



Lecture 2



CHAPTER 2: Traders and Businesses

The Constitutional Basis of Trade

Art 41 of FDRE Constitution: Economic, Social and Cultural Rights:

- 1) Every Ethiopian has the ***right to engage freely in economic activity*** and to pursue a livelihood of ***his choice anywhere*** within the national territory.
- 2) Every Ethiopian has the right to choose his or her ***means of livelihood, occupation and profession.***

Constnal basis...continued

Similarly, Art. 43 of the Constitution provides the right to development. It says that “The Peoples of Ethiopia as a whole, and each Nation, Nationality and People in Ethiopia in particular have the *right to improved living* standards and to sustainable development.”

Based on these constitutional provisions and in order to carry out the duties imposed pursuant to Arts. 51(2), 51(9), 55(4) and 77(6), 89(1) and 91(3) of the Constitution, the government has adopted various laws which are believed to realize the rights enshrined under the constitution.

Constnal basis...continued

The Com. Code, enacted prior to the Constitution, and other trade and commerce related legislations are in line with these provisions.

The government has also adopted various legislations that are planned to modernize the old provisions of the Comm. Code.

Examples of such legislations include, but not limited to, Commercial Registration and Business Licensing Procln, Trade Practice and Consumer Protection Procln, Trademark Procln, Copyright and Neighboring Rights Procln, etc.)

What is trade?

Trade can be defined as “a regularly carried out and organized production, exchange of goods and services undertaken with the objective of earning profit and acquiring wealth through the satisfaction of human needs.”

The code uses words “trade” and “business” interchangeably to refer the same thing.

Then, in what way (form) trade can be undertaken?

The first opportunity to undertake business activity is trading individually; i.e. the trader is an individual person. The business here is called **sole proprietorship**.

Trade can also be undertaken by a group of individuals by forming Business Organization (BO)- an alternative to trading individually.

Who are traders?

- ▶ Art. 5, Com. C: “Persons who *professionally* and *for gain* carry on the following *activities* shall be deemed to be traders....”

- a) **Carryout the activity “professionally”**

What is profession/professional?

1. *Dictionary meaning*: “A person who has acquired some kind of learning or training in certain defined field of study or occupation requiring high level of training and proficiency.”
E.g. law, medicine, accounting

Traders...cont'd

The labor and skill involved should predominantly be *intellectual* rather than physical or manual.

2. *Legal interpretation*: “A person who legally carries out certain activity having *license* and satisfying of other *requirements* of the law.”

The objective of the law: to impose an obligation the law anticipates from certain traders who are able to bear it, and to exclude others.

Traders...cont'd

b) Carry the activity for gain,

What kind of gain?

It should be for *economic* benefit, not for moral or any other.

He may incur loss, but still he is a trader; we've to look his initial motive.

c) Carryout one or more of the activities.

Activities enumerated under Art. 5 of the Code

It may be doing anyone or more of them.

Traders...cont'd

- ▶ Are the enumerations under Art. 5 exhaustive? Or illustrative?
 - ▶ Trading activities are not predetermined. Business is dynamic.
 - ▶ If it's exhaustive, what is the purpose of exclusion under Arts. 6, 8 and 9? (*why it excludes agriculture, forestry, fishery and handicraftsmen from being traders? To favor people under poor conditions-since majority of Ethiopians are living with such activities.*)
 - ▶ Proc. No. 686 and Regulation No. 13 (as amended) widen the definition of traders. Investment Proclamation (769/12) and the Regulation also provides business activities which are not listed under Art. 5 of the Comm. Code.

Traders...cont'd

Art. 2(2) of Proclamation No 686/10, apart from the lists under Art. 5 of the Comm. Code, includes “...who dispenses services, or who carries on those commercial activities designated as such by law.” to the definition of traders.

Traders...cont'd

- ▶ Are all persons who satisfy the three cumulative requirements traders?

Not necessarily. (Art. 9-handicraftsmen aren't traders.)

- ▶ What are the elements of Art.9 to call a certain activity as handicraft?
 1. Carry the activity *independently*: there should not be a *nexus* with persons called traders.
 2. Depend for *livelihood* mainly on the *fruits* of the activity claimed to be handicraft.
 3. Carry *manual* work. However, he may use simple tools that can move through human agent.

Traders...cont'd

- ▶ The handicraftsman may undertake his business with the assistance of family.
- ▶ However, what is the scope of *family*? (the code is silent as to the status of the family.)
 - ▶ Extended or nuclear family?
 - ▶ Practically, those people, unless under the control of the handicraft, or expect daily bread from him, wouldn't give hand without employment. (if they are employed, they're employees, not assistance of family though they're really members of family.)

Traders...cont'd

- How many apprentice can a handicraft may use?
 - ▶ *No limitation*, it may mean also three. Because it says "...three employees or apprentice...."

Traders...cont'd

4. ...*buy* such (raw) materials...and *use* with out storing for future.
- * This requirement shows that handicraftsmen are very poor people whose return is very small.

Right to carryout Business Activity in Ethiopia

Art 41 of the Constitution: Economic, Social and Cultural Rights

1) *Every Ethiopian has the **right to engage** freely in economic activity and to pursue a livelihood of his choice anywhere within the national territory.*

2) *Every Ethiopian has the **right to choose** his or her means of livelihood, occupation and profession.*

Right to carry out...cont'd

- ▶ The same type of provision is also found under Art. 16(1) of the Civil Code. It says that “Every person is free to exercise any activity which he deems proper in that which concerns his calling and his leisure.”
- ▶ Art. 16(2) is about restrictions: “for the rights of others, morality and the law.”

Right to carry out...cont'd

- ▶ In the light of the Civil Code, i.e. Art. 16(3), a person's right to carry on trade may be restricted in two ways. These are:
 - ▶ Voluntary restraint, and
 - ▶ Compulsory restraint

Right to carry out...cont'd

1. **Voluntary restraint of the Freedom**

Would it be possible to enter into agreement limiting constitutional right to trade? NO!

Why? Public policy; it requires that everyone shall be at liberty to work for himself; and shall not be at liberty to deprive himself or the state of his labor, skill or talent by any contract s/he enters in to.

Right to carry out...cont'd

Under Art. 16(3) of the Civil Code it is provided that voluntary restraint of trade unless supported by some justifiable reasons, can't be enforced.

Some of such exceptions includes in the cases of:

1. Art. 30: commercial employees
2. Art. 40: commercial travelers and representatives
3. Arts. 47 and 55: commercial agent
4. Art. 144: lease of premises
5. Arts 204 and 205: hire of a business
6. Arts. 158: sale of business

Right to carry out...cont'd

The **remedy** for the non observance of the prohibitions in above cases is provided under Art. 131 of the Comm. Code dealing with preservation of goodwill, i.e. unfair competition.

Right to carry out...cont'd

2. Compulsory Restrictions on Freedom of Trade

- ▶ To safeguard public interest, interest of individuals, the law, very exceptionally, spell out restrictions limiting constitutional right to trade.

E.g. Arts. 11-26 of Com.C

Art 11: persons incapable under the civil code (minors and JIP)

what is the policy behind?

A tutor can't undertake trade on behalf of the minor except in case of Art. 288 of civ.c.

Right to carry out...cont'd

- ▶ what if the incapable person carry on business?
- ▶ For JIP the general rule is that they are presumed to be capable (art. 192 civ.c, 121 com.c) but for minor (art. 199 civ.c)
- ▶ **Could LIP carryout business?**
 - ▶ Art. 12 didn't allow.
 - ▶ The practice
 - ▶ Art. 383, 380 civ.c

Right to carry out...cont'd

Art. 16: married persons- any married person may carry on trade as though he were unmarried.

There should be the consent of the other spouse.

The other spouse can *object* and such objection has to be *entered in to commercial register*.

- ▶ Property of spouses (common property and personal property)
- ▶ Debts of spouses

Right to carry out...cont'd

- ▶ **Foreigners:** can carry out trade as that of Ethiopians- Art. 389 civ.c.
 - ▶ However, they may be prohibited to enjoy full civil right. (they may be required for permission, prohibited to engage in some fields that are reserved for nationals only- Schedule attached to Reg. No. 270/12)
 - ▶ Foreigners are also not allowed to engage in activities exclusively given for the gov't. (Art. 6(1) of Investment Procl No. 769/12)

Right to carry out...cont'd

- ▶ **Legal persons:** categorized in to two-associations and business organizations.
- ▶ **Associations:** formed as per Art. 404 of the civ.c or any other public law. It can not carry on trade.
 - ▶ It may be religious, charity, social.
 - ▶ Religious organizations and associations shall be registered by Ministry of Federal Affairs- Art. 14(1)(h) of Procl. No 691/10, formerly by Ministry of Justice, Art. 23(9) of Procl. No 4/95
 - ▶ Not allowed to undertake trade- Art. 25(1) com.c. If they engage in trade, will be dissolved- Art. 461 (1) of civ.c.

Right to carry out...cont'd

- ▶ **Business Organizations:** established to carry out trade. Exceptionally, they may be prohibited to engage in particular form of trade. E.g.
 - ▶ Partnerships and PLC can't carry out banking and financial business.
 - ▶ Can't engage in activities reserved exclusively to the gov't- Art 6(1) of Proc 769/12.
 - ▶ Art 26 of com.c: No BO shall carry on a trade which it is not permitted to carry on or which is subject to specific requirements with which the BO has not complied.

Right to carry out...cont'd

- ▶ If the BO is operating an activity outside its object, the business entities set up is *ultra vires*.
- ▶ Its effect is that it render the activity *void*- it produces no effect.

Effects of Non-observance of Restrictions

- ▶ The effect varies depending on the nature of restriction(s).
 - ▶ For incapacity- business contract is invalidated. When it carry business without benefiting the incapable, it has effect.
 - ▶ For married person
 - ▶ License, penalized, may be imprisonment or confiscation- Art 24 of com.c
- ▶ Illegal trader can't raise as a defense the illegality of his activity to third parties who deal in good faith not fulfill obligations that may arise from such an illegal activity or to tax authority for purpose of payment of tax. (Art. 24(2))

Effects...continued

- ▶ Contraband trader
 - ▶ Could they raise the illegality to avoid tax liability?
 - ▶ They can't! Art. 24(2) of Com.c.