PUTTING THE LEGAL CLOCK *BACK*?

The Law and its Sources

In the last issue of this Journal appeared Professor Vanderlinden's "Introduction to the Sources of Ethiopian Law."[1] It is difficult to exaggerate the merits of my learned colleague's work, which constitutes the first and only survey of this kind in Ethiopia. Of such documentary sources as are published and readily available, he seems to have omitted only one. In addition to the collection of proclamations started in 1951 by the government, which he mentions,[2] there also exists a special collection of decrees and orders, started by the government in the same year.[3] This is really a trifling amendment to Professor Vanderlinden's survey, which is excellent in its research aspects.

My colleague's meritorious concentration on tracing and collecting various source-data (and meeting deadlines for work-completion) seems to have left him with much too little time for a flawless formulation of the theoretical premises and conclusions of his work, with which formulations I beg, with all respect, to disagree, fully aware of my unfair advantage in terms of disposable leisure.

I do not propose substantially to add to the enormous, controversial and partly futile doctrinal literature concerned with defining the meaning of such terms as "law" and its "sources." Since Professor Vanderlinden surveys the "sources" of "law," he is in a less fortunate position in that he can avoid neither a *definition* of these terms of reference for his work, nor definitions of terms denoting his subdivisions of sources of law. The adequacy of these definitions, which constitute the theoretical foundation of his survey, will be questioned below.

My learned colleague defines *the law*[4] as "those acts and institutions the respect for which is enforced by socially recognized organs in order to safeguard social cohesion and develop society." This definition may perhaps satisfy a sociologist. It can hardly satisfy a lawyer, who would usually expect the term "law" to denote, primarily, "enforceable rules of conduct." The terms "acts" and "institutions" are little helpful. An "act" need not be a rule, while an institution anyway represents a bundle of rules. As to the social "cohesion" or "development" purposes, they seem irrelevant to any acceptable definition of "law." When Emperor Susneyos enacted enforceable rules which, far from being concerned with social cohesion or "development," reflected his socially harmful religious convictions, were they not "law" before they were repealed? And in a modern system, with its conflicting opinions as to what tends to promote cohesion and development, who is to determine whether an "act" satisfies this requirement for being called a "law"? Another criterion of the above definition is acceptable for the past (before

1. J. Vanderlinden, *J. Eth. L.*, vol. 3 (1966), p. 227. [Hereinafter cited as "Vanderlinden."] The same paper had previously been published as a monograph for the Haile Sellassie I University Law Exhibition of January, 1966.
2. Vanderlinden, note 57 and accompanying text.
3. See Imperial Ethiopian Government, *Negarit Gazeta, Decrees and Orders*, vol 1 (Addis Ababa 1951).
4. Vanderlinden, p. 227.

1960) but not for the present. It is no longer sufficient that certain rules be enforced by (any) "socially" recognized organs at, e.g., the local or tribal level if such rules are repealed by virtue of Article 3347 Civil Code or Article 2 Penal Code. They can no more be called "laws" in Ethiopia, because any imposition of them can be ultimately resisted before state-recognized organs.

Even before defining the "law," my colleague defines *sources of law* as consisting of "any documentation, mostly written but also oral, which can add to our knowledge of the law" in Ethiopia.[5] After thus giving the term "sources" the evidential meaning of "documentation" he proceeds to a somewhat inconsistent classification of them into "legal" (legislation, custom, case-law, legal science, legal documents)[6] and "non-legal" ones (scientific and literary works). It seems that a proper classification should stress the difference between the sources *productive* of the law (facts producing it) and the documentations *evidencing* such production or the existence of its product, the law. Such documentation can be "non-legal" (e.g., a travel-report) although it bears on a "legal" source (e.g., on legislation by a drum-heralded proclamation, witnessed by a traveller). On the other hand, from the sources truly productive of the law, formally and properly called sources of law (in contemporary Ethiopia, primarily legislation) should be strictly distinguished sources *of knowledge about the law*, or of "persuasive" authority (in contemporary Ethiopia, case "law," legal science and sometimes custom), which may or may not inspire the legislative and interpretative processes, but are hardly "by themselves" productive of the law. If, after some authors, they may be vaguely called "material" or "cognitive,"[7] or "secondary,"[8] sources of law, at least they should be clearly distinguished from the aforementioned "formal" or "productive" (or "primary") sources, or sources of law *sensu stricto*. The lack of such clear initial distinctions necessarily leads to the further flaws in my colleague's theoretical arguments and conclusions (see below). It does not prevent, however, his detailed description of the various "sources" of "law" (within his meaning of these terms) from being extremely useful to research scholars.

Legislation

Before giving us a masterly historical outline of documentary evidence, non-legal and legal, for the legislative law-creation in Ethiopia, from its modest ancient beginnings to the present day, Professor Vanderlinden defines legislative enactment as "the formal expression of the will of the governing persons or institutions in a given society in the exercise of their governing functions."[9] In my humble view, this definition is inadequate in that, even excluding the judicial function, it provides no criterion for distinguishing between the legislative and the executive one. Under this definition, an act formally expressing the Emperor's will that a given governor

5. *Ibid.* Is "oral" a metaphor?
6. Vanderlinden, p. 228. Legislation, custom, case-law, legal science, may be documented but are not documents. As to legal "documents," they may evidence any of the above.
7. Terms familiar to continental lawyers. See the able discussion of analoguous matter in S. Tedeschi, "Sulla Gerarchia delle fonti del diritto nel sistema giuridico etiopico," *J. Eth. Studies*, (December 1966).
8. A term familiar to Anglo-American lawyers.
9. Vanderlinden, p. 228.

present himself at the palace might be called a legislative enactment.[10] This definitional loophole may be plugged by substituting "law-making" or "governing" before the word "function." As borne out by the considerations exposed below, legislation in Ethiopia is now the *primordial*, indeed almost unique, source of law *sensu stricto* (as distinguished from the aforementioned sources of knowledge about the law).

Custom

Custom was, before the recent codifications, an important source of Ethiopian law. Professor Vanderlinden defines custom as "the set of social attitudes which, in a given society, are considered part of the law and thus are enforced as such."[11] Even though we may accept, for non-definitional discussions, the habit of using "custom" as shorthand for "customary law," the classical distinctive definition of, respectively, custom and customary law through the criteria of *repetitio* (which creates custom) and *opinio necessitatis* (which makes custom law) would perhaps have been preferable on grounds of clarity.[12]

Professor Vanderlinden's survey of the available documentary evidence of Ethiopian customary "laws"[13] is very illuminating and helpful to students of this subject.[14] After his excellent summary of the evidential sources of our knowledge of Ethiopian customs, Professor Vanderlinden discusses the *enforceability* of customary "law" in contemporary Ethiopia[15] with reference to civil law and to my own views as expressed in the *Journal of Ethiopian Studies*,[16] which views are now reproduced and further developed in the *Journal of Ethiopian Law*.[17] After agreeing with all my "major conclusions," my colleague disagrees with my inference that the "repeals" provision (Article 3347 Civil Code) "severely limits the field of legal application of custom in Ethiopia." The adjective "severely" implies a judgment of value, which is essentially relative. In its defence, I could therefore simply ask him to cite a single African country where the legal applicability of customary

10. Compare the discussion of the definition of "law," above.

11. Vanderlinden, p. 241.

12. Compare Tedeschi, work cited at note 7.

13. Which we shall continue so to call (within quotation marks) for want of a better word, irrespective of the repeals operated by Article 3347 Civil Code.

14. The following lapse is surely unintentional: on page 243 we read that "the only tentative description of Ethiopian legal traditions as a whole, both legal and non-legal, is that of Walker, published in 1933." Indeed, how can *legal* traditions be "legal" or "non-legal"? This is tautology followed, in the alternative, by a contradiction. Another minor objection concerns the words "European-trained jurists have probably had a tendency to scorn such folk expression of legal relationships" (referring to customary rules expressed in proverbs; see page 243). If this is a contention, it seems wrong: European jurists are, just as or more than others, notoriously familiar with legal proverbs and maxims, many of which are rooted in old custom.

15. In other words, the law-creative function of custom. Vanderlinden, p. 244.

16. "A New Legislative Approach to Custom: the 'Repeals' Provision of the Ethiopian Civil Code of 1960," *J. Eth. L.*, vol. 1 (1963), pp. 57 *et seq.*

17. "Code and Custom in Ethiopia," *J. Eth. Studies*, vol. 2, no. 2 (1965), pp. 425 *et seq.* See also G. Krzeczunowicz, "The Ethiopian Civil Code: its Usefulness, Relation to Custom and Applicability," *J. African L.*, vol. 7 (1963), pp. 172 *et seq.*

rules has been restricted more than in Ethiopia. I will go further, however, and respectfully submit that his subsequent arguments in support of his position do not accurately (1) represent or (2) interpret Civil Code law.

My colleague seems to contradict himself where he says that the "validity" of marriage is determined partly by the customary requirements although "no marriage can be annulled [invalidated] on customary grounds." He appears to err in his *representation* that the only limitation to the marriage-parties' free settlement of their respective rights and duties is that provided by Article 636 (duty of support, etc.). Indeed, further important mandatory rights and duties are enacted by Article 640 (duty of cohabitation and of sexual relations), 638 (see text), 639 (see text), 629 (duty of fidelity, which is mandatory by virtue of adultery being a punishable offence under Article 618 Penal Code)[18] and, substantially though impliedly, Article 637. Professor Vanderlinden is apparently also wrong in saying that "family arbiters" are the only competent authority to pronounce divorce. By virtue of Article 336 the arbitrators' decisions are impugnable before the courts on certain grounds, which include illegality (this term obviously comprises infringements of Code provisions). It is suggested that before forming an opinion, our readers simply read the Code on these topics.

My colleague appears also to err in his *interpretation* of the Code law. His "main objection" to my analysis is that I have "neglected the very important provisions" of Article 3348.[19] This article and the subsequent ones deal with the "intertemporal" consequences of the sweeping "repeals" provision preceding it (of Article 3347), while I have dealt primarily with the "permanent" effects of this provision. In other words, our conflict is imaginary. Given the challenge, however, I must observe that Professor Vanderlinden's contentions seem misguided even in the field of "intertemporal" law. Article 3348 implements the principle of non-retroactivity of laws known to most Romanistic legal systems.[20] As to Article 3351(1) read in conjunction with Article 3348(2), it is quite unnecessary to split hairs, since these texts are reasonably clear and do complete each other.[21] In shorthand, pre-Code legal consequences of situations like tutorship, marriage or ownership remain as acquired under the old law,[22] but the post-Code effects of the same legal situations are as determined by the new law. For instance, as from September 11, 1960, the legal duties of before-established tutors are no more those prescribed by custom, but those ordained by the Code (compare last sentence of Article 3353). This principle suffers an exception in the case of contracts (Article 3351(2)), which exception is also widely admitted in Romanistic systems, and is more apparent than real. It is the simple consequence of the principle called "freedom of contract," whereby a contract's content is determined by the

18. See the instructive enumeration of these mandatory provisions in W. Buhagiar, "Marriage under the Civil Code of Ethiopia," *J. Eth. L.*, vol. I (1963), p. 85. See also Civ. C., Art. 631: a contract of marriage must neither derogate those provisions, *nor* purely and simply refer to local *customs* (which therefore obviously have *no legal validity* as such).

19. Vanderlinden, pp. 244-45.

20. See, e.g., any of the standard French treatises on the doctrine of "droits acquis." In particular, see M. Planiol, *Treatise on the Civil Law* (trans. Louisiana State Law Institute, 1959), vol. 1, Nos. 233-63.

21. Incidentally, they also express an approach familiar to Romanistic legal systems.

22. Whether customary or other.

parties (Article 1731(2)), who can "set aside" any non-mandatory provisions of the law (Article 1731(3)). The presumed will of any parties to a pre-Code contract was to have it governed by pre-Code law, just as if this law[23] had been "written into the contract."[24] As to those mandatory provisions which, precisely, aim at preventing the parties' will from being affected by defects, they do apply to pre-Code contracts (Article 3351(2)).[25]

In Professor Vanderlinden's view,[26] contractual relations can include marriage relations. If we accept this as a premise then, pursuant to Article 335(2), the effects of pre-Code marriages should not be governed by the Code but by pre-Code law, which, in this field, is mostly customary. But the premise seems wrong. Although entered into by way of an agreement, marriage is an institution: its main purposes (cohabitation, sexual relation, bringing up the children) are of a non-proprietary nature and are governed by mandatory provisions,[27] while contracts are agreements of a proprietary nature (Article 1675) and are governed predominantly by permissive provisions.[28] This is, both, the law on the books, and, with few exceptions, the law as applied by the courts. For instance, a pre-Code marriage cannot be dissolved otherwise[29] than in accordance with the Code.

From his above-mentioned contentions my colleague draws this conclusion: "If therefore custom is to be enforced, it will have to be known, and in order to be known it will have to be studied." To a straight-forward reader of the repeals provision (Article 3347(1)) this statement must seem strange. Study of customs has intrinsic merits[30] which need not be justified by asserting their enforceability.[31] Regarding the legislator's intent in this respect, I must stress that the expert drafter of the Code, initially "custom-minded," "was rallied to the view of his Ethiopian councillors [in the Codification Commission] who were unanimously hostile to custom."[32]

Case "Law"

In non-common law countries, case "law," as a term, is a misnomer, since judgments are not normative (do not create rules binding for the future), but merely dispose of the specific cases at bar. Unfortunately, the Continental terms

23. Whether customary or other.
24. Compare Planiol, work cited at note 20, No. 261.
25. As, for instance, to pre-Code land-tenure contracts (cf. Art. 2975). By way of extensive interpretation, Article 1709(2) may perhaps also apply to them.
26. Vanderlinden, p. 245.
27. See above.
28. As to obligations of a proprietary nature incidentally arising in connection with marriage, they are easily governed by contract law, either because they are part of the "contract" of marriage, which is conditional upon marriage and precedes it, or else by virtue of Article 1677.
29. E.g., by unilateral repudiation (Art. 664). This is without prejudice to the controversed problems of the personal status law of the Moslems. See below.
30. Particularly in the fields of anthropology, ethnology and sociology, or even of law where the law expresses code-incorporated custom.
31. Compare Tedeschi, work cited at note 7.
32. Translated from R. David, "La refonte du code civil dans les etats africains," *Annales Africaines*, (Dakar 1962), p. 6, al. 4.

Jurisprudence (French), *Giurisprudenza* (Italian), *Rechtssprechung*[33] (German), *Orzecznictwo* (Polish), etc., etc., seem to have no exact counterpart in English, in which we may therefore continue to use the "case law" misnomer (possibly within quotation marks), provided we are well aware of its non-normative connotation in non-common law countries. Granted such awareness, we can even use, as a figure of speech, M. Planiol's phrase "In the judgments alone is to be found the law in its living form" (i.e., in its everyday non-normative application).[34]

In continental systems lacking an express prohibition of judicial rule-making on the lines of Article 5 of the French Civil Code,[35] the non-normative character of adjudication (as distinguished from legislation) is accepted as evident.[36] The same is true of Ethiopia, as clearly shown by the failure of an attempt to introduce a system of "binding judicial precedents" in this country.[37] In view of such failure, and of what has been said above about "custom," my colleague's contention that in Article 110 of the Revised Constitution[38] "the law," as used in the singular form, should mean also "custom," "case-law," or "legal science" seems to be open to question. Civil custom is not law except where "otherwise expressly provided" (Article 3347(1))[39] by *legislation*. Penal customs are completely obliterated by the principle of "legality" (precisely) formulated in Article 2 Penal Code. Case "law" is *not* law unless and until the aborted system of "binding judicial precedents" is re-enacted. As to "legal science," it has today, in spite of its usefulness, merely an educational and persuasive function. Professor Vanderlinden's misconceptions in these respects seem due to his initial failure to distinguish sources of law *sensu stricto* from sources of knowledge about the law, to which latter sources case "law," legal science and, in relevant Code areas,[40] even custom properly belong. They may have a great persuasive influence, but they do not represent "the law."[41]

Collecting data on old cases is of great value to the legal historian. As to recent or contemporary cases, they constitute the very lifeline of our Law School, which uses them to explain and illustrate the legislation in force. As with the study of custom, therefore, the study of judicial decisions has essential merits which need not be justified by assertions regarding their force as "law." Just as contracts, they bind only the parties (cf. Article 1952(1)) "as though they were law" (cf. Article 1731(1)). By a figure of speech, judicial decisions are the law of the

33. Clearly and logically contrasted with *Rechtsgebung*.
34. See Vanderlinden, p. 246, note 83 and accompanying text.
35. The enactment of this article was due to special historical reasons: See Planiol, work cited at note 20, No. 155.
36. On the arguments involved, see any standard treatise.
37. The relevant Courts Proclamation, 1962, Proc. No. 195, *Neg. Gaz.*, year 22, no. 7, has been indefinitely suspended by the Courts (Amendment) Proclamation, 1963, Proc. No. 203, *Neg. Gaz.*, year 23, no. 16, and finally superseded by the Civil Procedure Code of 1965.
38. Providing that judges, in the administration of justice, "submit to no other authority than that of the law."
39. This remark is without prejudice to the *wider* problem of so-called "outlets" for custom, discussed in my articles cited at notes 16 and 17.
40. Those representing incorporated custom.
41. Perhaps fortunately, since there are conflicts within and between them. For the *exceptional* cases where local customs are binding by way of express legislative reference to them, see Krzeczunowicz, "Code and Custom in Ethiopia," cited at note 17.

parties, not the law of the land.[42] And it is precisely the courts' freedom from the shackles of "precedent" (or "custom") that enables them to develop the law's applications without resorting to the limited and esoteric techniques of "distinguishing."

Fetha Negast

With respect to the *Fetha Negast*, Professor Vanderlinden's statement that "although the text was never promulgated as legislation, it was applied throughout the country"[43] seems too strong. The first sub-sentence should be reformulated as follows: "In spite of a title suggestive of kingly legislation, there is so far no evidence of a promulgation of the Fetha Negast." As to the allegation that the Fetha Negast "was applied *throughout* [emphasis added] the country," it lacks substantiation and seems supported by neither of the authorities to which my colleague himself refers in note 98.

As a source of (lay) law, the *Fetha Negast* has been *replaced* by the Penal Code of 1957 (see Article 2) and the Civil Code of 1960 (see Article 3347). It partly remains, however, a source of knowledge about the law: it is a persuasive authority for the purpose of interpreting such Code provisions as were inspired by it.

Muslim Law

Muslim law is a product of religious science. The modern tendency, even in Muslim countries, is to enact uniform lay legislation replacing the "religious" laws.[44] Since the Christian Empire of Ethiopia has replaced even the Fetha Negast and has done away with the temporal jurisdiction of its own religious authorities, it could hardly be expected formally to recognize, in its codes, the existence of a separate body of law for privileged followers of another religion.[45] Indeed, draft legislation to such effect seems to have been rejected by the Codification Commission[46] and, on the face of Article 3347(1) Civil Code, Muslim law can, theoretically, be viewed as unenforceable. In accordance, however, with the tradition of tolerance, deep-rooted in Ethiopia, a procedural proclamation establishing a separate jurisdiction of "Kadis and Naibas Councils"[47] over certain personal status matters concerning Moslems is still applied, and this may well continue until such time as the condition of the country permits of a more effective uniformization of the

42. Their legal reasons do not bind subsequent courts even though, in fact, they may have a great persuasive influence. Because of the lower courts' fear of "reversal," this influence is especially strong in the case of Supreme Imperial Court opinions. The Supreme Court is nonetheless free to reverse its own prior views in response to a lower court's reasons.
43. Vanderlinden, p. 250.
44. See for instance, J. N. D. Anderson, "Recent Reforms in the Islamic Law of Inheritance," *Int'l and Comparative L. Quarterly*, vol. 14 (1965), p. 353, concerning new legislation in Egypt Syria, Tunisia, Morocco, Irak and Pakistan. (The earlier reforms in Turkey are notorious.) Such reforms were discussed (with my participation) by the Section I, D, 1. of the Seventh International Congress of Comparative Law (Upsala, 1966).
45. See also Article 37 of the Revised Constitution on "equality before the law" and Article 38 on "non-discrimination."
46. The relevant documents are not published.
47. Proc. No. 62 of 1944, *Neg. Gaz.*, year 3, no. 9.

legal system in accordance with what Article 3347(1) Civil Code provides on its face. It seems anyway an exaggeration to say, *without qualification*, that "Muslim law is enforceable in many parts of the country."[48] Only that part of Sharia law which regards certain personal status matters[49] is still applied to Moslem subjects in spite of the sweeping formulation of Article 3347 Civil Code, which article safeguards the basic principle of legal uniformity. This seems hardly sufficient fully to support my colleague's contention that Muslim law in Ethiopia constitutes another area in which the contribution of legal science could be "fundamental." Indeed, such contribution would be of scarce value to the general legal practitioners in this country (who are rather in need of Code-commentaries).[50]

Conclusion

Professor Vanderlinden's work presents outstanding merits in its major research aspect. But acceptance of his theoretical premises regarding sources of law and of his conclusions concerning, among others, the enforceability of customary "law" in Ethiopia and the meaning of the word "law" in Article 110 of the Revised Constitution[51] would endanger that legal certitude which constituted the very purpose of the year-long labours of the Imperial Codification Commission. Such putting of the legal clock *back* would be incompatible with the law on the books, which can be changed only by legislation.[52]

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48. Vanderlinden, p. 253.
49. Essentially, family and succession matters: see Kadis and Naibas Councils Proclamation, Art. 2, cited at note 47. The same article provides, *in fine*, that the Naibas Councils jurisdiction may be limited by an order of the Minister of Justice.
50. At the end of his paper Professor Vanderlinden discusses *legal documents*, which he defines as "those documents which everybody uses in the course of normal life when acts having legal consequences are performed." It would seem to follow that everybody incurring, e.g., an extra-contractual liability by performing a normally tortious act is using a legal document, while writings evidencing juridical acts performed outside the scope of everybody's "normal" life are not legal documents. I readily assume that this connotation is not intended.
51. The context preceding the sub-sentence, "they submit to no other authority than that of the law," clearly shows that this constitutional provision has, in common with similar formulations abroad (See M. Capeletti and J. C. Adams, "Judicial Review of Legislation: European Antecedents and Adaptations," *Harvard L. Rev.*, vol. 79 (1966), p. 1207.), no other purpose than that of excluding administrative interference in the judicial process. Its meaning should not be "stretched" to cover other aims. See above, note 38 and accompanying text.
52. I have shown my manuscript to Professor Vanderlinden in order to enable him to publish a counter-reply simultaneously with my reply to his original article. Since, in the editors' right opinion, this scholarly exchange must end somewhere, my colleague's last word (see below) shall be final.