

The Requirement of Spousal Consent for Transfer of Shares in Public Companies under Ethiopian Law: A Call for Free Transferability of Shares

Yihun Zeleke*

Abstract

Due to the increasing importance of shares as means of household savings, countries with statutory matrimonial regime incorporate rules, in their family law, that regulate matters related to management and transfer of shares. Especially, countries with default rule of a community of matrimonial property require spousal consent for the transfer of common property of spouses, but they exempt such requirement for the transfer of shares in a commercial company. The position of Ethiopian laws in this regard is absurd. The practice is mixed, inconsistent and arbitrary. It also creates discord of opinion to the extent of making some companies unsure of how to act. This directs the researcher to raise the following questions: Is spousal consent a requirement to transfer shares of public companies under Ethiopian law? Should spousal consent be a requirement for such transfers? Is there a lesson Ethiopia may draw from other countries in this regard? Through analysis of these issues, the writer concludes that the position of Ethiopian law concerning the issue of spousal consent vis-à-vis transfer of share is ludicrous and inadequate. This article argues for a clear exemption of the requirement of spousal consent for the transfer of shares in public companies and recommends the country to draw lessons from other countries to realize the free transferability of shares.

Key Terms: Spousal Consent, Shares, Transfer of Shares, Company Law, Family Laws, Public Company.

Introduction

Doing business in the form company has become the one of the preferred approaches the modern business community is acculturated to. It is important to raise capital through equity and debt securities, where the issuance of shares is

* B.Ed, LL.B, LL.M; Lecturer in Law, School of Law, Bahir Dar University. The author can be reached at yihunze@gmail.com.

the main one.¹ Parallel to the growth of companies (also called corporations), economic activity has been flourishing in the form of share/stock market. A rational investor seeking to involve in the equity market is very much concerned about the possible returns, and possibilities of liquidating his investment.² One way of attracting investors' in the equity market is, *inter alia*, to ensure security and predictability of share transfer.³ This realized where a transfer of shares goes smooth and the transferor enjoys rights attached to shares and the transferee is able to acquire these rights without interference. In fact, free transferability of shares is a pillar principle of every corporate law and the right to transfer shares is considered as one of the fundamental rights of shareholders.⁴

Nowadays, because saving has moved away from traditional bank deposits to investment in securities, shares have made up an increasingly large proportion of households' financial assets in many countries, developing and developed.⁵ Consequently, in addition to corporate laws, countries with statutory matrimonial regimes⁶ devote some provisions in their family law to regulate spousal interest in particular relation to spousal consent *vis-à-vis* transfer of an interest in shares. In an attempt to maintain a balance between the security of share transactions/economic interests and family interests, many countries exclude spousal consent requirements for the transfer of shares of a commercial company but maintain such a requirement for the remaining types of transactions.

¹Andreas Cahn and David C. Donald, *Comparative Company Law, Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA*, 1st ed., Cambridge University Press, (2010), PP.165-168, [hereinafter Andreas, *Comparative Company Law*].

²Egon Guttman, The Transfer of Shares in a Commercial Corporation - A Comparative Study, *B.C.L. Rev.*, Vol.5 No. 3, (1964), P. 491, available at <http://lawdigitalcommons.bc.edu>, last accessed on 21Nov2019[hereinafter, Egon, The Transfer of Shares in a Commercial Corporation - A Comparative Study], David Ciepley, Beyond Public and Private: Toward a Political Theory of the Corporation, *American Political Science Review*, Vol. 107, No. 1, (2013), PP.139-158 ,available at URL: <https://www.jstor.org/stable> last accessed on 08 July 2019.

³Asrat Tessema, Prospects and Challenges for Developing Securities Markets in Ethiopia: An Analytical Review *Blackwell*, Vol.15 No.1(2003), Oxford, UK , PP. 56-57, available at <https://onlinelibrary.wiley.com>, last accessed on 20 June 2019.[hereinafter: Asrat Tessema, Prospects and Challenges for Developing Securities Markets in Ethiopia]

⁴Kraakman, R, *etal*, *The Anatomy of Corporate Law, A Comparative and Functional Approach*, 3rd Edition ,Oxford University Press,(2017),PP.10-11[hereinafter Kraakman, *Anatomy of Corporate Law*], Julian Velasco, The Fundamental Rights of the Shareholder, *U.C. Davis L. Rev.* Vol.40, No.407 (2006), available at <https://heinonline.org>, last accessed on 02 Oct 2018,P. 411[herein after Julian, The Fundamental Rights of the Shareholder]

⁵Smriti Menon, A Comparative Study of the Indian Stock Market with Two International Stock Markets between 2012-17, *International Journal of Engineering Technology Science and Research IJETS*, Volume 5, Issue 3, (2018), P.447, available at www.ijetsr.com, last accessed on 12 Feb. 2019.

⁶Matrimonial regime refers to special rules concerning the property relationship between spouses during or after marriage. Countries govern such proprietary relationship through their family code.

The Ethiopian company law, like the case in other countries⁷, recognized the free transferability of shares as its pillar principle. As of the Commercial Code of Ethiopia, holders of shares of a public company⁸ are entitled with, *inter alia*, basic economic rights including the right to transfer.⁹ However, the code only broadly stipulated modes of shares transfer.¹⁰ It is, for example, silent about the issue of whether spousal consent is, or not, a requirement during the transfer of shares. Similarly, the Revised Family Code of Ethiopia, though it mentions the requirement of spousal consent in cases of transactions the value of which exceeds five hundred Ethiopian Birr¹¹, does not incorporate comprehensive provisions to regulate issues of spousal consent in cases of transfer of shares nor does it contain special provisions to govern the transfer of shares in publicly held companies. This might lead to the discord of opinion which in turn may create doubt into this issue. Obviously, providing that the country has no active institutionalized secondary security market and its public confidence in the share market eroded due to historic injustice¹², this is like adding fuel to a fire.

Given the increasing number of companies and the resultant natural development of transactions of shares in the country, the issue of whether spousal consent is or should be a requirement (or not) for the transfer of shares under the Ethiopian law is an issue that requires exposition. Despite the practical significance and perplexing nature of the issue, there are no, to the best of the

⁷ Kraakman, *Anatomy of Corporate Law*, *Supra Note* 4, PP.10-11. For the reasons that it provides companies with maximal flexibility in raising capital, maximizes liquidity of shareholdings and enhance the ability of shareholders to diversify their investments, all jurisdictions (be it common law or civil law, developed or developing) recognize free transferability of shares at least for one class of companies

⁸ For the purpose of this article, public company refers to a share company, be it formed by public subscription or as between founders, whose ownership distributed amongst general public shareholders via the free trade of shares of stock on exchanges or over-the-counter markets.

⁹ Commercial Code of the Empire of Ethiopia, 1966, *Negarit Gazzeta*, Extraordinary issue, Proc. No. 166, 19th year, No. 3, Art. 345 [hereinafter, Commercial Code of Ethiopia]

¹⁰ *Id.* Art.340 & 341.

¹¹ Revised Family Code of Ethiopia, Proclamation No. 213/2000, *Federal Negarit Gazette*, (2000), Article 68.[herein after, Revised Family Code of Ethiopia].

¹² Areya Debessay and Tadevos Hareg-work, Towards the Development of Capital Market in Ethiopia, Problems and Prospects of Private Sector Development,P.232, available at <https://www.ecaecon.org>, last accessed on 12 Feb.2020; Jetu Edosa Chewaka, Legal Aspects of Stock Market Development in Ethiopia: Comments on Challenges and Prospects, *Mizan law Review*, Vol. 8, No.2(2014).PP.440-441. Since its inception in the beginning of the 20th C, doing business by establishing business entity showed steady development and over the counter share trading system evolved in the late ages of the Imperial regime. This was, however, short lived for it abolished in 1975 by the *Derg* regime. Since recently, the country once again has witnessed a growth in the number of share companies establishing by offering their shares to the public and resultant increase in share transactions. It is unfortunate that Ethiopia does not yet have an institutionalized stock market. Where a shareholder of a share company wants to transfer his interest, he has limited market chances to do so; he has to either resell to the company itself or has to look for a potential buyer by himself or he has to contact an ordinary broker who is willing to act on his behalf.

researcher's knowledge, academic works in this particular issue. It is, therefore, the purpose of the writer to carefully analyze pertinent laws of Ethiopia and assesses the practice with the purpose of reaching a sound conclusion regarding whether spousal consent is, or should be a requirement to the transfer shares of public companies. For the purpose of this paper, the transfer of shares refers to the transfer of title to shares, voluntarily, by one party to another. A related concept, which is not the concern of this paper, is the transmission of shares which refers to the transfer of title to shares by the operation of law which happened due to insolvency, death, inheritance, or lunacy of the member.¹³

For a better understanding of the issue at hand and drawing lessons, the writer has overviewed the trend and pertinent laws of US community property states¹⁴ and English law for they have advanced legal system and well-developed equity markets. The writer also reviewed the pertinent laws of France which have a statutory matrimonial regime and have a significant influence on the Ethiopian Commercial Code, and that of South Africa, a developing African state which incorporated the default rule of a community of property in its family law.¹⁵ Methodologically, plus to in-depth analysis of pertinent laws and relevant documents, the writer has interviewed authorities and legal professionals to corroborate legal analysis and reach a sound conclusion.

This article is composed of five sections. The first two sections highlight the property and transferability nature of shares under the laws of selected countries in general, and under Ethiopian law in particular. The third section discusses the issue of spousal consent for the transfer of shares. This part of the article focuses on explaining how countries try to regulate the issue of spousal consent during the transfer of shares. The fourth section which constitutes the significant portion of this article discusses the requirement of spousal consent for the transfer of shares under Ethiopian Law. Finally, the last section provides concluding remarks in which the writer forwards his recommendations as well.

1. General Overview of Transferability of Shares in Public Companies

The property nature of shares has *sui generis* features for it surpasses the so-called real property right, good against the world' and credit rights, good only

¹³ Benazhir Shaikh, Differences between Share Transfer and Share Transmission, LegalWiz, (20 Aug, 2020), available at www.legalwiz.in/blog, last accessed on 10 Sept. 2020.

¹⁴ For the purpose of this article, the phrase "Community Property States" refers to states in which the law presumes that property acquired by a married couple during their marriage is joint property.

¹⁵ United Nations, Marriage, Family and Property Rights, UN Women, UNDP, UNODC and OHCHR, New York, (2018), P.39, available at <https://www.ohchr.org>, last accessed on 10 Nov 2019.[hereinafter United Nations, Marriage, Family and Property Rights]

against a handful of persons.¹⁶ Commonly, shares perceived as *choses in action* (not things in possession), comprising of patrimonial subjective right the holders of which are free to negotiate them in the market unless the law or the company's contract establish differently.¹⁷ As can be learned from the cumulative readings of pertinent provisions under the Civil Code and Commercial Code of Ethiopia a share is an aggregate of rights (claims) arising from membership to a business entity.¹⁸

Whatever its type, rights attached to shares can be summed as economic, management, political and litigation rights.¹⁹ Despite differences in some other respects, basic corporation theories asserted the significance of the economic rights of shareholders.²⁰ Thus, the marketability of shares deserves greater respect and protection by law.²¹ Shareholders may fully enjoy economic rights providing that they are able to transact their share with whomever capable of buying their share. And this is the foundation of the company business. Without this, it is unwise to expect investors to be interested to take part in share buying and selling activities. Obviously, shareholders of a publicly held company do

¹⁶ Iris H. Chiu, The Meaning of Share Ownership and the Governance Role of Shareholder Activism in the United Kingdom, *Rich. J. Global L. & Bus.*, Volume 8, Issue 2, (2008).P.120, available at: <http://scholarship.richmond.edu/> last accessed on 20 December 2019

¹⁷ Lécia Vicente, The Requirement of Consent for the Transfer of Shares and Freedoms of Movement: Toward the Liberalization of Private Limited Liability Companies, A comparative study of the laws of Portugal, France, Italy, Spain, the United Kingdom and the United States and its interplay with EU law, European University Institute , PHD Thesis, (2014).P.244-248[hereinafter, Lécia, The Requirement of Consent for the Transfer of Shares and Freedoms of Movement]; Andreas , Comparative Company Law , Supra Note 1,P. 244.

¹⁸ Civil Code of the Empire of Ethiopia, 1960, *Negarit Gazzeta*, Extraordinary issue, Proc. No. 165, Issue No. 2, Art 1128, 1127, 1186, 1191, 1310, 2266; Commercial Code of Ethiopia, *Supra Note 9*,Article 345

¹⁹ Andreas C., *Comparative Company Law*, *Supra Note 1*, PP. 264-269. Economic rights of share include right to transfer, share in the profit of the company, and right to receive residual share up on liquidation. Political rights, also called control rights, include voting rights which enable a shareholder to elect directors or approve important changes in the company, such as mergers. Rights to assume board position and other key position in a company are management rights of shareholders, but such rights are less significant in public commercial company as management of such company is hold by professionals. Litigation rights, which include action against directors for breach of statutory duties and fiduciary duties, enable shareholders to maintain their interest in shares. The scope of rights to a shareholder may vary depending on the classes of share. For example, preference shareholders, unlike common shareholders, enjoy rights arising from contracts. It may also vary depending on the nature of issuing company. For example, unlike the case of share companies, right to transfer share in closed companies subjected to multiple restrictions and the transfer does not automatically grant membership to the company for transfer management rights require the consent of non transferring shareholder.

²⁰ Julian Velasco, The Fundamental Rights of the Shareholder, *Supra Note 4*,P.425.

²¹ Julian Velasco, Taking Shareholder Rights Seriously, *U.C. Davis L. Rev.*, Volume 45, (2007),P 610, available at <https://heinonline.org>, last accessed on 02 Oct 2018; See also Julian Velasco, The Fundamental Rights of the Shareholder P.414-416; See also Hamilton F. Potter, Jr. and David I. Mclean ,Introduction to Book Entry Transfer of Securities, American Bar Association, The Business Lawyer, Vol. d28, No. 1 (November 1972), P.214,259-264 available at URL: <https://www.jstor.org/>, last accessed: 03-12-2019 07:40 UTC

not run the company's business as the day to day business of the company is in the hands of professional managers. This separation between the shareholder and management of corporations has its base on greater freedom to transfer rights attached to shares.²² For the best realization of its transferability, shares of public companies are usually certificated.²³

In this regard, the corporate law approach is that for shareholders are not entitled to run the business personally, they should be entitled to sell shares freely.²⁴ This is why, though steadily changes over the jurisprudence of the nature of rights attached to shares, free transferability of shares remained as one foundation ever established in corporate laws.²⁵ Respecting and working for the realization of this fundamental right of shareholders is the primary purpose of corporate managers, and the corporation itself. This is also a complement to the principle of shareholder primacy governance²⁶ which is a foundational concept of corporate law and governance. However, whether the general rules of transfer or special rules of equity securities are applicable to the transfer of shares has been a contentious issue in corporate jurisprudence.²⁷ Controversies and critics²⁸

²² Egon, The Transfer of Shares in a Commercial Corporation - A Comparative Study, *Supra Note* 2, P.494

Separation of ownership and management is a key feature of Share Company. And this is so partly because shareholders have no, save rare exception, fiduciary duty to a publicly held company and their share ownership does not directly impact the corporation. Their right to sell shares is presumed as fundamental for not only it is a means of obtaining economic benefit from their investment in the corporation but it is their means of exit should they become dissatisfied with management.

²³ Andreas, *Comparative Company Law*, *Supra Note* 1, P. 259-264.

²⁴ John Armour, & et al, The Essential Elements of Corporate Law: What is corporate law? Harvard Law School, Cambridge, (7/2009). Discussion Paper No. 643 (2009), P. 2; See also Julian Velasco, The Fundamental Rights of the Shareholder, *Supra Note* 4, P.322

²⁵ Kent Greenfield, *The Failure of Corporate Law fundamental flaws & progressive possibilities*, the University of Chicago Press, (2006), P.131; Stephen Bainbridge, *The New Corporate Governance in Theory and Practice*, Oxford University Press, Oxford, 2008, P.51. Laws of corporations founded on the principles free transferability of shares, legal personality, limited liability, separation of ownership and management.

²⁶ Robert J. Rhee, A Legal Theory of Shareholder Primacy, *Minn. Law. Rev.*, Volume 102, (2018), PP.1951-1952, available at <https://heinonline.org>, last accessed on 02 Oct 2018. The idea of corporate primacy dictates that shareholders have the priority interest in both economics and governance of the corporation. In fact opponents of this idea argue in favor of stakeholder approach arguing that stakeholders other than shareholders also deserve proper protection.

²⁷ Alfred F. Conard, An Overview of the Laws of Corporations, The Michigan Law Review Association, *Michigan Law Review*, Vol. 71, No. 4 (1973), P. 621-690, available at <https://www.jstor.org/stable>, last accessed on 10 July 2019, P. 669; D. S. C. Corporations: Negotiability of Stock Certificates: Estoppel of Owner to Assert Title as against Bona Fide Purchaser When Certificates, Indorsed in Blank, Are Lost, Stolen, or Obtained from Owner by Fraud, *California Law Review*, Vol. 17, No. 4 (1929), P. 403-411, available at URL: <https://www.jstor.org/stable>, last accessed on 29 July 2019. [hereinafter D. S. C. Corporations: Negotiability of Stock Certificate]

²⁸ D. S. C, *Corporations: Negotiability of Stock Certificate*, *Supra Note* 26, P.404-406. Treating shares like other negotiable instrument contradict the basic nature of shares. This is so because interest in shares may exist, and are even required to exist, without certificate. Only fully paid up shares are certificated. It has been an accepted jurisprudence that membership rights of shareholders are not

surrounding the applicability of a particular law become less important for many countries have introduced independent legislation concerning the transfer of shares. Such rules maintained the free transferability of shares in publicly owned corporations. This is also true regardless of his intent to leave the company.²⁹ Thus, in modern company laws, shareholders' rights are *prima facie* freely transferable unless the articles of incorporation provide to the contrary.

1.1. Modes of share transfer

On the bases of modes of transfer, shares can be either bearer or registered.³⁰ Share transfer involves tripartite parties: transferor, transferee, and the company. Depending on its nature, bearer or registered, a share could be transferred through negotiation, assignment, or some special form of transfer specified in the article of association of the company. Until recently, to give effect to the transfer, parties have to follow the internal rules and procedures of the company.³¹ A mere delivery is enough to transfer ownership of bearer share. Currently transfer through physical delivery is a rare practice for the whole transaction carried out on the books of the clearing house in which shares are, in many instances, kept.³² Despite its multiple drawbacks³³, the transferability of ownership of bearer shares is fast, easy, cost-effective, and non-bureaucratic. On the other hand, transferring registered shares require additional qualifications. Under the French and German legal system, especially until the introduction of the dematerialization system (conversion of share certificate into an electronic format) in 1981, certificated fully paid up shares were presumed as and transferable like negotiable instruments. On the other hand, in countries

dependent upon the existence of a share certificate, which is but evidence of membership in the corporation. Critics of the time argued: unlike transactions over negotiable instruments which were subject of laws of negotiable instruments, purchasers of shares, who faced enforcement difficulties, are subject of rules of apparent agency, principle of *Estoppel* or *indicia* of ownership.

²⁹ Paul Eden, The Equitable Ownership of Shares, Cooke, Ch10, (2002), PP.183-184, available at <https://www.academia.edu>, last accessed on 10 Nov2019 [hereinafter Paul, The Equitable Ownership of Shares].

³⁰ *Ibid.*

³¹ In today's digital age transfer of share is usually processed by stock transfer agent (also called share registry) which applies software secretarial package or electronic share dealing system to cancel the name and certificate of the shareholder who sold the shares of stock, and substitutes the new owner's name on the official shareholder listing.

³² Andre Vanterpool, The Reasons for the Rise and Fall of Bearer Shares: A Company Law comparison between the UK and some offshore jurisdictions, LLM thesis, Institute of advanced legal study, University of London, (2016), PP.8-12, available at <https://sas-space.sas.ac.uk>, last accessed on 12 Feb 2019. [hereinafter, Andre, The Reasons for the Rise and Fall of Bearer Shares]

³³ *Ibid.* Nowadays, many countries revise their laws regarding bearer shares; some restrict the issuance of such shares others banned the use of bearer shares. This is due to the fact that bearer shares exploited as means of money laundering, tax evasion and avoidance, corruption and other financial crimes. Such drawbacks added by risks of loss are reasons for increasing disappearances of bearer share which had been common couple decades before.

influenced by English law, the transfer of certificated registered share is relatively complex as separation of legal title and beneficial interest is maintained in certificated shares while such distinction is absent in uncertificated shares.³⁴

Traditionally, transfer of certificated registered share requires the transferee return the transferor's certificate to the issuer, cancellation of the transferor's certificate by the issuer, the replacement of the transferor's name by that of the transferee on the books of the issuer, and issue by the issuer of a new certificate to the transferee, in the transferee's own name. Nowadays, the transferor would deliver the certificate and an endorsement in blank to his or her broker, who would deliver this documentation to the transferee's broker, for further action.³⁵ In cases where shares are not certificated, parties may, after concluding share sale and purchase agreement, submit a written instrument to the company. Where the company uses a transfer form, both transferor and transferee have to sign on the form. If no transfer form is used, the transferor prepares a document that corresponds to a transfer form.³⁶ The transfer of registered shares, certificated or not, completed upon registration on the book of the issuer.³⁷ Requirement of registration is not necessary where the share is a bearer one and the company issuing such share does not expressly require registration for the transfer of ownership. There are, however, practices of concluding written share sell agreement, and holders of such shares get registration at the company to complete the change in ownership.³⁸

The effect of unregistered transactions of share is controversial. An argument in this regard is that even if the purchaser does not acquire a complete legal title, a person who holds shares has an unconditional right to registration in the book of the company.³⁹ This seems at least true in case of bearer share for a mere

³⁴ Carsten Gerner & Michil Schiling, *Comparative Company Law*, 1st Edition, Oxford University Press, (2019), P. 341- 342, available at <https://books.google.com.et/books>, last accessed on 25 June 2020

³⁵ Geva, Benjamin, Recent International Developments in the Law of Negotiable Instruments and Payment and Settlement Systems, *Texas International Law Journal* ,(2007), P.705;Paul , The Equitable Ownership of Shares, *Supra Note 29*, P.185

³⁶ Egon, The Transfer of Shares in a Commercial Corporation-A comparative Study, *Supra Note 2*, P.512.

³⁷ Id., P.706; Paul, The Equitable Ownership of Shares, *Supra Note 29*, PP. 184-185. The trend in modern business is that of investors, both individuals and institutions no longer request paper share certificates issued in their own names but hold their shares via a nominee company in order to enjoy the benefits of electronic shareholding.

³⁸ This is the case mainly in closed corporation where membership rights to the company depend on the will of the non transferring shareholders. Primarily, the purpose is to ensure the legitimacy of proper transfer and membership, albeit articles of association unable to restrict free alienation of bearer share

³⁹ Borrowdale, The transfer of proprietary rights in shares: a South African distillation out of English roots, *The Comparative and International Law Journal of Southern Africa*, Vol. 18, No.1(1985), P.38,

delivery of the share certificate may suffice for the transfer of ownership.⁴⁰ The prevailing argument, however, is that share transfer is valid against the company and third parties only after the company received the application and effects registration.⁴¹ If not registered, it remains valid only between contracting parties in which case the transferee may raise the principle of *estoppels* as a defense. This argument was founded upon the division between legal and equitable title, beneficial ownership.⁴² Thus, where this is the case a holder in due course may compel the company to make registration, in which case the company has to validly refuse transfer on grounds of prior restrictions or register the bona fide purchaser who relied on the certificate. Generally, the security of business and investors is a priority in the transfer of bearer share while the security of title, which lies on the principle of '*nemo dat quad non habet*', is a priority in the transfer of registered shares.⁴³

1.2. Restrictions against Transferability of Shares

Though the default rule of transfer of shares in publicly held companies is free transferability⁴⁴, companies do not automatically approve and register the transfer. The transferor has to meet the necessary transfer requirements stipulated under pertinent laws and in the internal constitution of the company. As a rule, the transfer of shares of a publicly held company does not require the assent of the company; the company has no right to stipulate limitations in the transfer of shares.⁴⁵ Where there are limitations, such restrictions are presumed to ensure better protection of the company or/and shareholders. However, the restriction is there even in situations in which the law and the articles of

available at <https://www.jstor.org>, last accessed on 25Dec2019.[hereinafter, Borrowdale, The transfer of proprietary rights in shares: a South African distillation out of English roots]

⁴⁰ Id., Gerald M. Amero, Corporations Bearer Shares in the United States Civil Law Contrast Connecticut and Montana Statutes Authorizing Issuance, Cornell L. Rev. Volume 18 (1962),PP.178-179, available at: <http://scholarship.law>, last accessed on 25Dec2019

⁴¹ Borrowdale, The Transfer of Proprietary Rights in Shares: a South African Distillation Out of English Roots, *Supra Note* 39, P.38-39

⁴² Id., P..37 Beneficial ownership refers to having an ownership of the benefits of something without actually owning that thing.

⁴³ Andre, The Reasons for the Rise and Fall of Bearer Shares, *Supra Note* 32, P.7

⁴⁴ Kraakman, *Anatomy of Corporate Law*, *Supra Note* 4,P.10 Though share companies enjoyed limited liability and free transferability of shares, share companies are subjected to strict regulation, corporate social responsibility monitoring and financial disclosure. Unlike the case in share companies, restrictions imposed on share transfer is stringent in Private companies. The rationales of such restrictions are, *inter alia*, a desire to limit membership, the need to keep company secrets confidential, a devise to retain employees and persons with special expertise, to prevent shares from being hold by competitors.

⁴⁵ Guido Ferrarin, Corporate Ownership and Control: Law Reform and the Contestability of Corporate Control, Centre for Law and Finance, University of Genoa, Sweden, 2000, PP.6-7, available at: <https://www.oecd.org/>; Commercial Code of Ethiopia, *Supra Note* 9, Article 345

association provide mechanisms to prevent shareholders from being locked-in to the company. This could be a case where they attribute a greater value to those restrictions than to the right to freely resign from the company.

Even if they are not uniform across companies and jurisdictions, the most commonly stated restrictions, *inter alia*, are pre-emption rights of existing shareholders, the directors' power to authorize share transfers and share buy-back options of the company.⁴⁶ The effect of a deal in breach of such restrictions, however, does not seem similar across jurisdictions. For example, in countries influenced by English Law, courts grant equitable interest (beneficial ownership) to the purchaser instead of ordering specific performance.⁴⁷ This is the case even if it is a breach of the internal constitution of the company.⁴⁸

2. Transferability of Shares under Ethiopian Law

Free transferability of share is one of the core principles of the Ethiopian Commercial Code, where, holders of shares in Share Company are entitled with, *inter alia*, basic economic rights which includes the right to transfer.⁴⁹ The Code makes the transfer of share relatively much easier in public companies as compared to other forms of business entities.⁵⁰ In fact, the right to own and exchange one's properties is a constitutionally recognized right.⁵¹

On the bases of transferability, the Code recognizes two forms of shares: registered and bearer shares.⁵² Shares are also convertible from one to another, but only a share fully paid up can be a bearer share.⁵³ But, not all Share Companies are able to issue all types of shares.⁵⁴ Like other corporate laws, the Commercial Code dictates that bearer shares are transferable by mere delivery

⁴⁶*Ibid.* Preemption clause is a contractual obligation up on the shareholder to sell their share to the company or to other shareholder. And it is a priority right to the company to buy shares of its shareholders.

⁴⁷ Paul, The Equitable Ownership of Shares, *supra* Note 29, P. 186-190; See also, Lécia, The Requirement of Consent for the Transfer of Shares and Freedoms of Movement, *Supra* Note 17, P.245-246

⁴⁸ *Ibid.*

⁴⁹ *Id.*, Art 345 & 333

⁵⁰ Written agreement, approval by majority of the members representing at least three-quarters of the capital, and a register in the commercial register are conditions that must be satisfied in order to transfer shares in private limited companies.

⁵¹ The Constitution of Federal Democratic Republic of Ethiopia, Proclamation No.1/1995, *Federal Negarit Gazette*, (1995), Article 40.

⁵² Commercial Code of Ethiopia, *Supra* Note 9, Art.325

⁵³ *Id.*, Art.338, 325(3)

⁵⁴ Proclamation to Provide for Banking Business, Proclamation No. 592/2008, *Federal Negarit Gazette*, (2008), Article 10.[hereinafter, Banking Business Proclamation No.592/2008]. Ethiopia prohibits financial institutions from issuing bearer shares. Shares issued by Banks are only one class and registered as ordinary shares of the same par value.

of the instrument.⁵⁵ On the other hand, the transfer of register share is completed providing that the transfer registered in the books of register deposited at the head office of the issuing company and owners of such shares recorded in the registry.⁵⁶

Generally, transferring shares in public companies necessitate cause (juridical act or law), compliance with restrictions, if any, and registration.⁵⁷ The transfer of ownership of registered shares requires the conclusion of an agreement between the seller and the buyer (either on the share certificate itself or in a separate document), while the transfer of bearer shares may take place through the mere delivery of the shares. A complement to this is the rules of negotiable instruments that require the entry of the name of the transferee in the instrument in order to transfer instruments in a specified name.⁵⁸ A similar provision is also inserted in the proclamation enacted to regulate the banking business.⁵⁹ Where registration is required, failure to register makes the transaction null and void.⁶⁰

Laws governing negotiable instruments recognize the transferability of bearer instruments by mere delivery.⁶¹ Legal literature equate shares as negotiable instruments and call for the application of provisions of negotiable instruments for the transfer of shares.⁶² In fact, the definition of negotiable instruments under the Ethiopian law is much wider than the one adopted by other legal systems, particularly those following the Common Law tradition. Unlike the case of Ethiopia, US law, for example, restricts the scope of negotiable instruments to bills of exchange, checks and promissory notes.⁶³ Where shares equated as negotiable instruments, they are transferable by commercial procedures such as delivery which is simpler than ordinary assignment stipulated in the Civil Code. Where this is the case, rules regarding bearer instruments and instruments to a

⁵⁵ Commercial Code of Ethiopia, *Supra* Note 9, Art.340

⁵⁶ *Id.*, Article 341

⁵⁷ *Id.*, Article 333,341

⁵⁸ *Id.*, Article 722 and 723

⁵⁹ As per article 10 of the same proclamation, any transfer be registered in register of the bank and every bank shall keep a register of share as determined by the National Bank and which shall show the names and voting rights of shareholders.

⁶⁰ *ወ/ሮ መዋዕል ተኩሰ መርሻ vs አንበሳ ኢንተርናሽናል ባንክ፣ ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት፣ ቅዱ. 22፣ መ.ቁ. 139385 ፣ 2010 ዓ.ም.።*

⁶¹ Commercial Code of Ethiopia, *Supra* Note 9, Art.721

⁶² Fasil Alemayehu and Meheratbeb Teklemedhin, *Law of Banking, Negotiable Instrument and Insurance*, Teaching material, Prepared under the Sponsorship of the Justice and Legal System Research Institute sponsored by justice, 2009, P.1; Fasil Alemayehu, *Law of Property*, Teaching material, Prepared under the Sponsorship of the Justice and Legal System Research Institute sponsored by justice, 2009, PP. 25-26.

⁶³ Martin J. Aronstein, The Decline and Fall of The Stock Certificate in America, *Journal of Comparative Corporate Law and Securities Regulation* 1 (1978) ,Vol.1,Issue.3,PP.273-274, available at <https://scholarship.law.upenn> , last accessed on 25 Jan 2019.

specified person are applicable to, *mutatis mutandis*, bearer share, and registered share respectively. Under the Ethiopian general law of property, bearer shares assimilated as corporeal chattel the transfer of which requires only a valid cause and delivery.⁶⁴ Some also argue for, by analogizing shares as corporeal chattels, the application of rules of property governing acquisition and transfer of other kinds of corporeal chattels to the transfer of shares.⁶⁵ Where shares are assimilated as corporeal chattel, they are subject to rules governing corporeal movables.

In the opinion of the writer, given the special property nature of shares (*save the bearer type*) which is neither an ordinary ‘thing’ nor a negotiable instrument in its strict sense, applying rules of corporeal chattel or negotiable instrument in full terms may not be appropriate.⁶⁶ Since registered shares require registration for its transferability, such shares are special movable; movable properties that require registration and issuance of title deeds for their transfer are considered as special movables.⁶⁷ For a valid transfer of shares the instrument which establishes such rights drawn up in a valid legal form and register in a registrar.⁶⁸ Delivery of the certificated registered shares, which may or may not entail names of the holder, does not guarantee ownership nor did failure to take delivery denies ownership.⁶⁹ In this regard, a decision rendered by the Federal First Instance Court⁷⁰ dictated that ownership of shares proved not only checking the list of the name registered in the book of the company but also share certificates and registration in the commercial registration and licensing office.

Like elsewhere, the right to transfer shares is subjected to restrictions under the Ethiopian Legal System. In most cases, such restrictions may arise from the

⁶⁴ The Civil Code of Ethiopia, *Supra Note* 18, Art.1128.

⁶⁵ Gadissa Tesfaye & Mebrathom Fetewi, *Law of Sales and Security Devices Teaching Material*, Prepared under the Sponsorship of the Justice and Legal System Research Institute (2009), P.9

⁶⁶ For registered shares requires registration for its transferability, such shares can also be categorized as special movable for, at least in legal literatures, movables which require registration and title deeds for their transfer are considered as special movables. Thus, contract involving transactions of shares, for its special nature, is expected to be in written form, must be signed by contracting parties and attested by two witnesses. It is also arguable to apply art1128 of the civil code to claims and rights incorporated in registered securities. Especially, few rules regarding possession in good faith (1165, 1167 are not applicable to shares. A valid property acquisition of shares requires not only a cause but also registration and issuance of a certificate of title by a proper authority to transfer its ownership.

⁶⁷ Muradu Abdo, *Subsidiary Classification of Goods under Ethiopian Property Law*, *Mizan Law Rev*, Vol.2 (1), (2008), PP.81-82.

⁶⁸ *Ibid*.

⁶⁹ Commercial Code of Ethiopia, *Supra Note* 9, Art. 330,325(1) &343(3).

⁷⁰ ፌ.ዲ.ዲ. ጸ.ጥርስ ግመስቀል፤ የኢ.ፌ.ዲ.ደ ከባንክ ህግ፤ ሁለተኛ እንግሮ፤ 2008 ዓ.ም. ገጽ 118.

articles of association or else by resolution of the extraordinary meetings.⁷¹ Pre-emption rights of the company or shareholders⁷², assuming the position of directorship⁷³, the directors' power to authorize share transfers⁷⁴, and buyback options of the company⁷⁵ are, *inter alia*, possible limitations on the transferability of shares under Ethiopian company law. Where shares are issued in return for contribution in kind, such shares should remain with the company and may not be assigned until verification of valuation and they may not be subject of transaction till the expiry of a minimum of two years from registration.⁷⁶ However, such restrictions not imposed to hinder the free transferability of shares but maximize shareholder interests.

The effect of failure to observe this restriction, however, is not clear in Ethiopia. It seems that the share sale and purchase agreement do not bind the company for the holder to try to dispose of his share by violating his contractual agreement with the company. However, the transferor's relationship with the transferee is subject to the principle of the general contract.

3. The Case of Spousal Consent for the Transfer of Shares

As discussed in the preceding sections, shares issued by public companies are freely transferable although company laws mainly govern ways and procedures of shares transfer. However, discussion over the issue of spousal consent *vis-à-vis* transfer of shares remains incomplete if concluded without addressing the proprietary relationship of spouses which is principally determined by the family law regime. Whether spousal consent is a requirement to transfer shares of public companies depends, not only on the analysis of corporate law but also on the matrimonial regime which is a matter of family law.

3.1. Company Laws in Relation to Spousal Interest

The law of a company regulates, *inter alia*, the relationship between a company and its registered shareholders; neither relationship between spouses nor the company's relations with the spouses of its shareholders is the focus. In fact, in a few instances, companies insert provisions to regulate spousal interests for the

⁷¹ Commercial Code of Ethiopia, *Supra* Note 9, Art. 333 & 349

⁷² *Id.*, Art. 333(2)(a)

⁷³ *Id.*, Art. 349

⁷⁴ *Id.*, Art. 333(2)

⁷⁵ *Id.*, Art. 332

⁷⁶ *Id.*, Art. 339(2) & 315

realization of certain purposes. Especially in “closed” companies⁷⁷, shareholders usually either make an express agreement regarding spousal consent and state such stipulation in the internal constitution of the company or let their spouses sign-on the spousal consent clause which is attached as an exhibit in the share purchase agreement.⁷⁸ The very purposes of such spousal consent are to deter undesirable requests from non registered spouses for membership and to maintain the ownership structure of the company.⁷⁹ The issue is less important in countries which maintained separate property regime, however the case is vital in those states with a community of property regime for it is difficult to enforce equal management power of spouses due to the structure of corporations.⁸⁰ The usual trend in this regard is only an elected spouse has the authority to manage the business, even where shares of stock are subject to joint or equal management.⁸¹

Under the company laws of the UK and South Africa, provisions related to spouses of shareholders of public companies are within sections dealing with beneficial ownership.⁸² Their company laws entitle a shareholder’s spouse with a right to control the exercise of any such rights arising from holding of shares.⁸³ Such countries require public companies to make notice requiring information about interests in their shares.⁸⁴ Such notice is made to any person whom the company knows or has reasonable cause to believe to be interested in the company’s shares or to have been so interested at any time during the three

⁷⁷ A closed company, for the purpose of this article, refers to companies with a small number of shareholders who actively participate in the management of the business, and whose shares are not publicly traded.

⁷⁸ Gilbert N. Kruger, Stock Transfer Restrictions and the Close Corporation--A Statutory Proposal, *Hastings L.J.*, Vol.17, Issue 583 (1966),P. 584-585 ,available at <https://repository.uchastings.>, last accessed on 26 Nov. 2019; Richard R. Orsinger & *et al*, Dividing Ownership Interests in Closely-held Business Entities: Things to Know and to Avoid, (2016) , PP. 2-3, Available at <http://www.orsinger>, last accessed on 01 Jan 2020.[hereinafter Richard & *et al*, Dividing Ownership Interests in Closely-held Business Entities]

⁷⁹ Richard & *et al*, Dividing Ownership Interests in Closely-held Business Entities, *Supra* note 78, PP.2-3

⁸⁰ J.Thomas Oldham, Management of the Community Estate during an Intact Marriage, *Law and Contemporary Problems*, Vol. 56: No. 2 (1993),P. 125, available at <https://scholarship.law.duke>, last accessed 29Jan2020.[hereinafter Thomas, Management of the Community Estate during an Intact Marriage, *Law and Contemporary Problems*]

⁸¹ *Ibid*

⁸² UK Company Act 2006 , Chapter 24, Part 22, Art.820 ,822, available at <https://www.legislation.gov.uk>, last accessed on 23 Dec.2019 [hereinafter, UK Company Act of 2006]; Government Gazette of Republic of South Africa, No. 71, Companies Act.2008, Vol. 526, Art. 56(2)(b), available at <https://www.gov.za/documents/companies>, last accessed on 11 Sept.2019 [hereinafter South Africa Company Act 2008]. Though the primary purpose of provisions related to beneficial ownership is to enhance the effectiveness of regulators and contribute to a culture of transparency by companies, in the interest of protecting investors and creating confidence in markets, demand for disclosure of beneficial ownership create opportunity to spouses to report or be vigilant of their interest in shares.

⁸³ *Ibid*.

⁸⁴ Andre, The Reasons for the Rise and Fall of Bearer Shares, *Supra* Note 32, PP.30-33

years immediately preceding the date on which the notice is issued.⁸⁵ Failure to comply with such notice entails criminal liability and the company may request courts to order restrictions, including its transferability, on such shares. Similar corporate rules are identified in many countries and their existence also recommended by the OECD.⁸⁶ As per the OECD report, company laws of respondent countries assume a person, by virtue of his marriage to a shareholder, as a beneficial owner of shares registered in the name of his spouse.⁸⁷ A spouse has a beneficial interest in securities if he/she is married in community of property to a person who has a beneficial interest in that security.⁸⁸

This does not, however, implicate whether a shareholder of a publicly held company has to obtain his spouse's consent to transfer his interest in shares. Provisions as to shareholders' spousal consent for the transfer of shares in publicly held companies is generally absent under company laws. A rare instance is a stipulation declaring the unlawfulness of the requirement of spousal consent as a condition of purchase and sale of securities inserted in the corporate law of the US state of California.⁸⁹ As a rule, corporation or transfer agent or registrar is not liable to any married person or any transferee of such person for transferring shares or other securities on their books at the instance of the person in whose name they registered, without the signature of that person's spouse. This is true even if registration indicates that the shares or other securities are community property.⁹⁰ Though such unusual provisions under the company laws of the State of California, the trend is regulating issues of spousal consent *vis-à-vis* transfer of shares by family laws, rather than company laws. While corporate laws stipulate general principles and rules of share transfer, the law of families regulates spousal interest in relation to such transfer. Thus, a direct and complete answer to the issue at hand acquired by looking at the family laws for it is a special law governing the proprietary relationship of spouses and its effect on the transfer of properties.

⁸⁵ UK Company Act 2006, *Supra Note* 21, Art. 793,794; South Africa Company Act 2008, *Supra Note* 82, Art.122

⁸⁶ OECD, Disclosure of Beneficial Ownership and Control in Listed Companies in Asia, (2016), P.7,9 &19, available at <https://www.oecd.org/daf/ca/>, last accessed 29 Nov. 2019

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ California Corp Code, Section 420(c), (2019), available at <https://codes.findlaw.com/ca/corporations> , last accessed on May 2020.

⁹⁰ *Ibid.*

3.2. Family Laws in Relation to the Requirement of Spousal Consent for the Transfer of Shares

As also mentioned above, many countries regulate ownership and manner of disposition of shares/stocks by their family laws. The issue of whether the consent of only one of or both spouse/s is/are required to dispose of community property arises from the nature of the marital property system which is generally classified either common law system or community of property system.⁹¹ The former lies upon title; neither spouse has an interest in the property of the other unless the property is jointly owned, and the later dictates properties acquired during the marriage as common property and spouses have equal/joint management rights.⁹² Obviously, where shares registered in the name of both spouses, disposal of such shares requires the consent of both, thus, spousal consent is not an issue for the transferee and other concerned parties have notice of joinder.⁹³ Thus, spousal consent is an issue only in countries with a community of property and where shares are registered in the name of one spouse for the fact that legal title, being in the name of only one spouse, does not characterize the property either separate or community.⁹⁴

⁹¹ Generally, countries with Civil Law traditions have statutory defined default matrimonial regimes where as countries with common law tradition adopted default rule of separation of property. Some countries govern proprietary relationship of spouses on bases of separate property systems which is based on the premise that marriage is solely an interpersonal union. In such cases either all property are owned separately both before and after marriage or presume separation but courts are given discretion to make equitable distribution of property at death or dissolution of the marriage. The principle in states with community of property is properties, save few exceptions, presumed to be community property unless the source of the acquisition of property can be traced to a separate source or the parties have entered into an agreement specifying the nature of the property. Where property is acquired during marriage, the community presumption would apply even if such property titled to one spouse. Thus, shares in business entities are common properties of spouses unless it becomes separate by prenuptial agreement or any other lawful reason. This is also true under Ethiopian law.

⁹² Michael Davie, *Matrimonial Property in English and American Conflict of Laws*, Cambridge University Press, *The International and Comparative Law Quarterly*, Vol. 42, No. 4 (Oct., 1993), pp.855-856, available at <https://www.jstor.org>, last accessed: 28-12-2019 12:07; Thomas, *Management of the Community Estate during an Intact Marriage*, Law and Contemporary Problems, *Supra Note* 80,P. 99.

⁹³ It is true that title to property, whether the share registered in the name of one or both, does not conclusively determine whether it is community, quasi-community, or separate property. However, legal title to property create presumptions, the person/s whose name is/are appeared in the title deed presumed as owner/s. This does not, however, implicate shares registered in the name of a spouse is separate property of that spouse, since status of property in marriage basically determined by multiple factors including source, prenuptial agreement, and the matrimonial regime of a particular state. But, regarding shares of public commercial companies, title deed creates presumption of ownership only to person whose name is registered. Such presumption entails greater weight than community property presumption for this presumed as best mechanism to protect the interest of third parties. The reverse is, however, true in relations to shares attached to immovable property or issued by civil company shares giving right to use home.

⁹⁴ Lucia Ruggeri,Ivana ,et al, *Family Property and Succession in EU Member States; National Reports on the Collected Data*, University of Rijeka, Faculty of Law, Croatia,(2019), PP.691-692, available at

Where there is no statutory matrimonial regime, like English Law, for example, marriage in principle does not have proprietary effects; husband and wife are treated like two persons for the purpose of acquisition of property.⁹⁵ Each spouse owns their property and is liable for his or her debt. Thus, shares registered in the name of a spouse presumed as owned by that spouse, thus, freely transferable without the consent of the other spouse; she may transfer or enjoy the rights attached to such share without the concurrence of her husband.⁹⁶ Shareholders' marriage status does not of itself in any way alter his property rights either *vis-à-vis* his spouse or third parties such as creditors.⁹⁷

In the US, though most states still maintain common law tradition like that of the English law, an increasing number of states are adopting the principle of the community of property.⁹⁸ In states where the separation of property is the principle, only a spouse whose name appeared on the deed or registration document, where no such certificate, or other title paper, presumed as owner and disposal of such rights attached to does not necessitate the consent of the other.⁹⁹ In cases of an item that doesn't have a title document, the one who paid or got it as a gift presumed as owner.¹⁰⁰ In States with a community of property, shares registered in the name of only one spouse presumed as common property unless the contrary proved.¹⁰¹ However, even in such community property states, for corporate change in ownership purposes, a husband and a wife are treated as separate individuals, and the ownership interest of one spouse in a corporation does not attribute to the other. The underlying principle, with regards to the management of shares, is legal title presumption prevails over the

<https://www.euro-family.eu> , last accessed on 11 Sept 2019.[hereinafter, Lucia, *Family Property and Succession in EU Member States*]; Thomas M. Featherston, Jr., separate property or community property: an introduction to marital property law in the community property states, *Baylor University School of Law Waco*, Texas ACTEC Rocky Mountain Regional Austin, Texas September 9, 2017.P.9.

⁹⁵ *Ibid*; Anne Sanders, private autonomy and marital property agreements, *Cambridge University Press*, Vol. 59, No. 3 (JULY 2010), P.575, available at Stable URL: <https://www.jstor.org> , last accessed on 28 Aug 2019.

⁹⁶ UK Public General Acts, Married Women's Property Act 1882 , CHAPTER 75, An Act to consolidate and amend the Acts relating to the Property of Married Women. Chapter 75, Art. 6, available at <http://www.legislation.gov.uk/>, last accessed on 25 Aug 2019.

⁹⁷ *Ibid*

⁹⁸ Thomas, Management of the Community Estate during an Intact Marriage, Law and Contemporary Problems, *Supra Note* 80, P. 125.

⁹⁹ *Ibid*.

¹⁰⁰ Lina Guillen, Marriage & Property Ownership: Who Owns What?, (2020), available at <https://www.nolo.com> , last accessed on 3 Feb 2020

¹⁰¹ Thomas, Management of the Community Estate during an Intact Marriage, Law and Contemporary Problems, *Supra Note* 80, PP.113-120.

presumption of a community of property unless contrary proved by clear and convincing evidence.¹⁰²

Thus, in the US, be it in a state of community or separate matrimonial regime, shareholders of public corporations may transfer their shares without the consent of their spouse, unless such shares are registered in the name of both spouses or shares in a real estate company; in this case a shareholder, in a community of property, has to obtain the consent of his spouse even if the shares are registered in his name only.¹⁰³ Where shares registered in the name of a spouse with clear consent/ knowledge of the other spouse, such property presumed as, for the purpose of a transaction, separate property even if acquired from a community of property.¹⁰⁴ In order to deter fraudulent or abuses by one spouse, the US community property states confer "add-a-name" remedy to the other spouse, have useful statutes that permit a spouse to add his or her name to the title registered in the name of the other spouse.¹⁰⁵ Further, the US law protects corporations in making the transfer as well as the transferee in acquiring, through purchase or in any way, rights against claims of spouses of the transferor.¹⁰⁶

Similarly, the French Family law, which adopts the default rule of the community of property, allows a spouse to transfer shares of a commercial company without the consent of the other even if such shares are common property.¹⁰⁷ In fact, under French law, a spouse cannot sale shares of, even if registered in his/her name only, the civil company giving a right to use a home.¹⁰⁸ A narrower approach is adopted by South African law which generally

¹⁰² *Ibid*; SupporTax, Lawgic, The Family Residence, A Comprehensive Review of key Legal Concepts and Principles, *California Family law*, (2014), P.11, available at <http://www.atyvideo.com/documents>, last accessed on 01Jan 2020.[Here in after: SupporTax, Lawgic, The family Residence, A Comprehensive Review of key Legal Concepts and Principles]

¹⁰³ Kenneth D. McCoy Jr., Problems In Classification of Particular Property Under Community Property Regimes, *Lousiana. L. Rev.* Vol.25, No.1, (1964) PP. 121-125, available at: <https://digitalcommons.law>, last accessed on 01Jan 2020.[Here in after, Kenneth D, Problems In Classification of Particular Property Under Community Property Regimes].

¹⁰⁴ SupporTax, Lawgic, The Family Residence, A Comprehensive Review of key Legal Concepts and Principles, *Supra Note* 102, P.11

¹⁰⁵ Thomas Oldham, Management of the community Estate during an Intact Marriage, *Supra Note* 80,P.115

¹⁰⁶ *Ibid*.

¹⁰⁷ Prof. Frédérique Ferrand and Dr. Bente Braat, France National Report, (2008), University Jean Moulin Lyon 3, France , P.15, available at <http://ceflonline.net>, last accessed on 05 Jan 2020 ; Lucia, Family Property and Succession in EU Member States, *Supra Note* 94, P. 240

¹⁰⁸ Bernard Audit, Recent Revisions of the French Civil Code, *Lousiana. L. Rev.*, Vol.38, No.3, (1978), P.781, available at: <https://digitalcommons>, last accessed on 02 Jan 2020; L. Neville Brown, The Reform of French Matrimonial Property Law, *Oxford University Press, The American Journal of Comparative Law*, Vol.14, No. 2 (1965),P. 314, available at <https://www.jstor.org> , last accessed on 02 Jan 2020.

requires a married person to produce written consent of his spouse in order to alienate, cede or pledge any shares, stock, debentures, etc. unless he acted in the ordinary course of his profession, trade or business.¹⁰⁹ To one's surprise, like the case in the US, France, and English law, a spouse in South Africa can transfer shares of a commercial company without the consent of the other spouse.¹¹⁰ Even where spousal consent is required for certain kinds of transactions of shares, the inclination of South African family law is making the transaction effective than considering it void or subjected to cancellation.¹¹¹

The general rule, at least in the selected countries, is that spousal consent is not a requirement to the transfer shares unless such shares are registered in the name of both spouses or are shares of the civil company.¹¹² By waving the requirement of spousal consent for the transfer of shares of a commercial company, family laws of US community property states, France and South Africa complement with the central approach of company laws: Shares of commercial companies are supposed to be negotiable and transferable freely. It seems in cases of transactions of shares of a commercial company, priority is given to business security than non-consenting spouses. To protect the interest of the non-consenting spouse and the family institution, their laws prefer to penalize the contracting spouse, in case of abuse, and confer an add name remedy to the other spouse.

¹⁰⁹ Bertus Preller, *The Matrimonial Property System*, (2019), PP.3-5, available at <https://www.divorcelaws.co>, last accessed on 24 Jan 2019; South African Government :The Matrimonial Property Act (Act No. 88 of 1984) , (2009), Art.15(2)(b) & 15(6), available at <https://www.gov.za/documents/>, last accessed on 02 Jan 2020 [Here in after, South Africa Matrimonial Act 88 of 1984]. Even in cases where non consenting parties entitled to challenges transactions of shares (like shares giving right in an immovable), the South African solution does not automatically entitle the non consenting spouse with right to request an order of cancellation or invalidation of the contract of share sale and purchase agreement. Rather it declares the transactions valid providing that the person, who deals with the spouse, does not know and cannot reasonably know that the transaction is contrary to those provisions prohibiting transactions without the consent of spouse. The same goes even if the spouse engaged in the transactions without requesting his spouse's consent for he knows or ought reasonably to know that he will probably not obtain the consent required. The law penalizes such a spouse and an adjustment effected in favor of the other spouse upon the division of the joint estate if the joint estate suffers a loss due to the transaction.

¹¹⁰ *Ibid.*

¹¹¹ *Id.*, P.5.

¹¹² Countries incorporate rules requiring spousal consent in transactions of shares giving right to an immovable or right to use or lease immovable. Deals and transfer of such shares always require consent of both spouses and companies issuing such share incorporate spousal consent clause in their share transfer form and transacting party has to complete and execute, or cause to be executed, the enclosed spousal consent clause. He/she has to either bring his spouse execute such consent or if he is not married, has to confirm his status as single.

4. The Requirement of Spousal Consent Vis-à-Vis Transfer of Shares in Public Companies under Ethiopian Law

As discussed in the preceding sections, what is required to, at least as per the Commercial Code, transfer shares of public companies is the consent of the transferor, registration, and return of the certificate of share, if any. On the other hand, the Revised Family Code requires the consent of both spouses in cases of transactions the value of which is more than five hundred Birr unless the subject of the transaction is separate property.¹¹³ The practice is mixed and arbitrary. Some companies require transferors to obtain spousal consent or document to evidence separate ownership or to produce a document attesting one is not married, while others do not.¹¹⁴ The absence of clear regulation together with practical inconstancies led to the discord of opinion which brought doubt into this issue. As a result, companies find themselves in a situation where they are unsure of how to act. The writer, hereunder, carefully analyzes pertinent laws of Ethiopia and assesses the practice with the purpose of reaching sound conclusions regarding whether spousal consent is, and should be a requirement to transfer shares of public companies.

4.1. The Position of Ethiopian Company Law

The Commercial Code of Ethiopia not only recognized shareholders' right to transfer shares,¹¹⁵ but it also provides modes of shares transfer.¹¹⁶ Given the fact that most companies are obliged to follow sample memorandum and article of association, which are usually copies of the sample offered by the registering office, the internal constitution of companies does not incorporate detailed rules of procedures and requirements necessary for the transfer of shares.¹¹⁷ Nor are uniform share transfer requirements evolved by business practice.

¹¹³ Revised Family Code of Ethiopia, *Supra* Note 11, Art. 68

¹¹⁴ See Discussion *infra*, Foot Note Description, P.20

¹¹⁵ Commercial Code of Ethiopia, *Supra* Note 9, Art. 333,345

¹¹⁶ *Id.*, Art 304,306

¹¹⁷ Generally, as I extracted from my interviewees and/or personal observations & experience, what is done in practice is that the transferor, after concluding an agreement with the transferee, present a transfer request, usually in written form, to the issuing company. The company, after confirming the transferor's right to transfer and payment of transfer fee, let both parties to sign on share transfer form prepared in three or four copies. Then the company, after approving the transfer by board minutes and putting its stamp on the transfer form, takes the signed form together documents like an application letter and copy of the parties' Id No. to notary office or registering office. The official in the notary or registering office, as the case may be, up on payment of a *stamp duty*, puts its seal on each page of the transfer form and letter of application presented to it by the company. Finally, the official deposits a copy of it in the file of the company and returns the remaining copies to the company. The abovementioned procedures and requirement, however, does not work for transfer of shares issued by

Business practice as to spousal consent is mixed and arbitrary.¹¹⁸ There are instances a transferor is required to bring his/her spouse to sign on a written share sell and purchase agreement and a copy of which deposited in the company.¹¹⁹ In some cases, companies insert the spousal consent clause in the transfer form¹²⁰ and on which spouse of the transferor signs. If the transferor is not married, he/she has to prove it by producing a document attesting his/her marital status.¹²¹ Even if determining the identity of the seller is relatively easy, ascertaining the identity of the spouse may not be an easy task. The usual practice, in this case, is to request the seller produce a legal certified document as to his marital status.¹²² Some others don't require spousal consent and they simply follow the requirement stated in the model transfer form, which has no

Banks; following delegation by National Bank of Ethiopia, transfer of shares issued by commercial Bank processed and completed in the concerned Bank itself.

In SNNPE and ANRS, transfer of shares completed after an approval by the registering office. In the remaining parts of Ethiopia, transfer completed up on the approval of document authentication and registration office. To complement with 'Doing Business Report' the FDRE Attorney General, by a letter written on 03/04/2012 E.c, delegate powers previously vested on the hands of Federal Documents Authentication and Registration Agency to Ministry of Trade and Industry which in turn delegate its power to Regional Trade Bureau. The scope of the delegation is, however, arguable.

¹¹⁸ Interview with Proff Tilahun Teshome, Proffessor of Law at AAU and senior attorney at Law, Adiss Ababa(02 Jan 2020), Aschalaw Ashagrie, Attorney at Law and Professor of Law at AAU,Adiss Abeba (10 Dec 2019);Feqadu Petros, Attorney at Law, Former professor of Law at AAU,Adiss Abeba (15 Dec 2019); Nega Mirete,Legal &Shareholders' Affairs Manager, Habesha Breweries Share Company, former professor of law at BDU ,Adiss Abeba(10 Jan 2020);Habtamu Mengistu, General manager of Abay Bank S.c Bahir Dar(15Dec 2019), Tewachew Gelaw, General Manager of NIB International Bank S.c, Bahir Dar Branch;Senalet Betremariam, Share and shareholder Administrator of Abissina Bank S.c, Addis Abeba(14 Jan 2020). Note that the stance of my interviewees , with regard to the requirement of spousal consent is not the same. For example, Proff Tilahun Teshome, Aschalaw Ashagrie, &Feqadu Petros consider the requirement as unnecessary and against the property nature of shares. For them, the requirement of spousal consent arises from overwhelmed by women's rights protections. Others, relying on the family law, stress on the importance of involving spouses during shares transactions for avoiding unnecessary risks to the company and the purchaser.

¹¹⁹ *Ibid*

¹²⁰ See, for example, the transfer form of Abay International Bank Sc, Bahir Dar Mahel Gebiya Sc.& Apple Nigid and Apartment Sc.[copy of the transfer form can be accessed from the writer] Though the Commercial code does not prescribe a specific transfer form be used, companies use 'standard' transfer form which is usually acquired from registering office. A typical transfer form entails the name of transferor, transferee, and number of shares owned by the transferor, number of shares be transferred, the par value of shares, signature of the transferor, and signature of the transferee. No spousal consent clause inserted in the transfer form. Companies do not insert, at least from what I have observed and learned from statements given from my respondents, provisions dealing spousal interests in their internal constitution.

¹²¹ Interview with Mr.Birhanu Teshome president of Bahir Dar Mahel Gebiya S.c, Bahir dar,(15 December 2020); Mr. Nega Mirete,Legal &Shareholders' Affairs Manager, Habesha Breweries Share Company, former professor of law at BDU, Adiss Abeba(10 Jan 2020);Habtamu Mengistu, General manager of Abay Bank S.c,Bahir Dar Branch (15Dec 2019), Tewachew Gelaw, General Manager of NIB International Bank S.c, Bahir Dar Branch;Senalet Betremariam, Share and shareholder Administrator of Abyssinia Bank S.c, Addis Ababa(14 Jan 2020).

¹²² *Ibid*

spousal consent clause, of the registering office.¹²³ Even when companies don't request, some transferees demand transferors to, to avoid possible risks, have written consent of their spouses or sign on an independent share sell and purchase agreement.¹²⁴ Similarly, the standard memorandum and article of association offered by the same body are silent about spousal consent and spouses' property interest issues.¹²⁵

Such a requirement is also absent in the Commercial Code. The Code does not notify the spouse's ownership interest in shares issued by a business entity nor does it require spousal consent for the transfer of such shares. If a spouse acquires registered shares by prenuptial agreement or through finances belonging to the community property, it is uncertain whether the other spouse also becomes a member of the company. Nor does the code declares spouse as, like the case in most countries and as revealed by the OECD report, a *defacto* beneficial owner of shares registered in the name of the other spouse. Provisions dealing with share companies have not mentioned the word spouse, save their exclusion as auditor¹²⁶, nor does it mention the requirement of the phrase "spousal consent" for transferring shares. Whether one has to acquire a spousal consent to dispose shares issued in share companies, or not, does not arise from the readings of provisions incorporated under the company law of Ethiopia. Only shareholders are entitled to rights attached to shares. Even if joint ownership over shares is recognized, the Code requires, due to the indivisibility nature of shares, the appointment of a representative to exercise shareholder's rights.¹²⁷

A pertinent provision in the Code is article 16 which authorizes a trader to transact without consent of his spouse unless clear objection aroused. This should not be, however, construed as if all married traders have the right to transfer shares without the consent of their spouses. A trader can do it where

¹²³ One may assert this fact by looking the copy of shares transfer certificate deposited in the registering office of ANRS Trade Bureau. One may also see model transfer form, which is available and easily accessible in each regional trade bureau [a copy of it can also be accessed from the writer].

¹²⁴ For example, my interviewee Mr. Kedir Alemu, V.Manager of Bunna International Bank Sc, Mr. Shegaw Taye general manager of Apple Business and Apartment Sc and Mr. Gebeyehu Asamenie , chair person of Miraf Business and Apartment Sc, told me that transacting parties , in addition to the transfer form formally used by the company, usually undertake an independent written shares purchase and sell contract. This is, according to my interviewee, common especially when they don't know each other, for avoiding risks. And it is a trend that the spouse, if any, of the transferor puts its signature on the written agreement. A copy of such agreement deposited in the company.

¹²⁵ One may assert this fact by looking the various memorandum and article of association deposited in the registering office of Regional Trade Bureau and Ministry of Trade

¹²⁶ Commercial Code of Ethiopia, *Supra* Note 9, Art 370(b)

¹²⁷ *Id.*, Art. 328

dealings on shares are part of or related to the ordinary course of the trader's profession, trade or business. This seems similar to the South African approach which does not require spousal consent in case of transactions of shares if performed by a spouse in the ordinary course of one's profession, trade, or business.¹²⁸ However, the South African family law, which has similar matrimonial regimes with regard to the management community of property like that of Ethiopia¹²⁹, extends this protection to non-traders engaged in the transfer of shares. As will be discussed in the upcoming section, the Ethiopian family law does not expressly exempt spousal consent for the transfer of shares.

Given the property nature of shares and because neither the Commercial Code nor the sample transfer form, which is supplied by the registering office, requires spousal consent, at least at this stage, that transfer of shares of public companies is not subjected to the requirement of spousal consent. It is, however, too early to conclude without analyzing other pertinent laws dealing with spouse's proprietary interest on shares registered in the name of the other spouses and resultant effects on transferability.

The silence of the Commercial Code is not an exception to Ethiopia. As discussed in the preceding chapter, company laws of UK, US community property states (with the exception of the US state of California), South Africa, and France do not regulate the issue of spousal consent by their company laws. It is through the provisions under their family law they regulate the issue of spousal consent for the transfer of shares. They exempt the transfer of shares of commercial companies, save a few exceptions, from the general requirement of spousal consent. Thus, like the case of the aforementioned countries, one has to consult the Revised Family Code Proclamation, to safely conclude whether spousal consent is a requirement or not.

¹²⁸ South African Government, South Africa Matrimonial Act 88 of 1984, *Supra Note* 109, Art.15(6)

¹²⁹ Under family laws of both Ethiopia and South Africa, spouses have equal control and management over common property of an intact marriage. Their laws generally require the consent of both spouses to alienate common property. Art 15(2)(c) of South Africa Matrimonial Property Act 88 of 1984 dictates " ... a spouse in a marriage in community of property may perform any juristic act with regard to the joint estate alienate, cede or pledge any shares, stock,.... by or on behalf of the other spouse in a financial institution, forming part of the joint estate". Plus, art.15(7) states: "Notwithstanding the provisions of subsection (2) (c), a spouse may without the consent of the other spouse sell listed securities on the stock exchange and cede or pledge listed securities in order to buy listed securities; (b)(ii) alienate, cede or pledge building society shares registered in his name".

4.2. The Position of the Revised Family Code of Ethiopia in Relation to the Requirement of Spousal Consent for the Transfer of Shares

Ethiopia adopted a partial matrimonial regime as well as joint administration of marital property under its family code.¹³⁰ Marriage in Ethiopia creates a proprietary relationship between spouses and that the marital property attaches to that interpersonal community.¹³¹ Our family code does not demand common property, be it in shares in a business entity or any other type, be registered in the name of both spouses. It rather simply presumes communality of properties unless the separate ownership proved or declared.¹³² However, it fails to differentiate between the proprietary and the corporate issues of business shares. An indication for this is a decision rendered by the cassation bench: a company forced to receive membership of a spouse of a shareholder.¹³³

The writer argues, the silence of the Ethiopian Family Code in addressing the distinction between proprietary and management (also called corporate) rights over securities has to be presumed as if it implies the matter to be regulated by company law which denies membership right to spouses of shareholders unless division of shares ordered by the court upon dissolution of marriage. This is especially true in close companies where the personality of a member is important to the other. The fact that a married person acquired a business share does not automatically result in membership in the company for their spouse.¹³⁴ In an attempt to prevent undesired membership, the international experience, in

¹³⁰ United Nations, Marriage, Family and Property Rights, *Supra Note* 15, P.39.

¹³¹ Revised Family Code of Ethiopia, *Supra Note* 11, Art. 60-64. Cumulative reading from article 60 to 64 of the Revised Family Code Proclamation of Ethiopia tells us: if a thing/interest is part of matrimonial property, any increased value of the interest accrues to the benefit of both spouses. And in principle, what is acquired during the marriage by personal effort belongs to both spouses. As per article 57 and 58 of the code, if the property is the owner's separate property, any increased value generally accrues only to the benefit of the owner spouse. Pursuant to article 66 of the family code spouses are expected to administer their common property conjointly unless they, by agreement, appoint one of them to administer all or part of the common property. An exception to this is where one of them declared incapable, or deprived of his right of property management or for any other reason is unable to administer the common property. Article 69 of the same code allows a non consenting spouse to request, within six months on which he/she came to know the existence of such obligation, or, in any case, two years after such obligation entered, the court for cancellation of obligations arises from the transactions undertaken without his/her consent. Art.68 stipulates that a spouse who own personal property may not set up against third parties unless the latter knew or should have known such fact. The code also illustrates the nature and scope of transactions that requires, or not, consents of spouses.

¹³² *Id.*, Art.63.

¹³³ አዋጅ ፍልል ሁሉን ላይ አብዮ የአሽከርካሪዎች እና መኪኒኮች ማሰልጠኛ ማዕከል ኃ. የተወሰነ የግል ማህበር ጠቅላይ ፍርድ ፤ ቤት ሰበር ሰሚ ችሎት፤ ቅፅ 17፤ መ.ቁ. 102652 ፤ መ.ጋቢት 16 ቀን 2007።

¹³⁴ Commercial Code of Ethiopia, *Supra Note* 9, Art. 523-524.

this regard, is inserting a spousal consent clause in the share purchase agreement or shareholder agreements.¹³⁵

The Revised Family Code of Ethiopia does not, unlike the case of the US community property states, South Africa and France, incorporate special provisions dealing with the proprietary relationship of spouses with regard to shares of a commercial company in general and the manner of disposition of such shares.¹³⁶ The code tries to regulate the issue of spousal consent for the transfer of shares just like any other form of property. Unlike the case of other countries, the code does not devote special provisions to deal with spousal consent in relation to the transfer of shares. The only pertinent provision in this regard is Article 68(1) (b), which reads;

Requisite of Agreement of Spouses

Unless provided otherwise by other laws, the agreement of both spouses shall be required to;

- (b) sale, exchange, pledge or mortgage, or alienate in any other way, a common movable property or securities registered *in the name of both spouses*: the value of which exceeds five hundred Ethiopian birr.

የተጋቢዎች ስምምነት አስፈላጊ ስለመሆኑ

በሌላ ህግ በተለየ ሁኔታ ካልተደነገገ በስተቀር በሚከተሉት ጉዳዮች ላይ የተጋቢዎች ስምምነት አስፈላጊ ነው፤

- (ለ) ዋጋቸው ከብር (አምስት መቶ) በላይ የሆኑ የሚንቀሳቀሱ የጋራ ንብረቶችን ወይም የገዝብ ሰነዶችን ለመሸጥ፣ ለመለወጥ በመያዣ ወይም በዋስትና ለመስጠት ወይም በሌላ በማዘዝ ሁኔታ ለማስተላለፍ

[Emphasis added]

Apparently, the Revised Family Code requires spousal consent for the sale, exchange, pledge or mortgage, or alienate in any other way, common movable property or securities worth more than 500 Birr. The purpose of this article is to deter a spouse's act of disposal of community property without the consent of the other and not to allow the third party to acquire ownership of community

¹³⁵ Richard & *et al*, Dividing Ownership Interests in Closely-held Business Entities, *Supra* note 78, P.13

¹³⁶ It should, however, be clear that assets of the company owned by the company itself, not by its shareholder. The company's assets, liability, profits typically belong to the company and are neither community nor separate property of spouses. What the shareholders own is an interest in shares, this is what is either a community of property or separate property.

property without the consent of the couples.¹³⁷ In addition, the family code empowers the non-consenting spouse to request for cancellation of transactions within six months, starting from the moment she/he knows of the transaction or within two years in any case.¹³⁸ This article, which is presumed as an addition to the general rules of invalidation of contract, designed as a means of balancing the security of the transaction and that of the interests of non-consenting spouses.¹³⁹

However, a closer look at the aforementioned provision reveals inconsistency between the Amharic and the English versions of the code, at least regarding securities in general and shares in particular. While the English version of the same article requires the consent of both spouses only in cases of transactions of securities¹⁴⁰ registered in the name of both spouses, no such qualification is stipulated in the Amharic version which requires the consent of both spouses in any transactions, regardless of in whose name securities are registered, providing that the value of which exceeds five hundred Ethiopian Birr. The English version implies spousal consent is required to transfer securities only if securities registered in the name of both spouses. As per the English version shares registered in the name of one spouse only, even if it is part of a community of property, is transferable without the consent of the other spouse. It seems the English version, like that of other countries with a community matrimonial regime, lies on the principle: legal title presumption prevails over the presumption of a community of property.¹⁴¹ By practice, it is the English version which is being followed by some companies, notary and registering office.¹⁴² The model share transfer form is also a complement to the English version.¹⁴³

¹³⁷ መሐሪ ረዳኢ፤ የተሻሻለው የቤተሰብ ህግ ለመገንዘብ የሚረዱ አንዳንድ ነጥቦች ቅፅ አንድ፤ ንግድ ማተሚያ ድርጅት፤ (1995)፤ ገፅ 72-75።

¹³⁸ Revised Family Code of Ethiopia, *Supra* Note 11, Art. 70

¹³⁹ Medhanit Legesse Negash, *Major Changes by the Revised Family Law of 2000, Regarding Women's Rights and the Need to Enhance Awareness of the Society*, (2008), Law Faculty of Law Series on Ethiopian Private Law, Vol.1, P.P 50-54. [hereinafter, Medhanit, *Major Changes by the Revised Family Law of 2000*]; መሐሪ ረዳኢ፤ ኢየሱሳለሙ የቤተሰብ ህግ ለመገንዘብ የሚረዱ አንዳንድ ነጥቦች ቅፅ አንድ፤ ገፅ 78።

¹⁴⁰ Securities are one type of negotiable instruments particularly, documents containing rights for payment a certain amount of money. Shares or stocks and bonds or debentures issued by companies or treasury bills issued by the government through the national or central bank are the typical examples of securities.

¹⁴¹ Interview with Proff Tilahun Teshome, Aschalaw Ashagrie, Feqadu Petros, Nega Mirete, Habtamu, Tewachew Gelaw & Senaiet Betremariam, *Supra* Note 118.

¹⁴² *Ibid*

¹⁴³ One may see model transfer form, which is available and easily accessible in each regional trade bureau. And a copy of it can also be accessed from the writer.

On the other hand, the stance of the Amharic version is clear: disposal of shares, being a movable property, requires the consent of both spouses unless its value is less than five hundred Birr or the shares proved as separate property. Plus, unlike the case of other countries including those with community property, our family code does not distinguish shares of different companies nor does it incorporate provisions exempting transactions of shares of public companies from the requirement of spousal consent. This directs us to raise an obvious legal question: which one prevails over the other? Conflicts and inconsistency between the two versions, avoided by applying the language of the lawmaker: *The Amharic version prevails over the English version*.¹⁴⁴ Amharic version not only complements with pillar principle of the community of matrimonial property adopted in the family code but it goes with the default rule of joint management of the common property.

The writer does not take the inconsistency as a mistranslation or mere slips of the pen. Rather it arises, *to state it boldly*, from a misunderstanding of the property nature of shares or perhaps from the desire for over protection of women at the expense of the security the business. An indication for this is that both the *Amharic* and the English version of the old pertinent provisions in the Civil Code dealing with family matters entail the phrase “registered in the name of both spouses”.¹⁴⁵ While the pertinent article in Revised Family Law maintained the English version as it is, its *Amharic* counterpart avoids the phrase “registered in the name of both spouses”. This is, according to prominent legal scholars, a deliberate avoidance.¹⁴⁶ This could arise from the desire of overprotection of women, for a substantial portion of wealth dominated by men and due to strong pressures from advocates of women’s rights, which is a major critic against the Revised Family Code.¹⁴⁷ It is, however, unclear why the lawmakers maintained the phrase “*registered in the name of both spouses*” in the English version. Given the negotiable, liquidity and tradability nature of shares, it is absurd to incorporate the requirement of spousal consent in the Revised Family Law. In light of this arguable and incongruous position of the family

¹⁴⁴ A proclamation to Provide for the Establishment of the Federal Negarit Gazeta, 1995, *Negarit Gazzeta*, Extraordinary issue, Proc. No. 3, Art. 2(4)

¹⁴⁵ The 160 Civil Code of Ethiopia, *Supra Note* 18, Art. 658(b)

¹⁴⁶ I am also able to learn similar assertion from Proff. Tilahun Teshome [See *Supra Note* 118], who took part in the revision of the Family Code, who informed me that the law maker deliberately avoided the phrase “registered in the name of both spouses” from the Amharic version.

¹⁴⁷ Interview with Proff Tilahun Teshome, Aschalaw Ashagrie & Nega Mirete, *Supra Note* 118.

law, it is a surprise that the issue of spousal interest in shares is not yet an issue regulated by the Draft Commercial Code.¹⁴⁸

In an attempt to extend protection to a non-consenting spouse, the law empowers the victim spouse to request the court for the invalidation of the transactions within six months after she/he knew the act or within two years after such obligation entered.¹⁴⁹ In this regard, the law of France and South Africa, which also has default rule of a community of property, clearly differentiates shares of commercial companies from others and allows the transfer of such shares without the requirement of spousal consent.¹⁵⁰ The Ethiopian law does not make such differentiation.

4.3. Should Spousal Consent be a Requirement?

In this respect, there are two arguments. Of which, is an argument in favor of a requirement of spousal consent for the transfer of shares. Such argument is compatible with the general principle of joint management of community of property which is incorporated under the Revised Family Code. Proponents of this line of argument base their argument on policy issues; the policy reason behind incorporating the requirement of spousal consent is ensuring gender equality in marriage by allowing equality of opportunity to participate in the management of the community of property.¹⁵¹ A complement argument, which mainly arises from gender sensitivity, is spousal consent help to resist a patriarchal power system in marriage for many of common property registered in the name of the husband.¹⁵² A related justification is a plea for the economic protection of women¹⁵³ for the investment of households' financial assets in transferable securities increases parallel to an increasing number of companies in the country. Allowing a spouse to dispose of properties registered in his name without the consent of the other deprives the non-consenting spouse to control over the vested fifty percent interests he or she has in community shares.¹⁵⁴

¹⁴⁸ The Draft Commercial Code of Ethiopia, Latest Version [soft copy of the document can be accessed from the writer]

¹⁴⁹ Revised Family Code of Ethiopia, *Supra* Note 11, Art. 69

¹⁵⁰ See discussion *supra*, Sub heading 3.2, PP. 15-18

¹⁵¹ Medhanit, *Major Changes by the Revised Family Law of 2000*, *Supra* Note 139, P.P 50-54 ; መከራ ረዳ፤ ኢየተሸላው የቤተሰብ ህግ ለመገንዘብ የሚረዱ አንዳንድ ነጥቦች ቅፅ አንድ፤ ገፅ 78።

¹⁵² Medhanit, *Major Changes by the Revised Family Law of 2000*, *Supra* Note 139, PP. 50-54.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

Some company officials, legal practitioners and academia share such justifications.¹⁵⁵ They also insisted that the Revised Family Code is clear; it generally requires the consent of both spouses for the transfer of movable property, which includes shares, the value of which is more than Five Hundred Birr.¹⁵⁶ For them, failure to request spousal consent arises from misunderstanding, thus, rectified.¹⁵⁷ It is on this belief that some notaries, registering office, company officials and transferee require spousal consent at times of share transfer. Given the family code position on the matter and is a recent enactment, as compared to the Commercial Code, and it is a special law regulating the proprietary relationship of spouses in intact marriage as well as at times of divorce, it seems, at least legally speaking, logical to argue that spousal consent is an additional consideration for the transfer of shares in public companies.

A counter-argument, *which is also the position of the writer*, is in favor of exempting the requirement of spousal consent for the transfer of shares. The writer endorses the requirement of consent of both spouses especially for those transactions particularly involving a substantial amount of money and where the very nature of the transactions took a relatively long time. However, the requirement of spousal consent for the transfer of shares not only deviates from the trend in countries with a developed equity market but also considerably jeopardizes the security of the business. Some even argue requiring spousal consent for such transactions is beyond the intention of the lawmaker.¹⁵⁸

The requirement of spousal consent creates a burden upon commercial transactions involving married people, even to those not married. Not only it creates logistical problems, but it also opens doors to legal disputes for the non-consenting party to challenge the transactions on various grounds. If the spousal consent requirement is applied to all transactions involving shares, both spouses

¹⁵⁵ Interview with AtoYohannes Yigezaw, Acting Director of ANRS Document Authentication and Registration Institution, Bahir Dar, (10 December 2020); Assefa Getnet, Judge of ANRS Supreme Court, Bahir Dar, (20 May 2020); Tegegne Tesheshego, Senior Attorney at Law, Bahir Dar, (15 Dec 2020); Birhanu Teshome President of Bahir Dar Mahel Gebiya S.c, Bahir dar, (15 December 2020);

¹⁵⁶ *Ibid.* Companies which require spousal consent usually follow either of two prevailing approach; either they insert spousal consent clause in the share transfer form and demand the transferring party to bring his spouse and sign over it or request the transferring party to produce notarized written spousal consent. Though, the company is in much better position to assess the honesty of his shareholder and is much better able to guard against his dishonest, it is unclear how official of the company verify the truthfulness of the document presented to it. This will not only creates difficulties on the company in ascertaining the marital status of their shareholder, shares may transfer to a bona fide purchaser may intimidate the interest of spouses.

¹⁵⁷ *Ibid.*

¹⁵⁸ Interview with Aschalaw Ashagrie, Feqadu Petros & Nega Mirete, *Supra Note* 118.

need to know the nature of transactions affecting the community and decide whether to consent. Doing this, given the tradability nature of shares which requires parties to make quick decisions, may make the country's 'ease of doing business' record from bad to worse as it imposes many costs upon commercial transactions involving a married person. Such a burden felt in countries where share transaction digitalized and personal data are easily accessible.¹⁵⁹

Though not yet well developed in Ethiopia, transactions of shares are increasing in volume and will become imperative to a national economy. Where spousal consent is a requirement to transact shares, it certainly creates inconvenience, dalliance and additional cost. Above all, it makes the transactions extremely complicated and cumbersome. Given the absence of centralized digital data and online service in the country, getting documents attesting one's marital status usually takes too long. Equally burdensome and inconvenient is providing power of attorney to one spouse or making her/him sign on the transaction. This discourages investment in the area as it reduces the economic benefit of the holder by enhancing the cost of the transaction. Since shareholders primarily means of realizing economic rights is selling shares, affecting the transaction jeopardize the equity market.¹⁶⁰ Investors are interested in the share market providing that transactions are stable, reliable, predictable and fast.¹⁶¹ On the other hand, allowing a titled spouse to transfer shares facilitates transactions for the family. Transacting parties, companies and others do not have to worry about determining whether someone is married and, if so, about obtaining the consent of each spouse before completing a transaction. In fact, greater liberalization of the rules on the transfer of shares achieved if it is possible to avoid the unnecessary intervention of the market.

It is also important to note that allowing a shareholder to transfer shares without the requirement of the consent of his spouses does not mean that the transaction will necessarily jeopardize the interest of the non-consented spouses. Mechanisms are designed to protect spousal interests without severely compromising the security of the business. One way out is to adopt a permissive provision, preferably in the Commercial Code, which allows a spouse to add

¹⁵⁹ Thomas, Management of the Community Estate during an Intact Marriage, Law and Contemporary Problems, *Supra Note* 80, PP.107-108. A recommendation during the revision of French Civil Code was withdrawing husband's power to sell securities and stocks belonging to the community without the consent of the wife. This recommendation, however, overturned by the banking profession who justify that such spousal consent requirement be a source of excessive complications.

¹⁶⁰ Julian, Taking Shareholder Rights Seriously, P.632; Asrat Tessema, Prospects and Challenges for Developing Securities Markets in Ethiopia, *Supra Note* 3, PP. 56-57.

¹⁶¹ *Ibid.*

his/her name in the register of shareholders.¹⁶² Such a mechanism has two-fold purposes: it is a notice to the other contracting party and enables the issuing company or its agent to process and approve transaction confidently, without fear of endangering the pecuniary interest of the transferring party's spouse. In cases where a married shareholder undertakes transactions fraudulently, the best option is penalizing the wrongdoer spouse, either during an intact marriage or upon dissolution, rather than invalidating the transactions.

The trend in relation to the transfer of shares in a public company is following title rule; titled spouse can transfer shares, be it community or separate property, without the requirement of spousal consent.¹⁶³ Such consent is required only to transactions of shares whose structure would not burden by the joint management requirement.¹⁶⁴ Countries adopted the default rule of community property regime like that of Ethiopia does not require spousal consent for the transfer of shares of commercial public companies.¹⁶⁵ This is true even if shares registered in the name of either or both spouses presumed as common property. In light of Ethiopia's desire to liberalize its economic sector and aspiration for the stock exchange, adopting an international trend is no more an option.¹⁶⁶ In fact so as to not endanger family and non consented spouses, spousal consent should not be waived to all kinds of transactions. In this regard, lessons can be taken from the US community state of California which adopts a statute expressly prohibiting acts of requiring spousal consent as a condition of purchase and sale of securities or/and from South Africa law which exempt the requirement of spousal consent in case of, save few exceptions, transfer of shares.¹⁶⁷

Another justification against the spousal consent requirement could arise from the negotiable character of shares. The *sui generis* feature of shares and the rational of certifying shares justify free tradability of shares; commercial transaction involving shares has to be free from an unnecessary hindrance.¹⁶⁸ In this regard, it is sound to argue that the spousal consent requirement will delay

¹⁶² Note that the Commercial Code of Ethiopia recognized joint ownership over shares. But, due to indivisibility nature of shares, the law requires the appointment of a representative to exercise shareholder's rights.

¹⁶³ See discussion *supra*, Sub heading 3.2, PP.15-18

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

¹⁶⁶ In a recent circular letter delegating power of registration and authenticating document of business entities to Regional trade bureau, the Ministry of Trade and Industry informed the respective regional trade bureau about the country's move to adopt centralized digital system to regulate company business

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

the transactions and affects the economic rationales of free transferability of the share as well as its liquidity trait. Clearly, requiring spousal consent would force a transferor either to involve his spouse in the transactions either by making her sign on the share transfer form or produce a document attesting written spousal consent; where one is not married, he/she has to produce documents attesting marital status. These are too many hassles to transfer shares supposed to negotiate easily.

Concluding Remarks

Transferability of shares is a base of doing business in company form for it, on the one hand, permits the company to conduct business uninterruptedly and without complications as the identity of its shareholders changes, and on the other hand, it enhances the liquidity of shareholders' interests and makes it easier for shareholders to realize the economic aspiration. For the realizations of free transferability of shares, countries exempt shares transactions from unnecessary hurdles. Even countries with a community of property, though they underlined the requirement of spousal consent for the transfer of common properties, exempted such requirement for, save rare cases, the transfer of shares in commercial companies.

However, the Ethiopian case is different. Though the Commercial Code maintained free transferability of shares, the Revised Family Code, arguably, require spousal consent for the transfer of shares unless such shares are a personal property. Even if the Code does not automatically void non consented share transfer, the security of the business is unrealistic for the non-consenting party has the right to request the court for the invalidation. No doubt, this is a challenge for shares transactions.

Given the trend in countries with the developed equity market, the special property nature of shares, the genesis of doing business in company form and the country's aspiration to liberalize its economy, the writer's stance is: transfer of shares in public companies has to be clearly exempted from the requirement of spousal consent. In fact, this way is to avoid practical confusion and arbitrariness, realize the tradability of shares, and to maintain consistency between the Commercial Code and the Family Law. A possible way out could be crafting the Amharic version of article 68(b) of the Family Code in light of its English counterpart or inserting provisions dealing with spousal interest in the upcoming Commercial Code.

To balance the security of business and family interests, Ethiopia may draw lessons from other countries and integrate into its context. In this regard, my recommendation is to adopt an “*add name remedy*” to confer a person, who acquired co-ownership of shares because of his marriage, with a right to register in the company book registry as a joint owner. Doing this, not only offer notice to the company and the transferee, helps to protect spousal interest as it allows the non registered spouse to exercise joint management. Most importantly it facilitates free transferability of shares as it allows parties to freely transact without fear of risks of invalidation and a burden to produce documents attesting marital status. Where there is abuse, it is preferable to penalize the wrongdoer spouse, during or at times of dissolution of marriage, rather than empowering the non-consenting spouse to endanger the viability of share transactions. It is also wise to enact an independent comprehensive rule regulating the transfer of shares for it helps to avoid arbitrariness and confusion in share transactions.

