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POSITIVISM AND THE RULE OF LAW, FORMAL SYSTEMS OR CONCEALED VALUES: A CASE STUDY OF THE ETHIOPIAN LEGAL SYSTEM

JOHN W. VAN DOREN*

I. INTRODUCTION

The troublesome thing about Positivist Western jurisprudential ideas as they relate to definitions of a legal system, the Rule of Law and Law and Development is that they carry a hidden ideology while purporting to be neutral. For example, as discussed in III-A-1, *infra*, the modern positivist Professor H.L.A. Hart defines a legal system in such a way as to downplay the importance of unwritten customary law. Hart's most important criteria in determining the existence of a legal system is the rule of recognition. This rule is a social rule, i.e. a rule that is observable as a matter of fact. The rule of recognition identifies sources which are commonly accepted by officials, often judges, as authoritative for determining primary rules. Primary rules are the basic legal rules in the society and are designed to govern conduct, such as a law against murder. The absence of the rule of recognition is a serious obstacle to gaining Positivist acknowledgment of a legal system.

Because Ethiopia has no rule of recognition in the Hartian sense and relies primarily on unwritten customary law, Ethiopia's legal system may not qualify as a legal system by Modern Positivist standards. My purpose here is to argue that this fact reflects poorly on the Modern Legal Positivist definition of legal system, which is revealed as ideologically tainted and at best culture-specific.

The Rule of Law is another ideological notion that often accompanies Positivism. A purpose behind the doctrines of Positivism is to control the discretion of officials. Rule of Law theorists refer to an objectively verifiable criteria that serves as a standard by which to determine whether officials, often judges in the Western World, have exceeded the bounds of their authority. Seemingly related is the

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Western-based Law and Development criteria which may posit a system of law with a capitalist content assured of application by a positivist Rule of Law orientation. A major purpose behind Rule of Law and Law and Development propaganda is to promote security of expectations in the arena of commercial relations.

Thus, much ink is spilt in arguing that legal standards must be certain. Definite legal standards are seen to serve a three-fold function: 1) to legitimize the role of the judiciary in a democracy, by minimizing the need for judicial discretion and restricting judges to carrying out the democratic will of the legislature, 2) to eliminate unforeseeable outcomes, and protect fundamental rights from abuse by deviant judges, and 3) to insure the security of expectations in economic, social, and political life.

Security of expectations is in many respects a laudable objective. The problem is that proponents of this criterion carry with them much unacknowledged ideological and cultural baggage. Moreover, the emphasis on security of expectations denies the legitimacy of dissimilar, or even variant capitalist, societal forms. Finally, Positivist and Western Law and Development Ideologies obscure the existence of change through court law. The hidden operative here is a built-in preference for the status quo once Western Capitalist values are achieved.

While customary law may have its own problems, great tension can result when Western Capitalist norms are superimposed on top of a customary law base. One may concede the importance of stability. The problem is that ideas of legal systems, Rule of Law and Law and Development carry concealed substantive bias and distort what really occurs in the legal arena. The ideologies are interrelated because, as mentioned above, all three have in common the belief that law should be written and observed with the least possible discretion exercisable by judicial officials and imply that Western legal systems meet these criteria.

The purpose of this article is to consider the Ethiopian legal culture as a case study for the application of Western Positivist ideas of what constitutes a legal system, viewed in the context of the Rule of Law and Law and Development criteria. In so doing, part of the task is to search for the essence of the Ethiopian legal culture. The historical traditions which reflect on the Ethiopian legal culture will be briefly reviewed; then this piece will discuss the sources of law in Ethiopia, both indigenous and imported. Concluding sections discuss the problems of whether Ethiopia has a legal system, whether a Rule of Law is present, and implications of the Ethiopian legal culture for Law and Development approaches.

II. THE ETHIOPIAN LEGAL CULTURE

A. *Ethiopian History*

Historically, the major forces of the power elite in Ethiopia have been the Emperor, the feudal nobility and the Church. For many centuries, Ethiopia has developed the tradition of rule by an Empress or Emperor. The major Emperors who will be discussed here are Menelik II (1889-1913) and Haile Selassie (1930-1974).¹ As the empire expanded, there was an amalgamation of tribes into some concept of a distinct "Ethiopian" entity. Currently, there are four or five main tribes. Each tribe has developed its own distinct mores or law. Historically, emperors might be strong or weak, effective or ineffective. As in the history of England, power alternated between a somewhat centralized authority and a feudal nobility. Transportation and communication were undeveloped until the late 19th and 20th centuries, and thus there were strategic and logistical problems in the exercise of centralized power.

Ethiopia evolved from Axum, a highly-developed, Christian, slave-owning kingdom.² Axum was located in the area now occupied by the northern Ethiopian province of Tigre and former province of Eritrea.³ Nearly all the lands of modern day Ethiopia were Axum's vassals.⁴ Maintaining economic, political, and cultural ties with Egypt, Persia, Arabia, Greece and India, Axum reached its peak development between the 4th and 6th centuries A.D.⁵

The linking of the authority of the Emperor with the Church has its origin in Axum. Ethiopian legend tells that the Queen of Sheba traveled from Axum to Jerusalem to visit King Solomon.⁶ The first Emperor, Menelik I, is said to be the product of the union of Solomon and Sheba.⁷ The Ethiopians believe that Menelik I spent several years in Jerusalem as a young man, and returned to Ethiopia with the Ark of the Covenant.⁸ The object believed by Ethiopians to be the Ark is still kept, guarded by monks, in the town of Axum, province of Tigre.⁹

1. The reign of Emperor Haile Selassie was interrupted by the five-year Italian occupation of Ethiopia (1937-1941). See Peter Schwab, *DECISIONMAKING IN ETHIOPIA* 160 (1972).

2. See Georgi Galperin, *ETHIOPIA: POPULATION, RESOURCES, ECONOMY* 7 (1981).

3. See Graham Hancock, *ETHIOPIA THE CHALLENGE OF HUNGER* 26 (1985).

4. See Galperin, *supra* note 2 at 7.

5. *Id.*

6. See Hancock, *supra* note 3 at 26.

7. *Id.*

8. *Id.*

9. *Id.* at 27.

The decline of Axum, triggered by the 7th century Muslim Arab conquests, marked the beginning of a long period of conflict.¹⁰ The 8th century saw Christian, feudal-slave-owning principalities warring both against each other and against the Muslim Sultanates.¹¹ This post-Axum period of war resulted in the loss of much of the products of Axum's culture.¹²

In a feudal society the ownership of land carries with it the bulk of social, economic and political power. The Ethiopian Orthodox (Coptic) Church was a prominent player in this arena. At one point, the Church owned one-third of the land in Ethiopia.¹³ The Church had supported the "true descendent" of the line of Solomon during a 13th century contest over the power to rule. When Yekuno Amlak, this true descendent, in fact gained power, he allocated one-third of the land to the Church for its support.¹⁴ Thereafter, the Church lost its realm at one point but gained it back in 1632.¹⁵ Thus, as late as the reign of Emperor Haile Selassie, the Ethiopian Orthodox Church continued to be a powerful landowner.¹⁶

Lands were also given by the government to the Islamic Church.¹⁷ However, total figures as to the amount of land owned by mosques in Ethiopia is not easily ascertained because records were kept in Arabic script.¹⁸ In any case, although there are relatively equal numbers of Muslims and Christians in Ethiopia, the Christian Amhara and Tigray tribes dominated the political institutions and the Ethiopian Orthodox Church was a dominant political force.¹⁹

The territorial boundaries of Ethiopia were effectively determined during the reign of Menelik II.²⁰ The Ethiopian Empire was consolidated by conquest or "manifest destiny" through Menelik's takeover of what became the Southern Provinces of Ethiopia.²¹ As did William the Conqueror in England after 1066, so did Menelik II

10. See Galperin, *supra* note 2 at 7.

11. *Id.*

12. *Id.* at 8.

13. See Guangoul, *The Courts of the Ethiopian Church in Redden*, PUBLIC LAW II, at IV (c)1, IV(c)4, and IV(c)5 (1964-65)(unpublished materials).

14. *Id.*

15. The Ethiopian Orthodox Church lost its realm at one point, but regained it in 1632. *Id.* at IV(c)5, IV(c)6.

16. See Harrison C. Dunning, *Land Reform in Ethiopia: A Case Study in Non-Development*, 18 UCLA L. REV. 271, 292 (1970).

17. See Schwab, *supra* note 1 at 65.

18. *Id.*

19. *Id.* at 15.

20. See Galperin, *supra* note 2 at 12.

21. *Id.* at 12-13.

in Ethiopia distribute lands to supporters and fellow conquerors.²² Approximately two-thirds of the land in the southern regions was taken from the indigenous inhabitants and redistributed.²³

Feudal incidents of land ownership persisted into the 20th century during the regime of Emperor Haile Selassie. There was thus a carryover of the feudal practice of peasants giving personal services, goods, or sharecropping for the use of farm land.²⁴ Another pattern during Emperor Sellassie's reign was land use paid for by rent.²⁵ In earlier times, the feudal landholders had been deputized by the central imperial government as public officials, and become tax collectors for the central government, thus amalgamating the concept of rent and tax.²⁶

In sum, the pattern of land ownership during the regime of Emperor Haile Sellassie reflected these past allocations. There was concentrated ownership of land in the hands of the royal family, the church, and the nobility, that coincided with the group that held political power.²⁷ With regard to the amount of land owned by the church at this time, some commentators cautiously assert that reliable statistics do not exist, but that the church was a large landowner.²⁸ In any event, land ownership in Emperor Selassie's time was one in which a small elite owned the substantial portion of land in Ethiopia.²⁹ In 1975, just after Emperor Haile Selassie was deposed, more than one-half of farmers in Ethiopia were tenants, and the majority of the rest shared land under communal tenure, most of whom were engaged in subsistence agriculture.³⁰

1974 marked the end of the ancient monarchy. Frustration with the famine, low wages and dramatically unequal distribution of land led to protests and strikes.³¹ A small group of junior military officers and soldiers quickly organized, overthrew Emperor Selassie and seized power.³² This revolutionary group, calling themselves the

22. See Norman J. Singer, *A Traditional Legal Institution in a Modern Legal Setting: The Atbia Dagna of Ethiopia*, 18 UCLA L. REV. 308, 309 n.6 (1970).

23. See Girma Kebede, *The State and Development in Ethiopia*, 12 (1992).

24. See Dunning, *supra* note 16 at 273-74, 277.

25. *Id.* at 273-74, 276.

26. *Id.* at 273-74, 277, 282-83.

27. See Menghistu Fisseha-Tsion, *A Short Review of the Ethiopian Income Tax System*, (International Bureau of Fiscal Documentation Bulletin 8, 1980).

28. See Dunning, *supra* note 16 at 292, 293 n.101.

29. See Dunning, *supra* note 16 (*passim*), e.g., 291-93, 306.

30. See Bereket A. Habte-Selassie, *Development Lending and Institution Building*, 19 J. AFR. L. 118, 130-31 (1975) (indicating that this factor impedes development).

31. See Kebede, *supra* note 23 at 1-2; Galperin, *supra* note 2 at 13-15.

32. See Menghistu Fisseha-Tsion, *Highlights of the Constitution of the Peoples' Democratic Republic of Ethiopia, (PDRE); A Critical Review of the Main Issues*, 14 REV. OF SOCIALIST L. 129 (1988); Kebede, *supra* note 23 at 2-3.

Provisional Military Administrative Council (PMAC) or the Derg (an Amharic word meaning *committee*), formed an alliance with the All-Ethiopian Socialist Movement (MEISON), a leftist civilian group.³³ The Derg, espousing Marxist-Leninist rhetoric,³⁴ suspended the constitution of 1955.³⁵ The European-inspired Codes, which will be discussed in section II-B-2, remained in effect.

In May 1991, the government of Mengistu was overthrown by the Ethiopian Peoples Revolutionary Democratic Front, hereafter EPRDF. The EPRDF is composed of the Tigrean Peoples Liberation Front, the Eritrean Peoples Liberation Front, and the Oromo Liberation Front. The first two groups had espoused a Marxist ideology.³⁶

In June of 1991, a national conference was held resulting in the formation of a transitional government based on the EPRDF. Mr. Mengistu was superseded by President Meles Zenawi, who came from the officially Marxist Tigrean group.³⁷ Much of this Marxist dogma has been dropped, and Ethiopia has received loans from Western-based internationally-oriented development banks.

It is necessary to consider the current socioeconomic conditions in Ethiopia as the context in which the legal system applies. At the present time, the illiteracy rate in Ethiopia is perhaps 85%.³⁸ Most Ethiopians live at least a one-day walk from the nearest all-weather road.³⁹ There are two rail lines, one from Addis Ababa to Djibouti, and another one in Asmara. Bus service exists, but the roads can be problematic. There are few automobiles. The telephone service is modest. The country has a very small number of persons devoted to commerce, business, and manufacturing; most workers are farmers, and most of those engage in subsistence farming.⁴⁰

33. See Kebede, *supra* note 23 at 3.

34. *Id.*

35. See Fisseha-Tsion, *supra* note 32.

36. See Clifford Krauss, *Ethiopia's Dictator Flees; Officials Seeking U.S. Help*, NEW YORK TIMES, May 22, 1991, at A1, A9. However, in my personal observation during a visit to Ethiopia in September 1991, and in perusing the Ethiopian Herald and reviewing the Transitional Period Charter, the Marxist ideology is not in evidence. Remnants of Marxism were gone or altered. For example, the statue of Lenin has been removed from its ironic silent confrontation with the Hilton Hotel in Addis Ababa, and a replica of Marx has been defaced.

37. See Jennifer Parmelee, *Ethiopian Government Critic Sentenced*, WASHINGTON POST, June 29, 1994 at A17.

38. See Fisseha-Tsion, *supra* note 27 at 11.

39. *Id.*

40. Paul Brietzke, *Private Law in Ethiopia*, 18 J. AFR. L. 149, 152-53 (1974) (small urbanized minority engages in capitalism); see also Habte-Selassie, *supra* note 30 at 131 (subsistence farm economy).

B. *Ethiopian Legal Structure*

Like layers of rock from different epochs, five separate sources compose the current Ethiopian legal structure. The first three sources of law are indigenous to Ethiopia. First, the traditional legal system consists of unwritten or customary law, which varies from tribe to tribe. Second, there is the Fetha Negast, a code tradition introduced in Ethiopia in the 15th or 16th century. Third, there is a traditional public law comparable to that which supported European kings after the rediscovery of Roman Law. The last two layers of the Ethiopian legal structure may be described as imported. The fourth layer consists of Western Codes imported to serve the interests of a tiny commercial elite interested in developing Western style business. Finally, there is an overlay of Socialist proclamations of the Mengistu regime and the sources of law contained in the various constitutions beginning in 1931.⁴¹ Each of these Ethiopian sources of law will be discussed in turn.

The public law supporting the tradition of the Emperors has been severely undermined by the revolutions since 1974. The fate of the Socialist overlay from the Mengistu era is uncertain, though it is clear that there is great hostility toward Mengistu himself and his ruling group by the conquering revolutionaries. It is argued later that the imported Western-based Codes are ineffectual, and that the Fetha Negast is not a predominant source of law. This leaves custom, often unwritten, as the major source of law.

1. *Traditional Law*

Ethiopia has within it some 42 tribes, the most numerous of which are the Oromo, Amhara, Tigreans and Galla. Each of these groups has an oral customary law which may vary from group to group.⁴² Since Positivists indicate that written law is crucial to a legal system, Ethiopia's legal culture may not meet the requirements of that definition of a legal system.

No formalized or institutional courts administered customary law until the end of the 19th century.⁴³ Instead there was an informal hierarchy of administrative and judicial arbiters, beginning with

41. See Paul Brietzke, *Socialism and Law in the Ethiopian Revolution*, 7 REV. OF SOCIALIST L. 261, 271 (1981)(generally supporting this paragraph).

42. See G. Krzeczunowicz, *An Introductory Theory of Laws in the Context of the Ethiopian Legal System*, 1-2 (1971-7) (unpublished manuscript in the Archives of the University of Addis Ababa Law Library); see also section II B 6 *infra* for discussion of Constitutions.

43. See James Paul and Christopher Clapham, *II Ethiopian Constitutional Development*, A Source Book, 841 (1971) (commentary of other authors).

village elders and culminating in the Emperor's Chilot.⁴⁴ The Chilot was the court of last resort in which the Emperor dispensed justice without being necessarily bound by law. It is said that the Ethiopians have traditionally been quite litigious, and have had numerous traditional rights of appeal, with the Emperor exercising a final judicial power since the middle ages.⁴⁵ Customary law was not binding and could be disregarded by decision makers.⁴⁶

The Fetha Negast, meaning "Laws of the Kings," was drafted in Egypt during the 13th century and introduced in Ethiopia in the 17th century.⁴⁷ The purpose of this code was to guide Christians living in a Moslem society. Written in Arabic, the Fetha Negast was translated in Ethiopia into Geez.⁴⁸ Geez, an ancient liturgical language, was the language of the educated.

The Fetha Negast was never consistently applied in Ethiopia, even where introduced, and customary norms persisted despite its introduction. Because the Fetha Negast existed only in Geez, the code was inaccessible to all but the highly educated. By the mid-1950's, the Fetha Negast was considered out-of-date and it was unclear that it was applied with any regularity.⁴⁹ Article 3347 of the Civil Code, in effect, repeals the Fetha Negast.⁵⁰ However, the Fetha Negast remains the text of the canon law for the Ethiopian Orthodox Church⁵¹ and its tradition may continue to influence decisions today.⁵²

In the beginning of the modern era, in the late 19th century, prior to the conquest or consolidation of the Empire by Emperor Menelik in 1896-1905, the southern part of Ethiopia was inhabited by nomads.⁵³ The nomadic tribes in the south were pagan and Muslim and were hostile to the conquerors.⁵⁴ Menelik's army was composed largely of Christian Amhara and Shoa Galla (Oromo).⁵⁵ The

44. *Id.*

45. *Id.* at 841-43.

46. See Kenneth Redden, *THE LEGAL SYSTEM OF ETHIOPIA*, 41-43 (1968).

47. *Id.* at 41-42; Brietzke, *supra* note 40, at 149 (at least since 17th century); Norman J. Singer, *Modernization of Law in Ethiopia: A Study of Process and Personal Values*, 11 *HARV. INT'L L. J.* 73, 74 n.2., 83 (1970).

48. See Redden, *supra* note 46 at 41.

49. See Singer, *supra* note 47 at 73-74 n.2.

50. See Krzeczunowicz, *supra* note 42 at 6.

51. See Singer, *supra* note 47 at 74 n.2.

52. See Krzeczunowicz, *supra* note 42 at 6; J. Vanderlinden, *Civil Law and Common Law Influences on the Developing Law of Ethiopia*, 16 *BUFF. L. REV.* 250, 252-55 (1966-67) (Fetha Negast modified by sense of justice).

53. See Singer, *supra* note 22 at 309 n.6.

54. *Id.* at 309-10.

55. *Id.*

legal structure imposed was that of the Amhara, but it appears that the resolution of disputes by local customary law continued.⁵⁶

At the time of Menelik (1889-1913), the court structure was based on *woreda-awradja* political divisions.⁵⁷ A court structure consisting of 14 provincial courts, 92 *awradjas* courts, with each *awradja* containing 243 *woredas*, was affirmed by Emperor Haile Selassie in 1942 and for the first time judges were appointed to all the courts.⁵⁸ These judges were mostly educated Amhara who lacked formal legal training.⁵⁹

2. Introduction of Western-Based Codes

The first Ethiopian Criminal Code appeared in the early 1930's.⁶⁰ In the 1960's, a large body of law was introduced into Ethiopia consisting of codes imported from Western nations with the Civil Law tradition. Between 1957 and 1965, six codes were enacted in Ethiopia: the Criminal Procedure Code of 1961, the Civil Code of 1960, the Commercial Code of 1960, the Maritime Code of 1960, the Civil Procedure Code of 1965, and the Penal Code of 1957.⁶¹

The Ethiopian Civil Code was drafted by Professor Rene David.⁶² While acknowledging the foreseeability of substantial resistance to the implementation of the code in Ethiopia, Professor David predicted that the code would eventually be assimilated in the same manner that Roman law was absorbed in continental Europe.⁶³ Professor David envisioned that the codes would be rapidly assimilated in the Supreme Court in Addis Ababa, in the disposition of disputes where the matter is sufficiently important and where one of the parties is a foreigner, but that the remainder of the Civil Code would only gradually be put into effective execution.⁶⁴ While Ethiopia may be better off with the codes than without them,⁶⁵ even this forecast of

56. *Id.* at 309-11.

57. *Id.* at 309, 312 n.18.

58. *Id.* at 312 and 312 n.18.

59. *Id.* at 312 n.19.

60. *Id.* at 311.

61. See Kenneth Redden, *Legal Research and Law Reporting in Ethiopia*, 2 LIBER. L.J. 122, 127 (1966).

62. See Rene David, *A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries*, 37 TUL. L. REV. 187 (1963).

63. *Id.* at 189 n.2, 193.

64. *Id.* at 204.

65. I am indebted to my colleague Tshai Wada at the Addis Ababa Faculty of Law for forcing this realization on me. The Civil Code contains much that is helpful to the establishment of human rights, but how authoritative is it? There is a right of habeas corpus provided in the Code of Civil Procedure. See *Assefa Dula v. Public Security Department*, High Court, Addis Abada Civ. Case No. 322/58 (1965)(detained prisoner released on habeas corpus). But in my

acceptance by gradual assimilation was perhaps overly optimistic and will be discussed later in section 2b. The basic problem is that customary law continues to hold sway as administered by customary tribunals and mediators, and even the exceptional use of government courts produces judgments which may not serve to implement code provisions.

a. Code Attempted Abolition of Customary Law

Attempts to substantially reduce the reach of customary law have not been successful. The Civil Code of 1960 has a provision which declares that the Code replaces customary law.⁶⁶ Unless otherwise expressly provided, all rules previously in force, whether written or customary, which concerned matters provided for in the Code, were to be repealed and replaced by the Code.⁶⁷ This text repeals even those pre-existing rules which would have supplemented the code in such matters as succession, family and property.⁶⁸

In a study completed in 1968, it was found that customary dispute resolution based on customary law applied by local elders was alive and well despite the attempt of the Code to curtail it.⁶⁹ Because the local elders are often illiterate, they do not apply a sophisticated legal treatise like the *Fetha Negast*.⁷⁰ Elders do state that they apply customary practices and some moral rules and principles.⁷¹ They see their function as restoring harmony across a broad spectrum of relations between the parties.⁷² Apparently, at least in the tribe studied, there is no standing body of elders to hear disputes,⁷³ and the selection of decision makers is ad hoc, chosen as in arbitration. In an attempt to introduce government courts in outlying areas, the Amhara introduced the *Atbia Dagnia*, or local judge, into rural areas in 1947.⁷⁴ The complexities of the reception of the *Atbia Dagnia* need not detain us here except to note that where such judges exercise

interviews with detainees in September 1991, it was indicated by a legally sophisticated lawyer detainee that no legal remedies could avail them at this time.

66. See Ethiopian Civil Code § 3347.

67. *Id.*

68. See Krzeczunowicz, *supra* note 42 at 2.

69. See Paul and Clapham, *supra* note 43 at 845-48.

70. *Id.* at 845-46.

71. *Id.*

72. *Id.* at 846.

73. *Id.*

74. See Singer, *supra* note 22 at 312-13.

power, they often use customary law or equity rather than the Civil Code.⁷⁵

Moreover, the omnipresence of customary law is kept alive by the practice of ordinary courts referring matters to a council of elders, though it is not clear which situations justify this approach.⁷⁶ The elders also settle criminal cases.⁷⁷ In Southern Ethiopia it is estimated that only 3% to 4% of litigation is brought before government courts, and tribe members feel a moral obligation to seek tribal rather than government court resolution.⁷⁸ The Gurage tribe, for example, has courts that use customary norms to determine disputes between members of the group which could erupt into violence and otherwise disturb social equilibrium.⁷⁹ Government courts play little part in this process.⁸⁰ Considering that 80% of Ethiopians live approximately one day's walk from the nearest all-weather road,⁸¹ can the foreign norms codified in the Ethiopian Civil Code have much influence? Thus, the people still view the proper dispute resolution procedure to be the customary one.⁸² While section 3347 of the Ethiopian Civil Code purports to eliminate customary law, such law continues with remarkable vitality.⁸³

Another avenue for the survival of customary law was provided by the Civil Code itself through the retention of arbitration and compromise.⁸⁴ Compromise possibilities consist of referral to a conciliator, or an agreement of the parties to resolve their dispute without such a reference.⁸⁵ Conciliation must be made on a basis of mores not repugnant to law or to public morality.⁸⁶ Arbitration is

75. *Id.* at 313; Krzczunowicz, *The Present Role of Equity in Ethiopian Civil Law*, 13 J. AFR. L. 145, 155-56 (1969) (*Atbia Dania* who are something like justices of the peace perform mediation though they are hardly versed in content of code provisions; but writer appears to refer to this as in accord with the Code on the theory that the Code authorizes the procedure and it is compromise not arbitration.)

76. See Paul and Clapham, *supra* note 43 at 847-848 (referring to an easement case).

77. *Id.* at 848.

78. See Norman J. Singer, *The Status of Islamic Law in Ethiopia*, LE PLURALISME JURIDIQUE 207, 208 n.4 (1972) (a 3% to 4% estimate is probably accurate for some groups).

79. See Paul and Clapham, *supra* note 43 at 845.

80. See Singer, *supra* note 22 at 332.

81. See Fisseha-Tsion, *supra* note 27 at 11.

82. See Singer, *supra* note 22 at 332-34; see Brietzke, *supra* note 40 at 154 n.2 (the Codes should only have repealed custom inconsistent with the Code—not all custom not embodied in it, and some judges act on the basis that the Code has done the latter, citing Krzczunowicz). See also Norman J. Singer, *The Ethiopian Civil Code and the Recognition of Customary Law*, 9 HOUSTON L. REV. 460, 493-94 (1972).

83. See Singer, *supra* note 82 at 480-94.

84. *Id.* at 480-94.

85. *Id.* at 484.

86. *Id.* at 492.

supposed to be made on the basis of principles of law.⁸⁷ However, conciliators and arbitrators may be using customary law or equity even if it conflicts with the Code despite what seems to be the elimination of the customary law by section 3347.⁸⁸

b. Gap Between Codes and Legal Reality

As indicated in the last section, many disputes are settled by traditional sources such as elders whose use of customary law may conflict with the Code.⁸⁹ This failure to assimilate the Code is not limited to rural areas but extends to disputes in urban areas.⁹⁰ The fact that the Codes are not substantially implemented or regarded as authoritative creates a chasm between official norms and prevailing norms.

The conflict between the Codes and traditional law is illustrated by Professor Beckstrom's study, which indicates that the Codes still had not taken hold in 1974.⁹¹ Beckstrom lists these reasons: 90% or more of the population are illiterate; the great majority of judges have received education only to the fifth grade;⁹² and there is a small and relatively informally educated attorney population.⁹³ Even the small group of educated lay persons, including business persons aware of the Code, may not use it, e.g., bankruptcy is available but not used.⁹⁴ Professor Beckstrom states that well-established distribution and communication networks do not exist to make people aware of the law, and administrative facilities may not exist to put laws into effect. One could add that Ethiopia lacks a tradition of applying codes because of the historical reluctance to be bound by an application of existing rules.⁹⁵

Areas of private law such as inheritance and family law either codify existing practice or, where different, the Code-enacted reforms may be ignored by judicial nullification, or avoided through alternative dispute resolution.⁹⁶ In very remote areas, there are no

87. *Id.* at 492-93.

88. *Id.* at 492; see also Krzeczunowicz, *supra* note 75 at 155-56 (*shemageles* [elders] are used even in urban areas and use their own equitable concepts to achieve compromise).

89. See Singer, *supra* note 82 at 493-94.

90. See John H. Beckstrom, *Handicaps of Legal Social Engineering in a Developing Nation*, 22 AM. J. OF COMP. LAW 697, 703-04 (1974).

91. *Id.* at 704-06, 712.

92. *Id.* at 704-05, 709-10.

93. *Id.* at 706-08.

94. *Id.* at 704.

95. See Singer, *supra* note 47 at 98.

96. See Brietzke, *supra* note 40 at 165.

government courts, so customary law will continue to hold sway.⁹⁷ Government law, such as the Civil Code, is only resorted to in exceptional situations such as those involving tax or penal law or where traditional dispute resolution has failed.⁹⁸ Even in those cases, judges may be unaware of applicable state sanctioned law, misunderstand it, or simply refuse to apply it.⁹⁹ Judges purporting to utilize the Codes in deciding cases have cited irrelevant code provisions and failed to cite appropriate provisions.¹⁰⁰ Ethiopian judges may not be conditioned to apply the Codes as a binding force.¹⁰¹ There is also a lack of knowledge about what is occurring in rural areas. Sedler states: "It simply is not known what is happening in many parts of the country, or what will happen, and any prediction is hazardous."¹⁰² It is at best uncertain to what extent the code is in use outside of Addis Ababa.¹⁰³

Studies have indicated that the Civil and Commercial Codes are not used in the small business arena even in Addis Ababa.¹⁰⁴ In the small business arena relief is sought through informal dispute resolution where the Commercial Code is seldom used.¹⁰⁵ In the past, the Code sections dealing with negotiable instruments received little use,¹⁰⁶ but are now used in some commercial circles.¹⁰⁷

With regard to the application of the Codes in general, the only evidence from personal experience of the author is highly impressionistic and incomplete. On November 3, 1990, the author interviewed four judges in the Civil and Criminal High Court in Dira Dawa, Ethiopia, and a Public Prosecutor. These judges stated that they refer to and use the Civil and Criminal Code in Amharic. They have an English Civil Code translation at home, and use it in case of the ambiguities in the Amharic version. The English translation is often obscure¹⁰⁸ and the French text in Dira Dawa would be of no aid because the judges do not comprehend French.

97. See Robert Sedler, *The Development of Legal Systems: The Ethiopian Experience*, 53 IOWA L. REV. 562, 607 (1967).

98. See Brietzke, *supra* note 40 at 155.

99. *Id.*

100. See John H. Beckstrom, *Transplantation of Legal Systems: An Early Report on the Reception of Western Laws in Ethiopia*, 21 AM. J. OF COMP. LAW 557, 565 (1973).

101. See Sedler, *supra* note 97 at 606.

102. *Id.* at 609.

103. See Krzeczunowicz, *supra* note 75 at 154-55 (in several areas the Codes are not known).

104. *Id.*; Brietzke, *supra* note 40 at 164.

105. *Id.*

106. *Id.*

107. Interview with Tshai Wada, Professor, University of Addis Ababa, Ethiopia.

108. See Franklin Russell, *The New Ethiopian Civil Code*, 29 BROOK. L. REV. 236, 237 (1963).

The Dira Dawa High Court judges said they would not have felt that they had the "jurisdiction," or authority, to decide a case on the basis of the 1987 Constitution. I said that the Constitution contained a provision that women were to be seen in law as equal to men. There, the *Kadi* or customary courts still function to handle certain disputes. One judge smiled and said that in the cases involving Muslims which he decides in the *Kadi* Court that such a provision "would not be practical."¹⁰⁹ Another judge said he found no difficulty in using the Code. After all, he had studied the Code in law school and they were all law graduates. In difficult cases, they gathered together to discuss the appropriate outcome. The judges stated that while precedent does not matter in theory, it does in practice.¹¹⁰

Despite the pro-code thrust of this anecdotal information, those who seek to implement the Codes face substantial obstacles. The Codes are a challenge even to the educated, and conflict with the oral tradition. There is, however, a tradition of respect for written codification, as illustrated by the Fetha Negast. Those who wish to see the Codes implemented hope that the tradition will be transferred to the Codes.

Other factors hampering the penetration of the Codes into the legal life of Ethiopia are (1) translation problems, (2) conflict between Christian values incorporated in the Code and Muslim values not incorporated, (3) extra-code norms which may nullify code provisions, (4) retention of jurisdiction by the Coptic Christian Church, and (5) the lack of a reporter system for the cases.

An initial obstacle to assimilation of the Codes is the translation problem. The Codes were originally drafted in French and English and then translated into Amharic. Though rich and subtle, the Amharic language did not have a highly developed legal vocabulary. Hence the project to translate Professor David's French text into Amharic proved formidable.¹¹¹

A second problem in fusion of the Codes with reality in Ethiopia is the conflict in values between Christians and Muslims. The decisions were made with respect to the Code-promoted Christian values at the expense of Islam, and other minorities.¹¹² It has been estimated that only five out of twenty million people speak Amharic as their native tongue, and that just two million speak it as a second

109. Interview by Author, Dira Dawa, Nov. 3, 1990.

110. *Id.*

111. See Beckstrom, *supra* note 100 at 563 (supporting this paragraph).

112. See Singer, *supra* note 47 at 98.

language.¹¹³ However, the Ethiopian commissioners who advised the Continental drafters on Ethiopian norms represented the supremacy of Christian and Amharic norms.¹¹⁴ The European drafters represented European norms, and no one represented diverse minorities.¹¹⁵ In actuality, the Ethiopian Commission served as no more than translators.¹¹⁶ The Codes were enacted because an elite group wished to change the image of their legal culture from "primitive." This elite group has been characterized as Westernized, achieved control of Parliament in Ethiopia during the acceptance of codification, and engaged in modest capitalist ventures.¹¹⁷ This elite group sought a progressive development-oriented face.¹¹⁸

A third difficulty in implementation of the Codes is that they are frequently subject to extra-code norms which may limit their applicability. On the surface, in the adoption of children for example, the interposition of the Code may be deemed successful. The changes to custom that the Code made in adoption practices had not produced litigation on substantive issues in the first decade following enactment of the Code.¹¹⁹ However, extra-legal judicial concerns have served to inhibit Swedish persons from adopting Ethiopian children despite the fact that the Code does not proscribe such adoptions.¹²⁰

A fourth problem in Ethiopia's digestion of the Codes relates to the abolition by the Code of the jurisdiction of the Coptic Christian Church. The jurisdiction of the Coptic Christian Church was officially abolished by decree in 1942,¹²¹ but the reality remains otherwise. For example, if either party to a church marriage wishes a divorce or a separation they must seek it from the church tribunal.¹²² Moreover, during the reign of Emperor Haile Selassie, cases referred to the Emperor were then referred by him to the Church Court.¹²³ The Civil Code eliminates the jurisdiction of the Church with respect to its provisions concerning personal status, but in fact a parallel jurisdiction exists with trial and appellate jurisdiction.¹²⁴

113. See Redden, *supra* note 61 at 125 (the rest speak some 45 different languages).

114. See Singer, *supra* note 47 at 122.

115. *Id.*

116. *Id.* But see John H. Beckstrom, *Adoption In Ethiopia Ten Years After the Civil Code*, 16 J. AFR. LAW 145, 150 (1972) (commission reversed French drafters to conform some of Code to pre-existing custom).

117. See Brietzke, *supra* note 40 at 152-53.

118. See Singer, *supra* note 47 at 122-23.

119. See Beckstrom, *supra* note 116 at 153, 167 (*semble*).

120. *Id.* at 161-62.

121. Decree No. 2 of 1942. See A. Guangoul, *The Courts of the Ethiopian Church*, in Kenneth Redden, PUBLIC LAW II at IV(c)1, IV(c)7 and IV(c)8 (unpublished materials).

122. *Id.*

123. *Id.*

124. *Id.* at IV(c) 9-10.

Finally, the implementation of the Code is deterred by the absence of a concept of *stare decisis* and a case reporter system. The concept of *stare decisis* is not present, in theory, in Civil Law countries, nor is it functional in Ethiopia. Written judgments are common.¹²⁵ However, there is no reporter system. Although cases are on file in the archives, as a practical matter, it is not feasible for lawyers or judges to consult them. The absence of the concept of *stare decisis* may be seen as an impediment to implementation of the Civil Code. However, it has been suggested that the relevance of the absence of *stare decisis* is overstated. In practice, courts in the United States treat precedent as judicial custom which may or may not be binding. This treatment is functionally similar to the use of civilian tradition in Ethiopia.¹²⁶

Despite the obstacles, certain aspects of the legal climate in Ethiopia may act to promote implementation of the codes. One factor aiding the Code development is that it constitutes the only hope for a unified law. Another factor which could aid in the acculturation of the Code is that in contracts, there is no strong, developed customary law to challenge the Codes.¹²⁷ It has been observed that foreign-based law can be applied more easily in areas in which there is no indigenous law that is competitive with the foreign implant.¹²⁸ However, even this point may be superficial, for, as Professor Brietzke acutely points out, the Ethiopians had a developed set of commercial practices which were ignored by the European-based drafters of the relevant Codes.¹²⁹

3. *What Are the Prevailing Norms?*

The prevailing norms are indigenous and are both written and unwritten customary understandings about who will exercise power. To borrow Hart's terminology, these norms consist of primary rules and secondary rules. The primary rules govern behavior. These rules are internalized, consisting of largely unwritten custom with a lesser component of written indigenous norms. The secondary rules govern who is authorized to make decisions and which sources of rules are authoritative. The secondary rules may also include significant unwritten components.

125. See Redden, *supra* note 61 at 123. The Supreme Court did launch a reporter system with the recent publication of the first bound volume in Amharic. However, it is not known if this precedent will be followed by the post-revolutionary court.

126. See Brietzke, *supra* note 40 at 159.

127. See David, *supra* note 62 at 195.

128. See Brietzke, *supra* note 40 at 149-50.

129. *Id.* at 150.

The Ethiopian society functions, however; people seem to know what is expected of them. In Ethiopian rural areas, tribal life is composed of patterns based on kinship. Social cohesion is created more by informal social pressures than by resort to litigation. Life is still organized in such a manner that there is individual responsibility for subsistence, e.g., the harvesting and cultivation of crops. Village citizens are dependent on the group for approval and assistance relating to marriage and burial.¹³⁰ As one writer puts it: "The threat of withdrawing kinship services from a recalcitrant remains always a potential which, together with moral and ethical sanctions, reinforce [sic] the overall system of order and social control, thereby giving conformity to the norms of expected behavior."¹³¹ Could it be that this is the key to the continued stability and primary importance of the indigenous norms despite the challenge of artificially imposed external norms?

Not all official norms are functionless. For example, the Mengistu regime promulgated a series of land reform measures, and the state took over much of the means of production.¹³² Indigenous norms, even when officially imposed, are distinguishable from external norms. Indigenous norms are those precepts which originate from Ethiopian tradition and culture, or are generated by those in power, but not superimposed wholesale such as codes and constitutional human rights provisions. External norms are those legal standards of behavior which come from the outside of Ethiopia, frequently from the West. Official norms which are indigenous to Ethiopia tend to be more operative than those which are external.

Thus, Ethiopia has a traditional system of exercising power. Power may be defined in terms of effective decision-making, and the ability to influence it.¹³³ Numerous factors may be present in influencing decision-making: opinions, values, customs, educational experience, and the role of elites.¹³⁴ Perhaps unwritten rules, based on church teachings, attitudes toward work, commerce, military prowess, authority and so on, are governing and influencing decision-making.¹³⁵ Historically, these factors may have produced a system

130. See Paul and Clapham, *supra* note 43 at 844-45, (citing JOURNAL OF ETHIOPIAN STUDIES 89-91 (1967)) (supporting last three sentences).

131. *Id.* at 845.

132. See Harrison C. Dunning, *Rural Land Reform in Socialist Ethiopia: The First Year*, VERFASSUNG UND RECHT IN ÜBERSEE 203 (2 Quartal 1977).

133. See Paul and Clapham, *supra* note 43 at 733.

134. *Id.* at 734.

135. *Id.*

understood by people and taken to be legitimate, thereby producing a social equilibrium.¹³⁶

4. *Imported Norms vs. Customary Norms – Ideological Incompatibility*

There are basic ideological conflicts between imported Western norms in the Constitutional setting (to be discussed *infra*) and the host social context. Another prominent source of contradiction is the presence of a capitalist-oriented Civil Code in a regime which has a socialist orientation. The extent to which the regime of Mr. Zenawi will reduce the conflict is uncertain at this time. The Draft Economic Policy calls for increased privatization of wholesale and retail services, export-import operations, and tourism.¹³⁷ The Draft refers to a possible encouragement of private enterprise in banking and insurance.¹³⁸ But the fact is that the land, banking, and large buildings (perhaps those over two stories) will remain under state control.¹³⁹ Privately-owned houses in excess of one, confiscated under Mengistu, will be returned.¹⁴⁰ State farms will be eliminated¹⁴¹ and freight transport and public transport will be denationalized.¹⁴²

While land and what major commercial enterprises there are remain state owned, what can be the role of a Civil Code designed for a capitalist *laissez faire* liberal regime? The French Civil Code had bourgeois presuppositions. While the French Civil Code declared private property an entity free of feudal obligations, it carried with it the bourgeois ideas of the protection of real property within the family unit of small farms and small family businesses.¹⁴³ Professor Brietzke sums it up well: "The outstanding characteristics of Ethiopian private law are its orientation towards nineteenth century capitalism and the lack of meliorating provisions associated with the welfare state in the West and with broadly-based development in the Third World."¹⁴⁴ Thus, the conception of property contained in the Civil Code is that of absolute ownership with no

136. *Id.* Professor Paul went on to suggest that the Constitution of 1955 had the potential to upset the traditional balance. *Id.* at 734-35.

137. See THE ETHIOPIAN HERALD, October 1, 1991, p. 1.

138. *Id.*

139. Interview with Tshai Wada, Oct. 2, 1991. Mr. Wada is Associate Dean of the Law Faculty at the University of Addis Ababa.

140. *Id.*

141. *Id.*

142. *Id.*

143. See Brietzke, *supra* note 40 at 151.

144. *Id.* at 160.

social obligations.¹⁴⁵ This concept seems utterly at odds with the state ownership of land under the leadership of Mengistu or for that matter President Zenawi. There was a lack of synchronization between Commercial Code provisions governing corporations "for gain" (profit), and the socialization of the 100 largest companies in Ethiopia in 1975 under Mengistu's socialism.¹⁴⁶ The presence of freedom of contract in the Civil Code also created a situation of inefficiency because of inequality of property distribution and consumer inexperience. Because the bargaining power of landlords was so great, formal equality was of no helpful relevance.¹⁴⁷ Theoretically, the Code law remained applicable during Mengistu's leadership. However, the Code law simply did not lend itself to application to the bulk of transactions relating to the means of production, including land, which was socialized. It appears that, under President Zenawi, social ownership will continue to render application of the Code law somewhat irrelevant.

5. Summary

In sum, a study of the Ethiopian legal system reveals a large variety of state originated norms in an uncertain relationship with each other and with customary norms. The prevailing norms appear to be unwritten and customary, and certainly indigenous, rather than imported written norms. First, most relevant is traditional customary law, which varies from place to place, and is unwritten. Second, and related, customary tribunals are alive and well and their resolutions do not appear to be based on Code-originated norms. Third, there is an overlay of imported Codes carrying the Western imported ideological baggage with, at best, uncertain acceptance outside of Addis Ababa. Difficult translation problems of the Codes from French to Amharic, and the lack of terms comparable to Western legal terms in Amharic further compound the problems. Moreover, as in the Civil Law tradition, there are few reported cases, and those which are, are practically unavailable. And even if found, with no *stare decisis*, the cases themselves need not be viewed as authoritative. Fourth, norms of the Coptic Christian Church may be applied by church tribunals which may not be consistent with Code norms. Finally, as discussed in the next section, imported constitutional norms have also not fared well.

145. *Id.*

146. *Id.* at 163-64.

147. *Id.* at 161-62.

6. Constitutional Norms – More State Norms of Limited Utility

A. Constitutional History

1. The 1931 Constitution

The basic problem of a Western observer seeking to understand the role of a Constitution in Ethiopia is that Constitutions were not adopted largely to be effective, but for other purposes. The first Constitution in Ethiopia was adopted in 1931, under the sponsorship of Emperor Haile Selassie. It was based in part on the Japanese Constitution.¹⁴⁸ The 1931 Constitution was revised and superseded by the 1955 Constitution, which was drafted by United States jurists, and was influenced by the United States Constitution.¹⁴⁹

2. The 1955 Revised Constitution

The reasons for establishment of Constitutions in Ethiopia were different from those of a liberal society such as the United States. The revised Constitution of 1955 was adopted in part for reasons extraneous to the desire to implement its content. One reason was the desire to put the human rights provisions on a par with the Eritrean Constitution. The image which Ethiopia was projecting was one of backwardness. In short, the elaboration of rights became vogue, and like a new hat, everyone had to have one. From the viewpoint of the Ethiopian Empire in Addis, the Constitution also served the important purpose of declaring the Eritrean legal, judicial and other structures subordinate to Addis.¹⁵⁰

The Constitution of 1955 also served to consolidate the power of Emperor Haile Selassie in other respects. According to Professor Scholler, Emperor Haile Selassie was successful in reducing the power of traditional elites.¹⁵¹ The revised Constitution of 1955 was seen as a consolidating act of the Emperor's power,¹⁵² much as the Constitution of 1931 was a continuation and statement of imperial power. But as new power relations consolidated, a statement developed. The first half of the 20th century saw the birth of a new elite consisting of the army, the civil service, students, teachers, and

148. See Heinrich Scholler, *Ethiopian Constitutional Development*, JAHRBUCH DES OFFENTLICHEN RECHTS DER GEGENWART, 502, 528-530 (1976) (Contrasting Meiji Constitution with Ethiopian Constitution of 1931); Singer, *supra* note 47 at 78.

149. See Singer, *supra* note 47 at 78, n.16.

150. See Scholler, *supra* note 148 at 533-34.

151. *Id.* at 564.

152. *Id.*

workers organizations.¹⁵³ This new elite opposed the traditional elite. Emperor Haile Selassie proved himself either unwilling or unable to make real inroads into the power of the traditional elite to resolve power conflicts. The traditional elite may have been subordinate to him, but they exercised the power of putting on the brakes with regard to any serious land or tax reform.

With regard to the efficacy of the Constitution of 1955, one commentator has described that Constitution as basically not worth the paper it was written on because of its tenuous relationship to reality.¹⁵⁴ The political and human rights referred to were so qualified as to be meaningless.¹⁵⁵ The Constitutional organization of government structure bore little relation to the reality.¹⁵⁶ The Constitution has been called "nominal, semantic and unauthentic."¹⁵⁷ The basic values underlying the Constitution were neutralized by "traditional jural postulates and events and traditional practices outside the document's frame of reference."¹⁵⁸ Courts were reticent to invoke the Constitution to protect human rights against government interests.¹⁵⁹

Professor Scholler elaborates on this conclusion in a lengthy and incisive article published in 1976. His theme is that some "jural postulates" or grundnorms (Kelsen) were operative outside of the Constitutional framework and constituted contradictions or sources of tension between the premises of the revised 1955 Constitution and the existing order. These jural postulates were feudal in origin. First, was the idea of monarchy itself as having derived from the union of the Queen of Sheba and King Solomon which produced the first Emperor of Ethiopia, Menelik I. The tradition is that legitimate Emperors come from this line, and that the promises made by God to Israel devolved upon Ethiopia when the Jews rejected Christ. The Emperor is thus Elect of God, Conquering Lion of Judah, and rules as God's representative on earth, by divine right. The second postulate relates to the role of the Church. The Orthodox Church is an established Church, and the legitimacy of the Church and State are merged, inseparable, and symbiotic.¹⁶⁰

153. *Id.*

154. See Brietzke, *supra* note 41 at 271-72.

155. *Id.* at 272.

156. *Id.* at 271.

157. *Id.* at 272.

158. Heinrich Scholler and Paul Brietzke, *Law and Politics in Revolutionary Ethiopia*, VERFASSUNG UND RECHT ÜBERSEE 183, 186-87 (Quartal 1975).

159. *Id.* at 187.

160. Scholler, *supra* note 148 at 545-47; see text and notes at 6, 7, 8 *supra*.

Scholler elaborates on his theme by articulating six premises of the Constitutional development in Ethiopia from 1931-1974. Those premises are: (1) the strengthening of the traditional monarchy; (2) the modernization of administration through ministries; (3) the addition of a Senate and elected House; (4) the emphasis on the Rule of Law; (5) the affirmation of a judicial arena; and (6) enumerated human rights.¹⁶¹ The last five policies are seen as Western. The basic position is that these latter five, grafted on to Ethiopian tradition, did not take hold, and were neutralized whenever important conflicts with the pre-existing traditional grundnorms existed. Put less delicately, the Constitutions were neutralized, i.e. rendered a dead letter, whenever important conflicts with traditional norms arose. The judiciary was basically unwilling or unable to implement such norms as the human rights guarantees and the Rule of Law.¹⁶²

3. *The 1987 Constitution*

The 1955 Constitution was suspended by the Derg.¹⁶³ The Mengistu regime eventually replaced the 1955 Constitution with the 1987 Constitution.¹⁶⁴ There were similarities (and some differences) between the 1987 Constitution's economic system and the form of state, and the Constitution of the former U.S.S.R.¹⁶⁵ Basically, however, land was held in state ownership and the state took over many existing commercial enterprises.¹⁶⁶ The Constitution of 1987 never got off the ground. Even when promulgated in 1987, it was unclear whether the Supreme Court or the Council of State had the power to interpret it. Local judges indicated they were not sure they had the authority to act upon it. Moreover, many of the provisions of the 1987 Constitution were meaningless in or at odds with practice, and contained self-negation.¹⁶⁷ Perhaps, the Constitution of 1987 was designed to be aspirational, or worse, merely window dressing.¹⁶⁸

161. *Id.* at 548.

162. *Id.* at 549 (stating that the Ethiopian courts have taken "little or no advantage" of the Constitutional possibility of declaring government rules, acts, or laws to be unconstitutional). For discussion of beginnings of such attempts, see Paul and Clapham, *supra* note 43.

163. Fisseha-Tsion, *supra* note 32 at 129 (1955 Constitution suspended on September 11, 1974).

164. *Id.* at 131.

165. *Id.* at 146.

166. See Fisseha-Tsion, *supra* note 27 at 6, 8.

167. See Fisseha-Tsion, *supra* note 32 at 151-53.

168. *Id.* at 147, 151 (critics argue that the Constitution's enumerated rights and freedoms are meaningless); 152 (article 58 of the Constitution allowed negation of guaranteed rights, i.e., when necessary to protect the interests of the state); 152 (freedom of movement guaranteed but compulsory resettlement belies the guarantee).

4. *The Present Constitution*

The Transitional Charter is the current authoritative document, which provides for the making of a new Constitution. The present legal status of the 1987 Constitution is unclear. Any law contrary to the Transitional Charter is null and void.¹⁶⁹ Because the Charter only repeals laws inconsistent with it, it is arguable that human rights provisions, or other provisions of the 1987 Constitution are in effect. However, the practical answer is that because the 1987 Constitution was a product of the Mengistu regime, and anything that has that quality is reviled by the temper of the times, it would be impolitic to base an argument on its provisions.

a. Deeply Structured Societal Conflicts Curtail Efficacy of Western Constitutional and Other Norms

The basic problem with the transplant of Western norms is that these norms may fail to take when introduced into a non-Western arena. Western norms have frequently not fared well in Ethiopia, or elsewhere in Africa, and one comes away wondering why. Perhaps Professor Scholler's analysis provides us with some clues. Professor Scholler points out that these Western norms conflict with the power of traditional feudal elite in Ethiopia, the Church and the nobility. Feudalism involves the idea that the main productive resource, land, is owned by the emperor or king. In feudal England, the land would return to the king upon the death of the holder. Therefore, land ownership was limited to a life estate. Theoretically, the feudal system of Ethiopia was even more centralized than that of England because titles and offices could be revoked at the will of the emperor.¹⁷⁰ However, the reality may have been different.

Another variable is the ruler's state of mind with regard to the appropriate use of power. The ruler's attitude that power should be exercised personally is a key to understanding. Delegated authority was deemed demeaning and untraditional.¹⁷¹ Remnants of feudalism remained in the Parliamentary regime when local peasants returned former and current feudal lords to power.¹⁷² Land ownership retained its feudal character in that *corvee* labor was owed, and feudal payments for the use of land were continued.¹⁷³ Traditional

169. See NEGARIT GAZETA, No. 1, July 22nd, 1991, Part Five, Art. Eighteen.

170. See Scholler, *supra* note 148 at 520.

171. *Id.* at 523 (power exercised personally).

172. *Id.* at 525 (peasants may cast votes as lord requires).

173. *Id.* at 524-25.

feudal elites stand to loose power from modernization, progress and development.¹⁷⁴ The elites have good reason to resist development.

An example of the conflict between the traditional forces and modernizing forces is indicated by the experience with the Land Tax Proclamations of 1942 and 1944, enacted during the regime of Emperor Haile Selassie. The traditional forces allowed the law to be enacted, but were successful in preventing its implementation.¹⁷⁵ Thus, the forces for modernization (sometimes students),¹⁷⁶ were in continuing conflict and stalemate with the landowning elite and the Ethiopian Orthodox Church. Emperor Selassie's regime was unable to reconcile these forces, and it appears that any regime will have the same difficulty.

Both the Mengistu regime and the current regime continued the ownership of land under a form of socialism which provides continuity between feudalism and socialism. The modern state in Ethiopia may be seen as simply standing as a successor to the feudal rights of the emperors of Ethiopia. However, important changes, wrought by the regime of Mengistu, have weakened the traditional power base. The Church has lost much of its land, though it retains considerable spiritual power. The traditional aristocracy has lost much of its power base in land. Land reform, stalled and perhaps impossible under Emperor Haile Selassie's regime, was realized in part under Mengistu. These were achievements of the Mengistu regime, though the cost in terms of human life, violence and repression was excessive. The policies of the existing regime of Mr. Meles Zenawi remain to be seen.

Having reviewed some political history and analyzed legal structures, we now turn to a discussion of whether Ethiopia has a "legal system," the Rule of Law, and the implications of this for Law and Development.

III. ETHIOPIAN LEGAL CULTURAL: IMPLICATIONS FOR ANALYSIS OF LEGAL SYSTEMS, RULE OF LAW, AND LAW AND DEVELOPMENT

The ruling theory in the West, Positivism, gives us a definition of a legal system which will be tested as a model. This model is defined below in A-1.

174. See Schwab, *supra* note 1 at 27, 62-63, 184-85.

175. *Id.* at 47.

176. *Id.* at 27, 39, 62-63, 150-57, 185.

A. Does Ethiopia Have a Legal System?

The learned Professor J. Vanderlinden opens an article he wrote in 1966-67 after the Codes were introduced into Ethiopia with an intriguing sentence. "The main characteristic of the contemporary Ethiopian legal system is that it does not yet exist as such."¹⁷⁷ By contrast, Professor Sedler wrote, in 1967, that he found Ethiopia had accomplished a substantial start in the creation of a modern legal system. Professor Sedler notes that the Ethiopian Constitution of 1931 set out that judges should decide according to law, which was an important beginning. A state court system had developed, and Western Codes had been enacted, though serious problems of implementation remained.¹⁷⁸ To answer the question of whether Ethiopia has a legal system it is necessary to define a legal system. In the section that follows, I conclude that according to Legal Positivism, it is uncertain whether Ethiopia has a legal system. Also, according to the natural lawyer orientation of Professor Lon Fuller, it is doubtful that Ethiopia has a legal system. But according to other definitions, such as those of Professor Poposil, Ethiopia meets the criteria for having a legal system. Suspicions are activated where these varying results occur and we may legitimately ask if the definitions are not value-laden and culturally biased.

1. Modern Positivism Indicates Ethiopia Has No Legal System

In the West, Positivism is the prevailing mode for conceptualizing legal systems presented by officials and professors. However, in United States academic circles, Positivism exists in terrific tension with competing explanations. There exists so much controversy that in a recent decision on abortion, three Supreme Court Justices openly argued that the legitimacy of the legal process was at stake if the development of law were not given a greater appearance of coherence.¹⁷⁹ The assault on Positivism by American Legal Realists during the 1920's and 1930's has been revived, post-1977, by the Critical Legal Studies Movement.¹⁸⁰ It is startling to read that even a critic of Realism and Critical Legal Studies can conclude that there is a consensus among the American academic community, left, right and center, that at least as regards Constitutional Law, there can be

177. See Vanderlinden, *supra* note 52 at 250.

178. See Sedler, *supra* note 97 at 634-35.

179. *Planned Parenthood of S.E. Pa. v. Casey*, 112 S.Ct. 2791, 120 L.Ed 2d 674, 707-09 (1992).

180. See John Van Doren, *Finance Capital in Uganda: A Collision of Perspectives of Marxism and Capitalism*, 9 DICK. J. OF INT'L L. 231, 235 (1991).

no objective basis of morality discoverable from which to project an interpretive strategy.¹⁸¹

The exposition of texts, constitutional or otherwise, is often indeterminate. Indeterminacy analysis strikes at the heart of Positivist claims that by and large, a legal system is deemed to exist only if there is a discernable rule structure which determines rights and duties. If the cases, codes, constitutions, and texts are indeterminate, as this author believes, and no undisputed moral standards exist outside the text, formalists such as Positivists, talking about a Rule of Law have a problem! According to modern Positivist definitions, Professor Vanderlinden is correct: Ethiopia probably fails the "legal system" test. Viewed from another perspective, however, it is the definition of modern Positivism that fails and is revealed as value-laden, mono-dimensional, and culturally biased.

In Ethiopia, the Positivist model for a legal system is not realized because as previously discussed, much of the conduct in the society is not governed by official norms. The prevailing norms are customary or traditional. Official norms are rules and precepts generated through official state organs such as the President, ministries, parliament, the courts and so on. Thus, while state norms exist in profusion, it is not clear that they are taken seriously, particularly with regards to the imported norms. The governing norms may often be unwritten and are not derived from state sources. Thus, there are enormous gaps between the official norms and the actual norms governing the conduct of society. Another way to look at these gaps is, in terms referred to by Ehrlich, as a gap between the positive law and the living law.

The question for Positivists becomes, how much of a gap can there be, consistent with the presence of a legal system? For example, even the indigenous-based norms (the public law of Mengistu), did not affect the lives of large rural areas which are defined as those areas one half day's walk from the nearest all-weather road.¹⁸² Yet, the Ethiopian daily life is not chaotic. Society functions reasonably well on a day-to-day basis. Citizens know what is expected of them. These expectations are largely realized despite the lack of any strong demonstrable relation between many official norms and the behavior actually required. In significant instances, it is not that the official norms were subject to erosion, but that the norms were never operative, and in some instances never intended to be operative.

181. See Graham Walker, *MORAL FOUNDATIONS OF CONSTITUTIONAL THOUGHT*, 10, 13-17 (Princeton University Press) (1990) (constitutional scholars make prescriptive assertions but flee from asserting objective moral foundations).

182. See Fisseha-Tsion, *supra* note 27 at 11.

The preceding discussion would lead some jurists to deny that such a regime had a legal system.¹⁸³ Professor H.L.A. Hart, the Oxford Positivist, might deny that a regime with a low correlation between official norms and functionally operative norms has a legal system. It is fundamental to Hart's Positivism that the rules that govern society be derived, to a significant extent, from the official norm structure. Law is to be separated from custom and morality. Officially derived rules are to be applied by decision makers because they are the rules of the society, not necessarily because of their inherent fairness. Officially derived rules may or may not be in accord with the custom and morality of the society, but must be applied regardless.¹⁸⁴

Hart defines a legal system as a system which is composed of a union of primary and secondary rules. Primary rules are those rules which determine disputes and guide citizen conduct. One analogy is that the primary rules of a legal system are like the rules in a rule book governing a chess game.¹⁸⁵ The most important secondary rule is the rule of recognition. The rule of recognition serves to identify sources of primary rules. In our analogy, the rule of recognition would be that which identified the rule book as the source of primary rules governing the chess game. Hart argues that a legal system has a rule of recognition, a social rule that makes a reference to sources of primary rules.¹⁸⁶

Suppose that, in our chess analogy, some of the rules in the rule book are not regarded seriously by officials. The rule book contains some indigenous rules and others that are foreign imports placed there to give the local chess game the appearance of progressivity without the substantive burden of the silly rules imposed by foreigners. Just to make matters even more interesting, sometimes officials use the foreign rules, or at least cite to them. A Hartian could point out that Hart did say that officials may have the "internal point of view" as regards the source of the rule of recognition or at least, an attitude that the secondary rules are acceptable. But, arguably, officials in Ethiopia have not had the internal point of view with regard to at least the non-indigenous based norms. There is evidence that

183. See John Van Doren, *Theories of Professors H.L.A. Hart and Ronald Dworkin—A Critique*, 29 CLEV. S. L. REV. 279, 283-85 (1980). See, e.g., H.L.A. Hart, *THE CONCEPT OF LAW*, 92 (1961) (rule of recognition as source officially referred to); 111-12 (rule of recognition must be accepted by officials as a common standard of correct judicial behavior); 140 (rules have a core of settled meaning). See also John Van Doren, *Death African Style: The Case of S.M. Otiemo*, 36 AM. J. COMP. LAW 329, 335 n.49 (1988).

184. *Id.*

185. See Van Doren, *supra* note 183 at 279-284.

186. See note 183 *supra*.

Ethiopian officials have not really accepted Western norms underlying the imported legal system. This is but another reason that a Hartian could say that Ethiopia does not display the requisites for a legal system, which is so much the worse for the Positivist criteria.

Where, as in Ethiopia, officials who make adjudicatory decisions may not justify decisions or where the sources officials refer to in justifying decisions may bear little relationship to actual norms used in making decisions, the Hartian system would be of very limited utility. Equally significant, there is a confusing array of norms officially promulgated which are not used at all. Perhaps it is more accurate to describe the situation as one in which there is an indefinite pattern of use of sources of official norms. There are comprehensive codes and there have been constitutions referred to in some circumstances as an official justification for decisions, but ignored in other situations. The *Nagarit Gazeta*, where law emanating from the state is published, cannot be the source for the Ethiopian rule of recognition because laws set out there are not necessarily operative norms. A modern Positivist would have difficulty finding a legal system in Ethiopia.

Professor Lon Fuller, who wrote from a Natural Law perspective, argued that there may be no legal system where Rex (an imaginary king) promulgates a set of legal norms but then decides disputes on other grounds. Professor Fuller stressed that the concept of law necessarily involves communication between officials and the people. Professor Fuller referred to this as an aspect of the "internal morality of the law." That which masqueraded as law was not in fact law unless the criteria he enumerated were observed.¹⁸⁷

In analyzing the early regime of the Derg, later dominated by Haile Meriam Mengistu, critical legal observers found that the Derg displayed all the characteristics which negate a legal system, namely eight characteristics which Fuller refers to as the internal morality of the law.¹⁸⁸ These factors are described as excessive specificity, incommunicativeness, retroactivity, incomprehensibility, contradiction, unfulfillable demands, capricious change, and irrelevant administration. Professor Fuller indicated that it was important to have a correlation between official norms and governing norms in order to aid communication between the ruler and the ruled. Thus, perhaps Fuller might not be troubled if everyone knew that the official norm structure was there for other reasons, such as symbolism, or the creation of a progressive appearance. Professor Fuller stressed

187. See Lon Fuller, *THE MORALITY OF LAW*, 2, 38-39 (1969) (supporting this paragraph).

188. See Scholler and Brietzke, *supra* note 158 at 197.

the importance of official norms correlating substantially with enforced norms because of the importance of citizens being able to plan behavior. But if everyone either knows that the officials norms are inoperative or has no knowledge of them at all, Fuller's communicativeness criteria may not be a problem.

My point is, however, a variation of this theme: At least since the 1930's Ethiopia's lawmakers have had communicative intent only in specific instances in their lawmaking. Nor am I here concerned with the lack of communicativeness that comes from vagueness. My concern is the need for a scorecard, so to speak, as an aid in separating prevailing norms from the mass of competing norms. One starting point is to separate non-functional norms, often foreign, adopted norms, whose purpose was symbolic or propagandistic rather than functional.

The Codes were aspirational in the sense that they are designed to alter social practices rather than to reflect them. But the problems of such an approach for the Positivist paradigm is serious. It is as though someone said, "Here is the rule book for chess, but please note some of these rules are aspirational; that is, it is improbable that officials will pay any attention to them in the near future. Some of the rules conform to existing customs (e.g., those dealing with marriage and divorce), but others do not conform.¹⁸⁹ Have fun figuring out which are which."

2. *Other Definitions of Legal Systems – Professor Poposil*

Definitions of what constitutes law and a legal system abound. Professor Poposil, a specialist in legal anthropological studies, isolates four factors—the presence of which denote the existence of a legal system. These factors are: (1) adjudication or mediation; (2) sanctions; (3) obligations or Hoffediani rights, and (4) future applicability of the norms established through conflict resolution. Poposil stresses only those rules or norms arising out of conflict resolution, thus de-emphasizing rules in the abstract. Poposil makes no effort to separate law and morality, custom and law, or adjudication and legislation. By Professor Poposil's criteria, virtually all societies have a legal system, which was no doubt his intention.¹⁹⁰

Professor Singer, a close and able observer of the Ethiopian legal culture, defines law as does Professor Poposil: (1) an effective authority which need not be governmental, (2) social attitudes

189. See Beckstrom, *supra* note 100 at 568-69 (traditional marriage and divorce law incorporated in Code).

190. See Leopold Poposil, *THE ETHNOLOGY OF LAW*, 15-22, 27, 30-51 (1978).

considered to be law by the society, (3) affected persons recognize their rights and duties, and (4) sanctions are present.¹⁹¹ Singer refers to the Amharic law as customary law, but notes that the Amhara did not regard their law as customary since it formed the basis of the law of the new empire.¹⁹² If this definition is accepted, the Ethiopian legal culture displays the relevant attributes of a "legal system."

3. Rule of Law

Positivism generates an idea of a legal system in which the system is characterized by rules which are stable. The companion concept in the common law is *stare decisis*, which is the policy that judges should follow previous cases because of a rule of social acceptance by officials, and not necessarily because the previous cases are inherently correct.

The Rule of Law is a concept that may be related to Positivism. While not coincident, Positivism may be seen as a desirable companion to the Rule of Law. A basic idea of the Rule of Law is that rulers are bound by an objective standard and may not change fundamental aspects at their convenience and uncontrolled discretion. The Rule of Law presupposes a kind of Positivism, or at least Formalism, i.e., there are rules that pre-exist their application. These rules are not subject to major application problems and are therefore stable and uniform in such a way as to be capable of binding those who rule. These rules may be changed by methods designated by the system.

At least implicit in the Rule of Law is the notion that citizens will be protected against arbitrary action by government. But, if the meaning of the Rule of Law is defined by referring to some pre-existing determinate rules which assertedly govern the conduct of rulers, and texts purporting to contain or engender such rules are not determinant, what can this term mean? Despite the doubt cast on the existence of the Rule of Law by Legal Realists, the term Rule of Law still has efficacy. Decision makers may observe a self-imposed limitation, as a part of their tradition, whereby they act as though they are bound by an agreement regarding interpretation and conventions. Such a self-imposed limitation may be extremely important. The acculturation of potential legalists—the learning of the catechism and traditions of restraint governing its exercise—is an extremely important method of social control. But should we pretend that the Rule of Law means more than that?

191. See Singer, *supra* note 22 at 311 n.15.

192. *Id.*

Professor Brietzke states that the Rule of Law was not present in Ethiopia under the Emperor Haile Selassie.¹⁹³ Commentators on the Ethiopian legal culture observe that the idea that inflexible rules exist which govern disputes is not traditional. The *Fetha Negast* was a guide only. The fact that the Ethiopian emperor could alter any court judgment is taken as evidence that a Rule of Law did not exist.

The concept of the Rule of Law is ambiguous. It may refer to the idea that there is a fundamental law, such as a constitution, which rulers consider to be controlling over their lawmaking. Or it may refer to an idea that there is a set of rules that the decision-makers adhere to over which they have no discretion. "Rule of Law" may also be used to refer to law as an instrument to prevent government from dominating citizens and to promote liberty through enjoyment of rights, and thereby add to the quality of life.¹⁹⁴ Law as a device to govern governors could theoretically be incorporated into all legal systems.¹⁹⁵ Such limitations include guarantees of checks on administrative action that is arbitrary, checks on the executive, and on other organs of state. In this respect, it is not clear that this element has been or will soon be present in Ethiopia.

Let us consider further the argument that Ethiopia did not have the Rule of Law. Ethiopian observers could claim that the Rule of Law is whatever the emperor decrees is the Rule of Law. Is there a contradiction here? Can you have a meaningful master rule of recognition—a "secondary" rule that refers to a source of law which is indeterminate? My conclusion is no, that such a master rule of recognition—the rule that points to a source or sources of rules—could not be one which referred for example, to the telephone book.

Writings may provide substantial aid to the notion of a Rule of Law. However, legal history has revealed much manipulation of writings. Writings are not a cure-all. It is instructive to stress again that the most fundamental aspects of the British constitutional system are conventional, customary, and unwritten.

It is not clear that even the United States legal system can meet the Rule of Law criteria. The traditional approach in the United States is that the Constitution governs. If one were to say that the Constitution is a guide, but that traditional justice and equity or changing conditions may modify it, would that be a significant change of Constitutional jurisprudence? American Formalists would and do fight hard to avoid that characterization. In fact, the Constitution is sufficiently flexibility that it can be, and is, transformed all

193. See Brietzke, *supra* note 41 at 277.

194. See Paul and Clapham, *supra* note 43 at 615.

195. *Id.*

the time by a combination of legislative, executive, and judicial acts. What is left, is a set of imponderables: the source and legitimacy of the changes.

Any attempt to describe the United States constitutional system rigidly, in terms of Positivism or the Rule of Law will fail. There may be value in acculturating decision-makers in the ethic that they have a moral duty to apply rules. Perhaps it is better simply to enumerate the values one holds, such as, democracy, a republican form of government, and human rights. One could stress the need for a proper balance between predictability and communication of the standards to be applied, and the need for flexibility and change which cannot be anticipated in fixed texts. If there were a homogeneous society with shared values, the writings governing it need not be more than suggestive.¹⁹⁶ The ideal of the Rule of Law, that government conduct is controlled by law, is a valuable one. However, no system of law can fully prescribe what does or should occur in the future. All that we can do honestly is let people in on this secret, and seek to convince decision-makers of the value of traditions leavened by the need for change.

In summary, there does not seem to be a master rule of recognition in Ethiopia which ranks potential sources of law as required by Professor Hart in his description of a legal system. For example, during the Mengistu period, the grundnorm or master rule of recognition might be said to be "Ethiopia Tikdem" (Forward Ethiopia). But the phrase was so vague as to be meaningless.¹⁹⁷

In Ethiopia, prevailing norms are often customary and unwritten.¹⁹⁸ Professor Hart refers to a situation in which there are no rules of change, adjudication and recognition as "primitive." Hart may have indicated that a regime with oral customary rules may not have a rule of recognition, a necessary component of a legal system. Hart may also have concluded that a regime in which customary law governed without official determination that it was authoritative did not have a legal system. Finally, Hart would have a hard time finding a legal system under his criteria where there was a huge gap between official norms and the operative norms which are in Ethiopian customary norms.¹⁹⁹ In this context it is ironic that the

196. See Mark Tushnet, *The Red, White and Blue*, 317 (1988).

197. See Scholler and Breitzke, *supra* note 158 at 194, 198.

198. See section II, B *supra*.

199. See Hart, *supra* note 183 at 89-93; Van Doren, *supra* note 183 at 279-82 (supporting this paragraph).

English Constitution itself is customary and "unwritten,"²⁰⁰ not to mention American constitutional practice.

The Positivist John Austin stresses that law is the command of a sovereign backed by force. Professors Scholler and Brietzke described the Mengistu state and its predecessor as exemplary of the Austinian command Positivism: the orders of a sovereign gunman backed by force.²⁰¹ Such a definition is helpful, but it cannot avail modern Positivists because they strenuously reject it.²⁰²

Finally, Professor Poposil's definition is the only one that clearly embraces the Ethiopian case, and accommodates the idea that Ethiopia has a legal system.

B. Law and Development: Is a Western Legal Model Necessary for Development?

1. Law and Development

Law and Development may be defined as a set of legal propositions which produce decisional regularity, and which are thought to be preconditions to economic development.

Some commentators stress that stable rules with consistent results are advisable in the promotion of economic development. Law and Development criteria then may presuppose a kind of Positivism similar to the Rule of Law in that there are rules, and these rules should be observed, i.e., officials may not disregard them at will. A dominant theme of Law and Development literature is that Western legal structures are a necessary, or at least a desirable component of economic development. Thus, it does not appear that just any set of norms will do. While Positivism is consistent with any set of norms, Law and Development as linked to Rule of Law appears to incorporate Western norms of limited government, civil rights, and market economy notions of property and contract.

But the idea of stability and uniformity is only a part of the problem relating to development. First, the importance of a legal structure to capitalism can be overstated. Business operates without recourse to legal sanctions in many instances. Second, change, flexibility and ad hoc adjustment to variable fact patterns are also important components. Moreover, it may be that the content of rule

200. See David Yardley, *INTRODUCTION TO BRITISH CONSTITUTIONAL LAW*, 3-7 (6th ed., 1984).

201. See Scholler and Brietzke, *supra* note 158 at 186, 198 (The capricious orders of a crazy despot may be law according to Austin, but if so, so much the worse for his definition.)

202. See Peter Mirfield, *In Defense of Modern Legal Positivism*, 16 *FLA. ST. U. L. REV.* 985, 991 (1989).

norms is more important than the notion of uniformity and stability. Uniformity and stability in a socialist system may not constitute an effective attraction for capital. Alternatively, considerable diversity of legal norms may not be inconsistent with economic development. This is evidenced by the economic development despite differing laws of the United States, and in the nations comprising the European Union. However, if the content of law is subject to continuous change of a kind that threatens capital investment and presents a continuous erosion of uniformity and stability, negative effects on development may be felt.

Commentators have varied considerably in their assessment of whether the imported Western legal system is desirable for economic development in Ethiopia. Professor Sedler has written an analysis of the Ethiopian system from the standpoint of development.²⁰³ Professor Sedler's analysis bears a remarkable correlation with the Positivism of H.L.A. Hart. Professor Sedler names the following attributes as necessities of a developing society's legal system: (1) a well-developed body of law and established institutions that declare the law; (2) a known hierarchical relationship between sources of law; and (3) determination of identity of the organs of government that promulgate laws.²⁰⁴

The thrust of these criteria appears twofold: first, there needs to be a degree of certainty with regard to the question of who determines law according to what sources, and secondly, the ranking of those sources. This incorporates some of Professor Hart's Positivism and Max Weber's notion that capitalism requires a security of expectations. In a developing society, Sedler continues, there must be a planned and structured development rather than an evolutionary one.²⁰⁵ Presumably, this is because the luxury of evolutionary change is one that developing countries cannot afford. Sedler seems to contrast a slower evolutionary change characteristic in the capitalistic West, and a planned catch-up which developing countries may be using.²⁰⁶

Sedler indicates that customary law, because of its variation from tribe to tribe, impedes economic relationships. Customary law should be relegated to a lesser place,²⁰⁷ because customary law is unwritten and therefore uncertain and difficult to ascertain.²⁰⁸ This

203. See Sedler, *supra* note 97.

204. *Id.* at 562-64.

205. *Id.* at 564.

206. *Id.*

207. *Id.* at 578, 588.

208. *Id.* at 588.

criteria appears as an analogue to Hart's definition that the rule of recognition identifying sources should be written. Land tenure in its customary form may impede economic relationships and modern productive practices.²⁰⁹ Land held in customary title is often held for the benefit of a group and alienability is not a functional concept. Moreover, uncertainty of title may be present and also prevent free alienation, as well as the development of a cash economy.²¹⁰ Sedler argues that adaptation to the Codes is the price for economic development.²¹¹

Professor Brietzke takes a middle position with respect to the extent to which the Codes and other legal structures might lead to development. He appears ambivalent about the Codes. On the one hand, he persuasively argues that the Codes are at such a quantum variance with Ethiopian societal structure and customs and practices, that they will not accomplish a development purpose.²¹² On the other hand, Professor Brietzke agrees with the basic presuppositions of the Sedler analysis: (1) that development, predictability and uniformity of law are required; and (2) that the existing traditional structure is inadequate in both those respects. What Professor Brietzke appears to advocate is a code, but one that more closely resembles the traditions of the people.²¹³

However, others are less sanguine about the effect of codes on development.²¹⁴ One Ethiopian commentator questioned the necessity of Western-oriented codification for development and suggested that miracles of social change will not come from the Codes. He argued that it was more important to alter the forces of tradition and accompanying attitudes of the people.²¹⁵ However, advocates of change through law might argue that legal changes may accomplish social changes.

Professor Beckstrom finds correlation between Western law and social practices and economic development to be problematic. The nuclear family, as opposed to the extended family, is supposed to be a necessity to promote mobility of the labor force, and thus has been held to be an important institution aiding development.²¹⁶ Beckstrom questions whether a change from extended to nuclear

209. *Id.* at 588-89.

210. *Id.* at 589.

211. *Id.* at 634-35.

212. Brietzke, *supra* note 40 at 153.

213. *Id.* at 156 (arguing for a Code that is more in keeping with customary law).

214. *See* Habte-Selassie, *supra* note 30 at 118-120.

215. *Id.*

216. *See* Beckstrom, *supra* note 90 at 697-98.

families is a necessary precondition to development in Africa and whether such a change is feasible.²¹⁷

Neither is Professor Vanderlinden particularly hopeful about the relationship between the imported law and hoped for economic development. Professor Vanderlinden identifies major differences between the political, social, and economic conditions in Ethiopia and those in both France and Switzerland. Vanderlinden concludes that the relevance of French or Swiss legal doctrine to contemporary Ethiopia is unclear.²¹⁸

IV. CONCLUSION

The formal aspects of Rule of Law, Positivism, and Law and Development can all be distilled to one idea—preservation of the stability of any status quo. The theories of Positivism and the Rule of Law can support important values: for example, democratic values and security of expectations, if those are the values in the regime employing Positivist approaches. But stability is not an end in itself. The not-so-hidden agenda of exporters of the Rule of Law notion is the promotion of democratic and capitalist values. In the context of Law and Development, the idea that stability is needed for development may become a self-fulfilling prophecy. Those who have capital are often Western and capitalist-oriented and require legal structures to be familiar to them. In requiring legal structures to be familiar, these capitalists are requiring legal structures to be capitalistic. Western (and other) investors require that official discretion be limited so that there can be no change of the rules. A circularity is created. The certainty associated with Western-based Codes or legal-political values is required for development because Western investors require it.

As mentioned above, Positivists stress written rule norms which emanate from the state and they insist that these rule norms must be taken seriously by officials. Definitions of a legal system applied to Ethiopia appear to be highly normative Positivist ones which are culture-specific to the West. Positivist dogma purporting to define a legal system is not descriptive of the functioning legal culture in Ethiopia. Hence, Positivism and its delineation of a "legal system" are of little help in understanding or describing Ethiopian legal culture.

Moreover, it seems unfair to withhold recognition of the existence of a legal system in Ethiopia when it is doubtful that the Rule

217. *Id.*

218. See Vanderlinden, *supra* note 52 at 263.

of Law exists in the West. One serious objection to legal Positivism is that the United States may not have a "legal system," if Positivist criteria are necessary. For example, very few commentators think Positivism describes what occurs in United States constitutional jurisprudence. While court decisions render broad constitutional norms specific, no one seems to regard *stare decisis* as particularly descriptive of reality in constitutional adjudication.

Thus, the basic argument is over values, not shibboleths, such as the Rule of Law, which are code words for certain Western values. The Rule of Law includes the idea that written, pre-existing, state-imposed rule norms bind decision makers. My argument is that no text, constitution, or civil code is adequate to insure that rulers will consider themselves bound by pre-existing law. A society desiring a Rule of Law, as it is used in Western literature, may be better off with some writing, but the essential element is the socialization of officials and citizens with respect to those values which constitute Western culture.

The consideration of the Ethiopian case raises more questions than it answers in the context of Law and Development. While Positivist values may be argued to be a precondition to development, there are several unknowns. Positivism, with its emphasis on rules, stability and uniformity, may have a legitimate role in the development process. However, there are other qualities which, although discordant with Positivist values, make desirable contributions to the development process. Examples of such qualities include the flexibility to experiment and adapt to change and the idea that there is more than one way to achieve development. Development requires a balance between stability and change; capitalism appears in several forms, and the appropriate balance is not always known in advance.

In summary, this piece has made three major points. First, the prevailing mode of exposition of law in the West, Positivism, does not capture the phenomenon of the Ethiopian legal culture. The proliferation of rules promulgated by the state in the form of Civil Codes and Constitutions were never intended to be effective, so of what use is a rule of recognition referring to them? Second, admittedly, the Rule of Law is an important tradition, when used in the context of some law that binds rulers and which guarantees the citizens rights against the government. It is not clear, however, that writings are capable of preserving it. The idea that there is a government of laws and not of persons can help prevent officially-exercised discretion which would destroy important values, but the text of constitutions, such as that of the United States, cannot insure this result by itself. Much distortion of the reality of constitutional and civil code adjudication occurs in order to preserve the myth of a

Rule of Law. Third, modern Positivism is designed largely to legitimate the role of judges in a democracy and confine them to a ministerial role. That doctrine fits nicely with the idea that judges are not elected, and should defer to the elected Parliamentary body by applying rules because they are there. However, in Ethiopia, the judiciary does not enjoy legitimation by a strong tradition (with the possible exception of the Chilot). Therefore, the Positivist system, as a justification for the judiciary, is of less relevance in Ethiopia. Of what use is a rigid judicial positivism in a repressive regime, such as the Mengistu regime, where, arguably, judges should have the flexibility to avoid harsh edicts issued by the executive and legislative organs?

Positivist definitions of a legal system have been revealed as culture-bound, and at best, culture-specific. The idea that a legal system must exhibit written primary rules which can be derived from a rule of recognition suffers from two major problems in the context of Ethiopia (and elsewhere). First, this definition is culture-bound, or a truism. Any decision-maker who refers to any source will fulfill the initial feature of the rule of recognition. The problem is that while a decision-maker might refer to the Ethiopian Civil Code, or to a Constitutional provision, much of the Civil Code is not observed. Therefore, it is a misleading reference. Second, Positivism fails to capture the difference between official indigenous norms, which may be taken seriously, and official imported norms, which may be there for reasons other than to effect their observation.

The acculturation of an ethic that judges are not to play an overtly creative role may be laudable where there is a tradition of civil liberties. Perhaps the myth that judges do not play a creative role is a necessary ingredient to maintain legitimacy where judges are engaged in decision-making. However, it is not defended on that ground. In an effort to avoid subjectivity, or the appearance of subjectivity, Positivists put forth this myth as objective description. The legal arena cannot, however, be explained in this manner without unacceptable distortion.

Moreover, the exclusion of unwritten customary law from a definition of a legal system is nothing more than Western cultural bias. If stability is all that is desired there may be as much in customary norms as in state-directed norms. Finally, the idea of a rule of recognition presupposes that decision-makers regard state imposed norms with more or less equal seriousness. This is another Western cultural bias.

Law and Development approaches involve consideration of the relationship between the legal system and economic development. Some commentators using this perspective have reviewed the

Ethiopian situation and found it wanting. These commentators have referred to the lack of the Rule of Law, i.e., the lack of a set of rules that cannot be changed arbitrarily by decision makers. However, the history of constitutional law in the United States reveals that the United States Constitution can accommodate just about anything. The Constitution is valuable primarily as a symbol, like the flag, which evokes an allegiance and a legitimizing emotion no matter how out of kilter the practice and the legitimizing theory.

Law and development advocates or commentators may adopt Positivist tenets: that there should be stability, a hierarchy of norms and rules that govern rather than serve as general guides. However, it is clear to advocates of these views that not just any norms will do. It becomes necessary to identify the substantive content of the desired norms, and thus to recede from the purely formal criteria of Positivism and the Rule of Law. At this point, one begins to make conscious value judgments about the desirability of aspects of private property and the contract regime of the Western capitalistic model. Moreover, because those who deploy capital are primarily those who hold to some version of capitalism, the need for "civil codes" embodying those values becomes a self-fulfilling prophecy. Human rights provisions may accompany the other requirements of capitalist investors. The demand for human rights provisions may be motivated by humanitarian concerns or by the self-interested fear that private rights are in jeopardy without curtailment of the power of the state through "civil society." This serves a particular capital export modus which is now predominantly capitalist in orientation.

This author leaves the question of whether this produces a desirable situation for another day. What is to be stressed is that the talk about Positivism and its companion concept of the Rule of Law contains mythology, is deceptive, and, while purporting only to describe, involves value judgments that may be culture-specific. Thus, Positivism and the Rule of Law may be mere ideologies which are not practiced even where their virtues are extolled. Although, stability gained through strict interpretation of writings protects important values in the West, ultimately, it is tradition and socialization which protect those values, not strict interpretation of writings.

It is appropriate to teach decision-makers about values, or about choosing between conflicting values. Can we not let everybody else in on the secret? If the "Rule of Law" means there is a concept that government is limited, that is certainly an important concept. Writings can play a part in that concept, particularly where traditions of limited government are not customary. However, no writing of any sophistication can insure the result of limited government.

It is not enough to say: "Respect writings." It is the content of the writing that matters. No writing that will not become quickly outdated can supply criteria except in a most general and conflicting way. We are left with a plea that disseminators of Positivist and Rule of Law ideologies become more candid about their value preferences and directly promote those values focusing on inculcation rather than hiding behind various phrases with concepts not followed even where they originate. Would it not be better to drop the references to the Rule of Law and directly promote Western values such as human rights and the security of expectations for investors? Continued propagation of mythology carries with it the risk that some day the people will find out and hold the myth perpetrators accountable.