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Seventh Annual Report of the Dean
Cliff F. Thompson

## CASE REPORTS

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Treaty Making Power and Supremacy of Treaty in Ethiopia
H. E. Ato Aberra Jembere

Decision Trees

- Peter L. Strauss and Michael R. Topping

Book Review
R. M. Cummings

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FACULTY OF LAW

The Faculty of Law of Haile Sellassie I University, established in 1964, offers courses in law leading to the LL.B. degree and to a Diploma or Certificate in law. For further information contact the Assistant Dean, Faculty of Law, Haile Sellassie I University, P. O. Box 1176, Addis Ababa.

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# SEVENTH ANNUAL REPORT OF THE DEAN <br> 1962 E. C. (1969-70 G. C.) <br> Cliff F. Thompson, Professor and Dean, Faculty of Law <br> Haile Sellassie I University 

## I. A New Transitional Phase

In the seventh year of its history, the Law Faculty clearly entered a transitional period of immense importance. The Faculty began the change from being a new law school with an expatriate staff, to becoming an established law school with a predominantly Ethiopian staff.

The signs of this transition are dramatic. For example, only a few years ago there were less than 10 Ethiopian lawyers with the training to enable them to make a high-calibre analysis of the new Ethiopian laws, and there was no forum for the systematic consideration of Ethiopia's developing legal system. Today the Faculty has published more than fourteen issues of the Journal of Ethiopian Law, and Ethiopians increasingly are the concerned scholars who write it.

A few years ago there were no University degree level law students in Ethiopia; today, there are more Ethiopian full-time University law teachers than the number of expatriates who began the law school in 1956 E.C. (1963-64 G. C.). This year the Faculty added three full-time Ethiopians to the three previously selected and made offers to three more for next year. According to the plan begun 1961 E. C. (1968-69 G.C.) to recruit three Ethiopians yearly, the Faculty will be substantially Ethiopianized by 1967 E. C. (1974-75 G. C.).

Less dramatic than the increase in Ethiopian staff members, the increase in the age of the Faculty is an equally significant part of the transitional phase.

We are not yet a mature Faculty; we are growing, and I believe we are inevitably going to have a number of growing pains. The inauguration of this law school generated considerable excitement. The joy of innovation in the early days of the Faculty was not a guarantee of a correct start, so we should be warmly thankful for the brilliant beginning. In the past year we continued or completed programs begun earlier, and we also progressed by innovating programs destined for future completion.

Quite obviously, the transitional period we are entering has a double challenge: to maintain what we have while at the same time to move forward with new ideas. The laws of science inform us that it is harder to start an object moving than it is to keep it moving. But for human insititutions, we all know there is another rule: it is often easier for us to start an institution or project than it is to continue it, or to finish it well. To meet the double challenge of the old and new,
the Faculty must have a highly motivated staff whose energy will match their mental ability.

## II. Four Commen Threads in 1962 E. C. (1969-70 G. C.)

I believe that four common threads dominated the pattern of our diverse activities last year. These threads touched nearly all we did, so I will briefly describe them (but not attempt to order their importance) before discussing specific Faculty programs.

One common thread is the result of the rapid turn-over of staff combined with the increasing carry-over of unfinished projects. This placed tremendous pressureş on the new staff.

Many of the staff who began projects are no longer with the Faculty in 1961 E. C. (1968-69 G. C.) alone, nine key members left Ethiopia. But the projects still required completion: projects such as Law House; publication of the Consolidated Laws of Ethiopia; and the collection of African statutes by our Center for African Legal Development all required new staff members to undertake them, and thus to delay progress on their own innovations. Another typical example was the new staff member who used time he might have spent on his own research and writing in order to transform a typwritten manuscript by a former member of staff into a professionally printed volume.

The turn-over of our staff has always been a difficulty, but the problem has become more acute now that the roster of Faculty obligations has lengthened.

Until the staff is substantially Ethiopianized, and therefore has a more permanent membership, these carry-over projects will exist. Fortunately, a sufficient number of staff responded well to this work, both because it had to be done, and because there must be an established pattern of responsibility which will insure the conclusion of all projects despite the turn-over of staff.

A second thread which ran through many of our activities was the effort to move more closely together the life of the University's Central Administration and the life of the Law Faculty. The University Administration and the Law Faculty were born virtually simultaneously, and although their growth was theoretically as one body, in fact they developed in many ways as separate personalities. The Law School made decisions and began programs before it was possible for the University to develop general administrative policies suitable for all Faculties. Even now the University Administration seeks to encourage a healthy autonomy for its Faculties. But the University is establishing patterns applicable to all Faculties, and these are sometimes in conflict with the practices of the Faculties. We are being asked to conform. We are willing, and we are changing, but it is not easy, and often it cannot be done rapidly without grave dangers.

For example, the challenge is to coordinate our extensive extension program of law teaching more closely with the University's Extension Department, without destroying the basis of the Faculty's ability to run a successful program. During the past year the University Administration and the Law Faculty also considered anomalies between University policy and Faculty practice in registration procedures;
in student regulations, such as those applying to Ethiopian University Service; and in financing. The effort to achieve coordination will continue.

A third common thread which pervasively touched all our efforts was shared by the entire University the return of the withdrawn students. The 1961 E. C. (1968-69 G. C.) academic year was dominated by the withdrawal of more than $70 \%$ of the University's students in the second semester, and this past year was shaped by their return in the first semester.

This unusual situation required the Faculties to be magicians - to juggle class schedules, to add courses and staff burdens so that every semester would contain both 1st and 2nd semester courses. The incidental side-effects of the situation added greatly to the administrative burdens of the Faculty. There were, for instance, an abnormally large number of student petitions to clatify rules in an unprecedented situtation, and extra planning efforts by the Law Faculty staff on proposals such as the imaginative but ill-fated Trimester Plan to make-up lost time for the students.

The major question was whether staff and students could manage the abnormal scheduling without diminishing the standard of academic performance. I am pleased to report that the results were largely reassuring, and that all students and staff deserve praise for their efforts.

The fragility of this unique academic curriculum was severely threatened, however, by the most overwhelming of the threads in the pattern of events: a broken thread - the tragic events of Tahsas, 1962 (December, 1969 G. C.). A clash between students and government forces resulted in the death of students on campus, and the closure of the University for two months. The emotional demands on each of us during those unfortunate days were not compatible with the intellectual aspirations of the University. The re-opening of the University proceeded normally enough to allow completion of the academic year, and we were fortunate to have continued education, with a slow return to the research and publication so needed by the nation.

## HII. Program of the Faculty of Law

## 1. Students

## Law House

One of the most important events this year was the opening of Law House, a self-help project requiring a known cost of over Eth. 120,000, and incalculable labor by many students and staff who raised the donations in cash and kind. In addition to being a self-help endeavour for law students and staff, Law House was to provide a commodious place for students, alumni, and staff to meet, and to give to some of the law students an environment conducive to serious study. The goals were realized this year, and the staff and students many no longer with the Faculty - deserve our admiration for their achievement.

Three matters remain unsettled. We must eliminate a debt of more than Eth. $\$ 15,000$; we must define the status of Law House vis-a-vis the University Administration; and we must work to eliminate the misunderstandings about Law House which seem to arise amongst students living in the dreadful tin-can hostels near-by. If Law House were at Arat Kilo campus or on the Building College grounds it would not be note-worthy. But perhaps its closeness to shabby housing for other
students has been useful, since Law House was one influence on the University Administration when it decided to give high priority to student dormitories in its new capital investment program.

We also await to see what the students now in the Law School contribute to Law House. They are largely the beneficiaries of persons who worked without even the reward of living in Law House. What will those who live there contribute to ${ }^{*}$ their successors?

## Summer Session

The extraordinary event of the year, arising from the desire to makd-up lost time for the withdrawn students, was an unprecedented summer session, in which one-quarter of the regular teaching staff taught three-quarters of the student body (both withdrawn and some 'regular' students) one-third of the regular law courses, for nine hours of credit.

This session, following hard on an emotionally charged and exhausting semester, could have been a disaster. But it was not. Why? Our Law students worked diligently. Also, we found that nine hours of credit in eight weeks (instead of approximately 18 hours of credit in 16 weeks) required tighter planning of teaching and studying, and in the end we had a more efficient use of time. Five days a: week, a student met in three courses for one and one-half hours daily for each course. There was no loss of continuity between lectures, and each class was long enough to allow meaningful discussion.

## Statistical Survey

At the beginning of the academic year, the Law Faculty had 746 students: 278 in the Bachelor of Laws degree program; and 468 in the sub-degree certificate programs in Addis Ababa, Jimma, and Harrar.

At the start of the second semester, an additional 32 students were admitted to Law I students who had withdrawn and who after their return became eligible for the Law Faculty in the second semester of the academic year. It is symptomatic of the complexities arising from the withdrawn student situation that the screening, interviewing, and admission of Law I students which normally is done over the two month vacation had to be completed in less than two weeks. The extra strain on staff seems to have been justified in at least one important way the class is reported as particularly strong.

The drop-outs or dismissals were low except in the new evening LL.B. class, which lost about 30 of its 105 members by the start of the second semester. Judging by prior evening LL.B. groups, this loss was low for the first year. Whether the extension of the program from four to five years has reduced the burden on students sufficiently to reduce the drop-outs will, however, have to await judgment.

Twenty-one students received the Bachelor of Laws degree at the July graduation. Fisseha Yimer received the Chancellor's Medal, and both he and Alemu Fokion graduated with Distinction.

There were 230 graduates of the sub-degree Certificate programs in Addis Ababa, Jimma, and Asmara. The following students graduated with honors- Sahle Wolde, Wubishet Werede in Addis Ababa; and Araya Belay in Asmara.

The sub-degree students in Asmara and Jimma wanted to travel to Addis Ababa to receive their Certificates, but it appeared that the University's policy of seeking regional graduations was a success. The impressive ceremonies, presided over in Asmara by H.E. Ras Asrate Kassa and in Jimma by H.E. Ato Lema Firehewot, brought special events to the cities which were causes of civic pride, and our graduates admitted to being pleased by their local recognition.

## Honour System

There was one Honour Board case this year which was handled with speed and justice by the Faculty Advisor and student members.

But it also became clear that the meaning and operation of the Honour Code are less than obvious to many students, so that student-staff discussions will open on this topic in 1963 E. C. (1970-71).

## 2. Staff

Of the 21 posts budgeted by the University for the Law Faculty, 18 were filled at the beginning of the year one member was unable to return for medical reasons; one recruit declined at the last moment; and one post was unfilled.

The staff was highly qualified. It is equally important to note that fully half of the staff was new to the Faculty, and five other had served only one year. By early in the second semester three of the four members of staff who had served more than two years went on final leave. We then had 15 fulltime staff members, and 15 of the 25 courses offered by the Law School were taught by the instructor for the first time. Yet 10 of 15 teachers provided their students with new or revised teaching materials in 14 courses. Seven of our teachers offered evening classes at no extra compensation, and all 15 teachers were engaged in research in Ethiopian law.

The typical staff member was thus a person with very limited experience with Ethiopian legal problems, but a person who was energetically attempting to master the situation in order to make a useful contribution. This is not a new pattern, but a repeating pattern caused by the turn-over of staff. I have already discussed the way in which the carry-over of unfinished Faculty projects makes more acute the old problem of a rapid turn-over of staff. Fortunately, all of the previous staff remains on the Faculty for the 1963 E. C. academic year, (1970-71 G. C.). And it will be of great help to the Law School that two experienced scholars agreed to extend beyond their original commitments:- Zygmunt Plater and Associate Professor Sklar, who sacrificed a tenured academic position at Ohio State University in order to stay in Ethiopia.

The staff's efforts were particularly admirable because the departure of the Assistant Dean in the second semester added another unusual burden-many of the new staff, unfamiliar with Faculty and University procedures, had to master them as an interim administrative solution.

## Ethiopianization

Three of our Ethiopian staff completed two years of teaching and research at the Faculty at the end of the year, and left for two years of advanced legal study abroad: Fasil Nahum (Yale University); Semereab Michael (Brussels University);
and Worku Tefara (Northwestern University). Each received a scholarship from the University of his choice, and fully deserved it. During his scholarship leave, each will work closely with former members of our Faculty who are now teaching at the named Universities. Abiyu Geleta, Dr. Berhane Ghebray, and Yohannes Heroui completed their first year as full-time staff members. The Faculty considered many fine Ethiopians as possibilities for staff, and made offers to three outstanding persons: : Judge Assefa Liben of the High Court; Mebratu Yohannes of the Ministry of Community Development and Social Welfare; and Captain Shimelis Metaferia of the office of the Chief of Staff of the Armed Forces.

Staff Activities. In addition to regular teaching responsibilities, some of the important activities of individual staff members reffect the scope of the Law Faculty's functions:

Abiyu Geleta. Assisted the Center for African Legal Development early in the year; preparing textbook on introduction to Ethiopian Property Law; wrote legal advice for the Office of the University Business Vice President. Summer Session Teacher.

Frank Ballance. Chairman of the Curriculum and Academic Standards Committee; research and writing on two articles, "Zambia and the East African Community" and "Share Companies in Ethiopia"; preparing new teaching materials for Law and Development course.

Berhane Ghebray. Published, in French, Ethiopian Local Government; research for book on taxation; Director, beginning in the second semester, of the SubDegree Extension Program for the Faculty.

Jacques Bureau. Supervised a renewed effort to begin the Amharic-English-French Lexicon. Summer Session Teacher.

Bill Ewing. Published, Consolidated Legislation of Addis Ababa (Editor), and an article on labour law; completed the more than 1000 pages of manuscript for Consolidated Laws of Ethiopia (Editor); prepared for publication several articles, including an analysis of legal research in Ethiopia for Rural Africana; Chairman of the Development and Promotions Committee; transitional Chairman of the CurricuIum Committee; director of the Consolidated Laws Project; member of several University committees, including the one for the new Student Legislation.

Fasil Nahum. Completed or modified for publication two articles on Ethiopian Constitutional Law and began another; completed a summary of Ethiopian legislation for 1968; member of several Faculty committees and the University's Press Board.

George Krzeczunowicz. Completed for publication the manual, Ethiopian Laws of Extra-Contractual Libiability, and completed articles on the role of Equity in Ethiopia and the University College Era of Ethiopian Legal Education; continued writing on two other articles, on Equity and Legal Education in Ethiopia; member of several Faculty and University committees; continued his workshop meetings with former students, now legal advisers and judges; prepared teaching problems in Family Law.

John Messing. Preparing new teaching materials for Transnational Transactions and Natural Resources; research and writing on several articles dealing with economic development; late in the year, member of the University Faculty Council and supervised filing of Faculty teaching materials and final examination procedures and processing.

Peter Mutharika. Visiting Lecturer in second semester on leave from University of Tanzania; helped with editing of Paul \& Clapham's Constitutional Law, Vol. II.

Katherine O'Donovan. Prepared (with Thompson) temporary edition of Legal Analysis Teaching Materials and preparing teaching materials for Private Law and Public International Law; began research on role of judge in Ethiopia; English Editor for Journal of Ethiopian Law and Paul \& Clapham, Constitutional Law, Vol. II; member of University Faculty Council and several Faculty committees; in second semester, de-facto Assistant Dean; in Summer Session, Assistant Dean and director of student research projects, including Consolidated Laws Project and the Journal of Ethiopian Law.

Don Parris. Worked on teaching materials for Administrative Law; early in the year, English Editor of the Journal of Ethiopian Law and member of the Faculty Student Relations Committee.

Zyg Plater. General Editor, Journal of Ethiopian Law - 2 journals published and 3 in preparation; supervision of printing of three books by Faculty members; assistance in getting Law House opened; late in the year, Acting Chairman of Research and Publications Committee, with numerous administrative and editing duties; preparing article on comparative Constitutional Law.

Paul Ponjaert. Until his departure in the second semester, Assistant Dean; and Secretary of Center for African Legal Development; preparing (with Vanderlinden) a manual on Family Law.

Semereab Michael. Completed for publication an article on administrative contracts in Ethiopian Law; revised some teaching materials in Obligations; Chairman of Student Relations Commitee and member of the Ethiopian University Service Committee.

Ron Sklar. Preparing article on the Penal Code and teaching materials for Penal Law; Chairman of the Honour Board, and of the Library Committee; and member of nearly all Faculty committees.

Jacques Vanderlinden. Completed for publication, in French, of introductory book on Ethiopia's legal system; final editing of book on law of persons; preparing (with Ponjaert) manual on Family Law; early in the year; Chairman of the Research and Publications Committee; Director, Center for African Legal Development.

Thierry Verhelst. Completed for publication an article, "Customary Land Tenure as a Constraint on Agricultural Development: a Re-Evaluation"; began research on existing land tenure in Ethiopia; preparing teaching materials in Agrarian Reforms and several related articles; responsibility for Faculty physical plant and non-academic personnel; late in the year, appointed Associate Director, Center for African Legal Development.

Worku Tefara. Modifying for publication an article on "Right to Counsel"; research on civil procedure problems in Ethiopia; member of several Faculty and University Committees, including the University Committee on Student Legislation; Secretary to the Executive Committee of the University Faculty Council.

Yohannes Heroui. Research on article about the O.A.U; supervised some Amharic translations for the Journal of Ethiopian Law and served as Case Editor; early in the year, member of the University Faculty Council, Summer Session Teacher.

For the Summer Session, we were fortunate to obtain the services of two visiting teachers who contributed greatly to the success of that program: John Wylie, of the Law Faculty, Queen's University, Belfast, Ireland; and Professor Zaki Mustafa, formerly the Dean of the Law Faculty at the University of Kahrtoum, and presently Law Faculty Dean at Ahmadu Bello University in Northern Nigeria. Both were model teachers and colleagues.

The records of those who left us this year speak for them, but I would add a few personal words.

Paul Ponjaert, the Assistant Dean, carried alone the Faculty's administrative responsibilities in the time between Dean Johnstone's departure and my arrival; he will be remembered best for the constant charm with which he confronted the problems surrounding his office. Associate Professor Vanderlinden, founder and Director of the Center for African Legal Development at the Faculty, was a whirlwind of intellectual enlightenment and he cared greatly for the future of our efforts. The characteristic of commitment and concern for this Faculty also distinguished Assistant Professor Ewing, who was the General Editor of the Consolidated Laws Project, a vital and mammoth undertaking. His perception and judgment, as well as his experience here, made his counsel wise, and I sought it daily. We miss them all greatly.

The part-time teachers were fewer than in recent years, but they were of the usual high standard.

In the two Certificate programs which were running in Addis, the teachers were: Major Abebe Guangoul, Legal Advisor, Pension Commission; Dr. Assefa Habtemariam Legal Advisor, Ministry of Commerce and Industry; Judge Assefa Liben, Judge of the High Court; Colonel Belachew Jemaneh, Chief of Public Security, Ministry of Interior; Bilillign Mandefro, Legal Adviser, Auditor General's Office; Negga Tessema, Vice Mayor, Addis Ababa; Mohamed Abdurahman, Vice Minister, Pension Commission; Selamu Bekele, advocate and Legal Advisor, Tobacco Monopoly; Shiberu Seifu, Advocate, and Legal Advisor, Ethiopian Airlines.

In Asmara the teachers were: Captain Berhanu Bayih, 2nd Infantry Division Headquarters, Asmara; V/Afe Negus Kassa Beyene, Supreme Imperial Court of Asmara; and Ato Kesete Haile, Legal Advisor, Commercial Bank of Asmara.

In Jimma, the final year of the Certificate program was entirely taught and administered by Wondimu Kassa, who was on Ethiopian University Service from the Law Faculty.

## 3. Curriculum and Academic Standards

## Sub-Degree Certificate and Diploma Programs

As two of our Certificate programs came to an end after nearly three years of instruction, the Faculty paused in its intake of sub-degree students in order to evaluate the effectiveness of the Certificate and Diploma programs.

The quantity of students in these programs, operating in four provinces, has always been impressive, and there were many requests for more courses. But the possibility - if not the necessity - of improving the quality of these programs became increasingly a major concern of the Faculty, the Ministry of Justice, and other relevant institutions.

The completion of the report Basic Legal Education in Ethiopia - An Evaluation was, therefore, the significant development of the year. Thomas Geraghty and a student research team studied the relevant records and interviewed teachers, students, and employers as the basis for the final report. It confirmed our belief that substantial improvements should be made in the sub-degree programs, and provided a basis for substantive discussions about what could be done.

Near the end of the year, Dr. Berhane Ghebray became primarily responsible for the sub-degree programs. Substantive planning for the extension programs is presently mixed in a complex way with unsettled administrative arrangements which concern the central University Administration and the University's Extension Department. We aim for a better program in both content and administration next year.

## LL.B Program

The return of the withdrawn students dominated the Faculty's curriculum planning. We accommodated all students in both semesters by a complicated re-scheduling of courses, and we were the only Faculty able to do this without an increase in budget.

We were aware of the possible risks to our acadamic standards, caused by the need to offer courses out of their proper sequence, and by the added teaching and administrative burdens which meant less time could be given to individual students. Students and staff responded well to the abnormal situation, and although all wished an early return to normality, they managed the interim with gratifying tenacity.

The Law School was the first Faculty to plan for the early readmittance of the withdrawn students, and subsequently I was chairman of the President's Committee which opened the way for the return of withdrawn students from other Faculties of the University. We believe the sacrifices required by all in order to achieve the early readmittance of the students were worthwhile. But I believe the record also allows me to emphasize the problems as well. The greatest problem was neither financial nor academic, but simply that handling the abnormal situation absorbed much of our time and energy which normally would have been spent on new teaching materials, more research and scholarly writing, and on plans and programs to make the Faculty a better and more effective institution.

Despite the problems, the creation of teaching materials suited to the needs of Ethiopia remained a paramount goal. Teachers prepared new or revised materials in 14 courses.

A significant aspect of many of the new teaching materials is their reliance upon actual case-problems arising in the ministries and the public corporations, and in the private sector. In the past, the Faculty's teaching materials characteristically applied foreign comparative legal materials to the provisions of Ethiopia's codes. A comparative approach remains important, but we are increasingly using real rather than hypothetical problems of Ethiopia in our teaching materials.

To provide for the full utilization of teaching materials in the future as well as the present, the Faculty inaugurated a centralized collection of the stencils prepared for courses. Formerly, a number of stencils were mislaid or lost when staff changed, and there was some unnecessary repetition in preparing stencils.

In the third and fourth year courses there was a considerable amount of curriculum innovation, and less reliance upon a final examination as the sole judgment of a student's performance. Tentative experiments of earlier years were developed
in force-for example, 18 students in the Natural Resources course spent a considerable part of the semester in a realistic simulation of the negotiation sessions required to hammer out a mining concessions agreement.

We became convinced this year that the writing program should be more systematic and valuable to the student, particularly in the development of legal drafts ing skills which are constantly required in government and private practice. The Senior Research requirement has worked exceptionally well, but the remainder of the writing program is largely unsatisfactory. The Curriculum Committee will be considering revisions in the writing program and other portions of the curriculum.

## 4. Research and Publication

The research and publication program is an integral part of the Faculty's aim to serve the legal development of Ethiopia.

Professor Ewing's research survey prepared for the spring, 1970 issue of Rural Africana is the most comprehensive survey and analysis of Ethiopian legal research, and I recommend it to you. He analyses the Faculty's 13 published books and 12 issues of the Journal of Ethiopian Law and the many articles and the few books published abroad, into six overlapping categories: 1) introductory works (e.g. Vanderlinden's new book on Ethiopian Law); 2) historical, jurisprudential and comparative works (e.g. the English translation of the Fetha Negast: The Law of Kings) 3) source materials (e.g. The Consolidated Laws of Addis Ababa) ; 4) instructional works explaining the law on the books (e.g. Sedler's Ethiopian Civil Procedure); 5) empirical works discribing what actually happens in Ethiopian institutions (e.g. the Journal articles by the Northwestern University research project on local courts administration, divorce procedures 10 years after the Code, and labour relations); 6) empirical works with a social science orientation (e.g. Singer's article on the effect of customary law in development).

## Need to Assess Priorities

After examining the conflicting views regarding future research priorities, Professor Ewing states:
"That the major effort in the future should be directed along the following lines:
(1) Preparation and dissemination in Ambaric of explantions of the major provisions of the law in as simple and clear a form as possible;
(2) Studies of the effects and effectiveness of the laws, to determine whether they are actually having beneficial or detrimental results;
(3) Studies of the attitudes and practices of the people in the various parts of the country to determine what legal methods are best adopted to bring about policy goals of development and social justice; and
(4) Studies of the possibility of applying successfully to Ethiopia measures adopted in other countries to bring about these goals.

Because too many policies and studies of the law in the past have been aimed at problems which occur mainly in urban areas, which contain only a small proportion of the population, future work should deal with the rural areas and their people and problems in order to benefit the vast majority of the people."

This listing of priorities is a useful aid to the discussion which must begin concerning the direction our research should take. The Faculty has always emphasized research related to the needs of Ethiopia, and because there was so little to begin with, priorities did not have to be assigned.

The books and articles have become an important element in the foundation sof Ethiopia's modern legal system. But there is now a need to focus sharply our priorities - to avoid unnecessary duplication of efforts, and to base our research and publication upon a clear-headed assessment of needs. Otherwise, $I$ believe there is a danger of equating quantity with quality in our research and publication program.

Publications of 1962 E. C. (1969-70 G. C.)
In the past year, the Faculty published four issues of the Journal of Ethiopian Law (in English and Amharic) under the General Editorship of Zygmunt Plater. From the many outstanding articles in the published issues, I note Bililign Mandefro's "Agricultural Communities and the Civil Code" (Vol. VI, No. 1) as typical of the Journal's aims - to have more writing by Ethiopian lawyers and to be both scholarly and useful in content. His exposition brings sense to the Code provisions dealing with traditional agricultural communities, and provides practical recommendations to make the Code more effective in order to implement the development policies regarding agricultural communities.

The Faculty also published four books, began printing a fifth, and readied thref more for delivery to the printers. Two of the books will assist an understanding of existing Ethiopian law: Professor Krzeczunowicz's book on extra-contractual liability and Professor Vanderlinden's book on the Law of Persons. Dr. Berhane Ghebray's book provides an introduction to the organization of local administration in Ethiopia, and the Consolidated Laws of Addis Ababa (in English and Amharic Ewing, Editor) is a basic law source for the capital. We began to print portions of the second volume of the much admired work by Paul and Clapham on the development of Ethiopian Constitutional Law.

Of the books being prepared for printing, the most important is the Consolidated Laws of Ethiopia (Ewing, Editor), which will be over 1000 pages in each of the Amharic and English editions. This project will undoubtedly be one of the Faculty's major contributions to Ethiopian legal literature, for it brings together nearly a quarter of a century of Ethiopia's non-Code laws, with editorial guides to legislation repealed, obsolete, or impliedly repealed, and with finding tables, indexes, and analytical notes.

## Library and Legal Documentation

After a gap of nearly six months, the Faculty obtained the services of a head librarian, Mrs. Ben-Nathan, who has vigorously undertaken the library's administration, including the conduct of our first inventory in some years. We continued to add items to our Archives, and the Judgment Analysis Project continued throughout the year.

## Center for African Legal Development

With the final departure from Addis of the Center's Director, Dr. Vanderlinden, the Faculty was fortunate to have Dr. Verhelst, another Belgian, assume the duties of Associate Director. The Center continues to a mass on microfilm the legislation
of all African countries, which will constitute a unique research center. Dr. Vanderlinden will remain as Director to supervise the photographing of microfiches in Brussels, and to put the finishing touches on the Bibliography of African Law, from post World War II to present.

## Visitors to the Faculty

During the past year we were honoured by visits from the following persons, some of whom were able to give lectures to staff and students: William Capstick, Esq., Head of the Law Department, Evelyn Hone College for Adult Education Zambia; Mr. Lutapimwa Kato and Mr. Rudy James both of the Law Faculty, University College, Tanzania; The Hon. Mr. Justice A. Saidi, Chief Justice of Zanzibar, and Mr. L. Makame, High Court Registarar of Tanzania; Professor J. Gilfssen of Brussels Univesity; Mr. John Bainbridge, Director of the African Program of the International Legal Center; Miss Wonuola Odessanya, Lecturer in the Law School, University of Zambia; Mrs. C. Spurgin, President of International Association of Juvenile Courts and President of the Lay Magistrates Association; and Professor S. J. Thurman, Dean of the Law School, University of Utah.

## Financing

In regard to the long-term planning of the Faculty, the most important event of the year was the Faculty's negotiation with the University Administration and the Ford Foundation which resulted in the strong possibility of continued financial support from the Ford Foundation.

The amount of assistance is likely to be more modest than in the past, but considerably more than even the most optimistic persons had predicted. The funding is vital for two major areas. In staffing it would allow the Faculty to seek the best available expatriates in the period when the number of expatriates will be steadily declining as the Faculty is Ethiopianized. In research and publications the Faculty would be able to maintain the same level of quality in its program, including the use of student researchers, and to innovate in selected areas.

The Faculty also negotiated with the University Administration for a portion of the AID loan for equipment and library, and received the promise of useful amounts. We received assurance of help in staffing from the Canadian Government and from the German Educational Exchange Service. The Faculty also negotiated for an extension of the generous support by the Belgian government to the Center for African Legal Development which began three years ago, and there was a strong likelihood of another three year grant.

The success in the past year in securing support from foreign donors should not obscure the central importance of the Faculty's budget received from the Imperial Ethiopian Government's allocation to the University. The Faculty could not operate without it, and more important, the grants promised by outside donors are based upon the assurance of adequate local financial support. In this respect the Faculty's University budget is not unsatisfactory, and it has become more realistic in its support of the secretarial staff needed to prepare the flow of teaching materials and research papers. In other respects the budget will have to grow to fill the declining level of foreign support, particularly in such areas as student research work, and in the funding of senior staff positions.

## Looking Ahead

The prospect of continued support from the Ford Foundation made it possible for us to plan seriously for a Law Institute and Lexicon Project. We revived the Lexicon Project in 1962 E. C. (1969-70 G. C.) in order to judge its possibilities, and we concluded that it could be an important aspect of the Law Institute. The ; creation of an Amharic legal vocabulary is proceeding at a rapid pace but with tremendous confusion and with an undesirable multiplicity of phrases for individual legal concepts. Judges, legal advisors, and lawyers all support our efforts to guide the development of the legal language as an effective tool of communication.

We were also assured of a grant from the Council on Legal Education for Professional Responsibility, Inc. in New York for the support of a program in providing legal aid to the poor. The approval of a grant to our Law Faculty was the only grant made to a law school outside of the United States. We believe it can serve an important pedagogical purpose in our Faculty, and in cooperation with judges and legal officials we began preparation for the start of a modest legal aid program.

But just as the prospect of continued support by foreign donors made it possible to continue planning for innovations needed in Ethiopia, the likely decline in the level of such support made it necessary to reconsider the value of our programs, to consolidate out efforts, and plan for a future which is manageable.

In any event, we must continue to aim for our graduates to be men of ability and aspiration. We must therefore intensify, not relax, the tradition of hard work and achievement carried by our staff and students.























## REPORTS

The following reports are cases decided by the Supreme Imperial and the High Courts of Ethiopia. The Amharic judgment is official and always precedes the English.

The Journal of Ethiopian Law is a scholarly publication, addressing itself to all members of the profession. Its purpose in publishing judgments is to make known to the profession interesting decisions which in the opinion of the Board and Editors raise important issues of law. In selecting a particular judgment for publication, the Board and Editors do not wish to convey the impression that the judgment is definitive on any proposition for which it may stand although the quality of the the decision is always an important consideration in determining whether it should be included in the Journal. When, in the opinion of a Board Member or an Editor, a judgment is of interest and raises an important issue of law but there is reason to believe that aspects of the decision are contestable or that the result reached by the court is not clearly the only supportable conclusion, a note on the case is often included. The absence of such a note is not however to be interpreted as indicating complete finality on the issues raised in the case, as it is expected that members of the profession on all levels may hold differing opinions on the merits of any judgment published herein.

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# SUPREME IMPERIAL COURT 

Addis Ababa, Div. No. 1
Justices:
Afenegus Teshome Haile Mariam
Ato Tadesse Tekle Giorghis
Kegnazmatch Mulat Beyene
HABIB KEBIR v. DANIEL EGU
Civil Appeal No. 533-60
Commercial Law-Dissolution of a private limited company-additional evidence on appeal-serious disagreement as a good cause for dissolution-Obligations preceding the memorandum and articles of association-Civ. Code Arts. 1731, 1828, Civ. Proc. Code Arts. 327. 345(1) (a) (b); Comm. Code Arts. $542,218,510,512,516-518,314,520,219-223,524$ (1).

On appeal from the decision of the High Court holding that disagreement that existed between the appellant and the respondents justified the dissolution of the Company they bad jointly established.
Held: Decision affirmed.

1. Additional evidence on appeal is permitted only where the provisions of Arts. 345(1) (a) \& (b), Civ. Proc. Code are satisfied.
2. The existence of a serious disagreement among the partners of an enterprise is a good cause for the dissolution of the enterprise.
3. Private agreements entered into by members of a Company prior to or after the formation of the Company may not affect or derogate legal provisions or the provisions contained in the memorandum or Articles of Association.

## JUDGMENT

The Appellant, pursuant to Article 327 of the Civil Procedure Code, applied for permission to call additional witnesses. On appeal additional evidence may be adduced pursuant to Article 345 (1) (a) and (b) only where

1. the Court from whose decree or order the appeal is preferred has refused to admit evidence which ought to have been admitted;
2. the calling of additional evidence is deemed necessary for determination of the matter in dispute or in the interests of justice.

Appellant had prayed in the High Court for permission to call witnesses. He sought to prove by witnesses that the Respondents had repeatedly requested the sale of the factory, that the Respondents intended to carry out commercial activities with another person and that they repeatedly requested to return to their country of origin. The High Court denied the application for lack of good cause. We find the order of the High Court sustainable and shall herein below set forth the reasons.

The Plaintiffs, present Respondents, brought an action for the dissolution of the company pursuant to Article 542 and 218 of the Commercial Code. They have set forth in detail the causes for dissolution. The Court has to determine whether the cause alleged is good and sufficient for the dissolution, and should it so determine it shall pronounce the dissolution of the company; if otherwise it shall reject the application. The Respondents have shown that there exists serious disagreement between them and the Appellant did not disprove this in his defence. The Appellant seeks to prove that Respondents expressed their intention to sell the factory, that they planned to carry out commercial activities with another person and that they had expressed their desire to return to their country. The Appellant did not seek to disprove the reasons given by the Respondents. Therefore, we find that the High Court properly rejected the Appellant's application to introduce additional evidence.

We shall now revert to the main issue. From an examination of the High Court record, it appears that Plaintiffs, present Respondents, applied to the High Court for the dissolution of a private limited company carrying out commercial activities under the designation "Black Pearl" and for the appointment of liquidators. The High Court, after hearing the Appellant pronounced the dissolution of the company and the appointment of liquidators. The Appeal is preferred from this decision.

The Respondents applied for the dissolution of the company alleging that 1. Serious disagreement exists between the Respondents and the Appellant; 2. Appellant refused the Respondents access to the company's books and did not consent to the appointment of an auditor to audit the company's book and was not willing to distribute their share in the profits. The Appellant contends that the company should not be dissolved on the ground that:

1. The company was formed pursuant to the agreement entered into between Appellant and Respondents in Rome whereby Appellant undertook to establish the company at his own expenses and the Respondents undertook to render him services at fixed salaries for a period of five years and at the expiration of which it was provided that they would share equally with the Appellant in the profit; that the Appellant established the company with his own expense; that the request for the dissolution of the company made by the Respondents purporting to have contributed half of the capital for the formation of the company and purporting to be joint owners of the company is not proper.
2. The Respondents' request for the dissolution of the company is not made in good faith but to discredit the Appellant's business acumen and with intent to carry out commercial activities with a certain Italian and therefore the Respondents are bound by the Rome contract and may not request the dissolution of the company. The contentions rendered by the Appellant and Respondents have been summarized herein above and we shall now proceed to consider these contentions in light of the relevant legal provisions. We shall at the outset consider the argument advanced with respect to the Rome contract. It has not been contested that the Appellant and Respondents agreed to form a partnership for the manufacture and sale of aerosol and cosmotics. However, it is to be noted that the business organization designated "Black Pearl" was not formed by virtue of the Rome contract but pursuant to the memorandum and articles of association signed by the Appellant and Respondents in compliance with the Commercial Code. The cardinal rule is that where a business organization is formed pursuant to a memorandum and articles
of association duly drawn in accordance with the Commercial Code said business organizations shall acquire legal personality, and shall be managed in accordance with the law, the memorandum and articles of association. Private agreements entered into by members of the company prior to or after the formation of the business organization may not affect or derogate legal provisions or the provisigns contained in the memorandum or articles of association and we shall herein below set forth the reasons therefore.

A private limited company is formed after the memorandum and articles of association thereof are drawn pursuant to the provisons of Articles 510, 512, 516, 517,518 and 314 of the Commercial Code and after the said business organization is made known to third parties and is registered pursuant to Articles 520, 219, 220, 221, 222 \& 223 of the Commercial Code. A private limited company formed in such manner shall be managed and shall operate in accordance with the law and its by-laws. Likewise it may be dissolved in accordance with Article 524 (1) of the Commercial Code. Any other private agreement shall not affect the company. Although the Appellant and Respondents had earlier signed an agreement in Rome, the said company was formed and acquired legal personality by virtue of the memorandum and articles of association signed by both parties and by virtue of the registration thereof. Therefore, the Rome contract is not material in considering the request for the dissolution of the company.

The Appellant contended that the Rome contract is relevant to the matter in dispute and invoked. Articles 1731 and 1828 of the Civil Code in support thereof. Article 1731 (1) provides that the provisions of a contract lawfully formed shall be binding on the parties as though they were law. Even if we hold that by virtue of these provisions the Rome contract is law between the Appellant and the Respondents, this contract may not affect the company because it was formed pursuant to the memorandum and articles of association. Furthermore, although both parties agreed to and signed the Rome contract, they had thereafter drawn and signed the memorandum and articles of association wherein the business purpose of the company, the amount of subscription and the rights and obligations of each member were set forth in detail. Therefore, the Rome contract is deemed to have been substituted by the memorandum and articles of association and it does not have any bearing on the application seeking the dissolution of the company. Article 1828 relates to novation. Novation shall be deemed to occur when the parties express the unequivocal intention to substitute the original obligation by another. The memorandum and articles of the association manifest the Appellant's and Respondents; intentions to extinguish the Rome contract. Therefore, the legal provisions invoked by the Appellant do not support his argument and we do not therefore find this argument tenable.

The Appellant stated that he had subscribed the whole amount of the capital for the formation of the company and that as the Respondents had not made any contribution, they have no right to request the dissolution of the company. As we have already observed, the law clearly provides that when a company is formed the amount of contribution made by each member shall be shown in the memorandum of association. The memorandum and articles of association establishing the company show that the amount of the company's capital is E S 80,000 . The Appellant contributed E $\$ 40,000$ and each of the Respondents contributed E $\$$ 20,000 and that said capital was fully paid up. Whereas the amount of capital subscribed and fully paid up by each member was known at the time of the formation and registration of the company, the contention that Respondents did not pay
their contribution and may not therefore request the dissolution of the company is not sustainable. If the Appellant as alleged has paid the contribution due from the Respondents then he may bring an action to recover said sum but he may not on this ground cause the company to be divested of legal personality and the members to be deprived of their legal rights. Where one becomes a member of a company either by paying his contribution from his own pocket or by having it paid by someone else, on his behalf then he acquires all the rights inherent in membership. Another member may not divest him of his rights on the ground that he had paid his contribution on his behalf. As the Respondents are the founders of the company, they have requested the dissoluton of the company pursuant to Articles 542 and 218. One of the grounds they raised in favour of dissolution is the existence of serious disagreement between the Appellant and the Respondents. The evidences introduced by the Respondents tends to show that disagreement exists between them and that this disagreement engendered recrimination against one another which resulted in the cessation of the company's operation. Whereas the existence of serious disagreement among the members is one of the good causes for dissolution of a private limited company, the order of the High Court for the dissolution of the company is valid. Therefore we hereby affirm the decision of the High Court and dismiss the appeal.

The High Court shall be so notified.
We have lifted the injunction ordered on January 11, 1969.



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## SUPREME IMPERIAL COURT

Addis Ababa, Div. No. I

Justices:
Afenegus Teshome Haile Mariam
Ato Taddesse Tekle Giorghis
Ato Haile Betselot
Criminal Appeal No. 171/61
Juxisdiction-venue. - Crim. Pro. Cole Arts. 99, 107,6,116,109,100-104; Penal Code Arts. 641. 642 (b), 383(a) (d), 656.
Appeal preferred against the order passed by the High Court rejecting the motion of the public prosecutor to transfer the cass to a High Court in Addis Ababa.

Held: Reversed.

1. The general rule is that offences should be tried in the Court of the locality where the act was committed.
2. Where, however, the case falls under Arts. 100-104 of the Criminal Procedure Code the suit may be filed in a Court selected by the pablic prosecutor.

## JUDGMENT

This appeal is preferred against the order passed by the High Court on Oct. 22, 1968. We have studied the file. The Public Prosecutor (present Appellant) preferred charges against the Respondent and moved that the offences be tried by the High Court sitting in Addis Ababa. The Defendant (present Respondent), represented by counsel, prior to entering his plea objected that the offence should be tried by the court within the local limits of whose jurisdiction said offence was alleged to have been committed. The High Court sustained the objection and held that as the more serious offence was allegedly committed in Harar Governorate General, it is not proper to file charges on the less serious offences in Addis Ababa and apply for the appearance in Addis Ababa of witnesses and the Defendant, residing in Harar. It dismissed the case; ordered the registrar to forward the record to the Harar High Court in order that the Court may try the offence pursuant to Articles 99-100 of the Criminal Procedure Code. Wherefor this appeal is taken.

In his memorandum of appeal, the Public Prosecutor has set forth the grounds of objection to the order appealed against. Grounds of objection are: that the Defendant (present Respondent) was charged on four counts; that the offences were committed in Addis Ababa and Diredawa; that in such cases Article 107 of the Criminal Procedure Code authorizes the Public Prosecutor to decide which court shall have jurisdiction to try the offences charged and that therefore the order passed by the Court to the effect that the offence be tried by the Harar High Court is erroneous.

The Defendant (present Respondent), on his part, has stated in detail, in his seven-page application, dated March 17, 1969, his arguments in support of the
contention that the case should not be tried in the Addis Ababa High Court. The substance of the application is: that most of the offences were allegedly committed and the consequences allegedly ensued in the area within which the injured party and the Defendant reside; that investigation into the offence was conducted by the police and the result thereof was forwarded to the Public Prosecutor at Harar; that trying the case in Addis Ababa would create inconvenience in introducing defence witnesses and that therefore the order passed by the High Court should be affirmed pursuant to Article 6, 99 and 100 of the Criminal Procedure Code. Should the application be rejected he requested the Court to order separate trials pursuant to Article 116(2).

Therefore, having considered the legal arguments presented by both parties, we shall examine whether the order passed by the High Court is appropriate. The Public Prosecutor's charge alleges that the Respondent committed four offences. One of these offences was allegedly committed in Addis Ababa, while the second was allegedly committed in Diredawa. It has not been disclosed where the third and fourth offences were committed. Indeed it has been averred that it is the lower courts that may exercise jurisdiction with respect to the third and fourth charges. However, pursuant to Article 109(3) of the Criminal Procedure Code, the Public Prosecutor joined these charges with the first charge and filed them in the High Court. Therefore, the question is which High Court may try the offences charged.

Article 6 and the first schedule of the Criminal Procedure Code define the jurisdiction of courts regarding criminal cases. The first schedule specifies the different kinds of offences and the court having jurisdiction to try said offences. Article 6 provides that in accordance with Articles 99-107 courts shall have the power to try offences committed within the local limits of their jurisdiction. Therefore, where a question arises regarding the court where a charge should be filed, it is necessary to refer to the First Schedule first and then to Article 6 which cross-refers to Article 99-107.

Hence, in the case at bar, we shall consider the provisions cited hereinaboye to determine which court may exercise jurisdiction.
a) First charge - Breach of trust and aggravated breach of trust contrary to Articles 641 and 642 (b) Penal Code; in accordance with the first schedule this falls within the jurisdiction of the High Court. Since it was allegedly committed in Addis Ababa it is to be tried in Addis Ababa in accordance with Article 99.
b) Second charge - Fraudulent misrepresentation contrary to Article 656 Penal Code. This falls within the jurisdiction of the High Court in accordance with the First Schedule. Since it was allegedly committed in Diredawa it is to be tried in Diredawa in accordance with Article 99.
c) Third and Fourth charges since these deal with creating a false instrument contrary to Article 383 (a) (d) Penal Code, it is within the jurisdiction of the High Court. Since the place where the offences were allegedly committed is not known it is to be tried in any Awraja court with material jurisdiction pursuant to Article 102(a).
As noted above, although the first two charges must be tried by the High Court at Harar pursuant to Article 99 and the First Schedule, and although the third and fourth charges may be tried by any Awraja court, the Public Prosecutor has joined and filed the charges in the Addis Ababa High Court. This is a lawful act and the reasons therefor are set forth hereinbelow.

The cardinal rule is that when a law is promulgated it must cover the different situations which are likely to arise in the future. The Criminal Procedure Code was designed to embrace provisions concerning the filing of charges, places of trial and jurisdiction of courts. These provisions must not be considered in isolation but as a whole by interrelating one with the other. A rule of law is never considered in isolation; it must be related to and supplement other rules of law. If it is considered and interpreted without having regard to other provisions the law will appear to be incomplete and one provision will appear to be contradictory and inconsistent with the other.

Thus, when we consider as a whole the provisions governing the framing of a charge, the place of trial and the jurisdiction of courts, we find that the charge against the Respondent was properly filed in the Addis Ababa High Court.

The general principle is that a criminal offence is tried at the place where the crime is committed by a court with jurisdiction in accordance with Article 99. However, in cases falling under Articles $100,101,102,103,104$ the Public Prosecutor need not comply with Article 99. Where pursuant to Article 116 several charges are joined against the same defendant, the Public Prosecutor is not bound to act in accordance with Article 99, although the said provision may provide that each charge be tried in a different place. Consequently, by virtue of Article 107 the Public Prosecutor shall decide the court in which the charge shall be filed regarding cases that fall under Articles 101-104 and in charges filed pursuant to Article 116.

As we have stated above, the Respondent is charged with having committed four different offences. Pursuant to the schedule the two charges fall within the jurisdiction of the High Court and pursuant to Article 99 their places of trial are Addis Ababa and Diredawa. The third and fourth charges fall within the jurisdiction of the Awraja Court and it appears that they may be tried by any Awraja Court. Notwithstanding the fact that the Defendant is charged with having committed four different kinds of offences that the places wherein the offences were allegedly commited are different and that the courts exercising jurisdiction are the High Court with respect to some offences and the Awraja Court with respect to the rest, the third and the fourth charges may be joined with the first pursuant to Article 109, the second charge may be joined with the frst pursuant to Article 116 and all charges ought to be filed with the court which the Public Prosecutor pursuant to Article 107 decides to have jurisdiction. He decided to file the charge in the Addis Ababa High Court. Thus, instead of trying the charges filed by the Public Prosecutor in conformity with the procedure, the High Court erroneously decided that the case be transferred to Harar Governorate General on the ground that the serious offence was committed there.

In his application, the Respondent requested pursuant to Article 116(2) that the offences charged be tried separately at the place wherein they were allegedly committed. Article 116 (2) provides that all charges must be tried together but where the accused is to be embarassed in his defence, the court shall order that the charges be tried separately: A motion for separate trial should be made to the court of first instance and not to the Appellate court and therefore we have denied the motion.

Therefore, for the reasons stated hereinabove, we hereby quash the order passed by the High Court and remand the case to the Addis Ababa High Court for further proceeding.

March 20, 1969.

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## HIGH COURT

Addis Ababa
Judges:
Ato Assefa Liben
Ato Abebe Awgichew
Ato Mohamed Berhan Nurhussen
Distiller's Co. Ltd. v. Ato Mola Maru.
Civil Case No. 919-59
Unfair trade competetion-imitation of trade mark-Civ. Code Arts. 1240-56; Comm. Code Arts-$30,40,47,55,134,144,158,159,204-5$.
Defendant was charged with deliberate copying of Plaintiff's trade marks which the former allegedly used on bottles in which drinks of the same class as that of Plaintiff were sold.

Held: Defendant liable.
Although there is no legislation covering questions of trade mark the act of defendant constitutes unfair competetion as governed by the Commercial Code.

## JUDGMENT

Counsel for Plaintiff has argued as follows:
That Plaintiff is the proprietor of Gordon's Dry Gin which is known throughout the world, and that it has come to the knowledge of Plaintiff that sales are taking place in Ethiopia of Dry Gin by Defendant under a get-up substantially similar to that of Gordon's Dry Gin. In order to sustain this argument Counsel for Plaintiff has submitted in Court Exh. P.1 and P.2. Besides, the Plaintiff also produced in Court Plaintiff's bottle as Exh. P. 3 and the bottle used by Defendant as Exh. P. 4.

Counsel for Plaintiff has argued that the imitation of the get-up as a whole, that is to say, the general appearance of the labelled bottle, is particularly objectionable and tends to deceive purchasers as to the origin of the Dry Gin produced by Defendant; that there is no doubt that the resemblance is due to deliberate copying, and that the many similarities of minute details in the two labels could not have occurred by coincidence; that the most obvious example of this is the use by Defendant of his telephone number to correspond with the statement "ESST"D 1769" which refers to the date when Gordon's Dry Gin was first produced. In addition to the above the name Garden's is confusingly similar to the trade name Gordon's. That this imitation of get-up provides a weapon for a dishonest bartender who is enabled to pass-off Garden's Dry Gin in response to orders for the more expensive Gordon's Dry Gin. A clear evidence that proves unquestionably an attempt to confuse and deceive the public is that the bottle bearing the Gordon's label (Exh. P 4) is in fact a refilled Gordon's Dry Gin bottle. Counsel for Plaintiff went on to state that Plaintiff published a notice in the Ethiopian Herald dated

5-3-55 (No. 37 file 12) claiming ownership inter alia of Gordon's Dry Gin label, the device of the Boar's Head and the word 'Gordons.'

In reply to the defence put-up by Defendant, who argued that unfair competition covers persons who are only mentioned in the Commercial Code, Counsel for Plaintiff stated that the Provisions of Article 134 of the Commercial Code duly cover any person engaged in trade practice.

Counsel for Plaintiff stated that Plaintiff does not know that a trader in Asmara uses in his trade the bottles of Gordon's Dry Gin; that no law for registration of trade marks has yet been enacted has no connection with the present case. Counsel for Plaintiff has presented to the Court a copy of a judgment given in Civil Case No. 1240-56 in connection with a case of unfair competition. In addition, Counsel for Plaintiff has introduced in evidence copies of judgments given in favour of Plaintiff in similar cases by Courts of three different countries.

In his reply Defendant has argued that Plaintiff cannot sustain its claim under the Provisions of Articles 134 (1) (a) and 134 (2) (a) of the Commercial Code. That according to Articles 30, 40, 47, 55, 144, 158, 159, 204 and 205 of the Commercial Code the question of unfair trade practice covers only those who are employees, agents and others who have such relations with the merchant. He said that there is no law which restrains merchants other than the above from carrying on such trade competition. That Article 134 of the Commercial Code cited by Plaintiff in the present case deals with false statement and defamation, whereas none of the evidence adduced by Plaintiff proves that any such act is committed by Defendant. Defendant went on to state that the labels appearing on the bottles of Plaintiff and Defendant are entirely different. Defendant argued (1) that Plaintiff's bottle (Exh. P.3) bears the name Gordon's; (2) that the trade mark bearing on Plaintiff's bottle (Exh. P.3) is a Boar's Head whereas Defendant's bottle (Exh. P.4) bears the trade mark of two lions; (3) that Plaintiff's bottle has a metalic seal whereas Defendant's (Exh. P.4) has a cork seal; (4) Defendant's bottle bears the name of Molla Maru with the trade mark of two lions and a picture of a man, whereas Plaintiff's bottle bears a different name and trade mark; (5) that Plaintiff's bottle bears the words Distillery London, whereas Defendant's bottles bear the words Liquors Factory Line; (6) the words depicted at the bottom of Plaintiff's bottle are "The Heart of a Good Cock-tail" whereas at the bottom of Defendant's bottle are written the words "The best Stimulant of Your Apetite"; (7) the flowers at the right and left sides of Plaintiff's bottle are purple in colour whereas Defendant's are green. That the fruits appearing at Plaintiff's bottle are three and one, whereas Defendant's are one, three and four. In all Defendant has quoted such seven diffferent items between his bottle and that of Plaintiff's.

Defendant stated that although the trade marks appear in both, the bottles of Plaintiff and Defendant have seven different items. The only thing which is found to be similar in both bottles are the words Dry Gin. Defendant stated that the Asmara Liquor Factory (Ex. D.2) and the Merkebegnia Industry of Addis Ababa (Exh. D.3) are using these names in selling their products.

In addition, Defendant argued that he has not made defamatory statements and never exercised unfair competition against Plaintiff. He asserted that 'Dry Gin' is a name of a liquor and not the trade mark of Plaintiff. Defendant stated that he has published a notice in the Addis Zemen Gazetta dated April 13th 1964 No. 138 and no one has objected to such notice for a period of one year. He also said that there has not been any notice published restricting the use by others of the

Gordon's Dry Gin Bottles. He said that if one uses said bottle for water or any other drink it is all the same.

The above is the argument exchanged between Plaintiff and Defendant. The important questions to be answered are the following:-

Are there similarities between the labels used by Plaintiff and Defendant? And if so to what extent do such similarities confuse and deceive the public? These questions are not directed to persons who can place said bottles side by side and compare the similarities existing between the two bottles. This question, as far as the Court is concerned, has reference to the general consumer at large.

The bottles Plaintiff has produced in Court as exhibits were closely" watched and observed by the Court while in session. There is no doubt that "the labels used in both bottles are of similar type and confusing. In particular the Court has been able to observe that the words Garden's and Gordon's appearing especially in English on the two bottles are quite similar and confusing when even closely seen. Even when these two names are pronounced one cannot tell the difference unless he hears them spoken clearly and precisely. However, Defendant has pointed out other minor differences between the two labels.

From what the Court saw the said minor differences are made up in such a way as to create confusion between the two get-ups. As a matter of fact such minor differences can only be traced by persons who put and compare the two set-ups side by side and this requires a special treatment. In view of the fact that there exists a great number of other labels the reason why Defendant has done his best to create such similarities between his get-up and that of Flaintiff's is nothing but an act intended to benefit from the get-up and reputation enjoyed by Plaintiff.

Counsel for Defendant has argued that the question of unfair competition has reference only to commercial agents and employees as for Article 134 of the Commercial Code and as such this cannot apply in the present case. In the Court's opinion the said argument is wrong since the provisions of Article 134 cover any and all merchants engaged in such business.

It is true that competition in commercial business is allowed by law. That is to say if a merchant produces the best quality of drink and attracts the consuming public without using the labels of another, such is a fair competition. However, the purpose of imitating the labels used by another for a long time is an act of unfair competition which falls under the provisions of Article 134 of the Commercial Code.

Defendant has argued also that since other merchants are using the bottles belonging to Plaintiff there is no reason why he cannot use them. This argument has no relevance to the present case since Plaintiff has not raised the question of ownership of such bottles. We are convinced that Plaintiff will have no objection if Defendant uses Plaintiff's bottles for sale of milk. What Plaintiff contends in the present case is that Defendant is using Plaintiff's bottles for the sale of the same kind of liquor Plaintiff produces and in doing so Defendant has confused and deceived the public.

In our opinion and as far as the law is concerned the petition made by Plaintiff is proper. The fact that Defendant admits using Plaintiff's bottles for selling such liquors gives more weight to the similarities which Defendant has imitated from Plaintiff.

According to the proof adduced it is evident that Plaintiff is the owner of Gordon's Dry Gin label (Ethiopian Herald dated March 5th 1955 No. 37). At the same time Defendant has contended that Plaintiff has not registered his labels with the Ministry of Commerce \& Industry. Nevertheless, this allegation has not been supported by evidence.

Whereas Plaintiff's products sold under the said labels are known all over the world such get-ups cannot be taken away from them under the pretext that there do not exist laws which cover the registration of trade marks.

In view of all the reasons stated above the Court found that Defendant has committed an act of unfair competition and we hereby restrain Defendant from using the said similar labels for the sale of his products from the date of this judgement and to stop using in future any such labels similar to that of $\overline{\$}$ laintiff.

November 4, 1968



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# SUPREME IMPERIAL COURT 

Addis Ababa, Div. No. 6
Justices:
Mr. Justice Debbas
Mr. Justice Tessema Negede
Mr. Justice Tseggai Teferi
SYLVIA ZEVI v. RENATO ZEVI
Civil Appeal No. 1109-56
Family Law-Divorce-Family arbitrators-Right of Appeal to Court from Arbitrators* award-Nationality and Religion as causes for divorce-Civil Code Art. 736.

On appeal from the decision of the High Court rejecting an application to revise arbitral award by the majority of family arbitrators refusing divorce to plaintiff. Held: Decision reversed.

1. Manifestly unreasonable decisons by family arbitrators are appealable to a court.
2. Arbitrators are empowered to consider neither the nationality nor the religion of the spouses. In making their decisions arbitrators have to follow strictly provisions of the Civil Code.
3. A life of dissination by a spouse, disrupting the stability of the family and humiliating the other spouse. is a sufficient ground for divorce under the Civil Code.

## DECISION

This is an appeal against the decision of the High Court (2nd commercial division) dated 6th March, 1963, in Civil Case No. 112-55, whereby the High Court rejected the petition of the Appellant to revise the decision of the majority of the arbitrators, denying her divorce from her husband, the present Respondent.

Whereas the Respondent seemed to be away from Ethiopia, and although the memorandum of appeal is more than clear, we nevertheless deemed it proper to enquire from the Security Department about the Respondent. In its letter dated 7-5-63 No. 7-7502-Z-88, the Security Department notified us that the Respondent had definitely left Ethiopia on 22.9.62 i.e. about ten months ago. He had no re-entry visa. Although the letter of the Security Department was enough evidence of the Respondent's absence from Ethiopia, we nevertheless wanted to give him more chance to defend himself, if he has any defence at all, and we summoned him through the "Ethiopian Herald" in two different notices published on 26.5.63 and 29.5.63, respectively. The consequence of our-summons in the "Ethiopian Herald" is that Mr. Vosikis appeared on the 6th of June, 1963 and alleged that he represented Renato Zevi; he produced us a two-page letter in French, which we would have liked to keep and study; but Mr. Vosikis openly told the Presiding Judge that there was "secret matter" in the letter and that he would not like that paper to remain in the Court file. He withdrew his paper. Under the circumstances, we cannot consider that Renato Zevi entered a proper appearance on the date he was summoned to appear, as he did not appear in person, and did not send us a properly delegated counsel. The sense of "properly delegated counsel" is not unknown to a lawyer of so many years of experience like Mr. Vosikis. His own client Renato Zevi having rescinded his power of attorney after he ran away from Eth-
iopia, cannot ask him through a simple letter which we did not even see as it contained secrets - to reappear for him; he cannot revalidate the power of attorney so cheaply. A power of attorney originating from a foreign country must necessarily be signed by Renato Zevi in the presence of a Notary Public, legalised by the competent authorities of Italy, and finally legalised by our Ministry of Foreign Affairs. This has not been done in the case of Zevi and we consequently rule that he did not enter an appearance either in person or through a properly delegated counsel, as called upon in the newspaper. Under the circumstances, whereas we cannot leave this helpless woman neither married nor divorced, we have decided to give our final opinion forthwith, as to whether the majority or minority arbitral award should be considered as valid and executed.

It is established and undisputed that both Appellant and Respondent were married on 26.4 .52 according to the rites of the Catholic Church. As a result of this marriage, they had three children who are at present 10,7 and 5 years respectively. The marriage was solemnized in the Catholic Church of Addis Ababa.

Both Appellant and Respondent were living in Ethiopia for very long years, and they hold Foreigners' Identity Cards as foreign residents in Ethiopia. As residents, they are entitled to the protection of our Civil Code. This very same division of the Supreme Imperial Court has, in two previous appeals, i.e. 633-55 and 724-56, held that if either of the two spouses was domiciled in Ethiopia at the relevant time, the family arbitrators shall be entitled to entertain a petition for divorce, as is the present case.

Bearing in mind that she was domiciled in Ethiopia, and on grounds of matrimonial differences with her husband, the Appellant applied for divorce through arbitration, in accordance with the relevant provisions of the Civil Code. Five arbitrators heard both spouses, and it was held by a majority of 3 to 2 that there existed no good ground for divorce. The majority arbitral award dated 17th July, 1962 states, among others, that both spouses being of Italian nationality, and having solemnized their marriage according to the Catholic Dogma, are authomatically not entitled to divorce, as the Roman Catholic Church does not allow divorce. The minority arbitral award, on the other hand, dated 19th July, 1962, did not go intoquestions of religion or nationality. It openly mentioned at the beginning thereof, among other things, that the husband Renato Zevi "reserves his right to bring a petition for divorce because of alleged faults of his wife." But the husband, at that time, asked the arbitrators to dismiss his wife's petition for divorce. In brief, whereas we shall go at a later stage lengthily into the arguments of the arbitrators, the minority arbitral award held that the petitioner Sylvia Zevi had advanced sufficiently reasonable grounds to entitle her to divorce from her husband; and the minority thereupon declared the dissolution of the marriage between the two spouses.

Basing herself on Article 736 of the Civil Code, which authorizes an appeal to Court against a manifestly unreasonable decision of arbitrators, the Appellant Sylvia Zevi appealed to the High Court for reversal of the majority arbitral award and the confirmation of the minority arbitral award, granting her divorce. The High Court dismissed her appeal, considering that drunkenness, gambling and going home late in the evenings, which is tantamount to social isolation of the wife, are not sufficient grounds to grant a divorce.

The above is a brief resume of Sylvia Zevi's case, so far that is why she appealed again to the Supreme Imperial Court, asking for reversal of the majority arbitral award and the confirmation of the minority award, or in brief, the quashing. of the decision of the High Court, and the confirmation of the minority opinion. of the arbitrators.

Before coming to the merits of the appeal, it is interesting to emphasize that the husband absconded from Ethiopia about three or four months prior to the decision of the High Court. When he so absconded, he took with him the three minors born out of the marriage with Sylvia Zevi. He completely disregarded the fact that they are not only his own childeren but those of Sylvia too. Furthermore, by so escaping from Ethiopia while his case was still pending before the High Court, we are forced to deduce that he intended to run away from the jurisdiction of our Courts, as he was domiciled here and was subject to our laws and decisions. By going to a foreign land, i.e. his country of origin Italy, he would thus change his personal status and avoid the application of Ethiopian law against him, in case the High Court pronounces a decision adverse to him. And by leaving Ethiopia before the final decision of the High Court, it is more than clear that he was afraid of the result of the High Court decision, particularly that he took with him three minor children, who are now subject of this final decision of the Supreme Imperial Court, but who are not within our jurisdiction. Last but not least, Renato Zevi cancelled, from Italy, the power of attorney that he had given to Mr. Vosikis in Ethiopia; the High Court records clearly show us that his advocate produced the letter of cancellation of his mandate, and walked out from the Court-room. By so cancelling the power of attorney, the intention of Renato Zevi is clear to us: he urges us to deduce that he wanted his helpless wife to continue living alone, on pure uncertainty of the future, and hopelessness as to her children. Such a shameful attitude on the part of a man forces us to find as a fact that he is a person of bad faith, with whom a lady cannot continue existing and killing her future.

There are other facts of which we are, officially unaware, namely (1) instituting in Italy proceedings against his wife, seeking separation from bed and board; those are proceedings allowable in Italy in lieu of divorce as divorce is not allowed under the Catholic dogma. (2) Both spouses have been living separately in Ethiopia for more than 3 years.

The latter two grounds will not affect us much, as the shameful attitude of this man forces us to make our deductions.

To start with, it is clear beyond the least shadow of doubt that all five arbitrators, and the High Court, found as a fact that the husband is a gambler, a drunkard, and a man who was abusing his wife all day through, coming late at night, and having no respect whatsoever to his helpless wife. As a result of his inveterate gambling, the financial stability of the family has been shattered. As a result of his continued insults and abuse of his wife, there arose the question of absolute incompatibility of character, coupled with the social isolation of his wife. In our opinion, those grounds are more than sufficient to allow a divorce. The majority of the arbitrators should have realized that more harm can befall a husband and wife who are forced to live together out of social necessity, when the spiritual communion and mutual respect between them have ceased to exist. This is an argument that all arbitrators should, in the future, consider before pronouncing themselves on a question of divorce. They have certainly tried their best to reconcile them but in vain. So what is the use of forcing them to live together, especially that they have lost the mutual respect they owe to each other. The arbitrators may have very well known that both spouses were living separately in Ethiopia for the last three years; so what is the use again to force them to keep "officially married" but hating each other and disrespecting themselves in the presence of their minor children. If Renato Zevi reserved his right to petition for divorce, as it clearly set down in the minority arbitral award, so again what is the use of forcing them to live
together? Abuse of the wife, inveterate gambling and drunkenness amount to social isolation of the wife and disregard of her very existence. So what is the use of forcing those two human beings to keep officially married? It is preferable to divorce two such persons than to let them plan their very destruction. One can see the irresponsibility of this type of man who takes away the three minor children, completely disregarding the existence of their mother; his irresponsibility is still more striking when, through gambling, he shattered the financial stability of the whole family. Consequently, for such a man, no opening is available but throw him out of the family through divorce. The woman is not his slave to continue living in hopeless uncertainty.

In addition, it is of extreme importance to underline in the present appeal and for the future, that the question of religion and nationality which the majority arbitral award seems to have based itself thereon, should not affect the arbitrators. In this case, the learned majority of the arbitrators mentioned in its award that both parties being Italians, married according to the Catholic dogma, cannot obtain divorce, as divorce is not allowed according to the rites of the Catholic Church. This argument may very well be strong before an Ecclesiastical Court but not before a Civil Court. We are not concerned with religious matters. If the Civil Code allows divorce to be pronounced by arbitartors, it is irrespective of religion and nationality. What is conclusive is the law of domicile; and we have established this principle in two previous appeals, as well as in the present one. Sylvia Zevi, as a foreign resident domiciled in Ethiopia, is entitled to the protection of our Civil Code. The Ethiopian Civil Code mentions no religion and no nationality. It simply authorizes family arbitrators to pronounce a divorce, if all conditions of the Civil Code are complied with. In this particular case, the family arbitrators were entitled to entertain the petition for divorce; and despite what they heard, they refused the petition by three to two. The opinion of the High Court upholding the majority is, in our opinion, wrong.

In view af all the above reasons, and whereas the Appellant is entitled to impugn any manifestly unreasonable decision of family arbitrators under Article 736 of the Civil Code; and whereas the Appellant did so before the High Court but unsuccessfully; and whereas more harm can befall a husband and wife who are forced to live together out of social necessity, because they are so ordered by the family arbitrators, although the spiritual communion between them has ceased to exist; and whereas it has resulted before the family arbitrators and the High Court that the husband is an inveterate gambler, drunkard, socially isolating his wife; and whereas the question of religion and nationality cannot be considered in this case and all other similar cases; and whereas it is literally detrimental to both spouses to continue living together in pure unhappiness, when the marital bond has been finally severed; and whereas we consider that all the above arguments logically justify a divorce and dissolution of marriage according to the Civil Code; we therefore allow this appeal, and as already pronounced by the minority of the arbitrators, we hereby declare the dissolution of the marriage between Renato Zevi and Sylvia Zevi as from the date of the minority arbitral award. This is tantamount to a reversal of the decision of the High Court and a confirmation of all the minority arbitral award.

A copy of this decision shall be served on the High Court for execution.
Given and delivered in open Court this 11th day of June 1963 in the presence of the Appellant in person and of her attoney Mr. Hamawi. Given in default of Respondent for reasons explained in this decision.

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## HIGH COURT

Addis Ababa, Commercial Division

Judges:
Ato Negussie Fitawake
Ato Mohamed Berhan Nurhussien
Ato Zelleke Desta
Civil Appeal No. 1220-60
Suretyship-counter guarantee-proof of guaranty-Civ. Code Arts. 1922, 2472, 2002, 2003, 1725(a)
Appeal from the ruling of the Awraja Court admitting oral evidence to prove the existence of a contract of counter-guarantee.

Held: Decision quashed and remanded.
For an oral proof to be admitted one has to establish that the document bearing the contract was lost. Mere allegation is not enough.

## JUDGMENT

Initially this suit had been instituted in the Menaghesha Awraja Court. The Plaintiff, present Respondent, stated that as the second Defendant had misappropriated a certain sum from the government revenue he (the Respondent) was ordered to pay in his capacity as a guarantor, and that he was compelled to institute a suit against the counter-guarantor. The Defendant-appellant, in his reply contended that he did not sign as a counter-guarantor; and that if it is alleged that the document that evidences the counter-guarantee has been lost then it is not possible to introduce witnesses to show the existence thereof and invoked Article 2472 of the Civil code in support of his contention.

The Menaghesha Awraja Court directed the witnesses who had attested to the making of the contract to give their testimony; four witnesses testified that a document of counter-guarantee was executed and that they had signed it.

The Appellant, who objects to the judgment of the lower court, contends that: 1) he did not bind himself as a counter-guarantor; 2) pursuant to Article 2472, since the amount of money involved exceeds $E \$ 500$, the claim cannot be proved by witnesses; and according to Article 1922 a guarantee must be proved expressly and not by witnesses; 3) the witnesses introduced are the Respondent's relatives and as such not trustworthy.

The Respondent submits that: 1) when the Appellant's son, Ato Assefa Demissie, was employed by the Ministry of Finance Appellant requested Respondent to act as a guarantor for his son; that when the Respondent bound himself as guarantor, the Appellant undertook to act as a counter-guarantor in favour of his son; 2) as the document embodying the counter-guarantee was lost, he called witnesses pursuant to Articles 2002-2003; that these witnesses who testiffed at the Awraja Court had attested to the making of the contract and were as closely related to Appellant as
to himself; 3) the Appellant, who asserts that he is not related to the witnesses, made references to a criminal charge which does not at all have any bearing on the civil case; 4) that Article 2472 of the Civil Code cited by the Appellant is not relevant in the case of a debt owed to the state but to a contract of loan. That the action was brought to compel Appellant to effect payment in comformity with his undertaking and that the complaint does not allege that Appellant owes money as a result of a contract of loan.

In his reply, the Appellant stated that Article 2472 (3) of the Civil Code supports his argument and that the witnesses were related only to the Respondent.

The main issue in the case at bar is whether witnesses who signed the document of counter-guarantee may give testimony when said document is allegedly lost. Article 2003 of the Civil Code, relating to modes of proof, provides that where the law requires written form for the completion of a contract such contract may not be proved by witnesses or presumed unless it is established that the document evidencing the contract has been destroyed, stolen or lost. Article 1725 (a) requires that contracts of guarantee shall be in writing. Article 2472 (3) of the Civil Code which relates to a contract of loan is not relevant to a cause of action founded on the liability of a guarantee. What conditions must be fulfilled prior to allowing the Plaintiff to introduce oral evidence pursuant to Article 2003 of the Civil Code where Plaintiff alleges that the document embodying the counter-guarantee has been lost and applies to call the witnesses who have attested to the existence thereof? Article 2003 states that where the law requires written form for the completion of a contract, such contract may not be proved by witnesses unless it is established that the document evidencing the contract has been destroyed, stolen or lost. One who seeks to avail himself of this provision must primarily establish that the said document has been destroyed, stolen or lost. The term "unless it is established" shows that the mere allegation that a certain document has been lost does not suffice but the loss thereof must be proved by evidence. If it be allowed to call witnesses merely by alleging that a document has been lost, stolen or destroyed, it would render ineffective the legal requirement of documentary proof. The purpose of the law is to enable a person to prove by witnesses the existence of a contract where he succeeds in establishing that in actual fact a written contract existed and that such contract has been lost, stolen or destroyed due to some fortuitous event. The object of the law is to prevent the extinction of a right created by a contract merely by reason of the loss of a written document due to some fortuitous event. However, the Awraja Court, without establishing the loss of the document evidencing the counter-guarantee, admitted oral evidence merely on the basis of the allegations contained in the plaintiff's statement of claim. We do not find the ruling of the Awraja Court to be consistent with Article 2003. We therefore quash the judgment passed by the said lower Court in Civil file No. 661-60 and remand the case for further proceeding not inconsistent with this opinion.

Each party shall bear his own cost incurred during the proceedings in this Court.

October 8, 1968.



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# SUPREME IMPERIAL COURT 

Addis Ababa, Div. No. 1

Justices:
Afenegus Teshome Haile Mariam
Ato Tadesse Tekle Giorghis
Kegnazmatch Mulat Beyene

## TIRUNESH YIGLETU v. KIDANE DEGEFA Civil Appeal No. 923-60

Withdrawal from Suit-refund of Court fees, Civ. Pro. Code Arts. 231,232, Legal Notice No. 177 of 1953 Arts. 11, 21.
An appeal against the judgment of the High Court denying the request of appellant to be refunded the Court fees he had paid on the ground that he withdrew from the suit before trial was commenced.

Held: Reversed.
When a party withdraws from a suit, before the other party is summoned, the court fees he had paid shall be refunded after a portion prescribed by law is deducted.

The Appellant, who had withdrawn from suit pending in the High Court before the Defendant was summoned and before trial was commenced, applied to be refunded the Court fees she had paid. The Court denied the application and this appeal is preferred against the said denial.

Cases similar to the subject case do not require presence of the opposite party and so we do not consider that the appearance of Defendant is necessary for determing the instant appeal. It appears from an examination of the memorandum of appeal and the record of the High Court that the Appellant contends that as she had withdrawn from the suit she had instituted before the Defendant was summoned, and since subsequently, the file was closed she should be refunded the court fees pursuant to the Civil Procedure Code, Article 232 and Article 11 of the Court Fees Rules, Legal Notice No. 177 of 1953, Negarit Gazetta year 12 No. 15.

However, the High Court denied the Appellant's application holding that Civil Procedure Code Article 232 applies to statements of claim which have been rejected and not to the case where the Plaintiff withdraws from a suit.

In order to determine whether the decision rendered by the High Court is valid as a matter of law, it is necessary to examine the provision cited by the Appellant.

Article 11 of Legal Notice No. 177 of 1953, published pursuant to authority vested by the Administration of Justice Proclamation, provides that where the Plaintiff withdraws his claim before trial, he will be refunded the court fees paid, after a certain portion thereof is deducted. Article 232 (1) (b) of the Civil Procedure Code provides that where a statement of claim is rejected under Article 231 the plaintiff shall be refunded with the prescribed portion of the court fees paid on filing the statement of claim. These two provisions are supplementary to and not
contradictory with each other, nor may they be interpreted in such manner as would render them contradictory. When the Court Fees Rules are read in conjunction with Article 232 of the Civil Procedure Code it becomes clear that where the Plaintiff withdraws his suit before the case goes to trial and where the file is closed as a consequence thereof, the Plaintiff shall be refunded the prescribed portion of the Court Fees. The High Court erred in its interpretation of the term 'rejected' The Civil Proceduce Code in Article 231 lays down the conditions for rejection and in Article 232 the effect thereof. Article 232 (1) (b) states that if a claim is rejected, the Plaintiff shall be refunded the prescribed portion of the court fees and the High Court was of the opinion that this provision is applicable only in the case where statements of claim have been dismissed by reason of rejection of the claim.

A suit is dismissed not only when it is rejected but also when the Plaintiff withdraws from the suit. Since the law provides that the Plaintiff should be refunded with the prescribed portion of the Court fees, where a suit is dismissed because the statement of claim is rejected, it is not proper to hold that the Plaintiff shall not be refunded the court fees when the suit is dismissed as a result of his withdrawal from the suit. We deem it necessary at this point to expound on the rationale for requiring the payment of court fees. The fundamental principle is that a person pays court fees in consideration of the services which the court renders to him. The constitutive elements of the said service are the summoning of the parties to appear in court, the hearing of the arguments tendered by both parties and finally the adjudication of the rights of the parties. However, the Court would not render such services where the Plaintiff withdraws his claim before the Defendant appears and the case proceeds to trial. Therefore, if by reason of his withdrawal the Plaintiff does not obtain the services he is otherwise entitled to by law and if he does not make a demand upon the Court's time there is no reason why he should be required to pay the court fees in full. That is why the law provides that where the Plaintiff withdraws his claim he should be refunded the court fees he had paid after a.certain portion thereof is deducted in consideration of the filing of the suit and the use of some of the Court's time.

Whereas, as we have already observed, the Plaintiff had withdrawn her suit before the Defendant was summoned, and whereas Article 11 of the Court Fees Rules provides that the plaintiff shall in such cases be refunded the court fees and whereas this provision is consistent with article 232 (1) (b) of the Civil Procedure Code, we hereby direct that the Plaintiff be refunded the court fees she had paid after the prescribed portion thereof is deducted pursuant to the Court Fees Rules.

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# SUPREME IMPERIAL COURT 

Addis Ababa, Div. No. 1

## Justices:

Afenegus Teshome Haile Mariam
Ato Tadesse Tekle Giorghis
Kegnazmatch Mulat Beyene
SUBSIBE OSMAN v. AKBERILE CAMORUDANE \& Co.
Civil Appeal No. 537-59
Commercial Law-Promissory Notes-Transfer of Promissory NotesComm. Code Arts. 744, 823 825(2): Civ. Code Arts. 1696, 1704.

On appeal from the decision of the High Court holding that the Defendant pay debts he owed to the plaintiff who possessed promissory notes validly transferred to him.
Held: Decision affirmed.

1. As promissory notes are deemed to be equivalent to cash, one can transfer them to a creditor to pay off debts, and may be challenged only by showing the invalidity of the notes.
2. Even an undated promissory note may be valid unless it is proved that it was acquired fraudulently or in bad faith.
3. Unless other wise provided in writing, a promissory note may not be burdened with any kind of condition to be used against the interest of a bearer in good faith.

## JUDGMENT

In the Case at bar the Respondent is the original Plaintiff and the Appellant is the original Defendant. Plaintiff, the present Respondent, instituted suit against the Defendant on two promissory notes drawn by the same on February 12, 1966 and maturing on March 22, 1966 and April 15, 1966 respectively. The Plaintiff claimed relief in the sum of $E \$ 40,000$ together with interest thereon. He has offered in evidence photocopies of the documents, the subject matter of the dispute and photocopy of the letter addressed to him from a trader, one Rattelal Shanemel. Defendant, after receiving a copy of the statement of claim submitted and the documents introduced by the Plaintiff replied that:

1. The promissory notes do not bear the date of the making thereof.
2. No business relations existed between him and the Defendant.
3. Rattelal Shanmel, with a view to procure unjust enrichment for the Plaintiff and for himself, added one zero to the E $\$ 2,000$ appearing in each promissory note, thereby making it $E \$ 20,000$. The Defendant argued that the two promissory notes are, therefore, of no effect.

After admitting the evidence submitted by both parties and after considering the legal arguments tendered by the parties, the High Court held that Defendant
shall pay Plaintiff the amount claimed together with interest and Court fees in the sum of $\mathrm{E} \$ 1,500$ and $\mathrm{E} \$ 500$ costs.

The Defendant, aggrieved by the judgment, lodged this appeal. The Respondent was summoned to appear and both parties submitted in detail their argument with regards to both facts and the law.

We shall primarily consider the Appellant's contentions. The Appellant did not deny that he had endorsed the promissory notes but has raised the following contentions in support of his position that he is not liable theron. He argues that:

1. Since the document produced by the Respondent allegedly written by Rattelal Shanmel contains the conditional clause, "in the event that he (Rattelal Shanemel) dies from an airplane accident," Respondent may not maintain an action unless said condition is fulfilled.
2. The promissory notes do not bear the date of issue.
3. There were no business relations between the Appellant and the Respondent; the Appellant has purchased no merchandise from the Respondent; and that the Respondent may not therefore benefit himself by the promissory notes.
4. Even if it had been established that the Appellant had issued the promissory notes in Rattelal Shanmel's name, Shanmel, with a view to obtaining unjust enrichment for the Respondent and for himself, had fraudulently added one zero on the $\mathrm{E} \$ 2,000$ indicated in the notes, thereby making it $\mathrm{E} \$ 20,000$ and that the notes are therefore, null and void by virtue of Articles 1696 and 1704 (1) of the Civil Code.

The Respondent acquired the promissory notes from Rattelal Shanmel who, before he left Ethiopia, dispatched these notes together with a letter to the Respondent. Shanmel wrote, "I am leaving for Djibouti alone, and should anything happen to me, I leave these promissory notes in satisfaction of my debts"

Shanmel did not return to Ethiopia. The Appellant argued that the letter Shanmel wrote reads, "should I meet with an accident resulting in my death" and therefore the Respondent may not make use of the promissory notes unless it is established that Shanmel died as a result of an accident. But the Court overruled this contention. Since Rattelal Shanmel did not deny that he was indebted towards the Respondent and since he departed from Ethiopia after transferring to him (the Respondent) the promissory notes in satisfaction of his debt, the debt is considered to have been paid, for the promissory notes are deemed to be equivalent to cash. Therefore when the Respondent requires the Appellant, the drawer of the notes, to pay, the Appellant may argue that the promissory notes are not valid, but he may not refuse payment on the ground that Shanemel had not met with an accident. We do not, as a matter of law or equity, think that it is fair to order the Respondent to wait until after Shanmel's death in order to recover the debts owed to him.

With respect to the argument that no date was indicated on the promissory notes, we ordered the production of the originals and we have ascertained that the original documents contain dates. Furthermore, the Appellant may not avail himself of this argument unless he can establish in accordance with Articles 825 (2) and 744 of the Commercial Code that the Respondent acquired the instrument fraudulently or in bad faith.

We shall examine the Commercial Code with regard to the argument that as there were no business relations between the Appellant and the Respondent and as the Respondent had not received delivery of commercial goods, he is not liable on the promissory notes. Article 823 of the Commercial Code sets out the condition required in the making of a promissory note. Where a promissory note contains a promise to pay a sum certain in money at sight or on a fixed date to a specified person or to the bearer and where it bears the drawer's signature, such promissory notes shall be valid and binding. The drawer may not set up any defence other than disclaiming the signature appearing thereon.

The Appellant has admitted that the signature appearing on the promissory note is his. He submits that he shall not effect payment on the ground that no business relations existed between him and the Respondent and that Rattelal Shanmel had agreed to deliver to him commercial goods in consideration of these promissory notes. However, according to Article 823 of the Commercial Code a promissory note cannot contain a condition and as these promissory notes contain no such condition, the Appellant may not set up the defence that he had no business relations with the Respondent and that he had not received delivery of anything from the Respondent.

A promissory note is equivalent to cash and it may therefore be transferred from one person to another; that is why the law requires a promissory note not to be subject to any condition. A condition of which he was not aware may not be set up against the holder of the instrument which is equivalent to cash. If at the time of issue, the drawer has entered into a written agreement with the holder then he may set up the agreement against said person; but he may not do so against a third party who has acquired the notes in good faith.

The defence of the Respondent would have been tenable if Shanmel had in writing undertaken an obligation to deliver commercial goods to the Appellant. However the Appellant merely applied to produce witnesses to prove such agreement and did not succeed in establishing the existence of a written agreement. Even if Shanmel had entered into an obligation to deliver commercial goods to the Appellant in consideration of the promissory notes, such obligation may not be set up against the Respondent, because although the fact that the Respondent's name appears on the promissory notes makes him the first bearer, he acquired the notes from Shanmel in good faith. Therefore, the agreement existing between Shanmel and the Appellant may not be set up against the Respondent.

With respect to the argument that the sum appearing on the notes has been fraudulently altered, the sum $E \$ 20,000$ is expressed both in words and figures. Since there is no discrepancy between the two, we could not find fraud.

As we have already observed the Appellant had issued these promissory notes in favour of Rattelal Shanmel and Shanmel had in turn transferred the notes to the Respondent in satisfaction of his debt. The Appellant has not shown that the Respondent acquired these notes in bad faith. Therefore, we hereby afirm the judgment of the High Court and dismiss the appeal.

May 15, 1967




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# TREATY-MAKING POWER AND SUPREMACY OF TREATY IN ETHIOPIA 

By

## Aberra Jembere*

" .International treaties. to which Ethiopia shall be party, shall be the supreme law of the Empire.

Art. 122 Revised Constitution of Ethiopia.

## Introduction

The word "treaty" is derived from "traiter" French for "to negotiate," and denotes those international agreements which are intended to have an "obligatory character." ${ }^{1}$

The generic term "treaty" is used in this study in its general sense, so as to cover "treaty", "protocol" "international agreement", "convention" and "obligation" (in the latter case in its narrow sense). ${ }^{2}$ The difference in form of such instruments does not extend to their juridical effect, and the rules of international law are equally applicable to all contractual engagements between States or a State and International Organizations. Both the so-called law-making treaties and other treaties are treated in this study under this general term, as there is not much difference between them as pointed out by Oppenheim, who stated that:
"In principle, all treaties are law-making in as much as they lay down rules of conduct which the parties are bound to observe as law." 3

In this study we are concerned with the following questions:

1. Is treaty-making the prerogative of the Emperor alone?
2. Could this power be delegated?
3. Can a treaty amend or modify the provisions of the Constitution or any other legislation in existence?
4. Are treaties concluded prior to, and after the promulgation of the Revised Constitution supreme law equally?

* B. A., LL. B. This study was originally submitted as one of the LL.B. Papers, entitled "Treaties as the Supreme Law of the Empire," to Faculty of Law, H.S.I.U., 1967. Now it has been expanded to include the treaty-making power in Ethiopia, and re-arranged for publication in the Journal of Ethtopian Law.

1. Ernest Satow, A Guide to Diplomatic Practice (4th ed., 1962), § 553, p. 325.
2. See p. 420, infra.
3. L. Oppenheim, International Law, (Treaties) (8th ed., 1955), Vol. I, § 492, p. 879.
4. Is municipal action required to implement treaties?
5. How can conflicts of treaties with municipal law ${ }^{4}$ be reconciled?

In order to answer these questions this article attempts to analyse two relevant provisions of the Revised Constitution, namely, (a) Art. 30 , which is the source of treaty-making power; and (b) Art. 122, which is the supremacy clause, incorporating treaties into the municipal legal framework, and stipulating the enforcement of treaties as the supreme law of the Empire.

The analysis however, must necessarily be of a preliminary nature, not only because of the scantiness of material on the subject, but also because of the brevity of the legal experience under the Revised Constitution of Ethiopia.

The fact that the subject is complex, coupled with the lack of material such as decided cases on treaties in Ethiopia, and the non-availability of any preparatory work on the draft of the Constitution, or any official commentary on the Revised Constitution, makes the task of the writer a difficult one.

## PART I.

## TREATY - MAKING POWER

The technical term "treaty-making" usually includes the whole process of negotiating, initialing, signing, ratifying, exchanging of instrument of ratification, publishing the legislation of parliamentary approval, and authenticating the legality of the treaty so concluded by one nation with another nation or international organization.

This study, however, attempts to show only where the treaty-making power lies in Ethiopia according to the existing laws and the effect of the treaty. It does not go into the details of treaty-making process, which have been amply covered in the paper of Captain Shimelis Metaferia. ${ }^{5}$

It should be noted however, that there is a basic difference in treaty-making process in Ethiopia, since the promulgation of the Revised Constitution and in the period prior to it.

## A. Prerogative of the Emperor to make-treaty.

Prior to November 4, 1955 (the date of promulgation of the Revised Constitution) the treaty-making power was vested in the Emperor alone without any limitation. This is shown by Art. 14 of the 1931 Constitution which states: "The Emperor has legally the right to negotiate and sign all kinds of treaties."

For practical purposes, however, the Emperor by Order No. 1 of 1943 delegated the Foreign Minister to negotiate treaties and agreements on His behalf. ${ }^{6}$ This delegation was enforced, even after the promulgation of the Revised Constitution. It was amended however, by Order No. 46 of 1966 , as will be demonstrated later.
4. The term "municipal law" means national or domestic law of any country.
5. Shimelis Metaferia, Treaty-Making Power in Ethiopia (Ll.B. Paper, unpublished, Faculty of Law, H.S.I.U., 1967).
6. Ministers (Definition of Powers) 1943, Art. 43 (f and g), Order No. 1. Neg. Gaz., year 2, no. 5.

Since the promulgation of the Revised Constitution the whole power of foreign relations, of which treaty-making is one, is also conferred on the Emperor by Art. 30 of the 1955 Constitution. ${ }^{7}$ However, the requirement of parliamentary approval of certain kinds of treaties is embodied in the same Article, as pointed out below.

## B. Analysis of Art. 30.

(a) Discrepancy between the Amharic and English Version.

Art. 30 of the Revised Constitution outlines the prerogative of the Emperor in the field of foreign relations and treaty-making, and the limitations therein. The analysis of the Article under consideration reveals the following facts:

First of all, unlike the English version, the Amharic version of Art. 30 of the Revised Constitution is divided into two parts. The first one deals with foreign relations in general, and the second with treaty-making in particular. It should be noted however, that the words contained in the very first sentence, i.e. supreme direction of the foreign relations of the Empire implies the treaty-making power as well. (Emphasis added).

Secondly, the Amharic text of the same Article employs the words "He, alone" only in the second part. Hence, one may rightly conclude that the Emperor can delegate his power of treaty-making concerning setlement of disputes and measures of co-operation, (which includes all kinds of treaties), but not those concerning ratification of treaties. Thus as stipulated in the third sentence of the Article under review, the determination of the kind of treaties that do or do not require ratification, is the sole power of the Emperor. However, the Emperor's prerogative to decide which treaties need parliamentary approval is and should be governed by the general criteria laid down in the "however clause" of Art. 30.

While concuring generally with the analysis made and the conclusions presented by Captain Shimeliss concerning the treaties and agreements enumerated in the "however clause" of Art. 30, the writer would like to point out a discrepancy between the Amharic and English version, as to the treaties laying a burden on Ethiopian subjects personally. In the first place, the equivalent for the English word "personally" does not exist in the Ambaric version at all. Secondly, for the English term "burden" an Amharic word "gudat" is employed. This single word has two connotations in the Amharic language: (a) physical injury and (b) damage or loss

[^12]8. See note 5, supra, pp. 132-134; 152-154; 158-160; 171-172; 175-178; 191-193; 196-198.
of property. Thus, the literal translation of the Amharic version for the English phrase which reads: "treaties laying a burden on Ethiopian subjects," would be "treaties bringing about damage or injury on Ethiopian subjects." Hence, according to the Amharic, which is the official version, any treaty which might bring about any damage or loss to a property belonging to an Ethiopian or a physical injury to an Ethiopian subject must be laid before Parliament for approval before ratification by the Emperor. Thus, a treaty which might be interpreted to give: (a) a privilege to a foreign Government to take a piece of land, belonging to an Ethiopian, by expropriation proceeding for the use of its Embassy rather than by a direct negotiation with the owner as to the price; and (b) an immunity to its diplomat residing in Ethiopia from paying an adequate compensation, if any of them inflict a physical injury on an Ethiopian might be cited as an example of the kind of treaty envisaged in the Amharic version of Art. 30. On the other hand, if the English version is considered to be more logical, a treaty calling for military assistance to a foreign power or payment of a special tax for the benefit of a foreign power may involve a burden on Ethiopian subjects as illustrated by Captain Shimelis.

## (b) Delegation of Treaty-Making Power.

Since the promulgation of Order No. 46 of 1966, the Ministers of Foreign Affairs, Finance, and Planning and Development are empowered to negotiate and conclude international treaties, agreements, and arrangements; whereas the Ministers of National Defence and Foreign Affairs are required to ensure that obligations under treaties and agreements are carried out; and enforce all treaties, conventions and international obligations of the nation. ${ }^{9}$

In other words, the Minister of Foreign Affairs has been delegated, by Art. 28 (c) of Order No. 46 of 1966, to conclude certain types of agreements, except in so far as specific power has been delegated to another Ministry or Public Authority. The kind of agreements that other Ministries or Public Authorities are empowered to negotiate and conclude are agreements dealing with loans and credits by the Minister of Finance; economic and technical assistances formerly by the Minister of Planning and Development, presently by the concerned Minister together with the Head of the Planning Commission Office which is part of the Prime Minister's Office, (as provided in Order No. 63 of 1970). ${ }^{10}$

The other Ministers or Heads of Public Authorities, as executing agents, may conclude protocols or other agreements, which come under (or based on) an umbrella agreement signed by one of the above named Ministers or by an Ethiopian ambassador or minister abroad after having been given "full power" by the Emperor to sign such treaties or agreements. An example of such agreement would be a cultural relation agreement or an agreement dealing with an execution of a project, e.g. building a school by a joint fund, contributed by the two contracting parties.
(c) Findings as to the Provisions of Art. 30.

By virtue of Art. 30 of the Revised Constitution, treaty-making power is the prerogative of the Emperor, subject of course, to parliamentary approval for certain
9. Ministers (Definition of Powers) (Amendment No. 2), 1966, Arts. 25 ( g and h ); 28 (c and d); 29 (h) and 33 (h) Order No. 46 Neg. Gaz., year 25, no. 23.
10. Planning Commission Order, 1970, Art. 5(3) Order No. 63 Neg. Gaz., year 29, no. 19.
kinds of treaties and agreements, enumerated in the "however clause" of the same Article. But, by Order 46 of 1966, the Emperor has delegated the power of negotiating and concluding treaties and agreements to the Ministers of Foreign Affairs, Finance and Planning and Development (presently the Head of Planning Commission Office). The other Ministers or Heads of Public Authorities are entitled only to conclude cultural agreements and protocols dealing with the execution or carrying" of certain programmes (projects), provided for in an umbrella agreement, signed by a duly authorized official of the Government.

However, notwithstanding the proviso of Art. 30, the power to ratify on behalf of Ethiopia, and to determine which treaties and international agreements shall be subject to ratification before becoming binding upon Ethiopia is the sole prerogative of the Emperor. Because both the Amharic and English version of Art. 30, states that the Emperor alone has this right. This is not a power which can be delegated to any official.
(d) Reconcilation of Art. 1 and Art. 30.

As rightly pointed out by Captain Shimelis in his paper, ${ }^{11}$ Art. 1 of the Revised Constitution on the face of it seems to forbid the making of a treaty which tries to alienate sovereignty rights and territories of the Empire of Ethiopia. On the other hand, Art. 30 opens the possibility of concluding treaty which involves a modification of the territory of the Empire or sovereignty rights over any part of such territory, provided parliamentary approval is obtained before ratification. These basic conflict of the two constitutional provisions must be reconciled somehow.

Since, no country by its own Constitution incapacitates itself from making treaties with other countries which are for its own good, the writer attempts to reconcile the two provisions by the well-established rule of interpretation of law that a specific provision prevails over a general one. Hence, Art. I being too general, and placed in the general part, should be interpreted in the light of Art. 30, which is a specific provision for treaty-making power in Ethiopia.

## C. Requirement of Parliamentary Approval.

As stipulated in Article 30 of the Revised Constitution all treaties dealing with the following matters require the approval of Parliament, before becoming binding upon the Empire and inhabitants, i.e. before municipal execution and application:-

1. Treaties of peace;
2. Treaties and international agreements involving a modification of the territory of the Empire;
3. Treaties and international agreements involving a modification of sovereignty or jurisdiction over any part of such territory;
4. Treaties and international agreements laying a burden on Ethiopian subjects personally (or according to the Amharic version bringing about physical injury or damage to property);
5. Treaties and international agreements modifying legisiation in existence;

[^13]6. Treaties requiring expenditures of State funds;
7. Treaties and international agreements involving loans; and
8. Treaties and international agreements involving monopolies.

Treaties and international agreements of this nature should go through the law-making process as laid down in Articles $88-90$ inclusive of the Revised Constitution, and be ratified by the Emperor ${ }^{12}$ after the approval of the Parliament -Chamber of Deputies and the Senate- by a majority vote of both Chambers.

This requirement was not applicable to treaties and international agreements concluded prior to the promulgation of the Revised Constitution of Ethiopia. Art. 14 of the 1931 Constitution did not require the approval of Parliament, and consequently, any treaty or international agreement was binding upon Ethiopia. winout such approval. Thus, treaties and international agreements concluded before November 4, 1955 are still binding upon Ethiopia, even though their provisions may be subject to ratification with the approval of Parliament had they been concluded after the promulgation of the Revised Constitution.

The High Court of Ethiopia, on a constitutional issue raised as to the applicability of Art. 122 of the Revised Constitution has given a ruling to the effect that Art. 122 does not affect any legislation, order etc., that was in force at the time the Constitution was promulgated. ${ }^{13}$ Thus, what Art. 122 of the Revised Constitution impliedly provides, i.e., that any international treaties conventions and obligations to which Ethiopia shall be party in the future, if inconsistent with the provisions of the Constitution, are null and void, does not affect any treaty or agreement that was in force at the time the Revised Constitution was promulgated.

The approval of a treaty by Parliament follows a similar step-by-step procedure described in "The Law Making Process in Ethiopia." 14 The only exception being, in case of treaties, that the text which is submitted to Parliament by the Executive branch of the Government has to be accepted as submitted or rejected into without any amendment, unlike proposals of laws which are subject to amendment. When approving a treaty or agreement the Parliament approves a draft Proclamation submitted along with it, which states that the treaty or agreement signed on a given date between the contracting parties is duly approved. The publication of the said Proclamation in the Negarit Gazeta without the text of the treaty or agreement is the practice except in the case of the O.A.U. Charter, when the full text of the treaty was published.

As Wright states : "Though requirements for legislative participation may sometimes delay execution of treaties requiring positive action, undoubtedly popular participation in the conduct of foreign affairs frequently renders a State more likely to fulfill ordinary obligations of customary international law and treaty." ${ }^{15}$
12. Ratification of a treaty is an act by which the provisions of a treaty are formally confirmed and approved by the Emperor after the approval of the Parliament, with expression of willingness to be bound by the provisions of the instruments of ratification upon deposit or exchange of the instrument, unless otherwise stated in the treaty itself.
13. H.E. Lij Araya Abebe v. The Imperial Board of Telecommunication of Ethiopia (High Court, 1956 (E.C.), J. Eth. L., Vol. 2, (1965) p. 305.
14. Kenneth Robert Redden, The Law-Making Process in Ethiopia (1966) pp. 29-30.
15. Quincy Wright, "International Law in Its Relation to Constitutional Law," American J. Int'l. L. Vol. 17 (1923), No. 2, p. 236.

## TREATY-MAKING POWER AND SUPREMACY OF TREATY IN ETHIOPIA

The promulgation of the Proclamation approving a treaty or agreement, which falls under the "however clause" of Art. 30 of the Revised Constitution, makes it executory and applicable in Ethiopia.

On this point Preuse writes: "As in the case of a law, a treaty was obligatory, by virtue of its regular conclusion, executory, by virtue of its promulgation, and applicable, by virtue of its publication." ${ }^{16}$

Therefore, the role of parliamentary approval is very significant, as it gives such effect to treaties. It should be noted however, that ratification of an MLO convention differs from the ordinary ratification of a treaty which has been negotiated and signed by plenipotentiaries. ${ }^{17}$ Because, they are not self-executing or, intended to be so.

Non-unanimity exists among the authorities whether the effect of ratification is retroactive, so as to make a treaty binding from the date when it was duly signed by the representatives.

Mr. Jones writes, that the international law doctrine which states that the ratification of treaties gives the retroactive effect has been accepted by well-known writers on international law. The doctrine he discusses in his paper reads:
"A treaty is binding on the contracting parties, unless otherwise provided, from the date of its signature, the exchange of ratifications having, in such case, a retroactive effect, confirming the treaty from that date." ${ }^{18}$

On the other hand Oppenheim states:
"The fact that ratification imports the binding force to a treaty seems to indicate that ratification has normally no retroactive effect." ${ }^{19}$

The present writer submits that due to practical necessity the latter view should be maintained in Ethiopia. In other words, a treaty to which Ethiopia is a party, unless the treaty otherwise provides, should become binding from the date of its ratification rather than the date of signature.

## D. Validity of a Treaty.

In order to have full obligatory force and give rise to international obligation a treaty must possess intrinsic or inherent validity, in addition to its formal and temporal validity, as asserted by the international jurists. ${ }^{20}$ The term 'formal validity' and 'temporal validity' denote the regularity of conclusion and continuing existence and non-termination of a treaty respectively. 21

Thus, in order that a treaty be legally binding, as Schuman puts it, certain conditions are essential: (1) The parties must be legally competent; i.e. they must

[^14]be free under the terms of their Constitution and earlier treaties to contract the engagement. (2) The plenipotentiaries must have been fully accredited and must have acted within the scope of their authority. (3) There must be freedom of consent, with no sign of fraud, or coercion applied against the person negotiating. (4) Treaties must conform to international law, and must not infringe the right of a third State. ${ }^{22}$

Apparently, there are two main schools of thought concerning the international validity of treaties, and competence of the treaty-making power. The theories advocated by the two schools of thought are given below, as cited by Professor Briggs from the original source:

According to the Harvard Research, a summary of the opinions of a distinguished group of international lawyers ${ }^{23}$ shows that there is a large body of doctrine to the effect that the international validity of treaties is a matter which is determined by international law, that while a State may by constitutional provisions limit and regulate the exercise of the treaty-making power, such provisions have no international significance, and that treaties made by the organs designated by the Constitution to exercise the treaty-making power are binding as international engagements even though the treaty-making organ or organs exceed their constitutional competence.

An equally distinguished group of writers, ${ }^{24}$ maintain that the international validity of treaties and the competence of the treaty-making authorities are determined in part at least, by the constitutional law of the States which enter into them and that international law recognizes that this must be taken into account; . .that it is both the right and duty of a State when negotiating with another State to verify by incquiring the facts relative to the competence of the treatymaking organs of the latter State.. and therefore a treaty which is unconstitional or ultra vires for want of competence on the part of the treaty-making authorities or in excess of competence, is null and void and consequently not binding on the State whose Constitution has been violated. ${ }^{25}$

According to the same source, the Harvard Research, after examining the doctrine, the practice and jurisprudence of different States concludes: "It seems clear from this summary of the doctrine, the practice, and the jurisprudence, the preponderance of authority is in favour of the view: (1) that the competence of the treaty-making organs of a State is determined by the law of that State; and (2) that treaties made on its behalf by organs which are not competent under that law to conclude them are not binding internationally upon such State.י"26

The writer of this study, however, disagrees with the conclusion reached by the Harvard Research, and following the thinking of the first school of though, submits that a treaty made on behalf of a State by organs which are not competent under the law i.e. who exceeded their constitutional competence to conclude it, is not enforceable nationally in the State whose Constitution has been violated, although it
22. Frederik L. Schuman, International Politics, (6th ed., 1958), p. 126.
23. The names of the authorities omitted.
24. The names of the writers omitted.
25. Herbert W. Briggs, The Law of Nations (2nd ed. 1952), p. 846.
26. Id. 847,
may in some cases be binding internationally for reasons of the stability and security of the process of making international treaties and agreements.

To this effect, the comment to section 126 of the Restatement of Foreign Law reads in part:
"The practicalities of international relations, therefore, militate against accestance of the view that would declare an international agreement not binding upon a State if made in excess of the Constitutional or domestic authority of the official acting on its behalf.'" ${ }^{27}$

Consequently, a treaty concluded on behalf of Ethiopia by organs designated by the Constitution to exercise the treaty-making power shall not be executed by courts nationally, if found to be in excess of the powers vested on them. But it may be binding upon Ethiopia internationally unless the other party to the treaty is in fact aware that the agent of Ethiopia is exeeding his authority. That is to say, such treaty can not be enforced by the municipal courts of Ethiopia; but international bodies may hold that such treaty is binding upon Ethiopia in accordance with the rules and practices of international law, if a dispute arises.

As quoted by Professor Bishop, the celebrated authority on International law, from Hackworth's Digest of International Law: "The treaty still subsists as an international obligation although it may not be enforceable by the courts or administrative authorities." ${ }^{28}$

Thus, legislation enacted either by the Parliament or the Executive branch does not relieve internationally the Government of Ethiopia of the obligations established by a treaty, while such treaty is not enforceable nationally for the following reasons.

A treaty cannot be valid in a country if it infringes its Constitution, because the power to make a treaty is derived from the Constitution. Hence, a treaty cannot legally provide the opposite of what the Constitution provides.

## E. Need of Municipal Action to Implement Certain Treaties.

It might be advisable to point out at the outset the distinction between a self-executing treaty, and a non-self-executing treaty. As rightly stated by Byrd: a self-executing treaty provides, or in case of silence is later legally held to provide, that its provisions shall or may be implemented without the need of any additional authoritative instrument or legislation; whereas the provisions of a non-self-executing treaty may not be implemented until further authority has been provided by legislative or other action. ${ }^{29}$

The kind of treaties enumerated in the "however clause" of Art. 30 of the Revised Constitution should be backed by legislative action, i.e. Proclamation of approval, so that their execution may be enforced by Ethopian Courts, if so required.

As to the treaties ratified by the Emperor without the approval of the Parliament, pursuant to the third sentence of Art. 30 of the Revised Constitution, it

[^15]would be expedient to issue "Executive Notice" so that the Courts may take a judicial notice of the treaty if any dispute arises.

One might cite Articles 55 and 56 of the Charter of the United Nations to which Ethiopia is one of the first signatory States, as an example of non-executing provisions. Those provisions of the Charter do not create rights and duties for individuals, ${ }^{30}$ until implemented by legislation. ${ }^{31}$ On the other hand, some constitutional provisions require that certain acts should not be taken unless provided by international agreement. For instance, Art. 50 of the Revised Constitution stipulates that: "No other person shall be extradited except as provided by international agreement."

The self-executing treaties, however, do not require any legislation to make them operative and effective.

## PART II.

## SUPREMACY AND EEFECT OF TREATIES.

Provided it possesses esential validity, a treaty to which Ethiopia is a party and which has been concluded in conformity with the Revised Constitution must be enforced in Ethiopia as supreme law by virtue of Art. 122.

Treaties concluded prior to the promulgation of the Revised Constitution are enforced because Order No. 6 of 1952 makes all international treaties, conventions and obligations then in force, part of the supreme law of the Empire. ${ }^{32}$ The scope of this Order was extended later by the Public Rights Proclamation No. 139 of 1953, which stipulates: in addition to existing treaties, international conventions and obligations in force in 1952; all treaties, international conventions and obligations and executive agreements ${ }^{33}$ henceforth concluded and/or ratified shall be the supreme law of the Empire, and shall be self-executory. ${ }^{34}$ However, the supremacy of treaties concluded and/or ratified prior to the promulgation of the Revised Constitution is not of the same standing with the supremacy of treaties concluded since then, as shall be explained later.

## A. Analysis of Art. 122.

The English text of Art. 122 of the Revised Constitution reads:
"The present Revised Constitution, together with those international treaties, conventions and obligations to which Ethiopia shall be a party, shall be the supreme
30. Brierly, cited above at note 17, p. 117.
31. Treaty implementing legislation is legislation enacted to enforce or otherwise effectuate a non-self-executing treaty.
32. Federal Incorporation and Inclusion of the Territory of Eritrea within the Empire of Ethiopia Order, 1952, Art. 8, Order No. 6, Neg. Gaz., year 12, no. 1.
33. It should be noted that, unlike the English version of Art. 1 of the Proclamation No. 139 of 1953, the enumeration in Art. 122 of the Revised Constitution, of the types of treaties and international agreements that are given the status of supreme law of the Empire does not include "executive agreements".
34. Public Rights Proclamation, 1953, Art. 1. Proclamation No. 139, Neg. Gaz. year 13, no. 3.
law of the Empire, and all future legislation, decrees, orders, judgments, decisions, and acts inconsistent therewith, shall be null and void." (Emphasis added).

Note, first, that the Amharic version of the same Article differs from the English version. The literal translation of the Amharic version is:-
"This Revised Constitution, together with those international treaties, world conventions and obligations to which Ethiopia shall be party (with connotation of futurity) shall be the supreme law of the Imperial Government. All legislations, decrees, judgments, decisions to be made in the future, if inconsistent with this Constitution, shall be null and void."

Besides the difference in construction of the sentence, (i.e. one complex sentence in the English version in contrast to two short sentences in the Amharic version); the main differences are: (1) that "Imperial Government" and "world conventions" are used in the Amharic version instead of "the Empire" and "international conventions" respectively; (2) that the legal term "orders" and "acts" do not exist in the Amharic version at all and (3) the technical term "therewith" is used in the English version to mean the Constitution and treaties, while in the Amharic the language used is "inconsistent with this Constitution." The latter variances in the two texts makes a considerable difference as will be demonstrated later.

## B. Definition of The Technical Terms Used in Art. 122.

(i) The word "international", in the first place, qualifies the terms treaty, convention and obligation that had been concluded by Ethiopia with other State, or States or International Orgnization; and secondly, it denotes that such treaties operate within the sphere of international law.
(ii) A "treaty" is a written agreement (compact) between two or more States or International Organizations, signed by their duly authorized representatives, creating a relation and obligation between themselves, and ratified by the supreme organ(s) in accordance with the constitutional requirements of the contracting parties.

It should be noted here, that a concession contract is not an international treaty by definition, ${ }^{35}$ because it is a contract between a State and an individual investor or a firm, and not an agreement concluded between a State and another State or International Organization. Consequently, except in a very few special cases, a concession contract is governed by the public law of the contracting State rather than by international law in general, and the law of treaties in particular.
(iii) The term "convention" is usually used to describe a multipartite instrument, or a bilateral arrangement of a technical nature, or a contract which determines the relation between States in some special field. To this effect Myers writes:
"Convention has become the standard name of instruments produced by multilateral bodies, which in particular instance study specific phases of a general subject. ${ }^{3} 36$ Thus, this term covers(1) multilateral law-making treaties; (2) treaties con-

## 35. N. March Hunnings, International Law in a Nutshell (1959) p. 46.

36. Denys P. Myers, "The Names and Scope of Treaties," American J. Int'l L. Vol. [51 (1957)
p. 587.
cluded under the auspices of the League of Nations or the United Nations; and (3) the Labour and Red Cross Conventions, negotiated by the International Labour Organization (ILO) and the International Red Cross Organizations respectively.
(iv) The term "obligation" may have two interpretations. In the broader sense, it denotes the international obligations that Ethiopia is required to respect under international law, ${ }^{37}$ like sending troops to Korea and Congo, pursuant to the Resolution of the Security Council of U.N., and abiding by the general rules of international law. ${ }^{38}$ In the narrower sense, it denotes merely the contractual engagements or treaty obligations of Ethiopia, i.e. paying its national debts in due time. ${ }^{39}$

It is not clear whether the term "obligation" is used in Art. 122 of the Revised Constitution in its wider or narrower sense. But the present writer, however, reads it in a narrower sense. Incidentally, the term "obligation" is not mentioned in Art. 30 of the Constitution, which requires ratification of all international treaties and agreements. 40

This study does not attempt to treat "international obligation" in its broader interpretation, since that is a major topic by itself which requires further and thorough study of the applicability in Ethiopia of customary international law rules recognized in other civilized States. Thus, the term "obligation" is treated in this study in its narrow sense only.
(v) The term "supreme law" denotes that the Revised Constitution and treaties concluded in accordance with Art. 122 are superior to all laws in the hierarchy of laws in Ethiopia, under which if found to be inconsistent, all other laws shall be declared null and void by Ethiopian courts. ${ }^{41}$

Taken together, those technical terms clearly stipulate that international treaties, agreements, conventions or obligations to which Ethiopia is a party, and made pursuant to the Revised Constitution are (along with the Revised Constitution) superior to ordinary laws in the hierarchy of laws in Ethiopia. ${ }^{42}$

## C. Finding as to the Supremacy of Treaty.

Treaties are declared by the Revised Constitution to be the supreme law of the Empire, when concluded in accordance with the provisions of the Revised Constitution of 1955.

Moreover, according to the English version of the supremacy clause of Ethiopia, all future legislation (proclamations), decrees, orders, judgments, decisions and acts ${ }^{43}$ inconsistent with the Constitution and international treaties, are null and void,
37. Charles G. Fenwick, International Law (4th ed. 1965), p. 110.
38. Maritime Proclamation, 1953, Art. 101. Proclamation, No. 137, Neg. Gaz., year 13, No, 1.
39. See note 9 supra, Art. 25 (h), Order No. 46, Neg. Gaz., year 25, No. 23.
40. The term "international agreement" is not used in Art. 122, as in Art. 30 and 50 of the Revised Constitution.
41. R.C. Means, "The Constitutional Right to Judicial Review of Administrative Proceedings: Threshold Question," J. Eth. L., Vol. 3, (1966) p. 181.
42. G. Kreczunowicz, "Hierarchy of Laws in Ethiopia," J. Eth. L., Vol. 1. (1964), p. 111.
43. The word "act" is used in Art. 122 of the Constitution to denote Governmental action imposing duty or obligation on individuals.
specifically in the case of the former, and inferentially in the case of the latter. That is to say, any legislation enacted by the legislative or the executive branch; or any decision or act by the administrative body or the judiciary, made contrary to the supreme law, shall be declared null and void under the public law, as unconstitutional. If declared unconstitutional, it is unenforceable by the Ethiopian courts.

On the other hand, since the Amharic version of Art. 122 does not employ the term "order" and "acts" in the enumeration of future legislation and governmental acts to be declared null and void, if found to be inconsistent with the supreme law, any future "orders" or governmental "acts" may not be subject to such declaration according to the Amharic version. Even though, strictly speaking, the Amharic version prevails over the English version in case of contradiction, due to the fact that Amharic is the official language of Ethiopia by virtue of Art. 125 of the Revised Constitution, the later conclusion could not be maintained as logical. There is no rational basis for holding "orders" and "acts" valid when contradicting the supreme law, whereas proclamations, decrees, judgrnents and decisions are to be declared null and void, if found to be inconsistent with the supreme law of the Empire.

Since the variance between the English and the Amharic version of the Article under review seems to be an over sight in translation from the English text into the Amharic; and the logical reading of the Article requires that the omitted technical terms be read into the Amharic version as well, the writer suggests that the Amharic version should be considered to mean what the English version stipulates.

Moreover, as pointed out earlier there is a difference between the English and the Amharic version of Art. 122 of the Revised Constitution arising from the fact that "inconsistent therewith" is used in the English version, while "inconsistent with this Constitution" in the Amharic version.

The term "therewith" in the English version seems to mean the Constitution and treaties. On the other hand, the Amharic excludes treaties, as the language used is "inconsistent with this Constitution."

This is a discrepancy created by a bad translation of the complex and involved Article under consideration. The fact that both the Constitution and international treaties are made the supreme law of the Empire, as stipulated both in the Amharic and the English version of Art. 122 of the Revised Constitution justifies a conclusion that the difference arises from bad translation of the legal terminology "therewith" from English into Amharic, rather than a legislative intent to make a distinction between the-Constitution and international treaties, in respect to their taking precedence over all legislation, and limiting subsequent national legislation. Otherwise, there is no justification in placing treaties as part of the supreme law, if future legislation, decress, orders, judgments, decisions and acts inconsistent therewith shall not be declared null and void.

The technical term "therewith" should therefore include both kinds of supreme law - the Revised Constitution and international treaties - in the sense it is used in the English version of the Article under review. The logical reading of the Article as well as the doctrine of the supremacy clause leads to such conclusion.

As far as a treaty is concerned, the words, 'shall be null and void' in Art. 122 of the Constitution, means that the treaty will be of no force or effect insofar as the municipal or domestic aspects of the treaty are concerned. The international
obligation of the treaty are not affected by this language for the external force and effect of such treaties are governed by international law due to the contentions advanced earlier. In other words, a treaty would not lose its international validity because in substance it violated the Constitution, and thereby lacked domestic validity. In the words of Kuhn, international, not municipal standards of law should determine a treaty's scope and the limitation of its use. ${ }^{44}$

In short, the supremacy of a treaty means essentially two things: its provisions takes precedence over all legislation, except the Revised Constitution; and further, treaty provisions not only invalidate previous national law, but also limit subsequent national legislation. (See Pages 415-417).

Incidentally, the Constitution of Ethiopia, unlike its counterpart the Constitution of United States of America, does not consider as part of the supreme law, treaties made prior to the promulgation of the Revised Constitution, i.e. November 4th, 1955.

This contention is based on the usage of the first "shall" employed in Art. 122 of the Revised Constitution.

The world "shall" is employed in Art. 122 of the Revised Constitution with the connotation of futurity, and should be read to mean that only treaties concluded or adhered to by Ethiopia subsequent to November 4, 1955 are to be considered as part of the supreme law of the Empire. The word "shall" is not used here in the imperative sense as it is usually used in legal drafting. In other words, the context does not include treaties concluded prior to November 4, 1955 for the following reasons:-
a) In order to avoid ambiguity, the Revised Constitution consistently used the word "is" instead of "shall", whenever it was desired to give effect in the future to past happenings. For instance Articles 123, 124, 125 and 126 of the Constitution used the word "is" in the imperative sense rather than the usual word "shall", which was used in other Articles of the Constitution. Under such circumstance one may contend that those Articles embrace past happenings. If Art. 122 was intended to give the same status to treaties concluded prior to, and subsequent to November 4, 1955 the verb "is" should have been used instead of "shall", as in the case of subsequent Articles cited above.
b) The Amharic version of the same Article uses the word "shall" with the connotation of futurity. Since Amharic is the official language of the Empire by virtue of Art. 125 of the Revised Constitution, the reading of the Amharic version should be given more weight. Consequently, the first "shall be" in the English version of the Article under consideration has been employed not in the imperative sense but with connotation of futurity. The second "shall be" is used, however, in the imperative sense of the word.
c) It is a well-established rule of law, that new legislation should not have a retroactive effect, unless specifically provided therein. Accordingly, Art. 122 of the Revised Constitution should not be read to imply that treaties concluded prior to the promulgation of the Revised Constitution are to be considered as part of the supreme law retroactively.

[^16]d) Last but not least, an inquiry as to the legislative intent made by the writer of this study, does not support the view that Art. 122 of the Revised Constitution was intended to give the status of supreme law, to treaties concluded prior to the enactment of the present Constitution.
Therefore, Art. 122 of the Revised Constitution does not give equal status to treaties concluded prior to the promulgation of the present Constitution. In other words, the pre-Revised Constitution treaties. are not now the supreme law of the land (Empire).

Neverthless, the fact of not putting treaties concluded prior to the promulgation of the Revised Constitution on an equal level with treaties negotiated after the promulgation of the Revised Constitution does not mean that Ethiopia will not respect her obligations under these treaties. On the contrary, provided they possess essential validity, irrespective of the fact that they are not placed on an equal footing with the Constitution, Ethiopia has to respect them and they are operative and binding until such time as she substitutes them with treaties negotiated on better terms. The Tesemma Wolde Yohaness Vs. Van Bethvson and Jack Hensel's case, ${ }^{45}$ may be cited as an example, of the fact that Ethiopia respects her treaty obligation, inspite of the fact that this is inconsistent with her law in force.

The holding of the Awraja Court in the cited case, substantiates the contentions advanced elsewhere in this study, inter alia:
(i) that provided it possessed essential validity, irrespective of the fact that it is not made part of the supreme law, a treaty concluded prior to the promulgation of the Revised Constitution should be respected until formally terminated or replaced by another treaty;
(ii) that a treaty prevails over a primary law, as the treaty in point superseded the Administration of Justice Proclamation of 1942, which gave jurisdiction to the Awraja Courts to hear such cases; and
(iii) that Courts have to interpret and enforce treaties made prior to the promulgation of the Revised Constitution, due to Art. 8 of Order No. 6 of 1952 and Art. 1 of Proclamation No. 139 of 1953.

## D. The Relationship Between Municipal Law And Treaties.

International law including treaty is usually received into the national law in two ways:
a) by prescribing in the national law, the penalties for the offences agreed upon by the civilized States as international crime, e.g. as provided in Articles 281-295 inclusive, of the Penal Code of Ethiopia of 1957; and
b) by incorporating treaties into the national legal framework in general terms, as provided in Art. 122 of the Revised Constitution.
Thus, Art. 122 of the Revised Constitution integrates or incorporates treaties concluded since November 4, 1955 into the internal legal system of Ethiopia.

[^17]Treaties concluded prior to the promulgation of the Revised Constitution are incorporated into the legal system by Order No. 6 of 1952 and Proclamation No. 139 of 1953.

Otherwise, in case of any dispute arising out of such treaties, the Ethiopian courts may not have a legal basis to enforce those treaties. To this effect, Kaplan, and Katzenbach write:
"National courts ...apply international law only because the latter has been received into, or incorporated within, the national law." ${ }^{46}$

## PART III

CONFLICTS OF TREATIES.

## A. Conflicts Between Two Treaties.

One of the authorities in internnational law, Kelsen concluded his writing on conflicts between treaties by saying: "If the conflicting treaties are concluded by the same contracting parties, according to general international law the rule lex posterior derogant priori applies. The latter treaty abrogates the earlier treaty. It is, however, possible that a treaty establishes the contrary principle: lex prior derogant posteriori, that is to say, that a latter treaty (concluded by the same parties) shall be nuil and void if incompatible with the first treaty." ${ }^{47}$

The writer of this study submits that, in case of conflicts between two treaties concluded by Ethiopia with the same contracting party the treaty latter in point of time shall abrogate the provious treaty.

But, in case of conflict between two treaties, each with a different other State, the result will be different.

As to priority of conflicting treaty obligations Briggs writes:
"Although many writers assert that a latter treaty is null and void if in conflict with a prior treaty between one of the parties and a third State, the Harvard Research in Art. 22 (c) merely stipulated that the carlier treaty takes priority". 48

The writer of the present study suggests that the second treaty, although inconsistent with the first, should not be held to be invalid, but the earlier treaty be given priority in execution, while making reparation for the damage caused by the non-performance of the latter treaty. The rational for an earlier treaty receiving priority over a latter treaty in terms of execution is to find a way out of such dilemma, and to satisfy the old legal maxim: Pacta Sunt Servanda, i.e. agreements must be observed. To this end, Prof. Wehberg states: Without the recognition of the principle of and adherence to treaties there can be no intercourse between nations or any international law. ${ }^{49}$
46. M. A. Kaplan and DeB. Katzenbach, The Political Foundation of International Law, (1961), p. 268.
47. Hans Kelsen, The Law of the United Nations. (1964) p. 112.
48. Briggs, cited above at note 25, p. 908.
49. Hans Wehberg, "Pacta Sunt Servanda," American J. Int'l L. Vol. 53 (1959 supp.) p. 786.

## B. Conflicts between Treaties and Municipal Law.

The conflicts between treaties and municipal law can arise in Ethiopia in various ways: (a) conflict of treaty with prior primary law (Proclamation or Decree); (b) conflict of latter primary law with prior treaty; and (c) conflict between treaty and constitutional provisions.

## (i) Conflict of Treaty with Prior Primary Law.

When a primary law, i.e., Proclamation or Decree enacted pre-Revised Constitution, and a treaty concluded prior to November 4, 1955 are wholly inconsistent with each other, and the two cannot be reconciled, the latter must prevail by virtue of Art. 8 of Order 6 of 1952, and Art. 1 of Proclamation No. 139 of 1953. Similarly, when a prior law, enacted since the promulgation of the Revised Constitution and a treaty concluded afterwards are wholly inconsistent with each other, the treaty shall be considered to have amended the prior legislation, and as the supreme law it should prevail by virtue of Art. 122. It is to avoid such conflicts that Art. 30 of the Revised Constitution makes it imperative that all treaties and international agreements modifying legislation in existence be ratified by the Emperor after the approval of the Parliament, before becoming binding upon the Empire and inhabitants thereof.

## (ii) Conflicts of Treaty with latter Primary Law.

Unlike in the U.S.A. ${ }^{50}$ no primary law, even if later in point of time, may be enforced in Ethiopia contrary to treaty rights or obligations, and no treaty may be abrogated or modified by latter primary law.

As to contradiction between a treaty and latter primary law, authorities on constitutional law state that: "even if a treaty may be modified by a latter law, such law ought never to be construed to violate the law of nations (which of course includes treaties) if any other possible construction is possible." ${ }^{51}$

The final provisions of Proclamation No. 137 of 1953, lays down a general rule which is in line with this opinion. The provision in point reads in part:
".. This Article is not to be construed as being inconsistent with the continuance of existing obligations under international treaty or convention to which We are a party." 52

In addition, treaties being part of the supreme law may not be superseded by any subsequent legislation. That is to say, since treaties are part of the supreme law of the Empire, all future legislation, decrees, orders, judgments, decisions and acts inconsistent with duly ratified treaty shall be null and void, as laid down in Art. 122 of the Revised Constitution.
(iii) Conflicts of Treaties with the Provisions of the Constitution.

Provided it is concluded in accordance with the Revised Constitution a treaty is placed on equal level and made of like obligation with the Constitution of

[^18]Ethiopia. Since both are declared to be supreme law, no superior efficacy is given to one over the other in the language of Art. 122 of the Revised Constitution. But if the two are incompatible, the Revised Constitution will prevail over the treaty, even if the treaty was concluded after November 4, 1955, because, a treaty to be binding upon Ethiopia municipally must be consistent with the Constitution in the first place, and meet the requirements of Art. 30 of the Revised Constitution. As Byrd puts it: ". a treaty is to be measured by the Constitution, and if in violation of it, must fall." ${ }^{53}$ Therefore, a treaty entered into in conformity with the Constitution so far as procedure goes, but which, in substance, violates some other provision of the Constitution shall be declared null and void by the Courts of Ethiopia.

Because, an action to be taken under the power to make international treaty is checked by other provisions of the Constitution, and any violation of such limitations makes the treaty null and void. Thus the power to make treaty, grounded in the Constitution must be determined not only by the constitutional language granting it but also by the restrictions placed upon it by other constitutional limitations. The samet is pointed out in the Restatement of the Foreign Relations Law. ${ }^{54}$ Illustrations:-

If State $A$, in reciprocity of an offer, is willing to conclude a treaty with Ethiopia, under which the nationals of that State who are residents of the Empire are prohibited to bring suit, against the Government of Ethiopia or instrumentality thereof, for the wrongful act resulting in substantial damage, would Ethiopia constitutionally enter into such treaty? The answer is obviously no. Because, such treaty curtails one of the rights guaranteed in Chapter MI of the Revised Constitution of Ethiopia, notably the right of redress under Art. 62 (b) of the Constitution.

The conclusion of a treaty which prohibits the nationals of the other contracting State, who are residents of Ethiopia, from exercising their right of redress under Art. 62 (b) of the Constitution is unjustifiable, as it does not fall under any of the criteria laid down in Art. 65 of the Revised Constitution. Art. 65 of the Constitution stipulates that: (1) respect for the rights and freedoms of others; (2) the requirements of public order, and (3) the general welfare, alone justify any simitation upon the rights guaranteed in the Bill of Rights of Ethiopia i.e. rights enumerated in Chapter III of the Revised Constitution.

Such treaty is unjustifiable under Art. 65 of the Revised Constitution, due to the fact that it does not meet any of the criteria laid down therein.

Hence, such a treaty could not be constitutionally concluded by Ethiopia even with the approval of the Parliament. The power of Ethiopian Government to deal with a matter by international treaty is, therefore, limited by the restrictions placed upon it by other constitutional limitation.

In the case of the pre-Revised Constitution treaties, the fact that they were not entered into procedurally as now required by Art. 30 of the Revised Constitution does not affect their validity now. Since one can't get out of treaty obligation just by changing its own Constitution, they still remain binding internationally. Due to

[^19]the fact that they have been incorporated into municipal law of Ethiopia by Order No. 6 of 1952 and Proclamation No. 139 of 1953, they are binding domestically too. Consequently, a treaty concluded either under Art. 14 of the 1931 Constitution of Ethiopia, or according to the treaty making practice prior to 1931, even if found to be incompatible with the provisions of the present Constitution shall be enforced unless terminated or until such time that it is replaced by a treaty renegotiated with the other contracting party. Because Art. 122 of the Revised Constitution does not affect any treaty that was in force at the time the Revised Constitution was promulgated. The pre-Revised Constitution treaties, even if they deny some substantive rights now guaranteed by the Revised Constitution shall not be declared null and void under the same Article.

Such a result places the Government in a dilemma. Because, the Government had to choose between two evils. It had to choose between (a) breaching the provisions of the treaty while maintaining the substantive rights now guatanteed by the Constitution; and (b) maintaining the treaties even if incompatible with the provisions of the Revised Constitution while denying the people some of the substantive rights guaranteed by the Revised Constitution. This is a difficult choice as the consequence of both is so great.

However, this is not at all, a problem without any solution. The Government may overcome such a problem by re-negotiating the terms of the treaty with the other contracting party, or parties, so that its provisions shall conform with the provisions of the Revised Constitution.

## C. Conflicts of Treaties with the Charter of the United Nations Orgnization

As rightly pointed out by Lord McNair, many of the provisions of the Charter of the United Nations, a treaty purporting to create legal rights and duties possessing a constitutional or semi-legislative character, with the result that member States cannot contract out of them or derogate from them by treaties made between them, and that any treaty whereby they attempt to produce this effect would be void. ${ }^{5 s}$ The provisions in point are paragraphs 3 and 4 of Article 2 of the United Nations' Charter, which creates rights and duties (a) as between members of the U.N.O. and (b) as between the United Nations and its members. ${ }^{56}$

Besides, Article 103 of the Charter provides:
"In the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

As to retrospective and prospective operation of this provision Lord McNair writes:
55. Lord McNair, The Law of Treaties (1961), p. 217.
56. Article 2 of the Charter reads in part:-
"3. All members shall settle their international disputes by peacefui means in such a manner that international peace and security, and justice, are not endangered.
"4. All members shall refrain in their international relations from the threat or use of force against the territorial intergrity or political independence of any State, or in any other manner inconsistent with the purpose of the United Nations."
(i) So far as concerns existing agreements between members, it merely declares the existing rule of law to the effect that such agreements can be validly modified by a latter agreement, in this case the Charter; so far as future agreements are concerned, they thereby agree with all the members and with the United Nations that they can not contract valid obligations which conflict with those contained in the Charter.
(ii) So far as concerns agreements between members and non-members the position is not quite so clear. Our submission is that as regards existing treaties members are precluded by the Charter from performing a treaty which conflicts with the Charter, for instance, one which involves the unlawful use of force, and further, they are probably under a duty to use all lawful means to liberate themselves from obligations which conflict with the Charter; while as regards future treaties no member can create any valid obligation inconsistent with the Charter; moreover, a co-contracting non-member is aware of the fact, because the Charter must be regarded as what an English lawyer would call a 'notorious' instrument; and a non-member state must be deemed to know whether a State with which it is about to contract is a member or not. This view does not imply that the United Nations by their Charter have power to make rules binding upon a non-member; it means that members by acceptance of the Charter, a constitutive instrument, have accepted a limitation of their treaty-making capacity. ${ }^{57}$

Accordingly, by virtue of Article 103 of the United Nations' Charter in case of conflicts between Ethiopia's obligations under the Charter and under other international treaties the former shall prevail over the latter. This conclusion is substantiated by the general principle advocated by Kelsen on conflicts between obligation under the Charter and obligations established by treaties concluded between U.N. members, viz.; "For according to general international law, such treaty, if concluded before the Charter has come into force, is abrogated by the Charter; and if concluded after the Charter has come into force, the treaty inconsistent with the Charter is null and void under other provisions of the Charter. For such a treaty is an attempt to amend or abolish the Charter or parts of it in the relation of the members, parties to this treaty." 58

In short, a treaty concluded prior to the Charter is abrogated by the Charter. And a treaty concluded subsequent to the Charter of U.N. is null and void by virtue of the Charter, if found to be inconsistent with the provisions of the said Charter.

It should be noted also that the Charter of the U.N. in Article 102 stipulates that all international treaties must be registered with the Secretariat of U.N., in order to avoid such conflict, and for purpose of constructive notice to other States. At its 65th meeting the General Assembly of the U.N. adopted Regulations to give effect to Art. 102 of the Charter. Effect of non-registration of treaties is that it may not be invoked before any organ of the United Nations (including the International Court of Justice) and not to take away the validity of the treaty. ${ }^{59}$
57. McNair, cited above at note 55, pp. 216-218.
58. Kelsen, cited above at note 47 , p. 113.
59. Brierly, cited above at note 17, p. 324.

## D. Conflicts of Treaties with the Charter of O.A.U.

The Charter of the Organization of African Unity (O.A.U.) signed on 25 th of May 1963, is a multilateral treaty by definition.

The Charter signed and ratified by the signatory States in accordance, with their respective constitutional processes, as required by Article XXIV of the Charter, is binding on all the signatory States. As far as Ethiopia is concerned, since the Charter, an international treaty, has been duly ratified, ${ }^{60}$ it is part of the supreme law of the Empire, in the language of Article 122 of the Revised Constitution.

Therefore, in case of conflict between the provisions of the Charter of O.A.U. and primary legislation of Ethiopia, the provisions of the O.A.U. Charter control as it is treaty proclaimed to be part of the supreme law of Ethiopia. But in case of conflict between any resolution passed either by the Assembly of Heads of State and Government or the Council of Ministers of O.A.U. and any legislation, the municipal law shall prevail, due to the fact that a resolution is just an understanding on a point of principle to be followed in common by member States, and not a binding treaty. Only a treaty duly negotiated and ratified in accordance with its constitutional processes binds Ethiopia, as laid down in Article 30 of the Revised Constitution of 1955.

## E. Solution of Treaty Conflicts.

Kelesn suggests the following solution of treaty conflicts:
"In order to solve the conflict between two inconsistent treaties concluded partly by the same parties in a more adequate way than that provided for by general international law, it has been suggested that the State which has concluded two inconsistent treaties should be bound to perform only the first concluded treaty and to make reparation for the damage caused by the illegal nonperformance of the subsequently concluded treaty. Both treaties remain valid, but a priority of execution is established with respect to the previously concluded one." ${ }^{6}$

Accordingly, in case of incompatibility of treaties with one another, Ethiopia may employ such solution to resolve conflict between its two inconsistent treaties.

## F. Reconcilation of Municipal Law with Treaties.

According to international law, and practice, parties who enter into a treaty engagement are expected ipso facto to bring their municipal law into conformity with their international treaties.

Since treaty are part of the supreme law of the Empire, for Ethiopia the obligation to bring her municipal law into conformity with treaties to which she is a party and to maintain it, is not only a matter of international necessity, but it is a constitutional requirement too. Because it is a well-established rule of constitutional law that all primary and subordinate laws should be consistent with the supreme law, i.e. the Constitution and treaties in the case of Ethiopia. In fact by virtue

[^20]of Art. 122 of the Revised Constitution, the provisions of municipal laws enacted after the promulgation of the Revised Constitution cannot prevail over those of the treaties to which Ethiopia had become a party after November 4, 1955; provided they possess essential validity.

However, this should not be construed to mean that Ethiopia has to change the provisions of her Constitution so that they conform with treaties to which she is a party. Even though treaties concluded after November 4, 1955 are placed on equal level with the Constitution they are, however, required to conform with the provisions of the Revised Constitution, in order to have essential and formal validity, as well as municipal effect.

Thus Ethiopia may not invoke a provision of her municipal law to justify nonperformance, provided that the conclusion of the treaty satisfies the requirements of her Constitution.

On the same point, the Permanent Court of International Justice at The Hague ${ }^{62}$ in its advisory opinion on the treatment of Polish Nationals in Danzing said:
"A State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force." ${ }^{63}$

The Harvard Research also in Article 23 states:
"Unless otherwise provided in the treaty itself a State cannot justify its failure to perform its obligations under a treaty because of any provisions or omission in its municipal law, or because of any special features of its governmental organization or its constitutional system." ${ }^{64}$

The Russian lawyers go further and suggest that:-
"...both the rules of International Law and those of domestic origin should have the same binding force for all organs and nationals of the countries concerned. But by concluding an international agreement a governing authority undertakes, if necessary, to bring its domestic legislation into line with the international commitments it has assumed." 65

Hunnings also spells out the main principles of municipal law in international law as follows:
"(a) A State may not plead that the violation of treaty or its non-fulfilment of international obligations is due to its Constitution or to the acts or omissions of either of the three branches or other organs of its government.
(b) A State may not pass legislation which endangers the treaty rights of other States.
(c) A State which has contracted international obligations is bound to give effect to them in its municipal legislation.

[^21](d) The evasive form of a measure under municipal law is irrelevant if in fact it amounts to a violation or nonfulfilment of an international obligation." ${ }^{66}$

In simple terms all this means: deficiency in municipal law does not afford a defence to an action for breach of treaty obligation; and a State party to a treaty cannot excuse itself for non-performance, by pleading that its municipal law or organization prevented it from performing the obligation under treaty or did not enable it to do so.

Therefore, Ethiopia has to make its primary and subordinate laws to conform with treaties she is party to, if any of them conflicts with its treaty engagements.

Moreover, since the provision of the Constitution accords an equal status to the Constitution and treaties, the Ethiopian Courts should apply and interpret treaties of all kind which may come before them. As Kaplan and Katzenbach rightly stated, in United States (as in Ethiopia) the Constitution specifically describes treaties as "supreme law" and inferentially assigns courts the task of their interpretation. ${ }^{67}$

Thus, all branches of the Government of Ethiopia - legislative, executive and judicial - should give effect to treaties to which Ethiopia is a party. Treaties concluded prior to the promulgation of the Revised Constitution and which are inconsistent with the provisions of the Revised Constitution should be re-negotiated, so that they conform with the provisions of the Revised Constitution.

## CONCLUSION

Prior to November 4, 1955 (the date of promulgation of the Revised Constitution), the treaty-making power was conferred by Art. 14 of 1931 Constitution on the Emperor, without any limitation. After the promulgation of 1955 Constitution, even though the treaty-making power is vested on the Emperor by Art. 30, it is somewhat limited, as parliamentary approval for certain kinds of treaties, enumerated in the "however clause" of the same Article, is made imperative.

Up to the promulgation of Order 46 of 1966 , the Foreign Minister was delegated by Art. 43 ( $f$ and $g$ ) of Order No. 1 of 1943, to negotiate treaties and agreements on behalf of the Empeor. Since then, however, the Ministers of Foreign Affairs, Finance and formerly the Minister of Planning and Development (presently the Head of the Planning Commission Office) are delegated by Order No. 46 of 1966 and Order No. 63 of 1970, to negotiate and conclude treaties. While the treatymaking power delegated to the Minister of Foreign Affairs is a general one, the power delegated to the Ministers of Finance and the Head of Planning Commission Office are limited to agreement dealing with loans and credits in the case of the former, economic aid and technical assistance in the case of the latter. The other Ministers and Heads of Public Authorities conclude protocols or agreements dealing with cultural relations and execution of joint projects (financed from a fund contributed by the contracting parties) provided for in a prior umbrella agreement signed by a duly authorized official of the Government.
66. Hunnings, cited above at note 35, p. 8.
67. Kaplan and Katzenbach, cited above at note 46, p. 269.

The prerogative to ratify treaties and to determine which treaties and international agreements shall be subject to ratification before becoming binding upon Ethiopia, is reserved to the Emperor alone, by Art. 30 of the Revised Constitution. However, this prerogative is subject to the proviso of the same Article, and cannot be delegated.

As to reconciling of Arts. 1 and 30 of the Revised Constitution, the writer submits that Art. 1 being too general and placed in the general part of the Constitution, should be interpreted in the light of Art. 30 of the same Constitution, which is specific provision for treaty-making power in Ethiopia. Moreover, according to the Amharic version, which is the official one (by virtue of Art. 125 of the Revised Constitution) treaties which might bring about any damage or loss of property or physical injury on Ethiopian subjects must be laid before Parliament for approval before ratification.

It is submitted also, on the basis of the foregoing examination of Art. 122 of the Revised Constitution, that treaties to which Ethiopia is a party, and concluded in accordance with the Revised Constitution of 1955, must be enforced in Ethiopia as the supreme law of the Empire. Because, by the express words of the Constitution such treaties are proclaimed as the supreme law of the Empire along with the Revised Constitution. In other words, treaties concluded in accordance with the Revised Constitution are placed on equal level, and made of like obligation with the Constitution by virtue of Art. 122 of the Constitution, which integrates or incorporates treaties directly into internal legal system of Ethiopia.

As part of the supreme law of the Empire, treaties, therefore supersede all ordinary laws of Ethiopia, in case of conflicts. In case of conflict between a treaty and the provisions of the Revised Constitution, however, the provisions of the Constitution shall prevail over the treaty, ever if the treaty is later in point of time. Because, a treaty to be binding on Ethiopia and the inhabitants thereof, must be consistent with the Constitution, and possess intrinsic or inherent validity, in addition to its formal and temporal validity.

Granted that a treaty is formal and validly concluded, it becomes a supreme law in the hierarchy of laws in Ethiopia, if executed after the promulgation of the Revised Constitution. Thus, all primary laws, shall be declared null and void, if found to be inconsistent with a treaty. In other words, any legislation enacted by the legislative, or the executive branch, or any decision or act made by the administrative body or the judiciary, contrary to the supreme law, i.e. the Constitution and international treaties shall be null and void, as provided in the supremacy clause, i.e. Art. 122 of the Revised Constitution of Ethiopia. But a treaty which provides the opposite of what the Constitution provides should not stand. Here the words, "shall be null and void" mean that a treaty which violates the provision of the Revised Constitution, or any future legislation, decrees, order, judgments, decisions and acts that are inconsistent with the treaties made pursuant to the Revised Constitution, will be of no force or effect insofar as the municipal or domestic aspects of the treaty are concerned. The international obligation of the treaty are not, however, affected by this language for the external force and effect of such treaties are governed by international law.

In case of conflicts between Ethiopia's obligation under the U.N. Charter and the other international treaties, the provisions of the Charter prevail. Because, the Charter is law-making treaty and Ethiopia by signing and ratifying it has obligated herself not to contract out of it or derogate from it. In case of conficts between

Ethiopia's obligation under O.A.U. Charter and other international treaties, however, the one earlier in point of time takes priority.

As to treaties concluded prior to the promulgation of the Revised Constitution, the writer of this study ventures to propose that, such treaties should be enforced provided they possess essential validity as they have been incorporated into the municipal law by Art. 8 of Order No. 6 of 1952, and by Art. 1 of Proclamation No. 139 of 1953.

The supremacy that the pre-Revised Constitution treaties acquire under the just cited legislations and the supremacy that the treaties made pursuant to the Revised Constitution derive from Art. 122 of the Revised Constitution differs both in status and effect.

The latter class of treaties are made supreme law by the supreme law of the Empire itself, while the former are made supreme law just by a primary law. Thus, the status of supremacy to be acquired by the two is not the same. Naturally, the supremacy derived by the Constitution is higher, due to the fact that treaties are given more or less the same standing and effect as the Revised Constitution, unlike the supremacy acquired by the Order, supplemented by Proclamation. Secondly, the Constitution, besides being the supreme law of the Empire in the true sense of the word, is later in point of time, hence, what is provided in the Constitution should have more weight, and consequently modifies the effect of the provisions of the Order and the prior Proclamation.

As the analysis made earlier shows, Art. 122 of the Revised Constitution does not make any reference to the status of the treaties concluded prior to the enactment of the Revised Constitution. In the absence of such reference and the nonretroactivity of Art. 122 of the Constitution in its application, the logical conclusion would be that the supremacy of the treaties concluded prior to the promulgation of the Revised Constitution has been supreseded by the supremacy of the treaties made in accordance with the provisions of the Revised Constitution. In other words, by the enactment of the Revised Constitution, with a supremacy clause not embracing the treaties made prior to it, the role and effect of Art. 8 of Order No. 6 of 1952 and Art. 1 of Proclamation No. 139 of 1953, is reduced merely to incorporating the pre-Revised Constitution treaties into the municipal law of Ethiopia,

Its function of making treaties the supreme law of the Empire has been taken over by Art. 122 of the Revised Constitution; as the result only the treaties made under the authorities of the Revised Constitution, become the supreme law of the Empire together with the Revised Corstitution which considers as part of the supreme law of the Empire treaties, conventions, and obligations to which Ethiopia shall be party in the future.

The words "shall be party" here refer to treaties, conventions and obligations concluded after the promulgations of the Revised Constitution, i.e. Noyember 4th 1955. The word "shall" is employed in the context which indicates futurity and not in imperative sense of gramatical interpretation of the word. Thus, treaties are declared to be the supreme law of the Empire when concluded in accordance with the provisions of the Revised Constitution of 1955. The Revised Constitution being the organic law and the principal supreme law in the hierachy of laws in Ethiopia, and later in point of time, supersedes also what was provided in Art. 8 of the Federal Incorporation and Inclusion of the Territory of Eritrea within the Empire of Ethiopia Order (Order No. 6 of 1952) and Art. 1 of the Public Rights Proclamation, (Proclamation No. 139 of 1953).

Moreover, treaties concluded in accordance with the Revised Constitution automatically acquire municipal effect by virtue of Art. 122 of the Revised Constitution. Treaties concluded prior to the enactment of the Revised Constitution acquire municipal effect due to Art. 8 of Order No. 6 of 1952 and Art. 1 of Proclamation No. 139 of 1953. Since treaties concluded prior to the promulgation of the Revised Constitution derived their municipal effect from primary legislation and not from the organic law - the Constitution - a problem may arise in their implementation. For instance, if a governmental act is taken now to implement an obligation under a treaty concluded prior to the promulgation of the Revised Constitution, and such implementation is inconsistent with the provisions of the Revised Constitution, the act may be declared null and void under the latter part of Art. 122 of the Constitution.

To avoid such consequence, if any treaty concluded prior to the promulgation of the Revised Constitution is inconsistent with the present Constitution, Ethiopia should re-negotiate with the other contracting party, so that it may conform with the provisions of the Revised Constitution.

Since treaties are proclaimed to be part of the supreme law of the Empire by the Revised Constitution, Ethiopia is constitutionally required also to bring its municipal law into conformity with treaties to which she is party to and to maintain so, in order to avoid any conflict or inconsistency between its treaty obligations and the provisions of the present Constitution.
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# "DECISION TREES" 

by Peter L. Strauss and Michael R, Topping ${ }^{\text {m }}$

The object of this paper is to inform those concerned with the administration of justice in Ethiopia - particularly, criminal justice - about a new and simple procedure which may assist in procuring uniform interpretation and application of laws and regulations. The problem of uniform interpretation and applicatiof is particularly severe where, as in Ethiopia, new laws must be interpreted and applied by persons who have not yet had the opportunity of formal legal education. For these persons the discovery of the relevant code articles and the understanding of their interrelationships and application must be very difficult iadeed. One possible result of this unfortunate state of affairs is that the codes will not be fully, effectively, or consistently applied throughout the Empire. If, on the other hand, administrators try to avoid this problem by assigning the Empire's comparatively few legally trained persons to such jobs as public prosecutor, woreda court judge, etc., then the result may be waste of legal resources. No one of these jobs is, in national perspective, of the very greatest importance; overall inefficiency of performance in them, on the other hand, can markedly reduce the quality of Ethiopian justice.

The most efficient use of Ethiopia's limited legal resources might be promoted by a scheme which enabled the central administration in Addis Ababa to send provincial centers of law enforcement programmed instruction, which would enable even persons who have not had formal legal training to proceed, step by step, through the solution of a legal problem to its proper conclusion. This paper is concerned with one such form of programmed instruction, which involves the construction of what have been designated variously as "algorithms," "flow charts," "logical trees," or "decision trees."** The last term, "decision tree," will be used here, since it best expresses the purpose of the procedure: to assist local administrators to reach uniform and correct decisions in applying national law. For reasons of convenience, this article will discuss "decision trees" only as they might apply in penal law. It will be apparent, however, that the procedure could as easily find application in any area of codified law.

If we take almost any article of the Penal Code, we shall observe that for it to be applicable, a number of conditions have to be satisfied. Let us take as an example, Article 589(1), which defines the principal offence of rape. Before that offence is constituted, there must be:
(a) an accused who has
(b) compelled
(c) a woman

[^25](d) to submit to sexual intercourse
(e) outside wedlock by
either (f) violence
or (g) grave intimidation
or (h) after having rendered her unconscious
or (i) incapable of resistance.
Unless each of conditions (a), (b) (c) (d) and (e), and, at least, one of conditions (f), (g), (h) or (i) are satisfied in any given case, the offence of rape has not been committed.

A check list such as this, indicating the necessary pre-conditions for application, could be prepared for almost any code provision. In this form, however, it migit not seem to serve any useful purpose. It appears to be little more than a cumbersome way of restating the article itself.

One of the contributions of the decision tree becomes apparent if the check list is put in question form:

1. (a) Did the suspect use violence on a person?
(b) Did the suspect use grave intimidation on a person?
(c) Did the suspect render a person unconscious?
(d) Did the suspect render a person incapable of resistance?
2. Was that person a woman?
3. Did he thus compel that woman to submit to sexual intercourse?
4. Was that act of sexual intercourse between persons who were not then busband and wife?
and if a mandatory instruction is added:
The suspect may be convicted of rape only if the answer to each of questions 2,3 and 4 and to at least one of questions $1(a), 1(b), 1(c)$ or $1(d)$ is "yes." The form serves to emphasize the separate elements which must be present to constitute the offence, by requiring the local administrator to answer relevant questions and instructing him to proceed only if certain answers to those questions are obtained. He is thus forced to analyze the evidence in the appropriate way, and taken, step by step, through a decision process which he might not have correctly understood by himself.

The decision tree itself embodies the same technique of breaking legal provisions down into their constituent elements, and then presenting each eiement in the form of a simple question. It goes further, and puts these questions in logical order and diagrammatic form. This has the advantage, as we shall see later in dealing with more complex "decision trees," of simplifying the mandatory instruction. For the user, it has the great advantage of being a visual as well as a verbal process, and of never requiring him to do more than answer "yes" or "no" to a simple question. The only constraint is that having answered one question, he must proceed to the question diagrammatically indicated by that answer, and so on to a stated result, which he must accept as correct. The procdeure automatically directs him to the appropriate questions and the correct outcome. In the words of Messrs. Lewis, Horogin and Gane the user "is like a computer working through a program. In both cases the process is automatic, and provided there are no ambiguities of instruction, a successful outcome is guaranteed."

The simplest way of explaining the nature and use of decision trees is by examples. Let us therefore, first of all try to put the requirements for the commission of the offence of rape, as defined by Article Penal Code 589, in "decision tree "form.

Fig. 1
START


This diagram is, it is hoped, self-explanatory. Like the words of Article 589 themselves, it serves to define the offence of rape by setting forth the pre-requisites of the offence. By stating these pre-requisites separately, and in question form, it performs the significant added function of predigesting the article -stressing what is important and forcing the administrator's attention, in logical order, to the conclusions he must reach in order to justify conviction. The administrator is no longer completely free to overlook or to misunderstand one of the constituent elements of the offence.

The diagram assumes, however, that the administrator has already decided, by some other means, that "rape" is in fact the crime he is interested in. An additional, and greater, use of decision trees is to assist in the making of this kind of decision; to help the administrator decide which of several provisions before him is relevant to a case at hand. Decision trees which perform this finding function have been called "homing decision trees." A very simple example of such a tree, one step more complex than our tree for Article 589(1), can be constructed with reference to the crime of bigamy. This is a crime which can be committed in either one of two fact situations. Under Article 616(1), bigamy is committed by the already married person who intentionally contracts another marriage before dissolu-
tion of the first; under Article 616(2), bigamy is committed by an unmarried person who marries another whom he knows to be tied by the bond of an existing marriage.

The following decision tree would enable us to determine whether in any given case Article 616 is applicable, and, if it is, whether a charge should be preferred under Article 616(1) or Art. 616(2).

Fig. 2
START


This, again, is a very simple model, but it does help us to see how a properly constructed decision tree can be utilized to select the appropriate code provision.

In the two simple decision trees produced above, no effort has been made to show the relationships which every Special Part article has to articles of the General Part. In consequence, the mere use of these decision trees would not (any more than simple reference to Article 589 or Article 616) enable the user to decide upon the disposition of the case. For example, the accused might plead a mistake of fact, (Article 76) - in a rape case, that he thought the woman was his wife; in a bigamy case, that he believed a previous marriage was no longer valid. Questions of attempt, guilt, causality, responsibility, and the like may often arise in ways which would not always be obvious to the untrained person faced with the neces-

Fig. 3

sity to understand or administer the codes. It would be inefficient to deal with these general questions, which could arise under almost any provision of the Special Part, in each decision tree that was constructed with respect to a particular offence; these questions may deserve separate, generalized trees of their own. But it may promote efficiency in applying the Code to indicate in decision trees for specific offences how, at least, the most common of these general questions might arise. Thus, our decision tree on rape might be revised to accomplish this in the manner shown by Fig. 3 above.

We are now in a position to take more complex examples, which go farther towards showing the interrelationships of a group of legal provisions. Too murch complexity in a single tree, however, might threaten to deprive the tree of its value as a simplifier of the law. Moreover, enough has been said about decision trees to realize that they may have several uses. The prosecutor will want to know how to coordinate provisions of the Special part to which he might refer in formulaing his charge. He may also find it valuable to have reference to General Part provisions which could modify the charge or affect proof requirements at trial. He may not, on the other hand, be overly interested in possible defences, or in learning of the circumstances which could authorize a judge to increase or decrease a sentence. Thus, for his purposes, only some of the many interrelationships need be shown. Similarly, for the judge, less emphasis on possibilities for charge and more emphasis on possibilities for disposition may be appropriate. A separate, educational function may be served by decision trees which reveal the interrelationships of commonly used sections of the General Part.

The three decision trees which follow are intended as examples of each of these types. The first emphasizes the "homing tree" approach which may help prosecutors to find the appropriate charge among several interrelated provisions. It is principally based on the nine articles of Book V, Title I, Chapter 1, Section II of the Special Part, dealing with abortion. The second is derived from this tree, but stresses sentencing information. The third, dealing with General Part problems, might help answer the question whether an incomplete offence has been perpetrated.

The reader will by now have been led to an obvious question: how does one draft a decision-tree? There is - at any rate for the lawyer - no answer. To quote Messrs. Lewis, Horogin, and Gane once more, constructing a decision tree "is a valuable exercise in clear thinking. This is so because the compiler must penetrate an often dense and tortuous style in order to determine that which will exactly embody the rules governing the decision making process." A logical basis for a decision tree is of course essential, but it is not (for the lawyer) enough: a certain intuitive element is involved. In compiling our decision tree relating to abortion, we might have felt it necessary to cover the situation of an abortion procured during an election meeting: we might have felt it necessary to deal with the hypothesis that the abortion was performed in Khartoum .. and so forth. The situation seemed too remote from the normal and therefore a selective process was applied. The size of any particular tree must be limited. The drafting of decision trees is an art as well as a science. There is no reason, in theory, why we could not construct a tree which covered the whole area of penal law, including procedure, a tree which would tell us whether any, and if so, which offence or offences had been committed, what charge or charges should be preferred, how the subsequent trial proceedings should be conducted, what modes of disposition were open to the court in the event of a conviction, and by what considerations the court should be guided in its ultimate disposition. There are, however, no office walls large enough to

## DECISION TREES

## Fig. 4 ABORTION



1. See next page for possibilities of aggravation and mitigation of penalty.
2. It is uncerrain whether the woman is guilty of an offence.
3. In case of repeated offences, Art. 122 may also be cited.
ed in its ultimate disposition. There are, however, no office walls large enough to carry the necessary tree. Nor, if there were, would anyone wish to use such a complex instrument which would hardly simplify size limits the decision tree's effectiveness for the law. It is for this reason that there is an intuitive as well as a logical element involved in the construction of legal decision trees.

Fig. 5
II. Sentencing persons found to have violated abortion provisions

## A. MITIGATION



It should now be clear what the decision tree can do. An important caveat must be entered at this stage to indicate what a decision tree cannot do. It cannot perform the truly creative part of the lawyer's task, but only the mechanical, part. A decision tree is helpful where and only where no dispute arises as to the
meaning of the questions which the user has to answer. We could, for example, construct a decision tree for Penal Code Articles 608-613 relating to offences tending to corrupt public morals, and at various points our tree would ask the user whether an act was "obscene" or "purely artistic, literary or scientific in character." No decision tree, no mechanical process, can answer such a question, save in the clearest of cases. The user of the tree can properly decide that an authoritative and lavishly illustrated medical text book on anatomy is not obscene, and that some work of "hard-core" pornography is. But he can do nothing with D.H. Lawrence's controversial novel, Lady Chatterley's Lover. That is a matter for the courts, for genuinely creative legal argument in the light of external authority and policy analysis. The decision tree, in fact, does the boring part of the lawyer's job.

## B. Aggravation



> The general aggravating circumstances of Art. 81 may also apply, and justify imposition of a punishment within the upper range of the limits given.

Efficient legal administration, however, requires that this boring part of the lawyer's job be well done. Issues must be swiftly and accurately identified, so that appropriate evidence and arguments can be marshalled for creative work. The discovery of relevant code articles, their relationship and application, is an essential first step. In a nation such as Ethiopia, where formal legal education is not yet widespread, even this first step must often be difficult indeed. As stated above, what the decision tree might do is to facilitate the taking of this important first

Fig. 6 DEGREES IN THE COMMISSION OF AN OFFENCE (Arts. 26-31)


## DECISION TREES

step. Presumably, it does not need a high-level legal education to know that one is dealing with abortion rather than with an electoral offence. Given, then, an appropriately drafted set of basic decision trees the efficiency of local law enforcement officers not possessing a legal education would be greatly enhanced, and at the same time those who did possess a formal legal education would be released from the mere mechanics of law to finding the more creative and more important tasks for which their training has fitted them.
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# ENNIS LLOYD, INTRODUCTION TO JURISPRUDENCE 

## (Second Edition, Stevens, London 1965)

Reviewed by R. M. Cummings*

This book by Professor Lloyd, who is Quain Professor of Jurisprudence in the University of London is a revised edition of the book that first apeared in 1959 Both this edition and its predecessor set out, as the author states, "to provide the student with a textbook enabling him to make the acquaintance of the theories and ideas of leading jurists on the basis of texts selected from their actual writings, together with a reasonably full commentary in the form of introductory chapters to the various sections of the book and full annotation of the texts."

Any reader familiar with the subject of Jurisprudence (as the word is used in the English or American sense) will be impressed by the degree of success of this book in achieving what it sets out to do. The student is exposed to ten basic topics, which are not intended to be all-inclusive. The areas selected for examination are marked by a high degree of relevance (the nature of jurisprudence, the meaning of law, natural law, sovereignty and the imperative theory and analytical positivism, the pure theory of law, the sociological school, American realism, the Scandinavian realists, custom and the historical school, and the judicial process) and the writers by their importance and lucidity, ranging from the great Greeks to contemporary theorists. The inclusion of actual cases to illustrate philosophical points is most welcomed and happily not overdone (there is a danger in the use of cases in Jurisprudence books that the basic theoretical problems may be overwhelmed by practical illustrations). The notes containing the author's point of view are extremely helpful, and are the least out of place, considering the importance of Professor Llyod as a Jurisprudential thinker in his own right. In short, the book can be highly recommended, particularly for use in a course on Jurisprudence where the teacher prefers to use a single book on the subject.

There can be no arguing with the selection of subjects and writers in such a ${ }^{\text {Ebook }}$ since the author, whose scope is really quite enormous, has exercised a degree of judgment which is clearly within his discretion. Any omissions for the purpose of a course of study can be readily supplemented. Indeed, Professor Lloyd points out some intentional omissions from the first edition, and suggests reading matter on these topics should one wish to pursue them.

This reviewer's personal predilection causes him to wish that Professor Lloyd might have chosen to examine certain aspects of socialist theories of law even though his explanation for eliminating this subject from the second edition is quite sound. Without having gone into a discussion of comparative law and the Soviet system, (one must wonder if this problem does not exist anyway in the examination of

[^27]American realism and Scandinavian school) the views of Marx and Engels on the ultimate abolition of law would have made the book more complete. The simple invocation of Kelsen and the need for sanctions is not really enough to deal effectively with the problems raised by the Nineteenth Century philosophers of social revolution. This reviewer's experiences as a teacher in Africa forces him to conclude that the issues of socialism in law must be met head on and should not be underestimated.

The value of Jurisprudence at this time in history is extremely great, simply because the idea of the rule of law has never been so under fire. Professor Lloyd has emphasised the conflict between natural and positive law (i.e., the search for ultimate values and the notion of relative principles enforced by the State) and he has created a work from which one sees how each school can benefit from the other. Indeed, the introduction of Wittgenstein is particularly helpful in understanding the linguistic difficulties at the heart of the conflict. This emphasis on the conflict between schools of Jurisprudence, however, requires the acceptance of law and leaves little room for the arguments against law. To suggest that Marx is the anti-lawyer personified and therefore must be the subject of separate study is the same as saying that Nietzsche, the "anti-Christ", should be excluded from the study of the philosophy of religion.

The importance of the works of the revolutionary Marxist, Marcuse, amongst today's students and the emphasis on revolution necessitates an examination of anti-law theories in Jurisprudence. If present practice continues, just as "God is dead" has become the basic issue of theology, "law is dead" will become the basic issue of Jurisprudence.

Why is this the case? The most obvious reason is that the study of positive law has often neglected the notion of justice, particularly in the distributive sense, i.e., the application of a principle of proportion in the allocation of benefits and burdens in society, which can be easily confused with natural law, but is not the same thing. What is involved is the sudden realization by numerous people that violence is a means of accomplishing certain ends. Whereas natural law relies on reason in determining which values are true and false, even if ultimate emotional reactions are involved (Hume teaches us that justice is a sense), it is much easier to say that when an intellectual or even emotional method of proving the validity of social positions is impossible violence becomes the method of proof. Kierkegaard accepts the willingness to die for a belief as proof of its truth, and the willingness. to die creates formidable fighters. In short, Marx, Kierkegaard and Marcuse together create a formidable opposition to the rule of law. One would bope that Professor Lloyd might choose to employ his genius and scholarship in analyzing the problems that these anti-law writers have created in a world where violencehas become all too common and where law is all too often regarded as an obstacle to social progress. If Austin is right, and obedience to law is a habit, we could be in the process of getting over the habit. What more important concern for Jurisprudence could there be than the examination of the works of those who would help us overcome the law habit?
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[^10]:    61. KAN3
    
    
[^11]:    67. 斤Tラ
[^12]:    7. Art. 30 of the Revised Constitution reads: The Emperor exercises the supreme direction of the foreign relations of the Empire. The Emperor accredits and receives Ambassadors, Ministers and Missions; He, alone, has the right to settle disputes with foreign Powers by adjudication and other peaceful means, and provides for and agrees to measures of co-operation with foreign Powers for the realization of the ends of security and common defence. He, alone, has the right to ratify, on behalf of Ethiopia, treaties and other international agreements, and to determine which treaties and interntational agreements shall be subject to ratification before becoming binding upon the Empire. However, all treaties of peace and all treaties and international agreements involving a modification of the territory of the Empire, or of sovereignty or jurisdiction over any part of such territory, or laying a burden on Ethiopian subjects personally, or modifying legislation in existence or requiring expenditures of state funds, or involving loans or monopolies, shall, before becoming binding upon the Empire and the inhabitants thereof, be laid before Parliament, and if both Houses of Parliament shall approve the same in accordance with the provisions of Articles $88-90$ inclusive of the present Constitution, shall then be submitted to the Emperor for ratification.
[^13]:    11. See note 5 supra, pp. 120-122.
[^14]:    16. Lawrence Preuse, "Relation of International Law to Internal Law in the French Constitutional System," American J. Int'l. L. Vol. 44 (1950), p. 650.
    17. J. L. Brierly, The Law of Nations (1963) p. 154.
    18. Mervny Jones, "The Retroactive Effect of the Ratification of Treaties" American J. Int'l. L. Vol. 29 (1935) p. 51.
    19. Oppenheim, cited above at note $3, \S 518$, p. 917.
    20. United Nations, Yearbook of the International Law Commission (1958) Vol. II, p. 23.
    21. Ibid.
[^15]:    27. The American Law Institute, Restatement of the Law, The Foreign Relations Law, (1962),
    126, p. 462.
    28. William W. Bishop Jr., International Law, Cases and Materials, (2nd ed. 1962), p. 145.
    29. Elbert M. Byrd, Jr., Treaties and Executive Agreements in the United States (1960) p. 202.
[^16]:    44. Arther K. Kuhn, "The Treaty-Making Power and the Reserved Sovereignty of the State," Columbia Law Review, Vol. 7 (1907). p. 185.
[^17]:    45. Tesemma Wolde Yohaness Vs. V. J. Van Bethvson and Jack Hensel (Addis Ababa Awraja Court, Civil Case No. 3309 of 1956 E.C.)
[^18]:    50. In the case of the Cherokee Tobaco (Boundinot v. United States) the Supreme Court spoke as follows: "A treaty may supersede a prior Act of Congress (Foster and Elen V. Nelson) and an Act of Congress may supersede a prior treaty (Taylor V. Morten ...)"
    51. Roland J. Stanger, Cases and Materials on Public International Law, (1966-1967) unpublished, Library, Faculty of Law Haile Selassie I University: p. 123.
    52. See note 38 supra.
[^19]:    53. Byrd, cited above at note 29, p. 84.
    54. The American Law Institute, cited above at note 27, p. 437.
[^20]:    60. Charter of the Organization of African Unity Approval Proclamation, 1963, Prociamation
    No. 202 Neg. Gaz., year 22, no. 16 .
    61. Kelsen, cited above at note 47, p. 117.
[^21]:    62. Ethiopia ratified the Statute of the Permanent Court of International Justice (Now the International Court) in July, 1926.
    63. McNair, cited above at note 55 , pp. 100-101.
    64. Id., pp. 78-79.
    65. Acaderny of Sciences of the U.S.S.R. Institute of Law, International Law, p. 15.
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    ** A clear and comprehensive account of the nature and uses of decision trees is to be found in B.N. Lewis, I.S. Horogin \& C.P. Gane, Flow Charts, Logical Trees and Algorithms, London HMSO, 1967, to which the present writers are indebted.

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