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Traditional Criminal Procedure in Ethiopia

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"No modern legislation which does not have its roots in the customs of those whom it governs can have a strong foundation."

Haile Sellassie I, Emperor of Ethiopia

INTRODUCTION

In the decade 1955-1965 the Ethiopian government completely revolutionized its legal system by promulgating comprehensive legal codes and a new constitution.[1] These laws have a predominantly Western flavor, and seem to bear little relation to the traditional patterns of life which still prevail in the Empire—one of the least "developed" areas of Africa. This state of affairs has led some to

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The citation is from *Fetha Nagast* (Eng. transl. by Abba Paulos Tzadua; ed. by P. Strauss, 1968), Preface, p. v. [Cited hereafter as *Fetha Nagast*].

1. The codification history is reported in Vanderlinden, "Civil Law and Common Law Influences on the Developing Law of Ethiopia," *Buffalo L. Rev.*, vol. 16, p. 250. Literature on the codification includes David, "Civil Code for Ethiopia," *Tulane L. Rev.*, vol. 37, (1963), p. 187; David, "Les sources du Code civil éthiopien," *Rev. int'l de droit comparé* (1952), p. 497; Singer, "Modernization of Law in Ethiopia: A Study in Process and Personal Values," *Harv. Int'l L.J.*, vol. 11 (1970), p. 73; J. Graven, "Vers un nouveau droit pénal éthiopien," *Rev. int'l de criminologie et police technique* (1954), p. 250; and other sources cited in Vanderlinden, "Outline of a Bibliography on Ethiopian Law," *Journal of Ethiopian Law* (hereafter *J. Eth. L.*) vol. 3 (1966), pp. 256, 273 ff. *passim*, supplemented in *J. Eth. L.*, vol. 4 (1967), p. 433. The Criminal Procedure Code of 1961 is discussed in P. Graven, "La nouvelle procédure pénale éthiopienne," *Rev. pénale suisse* (1963), p. 70; P. Graven "Joinder of Criminal and Civil Proceedings," *J. Eth. L.*, vol. 1 (1964), p. 135; P. Graven, "Prosecuting Criminal Offences Punishable only upon Private Complaint," *J. Eth. L.*, vol. 2 (1965), p. 121; Current Issue, "Criminal Appeals," *J. Eth. L.*, vol. 1 (1964), p. 349; Current Issue, "Conditional Release," *J. Eth. L.*, vol. 2 (1965), p. 539; Fisher, "Some Aspects of Ethiopian Arrest Law: The Eclectic Approach to Codification." *J. Eth. L.*, vol. 3 (1966), p. 463; Fisher, "Involuntary Confessions and Article 35, Criminal Procedure Code," *J. Eth. L.*, vol. 3 (1966), p. 330, and S. Fisher, *Ethiopian Criminal Procedure* (1969). The last-named work is hereafter cited as Fisher (1969).

characterize the new codes as "fantasy law," which may serve to put a modern "face" on the country but, at least for some time to come, will not have any serious impact on the conduct of its affairs.[2]

Ethiopia's policy in regard to customary law does seem to have been remarkably negative. The codifiers apparently made no attempt to review existing written sources on the customary legal systems in operation throughout the Empire, much less to initiate or encourage systematic studies to supplement the scanty information available. Post-hoc justifications of this policy have been published by some of the code drafters as well as by scholars. They range from denial that customary law really existed in Ethiopia, to negative comments on its changeability, lack of uniformity, incompleteness, obscurity, and low status. These commentators also point out that some customs have been incorporated into the new laws, or otherwise permitted to operate within the new legal framework, that uniformity of laws is necessary and desirable for a country as heterogeneous as Ethiopia, and, finally, that the abandonment of custom is not a serious worry because for a long time to come the codes will not be applied in large parts of the Empire.[3] These circumstances raise two important questions: first, what *was* "the customary law" of Ethiopia which the codes changed, and, second, how have the new codes changed it, both "on paper" and in practice? In this article we shall attempt to answer only the first of these questions, with regard to the law of criminal procedure. Drawing mainly upon scattered secondary sources,[4] we shall attempt to construct a model of Ethiopian

2. Schiller, "The Changes and Adjustments Which Should be Brought to the Present Legal Systems of the Countries of Africa to Permit them to Respond more Effectively to the New Requirements of the Development of the Countries," in A. Tunc (ed), *Les aspects juridiques du développment économique* (1966). See also Allott, "The Unification of Laws in Africa," *Am. J. Comp. L.*, vol. 16 (1968), pp. 51, 52, 59, describing the phenomenon as "phantom law."

3. Cf. David, "Sources of the Ethiopian Civil Code," *J. Eth. L.*, vol. 4 (1967), pp. 341-44; Sedler, "The Development of Legal Systems: The Ethiopian Experience," *Ia. L. Rev.*, vol. 53 (1967), p. 562, 567-68; Krzeczunowicz, "Code and Custom in Ethiopia," *J. Eth. L.*, vol. 2 (1965), p. 425.

4. The present writer has primarily relied on the following sources in attempting to reconstruct "traditional" Ethiopian criminal procedure:

a. Secondary materials in English, Italian, French, and Amharic in the Ethiopian collections at the Institute for Ethiopian Studies and the Law Faculty Archives at Addis Ababa, the British Museum in London, the libraries of the Harvard and Boston Universities, and the Library of Congress. Italian and Amharic materials required the use of translators. Most of the materials were "travellers reports," which are difficult to use because their authors frequently did not distinguish between what they personally observed and what they heard (or read) about. Because of the possible pyramid effects of rumormongering, it is just possible that a "widely reported" phenomenon was actually observed, or mis-observed, only once. In an effort to keep the record clear, we have tried to cite differing or duplicate secondary accounts in detail.

customary criminal procedure. This model will hopefully provide some basis for future research assessing the Ethiopian Criminal Procedure Code of 1961[5] in the light of this background.

THE CUSTOMARY CRIMINAL PROCEDURE

A. *Scope of Study*

The term "customary Ethiopian criminal procedure" requires clarification on several points. First, which of the myriad customary societies do we investigate? ". . . Ethiopia is a country which embraces a complex variety of ethnic elements representing a veritable mosaic of races, tribes, and linguistic groups."[6] Joined together in the Empire with the dominant highland Christian groups are large Muslim and pagan groups of the most diverse socio-economic organization. Some of these groups have been hardly studied, and we know very little about them. Most generalizations about "the customary law of Ethiopia" would therefore be absurd if taken literally. In this work we have chosen to focus upon the law of the dominant Christian groups: the Amhara, who inhabit the central plateau region, and the Tigrai, of highland Eritrea. Although there appear to be differences between the procedures used by these two tribes (and, doubtless, also, among sub-groups within them), the broad outlines of their procedure seem sufficiently similar to treat them as the same for our purposes. Although some features of procedure among the third major group in Ethiopia, the heavily Muslim and pagan Galla of Southern and Western Ethiopia, also resemble those of the Christian groups, we shall for the most part exclude them; likewise, Islamic law, which is of considerable importance in Ethiopia, is not considered. But some of our conclusions will doubtless apply to these groups, as well as to the many others found in Ethiopia.

Focusing as we do upon the Amhara tribe, we manage to minimize another serious definitional problem, which however needs to be kept in mind. That concerns the meaning of "*customary* criminal

b. Interviews sporadically conducted by two Ethiopian students in Addis Ababa and Harrar between 1964-1968. In 1965-1966 both students participated in a radio program in Addis Ababa on customary procedure, and one wrote a series of Amharic-language newspaper articles, published in the summer of 1966, on the subject. On both occasions public appeals for criticisms of our tentative reconstructions, and for more information, were unfortunately in vain.

c. Personal observations, newspaper stories, and anecdotal accounts gathered in Ethiopia between 1964-1968.

d. (No substantial observations or interviews in the "field" were done).

5. Promulgated by "The Criminal Procedure Code Proclamation, 1961," *Negarit Gazeta*, Extraordinary Issue No. 1 of 1961.

6. E. Ullendorf, *The Ethiopians* (1960), p. 33. See also H. Lewis, *Peoples of the Horn of Africa* (1955); E. Cerulli, *Peoples of Southwest Ethiopia and its Borderland* (1956).

procedure." In the past, a condition of legal dualism obtained for most subjects of the Empire. The Imperial courts, whose structure we shall attempt to describe below, were the official judicial organs of the nation. They supposedly administered as law the sacred legal text, the Fetha Nagast,[7] and any relevant Imperial orders. But particular ethnic groups in the Empire had their own dispute settlement organs and procedures, which presumably paralleled the hierarchical structure of the Imperial system, and these organs applied their own customary law.[8] This picture, if it is an accurate reconstruction, is further complicated by the fact that even among the highland Christians the Fetha Nagast was not widely applied; it remained an esoteric document hardly known or used outside of the highest Imperial court —the Emperor's *chilot*.[9] What law, then, did the Imperial courts actually apply? Although most of the Imperial judges appear to have been (and, indeed, remain) Amharas, and they may have tended to apply the law known to them, it is very likely that Imperial courts in non-Amhara areas, with the aid of assessors, did at least attempt to apply the local customary law.

If, at least in Amhara areas, the Imperial courts generally applied Amhara customary law[10]—including the procedural law—then our inquiry into customary Ethiopian criminal procedure need make no distinction between Imperial law courts on the one hand, and "customary" law courts on the other. While it is true that many aspects of the criminal procedure occurred outside of the courts—in "informal" adjudication or settlement, etc.—such activity should be seen as part of, and subordinate to, the formal court mechanisms, rather than parallel to them. Therefore, when we speak of "*customary* Ethiopian criminal procedure" we are referring to the actual procedure followed among the Christian Amhara, whether before "duly constituted" Imperial officials or other accepted bodies.

However, our identification as "customary" law of all proceedings in the Amhara areas, whether under Imperial sanction or otherwise,

7. The *Fetha Nagast*, "The Law of the Kings," is a text of religious and secular rules written in Egypt in the thirteenth century as a guide for Coptic Christians living there. It was introduced into Ethiopia in the 15th or 16th Century. The religious content of the Fetha Nagast derives from the Old and New Testaments, and its secular content from Roman-Byzantine law sources. See Foreword, *Fetha Nagast*, pp. xv ff.

8. See Singer, "A Traditional Legal Institution in a Modern Setting: The Atbia Dagnia of Ethiopia," *U.C.L.A. L. Rev.*, vol. 18, no. 2 (Dec., 1970), p. 308.

9. W. Plowden, *Travels in Abyssinia* (1868), pp. 93-94; A. Pollera, *L'Abissinia di ieri* (1940), p. 99 [cited hereafter as Pollera]; A. Raffray, *Abyssinie* (1876), p. 162 [cited hereafter as Raffray]. But see, *contra*, Foreword, *Fetha Nagast*, pp. xxi ff.

10. One might argue that Amhara law was not a "customary" legal system because its basic document, the *Fetha Nagast*, was written. However, we apply the terms "customary" and "traditional" interchangeably in this article to refer to the pre-1935 legal system.

cannot continue into the modern era of extensive legislation inspired by nonindigenous models. We have therefore established 1935—the year of the Italian occupation—as a general cut-off date to the customary era. Within that era, our chief focus will be on the latest periods (for which we have the most information), starting with the reign of Menelik II (1889-1913).

A last issue as to scope relates to the meaning of "customary *criminal* procedure"—by what criteria do we regard certain procedures as "criminal" and others as "civil"? In the great bulk of offenses considered "criminal" under contemporary Western (and Ethiopian) law—offenses against private property and aginst persons (including homicide)—the injured party himself initiated and prosecuted the action. Indeed, as will appear below, he also executed the penal sentence. Not only was the method of criminal prosecution "civil" in character, but such offenses were usually "compoundable" in the sense that the injured party could accept restitution and thereby save the offender, even after conviction, from penal sanctions. Certain offenses such as blasphemy, perjury, banditry or treason were not subject to this "quasi-civil" procedure, but were prosecuted and punished by state officials. However, in this article we will not focus on the procedure followed in such cases of "true crimes." Since our ultimate interest is the way in which modern Ethiopian law has changed the traditional practice, we will be concerned here with the customary procedure used to deal with disputes now governed by the 1961 Criminal Procedure Code—*i.e.*, crimes under contemporary law. Since many of these offenses were treated as "civil" matters under customary law, it results that the ordinary customary "civil procedure" is often as relevant as the criminal.

B. The Imperial Administrative and Judicial Structure

As was the case in most African traditional societies, separation of judicial from administrative power was until very recently not a feature of Ethiopian governmental organization. In order to understand the context of customary criminal procedure it is therefore necessary to know something of the Empire's administrative structure during the period under consideration. The following account, like our description of the customary procedure itself, is reconstructed from secondary sources which are often unsystematic, fragmentary and conflicting. Therefore, the picture we present can be only approximate.

At the base of the official Imperial structure we find the parish headman, or chief, called the *chika shum* ("appointed over the soil").[11]

11. S. Messing, *Highland-Plateau Amhara of Ethiopia* (unpublished doctoral thesis, Univ. of Pa., 1957), p. 79 [hereafter cited as Messing].

In some parts of the Empire, apparently, the *chika-shum* was a subordi-

This personage, whose eligibility for the post is hereditary and tied to land ownership,[12] is appointed by the governor-general of the province (*tekle guezat*).[13] The parish headman acts as the lowest judge (*dagna*) in the court hierarchy.[14] Conciliatory or arbitral dispute settlement involving the elders (*shemagalye*), large land holders (*balabath*) or others takes place at a still lower level, but outside of the formal governmental structure, and will be discussed later. Some writers seem to distinguish between the parish headman's administrative office and that of the judge (*dagna*)[15], but it appears that only in urban areas, where specialization of function was warranted by the increased volume of judicial business, were the two offices held by different persons.[16]

The administrative level between the village and the province is the district (*woreda*),[17] administered by the district governor (*woreda-gaj*). Although there is some inconsistency and confusion in the terminology used by different writers in describing this functionary, it seems that the following terms also refer to him: *woreda-shum* (district chief), *mislene* (lieutenant), and *malkagnia* (officer, deputy).[18] The district governor was appointed by the provincial governor, and reportedly sat to hear appeals in cases decided by the parish headman.[19] From the district governor's court, appeals went to the provincial governor, who sat in court with an uncertain number of judges.[20] Redress lay from the provincial governor's court to that of the Emperor, but not to him personally. An official known as the

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nate to the parish headman, known there as the "*Bal a Gult*"; see Singer, op cit. supra n.8, pp. 316-17. In this article we follow Messing's description of the *chika-shum*'s role.

12. D. Levine, *Wax and Gold* (1965) pp. 57-58.

13. Messing, supra n.11, p. 79. Compare C. Sandford, *Ethiopia Under Haile Sellassie* (1946) at p. 81, stating that the district governor appoints the local judge.

14. Castro, "Criminali, giudici e tribunali etiopici," *Bollettino della Società Geografica Italiana*, Serie IV, vol. 12, no. 4 (1911) p. 434 [hereafter cited as Castro (1911)]. T. Lefebvre, *Voyage en Abyssinie* (1845), vol. 1, p. xxxv; P. de Lauribar, *Douze ans en Abyssinie* (1898), p. 91.

15. Messing, supra n.11, pp. 318-19, describes the *dagna* as a regular, "year round" judge, appointed by the governor of the sub-province. See note 25, infra.

16. M. Perham, *The Government of Ethiopia* (1948), p. 144 [hereafter cited as Perham].

17. But see note 25, infra.

18. Sandford, n. 13, p. 81 and Perham, n. 16, p. 144 use *malkagnia*; Messing, n. 11, pp. 80, 281, 284 and N. Marein, *The Ethiopian Federation and Laws* (1954), p. 53 use *mislene* but the former implies that the *mislene* is not the district governor, but "ranks equal" to and "expects aid" from him (p. 80).

19. Perham, supra n. 16, p. 144; Castro supra n. 14, p. 434.

20. The Amharic word for judge is *wonber* (lit. "chair"). According to C.H. Walker, *The Abyssinian at Home* (1933), pp. 145-46 [hereafter cited as Walker], the provincial governor has two judges, appointed by himself: one of the left (*gera*) and one of the right (*kagn*), "of whom the Right Wamber is the greater." The judges may sit alone, or in court together with the gover-

Afe Negus ("Mouth of the King") heard the great bulk of the Emperor's judicial business. To relieve the excessive burden of cases coming to the *Afe Negus*, and thereby to speed up the appeal process, in 1908 Emperor Menelik established a special tribunal to Addis Ababa composed of twelve "princely judges" (*wonder-rases*), two to deal with cases from each of the six parts of the Empire.[21] From this court, apparently, cases could still go to the *Afe Negus*,[22] and from him, in last resort, to the Emperor's court.[23]

Two additional points should be noted. First, it is probable that each level of "appeal court" mentioned above also had original jurisdiction, although the rules, if any, restricting the initiation of cases at any given level are not known to the present writer.[24] Also, although only the major levels of administration/adjudication have been presented, it may be that other levels existed.[25] Surely, in addition, there

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nor and jurors. He states that appeal seems to have been allowed from the left to the right judge, and from the latter to the governor's court. J.B. Coulbeaux, *Histoire politique et réligieuse de l'Abyssinie* (1929), vol. 2, p. 302, has the governor sitting with three judges of the right and three of the left; Messing, n.11, p. 319-20, with two on each side, and Sandford, n.13, p. 81, one. Perham, n.16, pp. 144-45, suggests that the litigant dissatisfied with the district governor's decision had the option to appeal either to the provincial governor's judges (whom she has sitting with four assessors) or to the governor himelf.

21. Guebre Sellassie, *Chronique du régne de Menelik II* (1932), vol. 2, p. 531; Mahtama Selassie Wolde Meskel, *Zikire Neger* (1950), p. 70 [hereafter cited as Mahtama Selassie Wolde Meskel]. Walker, n.20, p. 151, speaks of the *Afe Negus* being assisted by "twenty-four Wambars, who divide among themselves the affairs of Ethiopia." This sounds suspiciously like the twelve-judge tribunal created by Menelik.

22. Guebre Sellassie, op. cit. supra n. 21, vol. 2, p. 531, n. 3; Perham, n. 16, p. 145; L. Castro, *Nella Terra dei Negus* (1915), vol. 2, p. 130. The exact relationship between the *Afe Negus*' jurisdiction and that of the twelve "princely judges," on the one hand, and the Emperor's court, on the other, is not clear. As to his role as "Minister of Justice" see note 25, infra.

23. Castro, supra n. 14, p. 434.

24. It is reported that the twelve "princely judges" in Addis Ababa had original jurisdiction over cases submitted by litigants from the respective provinces under their charge, should those away from home wish to be judged by someone from their own province. Castro, supra n. 22, vol. 2, p. 129. As another example, capital cases were in the sole jurisdiction of the Emperor, although preliminary hearings might be held at various levels below his court.

25. For example, we have omitted mention of two levels of administration and judicial competence which function currently in Ethiopia but which are not mentioned by any of the historical sources: the sub-district (*mektl woreda*) and the sub-province (*awraja*). Thus, there may have been four official levels below the provincial one: village (parish), sub-district, district, and sub-province. Messing, n.11, who wrote in the nineteen fifties, does describe both additional levels: pp. 80, 284-85; and see note 15, supra.

Mahtama Selassie Wolde Meskel, pp. 73, 75 also speaks of an appeal from the twelve "princely judges" in Addis Ababa to the "Minister of Justice," but this probably is meant to refer to the *Afe Negus*, who apparently held that portfolio from the time that Emperor Menelik created the Ministries (1908) until the Restoration (1941). See Selamu Bekele and J. Vanderlinden, "Introducing the Ethiopian Law Archives: Some Documents on the First Ethio-

were specialized judicial bodies such as church[26] and market[27] courts which functioned to some extent outside of the normal hierarchy.

C. *The Procedure*

Having described the traditional institutional framework of Ethiopian Imperial law, we can now consider the criminal procedure itself. We shall divide our discussion roughly according to the stages of the process: criminal investigation where the offender is unknown, sanctuary, pre-trial procedure, informal settlement of disputes, trial procedure, appeal and execution of sentence.

1. *Where the Offender is Unknown: Criminal Investigation*

a. *Police Investigation.* Apparently some sort of indigenous "police force" has existed in Ethiopia for a long time.[28] The *netch lebash* ("thief-catchers in white") are non-uniformed rural police irregulars whose service obligation is tied to feudal land tenure.[29] Unfortunately, the present writer knows nothing more about their organization or functions.

b. *Affersata (communal inquiry).* A very significant traditional institution is the *affersata*, or government-sponsored communal inquiry into crime. A Gallinya word, "affersata" may be related to the verb *affersa* ("to fan"), which is applied to the process by which bits of husk are separated from kernels of corn. The institution is also known as *auchachin* in Shoa and Wollo provinces, and as *iwus* in Gojjam province;[30] it has apparently functioned in Ethiopia for a

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pian Cabinet," *J. Eth. L.*, vol. 4 (1967), p. 413; Bereket Ab Habte Sellassie, "Constitutional Development in Ethiopia," *J. Afr. L.*, vol. 10 (1966), p. 80. It must be noted, though, that appeal to the Minister of Justice entailed no conflict with his duties as *Afe Negus*, or "Chief Justice," because in those days the task of the Ministry did not, as now, include the prosecution of offenders (there was then no system of public prosecution), but solely supervision of the judiciary.

26. Perham, supra n. 16, p. 150.

27. The market master, or *nagadras*, supervised, and perhaps sat on cases along with, this special judge; P. Mérab, *Impressions d'Ethiopie* (1929), vol. 3, p. 230 [hereinafter cited as Mérab]; Perham, p. 150; Walker, pp. 150-51.

28. The history of police in Ethiopia is reportedly given in Aymiro Negussie, *Yeselam zeb* (1963).

29. Bulcha Demeksa, *The Law and Practice of Bail in Ethiopia* (1965, unpublished, Addis Ababa, H.S.I.U. Law Faculty Archives), p. 3; Messing, supra n. 11, p. 80.

30. Grazmatch Taddesse Tebike, "Affersata," Addis Zemen, Tekemt 26, 1959 E.C., with English translation in Law Faculty Archives, H.S.I.U., Addis Ababa. But some writers state that these are different institutional forms. See Poletti, *Il Codice penale abissino* (1938), pt. III, pp. 249-256 (*ehuss* is a privately initiated communal inquiry; *affersata*, used in more serious cases, is called by government); Sandford, n. 13, pp. 83-84 (*affersata* meetings called first, and if fail to turn up criminal, more "drastic" session, *auchachin*, is convoked).

K.E. Knutsson, *Authority and Change* (1967), p. 122, n. 10 offers another Gallinya term for *affersata, izgota.*

long time.[31]

An *affersata* to discover a criminal's identity was called by a local official such as the district governor, either upon request of the injured party, or, in cases of serious public disturbance, on government initiative.[32] The technique used was to summon[33] all inhabitants[34] of the neighborhood where the crime was committed, and to sequester them until they named the criminal.[35] Failure to attend the *affersata* was sanctioned by an "absence fine,"[36] and the assembly's failure to name the criminal resulted in communal liability to repair the damage caused by the offense.[37] The wish to avoid this liability, together with the serious hardship caused by sequestration of the whole community (it was reportedly decreed: "not a cow be milked nor a baby suckled" until the investigation was over),[38] provided ample incentive to name the offender if that was possible.

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31. Aymiro Negussie, supra n. 28, p. 23, traces the origin of *affersata* to 1781, during the reign of Emperor Adyam Seged Iyasu, when it was instituted as an aid to his police force, the Leba Aden ("Thief Hunters"). I am indebted for this information to Ato Seifu Felleke.

Compare also *Fetha Nagast*, p. 296, quoting the Bible, Deut. 21: "When you find a murdered man in a deserted place or a field and no one knows who killed him, then your judges and elders shall go out and measure [the distance] between the place where the murdered man was and the city. [They shall see] which city is nearest to the murdered man, and then the elders of that city shall take an oath and say: 'Not ours the hand that shed this blood; our eyes never saw who killed him.'" And you, [O judges,] make inquiries about this blood and judge the matter with righteousness."

32. Sandford, n. 13, p. 83; Affersata Proclamation, 1933, Preamble, quoted in Mahtama Selassie Wolde Meskel, n. 21, p. 95; Knutsson, supra n. 30, p. 122; Pollera, n. 9, p. 131; Walker, n. 20, p. 153. But Messing, n. 11, pp. 326-27, says it is usually used only in homicide cases.

33. Compare R.P. Azais and R. Chambard, *Cinq années de recherches archéologiques en Ethiopie* (1931), p. 69: inhabitants of the village all brought to the *affersata* in chains.

34. But some writers state that only grown men were required to attend, Messing, n. 11, pp. 326-27; Walker, n. 20, pp. 153-54 (only in murder case will women and children attend—but a woman or slave always remained behind in each household to bring food to those inside the enclosure); Pollera, n. 9, p. 131; Sandford, n. 13, p. 84, Sahle Sellassie, *The Afersata* (1968) p. 21.

35. But *cf.* Mérab, n.27, vol. 3, p. 244: seven day maximum limit.

36. Walker, n. 20, p. 153; Pollera, n. 9, p. 132.

37. Walker, n. 20, p. 156; Pollera, n. 9, p. 134 (also fine to governor); Sahle Sellassie, n. 34, p. 89; H. Ludolph, *A New History of Ethiopia* (1682), p. 239 ("If the Homicide escapes unknown, the Inhabitants of the place and all the Neighborhood are obliged to pay a Fine; by which means many Murthers are either prevented or discovered.") But Messing suggests that there would be no communal liability if they could prove that the offender was a passing stranger, and that they were blameless in failing to prevent the crime. Messing, n. 11, p. 326. Compare the "hundred's" collective responsibility under old English law, Plucknett, *A Concise History of the Common Law* (5th ed., 1956), p. 89.

38. Mérab, n.27, vol. 3, p. 244: "Tant que dure l'affersata, on n'a pas le droit de mener le boeuf au pâturage, le veau à la vache, l'enfant à la nourrice;" Perham, n.16, p. 149. One can hardly accept this description literally.

The *affersata* procedure utilized a small group of elders who administered the interrogation of everyone present, and a system of anonymous denunciation under which the informers were referred to only as "birds."[39] Walker describes the procedure thus:

> The crowd of those shut in will select seven or eight or nine "mirtocc," or chosen ones, who will sit apart with the clerk. First each of the chosen will take the oath, for a small hole will have been dug and fire lighted within. Then preparing water each will swear, saying, "What I saw and heard I will not hide," saying, "The guilty man is my brother. Even if he is my father I will tell." So quenching the fire with the water he adds, "If I spoke a lie, may God likewise extinguish me!" and sweeping the ground with the stalk of maize and its cob he swears, "May God thus sweep away our seed if I lie." Also there may be closed eggs, a closed gourd, and a sickle, on which each will swear, saying, "If I conceal what I have seen and heard, may He close me as this gourd and cut my stomach thus!" So all present will take the oath. Also there will be two or three "birds" who swear that they will tell what they hear to none but the clerk. Or perhaps the chosen ones will pass from group to group questioning each person and will find someone who saw or heard. Then they will return to the clerk and say, "We have heard the mouth of the bird tell that so-and-so was the thief."
>
> It may be fifteen days before the thief is found and, when the birds have spoken, the priest will come bearing the Cross and Picture of Mary and will sit beside the chosen ones. Then one by one they will all pass and strike the Cross and Picture and swear, "May He perforate me as the Cross! May he obliterate me as the Gospel! I saw not!" But the "bird" will swear, "Having seen I spoke not with lies," having related all in secret to the chosen ones.[40]

Apparently all persons present at the *affersata* gave testimony under oath to the elders,[41] who were sworn not to reveal their identity. When all the evidence had been collected, Pollera reports, the elders classified the results and, aided by a scribe, reduced them to writing in this way: Eye-witnesses to the deed were called *merfée* ("needles"); those who witnessed relevant facts and circumstances were called *emni* ("stones"); and those claiming to have heard the name of

39. An Ethiopian observer has suggested that the "birds" expression originates in an indigenous saying "that even in a very lonely forest there is either a devil or a bird to see you." Nebiyelul Kifle, *Issuance of Arrest Warrants in Ethiopian Law* (1965, unpublished, Addis Ababa, H.S.I.U. Law Faculty Archives) p. 17.

40. Walker, n. 20, p. 154. See also Sahle Sellassie, n. 34, pp. 21 ff.

41. Messing, n. 11, p. 326; Nebiyeleul Kifle, n. 39, p. 17; Pollera, n. 9, p. 132.

the guilty party by hearsay were called *uf* ("birds"). The document prepared by the elders reportedly ran something like this:

> The committee, composed of (names of members), having carried out the Afarsata for discovery of the authors of the crime . . . . , having assembled on such and such a day, in such and such a place, declares that this evidence has been collected:
>
> Such and such . . . needles: they have said to have seen such a person(s) carry out the crime.
>
> Such and such . . . stones: they have declared that, for the facts and circumstances observed a little before or a little after the crime, they consider the guilty are such and such. . . . .
>
> Such and such . . . birds: they have claimed to have heard from a third party that the guilty would be such and such. . . .[42]

Pollera's classification is thus more precise than that of other writers, in that he breaks down into three groups the informants which others seem to describe simply as "birds." He also states that one accused at an *affersata* could appeal to the governor only against the testimony of "birds," not against that of "needles" and "stones."[43] However, it is not clear when an accusation at *affersata* was treated as sufficient evidence of guilt to support the application of sanctions;[44] sometimes, of course, the accused confessed on the spot.

The institution of *affersata* was not very popular either with the people or with the central government authorities, but local potentates apparently found it useful. An important effect of convening an *affersata* was to oppress the poor inhabitants of the neighborhood where it was held, for it was they who had to provide the visiting officials and soldiers with food and drink for as long as it lasted;[45] the desire to be rid of the invading parasites, and to get back to untended farms and households, might conceivably have led to false accusations and even to false confessions. Then, too, some criminals and others reportedly took advantage of the anonymity of the "birds" to accuse innocent persons, perhaps personal enemies, who could never

42. Pollera, n. 9, p. 133.

43. Ibid.

44. Knutsson, n. 30, p. 122, implies that proof, in addition to bare accusation, was required to be presented at the *affersata*. Sandford, n. 13, p. 83, states that those accused in *affersata* would be sent by the district governor (*malkagnia*) for trial before the local judge. According to Nebiyeleul Kifle, n. 39, pp. 17-18, if the suspect failed to confess the people of the neighborhood were canvassed or re-convened, and asked to agree to reveal the names of the "birds" as witnesses to be used in court proceedings. But other writers give the impression that accusation, at least by some minimum number of "birds," was enough.

45. Poletti, n. 30, p. 256. But see Walker, n. 20, pp. 153-54: "the judge will receive his dinner by turn from those who asked for the holding of the inquiry. . . ."

learn the identity of their accusers.[46] In an attempt to curb some of these abuses Emperor Haile Sellassie issued a proclamation in 1933 to regulate *affersata*:[47]

AFFERSATA PROCLAMATION, 1933

Whereas before, whenever cattle were lost, [or] money stolen, people were forced to leave their crops or occupation and gather for Affersata;

Whereas now we have come to realize that the harm done by such an act is greater than the wealth lost or stolen, and whereas many used this system in falsehood, and whereas innocent people have been said to have done an act by informers who change their names[48] only to harm their enemies, for the future we make the following law.

FIRST

Those persons who come for Affersata shall not be forced to stay until all others come but should be examined under oath and be allowed to leave.

SECOND

There shall be Affersata only once a month on Saturdays and Sundays and not on working days.

THIRD

When Affersata is held twice a month, the judge should go every three hours to control the places of meeting and he should not force people from far away places to come and spend the night outside their homes. When a person has been examined and sworn, he shall be asked to send his family after he returns and he shall not be asked to come with all his family at once, leaving the house, cattle or work unattended.

. . . .

SIXTH

To avoid procrastination and possible delay to the [victim of the crime] and the judge, family members should be sworn and examined between 3 o'clock and 9 o'clock on Saturday. Heads of families should gather on Sundays from 1 o'clock to 3 o'clock and should stay until 8 o'clock and be let free. If, during the two days, a household member or a head of family is absent, let him pay "alad" ($0.50). If this happens during the next month, let the judge inquire whether the person is absent because of things beyond his control, and if he is not, the judge can make him pay two or three times the above sum according to the fault of the absentee.

SEVENTH

This absentee's fine shall be collected by a person appointed by the governor, and out of every ten, let two be paid to the court as fees, one to the judge, and seven to the complainant. The Affersata judge may not accept anything from the poor in the name of "supper".[49]

. . . .

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46. Pollera, n. 9, p. 134; Mahtama Selassie Wolde Meskel, n. 21, p. 96.

47. Reproduced in Mahtama Sellassie Wolde Meskel n. 21, p. 95. The English translation is from Aberra Jembere, *The Right to a Speedy Trial in Ethiopia* (1965, unpublished, Addis Ababa, H.S.I.U. Law Faculty Archives), Appendix II.

48. Referring, apparently, to those who testify as "birds."

49. See text accompanying note 45, above.

TENTH

Governor, you are paid because you are a judge,[50] and therefore you should not be careless with your job and let thieves flourish. You should take a complaint and follow it up and destroy the culprit, otherwise the responsibility will be yours.

. . . .

This reform legislation apparently had only limited success, and some of the problems it was designed to solve still exist today.

c. *Lebashai ("Thief-Seeker").* A much-reported traditional method of criminal investigation involves the *lebashai*, or thief-seeker, who discovers the wrongdoer's identity and the location of any fruits of the crime by drugging a young boy who "sniffs out" the culprit.[51] According to Walker,[52] the victim of a theft would go to the "chief" thief-seeker who would send a suitable[53] boy back with the victim to the scene of the crime, where the parish headman (*chika shum*) would

> set up at the door of the [victim's] house a tent in which the boy may be guarded that night lest he eat and drink.[54] At dawn the servant of the chief of the leba shai will come with witnesses and will make the boy sit and taking medicine from a bag, will mix it with milk and give the boy to drink. Then, filling a pipe with tobacco, he lays on the top another medicine and placing an ember on it he gives it to the boy to smoke. . . .[55] Having smoked a little, the boy collapses like a drunken man and lies extended. Then the Chiqa Shum three times passes round the boy's head a short yellow wand and strikes him thrice, intoning the word "Diras!" ("arrive!"). So the boy, rising with fixed eyes, reels here and there like a drunken man, at another time flying like a winged bird, while all follow behind. The Chiqa Shum keeps hold of a sash tied round the boy's waist and, when they come to water, he (or the witnesses or servant) will carry the

50. Recall that district and provincial governors also acted as judges; there was no separation of powers. See text accompanying notes 17-20, above.

51. This practice is said to exist elsewhere in the world. Messing, n. 11, p. 325, says it has been traced by some to ancient Greek parallels, and by others to Arab bedouin practices. G. MacCreagh, *The Last of Free Africa* (2d ed., 1935), p. 184, without further specifics declares its similarity to the West African "obeah."

52. Walker, n. 20, pp. 157-58, 161. Other detailed descriptions are found in Castro, "Ipnotizzati ed ipnotizzatori cercatori di ladri," *Archivio di Psichiatria Neuropatologia, Antropologia criminale e Medicina legale*, vol. xxxix (1908), pp. 606-07; Mérab, n.27, vol. 3, p. 254ff.; W.C. Harris, *The Highlands of Ethiopia* (1843), p. 115.

53. The boy was supposed to be young (ten to fifteen years old), and only just entering puberty, to ensure his virginity. Castro, n.52, p. 608; Mérab, n.27, vol. 3, p. 254; MacCreagh, n.51, p. 184; Walker, n.20, p. 159. He was usually the son of a slave or poor man. Ibid.

54. According to Castro, n. 52, p. 606, the boy is "prepared" on the evening before the main event: he is washed, his fingernails cleaned, etc.

55. According to Castro a water pipe is used, ibid.

> boy across, lest he touch it and suffer contamination. If they see animals on the road, the boy may run towards them, but the Chiqa Shum will seize him in his arms till they pass. If they meet a man, the man will at once squat in the road, for the boy will slap and cuff him. So the boy follows the thief and, if he comes to the hut where the thief lived, will enter and make as if he were carrying out the stolen goods. Or he may get up onto the bed or mud dais and stretch himself where the thief slept. Or the thief may have pushed the money into a hole or under a stone, and sometimes the boy will go and pull it out, blowing hard with his breath. If there is a gathering of men and the thief is among them, the boy will go round the circle, as they all sit in fear, and knock with his knee each as he passes. When he comes to the thief, he will whisper softly to him as a robber to his accomplice and circle round him thrice and butt him with his knee, and puffing and blowing will at length fall upon his neck and seize him. So men know the thief and take him. Then the servant of the chief of the thief seeker [sic] lifts up the prostrate boy and carries him outside and covers him up and gives him bread and beer to make him vomit and be cured. . . . A wrong-doer may know that water defeats the boy, and so he will wash himself. Or he will run to the edge of a precipice and pretend to jump down, or will climb a tree and with a rope pretend to hang himself. This the thief finder will do also, and must be restrained. Once a murderer cast the body into river and the boy led men to it, acting as though he were dragging a corpse, and would have fallen in if he had not been held. Then he led them back to Addis Ababa from house to house, till the murderer was found.[56]

The thief-seeker institution has been reported to function among the highland Christians in both Ethiopia and Eritrea, and among the Galla.[57] Walker states that there is a "head" thief-seeker in Addis Ababa who "licenses" all thief-seekers of the Empire annually,[58] and it is probably this personage who in Walker's above-quoted account is referred to as the "chief" who sends a "servant" with the boy, to perform under the parish headman's direction. Most reports instead attribute the direction of the entire ceremony, "sniffing out," etc., to a thief-seeker who accompanies the boy to the scene.

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56. MacCreagh, n. 51, p. 186, reports another device to escape detection: if a piece of iron or steel bent in a half-moonshape is carried by the criminal, the thief-seeker's "trail" will be bent and will return to the starting point.

57. F. Ostini, *Trattato di diritto Consuetudinario dell'Eritrea* (1956), p. 44 [hereafter cited as Ostini]; Castro, n. 52, *passim*; Perham, n.16; p. 150. But see Pollera, n.9, p. 127: Eritreans never adopted thief-seeker practice. And P.M. de Salviac, *Les Galla* (1901), p. 165 describes it is an Amhara practice.

58. Walker, n. 20, pp. 158-59; Messing, n. 11, pp. 322-24.

The secrets of the thief-seeker's art are passed down from father to son—the chief secret reportedly being the drug's composition.[59] Observers state that judging by the odor the drug is probably hashish, perhaps mixed with other substances such as opium or stramonium.[60] Perhaps the thief-seeker also practices hypnotism on his young subject,[61] through which he influences him to accuse whichever person seems the most likely suspect in light of the thief-seeker's own prior (and presumably discreet) investigations.[62] A popular story relates that Emperor Menelik opposed the thief-seeker practice and in order to demonstrate its inefficacy had a palace notable pretend that his ring was stolen. In fact the Emperor hid the ring in his own garments. A thief-seeker was consulted, and the child he drugged immediately pointed to the ring's hiding place. Thereafter, it is said, Menelik did not oppose this means of investigation.[63] There are even some reports of government patronage of the practice.[64]

Undoubtedly the thief-seeker was often extremely effective, if only because most people feared his powers.[65] Mere threats to summon his aid would no doubt often bring about the return of stolen goods, etc. But the thief-seeker was also a controversial institution, subject to great abuse. Frequently, it seems, no corroborating evidence was required beyond the boy's "sniffing out" of the accused, which sufficed as a basis for application of sanctions.[66] Since the thief-seeker's fee was collected out of the guilty party's payment, in restitution and compensation, to the injured party, the incentive for false accusation was increased.[67] There are numerous reports of such abuses, extending even to accusations that the thief-seeker acted in cahoots with thieves, corruptly agreeing to provide "protection" by seeing that innocent parties were always "tagged" by the boy.[68] Not

59. Ibid; Harris, n. 52, p. 115; Castro, n. 52, p. 607; Mérab, n.27, vol. 3, p. 255; de Salviac, n. 57, p. 165.

60. Pollera, cited in Ostini, n. 57, p. 44; Castro, n. 52, pp. 606-07.

61. Azais and Chambard, n. 33, p. 70; Castro, n. 52, p. 608.

62. Castro, n.52, p. 608; Mérab, n.27, vol. 3, p. 262; Pollera, n.9, p. 128.

63. Ostini, n. 57, p. 44; Pollera, n. 9, p. 129; de Salviac, n. 57, p. 166. Harris, n. 52, p. 115 attributes the experiment to an earlier monarch.

64. Mérab, n.27, vol. 3, p. 255, describes a government "department" employing numbers of thief-seeker "trainers" and their apprentices. See also Pollera, n.9, pp. 128, 130.

65. H. Rebeaud, *Au Service du Negus* (2d ed., 1935), pp. 154-58, reports that most people were terrified of the thief-seeker.

66. Harris, n. 52, p. 115; Castro, n. 52, pp. 608-09; MacCreagh, n. 51, p. 186. A. Gleichen, *With the Mission to Menelik* (1898), p. 241, carries another version to apparent extremes: the boy is drugged to sleep and told to dream, and "whatever person he dreams of is fixed on as the criminal; no further proof is needed."

67. Harris, n. 52, p. 115; Messing, n. 11, pp. 324-25.

68. Castro, n. 52 (1908), pp. 608-09; Mérab, n.27, vol. 3, p. 263; "Thief-Detector" (no author, no date), *Brihanina Selam*, in H.S.I.U. Law Faculty Archives. Walker, n. 20, pp. 158-59, reports that some thief-seekers will make

surprisingly, therefore, there has been some government regulation of the practice such as maximum fee amounts,[69] and sanctions against accusation of innocent parties.[70]

d. *Other supernatural means of investigation.* The victim of a crime committed by unknown persons might resort to supernatural means of investigation other than the thief-seeker. An Amhara might go to the *tankwa* ("sorcerer"), a practitioner of "black magic" who can divine the offender's identity by throwing bones,[71] and whose supernatural powers enable him to "summon the devil to liquidate the enemy of a client."[72] The use of diviners for such purposes, a practice well known to African custom,[73] is also reported among the Gurage of Ethiopia.[74]

Another procedure used in cases where the victim is unable to learn the offender's identity is to go to a Coptic church and, "having purchased incense and given a gift, pronounce a solemn curse, '*sabate masdafat,*' " on the offender.[75]

2. *Sanctuary*

In his classic work *The Nature of African Customary Law,* Dr. T.O. Elias writes of traditional monarchical societies in Africa that the offender

> may usually escape summary justice by beating a hasty retreat into any nearby sanctuary, such as a sacred grove or King's palace, chief's or councillor's residence, pending the hearing of the case against him. . . . The whole thing is a device against free or frequent indulgence in vendetta by the populace. Of course, it is otherwise if the criminal were caught by the injured

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a "deal" with thieves to give the boy ineffective drugs, or advise the thieves on methods to evade detection, *e.g.,* by walking in water, washing themselves immediately after the crime, etc.

69. Messing, n. 11, pp. 324-25 reports that Menelik fixed a maximum fee of E$6.

70. Walker, n.20, p. 161, refers to sanctions of damages and fine. Mérab, n. 27, vol. 3, p. 260, n. 1 reports that in 1925 Emperor Haile Sellassie I, as Regent, forbade the use of thief-seekers under threat of severe penalty; see also MacCreagh, n. 51, p. 186. But the Ethiopian royal chroniclers do not, to our knowledge, mention any such legislation. A different sort of safeguard against abuse of the institution may have been the requirement that before the thief-seeker's aid was summoned, the complainant solemnly swear as to injury by the alleged crime. Walker, n. 20, p. 160.

71. Messing, n. 11, p. 325.

72. Levine, n. 12, p. 70.

73. T.O. Elias, *The Nature of African Customary Law* (1956), p. 221.

74. Shack, "Guilt and Innocence: Problem and Method in the Gurage Judicial System," in M. Gluckman (ed.), *Ideas and Procedures in African Customary Law* (1969) pp. 153, 160.

75. Messing, n. 11, p. 325.

party and/or his sympathisers before reaching the security of a sanctuary.[76]

The institution of sanctuary at certain[77] Coptic churches was also recognized by the people and government authorities in Ethiopia. Messing states that the procedure was for an accused to enter a churchyard and sound the bell, thus announcing to his pursuers (whether they be government police or the victim's kinsmen) that he had placed himself under the protection of the church.[78] The available reports confirm that the function of sanctuary in Ethiopia was as Dr. Elias has suggested—to forestall blood revenge by the injured party for long enough to set reconciliation procedures in motion.[79] It seems that the church authorities took an active part in promoting this reconcilation.[80] Thus, the Fetha Nagast, quoting the Bible in part,[81] says of homicide:

> "If the striking was accidental, without any enmity, or if out of malice one threw a stone or some other thing which brings about one's death, unaware that he would die . . . without any feeling of enmity or evil, judgment shall take place between the slayer and he who claims the blood; due consideration shall be given to the case, and the slayer must be rescued from the power of the avenger of the blood and sent to a place [of refuge] and make his home there." In case he had no intention to kill him, but God provided the occasion for the death of the other by his hand, he may take refuge in the place of God; but if the avenger of the blood finds him outside [the place of refuge] and kills him, he will incur no guilt. . . . In case the slayer is proud and lets himself be seen by the kinsmen of the man he killed, boasting of himself against them, and they kill him, they shall not be held guilty; there shall be no punishment for his killers for he should not be seen until the end of their mourning.[82]

The right of sanctuary was not available in all cases; particularly those crimes which were so heinous as not to permit of blood-money compromise, such as homicidal recidivism[83] and treason,[84] were not

76. Elias, n. 73, pp. 215-16.

77. Poletti, n. 30, p. 267, says only five out of the one thousand churches in Gojjam province could give sanctuary. See also "Consul Plowden's Description of Abyssinia, 1852-5" in J.C. Hotten (ed.), *Abyssinia and Its People* (1868) p. 118 [hereafter cited as Plowden in Hotten].

78. Messing, n. 11, pp. 389-90.

79. Poletti, n. 30, p. 267. Compare church asylum in Anglo-Saxon law, which functioned similarly except that the Crown also had a pecuniary interest in reconciliation. C.H. Riggs, *Criminal Asylum in Anglo-Saxon Law* (1963), pp. 20-21, 34.

80. Ibid.

81. Numbers, chap. 35, v. 22.

82. *Fetha Nagast*, p. 294.

83. Id., p. 291, text accompanying n. 15.

84. See the eighteenth century case of Surahe Krestos recounted in the

subject to sanctuary, and anyone invading the church to remove such an offender from his claimed asylum was protected.[85] To violate legitimate sanctuary, on the other hand, was a serious crime:

> One who by his power and with violence takes a person seeking refuge in a holy church out of that church shall be beaten and his hair shall be shaved. He shall be sent into exile and remain there forever. . . .[86]

3. *Proceedings Where the Offender is Known*

In cases where the complainant knew the alleged offender's identity, his first task was to secure the latter's submission to some dispute-settlement machinery. In appropriate cases informal techniques for reconciling the parties first would be tried; if unsuccessful, the procedure could progress on more formal levels.

a. *The issuance of "process," pre-trial detention and conditional release through personal sureties.* It appears that under Amhara customary law any person had the power to "arrest" a suspected lawbreaker by ordering the latter to submit to custody in the name of the Emperor or some other royal personage.[87] If the suspect ignored the injunction to stop he could be apprehended by force,[88] a situation which presumably raised a community social obligation to assist. The person against whom this oral injunction[89] was issued was further

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Foreward to *Fetha Nagast*, p. xv. This case also discusses fully the question whether intentional killers are eligible to take sanctuary.

85. *Fetha Nagast*, p. 291.

86. *Id.*, p. 294. See also *id.*, p. 306: "One who transgresses against a person who took refuge in a church, pulling him out of it violently, shall be flogged twelve times. . . ." For comparable Anglo-Saxon legal rules see Laws of Alfred cap. 2-1 in F.L. Attenborough, *The Laws of the Earliest English Kings* (1922).

87. Mérab, n.27, vol. 3, p. 235; C. Conti-Rossini, *Principi di Diritto Consuetudinario dell'Eritrea* (1916), p. 500 [hereafter cited as Conti-Rossini]. The general formula runs, *Be . . . . . amlak,* or "By the divinity of . . . ." Variations include, *Behig amlak,* ("By the divinity of the law"), Be *Menelik amlak* ("By the divinity of [Emperor] Menelik"), *Be Haile Sellassie amlak,* etc. These expressions are commonly heard today in Ethiopia. Messing, n.11, p. 315 reports the use of *Haile Sellassie Yemut* ("Let Haile Sellassie die . . .") in this context but this appears to be a confusion with the testimonial or promissory oath formula ("Let Haile Sellassie die [if I lie] . . . . ," discussed at text accompanying notes 164-65, infra.

88. Mérab, n.27, vol. 3, pp. 214, 235. But see, *contra,* Walker, n.20, pp. 168-69: if the accused refuses to stop, the accuser "may not lay hands on him" but can only follow after him, appealing to passers-by to judge his case.

89. This power of private individuals to issue oral injunctions in the nature of "service of process" has been reported in Eritrean customary law as well, but in a more extreme form. There the oral injunction, known as *ghezzi,* could apparently be used as a sort of temporary restraining order binding the accused to refrain from various kinds of actions which the accuser considered prejudicial to him, until the dispute could be placed before a judicial authority. Thus, Pollera reports the use of *ghezzi* to enjoin an adversary from working disputed agricultural lands, and even from speaking.

obliged to accompany his accuser before whatever formal or informal body[90] the accuser wished to submit the dispute to.

Following the accused's initial physical submission to the legal process, there seem to have been two major types of restraint employed to assure his continued attendance at the proceedings: ambulatory custody (*koragna*)[91] and conditional release to sureties.[92] A third technique, fixed-location detention in "public facilities" such as the parish headman's living compound, seems to have occurred only exceptionally.

Ambulatory custody refers to the practice of physically linking the accused and his accuser by knotting together one corner of each of their cotton togas (*shammas*); the pair thus joined were under an obligation not to break the knot unless ordered to by a judge. In a variation of the practice, the accused's right wrist was chained to the accuser's left.[93] They had to live together thus until either the case was resolved or the accused produced acceptable sureties for his conditional release. But the accuser had the right to substitute for himself any of his dependent family or retainers to serve as a "walking prison."[94] It should be stressed that this "prison" often depended for its power of constraint on the accused's acceptance of community expectations that he submit peaceably, rather than on the use of force. Thus, even young boys, whose time and energies were relatively expendable, were used as "jailors." Apparently, ambulatory custody

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The latter injunction (justified apparently as needed to stop the restrained party from intimidating or suborning witnesses) led to his appearing before the authorities to request *by humming* that the injunction be lifted! Pollera, n. 9, pp. 108, 109. See also Nadel, "Land Tenure on the Eritrean Plateau," 16 *Africa* 1, 99 at 193 (1946); Conti-Rossini, n. 87, p. 523. (The 1945 local Eritrean legislation, *Laws of Adghena Tegheleba: Customary Law of Akele-Guzai* (1946) which codified local customary law, punishes with fine any litigant who uses a *ghezzi* to restrain his adversary from speaking. Chap. 23, art. 202). Pollera, n. 9, p. 108 points out that the *ghezzi*, though obviously subject to great abuse, usefully functioned to "freeze" the status quo pending submission of a dispute to recognized authorities which, owing to vast distances and poor communications, were not quickly accessible to the parties. Failure to abide by the *ghezzi*, and abuse of the power to issue same, were sanctioned by fines. Ibid.; Conti-Rossini, n. 87, pp. 500, 523. In Amhara customary law the injunctive power does not appear to have been given thus to private parties, but Messing, n. 11, pp. 317-18, reports that even the lowest courts issued similar "cease and desist" orders (*fetem*) pending the litigation.

90. But see d'Abbadie, "La procédure en Ethiopie," *Nouvelle Revue Historique de Droit Français et étranger*, 12th yr. (1888) p. 462, 463 [hereafter cited as d'Abbadie], stating the accused always has the right to select the judge he will appear before.

91. *Koragna* was also used in post-conviction stages of the process. See text accompanying note 201, infra.

92. Suretyship is discussed in connection with trial at text accompanying notes 116-20, infra.

93. Plowden, n. 9, p. 95; Walker, n. 20, p. 169.

94. Castro, n. 4, p. 429. Some report the accuser's hiring of a substitute "jailor", and even renting the chains! Mérab, n.27, vol. 3, p. 207; Plowden in Hotten, n.77, p. 183.

could be imposed by the accuser himself or, at his demand, by any passer-by, or by a judge. The knotted togas or the wrist chains indicated to the passing public that the pair were obliged to maintain their mutual bondage peaceably.[95]

Thus, over a century ago Plowden reported that when a passer-by is stopped by disputants and asked to deal with their case,

> "He must . . . place the accused in bonds, which is done by tying his cloth to that of the accuser, and escort or send them to the nearest magistrate, who, should the accused demand it, must in like manner forward him to his immediate master or chief, where the case is first heard. . . ."[96]

And another nineteenth century traveler reports:

> "When one has a complaint against another, he ties the bottom of his shamma to the other's and he cannot untie it without declaring himself guilty. He is led this way before the judge. If the suspect is a criminal suspected of wanting to escape, he is bound by a chain which is fastened to his wrist at one end, and at the other to the wrist of [the plaintiff's] trusted servant."[97]

Most observers agree that the accuser was responsible for the accused's welfare while in ambulatory custody, including providing for his food and shelter.[98] Although subject to abuse,[99] this feature may have operated as a deterrent to unfounded accusations, or the arbitrary rejection of persons nominated as sureties.[100]

The institution of ambulatory custody should be viewed in light of the fact that, as was true of African societies generally, prisons were virtually unknown in Ethiopia before the modern era. The outstanding exception was the use of remote natural fortresses (*ambas*) to keep "politically dangerous" persons in preventive detention. Members of the royal family who were potential rivals for the throne were particularly subject to this form of treatment. However, imprisonment was not generally known in the ordinary criminal process, either as a temporary pre-trial measure or as a penal sanction.[101] And, it appears, even the use of ambulatory custody was

95. Mérab, n.27 vol. 3, p. 214.
96. Plowden in Hotten, n. 77, p. 186.
97. Lefebvre, n. 14, vol. 1, p. xl.
98. Messing, n. 11, p. 328; Walker, n. 20, p. 170. Walker reports, p. 169, that the accuser had even to provide sureties to guarantee safe and fair treatment of the accused. But see Lefebvre, n. 14, vol. 1, p. xl: accused must feed the accuser's retainer with whom he has been placed in ambulatory custody.
99. Walker, n. 20, p. 170, refers to the possibility that the accuser will under-feed the accused to force him to capitulate.
100. Messing, n. 11, p. 328.
101. Pollera, n. 9, p. 101; Messing, n. 11, p. 308; Alvares wrote in the 16th century: "The . . . valley reaches to the (very high) mountain where they put (all) the sons of the Prester John. . . . They say that this mountain is

looked upon as exceptional once the proceedings had been initiated before a court; conditional release on personal guarantee seems to have been regarded as the normal situation for accused persons.[102]

b. *Informal settlement of disputes.* "Than the pleader at law, the reconciler, than the washer the drier [is better]" is an Amhara proverb attesting to the universal preference for "out of court settlement" of disputes.[103] Conciliation definitely appears to have been a part of Ethiopian criminal procedure, but the sources do not, in general, reveal any group certain from whom the conciliators were drawn. There are some reports indicating that elders (*shemagalye*) were preferred,[104] and one which points to the involvement of the parish headman,[105] but some observers remark that any passerby could and might be pressed into service as a judge, "in the name of Menelik" or some other royal personage.[106] The complainant would simply request the stranger to be his judge, and the person so approached had to convene a tribunal on the spot to hear the case:

> "Litigation at its lowest stages was a voluntary and spontaneous form of arbitration. Parties in civil and even minor criminal disputes would call upon a passer-by to decide the issue between them under a tree. These informal roadside courts might last for hours, to the deep interest of the spectators. . . . Judges thus conscripted were expected to accept their duties . . . as a civic obligation. They were generally offered a small fee for their services."[107]

It may be that ordinary passersby did function in this way as judges for strangers, perhaps of different tribes, who fell into disputes while on the road or in a country market, without ready access either to tribal authorities recognized by both parties or to Imperial court officials.[108] On the other hand, it is suggested by some writers that the "passerby judge" did not actually hear the case, but had only

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cold and big . . . that it is by no means possible to get out of it, . . . and that in this valley . . . they place those who are nearest to the King, that is to say, those who are still of his own blood . . . and no one approaches them, nor do they go near others. . . ." F. Alvares, *The Prester John of the Indies* (Hakluyt Society ed. by C.F. Beckingham and G.W.B. Huntingford, 1961), pp. 237-38, 243-44.

102. Conditional release is discussed below at text accompanying notes 116-20, infra.

103. Walker, n. 20, p. 135.

104. Ostini, n. 57, p. 17; Messing, n. 11, pp. 316-17; Plowden in Hotten, n. 77, p. 187.

105. Ostini, n. 57, p. 17.

106. "Be Menelik Amlak Dagnegne," meaning "For the divine sake of Menelik, judge me" is one formula, reportedly still in use today.

107. Perham, n. 16, pp. 144-45. See also C.F. Rey, *Unconquered Abyssinia* (1923) p. 114; E. Combes and. M. Tamisier, *Voyage en Abyssinie* (1839) vol. 3, p. 357; Plowden in Hotten, n. 77, p. 186. De Salviac, n. 57, p. 207 states this practice is not followed by the Galla peoples.

108. See Pollera, n. 9, p. 111.

the task of ensuring, as discussed above,[109] that the defendant accompanied the complainant to the nearest (official) judge, *i.e.*, that he acted to issue (or bolster) compulsory process:

> "If a creditor meets his debtor on the road, he may follow him, crying, 'By the Bed! By the State! Go not!' But he may not lay hands on him . . . If he meets a passer-by, he will cry, 'Lo! This man, whom I adjured by the Bed, would not stop. Take heed, for thou wilt be my witness!' And, when he finds a fit person, he will say, 'Come! Judge me!' or he may appeal to several passers-by. So that person must return with them to a big judge and hand them over. . . .[110]

It is also not clear whether or in what circumstances the decisions of these "impromptu" tribunals were binding. Walker, stressing the conciliatory aspect, quotes the Amhara proverb, "If it burns me, with my spoon; if it burns me not, with my hand," meaning "if you decide fairly, I'll accept the decision; if not, I'll go to a (real) judge".[111] But others describe a true arbitral procedure, where the parties make solemn oath that they will accept the "decision of the elders."[112] The likely explanation for this apparent conflict is that the writers in question were describing different institutions. Both types of settlement procedure may have existed—conciliations and arbitrations. But it should be noted that even those describing conciliatory procedures cite the strong pressure of public opinion on the litigants to accept the decision.[113]

c. *Trial court proceedings.* Court proceedings in traditional Ethiopia resemble in many respects those which have been reported throughout indigenous Africa. Those are characterized by relative informality, free debate by the parties, their pleaders, and bystanders, major reliance on testimonial proof by human witnesses, some supernatural modes of proof, and "consensus" judgments strongly influenced by lay observer/participants.[114] In addition, the traditional procedure in Christian Ethiopia appears to have certain prominent features not commonly found in other parts of Africa: these are the extensive use of personal sureties, the institution of wagers, and the apparently elaborate regulation of witness evidence.[115]

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109. See the discussion at text accompanying notes 94-96 supra.

110. Walker, n.20, pp. 168-69. See also Mérab, n.27, vol. 3, pp. 212-13; Plowden in Hotten, n.77, p. 186.

111. Walker, n. 20, p. 134. See also Perham, n. 16, p. 144; Combes and Tamisier, n. 107, vol. 3, p. 357.

112. Both Ostini, n. 57, p. 18 and Plowden in Hotten, n. 77, p. 187, state that no appeal lies from the arbitral decision of the elders.

113. Plowden, n. 9, p. 106; Perham, n. 16, p. 144.

114. See Elias, n. 73, chap. 12, *passim.*

115. These differences may in part be due to the Semitic and Roman-Byzantine influences on Ethiopian culture. See n. 7, supra.

(i) Preliminary proceedings: the requirement of personal sureties

> "After the injunction to appear before the judge, the first act to institute any case is the establishment of one or more guarantors according to the importance of the case.
>
> The guarantor, called 'wahs,' is a personage that one meets in Abyssinia in any contract or controversy, who in the judicial procedure answers for the disciplinary conduct of the parties before the judge, for their appearance in court, and for the execution of the civil sentence."[116]

As the above-quoted account by an Italian administrator implies, both parties to the litigation had to present sureties,[117] who were responsible to insure various obligations of the parties—not just their continued appearance. Also, although this passage specifies the surety's secondary liability vis-a-vis the "civil sentence," there are indications that a form of suretyship existed in criminal cases[118] whereby the surety was liable to criminal penalties if the accused absconded.[119] Sureties were drawn from the accused's circle of kin and friends, and absconding was reportedly rare.[120]

The surety practice was ubiquitous in Ethiopia in a multitude of contexts unconnected with litigation. We have already mentioned how it functioned in the pre-trial stage, and below we shall be noting its use at other stages of the proceedings—particularly concerning wager obligations, and execution of the sentence.

(ii) *Composition and functioning of the tribunal.* The Ibo proverb, "A case forbids no one,"[121] also describes the Ethiopian tradition of public trial, where the two parties confronted one another before the judge and in the presence of an active lay audience:

> "It is traditional . . . that procedures of any kind have to take place in a public place, accessible to all. Each region, with such an intention, possesses a place where in the shade of an old tree, the leader administers justice."[122]

The adversariness of the procedure is illustrated in the Fetha Nagast, which states:

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116. Pollera, n. 9, p. 114; Masucci, *Il garante nelle consuetudini etiopiche* (1914), p. 106. See also Plowden in Hotten, n. 77, pp. 121, 183. The different types of suretyship contracts have been described in Poletti, n. 30, p. 260.

117. See also Plowden, n. 9, p. 96; d'Abbadie, n. 90, p. 463; Laws, n. 89, ch. 23, Art. 192A. For similarities in early Anglo-Saxon law see E. de Haas, *Antiquities of Bail* (1940) p. 4.

118. See p. 713, supra, for our definition of "criminal" cases.

119. Castro, n. 14, p. 434; Plowden in Hotten, n. 77, p. 184; Poletti, n. 30, p. 260 (describing *Ieesserat Was*).

120. Plowden in Hotten, n. 77, p. 184.

121. Elias, n. 73, p. 239.

122. Pollera, n. 9, p. 113. See also d'Abbadie, n. 90, p. 469.

> "He [the judge] shall not receive the litigants individually, in the absence of their adversaries, nor must he see them individually after they are separated."[123]

A judge who gave a decision on the basis of *ex parte* argument was liable, under the Fetha Nagast, to the sentence he passed.[124]

All observers appear to agree that the proceedings were much influenced by the lay audience, who were free to interject their own questions, comments, and even wagers on the outcome of the suit.[125] Some report, in addition, the practice of establishing jurors in certain cases to aid in deciding the case. Thus, Walker describes the provincial governor's court:

> ". . . [I]f the matter is important, the judge may call on all those who are listening to become jurors, provided that they are of prudent age, since all men love a suit and many will be there saying, "I will listen to the procedure and accustom myself to the Law." . . . Thus there may be a crowd of jurors. The adversaries may deny the judgment of the witnesses, but the jurors will bear witness to the . . . contradiction and agreement made by each party in the pleading. . . .
>
> A man may choose his own jurors, for there is a saying, "A juror and a horse according to one's love!" But the adversary may refuse to accept them till the judge tires and cries, "Thou has refused them all! Whence can others be brought! Prefer So-and-so and So-and-so!" and will constrain him. . . .[126]

Other writers describe the selection of a few jurors to aid the judge rather than the above described system of converting the assemblage at large into a "jury".[127]

In Ethiopia, as in African customary procedure generally,[128] the principle of court representation of a party by another was well established. Thus, in 1935 the English observer Harmsworth wrote:

> Two men in white *chammas* were dancing and stamping and making frenzied gesticulations. Before them, in solemn array, sat a dozen or more elders who listened intently and made occasional notes. . . . Not once . . . did either the plaintiff . . . or the accused . . . utter a single word. But their silence was more

123. *Fetha Nagast*, p. 253. See also Ethiopian Penal Code of 1930, para. 223.
124. *Fetha Nagast*, p. 258.
125. See, *e.g.*, Messing, n. 11, p. 330.
126. Walker, n. 20, pp. 138-39.
127. See d'Abbadie, n.90, p. 463; Mérab, n. 27, vol. 3, p. 232. According to the Fetha Nagast "experienced persons" [in law] were to sit with the judge to be consulted on "difficult questions," *Fetha Nagast*, pp. 257-58. See also de Salviac, n. 57, pp. 201-02, reporting the existence of a system among the Galla whereby two juries were empaneled to deliberate simultaneously in each case.
128. Elias, n. 73, p. 240.

> than made up for by the volubility of the counsels for the defense and the prosecution, who vied with each other in theatrical wavings of the arms and stamping movements of their feet. At the end of their impassioned orations . . . each would gather his *chamma* around him and throw the ends over his shoulder, as proud as a Roman. . . .[129]

But it has also been observed many times that the average Ethiopian litigant prided himself on his considerable ability in self-advocacy, and often preferred to defend himself rather than engage a spokesman.[130] Advocates included both "amateur" family members and "professionals" hired for a fee. The latter did not enjoy a high status and, we can speculate, were not very numerous.[131]

Foreigners were frequently struck by the dynamic and skillful advocacy which they observed in customary Ethiopian tribunals. As indicated in the above description by Harmsworth, energetic physical gesticulations were commonly employed;[132] most of these probably served symbolic functions. The use of a large stick—similar to the kind which men in some parts of Africa carry wherever they go—is often mentioned,[133] as is symbolic manipulation of the toga.[134] For instance, Messing describes the device of a defendant's throwing his toga off his shoulders in the middle of his argument, as a way of showing his readiness to receive the flogging which the court could order. This serves to prove his sincerity and express confidence that the court will not judge him guilty.[135] The "language of the toga," wherein status or mood is communicated symbolically by the way one wears one's toga—raised or lowered, covering the mouth or exposing it, etc.—is a general feature of Ethiopian culture; its appearance in judicial proceedings is simply one instance of its general social function.[136] Proverbs, which also function prominently in traditional Ethiopian culture, play a marked role as well in judicial advocacy.[137]

Despite the acceptance of advocacy styles which seem unre-

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129. G. Harmsworth, *Abyssinian Adventure* (1935) p. 183.

130. Mérab, n.27, vol. 3, pp. 240-41; Perham, n.16, p. 144; Messing, n.11, p. 327; A. Wylde, *Modern Abyssinia* (1901) p. 310; Raffray, n.9, p. 163.

131. Walker, n.20, pp. 174-78; Shack, n. 74, p. 153; Mérab, n.27, vol. 3, p. 240-41.

132. See H. d'Orleans, *Une Visite à L'Empereur Ménélick* (1898) pp. 131-32: Mérab, n.27, vol. 3, pp. 228-29. Compare P. Gulliver, *Social Control in an African Society* (1963) p. 224 reporting similar phenomena among a different African people.

133. Walker, n. 20, pp. 179-80; *Fetha Nagast*, Foreword, p. xx, n. 33. De Salviac, n. 57, p. 201 and d'Abbadie, n. 90, p. 465 report the use of small whip-like rods by court speakers among the Galla.

134. Messing, n. 11, pp. 238-39 and 519; d'Abbadie, n. 90, p. 463.

135. Messing, n. 11, p. 329.

136. See Levine, n. 12, p. 254.

137. Messing, n. 11, pp. 330-31; d'Abbadie, n. 90, p. 466 ("Every pleading is sprinkled with rhymed and well-known proverbs").

strained by comparison to Western courtroom etiquette, the Ethiopian proceedings operated in a context of strict decorum which allotted to each party a particular place before the tribunal, and which forbade speaking out of turn and other disruptive conduct on pain of contempt sanctions. Thus, Walker reports that the complainant always had the right to be on the judge's right side:

> "I, being the accuser, will take the right like the Saints, whose work is to the right towards God. And do thou take the left like Satan, whose work is left-handed and deceitful."[138]

In some tribes, it is reported that pleading ritual required the plaintiff when addressing the tribunal to hold the sole of one foot up against a tree while the defendant had to squat with one leg extended and the other bent under him. The report states that this arrangement was designed to assure brevity of speech.[139]

There was also a definite progression of speeches by the various participants. First the complaining party would address the court recounting the injury done him by the defendant. Then the judge would ask the defendant whether the accusation was true, whereupon the latter was free to tell his story. It was forbidden to interrupt one who had the floor. According to the Fetha Nagast,

> If one insults the other or says shameful words, the judge shall cut him short; if he does this again, the judge shall reproach him, and if he persists in this, the judge shall excommunicate him.[140]

Such was the advantage of having bishops on the bench!

Witnesses would only be called after both sides had spoken, to clarify disputed issues.[141] But first wagers, to which we now turn, would be made.

(*iii*) *Wager.* If the defendant admitted his accuser's allegations, the court would directly consider the sentence. If, however, the defendant denied his liability, the production of witness evidence was normally preceded by the making of wagers between the parties. The wager institution is not unique to Ethiopian law: it has been reported elsewhere in Africa,[142] Europe, and other places.[143] Wagers serve several functions: providing revenue (out of the loser's bet) to the judicial organ, "weeding out" some of the more flagrantly unmeri-

138. Walker, n. 20, p. 179.
139. De Salviac, n. 57, p. 201.
140. *Fetha Nagast*, p. 258. See also Walker, n. 20, pp. 179-80; *Laws*, n. 89, chap. 23, Arts. 200-203.
141. Mérab, n.27, vol. 3, p. 232.
142. Elias, n. 73, pp. 232-33 mentions the tradition of oath and betting in combination among the Ibo of Nigeria. The connection in early Roman law between the oath and wager is remarked by H. Silving, *Essays on Criminal Procedure* (1964) p. 17.
143. Silving, *loc. cit.*; Conti-Rossini, n. 87, p. 524 adverts to the relationship

torious claims, and heightening the dramatic qualities of public litigation. As will appear from our discussion below, they are also subject to severe abuse.

Two types of wager ritual have been reported in traditional Ethiopian tribunals. The most commonly reported method involved symbolic knotting of the cotton toga, referred to in the following excerpt as *futa*:

> The acceptance of the wager has its characteristic rite. The proposer, holding on to the edge of his own "futa", makes a knot rapidly, puts it on the palm of his left hand, pronouncing the bet, and with his right hand repeatedly taps the knot. If the adversary accepts, he unties the knot and makes a new one that unites his "futa" with his adversary's "futa"; he taps this with his right hand, declaring his acceptance. Naturally, he may propose modifications, additions or clarifications, so that before arriving at the definitive formula there is a repetition of different proposals, a tying and untying of knots . . . up to the point where, having reached an agreement, the wager is accepted.[144]

Another method involved the making of certain body motions to indicate the amount of the wager one wished to make. Before a money economy existed in the country, wagers were made in kind. Litigants would commonly bet honey or livestock. Wager by sign-language consisted, for example, of licking one's palm to indicate a bet of honey, extending arms and waving of hands in imitation of a gallop to indicate a bet of a horse, and raising the hands to the ears and moving them up and down to indicate a bet of a mule.[145] With the passage of time, and the introduction of government regulation by statute, commodities acquired fixed money equivalents in certain regions, so that a bet of "honey" was understood to mean so many dollars, a bet of a "horse" such and such larger sum, etc. But the tradition continued, apparently, of expressing wagers in terms of the original commodities, and in the ways described.

The custom of wager gave rise to two kinds of problems: the escalation of wager stakes far beyond the means of the parties, and extension of wagering to issues which were of remote relevance to the principal issue of the case. Thus, the wager system permitted the

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between the wager institutions of Ethiopia, India, ancient Greece, ancient Rome, and Aryan law.

144. Pollera, n. 9, p. 119. See also H. Dufton, *Journey Through Abyssinia* (2d ed., 1867) pp. 65-66, and d'Abbadie, n. 90, p. 467. The latter reports a procedure of knotting the judge's toga, not the adversary's. He also mentions an alternate method of indicating a bet—closing the extended, open hand of the judge; the adversary signifies his acceptance of the bet by re-opening the judge's hand. Conti-Rossini, n. 87, p. 524 reports the same.

145. Messing, n. 11, p. 519. But see Walker, n. 20, p. 182, implying that only a mute would wager by use of this sign language.

parties to top each other's bets in a spiral which might even end in the wagering of one's hand, eye, or very life.[146] If a complainant refused to wager on his cause, he apparently could not proceed with the case.[147] While it is not clear what remedy a poor litigant had against escalation of the stakes beyond his means,[148] it was not unusual in the heat of contest for a litigant, moved by pride and a wish to impress upon the judge the worth of his cause, to participate in the bet-topping.[149] Since the judges received their income in large part from a share of the loser's bet,[150] they were reportedly less than vigilant in helping to keep the stakes at a reasonable level. This abuse was apparently so serious and so widespread as to provoke an Imperial proclamation by the Emperor Menelik in 1908:

> I proclaim that henceforth no bets should be contracted in which the losing party in the litigation shall receive a certain number of whippings. From now on honey should be used as a possible payment. At the most let the parties promise a horse or a mule. The judge should not permit an amount greater than this to be staked. If a party loses on a mule, he may pay twenty dollars; on a horse, ten dollars; on honey, four dollars.[151]

In 1932 Emperor Haile Sellassie found it necessary to issue a further proclamation, establishing reduced dollar equivalents for bets of a "mule," "horse," etc.[152]

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146. Conti-Rossini, n. 87, p. 526; Pollera, n. 9, p. 118; Walker, n. 20, p. 137. Bets of limbs or one's life were, as in the case of honey or livestock, generally payable at "fixed" dollar amounts which, we may speculate, were quite high relative to the resources of most litigants.

147. Messing, n. 11, pp. 318-19, 329. It is not clear whether a defendant, if he refused to wager, would automatically lose the case. (The sanction of non-access to the courts would obviously only be effective against the complainant.) Lefebvre, n. 14, vol. I, pp. xxxix-xli, states that he would. Conti-Rossini, n. 87, p. 524 states the only sanction on either party's refusal to wager was the risk of losing credibility and the judge's favour.

148. Walker, n. 20, p. 142, states that a poor litigant had the right to keep the stakes relatively low. Other writers suggest that the poor were remedyless, but one claims the wager system favored the poor because it was to the judge's advantage to decide the case on the merits against the party who was most able to pay the amount waged. Plowden in Hotten, n. 77, p. 185.

149. Walker, n. 20, pp. 181-82.

150. Pollera, n. 9, p. 118; Guebre Sellassie, n. 21, vol. 2, p. 529, n. 2; Messing, n. 11, p. 283. Judges also received gifts from the litigants. The line between acceptable gift-giving to judges and the payment of bribes (*goubo*), which were disapproved but apparently common, is unclear. See Coulbeaux, n. 20, vol. 2, p. 300; Mérab, n.27, vol. 3, pp. 246 ff.; Rey, n. 107, p. 130. Salaries for judges were apparently established for the first time in 1931 or thereabouts. See Brihanina Salem, Hedar 2, 1924 E.C., p. 367, "Good Progress: Judge Fees for Hearing Witnesses and Judges' Salaries" (Addis Abada, H.S.I.U. Law Faculty Archives). Compare Sec. 143, Penal Code of 1930 (judges allocated share of certain fines); *Laws*, n. 89, Art. 210 (establishes fees for judges, plus wager proceeds).

151. Mahtama Selassie Wolde Meskel, n. 21, p. 896. A slightly different version is given in Guebre Sellassie, n. 21, vol. 2, pp. 428-29.

152. Mahtama Selassie Wolde Meskal, n. 21, p. 103. Messing, n. 11, p. 329,

The extension of wagers to issues other than the main subject of the litigation had the effect not only of mounting the stakes considerably, but of delaying and possibly distorting resolution of the principal question. Thus, the parties might wager as to who would win a wager previously made, on whether or not a certain witness would be believed, on whether a cited rule of law was actually contained in the Fetha Nagast, etc. Again, the judge's pecuniary interest in the "piling up" of wagers conflicted with his duty to keep the proceedings focused on the original dispute. This problem was no doubt intensified if, as some have reported, not only the parties to the case but also the collected bystanders could participate in the wagering.[153]

(*iv*) *Modes of Proof.* After the parties had designated guarantors, made their initial statements, and entered into wagers, the witness evidence would be heard. The sources seem in accord that only the accuser could call witnesses,[154] which the accused had power to reject for cause. Thus, it is reported that the accused could insist on the disqualification of the accuser's servants and other dependents, and his relatives by blood or marriage within four degrees of relationship.[155] He could also reject any witness who was involved in litigation against him, or otherwise known to be his "enemy," and young children.[156]

To solve the problem of transporting witnesses from remote places to the place of trial, it was quite common to take evidence "on commission."[157] The judge appointed an agent, known as a *calati*,[158] who was empowered to travel to the homes of the accused's witnesses, and there record their testimony.[159] The accuser and the accused accompanied him on his journeys, which could be very long and arduous.[160] (If the accused had no guarantor, he would be in ambulatory custody

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states that the Imperial restrictions on the wager stakes resulted in more surreptitious bribing of judges.

153. Messing, n. 11, p. 330; H. Norden, *Africa's Last Empire* (1930) p. 27.

154. Plowden in Hotten, n.77, p. 184; Mérab, n.27, vol. 3, p. 234.

155. Conti-Rossini, n. 87, p. 503; Walker, n. 20, pp. 140-41; Messing, n. 11, p. 316. See also the similar rules in *Fetha Nagast*, p. 265-66.

156. Mérab, n.27, vol. 3, p. 234; Ostini, n.57, p. 25.

157. Plowden in Hotten, n. 77, p. 184; Walker, n. 20, p. 168.

158. Eritrean sources use the term *memaskari.*

159. Some sources state that the *calati* syste of introducing witness testimony was exclusive, and that witnesses were never produced to testify in court, d'Abbadie, n. 90, p. 467; Pollera, n. 9, p. 120; Maj. Abebe Guangoul, *Summary Contempt Power of Ethiopian Courts* (1966, unpublished, Addis Ababa, H.S.I.U. Law Faculty Archives), p. 6. Others state, more convincingly, that the *calati* was used only when a witness lived far from the court and could not conveniently be produced. See, e.g., Mérab, n.27, vol. 3, p. 234. Many trial observers report seeing witnesses testify.

160. Plowden, n. 9, p. 105; Plowden in Hotten, n. 77, p. 184. One source suggested that the *calati* institution served to "bring the parties together during the peregrinations and thus to furnish the occasion for a peaceful agreement." Pollera, n. 9, p. 122.

during this entire time). Since, to avoid subornation, the accused generally refused to name his witnesses prior to the time of their testimony, only the location would be known. If when the travelers reached the witness, the accused objected to him for cause, the *calati* could decide to take the testimony subject to later objection before the court.[161] At the journey's conclusion, the trial would resume and the *calati* would report the testimony to the judge in a public hearing.

The subject of witness testimony under traditional Ethiopian law is quite bound up with the matter of oaths. Several different types of oath can be distinguished. First, there were "testimentary oaths," employed by witnesses and the parties themselves[162] to validate their evidence. There were also decisive oaths of two sorts, resorted to in the absence of testimonial evidence: suppletory oaths, administered by the judge to a party to fill a specific gap in the evidence, and decisory oaths, administered by one party (or by religious authorities) to the other party when there was no acceptable witness evidence to prove the main issue of litigation.[163]

Testamentary oaths, which were taken by all who bore witness,[164] seem to have been in the form very commonly used in everyday parlance even today in Ethiopia: on the life of the Emperor or other hallowed personnage. Thus, "*Haile Selassie yemut*" ("let Haile Sellassie die [if I lie]"), or even "*menghesti yemut*" ("let the government perish").[165]

As for decisive oaths, the Fetha Nagast says: "Know that it is the accuser who must produce witnesses to prove something, and the accused who must take the oath."[166] The need for suppletory and decisory oaths was increased by the accused's power to reject the testimony of various classes of persons, and by a possible requirement, at least in certain types of cases, that the accusation be supported by a minimum number of acceptable witnesses.[167] Where the accuser was

161. Pollera, n. 9, p. 120; Conti-Rossini, n. 87, p. 503; *Laws*, n. 89, chap. 23, art. 200.

162. The status of an accused's testimony is dealt with in *Fetha Nagast*, p. 266.

163. Ostini, n. 57, pp. 26-27. Ostini's classification of decisive oaths seems clearly influenced by the Roman and modern civil law classification: see Silving, n. 142, pp. 16 ff. Decisory oaths in African customary law generally are discussed in Elias, n. 73, pp. 228, 230-31. Another form of oath, the *fetzmi*, is reported for Eritrea. This oath was sworn by both parties, in the "Let X die" form, at the start of proceedings to affirm their intention to abide by the decision of the court. Pollera, n. 9, p. 125; Conti-Rossini, n. 87, p. 522; Ostini, n. 57, p. 17.

164. Pollera, n. 9, p. 122; Dufton, n. 144, p. 65; Ostini, n. 57, p. 24; Walker, n. 20, pp. 139-40. But see d'Abbadie, n. 90, p. 467.

165. Poletti, n. 30, p. 264; Mérab, n. 27, vol. 3, pp. 234-35; M. Griaule, *Abyssinian Journey* (1935) p. 131.

166. *Fetha Nagast*, p. 258; see also id. at pp. 255-56, 259.

167. Conti-Rossini, n. 87, p. 503; Pollera, n. 9, p. 120; *Fetha Nagast*, p. 265. There are also reported tendencies on the part of Ethiopian judges to decide

unable to produce a sufficient quantity of acceptable witnesses[168] he might challenge the accused to take a decisive oath. If the accused took the decisory oath, he won the case; if he refused, he lost. Oath-taking was an extremely solemn ceremony which often took place at the local church, before the judge or his representative, parish priests, monks, and onlookers.[169] Various forms of the church oath have been reported. One form required the swearer to take hold of the church door and close it, saying, "If I lie, may [St. George, St. Mary, etc.] close my mouth as I close this door."[170] Or, the swearer would lie outside the church on a spread used for the dead. The priest would recite a sermon, then give the swearer a lighted candle which the latter would blow out, saying, "If that which I have affirmed is false . . . may my life go out in sin as the flame of this candle goes out."[171] Or, the priest would hand him a cup of water which he poured on the ground saying "may my family be lost up to the seventh level, may its blood be absorbed by the earth as this water disappears."[172] Or, the swearer might light a little straw, and extinguish the flame with water, saying his family "may be burnt, and their memory blotted out from the face of the earth for seven generations" if he lies.[173] The supernaturally enforced consequences of these oaths were considered so terrible that, apparently, every effort was made to reconcile the parties at the church to avoid the accused's taking of the oath.[174]

A last mode of proof that should be mentioned in addition to witness testimony and oaths is the ordeal. Although the ordeal is reportedly much used in African customary law,[175] there are few reports of it in the literature on Ethiopia. One observer describes an ordeal requiring theft suspects to eat a large piece of bread, which the guilty ones were unable to swallow because their mouths were too dry.[176] Another describes forcing a suspected "witch" to drink a truth-inducing beverage.[177]

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according to the number, rather than credibility, of witnesses. See Coulbeaux, n. 20, vol. 2, p. 302; *Fetha Nagast*, p. 269.

168. Mérab, n. 27, vol. 3, pp. 241-42; Walker, n. 20, p. 140. But see J.S.S. Rowlands, "Notes on Native Law and Custom in Kenya," *J. Afr. L.*, vol. 6 (1962) p. 192, 207, *contra*. This procedure is reported also for the Gurage tribe: W. Shack, *The Gurage* (1966), pp. 158-59.

169. Mérab, n.27, vol. 3, pp. 241-43; Walker, n.20, p. 140.

170. Mérab, n.27, vol. 3, pp. 241-42.

171. Pollera, n. 9, p. 124.

172. Ibid.

173. M. Parkyns, *Life in Abyssinia* (1853) vol. 2, pp. 257-58.

174. Walker, n.20, p. 135; Mérab, n.27, vol. 3, pp. 241-42. For a form of Galla oath, see Mérab, p. 243.

175. Elias, n. 73, pp. 228 ff.

176. H. de Monfried, *Vers les terres hostiles de l'Ethiopie* (1933) pp. 213-14. Compare Plucknett, n. 37, p. 114, reporting a similar ordeal in Anglo-Saxon law.

177. Ostini, n. 57, pp. 43-44.

(v) Judgment

From the little information available on the judgment stage of proceedings, it appears that after the evidence was heard the judge would invite the "jurors"[178] or elders present to give their opinions on the case, and he would only make his decision after hearing their opinions. Thus, Walker reports of the procedure in the provincial governor's court:[179]

> After the jurors have listened . . . the Chamberlain will cause them to testify—one from the right, one from the left, each in his turn swearing, "May he judge against it, my soul! May the sword judge against me!" "If I show favour, may He show favour against me!" Let that party conquer!" Each juror—beginning from the left—having adjusted his shamma will step to the front and make the oath . . . . Lastly the Right Wambar ["judge"] will rise up and all with him save the Governor, and he will make the Wambar's oath and all will sit again when he sits. And after him the Left Wambar.

A similar procedure, of opinions by the elders before the judge spoke, is described for the Emperor's court.[180]

d. Appeal. Ludolph's seventeenth century history of Ethiopia states:

> It is lawful to appeal from Inferior Sentences either to the King or the Court-Tribunals: but that is seldom done; by reason of the Poverty of the People, and the tediousness of Travelling: and partly out of the Little hopes they have of redress. For the Governors and Judges of Provinces are offended with appeals, as seeming to them an accusation of Injustice; and therefore the wrong'd Parties fearing their displeasure, rather choose to lose their right, than the favour of the Judges.[181]

To the contrary, more recent observers note a very strong tradition of taking appeals,[181] on minor interlocutory issues as well as major ones, through multiple court levels and up to the Emperor's own court.[182] The Emperor himself has always been popularly regarded as the ultimate source of justice, to whom litigants could appeal in the last resort. But Ludolph's statement reveals certain characteristics of the traditional appeals system which are noteworthy. Because of the lack of separation of powers between administration and ju-

178. See the text accompanying notes 121-127, supra.
179. Walker, n. 20, pp. 138-39. See also d'Abbadie, n. 90, p. 468.
180. Mahtama Selassie Wolde Meskel, n. 21, pp. 106-08.
181. Ludolph, n. 37, p. 238. See also Almeida, "History of High Ethiopia, 1628-46," in G.W.B. Huntingford and C. Beckingham (ed.), *Some Records of Ethiopia, 1593-1646* (1954) p. 73, *accord.*
182. D'Abbadie, n. 90, p. 467; Nebiyelul Kifle, n. 39, pp. 14-16, as quoted in Fisher (1969), n.1, pp. 421-22; Perham, n. 16, p. 143.

diciary,[183] an appeal was often, in fact or effect, a claim that one's "lord" had done him an injustice. This "personal" aspect is illustrated by the fact that the judge below was himself a party to the appeal, and had to appear either in person or by representative.[184] If the appeal court determined that the judge had acted arbitrarily or unjustly, he could be disciplined.[185] Also, it seems that the system of wager applied to appeals, in that the appellant might bet the judge that his decision would be reversed.[186] For these reasons judges would understandably be hostile to appeals.

The procedure by which one could appeal from the decision of a district governor's court, for example, to the provincial governor's was to bring the case to the latter's attention by means of a petition. Apparently this was done by a combination of personal "connections" and gifts to the appropriate court officials.[187] For the poor man who lacked the necessary means or contacts to penetrate the bureaucracy it was customary to use more drastic methods of drawing attention to his complaint:

> If a man is oppressed by the Wambar he may place a load of stone or wood upon his head and wait by the road side or at the gate till the governor passes. Then he will lift up his burden and cry out "Abeit Abeit!"[188]

The "right" to direct appeal to one's ruler by crying "abeit" has been widely noted by foreign observers, and was used to complain of alleged administrative as well as judicial injustice. Even in contemporary Ethiopia, one sees subjects approach the Emperor's entourage, petition in hand, and try to throw themselves in the path of His automobile. In many cases the security guards will simply brush such petitioners aside, but a successful attempt would result in His Majesty's instructions to a subordinate to accept the petition and deal with it. If the petition appeared worthy of investigation, an order might be issued to the court below to send up the case file for review.[189] Or, the judge might simply be summoned to appear with the file, the parties, and perhaps the witnesses, for a hearing of the appeal.

183. Refer to our description of the administrative/judicial structure on appeal at text accompanying notes 12-25, *supra*.

184. Walker, pp. 146-47; Mérab, vol. 3, p. 238 ("The judge who sat at first instance is called to give his account of the proceedings and to give the reasons which motivated his sentence."); Pollera, p. 121; d'Abbadie, p. 467.

185. Mérab, vol. 3, p. 238; Walker, pp. 146-47.

186. Pollera, p. 121.

187. Id., p. 102.

188. Walker, p. 147. See also Mérab, n. 27, vol. 3, p. 238; Messing, n.11, p. 307; Pollera, n.9 p. 102.

189. Article 8 of His Majesty's preamble to the Penal Code of 1930 states: "The Minister of Justice may call for the record of any case before the tribunals to assure himself of the correctness legality and propriety of all proceedings and to transmit the same to us with such observations as he thinks fit." Recall that the Minister was for some time the *Afe Negus* as well.

Whether or not every appeal consisted of a full trial *de novo* is not clear.[190]

e. *"Execution of Sentence:" The Injured Party's Role.* A central characteristic of Ethiopian customary criminal procedure was the absence of any official prosecuting agency. In the great bulk of offences considered "criminal" by modern laws the injured party initiated and prosecuted the action. It was often his task, also, to execute the sentence:

> "In case of murder, for instance, unless the victim has some relative, who, acting as accuser, seizes the homicide himself, proves the crime, and is ready to slay him with his own hand, the culprit will be untouched—justice furnishing neither accuser nor executioner."[191]

In some offences, such as blasphemy, perjury, banditry or treason, the (theocratic) state itself was the chief victim, and took action through its own agents (parish headman, local governor, etc.) So also, theft at the market place might be summarily punished[192] by action of the market master. But most offences—and the sources refer mainly to homicide cases—were regarded as primarily a matter between the victim (or his kin) and the convict.

A convicted murderer was handed over for punishment to the victim's family, who could inflict on him any kind of gruesome death they chose.[193] Over the years the central government made certain efforts to assert its interest in such cases. First, the law saved to the Emperor personally the sole right to decide capital cases,[194] and forbade blood revenge without mediation of the official court process.[195]

190. The question is particularly important in capital cases, since traditionally only His Majesty personally, sitting in his *chilot* (court), could impose that penalty. Mérab, n.27, vol. 3, p. 211; Plowden in Hotten, n.77, p. 121; Rey, n. 107, p. 130.

191. Plowden in Hotten, n. 77, p. 188. See also de Salviac, n. 57, pp. 201-02; Pollera, n.9, p. 99; Mérab, n.27, vol. 3, p. 213.

192. Non-capital punishments included banishment, flogging, fines, and mutilation. Descriptions of these and other gory punishments alleged to have been used are found in Wylde, n.130, p. 310; Plowden in Hotten, n.77, pp. 189-90; Mérab, n.27, vol. 3, pp. 188 ff.; J. Bruce, *Travels to Discover the Source of the Nile, 1768-1773* (1790) vol. 3, pp. 286-87; Castro, n. 14, p. 438.

193. Ludolph, n. 37, p. 239; Plowden, n. 9, p. 98; Almeida, n. 181, pp. 75-76; Ostini, n. 57, p. 32; H.A. Lewis, *A Galla Monarchy* (1965), p. 60. But other sources state that the execution had to be in the same manner as the original homicide: Castro, n.14, p. 436; Wylde, n. 130, p. 308; Harmsworth, n. 129, p. 273-74; Mérab, n. 27, vol. 3, p. 217-218. Thus the famous story attributed to various emperors: when the victim's kin in a case of accidental homicide refused to accept blood money, and unreasonably demanded the convict's life, the emperor insisted they kill him in precisely the way he had killed the deceased: by falling upon him from a tree branch high above the ground. The kin group chose the blood money instead. Mérab, vol. 3, p. 218; Gleichen, n. 66, p. 240; Parkyns, n. 173, vol. 2, p. 238.

194. See note 190, supra.

195. See *Fetha Nagast*, p. 295.

Second, the government periodically tried to control the manner and means of execution by the kin group, by requiring that executions take place at special government supervised locations. For example,[196] in 1925 the then-Regent Haile Sellassie established an execution device in a village near the capital, where the murdered man's kin were restricted to pulling a lever which caused a rifle to fire at the condemned man's heart from a fixed position.[197]

However, the penalty in personal injury or homicide cases did not necessarily result in "legalized vengeance" by the victim or his kin: it could be converted at the latter's option into a "blood money" payment of reconciliation. There were money equivalents, established by custom or statute in various parts of the Empire, for all kinds of injuries, including death.[198] But if in a capital case the victim's family, through spite or pride,[199] refused to accept compensation, they might proceed to execute the offender. Interestingly enough, it was the function of the elders, church officials, and judge (including in capital cases, the Emperor Himself), to plead with the "winners" of the case to be merciful and accept a reconciliatory settlement from the loser.[200] But the injured party could and often would reject even the Emperor's plea for mercy.

If the victorious victim agreed to accept compensation in lieu of other penalty, the accused would produce a guarantor of payment, or else might be placed in ambulatory custody for the duration of whatever travels he required to raise the necessary money from his relatives.[201] If that source failed, he might take to begging in the streets.[202]

Conclusion

The above description demonstrates that there was a functioning indigenous system of criminal procedure before the Italian invasion of Ethiopia in 1935. The system was marked by a number of striking characteristics. Some, like ordeal, oath-taking, and the role of elders are common to many African customary systems: others, like guaran-

196. Plowden in Hotten, n. 77, p. 235, reports that the Emperor Theodore, newly acceded to the throne, "has abolished the barbarous practice of delivering over murderers to the relatives of the deceased, handing over offenders, in public, to his own executioners to be shot or decapitated."

197. Mérab, n.27, vol. 3, p. 220, n.1.

198. Id., p. 190; Messing, n.11, p. 307; Ostini, n.57, pp. 32-33.

199. Messing, n. 11, p. 307, states that a weaker kin group will likely accept blood money but a stronger will not, thereby perpetuating a blood feud.

200. *Fetha Nagast,* p. 294; Mérab, n.27, vol. 3, p. 236; Mahtama Selassie Wolde Meskel, n.21, p. 107; Kassa Beyene, *"Blood Money" Problems in Ethiopian Traditional and Modern Law* (1967, unpublished, Addis Ababa, H.S.I.U. Law Faculty Archives), p. 8. See also n. 193, *supra.*

201. Mérab, n.27, vol. 3, pp. 190, 236; Messing, n.11, p. 316.

202. Castro, n.14, p. 436; de Salviac, n.57, p. 208; Mérab,vol. 3, p. 236.

tors and wager, may be more uniquely Ethiopian. The traditional system of criminal procedure was very deeply rooted in Ethiopia's religious culture and highly stratified society, and depended for its effectiveness upon a social context of close-knit rural community. At least some of the traditional legal institutions would not be well-suited to the changed conditions, such as increased mobility and urbanization, which have developed in the Empire during the last thirty-five years. In the comprehensive revamping of the national law which took place in Ethiopia between 1955 and 1965, the question of which institutions to retain as compatible with desired change, and which to discourage or forbid, must have been formidable. As it developed, the new law presents a contrast so marked as to be revolutionary. The Revised Constitution of 1955 contains a "bill of rights" closely resembling, in significant parts, the American Constitution. The Anglo-American framework thus superimposed upon the law of criminal procedure includes provisions[203] on "due process," "equal protection," right to counsel, arrest, detention, search and seizure, etc., which would be familiar to an American lawyer, but which bear no obvious relationship to traditional law or values. The Criminal Procedure Code, enacted in 1961,[204] completed the drive to "modernity." Unlike the new Civil Code, which expressly makes a sweeping repeal of customary law,[205] the Criminal Procedure Code contains no repeals provision. Article 1 (2) states that:

> "the provisions of this Code shall apply to all matters coming within the jurisdiction of the courts, the prosecution and police authorities."

This impliedly repeals inconsistent statutory and customary rules, but does not settle the status of practices which are not inconsistent with any provision of the Code, *e.g.*, the inviolability of sanctuary. But if the Criminal Procedure Code does not specifically repeal customary law, neither does it commonly incorporate customary practices, either directly or by reference.[206] On the contrary, the procedure of the

203. See Arts. 37, 43 and 52, *Rev. Const.*

204. *Op. cit. supra* n. 5 [hereinafter cited as Crim. Proc. C.].

205. See Krzeczunowicz, "A New Legislative Approach to Custom: the 'Repeals' Provision of the Ethiopian Civil Code of 1960," *J. Eth. Studies*, vol. 1 (1963), p. 57; Krzeczunowicz, "Code and Custom in Ethiopia," *J. Eth. L.*, vol. 2 (1965), p. 425.

The Penal Code of 1957, which superseded the Penal Code of 1930, is also silent about the effect of customary law, but repeal was certainly intended. Article 3 ("Other Penal Legislation") states: "Nothing in this Code shall affect Police regulations and special laws of a penal nature: Provided that the general principles embodied in this Code are applicable to those regulations and laws except as otherwise expressly provided therein." For commentary on the Penal Code see Lowenstein, "The Penal System of Ethiopia," *J. Eth. L.*, vol. 2 (1965), p. 383, and sources cited in Fisher, "Some Aspects . . . ," *op. cit. supra* n. 1, in footnote 4.

206. The Civil Code does so to a significant extent. See sources cited in n. 205, supra.

strongly Anglo-American Code is considerably different from, and often highly inconsistent with, traditional forms. Thus, the provisions on "criminal investigation" make little concession to the Ethiopian context. Investigation is conducted by police officers, who are accountable to the public prosecutor.[207] The Code does not mention such traditional institutions as *affersata* or thief-seeker. The rules on arrest are standard Western fare,[208] and do not mention the customs of "ambulatory custody" or sanctuary. As in the West, suspects may be detained before trial in police jails and in prisons.[209] The law of bail, drawn from Commonwealth law, departs from customary law in denying the possibility of pre-trial liberty to defendants charged with capital offenses.[210] In contrast to customary procedure, most cases are brought by a public prosecutor, rather than the injured party, and payment of "blood money" will not generally insulate the accused from criminal liability. The Code's procedure at trial does not provide for the practice of wager. Furthermore, the Code not only fails to recognize the defendant's customary oath-taking at trial, but, in the European fashion, apparently does not permit the defendant to give sworn testimony—he may make only an unsworn statement.[211] The Code does not provide for commission (*calati*) evidence,[212] and there is no disqualification of witnesses on account of their relationship to the injured party or the defendant. Laymen, whose participation formed a vital part of the traditional criminal process, have no role in the trial of all but the most minor offenses under the Code[213]—professional judges are the sole triers of fact. Criminal ap-

207. Arts. 22-39, *Crim. Proc. C.*

208. Id., Arts. 49-51; Art. 51, Rev. Const.; Fisher, "Some Aspects . . . ," n. 1, *passim.*

209. Arts. 59-60, Crim. Proc. C. With the break-down of the system of personal guarantee in urban centers Ethiopia has acquired a problem well known to "developed" countries—the prolonged pre-trial detention of suspects. In 1965 over one-third of Ethiopia's prison population was awaiting trial. Detention periods of a year or more are not rare; see Fisher, n. 1, (1969), pp. 161-62, 299-304. Ethiopians also experience "preventive detention" for political purposes, a quite traditional practice in the Empire. See text accompanying n. 101, supra. A wartime preventive detention statute was enacted in 1942, but was presumably repealed by the war's end and the enactment of the Code. In contrast to the post-independence law of many other developing countries, Ethiopia's new Constitution and laws contained no preventive detention authority, yet until 1969 the practice existed illegally. In 1969 the first modern preventive detention act, to remain in force six months, was promulgated in response to student disturbances. See Public Safety and Welfare Order, 1969, Order No. 56, *Neg. Gaz,,* yr. 28, no. 13. The legislation has since been renewed for a second six month period. Public Safety and Welfare (Amendment) Order, 1969, Order No. 60, *Neg. Gaz.,* yr. 29, no. 7.

210. Art. 63, Crim. Proc. C.

211. Id., Art. 142(3). See the discussion in Fisher, n. 1, (1969), p. 316.

212. Compare Arts. 122 ff., Eth. Civ. Proc. C., establishing the practice for civil cases. But the law of evidence, which may soon be enacted in code form, may fill this gap.

213. See Singer, n. 8, *passim.*

peals are no longer unlimited in number—the Code limits the parties to two appeals,[214] although the right of ultimate resort to the Emperor's court is preserved.[215]

On the other hand, traditional practices have not been entirely rejected in the new law; some accommodations have been made. In future research we hope to explore the extent of those compromises, an enterprise which the limitations of space here prevent. In this article we hope to have laid some basis for such inquiries.

214. Art. 181, Crim. Proc. C.
215. Id., Art. 183.