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## JOURNAL OF ETHIOPIAN LAW

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Vol. XV<br>February 1992

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File No: 1272/77
Tahsas 4,1978

The Provisịnal Military Government of Socialist Ethiopia<br>Addis Ababa Awraja Court<br>Labour Division

| Judge: | Ato Yared Asfaw |
| :--- | :--- |
| Appellant: | On behalf of the International Community School, Ato <br> Negussie Fetawoke appeared. |
| Respondent: | Mrs. Svetlana Mamadova appeared. |

The case was adjourned for investigation. After analysing the case in light of the law, we have given the following decision.

## DECISION

This appeal has been lodged against the decision of the Conciliation Officer of the Ministry of Labour and Social Affairs rendered on Hamle 24,1977 on the claim made by the [present] Respondent.

The written and oral arguments of the present Appellant and the Respondent before the Conciliation Officer are briefly the following:

The Respondent had lodged a complaint stating that the Appellant, knowing that her marriage with an Ethiopian national had conferred upon her Ethiopian nationality in accordance with the Ethiopian Nationality Law, and being aware that previously she worked without a work permit, and disregarding the fact that the Appellant had requested and obtained the work permit and employed her as a music instructor from Nehassie 1975 up to Hidar 10,1975, it had improperly dismissed her from her job, stating that the work permit was revoked. The Respondent claimed that, since the act is improper, she should be reinstated in her job after being compensated for the salary she did not get as of the time of her dismissal. The Appellant has responded stating that the Respondent was employed as of Nehassie 1975 up to Hidar 10,1977, after a request was made for a work permit by considering
her as a foreigner, which work permit was later revoked. Since a foreigner whose work permit has been revoked cannot request to be reinstated to his or her job, in accordance with the regulations, the Appellant requested that the Respondent's claim for reinstatement be dismissed. After studying the case, the Conciliation Officer decided that the Respondent married an Ethiopian husband and hence she has Ethiopian nationality. Hence, whether or not the work permit is revoked, it will have no effect on the employment contract. Accordingly, the Reconciliation Officer decided for the reinstatement of the Respondent to her job and for her to be compensated for the unpaid salary and other benefits. The present appeal has been lodged against this decision. The decision is supported with copies of the written arguments and evidence presented by both parties.

The case of the Appellant's claim is that, since the decision of the Conciliation Officer, which held that the Respondent is an Ethiopian, is not supported by law or facts, the Appellant asked for the rejection of the decision and for a reversal decision to be given.

The Respondent on her part said that her response is the same as that which she stated before the Reconciliation Officer, and she sees no point in repeating that statement. She reminded the Court of the fact that the Appellant has appealed in order to harass ber through endless litigation, and asked the Court to dismiss the appeal and confirm the decision of the Conciliation Officer.

This Court has carefully examined the file in order to find out the issues to be decided, has referred to the written and oral arguments, and has also called an expert, the Head of the Passport, Visa and Nationality Section of the Ministry of Foreign Affairs, to clarify the question of the change of nationality.

We have summarized above the proceedings of the litigation between the Appellant and the Respondent for introductory purposes. Was the Conciliation Officer right or wrong in his decision? Based on this question, which indicates the course of our decision, we shall try to deal first with the following issue:

Was the Conciliation Officer right in deciding that, since the Respondent has married an Ethiopian husband, she has become an Ethiopian National and the revocation of the work permit has no effect on the contract of employment?
Based on these points and having regard to the law and practice, we shall state our findings, concluding opinion, and decision, step by step.

In analysing the first issue, we shall raise certain questions such as "How can a foreign national become an Ethiopian citizen?" What is the law and practice with regard to the granting of Ethiopian nationality? We shall raise these points in light of certain concepts.

We have observed that the basis of the decision of the Conciliation Officer which held that the Respondent is an Ethiopian, and thus the revocation of the work permit has no effect in the contract of employment with the Appellant, is the Nationality Law of 1922 Ethiopian calendar which provids that, if the Respondent marries an Ethiopian, she shall acquire Ethiopian nationality, and this seems also to be the explanation of the Ministry of Foreign Affairs in its letter, stating that the Respondent became an Ethiopian national as of the date she married her Ethiopian husband.

It is known in the various legal systems that every country has a nationality law in addition to other laws that provide for rights and duties of an individual, and the manner how the individual can ask for and/or lose such rights and duties. In these nationality laws, general characteric features of rights and duties such as the mode of changing a nationality and others are provided.

Even if such nationality laws provide various provisions especially for changing of nationality, we can classify the nature of these provisions into two parts. The first refers to those nations that permit dual nationality, permitting persons who request to have a nationality of another country in addition to the nationality of their land of birth, while, on the other hand, there are systems that prohibit dual nationality by annulling either the original nationality or the new nationality. The various treatises written on the nationality laws of countries and on international law help us to understand that the rationale behind such nationality laws is to avert a situation whese a person becomes stateless, and to protect the dignity of the person and his offspring.

A question that we usually ask ourselves is, "What is the importance of a nationality law ?" The nationality law makes us aware that a person with a given nationality, has rights and duties emanating from his nationality, and on the other hand it is to be understood that the nationality law helps us to choose the law to be applied to solve everyday disputes in a society; such may also be ascertained from the field of Private International Law (Conflict of Laws).

Based on this understanding, we shall turn our focus to the situation in our country, and find that the Ethiopian Nationality Law was proclaimed in the

Berhanena Selam news paper, Volume Six, Number 30, 1922 Ethiopian Calendar. Comparative analysis of the provisions of this Nationality Law, specially Art. 4 and the provisions that follow it, make it clear that the Ethiopian Nationality Law prohibits dual nationality. We may also observe that there are two ways in which nationality can be granted:

1. As indicated in Art. 12, when a request is made by a person who has attained full age in accordance with the regulation of his land of origin, who has lived in Ethiopia for at least five years, who is able to earn his livelihood, who can speak the Amharic language and who has not been previously charged of criminal acts: such person can be granted the nationality.
2. Without the preconditions stated in (1) above, a foreign woman may obtain Ethiopian nationality as a resullt of her marriage with an Ethiopian, as provided in Art. 2.

We shall analyze the provision that has relevance to the decision of this case, i.e. the law that deals with the nationality conferred upon a woman, as a result of marriage. Art. 2 of the 1922 (E.C) Ethiopian Nationality Law states," A lawful marriage of an Ethiopian subject with a foreign woman confers Ethiopian nationality upon her."

In fact, the Amharic version of the English term "Confers" is ambiguous and can raise various opinions, but the English word makes the provision clear by taking into consideration the precondition of the woman's consent.

We find it proper that the alternative solution to the problems arising from the application of the law include the consideration of the consent of the married woman, and the provision that the laws of her original nationality do not prohibit the changing of her nationality. Otherwise, should the law mandatorily impose on her the nationality, even if the Respondent does not want the nationality? The answer to this question shows that the law is not mandatory, and the practice of Ethiopia in the implementation of this law shows that Ethiopian nationality is not acquired by a mandatory imposition, but through a process where the beneficiary of the right should expressly declare her consent to get the nationality in front of a pertinent body, and should prove that she has renounced her original nationality. Unless this is done, a situation may occur where the woman has dual nationality, because, due to the right she acquired by the law, the beneficiary would be able to have Ethiopian nationality in addition to her original nationality, thus contravening the provisions
of the Nationality Law. Based on this, we understand it to be essential that the beneficiary of this law should manifest through her practices or other conduct that she has consented to acquire the nationality and to perform her duties emanating from the nationality. In other words, since law is based on inherent facts of various phenomena and expresses such relationship and interactions, it will be seen that the Respondent has consented to the right the law gave her through her express manifestation or at least through her conduct.

Based on this understanding, we shall try to see the overall conditions of the Respondent before trying to deal with our decision:

1. The Respondent was married to the Ethiopian husband, Ato Belay Dechasa, in 1976 in the city of Moscow, U.S.S.R..
2. The Respondent had not expressed her willingness to accept the right the law gave her (i.e. to be an Ethiopian) either to the Ethiopian Embassy in her country or even after she came to Ethiopia in 1972 (E.C.)
3. The Respondent worked in the Yared School, Addis Ababa, from 1972 to 1974 E.C. without a work permit, after she came to Ethiopia. Later, stating that she was a foreign national, based on her original nationality by birth, and declaring she had Soviet passport numbered 376067, she requested a work permit in a letter dated 20 August 1982 ( 14 Nehase 1974). Based on these facts, the present Appellant applied to the Foreigners' Employment Section, secured the Respondent's work permit and employed her as an instructor from 1975 to Hidar 10,1977 (20 November 1984); the Appellant later revoked the work permit as a result of the termination of the employment contract. The work permit document is still in the possession of the Respondent.
4. Even though she was married to her Ethiopian husband in 1976, she did not request to have the right granted to her by the law and it was only on Tir 7,1977 (16 January 1985) that she consented and requested to take the nationality; accordingly, a new identity card was issued to her on Miazia 19, 1977 (28 April 1985) as a confirmation of her Ethiopian nationality. As a result of her renunciation of her previous nationality, she was also registered on page 2106 of the Nationality Registry after it was ascertained that she had returned the Soviet passport.

Nationality of Married Women
Finally, even if it is not of direct relevance to the decision, the Respondent admitted that she had used her Soviet passport to go to her country, after the Ethiopian Nationality I.D. card was issued to her, but before she acquired an Ethiopian passport. Moreover, she explained at the hearing held on Hidar 28,1978 ( 7 January 1986) that she had requested the Central Committee of the Communist Party of her country, by stating her consent, to change ber nationality, but that she had at that time not yet received a reply.

Based on such statement of facts by the Respondent, we shall see the reasoning of our decision on the case, especially on the question, " Was the Respondent an Ethiopian at the time she concluded the employment contract with the Appellant?"

1. As explained above, even if the Nationality Law provides that the Respondent becomes an Ethiopian upon marrying an Ethiopian husband, and even if such was verified by the authorities of the Ministry of Foreign Affairs in a letter dated Hamle 12,1977 (20 July 1985), the evidence we received and a comparative analysis of the facts that she had not consented to enjoy her rights although she received the I.D. card (with its rights and benefits) from Ethiopian Ministry of Foreign Affairs after renouncing her previous nationality, all reveal the Respondent had retained her original nationality in addition to the Ethiopian nationality the law gave her, even after marrying an Ethiopian. In addition, her previous employment without a work permit after she came to Ethiopia, and her later request to get a work permit by showing her original nationality's identity helps us to understand that the Respondent was holding dual nationality, a state of affairs prohibited by the Nationality Law. Therefore, we have decided that the contract of employment the Respondent concluded at that time with the Appellant was in accordance with the employment regulation of foreign nationals.

As the Respondent was consenting to be treated as a Soviet national when she concluded the contract of employment with the Appellant, we have decided that the execution and revocation of the employment contract is to be carried out as in the procedure followed for foreign nationals.

In accordance with the regulation that governs the contract of employment of foreigners, it is provided that, if after the employer had requested and obtained a work permit for its employee, the contract of employment is terminated and the

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work permit is revoked, the employee cannot invoke a decision that the revocation was improper, nor can he or she request to be reinstated in the job; therefore we have rejected the argument of the Respondent to be reinstated in her job, because this reinstatement is prohibited by Art. 14(1) of Proclamation No. 64 of 1975 and the directive issued by the Ministry of Labour and Social Affairs in Tahsas 1974.

# Legal Opinion of the Procurator General On the Nationality of Married Women 

The Nationality Law of 1930, in Art. 2, states, "A lawful marriage of an Ethiopian subject with a foreign woman confers Ethiopian nationality upon her." At all stages (of the case) the point under dispute was what does "confers... upon her" mean ? Even if the law seems self-explanatory, the Awraja Court that heard the case stated that the condition of consent should be taken into consideration. The law is silent, however, as to the ascertainment of consent. On the other hand, even if it is evident that a nationality cannot be imposed on a person without the person's consent, the Applicant contests that the law has "mandatorily" made her an Ethiopian. But the law does not prohibit a woman who wants to retain her nationality for various reasons from doing so after marrying an Ethiopian national; this is also supported by customary practices. It is a known fact that there are many foreigners who have married Ethiopians and who still retain their original nationality in accordance with the law of their native nationality. Therefore, the fact that a woman married an Ethiopian cannot be the sole proof of her wish to be an Ethiopian national.

Nationality is a basic political right that indicates the voluntary nature of the relationship between the state and the individual and thus it is a legal mechanism that makes the individual part of the society. Rights and duties emanate from nationality. Even if the law permits the nationality to a foreigner, the law cannot impose Ethiopian nationality on him or her, if there are signs indicating lack of consent of the person. Since nationality cannot be imposed, and the Nationality Law, for example in Art. 16, stipulates that the husband and wife can each retain different nationalities, it would not be correct to argue that the Ethiopian nationality could automatically be acquired at the conclusion of marriage. In this respect there is no language disparity between the Amharic and English version of Art. 2 of the Nationality Law. Therefore the interpretation of the phrase "...confers Ethiopian nationality upon her" in Art. 2 should be made with the view that the woman should be "willing" to accept that nationality without making other demands. The case we are dealing with shows that Wro/Mrs/ Svetlana might legally have been an Ethiopian citizen as of the date she concluded the marriage. But for reasons that are not clear to us, the person was either not willing or undecided to be an Ethiopian citizen until this case reached a certain point, and this fact could be observed by the evidence presented. The fact that she requested a work permit in order to be employed as a music instructor from the Ministry of Labour and Social Affairs by acknowledging her Soviet nationality, and that the work permit identifies her as a Soviet national; the fact that she used her Soviet passport to go to her

## Nationality of Morried Womer

country (and return to Ethiopia) after she was married; and the fact that she applied to the Nationality Section of the Ministry of Foreign Affairs requesting Ethiopian nationality in 1985 G.C. (Tir 1977 E.C.) are all evidence revealing her state of mind towards becoming an Ethiopian national. As stated above, the condition of consent is not explicitly indicated in Art. 2 of the Nationality Law. But for the aforementioned reasons, and since this issue is clearer in Art. 4, it might be said that the presence and expression of consent should exist in Art. 2 as an intention of the legislator.

Art 5 [sic; in fact, Art. 4] declares that an Ethiopian woman shall lose her Ethiopian nationality if she concludes marriage with a foreigner and if the marriage"... confers upon her the nationality of her husband." What is clear from this provision is that an Ethiopian woman should consent to accept the nationality of her husband, and the sole fact that the nationality law of her husband's country confers upon her her husband's nationality will not be enough to deprive her her Ethiopian nationality. This is a mechanism provided by the legislator to protect persons from being without a nationality, and on the other hand to prohibit dual nationality; this mechanism should also be followed in the case of Art. 2. Pursuant to the law, as of 1979 when Wro. Svetlana concluded marriage with an Ethiopian, she became an Ethiopian citizen; but it is evident that her wish to be an Ethiopian citizen followed later, i.e. in 1985 when she requested Ethiopian nationality, and until that time she did not express her consent to take Ethiopian nationality; the work permit she received indicates her Soviet nationality. We have no doubt that the information in the work permit, including her nationality, was given by herself. Therefore, when she concluded the contract with the International Community School, she was not an Ethiopian citizen.

Another point concerning nationality to be analyzed in this case is the issue of dual nationality. We can understand from the Ethiopian Nationality Law, especially Arts. 4, 6, 7, 11, 17 and 18, that dual nationality is prohibited. On the other hand, the Nationality Law of the Soviet Union states that a national of the Soviet Union shall' not lose his/her nationality because of marriage. In order to lose the Soviet nationality legally, it is required to follow a certain procedure by which permission is requésted and granted or refused. Dual nationality is explicitly prohibited in Soviet law.

The prohibition of dual nationality means that, in order to receive either Soviet or Ethiopian nationality, a foreigner must renounce (or, as our legal terminology states, "be detached from") his original nationality. It makes no difference to the execution of this law whether or not the person acquires the new
natimality iltrough marriage.
A comparative analysis of the laws of the two countries brings us to the following (y)nclusions.

In accordance with Soviet Law, Wro. Svetlana could not change her Soviet untionulity for the sole reason that she married an Ethiopian, without previously selting permission to lose her Soviet nationality or without following the procedure of stating and proving her unwillingness to remain a Soviet national. This means that after her marriage she remained a Soviet national in the eyes of the Soviet law. This was also Wro. Svetlan's belief, shown by the fact that her request to change her nationality and the grant of permission were made only after a lapse of some time.

We have stated that the nationality laws of both countries have a similar stand on dual nationality. They differ in that the Soviet law is explicit. Our analysis of some of the provisions of the Ethiopian Nationality Law explains that the law prohibits dual nationality. For example, a child born to an Ethiopian woman and a forcigner shall be considered as having the nationality of his father, in accordance with Art. 6. If, due to the fact that he was born to an Ethiopian mother, he wants his mother's nationality, he would first have to prove that he has renounced his finther's nationality (cf. Art.1). Similarly, it may easily be observed that Art. 9 prohibits dual nationality on the one hand, and on the other hand, protects persons from being without a nationality.

Therefore, the Ethiopian law that prohibits dual nationality to this extent expects Wro. Svetlana, whose case is governed by Art. 2 , to avoid dual nationality and state (at least for formality's sake):
(1) I have concluded marriage with an Ethiopian; hence
(2) I have renounced my original nationality (whether or not in accordance with Soviet law). I have decided to be an Ethiopian citizen, and would like this to be known so that my nationality rights be affirmed.

Without such statements being made and being confirmed, it is unacceptable, by the law and the policy behind it, to assume that the Respondent has become an Ethiopian citizen just because of the conclusion of marriage.

But the opinion of the Awraja Court is that the Respondent has tried to hold

## Naxionality of Married Women

dual nationality. This was not without reason. It is possible to see from the file of the case that Wro. Svetlana appeared to have different nationalities at different times. Even if the Ethiopian law does not require additional issue, for reasons specified above, dual nationality is prohibited under both Ethiopian and Soviet law, and therefore we find the argument of Wro. Svetlana unsound in her statement that she has been or is an Ethiopian citizen without previously legally giving up her Soviet nationality.

Based on one of the letters of the Ministry of Foreign Affairs we found in the file, an analysis is essential of the question that, if Wro. Svetlana has become an Ethiopian "automatically" on marriage, and on the other hand if in accordance with the Soviet Nationality Law she could not lose her Soviet nationality merely because of marriage, did she have dual nationality? It is undoubted that Soviet law is to be executed in Soviet territory, and Ethiopian law is executed in Ethiopian territory. Therefore, it could be argued that, since the Soviet law cannot be executed in Ethiopia, and because the Respondent can be an Ethiopian citizen in accordance with Ethiopian law, Wro. Svetlana is an Ethiopian citizen. But what if on a certain occasion she happens to be in Soviet territory? Are we going to agree that she is a Soviet national ? If we accept her argument, will she not be a Soviet national in accordance with Soviet law and an Ethiopian citizen in accordance with Ethiopian law ? But we know that both laws prohibit dual nationality. By a comparative analysis of Arts. $4,6,9,11,17$, and 18 , we have earlier arrived at the conclusion that she cannot acquire the second nationality without first renouncing her original nationality. Accordingly, we find the condition of her consent imperative.

In this respect, (a) the fact that she used her Soviet passport until 1985 (1977 E.C.), and the contract she entered into, which could not have been signed had she been an Ethiopian national, (b) the fact that she was exempted from payment of National Contribution ${ }^{1}$ at the time covered by the contract because she was a foreigner, (c) the fact that she requested the Ministry of Foreign Affairs, in her own handwriting, to be given Ethiopian nationality as of 1985 (and not as of the date of her marriage), and the fact that she was later registered as an Ethiopian citizen after she received permission from the Soviet Union's Government - all these are facts that clearly show that Wro. Svetlana did not consent (or did not have legal permission) to be an Ethiopian national until 1985.

[^0]Wro. Svetlana lost her Soviet nationality after she received "permission" by following the proper procedure in Soviet law. She might, however, have ignored this procedure. It is right to assume that she followed this procedure because, in case she wanted to regain her original nationality for any reason, she thought that it might be beneficial to renounce it through the correct procedures.

Another issue that needs explanation is the legal interpretation of the request made to the Ministry of Foreign Affairs, stating that it should grant or give nationality. Even if customarily "permission" is requested, the Ministry does not "grant" nationality. Nationality may be acquired or is granted by the Nationality Law, but it is the execution that is carried out by the said Ministry as stated in the law. When a person applies for nationality, he is indicating that he can receive the nationality in accordance with the law, he is acknowledging his consent. We have understood from the practice that when an applicant hands in his application, he shall return or show evidence to a pertinent body that he has returned the documents concerning his original nationality. The Ministry shall then register him as an Ethiopian citizen and will issue an Ethiopian identity card to him. This was what happened in the case discussed here. Based on the application entered by the Appellant (Wro.Svetlana) on Tir 7, 1977, she received a signed Ethiopian nationality identity card from the Ministry on Miazia 17, 1977 (28 April 1985).

# The Nationality of Married Women Under Ethiopian Law 

Getachew Aberra*

## I

The provisions of the Ethiopian Law of Lationality of 1930 relating to the nationality of married women have, of late, been the subject of different interpretations. In a labour dispute ${ }^{1}$ between Mrs. Svetlana Mamadova and the American Community School which involved the nationality of a Russian woman married to an Ethiopian subject, the Conciliation Officer of the Ministry of Labour and Social Affairs held that Mrs. Svetlana had become an Ethiopian subject by virtue of her marriage with an Ethiopian national. On appeal, the Awraja Court ruled that Mrs. Svetlana would not become an Ethiopian subject under Ethiopian law, by the mere fact of her marriage with an Ethiopian national. This decision of the court was subsequently endorsed by the Office of the Procuracy.

The decision of the Awraja Court raises two interesting and important issues regarding the nationality of alien women married to Ethiopian nationals: What is the effect of marriage, under Ethiopian law, on the nationality of alien women married to Ethiopian nationals? Can Ethiopian court deny Ethiopian Nationality to an alien women married to an Ethiopian national on the ground that the Ethiopian Law of Nationality does not allow dual nationality?

In this paper, it is proposed to show that the provisions of the Ethiopian Nationality Law of 1930 relating to the nationality of alien women married to Ethiopian nationals are based on the old concept of the unity of the family. For this purpose, the evolution of the law on the nationality of married women is examined with a view to putting the Ethiopian Law of Nationality regarding married women in context. This is followed by a brief discussion of the issue of dual nationality, as this, too, is an issue with regard to which there appear to be differences of conceptions and interpretations. After a brief survey of the possible sources of the Ethiopian Law of Nationality of 1930,the application of this law by the Awraja Court to a case involving the nationally of an alien women married to an Ethiopian national is examined. Finally, a few remarks are made, by way of conclusion, on the distinction between law making and the judicial function, and the danger of

[^1]overlooking the consequences which follow when one oversteps into the realm of the other.

## II

The development of the concept of nationality presupposes the emergence of nationstates and a system of international relations. ${ }^{2}$ The enactment of nationality rules is of no practical significance for a state's population where such a state does not have international relations with other states. In the absence of other states, and, therefore, of international relations, the problem of what Panhuys calls "marginal cases ${ }^{\prime 3}$ does not arise. Because a plurality of states exists interconnected more and more within a system of international relations, the problem arises when there occurs doubt as to whether or not an individual belongs to one state or another. The problem of determining whether an individual belongs to one state or another appeared in its concrete form with the introduction of compulsory military service and the universalization of national political rights. ${ }^{4}$

A determination that an individual is a national of a state to the exclusion of other states necessarily involves the relationship between states. It can be seen, therefore, that, ideally, questions of nationality ought to be determined by international law.

However, as the concept of nationality is a recent phenomenon, international law has not as yet developed concrete rules to govern matters of nationality. International law simply recognizes that each state has the right to determine under its own law who its nationals are. ${ }^{s}$

The nationality of married women is, thus, determined by the laws of each state. Provisions of the nationality laws of states are based on one of the two basic principles governing the nationality of married women. The first of these principles is one which requires the nationality of the wife to follow that of her husband, while the second principle reserves to the married woman the right to choose her own nationality. Until the close of World War I, states invariably applied the first principle in accordance with which marriage by itself conferred the nationality of the husband on the woman. A number of arguments are forwarded to justify the acquisition by the wife of the husband's nationality. It is urged that the unity of the family should be maintained by having all members of the family - wife, husband and children under age - belong to the same nationality. The argument here is that this avoids the difficulties that the family faces when husband and wife are subjected to
different and possibly conflicting regimes of allegiance.
Where wife and husband belong to different legal systems, the family can be made to face serious hardships when called upon to discharge different legal obligations which have to be met from resources which may or may not be held in common. ${ }^{6}$ From the point of the state, too, it is argued that the sovereign is entitled to the undivided allegiance of the family as a whole. It is almost always the case that marriage brings the wife to the state of which the husband is a national. And whoever is found in the territory of a sovereign owes allegiance to him. Moreover, it is said, in connection with this, that it is convenient for the state to take the family as the unit of nationality.

It is, however, obvious that the concern for maintaining family unity or the unity of allegiance of the family by having the women acquire the nationality of the husband without consideration of the consent of the wife hides a serious imbalance behind it. For it is clear that the law fails to take the woman as an individual in whom inheres the inalienable right of being consulted for her consent in a matter that directly affects her as an individual.

The unity of the family and its unity of allegiance could have been preserved by having the husband acquire the nationality of the wife in the same manner as the wife is made to acquire the nationality of the husband. It has almost always been the case that it was the woman who had to adopt the nationality of the husband and not the husband who had to adopt the nationality of the wife. ${ }^{7}$ In the relatively rare case of the husband living in the territory of the state of which the wife is a national, the procedure of naturalization in which both the act and intent coincide was made available to the husband. The wife did not enjoy this opportunity.

This disregard of the right of the woman in the law of the nationality of married women represents a development backwards. Before the advent of male chauvinism during the feudal era, the law of nationality of married woman was more humane and egalitarian. It was by and large based on the principle of Roman law, "No one should change his civitas or remain in one against his will."s

In the United States of America, the acquisition, retention and loss of nationality was, until 1855, a matter that depended on the will of the person concerned. Indeed, such freedom was thought to be a natural and inherent right of all people, indispensable to the enjoyment of the right of life, liberty and the pursuit of happiness.'

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However, one observes that it did not take long for the American legal system to fall into the traps of male chauvinism. In 1855, the American Congress passed an Act which conferred U.S. citizenship on any alien woman who married an American citizen. ${ }^{10}$ And in 1907, the picture was completed when the U.S. Congress passed another Act, pursuant to which a U.S. woman married to a foreigner acquired the nationality of her husband, i.e., she lost her American citizenship. ${ }^{\text {.1 }}$

The American law of nationality was thus brought "up-to-date" to make it conform with the common law principle applied by the British legal system after 1844. In England, the common law principle that the national status of a woman did not change upon marriage applied until 1844. ${ }^{12}$ This common law rule applied both in the case of an alien woman married to a British subject and a British woman married to a foreigner. ${ }^{13}$ The basis of this rule is the feudal concept of allegiance, that one's allegiance to the king could not be changed at will.

This common law rule, however, had to give in,finally, to the influence of the relatively modernized feudal rule which appeared in the Code Napoleon of 1804. The Code Napoleon, while retaining, in Article 12, the rule that an alien woman married to a Frenchman followed the condition of her husband, provided in Article 19 that a French woman who married a foreigner would also follow the condition of her husband. This provision of the Code represented a step forward, since, under the feudal rule as expressed in the principle of the common law, a woman married to a foreigner was not allowed to change her allegiance by acquiring the nationality of the husband. ${ }^{14}$

This, then, was a partial liberation for women in the spirit of the French Revolution.

The Code Napoleon was more significant by the influence it had over the evolution of the law of nationality of married woman throughout the continent of Europe. Thus, in 1844 the British Parliament adopted an Act in accordance with which an alien woman who married a British subject acquired the character of a naturalized British subject. This was the first departure from the common law principle. The British law of nationality of married women was made more complete when, in 1870, Parliament passed another Act, pursuant to which a married woman would be deemed to be the subject of the state of which her husband was for the time being a subject. ${ }^{\text {IS }}$

Again, the French legal system took the lead in the area of the nationality of
married women when, in 1889, Article 12 of the Code was altered and a further proviso added to the effect that a French woman would not change her national status upon marriage unless her marriage conferred upon her the nationality of the husband. ${ }^{16}$

The principles laid down in the Code Napoleon regrading the nationality of married women had their gradual impact throughout the so-called civilized world.

The influence of the Code enormously increased especially during the period that followed the conclusion of the First World War. By around 1930, as many as fifteen of the European States had adopted nationality laws providing for the acquisition by an alien woman of her husband's nationality. Some of the Latin American states and all five of the Scandinavian states had adopted similar laws. ${ }^{17}$

## III

It has been said that citizenship is a result of both act and intent, and that a person may reside in one state and be a citizen of another state. ${ }^{18}$ This implies that a person cannot be forced to acquire or lose his citizenship unless he has taken some action and shown some intention to that effect. This statement may be correct with regard to cases of the acquisition and loss of citizenship in connection with the normal procedure of naturalization and expatriation. With regard to the acquisition and loss of nationality by married women, however, this statement could not have been correct between the second half of the 19th century and the first half of the 20th century. It is not correct even to this date with regard to the legal systems of many states, including that of Ethiopia.

Article 12 and 19 of the Code Napoleon, the Acts of 1844 and 1870 passed by the British Parliament and the laws of 1855 and 1907 adopted by the U.S. Congress, which enormously influenced the development of nationality laws adopted by other states, were all based on the feudal concept of allegiance. Because of this circumstance, we find the interests of the sovereign for the undivided allegiance of the family under the guise of maintaining the unity of the family, having been given preference at the expense of the freedom of the married woman. Thus, the mere fact of marriage was sufficient to deem the wife the national of the state of her husband. The consent of the women was bluntly disregarded, and sometimes assumed in a matter that directly concerned her personal status.

In the United States, prior to 1922 , an alien woman married to a U.S. citizen

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became herself a U.S citizen irrespective of her consent. In a case of marriage of an alien woman to a U.S. citizen (Brader v.Zubrick), which occurred in 1922, the U.S. Court held that the alien woman had acquired U.S. citizenship by such marriage ${ }^{19}$ (emphasis added). During the period that preceded 1922, the rule laid down in Kelly v. Owen applied, so that a state of marriage to a citizen was sufficient to confer citizenship. ${ }^{20}$ In general, in the absence of a contravening status, the citizenship or nationality of a wife was, during coverture, that of her husband. ${ }^{21}$

Sometimes, consent to renounce nationality by the woman was held to be implied from the act of marriage itself. In Mackenizie v. Hare, the U.S. Supreme Court found the intent to renounce U.S. citizenship in the act of marriage and the presumed knowledge of the legal consequences of such an act. ${ }^{22}$

The same argument can be made that the consent of alien woman to acquire the nationality of the husband is implied from the act of marriage. In the opinion of this writer, however, it is difficult to take conset given in respect of marriage as consent given in respeect of the acquisition or loss of one's nationality. The conclusion of marriage is a juridical act having its own juridical consequences. The acquisition or renunciation of nationality is an entirely different and independent juridical act, having separate and other juridical consequences.

One can give his consent to accept the juridical consequences of marriage and still withhold his consent to accept the juridical consequences of acquiring a new nationality or of renouncing his nationality. To imply consent to acquire or renounce one's nationality from the act of concluding marriage, it appears, is yet another method which tends to perpetuate a basically unjust legal situation that developed on the basis of an outworn concept of allegiance.

The difficulty of having to justify a discriminatory and unjust rule is apparent from the reasoning of the Court.

In this same case (Mackenzie v. Hare) where the status imposing loss of nationality upon American women on marriage to foreigners was challenged as discriminatory and arbitrary, the Court ruled that, since the wife acquired automatically her husband's nationality under the concept of marital unity then prevalent in the laws of other states, the law causing American women to lose involuntarily their American citizenship simultaneously was a reasonable attempt to achieve the political ideal of unitary citizenship. ${ }^{23}$ It did not then matter that this political ideal of unitary citizenship was achieved at the expense of the freedom of married woman to choose ber own nationality.

Viewed from this point of view, the categorization of the acquisition upon marriage by an alien woman of her husband's nationality as a form of acquisition of nationality by naturalization ${ }^{24}$ is equally misleading. To the extent that acquisition of nationality by naturalization presupposes both the act and intent of the person naturalized, ${ }^{25}$ it certainly cannot describe the manner of acquisition of nationality by an alien woman married to the national of another state. For, in the marriage of an alien woman to the national of another state, the effect of marriage was automatic, and neither act nor intent was required for the alien wife to acquire her husband's nationality and to lose her original nationality, too. The real purpose of nationality laws prior to 1922 as regards some countries, and long afterwards as regards many others, it should be noted, was, with respect to married women, to achieve the political ideal of unitary citizenship and thereby to maintain a unity of allegiance. ${ }^{26}$ This political ideal was achieved by ignoring the natural right of the married woman to express her consent when she acquired her husband's nationality and lost her original nationality.

The practice of continental Europe was not different from that of the U.S. in this regard. In Europe, too, marriage ipso facto involved a loss of nationality by the wife. During the period that elapsed after World War I, as many as fifteen European states had adopted nationality laws on the basis of which alien women married to their nationals acquired their husbands' nationality unconditionally. ${ }^{27}$

In all the five Scandinavian states, alien women automatically acquired their husband's nationality. In Germany and Italy, too, marriage of an alien woman to a national had the automatic effect of giving to the alien woman the husband's nationality.

As things stood then, the automatic effect of marriage was so widely practised and strongly adhered to by so many of the major countries of the world, that President Hammarskjld had to admit at the International Law Conference held in Stockholm (1923): "Under present conditions, a reform which would deprive marriage of its automatic effect on the nationality of the wife would have very little chance of being universally accepted. ${ }^{28}$ Indeed, some international jurists went even further and suggested, as a principle of international law, that the nationality of the married woman was presumptively that of her husband. ${ }^{\text {ig }}$

Thanks to the efforts of women's organizations since the beginning of the 20th century, and the opinions of prominent international jurists, the law relating to the nationality of married women continued to draw the attention of the legislators of
different states, especially after the end of World War L. No doubt, this legislative concern was prompted by the difficulties alien women and their husbands had to face during the course of the war.

Russia was the first state to take legislative action in this regard. In 1918, she adopted a law to the effect that marriage per se did not affect the nationality of the wife. ${ }^{30}$ However, the law cannot be complete where it does not adequately provide for the procedure whereby an alien woman married to a national can, if she desires, acquire her husband's nationality and lose her original nationality.

It was, therefore, the Act of 1922 passed by the U.S Congress which really set in motion legislative activity relating to the nationality of married women. In this Act (known as the Cable Act), certain provisions were made so that:
a) mere marriage of an alien woman to a U.S. citizen did not automatically give her U.S.citizenship, which she could acquire only through naturalization; and
b) the mere marriage of a U.S. woman to an alien did not result in her loss of U.S. citizenship unless she made formal renunciation. ${ }^{31}$

The Cable Act had had its gradual impact on the legislation of a number of states. Belgium (1922), Rumania (1924),France (1927), Norway, Sweden, Denmark, Iceland and Finland (1924-27) adopted new laws affecting to varying degrees the principle that a woman's nationality depended on that of her husband. ${ }^{32}$

Around this period, too, various international bodies were actively involved in the development of concepts that would guide national legislation on the issue of the nationality of married women. In its 1922 Conference, the International Law Association declared that, in its opinion, it would be desirable to fix by treaty the nationality of the married woman, reserving to her as far as possible the right to choose her own nationality. ${ }^{33}$. A model status prepared along those lines was adopted the following year, 1923, at the Stockholm Conference of the Association.

The Commonwealth Conference, too, held in 1926, expressed its concern over the effect of marriage on the nationality of married women. ${ }^{34}$

Finally, the Committee of Experts for the Progressive Development of International Law set up by the League of Nations found that the law of nationality (including that of married women) was ripe for codification.

These various efforts led to the adoption at the Hague, in 1930, of the Convention on Certain Questions Relating to the Conflict of Nationality Laws.

Nevertheless, this Convention did not go as far as restoring to the married woman the right to choose her own nationality. Article 8 of the Convention stated:

> "If the national law of the wife causes her to lose her nationality on marriage with a foreigner, this shall be conditional on her acquiring her husband's nationality."35

The Convention in its very first Article reaffirmed the rule that it is the right of each state to determine under its own law who are its nationals. Once this rule was adopted, it was inevitable that the automatic effect of marriage had to be recognized in an indirect way. Articles 8,9 and 11 are based on this recognition. Thus, the Convention limited itself, in this regard, to regulating the problems of dual nationality and statelessness which unavoidably followed from the rule laid down in Article 1. Consequently, the problem of the nationality of married women was not $:$ : considered as a problem by itself; the Convention was interested in the law of nationality of married women only as it gave rise to dual nationality and statelessness.

Indeed, as general state practice and international conventional law was based on the traditional principle that, during coverture, the nationality of the wife followed that of the husband, the authors of the 1930 Convention did not seek to promote the recognition of the rights of women nor to achieve equality of rights between husband and wife in matters of nationality. ${ }^{36}$ The Conference, therefore, deemed it necessary to append a recommendation for national legislation. Recommendation IV thus adopted by the Conference stated:
> "The Conference recommends to the States the study of the question of whether it would not be possible.
(1) to introduce into their law the principle of the equality of the sexes in matters of nationality, taking into consideration the interest of the children, and especially,
(2) to decide that, in principle, the nationality of the wife shall henceforth be not affected without her consent either by the mere fact of marriage or any change in the nationality of her husband. ${ }^{137}$

The Convention was ratified very late (on 1 July 1937, the day it was registered with the Secretariat at the League), and by very few countries (only by 11 of the 32 signatories). Despite this, however, the Convention itself and specially Recommendation IV appended to it appear to have had some influence on national legislation adopted subsequently. Thus, with regard to a native-born woman married to an alien, some states showed willingness to allow her to retain her original nationality unless she made a formal declaration of renunciation. However, practically all states, with few exceptions, were unwilling to reserve to the alien woman married to a national the same right that they reserved to their own nationals. ${ }^{38}$

Accordingly, with regard to alien women married to nationals, the old rule that the nationality of the married woman follows that of her husband, irrespective of her consent, continued to apply.

Meanwhile, various women's organizations, international jurists, regional and world bodies continued their efforts with a view to adopting principles of nationality law relating to married women that would ensure equality of the sexes.

The Montevideo Convention on the Nationality of Women of 1933 deserves particular mention here, as it was the first multilateral convention to recognize the equality of the sexes in matters of nationality. ${ }^{39}$ Article 1 of this Convention obliged parties to accept the assessment, "There shall be no distinction based on sex as regards nationality in their legislation or in their practice. ${ }^{40}$ The adoption in 1945 of the Charter of the United Nations at the San Francisco Conference on International Organization had a significant influence on the evolution of the law on the nationality of married women. Article 1, paragraph 3 of the Charter provides, as one of the purposes of the United Nations, the achievement of international cooperation in promoting and encouraging respect of human rights and for fundamental freedoms for all, without distinction as to sex, race or religion. ${ }^{41}$ See also Article 55, 56, 62, 68 and 76 of the Charter.

In 1948, the Universal Declaration of Human Rights was adopted. Articles 15 and 16 of this Declaration provided, inter alia, that everyone has the right to a
nationality; that no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality, and that men and women are entitled to equal rights as to marriage, during marriage and at its dissolution. ${ }^{42}$

In the meantime, under pressure from women's organizations and other groups, a Commission on the Status of Women was set up by the Economic and Social Council of the U.N. charged with the task of attaining equality between men and women. Though the original intention of the Economic and Social Council was to charge the International Law Commission with the responsibility of preparing a draft convention, it was found out that that would take a longer time than the situation of married women would allow. In the event, the Commission on the Status of Women was entrusted with the task of preparing such a draft convention. ${ }^{43}$ After around ten years of study and discussion, the Commission came up with a draft Convention on the Nationality of Married Women. The draft Convention was adopted by the U.N. General Assembly and opened for signature by member states on 28 January 1957.44 It came into force on 11 August 1958.

The 1957 Convention on the Nationality of Married Women is based on the recognition that the nationality of married women is a problem that attaches to the dignity and freedom of women as individuals. It therefore directly addresses the very core of the problem - the effect of marriage on the nationality of the married women.

Article 1 of the Convention gives the following significant provision:
"Each contracting party agrees that neither the celebration nor the dissolution of a marriage between one of its nationals and an alien, nor the change of nationality by the husband during marriage, shall automatically affect the nationality of the wife" (emphasis added).

By this Convention, the international community assembled in the General Assembly of the United Nations stood in unison and recognized the right of the married woman to choose her own nationality. The Convention represents a victorious conclusion of the struggle for the previous one hundred years of women's organizations and international jurists. And, one may add, it represents a victory for justice.

However, the problem of nationality of married women is still far from being over. By around 1979, the Convention had been ratified and acceded to by very few countries, ${ }^{45}$ and it appears that not many even of those states seem to have adopted
national legislation to give effect to the Convention.
The report of the U.N. Secretary General submitted in 1963, five years after the Convention came into effect, makes this clear. ${ }^{46}$

According to the report, the legal systems of states are classified into three main groups:
a) The first group consists of legal systems where the nationality of the wife follows automatically the nationality of the husband, i.e., marriage itself, the dissolution of marriage and change of nationality by the husband during marriage have direct effect on the nationality of the wife. The Ethiopian Law of Nationality of 1930 is shown in the report ${ }^{47}$ as falling under this group. Some twenty-seven states fall into this group, including Ethiopia, Italy, Austria, Greece, the Netherlands, Switzerland, Portugal and Turkey.
b) The second group consists of legal systems where marriage automatically affects the nationality of the alien wife, but, to avoid statelessness and dual nationality, the principle of the unity of the family is somewhat modified to accord with the provision of the law of the husband's state. About thirteen states fall under this group, including China, Belgium, Tunisia, Bolivia and Cameroon.
c) The final group consists of legal systems where marriage has no effect on the nationality of the alien wife without her consent. Of these, approximately twenty-four states simply recognize the right of the alien wife to acquire the husband's nationality; some 24 states have provided for easier terms of naturalization;' some 12 states simply do not recognize marriage as having any effect on the nationality of the alien wife. ${ }^{48}$

The picture is quite different as regards marriage of a woman national to an alien husband. ${ }^{49}$ Six states provide for the automatic loss of nationality of a woman national married to an alien husband; the Ethiopian Law of Nationality, according to the report, comes under this group. However, the loss of Ethiopian nationality by an Ethiopian woman is conditional upon her acquiring her husband's nationality. Some seventeen states provide for the automatic loss of nationality by a woman national upon marriage to an alien if she acquires the nationality of the husband. About seventy-seven states reserve to their woman nationals the right to retain their nationalities upon marriage to aliens.

As can be seen, though the 1957 Convention is an achievement by itself, there
is a long way to go before its letter and spirit are fully given effect by the generality of states.

## V

One of the effects of marriage on the nationality of the married woman is that it increases the chances under which the woman can have, voluntarily or involuntarily, not only dual but also multiple nationality. Normally, dual nationality occurs in respect of any person when conflict arises between different principles followed by states to determine who their nationals are. Thus, if a person born of Ethiopian parents in the United States is naturalized in Great Britain, such a person will have not just dual but multiple nationality. This is so because Ethiopia follows the principle of jus sanguinis, while the United States applies the principle of jus soli. The naturalization law of Great Britain does not require ${ }^{50}$ a person's release from his original nationality for naturalization as a British national. So, if an Ethiopian woman, born in the U.S.A. and naturalized in Great Britain marries a German national (whose nationality law gives automatically the nationality of the husband to an alien wife, ${ }^{51}$ ) she ends up having the nationality of four states.

Dual nationality occurs not only due to the conflicting application by states of the principles of jus sanguinis and jus soli, but also because of refusal by states to allow their citizens to expatriate themselves (to renounce their nationality), and because of failure by some states to require release from original nationality or allegiance before conferring their citizenship by naturalization. ${ }^{5}$

The automatic effect of marriage on the nationality of married women increases the incidence of dual or multiple nationality. A good example of this is the case of the Complainant referred to in the first paragraph and also later in this paper. Under the Law of Citizenship of the Soviet Union of which the Complainant is a national, marriage does not change the nationality of a Soviet woman, ${ }^{53}$ while under the Ethiopian Law of Nationality, the lawful marriage of an alien woman to an Ethiopian subject confers Ethiopian nationality on her. As argued here, the Ethiopian Law of Nationality is based on the old rule that the nationality of an alien wife unconditionally follows that of her husband, while, under U.S.S.R. law, a Soviet wornan married to an Ethiopian subject inevitably acquires dual nationality.

A person may use his dual or multiple nationality to avoid legal duties, or to realize benefits by moving from one state to another of those whose nationalities he possesses.

On the other hand, a person who possesses dual or multiple nationality can be required to discharge his duties under different legal systems of the states of which he is a national. Obligations of military service and tax liabilities are classical examples of duties which a person of dual or multiple nationality is usually called upon to discharge by states whose nationalities he possesses. This can obviously make the life of such a person difficult.

However, the real difficulties in respect of a person of dual or multiple nationality arise when such a person is injured by a state. When this occurs, the person injured cannot himself bring an international claim against the state which injured him, since it is generally agreed that individuals are not the subjects of international law, and that therefore they do not have international standing. ${ }^{54}$ The injured person can bring an international claim against the state which injured him only by seeking the diplomatic protection of one or the other of the states whose nationality he possesses. As nationality is a legal relationship between a person and a state which allows the jurisdiction of the state to be extended, and the laws of the state to be applied to the person, ${ }^{55}$ the issue of jurisdiction and of diplomatic protection of a person of dual or multiple nationality interests all the state of which such a person is a national. ${ }^{56}$ In these circumstances, conflict of jurisdiction and of claim to extend diplomatic protection to a person of dual or multiple nationality is inevitably bound to arise among the states involved.

How then are the claims of states for the diplomatic protection of a person of dual or multiple nationality to be settled?

As these claims are international claims of states, they are settled in accordance with international law, conventional and customary.

It is now an accepted principle of international law that the power to determine who the nationals of a state are remains within the domain reserve of each state. This is confirmed by cases decided by both the Permanent Court of International Justice and the International Court of Justice. ${ }^{57}$ The Hague Convention of 1930 accepts the principle, "It is for each state to determine under its own law who are its nationals. ${ }^{58 *}$ Even such writers as Van Panhuys and Joseph L.Kunz, who differ on the findings of the Court of International Justice in the Nottebohm case, agree that international law recognizes the right of each state to determine who its nationals are ${ }^{59 .}$ Accordingly, "How far a given state intends to stretch its personal jurisdiction or sovereignty with regard to nationals abroad is a matter of domestic law ${ }^{146 .}$

If each state has, under international law, the general right to determine who its nationals are in accordance with its own domestic law, it follows that other states have the general duty to recognize such determination. Indeed, Article 1 of the Hague Convention cited above stipulates that the domestic law under which each state determines who its nationals are "shall be recognized by other states insofar as it is consistent with international conventions, international custom and the principle of law generally recognized with regard to nationality."

Insofar as the question of nationality is concerned, Article I above is consistent with the principle that the competence of the legislator of a state, and therefore the force of its law, are limited to the territory of that state. ${ }^{11}$

Hence, in this regard, it is correct to say, " In the absence of any treaty or some other form of international compulsion, the (Ethiopian) court can refuse to consider any law but its own" ${ }^{2}$

In other words, an Ethiopian court cannot refuse to declare a person of Soviet origin an Ethiopian national under the Ethiopian Law of Nationality on the ground that to declare him so would make him a double national because of the conflict between the nationality laws of the two states. ${ }^{63}$ In Ethiopia, Ethiopian courts are not duty-bound to apply Soviet law which is inconsistent with Ethiopian law, and the courts can therefore declare a person an Ethiopian national irrespective of Soviet law. Since the Ethiopian Nationality Law does not recognize dual nationality, Ethiopian courts cannot recognize a person as a foreign national if he is at the same time an Ethiopian national under Ethiopian law.

This, indeed, is the rule that has been laid down in Article 3 of the Hague Convention which provides: "Subject to the provisions of the present Convention, a person having two or more nationalities may be regarded as its national by each of the states whose nationality he possesses."4

When a person possesses dual nationality, the state of which such person is a national cannot afford diplomatic protection to such person against the state of which he is also a national. This rule which has been confirmed by the International Court of Justice in the Nottebohm case, is laid down in Article 4 of the Hague Convention thus: "A State may not afford diplomatic protection to one of its nationals against a State whose nationality such a person also possesses. ${ }^{*}$. 5

As regards third states, practice can differ from one state to another. In Great Britain, for example, a person naturalized as British is expected to be recognized as such everywhere except only within the territory of that state from whose citizenship he has not been legally released." However, other states may not necessarily recognize a person as British if that person is also a national of another state. A British international jurist once suggested that, in such a case, the true test for all states would be, apart from treaty obligation, to recognize the nationality of that state which the individual himself has last selected. ${ }^{67}$

The Hague Convention appears to have adopted a more objective test. Article 5 of the Convention stated:
" Within a third State, a person having more than one nationality shall be treated as if he has only one ... A third State shall, of the nationalities which any such person possesses, recognize exclusively in its territory either the nationality of the country in which he is habitually and principally resident or the nationality of the country with which in the circumstances he appears to be in fact most closely connected." ${ }^{68}$

In cases where two or more states are in dispute over the right to extend diplomatic protection to a person who possesses their nationality, the situation is controversial. In a dispute between Guatemala and Liechtenstein over the diplomatic protection of a certain Mr. Nottebohm, the International Court of Justice ruled that the state with which the person had a genuine link had the right to extend diplomatic protection to such a person. ${ }^{69}$

The " genuine link " concept of the International Court of Justice has been disputed by a number of international jurists. And, indeed, the concept appears to be contrary to the basic rule laid down in Article 3 of the Hague Convention, that where a person possesses the nationality of two or more states in accordance with their respective domestic laws, each of such states may regard such person as its national irrespective of any " genuine link ". A state which applies the principle of jus sanguine, for example, regards as its national any person born of its nationals, even when the person has never seen the territory of that state, and where, therefore, there is nothing which one can call a "link" between such person and such state. Both Van Panhuys and J.L. Kunz argued that there is no sufficient evidence to justify that the "genuine link" rule has developed as a customary rule of international law. ${ }^{70}$ It has been suggested, instead, that a person is a national of a state as long as there is some minimum connection or link between such person and
state.
Nevertheless, it is generally agreed that the "genuine link" rule laid down by the International Court of Justice in the Nottebohm case is the rule applicable to dispute between two or more states on the diplomatic protection of a person who possesses their nationality. ${ }^{71}$

The problems of dual nationality and statelessness appear to be problems the international community have to live with for some time to come. These problems will continue to arise simply because no two states legislate alike on the admission of individuals as members, or on releasing them from the bond which attaches them to the state; such phenomena as war and revolution cause cession of territory, or dismemberment of a state, which create conditions rendering certain individuals stateless and giving others more than one nationality, with all the consequences emanating therefrom. ${ }^{2}$

As the incidence of conflict of nationality laws is relatively a new problem, occasioned by the emergence of nation-states, it appears that it will take some time before appropriate rules of international law, conventional and customary, are developed to avoid such conflict. The consolidation of such supranational institutions as the European Economic Community to higher forms of integration can perhaps lead to new experience, whereby it may not matter where a person is born or who his parents are. The national barrier, it seems, can only disappear when states adopt a new outlook about their sovereignty.

Until then, however, international law simply recognizes the existence of dual nationality and statelessness. The 1930 Hague Conference and Convention accept the occurrence of dual nationality and statelessness as they arise. They have dealt with the symptoms of the problems, not their causes. This was so because states were simply not willing to compromise their absolute sovereignty, which gave them the right to determine who should be their nationals. ${ }^{3}$

Casee of statelessness and dual nationality cause serious difficulties to individuals, and may sometimes lead to confrontations between states. It is, therefore, desirable to avoid such cases. To achieve this goal, nothing less than what Joseph L.Kunz suggested as early as 1960 is required:
"...it would be necessary for international law to regulate the problem of nationality, not by a mere attribution of competence to sovereign states, but by direct
substantive rules establishing uniform principles for the grant of nationality. Even that would not be sufficient. For, even if a universal treaty to this effect were concluded and ratified, the difference of languages and the difference of interpretation by municipal courts would soon again introduce causes of conflict. It would, therefore, be necessary also to create a Supreme International Court of Nationality to keep the application of the universal treaty uniform. ${ }^{14}$

But the world has to go a long way before this ideal situation prevails. States still retain broad powers to determine who are their nationals in accordance with their domestic laws. In determining who are their nationals, states are obviously guided by a number of considerations, including treaty obligations. They try to avoid in their domestic laws provisions which may have the effect of giving dual nationality to their nationals and of making their nationals stateless. Provisions such as Article 4 of the Ethiopian Law of Nationality of 1930 are guided by such considerations. If an Ethiopian woman acquires the nationality of her foreign husband, she automatically loses her Ethiopian nationality. This avoids the situation where the woman can have both Ethiopian nationality and the nationality of her husband. On the other hand she automatically retains Ethiopian nationality if the law of the state of her husband does not confer her husband's nationality on her. This is intended to avoid a situation where an Ethiopian woman married to a foreigner loses her Ethiopian nationality without acquiring the nationality of her husband, and becomes stateless.

States can incorporate such considerations only in their domestic laws. They have no power to influence the domestic laws of other states. In other words, they cannot prevent other states from enacting nationality laws which have the effect of creating situations where dual nationality can occur. Such is the case, for instance, where states in their nationality laws provide that marriage has no effect on the national status of women. The Law of Citizenship of the Soviet Union is one such law. ${ }^{75}$

In such cases, a woman cannot acquire the nationality of her husband even if she wants to. Thus, if a Soviet woman marries an Ethiopian national, she possesses dual nationality. If, however, a Jordanian woman marries a Soviet national, she becomes stateless, since, under the law of Jordan, a Jordanian woman married to a foreigner automatically loses her Jordanian nationality, ${ }^{76}$ and, under Soviet Law, her national status does not change upon marriage. ${ }^{77}$

Precisely because of the diversity of factors and considerations which influence the domestic laws of states, a state simply cannot afford to condition the
force and effect of its law on its consistency with the laws of other states. Apart from treaty obligations, it has neither a legal nor a moral duty to do that. This, however, does not mean that states can dispense with the principles generally accepted with regard to nationality. ${ }^{78}$

The principles generally accepted with regard to nationality which became clear from the foregoing discussion can be briefly reviewed here for purposes of clarity.

A state which is a party to a treaty governing dual or multiple nationality must give effect to the provisions of that treaty, and its courts have to apply these provisions. Non- compliance with the provisions of such a treaty will be subject to whatever sanction is available under international law.

In the absence of any treaty obligations, the issue of nationality is settled in accordance with municipal law. International law recognizes that the matter of admission of an individual to membership of a state or of releasing him from such membership is a subject of municipal law. The generally accepted principles in accordance with which states confer nationality on individuals are jus sanguinis and jus soli. The principle of jus sanguinis is based on the nationality of the parents of the person, while that of jus soli is based on the place of birth of the person. The automatic effect of marriage on the nationality of a woman is another principle widely applied by states in their nationality laws.

Where the nationality of a person becomes a contentious issue between two or more states, the rule laid down in the Nottebohm case applies, so that a person is a national of the state with which he has a "genuine link". Whether a person has a "genuine link" with a state is determined by having regard to a number of factors of varying importance. These include habitual residence, centre of interests, family ties, participation in public life, attachment shown to the given state and inculcation of such attachment to children (ICJ Reports, 1955, pp. 4 et seq). Though challenged by some authorities, the "link" theory of the International Court of Justice as elaborated in the Nottebohm Case appears to have developed as a customary rule of international law.

## VI

The Ethiopian Law of Nationality of 1930 , with regard to the nationality of the married woman, does not depart from the principles generally accepted with regard to nationality around that period. i.e., the period that followed the end of World

War I. Indeed, this writer observes that the provisions of this law regarding the nationality of married women are based on the principles of family unity, which was then applied by the majority of the states which had diplomatic and other relations with Ethiopia around 1930.

It is to be noted that before the end of the 19th century, not many Ethiopians lived abroad, and not many foreigners lived in Ethiopia. As a result, the problem of a person's nationality did not concretely arise, and the country did not have any concretely formulated nationality concepts and rules of its own. The law of 1930 was the first law ever issued to regulate the problem of nationality.

By the turn of the century, however, one finds a number of foreign powers represented in Ethiopia. Most of these powers, it may be noticed, were powers which had colonial ambitions over one or the other part of the country. At any rate, around this period, some seven states were represented in Ethiopia by ordinary legations (the United States of America, Great Britain, Belgium, France, Greece and Germany) and two others, Sweden and Turkey, had honourary consulate. ${ }^{79}$

In 1908, France, through her representative named Klobukowski, concluded with Emperor Menelik of Ethiopia a treaty (known as the Klobukowski Treaty) providing inter alia for the establishment of a special court to hear disputes between French nationals, and between French nationals and Ethiopian nationals. ${ }^{89}$ As most of the foreign powers had separately concluded treaties with Ethiopia providing for most-favoured-nation treatment, this provision of the Klobukowski Treaty automatically applied to the other powers as well.

Though France had insisted that the composition of the court be that of ordinary consular courts, Emperor Menelik was adamant on this point. ${ }^{81}$ Consequently, the Special Court was composed of a representative of each of the states whose nationals were involved in the dispute, and Ethiopian judges.

One of the provisions of the Klobukowski Treaty was that an Ethiopian member of the Special Court had the duty to know the laws of Great Britain, France and Italy. ${ }^{82}$ It is interesting to note in this connection that Ras Tafari Mekonnen, who in 1930 become Emperor Haile Selassie I, and who as Emperor issued the Ethiopian Law of Nationality of 1930, had served as an Ethiopian member of the Special Court. ${ }^{83}$

The klobukowski Treaty appears to have had a big impact on the evolution in Ethiopia of modern legal concepts in general. The Special Court had to apply
foreign law to foreign parties, and Ethiopian law to Ethiopian disputants. ${ }^{\text {en }}$ It was therefore inevitable that Ethiopian legal concepts had to be confronted with modern European legal thinking before the Special Court. Accordingly, the Special Court served as an early forum through which European legal concepts could be introduced into the Ethiopian legal system.

From the point of view of the Ethiopian Nationality Law, the significance of the Klobukowski Treaty is the fact that it established the need for defining who were Ethiopian nationals for the purpose of the jurisdiction of the Special Court. Moreover, the Special Court provided a forum in which future Ethiopian legislators became acquainted with the concepts and rules contained in the nationality laws of the various states then represented in Ethiopia, especially those of Great Britain, France and Italy.

By 1930, states whose nationality laws relating to married woman were based on the primacy of family unity, as well as those states whose nationality laws were based on the principle of equality of the sexes, were represented in Ethiopia. Of these, the nationality laws of the United States and France were based on the principle of equality of the sexes, while the nationality laws of the other states were based on the principle of family unity.

According to the French Law of 10 August 1927, ${ }^{85}$ " A foreign woman who marries a French man becomes a French woman only on her express application, or when, in accordance with the provisions of the law of her nation, she is necessarily put in the condition of her husband..." and
" A French woman who should marry an alien maintains her French nationality unless she expressly declared a wish to acquire, in accordance with the provisions of the law of the nation of her husband, the said husband's nationality...".

The law of 22 September 1922 of the United States * is very much the same as the French one:
"Any woman who marries a citizen of the U.S. after the passage of this Act... shall not become the citizen of the U.S by reason of such marriage...but, if eligible for citizenship, she may be naturalized..." and
" A woman citizen of the U.S. shall not cease to be a citizen of the U.S. by reason of her marriage after the passage of this Act, unless she makes a formal renunciation of her citizenship..."

The U.S. Law of 1922 and the French Law of 1927 are typical examples of nationality laws which reserved to the married woman the right to choose her own nationality.

It is interesting to note here that the two states, by these laws, completely reversed their respective positions as regards the nationality of the married woman. The U.S. Law of 1855, as supplemented by the Law of 1907, as well as Arts. 12 and 19 of the Code Napoleon of 1804, as amended by the Law of 1889 , were, as far as the nationality of married women is concerned, the same as the present Ethiopian Laws of Nationality. They were then based on the principle of family unity, pursuant to which marriage had the automatic effect of conferring on the woman the nationality of her husband.

As can readily be seen, the Ethiopian Law of Nationality of 1930 bears no resemblance either in letter or spirit to the U.S. Law of 1922 and the French Law of 1927. It appears that these were laws which were too modern for the Ethiopian legislator of 1930 to accept.

It is, on the other hand, clear that the Ethiopian Law of Nationality is based on concepts and rules which one observes in the nationality laws of the other powers represented in Ethiopia around that period. Of these, the nationality laws of Belgium, Italy and Greece ${ }^{87}$ bear a striking similarity to the Ethiopian Law of Nationality.

The Law of 15 May 1922 of Belgium states:
" The foreign woman who marries a Belgian... follows the nationality of the husband," and
"The following persons lose Belgium nationality:
(2) the woman who marries a foreigner of specified nationality if, by virtue of the law in force in her husband's country, she acquires his nationality."

This law reserves to the Belgian woman the right to retain her Belgian nationality upon declaration to do so.

The law of 13 June 1912 of Italy stated:
" A Foreign woman who marries a citizen acquires Italian citizenship,..." and
" A female citizen who marries a foreigner loses Italian citizenship if her husband possesses a citizenship which may be communicated to her by marriage...."

Finally, Law No. 391 of October 29, 1856 of Greece stated:
"An alien woman married to a Greek becomes Greek," and
" A Hellenic woman who marries a foreigner loses her Hellenic nationality only in the case where her marriage confers upon her the husband's nationality."

As the 1931 Constitution of Ethiopia had the Meiji Constitution of Japan as its model, the Ethiopian legislator seems to have had some special interest in the legal system of the Meiji dynasty of Japan. Though Japan had no legation or consulate in Ethiopia by 1930, her Law No. 66 of March $1899{ }^{\circ}$ bears another striking resemblance to the Ethiopian Nationality Law.

This Law's provisions stated:
" An alien acquires Japanese nationality in the following cases:
(1) by becoming a wife of a Japanese"; but

[^2]It should be stated here that the U.S. Law of 1922 and the French law of 1927 were, even as late as the 1940s, considered to be the novelties, ${ }^{\text {s }}$ and were therefore exceptions, as they were based on the new concept of the freedom of the married woman to choose her own nationality.

By 1930, the rule that prevailed was that which was reflected in the nationality laws of the other powers represented in Ethiopia.

According to the rule which then prevailed, the automatic effect of marriage on the nationality of the alien married woman was taken for granted. ${ }^{\text {¹ }}$ Article 2 of
the Ethiopian Law of Nationality of 1930, above, is a typical example of this rule.

## VII

The preceding brief discussion on the evolution and development of the law of nationality relating to married women showed that states applied two concepts in their nationality laws. The first and older concept is based on the principle of family unity, according to which marriage has the automatic effect of giving to the wife the nationality of her husband. The second and latest concept is based on the principle of the freedom of the married woman to choose her own nationality, according to which marriage per se had no automatic effect on the nationality of the Wife.

The Ethiopian Law of Nationality is clearly based on the old principle, so that marriage of an alien woman with an Ethiopian subject has the automatic effect of giving to the alien woman the nationality of her husband, i.e., she automatically becomes an ethiopian subject. According to Article 2 of the Ethiopian Law of Nationality, it is the marriage that gives Ethiopian nationality to the alien woman.

The only fact that needs to be proved is, therefore, whether the alien woman has concluded a lawful marriage with an Ethiopian subject. Once this is proved, she automatically becomes an Ethiopian subject. It is not open to the alien woman to deny that she has become an Ethiopian subject. Nor is it open for the Ethiopian authorities to deny her the necessary documents showing that she has become an Ethiopian subject as of the legal ceremony of marriage. Since it is marriage that gives the alien woman Ethiopian nationality, the Ethiopian authorities can only declare that the alien woman is an Ethiopian subject. They cannot create the fact of her being an Ethiopian subject, so that, under the Ethiopian Law of Nationality, the action of the authorities is declaratory, and not constitutive of the fact of the alien woman being an Ethiopian subject. In this regard, therefore, the action of the authorities relative to alien woman has no more nor less effect than on native-born Ethiopian subjects.

To condition the acquisition of Ethiopian nationality by an alien woman married to an Ethiopian subject upon her declaration or consent is to apply the latest rule that, under the Ethiopian Law of Nationality, marriage per se has no automatic effect on the nationality of an alien woman married to an Ethiopian subject. It now remains to test against this background the decision of the Awraja Court in the case of Svetllana Mamadova v. the American Community School.

In the labour dispute referred to earlier (p.1) between a certain Mrs. Svetlana Mamadoova, hereinafter the "Complainant", and the American Community School, hereinafter the "Defendant", here in Addis Ababa, the issue of the nationality of married women under Ethiopian law was raised.

The Complainant, a citizen of the Soviet Union, was married to an Ethiopian national under a marriage contract concluded in 1979 in Moscow in accordance with the laws of the Soviet Union. Here in Addis Ababa, the Complainant was employed in 1982 by the Defendant, subject to the renewal of her work permit by the Ethiopian Ministry of Labour and Social Affairs, as is required of foreigners working in Ethiopia in accordance with Labour Proclamation No. 64 of 1975.

When the Defendant refused to have the work permit of the Complainant renewed and cancelled her contract of employment on the ground that she was found to be not competent for the job, she lodged her complaint with the Conciliation Officer of the Ministry of Labour and Social Affairs. One of the submissions of the Complainant was that, as, under the Ethiopian Law of Nationality of 1930 , she had herself become an Ethiopian subject by virtue of her marriage with an Ethiopian subject, she did not need any work permit as a foreigner, and failure to renew her work permit would not therefore be a ground for the cancellation of her contract of employment.

On the issue of the nationality of the Complainant, the Conciliation Officer held that she had automatically become an Ethiopian subject by virtue of her marriage with an Ethiopian subject.

On appeal, the Labour Division of the Awraja Court reversed the decision of the Conciliation Officer, inter alia, on the following dubious ground:
(a) Under Article 2 of the Ethiopian Law of Nationality of 1930, an alien woman married with an Ethiopian subject cannot acquire Ethiopian nationality uniess she makes a declaration to become an Ethiopian subject and renounces her original nationality.
(b) Since the Ethiopian Law of Nationality of 1930 prohibits dual nationality, the Complainant cannot be a citizen of the Soviet Union and an Ethiopian subject at one and the same time. When the Complainant petitioned to the Office of the Procuracy for referral of her case to the Supreme Court for hearing on cassation, of quashing the decision, the Office denied the petition on the ground that the decision of the Awraja Court was in conformity with the Ethiopian Law of Nationality of 1930
and that, therefore, the Office found no cause to justify the referral of the case to the Supreme Court.

Article 2 of the Ethiopian Law of Nationality of 1930 states the.following provision:
" A lawful marriage of an Ethiopian subject with a foreign woman confers Ethiopian nationality upon her. ${ }^{222}$ (The Amharic version of this same Article, though not literally identical with the English version, is, by its effect, the same as the English.)

This Article is a typical example of nationality laws, in accordance with which a lawful marriage is sufficient to confer the husband's nationality on a foreign woman. As this Article is based on the principle of what is known as the "unity of the family", it is clear that, under the Ethiopian Law of Nationality, marriage has an automatic effect on the nationality of a foreign woman.

This is consistent with Article 4 of the Ethiopian Law of Nationality, regarding an Ethiopian woman married with a foreigner, which affirms:
" A lawful marriage contracted abroad of an Ethiopian woman with a foreigner deprives her of the Ethiopian nationality if her marriage with a foreigner gives her the nationality of the husband. Otherwise, she keeps her Ethiopian nationality."

Here again, primacy is given to the principle of the unity of the family, and marriage itself, irrespective of the consent of the woman, deprives an Ethiopian woman of her Ethiopian nationality. This, of course, is conditional upon her acquiring the nationality of her husband in accordance with the law of the state of which the husband is a national. Loss and retention of Ethiopian nationality by the Ethiopian women under this Article occurs irrespective of the consent of the woman.

The acquisition of Ethiopian nationality by an alien woman pursuant to Article 2, and the loss of Ethiopian nationality by an Ethiopian woman pursuant to Article 4, are not conditional upon the consent or the prior or subsequent declaration of the woman. Acquisition and loss of Ethiopian nationality by married women under Ethiopian law are thus considered automatic.

It seems, therefore, that both the Awraja Court and the Office of the Procuracy wrongly applied to this case the principle of the equality of the sexes to
determine the nationality of the Complainant, for it is actually the principle of the unity of the family that the Ethiopian legislator has provided for in the Ethiopian Law of Nationality of 1930 . Equality of the sexes as a principle of the law of nationality of married women is the most recent rule, which is itself in the process of development. The Ethiopian Law of Nationality of 1930, on the other hand, incorporates with regard to the nationality of married women the old rule that the nationality of the woman follows that of the husband, and is thus a long way behind the latest rule.

Speaking in terms of de lege lata, the decision of the Court in this case is not based on Article 2 of the Ethiopian Law of Nationality of 1930. It is based on an entirely new law based on an entirely different principle: the freedom of the alien married woman to choose her own nationality. The decision is based on new, judgemade law.

This writer realizes that the Ethiopian judge, in common with judges of other countries which follow both the common Low System and the Civil Law System, has a role to play in the constructive elaboration and development of statutory law, in adapting the law to new situations which the Ethiopian legislature could not have foreseen when it enacted the particular piece of legislation at issue. However, the judge, in encouraging development, remains within the boundaries of his judicial function.

The first principle that the judge should be guided by, however, is that he should apply the law as he finds it. He should discover the law and not anticipate it. In this connection one can only admit that the Ethiopian Law of Nationality of 1930 is an old law, because of this, it is based on an old concept as regards the nationality of a married woman.

Despite this, however, the judge can only apply the law as he finds it. He cannot disregard the law simply because he disagrees with the values it protects. In finding the law, in discovering it, he should note that the rule for the construction of acts of the legislature is that they should be construed according to the intent of the legislature which passed them. ${ }^{3}$ He must at the same time note that he cannot impute to the legislator an intent such as is not supported by the face of the law itself.' "The duty of the court is neither to add to nor to take from a statute anything, unless there are good grounds for thinking that the legislature intended something which it has failed precisely to express. ${ }^{95}$ It cannot be said in this case that the Ethiopian legislature of 1930 intended the new rule and failed to express it precisely.

When, under the guise of the judicial function, the court comes up in its decision with a new law, then that is the end of the law itself as far as our legal system is concerned. For it should be noted that the promulgation of laws has the effect of creating expectations in the general public.

The public conduct themselves in their day-to-day behaviour in general accord with the expectations created by the law as promulgated. If the decision of the court is such that it cannot be reasonably predicted, then the law will cease to create such expectations and will therefore fail to achieve one of its principal objectives. In this regard, the court should appreciate the essential nature and purpose of law, for "enacted law is the creature of the legislator's thought and will."\%

The provisions of the Ethiopian Law of Nationality of 1930 relating to the nationality of married women are based on concepts too old for our period of equality between the sexes. They need a re-examination, preferably with a view to making them conform with the United Nations Convention of 1957 on the Nationality of Married Women. This writer believes that it will be in the interests of the Ethiopian legal system as a whole if changes in the law are effected through the normal law-making process, rather than in the form of judicial decisions.

## NOTES

1. See Svetelana Mamadova v. American Community School, Addis Ababa Awraja Court, Labour Division, File No. 1272/77; see also Higawinet. Office of the Procuracy of Ethiopia, Vol. 1, No.1, April 1989). pp. 63 et seg.
2. Clive Parry, "Plural Nationality and Citizenship with Special Reference to the Commonwealth", British Yearbook of International law. Vol. 30 (1953), p. 244.
3. Van Panhuys, The Role of Nationality in International Law, (Leyden, A.W. Sythoff, 1959). p. 150.
4. Clive Parry, on cit, p. 249.
5. See notes 59 and 60 infra.
6. For a detailed discussion of this point, see Beroe Bicknell, The Nationality of Married Women", Transactions of the Grotius Society. Vol. 20 (1934), pp. 118-211.
7. See, for example, the survey of nationality laws annexed to Nationality of Married Woman
(Report of the Secretary General) (United Nations, New Yort, 1963); see also the collection of nationality laws in the work cited in note 32 infra.
8. R.S. Fraser, "Expatriation As Practised in Great Britain", Transactions of the Grocius Saciecty Vol.16,p.78.
9. Ibid., p. 74.
10. G. Van Glahan, Law_Among Nations, An Introduction to Public_International Law (The Macmillan Company, 1972), p. 104; Corpus Juris Secundum, p. 1138.
11. Corpus Juris Secundum, p. 1138.
12. F. Llewellyn," The Nationality of Married Women", Transactions of the Grotius Society, Vol. 15, p. 122.
13. Ibid
14. Ibid., p.123.
15. Ibid.
16. Ibid., p.12.
17. Ibid,
18. Corpus Juris Secundure, p. 1138; see also Fasil Nahom, "(Ethiopian) Nationality Law and Practice", p. 1 (unpublished), Law Library, Haile Selassie I University, Higawinet pp. 64, 68.
19. Corpus, Juris Secundum p. 1138,
20. Harvard Law Review Vol. 50, p. 831.
21. Corpus Juris Secuadum, p. 1138.
22. "Developments in the Law, Immigration and Nationality", Haryard Law Review, Vol. 34, p.867.
23. See Harvard Law Review. Vol. 63,p. 886.
24. Paul Weis, Fationality and Statelessness (2nd ed.), (1979). passim; Fassil Nahom, op. cit, chart.
25. See Corpus Juris Sccundum, p. 1138; Paul Weis, op. cit., p. 239; Fassil Nahom, op. cit. pp. 3 et Seq.
26. See, for example, Harvard Law Review, Vol. 50, p. 83.

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27. F.Lewellyn, opcit., p. 133; see also B. Bicknell, opcit, pp. 106 et.seq.
28. Quoteed in Leewellya, op.cit., p.134.
29. Clive Parry, opncit., p. 254.
30. Bicknell, on.cit., p. 112; see also V. Shevtsov, Citizenship of the U.S.R., (Progress Publishers, Moscow, 1979). p. 82.
31. ACollection of Nationality Laws of Various Conptries As Contained in Constitutions, Statutes and Treaties, (eds. Richard W. Flournoy, Jr, and Maniey O. Hudson), New York, 1929, p. 608.
32. Bicknell, opcit., p. 112; Lewellyn, op.cit., pp. 121 et seg.
33. Lewellyn, opcit. p. 125.
34. Ibid., p. 127.
35. Leaque of Nations Treaty Series, Vol. 197, p. 89.
36. Convention on the Nationality of Married Women; Historical Backoround and Commentary,(United Nations, New York, 1962). p.9.
37. Ibid. p.11.
38. Ibid., p.7; see also Bicknell, opscit., p. 113.

39 Convention on *' Gtionality of Married Women.... p. 11
40. Bid., p. 12. Basic Documents in International Law (ed. Ian Brownlie, 3rd edition), Clarendon Press,
41. Basic Documents in Inter
42. Ibid. pp. 251 et seg.
43. Convention on the Nationality of Married Women..., p.17.
44. United Nation Treaty Series. Vol. 309, (1958), pp. 68 et sea,
45. V.. Shertsov, on.cit., p. 105
46. See note 8 supra.
47. Convention on the Nationality of Married Women..., Annex.
48. Ibid.
49. Ibid; see also Bicknell, opcit., pp. 112-3.
50. Quoted in Fraser, placit., p.85.
51. See Bicknell op,cit., p. 114; Lewellyn, op.cit., p. 115;Collection of Nationality Lawn..., p. 306.
52. Fraser, op.cit., p. 85; Joseph L. Kunf, "The Nottebohm Judgement", American Journal of International Law, Vol. 54 (1960),pp. 543, 553.
53. "Law of The Union of Soviet Socialist Republic On Citizenship of the U.S.S.R. of December 1, 1978", in Legislative Acts of The U.S.S.R. $1977-1979$ Progress Publisher, Moscow, 1981, pp. 353 et_seq.
54. International jurists hold different views on this point; for our purpose here, see Article 34 of the Statute of the International Court of Justice, Basic Documents, note 42 supra, which provides: "Only States may be parties in cases before the Court." See also Daniell T. Murphy, The Restatement (Third's) of Human Rights Provisions: Nothing New, But very welcome", The International Lawyer Vol. 24 (1990), No. 4, p. 927.
55. See, for example, Shevtsov, opcit., p.21.
56. Some jurists argue that states have the duty to bring an International claim on behalf of their nationals: see, for example, W.R. Bisschop, "Nationality in International Law", American fournal of International Law, Vol 37 (1943), p. 323; Shevtsov, op,cit., pp. 31 et seq.
57. See The Tunis and Marocco Nationality Decrees Case, Permanent Court of International Justice Reports. Series B,No.4,p.24; The Nottebohm Case, International Court of Justice Reports 1955.
58. League of Nations Treaty Series Vol. 179, p. 89, Article 1.
59. van Panhuys, op.cit., P. 55, 150 passim; Kunz, op,cit., p. 545.
60. Macmillan Koessier," "Subject", "Citizen", "National" and "Permanent Allegiance", Yale Law Journal. Vol. 56 (1946-47), p.70.
61. F.A. Mann, Recueil des Courts Vol. 111 (1964), pp. 9 et seg; Ian Brownlie, "Public International Law", British Yearbook of International Law, Vol. 39 (1965), pp.432-3.
62. R.A. Sedlet, The Conflict of Laws in Ethiopia
(Faculty of Law, Haile Selassie I University, Addis Ababa, 1965),p.6. see also Shevtsov, onsit., p. 49, who says, "One of the fundamental aspects of state sovereignty - independence with reference to citizenship - is expressed, above all, in the fact that every sovereign state regulates all matters pertaining to its citizenship on its own account, independently of any other authority whether inside or outside its borders."
63. See Article 4 of the Law of the Union of Soviet Socialist Republics on Citizenship of

Nationality of Married Women
December 1, 1978, note 54 supra in accordance with which marriage has no effect on the citizenship of the spouses, while, under the Ethiopian Law of Nationality of 1930, marriage confers the nationality of the busbands on the wives.
64. United Nations Treaty Series, note 44, supra.
65. Ibid.
66. Fraser, op.cit., p.82.
67. bid.
68. See Note 57 supra.
69. International Court of Justice Reports, 1965, pp. 22-3.
70. See note 60 supra-
71. See note 57 supra.
72. Biscope, op.cit., p. 321.
73. Ibid., p. 324
74. Kunz, op.cit., pp. 563-4.
75. See note 53 supra.
76. Convention on the Nationality of Married Women..., Annex.
77. See note 54 supra.
78. See, for example Kunz, op.cit., p. 546; van Panhuys, op.cit., passim; Koessler, op.cit., p. 74.
79. Heinrich Scholler, The Special Court of Ethioipia, 1920-1935, Stuttgart, 1985, p. 48.
80. Ibid., p. 45.
81. Ibid.
82. Ibid.
83. Ibid.
84. Ibid.
85. Collection of Nationality Laws..., p. 245.
86. Ibid., p. 608.
87. Ibid., pp. 29, 363, 315.
88. James C.N. Paul and Christopher Clapham, Ethiopian Constitutional Development: A Source book. (Faculty of Law, Haile Sellassie I University, Addis Ababa, Vol. I, p. 336.
89. Collection of Nationality Laws..., p. 382.
90. van Panhuys, op.cit., p. 161.
91. See, for example, Llewellyn op.cit., p. 133; Bicknell op.cit, p. 113, Convention on the Nationality of Married Women..., note 32 supra; Collection of Nationality Laws..., passim,
92. For the text of the law, see Consolidated Laws of Ethiopia, Vol. I; also available in Balambaras Mahtema Selassie Wolde Meskel, Zikre Neger 1939 (Eth. Cal.), pp. 183 et seg. (Amharic); N. Marein, The Ethiopian Empire Federation and Laws, Hotterdam, 1954, pp. 61 et seg. (English); the Ethiopian law of Nationality of 1930 is one of the laws issued before the Italian envasion, and just one year before Ethiopia received its first written constitution in 1931.
93. C.K. Allen, Law in the Making, Oxford, (7th edition 1964),p.491.
94. M.Farani, The Interpretation of Statutes,(Lahore Law Times Publications, 1970), p. 33.
95. Ibid., p. 107.
96. Allen, op.cit., p. 427.

# Salient Features of the Major Ethiopian Income Tax Laws ${ }^{1}$ 

Bekele Haileselassie*

## I. Introduction:

Three separate income tax proclamations are currently in force in Ethiopia.

1. Proclamation No. 296 of 1986, applying to income derived from petroleum operations.
2. Proclamation No. 77 of 1976 (as amended) relating to income arising from agricultural activities.
3. Proclamation No. 173 of 1961 ( as amended) dealing with all income obtained from sources other than petroleum operations and agricultural activities.

Of the three legislations mentioned above, the first one has not been treated in this article. This is because currently it has virtually no application since the production of petroleum in: commercial quantity has not as yet materialized in Ethiopia.

The main concern of this article is to acquaint the reader with the Ethiopian income tax system in general. Accordingly it describes the chief aspects of the major Ethiopian income tax laws. Beginning with an explanation for the statutory definition of the word "income", it tries to provide answers to such questions as who are affected by the income tax laws and what are their major legal obligations? How are income tax collection and assessment carried out? What are the measures for ensuring compliance? What can taxpayers do when they are aggrieved at the way their tax liability is determined? Who is entitled to exemptions under the income tax laws?

The concluding section tries to bring to light some selective issues and problems of practical significance. In so doing, it underscores the need for

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improvement. It is hoped that this paper will make some contribution towards further research on the subject.

## II. STATUTORY PARAMETERS OF INCOME

That the word " income" is hard to define is a point that has often been reiterated in many writings and articles on the subject. Scholars and experts in various disciplines usually tend to give a definition to the term from the vantagepoint of their own fields of specialization and concern, as a result of which a consensus on its meaning is hard to come by. Hence, in the area of what may be called applied taxation, it has become customary to obviate the aforementioned difficultly by means of statutory definitions.

Ethiopia's statutory meaning of "income" holds all payments in cash and benefits in kind as income, regardless of the whereabouts of the recipient, provided they originate from sources within the country. ${ }^{2}$ Consequently, the treatment of payments in cash and benefits in kind that arise from sources outside Ethiopia as income is a matter of exception. ${ }^{3}$

Another statutory equivalent to the word "source" is "activity", which includes employment, professional and vocational occupations, agricultural undertakings and businesses of any sort. In principle, therefore, the word "income" applies to those payments in cash and benefits in kind that ensue from an activity. ${ }^{4}$ Yet again, as an exception to the rule, dividends from share entitlements, royalties from use of patents and copyrights, as well as prizes and awards won by chance, such as in a lottery, fall within the domain of income. ${ }^{3}$

In daily parlance, different words are employed to refer to certain sums in money paid or received according to context: salaries, wages, bonuses, emoluments, interests, profits and so on. Likewise, benefits in kind offered or obtained may take on the form of goods or services of commercial value. Nonetheless, these distinctions in expression and appellation carry no relevance to the statutory definition of income, and in principle all of them attract tax unless legal exemptions avoid it .

## III. SUBJECTS OF INCOME TAX

The term is one coined to stand for both actual tax-payers and tax collection intermediaries. Broadly speaking, all persons and organizations that are involved in
an offer or receipt of an income that attracts tax are subjects of income tax, whether as an actual tax payers or a tax collection intermediary or both.

The word " person" refers to individuals who may receive their income as an employee, a trader, an independent contractor, a farmer, an author, a composer, a prize winner, a share-holder, etc. ${ }^{7}$ By " organization" is generally meant bodies corporate both of public and private nature which engage in trade, including state farms, joint ventures, corporations, share companies and so on. ${ }^{8}$

All subjects of income tax are required to comply with two main obligations, namely, declaration of income and payment of taxes. Certain categories of subjects of income tax also have another obligation, i.e. maintenance of books of accounts and records.

## 1V. TAX COLLECTION SCHEMES

The imposition of the obligations to declare income and pay tax are obviously for the purpose of insuring tax collection. To this end, both the withholding and self-reporting systems are employed.

The application of the withholding system is in respect of incomes that arise from employment, share entitlements, chance winnings, and use of patents and copyrights. It also extends to payments made for services rendered from abroad. In such cases the individual or organization that advances income to another acts as tax-collection intermediary, since he, she or it is under the obligation to declare such income and transfer the tax thereon to the Income Tax Authority within one month from the date of effecting payment. Consequently, such an individual or organization is authorized by law to deduct from and with hold the tax levied on the income of the recipient. ${ }^{10}$

Another instance of the application of the withholding scheme is in relation to interests payable on loan to credit institutions. Under this situation, if the borrower happensto be a tax-payer, he, she or it is required to declare the income of the credit institution in question and transfer the tax thereon to the Income Tax Authority, upon the fulfilment of the obligations that relate to the income of the former. If the borrower has no tax-payer's status, the obligations must be met within four months from the end of the Ethiopian fiscal year. ${ }^{11}$

The self-reporting system is employed as regards all other income sources,
as well as employment in special situations. Individuals who work for more than one employer in one month or in entities that represent diplomatic interests of a foreign state are obligated to declare their income and pay tax thereon in person. ${ }^{12}$ Individuals and organizations that are habitually engaged in professional and vocational occupations and businesses of any sort are obliged to declare their income and many pay the tax thereon within specified periods ranging from one to four months from the end of Ethiopian fiscal year, depending on the tax-payer's categorization. ${ }^{13}$ Income form casual rental of property must be deciared with a view to effecting tax payment within one month from the date of acquisition. ${ }^{14}$

In respect of income from agricultural activities, provisions are made for participation of peasant's associations in the process of tax collection. They are vested with the power to collect taxes from farmers up to annual taxable income of Birr $600{ }^{15}$ Generally, the compliance with the obligations to declare income and pay tax thereon must be met each year within the period that runs from 1 Tahsas to 30 Miazia, in line with the prevailing harvest season in Ethiopia. ${ }^{16}$

## v. TAX ASSESSMENT

Assessment is the process of determining the taxable income to which a given tax rate applies. Generally, this process may not be difficult in respect of such withholding schemes involving income sources as chance winnings and use of patents and copyrights, unless there exists a collusion between the tax-collection intermediary and the actual tax-payer, with a view to concealment of income. As regards other sources of income, in particular those to which a profit tax attaches, the assessment process may not be so easy a task as it may seem.

Under the Ethiopian taxation system, income-tax liability is assessed either on the basis of books of accounts and records, or by estimation. Those tax-payers that are obliged to keep books of accounts and records are required to submit them to the Income Tax Authority for inspection upon request. ${ }^{17}$ If they do so, and their books of accounts and records come up to the satisfaction of the Authority, their tax liability is assessed on the basis of such books of accounts and records. ${ }^{18}$ Conversely, if these tax-payers either fail to submit their books of accounts and records, or if the Authority rejects them for any reason, assessment of tax liability is done by estimation. Tax liability is also assessed by estimation in respect of all tax-payers that are not bound by law to keep books of accounts and records. ${ }^{19}$

More often than not, there appears to exist a disparity in amounts between
the taxable income and the sum total income (gross income) of a tax-payer for a given accounting period. This is particularly true of such income sources as employment, professional and vocational occupations, agricultural undertakings and other businesses of every description. The reason for this lies in the provisions of the law that make allowance for excludable and deductible outgoings and losses.

As far as the Ethiopian tax system goes, the term "exclusion" means preclusion of certain classes of payments in cash and benefits in kind from the canvass of taxable income from employment. "Deduction", on the other hand, signifies the subtraction of certain items of expenses incurred or losses sustained in the process of creating income from gross earnings that accrued within a given accounting period.

In principle, the sum total income a worker receives in a month is taxable. ${ }^{20}$ Nonetheless, four classes of payments which actually provide an advantage for the employee and present expenses to the employer may be excludable while assessing the tax liability of the former. Apart from the one that concerns medical treatment, the other classes of payment have to do with transportation and travelling expenses borne by the employer. ${ }^{21}$

As regards taxes on profits, the rule is to take away from gross income all expenses incurred and losses sustained for the purpose and in the process of generating the income on which tax is imposable in respect of a given accounting period. Statutory enumeration of deductible and non-deductible items of outgoing and losses is in fact provided. ${ }^{22}$ This approach indeed goes a long way to the determination of deductibility.

Under the Ethiopian income tax system, aggregation is possible. However, it follows the schedular and not the global approach. There are three main schedules in the Ethiopian income tax system, one for income from employment, another for income from agricultural activities, and a third for those derived from all other sources of businesses, as well as professional and vocational occupations including those from casual rental of property. ${ }^{23}$ In instances where incomes are obtained from more than one source under different schedules, it is not permissible to add up the taxable incomes and compute tax on the aggregate amount, as is generally the case in the global approach. Thus, aggregation of taxable income takes place only where the sources from which the incomes are derived fall under one and the same schedule and applies only where the incomes are obtained within the same accounting period. ${ }^{24}$

In relation to only one income source, viz. employment, an explicit provision for what may be called pro-rata computation is made. Thus, if an employee happens to be in a situation where he receives, say, his three months pay at once, tax liability may not be assessed on the sum-total income. First, the sum total income must be pro -rated over the number of months of services to which the pay corresponds, and then tax liability is computed. ${ }^{25}$

As regards income from agriculture, tax liability is generally worked out by the application of what may be called an anticipatory assessment. This version of assessment by estimation takes as a basis of computation the prospective income of a given farmer which is calculated by having a look at the harvest as it stands. Nevertheless, such assessments may not be conclusive; upon submission of convincing proofs, tax adjustments are allowable where proceeds from a sale of produce fall short of the income assessed by anticipation. ${ }^{26}$

The segregation of income into allowable and non-allowable portions to get at the taxable income by the use of the estimation method of assessment poses practical difficulties. Obviously, it is impossible to determine exactly the statutory allowable outgoings and losses for computing taxable income in the case of assessment by estimation. On the other hand, a tax-payer whose liability is assessed by estimation need not be totally denied access to fair play. This anomalous situation necessitates methods which can bring about results in line with equity.

To this end, general standards of profit rates in percentages are administratively set for a general application in respect of each type of activity, having due regard to, inter alia, the statutory allowable and non-allowable items of outlays and losses. Each standard profit rate applies to all tax-payers who carry on the type of activity to which it is meant to correspond. Thus, taxable income in case of assessment by estimation is calculated as that portion of the profit that accrues to a particular tax-payer in a given accounting period which tallies with the appropriate standard profit rate.

The process of assessment by estimation calls for unstinted effort for the acquisition of information conducive, on the one hand, to making comparative studies within the specified type of activity to get at reasonable and feasible standards of profit rates, and on the other, to determining the profits of a particular tax-payer in a given accounting year. Both lines of action, therefore, need effective inspection techniques and dependable skill in data analysis.

Needless to say, assessment, as a whole, necessitates being conversant with
the operative tax rates. Under the Ethiopian income tax system, one can discern three formulations.

The fixed rates in percentages are applicable to taxable incomes in respect of state farms, and all cases where the liability to pay tax rests with organizations to the exclusion of agricultural producers co-operatives. Such tax-payers, with the exception of joint ventures, pay in tax $50 \%$ of their annual taxable income. ${ }^{27}$ The fixed rates in percentages are also applicable to royalties, dividends and prizes, and constitute $40 \%, 10 \%$ and $10 \%$ of such incomes respectively. One more application of fixed rates in percentages is with respect to payments made for services rendered abroad, which is set at $10 \%{ }^{28}$

Instance of application of specified rates in amounts are found in cases where incomes are derived from agriculture. In relation to agriculture, annual taxable income which does not exceed Birr 600 is subjected to a specified rate of Birr $10{ }^{29}$

The marginal rates in percentages are given application with regard to income from employment. They also apply to annual taxable income that exceed Birr 600 in case of agricultural undertakings, and that exceed Birr 300 in case of other activities. ${ }^{30}$ For the purposes of determining tax liability, each rate is applicable to a portion of the taxable income that falls within the minimum and maximum income limits that correspond to it, and a summation of the results is made.

Generally speaking, assessment concerning income from professional and vocational occupations as well as other businesses and agricultural activities must be made within five years from the date when declaration of income is made by taxpayers. Failure to do this may result in barring the exercise of assessment in respect of tax-payers who complied with the obligation to declare income. ${ }^{31}$ This statutory limitation to assessment may not, however, work in all cases of deceit relating to income and the activity the income is derived from. ${ }^{32}$

Once an assessment of tax liability is made, it is reduced into what is often called tax assessment notification to be served upon the concerned tax-payer. ${ }^{33}$ The assessment notification must be prepared in such a way as to clearly indicate how the tax payable is computed. It should also spell out the types of penalties and their amounts, if there are any. ${ }^{34}$

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## VI. MEASURES TO ENSURE COMPLIANCE

The enforcement of the three heretofore mentioned main obligations of income tax is hinged on penalties that are imposable as part of the tax payable in case of default. ${ }^{35}$ Failure to maintain books of accounts and records as prescribed by the law carries with it a penalty of $20 \%$ of the amount of the tax finally assessed. ${ }^{36}$ The same applies to non-compliance with the obligation to make declarations of income from businesses as well as professional and vocational activities. ${ }^{37}$ Concerning agricultural income tax, the penalty imposible in default of the obligation to declare income is $25 \%$ of the tax finally assessed. ${ }^{38}$ The penalty that ensues from omission of payment of tax on the due date is worked out in a somewhat different way, suggestive of interest.

As regards income from agriculture, failure to effect tax payment on the due date entails a penalty of $25 \%$ of the unpaid tax in respect of each month of delay. ${ }^{39}$ As the penalty has, as its ceiling, $50 \%$ of the unpaid tax, it is obvious that it runs only for two months. For other income sources the rate at which this penalty increases is set at $2 \%$ per month, the maximum limit being the same as that stated above. ${ }^{40}$

Non-compliance may also result in the revocation of licenses under which activities are carried on. Municipalities and other appropriate public authorities are generally required by law to revoke the licenses of delinquent tax-payers at the request of the Ministry of Finance. ${ }^{41}$

Compliance may also be sought through judicial means. It is possible to distrain upon property for unpaid taxes, and settle the debt from the proceeds of the sale therefrom via execution proceedings. ${ }^{42}$ Moreover, infractions of tax laws, in principle, constitute criminal liability punishable under the Penal Code. ${ }^{43}$ Consequently, tax-payers are assumed to be deterred by the facts mentioned above from violating what is required of them by the law.

## VII. GRIEVANCES

Upon receipt of a tax assessment notification, the tax-payer is, in principle, obligated to settle accounts with the Income Tax Authority within one month. ${ }^{44}$ Nonetheless, if the tax-payer feels unhappy about the way his/her or its liability is assessed, there are two options open for airing grievances.

First, the tax-payer may opt for administrative means. In such cases, an application for a review of the assessment notification is made to the Income Tax Authority and, usually, a three-man committee examines the validity of the taxpayer's claim. Generally, the investigation process involves going. into the files of the tax-payer, and inspection of premises where activities are carried on. If the findings of the committee warrant revision of the assessment, it is performed accordingly, and the new assessment is. served on the tax-payer afresh.

Second, the tax-payer may opt for a legal remedy which stems from the right to appeal against the assessment made by the Income Tax Authority. For the exercise of the right to appeal, however, the fulfilment of two preconditions are mandatory: the first relates to the time within which an appeal must be made, which runs for just one month from the date of receipt of an assessment notification. The second is the requirement to deposit the prescribed amount of money with the Income Tax Authority. The absence of either of the two preconditions bars the exercise of the right of appeal, in the event of which the assessment notification becomes final and conclusive and generally executory by courts. ${ }^{45}$

The appeal is lodged with a special tribunal at the first instance. ${ }^{46}$ The tribunal is empowered to increase, reduce, confirm or annul the tax assessed by the Income Tax Authority, and to make consequential order for the disposition of the matter. ${ }^{47}$

Both parties, i.e., the tax-payer and the Income Tax Authority, have a right to appeal to courts whenever they are dissatisfied with the decision of the tribunal. The right is, however, restricted to points of law, as the courts are precluded from going into the merits of the case, and are required to send back the case to the tribunal having rectified only what they consider legally erroneous in the decision. ${ }^{48}$

## VIII. EXEMPTIONS AND INCENTIVES

Under the Ethiopian Income Tax System, exemptions are provided by (a) the income tax proclamations, (b) other municipal laws, and (c) international treaties and conventions.

As regards employment, monthly income of all employees not exceeding 50 Birr is tax-free. ${ }^{49}$ In addition, income that accrues to unskilled workers under the conditions prescribed by the law entails no tax. ${ }^{50}$ Exemption is also granted to an employee of a person or organization residing abroad in respect of the income he
receives from such an employer, provided his stay in Ethiopia in one year does not exceed 183 days, and provided further he may not work for another organization or person within Ethiopia. However, such an employee may be subjected to payment of tax on such income if the employer residing abroad has business in Ethiopia. ${ }^{51}$

Still another instance of exemption relating to employment pertains to diplomatic and consular corps. It also extends to other diplomatic passport-bearing personnel working in entities that represent the interests of a foreign state, provided such personnel have nationality of the state represented. The exemption applies, however, to the income they receive from the exercise of their normal functions only. ${ }^{52}$

Exemptions are also granted in respect of other income sources. Generally self-employed artisans who live outside municipal areas and townships earn tax-free income from their trade. ${ }^{53}$ Likewise, interests accruing to persons from savings in credit institutions recognized by the law, and premiums collected by foreign reinsures, entail no tax. ${ }^{54}$ In addition, income from chance winnings which does not exceed Birr 100 does not give rise to tax liability. 55 Tax payers that derive income from sources chargeable under schedule $C$ have also no liability to pay tax provided their taxable annual income does not exceed Birr 300. ${ }^{56}$

As regards cooperative societies, save those engaged in agricultural activities, the income retained by them is untaxable. If distribution of income amongst their members takes place, however, each member is exempted from payment of tax only to the extent to which his/her annual share does not exceed Birr $500 .{ }^{57}$

All exemptory provisions contained in international treaties and conventions to which Ethiopia is a signatory party are abided by and given application within the territory. ${ }^{58}$ Thus, income received by officials of international organizations such as the specialized agencies of the United Nations is not subject to the payment of taxes. ${ }^{59}$

Exemptions from the payment of income tax may also result from municipal laws other than the tax legislations. The exemptions granted to the Relief and Rehabilitation Commission and the Sport Commission are just two instances of the above. ${ }^{60}$

Incentives by way of income tax are extended to joint ventures formed pursuant to Proclamation No. 32 of 1989. They are allowed to enjoy five years' tax holiday with respect to a newly launched project from the date of commencement
onwards. A three-year tax holiday relating to expansion is also stipulated. Besides, the fact that the rate applicable to their taxable income is set at $40 \%$ signifies additional favourable treatment. ${ }^{61}$

Investors in agricultural and industrial activities as well as hotel undertakings may become beneficiaries of exemptions from the payment of income tax for specified periods. ${ }^{62}$

With respect to agricultural activities, an investor shall be entitled to a tax holiday for two years, three years or five years as of the commencement of production provided the amount of capital invested is a) over Birr three hundred thousand but not more than Birr seven hundred and fifty thousand b) over Birr seven hundred and fifty thousand but not more than Birr two million and c) over Birr two million, respectively.

Here again the duration of the tax holiday is extended for a period of one year if the investment occurs in areas designated as preferred by the Council of Ministers. Investing in such areas in the field of industry also carries with it the benefit of being exempted from the payment of income tax for a period of two years as of the commencement of operations even in cases where the amount of the capital involved is Birr five hundred thousand or less but more than Birr fifty thousand.

The establishment of hotel services in preferred areas is encouraged by a grant of exemption from the payment of income tax for a period of two years as well. Enterprises of this nature must however, meet the standard criteria set by the Hotel and Tourism Commission in order to be eligible for the exemption.

Where major expansion is ascertained to have taken place in agricultural or industrial concerns in respect of which a tax holiday for two years, three years or five years has been granted, the income deriving from the expansion shall remain unaffected by income tax for one year, two years, and three years respectively. ${ }^{63}$

## IX. CONCLUSION

At the close of this brief survey of income tax in Ethiopia, some basic points are worth considering.

## THE STATUTORY DEFINITION OF INCOME

Does the Ethiopian statutory definition of the word "income" pose no problem? The answer to the above question appears to be "yes, it does." In the first place, there is an ambiguity in the language of the meaning of "income", as to whether the "revenue" itself or the "source", i.e. the activity which gives rise thereto, must have its origin in Ethiopia. Secondly, there is nothing in the definition that indicates its extension to goods and services of commercial value, in contradistinction to other provisions of the law that appear to establish this fact. Consequently, there is a need for an improved definition of the word "income" aimed at rectification of the above-mentioned and other defects.

## DIVIDENDS AND ROYALITIES

How competently do the taxes on dividends and royalties operate? Over ten years have passed since these taxes were introduced into the Ethiopian direct taxation system, and all attempts at their implementation have encountered difficulties.

As there is no provision in the law in respect of transnational companies with branches or subsidiaries in Ethiopia, it has become impossible to assess and collect dividend tax where such is the case. Even where the company has Ethiopia as its country of incorporation, the fact that the tax liability arises only when dividends are "declared and paid" enables the shareholders to circumvent collection by postponing the distribution of profit amongst themselves in their general meetings indefinitely, but creating subtle mechanisms, such as artificial loan agreements with the company which would ensure the benefits from their dividends. ${ }^{64}$

The tax on royalties with its high rate of $40 \%$, has a clearly discouraging effect on the work and creativity of the mind, which has made its application unacceptable. Further, its scope is undefined in the income tax laws, and there is no separate legislation on patents and copyrights which governs the situation. All these factors tend to render its implementation difficult. Consequently, the reappraisal of the above two taxes in the light of the objective situations of presentday Ethiopia is felt necessary, and even imperative.

## PAYMENTS FOR SERVICES RENDERED FROM ABROAD

At least two major problems stand in the way of an attempt to implement the tax imposed on payments made for services rendered from abroad. In the first place, it is not clear whether the tax is intended to apply to cases where the actual performance of the service takes place outside Ethiopia. If this is so, the tax in question becomes an exception to that principle which holds the sources of all receipts of cash and benefits in kind within Ethiopia to constitute "income". Secondly, it is uncertain whether it is meant to apply only to casual instances or to all cases that involve transfer of service from abroad, including ongoing concerns. Thus, the provisions that deal with this tax need amendment.

## CASUAL RENTAL FROM PROPERTY

Incompatibility seems to exist between tax payment and assessment in respect of casual rental from property. The tax is required to be paid within one month from the date of receipt of such income, whereas it assessment is made pursuant to schedule $C$ which is based on annual taxable income. This anomalous situation makes the levying of tax on casual rental from property quite difficult. The problem seems to render even aggregation complicated in a case where a given tax-payer happens to get income from sources such as trade in addition to casual rental from property. Viewed from the above problems, and the possibility of taxing any income from any source (activity) not specifically mentioned in the law under Schedule C, even a proposition that calls for the repeal of the provisions that deal with casual rental from property seems worth considering.

## TAXATION OF PUBLIC ENTERPRISES AND FINANCIAL AGENCIES:

Is it advisable to tax public enterprise, and financial agencies in the face of their obligation to transfer all surpluses to the central government? Detached from present circumstances, the negative side of the above issue appears too plausible to disclaim. It is plain that the application of double revenue raising channels to one subject and the same income simultaneously tends to result in operational redundancy, leading to waste of manpower, time and resources, thus putting the government to large and undesirable expense. With due recognition of all disadvantages implied in retaining the application of income tax to public enterprises, and financial agencies however, we may be justified in considering the other point of view. The question is one of time: to figure out exactly when to put
an end to the application of income tax as regards public enterprises and financial agencies. A swift shift from one system to an entirely new one is usually in danger of incompleteness and inefficiency, and perhaps all the more so in the case of handling public finance policies.

The application of taxes to public enterprises and financial agencies in the present circumstances is held as justified on the grounds that it serves the purpose of control and countercheck, and particulary as a means of calibrating economic performance. Yet as long as public enterprises and financial agencies continue to remain under income tax obligation,the need to coordinate operations so as to minimize the disadvantage is evident.

## THE INCOME TAX RATES

The present rates, with their unmistakably high progression are apparently meant to narrow the gap of income disparity. They show that the tax burden becomes heavier as income goes higher. However, social justice is not sought only along this line, and it is perhaps high time to think in terms of what is known as horizontal equity as well. That is to say, the tax burden should be lighter on individuals with dependents than those without dependents despite the fact that they get the same amount of income within the same accounting period. The structure of the present income tax rates may also come under criticism for discouraging private efort to engage in business that are both legal and profitable profitable.

In the case of employment the cumulative rise of the rates amounts to $85 \%$ in respect of the monthly taxable income that exceeds birr 3,750. With regard to agricultural activities it goes as high as $89 \%$ for that portion of annual taxable income of individuals and producers co-operatives exceeding Birr 36,000.

For other businesses the cumulative rise of the rates amounts to $59 \%$ in respect of that part of annual taxable income of individuals exceeding Birr 24,000. From the above one can easily see the adverse impact of the rates on private business initiative which is expected to play a significant role in national development.

## TAX APPEAL TRIBUNALS

One of the considerations that called for the creation of tax appeal tribunals seems to be the idea that they may have a role to play in minimizing the work-
load of the regular courts. However, since the litigating parties more often than not exercise their right to appeal against the decisions of the tribunals, much of the strength of the above argument is lost. The restricting of the power of the regular courts to mere points of law, and the requirement to send back cases to tax appeal tribunals for final disposition, tend to result in undesirable prolongation of the judicial process.

Hence, it is felt to be of paramount importance to make a careful evaluation of the merits and demerits of the existence of thee tax appeal tribunals, and even consider their abolition, in favour of the advantages attainable by setting up special tax divisions within the structure of the regular courts to deal with tax matters in their entirely.

## CO-OPERATIVE SOCIETIES

The idea of granting exemption to co-operative societies presumably sprang from the need to give encouragement to their formation. Its formulation also goes with the acknowledged principle that the impact of taxes should be less on savings and more on consumption. As regards this question, however, the anomalous exemptory status of peasant producers co-operatives, the self-defeating exemptory provision in respect of members of co-operative societies as a whole, and the issue of collection of tax from those liable to payment have become problems of great concern.

## PARTICIPATION OF MASS ORGANIZATIONS IN TAX ADMINISTRATION

To what extent is the participation of the Peasants' Associations useful and expedient in the process of taxation? It is not surprising that this issue should become a major concern, for effective use of appropriate mass organizations as an extended arm of the tax authorities goes a long way to enhancing the revenue raising capacity of the government. The Peasant Associations, as noted earlier, have had initial experience along this line and proper assessment of the experience would help not only to find out areas that need improvement, but also to devise better means of similar applications for the future. As a general remark, however, it may be stated that the feasibility of such scheme largely depends on the general level of education in the population, creation of a high level of tax awareness, and the degree to which responsibilities and functions are clearly defined in the law and directives.

To sum up, the issues, anomalies and shortcoming detectable in the present income tax system of Ethiopia may be many more, and much more diversified. There is a pressing need to improve the situation for implementing public finance policies, if income taxes are to be effective instruments. The removal of all encumbrances, of whatever nature, that bar proper and undifferentiated application of the income taxes is clearly of absolute necessity; yet the task of over-hauling the system will also demand a great deal of work.

The constraints on the application of the income tax system may have their origin in either the policy, the law or the administration, and the effort at the improvement of the system must be made from these three fundamental perspectives.

## NOTES

1. The writer of this article had the opportunity to present a discussion paper entitled "Income And Property Taxes in Ethiopia- A Synopsis of Basic Functions and Salient Features" to the Ethiopian National Training Worksbop on Public Finance for Development. The Workshop had been organized by the Economic Commission For Africa in collaboration with the Ministry of Finance from 22 to 26 October 1984.

It was the intention of the writer to have the above mentioned paper published in this Journal without any alterations. Nontheless, the abridgement of the original text was required due to limition of space. Further, it has become necessary to update the contents of the original text in light of the income tax and other relevant laws promulgated thereafter.

As can be gathered from the title of this article, all the discussions on property taxes are cmitted by way of abridgement. On the other hand, much of that portion of the original text pertaining to income tax is retained intact.
2. Sec Art. 3 of Income Tax Proclamation No. 173 of 1961 (as amended). In this paper unless indicated otherwise all Articles refer to this Proclamation.
3. The exception is the tax imposed on payment for services rendered from abroad.

4 See the Amharic version of Art. 4 (a\&b); see also Art. 3(9) of Proc. No. 77 of 1976 (as amended).
5. Art. 4 (c,d, \& e).
6. Art. 6.

Joumat of Eihipian Law, Voi. 15, 1992
7. Art. 3(b).
8. Art. 3(a); Cf. Art. 3 (3) of Proc. No, 77 of 1976 (as amended). Note that (a) co-operative societies are excluded from the definition accorded to "organization" as far as proc. No. 173 of 1961 (as amended) goes; (b) for the purpose of this text, "joint-venture" has to be understood in the context of Proc. No. 32 of 1989.
9. Art. 26 of Legal Notice No. 258 of 1962.
10. Arts. 30 and 34 (b,c,d \& e).
11. Art. 21 (2,3, \& 4) of L.N.No. 258 of 1962.
12. Arts. 32, 33, and 45. Though the law bas nothing to say on the matter, practice holds that employees in international organizations with liability to pay income tax should declare in person to the Income Tax Authority the monthly income they receive from their employment and pay the tax thereon.
13. Art. 25 of L.N.No. 258 of 1962; see also Arts. 35 and 46. Note that the Ethiopian fiscal year runs from 1 Hamle to 30 Sene.
14. Art. 34 (a).
15. Arts. 17; see also Art 20 of Proc. No. 77 of 1976 (as amended).
16. Art. 13 of Proc. No. 77 of 1976 (as amended). Note that the obligations to declare income and pay tax must be met within thirty days from the date the farmer receives the income, cven where it takes place prior to 1 Tahsas.
17. Art. 22.
18. Art. 30; see also Art. 21 of Proc. No. 77 of 1976 (as amended).
19. Art. 40; see also Art. 21 of Proc. No. 77 of 1976 (as amended).
20. Art. 8.
21. Art. 4 of L.N. No. 258 of 1962.
22. Art. 16 and 17 of L.N. No. 258 of 1962, as well as Art. 24 of Proc. No. 77 of 1976 (as amended).
23. Arts. 4, 7(b) (2) and $12(\mathrm{~b}, \mathrm{c}$ \& d); see also Art. 25(1 \& 2) of Proc. No. 77 of 1976 (as amended).
24. Art 5 cum Art. 34 (c) of L.N. No. 258 of 1962; Cf. Art. 23 of Proc. No. 77 of 1976 (as

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amended).
25. Art. 7(a).
26. Art. 15 of Proc. No. 77 of 1976 (as amended). Note that the Peasant Associations participate in the assessment process and, in fact much of the work rests with them. See Art. 16 of Proc. No. 77 of 1976 (as amended).
27. Art. 17(c); see also Art. 25(1) of Proc. No. 77 of 1976 (as amended).
28. Art. 17.
29. Art. 17; see also Art. 20 of Proc. No. 77 of 1976 (as amended).
30. For employment see Art. 7(b) (2); for agriculture see Art. 25(2) of Proc. 77 of 1976 (as amended) and for other sources of income Art. 12 (b) (2)
31. Art. 41; see also Art. 26 (1) of Proc. No. 77 of 1976 (as amended).
32. Art. 70; see also Art. 26 (2) of Proc. No. 17 of 1976 (as amended).
33. Arts. 47 and 48.
34. Art. 34 (d) of L.N. No. 258 of 1962 and Art. 27 (1) of Proc. No. 77 of 1976 (as amended).
35. Art. 69; see also Art. 40 of Proc. No. 77 of 1976 (as amended).
36. Art. 68; see also Art. 39(2) of Proc. No. 77 of 1976 (as amended). Note that it is problematic to apply the penalty in the case of tax on income from agriculture, for there is no regulation issued by the Minister of Finance to date.
37. Art. 66.
38. Art. 39 (3) of Proc. No. 77 of 1976 (as amended). Note that it would have been much better to put the percentage instead of cross-referring
39. Art. 39 (1) of Proc. No. 77 of 1976 (as amended).
40. Art. 67.
41. Art. 27.
42. Art. 62; see also Art. 63 and Art. 41 of Proc. No. 77 of 1976 (as amended).
43. Art. 70; see also Art. 43 of Proc. No. 77 of 1976 (as amended). The relevant Penal Code provisions are Arts 354-356; 362-740.
44. Art. 46.
45. Art. 54 and 55, Cf. Arts. 27(2) and 28 of Proc. No. 77 of 1976 (as amended).
46. Art. 49; see also Art. 29 of Proc.No. 77 of 1976 (as amended).
47. Art. 56. Cf. Art. 33 of Proc. No. 77 of 1976 (as amended).
48. Arts. 58-60; Cf. Arts. 34 and 35 of Proc. No. 77 of 1976 (as amended). Note that in the case of tax on income from agriculture the decision of the awraja court is non appealable.
49. Art. 7(b) (1).
50. Art. 18 (c); see also Art. 10 of L.N. No. 258 of 1962.
51. Art. 18(d); see also Art. 11 of L.N. No. 258 of 1962.
52. Art. 18(g).
53. Art. 18(b). Note that such persons should not employ workers on a permanent or regular basis, to benefit from the exemption. Cf. Art. 9 of the 1961 Commercial Code of Ethiopia.
54. Art. 18(e and f).
55. Art. 17(b) (1).
56. Art. 12(b) (2).
57. Art. 2(4) of Proc. No. 155 of 1978.
58. Art. 18(h)
59. Article 5 Section 18 of the Convention on the Privileges and Immunities of the United Nations, and Article 6 Section 19 of the Convention on the Privilege and Immunities of theSpecialized Agencies of the United Nations.
60. Art. 9 of Proc. No. 203 of 1981 and Art. 23 of Proc. No. 92 of 1975.
61. Art. 27 (5) and (10) of Proc. No. 32 of 1989.
62. Arts. 11 and 12 of Council of State Special Decree No. 17 of 1990.
63. Pursuant to Art. 2 (2) of Council of State Special Decree No. 17 of 1990, "major expansion" means an increase of $50 \%$ or more of production or service rendering capacity.
64. Art. 34 (b). Cf. Art. 419 and 420 of the 1961 Commercial Code of Ethiopia.

# LIABILITY FOR THE ACTS OF MINORS UNDER ETHIOPIAN LAW* 

Negatu Tesfaye**

## General

According to Article 2027 of the Ethiopian Civil Code, a person incurs three types of liability. First, a person is liable if he causes damage to others by his fault. Second, a person is liable, where the law so provides, for damage caused to others by his"activity" ${ }^{2}$ or by a "thing ${ }^{n 3}$ he owns or he holds. Finally, a person is liable where another person, for whom the law makes him answerable, incurs a liability based on fault or provided by law.

The first type of liability (i,e. liability for one's own fault) represents the ordinary law of non-contractual liability of all countries. This is because making fault (or guilt) a necessary condition of civil liability accords well with the sense of justice of any society. On the other hand, some writers consider the second type of liability (i.e. liability without fault) as a social injustice. They criticize it on the ground that "it would be the equivalent in civil law to the condemnation of an innocent person in cirminal law." ${ }^{44}$ The difference between those who are in favour of imposition of liability without fault in exceptional cases and those who reject it altogether seems to lie in their approach to the law of non-contractual liability. According to the views of those who completely reject liability without fault, the primary function of noncontractual liability is repression, i.e. prevention of wrongs and punishing fault. For them, compensation of victims of harm is its secondary function. ${ }^{5}$ On the other hand, those who are in favour of imposition of liability in certain exceptional cases say that the primary social functions of non-contractual liability is that of securing individuals against harm, i.e. securing compensation for victims of harm. According to this view, it is not the purpose of non-contractual liability to punish wrongdoers. This is taken care of by the penal law. The effect of civil liability is payment of compensation to victims of harm. It would thus be erroneous to consider non-

[^4][^5]contractual liability as one devised for the repression of wrong-doing. ${ }^{6}$
However, it should be noted that when it is said that the primary social function of non-contractual liability is that of securing compensation for victims of harm, it does not mean that liability will be imposed on persons without good reasons. Neither does it mean that, particularly in case of liability based on fault, the wrongdoer will not be "punished", stricto sensu, for his fault. There is a financial sanction. Although he may not be deprived of his liberty as in the case of criminal liability, he shall pay compensation to the person injured by his fault. This reduces the value of his assets. In this sense one may say that he is "punished". This discourages individuals from performing wrongs against others. This, however, is a secondary function of the law of non-contractual liability.

The third type of liability (i.e. liability for the acts of others) arises only in certain specific instances. Generally, there are three cases in which one is made answerable under the civil law for the acts of another. First, the parent or other persons who are in loco parentis ${ }^{7}$ are responsible for damages caused by minors. ${ }^{8}$ Second, an employer is liable for the damage caused by his employee." In addition to these, there is also a third case that makes one answerable for the act of another. This is the case of defamation committed by the author of a text. In such a case the managing editor of the newspaper, the printer of the pamphlet or the publisher of the book is made liable for defamation committed by the author of the text printed therein. ${ }^{10}$ The latter two cases will not be discussed in this paper. It is only liability for the acts of minors that we shall focus on.

What are the bases of liability for the acts of minors? Which classes of persons are made answerable and why is the liability imposed on them?

## The Different Approaches

Broadly speaking, there are two different approaches to establish answerability for the acts of minors. These are based on (1) presumption of fault, and (2) proof of fault. We shall briefly discuss them in turn.
(1) Liability based on presumption of fault

According to this approach, answerability for the acts of minors is based on
the presumed fault of the persons charged with the care of a minor child. This approach is generally applied in countries whose laws are influenced by the civil law systems. However, there are slight differences. In countries where the French and German Civil Codes have strong influence, the parents and other guardians of the child have primary responsibility. ${ }^{11}$

In several European socialist countries and the Soviet Union, these persons have primary responsibility only until the child attains a specific age, usually thirteen or fifteen years. According to the laws of these countries, the minor does not incur liability if he is under thirteen or fifteen years of age. ${ }^{12}$ However, after the child attains these full specified ages, he becomes liable for the damage he caused. Thus, the liability of his parents becomes secondary at this stage, i.e. they will be held liable only if the child's assets are not sufficient to satisfy the debt he incurred. ${ }^{13}$ But in many countries which follow the continental legal systems, the minor is not exempt for liability and the parents' answerability exists irrespective of whether the minor's assets are sufficient to pay the debt he incurred.

Apart from these slight differences, in both cases, if the parents prove that they could not have prevented the minor's act which gave rise to the liability, they will be relieved of their answerability. This means that the presumption is not one which is irrebuttable. ${ }^{14}$

## (2) Liability based on proof of fault

At common law and in the Scandinavian countries the parents of the minor child will not be liable for the damage caused by their child merely because of the parent-child relationship. They will be answerable only if it is established that the damage was the result of their negligent supervision. The burden of proof rests with the victim to establish the existence of negligent supervision on their part. No presumption exists to assist him ${ }^{15}$

## The Ethiopian Approach

Under our law, the class of persons charged with supervision of minors are, alternatively, the father, ${ }^{16}$ mother, the person in whose charge the child has been placed if the child lives outside the family home, the teacher, and the master. ${ }^{17}$ The employer is also mentioned with these persons. However, since the conditions of the employer's liability for the acts of his (or its) employees is the same, ${ }^{18}$ whether the employee is a minor or an adult, we shall not discuss it here.

It should be noted from the outset that, under Ethiopian law, the minor is not exempted from liability merely because someone is made answerable for the liability incurred by him. He is liable to make good the damage he caused together with the person answerable for him. ${ }^{19}$

It is provided in Article 2124 of the Civil Code that the father shall be answerable if his minor child incurs a liability A minor child incurs non-contractual liability in two ways. He may commit fault and cause damage to another. He then incurs the liability by his own fault. He may also engage in a certain activity or own or use a certain thing, and damage may be caused to another by his activity or by the thing he owns or uses. Here, he incurs the liability not because he has committed fault, but because the damage was caused by his activity or by the thing he owns or uses ${ }^{20}$ for his personal benefit, and because the law provides that there is a liability without fault in such cases. ${ }^{21}$

What does then the law mean when it provides that the father is answerable if his minor child incurs a liability? Does it mean that he is liable for all noncontractual liabilities of the child, and not merely for those based on fault? Or, to put it differently, does it mean that the father is liable without his fault whenever his child incurs a liability, irrespective of whether the liability is incurred due to the fault or without the fault of the minor child?

According to Professor Krzeczunowicz, who wrote an excellent book on the Ethiopian law of extra-contractual liability, responsibility for minors "covers all extracontractual liabilities of the child and not merely those based on fault." ${ }^{22}$ This means that if, for instance, the minor child owns a motor vehicle, the father shall be answerable if the motor vehicle which is owned by the child causes damage to another person. This is so because the minor, as an owner of the motor vehicle, will incur a liability without his fault if his motor vehicle causes damage to another person. ${ }^{23}$ Professor Krzeczunowicz gives the following example in a footnote to illustrate that this is the case: "The child may own an animal and incur a 'strict' liability under Article 2071. This suffices to make the father (Article 2124) or other 'guardian' (Article 2125) liable for the child." ${ }^{24}$ One may arrive at such a conclusion, as Professor Krzeczunowicz did, by interpreting Article 2124 cum Article 2027(3). Article 2027(3), which is the last source of non-contractual liability, provides that "A person shall be liable where another person, for whom the law makes him answerable, incurs a liability based on fault or provided by law" (emphasis added). Thus, pursuant to this provision, a person will be held liable if another person, for whom the law makes him answerable, incurs a liability in accordance with the provisions of Articles 2028-2065, or Articles 2066-2089, i.e. if he causes damage to
another by his fault or by his non faulty activity (e.g. Articles 2066 and 2067), or if a thing he owns (Articles 2071, 2077, 2081), or uses for his personal benefit (Articles 2072 and 2082), causes damage to another without his fault. However, although this provision seems to mean what it says, there is no vicarious liability if an employee or an author incurs a liability in accordance with the provisions of Articles 20662089. In fact, as regards employees, the employer will be answerable only if the employee commits fault in the discharge of his functions (Articles 2129, 2130 cum Article 2131) or while carrying out his official duties (Article 2162(2) cum Article 2127 (1). There is no liability for other faults of the employee. As regards authors, the vicarious defendant will be liable only for the fault of defamation (Article 2135). Thus, the only "exception" seems to be the case of the minor child. Pursuant to Article 2124, where a minor child incurs a liability whether by his fault or without his fault (e.g. under Articles 2066-2089), it seems that his father shall be answerable under the civil law. Moreover, if this is the interpretation that one can give to Article 2124 cum Article 2027(3), then not only the father but also the other "guardians" of the minor child enumerated under Article 2125 will be answerable under the civil law whenever the child incurs non-contractual liability, depending on whoever was custodian of the child at the time when he incurred the liability. This will be so because these "other guardians" of the child are answerable in lieu of the father.

On the other hand, a contextual interpretation of the law seems to restrict the vicarious liability of the father and the other guardians only to such cases where the minor child acts positively and incurs a liability. This seems to be so when one considers the heading of section 4 , which reads as "liability for the actions ${ }^{25}$ of others" (emphasis added). The Amharic version of Article 2124, which is consistent with this, requires a positive act, i.e. an act of commission, on the part of the child in order to make the father and the other guardians liable. It provides "Akalemeten Yaladerese lij alafinet yemiyasketil Sira Yaseraa endehon ..." (emphasis added). Moreover, article 2136, which is placed under this section, restricts the-vicarious liability of these persons only to such cases where the minor child by his act causes damage to another person. ${ }^{26}$

Be it as itmay, what is the rationale for declaring parents, and other persons who may have power of contrel over a minor child, answerable? Let us see what Treilhard, one of the draftsmen of the French Civil Code of 1804, which influenced the civil laws of many countries, had to say on this point.

He wrote:
"Those upon whom liability is imposed may, at least, be charged:

> Some with weakness, some with bad choice and all with negligence. Happy are those who may not blame themselves for teaching baneful principles and setting a bad example. Let this liability couse fathers of families to be more prudent and careful...and to pay more attention to the extent and sanctity of their obligations. The life we give to our children is not a blessing uless we teach them virtue and prepare them as good citizens ${ }^{127}$ (emphasis added).

It was and is for these reasons ${ }^{23}$ that persons who are charged with the duty of supervision of minor children were declared answerable under the civil law for the acts of minors. Such persons have the duty to inculcate respect for the interests of others, "which, if damaged, reflected prima facie a failure to instil due discipline. Such failure is tantamount to fault." ${ }^{29}$

In conformity with the above rationale, at civil law, as we have seen earlier, liability for the acts of minors is based on presumption of fault. Whenever the minor child causes damage to another person, the parent or other guardian of the child is presumed to be at fault in exercising supervision over him or her. However, he can rebut the presumption and relieve himself of liability by showing that he could not have prevente ${ }^{30}$ the occurrence of the damage.

In the Soviet Union and East European socialist countries, the parent bears responsibility for harms caused by the minor only if he is at fault in supervising the child.

In common law and in the Scandinavian countries the parent is not responsible for the damage caused by his minor child merely because of parent-child relationship. There, the basis of liability of the parent is his own negligent conduct, i.e. improper supervision. If the parent was not negligent in exercising supervision over the child, he will not be liable for his child's faulty conduct.

The foregoing shows that in all legal systems the answerability of the parent or other guardian is not unconditional. The liability arises not by virtue of the sole fact of harm having been caused, or parent-child or guardian-child relationship having been established, but only in the event it is established (or presumed) that the person concerned was at fault in exercising supervision over the minor child.

Is our law different from the foregoing legal systems? Particularly considering the fact that our Civil Code was influenced by the continental legal systems, can one say
that it is different in this respect from those legal systems where the liability is based on rebuttable presumption of fault? Would not it be absurd to say that our law is entirely different from the legal systems of the whole world in this respect, and to hold that the father or other guardian of the minor child will be answerable whenever the minor child incurs non-contractual liability whether based on fault or not? Cannot one interpret our law to mean that answerability for the acts of minors is based on presumption of negligent supervision?

This author thinks that there is room to interpret the provisions of the Civil Code, which governs responsibility for the acts of minors, to mean that such responsibility is based on presumption of negligent supervision as in the civil law systems, and not on the mere fact of liability having been incurred by the minor child nor on the mere fact of parent-child or guardian-child relationship having been established. The selection of the persons who may be answerable for the acts of minors gives a hint that this, in fact, is the case.

To begin with, the liability is alternative and presupposes possession and exercise of paternal authority or power of control over the minor child. The first person liable is the father. This seems to have connection with the authority of the father as the head ${ }^{31}$ of the family as in the case of the Roman patria potestas. As the head of the family the father has the authority to supervise not only the activities and behaviour of his minor children but also of his wife. ${ }^{32}$ It seems that it is in recognition of this factual as well as legal authority that children in our society usually give more respect to their fathers than to their mothers. It is also in consideration of this paternal authority that the law made the father answerable for damage caused by his minor child.

The mother is made answerable only in lieu ${ }^{33}$ of the father and only if she was exercising paternal authority over the child at the time he incurred the liability. The mother usually exercises paternal authority where the father is dead, disabled, absent or condemned for abandoning his family. ${ }^{34}$ She may also exercise this authority where the spouses cease to cohabit in consequence of divorce and if the family arbitrators entrust guardianship to her. ${ }^{35}$ Moreover, she has an exclusive authority over any child whom she had before the marriage. ${ }^{36}$ It is in these instances that the mother will be liable for the acts of her minor child.

Other guardians of the child are also made liable in lieu of the father, but only if they had power of control over the child when he incurred the liability. If the child lives outside the family home, it is up to the person in whose charge the child has been placed to oversee what activities the child may or may not do. Accordingly,
if the minor incurs liability while in his charge, it is this person who will be liable and not the natural parents of the child. ${ }^{37}$ Since the child was not under their control, it cannot be said that he or she incurred the liability due to their improper supervision.

Where the minor incurs a liability while at school, the teacher will be answerable. ${ }^{38}$ It is obvious that minor children spend a substantial part of their time at schools where the risks of accidents are usually great. As a result the liability of the teacher raises problems which merit special examination. There are many teachers who teach in the same school, for the present system of education requires the assignment of at least one instructor for each subject. Gone are the days where the teacher and the head of the school was one person. Such a system of education was possible at the ecclesiastical schools. Thus, it is not difficult to observe that it is not easy to pinpoint the particular teacher who failed in his duty of supervision. Should all the teachers of the school be jointly liable? Or should the director or administrator of the school alone be liable? How can he supervise many thousands of pupils at one time?

Students usually quarrel and cause injuries to one another not when the teacher is giving a lesson in the classroom but when he leaves the classroom or when they are playing in the school compound during breaks, or before classes begin. Do we expect the teachers to stay with them during these hours in the playgrounds and supervise their activities? Is it proper that this category of private and state employees should be burdened with such an exceptional and onerous liability simply because they happen to teach minor children? Would it not be fair to charge the employer of the teacher with the burden of compensation?

In Germany teachers are considered as state officials, and negligent supervision on the part of the teacher is considered as breach of official duty. As a result the liability of teachers for damage caused by pupils at school shall be borne by the State. ${ }^{39}$ Moreover, the presumption of fault against teachers does not operate in Germany. France too has done away with the presumption of fault in respect of all teachers. As a result a person whose interest is injured by a pupil's wrongful act must adduce proof that the teacher was at fault in his supervision. ${ }^{40}$

Should we follow, at least in the future, this approach and make the school liable instead of the teacher? If the school is to be held liable, would there be a fear that teachers may not properly discharge their duty of supervision? If this is a genuine fear, we may continue to make the teacher liable but only when his or her fault is of exceptional gravity and by putting the burden of proof on the side of the
plaintiff or the school to adduce proof that the teacher was faulty in his supervision. However, under our present law, not only is the teacher liable for damage caused by a pupil, but also he has no possibility of rebutting the presumption of fault of improper supervision.

If a minor child causes damage while serving an apprenticeship, the master will be liable in the same way as the teacher will be. However, the position of the master does not seem to be as precarious as that of the teacher, for it is only those who are above fourteen years of age who will be employed as apprentices. ${ }^{41}$ Such persons are nearing maturity and seem to be ready to shoulder responsibility and refrain from reprehensible behaviour.

The heading of Section 4 of Chapter 1 of Title XIII, Article 2136, and the Amharic version of Article 2124, indicate that the liability of the father or any other guardian is limited to the cases where the minor child causes damage to others by his act. When one considers all these factors together, he will necessarily arrive at the conclusion that under our law, as in the civil law systems, liability for the acts of minors is based on presumption of negligent (i.e. faulty) supervision, and is restricted to such cases where the minor child incurs the liability by his fault. The only difference is that, under our law, the presumption is not rebuttable, except in the case of force majeure. ${ }^{42}$

It is to be noted that this liability of the person charged with the duty of supervision of minor children ensures the victims of harm compensation for damage. However, equity and justice demand that such assurances be confined within reasonable limits. If it is to be held that responsibility for children covers all noncontractual liabilities of the minor child and not merely those based on fault, it would mean that the parents as well as the other guardians enumerated in Article 2125 would be liable if, for example, an animal, or a motor vehicle owned ${ }^{43}$ by the minor child, causes damage to another, depending under whose control the minor was at the time he incurred this "strict" liability. This is precisely what Professor Krzeczunowicz said in a footnote. ${ }^{44}$ What justification can one give to such a liability? Should the teacher be liable simply because the child incurred such liability while at school? Should the master be liable merely because the minor child incurred this liability while serving an apprenticeship? Should the parents, for that matter, be liable simply because these things are owned by their child? This author does not see any justifiable reason to make these persons liable in such cases. To hold these persons answerable for the liability incurred by the minor without his fault would be committing a social injustice against them. It would indeed be " the equivalent in civil law to the condemnation of an innocent person in criminal law."

## Negatu: Liability for the Acts of Minors

In such cases it is only the owner or holder of the thing that must be held liable. It has to be borne in mind that harm from certain activities or use of certain types of things often occurs, to use Professor Krzeczunowicz's words, "without defendant's fault even by the severest standard of care, or without evidence of fault even by the mildest standard of proof." ${ }^{45}$ However, in such cases, since it is the defendant who benefits by engaging in certain activities or by using certain things, there is no reason why he should benefit at the expense of the innocent victim. Equity demands that in such cases the burden of the loss be shifted on to the owner or user of such things, or the beneficiary of such activities.

Therefore, unless we examine Articles 2124-25 cum Article 2027(3) very closely and very carefully and interpret them contextually (by including the heading of the Section and Article 2136), they apparently seem to mean that parents and other guardians of the child are liable for all non-contractual liabilities of the minor. This is particularly true when one considers the English version. However, the controlling Amharic version seems to restrict the liability only to such cases where the minor child causes damage by acting positively. According to the Amharic version, if a minor child commits an act and incurs liability, the father, and in lieu of him, the other guardians of the child, will be liable irrespective of whether the act was faulty or not faulty. But if the child incurs the liability without committing an act as in the cases where his animal or taxi causes damage to another, no one will be liable except the owner child himself.

On the other hand, if one considers the English version without having regard to the heading of Section 4 of Chapter 1 of Title XIII and to Article 2136, he will conclude by saying that these persons will be held answerable even for such types of liability incurred by the child, which conclusion, if applied, will lead to absurdity.

## CONCLUSIONS

From the foregoing analysis one may draw the following conclusions:

1. That the liability of the persons mentioned under Articles 2124-25 of the Civil Code is based on presumption of fault of improper supervision. Had the basis of answerability not been fault of improper supervision, the persons enumerated under Article 2125, particularly the teacher, master, and the person to whose care the child has been entrusted, would not have been made answerable. Moreover, the
liability of the mother would not have been in lieu of the father. Instead, her liability would have been joint. Furthermore, there would have been answerability for the acts of insane persons. All these confirm the fact that the liability of the father and the other guardians is not based on the mere fact of parent-child or guardian-child relationship or damage having been caused to the victim, but on failure to properly discharge the duty of supervision.
2. That since the liability is based on presumption of fault of improper supervision, there is no answerability if the minor incurs "strict" liability.
3. That, under our law, the vicarious defendant cannot adduce proof to rebut the presumption.

## Suggestions de lege ferenda

Liability for the acts of minors is based on presumption of fault of improper supervision. This is the case in all countries which have adopted the civil law approach. This presumption is necessary because, "generally, faulty supervision would be difficult of proof, since the injured party will usually have little acquaintance with the child or his parents before the accident, so as to be able to show a circumstantial lapse in duty. An injured person would thus be at a disadvantage with regard to the burden of proof. ${ }^{\text {nt }}$ However, it does not seem right to make the presumption irrebuttable. It would be appropriate and logical to allow the persons charged with the duty of supervision of a minor child to adduce proof to show that there was no default in proper supervision on their part and so to be relieved of their responsibility.

In the future we hope that equality between the spouses will be established legally. Parental authority will then be exercised jointly by the father and the mother. In such a case their liability should be joint instead of alternative.

With respect to teachers, however, the presumption does not seem to be appropriate. Except those who are teaching in the very few private schools, teachers are state employees. Why should they be singled out from other state employees and be burdened with such onerous liability? In order at least to ease their burden, it would be fair to put the burden of proof on the side of the victim to show that the particular teacher was at fault in exercising supervision over his or her pupil. It
would even be more equitable to charge the school (whether government or private) with the burden of compensation, except where the fault of the teacher is shown to be of exceptional gravity, in order to ensure compensation to the victim.

For the foregoing reasons, the author proposes the following provisions as a substitute to Articles 2124 and 2125, to be adopted by the Law Revision Committee authorized to revise Book IV of the Civil Code.

Article 2124-Parents' Liability
(1) Where the father and the mother jointly exercise parental authority over their child, they shall jointly be answerable under the civil law where their minor child causes damage to another, unless they prove that the damage was not caused by lack of proper supervision.
(2) Where only one of the parents exercises parental authority over the child, such parent shall alone be answerable.

## Article 2125-other Guardians of the Child.

(1) The following persons shall be answerable in lieu of the parents:
(a) the person in whose charge the child has been placed, where the child lives outside the family home;
(b) the school during the time when the child is at school;
(c) the master or undertaking during the time when the child is serving an apprenticeship.
(2) In the case of sub-article 1 (b) of this Article, the school which has paid compensation to the victim may recover from the teacher where it proves that the later's fault is of exceptional gravity.

Consequently, the last phrase in Article 2027 (3), i.e. "or provided by law", should be deleted for lack of reference to any specific situation.

## NOTES

1 Fault is defined under our law as "any act or forbearance which offends morality or the usual standards of good conduct", and it consists in an intentional or negligent act or forbearance. See Article 2030 (1) cum Article 2029. Under Ethiopian Law, fault is assessed by having regard to the conduct of a reasonable person and without regard to the age and mental conditions of the tortfeasor. See Article 2030 (2-3). Consequently, an infant or a madman could be declared faulty and held liable. Incidentally, unless indicated otherwise, all Articles refer to the Ethiopian Civil Code of 1960.

2 The activities which make a person liable without his fault are (a) those considered "dangerous" (Article 2069), (b) deliberate infliction of damage to another in a state of necessity (Article 2066), and (c) infliction of bodily harm on another by one's act (Article 2067).

The reader may wonder how onc can inflict bodily harm on another by one's act without being at fault. Consider, for example, a situation where minor children play soccer in the playground which is located just across from the Addis Ababa Municipality building. Suppose the ball, kicked very hard by one of them, goes out of the playground and bits and breaks the windscreen of a fastmoving automobile, as a result of which the driver of the automobile, sustain bodily harm from the broken windscreen. Here the harm is caused by mere accident. There is no fault on either side. The cause of the harm is the act of kicking the ball. However, note that the minor is not liable for the damage caused to the automobile.

Consider another example. Suppose a minor, while riding a bicycle, loses balance and falls on and injures a pedestrian when the front tyre of his bicycle suddenly bursts. Here too, there is no fault on either part. But it is clear that the minor's act of riding the bicycle and the subsequent burst of the tyre is the cause of the harm sustained by the pedestrian. Incidentally, note that generally, when a plaintiff suffers bodily harm due to an act of a defendant, the former need not prove fault on the part of the latter in order to claim compensation. In such a case the defendant shall be liable irrespective of his fault, provided there is no fault on the part of the victim.

3 The things which make a person liable without his fault for damage caused by them are animals (Article 2071) buildings (Article 2077), machines and motor vehicles (Article 2081), and manufactured goods (Article 2085).

4 M. Planiol, quoted by F.N. Lawson et all in Amos and Walton's Introduction to French law. 2nd edit. (Oxford, Clarendon Press, 1963), p. 203.

5 See, for example, R.F.V. Heuston, Salmond on the Law of Torts, 16th edit. (London, Sweet \& Maxwell, 1973), pp. 20-21.

6 See, for example, George Krzeczunowicz, The Ethiopian Law of Extra-Contractual Liability (Addis Ababa, Faculty of Law, 1970), pp. 38 and 61.

7 These persons are usually teachers, artisans, administrators, and persons in whose charge the child has been placed if the child lives outside the family home.

8 A minor is a person who has not attained the full age of eighteen years. See Article 198. However, not that there is no liability for the acts of an emancipated child even if he has not attained the full age of eighteen years. This is because ${ }^{n}$ an emancipated minor shall be deemed under the law to have attained majority in all matters that concern the care of his person and the management of his pecuniary interests". See Articles 329, 330 and 333.

9 See Articles 2126-2127;2129-2131. The liability of the employer is "strict" in the sense that his (its) proof of his (its) faultlessness cannot relieve him of his (its) liability. There are good reasons for imposing liability without fault on the employer. First, it is because the injurious faulty act was committed while the employee was performing work for the benefit of the employer. Second, had it not caused damages, the employer would have been the sole beneficiary of the work performed. Therefore, it could be proper to also charge the employer with the burden of compensation for damages caused by his employee because of a fault committed in discharge of the latter's functions or official duties. Incidentally, for purposes of this article, the word employee includes public servants and government employees.

10 See Article 2135. Regarding the liability of the publisher of a book for defamation committed by the author, it seems that this liability is imposed on the ground that he has indirectly participated in the defamation by publishing and distributing the book to the public. Moreover, he has also derived financial benefit by publishing the book which contains a defamatory statement.

As regards the managing editor of the newspaper, his liability can be justified on the ground of negligence, for, had he not been negligent, he would not have allowed such a defamatory article to be published in the newspaper. Moreover, in both cases there may be instances where the author does not disclose his true identity. Thus, there is a need to aid the victim of defamation by such means to claim compensation from such person.

11 See Jean-pierce Le Gall, "Liability for persons under supervision", International Encyclopedia of Comparative Law Vol.XII, ed. Andre Tunc (The Hague, Boston, London, J.C.B. Mohr, Tubinger, and Martinus Nijhoff publishers, 1973), p.7.

12 This presupposes that a minor who is under a specified age is exempt from liability. For example, in Poland a minor under 13 years of age and in the Soviet Union a minor under 15 years of age does not incur liability. See Articles 426 of the Polish Civil Code, and Article 450 of the Civil Code of the RSFSR.

13 See Le Gall, note 11 supra, p.7, and Art. 451 of the Civil Code of the RSFSF.
14 See Ibid., pp. 8-25. The only exceptions according to Le Gall, are Louisiana (see its CC art. 2318) and Malagasy (See Malagasy's Law on the General Rules of Obligations, art. 223). This author thinks that the exception also includes Ethiopia (See Article 2124-25).

15 Ibid., PP. 7; 25-29
16 Articles 2124. The full text of the Article reads as follows:
"Article 2124-Father's Liability

The Father shall be liable under the Law where his minor child incurs a liability".
17 Article 2125. Its full text reads as follows:

## "Article 2125-Other Guardians of the Child

The following persons shall be liable in lieu of the father:
(a) the mother, where she exercise the paternal authority over the child;
(b) the person in whose charge the child has been placed, where the child lives outside the family home;
(c) the teacher or the master during the time when the child is at school or serving an apprenticeship;
(d) the employer, where, under the terms of the following Articles, his liability is involved in consequences of an act committed by the child."

18 If the employer is the state, it will be liable only if its employee commits an "official fault" within the meaning of Article 2126 (2) cum Article 2127. If the employer is a body corporate or an individual physical person, it (or he) will be liable only if the employee commits fault in the discharge of his functions. See Articles 2129 and 2130 cum Article 2131.

19 See Article 2136 and note 1 supra.
20 See Article 2072 and 2082.
${ }^{21}$ See notes 2 and 3 supra.
22 See Krzeczunowicz, note 6 supra, pp. 50-51.
23 See Article 2081.
${ }^{24}$ Kreczunowicz, note 6 supra, p. 51, footnote 145, and p. 54.
25 The French version seems to say, "Responsibility for the acts of others and plurality of liable persons". It reads: "De le responsibilite du fait d" autrui et de la pluralité de responsables". The Amharic version says deliela sew tegbar alafi silemehon (emphasis added). Professor Krzeczunowicz's revised translation", which seems to be erroneous, simply says "liability for others".

26 Article 2136 reads as follows:
(1) A person who caused damage shall repair it notwithstanding that another person is declared by law to be liable for such damage.
(2) The person who caused the damage and the person whom the law declares to be liable for

## Negatu: Liabitity for the Acts of Minors

such damage shall be jointly liable to repair such damage.
(3) The person answerable under the civil law for the action of another may demand that the author of the damage be made a party to the suit brought by the victim for compensation.

27 As quoted by Le Gall, note 11 supra, p. 5 .

28 The other reason is to ensure compensation to victims injured by the faulty acts of minors who are not usually capable of paying compensation for their victims. This is what Professor Krzeczunowicz says on page 54 of his book cited at note 6 supra. Those persons, he says, are legal guarantors, and their guarantee is that the child will not commit fault (emphasis added).
${ }^{29}$ Le Gall, note 11 supra, p. 5 .
${ }^{30}$ This defence is not restricted only to force majeure. He can also adduce proof to show that he was not at fault in exercising supervision. See Lawson, note 4 supra, pp. 227-228.

31 Article 635 (1).
32 Article 644 (2) cum Article 635(2).
33 If the liabilityy of the mother is in lieu of that of the father, it follows that, if the father is liable, the debt incurred by the wrongful act of the child will be paid only from the personal property of the father and, if this is insufficient, from the common property. In other words, if the personal property of the father and the common property is not sufficient to satisfy the debt, it cannot be paid from the personal property of the mother. The reverse is also true, See Article 659 cum Article 660.

34 Article 633
35 Article 661 cum Article 662
36 Article 639
37 Article 2125 (b)
38 Article 2125 (c)
39 Le Gall, note 11 supra, p. 23.
40 ibid.
41 See Labour Proclamation No. 64/1975, Article 27.
42 This defence is not expressly prohibited, unlike the case of liability without fault (Article 2086 (1).
43 Some readers may ask how a minor can legally own property, particularly the types of property
which make a person liable without his fault for damages caused by them. Under our law, there are no restrictions on the types of property a minor child can own. The minor can own any type of property, including commercial, industrial or other enterprises - Article 288. The minor can acquire such property through donation, bequest or inheritance - see Articles 287 and 299 (1). Incidentally, note that all the minor's property shall be controlled and administered by a tutor who shall ensure that the property of the minor be not mixed with his own property - see Articles 280 (2) and 283. Usually, the father and the mother are, during their marriage, jointly tutors of their minor children - See Article 204.

44 See note 24 supra.
45 Krzeczunowicz, note 6 supra, p. 38.
${ }^{46}$ Le Gall, note 11 supra, p. 6.

# YATAYYAQ MUGET: <br> THE TRADITIONAL ETHIOPIAN MODE OF LITIGATION 


#### Abstract

Abera Jembere*

The body of law that was indigenous to Ethiopia and which marked a significant development in the last decades of the nineteenth century and the first three decades of this century was the regime of law known in modern legal science as Civil and Criminal Procedure laws. It was transmitted from generation to generation by oral tradition.


This procedural law included the law of evidence, which incorporated a highly sophisticated technique of interrogation and cross-examination known as Tatayyaq Muget. The term Tatayyaq literally means "be interrogated". Techniccally, however, it is the traditional mode of litigation in court proceedings. Esette-Ageba-Muget ${ }^{1}$ was used interchangeably with Tatayyaq to denote features of court proceedings and the same mode of litigation. Muget means litigation, and includes all procedural aspects of the administration of justice.

General E.Virgin summarised his vivid eye-witness account of court proceedings conducted according to the indigenous mode of litigation of Ethiopia, in the following manner:

The Abyssinian is a born speaker and neglects no opportunity of exercising this talent. A law-suit is a heaven-sent opening and entails as a rule a large and appreciative audience: now threatening and gesticulating, now hoarsely, whispering with shrugged shoulders, now tearfully, he tells of his vanished farthing, and points a menacing, trembling finger towards the accused.

The judge in the midst of a circle of spectators, having listened to the eloquence with a grave and thoughtful

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## Aberra: Tarayyaq Muget

men, now invites the accused to reply. Like a released spring he leaps up, and with raised hands calls heaven to witness his innocence, then falls on one knee, rises, stands on tiptoe, drops back on his heels, shakes his fist under the nose of his adversary and approaches the judge with clasped hands, while all the time an unceasing stream of words pours from his lips.

This theatrical exposition of court proceedings shows how the tatayyag mode of litigation, which forms part and parcel of the Ethiopian cultural heritage operate. Customary law, together with the Tatayyaq mode of litigation, had become the prevailing law in a large part of Ethiopia by 1936.

What are the major features of the institutions involved in the application of the Tatayyaq Muget and how does it actually operate?

## I. FEATURES OF COURT PROCEEDINGS

Litigation at the initial stage was in general a voluntary and spontaneous form of arbitration. A party to a dispute was entitled by law to call upon any passer-by to decide his case. If the parties to the alleged dispute were satisfied by the rulings of the "road-side" courts ${ }^{4}$, the matter would be considered settled. However, if a decision satisfactory to either or both of the parties could not be obtained, they would go to court, or sometimes the person who acted as a "road-side" judge would take them to the lowest official judge.

The lowest official judge could be the Chika Shum ${ }^{5}$ or the Melkegna. ${ }^{6}$ The Chika Shum and the Melkegna were basically administrative officials who exercised judicial power. The concept of separation of power was alien to the then existing society. Every government official was thus referred to as Dagna (judge).

The Techiwoch or Korqwaris (assessors) ${ }^{7}$ stand next to the Dagna in order of importance: Some of them were selected by the contending parties, and some by the regular court from among those people attending a court session.

The third typical feature of the judicial process was Wass (guarantee). The most frequent forms of guarantee were as follows:

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1) Yeqebeqabe Wass or Yemegazia Wass - a form of guarantee secured for maintaining good conduct in a community, and usually given by all adult males at the time of establishing a residence.
2) Yesene-Ser'at Wass - a guarantee produced by both parties at the time of initiation of a case to ensure respect and fulfilment of all procedural requirements in a case, and also to ensure the appearance of the party in question on the day fixed for hearing.
3) Yegefi Wass - a guarantee produced by a party to prove the points he alleged, and particularly where compensation was due for making undue adverse remarks about the person of an adversary.
4) Yedagnenet Wass - a guarantee produced by both parties at the initial stage of a proceeding for securing the payment of court fees by the party who lost the case.
5) Yewurered Wass - a guarantee entered into at the time of contestation to secure the payment of a wager or bet by the loser payable on and at the time of settlement of the issue under contestation.
6) Yebesella Wass - a guarantee to secure the payment of the value claimed in a civil suit, produced at the time of pronouncement of judgement.
7) Yettelefa Wass - a subrogate guarantee to secure the appearance of the principal guarantor or the payment of the debt.
8) Yeje-Tebik Wass - a guarantee produced at any stage of a criminal proceeding to ensure the proper behaviour of a person alleged to have theatened the life of another person. ${ }^{8}$

The fourth and the last element of a legal process involved in this system was the institution known then as Negerefej; which pertained to a person who usually had a fair knowledge of the law, and who had agreed to represent a person before a court.

Let us now come to the crux of the matter and show how the Tatayyaq mode of litigation operated, i.e. how court proceedings were conducted at a regular court of law at all levels.

## II. COURT PROCEEDING

## A. Case Initiation

A court proceedings begin with securing Yesene-Ser'at Wass by both the plaintiff and the defendant. The judge would then require the plaintiff to put forward his claim. After the full claim had been stated, the defendant would be required to admit or deny it.

If the claim was denied, the legal representative of the plaintiff, moving with his stick to and from in the court room before the judge, would present the principal and side issues involved with respect to the case in hand.

The defendant, in his turn, would in like manner present his defence.

## B. Wurrered Metkel; Laying a Wager or Bet

At this stage, the plaintiff lays a wager to prove his claim. The defendant may require the plaintiff to reduce the amount of the wager, for instance, from a mule to a horse. If further reduction is required, it might be reduced to "honey"." The defendant would then lay down the same amount of "honey" as laid by the plaintiff. Alternatively, he may admit the claim, but deny some of the assertions as the saying goes " ameno yemwagetwal, kerekesebet yeshemtwal", which brings home the fact that admission may be equally as beneficial as shopping in a cheap market. If, on the other hand, the defendant intends to admit the assertion, he would respond "Agurah tennagne" (I concur).

If such admission is secured, the plaintiff would say:
"be agurah tennagne yetereta, mehale agedawn yetemetta" (a person who looses the litigation by admission is like a person who has been struck on his leg). He would then request that judgement be entered against the defendant. The party that invoked "agurah tennagne" would be required to pay one Birr as a court fee. No appeal was allowed from such a ruling.

## C. Introduction of Oral or Documentary Evidence

If the defendant denied some of the facts alleged against him, the facts which were denied had to be proved. The plaintiff may therefore introduce oral or documentary evidence, or both, to prove his allegation.

After both parties had laid their bets and the issue between them had been determined, at least three witnesses from each side would be heard. The witness would openly testify before the court in the presence of the parties or their legal representatives. Where available, documentary evidence would have to be submitted to the court. At this juncture, we should appreciate the admissibility and the probative value of evidence obtained through the what was known as Yechibette Dagna. ${ }^{10}$

If, for reasons of old age or serious sickness, a witness was prevented from appearing before the court, the depositions of that witness had to be taken by a judge commissioned for this purpose, the Yechibette Dagna. This judge would be informed by the court as to the issues raised, and would be required to report back the testimony of the witness. This judge would therefore go to the locality where such a witness lived, together with the parties to the dispute. He would then hear the testimony of the witness in the presence of the parties, four observers selected by each party and the local Chika Shum. On his return, in the presence of the parties, he would report orally the testimony to the judge who had given him the assignment. ${ }^{11}$

If the Yechibette Dagna made errors in transmitting the testimony, the method of correction that was used was as follows:

If he added to, or missed out something from what was stated by the witnesses, the interested party may state: Remember your honour: as God has endowed you with the power of memory, so let God help you to recall what has been testified by So-and-So. ${ }^{12}$

If the Yechibette Dagna held to his version, the observers would be required to give their own. Depending on which one was proved correct, either Yechibette Dagna would be reproved, or the party which had made the allegation would pay compensation to the Yechibette Dagna.

In principle, a witness was not required to tender an oath prior to giving his testimony. He would, however, be required and warned to testify the truth and only the truth.

Failing this, the party against whom the witness tesfified had the right to request the court to require the witness to tender an oath, and this was done during mass, particularly when the holy communion was offered. The witness would close

## Aberra: Tatayyaq Muget

the door of a church ${ }^{13}$ and/or hold the Holy Bible, saying:
May He perforate me like His cross,
May He erase me like His picture,
May He chop me down into pieces like His flesh,
May He spill me like His blood, and
May He choke me up as His Altar is closed, If I am not telling the truth.

If he had already testified out of court, the other party may impeach the credibility of his testimony or may claim that it may not be admissible at all.

Consanguineous relationship and other relationships, such as those of filiation, godfather, adopted child, godchild and the like, were grounds that could be invoked to bar a person from testifying or to discredit his testimony. ${ }^{14}$

The party which called the witness would, before asking him to testify, warn him as follows: ${ }^{15}$

One may go to hell after death;
One may be reduced to bones, laying sick in bed;
One may also be a permanent inmate of a hospital;
All the same, one is obliged to tell the truth.
In a similar manner, defendant will advise the witness to tell the truth and ask him to testify that he did not know what was alleged by the plaintiff.

After all the witnesses had given their testimony, the party who felt that most of the witnesses had testified in his favour would pray for judgement to be entered in the following manner.

As a threshing-ground would go to the one who prepared it, judgement should be made in favour of one whe has been proven right.

There were instances where each party to the suit would claim that the testimony given stood in his favour. In such a situation, contentions were settled by mere allocation of the testimony to this or that party by the persons selected as observers. These persons were known as Iribe Emagne. ${ }^{16}$ Later on, however, a rule was enacted that required the witness who had given the testimony which had
become the object of contention to be recalled, to ascertain as to whom his testimony favoured. ${ }^{17}$ His answer would automatically settle the matter.
D. Tatayyaq: be interrogated

In the past, parties to a civil case had no use of such legal institutions as defence witnesses. For the cause of action alleged by the plaintiff, there always lay a claim by the defendant that it should have been he who ought to have had the right to establish whether the alleged cause of action existed or not. ${ }^{18}$

On this point, Rev. M. Russell, commenting on this mode of litigation, wrote the following about 150 years ago:

The lawyers stand on either side of the plaintiff and the defendant pleading in a loud tone of voice their several causes, during which process wagers of mules, cows, sheep and gold are continually laid by the orators that they will prove such and such charges contained in the libel.... ${ }^{19}$

The exercise of such procedural right used to be invoked either by the party to the case personally, or by his counsel. Where such questions of law arose, the other party would say Kafe $e^{20}$ or Kettebekaye $e^{21}$

On the day fixed for the hearing, the plaintiff, either himself or through his counsel, and before proceeding to the interrogation in accordance with the rules of the Tatayyaq muget, would ask whether or not the rules of procedure were correct. If the defendant's answer was in the positive, then the plaintiff would go on throwing out various questions to show the implications of the claim set forth.

The plaintiff was allowed to pose only one question at a time, and the contending party had to give a single and direct answer to every question asked. In this manner, question and answer went back and forth between the adversaries. A bet was laid down to sanction this rule of procedure. To respond anything less or more than what was required amounted to violating the rules of procedure. ${ }^{22}$

If one party violated this rule of procedure, he would be required to produce a guarantee for the payment of the wager made earlier. Whether or not a party had violated these rules was established by the Techewoch. Even where a party readily admitted the commission of such a fault, he nevertheless had to pay the bet.

When the plaintiff finished his questioning, the defendant would in turn start posing questions.

## E. Wurd Menzat or Bela Lebelha: art of advocacy and

challenge after the examination and cross-examination of the case had been finalized and before the judge gave his decision, the parties would resort to wurd anezaza the art of advocacy applied to convince the judge and the persons attending the court session by the use of poetry and eloquent expressions.

At the same time, each party would endeavour to ridicule and harass the other party, by exposing some of the disgraceful deeds alleged to be committed by the opponent, and shameful events that had reputedly occurred in his family background, with a view to discrediting the adversary by making public his weak points.

The following presentation may roughly show the challenge involved:

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Tell me and I will tell you the system of the Ate Ser'at \({ }^{23}\) and the truth of Abraham. Never will I speak a lie, but the truth and only the truth.
On one side, the judge,.
On the other myself, The judgement rendered by the judge... and an animal slaughtered by the knife of an Adal; never shall the judgement be quashed, and would not there be a soul to be alive. Daring to pay honey, Pulling down the enemy to his knees. If I have performed a bad deed, I regret it.
But if I have done well, you should never let me fail. \({ }^{24}\)
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In a similar manner, the other party in his turn would endeavour to convince the judge and to ridicule his adversary.

These are many emotion-laden words; none-the-less they resemble the present

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legal concept of judgement where opinion is given by both parties, just before the judge sums up the proceedings and renders his judgement.

The other purpose of wurd menzat was to win over the judge. In this regard, a wurd made by a certain Basha Mullatu Wolde Yohannes was believed to have greatly impressed Afe-Negus Nessibu:
"A piece of leather thrown into the fire, A bed splendid with leather attire, So would Nessibu roast one found to be a liar, as the piece of leather thrown in the fire, Warm and soft, he is for the truth, keeps it in the bosom of the bed, that it may have warmth." ${ }^{25}$

Once litigation had passed the wurd anezaz stage, the Techewoch (assessors) would be asked to give their opinion in ascending order of seniority.

## F. Opinion Giving and Rendering of Judgement

Techewoch or judges would tender the following catch when giving their opinion as to how the case should be disposed of:
"Let me face my trial and let it be brought before the wronged, If I did anything wrong and justice is shunned. Let the enemies of my lord be sent to the sword, let those close by the lord be beheaded, and those afar smashed. ${ }^{26}$

The observers, after giving their analysis, would recommend a decision.
Finally the judge would give his reasoned judgement. He would finally say to the plaintiff or the defendant, as the case might be:
"I have decided against you, pay court fees and the bet. ${ }^{27}$
This would be the end of the matter, unless and apeal was lodged to the next higher court. ${ }^{28}$

## Aberra: Tataynaq Muge

## G. Appeal

An appeal may be based on substantive or procedural issues, including interlocutory matters. Every complaint lodged against the judgement or interlocutory decisions of a court was examined not only by judges sitting in higher courts, but also by Korqwaris, i.e. assessors attending the court session.

Appeals made on interlocutory order were not so infrequent as implied by Art. 184 of the Criminal Procedure Code. Whenever one of the parties felt that such interlocutory decisions would be prejudicial to the principal issue, he was justified in making an interlocutory appeal, if, for instance, on a question of title, a ruling was given as regards the mode of proving such subsidiary issues as the existence of a preemptive right in the customary law of a specific society, which would adversely affect the interest of the complainant, unless immediately addressed; then this might be considered as a justifiable ground for lodging an interlocutory appeal.

Another matter that was taken to a higher court, particularly that of the AfeNegus ${ }^{23}$, was the question of interpretation of law. The Yeyigebal Kireker, a dispute over who has the right to prove an allegation, and questions of interpretation of law were submitted to the Afe-Negus, who was assisted by the Ras Wembers. ${ }^{30}$ For instruction or guidance as to how a set of facts or questions of law were to be interpreted, it was to this court that judges of lower rank had to make reference.

## III. CONCLUSION

The system of litigation conducted in accordance with the rules of the Tatayyaq Muget, during the last century and the beginning of this century, was indigenous and unique to Ethiopia.

A close observation of the old laws of Ethiopia, as summarized above, reveals that the procedural laws were more developed than the substantive laws. This is attributable to the teachings of scholars of the Fetha Negast ${ }^{31}$, to the experiences gained in the practice of the legal profession and to the traditional value attached to the practice of bringing up young men as legal apprentices in the courts of governors and in the imperial palace. The fact that litigation, at least as regards the "road-side" courts, was a voluntary and spontaneous form of adjudication has greatly contributed to making the administration of justice a civic obligation of any lawabiding citizen. This and other factors combined have succeeded in making the

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traditional procedural laws relatively well developed.

## NOTES

1. Esette-Ageba means betting, i.e. agreeing to pay the amount the terms of wager offered by the adversary. Shibeshi Lemma, Yettentu Esat Ageba Muret, senior research paper submitted to the Department of Ethiopian Languages, Addis Ababa University (unpublished), Law Faculty Archives,(1965 Ethiopian Calender).
2. Virgin, Eric, The Abyssinia Iknex (London, Macmillan and Co. Ldd. 1956), p. 91 quoted in Shibeshi Lemma, Yettentu Esat Ageba Muget. Op.cit. p.2.
3. In the preamble of most of the proclaimed laws, there was a stipulation to the effect that one had the right to bring a case to a passer-by, and the passer-by had the power to act as a judge and render justice.
4. The "Road-side courts" do not follow the Tatayyaq Myset Procedure.
5. Chika Shum is a local chief.
6. Melkegna is a governor of a locality.
7. At different levels of courts, different members of Techiwoch or Korqwaris (assessors) were selected by both parties and the judge, the number varies from 6 to 8 Techiwoch.
8. All kinds of guarantees were not used in all cases.
9. This was a kind of wager paid in cash, i.e., four Birr for every bet of mar (honey).
10. A commissioned judge.
11. Mateme Selassie Wolde Meskal, Yernam-Allon Eniwqachew (Addis Ababa, Institute of Ethiopian Studies, Addis Ababa University, 1958 Ethiopian Calender) (unpublished), p. 39.
12. Ibid.
13. Closing the door of a church takes place for important matters only.
14. Interview with Fitawrari Abebe Gebre, former judge and a high government official knowledgeable about the traditional mode of litigation.
15. Ibid.
16. Assessors nominated afresh for the particular hearing.

## Aberra: Tatayyaq Muget

17. Mahteme Selassic, op.cit., p. 40.
18. Ibid.
19. Russell, Michael,Nubia ar Abyssinia (New York J. and J.Harpper, 1833) p.267, quoted in Shibeshi Lemma, op.cit.p. 2.
20. Kafe literally means "with my mouth": technically, however, it is a request for leave to appear with a counsel; such plea entitled one to three days' grace.
21. Kettebekaye is a request for permission to appear with a counsel; it entitled one to seven days' grace.
22. Mahteme Selassie, op.cit., p. 40.
23. Atse Ser'at literally means "The law of the king". It was a way of invoking the customary principles of law that had been applied and recognized by courts as either substantive or procedural law of the country.
24. Mahteme Selassie, op.cit., pp. 40-41.
25. Interview with Bitwoded Zewde Gebre-Heyot, former high government official.
26. Mahteme Selassie, op.cit., p.39.
27. Interview with Fitawarari Abebe Gebre, cited above, at note 11.
28. The list which shows the hierarchy of regular courts prior to 1935 was as follows:
1) The Zufan Chilot (Crown Court)
2) The Afe-Negus Court (Court of national jurisdiction)
3) The Shallekn Court (Court of the Governor)
4) Yekal Dagna (District Court)
5) Yesir or Yafer Dagna (court of first instance).
29. The Chief Justice.

30 Justices appointed by the central government to assist the Afe-Negus with appellate jurisdiction, sitting in six divisions to hear appeals coming from areas allotted to each of the divisions of the court.
31. The Law Book entitled The Law of the Kings. It was introduced to Ethiopia between the 15th and the $16 t \mathrm{~h}$ centuries, and incoperated into the legal system of Ethiopia in 1908 by Menelik II.



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48. Xhemen





 /1960/* 1غ 543+553m





















 n+ $n+$ nar*ホ世+18545m


















65. กitur man

67. AH fom












 1985 18 48m


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$n+A>8 n \rightarrow 4 A^{*}$

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 296/1979










[^8]













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5. PqAC $\mathrm{ADAA7}$

































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h7n finf




















今くイР7






































 $+292 \times 8079 \operatorname{man}^{32}$



 -ncuc MAntak

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## 7．干 人 中 中事





















































A内面 P2






 PAn乎 $600^{56}$














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与十下











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## P1贝 14GAKF:
















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6. x 7 \$ $\boldsymbol{7} \mathbf{6}$
7. $x 7+\pi \times 1 /$
















14. $n 7+54 / \mathrm{n} / \mathrm{m}$





17. $\boldsymbol{\lambda 7 + \pi} 22=$


20．$k 7+\pi 8=$


 245 \＆の日h大Am






25．$\times 3+\pi$ 7／4／4



 25／1／n

28． $\mathrm{k} 3+\pi$ 17

29．$\times 5+8$（ 17 20

 12／n／／2／7 \＆Antan






 P97日勾
 と湖A。

37．$n 7+8 \times 66$




40．$\lambda 7+\pi$ 67
41． $\mathrm{ny+n} 27 m$
人3＋x 41．

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44．$\quad x>+\pi 46$



 sfoctata＝




49．$A 7+\pi / 7 / 1 /=$




52. $k 7+\pi 18 / n / m$


 f394C9An

55. $n 7+\pi 17 / n / / 1 / m$
56. $\lambda 3+\pi=12 / \Lambda / / 2 / m$

58. $\lambda 7+\pi 18 / \pi / m$












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$$
n 73+1+n 4 p^{* *}
$$

m $\$ 14$















[^9]


























 u7＋74C50m














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## fh 的號houhht













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 P十





































 $\mathrm{P}+\mathrm{G} \alpha \ll / \mathrm{m}$
































































































人8ひ5？



















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## 9 mpar




















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 responsiabilité du fait d'autrui et de la pluralité de






 nsn+Cn+9m





 \& $\boldsymbol{B}$ ahtan













31．＋ァc $635 / 1 / m$


 PとhんA






34．trc 638

36. + + $c 639$
37. †тс $2125 / a / m$
38. *TC $2125 / 4 / \omega$


























## tmp7-77



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Ptmp7








 Pamety































 ノタビキャム。














甲行























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v/ BChc atace










A/ occesotha















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بt+ $+\infty$
小7 $\boldsymbol{*}$


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$\infty \quad+\quad+m p t$








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    hX7CNJTP
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## 3. 9 mpAS














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18．74 h リ リm







 PA7月女 h7
24. 7 H+


26. Tito man hav nif $h+m+n$ or 17 39m




1. PW47747








2. Stinitatin15y



[^0]:    1 As she was a foreigner, she was not required to pay the National Contribution at the time; and she did not argue that she should pay (as an Ethiopian citizen).

[^1]:    "Part-time Lecturer, faculty of Law, Addis Ababa University

[^2]:    " A Japanese who, on becoming the wife of an alien, has acquired her husband's nationality loses Japanese nationality."

    The Ethiopian Law of Nationality of 1930 states:
    " A lawful marriage of an Ethiopian subject with a foreign woman confers Ethiopian nationality upon her..." and
    "A lawful marriage contracted abroad of an Ethiopian woman with a foreigner deprives her of the Ethiopian nationality if her marriage with the foreigner gives her the nationality of her husband. Otherwise she keeps her Ethiopian nationality."

[^3]:    *Lecturer, Faculty of Law, Addis Ababa University

[^4]:    *This article was written in 1988 and was submitted to the then Editorial Committee of the Journal in the same year.

[^5]:    *Assistant Professor, Faculty of Law, Addis Ababa University.

[^6]:    *Part-time Assistant Professor, Addis Ababa University, Faculty of Law.

[^7]:    
     3 $\boldsymbol{\omega}$

[^8]:    

[^9]:    
    
    

