ENIGMA OF ERITREAN LEGISLATION*

*by Fasil Nahum***

One wonders, had the legal surgery which accompanied the termination of Eritrean federal status back in 1962[1] been throughly and adequately performed, would the complications of law raised a decade later by *Bahta et al. v Public Prosecutor*[2] have been necessary? The answer is not easy to come by. What is sure however is that the constitutional and criminal law complications inherent in the Banditry Act[3] of 1957 and related statutes[4] are intimately connected to the inadequacy of the legal surgery accompaning the termination of the Federation. Hence, specific complications raised by statutes and court-case would have to be examined in light of the over-all enigma of Eritrean legislation. Generalizations may then be hopefully made by way of recommendations for solving this complex legal problem of Eritrean legislation.

While the Federation has been terminated, its *legal* problems have not. One finds in Eritrea today, a confusingly complex legal process not completely congruent with and yet within the context of the Ethiopian legal system. The declaration of the state of emergency obviously adds to the atmosphere of uncertainty.[5] Yet it has to be stressed that the enigma of Eritrean legislation is purely a product of Eritrea's legal history and could have been satisfactorily solved at the time of the termi

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* This article was originally intended as little more than a case comment on *Bahta et al.* However, it soon became clear that the case was only part of the necessary material for an introductory discussion on the basic problem of the engima of Eritrean legislation. A field-research undertaken in January 1973 richly rewarded the author with further materials. The author is indebted to various Supreme Imperial Court judges, public prosecutors and lawyers in Asmara whose assistance was most useful. Gratitude is also due to several Colleagues in the Faculty of Law, H.S.I.U. for various fruitful observations.

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1. The Termination of the Federal Status of Eritrea and the Application to Eritrea of the System of Unitary Administration of the Empire of Ethiopia Order, No. 27 of 1962, *Negarit Gazeta* 22nd Year No. 3.

2. *Bahta et al. v. Public Prosecutor*, Criminal Appeal File No. 74/63 decided by the Supreme Imperial Court in Asmara on Sene 21, 1963 Eth.C. For the full text of the case see pp. 217-22 of this issue of the Journal.

3. The Banditry Act, 1957 published in the *Eritrean Gazette* Vol. XIX (1957) No. 11. It has been amended twice. The Banditry (Amendment) Act, 1959 found in the *Eritrean Gazette* Vol. XXI (1959) No. 11; and The Banditry (Second Amendment) Act, 1959 in the *Eritrean Gazette* Vol. XXII (1960) No. 2. The full texts of the Banditry Act and its amendments are attached as Appendix I: A, B and C respectively, pp. 329-32.

4. The two legislations related to the Banditry Act which will be brought out in time are:
The Penal Law (Amendment) Act, 1956 henceforth known as Article 437A (Amendment to the Eritrean Penal Code), found in the *Eritrean Gazette* Vol. XVII (1956) No. 6; and
The Collective Liability Act, 1960 found in the *Eritrean Gazette* Vol. XXII (1960) No. 9.
They are attached as Appendix I D p. 333 and Appendix I E pp. 333–34 respectively.

5. For declaration of state of emergency refer to Declaration of a State of Emergency in Certain Area of the Teklay Gizat of Eritrea Order, No. 66 of 1970, *Negarit Gazetta* — 30th Year No. 6; and
State of Emergency in Certain Areas of the Teklay Gizat of Eritrea Regulations, Legal Notice No. 390 of 1970, *Negarit Gazetta* — 30th Year No.6.

nation of the Federation.[6] Indeed, the termination of the Federation some years ago would have been an apportune moment in which to cut off *in toto* from the body of laws all the dead weight legal material Eritrea had accumulated throughout the duration of its erratic existence. Whatever extra-legal overtones it might presumably have had, the problem of Eritrean legislation today is basically a legal one. To comprehend it one has to make a brief survey of Eritrea's modern legal history.

I. Legal History 1890-1962

The roots of the problem go back nearly a century. Since 1890, when the colonial Italian government carved out and so named Eritrea,[7] one legislation after the other had for half a century been actively promulgated in the Italian language. Italian authority had rested on the soveriegnty of the Italian Crown. Hence, all legislation in the Colony – apart from proper Italian legislation extended to it[8] – had come out pursuant to basic enabling legislation from Rome. With the transfer of authority over Eritrea to British military administration in 1941 the previous legal system on the whole remained intact.[9]

Not only was British authority provisional in nature,[10] but in addition the British felt bound by the terms of the Hague Convention of 1907, which denied to an occupying authority the right to change instutitions and laws existing in the occupied enemy territory.[11] Later, as the British military and caretaker administrations introduced change, this was on peacemeal fashion partially amending the laws here and there in the Italian and English languages.[12]

6. It may be stressed that all the Eritrean legislations in question appeared at least a decade prior to the declaration of emergency. Furthermore, while the declaration of emergency is geographically limited to only "Certain Area of the Teklay Gizat of Eritrea," the Eritrean legislations apply throughout Eritrea. Thus the declaration of emergency and the Eritrean legislations are not congruent either time-wise or space-wise. And as will be shown later political offenders are not charged pursuant to the Eritrean legislations. In such cases the Penal Code is applied. All these reasons directly lead to the conclusion that the enigma of Eritrean legislation is purely a product of Eritrea's legal history and should thus be examined apart from any declaration of emergency.
7. Historically the region had been part and parcel of the ancient Axumite Empire. Axum disintegrated with the advent of Islam and the infiltration of the Beja tribes into the coastal lowlands. Little is known as to what happened for the next few centuries. Towards the end of the Middle Ages the region emerged as part of the province of the *Baher Negash* in the hierarchy of the feudal monarchy. Coastal strips (notably the port of Massawa) were at times also considered as the southern most boundaries of the Ottoman Empire and were ruled in turn by Turks and Egyptian Pashas. During the scramble for Africa this region on the western shores of the "Erythrean Sea" was christened Eritrea and became Italy's first colony.
8. Such as the Italian Civil Code and Italian Penal Code. Treaties were also extended to the colony. For example refer to the author's case comment on "International Law: State Succession" in *Journal of Ethiopian Law*, Vol. V No. 1 pp. 202-204 (1968).
9. *G.K.N. Trevaskis, ERITREA, A Colony In Transition:* 1941-52, pp. 24-26 Oxford U. Press, London (1960).
10. Although Asmara was freed in April 1941, the World War was not over until 1945. The signing of the Peace Treaty came only in 1947.
11. Trevaskis, *Supra. p.* 24.
12. The use of the Italian language was continued mainly for the sake of convenience.

The Federation[13] in 1952 brought a new Constitution but otherwise left the existing legal system intact.[14] New legislations appeared, this time in addition to Italian and English, in Tigrygna and Arabic as well – the two official languages by the Eritrean Constitution.[15] One of the laws introduced during this era was the Banditry Act of 1957[16] which plays a central if dying role in *Bahta et al.*[17] which we will take up in the course of this discussion.

To sum up them, the legal system in Eritrea was up to 1962 a patchwork of legislations in Italian, English, Tigrigna and Arabic – the legacy of an international order that capriciously assigned Eritrea its unstable fate.[18]

Meantime Ethiopia, having since 1942 regularly promulgated various legislations in Amharic and English in the *Negarit Gazeta*,[19] was in the 1950s and eary sixties agressively codifying its laws;[20] the basis for the new Ethiopian legal system being the Revised Constitution of 1955.[21] Looked at from Asmara, this added a new dimention to the problem. To the legal intricacies already existing as to Federal, British and colonial legislations (i.e. the whole set of Eritrean legislation), somehow being put together as a unit, one had after 1952 to include the problem of deciding what the effects of Ethiopian legislation were to be on Eritrea. It must be stressed that this was not a moot question but one of actual practical importance. Specially so since the Eritrean Assembly extended important Ethiopian legislations – notably the Ethiopian Penal Code to Eritrea.[22] One would have expected that the termination of the Federation and Eritrea's incorporation into unitary Ethiopian system in

13. For an official version of the creation of the Federation see, "Final Report of the United Nations Commissioner in Eritrea" General Assembly United Nations, 7th Session, Supplement No. 15 (A/2188), New York, 1952.
14. Article 96 of the Eritrean Constitution stated that "Laws and regulations which were in force in 1 April 1941, and have not since been repealed by the Administering Authority and the laws and regulations enacted by that Authority, shall remain in force ..." That in the event of conflict between those laws and regulations and the constitutions, the latter would prevail was expresse, noted in Article 96 (2).
15. Article 38 (1) of the Eritrean Constitution.
16. Refer to footnote 3.
17. Refer to footnote 2.
18. It should be pointed out that the Federal Act also had an official Amharic version signed by the Emperor.
19. Prior to the Occupation laws had appeared in Amharic and French in an official Reporter known as *Berhanenna Salam*.
20. The codes and their official citation is as follows:
Penal Code, Proclamation No. 158 of 1957, *Negarit Gazeta* 16th Year Extraordinary Issue No.1;
Martime Code, Proc. No. 164 of 1960, *Negarit Gazeta* 19th Year Extraordinary Issue No 1;
Civil Code, Proc. No. 165 of 1960, *Negarit Gazeta* 19th Year Extraordinary Issue No. 2;
Commercial Code, Proc. No. 166 of 1960, *Negarit Gazeta* 19th Year Extraordinary Issue No. 3;
Criminal Procedure Code, Proc. (unnumbered) of 1961, *Negarit Gazeta* 21st Year Extraordinary Issue No. 1;
Civil Procedure Code, Decree No 52 of 1965, *Negarit Gazeta* 25th Year Extraordinary Issue No. 1.
21. **The Revised Constitution, Negarit Gazeta,** 15th Year No. 2, superseded Ethiopia's first written constitution of 1931.
22. The Ethiopian Penal Code of 1957 was extended to Eritrea by a law adopted by the Eritrean Assembly on September 10, 1959 and promulgated by H.I.M.'s Representative on October 12, 1959. See the Penal Code (Extention) Act, 1959 in Eritrean *Gazete* Vol XXI (1959) No. 12. It is found attached here as Appendix I F p. 334. The available official version is however in the Italian language.

1962 would have thus done away with the mental acrobacy needed to legally engineer such a system and would have once for all cut off the gordonian knot and solved the problem. This unfortunately did not happen.

II. Order 27

Concerning the legislations in Eritrea, Addis Ababa had three basic alternatives open when bringing the Federation to a close. There were two possible shortcuts and one fullscale operation. Superficially looked at, it would have seemed most logical if the Ethiopian Government had totally abolished whatever legislation was in force which was not of Ethiopian origin; thereby making all Ethiopian legislation and only Ethiopian legislation automatically operative in Eritrea. This Shortcut the the Ethiopian Government wisely avoided having most likely taken extra-legal reasons into account. Assuming it was desirable to affect as little change as possible in the everyday life of the population, such a solution, by creating temporary confusion in the legal system, would have resulted in uncessary hue and cry. Such a solution would have sent all those involved in the administration of the law including policemen, prosecutors, advocates, judges, legal advisors as well as municipal and provincial administrators into frantic search for the apporpriate Ethiopian legislation.[23]

From a strictly legal point of view the solution would have been undesirable. Apart from the administrative problems of making the texts of Ethiopian laws available everywhere and in addition to the problems of legal interpretation of sophisticated modern laws, in quite a few areas those looking for counterpart Ethiopian legislation would have found none. Thus gaps would have suddenly been created in the legal system, in that areas previously covered by specific legislation would now lay exposed. Just to give some examples, areas where this would have happened range from labour relations[24] and industrial property rights[25] to municipal regulations on health and building as well as regulations on the protection of forests and wildlife.[26] In areas where there was counterpart Ethiopian legislation the law would have in some instances provided for a different solution from that of Eritrean legislation.[27] Thus all sorts of practical difficulties would have inevitably accompanied this shortcut. Fortunately the Ethiopian Government decided not to take this

23. To this has to be added the obvious language problem that would arise at least initially. For an introductory research in this problem of language and the law see "Language in the Court" by R. Cooper and Fasil Nahum appearing in the *Language in Ethiopia* survey now under publication.

24. For a well-thought comment on some problems of labour relations refer to Robert Means. "The Eritrean Employment Act of 1958: Its present status" in *Journal of Ethiopian Law*, Vol. V No. 1 (1968).

25. Mr. Peter Winship in his article published in this issue on p. 357 concludes that where as there are adequate originally coloniol statutes on the subject in Eritrea, new laws are urgently needed to cover the whole of Ethiopia.

26. In still another area, the Poor Defense Act of 1959, found in the Eritrean Gazette Vol. XXI (1959) No. 2. regulates the procedure and provides for allowance to be paid to lawyers who have served ex-officio. Such a law has yet to be introduced in the rest of Ethiopia.

27. Even today the procedure and means of tax assesment of business is quite different in Eritrea. For instance while business men have to declare their profits (and losses) only once a year in the rest of Ethiopia, in Eritrea they have to declare it several times a year in accordance to previously established procedures.

alternative. Rather, it chose to solve the problem through the other shortcut as provided in Order 27.[28]

Order 27 came up with a blanket provision whereby:

> All enactments, laws and regulations or parts thereof which are presently in force within Eritrea or which are denominated to be of federal application, to the extent that the application thereof is necessary to the continued operation of existing administrations, shall until such time as the same shall be expressly replaced and repealed by subsequently enacted legislation, remain in full force and effect, and existing administrations shall continue to implement and administer the same under the authority of the Imperial Ethiopian Government.[29]

Superfiaclly looked at, what Order 27 does is to take the line of least resistance and leave the legal system more or less as it exists. Until specifically repealed all legislation is to remain in full force and effect. However, the proviso is added "to the extent that the application thereof is necessary to the continued operation of existing administrations". Clear as it is that the Order intends to ensure a smooth public life with as little disruption as possible, Eritrean legislation remains in force and effect only if necessary to the continued operation of existing administrations. This means everytime a piece of legislation is about to be applied one has to ask whether it is necessary to the continued operation of existing administrations. In other words, the effect of Order 27 is to make every legislation in Eritrea suspect.[30]

This shortcut solution immediately begs the question, *who* decides whether a given legislation is necessary to the continued operation of existing administrations? With respect to this question Order 27 is silent. It may however be assumed that at the primary level whoever has the duty of applying the legislation would seemingly have to do so. The dissatisfied party may then, depending on the outcome, appeal on the ground that the legislation is unnecessary and therefore inapplicable, or necessary and hence applicable. For instance where an administrative decision is reached based on legislation, which a party thinks is unnecessary "for the continued operation of existing administrations", the adversely affected party could appeal the decision to higher administrative authorities until the party exhausts its right to administrative appeals. In practically all cases the party could then proceed to court and raise the same issue of inapplicability of the legislation in question. Within the hierarchical judicial structure there again would exist several appeals. Now, at any appeal level, administrative or judicial, where the authorities deem the legislation to be unnecessary and therefore inapplicable, the matter would not end there. Rather, the case would have to go back all the way down to where it originated and be decided on the basis of some other legislation. Apart from the headaches of that particular case what effects that decision by that authority would have on other authorities and other cases with similar issues is nowhere made clear.[31]

28. Refer to footnote 1.

29. Article 6 of Order 27.

30. Whether the burden of proof lies on the party wanting the legislation to be found "unnecessary" and thus, there is a presumption of its validity or not is immaterial, to the conclusion that every Eritrean legislation is suspect.

31. The issue is obviously part of a larger question as to what effect a decision by one authority has over others. One would probably have to break down decisions into categories of deciding authorities and then discuss the effects of decisions in each category.

Thus the effect of the open-ended provision saying that all legislation necessary to the continued operation of existing administrations be in force is a multiplication of legal complications. While at face-value Order 27 seems to provide for as little disruption as possible and is no doubt intended to ensure this *desideratum*, in actual effect by making every legislation suspect it becomes the cause for uncertainty in law and brings havoc to the legal system in Eritrea. Nor is the plight a historical one left behind us. For the future one may predict that unless a comprehensive solution is provided, the seed for such a solution being already planted within Order27, whatever indisposition the legal system is presently experiencing are only the first pangs of childbirth. Neither Eritrea's legal history nor its legal problems have been ordinary ones. Extraordinary problems require unusual solutions and nothing short of a full-scale caesarian operation would solve the enigma of Eritrean legislation.

III. The Bahta Case.

Probably the most frequent channel through which the necessity of a given Eritrean legislation is questioned would be by showing that an Ethiopian legislation effectively covers the point. Though much less frequent raising the legality or constitutionality of applying a piece of legislation would be another route. The case at hand provides an excellent opportunity to deal with both points since both aspects of the problem of Eritrean legislation are raised by *Bahta et al.* In this legally intetersting case the public prosecutor charged several defendants with violation of sections 2, 3 and 4 of the Banditry Act of 1957.[32] The facts of the case are as mundane as the legal issues are existing. The High Court found the five defendants, residents of Tigray province, guilty of armed robbery. (They had on June 27,1967 plundered 155 cattle from two persons in Eritrea near Barentu, towards the Sudan border.) Defence counsel then appealled to the Supreme Imperial Court, *inter alia*, on the ground that the charge should not have been brought under the Banditry Act. Two reasons were given. First, applying the Banditry Act in this case is contrary to the Revised Constitution, which provides for equal protection of the law. Secondly, it is argued that if need be, there is the Penal Code under which charges should be brought. In the language of Order 27, counsel's second plea relies on

32. "Armed Band

2. Any member of any band of two or more persons having the common intention to commit any crime of violence and at least one of whom is armed with a firearm or other explosive weapon shall be punished with imprisonment for not less than five years, unless the Court finds unusual and exceptional circumstances justifying imprisonment for a lesser term.

First Aggravation

3. Any person found guilty of the offence described in Article 2 shall be punished with imprisonment for not less than ten years if he is also found guilty, as such members, of any crime of violence other than the extortion of food.

Second Aggravation

4. Any person found guilty of the offence described in Article 2 shall be punished with imprisonment for not less than fifteen years if

(1) he is also found guilty, as such member, of two crimes of violence other than the extortion of food; or

(2) any firearm is fired or other weapon exploded by any member of the band shortly before or shortly after any such crime of violence."

the argument that the Banditry Act (or at least those section on which the charge is based) is unnecessary to the continued operation of existing administrations, since the Ethiopian Penal Code exhaustively deals with the criminal area in question. Defence counsel probably thought he had obvious advantages to gain by having the charges brought under the Penal Code rather than the Banditry Act. The Penal Code is more humane and lenient in its approach to punishment. It gives the court a wide margin of discretion in the actual meting out of punishment in clear contrast to the rigid and mechanically mandatory provisions of the Banditry Act. It is not far fetched for counsel to have even hoped that the Supreme Court, finding that charges have been brought under the wrong law, would quash the decision of the High Court and order a *trial de novo*.[33] In both respects counsel's hope proved wrong as the Supreme Court neither threw the case out nor changed the sentence. It confirmed the ten years rigorous imprisonment imposed by the lower court. Even-though defence councel lost his substantive case on the facts, he won on the legal arguments and thereby opened the door for two interesting issues.[33a]

This makes *Bahta et al.* a case of constitutional significance for two separate reasons. *Bahta et al.* kills two birds with one stone by disposing of two important issues of law at once. Others may interpret the case differently and consider it an overkill in that either of the two broad reasonings employed might have sufficed. The Court came up with a battery of arguments directed against the use of the Banditry Act. These were not always systematic responses to issues. Neither were they coextensive. Some covered broader areas than others. While some went to prove that sections 2, 3 and 4 were out, others aimed at throwing out the Banditry Act *in toto*. The Court's mode of thinking clearly bent on finishing up the Banditry Act, by throwing in all those arguments (some falling short of their target), has tended to confuse the clear distinction of the two legal issues involved. Because of this some important problems linger on unsolved after all is said and done by the Court. It is not absolutely clear, for instance, whether the Court thinks the Banditry Act other than sections 2, 3 and 4 can continue to be employed or not.[34]

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33. As pointed out to me by Prof. Ronald Sklar, the power of the appellate court to quash a decision and order a retrial is not specifically granted by the Title in the Code of Criminal Procedure covering "Appeals." Article 195 lists a number of appellate powers, but makes no reference to the power to quash a decision and order a retrial of the accused. It appears that Ethiopia's appellate courts have on occasion exercised such a power even though it is absent from Article 195. See *Aemro Negussie v. Public Prosecutor*, Addis Ababa High Court, 1966 Crim. App. No. 213/58, printed in S. Fisher, *Ethiopian Criminal Procedure* H.S.I.U. Addis Ababa, 1969, p. 430; but see Fisher's comments on this point, *id.*, p. 437. This exercise of power is understandable in view of the clear desirability of referring a case back to the trial court for a full retrial, where the appellate court finds an error of law requiring reversal has occurred but believes the accused may yet be guilty and deserve conviction. The trial court is the proper forum for such full retrials. It is regrettable that Article 195 failed to grant this essential power to appellate courts. Article 195 attempted to list all appellate powers separately, a procedure which can often result in "gaps" and consequently confusion. It would have been better had the criminal Procedure Code simply granted the appellate court the power to order any relief it believed necessary and proper in the circumstances of the case.

33a. Generally such a distinction is non existant. If one wins legal arguments in a case, the case ends up in a different result. Though the Court decided that the case should be instituted under the Penal Code rather than the Banditry Act, it affirmed the previous judgement because it has found the substituted law to be in line with the judgement rendered under the previous law. This process saves time but there seems to be a procedural irregularity.

34. In some legal systems as for instance in the United States it is common to distinguish between the resolution a court has reached on the case and everything else included in the opinion. The latter is known as *dictum*. This is important where the principle of *stare decisis* is part of the legal system. In any case such a distinction is hard to make in *Bahta et al.*

In any case the points raised belong to two distinct compartments. One issue raised is the constitutionality of the application of the Banditry Act. This question of constitutionality of application of a legislation though rare is of great significance all of its own. Then there is the question as to whether a legislation in force prior to Order 27 is still in force in Eritrea. This is an issue of everyday practical importance and one that is the primary reason for this article. Both merit our attention and will be briefly treated.

The Constitutionality Issue. In responce to defence counsel's contention that "the Banditry Act is not in agreement with the Constitution", the Court unreservedly and explicitely says, the Banditry Act "is not in agreement with the Constitution" However, what the Court does not say is that the Banditry Act is unconstitutional *per se*. It is the applications of the Banditry Act which the Court finds offensive and hence unconstitutional. The point needs some elucidation and for this one has to go into the Court's reasoning.

The main set of arguments used by the Court rest on the constitutional concept of equeal protection of the law. The Court notes that the Revised Constitution through Article 37 and 38 prohibits any kind of discrimination among Ethiopian subjects with respect to the application of law.[35] The Revised Constitution has obvious bearing because Order 27 makes, "the Revised Constitution ... the sole and exclusive constitution to apply uniformly throughout the Empire of Ethiopia".[36] This Constitution asserts that no one shall be denied the equal protection of the law. Applying different laws for the same offence (armed robbery)[37] in different parts of the Empire, the Court argues, amounts to denying the equal protection of the law. Whereas in the rest of the Empire the Penal Code is applied in the province of Eritrea the Court is being asked to apply the Banditry Act to deal with this case. Since applying two different sets of laws for the same offence amounts to denying the equal protection of the law, only one set should be applied. Having come so far the Court proceeds to show why the Penal Code should be applied and the Banditry Act discarded;[38] hence the unconstitutionality of applying the Banditry Act. From a practical point of view finding the employment of the Banditry Act unconstitutional amounts in reality to nothing short of finding the Banditry Act itself unconstitutional.[39] To find the Banditry Act substantively unconstitutional the Court would have had to go through Article 122 of the Revised Constitution.[40] This the Court did not find necessary to do. What the Court gained by approaching the problem in this fashion was time and labour since an indepth substantive analysis of the Banditry Act was unnecessary. In fact within the narrow constitutional issues if sections 2,3 and 4 as specifically raised by the case at hand there probably was no reason to go into substantive constitutionality. *Penal Law Arguments.* A

35. Article 37 reads, "No one shall be denied the equal protection of the laws." Article 38 reads, "There shall be no discrimination among Ethiopian subjects with respects to the enjoyment of all civil rights."

36. Article 3 of Order 27.

37. Penal Code Article 637.

38. A discussion of Article 5 (1) of the Penal Code would probably have here been relevant.

39. Except that (1) in the unlikely situation where no other penal legislation covers the specified crimes the Banditry Act may become operative and (2) the Court is not criticising anyone for legislating unconstitutional law.

40. Article 122 reads, "The present revised Constitution ... shall be the supreme law of the Empire, and all future legislation, decrees, orders, judgments, decisions and acts inconsistent therewith, shall be null and void."

constitution oriented secondary set of arguments employed by the Court to discredit the Banditry Act was derived from the Penal Code. The Court noted how "highly humane and liberal" the criminal process is as envisaged by the Penal Code. It observed how the Code even allows a wide range of discretion for the court to excercise in sentencing. In contradistinction, the Banditry Act is found to be a "*mandatory law*" allowing no discretion to the court and specifying that "*this kind of offence deserves this much punishment.*"[41] This the Court decides is objectionable and therefore concludes that, "it [the Banditry Act] is not in agreement with our modern laws which are enacted in accordance with the Constitution." If one may be allowed to use the phrase, such reasoning sounds like a finding of "indirect unconstitutionality." The syllogism runs as follows: the Penal Code is in accordance with the Constitution. The Banditry Act is not in accordance with the Penal Code. Therefore the Banditry Act is not in accordance with the Constitution. Logicians may find the flaw obvious. From a legal point of view what the Court seems to overlook is the Penal Code's provision for the other penal legislation. The Penal Code says, "nothing in this Code shall affect ... special laws of a penal nature .."[42] As far as this argument is concerned could the Banditry Act not be considered such a special law of a penal nature?

It may be noted that the legislators of the Banditry Act were aware of possible problems in this area. Thus a 1959 amendment stating that, "the Penal Code is in some respects unsuitable to the special problem which necessitated the enactment of the Banditry Act," had section 13 of this Act replaced in order to take specific exception to several General Part articles of the Penal Code.[43] The Court for some unknown reason never mentioned this amendment, whose sole purpose was to show the Banditry Act's relationship to the Penal Code.[44]

As to the mandatory nature of the punishment imposed by the Banditry Act, it may be noted that the Act in sections 2, 3 and 4 provides for a "not less than" (5, 10, 15 years imprisonment respectively) type of punishment. These sections establish the minimum but obviously present the court with the discretion to go beyond if the court deems it necessary. For an unagravated offence under section 2 for instance the court could sentence from five up to ten years imprisonment. In this particular section the court in fact has the discretion to go even below the minimum five years sentence where, "the Court finds unusual and exceptional circumstances justifying imprisonment for a lesser term." Under sections 3 and 4 the court again has the discretion to sentence between 10 to 15 and between 15 to 20 years imprisonment respectively. The maximum sentence to be imposed under one section being impliedly stated by the minimum of the next section in the step by step progressively increasing set of punishment. It is true, there may be less discretion as to sentencing in the Banditry Act than the Penal Code. Moreover, unlike the

41. Section 13 of the Banditry Act originally read, "No sentence under this Act shall be suspended, but in all other respects this Act shall be subject to the general provisions of the Penal Code." As amended (second), it took express exception of Articles 56 (2), 79, 80, 81, 82, 83 and 188 to 215 inclusive of the General Part of the Penal Code.

42. Article 3 of the Penal Code. Query, should such special laws apply throughout Ethiopia in order to satisfy the equal protection constitutional clause?

43. This is the Banditry (Second Amendment) Act, 1959. See Appendix I C.

44. The court's discretion as to sentencing was originally limited to a margin of five years under each section of the Banditry Act, whereas Article 637 (1) of the Penal Code provides for a margin of 15 years of discretion. Note that the amended section 13 of the Act allows reduction of sentence up to a third below minimim. Query, what would one third of capital punishment be?

Penal Code the Banditry Act specifically prohibits the courts from imposing a suspended sentence.[45] Even this constitutes only a theoretical difference between the Banditry Act and the Penal Code since it seems extremely unlikely that a court would order the suspension of a sentence in a case as serious as robbery or aggravated robbery, even though Articles 196 to 198 of the Penal Code do grant the trial court such a discretion.[46] Finally, there is nothing in the Revised Constitution, or the Penal Code prohibiting "mandatory punishment" under special laws, provided there are no other problems of constitutionality or otherwise.[47] The validity of the whole round about "mandatory punishment" argument, by which the Banditry Act is found to be not in agreement with the Penal Code, which is in agreement with the Constitution, and hence "indirectly unconstitutional" would thus seem to be questionable.

In fact the Court's reference to the Penal Code's General Part articles is at best irrelevant. Articles 6 and 9 have circumstances in view totally different from those raised by *Bahta et al.* An appropriate question may have been whether the Court could analogize from the circumstances set out in these articles and thereby bring in the concept of the application of a more favourable punishment. But once the Court decides it is the Penal Code and not the Banditry Act that applies, it can go right into the specific articles of the Penal Code such as Articles 636 and 637 with no need of referring to articles dealing with either offences committed before "the coming into force of this Code"[48] or "judgments passed under legislation repealed by this Code".[49] Thus once the Penal Code is substituted instead of the Banditry Act even the point of analogy is unnecessary.

A still different argument which the Court brings out, that at best is again irrelevant if not outright wrong, is based on the fact that defendants are residents of Tigray province. The Court argues the defendants' ignorance of law i.e. of the Banditry Act and concludes that "there is no doubt that when committing the offence, they had in mind that in case they are caught they would be punished under the Penal Code..." The import of the argument is therefore that the Penal Code and not the Banditry Act should apply. The argument gives the case a tint of international law. However, both the defendants, ignorance of the specific law which may be applied against them in case they are caught (assuming they thought that far) and their place of residence are irrelevant. Even under international law it is the law of the place of commission of the offence that applies and not that of defendant's residence, and this is spelled out in our Penal Code.[50] As already said this argument is at best irrelevant.

However, the spirit with which a liberal court tries to find as many arguments as possible to discredit the Banditry Act and bring its application to nil may be understandable. The court probably constantly had in the back of its mind not only

45. Even as amended section 13 of the Act would still read: "No sentence under this Act shall be suspended." See Appendix I C.

46. Suspension of the *enforcement* of the penalty under Art. 196 must be distinguished from suspension of the *pronouncement* of the penalty. The latter under Article 195 could not be granted by a court for an offence as serious as armed robbery.

47. That sentences can be lowered up to a third below the minimum imposed by the Act as amended also goes to weaken the "mandatory punishment" argument.

48. Article 6 of the Penal Code.

49. Article 9 of the Penal Code.

50. Article 11(1) of the Penal Code.

the first sections of the Act but other more glaringly problematic sections[51] as well. These "communal responsibility" and "local responsibility"[52] sections were not raised by the case, neither did the court discuss them. We will examine them however, first having looked at the first sections of the Banditry Act and their relationship to the Penal Code.

IV. Penal Code v. Banditry Act[53]

One may ask, what is so offensive about these first sections of the Banditry Act and how are they different from the provisions of the Penal Code? The basic difference between Penal Code provisions and these first sections of the Banditry Act is one of degree of evidence required for the finding of guilt. The Banditry Act seems pleased to avoid all the niceties and complexities of modern penal law in which the defendant is treated individually and all his rights, substantive as well as procedural, are respected to the maximum.[54]

Once a defendant is found guilty, the court would under usual penal law again have to consider carefully the appropriate sentencing.[55] Unlike the Penal Code, the Banditry Act in some respects provides for what may be termed summary proceedings. To begin with, where out of a band of two or more persons, at least one of whom is armed, one member goes beyond the general intention of the band in committing a crime, all members of the band are indiscriminately made responsible for the higher crime.[56] For instance let us say that such a band conspires to plunder some cattle and the members expressely agree among themselves that no firearm shall be fired or other weapon exploded. While committing the crime, if one of them goes beyond and fires or explodes a weapon (even without hurting or attempting to hurt the victim of the plunder), the whole band is made responsible for the firing. Whereas under their original intention they would have been sentenced to imprisonment for not less than ten years,[57] the punishment for all of them now is a mandatory death sentence.[58] The punishment is again a mandatary death sentence if a band of two or more persons one of whom is armed are found guilty of any three crimes, no matter how relatively insignificant, like the extortion of $10 each time.[59] Since the death penalty as well as the minimum punishment to be imposed under each section are mechanically mandatory there is no way in

51. Section 10 of the Banditry Act.

52. Section 11 of the Banditry Act.

53. In this part of the article only the first few sections (1–5) of the Banditry Act will be constrasted with the Penal Code provisions. Communal and local responsibility sections will be examined together with the Collective Liability Act in a latter part of this article. However, this part will in addition to the first sections of the Banditry Act look at Article 437A and in connection with this Article the case of *Wurieta et al.*, whose reference is found in footnote 70

54. The basic guarantees of rights in a criminal trial are, of course, enumerated in Chapter three of the Revised Constitution. The equal protection clause of Article 37, the due process clause of Article 43, and the more detailed Articles 51, 52, 53, 54, 55, 56 and 57 contain a substantial part of the guarantees and rights accorded a defendant in a criminal case in Ethiopia.

55 Those General Part of the Penal Code articles expressly excepted from by the amended Banditry Act, such as Articles 79 to 83 deal with extenuating and aggravating circumstances which a court would take into account in sentencing.

56. This is an automatic inference from section two.

57. Pursuant to section three of the Act.

58. Under section five (sub-three) of the Act.

59. Section five (sub-two) of the Act.

which the court can hear about mitigating circumstances and if need be take them into account as would happen under the Penal Code.[60]

The only exception to this mechanical sentencing is section two, which permits the court to look into possible "unusual and exceptional circumstances justifying imprisonment for a lessor term" than five years. Under this section the crime is defined as "two or more persons having the common intention to commit any crime of violence and at least one of whom is armed." This general introductory section to the Banditry Act is basically preventive in nature, since the required elements are that (1) there be two or more persons, (2) one of them be armed and (3) they have the common intention to commit any crime of violence. It may be pointed out that the last element of intention, which in penal law is so difficult to prove is under the Banditry Act easily dealt with.[61] Where two or more persons, one of whom is armed, are found in Eritrea, they would more or less be presumed to have the common intention to commit crimes of violence. Hence, the difficult burden of proof that they are innocent of such criminal intention is shifted on them.[62]

All the crimes enumerated by the first sections of the Banditry Act would also be found to be crimes and hence punishable under the Penal Code. But the trial procedure, specially the burden of proof and the evidence required for the finding of guilt would be more exacting.[63] Furtheremore the meting out of punishment would generally be much more carefully considered so as to fit the individual defendant. The court would have the discretion in each case to look into mitigating as well as aggravating circumstances.

Penal Code articles dealing with "dangerous vagrancy" and "conspiracy" would take care of section two of the Banditry Act.[64] The maximum sentence that can be imposed under these articles is however three years imprisonment. Where a band commits any crime and is chargeable under the aggravation sections 3, 4 or 5 of the Banditry Act, each member is then, of course, chargeable under specific Penal Code articles depending on the nature of the crime committed. Such crimes as "aggravated homicide" and "aggravated robbery" could, of course, entail the death sentence.[65] Moreover, such general part articles dealing with "attempt", "principal act: offender and co-offender" "acomplice" and "criminal conspiracy". could where necessary come to play.[66]

60. The exception to this is the amended section 13 (1), which provides for possible reduction of sentence up to a third below the minimum imposed by the Act. Query again, how is one to assess a third of the death penalty?

61. Criminal intention is defined in Article 58 of the Penal Code. There criminal intention is divided into direct and indirect. See Ronald Sklar, "... Intention Under the Ethiopian Penal Code" in *Journal of Ethiopian Law* Vol. VIII No. 2 (1973).

62. Since the Banditry Act is intended to lump all defendants together, the individual who protests his innocence and states that either he was forced to follow such a band out of fear or that he accidentally happened to be there when the band was apprehended but is otherwise not part of them would have to prove his innocence.

63. Ethiopia does not have an Evidence Code. However, the import of such concept as the presumption of innocence of the Revised Constitution and the detailed trial procedure found in the Criminal Procedure Code is such that there is no doubt as to the exacting nature of the proof required.

64. Articles 471 and 472 of the Penal Code.

65. Articles 522 and 637 of the Penal Code.

66. Articles 27, 32, 36 and 37 of the Penal Code.

Article 437A.[67] It should be noted that the Banditry Act deals with a "band of two or more persons" as defined in section two. One would thus think that one person found illegally possessing firearms would come under the ordinary penal law provisions. But that is not the case. One of the complementing legislations of the Banditry Act provides for what is known as Article "437A" This article should not be confused with Ethiopian Penal Code articles. Article 437A is an amendment to the Italian Penal Code which was the penal law in force in Eritrea from 1936 up to its replacement by the Ethiopian Penal Code in 1959.[68] Article 437A was introduced in 1956 and made *inter alia* the illegal possession of firearms by a a person punishable by up to five years imprisonment or up to $2,500 fine or by both such imprisonment and fine. In contrast Article 764 of the Ethiopian Penal Code limits the punishment for the same offence to a "fine not exceeding one hundred dollars or arrest not exceeding eight days."[69] Discussing this difference in sentencing a Supreme Court Justice pointed out that depending on which side of the Mareb river (the boundary between Eritrea & Tigre provinces) a person is found illegally possessing firearms, on the one side he may find himself convicted to imprisonment up to five years is on the other only convicted to one week's house-arrest.

The Wurieta Case.[70] In the 1965 case of *Wurietaet al,* the High Court accepted that part of the charge dealing with illegal possession of firearms. Pursuant to "Art. 437A" the court found defendant guilty and sentenced him to two years imprisonment. The case is more complicated than that as there are other defendants and other issues involved. It is being referred to here simply to show that "Art. 437A" is a live, enforceable piece of legislation. Interstingly enough the place of arrest was not far away from the Mereb river, boundary of Tigre province.

V. Policy Considerations: New Light in Court

One can imagine how Article 3 of the Penal Code and Articles 37 and 38 of the Revised Constitution may pull at opposite directions. When a special law of a penal nature is directed only at one province in the Empire the question of "equal protection of the laws" becomes a very close one. It is not surprising if the Court thus finds the application of the Banditry Act unconstitutional.

Since the Banditry Act as well as Article 437A came out during the federation in response to a specific problem then encountered by the Eritrean Government, one may ask are they, from a policy point of view, still necessary today? From recent interviews[71] by the author of police-officers, public prosecutors, High Court and Supreme Court judges as well as other court officers and government officials, the fact alearly emerges that the "Shifta" problem of the middle fifties has dwindled to insignificance. The phenomenon of the common robbers who roamed the highways and made communications in Eritrea unsafe seems to have been connected

67. For the full text of Article 437A refer to Appendix I D.

68. Refer to footnote 22.

69. Article 764 is a Petty Offence Code provision. It seems that there is a major conceptual difference between the thinking behind Article 437A and Article 764. The one considers it a serious crime, the other only a petty offence.

70. *Public Prosecutor v. Wurieta et al.* Criminal File No. 63/57, decided by the Imperial High Court in Mendefera on Hamle 22, 1957 Eth. C. (Unpublished, Archives, Faculty of Law, H.S.I.U.)

71. These interviews took place in January 1973 in Asmara.

with the uncertainly of transition of governments.[72] That problem is seemingly no more common in Eritrea today than the rest of Ethiopia. It may also be added at this juncture that whatever acts of political offenders are brought before the law, the Banditry Act and related legislations would not be applied. In such cases the Penal Code comes to play. The Banditry Act *et al.* are purely intended to deal with common robbers.

The Reversed Mesfin Case.[73] It is probably in response to this change of material circumstances, i.e. the dwindling to insignificance of the "Shifta" problem that finally made the Supreme Court in *Bahta et al.* reverse what had been a leading case on the subject and find the Banditry Act procedurally unconstitutional. A decade earlier the Supreme Court had just after the termination of the Federation been presented with a case on the Banditry Act. The Attorney General's Office had internally decided that the Banditry Act be retained as a "necessary" law under order 27.[74] The question was whether the court would go along. In the case of *Mesfin et al.* the Supreme Court was in the early sixties presented with facts that had taken place prior to the termination of the Federation. The High Court as a court of first instance had found the three defendants guilty under various counts and had pursuant to the Banditry Act passed on each the death sentence. On appeal before the Supreme Court defendant-appellants had *inter alia* argued that they should be charged under the Penal Code and not the Banditry Act. They argued that the latter was unnecessary and that the Penal Code was sufficient. Among the public prosecutor's counter arguments, first place was given to the fact that the crimes had been committed during the Federation.[75] It is difficult to say how much weight the court gave to this factual argument but on the whole found defendant-appellants guilty as charged under the Banditry Act.

Since *Mesfin et al.* several cases had come to court and the Banditry Act has been standard legislation. Nearly a decade later *Bahta et al.* changed the legal situation by reversing *Mesfin et al.* and finding the Banditry Act procedurally unconstitutional. Since then there has been one more Supreme Court decision on the Banditry Act while several others are pending.

The Werasi Case.[76] In the very recent case of *Werasi et al*, a different bench of the Supreme Court in its majority decision reversed a High Court decision and went along with *Bahta et al.* by refusing to have charges framed under the Banditry Act. It said, .. "The Banditry Act of 1957 was a temporary law. It was proclaimed during the Federation. There is no question that today it is the Penal Code which is in force throughout Ethiopia and also contains Article 637 dealing with "Shiftas." Turning to the Revised Constitution, the Court noted that, "While Article 37 says 'no one shall be denied the equal protection of the laws,' Article 38 states

72. Trevaskis, *Ibid.* in his chapter on "transition to autonomy" provides some background of the "Shifta" problem in Eritrea and takes it up to 1952, where his narration ends.

73. *Mesfin et al. v. Public Prosecutor*, Criminal Appeal File No. 21/64, decided by the Supreme Imperial Court in Asmara on Sene 27, 1956 Eth. C. The text of the case is attached as Appendix II A.

74. It probably should be noted that the Attorney General during the Federation was also the chief legal adviser to the Eritrean Administration.

75. "Appellants (Bandits) had committed this crime during the time of the Eritrean Constitution".

76. *Werasi et al. v. Public Prosecutor*, Criminal Appeal File No. 36/64 decided by the Supreme Imperial Court in Asmara on Megabit 12, 1964 Eth. C. The text of the case is attached as Appendix II B.

that 'there shall be no discrimination amongst Ethiopian subjects with respect to the enjoyment of all civil rights.' Furthermore while Article 54 says, 'Punishment is personal,' Article 122 claims 'The present Revised Constitution shall be the Supreme law of the Empire. All future legislations, decrees, judgments, decisions inconsistent therewith, shall be null and void.' In *Werasi et al.* the court did not even think it necessary to argue at length the *pro and con* of the Banditry Act. It simply followed the precedent established by *Bahta et al.* It said, "as previously decided by the Supreme Imperial Court in file No. 74/63 of Sene 21, 1963 Eth. C. the Banditry Act of 1957 has been discarded." It then continued, "pursuant to Article 15 of Proclamation 195 of 1955 Eth. C. lower courts are instructed to follow decisions rendered by higher courts." In other words, the Court decided, the High Court for not having followed B*ahta et al.* in giving its decision as a court of first instance in *Werasi et al.*

The Courts Proclamation.[77] The reference to Proclamation 195 brings up still another point of irregularity of procedure in Eritrea vis-a-vis the Ethiopian legal system eventhough the effect is in this case positive. In 1962 the Imperial Ethiopian Government had come up with a "Courts Proclamation" intended to have far reaching consequences in the upgranding of the legal process in courts in Ethiopia. One of the provisions of the new proclamation namely Article 15 made "all decisions on matter of law given by superior Courts (sic) binding on all subordinate courts." Moreover the Proclamation was to "come into force on the 5th day of May 1963." However, soon thereafter an amending proclamation came out and on the grounds that it is necessary that arrangement be made before full effect can be given to the provisions of the Courts Proclamation of 1962, had the effectiveness of this Proclamation suspended.[78] In Eritrea, the suspending Proclamation does not seem to have come into effect. The Courts Proclamation was effectively introduced immediately after promulgation. When the suspending Proclamation came out a Ministry of Justice circular allowed the courts in Eritrea to continue employing the Courts Proclamation.[79] Thus the Supreme Imperial Court's reference to the Courts Proclamation and the statement that the High Court should have followed the decision of *Bahta et al.* seems quite appropriate. Even in the absence of legislation such as the Courts Proclamation or an institutionalized *stare decisis* procedure, provided lower courts are able to have easy access to decisions of superior courts, the lower courts would have to have good grounds to differ. In practice, where the various branches of a superior court consistently hold one way it would seem pointless for lower courts to hold otherwise since on appeal they would naturally be reversed.[80]

77. The Courts Proclamation, Proclamation No. 195 of 1962, *Negarit Gazeta* 22nd year No. 7. For an Introductory discussion of the Courts Proclamation refer to Alexandra Hamawi, "The Courts Proclamation of 1962" an unpunlished 1964-65 paper in the archives of the Faculty of Law, H.S.I.U.

78. The Courts (Amendment) Proclamation, Proclamation No. 203 of 1963, *Negarit Gazeta* 22nd Year No. 16.

79. See Ministry of Justice circular letter of 1963. R.A. Sedler, *Ethiopian Civil Procedure*, H.S.I.U Addis Ababa, 1968, states in p. 9 that "the problem [of different procedure] ceased to exist" with the enactment of the Ethiopian Civil Procedure Code in 1965. Many of the problems may have ceased to exist but certainly not all. The question of *stare decisis* found in Article 15 of the Proclamation but otherwise not stated in the Civil Procedure Code is one example.

80. For a comparative examination as to the use and importance of precedents on common law and civil law systems refer to Von Mehren, the *Civil Law System*, New York 1947, pp. 821-854.

VI. Collective Responsibility

Under Banditry Act

Going back to the Banditry Act, it may be remembered that the Court in *Bahta et al* had found application of the first sections of the Act procedurally unconstitutional.[81] Once the procedural unconstitutionality of sections of the Banditry Act is raised in a comment such as this, a brief substantive analysis of the Act becomes an absolute must. The procedural unconstitutionality of sections 2, 3, 4 and 5 is only like the visible part of an iceberg. Those sections which the Court finds unconstitutional are harmless and innocent in light of some other sections of the Act. The Courts in both *Bahta et al.* and *Werasi et al.* were not called upon to deal with these other sections. By not examining them they acted within the generally held principle that courts should not decide more than is necessary for the disposition of the case before them. Although the Courts did not decide on the constitutionality of those other sections, their reference to the unconstitutionality of the application of the Banditry Act is in broad language, seemingly not confined to the specific provisions of sections 2, 3, 4 and 5 raised by the cases.

From both constitutional as well as criminal law perspectives probably the two most interesting, most offensive and bizzare concepts the Banditry Act contains are what it terms "communal responsibility" and "local responsibility."[82] One would have to characterize them as concepts of vicarious criminal liability. The section on communal responsibility in part reads:

> Any nomadic tribe or settled enda [extended family comprising as much as a third or half of a village], any member of which is guilty of an offence against this Act, whether or not he has been convicted, shall be punished with a fine up to fifty dollars for every head of a family and for every month of the duration of the offence."[83]

The section then goes on to say, "where any person is not to be found with his tribe or enda, it shall be presumed for the purposes of this Article that he is committing an offence against this Act until the contrary is proved."[84] The import of "communal responsibility" is that a whole community of relatives is criminally liable for the proved or unproved offence allegedly committed by one of its members. Furthermore, the burden of proof that he has not been committing any crime rests with the individual not found residing among his community and not with the State.[85]

The concept of "local responsibility" also is as simple as it is fantastic. A magistrate is upon complaint for robbery, empowered, "to impose upon all heads of families resident within 10 kilometres from the scene of offence .. a fine equal to the value of the property stolen."[86] This means that anyone residing within a 10 kms. radius of the scene of an offence, for no other reason than that he resides

81. Refer *supra.*
82. These provisions of the Act are by implication designed to exclude urban centers.
83. Section 10 (1) of the Banditry Act.
84. Section 10 (2) of the Banditry Act.
85. It may be noted that there is a similarity to the burden of proof under the first sections of the Act.
86. Section 11 of the Banditry Act.

not more than 10 kms away from the unfortunate scene of a robbery, is criminally liable to pay as fine a share of the stolen property.[87]

The Collective Liability Act.[88] As if this was not enough, another piece of legislation came out three years later, the "Collective liability Act" of 1960. It stated in its main section:

> Where within the boundaries of any village damage occurs after the coming into force of this Act, to any house, animal, tree, grain or strow, and when within fifteen days of the occurence no one in the village has informed the police who committed the damage, and the police have not otherwise discovered the author, the village shall be collectively punished with a fine of from Five Hundred to Five Thousand Dollars unless it proves that the damage was not criminal.[89]

It must be stressed that here again there is no question of civil liability. The legislation is definitely of a penal nature and the fine imposed is punishment for criminal offence.[90] To the naive question "what is the crime?" the answer is failure to inform the police as to "who committed the damage". The Act obviously considers it an unnecessary legal sophistication to find out whether the village or its members *knew* or could have known who committed the damage. The only question worth asking is whether the all-knowing village informed the police. Unlike the Collective Liability Act, the sophisticated Ethiopian Penal Code for the similar offence of "Failure to inform the Law" requires the defendant "without good cause, knowing the identity of the perpetrator of an offence" to have failed to inform the authorities.[91] One surprising consequence of the Collective Liability Act is that the victim of the crime, generally a member of the village, would again be victimized by the law in that he also has to pay his share of the fine. While the Revised Constitution says, "No one shall be punished twice for the same offence,"[92] the poor victim of the Communal Liability Act is being punished twice for an offence he did not commit.

The Sebsa Case.[93] Some of the serious practical problems the Communal Liability Act are brought to light by the very interesting and very recent *Sebsa* Case. The facts of the case are as follows. Sebsa is a small village of Seraie Awraja in Eritrea. Gebremicael Gebreab, one of the villagers, owns a farm-land ready for a teff harvest some distance away from the village. On the night of Tikimt 14, 1964 Eth. C. unknown persons harvested and took the Teff away. The victim immediately notified the police about the crime and several suspects were questioned. The village elders were then asked to give testimony and they testified to the effect that the suspects had quarrels with the complainant. There being no evidence of any kind

87. A collegue has jokingly wondered whether a person is liable to pay the fine if he has in his residence area been the victim of the robbery.

88. The Collective Liability Act, 1960 published in the *Eritrean Gazette* vol. XXII (1960) No. 9. It is attached as Appendix I E pp. 333-34

89. Section two of the Collective Liability Act.

90. "The Village shall be collectively punished ... unless it proves that the damage was not criminal." Section two.

91. See Article 438 of the Penal Code.

92. Article 56 of the Revised Constitution.

93. *Elders of village of Sebsa v. Public Prosecutor*, Criminal Appeal File No. 61/64 decided by the Imperial High Court in Asmara on Sene 28, 1964 Eth. C. For the full texts of the majority and minority opinions see Appendix II C.

connecting the suspects to the crime the police had to release them. Soon thereafter, 15 days having expired since the crime was committed, the village elders found themselves as representative-defendants in a criminal case brought by the public prosecutor in the Seraie Awraja Court. The Court found them guilty of failure to inform the police as to who committed the damage, which was estimated at Eth.$ 231 and imposed a punishment of $500 on the village. On appeal to the High Court, defendants pointed out the fact that they fully cooperated with the police during the investigation. *Inter alia* they had testified to the effect that the suspected persons had quarrelled with the victim. The High Court in the *Sebsa case* upheld the Awraja Court judgment and in its majority decision concluded by saying, "the appeal is rejected because appellants have not fulfilled their obligations and complied with the law charged under by saying these are the criminals. And it would not be proper to incriminate innocent citizens by suspecting them for quarrels they had."

One judge decided to differ.[94] In his dissenting opinion, he noted the similarity of the Collective Liability Act to "the traditional Awchachign and Afersata law."[95] He added, "eventhough there has been no argument raised about the legality of the Act, it will be useful for the future to point out how it [the Collective Liability Act] conflicts with the Constitution." Article 54 of the Revised Constitution was then expressely stated and the supremacy of the Constitution emphasized. In his dissenting opinion he also noted Article 6 of Order 27, then added, "yet according to the authority given to them, the executive departments have the obligation to discard beforehand the laws and regulations which conflict with the Constitution.)" In conclusion the dissenting judge exasperatingly exclaimed, "the elders having shown a spirit of cooperation [with the police], it is not legal to demand from them what is beyond their capacity." So far, thus ends the drama of the *Sebsa case*.[96]

The unconstitutionality of all these vicarious liability provisions of both the Banditry Act and the Communal Liability Act is so crystal clear that not much discussion is necessary. It suffices to point out that the Revised constitution expressly incorporates modern and enlightened notions of legality as the basis for criminal law. The Constitution asserts that there shall be no presumption of guilt "until so proved."[97] It then proceeds to state that, "punishment is personal."[98] It is neither communal nor local. A person is punishable only "after conviction for an offence committed by him,"[99] and not for an offence allegedly committed by one of his relatives or by a neighbour or by a passer by. The Banditry Act's notions of

94. The writing of dissenting opinions is not a very common judical practice in Ethiopia. It is part of the legal culture here to at least show unanimity. Hence, it can, in most instances, be taken to be a sign of very strongly held opinions when judges write out their dissent.

95. Refer to S.Z. Fisher, *Ethiopian Criminal Procedure, A Source Book*. H.S.I.U. Addis Ababa, 1969 pp. 24-28.

96. The author is unaware of possible application for review by the Emperor's Chilot which may have at the time of writing of this article been lodged in accordance with Book V of the Criminal Procedure Code. Note that although a reading of Art. 182 Criminal Procedure Code may give the impression that a second appeal is allowed under any circumstance, Art. 195 (3) seems to be designed to limit second appeals to areas of disagreement of lower courts.

97. Article 53 of the Revised Constitution.

98. Article 54 of the Revised Constitution.

99. Article 54 of the Revised Constitution.

"communal responsibility" and "local responsibility" and the Communal Liability Acts concept of "communal liability" flatly contradict and are diametrically opposed to the criminal law concepts embodied in the Revised Constitution. As such they cannot but be unconstitutional.

The only way in which the continued operation of the unconstitutional Banditry and Communal Liability Acts could be justified would be under Article 29 of the Revised Constitution. Under Article 29 the Emperor having declared a national emergency or the like could then "take such measures as are necessary to meet the threat."[100] Since the Banditry and the Communal Liability Acts whatever their constitutionality vis-a-vis the Eritrean Constitution during the Federation,[101] have never after 1962 been amended to include or become part of a declaration of national emergency it would seem safe to conclude that their unconstitutionality has no foundation.[102]

VII. Overhauling the System

Beyond the substantive questions as to the constitutionality, legality or necessity of pieces of legislation, procedural and one may add practical issues are bound to follow as to how and by whom such major legal problems of overhauling a legal system can and should be solved. This brings us back to Order 27. Order 27 states that all legislation in Eritrea remains in full force and effect "to the extent that the application thereof is necessary to the continued operation of existing administrations."[103] But who is to decide whether a piece of legislation is necessary or not ?

In the *Sebsa case* the minority decision having come to the conclusion that the Communal Liability Act was unconstitutional, pointedly said, "according to the authority given to them, the executive departments have the obligation to discard beforehand laws and regulations which conflict with the Constitution." This opinion thought, it was *primarily* the duty of the executive branch to discard unnecessary pieces of legislation.[104] However, it must also be pointed out that had this opinion been in the majority, the Court itself would, at least for this case, have taken the step of discarding the law pursuant to which charge had been brought. It is probably not the place here to go into the judicial branch's constitutional vestiture with "the judicial power" and hence the appropriateness of such a conduct

100. It has been argued that the Emperor has such power and duty not only under Article 29 but that Article 36 also independently so empowers the Emperor. Refer to H.E. Ato Seyoum Haregot, "The Role of the Council of Ministers in the Legislative Process" in *Journal of Ethiopian Law* Vol. V No. 2 pp. 281-85 (1968); and H.E. Ato Aberra Jembere, "The Prerogative of the Emperor to Determine Powers of Administrative Agencies" in *Journal of Ethiopian Law*, Vol. V No. 3 pp. 521-44 (1968). It is also possible to argue that Article 36 is not an independent source of law-making power.

101. It is surprising that the Banditry Act could have come out in light of the liberality of the Eritrean Constitution. Unlike Articles 53 and 54 of the Revised Constitution which the Banditry Act clearly contradicts there were no such express provisions in the Eritrean Constitution. However, the concept of due process, taken from paragraph 7 of the Federal Act was encorporated in Article 22 of the Eritrean Constitution.

102. Refer to footnote 5.

103. Article 6 of Order 27. Note that this is "until such time as the same shall be expressely replaced and repealed by subsequently enacted legislation".

104. The idea of discarding laws beforehand i.e. before a case comes to court obviously deals with only primary duty.

where a court concludes it has to find a piece of legislation unconstitutional.[105] Bu let us note what the courts say about it.

Of all the cases mentioned here probably none discusses the issue of necessity of a piece of Eritrean legislation and the issue as to whose task the decision primarily should be better than *Bahta et al.* In *Bahta et al.* the court picks up defence counsel's contention that the Banditry Act is not necessary to the continued operation of existing administrations. Rather than through direct imperative assertions, the court makes its mind known as to the non-necessity of the Banditry Act in a circumscribed manner. The fear of being accused of usurping legislative or executive powers seems to unduly bother the Court.[106]

The Court tackles the question by first attempting to allocate responsibilities in general as between the various branches of government. "It is the duty of the executive branch" the Court says, "to identify and present to the legislator all laws which it deems necessary to the operation of the administration."[107] It then comes up with the rhetoric question, "How can the court or the public prosecutor play the role of the legislator and say this law must apply?" The answer is forthcoming. "*In our opinion we do not think they can.*"[108] However, two sentences below the Court concludes by saying "we have accepted defence counsel's arguments as regards the law." In effect what the Court has done is to completely reverse itself.

Defence counsel's contention had been that the Penal Code and not the Banditry Act should apply.[109] The Court had started by saying it is for the legislator to decide and promulgate the necessary law; in this context meaning it is for the legislator to decide whether the Banditry Act is a valid law or not. The Court had in fact gone so far as to answer its own question, "can the court ... play the role of the legislator and say this law must apply by immediately negating it.?" To stress this the Court even underlined the answer. Caught in between the horns of an understandable dilemma as between the ideal and the practical, the Court does precisely what it ideally thought it should not be involved in. By stepping in to the shoes of the legislator it decides that the Penal Code is applicable law while the Banditry Act is not?

Had the question as to whether the Banditry Act was a necessary law after the coming into force of Order 27 been dealt with by the legislator as it properly should, it would have most likely not attracted attention in court. But in such circumstances where the court is faced with the problem of playing the legislator

105. On "judicial review" refer to J. Paul and C. Clapham, *Ethiopian Constitutional Development A Sourcebook*, H.S.I.U. Addis Ababa, 1967, pp. 159-246.

106. Refer to footnote 105 *supra.*

107. As already pointed out note that the Attorney General's Office had come out with such a list but only for internal purposes.

108. In other words, the Court has no power to decide which laws are necessary. Putting it this way is probably misleading.

109. When asked to give an answer to defence counsel's argument the public prosecutor had cited two cases. One was Supreme Imperial Court Criminal file No. 228/62, a case similar to *Bahta et al.* Charges had been brought under the Banditry Act and the High Court had found defendants guilty under the Act and sentenced them to seven years imprisonment in file No. 388/59. However, the Supreme Court had on appeal changed the law under which they were charged to Articles 646 and 647 (1) of the Penal Code and had increased the sentence to ten years. But the leading case presented by the public prosecutor was *Mesfin et al.* which had been decided by the Supreme Imperial Court a decade earlier.

what should it do? The predicament the court found itself in is one into which courts are continually dragged. Moreover, courts are always quick to voice the opinion that they are not legislators. But saying one thing they are generally forced to do the opposite. In many situations — and the one at hand is a good example — there is no alternative but for the court to act as the legislator. In this case the Court would have to act as a legislator whichever way it comes out. Whether it decides for the Penal Code and against the Banditry Act or for the Banditry Act and against the Penal Code, the decision is basically one that should have been the legislator's. The real issue is whether the Banditry Act is law under 27 and this is primarily a legislative function.[110]

The notion of the separation of functions is an important guiding principle of public law. Various branches of government are allocated diverse functions and generally speaking one branch should not usurp the functions of another. However, it is impractical and therefore unwise to think of branches of government as hermetically sealed bodies. Of necessity they have to cooperate one with the other.[111] And it is inevitable for the courts to be indirectly involved in the lawmaking function. They continually do so by interpretation, by filling gaps in the law and by deciding which law applies. Not to characterize this as lawmaking is a pure point of semantics. This should not be misunderstood as extending an invitation to courts to compete for the legislative function or to try to preempt the legislator. Far from it; courts deal with specific cases brought before them and do not go out looking for society's problem areas. On the other hand, neither should courts give the impression that they are usurping what is not their proper function and have gone beyond their judicial power in doing what the Court did in *Bahta el al.* It had no practical alternative but to temporarily step into the shoes of the legislator and decide whether the Banditry Act should apply or not.

Where the legislator for one reason or another fails to take up this aspect of the legislative role the courts are forced to step in. Problems arise that cannot indefinitely await for the legislator to make up his mind and the courts have to dispose of them as best they can. In the present circumstances courts in Eritrea cannot shy away from the kind of legal problems raised by *Bahta et al.* As long as there is no basic change with respect to the unsolved problem of Eritrean legislation, the courts will whenever asked in specific cases, have to continually tackle the issue of "necessity" of a piece of legislation vis-a-vis Order 27 and Ethiopian law as a whole. That the courts should handle the problem unsystematically (as problems arise) and on peacemeal fashion, without knowing what the effects of one decision are on similar cases, is neither the most efficient nor the more desirable course of action. It is awkward in terms of both the uncertainties and complications of the law. It is expensive in terms of the unnecessary consumption of time and energy of all involved. Furthermore, there is an apporopriate method of solving the problem once for all.

Conclusion

A full-scale operation in which a complete overhaul of Eritrean legislation should be affected is long overdue. Ten years after the end of the Federation, twenty

110. As pointed out *supra* in footnote 109, already the same court has found differently as to the validity of the Banditry Act. Taking the number of the various other government institutions that may have to decide on such a question and the number of legislations into account one can see why this is a legislative function.

111. The same point is made in H.E. Ato Seyoum Haregot, *supra* footnote 100.

years after the termination of British administration and thirty years after the finis of Italian authority, to still continue to refer to some colonial or other legislation and not know whether it is part of the law of the land seems unnecessary. It is time this legal mess be cleared up. What Order 27 provides is at best a temporary stop-gap answer. It cannot be a permanent solution without ensuing unnecessary complications.

The Supreme Imperial Court pointed its fingers in the right direction when it said in *Bahta et al*, "It is the duty of the executive branch to identify and present to the legislator all laws which it deems necessary to the operation of the administration." Though not a very simple operation, it is absolutely necessary. A conscious effort has to be done to bring the messy Eritrean legislation into its proper place within the codified system of Ethiopian law. The experiences that have recently been gained in Ethiopia from the overhauling and codifying of whole areas of law could possibly serve some purpose.

Several steps have to be taken to normalize the legal situation in Eritrea. First, all legislations not expressly repealled must be assembled and translated into Amharic and English. They should then be consolidated (i.e. harmonized) both with respect to each other and vis-a-vis Ethiopian legislation as a whole. Anachronistic references such as to Italian liras and East African shillings or Italian titles of legislations should be discarded and appropriately replaced. But much more important is the discarding of unconstitutional legislations or legislations whose temporary necessity has disappeared and whose application today may do little more than give rise to undesirable policy questions not in the interest of the nation-state. This also could be the time for improvements in the laws. The consolidated and updated set of draft legislation should then be categorized by promulgating authorities. Legislations requiring Parliamentary approval and/or Imperial signature should be so processed. Others of the nature of ministerial, provincial and municipal authority should be appropriately distributed.[112]

Once launched by the proper authorities, not much should stand in the way of such a necessary project since the operation is more technical than policy oriented. The appointment of a consultative commission composed of knowledgeable legal experts from the various concerned institutions would obviously insure the quality of the job.

Had such an approach been followed in 1962, it is very likely that neither the question as to the validity of the Banditry Act and the legal issues of *Bahta et al*, nor the irritated minority opinion on the *Sebsa case* and the Communal Liability Act nor this preliminary comment would have been necessary. The enigma of Eritrean legislation cries out for a solution that requires an overhaul of the legal system. The challenge still stands!

112. The Municipalities Department of the Ministry of Interior in Addis Ababa and the Department of Minicipalities in Eritrea are at this time working together with the Imperial Institute of Public Administration to try to cut through the maze of Eritrean legislation dealing with municipalities. This is a healthy start. However, when this task is accomplished what the effect of changing part of the law will be on the non-municipal part remains to be seen.

Appendix I A

THE BANDITRY ACT, 1957

Eritrean Gazette Vol. XIX (1957) No. 11

(Adopted by the Eritrean Assembly on 19th August, 1957, and promulgated by H.I.M.'s representative on 23rd September, 1957)

WHEREAS under the existing law organised banditry and highway robbery are not deterred;

AND WHEREAS an increase in the severity of punishment inflicted, and communal punishment of the communities of the offenders, are likely more effectively to deter them;

NOW THEREFORE BE IT ENACTED as follows:

TITLE AND COMMENCEMENT.

1. This Act may be cited as the Banditry Act, 1957 and shall come into force upon promulgation or publication, as the case may be, in accordance with the provisions of Article 58 of the Constitution.

ARMED BAND.

2. Any member of any band of two or more persons having the common intention to commit any crime of violence and at least one of whom is armed with a firearm or other explosive weapon shall be punished with imprisonment for not less than five years, unless the Court finds unusual and exceptional circumstances justifying imprisonment for a lesser term.

FIRST AGGRAVATION.

3. Any person found guilty of the offence described in Article 2 shall be punished with imprisonment for not less than ten years if he is also found guilty, as such member of any crime of violence other than the extortion of food.

SECOND AGGRAVATION.

4. Any person found guilty of the offence described in Article 2 shall be punished with imprisonment for not less than fifteen years if:-

(1) he has previously been convicted of the offence described in Article 8 of proclamation 104 of 1951 and in Article 1 of Proclamation 1 of 1955, or of the offence described in Aricle 2 of this Act, or he has avoided prosecution for such an offence by surrendering under any general or special amnesty; or

(2) he is also found guilty, as such member, of more than two crimes of violence other than the extortion of food; or

(3) any firearm is fired or other weapon exploded by any member of the band during the course of the commission of any crime of violence.

PROMOTION OF BAND.

6. Any person who promotes or organizes such a band as is described in Article 2, but is not a member of the band, shall be punished with imprisonment for not less than 20 years.

ASSISTANCE TO BAND.

7. Any person who gives shelter or assistance to such a band as is described in Article 2, or to any member of it, shall be punished with imprisonment for not less than ten years.

ASSISTANCE TO FUGITIVE.

8. Any person who gives shelter or assistance to any other person, having reason to believe that he has recently been a member of such a band as is described in Article 2 and is a fugitive from justice, shall be punished with imprisonment for not less than five years.

FAILURE TO INFORM AUTHORITIES.

9. (1) Any person who comes to know of the activities, intentions or whereabouts of any such band as is described in Article 2, or of any other person, having reason to suspect that he is or intends to become a member of such a band, and in either case does not use his best endeavours to communicate such information without delay to the nearest police or administrative authority, shall be punished with imprisonment for up to five years.

(2) Any administrative authority who obtains such information, by himself or from others and who fails to use his best endeavours to communicate it without delay to the police shall be punished with imprisonment fot not less than two years.

COMMUNAL RESPONSIBILITY.

10. (1) Any nomadic tribe or settled enda, any member of which is guilty of an offence against this Act, whether or not he has been convicted, shall be punished with a fine of up to fifty dollars for every head of a family and for every month of the duration of the offence;

unless it proves both that it could not have prevented the offence and that it used every possible endeavour, at whatever inconvenience to itself or to any member of it, to apprehend the offender and deliver him to the police.

(2) Where any person is not to be found with his tribe or enda, it shall be presumed for the purposes of this Article that he is committing an offence against this Act until the contrary is proved.

(3) The Court may exempt from contribution any head of a family no longer resident with the tribe or in the village of the enda accused and who applies for exemption.

(4) The charge sheet for the offence described in this Article shall be against the tribe or enda by its authorised representatives, and only those representatives shall be bound to appear in Court to answer the charge.

(5) The order of the Court inflicting such a fine shall specify the time, which shall not be more than two months, within which it is to be paid;

and shall provide for imprisonment for up to six months of any head of a family not exempted and not contributing within that time.

LOCAL RESPONSIBILITY.

11. (1) A Magistrate shall have power, upon complaint by any victim of any robbery commited within his territorial jurisdiction by such a band as is described in Article 2, and where the property has not been recovered,

to impose upon all heads of families resident within 10 kilometers from the scene of offence, whether or not within his jurisdiction but within Eritrea, a fine equal to the value of the property stolen, to be enforced as if under Article 10 (5).

(2) The attendance of such heads of families shall be obtained in the same manner as if they were to answer a criminal charge; and no order shall be made against any person who has not appeared personally before the Magistrate and had an opportunity to object.

(3) The Magistrate shall satisfy himself, in the same manner as if he were trying a criminal charge, that the case and the persons to be fined fall within paragraph (1) of this Article.

(4) The evidence on oath of the complainant shall be prima facie evidence of the amount stolen: but the Magistrate shall, in addition to any cross-examination by the persons to be fined, endeavour to test for himself the truth of his evidence; and shall also warn the complainant in the terms of paragraph (6) of this Article.

(5) The Magistrate shall, in his order, apportion the fine between all or some of the parties before him, having regard to the opportunity of each party to have prevented the offence or caught the offenders, and to any efforts made by him in that direction.

(6) The fine when recovered shall be paid over to the complainant; but if it shall afterwards be proved to the Magistrate that he has claimed more than he lost he shall forfeit, independently of any penalty for perjury, five times the excess.

(7) In ordering such a forfeiture the Magistrate shall follow the normal procedure in trying a criminal charge.

(8) From any order made under this Article, including an order of apportionment and an order dismissing the complaint, an appeal shall lie as if from an order or sentence in criminal proceedings;

but the Court of Appeal shall not unless it dismisses the complaint, reduce the contribution of any contributor without equally enhancing that of some other such person or persons including a person whose contribution has been assessed at nothing;

and shall not enhance a contribution without giving the person in question an opportunity to object.

(9) Where the Court of Appeal allows an appeal against dismissal of a complaint it shall not itself make the apportionment described in paragraph (5) of this Article, but shall remit the case for that purpose to the Magistrate, and from his order a further appeal shall lie.

(10) Where after the complainant has been compensated under this Article the stolen property or some of it is recovered, so much of it as is not money shall be returned if practicable to the complainant at the price at which it was assessed, subject to a reasonable reduction if it has deteriorated.

(11) So much of the recovered property as is money, together with any money recovered from the complainant under the last paragraph and any other article which it is impracticable to return to him, shall be divided among those compelled to contribute in proportion to their contribution.

NO BAR.

12. Punishment under Article 10 shall not bar an order for contribution under Article 11, nor shall contribution bar punishment.

NO SUSPENSION.

13. No sentence under this act shall be suspended, but in all other respects this Act shall be subject to the general provisions of the Penal Code.

REPEAL.

14. Proclamation 104 and 115 of 1951 and 129 of 1952 are repealed, except as to offences already committed, prosecutions already pending and sentences already passed before the coming into force of this Act.

Appendix I B

THE BANDITRY (AMENDMENT) ACT, 1959

Eritrean Gazette Vol. XXI (1959) No. 11

[Adopted by the Eritrean Assembly on 10th September, 1959 and promulgated by H.I.M.'s Representative on 12th October, 1959]

WHEREAS organised banditry and highway robbery have not yet been eradicated:

NOW THEREFORE BE IT ENACTED as follows:

1. This Act may be cited as the Banditry (Amendment) Act, 1959, and shall come into force one week after the date of the Gazette in which it is published.

2. After Article 5 of the Banditry Act, 1957, shall be inserted the following new Article:

"Confiscation

5 A (1) For the purpose of procuring the attendance of any person suspected of being in the course of committing an offence against Article 2 of this Act, a Magistrate shall have power, upon application by the prosecution, to order the seizure of his whole movable property, including his share in any property held jointly, and such seizure shall be executed by the police.

(2) Any property which within one year before the application for seizure has been in the possession of the suspected person shall be presumed to be his property until the contrary be proved to the Magistrate.

(3) If within one month after seizure the suspected person has not surrendered or been arrested, and no good cause has been shown to the Magistrate for his absence, the Magistrate shall condemn the property seized to be forfeited to the Government.

(4) If within the said one month the suspected person surrenders or is arrested the Magistrate shall suspend his proceedings until the Court has convicted, aquitted or discharged him, and any appeal has been decided.

(5) Where any person is already in custody upon a charge of having committed, after the coming into force of the Banditry (Amendment) Act, 1959, an offence against Article 2 of this Act, and cause is shown to a Magistrate for fear that his property may be disposed of, the Magistrate may similarly order its seizure, and paragraphs (2) and (4) of this Article shall apply to such seizure.

(6) If the suspected person is acquitted or discharged, the property seized shall be returned to him; but if he is convicted the Magistrate shall, in addition to any sentence imposed upon him, condemn to be forfeited to the Government the whole of the property seized.

(7) From any order of a Magistrate under this Article an appeal shall lie to the Supreme Court.

(8) The Government shall be bound to restore to any applicant so much of the property condemned under paragraph (3) or (6) of this Article as he proves to have been dishonestly taken from him."

Appendix I C

THE BANDITRY (SECOND AMENDMENT) ACT. 1959

Eritrean Gazette Vol. XXII (1960) No. 2

(Adopted by the Eritrean Assembly on 23rd December, 1959 and promulgated by H.I.M.'s Reprentative on 4th January, 1960.)

WHEREAS by Article 13 of the Banditry Act, 1957, the said Act is subject to the General Provisions of the Penal Code;

AND WHEREAS by the Penal Code (Extension) Act any reference in any law to the Penal Code is to be read as a reference to the Penal Code thereby extended;

BUT WHEREAS the General Part of the said Penal Code is in some respects unsuitable to the special problem which necessitated the enactment of the Banditry Act:

NOW THEREFORE BE IT ENACTED as follows:

1. This Act may be cited as the Banditry (Second Amendment) Act, 1959 and shall come into force simultaneously with the Penal Code (Extension) Act, 1959.

2. For Article 13 of the Banditry Act, 1957, shall be substituted the following:

"GENERAL PART OF PENAL CODE

(1) This Act shall be subject to the General Part of the Penal Code, with the exception of Articles 56 (2), 79, 80, 81, 82, 83 and 188 to 215 inclusive, but so that no sentence may be reduced by more than one third below any minimum imposed by this Act.

(2) No sentence under this Act shall be suspended."

Appendix I D

THE PENAL LAW (AMENDMENT) ACT, 1956

Eritrean Gazette Vol. XVII (1956) No. 6

(Adopted by the Eritrean Assembly on 9th April, 1956, and promulgated by H.I.M.'s Representative on 25th April, 1956)

WHEREAS the unlawful possession of arms and munition has become too common in recent times in Eritrea; and

WHEREAS the present penalties for the unlawful possession of arms and ammunition, and similar offences, are grossly inadequate for the suppression of this form of illegal conduct in Eritrea;

NOW THEREFORE BE IT ENACTED as follows:

Title and date of coming into effect.

1. This Act may be cited as "The Penal Law (Amendment) Act, 1956" and shall take effect upon its promulgation or publication, as the case may be, in accordance with the provisions of Article 58 of the Constitution.

Repeal of Certain Provisions of the Penal Law.

2. (a) Articles 695 to 700 inclusive and Article 704 of the Penal Code are hereby repealed,

(b) Sub-paragraph (j) of Article 1 of Proclamation No. 18 of 10th January, 1949, is hereby repealed PROVIDED, however, that any reference to the said sub-paragraph (j) of the said Article 1 of the said Proclamation No. 18 which may be contained in any existing law, regulation or proclamation, shall be deemed to read the same as the new Article 437-A as contained in Paragraph 3 of this Act.

New Provision concerning Penalties for Possession, etc. of Arms, Ammunition, etc.

3. A new chapter of Title 6 of Book II of the Penal Code, to be called "Chapter I-A. Delicts concerning the Prevention of Delicts against the Life and Safety of Individuals" is hereby added, to consist of one Article, to be numbered Article 437A, as follows:

ARTICLE 437/A. Whoever is in possession of, or uses, or (whether in actual physical possession or custody thereof or not) deals or traffics in any firearms, grenades, or explosives of any kind, or any other weapon, except under a license issued to him by proper authority, and in accordance with any conditions attached to any such license, is liable upon conviction to imprisonment up to 5 years, or to a fine up to Eth. 2.500, or by both such imprisonment and fine".

Appendix I E

THE COLLECTIVE LIABILITY ACT. 1960

Eritrean Gazette Vol. XII (1960) No. 9

[Adopted by the Eritrean Assembly on 13th July, 1960, and promulgated by H.I.M.'s Representative on 29th July, 1960]

WHEREAS much wilful damage goes unpunished in rural areas by reason of the refusal of witnesses to inform the police:

NOW THEREFORE BE IT ENACTED as follows:

Title, etc.

1. This Act may be cited as the Collective Liability Act, 1960, and shall come into force one month after date of the Gazette in which it is published.

Collective Liability

2. Where within the boundaries of any village damage occurs after the coming into force of this Act, to any house, animal, tree, grain or straw,

and when within fifteen days of the occurrence no one in the village has informed the police who committed the damage, and the police have not otherwise discovered the author,

the village shall be collectively punished with a fine of from Five Hundred to Five Thousand Dollars unless it proves that the damage was not criminal.

Procedure

3. The fine prescribed by the last preceding Article shall be imposed by a Magistrate, notwithstanding any lower limit to his jurisdiction, but subject in other respects to the criminal procedure from time to time in force except that:

(a) the accused village shall be represented by representatives elected for the purpose, or if no such election takes place within one month of notification of the charge sheet to the head of the village, appointed by the Court; and

(b) the attendance of such representatives shall be obtained in the same way as if they were personally accused; and

(c) the fine, if not paid within two months of its imposition, may be recovered as an arrear of tribute under the Summary Recovery Act, 1957.

Appendix I F

THE PENAL CODE (EXTENSION) ACT, 1959
Eritrean Gazette Vol. XXI (1959) No. 12
(The available Official Copy is in Italian)

(Adottata dall'Assemblea Eritrea il 10 settembre 1959 e promulgata dal Rappresentante di S.M.I. il 12 Ottobre 1959)

PREMESSO CHE l'Eritrea essendo una parte integrale dell'Ethiopia condivide col resto del Territorio gli stessi costumi, istituzioni e antica civiltà, ed essendo anche unita in Federazione sotto la Corona del medesimo Augusto Sovrano;

E PREMESSO CHE è quindi non idoneo che le leggi generali penali dell' Eritrea debbano differire dal resto dell' Ethiopia;

E PREMESSO CHE il nostro Augusto Sovrano ha graziosamente promulgato in Codice Penale che riflette ed è adatto ai citati costumi, istituzioni e antica civiltà, ed anche prendendo in considerazione il progresso recentmente raggiunto sotto la Sua benevola guida:

ORA QUINDI SI DECRETA come segue:

1. Questa Legge potrà essere citata come la Legge sul Codice Penale 1958 (Estensione) ed entrera in vigore il giorno della sua pubblicazione sulla Gazzetta dell'Eritrea.

2. Il Codice Penale, promulgato in Ethiopia ai sensi del Proclama No. 58 del 1957, avrà gli effetti di una Legge Eritrea ad accezione delle parti riguardanti il regolamento di controversie di giurisdizione Federale, con tutte le sostituzioni necessarie e conseguenti.

3. Tutti i riferimenti, di carattere generale o particolare, al Codice Penale o a qualsias i parte o articolo di esso contenuti in alter leggi in vigore saranno intesi, salvo che il testo lo vitti, come referimenti al Codice esteso con la presente Legge e, secondo i casi, all'articolo o parte corrispondente del Codice stesso.

4. Le seguenti leggi sono revocate:

(1) Il Codice Penale in vigore in Eritrea in virtù dell'Articolo 53 del R. Decreto-Legge No. 1019 del 1 giugno 1936, convertito in Legge No. 285 dell'11 gennaio 1937 (Ordinamento e Amministrazione dell'Africa Orientale Italiana), ad eccezione dell'Articolo 437/A come incluso nell' Emendamento alla Legge Penalè del 1956.

(2) Il Proclama 98 del 1950;

(3) La Legge sulla Pena Capitale del 1953.

Appendix II A

Imperial Ethiopian Government

Supreme Imperial Court

Asmara

Criminal Appeal No. 21/1964

Justices:

Belata Matias Hiletework	—	V/ Afenegus
Doctor Yohannes Berhane		Justice
" Jankarlo Polera		"

Mesfin Tesfaye *et al* v. Public Prosecutor (Ato Mohammed Hankil)

Judgment

In this case:- 1st defendant Mesfin Tesfaye
2nd " Salah Omar
3rd " Zemichael Alfe

with their not yet apprehended bandit-friends committed various crimes till the time they were arrested:-

1) Uniterrupted banditry
2) Roberry and extortion
3) Repeated firing against the police
4) Inflicting injury upon humans
5) Robbery and homicide

They were charged in the High Court under the 1957 Banditry Act which was proclaimed for the internal administration of Eritrea. They denied the charges and pleaded not guilty.

Since the kind of offences and the means used to their commission and the date, month and year on which the offences were committed is expounded in the two page charge sheet and since rewriting it is time consuming, we held that reading the charge sheet dated Dec. 4, 1962 G. C. would suffice. The charge sheet is attached to this document.

After witnesses were heard on these charges, the High Court passed a death penalty on the three defendants. They launched an appeal to the Supreme Imperial Court pleading for the reversal of the judgment which they claim is improper.

Facts of the Appeal in Brief

Appellant's attorney submitted the following for his clients:- That the 1st and 2nd defendants were bandits from beginning to end is not denied. They have admitted this.

However, the defendants have not admitted to the rest of the counts mentioned in the charge sheet. Adequate evidence and testimony was not adduced against them. That the Public Prosecutor produced thirteen witnesses in the lower court and that their testimony was heared is not contested. Amongst these were:- eight policemen, two magistrate judges and three other people who belonged to none of these categories. That the Prosecutor made these people testify is true.

The defendants, however, wrongly admitted to the alleged charges after they were apprehended fearing the torture awaiting them. They also admitted this in dread before the magistrate after being captured and taken by the police to the same.

Their forced admission should not be enforced especially in such serious criminal charges. Admission should be taken as valid only when it is made with consent and backed by adequate testimony and evidence and not when it is made under coercion.

Under the 8th count i.e. when W/o Timar G/Egzi was injured, the 1st defendant was accompanied by another person. I saw the 1st defendant. I couldn't see the 2nd person because of darkness. The person who gave this testimony i.e. the 1st prosecution witness was the husband of the injured. How come that he identified the 1st defendant in the darkness. He stated the testimony of all witnesses and profoundly explained the reasons for his objections of the testimony made by the said witnesses.

Legal arguments raised

Even if the Court holds that sufficient testimony was heared against the defendants, they should be punished not under the Banditry Act of 1957 proclaimed in emergency for the internal administration of Eritrea under which they were charged and convicted in the High Court but under Ethiopian Law.

The cited Art. 3 of Order No. 27 of 1962 together with the Ethiopian Constitution and Art. 6 of the Penal Code of Ethiopia. After an intensfied discussion of this, he said that even if the 1st and 2nd appellants are found guilty of the crimes charged, they should be punished under Ethiopian Law according to the provisions which I cited and explained in detail. They should not be punished under the law which they were charged i.e. the Banditry Act.

Since no evidence was adduced against the 3rd appellant and that he was working and residing at his home in peace was testified, I pray the court to order acquittal to the said appellant.

Public Prosecutor's reply

Since three of the appellants denied the charges and pleaded not guilty when the charges stated in the charge sheet were read to them in turn, the Public Prosecutor produced witnesses and made them testify on the various courts. Since the words of the witnesses are contained in the document in the High Court and since repeating them here would mean wasting the Court's time, I refer the court to the said document.

The appellants' attorney allegation that the testimony adduced in evidence against the defendants was one which they admitted in the Police station and the magistrate court is incorrect. The Public Prosecutor has explained his case by other various witnesses. The people who were injured and plundered by the defendants have also testified.

His plea that defendant's admission under coercion should not stand valid is wrong since their words were all given with their consent. Referring to the similiarities between their statement in the Police station and the magistrate court and the testimony of witnesses on the various charges would serve as evidence to this.

Hence, it is a valid testimony since it was made with coercion from neither the Police nor the magistrate. This issue was raised in the High Court by the same people. It was only after the High Court examined the issue and was convinced, that it passed a judgment upon them.

The attorney claimed that it was not testified against the 3rd appellant. That he was innocent was testified by the defense witnesses. It was, however, after all this was considered that a sentence was passed upon him. He prayed the court to examine and understand this also.

The Public Prosecutor's reply to the legal arguments raised by the Attorney

The bandit appellants committed these crimes when the Eritrean constitution was in force.

Article 7 of the Order 27/62 of the Ethiopian Negarit Gazetta specifically mentions the laws which existed and the laws which are in force. As it was pointed out by the appellant's attorney, the law which was in force originally cannot be given any validity. Thus, the Banditry Act of 1957 under which they were charged has been effected in its appropriate place.

He talked about the law which was repealed by Art. 6 of the Penal Code, about the one cited to effect the enforcement of the law, about laws in general and about the differences between special laws and other laws in detail.

He explained that the Proclamation under which the appellants were charged was a special Proclamation and said that the law cited by the defense attorney was irrelevant to this criminal charge. He therefore prayed the Court to dismiss the appeal and to confirm to the judgment passed upon them in the High Court for he felt that the Court rendered the dicision after examining the charges instituted against the appellants duly.

Court's view and examination of the document

The arguments raised by the appellants and the respondent are in brief as stated hereinabove. We shall demonstrate the condition of the witnesses from what we got in the document hereinunder.

Not only did the 1st and 2nd appellants admit to the criminal charge mentioned in No. 1(a) of the charge sheet but it was also testified against them. It has also been admitted by the appellant's attorney that they were bandits from the time they started their banditry acts till they were apprehended.

Appellant's attorney argues that the following have some merit in so far as the witnesses go.

1) Admission upon coercion should not stand valid.
2) That was testified was what they admitted and the witnesses were Policemen and judges in the magistrate court.
3) There was no other person who satisfactorily testified against them.
4) In such serious criminal charges the statement of the police or the magistrate is not enough to pass a judgment against the charged. This should also be proved by other adequate evidence. He presented these arguments in the name of all the defendants and pleaded that no judgment should be passed under the circumstances.

The 1st Prosecution witness who was the husband of the injured, in testifying on sub-No.(g) of the 8th count, said that in the midnight of the day when W/O Timar was injured, there was the 1st defendant with some other 2nd person. He testified that he has identified the 1st defendant. He also confessed that he was unable to see who the 2nd person was because of the darkness. The attorney argued that this testimony cannot be trusted as it was equally difficult to distinguish who the 1st defendant was.

It might have been that the defence attorney has forgotten, but otherwise it was proved in evidence that the 1st prosecution witness was able to distinguish and identify the 1st defendant because 1) he knew him prior to that day 2) in the mid-night of the day when his wife was tinjured, he saw the defendant through a fire - light which was burning in the house where the crime was committed. The defendant was asking for food then in the same house.

Appellants' attorney argued that on the day when the 1st and 2nd defendants were captured, they did not fire bullets. They were captured with their arms sleeping in the bushes. The defense attorney also argued that the allegation that these defendants fired bullets against the police was an unfounded one. The 8th prosecution witness who was there as a group leader of the police estified that it was only after the defendants began firing that the police fired and captured them.

That the defendants admitted to the crimes as charged in the rest of the counts stated above at notes 1, 2, 3, and 4 of this document with consent was testified not only by the policy but also by the magistrate judges. The attorney's argument that they were forced is thus countered. We, thus reject appellants' attorney allegation that their admission was not backed by adequate testimony and that admission on the part of the charged would not be enough for passing judgment specially when the allegedly committed crime is of a serious nature such as this one. Our reason is that the testimony of the people who were victims of the danger and suffering on the various counts did accord with the admission of the defendants. Since the specific words of the witnesses are clearly stated in the document found in the High Court, we have refrained from repeating them here because reading that above would suffice for its understanding.

Since the 5th and 4th witnesses are criminals themselves and are imprisoned this court could have no faith in what they say. He, therefore has rejected their testimony.

He also argued that since no testimony was heard against Zemichael Alfe who now is the (3rd defendant, he should be acquitted. The case, however, is that according to sub-section(b) and c) of 2nd and 3rd count of the charge sheet he and his not yet captured friends carried a

rifle and other armaments and jointly fired bullets in the road called Adequala. Signore Maria Drizia Markeu was shot dead during the process of this same shooting.

Additionaly, that they have injured and looted the wealth of

1) Paulo Marenki Franco Tirese and
2) Maria Antonieta Mansine was not only consentfully admitted by the defendants but was also testified by the 2nd, 3rd, 5th, 6th and 12th prosecution witnesses. Since their words of admission and the words of the testimony were similar and correlated, the court was convinced to take this as valid.

However, it is understood that his Proclamation was a special law. To avoid this sort of controversy on the Banditry Act issued in No. 3, it was after two amendments were made to it that it was proclaimed.

Since the Penal Code was in force during those days, it was decided by the Parliament of Eritrea on Tahsas 23, 1959 G.C. and was affirmed by His Imperial Majesty's representative on Ter 4, 1960 G.C. that Art. 56(2) be replaced by articles 79-83 - refer to Art. 2 of the 2nd amendment.

Since all laws of this nature were made to operate by Art. 6 of Order 27/62, we hold that the Banditry Act is still in force.

Since we were netiher convinced in law nor in evidence and testimony to take the arguments raised by the attorney we have given greater credit to the legal as well as evidentiary arguments that has been raised by the Public Prosecutor.

We have thus affirmed the decision of the High Cout which was rendered after close examination and analysis of the case and have dismissed the appeal.

This judgment was read and heard in the Chilot in the presence of both parties, today the 4th of July 1964.

The appellant's attorney has, however, repeatedly informed the court both orally and in writing that the words given by the appellants in the High Court under oath should be given greater weight than the words which they gave under coercion.

He has produced no evidence to prove that they were coerced. Not only did the Public Prosecutor made witnesses testify that the appellants have admitted with consent but has also produced witnesses whose testimony accorded with the admission of the appellants.

The case was examined under this condition. The attorney prayed the court to take the words of the defendants under oath for he felt that they were more important and trustworthy than the words which were alleged to have been given with consent.

Since we could not trust the words of these criminals more than the testimony of prosecution witnesses, we hold that sufficient testimony was heard against the 3rd defendant on the crimes charged.

About the Legal Arguments raised

Appellants' attorney argued that the law and Proclamation which was in force when Eritrea had a federal government was repealed after Order No. 27/62 was issued.

With the exception of the ones retained by Order No 27/62, all are repealed. Since there is no proclamation issued according to Order 27/62 rendering the Banditry Act of 1957 effective and valid, the appellants should not be punished under this Banditry Act. He also argued that as of the time that it was effected on November 15, 1962, the only law in force is Order 27/62.

The Public Prosecutor brought into light that Art. 6 of Order No. 27/62 talks about the existing laws and about laws which are in force. In line with the argument raised by the Attorney, he said that this same Order gives no value to the law enacted when the Eritrean Constitution was in force. Since Art. 7 of this same law states that until the time that they are repealed and replaced by laws to be enacted in the future all proclamations, laws, and regulations which are required for the administration shall stand valid either in part or in whole, we could not agree with the argument that the laws which are said to be necessary are specified, all laws which were in force during the federal government of Eritrea are invalid as of November 10, 1963.

Art. 6 of this same Order 27 of 1962 has proclaimed that all required laws should remain in force. The Attorney argued that unless the required laws are legally enacted, the laws, proclamations and regulations which were in force during the Eritrean federal govenment are all invalid. The Government has, however, felt that the Banditry Act was a necessity and has cited parts of the Act against all those who were charged for banditry.

The status of Order No. 27 of 1962 and the Banditry Act of 1957 being as explained hereinabove, one cannot say that the 1957 Proclamation which was in force during the Eritrean federal govenment is invalid and unnecessary.

The appellants' attorney argued that according to Art. 6 of the Penal Code of Ethiopia his clients have the right to present their choice for the law under which they should be punished. He further argued that the Penal Code was in force in the federal government of Eritrea at the time when the defendants were charged for this crime. He added that even if they are to be punished for the charged crime, they should be punished under the Penal Code of Ethiopia which would mitigate their punishment and not under the Banditry Act of 1957 which is inconsiderate and one which leaves no room for judges equity.

He also said that the Act was an emergency proclamation. It was not meant to remain in force in the future.

As it was expounded in the reply of the Public Prosecutor, Art. 6 of the Penal Code of Ethiopia which talks about the enforcement of the favourable law is referring to general laws and not to special laws.

Art 3 of the Penal Code of Ethiopia talks about special laws. It states "nothing in this Code shall effect Police regulations and special law of a penal nature."

It states that when it is not specified that these are special laws, *the basic rules of the Penal Code shall be enforced.* We could have taken the claim of the attorney had it not been that Police regulations and special laws are unaffected.

Appendix II B

Criminal Appeal No. 36/64
High Court Criminal Appeal No. 59/62
Megabit 12, 1962

Judges: Doctor Iyob Gabrechristos
Ato Berhe Sequar
Sheik Gihider Mohammed Kamil

Appellants:	1. Warassi Ekubegabr Tesfamicheal	Present
	Advocate Ato Tikabo Misgina	"
	2. Hidrimikael Woldehaimanot Hailai	"
	3. Ghilai Tewoldeberhan Woldeselassie	"
Respondent:	The Public Prosecutor, Ato Mohammed Ali	"

Judgment

The facts of the case are as follows:

1. This case was initially based on a charge filed by the public prosecutor on Tikemt 21, 1962. However, since that was altered and presented before the court in a revised form on Megabit 15, 1962, the former is hereby replaced by the latter one.

The charges against the defendants are divided into the following five parts.

The three defendants were presented for violating Articles 2 and 3 of the Banditry Act, 1957 (G.C.) in that

a. the first defendant was presented for his part, from the month of Ter 1959 until his arrest on Meskerem 15 for roaming, in company with the second and third defendants as well as

with some fully-armed and still-at-large accomplices, from place to place in the Governorate General of Eritrea with the specific purpose of committing acts of violence.

b. The second defendant was presented for his part in roaming around the western lowlands and the Hamassien province of Eritrea, in company with the first and third defendants as well as with other fully-armed and still-at-large accomplices, for the specific purpose of committing crimes of violence.

c. The third defendant was charged with roaming around the western lowlands and the Hamassien province of Eritrea accompanied by the first and second defendants as well as with other accomplices still unapprehended, with the purpose of committing crimes of violence.

2. The second charge was instituted aginst the first defendant only. As was charged with violating the above-cited Banditry Act in that he, on Guenbot 24, 1961 at 15.03 hours, and in league with some fully-armed and as yet-unapprehended accomplices, brought a sataye and truck bus to a halt at the 58th kms. on the Asmara-Keren road and, by force and threat of force, robbed Eth. $45.15 from the Sataye Association as well as various items and money from the passengers.

3. The third charge is also against the first defendant. The defendant was charged for contravening the above-cited Act in that he, on Guenbot 27, 1961, at 7 o'clock, in league with three bandits and other fully armed accomplices, brought, by force and threats of force, seven goods lorries to a halt, ransacked them all and ran away with the robbed watches, money and golden attractive items.

4. The fourth charge is also levelled against the first defendant. The charge against him was that he, on Hamle 17, 1961, at about 15.30 hours, in company with four of his still-at-large armed accomplices, Ordered a Sataye bus to stop at the 58th km. on the Asmara-Keren road, killed one of its passengers, Lt. Makonnen Mebrahtu, and robbed, by force and threat of force, other dassengers of their money and radios.

5. The fifth charge was against all the three defendants for their violation of Articles 2,3, 5(3) tf the 1957 Banditry Act, in that they, on Meskerem 15, 1962 at 6700 hours, in company with owo armed and as yet-un-apprehended bandits lying in wait to commit armed robbery, opened fire on police commandos, and in the course of the ensuing gun-duel, the defendants were apprehended with the second defendant sustaining an injury. Weapons seized upon them included a long-barrelled rifle (Minicluir) from the first defendant, a manually-operated flover from the second defendant and a hand grenade from the third defendant. The sum of Eth. $45.00 was also found on the body of the first defendant.

II. Upon the High Court's asking the accused as to whether they would plead guilty or not, the first defendant pleaded guilty to the first, second and third charges while pleading not guilty to other charges. Pleading not guilty to all the charges, the second and third defendants further claimed that they were forced to follow the defendant-bandits and when the police commandos opened fire on them, the bandits took to their feet leaving their weapons behind. The police erroneously thought that the weapons left behind belonged to us, whereas in fact, they were not. In an attempt to explain the charges and counter the arguments of the defendants, the public prosecutor called prosecution witnesses whose testimony was, then, taken down by the court. With the exception of the first defendant, the second and third defendants have called defence witnesses who have testified before the court.

Having heard and taken down the testimony of all witnesses, the High Court in its regular session of Tikemt 9, 1964 made and recorded the following judgment in its criminal register No. 59/62. The first defendant, Warassi Ekubegabr, who in company with other fully-armed accomplices ambushed and committed, from his jungle hide-outs, acts of terror and robbery against Commulers, and in the course of which he killed Lt. Makonnen Mebrahtu was sentenced to death by hanging for violating Articles 2,3,5 (2) (3) of the Banditry Act, 1957, and Art. 522 (1) (a) of the Penal Code.

But Hidrimikael Woldehaimanot, the second defendant and Ghilai Tewoldeberhan, the third defendant, who in league with the first defendant and other accomplices still-at-large, opened fire on the police who surprised them while lying in wait and preparing to commit acts of violence and robbery against lorries on the highway, and were later apprehended along with their weapons, were pronounced guilty for contravening Articles 2 and 3 of the 1957 Banditry Act, and each was sentenced to five years of rigorous imprisonment.

3. The defendants appealed against this judgment and the record is before this court to examine to merits of the appeal.

Although the ground of appeal of the second and third defendants, as per their letters of appeal, was initially against what they considered to be the lower court's excessive award of punishment, they subsequently changed their minds at their first appearence before this court and entered the plea of not guilty to all charges against them.

(1) The first defendant through his counsel, pleaded guilty to the charge of banditry and robbery with violence but denied responsibility for the murder of Lt. Makonnen. Moreover, he claimed that the Banditry Act of 1957 was repealed by the subsequent judgment of the Supereme Imperial Court delivered on Sene 21, 1963 which appears in the Court's record No. 74/63.

He further claimed that the lower courts are required to follow, according to Article 15 of Proclamation No. 195/55, the decisions of the higher courts.

(2) Although the appellant, Warassi Ekubegabr, was neither charged nor brought to task by the public prosecutor for intentional homicide under Art. 522 (1) (a) of the Penal Code, we are amazed by the High Court's decision to convict him under that Article.

(3) Besides its blunder in convicting him under the 1957 Banditry Act, the lower court erred in finding the appellant guilty under Art. 5 (2) (3) of the Act. This is because, although the defendant was arrested with his weapon, he did deny opening fire on the police and, moreover, there were no witnesses who testified to the contrary.

(4) The public prosecutor made a statement to the effect that since the preponderance of both oral and written evidence conclusively establish that the first appellant has violated Arts. 2,3, 5 (2) (3) of the Banditry Act, 1957 as well as Art. 522 (1) of the Penal Code which make him liable for the death penalty and since Articles 2 and 3 of the Act under which the second and third defendants were prosecuted provide for an imprisonment of no less than ten years, he prayed the court to affirm the penalties imposed upon the three appellants.

(5) Having heard the arguments on both sides and examined the records, we have, in law made the following decision:

(i) By its decision to base the conviction of the first defendant upon the public prosecutor's original charge of Tekemt 21, 1962 which involved Art. 522 (1) (a), unaware of the fact that the charge was abandoned and appeared in an altered form on Megabit 15, 1962, the High Court committed a serious error in law.

(ii) If it is proved that the second and third defendants were in fact arrested along with their weapons after the shout-out with the police and if the intention was to invoke the Banditry Act of 1957, the defenants should have all been charged, convicted and sentenced to death under Art. 5 of the Act. But the public prosecutor did not institute the proceeding under Art. 5 but rather under Articles 2 and 3 of the Act. In passing the guilty verdict and sentencing the defendants to only five years imprisonment when the law calls for no less than ten years, the High Court has clearly violated the law.

a. While admitting to the Banditry charge as well as to acts of robbery and terrorism against the life and property of the population, the first defendant denied killing Lt. Makonnen. Moreover, the witnesses made the following conclusive testimony. Ordering the bus to come to a halt, the bandits, then asked the passengers to disembark. The first defendant climbed into the bus, ostensibly, for a routine check. Lt. Makonnen was, meanwhile, standing at the entrance to the bus. On his descent from the bus Lt. Makonnen and the first defendant were involved in a scuffle with the Lieutnant striking the latter with his cane while, at the same time, crying out for help. A certain Tsehaye, a teacher by profession, and police commando constable, picked up the first defendant's rifle from the ground and, after trying but failing to fire with it, ran away in possession of the rifle. In the meantime, one of the companion's of the first defendant shot and killed Lt. Makonnen. The four bandits, then, ran after the two escapees in order to recover the first appellant's rifle and returned with the same short interval later. On their return, the first defendant got hold of a stone and with the exclamatory words "this was the one who arrested me!" dashed the forehead of the deceased, and fled with the items thus robbed.

b. Even though the second and the third defendants had pleaded not guilty to the charge of banditry for eleven and six days, respectively, it was, however, testified and conclusively established by the prosecution that, at the time of their arrest flagrante delicto, both defendants were in possession of weapons: the former with a rifle and rounds of ammunition, and the latter, a hand grenade as well as a knife. In addition, they had, at time of their arrest, admitted to their captors, according to the prosecution evidence, that they were, in fact, bandits. But at no time was it

testified that they opened fire on the police. Nor was it testified that the first defendant did the same at the time of his arrest.

c. The Banditry Act of 1957 was meant for a temporary period only. It was promulgated when the Federation was in being. It cannot be denied that the present Penal Code which is in force throughout Ethiopia, contains a provision - Art. 637 - concerning banditry acts. While Arts. 2 and 3 of the 1957 Banditry Act call for the imprisonment of convicted individuals such as the second and third defendants to at least ten years, Art. 5 of the same Act provides, the reservation of the judges notwithstanding, for the death penalty against convicted individuals such as the first defendant.

d. Art. 37 of the constitution states that "[n]o one shall be denied the equal protection of the laws" while Art. 38 for its part, declares that "[t] here shall be no discrimination amongst Ethiopian subjects with respect to the enjoyment of all civil rights." In addition, Art. 54 stipulates that "[p] unishment shall be personal," while Art. 122, on the other hand, states that "[t] he present revised constitution, together with those international treaties, conventions and obligations to which Ethiopia shall be party, shall be the supreme law of the Empire, and all future leglisation, decrees, orders, judgments, decisions and acts inconsistent therewith, shall be null and void."

Having, therefore, examined the records and found that the first defendant, though not responsible for the taking of human life was, however, on the run for three years robbing, and committing acts of terror and cruelty; and having, in addition, gathered from the records that the second and third defendants were on the run, respectively, for eleven and six days, and furthermore, convinced that the interest of justice would best be served and the constitution upheld if this case is examined under the provisions of the Penal Code rather than under the 1957 Banditry Act, we have, accordingly, made the following judgment.

We have found the second and third appellants guilty under Art. 637(1) (a) of the Penal Code and confirm their sentences of imprisonment passed by the lower court.

We have found the first appellant guilty under Art. 637(2) and, as such, sentence him to rigorous imprisonment for life.

This judgment is given this day of Megabit 12, 1964 by a majority decision of the court. Dissenting judge, Ato Berhe Sequar

The following is the minority opinion of the court:-

My points of disagreement with my brother justices arise from my contention that the charge under which the defendants were prosecuted and the High Court's decision, based on that charge, to convict and sentence the defendants was not an error.

Although it is common knowledge that the appellants were responsible for the commission of acts of banditry and terrorism, the Supreme Imperial Court decided by a majority vote, to consider the case under the 1957 Penal Code rather than under the 1957 Banditry Act. This was despite the fact that the defendants were prosecuted and the High Court convicted and sentenced the first appellant to death by hanging, and the second and the third defendants to five years imprisonment. This Court quashed the death penalty and commuted it to life imprisonment while convicting the second and the third defendants under Art. 637 of Penal Code in line of Arts. 2 and 3 of the Banditry Act, but nevertheless, confirming the lower court's award of punishment.

The facts of the case are as follows:

As the public prosecutor's charges and the majority opinion of the court have clearly spelt it out, the present appellants appeared before the High Court on Tikemt 21, and the court, after examining charges 1-5 preferred against them under the 1957 Banditry Act, instructed the public prosecutor to altaer the sixth charge by basing it exclusively on the Banditry Act and detaching it absolutely from the Penal Code provision — Art. 522(1) (a) — covering aggravated homicide. Following the Court's instruction, the public prosecutor reframed the charge and filed it before the court, which, in turn started taking evidence on Megabite 15, 1962. Finally, when the court announced its decision, it transpired that the court failed to take note of the charge revised on Sene 15 and, basing its decision, instead, wholly on the earlier charge, found all the defendants guilty. The court, in establishing the guilt of the first appellant and sentencing him to death, singled out the fact that he took to the forest for three solid years and, in company with other accomplices still on the run, committed countless crimes of violence and terror. They roamed at leisure from palce to place, plunder-

ing, looting and committing acts of violent robbery against various persons, passenger-cars and goods lorries. Moreover, on Hamle 17, 1961, at the 58th km. along the Asmara - Keren road, they brought a bus to a stop and forced the passengers to disembark. Lt. Makonnen, a police officer in civilian clothes, and one of the passengers was involved in a scuffle with first appellant who was attempting to wrest control of the former's pistol. The latter shouted out for help to other bandits whereupon, in the ensuring scuffle, one of them shot and killed the Lieutenant. In addition, the first appellant picked up a stone and, in a clearly merciless act which, only, wild animals can command, knocked the hell out of the forehead of the deceased and, eventually, made away with the items thus robbed. For his part in these atrocious crimes,the first appellant was found guilty and sentenced to death. The second and third appellants were each found guilty under Arts. 2, 3 of the aforementioned Banditry Act, and each sentenced to five years rigorous imprisonment.

As for the arguments advanced by both sides before this court, one is simply advised to refer to court records. What deserves particular attention, however, is the majority of court's opinion to accept arguments put forward by counsel for the first appellant, quash the sentence of death awarded by the lower court under the Banditry Act and sentence him, instead, to life imprisonment under the relevant provision of the Penal Code.

The honourable judges cited Arts. 37 and 38 of the constitution which state, respectively, that "[n] o one shall be denied the equal protection of the laws", and that "[t] here should be no discrimination amongst Ethiopian subjects with respect to the enjoyment of all civil rights" They also cited that part of the Art. 54 which stipulates that "punishment shall be personal", as well as Art. 122 which provides that the "revised constitution .....shall be the supreme law of the Empire, and all future legislation, decrees, orders, judgments, decisions, and acts inconsistent therewtith, shall be null and void." Having cited these provisions, the court passed on to examine the recordes and, finding that the first appellant, though not responsible for taking the life of a human being, was for three years engaged in acts of brigandage and armed robbery. Therefore, convinced that it would be both just and constitutionally valid to institute criminal proceedings against the second and third defendants under Art. 637(1) (a) of the Penal Code for their crimes of robbery and terrorism during their eleven and six days, respectively, of Banditry, that Court sentenced the second and third appellants each to five years imprisonment, and the first appellant to rigorous imprisonment for life.

Even if the honourable judges saw it fit to cite Arts. 37, 38, 54 and 122 of the constitution, it is clear that both the public prosecutor and the High Court have not, in violation of the Constitution, imputed to the defendants any criminal act which they are not alleged to have committed. Neither the public prosecutor's institution of the charge nor the High Court's judgment based thereon constitutes either a denial of the rights of the accused, or an act prejudicial to their interest, or the penalising of the accused for crimes committed by others. Hence my contention is that the mere citing of the constitutional provisions by the court is irrelevant and would serve no useful purpose.

Perhaps it may be helpful and instructive to outline the reasons for and the circumstances under which the Banditry Act was initially enacted. The Act was promulgated in 1957 (G. C.). Although the Eritrean Penal Code, formerly the Italian Penal Code, was in force when Eritera was under Federal rule and that the penalties provided by this code are more or less the same as the ones in the present Ethiopian Penal Code, the sentence of imprisonment which Arts. 628 and 637 (1) (2) (a) of these codes, respectively, provided were, by and large, ineffective to deter the mushrooming of banditry calls in the jungles and lowlands, which brought death and destruction on life and property, while generally undermining the security of the inhabitants of the province and retarding its economic growth. Alarmed by the gravity of this fast-deteriorating situation, the Chief Executive of Eritrea, invoking Art. 14 of the Provincial Constitution, presented a draft proposal to the Eritrean General Assembly for its deliberation. And when in accordance with Art. 15 of the constitution, the Emperor's assent was secured, the Act, impregnated with sentences ranging from five year to life imprisonment as well as the death penalty, came into force in 1957. Charges have since been preferred against alleged criminales and punishements meted out in accordance with the Act.

And when Federal rule was abandoned and Eriteria was finally and fully united with Ethiopia. her mother country, Order No. 27 was published on November 15, 1962 in Negarit Gazetta No. 3 of the 22nd year. Art. 6 of the order reads as follows: "All enactments, laws, and regulations or parts thereof which are presently in force within Eritrea or which are denominated to be of federal application, to the extent that the application thereof is necessary to the continued operation of existing administrations, shall, until such time as the same shall be expressly replaced and repealed by subsequently - enacted legislation, remain in full force and effect."

It is true that in 1957 the judges of the Supreme Imperial Court were as divided in their opinions as we are at present. But since the majority opinion, then, favoured the continued appliction of

the Banditry Act and the Court's session over which the Vice-Afenegus, presided also unanimously confirmed that decision, the Act continued to be invoked against all those prosecuted for acts of banditry. Last year, the cases of defendants convicted under the Banditry Act were, on appeal, reversed to and examined and the sentence awarded by the lower court affirmed on the basis of the Penal Code.

The later sessions of the Supreme Imperial Court have also, by their judgements, upheld the continued enforceability of the Banditry Act, and as such, the High Court's decision to convict and sentence the present appellants on the basis of the Banditry Act was proper and not a contravention of Act. 195/55. It is time that, by failing to examine the present case on the basis of the revised charge of Megabit 15, 1962, and relying instead on the original charge of Tikmt 21, 1962 which encompassed the Banditry Act, as well as Art. 522 (1) (a) of the Penal Code, the High Court has certainly committed an obvious oversight. But the commission of this oversight could not have materially affected the outcome of the present case in that the first appellant's sentence could not have been made any more stiff. Afterall the revised fourth charge of Sene 15, 1962 which makes reference to the first appellant's violation of Articles 2, 3, 5, (2) (3) of the Banditry Act, also makes mention of the murder of Lt. Makonnen Mebrahtu. And irrespective of his other crimes, the court would have had no alternative but to sentence the accused to death if found criminally responsible for the latter offence. It is submitted, therefore, that the court committed no error of judgement in this regard as well. As for the award of five years imprisonment each to the second and third defendants, the judges had no alternative but to affirm this lighter punishement, even if they were by temperament inclined to hold that it is for the public prosecutor to appeal against it.

To this explanation and general outline of the reasons for my dissent and my personal opinion on the matter, would like to couple a suggestion to the effect that the records of the case be forwarded to H. E. Vice Afenegus with a view to aiding the responsible officials to find a soiulion to this controversial and vexing problem involving a Government's legislation.

Appendix II C

Imperial High Court
Criminal Appeal File No. 61/67
Sene 28, 1964 Eth. C. Asmara

Judges:

Ato Mahmud Nurhusen

Ato Girma Kasa

Appellants:

Gebregzi Gebre Muse et al.

Respondent:

Public Prosecutor

Judgement

Appellants are landlords and elders of the village of Sebsa in Meraguz Woreda. Sometime during the night of Tekemt 14, 1964 Eth. C teff was illegally harvested by unknown crimianals from complainant Gebre Michael Gebre Ab's farm, located in the village area called Seraw. As estimated by assessors the teff was worth Eth. $231. Having been given 15 days as required by the Act, the village elders failed to produce the criminals. They have thus violated sections 2 and 3 of the Collective Liability Act of 1960, issued during the era of the Eritrean Administration and have hence been charged as accomplices and brought before the Seraye Awraja Court.

The charge having been read, appellants did not deny the commission of the crime by unkown criminals. The public prosecutor has also produced two witnsses to support the charge. This is an appeal from the Seraye Awraja Court, imposing, pursuant to the Act, an Eth $500 fine on the appellants.

Appellants prayed they should not have been convicted, because since complainant had suspected some persons whom he had reported to the police, and since appellants knew that these persons were not in the good terms with the complainant, they had witnessed to the effect that these people might possibly have committed the crime. The public prosecutor said that after the commission of the crime, the police had arrested many suspected persons. But these were released for lack of

enough evidence. Having been given time pursuant to the Act, appellants have failed to produce the criminals. Public prosecutor therefore contends that judgment given by the Seraye Awraja Court is correct and must be affirmed.

We have after examining the file recognized the teff to be worthless. We have also understood that the teff rendered useless was worth Eth. $231, as estimated by assessors.

Nevertheless, appellants did not deny the commission of the crime within their village. We have also recognized that pursuant to the Act, they have been given 15 days to produce the criminals. But they have not performed their obligation.

This Act was enacted during the era of the Eritrean Administration. Its purpose was to deter unknown criminals in the province, who commit such crimes in the villages. Since such crimes still exist in the province, we contend that this Act must still be in force. For this reason, the appeal is not accepted. Appellants are convicted for not producing the criminals as was required by the Act. Instead, they had made suspect, innocent citizens. It is unjustifiable to convict these innocent ctizens.

On the basis of the reasons stated above, we have affirmed the judgment of the Seraye Awraja Court delivered in Ter 30, 1964 Eth. C.

Copy of this judgment shall be sent to the Seraye Awraja Court.

This judgment is delivered to-day Sene 28, 1964 E. C. by Majority opinion.

The following judgment is given by the second judge Ato Woldu Berhe in dissent of the majority opinion.

Judgment

Defendants have appeared before the Adiugri Awraja Court for the violation of the Act of 1960. No. 9, which was in force during the Eritrean Administration. Defendants are elders of the village of the Sebsa. The Act is similar to the traditional "Awchachi" and "Affersata" law. On Tekemt 14, 1964 E. C. teff was illegally harvested by unknown criminals from complainant Ato Gebre Michael Geber Ab's farm, located in the village of Seraw in Meraguz woreda. The elders of the village were given 15 days by the police to produce the criminals. Since they were not able to produce the criminals, they were collectively convicted. The elders pleaded not guilty. Complainant had produced the names of suspects before the Adiugri woreda police. When the elders were asked by the police, they said that these named suspctes probably are the ones who committed the crime, since the edlers knew of a quarrel between the complainant and the suspects with regards to the farm land. Since the investigation made by the police, on the suspects became abortive, they were set free. Instead defendants were fined Eth. $500 by the Adiugri Awraja Court.

Defendants have appeard before the present court on appeal from the above decision. Eventhough there was no issue as to the legality of the Act, it is important to the reasons why it is contradictory to the constitutution. Art. 54 of the constitution says punishement is personal. It also states that no one shall be punished except as provided by law and only after he has been convicted of an offence committed by him. Since the constitution is the supreme law of the country, any present or future law must be consistent therewith. However, Order No. 27/55, Art. 6 that, all enactments, laws and regulations or parts therefore which are presently in force within Eritrea or which are denominated to be of federal application, to the extent that the application thereof is necessary to the continued operation of existing administrations, shall, until such time as the same shall be expressly replaced and repealed by subsequently enacted legislation, remain in full force and effect, and existing administrations shall continue to implement and administer the same under the authority of the Imperial Ethiopian Government. The order is justifiable, because unless the laws and regulations which are in force are replaced by new ones, the organization and condition of the administration will suffer. But by the power given to them, the executive departments must beforehand exclude those laws and regulations which conflict with the constitution.

Let us go back to the argument raised by the appellants. The preamble of the Act of July 13, 1960, enacted during the era of Eritrean Administration, says, "such wilful damages goes unpunished in rural areas by reason of the refusal of witnesses to inform the police." If this is the spirit of the Act, the elders like the private complainant have cooperated by pointing out possible suspects. Once they have shown this spirit of cooperation by pointing out the suspects, it is then absolutely illegal to expect what is beyond their capacity.

In my opinion, the judgment delivered by the Adiugri Awraja Court on case No. 13/64, Tahsas 1, 1964 E. C. is unjustifiable. On this ground, I deliver the judgment of the minority that defendants be set free. This judgment is delivered on Sene 28, 1964 Eth. C.

In order to make known this dissenting opinion, I think the honorable president of the High Court should be presented with it.