BOOK REVIEW

Steven Lowenstein, **Materials for the Study of the Penal Law of Ethiopia**, Addis Ababa, 1965. 425 pp., $10

Students of Ethiopian law can now start to cheer. After the intense codification of Ethiopian law, which was initiated in 1954 and is still going on, publication new juridical materials is developing in Ethiopia. Some brief juridical studies have already been published in the *Journal of Ethiopian Studies* of the Institute of Ethiopian Studies (the Institute is part of the Haile Sellassie I University). Now we have the bi-annual publication of a *Journal of Ethiopian Law* in which not only juridical studies, but also interesting judgments of Ethiopian courts are published. Above all, the fact that the judgment of the courts had never before been published was a gap sorely felt by jurists. Since law lives in the way it is daily practiced in courts, it is to be hoped that the publication of judgment will be not only continued, but further expanded. The program far mentioned due to the activities of the Faculty of Law of the Haile Sellassie I University, which is to be praised from all points of view.

Although the regularity and accelerated rhythm of these publications is a source of satisfaction to all those who are interested in Ethiopian law, there is particular cause for satisfaction on the part of those who are primarily interested in penal law. In the summer of 1965 the Faculty of Law published, one after another, two works on the penal law of Ethiopia. One is the work of a former professor at the same faculty, Steven Lowenstein (which is the book under review). The other is by the former legal advisor of the Ministry of Justice in Addis Ababa Philippe Graven. The latter's book, *An Introduction to Ethiopian Penal Law*, is a detailed commentary on the first 84 articles of the Penal Code of Ethiopia. Since others have undertaken the task of reviewing Graven's commentary, the scope of this review is limited to the work of Lowenstein.

The general character of Lowenstein's work is well summarized by the word "materials," which he modestly inserted in its title. The work in fact consists of materials which the author thought useful to compile for the purposes of teaching the main elements of penal law to the students of the University (as he points out in the introduction). These materials are of a quite diversified nature: Ethiopian and foreign judgments (the recourse to foreign judgments is justified by the unavailability of Ethiopian judgments); selected passages from the Penal Code of Ethiopia, both from the official English version and the French versions (avant-projet) from which the English was translated; and in addition passages from the preliminary draft compiled by Professor Jean Graven of Geneva. It also contains texts of foreign legislation by which the Ethiopian legislator may have been

1 Since the Revised Constitution of 1955, the following codes have been promulgated: the Penal Code (which came into force in 1958), the Civil Code (in force as of 1960), the Commercial Code (in force as of 1960), the Criminal Procedure Code (in force as of 1961), the Civil Procedure Code (in force as of 1965). The Code of Evidence is yet to be promulgated.

inspired; doctrinal excerpts (almost entirely of Anglo-Saxon origin); practical examples of crimes; series of questions which students are invited to answer, etc.

The mass of material is undoubtedly abundant. In fact, one is justified to ask whether all of it was entirely necessary, and particularly whether a student will not be at a loss. In order to provide an answer to this question, it is necessary to examine the volume very closely.

The extensive reports of the main judgments of Ethiopian courts relating to penal law undoubtedly constitute a precious contribution, for which we must be grateful to Lowenstein. However, none of the judgments is followed by critical commentary. Such commentary would have been very useful because, with due respect to the judiciary, it has never been claimed that courts are necessarily infallible, or that their decisions should be always and unconditionally approved. Credit must also be given to Lowenstein for the collection of documents relating the successive phases of the creation of the Code (extracts from the preliminary draft, the avant-projet in French, the official English version and excerpts from the minutes of the Codification Commission).

The choice of the remainder of the materials, however, gives rise to perplexity.

In a book primarily meant for beginners, was it at all necessary to resort to a large number of judgments from Australia, Canada, England, Ghana, India, Israel, Kenya, New Zealand, Nigeria, Sudan, Tanzania, United States and Zambia? It seems that one is justified in having doubts on this question. In fact, the majority of the countries mentioned have legal systems based on concepts which are basically different from those on which the Ethiopian codification, and in particular the Ethiopian Penal Code, was founded. The question whether such vast and elaborate materials are comparable is debatable. In any event, the comparisons are so difficult that the reviewer feels that it would have been advisable to reserve them for specialists rather than presenting them *ex abrupto* and with almost no explanation to Ethiopian beginners.

The abundant extracts of doctrine cited in the text raise similar doubts. We must definitely approve the citation of the writings of the "father" of the Code, Professor Jean Graven (who, though to date he has not published any doctrinal study on Ethiopian penal law, has in various writings traced the historical background up to the coming of the Penal Code, which he drafted), and of Logoz (author of a well-known commentary on the Swiss Penal Code) in addition to the recourse to the "Fiches juridiques suisses." But the recourse to large extracts of Anglo-Saxon doctrines of penal law (notwithstanding the use of such great names as Hart, Hall, and Harno) for defining basic concepts of the penal law of Ethiopia often leaves one puzzled. This is the more so when one recalls that the purpose of the materials is to explain to beginners the basic principles of Ethiopian penal law, a law which certainly is not based on Anglo-Saxon principles.

At this juncture it can be argued that Ethiopian penal science is in its infancy, and that in the absence of works devoted specifically to the penal law of Ethiopia, recourse to elaborations of foreign doctrine was inevitable. This argument is only partly correct, however. To start with, to have recourse to foreign doctrine cannot mean that a series of excerpts, even if written by famous authors, should be wholly transported. After a careful choice of the doctrine which can be used, it should be elaborated, so that the fundamental concepts to be provided to the Ethiopian students may be extracted in a clear and concise form. But there is more to it: Whoever decides to undertake this delicate and tiresome doctrinal

elaboration must beforehand have carefully selected the foreign penal law doctrine which he proposes to utilize in order to contribute towards the formation of the Ethiopian one. This imposes the preliminary requirement of deciding upon the models which are to be mostly referred to in portraying the essential lines of the physiognomy of the Ethiopian penal system. The Ethiopian Penal Code undoubtedly has adopted a system similar to that which is referred to as the "Continental" type. A quick glance at the Ethiopian Penal Code will suffice for a European jurist to recognise in it a propagation of the vast family of codes that originate from the great French codification of the early 19th century. However, such an observation will not in itself be enough. To be sure, the French Penal Code of 1810 (even if it has undergone profound modifications) is still in force; but for the penal codes of a majority of the western nations, that Code is no more than a distant ancestor. So much so that it hardly resembles any of the continental penal codes, and comparing it to any of them would be of little use.

Which are the codes, then, that are the nearest to the Ethiopian Code? The models which the Ethiopian legislator has referred to in the codification of Ethiopian penal law are innumerable;[2] but those from which the legislator derived a major inspiration are well-known. In an article written by Professor Jean Graven (and cited by Lowenstein on page 63) it is stated that "certainly the continental system, and its great French model in particular, has been retained with respect to general juridical method.... The most modern codes and projects which are generally considered the best — the Swiss, German, and Italian among others — were precious sources providing numerous suggestions and solutions." This is a significant statement. Jurists know that the three above-mentioned codes (and others closly related to them) constitute a well-defined family, despite differences in detail, and for many decades they have worked together in identifying and defining with scientific rigour, concepts and problems which are substantially identical. The scientific literature of the three countries mentioned above is so vast that it can be said to be almost endless: from Stoose to Hafter in Switzerland, from von Liszt to Welzel in Germany, from Carrara to Bettiol in Italy, the spectrum is quite vast; monographs, manuals and treatises are innumerable. And when one undertakes to write a book in which the fundamental lines of the Ethiopian Penal Code are to be identified and exposed, one must resort primarily to this doctrinal stream. It is unnecessary to state that this observation is not intended to imply that the Ethiopian Code was not inspired by any comparision of Anglo-Saxon and continental doctrines of penal law. Nor is it a matter of passing judgment on whether one is superior to the other or vice versa; such comparisons of scientific materials are both useless and insignificant. It is primarily only a matter of establishing which penal laws are closest to the Ethiopian one, and later of making use of the doctrines deriving from these laws, in order to explain and expose — with an appropriate elaboration — the outlines of the penal law of Ethiopia.

I do not want the preceding observations to sound critical of the efforts of Lowenstein, which are to be esteemed for being the first laborious study published in a difficult and unexplored area. The observations are meant only to be a modest contribution by way of pointing out an important track, or rather the main track, which Ethiopian penal science will in the future be unable to avoid.

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2 See the list of main foreign penal law provisions consulted in the drafting of the Ethiopian Penal Code in the appendix to P. Graven, *An Introduction to Ethiopian Penal Law* (Addis Ababa, 1965), pp. 271-274

My observations are not at all "theoretical;" in fact they are very practical. Thus, his having set aside the above-mentioned continental doctrines (the German, Italian and largely also the Swiss one) has led Lowenstein to omit treatment of even some fundamental questions of penal law. The author says that the main purpose of the method followed by him is "to encourage students to think for themselves carefully and creatively" — "to help to train the penal law student in the essential thought patterns of the lawyer: the ability to isolate material facts, to apply abstract legal principles to these facts, to be relevant and to work hard and independently." Such are observations which distinguish a really good educator. But, in order for the student, especially a beginner, to fulfill these auspicated activities, is it not primarily necessary to provide him with a book (a "textbook" as the Anglo-Saxons call it) in which he may find the fundamental principles of the penal law of Ethiopia unified and set in an orderly manner in one homogeneous treatment? Lowenstein's book, rich in (foreign) doctrinal citations and judgments, presents itself as a fragmentary work which may definitely give rise to useful thoughts to someone who has solid notions of penal law. But how will the Ethiopian student, on his own, fill the gaps and solve the doubts that are bound to spring to a beginner's mind?

The following are examples of some of the gaps which may be pointed out in the book under review:

(1) Some fundamental principles of Ethiopian penal law are contained in the Ethiopian Constitution of 1955. It would be superfluous to note how important consitutional penal dispositions are in modern states. In the volume under review no trace will be found of these principles — nor is there a hint of the importance of their "constitutionality."

(2) Article 2 of the Ethiopian Penal Code concerns the fundamental "principle of legality", which in the continental system is considered (from the time of the French codification) a cardinal point of the penal law. Not one comment on this principle is provided by Lowenstein.

(3) The same Article 2 is concerned with the interpretation of penal law, a vital problem for every penalist. Yet, description of the procedure of interpretation is limited to a very few excerpts from continental and common law treatises. It should be added that the Ethiopian Penal Code contains a provision expressly prohibiting reasoning by analogy in penal law; yet, not one line of comment is given on such a prohibition and its delicate limitations.

(4) Articles 5-10 of the Penal Code are dedicated to the well-known principle of non-retroactivity of penal law and to exceptions to such a principle. The student would search in vain for a statement and explanation of this principle.

(5) Article 25(2) speaks of "non-instantaneous offence," Article 33 of 'proper" (or special) offences, and Article 34 of "collective offences" but in the volume under review there is no explanation of these terms. There is no tentative classification of offences, not even in a summary form. Should we then hope that the student will deduce the classification and distributions on his own?

(6) There is only a brief mention in the volume of the difference between main participation (offender and co-offender) and secondary participation (instigator and accomplice) in an offence, dealt with by Article 32 *et seq.*

(7) In many of the provisions of the Penal Code (Articles 41(2), 60(1), 60(2), 71, and 74) the legislator speaks explicitly of the interests injured by the offences. It is not necessary to indicate the importance of this concept, which is expressly developed mainly in the continental doctrines. In the volume under review there is not a single explanation of this concept, which would have been useful to clarify to the beginners; the more so because of the uncertainly and imprecision of the articles in the official English version.

(8) The Ethiopian Penal Code (Articles 66-78) contains a paragraph entitled "Justifiable Acts and Excuses." Jurists well know that this is a delicate field: they are the causes which exclude the punishability of an accused. Now — who will explain to the student which ones are the "justifiable" and which the "excusable" ones? Who will explain, or attempt to explain, why the author of the Ethiopian Code has used both terms in the title of the paragraph?

(9) The second paragraph of Article 40 speaks of the non-transmissibility to others of personal (or subjective) circumstances (or causes) which have the effect of excluding punishment. This suggests that the student should be given an idea of the distinction between subjective and objective causes of exclusion of the punishability and the implications of such distinction. It is a difficult topic, but it is inevitable. Yet except for a one-page note at the beginning of the volume, no mention is made of this distinction.

(10) The Ethiopian Penal Code has adapted a broad system of distinctions as to the circumstances of offences: generic or specific, aggravating or extenuating, general or special, subjective or objective. It is enough to read the long Articles 79-84 (and those to which these articles refer) to realize that it is a delicate and complex system. Lowenstein does not dedicate a single comment — on the ground that there is a belief that the student can truly, on his own, understand and delineate the way this system works.

The examples could be multiplied. But it is time to end this brief note and to pull together the threads of the speech. In fact, the purpose of this note is not to point out and enumerate gaps and defects, which in reality are inevitable in a work which, like that of Lowenstein, represent a laudable "pioneer" endeavour. The purpose, rather, is to record with satisfaction the collection of materials, although it is to be pointed out that the work is not yet sufficient to delineate a panorama of Ethiopian penal law presently in force. Nearly eight years have elapsed since the Penal Code first came into force, and it is time that the jurists began to elaborate and set forth the fundamental lines of the system. This means that they must study the system adapted by the Ethiopian legislator in its broadest zones and in some of its particular dispositions.

In conclusion, jurists ought to be grateful to Professor Lowenstein for the "Materials", many of which are precious, which he has put at their disposal. But it is to be hoped that, after the materials, the moment will come when it will be possible to see also some portions of the "edifice."