of Haile Sellassie I University has been authorized to selected for inspection the most interesting cases on file in the High Court from among the thousands decided every year.[95] Other cases have been communicated to the same Faculty by the courtesy of the Afa Negus, President of the Supreme Court of the Empire, and some of these cases have been published in the Journal of Ethiopian Law together with cases originating in the High Court.[96] This action by the Journal is a first step down a long road which might one day lead to the creation of a permanent and widespread case-reporting system in Ethiopia.

In conclusion it is necessary to note the fundamental role of His Imperial Majesty's personal Court, the Chilot, the decisions of which have unfortunately

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[90] See, on this, the remarks in M. Perham, *Government in Ethiopia*, (London 1948), p. 151.

[91] See, on this point, the remarks by Zervos, cited in note 29, pp. 275-277.

[92] We may be sure that such is the case for the Foreign Office Archives in London where the judgments of mixed courts in Ethiopia have been deposited.

[93] Through the courtesy of the French Government, we have had the possibility of consulting some judgment still available in Addis Ababa in the French Embassy Archives.

[94] See the *Negarit Gazeta — Proclamations volume*, cited in note 54, pp. 4-11.

[95] These cases are deposited in the Law Faculty Library and the most interesting out of them are printed in the *Journal of Ethiopian Law*. As for the statistics on judicial activity, consult, *Statistical Abstract* published by the Ethiopian Government (Central Statistical Office).

[96] Eighteen cases have appeared in the first three issues of the *Journal* and nineteen will be in the next issue. Nine cases of the High Court have been published in the first three issues of the Journal and eight will be in the next issue.

not yet been published. The case is the same for the decisions of the administrative, military and other tribunals.[97]

IV. LEGAL SCIENCE

By legal science, we mean that part of the formulation of the law which, in most societies, is laid down by persons who have acquired, through experience or study, a knowledge of the law and whose function in social life is to convey that knowledge to the members of their respective societies. It must also be noted that these persons often do not exercise governmental or judicial functions; if and when they do, there is nevertheless a clear distinction between their functions as scholars and as members of the governing or judicial bodies.

Legal science in Ethiopia can be found as far back as the first period of the country's legal history. That period even produced a piece of legal science which was to know great fame and provide the country with the basis of its law for the following four centuries: the *Fetha Negast*. The exact origins of the *Fetha Negast* are still a matter of controversy between scholars, and especially as to its sources (one of the main problems being to trace the respective influences of Byzantine and Muslim law on the Arab *Nomocanon* which is the direct source of the *Fetha Negast*).[98] The Arab *Nomocanon*, written in the 13th century in Arabic by an Egyptian Christian canonist was translated into Ge'ez between the 14th and the first half of the 16th century; we know the text was in Ethiopia by the latter time. From that time on, the *Fetha Negast* provided Ethiopian lawyers with the quasi-official basis of their law; although the text was never promulgated as legislation, it was applied throughout the country and also taught in schools where law was a subject of study.[99] The text was also widely commented on and even translated from Ge'ez into Amharic. Until now none of these translations has been published, but His Imperial Majesty has recently agreed to the printing of an Amharic version of the text accompanied by a commentary.[100] The *Fetha Negast* was also published and translated into Italian by I. Guidi[101] and an English translation is now being prepared by Aba Paulos Tsadua and will be published by the Faculty of Law, Haile Sellassie I University.[102] It must finally be noted that it is the second part of the *Fetha Negast* which has been used in lay matters, the first dealing only with religious matters.

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[97] However some cases adjudicated by the Labour Relations Board and the Tax Appeal Commission have been recently put at the disposition of the Faculty of Law and will be published in the next issue of the *Journal of Ethiopian Law*.

[98] On the *Fetha Negast*, see the articles by Nallino, Costanzo, Cerulli and d'Emilia in the Bibliography cited in note 16 under Legal Science (1st period).

[99] All evidence indicates that the teaching of law was until the contemporary period a matter within the exclusive competence of the Ethiopian Church. On the other hand, if one is to believe travellers, it seems that some places were known as centers of legal studies (see, for example, Lefebvre, cited in note 86, vol. I, p. 178). Still it seems that these studies cannot be totally distinguished from those leading to priesthood.

[100] To be published late in 1965 or in the beginning of 1966 by Berhanena Selam Printing Press in Addis Ababa.

[101] I. Guidi, *Il Fetha Negast o Legislazione dei Re. Codice ecclesiastico e civile di Abissinia*, 2 vol., (Rome 1895-1899).

From the time of its introduction into the country until the present, the importance of the *Fetha Negast* was such that it practically precluded any development of legal science outside its sphere of influence. In order to find another work of importance which can be considered part of Ethiopian legal science in our first period we must therefore consider outside influences. A description of the laws of the country under the title *Laws and Institutions of the Kingdom*, was prepared for Bruce by an unknown person; little else is known about this work, but the manuscript is among the Bruce papers in the Bodleian Library in Oxford.[103]

It must also be noted that very few foreigners seem to have written on the legal system of the country during the first period of Ethiopian legal history; of course many travel reports contain information concerning aspects of the law but none of them can really be considered to belong to legal science.[104]

The only studies made during the first period came rather late, during the 19th century, most of them being concerned with the publication of or commentary on either religious or historical texts; such is the case for the studies by Dillmann on Zara Yaqob's legislation or by Pell Platt on the Ethiopian *Didascalia*, an important and ancient source of Ethiopian Church Law.[105]

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Turning now to the second period, radical changes took place in the field of legal science. As far as is known however, Ethiopians still did not take part in expanding the knowledge of the law of their country (although one may be sure that the traditional teaching and commenting on the *Fetha Negast* was being carried on); the field belonged exclusively to foreign scholars, and their action took many forms.

First of all, studies on the *Fetha Negast* were developed, due in great part to the masterful work accomplished by Ignazio Guidi in publishing the text and translation of the *Fetha Negast* in 1895 and 1899.[106]

But the main field in which scholars, mainly Italians, were working then was that of customary law, and especially customary law of Eritrea; the fundamental work done at the time by Conti Rossini and all those who enabled him to get materials for his synthesis has already been mentioned and underscored.[107] It must be stressed here that, although these studies were already included in the section of this paper on customary law, they are nevertheless, in the true sense of the word, part of legal science.

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[102] To be published in 1966 by the Faculty of Law, Haile Sellassie I University. It must be noted that this translation will deal with the lay part of the *Fetha Negast* as well as with its religious part.

[103] See Bodleian Library, Bruce Manuscripts, number 88 and 92. A microfilm of these two manuscripts has been deposited in the Ethiopian Law Archives of the Law Faculty, Haile Sellassie I University.

[104] See the mentioned works by Alvarez or Lefebvre (only to mention two examples) in notes 65 and 86.

[105] See in the Bibliography cited in note 16 under Legal Science (1st period).

[106] See note 101.

[107] See notes 66 and 68.

Other studies on various aspects of Ethiopian law were also published during that period and they deal with either specific problems or specific documents of which they often provide the first edition.[108]

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One cannot say that the third period is very different from the first as far as legal science is concerned. Perhaps the studies on the Ethiopian legal system grew more numerous, but it cannot yet be said that through them a general picture emerges. Studies were still published on the same lines as before, and the only noticeable change was that some of the new legislation passed in this period attracted the attention of scholars and gave way to some truly legal studies.[109]

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It is only during the last period of Ethiopian legal history that legal science made a real start in the country.

First of all, in the years following the end of the Second World War the first overall descriptions of the legal system of Ethiopia were published. Two books of this type, differing radically from each other in the personality of their authors and in method are Margery Perham's, *The Government of Ethiopia*[110] and Nathan Marein's, *The Ethiopian Empire, Federation and Laws.*[111] Apart from these two major books, many articles were written on the development of the law during this period.[112]

Then, a most important contribution to the legal history of the country during Menilek II's reign and the period before 1935, was made by the former Minister of Public Works, Balambaras Mahtämä Selassie Wäldä Mäskäl, who published his *Zekrä Nägär* in 1950. The book is a detailed account, nearly always based on reproduced documents, of the development of the law in those vital years stretching from 1908 (the appointment of the first Ethiopian Cabinet) to 1935 (the outbreak of the war). Unfortunately the work is not accessible to most foreign scholars as it has until now been published only in Amharic.[113]

Finally the most important development in this period is the establishment, within the Haile Sellassie I University, of a Faculty of Law exclusively dedicated to the building and spreading of Ethiopian legal science. This can be seen immediately by looking at the publications that the Faculty has either published or sponsored in the short time it has been functioning. Apart from the *Journal of Ethiopian Law*, some books on fundamental aspects of Ethiopian law have

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108 See in the Bibliography cited in note 16, under Legal Science (2d period).

109 See in the Bibliography cited in note 16, under Legal Science (3d period).

110 London (1948).

111 Rotterdam (1955). This edition was preceded by a mimeographed edition in which the various topics dealt with by the author were classified in alphabetical order, under the title *Handbook to the Laws of Ethiopia, (Addis Ababa* 1949). Then the first printed edition appeared in 1951 under the title *Judicial system and the laws of Ethiopia.*

112 See Bibliography cited in note 16, under Legal Science (4th period).

113 See note 22. Parts of the work have been translated into English by students of the Faculty of Law, Haile Sellassie I University.

already been published.[114] On these bases and with young Ethiopian scholars graduating every year, it may be assumed that the future of legal science in the country is in good hands.

But all these apparent manifestations of Ethiopian legal science must not obscure the very important fact that a good deal of it is still unknown. As was mentioned with reference to customary law,[115] many Ethiopians (some of them occupying vital positions in the administration of the country) with extensive legal experience, have been writing, for the instruction of their successors, studies on various points of Ethiopian law. Unfortunately these essays, which could in some cases prove invaluable, are not published or even accessible to persons interested in their contents. Now is certainly the time for these studies to be brought to light and it is to be hoped that their authors will both see the need and agree to put them at the disposal of scholars.

A last area must finally be mentioned in which the contribution of legal science could be fundamental and that is that of Muslim law, which is still enforceable in many parts of the country. This is the result of conflicts between Ethiopia and the Muslim world which began in the first year of the 14th century. As a result, some parts of the population of the Empire have been subjected to Muslim law and still observe it to-day. Three rites are represented in the country (Shafiite, Malekite and Hanafite) and wherever they apply they either co-exist or come into conflict with the local customs. Apart from general text-books on Muslim law, the sources concerning its application in Ethiopia are scarce; one has to rely upon remarks which can be found in various documentary, historical or scientific works.[116]

Legal science in Ethiopia is perhaps still in its infancy, but every Ethiopian and foreigner interested in the future of the country has a duty to help its development.

V. LEGAL DOCUMENTS

Legal documents are those kinds of documents which everybody uses in the course of normal life when acts having legal consequences are performed. One can classify them as private and public documents according to their origin; the former come out of the activity of individuals, the latter out of the activity of the State.

As far as private documents are concerned, the main difficulty in getting them and using them as a source of law is that on the one hand they are practically never published and on the other they tend to be destroyed as soon as no further need for them is felt. Fortunately, some of them tend to establish rights of such a permanent nature that they are sometimes kept for centuries. Some of them are, or were, also recorded in non-legal works (such as religious books

[114] See the list of these publication in the advertisements at the front of this Journal.

[115] See above p. 246, 245.

[116] See mainly J.S. Trimingham, *Islam in Ethiopia*, London 1952. See also some studies on Islamic influences on the *Fetha Negast* in the Bibliography, under Legal Science (1st period).

in the monasteries) and as these have been preserved from destruction, so have certain legal documents from the first period of Ethiopian history.[117]

Unfortunately, private legal documents from the second period of Ethiopian legal history are scarce and are nearly impossible to uncover. This is true for the succeeding periods as well, with the exception of some documents which have been published in newspapers for the information of the public (this is the case, for example, for High Court notices on successions or commercial matters).[118] It is to be hoped that those who wish to contribute to knowledge of Ethiopian law will decide to deposit private documents of their own, as soon as they are of no direct use to them, in such places as the Ethiopian Law Archives.

As for public documents, which involve mostly government reports and correspondence, they are, by their very nature, inaccessible to the public and to scholars. The only exception is for those dealing with Ethiopian affairs which touch on relations with other countries and could be found in foreign archives. These are generally accessible after a 50 year period has elapsed; for example, the Public Record Office in London would at the present time open its files up to 1915. This could provide us with a lot of public documents related to the first and second periods of Ethiopian legal history.[119] Unfortunately, as far as Ethiopia is concerned, there is no such organization of the public archives and they are thus completely inaccessible.

B. NON LEGAL SOURCES

Not much need be said concerning the place of non-legal documentation in a systematic study of Ethiopian legal history. As already seen when dealing with legal sources, non-legal works can help tremendously towards a better knowledge of Ethiopian law. Through historical sources such as the chronicles, documentary sources, such as travel reports, or even religious sources, such as Zara Yaqob's works, some evidence is provided concerning the law of Ethiopia during each period. It must also not be forgotten that although non-legal sources are less important in more recent periods, they still can play a capital role; such is for instance the case with newspapers during this century.

CONCLUSION

As indicated in the introduction to this paper, its author had no intention whatsoever of presenting a systematic or complete description of the sources of Ethiopian law. The field is so wide and so little was known about it until

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[117] Most of these documents are found as parts of other historical documents, and it is thus the task of the legal historian to peruse catalogues of museum or archives in which documents on Ethiopian history are deposited in order to find the legal documents incorporated to more general documents. The Ethiopian Law Archives, Haile Sellassie I University, have recently received photocopies of some of these documents ranging through the first and second periods of Ethiopian legal history from the Ethiopian Archeological Institute.

[118] The Ethiopian Law Archives have started a systematic collection of such notices.

[119] Some research of that kind has already been started last summer and will be carried on systematically during next summer by a member of the staff of the Law Faculty, Haile Sellassie I University.

recently that such an attempt would be in vain. This becomes more obvious when one realizes that so many studies on the law of Ethiopia have been prepared, all through history, by Ethiopian scholars, but are not yet available to the public being still in manuscript form; it is clear that this is the point on which most contributions should come in the coming years. The single aim of this paper is to make Ethiopians and foreign scholars aware of the unlimited possibilities of study in this area. As in many fields of Ethiopian studies today, much work can and must be done. If, once published, the present article was considered by more experienced people as not reflecting half of what could be known of the sources of Ethiopian law, its author would be satisfied and consider his efforts a success. If such a constation of the weakness of the present paper was then followed by an effective increase in our knowledge of Ethiopian law and by the development of an active interest in its sources, the purpose of this paper would have been doubly fulfilled. It can only be hoped that such will be its effect.