

Buffalo Law Review

Volume 16

Number 1 *The Common Law and the Civil Law:
Some Encounter, Influences and
Comparisons—Essays in Honor and Memory of
Arthur Lenhoff (1885-1965)*

Article 14

10-1-1966

Civil Law and Common Law Influences on the Developing Law of Ethiopia

J. Vanderlinden
University of Brussels

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/buffalolawreview>



Part of the [Courts Commons](#), and the [Jurisprudence Commons](#)

Recommended Citation

J. Vanderlinden, *Civil Law and Common Law Influences on the Developing Law of Ethiopia*, 16 Buff. L. Rev. 250 (1966).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol16/iss1/14>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

CIVIL LAW AND COMMON LAW INFLUENCES ON THE DEVELOPING LAW OF ETHIOPIA*

J. VANDERLINDEN**

INTRODUCTION

THE main characteristic of the contemporary Ethiopian legal system is that it does not yet exist as such. The revolution (and this author thinks one can really speak of it as a revolution) resulting from the introduction nearly at the same time, of a system of legal education and of six codes covering most fields of current legal activity in the country, has not yet borne its fruits. The setting in which that revolution occurred is such that one can still wonder what these fruits will be. Yet one thing is sure: out of that setting will arise the Ethiopian legal system, and what exists now in Ethiopia is only the foundation on which that system will be built.

Accordingly this article will be a description, as accurate as possible, of all the factors which could contribute to the building-up of that system; among these factors we will emphasize the formal sources of the law and the organization of legal education, the latter having a direct influence on the attitude of the judicial personnel. The description will be divided into two parts: the pre-war period and the post-war period, keeping well in mind that war started for Ethiopia in 1936 and ended in 1941. Each period is fundamentally different from the other, and each of them contributes in some way to the existing situation.¹

Finally, in the conclusion, the author will attempt to forecast (although he knows how frail such forecasts may be) what might be the main lines along which Ethiopian law could develop in the not too distant future. As the reader will see, many alternatives will remain open and it is quite possible that only the next generation will provide us with definite answers to many questions.

I. THE PRE-WAR PERIOD

A. *Pre-War Legal Sources*

In considering the pre-war period, the main question about the development of the Ethiopian legal system is of course to decide when one begins to speak of an *Ethiopian* legal system as such. The answer to this question seems to be easy as references are so commonly made to the main source of Ethiopian legal history,

* I must express my thanks to Miss C. Cole, who has kindly agreed to check the English text of this article. This does not however prevent all remaining mistakes, especially insofar as style is concerned, being the author's exclusive responsibility.

** Docteur en droit (Brussels); Maître de Recherches, Institute of Sociology, University of Brussels; Visiting Lecturer in Law, Haile Sellassie I University, Addis Ababa (1965); University of Edinburgh (1966).

1. This article is based on the existing literature on Ethiopian law. For such literature and a general outline of the development of the sources of Ethiopian law, see Vanderlinden, *An Introduction to the Sources of Ethiopian Law With an Outline of a Bibliography*, 3 J. Ethiopian L. (1966). It was also inspired by a one-year stay in Ethiopia in 1965.

the Fetha Negast, ("Law of the Kings") which we know was introduced in the country between the fourteenth and the first half of the sixteenth century.

But the immediate objection to these references to the Fetha Negast is that it did not represent effectively the law enforced in Ethiopia during that time. Some argue that copies of the Fetha Negast are difficult to find if one compares them with copies of other books such as religious books. And from this they infer that it had far less importance and impact on everyday life than legal historians and scholars, whether they be Ethiopian or not, generally attribute to it. It is also said that in a country where the rate of illiteracy is so high one can wonder about the exact influence of a text which only a very small fringe of the population could read. The author feels that the truth lies in between these two sets of opinions, as it often does.

First of all, against the opponents of the Fetha Negast, let us say that the two arguments they present, if they were admitted, would result in most of the legal books on which European legal history is founded being considered as mythical and of no influence on the law of their times. It is obvious that one would find in continental Europe before the nineteenth century more copies of the Bible than of any of the most famous legal codes, and that these codes were only directly accessible to a minority of trained persons upon whom rested the legal development of the Continent. This does not mean that the codes were of no importance, however. Thus not being able, by the use of this argument of limited access, to establish the lack of importance of the Fetha Negast, one must not go to the other extreme and exaggerate its impact on the everyday life of the Ethiopians. There is reason to believe that most of their legal life was governed by tribal customs and that it was only before church courts or before the highest among the lay courts (such as the Imperial Chilot) that the Fetha Negast was invoked. But this is precisely the level where one could speak of Ethiopian law in the form of the king's or emperor's law.

Secondly, it must be noted that even at the level of high judicial hierarchy, the text was never promulgated by any of the Ethiopian kings or emperors. The result was that the Fetha Negast always remained a private compilation which derived its authority from the fact that it was unique, and that it was constantly referred to in the most important cases. The fact that the text had no authoritative value deriving from legislative sanction also meant that it was not binding on the judges and that equity could always be introduced in judgments, no matter what the Fetha Negast provided for in a specific case. Nevertheless, the conclusion could be that, although it was limited with respect to the number of people concerned, its influence on the organs which were making the only *national* law of the time was essential.²

A third point which is worth mentioning about the Fetha Negast is that it

2. As will be discussed more fully, *infra*, p. 254, the Fetha Negast was also the main if not the only source as far as legal education was concerned during this period. This is certainly a factor indicating its importance. See Graven, *The Penal Code of the Empire of Ethiopia*, 1 J. Ethiopian L. 267, 268-72 (1964).

provides us with a first example of a reception of foreign thought in Ethiopian legal history. The text, whether it be mainly Byzantine or Muslim in its origins, was in all cases imported in Ethiopia after it had been translated from the Arabic into Geez in Alexandria or in Ethiopia between the fourteenth and the sixteenth century. The Arabic original was known as a *Nomocanon* of which, as we said, the origins were either Byzantine or Muslim. In any case Roman influences are directly perceptible on a first reading of the text. Unfortunately it is very difficult to know exactly what happened during that first reception. No case-law of the period has been kept, very few commentaries on the Fetha Negast (most often in the form of marginal glosses) are available and, what is more, they have not been translated so that they can be used by persons whose speciality is not Geez linguistics.³ It is thus impossible to know at the present time how these foreign legal institutions, imported in Ethiopia a few centuries ago, were used by Ethiopian lawyers to solve the problems which confronted them. How they applied those Muslim or Byzantine rules is unknown and will perhaps remain so for a good while. One can only guess, from what has been said of the binding character of the Fetha Negast, that adaptations must have been frequent, *i.e.*, whenever the text had to be fitted to the Ethiopian feelings of justice.

As a conclusion, it seems that the Fetha Negast was, in fact, the main source of the law for the period preceding the twentieth century, but that it was constantly subordinated to a predominant authority, which we could call equity, not in the technical meaning of English law, but in the sense of a source reflecting the basic feelings of justice prevalent in a given society at a given time.

Apart from the Fetha Negast, the formal sources of an Ethiopian national law were scarce throughout the first period. It was not until the beginning of the twentieth century that legislation really started to play some part in the legal development of the country.

Legislation began with Emperor Menilik II and developed specially during the reign of His Imperial Majesty Haile Sellassie I, not only as Emperor but also as regent. However one cannot yet speak of any reception of foreign law at that time. Of course Menilik was advised in his efforts toward legal reform by foreign advisers, among whom one may point out Ilg and Chefneux, but it is impossible to decide if these influences were the origin of some kind of reception of foreign law. One point worth noticing is the reference to the French Code Civil in the last article of a decree of 1908 on land registration in Addis Ababa; that article states that for any matter which is not dealt with in the decree one shall use the "Napoleonic Code."⁴ But it is impossible to say in what

3. Professor David, in his article *Le Code civil éthiopien de 1960*, 26 *Revue de droit international privé* 668 n.1 (1961), indicates that the Fetha Negast has never been translated into Amharic. This statement needs correction as the author has seen such translations, one of them being printed at the present time by the Government Printer, Berhanena Selam, in Addis Ababa. However until recently they have been inaccessible to scholars, being kept mostly in church libraries.

4. This decree has been published in a capital book for the study of the legal develop-

measure such provision was ever applied, if it ever was; one can easily imagine the obstacles, if only because of the language (very few Ethiopians understanding French and no Amharic version of the French Code Civil existing), to the enforcement of that article.

As for the legislative developments during the reign of Ras Tafari as regent and, after his coronation as Haile Sellassie I, Emperor, one also sees that they were influenced by foreign laws. This is the case, for example, of the first Ethiopian Constitution (inspired by the Japanese Constitution) and of the important commercial regulations promulgated in the 1930's (apparently inspired by French law). Again it does not seem that one can speak of a real reception, as the influence of foreign law seems to have been limited to the inspiration of the Ethiopian texts without influencing, in any sense, their application.

The most effective means by which Ethiopian legal thought could have been influenced from the outside was in fact the Special Tribunal established under the Klobukowski Agreement of 1908 between Ethiopia and France.⁵ Article 7 provided for the existence of a mixed court in which an Ethiopian judge (the President of the Tribunal) would sit with consular representatives of foreign nations whenever a case arose involving an Ethiopian and a foreigner. The law enforced by the court would be Ethiopian law when the defendant was an Ethiopian, and foreign law when the defendant was a foreigner. Unfortunately it seems that, although the activity of the tribunal was at one time considerable (especially the division involving British subjects), considerations of national interest prevailed over the law in many instances: this was certainly the reason for a boycott of the tribunal by higher Ethiopian judicial authorities. There was even a time when the Emperor (before whose Chilot appeals against a decision of the Special Tribunal had to be lodged) refused to hear any such appeals on the ground that the functioning of the tribunal was prejudicial to Ethiopian interests. One may thus assume that instead of the positive effect the existence of a mixed court could have had, it had in fact a negative effect, since the decisions of the Special Tribunal were not recognized by the Ethiopians.

In conclusion, it seems that some foreign influences on the development of Ethiopian substantive law existed during the pre-war period, and that they were mostly Continental and possibly French.⁶ But it also seems that they left but little trace on the Ethiopian system as such and can thus be ignored.

B. Pre-War Legal Education

As for legal education during the pre-war period, it was mostly acquired abroad insofar as the training of lay judges was concerned. We unfortunately do

ment of Ethiopia; see Balambaras Mahtämä Selassie, *Zikire Negar* 167 (Addis Ababa 1951 E.C.). Unfortunately for foreign scholars, this important work exists only in Amharic.

5. The text of the agreement in its Amharic and French versions has never been published. An original lies in the Archives of Ethiopian Law established by the Faculty of Law of Haile Selassie I University in Addis Ababa. The French text was published in Figli, *L'Etiofia nella politica europea* 259-61 (Padova 1936).

6. See Arnold, *Die Zivilrechtspflege in Äthiopien*, 25 *Rabels Zeitschrift* 66 (1960) for an example of this.

not possess any complete record of the number of Ethiopians who studied law at that time, and more especially after the First World War. From circumstantial evidence gathered in Ethiopia it seems that many went to France. This is consistent with the French influences on the general development of Ethiopia during that time. But it also seems that a rather small number of these lawyers ever entered practice in Ethiopia either as judges or as barristers. They appear to have been rapidly absorbed in the higher political hierarchy of the country with relatively small influence on the development of the Ethiopian legal system.⁷

At the same time, a process of legal education which had been going on for centuries was being continued; that was the legal training in church schools. As far as these are concerned, the Fetha Negast seems to have been the most important (if not the only) source used in matters of legal training during all these centuries. The only Ethiopian law schools were in fact church schools. Their approach to legal instruction was strictly exegetic, the lessons being a word by word commentary of the Fetha Negast in the light of each professor's experience.⁸ The result is that other law books were practically unknown in the country during the long period preceding the twentieth century. During all that time, the Fetha Negast and the exegetic commentaries on it seem to have been the only written sources of Ethiopian law.

It is only in the last fifty years that other written sources appeared side by side with these. Menilik II was the first to order the permanent recording of both legislation and case-law, and the beginning of the century saw the first systematic efforts to describe the customary laws of some ethnic groups living within the Ethiopian borders. At the same time the Fetha Negast remained the ultimate source toward which everybody, including the Emperor, would look when a final decision had to be made. It is therefore understandable that there are so many references to it in all Ethiopian codes: the Ethiopians always considered it as the cornerstone of Ethiopian legal thinking. It was on the basis of the Fetha Negast that cases were decided in the Imperial Chilot; in such cases, a specialist in the church legal education would sit as an adviser to the Emperor. During that period it was also decided for the first time to make a printed version of the text. This was begun on the eve of the war and only a few pages were printed before the Italian invasion.⁹

The conclusions, insofar as foreign influences through legal education are

7. Against this view of the author, see Bentwich, *Law and Justice in Ethiopia*, 165 Contemporary Rev. 268 (1944); he mentions "a considerable number of Ethiopian judges who have . . . a legal training." But this could also refer to a traditional legal training in the Fetha Negast. In accord with the author's view is Arnold, *op. cit. supra* note 6, at 55 n.11.

8. Due to the courtesy of Like Seltanat Habte Mariam, Head of Administration of Trinity Church, Addis Ababa, the author was able to see a class book used in one of these traditional schools. It contained a word by word commentary on the Fetha Negast, as well as philological data on the translation from Geez into Amharic. An Ethiopian colleague in the university, specializing in these languages, considered these data exceptionally interesting.

9. The few printed pages are kept in the Manuscript Section of the National Library in Addis Ababa because of their unique character.

concerned, are thus as negative as they were for direct influences on the sources of the law. One could say, in the state of our present knowledge of the development of Ethiopian law, that it had kept most of its original character when the war broke out in 1936. Foreign influences had only been superficial and the existing sources, whether they were the Fetha Negast or newly introduced legislation based on a foreign model, were still confronted with imperatives of justice which tended to give preference to an equitable solution rather than to a strictly legal solution. This, we feel, cannot be sufficiently emphasized.

II. THE POST-WAR PERIOD

A. *Modernizing the Judiciary*

The post-war period saw the sources of Ethiopian law undergoing new developments—the result of policies which had been prevented from coming into effect earlier by the war. One may say that the form of the development was new, while its contents were old.

First of all legislation was developed to a considerable extent, and a complete administrative structure of a modern state was progressively built up through proclamations, orders or decrees. A new constitutional framework was also set up in the Revised Constitution of 1955. Finally all these legislative enactments were regularly published in the *Negarit Gazeta* established in 1942. Obviously part of that legislation was promulgated under foreign influence (mainly British); but a much more important step was taken when a new court structure was established and foreign judges were appointed to high judicial functions on full equality with Ethiopian judges. The court structure again reflected the British influence. It had an hierarchy of which the higher elements were a Supreme and a High Court. The president of each division or chamber within the High Court was one of the three foreigners appointed to judicial functions; these were two British subjects and a Palestinian.¹⁰ Through these newly appointed judges and their successors, a way was open to the reception of foreign legal thought. One could even say it was open to British legal thought, as the British were in fact playing a predominant role in Ethiopia immediately after the liberation. The switching from French to English as the second language of the country (Amharic remaining the only official language) is but one indication of that change in influences.¹¹

And, of course, with British judges, came British legal ideas. One should not be surprised if it is from that time that an idea of the doctrine of precedent (in a very attenuated form) came into Ethiopian legal thinking. Refer-

10. See Bentwich, *op. cit. supra* note 7, at 268; Arnold, *op. cit. supra* note 6, at 55 mentions for a later period three Swedes and an Englishman.

11. Apart from the article by Bentwich, *supra* note 10, see Bentwich, *Private International Law in Ethiopia*, 4 Int'l L.Q. 111 (1951); Russell, *The New Ethiopian Penal Code*, 10 Amer. J. Comp. Law 266, 277 (1961); Arnold, *op. cit. supra* note 6, at 53 n.1, 56 n.14; all of whom insist on the post-war British influence in Ethiopia. This is of course particularly true for former Eritrea, now part of the Empire.

ences began to be made in court decisions (especially in the Supreme Court) to previous cases decided by the court, with a corresponding tendency toward stability. As yet one cannot speak of a strict doctrine of precedent and stare decisis, but one could say that the ground was being prepared for an active role by the judiciary in the legal development of the country.

However the complete development of a common law doctrine was hindered by many factors, a few of which must be mentioned here. First of all we note the heterogeneity of the judicial body: if many judges were of British background, other nationalities were represented and, more important, these foreigners were sitting with Ethiopian colleagues whose language and background had not much in common with theirs. Also one must consider the lack of communication within the judicial body, either for language reasons or because decisions of one division were not (and why, in fact, should they be?) communicated to the others. Finally the lack of a legal profession with a common background and an education in the law of the country, as well as the lack of an Ethiopian legal science, were determining factors in preventing another influence which could have been exerted on the judiciary. As far as legal literature was concerned, the vacuum was total; as for lawyers, according to Bentwich,¹² they were four and came from Continental countries, to wit, Russia, Italy, Greece and Germany. These lawyers had however to win cases before common law oriented judges. One can easily understand that the best way to achieve that aim was to present cases following a common law approach.

It thus seems clear that seeds were sown of which the fruits still had to appear, but these seeds were definitely common law seeds and one would expect Ethiopia to follow a common law path.

At the same time, the great importance of the judiciary in developing the law of the country was encouraged by the lack of developed and comprehensive legislation in such areas as private law (civil and commercial), civil and penal procedure, and even penal law where the Penal Code of 1931 obviously needed some improvements. It is also true that the Ethiopian tradition according to which justice prevailed upon the strict rule of law was certainly favouring the development of a judge-made law in all areas where some flexibility could be allowed. As Bentwich says in one of his articles, "it [the civil chamber of the High Court] has a delightful and enviable freedom in the law which it applies," and also, "the Judges of the High Court may apply their own legal wisdom and the principles of justice and equity without being tied by the letter of the law."¹³

B. Codification of the Laws

This was the situation in the 1950's when the move toward codification was started and a totally new factor was introduced. Ethiopian codification lasted for approximately ten years from 1955 to 1965, and it resulted in the promulga-

12. *Op. cit. supra* note 7, at 269.

13. *Ibid.* See also Arnold, *op. cit. supra* note 6, at 68.

tion of six codes in the full sense of the word, *i.e.*, a civil code, a penal code, a commercial code, a maritime code, a civil procedure code and a criminal procedure code.

These codes were all either drafted by foreign lawyers or inspired by foreign sources. The Penal Code and a draft of a Penal Procedure Code (which was not adopted) were prepared by Professor Jean Graven of the University of Geneva, a prominent Swiss criminal lawyer.¹⁴ His draft of a Penal Procedure Code was set aside and replaced by a Criminal Procedure Code inspired by the Malayan Criminal Procedure Code; the work was done by Sir Charles Mathew, who was at the time occupying high judicial office in Ethiopia. One must immediately note here the basic differences of approach toward codification between the Swiss and the British lawyer with, as a result, a fundamental difference between the substantive and adjective parts of the Ethiopian penal system.

The same is true insofar as private law is concerned. The Civil Code was drafted by Professor David, Professor of Comparative Law in the University of Paris, whose work is representative of the most advanced legal thinking in modern law, and not only modern European law, as Professor David was inspired in some cases by Israeli drafts, *e.g.*, on the law of successions. The Commercial and Maritime Codes were drafted by other French Professors, Professor Escarra, and after his death, Professor Jauffret. They are representative of the most recent developments in French commercial legal thought. But the approach is fundamentally different in the Code of Civil Procedure (the last of all these codes), drafted by Ato Nirayo Ensayas, Assistant Minister of Justice, and in which the influence of the Indian Code of Civil Procedure is clear. Again a dichotomy is established between the substantive and the adjective law, with the result that in Ethiopia substantive law is Romano-Germanic while adjective law is nearer to the common law tradition.¹⁵

To this it must be added that all codes dealing with substantive law were drafted in French and then translated into Amharic and English with all the technical problems involved.¹⁶ The only official version is the Amharic one; the English one has some authority because it is published in the *Negarit Gazeta*. As for the French versions, the ones representing the original thought of the drafters, they have no authority at all, although they are often useful for a better understanding of the two others. At this point, two questions may be

14. This Code seems to have been inspired by the Swiss Penal Code, according to Lowenstein, *Materials for the Study of the Penal Law of Ethiopia* (Addis Ababa 1965). But see, to the contrary, Russell, *op. cit. supra* note 11, who points out chiefly similarities with the French and Italian Penal Codes and does not mention the Swiss. (*Id.* at 267, 276 n.34). It seems however that Russell is wrong in attributing the paternity of the Ethiopian Civil Procedure Code to Professor Graven. (*Id.* at 266).

15. This dichotomy could have been avoided if Professor David had accepted the offer of the Imperial Government and drafted the Code of Civil Procedure (see David, *A Civil Code for Ethiopia*, 37 *Tul. L. Rev.* 192, 204 (1962)); and if Professor Graven's draft of the Penal Procedure Code had not been replaced by the work of Sir Charles Mathew. This shows clearly that the dichotomy was not originally planned by the Ethiopian Government.

16. Professor David has referred to the work of translation done by the commission in these words: "Their task was no less than overwhelming on this subject." *Id.* at 199.

asked: why were the codes prepared by Continental lawyers and in French when it was known that they would thus have to be translated twice (into English and Amharic), and what is now the position in Ethiopia in regard to the French versions of the various codes?

No one is perhaps better qualified than Professor David to give an answer to the first question, and he does that in one of the articles he has devoted to the Ethiopian Civil Code.¹⁷ Three factors, a technical one, an historical one and a political one can be considered in that respect. The first factor is the better suitability of the Continental legal concepts as far as codifications of the law are concerned, as greater experience has been acquired to this day in that field by Continental lawyers. A second factor is the fact that Ethiopian legal tradition as expressed in the Fetha Negast is connected to some extent to the Byzantine legal tradition, itself an heir to the Roman legal tradition. The drafting of the codes by experts in Romano-Germanic systems was thus establishing an historical continuity in the development of Ethiopian law. Finally, and to this factor Professor David seems to attach the heaviest weight, political considerations could have played a role, as Ethiopia has tried to react against the predominant Anglo-American influence on its general development since the liberation. These are of course hypotheses, but they can cast some light on the reasons why the draftsmen of the codes were French and Swiss in an English-speaking country. And of course, as these experts came in at the request of the Ethiopian government, it was in a sense natural that they would draft the codes in their native language, as being the most suitable to reach the aims envisaged by the Ethiopian government.

As for the second question posed above, the status of the French versions of the codes, some authors consider the original French text of the codes to be the reference text to which one should refer in any circumstance when the Amharic or English text is difficult to understand.¹⁸ This is not the attitude of many Ethiopians. Confronted with the discrepancies existing between the Amharic, the English and the French texts of the codes, their reaction is that there is but one version, the Amharic one, as it is the only one which Parliament has voted to adopt. Judicial construction must be based only on that version and judges should build upon it without consideration of the other versions, none of which is official. This attitude, favoured by this author, seems in a way to be the only one through which a truly *Ethiopian* legal system will be established. This should not however prevent a re-harmonization of the Amharic and English versions of the codes. The English language is used by so many persons interested in the development of Ethiopia who cannot be expected to master Amharic that it would be a factor of judicial insecurity and uncertainty if both versions were not brought into concordance. As for the French originals, one must be very

17. *Op. cit. supra* note 15.

18. See Russell, *op. cit. supra* note 11, at 266; Graven, *Ethiopia*, 12 *Int'l Rev. Crim. Policy* 214 (1957).

careful in handling them; they seem clearly to have no validity whatsoever in the eyes of many Ethiopian lawyers.

All drafts were submitted to the Codification Commission established by His Imperial Majesty Haile Sellassie I. In many cases, the work of the commission, and especially of its Ethiopian members, was important. It was perhaps less evident in dealing with technicalities, but where essential matters of Ethiopian legal tradition were concerned, the Ethiopian members of the commission would step forward and make their views prevail. This is certainly the case in the parts of the Civil Code dealing with marriage, successions and property; there the code is Ethiopian in its basis.¹⁹ As soon as final drafts were adopted by the Codification Commission, they were sent to Parliament, discussed and adopted before being submitted for Imperial sanction. Before Parliament, some changes to take into account Ethiopian traditions were also introduced. For example, corporal punishments, which had been suppressed by the commission, were re-established by the legislature.²⁰

The purpose of Ethiopian codification was two-fold; this is clearly stated in the prefaces to most codes. First of all the traditional aspect of codification was met—that is the desire to establish a perfect knowledge of the law among all people interested, by providing them with a clear, systematic, compact, complete and authoritative statement of the law. But what may be called the programmatic aspect of codification was also dealt with, since the codes were at the same time a definition of the framework toward which the country has to move if it wishes to develop into a modern state in the full sense of the word. The institutions dealt with in the code were conceived as an ideal goal which was far from being reached, but would be met when Ethiopia achieved its complete political, social and economic evolution. In a sense the path was laid for coming progress. And this is clearly reflected when one considers the contents of the codes: they immediately strike one as being more suitable for the Ethiopia of tomorrow than for the Ethiopia of today.²¹

Obviously the completion of codification was to have other far-reaching consequences as far as Ethiopian legal development was concerned.

First of all, everything which had preceded codification was now out of date, having been either embodied in the codes or rejected. This is true, for example, of the Fetha Negast and the customary laws in force in the country. The fundamental principles of the Fetha Negast are to be found back in the codes where they represent Ethiopian tradition, alongside those parts of customary law which have been kept. As for the rest, it has been declared void, except for a transitional period in civil matters.²²

19. On the originality of the Civil Code, see David, *op. cit. supra* note 3, at 675-77.

20. See Graven, *op. cit. supra* note 18, at 216.

21. That desire to establish a modern system of law has been emphasised in the prefaces to the codes and by the draftsmen of the various codes (see, e.g., Graven, *supra* note 18, at 214-16), but nowhere as well as in David, *supra* note 15, esp. at 195, 203.

22. See Arts. 3358-67 of the Civil Code dealing with transitional provisions and the remarks by Professor David on the reduction in number of these provisions by the Ethiopian

On the other hand, the codes, having been promulgated in the same way as all other legislation, are, in principle, binding on the courts. The courts should thus lose, under strict code doctrine, the wide powers they had in the previously uncodified system where they were the chief artisans of legal change. And this point is more obvious when one knows that some codes (this is specially true for the Civil Code), have purposely been drafted in a very detailed and precise way in order to avoid too much flexibility in judicial interpretation.²³ Of course one may not hope to bind the courts, in the strictest sense of the term, by the drafting of a code; such illusion was already absent in the mind of the most important codifiers of the early nineteenth century and with the passing of time exegetic methods have definitively been considered out of date. Nevertheless the idea that the code has to be followed wherever it sets rules cannot be ignored and is a fundamental basis of any system resting on codification.

These then were the developments, during the second period, as far as the sources of law are concerned. One could say that the match between common law and codification influences was still to be played since the codes had to be enforced by a judiciary whose approach was mostly that of common lawyers, reinforced in this attitude by the Ethiopian tradition on the role and importance of justice or equity in administration of the law.

C. Legal Education

During this period a new factor has been introduced in the form of legal education. To begin with, it seems that a French-speaking law faculty was to be established in Addis as part of the University. This would obviously have fitted with the fact that all codes, except the Code of Civil Procedure, had been drafted in French, and nothing at that time (the 1950's) would have prevented the latter being drafted in that language as well.²⁴ That such a step was considered is fact, although one can immediately see the problems which would have resulted in a country where English had been the second language for ten years and where (apart from Amharic) all legal transactions were taking place in that language. Another problem would have been that of the integration of a French-speaking faculty into an English-speaking university, the Haile Sellassie I University in Addis Ababa. Finally, so far as the recruitment of students was concerned, it would undoubtedly have been limited by the necessity of finding not bilingual, but trilingual persons, *i.e.*, students having a good knowledge of English and French, as well as Amharic. The only possible solution to such problems would have been a return to the pre-war situation with French as a second language; but this could not, for obvious reasons, be considered.

An English-speaking faculty of law was finally established in the academic

Parliament (*Id.* at 201); the original transitional provisions numbered 84 articles. The references to the Fetha Negast can be found in the prefaces to the Civil and Penal Codes.

23. See David, *op. cit. supra* note 15, at 203, where he emphasises the inconveniences resulting from equity as a source of law (when one cannot rely upon a first-class judiciary).

24. See note 15 *supra*, on the offer made to Professor David to draft the Code of Civil Procedure as well.

year 1963-64 with the full support of the Ford Foundation and of American universities which provided most of the senior teaching staff. Meanwhile an effort had been made to train a few Ethiopian lawyers abroad, namely in McGill University, on the assumption that there at least teaching could be provided in English in a mixed jurisdiction system.²⁵ The exact number of graduates of McGill is not known by the author, but it seems that it can be estimated at approximately twenty persons, all in charge of higher judicial or administrative functions connected with the Ministry of Justice.²⁶ But of course the main effort must now be to concentrate on the first Ethiopian faculty of law in which Ethiopian lawyers could get a full introduction to their national legal system. The Law Faculty of Addis Ababa has graduated its first students in summer 1966 and one would, under present circumstances, expect fifteen to twenty law graduates to come onto the market each year.

If we turn to the main characteristics of the teaching of law in Ethiopia today, the following three points must be emphasized: (1) At the higher level, that of the LL.B., teaching is exclusively in English. Fortunately a constant effort is being made by most teachers to take into account problems which would arise from discrepancies between the English and the Amharic versions of the texts. Nevertheless they can only have a limited influence, as most teachers are totally unfamiliar with Amharic, and especially legal Amharic; while many students only consider it for what it in fact is—their second language. The result is that the students cannot be expected to master it sufficiently well to really contribute to the building up of a true Ethiopian legal science in the national language of the country. What would be needed here is in fact some record of the activity of the Codification Commission reflecting the excellent work done by the commission in translating into Amharic the drafts submitted by foreign experts. If one is to believe Professor David, “it was necessary for the Commission, in many instances, to coin new expressions”²⁷ sometimes borrowed from the Geez and still comprehensible to Ethiopians of today, and also to adapt the way in which western thought develops to the way in which Amharic thought does. Without such record, students and teachers are obliged to repeat the same task, without unfortunately possessing the talents and experience which characterized the members of the Codification Commission. This is thus the place to emphasize the importance of interdisciplinary studies for the development of Ethiopian law. Without the contribution of linguists, and this cooperation has already been requested, there is no hope of building up a true Ethiopian legal system which will possess that essential of all legal systems—a language of its own.

25. The fact that Ethiopia was considered a mixed jurisdiction, on the same footing as Louisiana or Quebec, from the very moment legal education was first considered, is also a clear indication of the strength of the common law tendency in the country.

26. Since these lines were sent to the printer, the author was able to collect some information on these graduates from McGill University; their total number was 12.

27. *Op. cit. supra* note 14, at 199.

(2) Ethiopian law is being taught by means of the case method favoured in many American law schools. This method is largely foreign to European systems, where more emphasis is probably put on the analysis of the inner structure of the codes and on the necessary links which exist between each of their parts. This lack of a rigid articulation in the teaching of the codes is perhaps the first point which strikes most European lawyers when they are confronted with the education being given the students in Addis Ababa.

This is obviously more striking to those who, having to teach in the second or the third years, fully realize the effects of the case method on the students. One finds that the code is considered rather like a corpus of articles from which the party tries to fish a suitable argument by finding some analogy between the case he has to deal with and the article of the code, but without too much consideration for the exact place of that article within the structure of the code. This is perhaps a common mistake made by many beginners in a code system, but one cannot help feeling that it is accentuated rather than cured by case method teaching. This was in a sense foreseen by Professor David when, referring to the necessity of the *Institutes of Ethiopian Civil Law*, he justified them by the necessity "to prevent one from devoting himself to the letter of dispositions considered separately without considering their context."²⁸

(3) This lack of a general idea as to the method by which the best use can be made of a code is reinforced by the complete lack of any suitable manual (with a few exceptions) which can provide the student with a systematic, clear and concise view of the law of Ethiopia, or, at least, of some of its parts. The faculty is making a great effort to remedy the situation and to prepare manuals of this kind, but obviously these cannot be written in a day so it will be some time before they can be available in the field of civil law (to give just one example). One must stress here that the teachers of Ethiopian law are confronted with the enormous task of mastering a totally new system of law themselves before explaining its intricacies to the students. One may say that in the jungle of Ethiopian law, students and professors are virtually on the same footing. This need for manuals (as it has already been said) had been mentioned by one of the chief participants in the Ethiopian codification, Professor René David. He was insisting on the abstract and schematical aspect of the code and on the fact that "a number of judges are disoriented by the new codes that they have to apply."²⁹ He also mentioned the usefulness not only of the very important and detailed alphabetical tables which had been omitted in the English and Amharic versions of the Civil Code, but also of the commentaries drafted by him on each part of the code; unfortunately none of these documents are at the present time accessible to legal scholars in Ethiopia, and the same is true

28. *Id.* at 190 n.4.

29. *Id.* at 190 n.4, 196, 198. The announcement made in note 7 on page 196 seems unfortunately not to have been followed in reality. The tables, as far as we are informed, have never been published in the *Gazeta*.

of parliamentary records where some useful commentaries could certainly be found.

The conclusion which comes naturally to mind is that the present tendency of Ethiopia to grow into a common law system in spite of its codes is likely to continue in the foreseeable future. Young lawyers trained by common law teachers according to common law methods are likely to carry on the present tradition of drafting court decisions. This has little in common with the approach to law and style of judgments one would expect in a code country.

It could be said of course that a remedy to the present situation can be found in using foreign documentation and foreign manuals to overcome the temporary lack of genuine Ethiopian explanatory sources. Excellent French or Swiss manuals or treatises could certainly be used, but seldom are. Here also the obstacles are considerable.

First of all most of these books are unintelligible to most students as they do not read French (to take only the example of that language). An attempt has been made by the Law Faculty in Addis Ababa to provide the students with a reading knowledge of that language, but the results in this direction have proved rather disappointing despite all the efforts made. It must not be forgotten that the teaching of French at the university level comes rather late. In addition it means, for many students, a fourth language, since Amharic and English have often already been added to their native language. In any event to acquire a satisfactory mastery of legal French in order to read treatises and grasp the inner structure of court decisions is no easy task. Thus it is not to be wondered that the results are not the ones hoped for by the faculty. As things now stand, there seems little likelihood that Ethiopian lawyers' cases will contain, in the future, any more references to foreign doctrine than do present papers prepared by Ethiopian students.

Besides, one could justly challenge the relevance of French or Swiss doctrine so far as contemporary conditions in Ethiopia are concerned. There is such a difference between the conditions in developing Ethiopia and those in either France or Switzerland today, while all the political, social and economic background which justifies legal development is so utterly foreign to Ethiopian conditions, that one does not see, in general, what aid foreign doctrine could bring to the solution of Ethiopian problems.

One could also justly point out that the Amharic text of the Civil Code, being the only official one, even if it has the same meaning as the French text from which it was inspired, is different in its wording and phrasing. As a result, many foreign commentaries on the French original are inadequate.³⁰

Finally, Ethiopians have a deep sense of their own personality and tend to

30. The author has been able, while teaching Ethiopian law, to verify how much versions of the code differ from each other. Professor David himself admits that "it is concerning the nuances only that the Amharic text can appear different from the French text." (*Op. cit. supra* note 15, at 199). But when one knows the importance of nuances in law, one realizes the validity of the argument against the use of foreign doctrine.

consider the application of foreign doctrine to their country as an intellectual encroachment. They do not wish, and here one must agree, Ethiopian law to develop along lines other than those specifically Ethiopian, harmonizing as much as possible with Ethiopian tradition and genius. One is very far from the situation envisaged by Professor David when he wrote: "Il leur a paru nécessaire bien au contraire de rattacher le droit éthiopien à un système de manière que les Ethiopiens puissent bénéficier de la science étrangère"³¹

III. CONCLUSION

Thus the stage seems to be set for the development of a common law system in Ethiopia, since it cannot be seen how the civil law influences which are to be found in the codes could possibly outweigh the common law influences of both tradition (even if the tradition is a recent one) and legal education. The only possible way of reversing that trend would be to put all legal education concerning the civil and penal codes into the hands of civil lawyers, and this seems unlikely in the near future.³² But, on another hand, nothing is settled yet in a fluid situation where the impression of fluidity is reinforced by a recent decision of the Supreme Court indicating clearly that even the basic point, the hierarchy of the sources of law, is not yet fixed.

In that decision,³³ the Supreme Court decided unanimously to depart from a strict provision of the Civil Code (Art. 881) in order to ensure that justice was effectively done. This was a contest of the validity of a will which had not been witnessed by four witnesses, but by three only. The Supreme Court reversed a decision of the High Court declaring the will to be void for lack of a substantial requirement imposed by the code. The Supreme Court considered that, since the intention of the deceased was clear in the light of available evidence, that intention alone had to be given effect in spite of all formal requirements set out in the code. In a code system, and also in a system where Articles 108 and 110 of the Ethiopian Constitution³⁴ are construed narrowly, such a decision is illegal as being contrary to a clear and definite provision of legislation. But in a developing system, where judges are not only entrusted with deciding cases according to legislation, but also with contributing actively to the legal development of the country, one cannot help feeling that the decision of the Supreme Court should rank among those which would ease the contact between modern legislation and an unsophisticated society. This case is also interesting not only from the point of view of the conflict between case law and legislation; it is

31. *Op. cit. supra* note 3, at 669.

32. Accordingly, if one can agree with Professor David, *supra* note 3, at 669, that the Ethiopian Civil Code belongs to the Continental or Romano-Germanic family, the same would not yet be true for the Ethiopian legal system.

33. See 1 J. Ethiopian L. 26 (1964).

34. *Revised Constitution of the Empire of Ethiopia* (Addis Ababa 1955). These articles provide that the courts must decide cases according to the law; thus the controversy could be over the exact meaning of the word "law" as here used. In favor of such narrow construction, see Sedler, R., *The Chilot Jurisdiction of the Emperor of Ethiopia: A Legal Analysis in Historical and Comparative Perspective*, 8 J. African L. 71 (1964).

also a clear indication that the traditional Ethiopian sense of justice is still an important component of the contemporary Ethiopian system: according to it, *summum ius* should never be *summa iniuria*.

If such attitude became part of the current practice in the Supreme Court, the latter would in fact be the organ through which flexibility would be introduced in the development of the Ethiopian legal system. The effect of such decisions on the lower courts would be immediate as there is a growing tendency to consider that they are bound by the decisions of higher courts.³⁵ This could be the best way of overcoming the difficulties in the introduction of modern codes into underdeveloped countries. What could be added to such doctrine is the wish that these decisions would only be taken by all divisions of the Supreme Court sitting together, in order to ensure unity within the court on such important decisions. This doctrine would also mean a wide interpretation of Articles 108 and 110 of the constitution by including within the law (as used in these articles) these decisions taken by the Supreme Court in plenary session.

Finally one could not say that such a doctrine of the role of the Supreme Court would prevent the codes from having their full effect. Four of the reasons underlying the Ethiopian codification seem here to be essential. The codes should, first of all, establish a unified Ethiopian law in a country where previously dozens of customary codes were in force. One does not see how these powers of the Supreme Court would conflict with national unity: in fact, since the times of Emperor Menilik II, it seems that the Imperial Judges have been progressively developing a true Ethiopian legal tradition. A reflection of this tradition can be found in what we have called the *Digest of Ethiopian Case-Law* which contains more than 7,000 decisions by these judges in civil matters and which was prepared for the use of the Codification Commission.³⁶ The knowledge of the law is another objective of codification. Again those few selected cases handled by the Supreme Court could easily be published and made known to the public so that they would progressively become part of editions of the codes. Another point on which some draftsmen have insisted, when supporting the Ethiopian codification, is the necessity of fighting the arbitrariness of the judges.³⁷ One has the feeling that, at the level of the Imperial Supreme Court, such argument is without validity and cannot be taken into consideration. Finally, to consider a last aspect of codification, one cannot say that wider powers vested on the Supreme Court would impede the programme set up by the legislature for the development of the country. It must be admitted, still, that these powers could, in some cases, slow down such development, due to the conservative attitude of the court. On the other hand, the main justification for the attribution of these wider powers is precisely the need for an organ which will help to ease the transition of the Ethiopian society of today to the Ethiopian society of tomorrow.

35. *Id.* at 75 n.3.

36. The author's opinion is that the *Digest* contains clear evidence of the existence of Ethiopian law before codification.

37. See David, *supra* note 15, at 188, 203.

But the main obstacle to vesting these wider powers on the Supreme Court is that such powers already exist within the jurisdiction of his Imperial Majesty when he sits in Chilot.³⁸ As long as this imperial prerogative will exist (and all evidence tends to show that it will exist as long as the present form of the Ethiopian State will), one does not see the point in vesting on the Supreme Court more powers than the ones it has under the constitution as the Supreme Court of the Empire. The only problem would then be the precedential effect which should be given to judgments in Chilot, as these cannot for the moment be included in the provisions of the above-mentioned article of the Court Proclamation in 1962.³⁹ But this seems to be a minor matter and could be decided by the courts themselves.

Assuming that such development is possible and the building of such a system desirable, one must pose a last question and that is: should there not be in Ethiopia today a permanent organ which would have as its sole task to advise on the development of the law of the country with the help of all interested people, whether they be officials of the Ministry of Justice, judges, barristers, parliamentarians, scholars, etc? The recent steps taken in Great Britain in establishing the Law Commissions for England and Scotland⁴⁰ tend to prove that it is desirable to put in the hands of a specialized body, which would refer problems and possible decisions to the government, the innumerable questions arising out of the daily working of the law. This would be a simple advisory body, but it would at least be permanently and systematically engaged with those questions and thus prepare the way for executive, judicial or even legislative action. In this way, it would not only unite all those interested, but also relieve the Ministry of Justice and the judiciary of a task which would otherwise be an abnormal burden, if it were to come on top of their normal daily activities.⁴¹

In conclusion, on the basis of a civil and penal system inspired by Continental doctrines, of a legal profession trained and practising under common law inspiration, and, last but not least, of a sense of justice and harmonious development of society arising out of Ethiopian tradition (of which Chilot is undoubtedly part), Ethiopia could build up progressively a system of its own. This would of course be a challenge to Ethiopian lawyers, old and young, and a challenge worthy of their legal tradition. What is more, Ethiopia could evolve a system which would in many cases provide an example to many developing countries faced with the same problem of modernization within a traditional society. Once more it would be the leader of Africa on a difficult path; one cannot but hope that this will be the case.

38. See Sedler, *op. cit. supra* note 34.

39. See note 35, *supra*.

40. Law Commissions Act, 1965, — Eliz. 2, c. 22.

41. In that respect one could consider a new start for the former Consultative Committee for Legislation. See Redden, *The Law-making Process in Ethiopia* (Addis Ababa 1966).