"DE FACTO" AND CUSTOMARY PARTNERSHIPS IN ETHIOPIAN LAW

*by Paul McCarthy**

In 1960, the Empire of Ethiopia adopted for the first time a comprehensive Commercial Code, based for the most part on Continental European law. This Code introduced a number of new concepts into Ethiopian law and profoundly modified a number of others. Falling into the latter category is the concept of a partnership. Arrangements under which a business is carried on by two or more persons jointly have long existed in Ethiopia. These "partnerships" may vary a great deal with regard to the forms which they may take or the local customary rules which may govern them. Before 1960, no attempt to bring all such organization under a single set of rules met with any success. As early as the 15th century the Fetha Negast[1] or "Law of the Kings" devoted an entire chapter to the regulation of partnerships. Based upon Byzantine legal concepts, the Fetha Negast was the "official" law of the Empire but it is doubtful whether it was ever applied very far from the Imperial capital. The Law of Companies, adopted in 1933, and largely copied from French law, represented an attempt to introduce modern legal regulation for business organizations, including partnerships. However, with the outbreak of the war with Italy, little real effort was made to apply this law to local business.

These business arrangements may no longer ignore, or be ignored by, the modern law. The concept of a code (commercial or otherwise) implies that it is to govern all of the legal relationships which fall within its scope and we may safely assume that this was the intention of the parliament in adopting a Commercial Code. In the preface to the Commercial Code, Emperor Haile Sellassie I speaks of the code as "regulating the constitution and activities of all business organizations. . . ." All businesses created prior to the coming into force of the Commercial Code had to comply with it within six months of that date. Commercial relationships which may not have been formed with the Commercial Code in mind, must now comply with it in order to comform to the law; customary rules may no longer be applied by the courts. On the other hand, customary institutions do still exist. The problem is, therefore, to provide legal rules which may accommodate such institutions which at the same time are consistent with the Commercial Code.

Persons may form "partnerships" with the intention of complying with the Commercial Code yet fail to do so for one reason or another. Usually, they will fail to comply with some required formality such as a written contract or the rules relating to registration and publicity. The consequences of this failure will be discussed below. For the moment, we can say at least that the parties to this contract have intended to form a partnership as defined by the Commercial Code and so it should be treated a such. When one deals with a contract between two (or more) persons who have only some customary institution in mind, the situation

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1. *Fetha Negast,* Chapter XXXIV.

is somewhat different. Here we must pose the "there should" question of whether the organization which they intended to form qualifies as a partnership within the meaning of the Commercial Code. If it does, then it should be treated the same way as a partnership created by two persons who intended to have their organization governed by the Code. Is it likely that this would be true of Ethiopian customary institutions which resemble partnerships?

The Present Situation in Ethiopia

Very little field research has been done into the commercial relationships existing in Ethiopia. The author has investigated the system of relationships prevalent among Gurage merchants in Addis Ababa. This is probably not the only such institution in Ethiopia nor is it necessarily typical. There are several reasons for this choice. As indicated above, very little has been written about this subject and so one must rely on personal interviews. In the present case, such interviews were in fact available with Gurage merchants. Second, while partnerships probably exist among other groups of Ethiopians and are fairly common among Arab and Indian merchants, among the Gurage they are the most common way of doing business. Third, while the Gurage constitute a rather small percentage of the total population of Ethiopia, they are extremely important in the commerce carried on in Addis Ababa. In any case, the legal tests herein discussed would apply in analogous fashion to other institutions. The Gurage institution will serve as an example.

As mentioned above, partnership is the predominant way of doing business among the Gurage. A merchant who wishes to invest in a new business will seek someone who knows how to run such a business and in whom he has confidence. When he can find such a person, they will enter into an agreement whereby the one will contribute the necessary capital to start the business and the other will actually operate it. If the merchant cannot find such a person, he will hire someone to manage the business for him. If this arrangement proves satisfactory to both parties, they will often then conclude the same type of agreement.[2]

Under such an agreement, the two men involved will share both profits and losses, usually equally. The parties consider themselves to be joint owners of the business (building, inventory, etc.) and both may participate in decisions. Upon termination of the arrangement, after all debts are paid, the capital contribution will be returned to the contributor, not in kind but in value. The remainder, including any increase in the value of the business as a whole or of any given asset, is shared by both parties according to the agreement. Variations may occur. For example, both parties may contribute capital in equal or unequal proportions; where a large undertaking is involved, more than two persons may join. However, even

2. This process of converting an employment relationship into one of "partnership" is not automatic but the Gurage show a marked preference for the latter. While it is impossible to know exactly why this is the case, a partial explanation may be inferred from the form that a partnership agreement will take. Such an agreement will usually be in the form of a *Gurda*. This institution will be more fully discussed below; however, this term is usually translated as a "bond of friendship." Any act taken by one of the parties against the interest of the other is considered as a very serious breach of one's obligations, incurring penalties of a quasi supernatural nature such as illness to one's family, loss of possessions, even death. If such a bond is too serious for a mere employment situation, this may explain the advantage to the merchant in making his employee a partner. On the other hand, the fact that a "bond of friendship" is involved would preclude its use between strangers.

in this case, there will usually be one party whose contribution consists solely in the actual management of the business.

It is the author's contention that this institution is a partnership within the meaning of the Commercial Code and must therefore be governed by it. The Commercial Code defines a partnership agreement[3] as "a contract whereby two or more persons who intend to join together and to cooperate undertake to bring together contributions for the purpose of carrying out activities of an economic nature and of participating in the profits and losses arising out thereof, if any."[4] This definition contains several elements, all of which are satisfied by the Gurage customary institution.

First, one must have the intention of the parties to "join together and co-operate."[5] This implies that the parties may both actively participate on a level of equality in the affairs of the business. Even where one party manages the business, both participate in important decisions. The institution may be distinguished from a lease or a loan. Though either a lease or a loan may satisfy some of the other elements of a partnership agreement, the lender or lessor's role is always passive as regards the business.[6] Also, with a loan or lease, the objects sought by the parties are essentially different; that is, one party may very well work against the interest of the other. A partnership implies that all parties collaborate and work towards a common goal. A partnership agreement may also be distinguished from an employment contract since the latter implies a subordination on the part of the employee, which is not to be found between partners.[7]

Second, all parties must contribute to the undertaking. As indicated above, among the Gurage one party normally contributes capital while the other contributes services. Both of these acts are recognized as valid contributions by the Commercial Code.[8] Third, the purpose of the organization must be to carry out activities of an economic nature. This is certainly true of the Gurage "partnerships" we have been describing which normally are engaged in commerce.[9] Finally, a partnership agreement must envisage the sharing of profits and losses. This is certainly true of the Gurage institution. These relationships are not mere associations, institutions which envisage "a result other than the securing or sharing of profits."[10] One might also point out that while loans, leases or employment contacts often involve the sharing of profits they seldom involve the sharing of losses.

3. A "partnership agreement" is a contract which forms any business organization, not just a partnership. See, Comm. C., Art. 210(1).
4. Id., Article 211. In Professor Escarra's original draft, there was but a single definition (a "business organization") but this was altered by the Codification Commission to distinguish the organization and the contract which establishes it.
5. Often referred to as the "affectio societatis." See Escarra, *Cours de Droit Commercial* (2d ed., 1952), p. 312.
6. It is true that where a large loan is made to financially unsound companies, the lender often plays a very active role in the direction of the company. It is probable, however, that the "lender" would be treated as a partner. See, Escarra, cited above at note 5, p. 312.
7. For a full discussion of these distinctions, see Escarra, cited above at note 5, pp. 310-313.
8. Comm. C., Art. 229 (1).
9. Usually, they carry on one or more of the activities described as "commercial" under article 5 of the Commercial Code.
10. Civ. C., Art. 404. Associations do not carry out activities of an economic nature and are not formed to secure profits.

The foregoing discussion shows that the Gurage commercial relationships satisfy the definition of a partnership agreement and may be distinguished from other types of contract. This in fact agrees with the intention of the parties, who consider themselves to be "partners." They should therefore be considered as business organizations, and more specifically partnerships,[11] and so are governed by the Commercial Code. However, such partnerships normally fail to comply with two provisions of the Commercial Code.

In the first place, most of these partnership agreements are not in writing as required by article 214 and therefore are invalid.[12] Gurage partnerships are formed through a contract called a "Yeket Gurda" (literally, "bond of friendship"). This is as much a ceremony as a contract, and is always bilateral. The two (or more) parties repeat three times a series of promises before a "judge" who is usually an elder.[13] In case of a dispute over the performance of the contract, the parties will go to this judge. Thus he is more than just a witness. The sanction for breaching the contract will be a misfortune of spiritual origin visited on the breacher.[14] Such oral partnership agreements are probably not limited to the Gurage. For example, Fetha Negast states that "A partnership is formed by word, by work and by service ...", never mentioning a written contract.[15] Since these partnerships are not supported by a written agreement, the partnersip agreements themselves are invalid. Under the Civil Code, this normally means that the existence of a contract is ignored and the parties are returned to their pre-contract positions. Yet the "partnerships" will often have operated for a considerable period of time. In such a case, the rules of invalidity will have to be applied in such a way as to take account of the complex relationships of the parties.

In the second place, none of these partnerships are registered or publicized as required by article 219. The Ministry of Commerce and Industry has made a considerable effort to get businesses to register. As a result, in Addis Ababa, there

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11. These arrangements do not include any set capital nor is the liability of all the parties limited, as is the case with share companies (Comm. C., Art. 304) or private limited companies (Comm. C., Art. 510 (1)). The object is usually commercial within the meaning of Article 5 of the Commercial Code and so they cannot be ordinary partnerships (Comm. C., Art. 213) nor is the participation of any party normally kept secret as with a joint venture (Comm. C., Art. 272(1)). Therefore, they should usually be considered general partnerships and occasionally limited partnerships where some of the parties anticipated enjoying limited liability.

12. Article 214 actually states that it shall be "of no effect." The argument that this means the same thing as "invalid" will be made below.

13. Thus, the judge will ask, "why do you seek this Gurda?" The parties reply "So as to have a partnership." The judge then says "This is an 'Arger yewortin' Gurda" ("Arger" and "Wortin" being the names of the two persons who are supposed to have originated the Gurda contract) which the parties then repeat. The judge asks "If you violate this gurda?" to which the parties reply, "On Maskal day (a Christian Ethiopian feast), let me wear rags, carry a basket and come to you (the judge) and beg." All of these questions and answers are stated three times. Finally, the judge dismisses them with the blessing, "Let this Gurda keep you from violating your agreement."

14. See note 2, above. See also, William A. Shack, *The Gurage*, Oxford University Press, 1966. "Yeket Gurda" is the contract used for important commercial contracts, such as the sale of land. There is also "Yedem" (blood) or "Anjet (intestine) Gurda" which is used to seal a reconciliation where one person has killed another and "Yerbret Gurda" in which the two parties promise in perpetuity not to injure each other in any way.

15. *Fetha Negast*, Chapter XXXIV.

are some 10,000 businesses registered, of which 400 are partnerships.[16] This is certainly far fewer than the total number of partnerships in existence and may perhaps be explained by a tendency of traders to register as individuals rather than as partners. Registration is new to Ethiopia and it will require a certain time before it can be put into full effect.[17] The result of non-registration, however, is that these partnerships "shall have no legal existence nor personality," according to Article 223 of the Commercial Code.

The remainder of this article examines the consequences of a failure to put a partnership in writing or a failure to register. The thesis presented is that such organizations are partnerships within the meaning of the Commercial Code. However, the failure to comply with all the provisions of the code means that they cannot be treated in exactly the same way as other partnerships. We may refer to them as "de facto" partnerships. Since an unwritten partnership agreement may not be registered, we may conveniently discuss the legal position of unregistered "de facto" partnerships and then the effects of an unwritten partnership agreement.

> **Article 223:** "*A business organization shall have no legal existence nor personality until all the provisions of this code relating to publicity have been complied with and registration is published in accordance with Art.* 87 *of this Code.*"

Legal Personality — Under the Civil and Commercial Codes, only "persons" may be the subject of rights or obligations. The term "persons" as used in the Codes is not limited to human beings however. The law has attributed some aspects of personality to certain organizations. For example, the State is considered as a person and so may exercise rights and be subject to obligations.[18] Since these organizations are considered "persons" by creation of the law, they are referred to as "legal" persons. If it fulfills the conditions imposed by the Commercial Code, a partnership is deemed to be a legal person.[19] As such, the partnership is not identical with the partners who created it; rather, it is in itself a separate entity. As a consequence, it may accomplish certain things, such as owning or disposing of property, which the law requires to be done by persons.

In the case of partnerships, the greatest practical significance of legal personality arises upon the dissolution and liquidation of the partnership.[20] Because it is a person, the partnership, and not the individual partners, can be the owner of assets. Parties who deal with a partnership become creditors or debtors of the partnership —a legal person. While such partnership creditors may ultimately have a claim against the partners as individuals, this claim is indirect; they must first claim against the partnership,[21] the person with which they have dealt.

16. As compared to 200 share companies, 400 private limited companies and 9,000 individual proprietorships.
17. The concept of registration of partnerships was first introduced in the Companies Law of 1933. However, these provisions were never enforced.
18. Civ. C., Art. 394.
19. Comm. C., Art. 210(2).
20. G. Ripert, *Traité Elémentaire de Droit Commercial* (3rd ed. 1954), p. 268.
21. Comm. C., Art. 294.

When a solvent partnership is liquidated, the claims of partnership creditors are first paid out of the partnership's assets.[22] The partners are then paid the original value of their contributions (but not the actual property contributed),[23] whatever assets may be left are profits and are distributed to the partners in equal shares provided that no other proportion is specified in the partnership agreement.[24] Where the assets of the partnership are not sufficient to pay the claims of creditors, the liquidators may call upon the partners for contributions.[25]

The most important aspect of this sequence of distribution is that the creditors of the partnership are paid before the partners. Thus, these creditors have a priority as to the assets of the partnership over the partners and anyone claiming through the partners. This priority is based on the idea that the partnership is an entity separate from its members. The result is that partnership creditors also enjoy a priority as to the assets of the partnership over creditors of the partners themselves ("personal creditors"). A creditor of an individual partner is given no direct claim against partnership assets. Rather, his claim is against the assets of his debtor, the individual partner. Among his debtor's assets is his interest in the partnership. As has been seen above, this interest gives the partner a claim against partnership assets but a claim which is inferior to that of partnership creditors. A personal creditor may exercise the partner's claim but in doing so, he stands in the place of the partner and acquires no claim superior to that of the partner.

For example, let us suppose that A, B and C have formed a partnership, complying with all the requirements of the Commercial Code, including Article 223. A has dealings with X in the name of the partnership; as a result, a debt of $1,000 is incurred. The debtor in this situation is the legal person, the partnership, and not A, B or C. X's claim is against the assets owned by the partnership. Let us further suppose that A owes Y $1000 and that this is a debt which he has incurred in his personal capacity. A has no assets other than his interest in the partnership. As far as X is concerned, as a partnership creditor, he will be paid before any assets are distributed to A (or the other partners). Y may claim A's interest in the partnership but, in doing so, he is exercising A's right. Therefore, Y will have only the right of a partner and this claim is inferior to that of X, who is a creditor. The result is that Y will not be paid if there are no assets left after X is paid. If there are assets left over, Y will receive that part which is due to A. Y's claim is still only equal to that of B and C, the other partners. Y is a creditor vis-a-vis A; he is treated only as a partner vis-a-vis the partnership, partnership creditors or the other partners. If the partnership were to have assets of $3000, X would first be paid $1000, leaving $2000 for the partners. In the absence of any agreement to the contrary, each partner would receive $^1/_3$ or about $666. Therefore, since A received $666, Y will ultimately receive only this much, if A has no other assets.

Lack of Legal Personality — To say that a partnership is denied legal personality, as in Art. 223, is to say that it will not be considered as a legal person, an

22. Comm. C., Art. 268. Where partners are owed money, they too are paid but only after third parties.
23. Comm. C., Art. 269.
24. Comm. C., Art. 270(1) (3).
25. Comm. C., Art. 268(1).

entity separate from its members. The effect of this is twofold. First, as there is no legal person to be the owner of the assets of the partnership, the partners themselves must retain ownership of them. Second, since third parties did not deal with the partnership as a separate entity, they must have a direct claim against the partners, the only "persons" with whom they dealt.

To illustrate, let us suppose that A, B and C have formed a partnership but have not complied with Article 223. A has dealings with X in the name of the partnership as a result of which a debt to X of $1,000 is incurred. If the partnership were a legal person, X's claim would be against it. But in our case, the partnership is not a legal person, and therefore X's claim is directly against A, B and C as individuals. A B, and C are the only "persons" with whom X has dealt. Each would ultimately be liable in the amount of $333.

Let us look at the liquidation of a partnership which has been denied legal personality. In this case, there is no question of distribution of assets to the partners since they are already the owners of them. Rather, it is of a question of allocation. Each partner is allotted the value of his original contribution. Any excess of assets is allotted equally among the partners in the absence of any agreement to the contrary. If there are only partnership creditors, such as X in our previous illustration, their position will not be significantly different from the case of a partnership with legal personality. Partnership creditors may present their claims directly against the partners themselves. However, the denial of legal personality is a penalty imposed on A, B and C for their failure to register and publicize their partnership. It is not a penalty directed at X, who is a third party in good faith. In this situation A, B and C should not be allowed to use the lack of legal personality against X. Thus, if X wishes to treat the partnership as a normal one, that is, treat it as a legal person and sue it directly rather than the partners as individuals, he should be allowed to do so in spite of the fact that the partnership would not be allowed to sue in its own name. On the other hand, X has the option to claim directly against the partners themselves. In either case, he will be able to satisfy his debt from all available assets.

The real significance of a lack of legal personality lies in a situation where personal creditors of the partners are involved. Returning to our illustration, let us also suppose that A owes Y $ 1,000 and that this is a debt which he incurred in his personal capacity. We saw previously that where a partnership has legal personality, a creditor of the partnership such as X would have priority over a creditor of one of the partners such as Y, as to partnership assets. But where there is no legal personality, we have seen, there are no "partnership assets" as such. The partners - - not the partnership - - own all assets and X's claim is against the partners - - not the partnership. Thus, part of X's claim is against the personal assets of A, one of the partners. Y has exactly the same type of claim against the assets which A owns. Thus, even as regards the partnership assets, X no longer has a priority over Y. Although we have said that A, B and C, being responsible for the lack of registration, may not take advantage of the lack of legal personality against X, Y is not responsible for this situation. Therefore, he may take advantage of it and have the "partnership" treated as lacking legal personality. Let us assume again that our "partnership" has assets of $3,000. In fact, since there is no legal person, the situation is really that each of the partners owns $\frac{1}{3}$ of this $3000. Thus, A has assets of $1000. Against these assets, X has a claim of $333 ($\frac{1}{3}$ of his total claim against the "partnership") and Y has a claim of $1000. Assuming

that A has no other assets, Y will ultimately receive ¾ or $750 (compared with $666 in our previous example) while X will receive $250.

Policy reasons for requiring partnerships to register — We have so far interpreted article 223 in a highly conceptual manner. To be certain that our analysis makes sense, we must examine whether the result reached may be justified by any of the possible policies or value judgements which the legislature might have has in mind when it adopted Article 223.

The primary consequence of a denial of legal personality is to place personal and partnership creditors on an equal footing where both claim against partnership assets. Since this result is in turn a consequence of a failure to register and publicize, one may infer that one policy[26] behind the registration of partnership is to protect personal creditors, even at the expense of partnership creditors. Apparently it is felt that non-registration may be more harmful to the interests of personal creditors than to those of partnership creditors. Is this true?

Persons who deal with a partnership may derive some benefit from the fact that it is registered and publicized because certain information may be readily available by consulting the commercial register. Thus, they may verify that there really is such a partnership, who the partners are, the value of the original contributions, etc.[27] Of crucial importance to a person who is dealing with an intermediary, which is always the case with a partnership,[28] is the extent of the intermediary's authority. The powers of the manager of a general partnership extend to all juridical acts which fall within the purpose of the partnership.[29] A third party will find this purpose set out in the commercial register. Any[30] further restriction placed upon these extensive powers is only binding on third parties where it has been entered in the commercial register or is in fact known to the third party in question. In practice, this rule works more to the advantage of the partnership than the third parties since it allows the partners to restrict a manager's powers and to make the restriction effective against all third parties, even those who have no actual knowledge of the restriction.[31] In this case, the lack of registration will not affect a third party since he will not be bound by that which is not published. He will lose nothing as a result of non-registration. Even though the commercial register could provide useful information for third parties who wish to deal with a partnership, the denial of legal personality for failure to register seems to be ineffective as a sanction.

26. There are probably several "policies" behind registration. For example, where all partnerships (and all businesses) are registered, this will provide needed information to the tax authorities. For this reason, penalties in the form of fines may be imposed for nonregistration. (See Articles 115 of the Commercial Code and 428 of the Penal Code). Such a policy would not explain the denial of legal personality.
27. Comm. C., Art. 216.
28. Comm. C., Art. 289(1) (See the French or Amharic version of the code).
29. Comm. C., Art. 216(4).
30. Comm. C., Art. 289(2).
31. In the United States, where there is no provision for the registration of partnerships, restrictions on the powers of a manager are only effective against a third party where the third party has actual knowledge of the restriction. There is no possibility of constructive notice. Uniform Partnership Act. (U.S.A.), § 9(4), in J. Crane, *Handbook on the Law of Partnership* (2d ed., 1952), p. 553.

The case is rather different when we examine the position of personal creditors of the members. As stated previously, where a partnership enjoys legal personality this means that the organization itself may own property. Where a member contributes a personal asset to a partnership, it becomes the property of the partnership. From the point of view of the member's personal creditors, property which was available for the payment of debts owed to them is no longer available. In its place, there is the member's interest in the partnership. As we have seen, although the personal creditors may exercise the member's interest, this claim is inferior to the claim of partnership creditors. One might say that from the creditor's point of view, the partner has exchanged an asset for something inferior in value.

Article 223 offers personal creditors some protection from this situation. The asset in question will only pass out of the hands of his debtor (that is, become the property of a legal person) where this fact has been registered and publicized. In this case, the personal creditors may not prevent the formation of the partnership but they may make an immediate claim against their debtor's partnership interest. The advantage lies in the fact that at the moment of formation and before the partnership has begun to operate the value of the partner's interest should equal the value of the assets contributed before the commencement of the business. That is, the partnership will not yet have incurred any losses which could diminish the value of their debtor's interest in the partnership. As a pratical matter the personal creditor's claim will not have to compete with that of partnership creditors since the latter do not yet exist.

Legal Existence — In addition to denying legal personality to an unregistered and unpublicized partnership, Article 223 also denies it "legal existence." In this case, the consequences of Article 223 are far from clear since, unlike "legal personality," the term "legal existence" does not have a fixed or technical meaning in Anglo-American law. Nor does the term "existence légale" have a technical meaning in French law. This is not to say that the term is never used. One may in fact say that where a partnership lacks legal personality, it may still actually exist but it is not recognized by the law as a separate entity and so has no "legal" existence. The effect of such an interpretation is to make the addition of "legal existence" to "legal personality" purely redundant. One should presume that the legislature did not intend to be redundant and so one must search for other possible meanings of the term.

The use of the terminology "no legal existence" might indicate that the law should completely ignore the situation arising out of the partnership. An example of such an approach is to be found in American law. Where a partnership was formed for an illegal purpose, such as illicit gambling or robbery, courts have refused to deal with it at all, even to the extent of ordering an accounting between the partners.[32] The partners are left in the position in which they are found. Although this might be rather unfair to some of the partners, the illegality is considered to so taint the partnership that a court will not even recognize that it exists. A failure to comply with the rules of publicity is a far less serious offense than a partnership with an illegal purpose and so such a penalty seems rather extreme.

32. A. Corbin, *A Treatise on the Rules of Contract Law* (1951), vol. 6, pp. 1036-1040.

Another possible interpretation might be that the term "no legal existence" is meant only to emphasize the fact that the partnership exists in contravention of the law, so long as it has not been publicized. However, the fact that the partnership has not complied with the law is so obvious that there is no reason to reemphasize it. Neither of the interpretations so far discussed seems reasonable.

More troublesome is the possibility that the denial of "legal existence" is meant to indicate that the want of publicity makes the partnership agreement itself invalid. This interpretation also has the advantage of giving the term "legal existence" a meaning distinct from that of "legal personality". Such a rule would hardly be unusual since invalidity is the penalty for lack of registration in such countries as France[33] and Lebanon.[34] The consequences of invalidity will be discussed in detail below. The primary consequence is that the partnership agreement cannot be enforced in the future. As will be seen, invalidity is a more serious "penalty" than lack of legal personality.

There are two arguments which militate against this interpretation. First, the Civil Code states the principle that "unless otherwise provided, a contract shall be valid not withstanding that prescribed measures of publication have not been complied with."[35] The general rule is clearly stated. An exception to the rule should be equally clear. This is certainly not the case with the term "no legal existence," an ambiguous term with no set or technical meaning. Since an exact word was available (*i.e.* "invalid" or "null") one would expect the legislator to use it if that was what he meant.

Second, Article 214 of the Commercial Code, in clear terms, provides that any partnership agreement not in writing is invalid. If the legislature wishes to provide the same penalty for lack of registration as for lack of writing, they would have used the same terminology. Furthermore, interpreting article 223 to require invalidation would itself create a redundancy. By its very nature, an unwritten partnership agreement cannot be registered. Article 223 encompasses all unwritten partnership agreements as well as those written agreements which have not been registered. If Art 223 required invalidation, then, there would be no need for a special article dealing with unwritten agreements.

In view of these considerations, it is more reasonable to conclude against the presumption, against redundancy. One must infer that in referring to "legal existence" the legislature only intended to give emphasis to the fact that unregistered partnerships are not to be considered as entities separate from the members themselves.

33. Law of 24 July 1867 (France), modified by Décr. L. 30 October 1935, Art. 58 in Code de Commerce (Petits codes Dalloz, 58th ed., 1962) p. 52. As the original drafter of the Commercial Code was French, one might argue that he probably followed French practice. However, Article 223, in its present form, was added to the draft code by Professor Jauffret, after the death of Professor Escarra, so as to avoid many of the difficulties which arise in French law.

34. Code de commerce (Lebanon), Art. 44, E. Boustany, *Codes Libanais en Textes Français* (1955). *Contra*, see Civil And Commercial Code (Thailand), Art. 1015 (1962) which provides loss of legal personality as the sole penalty for a failure to register.

35. Civ. C., Art. 1720(3).

Effect of Lack of Legal Personality on Other Aspects of Partnership Law

As mentioned above, the major significance of legal personality, or lack of it, comes during the distribution of assets to creditors at dissolution. At this time, or during the operation of the partnership, certain questions may arise to which legal personality could be significant. These will primarily involve the matter of contributions, powers of the manager and limited liability.

Contribution — Where a partnership attains legal personality, the partnership, as a separate entity, may own property. Among the property owned by the partnership will be the contributions it receives from the partners; the partners do not retain ownership of their particular contributions, but have only an undivided interest in the partnership as a whole. If the partnership is not treated as a separate entity, it cannot own property. The partners themselves must be the owners of what appears to be partnership property. The question is whether each remains the owner of his particular contribution or, rather, becomes a joint owner of all contributions.[36] One way to solve this problem is to begin with the proposition that the partnership agreement itself is valid as between the contracting parties, that is, the partners. We have already concluded that in the case of a *written* partnership agreement this statement is true whether or not the partnership is registered. As discussed above, one of the elements of a partnership agreement is the pooling of resources. If the partners have agreed among themselves to pool their contributions and this agreement is valid, it should be given effect. In cases where the partnership lacks legal personality because of a failure to register, it can be given effect by treating each partner as a joint owner of all contributions. This solution is more equitable than the alternative solution of considering each to remain owner of his own contribution from two points of view.

First, it honors the expectations of the contracting parties, the partners. Under a normal partnership agreement, although each partner may contribute specific assets to the partnership, he has no right to receive back that specific contribution. He has a claim only to its value.[37] If the partnership incurs losses so that some of these contributions are lost, this loss must be borne by all the partners,[38] and not just those who contributed the lost assets. This sharing of losses is of the essence of a partnership agreement. The effect of holding that each partner retains individual ownership of his contribution would violate this basic principle of a partnership agreement. The partners whose property was used up (usually the contributors of fungible goods, such as money) would bear all the loss. To illustrate, let us assume that A, B and C are parties to a written but unregistered partnership agreement. A and B each contributed $5,000 in cash while C contributed machinery worth $5,000. At a latter point in time, the business has, as assets, the machinery and $3,000 in cash. If C has a right to receive back his contribution in kind (the machinery), only A and B would bear the $ 7,000 loss incurred by the business. In this illustration, C would only share the loss where, and to the extent that, it exceeded $10,000. This runs counter to the expectations of all.

36. As for assets in excess of the value of contributions, these represent profits. Since they were acquired on behalf of all the members, they must be jointly owned.
37. Comm. C., Art. 269.
38. Comm. C., Art. 270(2).

Second, in discussing the policy behind registration, the point was made that it protects the interests of personal creditors. One effect of holding that the partners remain owners of their individual contributions, rather than joint owners of all of them, is to protect some personal creditors at the expense of others. To return to our previous illustration, suppose that B and C have no other assets and that previous to formation of the partnership B owed X $5,000 and C owed Y the same amount. The partnership is then formed and suffers the losses described. If B and C are treated as the owners of their individual contribution, Y will collect the full amount he is owed ($5,000) since his debtor, C will get back the machinery while X will only be able to collect $1,500, that is, B's one-half of the remaining $3,000, in spite of the fact that X and Y are equally third parties in good faith.

Powers of the Manager — The powers of the manager of a partnership extend to all acts which fall within the purpose of the partnership.[39] This scope of authority is considerably broader than would normally be inferred by civil law, where the designation of one as "manager" would be considered to be an authorization "expressed in general terms." Such authority would normally be intrepreted as being restricted to "acts of management."[40] Does the fact that a partnership is not registered mean that the "manager" is only an agent in the sense of the Civil Code and not the Commercial Code? If so, a third party who dealt with a person whom he assumed to have the broad powers of the manager of a partnership might find himself in the position of having dealt with one who acted beyond the scope of his powers. In this case, the "partnership" would not be bound.

Where the partners clearly intended their agent, the manager, to have the powers of the normal manager of a partnership, there is no problem. The relevant rules of the Civil Code are only rules of interpretation. The scope of an agent's authority is normally set in accordance with the actual intention of the parties.[41] A problem may arise where the parties intended to limit the scope of the manager's authority. The Commercial Code provides that any restrictions on the extent of the powers of a manager "shall only affect third parties where such provisions have been entered in the commercial register of if it is shown that the third parties were aware of such provisions."[42] This provision states a policy in favor of commercial certainty which should be respected. Since the partnership is not registered, restrictions on the manager's powers should affect only these third parties having actual knowledge of them.

Limited Liability — If a limited partnership is formed but not registered, this raises the question whether the resulting lack of legal personality will make all the partners fully liable.

A limited partnership is an organization in which some, but not all of the partners enjoy limited liability.[43] Unlike the identity of participants in a joint venture,[44] the existence of limited partners is normally made known to third parties

39. Comm. C., Art. 289(1) (refer to French text).
40. Civ. C., Art. 2203.
41. Civ. C., Art. 2181(1).
42. Comm. C., Art. 289(2).
43. Comm. C., Art. 296.
44. Comm. C., Art. 272(1).

and they are listed in the registered memorandum as such.[45] The law allows limited partners to limit their liability for the firm's undertakings only so long as they do not act in a manner that might mislead third parties into considering them to be general partners with unlimited liability. Where a limited partner involves himself in the management of the partnership, he becomes "fully jointly and severally liable for any liabilities arising out of his activities."[46]

Here we are dealing with a clear policy in favor of the protection of third parties who deal with a partnership. On the other hand, there seems to be no connection between limited liability and legal personality. In spite of the fact that a joint venture never enjoys legal personality[47] and is not registered,[48] some of its members may enjoy limited liability[49] so long as third parties are not misled as to their status.[50] There is no reason to deny limited liability to partners in an unregistered partnership so long as the policy of protecting third parties is safeguarded. Whether third parties might have been misled in a given case will depend on the factors of that case. It must be admitted, however, that where the partnership is not registered, it will in fact be more likely that third parties will be misled. Almost any dealings with third parties will probably make a limited partner fully liable.

Lack of Registration and Publicity as "Good Cause" for Dissolution of a Partnership

As indicated above, most of the problems involved with unregistered partnerships arise at dissolution and liquidation. Moreover, a lack of registration may in itself be a reason for dissolution of a partnership. The Commercial Code provides that a partnership "may be dissolved for good cause on the application of a partner."[51] A member of a partnership which exists in violation of the law has an interest in extricating himself from the situation. Dissolving the partnership is one way of doing this.

To say that a partner has "good cause" for dissolving the partnership is not to say that the partnership agreement may be invalidated. As indicated above, the agreement itself is valid (assuming it is in writing). It is only the organization which will be dissolved; there should be no question of any retroactive effect, such as might arise if the agreement were considered void from the start. As will be seen below, any interested party may attack an invalid partnership agreement whereas only a partner may request the dissolution of a partnership for "good cause."

When a partnership is attacked for lack of publicity, French law permits this defect to be "cured" by the registration and publication of the partnership agree-

45. Comm. C., Art. 298.
46. Comm. C., Art. 301(3). "Where appropriate, he may be declared jointly and severally liable in respect of some or all the firm's undertakings."
47. Comm. C., Art. 272 (3).
48. Comm. C., Art. 272(2).
49. Comm. C., Art. 276(2).
50. Comm. C., Art. 272(4). In this case, merely revealing the existence of the joint venture might cause third parties to rely on the personal credit of the revealed members.
51. Comm. C., Art. 218(1).

ment even after court procedings have begun.[52] This should be equally true in Ethiopia. The defect is trivial and may be cured easily. Of course, registration has no retroactive effect. The partnership will acquire legal personality only from the day of registration.[53] Third parties from the previous period, whether creditors of the partnership or personal creditors of partners will be thoroughly protected by the operation of Article 223 of the Commercial Code. Therefore, the only effect will be to halt the dissolution of the partnership and to give it a legal personality for the future.

Article 214: *"The formation of any business organization other than a joint venture shall be of no effect unless it is made in writing."*

Invalidity of the Partnership Agreement — We have been dealing until now with written but unregistered partnership agreements. In moving on to a discussion of unwritten partnership agreements, one must bear in mind that these agreements are necessarily unregistered.[54] In addition to the penalties imposed for the lack of a writing, the partnership will be denied legal personality.

The consequence of an unwritten partnership agreement is that the agreement itself is invalid.[55] This is not to say that the agreement does not exist at all or that it is "automatically" null and void. When we say that the agreement is invalid, we mean that someone may go to court and request that the contract be invalidated. Depending on the circumstances, the "someone" may be one or all of the parties to the contract or even an "interested third party."[56] Until invalidation is granted by a court, the contract remains in effect. An "invalid" contract may very well be acceptable to the persons involved or no one may be aware of the fact that some ground for invalidation exists. As a practical matter, such a contract will be indistinguishable from a valid contract, so long as it is not invalidated.

The issue is the time when invalidation takes effect; that is, whether the agreement is invalidated retroactively from the moment it was made or only for the future, as from the moment it is invalidated by the court. As a general rule, the effect of invalidation is to return the parties to the position which would have existed had the contract not been made and to nullify all acts done in performance of the contract.[57] This means that contracts are invalidated retroactively from the time they were made and so are considered as having never existed. For example, let us suppose that X and Y entered into an invalid contract for the sale of an automobile with X as seller and Y as buyer. If X later invalidates the contract, the effect will be to return the automobile to X and the price to Y. X will be considered to have always been the owner of the automobile.

52. Ripert, cited above at note 20, p. 434.
53. The violation of penal provisions (See Comm. C., Art. 115) may not be retroactively cured.
54. See the discussion as to the meaning of "no legal effect" at note 35 above.
55. Although the English version of Article 214 says it is "of no effect", the better translation of the French term "nul" is "invalid". Lack of writing is not the only ground for invalidating a partnership agreement. Since the agreement is a contract, it is subject to the general rules of contract. For example, the contract may be invalidated for a defect in consent or lack of capacity on the part of one of the partners.
56. Civ. C., Art. 1808.
57. Civ. C., Art. 1815.

However, there are two exceptions to the rule of retroactivity. Where the interests of third parties are concerned, acts done in performance of the contract are not invalidated.[58] For example, if Y had already resold the automobile to Z, it would be unfair to force Z to return it to X. The account between X and Y would be settled by the payment of money only. Nor are acts nullified where this is not possible or would involve serious disadvantages or inconveniences.[59] For example, if the automobile had been destroyed, it could no longer be returned. The court would have to order Y to pay an appropriate sum of money to X.

If one considers the invalidation of a partnership agreement which has not been executed, that is, where the partnership has never operated as such, one may apply the general rule. The parties may conveniently be returned to their previous positions. However, very often, the partnership will have actually operated, perhaps for a long period of time, and this fact will be difficult to ignore. The interests of third parties who dealt with the partnership will be involved. The situation among the partners themselves may be quite complicated and so it may be difficult or even impossible to restore them to their original positions. These practical considerations will mitigate against retroactive invalidation to such an extent that it will be the exception rather than the rule when dealing with partnerships. The partnership will in effect be treated as valid up to the moment of invalidation and only be nullified for the future; those things done in the past will be enforced.[60]

When the partnership agreement is prospectively invalidated, the partnership can no longer exist since there will no longer be an underlying contract to support it. The partners are no longer bound by any contract; their affairs must be sorted out and the assets held in common must be apportioned. The practical effect of invalidation of the partnership agreement is to dissolve the partnership, which will, in turn, lead to liquidation of the partnership assets.

The same practical consideration, that is, the interests of third parties and the complexity of the arrangements between the partners, has led the French jurists to develop a theory of "de facto" partnerships ("sociétés de fait") to deal with a partnership which is subject to invalidation,[61] and which has operated over a period of time.[62] Under this theory, the partnership agreement is considered as valid up until the time that a court pronounces its invalidation. Both third parties and the partners themselves may prove this "de facto" existence by any means, where it is a question of liquidating the partnership rather than of enforcing the agreement in the future.[63] We have just suggested the same solution for Ethiopia by an application of the rules of the Civil Code.

In developing a special theory for partnerships, French law recognized that partnership agreements are especially complicated contracts and, as such cannot always be subject to the normal rules of the Civil Code. One result of this analysis is to treat an unwritten partnership agreement in the same way as a written

58. Civ. C., Art. 1816.
59. Civ. C., Art. 1817(1).
60. Professor David himself recognized that the exception might become the rule. See, R. David, *Avant-Projet* of the Ethiopian Civil Code (unpublished).
61. Note that in French law, a partnership agreement may be invalidated for lack of registration as well as lack of a written agreement. Law of 1867, Art. 58, cited above at note 33.
62. A Moreau, *Associations en Participation et Sociétés de Fait* (1958), p. 863.
63. Ripert, cited above at note 20, p. 292.

but unregistered agreement, provided that the partnership has operated and that the enforcement of the agreement in the future is not involved. However there are two significant differences between the two situations.

First, under the Civil Code, a contract not made in the prescribed form may be invalidated by the parties to it *or* by any interested third party.[64] The effect of this is to allow interested third parties to force the dissolution and liquidation of any partnership not supported by a written agreement. Among "interested third parties," we may include partnership creditors and probably personal creditors of the partners. In the case of a written but unregistered partnership, only the partners may force dissolution.

Second, the partnership assets will often be distributed according to the Commercial Code rather than according to the partnership agreement. Normally, the partners may freely agree in the partnership agreement on the proportional distribution of profits.[65] In the absence of such a provision in the partnership agreement, profits are to be distributed equally.[66] When the partnership agreement is invalidated, the parties must be considered to have failed to agree since liquidation according to the invalid agreement would be enforcing one part of the agreement in the future. The entire agreement will have been invalidated. One cannot enforce one part of it. However, it is very important to note that this latter statement is based on the assumption that the partnership agreement has been invalidated. As stated above, invalidation is not automatic; the partnership may be dissolved without invalidation, for example, by agreement among the partners. In this situation, the assets would be distributed according to the agreement.[67]

"Apparent Partnerships" and Third Parties — A related problem arises where a third party has dealt with what he supposed to be a partnership and he now wishes to hold someone liable as a partner. To do so, need he only show that the individual in question held himself out to the public as a partner, that is, that there was ostensibly a partnership, or must he prove the actual elements of a partnership contract that is, that the persons involved really intended to be partners? Ethiopian law has no specific provision on this subject but possible solutions may be suggested by the rules applied in other countries.

American law has gone the farthest in dealing with this situation. Recognizing a need to protect the innocent third party who has relied even where no genuine

64. Civ. C., Art. 1808(2)
65. Comm. C., Art. 270(3).
66. Ibid.
67. A disagreement may arise over whether to invalidate or not. The conflict may be resolved according to the following two principles. As between any third parties and the partners themselves, the third parties should prevail. The partners are responsible for the invalidity and should not be allowed to use it against third parties. As between third parties or as between partners, those seeking invalidation should prevail.
    What would be the practical effect of these principles in a case where the partners wished to invalidate their partnership agreement while third parties did not? The partnership agreement would be treated as valid until all litigation involving the third parties was completed. At this point, the partners, or any one of them, would be free to bring an action to invalidate the contract. Thus, no partner could use the invalidity of the partnership agreement as a defense to an action brought by a third party.

partnership was formed, the doctrine of partnership by estoppel has been developed. Under this doctrine, when a person "represents himself, or consents to another representing him to anyone, as a partner in an existing partnership or with one or more persons not actual partners," he may be held fully liable as if he were a partner.[68]

In Ethiopian law, a person who permits his name to be used in the firm name will be liable as a partner even though he may not actually be a partner.[69] Although there is no general rule corresponding to partnership by estoppel, the above provision demonstrates a policy in favor of protecting third parties who may be misled as to a person's status in a partnership even though that person may not actually be a partner. This policy may lead Ethiopian courts to develop a doctrine similar to that in American law.

Even if the courts decline to follow the American solution, the results reached in actual cases may not be very different. An alternative approach may be illustrated by a French case,[70] since French law does not accept the doctrine of estoppel. In this case, a "de facto" partnership for the operation of a bank was found to exist between a father and a son. Typical of the evidence presented was the fact that the son often referred to himself as a banker, that the firm name of the bank was "Charles Dorient & Co., bankers" (indicating a partnership), that the son often signed for the bank without indicating that he did so by a power of attorney, etc. The court completely ignores the internal relations of the two men and relies wholly on external appearance. The result is justified since, as a general principle of contract law, one may rely on a person's manifested intention and ignore any unexpressed reservations. The result is curious in one respect; the court finds a real partnership as regards third parties whereas it might not find a partnership in a suit between the "partners." The "partners" themselves would have to show that in their internal relation, they really operated as a partnership.

The result under this French approach is very close to that reached under American law. The advantage of the American rule is that it is more realistic in that it recognizes that the real interest at stake is the protection of third parties. One is not really interested in the intention of the parties except where dealing with a dispute between the partners. If one follows the French approach, since we have assumed that the third party cannot produce a written partnership agreement, he will have shown the existence of an invalid partnership. This will be treated in the manner described above, that is, valid in the past but unenforceable for the future.

Conclusion

In dealing with agreements by which a business shall be operated by two or more persons, the courts must first deal with the question of whether the agreement is a "partnership" within the meaning of the Commercial Code. Where the agreement does satisfy these conditions, it should be treated as a partnership even where the parties were not aware of the Commercial Code, followed customary rules or

68. Uniform Partnership Act, cited above at note 31, § 16.
69. Comm. C., Art. 281(3).
70. Dorient c. Caubit ès qualité (Bordeaux, Fra., July 5, 1932), *Rev. des Sociétés*, 1932, p. 220.

forms, or where the formalities of a writing or of publicity were ignored. The lack of compliance with formalities raises special problems but problems not peculiar to "customary parterships." The same problems arise where persons who intended to comply with the Commercial Code nonetheless omit some formality. All of these problems may be solved by considering these partnerships to have a "de facto" existence.

We have examined two varieties of "de facto" partnership, the unregistered partnership and the partnership established by a contract not in writing. In both cases, we have seen that a mere lack of a written contract or lack of publicity does not preclude treating them in some respects as partnerships provided that they otherwise conform to the definition of a partnership as found in the Commercial Code. Further, in both cases, the prior acts of the partners must be recognized by law and given effect, whether these acts concern third parties or only the partners themselves. However, neither type of "de facto" partnership may enjoy legal personality. This is the very meaning of the term "de facto". Nonetheless, certain differences exist between the two types. Where the "de facto" partnership is not supported by a written agreement, its existence may only be recognized in the past. The agreement itself is not valid and so may not be enforced in the future. Where there is a written but unregistered partnership agreement, the contract itself is valid and so may be enforced prospectively. Any partner may convert the partnership into a "de jure" organization simply by registering it. There are two practical consequences to this difference. First the relations between the partners, even where third parties are concerned, will be regulated by their valid agreement in the case of an unregistered partnership. Where the partnership agreement is not in writing, the relations between the parties must be regulated by the rules of the Commercial Code. Second, only the partners may force the dissolution of a partnership which is supported by a written contract; any "interested" third party may attack an unwritten partnership agreement and thus bring about the dissolution of the partnership.