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Reviewed by Getahun Kassa

Editorial

In January 2011, the Senate Research and Publication Committee of Addis Ababa University assessed the Journal of Ethiopian Law as a reputable journal thereby affirming the continuing status of the journal as a leading peer-reviewed publication in legal studies in Ethiopia. The endorsement is the result of a process of evaluation of the journal based on the Senate Criteria for Journal Assessment. As much as the Senate Research and Publication Committee's decision is recognition of hard work, it should also push us to work even harder to meet our challenges in order to elevate the quality and relevance of the Journal of Ethiopian Law. In this regard, it is worth pointing out that the lack of adequate financial resources and the involvement of limited number of scholars in the editorial process in the face of an expanding work load are two of the most pressing challenges that need our serious attention.

The ever increasing cost of publication and the need to afford honorarium for reviewers and support staff make it necessary to expand our financial resources beyond the regular publication budget. In the last three months, Dean Zekerias Keneaa and the administration of the School of Law have done commendable work in corresponding with the various stake holders who are willing to support the Journal of Ethiopian Law. It is likely that these efforts will bear fruit in raising additional publication funds in the near future. I also hope that the ongoing recruitment of new staff members at the School of Law will give us a chance to expand the editorial team, which will have a positive impact in promoting the quality and the scope of the journal.

This volume contains three outstanding research articles that focus on Bankruptcy Law, the Sale of Business and Constitutional Interpretation. Moreover, two insightful case comments on the cassation jurisdiction of the Federal Supreme Court and the power of State Courts to exercise the jurisdiction of Federal Courts are published in this volume. Also published in this volume are case reports, a reflection and a book review. I thank the following esteemed reviewers who used their time on a pro bono basis to assess the research articles submitted for publication in this volume: Abera Degefa, Aman Assefa, Kalkidan Negash, Samuel Asfaw, Sisay Alemahu, Sisay Bogale, Tadesse Lencho, Tewordros Mehret, Thomas Gebreab, Wondemagegn Tadesse, and Zekerias Keneaa.

Girmachew Alemu (Ph.D.)
Editor-in-Chief
School of Law
Addis Ababa University

Ethiopian Bankruptcy Law: A Commentary (Part II)

Taddese Lencho*

The market doesn't recognize desert. Initiative, enterprise, innovation, hard work, ruthless dealing, reckless gambling, the prostitution of talent: all these are sometimes rewarded, sometimes not.

Michael Walzer[1]

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* Lecturer, Addis Ababa University, School of Law; LL.B (AAU); LL.M (University of Michigan Law School, Ann Arbor), PhD Candidate (University of Alabama Law School). E-mail:tadnoda@yahoo.com. I am grateful to the two anonymous assessors who commented on the earlier drafts of this article. I am also thankful to my colleagues Muradu Abdo, Gedion Thimotheos and Yazachew Belew for forwarding their much helpful comments in the colloquium. Needless to say, the responsibility for the errors and wrongheaded arguments (if any) remain all mine.

[1] Michael Walzer, "Spheres of Justice", in Tom L. Beauchamp and Norman E. Bowie (eds.), *Ethical Theory and Business* (University of Phoenix, Special Edition Series, 1997), at 640

* Editor's note: The long and detailed nature of this article has made it necessary to include a contents outline in order to make it easier for readers to follow the analysis.

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1. Introduction

In writing this sequel article, the greatest challenge was to prevent the second part from falling apart by a commentary that sprawls and meanders without any unifying theme to hold it together. It is impossible to canvass more than 200 articles (202 articles to be exact) in a two-part commentary. One would have to choose the 'salient' provisions of the bankruptcy law to give one a fairly representative feature of Ethiopian bankruptcy law. The author has picked what he considers to be the salient aspects of Book V of the Commercial Code and left out those parts which he thinks are purely procedural, technical and ephemeral.[2] The author did not follow an article-

[2] The provisions regarding 'proving of debts' (Chapter 5, Title II, Book V of the Commercial Code), for example, have been left out of this commentary. This omission is not a grievous one - in the order of things - because this chapter is familiar to those who are acquainted with Civil Procedure. Besides, the tenor of these provisions can be captured at first reading quite easily.

by-article commentary in the first part, and the approach is not followed in this part either. The author is fully aware that Book V (along with the whole of the Commercial Code) will be revised soon (perhaps substantially)–some steps have already been taken both by the government (the Ministry of Justice) and some members of the business community to that effect.[3] This article is written therefore not just with the intent to elucidating Ethiopian bankruptcy law but also with a view to showing the possible way forward for what needs to change. Since there is a dearth of materials on Ethiopian bankruptcy law–both the literature and cases are sorely lacking–the author has relied upon comparative bankruptcy law and literature to both understand and illuminate the provisions of Ethiopian bankruptcy law. Unlike the first part, however, the author has cast about a fairly diverse body of comparative materials on bankruptcy law to write the second part. Those who seek to find correspondence between the organization of this commentary and the organization of the bankruptcy rules in Book V of the Commercial Code will be sorely disappointed (in case they need to be forewarned). In a commentary of the whole Book V of the Commercial Code, reorganization (not to be confused with one of the subjects treated in this commentary) is unavoidable. This commentary is organized around some major themes of bankruptcy: the actors, the effects, and the alternatives to bankruptcy.

Some issues in bankruptcy are better left untouched in a general commentary like this. Wherever appropriate, a passing remark is made about these issues (with a nudging to others to think writing about these issues). The digression that ensues a proper treatment of these issues is simply too distracting in a commentary that is already bursting at the seams. The issue of jurisdiction over bankruptcy in the context of the federal structure of courts in Ethiopia is one such issue. Jurisdiction over bankruptcy raises collateral issues of court jurisdiction in general, federalism, cross-border issues of bankruptcy proceedings, issues which will take us far away from the matter at hand.

This commentary is divided into four parts. Part I deals with the persons and institutions responsible for the conduct of bankruptcy. Part II will address the important question of the effect of bankruptcy upon various

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[3]See Federal Democratic Republic of Ethiopia, Ministry of Justice, *Draft Commercial Code*, (unpublished); Tilahun Teshome and Taddese Lencho (eds.) *Position of the Business Community on the Revision of the Commercial Code of Ethiopia* (Addis Ababa Chamber of Commerce and Sectoral Associations, PSD Hub Publication No. 8, July 2008).

parties connected with the bankrupt debtor (including the debtor). Part III will deal with the equally important question of 'distribution' (and priorities of creditors) for which the whole bankruptcy proceeding is designed. Part IV will deal with the alternative schemes to straight bankruptcy, namely, composition and schemes of arrangement. Finally, the article will end with a conclusion.

I

2. Persons/Institutions Responsible in Bankruptcy Proceedings

The Commercial Code mentions four persons or institutions as responsible for the conduct of bankruptcy proceedings.[4] They are:

1. The Court of Bankruptcy (Articles 989-990)
2. The Commissioner (Articles 991-993)
3. Trustee/s (Articles 994-1001)
4. Creditors' Committee (Articles 1002-1003)

Although the Commercial Code mentions only these as responsible, we understand from the reading of other provisions of the Code that other persons are involved in various capacities at different stages of bankruptcy proceedings. The other persons involved in the conduct of bankruptcy proceedings include the judge,[5]the public prosecutor,[6] the bankrupt debtor,[7] the receiver,[8] 'competent authorities',[9] and of course individual creditors.[10] The role of these other persons is not closely and systematically regulated by the Commercial Code but their role is no less significant. The smooth and efficient conduct of bankruptcy proceedings can only come about with all these persons carrying out and fulfilling their assigned roles. The machinery of bankruptcy operates to the satisfaction of all parties involved when the individual roles assigned to these persons are carried out efficiently.

We shall follow the lead of the Commercial Code and treat the role of the court, the commissioner, the trustee/s, creditors' committee, and other persons in that order. The relationship among these persons or institutions is both vertical (hierarchical) and lateral. The following diagram represents their relationship:

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[4] See Commercial Code of Ethiopia, 1960, *Negarit Gazetta* – Extraordinary Issue No. 3 of 1960, Addis Ababa, Articles 989-1003.

[5] Id, Article 976(1).

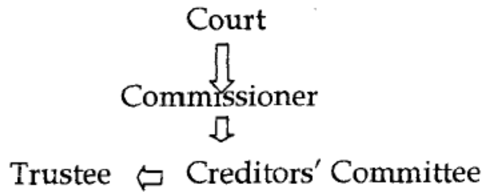
[6] Id, Article 1017.

[7] Id, Articles 1021, 1024.

[8] Id, Article 1039(3).

[9] Id, Article 991(3).

[10] Id, see Articles 1041-1046, 1082-1085.



The diagram above represents the simple relationship between these persons or institutions. But, as often happens, the relationship between them in the real world is more complex than what is indicated in the diagram.

a. Court of Bankruptcy

As the diagram above (simple as it is) shows, the court of bankruptcy occupies the apex of hierarchy of relations in a bankruptcy proceeding. By court, we mean the court that has declared the debtor bankrupt. Another way of distinguishing the court of bankruptcy is to describe it as the judicial body competent to control or supervise bankruptcy proceedings.[11] We must avoid the expression 'bankruptcy court' for that would convey the misleading notion that such a court is recognized in our court structure when it is not. But for purposes of this article, we may use 'court of bankruptcy' to avoid a more tedious expression 'court which has declared the debtor bankrupt' and to distinguish the court under consideration from other courts which may be involved in hearing and settling disputes related with bankruptcy. Besides the court of bankruptcy, we can imagine other courts getting involved in cases having something to do with bankruptcy. These courts include a criminal division court,[12] which hears and settles criminal cases involving bankruptcy, labour division courts[13] which hear and settle labour disputes (such as dismissal or reduction of workers as a

[11] United Nations Commission on International Trade Law (UNCITRAL), *Legislative Guide on Insolvency Law* (United Nations, New York, 2005), p. 4, glossary (i); UNCITRAL is a subsidiary body of the UN General Assembly which prepares international legislative texts for use by commercial parties in negotiating transactions. This body has prepared texts on subjects like international sale of goods, international commercial arbitration, procurement of goods, construction and services, and of course on insolvency law; see ibid.

[12] The Code itself mentions some of these courts related with the court of bankruptcy. Article 970 of the Code mentions a criminal (division) court on offenses connected with bankruptcy; Article 1075 of the Code mentions a court involved in the cancellation of a contract of sale; for offenses related with bankruptcy, see new Criminal Code of the Federal Democratic Republic of Ethiopia Proclamation No. 414/2004, Articles 725-733.

[13] See the Labour Proclamation 377/2003, *Federal Negarit Gazetta*, 10th year, No. 12, Articles 24, 25 and 29.

result of bankruptcy) and civil division court which hears and settles personal cases against a bankrupt debtor. These courts make decisions which may have a bearing on the course of a bankruptcy proceeding but they are not the courts the bankruptcy law refers to as court of bankruptcy. A court of bankruptcy may be indistinguishable from ordinary courts which deal with non-bankruptcy matters in its organization and even the qualifications of judges who man it. The court of bankruptcy is not even mentioned in the laws dealing with the powers and organizations of courts.[14] However, the nature of bankruptcy proceedings marks out a court of bankruptcy as peculiar, if not entirely unique, from the ordinary courts. First, a court of bankruptcy deals with collective proceedings. The very nature of collective proceedings imposes its own peculiar stamp upon the way a court of bankruptcy goes about its business. A court of bankruptcy potentially handles cases of tens, sometimes hundreds, of creditors against a bankrupt debtor. These creditors are not just numerous, they are also heterogeneous - some are suppliers, some are trade creditors, some are finance creditors, some are employees, etc. Their interests diverge as their classes. A court of bankruptcy is expected to strike a balance among these diverse groups of creditors.

Secondly, the consequence of a collective proceeding is that a court of bankruptcy gravitates to itself many disparate suits that are pending or about to be filed against the bankrupt debtor.[15] This phenomenon may be described as 'the gravitational force' of bankruptcy proceedings. As we shall see later on in this article, one of the immediate effects of bankruptcy proceedings is the suspension of all individual suits, which is followed by the attraction of these suits or actions to the court of bankruptcy. All creditors whose suits have been suspended or who are barred from bringing individual suits are then required to bring their suits to the court of bankruptcy.[16] In a manner of saying, the suits coalesce into a collective proceeding to be managed by a court of bankruptcy. A confrontation with

[14] The Civil Procedure Code of 1965 is an exception in this regard; Article 15 of the Code (which is now superseded by other laws) assigns the jurisdiction over bankruptcy to the High Court; See Civil Procedure Code of Ethiopia (1965), *Negarit Gazetta* - Extraordinary Issue No. 3 of 1965; bankruptcy is not mentioned as one of the subjects that falls under federal court jurisdiction in the Federal Courts Proclamation of 1996; see Federal Court Proclamation No. 25/1996, *Federal Negarit Gazetta*, 2nd year, No. 13, Article 5.

[15] See Commercial Code, supra note 4, Article 990.

[16] Id, see Articles 1041ff.

multiple creditors is prevented through orderly presentation of claims in a collective proceeding of bankruptcy.

Thirdly, a court of bankruptcy is different from most other court proceedings because the court handles bankruptcy proceedings through the intermediation of other persons - commissioners, trustees, among others (see below). The court of bankruptcy handles few of the cases directly. Most issues arising in bankruptcy proceedings are handled by the trustees and commissioners.

Some of the peculiar features of the court of bankruptcy flow from the nature of actions required to bring bankruptcy proceedings to a successful conclusion. Bankruptcy proceedings are not just about hearing and settling disputes. Bankruptcy proceedings are also about collection of debts, verification of claims, investigation and examination of accounts, settlement of debts and management of businesses (albeit temporarily).[17] Courts may be qualified to oversee others to do these, but they are not qualified to run the day to day business of a bankrupt business. The institutional arrangement for handling bankruptcy proceedings is an acknowledgement of the complexity of bankruptcy. That is why we have a division of labour (or more appropriately, assignment of functions) among the various persons and institutions responsible for the conduct of bankruptcy.

All that remains to do is to confirm the peculiar roles of the court of bankruptcy by reference to some of the provisions of Ethiopian bankruptcy law. It is the court of bankruptcy that sets the whole machinery of bankruptcy in motion -without the imprimatur of the court of bankruptcy, bankruptcy proceedings have not really begun. It is the court to which an application is first made and which orders preliminary investigation before it declares the debtor bankrupt, that declares the debtor bankrupt and fixes the date of suspension of payments, that makes all the appointments as well as removals or replacements of persons who are responsible for running the bankrupt estate.[18]

The bankruptcy court also plays supervisory roles over the activities of the persons appointed to run the bankrupt estate. We may cite several examples of this. The court receives reports or deposits of reports over the activities of these other persons responsible from time to time.[19]

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[17] Id, see Article 1018 and Articles 1035ff.

[18] Id, see Articles 975, 976, 977, 981, 993, 998, 999, and 1002(4).

[19] Id, see Articles 1014, 1015(3).

The third most important role of the court of bankruptcy is to make orders on matters which the other parties cannot. The court decides on the weighty matters affecting the bankrupt estate. The court of bankruptcy gives orders on all matters which are outside the jurisdiction of commissioners, such as sale of business, continuation of business, provisional admission of contested debts and closure of the bankruptcy proceedings. [20] The court of bankruptcy also acts as an appellate body for appeals from the orders of commissioners.[21]

b. Commissioner

The Commercial Code does not define a commissioner. Who is a commissioner, an officer of the court, an outsider? What are the qualifications and characters of a commissioner? The Code offers no clue to these questions. Book V of the Commercial Code is not the only place in Ethiopian laws where a commissioner is mentioned and used. The Ethiopian Civil Procedure of 1965 devotes a section to a commissioner.[22] However, since the Commercial Code came before the Civil Procedure Code, it is doubtful that the Commissioner mentioned in the Commercial Code is the one mentioned in the Civil Procedure Code. The first drafter of Book V of the Commercial Code expressed uneasiness about drafting some provisions because he could not anticipate what the Civil Procedure Code would provide. He actually named some of the provisions 'provisional' expecting them to be eventually superseded by the Civil Procedure Code.[23] Perhaps the case of a commissioner is one of them.

Another way of looking at the office of a commissioner is to treat it as another layer of trustee as a recent report of USAID suggested.[24] Although we are uncertain about the proper place of a commissioner in the Commercial Code, we know where the name came from. The commissioner in bankruptcy is a derivation from the early bankruptcy practice in England, where bankruptcy is taken out of the common law courts and arrogated to the Lord Chancellor of England who appointed five commissioners to make initial adjudications of bankruptcy issues.[25] The

[20] Id, see Articles 989 1037, 1039, 1049, and 1107.

[21] Id, see Articles 992(2), 1001(2), for example.

[22] See Civil Procedure Code, supra note 14, Articles 122-136.

[23] Peter Winship (ed. and trans.), *Background Documents of the Ethiopian Commercial Code of 1960* (Haile Selassie I University, 1974), at 102 and 104.

[24] United States Agency for International Development (USAID), *Ethiopia: Commercial Law & Institutional Reform and Trade Diagnostic*, January 2007, p. 54.

[25] See Thomas E. Plank, *Why Bankruptcy Judges Need Not and Should Not be Article III*

commissioners were appointed from among the list of bankruptcy commissioners, who were lawyers.[26] The adversarial procedures of the common law courts were deemed unsuitable for bankruptcy proceedings, involving as they did issues of adjusting relationships between an insolvent debtor and his/her many creditors.[27] The commissioners, in the early British bankruptcy practice, dealt with most issues involving bankruptcy proceedings like administering the bankrupt estate, determining the eligibility of the bankruptcy, allowing claims of creditors, distributing the bankrupt estate and discharging the insolvent debtor.[28] They also had important quasi-judicial powers like summoning the bankrupt and others, including the power to put in prison those who refuse their orders.[29] There is reason to believe that the commissioners in the Ethiopian bankruptcy law might have been inspired by this practice in the early English bankruptcy history.

There are three provisions in Book V of the Commercial Code devoted exclusively to the office of the Commissioner. Unfortunately, these provisions betray no hint as to what qualifications and characters are needed for the court to appoint one as a commissioner. There is a phrase in Article 993 of the Code "by another of its members" which seems to imply that a commissioner is appointed from the members of the court (possibly judges themselves). In practice, courts appoint commissioners from members of the public and do not heed the phrase 'by another of its members' in Article 993 of the Commercial Code.[30]

Current laws dealing with the internal administration of Ethiopian court system are silent about commissioners. This silence about commissioners may lead to administrative problems, because their office is not well regulated. We may argue that the commissioners should always be drawn from among the members of the judiciary. Perhaps that is why we find no provisions prescribing the character and qualifications of a commissioner.[31]

Judges, 72 Am. Bankr. L. J. 567 (1998).

[26] Ibid.

[27] Ibid.

[28] Ibid.

[29] Ibid.

[30] See *Selam Public Transport Share Co. vs. Ethio Investment Group PLC* (Federal First Instance Court, Com/File/No. 131125, 2001 E.C., in Amharic, unpublished).

[31] It is interesting to note on the other hand that the qualifications as well as the character of a trustee in bankruptcy are described and prescribed in some detail; see below.

Although the USAID Report casts doubt over the utility of commissioners as additional layers over the trustees, the additional layer is not really uncommon in different bankruptcy systems.[32] OHADA Uniform Bankruptcy Act, for example, requires the appointment of an 'official receiver' 'from amongst the judges of the court' who shall supervise the activities of a receiver or receivers in the conduct of liquidation (bankruptcy) proceedings.[33] The 'official receiver' is the equivalent of the 'commissioner' under Ethiopian bankruptcy law. His/her task is to 'ensure the rapid conduct of the proceedings and look after the interests at stake'.[34] Similarly, under French law, the court appoints a supervisory judge whose task is to 'supervise the speedy progress of the proceedings and the protection of parties' interests.[35] While the names used in different systems vary, it appears that the office of a commissioner might be necessary in bankruptcy proceedings. In fact, in some systems, there are multiple layers of supervision and roles in bankruptcy proceedings. Under the French law, for example, the bankruptcy court appoints not just an administrator

[32] Interestingly, there was a debate about the utility of a commissioner in the drafting commission, but it was apparently accepted after some debate; see Peter Winship, supra note 23, at 107.

[33] See OHADA Uniform Bankruptcy Act, 1998, Article 35; OHADA is an acronym of the French '*Organisation pour l'Harmonisation du Droit des Affaires en Afrique*' which is translated in English as the 'Organization for the Harmonization of Business Law in Africa'. The Organization was established in 1993 by fourteen Francophone African countries and has since then added two other members. At present, the members of OHADA are Benin, Burkina Faso, Cameroon, The Central African Republic, Chad, the Federal Islamic Republic of Comoros, Congo, Cote d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Senegal, and Togo. OHADA has developed a number of uniform acts: General Commercial Law, Commercial Companies and Economic Interest Groups, Collective Proceedings for the Clearing of Debts, Securities, Simplified Recovery Procedures and Enforcement Measures, and Arbitration; see Boris Martor et al, *Business Law in Africa: OHADA and the Harmonization Process* (Eversheds, 2002), at 4-7. The situation might have changed since then in Bahrain, but a dated article on Bahrain bankruptcy law states a similar arrangement under Bahrain bankruptcy system. Under the Bahrain bankruptcy law, bankruptcy judges – the equivalent of commissioners in Ethiopia, are appointed by court to supervise progress of bankruptcy proceedings and make all necessary arrangements for safeguarding the bankrupt's assets; see Richard Price and Christopher Walsh, *the Bahrain Bankruptcy and Composition Law*, 3Arab Law Quarterly3, 254, 256 (Aug. 1988).

[34] See OHADA, supra note 33, Article 39.

[35] See Louis Vogel and Francoise Perochon (trans.), *French Commercial Code*, as updated 03/20/2006, Articles L621-4 and L621-9.

(trustee) and supervisory judge but also court nominees, auctioneers, bailiffs, notaries or accredited commodity brokers.[36]

Whether commissioners are indispensable in bankruptcy proceedings is open to debate, but what they do once they are appointed in bankruptcy is not in doubt. Article 991 of the Commercial Code lists most of the functions of the commissioners in bankruptcy proceedings. Their most important role is one of supervision of the activities of trustees (who as we shall see carry out most of the day-to-day functions) and serving as bridges between the court and the trustee, and the creditors' committee and the trustee.[37] Since commissioners resolve many a dispute that would have ended up in court of bankruptcy, their role in saving judicial time should not be underestimated.

c. Trustees

One of the curious encounters of reading about the trustee in different bankruptcy systems is the multiplicity of names used to refer to the 'person responsible for administering bankruptcy proceedings': administrator, trustee, liquidator, supervisor, receiver, curator, official, judicial manager, commissioner.[38] Sometimes the same legal system adopts multiple names to refer to the person who does the same thing in different contexts. Ethiopian bankruptcy law uses the word 'trustee'; Banking Business Regulation Law uses the word 'receiver'.[39] The Commercial Code uses the word 'liquidator' to refer to a person who does similar things during the dissolution and winding up of companies for other reasons.[40] The Civil Code uses the word trustee in a different context.[41] Even the bankruptcy provisions use the word 'liquidator' and 'receiver' in some instances.[42] Whether it is appropriate to use multiple names is beyond the scope of this piece, but it is something to think about.

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[36] Id, see Article L621-4.

[37] For details, see Commercial Code, supra note 4, Articles 987(1) (d), 987 (2), 991-993, 994(3), 995-999, 1000(3).

[38] See UNCITRAL, supra note 11, p. 174, para. 35.

[39] See Banking Business Proclamation No. 592/2008, *Federal Negarit Gazetta*, 14th year, No. 57, Article 2(16).

[40] See Commercial Code, supra note 4, Articles 495-509.

[41] See the Civil Code of Ethiopia (1960), *Negarit Gazetta*, Gezette Extraordinary, 19th year, No. 2, Articles 516-544.

[42] See Commercial Code, supra note 4, Articles 1039 (3) and 1145.

Given the centrality of trustees to bankruptcy proceedings, it is generally agreed that trustees should be closely regulated in terms of qualifications, appointments, duties and liabilities.[43] In the area of qualifications - i.e., in terms of knowledge, experience and personal qualities required to occupy the office of a trustee, there are inevitably differences in how strongly and minutely the trustee is regulated by bankruptcy laws or laws related with bankruptcy law.[44]

While the complexity of bankruptcy proceedings in general makes it desirable to seek an 'appropriately qualified' trustee with knowledge of the law and adequate experience in commercial and financial matters,[45] one must be pragmatic in what qualified persons may be found in the market to occupy the positions of a trustee. Where the pool of qualified persons is limited, the courts should have enough latitude to draw trustees from the available pool. Depending on the depth and quality of the pool, the thresholds for qualifications may include requirements for 'professional qualifications and examinations', licensing, specialized training courses and certification examinations, and experience in some areas like finance, commerce, accounting and law.[46]

In some countries, strict regulation of the qualification of trustees may be facetious and unrealistic, given the limited pool of qualified persons to fill the position of trustees. It may be desirable in these countries to leave the qualification to the discretion of courts. Ethiopian bankruptcy law recognizes this limitation and leaves the matter to the Ministry of Commerce and Industry. Trustees are to be 'selected from the list of qualified persons of good repute resident in Ethiopia'.[47] The 'list of qualified persons' is to be prepared by the Ministry of Commerce (now Trade) and Industry but the Ministry has done nothing of the kind so far.

Perhaps, more important than the professional qualifications of a trustee are the personal qualities. The name trustee is evocative of some one who 'holds property in trust for the benefit of another and owes a fiduciary duty',[48] which ordinarily means that the trustee must possess certain

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[43] UNCITRAL, supra note 11, p. 174, para. 35.

[44] Id, pp. 174-176, paras. 36-43; see also *Collier's Bankruptcy Manual* (3d edition), p. 321.02

[45] UNCITRAL, supra note 11, p. 175, para. 39.

[46] Id, p. 175, para. 40.

[47] See Commercial Code, supra note 4, Article 994(1).

[48] See Bryan A. Garner (ed.), *Black's Law Dictionary* (7th edition, West Group, 1999)

personal qualities, like 'integrity, impartiality, independence and good management skills'.[49] Integrity requires that a person selected as a trustee has 'sound reputation and no criminal record or record of financial wrongdoing' and in some cases 'no previous insolvency or removal from public administration'.[50]

Impartiality and independence generally require the trustee to be free from conflicts of interest–what the UNCITRAL Legislative Guide (hereinafter simply the Guide) calls 'independence from vested interests, whether of an economic, familial or other nature'.[51] Conflicts of interest may arise from prior or existing relationships.[52] The Guide gives a full spectrum of instances in which the conflicts may arise:

> Prior ownership of the [business of] debtor; a prior or existing business relationship with the debtor (including being a party to a transaction with the debtor that may be subject to investigation in the insolvency proceedings and being a creditor or debtor of the debtor) a relationship with a creditor of the debtor; prior engagement as a representative or officer of the debtor; prior engagement as an auditor of the debtor; and a relationship with a competitor of the debtor...[53]

Ethiopian bankruptcy law does not list the positive qualities possessed of trustees like 'integrity', 'impartiality' or 'independence'. But some of these qualities are intimated. For example, the Commercial Code proscribes certain persons from the position of trustee - persons who have been declared bankrupt and persons who are deprived of civil rights [54] - because it presumes that these persons lack the integrity required to fulfill the roles of a trustee. The Code also proscribes persons who are related to the bankrupt debtor either by consanguinity or affinity from being appointed as trustees;[55] it also prohibits the appointment of creditors of the debtor[56] because these persons lack the 'independence' required to carry out the duties of trustees. Even after trustees are appointed, they are prohibited

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[49] UNCITRAL, supra note 11, p. 175, para. 41.
[50] Id, p. 176, para. 41.
[51] Id, p. 176, para. 42.
[52] Id, p. 176, para. 43.
[53] Ibid.
[54] See, Commercial Code, supra note 4, Article 994 (4) (a) & (b).
[55] Id, Article 994(4) (c).
[56] Id, Article 994(4) (d).

from 'self-dealing' (from acquisition of goods of the debtor) [57] because their 'impartiality' will be compromised through self-dealing.

A cursory comparison of the prohibitions in the Ethiopian bankruptcy law with the Guide reveals that cases in which conflicts of interest may arise or cases which compromise the integrity, impartiality or independence of trustees are not exhausted in the Ethiopian law. The integrity of a trustee may be vitiated by prior or existing business relationships (not necessarily creditor-debtor relationship), prior ownership of the debtor, a relationship with a creditor of the debtor, prior associations with the debtor as a representative or officer of the debtor, or even a relationship with the judge of court of bankruptcy, etc.[58] The provision that proscribes relatives from being appointed as trustees may be appropriate for natural persons but it does not cover business affiliations or relationships. These business affiliations may affect the integrity or impartiality of the trustee as much as the bonds of blood or marriage.[59] Although Ethiopian bankruptcy law is not exhaustive, it is not limiting. Courts may consider some of these additional factors in their appointments of trustees. Detailed regulations in this regard are not necessarily desirable anyway. Excessively prohibitive rules may circumscribe the options of courts as to dry up the available pool of qualified persons altogether. It may sometimes be appropriate for courts to appoint qualified persons as trustees in spite of the risks of conflicts of interest and then exercise powers of removal or replacement when a trustee so appointed has compromised his/her integrities.

d. Creditors' Committee

Like the name of trustees, different bankruptcy laws use different names to refer to an organ tasked with the functions of creditor's committee. Some laws use the expression 'bankruptcy controllers' or simply 'controllers', which may be a more apt name, given the role of creditor's committee in bankruptcy proceedings.[60] Under French law, the controllers (five in

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[57] Id, see Article 994 (5).

[58] See UNCITRAL, supra note 11, p. 176, para. 43; see Tilahun and Taddese, supra note 3, at 90; under the US Bankruptcy Code, a relative or even a person connected with the bankruptcy judge may not be appointed trustee; US Bankruptcy Code, Rule 5002(a), quoted in Collier's Bankruptcy Manual, supra note 44, p. 321.03.

[59] Compare Article L621-5 of French Code in this regard, which states 'No relatives or affines, up to a fourth degree included, of the head of the business or the managers, if the debtor is a legal entity, may be appointed to any one of the positions provided for ... except where this provision prohibits the appointment of an employee's representative.' See French Commercial Code, supra note 35.

[60] See Richard Price and Christopher Walsh, supra note 33, at 256.

number) are appointed by the supervisory judge (commissioner) 'from among those creditors requesting to be appointed'.[61]
OHADA Uniform bankruptcy Act uses a less common expression - assignees.[62]

The establishment of creditors' committee is recognition of the need to facilitate creditors' participation in bankruptcy proceedings.[63] As the first drafter of the Commercial Code stated, the creation of the creditors' committee is borne of the realization that 'general meetings of creditors would be too cumbersome to operate and too difficult to convene'.[64] The existence of the committee is not necessary in all bankruptcy proceedings, although Ethiopian law makes no exceptions.[65] It is clearly appropriate to have one where there are a very large number of creditors with diverse interests.[66]

One issue that needs to be resolved is what creditors are entitled to be appointed to the committee.[67] Particularly where the debtor has large numbers of creditors, disputes may erupt over the selection of some creditors for the committee. What factors should then be taken into account to qualify a creditor for the committee membership? Approaches to the formation of creditors' committee vary among different bankruptcy laws.[68] Some bankruptcy laws restrict membership to those creditors whose claims are verified and admitted.[69] Others make restrictions on location of creditors, presumably to overcome the challenges of distance for frequent meeting of the committee members.[70] Some systems permit the formation of separate committees for different categories of creditors (trade creditors, finance creditors, etc).[71] French bankruptcy law requires that at least one of

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[61] See French Commercial Code, supra note 35, Article L621-10; incidentally, French bankruptcy law uses 'creditors' committee' to refer to a creditors' committee set up to review and approve a reorganization plan - which is a much more specific act; see Articles L626-29 to L626-31 of French Code.
[62] See OHADA, supra note 33, Articles 48-49.
[63] UNCITRAL, supra note 11, p. 197, para. 99.
[64] See Peter Winship, supra note 23, p. 108.
[65] UNCITRAL, supra note 11, p. 197, para. 99.
[66] Ibid.
[67] Id, pp. 197-198, para. 101.
[68] See id, pp. 197-198, paras. 101-106.
[69] Id, p. 198, para. 101.
[70] Ibid.
[71] Id, p. 198, para. 102.

the creditors be from among secured creditors and one from among unsecured creditors if several member-creditors' committee is constituted.[72] Ethiopian bankruptcy law is clear in some respects and vague in others. We know that the committee members are to be selected by the commissioner from among all the creditors. And we know that the total number of members in a committee is either three or five –always an odd number to prevent ties from stalling committee decisions or opinions.[73] We also know that the committee is constituted after the list of creditors is deposited with the registrar.[74] The list includes both claims of creditors that are admitted and those that are rejected. It will be extraordinary if the commissioner chooses a creditor whose claims are rejected in the said list.

This much is clear. What is not clear is what factors the commissioner will take into account to select committee members. It appears that the commissioner has full discretion in this - may even afford to be arbitrary (there is nothing wrong if he casts lots to select members). The only restriction on the discretion of the commissioner is the rule that proscribes the selection of creditors who are related to a debtor either by consanguinity or affinity up to a fourth degree.[75]

Another issue is the role of the Committee. The Commercial Code does not make any distinctions among the different roles of the creditors' committee, but it is useful to divide the role of the committee into three roles: advisory, control and decisive functions.[76]

In its advisory roles, the opinion of the committee is sought when some issues affecting the bankruptcy proceedings are on the table. These include compromise and arbitration of claims concerning the bankrupt estate;[77] a proposal of composition by the debtor;[78] lump sale of assets during compulsory winding up[79] and a proposal of distribution upon compulsory

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[72] See French Commercial Code, supra note 35, Article L621-10.
[73] Commercial Code, supra note 4, Article 1002(3).
[74] Id, see Article 1044.
[75] Id, see Article 1002(5).
[76] Under different bankruptcy laws, the creditors' committee may undertake a range of functions: (i) advising a trustee of the wishes of creditors with respect to issues like the sale of business assets outside the ordinary course of business; (ii) consulting with a trustee on issues like the existing management of the bankrupt estate; and (iii) supervising a trustee; see UNCITRAL, supra note 11, pp. 200-201, paras. 110-112.
[77] Commercial Code, supra note 4, Art. 1038(1).
[78] Id, Art. 1082(1) and (4).
[79] Id, Art. 1107.

winding up[80]. On these issues, the opinion or recommendations of the committee carry some weight, but they are not decisive of the results. Those who make the ultimate decisions (the commissioner, the trustee, the court, etc) must take the opinion of the committee into account, although they are not bound by them. The committee's opinion is clearly a factor in how they reach a decision.

The second function of the committee is control.[81] In its control function, the committee participates in bankruptcy proceedings by having presence during verification of claims.[82] The third function is the strongest of all the powers of the committee: it is decisive. There is one instance - if the bare language of the Code is to be believed- in which the Committee assumes a decision making role during bankruptcy proceedings, and that is when assistance is to be given to the debtor and family after the compulsory winding up is commenced.[83]

e. Other Persons in Bankruptcy Proceedings: the Public Prosecutor, the Debtor, and others

Other persons responsible in bankruptcy proceedings -albeit in minor capacities- are mentioned in various provisions of the Ethiopian bankruptcy law -although no specific section is devoted to any one of them in particular. We have, for example, some provisions mentioning the public prosecutor. The public prosecutor is mentioned as one of the parties that can initiate bankruptcy proceedings against debtors, most likely as result of criminal investigations into the financial affairs of debtors.[84] The public prosecutor may also be called into action when a debtor, summoned to appear, fails to appear during the closing of the debtor's books.[85]

The bankrupt debtor has been stripped off most of his/her powers during bankruptcy, but s/he is not out of the picture completely. Even when the debtor is responsible for the bankruptcy, it is impossible to conduct bankruptcy proceedings without the presence and action in some capacity of the bankrupt debtor. Ethiopian bankruptcy law takes this reality into account and authorizes trustees to 'employ' the bankrupt debtor 'on such

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[80] Id, Article 1109(2).

[81] That is why in some bankruptcy systems, the committee has a name of controllers - which is an apt expression, see above.

[82] Commercial Code, supra note 4, Article 1043(1).

[83] Id, see Article 1102; note that before the compulsory winding up, the decision over the matter rests with the commissioner; id, see Article 1020.

[84] Id, see Article 975(c).

[85] Id, see Article 1004(4).

terms and conditions as the commissioner' shall fix.[86] The assistance of the debtor is critical in the successful winding up of the bankrupt business particularly when a decision is made to sell the business as a going concern, in which 'the debtor's detailed knowledge of the business and the relevant market or industry, as well as its ongoing relationship with creditors, suppliers and customers' might come in handy.[87] Apart from these limited cases, the debtor is mostly passive during bankruptcy proceedings - for legitimate reasons - the bankrupt estate needs protection from the bankrupt debtor. In the alternatives to the bankruptcy proceedings - composition and schemes of arrangement - the debtor is decidedly more actively involved both in the initiation of these proceedings and in getting the proposals approved (see below).[88]

Ethiopian bankruptcy law also anticipates that other persons might be needed during bankruptcy proceedings. Article 1015 of the Commercial Code authorizes trustees (with the consent of commissioner) to employ 'suitable persons' for 'preparing the inventory and valuation of the debtor's property'.[89] The 'suitable persons' have names in other bankruptcy laws. The French Code, for example, has a list of names for those persons who participate in taking inventory and valuation of the debtor's property: auctioneers, bailiffs, a notary or an accredited commodity broker.[90] We may need the services of these other persons in some large and complex bankruptcy proceedings.

II

3. Effects of Bankruptcy

The Commercial Code treats the effects of bankruptcy in Chapter 4 of Title II of Book V (Articles 1019-1040). The effects are divided into two - effects as regards the debtor (Section I) and effects on the management of the property (Section II). Closer reading of Section I (effects as regards the debtor) will reveal that the section covers more than just the effects upon the debtor. The judgment of bankruptcy affects not just the debtor but also creditors and at times even third parties. The effects as regards the management of property address various issues that are better treated under various subjects. These effects have already partly been dealt with above in connection with the power of trustees, and we will have occasion

[86] Id, see Article 1021.

[87] UNCITRAL, supra note 11, p. 162, para. 3.

[88] See Commercial Code, supra note 4, Articles 1081, 1119 and 1132, among others.

[89] Id, see Article 1015(4).

[90] See French Commercial Code, supra note 35, Article L621-4.

to deal with them below under the section on the effects of bankruptcy on contracts and leases (see below).

It is helpful to break Section I of Chapter 4 down to three parts based on the simple criterion of the person/s affected by bankruptcy. The title of section II of Chapter 4 of Title I of Book V is, in a sense, misleading. It makes more sense if the said section is divided as follows:

> Section I: Effects of Bankruptcy upon the Debtor
>
> Section II: Effects of Bankruptcy upon the Creditors of the Bankrupt Debtor
>
> Section III: Effects of Bankruptcy upon Third Parties (or more appropriately, Invalidation of Certain transactions during the Suspect Period).

We will deal with the three parts separately.

a. Effects of Bankruptcy Upon the Bankrupt Debtor

The Commercial Code lists the effects of bankruptcy upon the bankrupt debtor in a more or less haphazard manner. It would again make sense to classify these effects into two: personal and proprietary (pecuniary) effects.

i. Personal Effects of Bankruptcy

1. Restriction of Personal Freedom

The personal effects of bankruptcy are stated in Articles 1019 and 1022 of the Code. The personal effects (some of them in any event) are a reflection of the times during which the Code was written.[91] The first drafter of Book V was perfectly aware of this orientation of Ethiopian bankruptcy law. Having weighed the options out there, whether to view bankruptcy as 'blameworthy' or only as a 'simple accident of commercial life,'[92] the drafter went for the idea that bankruptcy should be associated with blameworthiness.[93] Articles 1019 and 1022 are inserted in the Code to stress

[91] See Peter Winship, supra note 23, at 103.

[92] Id at100.

[93] Id at 103; 'faulliti sunt deceptores et fraudotores' (bankrupts are deceivers and frauds) is how bankrupts were labeled in medieval Italy, from which bankruptcy practice emerged; see Volkmar Gessner et al, *Three Functions of Bankruptcy Law: The West German Case*, 12Law & Society Review4, 499, 531 (Summer, 1978).

this fact about Ethiopian bankruptcy law.[94] They project bankruptcy as something of a stigma and they are built upon suspicion.[95]

Article 1019 of the Code provides that bankruptcy results in the restriction of the freedom of movement of the debtor. The bankrupt debtor 'may not leave the area in which he resides without the permission of the commissioner.' Article 1019 of the Code appears to make the 'restriction of freedom' automatic. And, the restriction appears to apply to all bankrupt debtors, which means that a judgment of bankruptcy does not have to make specific reference to it. Be that as it may, the enforcement of the restriction leads to some practical difficulties.

There is reason to doubt if the restriction on debtor's movement is an automatic consequence of bankruptcy. First of all, the delimitation of the 'area in which the debtor resides' would require a specific order to that effect. For the restriction to be meaningful, we must expect the court of bankruptcy to make a specific order that the bankrupt debtor not leave an area whose geographical limits are known. Although this is not specifically mentioned as one of the orders the court of bankruptcy makes in its judgment of bankruptcy,[96] it would appear that the specific order is necessary if Article 1019 of the Code is to take effect. Secondly, Article 1019 refers us to Article 433 of the Penal Code of 1957 (now Article 440 of the new Criminal Code of 2004) for dealing with debtors who have violated the restriction under Article 1019. Article 433 of the 1957 Penal Code (and Article 440 of the new Criminal Code) talks about the offense of 'resisting authority'.[97] The material element of the offense of 'resisting authority' is a violation of a 'specific order given by either a public servant' or a 'lawful decision of a competent authority'. Without the specific order or a lawful decision, the offense itself does not exist. We cannot expect the material element of the offense to change just to accommodate the ambiguous language of the Commercial Code. Therefore, although the language of Article 1019 of the Code appears to automatically attach the restriction of the debtor's freedom of movement, the nature of the offense forces us to

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[94] See Peter Winship, supra note 23, at 103.

[95] These are just the beginning of punitive elements in Ethiopian bankruptcy law; as we shall see later, the punishment may even extend beyond the closing of bankruptcy proceedings; See, discharge, below.

[96] See Commercial Code, supra note 4, Article 977.

[97] The new Criminal Code prescribes a simple imprisonment of not exceeding one year or a fine not exceeding one thousand Birr; the punishment was one month or a fine not exceeding one hundred Birr under the 1957 Penal Code.

accept that the personal restriction attaches only if there is a specific order of the court to that effect. If the specific order can be adduced, it is possible to determine whether the bankrupt debtor has violated that order and it is possible to characterize that violation as an 'offense of resisting authority' under the new Criminal Code.

In any event, at present the questions surrounding Article 1019 should not really be about its various shades of meaning but whether it is necessary at all. First, Article 1019 makes no distinction between a debtor who, through his actions, is responsible for bankruptcy and a debtor who is quite simply a victim of unfortunate turn of events and finds himself in bankruptcy. Secondly, as we shall soon see, the debtor is dispossessed of his power to administer upon declaration of bankruptcy anyway and his whereabouts are in many instances irrelevant. Thirdly, survey of the bankruptcy laws of some other countries reveals that personal restriction of freedom of movement is no longer a feature of modern bankruptcy systems. Although some bankruptcy laws still retain some form of restriction of freedom of movement as a consequence of bankruptcy, many modern bankruptcy laws do not even mention it.[98] There are still countries which have retained restriction of freedom in their bankruptcy laws but they are in the minority.[99]

Even if the physical presence of the bankrupt debtor were necessary, the matter could be left to the discretion of the court of bankruptcy. The court might order some restrictions in cases where there is a real threat that the debtor might abscond while the bankruptcy proceeding is pending. It is also possible that where the debtor is inclined to abscond, the criminal justice system might have caught up with him for offenses related with bankruptcy. If alertness on both sides is warranted, it might be argued that both the bankruptcy court and the criminal division court should be able to restrict freedom of movement where absconding is a real and distinct possibility.

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[98] See French Commercial Code, supra note 35, Articles L653-1 to L653-11; OHADA, supra note 33; see also Richard W. Maloy, *Comparative Bankruptcy*, 24 Suffolk Transnat'l L. Rev.1 (Winter, 2000).

[99] In Poland and Taiwan, the bankrupt debtor cannot leave his or her residence without the permission of the court, and in Mexico, the bankrupt debtor is confined to the boundaries of the court's venue unless he or she is granted permission to leave; see Richard W. Maloy, supra note 98

Article 1019 is not merely a reflection of its time, but also of the modus operandi of the drafting of the different Codes in the 1950s. On the one hand, the drafters were reluctant to incorporate penal provisions in the Commercial Code,[100] but on the other hand, they were anxious not to leave anything to chance – hence at least a mention of the restriction in the Commercial Code. This however has an unintended consequence of uncertainty as to when and in what context the restriction is to be imposed.

2. Prohibitions and Forfeitures

Article 1022 of the Commercial Code (which incidentally should come immediately after 1019) adds another restriction, which might be taken to have both personal and proprietary effects. Article 1022 uses general expressions to denote these restrictions: prohibitions and forfeitures. But unlike Article 1019, which as we have seen uses a strong language of peremptory nature, Article 1022 uses a permissive language and defers these prohibitions and forfeitures to other laws: 'The bankrupt [debtor] may be subjected to such prohibitions or forfeitures as are provided by law.'

The restrictions, whatever form they might take, depend on other laws. The prohibitions or forfeitures are not defined in the Commercial Code. The second sentence of Article 1022 itself gives a hint as to what form these restrictions might take: 'Unless otherwise provided by law, such prohibitions or forfeitures shall cease to be effective where the convicted bankrupt is reinstated.'

The use of the expressions 'convicted bankrupt' and 'reinstated' immediately brings to mind cases in which a convicted person is subject to additional penalties by a criminal division court.

Prohibitions or forfeitures resulting from bankruptcy are found scattered in other laws of Ethiopia. We will just take two examples. The first example of a prohibition is offered in the bankruptcy law itself, although no direct reference is made in Article 1022 of the Code. Article 994 (4) (a) of the Code proscribes a person declared bankrupt from occupying the position of a trustee. This proscription does not obviously apply to the bankrupt debtor, for a debtor may not be appointed a trustee in his own bankruptcy in any case, but it applies to all persons other than the bankrupt debtor who were declared bankrupt previously.

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[100] Peter Winship, supra note 23, at 102.

The second example of prohibition or forfeiture is to be found in the Criminal Code. Articles 121-128 of the Criminal Code of Ethiopia (of 2004) provide examples of prohibitions that might ensue from declaration of bankruptcy. Unlike the possible rendering of Article 1019, these effects (what the new Criminal Code calls 'secondary punishments')[101] are not automatic. The 'secondary punishments' take effect only if the 'court has expressly so directed.' In so directing, the court may be guided by their aim and the result they would achieve on the safety and rehabilitation of the criminal.[102] These 'punishments' are typically ordered in practice in addition to the primary punishments like fine and imprisonment.

Secondary punishments, according to the new Criminal Code of 2004, include caution, reprimand, admonishment and apology, and 'where the nature of the crime and the circumstances under which the crime was committed justify' a deprivation of rights of the offender.[103] The deprivation of rights include civil rights, such as the 'right to vote, to take part in any election, or to be elected in any public office... to be a witness or a surety... to serve as an assessor',[104] the right to exercise family rights, such as parental authority, tutorship or guardianship,[105] and the right to exercise a profession, art, trade, or to carry on any industry or commerce.[106]

Of the long list of the deprivation of rights in the Criminal Code, the ones that seem reasonably likely to be ordered by a court in connection with bankruptcy is the deprivation of the right to exercise a profession, trade or to carry on any industry or commerce. The offenses that have some affinity with bankruptcy are 'fraudulent insolvency,'[107] 'irregular bankruptcy,'[108] and 'fraudulent bankruptcy'.[109] A debtor who has been convicted of any of these offenses under the Criminal Code may be subject to the secondary punishment of the right to run any business (not just his current business, which as we shall soon see, is automatic).

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[101] See the New Criminal Code of Ethiopia (2004), supra note 12, the Title of Section II.
[102] Id, see Article 121.
[103] Id, see Articles 122(1) and 123.
[104] Id, Article 123 (a).
[105] Id, Article 123 (b).
[106] Id, Article 123 (c).
[107] Id, Article 725.
[108] Id, Article 726.
[109] Id, Article 727.

These deprivations of rights may be permanent or temporary, depending on the discretion of the court.[110] Where temporary, deprivation may last from six months to five years.[111] Except in gravest of instances, none of the offenses connected with bankruptcy is ever likely to lead to permanent loss of rights.

Because of the dual organization of Ethiopian bankruptcy law (it has separate section dealing with additional rules of bankruptcy regarding business organizations),[112] we may forget that the effects of bankruptcy attach not just to debtors but also to partners jointly and severally (in the case of partnerships) and 'any person who has carried out commercial operations on his own behalf and disposed of company funds as though they were his own and concealed his activities under the cover of such company' (in case of share companies and private limited companies).[113] In the case of business organizations, the restriction of freedom of movement may not apply to the business organizations but where the judgment of bankruptcy names the partners (in the case of partnerships) and the managers and possibly directors (in the case of share companies and private limited companies) as commonly bankrupt with the business organization, the individuals named are subject to the effects of bankruptcy. Their freedom is restricted; and the prohibitions and forfeitures apply to them.

Whatever the specifics of prohibitions or forfeitures might be, the Commercial Code, true to the determination of the drafters to keep criminal provisions out of the Code, simply defers these matters to other laws, such as the Criminal Code.[114] This approach of the Commercial Code contrasts sharply with some other bankruptcy laws in the modern times. The French Commercial Code, for instance, lists the types of what it calls 'disqualifications and forfeitures' in the Commercial Code itself.[115] These disqualifications are the equivalent of our 'prohibitions and forfeitures'. They, for example, include disqualifications from running, managing, administering, controlling any business organization, denial of voting

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[110] Id, see Article 124.

[111] Ibid.

[112] See Commercial Code, supra note 4, Title IV, Book V, Articles 1154-1165.

[113] Id, see Article 1158 and 1160.

[114] See Myron M. Sheinfeld ,Teresa L. Maines, and Mark W. Wege, *Civil Forfeiture and Bankruptcy: The Conflicting Interests of the Debtor, Its Creditors and the Government,* 69 Am. Bankr. L.J. 87 (Winter, 1995)

[115] See the French Commercial Code, supra note 35, Articles L653-1 to L653-11.

rights, forced sales of shares, ineligibility for public offices, prohibition from issuing cheques and ineligibility for public procurement contracts.[116] Similarly, OHADA Uniform Bankruptcy Act (1998) has a separate section devoted to what it calls 'personal bankruptcies'.[117] The prohibitions resulting from personal bankruptcy in the OHADA Uniform Act of 1998 include a general ban to trade, direct, manage, administer or control an individual business or corporate body, a ban to hold an elective office or to be an elector for the said public office; a ban to hold any administrative, legal or professional representation office.[118]

Where the prohibitions or forfeitures are found or listed might be more a matter of approach than of substance, but listing these in the Commercial Code has the virtue of treating these matters as directly flowing from bankruptcy proceedings and avoids the risk of neglecting these matters whenever bankruptcy proceedings are set in motion.

ii. Proprietary Effects of Bankruptcy

The most significant effect of bankruptcy under Ethiopian law is the dispossession of the bankrupt debtor.[119] In this the bankruptcy law leaves no discretion whatsoever. However the bankruptcy has come about (or whether the bankruptcy is the making of the debtor or not), the debtor is deprived of his right to administer or dispose of his property. As usual, there is no better way of approximating its meaning than analyzing its language. Article 1023 of the Commercial Code states: 'A bankrupt shall not administer or dispose of his property, however acquired, from the day he is declared bankrupt until he is discharged'.

A number of questions may be treated in connection with the issue of dispossession of the bankrupt debtor (an article in its own right). For the purposes of this article, we wish to address ourselves to two important questions:

i) What is the extent of the debtor's dispossession; in other words, what is the scope of the bankrupt estate, from whose administration the debtor is removed?

ii) How does one effect dispossession in the case of business organizations where the persons who run the organization are not really the debtors?

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[116] Id, see Article L653-2, L653-8, L653-9.

[117] See OHADA, supra note 33, Part III, Chapter I, Articles 196-203.

[118] Id, Article 203.

[119] Commercial Code, supra note 4, Article 1023.

Let us address ourselves to the first question first. It is quite striking that although the word 'property' is frequently mentioned in several places in Book V,[120] no attempt is made to define the scope of property for purposes of bankruptcy, perhaps leaving the matter (as is often the custom) to general laws of Ethiopia. But it is quite possible that the term 'property' is not given to uniform definition and a general meaning of it in the Civil Code might not be suitable for bankruptcy purposes. Article 1023 talks about the consequences of bankruptcy upon the debtor without properly defining what his property consists in. A definition (at least of listing property included in a bankrupt estate and excluded from it) would have been desirable but we find none of that in our bankruptcy law.

A clear definition of the property subject to bankruptcy proceedings is critical for obvious reasons.[121] The identification of property subject to bankruptcy proceedings (preferably from a general definition) will "determine the scope and conduct of the proceeding" and "ensure transparency and predictability for both creditors and the debtor".[122] As is to be expected, the Guide supplies the best definition in this regard. According to the Guide, the bankrupt estate may:

> ... include all assets of the debtor, wherever located, whether in the forum or a foreign state, whether or not in the possession of the debtor at the time of commencement [of bankruptcy proceeding], and including all tangible (whether movable or immovable) and intangible assets... the debtor's rights and interests in encumbered assets in third party owned assets.... Assets acquired by either the debtor or the insolvency representative [trustee] after commencement of the insolvency proceedings (subject to specific exclusions that would apply in the case of natural person debtors....) and assets recovered through avoidance or other actions..... [123]

[120] Id, see for example, Articles 1026, 1028, 1035.

[121] See Michael M. Parker, *Bankruptcy Primer*, 24 Colorado Lawyer, 1561 (July 1995).

[122] UNCITRAL, supra note 11, p. 75, para. 3.

[123] UNCITRAL, supra note 11, pp 75-76, para. 4; see also Felix Lopez, *Creditors' Rights under Spanish Law, 33 Am J Comp L2, 259, 272 (1985)*; under Spanish law, goods and assets which are in debtor's possession but not owned by the debtor are set aside and transferred to their owners; certain secured creditors (pledges, ship mortgagees, ordinary mortgagees) are entitled to retain the collateral and to initiate a foreclosure in order to recover the amount of their claims; see also Pamela Krauss, *Unsettled Existence: The Fate of Licensed Intellectual Property Rights upon the Bankruptcy or Insolvency of the Licensor*, 19 Intellectual Property Journal, 149 (June, 2005).

At the other end of the spectrum we find property excluded from the bankruptcy proceedings. Their identification is equally (if not more) important. Again, we turn to the Guide for identification of these assets in general:

> ...assets owned by a third party that are in possession of the debtor ... such as trust assets and assets subject to an arrangement (whether contractual or otherwise) that does not involve a transfer of title but rather the use of the assets and return to the owner once the purpose for which they were in the possession of the debtor has been fulfilled....assets subject... to reclamation, such as goods supplied to the debtor before commencement but not paid for and recoverable by the supplier....[124]

And, where the bankrupt debtor is a natural person:

> ... post-application earnings from the provision of personal services by the debtor or monies received for public works by the debtor, assets ... necessary ... to earn a living and personal and household assets, such as furniture, household equipment, bedding, clothing and other assets necessary to satisfy the basic domestic needs of the debtor and his family.[125]

Between these opposite poles of inclusion and exclusion, there are many types of assets,[126] whose treatment are ambiguous and controversial (and ultimately depend on the choice made by a particular bankruptcy law of a country). These types of assets include encumbered assets, joint assets, assets located in a foreign country, some intangible assets, third-party-owned assets, in which the debtor has an interest.[127] The Guide supplies a number of alternative approaches to the treatment of these 'borderline' assets.[128] On the treatment of joint assets, just to give one example, the Guide provides approaches of complete exclusion from the bankrupt estate or inclusion of the part (or portion) belonging to the bankrupt debtor.[129] In any event, it is desirable that (whatever approach is taken in any particular case), the position of the law is expressed in clear language. The approach taken is not purely a matter of taste but one of policy and expedience. The

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[124] UNCITRAL, supra note 11, p. 80, para. 17; see also *Property of the Estate*,1 Bankr. Dev. J. 331 (1984).
[125] UNCITRAL, supra note 11, p. 80, para. 18.
[126] In this context, I use 'assets' to refer generally to property. I prefer assets to property because it is flexible to use both in the singular and plural.
[127] See, UNCITRAL, supra note 11, pp 76-79, 81, paras. 7-14 and 20-21.
[128] Id, see pp. 77-81, paras. 20-21.
[129] See id, p. 81, para. 21.

choice between different approaches may depend on laws other than bankruptcy law (e.g. family law), and "factors such as the ease with which the assets may be divided"[130] in the case of joint assets.

As alluded to before, Article 1023 of the Code supplies a less than satisfactory definition to the concept of "bankrupt property" (and obliquely as that): '... his [debtor's] property, however acquired...'

Since Article 1023 was intended by the drafter as a provision stating one of the effects of bankruptcy upon the debtor, it was never intended as a definition of a property subject to bankruptcy. It might therefore be a perversion to call it by something other than what it was intended for. Although we have no definition of property included in a bankrupt estate and excluded from it under Ethiopian law, we have hints in many provisions of Ethiopian law of both varieties. Let us look at some of them. Article 1018 of the Commercial Code is one of these provisions. One of the first tasks of trustees is the preparation of 'a balance sheet based on the books, documents papers and other information as available to them'.[131] The balance sheet is prepared with full knowledge and acknowledgment of the debtor.[132] Upon the completion of the inventory, there is a formal 'ceremony' of handing over of the debtor's property to the trustee. The lists of property to be 'handed over' include "all goods, money, securities, books, papers and documents, furniture and chattels of the debtor...".[133] Such handing over is verified by a note at the foot of the inventory (in which all parties involved attest by their signature of what property has been handed over).[134] In all likelihood a property that has been handed through a formal 'ceremony' is part of the bankrupt estate. It does not mean that the handing over will be smooth but once it is signed by the parties involved, it is an evidence that the trustee shall thenceforward exercise full powers over such property.

But that is not all. At the time of the handing over, there is a lot of property potentially belonging to the debtor but not in a position to be handed over physically[135] because such property is in the hands of third parties.

[130] Ibid.

[131] Commercial Code, supra note 4, Article 1014.

[132] Commercial Code, supra note 4, see Article 1015(1).

[133] Id, Article 1018.

[134] Ibid

[135] By the way, the process of handing over is by no means clear. UNCITRAL Guide provides two approaches. In some countries, legal title over the assets is transferred to

Bankruptcy does not come after the debtor has collected all property interests in the hands of third parties and put all his affairs in order. In recognition of this reality, Ethiopian law authorizes the trustee to collect all debts from third parties owing to the debtor.[136] The question is which debts? At the time of the judgment of bankruptcy, the bankrupt debtor may be owed a variety of debts, some directly related to the business which has now gone bankrupt and some personal to the debtor (where the debtor is a natural person). We may all agree that the trustee should collect debts owed in connection with the business. But how about debts owed to the debtor for personal torts like defamation, for injury to credit or reputation or personal bodily injury inflicted upon the debtor? Under Ethiopian bankruptcy law, although the distinction is made between 'debts relating to' the debtor's commercial activities and other debts for purposes of commencement of bankruptcy, this distinction is not maintained once the debtor is declared bankrupt.[137] If one is to go with the literal meaning of Article 1035(2) of the Code, therefore, the trustee is authorized to collect even personal debts owed to the debtor at the time of the commencement of the bankruptcy.[138]

There is another species of property belonging to third parties (or in the hands of third parties) which the law again authorizes the trustee to recover/reclaim for the interest of creditors of the bankrupt estate.[139] These are assets transferred by the debtor at the time when his bankruptcy became imminent. This period, known as 'suspect period' (see below), is a period when the debtor is suspected to have acted in connivance with third

trustees while in others the bankrupt debtor remains the legal owner of the assets but his powers to administer and dispose of these assets is limited, See UNCITRAL, supra note 11, p. 75, para. 2.

[136] Commercial Code, supra note 4, Article 1035(2).

[137] See Taddese Lencho, *Ethiopian Bankruptcy Law: Commentary (Part I)*, 22J. Eth. L.2, 57, 89-94(Dec. 2008); the UNCITRAL Guide states that some countries do not allow trustees to recover debts of personal nature like defamation for the benefit of the bankrupt estate. The debtor, in these countries, "remains personally entitled to sue and retain what is recovered in such actions", See UNCITRAL, supra note 11, p. 80, para. 18; for the contrary position, see *Collier's Bankruptcy Manual* (2d Edition Revised, Matthew Bender & Company, Inc., 2010), at 541.07.

[138] By the way, these controversies will not arise in connection with business organizations unless the court ordered the bankruptcy of members (partners) or officers (managers) of the business organization along with the bankruptcy of the business organization itself; see Commercial Code, supra note 4, Articles 1158 and 1160 of the Code.

[139] See Felix Lopez, supra note 123, at 273.

parties to diminish the value of the bankrupt estate and to undermine the chances of creditors of recovering their debts. Under ordinary circumstances, the debtor (who transferred property to third parties) is owed nothing (the third parties are not debtors, as in the case above) but because the transfer was fraudulently made, the trustee is authorized by Ethiopian law to recover the assets so transferred by invalidation of fraudulent transfers.[140] The trustee may recover these assets, which will form part of the bankrupt estate.[141]

On properties excluded from the bankrupt estate, we have answers (again less satisfactorily overall) in various provisions haphazardly scattered in Book V of the Commercial Code. We may proceed from the clear cases to the not-so-clear ones.

Of the clear cases, we might cite the following examples. "Negotiable instruments or other securities which have been handed to the debtor for purposes of collection for the benefit of the owner" and "remittances specifically made by the owner to be appropriated to specified payment,"[142] goods consigned to the debtor for deposit or for sale on behalf of the owner" if these goods "exist in kind, in whole or in part,"[143] goods the sale of which has been cancelled before bankruptcy,[144] movables sold with ownership reserved,[145] goods transmitted to the debtor but not yet delivered to the debtor's warehouse or to his agent at the time of bankruptcy.[146] Third party sellers are entitled to retain the goods sold to the bankrupt debtor "where such goods have not been delivered to the debtor" or not consigned "either to him or to third persons on his behalf."[147] Subject to the right of the trustee to exercise power of redemption of the property pledged (see below), pledgees have the right to sell the property for the satisfaction of their claims secured by pledge.[148]

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[140] For invalidation of transfers during suspect period, see below.

[141] See Commercial Code, supra note 4, Articles 1029-1034.

[142] Id, Article 1073.

[143] Id, Article 1074(1).

[144] Id; Article 1075.

[145] Id, Article 1076.

[146] Id, Article 1077.

[147] Id, Article 1078; see, however, Article 1079, where the trustee is authorized to require delivery by sellers as required by their contract under certain conditions specified therein.

[148] Id, Articles 1058 and 1059; for the rights of different categories of creditors against the bankrupt estate, see below.

What all these provisions do (they are fairly straight forward provisions and unlikely to lead to controversies in practice) is exclude all the properties mentioned therein from the authority of the trustee. They may be taken as definitions and/or enumerations of assets excluded from the bankrupt estate. These exclusions spare the owners/claimants from the unpleasant choice of having to stand with several other creditors to share from the now dwindling bankrupt estate.[149]

A less than satisfactory solution is provided for the treatment of encumbered properties held by mortgages and creditors secured by immovables or mortgages on the business.[150] In some provisions, Ethiopian bankruptcy law gives the impression that secured creditors are unaffected by the commencement of bankruptcy proceedings. Article 1026 of the Code, for example, suspends all individual suits of creditors included in the universality "except creditors whose claim is secured by "a special privilege, pledge or mortgage".[151] Article 1026 (together with Article 1025) gives the impression that secured creditors are not affected by bankruptcy proceedings. Carried to its logical conclusion, this may mean, for example, that the secured (encumbered) property held by these creditors is not part of the bankrupt estate and hence outside the jurisdiction of the trustee. We are compelled (at least partially and half-heartedly) to withdraw this conclusion or at least question our initial hunches when we come to Articles 1065-1072 of the Code. These provisions are couched in an unfortunate language of the order of sale of encumbered property vis-à-vis the 'unencumbered' bankrupt estate instead of stating the power of the trustee over encumbered assets (or even better stating whether encumbered assets are part of the bankrupt property).[152]

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[149] Where their claims exceed the value of the properties excluded above, they are reduced to the fate of other 'unlucky' creditors for the remainder of their claims; id, see Article 1059, for example, where it is stated: "where the price of sale [of the pledged property] is less than the amount of the debt, the pledgee may prove his claim for the difference as an unsecured creditor".

[150] Id, see Articles 1065-1068 and 1069-1072.

[151] Id, read Article 1026 together with Article 1025 of the Code – the latter *a contrario.*

[152] The word 'encumbered' is used here as a generic term referring to all property securing the debt owed by the bankrupt debtor. In other contexts, the words 'encumbered' or 'encumbrances' are as ponderous in pronunciation as their meanings but in this context these words are shorter than the words the Code uses, such as 'secured by immovables,' 'mortgage on the business'; see Commercial Code, supra note 4, the titles of Sections 4 and 5 of Chapter 5, Title II of Book V of the Code, Articles 1065-1072.

The language of Articles 1065-1072 is motivated by the desire to achieve the mathematical exactness of order rather than by the definition of who does what and when. As a result, these provisions are the most difficult provisions as any can be found in the whole body of Book V of the Code.[153] What these provisions say in so many but less elegant words is that secured creditors maintain exclusive power over the 'proceeds' of 'encumbered' assets sold to satisfy their principal claims- at least they do not have to share the proceeds up to the amount of the principal claims. What is more, secured creditors are entitled to participate in the share of spoils of the 'unencumbered' bankrupt estate, this time 'demoted' to the position of unsecured creditors.

Reality is chaotic. There is no reason for expecting that the order of sale (of encumbered as well as unencumbered assets) should fall exactly as the orders set in Articles 1065-1072. If all parties are left to their own devices, the orders may be disturbed. If secured creditors have their way, they may call the shots in ways that are patently unfair and unreasonable to unsecured creditors. Since their individual claims are not affected by the onset of bankruptcy (if we believe Article 1026 of the Code), secured creditors may stall the process of settlement of the bankruptcy proceeding by controlling the time of sale of the encumbered property. Such a leisurely approach is not compatible with ordinary bankruptcy proceedings. If the trustee has no power to force the sale of encumbered property, a disproportionate amount of property may lie out there while the unfortunate unsecured creditors are scavenging the worthless carrion of unencumbered assets. Even more galling, shameless secured creditors may participate in this scavenging while holding back the sale of encumbered assets. The encumbered assets will be sold eventually (secured creditors cannot permanently hold others hostage, if that is a relief) but by then so much has elapsed for unsecured creditors to be recalled to share in the proceeds of the remainder.

The silence of the Commercial Code on the power of the trustee over encumbered assets is a potential source of distraction as trustees should move to assert the interests of unsecured creditors against secured creditors who refuse to have collaterals sold in bankruptcy. Even when courts decide in favor of trustees, the very fact that trustees might be dragged to courts over this matter is a cause for concern. This could have been obviated had the Commercial Code had a provision somewhat similar to the French

[153] The price one pays in writing mathematical order in words is the loss of simplicity.

Code which authorizes trustees to sell encumbered assets on condition that the amount owed to secured creditors is set aside in a special fund - preserving the absolute priority of secured creditors in this regard. OHADA Uniform Bankruptcy Act gives trustees the power to sell encumbered property within three months from the date of declaration of bankruptcy, and upon the expiry of three months, secured creditors will have the right to sell encumbered property to satisfy their individual claims.[154]

We have seen that all the assets that are excluded from the bankrupt estate (at least not available to distribution among creditors) are excluded because these assets do not belong to the debtor in the first place (the debtor happens to be in possession of these assets on behalf of third parties as a bailor, etc) at the time of the adjudication of bankruptcy. On the exclusion of these kinds of assets, Ethiopian bankruptcy law is fairly straightforward and consistent with the practice in other bankruptcy systems.

But how about the property owned by the debtor? In other words, are any assets of the debtor exempted from the reach of bankruptcy? Let's explore the approach of some other bankruptcy systems before we turn to Ethiopian law.

The scope of exempt property under bankruptcy laws varies from country to country.[155] Under Australian law, for example, exempt property is limited to household furnishings, tools of trade, a motor vehicle up to a certain amount.[156] Under Spanish law, 'benefits that may be claimed only by the debtor (e.g. the right to alimony)' are exempted from the reach of bankruptcy estate.[157] Under the US bankruptcy laws, debtors have the right to choose between federal exemptions and state exemptions.[158] Under the federal exemption, the so-called 'homestead exemption' allows the debtor to exempt his aggregate interest up to a certain amount in real or personal

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[154] See OHADA, supra note 33, Articles 148 and 150.

[155] Michael M. Parker, supra note 121; see also Richard W. Maloy, supra note 98.

[156] See Nathalie Martin, *Common Law Bankruptcy Systems: Similarities and Differences*, 11 Am. Bankr. Inst. L. Rev. 367 (Winter 2003).

[157] See Felix Lopez, supra note 123, p. 272; Spanish law might have changed since 1985; for American law, see *Exemptions*, 1 Bankr. Dev. J. 297 (1984); *Exemptions – Section 522*, 2 Bankr. Dev. J. 41 (1985); in other bankruptcy systems, the extent of exempt property is regulated not by the bankruptcy law but by other laws; this approach appears also to be the case under the OHADA Uniform Bankruptcy Act and French Commercial Code for we find no specific provisions in this regard.

[158] See 1 Bankr. Dev. J.(1984), supra note 157, and 2 Bankr. Dev. J.(1985), supra note 157

property that the debtor and dependents use as residence.[159] For married couples, the exemption amount is doubled if both parties elect to take federal exemptions.[160]

Many other laws of Ethiopia exempt certain types of debtor property from attachment by creditors. The Ethiopian Civil Procedure Code exempts 'wearing apparels, cooking vessels, bed and bedding, tools, instruments of any kind used by the debtor, cattle and seed grain (for farmers), food and money as may be necessary to enable the debtor and family to sustain themselves for three months, pensions and alimonies, and two-thirds of the debtor's salary, and any other property declared to be exempt by other laws'.[161] Article 45 of the Public Servants Proclamation exempts benefits received under the Pensions Law from attachment except for the payment of 'public fines, fees or taxes' or the 'fulfillment of maintenance obligations'. Similarly, the Labor Proclamation of 2003 exempts employee benefits payable as a result of employment injuries from attachment, deduction or assignment.[162] In addition, the Labor Proclamation puts two-thirds of the monthly wages of a worker beyond the reach of attachment.[163]

The Ethiopian bankruptcy law does not mention exemption - not directly anyway. There is an allusion to exemption in Article 1010 of the Commercial Code -which exempts from seals 'movable property and chattels by the debtor and his family as have been set out in the list submitted to the commissioner'- but the cited Article does not specify which types of property are exempted from seals. Some of the provisions of the Commercial Code give the impression that no property of the debtor is exempted from the reach of bankruptcy. Article 1020 of the Code provides that the commissioner may give permission to the trustee to apply part of the bankrupt estate to the support of the debtor and his family. This holds for the period before the winding up of bankruptcy. After the winding up of bankruptcy, the creditor's committee must agree that assistance be given to the debtor and family from the bankrupt estate.[164] The provision that deals with priority of creditors - Article 1110 - puts the assistance to be given to the debtor and family before the claims of preferred and unsecured

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[159] 1 Bankr. Dev. J.(1984), supra note 157, at 299.

[160] Ibid.

[161] See Civil Procedure Code, supra note 14, Article 404.

[162] Labour Proclamation, supra note 13, Article 112.

[163] Id, see Article 59(2).

[164] See Commercial Code, supra note 4, Article 1102; the amount is fixed by the commissioner once the creditors' committee agrees.

creditors.[165] The assistance has priority over all creditors except secured creditors and cost and expenses of bankruptcy. It is clear that Ethiopian bankruptcy law has not neglected the welfare of debtors and their families - but not in an exemption sense. There is an apparent conflict between other laws of Ethiopia which exempt certain types of property, and the bankruptcy law, which caters for the welfare of debtors but does not talk about exemptions.

One way of dealing with this conflict is to give effect to the provisions of Ethiopian bankruptcy law and disregard the other laws (in other words, no exemption will take effect in bankruptcy proceedings). Another approach is to view the two systems as separate and give effect to both - in other words, give effect to the exemption requirements of other laws and recognize that assistance may in addition be provided in accordance with the rules of bankruptcy law.

Exemption provisions are expressions of public policy and therefore of peremptory nature. The provisions that deal with exemptions use a strong language and do not seem to admit of any exception. It seems unlikely that these provisions will be set aside in bankruptcy proceedings and it is reasonable to assume that whatever assistance is to be provided for the debtor and family, it is in addition to the property of the debtor that enjoys exemptions by the operations of other laws of Ethiopia. There is, in any case, an allusion to exemption in Article 1010 of the Code - which might be taken to have authorized exemption in accordance with other laws of Ethiopia.

We have seen cases in which Ethiopian bankruptcy law supplies answers (albeit in a haphazard manner) but there are many other cases for which an answer has to be sought elsewhere (other laws of Ethiopia), for we find no clear provision in the bankruptcy law in this respect. One such case is the treatment of joint and/or common assets upon the declaration of bankruptcy. What is, for instance, the effect of bankruptcy of a debtor upon the property of his/her spouse? A provision comparable to the following French bankruptcy provisions is not to be found in Ethiopian law:

> The spouse of a debtor subject to safeguard proceedings [bankruptcy proceedings] shall specify the content of his/her personal property, in compliance with the rules of matrimonial regime…

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[165] Id, see Article 1110(b).

> .... The administrator [trustee] may, if he proves by all means that the assets acquired by the debtor's spouse have been paid by money provided by the debtor, request the inclusion of these assets in the debtor's assets. [166]

French bankruptcy law clearly includes in the bankrupt estate the common property of the debtor and his/her spouse but personal property of the spouse is excluded (unless it is the fruit of a contribution made by the bankrupt debtor). US Bankruptcy law includes in the bankrupt estate the interest of the other spouse in 'community property' but not the separate property of non-debtor spouse.[167]
What about under our law? It will take another article of its own to attempt to provide an answer to this question. I will not attempt here but it is clear that an answer to this question is to be found in Articles 16-21 (Book I) of the Commercial Code and perhaps in the multiple family laws of Ethiopia.[168] Since bankruptcy is a federal matter, it would have been desirable to provide one uniform solution to this problem. Incidentally, the first drafter of the Commercial Code (Professor Escarra) thought about including a provision on this matter but decided against it because he was uncertain about what the Civil Code would say about the effect of marriage upon property in general.[169]

The treatment of joint properties is similarly consigned by default to the solutions possibly provided in the Ethiopian laws of property. The Guide mentions two options for the treatment of joint assets, including assets of the other spouse.[170] One is to exclude them completely from the bankrupt estate.[171] The other option is to treat the 'mutual assets belonging to the other spouse' as part of the bankrupt estate.[172]

The dispossession of the debtor can be effected without a hitch when the debtor happens to be a natural person. How is dispossession effected when

[166] French Commercial Code, supra note 35, Articles L624-5 and L624-6.
[167] See *Collier's Bankruptcy Manual* (2d Edition Revised, Matthew Bender & Company, Inc., 2010) at 541.07; also see OHADA, supra note 33, Article 99 for a similar treatment.
[168] Since family law is a jurisdiction of regional states, one can anticipate multiple (and at times contradictory) answers to this question.
[169] He wrote: 'for the spouse of the bankrupt, I have not drafted any provision because I have no knowledge at all about the Civil Code provisions on the property effects of marriage', see Peter Winship, supra note 23, at 104.
[170] UNCITRAL, supra note 11, p. 81, paras. 20 and 21.
[171] Id, p. 81, para. 21.
[172] Ibid.

the bankrupt debtor is a business organization? To whom does it take effect (if at all) - managers, members of board of directors? In other bankruptcy laws, there are additional rules regarding the effect of dispossession when the bankrupt involved is a business organization. French bankruptcy law, for example, provides that managers of business organizations 'shall remain in office unless the articles of association or a resolution passed by a shareholders' or partners' meeting provide otherwise', and only in case of need will the court appoint a representative.[173]

Again due to the dual organization of Ethiopian bankruptcy law, the effect of dispossession upon business organizations seems to have been forgotten. Where a trustee is appointed for a business organization, a dispute may arise between a trustee who wants to take over the management of the property and the managers and directors who have been in charge. The law makes no exception for the appointment of a trustee in case of business organizations. In the case of businesses organized as partnerships, there will be no problem, for the bankruptcy of the partnership automatically entails the bankruptcy of the general partners - which means that the partners will lose their right to administer and dispose of their property and the property of the partnership.[174] Where the bankruptcy involves companies, however, it will be difficult to upstage managers or board directors from the management unless the court declares them bankrupt in common with the business organization.[175] Can the court order the removal of the management of a company without implicating them in the bankruptcy? If the court does not say anything in the judgment of bankruptcy regarding the position of the management of the bankrupt company, can the trustee move to take over the management of the company as adverse party to them? These issues are not settled under Ethiopian bankruptcy law, and it may have been forgotten as a result of the dual organization of Book V of the Commercial Code (with separate rules on business organizations). If courts are compelled to declare members of the management staff bankrupt for the sole purpose of removing them from management, the action of the courts will certainly be an overkill and totally unnecessary. The common declaration of bankruptcy will bring about an avalanche of consequences upon the management staff out of

[173] See, French Commercial Code, supra note 35, Article L641-9; OHADA Uniform Act simplifies the issue by equating the bankruptcy of a business organization with its dissolution, paving the way for trustees (liquidators) to take over; see OHADA, supra note 33, Article 53.
[174] See Commercial Code, supra note 4, Article 1158.
[175] Id, Article 1160.

proportion to what is required in the circumstances, which is their removal and replacement by trustee/s or their full collaboration with the trustee/s appointed by court.

In a bid to prevent this, it is perhaps desirable to resort to the general provisions of the Commercial Code relating to the dissolution and winding-up of companies[176] - which are related procedurally to bankruptcy (although the causes are different). The affinity between the sections on 'dissolution and winding-up' and the Bankruptcy Book is not just wishful association. We have authority in Article 498 of the Commercial Code, which, upon referring the winding-up of companies that are declared bankrupt to Book V of the Commercial Code, declares that 'the directors' powers shall be restricted to representing the company if necessary'.[177] In addition, Article 497(2) of the Code states that 'the organs of the company shall restrict their activities to acts necessary to facilitate the winding-up and *which are not acts within the scope of the liquidator's (italics added)*. Courts may rely upon the general provisions of the Commercial Code already cited to restrict (if not completely remove) the involvement of managers and directors, in stead of declaring them bankrupt in common.

b. Effects of Bankruptcy upon Creditors

The provisions of Ethiopian bankruptcy law pertaining to effects on creditors only deal with the effects in so general language that it is impossible to get the full force of the effects by just reading these provisions. We need to plow deep into the provisions to get the full meaning of what bankruptcy means to creditors in general and to some categories of creditors in particular. We need specially to look at provisions that treat special category of creditors, like pledgees, lessors, mortgagees and others. These provisions are located far away from the provisions that talk about the effects of bankruptcy, but that is no bar to seeing these provisions for what they really are: they talk about the effect of bankruptcy upon these categories of creditors.

This part is divided into three sections. Section I will deal with the effect of bankruptcy upon creditors in general. Section II will deal with the effect of bankruptcy upon contracts in general. Section III will deal with the effect of bankruptcy upon some creditors: pledgees, lessors, sellers and creditors secured by mortgage on business and immovable property.

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[176] Id, see Articles 495-509.
[177] Id, Article 498 (1)& (2).

i. the Effect of Bankruptcy on Creditors in General

Bankruptcy affects not just the debtor; it affects the rights and interests of creditors as well. It results in the 'modification of the rights of creditors'.[178] Creditors, who hitherto had the right to exercise their remedies independently, including court actions and executions, are now subject to the constraints of bankruptcy.[179]

The first sign of this modification is the inclusion in a 'compulsory class (la masse),' the so-called 'universality of creditors', 'in the name of which the collective rights and interests of creditors are to be exercised and defended'.[180] In the apt words of Francois Gore, the rights of creditors 'are absorbed in a large measure by this class', creditors 'losing their rights of individual pursuit'.[181] As regards the universality of creditors, Article 1025 of the Commercial Code calls it 'a legal entity', which 'acquires rights and incurs liabilities' and is represented by the trustee.[182] The entity represents all creditors 'whose claims are not secured by a special privilege, a pledge, or a mortgage'.[183]

Since the Code names it boldly as a 'legal entity', we may be wondering about what type of entity it is. Since bankruptcy affects all kinds of businesses – from the sole proprietorships to share companies- we may be asking what sort of transformation the creation of a legal entity named 'universality of creditors' brings to the underlying business hitherto owned by the bankrupt debtor. Does it lead to any transformation at all? Does the new entity require the registration – as most business organizations in the Commercial Code do? Does it require the rewriting or writing anew of a memorandum of association? If we are looking in the Commercial Code for answers to these questions, we will be sorely disappointed – for the Code says nothing more than stating that the 'universality' is a legal entity.

The Commercial Code lays down no formalities for the creation and indeed formalization of the 'legal entity'. The trustee needs do nothing to formalize

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[178] Francois Gore, *the Administrative Autonomy of Creditors and French Legislation on Bankruptcy*, 17 Am. J. Comp. L1, 5, 6 (Winter1969).
[179] Ibid.
[180] Ibid.
[181] Ibid.
[182] See Commercial Code, supra note 4, Article 1025(2).
[183] Id, see Article 1025(1).

and publicize the entity.[184] The appointment of the trustee by the court is sufficient for the trustee to represent the universality.[185] The nature of the business of the debtor is not changed as a result of the bankruptcy. The trustee takes over the business as he found it and runs it on behalf of creditors. If it is a sole proprietorship, it continues as a sole proprietorship; if a share company, as a share company. What is transformed is the individuals at the helm of the business and for whom the business is run. Now the trustee is at the helm of the business in stead of the debtor, and the business is run for the interest of creditors rather than the debtor (shareholders in the case of companies, for example).[186] There is even no need to transfer title to property of the bankrupt debtor to the trustee. The trustee's appointment is enough to vest title in the trustee and take legal actions on the debtor's property.

The closest affinity one can find to the notion of 'legal entity' being latched onto the 'universality of creditors' is to be found not in the Commercial Code but in the Civil Code. The Civil Code devotes a section to 'trusts' under a chapter of what it calls 'property with specific destination'.[187] The bankrupt estate may be taken as 'property with specific destination', whose beneficiaries are creditors and representative is a trustee. In that context, it is appropriate to call the universality a 'legal entity'. It is also appropriate to call it such to signify that the creditors acquire a collective identity, united into a body known in French 'la masse'.[188]

The other most important effect of bankruptcy on creditors in general is the suspension[189] of all suits by creditors, except secured creditors.[190]

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[184] Of course, it is not entirely moot that the legal entity requires no further formalities, as the debate over the nature of this 'entity' elsewhere shows; for the debate, see, Stephen McJohn, *Person or Property? On the Legal Nature of Bankruptcy Estate*,10 Bankr. Dev. J. 465 (1993-1994).

[185] All that the trustee needs to do is take possession of property from the bankrupt debtor; see Richard W. Maloy, supra note 98.

[186] Elsewhere, it has been held that the trustee does not represent the debtor; nor does he owe the debtor any fiduciary duty; see Collier's Bankruptcy Manual, supra note 44.

[187] See Civil Code, supra note 41, Section 3, Chapter 3, Title III.

[188] See Boris Martor et al, supra note 33, at 173; Francois Gore, supra note 178, at 6.

[189] The use of the word 'suspension' is apt. Many other laws use the word 'stay' to refer to the same effect. They both signify that suspension is temporary, lasting until a discharge (if any) is entered, at which point those creditors whose debts are discharged are permanently prevented from pursuing the debtor; see Richard W. Maloy, supra note 98.

[190] Commercial Code, supra note 4, Article 1026.

Maximizing the value of the bankrupt estate being one of the overriding objectives of bankruptcy, the suspension of individual actions ensures 'a fair and orderly administration of the proceedings', giving trustees the breathing time to avoid making forced sales, to take stock of the debtor's situation and to achieve a result that is not prejudicial to the interests of the debtor and creditors.[191]

No definition of suits is offered in Article 1026 of the Commercial Code. All it says in a typical general language is that individual suits are suspended. We are inclined to associate suits with pending legal actions in courts, but reference to the bankruptcy laws of some other countries indicates that the word might have a far wider meaning than just a legal action in courts.
The approach of bankruptcy laws to the scope of suspension of suits is as diverse as can be.[192] Some laws suspend 'all remedies and proceedings against the debtor ... whether administrative, judicial or self help'.[193] Some other laws allow initiation or continuation of certain actions but bar enforcement or execution of judgments or orders.[194] Still others limit the actions that may be continued and allow the initiation of certain actions, like actions by employees.[195] Some countries draw distinction between regulatory and pecuniary actions- allowing the former to continue in spite of bankruptcy proceedings.[196]

Under French law, the following actions are suspended (stayed) upon the initiation of bankruptcy proceedings:[197]

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[191] UNCITRAL, supra note 11, pp. 83-84, para. 27.

[192] *Recent Developments – Automatic Stay Exceptions – Section 362(b)*, 4 Bankr. Dev. J. 43 (1987); see also Richard W. Maloy, supra note 98.

[193] UNCITRAL, supra note 11, p. 84, para. 30.

[194] Id, p. 86, para. 34.

[195] Ibid.

[196] Regulatory actions are actions taken 'to protect vital and urgent public interests, restraining activities causing environmental damage or activities that are detrimental to public health and safety'; see UNCITRAL, supra note 11, p. 86, para. 34; under US law certain actions, such as criminal actions, actions to enforce environmental law, governmental actions to prevent fraud, and domestic relations actions are exempt from suspension; see Richard W. Maloy, supra note 98.

[197] See French Commercial Code, supra note 35, Articles L622-28 and L622-30; the UNCITRAL Guide enumerates the types of actions that may be suspended: actions for the execution of judgments, actions to make security interests effective against third parties, recovery by owner or lessor of property that is used or occupied by, or in possession of the debtor, payment or provision of a security in a respect of a debt incurred by the debtor prior to the commencement of bankruptcy proceeding;

(i) order against the debtor to pay a sum of money;
(ii) the rescission of contract on the grounds of non-payment by the debtor;
(iii) all proceedings for enforcement filed by the creditors in respect of movable and immovable property belonging to the debtor;
(iv) the running of period of limitation;
(v) the accrual of legal and contractual interest;
(vi) any action against sureties and co-obligors;
(vii) registration of mortgage, pledge or lien;

Similarly, OHADA Uniform Bankruptcy Act is more specific and far more detailed than the Ethiopian law in this regard. Under OHADA law, 'all individual lawsuits for acknowledgement of rights and claims', 'all measures of execution' on the debtor's movable and immovable property', the running of a period of limitation or prescription are suspended upon initiation of bankruptcy proceedings.[198] Although Ethiopian bankruptcy law does not specify the suits that are suspended and those that are not, there are hints in some provisions (far away from Article 1026) that some suits are not affected by the commencement of bankruptcy. We, for example, read from Article 970 of the Commercial Code that criminal proceedings will continue unabated despite the bankruptcy proceedings.[199] Similarly, in Article 1050 of the Code we may have a case in which ordinary civil proceedings may commence (and in fact where bankruptcy proceedings may be stayed) where an objection contesting a debt is lodged.[200]

Both the French bankruptcy law and OHADA list actions that are not suspended by the initiation of bankruptcy proceedings, something the Ethiopian bankruptcy neglects to do. Under French law, all actions that are not listed as subject to suspension may be continued.[201] Under OHADA law, lawsuits for 'nullity' and 'resolution' are not suspended,[202] although it is not clear what these actions mean.

The other general effect of bankruptcy upon creditors in general (again excepting secured creditors) is the acceleration of the due dates of debts and

termination, suspension or interruption of supplies of essential services (e.g. utilities - water, electricity and telephone); see UNCITRAL, supra note 11, pp. 84-85, para. 31.
[198] OHADA, supra note 33, Article 75.
[199] See Commercial Code, supra note 4, Article 970(2).
[200] Id, see Article 1050(1).
[201] See French Commercial Code, supra note 35, Article L622-23.
[202] OHADA, supra note 33, Article 75.

the interruption of the bearing of interest.[203] These effects are too obvious to require further explanation.

ii. The Effects of Bankruptcy on Executory Contracts

Bankruptcy descends on the parties while many transactions remain unsettled. There may be signs that the business is running into financial difficulties but generally bankruptcy catches the parties unawares. In view of this fact, one of the issues bankruptcy laws address (or ought to) is the effect of bankruptcy upon contracts. At the time of the declaration of bankruptcy, we can envision three distinct states (or statuses) of contracts. There are contracts in which the bankrupt debtor has performed his part of the obligation, but the other party has not. There are contracts in which the other party has performed his part of the obligation, but the bankrupt debtor has not. There are also contracts in which both parties have not performed their obligations (the so-called executory contracts).[204] These executory contracts may include collective bargaining agreements, unexpired leases and insurance policy –to name but a few of the contracts which are likely and routinely to remain unfulfilled.[205] Of course, this is putting it very neatly. In practice, some contracts may be partially performed, raising questions of whether one should regard them as executory contracts or not. [206]

In the first instance, the debtor is a creditor and there is a clear rule in the bankruptcy law to resolve this issue: the trustee is authorized to collect the debts owed to the bankrupt debtor.[207] In the second instance, the other

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[203] For a comparative perspective, see Richard W. Maloy, supra note 98.

[204] There is no agreement over the precise meaning of executory contracts. In the United States, the widely accepted definition is proffered by Professor Vern Countryman who defined them as a "contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other." See Martin J. Bienenstock, *Executory Contracts and Unexpired Leases under the Bankruptcy Code,* Practising Law Institute Real Estate Law and Practice Course Handbook Series PLI Order No. N4-4580 May 5-6, 1994.

[205] See *Administration of the Estate,* 2 Bankr. Dev. J., 81, 89 (1985).

[206] In one case, a US Court held that if a contract has been substantially performed by one side, it is no longer an executory contract; Re2522 South Reynolds Corp., 33 Bankr. 616 (Bankr. N.D. Ohio 1983), quoted in id, at 89, see foot note 65.

[207] Commercial Code, supra note 4, see Article 1035(2).

party is a creditor and again there is a clear rule on how creditors may go about collecting their claims against the bankrupt debtor.[208]

It is the executory contracts that pose special challenges and (may) call for special rules in bankruptcy law. The treatment of contracts during bankruptcy cannot be seen lightly. From the vantage point of the bankrupt estate, the executory contracts may promise potentially valuable assets.[209] But interference with established contractual principles –as special rules of bankruptcy in this regard are likely to do – may harm the predictability of commercial and financial relations and increase the cost and diminish the availability of credit.[210]

Whichever side of the fence bankruptcy law falls, competing and conflicting policy issues are going to be at stake.[211] While a common solution for all kinds of contracts is generally preferred (and followed in many bankruptcy systems), exceptions for some contracts are unavoidable.[212] The ability of trustees to interfere with labor contracts are generally restricted (by other laws).[213] Other contracts for which special rules may exist include contracts for personal services (for which the identity of the parties who perform the contract is of particular importance) and financial contracts.[214]

On the treatment of contracts in general, we find two general approaches. We have, on the one hand, laws which leave this question to the general rules of contracts or other laws or the agreement of the parties.[215] The treatment of a contract after the commencement of bankruptcy in these systems is to be resolved by recourse to these other laws. If a contract between the parties contains a clause of termination or acceleration of the contract in the event of bankruptcy, for example, the clause is honored

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[208] Of course, it depends on the status of a creditor; if the other party is a secured creditor, he has the right to enforce his rights against the collateral, untroubled in many instances by the commencement of bankruptcy proceedings; if the other party is an unsecured creditor, he joins the universality of creditors; Commercial Code, supra note 4, see Articles 1025 and 1026.

[209] UNCITRAL, supra note 11, p. 120, para. 108

[210] Id, p. 120, para. 110.

[211] Ibid.

[212] Id, p. 121, para. 113.

[213] Id, pp. 121-122, para. 113; see French Commercial Code, supra note 35, ArticleL622-13.

[214] See UNCITRAL, supra note 11, p. 122, para. 113.

[215] Id, p. 120-121, paras. 110 and 111.

during bankruptcy.[216] Under the other approach, the bankruptcy law provides for special rules that override the clauses in a contract between the parties.[217] French law, for instance, has special rules on the treatment of executory contracts, restricting the right of the other party to terminate the contract as result of the commencement of bankruptcy proceedings, and giving trustees the option to continue or terminate the contract, as the case may be.[218] Similarly, under US law, a trustee may, with court's approval, reject, assume or assign executory contracts, provided the trustee agrees to cure 'any defaults and provides adequate assurance of future performance'.[219]

What is the position of Ethiopian law on the treatment of contracts during bankruptcy? Ethiopian bankruptcy law follows the first approach (of deferring the matter to be resolved by other laws - such as, general rules of contract in the Civil Code). There are, of course, exceptions to this general approach. The exceptions are provided for continuation businesses, leases, and possibly sales contracts (for leases and sales contracts, see below).

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[216] A number of factors support this position: the desirability of respecting commercial bargains; the need to prevent the debtor from selectively performing contracts that are profitable and rejecting those that are not, etc; see UNCITRAL, supra note 11, p. 122, para. 115.

[217] This interferes with the general principles of contract law, but it may be justified by the policy of maximizing the value of the bankrupt estate; see UNCITRAL, supra note 11, p. 122, para. 116.

[218] See French Commercial Code, supra note 35, ArticleL622-13; under French law, the trustee has the right to require the other party to perform an executory contract, in exchange for the performance of the bankrupt debtor's obligations under the contract. Upon the commencement of the proceedings, the other party has the right to give notice (of one month usually, but may be extended to two months) to the trustee to inform him of whether the trustee would wish to continue or terminate the contract. If the trustee does not respond to the notice or declares that the contract is terminated, the contract will automatically terminate. The trustee must move judiciously in deciding to either continue or terminate the contract, for the continuation of the contract entails performance by the trustee promptly. If he does not have the necessary funds at his disposal, termination is a better option. This holds not just for one time payment but also for installment contracts, in which case the trustee must ensure that he will have the necessary funds to satisfy payments of the successive terms; see ibid.

[219] Michael M. Parker, supra note 121; see also George G. Triantis, *The Effects of Insolvency and Bankruptcy on Contract Performance and Adjustment*, 43 University of Toronto Law Journal 3, 679, 690 (Summer 1993).

There is a special provision involving continuation of business during bankruptcy.[220] The continuation of the debtor's business during bankruptcy is not automatic. The trustee must obtain authorization from the court, which must decide on the matter only after hearing the report of the commissioner and the recommendations of creditors' committee, and authorize continuation if that is in the public or creditors' interest.[221]

Continuation of business may entail the continuation or termination of existing (executory) contracts or the entering into of new contractual agreements -that is why authorization of continuation has a direct bearing on the continuation or rejection of executory contracts. It is not clear if the authorization of continuation of business may be read as the authorization of existing contracts. Can the trustee use the authorization to prevent the cancellation of the contract by the other party pursuant to a clause of cancellation in the contract?

iii. Effects of Bankruptcy on Some Creditors

1. Pledgees

Pledgees do not have to stay in line to share from the proceeds of the bankrupt estate. This much we can learn from the general provision of Article 1026, which, as pointed out before, exempts secured creditors from the effects of bankruptcy. The full implications of this provision do not become apparent until we get to the provisions that treat the effect of bankruptcy on secured creditors like pledges. These provisions are found in a section on 'submission of claims' but they are better understood if they were placed in sections treating effects of bankruptcy.[222]

In an expansion of the provision that states that 'bankruptcy shall have no effect on secured creditors,' Article 1058 restates the same effect in a different language: a pledgee can sell the pledge (the property) without having to wait in line with other 'unsecured' creditors.[223] If the sale yields an amount more than the debt owed by the bankrupt debtor, the pledgee has the duty to claw the excess back to the bankrupt estate – in effect, return it to the trustee.[224] In reality, it is the trustee who should watch out for this

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220 See Commercial Code, supra note 4, Article 1039.

221 Id, see Article 1039(1).

222 There are reasons why they are covered in sections on 'submission of claims' of course. They make sense there too, because we can view these provisions in light of the issue of submission of claims.

223 Commercial Code, supra note 4, Article 1059.

224 Id, Article 1059.

and collect the excess from the pledgee. If the sale yields insufficient funds even for the satisfaction of the pledgee, the pledgee is reduced to the status of 'unsecured' creditor for the balance.[225]

The right of the pledgee to effect sale is not unlimited. The trustee has the power to redeem the pledge by paying the debt in full to the pledgee.[226] A trustee, as a fiduciary representing the best interest of unsecured creditors, should seek to maximize the value of the bankrupt estate by exercising the right of redemption. A dispute may arise between a pledgee who wants to exercise his power of sale and a trustee who wants to exercise his power of redemption. Which of them takes precedence? That is not resolved.

2. Lessors

Article 1060 of the Commercial Code treats the case of lessors. The treatment of lessors in the section that covers pledgees may be confusing at first reading, but there is a reason why the two cases are related. Under the Civil Code, lessors have the legal right of pledge, and the bankruptcy law is there to define the scope of this right of preference during the bankruptcy.[227] In ordinary circumstances, lessors have a legal right of preference over the movables which furnish the immovable leased.[228]

The effect of bankruptcy upon lessors is different from other creditors, for that matter even from other preferred creditors. Leases (particularly commercial leases) are often subject to special rules in many bankruptcy laws.[229] The reason has to do with the economic significance of leases for bankrupt estates. If the lease is below market price, the lease may be sold and return a benefit to the estate.[230] On the other hand, if the lease represents a losing concern to the business, the trustee may unburden the bankrupt estate by terminating the lease,[231] thus fulfilling one of the cardinal objectives of bankruptcy - which is maximizing the value of the bankrupt estate.

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[225] Id, Article 1059, second sentence.

[226] Id, Article 1058.

[227] See Civil Code, supra note 41, Articles 2896-2961.

[228] Id, see Article 2924.

[229] See OHADA, supra note 33, Article 97; French Commercial Code, supra note 35, ArticleL622-14 to L622-16, and Article L641-12; UNCITRAL, supra note 11, p. 129, paras. 137-138.

[230] UNCITRAL, supra note 11, p. 129, para. 137.

[231] Id, p. 129, para. 137.

Lessors do not have the right to terminate the lease simply because the lessee has been adjudged bankrupt.[232]The bankruptcy provisions take away the right of termination from lessors and give the option to the trustee - to continue or terminate the lease. The trustee must notify the lessor of his decision within 15 days from the deposit of inventory.[233] Although there are special rules regarding leases, these effects are really a continuation or extension of the general effect of bankruptcy upon creditors – suspension of suits (or stay of actions).[234] The lessor's right to terminate the lease is suspended awaiting the decision of the trustee whether to continue or terminate the lease.

If the trustee decides to continue the lease (as he is most likely to do), the lessor may apply (to court?) within 15 days to cancel the lease.[235] On what grounds the cancellation request is to be granted, the law does not say. In addition, the lessor loses his right to distrain movables until the trustee informs him of his decision either to continue or terminate the lease.[236] During bankruptcy, the lessor would probably be pleased to hear from the trustee that the lease has been terminated because he does not want to face the uncertainty that bankruptcy brings with it.

It appears that it is from this consideration (that the lessor is not at liberty to do what he wishes as a result of the bankruptcy proceedings) that the bankruptcy provisions compensate the lessor by giving him special rights of preference. In the event of the termination of the lease, the lessor has a preferential right covering all the claims arising out of performance of the lease contract and the contingent damages for the two years of lease prior to

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[232] Commercial Code, supra note 4, Article 1040(1); an interesting side note about this effect is that the bankruptcy affects not just commercial or industrial leases but also, it appears, residential leases for the bankrupt and his family; Article 1040(1) in part reads: "leases of immovable property used for the business or industrial operations of the debtor, including premises forming part thereof and occupied by him or his family…"

[233] Commercial Code, supra note 4, Article 1040(2).

[234] See Nancy Ann Connery, *Negotiating Commercial Leases: How Owners and Corporate Occupants Can Avoid Costly Errors* (Real Estate Law and Practice Course Handbook Series, November-December, 2006)

[235] Commercial Code, supra note 4, Article 1040(5); it is not clear to whom the application is made, but it is quite reasonably to the court.

[236] The word 'distrain' is defined in the dictionary as 'to seize goods and chattel as security for the payment of any obligation for which such action is made lawful'; see P. Ramanatha Aiyar, *Concise Law Dictionary, with Legal Maxims, Latin Terms & Words and Phrases* (3rd edition, 2006).

the adjudication of bankruptcy and for the current year.[237] If the lease is not terminated, the lessor has the preferential right for all unpaid rents.[238] With all outstanding rents paid, the lessor cannot force himself on an already distressed business by seeking payment for the current period and any rent to fall due.[239] All he can ask for is to seek the continuation of the guarantees given on the making of the contract (in other words, he cannot seek additional guarantees using the bankruptcy proceeding as an excuse).[240]
Throughout the continuation of the lease after bankruptcy proceedings are commenced, the lessor can only seek that the premises leased are properly furnished with movables of sufficient value and the payment (or fulfillment) of the obligations at the end of each letting period.[241] The replenishment of the movables in the premises leased is regarded as sufficient guarantee for the lessor. Unlike pledgees, lessors do not have the right to sell the movables over which they have preferential claims. The trustees have control over these movables. Where the movables are sold or removed from the premises, however, the preferential right of lessors will kick in. The proceeds of the sale should first be used to cover the claims of lessors. Lessors have preferential claims covering two years prior to the adjudication of bankruptcy and two years from the adjudication of bankruptcy.[242]

In addition to the power to continue or reject leases (over the reluctance of lessors), trustees also possess the power to assign leases. Assignment powers of the trustee carry some unpleasant or onerous consequences to the other party (lessor). They undermine the contractual rights of the other party.[243] They force the lessor to transfer the lease to a sub-lessee who may not be known to the lessor or with whom the lessor may not wish to do business.[244] Some bankruptcy laws take away the right of the lessor to invoke non-assignment clauses in the lease contract.[245] Others leave the matter to the rules of general contract.[246] Still others require the court to

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[237] Commercial Code, supra note 4, Article 1060(1).
[238] Commercial Code, supra note 4, Article 1060(2). Article 1060(2) is couched in an unfortunate language of negative expression, but the *'a contrario'* reading of it is inescapable.
[239] Ibid.
[240] Ibid.
[241] Id, see Article 1062.
[242] This is a joint reading of Articles 1060(1) and 1061.
[243] UNCITRAL, supra note 11, p. 129, para. 140.
[244] Ibid.
[245] Ibid.
[246] Id, p. 129-130, para. 140.

authorize assignment where the lessor does not consent to the assignment of the lease contract or require the trustee to show that the lessor will not be disadvantaged by the assignment or that the assignee can adequately perform the obligations under the lease contract.[247]

Ethiopian bankruptcy law lays down the same conditions for continuation and assignment of leases: i) the trustee or the assignee shall keep the premises furnished with movables of sufficient value; ii) the trustee or the assignee shall carry out all obligations arising out of the law or the lease agreement; and iii) the purposes for which the premises are utilized may not be changed.[248]

3. Sellers and Other Creditors with Rights of Recovery

The bankruptcy provisions start by removing all of the guarantees that are given to sellers in the Civil Code.[249] Any agreement to the contrary is not valid.[250] One obvious guarantee of the seller which is affected by the onset of bankruptcy is the right to demand payment.[251]

What the bankruptcy provisions take away with one hand, they return with the other, for sellers are granted certain though limited rights of recovery in spite of the bankruptcy proceeding pending against the buyer.[252] Sellers have the right to recover the goods sold - and therefore do not have to wait in line to share from the bankrupt estate - if their condition falls under one of the following three situations:

(i) if the contract of sale had been cancelled before the adjudication of bankruptcy or even if the cancellation is order after adjudication, if the proceedings for recovery of the goods or for cancellation of the contract were brought before the adjudication of the bankruptcy;[253]

(ii) if the contract of sale is a 'sale with ownership reserved' and the reservation had been registered in accordance with Article 2387 of the Civil Code;[254] or

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[247] Id, p. 130, para. 140.
[248] See Commercial Code, supra note 4, Article 1062.
[249] Id, Article 1063.
[250] Id, Article 1063(2).
[251] See Civil Code, supra note 41, Article 2333, where the right of the seller to demand payment is stated, except where the seller has the customary option of getting the price through compensatory sale.
[252] See Commercial Code, supra note 4, Articles 1075-1079.
[253] Even then, the seller has to show that the good exists in kind; see id, Article 1075(1) and (2).
[254] Id, Article 1076.

(iii) if the goods subject to the contract of sale have not been delivered yet to the debtor or to his agent either because they have not yet been sent or because they are in transit.[255]

These rights of recovery indicate that, with respect to bankruptcy, sellers enjoy the rights of secured creditors in certain limited situations. In bankruptcy, this is no mean right.

The right of sellers to recover the goods sold is counterbalanced by the power of trustees to demand delivery of the goods provided the trustees are willing to pay the agreed price to the seller.[256] This does not diminish the right of sellers - had bankruptcy not occurred, they would have the obligation to deliver the goods anyway. The right of trustees to demand delivery is subject to certain conditions. First, the trustees can demand delivery only in cases where the goods are still in transit or in the hands of the seller and the contract is not the subject of cancellation under Article 1075 or the contract of sale is not one with 'ownership reserved'.[257] And secondly, the trustees must obtain authorization from the commissioner(s) to demand delivery from sellers.[258]

Trustees who have opted not to exercise the right to demand delivery have the right to collect any advances received by the seller, including any advances for the freight, transport, commission, insurance or other expenses of the contract.[259] This, we note, is simply an extension of the power of the trustees to collect all debts owed to the bankrupt estate under Article 1035 of the Commercial Code.

Sellers, who do not have the right to claim recovery of the goods, have the right to claim the payment of the price and of the damages arising from the performance of the contract. This is not an enviable position to be in for sellers, for in this regard sellers are treated like all unsecured creditors, and therefore should stand in line with all other unsecured creditors to share from the distribution of the proceeds of the bankrupt estate.[260]

Sellers are not the only creditors with the right to recover the goods from the trustees without having to stand in line to share from the proceeds of

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[255] Id, see Articles 1077 and 1078.
[256] Id, Article 1079(1).
[257] Ibid.
[258] Ibid
[259] Id, Article 1079(2).
[260] Ibid.

the bankrupt estate. Articles 1073 and 1074 list two types of creditors who have the right to recover their goods. In both instances, the bankrupt debtor is not the principal debtor. It is because the goods that are in the hands of the bankrupt debtor do not actually belong to him by ownership right that these provisions entitle the owners of the goods the right to recover the goods.[261] The first instance is where the bankrupt debtor has been entrusted with possession of negotiable instruments, including cash (remittances) for the benefit of a third party owner.[262] This is the case where the bankrupt debtor has been appointed to cash negotiable instruments for the benefit of a third party owner and before the cash is collected, the agent (the debtor) has been declared bankrupt. The negotiable instruments do not belong to the bankrupt debtor and it is appropriate that they are recovered by the rightful owners.

The other case is where goods are sent/consigned to the debtor for deposit or for sale on behalf of the owner and the goods can be identified in kind (in part or in whole) at the time of the adjudication of the bankrupt (the agent, consignee).[263] The creditors who may benefit from the rights of recovery recognized under Article 1073 include lessors of chattels,[264] bailors[265] and purchasers bound to the debtor by a warehouse contract.[266]

4. Creditors Secured by Mortgage on Immovables and Businesses

Although the Commercial Code devotes separate provisions to these categories of creditors, the rules relating to these creditors are virtually identical, justifying their treatment under the same heading. On the effect of bankruptcy upon mortgagees, there are different approaches. There are laws that allow secured creditors in general to enforce their security interests, untroubled by the commencement of bankruptcy.[267] This approach is common in those systems which exempt secured creditors from the application of stay (suspension of suits).[268] There are also, on the other

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[261] See UNCITRAL, supra note 11, p. 80, para. 17; see also Civil Code, supra note 41, Article 1145(2), which gives creditors rights similar to that stated in Articles 1073 and 1074 of the Commercial Code

[262] See Commercial Code, supra note 4, Article 1072.

[263] Id, Article 1073.

[264] See Civil Code, supra note 41, Articles 2727ff.

[265] Id, see Articles 2779 ff.

[266] Id, see Articles 2806ff; see also the Proclamation to Provide for a Warehouse Receipts System No. 372/2003, *Federal Negarit Gazetta*, 10th year, No. 2.

[267] UNCITRAL, supra note 11, p. 107, para. 83.

[268] Ibid.

hand, laws which include encumbered assets in the bankrupt estate, to be controlled by trustees, subject to some conditions.[269] French law may be cited as an instance in this regard. French law authorizes trustees to sell encumbered property subject to the condition that the proceeds of sale are placed in a special deposit account, which are paid out to secured creditors upon the confirmation of a reorganization plan.[270] In some laws, the power of trustee over encumbered assets is dependent upon the nature of the proceeding: liquidation or reorganization.[271] A trustee has an unlimited power to sell encumbered assets when the proceeding involved is a reorganization while trustee's power to do so is limited by a period of time in a liquidation proceeding.[272]

We start with Article 1026 - which exempts secured creditors in general from one of the effects of bankruptcy - suspension of individual suits. As already alluded to, what a suit means in particular cases is not clear from the language of Article 1026, but in one respect, what is included in the suspension is beyond dispute - the suit includes an action for attachment of debtor's property.[273] A *contrario* reading of Article 1026 will lead us to conclude that secured creditors can attach (and foreclose in some cases) the collateral which they hold as security. But does that lead to a conclusion that mortgagees are not affected by the onset of bankruptcy proceedings?
Before we conclude, we need to examine other provisions of Ethiopian bankruptcy law. Two sections of the bankruptcy law are devoted exclusively to the rights of mortgagees.[274] These provisions contain some clues as to what bankruptcy may signify to mortgagees.[275] These provisions

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[269] Ibid.

[270] French Commercial Code, supra note 35, Article L622-8.

[271] UNCITRAL, supra note 11, p. 107, para. 83.

[272] Ibid; there are also ancillary issues like whether the trustee can sell encumbered assets free and clear of encumbrance; Id, see p. 108, para. 85.

[273] Commercial Code, supra note 4, see Article 1026, second sentence.

[274] Id, see Sections 4 and 5, Chapter 5, Title II of Book V, Articles 1068-1072.

[275] These provisions are found in a section dealing with submission and proof of claims in bankruptcy. Part of the reason why location of these provisions is controversial is because these provisions can be read as having double, even triple purposes/imports at a time. They may as a result be found to be at home immediately after Article 1026 (or in a section dealing with the effects of bankruptcy in general) or in a section dealing with distribution of the proceeds of bankruptcy (Articles 1101ff) or where they are now (in a section dealing with submission and proof of claims in bankruptcy). The complexity of these provisions at first reading is in part attributable to their compression of multiple purposes.

are found far away from the provisions and sections dealing with the effects of bankruptcy but it will be seen that they are in a way an extension of the general provision of Article 1026. Where they are located is not as important (after all we are better off having them in the Commercial Code than not having them at all) as their bearings on the question of the effect of bankruptcy on secured creditors.

We conclude generally from the joint reading of Article 1026 with Articles 1068-1072 that mortgagees are largely unaffected by bankruptcy. The provisions as they now stand may be read as denying the trustees access to encumbered property with an unpleasant result that the mortgagees might be able to call the shots over their collaterals and still be able to participate in the distributions from the bankrupt estate. Mortgagees can pursue their rights over their collaterals untroubled by bankruptcy proceedings. And their right to participate in the distributions from the bankrupt estate depends to a large extent upon the order of distributions from encumbered or unencumbered assets. As pointed out before, the ambiguity of Ethiopian bankruptcy law on this matter can lead to frequent disputes between trustees and secured creditors over collaterals and may result in substantial loss of time as trustees seek to yank encumbered property from the control of secured creditors for the benefit of unsecured creditors (universality of creditors).[276]

c. Effects of Bankruptcy on Third Parties - Avoidance/Invalidation of Transactions during the Suspect Period

The third effect of bankruptcy might also be termed 'effects upon certain creditors,' but this confuses the peculiar effect treated here under with the effects of bankruptcy upon creditors in general (already treated under preceding sections). Some creditors (third parties is a better word) are singled out by bankruptcy law because of the shady deals they make with the debtor as the bankruptcy of the debtor becomes imminent. These shady transactions are in some laws called 'preferential transfers'[277] because their

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[276] For possible solutions, see the section above dealing with the proprietary effects of bankruptcy.

[277] See Notes, *Preferential Transfers and the Value of the Insolvent Firm*, 87 Yale L. J.7, 1449; the avoidance rules in bankruptcy law have the objective of enriching the bankrupt estate by recovering assets paid to creditors, redistributing them among creditors according priority rules and the rules of equality among creditors and controlling creditor behavior during insolvency; id, see at 1449-1450; Michael M. Parker defines them as 'tools by which a trustee can persuade (or force) a beneficiary of a debtor's

aim is to accord preference in favor of certain creditors at the expense of the rest of creditors. If left unchecked by law, some creditors may exploit the existing business transactions, or the terms of their contracts or a special personal relationship with the debtor; they may extort a preference, which will impair either the priority rights or the right to equal distribution of the asset of the bankrupt debtor. Creditors, knowing or expecting that the business might soon be in financial difficulties, may engage in the scramble for the assets of a troubled business in what one writer calls 'race of diligence'.[278]

The bankruptcy laws of many countries provide that the transactions that accord preference of one form or another to one or more creditors to the detriment of other creditors would be avoided.[279] The avoidance of certain transactions is consonant with the basic principle of bankruptcy. Bankruptcy systems are built on the assumption that collective actions are more efficient in maximizing the assets available to creditors than a system that leaves creditors free to pursue their individual remedies.[280] The provisions that permit avoidance of certain transactions 'help to create a code of fair commercial conduct that is part of appropriate standards for the governance of commercial entities'.[281]

The avoidance provisions help to overturn certain transactions to which the bankrupt debtor was a party or involving the debtor's assets.[282] These suspect transactions are perfectly normal and acceptable when they occur outside the context of bankruptcy. These transactions would not have been invalidated under the ordinary rules of contracts, such as on grounds of mistake, or lack of object or some of the other grounds of invalidation of contracts under the Civil Code.[283] Needless to say, the other remedies creditors or the trustee might have to invalidate transactions under the general rules of contract in the Civil Code or the Commercial Code will

generosity to return the benefit to the bankruptcy estate'; Michael M. Parker, supra note 121.

[278] Notes, supra note 277, p. 1465.

[279] See UNCITRAL, supra note 11, pp. 135-155, paras. 148-203; OHADA, supra note 33, Articles 67-71; see also Notes, supra note 277, at 1449; Michael M. Parker, supra note 121; Richard W. Maloy, supra note 98.

[280] UNCITRAL, supra note 11, p. 136, para. 151.

[281] Id, p. 136, para. 152.

[282] Id, p. 135, para. 150.

[283] See Civil Code, supra note 41, Articles 1696-1730.

remain unaffected by the existence of the special rules of bankruptcy to invalidate transactions entered into during the suspect period.[284]

Generally two approaches have been discerned in describing transactions that are subject to avoidance.[285] The first - objective approach - is to describe objectively the types or characteristics of transactions that are liable to avoidance.[286] These features include the value paid (or the consideration) paid for the transaction (e.g. was the consideration paid by the creditor adequate), or whether the performance was for a debt that is due or whether the transaction was made between two related persons. The establishment of any of these facts renders a transaction liable to avoidance. For example, a mere proof of the fact that the value of property was less than a fair market value at the time of the conclusion of the transaction is sufficient to overturn the transaction. Similarly, if the transaction was concluded between two related persons (natural or juridical), it would be sufficient to overturn the transaction as invalid even though the value given in the transaction were fair.

The other approach is the subjective approach. The subjective approach relies upon evidence which can only be established by reference to mental state of the parties with respect to a specific case. Under the subjective standard, the person needs to provide evidence showing the intent to hide the asset from other creditors, knowledge on the part of the creditor about the insolvency of the debtor, etc. The proof required is a mental state of the parties about the circumstances surrounding the transaction. [287]

Both standards have been subjected to criticism for one reason or another.[288] The objective standard, while easier to establish, has been criticized because of its tendency to produce arbitrary results.[289] Legitimate and useful transactions may be avoided by a mere showing of, for example, relationship,[290] and fraudulent transactions may escape this fate because they were entered into outside the suspect period.[291] The subjective standard may overcome some of the problems of the objective standard, but

[284] UNCITRAL, supra note 11, p. 136, para 153.
[285] Id, see pp. 137-138, paras. 156-158.
[286] Id, pp. 137-138, para. 157.
[287] Id, p. 138, para. 158.
[288] Id, see p. 137, para. 157.
[289] Ibid.
[290] Id, pp. 137-138, para. 157.
[291] Id, p. 138, para. 157.

it is difficult to establish the subjective mental states like intent and knowledge to overturn a transaction.[292]

Few bankruptcy laws follow either the objective or the subjective criteria in their pure forms for invalidating transactions.[293] Some laws adopt a two-tiered approach of combining a short period (say of three or four months) within which all transactions are invalidated and no defenses can be presented by other parties, with a longer period (say a year or two) in which certain additional elements have to be proved by trustees, such as showing that the transaction was not in the ordinary course of business.[294]

Another form of combining the objective and subjective criteria is to apply the objective test for invalidating some transactions, such as undervalued transactions, and the subjective test to transactions that are aimed at defeating or hindering other creditors.[295] Accordingly, transactions like gifts can be invalidated through the objective criteria while others can be invalidated only if the subjective elements of knowledge or intent are established.[296]

Ethiopian bankruptcy law follows a combination of the objective and subjective tests for invalidation of transactions during the suspect period. For some transactions or acts, the fact that the transaction occurred during the suspect period is sufficient to overturn the transaction. The transactions that are objectively 'suspect' are 'gratuitous assignments', 'payments of debts not due', 'payments of debts due otherwise than in cash, by negotiable instruments or by bank transfers', and securities set up on the property of the debtor' for debts contracted before the setting up of such securities.[297] These acts of the debtor during the suspect period are invalid no matter what the subjective knowledge or intent of the parties was at the time of the conclusion of the acts. The suspect period is fixed by the law to be between fifteen days before the date of suspension of payments and the date of adjudication of bankruptcy.[298] Since the court of bankruptcy has the power to fix the date of suspension of payments as far back as two years

[292] Id, p. 138, para. 158.
[293] Id, p. 138, para. 159.
[294] Id, p. 138, para. 160.
[295] Id, p. 138, para. 161.
[296] Ibid.
[297] Commercial Code, supra note 4, see Article 1029(a-d).
[298] Id, see Article 1029(d).

before the date of adjudication of bankruptcy,[299] the suspect period can be as long as two years and fifteen days.

Other acts (i.e., payments of debts due and all acts for consideration), can be invalidated only if the subjective test is met. It is not enough that these acts occur during the suspect period (for these acts, incidentally, the suspect period is slightly shorter, by fifteen days - for it runs from the date of suspension). The trustee must show that 'the parties who have received payment or have dealt with the debtor did so knowing that suspension of payments had taken place'.[300] It should be noted that all that a trustee has to show is evidence showing that the other party had knowledge of the suspension of payments by the debtor.[301]

The subjective criterion under Ethiopian law is close to the objective criteria. The trustee does not have to show that the other party was complicit to the debtor's conspiracy to smuggle property away from the reach of other creditors. Nor is the trustee required to prove that the parties had the intention of defeating or hindering the interests of other creditors. This makes the job of the trustee much easier than otherwise. But it puts at risk so many transactions that are carried out as a matter of course, as a necessity of ordinary business relationships, like payments of utility bills and premiums to insurance companies.

The relief is that the court has the discretion to refuse trustee's request for invalidation on subjective grounds. While invalidation requests on objective grounds must be granted by courts, invalidation requests on subjective grounds may be refused. The court may look at the circumstances surrounding the facts of the transaction and refuse to grant invalidation, and one of the instances in which the court should refuse happens to be when the payments are a matter of ordinary course of business.[302]

III

4. Distribution, Priority of Creditors and Discharge of the Bankrupt Debtor

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[299] Id, see Article 977 and 978(3).

[300] Id, see Article 1030.

[301] Whether the suspension must lead to the bankruptcy that is now pending or whether any ordinary suspension will do, the law does not say.

[302] Article 1029 of the Code, which applies, as seen above, the objective standard uses a peremptory phrase 'shall be invalid' in contradistinction to Article 1030, which applies the subjective standard and uses a permissive phrase 'may be invalidated'.

a. Distribution in General

Equitable distribution of the assets of a bankrupt estate is one of the principal goals of a bankruptcy proceeding.[303] Equitable does not of course mean equal treatment. It means creditors with similar legal rights should be treated fairly, receiving a distribution on their claim in accordance with their relative ranking and interests.[304] Once the claims of various creditors are properly admitted and verified,[305] the stage is set for distribution of the proceeds of the bankrupt estate among the various creditors of the bankrupt debtor.

Creditors are not a homogenous group. Some of them had contractual relationships with the debtor prior to the onset of bankruptcy.[306] And there are those whose relationship with the debtor was not contractual - the so-called involuntary creditors, such as the tax authorities and tort claimants.[307] Distribution among these diverse creditors is about balancing the competing and conflicting interests of them. Distribution is not just about the application of bankruptcy rules - although the rules of bankruptcy are central; it is as much about giving effect to the various laws respecting the rights of the diverse creditors. Giving effect to other laws means that bankruptcy laws must at times respect the commercial bargains creditors struck with the bankrupt debtor.[308] It is held that that way the bankruptcy system 'preserves legitimate commercial expectations, fosters predictability in commercial relationships and promotes equal treatment of similarly situated creditors'.[309]

In addition to the legal and commercial relationships that establish some pecking orders of distribution, the rules of distribution in bankruptcy must also 'reflect the choices that recognize public interests,' like the protection of employment.[310] Needless to say, there are different approaches to the

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[303] Equitable treatment permeates and informs many provisions of bankruptcy laws, including provisions regarding the application of suspension of suits, voting, etc; see UNCITRAL, supra note 11, p. 11, para. 7; see also Donald K. Korobkin, *Rehabilitating Values: A Jurisprudence of Bankruptcy*, 91 Columb. L. Rev. 717.

[304] UNCITRAL, supra note 11, p. 11, para. 7.

[305] The admission and verification of claims in bankruptcy has not been addressed in this article. For rules on admission and verification of claims, see Commercial Code, supra note 4, Articles 1041ff.

[306] UNCITRAL, supra note 11, p. 266, para. 51.

[307] Ibid.

[308] Id, p. 267, para. 52.

[309] Ibid.

[310] Id, p. 267, para. 53.

ranking of different classes of creditors in bankruptcy. We shall look at the ranking of various classes of creditors under Ethiopian bankruptcy law below -as usual, with frequent reference to comparative experience.

b. Priority of Creditors

i. Priority Rights of Secured Creditors

Secured creditors enjoy absolute priority over the collateral they hold in many bankruptcy systems.[311] The collateral is commonly a specified property (immovable or movable) but in some countries, security over the general funds of the debtor is recognized.[312] The norm in virtually all countries is to permit secured creditors to seek payment out of their collateral by withdrawing the collateral from the estate.[313] However, some countries authorize trustees to sell the collateral and distribute the proceeds to secured creditors on priority basis after payments of the administrative costs of sale. [314]

In those systems where absolute priority is recognized, secured creditors enjoy priority not just against unsecured creditors but secured creditors who hold security over a collateral other than the one under consideration.[315] The only time their priority is in any danger of competition is when other secured creditors hold security over the same collateral.[316] While there are many possibilities of ordering or ranking these conflicts, the principle that is frequently in use in such cases is the 'first in time, first in right' principle.[317] It is a simple timing principle which gives precedence to a creditor who obtains security interest first.[318]

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[311] See Thomas H. Jackson and Anthony T. Kronman, *Secured Financing and Priorities among Creditors*, 88Yale L. J.6 1161-1162 (May 1979); UNCITRAL, supra note 11, p. 269, para. 62; Barbara Morgan, *Should the Sovereign be Paid First? A Comparative International Analysis of the Priority of Tax Claims in Bankruptcy*, 74 Am. Bankr. L.J. 461 (Fall, 2000).

[312] UNCITRAL, supra note 11, p. 269; a security scheme that attaches to a class of debtor's assets is called a floating charge. The assets covered by security change from time to time and the debtor is allowed to trade in these assets until a creditor takes a step called crystallization to attach whatever assets happen to be in the hands of the debtor at the time of attachment; see Vanessa Finch, *Security, Insolvency and Risk: Who Pays the Price?*, 62Modern Law Review5, 639, 658 (1999).

[313] See Richard W. Maloy, supra note 98.

[314] Richard Maloy cites Turkey as an example; see Richard W. Maloy, supra note 98.

[315] Jackson and Kronman, supra note 311, p. 1162.

[316] Ibid.

[317] Ibid.

[318] Ibid

Not all bankruptcy systems recognize the absolute priority of secured creditors.[319] In some systems, the claim of secured creditors is made subordinate to certain claims like bankruptcy expenses, employee claims and tax claims.[320] Under French law, for example, employees have one of the strongest positions among creditors. Salaries and sums due to employees rank above secured creditors.[321] There is still another approach to the ranking of secured creditors - namely partial absolute priority for secured creditors. In this, secured creditors are obliged to share some losses along with unsecured creditors.[322] Needless to say, these approaches are a reflection of different public policies in different bankruptcy systems.[323]

What is the position of Ethiopian bankruptcy law in this regard? The language of the main priority provision of the Commercial Code - Article 1110 - is unnecessarily ambiguous about the rank of secured creditors in bankruptcy proceedings. It is necessary to quote Article 1110 in full to understand its import:

> Article 1110 - Distribution of Proceeds of Winding-up
>
> After deduction of:
>
> (a) costs and expenses;
>
> (b) sums applied for the support of the debtor or his family; and
>
> (c) sums paid to preferred creditors;
>
> the net proceeds of the winding-up shall be distributed to all the creditors in proportion to the their debts proved and admitted, subject to the provisions of Articles 1065, 1066 and 1068.

Article 1110 can be read in two senses:

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[319] UNCITRAL, supra note 11, p. 269, para. 63.

[320] Id, p. 269, para. 63.

[321] Jay M. Goffman and Evan A. Michael, *Cross Border Insolvencies: A Comparative Examination of Insolvency Laws of Industrialized Countries*, 12J. Bankr. L. & Prac.5 (2003); employees have also the right to be paid during the 'observation period' while other creditors do not have the right; see ibid.

[322] UNCITRAL, supra note 11, p. 269, para. 63; for partial absolute priority, see Lucian Arye Bebchuk and Jesse M. Fried, *the Uneasy Case for Priority of Secured Claims in Bankruptcy*, 105 Yale L.J.4 (Jan. 1996).

[323] For a review of the different justifications given for priority of secured creditors and their critiques, please see Lynn M. LoPucki, *Unsecured Creditors' Bargain*, 80Virginia Law Review, at 1947-1963 (1994); Vanessa Finch, supra note 312, at 637-643. According to Finch, the rationale of security rests on three main arguments: that the security agreement has been freely bargained or contracted for (freedom of contract argument); that it does not deprive the company of value; and that relevant parties are given due notice of security agreements and therefore have no reason to complain; see id, at 660.

i) the position of secured creditors is subordinate to the creditors accorded priority in the bankruptcy law itself (i.e., priority creditors mentioned in Article 1110 (a) (b) &(c));

ii) the position of secured creditors is subordinate to none, save prior secured creditors over the same collateral.

These rival interpretations are made possible by the language of Article 1110 - which, instead of unequivocally placing the position of secured creditors vis-à-vis other creditors, leaves their position ambiguous. Besides, Article 1110 is incomplete. It does not mention some secured creditors who enjoy similar positions in other parts of the Commercial Code - e.g., creditors secured by mortgage on business are not even mentioned, although these creditors enjoy the same position in other matters.[324] We have treated these two classes of creditors (creditors secured on mortgages on immovables and creditors secured by mortgages on business) together because we are convinced that their position is virtually identical in bankruptcy proceedings (see part II, 3(c) (iii) (4) above).

Are we then to conclude that something is missing in Article 1110 of the Code? It is fair to say that something is indeed missing. There is no reason why creditors secured by mortgage on business should be excluded from priority when in other respects they belong to the same league with creditors secured by mortgage on immovables.[325]

Of the two rival interpretations of Article 1110, there are reasons to believe that the second interpretation is the correct one. The absolute priority of secured creditors has already been acknowledged in Articles 1065-1072 of the Commercial Code - to which we are referred at least partially in Article 1110. Creditors secured by mortgage (either on immovables or business) are paid in priority over all other creditors from the proceeds of encumbered assets. They rank with unsecured creditors only when they are not fully paid out of the proceeds of encumbered assets.[326] To be sure, the language of Articles 1065-1072 is not free from ambiguity either,[327] but in one respect their meaning is clear - secured creditors are subordinated or demoted to

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[324] Compare articles 1065-1068 with Articles 1069-1072.

[325] The discordance in the language of some provisions of the Commercial Code is not entirely unexpected; after all the first drafter died prematurely in 1954, leaving the drafts to the second drafter.

[326] Commercial Code, supra note 4, see Articles 1065 and 1069.

[327] Not the least of which, these Articles seem to use 'preferred' creditors in the same breath with 'secured' creditors'.

the position of unsecured creditors only when they are not fully paid out of the proceeds of encumbered property.

We may also cite Article 1026 to strengthen the position that secured creditors enjoy absolute priority under Ethiopian bankruptcy law. Article 1026, as repeatedly mentioned, exempts secured creditors from one of the effects of bankruptcy - suspension of individual suits. Many bankruptcy laws that exempt secured creditors from the effect of suspension also grant secured creditors absolute priority over their collaterals.[328] It will indeed be odd if Ethiopian bankruptcy were to exempt secured creditors from the effect of suspension and then turn around to subordinate their claims to other creditors.

In practice, secured creditors (particularly mortgagees) have invoked the provisions of the Civil Code to support their claims of priority over other creditors. Article 3076 of the Civil Code appears to support the absolute priority right of mortgagees in respect of 'the registered amount of the claim', which shall include interest, the necessary expenses and insurance premiums, and costs of attachment proceedings.[329] The language of the Civil Code is clear in granting absolute priority to mortgagees for it brooks no competition to mortgagees other than other mortgagees who have registered their claim on the same immovable property - in which case, the rule of first registered breaks the tie.[330]

However, the apparent clarity of the language of the Civil Code has not prevented controversies from arising in practice as to the priority rights of secured creditors' vis-à-vis other creditors. Secured creditors frequently found themselves asserting their priority rights against tax authorities, employees and judgment creditors. *Inland Revenue Authority vs. Fissehaye W/Gebriel, Housing and Thrift Bank and Addis Ababa Abattoirs,*[331] for example, involved a four-way dispute over priority of creditors. Fissehaye took all the trouble of finding and attaching the property of a debtor (which was the house of the debtor), but when the property was up for sale, other creditors came into the scene and demanded payment from the proceeds of the sale. Fissehaye argued that he was entitled to priority because he took all the trouble and should be rewarded with priority as a result of his diligence as

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[328] See UNCITRAL, supra note 11.
[329] See Civil Code, supra note 41, Articles 3077-3080.
[330] Id, see Article 3081.
[331] (Supreme Court, Civ/App. No. 13/1984), in Supreme Court Cases, Vol. 3, in Amharic, pp. 595-598

a judgment creditor. Housing and Thrift Bank claimed priority because it was a secured creditor (although in this case, its collateral was a garage not the house in question). Inland Revenue Authority (the Tax Authority) invoked a 1947 law which allegedly granted priority to government claims. Although this case involved the case of a secured creditor (the Bank) arguing priority over a property which was not its collateral, it is an illustration that the clear language of the Civil Code is no guarantee for the absolute priority rights of secured creditors, particularly when the competition comes to be against preferred creditors who are granted priority by other laws of Ethiopia. Perhaps partly as a result of this long line of disputes over priorities,[332] some recent laws of Ethiopia have clarified the priority rights of secured creditors vis-à-vis some preferred creditors. The tax laws of Ethiopia issued in 2002 have ended the long-time speculation over the priority of tax claims vis-à-vis secured creditors. Article 80 of the Income Tax Proclamation –which incidentally is reproduced verbatim in other tax laws of Ethiopia promulgated in 2002[333] - subordinates tax claims to the 'prior secured claims of creditors' in no uncertain terms. The tax laws strengthen the Civil Code's 'absolute priority' doctrine in respect of at least tax claims.

ii. Priority of Administrative Costs and Expenses

Ethiopian bankruptcy law accords the first priority (after secured creditors over their collaterals) to the satisfaction of what it calls costs and expenses.[334] Administrative expenses are granted priorities in many other bankruptcy laws as well.[335] The policy underlying their priority is the desire to ensure proper payment for the parties acting on behalf of the bankrupt estate - without whose diligence, the bankruptcy proceedings would not have been successful.[336]

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[332] See *Commercial Bank of Ethiopia vs. Inland Revenue Authority*,(Supreme Court, Civ./App. No. 562/69), in Supreme Court Cases, Vol. 1, in Amharic), at 17-18; *Abyssinia Bank vs. Inland Revenue Authority* (Tax App. Case No. 543, 1996 E.C.), in Amharic, (unpublished).

[333] See Article 32(1) of the Value Added Tax Proclamation No. 285/2002, *Federal Negarit Gazetta*, 8th year, No. 33; Article 14 of the Turnover Tax Proclamation No. 308/2002, *Federal Negarit Gazetta*, 9th year, No. 21, and Article 11(1) of the Excise Tax Proclamation No. 307/2002, *Federal Negarit Gazetta*, 9th year, No. 20.

[334] Commercial Code, supra note 4, Article 1110(a).

[335] See UNCITRAL, supra note 11, p. 270, para. 66; see also *the Priority Provisions*, 1Bankr. Dev. J. 282, 283 (1984).

[336] UNCITRAL, supra note 11, p. 270, para. 66.

Ethiopian bankruptcy law does not define what costs and expenses are. A debate may therefore arise as to what 'costs and expenses' qualify for priority under Ethiopian bankruptcy law.[337] Once again the Guide supplies the best enumeration of what expenses may qualify as administrative expenses in bankruptcy: remuneration of the trustee and any professionals employed by the trustee; debts arising from the proper exercise of the trustee's functions and powers; costs arising from continuing contractual obligations (e.g., labor and lease agreements); costs of the proceedings (e.g. court fees).[338]

A trustee may be authorized, as we saw above, to continue the business of the bankrupt debtor,[339] and once continuation of business is authorized, it invariably gives rise to a special category of creditors – post-bankruptcy creditors. Post-bankruptcy creditors are usually more demanding than creditors under ordinary circumstances, because they deal with a distressed business. Many of them are unlikely to enter into contracts with the bankrupt business unless they are paid in cash or guaranteed a security.[340]

In recognition of the serious difficulties trustees face in getting the business going, Ethiopian bankruptcy law accords post-bankruptcy creditors a rank above unsecured creditors. Although the Commercial Code declares them to be 'creditors of the universality' (in other words, unsecured creditors), the Code exempts them from some of the harsh consequences of bankruptcy, such as the operation of suspension of suits. Post-bankruptcy creditors are not bound by the operation of suspension of suits under Article 1026, which means that they can bring suits for the payment against the bankrupt estate as the claims fall due. And, more importantly, they have priority of payment before unsecured creditors.[341] We may have problems locating the exact ranking of post-bankruptcy creditors under Article 1110 of the Code. It is not clear from the language of Article 1039(2) if the priority of post-bankruptcy creditors is good against all other

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[337] The Amharic version is more expressive. Literally translated the Amharic version states 'expenses and costs incurred for bankruptcy proceedings'.

[338]See UNCITRAL, supra note 11, p. 270, para. 66; sometimes, a claim may be characterized either as a lower order (ranked) priority claim or a higher order (ranked) claim. For example, taxes incurred during and as a result of the administration of the bankrupt estate may be considered as lower order claims (as taxes) or higher order claims (as post bankruptcy expenses); see 1Bankr. Dev. J.(1984), supra note 335, at 288.

[339] See Commercial Code, supra note 4, Article 1039.

[340] In some systems, trustees are permitted to give security to secure post-bankruptcy financing; see UNCITRAL, supra note 11, pp. 115-117, paras. 100-104.

[341] See second sentence of Article 1039(2).

unsecured creditors or subordinate to some unsecured but preferred creditors. A problem of ranking may, for example, arise between the claims of post-bankruptcy creditors and the claims of tax authorities, which are preferred/priority claims (see below).

In other bankruptcy systems, the claims of post-bankruptcy creditors are regarded as the costs and expenses of the bankruptcy and are usually given priority ranking over all other unsecured creditors.[342] The costs and expenses of bankruptcy are also ranked first over all other unsecured creditors in Ethiopia. If we follow the trend elsewhere, it would appear that post-bankruptcy creditors are first priority creditors under Ethiopian bankruptcy law too. Since these creditors come into contact with the business of the bankrupt post facto, they might even demand security before entering into contracts with the trustee, in which case they will elevate themselves even higher to the absolute priority status of secured creditors.

iii. Priority for Sums for the Support of Debtor and Family

Before the winding up of the bankrupt estate, the commissioner may permit the trustee to apply part of the estate to support the debtor and his family.[343] Upon the winding up of the estate, the commissioner 'shall fix amount of assistance to be given to the debtor and family where the assistance is agreed to by the creditors' committee.[344] In terms of the timing as well as the procedures required, the two assistances to debtor and family are clearly different, but it is not clear if both or only one of them is applicable at a time. There is little doubt that both are discretionary, and as such may not be ordered at all. Once assistance to the debtor and family is ordered and the amount is fixed, however, the claim for assistance acquires a priority status, subordinate only to costs and expenses of bankruptcy (outside secured creditors, that is). This priority is not unique to Ethiopian bankruptcy law. French bankruptcy law, for example, accords priority to 'the subsidies granted to the head of the business or managers and their families.[345]

[342] See UNCITRAL, supra note 11, p. 116, para. 101.

[343] Commercial Code, supra note 4, Article 1020.

[344] Id, Article 1102.

[345] French Commercial Code, supra note 35, see Article L643-8; a question may of course arise as to who qualifies as a debtor, as the French law compels us to raise. Can the provisions of Article 1020 and 1102 of the Ethiopian Commercial Code be used to authorize assistance for managers of business organizations?

iv. Priority of Preferred Creditors

Outside secured creditors, the Commercial Code grants the third rank to preferred creditors – one rank above unsecured creditors. We have neither a definition nor even a description (not even a hint) about who these creditors are. We would have been better off if the Code left it as that, but the Code makes the task of identifying these creditors complicated by using 'preferred' creditors interchangeably or in the same league with secured creditors. Articles 1065-1067 of the Code appear to place 'preferred' creditors on par with secured creditors on the distribution of proceeds from encumbered and unencumbered assets.[346] Both cannot be true. Either preferred creditors are accorded priority on par with secured creditors (as Articles 1065-1067 seem to intimate) or they are subordinate to not only secured creditors but also priority claims like costs and expenses.[347]

Unable to make sense of the language of Articles 1065-1067, we cannot but incline to the latter view – i.e., that preferred creditors are subordinate to secured creditors. Who are preferred creditors? Article 1110(c) seems to take it for granted that we know what is meant by preferred creditors. We must look elsewhere to understand preferred creditors.

Some unsecured creditors are routinely accorded priority (preference) in various bankruptcy laws.[348] One type of unsecured claims that are frequently granted priority is tax claims.[349] The justifications that are given for the priority of tax claims are first that tax claims represent the claims of

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[346] Article 1065, for example, states in part 'where the distribution of the proceeds of sale of immovable takes place before or at the same time as that of the proceeds of the sale of movables, *preferred or secured creditors*....rank equally with the unsecured creditors...' (italics mine); the other articles repeat the reference to preferred creditors along with secured creditors; see, Commercial Code, supra note 4, Articles 1066, 1067 and 1068.

[347] There is an unfortunate and careless use of the expressions 'preferred creditors' with 'secured creditors. Sometimes, the expression 'preferred creditors' is used interchangeably with 'secured creditors' (see Article 1065); and at other times, it is used to refer to unsecured creditors but priority creditors (see Article 1110 (c)). The dictionary meaning of 'preferred creditors' is that of creditors having superior right to payment, which may mean both secured creditors and priority creditors. Secured creditors are creditors who have the right to proceed against a collateral and apply it to the payment of the debt. And priority creditors are creditors who are given priority in payment from the debtor's assets; see Black's Law Dictionary, supra note 48.

[348] See UNCITRAL, supra note 11, p. 270, para. 67;see also Jackson and Kronman, supra note 311, at 1161-1162.

[349] UNCITRAL, supra note 11, p. 273, para. 74; see also Volkmar Gessner et al, supra note 93, at 508.

the community and therefore deserve priority on that account and second that the government is an involuntary creditor, unable to choose its debtors and/or obtain security for its claims.[350] The third argument often raised in connection with the priority of tax claims is that many tax claims represent claims for payment of taxes from a debtor who has been holding the taxes in trust. For instance, a claim for the payment of VAT is made against a debtor that collects VAT from consumers on behalf of the government. The debtor of VAT is a collection agent for the government and is not an owner of the VAT claimed. This argument is partly true - for there are also taxes which are directly claimed from debtors (e.g., income taxes) for which the priority rules (if they exist) equally apply.[351] Ethiopian tax laws recognize this distinction between taxes collected by bankrupt debtors in trust and taxes owed by bankrupt debtors. Taxes collected by bankrupt debtors in trust (for example, taxes withheld by withholding agents) do not even form part of the bankrupt estate and may be not attached by creditors of the bankrupt debtor.[352] Whatever and however convincing the justifications may be, the priority of tax claims is not without its critics.[353]

The other types of unsecured claims that are commonly accorded priorities are employee claims.[354] The first argument in favor of granting priority to employee claims is the 'involuntary' creditor thesis. It is contended that employees must hire themselves out without being in a position to get security for their claims and the nature of their relationships makes it difficult to initiate an action against their employers.[355] The moral case in

[350]See Volkmar Gessner et al, supra note 93, at 508; this contention that the government is an involuntary creditor can be easily refuted: the government is not the only involuntary creditor out there; there are many creditors who are involuntary creditors and yet remain unsecured and un-preferred (e.g., tort creditors are involuntary creditors).

[351] There is a solution for recovery of tax claims from debtors who hold the taxes in trust; the government does not even have to stand in line for the collection of VAT from the debtor via priority provisions; the provisions relating to recovery of goods and money from a debtor who holds the goods and money in trust may be used to recover the taxes; see Commercial Code, supra note 4, Article 1073.

[352] See Income Tax Proclamation No. 286/2002, *Federal Negarit Gazetta*, 8th year, No. 34, Article 82.

[353] The critics fear that priority to tax claims may encourage tax authorities to be complacent about monitoring debtors and collecting debts in a commercial manner; see UNCITRAL, supra note 11, p. 273, para. 74.

[354] See UNCITRAL, supra note 11, p. 272-273, paras. 72-73; see Volkmar Gessner et al, supra note 93, at 508.

[355] Hahn, 1881, 348, quoted in Volkmar Gessner et al, supra note 93, at 508.

favor of priority for employee claims is compelling. In times of bankruptcy, employees are threatened with not just the loss of money but their means of livelihood - their jobs.[356] In recognition of this, the International Labor Organization (ILO) sponsored and succeeded in getting ratified an International Convention granting priority rights to employee claims.[357]

Many countries are not content with just signing the Convention and have included in their national laws provisions that grant priority to employee claims.[358] There are differences among countries in their approach to the ranking of employee claims. In many bankruptcy laws, employee claims are ranked higher than most other priority claims, and in some countries, employee claims are ranked higher than even secured creditors.[359] Under French law, for example, employees have one of the strongest positions among creditors. Salaries and sums due to employees rank above secured creditors.[360]

Preferred creditors may not have been identified in the bankruptcy law of Ethiopia with expectation that other laws will identify them. Indeed there are many other laws of Ethiopia which grant priority to some creditors. We will review some of these other laws to analyze what the priority might mean in light of Ethiopian bankruptcy law.

One of the laws that extend priority is the Labor Proclamation of Ethiopia. Article 167 of the Labor Proclamation extends priority to any claim of payment of workers arising from employment. Almost all of the tax laws of Ethiopia grant priority to tax claims.[361] Article 80 of the Income Tax Proclamation, which incidentally is the rule for all other taxes like VAT, states: 'From the date on which tax becomes due and payable under [this] Proclamation, subject to prior secured claims of creditors, the Authority has

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[356] Volkmar Gessner et al, supra note 93, at 510.

[357] See Protection of Wages Convention, 1949 (No. 95).

[358] See International Labor Organization, *Protection of Workers' Claims in the Event of Insolvency of their Employer* (International Labour Conference, 78th Session, Report V (1), 1991), p. 76, accessed at http://books.google.com.et/books, last accessed on October 24, 2010.

[359] Ibid.

[360] Goffman and Michael, supra note 321; employees have also the right to be paid during the 'observation period' while other creditors do not have the right; see ibid; see French Commercial Code, supra note 35, Article L625-1 to L625-8.

[361] See the Value Added Tax Proclamation, supra note 333, Article 32; the Turnover Tax Proclamation, supra note 333, Article 14; the Excise Tax Proclamation, supra note 333, Article 11.

preferential claim over all other claims upon assets of the person liable to pay the tax until the tax is paid.'

The Tax Proclamation even goes further in authorizing the Tax Authority to register tax claims over any property of taxpayers, thus elevating simple priority over unsecured creditors to priority over later secured creditors.[362] Preferred creditors are lumped together in an undifferentiated mass under Ethiopian bankruptcy law, although they comprise a diverse (not to say disparate) groups of creditors. These creditors - however diverse - occupy third place in the ranking of priority claims. That is where the problem begins. We will notice that many of the other laws granting priority use such a powerful and peremptory language that they do not appear to admit of any kind of competition. Let's examine some of the provisions. The already cited Article 167 of the Labor Proclamation: 'Any claim of payment of a worker arising from employment relationship shall have priority over other payments or debts.'

The priority provision of the income tax law as can be read from the citation above uses such a strong language as to admit of no competition whatsoever from other creditors (save prior secured creditors). If the creditors were not such a diverse group, we would have settled for a solution of proportional distribution of the proceeds among them. Compounding the problem is the fact that these laws came out at different times in Ethiopian history. The public policies that generated these priorities are not even related. Chances are the priorities to one group of creditors (e.g., employees) were granted without any consideration for the priority rights of other preferred creditors. The strong language used in the priority provisions of these other laws suggests that these priorities brook no competition. When tax claims compete with employee claims in bankruptcy, do we resort to pro rata distribution of the balance of the bankruptcy proceeds among them or do we have recourse to the rule of interpretation that gives precedence to later laws? As the law stands right now, there seems to be no better option for courts than ordering a pro rata distribution among diverse preferred creditors. That at least is more reasonable than simply applying the rule of interpretation that gives precedence to later laws over earlier laws. An adoption of the rule of interpretation that gives precedence to later laws leads to absurd conclusions in these cases, for the genealogy of the laws is not even related.

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[362] See Income Tax Proclamation, supra note 352, Article 80(2) - (4).

The priority provisions of the Commercial Code are in need of revision in this regard, perhaps along the lines of the priorities developed in the new Banking Business Proclamation of 2008. The new Banking Business Proclamation ranks claims against insolvent banks in the following order: 1) remuneration of the receiver and expenses of receivership (the equivalent of costs and expenses); 2) post-receivership (bankruptcy) creditors; 3) claims of non-managerial employees; 4) deposits; 5) taxes owed to the Federal and Regional Governments; 6) other claims against the bank and 7) interest on claims. [363] As can be readily seen, the new Banking Business Proclamation unpacks preferred/priority creditors and subordinates one to the other making it easier for courts to rank priority claims. We cannot say the same thing about the priority rules of the Commercial Code.

v. Ordinary and Unsecured Creditors

Ordinary unsecured creditors receive the balance of the proceeds of the bankrupt estate once the claims of all secured and priority creditors have been satisfied.[364] It is easy to view these creditors as homogenous (and prescribe a pro rata distribution among them) but some bankruptcy systems create lower order subordination among these creditors as well.
For business organizations in particular, shareholders may be seen as creditors of the company. Nonetheless, many bankruptcy laws subordinate the claims of owners and equity holders (including claims of interest) to the claims of ordinary, unsecured creditors.[365] Another possible subordination from ordinary unsecured creditors is the claim of related persons – creditors who have familial or business relationships with the debtor.[366] Some countries subordinate these claims in all cases and others subordinate them only when fraud is involved.[367] Finally, some countries subordinate claims such as gratuities, fines and penalties (whether administrative, criminal or some other type).[368] Some countries exclude these claims completely from the share of the bankrupt estate.[369]

Ethiopian bankruptcy law does not directly address the subordination of some claims of ordinary unsecured creditors at all. The conclusion we can draw from this is that all ordinary, unsecured creditors enjoy equal status

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[363] See Banking Business Proclamation, supra note 39, Article 45.
[364] UNCITRAL, supra note 11, p. 273, para. 75.
[365] Id, p. 273, para. 76.
[366] Id, p. 274, para. 77.
[367] Ibid.
[368] Id, p. 274, para. 78.
[369] Ibid.

and benefit from the pro rata distribution of the balance remaining after secured and priority creditors. However, the claims of owners and equity owners – to the extent they are treated as creditors – are subordinated to ordinary and unsecured creditors. Article 501 of the Commercial Code prohibits distribution of the assets among members of a company 'until the creditors of the company have been paid or provisions for payment made'. As for creditors that are excluded from the share of the proceeds of the bankrupt estate, the only creditors one can think of are the bankrupt co-guarantors who are jointly and severally liable.[370]Bankrupt co-guarantors may not claim against one another 'unless the total amount of dividends paid in the several bankruptcies exceeds the total amount of the claim'.

c. Discharge of the Bankrupt Debtor

Discharge, or the circumstances under which it is granted at all, is one of the central questions of any bankruptcy system. Discharge is described by one writer as 'the greatest gift that can be bestowed' by a bankruptcy regime, for it provides fresh start to honest debtors.[371] The prospect of discharge gives an otherwise submissive debtor the leverage to negotiate with creditors.[372] Failure of a business is increasingly seen as a natural feature of modern economies; businesses, good or bad, may fail even in circumstances where responsibility is not involved, and more importantly, once doomed is not always doomed, and in fact studies have shown that persons who have tasted the 'bitter pill' of failure are often more successful in later business ventures.[373]

Rafael Efrat, who studied and compared the bankruptcy systems of several countries, divides these systems into three based on their policy of discharge after the end of bankruptcy: conservative, moderate and liberal – echoing the common language in describing political parties.[374] In the conservative camp are countries marked for the conspicuous absence of debt forgiveness in their bankruptcy laws.[375] Moderate bankruptcy systems are distinguished by the availability of debt forgiveness for bankrupt debtors but the decision to forgive is in the discretion of the judges and is

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[370] See Commercial Code, supra note 4, Article 1056.

[371] See Michael M. Parker, supra note 121; see also *Exceptions from Discharge*, 1Bankr. Dev. J. 307, 308(1984).

[372] Michael M. Parker, supra note 121.

[373] See UNCITRAL, supra note 11, p. 281.

[374] See Rafael Efrat, *Global Trends in Personal Bankruptcy* 76 Am. Bankr. L.J. 81 (Winter, 2002).

[375] Ibid.

therefore fraught with some uncertainty.[376] The countries of the liberal camp offer discharge 'with high degree of certainty and with relative promptness'.[377] The United States is generally regarded as a country with the most generous regime of discharge in bankruptcy systems of the world.[378]
Although the Guide does not characterize discharge systems as conservative, moderate or liberal like Efrat did, it too identifies more or less three approaches to discharge.[379] There are systems where a debtor cannot be discharged until all debts are paid.[380] There also systems in which a number of conditions and restrictions attach before the debtor is discharged or upon which the debtor is discharged.[381] At the other extreme, there are systems that 'provide for complete discharge of an honest, non-fraudulent debtor immediately following distribution' in bankruptcy.[382]

No bankruptcy system grants blanket discharge to bankrupt debtors. Even countries that are regarded as 'liberal' in granting discharge often provide for exceptions. The US bankruptcy Code has a long list of exceptions to discharge, classified conveniently as government liabilities, tort liabilities and family support liabilities.[383] Of government liabilities, all income and excise taxes for three years prior to the bankruptcy are deemed non-dischargeable.[384] Of tort liabilities, damage claims arising from the debtor's willful and malicious injury to another person or property are not dischargeable.[385] Of family support liabilities, child support and alimony payments for the maintenance or support of a former spouse are deemed not dischargeable.[386]

Under French law, individual claims of creditors are terminated and the debtor is discharged upon closure of bankruptcy proceedings.[387] French law enumerates the conditions in which the debtor is not discharged upon

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[376] Ibid.
[377] Ibid.
[378] Ibid, see also see Richard W. Maloy, supra note 98.
[379] UNCITRAL, supra note 11, p. 282, para. 4.
[380] Ibid.
[381] Ibid; the debtor may be discharged on condition that he no longer acts as director or manager of a business organization.
[382] UNCITRAL, supra note 11, p. 282, para. 5.
[383] 1Bankr. Dev. J. (1984), supra note 371, at 307.
[384] Id at 308.
[385] Id at 319.
[386] Id at 316.
[387] French Commercial Code, supra note 35, see Article L643-11.

closure of bankruptcy proceedings. These conditions may be generalized as conditions related to the nature of the claims, and those that are related to the qualities or attributes of the debtor. Of the conditions related to claims that are not dischargeable upon closure of bankruptcy proceedings, French law mentions claims of creditors arising from criminal convictions of the debtor and claims attached to the person of the debtor.[388] The conditions related to the qualities or attributes of the debtor are personal disqualifications and convictions from fraudulent bankruptcy and being at the helm of a business which was previously submitted to bankruptcy within the last five years (in other words, no discharge on second bankruptcy).[389] OHADA Uniform bankruptcy Act of 1998 leaves the possibility of discharge open to all debtors except in one case: where a person is convicted of a felony or a misdemeanor leading to a prohibition to carry on a trade.[390]

Before we characterize Ethiopian bankruptcy law in its approach to discharge of debtors, we need to explore certain provisions of the Commercial Code to check whether discharge is available. The first provision to mention discharge is Article 987 (1)(b) of the Code - which incidentally deals with preliminary orders in the judgment of bankruptcy that are not open to set aside or appeal. Although Article 987 mentions 'discharge' as one of these orders, we have reason to be suspicious about the possibility of discharge at this early stage of the bankruptcy proceedings.[391] Another early provision of the Ethiopian bankruptcy law that promises discharge is Article 1023, which as early in this article fixes the period for which a bankrupt remains dispossessed of his property. That period of dispossession runs from the date of the declaration of bankruptcy to the time of the debtor's discharge. Again we cannot rely upon this provision for our opinion on the state of discharge under Ethiopian bankruptcy law - because this provision simply holds out a promise of discharge, which hinges on the 'real' provisions of discharge.

We need to look for discharge towards the end of the bankruptcy provisions. One provision in particular holds out perhaps the strongest

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[388] See ibid; according to the UNCITRAL Guide, claims that attach to the person of the debtor include tort claims, maintenance claims, penalties, etc; see UNCITRAL, supra note 11, p. 282, para. 7.

[389] French Commercial Code, supra note 35, Article L643-11.

[390] See OHADA, supra note 33, Articles 204-215.

[391] It is interesting to note that all the other matters dealt with in Article 987 are preliminary matters - like appointments, fixing the date of suspension, etc.

promise of discharge - Article 1107(5) of the Commercial Code. There it is stated that approval of a lump sale of assets shall result in the discharge of the debtor to creditors. However, the promise of discharge in the cited sub-article is too feeble a comfort for the debtor, compared in particular to the analogous provisions in the bankruptcy laws of other countries.
The authorization of lump sale of assets occurs under conditions very similar to composition - in other words, it is contingent upon the agreement of a substantial number of creditors. The trustees are required to consult creditors, who shall approve of the proposal (for lump sale of assets). The Amharic version of Article 1107(3) makes it very clear that three-fourths of creditors shall approve of the lump sale of assets for the sale to be confirmed by the court, which makes it an extremely stringent condition to overcome. That is why it is appropriate to consider this form of sale as something analogous to composition or schemes of arrangement, in which, as we shall see below, discharge is available if a certain percentage of creditors has approved the proposals (for composition or schemes of arrangement).

The natural homes of discharge are Articles 1113, 1114 and 1117 of the Code, all of which address the closing of bankruptcy proceedings. If discharge is available under Ethiopian bankruptcy law, it should have been mentioned in one of these provisions.

Article 1113 of the Commercial Code enumerates three grounds for closure of bankruptcy proceedings - distribution of the assets, insufficiency of assets, and absence of claims against the bankrupt debtor. Articles 1114 and 1117 state the consequences of closure of bankruptcy by reasons of the two grounds stated: insufficiency of assets and absence of claims against the bankrupt estate respectively - we are not told as to what happens when the bankruptcy comes to an end (as it often does) upon the distribution of the assets of the bankrupt estate.

Article 1114 puts it in no uncertain terms that where bankruptcy proceedings come to an end by reason of 'insufficiency of assets', the debtor will not be discharged. In fact, the creditors are thenceforward restored to exercising their individual rights and the debtor remains under the 'special incapacities' of bankruptcy.[392] Article 1117 states that the debtor is discharged when there are no more claims against the bankrupt estate. But that is because the debtor has paid all the claims against him. That is a

[392] Commercial Code, supra note 4, see Article 1114(2) &(3).

foregone conclusion even if we did not have Article 1117 of the Code – a debt discharged upon payment is one of the cardinal principles of contract.[393]

Where does that leave us on the question of whether Ethiopian bankruptcy law grants the relief of discharge to bankrupt debtors? The position of Ethiopian bankruptcy law on bankrupt debtors is in general pretty well known. The law attaches blameworthiness to all bankrupt debtors. Its restriction of freedom of movement and attachment of various prohibitions and forfeitures to debtors are abundant evidence of the position of Ethiopian bankruptcy law. Although some provisions seem to hold a promise of discharge (they are accidental slips, it turns out), the truth of the matter is that discharge occurs only if the bankrupt debtor has fully paid all the claims of creditors or creditors have consented to the discharge of the debtor.

IV

5. Composition and Schemes of Arrangement

The primary objective of bankruptcy as liquidation proceeding is to maximize the value of the bankrupt estate and distribute the proceeds among creditors – in other words, to liquidate the business of the bankrupt debtor.[394] Debtors who seek to escape the harsh conditions of straight bankruptcy or liquidation have other options available to them. The purpose of alternative proceedings to bankruptcy is different or should be different from straight bankruptcy or liquidation. It is 'to maximize the possible eventual return to creditors' and 'to preserve viable businesses as a means of preserving jobs for employees and trade for suppliers.[395]

In its inevitability as a procedure for liquidating the business of the debtor and distributing the proceeds among creditors, the results of a bankruptcy may satisfy the interests of some creditors – who may not necessarily be the majority of creditors as such. Creditors are not a homogenous group. Some creditors, such as customers or suppliers, may prefer the continuation of

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[393] See Civil Code, supra note 41, Article 1806, where it is stated 'an obligation shall be extinguished where it is performed in accordance with the contract'.

[394] That is why liquidation is sometimes alternatively used with bankruptcy; see Taddese Lencho, supra note 137, 57, 65-68; French Commercial Code states the objective of liquidation (the equivalent of our bankruptcy) as '...to end the business activity or to sell the debtor's assets through general or separate sale of its interests and property'; see French Commercial Code, supra note 35, Article L640-1.

[395] UNCITRAL, supra note 11, p. 209, para. 3; business rehabilitation is a recent development in bankruptcy theory; see Richard W. Maloy, supra note 98.

business with the debtor to rapid repayment of their debt.[396] Others may prefer quite the opposite. Debtors who find themselves in financial difficulties are as diverse as can be. For some, liquidation may be the only cure, but there are businesses which should be given another lease of life. Alternative procedures to bankruptcy fulfill the need to cater for the diverse needs of creditors as well as debtors - thus maintaining the balance that would have been upset by the dominance of liquidation in the market.

As suggested already, the alternatives to bankruptcy may take many forms: a simple composition (an agreement to pay creditors as a percentage of their claims, usually over time); continued trading of the business and its eventual sale as a going concern (and for the debtor to then be liquidated); transfer of all or part of the assets of the estate to one or more existing businesses or to businesses that will be established; a merger or consolidation of the debtor with one or more other business entities; a sophisticated form of restructuring of debt and equity.[397] As there are multiple alternatives for rehabilitation of businesses, there are multiple names in different legal systems. Indeed, one of the striking features of the alternatives to straight bankruptcy is the bewildering variety of the language used to describe these procedures under various legal systems. In England, they are known by the names 'Administration', 'Company Voluntary Arrangement' and 'Schemes of Arrangement', in the Netherlands by 'Suspension of Payments (Reorganization)' and 'Debt Rescheduling', in Japan by 'Corporate Reorganization' 'Civil Rehabilitation' and 'Company Arrangement'.[398] In the US, the various alternatives available in the US bankruptcy system are better known by their chapters in the US Code - Chapter 7 (which is a straight bankruptcy procedure), Chapter 11 (for reorganization of businesses) Chapter 13 (for Adjustments of Debts).[399] OHADA Uniform Act has two alternative procedures to liquidation; preventive settlement (*regalement preventif*) and legal redress

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[396] UNCITRAL, supra note 11, p. 209, para. 3; see also Richard W. Maloy,supra note 98; as Maloy writes 'supplier creditors prefer it in order to keep alive a good customer' and employees 'to keep their paychecks coming'; see ibid.

[397] UNCITRAL, supra note 11, p. 210, para. 4.

[398] See in general, Goffman and Michael, supra note 321; some countries use the expression 'schemes of arrangement' like Ethiopian law to describe one of the alternatives to bankruptcy - England, Israel, see Ronald J. Silverman, *Israeli Insolvency Law Moves to Encourage Reorganization* 25American Bankruptcy Institute Journal, 18-6, (July/August 1999) and Sandy Shandro, *U.K.'s Chapter 11 Plan: Schemes of Arrangement,* 25American Bankruptcy Institute Journal3 (April 2006).

[399] See Collier's Bankruptcy Manual, supra note 44.

(*redressement judiciaire*).[400] The French Code has an elaborate system for rescuing troubled businesses, even going to the extent of providing for a system to prevent future insolvencies through group insurance.[401] The Guide uses the word 'reorganization' to refer to all the alternatives. The Guide defines reorganization as 'the process by which the financial well-being and viability of a debtor's business can be restored and the business continue to operate, *using various means possibly including debt forgiveness, debt-rescheduling, debt equity conversions and sale of the business (or parts of it)* (italics supplied).[402] In this sense, reorganization embraces simple debt adjustment like composition as well as plans involving serious and fundamental reorganizations or restructuring of the business itself.[403]

The Ethiopian bankruptcy system envisages two forms of settlement for debtors who are either already in bankruptcy or about to go into bankruptcy (imminent bankruptcy): composition and schemes of arrangement.[404]

It is justified to look at the two alternative procedures in bankruptcy under one section – in order not only to sort out the differences but also to examine their similarities and as shall be suggested at the end of this article to press for the merger of the two procedures. Of course we have a definition of neither of the alternative proceedings. We will need to read all the provisions regarding composition and schemes of arrangement in order to understand the nature of these proceedings. Before we conclude, we

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[400] See OHADA, supra note 33, Article 2; Boris Martor et al, supra note 33, at 158.

[401] Under French law, all persons subject to the bankruptcy system may join the so-called 'prevention group,' which provides members with a confidential analysis based on the data supplied to it by these members. The group will notify members of their financial difficulties and recommends experts to be assigned to look into their difficulties. Accredited 'prevention groups' may enter into agreements with credit institutions and insurance companies with a view to preventing financial difficulties; see French Commercial Code, supra note 35, Article L611-1.

[402] UNCITRAL, supra note 11, p. 7.

[403] Some authors draw a fine line between reorganization and mere adjustments of debts. Adjustment of debts schemes 'adjust' or change the amount and/or the time and manner in which debts are paid, while reorganization schemes go deeper than that; see Richard W. Maloy, supra note 98.

[404] Banks have in practice developed the scheme of 'private receivership' in which they place their own employees or consultants inside the debtor's business to manage the financial operations and attempt to restore the debtor to solvency; see USAID, supra note 24, p. 53; the New Banking Business Proclamation has effectively created a receivership scheme for banks in insolvency cases; see Banking Business Proclamation, supra note 39, Articles 32-48; see also Taddese Lencho, supra note 137, at 72-74.

need to sort out the major differences between the two. The following table gives the gist of the differences as well as the similarities:

Table: Comparing Composition with Schemes of Arrangement

No.	Composition	Schemes of Arrangement
1	**Commencement Time** After suspension of payments and upon the expiry of the period under Article 1046 (see Article 1081)	**Commencement Time** Upon imminent suspension of payment or after suspension of payment (see Article 1119)
	Content of Proposal Percentage of payment, period of payment, guarantees, legal costs and remuneration of trustees to be offered in the proposal not specified by law (See Article 1081(2)	**Content of Proposal** The proposal should include an undertaking to pay not less than 50% within one year, or 75% within 18 months, or 100% within three years, with material or personal guarantees or a proposal to assign all assets held by the debtor (see Article 1121).
	Proposal to Whom? Commissioner (see Article 1082)	**Proposal to Whom?** Court (See Article 1119)
	Creditors' Vote 2/3rds of creditors representing 2/3rds of the debts should approve the proposal	**Creditors' Vote** A majority of creditors representing 2/3rds of all non-preferred or unsecured creditors should approve the proposal
	Confirmation by? Court	**Confirmation by?** Court
	Supervision The commissioner, the trustee(s) and the creditors' committee	**Supervision** The commissioner (and to some extent) the delegate judge
	Results of Confirmation by Court Binding on all creditors others than those holding security in rem and unsecured creditors whose claims have arise during the bankruptcy proceedings (post-bankruptcy creditors)	**Results of Confirmation by Court** Binding on all creditors, except secured creditors unless they voted upon giving up their security

Source: Tilahun Teshome and Taddese Lencho (eds.), *Position of the Business Community on the Revision of the Commercial Code of Ethiopia* (Addis Ababa

Chamber of Commerce and Sectoral Associations, PSD Hub Publication No. 8, 2008), at 108-109.[405]

The differences between composition and schemes of arrangement are in the main procedural, not substantive. Composition is a post-bankruptcy procedure while a scheme of arrangement is a pre-bankruptcy or at least contemporaneous procedure. There are also differences in the number of votes required of creditors for approval of each (see table above). But in terms of the contents of the proposals, there are virtually no differences between the two proceedings. They both are about adjustments of debts in absolute amounts or period of payment. In that sense, our conclusion that both are simple debt adjustment schemes was warranted.[406] Indeed, it won't be bold to call 'schemes of arrangement' a composition by another name. Do we need two separate titles in our bankruptcy system for what is at bottom a simple adjustment of debts? This is a question for policy makers, but let's point out what is missing in Ethiopian bankruptcy law in this regard by reference to other bankruptcy laws.

As pointed out before, the Guide adopts a definition that encompasses simple debt adjustment schemes as well as schemes for reorganization of the bankrupt business. It offers creditors as well as debtors a wide variety of options that are acceptable to both. There are times when simple adjustment of debts is not enough, just as liquidation is not an appropriate solution for all bankrupt businesses. There is no better way of conveying the content of reorganization as directly quoting from the Guide:

> Information relating to what is proposed by the plan could include, depending upon the objective of the plan and the circumstances of a particular debtor, details of classes of claims; claims modified or affected under the plan and the treatment to be accorded to each class under the plan; the continuation or rejection of contracts that are not fully executed; the treatment of unexpired leases; measures and arrangements for dealing with the debtor's assets (e.g., transfer, liquidation or retention); the sale or other treatment of encumbered assets; the disclosure and acceptance procedure; the rights of disputed claims to take part in the voting and provisions for

[405] In our recommendations to the Business Community, we pointed out these differences and concluded that these differences did not warrant having separate titles in the bankruptcy law of Ethiopia; see Tilahun and Taddese, supra note 3, at 104 and 108-109.

[406] See id, at 109.

disputed claims to be resolved; arrangements concerning personnel of the debtor; remuneration of management of the debtor; financing implementation of the plan; extension of the maturity date or a change in the interest rate or other term of outstanding security interests; the role to be played by the debtor in the implementation of the plan and identification of those to be responsible for future management of the debtor's business; the settlement of claims and how the amount that creditors will receive will be more than they would have received in liquidation; payment of interest on claims; distribution of all or any part of the assets of the estate among those having an interest in those assets; possible changes to the instrument or organic document constituting the debtor (e.g., changes to by-laws or articles of association) or the capital structure of the debtor or merger or consolidation of the debtor with one or more persons; the basis upon which the business will be able to keep trading and can be successfully reorganized; supervision of the implementation of the plan; and the period of implementation of the plan, including in some cases a statutory maximum period. [407]

Under French law a reorganization plan should include not just a request for adjustments of debt but also matters like prospects for employment, replacement of one or more managers, modifications of share capital, and increase or reduction of capital.[408] Similarly, OHADA Uniform Act requires debtors to include in the plan proposals for reorganization of the debtor's business, such as 'replacement of managers', 'economic layoffs', and commitments by shareholders or partners to increase the capital of the business organization, etc.[409]

Detailed plans are required by these other laws for a reason. Creditors to whom these proposals are presented are more likely to be swayed in the debtor's favor when they see credible proposals on the table. Creditors are less likely to vote for a proposal that simply asks them to adjust debts, while being mum (vague) on other aspects of the business. There might be instances where creditors are willing to go along with simple adjustments of debts (for which composition shall remain an option), but in many instances, creditors will need an assurance that the debtor is in a position to pay the debts in their adjusted state. This is where real reorganization of the

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[407] UNCITRAL, supra note 11, p. 215, para. 19.
[408] French Commercial Code, supra note 35, see Articles L626-1 to L626-4.
[409] OHADA, supra note 33, see Articles 6 and 7.

bankrupt business may be demanded by creditors. Ethiopian bankruptcy law does not prevent debtors from presenting detailed plans for reorganization. But there would have been some credence to the two alternatives in Ethiopian law if one of them (particularly the schemes of arrangement) has provisions resembling reorganization elsewhere.

The provisions of bankruptcy law may be as expansive as can be imagined, but it must be remembered that the content of the reorganization plan is not a matter that is entirely left to bankruptcy laws alone. Other laws may impinge on what can be presented for approval by creditors. To give but one example, the inclusion of the proposal to lay off workers on economic grounds is not just a matter of bankruptcy law but also of labor law. Creditors cannot approve of a plan of reorganization that violates the mandatory provisions of the Labor Proclamation.[410]

Whatever the differences might be between composition and schemes of arrangement, they must offer viable alternatives to bankruptcy. What is in it for a debtor to opt for schemes of arrangement in the first place or later a composition? If the two alternatives to straight bankruptcy (liquidation) are no better, there is no incentive for a debtor to propose any one of them.

The proposal of composition has a number of advantages to commend it. First and foremost, the proposal, if accepted, will be binding on all unsecured creditors (including those who dissented or voted against the proposal) and secured creditors who have participated in the votes thus relinquishing their security.[411] Secondly, the proposal of composition suspends (but does not completely terminate) most of the effects of bankruptcy.[412] Restrictions on debtor's movements are lifted; the debtor will resume full control of his property.[413] However, forfeitures and prohibitions, if any, will remain and the debtor although resuming control of his property will conduct his affairs under the supervision of trustees, commissioner and creditors' committee.[414] Besides, acts transacted during composition may not be invalidated unless there has been fraud on the part

[410] For the interface between bankruptcy law and other laws in this regard, please see UNCITRAL, supra note 11, pp. 215-216, paragraphs 21 and 22.
[411] Secured creditors are not obliged to participate in the votes.
[412] Commercial Code, supra note 4, Article 1090.
[413] Ibid.
[414] Id, Article 1090 (1).

of the creditors[415] - in other words, the bar for suspicion of the acts of the debtor is raised thus giving the debtor greater freedom to transact.

After the confirmation of the composition by the court, the debtor is restored to the management of his property, subject to the now less onerous supervisory controls of the trustees, the commissioner, and the creditors' committee[416]. The supervisory controls are now much attenuated to just ensuring whether the debtor is complying with the detailed instructions contained in the judgment confirming the composition.

The debtor gets to enjoy the positive consequences of the bankruptcy proceedings without having to suffer from the negative ones. A scheme of arrangement suspends the actions of creditors. Creditors may not distrain, acquire a preferred right over the debtor's property or register a mortgage.[417] Prescriptions, preemptions and forfeitures against the debtor are suspended.[418] But most of the negative consequences of bankruptcy do not attach. The debtor who proposes a scheme of arrangement prevents the possibility of losing the management of his property to a trustee.[419] This is incentive enough for debtors to propose the scheme of arrangement rather than face the onerous conditions of a bankruptcy proceeding.

For debtors, a scheme of arrangement presents a more attractive option than a bankruptcy proceeding. But, what about creditors? For creditors, bankruptcy proceedings provide a more secure guarantee and protection than schemes of arrangement - at least this is the case in the immediate aftermath of these proceedings. But all is not lost in the camp of creditors, either. Some of the effects of bankruptcy are replicated in schemes of arrangement. Although the debtor remains in the management of his property, he is subject to supervision of the commissioner and the delegate judge,[420] who may inspect the debtor's books and accounts at any time

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[415] Id, Article 1096.

[416] Id, see Article 1090 (1) together with Article 1088 (1).

[417] Id, see Article 1131(1).

[418] Id, Article 1131(2).

[419] Id, Article 1132.

[420] In a scheme of arrangement, the debtor retains the management of his/her property (one of the perks of a scheme), but the debtor remains under the 'supervision of a commissioner and guidance of a delegate judge'. Unlike bankruptcy proceedings, the procedures for the appointment and other issues like qualifications are not laid down in the provisions dealing with schemes of arrangement. It is not clear if the commissioner in the schemes of arrangement is the same commissioner identified in bankruptcy proceedings. But it appears that the commissioner in schemes of

during the proceedings.[421] Certain acts considered detrimental to the interests of creditors (e.g. gifts and gratuitous acts by the debtor) are not valid against creditors in the schemes of arrangement as well; the only difference being the length of the suspect period is shortened to run from the date the scheme of arrangement is proposed by the debtor.[422] And some acts require the approval of the delegate judge.[423] The delegate judge may not give his approval unless the necessity is clear.[424]

These restrictions apply to the debtor until the scheme is confirmed by court. Even after the scheme is confirmed, however, the debtor will continue to be under some restrictions. For example, the debtor 'may not dispose of or charge his immovable property', encumber his property by pledge or 'set aside any part of his assets otherwise than as required by the nature of his business until he has fully carried out' his duties under the scheme'.[425] The debtor will also continue to be under the supervision of the commissioner.[426] So generally, while the debtor enjoys greater liberty under composition and schemes of arrangement, it must be remembered that his freedom to transact is restricted in both proceedings.[427]

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arrangement has duties similar to that of a trustee in bankruptcy. S/he prepares an inventory of the debtor's estate, checks the list of creditors and debtors and prepares a detailed report on the affairs and conduct of the debtor on the proposed scheme and the guarantees offered to creditors; see Article 1135; compare Article 1135 with Articles 1014 and 1082; the delegate judge in a scheme of arrangement seems to take the position of a commissioner in a bankruptcy proceeding. The delegate judge presides over creditors' meetings in a scheme of arrangement; see Article 1136(1); the commissioner reports to the delegate judge over 'any fact likely to prejudice the creditors'; see Article 1151(2). Apart from these rules, we have no clue whatsoever about from where the commissioner and the delegate judge are selected.

[421] Id, Article 1132.

[422] These acts are compromise, arbitration and assignment not falling within the exercise of the business, mortgages, and pledges; id, see Article 1133.

[423] Id, Article 1133(2).

[424] Id, Article. 1132(2).

[425] Id, Article 1146(1).

[426] Id, Article 1151.

[427] It is perhaps disingenuous to present the rosy aspects of composition and schemes of arrangement and neglect to mention the real hurdles involved in getting either a composition or a scheme of arrangement approved. The two proceedings are filled with more uncertainties than straight bankruptcy proceedings. The debtor is at the mercy of creditors in both proceedings. There is no guarantee that the debtor's proposals will be treated kindly when they are presented for the votes of creditors.

The most important benefit of both composition and schemes of arrangement is they hold out a promise of discharge if they are successfully carried out. The confirmation of the composition is binding upon all creditors save secured creditors who have not participated and post-bankruptcy creditors.[428] Similarly, confirmation of the scheme of arrangement binds 'all creditors prior to the opening of the scheme'.[429] Since discharge is not available under the bankruptcy provisions of Ethiopian law, it is in the best interest of debtors to submit composition or schemes of arrangement plans rather than submit themselves to the harsh consequences of a straight bankruptcy proceeding.

6. Conclusion and Recommendations

Bankruptcy regimes vary in their orientations. Some systems are dubbed creditor friendly while others are dubbed debtor friendly.[430] Some bankruptcy systems set their priorities differently from others. For example, French bankruptcy regime's priorities are described as first saving the enterprise, second preserving jobs and lastly paying creditors.[431] Ethiopian basic codes in general were drafted in a vacuum of overarching public policies. The public policies to be served by the enactment of the codes were if any thing afterthoughts and often came through the speculations of the drafters themselves as to what suited Ethiopia's needs at the time. The first drafter of the Commercial Code acknowledged that he could have prepared five or six laws on bankruptcy (given the options out there) but he settled on the one he produced because 'the conditions of Ethiopia' 'both for the present and the immediate future' demanded a bankruptcy system with 'a theme of severity'.[432] In the choice of paradigms out there, the drafters were making conscious decisions about the direction of bankruptcy laws in Ethiopia. Drafting of bankruptcy law for Ethiopia should be the end product of serious deliberations over the policies and objectives the bankruptcy system should reflect. Once the policies are clearly identified, the details and technicalities can be handled by drafters or drafting commissions. In case there is any doubt over the role and function of

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[428] Commercial Code, supra note 4, see Article 1089(1); it is interesting to note that the confirmation does not affect the creditors' rights against persons jointly and severally liable with the debtor; id, see Article 1089(3).

[429] Id, see Article 1150(1); although the provision just cited says 'all creditors', the scheme, like composition, does not have a binding effect upon secured creditors unless they decided to vote in the scheme; see Article 1140 (2).

[430] Goffman and Michael, supra note 321.

[431] See ibid.

[432] Peter Winship, supra note 23, at 106.

bankruptcy, reference may be made to a growing literature on this subject elsewhere, from which policies appropriate for Ethiopia may be drawn.[433] Some provisions of Ethiopian bankruptcy law may have aged well, but there are some rules or orientations of Ethiopian bankruptcy law which – more than fifty years later – strike us as quaint and archaic. The first drafter of Book V of the Commercial Code acknowledged that he chose 'blameworthiness' to be associated with bankruptcy because that was the weltanschauung of continental legal systems towards bankruptcy at the time.[434] This outlook treated bankruptcy not merely as a simple accident of commercial life but as a blameworthy act, deserving of sanctions against the bankrupt debtor. It is argued in this article that this orientation of Ethiopian bankruptcy law is an orientation whose time has passed and needs to be revisited. The continental legal systems from which Ethiopian bankruptcy law was derived have since then reformed their bankruptcy laws and Ethiopia should follow suit.

Ironically, while the drafters wished to emphasize the punitive aspects of bankruptcy, they appear to have neglected an area which requires punishment– i.e. the apportionment or assignment of punishment to debtors and persons associated with debtors who might have been morally responsible for bringing down bankruptcy upon the business. The Commercial Code, placed along side modern bankruptcy regimes, is striking for its silence on liabilities, disqualifications, prohibitions or personal bankruptcies (whatever we might call them) resulting from moral responsibility for bankruptcy. The modus operandi of the drafting process, which operated on a strict division of labour between civil/commercial matters on the one hand and criminal matters on the other might have contributed to this lacuna in the Commercial Code.[435] There is a need to move away from the presumptuous blameworthiness of the Commercial Code to a regime of assigning punitive consequences to debtors and others that are responsible for the bankruptcy.

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[433] The UNCITRAL Guide cites some nine general objectives of bankruptcy systems: provision of certainty, value maximization, striking a balance between liquidation and reorganization, equitable treatment of similarly situated creditors, timely, efficient and impartial resolution of proceedings, preservation of the bankrupt estate, transparency and predictability, recognition of existing creditors' rights and establishing a framework for cross-border bankruptcy; see UNCITRAL, supra note 11, pp. 10-14, paras. 3-14; see also Elizabeth Warren, *Bankruptcy Policy Making in an Imperfect World,* 92Mich. L. Rev.2 (1993).

[434] See Peter Winship, supra note 23, pp. 100 and 103.

[435] See id at 102.

The first drafter of the Commercial Code, Professor Escarra, designated many rules of Book V of the Commercial Code 'provisional'. For example, Escarra meant Articles 979 and 980, 1055-1080 as provisional articles ultimately to be superseded by the provisions of the Civil Code and the Civil Procedure Code or at least to be re-written in light of the Civil Code and the Civil Procedure Code.[436] There is no evidence that that happened. Escarra also omitted provisions on the effects of bankruptcy on the spouse of the bankrupt because he was uncertain about what the Civil Code would provide for the effects of marriage on the property of the spouses. It is evident that many of the provisions of Ethiopian bankruptcy law were drafted without the benefit of hindsight of the rules of the Ethiopian Civil Code and Ethiopian Civil Procedure Code, among others. It is by no means necessary that the rules of bankruptcy should mirror the rules of the Civil Code or Procedure Code, but this must be a matter of conscious choices rather than random and arbitrary departures or coincidental affinities.

Priority provisions - in particular Article 1110 of the Code - will require some redoing as they do not address cases in which preferred creditors might come into competition with one another. Several Ethiopian laws have since the promulgation of the Commercial Code asserted the priority claims of some creditors (like employees and tax authorities) and these laws perhaps not surprisingly use a very strong language in asserting the priority claims of these creditors. In its current state, Article 1110 of the Commercial Code is indifferent to the strongly-worded priority rights asserted in different laws of Ethiopia. There is reason to believe that even preferred creditors should have ranking among themselves, as can be attested by the new Banking Business Proclamation of 2008. Article 1110 of the Code will need revision along these lines.

The dual organization of the bankruptcy law, with separate title for business organizations, is not helpful at all. There is reason to believe that this form of organization was responsible not only for needless repetition of identical rules, but also for neglect of some rules regarding business organizations. A case in point is the personal effects of bankruptcy upon business organizations. For obvious reasons, the personal effects cannot apply to business organizations as entities, but there is no reason why these cannot take effect upon the representatives of a business organization. Similarly, the rules pertaining to dispossession of the debtor in the event of

[436] Id at 103.

bankruptcy say nothing when the debtor involved is a business organization.

For bankrupt debtors, discharge is the real crown jewel in an otherwise dreary landscape of bankruptcy. But discharge is not really available under Ethiopian bankruptcy law even when the debtor is innocent. The absence of discharge in Ethiopian bankruptcy law may make the bankruptcy system less appealing to debtors. It is important to recognize that traders and businesses fail for any number of reasons, as they succeed for any number of reasons. As the American philosopher Michael Walzer put it, the market does not really recognize desert (see the quote at the beginning of this commentary). Some businesses fail for reasons of their own making and others fail for reasons beyond their control. The extension of discharge to those traders who fail for reasons beyond their control gives them another shot at life by allowing them to start another business with a clean slate. The bankruptcy provisions of the Commercial Code are thus in need of reform in this regard. Whether the conditions for discharge should be stringent or lax is a matter for policy makers to decide.

Ethiopian bankruptcy law offers two alternatives to straight bankruptcy - composition and schemes of arrangements. A close examination of these two schemes has revealed that these two schemes are similar on fundamental matters. They are both at bottom simple debt adjustment schemes. It is argued in this article that while simple adjustment schemes in bankruptcy qualify as 'alternatives' to straight liquidation schemes, it is not necessary to have two schemes for essentially the same end - adjustment of debts. What we need in stead of two simple adjustment schemes is a genuine reorganization scheme, which contemplates the restructuring of the bankrupt business beyond revision of debt payment provisions.

Finally, there is a need to reorient the outlook of Ethiopian bankruptcy system in ways that convey the message that priority is given to rehabilitation or rescuing of the troubled business and liquidation is the last option.[437]

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[437] See our recommendations in this regard, in Tilahun and Taddese, supra note 3, at 111.

The Sale of a Business as a Going Concern under the Ethiopian Commercial Code: A Commentary

Yazachew Belew*

Introduction

The sale of a business as a going concern marks the entry into and exit out of a business world. It is an entry point for the buyer who could be a novice in commerce or even for an accomplished businessperson who wants to expand his investment. It is an exit process for the seller who either quits business for whatever reason or plans to take advantage of the market when the value of his business appreciates. Thus, the rules governing this transaction need to be sufficiently clear and articulate enough for those who are involved in whatever capacity. The sale of a business is regulated mainly by the special rules of the Commercial Code as provided under Title Five and Chapter Three of Book I of the Code. The author submits that neither the abstract notion of business nor the special disciplines of the Code governing its sale have sufficiently seen the full light of the day through judicial pronouncements and academic writings. This problem has become more vivid during the revision process (a learning exercise in which the author has participated, albeit in part, especially in the review of Book I) of the extant Commercial Code. This commentary is, therefore, a modest attempt to explain, and whenever necessary and possible critique the special disciplines of the Commercial Code as they pertain to the sale of business as a going concern.

The commentary is divided into two parts. Part I deals with the notion business as a going concern and its constituent elements, for any juridical act one wishes to execute in relation to a business cannot be fully understood independently of the notion of business and its component parts. Part II deals with the specific rules governing the sale of business focusing on the validity requirements of the contract of sale, the respective rights and obligations of the parties to the contract as well as the creditors' protections.

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PART I: THE NOTION OF BUSINESS AND ITS CONSTITUENT ELEMENTS

Like any piece of property, a business once created[1] can be the object of different legal transactions including, but not limited to, sale. This commentary analyzes the rules which govern the sale of a business. When it does so, it will not discuss the rules which pertain to the sale of separate elements constituting a business which can in their own rights be the object of juridical acts. It discusses only the sale of a business as a single unified entity, most specifically as a 'going concern'.

1. Business as an incorporeal property

That 'business' which the Ethiopian Commercial Code minds about in its Book I in general and extensively under Title V in particular may not be congruent to the 'business' which a person on the street normally conceives of in his/her daily experience with the term. The notion of 'business' as employed in the Ethiopian Commercial Code traces its genesis to the French concept of *fonds de commerce.*[2] The Ethiopian Commercial Code defines 'business', rather put appropriately, the French concept of *fonds de commerce* has been translated into English as 'business' in the Code[3] although a French legal writer has made it clear that *fonds de commerce* 'is virtually untranslatable into English'[4] and that it 'has no counterpart whatsoever in English law.'[5] Even under French law the concept seemed to have undergone some sort of 'evolution' before it finally came out as a legal term of art.[6] It was also asserted that 'there is not any single [legal] text which defines

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[1] A French legal commentator argues that the 'going business exists as soon as its constituent elements are present and the owner has commenced operations. Since this determination is a difficult one to make, it is within the court's discretion to determine on a case-by-case basis when the going business has acquired a real clientele. The determination of the date of creation of a going business is important in the context of a sale of a business as well as renewal of a commercial lease.' See Christopher Joseph Mesnooh, *Law and Business in France: a Guide to French Commercial and Corporate Law*, Kluwer Academic Publishers, 1994), p.163.

[2] See Peter Winship, (trans.), *Background Documents of the Ethiopian Commercial Code of 1960*, (Faculty of Law, Haile Selassie I University, 1974), p. 52.

[3] Ibid, pp.50 and 52. Peter Winship translated the French concept of *fonds de commerce* in the original text of the General Report of Professor Jauffret, the draftsman of Book I of the Commercial Code, into English to mean '*business*'.

[4] Walter Cairns and Robert McKeon, *Introduction to French Law*, (1st ed., Cavendish Publishing Limited, 1995), p.87.

[5] Ibid. 75

[6] See Denis Tallon, 'Civil Law and Commercial Law', *International Encyclopedia of Comparative Law*, Vol.VIII Chapter 2 (1983), p.120. According to this author originally it was used to describe the overall business assets of a small merchant, but later developed as a legal term when tax was introduced upon the transfer of all elements constituting a merchant's business. 'It then developed further of the concern to group together under one institution the various elements used by a merchant to acquire and keep his clientele. All these elements can be considered as a whole valued as such for the purposes of successions, balance sheets, etc., for the object of legal transactions according to special rules (for transfer, hire, pledge,

what is meant by business assets *(fonds de commerce)*, or which rules apply to them... The result is a certain lack of precision both as to the meaning of the concept and the rules relating to it.'[7] It was also reported that the 'legal institution of business assets has not yet been given a completely defined form in French law'[8] as well as in other civilian traditions.[9] Notwithstanding this, the concept of *fonds de commerce* under French law represents *business assets* which 'denote all the movable goods, whether tangible or intangible, which are used by the trader in operating a commercial activity, and which have the purpose of attracting his customers.'[10] This is more or less identical with the concept of business under Article 124 of the Ethiopian Commercial Code which reads '[a] business is an incorporeal movable consisting of all movable property brought together and organized for the purpose of carrying out any of the commercial activities specified in Article 5 [11] this Code.'

Classifying property into different categories and then subjecting them to apparently different legal regimes seems to be the result of society's varying value and attitude towards a certain piece of property. The Ethiopian Civil Code classifies property primarily into the broad categories of movables and immovable,[12] a classification to which the law attaches different and important consequences.[13] The Code also sub-divides the movables into corporeal and incorporeal chattels.[14] Movables can also be further sub-classified as ordinary

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succession upon death, etc) and to be protected as such in their own right. ... Nevertheless, in FRENCH law there is not any single text which defines what is meant by business assets (fonds de commerce) or which rules apply to them but only a serious of scattered provisions. The result is a certain lack of precision both as to the meaning of the concept and the rules relating to it. However, there is general agreement that the business assets are made up of those items of movable property, both tangible and intangible which are assembled in order to meet the needs of a particular clientele. Its content thus varies with the purpose of the business. There is no one essential element although case law states that the clientele or the goodwill which a business enjoys is the essential basis of the concept of business asset.'

[7] Id

[8] Ibid, p.119.

[9] Ibid, p.122

[10] Walter Cairns and Robert McKeon, *supra* note 4, p.85.

[11] Article 5 of the Commercial Code is a long and closed list of activities which are deemed commercial either by nature or scale/size. For its drafting history and recent move see *infra* note 49.

[12] Article 1126 of the Ethiopian Civil Code.

[13]For the analysis of the Ethiopian law on classification of property, see generally Muradu Abdo, "Movables and Immovables under the Civil Code of Ethiopia: A Commentary," Jimma University Law Journal_Vol. 1, No.2 (2008) and Muradu Abdo, "Subsidiary Classification of Goods under Ethiopian Property Law: A Commentary," Mizan Law Review Vo.2 No.1 (2008).

[14] Article 1127 of the Civil Code.

and special.[15] Although the Civil Code neither defines nor slots 'business' expressly to any of its classifications, Article 124 of the Commercial Code has filled this gap first by defining business as an 'incorporeal' and then by subsequently classifying it as a 'movable', for all intangibles are assimilated to movables under the Civil Code.[16] This is also the case under the French system except that the grouping of business assets into intangible movable property is not as a matter of statute but of case law.[17] A striking feature of the concept of business is that it remains an intangible asset in the eyes of the law although many of its constituent elements are tangible assets, equipments and goods.[18]

The other interesting feature of the concept of business is that even if it is classified as a movable property, business is not an ordinary movable property in that the law, when it comes to transactions involving business, assimilates business more or less to an immovable for the rules governing such transactions are different from and stringent than those applicable to ordinary movables.[19] It is aptly observed that business is 'a special type of movable property linked to a particular locality; they therefore be made subject to registration.'[20]

2. Constituent Elements of a Business

Business, itself being an intangible asset without corporeal existence, nevertheless consists of 'movable property brought together and organized'[21] to serve a particular purpose, which obviously is a commercial activity. These movables in which a business is constituted are both incorporeal and corporeal assets as expressly provided for under Articles 127 and 128 of the Commercial Code. The corporeal elements of a business are equipments, goods or merchandizes as stipulated under Article 128-which varies from time to time depending on the nature of the commercial purpose they are destined to serve. Article 127(2) (a-e) has an open-ended list of incorporeal elements forming a business.[22] Included expressly in the list, however, are goodwill, trade name, trade mark, commercial lease right, intellectual property rights, and under sub-

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[15] Article 1186 of the Civil Code

[16] Articles 1128 and 1129 of the Civil Code.

[17] Denis Tallon cited *supra* note 6, p.120.

[18] A cumulative reading of Article 124 and Article 128 of the Ethiopian Commercial Code clearly leads to this conclusion.

[19] For instance transfer of business has to be made in writing, possession does not prove ownership, mortgage as opposed to pledge is the charge on business, and above all business has to be registered

[20] Denis Tallon, *supra* note 6, p.123.

[21] See Article 124 of the Commercial Code.

[22] The Commercial Code under Articles 130-149 treats each of these elements separately. They are also subject to special laws such as patent law, copyright law, trade mark law and other legislations.

article 2(e) 'such special rights as attach to the business itself and not to the trader.' One such special right that attaches to the business is a non-competition clause that protects a buyer of a business against competition from the seller of the business [23](see Part II, 4.1.E below). It is accorded legal protection under Article 159 of the Commercial Code as an element of a business. One can also validly argue that the open-ended list of Article 127(2) (e) captures such matters like administrative authorizations and licensing agreements.

A question may be raised at this juncture as to whether all the incorporeal and corporeal elements of a business are equally important, or if some element are more important, if not indispensable, than the others. As a matter of legal text French law (the official source of the Ethiopian law of business as employed in the Commercial Code[24]) that is said to have a relatively developed system of business asset compared to other civilian jurisdictions [25] makes no distinction between the different elements constituting a business asset. In this regard it was observed that '[t]here is no one essential element although case law states that the clientele or the goodwill which a business enjoys is the essential basis of the concept of business assets.'[26] The French scholar [27] who drafted Book I of the Ethiopian Commercial Code, however, elevated this case-law-borne distinction to a statutory status under Article 127(1) of the Code which reads 'A business consists ***mainly of goodwill***' (emphasis added), hinting some kind of difference in the order of importance as between matters constituting business. Moreover, sub-article 2 of the same provision as well as Article 128 of the Code have also employed the word ***'may'*** in their rendering that some other 'incorporeal and corporeal elements,' distinct from the goodwill, may also form part of a business. If one were to stick to the traditional legal postulate that ***'may'*** represents some thing permissive, he would hold that it is not mandatory for a business to have as its parts the things mentioned under these provisions; that they do not form the essential elements of a business; that they only have a secondary importance compared to 'goodwill'. In other words a business can exist as a unit and juridical entity in the eyes of the law and a trader can also operate it even if the business has lost some or all of its corporeal and incorporeal components so long as it retains its goodwill. A case for the goodwill as the central element of a business can also be made under Article 151(2) of the Code which can be construed to mean that the sale of a goodwill entails the sale of the entire business while the

[23]Article 158 of the Commercial Code.

[24]Peter Winship, *supra* note 2, p.52.

[25] For the comparative analysis of the concept business assets in the civilian jurisdictions, see Denis Tallon, supra at note 12, pp.119-126.

[26]Ibid, p.120.

[27] The draftsman of Book I was Professor Alfred Jauffret of the University of Paris.

sale of other elements separately is not even within the scope of commercial sale let alone to imply the sale of the business as a whole.

3. Business and the Immovable Property Serving as its Premise

In the preceding discussion we have seen a business as an incorporeal movable made up of other tangible and intangible movables. Put plainly, the constituent elements of a business, according to Article 124 of the Commercial Code, are all in all movables. It means that immovable property, by definition, is not part of a business. A person who owns the building where he carries on his own business will not factor his ownership right over the immovable into the equation that determines his business assets.[28] Even chattels which are meant to facilitate the economic exploitation of the building where the owner of that building carries on his business are no longer movables, for they are assimilated to immovables by destination.[29] Leaving immovable property at the outskirt of the notion of business is blamed, at least under the French system, on 'the traditional legal approach under which real property is not a matter for commercial law.'[30] Nevertheless, when a person carries on a business in an immovable which he does not own but which is leased to him, his lease right over that business premise constitutes an element of the business.[31] One may legitimately question the logic of maintaining the tradition of excluding immovable property from the concept of business entity both from the point of view of business reality and/or in view of the practical difficulties that may arise when immovables are excluded from the purview of the concept of business. The tradition has been criticised in France as 'paradoxical because it creates a difference between the merchant who is a tenant of the property where he carries on his business and who is well protected and the merchant who is the owner of that property.'[32] The exclusion of immovable property is further criticized on the ground that 'it can give rise to serious difficulties in case of sale of the business, enforcement of judgments, dissolution of marital property regime, succession, etc., because two different sets of rules apply, one for business assets and the other to the immovables.'[33] If business consists of assets (tangible and intangible) brought together and organized for the purpose of carrying out commercial activity, and if the carrying out of this commercial activity requires a premise-an immovable property-then,

[28]See also Denis Tallon, *supra* note 6, p.121.

[29]Id.

[30]Id.

[31] See Articles 127(2) (c), and 142-147 of the Commercial Code.

[32] Denis Tallon, supra note 12, p.121. In the Ethiopian context, however, it is hardly possible to imagine the case in which a trader who carries on a business in a premise of his ownership is less protected than a trader who carries on business in a leased premise.

[33]Id

what is the logic and reason to consider some of these assets as elements of the business and at the same time refuse to treat other assets which are brought together and organized to carry out that *same business* activity as outside of the business assets? In other words, why does the law have to discriminate between assets brought together and organized for the same purpose, destined to serve the same goal merely because some of the assets are movables and some are immovables?

The implication of excluding immovable property as non-constituent element of a business is that any legal transaction involving the business does not affect that immovable property serving as a premise of that business simply because the immovable premise is not part of the business. For instance, the sale of the business does not automatically mean the sale of the premise as well. Thus unless agreed otherwise, and save the case where the seller was carrying out the business in a leased premise, what the seller of a business has to transfer is the business alone; that the buyer cannot claim to continue operating the business in the same premise, that is, he cannot force the seller to transfer the possession and ownership of the business premise; that he has to relocate his business elsewhere. The Federal High Court in the case of *Urgessa Tadesse* (judgement creditor) *vs. Saida Ali* (judgment debtor)[34], however, took a completely different stance and ordered the judgment debtor to transfer to the judgment creditor not only of the business she sold but also of the business premise on the ground that the premise of a business is an element of the business even though it is an immovable property. The Court reasoned out that goodwill constitutes the main element of a business and is highly associated with the location value of the business premise. And the right of lease over the business premise is an element of the business as per Article 127(2) (c) of the Commercial Code. If the lease right over the premise is an element of the business, the premise itself, by analogy, is an element of that business. The Court further argued that even though the premise in which a business is carried out is an immovable property, since it has become part of the business element [by analogy] it shall be considered as a movable property, as the mere fact that a business is said to be an incorporeal movable property does not exclude its premise from forming part of the business element.[35] The Court

[34] Urgessa Tadesse vs. Saida Ali, (Federal High Court, 2002 E.C., Civil File No.56950), (Unpublished).

[35] In an interview made on November 5, 2010 with Judge Yoseph Aemero, who delivered the opinion of the Court, disclosed that he still believes that immovable property (premise) is not part of a business and sale of a business does not entail the sale of the premise. But Judge Yoseph maintains that the seller's use right over the business premise is part of the business and the seller is duty bound to transfer it to the buyer. And for Judge Yoseph to effect this transfer the seller has to transfer the possession, not the ownership, of the business premise and must also enter into a lease contract with the buyer. Unfortunately neither the original

incredibly introduced a new element of business contrary to the express list of Article 127 of the Commercial Code and the definition of business under Article 124 as a movable property.[36] One may wish to argue that the Court intended, though not clearly articulated, to treat business as a *principal* thing and its premise as an *intrinsic* element thereof. A thing can be an intrinsic element of another thing and thereby loses its own independent existence when[37]: (a) the law has expressly provided to that effect; (b) custom regards a thing as an intrinsic element of another thing; (c) the two things are materially or physically united in such a way that they cannot be separated without destruction or damage. In the case at hand while Article 127 of the Commercial Code does not say that business premise is an element of the business it hosts. And obviously it is hardly possible to imagine a *physical* unity between business and business premise as the former does not have corporeal existence at all.[38] The Court said nothing as to whether there exists a commercial custom in this country that treats a business premise as an intrinsic element of the business. Is it also possible to assume that the Court considered the business premise as an *accessory* of the business in the context of principal-accessory relationship within the meaning of Article 1135 et seq. of the Civil Code?

4. Credits and Debts of the Business

The other things which are associated with business but are excluded from the domain of the business, at least in systems which follow the French model, are credits (accounts receivables) and debts (accounts payables) of the business. Unless agreed otherwise, they remain the personal assets and liabilities of the owner of the business distinct from the business as such.[39] Article 129(1) of the Ethiopian Commercial Code, in relevant part, states: 'A business shall normally not include the assets and debts of the trader…' Conventionally, one can talk of the distinction between the assets which a person acquires and the debts which he contracts in his civil status-like any ordinary member of the community- from those assets acquired and debts contracted in his status as a trader (a professional) and in connection with his profession, i.e., the business he carries

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decree nor the ruling on the execution file contains a single phrase conveying this intention even if this line of argument is not also sound on many counts.

[36] The other way in which the Court's decision becomes controversial is its assimilation of immovable thing into a movable object. The Court's characterization does not fit to the theory of 'movables by anticipation,' for the business premise was not made the subject of any agreement anticipating its demolition sooner or later; rather things are to the contrary.

[37] See Article 1132 of the Civil Code.

[38] Unless one argues that the material unity under Article 1132(2) of the Civil Code should be liberally interpreted to cover economic unity/relations between intangible asset and another tangible object and that the intangible's economic value will considerably be affected by any attempt to separate the two.

[39] Id. See also Christopher Joseph Mesnooh, *supra* note 1, p.164.

out. The first group of assets and debts are no doubt out of the domain of the business. This is because one carries out a business with the goal of making profit and he allocates the necessary capital to achieve this goal, brings together and organizes tangible and intangible assets that constitute the said capital. Save for the exceptions[40] he is compelled to keep accounting records of his business transactions.[41] And a glance at Articles 74 and 75 of the Commercial Code shows that the contents of the balance sheet in terms of assets and liabilities are restricted to those which are directly related to the business and by definition exclude assets and liabilities of the person which are not directly related to his business. Whether the business has made profit or loss will figure out in the final balance sheet to be prepared at the end of the financial year.[42] Based on the outcome the person will make a rational business decision. Normally this decision should be made independently of what he owns and owes personally in matters not related to the business. The equation will not be balanced if he includes his personal assets and liabilities and tries to calculate whether his business is thriving or failing. This, the author thinks, is a matter of simple logic.
The thorny issue, however, is the rule that excludes from the domain of business those assets and debts of the trader which are acquired and contracted by him in the course of carrying out his commercial activities. The civil law system is sharply divided on this subject between those represented by the French model on the one hand, and that of the German model on the other hand, leading to contrasting consequences on the transferability of the credits and the debts to subsequent buyers and on matters of creditor protection schemes (see Part II, Section 5 below). France alluded to its tradition of single patrimony to justify the exclusion. In this regard it is observed that:

> By virtue of the principle of FRENCH law that a person can only have one patrimony (*patrimoine,* i.e. the legal total of his assets and liabilities), the business assets cannot be regarded as a separate entity with its own assets and liabilities (*universalite de droit),* nor as a separate patrimony (*patrimoine d' affectation)* forming a distinct whole separate from the other assets and liabilities of their owner.[43]

Contrary to this French approach to patrimony, the German legal system admits the ideals of multiple estates or plurality of patrimony and was said to adopt the

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[40] Article 64 of the Commercial Code exempts what it calls 'petty traders' from the duty to keep accounts on specific conditions determined by law.
[41] See Articles 63, 65-85 of the Commercial Code.
[42] See Article 67(2) of the Commercial Code.
[43] Denis Tallon, *supra* note 6, p.121.

first modern legislation that attempted to depersonalize obligations[44] which means credits and debts of the business are treated as elements constituting the business.

The Ethiopian law, following its French source, however, recognizes some exceptions in which credits and debts of the business are considered parts of the business itself and hence transferable. The first exception is 'the right to the lease of the premises.'[45] The second exception is non-competition clause.[46] The third exception is outstanding claims of employees of the business.[47] The fourth exception is the right to compensation when the business benefits from compensation insurance.[48] These are the credits and debts which are depersonalized by the law and shall, upon the sale of the business, will transfer to the buyer as constituent elements of the business sold. He can claim these rights and is also held answerable for these liabilities as well.

5. Business and Commercial Activities

The notion of business under Article 124 of the Commercial Code is intrinsically linked to two other important concepts clearly spelt out in that same provision: the concepts of 'commercial activity' and 'trader' without which the notion of business is incomplete. Article 124 defines every business as an incorporeal movable property. But for an incorporeal movable property to constitute a business of the type defined under this provision, it must have been destined to serve a particular purpose i.e. the carrying out of a commercial activity. Obviously every activity is not a commercial activity; it has to be expressly designated as such under Article 5 of the Commercial Code. Article 5 has a long, but closed list of activities it deems commercial (a recent move is towards making the list only indicative, though[49]). While some activities are commercial by nature, others become one when they are commercially operated.

[44] S. A. Bayitch, "Transfer of Business: A Study in Comparative Law," American Journal of Comparative Law, Vol. 6, No.2/3(Spring-Summer 1957), p. 286.

[45] See Article 129(1) second limb of the Commercial Code.

[46] See Article 129(2) cum Articles 158 and 159 of the Commercial Code.

[47] See Article 23(2) of the Labor Proclamation No. 377/2003 that governs the employment relation of the workers of the business and the employer operating the business. See also Article 129(2) of the Commercial Code cum Article 2587 of the Civil Code.

[48] See Article 673 of the Commercial Code.

[49] For the drafting history of Article 5 see Peter Winship, *supra* note 2, p.50. Making the list under Article 5 both long and closed was the deliberate policy decision of the draftsperson to avoid problems of interpretation-administrative as well as judicial-as to what constitutes a commercial activity, and hence falls within the scope of the Commercial Code. However, it has been recommended that 'the list should only be taken as indicative and not exhaustive in the face of an expanding economic transformation that is taking place in the country as opposed to the time of the promulgation of the Commercial Code.' See Tilahun Teshome and

6. Business and Traders

The other important concept with which the notion of business is inseparably associated is the concept of traders, which refers to the owners of the business. The analysis of this concept is not the central objective of this commentary. But as this work is about the sale of a business, it requires not only defining the object of the transaction as has already been done above, but also identifying the owner/seller of the object itself. The latter is important at least in two respects. Firstly, it helps us determine whether a person has a title to transfer as normally sale should result in transfer of ownership from the seller to the buyer because only traders can own and operate a business under Ethiopian law.[50] Secondly, it might throw some light on the concept of business itself and further our understanding of this abstract notion.

Traders under the chapeau of Article 5 of the Commercial Code are defined as persons who professionally and for gain carry on any of the activities listed under its sub-articles (1-21) as acts of commerce.[51] These persons can be physical or juridical. For a person to acquire the status of a trader three cumulative conditions must be fulfilled. First, the person must engage in an activity the law deems commercial as indicated above under sub-section 5. Secondly, the person must carry on that activity professionally, which means the engagement in the activity must be habitual, or as a matter of course; it must not be a onetime affair so to say. Thirdly, the engagement has to be for gain,[52] i.e. it has to be profit-driven as a matter of conventional wisdom.

Tadesse Lencho (eds.),'Position of the Business Community on the Revision of the Commercial Code of Ethiopia,' *PSD Hub Publication Series* No.8, (Addis Ababa Chamber of Commerce and Sectoral Association, 2008), p.9. The chapeau of Article 5 of the Draft Revised Version of the Commercial Code which reads: 'Any person who, as his regular profession and for gain, carries on any production and service activities is a trader. In particular:..' and goes on listing the activities has already made the list of commercial activities indicative leaving it open-ended employing the phrase 'in particular' which can be taken in that context to mean not limited to the listed indicated.

[50] Article 5 of the Commercial Code.

[51] The new Commercial Registration and Licensing Proclamation No.686/2010 like its predecessor Proclamation No. 67/97 employed the phrase 'business person' instead of the word 'trader' without, however, introducing a new definitional element to the notion of trader except that it indicated the possibility for an activity to be designated by law as an act of commerce though not originally listed under Article 5 of the Commercial Code. It rather addressed the concern that the list of Article 5 should not be exhaustive.

[52] In the context of reviewing Article 5 of the Commercial Code a member of the reviewing team emphatically argued that the 'gain' as employed in this Article should not be limited to the narrow accounting concept of profit, that it should be understood broadly to include any economic gain.

Freedom of trade, subject to such legal restrictions and prohibitions, is expressly recognized and protected under the Commercial Code in that every person has the right to carry on any trade of his choosing.[53] This is also recognised under the Federal Constitution.[54] There are, however, groups who do not enjoy this freedom of carrying on trade. These include minors and the incapable majors.[55] Article 25(1) of the Commercial Code also prohibits civil associations (NGOs) from carrying on any trade the violation of which leads to their demise as provided under sub-2 of the same provision. The recent Charities and Societies Law has mitigated this harsh position of the Code, though, without still considering them as traders.[56] Obviously, they are not considered as traders even if these activities are listed as acts of commerce under Article 5 of the Commercial Code.

In some jurisdictions such as France and Franco-phone African nations, the so-called liberal professionals such as lawyers, accountants, physicians, architects, etc as well as civil servants and employees of public bodies and those of state-owned enterprises are not allowed to engage in trade activities as a matter of legal prohibition.[57] The Ethiopian Commercial Code does not expressly exclude these groups from its own domain as the law of traders and acts of commerce. It, in general terms, states the possibility of restrictions and prohibitions on the freedom to carry on trade, but has chosen to leave the details for other (administrative) laws to provide. No specific law, as far as this author knows, is out there expressly prohibiting this group of professionals from engaging in trade activities. Nevertheless, as the list of commercial activities under Article 5 is an exhaustive one and the so-called liberal professions are no where in the list, those who engage in these professions are therefore indirectly prohibited from acquiring the status of traders. They are excluded by definition although the recent move seems to commercialize them as proposed under Article 5 of the

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[53] See Articles 22 and 23 of the Commercial Code.

[54] See Article 41(2) of the Ethiopian Constitution which reads: 'Every Ethiopian has the right to choose his or her means of livelihood, occupation and profession.'

[55] See Article 11(1) of the Commercial Code.

[56]See Article 103(1,2&4) of the Charities and Soceities Proclamation No.621/2009.Upon the written approval of the regulating body they are allowed to engage in income generating activities the proceeds of which should not be distributed to members or beneficiaries but used only to advance the cause for which they are established. They are also required to keep a separate account for these activities. However, it is not quite clear if the income generating activity in which a non-profit making association is allowed to engage in as per this law should be one that is incidental to its core service/activity, or it can be anything else so long as its proceeds can be used to finance its service. Article 103(1) of this Proclamation refers to 'activities ...incidental to the *achievement* of their purpose' (emphasis added).

[57] Boris Martor, Nanette Pilkington, Savod S. Sellers and Sebastien Thouvenot, *Business Law in Africa: OHADA and the Harmonization Process*, Kogan Page Ltd., London, 2002), pp.31-32.

draft version of the Commercial Code prepared by the Ministry of Justice which listed 'any consultancy service' as an act of commerce. Although the practice of the so-called liberal professions does not constitute a trade activity under Article 5 of the Commercial Code, this should not be taken to mean that the professionals cannot operate a side business listed under the same provision and thereby acquire the status of traders.

The fact that the concepts of 'business' and 'trader' are inseparably intertwined in that one does not exist independently of the other should not, however, overshadow the clear distinction between the two. Business by definition is a property, albeit a special type of property which does not have a corporeal existence, an abstract notion which exists only as a legal fiction yet assimilated to the class of movables for purposes of legal transactions. As such business is the object of rights and obligations. Trader on the other hand is a person under the law, the subject of rights and obligations-the owner of a property called business. Of course, the law attaches important legal consequences to the status of a trader as opposed to other civilians engaged in other activities. Firstly, traders are required to register in the commercial register[58]; consequently they also need to have trade names.[59] Secondly, they are bound to keep books of accounts[60] save for the 'petty traders.'[61] Thirdly, only traders can be declared bankrupt under Ethiopian law.[62]

PART II: THE SALE OF A BUSINESS

Although the autonomy of commercial law is well asserted in Ethiopia, i.e. the country has a Commercial Code separately from the Civil Code to regulate traders and commercial transactions, there is, however, no distinction between civil sale and commercial sale in that the same set of general rules of the Civil Code are applicable for any type of sale. But when it comes to the sale of a business the bulk of the rules are legislated in the Commercial Code Articles 151-170. These are special rules for a special type of incorporeal movable property called business. These special rules do not, however, necessarily obviate the relevance of the Civil Code's principles on contracts in general nor its specific stipulations on matters of sale contract. Article 1 of the Commercial Code has already reserved enough room for the application of the principles of the Civil Code on matters of the status and activities of traders. Moreover, Article 150 of the Commercial Code has called out specifically for Articles 2266-2367 of the

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[58] See Article 100(1) of the Commercial Code and Article 6(1) of the Commercial Registration and Licensing Proclamation No.686/2010.

[59] See Article 135 *et seq* of the Commercial Code.

[60] See Article 63(1) of the Commercial Code.

[61] See Article 64 of the Commercial Code.

[62] See Article 968(1) of the Commercial Code.

Civil Code dealing with contracts of sale to apply in the special circumstances of the sale of a business. Thus, we have at least two sets of laws governing the sale of a business in Ethiopia: the civil law and the commercial law.[63]

1. What Constitutes the Sale of a Business under the Commercial Code?

In a bid to delineate the scope of application of the special rules on the sale of a business, Article 151(1) of the Commercial Code has outlined the contours in such a general way that any sale, any assignment, and any distribution in exchange for payment are all subject to the disciplines of the Commercial Code dealing with sale of a business, even when these transactions are concluded in a disguised form, or whether they relate only to a branch or the goodwill of the business alone. The distinction between individual elements of a business as opposed to the business itself-taken as a juridical entity, as a unit, as a whole-with its implications for legal transactions involving each group is also reflected under Article 151(2). Pursuant to this provision the sale of individual part of a business, whether that element is tangible or intangible is, as a matter of rule, not subject to the disciplines of the Commercial Code; the sale of all or any of the individual elements of a business does not imply the sale of the business as an entity; that the sale of an element of a business is governed rather by a special laws, if any, relating to that specific property.

Nevertheless, Article 151(2) admits two exceptional cases where the sale of an element of a business is considered as the sale of the business entity thereby calling for the application of the disciplines governing the sale of business under the Commercial Code. The first case is when the sale relates to the goodwill of the business. This is precisely because business consists mainly of goodwill as stated under Article 127(1) of the Commercial Code. One cannot sell a business separating it from its goodwill nor can he sell the goodwill of a business without at the same time selling the business. The two are inseparably intertwined for purpose of legal transaction. The second exceptional case is where the apparent

[63] The application of the civil law takes two forms: on matters not specifically provided under the commercial law, its application is automatic and independent; on matters expressly covered by the rules of commercial law, its application is both concurrent and complementary, but it should not offend the special norms of the commercial law. For instance, on matters such as consent and contractual capacity as well as object of the contract of sale a business it is the general rules of the Civil Code that apply automatically and independently of the sales provisions of the Commercial Code as the latter are silent on these subjects. Whereas, on issues such as formality requirements and the respective rights and obligations of the seller and the buyer including creditors' protection which are specifically covered by the Commercial Code the general principles of the Civil Code on sale contract will be resorted to basically where the former does not exhaustively address them leaving a lacunae to be filled in by the latter.

sale of an individual element of a business entails or conceals the real underlying sale of the business entity or its goodwill. This is intended to catch disguised sale which the parties might not want to divulge. But how does the sale of an element of a business entail or conceal the sale of the whole business or its goodwill? What does concealment constitute? For instance, Article 139(1) of the Commercial Code provides that trade name, which is one of the elements of business per Article 127(2) (a), may not be assigned except together with the business it designates. The question is what will be the legal effect of assigning a trade name without the business? Is the assignment null and void or is it to be considered as an entailment or a concealment (whichever is the case for both have the same consequence) of the assignment of the business that automatically triggers the rules of the sale of a business by operation of Article 152(2)?

In the preceding discussion we have said that the sale of the goodwill of a business, which is only one of the elements of a business, albeit the major one, entails the sale of the business. And the sale of a business normally means the sale of all elements of that business, tangible and intangible assets included, unless the parties have agreed to exclude some elements save for the goodwill.[64] But does the sale of the goodwill of a business then necessarily entail the sale of all or some of the elements of that business in the absence of agreement (express or implied) to that effect? For example, can the buyer ask the seller to transfer other assets, say intellectual property rights forming part of the business, in addition to the goodwill sold where the contract is silent on this matter? The fact that the goodwill of a business can be the object of a sale contract tells us at least two things. Firstly, as an element of a business and also as any other piece of property it has an economic value capable of being priced (no matter how difficult the pricing might be) because pursuant to Article 2266 of the Civil Code one cannot talk of a valid sale contract without a price expressible in money. Secondly, it is capable of being priced independently of or separately from other elements of the business because no exactly two elements of a business listed under Articles 127 and 128 are identical-each is capable of being priced independently of the other and also sellable separately from the others. Else Article 151(2) would not have thought of excluding the sale of each element taken separately as not falling under the rules of the Code governing the sale of business. According to Article 130 of the Commercial Code goodwill is the value that results from the creation and operation of the business and highly attached to the customer base of the business. It is the economic value of the reputation of the business. It is defined as the additional value of the business over its other

[64] See Article 155(2) of the Commercial Code; incidentally it is good to note that this provision is out of place. As it deals with the scope of sale of a business, it ought to have been treated somewhere in relation to Article 151.

assets.[65] Thus, if business is composed of different elements, and if each of these different elements is capable of pricing and selling independently of the other element, it follows that the sale of the goodwill of a business does not, unless stipulated otherwise by the parties, necessarily entail the sale of other elements[66] of the same business.

2. Formality Requirements

It is an axiom that contracts can be validly concluded orally or even by conduct without the need for any special form except where either the applicable law or the parties themselves has expressly stipulated that the contract has to comply with certain form.[67] If there is a legal or contractual stipulation for a special form, it has to be observed as it affects the validity of the contract. Failure to comply with the special formality required by law or by the parties renders the contract a mere draft or incomplete that does not have any binding force on the parties.[68]

Article 152 of the Commercial Code explicitly requires a special form for the validity of the sale of a business in that it 'shall be null and void unless evidenced in writing.' The word 'evidenced' in this provision sounds a bit misleading because it could also be taken to mean that if the existence of the contract is disputed, it has to be proved by document, and this document may not necessarily be the deed that created the contract but any other document such as invoices, correspondences, etc so long as it proves that the underlying transaction is the sale of a business. This reduces the whole issue to that of evidentiary or probative value rather than a validity case. But the reading of Article 153 which provides for the contents of the contract of sale of business easily establishes the case for validity requirement. Further more, through Article 1 of the Commercial Code which allows the application of the Civil Code rules where they are not inconsistent with the special rules of the Commercial Code, one can bring in to the sale of a business additional validity requirements of Article 1727 of the Civil Code that the written contract for the sale of business must also be reduced to a special document signed by the seller and the buyer and attested by two capable witnesses. The contract of sale of a business must

[65]Denis Tallon, *supra* note 6.

[66] Whether this equally holds true for a trade name is controversial although Article 139(2) of the Commercial Code seems to suggest to this effect by prohibiting the buyer from using the prior trade name unless he adds a prefix that indicates he is not the one who first established the business! However, the possibility of selling and transferring the goodwill of a business without at the same time transferring the trade name which designates the very business-that in turn consists mainly of the goodwill-sounds logically absurd unless it can be said that for the buyer to benefit from the goodwill of the business he bought he does not necessarily have to retain and use the prior trade name by limiting the application of Article 139(2) to cases where the seller was using his family or surname as a trade name.

[67] See Article 1719 of the Civil Code.

[68] See Articles 1720(1) and 1726 of the Civil Code.

also contain certain particulars and it must also be published, but not as matters of validity requirements as we shall see below.

4. Obligations of the Seller and the Buyer

This Section discusses the major legal and contractual obligations of the seller and the buyer focusing on matters covered by the Commercial Code and related issues which the Code does not explicitly address but which warrant special attention due to the peculiar nature of business as an intangible asset.

4.1. The Obligations of the Seller

A. Disclosure Obligation

A contract for the sale of business is not only required to be made in writing but it shall also specify the following information:[69]

- Turnover and profits during the last three years of operation, or since its creation or acquisition if this took place less than three years before date of sale,
- Where the business is carried on in a premise let out for hire, date and duration of the lease including the name and address of the lessor, and
- The mortgage,[70] if any, on the business.

The question is whether the requirement to include these particulars in the sale contact is of a validity issue. It only constitutes disclosure obligation of the seller as these particulars are supposed to be within his/her knowledge. It does not seem to affect the validity of the sale contract even if it is not complied with although the law uses a mandatory tone to state the requirement. It can only give the buyer the right to seek, within one year from date of contract, judicial cancellation of the contract or the corresponding reduction in the purchase price upon proof of injury arising from the failure to disclose the said particulars or the inaccurate representation made in relation to them.[71] Accordingly, once the sale contract is validly concluded the buyer cannot take any unilateral action on account of the omission or inaccuracy of the above particulars. Only judicial

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[69] See Article 153 of the Commercial Code. Obviously these are the minimum facts that the sale contract carries. The name and addresses of the parties, the description of the business sold including its location and whether the sale includes all of the elements of the business or whether some elements are excluded, the agreed price, time and place of payment, etc are all vital particulars which the parties will have to provide for in their agreement. If they fail to do so, some of the missing particulars could easily be filled by the law itself, making the contract as complete as it can be. But there are also gaps which the law may not be able to fill on behalf of the parties. In such instances the contract becomes null and void or inoperative.

[70]As mortgage may not be the only encumbrance on the business, this provision should be interpreted widely to cover any third party claim over the business which down the road can be set up against the buyer leading to his dispossession or disturbance of peaceful enjoyment of the business he bought. For the history of how the term 'mortgage' is used in relation to business, see *infra* note 129.

[71] See Article 155 of the Commercial Code. Sub-articles 1&2 of this provision should be lumped together to avoid repetition.

remedy is available and the court has the discretion either to order the cancellation of the contract or the reduction of the purchase price.[72] Both remedies have completely different effects. When the contract is cancelled the seller and the buyer will, as far as possible, be reinstated back to the economic position they would have held had it not been for the sale contract and acts done with a view to discharging one's obligation under the contract produce no legal effect.[73] Whereas, in the case of reduction of the purchase price the contract keeps on producing its legal effects as between the parties (and even upon third parties affected) but the buyer will simply not bound to pay full price; the price will be reduced at least in proportion to the amount of damage he sustains because of the omitted or the inaccurately described particular pertaining to the commercial operations of the business, the existence of lease on premise and third party encumbrance on the business.

How does the judge, then, make a rational choice between ordering the cancellation of the contract one on the one hand, and ordering the reduction in the purchase price on the other hand especially when the buyer files suit primarily for cancellation of the sale contract? In other words, what principles guide the judge in the exercise of his discretion on this specific issue? One can hardly find any clue from Article 154 of the Commercial Code. All it talks about is the 'opinion' of the court measuring the injury sustained by the buyer due to the seller's default. But it can be argued that the primary intention of parties to any valid contract is to perform their obligations due under that contract, not to withdraw from their obligations. Contracts are entered into primarily for performance, not for cancellation. So, the judge has to give precedence to ordering reduction of the purchase price to cancelling the contract. In jurisdictions with comparable laws as in Ethiopia "cancellation is possible if it can be shown that the purchaser's rights are affected to such an extent that he would not have entered into the agreement if he had been aware of the true circumstances."[74] Nevertheless, the threshold of injury that leads to reduction in the amount of the purchase price, or the cancellation is still not an easy task to determine.

B. Duty to Transfer Possession

In any contract of sale the seller has the duty to transfer both the possession and the ownership of the thing sold. Article 155(1) of the Commercial Code provides

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[72] Under the French Commercial Code Article L141-3 2nd§ "Intermediaries, drafters of the contract and their agents shall be jointly and severally liable with the seller if they are aware of the inaccuracy of the information provided."

[73] See Article 1815(1) & (2) of the Ethiopian Civil Code.

[74] Boris Martor, Nanette Pilkington, David S. Sellers and Sebastien Thouvenot, *supra* note 57, p.46, note 86.

for seller's duty to 'hand over' the business he sold to the buyer. But it is not clear whether the term 'hand over" as employed here refers only to transfer of possession or it does also include transfer of ownership as the Commercial Code does not use both terms explicitly nor does it expressly provide for rules governing transfer of ownership separately. It simply contains some specific rules on the mode of the 'hand over' or at least rules on what is to be handed over. Perhaps, recourse to the gap filling provisions of the Civil Code could help resolve the matter. Pursuant to Article 1143 of the Civil Code delivery of the thing sold effects transfer of possession. Under Article 2274 of the same Code delivery is the 'handing over of the thing and its accessories.' Thus one would surmise that Article 155 of the Commercial Code was referring to seller's obligation to transfer possession of the business sold when it used the phrase 'duty to hand over' even if one could hardly rule out categorically its application to some issues of transfer of ownership.

The assertion that Article 155 of the Commercial Code provides for transfer of possession, however, would pit us against another difficult issue in the law of property: whether possession applies to intangible assets. Ethiopian law defines business as an incorporeal movable property; can we then talk of possession of an incorporeal asset which is beyond the reach of the natural senses of human beings? Is it possible to talk of the delivery and transfer of possession of something intangible? How is it possible to effect delivery of intangible assets? The answers to these questions depend arguably on the way we define possession. Article 1140 of the Ethiopian Civil Code defines possession as 'the actual control which a person exercises over a thing.' The issue is whether this control extends to intangible assets, business included. Muradu Abdo has the following to say supporting the view that possession applies to intangibles under Ethiopian law:[75]

> ...the concept of possession in Ethiopia covers both tangible and intangible things. Under the [Civil] Code, what can be the object of property rights can be the object of possession. We say Ethiopian law of possession applies to both corporeal and incorporeal goods because Article 1140 uses the term ``thing`` which must be seen in light of Article 1126, which should be construed to cover incorporeal things. *Hence*, under the Code, the scope of the subject matter of possession extends to tangible things and intangible things. The intangible things over which control is established may or may not have connection with material things.

[75] Muradu Abdo, *A Text-Book of the Property Law of Ethiopia* (unpublished, on file with author), pp.113-114.

Once the case for the application of the law of possession for business is made the next question will be the mode of transferring possession of this intangible asset. How would the seller transfer the *actual control* of the business as envisaged under Article 1140 of the Civil Code? Article 155(1) of the Commercial Code obliges the seller to handover the business to the buyer. Sub-article 2 of this provision has laid down the principle that "unless otherwise agreed the sale of a business implies the sale of all the constituent parts of such business." Thus, the seller is expected to transfer the possession of all the tangible and the intangible assets forming the business except those excluded by the agreement of the parties (which certainly does not include the goodwill of the business[76]). If the sale of a business implies the sale of all its component parts, it follows that the seller has to transfer the possession of each of these component parts and that the transfer of possession of the business becomes complete when all these elements are put under the *actual control* of the buyer. And the transfer of possession of each component part has to be carried out *individually* unless the transfer of one element is deemed to entail the transfer of other constituent elements which is not the case, though. This is because in the first place there is no express provision of the law to that effect. Secondly, no exactly two elements of a business are identical to warrant the transfer of one means necessarily the transfer of the other as well. Unfortunately, however, the Commercial Code rules dealing with the handing over of business are sketchy. Only goodwill, patent and copyrights are addressed, the latter two merely tangentially. Other elements constituting the business are apparently left unattended by the Commercial Code although one can argue that the gap might be filled by special laws dealing with these elements of business.

Transferring the tangible elements can easily be done, depending upon the nature and the size of the business, by taking inventory of the assets, checking and cross-checking of what are or are not available and finally handing over the items actually or constructively [77] whenever this is possible.

Article 155(3) provides for mode of transferring goodwill: 'The seller shall enable the buyer to take over the goodwill by handing to him all necessary documents and information.' This provision in a way tells us the location of goodwill, that is, in certain *documents*. Goodwill is the quality of a business to attract and retain customers; it is the clientele base of the business that arises from the creation and operation of the business, and its reputation in the minds and heats of customers. What are these *documents*, then, the transfers of which entail the handing over of the goodwill of a business? Surprisingly enough, they are not books and

[76] See Articles 127(1) & 151(2) of the Ethiopian Commercial Code.
[77] See Article 1145 of the Ethiopian Civil Code.

accounts as well as commercial correspondences on record prior to the date of sale. The seller is not even required to give these documents to the buyer at all; the latter has the right only to inspect the documents for a period of two years from date of purchase.[78] If goodwill is all about the clientele of the business, these documents must be related to the customers of the business, documents which contain, for example, the lists of customers, the outstanding orders of customers, suppliers, etc.

As we have seen in Part I above, immovable property does not make an element of a business. So, if the seller of a business owns the business premise, in the absence of otherwise agreement the buyer has to move the business out of that premise and relocate it elsewhere. But if the seller carries on the business in a leased premise, since the right to the lease of that premise constitutes an element of the business[79] it shall transfer to the buyer by operation of the law as a protection to commercial lease. And any agreement between the lessor and the lessee preventing the latter from assigning this right or from sub-letting the premise to the buyer of his business shall be of no effect.[80]

As discussed above handing over of the business sold involves dealing with each element of the business *individually*. The law, however, treats business as a distinct property, as a unit, a whole, an entity with juridical status. Thus, can we then talk of the transfer of possession of business as such, i.e., as a unit, a whole, entity without dismembering it into its constituent elements i.e. without talking about the 'summation' of the transfer of all individual possessions of each element as finally establishing the totality of transfer of possession of the business? Furthermore, a question may even validly be asked whether transfer of possession of the business is said to be complete at the conclusion of the transfer of each element of that business. In other words, does the transfer of all elements of the business necessarily mean that the buyer is in full possession of the business, i.e. in the *actual control* of the thing as that term is used in the Civil Code? Can we say that the buyer is in that *actual control* merely because the handing over of all the constitutive elements of the business is complete? When do we say that the buyer is in the *actual control* of the business? To answer these questions one must first understand the concept of *actual control* itself. The word *control* is not defined under the Civil Code, nor is it a term of art. In this situation we may accord such word its ordinary meaning.[81] The word *control* has multiple meanings but the definition that is most proximate to our purpose is the one that

[78] See Articles 156(2) & 157 of the Ethiopian Commercial Code.
[79] See Article 127(2) (c) of the Ethiopian Commercial Code.
[80] See Article 145(1) of the Ethiopian Commercial Code.
[81] Yule Kim, 'Statutory Interpretation: General Principles and Recent Trends,' available at http://assets.opencrs.com/rpts/97-589_20080831.pdf last accessed on August 7, 2010.

relates to management. It means to manage, to exercise power or authority over something such as a business or nation, or it refers to the ability or authority to manage or direct something.[82] The *control* under Article 1140 of the Civil Code must also be *actual* meaning real and effective. The question now is what it means to be in an *actual control* of a business? Definitely, it does not mean the physical control over the business for business is an intangible asset beyond the reach of the natural senses of human beings. It should rather be understood to mean the exercise of real and effective power and authority over the management and administration of the day-to-day affairs of the business. In short it means effective transfer of management of the business entity. In the context of sale of a business transfer of possession should include not only the handing over of tangible and intangible assets constituting the business but also putting the buyer in a position where he can effectively assert his authority over the administration/management of the business including hiring and firing of workers, receiving and executing customer orders, placing new orders to suppliers, making and receiving payments. This can be made possible though a number of ways such as allowing the buyer to take over the business premise including the seat of the management plus all the necessary documents that relate to the administration of the business. This author submits that the buyer who is not able to exert such powers in relation to the business he bought cannot be said to be in the *actual control* of the business which constitutes possession under Ethiopian law.

C. Duty to Transfer Ownership

The Commercial Code does not directly address the seller's duty to transfer the ownership of the business sold. Thus, the bulk of the rules governing issues of transfer of ownership are those principles of the Civil Code which pertain to sales in general[83] although the application of other relevant laws cannot also be sidestepped.

Pursuant to Article 2273(2) of the Civil Code the seller of a business shall transfer an unassailable ownership right,[84] meaning a right which third parties cannot easily controvert or question. It goes without saying that the seller must be the owner of the business sold in order for him to transfer an ownership right which is not assailable. The Latin maxim *nemo dat quod non habet*-that no one can

[82] See Encarta Dictionaries.

[83] See Articles 1 and 150 of the Commercial Code referring respectively to the general and special provisions (Article 2266-2367) of the Civil Code on matters not covered by the Commercial Code and/or so long as they are not inconsistent with the latter.

[84] See Article 2281 of the Ethiopian Civil Code.

transfer a better title in property than he himself has-[85] is well acknowledged under Ethiopian law.[86] This principle which protects the true owner admits certain exception that secures commercial transactions when the buyer has acted in good faith as clearly specified under Article 1161 of the Ethiopian Civil Code- an exception which does not benefit the buyer of a business for two reasons. Firstly, business is not an ordinary corporeal chattel to fall under Article 1161. Secondly, even if it could be argued to cover business, the buyer of a business cannot be presumed to have acted in good faith believing that the seller was the true owner of that business as a person who is in possession of a business cannot be presumed to be the owner of the business unlike the case for ordinary movables where possession is equivalent to ownership.[87] Business is the property of the trader as it is only traders who are allowed to carry on commercial activities.[88] It follows, then, that the seller of a business normally is trader.[89] As it is a must for any trader who operates a business in Ethiopia to register in the commercial register which is open for public access and inspection,[90] whosoever holds himself out as a trader has to show his certificate of registration that raises the presumption that he is a trader[91] and subsequently that he is the owner of the business designated therein. In other words ownership of a business is proved by the certificate of registration in the commercial register. The Commercial Code under Article 120(2) has made it clear that third parties are presumed to know entries in the commercial register and that they are not permitted to adduce any evidence to rebut this presumption of knowledge of the facts entered in the commercial register. The import of this provision is that any person who wants to buy a business has to first consult the commercial register to see whether the seller is the trader who owns and carries on that business. If he fails to do so and happens to deal with someone who does not have title in the business, he cannot, within the meaning of Article 1162(1&2) of the Civil Code, be considered to have acted in good faith believing that he is contracting with a person entitled to transfer the business because there is contrary evidence in the commercial

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[85] Trayner's Latin Maxims(4th ed., Universal Law Publishing, Indian Economy Print, 2005), p.375.

[86] See, for instance, Articles 2282 and 2884 of the Code where a buyer risks dispossession by the true owner.

[87] See Articles 1186(1) and 1193(1) of the Ethiopian Civil Code.

[88] For the interdependence and relationship between business, commercial activities and traders see *infra* Part I of this Commentary.

[89] A non-trader may become the owner of a business as an heir or as a donee. If this person is not allowed to carry on trade under the law, it seems that he has no option than selling or leasing the business.

[90] See Article 100 of the Commercial Code and Article 6(1) of the Commercial Registration and Business Licensing Proclamation No.686/2010.

[91] See Article 117(1) of the Commercial Code.

register. It is rightly argued that the "publicity [in the commercial register] has destroyed any claim of good faith on the part of the buyer."[92]

In conclusion one can safely say that in Ethiopia you can validly buy business only from its lawful owner and there is no way that you will get protection when you buy it from someone without title to the business. The law protects property ownership in business. This should not, however, be taken to mean that the law does not protect the security of commercial transactions in business when it denies protection to good faith purchasers. The institution of registration of traders and their business in the commercial register itself offers ample protection to third parties as the register contains important particulars about the business and its ownership. The register is open for inspection by interested persons. They are warned to check out the commercial register in advance; if they fail to do so, they do it at their own peril.

In the foregoing paragraphs we have seen that it is the owner alone who can transfer an unassailable ownership right in business. We have also seen that transfer of possession does not cause the transfer of ownership of the business sold. So, what is that which causes the transfer of ownership of the business sold, then? In other words, when is that a title in business is said to have been transferred from the seller to the buyer? The following pages will address this issue.

Article 2281 of the Civil Code states that the 'seller shall take the steps necessary for transferring to the buyer unassailable right over the thing.' What are the steps currently required by law to transfer ownership of the business from the seller to the buyer? Any interested investor can buy a business for sale, but to carry on the commercial activity involved in that particular business in his own name the buyer must always have to be a trader himself for whom registration is mandatorily required.[93]Thus, the buyer of a business has to get that business registered in his own name as a trader and new owner thereof. This requires cancellation of registration of the former trader i.e. the seller as aptly stated under Article 102 of the Commercial Code. It is the seller's duty to facilitate his own deregistration from the commercial register so that the buyer will step in. He has to apply for deregistration at the latest within two months from the date of sale or from date of his ceasing to carry on trade in his own name which ever

[92] Muradu Abdo, 'Subsidiary Classification of Goods under Ethiopian Property Law: A Commentary,' *Mizan Law Review*, Vol.2, No.1 (2008), p.83.

[93] See Article 100 of the Ethiopian Commercial Code and Article 6(1) of Proclamation No. 686/2010. The buyer must also fulfill the legal requirements for carrying on the trade in respect of which he seeks registration. See Article 97(1) of the Commercial Code.

is earlier.[94] It is when all these requirements are fulfilled that the transfer of title from the seller to the buyer will be officiated by cancelling the name of the former and entering that of the latter.

Moreover, pursuant to Article 41(2) of the Commercial Registration and Business Licensing Proclamation No.686/2010 the buyer shall at his own expense cause the publication, in advance of the transfer of ownership, of the notice of sale in a newspaper. This law has not provided for the details of the notice to be published nor has it expressly referred to relevant provisions of other laws, such as Articles 164-170 the Commercial Code if it involves sale. It does not, for example, provide for the purpose of publication, the particulars to be published, the newspaper in which the publication appears and the place where and the time within which the targets of the notice should react to it, etc. In Addis Ababa, for instance, the publication appears in the daily *Addis Zemen* in which buyers call upon third parties in general requesting them to appear before the sub-city's [where the business is located] office of trade and industry within 30 days of the publication of the notice should they have objections to the sale, or else title to the business and/or the license thereof shall be transferred to the buyers.[95]

In concluding this sub-section, it is worth noting that the Commercial Code does not contain a comparable provision as Article 1185 of the Civil Code which rules that ownership in immovable property is said to have transferred by registration in the register of immovable property. But a close reading of the whole architecture of the law of commercial register would reasonably lead one to argue that it is the deregistration of the former owner/seller and the registration of the buyer of the business that officiate the transfer of ownership to the latter. It follows that the buyer of a business who wants to avail himself of an unassailable

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[94] Article 112 of the Commercial Code refers only to lease and cessation of trade, but there is no reason why the sale of a business should be left out. And there could be difference in time between the date of sale and the date of cessation of trade because the transfer may take some time during which the seller still operates the business in his own name in which case he can be said to have failed in his duty to apply for deregistration only after he handed over the business to the buyer and ceased to operate it.

[95] This author has reviewed all the publications of sale that appeared in the daily *Addis Zemen* in the year 2002 E.C. Despite repeated efforts the author is unable to ascertain what practical action the trade and industry office of a certain sub-city administration in Addis Ababa takes when third parties objecting the sale appear as required by the notification. Does it conduct a hearing on whether the objections are valid, or does it simply refuse to cause the transfer of the business to the buyer merely because someone has objected? As some of the notices require the third parties to produce a court order prohibiting the transfer while some others do not so require, one cannot definitely tell what specific action it takes although it can be argued that office should not decline to process the transfer except where there is a court order to that effect.

ownership right has to bring the certificate of registration as proof of his ownership even if one may not find an express provision to this effect unlike Article 1195 of the Civil Code where a duly issued title deed raises presumption of ownership for immovable property.[96]

D. Duty to Warrant Against Dispossession

The seller's obligation is not limited to transfer the ownership of the business he sold; he has the duty to make sure that the title he transfers is unassailable by third parties and that the buyer's peaceful enjoyment is guaranteed.[97] The right of the buyer of a business can be assailed by third parties at least in three ways: First, if the seller does not himself have a valid title to transfer to the buyer as one cannot transfer more than what he owns.[98] However, the possibility of a person having to buy a business from someone who is not the lawful owner of that business in Ethiopia should, as a matter of law, be a rare phenomena because of the institution of commercial register and the publicity that attends it save the case where someone acted on behalf of the true owner without having a valid power of attorney. Secondly, even when the seller's ownership is perfect, unless it is transferred to the buyer in the manner prescribed by the law he may not be able to avail himself of the protection of the law as the owner of the business. For instance, ordinary creditors of the seller wish to attach the business in the hands of the buyer on the ground that the business is still the property of the seller so long as it is found registered in his name.[99] Even if the contract of sale of business is validly concluded between the seller and the buyer, it may not affect the interests of third parties creditors even if their claims are not secured by the business (either under the rules of Commercial Code or that of the Civil Code) until ownership of the business is transferred to the buyer in a manner prescribed by the law. The third group which pose actual threat to the buyer is creditors of the seller who have secured their claims by a mortgage on the business sold. This is explicitly provided under Article 190(1) of the Commercial Code which reads: 'A secured creditor may claim the business from a third party, as the mortgage follows the business into whatever hands it may fall.' In this case the buyer could be dispossessed of the business in the process of the creditors realizing their security even if all the formal requirements of transfer of

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[96] It is along this line of argument that a commentator held the view that the law treats business as a special movable property elevating it to the status of immovable property; see for example, Muradu Abdo, *supra* note 92, pp.81-82.

[97] See Article 2281 of the Civil Code.

[98] See Articles 2282 and 2884 of the Civil Code.

[99] See for instance Articles 170(1) of the Commercial Code where creditors of the seller including those which do not have formal mortgage on the business may take action that leads to the eventual dispossession of the buyer.

ownership have long been complied with and the buyer has got the business registered in his own name.

It is therefore the seller's duty to warrant the buyer against all forms of dispossession or assail by third parties exercising their legitimate rights that existed at the time the business was sold.[100] This warranty imposes two obligations upon the seller. Primarily, when the buyer is sued for dispossession the seller will be called upon to intervene in the suit to make his warranty good,[101] that is, to prevent the dispossession from happening so that the buyer will retain the business he bought. When dispossession could not be prevented the seller, unless agreed otherwise, would be required to return the purchase price in whole or in part depending on whether the dispossession was total or partial.[102] For instance, there will be partial dispossession when the mortgage attaches only some elements of the business,[103] or at times it may not even be necessary to sell the whole business when the proceeds from the sale of some parts of the business is sufficient to meet the claims of the creditors,[104] thus leading only to the partial dispossession of the buyer.

A cumulative reading of Articles 2282-2285 of the Civil Code tells us that the seller's warranty obligation is due all the time unless legally and/or contractually excluded or restricted. Warranty is legally excluded where the buyer daringly enters into the contract of sale of the business with prior knowledge of the risk of dispossession down the road.[105] In this case the seller has satisfied his disclosure obligation and informed the buyer of the rights of third parties on the business. The idea that prior knowledge of the buyer of the risk of dispossession excludes warranty by operation of the law itself suffers some exceptions, though. Firstly, warranty is still due if the seller has expressly agreed to warrant despite the existence of third party rights on the business posing the risk of dispossession.[106] It means that the seller has made the buyer to count on his words and led him into signing the contract which the buyer would have otherwise avoided.

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[100] See Article 2282 of the Civil Code.

[101] See Article 2285(1) of the Civil Code.

[102] See Article 2284(2) of the Civil Code.

[103] On the possibility of partial mortgage of a business see Articles 191(2), 178(2) and 175(2) of the Ethiopian Commercial Code.

[104] The idea that there should be proportionality between creditor's claim and debtor's property subject to attachment and sale has been clearly recognized under Ethiopian law. Article 394(2) of the Civil Procedure Code states: 'The value of the property attached shall, as nearly as may be, correspond with the amount due under the decree.' Article 439(1) of the same Code suggests the possibility of selling only that part of an immovable property which so long as it is sufficient to cover the decreed amount.

[105] See Article 2283(1) of the Ethiopian Civil Code.

[106] Id.

Secondly, since it is the seller's obligation to disclose any mortgage on the business at the time of sale as required under Article 153(3) of the Commercial Code, prior knowledge on the part of the buyer that the business was encumbered by such a mortgage does not exonerate the seller of his warranty obligation as explicitly stated under Article 2283(2). For stronger reason, when the buyer was not 'aware' of the existence of mortgage on the business at the time he entered into the sale contract, the seller's warranty obligation should still due although it is hardly possible to imagine a buyer ignorant of a mortgage on a business as mortgage is always required to be registered for its validity[107] and that the register of mortgage is open for public access and inspection.[108] How about the case where the buyer is dispossessed under Article 170(1) of the Commercial Code by a court, ordering the sale by auction of the business where the price for which it was originally sold to the buyer was insufficient to meet the claims of the creditors? This provision seems to cover mortgagees as well as other ordinary creditors who do not have formal mortgage over the business but who still have the right to claim their money from the business. Obviously if the buyer is not aware of the existence of the latter class of creditors he should be warranted against dispossession pursuant to Article 2282 of the Civil Code. After all it is the seller's obligation to disclose to the buyer any form of third party right encumbering the business at the time of sale although Article 153(3) of the Commercial Code mentions only of mortgage which, in my opinion, should be construed in a manner that serves its purpose of putting the buyer on guard so that it covers cases such as those of the above class of creditors stipulated under Article 170(1). But what if the buyer is aware of the existence of an Article 170(1)-creditors because the seller has disclosed this as a matter of fact or he should be presumed to have known as the existence of creditors armed with such right is already a matter of public knowledge, legislated in the Commercial Code the ignorance of which may not be an excuse? Can we say that the buyer waived his warranty protection under Article 2283(1) of the Civil Code on the ground that he was aware of the risk of dispossession at the time he entered into the sale contract, or can we hold that Article 2283(2) of the Civil Code which forces the seller to make his warranty good in case of dispossession due to the falling in of mortgage be construed widely to cover an Article 170(1)-creditors? This author supports the latter side of the argument because he does not see any rational for the law to discriminate between creditors of the seller when such discrimination defeats the whole purpose of warranty due by the seller in a manner prejudicial to the buyer.

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[107] See Articles 171(3), 175, 178, and 184 of the Ethiopian Commercial Code. See also Proclamation No.98/98 on Business Mortgage on specific rules that cater for the special interests of commercial banks lending money on the security of business.
[108] See Article 184 of the Ethiopian Commercial Code.

So far we have seen how the law itself excludes/limits warranty although the parties can still make the warranty due by contrary agreement. Let us now turn to the circumstances under which warranty is contractually excluded and/or restricted. While the law under Article 2284(1) of the Civil Code recognizes party autonomy to exclude or restrict warranty due from the seller against dispossession of the buyer it also explicitly states the rule of the thumb for interpreting that contractual clause in the event of dispute as to its scope in that such clause shall be 'construed strictly.' As we have seen earlier, warranty against dispossession is due as a matter of principle; hence its exclusion or restriction comes into picture only as an exception. And exceptions have to be interpreted narrowly so that they do not themselves become the principle. This is to mean that the judge has to adopt a narrow approach to the terms, expressions, words etc used by the parties so as not to create the exclusion or the limitation of warranty against dispossession by way of implication. Interestingly enough, even when the parties agree to exclude or restrict warranty against dispossession, it does not mean that the seller's obligation to return the price of the business if the buyer is dispossessed down the road is extinguished. The seller can avoid returning the price in whole or in part only if there is an express agreement by the buyer waiving this right.[109] This author believes that such an agreement of the buyer itself should also be construed narrowly. Finally, per Article 2284(3) of the Civil Code an agreement excluding or restricting the warranty against dispossession (be it preventing third parties from dispossessing the buyer or returning the price in the event of dispossession) produces no legal effect where the seller has intentionally concealed that a third party had a right on the business sold or dispossession is due to the act of the seller simply because one should not benefit from his culprit conduct. That right of a third party which, if concealed, would defeat the agreement to exclude or restrict warranty apparently is not a mortgage on the business for its registration and the accessibility of the register to any interested person makes it a matter of public knowledge which the seller cannot be accused of concealing. And it is also immaterial whether the seller conceals it or not as dispossession arising from the falling in of mortgage is always warrantable.[110]

Lastly, for the buyer to avail himself of the seller's warranty obligation he must put the seller on notice when third parties start exercising their right that will eventually leads to his dispossession. For instance, when the buyer is sued for dispossession, he must call upon the seller so that the latter shall join the proceeding and make good his warranty.[111] The seller will join the suit as a third

109 See Article 2284(2) of the Civil Code.

110 See Article 2283(2) of the Civil Code.

111 See Article 2285(1) of the Ethiopian Civil Code.

party defendant for the purpose of disputing the third party's claim for dispossession against the buyer.[112] The seller has to take this stance because of the derivate liability that characterizes the relationship between the three of them i.e. the third party (the plaintiff), the buyer (the principal defendant), and the seller (the third party defendant) in which the liability of the principal defendant to the plaintiff triggers the liability of the third party defendant to the principal defendant. In our case where the buyer(the principal defendant) is held liable for the third party dispossessor (the plaintiff) and instructed to give the business back to him, the seller(the third party defendant) will be held liable for the buyer (the principal defendant) in the form of returning the purchase price in full or in part. Thus the seller has got an interest in joining the litigation on the side of the buyer to keep his liability at bay. Hence, depending upon the nature of the suit for dispossession the seller could defend the buyer and prevent the dispossession by invoking defences available to him in his personal relation with the third party dispossessor (the plaintiff), for example, by asserting that he was the true owner of the business at the time the contract was entered into, or that the claim of the third party (seller's creditor) was extinguished or no more enforceable, or that the mortgage on the business is not valid, etc. He can also raise defences available to the buyer himself against the third party. It is in this sense that the seller makes good his warranty within the meaning of Article 2285(2) of the Civil Code which also requires the joinder of the seller to be made in 'due time' for joinder as a procedural device is both time and state precluded in civil litigation.[113] Generally the seller who is joined as a third party defendant will attempt primarily to secure a judgment favourable to the buyer so that the latter will retain the business he has bought. But if the third party prevails, the seller will return the purchase price in full or in part depending upon the extent of the dispossession.

Article 2285(2) of the Civil Code, however, relieves the seller of his warranty obligation when his timely joinder could not deliver the ultimate because dispossession came about due to the act of the buyer himself despite the seller's relentless effort in the fight against the third party in the judicial proceeding. Apparently the case was lost on a procedural and/or substantive point because of the fault of the buyer. For instance, the act of the buyer leading to his eventual dispossession might have rendered an otherwise strong and fruitful defence of the seller quite impotent, meaning the seller either was not able to invoke the defence successfully because of the act of the buyer; or even if he was able to

[112] See Articles 43 and 76(1) of the Ethiopian Civil Procedure Code.

[113] A defendant is allowed to bring in another person as a third party defendant only if he pleads this in his statement of defense which is filled on or before pre-trail hearing save the case for amendment of pleading; see Articles 43(1) and 91 of the Ethiopian Civil Procedure Code.

raise the defence he could not purse the defence to its logical conclusion because the buyer aborted the judicial process, say, by entering into a compromise agreement with the third party without the knowledge and consent of the seller. And acknowledging the right of the third party outside judicial proceeding or entering into a compromise agreement with him without the prior knowledge and consent of the seller militates against the seller's ability to prevent dispossession and a buyer does this at the pain of losing his warranty due by the seller unless the buyer can show that under the circumstances the seller himself could not have prevented dispossession.[114]

When the seller was not joined (in due time or not at all) without any fault on his part and that the buyer lost the case to the third party and was dispossessed as a result, the seller would be released from his warranty obligation (that is, he would not be asked to return the price in full or in part) provided that he could show that the proceeding might have had a more favourable outcome had he been joined in due time.[115] The seller is expected to prove that there was chance for the buyer to win the case. This may not be an easy task as predicting what the verdict of the judge is a treacherous terrain in its own right. In any case, to relieve the seller of his warranty obligation on this count we need to consider the issue on a case-by-case basis taking into account the relative strength of the case of the third party, and the nature and availability of defences which the seller could have invoked against that third party, and the relevance and admissibility of his evidence in relation to the said defences.

E. Duty to Refrain From Competing with the Buyer

A person who buys a going business is just investing and expects a reasonable return on the capital he committed to the investment. The law has different schemes of protecting such investment from different risks including unfair commercial competition. It does also protect the buyer of a business even from a lawful or legitimate competition if that competition comes from the very person from whom the buyer acquired the business. The source of the seller's duty not to compete with the buyer by operating a business similar to the one he already sold could be a stipulation of the law itself or the agreement of the parties. In some jurisdictions the law prohibits the seller from competing with the buyer but the parties can agree otherwise to derogate from the terms of the law. In others, the prohibition does not come from the law directly; it arises from the agreement of the parties which is enforceable at law.[116] Ethiopia seems to have adopted the

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[114] See Article 2286 of the Ethiopian Civil Code. For more on compromise see also Articles 3307-3317 of the same Code and Articles 274-277 of the Civil Procedure Code.

[115] See Article 2285(3) of the Ethiopian Civil Code.

[116] For the rules in some Francophone African states, see Article 123 of the Uniform Act of OHADA which provides that '[t]he non re-establishment *clauses* (emphasis added) shall be

first approach[117] as stated under Article 158 of the Commercial Code (titled *seller prohibited from competing*) which reads:

1) During five years from the sale, the seller shall refrain from doing any act of competition likely to injure the buyer. He may not carry on, in the vicinity of the business sold, a trade similar to the trade carried on by the buyer.
2) The contract of sale may specify the extent of such prohibition which shall in no case exceed five years.

The scope of protection Article 158(1) affords the buyer of a business appears wide enough at first glance. On top of unfair commercial competitions which are prohibited, it even seems to cover all forms of legitimate and fair competitions from the seller. But a closer look at the phrase 'likely to injure' in sub-article 1 first sentence has put a limitation on the scope of prohibited acts of the seller by injecting a necessity test or causation in that the buyer must prove actual or potential damage to his business arising from the seller's acts of competition. Thus, one can safely argue that it is not each and every fair commercial competition from the seller that the law sanctions; the seller is free to engage in fair commercial competition with the buyer of his business as long as that competition is not injurious to the buyer. Stated otherwise this is to mean that the seller is not totally prohibited from operating a business similar to the one he sold to the buyer; he can carry out similar business subject to legally as well as contractually imposed limitations (see below). It is totally nonsensical to talk about a competition injurious to the buyer if the seller is disallowed to engage in a similar business as he sold, for only similar businesses do compete against each other and lead to injury when abused. It is only within the context of competing businesses that Article 158(1) first sentence conceives acts of competition which are allowed or disallowed.

The question, then, is what are those fair commercial competitions from the seller which are injurious to the buyer, hence become unlawful and prohibited under Article 158(1) first sentence and whether there should be some sort of *de minims*

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valid only where they are limited, either in time or space in space; one such limitation is enough to make the clause valid.' See also Section 16601 of the California Business and Professions Code as quoted in Dan Woods and Tim Rusche, 'Enforceability of Covenants not to Compete in California', available at http://www.whitecase.com, last accessed on August 15, 2010.

[117] Some people suggest that the Commercial Code should leave the issue for freedom of contract which essentially means the parties at liberty to conclude non-compete agreements enforceable at law; absent such agreement, seller is free to compete with the buyer at any time and place. Any way, parties are still free to disregard the application of Article 158 by a contrary agreement.

as to the level of injury to the buyer? In the absence of some kind of guideline Article 158(1) first sentence could be very difficult to apply to concrete cases leading to its abuse or disuse. For instance, in California where parties can enter into a non-competition agreement comparable to Article 158 of the Ethiopian Commercial Code, a court held that '... not all competitive activity is absolutely prohibited. Competition, or to carry on a similar business, generally means substantial competitive business activities, and not merely isolated or occasional transactions.'[118] Arguably, Article 158(1) first sentence should include competition in the form of soliciting customers of the business especially former customers which essentially constitute the base of the goodwill of the business the buyer acquired. However, the seller's act of soliciting his former key employees does not seem to be outlawed under Article 158(1) first sentence even when there is an agreement between the seller and the buyer to this effect as this could be contrary to freedom of work already guaranteed under Article 41(2) of the Ethiopian Federal Constitution which reads: 'Every Ethiopian citizen has the right to choose his or her means of livelihood, occupation and profession.'

The protection the buyer enjoys against the seller operating a similar business is never meant to be absolute. It is limited not only in terms of its scope as highlighted above, but also in time and space. The seller's obligation to refrain from competing with the buyer of his business by operating a similar business remains in force for a maximum period of five years from the date of sale[119]; parties can agree only to shorten this period. The other important element of the seller's obligation is that it is enforceable only within a given geographic area, which is the *vicinity* of the business he sold as stated under Article 158(1) second sentence. What does this concept of *vicinity* cover? Article 158 does not define it. It is for the court to determine unless parties agree on its coverage. It can cover a small area, or a large area, or all parts of the country, or even the whole globe when the business is traded on the Internet. So long as the public policy behind Article 158 is the protection of the legitimate business interests of the buyer without any intention of depriving the seller of his equally, if not more, legitimate right to earn a livelihood the controlling factor in the equation to delineate *vicinity*, in my opinion, should be the 'commercial presence'[120] of the

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118 Swenson v. File (1970) 3 Cal.3d 389, 397.) as quoted in, 'California Non-Compete Agreements', available at 'http://www.andersenalumni.net/%5CCalifornia%20Non-Compete%20Agreements.pdf', last accessed on August 15, 2010.

119 It has been proposed that the prohibition of Article 158 shall take effect 'within five days following the sale'; see Dominique Ponsot, *Title V: Business: Comments and Proposals of Amendments,* (unpublished, on file with the author), p.12.

120 This concept is borrowed from Article I (2) (c) of the WTO's General Agreement on Trade in Services where it refers to the third mode of delivery of service in which a firm offers service by establishing office, branch or subsidiary in a foreign country.

buyer in a particular locality, that is, whether the buyer sells goods produced by or supplies services of that very business-not any other similar business-he has bought from the seller in a given market. Any other place where the buyer is not commercially present is definitely outside the *vicinity* for purpose of Article 158(1) second sentence.

Article 158(2) allows parties to specify the extent of the prohibitions stipulated under sub-article 1 pertaining both to the nature of acts which are considered unlawful competitions as well as the geographic area within which they are treated as illegal. Thus, they are free to list down specific acts as illegal, and leave the rest as permitted, or vice versa. They can agree to allow the seller to operate similar business in the same vicinity, of course under different trade name,[121] of the business sold with or without attaching conditions such as compensation for the buyer and limiting the business to a specifically defined location in that vicinity. They can also specifically define the vicinity as narrowly as naming a particular locality (or a supermarket for which the seller can supply or even specific customers) or as widely as they wish. But the apparently unlimited party autonomy under Article 158(2) should not offend the overarching public policy that protects only legitimate commercial interests of the buyer and hence it should not be taken for granted that every agreement under this provision is enforceable at law so long as it does not exceed the legally limited five years. There is no point for the buyer to seek protection in a place where he is not commercially present.

This pits us to another controversial issue of whether the court should rewrite the terms of the agreement so as to bring it within the limitations of the law, or whether it has to void that part of the agreement in total where, for example, it is unreasonable or where the parties agree for a term of more than five years. Article 158 is not explicit on this subject. The gap filling provision of the Civil Code Article 1716(1) provides that where the obligation of a party is unlawful it shall be of no effect making it clear that there is no room for courts to rewrite that part of the contract to make it lawful and enforceable. But it is also equally harsh to totally disregard the public policy that protects the legitimate business interest of someone who has invested his capital and put him off guard merely because the agreement under Article 158(2) of the Commercial Code is entered into for more than five years which can be reduced to five years so that it serves its intended purpose. Moreover, an unreasonable term of a contract is not always unlawful as it is possible for a contractual term to be unreasonable and lawful at the same time. The court should resort to getting the intention of the parties

[121] See Article 139(2) of the Ethiopian Commercial Code.

acting in good faith and construe the term in such a way as to balance the competing and conflicting interests of the seller and the buyer.

Finally, Article 158 of the Commercial Code does not expressly address the case where the seller competes against the buyer indirectly through third party which he controls and is capable of injuring equally, if not more, as a direct competition from the seller himself. It is rightly proposed that this provision should extend to "cases of trading through a straw man or a legal entity owned or controlled by the seller."[122] Lastly, to make the protection complete, Article 158 should also cross refer to Article 134 of the Commercial Code and expressly sanction the seller's failure to refrain from competing against the buyer.

4.2. Obligations of the Buyer

The buyer of a business under Ethiopian law has important obligations not only towards the seller but also towards third parties such as the seller's creditors and former employees of the business he bought. The discussion in this section is limited only to his obligations towards the seller focusing on the duty to pay the purchase price and the seller's guarantee of payment. His obligations towards third party creditors of the seller will be discussed in the next section. The employment and tax consequences of the sale of business both upon the seller and the buyer are obviously outside the scope of this commentary.

A. The Buyer's Duty to Pay the Purchase Price and the Seller's Guarantee of Payment

i. The Duty to Pay the Purchase Price

The principal obligation of the buyer in any sale contract is the payment of the agreed purchase price. As we have seen in Part I of this commentary, business is composed of tangible and intangible assets each with the attribute of independent valuation for the purpose of legal transactions. But Ethiopian law does not expressly require the separate pricing of these elements of the business unlike its French counter part where 'separate prices shall be established for fixed assets of the business, the equipment and the goods'[123] which has implication for the seller's legal mortgage that guarantees the payment of the purchase price as we shall see below. Thus under Ethiopian law the purchase price of the business which the buyer is bound to pay is the aggregate value of each of the elements of the business covered by the sale contract although

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[122] Dominique Ponsot, *supra* note 119, p.12.

[123] See Article L141-5 third paragraph of the English translation (unofficial) of the French Commercial Code available at http://www.legifrance.gov.fr, last accessed on August 18, 2010. See also Christopher Joseph Mesnooh, *Law and Business in France: A Guide to French Commercial and Corporate Law*, Kluwer Academic Publishers, 1994, p.165.

practical convenience could require parties to price each element separately as there is nothing that restricts party autonomy in this regard.

The parties are at liberty to determine the terms and conditions of payment. In the absence of agreement otherwise, payment shall be made in cash,[124] and the sale is not considered one on credit. The implication of this is that the buyer can request the seller to deliver the business only upon payment of the full purchase price because performance has to be simultaneous for both parties as stipulated under Article 2278(1) of the Civil Code. Interestingly, however, even if the seller offers to deliver the business he has sold or has actually put it at the disposal of the buyer and that the buyer is also ready to effect payment to the seller, the seller does not have the right to collect his money automatically and directly. The seller's right to receive payment is subject to the complex schemes (see section 5 below) put in place to guarantee the claims of third party creditors.[125] Any direct payment made to the seller in breach of these schemes will not affect third parties; it rather leads to the joint liability of the buyer himself.[126] So, the buyer is expected to withhold payment of the purchase price unless a specific third party, for instance a blocked or escrow account with a bank,[127] is named in the sale contract to serve as a trustee in which case the buyer can discharge himself of his obligation towards the seller by depositing the money with that third party.[128]

ii. Legal Mortgage: Seller's Guarantee of Payment

The seller's security right that gives him the status of the most preferred creditor of the buyer is well recognized under the Ethiopian Commercial Code. Article 163 of the Code declares in part that 'until he is fully paid, the seller shall be secured by a legal mortgage...' This is further elaborated under Article 173(1) of the same Code which reads: 'Where a person sells a business and the price of the sale is not fully paid to him, the payment of the price or such part thereof as is still due shall be secured by a legal mortgage on the business sold.' One may, however, validly raise a question at this juncture: is it appropriate to talk of 'mortgage' instead of 'pledge' in relation to a business? Business is defined as a movable property under Article 124 of the Commercial Code and the concept of 'mortgage' is used, under the Ethiopian legal system, in relation to immovable property, while 'pledge' is employed for a charge on movables. The draftsman,

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[124] See Article 160 of the Ethiopian Commercial Code.
[125] See Articles 160 second sentence, 161, 162, 164-170 of the Ethiopian Commercial Code on third party protections.
[126] See Articles 162(2) and 167(4) of the Ethiopian Commercial Code. For a comparable provision in France, see Article L141-17 of the French Commercial Code.
[127] See for example Article 125 of the Uniform Act of OHADA. It also provides for a notary to serve as a trustee
[128] See Article 162(3) of the Ethiopian Commercial Code.

Alfred Jaufferet, deliberately opted to deviate from this conventional approach to use the term 'mortgage' to a security one creates over a business. For him, this was some kind of 'innovation' justified in the following words:[129]

> The principal innovation it [Chapter IV of Book I of the Commercial Code] introduces is to recognize the existence of mortgages on a business. Certain laws, at least the French and Belgian laws, allow a business to be pledged (nantissement) but this pledge is so similar to a mortgage (hypthe⁸que) that it is preferable to provide frankly that there can be mortgage of the business. If mortgages are provided for, then it is much simpler to consider the privilege of the seller as a legal mortgage. By another innovation I also recognize a legal mortgage on the business of the bankrupt in favor of the universality of creditors.

Whether Jaufferet's innovation has in practice made the collection of the purchase price simpler and more efficient is a matter to be tested by an empirical survey. This commentary will, however, focus on the formal analysis of how the principles of the seller's legal mortgage are designed to operate.

A business is capable of being mortgaged[130] to secure the payment of a debt. On the basis of their sources, three different types of mortgages can attach a business: legal mortgage[131] that arises from the operation of the law itself; contractual mortgage[132] which parties create by agreement; and judicial mortgage[133] where the business is encumbered by a court order in the context of court proceedings to secure the eventual execution of a decree.

The right of the seller of a business to have his claims for the payment of the purchase price secured by a mortgage right over the business he sold is a typical case of legal mortgage as it arises from the Commercial Code provisions without the need for the agreement of the parties. Nevertheless, it is valid against third parties only if the sale of the business is made in writing and that the mortgage has been registered[134] within one month from date of sale[135] featuring all the particulars listed under Article 175(1) (a-h) of the Commercial Code including

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[129] See Peter Winship(trans.), *supra* note 2, P.53. footnote omitted.
[130] See Article 171(1) of the Commercial Code.
[131] See Articles 171(2), 163 and 173 of the Commercial Code.
[132] See Articles 172(2) and 177 of the Commercial Code.
[133] Generally see Articles 151 *et seq.* of the Civil Procedure Code.
[134] On the manner and conditions of registration of mortgage see Articles 3-12 of the Business Mortgage Proclamation No.98/98.
[135] See Article 173(2) of the Commercial Code.

the possibility of bringing a suit for cancellation of the contract of sale and the scope of the mortgage.

In the case of a contractual mortgage on a business, pursuant to Article 182 of the Commercial Code, registration has the effect of securing the claim only for five years-meaning the creditor will simply remain an ordinary creditor on equal footing with other creditors-unless it is renewed for additional time before the expiration of the five years. But in the case of the seller's legal mortgage on the business nothing has been explicitly stated unless one argues that Article 182 is equally applicable to legal mortgage as well, which however seems to be at loggerheads with Article163 of the Commercial Code that purports to secure the seller *'until he is fully paid'*(emphasis added). This means the seller's mortgage right, once registered does not need any renewal and keeps on producing effect until such time that the seller is fully paid. The purpose of having to register the seller's legal mortgage is to warn third parties and not to subject the seller's right to payment of the purchase price or cancellation of the contract when payment is denied on the condition of registration of his legal mortgage.

As for the substantive contents of the seller's legal mortgage as per Article 189(1) of the Commercial Code, a creditor has the right to realize his security in the even the debtor defaults subject to the legal procedures protecting the interest of the debtor; the creditor will move the court to attach the security device and sell it by auction, out of which proceeds the creditor will be paid.[136] An argument can be made that this provision is applicable to the seller's legal mortgage. But that is not what the relevant provisions of the Commercial Code dealing with the seller's legal mortgage provide, at least expressly, although pushing them to their logical conclusions may not necessarily exclude this possibility (if the seller so desires). Articles 163 and 174 establish the seller's right to cancel the contract when the purchase price is not fully paid, while Article 176(1) openly states in part that '[t]he seller who cancels the contract on the ground that he has not been fully paid... shall, whatever part of the price still due, take back the whole business in its condition on the day of cancellation...' Thus cancellation and the subsequent reinstatement of parties back to their former position is the consequence of the seller exercising his mortgage right. One can argue that the seller is entitled to cancel the contract and get his property back under Article 2348 of the Civil Code even without the need for the technicalities of the legal mortgage under the Commercial Code, questioning the importance of the institution of legal mortgage as far as the relationship between the seller and the buyer is concerned. One does not need, in the opinion of this author, the

[136] For banks foreclosing their mortgages following a different track see Property Mortgaged or Pledged with Banks Proclamation No.97/98.

'invention' of the institution of legal mortgage on a business he sold to request payment of price and to cancel the contract when payment is not effected. The seller's legal mortgage becomes meaningful guarantee to the seller for the payment of the purchase price when the buyer has transferred the business to third parties or when he encumbers the business with third party claims short of transfer of title. In short, legal mortgage of the seller becomes meaningful when there are claims of third parties competing against that of the seller over the business. In that case the legal mortgage of the seller shall rank before contractual mortgages as clearly stated under Article 192(3) of the Commercial Code. Thus, the seller's cancellation of the contract as an exercise of his mortgage right can go far beyond his relationship with the buyer and affect third parties who have got interest in the business. He can claim the business from a third party, as the mortgage follows the business into whatever hands it may fall.[137] In effect, third parties will be dispossessed of the business if they are in possession, or their claims will rank second to that of the seller as a result of the latter's legal mortgage.

The law does also protect the interest of third parties against the seller who wishes to cancel his contract as an act of exercising his legal mortgage when the buyer fails to pay the purchase price. For this legal mortgage to affect third parties it is not enough that that the underlying sale contract is made in writing and that the mortgage itself registered. The seller's reservation to bring legal action for cancellation of the contract if the buyer fails to pay the price in full has to be entered also in the register of mortgages.[138] In the absence of such a pubic warning, the effect of the seller's cancellation of the contract will be confined only as between him and the buyer. The other side of this requirement is that the seller cannot unilaterally cancel the contract; only a court can order cancellation on account of the seller's legal mortgage. This affords third parties another layer of protection because when the seller brings an action against the buyer in a bid to exercise his mortgage right, interested third parties are entitled to intervene in the suit to assert their right as the outcome of the suit will certainly affect their interests.[139]

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[137] See Article 190(1) of the Commercial Code.

[138] See Article 174 of the Commercial Code. For a comparable position in France, see Article L141-6 of the French Commercial Code. Under Article 136 of the Uniform Act of OHADA, the seller who intents to file a suit for cancellation of the contract has the duty to notify such action to registered creditor of the business at the elected domicle.

[139] See Article 41 of the Ethiopian Civil Procedure Code. The seller can also directly join the buyer and the third party in possession of the business in one suit under Article 35 of the Civil Procedure Code instead of suing the buyer alone.

It can also be argued that on the basis of Article 190(1) of the Commercial Code the seller of the business has a direct right of action against any third party in possession of the business where the buyer fails to pay the price. But in this case it does not seem appropriate to talk about 'action for cancellation of the contract' as there was no contract concluded between the seller and the third party.[140] It seems rather a suit for dispossession against the third party on theory of extra-contractual relationship.

The other protection to third party is the scope of the legal mortgage itself which has to be specified in the entry in the register of mortgage per Article 175 (1) (g) of the Commercial Code. As business is composed of different elements the seller is expected to make clear whether he intends to extend his legal mortgage to all those elements which form part of the business sold, or whether the mortgage is limited to some specific elements alone. Articles 175(2) and 191(2) have slummed shut the door on legal mortgage by analogy in that they expressly limit the application of the mortgage 'to such parts only of the business as are expressly specified in the entry.'[141] The import of this is that a successful action for dispossession by the seller exercising his mortgage right results only in the partial dispossession of the third party and that the latter will retain those elements of the business which are pretty much out side the scope of the mortgage although the mortgage might sill have affected substantial part of the business leaving no room good enough for the third party to comfort himself in.
In contrast to the scope of the effect of a suit for dispossession by the seller against third party in which the latter is dispossessed only those elements of the business which are within the scope of the mortgage, the effect of cancellation for nonpayment of price against the buyer will result in the dispossession of the *whole business* as it stands on the day of cancellation and subject to a settlement that takes into account the values of the elements of business on that date; of course, new parts acquired after the contract was made are excluded [142] to prevent unjust enrichment to the seller. It means that as against the buyer, the seller's right extends to each and every element of the business sold for 'whatever the part of the price is still due.'[143] The Ethiopian Commercial Code does not provide for separate pricing of the elements of business at the time of sale, thus the seller's right to payment is secured by the whole business as an

[140] For a contrary view on this, see Menber-Tsehai Tadesse, *Mortgage: Wastina Yetenefegaw Ya Wastina Higi*,(unpublished, on file with the author), p. 69.
[141] Under French law, however, legal mortgage covers all elements of the business listed in the sale contract. See Article L141-5 and Article L141-6 of the French Commercial Code under Article 134 of the Uniform Act of OHADA the seller has a preferential right over the business sold as a whole, without limiting it to those elements listed in the registry.
[142] See Article 176(1) of the Commercial Code.
[143] Id.

entity.[144] When the seller takes back the whole business as it stands on the day of cancellation, restitution shall be made taking into account the increase or reduction in the value of the business elements covered in the sale contract.[145]

5. The Seller's Creditors in Relation to the Business Sold

In the sale of a business between the seller and the buyer, third parties may, however, come into picture on both sides of the transaction. In section 4.2.ii above, we have seen how the law guards third party creditors of the buyer when the seller enforces his legal mortgage. Here the institution of registration of mortgage which is accessible to the public gives third parties a prior warning as to what claims are already encumbering the business which they wish to deal with.

The interests of third party creditors of the seller are also affected when the seller disposes of the business precisely because debts of the business (accounts payables) will not be transferred, unless agreed otherwise, to the buyer as they do not by definition form part of a business.[146] Creditors may not be able to get their money very smoothly if the seller transfers his business without the transferee being held answerable for the debt. It must be this non-transferability of the debt of the business to its buyer that led the French law to adopt a very complex scheme of protection to the seller's creditors [147] which are also replicated in Ethiopia.

There are two major schemes that protect the seller's creditors under the Ethiopian Commercial Code. The first one is the right of creditors to block the direct payment of the purchase price to the seller so that they will share the proceeds among themselves. The second one is the right to have the sale contract cancelled and have the business put up for auction sale in order to raise more money when the original price is insufficient to meet their claims. In order for them to be able to make use of these schemes, the law has imposed certain obligations upon the buyer. We shall deal with each scheme turn by turn, but let's first consider the buyer's duty that triggers the schemes. That obligation of the buyer which emanates from the operation of the law (Articles 161and 164 of the Commercial Code) is the duty to cause the double publication of the notice of sale. The publication has to be made in the official commercial gazette and in a newspaper empowered to carry legal notices circulating where the head office of

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[144] For a different approach under in France, see Article L141-5 of the French Commercial Code.

[145] See Article 176(2) of the Commercial Code.

[146] See Article 129(1) of the Commercial Code.

[147] See generally Articles L141-12 to L141-22 of the French Commercial Code. These institutions are absent in the German system where debts of the business are transferable to its buyer; see also S. A. Bayitch, *Supra* note 44.

the business sold is located.[148] Ethiopia never established an official commercial gazette, and the idea of having one in the future seems dropped.[149] The purpose of publication of the sale is just to notify third party creditors of the seller as to the sale of the business so that they can lodge their objections that the seller should not receive the selling price directly. If this is the case, the Commercial Code must remain content with a single publication provided that it is effective and efficient enough to inform the creditors. The notification includes:[150] the names and addresses of the seller and the buyer; the type and address of the business; addresses of branches covered by the sale contract; the date and nature (whether it is credit or cash sale) of the contract; the agreed price; and the address for serving legal papers at the place where the business is located. The name and address of a third party, if any, designated as escrow agent under Article 162(3) should also be published (although it is not listed under the law) for the same reason that creditors need to know the name and address of the buyer of the business (see below under sub-section i). The sale must also be published within one month from the date of signature of the contract of sale.[151] The law validates even a late notice, that is, after the expiration of the one month period but makes the buyer liable for any damages caused by reason of the delay.[152]

The current practice in Addis Ababa is to publish the notice of sale in the daily *Addis Zemen*. The author has reviewed all the notices of sale of business that appeared in this newspaper in the year 2002 E.C. Buyers simply call upon third parties in general requesting the latter to appear before the sub-city's [where the business is located] office of trade and industry within 30 days of the publication of the notice should they have objections to the sale, or else title to the business and/or the license thereof shall be transferred to the buyers. While one can validly assert that the notice caters for those who object the transfer of the business (for instance, the true or joint owners of the business who did not consent to the sale), it is hardly possible to claim that the notice is the prototype envisaged under Article 167 of the Commercial Code which directly targets creditors of the seller. This is because firstly, the notice calls for those who object

[148] See Article 164(1) of the Commercial Code.

[149] The Draft Revised Commercial Code prepared by the Ministry of Justice has also dropped commercial gazette, see Article 164 of the Draft, on file with the author.

[150] See Article 165 of the Ethiopian Commercial Code.

[151] Article 166(1) provides that '[n]otice under Article 164 shall be published during the month within which the sale took place.' The phraseology of this provision sounds confusing at best. The sale of a business has to be made in writing and should be considered to have taken place from date of signature by which parties express their consent to conclude the contract, and the one month period should reckon from this date.

[152] See Article 166(2) of the Commercial Code.

the sale of the business. Certainly, creditors of the seller cannot lodge such kind of objection simply because they do not have the substantive right in this regard. Their right is only to claim the payment of debts from the proceeds of the sale of the business. And this right, as we shall see in the subsequent sub-sections to follow, will not be affected by the sale. Secondly, even if we overstretch the notice to make it cover creditors of the seller, they are not required by the law to appear before a government agency, such as the trade and industry office of sub-cities in Addis Ababa, to lodge their objection. Since the only purpose of their objection is to prevent the seller from collecting the purchase price until their claims are satisfied and not to forestall the transfer of ownership, there is no need for them to appear before an organ that handles the transfer of ownership and not mandated to hear whether creditors have valid claim against the seller nor empowered to enjoin the buyer from effecting payment of price to the seller. (On the nature of the creditors' objection and to whom they are directed, see below).

i. Blocking the Payment of the Purchase Price to Share the Proceeds

This is a scheme which gives creditors of the seller the priority to satisfy their claims from the proceeds of the sale of the business before the seller is able to collect the purchase price from the buyer. It is triggered by the buyer's publication of the notice of sale as described above. Article 167(1) of the Commercial Code provides that 'within one month from the publication of the last notice, any creditor of the seller may, even where his claim is not due, move the court to set aside the proceeds of the sale and shall notify the buyer at his address for service.' Creditors are expected to file their application within the prescribed time from the date of publication at the pain of losing the right if filed out of time unless there wasn't publication made or that it did not contain the particulars listed under Article 165 of the Commercial Code in which case the application could be made at any time[153] so long as the price was not paid to the seller. But there is no point talking about objection if the buyer has already paid the seller in which case the remedy is just to hold him liable for the creditors directly.

In addition to the buyer, a third party designated as escrow agent under Article 162(3) should also be notified of any objection to the payment of price even if Article 167(1) makes no mention of this. It is only logical to instruct the creditors to file their application (which shall show their names and addresses as well as the amount and basis of their claim[154]) within a definite period of time and attach legal consequences if they fail to act accordingly. Expecting creditors to communicate their objections to the buyer alerting him that they are after their

[153] See Article 167(3) of the Commercial Code.
[154] See Article 167(2) of the Commercial Code.

right, that he shall not effect payment directly to the seller is also understandable, or even desirable as the buyer may not in fact know the existence of such legal prohibition in the first place. However, to require the creditors to file their application objecting the payment of the price with a court of law as stated under Article 167(1) of the Commercial Code petitioning the court to order the buyer set the proceeds of the sale aside is, in the opinion of this author, both unnecessary and meaningless. It is unnecessary because Article 162(1) of the Code has already prohibited the buyer explicitly from paying the seller until the time fixed for objection expires or until settlement is reached following the objection. Article 162(1) reads: 'After the sale, the price of the sale shall not be paid to the seller until the period of time for making application to set aside expires or, where any such application has been made, until the rights of the creditors have been settled by agreement or by the court and such creditors have been paid.' The law has already created and imposed upon the buyer the obligation of not paying the seller. And if a buyer contravenes this obligation and effects payment to the seller, Article 162(2) rules that such a payment shall not affect third party creditors of the seller [which means the buyer is jointly and severally liable with the seller for these creditors!]. If the law has already prohibited the buyer, there is no reason for the court to repeat the same instruction as granting the injunction adds no value. The court cannot claim to have created what has been already there nor can it claim to have enforced it because the court cannot physically prevent the buyer from effecting payment at all; buyer can do that at his own peril. Obviously, the court cannot order payment to the creditors merely based on their motions under Article 167(1) unless the creditors have a civil decree in their own hands, which is not also the case here. These applications are also inherently different by their nature from a formal lawsuit instituted with a view to having the court determine their claims against the seller. The court is not hearing the merit of the case on the basis of such applications. Thus, procedurally speaking, the court cannot order the seller to enter defense on the substance of the dispute and go to trial based on applications filed under Article 167(1) of the Commercial Code. Even an order of the court granting an application filed under Article 167(1) is not an instruction to the buyer to pay the creditors from the proceeds of the sale for this amounts to a sheer denial of due process to the seller who has the right to contest the claims of the third party creditors. And finally, if the creditors who use the institution of objection under this provision were already in possession of a decree in their favor, no reasonable person would think of objection under Article 167(1) as the rules of execution of money judgment are obviously shortcut and more effective.[155]

[155] See Articles 394, 395, 409(3) of the Civil Procedure Code of Ethiopia.

In conclusion, it is worth noting that requesting the creditors to move the court to set aside the proceeds of the sale per Article 167(1) is meaningless and serves no purpose of protecting the creditors except increasing the cost of transaction to recover their claims. The purpose of filing objection with the court cannot be obtaining a summary judgment that establishes the claims of third parties as against the seller, nor is it a summary execution of a money judgment. Hence, there is no need for the seller's creditors to file their objection with a court. So this idea should be dropped out in the would-be Revised Commercial Code of Ethiopia.[156]

The other problem related to the issue of directing third party creditors to file their objection with a court is Article 167(4) which purports to prohibit the buyer or any person with whom the proceeds of the sale has been deposited from effecting payment to the seller 'until the application is decided.' As we have seen above literally there is nothing that awaits the decision of the court under Article 167(1). Such a prohibition will have meaning and effect only if it is made part of Article 168 which provides for the right of the seller[157] to challenge, before a court of law, the objection lodged by third party creditors for want of form (e.g. it does not contain the particulars required under Article 167(2)), or that the objection was made out of time, or it was made with out good cause, i.e., without the third party having any legitimate claim against the seller. In effect the seller is asking the authorization of the court to receive payment under Article 168. The court then hears the creditor to determine whether the objection to payment is valid or not. If the court finds that the objection is not valid due to any one of the above reasons, it allows the seller to receive payment and instructs the buyer or the third party escrow agent to release the payment. But if the court rejects the seller's application and sustains the objection as valid, the seller will not be able to get the payment of the price until he reaches settlement with his creditors or until the court lifts(see below) such objection. In any case pending the application of the seller the buyer or the third party escrow agent are under the prohibition of the law from making payment to the seller as stipulated under Article 162 to which Article 167(4) itself refers.

The blocking of payment by the creditors through their objection, however, is not forever. When the seller and his creditors are unable to settle the claims amicably, there must be a mechanism which ends the deadlock, or else blocking payment for indefinite time is prejudicial for both parties alike. It should be

[156] Article 167(1) of the Draft Revised version of the Code prepared by the Ministry of Justice, however, maintained the extant text as it was.

[157] Article 168 refers to 'buyer' not 'seller' but this seems to be a slip of the pen as there is no reason for the buyer to go to court with a view to challenging the objections of third party creditors.

noted that the blocking of payment is a sort of interim measure of protection,[158] not an end in its own right. Its objective is to keep the purchase price in the hands of the buyer until the creditors of the seller have got the opportunity to discuss their claims with the seller on the one hand and as between themselves, if they are many, so as to settle their claims amicably. If they are successful, they will share the proceeds of the sale as between themselves by agreement, or failing such agreement, the court will divide the proceeds for each according to their rank.[159] Secured creditors will rank first as opposed to ordinary creditors and they shall rank as between themselves according to their order of registration of their mortgage on the business.[160] Ordinary creditors shall rank concurrently and division of the proceeds of the sale left from the secured creditors should be made *pari passu* i.e. ratably in proportion to their claims.[161]

Nevertheless, this may not always be the case. The seller might contest not only the existence but also the amount of the claims third parties are asserting against him, and negotiations could fail as well. When the seller denies liability to all or some of the creditors either in whole or in part, they normally file a formal law suit to have their claims determined. But as exercising their right is purely within their discretion it should not bother the seller under normal circumstances. However, when he is prohibited from receiving payment of the purchase price until their claims are finally settled there must be some mechanism which forces his creditors to file a formal suit as soon as possible for the ability of the seller to receive the price solely depends upon the outcome of such suit. It will be to the determent of the seller if the creditors, on the one hand, object to the seller's right to receive payment and are not willing to act upon their claims, on the other hand, leaving the seller in a complete limbo. Unfortunately, there is nothing in the Ethiopian Commercial Code that puts pressure upon the creditors so that they take their objections one step further when amicable solution is not reached with the seller. In jurisdictions where there is a comparable system of creditors' objection this concern is addressed by instructing the creditors to file a formal law suit within a certain period following notification of the objection failing which the objection shall be set aside by the court.[162] This author suggests that the would-be Revised Commercial Code of Ethiopia has to adopt this approach

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[158] See also Boris Martor, Nanette Pilkington, David S. Sellers and Sebastien Thouvenot, *supra* note 57, pp.46-47.

[159] See Article 169 of the Commercial Code.

[160] See Article 192(1) and (2) of the Commercial Code.

[161] There is nothing to this effect under the Commercial Code or under the Civil Code of Ethiopia. Article 403 of the Civil Procedure Code might have intended for *pari passu* but not explicit or even complete.

[162] See Articles 128 and 130 of the Uniform Act of OHADA where the objection has only a conservatory effect until the creditors file a law suit with a court of law.

and it also has to clearly state the purpose of the objection as protection to the interests of the creditors until they will be able to settle their claim by agreement; and failing the agreement until they will be able to file a law suit which has to be made within a definite period at the expiration of which the seller should be allowed to receive the payment of the purchase price.

ii. Reselling of the business by a public auction

The publicly declared price, [163]which is blocked in the hands of the buyer or the third party escrow agent, if any, to be shared among the creditors as per Article 169 of the Commercial Code, may not be sufficient to meet their claims. If this is the real market value of the business at a point in time, there is nothing to be done. But if the business is underpriced deliberately or because the seller is out-bargained, or if the publicly declared price is not the actual price negotiated between the seller and the buyer, the creditors have the right under Article 170(1) of the Commercial Code to request the judicial cancellation of the contract of sale and the reselling of the business by auction so that it fetches better price from which they will be paid off their claims. The procedure of reselling the business, however, is not fairly clear. What sets the reselling process in motion in the first place? Is it the result of the mere contention of the creditors that the publicly declared price of the business is insufficient to meet their claims? Or are they required to establish a *prima facie* case of the business being underpriced or the negotiated price is concealed to their detriment? The latter seems to be the case from the title of Article 170 which reads 'overbid by creditors' but there is nothing specific to this effect from any one of its three sub-articles detailing its contents. To initiate the process of reselling these creditors have to 'overbid' the original buyer-and nobody else at this stage-by offering a price better than the one offered by him. The issue is about the amount of the new bid price. Article 170(2) mandates the court to 'order the sale by auction' provided that 'the price of the sale shall be higher by one-tenth than the price specified in the contract of sale.' A close reading of this provision leads us to the interpretation not only that the bidders are the creditors (that the auction is thus among them) themselves but also that the figure represents the bid price they have to make to set the reselling process in motion. What follows from this point onward is not also clear. Can we say that the auction is now over and the court shall order the sale of the business to the creditor who has made the offer as sub-article 2 seems to suggest, or is the business going to be put up for a sale by an auction to the general public as sub-article 3 apparently conjures up, which is the case under some jurisdictions.[164] In the Ethiopian case, Article 170(3) provides that 'where no

[163] See Article 165(e) of the Ethiopian Commercial Code.

[164] See Articles L141-19 to L141-20 of the French Commercial Code and Article 131 of the Uniform Act of OHADA.

third party presents himself at the sale, the business shall be sold to the creditor making the highest bid.' This reference to 'third party' indicates that the reselling is by a public auction in which the creditors can participate on equal terms with other members of the public. In this case the business will be sold for the highest bid. If the public auction, however, fails to fetch more price the business will be sold to the creditor who has offered the highest bid. In both cases the business cannot be sold for a price which does not exceed the original purchase price by one-tenth as stipulated under Article 170(2).

The other important issue in relation to the reselling procedure is the need for some kind of caveat to prevent the creditors from abusing their right to cancel the original sale contract and request for reselling the business especially when all or some of them are commercial competitors of the buyer in the same or related area of business or even by the ill motive of the seller who thinks that he was out bargained by the buyer. The law has to equally cater for commercial security as well and should try to strike the balance between conflicting interests of the seller's creditors whose action will lead to the eventual dispossession of the buyer, on the one hand, and the interests of the buyer who transact with the seller in good faith and want to reap the fruit of his investment, on the other hand. Firstly, as highlighted above, the allegation by the creditors that the original purchase price is insufficient to meet their claims by itself should not warrant cancellation of the first sale. They must be asked to establish a *prima facie* case not only by offering a better price the threshold of which should be clearly spelled out but also by depositing the same with the court.[165] Secondly, it must be used as an alternative to the sharing of the proceeds of sale as stated under Article 169; it should not come after the sharing of the proceeds proved a failure. The two schemes should be made available at the same time and the creditors should choose one of them within the same defined period following the publication of the sale contract.[166] Thirdly, the idea of public auction should be dropped altogether unless the creditor who originally offered a better bid is forced to buy the business at that price and other creditors are held liable jointly and severally for any damages sustained by the seller and the buyer for canceling the original sale contract but failed to buy or resale the business for a better price. Basically the purpose of the law under Article 170 is to protect the creditors of the seller against backdoor arrangements between the seller and the buyer. It should not be used to inject insecurity to or perceived as a threat to genuine commercial transactions. So, it should be redrafted in a way that articulates its purpose as a shield, and not as a sward.

[165] This is the requirement under French law and the Uniform Act of OHADA, see Id.
[166] This is the approach under French law and the Uniform Act of OHADA, see Id.

Conclusion

This commentary sets out to explain and, whenever possible, critique the rules that govern the sale of a business under the Ethiopian Commercial Code. Nonetheless, it claims neither to have advanced nor refuted a specific central thesis. Yet it has raised and grappled with a host of diverse questions. The Ethiopian law recognizes the abstract notion of business as a going concern as a special type of movable property composed of both tangible and intangible assets, mainly its goodwill. While this approach can be praised as commendable, the tradition of leaving immovable property at the outskirt of business particularly where the immovable is destined to serve the business as its premise needs policy reconsideration.

The sale of business as a special type of movable property without a corporeal existence is subject to special disciplines under the Commercial Code although the general rules of the Civil Code are also applicable in many respects. What is peculiar about these disciplines mainly is the scheme of protection accorded to third party creditors of the seller: the price of the business sold is the security of the creditors; thus the seller is not allowed to receive payment until the creditors' claims are settled. The buyer is required not only to withhold payment of price (even if he has taken delivery), but is also supposed to look for creditors of the seller by publishing notice of sale at his own cost. These are restrictions on simultaneity of performance, which is the norm under general law of obligations, arising from the underlying rule that the debts and credits of the business do not constitute its elements and hence do not transfer to the buyer of the business. That complex architecture of creditors' protection can easily be avoided by allowing the transferability of the debts and credits of the business to the buyer and making both the seller and the buyer jointly and severally liable to third parties. This, however, may discourage buyers who need to acquire a business on a clean plate.

All about Words: Discovering the Intention of the Makers of the Ethiopian Constitution on the Scope and Meaning of Constitutional Interpretation

Getachew Assefa*

I. Introduction

Over the last 15 years or so, the discussion on constitutional interpretation in Ethiopia has obtained the greatest attention. It is not at all difficult to understand why this has been the case. This is essentially because of the unprecedented system of constitutional interpretation designed in the 1995 Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution or Constitution). The fact that the discourse on the area has flourished to such a promising extent is very positive. There are sources of concern, however, in relation to this flurry of literature on Ethiopian constitutional interpretation. An easy problem to pick up from the many writings seen so far is the disconnect that exists between most of what have been written. Every writer espouses his idea in isolation from others. Reference to other works by other authors on the same area is seldom the case and much less is the habit of taking issue with the positions of other authors. As a result, we see that divergent and isolated positions have been taken for example on the scope of the power of the House of the Federation (HoF) and the role of courts vis-à-vis constitutional interpretation. The immediate effect of this is that the users of our products, i.e. our writings, are confused with the islands of views on the same subject that are disconnected. They are confused and, in some cases, misled with the views we have inked. It is time that we take issue with each other so those who read what is penned by one scholar would not take his/her opinion for granted in the absence of critique on that work by other scholars that would help the reader view the various opinions in a better light. Truly, determining the unmistakable trajectory of constitutional interpretation in Ethiopia is very difficult primarily because the FDRE Constitution is very general on the matter. Its sensible elucidation cannot be done fully by one paper or writer. Clarification of such a vexing issue can be achieved through a concerted effort and a sustained engagement.

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This article is a modest attempt at reviewing and evaluating most (if not all) of the views aired by Ethiopian and foreign academics on Ethiopia's system of constitutional interpretation. It also in the same context looks at the positions taken on different issues of constitutional interpretation by the HoF, the Council of Constitutional Interpretation (CCI) and the judiciary so far as those positions are possible to ascertain. This author believes that some of the apparent positions taken by at least the CCI have been influenced or at least emboldened by the academic writings that came out earlier. A case in point is the position of the CCI on the question of its (as well as HoF's) interpretive jurisdiction on executive acts and decisions. The CCI maintains a position that the Ethiopian Federal Constitution does not empower it to interpret executive acts and decisions. This position aligns with the academic writings that came out in 2000 and 2002 reviewed in this article.

By adopting a critical and practice-oriented approach, this article hopes to encourage those who have an interest in the area to join the debate and contribute his/her fair share. I believe that the arguments and analysis put forward in this article will take the debate on constitutional interpretation a step forward.

The main objective of this article is not to delve into the theoretical and normative discourses of judicial or non-judicial review of constitutionality. Nor is it to investigate the theoretical underpinnings of originalism as an approach to constitutional interpretation. It is rather to set out as clearly as possible the meaning and scope of constitutional interpretation in Ethiopia as it is purported in the FDRE Constitution. This author believes that the most potent instrument for doing so at this point in time is the identification of the original understanding or intention of the makers of the FDRE Constitution which calls for a closer study of the history of its making.

The closer examination of the making history of the FDRE Constitution reveals that there was no distinction made among laws or decisions involving constitutional interpretation with a view to partitioning the jurisdiction among the HoF and the courts. The overwhelming consensus at the making time was that all kinds of 'constitutional dispute' or 'constitutional interpretation' will be within the powers of the HoF. In this regard, the article also argues that the key matter is the determination of the meaning of a 'constitutional dispute' or a 'matter of constitutional interpretation'. A constitutional dispute or a matter of constitutional interpretation is a constitutional issue—whether that relates to a constitutional provision, or a conflict between the Constitution and any other law or decision—to which there are two or more equally persuasive sides or viewpoints.

The above argument which is based not only on the study of the making history of the FDRE Constitution but also on the closer study of the pertinent provisions of the same Constitution establishes further that a mere expounding of a constitutional provision does not entail constitutional interpretation. An expounding of a constitutional provision becomes a matter of constitutional interpretation only if the provision in question involves a constitutional issue amenable to two or more equally persuasive viewpoints in a given case at a given time. It is thus argued in this context that it will be within the power of courts to determine the meaning and scope of a constitutional provision so long as a constitutional issue in the above sense has not arisen. By promoting the above standpoints, this author calls for an immaculate examination of the concepts of 'constitutional dispute' and 'constitutional interpretation'. It is believed that the academics as well as the CCI will be prompted to revisit their positions or embark upon a fresh look at the law book and its architectural history.

The article begins with a review of the major scholastic works in relation to the law of constitutional interpretation in Ethiopia. This section is intended only to put in perspective the views held by the authors on main and dividing issues of constitutional interpretation in Ethiopia. By so doing the intention is to allow the reader to compare the viewpoints forwarded by these scholars with one another, and with this author and then make an informed assessment and reflection on the subject matter. Section two presents a condensed snapshot of the opinions of the CCI regarding the scope and meaning of constitutional interpretation power of the HoF (and CCI). In the third part of the article, the making history of the FDRE Constitution is presented so that the reader will see what was originally intended by the makers regarding the meaning and scope of constitutional interpretation in Ethiopia. This will help the reader to understand and evaluate the opinions forwarded by the scholars. The fourth and last section of the article is devoted to analysis and conclusions. Here an attempt is made to evaluate and critique the views held by the scholars whose works are reviewed as well as those of the CCI. Moreover, the author offers his own perspective on what he believes is the correct approach to understanding the Ethiopian law of constitutional interpretation.

II. A Review of the Existing Academic Works on Constitutional Interpretation in Ethiopia

Assefa Fiseha is among the first and the most prolific of those who have written on Ethiopia's system of constitutional interpretation.[1] The main thrust of his

[1] The following are Assefa's major publications on constitutional interpretation in Ethiopia: 'Constitutional Interpretation: The Respective Role of Courts and the House of the

argument in all of his writings is that courts are empowered by the FDRE Constitution to interpret it.[2] His conclusions are derived from a cumulative reading of certain provisions of the Constitution. He primarily builds his argument around the provisions of Art. 84(2) and Art 13(1) of the FDRE Constitution. Asking the question whether the HoF is the sole and ultimate interpreter of the Constitution on every matter or whether the Constitution leaves room for other bodies, he goes on to answer the first part of the question in the negative and the second part in the positive. For this, the Amharic version of Art. 84(2) is his source of inspiration. He pays a particular attention to the phrase: 'በፌደራሉ መንግስትም ሆነ በክልል ሕግ አውጪ አካላት የሚወጡ ሕጎች...' ('which most approximately means 'laws enacted by the federal as well as State law making bodies') and argues that this wording of the Constitution limits the power of the HoF (and of the CCI) to reviewing the constitutionality of only 'laws enacted by the Federal House of Peoples' Representatives (HoPR) and its state counterparts'.[3] Assefa argues derivatively that 'as far as the constitutional compatibility of the acts of the executive with the Constitution --- is concerned,

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Federation' in *Proceedings of the Symposium on the Role of Courts in the Enforcement of the Constitution* (Addis Ababa: May 19-20 2000; hereafter 'Symposium on the Role of Courts); 'New Perspectives on Constitutional Review in Ethiopia' in *Ethiopian Law Review* Vol.1 (2002); 'Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of the Federation' in *Mizan Law Review*, Vol.1, No.1 (2007)—hereafter 'Constitutional Adjudication in Ethiopia'; 'Federalism and Adjudication of Constitutional Issues: The Ethiopian Experience', in *Netherlands International Law Review*, Vol. LII, No. 1(2005); and 'Federation and Second Chambers' in *Indian Journal of Politics*, Vol. 39, No. 3 (2005).Assefa also discusses the Ethiopian system of constitutional interpretation in chapter 8 of his book: *Federalism and Accommodation of Diversity in Ethiopia: A Comparative Study* (Revised Edition; 2007)—hereafter *Federalism and Accommodation of Diversity*; reviewed by Getachew Assefa in *J. Eth. L.*, Vol., 22; No. 2 (2008).

[2] See for example Assefa Fiseha, *Symposium on the Role of Courts*, at 10.

[3] See Id. at 12. I should like to mention here that Dolores A. Donovan has the same view of the jurisdiction of the HoF vis-à-vis constitutional interpretation. She states that Art. 84 of the Constitution makes it clear that the act of interpretation which the makers of the Constitution had in mind was the act of declaring a federal or state legislative provisions invalid as violative of the Ethiopian Constitution. See Dolores A. Donovan, 'Levelling the Playing Field: The Judicial Duty to Protect and Enforce the Constitutional Right of Accused Persons Unrepresented by Persons' in *Ethiopian Law Review*, Vol. 1, No. 1 (2002) at 31-32. Although was not well elaborated, this author also supported this position in a couple of early publications. See generally Getachew Assefa, 'Problems of Implementation of Human Rights Treaties in Ethiopian Courts,' in *Proceedings of the Symposium on the Role of Courts in the Enforcement of the Constitution* (Addis Ababa: May 19-20 2000); and Getachew Assefa, 'Protection of Fundamental Rights and Freedoms in the Ethiopian Federalism,' in *Proceedings of the Symposium on the First National Conference on Federalism, Conflicts and Peace Building* (Addis Ababa: 2004). The argument presented in this article is therefore a revision of the author's earlier position as well.

the Constitution is silent'.[4] According to him, since the Amharic version of Art. 84(2)—as opposed to the English version which could be controvertible—'makes it clear that the term law refers to laws enacted either by the HoPR or state legislative bodies [and therefore nothing more]', a citizen can challenge the constitutionality of all laws other than proclamations of HoPR and state councils before ordinary courts. More clearly, his argument is that the review of constitutionality of regulations, directives, decrees, orders, notices, will be the competence of the ordinary courts.[5]

The second ground for Assefa's argument finds salvo in Art. 13(1) of the FDRE Constitution. According to Assefa, Art. 13(1) which stipulates that 'all Federal and State legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of this Chapter [chapter three]' makes it mandatory that the courts engage in the interpretation of the scope and limitation of the rights in the third chapter in order to live up to its duty to 'respect and enforce' the Constitution.[6] Assefa extensively discusses the activist roles the judiciary in the USA played in the 1950s and 60s and urges the Ethiopian judiciary to draw lesson form the US courts.[7] The core of his views remained unchanged as reflected in all of his subsequent publications. He rather used all later practices and legal developments in relation to constitutional interpretation to strengthen his positions. In for example the most recent of his publications in 2007, he discusses how the role of the judiciary has been affected by the legal and practical developments.[8] Assefa believes the two

[4] Id.

[5] Id. Assefa tries to strengthen his position by stating that such a differential treatment of interpretation of the Constitution vis-à-vis parliamentary enactments is consistent with the parliamentary form of government in which the parliament is the supreme body subject to only the supremacy of the constitution, and ordinary courts are thus prohibited from nullifying parliamentary enactments. See Id.

[6] Id., at 14. Assefa quotes in support of his argument here the opinion of, Clyde Willis, an American law professor who was visiting the AAU Law School back in early 1990s. Willis argued that in order to settle ordinary criminal cases on freedom of religion, search and seizure, right to speedy trial, etc, the courts' involvement in constitutional interpretation is unavoidable. See Id. This author does not disagree with Assefa and Willis on the role of the courts to deal with the kinds of cases that arise in relation to criminal justice administration and ordinary civil litigation that may have to be resolved by citing the provisions of the Constitution. This in a way is a form of textual interpretation by which the courts engage in the reading and application of the text of the Constitution. However, as I will fully bring to light later in this article, as opposed to the systems in which courts are fully mandated to interpret the constitution such as in the USA, textual interpretation in Ethiopia should be understood in a stratified way, from mundane to more complex one.

[7] See Id., at 15-16.

[8] 'Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of the Federation' in *Mizan Law Review*, Vol.1, No.1. See also his book (note 2 above), at 388-394.

proclamations enacted in 2001 are incompatible with the Constitution.[9] Here again he reiterates his view discussed above that the HoF's role has to be restricted to 'reviewing the constitutionality of laws enacted by the legislature: federal and state'.[10] He takes issue with the two proclamations primarily because he believes they expand the reviewing jurisdiction of the HoF by broadly defining the term 'law' to embrace regulations and directives issued by the executive branch of government as well as international agreements ratified by Ethiopia.[11] In this connection Assefa has the following to say:

> ...by defining 'the law' too broadly to include all conceivable acts of the legislature and the executive, the drafters of the new laws that are supposed to define the role of the HoF and the CCI, have themselves apparently come up with an unconstitutional law. This is so because the Federal Constitution is at least clear on this point: it never intended to include regulations, directives and decisions of administrative bodies in the way the laws attempted to include. By so doing the drafters [of the two proclamations] have wiped out or at least attempted to wipe out the jurisdiction of the courts: federal and state.[12]

He accordingly reaffirms his contention that 'it was not the intention of the framers of the Constitution to rule out the jurisdiction of the judiciary from all constitutional matters'.[13]

Another publication to consider is Ibrahim Idris's article which was one of the early and influential works.[14] Ibrahim contends that under the FDRE Constitution the courts are denied both the power of interpreting the constitutional provisions and handling judicial review of legislative statutes.[15]

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[9] See Id., p.15. The two proclamations are: Proclamation No. 250/2001, *Council of Constitutional Inquiry Proclamation*; and Proclamation No. 251/2001, *Consolidation of the House of the Federation and Definition of its Powers and Responsibilities Proclamation*. Assefa says that the two laws '--- indirectly strip the jurisdiction' of the regular judiciary---'. See Id.

[10] Id., at 15-17. Assefa uses the same argument based on the reading of the controlling Amharic version of Art. 84(2) which he believes to restrict the constitutional interpretation power of the HoF to only parliamentary enactments at both state and federal levels. He also turns here as well to the argument emanating from the notion of parliamentary supremacy as justifying deferential treatment of parliamentary enactments, and not other laws. See note 5 above.

[11] See Id., at 17.

[12] Id. Assefa asserts further that in the *CUD v. Prime Minister Meles Zenawi* (2005), the federal court 'wilfully relinquished its constitutional mandate' by its act of referring the case to the CCI. See my discussion on this under the next section of this article.

[13] Id. at 32.

[14] Ibrahim Idris, 'Constitutional Adjudication under the 1994 FDRE (Federal Democratic Republic of Ethiopia) Constitution' in *Ethiopian Law Review*, Vol. 1, No.1 (2002).

[15] Id., Art. at 67.

Having argued that the power to interpret the Constitution is entirely the power of the HoF, he specifically has the following to say:

> ... the scope of constitutional adjudication consists of two situations: interpretation of constitutional provisions and determination of constitutionality of legislative act. Accordingly all other legal issues, including those having constitutional significance such as an act or a decision of a state organ or a public official or a custom contravening the Constitution are not matters to be entertained by the Council of Constitutional Inquiry and the House of the Federation. Under Ethiopian law, any petition on the unconstitutionality of an administrative act or a decision or a custom is within the judicial jurisdiction of an ordinary court.

Besselink's article on the protection of human rights in Ethiopia is also worthy of consideration for it is an, if not the most, insightful textual readings of the FDRE Constitution's interpretative system.[16] He sharply analysed the respective role of the HoF/CCI, and the judiciary relative to the interpretation and enforcement of the fundamental rights and freedoms of the Constitution. He observes that the wording of the relevant provisions of the Constitution, i.e., Arts. 83(1), 84 (1 and 2) and 62(1) do not clearly provide 'the extent to which these bodies [HoF/CCI] have exclusive power to decide constitutional issues'.[17] He concludes at one point that Art. 62(1) must be understood 'to probably mean that the HoF has the power to interpret the Constitution *authoritatively*, that is to say: it is the ultimate interpreter and its interpretations will be decisive and binding'.[18] He further concludes that 'this does not out-rule every and any powers of interpretation of the constitution by others'.[19]

Although he rather promotes a very cautious and insightful reading of the text of the Constitution regarding the matter at hand, Besselink seems to endorse the view, at least partially, that Art. 84(2) 'suggests a much more limited exclusive jurisdiction of the Council and the House of the Federation: only the power to give an authoritative interpretation of the Constitution with a view to establishing the (in-) constitutionality of federal and state legislation is reserved to the Council and the House of the Federation.[20] He tries to justify his position

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[16] Leonard F.M. Besselink, 'The Protection of Human Rights in Federal Systems- the case of Ethiopia' in *Proceedings of the 14th International Conference of Ethiopian Studies* (Nov. 6-1, 2000, Addis Ababa), Vol.,3. See specifically his discussion at 1372-1379.

[17] Id., at 1373. See incidentally that Professor Besselink leaves out Art. 84(3) of the FDRE Constitution from the list of determinant provisions.

[18] Id.

[19] Id.

[20] Id.

by the provisions in Arts. 9(2), 79(1) and 13(1) of the Constitution which together vest judicial power in the courts, and impose on all organs of state, along with others, the duty to respect, to enforce, to ensure the observance of, and to obey the Constitution. As regards the power of the courts to interpret the text of the Constitution, he seems to conclude that in relation to non-rights parts of the Constitution the courts 'should be assumed to have the power to apply the Constitution whenever the meaning of the Constitution is beyond doubt and does not require 'interpretation'' or because of the obviousness of the case or because it was previously settled by the CCI/Hof.[21] Regarding the power of the courts to interpret the rights and freedoms in the third Chapter of the Constitution, he boldly states that such a power is not within the competence of only the Hof and the CCI.[22] But he does not go further to show as to how the competence between the Hof/CCI on the one hand, and the courts on the other can be shared.

When it comes to the power of HoF/CCI relative to other matters such as executive actions or rules alleged to have violated the Constitution, Besselink puts forward an interesting perspective, different from those of Assefa and Ibrahim discussed earlier.[23] He proposes the following way of approaching the matter under consideration:

> ...the broadly described power to 'interpret' the Constitution [Art.62(1)], respectively, to 'investigate issues of constitutional interpretation' [Art.84(3)] and investigate or decide 'constitutional disputes' [83(1), 84(1)] is vested in Council of Constitutional Inquiry and House of Federation in a non-exclusive manner, whereas the power respectively to investigate and decide on the disputes concerning the constitutionality of legislation has been vested exclusively in these institutions.[24]

Besselink concludes that whether the matters involving the executive action relates to human rights violations or other matters in which allegation is made that there is an issue of constitutionality of the executive action involved, the HoF/CCI has jurisdiction which is not exclusive but shared with the judiciary, most appropriately, I believe, the CCI/HoF being appellate loci for a case that has begun somewhere in a court of law.

Yonatan Tesfaye is another author who dwelt on the law of constitutional interpretation in Ethiopia.[25] Originally, his ideas on the role of the courts in the

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[21] Id., 1374.

[22] Id.,

[23] Id., at 1376-1377.

[24] Id., at 1376.

[25] The following two of his publications are considered most related for our purpose: 'Whose Power Is It Anyway: The Courts and Constitutional Interpretation in Ethiopia' in *J. Eth. L.*,

enterprise of constitutional interpretation lack clarity.[26] However, in his other article considered here, Yonatan comes out with a clearer view of the role he ascribes to the Ethiopian courts regarding the task of interpreting the FDRE Constitution in a way much related to, and perhaps inspired by that of Ibrahim's point of view discussed earlier. In an attempt to put the works of other scholars, primarily Assefa's, in perspective, Yonatan says the following:

> The import of this argument is that it is only the power to enquire into the constitutionality of legislation that the Constitution has entrusted to the House [HoF]. The Constitution, as a result, does not identify a single organ that is responsible for constitutional interpretation. In the absence of any law or provision that excludes the courts from the business of constitutional interpretation, they conclude, the courts still *have the power to expound the provisions of the Constitution through interpretation,* short of invalidating legislation for unconstitutionality.[27] (Emphasis added).

Yonatan goes on to state that a close reading of the FDRE Constitution does not warrant the conclusion that the constitution does equate constitutional interpretation with only the 'power to determine the constitutionality of legislation'.[28] He urges that in order to determine what 'constitutional interpretation' must mean according to the Constitution, one needs to define what a 'constitutional dispute' is since the Constitution also empowers the HoF to decide all constitutional disputes.[29] He goes on to argue on the basis of Art.

Vol.22, No.1.(2008)— hereafter 'The Courts and Constitutional Interpretation in Ethiopia'; 'Judicial Review and Democracy: A Normative Discourse on the (Novel) Ethiopian Approach to Constitutional Review' in *African Journal of International and Comparative Law,* Vol. 14, No.1 (2006)— hereafter 'Ethiopian Approach to Constitutional Review'. In his first article mentioned above, Yonatan has embarked upon an exemplar scrutiny of other writers' works and he should be credited for that.

[26] See 'Ethiopian Approach to Constitutional Review', Id. at 79-81. One will find it difficult to understand whether the matter with the judiciary of Ethiopia regarding non-utilizing the constitution for settlement of cases has to do with the judges' own problems (what he calls 'hands-off' approach at one point) or whether it has to do with the constitutional arrangement that prohibited courts from interpreting the Constitution. But he seems to align more with the second reason from what he says in the conclusion: 'the Ethiopian approach to constitutional review--- totally excludes courts from the business of constitutional interpretation'. See Id., at 82. One will find it difficult also to learn whether he assigns same or different meanings to the terms 'constitutional review' and 'constitutional interpretation'. See generally Id.

[27] 'The Courts and Constitutional Interpretation in Ethiopia' (note 25 above) at 133. Yonatan does not make any reference to Professor Besselink's work referred to above.

[28] Id., at 133-134.

[29] Assefa and Yonatan maintain divergent views on what each of the terms—'constitutional interpretation' and 'constitutional dispute—means. Assefa believes that constitutional dispute involves cases of real dispute between parties. He does not consider cases of review

84(1) and (2) of the Constitution that constitutional dispute would mean both 'the general task of interpreting the Constitution with a view to ascertaining the meaning, content and scope of a constitutional provision', and 'the more specific task of determining the constitutionality of federal or state law...'.[30] Yonatan boldly concludes that the courts do not have the power to interpret the Constitution in either of the senses he elaborated as discussed above.[31]

In taking issue with Assefa's position that enforcement of the Constitution (for example in relation to the third Chapter) presupposes interpretation of some sort, Yonatan somewhat ambivalently goes on to say 'yes' and 'no'. He says that although 'most often courts are required to interpret the law in order to determine the meaning of the applicable law and apply it to the operative facts of the case brought before them', there may however be at least few cases 'where the courts can enforce the provisions of the Constitution without interpretation.[32] He goes on to give examples of cases in which the provisions of the Constitution are stated in 'an explicit and clear manner' and hence do not require the courts to do any work of interpretation but application.[33] Yonatan sums up his main argument by stating the following:

> ... the courts are expected to enforce the provisions of chapter three of the Constitution only to the extent that it does not engage them in interpretation. However, 'if issues of constitutionality arise in the courts'--- in the process of enforcing the Constitution, the courts should refer the matter to the Council. They should refrain from giving meaning to the provisions of the Constitution and resolve the Constitutional

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of constitutionality as falling under the ambit of what we call constitutional dispute because review of constitutionality does not necessarily involve a dispute between parties. A good example is abstract review of legislation which is essentially initiated by political bodies and can be resolved by the HoF without the existence of any other party—'defendant' in the case. See Assefa 'Constitutional Adjudication in Ethiopia' (note 1 above), note 22 at 10. Yonatan on the other hand states that a clear example of a constitutional dispute is reviewing the constitutionality of legislation found to be in contravention of the Constitution. He cites Art. 84(2) of the Constitution which deals with rules and procedures of challenging constitutionality of federal and state law before the HoF and the CCI as a prime case of constitutional dispute. According to Yonatan, another aspect of constitutional dispute 'is the mere fact that a dispute involves constitutionally recognized rights' and he further holds 'the determining factor is that a claim is made based on the provisions of the Constitution or that the provisions of the Constitution are in one way or another implicated in a case brought before the court'. See The Courts and Constitutional Interpretation in Ethiopia (note 25 above) at 134.

[30] .See The Courts and Constitutional Interpretation in Ethiopia (note 25 above) at 134.

[31] Id., at 134-135.

[32] Id. at 139.

[33] Id., at 140-141. We shall return to this argument later in the article to show that it misses a critical point.

dispute. Under such circumstances, they are expected to defer to the interpretation of the House.[34]

The conclusion that one can draw from the above is that in all cases where a court has to interpret the Constitution in order to settle a dispute at hand, the court in question must do nothing but refer the case to the CCI.

Other scholars have also in various ways and degrees discussed constitutional interpretation in Ethiopia. Tsegaye Regassa for example argues that Ethiopian courts must be considered to assume to have inherent power to engage in review of constitutionality when there are clear cases in which the norms in a given law contradicts with those of the Constitution.[35] Girmachew Alemu has also touched upon constitutional interpretation in the context that courts are denied the power to interpret the Constitution, although, brief and incidental as it is, his discussion does not reflect on the issue under consideration.[36]

Sisay Alemahu, who also makes an incidental discussion on constitutional interpretation system of Ethiopia in a couple of his publications, argues that 'the mandate of the HoF --- to interpret the Constitution does not exclude the courts from applying constitutional provisions on fundamental rights and freedoms'.[37] The following is his main argument in this regard:

> ...Art. 84 of the Constitution--- shows that 'constitutional disputes' are those in which the constitutionality of laws or decisions is contested and/or those which make the interpretation of some constitutional provisions necessary. It may be that the precise meaning and scope of a constitutional provision is disputed or a legislation invoked by the parties or relied on by the court, or a decision given by the government organ or official is contested or considered to be inconsistent with the Constitution. Such instances may give rise to 'constitutional disputes' that make constitutional interpretation necessary.[38]

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[34] Id., at 141.

[35] Tsegaye Regassa, 'Courts and the Human Rights Norm in Ethiopia' in *Proceedings of the Symposium on the Role of Courts in the Enforcement of the Constitution* (Addis Ababa: May 19-20 2000) at 114-120.

[36] Girmachew Alemu, 'Beyond the Red Terror Trials' in *The Ethiopian Red Terror Trials*, K. Tronvoll, C. Schaefer & Girmachew Alemu (eds.) (James Curry, 2009) at 118-120.

[37] See for example Sisay Alemahu, 'The Constitutional Protection of Economic and Social Rights' in *J. Eth. L.*, vol.22, No. 2 (2008) at 144-145.

[38] Id., at 145. The points in the quoted paragraph are also based on the Provisions of Arts. 6, 17 and 21 of Proclamation 250/2001. See Id.

Sisay seems to conclude that 'when such disputes arise in a case already before a court of law, the court is not precluded from entertaining and ultimately deciding the case' as the court is only required to submit a legal issue of constitutional interpretation to the CCI only if it believes that there is a need for 'authoritative constitutional interpretation'.[39]

Takele Soboka's recent article comes up with what one may term as the most liberal ever understanding of the role of courts in the interpretation of the FDRE Constitution.[40] He boldly affirms that 'the Ethiopian Constitution has apportioned the duties of constitutional interpretation between two bodies: the judiciary and the CCI/HoF' wherein the judiciary is the principal body to adjudicate constitutional issues.[41] In what may be considered as a shared view with Tsegaye, Takele believes that 'this would mean that the judiciary is equally duty bound to deny applications to cases before them those laws which they deem are outright unconstitutional'[42]. According to him 'in case the court reaches the conclusion that the law under consideration is clearly unconstitutional, it refuses to apply it to the concrete case before it and renders a decision on the bases of other laws and precedents that are constitutional', and this may be, as done in systems like the UK and Australia, called *disaplication*.[43] He believes that the term 'constitutional dispute' in Art. 83 of the Constitution must be understood to mean interpretational dilemmas or disagreements rather than factual disputes and he concludes that the Constitution does not vest in the HoF the power of adjudication of constitutional disputes involving concrete factual situations beyond the requirements of abstract interpretation of the Constitutional provisions.[44]
In a related argument, Takele asserts:

> ...the Constitution itself has come close to defining the meaning of 'constitutional dispute.' Under Article 84(2), a dispute is used to refer to a situation '[w]here any Federal or State law is contested as being unconstitutional,' thereby necessitating the need to investigate the dispute and CCI's recommendation for or against interpretation of the contested law. It thus hints at the intended meaning of the word

[39] Id. See also Art. 21 of Proc. No. 250/2001.
[40]Takele Soboka, 'Judicial Referral of Constitutional Disputes in Ethiopia' in Assefa Fiseha and Getachew Assefa (eds.) *Ethiopian Constitutional Law Series*, Vol. 3 (Addis Ababa: AAU Printing Press, 2010).
[41] Id., at 66.
[42] Id., at 67.
[43] Id.
[44] Id.

'dispute' as it refers to a situation where the constitutionality of a federal or state law is doubted or contested.[45]

In such a way, Takele argues that any further expansive ascription of the power of the HoF to extend to 'the resolution of each and all constitutional disputes is to usurp the power of the regular judiciary' in ways contrary to the design of the Constitution itself.[46] He concludes that 'the contextual reading of the Constitution means that the word 'dispute', that appears only once in Art 83(1) of the Constitution must be taken to mean constitutional interpretation.[47] Another point perhaps worth noting in his argument is the one that goes along the line of Tsegaye earlier discussed which says that if the judge has no doubts about constitutionality or unconstitutionality of a law, the need for interpretation is dispensed with and it remains for the judge to apply or disapply the law in question.[48] The purport of this argument is that the judge can set aside a law the unconstitutionality of which he is certain about.

Finally, it is worth mentioning the expressed opinions of the former President of the Federal Supreme Court (FSC)—also ex officio chair of the CCI, and the former Vice President of the same Court—also ex officio vice-chair of the CCI. The former President of the FSC, as we can tell from his keynote address made at one gathering back in 2000, seems to believe that the power to 'interpret the Constitution is equated with the power to declare federal or state laws as unconstitutional and therefore null and void'.[49] A key note address as it was, this will not give the full view of the opinion of the former president and it should be taken at that. However, more elaborate views of the former vice-president Menbertsehai could be gathered from his publications and speeches.[50] One can conclude from these that, his theory is inclined more towards the position espoused by such scholars like Assefa discussed above. Menbertsehai seems to assert that other than non-justiciable matters such as the right to self-determination and vertical division of power between the Federal and state governments, cases of constitutional interpretation arise in the context of the claim of unconstitutionality of federal or state law.[51] But he also believes that

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[45] Id.
[46] Id.
[47] Id., at 68.
[48] Id., at 77.
[49] Ato Kemal Bedri, 'Keynote Address' in *Proceedings of the Symposium on the Role of Courts in the Enforcement of the Constitution* (note 1 above) at 4. See also a related discussion in Yonatan Tesfaye, 'The Courts and Constitutional Interpretation in Ethiopia' (note 25 above).
[50] An important publication, used in this review, is his book in Amharic □□□□□□ □□□ □□□ □□□□□ (roughly translated as 'the Situations/Features of Law and Justice in Ethiopia') published in December 2006.
[51] See Id., at 144.

courts have a role to play in the interpretation of the Constitution, and in this regard ascribes to courts a wider jurisdiction. As Assefa, Menbertsehai also holds that if a given case involves the challenge of constitutionality of a decision or a directive of a government organ, there is nothing that prohibits the entertainment (and decision) of such a case by an ordinary court.[52] Menbertsehai makes two additional points worth noting. The first one is that when a question of constitutionality is raised in relation to a law material for the case before it, the court must scrutinize whether the question of constitutionality is reasonably persuasive or not, and he calls this 'preliminary constitutional interpretation'.[53] The second point relates to interpreting the provisions of the constitution itself, and he says that based on Art. 3 of Proclamation No. 25/1996 (the Federal Courts Proclamation) courts have jurisdiction over cases arising under the Constitution. Therefore, he concludes, this indicates that courts can 'to some extent' interpret the Constitution.[54]

III. A Review of the Jurisprudence of the CCI and the HoF

According to the HoF's *Journal of Constitutional Decisions* published in 2008, there have been more than 80 applications, mostly by private parties, made to the CCI for constitutional interpretation. The CCI made recommendations to the HoF for constitutional interpretation in only three of the above applications.[55] While a few are still pending in the docket of the CCI, most of the rest have been rejected as not entailing constitutional interpretation.

The author's intention here is not to review the whole jurisprudence of the CCI and HoF that has emerged out of all the cases they have considered. Rather the author will canvass a few cases in order to assess particularly the position of the CCI relative to the scope and meaning of constitutional interpretation in Ethiopia. This exercise is hoped to show the interpretive stance the CCI and HOF have taken as regards their own powers as well as those of the courts.

When we study the cases referred to the CCI right from the early days of its establishment, we see all sorts of cases from those alleging religious discrimination, to claims against municipality decisions, to those raising fundamental group rights issues such as the *Silte* case[56] and the *Beneshangul/Gumuz* case[57]. A good number of these cases has been referred to

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[52] Id., at 145-146.
[53] Id., at 146.
[54] Id.
[55] These are the *Silte* case, *Beneshangul-Gumuz* Language case, and the *Kedija Beshir* case.
[56] See *Journal of Constitutional Decisions*, Vol. 1, No. 1(in Amharic, 2008) (published by the HoF) at 40-100. The English rendition of the parts of the cases reproduced or otherwise mentioned in this article (including those in the Journal) is made by the author from the Amharic original.
[57] Id., at 14-33.

the CCI by affected individuals either after a court decision or in the middle of the court process. However, most seem to come directly to the CCI, hence making it an avenue of first instance. The opinions of the CCI so far also show that it has rejected most of these cases as not entailing constitutional interpretation. This pattern of opinion is hoped to make those who will intend to bring cases to the CCI to think twice as it shows that the latter is seriously filtering cases when it comes to constitutional interpretation. This at the same time will encourage such potential applicants who want to make the CCI a first instance interlocutor to in stead resort to the judiciary with their claims.

Turning to the examination of the CCI's jurisprudence, the following paragraphs will explore the issue under two categories: textual interpretation of the Constitution, and review of constitutionality of laws and decisions. Following a conventional understanding in constitutional law, the terms 'textual interpretation of the Constitution', are ,meant to refer to cases in which interpreting the provisions of the Constitution becomes necessary for giving resolution to a certain dispute. Likewise, the terms 'review of constitutionality' on the other hand refer to cases in which the constitutionality of a law enacted at Federal or state level, or decisions of Federal or state organ or official are challenged.

To get directly to the heart of the matter, as far as the interpretation of the text of the Constitution is concerned, the opinions given so far by the CCI do not give rise to any doubt that such is within its jurisdiction. The CCI has taken upon itself to look into cases that are principally based on the interpretation of the text of the Constitution for resolution of the submitted disputes. The opinions it gave in relation to the *Silte* case, *CUD v. Prime Minster Meles Zenawi*, and the *Corruption case* (involving 41 persons) are good testimonies to the above assertion. The first two cases will be discussed here, and the reader is referred to a recent article published in J. Eth. L. for the third case.[58]

As this is almost a commonplace by now, in the *Silte case*, the central issue was the determination of the identity of a group, the Silte, which has claimed for a distinct identity as opposed to the assumption that it was part of the Gurage people. The CCI stated that there were two major questions to be answered for the resolution of the case:

1) On which organ or body does the Constitution bestow the power to determine the identity of a group?
2) What procedures should be utilized in order to decide on an identity claim by a group?

[58] Wondwossen Demissie, 'The Right to Bail in Ethiopia: Respective Roles of the Court and the Legislature' in *J. Eth. L.* Vol, 23, No.2 (2010).

In its attempt to resolve these questions and with a view to resolving the question of identity pressed by the Silte people, the CCI stated from the outset that there is a need to interpret the text of the Constitution.[59] In regard to the first question, the CCI arrived at a conclusion that there is no provision in the Ethiopian Constitution that 'directly and clearly' provides as to who has the power to determine the identity claim of a group.[60] Having made the above-stated conclusion regarding the apparent gap in the Constitution, it went on to make a textual interpretation of the latter. It stated that a close reading of Article 52(2, a) of the Constitution would give a direction to the resolution of the case.[61] The CCI went on to hold that when the states establish their respective state administrations that best advance self-government, they need to first decide on the question of identity.[62] It also unambiguously stated that 'since the federal state structure put in place by the FDRE Constitution gives states the power to decide on their internal matters and that identity questions arise within states, such questions must obtain the decision of the state in question'.[63] The CCI also opined that by virtue of article 62(3) of the Constitution, the HoF will remain to be the ultimate settler of questions of self-determination. But it also said that the HoF shall be the appellate body in relation to questions of identity determination while the concerned state council remains to be the body to serve as a first instance venue with original jurisdiction.[64] As regards the second question (the question of procedure), the CCI recommended that referendum be used in the same way as in the claim for statehood (Art. 47) and secession (Art. 39).[65] This opinion of the CCI was endorsed by the HoF. This beyond any doubt shows that such a textual interpretation of the Constitution is well within the jurisdiction of both the CCI and the HoF, and that both bodies have accepted and exercised this constitutional competence. As will be later shown, the fact that textual interpretation of the Constitution was understood by its framers is vindicated by this jurisprudence.

The second showcase is the *CUD* case of 2005. A good number of academics has taken interest in this case for obvious reasons. Some have made this case part of their academic writings primarily holding the view that the Federal First Instance Court (FFIC) made a mistake by referring the case to the CCI for

[59] *Journal of Constitutional Decisions* (note 56 above) at 41.
[60] See Id. at 41-42.
[61] Art. 52(2)(a)—which deals with the powers and functions of states—provides one such powers to be 'to establish a State administration that best advances self-government, a democratic order based on the rule of law; to protect and defend the Federal Constitution'.
[62] *Journal of Constitutional Decisions* (note 56 above) at 43.
[63] Id.
[64] Id., at 44.
[65] Id., at 45-46.

constitutional interpretation.[66] As it is not necessary for the purpose of this article to comprehensively review the opinions of the scholars that have commented on the *CUD* case, the author would just like to briefly inject a view in relation to the agenda of this section, i.e. textual interpretation of the Constitution, that the position of the FFIC was at least partially defensible. Most of the commentators referred to above[67] rejected particularly the issue framed by the Court as inappropriate. This in the opinion of this author arises from the failure to look at the case in the prevailing circumstances as opposed to a normal time enforcement of the law. This can help see what the court was made to deal with was not a type of case that could be decided in the same way as other everyday cases. No one would argue that the Prime Minister's ban of outdoor meetings and demonstrations on any one fine morning would be defensible, nor would it be a matter for constitutional interpretation because it would clearly fly in the face of Art. 30(1) of the Constitution which guarantees to everyone 'the right to assemble and to demonstrate together with others peaceably and unarmed, and to petition.' In other words, a court of law in Ethiopia could declare that such a ban by the chief executive violates the Constitution; that is precisely what it is supposed to do under Art. 13(1) of the Constitution. But in the *CUD* case, the court was confronted not with a clear situation of enforcement of the Constitution in normal times but with a high-stakes situation in which, depending on its rulings—whether its ruling is correct or not—a situation that would be capable of being highly politicized would arise. This would directly place the court in confrontation with the executive, not to mention the risk that its decision would be dishonoured by the latter. In the opinion of this author, it was acceptably prudent for the court to make this case a case for constitutional interpretation and get out of the flames, at least momentarily. However, this author agrees with the view that the court failed to interact with the case (as it was legally bound to) and frame the legal issue(s) it believed would involve the interpretation of the Constitution.[68] That way, it would have made use of the opportunity to engraft its judicial and rightful views on the dispute. That was not to be, and it is regrettable.

On a non-prudential consideration ground, and this is more important, this author also believes that there was an issue of constitutionality involved in that case. As stated above, the question was whether the Prime Minister was

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[66] See Assefa, 'Constitutional Adjudication in Ethiopia' (note 1 above); Sisay, 'The Constitutional Protection of Economic and Social Rights'(note 38 above); also in Sisay Alemahu, 'The Justiciability of Human Rights in Ethiopia' in *African Human Rights Law Journal*, Vol. 8 (2008), at 279-281; Takele, 'Judicial Referral of Constitutional Disputes in Ethiopia' (note 40 above).

[67] See for example Takele and Sisay, Id.

[68] See Art. 21, Proclamation No. 250/2001.

empowered by the Constitution to take measures (such as the one he took) in circumstances in which he deemed the nation's peace and order would otherwise be in grave danger. Such a constitutional interpretation question—textual interpretation—is warranted in the absence of a clear constitutional provision answering such a question. That was what that Court did, and that was in a way what the CCI investigated in its opinion by looking at the overall executive powers in the Constitution.[69]

In conclusion of the above points, this author would like to underscore first that the CCI has no doubts or confusion regarding its powers of investigation into constitutional disputes to ultimately recommend the textual interpretation of the Constitution by the HoF. Secondly, it is important to note from the forgoing that a jurisprudential stance to the effect that ordinary constitutional enforcement issues will not be passed upon by the CCI/HoF is being developed as the numerous cases rejected by the CCI has effectively demonstrated.[70] This is in line with the Constitution's provisions particularly those under Arts. 83 and 84(1). These provisions make reference to constitutional disputes, not to everyday constitutional application or enforcement.

Takele rightly observes that constitutional dispute is said to have arisen if there is a real and important disagreement between two or more constructions of a constitutional rule or principle each of which is forcefully persuasive.[71] If owing to the equally persuasive nature of the arguments of both sides, a judge believes that the dispute cannot be resolved without interpreting the constitutional rule or principle in question, there arises the need to interpret the Constitution. Constitutional disputes do not involve factual disputes.[72] Constitutional disputes rather involve in terms of the text of the Constitution issues like resolution of gaps in the Constitution (such as the one determined in relation to the *Silte* case), conflict of norms in the Constitution and problems arising from the *sue genres* nature of the Constitution.

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[69] See the Opinion of the CCI reported in *J.Eth. L.*, Vol. 23, No.2 at 146.

[70] In this connection, the observation by Sisay that the submission of a claim on the basis of a constitutional provision startles our courts to think to consider referring the case to CCI may be a little exaggerated but has some grain of truth in it. See Sisay (note 66 above) at 278. We have on the other hand cases in which courts have taken upon themselves settling a dispute on the basis of constitutional provisions in a situation that borders deciding a constitutional dispute in the sense of Article 83 of the Constitution. See, for example, the Federal Supreme Court's cassation decision in the case *W/t Tsedale Demissie v. Ato Kifle Demissie* (Federal Cassation File No. 23632). See also the comment on the same by Getachew Assefa in *J. Eth. L.* Vol. 23 (No.2) at 162.

[71] See Takele (note 40 above).

[72] Id.

We shall now turn to the second category of the CCI's jurisprudence, review of constitutionality of laws and decisions. The CCI defines its jurisdiction regarding review of constitutionality of laws and decisions very narrowly. It appears that the CCI has come to believe that the Ethiopian Constitution limits its (and the HoF's) power of reviewing constitutionality only to cases of contestation that a Federal HoPR's or a state council's proclamation is unconstitutional. It suffices to see a recent case considered and decided by the CCI to show its position in this regard. In the case *Ethiopian Blind Persons Association v. Oromia Education Bureau and Jimma College of Teacher Education*, the CCI stated that if at issue is the constitutionality of other matters than state or federal proclamations, it will not be for the CCI to decide but for the courts.[73] It reasoned on the basis of Art. 84(2) that its mandate is limited to review of constitutionality of proclamations of both levels of government. Interestingly, it also admonished courts in its opinions that they should send only those cases in which constitutionality of proclamations are challenged, not when regulations or decisions are challenged. The reading of the relevant provisions of the Constitution as well as the documents recording its making process demonstrate that the interpretive jurisdiction of the HoF (and CCI) is meant to be all-encompassing. In other words, whether at issue is the constitutionality of a proclamation or a regulation of the executive or a decision of an official or organ of state, the ultimate settler is the HoF. The intention of the framers of the Constitution will be shown in the following section.

IV. Understanding the Makers of the Constitution

This section presents the controlling views around which consensus was reached regarding the scope and meaning of constitutional interpretation during the making of the FDRE Constitution. The views presented here are those of the members of the Constituent Assembly that discussed and ratified the Constitution. Although the debates held in other bodies involved in the making process such as the drafting commission and the Transitional Council of Representatives are worth looking into, unfortunately, the minutes of these bodies do not shed any light on this particular case. As a result, we will look only at the Minutes of the Assembly that embody the discussion in relation to Arts. 62(1), 83, and 84 of the Constitution.

Before taking up the 'genetic' history of the FDRE Constitution with the intention of locating the original understanding of the makers as regards the scope and meaning of constitutional interpretation, a few words on the theoretical squabbles around the use of original understanding or intention of makers of a given constitution for interpreting its text will be in order. The

[73] Decided in December 2003 with all the 10 members concurring.

interpretive approach that advocates for ascertaining the original meaning attributed to a word or a clause or a phrase by the framers and to use that same meaning to solve a case is commonly known in the American constitutional jurisprudence as 'originalism' or the 'jurisprudence of original intention'[74]. Although the approach has its genesis in the works of the US Supreme Court, it has been employed in other systems such as the German and south African constitutional courts. This approach stands for the view that where the meaning of a constitutional provision is unclear, judges should be guided by the original intent of the framers (or original authors) of the constitution.[75]

Originalism is one of the most controversial approaches of constitutional interpretation in constitutional theory.[76] It has both supporters as well as detractors in the academic and practicing lawyers and judges in the United States and elsewhere. Those who object to the originalist positions point primarily at the extreme difficulty of precisely ascertaining the so called original intent or understanding of the framers of the constitution. This difficulty relates both to the problem of deciding whose 'intention' or 'understanding' should count (is it the drafters'? the ratifiers'? or of the people who elected them?), and the evidence for vindicating the intention to be used.[77] Each participant or delegate in a constitution making process may have his or her own understanding of the given term or clause put in the constitution and therefore it may not be warranted to conclude that there was a shared intention. These problems would be further complicated by layers and layers of compromise that go into the text of the constitution among the delegates and the interests they

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[74] For a useful summary of methods of constitutional interpretation developed by the American Supreme Court, see Walter F. Murphy, et al., *American Constitutional Interpretation*, 2nd ed. (Westbury, N.Y.: Foundation Press, 1995).

[75] Aileen Kavanagh, 'Original Intention, Enacted text, and Constitutional Interpretation,' in *Am. J. Juris.*, Vol., 47 (2002) at 255; William J. Brennan, Jr., 'The constitution of the United States: Contemporary Ratification,' in *S. Tex. L. Rev.*, Vol. 27 (1985-1986) at 435.

[76] This can be seen from the existence of a veritable mass of literature written in support or explanation or critique of this approach. See for example: Mark Greenberg and Harry Litman, 'The Meaning of Original Meaning,' in *Georgetown Law Review, Vol., 86 (1998);* W. Rehnquist, 'The Notion of a Living Constitution,' in *Texas Law Review*, Vol., 54 (1976); Earl Maltz, 'The Appeal of Originalism," in *Utah Law Review*, Vol. 4 (1987); David Strauss, 'Common Law Constitutional Interpretation,' in *The University of Chicago Law Review*, Vol. 63 (1996); James Fleming, 'Fidelity to our Imperfect Constitution,' in *Fordham Law Review*, Vol., 65 (1997); James Boyd White, 'Constraining a Constitution: "Original Intention" in the Slave Cases,' in Md. L. Rev., Vol., 47 (1987-88); Aileen Kavanagh, 'Original Intention, Enacted text, and Constitutional Interpretation,' in *Am. J. Juris.*, Vol., 47 (2002); William J. Brennan, Jr., 'The constitution of the United States: Contemporary Ratification,' in *S. Tex. L. Rev.*, Vol. 27 (1985-1986); and Edwin Meese III, 'The Supreme Court of the United States: Bulwark of a Limited Constitution,' in *S. Tex. L. Rev.*, Vol. 27 (1985-1986).

[77] Aileen Kavanagh (n 76 above) at 255-56.

represent.[78] The problem of obtaining a full record of the making process is also not to be underestimated. Beyond the above important technical objections to this interpretive approach, more fundamental objections are also raised by its opponents. One such objection states that originalism stagnates the constitution thereby making it irrelevant to the present society. A good argument is made by White in relation to the US Supreme Court's decision on slave cases of mid 19th century.[79] In *Dred scott* (1857), for example, the Court held that according to the intention of the framers of the Constitution, negroes cannot become citizens of the US.[80] So the argument against original intent approach is that adherence to it could be as ridiculous as the *Dred Scott* decision.

Supporters of the jurisprudence of original intention on the other hand claim that it should be the controlling approach for it seeks to discern the meaning of the text of the constitution by understanding the intentions of those who framed, proposed and ratified it.[81] They believe that originalism is the best way to explicate the original and the true meaning of a constitutional text thereby keeping the meaning of the text within safe framework of fundamental principles that are permanent.[82] They also point at the danger of the interpreters' substitution of their own values and worldview for the true meaning of the text if they are allowed to attribute meaning to a constitutional provision at will without searching for the intention of the framers. One of the hazards of such judicial liberty was pointed out to result in judicial activism through which under the guise of interpretation, the interpreters impose their own ideology on the society.

As one can see from the above, both sides have plausible points to make. Therefore a total rejection of one side in favour of the other may not be advantageous. Even those who have rejected originalism as an implausible theory on a normative level have accepted the significance of the framers' intent to understand what the constitution means today.[83] This author's position as it relates to the use of the intention of the framers to interpret the FDRE Constitution is not doctrinal or normative but conceptual. Rather the author argues that interpreters of the Ethiopian Constitution must rely on the

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[78] Lourens M. du Plessis, 'The Evolution of Constitutionalism and the Emergence of a Constitutional Jurisprudence in South Africa: An Evaluation of the South African Constitutional Court's Approach to Constitutional Interpretation,' in *Sask. L. Rev.*, vol. 62 (1999) at 311-12.

[79] See James Boyd White (n 76 above).

[80] See Id.

[81] Edwin Meese III, (n 76 above) at 466.

[82] Id.

[83] Aileen Kavanagh (n 76 above) at 256-57; Lourens M. du Plessis (n 78 above).

intentions of the framers which are manifest, or at least implicit (where not so manifest) in the text of the Constitution to shed light on constitutional issues in dispute. The argument of the author is not for this approach to be used as a stand-alone means of interpretation but in combination with other approaches.
In the case of the FDRE Constitution, there are more reasons that enhance the relevance of this approach. The first important reason is the fact that the Constitution was ratified not so long ago which makes the facts and circumstances of its making directly relevant to the present time. The second reason is that since the issue of constitutional interpretation power was hotly debated, there can be a lot to be learned, at least in relative terms, from the records of the debates and the fundamentals that swayed the decisions that went into the Constitution. Third, we can say that the making history of the constitution is well documented and kept and can be accessed by the interpreters and researchers. Because of these and perhaps other reasons, ascertaining the intention of the framers in our case would not be as difficult as it would be in the US where for example there were no official minutes of the Philadelphia Convention of 1787.[84]

As we turn to the point under consideration, it is imperative to mention at the outset that most of those who have written on the Ethiopian system of constitutional interpretation and who have discussed the determinants of the decision made in favour of making the HoF the interpreter of the Constitution, and not the courts, have a clear understanding of those determinants and have articulated them well.[85] The arguments and sort of policy debates on who should interpret the FDRE Constitution were made by the Constituent Assembly mainly in relation to Art. 62, which provides for the powers and functions of the HoF. One of the swaying arguments that were overwhelmingly reflected in the Constituent Assembly was the position that the Constitution is a political (as much as it is legal) covenant among the nations, nationalities and peoples of Ethiopia. Covenant as it is, the argument goes, it must be interpreted directly by those who represent, and are elected by, the parties to it.[86] The majority of the members of the Constituent Assembly were persuaded by the

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[84] See Walter F. Murphy, et al. (n 74 above).

[85] See for example Assefa Fiseha , 'Constitutional Adjudication in Ethiopia' (note 1 above) at 10-14, and *Federalism and Accommodation of Diversity* (note 2 above) at 388-391; Yonatan Tesfaye, 'Ethiopian Approach to Constitutional Review' (note 25 above) at 69-70.

[86] See the discussion of the Constituent Assembly on Art. 62 in Vol. 5 of the *Minutes of the Constituent Assembly* (November 1994, Addis Ababa). Embedded in this argument was also the old question in relation to judicial review of constitutionality that a few judges should not be allowed to control the decisions of the majority. This was clear from the repeated references made to the 'hazards' of the US system of judicial review and the fact that the Ethiopian arrangement would be a solution to the sorts of problems the US system grapples with.

argument that courts may not neutrally interpret or even may misinterpret the Constitution thereby encroaching on the rights of nations, nationalities and peoples.[87] Forceful arguments were made along the line that the Constitution must be interpreted by those who are holders of the rights the Constitution protects.

It is worth noting that ideas along the line of dividing up the interpretation of the Constitution between the courts and the HoF were aired at the Assembly.[88] This was to the effect of giving the power of interpreting the Constitution dealing with the rights of nations, nationalities and peoples to the HoF while other parts dealing with rights of individuals should be left to the courts. This approach did not muster the required support because of the same reason for which the power was given to the HoF, i.e. the fear that such power of ultimate say on constitutional interpretation by the courts may work against the rights of nations, nationalities and peoples.[89] It has been also persuasively argued by vocal members of the Assembly (and that appears to have swayed the decision finally made) that if courts (ordinary or constitutional) are made to interpret the Constitution, they may through interpretation fundamentally change the Constitution just like the American Supreme Court has been doing. According to them, such 'rewriting' of the Constitution by courts may result in dire consequences for Ethiopia if group rights fall prey to such a judicial activism by our courts.[90]

The forgoing shows that members of the Constituent Assembly have squarely dealt with textual interpretation of the Constitution. There cannot be any doubt that the framers have intended that the HoF's (and the CCI's) competence covers fully textual interpretation of the Constitution. As regards the determination of the overall scope and meaning of constitutional interpretation, a better picture emerges from looking at the Assembly's discussion on Arts. 83 and 84 of the Constitution. Regarding the key terms—'constitutional dispute' and 'constitutional interpretation'—that have proved to be matters for debate among scholars, the debates were not clearly forthcoming on whether they are identical or distinct. Perhaps it would be wrong to expect such a technical detail from an assembly made of ordinary representatives of the people. But we at the

[87] Id.

[88] Id.

[89] Id.

[90] Id. The jurisprudence of the US Court was mentioned by many members during the discussions at the Assembly. The argument was that the dire consequence would result here, and not in the US constitutional system, because the foundation of the Ethiopian political-constitutional system is laid on the respect for the rights of nations, nationalities and peoples who are made the holders of the sovereign power.

same time can see that the two terms were used or uttered together by the discussants, which shows that in their minds they were intended to embrace all matters of dispute and interpretation involving the Constitution and that such matters are to be resolved ultimately by the HoF.[91] One clear instance was to be found in the report of the Judicial Affairs Committee of the Constituent Assembly. It stated in relation to Art. 83 of the Constitution that 'whether it is a decision on constitutional disputes or a constitutional interpretation, it shall be ultimately decided by the HoF'.[92] This Committee also presented the two terms to be inseparable by stating that 'under Art. 83 interpreting the constitution means that the HoF has the power to settle all disputes that arise under the Constitution.' This view was endorsed almost unanimously by the Assembly.
A conclusion that the author believes could be drawn from the above is that there was no indication that a distinction was made among matters or laws or decisions involving constitutional interpretation that can or cannot go to the HoF. The overwhelming consensus was that anything and everything so long as it involves 'constitutional dispute' or 'constitutional interpretation' will be within the powers of the HoF. And what is important in this regard is the process of identifying whether a given dispute involves a constitutional dispute or constitutional interpretation. That is precisely what the CCI is there for as mandated by Art.84 which makes both procedural and substantive determination regarding the powers of the CCI. The identification of whether there is a constitutional dispute or not, as shall be argued later, will be made first by courts in the case of disputes coming from cases before courts, and by the CCI itself in cases that are lodged with it in first instance.

V. What is the Scope and Meaning of Constitutional Interpretation in Ethiopia? Analysis and Conclusions

This section will present my analysis and observations on the materials canvassed as well as the constitutional provisions being considered. The author will provide a quick analysis of the scholastic debates and of the positions of the CCI/HoF where applicable, and then present his own critical views in relation to the matters under consideration.

As shown earlier in the article, some of the scholars have argued for all-pervasive constitutional interpretation power of the CCI/HoF although there are some differences in the views of such scholars. Yonatan and Ibrahim are good examples. Yonatan has argued that anything that involves constitutional interpretation, including any construction (or in his words 'expounding') of a constitutional provision as well as review of constitutionality of any law (proclamation, regulation, directive) and decision of organ or official of state

[91] See in Id., the discussions on Arts. 83 and 84 of the FDRE Constitution.
[92] Id.

shall be decided by the HoF.[93] In this regard, he asserts that constitutional dispute means both the general task of interpreting the Constitution for the purpose of ascertaining the meaning, content and scope of a given constitutional provision, and the determination of the constitutionality of federal and state law.

In relation to the power of courts, Yonatan argues that courts are given only the power to directly (and what can also be called mechanically) apply the provisions of the Constitution which are 'clear and explicit'. In an attempt to demonstrate such clear and explicit provisions of the Constitution, he takes as an example Art. 21(2) of the Constitution which states that 'all persons shall have the opportunity to communicate with and to be visited by, their spouses or partners, close relatives, friends, religious councillors, medical doctors and their legal counsel'. He says that this is a perfect example of a provision that need not involve the court in any interpretation but only mechanical application when a claim is made by a detainee or a prisoner. In such a way, he divides the constitutional provisions into two: clear and explicit (and therefore mechanically enforceable by courts), and those not clear and explicit which require some interpretation or expounding which will be untouchable by courts. In an attempt to give meaning to the concept of 'constitutional interpretation', Yonatan goes on to mistakenly assume that, from the courts' point of view, categorization of constitutional provisions in to those 'clear and explicit' and not so clear and explicit readily emerges from the face of the provisions. But an attempt to do this in abstraction without there being the underlying factual dispute to solve is highly misleading. One can assume complicated claims based on the constitutional provision that he presented as clear and explicit. Assume a person serving a prison term claims that the right to visitation by a spouse includes an extended, privately arranged stay with a spouse. A resolution to such a claim can not be made from the mechanical application of the provision in question.[94] The phrase 'to be visited by their spouses' in Art. 21 of the Constitution can prove to be as intricate as any complex constitutional dispute given the underlying facts the court is required to deal with. We can agree with the attempt to cut a slice for the courts in the enforcement of the Constitution;

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[93] See Yonatan 'The Courts and Constitutional Interpretation in Ethiopia' (note 25 above).

[94] Yonatan's other example on Art. 19 is not less controversial. He himself has admitted that the 'reasonable time' for journey to a court of law may require interpretation, but again says that it will not be a problem in most of the towns where courts and police stations are found proximate to each other. But Ethiopia is not only towns, and as we speak people have to travel hours and hours to get to courts and towns. Therefore, even if 'this does not apply in most of the towns', it applies in most of Ethiopia thereby making determination of 'reasonable time' all the more an issue for interpretation and fixation. See Yonatan, Id. at 141, note 52.

but to try to do that in the way Yonatan attempts to do, i.e. courts for only mechanically applying the Constitution, would be unrealistic and was not at all intended by the makers of the Constitution. This author believes that this position is engendered by a wrong approach to determining the meaning of 'constitutional interpretation' and 'constitutional dispute' which shall be explained in a moment.

As mentioned above, Ibrahim also seems to espouse the view that all or any kind of interpretation of the provisions of the Constitution is the power of the HoF, and courts are denied the power to engage in that. As he does not dwell reasonably well on this issue, I may have as well misread his view on this point. But as summarized earlier, he holds a view that courts have the power to review the constitutionality of executive acts (regulations, directives) and decisions as well as customary practices. He understands, in this case as Assefa and Takele do, that the power of the HoF is limited to review of constitutionality of 'legislative acts'—parliamentary acts alone. On the other hand Takele and Tsegaye go to the extent of arguing that a court of law can, in a dispute setting, set aside a law that is clearly unconstitutional without the need to refer such a law to the CCI/HoF. Takele, although in this case he eventually aligns with Assefa[95], has directly attempted to clarify the meaning of constitutional dispute vis-à-vis constitutional interpretation. He asserts that the concept of constitutional dispute carries pretty much the meaning ascribed to it by Art. 84(2) of the Constitution—'a situation where any federal or state law is contested as being unconstitutional.[96] Sisay on the other hand seems to believe the two concepts are the same basically in the sense that a constitutional dispute engenders constitutional interpretation.[97]

We have seen earlier Besselink applies three different approaches to the power of determination of constitutional issues: in non-rights parts of the Constitution, the courts can apply it but can not interpret it; in rights provisions of the Constitution as well as in cases where constitutionality of executive actions and rules are challenged, they share competence with the Hof/CCI. Sisay's position was shown to be a somewhat centralist position. His argument, as shown earlier is to the effect that constitutional dispute/interpretation is said to arise when constitutionality of any law or decision is at issue and when 'the interpretation

[95] He on some occasions has stated that constitutional dispute might be narrower than constitutional interpretation since the latter embraces at least cases of abstract review which can not be covered by the former.

[96] See the text accompanying note 46 above.

[97] See text accompanying note 38 above.

of some constitutional provisions' becomes necessary.[98]

On the whole, it should be clear by now that different threads of thoughts and approaches have been espoused by the reviewed authors. As can be seen from the above summary, a closer look at these opinions shows that the positions taken by the writers (and the CCI) have been influenced by their understanding of the concepts of 'constitutional dispute' and 'constitutional interpretation'. Agreeably, any serious attempt to clarify the meaning and scope of constitutional interpretation in Ethiopia must address itself to the understanding of these concepts. This article argues for a fresher look at these concepts.

Earlier we have noted that during the discussion of the Constituent Assembly these conceptual expressions were used consistently to denote that all matters of dispute and interpretation involving the Constitution must be resolved ultimately by the HoF.[99] It needs to be re-emphasized that the Minutes of the Constituent Assembly do not give any indication that a distinction needs to be made among matters or laws or decisions involving constitutional interpretation that may or may not go to the HoF. This makes it clear that the HoF is the body with whom the ultimate power to decide all constitutional disputes and all questions of constitutionality reside. This is also manifest from the provisions of the Constitution. This must lead us to a conclusion therefore that so long as there is a constitutional dispute or a question of constitutionality that needs resolution, it has to be submitted to the CCI/HoF whether the question is clear or simple or complicated. To state this in other words, it will be unconstitutional for the courts to pass upon an issue of constitutionality or a settlement of constitutional dispute whether they are faced with simple or complex issues in the matter. So the argument by those who say that courts can set aside a clearly unconstitutional law relied upon by the parties in a dispute is untenable when seen both from the vantage point of the intention of the makers and the black letter law of the Constitution.

It has been noted that for the CCI/HoF to be involved we must first be sure (and therefore clear) that what is before it is either a constitutional dispute or a constitutional interpretation question. We see that the Constitution uses the two expressions almost equal times and almost identically again when it comes to

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[98] See Id., again. Sisay however goes on to say that generally a constitutional dispute arises (thereby making constitutional interpretation necessary) in cases where 'the precise meaning and scope of a constitutional provision is disputed'. See Id. However, this assertion of his makes constitutional interpretation very fluid and also the respective role of courts and the HoF impossible to determine.

[99] See again discussion of the Constituent Assembly on Art. 83 and 84 in Vol. 5 of the *Minutes of the Constituent Assembly* (November 1994, Addis Ababa).

the power of the HoF. These are evident from Arts. 62, 83 and 84. Art. 62(1) says 'the House [HoF] has the power to interpret the Constitution', while Art. 83(1) says 'all constitutional disputes shall be decided by the House of the Federation'. The fact that the two terminologies are meant to convey a determination of a constitutional issue can be clearly gathered from Art. 84(1) of the Constitution. It reads:

> The Council of Constitutional Inquiry shall have powers to investigate constitutional disputes. Should the Council, upon consideration of the matter, find it necessary to interpret the Constitution, it shall submit its recommendations thereon to the House of the Federation.

One can easily see from the above provision the fact that it is the existence of a constitutional dispute that leads to the interpretation of the Constitution.[100] The two are part of a continuum of what is called determination of a constitutional issue. Contrary to what some of the authors whose works I have reviewed in this article believe, Art. 84(2) is not meant to determine the jurisdiction of the HoF. It is rather principally meant to set down procedures for the CCI to go about determining a dispute involving a federal or state law submitted to it by a court or an interested party.[101] It needs to be further noted that Art. 84 is not meant to regulate the powers and functions of the HoF regarding settlement of

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[100] As my summary above of professor Besselink's article indicates, he failed to pinpoint where exactly at the power of the courts and HoF can be shared regarding for example the interpretation the provisions of Chapter Three of the Constitution as well as in cases involving constitutionality of executive actions. The point of exist of the courts and entry of the HoF/CCI needs to be pointed out with some certainty, and I believe that is possible only with an ascription of a correct meaning to the term 'constitutional dispute'.

[101] Incidentally, some authors have chosen to give the phrase 'interested party' very broad meaning which does not seem to me to be warranted by the Constitution. See Yonatan 'Ethiopian Approach to Constitutional Review''(note 25 above), note 2 at 53; and also in 'The Courts and Constitutional Interpretation in Ethiopia', Id., at note 3 and 135. See also Ibrahim (note 14 above) at 82-84. Both of these authors relied on Abebe Mulatu's piece entitled 'who is the Interested Party to Initiate a Challenge to Constitutionality of Laws in Ethiopia', published in *The Law Student Bulletin*, Vol.1 (1999). The idea is that the phrase can be taken to mean among others an NGO, an association or any organized interest group who may be affected by the law being challenged. I believe on the contrary that in the two places where Art. 84 uses the phrase 'interested party', it is meant to specifically refer to a disputant party to a case in court now being challenged. The Amharic version of Art. 84(2) states that more clearly: '--- ጉዳዩም በሚመለከተው ፍርድ ቤት ወይም <u>በባለጉዳዩ</u> ሲቀርብለት ---'. This unmistakably refers to the person who is a party to a given case in a court and wants a constitutional interpretation to be made for a just disposition of his case. Similarly, the phrase 'the interested party' in Art. 83(3) refers to a disputant in a case. This is more clearly so because under this Sub-Article, the case comes from the court in the first place and such an interested party can only be someone who is a defendant or a plaintiff in that case because of the procedural requirements in our laws that are in place.

constitutional disputes or constitutional interpretation; it rather is meant to provide for the powers and functions of the CCI. This must also hint at the fact that it would be misleading to try to determine the power of the HoF by using a provision which was not meant for that purpose.

Even for those who believe that Art. 84(2) is important for determining the powers of the HoF, this author believes that Art. 84(1) and 84(3) are equally important in that regard and that Art. 84(2) should not be viewed in isolation. In this connection it has already been shown that Art. 84(1) states clearly that constitutional disputes lead to constitutional interpretation and therefore the two cannot be separated.[102] A closer study of the provisions of Art. 84(1) also depict that constitutional disputes cannot be limited to what Art. 84(2) is believed by some to mean, i.e. federal or state parliamentary acts, because it speaks about [any kind] of constitutional disputes that may lead to constitutional interpretation. Furthermore, Art. 84(3) refers to '*issues* of constitutional interpretation' (Emphasis added). An issue of constitutional interpretation would arise when there is a constitutional dispute. A constitutional dispute can arise in such situations as the familiar *Silte* case where the Constitution does not readily deal with an important matter of determination of an identity of a group. Therefore Art. 84(1-3) gives us primarily the overall powers and functions of the CCI and plays a great role in elucidating the two terminologies ascribed in Arts. 62(1) and 83(1) to the HoF as its powers.

Having concluded that the phrases 'constitutional dispute' and 'constitutional interpretation' are part of the same power of determining a constitutional issue and also that all constitutional disputes—whether involving federal or state proclamation, regulation, directive or decision of federal or state organ or official—are made within the constitutional interpretation powers of the HoF/CCI, it is appropriate to say a little more on when the application of the text of the Constitution by the courts may give rise to a constitutional dispute that makes the interpretation of the Constitution necessary.

We have earlier seen the views of Yonatan which says that anything that goes beyond mechanical application of the clear and explicit provisions of the Constitution are not for the courts to do; they rather have to defer that to the CCI/HoF. Again, such an attempt to categorize provisions of the Constitution

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[102] This is even self-evident from Art. 84(2) itself which says that: 'where any Federal or state law is contested as unconstitutional and such a dispute is submitted by any court or interested party---'. (Emphasis added). As can be seen, Art. 84(2) calls a contestation of unconstitutionality of a law a dispute once more underscoring the fact that the two expressions are part of the same process.

into 'clear and explicit' and 'not clear and explicit' without the underlying factual disputes would be severely misleading. First, such an approach cannot be anchored to any part of the Constitutional text; nor can it be shown to have been insinuated by its framers. Second, it is hugely problematic as a matter of legal interpretation to think that the role of the courts in relation to the application of the textual constitutional law would be limited as such by clarity or explicitness of constitutional provisions. What emerges from the making history as well as the wording of the Constitution is that what makes a given matter an issue of constitutional interpretation is whether a constitutional dispute is involved or not in the application of that particular constitutional provision. This author concurs with Takele on the point that it is absolutely the province of the courts to determine the content and meaning of a constitutional provision so far as its application for the resolution of a factual dispute is concerned. But while in the process of the court's doing so, if a constitutional dispute arises that convincingly calls for the authoritative interpretation of the Constitution, the court in question or the litigant would call the CCI/HoF into action as per Arts. 62(1), 83(1) and 84 of the Constitution.[103] Therefore, all determinations of the content and meaning of a provision of the Constitution in relation to a factual dispute submitted to it in a case lie within the powers of the courts unless and until a constitutional dispute arises. It was earlier pointed out that a constitutional dispute is said to have arisen if a court is confronted with two or more equally persuasive viewpoints regarding the constitutional issue in question. It has been reiterated in Proclamation No. 250/2001 that the court of law is the first important determiner of whether an issue before it requires constitutional interpretation or not. According to this law, a court handling a dispute shall submit constitutional interpretation issues to the CCI only if it believes that there is a need for constitutional interpretation in deciding that case.[104] It further states that the court must forward in this case 'only the legal issue necessary for constitutional interpretation.' This law also obliges a disputant before a court of law who wishes to submit a constitutional interpretation issue to the CCI to first submit the question of constitutionality to the court handling the case.[105] This must inform us that an issue of constitutional interpretation cannot readily emerge from the face of a constitutional provision or a case until after a vigorous investigative engagement in the fact and the law by a court or the CCI, as the case may be. Informed must we be as well that the courts of law play a determinative role in formulating constitutional interpretation issues. But beyond determining or formulating issues of

[103] See also Arts. 21 and 22 of Proclamation No. 250/2001 for further clarification of what the court should do in relation to issues of constitutionality arising in relation to a case it is handling.

[104] Id., Art. 21.

[105] Id., Art.22.

constitutional interpretation or constitutional dispute, the courts do not have the power of resolving them. This is in line with both the spirit of the Constitution and its framers' intentions.

In summing up, it is worth restating that the view that we can create a catalogue of constitutional provisions to automatically determine whether they fall under the application-jurisdiction of the courts or not is not a correct understanding of the constitutional interpretation regime under the FDRE Constitution. The correct understanding rather is that the courts can determine the content and meaning of a constitutional provision so far as a constitutional dispute requiring constitutional interpretation (by the HoF) is not involved. In the case of disputes before a court of law, the court in question determines whether a constitutional dispute requiring constitutional interpretation has arisen or not while the CCI determines whether or not a constitutional dispute exists in relation to matters coming to it out of court. As regards the proper expanse of the jurisdiction of the HoF as well, this article has argued that the makers did intend that the HoF commands all the powers to interpret the Constitution or decide on all constitutional disputes, and the CCI to investigate in relation to all matters involving constitutional dispute requiring constitutional interpretation without any exception or limitation. There was no design to share these powers among the courts and the HoF. It is therefore a high time that the course of the debate by the academics and the position of the CCI be reconsidered. There is no other correct way of understanding the understanding of the makers of the FDRE Constitution on this matter.

WE WERE JUST TESTING OUR WINGS

Yacob Haile-Mariam (Ph.D.)*

Background of the Dispute with the University

It was June 1966, six senior law students at the Haile Selassie I University Law School, having competed our studies and having passed our exams were readying ourselves for one of the greatest events of our life: graduation from the Law School of Haile Selassie I University. We were in a week going to receive our LL.B. degrees, or so we thought, from the hands of none other than the Conquering Lion of the Tribe of Judah, His Imperial Majesty Haile Selassie I, Elect of God and Emperor of Ethiopia. Having been at the University for five long and exhaustive years, we were anxious to take up one of the many plum jobs awaiting us and then start enjoying the good life.

We had completely forgotten that earlier the University had proclaimed what then was called "University Service", which required all students to serve one year in different capacities, mostly as teachers in rural schools, as a requirement for graduation with bachelor's degree in all the academic disciplines. The military members and civil servants in our class who were quite few in number were exempt from the Service.

Our enthusiasm was dashed when one morning we were informed that like all other students at the University we had to serve in rural areas for a year before being awarded our degrees. The students at the other departments of the University meekly and quietly accepted their fate and readied themselves to go on the University service. Not us lawyers. We decided we were not going to accept this "injustice" lying down. After all we were no theology students who would turn the other cheek and therefore we decided not accept this program imposed on us without a fight. We were lawyers and we vowed we would fight this "injustice" all the way up to the Supreme Court if necessary. We decided to show the University officials that it was not for nothing that we had studied the law for five years, and we were fully equipped with all the arsenals our law study provided us with to fight off this "injustice".

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So one bright morning all six of us were packed in a rickety old Volkswagen belonging to one of our colleagues, the late Girma Tadesse and headed to Lideta and filed a suit against Haile Selassie 1 University at the First Division of the High Court where Justice Buhagiar, a British Citizen of Maltese origin, presided.

The Plaintiffs

The plaintiffs were Ababiya Abajobir, Girma Tadesse, Shimellis Hussein (since deceased), Yacob Haile-Mariam, Yohannes Herouie and Zera Brook Aberra (who since has become an Eritrean citizen). Selamu Bekele who had the highest GPA in our class was scheduled to go to Harvard Law School for further studies and therefore did not join us in the suit. Neither did Ms. Alexandra Hamawi, who was a Greek citizen and therefore was exempt from the service. The case was captioned as Ababiya Abajobir, *et. al.* versus Haile Selassie I University. We decided to represent ourselves thus giving us the opportunity to test the new wings we had acquired as law students.

The Defendant's Lawyers

The University retained two top notch lawyers: Ato Bekele Nedi and Ato Teferri Berhane (who since moved to Eritrea), both graduates of McGill Law School in Canada with vast experience in litigation and thoroughly familiar with the system. Theirs was the only modern law office in the country at the time in contrast to the other law offices established by persons who became lawyers through experience or following release from long incarceration for some criminal offense where they picked up some law.

We were awed by these two gentlemen who occasionally had taught us some courses as guest lecturers. Yet a bunch of some rag tag law students taking on these highly sophisticated lawyers was like David inviting Goliath for a fight.

Plaintiff's Statement of Claims

The plaintiffs' statement of claims largely drafted by Yohannes Herouie alleged the following:

a) The University had no authority under its Charter to proclaim or legislate a one year national service under the guise as an academic requirement for qualifying for an LL.B. degree;

b) If such service is required of the students, it should be proclaimed by the National Assembly which has the constitutional authority to impose obligations on all citizens or part thereof;

c) The University cannot arbitrarily impose as a requirement for graduation a subject which is not even remotely related with the study of the law. By way of an example, wouldn't it be capricious and arbitrary to require the consumption of a certain number of bottles of beer before a student would qualify for his law degree? We argued requiring a one year service in rural Ethiopia as a condition for getting a law degree was no less absurd;

d) We the plaintiffs and the University had some tacit agreement when we first joined the University. Our agreement was that we would take a specific number of courses and pass the exams and we would be awarded our degrees as a matter of right. The University Service was not, at the time we enrolled at the University or the Law School, one of those required courses needed for qualifying for an LL.B. degree. In fact the University Service was not shown even in the class schedule, because it did not exist at the time. Making University Service a requirement retroactively for graduation was a breach of the tacit agreement we had with the University when we first joined the University or the Law School.

We therefore prayed to the Court:

a) To declare that the proclamation of a national service a.k.a. University Service *ultra vires* to the authority and power granted to the University by the University Charter or any other rules and regulations of the University;
b) To order the University to grant us our degrees during the forthcoming graduation, that is June 1966.

Ababiya delivered the oral argument in English for the benefit of the presiding judge Justice Buhagiar who did not understand Amharic. The Court at the time had a full time interpreter with impaired eyesight and yet amazed everybody with his eloquence and precision of his interpretation, not to talk of the elegant figure he cut with the three pieces suit he sported everyday without fail.

Defendant's argument

Counsel for the defense forwarded the argument that the Court was not competent to determine what academic requirement for a law degree is and

what is not. The sole judge of this should be the University and the University alone which has the competence and the requisite knowledge for determining what the input for a law degree should be including the number of hours needed to complete it. Counsel for defense therefore argued that the Court had no subject matter jurisdiction and therefore the plaintiffs' claims should be dismissed with cost

The Decision of the Court and the Consequence thereof

Three days before the date of graduation, the Court handed down its decision ruling that the University under the Charter or otherwise had no authority to proclaim or legislate a University Service requiring students to serve in rural Ethiopia for a year as an academic requirement for earning a law degree. Hence the Court declared the proclamation of the University Service *ultra vires* to the authority granted to the University by the Charter and therefore null and void. The judgment was read in the open Court and set aside for signature in the judges' chambers. However, the signing of the decision apparently fell by the wayside and the judges left for the day without affixing their signatures to the decision. Since there were only three days left for awarding the degrees we prevailed on the Registrar Ato Senbeta to take the decision of the judges to their respective homes and have them sign it, which he did- an unfortunate act which would cost him his job later. We then rushed the decision to the Ministry of Justice and caught the Minster Ato Mamo Tadesse, a French educated lawyer himself, when he was about to leave for the day. We served on him the decision and then ran to the University to catch President Kassa Wolde Mariam before he left for the day. We arrived at the University and caught President Kassa at the door of his office and asked him to talk to us. He was obliged and we all went back to his office and to his surprise we served on him the decision of the Court. Though President Kassa deep at heart knew that the judgment will not be executed, he nevertheless seemed to be contented that his students could sue the University and could win. Indeed this mode of behavior was quite different from what President Kassa was used to with the students of Haile Selassie I University, which usually was mass demonstrations and protests. He immediately told us that the University will appeal to the Supreme Court and have the decision reversed and we better get ready to go to our respective places of assignments.

Short lived Joy and Pride

The joy and pride we felt the day the Court handed down its decision was indescribable. Our victory was an affirmation that now we were lawyers in

earnest and could tackle the world of litigation. Though they never expressed it, the faculty at the Law School was very happy and Professor Paul who had become Academic Vice-President was secretly overjoyed over the fact that his first batch of students could sue and win a major case all by themselves.

However our jubilation was to be short lived: victim of the total absence of judicial independence in the country, a fact that is plaguing us to this day. A day before graduation Justice Buhagiar and Ato Denekew, the presiding judge and the right bench respectively, were unceremoniously dismissed from the bench and Ato Senbeta from the office of the Registrar. The fact that the judges signed the decisions in their respective houses was regarded as judicial misconduct warranting their dismissal from the bench. With the exception of some Italian judges in Asmara, with the dismissal of Justice Buhagiar the influence of the British jurisprudence which had begun with the brief British administration of the judiciary after the Italian occupation came to an end.

The University Administration then warned us that if we do not fulfill the University Service we will never be awarded our degree. So Yohannes Herouie, Zera Bruk Aberra and Yacob Haile-Mariam were assigned to the Asmara Attorney General's Office and the High Court and the others were assigned to the Attorney General's Office in Addis Ababa. Apparently the University appealed to the Supreme Court and the decision was reversed without summoning the Respondents and giving them their day in Court-one among much blight in the judicial system of Ethiopia.

Conclusion

Was the decision of the Court correct? Ladies and Gentlemen, lawyers may differ in their opinion. But in hindsight and after so many years of experience in the law: my personal opinion is contrary to what used to be when I was a young and inexperienced lawyer. My present position, which I believe is a correct one, is that the Court was not competent to examine and determine what is academic requirement and what is not in a University setting. Such a determination should exclusively be within the competence of the University which is better informed on academic matters than the Court. To insist that the Court is better informed in matters of academia than a University and could determine what is academic requirement and what is not would border on judicial arrogance, of which

Courts are guilty of some times because of the finality of their decisions and the tremendous power they wield over litigants.

The Court should also not have forgotten the practical experience the students would acquire which would enhance the students' understanding of the society they were meant to serve and in fact even give them better perspective and relevance of the discipline they had studied. This is a very important component of an education and therefore the Court should have given some weight to this incontrovertible fact. In my opinion the Court erred in assuming jurisdiction and then declaring the National Service as *ultra vires* to the authority granted to the University by the Charter and therefore null and void. The substantial chasm that exists between now and the time the decision was handed down on my part may be attributable to age and experience where normally as time goes by one is guided less by passion and more by reason and objectivity.

የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ

የፌደራል ከፍተኛ ፍርድ ቤት

የመዝገብ ቁ. 83157

ሚያዚያ 25/2002

ዳኛ...... ዮሴፍ አዕምሮ

ከሣሽ............ የኢትዮጵያ መንገዶች ባለስልጣን - አቶ ቀነኒሣ ቀረቡ

ተከሣሽ......... ኤም.ጂ. ወርልድ ዋይድ
የግል ሊሚትድ

መዝገቡ ተመርምሮ የሚከተለው ብይን ተሠጥቷል።

ብይን

የከሣሽ ወኪሎች በ23/11/2001 ዓ.ም. ፅፈው በቀረቡት የክስ አቤቱታ ተከሣሽ ለድልድይ ሥራ የሚያገለግል ስካፎልድ ቱዩቦችና ስቲል ፓናሎች ከነተያያዥ ዕቃዎቻቸውና አገልግሎት (Scaffold tubes and steel panels with accessories and incidental services) ለከሣሽ ለማቅረብ በ2 የግዥ ውሎችን፣ በውል ቁጥሮች 68204/97 እና በውል ቁጥር 68243/97 እ.ኤ.አ.30/11/2004 እና 16/06/2005 የግዥ ውል ተፈራርሟል። በውሉ ላይ እንደተቀመጠው የተገዙት ዕቃዎች የታቀዱት በጊዜው እየተገነባ ለነበረው የኮምቦልቻ ወልዲያ ሥራ ፕሮጀክት እና የድልድይ ስትራክቸር ዋና ክፍል ለሚገነባቸው ሌሎች ድልድዮች ነበር። ተከሣሽ ያቀረባቸው ዕቃዎች ግን ለታሠበላቸው ዓላማ የማይውሉ ሆነው ስለተገኙ ውሉ ተሠርዟል። ስለዚህ ለተከሣሽ የተከፈለው ገንዘብ፣ ለተጨማሪ ሥራ ያወጣነው ተጨማሪ ወጭዎች፣ ለአገልግሎት የከፈልነው ወጭዎችን እና ወጭና ኪሣራ ይከፈለን ብለዋል። በማስረጃነትም ውሎች፣ ሪፖርቶች፣ የሠው ምሥክሮች ዝርዝር ቀርቧል።

የከሣሽ ክስ እና ማስረጃ ለተከሣሽ ደርሶት፣ በ15/6/2002 የተፃፈ መቃወሚያ እና የፍሬ ጉዳይ መልስ አቅርበዋል።

የተከሣሽ ጠበቃ ባቀረቡት መቃወሚያ፣በውሉ አንቀፅ 28 መሠረት በሁለታችን መካከል አለመግባባት ቢፈጠር አለመግባባቱ የሚፈታው በግልግል ነው። ስለዚህ ከሣሽ ከተስማማበት ውጭ ወደ ፍ/ቤት የመጣው ያላግባብ ስለሆነ ፍ/ቤቱ ሥልጣን የለኝም በሚል በብይን ይዘጋልን ብለዋል። ጉዳዩም በመንግስት የግዥ ኤጀንሲ በኩል እየታየ ስለሆነ፣ ይህ ፍ/ቤት ጉዳዩን ለማየት አይችልም። የከሣሽ እና ተከሣሽ የሥራ ቋንቋ እንግሊዝኛ ነው፣ የዚህ ፍ/ቤት የሥራ ቋንቋ ደግሞ አማርኛ ስለሆነ ፍ/ቤቱ በእንግሊዝኛ ሊዳኝ አይችልም። ክሱ ሲመሠረትም በየትኛው ውል መሠረት እንደሆነ ተለይቶ ስላልቀረበ፣ ተለይቶ እንዲቀርብ ሊታዘዝ ይገባል ብለዋል።

ፍ/ቤቱ በ22/7/2002 ክሱን ሠምቷል፡፡ የከሣሽ ወኪል ለመቃወሚያዎቹ በሠጡት መልስ በከሣሽ እና ተከሣሽ መካከል የተደረገው ውል የአስተዳደር ውል ነው፣ የአስተዳደር ውሎች ደግሞ በግልግል እንደማይታዩ በፍ/ብ/ሥ/ሥ/ህ/ቁ. 315(3) ተከልክሏል፣ ስለዚህ ጉዳዩ በመደበኛ ፍ/ቤት ሊታይ ይገባዋል ብለዋል፡፡ የግዥ ኤጀንሲ የዳኝነት ሥልጣን የለውም፣ ፍ/ቤቱ በአስተርጓሚ መስራት ይችላል ብለዋል፡፡ የተከሣሽ ጠበቃ በሠጡት ቃል ስምምነቱ አለምአቀፍ ነው፣ ከሣሽ ጉዳዩ በስምምነት እንዲታይ ተስማምቷል፣ውል ሲገባ ይህንን ሁኔታ እያወቀ ነው የተስማማው፣ ውሉም የአስተዳደር ውል ሣይሆን የአቅርቦት ውል (Supply contract) ነው፣ ከሣሽ የፈረመው ውል ያስገድደዋል፡፡ ጉዳዩ መጀመሪያ በግዥ ኤጀንሲ መታየት ይገባዋል፣ የግራ ቀኛችን የሥራ ቋንቋም እንግሊዝኛ ስለሆነ ይህ ፍ/ቤት በአማርኛ ሊዳኝን አይችልም ብለዋል፡፡

ፍ/ቤቱም 1/ ጉዳዩ መታየት የሚገባው በግልግል ነው? አይደለም?

2/ ጉዳዩ በግዥ ኤጀንሲ እየታየ መሆኑ፣ይህ ፍ/ቤት ጉዳዩን ከማየት ይከለክለዋል ወይ?

3/ የክሱ አቀራረብ ውሎችን የማይለይ ነው ወይ? የሚሉትን ነጥቦች በጭብጥነት ይዟል፡፡

ሥልጣንን በተመለከተ

ከውል የሚመነጩ ክርክሮችን ከመደበኛ ፍ/ቤቶች ውጭ በስምምነት በድርድር ወይም በግልግል ዕልባት መስጠት በህግ ታሪክ ውስጥ ረጅም ታሪክ ያለው እና በብዙ ሀገር ህጎች ውስጥ የተካተተ ነው፡፡ እነዚህ አማራጭ የክርክር መፍቻ መንገዶች በበርካታ ጉዳዮች ከሚጨናነቁት ፍ/ቤቶች አንፃር ሲመዘኑ ፈጣን፣ ኢኮኖሚያዊ እና ፍትሃዊ ፍትህ ከመስጠት አንፃር የተሻሉ እንደሆኑ ይታመናል፡፡ በተጨማሪም እንደ ክርክሩ ዓይነት፣ በጉዳዩ ላይ የተለየ እውቀት ያላቸውን ገላጋዮች ወይም አስማሚዎች ለመሠየም የተሻለ ዕድል ይሠጣል፡፡ እነዚህን የአማራጭ ክርክር መፍቻ መንገዶች ጥቅም በመገንዘብ፣ በሃገራችን ህጎች ውስጥም ተካተዋል፡፡ ከእነዚህ ውስጥ ከተያዘው ጉዳይ ጋር ግንኙነት ያለው የግልግል ሂደት (Arbitration proceeding) ነው፡፡

በመርህ ደረጃ በፍትሃብሔር ጉዳዮች ተዋዋይ ወገኖች ከውላቸው የሚነሣን ክርክር በገላጋይ ዳኞች እንዲታይላቸው አስቀድመው በውስጡ የመደንገግ የመዋዋል ነፃነት አላቸው፡፡ ይኹን እንጂ ሁሉም የፍትሃብሔር ክርክሮች በግልግል ይታያሉ ማለት አይደለም፡፡ ለምሣሌ የባልና ሚስትነት ግንኙነት መኖር? አለመኖሩን? መወሠን የሚችሉት ፍ/ቤቶች ብቻ ናቸው፡፡ (የተሻሻለው የቤተሰብ ህግ አንቀፅ 115)፡፡ ይህ ማለትም ባልና ሚስቱ ቀድመው ጉዳያቸው በግልግል እንዲታይ ቢዋዋሉም፣ ይህ ስምምነታቸው በህግ የተከለከለ ስለሆነ (Non arbitrable) ውጤት አይኖረውም፡፡ በተመሣሣይ መልኩ በፍ/ብ/ሥ/ሥ/ህ/ቁ. 315 (2) መሠረት ግልግል ከማይካሄድባቸው ውሎች አንዱ የአስተዳደር ውል (administrative contract) ነው፡፡ ይኹን እና ከአስተዳደር ውል የሚነሣ ክርክርን በግልግል

መታየት ወይም አለመታየት ላይ ሁለት ተፃራሪ ሃሣቦች ይንፀባረቃሉ። አንደኛው ሃሣብ በመሠረታዊ የፍትሃብሔር ህጉ ላይ የአስተዳደር ውል ለግልግል እንዳይቀርብ፣ ስላልተከለከለ፣ ተዋዋይ ወገኖች አስቀድመው ከተስማሙ፣ ክርክራቸው በግልግል ዳኞች ሊታይ ይገባዋል የሚል ነው። ሌላው ሃሣብ ደግሞ በፍ/ብ/ሥ/ሥ/ህ/ቁ. 315(2) በግልፅ ስለተከላከለ፣ ከአስተዳደር ውሎች የሚመነጭ ክርክር ለመደበኛ ፍ/ቤት እንጅ ለግልግል ሊቀርብ አይችልም ብለው የሚከራከሩ ናቸው። አሁን በዚህ መዝገብ የቀረበው ክርክርም እነዚህን ተፃራሪ ክርክሮች በያዙ ከሣሽ እና ተከሣሽ መካከል ነው።

ክርክር የተነሣበት ውል ለህዝብ አገልግሎት ለሚውል የድልድይ ሥራ የዕቃ ማቅረብ ስምምነት ነው። ውሉ የዕቃ ማቅረብ ቢሆንም፣ ከህዝብ አገልግሎት ሥራ ጋር በእጅጉ የተቆራኘ ስለሆነ የአስተዳደር ውል ይሆናል። ከሣሽ እና ተከሣሽ ባደረጓቸው ሁለት ውሎች ላይ፣ በመካከላቸው ልዩነት ቢፈጠር፣ በመጀመሪያ በስምምነት ለመፍታት እንደሚሞክሩ፣ ይህ ካልተቻለ ደግሞ አንዱ ወገን ጉዳዩ ወደ ግልግል እንዲመራለት የመጠየቅ መብት እንዳለው፣ገላጋዩም በኢትዮጵያ ህግ መሠረት፣ የ UNCITRAC የግልግል ደንቦችን (Uncitral arbitration rules) በመጠቀም ለጉዳዩ መፍትሄ እንደሚሠጥ ተመልክቷል (የውል ቁጥር 68204/97 አንቀፅ 28፣30፣ የውል ቁጥር 68243/97 አንቀፅ 27፣28፣29)። ከሣሽ ውላችን የፍ/ብ/ሥ/ሥ/ህ/ቁ. 315(2) የሚጥስ ስለሆነ ተቀባይነት የለውም፣ በመካከላችን ያለው ልዩነት መታየት የሚገባው በፍ/ቤት ነው ብሏል። ተከሣሽ ደግሞ ውሉ ዓለም አቀፍ ነው፣ ስለዚህ ጉዳዩ መታየት የሚገባው በተስማማነው መሠረት በግልግል ነው ብሏል።

የፍ/ብ/ህግ አንቀፅ 3131-3306 ድረስ ስለ አስተዳደር ውል የተደነገገ ነው። በዚህ በርካታ ድንጋጌዎች ውስጥ አንድም ቦታ የአስተዳደር ውል በግልግል አይታይም ተብሎ አልተከለከለም። በዚሁ ህግ ስለ ግልግል በተመለከተው አንቀፅ 3325-3346 ላይም በአስተዳደር ውል ላይ ግልግል አይደረግም የሚል ክልከላ የለም። እንዲያውም ተዋዋይ ወገኖች፣ ቀድሞውኑ የነበረ ክርክራቸውን ወይም ወደፊት ሊነሣ የሚችለውን ማንኛውንም ክርክር ለግልግል ዳኛ ማቅረብ እንደሚችሉ በህጉ በአንቀፅ 3328 ላይ ተመልክቷል። የአስተዳደር ውል የሚዋዋሉ ወገኖችም፣ ተዋዋይ እንደመሆናቸው መጠን አስቀድሞ ያላቸውን ክርክር ወይም ወደፊት ሊነሣ የሚችለውን ክርክር ለገላጋይ ዳኞች ለማቅረብ የመዋዋል ነፃነት አላቸው። ይህ በመሠረታዊ ህግ (Substantive Law) የተሠጣቸው የመዋዋል ነፃነት፣ ከሥነ ሥርዓት ህግ (Procedural Law) ማለትም ከፍ/ብ/ሥ/ሥ/ህ/ቁ. 315(2) ጋር ካልተጣጣመ፣ ቅድሚያውን ለመሠረታዊ ህግ በመስጠት ህጉን መተርጎም ተገቢ ነው። የፌዴራል ጠቅላይ ፍ/ቤት ሠበር ችሎት በመ/ቁ/16896 በአመልካች ዘምዘም ኃላፊነቱ የተወሠነ የግል ማህበር፣ ተጠሪ የኢሊባቡር ዞን ትምህርት መምሪያ መካከል በነበረው የአስተዳደር ውል የመነጨውን ክርክር በተመለከተ በ16/2/98 በሠጠው ውሳኔ፤ በመካከላቸው ባለው ውል መሠረት አለመግባባቶች ከተፈጠሩ በግልግል ዳኝነት እንደሚታይ በግልፅ የተስማሙ ስለሆነ እና ውል ደግሞ ህግ ስለሆነ፣ ክርክራቸው በግልግል ዳኝነት እንዲታይ ፈርዷል። ይህ

ማለትም ፍ/ቤቱ ለተዋዋይ ወገኖች የመዋዋል ነፃነት ቅድሚያ የሠጠ መሆኑን ነው። ስለዚህ የከሣሽ እና ተከሣሽ አለመግባባት አስቀድመው በተስማሙት መሠረት በግልግል መታየት ይገባዋል።

በግልግል መታየት ተገቢ የሚሆንበት ሌላው ምክንያት ደግሞ ውሉ አለም አቀፍ የሽያጭ ውል ባህሪ ያለው መሆኑ ነው። የኢትዮጵያ የአስተዳደር አካላት ከውጭ ተዋዋይ አካላት ጋር የሚገቡት ውል መከበር ይገባዋል። ውሉ የሚጣስ ከሆነ የውጭ ሃገር ተዋዋይ ወገኖች ውል ለመግባት ቁጥብ ይሆናሉ። ይህ ደግሞ አገራችን ከአለም አቀፍ የሽያጭ ውሎች የምታገኘውን ጥቅም ያስቀራል። ስለዚህ ለአለም አቀፍ የሽያጭ ውሉ ውጤት መስጠት ሃገራዊ ፋይዳም ይኖረዋል።

በሌላ በኩል ከሣሽ በተመሠረተበት አዋጅ ቁጥር 80/90 አንቀፅ 10(3) መሠረት፣ የከሣሽ ሥራ አስኪያጅ መ/ቤቱን በመወከል ክርክሮችን ከፍ/ቤት ውጭ በግልግል ለመጨረስ ሥልጣን ተሠጥቷቸዋል። በዚሁ ሥልጣናቸው መሠረት የከሣሽ መ/ቤት ሥራ አስኪያጅ ክርክር የተነሣባቸውን ውሎች ፈርመዋል። ክርክር ከተነሣም ጉዳዩን በግልግል ለመፍታት በአዋጅ በተሠጣቸው ሥልጣን ተጠቅመው ተዋውለዋል። ስለዚህ በከሣሽ እና ተከሣሽ መካከል የተነሣው ክርክር በግልግል መታየቱ ተገቢ ነው።

በአጠቃላይ ከሣሽ እና ተከሣሽ አስቀድመው በተስማሙት መሠረት በመካከላቸው የተነሣው ክርክር መታየት የሚገባው በግልግል ዳኛ እንጂ በፍ/ቤት ስላልሆነ፣ ይህ ፍ/ቤት የቀረበውን ጉዳይ ለማየት በፍ/ብ/ሥ/ሥ/ህ/ቁ. 244(2) (ሸ) መሠረት ሥልጣን የለውም። ከሣሽ ጉዳዩ በግልግል ዳኛ (ዳኞች)፣ በኢትዮጵያ ህግ መሠረት እንዲታይለት ወይም እንዲመራለት ማድረግ ይችላል። ቀሪዎቹን ጭብጦች ማየት አላስፈለገም።

መዝገቡ ተዘግቷል፣ ወደ መዝገብ ቤት ይመለስ።

Federal High Court File No. 83157

Judge: Yoseph Aemero

Plaintiff: Ethiopian Roads Authority

Defendant: MG Worldwide Private Limited

Ruling

The statement of claim submitted in the case recounts that the plaintiff and the defendant concluded two contracts of sale. According to these two contracts concluded on November 30, 2004 and June 16, 2005, the defendant undertook to deliver scaffold tubes and steel panels with accessories and incidental services to the plaintiff. The materials indicated were needed for the construction of bridges under the Komobolcha-Woldia Project. However, the contracts were cancelled due to the fact that the materials delivered were found to be not suitable for the intended purposes. Thus, the plaintiff claimed the reimbursement of the money paid for the defendant and payment of the cost that it incurred for additional work and services as well as other costs and loss. The plaintiff annexed documentary and oral items of evidence.

The defendant submitted its preliminary objections and statement of defense. The defendant raised a preliminary objection contending that pursuant to Article 28 of the contract signed between the parties disagreement arising from the contract should be resolved through arbitration. Thus, the defendant pleaded the Court to dismiss the case without considering the merits for want of jurisdiction. The defendant raised another objection arguing that the matter must not be considered by the Court as it is pending before Procurement Agency of the government. The defendant also invoked the argument that the working language of the parties is English. Thus, the defendant argued that the case should be dismissed as the Court is not in a position to adjudicate in English. Moreover, the defendant stated that it is not clear which contract is the basis of the statement of claim and requested the Court to require the plaintiff to clarify this.

The Court entertained the arguments of the parties. In its reply to the preliminary objection of the defendant, the plaintiff submitted that the contract concluded between the parties is administrative contract. It went on to argue that Article 315(3) of the Civil Procedure Code prohibits

arbitration in the case of administrative contracts. The plaintiff went on to state that the Procurement Agency does not have judicial powers. Therefore, the plaintiff asserted the case needs to be considered under ordinary courts. In response, the defendant submitted that the contract is an international contract and affirmed that the plaintiff has already agreed that disagreements shall be settled through arbitration. The plaintiff was fully aware of this clause at the moment of conclusion of the contract. The defendant rejected the assertion of the plaintiff that the contract is administrative contract; instead the defendant contended that the contract is a contract for the supply of goods and services. As a result, the defendant reinforced its arguments that the matter be considered by the Procurement Agency of the government as the Court is not in a position to adjudicate the matter in English.

Having entertained the contention of the parties, the Court framed the following three issues:

1. Whether or not the matter has to be resolved through arbitration;
2. Whether or not the fact that case is pending before the Procurement Agency divests the Court of jurisdiction ;
3. Whether the statement of plaintiff is clear in identifying the contract that is the basis for the claim.

Concerning Jurisdiction

The settlement of disputes arising out of contracts through negotiation or arbitration outside the purview of courts has distant history and is reflected in the laws of many countries. It is believed that these forms of alternative dispute resolution are more expeditious, economical and just compared to courts with backlog of cases. Furthermore, alternative forms of dispute resolution provide room for appointing arbiters who have special expertise in the subject matter of the dispute. These forms of alternative dispute resolution have also been entrenched in the laws of Ethiopia in view of their merits. One of these different forms of alternative dispute resolution is that of arbitration proceeding.

In principle, parties to a contract are at liberty to stipulate that disagreements arising from their contract will be resolved through arbitration. This, however, does not mean that all civil cases are amenable to arbitration. For instance, it is only courts of law which can decide the existence or not of matrimonial relations (Article 115 of the Revised Family Code). This implies that the agreement between a man and woman to present for arbitration their disagreement on such matrimonial relations

between them is null and void as the matter in question can not be subject of arbitration. Similarly, Article 315(2) of the Civil Procedure Code provides that administrative contracts can not be subject of arbitration. Regardless of this, there are two strands of thought concerning whether or not administrative contracts can be subject of arbitration. The first strand of thought posits that administrative contracts can be subject of arbitration if parties stipulated to that effect in their contract since the substantive law in the Civil Code which regulates these forms of contracts did not prohibit such arbitration. On the contrary, the other view holds that disputes arising out of administrative contracts are not amenable to arbitration as Article 315(2) of the Civil Procedure Code expressly prohibited arbitration in the case of such contracts. Thus, disputes arising from such contracts need to be submitted to ordinary courts of law and not to arbitration.

The present contract, which is at the heart of the dispute, is concluded for the supply of goods to be used in the construction of bridges for public use. Irrespective of the fact that the contract is for the supply of goods, it is closely intertwined with public use, which makes the contract an administrative contract. The parties have agreed that disputes arising from the two contracts concluded between them will be resolved in good faith amicably. In the event of failure to resolve the disputes in good faith, the contracts have laid out a provision whereby one of the parties can initiate arbitration proceedings. In accordance with Ethiopian law, the arbitrator was to resolve the dispute based on UNICTRAL arbitration rules. However, the plaintiff submitted that the agreement is made in contravention of mandatory rule of Article 315(2) of the Civil Procedure. As a result, the plaintiff argued the dispute needs to be resolved through ordinary courts of law. On the contrary, the defendant contended that the contract is international contract and the dispute arising from it needs to be submitted to arbitration.

Article 3131-3306 of the Civil Code govern administrative contracts. No where, among this gamut of provisions, is there a provision which prohibits arbitration in cases of disputes arising from administrative contracts. Likewise, Articles 3325-3346 of the Civil Code do not prohibit arbitration in case of disputes revolving around administrative contracts. There is no prohibition of arbitration in case of administrative contracts. On the contrary, Article 3328 of the Civil Code provides for arbitration of existing as well as future disputes. Moreover, parties to administrative contracts are entitled to freedom of contract to provide for arbitration of existing as well as future disputes to arbitration. If there is any contention that this right

that the parties are entitled to by virtue of the substantive law is contradictory to procedural rules, the substantive right should be given priority. In *Zemzem PLC vs Illubabor Zone Education Department,* the Cassation Bench of the Federal Supreme Court decided that the dispute between the parties should be resolved through arbitration by giving effect to the terms of a stipulation in their contract. The Court reinforced the principle that a contract validly agreed between the parties is law. This is indicative of the fact that the Court has given priority to the principle of freedom of contract of the parties. Thus, the dispute between the parties needs to be resolved through arbitration as agreed between them.

The fact the contract in question is of the nature of international transaction is another reason why the contract has to be resolved through arbitration. Contracts entered into by Ethiopian administrative agencies with foreign parties need to be observed. Failure to observe the contractual terms would prompt foreign parties to desist from concluding contracts in the first place. This would prevent the country from obtaining benefits it could have obtained from international sales transactions. Thus, giving effect to the terms of the international sales transaction in question has a bearing on the country as a whole. The plaintiff is given the power to resolve disputes by virtue of Article 10(3) of its enabling proclamation. Therefore, the consideration of the dispute between the parties through arbitration is appropriate as agreed beforehand. Therefore, the Court does not have the jurisdiction to entertain the matter in line with Article 244(2) of the Civil Procedure Code. The plaintiff is entitled to refer the matter to arbitrators so that it can be resolved pursuant to the relevant Ethiopian laws.

የወንጀል መዝገብ 605/92
ጥቅምት 27 ቀን 1996 ዓ.ም.

ዳኞች፡
መድህን ኪሮስ
ሰለሞን እምሩ
ዘውድነሽ አስረስ

ከሣሽ፡- ልዩ ዐ/ህግ ወ/ሮ ሳባ ገ/መድህን
ተከሣሽ፡- መስፍን በቀለ

ተከሣሽ፡- ከ1969 እስከ 1972 ዓ.ም. ድረስ "በቀይ ሽብር ዘመቻ" ወቅት የፖለቲካ ካድሬ በነበረበት ወቅት ከአዲስ አበባ ከፍተኛ 12 ውስጥ ብዛት ያላቸውን ተጎጅዎች በመግደል፣ ለመግደል በመሞከር፣ ከባድ የአካል ጉዳት በማድረስና ሕገ ወጥ በሆነ መንገድ በማሠር በወ.መ.ሕ.ቁ. 27፣ 32(1)፣(ሀ) ወይም (ለ)፣ 281፣ ወይም በአማራጭ 522 (1) (ሀ)፣538 (ሀ) እና 416[1] መሠረት በአጠቃላይ 26 ክሶች ቀርበውበታል። ተከሣሹ ጥፋተኛ አይደለሁም በማለቱ ዐቃቤ ሕግ ጥቂት ተጎጂዎችን ጨምሮ ብዛት ያላቸውን የአይን ምስክሮች አቅርቦ አስመስክሯል። ብዛት ያላቸው የጽሁፍ ማሥረጃዎችንም አቅርቧል። በዚሁም መሠረት በሁሉም ክሶች ላይ ጥፋተኛነቱ በመረጋገጡ ፍ/ቤቱ በተከሣሹ ላይ የእድሜ ልክ እሥራት ወስኖበታል።

ፍርድ ቤቱ ይህን ቅጣት የወሠነው ከተከራካሪ ወገኖች የቀረቡትን የቅጣት ማክበጃና ማቅለያ ምክንያቶችን ግምት ውስጥ በማስገባት ነው። የቅጣት ማቅለያ ምክንያቶችን በተመለከተ ተከሣሽ ያቀረባቸው ምክንያቶች ድርጊቶቹ በተፈጸሙበት ወቅት በጥይት ተመትቶ በደረሰበት ጉዳት የአእምሮና የነርቭ ችግር፣ የልብ ሕመም፣ የሆድ እቃና የጨጓራ ሕመም፣ የሐሞት ጠጠርና የሽንት ቧንቧ ጥበት ሕመሞች የተጋለጠ መሆኑን ገልጾ በነፃ እንዲሠናበት ወይም ቅጣቱ በገደብ እንዲቆይለት ጠይቋል። ሆኖም እነዚህ ሁኔታዎች በሕግ ዕውቅና የተሠጣቸው የቅጣት ማቃለያ ምክንያቶች ባለመሆናቸው ፍ/ቤቱ ውድቅ አድርጓቸዋል።

በተከሣሹ ላይ ቅጣቱ ከብዶ ሲወሰን እስከ ሞት ቅጣት ድረስ በማክበድ ይሆናል። በሌላ በኩል ፍ/ቤቱ ቅጣት በሚወሰንበት ጊዜ ከግምት ውስጥ ሊያስገባቸው የግድ የሆኑ የተለያዩ ሁኔታዎች መኖራቸው ግልጽ ነው(ወ.መ.ሕ.ቁ. 86)። በዚህ ድንጋጌ ከተመለከቱት ሁኔታዎች ውስጥ የአጥፊው የግል ሁኔታዎች ናቸው።

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[1] አን. 27 - ሙከራ፣ 32(1) (ሀ) ዋና፣ ወንጀል አድራጊ፣ 281 - ዘር ማጥፋት፣ በሰብአዊ ፍጥረት ላይ የሚደረግ ወንጀል፣ 522 - በግድ (የግፍ) አገዳደል፣ 538 - ከባድ የአካል ጉዳት እና 416 - ሕገ ወጥ በሆነ መንገድ ሰውን መያዝና ማሠር። በዚህ ረገድ ተከሣሹ ስለ ቅጣት ማቅለል ላቀረበው ክርክር የተያያዙት ማሥረጃዎች እንደሚያመለክቱት

ተከሣሹ በበርካታ ብርቱ በሽታዎች ተይዞ ይገኛል፡፡ በተለይም ደግሞ ራሱን ችሎ እንዳይንቀሣቀሥ በነርቭ መጎዳት ሳቢያ በተሽከርካሪ ወንበር እንደሚንቀሣቀሥ ፍ/ቤቱ የተገነዘበ ሲሆን ከዚህ ሌላ ከብሽሽቱ ከፍ ብሎ በሰውነቱ ላይ በተተከለ ሰው ሠራሽ ቱቦ ሽንት እንደሚያስወግድ በሀኪም ማሥረጃ ተረጋግጧል፡፡ ይህም ቋሚ በሽታና ችግር መሆኑ ተረጋግጧል፡፡ ይህ የተከሣሹ የግል ሁኔታ የማያቋርጥ የሌላን ሰው እርዳታና እንክብካቤ እንዲያስፈልገው ያደርገዋል፡፡

ይህ ማለት ግን በተከሳሹ ላይ የሚጣለው ቅጣት ይቀላል ማለት አይደለም፡፡ የግል ሁኔታው የዚህ ዓይነት መሆኑ የቅጣቱን አፈፃፀም በሚመለከት የሚሰጠውን ውሳኔ ሊለውጥ ከሚችል በቀር ቅጣቱ ከብዶ ከመወሰን ሊያስቀር የሚችል አይደለም፡፡

ስለዚህ ተከሳሹ ከዚህ በላይ የወንጀሎቹን አፈፃፀም የጥፋቱን ክብደት ወዘተ... መነሻ በማድረግ የተዘረዘሩትን የቅጣት ማክበጃ ምክንያቶች በመከተል ለተከሳሹ ጥፋት ይገባል በማለት በእድሜ ልክ ፅኑ እሥራት ይቀጣ ብለናል፡፡

ትዕዛዝ

1. ተከሳሹ ያለበት የጤና ሁኔታ የሌላን ሰው የማያቋርጥ እርዳታ እና እንክብካቤ እንዲያስፈልገው ያደርገዋል፡፡ እንዲህ አይነቱን የማያቋርጥ እርዳታ እን ክብካቤ በእሥር ቤት ማግኘቱ የሚያጠራጥር ነው፣ስለዚህ የቅጣቱን ጊዜ ከእሥር ቤት ይልቅ በሚቀርቡት ቤተዘመዶቹ እንክብካቤና ጥበቃ ሥር መፈፀሙ ለእርሱ አማራጭ የሌለው ነው፡፡

ስለዚህ ተከሳሹ ይህን አማራጭ በማስቀረት አሁን ካለበት ሁኔታው አኳያ እጅግ ወደሚጎዳው በእሥር ወደ መቆየት ሁኔታ የሚያስገባውን ድርጊት እንዳይፈፅም የሚያስገድደውና በመልካም አመል እንዲኖር የሚያስገድደው ምክንያት አለ ማለት ችለናል፡፡ ይህ ምክንያት መኖሩ ደግሞ ተከሳሹ ቅጣቱ ከመፈፀሙ በፊት ታግዶ እየተፈተነ ቢቆይ ከማጥፋት ይታቀባል፣ ስለዚህም አንድ ማስጠንቀቂያ ቢሰጠው በቂና ተገቢ ነው ብሎ ፍ/ቤቱ ተገቢ ግምት እንዲገምት አስችሎታል፡፡ ስለዚህ ከዚህ በታች የተመለከቱትን ግዴታዎች ሲያሟላ ተከሳሹ የተጣለበት የዕድሜ ልክ ፅኑ እሥራት ቅጣት ሳይፈፀም ታግዶ ለአምስት ዓመት እንዲቆይ አዘናል፡፡ (የወ/መ/ሕ/ቁ. 196፣ 202(1)፣ 200(2)).

ሀ/ ስለጠባዩ መሻሻል በብር 10,000.00 (አሥር ሺ ብር) የሚበቃ ዋስ ሲጠራ ወይም ገንዘቡን ሲያስይዝ፣

ለ/ ያለፍ/ቤቱ ፈቃድ ከመኖሪያው ከአዲስ አበባ ከተማ ከሦስት ሳምንት ለበለጠ ጊዜ ላለመውጣት ተስማምቶ ሲፈርም፣

ሐ/ ከዛሬ ጀምሮ በየስድስት ወሩ እዚህ ፍ/ቤት እየቀረበ ፍ/ቤቱ እንዲመረምረው ፈቅዶ ሲፈርም፣

መ/ ከላይ በተገለፀው የአምስት ዓመት ገደብ እንዲለቀቅ መፈቻ ይፃፍ፣ እስከዚያው ድረስ ቅጣቱን እንዲያስፈጽም ለማረሚያ ቤት ይፃፍ።

2. ተከሳሹ በፅኑ እሥራት ቅጣት (በዕድሜ ልክ) የተቀጣ ስለሆነ በወ/መ/ሕ/ቁ. 122(ሀ) ሥር ከተመለከቱት መብቶቹ በወ/መ/ሕ/ቁ/ 123(2) መሠረት በቋሚነት ተሽሯል፣ ይኸው ለፖሊስ፣ ለከተማው አስተዳደር፣ ተከሳሹ ለሚኖርበት ወረዳ፣ ለብሄራዊ የምርጫ ቦርድ፣ በከተማው ላሉ ፍ/ቤቶች ይፃፍ።

3. ተከሳሹን በየሁለት ሳምንቱ በመኖሪያ አድራሻው እየሄደ በገባው ግዴታ መሠረት በዚሁ በአዲስ አበባ መኖሩን እያረጋገጠ ሪፖርት እንዲያደርግ ተከሳሹ የሚኖርበት ወረዳ ፖሊስ ታዝዟል ይፃፍ።

መዝገቡን ዘግተን ወደ መዝገብ ቤት መልሰናል።[2]

ትዕዛዝ

ልዩ አቃቤ ህግ ነሐሴ 5 ቀን 95 ዓ.ም. በተፃፈ አቤቱታ ያመለከተው ተከሳሹ ጥፋተኛ በተባለበት የዘር ማጥፋት ወንጀል የእድሜ ልክ ፅኑ እስራት ቅጣት ከተወሰነበት በኋላ ባለበት የልብ፣ የጨጓራ፣ የነርቭ የሽንት ትቦ መጥበብ እና ሌሎች በሽታዎች ቋሚ የሆነ የተደራረበ የበሽታ ችግር ምክንያት በተሽከርካሪ ወንበር የሚንቀሳቀስ እና ሽንቱንም በሰው ሰራሽ ትቦ እየተረዳ የሚሸና በመሆኑ የሌላ ቋሚ የሆነ የቅርብ እርዳታ እና እንክብካቤ ያስፈልገዋል በማለት ፍ/ቤቱ የእድሜ ልክ እስራቱን በአምስት ዓመት የጊዜ ገደብ ገድቦለት ነበር። ሆኖም ተከሳሹ ከማረሚያ ቤት ከወጣ በኋላ በተሽከርካሪ ወንበር መንቀሳቀሱን እና በትቦ መሽናቱን አቋርጦ ያለምንም አጋዥ እንደማንኛውም ሰው ወደፈለገበት ቦታ ሁሉ በመንቀሳቀስ የእለት ተለት ተግባሩን እያከናወነ ይገኛል። ተከሳሹ ቀድሞውንም በተንቀሳቀቃሽ ወንበር ሲንቀሳቀስ የነበረው እና በሰው ሰራሽ ትቦ እየታገዘ ሲሸና የነበረው በዚሁ እንዲገለገል የግድ የሚለው ቋሚ በሽታ ኖሮበት ሳይሆን ፍ/ቤቱን ለማታለል የተጠቀመበት ስልት ነው። በመሆኑም ፍ/ቤቱ ቀደም ብሎ የሰጠውን የሕግ ትዕዛዝ በማንሳት ተከሳሹ የተወሰነበተን የእድሜ ልክ ፅኑ እስራት እንዲፈፅም እንዲወሰንልን የሚል ነው።

[2] ይህ ፍርድ እና ትእዛዝ የተሠጠው ጥቅምት 17 ቀን 1994 ዓ.ም. ነበር።

Federal High Court File No.605/92

Tikimt 27, 1996 EC

Judges: Medhin Kiros
Solomon Imirou
Zewdnesh Asres

Prosecutor: Mrs. Saba G/Medhin, representing the Special Prosecutor's Office.

Defendant: Mesfin Bekele Hora

The defendant was charged under Arts.27, 32 (1) (a) or (b), 281 or alternatively, Arts.522 (1) (a), 538(a) and 416[1] for killing, attempting to kill, inflicting bodily injury, and illegally detaining a number of victims between 1969 and 1972 E.C. - 1976 and 1980 GC - during the infamous 'Red Terror Campaign' -while he was serving as a political cadre at Higher 12, in Addis Ababa. A total of 26 counts were brought against him. Since the defendant pleaded not guilty, the prosecution called a number of eye witnesses including some of the victims and adduced many written evidences to prove the charges. He was then convicted on almost all charges and sentenced to life imprisonment.

The Court passed the sentence based on the different aggravating and mitigating circumstances presented by both parties. With regard to mitigation, the defendant prayed among others that, since he is still suffering from the bullet wound inflicted on him during that period by the so called anti-revolutionary elements - such as his victims - and this has resulted in mental and nerve impairment, cardiac, abdominal, intestinal and gall bladder complications, and the narrowing of the passage of the urine, he should be set free, or that the punishment should be suspended. The Court, however, dismissed all these, on the ground that none of them are recognized by the law as mitigating grounds. The Court stated that though the maximum penalty that should have been imposed could have been the death sentence, it noted the following personal circumstances that can be basis to mitigate punishment. The Court noted that the convict is

[1] Art.27- attempt, 32(1)(a) - participation as a principal offender, 281- genocide and crimes against humanity, 522 - aggravated homicide - homicide in the first degree, 538 - grave willful injury and - 416 - unlawful arrest or detention, of the Penal Code of Ethiopia of 1957.

currently suffering from several sicknesses as a result of which he cannot walk by himself and he is moving around in a wheel chair while his urine is extracted through tubes that are inserted into and protrude from his body. The Court also noted that these medical conditions of the convict are supported by a medical testimony. All these forced the Court to conclude that the convict needs uninterrupted assistance of others. The Court reasoned that all the abovementioned personal circumstances can be used as factors to mitigate punishment per Art.86 of the Penal Code. Thus, the Court preferred life sentence to capital punishment.

The Court then gave the following order with regard to the execution the punishment:

Order

The convict cannot receive the assistance needed because of his present sicknesses in prison and placing him under the supervision of his family is found to be indispensable.

The Court also presumes that the convict can be prevented from committing further crimes if he is given a warning and his sentence is suspended. Accordingly, the sentence shall be suspended for five years (as per Arts.196, 202(1) and 200(2) of the Penal Code) provided that he is willing to meet the following prerequisites:

a. The convict shall deposit a guarantee of ten thousand Birr or name a guarantor who can vouch for his credibility;
b. He shall not leave Addis Ababa - his residence- for not more than three weeks without authorization from the Court and sign an undertaking to this effect; and
c. He shall sign an undertaking to appear before this Court every six months, so that the latter can check his condition.

The Court at last ordered the release of the convict as of Miazia 17, 1994 E.C. and ordered the convict to report to the police station around his locality.

Almost a year and a half after this order, the prosecution petitioned the Court to revise its order and the latter issued the following order:

Order

The prosecution prayed that though the convict was released from prison on the ground that he was suffering from serious sickness and the sentence passed was suspended for five years, right after his release, the convict was seen walking around by himself without any assistance, and he no more uses a wheel chair and the tubes for excretion. The convict pretended to be sick and showed all these acts of pretence in order to deceive the Court.

Accordingly, the Court should withdraw its order and pass a new order for the convict to serve the life sentence passed on him.

The convict on his part prayed that at present he cannot undergo surgery on his gallbladder as the procedure could not be carried in this country because he has a cardiac problem and no anesthesia can be administered on him for the same reason. The convict also pointed out that the Medical Board of the Black Lion Hospital has decided that he should seek further treatment abroad. The convict further explained that the prosecution filed this petition in order to frustrate his appeal to the Supreme Court he lodged on the decision of the High Court that overturned his request to be allowed to follow up his medical case abroad. The convict argued that the prosecution has no legal ground to file this application and it could have appealed from the decision of this Court if it is of the opinion that the order is unlawful. For all these reasons the convict pleaded the Court to dismiss the prosecutor's petition.

After hearing the pleadings, the Court stated that the issue is whether there is any ground that enables it to withdraw its past ruling -the order of suspension. The Court noted that it suspended the sentence based on the facts that the convict was suffering from different sicknesses and medical evidences were submitted to prove this fact. The Court also noted that the convict attended all sessions of the trial using a wheelchair and tubes that extricate excretions were protruding from his body, as a result of which it formed an opinion that the convict was suffering from permanent and incurable sicknesses. As he was ordered to report to this Court at intervals, the Court has noticed that the convict was no more using the wheelchair and the tubes no more appear protruding from his body. Moreover, the Court noted that the convict entered into the courtroom walking without any assistant. Though he pretended to feign sickness by showing a sign of moroseness while entering the judges' chamber, he went out of it without any difficulty and he continued in this manner while reporting to this Court. The Court also observed that while entering the judges' chamber, though he requested to be allowed to talk while sitting because he cannot talk while standing due to his sicknesses and he was sitting and vacating the chair with the assistance of others, the convict has repeatedly left the chamber walking like a healthy person. In addition to these, some of the judges have seen him without his knowledge, and observed that he was doing his business in the city without any hitch. This fact has forced the Court to conclude that the convict was feigning sickness in order to create an impression that he is suffering from incurable sicknesses. The Court also

noted from the convict's petition submitted to this court that seeks a permission to be allowed to follow up his medication abroad, that the medical report issued by the Medical Board pertains only to his sickness on his gallbladder but not to any of the other alleged sicknesses during the last ruling. This is another prove that the convict alleged that he had several sicknesses in order to evade justice. As if these pretentions were not enough, the convict also attempted to feign sickness while he was appearing in court following up his case for authorization to go abroad for medication by coming to court with the assistance of others and requesting to talk while sitting though he was leaving without any assistance. The Court noted that these facts have forced it to conclude that the convict is still attempting to cheat and evade justice by going abroad.

Regarding the cardiac problem about which the convict petitioned to be allowed to go abroad for medication, the Court had called two expert witnesses who have the convict as their patient - an anesthesiologist and a cardiologist - and none of them testified that he has such an illness except his own allegation that he is suffering from it. Noting that this is another attempt to evade justice, the Court had earlier given warning to the convict, dismissed the petition and ordered the continuation of the suspension of the sentence. The Court also noted that the convict nonetheless continued facilitating his voyage abroad contravening the conditions placed upon him (i.e. that he should not leave his residence without authorization and the he should periodically report to this Court) by attempting to flee the country. The Court reasoned that by so doing the convict has violated the conditions placed upon him during the period of suspension and ordered the suspension to be withdrawn and the execution of the sentence of life imprisonment to revive as per Art.204 of the Penal Code.

ፍርድና በፍርድ ላይ የቀረበ ትችት፡- የክልል ፍ/ቤቶች የውክልና የዳኝነት ሥልጣንና ውክልናው ቀሪ የሚሆንበት ሁኔታ፤

ሞላ መንግስቱ*

መግቢያ

በዚህ ርዕስ ትችት የሚቀርበው የፌዴራል ጠቅላይ ፍ/ቤት ሰበር ችሎት በሰ/መ/ቁ 20465 ሰኔ 26 ቀን 1999 ዓ.ም በሰጠው ውሳኔ ላይ ነው፡፡ ለትችቱ ምክንያት የሆነውም የፌዴራል ከፍተኛ ፍ/ቤት በክልል ቢቋቋምም የክልሉ ጠቅላይ ፍ/ቤት የክልል ከፍተኛ ፍ/ቤቶች በውክልና ሥልጣናቸው የወሰኑትን የፌዴራል ጉዳይ በይግባኝ ተቀብሎ የማየት ሥልጣኑን የሚያስቀር አይሆንም በማለት የሰበር ችሎቱ የሰጠው ድምዳሜ ነው፡፡ ይህን ድምዳሜ ለመተቸት መሠረት ተደርገው የሚጠቀሱት ደግሞ የፌዴራሉ ሕገመንግሥትና ፍ/ቤቶችን ያቋቋመው አዋጅ አግባብ ያላቸው አንቀጾች ናቸው፡፡

በኢትዮጵያ የተመሠረተው የፌዴራል ሥርዓት በሕገመንግሥቱ አንቀጽ 50 የፌዴራልና የክልል የመንግሥት አካላትን የሚያቋቁም ሲሆን የመንግሥት ሥልጣንንም ለእነዚሁ አካላት በአንቀጽ 51-52 አከፋፍሎ ደንግጓል፡፡ የዳኝነት ሥርዓቱም ይህንኑ የመንግሥት አወቃቀር በመከተል በፌዴራልና በክልል ተለያይቶ የተዋቀረ በመሆኑ የፌዴራል ሥልጣን የሆኑ ጉዳዮች የሚታዩት በፌዴራል ፍ/ቤቶች ሲሆን የክልል ሥልጣን የሆኑ ጉዳዮች ደግሞ የሚታዩት በክልል ፍ/ቤቶች እንደሆነ በግልጽ ተደንግጓል፡፡ ይሁን እንጂ የፌዴራል ፍ/ቤቶች ሥልጣን የሆኑ ጉዳዮች በክልሎች የዳኝነት ጥያቄ በሚነሳባቸው ጊዜ የፌዴራል ፍ/ቤቶች በክልሎች እስኪቋቋሙ ድረስ የፌዴራል የመጀመሪያ ደረጃ ፍ/ቤት ሥልጣን ለክልል ከፍተኛ ፍ/ቤት፣የፌዴራል ከፍተኛ ፍ/ቤት ሥልጣን ደግሞ ለክልል ጠቅላይ ፍ/ቤት በውክልና የተሰጠ መሆኑን የሕገመንግሥቱ አንቀጽ 80 ደንግጓል፡፡

የፌዴራል ከፍተኛ ፍ/ቤትም ሆነ የመጀመሪያ ደረጃ ፍ/ቤቶች በአገሪቱ በሞላ ወይም በተወሰኑ ክልሎች እንዲቋቋሙ አስፈላጊ ሆኖ ባገኘው ጊዜ የሕዝብ ተወካዮች ም/ቤት ሊወሰን እንደሚችልም እንደዚሁ በሕገመንግሥቱ ተደንግጎ እናገኛለን፡፡ በዚህ መሠረትም ሕገመንግሥቱ ከታወጀበት ከነሐሴ 15 ቀን 1987 ዓ.ም እስከ መጋቢት 30 ቀን 1995 ዓ.ም ድረስ የሁሉም ክልሎች ፍ/ቤቶች ከክልል የዳኝነት ሥልጣናቸው በተጨማሪ በሕገመንግሥቱ በተሰጣቸው የውክልና ሥልጣን መሠረት የፌዴራል ጉዳዮችንም በዳኝነት እያዩ ውሳኔ ሲሰጡ ቆይተዋል፡፡ ይሁን እንጅ መጋቢት 30 ቀን 1995 ዓ.ም አዋጅ ቁጥር 322/1995 የፌዴራል ከፍተኛ ፍ/ቤትን ለማቋቋም በመውጣቱ[1] አዋጁ በክልል ፍ/ቤቶች

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[1] በዚህ አዋጅ በቤኒሻንጉል ጉምዝ፣ በጋምቤላ፣ በአፋር፣ በሱማሌና በደቡብ ብብሕ ክልሎች የፌዴራል ከፍተኛ ፍ/ቤቶች ተቋቁመዋል፡፡

የውክልና የዳኝነት ሥልጣን ላይ የሚያስከትለው ለውጥ ምንድን ነው? የሚለውን ጥያቄ ያስነሳል፡፡ የጥያቄውን መነሳት የበለጠ አስፈላጊና አግባብ የሚያደርገውም በክልሎቹ የፌዴራል የመጀመሪያ ደረጃ ፍ/ቤት ሳይቋቋም የፌዴራል ከፍተኛ ፍ/ቤት ብቻ በመቋቋሙ ውክልናው በከፊል ተነስቶ በከፊል ግን እንደፀና የሚቆይበት ሁኔታ በመኖሩ የተነሳውንና እንደፀና የሚቆየውን የውክልና ሥልጣን ለይቶ ለመረዳት የሚያስቸግሩ አከራካሪ ጉዳዮች ስለሚኖሩ ነው፡፡ ይህ አሁን የሚተቸው የፌዴራል ጠቅላይ ፍ/ቤት ሰበር ችሎት ውሳኔም የዚህ ዓይነቱ አከራካሪ ጉዳይ መፈታት ያለበትን መንገድ የሚያስረዳ ሲሆን ትችቱ ደግሞ የፍ/ቤቱ አቋም ከሕገመንግሥቱ አግባብ ያላቸው አንቀጾች አንፃር አንዳንድ ግድፈቶች አሉበት የሚል ነው፡፡

1. የጉዳዩ ዝርዝር

ህፃን ተመስገን ቱጂ በመኪና ተገጭቶ በደረሰበት የአካል ጉዳት ምክንያት ካሣ እንዲከፈለው በጉዳት አድራሽና ጉዳት ባደረሰው ንብረት ባለቤት ላይ የተጉጂው ህፃን ሞግዚትና አሳዳሪ አቶ ፀሐየ ዮሐንስ በቤኒሻንጉል ጉምዝ ለአሶሳ ዞን ከፍተኛ ፍ/ቤት ክስ ያቀርባሉ፡፡ በዚህ በከሳሽና በተከሳሾች መካከል በሚካሄደው የካሣ ክርክር አዋሽ ኢንሹራንስ ኩባንያ ጣልቃ ገብቶ ተከራከረ፡፡

ክሱ የቀረበለት የአሶሳ ዞን ከፍተኛ ፍ/ቤትም የግራ ቀኙን ክርክርና ማስረጃ መርምሮ ተከሳሾችም ሆነ ጣልቃ ገቡ ኢንሹራንስ ኩባንያ ለጉዳቱ ኃላፊነት እንዳለባቸው በመጥቀስ ህፃን ተመስገን ቱጂ ለደረሰበት ጉዳት ካሣ እንዲከፍሉ ወሰነ፡፡

አዋሽ ኢንሹራንስ ኩባንያ በዚህ ውሳኔ ቅር በመሰኘት የይግባኝ አቤቱታውን በቤንሻንጉል ጉምዝ ክልል ለተቋቋመው የፌዴራል ከፍተኛ ፍ/ቤት ይግባኝ አቀረበ፡፡ ጣልቃ ገብ ሆኖ የተከራከረው ኢንሹራንስ ኩባንያ የይግባኝ አቤቱታውን ለክልሉ ጠቅላይ ፍ/ቤት በማቅረብ ፋንታ ለፌዴራል ከፍተኛ ፍ/ቤት ያቀረበው ኩባንያው በፌዴራል መንግሥቱ የተመዘገበ ወይም የተቋቋመ የንግድ ድርጅት በመሆኑ በፌዴራል ፍ/ቤቶች ማቋቋሚያ አዋጅ ቁጥር 25/1988 አንቀጽ 5(6) መሠረት ጉዳዩ የፌዴራል ፍ/ቤቶች ስልጣን ነው፤ በቤኒሻንጉል ጉምዝ ክልል የአሶሳ ዞን ከፍተኛ ፍ/ቤት ጉዳዩን ተቀብሎ በመጀመሪያ ደረጃ ሊያይ የቻለውም የፍዴራል ጉዳዮችን የፌዴራል የመጀመሪያ ደረጃ ፍ/ቤትን ተክቶ መወሰን እንዲችል በተሰጠው የዉክልና ሥልጣን መሠረት ስለሆነ ጉዳዩን በይግባኝ ሊያየው የሚገባው በክልሉ የተቋቋመው የፌዴራል ከፍተኛ ፍ/ቤት ነው በሚል ነው፡፡

ይግባኙ የቀረበለት የፌዴራል ፍ/ቤትም የቀረበውን ጉዳይ ተመልክቶ ለመወሰን የሚያስችለው የሥረነገር ሥልጣን አለው ወይስ የለውም የሚል ጭብጥ ከመሠረተ በኋላ ይግባኝ ያቀረበው ኢንሹራንስ ኩባንያ የቤንሻንጉል ጉምዝ ክልል ነዋሪ በሆኑት ከሳሽና ተከሣሽ መካከል በተጀመረው የፍትሐብሔር ክርክር ጉዳት አድርሷል ለተባለው መኪና የመድን ሽፋን በመስጠቱ የተነሳ በመኪናው ባለቤት እግር ተተክቶ ጣልቃ ገብቶ ከመከራከሩ በስተቀር የራሱን መብትና ግዴታ

በተመለከተ የቀረበበት ክስ ስላልነበረ ክሱ የፌዴራል ጉዳይን የሚመለከት አይሆንም፤ ስለዚህም ይግባኙ የቀረበለት ፍ/ቤት ጉዳዩን አይቶ ለመወሰን የሚያስችለው የሥረነገር ሥልጣን ስለሌለው በፍ/ሥ/ሕ/ቁጥር 348(2) መሠረት ውሳኔውን አጽንተን ይግባኙን ሰርዘናል በማለት ወሰነ፡፡

ይግባኝ ባይ የነበረው ኢንሹራንስ ኩባንያ ይህ ውሳኔ መሠረታዊ የሕግ ስህተት ተፈጽሞበታል በማለት የሰበር አቤቱታውን ለፌዴራል ጠ/ፍ/ቤት ሰበር ችሎት አቀረበ፡፡ የይግባኝ ሰሚው ፍ/ቤት ውሳኔ መሠረታዊ የሕግ ስህተት የተፈፀመበት መሆኑን ያረጋግጣሉ በማለት ያላቀረባቸው ምክንያቶችም፡-

ሀ. በማንኛውም ተከራካሪ ወገን ክርክር ሳይነሳ ፍ/ቤቱ በራሱ አነሳሽነት የፍ/ቤቱን የሥረነገር ሥልጣን መኖር አለመኖር አንስቶ በጭብጥነት በመያዝ መወሰኑ የሥነሥርዓት ግድፈት መፈፀሙን ያሳያል፤

ለ. የአሶሳ ዞን ከፍተኛ ፍ/ቤት ጉዳዩን በመጀመሪያ ደረጃ ሥልጣን ተቀብሎ ውሳኔ የሰጠው በክርክሩ ከተጠየቀው የገንዘብ መጠን አንፃር ሥልጣኑ የፌዴራል የመጀመሪያ ደረጃ ፍ/ቤት በመሆኑና በፌዴራሉ ሕገመንግሥት በተሰጠው የውክልና ሥልጣን መሠረት የፌዴራል የመጀመሪያ ደረጃ ፍ/ቤትን በመተካት ስለሆነ እንጅ ጉዳዩ የፌዴራል ፍ/ቤት ሥልጣን ነው፡፡ የክልሉ ጠቅላይ ፍ/ቤትም ጉዳዩን በይግባኝ አይቶ ውሳኔ ከመስጠት በክልሉ የፌዴራል ከፍተኛ ፍ/ቤትን ያቋቋመው አዋጅ ቁጥር 322/95 ስለሚከለክለው ይግባኙ በክልሉ ለተቋቋመው ከፍተኛ ፍ/ቤት መቅረቡ ሕጉን የተከተለ ሆኖ ሳለ ውድቅ መደረጉ ሕጉን የተከተለ አይደለም፤

የሚሉ ናቸው፡፡

2. የሰበር ችሎቱ ውሳኔ

የፌዴራል ጠቅላይ ፍ/ቤት ሰበር ችሎት ጉዳዩን መርምሮ በአሶሳ ዞን የተቋቋመው የፌዴራል ከፍተኛ ፍ/ቤት የሰጠውን ውሳኔ በፍ/ሥ/ሥ/ሕ/ቁጥር 348(1) መሠረት አጽንቶታል፡፡ የሰበር ችሎቱ ውሳኔውን ለመስጠት ያበቁትን ምክንያቶች ሲያትትም በመጀመሪያ ክርክሩ የተነሳው የክልሉ ነዋሪ በሆኑ ሁለት ግለሰቦች መካከል እንደሆነ ጠቅሶ የኢንሹራንስ ኩባንያው ጣልቃ ገብቶ እንዲከራከር ስለተፈቀደለት ጣልቃ ገቢው በፌዴራል መንግሥቱ አካላት የተመዘገበ ወይም የተቋቋመ የንግድ ድርጅት በመሆኑ ብቻ ጉዳዩ በፌዴራል ፍ/ቤቶች ሥልጣን ሥር እንዲወድቅ ሊያደርገው ይችላል ወይ? የሚለውን ጥያቄ አንስቶ መልሱን ሳይሰጥ በማለፍ ለውሳኔው መሠረት ያደረጋቸውን ሁለት ምክንያቶች በዝርዝር ተንትኗል፡፡

እነርሱም፡-

1. ክሱም ሆነ የይግባኝ አቤቱታው የቀረበለት ፍ/ቤት ክሱን፣ ይግባኙን ተመልክቶ ውሳኔ ለመስጠት የሚያችለው የሥረነገር ሥልጣን የሌለው መሆኑን ከተረዳ በተከራካሪ ወገኖች በጉዳዩ ላይ ክርክር

ባይቀርብበትም ከፍርድ በፊት በማንኛውም ጊዜ በራሱ አነሳሽነት አንስቶ መዝገቡን መዝጋት እንደሚችል በፍ/ሥ/ሥ/ሕጉ በአንቀጽ 9፣231፣207፣211 እና 228 የተደነገገ በመሆኑ ይህን ነጥብ በተመለከተ ፍ/ቤቱ ስህተት ፈጽሟል ተብሎ በአቤቱታ አቅራቢው የቀረበው ክርክር ተቀባይነት የለውም፤

2. የሰበር አመልካች ይግባኙ በአሶሳ ዞን ለተቋቋመው የፌዴራል ከፍተኛ ፍ/ቤት መቅረብ ይገባዋል በማለት ላቀረበው ክርክር መሠረት ያደረገው የፌዴራል ከፍተኛ ፍ/ቤትን በተወሰኑ ክልሎች ለማቋቋም የወጣውን አዋጅ ቁጥር 322/95 ነው። የዚህ አዋጅ ይዘት እንደሚያስረዳው ደግሞ ክርክር የተነሳበትን የቤኒሻንጉል ጉምዝ ክልልን ጨምሮ የፌዴራል ከፍተኛ ፍ/ቤት በተቋቋመባቸው በአምስቱም ክልሎች የሚገኙ የክልል ጠቅላይ ፍ/ቤቶች ቀደም ሲል በሕገመንግሥቱ አንቀጽ 80(2) የፌዴራል ጉዳዩችን ለማየት በተሰጣቸው የውክልና ሥልጣን መሠረት ስለፌዴራል ከፍተኛ ፍ/ቤት ሆነው በመጀመሪያ ደረጃ ሥልጣናቸው ጉዳዮችን ለማየትና ለማስተናገድ ተሰጥቷቸው የነበረው ሥልጣን ቀሪ መሆኑን የሚያሳይ እንጅ የእነዚህ ክልሎች ከፍተኛ ፍ/ቤቶች ባላቸው የውክልና ሥልጣን ያዩትን የፌዴራል ጉዳይ በይግባኝ ተቀብለው ለማየት ያላቸውን ሥልጣን ያስቀረ አይደለም።በዚህም መሠረት አመልካች የይግባኝ አቤቱታውን ለክልሉ ጠ/ፍ/ቤት ከማቅረብ የሚያግደው ምክንያት አልነበረም። እራሱ ባነሳው የክርክር መስመርም ቢሆን ይህንኑ ለመንቀስ ታስቦ እንጅ ክርክር ያስነሳው ጉዳይ በይዘቱ የፌዴራል ጉዳይ ነው ለማለት ተፈልጎ አይደለም፤የሚሉ ናቸው።

በእነዚህ ምክንያቶች ላይ በመመሥረትም የሰበር ችሎቱ የፌዴራል ከፍተኛ ፍ/ቤት ሥልጣንን አስመልክቶ የሰጠው ውሳኔ በአግባቡ የተሰጠ ውሳኔ ነው ካለ በኋላ ይሁን እንጅ ፍ/ቤቱ በዚህ ነጥብ ላይ ብቻ ተወስኖ ነገሩን ሰምቶ የመወሰን ሥልጣን የለኝም በሚለው ውሳኔ መገደብ ሲገባው ከዚህ አልፎ በፍ/ሥ/ሥ/ሕ/ቁ.348(1) መሠረት የሥር ፍ/ቤቱን ውሳኔ አጽንቶትን ይግባኙን ሰርዞናል ማለቱ ተገቢ ሆኖ አላገኘነውም በማለት ውሳኔውን ደምድሟል።

3. ትችት

የሰበር አቤቱታ የቀረበበትን ውሳኔ የሰጠው በቤኒሻንጉል ጉምዝ ክልል የተቋቋመው የፌዴራል ከፍተኛ ፍ/ቤት ጉዳዩን ለማየት የሥረነገር ሥልጣን የለኝም ያለው፡-

1. ክርክሩ በሁለት የአንድ ክልል ነዋሪዎች መካከል የተነሳ የፍትሐብሔር ክርክር መሆኑን፣
2. የኢንሹራንስ ኩባንያው ወደክርክሩ የገባው ጉዳት አድርሷል ለተባለው መኪና የመድን ሽፋን በመስጠቱ ምክንያት በመኪናው ባለቤት እግር ተተክቶ እንጅ የራሱን መብትና ግዴታ በተመለከተ ክስ ያልቀረበበት መሆኑን፣

ከጠቀሰ በኋላ በዚህም ምክንያት ጉዳዩ የፌዴራል ጉዳይን የሚመለከት አይደለም በማለት ነው፡፡

የሰበር ችሎቱ በአመልካች አቤቱታ መሠረታዊ የሕግ ስህተት ተፈጽሟል ያሰኛሉ ተብለው በዝርዝር ከቀረቡለት ሁለት ዋና ዋና ነጥቦች አንዱን በቀጥታ መልስ የሰጠበት ሲሆን ሁለተኛውን በተመለከተ ግን መልስ የሰጠው በተዘዋዋሪ ነው፡፡ ይኸውም፡-

1. የሥረነገር ሥልጣንን አስመልክቶ በተከራካሪ ወገን ክርክር ሳይነሳ ይግባኝ ሰሚው ፍ/ቤት በራሱ አነሳሽነት አንስቶ ውስኔ መስጠቱ የሥነሥርዓት ግድፈት ነው በማለት የቀረበውን ክርክር በተመለከተ ሰበር ችሎቱ ክሱም ሆነ የይግባኝ አቤቱታ የቀረበለት ፍ/ቤት ክሱን ወይም ይግባኙን ተመልክቶ ውሳኔ ለመስጠት የሚያስችለው የሥረ-ነገር ሥልጣን የሌለው መሆኑን ከተረዳ በሌላው ተከራካሪ ወገን ይህን ጉዳይ አስመልክቶ ክርክር ባይቀርብም ከፍርድ በፊት በማንኛውም ጊዜ በራሱ አነሳሽነትና አንስቶ መዝገቡን መዝጋት እንደሚችል በፍትሐብሔር ሥ/ሥ/ሕጉ አንቀጽ 9፣231፣207፣211 እና 228[2] የተደነገገ በመሆኑ ይህን ነጥብ በተመለከተ መሠረታዊ የሕግ ስህተት ተፈጽሟል ተብሎ የቀረበው ክርክር የሕግ መሠረት የለውም በማለት የሰጠው ውሳኔ ትክክለኛና በአቤቱታ አቅራቢው በአንደኛ ደረጃ የቀረበውን መቃወሚያ በቀጥታ የመለሰ ውሳኔ ነው፡፡

2. የሰበር አልካች የቤኒሻንጉል ጉምዝ ክልል የአሶሳ ዞን ከፍተኛ ፍ/ቤት ጉዳዩን በመጀመሪያ ደረጃ ተቀብሎ ያየው በፌዴራሉ ሕገመንግሥት በተሰጠው የውክልና ሥለጣን መሠረት ጉዳዩ ከያዘው የገንዘብ መጠን አንፃር የፌዴራል የመጀመሪያ ደረጃ ፍ/ቤትን በመተካት እንጅ የጉዳዩ የሥረነገር ሥልጣን የፌዴራል ፍ/ቤት ነው፡፡ ስለዚህም የፌዴራል ከፍተኛ ፍ/ቤት በክልሉ በአዋጅ ቁጥር 322/95 በተቋቋመበት ሁኔታ የክልሉ ጠቅላይ ፍ/ቤት ጉዳዩን በይግባኝ ተመልክቶ ውሳኔ ከመስጠት ይህ አዋጅ ስለሚከለክለው የይግባኝ አቤቱታው በክልሉ ለተቋቋመው የፌዴራል ከፍተኛ ፍ/ቤት መቅረቡ አግባብ ነው በማለት ያቀረበውን ክርክር በተመለከተ የሰበር ችሎቱ፡-

ሀ. የጉዳዩ የሥረ-ነገር ሥልጣን የፌዴራል ወይስ የክልል ነው ከሚለው ጥያቄ ጋር በተያያዘ ክርክሩ የተነሳው የክልሉ ነዋሪ በሆኑ ሁለት ግለሰቦች መካከል በመሆኑና ጣልቃ ገቢው የሰበር አመልካች በፌዴራል መንግሥቱ አካላት የተመዘገበ ወይም የተቋቋመ የንግድ ድርጅት መሆኑ ብቻ ጉዳዩ በፌዴራል ፍ/ቤቶች ሥልጣን ሥር እንዲወድቅ ሊያደርገው ይችላል ወይ? የሚል ነጥብ በማንሳት ይህ እንዳለ ሆኖ ይልና አዋጅ ቁጥር 322/95 በክልል ፍ/ቤቶች የውክልና ሥልጣን ላይ የሚያስከትለውን ውጤት ወደ መተንተኑ ይሄዳል፡፡ ይሁን እንጂ ችሎቱ ይህን ጥያቄ በተመለከተ ውሳኔ ሰጥቶ ማለፉ አስፈላጊ ነበር፡፡ ምክንያቱም አንደኛ ይግባኝ ሰሚው

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[2] አንቀጽ 228 እዚህ ላይ በችሎቱ የተጠቀሰበት አግባብነት ግን ፈጽሞ ግልጽ አይደለም፡፡

ፍ/ቤትም ውሳኔ የሰጠው ጉዳዩን ለማየት ሥልጣን አለኝ ወይስ የለኝም የሚለውን ጭብጥ መሠረት በማድረግ ነው፡፡ ሁለተኛም የሰበር አመልካች ሌላው የውሳኔው መቃወሚያ ነጥብ ጉዳዩ የፌዴራል ጉዳይ በመሆኑ ፍ/ቤቱ ይግባኙን የማየት የሥረ-ነገር ሥልጣን እያለው የለኝም ማለቱ ሕጉን የተከተለ አይደለም የሚል በመሆኑ ለጥያቄው መልስ መስጠቱ ተገቢ ነበር፡፡

ሶስተኛውም ጣልቃ መግባት እንደ ዋና ተከራካሪነት ያስቆጥራል ወይም የጣልቃ ገቢው የፌዴራል አካል መሆን የፍ/ቤቱን የሥረ-ነገር ሥልጣን በተመለከተ የሚያመጣው ለውጥ አለ ወይስ የለም? የሚለውን ጥያቄ መመለስና ለመልሱ ምክንያት መስጠት ለበታች ፍ/ቤት ከፍተኛ ትምህርታዊ ጠቀሜታ ከመስጠቱም በላይ ሕግን ለማዳበር ጠቃሚ አስተዋጽኦ ይኖረዋል፡፡ አራተኛ ከታች በዝርዝር የምንመለከተውን ጥያቄ መመለስ ይህን ጥያቄ በተዘዋዋሪ ይመልሰዋል የሚባል እንኳ ቢሆን ይህ ትክክል የሚሆነው የአዋጅ ቁጥር 322/95 ትርጉምን ችሎቱ በተረዳበት መንገድ ብቻ ከተረዳነው ነው፡፡

ምክንያቱም ጉዳዩ የክልል ሥልጣን ነው ወይም የፌዴራል ሥልጣን ነው ብሎ መወሰኑ በአዋጅ ቁጥር 322/95 መሠረት የክልል ጠቅላይ ፍ/ቤት የፌዴራል ጉዳይን በተመለከተ የክልሉ ከፍተኛ ፍ/ቤት ውሳኔን በይግባኝ ተቀብሎ የማየት ሥልጣኑ ተነስቷል ወይም አልተነሳም ከሚለው ውሳኔ ጋር ተገናዝቦ ሲታይ በአመልካች መብት ላይ ለውጥ ሊያመጣ ይችላል፡፡ ለምን ቢባል የክልሉ ከፍተኛ ፍ/ቤት ያየው የፌዴራል ጉዳይን ነው የሚል ውሳኔ የመጀመሪያውን ነጥብ በተመለከተ ቢሰጥና አዋጅ ቁጥር 322/95 የክልል ጠቅላይ ፍ/ቤት የፌዴራል ጉዳዩን በይግባኝ የማየት ሥልጣኑን አንስቶታል የሚል ውሳኔ ሁለተኛውን ነጥብ በተመለከተ ቢሰጥ በመጨረሻ ጉዳዩ በይግባኝ የቀረበለት ፍ/ቤት ጉዳዩን ለማየት የሥረ-ነገር ሥልጣን የለኝም በማለት የወሰነው ያለአግባብ ነው ወደሚል መደምደሚያ ያደርሳል፡፡

ስለዚህም የሰበር ችሎቱ የጉዳዩ የሥረ-ነገር ሥልጣን ይግባኝ ሰሚው ፍ/ቤት እንዳለው የክልል ነው ወይስ የፌዴራል ፍ/ቤት ነው የሚለውን ነጥብ አንጠልጥሎ ከመተው ይልቅ መልስ ሰጥቶበት ቢያልፍ ኖሮ ከፍተኛ ጠቀሜታ ነበረው፡፡

ለ. የሰበር ችሎቱ ከላይ የተመለከትነውን ነጥብ በጥያቄነት ብቻ በማስቀመጥ ቀጥሎ በማንሳት ለውሳኔው መሠረት ያደረገው አዋጅ ቁጥር 322/95ን ነው፡፡ በዚህም ምክንያት አመልካች የይግባኙ ጉዳይ በክልሉ ለተቋቋመው የፌዴራል ከፍተኛ ፍ/ቤት ሊቀርብ ይገባዋል ለሚለው አቤቱታው መሠረት ያደረገው ከፍተኛ ፍ/ቤቶችን ስለማደራጀት የወጣውን አዋጅ ቁጥር 322/95ን እንደሆነ ከጠቀሰ በኋላ የአዋጁ ይዘት ምን እንደሆነ ገልጿል፡፡ በማያያዝም የዚህ የአዋጅ ይዘት እንዳሚያስረዳው ክርክር የተነሳበትን የቤኒሻንጉል ጉምዝ ክልልን ጨምሮ በአምስቱ ክልሎች የሚገኙ ጠቅላይ ፍ/ቤቶች ቀደም ሲል

በፌዴራል ጉዳይ በሕገመንግሥቱ አንቀጽ 80/2 በተሰጣቸው የውክልና ሥልጣን መሠረት ስለከፍተኛ ፍ/ቤት ሆነው በመጀመሪያ ደረጃ ስልጣናቸው ጉዳዮችን ተቀብለው ለማየትና ለማስተናገድ ተሰጥቷቸው የነበረው ሥልጣን ቀሪ መሆኑን የሚያሳይ እንጅ የእነዚህ ክልሎች ከፍተኛ ፍ/ቤቶች ባላቸው የውክልና ሥለጣን ያዩትን የፌዴራል ጉዳይ በይግባኝ ተቀብለው ለማየት ያላቸውን ሥልጣን ያስቀረ አይደለም።

በዚህም መሠረት አመልካች የይግባኝ አቤቱታውን ለክልሉ ጠቅላይ ፍ/ቤት ከማቅረብ የሚያግደው ምክንያት አልነበረም በማለት ከገለፀ በኋላ ይህም በመሆኑ የፌዴራል ከፍተኛ ፍ/ቤት በይግባኝ በቀረበለት ጉዳይ ላይ ሥልጣንን አስመልክቶ የሰጠው ውሳኔ በአግባቡ የተሰጠ ነው በማለት ደምድሟል በመጀመሪያ ችሎቱ ክርክር የቀረበበት ጉዳይ የሥረ-ነገር ሥልጣን የክልል ፍ/ቤት ነው የሚል እምነት እንዳለው ከውሳኔው ይዘት መገንዘብ የሚቻል ሆኖ ሳለና በዚሁ ላይ ተመስርቶ ጉዳዩን መወሰን እየቻለ የፌዴራል ጉዳይን የሚመለከተውን አዋጅ ይዘት ወደመመልከት ለምን እንደገባ የሚጠቁም አሳማኝ ምክንያት አናገኝም።

ሁለተኛ በአዋጅ ቁጥር 322/95 መሠረት የክልል ጠ/ፍ/ቤት የፌዴራል የውክልና ሥልጣን የተነሳው ከፍተኛ ፍ/ቤትን ወክሎ ለማየት የሚያስችለው የመጀመሪያ ደረጃ ሥልጣኑ እንጅ የክልሉ ከፍተኛ ፍ/ቤት በውክልና ሥልጣኑ ውሳኔ የሰጠበትን የፌደራል ጉዳይ በይግባኝ የማየት ሥልጣኑ አይደለም በማለት የተከበረው የሰበር ችሎት የደረሰበት ድምዳሜ በምክንያት የተደገፈ ካለመሆኑም ሌላ ከአዋጁም ሆነ ከሕገመንግስቱ ድንጋጌዎች ይህን የሚጠቁም ነገር አናገኝም። የፌዴራሉን ሕገመንግሥት አንቀጽ 80(2) ስንመለከት የክልል ጠቅላይ ፍ/ቤት ከክልል የዳኝነት ሥልጣኑ በተጨማሪ የፌዴራል የከፍተኛ ፍ/ቤት ሥልጣን ይኖረዋል ይላል።

ለዚህ ድንጋጌ መሠረቱ ደግሞ የዚሁ ሕገመንግሥት አንቀጽ 78(2) የሕዝብ ተወካዮች ምክር ቤት አስፈላጊ ሆኖ ሲያገኘው የፌዴራል ከፍተኛ ፍ/ቤትም ሆነ የመጀመሪያ ደረጃ ፍ/ቤት በሃገሪቱ በሙሉ ወይም በከፊል እንዲደራጅ በሁለት ሶስተኛ ድምጽ ሊወሰን ይችላል ጉዳዩ በዚህ አኳኋን ካልተወሰነ የፌዴራል ከፍተኛና የመጀመሪያ ደረጃ ፍ/ቤቶች ሥልጣን ለክልል ፍ/ቤቶች ተሰጥቷል በማለት ያሰፈረው ድንጋጌ ነው። የሕገመንግሥቱ አንቀጽ 80(5) ደግሞ የክልል ከፍተኛ ፍ/ቤት በፌዴራል የመጀመሪያ ደረጃ ፍ/ቤት የዳኝነት ሥልጣኑ መሠረት በሚሰጠው ውሳኔ ላይ የሚቀርበው ይግባኝ በክልል ጠቅላይ ፍ/ቤት ይታያል ይላል።

ከላይ ከተመለከትነው የሕገመንግሥቱ አንቀጽ 80 (2) የምንገነዘበው የክልል ጠቅላይ ፍ/ቤት የፌዴራል ጉዳይን በተመለከተ የመጀመሪያ ደረጃና የይግባኝ ሰሚነት ሥልጣን ያለው መሆኑን ነው። ይህ የውክልና የዳኝነት ሥልጣን የሚኖረው ግን ከተሰመረበት የአንቀጽ 78(2) ድንጋጌ እንደምንረዳው የሕዝብ ተወካዮች ም/ቤት በክልል የፌዴራል ፍ/ቤት እስኪያቋቁም ድረስ ብቻ ነው።

ከዚህም በተጨማሪ ለክልሉ ጠ/ፍ/ቤት የተሰጠው የመጀመሪያ ደረጃና የይግባኝ የዳኝነት የውክልና ሥልጣን ተነጣጥሎ አንዱ ተነስቶ ሌላው ሊቀጥል የሚችልበት ሁኔታ መኖሩን የሚጠቁም ድንጋጌ በሕገመንግሥቱ ውስጥ የለም፡፡

የፌዴራል ፍ/ቤትን በክልል የማቋቋም ውሳኔ በምክር ቤቱ እስኪሰጥ ድረስ በክልል ያለው የፌዴራል የዳኝነት ሥልጣን ለክልል ጠ/ፍ/ቤትና ከፍተኛ ፍ/ቤት ተሰጥቷል የሚለው የሕገመንግሥቱ ግልጽ ድንጋጌ ባለበት ሁኔታ የክልል ከፍተኛ ፍ/ቤት በፌዴራል የውክልና ሥልጣኑ ያየው ጉዳይ በይግባኝ የሚታየው በክልል ጠ/ፍ/ቤት ነው የሚለውን የሕገ መንግሥቱ ድንጋጌ ብቻ ነጥሎ በማንበብ በክልሉ የፌዴራል ከፍተኛ ፍ/ቤት ከተቋቋመ በኋላም ቢሆን ተፈፃሚ እንደሆነ ይቀጥላል ማለት ፍ/ቤቱ በመቋቋሙ ብቻ ቀሪ የሆነውን የውክልና የዳኝነት ሥልጣን ሕገመንግሥቱ ከደነገገው በተቃራኒ ሁኔታ ሳይኖካ ይቀጥላል እንደማለት ነው፡፡

የአዋጅ ቁጥር 322/95 አግባብ ያላቸው ድንጋጌዎችን ስንመለከት ደግሞ አንቀጽ 2 የፌዴራል ከፍተኛ ፍ/ቤቶች ከላይ በግርጌ ማስታወሻ ቁጥር 1 ሥር በገለፅናቸው አምስት ክልሎች መቋቋማቸውን ብቻ እንደሚደነግግ እንረዳለን፡፡ አንቀጽ 3 ደግሞ በአምስቱ ክልሎች የፌዴራል ከፍተኛ ፍ/ቤቶችን ያቋቋመው አዋጅ ከመውጣቱ በፊት በሕገመንግሥቱ አንቀጽ 78(2) በተሰጣቸው የፌዴራል ከፍተኛ ፍ/ቤት ሥልጣን መሠረት በተጠቀሱት ክልሎች የክልል ጠ/ፍ/ቤቶች በመታየት ላይ ያሉ ጉዳዮች በተጀመሩበት ፍ/ቤት ታይተው ይወሰናሉ ይላል፡፡ አዋጁ ከመውጣቱ በፊት በክልል ጠ/ፍ/ቤቶች መታየት የተጀመሩ ጉዳዮች ደግሞ ፍ/ቤቱ በመጀመሪያ ደረጃ እንዲያያቸው ወክልና የተሰጠው ጉዳዮች ወይም የክልሉ ከፍተኛ ፍ/ቤት በውክልና ሥልጣኑ ውሳኔ ሰጥቶባቸው በይግባኝ የቀረቡ ጉዳዮች ሊሆኑ ይችላሉ፡፡

አዋጁ የሚለውም በየትኛውም አይነት የሥልጣን ሁኔታ በመታየት ላይ ያሉ ጉዳዮችም ቢሆኑ አዋጁ ከመውጣቱ በፊት የተጀመሩ ከሆነ በክልሉ አዲስ ወደ ተቋቋመው የፌዴራል ከፍተኛ ፍ/ቤት መዛወር ሳያስፈልጋቸው በልዩ ሁኔታ በዚያው ይጠናቀቃሉ ነው፡፡ ይህ ማለት ደግሞ በመጀመሪያ ደረጃም ይሁን በይግባኝ ለክልሉ ጠ/ፍ/ቤት በውክልና ሥልጣኑ ይቀርብ የነበረ የፌዴራል ጉዳይ አዋጁ ከወጣ በኋላ የሚቀርበው በአዋጁ ለተቋቋመው የፌዴራል ከእተኛ ፍ/ቤት እንጂ ለክልሉ ጠ/ፍ/ቤት አይደለም ማለት ነው፡፡

እንዲያውም የአዋጁ አንቀጽ 3(2) አዋጁ ከመውጣቱ በፊት በክልል ጠ/ፍ/ቤት መታየት የተጀመረ የፌዴራል ጉዳይንም ቢሆን በፌዴራል ከፍተኛ ፍ/ቤት (በክልሉ በተቋቋመው) እንዲታዩ የፌዴራል ጠ/ፍ/ቤት ሊወስን እንደሚችልም ይደነግጋል፡፡

ከተመለከትናቸው የፌዴራሉ ሕገመንግሥትም ሆነ በአምስት ክልሎች የፌዴራል ከፍተኛ ፍ/ቤቶችን ለማቋቋም የወጣው አዋጅ አግባብ ያላቸው ድንጋጌዎች መገንዘብ የምንችለው ፍ/ቤቶቹ በተቋቋሙባቸው ክልሎች የሚገኙ የክልል ጠ/ፍ/ቤቶች በውክልና ተሰጥቷቸው የነበረው የመጀመሪያ ደረጃም ሆነ የይግባኝ የፌዴራል ጉዳይ ሥልጣን መነሳቱን እንጂ የፌዴራል ከፍተኛ ፍ/ቤት ሥልጣን ለሁለት ተከፍሎ የይግባኝ ሥልጣኑ በክልል ጠ/ፍ/ቤት በውክልና እንደተያዘ

እንደሚቀጥልና የመጀመሪያ ደረጃ የሥረ-ነገር የዳኝነት ሥልጣኑ ግን ከክልሉ ጠ/ፍ/ቤት ውክልናው ተነስቶ በክልሉ ለተቋቋመው የፌዴራል ከፍተኛ ፍ/ቤት እንደተሰጠው አይደለም።

በዚህም ምክንያት የተከበረው የፌዴራል ጠ/ፍ/ቤት የሰበር ችሎት በአዋጅ ቁጥር 322/95 የፌዴራል ከፍተኛ ፍ/ቤቶች መቋቋም ያስቀረው የክልል ጠ/ፍ/ቤት የፌዴራል ከፍተኛ ፍ/ቤትን ወክሎ በመጀመሪያ ደረጃ ሥልጣኑ ጉዳዮችን ማየትን እንጂ የክልል ከፍተኛ ፍ/ቤቶች በውክልና ሥልጣናቸው አይተው የወሰኑትን ጉዳይ በይግባኝ ተቀብሎ የማየት የውክልና ሥልጣኑን አይደለም በማለት የሰጠው ድምዳሜ ከሕጉ ጋር የተጣጣመ ሆኖ አይታይም።

ማጠቃለያ

የተከበረው የፌዴራል ጠቅላይ ፍ/ቤት ሰበር ችሎት በዚህ ትችት በተመለከትነው ጉዳይ አንዳንዶቹ ያነሳቸው ነጥቦችና የደረሰባቸው ድምዳሜዎች ተገቢና ጠቀሜታ ያላቸው ቢሆንም፡-

1. ይግባኝ ሰሚው ፍ/ቤት በጭብጥነት ይዞ ውሳኔ የሰጠበትንና የሰበር አቤቱታ አቅራቢውም አንዱ የመቃወሚያው መሠረት አድርጎ ያነሳውን ጉዳዩን የማየት የሥረ-ነገር ሥልጣን የፌዴራል ነው ወይስ የክልል ፍ/ቤት የሚል ነጥብ ዝርዝር ምክንያት ሰጥቶ መወሰን ሲገባው በጥያቄነት ብቻ አንስቶ ወደ ሌላ ነጥብ ማለፉ የውሳኔውን ግልጽነት፣ አስተማሪነትና ጥንካሬ የቀነሰ ጉድለት ሆኖ ይታያል።
2. የችሎቱ እምነት ጉዳዩ የክልል ሥልጣን እንጅ የፌዴራል ሥልጣን አይደለም ወደሚል ድምዳሜ ያዘነበለ እንደሚመስል ከውሳኔው አጠቃላይ ይዘትና በውሳኔው ውስጥ ከተጠቀሱ አንዳንድ ሐረጎች መገንዘብ የሚቻል ሆኖ ሳለ የፌዴራል ፍ/ቤትንና የክልል ፍ/ቤትን የውክልና ሥልጣን ግንኙነት የሚመለከተውን አዋጅ ቁጥር 322/95 ይዘት ወደመተንተን ለምን እንደገባ ግልጽ አይደለም። ይህ ጉዳይ የክልል ሥልጣን ነው ለተባለ ጉዳይ የፌዴራል ፍ/ቤትንና የክልል ፍ/ቤት የውክልና ሥልጣንን የሚመለከት አዋጅ ይዘት መዘርዘር ያለው አግባብነት ጥያቄ እንዳለ ሆኖ ሕጉን አስመልክቶ የተደረሰበት ድምዳሜም ትክክል ሆኖ አይታይም።

ምክንያቱም፡-

ሀ. በመጀመሪያ አዋጁ የክልል ጠ/ፍ/ቤት የፌዴራል የውክልና ሥልጣን ቀሪ የሆነው የፌዴራል ከፍተኛ ፍ/ቤትን ተክቶ በመጀመሪያ ደረጃ የሚያየውን ጉዳይ በተመለከተ እንጅ የክልል ከፍተኛ ፍ/ቤት በፌዴራል የውክልና ሥልጣኑ አይቶ ውሳኔ የሰጠበትን ጉዳይ ማየትን አይደለም በማለት የተሰጠው ድምዳሜ ምንም ምክንያት

ያልተሰጠበትና በየትኛው የሕግ ድንጋጌ መሠረት ወደዚህ ድምዳሜ እንደተደረሰ የተጠቀሰ ነገር የለም።

ለ. ከፌዴራሉ ሕገመንግሥትም ሆነ የፌዴራል ከፍተኛ ፍ/ቤቶችን በአምስት ክልሎች ካቋቋመው አዋጅ አግባብ ያላቸው የሕግ ድንጋጌዎች አንፃር ስንመለከተውም በቤኒሻንጉል ጉምዝ ክልል የፌዴራል ከፍተኛ ፍ/ቤት መቋቋም የክልሉ ከፍተኛ ፍ/ቤቶች በውክልና የፌዴራል የመጀመሪያ ደረጃ ፍ/ቤቶች ሥልጣን የሆኑ ጉዳዮችን አይቶ የመወሰን ሥልጣናቸውን ባይነካም የክልል ጠ/ፍ/ቤቶች በውክልና ተሰጥቷቸው የነበረው የፌዴራል ጉዳይን በመጀመሪያ ደረጃም ሆነ በይግባኝ የማየት የውክልና ሥልጣን ቀሪ ያደረገ መሆኑን መገንዘብ የሚቻል ሆኖ ሳለ የሰበር ችሎቱ የክልሉ ጠ/ፍ/ቤት የፌዴራል የዳኝነት የውክልና ሥልጣን በአዋጁ ቀሪ የሆነው ከፍተኛ ፍ/ቤቱን ተክቶ በመጀመሪያ ደረጃ ጉዳዮችን የማየት ሥልጣኑ ብቻ ነው በማለት የሰጠው ድምዳሜ ከሕጉ ጋር የተጣጣመ ሆኖ አይታይም።

የፌዴራል የሰበርና የሰበር ሰበር የስልጣን ምንጭ ገልጠን ብናየው! (በሰበር መ.ቁ. 26996 እና 31601 መነሻነት የቀረበ ትችት)

መሓሪ ረዳኢ*

1. መግቢያ

ኢትዮጵያ ከ1980ዎቹ አጋማሽ ወዲህ ከአሃዳዊ (unitary) መንግስታዊ ስርአት ወጥታ በፌዴራላዊ መንግስታዊ መዋቅር እየተዳደረች መሆንዋ የሚታወቅ ነው። በፌዴራሉ አወቃቀር መሰረት ዋነኞቹ መንግስታዊ ስራዎች ማለትም የህግ አውጪነት፣ የህግ አስፈጻሚነትና የህግ ተርጓሚነት ተግባራት በፌዴራል መንግስት ደረጃና በፌዴራል መንግስቱ አባላት (ክልሎች) ደረጃ እንደሚከናወኑ በፌዴራሉ ህገ-መንግስት ተመልክቶ ይገኛል።[1] በመሆኑም በፌዴራል ደረጃ የህግ አውጪነት ስራ የሚያከናውን የህዝብ ተወካዮች ም/ቤት፤ የህግ አስፈጻሚነቱን ተግባር የሚመራና የሚያስተባብር በጠቅላይ ሚኒስትሩ የሚመራ የሚኒስትሮች ም/ቤት፣ እንዲሁም የህግ ተርጓሚነቱን ስራ የሚሰራ በፌዴራል ጠቅላይ ፍ/ቤት የሚመራ ሶስት እርከኖች ያሉት የዳኝነት ስርአት ተዋቅሮ ይገኛል። በአባል የክልል መንግስታት ደረጃም በተመሳሳይ ሁኔታ የህግ አውጪነቱ ሃላፊነት በክልል ምክር ቤቶች፣ የህግ አስፈጻሚነቱ ስራም በክልል ርእሰ መስተዳድር በሚመራ ካቢኔ፣ እንዲሁም የዳኝነት ተግባራቱን በክልል ጠቅላይ ፍርድ ቤቶች ስር በተደራጁ ፍ/ቤቶች በመከናወን ላይ ይገኛል።

ህገ-መንግስቱ ተቋሞቹን በማደራጀት ላይ ሳይወሰን የስልጣን ክልላቸውንም ጭምር በህግ ለይቶ ለማስቀመጥ ጥረት አድርጓል። ለዚህ ይረዳ ዘንድም የፌዴራል መንግስቱን ስልጣን ለይቶ በማስቀመጥ ከዚያም በመቀጠል የፌዴራል መንግስቱንና የክልል መንግስታትን የጋራ ስልጣን የሆኑትን የዘረዘረ ሲሆን ከዚህ ውጭ ያለ መንግስታዊ ስልጣን ግን የየክልሉ ስልጣን እንደሆነ በማያሻማ መንገድ አስቀምጦ ይገኛል።[2] ነገር ግን ህገ-መንግስቱ የሚጠቀምባቸው ቃላት ጠቅለል ያሉና በመሰረታዊ መርሆዎች ደረጃ የሚመደቡ በመሆናቸው በወረቀት ላይ ግልጽና የማያሻሙ መስለው የሚታዩትን ያህል በእለት ተእለት የስራ አፈጻጸምና ክንውን ላይ ግን የዚያኑ ያህል ጠርተው አይታዩም።

በዚህ አጭር ጽሁፍ ውስጥ ከሶስቱ መንግስታዊ አካላት በአንዱ ማለትም በዳኝነት አካሉ ላይ በተለይም በሰበር ችሎቱ ላይ ብቻ በማትኮር ህገ-መንግስቱ የፌዴራልና የክልል የዳኝነት አካላት በሰበር ክንውን ዙሪያ እንዴት እንዳደራጃቸውና በተጨባጭም እንዴት እየሰሩ እንደሆነ ለመመርመር እንሞክራለን። የዚህ ጽሁፍ አቅራቢ የፌዴራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት በክልል ሰበር ሰሚ ችሎቶች የታዩትን የክልል ጉዳዮች በድጋሚ እያስቀረበና እየመረመረ ያለው በዚህ ረገድ በህግ የተሰጠ ስልጣን ሳይኖረው ነው ብሎ ይከራከራል።

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*ረዳት ፕሮፌሰር፣ አዲስ አበባ ዩኒቨርሲቲ፣ ሕግ ት/ቤት (LLB.;LL.M;Ph.D.Candidate)፣E-mail: me2ha1@yahoo.com.

[1] የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ ህገ-መንግስት አንቀፅ 50(2)

[2] ዝኒ ከማሁ አንቀጽ 52(1)

ሰበር ሰሚ ችሎቱ ከስልጣኑ ውጪ የሆኑትን ጉዳዮች እያስቀረበ በመመርመር ላይ በመጠመዱ ከአቅሙ በላይ የሆነ የጉዳይና የባለጉዳይ መጠን ተከማችቶበት ለያንዳንዱ ጉዳይ መመደብ ያለበት ጊዜና የሰው ሃይል እያነሰ ውሳኔዎችን በወቅቱና በጥራት ለመስጠት እየተቸገረ እንደሆነ ይታያል። ስለሆነም የባለጉዳዮችን ጊዜና ውጪ እያናረ፣ እንዲሁም የራሱን ውሱን ጊዜ፣ አቅምና ሃብት በህገ-መንግስቱና በህግ አውጪው ላልተመደበ ጉዳይ እያበከነው ይገኛል የሚለው የዚህ ጽሁፍ አቅራቢ እምነት ነው። እንዲያውም በዚሁ አካሄድ ከተቀጠለ የፌዴራሉ ምሰሶዎች ከሆኑት አንዱ የሆነውንና በህገ-መንግስቱ እውቅና ያገኘውን በዳኝነት ረገድ ክልሎች ራሳቸውን በራሳቸው የሚያስተዳድሩበት ስርአት እንዳይሸራረፍ ብሎም እንዳይናድ ስጋት አለው። ለዚህም የክርክር ጭብጡን በቀጣዮቹ የጽሁፉ ክፍል ያቀርባል። ይህ ፀሐፊ ያቀረበው አጭር ፅሁፍ በጉዳዮ ላይ የሰከነና ቀጣይነት ያለው የሃሳብ ልውውጥ እንዲካሄድ በር ይከፍታል ብሎ ያምናል።

2. የሃገሪቱ የዳኝነት ስርአት ህገ-መንግስታዊ ማእቀፍ

በፌዴራል ህገ-መንግስቱ ውስጥ የዳኝነት ነጻነት ስልጣንና አወቃቀርን የሚደነግግ ራሱን የቻለ ምእራፍ የተመደበ ሲሆን በስሩም ብዛት ያላቸው ንኡሳን አንቀጾች ያካተቱ አራት አንቀጾች ይገኛሉ።[3] በእነዚሁም መሰረት ከህግ በቀር በሌላ አካል የማይመሩ ነጻ የዳኝነት አካላት በፌዴራልም ሆነ በክልል ደረጃ መመስረታቸው የተበሰረ ሲሆን እያንዳንዳቸው ሶስት ደረጃዎች ያሉዋቸው የፍርድ ቤት መዋቅሮች እንደሚደራጁም ተመልክቷል።

በርግጥ የዳኝነት መዋቅሩም እንደ ህግ አውጪውና እንደ ህግ አስፈጻሚው በፌዴራልና በክልል ደረጃ የየራሱ መስመር ይዞ በትይዩ (parallel) መልክ የተደራጀ ነው።ነገር ግን በተግባር ደረጃ የፌዴራልና የክልል የዳኝነት አካላት የሚያገናኛቸው በርካታ ጉዳይ እንዳለ ይታወቃል። እንዲያውም በክልል ውስጥ ለሚከናወኑ የፌዴራል የዳኝነት ጉዳዮች በመርህ ደረጃ የክልል ፍርድ ቤቶች በህገ-መንግስት በተሰጣቸው ውክልና መሰረት የሚያከናውኑት ተግባር ነው። ስለሆነም የፌዴራል የዳኝነት አካሉ የራሱ የፍርድ ቤት መዋቅር ባላቋቋመበት ክልል ውስጥ የየክልሉ ከፍተኛ ፍ/ቤቶችት የፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤትን በመወከል፤ የየክልሉ ጠቅላይ ፍ/ቤቶች ደግሞ የፌዴራል ከፍተኛ ፍርድ ቤትን ተክተው ጉዳዮችን ማስተናገድ እንዳለባቸው በህገ-መንግስቱ ሰፍሮ ይገኛል።[4]

ከዚህ በተጨማሪም ምንም እንኳ በፌዴራል ጉዳዮች ላይ የፌዴራል ጠቅላይ ፍርድ ቤት የበላይና የመጨረሻ የዳኝነት ስልጣን እንዲሁም የክልል ጠቅላይ ፍ/ቤት ደግሞ በክልል ጉዳዮች የበላይና የመጨረሻ የዳኝነት ስልጣን የተሰጠው ቢሆንም የፌዴራሉ ጠቅላይ ፍርድ ቤት ግን መሰረታዊ የሆነ የህግ ስህተት ያለበትን የፌዴራልም ሆነ የክልል ፍርድ ቤቶች የመጨረሻ ውሳኔ በሰበር ለማየት ስልጣንና ሃላፊነት ተሰጥቶታል።[5] በመሆኑም የፌዴራልና የክልል የዳኝነት ስርአቱ ብዙ መገናኛ ነጥቦች ያሉት ነው።

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[3] ዝኒ ከማሁ ምእራፍ ዘጠኝ (ከአንቀጽ 78-81)

[4] ዝኒ ከማሁ አንቀጽ 80(2) እና (4)

[5] ዝኒ ከማሁ አንቀጽ 80(3)(ሀ)

ለዚህም የተሰጠው ምክንያት በሃገር ደረጃ ወጥነትና ተገማችነት ያለው የህግ አተረጓጎም ስርአት ለማዳበር ካለ ፍላጎት የመነጨ ስለመሆኑ ህገ-መንግስቱ ሲረቀቅ ከተደራጁ ቃለ-ጉባኤዎች መገንዘብ ይቻላል።[6] በፌዴራልና በክልል ህግ አውጪና ህግ አስፈጻሚ አካላት መካከል ግን እንዲህ ዓይነት የተደበላለቀ የስራ ግንኙነት አይታይም።

ይህ አይነቱ የዳኝነት አካላት አሰራር ከፌዴራላዊ ስርአት የስልጣን ክፍፍል አንጻር እየታየ የሚደገፍበትና የሚነቀፍበት ምክንያት የሚቀርብ ቢሆንም በዚህ ጽሁፍ ትኩረት የተደረገበት ነጥብ ግን ከዚህ ወጣ ያለ ነው። በዚህ ጽሁፍ ለመዳሰስ የተፈለገው ነጥብ ህገ-መንግስቱ የወሰደው አቋም የሚነቀፍበትም የሚወደስበትም ምክንያት እንዳለ ሆኖ፤ ለመሆኑ እየተሰራ ያለውስ በህገ-መንግስቱ መሰረት ነው ወይ? የሚለው ነው። ጉዳዩን በተጨባጭ ለማብራራት እንዲያመቸንም የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት መርምሮ ውሳኔ የሰጠባቸውን ሁለት መዝገቦች በምሳሌነት ወስደን እናያለን።

3. የጉዳዮቹ አጭር ዘገባ

የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ውሳኔ ከሰጠባቸው ጉዳዮች ውስጥ ለዚህ ውይይት የተመረጠው አንዱ ጉዳይ የሰበር መዝገብ ቁ. 26996 ነው። ወደ ዋናው ጉዳይ ከመግባታችን በፊት ግን አንድ ነጥብ ማስገንዘብ ይገባል። ይኸውም የዚህ ጽሁፍ ዋነኛ ትኩረት ሰበር ሰሚው ችሎት ጉዳዩን ያየው በስልጣኑ ክልል ስለመሆኑ ወይም አለመሆኑ ለመመርመር በመሆኑ ሰበር ችሎቱ በክርክሩ ዋና ይዘት (substance) ላይ የሰጠውን ውሳኔ በተመለከተ በዚህ ጽሁፍ ውስጥ የሚሰጥ ትችት አይኖርም። የጽሁፉ አላማ በስነ-ስርአታዊ (procedural) ጉዳዮች ላይ የተገደበ ነውና።

ወደ ጉዳዩ ስንገባ በዚህ መዝገብ የተያዘው ነጥብ በሽያጭ ውል ላይ የተነሳን ክርክር ለመፍታት የቀረበ ክስ ሲሆን ክርክሩ የተጀመረው በኦሮሚያ ብሄራዊ ክልላዊ መንግስት የጅማ ዞን ከፍተኛ ፍርድ ቤት ፊት ነበር። የዞኑ ከፍተኛ ፍርድ ቤት ባለጉዳዮችን አከራክሮ ውሳኔ የሰጠበት ሲሆን በውሳኔው ቅር የተሰኘው ወገንም ይግባኙን ለኦሮሚያ ክልል ጠቅላይ ፍርድ ቤት አስቀርቦ አሰምቷል። የክልል ጠቅላይ ፍ/ቤቱም የስር ፍርድ ቤቱን ውሳኔ ሽሮ የራሱ ጭብጥ መዝዞ በማውጣት የስር ፍርድ ቤቱ ውሳኔ እንዲሰጥበት መዝገቡን በፍ/ብ//ሥ/ሥ/ ህግ ቁጥር 343 መሰረት ለስር ፍርድ ቤት መልሶታል። በጠቅላይ ፍ/ቤቱ ውሳኔ ቅር የተሰኘው ወገን ግን ወደ ስር ፍ/ቤት ወርዶ ከመከራከር ይልቅ ውሳኔው መሰረታዊ የህግ ስህተት አለበት በሚል ጉዳዩን ወደ ክልሉ ጠቅላይ ፍ/ቤት ሰበር ችሎት አቀረበው። ነገር ግን የክልሉ ሰበር ሰሚ ችሎት የሰበር አቤቱታውን ውድቅ አደረገው። አመልካቹ በመጨረሻ የወሰደው አማራጭ ጉዳዩን ለፌዴራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት በማቅረብ 'የክልሉ ጠቅላይ ፍርድ ቤት በይግባኝና በሰበር ደረጃ የወሰደው አቋም መሰረታዊ የህግ ስህተት የተፈጸመበት ነው' በሚል ጉዳዩ በሰበር እንዲታይለት አቤቱታ ማቅረብ ሆነ። የፌዴራሉ ሰበር ችሎትም አቤቱታውን ተቀብሎና አከራክሮ የክልሉ ጠቅላይ ፍ/ቤት በይግባኝና በሰበር የሰጠውን ውሳኔ በመሻር የዞኑ ከፍተኛ ፍ/ቤት የሰጠውን ውሳኔ በማጽናት ጉዳዩን ላንዴና ለመጨረሻ ጊዜ እልባት ሰጥቶታል።

[6] Muradu Abdo, *infra note 10*, at 69.

ከዚህ ጋር በተመሳሰለ መንገድ በሰበር መዝገብ ቁ. 31601 ስር በአዲስ አበባ ከተማ ከቀበሌ ማህበራዊ ፍ/ቤት ተነስቶ በይግባኝ ወደ አዲስ አበባ ከተማ አስተዳደር የመጀመሪያ ደረጃ ፍ/ቤት የቀረበን ጉዳይ በመጨረሻም በከተማው አስተዳደር ይግባኝ ሰሚ ፍ/ቤት ታይቶ መጨረሻነቱ ያበቃለትን የቤት ኪራይ ክርክር የፌዴራሉ ሰበር ሰሚ ችሎት በሰበር ሰሚነት ስልጣኑ አስቀርቦ በመመርመር ውሳኔ ሰጥቶበታል። በመጨረሻም የቀበሌ ማህበራዊ ፍርድ ቤትን ውሳኔ አጽንቷል።

እነዚህ ሁለት ጉዳዮች አንዳንድ ተመሳሳይነት ይታይባቸዋል። ሁለቱም ተራ የውል አለመፈጸም ክርክር ሲሆኑ፣ የውል ጉዳዮች ደግሞ በክልል ጉዳዮች ስልጣን ስር የሚያርፉ ጉዳዮች ናቸው። በየአስተዳደራቸውም ባሉ የዳኝነት አካላት ታይተውም የመጨረሻ ውሳኔ አግኝተዋል። እንዲያውም የኦሮሚያው ጉዳይ ከመጨረሻ ውሳኔነት አልፎ በክልሉ ሰበር ችሎትም ታይቷል። ከእነዚሁ የመጨረሻ ውሳኔዎች በኃላም የፌዴራሉ ጠቅላይ ፍ/ቤት የመጨረሻ ውሳኔ ባረፈባቸው የህግ ጉዳዮች ላይ የሰበር ስልጣን አለኝ በሚል እምነት አስቀርቦ በመመርመር ውሳኔ ሰጥቶባቸዋል። በሁለቱም ጉዳዮች የስር የዳኝነት አካላት ውሳኔዎች በፌዴራል ሰበር ችሎቱ ፀንተዋል።

በሌላ በኩል ግን በሁለቱ ጉዳዮች መካከል ትኩረት የሚሹ ልዩነቶች ይታያሉ። አንደኛ የኦሮሚያው ጉዳይ የተነሳው ከመደበኛ ፍ/ቤት ሲሆን የአዲስ አበባው ግን ከቀበሌ ማህበራዊ ፍ/ቤት የተነሳ ነበር። ሁለተኛ የኦሮሚያው ጉዳይ በክልሉ ውስጥ በክልሉ ሰበር ሰሚ ችሎት ጭምር ታይቶ ያበቃለት ሲሆን የአዲስ አበባው ግን በከተማው አስተዳደር ይግባኝ ሰሚ ፍ/ቤት በይግባኝ ደረጃ መመርመሩን እንጂ በከተማ አስተዳደሩ በሰበር ስለመታየቱ መዝገቡ አያመለክትም። በከተማ አስተዳደሩ ውስጥ የሰበር ችሎት ስለመኖሩም የተመለከተ ነገር የለም። ሶስተኛ ኦሮሚያ በህገ-መንግስቱ ውስጥ በክልል መንግስትነት ታውቆ የተመዘገበ ሲሆን የአዲስ አበባ ከተማ አስተዳደር ግን የተሟላ የክልል መንግስትነት ስልጣን አለው ለማለት የሚያስደፍር አይደለም። እንዲያውም ተጠሪነቱ ለፌዴራሉ መንግስት ስለመሆኑ በህገ መንግስቱ በግልጽ የተመለከተ ሲሆን[7] ከፌዴራል መንግስቱም በተለይ ለፌዴራል ጉዳዮች ሚኒስቴር ተጠሪ መሆኑ ማቋቋሚያ አዋጁ ይደነግጋል።[8]

4. ለሰበርና ለሰበር ሰበር መሰረት የሆነው የህገ-መንግስት ድንጋጌ ይዘት

የፌዴራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት የስልጣኑ መሰረት አድርጎ የሚጠቀምበት የህገ መንግስቱ ድንጋጌ በፌዴራል ህገ-መንግስቱ አንቀጽ 80 ሥር የተመለከቱት ንኡሳን አንቀጾች ሲሆኑ ከተያዘው ጉዳይ ጋር አግባብነት ያላቸው እንደሚከተለው ይነበባሉ።

> *1. የፌዴራል ጠቅላይ ፍርድ ቤት በፌዴራል ጉዳዮች ላይ የበላይና የመጨረሻ የዳኝነት ስልጣን ይኖረዋል።*
>
> *2. የክልል ጠቅላይ ፍርድ ቤት በክልሉ ጉዳይ ላይ የበላይና የመጨረሻ የዳኝነት ስልጣን ይኖረዋል።...*

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[7] የኢ.ፌ.ዲ.ሪ ህገ-መንግስት አንቀጽ 49(3)

[8] የተሻሻለው የአዲስ አበባ ከተማ አስተዳደር ቻርተር አዋጅ፡ ቁ.361/1995 አንቀጽ 61(5)

3. በዚህ አንቀጽ ንኡስ አንቀጽ 1 እና 2 የተጠቀሰው ቢኖርም

ሀ) የፌዴራሉ ጠቅላይ ፍርድ ቤት መሰረታዊ የሆነ የህግ ስህተት ያለበትን ማናቸውም የመጨረሻ ውሳኔ ለማረም በሰበር ችሎት የማየት ስልጣን ይኖረዋል። ዝርዝሩ በህግ ይወሰናል (ሰረዝ የተጨመረ)።

ለ) የክልል ጠቅላይ ፍርድ ቤት መሰረታዊ የሆነ የህግ ስህተት ያለበትን በክልል ጉዳዮች የተሰጠ የመጨረሻ ውሳኔ ለማረም በሰበር ችሎት የማየት ስልጣን ይኖረዋል። ዝርዝሩ በህግ ይወሰናል ይላል።

5. ትንተና

እንግዲህ ከዚህ በላይ ለማሳየት እንደተሞከረው የፌዴራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት 'በህገ-መንግስቱ የተሰጠኝ ስልጣን ነው' በሚል እምነት በክልልም ሆነ በከተማ አስተዳደር የዳኝነት አካላት በተሰጡ የዳኝነት ውሳኔዎች ላይ 'የሰበር ስልጣኑን' በመጠቀም በክልል ደረጃ በሰበር የታዩትንም ጭምር እየመረመረና ውሳኔ እያሳረፈ ይገኛል። የማህበረሰባችን አልረታም ባይነትና በንጉሱ ዘመን የነበረው 'የዙፋን ችሎት' የቀረጸው የአዲስ አበባ የፍትህ የመጨረሻ ምንጭነት የታሪክ ግጥጥሞሽ ሆኖ በክልል ደረጃ ያበቃላቸው ጉዳዮች በሰበር ሰበር ለማሳየትና 'የመጨረሻ እድል ለመሞከር' እጅግ በርካታ ጉዳዮች ከየክልሉ ወደዚሁ ችሎት እየጎረፉ ናቸው። እንዲህ አይነቱ ሁኔታም ፌዴራላዊ መዋቅሩን ወደ አሃዳዊ ስርአት እንዳይመልሰው ከመስጋት በተጨማሪ የባለጉዳዮችን ጊዜና ወጪ እየባከነ እንደሆነ ይገለጻል።

ከወጪ አንጻር ሲታይ ከክልል ወደ ፌዴራል ሲመጣ፣ በተለይም የክልሉ የስራ ቋንቋ ከፌዴራሉ የስራ ቋንቋ የተለየ በሆነበት ሁኔታ፣ ጉዳዩን ለፌዴራል ሰበር ለማቅረብ ሲባል ሰነዶችን ወደ ፌዴራል የስራ ቋንቋ ማስተርጎም የሚያስከትለው ወጪ ይኖራል። ከዚህም በተጨማሪ በሰበር ፊት የሚደረግ ክርክር መሰረታዊ የህግ ስህተት ለማሳየት የሚደረግ ጠለቅ ያለ የህግ ክርክር ስለሚሆን ባለጉዳዩ ራሱ የሚያከናውነው ሳይሆን የጠበቃ ድጋፍና ተሳትፎ የሚጠይቅ ስራ ነው። ጉዳዩ በክልል ደረጃ እያለ በጠበቃ ተይዞ የነበረ ቢሆንም እንኳ አንዳንዴ የክልሉ ጠበቃ የፌዴራል የጥብቅና ፈቃድ ስለማይኖረው፣ በክልል የጥብቅና ፈቃድም ቀርቦ መከራከር ስለማይፈቅድለት፣ ሌላ ጠበቃ ያውም "በማናቸውም ደረጃ የፌዴራል ፍርድ ቤት" ቀርቦ የመከራከር ፈቃድ ያለው መቅጠርን የግድ ይላል። ይህ ሁሉ ወጪ የባለጉዳዩን የመጓጓዣ፣ የስንቅና የማረፊያ ወጪዎችን ሳይጨምር ነው።ጥረቱ የሚሞገስ ቢሆንም ባለጉዳዩችን በዘመናዊ የመገናኛ መሳርያ ተጠቅሞ ባሉበት እንዲደመጡ ማድረግ ግን በቀላሉና በአጭር ጊዜ የሚሳካ ድርጊት አልሆነም።

ይህንን ችግር በመገንዘብ የስራ ባልደረባዬ የሆኑት አቶ ሙራዱ አብዶ በሌላ የህግ መጽሄትና[9] በሌላ ቋንቋ፣ ከጥቂት ዓመታት በፊት አንድ ሰፋ ያለ የምርምር ጽሁፍ

[9] Muradu Abdo: *Review of Decisions of state courts over State Matters by the Federal Supreme Court*, Mizan Law Review: Vol.I, No. 1(2007) pp. 60-74.

ያቀረቡ ሲሆን የችግሩን ስፋትና ለፌዴራል ስርዓቱ ያለው እንድምታ ከመጠቆም ባሻገር እስከ ህገመንግስት ማሻሻል ድረስ የሚዘልቅ የመፍትሄ ሃሳብ አቅርበዋል፡፡ አቶ ሙራዱ የህገ-መንግስቱን ድንጋጌዎች በጥሞና በማንበብና ህገ-መንግስቱ ሲረቀቅ የተዘጋጁ ቃለ ጉባኤዎች በጥልቀት በመመርመር የፌዴራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት የሰበር ሰበር ስልጣን በህገ-መንግስቱ የተሰጠው መሆኑን በማመን ህገ-መንግስቱን በማሻሻል የሰበር ሰበር ስልጣኑን መገደብ እንደሚገባ ሃሳብ አቅርበዋል፡፡

አቶ ሙራዱ አብዶ የጠቀሱዋቸው ችግሮችና ስጋቶች የዚህ ጽሁፍ አቅራቢም ይጋራል፡፡ ነገር ግን ጽሁፍ አቅራቢው ህገ-መንግስቱ የሰበር ሰበር ሥልጣን ለፌዴራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት አልሰጠም፣ እንዲያውም ችግሩና ውዥንብሩ ህገ-መንግስቱን ከማሻሻል በመለስ መፍትሄ አለው ብሎ ያምናል፡፡ እንደሚታወቀው ህገ-መንግስት የማሻሻል ሂደት ረጅምና ውስብስብ ከመሆኑ የተነሳ በቀላሉና በአጭር ጊዜ የሚሳካ ድርጊት አይደለም፡፡ በተጨማሪም ህገ-መንግስቱን ማሻሻል ሳያስፈልግ ተፈላጊውን ግብ ማሳካት ከተቻለ፣ ለጋውን ህገ-መንግስት ገና በጨቅላ እድሜው ቀዶ ጥገና ውስጥ ማስገባት ተገቢም፣ ተመራጭም አይደለም፡፡

ሆኖም እዚህ ላይ የሚነሳው ተገቢ ጥያቄ የፌዴራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት የመጨረሻ በሆኑ ማናቸውም ጉዳዮች ላይ መሰረታዊ የህግ ስህተት ሲያጋጥም በሰበር የማየት ስልጣን በህገ-መንግስቱ የተሰጠው አይደለም ወይ? ህገ-መንግስቱን ከማሻሻል በመለሰሰ በምን ሊፈታ ይችላል? የሚል ይሆናል፡፡ ቀጥለን ስልጣኑ በህገ-መንግስቱ የተሰጠው እንዳልሆነ፣ ችግሩም የህገ-መንግስቱ እንዳልሆነና ህገ-መንግስቱን ከማሻሻል በመለስ ሊወገድ የሚችልበትን የመፍትሄ አቅጣጫ ለማሳየት እንሞክራለን፡፡

ከዚህ በላይ የህገ-መንግስቱን አንቀጽ 80 አካል የሆኑ ሶስት ንኡሳን አንቀጾች ከህገ-መንግስቱ እንዳለ ወስደን አስቀምጠናል፡፡ እነዚህ ድንጋጌዎች በጥሞና ሲታዩ በህግ የሚዳኙ ጉዳዮችን 'የፌዴራል ጉዳዮች' 'የክልል ጉዳዮች'ና 'ማናቸውንም ጉዳዮች' በሚል ለያይተው ያስቀመጥዋቸው ሲሆን በ'ፌዴራል ጉዳዮች' የበላይና የመጨረሻ የዳኝነት ስልጣን ለፌዴራሉ ጠቅላይ ፍርድ ቤት፤ በ'ክልል ጉዳዮች' ደግሞ የበላይና የመጨረሻ የዳኝነት ስልጣን ለክልሉ ጠቅላይ ፍርድ ቤት የሚሰጡ ናቸው፡፡

ድንጋጌዎቹ ወደ ሰበር ጉዳይ ሲመጡ ግን የክልሉ ሰበር ሰሚ አካል መሰረታዊ የሆነ የህግ ስህተት ያለበትን በክልል ጉዳይ የተሰጠ የመጨረሻ ውሳኔ ለማየት ስልጣን የሰጡት [10] ሲሆን የፌዴራሉ ሰበር ሰሚ አካል ግን መሰረታዊ የሆነ የህግ ስህተት ያለበትን የፌዴራል ጉዳይ ብቻ ሳይሆን ማናቸውንም የመጨረሻ ውሳኔ በሰበር ለማረም ስልጣን እንደተሰጠው ተመልክቷል::[11] የህገ-መንግስቱ ጉባኤ አባላት ከሰበር በፊት ላሉት ጉዳዮች የክልልና የፌዴራል ጉዳዮች እያሉ ሲከፋፈሉ ቆይተው የፌዴራሉን የሰበር ስልጣን ሲያመለክቱ ግን 'ማናቸውንም የመጨረሻ ውሳኔ' የሚል ሃረግ መጠቀማቸው የክልሉንም ሆነ የፌዴራሉ ጉዳይ የመጨረሻ ውሳኔ በፌዴራሉ ሰበር ሰሚ አካል እንዲታይ ስለፈለጉ ነው፣ የሚል መደምደሚያ ላይ የሚያደርስ ነው፡፡ ይህም በሁለት

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[10] ዝኒ ከማሁ አንቀጽ 80(3)(ለ)

[11] ዝኒ ከማሁ አንቀጽ 80(3)(ሀ)

ምክንያቶች ማጠናከር ይቻላል። አንደኛ የአንቀጽ 80(3) አቀራረጽ ይህንኑ የክርክር መስመር ያጠናክራል። ምክንያቱም ንኡስ አንቀጽ አንድና ሁለት የፌዴራሉን ለፌዴራል፣ የክልሉን ለክልል ከሰጡ በኃላ ንኡስ አንቀጽ ሶስት ከላይ የተጠቀሰው ቢኖርም በሚል የማፍረሻ ሐረግ መጠቀሙ የአጠቃላይ መርሁ ልዩ ሁኔታ መጥቀሱን የሚያመለክት ነው። ሁለተኛ ህገ-መንግስቱ ሲረቀቅ የተያዘው ቃለ ጉባኤም የፌዴራሉ ሰበር ሰሚ አካል የፌዴራል ጉዳዮችን ብቻ ሳይሆን ማናቸውንም (የክልል ጉዳዮችንም ጭምር) የመጨረሻ ውሳኔዎች በሰበር እንዲያይ ስልጣን የተሰጠው መሆኑ ያመላክታል።[12]

ነገር ግን የህገ-መንግስቱ አንቀጽ 80(3)(ሀ) የፌዴራሉ ጠቅላይ ፍርድ ቤት መሰረታዊ የሆነ የህግ ስህተት ያለበትን ማናቸውንም የመጨረሻ ውሳኔ ለማረም በሰበር ችሎት የማየት ስልጣን ይኖረዋል ብሎ አያበቃም። 'ዝርዝሩ በህግ ይወሰናል' የሚል ተጨማሪ ሐረግም አለው። በህግ ያውም በህገ-መንግስት፣ የሚካተቱ ቃላት ሃረጎችና አረፍተ ነገሮች ታስበባቸው የተቀመጡ፣ ተገቢ ፋይዳና ዋጋ ሊሰጣቸው የሚገቡ ናቸው። ሃረግና አረፍተ ነገር ይቅርና ነጠላና ድርብ ሰረዝ መጠቀም የተለያየ ህጋዊ ውጤት ሊያስከትል ይችላል። ስለዚህ በዚህ ጸሃፊ እምነት 'ዝርዝሩ በህግ ይወሰናል' የሚለው በንኡስ አንቀጹ ውስጥ ያለው ሃረግ ተገቢ ትኩረት ሊሰጠው የሚገባ ነው። እሴት የማይጨምር ነገር ህገ-መንግስት ውስጥ ይካተታል ተብሎ አይታሰብምና።በመሆኑም ዝርዝሩና ዋናው ቁም ነገር ማለትም በምን ጉዳዮችና(substantive) እንዴት(procedural) ሰበር ይቀርባል? የሚለው ለዝርዝር ህጎች የተተወ ነው ማለት ይችላል።

ከዚህ አንጻር የፌዴራል ሰበር ሰሚ ችሎት የስልጣን ዳር ድንበር በተሟላ ሁኔታ ለመለየትና ለመከለል ይቻል ዘንድ አግባብነት ያላቸው 'ዝርዝር ህጎች' ማፈላለግ ይገባል ማለት ነው። በተለይም የክልል ዳኝነታዊ ጉዳይ በመርህ ደረጃ የክልል ጠቅላይ ፍርድ ቤት ስልጣን በመሆኑ፣ ፌዴራሉ የዳኝነት አካል በክልል ጉዳዮች እንዲገባ መፈቀዱ የመርሁ ልዩ ሁኔታ ስለሆነ በጠባቡ መፈጸምና መተርጎም ያለበት ነው። የህግ አተረጓጎም መርህም የሚያስገነዝበን ይህንኑ ነው(Exceptions should be interpreted narrowly)። ይህም ማለት በዝርዝር ህግ ውስጥ በግልጽ ባልተሰጠ ነገር ፌዴራሉ የሰበር ስልጣን አይኖረውም ማለት ነው።

ስለዚህ ቀጣይ ስራችን የሚሆነው በዚህ ረገድ ዝርዝር ህጎች አሉን ወይ? የሚል ነው። መልሱም አዎንታ ነው። እንደሚታወቀው ህገ-መንግስቱ ከጸደቀ ከአንድ አመት በኃላ 'በአዋጅ ቁጥር 25/1988' የሚታወቅ 'የፌዴራል ፍርድ ቤቶች አዋጅ' የታወጀ ሲሆን በዚሁ አዋጅ ውስጥ የፌዴራሉ ፍርድ ቤቶች እርከንና የስልጣን ወሰን የሚያመለክቱ ድንጋጌዎች ተካትተውበታል። ከእነዚህም አንዱ የፌዴራል ጠቅላይ ፍርድ ቤት የሰበር ስልጣን የሚያመለክት በአዋጁ በአንቀጽ 10[13] ሥር ተደንግጎ ይገኛል። እንደሚከተለውም ይነበባል።

[12] Muradu Abdo, *Supra note* at 9, p.69.

[13] አዋጁ በአንቀጽ 22 ሥር ሰበር እንዴት ይቀርባል? ለሚለው ጥያቄ መልስ ይሰጣል።

የፌዴራል ጠቅላይ ፍርድ ቤት መሰረታዊ የሆነ የህግ ስህተት ያለባቸውን የሚከተሉትን ጉዳዮች በሰበር የማየት ስልጣን ይኖረዋል፡፡

1. በፌዴራል ከፍተኛ ፍርድ ቤት በይግባኝ አይቶ የመጨረሻ ውሳኔ የሰጠባቸውን ጉዳዮች፤

2. የፌዴራል ጠቅላይ ፍርድ ቤት መደበኛ ችሎት የመጨረሻ ውሳኔ የሰጠባቸውን ጉዳዮች፤

3. የክልል ጠቅላይ ፍርድ ቤት <u>መደበኛ ችሎት</u> ወይም <u>በይግባኝ አይቶ የመጨረሻ ውሳኔ</u> የሰጠባቸውን ጉዳዮች ናቸው፡፡(ሠረዝ የተጨመረ)

ከእነዚህ ንኡሳን አንቀጾች መገንዘብ የሚቻለው መሰረታዊ የህግ ስህተት የተፈጸመባቸው ጉዳዮች ወደ ፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ከሶስት አቅጣጫ ሊቀርቡ ይችላሉ፡፡ አንደኛው መንገድ ከፌዴራል ከፍተኛ ፍ/ቤት በቀጥታ ወደ ፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት የሚቀርቡ ጉዳዮች ይኖራሉ፡፡ ለምሳሌ በአሰሪና ሰራተኛ ህግ መሰረት የግልም ሆነ የወል የስራ ክርክር የመጨረሻ ውሳኔ የሚሰጥባቸው በከፍተኛ ፍርድ ቤት ደረጃ ነው፡፡[14] ስለሆነም እንዲህ አይነቶቹ ውሳኔዎች መሰረታዊ የህግ ስህተት እንዳለባቸው ከታመነ ወደ ፌዴራል ጠቅላይ ፍርድ ቤት መደበኛ ችሎት መቅረብ ሳይኖርባቸው በቀጥታ ወደ ፌዴራል ሰበር ሰሚ ችሎት ያመራሉ ማለት ነው፡፡ ሁለተኛው መንገድ ከፌዴራል ጠቅላይ ፍርድ ቤቱ ከራሱ በመደበኛ ችሎቱ በሶስት ዳኞች ተሰይሞ የሚያስተናግዳቸው በአዋጁ በአንቀጽ 8 በመጀመሪያ ደረጃ (original jurisdiction) የዳኝነት ስልጣኑ ወይም በአንቀጽ 9 መሰረት በይግባኝ (appellate jurisdiction) ሰሚነቱ አይቶ ውሳኔ ያሳረፈባቸው ጉዳዮች እንዲሁ መሰረታዊ የህግ ስህተት ከተገኘባቸው በፌዴራል ሰበር ሰሚው ችሎት የሚመረመሩ ይሆናሉ፡፡ ሦስተኛውና የመጨረሻው በዚህ አዋጅ የተመለከተው መንገድ፣ የክልል ጠቅላይ ፍርድ ቤቶች በመጀመሪያ ደረጃ ስልጣናቸው ወይም በይግባኝ አይተው የመጨረሻ ውሳኔ የሰጡባቸው ጉዳዮች እንዲሁ መሰረታዊ የህግ ስህተት ከተፈጸመባቸው በፌዴራሉ ሰበር ችሎት የሚታዩ ናቸው፡፡

ህገ-መንግስቱም ሆነ አዋጁ 'የመጨረሻ ውሳኔ የተሰጠባቸው ጉዳዮች' ሲሉ በሰበር የታዩትን እንደማይጨምር ከቃላት አጠቃቀማቸው መገንዘብ ይቻላል፡፡ ሁለቱም ሰነዶች የሚጠቀሙት አገላለጽ 'የመጨረሻ ውሳኔ የተሰጠባቸው ጉዳዮች መሰረታዊ የህግ ስህተት ከተገኘባቸው በሰበር ይታያሉ' በሚል ሲሆን ይህም ሰበርንና የመጨረሻ ውሳኔን ለያይቶ ያስቀመጠ አገላለጽ ነው በመሆኑም ሰነዶቹ 'የመጨረሻ ውሳኔ የተሰጠባቸው ጉዳዮች' ሲሉ ከሰበር በመለስ ህጉ በሚፈቅደው ስርዓት መሰረት የይግባኝ 'ጣጣቸውን'

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[14] የአሰሪና ሰራተኛ ጉዳይ አዋጅ ቁጥር 377/1996 መሰረት የግል የስራ ክርክር ከክልል የመጀመሪያ ደረጃ (ወረዳ) ፍርድ ቤት ተነስቶ በክልል ይግባኝ ሰሚ (ዞን ወይም ከፍተኛ) ፍርድ ቤት ያበቃል (አንቀጽ 139(2))፡፡ የወል የስራ ክርክርም ከአሰሪና ሰራተኛ ወሳኝ ቦርድ ተነስቶ ፌዴራል ከፍተኛ ፍርድ ቤት ላይ ያበቃል (አንቀጽ 154(2)) በሁለቱም መንገድ ዞሮ ዞሮ ማብቂያው የክልል ወይም የፌዴራል ከፍተኛ ፍ/ቤት ነው፡፡ በርግጥ ፌዴራል ከፍተኛ ፍ/ቤት ከቦርዱ የተለየ ውሳኔ ቢሰጥ ወደ ጠቅላይ ፍ/ቤት ይግባኝ እንዲቀርብ አይፈቀድም ወይ? የሚል ጥያቄ ሊነሳ ይችላል፡፡ ይህ ነጥብ በሌላ ጊዜ በሌላ ርእስ የሚታይ ይሆናል፡፡

የጨረሱ ለማለት ሲሆን አንዳንዴ ይግባኝ የማይባልባቸው ጉዳዮችም ሊኖሩ ይችላሉ። ለነገሩ 'የመጨረሻ ውሳኔ' የሚለው ሃረግ ሰበርን እንዲጨምር ተፈልጎ ቢሆን ኖሮ የመጨረሻ ውሳኔ ከተባለ በኃላ ተመልሶ ሰበር የሚል ቃል መጠቀም ባላስፈለገ ነበር።

ከዚህም በተጨማሪ በእለት ተእለት የህግ ቃላት አጠቃቀም አንጻርም ሲታይ 'የመጨረሻ ውሳኔ' ሲባል የመጨረሻው ይግባኝ ሰሚ ፍርድ ቤት የሰጠው ውሳኔ ማለት ነው። ሰበር መደበኛ የክርክር ሂደት ባለመሆኑና በልዩ ሁኔታ ብቻ የሚፈቀድ የክርክር ስርዓት በመሆኑ በዚህ ስሌት ውስጥ የሚገባ አይደለም። የመጨረሻ ውሳኔ ሲባል ሰበርንም ይጨምራል ከተባለ ግን ሁሉም ጉዳዮች በሰበር በኩል አልፈው ይጠናቀቃሉ፣ ሰበር ላይ ደርሰው 'ቁርጡ እስካልታወቀ' ግን የመጨረሻ ውሳኔ ተደርገው አይወሰዱም፣ ወደሚል መደምደሚያ እንዳይወስደን ያሰጋል። ስለዚህ የመጨረሻ ውሳኔ ሲባል ከሰበር በመለስ ባለ ስርዓት የታዩትን እንጂ በየትኛውም መድረክ በሰበር የታዩትን እንደሚጨምርም ተደርጎ ሊተረጎም አይገባም ባዮች ነን።

ምናልባት 'የመጨረሻ ውሳኔ' ሲባል ሰበርንም ይጨምራል ከተባለም ሌላ የመከራከሪያ ነጥብ ማቅረብ ይቻላል። በአዋጅ ቁጥር 25/1988 መሰረት ከክልል ተነስተው በፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ስልጣን ስር ይወድቃሉ ተብለው የተመለከቱት ጉዳዩች ሁለት ሲሆኑ እነዚህም 'የክልል ጠቅላይ ፍርድ ቤት <u>በመደበኛ ዳኝነት</u> ወይም <u>በይግባኝ አይቶ የመጨረሻ ውሳኔ የሰጠባቸው ጉዳዮች'</u> ብቻ ናቸው።[15] (*ሠረዝ የተጨመረ*)

ቀደም ሲል እንደተጠቀሰው ህገ-መንግስቱ የክልል ጠቅላይ ፍርድ ቤቶችም ቢሆኑ መሰረታዊ የህግ ስህተት ለማረም በክልላቸው የክልል ሰበር ሰሚ ችሎት ማደራጀት እንደሚችሉ አመልክቷል። ስለሆነም የክልል ጠቅላይ ፍርድ ቤቶች ጉዳዮችን ሲመረምሩ እንደነገሩ ሁኔታ በሦስት ደረጃ ማለትም በመጀመሪያ ደረጃ የዳኝነት ስልጣን (original jurisdiction) ወይም በይግባኝ ደረጃ (appellate jurisdiction) እንዲሁም በሰበር ደረጃ (cassation proceeding) ሊሆን ይችላል ማለት ነው። ከዚህ አንጻር በፌዴራል ሰበር ሰሚ ችሎት ይመረመሩ ዘንድ መስተናገድ የሚገባቸው በመጀመሪያ ደረጃ ዳኝነት ወይም በይግባኝ ደረጃ በክልል ጠቅላይ ፍርድ ቤት የታዩትን እንጂ በክልል ደረጃ በሰበር የታዩትን ጉዳዮች በተመለከተ በአዋጁ ውስጥ የተባለ ነገር የለም።

አዋጁ ዝምታ በመረጠበት ሁኔታ መወሰድ ያለበት የህግ ግምት ምን ሊሆን ይገባል? ብሎ መጠየቅና መልስ መሻት ተገቢነት ያለው ነጥብ ነው። በመጀመሪያ ደረጃ ቀደም ሲል እንደገለጽነው ሰበር ጠባብ ስርአት ነው። ማንኛውም የህግ ስህተት በሰበር ስርአት እንዲያልፍ የሚፈቅድ የህግ አካሄድ የለንም። በሰበር የመደመጥ እድል ከይግባኝም በእጅጉ የጠበበ ሲሆን ማናቸውም ባለጉዳይ የይግባኝ ያህል እንደ መብት የሚጠይቀው አይደለም። በሰበር ሰሚ ፍርድ ቤት እጅ ያለ ስልጣን (judicial discretion) ነው ምክንያቱም መሰረታዊ የህግ ስህተት አለ የለም ብሎ የመወሰን ብቸኛና የመጨረሻ ውሳኔ እርሱ ነውና። ስለሆነም ህጉ ዝምታ ከመረጠ ሰበርን ፈቅዷል ተብሎ ሊወሰድ አይችልም። ሁለተኛ እላይ እንደተመለከተው የፌዴራሉ የዳኝነት አካል የክልሉ የዳኝነት ዘርፍ የበላይ አካል ባለመሆኑ በግልጽ የተመለከተ የህግ ስልጣን ባልተሰጠበት ሁኔታ

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[15] 'የፌዴራል ፍርድ ቤቶች አዋጅ' ቁጥር 25/1988 አንቀጽ 10(3)

ክልሉ በስልጣኑ ያከናወነውን ዳኝነት የሚመረመርበት የህግ መሰረት አይኖረውም። በሶስተኛ ደረጃ በህገ-መንግስቱ ውስጥ "ለፌዴራሉ መንግስት በተለይ ወይም ለፌዴራሉ መንግስትና ለክልሎች በጋራ በግልጽ ያልተሰጠ ስልጣን የክልል ስልጣን ይሆናል' የሚል ህገ-መንግስታዊ መርህ አለን። ከዚህ መርህም አንጻር ህገ-መንግስቱ 'በዝርዝር ህግ ይወሰናል' ካለ በኃላ፣ ዝርዝር ህጉ ዝምታ ከመረጠ የፌዴራል ሰበር ሰሚው አካል የሰበር ሰበር የሚያከናውንበት የህግ ድጋፍ የለውም ማለት ነው። ሲጠቃለልም እላይ ለመንደርደሪያነት የተጠቀምንበት የኦሮሚያ ጠቅላይ ፍርድ ቤት በሰበር ችሎቱ መርምሮ እልባት የሰጠበትን ጉዳይ የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት አስቀርቦ እንደገና በሰበር መመርመሩ የህግ ድጋፍ የሌለውና የፌዴራልና የክልል የስልጣን ክፍፍሉን ያላገናዘበ አሰራር ነው ብለን እናምናለን።

በርግጥ የክልል ጠቅላይ ፍርድ ቤቱ የክልል ሰበር ሰሚ ችሎት ባላደራጀበት ሁኔታ የመጨረሻ ውሳኔው መሰረታዊ የህግ ስህተት አለበት ከተባለ በፌዴራል ሰበር ሰሚው መመርመርን እላይ በተጠቀሰው አዋጅ መሰረት አይከለከልም። ለምሳሌ የሶማሌ ክልልና የአማራ ክልል ጠቅላይ ፍ/ቤቶች እስከ ቅርብ ጊዜ ድረስ የክልል ሰበር ሰሚ ችሎት እንዳላደራጁ ይታወቃል። ስለሆነም የእነዚህ ክልሎች ጉዳዮች በህገ-መንግስቱና በዝርዝር ህጉ መሰረት በፌዴራሉ ሰበር ሰሚ ሊመረምሩ የሚችሉ መሆናቸውን መገንዘብ ይገባል።

በኛ እምነት ይህ አይነቱ አተረጓጎምና አረዳድ አንዳንድ ባለጉዳዮች የሰበር ሰበር 'ተጠቃሚ' ሌሎች ግን በአንድ ሰበር ብቻ እጣ ፈንታቸው የሚወሰንበት ወጥነት የሌለው አሰራርንም ያስወግዳል። ይህም 'ሰዎች ሁሉ በህግ ፊት እኩል ናቸው' ከሚለው ህገ-መንግስታዊ መርህም ጋር የተጣጣመ አተረጓጎም ነው። ስለዚህ የፌዴራል ጠቅላይ ፍርድ ቤት የሰበር ሥልጣን ያልተገደበ አይደለም ብቻ ሳይሆን እንዲያውም ሥልጣኑ በዝርዝር ህጎች በግልጽ በተቀመጡ ጉዳዮች ላይ ብቻ የተገደበ ነው የሚል እምነት አለን።

ቀጣዩ ስራችን ከአዲስ አበባ ከተማ የቀበሌ ማህበራዊ ፍርድ ቤት ተነስቶ በከተማው አስተዳደር ይግባኝ ሰሚ ፍርድ ቤት በይግባኝ ደረጃ ተመርምሮ የመጨረሻ ውሳኔ የሰጠበትን ጉዳይ የፌዴራል ሰበር ሰሚ ችሎት አስቀርቦ መመርመሩስ ምን የህግ መሰረት አለው? የሚለውን ማየት ነው። ቀደም ብለን እንዳየነው በፌዴራል ፍርድ ቤቶች ማቋቋሚያ አዋጅ ስር በተመለከተው አንቀጽ ስር ከአዲስ አበባ ከተማ አስተዳደር ፍርድ ቤቶች 'ጣጣቸውን የጨረሱ' ጉዳዮች በፌዴራሉ ሰበር ሰሚ አካል ሊመረመሩ የሚችሉበት እድል የሚጠቁም ድንጋጌ የለውም። ሰበር ሰሚው ችሎት ከፌዴራል ወይም ከክልል ፍርድ ቤቶች የሚነሱትን የመጨረሻ ውሳኔ ያገኙ ጉዳዮች ብቻ እንደሚያስተናግድ አይተናል።

በርግጥ 'ክልል' ሲባል በህገ-መንግስቱ በክልልነት የሚታወቁትንና አዲስ አበባ መስተዳድርንና ድሬዳዋ ካውንስልን ይጨምራል ሊባል ይችል ይሆናል። አንዳንድ አዋጆችም 'ትርጓሜ' በሚለው የአዋጁ ክፍል ይህንኑ በማካተት ችግሩን ለመፍታት ጥረት ሲያደርጉ ይስተዋላል። ነገር ግን አዋጅ ቁ. 25/1988 'ክልል' የሚለው ቃል ለአዋጁ አፈጻጸም ሲባል እላይ በተመለከተው መልክ እንዲተረጎም መመሪያ አልሰጠም። በመሆኑም 'የክልል ጠቅላይ ፍርድ ቤት የመጨረሻ ውሳኔ የሰጠባቸው ጉዳዮች' የሚለው ሃረግ፣ አዲስ አበባም ክልል ማለት ነውና 'የአዲስ አበባ መስተዳድር ይግባኝ ሰሚ ፍርድ

ቤት የመጨረሻ ውሳኔ የሰጠባቸው ጉዳዮች' ተብሎ ሊተረጎም ይችላል ብሎ መከራከር ሚዛን የሚደፋ ክርክር አይሆንም፡፡ ስለዚህ የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ከአዲስ አበባ መስተዳድር ማህበራዊ ፍርድ ቤት የተነሳውን ክርክር በሰበር አቅርቦ የመረመረው ከአዋጅ ቁጥር 25/1988 ከመነጨ ስልጣን አይደለም ማለት ነው፡፡ በመሆኑም ሌላ የስልጣን ምንጭ ካልተገኘለት በቀር ከስልጣኑ ውጪ ያከናወነው ድርጊት ነው ተብሎ ሊወሰድ ይችላል፡፡

ሆኖም 'ዝርዝሩ በህግ ይወሰናል' የሚለው ሃረግ አንድ አዋጅን ብቻ አይተን እንድንደመድም የሚያስገድደን አይሆንም፡፡ ለዚህ ስልጣን አግባብነት ያላቸው የህግ መሰረቶች በተለያዩ ህጎችና በተለያዪ ጊዜያት እየወጡ ተጨማሪ የሰበር ስልጣን መሰረቶች ከመሆን የሚያግድ አይደለም፡፡ ስለዚህ በሌሎች ህጎችም ቢሆን ለፌዴራል ጠቅላይ ፍርድ ቤት ተጨማሪ የሰበር ስልጣን የሚሰጡ ህጎች ካሉ አፈላልጎ ማግኘት ግንዛቤአችንን የሚያሰፋው ከመሆን አልፎ የሰበር ሰሚው የስልጣን ወሰንን በተሟላ ሁኔታና በአግባቡ ለመገንዘብ ይረዳናል፡፡

ከዚህ አንጻር 'የተሻሻለው የአዲስ አበባ ከተማ አስተዳደር ቻርተር' አዋጅ ቁጥር 361/1995 አንቀጽ 42(3) አሁን ለያዝነው ጉዳይ አግባብነት ያለው ነው፡፡ እንደሚከተለውም ይነበባል፡፡ *'በአዲስ አበባ ፍርድ ቤቶች የመጨረሻ ውሳኔ መሰረታዊ የህግ ስህተት አለው የሚል ወገን ለፌዴራል ጠቅላይ ፍርድ ቤት የሰበር አቤቱታ ማቅረብ ይችላል'* ይላል፡፡ 'መጨረሻ ውሳኔ' የሚባለውም በይግባኝ ሰሚ ፍርድ ቤት የተሰጠ ውሳኔ እንደሆነ በዚያው አዋጅ ውስጥ ተመልክቷል፡፡[16] በመሆኑም ምንም እንኳ አዋጅ ቁጥር 25/1988 የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት የአዲስ አበባ ከተማ መስተዳደር ፍ/ቤቶች የሰጡትን የመጨረሻ ውሳኔ በሰበር ለመመርመር የማያስችለው ቢሆንም በአዋጅ 361/1995 መሰረት ተጨማሪ ስልጣን የተሰጠው በመሆኑ ቀደም ሲል ለውይይት መነሻነት የተጠቀምንበት የሰበር መዝገብ ቁ. 31601 አስቀርቦ መመርመሩ ህጋዊነት ያለው ድርጊት መሆኑን መገንዘብ ይገባል፡፡

ከዚህ በላይ የጠቀስናቸው ሁለት አዋጆች የህገ-መንግስቱ አርቃቂዎች በፌዴራል ደረጃ በሰበር የሚታዩት ጉዳዮች 'በዝርዝር ህግ ይወሰናሉ' ብለው ለገቡት ቃል በከፊል መልስ የሰጡ ሲሆን ሌሎች ዝርዝር ህጎችም ቢሆኑ እንዲሁ ለዚህ ጉዳይ አግባብነት ያለው ድንጋጌ ይዘው ሊወጡ ይችላሉ፡፡ ለምሳሌ በአዋጅ ቁጥር 27/1988 የሚታወቀው 'የመከላከያ ሰራዊት አዋጅ' በአንቀጽ 32 ስር *'በቀዳሚ ወታደራዊ ፍርድ ቤትና በይግባኝ ሰሚ ወታደራዊ ፍርድ ቤት የተሰጠ የመጨረሻ ውሳኔ መሰረታዊ የሆነ የህግ ስህተት ያለበት ሆኖ ሲገኝ የፌዴራል ጠቅላይ ፍርድ ቤት ጉዳዩን በሰበር የማየት ስልጣን አለው'* የሚል ድንጋጌ ይገኝበታል፡፡ ይህም ለሰበር ሰሚ ችሎቱ ተጨማሪ የስልጣን ምንጭ ነው፡፡ እንዲህ እንዲህ እያለ በዝርዝር ህጎች ውስጥ የስልጣን መሰረት የሆኑ ድንጋጌዎች ማፈላለግ የሚቻል ሲሆን በዝርዝር ህግ የሰበር ስልጣን ባልተሰጠበት ሁኔታ ግን የመጨረሻ ውሳኔ በተሰጠባቸው ጉዳዮች ላይ ሁሉ ያልተገደበ የሰበር ስልጣን ለፌዴራሉ ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ተሰጥቷል የሚለው አተረጓጎምና አፈጻጸም የህገ-መንግስቱን ቃላትና መንፈስ የተከተለ አይደለም እላለን፡፡ የፌዴራል ሰበር ሰሚ ያልተገደበ ስልጣን ቢኖረው ኖሮ በሦስቱ አዋጆች የተመለከቱት 'የፌዴራል ጠቅላይ

[16] የተሻሻለው የአዲስ አበባ ከተማ አስተዳደር ቻርተር አዋጅ አንቀጽ 43(5)

ፍርድ ቤት በሰበር የማየት ስልጣን ይኖረዋል' የሚሉ ድንጋጌዎችና 'ዝርዝሩ በህግ ይወሰናል' የሚለው ሃረግ በህገ-መንግስቱ ውስጥ ማስቀመጥ አስፈላጊ ባልሆነ ነበር።

6. ማጠቃለያ

የፌዴራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት በዝርዝር ህግ በሰበር እንዲያይ ስልጣን ሳያገኝ እየመረመራቸው ያሉት የክልል ጉዳዮች ከስልጣኑ ውጪ በመሆኑ መቆምና ማብቃት ያለበት ድርጊት ነው። የፌዴራል ሰበር ሰሚ ችሎት የሰበር ሰበር እንዲያከናውን ያስገደደው የህገ-መንግስቱ ድንጋጌዎች አጻጻፍ የፈጠረው ችግር ነው ሲባል አልፎ አልፎ ይደመጣል። መፍትሄውም በህገ-መንግስቱ ድንጋጌዎች ላይ የማሻሻያ ስራ ማከናወን ነው እየተባለ ይነገራል። በዚህ ፀሐፊ እምነት ግን ችግሩ የህገ-መንግስቱ አጻጻፍ ሳይሆን የህገ-መንግስቱ አነባበብ ችግር ነው። መፍትሄውም ህገ-መንግስቱን ማሻሻል ሳይሆን ህገ-መንግስቱን ባግባቡ ማንበብ፣ ከዝርዝር ህጎችም ጋር አገናዝቦ መመርመር ነው። በዚህ ፀሐፊ እምነት ችግሩ የተፈጠረው 'ዝርዝሩ በህግ ይወሰናል' የሚለው ሃረግ ሳይነበብ እየቀረና የሰበር ስልጣኑ ያለገደብ የተሰጠ እንደሆነ ተደርጎ በመወሰዱ ነው። የህገ-መንግስቱ ጉባኤ አባላት የፌዴራሉ ሰበር ሰሚ ችሎት ያልተገደበ የመጨረሻ ውሳኔዎች በሰበር የመመርመር ስልጣን ሊሰጡት አስበው ቢሆን ኖሮ 'ዝርዝሩ በህግ ይወሰናል' በማለት በቀጠሮ ማሳደር አስፈላጊ አልነበረም።

'ታሪክ ራሱን ይደግማል' እንዲሉ በንጉሱ ዘመን በፍርድ ቤት ክርክር ሂደት የተቋጨን ጉዳይ እድሉ ከተገኘና 'አዲስ አበባ ሄዶ 'ዙፋን ችሎት' ፊት መቅረብ ከተቻለ ፍትህ ይገኛል' እየተባለ ብዙ ህዝብ ፍትህ የማይገኝን ፍለጋ ተንከራትቷል። በደርግ ዘመንም ግፍ የሚፈጽሙት የበታች ሹማምንት ናቸው። እንደምንም ተብሎ 'ሰውየው' (ኮሎኔል መንግስቱን ማለት ነው) ጋር ከተደረሰ ፍትህ ይገኛል እየተባለ፣ አልፎ አልፎም ራሳቸው 'ሰውየው' የሚያነሱት የስልክ ቁጥር፣ ራሳቸው 'ሰውየው' የሚቀበሉት ቴሌግራም አለ እየተባለ፣ የብዙ የፖለቲካ እስረኞች ቤተሰቦች 'የሰውየው' ን የስልክ ቁጥርና ቴሌግራም ፍለጋ አሳር መከራቸውን አይተዋል።[17] የ'ዙፋን ችሎት'ና የ'ሰውየው' ቋሚ አድራሻም አዲስ አበባ እንደነበረ ይታወቃል።

ይህንን አዲስ አበባን የፍትህ የመጨረሻ ምንጭ አድርጎ የመውሰድ ስነ-እምሮ በማህበረሰባችን ህሊና ውስጥ ተቀርጾና ዘልቆ ገብቶ ባለበት ሁኔታ አዲስ አበባ 'መናገሻ ከተማውን' ያደረገው የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት፣ በክልል ደረጃ በሰበርም ጭምር ታይቶ ያበቃለትን ጉዳይ አስቀርቦ ይመራምራል ሲባል፣ ፍትህ አላገኘሁም ብሎ ያመነ ሁሉ የእርሻ በሬውን ሳይቀር ሸጦ እንደተለመደው ወደ አዲስ

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[17] በወቅቱ በአንድ የክፍለ ሃገር ከተማ ውስጥ በጸረ አብዮተኝነት የተጠረጠረ ወጣት በአደባባይ በተደረገ 'የአብዮቱ ወገኖች' ስብሰባ በሞት እንዲቀጣ ተወስኖበት የፍርዱን አፈጻጸም ሲጠባበቅ በነበረበት ወቅት፣ የወጣቱ ወላጅ አባት ወደ 'ሰውየው' ቴሌግራም ልከውና ተሳክቶላቸው ልጃቸውን ከሞት ሊያተርፉ ችለዋል፣ እየተባለ ሲወራ እንደነበር የዚህ ጽሁፍ አቅራቢ በእንክሮ ያስታውሳል። ከሞት የተረፈው ወጣት በህግ ትምህርት ተመርቆ አሁንም በህይወት ይገኛል።

አበባ መከተቱ አይቀርም። ፌዴራል መዋቅሩ ግን እንዲህ ዓይነት ስሜትና ውጤት እንዲከተል ሳይሆን እንዲወገድ ታስቦ የተደራጀ እንደሆነ ይታመናል። የህገ-መንግስቱ ጉባኤ አባላትም ቢሆኑ ይህንኑ ውጤት ለማግኘት አስበውና ፈቅደው ህገ-መንግስቱን ቀርጸዋል ለማለት ያስቸግራል።

ስለዚህ ከዚህ በላይ የቀረበው የህግ አተረጓጎም ዘይቤና የመፍትሄ ሃሳብ ተቀባይነት ሊሰጠው ይገባል ምክንያቱም አተረጓጎሙ-፤

- ከህገ-መንግስቱ ቃላትና መንፈስ ጋር የተጣጣመ፤
- የፌዴራልና የክልል መንግስታት ስልጣን ክፍፍልን ያገናዘበ፤
- ሰዎች ሁሉ በህግ ፊት እኩል መሆናቸውና እኩል እድል ያላቸው መሆኑን ያረጋገጠ፤
- የዜጎችን ጊዜና ወጪ ብሎም መንገላታትን የሚቀንስ፤
- የመጨረሻው የፍትህ ምንጭ 'ማዕከላዊው መንግስት' ነው የሚለው የአሃዳዊ መንግስት ስነ-አእምሮ የፈጠረው ጠባሳም የሚፍቅ፤
- ለፌዴራል ሰበር ሰሚ ችሎትም ቢሆን የጉዳይና የባለጉዳይ ጫና በእጅጉ በመቀነስ ውጤታማና ጥራት ያላቸው ስራዎች እንዲያከናውን በር የሚከፍትለት ይሆናል ተብሎ ይታመናል።

የጉዳይ ጫና ሲቀነስለት ሰበር ችሎቱ ከተለያየ አቅጣጫ ተመዝነውና በቂ ጊዜ ተመድቦላቸው የሚሰጡ ውሳኔዎች ለማዘጋጀት አመቺ ሁኔታ ስለሚፈጥርለት በአዋጅ ቁጥር 454/1997 የተጎጸናፈው 'የመጨረሻና አስገዳጅ የህግ ትርጉም' የመስጠት ስልጣኑን የተፈረደለት ብቻ ሳይሆን የተፈረደበት ባለጉዳይም ጭምር 'የሚረካበት' ውሳኔ በማስተላለፍ እንዲወጣው ያስችለዋል። የፍትህ የመጨረሻና የመዳረሻ ግብም ይህ ነው።