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## JOURNAL OF

ETHIOPLAN LA $W$

##  JOURNAL OF ETHIOPIAN LAW

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Vol. 14 No. $I$

March, 1989
 Facality of Law, Addis Ababa University, 1989
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Published by Faculty of Law, Addis Ababa University, 1989

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# Tewodros II and the Regime of Exra-Territoriatity 

 under the Anglo-Abyssinian Treaty of 1849
## Introduction

Tamiru Wondimagegnehu

Tewodros II of Ethiopia is probably among those leaders. whose names are associated with as much curses as praises. One of thoseacts for which he definitely deserves praise is his refusal to give in to British extra territorial right which was bequeathed to him through his victory over Ras Ali.* In its simplest sense the regime of extra-territoriality was meant to serve as a vehicle of guaranting aliens to live under the protection of their national laws even when they are in a territory other than their own.

The pretext for such an arrangement has varied through the ages. It was religious difference at first and as the vears went by the protection of other interests such as commerce and trade crept into the list. Such a special protection was needed, so it was alleged by the lackeys of the regime, because the host courtries with their inferior and retarded civilization lacked legal institutions for the protection of foreigners in a manner consistent with the requirements of civilization. ${ }^{1}$

The regime of extra- territoriatity, therefore, generally involved a so-called civilized state on the one hand and a backward one on the other. In such a deal, however, it was the so-called backward state, that was invariably the loser as it was expected to make concessions on its sovereign right in return for nothing.

The striking of such a derogative deal with one power was enough to extend the scope of the treaty to include other states not party to it. This was generally achieved through the application of the most favoured nation treatment clause contained either in previous treaties or in newly concluded ones. ${ }^{2}$ Such an arrangement was, obviously, a limitation of the sovereignty of the conceding state in more than one way. It meant, in many respects, the exclusion, of the alien community from the jurisdiction of the state in which they reside or work. It also enabled the consul or diplomatic staff of a foreign power not only to usurp the judicial power of the host state, but also to apply his own legal system in a country which at least in theory, is sovereign and independent.

Since a good part of the trade and commercial activities were conducted by foreigners, such a treaty had also the additional effect of legislating such sectors out of the control of the host state. It was, in short, a prelude to a bigger loss which in many instances had resulted in the relagation of the host stat into a status of a colony or a protectorate. ${ }^{3}$

[^9]Not all leaders of the victim states were unaware of the heinous nature of such an arrangement. Emperor Tewodros 11 of Ethiopia who reigned from 1855-1868 was one of those leaders who foresaw the evil consequences of such a deal and stood squarely to oppose it. It was the first and the earliest attempt to impose such an affront on the independence of Ethiopia. His consistency was so remarkable in that he preferred death in his own hand, rather than capitulate to British dictation.

## Background to the Treaty of 1849

An outline of the history of the treaty, or that of Emperor Tewodros is beyond the scope of this short paper. What is intended here is to discuss and point out some of the salient elements in the Anglo-Abyssinian Treaty of 1849 regarding extra-territoriality and to touch on some of the objections which were raised by the Emperor. But to do that a sketchy presentation of the background of the treaty as well as the personalities that were closely involved with it would first be in order.

The history of the Anglo-Abyssinian Treaty of 1849 is in a way a history of Walter Chichele Plowden. Wakter Plowden was born on August 9,1820 He went to India at the age of 19 and joined the firm of Carr, Tagore \& Co., of Calcutta which job he gave up 4 years later with a view to return to England. On his arrival at Suez, sometime in 1843, he met Mr. John Bell, an ex-naval officer in the British army, and on the spur of the moment decided to join Mr. Bell in an expedition into Abyssinia with the aim of discovering the source of the White Nile. He remained in Abyssinia till 1846 when he decided to go back to England via Massawa, and reached London in August 1847. His nearly five years trave in Ethiopia had gained him the acquaintance and, indeed, the confidence of some of the prominent chieftains of the time. Ras Ali and Dejach Wube were among them. These two powerful chieftains were competing for the position of king-maker-a position that not only gave the powerful Ras to decide on who should be the king but also to act in the name of the king without even caring to consult him, Circumstances were in favour of Ali in the struggle, and upon his departure in 1846 Plowden undertook to act as All's emissary to Britain. He was accompanied by Aleka Desta as an envoy who, it is said, refused to proceed to London from Cairo after his bitter experience of shipwreck in the Red Sea. ${ }^{4}$

Ras Ali's message was not serious in content, so much so that he did not see the need even to put it on paper. With the envoy unwilling to go to England and with the small presents intended for the Queen laying in the bottom of the Red Sea, the task of conveying the oral message to great Britain was entirely left to Plowden. The purpose of the mission, as far as Ras Ali was concerned. did not pass from a mere expression of courtesy. This is evident from Plowden's own memorandum, which states in part, ${ }^{5}$

It is not to be supposed that the Ras could have in view any more definite result than a certain interchange of courtesy, the consequent facilities and protection that would be afforded by him to English travellers.
But from the point of view of Plowden the mission had definite intent and result. In the first place it had enabled him to travel to England and back at the expense of the British government. In the second place it had augmented his chance of having audience with the high ranking officials of the Foreign Office providing him thereby with the residual opportunity to advance his own views on what Britain should do about Ethiopia and possibly to press for it. In the end it was Plowden the British and not Plowden Ali's envoy that emerged. Great Brits in was quick to act. Sometime in 1847 Palmarstone had decided to appoint Mr. Plowden British Consul in Abyssinia with his residence at Massawa.

After further consultation Plowden was given his directives and assignments and was dispatched in January 1848 to Abyssinia, via Massawa, with a letter for Ras Ali and draft of the treaty to be concluded "without any material aiterations". Plowden was thus expected to accomplish mainly two tasks. The first was to establish British consulate in Massawa and to serve as the first British consul in Ethiopia from there; and the second was to get Ras Ali to agree to the terms of the treaty "drawn up in the name of the Emperor or in the joint name of the Emperor and the Ras" and to have it "signed by both". ${ }^{6}$ Plowden had equally succeeded and failed in both. His task was a success vis-a-vis. Ras Ali, but it was a complete failure vis-a-vis Emperor Tewodros.
in as much as the establishment of the Consulate as well as the designation of a Counsul did not arise from any bilateral accord between the two countries, it was a unilateral act of Great Britain. The effect was, however, greatly mitigated by the fact that the Consulate was to operate from Massawa, a territory then under Turkish jurisdiction.

Although Plowden was appointed the first Consul he was by no means the first to advance the idea of Consulate in Abyssiina. Charles Beke claims the credit for having put forward the idea as far back as 1846. According to him the "idea did not originate in any political object but in consequence of a suggestion made by me in 1846 as to the obtaining of agricultural labourers from Abyssinia". 7 Palmerston hinges the reason on trade, and when Plowden insisted that the Consulate be established on Ethiopian soil, he is said to have rejected the proposal in these words: "All we want is trade and land is not necessary for trade. "s

But, the purpose for establishing the Consulate, or the tasks assigned to the Consul, seem to be far from non political or simplistic as claimed by Beke and Palmerston. Past and subsequent events provide ample evidence to suggest otherwise. The inter European rivalry, specially between Britain and France,
which was evident from the intense diplomatic as well as religious activities in the courts of several chieftains from Shewa to Tegrai had no doubt their share to play. This was how Viscount Valentia, formerly Sir George Annesly, raised the alarm as early as 1804 for Great Britain against the impending French expansion in the region.

> The crescent of Mohammed no longer indeed, forebodes danger to christanity but the equally terrible eagles of regenerated France threaten universal destruction to ancient establishments, and it is apparent that their formidable master has more particularly formed his ptans against the eastern Empire of England. It was for the furtherance of this object that Egypt was conquered - and it is a continuation... to cultivate the friendship of the Arab powers. Abyssinia is of infinitely more importance than these, but fortunately. France knew not that Abyssinia was accessible."

The Viscount urged Great Britain to take advantage as the first comer by establishing relation with Abysisinia which in his words "will forever shut out the French, but if we should neglect the opportunity, they will profit by our folly... "The taking of Aden by the British in 1839, and the entrenchment of the Catholic Mission in northern Abyssinia as well as the intense activity of the French around Zeyla and Tajura were not signs that could help to mitigate the feud either.

This is also what one learns from the indignant reply of Plowden's brother against charges of breach of duty levelled at Plowden posthumously by officials of the Foreign Offce. According to him,

> "The duties of the Consul were to watch and counteract foreign intrigue-that of France especiaily, to keep peace between Abyssinia and Egypt; to obtain the abolition of slavery and to estabish and promote commercial intercourse between Great Britain and Abyssinia." 10

At any rate, whatever may be the motive, Plowden was back at Gondar early in 1848 not as a traveller as theretofore he was, but as Consul of the British Government, and of course with a definite assignment.

Plowden's report to the Foreign Office indicates that he did not meet any difficulty in presenting the gifts he was carrying for the Ras or in having himself accepted as British Consul in Abyssinia. Nor was he challenged on the content of the treaty which was unifaterelly drafted by the Foreign Office.

One problem in connection with it was to track down Ras Ali to enlighten him on the purpose and content of the treaty. Plowden states that he was greatly assisted by his fellow countrymen John Bell who, having earlier enrolled himself in the service of the Ras, was holding a position of some prominence.

Finally, after 8 months of wandering with the Ras accompanying him on his various campaigns. Plowden was able to have the treaty signed by the Ras and not by the King as directed by the Foreign Office on November 2, 1849, at a place called Ennawga, in the province of Gojam. This led Plowden to suggest to the Foreign Office that a ratification of the treaty be addressed to Ras Ali " to impress him with the reality of the transac "ion" and as a result the letter of ratification was received by Ali on 1 March $1852^{11}$.

The occassion of the signing of the treaty is vividly portrayed by Plowden as follows:
one morning, I went into his inner tent and has the treaty read to him by my scribe.
He kept taking to his favourite shoomeree about a horse that was tied in the tent and that was neatly treading me under foot half a dozen times' (we all sat on the ground, the Ras inclusive). On asking me some trifling question in answer, I begged his attention to what was being read, to which he assented, and yawned exceedingly - however, it was got through some points having been explained and dwelt upon by me. Where upon, the Ras said that he saw no harm whatever in the document: on the contrary, that it was excellent, but appeared to him excaedingly useless, in as much as he did not suppose as Abyssinia was then constituted, that one English merchant would or could enter it in ten years. He then sealed the two copies, and gave his own to a favourite debtara, with orders to take it to Debre Tabor, and lock it up there." 12

But Ali was not there to stay for long. He did not stay long enough even "to publicly proclaim the Consulate and the principal points of the Treaty" much less witness its implementation. His demise came swiftly when his soldiers were beaten successively by the forces of Kassa, his son-in-law, who was soon to become Emperor Tewodros II King of Kings of Abyssinia. The succession of events and the incredible decline of the Ras, who had signed the Treaty with the essumed title of 'Ali Neguse Abesha' only four years ago was so fast as to lead Plowden to inform the ${ }^{13}$ Foreign Office that the Treaty with Ras Ali was " likely to become a nullity". Ali knocked out of the scene soon after, Kassa and Wube emerged as the principal contenders to fill the place vacated by him. That too was not a duel which lasted long.

The battle of Deresge between the forces of Kassa and Wube of February 1855 sealed off the fate of Wube and that of the Zemene mesafint (alias the Era of the Princess, the period between 1769-1855 in Ethiopian history). Kassa, who emerged victoricus in successive battles, was not content with the assumption of the fictiticus title of King-Maker, so much vaunted and fought for by his predecessors. He was intent to deal with it decisively and to do that he had to pierce the veil that separated the puppet king from the strong chieftain and unite them in the personality of one leader. And that was precisely what he did when he was crowned and declared himself Tewodros II king of kings of Abyssinia on or around II February 1855 at the church of Deresge. It was the beginning of the end of an old era and the commencement of new one.

With kassa installed as Tewodros at the helm of state power and with the consequent confusion resulting from the war plowden saw it fit to remind Tewodros of the Treaty he had signed with Ras Ali and of his postion as British counsul in abyssinia.

He was at the court of Tewodros in June 1855 at the behest of John Bel who having changed side was even better off under his new master.

## The Treaty of 1849

But before proceeding into that, a quick survey of the relevant part of the treaty would first be in order.

The Anglo - Abyssinian Treaty of 1849 was concluded between the two countries as a Treaty of Commerce and Friendship. ${ }^{14}$
it consisted of 19 Arricles of which the first 16 and the last Articles were substantialiy identical with the 16 Articles that constituted the Anglo-Shewan Treaty signed on November 16,1841 is between Sahle silassie king of Shewa and Captain W.C. Harris at the Shewan Capital of Angolella.

These Articles mainly dealt with matters regarding the exchange of diploma tic agents and the manner of conducting commercial relations between the two countries as well as the amount of duties to be levied on imports and the manner and the place of paying same.

But the basis of the relations between the two countries as stipulated in these Articles were far from being reciprocal containing thinly veiled capitulatory terms in favour of British interest in Ethiopia, The most derogative part of the Treaty is, however, that provided under the magic ${ }^{16}$ number 17.

The orignial text of the treaty was made in English and Amharic with both versions appearing side by side on the same pages. The treaty contains no clause or clue as to which of the two versions should prevail in case of conflict.

But conflict, there surely was ! And that appeared in the very heart of Art 17 in a manner that compromised the judicial power of the British consul.

The beginning and the last parts of the Article are remarkably in agreement in both languages. But as if by design, the part dealing with the second jurisdictional power of the consul appearing in the middle of Article 17 of the Amharic text was simply the antithesis of the English version. According to the Amharic text was simply the antithesis of the English version. According to the Amharic version that part ran as follows:
. . and in all cases when disputes or differences shall arise between British subjects or between British subjects and the subjects of Abyssinia or between British subjects and the subjects of any other foreign power within the dominions of His Majesty of Abyssainia, the Consul of His Majesty of Abyssinia or other duly appointed officer, shall have power to hear and decide the same. (Emphasis added.)
Two consuls seem to have been anticipated according to the Amharic version of Articie 17.

The first an English Consul, to try and adjudicate any crime committed by a British subject any where in Abyssinia, and the second a consul of His Majesty of Abyssinia to hear and decide disputes or differences involving British subjects inter se or between British subjects and the subjects of the Abyssinian king or between British subjects and the subjects of any other foreign power.

Construed strictly this allocation of judicial power came close to drawing a line between criminal and civil jurisdictions. Accordingly, the judicial power of the British Consul went as far as and no further than hearing and deciding criminal cases in which British subjects are involved. Shorn of his jurisdiction over civil cases the British Consul as portrayed in the Amaharic version, is by far weaker and meeker compared to what was anticipated in the English version.

The hero or the crook responsible for this disparity is not known for certain. Whether it is a mistranslation, a slip of the pen or a purposeful deviation to pursuade Ali, or to accomodate his wishes is equally unknown.

Plowden's account of the signing ceremony does not shed much light on this problem. What is more, one finds no allusion to this disparity in the subsequent communication between the two government regarding the Treaty.

But then, the following points may, among others help to hint that the dis-: parity was a result of mistranslation or at any rate one not intended by Plowden

1. In the first place the Treaty was prepared in English and Plowden's mandate was to have it signed by Abyssinian rulers "without any material alternations." The Amharic version, if an intenced one, is clearly beyound that mandate.
2. The appointment of an Abyssinian Consul by the Abyssimian King as to hear and decide civil matters with British subjects appearing
paties is by all means reasonable and plausible. But the designation of such a person as consul and much more licensing him to carry out his duties,
... without any interference molestation or hinderance on the part of any authority of Abyssinia either before, during or after the litigation. . . especially by an international treaty sounds a bit too outlandish. It is difficult to anticipate other possibilities as the Treaty nowhere obliges the Abyssinian king to designate an expatriate as a consul or to. reappoint British Consuls to do the job for him .

3 Plowden, who worked so hard to get the Treaty signed by Ali, had it translated into Amharic by his own secretary. He also used the service of his secretary to have the Treaty read to Ali.

Obviously that was a golden opportunity for Plowden not oniy to put forward to Ali the Treaty as proposed in its English version but also to pursuade of beseech Ali to accept it.

This being the case it is hard to imagine that Plowden. of 'his own free will, would, right from the start, weaken his negotiating position by authorizing or instructing his secretary to soften and weaken the Amharic translation of Article 17.
4. There is equally no hint or evidence to suggest that the Amharic rendition of Article 17 is a result of a compromise between the two contracting parties. Ali, who apparently sought no aid from his councillors on the matter was, if anything unenthusiastic and least interested in the whole idea of a treaty. He had to be begged by Plowden during the discussion not to engage in triffling questions and attend to the Treaty while it was being read to him by Plowden's scribe. Having been read to Ali the Treaty
. . . was got through some points having been explained and dwelt upon by me where upon the Ras said that he saw no problem whatever in the document... He then sealed the two copies and gave his own to a favourite debtera, with order to take it to Debra Tabor , and lock it up there.

What plowden explained to Ali, or whether his explanation touched upon Article: 17 is difficult to say. It is equally hard to say whether there was a meeth ing of the minds between the two parties on Article 17 as Ail was affixing his seal at the foot of the Treaty, even though that may not have been a point significant enough to perturb Ali's passive mind. But as for Plowden he may safely assume that when he walked out of the inner tent of Ali with his sealed copy at hand, it must have been with a feeling of self- accomplishment fohaving the treaty 'got through' exactly as directed. The English version of Artir cle 17 reads as follows:

His Majesty of Abyssinia agrees that in all cases when a British subject shall be acçused of any crime committed' in any part of His Majesty's dominions, the accused shall be tried and adjudged by the British Consul or other officer duly appointed for that purpose by Her Britannic Majesty; and inall cases when disputes or differences shall arise between British subjects, of between British subjects and the subjects of His maiesty of Abyssinia; or between British subjects and the subjects of any other foreign power, within the dominions of His Majesty of Abyssinia, Her Britannic Majesty's Consul, or other duly appointed Officer, shall have power to hear and decide the same, without any interference, molestation or hinderance on the part of any authority of Abyssinia, either before, during or after the litigation.

According to the provisions of this Article the British consul or other British Officer duly appointed by Her Britannic Majesty for that purpose is empo-wered':-

1. To try and adjudicate all cases when a British subject shall be accused of any crime committed in any part of the dominions of His Majesty of Abyssinia.
2. To hear and decide all " disputes or differences,, within the dominions of His Majesty of Abyssinia.
(a) involving British subjects interse.
(b) between British subjects and the subjects of His Majesty of Abyssinia, and
(c) between British subjects and the subjects of any other foreign power.

One apparent loophole in, this Article is its failure to specifically provide the venue where a British subject should take his complaint in the event he is a victim of crime instead of its perpetrator. Considering the scope intended to be covered by the Treaty the loophole seems to have resulted from an oversight rather than an act of deference to the local judicial system

At any rate it would be most unlikely to expect that the narrow expression of the first part of this Article would have had the effect of limiting the jurisdiction of the Consul considering the fact that he was made by the Treaty an 'arbiter 'over all " disputes or differences" to which a British subject is a party.

Obviously, and for únderstandable reason, the Treaty is silent with regard to civil cases in which a British subject and the Abyssinian State are involved as parties.

The assumption of jurisdiction by the British Consul or any other designate over cases listed under Article 17 has the additiona! implication of deciding what law to apply: In as much as nothing is provided with regard to the law he is tacitly empowered to dispose all cases that appear before him in accordance with his own national law. That in short means a total disregard of the prevailing custom or legal system.

The insulation effect which results from such an arrangement for British subjects especially with regard to criminal offences is obvious. An act or omission becomes a crime not because the local law or custom makes it so, but because such conduct is declared crime under the British legal system. The net result is, therefore, not only one of jurisdictional competence to the British consul but also the application of the British standard of conduct in a locality with completely different setting. In short, a British citizen is allowed to live in Abyssinia under the legal norms of England simply because he is British, and by that fact alone he is absolved from observing the Abyssinian norm of conduct to the extent that such norm does not correspond to the British one.

This leaves no incentive to the British litigant to avail himself either of the local law or of such developed custom as resorting to shimagles (elders) to arbitrate issues involving civil or criminal cases.

The rest three instances over which the British Consul or other designate is given jurisdiction appear to foresee civil cases as the terms "disputes or differences" contained in the latter part of the Article seem to suggest.

Of these the last two give to the British Consul the right to pass judgement over disputes that directly affect the rights of persons that are not British citizens. Accordingly, the claim to jurisdiction by the British Consul over such cases is made contingent on whether one of the parties is a British subject. Hence the citizenship of the other parties as well as whether they appear as plaintiffs or respondents in the case is totally disregarded. Implied in this is also the fact that the non-British litigant had to travel to the locality where the British consul resides in order to present his case instead of availing himself of the local dispute setting mechanism. This in all probability would have had the tendency to deter several Abyssinian plaintiffs from pursuing a case against a British subject either from fear of incurring more expenses for the travel or to avoid the complications they would likely face before an alien judge. Here again the Treaty contains no hurdle to limit the discretion of the consul to apply the British legal system in the adjudication of the "disputes or differences" that are brought before him.

That part of the Treaty which purports to give jurisdiction to the British consul on nationals neither Abyssinian nor British goes even beyond the scope of capitulation as it touches upon the interests of a third power.

The Treaty, which fails to provide the applicable law, is also silent on whether or not appeal is possible from the decisions of the consul. Nor does it
provide who hears such an appeal if one were allowed. Since the consul is given the power to, hear and decide cases that fall under his jurisdiction
without any interference, molestation or hinderance on the part of any authority of Abyssinia either before, during or after the litigation . . . .
it may be reasonable to conclude that neither an appellate jurisdiction nor appeal from the decision of the Consul was anticipated by the Treaty. In addition, the wording of this provision seems to conveniently extend the jurisdiction of the Consul far beyond the realm of adjudication and stretch it deep into the sphere of execution.

- The Consul is further empowered by Article 18 of the Treaty
... To take charge of papers and property of a deceased British subject for the benefit of his lawful heirs and creditors without any interference of the Abyssinian authority . . . .

Here again no regard is made as to the citizenship of the heirs and creditors of the deceased British subject. The British Consul is once more again authorized to apply possibly the British legal system in matters that are likely to involve issues of conflict of laws.

Finally the strict observance of this lopesided arrangement is mace by Article 19 the basis of the "continuance of lasting and permanent friendship between the contracting Sovereigns." How long the Treaty was supposed to remain in force, or the manner of contracting out of the Treaty has not been provided by it.

That being the case, nothing less than mutual agreement would have ended it. And to strike such an accord one has to rely on the generosity of Great Britain which was most unlikely to be forthcoming in the circumstances

## Tewodros and the Treaty of 1849

Plowden apparently met no problem in extracting such a major concession from Ras Ali. ${ }^{17}$ He was at the Court of Tewodros in 1955 not with a view to renegotiate the 1849 Treaty or even to seek the new sovereign's confirmation on it. As far as plowden was concerned the Anglo - Abyssinian Treaty was une chose fait accompli and Tewodros was duty bound to honour it. This is what one gathers from Plowden's report of June 25, 1855 to the Foreign Off ice. The relevant part of that letter reads:

The evening before the day fixed for my departure the King sent to me to know the object of my coming. I replied that I had not come on the part of the government or in any official capacity but that as I was about to visit England, it was important that I should know and report His Majesty's desposition respecting
the establishment of a Consulate and friendly relations generally, 1 hinted also at what had been arranged with Ras Ali. ${ }^{18}$
flowden must have been taken by surprise by what the king had to say in reply to his assertive statement.
"I know nothing", retorted Tewodros, "of what Ras Ali may have done ... I have never heard of a Consulate under the former kings of Abyssinia and this matter must be referred to my council and the principal people of my court " ${ }^{19}$

Thus Tewodros had made his position about the Treaty very clear in an extremely precise manner.

His reply at once invokes negative as well as positive grounds as his defence. Negatively, he was disclaiming responsibility for a treaty of which he was unaware or to which he was not a party in the first place. The circumstances were suci that it was possible for Tewodros to be literally unawore of the Treaty. 20

Even if he were aware of it Tewodros was not ready to honour it because he was not bound by what "Ras Ali may have done." This is understandable because Tewodros, who replaced Ali by force of arms. was not ipso jure bound by a treaty obligation of the deposed Ras as if he had succeeded to him through normal constitutional process. Even if this latter argument of succession were to be disregarded Tewodros was not prepared to recognize the Treaty because he has "never heard of a Consulate under the former kings of Abyssinia'". In short he refused the request for Consulate because it appeared to him to be an "innovation" not known in the history of Abyssinia.

Thus Tewodros' disclaimer to be bound by what Ras Ali may have done as well as his refusal to accept an institution theretofore unknown in the history of Abyssinia struck hard at once at both ends leaving thereby no room for Plowden to manoeuvre.

Some of the points made by Tewodros were so anticipatory as to even counter future British accusations. Thus writing on October 5, 1865 to Colonel Staton Earl Russel states that the king,
so far from insisting on the observance of the Treaty of 1849 refused altogether to recognize that Treaty. Consut Plowden was told by the British Government in 1857 that the Emperor was bound in good faith to recognize that Treaty and if he objected to any of its provisions he should propose modifications. ${ }^{21}$

But there are no hints to justify this statement from Emperor's reply as repolted by Ploweden two years eartier: Tewodros was unequivocal about his objections to the Treaty, He had made it crystal clear in these words:

I can not consent to a consulate as I find in the history of our
institutions no such thing.

The messege of this firm stand was clearly received by Plowden, who took it to mean "Tewodros feared the clause conferring jurisdiction on the consul as trenciing on his prerogative" as reported to the Foreign office in Plowden's despatch of June 25, 1855.

No effort was spared by Plowden to extract the Emperor's approval of the Treaty as far back as 1855 . Intermediaries, in the personalities of John Bell, and Abuna Selame, 22 Head of the Ethiopian Church, were used. Direct negotiation between Plowden and the Emperor was attempted. And even territoial concession was offered. Thus Plowden states,

I had ventured to hint that the sea-coast and Massawa might possibly be given up to him on his consent.

All this to retain the Angla- Abyssinian Treaty of 1849 lock- stock and barrel.

But Tewdros' position was one of principle. He was prepared and willing to be on friendly terms with Great Britain. He, in fact had proposed to send Ambassadors to the great powers of Europe. But to this he attached one very important condition and that was 'to treat with them on equal terms." 23

In view of some of the measures taken by Tewodros soon after his accession to power, his claim to parity seems to have drawn a sympatheric stance even from Walter Plowden. Thus in his report to the Foreign Office Plowden observed,

He has abolished the barbarous practice of delivering over murderers to the relatives of the deceased, handing over offenders in public to his own executioners to be shot or decapitated

He has placed the soldiers of the different provinces uncier the comand of his own trusted followers, to whom te had given high titles but no power to judge or to punish, thus in fact creating generals in place of feudal chieftains more proud of their birth than of their monarch

As regard commerce, he has put an end to a number of vexatious exactions, and has ordered that duties shall be levied only at three places in his dominions.

All these matters cannot yet be perfect. . . He has declared that he will convert sword and lances into ploughshares and reaping-hooks, and cause a plough-ox to be sold dearer than the noblest warhorse. ${ }^{24}$

The implication of this testimony by no other person than the British Consul himself does not help to justify Britain's claim to extra-teritoriality for ts subjects. On the contrary, it implicitly removes the raison-d'etre for such an arrangement by minimizing the need to give special protection to aliens living
in Abyssinia. This meant that once in Abyssinia aliens, including Britons, were expected to live and be judged in accordance with the norms of conduct prevailing then in the country. Understandably Tewodros was not also prepared to confer on a foreign Consul the very judicial authority which he even demied his trusted generals to exercise.

In addition his refusal to acknowledge the Consul's jurisdictional right was also a direct corollary of his claim to relations with foreign powers on terms of equality. He had made it clear time and again that he would settle for nothing less than equality. Thus Plowden observed in his report to the Foreign Office.

He is peculiarly jealous as may be expected of his sovereign right and any thing that appears to trench on them.
Flowden's observation is further butteressed by a statement which Tewodros once made, presumably in jest, regarding his deat with God on this point.

I have made a bargain with God. He has
promised not to descend on earth to strike
me and I have promised not to ascend into
heaven to fight with him. ${ }^{25}$
The demands for extra-territorial right to British Consul was manifestly inconsistent with the Emperor's determination to exercise his sovereign right to the exclusion of others including even God.

The Emperor was also not unaware of the ultimate implications of such an arrangement as well as the excesses and abuses that result from it. Thus writing early in 1866 Charles Beke, who was highly knowledgeabie about Abyssinia, justified the Emperor's refusal to acceed to British terms in these words.

From his own subjects who had visited Egypt and the Holy Land as well as from travellers of other nations, he had heard of the abnormal privileges enjoyed by European Consuls in those countries and of the abuses they have often given rise to, and he was determined, and no one can blame him for it that within his dominions an imperium in imperio, like that within the Turkish dominions should not exist. ${ }^{26}$

To prove the veracity of Beke's observation one need only quate from the Emperor's own speech which he made around September 1863 on the occassion of expelling M. Lejean, the French Consul in Abyssinia, as reported by the Consul himself.

I know the tactics of European governments when they wish to acquire possession of oriental states. They first send missionaries then Consuls to support the missionaries then armies to support the Con-
suls. I am not a Rajah of Hindustan to be hambugged in that fashion. I prefer having at once to do with the armies. ${ }^{27}$
This was of course nearly three years after the tragic and untimely desth of Walter Plowden in 1860 who, having failed to strike an amicable deal with Tewodros, was on his way out to Massawa and possibly from thence to England. His departure was undoubtedly with an extremely heavy heart considering the fact that in five years he did not even manage to be acknowledged as a Consul by Tewodros much less secure any of the judicial and commercial privileges embodied in the treaty of 1849 .

The post vacated by Plowden was filled by Captain Charles Duncan Cameron whose appointment as "Her Majesty's Consul in Abyssinia" was announced in London on June 24th 1860.

## The Negotiation of a new Anglo-Abyssinian Treaty

The new Consul was despatched to Abyssinia with an introductory letter dated February 20,1862 to the King from Earl Russei. The letter failed to make even a prefunctory reference to the controversial Treaty beyond introducing the bearer as the new Consul succeeding the late Walter Plowden. 28

Even though the new Consul was to take up matters where the late Consul had left them subsequent British backsliding with regard to its policy on Ethiopia must have made things a bit complicated for Cameron to revive the discussion on the matter with full force and certainty. Then suddenly an opportunity presented itself to Cameron sometime in October 1862 while he was still in Gojam. It was a letter from Emperor Tewodros urging Cameron to leave for Massawa to find out and inform the Emperor whether he could "be able or not to pass certain Ambassadiors or Messangers" which the Emperor was anxious to send to England. Cameron was quick in repiying and this he did by a letter dated October 22,1862 written in Gojam. He also seized of the opportunity to revive the issue with:regard to the Treaty, which had remained practically a dead letter since its signature thirteen odd years ago.

The new proposal, which Cameron put forward, was based on an entirely new approach that called not for the confirmation but for the renegotiation of the 1849 Treaty.

The relevant part of that letter which is quoted at some length beiow reads as follows:

Having given your Majesty my opinion with regard to an Embassy. . . there is only one point further to discuss with your Majesty; viz., whether your Majesty wishes to avail yourself of my being here to make out a draft of a Treaty for the consideration of my queen, which if your Majesty thinks proper, can be signed conditionally, and notice of it now sent on by me while the draft itself, with the provisional signatures, can accompany your Ambassador.

I have a copy of the Treaty made through Ras Ali, with the former Emperor, which can be made the base of such a document if your Majesty wishes; and I now send it you, with certain aiternations for your Majesty's consideration.
I may observe at once that I know that the points on which your Majesty made a difficulty with Mr. Plowden on this subject were:-

1. The acceptance of a Consul.
2. If he were accepted, whether he should have jurisdiction as agreed in the former Emperor's Treaty.
On the first point, I can only ask your Majesty whether Mr. Plowden's stay here was not a positive advantage in so far as he acted as a mediator and friend generaliy, but particularly as a protector to the unfortunate Abyssinian Tribes laid open to Egyp1... Whether he did not testify his anxiety by word and deed that your Majesty... should become the sole master; lastly whether he ever showed a disposition to do any thing contrary to the interest, honour or independence of Abyssinia. I feel certain, too, that if English artisans were to come here, as I have heard is your Majesty's wish, it would be impossible for them to stay unless there was an officer of some kind either Envoy or Consul to look after them.

As regards a Consul's flying a flag, this is by no means necessary nor would my government even wish it if as I hear, your people might misunderstand it.

In regard to jurisdiction by a Consul, this is in your Majesty's hand, not ours, to decide. England wants to ensure justice and good treatment to her subjects and nothing more.

If your Majesty can explain to our government what I believe to be your Majesty's opinion viz., that such separate jurisdiction would be impossible to carry out and is also unnecessary where the laws are so mitd as in Abyssinia this would be sufficient for the present.

But it seems to me that a few hours' conversation could settle these matters either one way or the other. ${ }^{29}$
Henceforth the issue was not whether the Emperor was willing to acknowledge the Anglo-Abyssinian Treaty of 1849 but whether or not he was willing to negotiate a new treaty with Great Britain. No preconditions were set for the new deal. Nor was any reference made to the provisions of the old Treaty to obiige him to negotiate a new one. As a matter of fact the new proposal suggested that the provisions of the old Treaty with some alterations be used as a base for the new treaty and that if "His Majesty so wishes." Thus the new proposal which Consul Cameron put on the table was independent from and in no way connected to the Anglo-Abyssinian Treaty of 1849 . Implicit in Cameron's
new offer was, therefore, his acceptance of the lack of force of the old Treaty on the Emperor. That was, indeed, a major concession on the part of the government which the Consul represented and a major victory for Tewodros as well.

But the march of events did not help to see the new approach through to success. The Anglo-French alignment with Turkey-a Mosiem state, against Russia-a christian power, in the Crimean war had already made Fewodros question his simplestic view that these two European Christian powers were his natural allies in his relation with Turkey. Subsequent events did not help Tewodros to regain his confidence on these powers. In fact from 1863 on wards there were ample indications to suggest that the pendulum in British policy had swung far enough to favour Egypt and Turkey at the expense of Abyssinia.

Such vacillation in British foreign policy had even led some British officials lo question the wisdom of having any treaty relationship with Abyssinia. It was at this unfortunate moment of confusion that Tewodros despatched his letter through Consul Cameron to the Queen of England. ${ }^{30}$

The Consul having despatched the Imperial letter to the Queen via Aden undertook late in 1862 on an extended excursion to northern Abyssinia which also took him to the frontier territoxies of Egypt. Upon his return the air was rife with rumours about Egyptian armies approaching the frontiers of Abyssinia along those points. Yet nearly mine months after its despatch, there was no answer in reply to the letter which Tewodros sent through Consul Cameron to Queen Victoria. Unknown to both Tewodros and Cameron Britain had in fact decided to ignore the letter, and leave it unanswered. ${ }^{31}$ The atmosphere was thus sour with suspicion and sense of insult on the part of Tewodros when Cameron returned from his excursion around July 1863. And as if to add insult to injury Cameron, under pressure from the Foreign Office, chose that unfortunate moment to present his request to the King for permission to leave for Massawa. It was on that occasion that the King is said to have confronted the Consul with questions to the following effect. ${ }^{32}$
"Where have you been since you parted from Samuel( ${ }^{(33)}$ in Bogos?"
"Into the frontier province of Sudan."
"What for?"
"To see about cotton and trade and so forth."
"Who told you to go there?"
"The British Government."
"Have you brought me an answer from the Queen of England?"
"No?"
"Why not?"
"Because I have not received any communication from the Government on the subject."

[^10]"Because I have been ordered by the Government to go there."
"So your Queen can give you orders to go and visit my enemies the Turks and then to return to Massawa, but she cannot send a civil answer to my letter to her. You shall not leave me till that answer comes."

Meanwhile the Emperor's effort to unite and reform the country had also resulted in rebellions in many parts of his dominions. All this combined to lead Tewordros to take desperate actions that resulted in far reaching consequences. The extreme measure which he took in this regard was, however, the taking of hostages of foreign nationals including Consul Cameron who was chained on January 3, 1864, on charges of complicity with Egypt as well as for his failure to produce a letter from the Queen in reply to his message. From then on the issue was once more again changed from one of negotiating a new treaty to one of securing the release of the hostages.

Several attempts were made by Great Britain to heal the rupture for which it was partly to blame. The Queen wrote twice to Tewodros as if to atone for past errors. An Emissary consisting of three men with Hormuzd Rassam at its head was sent to negotiate the release of the hostages. Great Britain even displayed a softened heart to negotiate a new treaty should Tewodros be willing to release his hostages. But the concessions by Great Britain either did not go far enough or had come too tate to convince Tewodros to relax his hardened position. As a. result even Rassam and his colleagues soon found themselves sharing the fate of the very prisoners whose release they were supposed to secure.

Ironically Tewodros indicated at one point that the hostages, Cameron included, would be charged for their offences and be convicted in accordance with the provisions of the Fetha Neguest. ${ }^{34}$ Thus the Treaty which purported to exclude British subjects from the Abyssinian legal system and judiciary lacked even the authority to save the very Consul who was supposed to be far beyond the reach of Abyssinian law.

In this Cameron faired no better than Plowden for he too was home bound without enjoying the status of a consul much less secure for his country the realisation of the consular and commercial privileges contained in the Treaty of 1849.

As a matter of fact great Britain made no official reference to the Treaty of 1849 in its dealing with Tewodros regarding the hostages' case. It made no attempt to indicate to Tewodros that the taking of hostage of the British Consul and other British subjects was a clear violation of the terms of that Treaty. Nor did Britain invoke the provisions of the Treaty as a justification for the measure which it subsequently took to effect the release of the hostages

None of the Queen's two letters to Tewodros made specific reference to the Treaty. The first letter, which may be termed an act of intercession pure and simple on the part of the Queen, called upon Tewodros, to release his hostages as proof of this friendship towards Britain. The relevant part of the Queen's letter ran as follows,

Your Majesty can give no better proof of the sincerity of the sentiment which you profess towards us, nor ensure more effectualiy a continuance of our friendship and good will than by dismissing our servant Cameron . . . from your court . . . . ${ }^{35}$
By the time the Queen wrote her second and last letter to Tewodros on October 4, 1866 the drift of events had taken a turn for the worst. As a result Tewodros simply ignored the promise which he had recently made to release the hostages, and detained all foreigners including Rassam and company.

The Queen, therefore, invoked this time moral as well as legal grounds to justify her request for the release of the hostages. That letter which combined persuasion with dignified reproof read in part,

Your Majesty must be aware that it is the sacred duty of sovereigns scrupulously to fulfil engagements into which they may have entered and that the persons of Ambassadors such as our servant Rassam and those by whom they are accompanied are among all nations assuming to be civilized in invariably, held sacred. (We) invite Your Majesty to prove to the world that you rightly understand your position among sovereigns. ${ }^{36}$
The Treaty which was ignored by the politicians was not resurrected by men of war either. Thus we find Napier making no mention of the Treaty either in his pre-emptive letter "To Theadorus king of Abyssinia" or in his proclamation "To the Governors, the Chiefs, the Religious Orders and the people of Abyssinia. ${ }^{\prime 37}$

The hostages case was finally resolved by the famous battie of Meqdela* of April 10, 1868 between the forces of Tewodros and the expeditionary force of great Britain under the leadership of General Napier. Napier's expedition was a natural sequence in the chain of events as far as Tewodros was concerned and could not have come as surprise for him. He was then at his lowest ebb both in morele and men. What he had was also no match both in number and quality to the superior expeditionary force which had travelled all the way from Bombay with a resolve to conquer. With all odds pressing hard on him the option left to Tewodros was either to meet Napier's army in battle or to meet Napieand avoid the batte. Tewodros opted for the former and proved in deed hir preferrence "to do at once with the armies rather than to be hambugged" ins to slow submission through peaceful and yet capitulatory process. ${ }^{38}$

[^11]As could be expected it was Tewrodros who lost the battle. But in losing it he did not make himself available to the British Army to exercise that most coveted right of dictating the wishes of the victor over the vanquished.

With hind sight, it is possible that British dictation could have included the Imposition of some sort of ignominious or capitulatory arrangement in Ethiopia. But Tewodros chose death in his own hands and late on the afternoon of April 13, 1868 committed sucide rather than submit to the invading army as a ioser.

## Conclusion

Yet Tewodros was not a lone loser, nor one who lost something for nothing either. His resolve had forced Great Britain to tield 42,000 men supported by 17943 mules and ponies, 2538 horses, 1759 donkeys 8975 bullocks, 5735 camels and 44 elephants at an appalling cost of nearly $£ 9$ million i.e., $£ 5$ million above what was estimated, against less than 7000 men of his own ${ }^{39}$ In a very practical way he had made the British realize that it takes the mutual and considered consent of at least two parties to make an equitable treaty. He also had under-scored his resolve that Abyssinia was serious in its claim to treat with European powers, Britain included, on terms of equality and reciprocity.

In short his death signified at once his resolve and his defiance. These messages did not pass unnoticed by Great Britain. Thus writing soon after the war Napier stated.

The British Government (are) resolved not to retain any consular Officer in Africa for the purpose of maintaining communications with the rulers of Abyssinia. . .40

And as Rubenson rightly observed "aware of how dearly they had paid for the attempt of their Consuls to plant the British fiag in Abyssinia and so anxious to avoid similar cases in the future'" we find Great Britain actually withdrawing its consular tertacles from Abyssinia and its frontiers. ${ }^{4}$

Tewodros was dead. But dead too was the Treaty of 1849 along with 8 ritish ambitions in Abyssinia. The diplomatic activity of Great Britain that spanned over a period of two decades had thus ended in failure. But the failure had not been decisive enough to permanently deter Great Britain from seeking extra- territotrial rights for its consulate in Abyssinia.

And when Great Brirain finally succeeded in securing such a right some forty years later via the so called Klobukowski Treaty of 1908 it did so coming under the shadow of France ${ }^{42}$ and had to settle for terms that were far humbler and modest than those contained in the Treaty of 1849.

## FOOT NOTES

Fke President of the Supreme Cutr of tDRE. LIE, Facily of LAW', AAU(HSTU; LLA. Mawhester Unaversiry.
 (Oxfors, 1967), pp. 9-10t.
2. Thes the lranco-Ethopian Theate of rgos alias "The klobukowasi Treaty" provided extraterritorial right only to the Fremeh Consux in Fthiopia. Rut in the 1920 's mo fever than tencotisulates of Etropean powers were mainraining wosular courts in the country, by merely invoking the MFX ciause contained in treaties which Fthiopia concluded with their respective countries.
3. T.L. Briarly ; The law of Nations Ovford 64ticus. 667) pr. 173-174.

5. Foreign Office (PO) 40n/: pp. 7-D, quoted by Swen Kubenson; The Suratal of Ethiopian triependence, Narach, ry78; p. I2D.

7. Charles Heke; The Britioh coptioes in Ahwsinia Longmans, London 186\%), p. 19.
8. Quoted by Rubenson p.izs
9. Gearse Annesley; Vouses and Jracels to [mata,

10. Quotef by Beke, op. cir., pr 55-36.
11. Rubenson. op. cit., n. I3T-
12. lowaten, op.cit., pp. 42c-427
13. Orate? hy Rubenson, operin. f. r37.
14. For the Engish Text of the Treaty see Clive Pary: The consuldated Treaby series, Vol. 103, pp. 290-3n3.
15. Ibid, Voi. 92, rp. 272-276.
16. "Magic" hecause it was the disagreement on the provision of the ifth Article ot the Italo-Ethiopian Treaty, alias the Wichute Treaty of 1889 chat paved the way for the famous batile of Adwa between the two countries.
17. In fact as an expression of his delight with the presents Ali rewarded plowden by giving him two villages. Plowden, op.cit., pp. 396-399.

18 Report of June 25,1855, quoted by Beke, op.cit., p. 48 .
19 Ibid. f
20 This is evident from Plowden's narration which states: "He (Ali) sealed the two copies (of the 1849 Treaty) and gave his own to a favourite debetera with orders to take it to Debra Tabor and lock it up there. Now it is probably destroyed, the Ras's hows having been plundered and burnt by Dejaj Kassai in 1853., plowden, op. cit., p. 425.

21 Quoted by Beke, op. cit., p. 52.
22 According to Charles Beke" Abba Salama (a copt from Alexan ieria) was an un compom mising supporter of the protestant party (i.e. British interest) in Abyssinia in opposition to that of the Church of Rome (i.e. French interest) and he is understood to have been for several years a pensioner of that party through Consul Cameron ... and after his death for a short time through . . . his agent at Massawa., Beike, op.cit., pp. 16-17.
23 Plowden's Report of June 25 3,855, quoted by Beke. op. cit., P. 37.
24 Ibid, pp.35-38.
25 Ibid, p. 43
26 Ibid,p-54-55.
27 Ibid, p. 98.
23 Ibid,p. 67-68.
29 The letter is reproduced by Beke, op. cit., pp. 312-316.
30 The letter which was written on Oct. 29,1862 in Yebaba, Gojiam, is reproduced both in Amharic and English in

Girma Selassie Asfaw et al. ; The Amhuric Letters of Emperor Theodore of Echiopia to Queen Victoria and Her Special Envoy (oxford L'niversity press, 1979),pp. 3a-3d. f

31 The Emperor's letter was received by the Foreign Office in Feb., 863 from where it was forwarded to the India Office three months later. It remained there untill a year later and was returned on I I May 1864 by the India Office to the Foreign office without ans comment lbid, p. xil.
32. 32. Beke, on. cit. pp. 93-94.
33. Samuel was one of the King's interpreters who acconpuied Cameron during his journey to Messewa.

3-1. Tbit., p. 235 . Waidmsier describes what twok place a littie before thes at a judicial conierence in Rassam's tent scon after the prisoners were temporarily released into the custody of Rassam.
f ast week there was a bind of assize in Mr. Rassam's temt at the order of the binsw) which we of Caffat chat is Plad and our bretiona, together with the liberated prisoners, were called. The writer accusations of the king against Gaptain Cameron, M. Bardel and the missioneries Messes. Stern and Rosenthal, were Vublicly read, upon which the accused adnitted their guilt betiore the whole audience. Mr. Stern, especially said in the name of all of them, "We have done wrong against the King and we have recoved our just reward. We thank the King for having pardoaed us and we pray to Got that He may prolong the dife of His Maiesty, prosper his tingdom and subdue his enemies under him." Tewofross tid not attend the proceding. Quated by Bete, op. Git., p.210-215.
3. Nan Moorehead; The Ehe Nive (1980), p. 218.
35. Ikid, F. 232.
37. Ibid. pp. 244, 245 .
38. When Napier demainded that Tewodres sumender his person to the commander-in-chici as a contition to the hing's peacefut overture, after the first encounter between the wo Ammes Tewodros reiceted Napicis condition outrighty the these words:
"A warrior who has dandled strong men in his arms like enfants will never suffer fimself to be dandled in the arnis of others."
Quoted by Rubenson, . Lit., p p. 265.
39. Rubenson, op. cil., ए. 257.

4c. Quoted by Rubencon, ibid, p. 273.
4 r . Ibit.
42. See note 2 simpa. For the text oi the Treaty sce A. Gingola Duprey: De inamasion Ala Libreaion De STEthopic (Paris, 1955) Vol. I, Pp. 426-429.
Frons The Amharic Lethers of Emperor Thowhere of Ethopia to Oueen Vintoria ath Her Specia Eneob, by Gitma Selassie Asfaw \& David I, Appleyatd in collabontion with Bidward Iflendowf (Jublished for the Britien Arademy by Oxfori University Press, Oxford, (979) pp. 2h)
 Academy.
We reproduced the leters here becatse we think they are goot baciground documents to the ntater discussed in the main artiche (PDITOR).

# The Amharic Letters of Emperor Theodros of Ethiopia <br> to Queen Victoria and her Special Envoy. ** 

1. FO $1 / 10$, fol. 161. Theodros to Victoria, n.d.

In June 1855 Plowden had travelled to Gondar to undertake negotiations with Theodore, in particular to try and persuade him to recongize the 1849 treaty signed by Britain and Ras Ali ( ${ }^{1}$ ). Amongst other things the treaty had sought to provide for the formal appointment of a British Consul to the Ethiopian Court. Theodore, however, refused to recognize the treaty 'on the ground that it conferred judicial powers on Her Majesty's consul" (2). Nevertheless, Plowden continued to press for recognition of the treaty, though without success. By September 1857, he had even been instructed that the clause about judicial powers could be dropped if nécessary, but this, too, proved to be of no avail. In November Plowden enclosed with his despatches the following letter from king Theodros to Queen victoria in which the Emperor still avoided calling him consul.
"This letter which (is) sent by the King of Kings, Theodore of Ethiopia- May it reach the Queen of England, Victoria (3). How are you ? Are you well? I, glory be to God, am well.

I have received Mr. Plowden with love and friendship, understending that he is your envoy. That I have not sent a message until today is because I have had neither rest nor tranquillity. But now, as you are a child of Christ and I am a child of Christ, for the sake of christ I am seeking amity and friendship. Now since Christ makes me rejoice when we are at peace, I shall communicate all my joy through Mr. Plowden, ettaching to him a mian of trust, so that we may rejoice together.
2. "Fo"1/11, fol 226, Theodore to Baroni, n.d.

The death of Plowden, at the hands of the rebel chief Garred (1), eaply in 1860 had been followed, less than a year latter, by the death in battle of Theodore's other principal European companion and adviser. John Bell, known as liga-makwas Yohannes ( ${ }^{2}$ ). The following letter, written to Plowden's agent at Massawa, Raffaele Baroni( ${ }^{3}$ ), speaks of the avenging of the deaths of the two Europeans, the defeat of Theodor's main rival in the north, dajazmach ( ${ }^{4}$ ) Neguse, and reiterates the Emperor's intention of sencing envoys.
 King of kings Treciore: Nay it :each Mr. Baroni (s). How have you been ?

[^12]I, glory be to God, am well.
Good tidings: by the power of God, things have gone well for me. I have done away with the men who killed my friends, Plowden and John (Bell), and, by the power of God, I have destroyed all I found on the battlefield, excepting the women; not one did I spare. I at once pursued, went acrose, and,by the power of God, killed the thief Neguse (') along with his army in the plain at Aksum. As for you, come to me quickly. I am a man who will send the news, of $m y$ happiness which God has done for me to $m y$ friend the Queen of England; so come to me at ance, as you are the one who will teke the message on my behalf. That I have kept until now liqà - Màkwas Yohannes's and Mr. Plowden's men is because I intended that they should go together with you and with my men " ( ${ }^{7}$ )
3. Fo $95 / 721$, fol. 126, Theodore to Victoria, 29 october 1862.

In the autumn of 1862, Theodore was faced with the growing threat of a Turkish presence on three fionts. The border with the Sudan was under pressure from the Egyptians - the defeat of Neguse had brought Theodore face to face with Turkish expansion along the Red Sea coast- and in Jerusalem the Turkish authorities had sided with the Copts in a quarrel over the Ethiopian convent there. Theodore felt he had to retaliate and to defend his country and his faith. The new British consul to Ethiopia, Capitain Duncan Cameron, tried, however, to deter him from taking any action that would endanger the peace and hinted that there was an understanding between Turkey and France, the latter hoping to establish a base at Tajura. In order to clarify the situation and state his case, the Emperor decided to write to several European rulers. The following is the letter that was sent to Queen victoria and which Cameron was meant to deliver:
"In the name of the Father and of the Son and of the Holy Ghost, one God. King of kings, Theodore of Ethiopia, whom God in oneness and in Trinity has chosen and enthroned.
(2) See, p. xii, Footrote r .
(3). Sen his entry in Chi'c dell fintrea.
(4) Commenter of the Duor'; senior dignitary, court official.
(5) BN nch aive
(6) Of. Chie dell'Eritrea, pp. 2Iy-2?.

WalGa Maryam, pp. 23-4.
(7) Received 23 January 186.
orespordence, no 318 , Barmi to Pussell.

May it reach Victoria, Queen of England. How are you? I, glory be to God. am well.

Since my ancesstors, the kings, have until now offended our creator. He had handed their kingdom over to the Gallas and the Turks. But now, ever since I was born my Creator has raised me from the dust and given me power and placed me over the kingdom of my ancesstors. By the power of God, I have dislodged the Gallas. But when I told the Turks to relinquish the soil of my fathers they refused; and so, by the power of God, here I am about to struggle against them.

I formed a great liking for Mr. Plowden and for, liqa - makwas Yohannes when they told me there was a Christian monarch, a person, who loved ( fellow) Christians, and that they would introduce me to her, and when I thought that I had found your friendship.

Death is unavoidable, and so some men who hated me, intending to vex me, killed them (i.e, Plowden and Bell). But i, by the power of God, have exterminated them, my mortal enemies, without leaving a single one, my own kinsmen ( ${ }^{1}$ ). By the power of God, when seeking relations with you. I was troubled by the Turks holding the sea and refusing passage to my envoy; then Consul Cameron came to me with a letter and gifts of friendship.

By the power of God, I rejoiced greatly when | heard of your well being and your friendship. I have received the gifts of friendships which you sent me; may God reward you on my behalf!

But now, preventing me from sendnig my envoy, together with Consul Cameron, with gifts of friendship, the Turks will not let him cross the sea. So now, send to me a message that someone should receive the gifts at such-and-such a place. Consul Cameron should come with the answer for me.

You have to come forward to my aid when the Muslims intend to Proress me, the Christian ( ${ }^{2}$ ).

Written in 7355, in the year of Luke, on the 20th day of the month of Tekemt ${ }^{3}$ ) in the town of Yebaba ( ${ }^{4}$ ), in Gojiam.
(1) OI Letur 2 ahove.
(2) An English translation in the $1 P K O$, attached to this letter, renders thistailicult sentence as "Sce how the Islam (sic) oppress the Christian", which ignorts the structure of the Aminaric sentence. Rubenson, Swoival, p. 222, gives the translation. "You too, allow vourself to he oppressed with me (i.e share my sufferings) when the Muslims try to oppress me, the Christian", but see Ullendorff's review of Rubenvia in the Times Liserary Sunplement of $;$ D December 1976 where this rendering is questioneti.
A !irench translation of a copl of this krter addressed to Napoleon Ill has "Naiesze, verrezvous froidement les musulmans uppressent les Chretiens."
In our opinion $-14 \mathrm{~N}^{3}$ can, in the present context, only be an imperative, while hately (list sg. prefix-conj.) is the direct speech element introducul by $\boldsymbol{n} \boldsymbol{\lambda} \boldsymbol{\lambda} \%$ Once these aspects acr appreciated, the rest falls into place: "When the Muslim says to me, the Christian. II shali attack you', you have to come forward to my aid".
(3) 29 October 1862.
(4) Yebab (or Ibaba) lies between the disticts of A rawmeder and Damot. Iscuberg, Jictionary, p. 203: Pankhurst, p. I42.;

Dabtara Zanab, Yu-Tewodros tarih, p, 28:19.

In Witness whereof His
Majesty of Abyssynia has hereunto affixed his seal this first day of March in the year of our Lord 1852. Corresponding with the Abyssynian date the twentysecond day of Yekatteet in the year of our Lord 1844.

Treaty<br>of<br>Amity and Commerce<br>between<br>Great Britain and Abyssynia

Whereas commerce is a source of great wealth and prosperity to all those nations who are firmly united in the bonds of reciprocal friendship; and whereas the conclusion of a Treaty of perpetual Amity and Commerce between Abyssy nia and Great Britain, which has already been desired by their respective Sovereigns would tend to the mutual advantages of both countries; and whereas it is desirabie that the conditions should be specified whereupon the Commercial intercourse betwixt the two nations should be conducted; now it is hereby declared done and agreed as follows; between Welter Charles Metcalfe Plowden Esquire, He Britttanick Majesty Consul to His Mejesty of Abyssynia duely empowered to that effect by Her Britanick Majesty and by His said Majesty of Abyssynia on the other part.

## Article 1

A firm free, and lasting friendship, shall between His Majesty of Abyssynia and His Successors on the one part, and Her Most Gracious Majesty Queen of the United kingdom of Great Britain and Ireland, and Her Successors on the other part.

Article II.
For the purpose of preserving and strengthening the friendly relations subsisting between the two nations His Majesty of Abyssynia and His Successors shall receive and protect any Ambassador, Envoy, or Consul, whom Her Brittanick Majesty or Her Successors may see fit to appoint; and shall preserve inviolate all the rights and privileges of such Ambassador, Envoy or Consul.

Article III.
Her Brittanick Majesty and Her Successors will in the issue manner receive and protect any Ambassador, Envoy, or Consul, whom His Majesty of Abyssynia, or successors may see fit to appoint, and wifl equally preserve inviolate all the rights and privileges of such Ambassador Envoy, or Consul.

Article IV.
His Majesty of Abyssynia engages to grant to the subjects of Her Brittack Majesty, in and to the produce and commerce of Her Dominions all favrous,
privileges, advantages, or immunities, either as regards duties, imports or charges or in any other respect whatever which His Majesty of Abyssynia has already granted or may hereafter grant to the subjects, produce or commerce of any other foreign country.

Article V.
An import duty of five for every hundred and no more may be levied and received by His Majesty of Abyssynia and His Successors upon all goods and merchandize imported by British subjects into the kingdom of Abyssynia for sale either therein or in the countries beyond.

## Article VI.

This import duty of five for every hundred shali be assessed upon the current value of the merchandize at the market place of Gonciar and shall be paid at the rate of five for every hundred either in kind or in specie at the option of the merchant.

## Article VII.

When said import duty shall have been duly paid, the importing merchant shall be at full liberty to dispose of this goods at any place or places within the territories of Abyssynia without any license being required for the removels of the same and without any prohibition restraint or further duty or import of any kind being imposed upon the buyer, and the importing merchant may if he pleases carry away such goods to any other country or place, without any license being required for the removal of the same and without restraint or molestation or the payment of any further duty or import whatever.

## Article Viti.

British Merchants shall be at kiberty to purchase without the territories of Abyssynia all such commodities as they may think proper to buy whether such commodities are the produce of those territories or have been imported into those territories from other countries; and the said merchants may freely export the same without the payment of any duty whatever.

## Article IX.

The subjects of His Majesty of Abyssynia shall have in the United King dom the advantages which are aiready enjoyed or which may hereafter be enjoyed by the subjects of the most favoured nation; and no higher or other duties shall be imposed on the importation into the United Kingdom of goods the produce of Abyssynia, than or shall be payable upon the like goods the produce of any other foreign country imported in.

## Article $X$

A commercial intercourse shall be delivered and encouraged betwixt the subjects of Abyssynia and of the countries beyond that kingdom on the one hand and the subjects of Great Britain on the other.

Article XI .
In order to increase and promote commerce between Abyssynia and Great Britain, His Majesty of Abyssinia and His Successors shall encourage Merchants of all Nations to bring the produce of the interior of Africa into the Dominions of Abyssinia.

## Article XII.

With a like view Her Brittanick Majesty and Her Successors will protect British Merchants in importing into Abyssynia such articies as may be needed therein.

Article XIII.
For the better security of Merchants and their property His Majesty of Abyssynia and His Successors and Her Britannick Majesty and Her Successors, will respectively to the best of their power endeavour to keep and to secure the avenues of approach betwixt the sea coast and Abyssynia.

Article XIV.
With a view to promote and encourage reciprocal intercourse between the subjects of the Two Nations respectively, His Majesty of Abyssynia engages for himself and His Successors that no hindrance or molestation shall be offerred to British travellers whether residing within the territories of Abyssynia or passing through them for the purpose of visiting the countries beyond but such travellers shall be protected both as to their persons and as to their property.

Article XV.
The effects belonging to such traveliers, and not intended for sale shall not be liable to duty of any sort, and shall in every respect be held to be their personal property and to be inviolable.

Article XVI.
The subjects of His Majesty of Abyssynia shall meet with no hindrance or obstruction whilst residing in any part of the dominions of Her Britannick Majesty and shall not be prevented from proceeding beyond these. dominious at their pleasure.

Article XVII.
His Majesty of Abyssynia agrees that in all cases when a British subject shaII be accused of any crime committed in any part of His Majesty's dominions, the accused shall be tried and adjudged by the British Counsul or the officer duly appointed for that purpose by Her Britannick Majesty and in all cases when disputes or differences shall arise between British subjects or between British subjects and the subjects of His Majesty of Abyssynia or between British sub. jects and the subjects of any other Foreign power, within the Dominions of His Majesty of Abyssynia Her Britannick Majesty's Consul or other duly appointed officer shall have power to hear and decide the same without any interference, molestation or hindrance on the part of any authority of Abyssynia either before, during, or after the litigation.

Article XVIII.
If any British subject shall die in the territories of His, The British Consu or in his absence his representative shall have the right to take charge of the papers and property of the deceased for the benefit of his lawful heirs or creditors without any interference on the part of the Abyssynian authorites.

## Article XIX.

Finally it is agreed that upon a strict observance of all the foregoing articles and conditions shall depend the continuance of a lasting and permanent friendship between the contracting sovereigns.

In witness whereof the present Treaty has been signed and sealed by the above named Water Charles Metca!fe Plowden Esquire and by His Majesty of Abyssynia.

Done at Ennowga the second day of November in the year of our Lord one thousand eight hundred and forty-nine corresponding with the Abyssynian date, the twenty-fourth day of Tekumt in the year of cur Lord one thousand eight hundred and forty- two.

Walter Plowden.
His Majesty of Abyssynia hereby certifies that he had received from Walter Charles Mercalfe Plowden Esquire Her Britannick Majesty's Consul in Abyssynia, the Ratification, by Her Mejesty the Queen of the United Kingdom of Great Britain and Irelend, of the Treaty of Friendship and Commerce concluded and signed between Her Britannick Majesty and His Majesty of Abyssynia on the 2nd day of November 1849 corresponding with the Abyssynia date the 24 th day of Tekumit 1842.

In Witness whereof $H$ is Majesty of Abyssynia has hereunto affixed his Seal this the First day of March in the year of our Lord 1852, corresponding with the Abyssynian date the twenty- second day of Yekkateet in the year of our Lord 1844.

# THE LAW MAKING PROCESS IN ETHIOPIA: <br> Post - $1974^{1}$ <br> Part One <br> Law Making <br> Under the Provisional Military Government of Ethiopia 

Shiferaw Wolde Michael *

This article tries to depict the process by which law was made in Ethiopia by the Provisional Military Government. In terms of time span, it covers the period between September 12, 1974 and and September 12, 1987.

The process of lew making generally involves several stages-intiation, elaboration and coordination,enactment and signing and publication. We will tackle the topic in light of these items.

Most countries have written constitutions and these constitutions usually regulate the making of laws-who makes them and the rules or procedures to be followed by the law maker when it (in the case of a parliamentary assembly) or he (in the case of a monarch) makes laws. This was true of Ethiopia from the early 1920 s up to September 12, 1974.

The provisional Military Administrative Council did away with the Government of Emperor Haile Selassie I and assumed full government powers on September 12. 1974, and by Proclamation No. 1/1974 suspended the Constitution of 1955. ${ }^{2}$ The Chamber of Deputies and the Senate (Parliament) were also dissolved. ${ }^{3}$ Because of this the Constitution of 1955 renders no help in showing how laws are created in Ethiopia for the period after September of 1974.

The Provisional Military Administrative Council (Derg) has not issued any law that directly and exclusively deals with the process of making law. There are, however, some laws that shade some light on the subject. The most important of all is the Redefinition of the Power of the Provisional Military Administrative Council and The Council of Ministers Proclamation No. 110/1977. Article 5(6) of this Proclamation provides that the Congress ${ }^{4}$ of the Derg issues Froclemations. The power of enacting primary law (i.e. Proclamations) belonged to the Congress of the Derg. From Article $21^{5}$ of the same Proclamation we know that Ministers as well as Commissioners were given power not only to initiate but also to enact regulations. Normally regulations are subsidiary legislation. This is a very common practice. For example the Trade Unions Orgnization Proc. lamation No. $222 / 1982^{6}$ empowers the Minister of Labour and Social Affairs to issue regulations. Article 15 of the National Resources Commission Establishment Proclamation No. $217 / 1981^{7}$, gives the Water Resources Commissioner power to issue regulations.

The power to initiate legisfation is also given to some non- governmental agencies like mass organizations. Article 5 (12) of the Trade Unions Organization Proclamation No. $222 / 1982$ can be cited as an example. This Article reads:

## 5. Functions common to all Trade Unions

Every trade union shall, without prejudice to its duties and obligations under the appropriate law, have the following functions:
12) Publicize and ensure the observance and proper implementation by members of, laws, regulations, government directives and statements; recommend, subject to democratic centralism, the enactment of new labour laws and regulations and the amendment of those in force. (Emphasis added.)

The All-Ethiopia Peasent Association is also given some role in the consideration of laws concerning the peasantry. This is clearly stated in Article 30 (3) of the Peasant Associations Consolidation Proclamation No. 223/1982. ${ }^{8}$ Article $30(3)$, in part, reads:
3) to take part in the consideration of laws, regulation and directives concerning peasants . . . (Emphasis supplied.)
Central Urban Dwellers Associations are also given power to initiate and in some cases, issue laws. ${ }^{9}$ The power to intiate laws is given to both chartered and non- chartered urban centers. The relevent provisions concerning this point are sub-articles 1 and 2 of Article 39. This Article reads as follows:

1) In the case of a chartered urban centre:
a) upon approval by the Council of Ministers, levy and collect, urban land rent and service charges and urban house tax and charges;
b) upon approval by the Council of Minsiters,issues and enforee laws pertaining to the administration of the urban centre, the management of the property of the association, the security of the urban centre and the health of the urban dwellers;
c) prepare and submit to the Government and, when approved, implement the master-plan of the urban centre; administer urban land in accordance with the approved plan;
2) In the case of a non-chartered urban centre:
a) prepare and submit to the Minister, urban land rent and service charges and urban house tax and charges;
b) prepare and submit to the Minister and, when approved, imlement the master plan of the urban centre, administer urban land inaccordence with the approved plan.... (emphasis supplied. )

The issue of whether the power mentioned in the above indicated Article is given to the Associations in their capacity as mass organizations or local government is arguable. The latter alternative seems favorable - i.e., Central Urban Dweleers Associations are given such powers in their capacity as local governments.

The Revolutionary Ethiopian Women's Association and the Revolutionary Ethiopia Youth Association do not seem to have powers similar to those given to the mass organizations discussed above.

Having looked at the laws governing the intiation and issuance of proclamations and regulations, we will now examine the process of elaboration and coordination, enactment, signing, and publication of proclamations and regulations:

Laws are usually originally drafted by the concerned ministry or administralive organ. Some laws that orginate from the decision of the Council of Ministers or from specific order of the Head of State are prepared by the Legal Deparment of the Office of the Chairman of the Council of Ministers.. Either way, the draft law is sent to the Council of Ministers. The Secretary General of the Council with the approval of the Deputy Chairman of the Council of Ministers, either presents it to the plenary session of the Council of Ministers or sends it to the Legal Committee of the Council of Ministers for its consideration. In practice, we find that the dreft legisletion that are discussed by the Council of Ministers before they are sent to its Legal Committee are the ones that demand major policy decisions or, are those thet have to be published urgently. After deliberation on these draft legislation, the Council sends them to the Legal Committee together with policy directives. Draft legislation that do not seem to demand prior policy decisions by the Council of Ministers are, as stated above, directly referred to the Legal Committee by the Secretary General with the approval of the Deputy Chairman of the Council of Ministers.

The Minister of Law and Justice is the Chairman of the Legal Committee Other members, at the time of writing of this article are:
a) the Minister of Education ${ }^{10}$;
b) the Minster of Foreign Affairs;
c) the Deputy Minister of Finance;
d) the Deputy Minsiter of Mines and Energy;
e) a representative of the Office of the National Committee for Central planning;
f) the Head of the Legal Affairs Department of the Office of the Chairman of the Council of Ministers; and
g) the Minister or Commissioner of the Office sponsoring the draft legislation.

The Legal Affairs Department of the Office of the Chairman of the Council of Ministers gives clerical and technical services this Committee needs. It is also this Department that does the redrafting, in case the need to do so arises at this stage.

The draft approved by the Committee is sent to the Council of Ministers, accompanied by a covering letter signed by the chairman of the Committee. In the said letter, the main changes, if any, made in the draft by the Committee, the controversial issues involved, if any, and the conclusions and recommendations of the Committee are explained.

There are some exceptions to this established procedure. Sometimes draft legisiation are referred to a committee specifically set up to study a particular draft legistation. In other cases, the draft law may be referred to a joint Legal and Administrative Committee or to a joint Legal and Economic Committee of the Council of Ministers.

The Legal Committee or the special committee or the joint committee submit the draft legislation they have worked on to the Council of Ministers. The Council discusses the draft proclamation, and if approved, it is sent to the Provisional Military Administrative Council since it is the Congress of this organ that has the power to issue Proclamations. ${ }^{11}$ The draft proclamation approved by the Provisional Military Administrative Council is sent back to the Council of Ministers which in turn sends it to the Office of the Chairman of the Council of Ministers for publication in the Negarit Gazeta. The copy of the approved law that is sent to the Council of Ninisters is signed by the Secretary General of the Provisional Military Administrative Council. Proclamations appear in the name of the collective body-the Provisional Military Administrative Council (Derg). Alterations made by the Council of Ministers on a draft legislation under discussion are incorporated or adjusted by the Legal Affairs Department of the Office of the Chairman of the Council of Ministers.

Regulations, that is, subsidiary legislation, issued by ministers by virtue of the power given to them by an enabling legislation, are not sent to the Proytisional Military Administrative Council for approval. Once they are passed by the plenary of the Council of Ministers, they are directly sent to the Office of the Chairman of the Council of Ministers for publication in the Negarit Gazeta. They appear in the name of the Minister or commissioner that issued them.

The Legal Affairs Department of the Office of the Chairman of the Council of Ministers handles the publication of laws in the Negarit Gazeta.

# SCHEMATIC PRESENTATION OF THE LAW (PROCLAMATION) MAKING PROCESS UNDER THE PROVISIONALMILITARY ADMINISTRATIVE COUNCIL (EXCEPTION NOT SHOWN) 

Provisional Military
Administrative Council
4
Office of the Chairman
of the Council of

| Ministers |
| :---: |
| 6 |

7 Council of Ministers Berhanena

Selam Printing press

## KEY

1. Sponsoring ministry (office) prepares the draft proclamation and sends it to the Office of the Council of Ministers.
2. At the Office of the Council of Ministers, the Secretary General of the Council of Ministers, with the approval of the Deputy Chairman of the Council of Ministers, sends the draft proclamation either to the Legal Committee (2.a) or the plenary of the Council of Ministers (2.b).
3. The Legal Committee examines and usually redrafts the draft proclamation and sends it to the plenary of the Council of Ministers.
4. The draft proclamation passed by the plenary of the Council is sent to the Provisional Military Administrative Council for approval.
5. The approved draft prochamation is sent to the Office of the Council of Ministers.
6. The Office of the Council of Ministers sends this to the Office of the Chairman of the Council of of Ministers.
7. The Office of the Chairman of the Council of Ministers sends it for publication in the Negarit gazeta.

* Head, Legal Department, Council of Ministers, ILB., Faculty of Law, AAU (HSIU), LL.M., LLM, Columbia University.

1. The Law Making Processs in E:hiopia pre 1974 will be treated in another Article in the near future.
2. Negarit Gazeta, 34th Yeai No. 1, Articles 5 and 6.
3. Negarit Gazeta, 34 th Year No. I, Article 4.
4. The organizational set up of the Derg consisted of the Congress, having all Derg members as its members, the Central Committee, having forty members elected br the Congress, and a standing Committee consisting of Seventeen members elected by the Congress in both cases from amongst the Derg members. (See Article 2 of Proclamation No, 11/1977, Negarit Gazeta, 36th Year No. 13 ;)
5. This Articles reads: Each Minister shall prepare and submit to the Council of Ministers árat: lases necessary for the proper operation of his Ministry and for the proper carrying our of any other matters confined to his jurisdiction. (Emphasis supplied.)
6. Negarit Gareta, 4 1st Year No. 6 I.
7. Negarit Gazeta, 41 ist Year No. 3.
8. Negarit Gazeta, 4ist Year No. 6.
9. Negarit Gazeta, 4oth Year No. 15
10. The Minister of Education is also the deputy Chairman of the Committee.
11. See Article 5(6) of the Redefinition of Powers and Responsibilities of the Provisional Militaty Administrative Council and the Council of Minjeses Proclamation No. Iro/ig77, Negarit Gaseta, 36th Year No. 13 (1977).

# THE LAW MAKING PROCESS IN ETHIOPIA: <br> Post - 1974 <br> Part Two <br> Law Making <br> Under the PDRE Constitution : Analysis and Proposal 

Shiferaw Wolde Michael *
The process of making statute law is almost universally spelled out in the constitution of countries that have written constitutions. The process involves initiation, enactment, signing and publication. In some jurisdictions, another important stage- revision and coordination also exists.

It is the purpose of this article to probe into the relevant provisions of the Constitution of the PDRE which was adopted by the Ethiopian people by referendum held on February of 1987 and to find out the steps in the process of law making thereunder.

## Initiation of legisfation

The genesis of the process of making law is the stage of initiation. The releevant article of the PDRE Constitution on the initiation of legislation is Atrticle 71. According to this Article, the following have the right to initiate legislation:

- the Council of State
- the President of the Republic
- Commissions of the National Shengo
- members of the National Shengo
- the Council of Ministers
- the Supreme Court
- the Procurator General
- Shengos of higher administrative and autonomous regions, and
- Mass organizations through their national organs.

The right to initiate legislation means not just the right to propose legislation, for this can be done by individuals or institutions not included in the list under Article 71. It rather is the right to present the draft legislation to the enacting organ be it the National Shengo, the Council of State, the President of the Republic, or the Council of Ministers. A concerned individual may, for example propose draft legislation on protecting the envitonment. Yet he does not have a constitutional right to have it included in the agenda of the National Shengo. He can, however, submit his proposal to any one of the organs specified in

Article 71 of the Constitution and should such be endorsed by any of the organs it can be submitted to the organs empowered to enact laws by the Constitution.

The initiated legislation could be of the type of law that has to be issued by the Shengo, in which case it becomes a Proclamation ${ }^{1}$ or by the Council of State as Decree $1 a w^{2}$ or Soecial-Decree-law ${ }^{3}$ or by the President of the Republic as Presidential Decree law ${ }^{4}$. It is also possible that initiated legislation may have to be issued in the form of regulations by the organ in whom the Constitution has vested the power to do so.

## Enactment

The enactment stage in the law making process is when a bill or a draft law is authorized to become law. Under the Constitution of the PDRE the enactment of legislation is clear for certain types of legislation and is not 30 in the case of others.

This problem can perhaps best be treated if the types of laws under the the Constitiution are identified and discussed. Hierarchically, the types of law can be put as follows:

## Type of law

Proclamation
Decree
Regulation
Derivative regulations

## Issuing organ

Nationai Shengo
Council of State or the President of the Republic
Council of Ministers
empowered organ

A significant omission in this list of laws is the Special Decree of the Council of State. This is law issued by the Council of State when the National Shenigo is not in session and, as its name indicates, under «special» circumstances. The duration of the Special Decree is or should be the period between its issuance and submission to the next session of the National Shengo. Within this span of time the Special Decree is of equal standing with Proclamation,that is, the law issued by the Supreme organ of State power. Once the Special Decree is submitted to the National Shengo, it may be rejected, in which case, it ceases to exist; or accepted, in which case it has to be issued in the form of a proclamation by the National Shengo.

The other «type of law" which is not included in the above list is the Prestdential Decree. The power to issue Decree is also vested on the President of the Republic by Article 87 of the Constitution. This power is to be exercised only. when the Shengo is not in session. Presidential Decree is «laws by which the appointment or dismissal, by the Fresident of the Republic, of officials electep by the National Shengo is publicized. Because of its very limited purpose and lack of substantive application in every day life, it will not be treated in here

Normally Proclamations are enacted by the National Shengo. Laws issued by the Council of State as Decrees or Spec.al Decrees are enacted by the Council of State. The enactment of Presidential Decrees is done by the President of the Republic. The enactment of regulations is not as clear as the enactment of the types of laws discussed in the preceding paragraphs.

The word regulation is mentioned only in two Articles of the ConstitutionIn both cases it is mentioned in connection with the powers given to some state organs. It is first mentioned in Article 82 (1) (c) and then in Article 92 (1). The Council of State is given the power to «revoke regulations ... issued by State organs accountable to the National Shengo» under Article 82 (1) (c). Before wo embark upon the full examination of this sub-article, a glance at the organs accountable to the National Shengo is in order. The State organs that are accounable to the National Shengo (other than the Council of State and the President of the Republic) are:

1. the Council of Ministers,
2. the Supreme Court,
3. the Office of the Procurator General,
4. the National Workers' Control Committee,
5. the Office of the Auditor General, and
6. Higher Shengos of Administrative and Autonomus Regions.

Among the above, the National Workers' Control Committee (unless one argues that it falls in the category of mass organizations) and the Office of the Auditor General are not even given the right to initiate legisiation under Article 71 of the Constitution. What is more, while the Constitution gives some details on the structure and function of the other remaining organs, there is a complete blackout about the National Workers' Control Committee and the Office of the Auditor General. In Articles 63 (3) (e) and (f) and $64(\theta)$ of the Constitution only their establishment and «election» of the heads of these organs are indicated

Let us now see whether or not all state organs that are accountable to the National Shengo have the power to enact regulations. The main and perhaps the onty purpase of Article $82(1)$ (c) is to give power to the Council of State to revoke regulations and directives issued by the organs of state accountable to the National Shengo. We should note that all state organs accountable to the National Shengo do not have the right to issue regulations; but should they issue regulations (by whatever authority), said regulations can be revoked by the Council of State. The most one can say about this sub-article is that it presupposes the issuance of regulations and directives by state organs accountaable to the National Shengo. Hence, one can rightly conclude that the Article cannot be taken as a source of authority for the issuance of regulations by state organs accountable to the National Shengo.

This argument can be strengthened by refering to Articles 92 (1) and 97 (2) and (4) of the Constitution. Article 92 (1), the second article of the Constitution in which the word regulations appears, reads in part:

The Council of Ministers shall have the following powers and dutios:

1) . . . issue regulations and directives.

When, on the other hand, we look at Article $97(2)$, we see that Shengos of administretive and autonomous regions are given the power to issue diractives only.

Thus the Council of Ministers has the Constitutional right to issue regulalations. Shengos of Administrative and autonomous regions do not have similar right. To argue that Article 82 (1) (c) empowers shengos of administrative and autonomous regions to issue directives would (at least in the light of Art. 97 (2) be demanding something that the Article is neither expected nor intended to provide.

The other state organs, that is, the Supreme Court, the Office of Procurator General, the National Workers' Control Committee and the Office of the Auditor General, like the higher shengos of administrative and autonomous regions, do not have the Constitutional right to issue regulations.

On the other hand, it may be argued that had the full attributions of the instutions mentioned in the immediately preceding paragraph been treated in the Constitution; a provision on the making of regulations would have appeared. This, at best, is only a conjecture.

What is the meaning of the word «regulation» as used in the Constitution? Hierarchically, proclamation is of higher degrree than Decree of the Council of State or Decree of the President of the Republic. Inspite of this both are primary legislation. Similarly «regulations» as used in Article 92 (1) of the Constitution, is primary legisfation though hier archically lower than all the other primary legislation. Regulations issued pursuant to Article $92(1)$ of the Constitution is not derivative regulation. There will be no need to have a constitutional provision if the word "regulations" is to mean derivative regulations or executory acts deriving its power from some primary legislations-say a Proclamation or Council of State Decree. This would be better handled in the primary legislation that authorizes the issuance of the executory act itself.

It would be wrong to assume that the essence of the word «regulations»as used in Article 82 (1) (c) is the same as the one discussed in respect to Article 92 (1). The revocation of any regulation, be it derivative or not, that is contrary to laws enacted by the National Shengo, the Council of State or the President of the Republic, lies within the competence of the Council of State Besides, since the Council of State is the organ that is also given the power to interpret the Constitution and other laws, (Art. 82(1) (b), it would be illogical to hold that the power to revoke regulations (Art. $82(1)(c)$ is limited only to the type of regulations specified in Article 92(1) of the Constitution.

To conclude, the power to enact non-derivative regulations which actually fall within the group of primary law is only vested in the Council of Ministers by the Constitution. Other state organs that are accountable to the National Shengo do not have the constitutional authority to issue such regulations.

The power to issue derivative regulations or executory acts can be vested in these organs or other institutions like ministries by a primary legislation. Perhaps the only problem that calls for serious consideration would be that of no-menclature-what name is to be given to derivative regulations to be issued by state organs? It can be given a descriptive name-derivative or executory regulations.

## Siging

Signing is another stage in the law making process. Signing comes after ratification and then follows publication. Signing is not a discretionary power, If at all it is a power. It is only an attribute-a duty that has to be automatically discharged once it is made sure that the steps preceding it are taken. As can be seen below, this is in line with the laws and practices of many socialist countries. The constitutions of some countries include a provision on the maximum duration an approved law can stay without being published in the official gazette. For example, in Albania, laws must be published in the official gazette « not later than 15 days after their approvaly by the legislative organ. ${ }^{5}$ Laws adopted by the National Assembly of Bulgaria must be published in the state gazette not «later than 15 days after their adoption. » ${ }^{6}$ The same can be said about the law and practices of the German Democratic Republic ${ }^{7}$ and Romania. ${ }^{8}$

In the constitution of some countries the organs that sign laws are clearly indicated. In the Soviet Union «laws of USSR, decrees and other acts of the Supremes Soviet are published in the languages of the union republics over the Signatures of the Chairman and Secretary of the Presidium of the Supreme Soviet of the USSR. ${ }^{9}$ The Grand National Assembly laws of the Socialist Republic of Romania are signed by the President of the Republic. ${ }^{10}$ The The Chairman of the state council and its Secretary sign laws enacted by the Seym (Polish peoples' Assembly). ${ }^{11}$ In Cuba, it is the President of the National Assembly of Peoples' Power that is vested with the task of signing laws adopted by the National Assembly. ${ }^{17}$ The laws passed by the Hungarian Parliament are signed by the Chairman and Secretary of the Presidium of the Hungarian People's Republic. ${ }^{3}$

The constitution of the PDRE is silent on the matter. Perhaps the only clue one gets about it is in Article $86(5)$ of the Constitution. This Article reads in part:

The President of the People's Democratic Republic of Ethiopia, shall, inaccordance with this Constitution and other laws exercise the following powers and duties: Promulgate, in the Negarit Gazetta, laws
enacted by the National Shengo, the Council of State and the President of the Republic. (Emphasis added.)

Signing for verification of the correctness of the lav as enacted by the peoples assembly and signing for the purpose of publication in the official gazetto are two distinct duties. The first duty is almost invariably discharged (in sociaist jurisdictions) by the speaker or the presiding officer of the assembly. The latter is discharged by the Chairman of the Presidium of the Council of State.

Since promulgation of laws is interwined with the signing of laws, it would be logical to argue and suggest from Article 86 (5) that the signing of laws issued by the National Shengo, the Council of State and the President shall be done by the President of the Council of State - i.e., the President of the Republic.

This is only a partial answer to the issue of signing. The President of the Republic, according to Article $86(5)$ and the above interpretation, signs only Proclamations, Decrees and Special Decrees of the Council of State and Decrees and Special Decrees he issues. There are, as indicated in the first part of the Article, other regulations issued by the Council of Ministers and derivative regulations issued by organs empowered to do so by a law of higher degree. Since the laws to be promulgated by the President of the Republic are specified by the Constitution and since it would be incompatible with the post of the presidency to sign laws issued by lower organs of state, it is recommended that regulations issued by the Council of Ministers shall be signed by the Prime Minister who is the Chairman of the Council of Ministers. The head of the organ empowered to issue derivative regulations should sign the same.

## Publication

The last stage in the law making process is that of publication of the enacted laws in the gazette established for this purpose. The whole purpose of this stage is to make the law known to the general public:

Publication of laws, like the signing of laws, is something that has to be routinely done- it is not a power but only an attribute. The organ charged with this responsiblity shall, having ensured that the law has been enacted and signed by the appropriate organ, promuigate it in the gazette set up for this purpose.

Under the Ethiopian Constitution, publication of laws is not vested in one organ or individual. The President of the Republic is given the attribute of promulgating klaws enacted by the National Shengo, the Council of State and the President of the Republic. ${ }^{14}$ This takes care of Proclamations, Council of State Decrees and Special Decrees and Presidential Decree and Special Decrees. But in the list of laws we saw earlier, ther are «regulations" issued by the Council of Ministers and there are derivative laws or executory regulations issued by state organs empowered to do so. These, like the other laws, must be published in the Negarit Gazeta. Naturally, the question of who is to promulgate these
regulations in the Negarit Gazeta, follows. My suggestion is that the Prime Minister, in the case of regulations enacted by the Council of Ministers and the head of the state organ issuing in the case of executory regulations, should promulgate such regulations.

Finally, since in order of importance, most of the laws would be in the form of Proclamation, Council of State Decree and Presidential Decree, it is suggested that the Negarit Gazeta be administrated by the Office of the President of the Republic who is empowered to promulgate these laws.

## Revising and Coordinating

In the process of enacting statute law, the revising and coordination stage comes after the initiation stage. It has been intentionally postponed this late in the discussi on. The reason being that 1 intend to recommend some measures in respect to it and I did not want to mix it with the earlier technical discussion.

Before we go into a survey of the experiences of some selected countries on the matter, a glance at what revision and coordination involves is proper. At this stage of the law making process each draft law is examined and evaluated in light of:

1. its compatibility with the constitution, policy and programmes of the government (and party);
2. conformity with legislative drafting techniques and norms;
3. conformity with the standard format set for the particular type of law;
4. the elimination of internal and external discrepancios and;
5. ensuring the existence of provisions geared at solving the evi intended to be avoided by the (draft) law.

Any draft law that passes through this process will, needless to say, have most, if not all, of its defects corrected.

To show the experience of other countries with respect to this vital stage in the law making process is of importance to academics as well as to policy makers.

In Poland there is a legal Commission at the Office of the Council of Ministers that discharges the above functions. ${ }^{15}$ In France the coordination and revision is carried out by the Counsel d'Etart ${ }^{16}$ And in Federal Germany the Ministry of Justice fills this gap. ${ }^{17}$

In Ethiopia, under Derg, the Legat Committee of the Council of Ministers was the organ that did the coordination and revising of draft law. ${ }^{18}$ Under the

Derg practically every piece of legislation was intiaited by or passed through the Council of Ministers. The situation is not the same under the PDRE. Laws are, as we have seen earliar, initiated by organs not directly acouuntable to the Council of Ministers. This makes the Legal Committee of the Council of Ministers incapable, for lack of jurisdiction, to carry out the function of coordination and revision of all legislation. Assuming that the Legal Committee will continue to exist under the new Councif of Ministers, laws emanating from this organ will or can perhaps be revised and coordinated as before.

This will leave the coordination and revising of (draft) laws initiated by other organs specified in Article 71 of the Constitution without an office to discharge this badty needed task. To create an organ to do the coordination and revising of laws amanating from the rest of the organs under Article 71 is possible; but in the opinion of the author, it is a luxury that the country may not afford raking the acute shortage of legal cadres presently available into consideration. Further it may be a duplication of the function of the Legal Committee of the Council of Ministers unnecessarily.

The above argument leads us to venture a proposal towards the establishment of a legislative centre and abolishing the Legal Committee of the Council of Ministers. The competing candidates to act as the Centre would be:

- the Council of State,
- the Office of the President of the Republic,
. the Council of Ministers, and
- the Ministry of Justice.

The Council of State is, under the Constitution, the focal point for legislative activities. Its position as the standing organ of the National Shengo, the supreme legisfative organ, its power to issue Decrees combined with its being the interpreter of the Constitution and other laws, and its power to revoke regulations and directives issued by state organ accountable to the National Shengo are some of the important reasons to be put in support of proposing that the Council of State be the legislative centre.

In contrast to the above let us consider the reasons in favor of other competing organs. The Office of the President of the Republic acting as the legistative centre arises mainly because of two factors. One, because of the President's power to issue decree-law and secondly because it is his office that is given the responsibility of promulgating primary laws.

The argument for proposing that the Council of Ministers be the legislative centre has to depend only on the volume of legislation to be initiated by this organ. Since most state activities fall within the jurisdiction of ministries and other organs of state, and a great majority of laws to be issued will originate in the Council of Ministers, it may have a reason in its favor for having the said centre under it.

The last candidate in the list indicated above is the Ministry of Justice. The first argument in proposing this Ministry as a legislative centre rests on the assumption that the expertise is or should be readily available there. The other argument is that the task the Centre is expected to carry out is closely related to the functions assigned to the Ministry under. Article 36 of proclamation No. 8/1987. These functions, as stated under sub-articles 1 and 2 of the. above cited Article, are that of " assist (ing) in the preparation of draft laws when requested by other ministries, government organs or mass organizations ". and that of " undertaking codification works".

Among all the above and considering the reasons given in favour of each I propose that the Council of State should be responsible for the legislative centre.

In light of this proposal some words on technical details are in order. Draft laws may be referred to the legislative centre from several sources. In order to facilitate an efficient performance of the job we suggest that a Committee be established to revise and coordinate all draft laws before they are sent to the enacting organs. The Committee has to be composed of persons who are representative as well as knowledgeable in the details of legal drafting.

It is recommended that the membership be composed of persons from:

- the Council of State,
. the Council of Ministers,
. the Ministry of Justice,
the Office of the Procurator General,
- the Organ sponsoring the draft law under consideration; and
. not more than 3 (three) persons knowledgeable in legal draftmanship.
It should be noted in conclusion that the suggestions given in this Article are not based on Ethiopian experience. The reason for this is obvious- the Constitution was hardly a year old at the writing of the Article. This may be a disadvantage. On the other hand, it has its own virtues. It has given me complete freedom to, by drawing up on the experience of other countries, point out some problem areas that need to be concentrated upon. It is hoped that the Article would help all concerned to take appropriate measures early.


## Foot Notes

* Head, Legal Department, Council of Ninisters. LLB ., Faculcy of Law, AAU(HSIU); LIM Colombia [miversity presently also on part-time teaching at Tho Eaculy of Law, AAU

1. Art. 63 wi che Constitution
2. Art. $82(3)$, ibid.
3. Art. $\times 6(4)=$ ibid.
4. This is not a subiect that cata be dealt with in a patagraph or two. Ait. $\mathrm{N}_{3}$. of tix Constitution is one of the many controversial articles that will attract a lot of reseach by studenes of anstitutional law.
5. Art. 74 of the Constitution of the People's Republic of Albania
6. Arr. 84 (I) of the Constitution of the People's Republic of Bulgaria.
7. Art. 65 (5; of the Constitution of the German Democratic Republic.
s. Art. 57 ol the Constitution of the Socialist Republic of Romania.
8. Art. II6 of the Constitution of the USSR.
9. Art. 57 of the Constitution of the Sncialist Republic of Romania.
10. Art. 25(2) of the Constitution of the Polish People's Republic.
i2. Arr. 79 (d) of the Constitution of the Republic of Cuba .
11. Art. 26 of the Constitution of the People's Republic of Hungery
12. Art. 86(5) (a) of the Constitution.
13. R.Orzechowski, "The System and Mode of Creating Law in the Polish People's Republic The Lave in Poland ${ }^{\prime \prime}$, 1978, pp. 7-38
14. W.Dale, Legislative Drafring: A New Approach pp. 334-33s.
15. Ibid.
16. Shiferaw W.M., "The Law Making process in Ethiopia, Post I9;4, Part One, I. Maw Making under the Provisional Military Government of Ethiopia, see above, at p.

# The Supreme Court 

4th Division

# Ayelech W. Gabriel's Tutor V. Tirunesh Teseema 

Civil Appaal No. 394/72

Filiation - acknowledgment of paternity - proof - Articles 745, 751\&752 Civ. C.-

On appeal from the judgment of the High Court denying acknowedgment of paternity due to lack of evidence.

Held: For appellant on the grounds that acknowledgment of paternity of appellant's daughter has been made in writing according to Article 748 Civ.C.

1. The paternal filliation of a child may be established by acknowledgment of paternity which may result from the declaration made by the man that considers himself the father of the child.
2. Accoding to Article 748 (1) Civ. C. acknowledgment of paternity shall be of no effect unless it is made in writing.
3. Acknowledgment of paternity shall be proved by producing a written document where the declaration of acknowledgment has been recorded.
4. Except in the case mentioned in Article 146 Civ. C., acknowledgment of paternity shall not be proved by witnesses.
5. Where the declartation of acknowledgment of paternity need not be made with a view to producing the effects of acknowledgment of paternity according to Article 747 (2) Civ. C., and where the written document according to Article 748 (1) Civ. C. may be a document not necessarily written by the acknowledger; the school record showing that Ayelech has been acknowledged by Ato Wolde Gabriel as his daughter is acceptable proof of acknowledgment of paternity.

December 23, 1982. Judges:- Mekbib Tsegaw,
Beyene Abdi and Mekonnen Enawogaw.

The appellant Mulunesh Alemu in a statement of claim filed in the High Court alleged that she gave birth to Ayelech while living in an irregular union with the deceased, Ato Wolde Gabrield Tekle Mariam, and that he, acknowledging himslef to be the father, had undertaken to give maintenance allowance to Ayelech by paying for her upkeep and education. She prayed that Ayelech's
paternity be ascertained accordingiy and that she be issued with a certificate of heir. The respondent who happend to be the widow of the deceased contested appellant's claim. Respondent's contestation was based on the allegations that the deceased never paid for the child's maintenance and that he did not acknowledge her as his child in writing in accrordance with the law. Respondent contended that appellant's claim could not stand unless the deceased had the child acknowledged in witing and that appellant could not prove patenity by producing wirnesses. The High Court, after an appraisal of the arguments and ovidence presented by the parties and finding that the testimony of the pellant's witnesses was unconvincing decided against the appellant. This appeal was against this decision of the High Court.

The basis for the determination of paternity was neither the existence of marriage nor of an irregular union between her mother and the alleged father, Ato W/Gabriel T/Mariam. Ayelech was born both out of wedlock and out of any relationship analoguous to marriage. She may be called in common parlance an illigitimate child. Ayelec cannot, therefore, prove paternity by virtue of the presumptions laid down in Articles 740 (1) or 745 (1) of the Civil Code. Since Ayelech is an illegitimate child, she can have her paternity determined only by showing that she has been duly acknwledged (Art . 744) An acknowledgement of paternity shall be of no effect unless it is made in writing (Art. 748 (1), and excep: in the case mentioned under Article 146 of the Civil Code such an acknowledgement may not be proved by means of witnesses ( Art. 748 (2)). The provisions of Articlele 146 have not yet been implemented, however. Moreover, the office of the Officer of Civil status has not been established in accordance with the law. Therefore, no registers exist. The courts cannot therefore resort to proof by means of witnesses in accordance with Article 146. This Court thus finds the fact that the High Court allowed the appellant to prove that the deceased, Ato Wolde Gebriel T/Mariam; acknowledged her as his child by means of witnesses inappropriate.

In accordance with the 1960 Civil code acknowladgement of paternity shall therefore be of no effect unless made in writing. The system of acknowledgement of paternity that prevailed before 1960 was what prompted the promulgation of these rules. Since there was no known set of rules of acknowledment of paternity before the coming into force of this law, there was nothing that prevented proof of acknowledgement of paternity by any means whatsoever. This uncertainity in the mode of proof could not but entail serious negative consequences. The case with which one could prove paternity encouraged mothers to attribute paternity to a person of wealth and high social standing. Since there was a time when paternity could be established merely on the strength of the mother's testimony under oath, it is of common knowledge that this enabled a mother to attribute paternity to a person of her own choice rather than to the real father of the child concerned. The ever increasing practice of attributing paternity to the one with the greater wealth and better social status from among those who had sexual relations with the mother was duly taken
into consideration when attempt was made to modernize the law When the Civil Code of 1960, which is presently in force, was promulgated, due care was taken regarding the provisions on marriage to ensure that, on the one hand, no child should be left without a father and that no person should wrongly be burdened with paternity of a child who is not his offspirng. Due care was also taken to ensure that children born out of wedlock and those born from a relationship analogous to marriage would not be left without a father. To this end, the law has laid down a presumption to the effect that a child born out of wedlock shall have the husband as father (Art. 740) and that a child born during an irregular union has as father the man engaged in shuch a union (Art. 745). The question of establishing the paternity of children born without wedlock or irregular union is particularily problematic. The law has therefore taken special care to ensure that a person may not be declared to be the father of a child on flimsy grounds by introducing stringent rules of proof regarding the establishment of paternity of an illegitimate child. A child whose paternity has not been determined by law may, therefore, establish his paternity only where the alleged father has declared himself to be the father and acknowledged him. The law further requires that an acknowledgement of paternity may be made only in writing and that it may only be proved by means of written proof. The reasons that compelled the law maker to require that an acknowledgement of paternity of an if legitimate child made in writing has already been indicated herein above. It is appropriate that the law should attempt to prevent a situation where a person may be declared to be the father merely because he had sexual reiations with the mother and only on the basis of her wish and choice and on the strength of such unreliable modes of proof as prevailed before the coming into force of this law. The stringency of the law has, however, entailed new and still greater problems in trying to resolve older ones. It appears as if the objective conditions in the country were not duly appreciated at the time when the law was promulgated. The fact that over 90 percent of the Ethiopian people were illiterate at the time of the promulgation of the Code is not at all open to debate. Although no exact percentage is presently available, it is not debatable that until such time as the ongoing campaign to eradicate illiteracy is successfuly completed, the majority of the Ethiopian people, after twenty years, still remain illiterate. Such being the objective condition, the reason why the law required that an acknowledgement of paternity of an illegitimate child should be of no effect unless made in writing is a question that continues to puzzle the minds of many, and especially that of judges. Since acknowledgement of paternity is deter mined by various social and psychological factors the mere fact of literacy cannot in itslef be considered as a sufficient reason. How many fathers would be willing to acknowledge their children in writing and how many mothers would require the father to acknowledge his child in writing? The judge as a member of society is compelled to take such objective social and individual factors into consideration. It is of course not permissible for the judge to set the law aside, and decide in accordance with his own whims and his own perso-
nal sense of justice. The judges discretion lies only in interpreting legal provi~ sions in light of the prevailling conditions whenever he finds the law to be ambiguous. The provision relevant to the present dispute is that laid down in Article $748(1)$. When it is provided that acknowledgement should be made in writing, one is lead to the question of by whom, why and how it needs to by made. The ambiguity of the provision is made clearer when we consider that Article 747 (2) provides that a declaration made by a man that he considers himself the father of a certain child need not have been made with a view to producing the effects of acknowledgement of paternity. We do not think that the law maker was unaware of the fact that the majority of the people were illiterate both at the drafting stage and later when it was deiberated upon and promulgated. If this is granted, we cannot say that the instrument should be personally drawn up by the person acknowledging his paternity. We can only assume that what is required here is any reliable proof made in writing. The man making the acknow ledgement may get a third party to do the actual writing for him and attest it by means of his signature as long as the declaration contained there in is truly his. Uniess we contend that both the drafter and the law maker were totally unaware of the prevaling illiteracy, we can only assume that the law was promulgated with the view that the actual writing of the instrument may be made by a person other than the man making the acknowledgement.

The problem is only partially resolved, however, even if we were to conclude that such was the intention of the legislator. If the man who lacknowledged a certain child were, by virtue of his illiteracy, to have his decsaration be reduced to writing by some other person and thumb-mark it him1elf the problem arising from the non-fulfiliment of the requirements of Article (728 (3) would still remain. In accordance with the the said Article 1728 $\mathbf{s 3}$ ) of the Code, if the man who is making the acknowledgement is illiterate, truch signature would not bind him, unless it is authenticated by a notary,registaar or judge acting in the discharge of his duties. Juristic acts which are open lnd overboard do not normally satisfy the requirements of Article 1728(3), et aione an acknoiedgement of paternity which is highly prone to secrecy. A further point of dispute is thus bound to arise even if an acknowledgement of paternity were to be made in writing as all the the requirements of formality would not yet have been satisfied.

And that is not all there is to it. If an acknowledgement of paternity of an illegitimate child needs to be made in writing one may, since the matter relates to the requirement of form, arrive at a position which makes attestation by two witnesses obligatory. Professor Gearge Krzeczunowicz is one of those who follow this line of reasoning. Kzeczunowicz, in his article entitled, "The law of filiation and the Civit Coder has forwarded the view that an acknowledgement of paternity shall be of no effect unless it is made in writing and attested by two witnesses (J.Eth. L., Vol. 3 No. 2, p. 497.) It appears that Krzeczunowicz arrived at this conclusion by reading Article 748 in connection with Article 1727 (2). Article 1727 (2) is found in that part of the Civil Code which
deals with contracts. Neediess to say, contracts deal with the will and agreement of two parties. An acknowledgement of paternity is however a unilateral act. It is true that acceptance by the mother is required for an acknowledgement of paternity to take effect (Art. 751) (1) and that an acknowledgement made by a minor needs to be accepted by him upon his attaining majority. What we must note here is, however, that when it is required that an acknowledgement of paternity shall be of no effect unless it is accepted by the mother, or the minor upon attaining majority, it does not mean that it needs to be negotiated upon as in a contract. Moreover, the provisions of Article 747 (2) would be without any effect, if say, an acknowledgement of pateinity needs to be made in writing and attested by witnesses. If attestation by two witnesses was required, there would have been no need for a provision which requires that a declaration for an acknowledgement of paternity need not be made with a view to producing the effects of such acknowledgement. If, it is provided that a declaratiorneed not have been made with a view to producing the effects of an acknowledgement of patrenity, such a document could then be drawn up for a purpose other than an acknowledgement of paternity. It cannot thus be said that it needs to be attested by witnesses. A private letter could serve us here as a clear illustration. An acknowledgement of paternity could be made in a letter written for any other purpose. No one ever attests his letters to relatives and friends by wit nesses. Another example is a letter written to a public office. If the alleged father were to declare his paternity in an application to any public office, one would not require that such application should be attested by two witnesses. Since the draft law had already provided that an acknowledgement of paternity must be made' in writing and attested by four witnesses, our sole purpose for raising this issue is to point out the inappropriateness of such an interpretation.

The drafter of the Civil Code, Professor Rene David in his work entitled "Family Law in the Ethiopian Civil Code," has noted that the Codification Commission had deleted the provision which required attestation of acknowled.gement by four witnesses that appeared in the original draft (p. 66 note 103). The argument which holds that the instrument of acknowledgement of paternity needs to be attested by two witnesses is not, therefore, something we need to give much weight to. Although it is not as weighty as it appears, it is an argument which has already been raised and is likely to arise again. It is not therefore difficult to see how contentious the issue of the nature of the instrument of acknowledgement of paternity could be.

After an appraisal of all these problems we are compeled to conclude thast the acknowledgement of paternity of an illegitimate child needd not be an ins. trument personally drawn up and signed by the man who declared himself the father of the child. All that is required is any clear and reliable evidience made in writing. One may, for instance, come across, in a Court's a records, a testimony given before it to the effect that the witness had done something or learned about acertain event while he was, say, walking with his son «X». Could we refuse to admit this testimony given in connection with another matter as
evidence, supposing " $X$ " was to bring an action to claim the status of a child on the basis of the court's records? We think that the fact found in the court's records would be admissible as evedence irrespective of the fact that the witness did not attest it by affixing his signature thereto, for the simple reason that the court is a responsible organ of the state worthy of trust. We cannot doubt the probatory value of entries made in a court's records as it is an impartial, or at any rate deemed to be, organ of the state. We think that it is for the purpose of including situations of this kind that Article 747 (2) provides that the declaration made by the alleged father need not have been made with a view to producing the effects of an acknowledgement of paternity.

In the course of our investigations, the Kelemework school informed us that it had, upon request by Ato Wolde Gabriel Takle Mariam, who was an employee of the school, admitted Avelech to the school as his child and that she continued studing there from November, 1972 to 1978 . We had further summoned an official of the school who knows the condition under which and in whose name Ato Wolde Gebriel had Ayelech registered, to appear before the court with all the relevant evidence in his custody. We summoned the school official not to have him testify on the question of acknowledement of paternity per se, but so as to explain to us about what exactly is recorded in the school register; the manner in which the record was made and the procedure of registration followed by the school. The school secreatary, Ato Marcos Yilma, testified that Ato Woide Gabriel Tekle Mariam was a guard; that Ato Wolde Gabriel had Ayelech registered in the school in 1972 by declaring himself to be her father and by availing himself of the rule which enabled employees of the school to obtain admission of one of their offsprings into the school and that the child continued as a pupil there up untill the year 1978. The school secretary had further testified that Ato Wolde Gebriel's declaration was oral and that such declaration was not in any way confirmed by his signature. Asked as to why this was the case he said that an oral declaration made by an employee like the déceased was normally deemed to be sufficient and that the school never insisted that grade report cards be signed by guardians. What then could we infer from the facts detailed above? The Kelemework school is a government insitution, and we think that as a government institution it is an impartial servant of the people. Unless proved to the contrary, we find no reason to doubt the truth of statements made by its officials and of facts found in its records. In the present case, although there is no written application made by Ato Wolde Gabriel Teklemariam in which he requests that Ayelech be admitted to the school in which he works by declaring her to be his daughter, and even if his signature does not appear in her grade report card, it has been established that she was registered in the school as Ayelech Wolde Gabriel and that the school authorities, based on his oral declartions to that effect, registered her as his daughter. If the the presumption we set out above is found acceptable, we fail to find any reason to doubt both the impartiality and the truthfulness of the schoot authorities.

Obtaining an admission for a child into a school by declaring oneself the father of a child, come may ergue, does not amount to establishing paternity. This is an argument that we woud like to deal with in some detail. It is true that there is some basis to this argument particuiarly the present moment. We cannot dismiss the possibility that some school employees may obtain admission for childsen who are not their offspring by declaring themselves to be the fathers. What we would like to point out, is however, that such : practices have appeared at present due to the rapid increase in the number of school children and the relative scarcity of schools. The other point worth noting is the fact that such school employees do not obtzin admissions to such schools under false pretences to any and all children; but only to the children of their relatives, friends or neighbours. When we consider the time when Ayelech was admitted to Kelemwork school together with the reasons why the deceased Ato Wolde Gabriel Teklemariam had to get Ayelech registered by declaring himseif to be her father, we do not think that there is the probability that he would have done so urider felse preetense. Ayelech was admitted to the Keleme work School in 1972. The scarcity of schools that prevailed eight years ego cannot in any way be considered compareble to present day conditions. The number of school children had not reached the present level and schools were not as scarce as they are today. We do not therefore think that at the time the necessity to pretend paternity so as to obtain an admission for a child ever presented itslef. Moreover, there is no consanguinal relationship berween Ato Wolde Gabriel and Ayelech's mother. Neither has it been contended that she was merely a friend in the platonic sense nor were they neighbours. A consideration of the fact that Ayelech's mother was neither a relative, a friend nor a neighbour strengthens the argument that the reason why Ato Wolde Gabriel Teklemariam obtained Ayelech's admission to the school where he worked must have been because he was her real father.

Ayelech was eleven years old when she instituted an action claiming the status of a child. The alleged father had already died by this time. Ayelech's bond of filiation had not been a subject of dispute while A:0 Wolde Gabriel Takle Mariam was alive. Since a person normally institutes a suit in court only where the other perty is unwilling io perform his obligations, we cannot but conclude that the reason why Ayelech did not bring the action while her alleged father was still alive was because he had until his death been duly fulfilling his paternal duties. We strongly doubt whether this dispute would have come before this court if Ato Woide Gabriel Tekjemariam was still living. We are now unable to devine his wishes for the simple reason that he is now dead. We had attempted to summon his accedants to see if they were willing to acknowledge her in accordance with Article 750 . But we have learned that they are not alive either. Ato Wolde Gabriel Tekelemariam was not blessed with a child from his lawful wife. It was perhaps the fear of dying childiess that compelled him to engage in extra-marital sex with appellant's mother and beget Ayelech as a result.

When the court is called upon to establish Avelech's paternity, we fear lest we frustrate the deceased's hopes, thwart his aims and prevent the fulfilment of his wishes merely because an opposition has been filed by a party who, in fact, has no legal standing to do so when we are aware that Ato Wolde Gabriel Teklemariam had during his life time and as, soon as she attained school age obtained her admission into the school in which he was employed declaring her to be his daughter; that she was known to the school authorities as his daughter and that the question of his paternity was never a subject for a dispute when he was still alive. It is not without reason that we declare the respondent as having no legal standing in the case. The fact that she was his lawful wife is indisputable and no one can deny her the right to half of the common property acquired during the marriage. As respondent is not the lawful heir of the decessed none of her rights would be affected as a result of the ascertainment of Ayelech's paternal filiation. The deceased's heirs are the only persons who may vajidy contest Ayelech's claim. No one other than respondent has contested the patenity by clamiming himself to be a testamentary or an intestate successor. We have already indicated that respondent is neither a testate or intestate successor of the deceased. Since she had no children from the deceased there is no way in which she could claim to represent their interests as they would lawfully be the first to be called to the succession. To cut a long story short, there is no party whose interests would be adversely affected if Ayelech is declared to be Ato Wolde Gabriel's daughter. If ever there is one to be partially affected with a negative decision, it is the society at large. Since the children of today are its future citiezens, it is of concern to society to see to it that a child's family relations remain intact; that its social status continues undisrupted and that it is not destined to be a burden to society as a result of its filial relations being severed. We therefore think that the harn that may possibiliy result to society from the ascerainment of Ayelech's paternal filiation is much less than the benefits that would result therefrom.

To conclude, since Ayelech is an itlegitimate child her paternity can be ascertained only if her alleged father, Ato Wolde Gabriel Teklemariam, had acknowledged her. An acknowledgement of paternity cannot be asscertained by means of witnesses unless the conditions laid down under Article 146 are fulfilled. An acknowledgement of paternity is of no effect unless it is made in writing. Given the level of illiteracy in Ethiopia both at present and at the time of the Code's promulgation, it cannot be said that an instrument of acknowledgement of paternity must be drawn up by the author of the instrument himself. The question by whom, to whom and why a written instrument of acknowiedgement must be drawn up is, when considered from various viewpoints, highly ambiguous. If we insist that the law must be interpreted in light of the objective conditions and if Article $748(1)$ is deemed to refer to instruments which are not necessarily drawn up personally by their author, we may safely assume that what is required is any reliable proof made in writing. Although the Kelemework school in which Ayelech was a pupil was not an institution empowered to issue such a document there is no reason why a declaration received and recorded by
such an impartial government institution should not be considered as acceptable within the meaning of Aiticle $748(1)$. No person whose interests could be advesely affected if Avelech is deciared to be Ato Woide Gabriel Teklemariam's daughter has been found by virtue of being his heir either by testate or in taste succession. Moreover, respondent filed her conntestation without having lagal standing in the case. The question of Avelech's paternity could have made a difference only if the deceased had disowned her during his life time. In view of the fact that no dispute as to Ayelech's paternity had arisen while Ato Wolde Gabriel Teklemariam was alive, we strongly doubt if he would disown her now if he were alive. We doubt if the question would have come before the Courts at all. If decisions are to be rendered on the basis of the objective conditions prevailing in Ethiopia, we do not see why, in the present case, we cannot admit the evidence presented by the appellant. We have therefore, dismissed the judgement of the High Court and declare Ayelech to be Ato. Woide Gabriel Tokle Mariam's daughter. It is hereby decided that a copy of this judgment be sent to the High Court for its information.

## The Suprome Court <br> Penel

Tadesse Gurmu V. Tiruwork Eyassu
Civil Appeal No. 1111/74
lregular union, acknowledgement of paternity, Arts. 708, 709, 718, 721. 740, 746ff, 769, 771.

On appeal from the decision of the High Court deciding that the appellant is the father of the respondents son on the ground that the respondent and the appellant were living in an - irregular union at the time when the child was conceived

Held: Judgment of the High Court affirmed but on different grounds. There was no irregular union between the respondent and the appellant for they were not living in an irregular union. But the appellant has validly acknowledged the respondent's son in writing according to Art. 748 Civil Code.

1. Paternal filiation may be established either by presumption of paternity. or by acknowledgment or by judical Declartion of parernity (Art. $740 \mathrm{Civ} . \mathrm{C}$.
2. Two persons can be said to have been living in an irregular union if they were living like husband and wife (Art. 708 Civ. C.)
3. The respondent and the appellant were not living like husband and wife. No presumption of paternity could, therefore, arise as they were. neither living in wedlock, nor in an irregular union. The respondent's son, Solomon, therfore, cannot be considered to be the son of the appellant on these grounds.
4. According to Art. 748 (1) Civ.C. acknowledgment of paternity shall be of no effect unless it is made in writing.
5. Where the acknowledgment need not be made with a view to producing the effects of acknowledgment according to Art. 747 (2) the hospital record is a sufficient proof showing that the respondent's son has validly been acknowledeged by the appellant.

July 20, 1983. Judges:- Kegnazemach Endalew Mengesha, Alemayehu Haile, Getachew Afrassa, Seifu Feyissa, Liben Amede, Getachew Fikere Mariam and Asmerom Seyoum.

This case was intially filed in the High Court in which the present respondent was the plaintiff and the appellant was the defendant. In a statement of claim submitted on July 18,1980 the plaintiff alleged that both plaintiff and defen dant had a child by the name of Solomon Tadesse born to them . . on January

18, 1975 at the Ghandi Hospital ... while living together . . . in an irregular union." The hospital expenses were paid by the defendant and the child's clothes were bought by him. Plaintiff prayed that since the defendant has, having changed his mind about his paternity, ceased supplying his maintenance obligations that she be allowed to prove that ". . . Solomon Tadesse was born while she was living in an irregular union with the defendant. . ." and that it be established that the defendant is the child's father. She further submitted as evidence the names of withnesses that would testify in her favour and produced a hospital receipt (document) which indicated that he had deposited the required advance payment with the hospital cashier and that he had received the remaining balance upon plaintiff's discharge.

Defendant submitted his statement of defense on January 10. 1981. He alleged that plaintiff had a brothei from 1977 to 1979. Denying the fact that he ever lived in an irregular union with the plaintif (Art. 708) he claimed that he lived with his brothers and sisters. And since sexual relations between a man end a woman does not in itself produce any legal consequence, he argued that plaintiff had no cause of action against him. Asserting that he had never lived together with her as alleged, he claimed that she was engaged in the business of running a tavern. Defendant claimed that he did help in transporting plaintiff to the hospital because he accidentally happened to be in the neighbourhood at the time and that the money he deposited with the hospital cashier was given to him by the plaintiff herself for the purpose. He had, he said, to receive the remaining balance because the money was deposited in his name. He denied having bought any clothes to the child. He further asserted that his family had no knowledge whatsover about the relation alleged to exist berween himself and the plaintiff. He produced witnesses who would tesify to the fact that plaintiff lived as a prostitute and that she used to and still continued to run a tavern and that he never lived with her in an irregular union. Moreover, he indicated that a licence had been issued in her name to enable her to engage in the business of selling liquor.

In a reply written on February 3, 1981, the plaintiff reiterated that, although she had a licence as alleged, she lived with the defendant the child relevance their relationship. Since "the defendarst himself was aware that to was his offspring at the time of plaintiff's confinement and had in fact paid for his delivery" as his wire an the low here cited has no she payed that the court dec lare him to be the father of the child.

The High court examined the evidence brought from the Ghandi Hospital. The document read "name of patient : Tiruwork Eyassu; payment made by Tadesse Gurmu-Tel. 152025.» The date 15/5/62 (EC.) and the signature of the Cashier do also appear on the receipt. Moreover the Court heard the testimony of both parties and four other witnesses. One of the witnesses testified that the plaintiff had ties with the defendant; that he craved to have a child from her and that he paid the hospital expenses when the child was borne. She further testified that they lived together until they had a quarrel which lead to their esparation and that until their separation spent their nights alternately, once
in defendant's home and at other times in the plaintiff's home. The other witnesses testified that plaintiff and defendant were lovers and that defendant covered some of plaintiff's expenses.

One of the defendant's witnesses testified that plaintiff was frequently joined by different men in her bedroom; that she was often invited by all sorts of customers and, that he had the occasion to go and drink with the defendant at plaintiff's tavern. The second witness testified in the same manner. The other witnesses testified that she had lovers other than the defendant. Such, in brief, was the restimony preserited before the Court.

After an appraisal of the evidence presented by both parties and noting that since both plaintiff and defendant have admitted that they had sexual relations; that defendant had taken plaintiff to the hospital for delivery; that he had paid the required expenses as well as his overall conduct, the High Court coneluded that defendant is the chidd's father. The testimony of defendant's witnesses did not rebut that plaintiff and defendant lived together in an irregular union and that he paid for her maintenance. Since it has been established that the child was born while plaintiff and defendant were living in an irregular union it is obvious that paternal filiation exists and that Solomon Tadesse is Ato Tadesse's son.

Deferndant's appead was against this decision of the High Court. Defendant in his appeal reiterates that no relationship analogous to marriage which could justfy paternal filiation with the child ever existed between him and the plaintiff. He further argued that the fact that he deposited money with the hospital cashier and received the remaining balance upon the petient's discharge did not prove that the money belonged to him and neither was this, in itself, sufficient to prove his paternity.

The main points of the case are as follows. The conditions for the determination of paternal filiation are provided for in Article 740 of the Civil Code The conditions are: 1) where a relation, provided for by law has existed between the mother and the all eged father at the time of the conception or the birth of the child (Civ. C. Arts. 746-757), (2) where the alleged father declares himself to be the father of the child (Civ. C. Arts. 746-757), and (3) where a judicial decfaration was made in the case of abduction or rape of the mother ( Civ. C. Arts. 758-761).

On which of these conditions then did respondent base her claim? We shall try to answer this question in light of the law.

The conditions referred to as lawful relations under Article 740 (1) of the Civil Code are marriage and irregular union provided for under Articles 741 and 745 of the Civil Code respectively. The former relationship is not subject to controvesrsy and the latter refers to the relationship indicated under Article 708. This relationship exists when a man and a woman live rogether as husband and wife without having contracted marriage. This relationship does not result
merely from the act of sexual relation sbetween a man and a woman or from what is known in common parlance as concubinage (Arts: 721, 709 (3)), but from a relation ship which is taken by society as one pertaining to that of husband and wife ( 718 ( 2 ) and 709 (1) Civ. C.). Moreover, one must be able to prove that such a relationship does in fact exist. A mar and a woman living in such a union defer from married people merely because of the fact that they d.d not conclude a marriage in accordance with the conditions required by law.

Respondent did not clearly indicate upon which one of the conditions provided under Article 740 of the Civil Code she bases her claim. Article 771 of the Civil Code is the law we find cited in her statement of claim.

This article provides that possesion of status of a child referred to under Article 770 of the Civil Code may be proved by producing witnesses. This article does not introduce a new mode of establishing filiation other than those indicated under Article 740 ; it merely indicates the manner of proving the existence of such filiation. Where the conditions laid down under Article 740 exist, filiation may be proved by the record of birth (Art. 769). Although filiation may be proved by producing witnesses in default of the record of birth, it daes not mean that filiation may be established by means other than those laid down under Article 740. Despite the fact that plaintiff did not indicate clearly on what she based her claim, one is led to conclude that she has attempted to prove two points from a perusal of the facts decailed in her statement of claim. These are : (a) although no marriage existed between plaintiff and defendent at the moment of birth of the child, there existed an irregular union between them and that (b) defendant has duly acknowledged the child.

Attempt has been made to prove the existence of an irreguler union by means of witnesses who testified that although plaintiff had a tavern of her own she actually lived under defendant's control; that he covered some of her living expenses; that they spent their hights by alternsting between plaintiff's and defendant's residence and that they used to go together to places where he was invited. Defendant on his part has in his defense shown that plaintiff engaged in sexual relations with men other than himself ; that other men often invited her to dinks and that she often invited men to her bedroom. When one considers plaintiff's testimony to the effect that she used to shy away from defendant's parents, one is led to infer that although plaintiff and defendant were lovers their relationship could not be deemed as an irregular union. The fact that pleintiff's family alone considered them as husband and wife is not sufficient to prove the existence of an irregular union simply because the phrase «their families» under Articie 718 (2) refers to the families of both the man and the woman. If plaintiff often accepted invitations from other men, it indicates that she had not attained the status of an irregular union even if she never engaged in sexual relations with men other than the defenfdant. The fact that she frequented the tavern and accepted invitations can only indicate that plaintiff and defendant were et best lovers and not a man and a woman living together in an irregular
union. The allegation that Solomon Tadesse was a child born in an irregular union within the meaning of Articles $740(1)$ and 745 of the Civil Code is not therefore acceptable.

Let us then examine the allegation that defendant has duly acknowledged Solomon Tadesse. Plaintiff had produced witnesses who testified that the defendant had at the time of the child's birth been receiving well wishers: that he had bought the child's clothes; that he has uttered words indicative of his acknowledgment and has personally transported plaintiff to hosjital for delivery. She also presented a written document to prove that he paid for her hospitalization. Paternal filiation may be established by a declaration made by a $\mathrm{m} \varepsilon \mathrm{n}$ that he considers himself to be the father of a certain child (Arts. 746. 747 (1) and it should be in writing (Art. 478 (1). The written declaration can be made with the clear intention of making ai acknowledgement of paternity. It can also be made indirectly without the view of producing the effects of an acknowledgement of paternity. The wording of Article 747 (2) indicates that if, for instance, a man were to get a child registered in school under his own name or is found to have acted in a similar manner, one may admit such instrument as an acknowledgement of paternity. Witnesses have testified that the defendant was in plaintiff's residence when she was in labour; that he, together with another woman had taken her to hospital. It has also been estabished that he deposited the required amount for hospital expense on his own account; had given his telephone number to the cashier; and received the remaining balance upon plaintiff's discharge. Moreover, defendant has not denied any of thase facts. Defendant has argued that the writing does not prove that he is the father of the child. The fact that he deposited money which belonged to her; that he assisted her in a moment of need; that he deposited the money under his own name end signed a receipt for the remaining balance when he was so requested, does not, the plantiff argued have any relevance to the case at hand. If one were to help a sick stranger one finds on a road side, lransport him to a hospital, deposit the patient's or one's own money, and by an oversight, deposit it under one's own name, it is obvious that it may not lead to any responsibility on the dogooder's part. It would not also prove that the man is the fatherof a child or that there was an irregular union, between him and a woman if hewere to find that woman on the road side and in labour and takes her forthwith to hospital and deposited money for her hospitalization.

Such proof is not something to be taken in the abstract but must be appraised in accordance with the circumstances of the case. Defendant has not proved his allegation that the money deposited was the plaintiff's. His ailegafion that he did not take the remaining balance but he, as the depositor, merely signed for its receipt is not acceptable. Plaintiffs and defendant's relationship is not one analoguous to that one found on the road side and the good Samaritan example but a relationship which, as has been tesified, has a solid basis be hind it. We canrot accept the picture presented by the defendant which would have us belive that a man who had the occasion to spend a night with a certain
woman upon payment of 10 --- Birr would be in her house accidentlly when she is in labour, take her to the hospital upon her request, deposit the money needed for her hospitalization and give his address in case it becomes necessary that he be contacted. Considering the restimony presented about their reltionship we can only conclude that there is sufficient- evdence to declare that an acknowiedgement of paternity has been duly made (Art. 747 (2) and 748 (1).

We have therefore, though for a different reason, affirmed the decision of the High Court and declare Solomon Tadesse to be the son of Ato Tadesse Gurmu. Both parties shail bear the costs of administration of justice and the Court fees. It is heraby ordered that a copy of the judgment be sent to the High Court for its information.

This judgment is rendered by a majority vote by the Suprome Court, siting in panel, this day, the 21 st of July 1983 ."

[^13]
# CASE COMMENT ACKNOWLEDGING THE ILLIGITIMATE CHILD 

Mesfin Gebre Hiwot

1. Ayelech Wolde Gabriel V. Terunesh Tessema, and
2. Tadesse Gurmu V. Tiruwork Eyassu
(Supreme Court civil appeals No.394/72 and 1111/74 respectively).

The Supreme Court in the Ayelech case ${ }^{1}$ held that an entry in a school register made by a school official on the basis of an oral declaration made before him by a person to the effect that the pupil he is having registered is his own child is e valid acknowledgement within the meaning of Art. 748(i). ${ }^{2}$ The Court in the Tadesse Gurmu case further held that,pursuant to the same article, a receipt issued by a hospital cashier in the name of the alleged father indictaing payment made for the delivery of the alleged child is, likewise a valid acknowiedgement of paternity. It is our intention in this comment to show that in so holding. the Court errs both in its appraisal of the facts and in its interpretion of the law.

The Court maintains that what is envisaged in Article 748$)^{3}$ is any "weighty and relaiable evidence made in writing» which may or may not be personally drawn up by the author* of the instrument. On the basis of this general premise, the Court deems the following to be adequate to establish the paternity of a child by acknowledgement.

1. Testimony given by the alleged father before a court of law and recorded by the court clerk:
2. any entry made or minutes taken by government officials on the basis of declarations made by the alleged father:
3. any application written to any office by the alleged father, and
4. any private letter written by him to relatives or friends.

The court considers the sciool secretary in the Ayelech case and the hospital cashier in the Tadesse Gurmu case as neutral government officials, and therefore takes both the school register and the receipt as valid documents of acknowledgement of paternity.

The requirement that a: acknowledgement of paternity must be made in writing provided under Article $748(1)$ is interpreted extremely liberally. More liberally, in fact, than the words «weighty and reliable evidence made in writing" suggests. Before going into the correctness or otherwise of this statment, we
deem it appropriate to go into the sufficiency of the evidence upon which the court's decision is based; regardless of whether such evidence was submitted in the prescribed form or not.

## THE COURT'S APPRAISAL OF THE FACTS

The appeal in the Ayelech case is against the decision of the High court which decided for the respondent on the ground that the evidence presented did not show that Ato Wolde Gabriel Tekelemariam was indeed Avelech's father. ${ }^{5}$ The High Court made its decision on the basis of the testimony of witnesses. The Supreme Court on appeal dismissed the High Court's decision because it was unlawful. by virtue of Art. 748 (2) of the Civil Code, for the High Court to alow the appellant to prove herself to be an acknowledged child by means of witnesses. The court, then, proceeded to interpret Articfe 747(1) and as a reault arrived at the decision mentioned earlier.

Now, let us examine in some detail the evidence admitted by the court and its appraisal thereof. The evidence presented as proof to show that an ackno N ledgement of paternity was made is a letter by the Kelemework school written in response to an inquiry made by the court confirming that Ayelech Wolde Gabriel was a pupil in the same school from 1974-1979 and was registered on a request made by Ato Wolde Gabriel Teklemariam-then an employee of the school-who declared himself to be her father to the school authorities. As it coutd not take the letter itself as a document of acknowledgement-since it is clearly not a declaration made «in writing" by the alleged father - the Court took it as evidence to prove that such declaration was. in fact, made in the school register. But since it did not have the school register before it. ${ }^{7}$ the Court summoned the school secretary, Ato Marcos Yilma, as a witness to testify before it. The Court states its reasons for summoning him in the folowing words.

We summoned the school official not to have him testify on the question of acknowledgement of paternity per se but so as to explain to us about what exactly is recorded in the school register: the manner in which the record was made and the procedure of registeration followed by the school. (Emphasis added.)

In this testimony. Ato Marcos declares that the school register contains the name Ayelech Wolde Gabriel, that the record was made upon the request of Ato Wolde Gabriel Teklemariam who declared himsolf to be the child's father and (if we may so presume), that the appellant in this case is indead the same person whose name appears in the register. The question that needs to be answered at this point is whether one can take the evidence presented as sufficient to prove that Ato Wolde Gabriel had, in fact, declared himself to be Ayelect's father in writing

From the words of the court and the testimony given by the school secretary we may infer that

1. the exact information contained in the register is Ayelech W/Gabriel;
2. the record was made by an official of the school who was requested by Ato Wolde Gabriel to register a child by the name of Ayelech Wolde Gabriel who happens to be his own daughter: ${ }^{8}$ and
3. registeration is normally based on the oral declaration made by alieged parents or guardians before the registering officer.

It is clear from the foregoing, that the Court's knowldege' of both the existence and the contents of the register does not emmanate from the «writing» alone. which it says is the sole basis of its decision, but from a letter written by the school and a testimony given by a school official. It does not know from the same "writing" that the name Ayelech Wolde Gabriel belongs, for sure, to the appollant and not to a namesake; that the alleged father did declare himself to be Ayelech's father and that the record was made on the basis of his decfartions. In other words, everything that connects Ayelech and the alleged father is derived from the testimony of a witness and even the existence of the "writing" deemed to be the instrument of "acknowledgement of paternity" is proved not by producing it in court but by a letter that declares its existence, and its contents are «confirmed» by the testimony of the same witness. Under the circumstance, therefore, it is not possible to take the Court's words at its face value when it says that its decision is made on the basis of the record for it clearly does not know for sure that it exists and if it existed would prove nothing for the simple reason that it merely confines itself to stating the name: Ayelech Wolde Gebriel- a common enough name. It is not possible to take its words seriously either when it says: «we summoned the school official not to have him testify on the question of acknowiedgment per se...》 when everything that connects the child and the alleged father, in fact. depends on his testimony.

Let us now brieftiy consider the proof aduced in the Tadesse Gurmu case. The information contained in the record from the Ghandi Hospital reads: «Name of patient : Turuwork Eyassu; payment made by Tadesse Gurmu: Tel. 152025.. The date 15/5/62 E.C. and the signature of the cashier does also appear on the receipt. It is pertinent to note the following in connection with the information contained in the said receipt. The name of the child. Solomon. who is alieged to be the appellant's son does not appear on it. It is not even mentjoned that the patient was hospitalized for delivery. ${ }^{9}$ And if the case was indeed a case of delivery the receipt does not tell us that the delivery is that of the baby. Solomon, and that the supposed mother, Tiruwork Eyassu, is indeed the respondent in this case. in other words, all this does rot follow from the «writing» considered to be the basis of the decision. All this, if at all, the court obtains from the testimony of the witnesses which it says should not have been
heard in the first place. There is. on the face of it nothing in the writing which connects the chifd. Solomon. with the alleged father. Tadesse Gurme. It is submitted, therefore, that even if we were to accept the Court's interpretation of the law and maintain that any uwriting" is admissible, both the receipt and the register are insufficient simply because they do not at all prove what they are purported to prove.

The decision in the Tadesse Gurmu case is based on the interpretation of the law given in the Ayelech case and there is no reason to assume that future cases would not be based on it. It is, therefore, essential that we discuss and evaluate the position taken by the Court with regard to questions of law

## THE COURT'S INTERPRETATION OF THE LAW

In analysing the legal position taken by the Court regarding proof in writing within the meaning of Article 748 (1), we think that it is only appropriate that we must discuss the jurisprudential meaning of the term «written proof» or "proof in writing".

Declarations made by persons in writing may take two forms: private and public or authentic acts. The former are those acts drawn up by parties in their own name and the latter by public servants in the discharge of their offcialfunctions. ${ }^{10}$ Authentic acts are those $<$ received by a public officer having the power to draw up public acts in the place where executed and with the requisite formalities." "1 Authentic acts are not therefore declarations received by any and all officials but by those who have been specifically designated by law to receive them. Acts of civil status are, for instance, drawn up only by officers of civil status and, under certain conditions, by notaries. ${ }^{12}$

As a general rule ${ }^{13}$ no formalities are required for the draving up of private acts except for the requirment that they must be signed by their authors. ${ }^{1+}$

The probative value of authentic acts and acts under private signature ${ }^{15}$ differ in that more credence is given to the former than to the latter. The credence given to authentic acts is in a large measure due to the fact that those officials empowered to draw them up are accountable for the accuracy of the contents of the acts they draw up. ${ }^{16}$

Private and authentic acts are the only forms of written proof that are known as «pre-constituted proof». This does not mean, however, that under exceptional circumstance that private letters, domestic papers etc. cannot be intraduced as proof. The probative value of such proof is left to the discretion of the judge and they usually serve as a mere commencement of proof. Such writings are not in the catagory of the acts described above. They are not, therefore considered valid where the law requires proof in writing. ${ }^{17}$

To recapitulate: where the law requires written proof it means pre-constituted proof: that is, a writing drawn up with the intention of being used as proof in the event a dispute arises in the future. If it is required that it must be made
in the form of an authentic act, such an act must be drawn up by a public official specifically empowered to receive such declarations and not by any adminstrative or other pubtic official. Where private acts are required, such acts even if the body is prepared by a third person, must be signed by the author of the act. ${ }^{18}$ Any writing which is not made in either of these two ways cannot thus be considered valid as proof in writing under the law. The inevitable conclusion that we must draw from this is that the Court errs when it accepts entries made or minutes taken by any and all public officials on the basis of declarations made or applications submitted by the alleged father to any office and where it admits private letters and other writings made by the same as valid proof of acknowledgement of paternity.

The Court's interpretation which is so broad that it even admits a hospital receipt is based on the wording of article 747 (2) which reads: «such declaration need not have been made with a view to producing the effects of an acknowledgement of parternity.» The court gives what it considers to be the meaning of the said Article in the following words in the Avelech case.
"If it is provided that a declaration need not have been made with a view to producing the effects of an acklnowledegment of paternity. such a document could then be drawn up for a purpose other than an acknowledgement of paternity, it cannot thus be said that it needs to be attested'by witnesses. A private letter could serve us here as a clear illustration.\%

After drawing the proper conclusion that \& such a document could . . .. be drawn up for a purpose other than an acknowldgement of paternity", the court jumps to the conclusion that a «private letter could serve... as a clear illustration» of a document that can be accepted as a valid acknowiedgement of paternity. The Court, in so concluding, is confusing the form of proof required wth the formalities that one may have to fulfill in draawing up the instrument in the prescribed form in other words, it fails to distnguish the concept of formality from the concept of form. This is evidenced by the use the court makes of the following.words of the drafter in the Ayelech case.

These acceptances are not subject to any special form, although the acknowledgement itself must be made according to a certain formality. (Emphasis added - ). ${ }^{19}$

The translator of this work of R.David's says at footnote 103 that: In this article, the preliminary draft required that deciaration of paternity be made in the presence of four witnesses. Arts. 747 and 748 which were amended by the Commission have not preserved this requirement. ${ }^{20}$

The «acceptances» refer to the acceptance made by the mother and, in her defaut, the ascendants provided in article 751. The acceptance need not be in any special form, it may even be made tacitly, i.e., by not protesting a against
such acknowledgement within one month after he has come to know of it. ${ }^{21}$ And this is different from the requirement of Article 748(1) which insists that «an acknowledgement of paternity shall be of no effect unless it is made in writing. $y$ (Emphasis added.) The acceptance by the mother may thus be made in any form and can, therefore, be proved by any means, say, a private letter. ${ }^{22}$ The Court is not precluded from admiting any evidence, whatever the form, be it oral or written.

When David refers to the acknowiedgement of paternity. he does not refer to the form (as it must be in writing) but to «a certain formality" which, as the annotation made by the translator indicates, refers to the requirment of attestation by four witnesses which was later deleted by the Codification Commission. If the form required is written proof, say, a private act, it may or may not, therefore, be subjected to the formaility of being attested by witnesses. Contracts for instance, need to be attested by witnesses where they are required to be made in writing. The same holds with witls; but not with acknowledgement since such a requirment has clearly been rejected, as indicated earlier, by the Commission. The Court by confusing the requirements of form with what is provided as to formalities has, therefore. put the acknowledgement of paernity on a par with the acceptance by the mother- a situation which is conttrafy to both commonsense and the letter and spirit of the law.

The one argument that can be mads validly is, in fact, the contention that only authentic acts should be accepted as acknowledgements of paternity in view of the fact that article 748 (2) implies that acknowledgements were to be made by officers of civil status and, in their default, by notaries. Moreover, records of Civil Status do not need to be attested by witnesses. ${ }^{23}$ It is true that acknolewdgement of paternity may be made before an officer of civil status or notary, but this need not preculde private acts in view of the fact that the drafter had suggested a private act made according to «a certain formality»; i.e. attestation by four witnesses and the fact that the modern trend is to liberalise the proof of acknowledgement of paternity so to as improve the status of illigitmate children under the law. The fact that the said formality was deleted by the Condification Commission must thus be interpreted to mean that an act under private signature would suffice without requiring additional formalities.

The fallacy of the above statement can also be seen by comparing it with the French law of acknowledgement of paternity. French law requires that ack nowledgement of paternity must be made in the form of an authentic act and that a declaration made in the form of a private act is a radical nullity. ${ }^{24}$ In the words of Planiol, ${ }^{25}$

The law imposes no sacramental formula. It is not even necessary that the notorial act containing the acknowledgement have been especially dra fted to receive it. It may be there incidentally and even implicitly contai ned in it... The acknowledgement may thus flow from mere communications contained in the act, without being the subject matter of the enacting part of the act.

It is clear from the foregoing that the same rule providzy in article 747(2) is also provided in French law although it requires that acknowledgement of paternity must be in the form of an authentic act. It may therefore flow from a will made in notarial form or any other autinenticated act even if the subject matter of the act happens to have been dravn up with a vie $N$ other than " to produce the effects of an acknowledgement of paternity \%. Arficle 747 (2) should not. hence be interpreted to allow any and all sorts of deslaration; put on paper by the alleged father but that no formalities would ba required as to the manner in which such declarations are made provided that the instru nent itself is made in the form of a preconstituted propi, i.e., either in tis form of an authentic act or a: act under private signature.

## CONCLUSION

Starting from the worthy concern that children born outside of marriage should not be left without a father, the court has, we beliere, taken an extreme position in allowing school registers, hospital receipts and private letiers as valid acknowledgements. To take such a position is however to defeat the very purpose of article 748 (2) which is to provide beforehand an indubitable proof much more reliable than the testimony of witnesses which is based on a notoriously unreliable instrument - human memory. But then, can one really dare consider the testimony of witnesses under oath less reliable than the receipt admitted as valid in the Tadesse Gurmu case. We think not. We think that the court should have confined itself to admitting- «proconstituted proof" drawn up either as public or private acts.

Even if we were to take the Court:s interpreptation of the law as valid, it is clear that the Court did not stick to its own interpretation in these two cases and admit only the writting (writing as understood in commen parlance) as proof but did, in fact, rely more on the testimony of witnesses. It has as a matter of fact. admitted what amounts to proof in any form and did not restrict itself to proof in writing. We think that the position taken oy the court is a radical departure from both the letter and spirit of the law and that this, in practice, and ir spite of the concern shown by the court itself, is tantamount to a return to the conditions that prevailed before the code.

## FOOT NOTES

* Jecturer, Facinty of Law, AAU. LLB., Faculty of Law, AAU.

1. The two cases under consideration are here in after referred to as "the Ayelech case" and "the Tadesse Gurmu case.
2. All articiles cited in this Conment are from the Fthiopian Civil Code of 1960.
3. Art. $74 \%$ /s/reads: "an acknowledgement of perernity shall be of 20 effect unless it i: made in writing."
4. The word 'author' refers to the maker of an instrument.
5. It is not alnar whether the word office is restricted to government office or whetherit may include paivate offices and those of mass organizations.
6. It appears fiom the reading of the Courts decision that the dispute arose, as is usuelly in Ethiopia, when appellant through her mother and guardien requested that she be given a "certificate of heir" as an heir to the deceased, Ato Wolde Gabricl, witin the meaning of art. 995.
7. It is not clear why the Court did nor order that the register be brought before it for examination rether than going a round about way to prove its point.
8. It is not clear from the case whether Aco Marcos was the person who reveived the alleged deslarations of Ats Wolde Gabriel.
9. The fact that the recejpr is from the Glandi; Hospital is immaterial as said hospital doe not hande delivery cases only but all sorss of gynaecoiogical diseuses.
10. Planiok, Treite F/chentoire de Droit ivil, Vol. I part 5 , (1939) pp. 236-6.
ti. Planiol Id., Vol. 2 part I, p. 53. Planiol further notes on the same page that ;, acts passed is accordance with adminisrretive formalities arc assimilated to authentic acts." and again hn states: "Administretive agents drew fip many authentic acts. They however give authente icity only to those drefted within the limits of their attaibutions." Pleniol, cited at note ro, م. 806.
11. Cf.fArts. 48 and 146. For the purpose of acknoledgement of paternity of maternity French law attributes testimony given under oath before a court of law and recorded by the court's clerk with the status of an authentic act, planol, Vol. I part 1 , cited above at note 5, pp. 806-7.
12. Cf. Arts. 831 and 1727 Which are private acts requiring the formality of being attestcd by witnesses
13. "The signature gives the act its probative force; an act without signature is of no value evon in invil martters, as a commencement of proof by waiting." planiol, cited above at note is, p. 53. The Court needlessly bolabours the point thatthe writing need not be personally drawn wh by the author ofthe instrument. "They (the authorsof private asts-MGH.)canhave the bolyof the actrazen up by a third person, apd comfine themselves to signing." Id. p. 43. see also arts. $88 \mathrm{I} / \mathrm{I}, \mathrm{I} 7281728$ and 1720 regarding wills, contracts and the offects of the provisions as toform, resmpectively:
14. Thefterms" acts under private signature "are usually used synonymousluy atith" pritate acts"sig" nifying the indeppens ability of the signatares of their authors.
15. see f Art. 143 :
16. Planiol.fvol. 2 part 1 , tited above at note 11, pp.556-66.
17. The nature of the signature whether made in writing or is merely a thumb mark or takes any ot her form is irrelevant in as much as it is the author's usual signature and is reliably verifiable. see also note 14 above.
18. David, R.;'Family Law in the Ethiopian Civil Coule" in O'Dowvan, K, Cases and Materiuls ons Ethiopian Fanily Law (1972, trans., Hailu Cherinct umpublished) P.97.
19. David, cited above at note 320 p. 27.
20. Art. 753.
21. Even in France where mateernity of an illigitimate child can only be establivhed, tenlike in Ethitpia where prooveng the fact of bith suffices, by acknowledgenent, acceptance by the mother may be accepted by means of a private Ietter, if an acknowlodgesnent of paternitey has first been publicly licly made.
22. See Ghap. 3 of Book 1 of the Cibivil Cods.
23. Planiol, vol. I part I, cited above al note 10, p. 808
24. Id., pp. 80;-808.

# the hearing of final judgement by the SUPREME COURT BY WAY OF CASSATION <br> ANOTHER RIGHT OF APPEAL GRANTED TO ANY ONE OF THE PARTIES? 

Yoseph Gebre Egziabher*

One of the jurisdictions of the Supreme Court of the People's Democratic Republic of Ethiopia is. :
to hear by way of cassation a final decision of the Supreme Co:rt or other courts, where such decision contains fundamental error of law, or for other reasons specified by procedural laws. ${ }^{1}$

As regards the discharging of this function by the Supreme Court the law provides:

A final decision of the Supreme Court or any other court may be heard in cassation by a chilot ${ }^{2}$ constituted by at least four judges of the Supreme Court with the president or one of the vice prosidents presiding. ${ }^{3}$

Concerning the authority empowered to initiate such a hearing by way of cassation, it is provided:
a final decision shall be heard by way of cassation as provided in Article 4 of this proclamation where the president of the Supreme Court so decides or where the Procurator General submits a protest

An examination of these provisions of the proclamation raises the issue: What is the the role of the parties to a case that has been finally decided but that is found, upon an examination by either the procurator General or the president of the Supreme Court, to contain a «fundamental error of law" ?

Put differently, this general issue can be split into the following issues: (1) Is the hearing another appeal like any other ordinary appeal where the Supreme court must summon the parties as appellants and respondents?
(2) If so, will the hearing depend on the wishes of the parties like any other appeal?

If our answer to the issues in ( ${ }^{1}$ ) and ( ${ }^{2}$ ) is in the negative:
(a) Does it mean that the parties have no role in the hearing of the final decision by way of cassation?
b) If so. who will be the parties in the hearing of the final decision by way of cassation?

The issue as regards the role of the parties becomes all the more relevant when it is noted that review by way of cassation of a final judgement is not limited to criminal cases. It is possible in civil cases as well. In regard to criminal cases their adjudication is, obviously, within the jurisdiction of the procuratorial office. ${ }^{5}$ It thus becomes reasonable to expect that the hearing of a final. judgement in criminal cases would in most instances be submitted by the procurator Generals protest. This view becomes all the more tenable, at least normatively speaking, when it is recalled that ensuring the full realization of the rights of individuals, be it legal or physical, is one of the duties of the procuratorial office. ${ }^{6}$ it can thus be expected that one of the parties to the case, the procurator, would request that the procurator General submit a protest for a hearing of a final judgement in a criminal case by way of cassation in cases where it «contains fundamental error of law». The procurator would be expected to do this as part of his normal duty even if it is tha intreasts of the accused defendant that are at stake as a result of the fundamental legal error. In civil cases, however, most of the time no representative of a state organ with such similar duty apperears as one of the parties. Thus. a final judgement in civil cases that contains «fundamental error of law» may remain valid so long as one of the parties fails to bring such a judgement to the attention of the Procurator General or the President of the Supieme Court. It is also possible that either of the two officials could in some wav come across such a final judgement in a civil case.Outside these possibilities, however, a final judgment in a civil case that «contains fundamental error of law» would remain in force, despite the fact that it is illegal. This would be true in the absence of a mechanism that would enable bringing the existence of such a final judgement to the attention of the concerned officials. Yet. it seems to be clear. from the law that it is one of their duties.

A civil case being a private concern of the aggrieved parties it could appropriately be asked. why should such high state officials be concerned about a final civil judgement that «contains fundamental error of law»? However. it is clear that the above cited provisions on the hearing of final judgements by way of cassation are applicable to final judgements in civil cases as well.

It is also important to note the period within which an application for a hearing by way of cassation by the special chilot of the Supreme court. it can be made.
. . . within six months from the date oll which the decision protested is rendered. The Court may not be bound by the time limit set forth herein where there are special reasons and where the application is beneficial to a defendant sentenced to a term of imprisonment. ${ }^{7}$

As already pointed out above, the rectification of a final judgement in civil cases that contains «fundamental error of law» without a mechanism that could bring about its realization would, to a large extent, remain academic. This would be the case, since individual parties to such a case would not for obvious reasons. worry themselves to see to it that such \& fundamental error of law" is rectified unless they find it expedient. Neither should the concerned state officials be mechanically duty minded so as to rectify «fundamental error of law" contained in any final coupt judgement if is is known that the parties will not take advantage of such rectification. This does not. however, help us to fully reslove what the role of the parties to a final judgement that contains « fundamental error of lave» should be.

Neither does it helo us to understand why the Supreme court is empowered with this extraordinary power of review of judgements and why the duty to put this power into motion is imposed upon the Procurator Goneral and the President of the Supreme Court.

It thus becomes necessary to examine those objectives and powers and duties of the supreme court and the procuratorial office that could help us see if either or both state organs have objectives or powers and duties such that the mon-rectification of final judements in civil and criminal cases that contain «fundamental error of law" become deterimental to the attainment of such objectives or to the discharge of such duties. Both state organs could also have objectives or powers and duties that the attainment of such objectives or the discharge of such duties require the rectification of final judgements in civil and criminal cases that «contain fundamental error of law.» In the absence of such objectives and powers and duties that necessitate the rectification of such final judgements so as to. at least. enable courts learn from their errors; we will have no alternative but to leave their rectification to the entire discretion of the parties to such final judgements except those where the procuratorial office is represented as one of the parties. Let us, therefore, examime those objectives and powers and duties of these two state organs that could help us see if both or either of them have such objectives or powers and duties.

The procuratorial office has, among others, the following objectives:
to ensure that laws, regulations orders and directives of the people's Democratic Republic of Ethiopia are correctly and uniformily applied in all places: to protect the rights and freedoms of citizens guaranteed by the constitution and other laws. . . ${ }^{8}$

As regards powers and duties the procuratorial office is, among others empowered to:
supervise over the obsevance and correct application of the Constitution, other laws, regulations and directives by ministries, other organs of government, production, distribution and service fendering
enterprises, cooperatives, regional executive organs, officials thereof as well as individuals so as to ensure socialist legality. ${ }^{\text {. }}$

The Supreme Court, on the other hand, has, among others, the followwing objectives:
to safeguard the legally guaranted rights, interests and freedoms of individuals; to strengthen the maintenance of law and order and the observance of socialist legality. ${ }^{10}$

When it comes to powers and duties, the Supreme Court in its plenum has; among others, the powers and duties to:
issue directives to the courts with the view to improving the administ. ration of justice and ensuring the uniform application of laws ${ }^{11}$
'It can be noted from the above that both the Supreme Court and the Procuracy have the powers and duties of ensuring the correct and uniform application of laws.

Ensuring the correct and uniform application of laws, regulations and direc ${ }^{-}$ tives in all places in Ethiopia requires the working of all state organs, including obviously, the courts, mass organizations, enterprises engaged in production, distribution and rendition of services, and other institutions in the country in strict observance of the country's laws that are relevant for the proper discharge of their duties.

In other words. in order for there to be a uniform application of laws. regulations, orders and directives throughout the country, alf state organs, mass organizations and all other institutions in the country must exercise their powers and duties in accordance with the law. This means that similar sets of occurrences should, by being governed by similar decisions, be treated in similar ways: irrespective of the individuals empowered to render decisions and irrespective of the individuals affected or expected to be affected by the decisions. Such decisions that need to-be made in accordance with the law ensuring its correct and uniform application include, among others:
a) administrative decisions that must be made to grant a ficense to trade," to delimit areas of economic activities that are to be left to the private sector, to decide salaries that must be paid for similar posts, and the like: and
b) judicial decisions that must be made to redress wrongs suffered by individuals, to hold persons accused of crimes guilty, to arrive at penalties appropriate for crimes committed by persons found guilty of such crimes, and the like.

That Courts conduct trials to arrive at final decisions is obvious. That there are laws that govern the conducting of trials of both civil and criminal cases is
equally obvious. Thus, courts also must conduct trials in civil and criminal casesuch that the whole judicial process is based on the correct and uniform application of the relevant laws. What the parties to any case would be interested in is, however. in the uniform and correct application of the law by the courts in their final decisions that dispose of a given case. So long as final decisions of courts are based on the correct and uniform application of the law: parties will not bother themselves as to whether or not courts conducted trials by applying the relevant laws correctly and uniformly. If there is to be correct and uniform application of laws by state organs under supervision for its realization; there is no reason why the application of laws by the courts during the trial of civil and criminal cases should be an exception. The above cited powers and duties of the plenum of the Supreme court are thus, as can be clearly seen from its reading, intended to exactly achieve this. In other words. ensuring the correct and uniform application of laws by courts during the whole judicial process is not the duty of the procuratorial office. It is one of the duties of the plenum of the Supreme Court.

As can be inferred from the above cited powers and duties of the proculacy, socialist legality cannot mean anything else than strict observance and correct and uniform application of the country's laws by evervone expected to play any role, be it as an interacting member of the society or as an official entrusted with the rendition of decisions. so that legal norms will be effectively implemented.

Ensuring the correct and uniform application of the laws of the country, thereby achiving socialist legality, is thius one of the objectives and powers and duties of the two state organs mentioned just above It must, however, be noted that the duty of the plenum of the Supreme Court of ensuring the correct and uniform application of the laws the country by overseeing the discharge of functions of state organs is limited to the courts. The procuracy's duty of ensuring correct and uniform application of laws by state organs. ${ }^{12}$ on the other hand, does not include supervision over the judicial activities of courts. That the Suprome Court in plenum can also ensure the uniform and correct application of laws. When it is so requested by the Procurator General under his protest o when the president of the Supreme Court so decides, cannot be doubtedr However, ensuring the uniform and correct apllication of laws by lower court in. the discharge of theirjudicial function is viewed by the legislator as one of the duties of the Supreme Court in plenum which it must perform irrespective of any appeal made to it by any party to a case. This becomes true since parties to any case, be it civil or criminal, would resort to their legal rights of appeals only as regards the final decision of lower courts. A protest by the Procurator General or a decision by the presideut of the Supreme Court equally applies only to final decisions of lower courts as well as the supreme Court.

It being provided that the President or one of the Vice Presidents should participate in the plenum of the Supreme Court, ${ }^{13}$ the hearing of final judgements by the Supreme Court by way of cassation could be viewed as a mechanism at the disposal of the plenum that would facilitate the discharge of its above stated duty. However, it could equally be argued that uniform and correct application of laws by Courts in their final judgements is the duty of the procuracy. It can be argued that the Supreme court's duty, as regards final judgements of lower courts, is to strengthen socialist legality after its attention has been drawn by the procurator General or the accused person in criminal cases and by either of the parts in civil cases, to the existence of final court judgements that «contain fundamental errors of law». If the hearing of final judgements by way of cassation is viewed thus (a view that would be fully based on the justifiable ground that amendment of judgements would make sense if, and only if. at least one of the parties is willing to take advantage of such an amendment), it follows that the plenum of the Supreme court does not have the duty to review final court judgments by way of cassation unless. at least, one of the parties to any final juigement, be it by a protest or a petition. indicates its interest in a review of such a judgement.

It must, however, be recalled that even as regards the rectification of final court judgements that "contain fundamental error of law", all the party that shows interest in their review can do is to appeal to the sense of socialist legality of the plenum of the Supreme Court, so as to ensure socialist legality by the courts in their final judgements. The same holds true, in the case of normal appeals as well. Thus, the Procurator General may not, as indeed no other party may do, render decision the way he sees it fit for the realization of socialist legality and demand its implementation. The plenum of the Supreme court is, on the other hand, legally empowered. like any court, to replace the final judgement of any court, including the Supreme Court, by it sjudgement and demand its execution. It should thus follow that the plenum of the Supreme Cour thas the power and duty to quash final court judgements even in criminal cases that. in its view, «contain fundamental error of law" and replace them by its judgenents on the basis of a decision of the president of the Supreme Court for their review even in cases where the Procurator General objects. The view of the parties, including that of the Procurator General, as to whether or not a given final judement «contains fundamental error of law» is, except for its usual power of persuation, irrelevant as regards the final disposition of the final judgement under review.

That hearing of final court judgements by way of cassation would, on the other hand, serve the Supreme Court in the discharge of its function of ensuring the uniform application of laws by lower courts could not be doubted. This becomes true for the simple reason that this mechanism would, as indeed do normal appeals, enable it to realisze its above mentioned function. It would thus be reasonable to expect that the Suprema Court in plenum will, irrespective of the wishes and expectations of the parties to any final judgement, review any final judgement so as to improve the adminsitration of justice by ensuring the
uniform application of laws. It would thus be wrong, it seems reasonable to state, to view the hearing of final judgements by the plenum of the Supreme Court by way of cassation as another right of appeal granted to anyone of the parties to a final judgement of a court be it civit or criminal.

It could, however, be persuaively argued that examining the judgements of lower courts to ensure the "correct and uniform application of laws» does not inevitably entall revision of final judgements as is needed in cases where the final judgements «contain fundamental error of law» and at least one of the parties shows interest in their revision by way of cassation. The plenum of the Supreme court can thus issue directives to lower courts on how they should apply the law so as to ensure its uniform application after examining their final judgements that $k$ contain fundamental error of lawn, it can convincingly be argued. Wtithout necessarily rendering its fudegement on the case. If, at least ono of the parties to a final court judgement shows his interst in its review by way of cassation, the argument would 90 on, the plenum of the Supreme court would examine the final judgement by way of cassation.

That the plenum of the Supreme court must examine those final judgements on which the parties have exhausted their night of appeal as well. so as to effectively discharge its duty of ensuring uniform application of the law by the court must, however, be noted. It follows that the plenum of the Supreme court must, to teach all other divisions of the supreme court and lower courts so that they mav not commit similar «fundamental error of law» in the future, check their final judgements as wefl. Should it, however, resort to rendering its judgement on those final judgements of lower courts that « contain fundamentak ertor of laws: or would it be enough if it were to notify such lower courts on such errors in its directives?

To answer this, it becomes necessary to raise the question. What rationale, if any, could there be that must have forced the legislature to impose the duty of ensuring strict and uniform application of the contry's laws by all organs of state, mass organizations, enterprises engaged in production and distribution of goods and in the rendition of services and by private persons? To answer this question, a brief examination of the guiding principle of socialist societies and societies that follow the socialist path of deviopement becomes necessary.

The guiding principle in such societies is socialism. Their aspiration is to bring about an accelerated societal development by guiding their development in accordance with the the tenets of socialism. Thus, societies that have attained the societal stage of development of socialism guide their development to attain the communist stage of societal development in a planned manner. Likewise pre-capitalist societies that opt for the sacialist path of development guide their development programmatically to attain the socialist stage of societal development, by overpassing other. stages, including capitalism; as the history of development of the developed countries in Europe shows.

Under the tenets of scientific socialism, societies can attain higher stages of societal development provided the appropriate guidance is exercised by a state that is guided in accordance with scientific socialism. Once such a state comes into existence, ; development of the level of consciousness of the individual members of such a society and its economic development so that it attains the desired stage of societal develolopment in as short a period as possible, calis for strict compliance with the rules of conduct of societal interaction designed in accordance with socialism. In other words, designing rules of societal interaction that would accelerate the attainment of the aspried stage of development is indispensable. Such rules of societal interaction, it seems obvious to state, must be rules of societal interaction that are adhered to by all the members of such societies, if the development aspired at is to be realized. That this, in turn. would call for the strict and uniform application of norms of societal interaction sanctioned by law either positively or negatively so that socialist legality will be insured seems to be clear. A mechanism that would ensure the realization of socialist legality in the administration of justice so that state officiats intervene and remedy the illegality of final court judgements that may not be «disturbed » in tccordance with the legal system of capitalist societies, and societies that follow the capitalist path of development, becomes necessary.

That law is considered as one of the instruments of the State for the as pired stage of societal development in such societies can be seen from the role that law is expected to play in the Soviet Union. This is what is termed as the heuristic function of law, which is the the educational role that a legal system plays by making people learn the norms of societal interactions expected of them, so that law can contribute its share to the achievement of the stage of societal development that is aspired for. ${ }^{14}$ If law is to perform such a function, mechanisms that would, to the extent possibie, ensure its strict and uniform application must be devised.

If the functioning of such mechanisms were to be left to private individuals, they may not, as already noted above, ensure their strict operation so as to bring about the strict and uniform application of laws. One can, it seems reasonable to state as regards this point, draw an analogy on the division of crimes into complaint crimes and serious rimces. Complaint crimes, it is belived, affe ct mainly private interests of individuals who are the victims of such crimes. This being the case, prosecution and punishment of criminals who commit such crimes is left up to the discretion of private individuals who are the victims of such crimes serious crimes being. on the other hand conceived as crimes that affect not only the individuals who are immediate victims of such crimes but mainly society at large, the prosecution and punishment of such criminals is usually entrusted to a state organ: the office of the prosacutor This is for the reason that societies must prevent the commission of crimes by ensuring law and order which is a sine qua non for positive societal
interaction. However, if, despite this attempt, crimes are committed, the ferpetrators of serious crimes must, it is believed, be punsished by society at least for purposes of deterence. To leave the punishment of the perpetrators to the discretion of the immediate victims of serious crimes could amount to jeopardizing the overall societal interest of prevention of the commission of such crimes in the future by giving a lesson to would be perpetrators of such crimes in the future. This becomes true since the immediate victims of such serious crimes may, fer a variety of reasons such as getting the appropriate redress for their mishap. find it expedient to leave perpetrators of such crimes unpunished.

It can be stated that, once their premise on the prerequisite for societal development is accepted, socialist societies and societies that foliow the sociaןist path of development must, to realize the maximum contribution from their legal systems for their aspired development, entrust the strict functioning of mechnanisms such as the hearing of final judgements by way of cassation to the care of state officials. After all, that their hearing witl, to the extent that errors of law are rectified by it, contribute to the ensuring of strict and unifrom applicatation of laws cannot be doubted.

It must, however, be noted that as always happens in reasonings by analogiv, the rectifying of a <fundamental error of law» in a final judgement in a civil case, where the rectification brings about more benefits to one of the patties, may not be fully realized uniess the party so favoured decides to execute the rectified final judgement. This does not, however, mean that such final judgements need not be rectified. This is because rectification of « fundamental efror of laws in final judgements would enhance the discharge of one of the duties of the plenum of the Supreme Court already cited above; i.e.the issuance of $*$ directives to the courts with the view to improving the admini stration of justice and ensuring the uniform application of lawsy in the discharge of their judicial duties.

However, the argument that examining the judgements of lower courts to see if laws are uniformly applied does not necessarily entail revising these judgements to the extent that they «contain fundamental error of law". A question as to whether the plenum of the Supreme Court can issue directives to lower courts instructing them on how they should have applied the law could, as already noted above, be raised. It thus becomes essential to concede the role of initiation by at least one of the patries to a final court judgement and a display of interest that the party requesting for its revision will demand exechtion of the revised judgement of the plenum of the Supreme Court, should the party requesting revision by way of cassation find the revised judgement of the plenum of the supreme court more advantageous. The plenum of the Supreme Court may not demand aything more than this form the party that requests revision of a final judgement of any lower court, including the: Supreme Court. This becomes justifiable for the main reasan that
the plenum would, even in the absence of interest shown by a perty to any final court judgement, examine such judgement so as to be able to discharge onie of its duties, already cited, i.e.:

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\begin{aligned}
& \text { to issue directives to the courts with the view to improving the } \\
& \text { adminsitration of justice and ensuring the uniform application of } \\
& \text { laws. }{ }^{15}
\end{aligned}
$$

The duty of ensuring uniform application by the courts in the discharge of their judicial function being that of the Supreme Couft, it becomes essential to raise the question as to what meaning should be attached to one of the powers and duties of the procuracy, which is:
to follow up the legality of decisions or orders of the courts. ${ }^{16}$
The following points must be taken into consideration when attempting to resolve this question. One of these points is, as already noted above, the mechanism made available to the procuracy to ensure correct and uniform application of laws. This is to appeal to the sense of duty of higher courts to annul those judgements. orders and decisions of lower courts that are not rendered in accordance with the law. Thus, that it is the higher courts, in general, and the plenum of the Supreme Court in particular, that ensure the realization of socialist legality by quashing judgements, orders and decisions of lower courts that are not rendered in accordance with the faw seems to be clear.

The second point that must be kept in mind, as again already noted above, is that the judicial system in socialist societies and in societies that follow the socialist path of development is such that it cannot be performed if the plenum of the Supreme court is «dormants that needs to be «awakened» by either of the parties to a given case so as to examaine such a case to ensure socialist legality. Enhancement of the role that law is expected to play under socialism demands that the plenum of the Supreme Court discharge its share of duty of ensuring socialist legality. This demands that the plenum examine judgements of lower courts, without the need for any complaint from the parties to court judgements, so as to issue appropriate directives to lower courts.

That the president of the Supreme court will be responsibie to bring to the attention of the Supreme Court judgements that are not based on the uniform application of the law to enable the plenum issue appropriate directives is clear. That this task would include final court judgements as well as equally clear. Compared to the procurator General who will have access to final court judgements only in criminal cases, the president of the Supreme Court is the most approppriate official to decide which final couft judgements should be rectified by the plenum of the Supreme Court because they « contain fundamental error of law.n This becomes true since the discharge of this duty of his is incidental to the main duty of the plenum of the Supreme Court of ensuring the uniform application of laws by lower courts.

On the other hand, it must be noted that the procuratorial office is in no position to be even aware of the existence of decisions and orders made by
courts in civil cases in the discharge of their judical activities to arrive at a final decision that disposes of a case. Moreover, the plenum of the Supreme Court must, as already noted above, examine all orders and decisios rendered by fower courts while performing their judical activities so as to ensure uniform application of the law by lower courts, including the Supreme Court. It thus seems to follow that the power and duty of follow - up of the legality of decisions and orders of lower courts being implicit in the discharge of its duty of issuing «directives to the courts, with the view to improving the adminstration of justice and ensuring the uniform application of lawsy, it should be left to the Supreme Court. This becomes all the more reasonable when we recall that all the procuracy can do is appeal to the sense of legality of other judges in higher courts.

* Deputy Actorney General of PDRE. LLB., Faculty of Law, AAU (HSIU); PHD candidate, Edvard Kardlj Eniversity (Yogoslavia). Presently also on part-time teaching at Faculty of Law, AAU
I. Art. 4 '4; of the Supreme Court Establishment Proclamation No. 9 (Prochamations indicated byfsuch members are those of 1987 unless otherwise expressed Editor.)

2. An Amharic term that means a division of a court at any level within the hierarchy of courts. But here it means the Plenum of the Supreme Court.
3. Art 20 of the same Prociamations.
4. A1t. $5 / 1$ of the same Proclamation.
5. See the Procuratorial office Establishment Proclamation
6. See Art. Io of the same Proclamation.
7. Art. 5/2j of the Proclamation cited above at note I .
8. See Art. 4 of the Proclamation cited above at note 5.
9. See Art. Io/y/ of the Proclamation cited above at note 5 .
10. See Art. 3 of the Proclamation cited above at note 1 .
11. See Art. 22/2/ of the Proclamation cited above at note 1 .
12. That there are other state organs the supervision of whose activities to ensure socialisr legality is outside the Procuracy's jurisdiction should be noted. An obvious example is the Council of State.
13. See above at note 3 .
14. For a discussion on the heuristic function of law, see James L. Hiifdebrand, The Sociology of Sowiet Larv (New York, 1972), pp. 71-111.
15. For the same daty of the Supreme Coust in the Soviet Union, see P.Ia. Trubnikov, "Review of Decisions Through Judicial Supervision, "Soziet Lazw And Government (vol. 9, No.2), pp. 188-204 and V.V. Kulikov, "The Supreme Court of the USSR-The Highest Link In The Soviet Judicial System," Soviet Law And Government (Vol. 17, No.2(, pp. 57-74.
16. See Art. 13 of the Ploclamation cited above at note 3 .

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[^9]:    * See letters of Tenodros and the treaty of 1840 which are reprinked following the article as relevant background documenss (Editor)

[^10]:    "Why then do you come to me now?"
    "To request permission to return to Massawa.
    "What for?"

[^11]:    * Field Marshall Robert Napier was honoured with a statute at Queens Gate, in London bearing the additional title Lord Napier of Maqdala, beneath it.

[^12]:    (1) Thoodore's cousin (pace Rubenson, p. 1so, who describes Garred Kenfu as Thoodore' nephow) - ot. Wadda Marryan (ad. Mondon Vidithet, pp. 22-3).

[^13]:    "The minority opinion is not repreduced here. In summary the dissent is based on the proof of the existence of status and the dissenting judges nuled that suth was not proved. The opinion did not deal with acknowledgment of paternity in any way. (Editor.)

