

# The Historical Development of Bankruptcy Law Both in the World in General and Ethiopia in Particular: In Comparison and Contrast

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**Abstract:** This essay paper is to analytically discuss the brief historical evolution of bankruptcy Law both in the world more generally and in Ethiopia specifically. In tracing the historical evolution of bankruptcy law, it is believed that it is possible to reach at its optimum understanding of jurisprudential concepts, legislations enacted, the reactions of the society towards the law, and prevailing practices associated with its ups and downs with justifications. As such, the paper is aimed at disclosing the common/shared and different features of historical evolution of bankruptcy law in the world and Ethiopia. For this, this comparative observance of the law is essential in identifying the basic lacunas both in the jurisprudence and practice of bankruptcy law. For this, the scope of this paper is limited to discuss core similarities and differences of historical evolution of bankruptcy law both in the world in general and Ethiopian in Particular. Finally, the paper winds up the analytical discussion pinpointing rewarding solutions for the existent problems in this subject matter of law.

**Keywords:** Bankruptcy Law, Historical Development/Evolution, Legal History, Jurisprudence, Legislations, Less Practicality, Socio-Legal Research, Punitive Approach

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## 1. Introduction

Despite the fact that the historical development of bankruptcy law could be traced equally to the sociologist, investigating the status of the debtor class throughout the ages; to the political economist, studying the development of trade and credit; and to the jurist, striving to penetrate the gloom behind the origin and the growth of creditors' legal rights and remedies, it is difficult to show its distinct evolutionary stages.<sup>1</sup> This arises from lack of an independently researched historical jurisprudential study on the subject matter in many countries of the world. For this reason, the utmost effort/ study of socio-legal scholars is usually tedious. And the optimum understanding of the historical development of bankruptcy law an inevitably remains in vain. But, it is undeniable that there are scant mentions from the general works of bankruptcy law and its procedure in ancient Romans, Italians, French, and German.<sup>2</sup>

When we inquire why the historical development of bankruptcy law has suffered such its origin and/or trace, it is attributable to the ignorance of the law by the different time writers considering it as it is unnecessary, uninteresting, and

impossible; the narrow attention/focus of writers in ease drafting and improvement of the laws and regulations; and the less desire of writers to add the knowledge of the past and pinpoint to the students of contemporary legal science<sup>3</sup>. Similarly the historical development of bankruptcy law in Ethiopia shares the above problems in comparison though it will have its own additional explanations to the problem differently in contrast. As the culture, way of life, fashion, economic development, illiteracy level...etc issues vary in various countries of the world, we may not be able to find similar justifications for the above problems on the historical evolution of bankruptcy law. This is to mean both for the similarities and differences the historical evolution of bankruptcy law has evidenced in the world and Ethiopia will have unique or contextual justifications, elaborations, and extent of prevalence.

Above all, due to the reason that the historical development of bankruptcy law is wide, presenting the detailed historical evolution or development of bankruptcy law in this short essay is unthinkable. For this, the major points of similarities and difference will be taken for briefly explaining most important issues between the historical

development of the world and Ethiopia.<sup>1</sup>

## 2.The Historical Development of Bankruptcy Law in the World in General and in Ethiopia in Particular: In Comparison and Contrast

### 2.1. Shallow Legal History and Lack of Developed Jurisprudence on the Subject Matter

As it we have tried to pinpoint under the introduction part, in the bankruptcy law arena, there is any developed legal jurisprudence like other subject matters. Hence both the world and Ethiopian bankruptcy law lacks pertinent and clearly identified sources. So, no one could trace the origin and historical development of the world bankruptcy law. Hence, the law is not built on a well established jurisprudential foundation/base despite the practice of bankruptcy from time immemorial. This is because the writers have paid little emphasis like other subject matters. It was considered as if it is unnecessary, uninteresting, and impossible to write as one area of law in the legal discipline. Due to this kind of mischief act and misconceptions in the minds of earlier writers, bankruptcy law stayed undesirable area of study in past. In the same token, Ethiopia has entertained this problem.<sup>4</sup>

The historical development of Ethiopian bankruptcy law could not be traced back to 1933, where 96 articles of bankruptcy law passed by Emperor Haile Sellassie. Even this law was not used as a proper resource in the drafting of the commercial code except evidencing prior existence of bankruptcy law before itself. For sure, it is no any document that tells practical usage of this first bankruptcy law. And surprisingly, the well known Zikra Neger writer of the time, Maheteme Sellassie, did not inculcate while it has deliberated with other similar laws passed by that time in his works. From this, we can say that it is not exaggerating Ethiopia is unduly affected in lacking a jurisprudential concept of its own about bankruptcy law.<sup>5</sup>

<sup>1</sup>The Early History of Bankruptcy Law; University of Pennsylvania Law Review, pp. 223-224. The review succinctly dictates why tracing and understanding the historical development of bankruptcy law is difficult having taken the above mentioned reasons. For this, the review had produced the idea of English and American writers as an evidence for giving little emphasis to the law of bankruptcy taking it as unnecessary, uninteresting and impossible to back up the ample and clear evolution of the law throughout the different time periods. And the problem in relation to the historical development of bankruptcy law is not only of a certain country, but also it is of all the world countries. But, it is not possible to conclude all countries passed/ live in different environments, history, legal system, socio-economic, cultural and political contexts suffers the same impact. So, the same is true that Ethiopian bankruptcy law development has its own peculiar features. This does not mean that its peculiar features can swell the similarities it shares from the world historical development of bankruptcy law. Simply, many countries as they suffer outweighing similar historical development of bankruptcy law than narrow manifestation and explanations in different countries of the world.

<sup>2</sup>Ibid., see note 1 above.

<sup>3</sup> Supra., see note 1 and 2 above.

Like that of the world history of bankruptcy law, in Ethiopia bankruptcy law was given little attention by the legal community and of the general society. Then, here again also the legal community is primarily responsible for under development of bankruptcy law and its shallow/non-traceable origin of historical development in the realm of Ethiopian legal history. <sup>6</sup> The little attention is paid due to the fact that peoples in the country were not educated and have awareness about modern trade and business transactions. Even the handful educated elites from abroad were not in a position to understand such know-how, but they were acquainted or inclined with educations in politics/governance and judicial administrations.<sup>2</sup>

### 2.2. Bankruptcy Law Evolved as a Punitive Device: The Punitive Approach

Historically, individuals/debtors who file for bankruptcy protection or who have been bankrupt have been discouraged from their business, and treated harshly by the creditor and society. That was due to the negative perception conceived/held by the society. As such bankruptcy was manifested in the punitive treatment of debtors, which included at times:

- Forfeiture of all property;
- Relinquishment of spousal consortium;
- Revocation of citizenship,;
- Surrendering children as slaves;
- Prohibition from holding public office;
- Imprisonment; and
- Death

In addition to these severe and inhumane punishments, debtors were routinely degraded and humiliated in public. At ancient time, bankrupts were forced to sit in public and place baskets over their heads and other many more causalities like being sold at a public auction. Exactly speaking bankruptcy law is evolved from the practice of degradation and humiliation of bankrupts taking them as deceivers, frauds, offenders, cheaters, and squanderers.<sup>7</sup>

This traditional negative image of bankrupts was similarly held in many countries of the world. The same is true; in Ethiopia the aforementioned punishments were existent, especially till the reign of Emperor Menilik II although it was evident that such practices were evident/continued up to Emperor Haile sellassie, in the mid 19<sup>th</sup> century.<sup>8</sup>

So, the punitive nature of bankruptcy is the common

<sup>4</sup> See notes aforementioned notes 1, 2, and 3 on The Early History of Bankruptcy Law; University of Pennsylvania Law Review, pp. 223-224.

<sup>5</sup> Tadesse Lencho LLB. (AAU), LLM. (Michigan Law School), now he is a Lecturer in law and formerly Associate Dean and Acting Dean of Addis Ababa University, Faculty of Law; Ethiopian Bankruptcy Law: A Commentary (part one), pp. 60-63. As in the case of the world history of bankruptcy law, this writer strongly argued that the legal community is not familiar with bankruptcy law even incorporated in the commercial code. What he said "lawyers are a critical piece in the application of the law. If lawyers do not know or understand the law, it is unlikely that the law will ever come to courts even if it were included in the code." So, like that of the world historical development of law, writers are responsible for the retarded historical development of the law and its jurisprudential concept.

<sup>6</sup> Ibid., see note 5 above.

manifesting feature of the world and Ethiopian historical development of bankruptcy law before it has got its own modern shape taking into account respect or the human person and of his/her dignity, right to property, livelihood, the individual and public moral considerations, the latest perceptions on spirit of business and economic growth and development....etc significant determinants at this time.<sup>3</sup>

### 2.3. The Enactment of Legislations

It is an open truth and succinctly known fact that the historical development of bankruptcy law in the form of legislations could not be plausibly established or explained in the world. In its cover or bird's eye view it may seem us the commonly shared scenario to Ethiopia. But, the close look of the dates by which legislations enacted, Ethiopia's legislative history on the law of bankruptcy is much more a recent time as contrasted to England, the first official laws concerning bankruptcy were passed in 1542, under Henry VIII; the Sixteenth Century Spain's Phillip II declare four separate state bankruptcies in the years between 1557 and 1596; and in the United States, the first official bankruptcy law was enacted in 1800 in response to land speculation by which the world legislative history of bankruptcy law is explained.<sup>9</sup>

Whereas the first legislation born out in Ethiopia in the 20<sup>th</sup> century Even the introduction of modern constitution in Ethiopia is not a long time phenomenon (Endalachew and Muhabie, 2015) .

In addition to this recent phenomenon of enacting a single bankruptcy law, there were no any as such continued and improved amendments, and newly introduced laws apart from the commercial code in the historical development of Ethiopian bankruptcy law.<sup>10</sup>

Generally, it is possible to wrap up that historical development of Ethiopian bankruptcy law in terms of legislations stayed an infant in time, not well improved to fit the prevailing circumstances, not followed by modern laws, and not given due emphasis to put into practice like that of other laws. Then, tracing the very historical development of bankruptcy law of Ethiopia could not confidently be backed up on legislations or by any other written/documentary sources in such contextual realities of the country. And any trial of documenting convincing and resembling historical facts about this law is challenging as it shuts doors leading to the righteous historical destinations of bankruptcy law in the

country, Ethiopia.<sup>4</sup>

### 2.4. The Less Practicality of Bankruptcy Law

Another distinguishing factor of Ethiopian bankruptcy law from that of the world is its less practicality. In the country even though handful legislations are existent, they were not seen practically implemented. Courts had not entertained a considerable amount of bankruptcy cases.<sup>11</sup>

In the same way the following quoted note indicates us bankruptcy law has remained idle from practice before the court of law in spite of the fact that from 1960 onwards there has been the commercial code incorporating bankruptcy laws that enables us in regulating the bankruptcy issues. Here the following the full quoted note reads as follows:

*"It is only recently that the Ethiopian legal regime on bankruptcy is gaining considerable attention from legal practitioners, although the legal rules enshrined in the Commercial Code were issued back in 1960. Even then, the number of petitions pending in the judiciary is very limited. Nevertheless, the size of the businesses undergoing bankruptcy proceedings coupled with their multiple impacts is bringing the legal regime to the limelight."*<sup>12</sup>

The above note can be easily understood that although bankruptcy law is gaining the considerable attention of the legal practitioners and increasing bankruptcy proceedings resulted from enlargement of size of the business in the past, it was hidden from the limelight of the practice being presented before the courts. This scenario tells us that for the practical use of bankruptcy law, the mere understanding of the legal community and enlargement of size of businesses likely entertaining bankruptcy issues are not enough, rather the involvement of the business community is so far paramount.<sup>5</sup>

## 3. Conclusions and Some Recommendations

Showing the historical development of bankruptcy law in a full-fledged and coherent manner is not an easy task in situations where there is scant sources written on the subject matter and minimal practices. And when we try to have the historical development of bankruptcy law in Ethiopia, it

7. Rafael Efrat; Associate Professor, College of Business & Economics, California State University, Northridge. J.S.D., 2002, Stanford Law School; J.S.M., 1998, Stanford Law School; J.D., 1992, University of Southern California Law Center: *The Evolution of Bankruptcy Stigma*, PP. 365-377. In ancient time, bankruptcy law had been exercised as a means of punishing a debtor who failed to pay/return his/her debt. As such the world and of Ethiopia's historical development of bankruptcy law had witnessed the law being used as a punitive tool. This is all about what the punitive approach in the study of the subject matter dictates. In the same fashion, by this time, such backward approach had lost its significance in the world in general and Ethiopia in particular. And the rationales or purpose of the law is changed to affording better protections for a debtor and creditor, the general societal norms of the society and the business world completely- the balanced approach.

8. See note 4 above.

9. A Brief History of Bankruptcy and Bankruptcy Law available at <http://www.bankruptcydata.com/Ch11History.htm> (last visited: 01/03/2015)

10. See also at Tadesse Lencho's Commentary (part one) on the background document of the commentary, pp. 60-63

11 Id., See the aforementioned note 10; Tadesse L., said surprisingly the following amazing question like comment in his path to researching the reasons for the less practice of bankruptcy law having entertained by the courts. It reads as follows: "Is Ethiopian business environment immune from the natural laws of bankruptcy or has it always gone bankrupt wendaitout ever being noticed by the police or mediated by the law? Anyhow why that was so has been indicated under the aforementioned pages of this paper. What we want to show here is the less practicability of bankruptcy law in Ethiopia than that of the world when we assess its historical development/evolution in contrast.

12 Available at <http://www.addisfortune.net/columns/bankruptcy-cases-bankruptcy-judiciary/> last visited 28/02/2015

shares most features of the world's bankruptcy law historical development. And in some instances, though it is not as bold as the similarities it has in common with the world's historical development of bankruptcy law, Ethiopia's historical development of bankruptcy law has its own distinguishing features in contrast.

Bankruptcy law's historical development has evolved up to this time having shallow legal history and lack of developed jurisprudence content wisely. That is both the world and Ethiopian bankruptcy law historical development has passed many years back without obtaining its own distinctly identified legal history and jurisprudence. That was because the fact that business issues or streams were not perceived as significant since other laws linked with the means of political and judicial administrations are all-time sensitive things for the keeping of peace, order, security, and wellbeing of the state and the people. For this the commercial or business aspect was seen as secondary, hence it was run by the traditional/lagging system of business administration. By this time, bankruptcy law concepts were not given an attention to be treated and used as a law benefiting the country as other types of laws did.

Another similarity enjoyed in common is that the historical development of bankruptcy law has witnessed bankruptcy as a tool of punishing a debtor severely and inhumanly who failed to carry out their obligations assumed in their contract accordingly.

The slight difference found in the historical development of bankruptcy law in world and Ethiopia is in relation to enactment of legislations and practice of the law. In these two things the historical development of bankruptcy law in Ethiopia is weaker than that of the world.

Finally, I would like to recommend for the need to clearly reveal the historical development of bankruptcy law, socio-legal researchers, and personnel in the business community are expected to undergo a deepest doctrinal and empirical socio-legal and business researches. In doing this, academically, it is possible to create a clear know knowledge of the law, and practically, it is easy to lessen, or avoid the problems shading the law not to be presented before the lime light of the courts. That is the debtor-creditor issues in the business realm can be resolved amicably, and business persons could maintain their personal and contractual relationships promising better future harmonious business transactions pillar to economic growth and development of Ethiopia.

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