SOME OBSERVATIONS ON Art. 1922(3) OF THE CIVIL CODE COMMENT ON *GEBRE MARIAM AMENTE v. TELECOMMUNICATIONS*

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Suretyship — a contract by which a guarantor (surety) promises to a creditor to guarantee the obligation of a debtor (cf. Art. 1920 Civil Code) — is a very common device for securing a debt in Ethiopia. The application and interpretation of Articles 1920—1951 of the Ethiopian Civil Code are therefore of great practical importance. A provision which has created many problems in the past is Article 1922(3) of the Civil Code. It requires for a valid suretyship that the maximum amount for which the guarantee is given be specified in the document)[1] of guarantee).[2] The problems which arise are not primarily problems of interpretation — the language of the Code on this point is not ambigious — but they arise because the Code contradicts Ethiopian practice. It not only requires a form not previously necessary but what is more important endangers one of the main social functions of suretyship. Guarantors in Ethiopia are not only used to secure a specific debt (the "wass" of Ethiopian tradition) but also to guarantee the good behaviour of a person, especially an employee ("teyaji").[3] In the latter case it is nearly impossible to tell upon entering into a contract of suretyship what damages the person guaranteed for may cause in the future. So the application of Article 1922(3) requiring a specification of the maximum amount of the guarantee, to this kind of guarantee makes it, if not obsolete, at least of doubtful value).[4]

Given the widespread use of suretyship to secure an employee's loyalty it is hardly astonishing that there have been attempts to avoid this result of the new Code.

The fact that Article 1922(3) is not well suited for a guarantee for a person led to the argument that the lawmaker in the Civil Code provisions on suretyship had only intended to regulate guarantees for specified debts (the traditional "wastna"). The guarantee for a person ("teyajinet") according to this theory was still governed by customary rules. The High Court of Addis Ababa followed this argument. Therefore the Supreme Imperial Court had twice to reverse decisions by the High Court of Addis Abeba which had confirmed the obligation of a "teayji" to pay for the damage caused by unfaithful employees though the maximum amount of

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1. A contract of suretyship has to be in writing (Civ. Code 1725) and be attested by two witnesses (Civ. Code Art. 1727).
2. "The contract of guarantee shall be of no effect unless it specifies the maximum amount for which the guarantee is given."
3. One may easily find job advertisements in the Addis Ababa newspapers in which the applicant is asked to supply a guarantor, in one recent example even for an appointment as a Radio Technician.
4. Problems arising out of this situation for public agencies are discussed in detail in a research paper by Hizkias Assefa, "Guarantee for Fidelity of Employees in the Government Machinery of Ethiopia," (unpublished, Archives, Faculty of Law.)

the guarantor's liability had not been specified).[5] In both cases the Supreme Court makes it clear that there is no way to evade the words of the Code which makes no distinction as to the kind of obligation the guarantor undertakes to guarantee. Its second decision)[6] in this matter might well end the discussion as the Court in this very lucid judgment seeks to answer every possible argument to support the High Court's decision.

But the fact that the Supreme Imperial Court had twice to overturn the High Court's decisions with nearly the same arguments is in itself interesting enough to justify some further examination of the problem.

Article 1922 of the Civil Code is headed "form of suretyship" and (although the importance of Art. 1922(3) is by no means restricted to that of a form requirement as will be shown shortly) the High Court's persistence in disregarding this provision can be taken as a further example of the reluctance of part of the Ethiopian judiciary to decide a case on the basis of technical provisions of the new codes. The most prominent of the cases illustrating this tendency was *Avakian v. Avakian).*[7] More recent examples are a decision granting succession to a child adopted after promulgation of the Civil Code though the requirements of the Code (Art. 804) had not been complied with)[8] and a judgment of the Supreme Imperial Court in Asmara enforcing a contract for the sale of land not concluded in the prescribed form).[9] Those cases are intersting for various reasons. First, they show that disregard of Code provisions is not confined to one court or a category of courts (e.g. the lower courts): in the *Avakian* case the positions were exactly contrary to the "teyaj" cases, there the High Court defended the Code-provisions)[10] while the Supreme Imperial Court disregarded them. Secondly, they may not be simply dismissed as examples of ignorance of the law or insufficient training on part of the judges: on the contrary the courts were fully aware of the relevant Code-provisions and the arguments used to get around them demonstrate a high quality of legal reasoning)[11] (perhaps more so than many cases decided correctly in the final analysis).

The basic rationale behind all these decisions was obviously the feeling that adherance to formalities would lead to injustice. This feeling is easy to understand. Not only the layman but also the lawyer has difficulties coping with the idea that a will or a contract should be held invalid for failure to follow formalities despite clearly and undoubtedly expressing the intention of the parties. This attitude

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5. Ketema Haile v. EELPA, 6 *J. of Eth. L.* (1969) p. 38 *et seq.* Gebre Mariam Amente v. Telecommunications Department, 8 *J. of Eth. L.* (1972) p. 30 *et. seq.*
6. Gebre Mariam Amente v. Telecommunication, cited above at note 5).
7. 1. *J. of Eth. L.* (1964) p. 23 *et seq.* This case has been widely discussed and publicised, e. g. J. Vanderlinden, *Introduction au droit de l'Ethiopie moderne* (Paris 1971), p. 73 and by the same author: "Civil Law and Common Law Influences on the Developing Law of Ethiopia", 16 *Buffalo L. Rev.*, (1966), p. 250 *et. seq.* at p. 264, and "Quelques aspects fondamentaux du development juridique Ethiopien", *Verfassung und Recht in "Ubersee* Vol. 3 (1970) p. 167 *et seq.* p. 174.
8. High Court Addis Ababa, Emet Jejeb v. Dessie Abdecho, Civil Appeal 1307-60 (unpublished).
9. Supreme Imperial Court Asmara, Berhane Haile v. Asmerom Tedla, Civil Appeal No. 94-61 (unpunlished).
10. Cf. *supra* note 7.
11. This is especially true of the Supreme Court decision of Avakian v. Avakian and of the High Court decision in the "teyaji" cases.

is by no means restricted to Ethiopia or to Africa — or even to "developing countries". Also in other countries courts try to avoid harsh consequences to which the application of form-provision might lead in individual cases.)[12] But there are many reasons making the problem more acute in Ethiopia. Here the Codes are new, their provisions not well known and legal counsel is rare. The case of Article 1922(3) of the Civil Code shows that unfamiliarity with the codes is not limited to the uneducated: both contracts of suretyship held invalid by the Supreme Imperial Court were concluded with public authorities and even one of the major banks in Addis Ababa uses form-contracts for loans not complying with Art. 1922(3).)[13] So ignorance of the law — while in principle no excuse — is understandable in the Ethiopian set-up. This may tempt the judges to try to help those who came in difficulties by not observing forms prescribed in the Code.

This attitude is probably supported by additional factors. In a fully developed legal system the highly professionalized class of lawyers has its own values and its own concept of justice. These are not necessarily identical with those of the layman, because the lawyer's idea of justice includes values like certainty of the law and speed and efficiency of the legal process - values which might not be easily understood without explanation by people not connected professionally with the administration of justice. A lawyer in such a system will have no difficulty believing it "just" to decide a case on the mere basis of form, date or to give an *exparte*-judgment when the parties fail to appear,)[14] while a layman's idea of justice might will be hurt by those decisions. Most likely, in Ethiopia the differentiation between the popular and the laywer's concept of justice has not yet progressed so far and so many lawyers agree with the popular judgment, e.g. that a guarantor should stand by his word and not be allowed to sneak out with the help of some obscure Code-provision ...

If this is true it will hardly be sufficient to scold the courts for not complying with the Code-provisions. Even if they do so in the future in order not to have their decisions repealed (or criticized in scholarly journals) their conversion will be only superficial. What seems to be necessary on the contrary is to explain the rationale behind the provisions.

Even form-provisions which have no other purpose than to evidence a legal relation beyond doubt and therby to enhance the speed of legal proceedings are supportable because those are important aims in their own right. But many provisions which seem to be only technical on the first glance have rather substantive functions. (In other words, they not only serve the certainty and expediency of the legal process but are also intended to do justice between the parties). One such substantive function is that of warning: the person undertaking an obligation shall be advised that he is doing something serious, and it is a matter of

12. Thus in Germany Art. 313 of the BGB (Civil Code) which asks for a valid contract of sale of immovables to be attested by a court or a notary has become partly obsolete because of the refusal of the courts to enforce it if the result would be contrary to equity.

13. The guarantor for a loan also has to guarantee the possible interest for default and no maximum amount for this obligation is stated.

14. Concerning the failure of the Courts to apply the provisions of the Civil Procedure Code for cases of non-appearance of the parties see Daniel Gebrekidan, "Causes of Delay in Court" 1971 (unpublished Archives, Faculty of Law, H. S. I. U.), p. 8-41, and Ghelob Dafla, "Causes and Mechanisms of Delay in Courts" 1971 (unpublished, Archives, Faculty of Law, HSIU), p. 4-8.

experience that persons are more likely to promise something by word of mouth than to sign a document in the presence of witnesses. It is for this reason that the Civil Code prescribes a written contract for the sale of land as the good of the greatest economic importance,)[15] and for contracts creating long lasting obligations.)[16]

This warning function is also of special importance in the case of suretyship.)[17] The danger of a contract of suretyship lies in the fact that it is a guarantee for the debt of another person. The extent of the guarantors liability depends on the way the primary debtor performs his obligations and therefore in facts which are beyond the guarantor's control. So the Code requires a written contract to prevent the guarantor form entering into it carelessly. But it is doubtful whether this protection would be sufficient. Someone who guarantees a contract involving an obligation of Eth.$ 5,000.—will normally expect this sum to be the maximum risk he can possibly incur. But this need not be so: the original debt can be increased by interest or damages and so occasionally a guarantor would have to bear a much bigger liability than he expected, if his obligation would correspond to that of the debtor without limitations. The guarantor therefore would run a risk he can neither forsee nor control.

It is exactly this danger the Ethiopian Civil Code wants to avoid in Article 1922(3). By making the specification of the maximum amount a requirement for a valid contract of suretyship, the Code ensures that the guarantor only undertakes a calculable risk. By doing this the Code therefore is not just introducing a technical requirement for a contract of suretyship which was not asked for by the pre-Code law. On the contrary it substantially revises the concept of suretyship which can no longer be entered into without limitation, and this for sound reasons.

This being the policy behind Article 1922(3), the High Court violates not just the words but also the logic of the Code by trying to limit the application of this Article to guarantees for a specified debt, excluding the guarantee for a person ("teyaji"). Obviously it is even more important to protect the "teyaji" from entering into an uncalculated risk.

The amount of an ordinary debt (e.g. a credit or an obligation from a contract of sale) will only in exceptional cases be exceeded considerably by interest or damages. Therefore this amount can be taken as guideline by the guarantor to judge the risk he incurs. On the other hand, in a contract of employment there is very often no basis at all for guessing what damage the employee might possibly cause to his employer in the future: the employee's duties may perhaps not have financial aspects at all — and still he might burn the firm's premises down by smoking in a forbidden place.

Without the protection of Article 1922(3) Civil Code a guarantee for the behaviour of a person would be an extremely dangerous venture indeed. The promise to act as guarantor for a person is easily given in the abstract without really sensing the danger, and in addition there is a strong social pressure to stand as a guarantor for a relative or friend who is seeking employment.

15. Civ. C. 2877 and also Civ. C. Art. 1723.
16. Civ. C. Art. 1725.
17. Cf. Civ. C. Art. 1725(a).

In this situation the Code is sensible in asking for an explicit statement of the sum involved and thus warning the guarantor and enabling him to calculate exactly his possible future liability.

Therefore it is to be welcomed what the Supreme Imperial Court upheld this provision so clearly in *Gebre Mariam Amente v. Telecommunications*).[18]

That the use of suretyship as a means of securing against the disloyalty of an employee becomes very impractical because of the Court's decision may be regretted by employers who think they need to protect themselves against such losses. But they can protect themselves by taking out a fidelity insurance for their employees).[19] This is a much more sensible way to reach this aim in the interest of all parties concerned: the employer is more certain to get his money from an insurance company than from a guarantor who might well be as unreliable as the employee, the employee is no longer forced to look for guarantors when applying for a job (an obligation which might well create an undue advantage for those job-applicants with better connections), and if a damage arises it is borne by an insurance company (and therby by the community of those exposed to the same risk) and not by one guarantor who undertook his obligation without the professional expertise of an insurer to evaluate a risk and perhaps even under social pressure.

18. Cf. *supra*, note 5.
19. The same solution is advocated by Hizkias Assefa, cited above at note 4), *supra*.