PATERNITY ACTIONS IN ETHIOPIA

TEN YEARS AFTER THE CIVIL CODE

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Introduction

Attempts in a court of law to prove paternity, i.e., the biological paternal link between a child and a man, are made primarily for two reasons in Ethiopia; most frequently so that a child may be in the position of an heir to the man's estate, but occasionally so as to entitle a child during his minority to support from the man. Due to the absence of public records registries in the nation, it is often necessary for a child conceived and born during a valid marriage, formally entered into, to establish his paternity in court. But much paternity litigation appearing in the Ethiopian courts today involves attempts to establish filiation in the eyes of the law between a person and a man to whom the person's mother was not formally married. When such out-of-wedlock paternities are legally established the children are treated the same juridically as children born in wedlock. Ethiopia, in its recent history at least, has not had a legal concept of illegitimacy.[1]

In 1960 the country adopted a Civil Code, based primarily upon Western models, which contains detailed provisions dealing with filiation. These replaced the previously existing customary practices. The Code provisions have been discussed by Professor Krzeczunowicz in the Journal of Ethiopian Law.[2] The reader is referred to that article for an exposition of how the law of filiation in all its aspects is ideally intended to operate. In this article we will deal with the code provisions only insofar as they have appeared to pose major problems in the

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[1] G. Krzeczunowicz, Law of Filiation in Ethiopia, J. Eth. L., Vol. 3, p. 511 (1966).

[2] Ibid.

courts since their enactment. Our focus in conducting this study was from the standpoint of legal systems analysis: the efficacy of transplanting laws from one society to another. Thus although considerable statutory interpretation and construction will be engaged in so as to appreciate what has been facing the courts, the purpose of the article is not to solve every problem presented. These problems were uncovered primarily in an analysis of the filiation cases handled by the domestic relations division of the High Court in Addis Ababa between September, 1968, and February, 1971.[3] In addition, 17 filiation decisions of the Supreme Imperial Court sitting in Addis Ababa in the decade since the enactment of the Civil Code were located and examined.[4]

The Civil Code preserved intact all "legal situations" which existed prior to its effective date. Thus, if an instance of legal filiation was created prior to the Code, the Code's provisions dealing with the establishment of such situations would have no effect on it. But, of course, if no such situation was created, if at all, until after the Code's effective date, then the Code will govern the establishment of filiation in the case. For the purpose of discussing problems that have arisen in the courts, it is convenient for us to divide the cases along these lines into "post-code" and "pre-code" categories. First, however, before looking at the court cases we should acquire a frame of reference by examining what is known of customary practices and generally outlining the scheme of the Civil Code.

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[3]Ninety-three of 98 cases noted in the judges' diary for the period were located and examined. The remaining 5 were not in the court files, and there was no record of their whereabouts. The author wishes to acknowledge the invaluable assistance of Zemeheret Bereket-Ab, Girma Wolde Mariam and Israel Tekle in locating these cases and translating them from Amharic.

[4]No claim to completeness can be made for the survey of the Supreme Imperial Court cases due to the lack of an effective recording or indexing system in that Court. The Court has only appellate jurisdiction in filiation matters. Many of the cases examined were located through the High Court, Addis Ababa, files where they were noted as being appealed to the Supreme Imperial Court.

CUSTOM AND THE CODE

Customary Filiation Practices

Little is known about the customary practices in Ethiopia concerning paternal filiation. There is evidence that among some groups a cermonial procedure has existed whereby a bastard child could be accepted by a man. It involves the slaughtering of animals, the spilling of blood, and, in the presence of relatives and neighbors, the administration of an oath to the mother through the office of her "soul father", after which the mother would physically hand the child to the man.[5] Voluntary receipt by the man at the point presumably constituted acceptance by him of paternal responsibility for the child's birth. The youngster would apparently be recognized thereafter for all purposes as the child of the man.

Regarding the situation where the alleged father was dead, the Ethiopian Old Judgments Book contains cases indicating that adjudicative tribunals were ready to declare filiation if relatives or friends of the man testified he orally informed them he was the father.[6] There have been recent suggestions, however, that courts, at least in the years just prior to the adoption of the Code, were in the habit of declaring filiation on the basis of little more than rumours in the community. It seems that the courts were full of lost or forgotten middle-aged bastard children seeking to inherit a share of "father's" estate.[7] It has been asserted that the affiliation provisions of the Code were intended to correct this loose situation, with the dangers of injustice that it entailed.[8] Certainly they could have that

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[5] See reference in Workinesh Bezabih v. Yedenekou (Sup. Imp. Ct., 1963), J. Eth. L., Vol. 1, p. 17 and description in Yelfegn Wasse v. Semu Alemu (Sup. Imp. Ct., 1968, Civil App. No. 723/60) (unpublished).

[6] See 111th E.O.J.B.. No. 148, p. 183; 133rd E.O.J.B. No. 74, p. 229; 19th E.O.J.B. No. 123, p. 275.

[7] Workinesh Bezibah v. Yedenekou, cited above at note 5, p.20.

[8] G. Krzeczunowicz, cited above at note 1, p. 511.

effect when fully implemented by the establishment of institutions which the Code contemplates, but do not now exist and if some of the broad and conflicting provisions are interpreted to that end. Let us move on to examine the aspects of the Code that are most pertinent to this study.

The Civil Code

The Code, in its basic framework, stipulates that filiation between a man and a child can be legally established by showing either that (1) the man was married to the child's mother when the child was conceived or born, (2) the man was engaged in an "irregular union" with the mother at the time of conception or birth, (3) the man (or certain relatives if he is deceased) has acknowledged the paternity in writing, or (4) the mother was raped or abducted by the man during the time of conception.[9] this scheme is similar to European continental models upon which the draftsman, René David, drew with the exception of the "irregular union" category; this was a concession to local Ethiopian conditions.[10]

The categories listed above are to be taken as the situations that proof admitted into court should seek to establish. The Code devotes a special section to the mechanics of the proof itself. Records of birth are mentioned as the primary means of proof.[11] (A system for recording such vital information as the facts of birth and parentage has yet been established in Ethiopia although it is provided for in the Code.)[12] In default of a record of birth, filiation may be proven by showing "possession of the status of child" in accordance with Article 770. This is done by introducing four witnesses to testify that the subject was "treated by a man or woman, by their relatives and by society as being the child of such man or woman." This provision will be at the heart of much of our subsequent discussion. It is very broadly drawn and can easily be read to permit a declaration of paternity based upon virtually any kind of evidence, including mere unsupported opinions

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[9] Civ. C., Arts. 741-761.

[10] G. Krzeczunowicz, cited above at note 1, p. 522-23

[11] Civ. C., Art. 769.

[12] Id., Art. 90 et seq.

that a man is a child's father. However, it is evident from other parts of the Code that such a broad interpretation can not be given to Article 770 if the remainder of the filiation articles are to make sense. One of the themes that emerges from the Code is the protection of men and their estates against unjustified claims of paternity. This is done by providing that unless a child is born or conceived in a going marriage or irregular union, there are only two ways a man can legally be established as the father - by his acknowledgement of paternity or by proof that he had raped or abducted the mother.[13] Neither of these alternatives can be proven by the use of witness testimony under Article 770. Article 748 clearly calls for written acknowledgements and forbids the use of witnesses to prove them except in a special situation to be referred to presently. As to rape or abduction, a judicial declaration of paternity following proof of the facts of such is called for.[14]

If Article 770 were interpreted to permit any kind of testimonial evidence to be used to establish paternity it would undercut the Code's apparent scheme of limiting the means of proving paternity when the child was not born or conceived in a marriage or irregular union. Thus, Article 770 should be read as requiring that any testimony given there under be directed to showing (1) that the alleged father was engaged in a marriage or irregular union with the mother and (2) that the man, the woman, their relatives and society treated the subject as a child arising out of such relationship.

There is a further limitation on the use of Article 770. It can only be used even in the marriage and irregular union categories when the petitioner's reputation evidence is not "contested" (about which more will be said later). It is intended as a simplified means of proof in the absence of a proper contest. In order to help ensure the verity of the proof

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[13] "Relations established between a man and a woman out of wedlock or out of an irregular union shall have no juridical effect attached to them.... Without prejudice to the provisions of this Code relating to acknowledgement or adoption, children born of such relations shall have a juridical bond only with their mother." Id., Art. 721 (1) and (3).

[14] Id., Arts. 758-761.

under these circumstances, the Code seems to call for four witnesses each testifying to what Article 770 requires.[15] If someone contests, in the requisite manner, the petitioner's assertions or, even in the absence of such a contest, if possession of status is not satisfactorily shown by the four witnesses, then the marriage or the irregular union, as the case may be, and the status as a child of that relationship must be specificially proven as a matter of fact by introducing an "act of notoriety" into evidence.[16] This is, in effect, a certificate by a public official, made after interviewing witnesses and otherwise gathering information, stating that the facts are as set out in the certificate. A phrase suggests "acts of notoriety" can also be used to prove acknowledgements,[17] although the circumstances under which this might be done are unclear.

In any event, like birth records, the machinery for the issuance of "acts of notoriety" has not yet been established in the country. This will require, at a minimum, the designation by judicial administrators of people to perform this function, presumably, the provision of funds from which to reimburse them. Thus, since the enactment of the Civil Code, the only means provided in the Code that have been actually available to prove paternity in Ethiopia are:

1. Proof of the possession of status as a child by witnesses' testimony under Article 770.

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[15] Id., Art. 771 (2): "Possession of status shall be proved by producing four witnesses." Compare the "irregular union" chapter of the Code which provides that possession of that particular status "shall be proved by producing reliable witnesses." Id., Art. 719 (1). It would appear that the same type of wording would have been used in Article 771 (2) if nothing more than substantial cumulative testimony going to the issue was intended to be required. Thus the specification of four witnesses appears to call for each of them to produce self-sufficient evidence on the point. This would seem to be in keeping with the goal of tightening the requirements of proof in filiation cases. See text at note 8, above.

[16] Id., Art. 772

[17] Id., Art. 748 (2)

2. Proof of acknowledgement of paternity by submission into evidence of a writing containing it (Article 748).

3. Proof of the facts constituting a rape or abduction in the conception period (Article 758, 760).

With this background let us examine what has been happening in the courts since the Code's enactment. Though approximately 85-90% of the paternal filiation litigation in the Addis Ababa High Court during the period examined involved pre-Code cases, the remainder, i.e., cases where the birth (or the legally activating factor such as acknowledgement) occurred after the Code's effective date, September 11, 1960, will be dealt with first because they are most important for the future and most of what is said will be equally applicable to pre-Code cases.

POST-CODE CASES

A routine pattern has evolved in the Addis Ababa High Court in paternity filiation matters. Four witnesses were virtually always brought in and they testified regarding the relationship between the child and the alleged father. Sometimes there were contestants who presented their witnesses. When this occurred the judges were faced with a difficulty due to the earlier mentioned dictate that "acts of notoriety", the machinery for which does not exist, are to be used to establish filiation in case of a proper contest. We will examine this presently. First let us concentrate on what it takes for the petitioner to make out a prima facie case of filiation.

Prima Facie Cases

In the cases where the court has declared paternal filiation based upon the testimony of the four witnesses presented by the petitioner it has almost invariably cited Article 770 (proof of possession of status as child) even when no other rationale is given for the decision. When one examines the testimony it is found that the witnesses are usually describing the birth of the petitioner in either a marriage or a an irregular union situation involving the alleged father. It is often not easy to discern which is being described. The formal marriage and irregular union categories tend to blend into one another in people's minds if not in fact. An "irregular union" is not clearly defined in Ethiopian jurisprudence. It involves

something less than a formal marriage and something more than a casual sexual encounter or two. It might most aptly be described as "setting up housekeeping" together. There is really no need to distinguish clearly between marriage and irregular union here because we have seen that both can be proven by using four witnesses giving "possession of status" testimony. It need only be shown that there was at least an irregular union when this method of proof is used.

So far there is no problem. But, often witnesses' testimony fades away from proving even an irregular union. One or two of the four will testify to facts tending to show, for example, (1) that the man had acknowledged the child was his orally, or demonstratively by doing things for the child,[18] (2) that the man and woman were "lovers", [19] (3) that the man was seen regularly in the woman's house, [20] or (4) simply that the community knew that the man was the father.[21] Let us first examine this practice in light of the idealized version of how paternal filiation should work under a fully implemented Code; later we will examine it in light of the practicalities of the moment.

From a study of the Code's rather murky provisions one must conclude that filiation was not intended to be establish in this way. We have seen that evidence of the existence of a marriage or an irregular union in relation to which the subject was treated as a child is requisite to a finding of paternity based on Article 770. Furthermore, it appears that each of four witnesses must present evidence which, standing alone, would tend to establish these facts.[22] If the petitioner cannot produce such evi-

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[18] In re Chere Teklemariam (High Ct., Addis Ababa, 1970, Civil Case No. 309/62) (unpublished).

[19] In re Berehu Gebru (High Ct., Addis Ababa, 1969, Civil Case No. 1966/61) (unpublished).

[20] Alem Tshay Desta v. Zewde Wolde Senbet (High Ct., Addis Ababa, 1970, Civil Case No. 1194/61) (unpublished).

[21] Chonyalew Haile v. Bogalech Haile (High Ct., Addis Ababa, 1970, Civil App. No. 519/60) (unpublished) (pre-code case to which principle under discussion is equally applicable).

[22] See note 15 above.

dence, then, as noted earlier, he can establish paternal filiation by proving birth as the result of a rape or abduction (the incidence of this in the cases is so low and the means of proving it so clear that it will not be treated hereafter). He can also prove an acknowledgement under Article 748. However, the latter cannot be done by using witnesses under Article 770. It must be done by introducing a written acknowledgement into evidence. The line between status as a child of an irregular union, provable by witnesses under Article 770, and birth as the result of a casual relationship, calling for a written acknowledgement to establish paternity, is not easily drawn. The Code does provide some guidelines, however, and the sort of testimony noted in the text above at notes (18) through (21) does not satisfy them.[23]

If four witnesses cannot be found to give evidence of possession of the status of a child of a marriage or irregular union and a written acknowledgement is not available, a petitioner can still establish paternal filiation, according to the Code's contemplated scheme, by getting a court's permission to commission and present as evidence an "act of notoriety". That would in

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[23]An irregular union is defined as "the state of fact which is created when a man and a woman live together as husband and wife without having contracted marriage." Civ. C., Art. 709 (1). The mere fact that the two engage in sexual relations, even if it is repeated and notorious, is not sufficient. Id., Art. 709 (3). Though they need not represent themselves to others as husband and wife, evidence of such will help to establish the relationship. Id., Art. 709 (2) and see example of such in Yesharez Ireqejihun v. Gebre Medhim Wondimagegnehu (High Ct., Addis Ababa, 1968, Civil Case, Probate and Administration File No. 1041/60) (unpublished).

Difficult cases are often presented when a man hires a woman as a servant in his house. In one such case the woman was successful in establishing an irregular union and receiving maintenance expenses for her child by introducing in addition to witnesses' testimony, a letter from the man indicating that he intended to make her his wife. Mandefro Amenu v. Tewabetch Teklemariam (Sup. Imp. Ct., 1969, Civil App. No. 371/60) (unpublished).

volve, it seems, a designated official having to go into the community involved in order to gather all possible relevant information, from witnesses or otherwise, concerning the issue in question and report back to the court.[24] By this means the marriage or irregular union and the status as a child of it could be shown. Arguably also, a written acknowledgement that has been lost or destroyed could also be proven in this way. But never since the Code was enacted have "acts of notoriety" been available to litigants. In view of this let us take another look at what the courts have been accepting as evidence from witnesses under Article 770.

If a petitioner is trying to prove birth in a marriage or an irregular union and he cannot bring to court four witnesses each of whom is able to give testimony bearing on that issue, should he be told he has no recourse? The stiff four witness requirement is not particularly harsh when one has the alternative of "act of notoriety" proof. But when the latter is not available it seems to make good sense to relax the four witness requirement and accept three, two, or one giving substantial evidence on the issue. This is what the High Court has in effect been doing in a great many cases. This is clearly contrary to the Civil Code, yet it is an interesting example of how an imported statutory scheme, presupposing certain conditions that do not exist in the new country, has been adapted to effectuate rough procedural justice. This is not to suggest that judges have necessarily consciously dealt with the system's inadequacies in this way. There is no discussion in the cases along these lines. It may be that the judges have simply seized on Article 770 as something familiar - from customary practice - in an otherwise complex, vague and ambiguous set of Code provision, and permitted any kind of evidence to be introduced under that article's broad language, a practice which appears to be a sensible resolution of the system's shortcomings.

There is one respect in which the practice has gone beyond what is called for in adjusting the Code provisions to present realities. Occasionally none of the petitioner's four witnesses in a case in which filiation was decreed has given evidence tending to show petitioner's status as the child of a marriage or ir-

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[24] See Civ. C., Arts. 150 (1), 153.

regular union involving the alleged father.[25] As indicated earlier, at least one or more witnesses whose cumulative evidence on this issue is convincing should be required. No further departure from the Code would seem to be justified in the normal case.[26]

One of the cases to which we have reference involved no testimony regarding a marriage or irregular union situation, but all four witnesses testified as to oral acknowledgements made to them by the alleged father.[27] It is easy to see how such a case could occur given the background of a customary practice permitted proof of paternity by such oral evidence in even the "casual encounter" situation, and Article 770's language, broad when considered by itself, into which such procedure could be fitted. Nevertheless it has to be improper. The Code calls for the introduction into evidence of a writing containing the acknowledgement if paternal filiation is to be established in this situation. Unlike the marriage and irregular union situations there is no gap here between what the Code contemplates and what is presently possible, calling for an "adjustment" by the courts. It may appear harsh to make so much turn on written acknowledgements in a nation still largely

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[25] In re Bekeletch Mekonnen, (High Ct., Addis Ababa, 1969, Civil Case No. 1611/61) (unpublished); In re Bekeletch Demissie (High Ct., Addis Ababa, 1969, Civil Case No. 1518/60) (unpublished) (pre-code case to which principle under discussion is equally applicable).

[26] There is a possible argument that if one or more of the witnesses testifies as to personal knowledge or otherwise of the existence of a written acknowledgement now lost or destroyed this should suffice. This argument would run as follows: An exception to the prohibition regarding the proof of acknowledgements by witnesses is contained in a cryptic provision merely referring to "acts of notoriety" in that regard (Civ. C., Art. 148 (2); "acts of notoriety" are usually intended to be utilized when records containing the information are unavailable (Civ. C., Art. 147); and if the machinery for producing "acts of notoriety" is not presently available to prove a lost or destroyed written acknowledgement then an "adjustment" should again be made in the Code by permitting the petitioner to present witnesses on the point.

[27] Bekeletch Mekonnen case cited above at note 23.

illiterate. Many children may lose inheritances or maintenance help from their true biological fathers if the Code's scheme is enforced. But the scheme represents a decision that, as of the Code's effective date, men and their estates are to be protected in the "casual encounter" situation against paternity claims; their principal protection being the requirement of a written acknowledgement. If this is an inappropriate policy for Ethiopia to pursue the statutory scheme could be changed. But it would appear to be incumbent upon the courts presently to enforce the Code's dictates.

Contested Cases

Even if the petitioner, using witnesses under Article 770, presents evidence justifying a declaration of filiation when viewed in isolation, the Code specifies that he cannot prevail on this basis if there is a "contest". In such event the petitioner must resort to an "act of notoriety" if he is to establish filiation.[28] There is no indication as to what type and weight of evidence must be presented in opposition in order to put the petitioner in this posture apart from a stipulation that possession of status under Article 770 "may be contested by producing four witnesses."[29] Presumably all four witnesses must present opposition evidence going to the issue. But of what probative value must the cumulative contesting evidence be in order to counter the petitioner's prima facie case? Other troublesome problems exist in this area. It seems clear that if the petitioner presents four witnesses each giving evidence supporting his position and the contestant presents less than four witnesses, the statutory scheme contemplates that the petitioner should prevail. But what if the contestant presents four witnesses as effective counter-weights to the petitioner's four? Here again, the Code calls for the petitioner to resort to acts of notoriety-for which there is no provision in the judicial administration at present. Should the petitioner therefore lose? Also if the petitioner has only from one to three witnesses to support his case and uses them because he has no "act of notoriety" to resort to and the contestant puts in one to four witnesses to counter the petitioner what should be done?

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[28] Civ. C., Art. 772.

[29] Id., Art. 771 (2)

These questions and others that could be posed[30] represent the grist for a full law journal article. They are raised here only to illustrate the problems that can presently face a thoughtful court in this area. In the absence of authoritative answers to such problems it is not surprising to see how the High Court has proceeded. Whether it is a considered solution of this problem or merely a holdover from traditional ways of proceeding, the court appears, in each case, simply to decide for filiation or not after weighing whatever evidence the contestant presents against the petitioner's evidence, giving consideration to the reliability of the witnesses based upon their relationship to the parties.[31]

PRE-CODE CASES

In this section our attention will be focused on cases presently being seen in the courts in which the birth of the child in question, and any other incidents that might be legally relevant in a paternity action (such as an acknowledgement), occurred before the effective date of the Civil Code. Generally speaking, such cases would appear to be governed by the filiation articles of the Code by virtue of the "repeals provision", Article 3347, which states that

> "unless otherwise expressly provided, all rules whether written or customary previously in force concerning matters provided for in this Code shall be replaced by this Code and are hereby repealed."

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[30] Another interesting question that will eventually have to be answered is the meaning of Civ. C., Art. 782 which states that "the paternal filiation of a child may be contested only by means of an action to disown." There is no doubt that the portion of the Code we are discussing points to the propriety of someone contesting filiation in an action to establish filiation begun by another.

[31] E.g., Guardian of Kidus Yohannes v. Guardian of Tamarat Yonannes (Sup. Imp. Ct., 1968, Civil App. No. 543/61) (unpublished); Tsehaynesh Shifera v. Bekele Shifera (Sup. Imp. Ct., 1969, Civil App. 742/61) (unpublished); Gebeyenesh Wolde Aregay v. Betre Haimanot Desta (Sup. Imp. Ct., 1968, Civil App. No. 682/60) (unpublished); In re Mamite Mekonnen (High Ct., Addis Ababa, 1970, Civil Case No. 1405/60) (unpublished).

Thus, our discussion in the preceding section concerning the handling of evidence questions when one is attempting to prove birth in a marriage or irregular union situation would seem to be as applicable to pre-Code as post-Code cases. A difference would, however, appear to exist regarding the handling of acknowledgements. This difference has presented itself in a series of cases in which the Supreme Imperial Court first recognized it and then, seemingly distracted by contradictory Code provisions, indicated that it did not exist.

Our starting point is Article 3348 (1), a "savings clause", which stipulates that

> "Legal situations created prior to the coming into force of this Code shall remain valid notwithstanding that this Code modifies the conditions on which such situations may be created."

No definition of "legal situations " is contained in the Code. In 1963 in the case of Workinesh Bezabih v. Yidenekou,[32] the Supreme Imperial Court in a dictum statement suggested that, in the filiation context, it would include a case "when a person has been acknowledged as the child of a man in accordance with the formalities of acknowledgement under customary law although these formalities would not, under the Civil Code, be sufficient to constitute acknowledgement."[33] The court appears to be referring to the type of ceremonial formality that we noted earlier in this essay. The court surely was correct. A legal situation was created, i.e., certain legal rights and obligations between the parties arose upon the customary ceremonial acknowledgement requisites being satisfied.

Then in 1965 the Supreme Imperial Court, in two decisions reported in the Journal of Ethiopian Law,[34] held that the legal

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[32] J. Eth. L., Vol. 1, p. 17.

[33] Id., p. 21

[34] Tgie Habte Sellassie v. Senayit, (Sup. Imp. Ct., 1964,) J. Eth. L., Vol. 4 p. 240 and Malunesh Hailu v. Bekeletch Hailu (Sup. Imp. Ct., 1965), J. Eth. L., Vol. 5, p. 245.

situations" saving clause included oral and/or demonstration acknowledgements by a deceased alleged father. It permitted proof of acknowledgement by witnesses' testimony that deceased "treated the child as his own" in material ways such as providing food and clothing for him and assisting him to get married and by telling relatives and friends that he considered himself the father. It should be kept in mind that this cannot be done in post-Code cases because of the Code's stipulation that acknowledgements must be in writing and cannot be proven by witnesses. It should also be remembered that there is evidence that it was permitted under customary practices.

A western trained lawyer may question whether the court properly identified a "legal situation" here. It is certainly different from the ceremonial acknowledgement where the ceremony might be seen as the legally activating factor though a traditional adjudicative tribunal might have been later called upon to recognize this fact. Here, if the oral and demonstrative actions of the alleged father were to be legally activated under customary practice one might think it would have occurred when an adjudicate tribunal heard the facts and declared filiation based upon them; ergo, no legal situation was created if no such declaration took place before the enactment of the Code. This distinction appeared to have been recognized by the Supreme Imperial Court in the Workinesh Bezabin case.[35] The court's holding that oral or demonstrative pre-Code acknowlegements could create "legal situations" of paternal filiation raises the question of whether something less could do likewise; for example, mere opinions or rumours that existed prior to the Code to the effect that a man was a father due to a casual relationship with a mother.

But let us not go too far in applying western frameworks by way of assessment or in conjuring up logical extensions based upon western premises. The Ethiopian courts are not officially bound by any foreign conceptualism in defining the term "legal situation" and if it is thought desirable to exclude the opinion or rumour based category from the definition it might be done by stipulating that some positive action on someone's part (the alledged father in the acknowledgement situation) is a sine qua non of a "legal situation" having been created prior to the Code.

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[35] Workinesh Bezabih v. Yidenekou, cited above at note 30, p. 21.

To continue with the story: In both of the cases under discussion, the Supreme Imperial Court cited Articles 770 and 771 (1) as authority for permitting proof of oral and demonstrative acknowledgements by witnesses in pre-Code cases. This was unfortunate. It would have been much neater ultimately if the court had simply argued that the customary means of proving a "preserved" pre-Code legal situation (by witnesses in the case of acknowledgements) must of necessity be preserved as well (all rights must have a remedy). It could then have cited Article 3347, the "repeals" provision, which, by negative implication, states that any customary rules governing matters not provided for in the Code are not repealed. As nothing is provided regarding proving-up pre-Code legal situations, it could have been argued that the customary practice in the case of paternity acknowledgements of doing it by witnesses should remain intact.

However, the Court did not take that approach and its fixation on the evidence provisions in the Code's filiation articles soon resulted in a complete turnabout on the acknowledgement issue. Reversing a lower court finding of filiation in a pre-Code acknowledgements must be proven by a writing and cannot be proven by witnesses. About a year later there were indications in the cases that the Court was not clear as to what position it should take.[36]

Where does one go from here? First we should recognize that the Civil Code was not drafted with customary practices well in mind - and this undoubtedly includes filiation practices. [37] Thus

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[36] The court impliedly endorsed the writing requirement in Mulat Demissie v. Tobiau Demissie (Sup. Imp. Ct., 1968, Civil App. No. 581/60) (unpublished), but about the same time in another case it impliedly endorsed the earlier view that a pre-code acknowledgement could be proven by witnesses under Article 3348 Aberash Kebeta v. Negase Gejea (Sup. Imp. Ct., 1968, Civil App. No. 102/60) (unpublished).

[37] Professor David has stated that "our insufficient knowledge of the custom has often embarrassed and might have misled us." R. David, Le Droit de la Famille dans le Code Civil Ethiopian (1967) p. 69. He said that the Ethiopian members of the Codification Commission, which reviewed and revised his work to some extent, were generally not familiar with the customs of their own regions of the country. Id., p. 3.

it is unwise to search for a preordained method of dealing with this problem. In any case, there is no published legislative history to assist such inquiries. The draftsman's commentaries are unhelpful. As the reader will have by now appreciated, the Code is so drawn that it can accomodate either of the two routes the Supreme Imperial Court has taken. Rules of statutory interpretation are of little assistance in a situation this complex. The proposition that "specific provisions control the general" can be counterbalanced by "every right must have a remedy." The solution would then seem to lie in a pragmatic, policy-oriented approach.

We noted one author's suggestion that a purpose of the filiation provisions of the Code was to check the flow of court cases where adults were attempting, often successfully, to establish filiation to deceased alleged fathers for the purpose of sharing in inheritances on the basis of rather flimsy evidence.[38] Whether or not such a purpose was actually in the minds of those responsible for promulgation of the Code, it certainly is a worthy goal. The Supreme Imperial Court's latest position would serve this end. An intruding sense of injustice makes one reluctant to take this direction, however. As we noted earlier, if oral or demonstrative acknowledgements cannot be utilized today a number of children will lose inheritances from their true biological fathers. It is one thing to require written acknowledgements for births after the Code when "notice", theoretically at least,[39] has been given that such is necessary and another to require it in regard to pre-Code births where a mother or her child, assiduous to secure inheritance rights, would have had no reason to think they had to obtain a written document to do so and could not rely on oral or demonstrative acknowledgements.

Thus, equitable considerations point to the Supreme Imperial Court's original (and, at the moment, only publicized) position - permitting the use of witnesses to prove oral or demonstrative

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[38] See note 8, above.

[39] Of course, it is visionary to think that more than a few people (perhaps no women) actually know that the Code calls for written acknowledgements now, but if the Code's scheme of protecting men and their estates from unjustified paternity claims is to be effectuated it must be applied as of the enactment date of the Code.

acknowledgements. If this is done properly the end of eliminating decrees of paternity based upon flimsy evidence can also be served. There is, of course, the danger that accepted testimony may degenerate into something less than evidence of acknowledgement. To guard against this, the courts should be careful to require clear and convincing evidence of oral or demonstrative manifestations, heard or noted personally by the witnesses, that deceased considered himself to be the father.[40]

These problems concerning pre-Code cases will disappear as such cases gradually diminish in incidence and finally cease. They are present in great numbers at the moment, however, and could continue to appear, calling for special attention by the courts, for the next 50 or 60 years.

CONCLUSION

The filiation provisions of the Ethiopian Civil Code were drawn up to function in a framework including registries of civil status and administrative machinery for the issuance of "acts of notoriety". Neither of these institutions exist at present. There are no rules or regulations to give guidance as to how certain evidentiary and procedural imbalances that the lack of these institutions creates are to be handled until they are established. Our survey of the practice in the Addis Ababa High Court has indicated that the courts are using makeshift procedures, which may simply be hold-overs from pre-existing practice, that probably represents the best that can be done under the circumstances. The considerable difficulties in this area of discrepancy between the Code and practice may be eliminated if the judicial administration would take action to designate people to perform the official functions in the various courts under the "acts of notoriety" provisions and provide for their remuneration if necessary.

The Code, in a general provision, calls for the preservation of certain rights or expectancies created prior to its enactment

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[40] It is encouraging to note a recent case where the Supreme Imperial Court reversed a lower court decision of filiation due to the lack of convincing evidence of acknowledgement. Yelfegn Wasse v. Semu Alemu (Sup. Imp. Ct., 1968, Civil App. No. 723/60) (unpublished).

of a sort that could not be created thereafter. There are no details as to how such "legal situations" are to be proved and this has created problems for the courts in the paternal filiation area, as the main "legal situation" tentatively identified calls for a means of proof that the specific evidentiary articles of the Code no longer permit. Of the two possible ways that the Supreme Imperial Court has seen to get out of this dilemma, the one which is the most difficult to administer though most satisfying to a sense of justice, would seem to be indicated.