THE FALLACIES OF FAMILY ARBITRATION UNDER THE 1960 ETHIOPIAN CIVIL CODE

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INTRODUCTION

The justifications for the preservation of the old institution of family arbitration through the Civil Code as a mechanism for solving family disputes are well-expressed by the drafter of the Code in the following passage.

> "Betrothal, marriage, divorce and concubinage are susceptible of raising numerous legal difficulties. Chapter IX, which comprises of Arts. [722 to 737], refers to and deals with the manner of solving these difficulties. We have tried, on this subject, to take account of the customs and to preserve the inistitution of arbitration which is so much diffused in Ethiopia ... The provisions of Chapter IX aim at maintaining a well-established, and which appears to be an eminently respectable, tradition. On the other hand, they are inspired by the idea that the judges who are appointed by the state are not perhaps the best placed and the best qualified to resolve disputes of a family nature: this consideration has led different countries, such as Brazil, to create special jurisdictions for family litigation. This trend can corcorresopnd to that which has led many countries to establish special jurisdictions for the adjudication of cases, civil or criminal, concerning young persons. Moreover there are at the moment few qualified lawyers in Ethiopia; and for this reason, there is ground to dread the crowding of courts, which is the present evil all over the country; this consideration has strengthened our opinion, which is materialized by the provisions of Arts. [722 to 737]."[1]

To be more precise and concise the drafter incorporated the institution of family arbitration in the Civil Code for the following three reasons which are no more than mere assumptions as we shall see later:

1. It is a well-established and respectable tradition worth preserving for purposes of solving family conflicts;
2. It is a means of settling family disputes through arbitrators who are more qualified for this purpose than the judges of the regular courts; and
3. Family arbitration reduces the congestion of courts by providing a special forum for the settlement of family disputes.

With all due respect to the drafter and the Codification Commission who, as framers of our law, did their best in good faith and in all good will in order to Ethiopianize our new legal system by taking into the Civil Code some custo-

1. David, *le droit de la famille dans le Code Civil éthiopien* (Milano-Dott. A. Guiffre - Editore 1967) p. 64 Translation by the author.

mary elements like family arbitration, we humbly take exception to the above points of view and we shall progressibely show why we do so.

The purpose of this paper is to show that the above assumptions of the drafter have not proved as much true today when family arbitration is put to the test as the drafter might have thought in the abstract before the promulgation of the Civil Code.

In part I we shall briefly compare the institution of family arbitration with arbitration in general as we find it in the Western world. This we will do in order to understand the nature of family arbitration under our Code by way of contrast and comparison. Then we shall examine our customary law to see whether family arbitration has any origins therein.

In part II and III we shall examine the provisions of the law and several cases containing arbitral awards in order to see whether or not there is truth in the assumptions of the drafter as stated in Nos. 2 and 3 above. Finally we shall make some suggestions in our conclusion.

Throughout our discussions in this paper we shall make frequent reference to various Code provisions which we shall not be able to reproduce for lack of space and time. Therefore the reader is advised in advance to have the Civil Codes at hand.

PART I

THE NATURE OF ETHIOPIAN FAMILY ARBITRATION

A. Comparison with Anglo-American Arbitration

Although the characteristics of the institution of arbitration are basically the same in the western legal systems, we shall take as an example that under the Anglo-American legal system since it is the most developed and the most documented affording us with relevant materials for purposes of our discussion in this paper.

1. A brief look at Anglo-American Arbitration

> "Arbitration is a mode of settling differences through the investigation and determination, by one or more unofficial persons selected for the purpose, of some disputed matter submitted to them by the contending parties for decision and award, in lieu of a judicial proceeding. The object of arbitration is the final disposition of differences between parties in a faster, less expensive, more expeditious, and perhaps less formal manner than is available in ordinary court proceedings.
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> The investigation and determination of matters of difference are placed in the hands of private extraordinary judges, usually selected by the parties and known as arbitrators, who proceed in a judicial way, sometimes as an adjunct to a court of justice."[2] (Notes omitted.)

2. 5 AM Jur. 2d (1962), Appeal & Error, p. 519

The decision of the arbitrators is called the "award" which is binding on the parties to the arbitration "as to all matters properly submitted and properly investigated by the arbitrators under the authority of the submission [or agreement]."[3] The award is enforced as any ordinary judgment usually after confirmation by a court though under some laws the award of itself has the force and effect of a judgment.[4]

As it appears from the foregoing citation the distinctive characteristics of Anglo-American arbitration are the following:

1. Voluntary submission of the dispute or difference to the arbitartors by the parties who must have already made an agreement to settle their dispute thereby and to be bound by the award.
2. The speedy, less expensive and friendly solution of the dispute by one or more arbitrators with expert knowledge in a judicial, though informal manner, that is, in a way the ame dispute would be handled in a court of law.
3. The paramouncy of the agreement or contract which forms the basic frame of reference for purposes of deciding the dispute by the arbitrator or arbitrators.

Under Ethiopian law these characteristics of arbitration in general are apparent from the provisions of Arts. 3325-3346 of the Civil Code and Arts. 315-319 and Arts. 350-357 of the Civil Procedure Code. At this point it must be pointed out that there are two kinds of arbitration under Ethiopian law. Arts. 3325-3346 deal with arbitration proper as we find it in Anglo-American law. This is one kind. The second is family arbitration (our concern in this paper) which is dealt with under Book II, Title IV, Chapter 6 and 9 especially.

2. The General Features of Family Arbitration under the Ethiopian Civil Code[5]

1. **It is compulsory.** The code Compels resort to arbitrators whenever there is a family dispute by making family conflicts out of the jurisdiction of the regular courts except when they come by way of appeal (Arts. 736-37) and that under limited circumstances. (See generally Arts. 665(2), 666(1), 723, 725, 726, 727, 728.) The law forces the parties to consent to the arbitration of their dispute by persons selected by them. Thus there is no such thing as arbitral submission or an agreement to arbitrate a dispute and to be bound by its result. In family disputes there is no choice but arbitration. There is no way to go to the courts but through appeal and that only in cases of "corruption of the arbitrators or fraud in regard to third persons" or in cases of illegality or "manifest" unreasonableness of the award (Art. 736) or in case of unreasonable delay (Art. 737).

3. Ibid.
4. Id, pp. 638-639
5. For an elaborate discussion about the mechanics of marital dispute resolution through family arbitration the reader is referred to H. Beckstrom, "Divorce in Urban Ethiopia Ten Years after the Civil Code," *J. Eth. Law, vol.* 6 No. 2, 1969, p. 283.

2. **It is not before full-time arbitrators.** Generally the arbitrators are those persons who have been witnesses to the marriage or betrothal (Arts. 723, 725) though the parties or the court or the arbitrators may appoint other persons to act as arbitrators. (Arts. 728(2), 731-735).[6]

3. **It is seemingly speedy under certain circumstances.**[7] The arbitrators are required by law to pronounce divorce within one month (according to the official Amharic version of the Code) counting from the date of the petition in case of a serious cause of divorce (Art. 668) and within one year in other cases (Art. 678) which period may be extended to five years in the latter case, by agreement of the parties (Art. 678). In all cases they are bound to deliver the supplementary judgment within six-months from the date of the judgment of divorce (Art. 680(2)).

4. **It depends to a large extent on the substantive provisions of the law and to a much lesser extent on the agreement of the parties.**

   The parties may regulate their pecuniary relations by the contract of marriage which, to be valid must be in writing and attested by four witnesses to (Arts. 629, 627) or other contracts concluded during marriage which must be approved by the family arbitrators for purposes of validity (Art. 633). To this extent the arbitrators may refer to agreements made between spouses (Arts. 683(1), 690(1)). But in all other cases they are bound to frefer to the provisions of the law. (See Arts. 627(3), 634, 665(2), 683(2), 690(2)).

5. **Since there is little reliance on the agreement of the parties, the arbitrators, as we shall show later in more detail, are required to know the law to be experts in family arbitration.** Hence they are required to have legal training which is not the case in general arbitration practice.

6. **Reconciliation is part and Parcel of family arbitration under the Ethiopian Civil Code (Arts 676).** It is one of the legal duties of the arbitrators to be performed where there is no serious cause of divorce.

3. Ethiopian Family Arbitration Vis-à-vis Arbitration Proper: The Institutional Fallacies

The above outline of the general features of arbitration as is understood in the west on the one hand and Ethiopian family arbitration on the other throws light on their relationship. The basic attributes of arbitration as is generally understood and accepted in the modern world are lacking in our family artbitration. But without these basic qualities, which are outlined above, arbitration is no arbitration in its proper sense.

Ethiopian family arbitration is compulsory. But such arbitration is said to be no arbitration at all because it means "a vanishing of its voluntary nature" and a prevalence of "the spirit of litigation."[8]

6. The advantages that may flow from the permanent function as arbitrators of marriage witnesses (e.g. being acquainted with the law and the facts) is destroyed by the option the law gives to the parties to resort to other persons without limitation.

7. That this is not true in practice will be apparent from later discussions.

8. G. Philipps, "The Paradox in Arbitration Law: Compulsion as Applied to a Voluntary Proceeding." *Harv L. Rev.* vol 46, (1932 - 33), p. 1267.

Family arbitration under our Civil Code has, as its frame of reference, not the arbitral submission of the parties, but the substantive provisions of the law. This means that the family arbitrators must be, not only experts in famliy matters, but also experts in family law while arbitrators in general are not so much required to know the law as the technicalities of the type of dispute they arbitrate.

Ethiopian family arbitration contains a foreign element, reconciliation (which is related to the institution of compromise). But reconciliation and arbitration are two distinct and diametrically opposed dispute-settling devices. Arbitration presupposes a controversy or a difference to be tried and decided while reconciliation has as its purpose not to adjudicate a controversy but to avoid it through compromise.

These basic institutional fallacies of Ethiopian family arbitration render it the direct antithesis of arbitration proper. On the one hand it is a coercive arrangement which destroys people's right of choice in the settlement of their disputes and which substitutes for their consent to arbitration a statutory compulsion. On the other, it is, not arbitration in its proper sense, but a hybrid of two dispute-settling devices, reconciliation and a coercive arrangement for which we fail to find a better name.

B. Comparison with Customary Arbitration before the Civil Code

1. Customary Arbitration in General

In customary law we do not find a neat and clear definition of arbitration. As the following extracts from customary la w show it seems arbitration and compromise are generally synonymous terms to mean one and the same dispute-solving device. One thing is clear and that is whichever means is used in the dispute-solving process there is prior consent to the jurisdiction of the shimagilés and to be bound by their award.

Consider the following:

> **"Contract of Compromise:-**
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> Compromise means a return from compulsion to consent and settlement of the case by conciliation before chosen arbitrating "shimagiles".[9] "[Section] 2109. - A compromise reached through the arbitration of elders is executed by the judge of the arbitration and it may not be taken to a quasi-authoritative judge."[10] "[Sec.] 2112.- A person, who has agreed to reach a settlement before elders or a 'relative' judge and to be bound by their decision, may not refuse to make the settlement, nor may he cancel the settlement."[11]
>
> "[Sec.] 2104. - If the elders, selected to settle a border dispute refuse to do so after the parties have agreed to be bound by the decision of the elders and after the terms of the reconciliation have been heard before the court, none of the parties may break the settlement but higher authorities may force the selected elders to fix the border-line under dispute."[12]

9. *Digest of old Ethiopian judgments*, (Law Faculty Archives, unpublished) vol. 4. ch. 1
10. Ibid.
11. Ibid.
12. Ibid.

Section 2113 gives the right to a party to an arbitration to appeal to the "rightful court" from a decision made by a partial arbitrator. The court has the power to refer the case to another arbiter or elders.[13]

2. Customary Divorce and Arbitration

Nathan Marein, once a High Court judge here, writing before the promulgation of the Civil Code says:

"Apart from the Fetha Negast, there is no law of marriage in Ethiopia. The courts, when dealing with matters concerning marriage, apply customary law only."[14]

"The common feature of marriage is that a marriage contract is made between the parties, usually in writing. Such a contract is made before elders who are not members of the families, as witnesses, and each party puts up a guarantor known as the "Marriage Father" The 'Marriage Father' keeps one copy of the marriage contract. If there is any subsequent trouble between the parties the duty of the 'Marriage Father' is to try to effect a settlement between them."[15]
"There is no unified divorce law. The High Court relies on customary law as espoused by the various judges who happen to sit in on a particular case and on customs that vary in every area. Thus the law must vary with the parties in each case."[16]

The many avenues towards divorce under customary law: As we shall see later pronouncing divorce is the exclusive jurisdiction of family arbitrators under the 1960 Civil Code. That was not the case before its promulgation.

Let us see.

Divorce by Mutual Consent

"[Sec.] 6. - If a husband and wife whose marriage was concluded according to custom, file a case for separation due to a failure to live together harmoniously, and if the husband voluntarily declares out of court that he has divorced his wife and will share the property with his wife before the judge has given his decision, the case shall be closed when the judge records the agreement so reached."[17]

By Unilateral Repudiation

"[Sec.] 92. - Where husband and wife quarrel due to some misunderstanding, the husband, shall, in accordance with his capacity, either allow his wife to stay in his house and maintain her or he shall divorce her."[18]

By filing a suit in a court of law

"[Sec.] 23. - When a wife sues her husband for divorce in court, he shall not refuse [unless they were married by taking the sacrament together]".[19]

13. Ibid.
14. N. Marein, *The Ethiopian Empire - Federation and Laws* (Royal Netherlands Printing and Lithographing Co., Rotterdam, 1955) p. 160.
15. Id, p. 161.
16. Id. p. 164.
17. *Digest of old Ethiopian judgments*, vols. 1 and 2.
18. Ibid.
19. Ibid.

Before the elders or by Arbitration

"[Sec.] 2093. - When spouses get a divorce before the elders, having agreed to take a fixed sum of money and animals and if their so separation is known, the wife may not sue him again for a share of the property."[20]

"[Sec.] 199.—Where husband and wife have agreed in the presence of elders and arbitrators to take their own cattle when they divorce, the woman shall not ask her husband to pay her money which they have spent together and money which they have not admitted owing each other in the presence of friends."[21]

3. Family Arbitration through the Cases before the Civil Code

The cases which we are going to see may be of recent origin, but they certainly reflect the practice that existed in the old days. Dates are according to the Ethiopian calendar.

Zewditu Woragna v. Almaw Workineh[22] is the earliest case on the subject that we were able to find by looking through the files of the High Court. The file of this case contains a document in which husband and wife made an agreement of divorce and the partition of the common property before five witnesses one of whom is designated an arbiter or "relative judge". The wife had some difficulty in getting her share of the common property from her ex-husband. Therefore she applied to the High Court for the enforcement of the settlement whereupon the court instructed them to settle their dispute before shimagilés (or by arbitration). The parties went back to their locality and later the ex-wife came back with an instrument signed by both parties and by the three shimagilés who settled the dispute concerning the matrimonial property and who state that they made the parties agree on the terms and conditions specified in the instrument. The court ordered the enforcement of the settlement reached through the shimagilés upon the request of the lady.

A similar but more interesting case is *Atsede Yohannes v. Habte Selassie Belaineh.*[23] What is interesting in this case is a document which contains what might be called an amalgam of arbitral submission and award in one and the same instrument. We think it is worth our attention and we have hereby reproduced it after having translated it into English.

"**Agreement:-** I...Habte Selassie and ...Atsede Yohannes, husband and wife from 1942 up to now [Yekatit 1/45] have divorced owing to disagreement created in our married life, pursuant to the terms and conditions set by [four shimagilés and one 'relative judge'] as follows.
"...Atsede Yohannes shall be entitled to a total of $ 5,500 to be paid in cash, upon giving receipt, by ...Habte Selassie Belaineh in monthly instalments of $ 1,100 each as of Yekatit 30/45 to be completed on Sene 30/45 provided that she will have no right to claim from him [the rest of the common property]...

20. Id. vol. 4
21. Id, vols. 1 and 2.
22. (H. ct., AA, 1940, Civil Case No. 347/39) (unpublished)
23. (H. ct., AA, 1945, Civil Case No. 127/45) (unpublished)

"Failing the payment of the full amount specified above on Sene 30/45, ... H. Selassie is bound to pay $ 2,500 over and above the original amount. In addition he is under obligation as of today...to pay $ 30.00 monthly for milk ...and other necessary expenses for their child until he is three years old.
"We...A. Yohannes and ... H. Selassie Belaineh have freely and voluntarily agreed to the terms and conditions stated herein above and shall not violate the settlement.

"We the above designated persons have made the parties come to agreement as stated above and made them sign the instrument in their own free will. In accordance with this agrreement...A. Yohannes is released from the bond of marriage as of today Yekatit 1, 1945..." Signed by both parties and the five shimagilés.

This settlement was reached after the wife, petitioned the High Court for a decree of divorce and the division of the common property. While the court was considering the case the parties requested it to settle their dispute by the arbitration of shimagilés upon which the court appointed them an arbiter or a "relative judge" and sent them back home. Later they came to the court with the above instrument. Upon its attachment to the file the case was closed.

In **Feleketch Fesseha v. Dessita Belaineh**[24] the parties were referred to the arbitration of shimagilés. But upon failure of the husband to appear before the shimagilés the High Court pronounced divorce in favour of the wife. Many other similar cases may be cited but the above cases are enough for purposes of our discussion.

4. The General Features of Customary Arbitration

A close observation of the extracts from our old customaty jurisprudence and the cases discussed above shows the following general characteristics of "arbitration."

1. In all cases including family conflicts the parties had two choices in the settlement of their disputes: the courts on the one hand and the shimagilés on the other.

2. To submit a dispute for its solution by shimagilés was a purely voluntary act. Custom did not enforce the consent of the parties to go to the elders for the solution of their conflicts.

3. The shimagilés settled the dispute through an arrangement by making use of compromise and arbitration together or separately. The dichotomy that exists between arbitration and compromise in modern law, it is submitted, did not *always* exist under our customary law. Sometimes we find arbitration in its strict sense. Most of the times we don't. (One should closely examine section 2112, DOEJ and the *A. Yohannes* case above.) It is worthwhile to note this difference between our customary arbitration and modern arbitration though the voluntary nature of arbitration and the binding force of the award are the basic characteristics of our customary arbitration as well as of the modern one.

24. (H. ct., AA, 1949, Civil case No. 254/48) (unpublished).

4. The final settlement or agreement, which was signed by the contending parties and by the shimagilés if written, was enforceable by a court and binding upon the parties.

5. There was always an arbiter selected *ad hoc* by both parties or by a court, who adjudicated on the dispute or who somehow tried to bring the parties into agreement together with other shimagilés picked up from the community by the parties to the dispute.

5. The New Family Arbitration Vis-à-Vis the old one

One should not forget that our aim in this part of the paper is to show whether there is truth or not in the following statement of the drafter:

> "We have tried...to take account of the customs and to preserve the institution of arbitration which is so much diffused in Ethiopia...The provisions of Chapter IX aim at maintaining a well-established, and which appears to be an eminently respectable, tradition [the institution of arbitration]".[25]

Now the impending question is whether the so-called "respectable tradition," the institution of family arbitration as known and as understood in the pre-code days is preserved or not by the Civil Code? The inevitable answer is "no" for the following reasons.

The old institution of family arbitration was voluntary while the new one is compulsory. (See our discussion above.) This means in the old days people could go either to the courts or to the shimagilés depending on their choice. These two choices do not exist today as regards family disputes. Going to court now is allowed only in case of an appeal.

In the old days arbitration depended on the agreement of the conflicting parties while the new family arbitration does depend on the law. That is to say the source of customary arbitration was the agreement of the parties while the source now is the law.

The old-time family arbitrators or shimagilés applied the custom of their locality in settling a dispute while the present ones are required to apply the law. The Code leaves little chance to the arbitrators, if at all it does, to use custom in their decision. This can only be presumed from the provisions of Art. 695(2) and (3) and this is only for purposes of determining the penalites to be imposed on a guilty spouse. In all other cases the arbitrators must apply the provisions of the Code. (See for instance Arts. 668-682, 690(2), 695(1). The exclusive and restrictive nature of the Code as regards custom can be seen from Art. 631(2) which prohibits a contract of marriage, which has a minimal effect on the decision of the arbitrators anyway, from refering "purely and simply to local custom."

Thus emptied of its most important elements and filled with new ones, that "respectable tradition", the old institution of arbitration is preserved in its hollow and illusory form.[26]

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25. See note 1 *Supra*.

26. The existence of reconciliation in both the old and the new kind of arbitration seem to create some similarity between them. But this similarity is one of form rather than of substances Moreover, reconciliation has little role to play in family arbitration under the Code as we shall see later.

PART II

THE QUALIFICATION OF FAMILY ARBITRATORS FOR PURPOSES OF SETTLING FAMILY CONFLICTS

It is the assumption of the drafter that for purposes of deciding family disputes family arbitrators are more qualified than the judges in the regular courts, in other words, that family arbitrators are experts in the field. One of the benefits of arbitration in its proper sense is that it affords expert knowledge to the parties concerned in order to achieve a just settlement of the particular dispute for which the judges in the regular courts may not be qualified owing to the special character of the dispute involved. In oridnary arbitration the role of the arbitrator is to try issues of fact by virtue of his knowledge of that particular fact and thus come out with a just settlement of the conflict.

In this sense the arbitrator is more qualified than the judges in the regular courts.

To talk of the rural parts of the country and of customary arbitration,[27] in so far as issues of fact are concerned the shimagilés may be "the best placed and the best qualified" to resolve family disputes. They are usually seised of the facts prior to the trial of the dispute to the extent that it is almost unnecessary to adduce evidence and hear witnesses in order to prove an issue of fact. They know the background and even the temperament of the parties concerned and hence how to approach the problem since they are selected from the same locality as the parties are in; from among friends, village elders and religious leaders who have concern and sense of duty in the just settlement of the conflict which is acceptable to both parties. The shimagilés are especially qualified in the field of reconciliation by virtue of their age and long practice which gives an aura of authority to what they say. They know whether or not a dispute is susceptible of reconciliation. If not no time is lost on a case which does not afford any compromise. In such a case the problem is quikly disposed of and the common property liquidiated. In other cases they do their best to save the marriage by virtue of their wisdom and art. They spend long hours trying to reconcile the spouses. Damages are awarded to an injured spouse where necessary. Where there is a deadlock they let the matter rest for sometime, then resume the negotiation after a while and if there is still failure try another tactic another time until the parties are reconciled. (This tactic may be the inclusion of another influenctial elder or a religious leader.)

This is customary arbitration in its pure form as practised from time immemorial in rural Ethiopia where things seem to be still as they were before the coming of the Civil Code. But to talk of the countryside may be irrelevant since it is not in the most part affected by the new legal system. Therefore we should bear in mind that our discussion is generally related to the urban areas of the country where the people are relatively conscious of their rights and duties under the new laws with help of the various media.

In the urban areas society is progressively becoming impersonal as a result of increasing migration of people from the countryside to the towns where independence

27. The writer personally knows how family arbitration works at least in the province where he was born and reared. Sometime in the past he had to arrange for the settlement of disputes in his family through shimagilés and had witnessed many times how the elders settle family conflicts in the country-side.

and individuality are fostered. People know very little of each other since most of them have their roots in various parts of the country with cultural differences which act as a barrier to the understanding and concern about the problems of the other fellow. There is also the additional fact of time-consciousness in an urbanized society which means that people have little or no time to devote for purposes of arbitration which is time-consuming.[28]

All in all family arbitrators in an urban society lack the qualities and facilities that are required of them in order to adjudicate on questions of fact involved in a family dispute. They know nothing or very little about the background of the dispute and the parties. But a first-hand knowledge in family conflicts is a necessary element of family arbitration because otherwise it is doubtful that arbitrators selected haphazardly, and with no code of conduct can have a genuine concern and sense of duty in the just settlement of the dispute. It is doubtful that they make any effort to save the marriage through reconciliation which may be shunned by mere lip-service and that they take their time or care at all to devote the time necessary for the fair trial and just settlement of the dispute.

Even if family arbitrators may be qualified to try questions of fact and for purposes of reconciliation, still they are far from being qualified to be expert arbitrators in the eyes of the law because simple knowledge of the facts and the technique of reconciliation is only a small part of the job in family arbitration since the Civil Code compels them not only to know the whole substantive and procedural law but also to apply it correctly under all circumstances.[29] The following illustrations can make this clear.

According to Art. 736 of the Civil Code the decision of the family arbitrators must among other things, be legal, to be valid from which it follows that they are required to know the law if they are not to infringe it by their decisions. Leaving all other provisions of the law aside we shall briefly show how an arbitral award can be illegal under family law alone.

Under Article 690(2) the arbitrators are required to apply the divorce hinderance provisions (Arts. 691 - 694) irrespective of whatever agreement there might be between the spouses. Suppose husband and wife agreed before-hand that in case of divorce they shall share the common property equally whatever the cause of the divorce. A

28. H. Beckstrom in his article "Divorce in Urban Ethiopia Ten Years after the Civil Code," (cited at note 5 supra, p. 291) says that many couples go to court to obtain an order "that arbitrators, whom [they] solicit, shall act in a dispute," since it is becoming difficult to get persons who can act as aribtrators in the cities. But the sincerity of court-ordered arbitrators is very doubtful since they have no legal obligation to act as arbitrators. They usually react by absenting themselves from the proceedings and by mishandling the case (see *ibid*, note 40) or by demanding a much higher remuneration than would the parties pay for the same case if they went to court. In one case I know the five arbitrators demanded and were paid $ 100 each only to grant divorce. But for the same case the court fee would be $ 25.00 (See Legal Notice No. 177 of 1972, *Neg. Gaz.*, 12th yr. No. 15.) In another case they received a total sum of $ 2700 for both divorce and property award which is roughly the court fee that would be paid when the value of the subject matter ranges between $ 78,000 and 78,500. But the High Court would handle the same case for $ 90 as this is the practice in family disputes. This in addition shows how family arbitration is becoming expensive. Surely there is something wrong here.

29. We have already pointed out that custom has little or no place at all under the Civil Code. See p. 13.

decision given in a case of divorce for serious cause or on the insistence of one of the spouses on the basis of the agreement is illegal on its face.

According to Art. 681(2) "children shall be entrusted to their mother up to the age of five years" unless there is a "serious reason" for deciding otherwise. Suppose in a family dispute between a husband and a well-to-do wife the arbitrators decided that their two children, two and three years old respectively, be taken from their mother and entrusted to their father without any reason for so doing. It is an illegal decision.

It is provided (Art. 678) that the arbitrators "shall pronounce the divorce within one year" from the date of the petition for divorce in a case of non-serious cause. Suppose the arbitrators decided to extend this period to two years on their own and against the wish of the parties. The decision is illegal.

Under Art. 676, it is a duty on the part of the arbitrators to attempt to reconcile the parties before they pronounce divorce. In a real case[30] the spouses petitioned the arbitrators for a divorce decree and the tribunal granted the divorce without ever attempting to reconcile them and without trying to establish the cause of the divorce as it appears from the records of the case. This is an illegal decision in the eyes of the law because the tribunal bypassed its legal duty, attempt at reconciliation, and proceeded to give divorce decision.

Again in another real case[31] the tribunal liquidated the common property without pronouncing divorce. By so doing they acted against the basic rule that there is no liquidation of common property without an award of divorce because the former is a consequence of the latter.

In *Workinesh Shewatatek v. Zewdie Fellake*[32] the tribunal, harassed by the continued default of one of the parties, closed the case and told the petitioner to institute a suit in court thus waiving its own jurisdiction while it could have proceeded and given decision in default of the other party. (See Art. 317(4) Civil Proc. Code) Later the spouses divorced by mutual consent before four shimagilés through a written instrument in a contractual fashion. The same shimagilés liquidated the common property subsequent to the agreement of divorce. This amounts to recognizing divorce by mutual consent which is prohibited by Art. 665(1).

In *Manna Ayenew v. Mitiku Kassa*[33] in a decision pertaining to property the tribunal denied petitioner's request to prove her claim of $ 79,015 against her husband and gave an award, by majority vote, of $ 4000 and two plots of land for petitioner. The case is now in the Supreme Imperial Court on appeal based on the refusal of the tribunal to allow the petitioner to prove her claim, and to penalize the husband for adultery which she has proved as the records show.[34] In this case the tribunal committed a procedural error according to Art. 351(c) (ii)

30. *Menbere Zellelkatchew v. Tirualam Taddesse* (H. ct., Addis Ababa, Civil Appeal No. 309/63) (unpublished).

31. *Leggesse W. Mariam. v. Agaredetch Tejineh* (Sup. Imp. ct., AA, Civil Appeal No, 643/64) (unpublished). See also *Tirunesh Dessita v. Haile Selassie Makuria* (Sup. Imp. ct- AA, Civil Appeal No. 769/61) (unpublished)

32. (H. ct. Addis Ababa, Civil Appeal No. 818/63) (unpublished)

33. (Sup. Imp. ct., AA, Civil Appeal No. 600/64) (unpublished).

34. See *Mitiku Kassa v. Manna Ayenew* (Sup. Imp. ct., AA, Civil Appeal No. 350/57) (unpublished).

of the Civ. Proc. Code in that it refused to hear the evidence.[35] It can also be said that it committed a substantive error under Art. 693(1) Civil Code, in that it failed to penalize the guilty spouse, thus defeating one basic policy of the law which is to make divorce difficult by sanctioning the spouse who is at fault.

The above few instances, though many more can be cited, are enough to show that family arbitrators are required to know the law, at least family law, and to apply it correctly to avoid giving illegal decisions. But to what extent can this requirement be satisfied by lay judges who have no formal connection with the court system and who are selected *ad hoc?*

On the one hand the Civil Code requires resort to family arbitrators in family disputes. There is nothing wrong in that. On the other it requires a strict application of its provisions by the same. Surely there is something wrong in that. It is one thing to provide for an institution as a mechanism for settling a category of social disputes. It is another to provide for the implementation of the same institution by private citizens who know nothing about the law. Certainly there is a basic flaw in an institution that fails to create the conditions for its own implementation and such is the institution of family arbitration.

It is submitted that family arbitration under the Civil Code is an institution to be used, not by lay-men in the law, but by legally trained people. This being the case it is crystal clear that family arbitrators, being what they are, are never qualified for purposes of settling family disputes. If they are to be qualified they must have legal training. Otherwise the law is such as makes it difficult for laymen to be experts in settling family conflicts. Hence the fallacy of the statement that family arbitrators are "the best placed and the best qualified."

PART III

DOES FAMILY ARBITRATION REDUCE COURT CONGESTION?

When the drafter included family arbitration in the Civil Code he thought that it would help to reduce the congestion of the courts about which he was deeply concerned. He said:

> "... there are at the moment few qualified lawyers in Ethiopia; and for this reason, there is ground to dread the crowding of courts, which is the present evil all over the country; this consideration has strengthened our opinion, which is materialized by the provisions of Arts. [722 to 737]".[36]

With the greatest respect to the drafter's sincerity and concern we decline to entertain the belief that family arbitration can help to reduce the overcrowding of our courts. On the contrary we believe that court congestion is an evil inherent in the institution itself. The following discussion is meant to substantiate this conclusion.

35. For the same procedural error (in this case a denial of potitioner's request to prove adultery) see *Haile Mariam Tekle Selassie v. Yimenashu Zewdie* ((H. ct. AA, Civil Appeal No. 363/63) (unpublished).

36. R. David, cited above at note 1.

The Inadequacies of Family Arbitration

A. Lack of enforcement powers

1. Procedurally

The arbitration tribunal is required by law (Art. 317 (1), Civ. Proc. Code) to conduct its proceedings in a way similar to the proceedings of a civil court. This means that in order to fulfill its duties as a dispute-settling machinery it may

1. require any persons, physical or moral, to submit all information, documents and other evidence in their possession required by the tribunal for the carrying out of its duties;
2. require parties and witnesses to appear and tesftify at hearings;
3. administer oaths and or take admissions of persons appearing before it and examine any such persons upon such oath or admission;
4. in the case of persons summoned to give expert evidence, allow "reasonable renumeration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case." (See Art. 112(2), Civ. Pro . Code);
5. order the defraying by the parties of expenses incurred by the witnesses in attending at the tribunal;
6. take disciplinary measures through the chairman to ensure order in its proceedings and summarily punish any person present before it and who is guilty of improper conduct in the course of any proceedings. (Art. 480, cum Art. 317(1), Civ. Proc. Code)

These are some of the measures available to the tribunal in carrying out its duties. But these measures are only effective through the good will or submissiveness of the person against whom they are taken. Otherwise they are no more than mere requests for cooperation or good will of the party or the persons whose attention the tribunal wants to draw towards the fulfilment of a certain measure taken by it. This is so because the tribunal has no power to enforce the measures mentioned above or any other measures that the law allows it to take. Every measure the tribunal takes must be enforced through the courts in which case the interested party has to go to court with a request from the tribunal for the enforcement of its orders. (Art. 317 (3), Civ. Proc. Code.) This means that a file has to be opened in a regular court whenever the tribunal finds it difficult to implement its orders. But a simple request for the enforcement of a measure or order given by the tribunal may turn out to be an involved case by itself if a situation arises where the court has to issue orders repeatedly to a reluctant party or witness or where a defaulting witness or party has to be heard to prove that he failed to comply with the summons for good cause in a case under Art. 118 of the Civil Procedure Code. It is not difficult to see that such cases may contribute to the congestion of the courts.

2. Substantiatively

Under the Civil Code the family arbitration tribunal has, among others, the following substantive powers.

1. According to Art. 674 (1) the tribunal "shall order such provisional measures as are required by the circumstances in particular as regards the maintenance of the spouses and of the children or the management of the property of the spouses."

2. Under the same article (sub-art. 2) it "may assign or prohibit a determinate residence to the husband or to the wife" before the final award is given.

3. The tribunal in its final award has the power to liquidate all the pecuniary relations of the spouses, to punish a guilty spouse according to Arts. 691-692 and to regulate the custody and maintenance of the children born of the contending parties.

But as the tribunal has no power of enforcement in procedural matters, just the same, it lacks the same power in substantive matters. An order or award must be sent to the court through the successful party for its enforcement according to Art. 319 (2) of the Civil Procedure Code. Here again the successful party has to open a file in a regular court, if there is no file already open, and go through all the processes of execution, thus encumbering the court with all the problems of execution that may result from an ordinary judgment. As Book VI of the Civil Procedure Code shows the execution of an award as well as an ordinary judgment is an involved, intricate and vexatious affair to both the court and the party seeking execution. It is even more intricate and time-consuming than the trial of an ordinary case. Just consider the cumulative effect the foregoing inadequacies can have on court congestion.

B. Lack of Facilities

1. Ignorance of the law on the part of family arbitrators (See also Part II above.)

A High Court judge who sits in a division exclusively assigned to family disputes says: "The fact that artbitrators are by and large laymen and illiterate may well be the reason that cases conducted by family arbitrators are full of irregularities and problems."[37]

The law does not discriminate as to who is to be eligible to act as an arbitrator. The determination of who is to be an arbitrator is left to the choice of the parties. Naturally what the parties choose as their arbitrators is as much as possible those persons with whom they have already an established friendship or those who sympathize with them. No consideration may be given to the legal qualification of the would-be arbitrators, though persons with such qualification are almost nonexistent for purposes of family arbitration or unavailable without very high remuneration. After some fishing in the locality the parties pick up their own judges who form the arbitration tribunal which usually sits in church yards or under a big tree wherever this is available. There are no ways and means to help the tribunal get some enlightenment as to what the law says.[38] In such a situation the arbitrators are a law unto themselves and may decide according to their views of justice or according to the custom prevailing in their locality. The outcome of such arbitration is a mess and chaos from which the regular courts have the final burden of finding a way out.[39]

37. An interview with Hon. Ato Girma Selassie Araya, May 9, 1972.

38. Consider the role of the legal assessor in England who advises arbitrators regarding points of law.

39. For illustrations we refer the reader to the cases cited above in notes 30 - 35 which are abundant in both procedural and substantive errors and irregularities. An examination of the files themselves shows clearly how arbitration cases are indeed messy and chaotic.

"In practice the institution of family arbitration does not stand without court help. In fact, it has almost become subordinate to it. In most instances a party who wants to submit his case to family arbitration first approaches the court and open a file. The court then may give an order for the appointment of arbitrators. Once a file is opened either party may come with all sorts of complaints against the arbitrators and the other party. Courts usually accept their complaints."[40]

The institution as it appears now is not a sound and workable mechanism that can stand on its feet without the help of the regular courts. As a result the courts have taken it upon themselves to supervise arbitration proceedings in addition to handling numerous complaints and awards that come both on appeal and as references from a troubled tribunal seeking help. Just consider the following case.

Haile Mariam Tekle Selassie v. Yimenashu Zewdie.[41]

In this case the wife approached the Addis Ababa Awraja Court for the appointment of arbitrators whereupon the court in the presence of both spouses appointed a chairman and told them to go to their locality and select their respective arbitrators. The court left the file open expecting to hear the result of the arbitration in a month's time by fixing a date for that purpose. On the day appointed to hear the result the parties appeared and told the court that the arbitrators have not yet started hearing the case. The court made more than ten subsequent adjournments, each time making an order for a speedy settlement of the dispute and to see the award made by the arbitrators at the next adjournment. And at each adjournment the parties had to appear in court in order to give a report on the progress of the arbitration procceedings. Also the chairman of the tribunal had to appear in court several times in order to explain why the tribunal could not reach a decision as soon as the court expected.

During the arbitration proceedings the wife made two complaints to the court. Her first complaint relates to maintenance ordered in her favour by the arbitrators against the husband who refused to meet the order. The second has something to do with the conduct of the chairman whom she wanted to be replaced by another chairman because she alleged that he treated her unjustly.

Thus after so much swinging of the parties (and even of the chairman) from court to tribunal and from tribunal to court the arbitrators gave an award, an erroneous one, just a year after the case started and that through the constant and nagging orders of the Awraja Court.[42]

Though the arbitration proceedings were conducted under the supervision of the court in this case as in many other family cases and though the court constantly urged the tribunal to be on time in its proceedings, all the same the tribunal failed to give the award within the legal period of time which is one month according to the Amharic version and three months according to the English version of Art.

40. An interview with Hon. Ato Girma Selassie Araya cited above at note 37. See also H. Beckstrom, cited above at note 5 a, where he says that "litigants with divorce petitions are coming to courts initially in increasing numbers".

41. Cited above at note 35.

42. cf. *Mitiku Kassa v. Manna Ayenew* cited above at note 34 which took ten years though it was supervised by a court like this one.

668 since this is a case where a serious cause of divorce, adultery, is alleged. The tribunal also made another serious error in that it refused to allow the wife to prove the adulterous conduct of her husband. The High Court reversed the award on appeal by the wife and remanded the case to the same tribunal for rehearing.

At this point it must be abundantly clear that family arbitration has made for confusion and unnecessary complication in the administration of justice as shown above because it would have been easier and more speedy for a court to handle a case from the start and give a decision thereto or see a case on appeal from a lower court than adjudicate on a case which is already messed up and mishandled by lay judges who give awards based, not on rules of law, but on mere common sense.

Family arbitration as practised by the illiterate has, we believe, increased rather than decreased the overcrowding of the courts because it has become the breeding ground for grievances and irregularities from which emerge innumerable problems crowding court dockets.[43]

2. The nonexistence of an arbitration tribunal or persons legally bound to arbitrate in family disputes

Art. 725 (1) says that family disputes "shall be submitted to the arbitration of the persosns who have been witnesses to such marriage." But Art. 733 (2) makes it clear that even such persons are under no legal obligation to act as arbitrators. Nobody is bound under the law to arbitrate in family disputes for that matter in any dispute. But everybody is bound by law to submit family conflicts to an arbitration tribunal which is to be constituted by the parties concerned. The requirement of the law that family conflicts must be settled through arbitration and its failure to provide for a tribunal or personnel legally bound to handle the same conflicts expose one of the most outstanding paradoxes of the inistitution of family arbitration under the Code. What are the poor parties to do if no arbitrators are available?

What they do in practice is to go to court in order to get arbitrators appointed by the court though the courts have no power to order a person to act as an arbitrator. Initially the parties may succeed in getting persons who will act as arbitrators. But when these persons find the work inconvenient or when one of the parties who does not want to see the end of the dispute (usually the husband who wants to harass his wife) shows a hostile attitude towards them or exerts his influence on them they disband and quit by simply absenting themselves from the proceeding in which case the party concerned in the resolution of the dispute or both parties have to go to court to get another court - appointed arbitrator or arbitrators, or an order directing a previously appointed but reluctant arbitrator. In any case the parties request and the courts grant the request. This is done again and again until an award is given by some arbitrators after it is long overdue. Here is an example.

In *Mitiku Kassa v. Manna Ayenew*,[44] a case initiated in the High Court sitting at Dabre Markos, Gojjam, the court spent ten years just issuing orders to reluctant

43. Our conclusion is fully supported by the High Court judge whom we interviewed. See note 38 above.

44. Cited at note 34 supra. Incidentllay this is a case where a serious cause of divorce is alleged and later proved.

arbitrators and replacing unwilling arbitrators by new ones.[45] After so many orders and replacements, somehow some arbitrators came together in the sixth year and gave an award regarding property without pronouncing divorce. Then the court, seemingly angry, took up the case itself and gave a divorce decree. At this point new judges replaced the old ones. The new - comers who doubted the jurisdiction of the court in this matter asked for instruction from the Spupreme Imperial Court which after affirming the divorce decree for reasons of equity ordered the lower court to refer the case to family arbitrators for other matters. This year (1964 E.C.) the arbitrators gave an award which is on appeal in the Supreme Imperial Court for reasons which we discussed above.[46] It is now ten years since this case started and no one knows how long it will take in the appellate court.[47]

The non-existence in the Code of persons legally bound to arbitrate in family conflicts has created to the courts the additional problem of constituting an arbitration tribunal which is a serious gap left by the law. Though they have attempted to fill this gap, be it out of a sense of legal duty or out of humanity as response to the problems of the Ethiopian female, it has been an unsuccessful attempt in that it has done little good to the plight of the destitute woman. On the contrary it has caused problems to the courts themselves in that it has become itself one of the factors of court congestion.

It should be remembered that our effort in this part of the paper is to get an answer to the question already posed. This is the question: Does family arbitration reduce court congestion? Although we don't have statistical data to show how much it has contributed to court congestion and to disclose the percentage in the rise of the overcrowding of courts as a result of family arbitration as compared to other factors, we believe the above discussion is enough to show that family arbitration has accentuated the problem of court congestion in its own unwholesome and eccentric ways. Therefore the answer to the above question is a negative one.

PART IV

CONCLUSION

We have been so far occupied in trying to answer three difficult questions triggered by the statement of the drafter appearing in the introduction of this paper. In plain and simple language the questions appear more or less as follows:

45. The court went to the extent of issuing order for the arrest of the resistant arbitrators by the police and to appear in court for exlpanation.

46. See *Manna Ayenew v. Mitiku Kassa* cited at note 33 supra and accompanying text.

47. It was initiated in the High Court on Megabit 25-54 (E.C.) During all this time it is the woman who suffers the most hardship because in the words of Professor Beckstrom "[she] leaves the house and usually goes to stay with friends or family. This generally occurs regardless of who might be thought to blame or who is most desirous of separation. It is the Ethiopian male's pride and prerogative to stay in the home and sene or let the woman go away. This puts the man at a great practical advantage of course. Except for the little that the woman stealthily pack on her back, all of the couplels property remains under the man's control, so that in any case the next move is up to her." (H. Beckstrom cited at note 5 supra, p. 285). The husband may refuse to supply her with maintenance ordered by the arbitrators or by a court till a settlement of the dispute is reached and the execution of maintenance orders may constitute a case by itself over and above the main one.

Does family arbitration under the Civil Code resemble customary arbitration before the Code?

Are family arbitrators qualified to conduct arbitral proceedings as expected by the law?

Does family arbitration reduce court congestion?

To each and everyone of these questions we answered "no".

In the first place if family arbitration under the Civil Code has almost nothing in common with customary arbitration it has no value - neither cultural nor practical - worthy of the appreciation of the people and capable of gaining their acceptance. It is a new institution with an old name that has failed to gain ground in our society and as such it is likely that it will remain a stranger to the people for a long time to come.

Secondly if the new family arbitration is not such as to be handled by private citizens who do not have any legal training and if at the same time the same people are supposed to put it in practice by acting as arbitrators, it is submitted with great respect that the institution of family arbitration exists in the Civil Code as a serious legal anomaly that should be cleared immediately.

Finally if family arbitration does not help reduce the congstion of courts it has failed to meet the most that was expected from it. Therefore we make the following suggestions for a future amendment of the Code provisions concerning family arbitration.

In view of the fact that society has a paramount interest in the preservation and protection of the family as embodied in Art. 48 of the Revised Constitution, the power to pronounce divorce must be within the exclusive jurisdiction of the regular courts rather than in the hands of simple private citizens who know nothing about the aims and goals of the law and who may not take so much trouble to save a marriage as a duty - conscious court would.

In recognition of the fact that special qualities of personality and experience are needed in order to save a marriage from break-down and these qualities have been possessed from time immemorial by the shimagilés (in the true and traditional sense of the word) parties intending to get a divorce decree must be subjected to a process of reconciliation through the local judge *(atbia dagna)* before they can be granted divorce in cases of non-serious cause of divorce.

Considering the fact that the liquidation of pecuniary relations between spouses involve issues of fact that are difficult and time-consuming to prove in court the parties should be given the option to settle their pecuniary disputes through compromise or arbitration according to Arts. 3307 - 3346 of the Civil Code under certain circumstances which will be given in detail later.

In view of the fact that local judges *(atbia dagnas)* can have a big role to play in family disputes they should be permitted to exercise Civil powers in addition to their former ones and that should be specified in both the substantive and procedural laws.

Hence according to these guidelines the minor functions of family arbitrators referred to under such provisions as those of Articles 632, 633, 641, 648, 652, 655, 656, and 686 would be exercised by the local judge together with his assessors.

Also in cases where there are no serious cause of divorce the local judge would have the duty of reconciling or attempting to reconcile the parties through the shimagilés of the locality and give a certificate to the petitioner in case where reconciliation fails stating the reasons for the failure. Where the law provides for compromise and or arbitration he would lend a helping hand to the parties and arrange for the speedy settlement of the dispute through such means.

The court (whose jurisdiction in divorce cases is to be determined according to the Civil Procedure Code) would exercise the major powers now exercised by the family arbitrators. It would pronounce divorce in case of a serious cause within the legal limt of time (which should be three months). However in case of non-serious cause of divorce the court would first require the petitioner to try reconciliation and would not consider the petition unless the petitioner shows that reconciliation has been attempted through the local judge.

Notwithstanding the provisions of the Civil Procedure Code fixing the jurisdiction of courts on the basis of the value of the subject matter, disputes arising out of the dissolution of a marriage by divorce would be submitted to the determination of the same court which pronounced the divorce. In other cases the provisions of the Civil Procedure Code would apply to determine the jurisdiction of the court.

The court would be given the discretion to refer disputes regarding matrimonial property to be settled through compromise or arbitration in case of non - serious cause of divorce only when the parties agree to such resolution of the conflict. In case of a serious cause the court would allow only arbitration and not compromise and here again only when the parties agree. Where the court refers the dispute to arbitration it would do so with the necessary instructions to the arbitrators as regards the penalties under Arts. 691 - 693 of the Civil Code.

Whenever the parties choose the resolution by the court of their pecuniary disputes the court would apply the provisions of Arts. 690 - 695 *mutatis mutandis* thus having the discretion to penalize the blameworthy spouse even in a case where divorce is ordered for a non - serious cause.

It is finally submitted that there is a pressing need at present calling for the realization of the above suggestions.