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MESSAGE FROM THE EDITORIAL COMMITTEE

The Editorial Committee is delighted to bring Volume 9. No. 1 of Bahir Dar University Journal of Law. The Editorial Committee extends its gratitude to those who keep on contributing and assisting us. We are again grateful to all the reviewers, the language and layout editors who did the painstaking editorial work of this issue.

On this occasion, again, the Committee would like to make it clear that the Bahir Dar University Journal of Law is meant to serve as a forum for the scholarly analysis of Ethiopian law and contemporary legal issues. It encourages professionals to conduct research works in the various areas of law and practice. Research works that focus on addressing existing problems, or those that contribute to the development of the legal jurisprudence as well as those that bring wider national, regional, supranational and global perspectives are welcome.

The Editorial Committee appeals to all members of the legal profession, both in academia and in the world of practice, to assist in establishing a scholarly tradition in this well celebrated profession in our country. It is time to see more and more scholarly publications by various legal professionals. It is time for us to put our imprints on the legal and institutional reforms that are still underway across the country. It is commendable to conduct a close scrutiny of the real impacts of our age-old and new laws upon the social, political, economic and cultural life of our society today. It is vitally important to study and identify areas that really demand legal regulation and to advise law-making bodies to issue appropriate legal instruments in time. The Bahir Dar University Journal of Law is here to serve as a forum to make meaningful contributions to our society and to the world at large.

The Editorial Committee is hopeful that the Bahir Dar University Journal of Law will engender a culture of knowledge creation, acquisition and dissemination in the field of law and in the justice system of our country in general.

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Franchising in Ethiopian: The Need for Regulation

*Tegegne Zergaw**

Abstract

Franchising is a way of doing business in which the franchisor licenses its known business model or trademark for the use of the franchisee in return for consideration. It becomes a viable solution for business startups, especially for small and medium enterprises (SME), and to penetrate the foreign market. Franchising benefits not only those parties involved in the business but also the national economy. In order to create a leveling field and protect the interests of parties countries are on the move for regulating franchising. This article assesses the regulation of franchising in Ethiopia using comparative analysis method. Even though there are scattered laws pertaining to franchising, still the country lacks, compared to other countries, comprehensive and detailed laws on franchise regulation. The research identified several legal gaps in regulating franchising; essential aspects of franchising such as, pre-contractual disclosure, parties' relationship, and registration are not regulated in a comprehensive manner. Hence, the author recommends the adoption of comprehensive franchise laws that take into consideration the best international practice.

Keywords: Franchising, Trademark, Trade Name, IP, Regulation, Franchise Agreement

Introduction

Franchising is a method of doing business by licensing business processes and intellectual property (IP) rights to investors who will operate within an established business model.[1] The risks associated and the investment required for starting own business is one of the pushing factors that brings franchising into picture as a viable solution. Many persons have achieved great success

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[1] Donald P Horwitz *et al,* Regulating the Franchise Relationship, *St. John's Law Review*, Vol. 54: 2, (2012), p. 221, available at: http://scholarship.law.stjohns.edu/lawreview/vol54/iss2/1, accessed on 8/10/2018

through franchising either by being a franchisor or a franchisee.[2] As a result, franchising becomes a widely known mechanism of doing business highly exploited in developed nations, while uncommon in many developing countries, even if the situation is rapidly changing recently.[3] Given the large size of the Ethiopian population, coupled with its surging prosperity, successful businesses in the future will attract momentous demand for their goods and services, locally and abroad, which will result in the increased importance of franchise arrangements for the nation.[4] In Ethiopia, however, franchising is not widely known, and international franchisors have not adequately responded to the franchising opportunity in Ethiopia.[5] It is argued that the non-recognition of franchising as a viable business doing model is the major challenge for foreign investors,[6] and SME development in Ethiopia.[7] According to one research, lack of awareness on how to sell knowhow to the local market without losing goodwill, unfamiliarity with franchise business, and not realizing the benefits of developing local brands by local franchisors are the real challenge for Ethiopia.[8]

This does not, however, mean that there is no business practice of franchise in Ethiopia at all. Even if it is not in a satisfactory way, there have been small practices of franchise since the Imperial regime.[9] The earliest form of franchise in Ethiopia had been products marketing, mainly of Petroleum Products, Hotels and Beverages.[10] However, recently, business format franchising has also grown significantly, especially in the fast-food sector. Moreover, few international brands have opened their franchise businesses in Ethiopia.[11] Against this progress, however, Ethiopia still lacks franchise-specific law that regulates

[2] US Department of Commerce, Markets Top Report Franchising, Overview and Key Findings, International Trade Administration, (2016), available at: https://legacy.trade.gov/topmarkets/pdf/Franchising_Executive_Summary.pdfhttps, accessed on 10/09/2018.

[3] Ibid.

[4] Tagel Getahun, Franchise influx requires legislative demand, *Addis Fortune,* weekly newsletter, Vol. 13, No. 667, (February 10/2013), available at https://addisfortune.net/columns/franchise-influx-requires-legislative-demand/ accessed on 1 March 2018.

[5] Ibid.

[6] Zeray Yihdego, *et al,* Ethiopian Year Book of International Law, (2017), Springer, p.40, available at https://link.springer.com/book/10.1007/978-3-319-90887-8, accessed on 01 September 2012

[7] Federal Democratic Republic of Ethiopia Small and Medium Enterprise Development Policy and Strategy, (2012), available at: https://www.cmpethiopia.org › accessed on 11 August 2018

[8] African Development Bank Group, "Enhancing Development in Africa", Report No.3, p.2, available at http://www.afdb.org/fileadmin/uploads/afdb/documents/gene-documents/003_franchising.pdf, accessed 27/01 2017.

[9] Derese S. Bezawork, Franchising Law and Practice in Ethiopia, Unpublished, Addis Abeba University, (2003), p.46.

[10] Dawit Endeshaw, Food Franchises: "Tasting" the Business, *Reporter weekly newspaper*, (19 May 2018), available at: www.thereporterethiopia.com/Article/food-franchises-tasting-business, accessed on 19 April 2019.

[11] Ibid.

franchising in detail and in a comprehensive manner. Currently franchising is regulated by different scattered and general laws. However, the application of these laws may not be adequate given the specific nature of franchising; such laws are not designed to address problems inherent in franchising, such as information asymmetry, and bargaining power imbalance.[12] Furthermore, it may be burdensome and difficult for the parties to comply with and manage their affairs in accordance with these diversified laws. This article aims at assessing how franchising is regulated in Ethiopia, identifying gaps, and propose plausible solutions to fill the voids. In this regard, Part I of the article gives a general overview of franchising, while Part II provides the current status of franchise regulation in Ethiopia. Part III explains comparative approaches in dealing with franchising issues around the globe. And the last part provides concluding remarks.

1. General Overview of Franchising and Its Regulation

1.1. The Meaning of Franchising

The term franchising has been defined in several ways from different perspectives. The International Franchise Association (IFA) defines franchising as follows:

> *it is a contractual relationship between the franchisor and the franchisee in which the franchisor offers, or obliged to maintain, a continuing interest in the business of the franchisee in such areas as know-how and training: wherein the franchisees operate under a common trade name, format and procedure owned or controlled by the franchisor, and in which the franchisee will make a substantial capital investment in his business from his resources.*[13]

From this definition, one can understand that franchising is a contractual relationship that involves at least two parties through a legally binding contract, in which the franchisor has control over the way the franchisee runs the business and provides support to the franchisee in running the business. The franchisee has also the right and obligation to conduct the business through common trade

[12] Kendal H. Tyre, Legislative Outlook for 2017: Potential Changes in Franchise Legislation Across the World, *franchise law alert*, (2017), p.2, available at https://www.nixonpeabody.com › media › Files › Alerts › 2017, accessed 09 May 2019.

[13] Durban University of Technology, the Pros and Cons of Franchising for Chain Stores and Franchisee, (2019), p.7, available at https://www.dut.ac.za › wp-content › uploads › 2019/03 › Full-report, accessed on 8 December 2017.

name, format and procedure owned or controlled by the franchisor but by his investment.

On the other hand, the UNIDRIOT model franchise law defines franchising as follows: -

> *franchise are the rights granted by a party (the franchisor) authorizing and requiring another party (the franchisee), in exchange for direct or indirect financial compensation, to engage in the business of selling goods or services on its behalf under a system designated by the franchisor which includes know-how and assistance prescribes in substantial part how the franchised business is to be operated, includes significant and continuing operational control by the franchisor, and is substantially associated with a trademark, service mark, trade name or logotype designated by the franchisor.*[14]

From this definition one can understand that the Model Law recognizes "business format franchising" than ''traditional franchising''[15] as it authorizes the franchisee to operate the business under the system designated by the franchisor. Business format franchising requires the control exercised by the franchisor to be "significant and continuing" and the franchisee conducts the business on his own behalf and investment. The definition also underlines that the franchise business is highly associated with a trademark, service mark, trade name or logotype of the franchisor. Moreover, the definition emphasized that the accumulated business experience and know-how of the franchisor and the assistance offered by him constitute the base for franchising. In return for this, the franchisee is duty-bound to pay a certain amount of money in the forms of royalty.[16]

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[14] International Institute for the Unification of Private Law, Model Franchise Disclosure Law, Rome, (2002), P.19-21 (UNDROIT model law), available at: https://www.unId.roit.org › instruments ›, accessed on 18 December 2018.

[15] In traditional franchising the franchisee will not produce the product or provide the service by itself; rather it distributes a product produced by the franchisor by using the franchisor's trademark. Since the product sold by the franchisee usually is manufactured by the franchisor, it is uniform throughout the system and does not need that much control by the franchisor. On the other hand, in business format franchising, a franchisor, who has a well-established system, licenses its well-known business system and provides the franchisee not only with its product and trademark but also an outstanding business formula comprising all areas of management including marketing strategies, business advisory support, quality controls, business administration manuals, and training. In this system, the franchisor must retain substantial controls over the franchisees to ensure uniform quality in the system. Nobuo Mlyake, Franchising in Japan, *Antitrust Law Journal,* Vol. 58, No. 3, (1989), p. 978, available at http://www.jstor.org/stable/40843151, accessed on 17 November 2017.

[16] UNIDROIT model law, *supra* note 14, Article 2.

When we see the definition of franchising in Ethiopia it is defined [17] as

> *an agreement concluded for consideration between the franchiser and the franchisee in order to undertake business activities by using the trade name of the known product or service in order to share the nature and experience of the work under the leadership of the owner of the product that has got recognition.*

The proclamation requires the franchisor to share his/her experience about the business while the franchise is duty-bound to pay fee for the franchisor in return.[18] The proclamation also calls for the products or service of the franchisee to be at the same level of quality as the franchisor,[19] which is the hallmark of franchising. In general, franchising is explained as a system that typically includes the transfer of Intellectual property rights, access to business knowledge and methods in return for a fee. The franchisor commits herself to provide continuing support regarding the operation of the business while the franchisee agrees to abide by the standards set by the franchisor.[20]

1.2. The Role of Intellectual Property (IP) Rights in Franchising

Franchising is about the utilization all aspects of the business of the franchisor, in particular the IP rights associated with the business.[21] In franchising, several IP rights are exploited since the transfer of those intangible rights appears to be the base for franchise arrangements. In most case, these rights include trademarks, trade secrets (confidential information), patent, and copyright.[22] In this regard, a trademark is an essential IP right in a business enterprise that can be licensed via franchising. It comprises of logos, designs, drawings, symbols, taglines, numbers, three-dimensional features, or a combination of any of

[17] Commercial Registration and Licensing Proclamation no. 980/2016, *Federal Negarit Gazetta*, (2016), Article 2(33)

[18] Id., Article 37(2)

[19] Id., Article 37(3)

[20] Tamara Milenkovic , The Main Directions in Comparative Franchising Regulation –Undroit Initiative and its Influence, *European Research Studies*, Volume XIII, Issue (1), (2010), P.104, available at https://www.ersj.eu › repec › ers › papers › 10_1_p7 , accessed on 17 November 2017,

[21] Richard Gallafent, Role of Franchising of Intellectual Property Rights and other Technology Transfer Agreements for Enhancing the Competitiveness of Products and Services Of SMEs, WIPO Interregional Forum on SME (2002), p.7 https://www.wipo.int/edocs/mdocs/sme/en/wipo_ip_mow_02/wipo_ip_mow_02_10.pdf accessed on 17 November 2017,

[22] Brand Protect Team, "Why IP Protection is Vital to Franchisors," available at https://www.bptm.co.uk/franchising/why-ip-protection-is-vital-to-franchisors/, accessed on 13 December 2019

these.[23] Moreover, franchising usually involves the transfer of valuable trade secrets to the franchisee, and it is essential to protect this secret from the general public. In a franchise agreement, trade secrets of the franchisor could be in the form of financial or technical know-how, business plans, implementation strategies, distribution techniques, operation manuals, pricing technique, customer lists, chemical formula, etc.[24] Copyright is another important IP right that can be impacted in franchising and would thus require sufficient protection. Copyrightable works in franchising include literary works like operation manuals, recipes, source codes; musical, audio-visuals and sound recordings; architectural works like template plans and designs of the franchised buildings, sculptural works, etc. [25] Finally, a patent is the other types of IP that can be a subject of a franchise. Some franchisors possess patented inventions that are licensed to franchisees in the form of business methods, computer software application, and equipment hardware. Franchise agreement should prescribe the mode of utilization of the patented inventions in order to prevent unauthorized exploitations, and determine who own inventions created during the course of the agreement.[26]

1.3. The Benefits of Franchising

Franchising has many benefits for both the franchisor and the franchisee. On the side of the franchisor it enables him to create a diversified system of distribution for its product at a lower cost than operating individually.[27] It also decrease franchisor's risk of loss, allows the franchisor to shift technical risk, or the risk of obsolescence of tangible assets.[28] Quality control and innovation are the other advantages of franchisors. The franchisee, as an owner of his/her own business, strives to manage his/her business effectively by providing quality products to the consumers. This in turn benefits the franchisor to ensure the quality of products provided under its trademark. In addition to this, ownership incentives

[23] Sandra Eke "Why you need to Protect your Business Hashtags and Catchphrases," available at http://www.spaajibade.com/resources/why-you-need-to-protect-your-business-hashtags-and-catc accessed 13 May 2019

[24] John Onyido, The Role of Trade Secrets in the Protection of IP Rights, available at http://www.spaajibade.com/resources/the-role-of-trade-secrets-in-the-protection-of-ip-rights/ , accessed 04 June 2019

[25] Sandra Eke, Protection of Intellectual Property Rights in a Franchise Agreement,(2020), available at http://www.spaajibade.com/resources/protection-of-intellectual-property-rights, accessed on 10 June 2020

[26] Ibid.

[27] Curtis A. Loveland, Franchise Regulation: Ohio ConsId.ers Legislation to Protect the Franchisee, 3, *Ohio St. L.J*., 1972, P.644, available at: https://kb.osu.edu/bitstream/handle/1811/69299/OSLJ_V33N3_0643.pdf , accessed on 12 May 2018

[28] Ibid.

may transform franchised stores into powerful engines of innovation, as the franchisee strives to improve the system by exerting his entrepreneurial skill.[29] In general, as stated by Zeidman, franchising provides for the franchisor several opportunities: - highly motivated management; additional income from royalty payment; the possibility of marketing at the remote site; rapid growth and scaling of business; the rapid launching of new modified goods/services; reducing the scope of involvement in day-to-day management; and easier, faster and less risky international expansion.[30]

On the other hand, franchising enables the franchisee, especially SMEs startup, to compete more effectively than other competitors as a result of benefits driving from well-established and time-tested brands, and varied technical assistance. Since business startup for SME requires huge investment with the risk of losses at the initial stage, franchising has enormous benefit.[31] In other words, it enables SMEs to cache the attention of customers and to win the competition exerted from well-established and financially capable businesses.[32] In general, franchising offers the franchisee benefits such as:- following business methods successfully used and tested at a favorable price; preserving its economic and legal independence, and capability to compete with reliable profits that makes the business less exposed to the risk of bankruptcy.[33] However, even if franchising has different advantages, it has also many disadvantages for both the franchisor,[34] and the franchisee.[35]

In addition to its benefit for the parties, franchising has also tremendous influence for the national economy in terms of output, job creation, an increase in the tax base, economic modernization, balance of payments' adjustments, and SMEs and entrepreneurship development.[36] Franchising often transfers

[29] Ibid.
[30] Philip F. Zeidman, With the Best of Intentions: Observations on the International Regulation of Franchising, *Stanford Journal of Law*,Vol 19: No. 2, (2014), pp.241-242, available at, https://www.dlapiper.com › Zeidman Philip › Stanford Jou , accessed on 12 April 2018; Kolesova, *infra* note 33, p 479
[31] Loveland, *supra* note 27, P.644
[32] Richard R. Spore, Planting the Franchise Seeds: For the Client Who wants to 'grow' a Business, Franchising Offers Certain Benefits, p.6, available at: https://www.bassberry.com › professionals › spore-richard, accessed on 19 May 2018.
[33] Kolesova, Advantages and Disadvantages of Franchising as a Form of Business**,** Tomsk Polytechnic University, Tomsk, p 479, available at: earchive.tpu.ru › bitstream › conferenc, accessed on 13 August 2018.
[34] Ibid.
[35] Zeidman, supra note 30, p.246; Kolesova, *supra* note 32, p 479.
[36] Ilan Alon, Global Franchising and Development in Emerging and Transitioning Markets, *Journal of Macromarketing*, Volume: 24 issue: 2, (2004), p.150, available at https://doi.org/10.1177%2F0276146704269320, accessed on 13 May 19.

knowledge, technology, human capital and skill, and enhances entrepreneurial success due to the transfer of a proven business format connected to a well-known brand.[37] For instance, in South Africa, franchising contributes 12% of the country's GDP.[38] Moreover, the economic development in Central European countries and expansion into emerging markets in Latin America, Eastern Europe, East Asia and the Pacific is partly attributable for the international expansion of franchising.[39] In Africa too, specifically in countries like Egypt, Tunisia, Morocco and South Africa franchising significantly contributed in job creation, export and foreign exchange earnings, growth of SMEs, poverty reduction, dissemination of technology, and boosting entrepreneurship.[40] Generally, franchise influences a country's development, not only economically but also socially and culturally.[41] As a result, policy makers in emerging markets that observed the economic contributions of franchising have sought for ways to develop and regulate this form of business.[42] However, it does not mean that franchising is free from critics. According to sociologists, franchising, through its adherence to standardized rules, robs workers of their need to think intelligently and forces people to function as mindless automatons. They argued that global franchising has the potential to create socio-economic tensions that adversely affect the host market consumers, and workers. They oppose global franchising, which they see as representative of the global capitalistic system, as it imposes commonalities across nations that deemphasize relativistic, nationalistic, and regional sentiments.[43]

1.4. Regulation of Franchising

1.4.1. Private, Self and Public Regulation

An important aspect that should be considered in franchising is the issue of regulation. The regulation of franchising focuses on how the business relationship between franchisor and franchisee is controlled and governed.[44]

[37] Mirela Alpeza *et al,* Development of Franchising in Croatia, Obstacles and Policy Recommendations, *Vol.1, No.1,* p.9, available at https://core.ac.uk › download › pdf , accessed on 12 April 2018 and Id., p.161.
[38] Alon, *supra* note 36, P. 156.
[39] Ibid.
[40] Zeidman, supra note 30, p.243-244.
[41] Cintya Lanchimba *et al*, The Impact of Franchising on Development, Universidad Nacional Autónoma de México, Vol. 49, No. 193, (2018), p.7, available at: www.scielo.org.mx.>pdf>prode , accessed on 12 April 2019.
[42] Alon, *supra* note 36, p.160-161.
[43] Id., p.162-163
[44] Abell, Philip Mark, The Regulation of Franchising in the European Union, Queen Mary University of London, PhD, (2011), p84-85, available at http://qmro.qmul.ac.uk/xmlui/handle/123456789/2326, accessed on 10 December 2018

Even if there is no uniform practice of franchise regulation, private regulation, self-regulation and public regulation or the mixture of these are employed in different countries.[45] Private regulation refers to regulation of the parties by their own activities through the use of contractual agreements.[46] It usually regulates the grant, financial terms, term and renewal of the agreement, obligations of parties, confidentiality, restriction, transfer, purchasing ties, and termination.[47] Proponents of contractual regulation argue that governments should refrain, as much as possible, from regulating the private affairs of merchants as legislation would have a far-reaching effect upon the underlying principles of freedom of contract.[48] Hence, franchising requires effective general contracts laws to fully regulate the business and parties' relationship.[49] The supporters of this view do not fully accept bargaining power imbalance and abuse of power by the franchisor which is propagated by proponents of public regulation. Because franchisees and franchisors are equals in knowledge about the opportunity and the negotiation of the agreement, no one is forced to become a franchisee.[50] Moreover, while widespread termination and nonrenewal exist, there is no evidence that franchisors abuse their bargaining power.[51] They believe that the enforcement of existing contractual remedies is sufficient to eliminate any proven abuses that may occur either by the franchisor or franchisee without the need for public regulation.[52] In general, proponents believe that what is needed for franchising to thrive is recognition of the sanctity of contracts and strong IP protection.[53]

However, opponents criticize private contract as it is not only ineffective at addressing existing abuses, but it sets up and reinforces imbalance of power and uncertainty in franchising.[54] They believe that franchisees do not have equal bargaining power with the franchisor.[55] The franchisor dominate the interaction

[45] Ibid.
[46] Elizabeth Spencer, Reconceiving the Regulation of the Franchise Sector, Macquarie L.J., Vol. 8, (2008), p. 109, available at http://classic.austlii.edu.au/au/journals/MqLawJl/2008/7.pdf , accessed on12 March 2018
[47] Mark, *supra* note 44, p.102
[48] Donald, Supra note1, P.272-273
[49] Eshetu Yadeta, Note on Laws Regulating Franchise Business in Different Jurisdictions, *Haramaya Law Review*, Vol. 5: No.1, (2016), P.146 available at: https://www.ajol.info › index.php › hlr › Article, accessed on 23 March 2019
[50] Peter C. Lagarias *et al*, Modern Reality of the Controlling Franchisor: The Case for More, Not Less, Franchisee Protections, p. 144, available at: www.boulter-law.com › 2013/06 › FLJ_29_3 accessed on 23 February /2019
[51] Ibid., and Donald, *supra* note 1, P.262-263
[52] Id., 277
[53] Zeidman, *supra* note 30, p.252
[54] Spencer, *supra* note 46, p.111
[55] Lagarias, Supra note 50, p. 144

using its bargaining power, and enter into franchising without having any formula or business format, and without providing the necessary information for franchisees.[56] Moreover, the obligation of the franchisor and franchisee are not balanced and equally regulated. The contract gives franchisor extensive discretion, but with few and not detailed obligations and limitations[57] while the duties of the franchisee are voluminous and cumbersome.[58] As a result, franchisees are exposed to exploitation, poor quality support and ultimately brand failure.[59] It is stated that franchisees will be at a disadvantageous position because of lack of information, expertise, experience, and finance. Hence, unlike public regulation, private regulation is not adequate to control power abuse and imbalance.[60]

Self-regulation is the other mechanism to govern franchising. It focuses on how the relationship between parties in a franchise is governed through professional bodies that monitor conducts by prescribing and enforcing its own rules.[61] It is stated that self-regulation is more reflexive, responsive, contextualized, sophisticated and efficient than public regulation.[62] Supporters argue that it provides a balance between a too lax private and the rigid public regulation, as it is moderately flexible and can be easily revised. Code of conduct developed and constantly updated by a self-regulatory body will have a high compliance rate.[63] Moreover, the abuse and commercial failure in franchising cannot be addressed by private law remedies that are inadequate and too costly, and self-regulation is a better, cheaper and more focused option.[64] They believe that unlike self-regulation, public regulation will inevitably retard the success of franchising because of its cumbersome and commercially divisive nature.[65] In general, self-regulation, gives access to a greater degree of expertise, knowledge, commercially appropriate result that enable the franchise to grow ethically.[66]

[56] Mark, *supra* note 44, p. P.88
[57] Id., P,111-112
[58] Id., p.102-105
[59] Id., p.107-108
[60] Spencer, *supra* note 46, p.111-113, 271
[61] Economics and Sector Research Namibian Competition Commission, Market Study Report on the Development of the Franchising Industry and Recommendations for Regulation in Namibia, (2017), p.31-32, available at https://www.nacc.com.na/cms_documents/206_franchising_report.pdf, accessed on 20 July 2019.
[62] Spencer, *supra* note 46, p.105-106.
[63] Id., P. 3-4.
[64] Mark, *supra* note 44, P.111-112.
[65] Id., P.113.
[66] Id., P.111-112.

However, those who criticized self-regulation stated that a sense of inadequacy is expressed towards this mechanism, since industry role-players that lacks funding, effective enforcement mechanisms, and capacity to promote their interests and impact on non-members, regulate themselves.[67] In order to show the ineffectiveness of self-regulation, different writers cite the British Franchise Association and the Australian experience that have achieved little, fails to meet the demands of its members, and unable to limit dishonest franchisors.[68] Moreover, it is believed that self-regulation can be insufficient in protecting the interests of franchisees,[69] as the franchisors wield the power in self-regulation, and self-regulators exploit their power to protect the interests of the franchisor as a member.[70] Such an entity does not always provide reliable and accurate information for the franchisee that evidenced by the existence of high deceptive conducts.[71] In general, opponents believe that self-regulation that lacks transparency, consistency, accountability and proportionality will never be able to provide franchisees with the level of protection that they require.[72]

The other mechanism employed to regulate franchising is public regulation.[73] Proponents of this mechanism believe that the uncertainty that is inherent in the private and self-regulation could be addressed by responsive regulators who have a point of reference within the law that provides clarity and certainty.[74] Public regulation requires the franchisors to provide information about the franchise business, and put a range of restrictions upon the franchisor in dealing with the franchisees with the view to enable the franchisee to make an informed decision.[75] Proponents of a public regulation claim that wide spread abuses that include misrepresentation, nondisclosure, unreasonable requirements, refusal to renew, and arbitrary termination arise from the disparity of bargaining power, which is not susceptible of correction by existing legal remedies.[76] Hence, only the adoption of franchise law can address such abuses by creating certainty in the industry, prescribe minimum standards of behavior and subject it to public scrutiny.[77] Andrew Terry concludes that a healthy franchising sector requires

[67] Economics and Sector Research Namibian Competition Commission, *supra* note 61, p.31-32, and Mark, *supra* note 44, p121-122.
[68] Mark, *supra* note 44, p.114.
[69] Economics and Sector Research Namibian Competition Commission, *supra* note, 61, p. 31-32.
[70] Spencer, *supra* note 46, p.107.
[71] Id., p.110.
[72] Mark, *supra* note 44, p136.
[73] Spencer, *supra* note 46, p.109.
[74] Economics and Sector Research Namibian Competition Commission, *supra* note 61, p.31.
[75] Zeidman, *supra* note 30, p 247 and *supra* note, 61, p.31.
[76] Donald, *supra* note 1, P.244-245.
[77] Economics and Sector Research Namibian Competition Commission, *supra* note 61, p.31.

adequate and appropriate legal infrastructure,[78] as franchisees are damaged and franchising is diminished by the inappropriate practices of those who trade off the reputation of franchising. Therefore, an appropriate form of regulation which protects the interest of both parties in a manner that does not curb the entrepreneurial nature of franchising, or threaten its development, is critical.[79]

On the other hand, opponents argue that franchising should not fall under the ambit of public regulation as it has been regarded an undesirable phenomenon, a costly and unwelcome intrusion into the optimal function of free markets.[80] According to this view, legislation can be rigid, restrictive and create unnecessary burdens that could discourage investors by serving as a barrier to entry.[81] In addition to its costliness and requiring compliance cost, enforcement authorities may find it difficult to apply complex law that requires the high level expertise.[82] Furthermore, opponents argues that in attacking the central core of freedom to contract, laws regulating franchising consider merchants as they do not know, and cannot be trusted to determine what is in their own best economic interests.[83] Moreover, regulation could set the franchisor against the franchisee, thus undermining the mutuality of effort necessary to franchising; deny the franchisor to conduct their business with flexibility, and interfere with the successful allocation of goods and services. In sum, regulations reduce and destroy the real benefits of franchising.[84] However, some opponents do not automatically reject public regulation; rather, they believe that regulation should be limited to addressing specific, proven abuses taking into account the nature of the industry, and the length of the agreement.[85]

1.4.2. The Advent of Franchise Regulation and its Benefit

Franchising, which is treated as normal commercial contract between equal parties, is identified as vulnerable to abuse, as it is one-sided and mostly non-negotiable agreement solely prepared by the franchisor based on take it or leave it approach.[86] Due to economic and information disparity, business

[78] Andrew Terry, Franchise Sector Regulation: The Australian Experience, (2003/04), *LAWASIA Journal,* 57, UNDROIT, p.58.
[79] Ibid.
[80] Spencer, *supra* note 46, P.104.
[81] Ibid.
[82] Economics and Sector Research Namibian Competition Commission, *supra* note 61, p.31
[83] Donald*, supra* note 1p.276.
[84] Id., p.267-266.
[85] Id., 278.
[86] Elizabeth C. Spencer, Consequences of the Interaction of Standard Form and Relational Contracting in Franchising, p.3, available at https://www.jstor.org/stable/29542259, accessed 22 December 2019; Eshetu, *supra* note 49, p.146.

sophistication, differences in knowledge and size of business, lack of experience, a franchisee is in a weak position to bargain effectively with a franchisor, regarding terms and conditions of the agreement, and how to operate the business.[87] This leads to different abuses by the franchisors that include failure to disclose material facts, unwarranted termination or variation, non-renewal of the agreement, and prohibition of transfer.[88] For this reason, franchisees and their advocates began to express discontent during the end of the 1960s and these concerns evoked a legislative or regulatory response.[89] Hence, in the 1970's, the first move of franchising regulation evolved in the US., California in response to marketplace abuses by the franchisor. [90] Later, other States and the Federal government in the US incorporated the regulatory measure in the 1990s.[91] In the 1980s and 90s, there has been a proliferation of franchise laws that arose from genuinely felt concerns about abuses by franchisors.[92] As of 2019, more than 44 countries in the world,[93] and 9 countries in Africa adopted franchise-specific law.[94] In general, franchise-specific law appears to be a slowly growing trend internationally in response to reported abuses of the franchisors.[95]However, it does not mean that there are no countries that ripe the fruits of franchising without having franchise-specific law; UK, Finland, Norway, Chile, and Check Republic are examples of those that have achieved franchising growth without franchising-specific law.[96]

Franchise law is growing in importance and has been quickly developed in many countries as franchising becomes the more desirable business model.[97] Countries regulate franchising with the objective of enhancing the operation of the sector,

[87] Id., p.44; Lagarias, *supra* note 50, p.140.
[88] Lagarias, *supra* note 50.
[89] Alon, *supra* note 27, P.160-161.
[90] Lagarias, *supra* note 50, p. 139.
[91] Stephen Giles *et al*, Australian Franchise Law: How to Avoid. Being a Shrimp on the Australian Franchising Barbecue, p.164, available at heinonline.org › hol-cgi-bin › get_pdf › fchlj29, accessed on 10 March 2019.
[92] Zeidman, supra note 30, p.252.
[93] Id., p.252-260,United States, provinces in Canada, France, Brazil, India, South Korea, South Africa, Russia, Mexico, Albania, Spain, Indonesia, Moldova, China, Romania, Kirgizstan, Malaysia, Australia, Belarus, Turkmenistan, Taiwan, Azerbaijan, Latvia, Croatia, Georgia, Estonia, Lithuania, Japan, Kazakhstan, Italy, Mongolia, Vietnam, Sweden, Tunisia have franchise specific law.
[94] African Development Bank Group, *supra* note 8, P.2.
[95] Ibid.
[96] Alon, supra note 36, p.165.
[97] Rupert M. Barkoff, A Look at Franchise Regulation from Ground Level to 30,000 Feet Reviewed Work(s), p.15 Available at: www.kilpatricktownsend.com › Files › Articles › FLJ_W13_32_3_Barkoff, accessed on 11 July 2018.

to protect parties involved and consumers.[98] For this reason, regulation appears to be on the rise and is diverse worldwide. [99] In general, as stated by Andrew, franchising requires a law to support its orderly development.[100] Franchise law ensures that franchisees are provided with proper information that assists them to make a well-informed decision guides parties to better conclude and perform the agreements and guarantees the authenticity and transparency of documents produced by franchisors and the credibility of persons involved.[101] Apart from this, franchise regulation has become a stimulus for business development in developing countries, as the law has the capacity to attract investors by ensuring predictability and adequate protection.[102] It is argued that creating the right balance between parties, to minimize abuse and negative effects of having scattered rules, franchise-specific law is necessary and indispensable.[103] In general, franchising legislation would provide certainty and a clear framework for the relationship between the parties, addresses abuses within the sector, promotes enterprise development and contributes to the expansion of franchising business.[104]

As identified by researches conducted in different countries, lack of franchise-specific law and the consequent inadequate protection for franchise relationships is the major obstacle for the development of franchising.[105] In Thailand, even if franchising is growing, lack of uniform legislation affects its significant expansion.[106] Moreover, in Ukraine, a poor legal framework was a major factor that discouraged foreign franchisors to enter into the market that forces the country to adopt commercial laws in 2001, in which franchising was specifically addressed and given extensive recognition.[107] Research conducted in Croatia[108]and Jordan[109] identifies that countries with specific franchising

[98] Imed Bekhouche, *et al*, An Overview of Franchising Law: Why is it Important? *International Journal of Law and Public Administration,* Vol.1, No.1; (2018), p.41-42, available at https://www.researchgate.net › publication ›, accessed on 01 February 2018.

[99] Mark Abell, The Franchise Law Review, Law Business Research Ltd, 4th ed., (2017), London, available at: https://thelawreviews.co.uk › wps › forms › verify_digital_asset , accessed on 11 July 2018.

[100] Bekhouche, *supra* note 98, p.43-44.

[101] Id., p.41-42

[102] Barkoff, *supra* note 97, p.15; US Department of Commerce, *supra* note 2

[103] Pornchai Wisuttisak, The Regulatory and Commercial Environment for Franchising in Thailand in the Wake of the Asian Integrating Market, *Iium Law Journal*, Vol. 24, No. 1, (2001), p. 125-126, available at https://journals.iium.edu.my › iiumlj › index.php, accessed on 11 June 2018

[104] African Development Bank Group, *supra* note 8, P.4

[105] Bekhouche, *supra* note 98, p.41-42

[106] Ibid.

[107] Ukraine - Legislation and Regulations Relevant to Franchising, available at: https://www.unidroit.org/131-instruments/franchising/guide/guide-2edition/national-information-2nd-franchise/country/292-ukraine-legislation-and-regulations-relevant-to-franchising accessed on 11 July 2018

[108] Alpeza *et al, supra* note 37, p. 19 and 23

laws generally have the highest number of franchise systems the more franchise outlets, the more franchising impacts on the economy. In China, the adoption of franchise law in 2007, as a response to marketplace abuses, played an important role in improving the environment for franchising.[110] The adoption of franchise law in Vietnam also became a turning point for the development of franchising.[111] Moreover, in Malaysia the adoption of franchise law in 1998 provide certainty and great protection for parties, and encourage good business practices by protecting the system and the franchisor's copyright.[112] According to a research conducted in Latin America, franchise laws have a significant impact on development as the law significantly influences economic agent, increase the confidence of the participants by providing adequate and equal protection, and creates better relationships and thereby leads to better results as both parties fully aware of their rights and duties.[113] Generally, franchise law provides all parties with a clear framework to better understand the system and enhance the utilization of the model.[114] Therefore, having observed the contribution of franchising for development, policymakers in emerging markets are increasingly looking for ways to develop and regulate franchising.[115]

1.4.3. Approaches of Franchise Regulation

When we come to the approaches of franchise regulation there is no uniform approach even within countries that adopt franchise-specific laws. In this regard, one can find the "disclosure" countries, the "relationship" countries, and the "registration" countries.[116] In disclosure countries, the law typically obliged the franchisor to provide to a prospective franchisee a disclosure document setting forth specified information relating to the franchisor and the franchising business prior to signing the agreement and/or before any consideration is paid.[117] In relationship countries, the law regulates some aspects of the relationship between franchisors and franchisees that include terms of the

[109] Bekhouche, *supra* note 98, p.43-44
[110] Ibid.
[111] Yohanis Hailu, The Legal Framework for the Transfer of Technology in Ethiopian, *Journal of Law, Policy and Globalization,* Vol.55, (2016), p.122, available at https://iiste.org/Journals/index.php/JLPG/article/view/34245/35217 accessed on 23 March 2019
[112] Franchising in Malaysia, 2018, available at: https://www.lexology.com/library/detail.aspx?g=2c64640b-fa13-4f8d-a959-9f38ded3a4c0 , accessed: 08 May 2019
[113] Lanchimba, *supra* note 41, p.7
[114] African Development Bank Group, *supra* note 8, and Spencer, *supra* note 86, p.31
[115] Bekhouche, *supra* note 98, p.41-42
[116] Lagarias, *supra* note 50, p. 143-144
[117] Ibid.

agreement, renewal, good faith, product tie, termination, and non-compete restraint.[118] In registration countries, the laws merely spell out who and what must be registered in connection with a franchise operation; and in most cases, such laws require the registration of the franchise businesses and the agreements.[119] However, in many countries like China, South Africa, South Korea, Argentina, Malaysia, and Vietnam, their franchise laws tried to regulate the above elements in single legislation.[120] Such types of franchise laws, therefore, typically cover pre-contractual disclosure requirements, rules governing the offer and sale of franchises, right and duty of parties, registration requirements, post-sale relationship of the parties, and dispute settlement mechanism.[121]

According to Development Bank of Africa, franchise regulation would be most beneficial if it includes a definition, a requirement for pre-sale disclosure and requires parties to act in good faith towards each other.[122] Moreover, Timothy H. Fine stated that good franchise law should require registration of the franchise agreement; and to file a copy of the agreement or its revisions with the government organ. Through registration, it is possible to save franchisees' money that they otherwise would have lost for franchisors who failed to meet their obligations.[123] He also stated that a good franchise law requires parties to deal with in good faith and in a reasonable manner prohibits non-renewal of the agreement except on few grounds regulates the conditions to transfer the agreement and prevents a franchisor from terminating the agreement without good cause. He generally stated that good franchise law should be crafted by considering franchising as a special, long-term and continuing partnership, which is more than a commercial buyer/seller situation.[124]

[118] Ibid.
[119] In US 20 states have relationship legislation with the objective of controlling franchise agreement and regulates terms related to termination, renewals, transfers, encroachment, and advertising funds; Ewelukwa, *supra* note 74, p. 1
[120] Abell, *supra* note 54
[121] Uche E. Ofodile , Franchising Law: Does Nigeria Need one? Do other countries have them? Nigerian International Franchise Association, (2014), p. 1, available at www.nigerianfranchise.org › images ›, accessed on 23 March 2019
[122] African Development Bank Group, *supra* note 8
[123] Timothy H. Fine et *al*, The Proposed Uniform Franchise Act: The Franchisee Viewpoint, p.10, available at https://digitalcommons.law.seattleu.edu › cgi › viewcontent, accessed on 01 February 2019
[124] Ibid.

2. An Overview of Franchise Business in Ethiopia and the Need for Regulation

Currently, though their number is limited, there are entities in Ethiopia that run their business under franchise agreements. Ethiopia's current major franchise agreements were first drawn up nearly 50 years ago. The first franchisors in Ethiopia were Coca-Cola, Pepsi cola and Hilton International Hotels that took place in the 1960s, and the Sheraton Addis in 1990s.[125] Currently known international brands like Marriott, Radisson Blue, the Golden Tulip, Crowne Plaza, Wyndham Hotel Group, Ramada Hotel, Pullman Hotel, Pizza Hut, and KFC are operating their franchise business in Ethiopia.[126] However, the current franchising market in Ethiopia is heavily concentrated in Addis Ababa, which accounts for 95% of all Ethiopian franchised outlets.[127] According to one research, lack of awareness on the enforcement agency about franchise business, weak and fragile protection for IP infringements, and lack of motivation and coordination on the part of government agency to promote franchising are the main challenges for the development of franchising in Ethiopia.[128] Moreover, the country lacks a law specifically designed to regulate the franchise business. Even the term "franchise" is not mentioned both in the civil and commercial codes, and there is no government organ explicitly authorized to regulate franchising business.[129] Overall, the legal regimes that govern franchise agreements are located in various statutes such as contract law, commercial law, investment law, IP laws, competition laws, and other laws.[130] However, after enactment of the new Commercial Registration and Business Licensing Proclamation in 2016, the term franchising is explicitly recognized with the regulation of some aspects of franchising even though many important concerns regarding franchising are left unregulated.

2.1. The Existing Legal Framework for Franchising in Ethiopia

Before directly going to the discussion on the legal framework, it is better to look at the policy direction in relation to franchising. Ethiopia has few policies that directly embrace franchising as a business doing model. Among these, the

[125] Yohannis, *supra* note 4 P.1.
[126] US. Commercial Guides; Ethiopia 2017, US Department of Commerce, p.19, available at https://www.trade.gov/knowledge-product/ethiopia-market-overview? , accessed on 20 November 2019.
[127] Ibid.
[128] Nibemicheal Fikre, Business Franchise: The Legal Framework and Practice in Ethiopia, unpublished LLM thesis, Bahir Dar University, (2016) p.67.
[129] Eshetu, *supra* note 49, P.145.
[130] Ibid.

FDRE Micro and Small Enterprise (MSE) Development Policy and Strategy clearly outlines the government's position with regard to franchising. According to this policy franchising is an important investment methodology that can significantly contribute to the development of SMEs in Ethiopia. As stated in the policy, if well utilize, franchising can help to speed up Ethiopia's economic growth by attracting foreign investment and creating a new job.[131] Since franchising is the most effective mechanism for SME development, the policy emphasizes on enabling SME to work with an experienced local or foreign partner through franchising.[132] In order to solve problems currently faced by SME, the policy underlined on the preparation of legal and regulatory frameworks for franchising. It is stated that due to the limited experience of franchising in Ethiopia, appropriate legal framework shall be prepared.[133]

With the legal regime, the first important law that is applicable for franchise agreement is contract law parts of the 1960 civil code. A franchise comes into existence utilizing a contract. Hence, regulating franchising begins by regulating the contract that gives rise to it. Consequently, the contract has to be in strict compliance with the provision of the code and needs to fulfill essential conditions of the contract.[134] Moreover, the principle of good faith applies in the making,[135] interpretation,[136] and performance[137] of the franchise agreement. The rules that govern adhesive contract[138] and rules applicable for termination of the contract[139] will also govern franchise agreement. On the other hand, the Commercial Code is also the other law applicable to franchising. There are a number of provisions in the Code like those on goodwill,[140] trade name,[141] distinguishing marks,[142] and assignment of premises.[143] These provisions are, in one or another way relevant for franchising, and influence how the franchised business is run.

[131] FDRE Small and Medium Enterprise Development Policy and Strategy, *supra* note7, P.23.
[132] Ibid.
[133] Id., P. 24.
[134] Civil Code Proclamation No.165, *Negarit Gzaeta,* (1960), Tittle XII, Article 1675 and ff.
[135] Id., Article 1702.
[136] Id., Article 1713 and Article1732.
[137] Id., Article 1785(1).
[138] Id., Article 1738(2).
[139] Id., Article 1820, 1821, 1819-1825, 1820(1), 1822, 1823.
[140] Commercial Code Proclamation No. 166, *Negarit Gazeta,* (1960), Article 127(1), 130-134).
[141] Id., Article 127 (2) (a), Article 135.
[142] Id., Article 140 and 141.
[143] Commercial code, Article 139.

The other piece of legislation that may be relevant for franchising is the Trademark Registration and Protection Proclamation.[144] As per Article 26, and 29 (2) of this proclamation, it is only owners of a registered trademark who shall have the right to license the use of a trademark. Hence, in order to franchise the trademark, a franchisor is required to register the trademark and the franchise agreement at the Ethiopian IP Office. As per the proclamation, a license contract on a registered trademark or an application for registration of a trademark, as well as modification or termination of the same shall be submitted to the Office; otherwise, the license shall have no effect on third parties.[145] Moreover, any license contract on a registered trademark or an application for registration of same shall be null and void unless it contains a provision that enables the franchisor to effectively control the quality of the goods or the services provided by the franchisee.[146] The rationale behind for such requirement maybe the need to protect consumers, since the use of the trademark by a licensee may mislead consumers as to the quality of the goods or services unless there is effective quality control.[147] Moreover, the proclamation prohibits the inclusion of unjustified restrictions that are not necessary to safeguard the right of parties, for which the inclusion leads to the nullity of the contract.[148]

The other relevant law is the Inventions, Minor Inventions and Industrial Design Proclamation, which comes in to picture when the franchise agreement involves the use of the franchisor's patent right.[149] Pursuant to Article 26 of the proclamation, the franchisor should have a patent granted by the Ethiopian IP office in order to license the use of its patent. A foreign franchisor that provides a patented invention for the franchisee can also use the option of acquiring a patent of introduction in order to acquire protection in Ethiopia.[150] However, the Ethiopian patent law has no clear provision on voluntary licensing of patent rights, the details of its registration, the form and nature of licence contract, grounds and procedures to revoke the contract, and duration of the licence.[151] Apart from these, a manual containing the entire techniques and methods of running the franchised business and how to use the service or products is protected under the copy right law. In this regard, domestic and Ethiopian

[144] Trademark Registration and Protection Proclamation No. 501/2006, *Federal Negarit Gazetta,* (2006).
[145] Id,, Article 16
[146] Id., Article 30
[147] Yohanis, *supra* note 111, p.122
[148] Trademark Registration and Protection Proclamation*, supra* note 144, Article 31(1)
[149] Invention, Minor invention and Industrial Design Proclamation No. 123/1995, *Federal Negarit Gazetta,* (1995),
[150] Id., Article 21 and 28
[151] Id., Article 35(3) and 30(3)

resident franchisor's copyrightable work acquires automatic recognition, while foreign franchisor should publish its work in Ethiopia.[152] The copyright law has some rules on licensing of economic rights. Such rules specifically require the agreement to be in writing and allow the termination of the agreement after five years unless parties agree to the contrary.[153] Failure to adequately exercise the rights by the licensee that prejudices the legitimate interest of the author could be revoked by the latter.[154] However, under the patent and copyright law issues like determination of royalty for licensing, voluntary licensing, implied warranty, and the fate of subsequent improvements of the licensed product are not clearly regulated.[155]

The other category of law that governs franchise agreement is technology transfer aspect of the investment law.[156] In relation to an agreement that entitle the franchisee to use the methods of production, service and marketing, or entire business operation model of the franchiser, the technology transfer aspect of the investment proclamation is applicable, because such kinds of the agreement are being considered as technology transfer agreements under the proclamation. Accordingly, franchising agreements which have these elements are required to be registered before the Investment Commission. As per the proclamation, where an investor concludes a technology transfer agreement related to his investment, he shall submit the same to the Commission for registration and failure to do so result in the nullity of the agreement.[157] However, as one can understand from the contrary reading of Article 15(1), if the franchisor simply transfers its trademark or other designations that represent his goodwill without introducing certain patented machinery or technical information related to the production of specific goods, the agreement will not be subject to the investment proclamation.

Commercial Registration and Business License Proclamation is also the other relevant law which has direct application for franchising.[158] This law under its Article 2(33) explicitly introduces the concept of franchising in Ethiopian and

[152] Copyright and Neighbouring Right Protection Proclamation No. 410/2004, *Federal Negarit Gazetta*, (2004), Article 3
[153] Id., Article 23(2), and Article 24(3)
[154] Id., Article 24.
[155] Dagnachew Worku, Examining the Legal Regime Governing Commercialization of Patents, Copyrights and Trademarks in Ethiopia, Developing Country Studies, *IISTE,* P. 36, available at www.iiste.org, accessed on 1 May 2018
[156] Investment Proclamation No. 1180/2020, *Federal Negarit Gazetta*, *(*2020), Article 2(9) of the proclamation clearly defined what Transfer of technology agreement refers
[157] Id., Article 15(1)
[158] Commercial Registration and Licensing Proclamation, *supra* note 17.

regulates the registration of the franchise agreement. As provided under the proclamation no person shall obtain any kinds of business license without being registered in commercial registrar.[159] Hence, parties to the franchise agreement should register the agreement before the competent authority by attaching documents listed under the regulation.[160] In this regard, an application for a special franchising registration should be submitted by filing a prescribed form and attaching documents listed under Article 48 of the regulation.[161] As provided under Article 6(2) of the proclamation, the registering officer shall register the application upon payment of service fee and issue a certificate of registration to the franchisor and franchisee if the application is found acceptable. However, the law is not clear as regards who owes the duty to undertake the registration. Under the draft commercial code it is the franchisee that has the duty to register the franchise agreement.[162]

As one can understand from the proclamation and the regulation, prior to registration the franchisor and the franchisee should have a valid business registration and trade license, as no one can engage in any business activity without having a license.[163] Moreover, any amendment or alteration in the original registration shall be registered with the registering office.[164] In this regard, the regulation provides the procedure for renewal,[165] and getting a substitute certificate if the registered franchise certificate is damaged.[166] Moreover, in order to cancel the franchise certificate, parties should submit an application with the approved cancellation agreement and the original certificate.[167] Finally, the proclamation enumerates criminal acts. If parties to franchise prepared or used false franchising certificate; or engaged in the business without having a license, or obtain or renew franchising certificate by submitting false documents and fails to notify changes that warrant amendment of the registration, shall face penalties prescribed under Article 49 of the

[159] Id., Article 5(1&2).

[160] Commercial Registration and Licensing Regulation, No. 392/2016, *Federal, Negarit Gazetta*, (2016), Article 48-51. In this regard the regulation, among other things, incorporated rules that govern the registration, renewal, and cancelation of franchise, and provides the documents that should be attached for this effect.

[161] A notarized franchising contract and its authenticated original and copy; a notarized registration certificate of the franchiser; a photocopy of the valid trade license of the franchisee; two passport size photographs, original and necessary copies of valid identification card or valid passport of the franchising manager; and the power of attorney, valid identification card or passport of the principal and the attorney when it is submitted by an attorney

[162] **የኢትዮጵያ ፌደራላዊ ዲሞክራሲያዊ ሪፐብሊክ የንግድ ህግ ረቂቅ ፣ (2011 ዓ.ም)፣ አንቀጽ 208**

[163] Id., Article 6(1) & 22(1); Commercial Registration and Regulation, *supra* note 160, Article 48(2&3)

[164] Commercial Registration and Business Licensing Regulation, supra note 160, Article 10.

[165] Id., Article 49.

[166] Id., Article 51.

[167] Id., Article 50.

proclamation. Generally, the Proclamation was expected to pave the way for legitimizing franchising and clarifying the grey area. However, it failed to regulate basic features of franchising like contents of the agreement, pre-sale disclosure, rights and duties of parties, and as such it has been criticized for being too general.[168]

There are also different tax laws relevant to franchising. Withholding tax regime is one of the prominent taxes that apply to the franchise in Ethiopia.[169] Hence, by virtue of Article 51, 53, 54 the Income-tax law royalty payment be subject to 5% of withholding tax. If a foreign franchisor gives technical services for a domestic franchisee in Ethiopia, his payment is subject to 15% VAT, and if he renders the service for Ethiopian franchisee but outside Ethiopia, his payment is subject to withholding tax of 10%.[170] For the enforcement of this tax liability, a domestic franchisee has an obligation to act as a withholding agent for Schedule D royalty payment and for the VAT.[171]

Finally, it is also worthy to look at the current draft Commercial Code prepared by the FDRE General Attorney Office,[172] as it shows the currents position of the government. Under the draft code, there are provisions specifically devoted to the regulation of franchising. The draft code under Article 204 provides a definition for franchising, even if the types of IP rights subject to franchising are not clearly incorporated. Apart from this the draft law clearly provides the scopes of the right of the franchisee under its Article 204(2). Hence, lease right over the franchised business in no way has the effect of providing for the franchisee ownership right over the franchised business. Moreover, it requires mandatory registration of the franchise contract,[173] and the designation of specific place or surroundings dedicated to the franchise business. [174] Corporal or incorporeal goods can be subject to franchising agreement, even if the details are left for the determination of subsequent legislation.[175]

Apart from this, the draft code devotes a provision that regulates the right and duty of the franchisee and the franchisor. In this regard, Article 207 specifically deals with the duty of the franchisor. Accordingly, the franchisor has the duty to provide detailed information as to its trade activity, the financial position of the

[168] Tyre, *supra* note 12, p.2.
[169] Income Tax Proclamation No. 979/2016, *Federal Negarit Gazetta,* (2016).
[170] Value added Tax Proclamation No. 285/2002, *Federal Negarit Gazeta*, (2002), Article 7(1)(c).
[171] Id., Article 32(1) and 23(3); Income tax Proc. *supra* note 169, Article 64(3).
[172] **የኢትዮጵያ ፌደራላዊ ዲሞክራሲያዊ ሪፐብሊክ የንግድ ህግ ረቂቅ ፣** (2011 ዓ.ም).
[173] Id, Article 204 (4).
[174] Id, Article 205).
[175] Id, Article 206).

business, and other related information that helps the franchisee to make informed decisions within 30 days from the conclusion of the contract or from taking payment.[176] However, the law does not provide for private actions during the violations of disclosure rules, and does not impose ongoing disclosure obligation on the franchisor with the limited condition. The other duty of the franchisor is the duty to protect the franchisee from trademark fraud. Hence, if any third party infringes on the trademarks that subject to the agreement, the franchisor has the duty to bring an action against the violator with the view to discontinue the illegal act and to get redress. Apart from this, the law imposed on the franchisor general duty to provide assistance and appropriate training for the franchisee on how to operate the business besides other duties that will be provided by other laws and the franchise agreement.[177] As far as the duty of the franchisee is concerned the code imposed only the duty to make the registration of the franchise agreement before the relevant government authority.[178] Obviously, in addition to this duty, the franchisee may also have other duties provided under the franchise agreement. Finally, the draft code mandated the determination of other duties of the franchisor and detailed regulatory matters for legislation to be issued later.[179]

2.2. The Need for Comprehensive Franchise Regulation in Ethiopia

As one can understand from the aforementioned discussion, Ethiopia doesn't have comprehensive franchise law even after the introduction of franchise concept under 2016 commercial registration law. In other words basic elements of franchising such as pre-contractual disclosure, contents of the agreement, parties relationship and basic protection left unregulated under the current laws. This will inevitably create legal uncertainty, and partly attributable to the lack of interest among international and local franchisors to do business with other firms in the country.[180] This is detrimental to the country's endeavor to access and adapt foreign technologies, attract foreign investment, and promote SMEs. According to some writers, lack of specialized laws still results in real challenges for investors who are seeking to franchise their businesses in Ethiopia, led to the copying and misappropriation of well-known and established Ethiopian brands in the local market and a big challenge for SMEs.[181]

[176] Id, Article 207 (1)).
[177] Id, Article 207 (2)).
[178] Id, Article 208.
[179] Id, Article 209.
[180] Yohanis, *supra* note 111, p.24.
[181] Yohannes, *supra* note 4.

On the other hand, in developing countries like Ethiopia, a small business failure is highly correlated with product quality, and franchising creates a stringent product quality control system, guarantees a business success, and reduce overall operational risks. It also enables small business to use the name, goodwill, marketing systems, support facilities and business experience of a renowned brand owner.[182] In Ethiopia there are many successful local brands and home grew franchising concepts operating in different industries like Selam Baltina, Tomoca Coffee, Shewa Bakery, Yohannes Kitfo, and Saay Pastry. Although these businesses were invented and have grown over the years, they are not well duplicated and distributed in all region of the country. Instead of duplication these businesses still operated by the original owners, mainly in the capital city.[183] In Ethiopia, most known Brand owners prefer to open an outlet by themselves than franchising their business. For instance, though there was a franchise request from US, Germany, Ghana, and Djibouti to franchise Tomoca Caffe, the response was not positive due to fear of losing its good will. In general, inability to know how they can sell and protect knowhow, how to transfer their ways of doing business to others, and how to exploit their trademark and good-will is a critical problem that Ethiopian brand owners encountered.[184] Hence, legal support for franchising would have allowed better multiplication of successful business across the regional states, and to increase the competitiveness of local brands that can be sold to other countries.[185]

Apart from this, effective enforcement of IP rights is one basic condition for commercialization of IP through licensing for others.[186] In Ethiopia apart from gaps in the legal framework, the inability to enforce IP rights is a big challenge for franchising. Many in the field stated that the main problem of the Ethiopian IP regime lies on ineffective enforcement due to lack of strong institutions and lack of awareness about the nature of IP on the part of relevant actors.[187] In this regard, Ethiopia is a country with a high rate of piracy of IP in the creative industry that makes Commercialization of IP right by the owner, assignee or

[182] Franchising Unlocks Ethiopian Small Business Potential, *Addis Fortune, Weekly Newspaper*, Vol.12, No.283, (July 3 201) available at https://www.printversion.addisfortune.net/resource/vol_12_num_583/index.html#p=2 , accessed on 11 February 2020.

[183] Ibd.

[184] Nibemicheal, *supra* note 128, p.80.

[185] Ibid.

[186] Getachew Mengistie, The Contribution of Creative Industry for Economic Development, (2013), p.32, available at http://etd.aau.edu.et/bitstream/handle/123456789/16125/Dagnachew%20Worku.pdf? , accessed on 28 June 2015.

[187] Elias N. Stebek *et al*, Property Rights Protection and Private Sector Development in Ethiopia, *Mizan Law Review* Vol. 7 No.2, (2013), available at https://www.ajol.info/index.php/mlr/Article/view/108310/98129, accessed on 02 July 2019

licensee is unthinkable.[188] It is not surprising to see international acclaimed trademarks used by local investors without the recognition or permission of the rightful holders of the brand. One example could be the case of In-N-OUT Burger, Kald's coffee, Kentake Krunchy Fried Chekin, Intercontinental Hotel, and Crown Hotel who is still using the name of the known international brands in Ethiopia.[189] There is also unauthorized McDonald's restaurant in Adigrat, a Starbucks in Mekelle, and Burger King, Subway sandwich in Addis Ababa.[190] All these are examples to show the wide spread infringements of international brands in Ethiopia. In general, difficulty of enforcing intellectual property rights, product quality control, and cumbersome banking regulations make franchising difficult in Ethiopia.[191] Hence, given the pivotal role of franchising to the local economy, it seems like a perfect time to discuss a comprehensive franchise law in Ethiopia that address various issues commonly dealt with under franchising laws. Such legal reform and other initiatives that promote franchising may have its own contribution to Ethiopia to recover from the economic impact of the past years' instability and to alleviate the acute problem of unemployment.

3. The Lessons for Ethiopia from the Experience of Other Jurisdiction

As mentioned earlier, in respect of the statutory regulation, franchising franchise laws around the globe typically cover one or more of the following topics: pre-contractual disclosure, rules governing offering and sale of franchises, registration requirements, requirements relating to the contents of franchise agreements, the post-sale relationship between the parties, and dispute settlement.[192] Concerning legal and regulatory framework for franchising in Ethiopia, it would be worthwhile to consider the approaches of countries such as China, Argentina, Malaysia, South Korea, Australia, Vietnam, and South Africa.[193] Therefore, this part of the article tries to identify the gaps in the law

[188] Getachew, *supra* note 186, p.33.

[189] Due to trade mark infringements of the known US. brand, the U.S Embassy in Ethiopia has led a quiet protest against InterContinental Addis, refusing to do business with it and advocating a stricter IP protection in Ethiopia. Dawit Endeshaw, Rising trademark debacle, *Ethiopian reporter weekly newsletter*,(September 2, 2017), available at https://www.thereporterethiopia.com/content/rising-trademark-debacle accessed on 11 March 2018.

[190] Ibid.

[191] Ethiopia – Franchising, Discusses Opportunities for U.S. Franchisers and Legal Requirements in the Market, International Trade Administration, (2019), available at https://www.trade.gov/knowledge-product/ethiopia-franchising accessed 01 February 2020.

[192] Spencer, Elizabeth, The Regulation of the Franchise Relationship in Australia: a Contractual Analysis, *Doctoral thesis*, (2008) available at: https://research.bond.edu.au › files ›, accessed on18 February 2019 and *supra* note 62, p.120

[193] African Development Bank Group, *supra* note 8, p.3

and the possible lessons that Ethiopia could draw from the experience of other jurisdictions.

3.1. Definition of Franchising

A definition on franchising needs to clarify that the franchisee is granted a license to operate a business using the franchisor's trademark and other IP rights in return for fee/royalty while the franchisor holds administrative rights and control over the business as distinguished from distributorship, and agency.[194] Moreover, whether the law adopts traditional or business format franchising or both should be clearly indicated under the definition. When we see the Ethiopian experience in this regard, the definition provided under the Commercial Registration Proclamation is not without a problem.[195] Even the draft commercial code does not rectify this gap of the proclamation.[196] In the first place, the definition narrows down the scope of franchising as it is not recognized licensing of other IP rights other than trade names. Even if franchising normally covers licensing of goodwill, trademark, trade secret, patent, and copyright, similar indication is not incorporated under the definition. Moreover, it is not clear whether the law recognizes business format or traditional franchising. In general, the coming commercial code should provide a definition that clarifies factors such as the community of interest, types of franchising, the possibility of licensing different types of IP rights; and excludes other forms of business model that have similar features with the franchise like distributorship and agency.

3.2. Disclosure Requirement and Liability Arising There from

Disclosure scheme is designed to prevent fraud and misrepresentation by obliging franchisor to provide for the franchisee information necessary to make an informed decision before entering in to the agreement.[197] Countries with disclosure rules require substantial information to be disclosed to the potential franchisees, although the details tend to vary.[198] The information generally includes: - details of the franchisor and the franchise business; financial information of the franchisor; details of the franchise network; details of litigation; different payable fees; restrictions imposed on the franchisee; the

[194] Bruce S. Shaeffer *et al*, Franchise Regulation and Damages, Wolters Kluwer Legal & Regulatory U.S., (2005), p.88, available at https://lrus.wolterskluwer.com/store/product/franchise-regulation-and-damages/, accessed on 1 June 2012

[195] See Commercial Registration and Licensing Proclamation, *supra* note 17, Article 2(33)

[196] የንግድ ህግ ረቂቅ አንቀጽ 204

[197] Loveland, *supra* note 27, P.652.

[198] Ibid.

obligations of parties; purchase ties, term, termination, renewal of the agreement; details about franchisor's IP right; details of financing arrangements, and exclusivity clause.[199] In many countries, the laws also require the franchisor to disclose its and associate's corporate details; its business experience; the history of prior bankruptcy; details of any restrictions on IP use; list of current and former franchisees; details of the initial and associated costs; and details of purchasing requirements.[200] In a similar manner, the Model Law requires the franchisor to provide basic information similar with the above-mentioned one including the franchisor IP right; the franchise business and its business experience; any criminal convictions relating to fraud or similar acts; any bankruptcy proceeding; the total number of franchisees; financial information; information related to any affiliates of the franchisor; and purchasing requirement.[201] In this regard, the model law requires the franchisee to acknowledge in writing the receipt of the disclosure document upon the request of the franchisor.[202] In a similar manner the franchise laws of China,[203] Australia,[204] South Africa [205] and the USA[206] regulate pre-contractual disclosure in detail and in a comprehensive manner.

In Ethiopia, currently, there is no law that regulates the pre-contract disclosure apart from the draft commercial code, which imposes on the franchisor the duty to disclose certain information before the conclusion of the contract.[207] However, the list of the information required to be disclosed is not detailed and the draft code is still insufficient as compared with the disclosure laws of other jurisdiction like China, US, Australia, South Africa, Argentina, and the Model law. Since the lists are not detailed, it is not as such enough to protect the franchisee from fraud and abuse, and does not enable him to make an informed decision. For this reason, the coming law should require the franchisor to give some basic information in a similar fashion with the model law and the laws of the aforementioned countries. Most importantly, the coming Ethiopian

[199] South Africa Consumer Protection Act, *infra* note 221, and China Franchise 2020, *infra* note 213.
[200] Stephen Giles *et al*, *supra* note 91, 166.
[201] UNDROIT Model law, *supra* note 14, Article 6(1).
[202] Id., Article 7.
[203] Paul Jones *et al*, Franchise Regulation in China: Law, Regulations, and Guidelines, p.57-58, available at: www.jonesco-law.ca › files › pdf, accessed on 14 April 2019.
[204] Overview of Australian Franchise Regulation, *Wiley Rein's International Franchise Development Series*, available at http: s://iclg.com › practice-areas › franchise-laws-and-regulations › australia, accessed on 14 April 2019
[205] The South African Consumer protection Act Regulation, Regulation no. 3,available at https://www.gov.za › documents, accessed on 12 October 2017
[206] U.S. Federal Trade Commission, Trade Regulation Rules ,Article 436, available https://www.ftc.gov › sites › default › files, accessed on 12 March 2016
[207] **የንግድ ህግ ረቂቅ አንቀጽ** 204

commercial code should require disclosure of all relevant information without requiring an exclusive list. Under this approach, additional information which is material to the transaction may need to be disclosed when required by the franchisees. This approach would provide parties with more flexibility and protect franchisees that may want to access the information which varies according to the nature of each transaction. Furthermore, the law should require the franchisee to issue a receipt as far as the disclosure is concerned, and guarantee to protect the confidentiality of information disclosed by the franchisor. Moreover, the coming law should also take a clear position as to whether the duty of disclosure is a one-time obligation or not. In some countries like Australia, the duty of disclosure is continuing obligation, in which disclosure document must be updated within a certain period of time, on the happening of major changes or when the franchisee requested.[208] However, some countries like United State and South Africa do not impose continuous disclosure obligation.[209] In this regard, the coming Ethiopian law should adopt continuous disclosure obligation on the franchisor within a lapse of a certain period of time, and happening of material change. Because if the obligation is not continuing, at least on certain basic information, it will affect the interest of the franchisee as the franchisor may hide basic information which has a detrimental effect on the franchisee.

The other important concern in relation to the duty of disclosure is good faith**.** Disclosing all material facts fairly and in good faith helps the franchisee to make an informed decision before concluding the agreement. Some countries such as the Canadian provinces, China, South Korea, Germany, and Malaysia imposed a strict duty of good faith on both parties.[210] The law of South Africa also requires the franchisor to avoid any fraudulent miss-presentation, which can lead to claims for damages by the franchisee.[211] In Malaysia both parties are required to avoid unreasonable overvaluation of fees or price, and conduct that is not necessary for the protection of legitimate interest of parties.[212] The franchise law of China requires franchising activities to be conducted in compliance with the principles of free will, fair dealing, honesty, and good faith .[213] Hence, the laws

[208] Giles *et al*, supra note 91, 169,

[209] Danie Strachan *et al*, Franchising in South Africa: Overview, *Practical Law Global Guide* (2016/17), available at global.practicallaw.com/8-632-7998 , accessed on 12 March 2019

[210] Abel, *supra* note 99, p. 18-19.

[211] Strachan *et al, supra* note 209

[212] Adhuna Kamarul Ariffin *et al*, Franchising in Malaysia, (2018), *Thomson Reuters, practical law***,** available at https://uk.practicallaw.thomsonreuters.com/ , accessed on 10 August 2018

[213] China Franchise 2020, Law and Regulation, (2019), China ICLG, available at https://iclg.com › practice-areas accessed on 09 January 2020

of many states recognize the principle of good faith in franchising that aims to avoid any fraudulent or negligent miss-presentation by the franchisor. In Ethiopia, however, there is no clear duty on the franchisor to disclose all material facts fairly and in good faith, though the laws of contracts require a contract to be performed in good faith.[214] Hence, Ethiopia should have a law that clarifies how broadly good faith can be interpreted in the context of franchising to ensure fair dealing, and protect the weaker parties from unfavorably drafted provisions.

Finally, many jurisdictions regulate the consequence of failure to observe the duty of disclosure. Hence, failure to comply with the disclosure obligation enables the franchisee to reject the agreement so long as it does so within a reasonable time. For instance, under the Model Law, if the disclosure document or material change has not been delivered or contain a misrepresentation, the franchisee can terminate the agreement and/or claim damages.[215] In South Africa, there are substantial penalties for failure to provide timely disclosure.[216] In China, failure to disclose material information or misrepresentation, in addition to the franchisee being entitled to terminate the contract, results in fines imposed by the government and a public announcement of the violation when the act is a serious one.[217] Hence, the Ethiopian law should clearly prohibit willfully making of untrue and misleading statement or omitting material fact in any disclosure. The law should also create a civil remedy for the injured franchisee due to franchisors failure to observe the duty of disclosure. This gives the franchisee a cause of action for damages and to claim termination if the violation is willful.

3.3. Franchise Agreement and Registration Requirement

A number of countries insist that a franchise agreement should contain certain basic elements. In this regard, the Model law preferably requires the agreement to incorporate terms and conditions of renewal of the agreement; training programs; the extent of exclusive rights to be granted; conditions to terminate the agreement by both parties; the limitations imposed on the franchisee; in-term and post-term non-compete covenants; the fee imposed on franchisee; the conditions to transfer the agreement; and any dispute resolution processes.[218] Similarly, franchise laws of South Africa and China require the agreement to

[214] The 1960 civil code, *supra* note 134 Article 1732 and 1785
[215] UNDROIT Model Law, *supra* note 14, Article 8(1)
[216] Strachan an et al, *supra* note 209
[217] Jones *et al*, *supra* note 203, p.61
[218] UNDROIT Model Law, *supra* note 14, Article 6(2)

incorporate obligation of both parties; conditions to transfer the agreement; training and assistance provided by the franchisor; duration and renewal of the agreement; description of any trademarks and franchised IP rights and condition for their use; any restrictions imposed on the franchisee; and the financial obligation of the franchisee.[219] However, in Ethiopia, the existing laws are silent as far as basic items that should be incorporated under the franchise agreement. In this regard, the future franchising laws of Ethiopia should require the incorporation of some basic information in the agreement by drawing experience from the laws of the above-mentioned jurisdiction. The other important issue that should be regulated is whether the agreement must be in writing, and if not, the consequences of such agreement. In China[220] and South Africa, their respective laws require the agreement to be in writing and signed by the franchisee.[221] However, the experience of Australia is different in this regard, as it requires the agreements can be a written, oral, or implied agreement, or a combination of all.[222] When we come to Ethiopia, a contract does not need to be in writing to be valid unless the law clearly requires so.[223] Hence, to facilitate the process of proof of the transaction and to reduce any potential disputes, the Ethiopia law should clearly require a franchise agreement to be in writing.

The other important issue in franchising is registration. In this regard, China, Lithuanian, some state in US, and Malaysia require the registration of franchise agreement and IP rights.[224] For instance, in China, the law requires the franchisor to register the agreement within fifteen days after the execution of the agreement.[225] In Malaysia, franchisors must register their agreement before they can operate the business; otherwise it is an offense punishable with a fine and imprisonment.[226] In the US, 10 states have formal registration and review processes, and 4 states have filing requirements. On the other hand, laws in Australia, Argentina, South Africa and federal law in the US do not impose filling or registration requirements. For instance, in Australia, there are no

[219] Strachan *et al*, *supra* note 209; China Franchise 2020, *supra* note 213.
[220] Ibid.
[221] South Africa Consumer Protection Act No.68, 2008, sec.7 available at https://www.saica.co.za › Legislation › tabId.
[222] Giles *et al*, *supra* note 91, 168.
[223] The 1960 Civil code, *supra* note 134, Article 1723
[224] Lena Peters, Franchising: Recent Legislation and the UNIDROIT Model Franchise Disclosure Law, (2004) p.46, available https://heinonline.org/HOL/Page?handle=hein.journals/blawintnl2004&div=5&g_sent=1&casa_token=&collection=journals, accessed on: 18 February 2019
[225] Jones *et al*, *supra* note 203, p.60
[226] Ariffin, *et al*, *supra* note 212

registration requirements for franchise agreement, even if several reports recommended the country to introduce the system.[227]

The best model to follow in Ethiopia is the one that provides a detailed registration process and sets forth clear standards for all documents that need to be considered during registration. Actually, the existing law requires registration of the franchise agreement, even if it does not exhaustively list the formality requirements and the forms, applications, and notices to be considered during registration. Hence, the future Ethiopian law should require the registration of the franchise agreement and IP rights, and list documents to be filed with the registration application, including a copy of the agreement, the operations and training manual, financial statements, and any additional documents required by the Registrar. The law could also require that registration should be effected before the conclusion of the agreement. However, giving the registrar broad discretionary power to accept or refuse registration may not be the best option in Ethiopia as it may lead to abuse of power. Finally, submitting false or misleading documents should be a criminal offense to deter improper behavior, and the law should impose penalties for violating the registration rules.

3.4. Rights and Obligations of Parties in Franchising

In most cases, determining the rights and duties of the parties is left for the agreement of the parties, since rights and obligations in franchise vary according to the nature of each transaction. However, there are legal systems that provide comprehensive lists of rights and duties of parties while many other countries provide certain rights and obligations as instances and leave others for the agreement of the parties.[228] In Argentina, for instance, the law imposes a mandatory obligation on the parties that cannot be overridden by express agreement of the parties. Hence, the franchisee has the duty to carry out the franchised activity in compliance with the operational manual: provide any information that may be reasonably required by the franchisor and facilitate any inspection of same; not to carry out any act that may cause a risk to the prestige of the franchisor or his IP right and to keep the specific technical knowledge confidential, and to comply with the agreed consideration.[229] The franchisor also has the duty to provide pre-contractual information, technical knowledge and operational manual required to carry out the business; ensure the provision of

[227] Giles *et al*, *supra* note 91, p.169 ; Lynch *et al*, *infra* note 229
[228] Peters, *supra* note 224 p.46
[229] Valeriano Guevara Lynch *et al*, Regulation of Franchise Agreements in Argentina: Overview, *Thomson Reuters, practical law*, (2017), available at: https://uk.practicallaw.thomsonreut, accessed on 13 April 2019

goods or services in a timely manner and good practice; and defend and protect the use right of the franchisee.[230]

In Malaysia, the franchise act requires both parties to act honestly and lawfully, to pursue best franchise business practice of the time and place, protect the consumers' interest, and to avoid unnecessary and unreasonable conducts.[231] Furthermore, the franchisor is obliged to give a written notice for the franchisee about breach of contract and allow him to remedy the breach; and to assist a franchisee to operate its business.[232] On the other hand, in South Africa the law does not specify any ongoing obligation on the parties; but requires the obligations and the rights of both parties to be recorded in the agreement, and not to be unfair, unreasonable or unjust.[233] In Vietnam, the general rule is that parties have the right to freely negotiate the terms and conditions of the agreement including their rights and obligations.[234] When we come to Ethiopia, in addition to what is provided under the draft code, the law should require the franchise agreement to incorporate minimum rights and obligations of parties that are common in most jurisdictions such as non-competition, fair dealing, and prohibition of unnecessary and unreasonable conduct, protection of IP rights and confidential information, franchisor's assistance, and training.

3.5. Transfer of Franchise Agreement

Transfer clause enables both parties to transfer rights arising from the franchise agreement to a third party. Franchise laws in most cases incorporate the franchisee's obligation not to transfer the business without prior approval of franchisor.[235] Some laws also prohibit the franchisor from unreasonably withholding its consent to the transfer made by the franchisee, if the transferee meets the legitimate qualifications of the franchisor.[236] Some other laws require franchisees to notify the franchisor of his intent to transfer the franchise, in order to enable the franchisor to decide upon the transfer.[237] Under the model law, the

[230] Ibid.
[231] Ariffin, *et al*, *supra* note 212
[232] Ibid.
[233] Strachan *et al*, *supra* note 209
[234] Tu Ngoc Trinhand *et al*, Regulation of Franchise Agreements in Vietnam: Overview, *Thomson Reuters, practical law* 2017 available at: https://uk.practicallaw.thomsonreut, accessed on 21 April 2019
[235] UNDROIT model law, *supra* note 14, Article 6 (2)(k)
[236] Arkansas Code Title 4, Business and Commercial Law § 4-72-205, available at https://law.justia.com/codes/arkansas/2012 accessed 21 May 2019
[237] Iowa Code Chapter 523H, Franchise, (2011), available at https://www.legis.iowa.gov › docs › code › 523H accessed 21 May 2019

franchisor is required to disclose the conditions under which both parties can assign or transfer the agreement for third parties. Such conditions include whether the franchisor's consent must be obtained or approve the new franchisee, or the franchisee must compensate the franchisor for the training that the new franchisee will be required to undergo.[238] The laws of Malaysia allows the franchisor to require its prior consent before the franchisee transfer the business if this is incorporated in their agreement.[239] South African law also requires parties to incorporate in their agreement the conditions under which the franchisee can transfer the franchise business.[240] Hence, the coming Ethiopian law could require parties to incorporate in the agreement conditions to the transfer like obtaining the prior consent of the franchisor since this protects the franchisor from accepting the transferee that he/she did not choose. However, to avoid abusive denial, the law may require a franchisee to grant the franchisor the right of first refusal before the transfer.

3.6. Term, Termination and Renewal of Franchise Agreement

Many franchising laws require a minimum term for the agreement, the violation of which may result in invalidation. For instance, in China and Malaysia, their laws impose mandatory minimum duration of three and five years respectively.[241] In South Africa and the Model law, parties are obliged to incorporate the terms of the agreement whose failure leads to invalidation.[242] The rationale behind this rule is to protect the franchisee that needs a proper amount of time to see the fruits of its investment. When we come to Ethiopia, the law of contract recognizes freedom of parties to set terms of their contract unless the law itself mandates a minimum term.[243] Therefore, the coming Ethiopian law, in line with the franchise law of other countries, should provide a minimum term for the agreement with a view to protect the franchisee against abusive or wrongful termination. Or to the minimum, the law should require parties to incorporate the terms in the franchise agreement.

Termination is the other important issue regulated under franchise law. In most cases, franchise agreements provide a long list of instances in which the franchisor is entitled to terminate the agreement without providing such right for

[238] UNDROIT model law, *supra* note 14, Article 6 (2)(k)
[239] The Franchise act of Malaysia 1998, available at http://www.mfa.org.my/newmfa/regulation-under-the-franchise-act-1998 accessed on 10 August 2019
[240] Regulation 2, South Africa Consumer Protection Regulation, *supra* note 205
[241] China Franchise, *supra* note 213; The Malaysia franchise act 1998, *supra* note 239
[242] Strachan an et al, *supra* note 209
[243] The 1960 civil code, Article, 1711, supra note 134

the franchisee.[244] Generally, many franchising laws across the globe have strict rules on termination of the agreement to protect the franchisee from abusive termination.[245] In Malaysia, the franchise act allows both parties to terminate the agreement only for a good cause that includes failure to comply with the agreement and to remedy breaches, abandonments of business.[246] The Model Law also requires the franchisor to incorporate in the disclosure document the conditions under which the agreement may be terminated by both parties and its effects, and the term and conditions of renewal of the agreement.[247] Moreover, it allows the franchisee to terminate the agreement if the disclosure document or notice of material changes is not delivered, contains a misrepresentation and an omission of a material fact.[248] In Argentina, termination without cause is not permitted during the term of the agreement except for material breach of essential obligations by the other party. Moreover, the franchisor has the right not to renew the agreement by notifying his decision for the franchisee, one month in advance for each year.[249] The Korean franchise Acts allows the franchisor to terminate the agreement when a bankruptcy proceeding is filed against the franchisee, and unable to manage the franchise outlet due to force majeure. Moreover, the law required the franchisor to provide a notice of non-renewal, 90 days prior to the expiry of the agreement.[250] The future Ethiopian law should provide rules about termination, and provide for the franchisors the right to terminate the agreement for good cause and should explain precisely what constitutes good cause. Moreover, to create equilibrium, the law should allow a franchisee to terminate the agreement in certain cases such as franchisor's failure to meet disclosure requirements. In addition, the future law should also require the franchiser to incorporate in the agreement the term and conditions of renewal of the agreement.

Conclusion

Franchising could be one of the viable strategies of doing business especially for small business. For this reason, regulating franchising is on the rise. Such laws are designed to regulate pre-contractual disclosure and its content, the relationship of parties, registration of the agreement and documents required to be attached, and basic elements that should be incorporated in the agreement and

[244] UNDROIT Model Franchise Disclosure Law, Commentary, *supra* note 241
[245] Ibid.
[246] The Malaysian Franchise Act 1998, *supra* note 239
[247] UNDROIT model law, *supra* note 14, Article 6 (2) (D) and E
[248] Id., Article 8(1)
[249] Valeriano Guevara Lynch and et al, *supra* note 229
[250] Peters, *supra* note 224, p. 48-49

its form. Though the concept of franchising has been introduced in Ethiopia since a long time, and its economic and commercial importance makes it one of the viable methods of investment and SME development, still the country lacks a law that comprehensively regulates franchising. Hence, basic issues of franchising like pre-contractual disclosure, parties' relationship, franchise agreement and its basic content, trade restraint and other similar matters are not regulated. Due to the lack of special law addressing these basic elements, certain aspects of franchising are regulated by different laws that are not in line with the specific nature and peculiar features of franchising. Generally, lack of specific law to regulate franchising and inadequate IP protection in Ethiopia may hinder the development of franchising. It may create disincentive for foreign investors, halt development of local brands, obstruct technology transfer, and hamper the development of SME. For the successful expansion and smooth functioning of franchise businesses, a separate and comprehensive law that governs franchising is preferred instead of the existing clauses which are found flung in different legislations. Hence, Ethiopia needs to adopt a franchise-specific law that regulates, among other things, precise definition; pre-contractual disclosure; formality requirement of the agreement; registration of the agreement; and the relationship of the parties that include their respective rights and obligations including termination, transfer and renewal of the agreement, and restriction imposed on the franchisee.

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, inconsistance 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

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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 regimes[6] 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.

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[1] Andreas 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, C*omparative Company Law*].

[2] Egon 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.

[3] Asrat 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]

[4] Kraakman, 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]

[5] Smriti 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 IJETSR*, Volume 5, Issue 3, (2018), P.447, available at www.ijetsr.com, last accessed on 12 Feb. 2019.

[6] Matrimonial 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 countries[7], recognized the free transferability of shares as its pillar principle. As of the Commercial Code of Ethiopia, holders of shares of a public company[8] 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 Birr[11], 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 injustice[12], 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 Gazetta*, (2000), Article 68.[herein after, Revised Family Code of Ethiopia].

[12] Areya Debessay and Tadewos Hareg-work, Towards the Development of Capital Market in Ethiopia, Problems and Prospects of Private Sector Development,P.232, available at https://www.eeaecon.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 states[14] 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, 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 l. 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 governance[26]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 critics[28]

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[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 drawbacks[33], 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 transferability[44], 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 Dstillation 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 is 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 Gazetta*, (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 Gazetta*, (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 ተኩሪ መርሻ *vs* አንበላ ኢንተርናሽና ባንክ፤ ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት፤ ቅፅ. 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 Court[70] 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 it 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] ፈቃዱ ኢዮሮስ ገ/መስቀል፤ *የኢቲዮጲያ ኩባንያ ሀግ፣* ሁለተኛ እትም፤ 2008 ዓ.ም. ገፅ 118.

articles of association or else by resolution of the extraordinary meetings.[71] Pre-emption rights of the company or shareholders[72], assuming the position of directorship[73], the directors' power to authorize share transfers[74], and buyback options of the company[75] 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" companies[77], 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.Chapter75,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, C*a1jfornia 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 minuets and putting its stump 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 form[120] 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;Senaiet Betremariam, Share and shareholder Administrator of Abissina Bank S.c, Addis Abeba(14 Jan 2020). Note that the stance of my interviwees , 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;Senaiet 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 auditor[126], 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 Ethiopia[129], 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] አቶ ደሊል ሁሴን *Vs* ኢትዮ የአሽከርካሪዎች እና መካኒኮች ማሰልጠኛ ማዕከል ኃ. የተወሰነ የግል ማህበር ጠቅላይ ፍርድ ፤ ቤት ሰበር ሰሚ ችሎት፤ ቅፅ 17፤መ.ቁ. 102652 ፤ መጋቢት 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 የሚነቀሳቀሱ የጋራ ንብረቶችን ወይም የገንዘብ ሰነዶችን ለመሸጥ ፣ለመለወጥ በመያዣ ወይም በዋስትና ለመስጠት ወይም በሌላ በማንኛውም 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 securities[140]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] መለሰ 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*]; መለሰ ረዳኢ፤ ኢየተሻሻለው 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 accessable in each regional trade buearu. 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 advocators 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 compatable 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 women[153] 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 ; መሐሪ ረዳ፤ አዲሱ የቤተሰብ ህግ ስለሚያስከትላቸው ለውጦች 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.

Some Legal Controversies Regarding Party-affiliated Endowments and Their Participation in Business Activities: The Case of EFFORT and TIRET Endowments

*Mamenie Endale Messelu**

"*A tree will not grow tall unless it has healthy roots and a solid foundation, the same applies to a company; a company will not succeed in growing unless it first puts in place healthy roots.*"

Professor Costas Markides [1]

Abstract

Social service needs in no way can be fulfilled by the government alone. That is why governments are giving due consideration for Civil Society Organizations (hereinafter CSOs) and incorporating them in their legal frameworks. Charitable endowment is among the different classifications of CSOs, which play a significant role in every walk of life as they fill the gaps that the government fails or is unable to discharge its responsibility in various dimensions including human rights protection and socio-economic development. In Ethiopia, party affiliated endowments such as Endowment Fund for the Rehabilitation of Tigray (EFFORT), Amhara National Regional State Rehabilitation and Development Fund (TIRET), Endowment Foundation for the Development of Oromia (TUMSA), and Endowment Fund for the Development of Southern Nation Nationalities and Peoples (WENDO) are established by Tigray Peoples Liberation Front (TPLF), Amhara National Democratic Movement (ANDM), Oromia Peoples Democratic Organization (OPDO), and Southern Nation Nationalities and Peoples Democratic Movement (SEPDM) respectively, on the assumption that the wider public of each regional state community is the beneficiary of these endowments. This article examined the legality of formation, registration, and operation of these endowments and their participation in business by using EFFORT and TIRET endowments as a case study. The article upholds doctrinal legal research which is based

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[1] Professor Costas Markides, David against Goliath: How can Estonian Companies Grow by Challenging Bigger Global Competitors and Conquering New Markets*; London Business School*; (March 2006), pp.1-6.

on the identification, synthesis and analysis of the law defining endowment and their participation in business. The finding shows that there is defective formation of EFFORT and TIRET endowments, and also that their involvement in business activities is contrary to the provisions of the laws regarding commerce, tax, competition, and CSOs.

Key words: *Business Entities; Charity Laws; EFFORT endowments; TIRET endowments; Party affiliated endowments; Registration.*

Introduction

CSOs are prevalent and have been playing an increasing role in complementing the governments' deficiency to address societal needs. These organizations are rampant in virtually every corner of the world in varying forms and nomenclature. As such, even if there is no universal definition for **CSOs,** it can be defined as organizations that are non-governmental, not for profit, not representing commercial interests, and that pursue a common purpose of the public interest.[2] It includes Civic Organizations, Charitable Endowments, Non-Governmental Organizations (NGOs), Private Voluntary Organizations (PVOs), and Professional Organizations.[3]

CSOs obtained funds from different sources namely, foreign funds, membership contribution, government support, income generating activities, private donation, and public collection.[4] All these funds are minimal except income generation activities. Due to this reason different jurisdictions allowed CSOs to take part in trade and investment activities. For example, in USA and UK, CSOs have variety of options to undertake trade and investment activities such as in the form of establishing companies and subsidiaries. Moreover, USA and UK arranged the system of tax exemptions for CSOs.[5]

[2] Gebre Yntiso et al. Non-State Actors in Ethiopia, Update Mapping Final Report, *European Union Civil Society Fund II (CSF II) and Civil Society Support Programme (CSSP),* p.13, [hereinafter Gebre, Non-State Actors in Ethiopia, Update Mapping Final Report].

[3] Francesco A. Schurr, Charitable Foundations in the Principality of Liechtensetin:Tradition and Recent Developments, *VUWLR*, (2011), p.159. See also Tsehai Wada, The Regulatory Framework for Civil Society Organizations in Ethiopia, (2008), p. 1, available at http://www.abyssinialaw.com last accessed on 13 March 2018.

[4] Gebre, Non-State Actors in Ethiopia, Update Mapping Final Report, supra note 2, p.39.

[5] James R. Hines Jr., Non-Profit Business Activity and the Unrelated Business Income Tax, Tax Policy and the Economy, volume 13, MIT Press, pp. 57 – 84; UK Charity Commission Guidance: Charities Act 2006, Chapter 35, titled on charities and trade, (2006), [hereinafter UK Charities Act of 2006]. See Section 4 and 5 below for more detail information in this regard.

In Ethiopia, CSOs are established with a view to serve different category of communities. The usual forms of establishment include religion[6], ethnicity or region.[7] The best example of ethnic or region based CSOs are the so-called EFFORT, TIRET, TUMSA, and WENDO endowments that are established by TPLF, ANDM, OPDO and SEPDM respectively.

This article investigated and analyzed the legal status of these party affiliated endowments and their participation in business activities by using EFFORT and TIRET Endowments as a case study. There is no dictionary or universal definition for the term party affiliated endowments and the business entities owned/managed by them. Thus, for the purpose of this article, the writer gives working definitions: '*Party affiliated endowments'* are endowments in which the party officials either established or managed them by alleging that the wider public is the ultimate beneficiary of the endowments; and '*Party owned/managed business entities'* refer to those business entities that are established by the aforementioned party affiliated endowments as a separate business organization, or businesses that are operated by party affiliated endowments as a sole proprietorship.[8] The author gives special emphasis to EFFORT endowments and its participation in business activities because it is by far the largest in terms of assets, number of subsidiaries, sectoral coverage and supra- regional orientation.[9]

The article upholds doctrinal legal research which is based on the identification, synthesis and analysis of the law defining endowment and their participation in business activities. Books, journal articles, and different guidelines on the legality of party owned/managed business entities are reviewed and analysed to establish the conceptual framework against which the Ethiopian legislative frameworks and practices are examined. This is followed by identification, analysis and synthesis of both the federal and regional state laws related to party affiliated endowments' formation, registration and operation.

[6] From religion perspectives, it is the notion of being rooted in a religiously inspired system of beliefs and thoughts of the quest for nearness to God. See Yaacov Lev, Charity, Endowments, and Charitable Institutions in Medieval Islam, *University Press of Florida*, (2005), p.1.

[7] Aychegrew Hadera Hailu, Towards a History of Non-Governmental Organizations (NGOs) in Ethiopia since the 1960s, *Bayreuth University*, PhD Dissertation, (2016), p.78.

[8] Party owned business is a common name in case where a party undertakes business directly or indirectly by using the state machinery. For example, in Taiwan, a dominant party (Known as KMT's) owned the huge percentage of the Country's business sector and as a result, it is known as "*KMT's Business Empire*". See Berhanu Abegaz, Political Parties in Business, *the College of Willian and Mary, Department of Economics, Working Number113*, (April 2011), p.40, [hereinafter Berhanu, *Political Parties in Business*].

[9] Ibid.

The article has six sections. In the first section the background of party-affiliated endowments and their business entities are examined. Section two of the article evaluated the legal personality of party-affiliated endowments (i.e. their registration, formation and legal personality is evaluated). In section three, the writer assessed the legal permissibility of party-affiliated endowments involvement in business activity. Section four of the article addresses the issue of taxation of party affiliated endowments and their business entities. In section five, the article shows the party owned/managed business entities' non-compliance with the rules of competition laws. Finally, the writer forwarded concluding remarks and recommendations for the identified legal and practical gaps.

1. Background to EFFORT and TIRET Endowments and Their Participation in Business Activities

After the demise of the Dergue regime, there was money and material accumulated during the armed struggle by the TPLF, ANDM, OPDO, and SEPDM.[10] And, there were serious confrontation as regards who shall be the owner of this asset.[11] By using the funds and capital the parties had accumulated during the war[12], and members (veterans) contribution, each of the four political parties established their own endowments such as EFFORT, TIRET, TUMSA, and WENDO; established by the then TPLF, ANDM, OPDO and SEPDM respectively.

For example, the EFFORT memorandum provided that it was established by 25 so-called founder members, each of whom contributed a nominal ETB 2,000 (Two thousand birr) startup capital.[13] In addition, different sources provided that the sources of EFFORT capital are:(1) irrevocably committed contributions

[10] For example, Aregawi Berhe, wrote about one of the first successful operations the then guerilla fighters ever had 'Axum Operation'. It is a military operation that succeeded in raiding a police garrison and a bank in Axum during which the TPLF fighters made away with " substantial amounts of arms and ammunition and 175,000 birr (see Aragew Berhe, A Political History of the Tigray People's Liberation front (1975-1991): Revolt, Ideology, and Mobilization in Ethiopia, California*, Teshai publishers*, (2009), pp. 94-97, [hereinafter Aragew, *A Political History of the Tigray People's Liberation front*].

[11] See for example, Tadesse Kassa, Chief Executive Officer of TIRET Corporate, 20 years special video report of TIRET Corporate, *Ethiopian Embassy of London,* (2015), *available on https://youtu.be/bVTNd-xTJWs=56 last accessed on 17 December 2018*; Sibhat Nega, Who is the owner of EFFORT Endowment and its business entities and the legality of its registration? Voice of America, (1 May 2017), available on https://youtu.be/S-6iXStxPII?t=118 *last accessed on 17 December 2018*.

[12] Sarah Vaughan and Mesfin Gebremichael, Rethinking Business and Politics in Ethiopia: The role of EFFORT, *The Africa Power and Politics Programme*, (2011), pp.1-66, p.35, [hereinafter Sarah and Mesfin, *Rethinking Business and Politics in Ethiopia*].

[13] See EFFORT Endowment Establishment Memorandum of Association, Article 8.

from supporters of EFFORT in Tigray and internationally[14]; (2) money and material accumulated during the armed struggle by the TPLF, including by military means[15]; and (3) profits from Relief Society of Tigray[16] (hereinafter called REST) own investments, through share companies and other activities.[17] Similarly, the TIRET memorandum and article of association provides that TIRET corporate was established as an endowment organization in 1995 with an initial capital of Birr 26, 053, 813.59 (Birr 20, 860,015.44 in kind and Birr 5,193,798.15 in cash); which was contributed by the then Amhara National Democratic Movement (ANDM) and its 25 founding members each of whom contributed a nominal Birr 2400 startup capital.[18]

Concerning party affiliated business entities, let us see the background of one or more business entities of EFFORT Endowments. Initially Alemeda Textile was established by five veterans of TPLF. The former shareholders of Almeda Textile were Yewubmar Asfaw Kidanu, Tsegabirhan Hadush W/mariam, Hailalibanos W/Micheal, Feseha Zerihun Weldu, and Geday G/Egzabhar Meshesha. For example, Hailalibanos W/Micheal was the head of intelligence and security and Yewubmar Asfaw Kidanu, a TPLF Veterans and the wife of Gebru Asrat, who was the then president of Tigray Regional State. Five of them were assumed to contribute Birr 36, 000,000 and the total initial capital of Alemeda was Birr 180, 000,000. Thereafter on Nehassie 1988 E.C all of the five shareholders transferred their shares to REST in the form of donations.[19] Likewise, Guna Trading House was established by 6 veterans of TPLF by

[14] See for example, the famous Band Aid known as Live Aid organized by Bob Geldof generated $65 million pounds. Some criticized this aid money as it is collected in the name of saving famine victims but actually it had been used by the TPLF to overthrow the Derge regime [See Gebru Asrat, Sovereignty and Democracy in Ethiopia: *Signature Book Publishing*, *Washington, D.C, Volume* 5, (2016).

[15] See for example, Aragew, *A Political History of the Tigray People's Liberation front*, pp. 94-97, supra note 10.

[16] Relief Society of Tigray was founded in Washington DC, USA in 1978 as an organization providing relief efforts to civilians of Tigray and since the 1990s it is the major NGO operating in Tigray Regional State.

[17] See EFFORT Endowment Establishment Memorandum of Association, Article 8. For further information, see Sarah and Mesfin, *Rethinking Business and Politics in Ethiopia;* supra note 12, pp.36 & 37.

[18] See TIRET Corporate Establishment Memorandum of Association, May 19, 2006 E.C, Articles 8 & 9. The founder of TIRET Corporate were Berket Semhon W/Gerima, Wondosen Kebede Nura, Tefera Walwa Wondemagegn, Tadesse Kassa Ketema, Helawie Yosef Mengistu, Kassa Tekle Berhan G/Hiwot, Kebede Chana Gebru, W/ro Enewye G/Medhen Abera, Tesema G/Hiwot Engeda, Yosef Reta H/Giorgies, Melese Tilahun Degena, Kebede Tadesse Belay,W/ro Genet Zewude Biru, Ayalew Gobeza Workneh, Demeke Mekonen Hassen, W/ro Asefash Tasew Malede, Eyasu Belachew Tefera, W/ro Berhana Abera Lemma, Tewlde W/Medhen, Gualie Kidu Mengesha, Dessie Guben Taye, Major General Haila Tilahun Gebre Mariam, and Colonial Abate Mekonen Shiro. TIRET Corporate is not a proper name and it should be called as TIRET Endowment.

[19] See Ermias Legesse, *Yemeles Leqaqit*, Netsanet Publishing Agency, pp. 333-335, [Hereinafter Ermias, *Yemeles Leqaqit*].

individual contributions of Birr 1,700,000.00, and later on the former shareholders transferred their shares to REST in the form of donations.[20]

As regards the formation of party affiliated business entities, there is a big difference as between the simulation and the reality. The simulation is that the formation of those party affiliated businesses apparently meets the requirements of the commercial code i.e. at least two members in the case of PLCs or at least five members in the case of share companies.[21] However, the reality is that those party affiliated endowments such as EFFORT and TIRET endowments are used as a cover to finance party affiliated companies.[22]

Of course, a tendency is common in most commercial practice in Ethiopia. A shareholder requires another shareholder, commonly called a sleeping shareholder or fictitious member, just to fulfill the minimum legal requirement and get license of incorporation. In effect, it could be said that some companies in Ethiopia are one-man companies and the members are pseudo. The reason is that there are nominal members who hold insignificant shares in the company, the so called sleeping members.[23] Likewise, in party affiliated business entities, the distribution of shares as between shareholders are skewed and a shareholder with insignificant shares seems to be there only for the purpose of compliance with membership requirements and to supply assistance to the other shareholder to do business. For example, in the table III below, one of the members of the Guna Trading held only 1% while the other shareholders control 99% of the total shares. Thus, one of the shareholders in the company simply lent his name to be included in a memorandum of association to fulfill the minimum requirements of the commercial code; and such a shareholder is obviously nominal.

In this regard, there is a little bit of confusion as Art. 64 (1) of Proc. No. 1113/2019 provided that "*CSOs may engage in income generating activities by establishing a separate business organization (company), acquiring shares in an existing company, collect public collections or operating its business as a sole proprietorship*". Here, the confusion is whether the phrase "*by establishing a separate business organization/company"* indicates that the two or five

[20] See the annexed table 3 & 4.

[21] The Commercial Code of Ethiopia, Proclamation No. 166/1996, *Federal Negarit Gazzeta*, (1960), Articles 510 (2) & 311, [Hereinafter the commercial code].

[22] See the annexed table 5 & 6. For example, table 6 shows that TIRET endowment takes the lion shares of several companies. This means that members/shareholders may not come together or associate to contribute capital in cash or in kind and participate in the profits and losses as supposed to be, but simply to fulfill the legal requirements of membership.

[23] Niguse Tadesse, Major Problems Associated with Private Limited Companies in Ethiopia, The Law and Practice, *Addis Ababa University, LL.M Thesis (Unpublished)*, (2009), pp. 133-136.

membership requirement provided under the commercial code is repealed and single member company is allowed for CSOs as per the proclamation.[24] In the opinion of the writer, concerning the formation of business organization/companies in general and determining the minimum membership requirement in particular, the commercial code is the governing law. Sub Art. 1(the Amharic version) and sub Art. 3 of Art. 64 of Proc.No.1113/2019 clearly refer to the applicability of other relevant laws including the commercial registration and business licensing laws for the income generating activities of CSOs. As a result, the writer argues that Art. 64 (1) of Proc.No.1113/2019 should be read in line with the relevant provisions of the commercial code and a charity cannot individually establish a one man/single member company.

Moreover, Art 347(1) of the commercial code required share companies to be managed by boards of directors comprised of shareholder directors only. It requires that a person who is in the post of director or chairman must be a person who owns at least a minimum share in a given company. In this regard, Eyessus Worku Zafu once provided that '*party owned/managed companies were first established with not more than three shareholders and yet they were called share companies'*; he added that '*even when they were established with a minimum of five shareholders as per the requirement of the commercial code, they will be found being chaired by persons who do not have any share'*.[25]

2. Legal Personality of EFFORT and TIRET Endowments: Exploring the Past and Present

One legal issue to be explored is the governing laws for registration or legal personality of party-affiliated endowments**.** During the imperial regime, the Civil Code of 1960 was the basic text of law that governed the formation and

[24] It seems based this confusion that the draft article of association of TIRET endowment includes a provision that allows TIRET to establish a single member company/a company totally owned by TIRET Endowment. Art. 9(2) of the draft provided that *"ዋድርጅቱን ሀብት ዝ. በሚደክገኙ የምርት፣ የአገልግሎትና የንግድ ተቋማት በማሰማራት ባለአክሲዮን በመሆን እና አዳዲስ የንግድ ድርጅቶች (ኩባንያዎችን) ወይም የንግድ ስራዎችን* ***በብቸኛ ባለቤትነት*** *በማቋቋም የዝ. ማህበኛ ስራዎችን ማከናወን".* The phrase "***በብቸኛ ባለቤትነት በማቋቋም***" indicated that TIRET endowment can establish a one man/single member company.

[25] Eyessus Worku Zafu, the then Managing Director of the United Insurance Company S.C and Vice President of the Addis Ababa Chamber of Commerce, The Impact of Party Owned/Managed Companies on the Private Enterprises, *the Ethiopian Addis Tribune*, (17 May 2002), p.1, [hereinafter Eyessus Worku, The Impact of Party Owned/Managed Companies on the Private Enterprises]. Moreover, the annexed table 3 & 4 shows that most party owned/managed companies have at least one physical person holding some nominal shares. For instance, the annexed table 2 & 5 indicated that in 1995 the chairman of Almeda Textile Factory, Sheba Tannery Factory, Beruh Chemical Factory, and Addis Pharmaceuticals Production were Abadi Zemu, who hold a nominal share in those companies. Similarly, the annexed table 5 shows that the chairman of Sur Construction, Addis Engineering Consultancy, Star Pharmaceuticals, and Mesfin Industrial Company were Arkebe Ekubay, who hold a nominal share in those companies.

registration of endowments in the country. Concerning the controlling and supervisory organ of an endowment, the cumulative reading of Art.468 & 506 of the Civil Code gave the mandate to an office of association/endowments that was established in the capital of each province. The Civil Code designated the Ministry of Internal Affairs as the registering organ of associations and endowments, which in turn, issued registration regulations No. 321/1966.[26] However, the power of Ministry of Internal Affairs to register and supervise associations and endowments were lifted by the transitional government.

On December 1993, the Transitional Government had ratified the "National Policy on Disaster Prevention and Management". This policy in its article 10 had designated Disaster Prevention and Preparedness Commission (CDPP) to be the supervisory body concerning all NGOs including endowments operating within the country.[27] In addition, Proclamation No. 41/1993, which defines the Powers and Duties of the Central and Regional Executive Organs of the Transitional Government of Ethiopia", had made CDPP and BDPP (Bureaus for Disaster Prevention and Preparedness) the supervisor and coordinator of NGOs' activities at the federal and regional level, respectively.[28] Later on in 1995, Art. 23 (9) of Proc. No. 4/1995 gave the power of registration of NGOs including endowments to the Ministry of Justice.[29] At regional level, at different time span the power of Bureaus for Disaster Prevention and Preparedness had been transferred to their respective Justice Bureaus.[30]

[26] It is the regulation issued pursuant to the control of associations' provision of the Civil Code of 1960. Regulation No. 321/1966 lays the registration procedure which among other things sets rules and standards for the: (1) application form for registration; (2) contents of the memorandum and articles of association; (3) verification and review of application; (4) supervision of the organizations/associations after registration; and (5) dissolution of the associations/organizations.

[27] See also Art. 6/10 of Proc. No.10/1995 which was endorsed the mandate of Disaster Prevention and Preparedness and Relief Commission to coordinate and supervise relief activities of NGOs including endowments at the federal level.

[28] For further information see Jeffrey Clark, Civil Society, NGO, and Development in Ethiopia, A Snapshot View, The World Bank, Washington, D.C, (2000), p. 12.

[29] See the Definition and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia, Proc. No. 4/1995, (1995), Article 23(9). Later on Proc. No. 4/1995 was repealed by Proc. No. 471/2005, but the power of the Ministry of Justice to register endowments was intact (see the Definition and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia, Proc. No. 471/2005, (2005), Article 23 (8)).

[30] See Proc. No. 87/2004 of Oromia; Proc. No. 64/1995 (E.C.) of SNNP; Proc. No. 58/2006 of Benishangul-Gumuz; Proc. No. 167/2009 of ANRS. In 2010, the Amhara Regional state further lifted the power of Justice Bureaus to register and supervise associations and endowments and given the mandate to the Bureau of Administration and Security Affairs (See the Definition and Duties of the Executive Organs of the Amhara National Regional State, Proc. No. 176/2010, *Zikre Hig*, (2010), Article 32 (4). And, currently, the power of registration and supervision of CSOs in Amhara Region is given to the bureau of attorney general.

EFFORT and TIRET endowments were established in 1995, as per Article 483-506 of the Civil Code provisions.[31] The issue is that the Civil Code is enacted at the time when Ethiopia was a Unitary State but, EFFORT and TIRET endowments are established while the political system of Ethiopia changed from Unitary into a Federal structure. Here, the Civil Code is regulating civil matters and comprises several laws including but not limited to family, contract, property, and endowments/associations. Each regional state has the primary jurisdiction to enact a civil law.[32] On the other hand, there is a scenario for enactment of civil law by the federal government in cases where the House of Federation recommends doing so for the purpose of creating one civil community with in the country.[33]

The writer argues that to make the Civil Code as the laws of each regional state or federal government, they are expected to endorse it by their laws. However, neither the federal government nor the regional states explicitly endorsed the Civil Code, which makes the legal bases for establishment of EFFORT and TIRET Endowments uncertain and questionable.

But, in practice, both levels of governments did endorse and apply the Civil Code. The provisions of the Civil Code governing contract and property are the applicable laws throughout the country without explicit endorsement by the federal government. Concerning family matters, while the Amhara, Tigray, and Oromia regional states enacted their own family laws; the rest continued to apply the Civil Code by default.[34] Till 2009, the case of charitable endowment was not an exception as the Civil Code was an applicable law throughout the country without endorsement of the federal or regional governments. Besides, the then director of registration of association and endowments at the office of Ministry of Justice, Getachew Gonfa, once disclosed the fact that EFFORT and TIRET were not registered as per the provisions of the Civil Code.[35] In 2009, the federal government enacted a charity and societies proclamation, Proclamation Number 621/2009, which was applied, among other things, to charitable endowments operating in more than one region or charities operating

[31] See the preambles of the memorandum and article of associations of EFFORT and TIRET endowments.

[32] Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No.1/1995, *Federal Negarit Gazeta*, (1995), Article 52 (1) cum. Article 55 (6), [Hereinafter the FDRE Constitution].

[33] Article 55(6) of the FDRE Constitution provides "…*the House of People Representatives shall enact civil laws which the House of the Federation deems necessary to establish and sustain one economic community*".

[34] None of each regional state endorsed the Civil Code by the law rather they are simply applying it by default.

[35] See Getachew Gonfa, the then Director of Charitable Endowments Registration and Supervision, Former Ministry of Justice, *the Ethiopian Reporter*, (February 24 1996 E.C).

in Addis Ababa and Dire Dawa.[36] On the other hand, with the exception of the Amhara National Regional State, no other region has enacted a special law to govern the activities of CSOs in their respective region. The Amhara National Regional State enacted Proclamation No. 194/2012 and Regulation No. 117/2013 to register and administer charities and societies established to operate only in the region. Accordingly, TIRET Endowments was registered at the Amhara National Regional State Bureau of Administration and Security Affairs,[37] by alleging that the Amhara Community is the ultimate beneficiary of TIRET endowments. Until that time EFFORT Endowments continued to be regulated by the provisions of Civil Code.

In February 2019, the federal government enacted Proc. No. 1113/2019, which defined a charitable endowment as **"**an organization through which certain property is perpetually and irrevocably designated by donation, money, or will for a purpose that is solely charitable".[38] The proclamation is applicable to: Organizations operating in two or more regional states; Foreign Organizations; Organizations established in Ethiopia to work on International, Regional or Sub Regional issues or not operate abroad; Organizations operating in the City Administration of Addis Ababa or Dire Dawa; and, Charitable Organizations established by religious Institutions.[39]

In the opinion of the writer, neither EFFORT nor TIRET endowments are within the ambit of this proclamation as their level of operation is limited to Tigray and Amhara National Regional States, respectively.[40] Currently, TIRET Endowment is accountable to the Council of the Amhara National Regional State.[41] However, the Council has not any legal basis to decide on the fate of a chartable

[36] See The Charities and Societies, Proclamation No. 621/2009, *Federal Negarit Gazeta*, (2009), Article 3, [hereinafter Proc. No. 621/2009). Art. 6(1) (a) of Proc. No. 621/2009 gave the charities and societies agency the power to license, register and supervise charities and societies.

[37] The Bureau of Administration and Security Affairs is the responsible organ to register and supervise charitable endowments operating in Amhara Region. See the Charities and Societies Proclamation No. 194/2012, *Zikre Hig,* (2012), Article 5, [hereinafter, Proc. No. 194/2012] ; See also the Definition and Duties of the Executive Organs of the Amhara National Regional State, Proclamation No. 176/2010, *Zikre Hig*, (2010), Article 32 (4).

[38] The Organization of Civil Societies, Proclamation No. 1113/2019, *Federal Negarit Gazeta,* (2019), Article 21, [hereinafter, Proc. No. 1113/2019].

[39] Ibid, Article 3(1).

[40] However, practically, for example, TIRET Endowment is registered as per Proc. No. 1113/2019. See the Council of the Amhara National Regional State 5th round, 5th year and 14th regular meeting (*የአማራ ክልል ምክር ቤት 5ኛ ዓመት የስራ ዘመን 14ኛ መደበኛ ጉባኤ*). The Council affirms that TIRET Endowment is registered as per the proclamation.

[41] Ibid. See also Draft TIRET Endowment Article of Association, 2020, Article 15, 16, and 19.

endowment as it is the jurisdiction of Bureau of Amhara National Regional State Administration and Security Affairs.[42]

Therefore, in the opinion of the writer, there is defective registration and formation of EFFORT and TIRET endowments that could lead to deprivation of their legal personality and their assets could be transferred to another charitable endowment that has similar or related objectives.[43]

3. Party Affiliated Endowments Participation in Business Activities

Charitable endowments often take part in trading and investment activities, to raise money for their charitable purposes.[44] The term 'business activities' in the context of CSOs can be defined as all activities of producers, traders and persons supplying for the purposes of obtaining income therefrom on a continuing basis.[45] Passive investments are traditionally excluded from this definition.[46] Passive investments means investment in shares or bonds, renting activities, place funds in interest- bearing bank accounts, and from these activities charities generate passive income in the form of dividends, interest, rents, royalties, and capital gains.[47]

There are three approaches concerning the permissibility of charities involvement in business activities. The First approach is allowing charities to involve in any kind of business activities without limitation. However, the charities are not allowed to distribute the profit earned and business activities should not be their primary purposes. This approach is commonly adopted by Western Europe Countries.[48] The second approach is allowing charities to involve in business activities with condition/requirements (relatedness requirement), which require a relationship between the business activities and

[42] Proc. No. 194/2012, Article 5. This power is given to the Justice bureau for other regional states and for Organization of Civil Society Agency at federal level; the agency is in turn accountable to the federal attorney general (See Proc. No. 1113/2019, Article 78).

[43] The CSOs law required that in case a charitable endowment is dissolved and cease its legal personality, the asset or property of that charitable endowment should be transferred to another charitable endowment that have similar or related objectives (See Proc. No. 194/2012, Article 89; Proc. No. 1113/2019, Article 84).

[44] UK Charities Act of 2006, supra notes 5.

[45] Volker Then et al, The European Foundation, a New Legal Approach, A Project of Bertelsmann Stiftung, *Cambridge University Press*, (2006), p. 329, [hereinafter Volker et al, The European Foundation, a New Legal Approach].

[46] Ibid.

[47] Leon E. Irish, Jin Dongsheng and Karla W. Simon, China Tax Rules for Not-for- Profit Organizations, A Study Prepared for the World Bank, (2004), pp. 30 & 57, [hereinafter Leon et al, China's Tax Rules for Not-for-Profit Organizations].

[48] European Center for Not-for-Profit Law (ECNL), Legal Regulation of Economic Activities of Civil Society Organizations, Policy Paper, (2005), p. 8, [hereinafter ECNL, Legal Regulation of Economic Activities of CSOs].

the purpose of the organization.[49] The relatedness requirement is expressed in different ways. It may be described as a requirement that the business activities pursued by the charities need to be related to their '*statutory purpose'*.[50]

This means that a charity which is established to provide education to the poor could be allowed to open a private school and generate income there from. It cannot, however, run a clinic or a shop for the purpose of income generation, even though the money will be used to finance its charitable activities.[51] On the other hand, the relatedness requirement may be defined in terms of the charities involvement in business activities as 'incidental/auxiliary' to the primary purpose of the charities. Incidental means less important than the main purpose of the charity, which does not necessarily have to be 'related' to the statutory purpose.[52] Moreover, the charity may be required to identify the business activities that they wish to carryout in their 'founding documents' and it is allowed to involve only in activities indicated in the governing documents that are related to their primary purposes. For example, Slovenia, Serbia and Montenegro adopted this approach.[53]

The third approach is prohibiting charities involvement in business activities, but allowing them to engage in business activities indirectly through business corporations. For example, Turkey adopted this approach.[54] There are also countries that are applying one or the other approach, depending on different contexts. For example, in France, as a principle, CSOs can engage directly in any business activity, and the relatedness issue becomes relevant if there is a concern that the business activities of the CSOs are creating unfair competition with the commercial sector.[55] In United Kingdom, Chapter 35 of UK Charities Act of 2006 provided that trade and investment can be carried out by a charitable endowment in the form of primary purpose trading[56], ancillary

[49] Ibid.
[50] Ibid.
[51] Users 'Manual for the Charities and Societies Law, Taskforce on Enabling Environment for Civil Society in Ethiopia, Addis Ababa, (2011), pp.1-91, p.48, [hereinafter Users' Manual for the Charities and Societies Law].
[52] ECNL, Legal Regulation of Economic Activities of CSOs, p. 9.
[53] Ibid.
[54] Ibid, p.12 cited TUSEV: Monitoring Matrix on Enabling Environment for Civil Society Development, Country Profile Turkey, 2013.
[55] Ibid, p. 9.
[56] Primary purpose trading means the trade is carried out of a primary purpose of the charity that is directly related to the aims of the charity; or the work of the trade is mainly carried out by the beneficiaries of the charity. For example**:** a charity charging for a training session or selling a religious publication; sale of goods manufactured by disabled people who are beneficiaries of a charity for the disabled; sale of tickets for a show put on by a charitable theatre, or for an art exhibition held in a charitable art gallery.

trading[57], non-primary purpose trading,[58] and trading subsidiary[59]. In USA, endowments are allowed to engage in trade and investment activity in the form of incidental profits[60], by establishing for profit subsidiaries,[61] by forming business partnerships,[62], via program related investment,[63] and through social impact investment tools.[64]

In Ethiopia, Art. 483 of the Civil Code provided that *"an act of endowment is an act whereby a person destines certain property irrevocably and perpetually to a specific object of general interest other than the securing of profits."* The last phrase "... to a specific object of general interest *other than the securing of profits*..." indicated that an endowment shall not be established for maximizing profits/profit motive. This requires charities to be established to pursue altruistic objectives. However, to achieve its altruistic purpose, a charity may engage in income generating activities. In relation to this, art 25 of the commercial code prohibited associations from undertaking trade activity. Here what is prohibited

[57] Ancillary trading is trading which is in some way complementary (or ancillary) to a charity's primary purpose. It is therefore legally part of the charity's 'primary purpose trading'. For example**:** a museum cafe, selling goods to visitors of the museum'; a gallery selling goods to visitors; and a theatre restaurant selling meals to members of the audience.

[58] Non-primary purpose trading means trading intended to raise funds for the charity, rather than trading which in itself furthers the charity's objects. For example**:** a theatre restaurant selling meals to members of the public who have not bought tickets to the theatre production; a charity buying pre-made Christmas cards then selling them for a profit; and some fundraising events and corporate sponsorship. Charity law allows the Non-Primary Purpose Trading, if it doesn't involve significant risk to the resources of the charity.

[59] Trading subsidiary is any non-charitable trading company owned by a charity or charities to carry on a trade on behalf of the charity (or charities). For example: the Depaul Box Company sells boxes for moving, profits go to Depaul UK, a youth homelessness charity.

[60] An incidental profit includes fees and charges collected from the service they provide. For example, tuition fee for educational centers and charges for hospitals.

[61] Establishing for profit subsidiaries means establishing separate business entity and investing in them so long as the endowments are investors in the company and the profits of such an investment is used for the running of the non-profit and not distributed to the members of the non-profits [see Mechais Viravaidya & Jonathan Hayssen, Strategies to Strengthen NGO Capacity in Resource Mobilization via Business Activities, *PDA and UNAIDS Joint Publication*, (2001), p.44.

[62] Formation of business partnerships means that joint venture and /or partnership between an endowment and for-profit companies. For example, the American Cancer Society allowed for the use of its logo and name on Florida Citrus Industry that use Citrus which is a contributor to cancer prevention. This helps the NPO in teaching the benefits of citrus on the one hand and receiving payments for the endorsement at the same time. The Florida Citrus Company in turn the benefits of credibility, [See Paul E.Waddell, Unlocking Profit Potential: Your Organization's Guide to Social Entrepreneurship, (2002), p .9].

[63] Program related investment indicated, for example, there may be investments in business in deteriorated urban areas under a plan to improve the economy of the area by providing employment or training for unemployed residents, and investments in NGO combating community deterioration [See Sisay Habte Gemeda, Doing Business via Non-profits: Lessons from the US for Ethiopia, Central European University, LLM Thesis, p. 48, [hereinafter Sisay, Doing Business via Non-profits].

[64] Ibid, p.49; According to Sisay social impact investment tools includes: loans, credit enhancements, social impact bonds, and Qusi-public investment funds. For example, International Finance Corporation (IFC) providing funding to 23 private Schools in Kenya with 300, 000$ and provided 113 others with advisory support.

is an association but not endowments. Therefore, in the opinion of the writer the Civil Code followed the first approach that permits a charity to undertake any business activities.

EFFORT and TIRET endowments are assumed to be established as regional charitable endowments, as per Arts. 483-506 of the Civil Code.[65] As usually claimed by some politicians, the wider public in Tigray and Amhara regions, being 'ultimate beneficiaries' of EFFORT and TIRET endowments, respectively; it could be argued that EFFORT and TIRET endowments are not ultimately meant for profit. And, it is clear that to achieve their altruistic purpose, EFFORT and TIRET endowments can engage in income generating activities. Meaning, an endowment is to be established to pursue altruistic objectives. It shall not be established for maximizing profits. And, its involvement in business activities is simply to achieve its altruistic purpose. However, EFFORT and TIRET endowment put in their memorandum and article of associations that their primary objectives are undertaking sustainable investment and trading activity.[66] So, it is clearly against Art. 483 of the Civil Code that stated the primary purpose of an endowment should not be involvement in profit driven business activities.

The writer argues that EFFORT and TIRET endowments can involve in different business or commercial activities either by way of establishing business organizations or being shareholders in different companies. However, all these should not be stated as their primary objectives rather their involvement in business activity is to achieve their altruistic purpose.

The other problem of EFFORT and TIRET endowments is concerning timely disbursement and adequacy of distribution. In several jurisdictions, there is a requirement of timely disbursement, which requires charities to spend a certain income that may be derived from business activities or other sources, for their charitable purposes, within a fixed period of time.[67] Accordingly, all profits

[65] See the preamble of the memorandum and article of associations of EFFORT & TIRET endowments.

[66] See for example, TIRET Memorandum of Association, Article. 4, 5, & 6, and TIRET Article of Association, Article 2; see also EFFORT Memorandum of Association, preamble, Art 3 & 4, and EFFORT Article of Association, Article 2. For example, let us see the following provisions of TIRET memorandum of association: "*Article 5(1) ፡ ዋርት የሚከተሉት አላማወች ይኖሩታል...የአገሪቱና የክልል ህጎች በሚፈቅዱት መሰርት በማንኛውም የንግድ ማህበር ባለአክሲወን በመሆን ለኢንስትመንት የሚውል ሀብት መፍጠር...፤ Art. 6(4): የኢንቨስትመንት ሰራወቹን በልማታዊ አግባብ ማከናወን...፤ Art. 6(5): ዋርት አላማወቹን ለማሳካት የሚከተሉት አላማወች ይኖሩታል...ብቁ ተወዳዳሪና ትርፋማ የሆኑ ተቃማትን መገንባት...*".

[67] For example, in ***Germany*** Charities should spend most of their annual income with in two year; in ***Finland*** within a reasonable time frame, in ***Spain*** within four years, in ***UK*** and ***Turkey*** within reasonable time. See European Foundation Center, Comparative Highlights of Foundation Laws, Operating Environment for Foundations in Europe, (2015), pp. 10-42.; Klaus J. Hopt et al, Feasibility

generated from IGAs shall be distributed in goods or services to the beneficiaries or the funds received should be used for subsidizing the delivery of services. However, in Ethiopia, there is no mandatory provision that requires charities to spend their income for charitable objectives and practically party affiliated endowments are accumulating their income for a long period of time without spending it for their charitable objectives. EFFORT and TIRET endowments are usually being criticized as their practice is '*investment over investment*'. This means the profit acquired by one company is allocated for the establishment of another company; the latter is also expected doing the same.[68]

Additionally, concerning TIRET Endowment in Amhara National Regional State, the Civil Code provisions governing endowments is repealed by Proc. No. 194/2012.[69] Art.6 of the proclamation clearly provided that a Charity is established for charitable benefit to the public at large or certain social sections, such as women, children, disabled etc. This means that an endowment is established as a not for profit to pursue altruistic objectives and serving the public at large or a given social section. Art.97 of Proc. No. 194/2012 states that

Study on a European Foundation Statute, *Final Report, European Commission*, (2015), pp.85-99; Leon et al, China's Tax Rules for Not-for-Profit Organizations, supra note 47, p.36.

[68] See, Manaye Jemberie, Critical Assessment of the Legal Regime of Income of Income Generating Activities of Charitable Endowment's in Amhera Region: A case of TIRET endowment, *Bahir Dar University, LLM Thesis (Unpublished),* (2017), pp.31 & 38, [hereinafter Manaye, *Critical Assessment of the Legal Regime of Income of Income Generating Activities of Charitable Endowment's in Amhera Region*]. See also, Draft Article of Association of TIRET Endowment, Article 13(1) provided that *"የፃሪት አጠቃላይ ሀብት ዘላለማዊ እና በቀጣይነት ለአማራ ብሔራዊ ክልል ሕዝብ የተሰጠ በመሆኑ በኢንቨስትመንት በመሰማራት የሚገኝ ትርፍ ለአዳዲስ ኢንቨስትመንት፣ ለነባር ክብረይዎች ማስፋፊያ፣ ለበጎ አድራጎት ስራዎች እና ለድርጅቱ አስተዳደራዊ ውጭዎች ክሚውል በስተቀር ለግለሰቦች አይከፋፈልም"* There is no requirement for timely disbursement and adequate distribution within a certain time limit.

[69] The Civil Code provisions governing endowments (Art. 483-506) was repealed by Proc. No. 621/2009 though the later itself is also repelled by Proc. No.1153/2019. However, do not forget that the scope of application of the two proclamations (Proc. No. 621/2009 and Proc. No.1153/2019) is at the federal level. On the other hand, EFFORT and TIRET Endowments are deemed to be established as regional endowments for the benefit of the Tigray and Amhara community, respectively. Accordingly, while the TIRET Endowment is governed by Proc. No. 194/2012, EFFORT endowment is yet governed by the Civil Code provisions. That is why the writer focused his discussion on Proc. No. 194/2012 instead of Proc. No. 621/2009 and Proc. No.1153/2019. Of course, there is no such difference between Proc. No. 194/2012 and Proc. No. 621/2009 concerning the permissibility of endowments involvement in business activities. Concerning, Proc. No. 1113/2019, this new proclamation has been coming with a new approach by lifting the income generating activities restrictions of the repealed proclamation (Proc. No. 621/2009). Art 63(1(b)) of the new proclamation entitled CSOs the right to engage in any lawful business and investment activity in accordance with the relevant trade and investment laws in order to raise funds for the fulfillment of its objectives. Art 64(1) of the same proclamation provides that CSOs which engages in income generating activities may do so by establishing a separate business Organization (company), acquiring shares in an existing company, collect public collections or operating its business as a sole proprietorship. Even, art 25 of the commercial code that was restricting association's engagement in trade activity is repealed by art 87 of this new proclamation. Thus, likewise the Civil Code, Proc. No. 1113/2019 followed the first approach that permits charities to undertake any business activities so long as the profit obtained from business activities is not distributed for members.

charities and societies may, upon a written approval of the Bureau, engage in income generating activities which are *incidental to the achievement of their purposes*.[70] A charity will be eligible for permission when the activities are related to its altruistic purposes, and the income derived there from will be used to further their objectives. The proceeds must not be distributed among members or beneficiaries of the charity and must only be used to further the purpose for which the charity was established.

Therefore, in the opinion of the writer, Proc. No. 194/2012 followed the second approach that permits a charity to undertake business activities with the fulfillment of the relatedness requirement. However, it is difficult to evaluate as to whether TIRET endowment involvement in investment and trade activities has met the "*relatedness*" requirement of Proc. No. 194/2012 because TIRET endowment lacks clear and precise objectives.[71]

4. Taxation of Party Affiliated Endowments

Usually different jurisdictions provide favorable tax treatments for charities of diverse kind. The justifications include: (1) Charities perform tasks that are supportive of central values that a government wishes to encourage or give incentives[72]; (2) Charities relieve a government from burdens it would otherwise have to bear[73]; (3) The objectives of charities are not profit, but rather public benefit purposes. Taxing their income would deter them from achieving their purpose[74]; and (4) Usually charities provide public goods and services in which market failure is likely to happen unless government intervenes in the form of subsidy or tax incentives[75].

There are also different approaches followed by different jurisdictions concerning the scale and extent of privileges. These are (1) full exemption in which charities are exempt from paying tax on their all business income; (2) partial exemptions which provide exemptions to some business income or

[70] See the above discussion on 'relatedness requirement' for better understanding of the term '*incidental to the achievement of their purposes'*.

[71] Article 11 of the Memorandum of Association of TIRET endowment simply stated that 'the wider Amhara community is the beneficial of TIRET endowment'. It would be better to put some specific objectives and purpose of TIRET endowments in the form of health (prevention of cancer), education (accessibility of education for vulnerable communities), etc.

[72] Kimberly Scharf and Sarah Smith, Charitable Giving and Tax Policy, A Historical and Comparative Perspective, in Gabrielle Fack and Camille Landais (eds.), Chapter Five, Charitable Donations and Tax Relief in the UK, *CEPR Conference*, Paris School of Economics, (May 2012), p.121.

[73] Volker et al, The European Foundation, a New Legal Approach, supra note 45, p.301,

[74] Ibid.

[75] Mollay F. Sherlock and Jane G. Gravelle, an Overview of the Non-profit and Charitable Sector', *Congressional Research Service*, (2009), p.41.

preferential tax treatment under certain conditions; and (3) full taxation as any other for profit business entities.[76] For example, in France, in principle, full exemption is provided without any condition. However, when the issue of competition with the commercial sector comes in to picture, the exemption will be lifted.[77] In UK, where an endowment is trading, the trading profits are, in principle, subject to income tax, other than as specifically exempted. However, there are considerable tax advantages for charitable endowments as compared to ordinary commercial companies such as exemption from value added tax (VAT).[78]

In USA, American non-profit organizations including endowments are generally exempt from federal income tax, with the exception that profits earned from activities that are "unrelated" to exempt purposes are subject to the Unrelated Business Income Tax (UBIT).[79] On the other hand, in Turkey and Slovenia all profits from business activities of charities are subject to tax under the same conditions as any other for profit business entities.[80] As discussed earlier, several jurisdictions separately treat business activities and passive investments of charities. There are countries that fully exempt, partially exempt passive

[76] ECNL, Legal Regulation of Economic Activities of CSOs, supra note 48, pp.13-15.

[77] Caroline L. Newman, Recent Ministerial Instructions Regarding the Tax Treatment of NPOs, in Leon et al, China's Tax Rules for Not-for-Profit Organizations, *International Journal of Not for Profit*, (2000), p.33.

[78] UK Charities Act 2006, Chapter 35, p.4, supra note 36. It provided that the profits of primary purpose trading are exempt from tax. There is no blanket exemption from VAT. In relation to Non-Primary Purpose Trading**,** the profits will probably be taxable with limited exemption for:

1. *Sale of donated goods = the sale of donated good does not constitute trading for tax or charity law purposes. The sale of donated goods by charity law is zero rated for VAT purposes. The entitlement to rate relief is not affected if the trade is carried out by the charity;*
2. *Small scale trading: the total turnover from all the charity's non-exempt trading activity must not exceed the annual turnover limit. The annual turnover limit for non-primary purpose trading is £5,000 if the charities total annual income is less than £20,000. If the annual income is above £20,000, the limit is either 25% of the charity's total incoming resources up to a maximum of £50,000;*
3. *Certain fundraising events: a range of fundraising activities may involve trading for example lotteries, marketing and corporate sponsorship. In that case, there is a tax and a VAT exemption for one off fundraising events and a tax exemption for lottery income*.

[79] Title 26 of Internal Revenue Code, $ 501/c/3 and $ 511 of IRC; in James R. Hines Jr., Non-Profit Business Activity and the Unrelated Business Income Tax, Tax Policy and the Economy, *MIT Press*, *Volume 13*, pp. 57 – 84. The UBIT is intended to prevent "unfair" competition between tax-exempt non-profits and taxable for-profit firms, and also to prevent erosion of the federal tax base through tax-motivated transactions between taxable and tax-exempt entities. State also exempt Non- profit Organization, including endowments from sale tax, income tax and property tax. See, for example, State Taxation and Non-profit Organization, North Carolina Department of Revenue, available at https://:www. dor.state.nc.us/publications/nonprofit 2008 last accessed on March 5 2018.

[80] ECNL, Legal Regulations of Economic Activities of CSOs, p.15, supra note 40; See also Peter Pajas, Economic Activities of Not-for Profit Organizations, Conference Report in Regulating Civil Society, Budapest, Hungary, May (1996), p.9.

income of the charities, and there are others that subject this income of charities to full taxation.[81]

In Ethiopia, the Federal income tax proclamation, Proc. No. 979/2016 under Art.65 (1) (m) provides that "*the income of non-profit organization other than business income that is not directly related to the core functions of the organizations is tax exempt*".[82] This means that any income except business income of non-profit organizations is exempted without any condition. So, the charities income from passive income is fully exempted without any condition, including the relatedness requirement. Dividend, interest, capital gain and the like are the main source of income of EFFORT and TIRET endowments.[83] Dividend is defined as a distribution of profits by a body (includes the charities) to a member.[84] Capital gain is derived from the disposal of immovable property, a share, or bond including the transfer of any interest in shares or bonds, such as, in the case of shares, a right or option to acquire shares.[85] An interest income may be derived from savings/deposits in financial institutions or other sources such as a loan extended to others.[86] All this income of EFFORT and TIRET endowments is under the category of passive investments that can be fully exempted without any condition as per Art. 65(1) (m) of income tax proc. No. 979/2016.

In relation to business income of charities, it will be exempted if it is derived from a business activity that has a direct relation to their function.[87] In foreign countries, the primary purpose of a charity (specified in its memorandum or

[81] While USA and most European countries adopted the fully exempted approach, Countries like Turkey, China, Madagascar and Slovenia fully taxed the passive income of charities. And, there are also countries that adopted the partial exemption approach. See ECNL, Legal Regulation of Economic Activities of CSOs, p.18, supra note 40; see also Feng Xiaoming, China's Charitable Foundations, Development and Policy Related Issues, Stanford Center for International Development, Working Paper No. 485, 2013, p.21; Billur Yalti, Taxation of Charities in Turkey, Koc University, Faculty of Law, p.11, available at http://www.springer.com/document last accessed August 2018.

[82] The Federal Income Tax Proclamation of Ethiopia, Proclamation No.979/2016*, Federal Negarit Gazette, (2016),* Article 65 (1) (m), [hereinafter, Income Tax Proc. No.979/2016]. In this regard, Art. 64 of Proc.No.1113/2019 simply refer to the applicability of tax laws.

[83] For example, from the table attached below, we can discern that EFFORT and TIRET endowments involve in business activity in the form of establishing companies or purchasing shares in other business entities. As a result, they can acquire dividends from the distribution of profits.

[84] See Income Tax Proc. No. 979/2016, Article 2(6) & 55.

[85] Ibid, Article 59 and also see the Federal Income Tax Regulation of Ethiopia, Regulation No. 410/2017, *Federal Negarit Gazette,* (2017), Article 6, [hereinafter, Income Tax Regulation, No. 410/2017].

[86] Income Tax Proc. No. 979/2016, Article 2(16) & 56; see also Income Tax Regulation, No. 410/2017, Article 3.

[87] Here, there is discrepancy between the Amharic and English version of Article 65(1) (m). While the Amharic version requires a simple 'relation' *(ድርጅቱ ከተቋቋመበት አላማ ጋር የማይገናኝ የንግድ ስራ ገቢን ሳይጨምር),* the English version requires the income generation activities to have a '***direct relation to the core function of the charities***.

article of associations) serve as a reference point to determine whether a certain business income of that charity is related or unrelated. As a result, the charities are required to adopt more measurable, specific and particular objectives.[88] However, in Ethiopia, neither the income tax nor the charity laws set the mechanism of determining the related and unrelated business income of charities. In addition, party affiliated endowments in Ethiopia expressed their charitable purpose activities in general terms such as poverty alleviation, economic and social development, bringing technology transfer, etc.[89]

Moreover, there is lack of clarity as regards the competent organ to determine the relatedness requirement of the law. In this regard, there will be power overlap between the Organization of Civil Society Agency and the tax authority. As a result, the absence of a guideline to determine the relatedness or unrelatedness of business income together with the absence of mandatory requirement to adopt a specific measurable objective may create a problem to apply the exemption rule for business income of charities in general and EFFORT and TIRET endowments in particular.[90]

In the opinion of the writer, for tax purposes, EFFORT and TIRET Endowments and their business entities shall be treated separately. Accordingly, EFFORT and TIRET owned business entities shall not get tax privileges and they should be treated as for profit companies established by individual persons. This means that the tax exemption provided under Art. 65(1) (m) of the income tax Proc. No. 979/2016 is not applicable for EFFORT and TIRET owned business entities.

However, usually EFFORT and TIRET owned business entities are being criticized as they are not transparent and accountable.[91] In particular, they do not open their accounts for government audit and there is no clear information as regards whether they are paying any tax at all.[92] They are being found in running their business in fraudulent manner by reporting more expenses than the actual costs, and without paying value added taxes collected from their customers.[93] For example, the federal First instance court of Lideta on 19th December 2012

[88] Richard Jenkins, Governance and Financial Management of Endowed Charitable Foundations, *Associations of Charitable Foundations*, (2012), pp.22 -224

[89] See, for example, the Memorandum Association of TIRET Endowments, the Preamble and Article 5.

[90] Income Tax Proc. No. 979/2016, Art. 65(1) (m).

[91] Eyessus, The Impact of Party Owned/Managed Companies on the Private Enterprises, supra note 25, p.1. Eyessus said that no one can give accurate and qualified information about party owned/managed companies as there is not much information available.

[92] Berhanu, *Political Parties in Business*, supra note 8, p.42.

[93] See, for example, Amare Argawi, EFFORT Endowment and its Business Entities, *Ethiopian reporter*, (23 January 2005 E.C), p.1.

ruled that one of EFFORT's companies, Mega Entertainment Center, had not paid taxes for eight years.[94] Moreover, there was a report that exposed EFFORT companies have imported different materials including cars without paying custom duty worth of Birr 24, 000,000.[95]

5. Party Affiliated Endowments Participation in Business Activities and Their Non-compliance with the Rules of Competition Law

Since 1991 the ruling government (EPRDF) advocated free-market economy, privatization, and competitive policy. To translate the policy in to an operative document, different laws have been enacted at different times such as trade practice proclamation, Proc. No. 323/2003; Trade Practice and Consumer Protection Proclamation, Proc. No. 685/2010; and Consumer Protection and Competition Proclamation, Proc. No. 813/2013. And also for the proper implementation of these laws, trade competition and consumer protection authority (formerly known as trade practice commission) is established. All these policies, laws, and organs have been advocating free trade based on efficiency. Accordingly, the Competition and Consumer Protection Proclamations prohibited anti-competitive trade practice and agreements.[96]

Though a free-market and liberalized economy has been launched and it is an attractive and applauding ongoing process in Ethiopia, there are some practical and legal lacunas concerning **EFFORT** and **TIRET** business entities. The legal gaps are absence of a requirement for charities to have particular objectives; lack of clarity on the scale of income generation activities; absence of a requirement for timely disbursement/distribution; full tax exemption of passive investments and generous business income tax exemption so long as the income is related with the objectives of the charity. All these legal lacunas enable party affiliated endowments to engage in a wide range of income generation activities, which creates unfair competition and negatively affect the commercial sector.

Moreover, in practice, the World Bank, many internal and external observers, as well as, business people have noted that party-affiliated endowments such as EFFORT companies enjoy preferential access to contracts, capital, physical

[94] Yohaness Equbay v. ERCA, Federal Supreme Court Cassation Decision, Criminal Case File No. 100079, (4 March 2007 E.C); see also Fekadu Petros, Ethiopian Company Law, *Far East Trading publisher PLC's*, Vol.2, (2016), p.349; see also Amare Argawi, EFFORT Endowment and its Business Entities, *Ethiopian reporter*, (23 January 2005 E.C), p.1.

[95] Ethiopian Television, EFFORT Companies importing different raw materials without proper tax payment, (29 February 1996).

[96] See Trade Competition and Consumer Protection Proclamation of Ethiopia, Proclamation No. 813/ 2013, *Federal Negarit Gazeta,* (2013), Article 5-13.

infrastructure and administrative services, tax breaks and other politically motivated and privileged supports.[97] Party-linked enterprises/companies accomplish win-win outcomes by reducing coordination failures in investment, training, marketing, raising investible resources via rent seeking (government contracts, state policy, differential enforcement of laws and regulation); entering into high-risk, high-return sunrise industries.[98]

Accordingly, EFFORT companies undermine competition on trade and investment and adversely affect the society because:(1) the TPLF deliberately give privileged and monopolistic economic power to control huge amounts of assets; (2) they create barriers to new market entrants; (3) they create an endemic culture of obscene corruption by leveraging state resources and unfair trade practices through granting privileged access to land and information regarding procurement; and (4) since they operate across various sectors, some have real strategic influence on other sectors. Their affiliation with the state create advantages which are unavailable to firms owned by private investors such as access to information on policies and programs which influence profitability of firms, and access to bank credit.[99]

Amare Aregawi, who was the then editor in chief of the Ethiopian Reporter, disclosed the fact that Almeda textile once borrowed 1.8 billion Birr from the Commercial Bank of Ethiopia without legal security, and failed to pay its debts and interests. To shield this fact from World Bank & IMF, the commercial bank transferred the debts of Almeda Textile to the Development Bank of Ethiopia and then, the later canceled 1.8 billion birr debts of Almeda textile.[100] Besides, the Ethiopian military armed forces and police force uniform were all supplied by Almeda Textile. Sur construction were also handed big government construction projects like Gebba dam project, Zarema River May Day Dam Project, Tekeze Hydro plant and Tis Abay II hydro project. Electromechanical projects were handled by Mesfin Industrial Engineering. Messebo cement which is also a subsidiary of EFFORT was the sole supplier of cement for the Great Renaissance Dam.[101]

[97] See World Bank, Ethiopia: Toward the Competitive Frontier, Report No. 48472-ET, 2009a; World Bank, Doing Business in Ethiopia, Report No. 50491, (2009b).
[98] Berhanu, *Political Parties in Business*, supra note 8, p.47.
[99] Ibid, 48.
[100] See Amare Argawi, EFFORT Endowment and its Business Entities, *Ethiopian reporter*, (5 December1996 E.C); (16 October 2005), (23 October 2005), (30 October 2005), (23 January 2005 E.C).
[101] Sarah and Mesfin, *Rethinking Business and Politics in Ethiopia, supra note 12,* pp., 1-.66; See also, Ermias, *Yemeles Leqaqit, Supra Note 19. pp.220-222.*

Moreover, Addis Fortune, in 2011, reported that the government authorized the Ethiopian Petroleum Enterprise (EPE), a government agency, to import 650,000 ton of coal worth US$29.5 million from abroad to supply it to Messobo cement factory.[102] EFFORT Companies are growing in the form of vertical integration which means material and service processed by one company is often an input to another company, which likely destroys free trade and healthy competition. This in turn hurts other business and discourages other new ones from entering into the market. [103]

Concluding Remarks

The case of party affiliated endowments and their participation in business is a very complicated issue that requires dialogue between all stakeholders. This article attempts to review some legal issues concerning their formation and operation. EFFORT and TIRET endowments were established in 1995, as regional charitable endowments, as per Arts. 483-506 of the Civil Code. The issue is that the Civil Code is enacted at the time when Ethiopia was a Unitary State but, EFFORT and TIRET endowments are established while the political system of Ethiopia is a Federal state structure. So, to make the Civil Code as the laws of each regional state or the law of federal government, they are expected to endorse it by the law. However, neither the federal government nor the regional states explicitly endorsed the Civil Code, which makes the legal personality of EFFORT and TIRET Endowments questionable. So, in the opinion of the writer, there is defective registration and formation of EFFORT and TIRET endowments that could lead to deprivation of their legal personality and their assets could be transferred to another charitable endowment that has similar or related objectives.

Moreover, Art. 347(1) of the Commercial Code provided that the directors of share companies should have been appointed from the shareholders. However,

[102] ----------, Landlocked Ethiopia further locked out by ruling party's corrupt endowments, *Ethiopian Addis Fortune, (3* July) 2012, pp.1 &2, available on http://www.addisfortune.net/fortune_editors_note.htm) last accessed on 5 November 2017. The report provided that the entire process of modernizing and increasing the role of the private sector is delayed to this day due to the private sector is unable to compete with EFFORT owned companies. Addis Fortune added that "*Landlocked Ethiopia further locked out by ruling party's corrupt endowments*" and those of party-affiliated companies monopolized the Ethiopian economy and beat the private sector to the extent never seen anywhere in the African continent.

[103] For example, Ezana Mining (subsidiary of EFFORT) which includes the building of a new gold processing plant at a cost of 700 million birr. The electro mechanical is undertaken by Mesfin Industrial Engineering. There are also distribution and supply arrangements between Mesebo, Guna and Trans Ethiopia. Sarah and Mesfin, *Rethinking Business and Politics in Ethiopia,* p.41, supra note 7.

the directors of most of EFFORT and TIRET owned/managed companies are non-shareholders, which is a clear violation of the law that should be considered by the relevant organ. There is also political intervention in the day-to-day business of EFFORT and TIRET endowments, and there is a trend of appointing senior government officials as a board member of the party owned/managed companies. Thus, compliance with appropriate laws is required.

Furthermore, several jurisdictions allow CSOs to engage in business activities as long as their activities do not constitute the primary objectives of the organization. However, the objectives provided under the memorandum and article of association of EFFORT and TIRET endowments indicated that the primary purpose of the endowments is involvement in business activity and being profitable. And in fact there is investment over investment as the profit acquired by one company will be allocated for the establishment of another company; the latter is also expected to do the same. Thus, the writer recommends EFFORT and TIRET endowments to revise their memorandum and article of associations and make only altruistic purpose as their primary objectives.

Besides, the absence of a requirement for charities to have a particular objective; absence of clarity on the scale/restriction on the scale of income generation activities; absence of a requirement for timely disbursement/distribution; and full tax exemption of passive investments of charities is another problem. All these legal lacunas enable party affiliated endowments to engage in a wide range of income generation activities, which in the opinion of the writer creates unfair competition and negatively affects the commercial sector. Therefore, the writer recommends the government to include mandatory provisions on the CSOs laws that incorporate a requirement for charities to have specific objectives, fixing the scale of income generation activities, limiting the amount of profit subject to tax exemption, and requirements for timely disbursement of income.

Finally, usually party owned/managed business entities are being criticized as they are not transparent and accountable. In particular, they do not open their accounts for government audit and there is no clear, accurate and qualified information concerning the extent of tax they pay each year. So, in the opinion of the writer recommends that the government should strictly follow up the party affiliated endowments and their participation in business activities, in particular strict administrative measures should be taken at the time where they fail to give proper records or reports.

Annexed Tables

Table 1: The former shareholders of Alemeda Textile before transfer in 1988 E.C.[104]

NO.	Shareholders of Alemeda Textile	No. of Shares	Per value of a share	Total value of the share
1.	Yewubmar Asfaw Kidanu	1,000,000.00	36.00	36,000,000.00
2.	Tsegabirhan Hadush W/mariam	1,000,000.00	36.00	36,000,000.00
3.	Hailalibanos W/Micheal	1,000,000.00	36.00	36,000,000.00
4.	Feseha Zerihun Weldu	1,000,000.00	36.00	36,000,000.00
5.	Geday G/Egzabhar Meshesha	1,000,000.00	36.00	36,000,000.00
Total				180,000,000.00

Table 2: The shareholders of Alemada Textile after transfer of shares, in 1988 E.C[105].

No.	Shareholders of Alemeda Textile	No. of Shares	Per value of a share	Total value of the shares
1.	REST	8,729,999.00	20.00	174,599,980.00
2.	Guna Trading	90,000.00	20.00	1,800,000.00
3.	Hiwot Agricultural Mechanization	90,000.00	20.00	1,800,000.00
4.	Shaba Lether Factory	90,000.00	20.00	1,800,000.00
5.	Abadi Zemu	1.00	20.00	20.00
				180,000,000.00

Table 3: The former shareholders of Guna Trading House before transfer of shares on Nehassie, 1987 E.C[106]

No.	Shareholders of Guna Trading	No. of shares	Per Value of a share	Total Value of the share
1.	Girmay G/medihen	1,700.00	1,000.00	1,700,000.00
2.	Gidey G/Micheal	1,700.00	1,000.00	1,700,000.00
3.	Hibur G/Kidan	1,700.00	1,000.00	1,700,000.00
4.	Solomon G/Hiwot	1,700.00	1,000.00	1,700,000.00
5.	Mulu Hagos	1,700.00	1,000.00	1,700,000.00
6.	Tsegaye Teamyalew	1,700.00	1,000.00	1,700,000.00

Table 4: The shareholders of Guna Trading S.C. after transfer of shares on Nehassie, 1987 E.C [107]

No.	Shareholders **of Guna Trading S.C**	No. of Shares	Per Value of a share	Total Value of the Share
1.	REST	9,699	1000.00	9,699,000.00
2.	Alemeda Textile	100	1000.00	100,000.00
3.	Trans Ethiopia	100	1000.00	100,000.00
4.	Mesebo Cement Factory	100	1000.00	100,000.00
5.	Sibhat Nega	1	1000.00	1000.00

[104] See Ermias, *Yemeles Leqaqit*, supra note 19; pp. 333-335, 374-375
[105] Ibid.
[106] Ibid.
[107] Ibid.

Table 5 : Some List of EFFORT Companies[108]

Company Name	Year.EC	Capital	HQ	Board Chairman	Shareholders for the company
1. Selam Transport	1995	10,000000 Birr	Mekele	Arkebe Ekubay	
2.Segel Construction	1995	10,000000 Birr	Mekele	Araya Zerihun	
3.Mega Net Corp	1993, 1995	10,000000 Birr	Mekele	Alemseged Gebreamlak	Trans Ethiopia; Mesebo Building Materials; Guna Trading House; Mesfin Industrial Egnering; and Meskerem Investment.
4. Hitech Park Axion Association	1995	10,000000 Birr	Mekele	Shimelis Kinde	-
5. Fana Democracy plc	1995	6,000,000 Birr	Mekele	Negash Sahle	-
6. Express Transit	1995	10,000000 Birr	Mekele	G/selassie Gidey	-
7. Ethio Rental Axion Association	1995, 1996	72,000000 Birr	Mekele	Atkilit Kiros	-
8. Dilate Brewery	1995	15,000,000 Birr	Mekele	Kahsay TewoldeTedla	-
9. Dessalegn Caterinary	1995	5,000,000 Birr	Mekele	Dr, Maru Erdaw	-
10. Addis Consultancy House	1995	10,000000 Birr	Mekele	Sibhat Nega	-
11. Birhane Building Construction	1995	10,000000 Birr	Mekele	Bereket Mazengiya	-
12. Sheba Tannery Factory Axion Assoc.	1993, 1995	94,000,000 Birr	Wukro	Abadi Zemu	-
13. Meskerem Investment	1995	20,000,000 Birr	Axum	Tewodros Ayes Tesfaye	-
15 Global Auto Sparepart	1995	26,000,000 Birr	A.A	Teklebirhan Habtu	-
16. Experience Ethiopia Travel	1993, 1995	3,000,000 Birr	Mekele	Tony Hiki	-
17. Addis Engineering Consultancy	1995	25,000,000 Birr	A.A	Arkebe Ekubay	-
18. Hiwot Agriculture Mechanization	1995	25,000,000 Birr	Mekele	Yohannes Kidane	REST; Almeda Textile; Guna Trading House; Tesfa Livestock; and Yemane Kidane
19. Beruh Chemical Axion	1994, 1995	25,000,000 Birr	Mekele	Abadi Zemu	Mega Net Corporation; REST; Almeda Textile; Sheba Tannery; and Abadi Zemu
20. Rahwa Yebegina Fiyel Export	1995	25,000,000 Birr	Mekele	Yassin Abdurahman	-
21. Star Pharmaceuticals	1995	25,000,000 Birr	Mekele	Arkebe Ekubay	-
22. Tesfa Livestock	1995	20,000,000 Birr	Mekele	Yohannes Kidane	-
23.Almedan Garment Factory	1995	660,000,000 Birr	Mekele	Abadi Zemu	
24. Mesfin Industrial Enginering	1993, 1995	100,000,000 Birr	Mekele	Arkebe Ekubay	Sur Construction; Trans Ethiopia; and Hiwot Agricultural Mechanization
25. Mesob Cement Factory	1995	240,000,000 Birr	Mekele	Abadi Zemu	
26. Almeda Textile Factory	1993, 1995	180,000,000 Birr	Mekele	Abadi Zemu	REST; Guna Trading House; Hiwot Agricultural Mechanization; Sheba Tenary; and Abadi Zemu
27. Sur Construction	1992, 1995	150,000,000 Birr	A.A	Arkebe Ekubay	Trans Ethiopia; Mesebo Building Materials; Mesfin Industrial Egnering ; Saba Tannery
28. Trans Ethiopia	1995	100,000,000 Birr	Mekele	Shimelis Kinde	-
29. Dedebit Saving & Loan	1995, 1997	60,000,000 Birr	Mekele	Atkilit Kiros	-
30. Ezana Mining Development	1995	55,000,000 Birr	A.A	Tewodros H. Berhe	-
31.Addis Pharmaceuticals Production	1992, 1995	53,000,000 Birr	A.A	Abadi Zemu	-
32. Tana Trading House Axion Association	1995	50,000,000 Birr	A.A	Sibhat Nega	-

[108] See Sarah and Mesfin, *Rethinking Business and Politics in Ethiopia*, supra note 22, pp. 66 & 67; Ermias, *Yemeles Leqaqit*, supra note 19, pp. 333-335, 374-375; Berhanu, *Political Parties in Business*, supra note 8, p.45.
N.B. Some Board Chairmen might have moved within the subsidiaries and the list of EFFORT owned/managed companies are not exhaustive because information is lacking.

Table 6: Some List of TIRET Corporate Companies[109]

No	Name of the Company in which Tiret is a shareholder/an investor	Amounts of Tiret investment/ shareholding in percentage (%)
Manufacturing Cluster/sector		
1	Tana Communication PLC	86
2	Tekrerwa Plastic Factory PLC	90
3	Azila Electronics PLC	90
4	Waliya Korki factory PLC	56.46
5	Gondar Malt Factory PLC	90.16
6	Jirie Spring Water PLC	70
7	Telaje Garment PLC	10
8	Tana Pulp and Paper Share Company	13
9	Lapalma PLC	45
10	Jerba Carton Packaging PLC	93.33
11	Eshet Starch and Starch Bi-products PLC	72
12	Blue Nile Pharmaceutical Manufacturing Share Company	40
13	Dventus Wind Technology PLC	94
14	Dashen Brewery Share Company	49.9
Service cluster/sector		
15	Tikur Abay Transport PLC	95
16	Ambassel Trading PLC	80
17	Belesa Logistics PLC	20
18	MVR Consulting PLC	89
Agro Processing Cluster /sector		
19	Zeleke Mechanized Agriculture PLC	82
20	Woldiya Fruit and Vegitable PLC	99.8
21	Gendawuha Cotton Processing Factory PLC	94
22	Tiza Milk PLC	95
23	Yeju Honey Processing PLC	80
24	Ma'ed Food Complex Share Company	60
25	Tikob Trading PLC	90

N.B. The List is not exhaustive, for example, the percentage/share value of TIRET Corporate on financial institutions such as Abay Bank, Wogagen Bank, Africa Insurance, and Abay Insurance is not provided because the information is lacking.

[109] Manaye: Critical Assessment of the Legal Regime of Income of Income Generating Activities of Charitable Endowment's in Amhera Region, supra note 68, pp. 30 & 31, citing the compiled reports of TIRET Charitable Endowment [*Sic*].

Major Problems Associated with Rules on Permanent Establishment under Ethiopian Income Tax Law

Alemu Balcha Adugna[*]

Abstract

The allocation of taxing rights between the states with respect of business profits is a very complex activity. The central notion of the allocation rules is the Permanent Establishment (PE). However, owing to the gaps or mismatches that attributed to the definition of PE as envisaged under tax treaties and national laws, base erosion and profit shifting became an international agenda. This article examines the concept of PE as defined under the Ethiopian income tax law, identifies its shortcomings and explores opportunities for proper regulation. To this end, it employed doctrinal legal research method to investigate the pertinent provision of income tax law. Accordingly, the finding of the paper shows several pitfalls of Ethiopian income tax regime concerning permanent establishment. Absence of definition for the elements of a permanent establishment, total disregard of permanent establishment concerning E-Commerce, and its failure to manage artificial avoidance of permanent establishment status are among the major problems. Furthermore, absence of any clarification concerning a place of management and effective place of management, which is provided as a requirement for determining whether a foreign enterprise has a permanent establishment or a resident respectively, and absence of exceptions for the interruption of activities via force majeure in relation to construction or building and service permanent establishment are other problems of Ethiopian income tax law. Accordingly, multinational corporations may resort to base erosion and profit shifting by using the gaps that are left by Ethiopian tax regime. Hence, Ethiopian income tax law should be amended in a way that solves the aforementioned lacunas.

Keywords: Permanent establishment, electronic commerce, artificial avoidance, effective place of management.

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Introduction

The growth of the international trade and investment, just after the First World War, has created a vast expansion of business across borders posing a new challenge in the taxing power of governments.[1] Both countries where the business was established and the country where the business is conducted face the problem (which is also known as the double taxation problem) of taxing the same business activities.[2] As the problem undermines the expansion of international business, it is crucial to find a solution to the problem. After a number of efforts, it was finally decided that tax on profits should be based on the permanent establishment rule where the source country should tax profits derived from a foreign business if the permanent establishment of the business exists in the host country.[3]

The existence of a permanent establishment is a requirement for a country to tax non-resident's business profits derived from sources in that jurisdiction.[4] As stipulated under both the OECD and UN Model Conventions, a source country should tax profits derived by a foreign business if and only if the enterprise maintains a PE and only to the extent that the profits are attributable to the PE in that country.[5] Hence, the main use of permanent establishment is to determine the right of a Contracting State to tax the profits of an enterprise of the other Contracting State.[6] Once, it has been established that a permanent establishment exists; the profits of the permanent establishment must be calculated based on the arms-length principle.[7]

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[1] Susan C. Borkowski, Electronic Commerce, Transnational Taxation and Transfer Pricing: Issues and Practices, *International Tax Journal*, Vol .28, No.2, (2002). Pp.1-36.

[2] Arthur J. Cockfield, Balancing National Interest in the Taxation of Electronic Commerce Business Profits, *Tulane Law Review*, Vol .74, No.1, (1999), p. 133.

[3] *Id.*

[4] Cormac Kelleher, Problems with Permanent Establishments, TTN Conference, Prague, (2009), p.1.

[5] OECD Model Convention, 2017 update, Art. 7(4), (hereafter called OECD Model Convention) available at https://www.oecd.org/ctp/treaties/2017-update-model-tax-convention.pdf.land UN Model Convention, 2017update, Art.7(4), (hereafter called UN Model Convention) available at https://www.un.org/esa/ffd/wp-content/uploads/2018/05/MDT_2017.pdf last accessed on 03July 2019. From article 7(4), we can easily surmise that the competency of the host states to impose taxes on non-resident persons that derived profits or income from their country is determined via permanent establishment. Accordingly, non-resident enterprises that derived income from the host country are subjected to taxes if and only if it undertakes business activities in the forms of permanent establishment.

[6] Aiko Nakayama, The Permanent Establishment Concept Under Tax Treaties and Its Implications for Multinational Companies, Master's thesis, University of London, (2012), p.27

[7] Commentary on OECD Model Convention of 2017 update, paragraph 16 to Art.7(here in after called commentary on OECD Model Convention) available at https://www.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-condensed-version-2017_mtc_cond-2017-enlast accessed on 03July 2019

Defining what constitutes a permanent establishment is critical for hosting countries to identify whether a certain non-resident enterprise is subject to tax within their territory or not. However, there is no a universally accepted definition so far in the literature. According to paragraph 1 of Article 5 of both OECD and UN Model Tax Convention, a permanent establishment is "a fixed place of business through which the business of an enterprise is wholly or partly carried on".[8] Besides, article 5(2), 5(3), 5(4), 5(5) and 5(6) of both the OECD and UN Model Conventions have provided for the list of activities that constitutes permanent establishment, list of activities that cannot be deemed to be permanent establishment, conditions when construction or building project by non-resident constitutes permanent establishment, and agency permanent establishment, respectively.[9]

Two types of a permanent establishment are contemplated by Article 5 of both OECD and UN Model Tax Conventions. The first type of a permanent establishment is associated with the permanent establishment which is part of the same enterprise and under common ownership and controls like an office and branch.[10] The second type of a permanent establishment is an unassociated permanent establishment. This type of permanent establishment involves an agent who is legally separate from the enterprise but is nevertheless dependent on the enterprise to the point of forming a permanent establishment.[11] Yet, the advent of E-Commerce provides a new way of conducting commercial transactions in today's global market. As E-Commerce has sparked considerable debate over the continued viability of the PE rules, numerous reform suggestions have appeared in the tax policy and law literature.[12]

Coming to the context of Ethiopia, the way the issue of permanent establishment is approached under the repealed proclamation number 286/2002[13] is quite

[8] OECD and UN Model Conventions, Art.5 (1). Both UN and OECD Model Conventions have defined permanent establishment in similar ways. Yet, they have slight differences concerning activities that constitute a permanent establishment, and duration of activities to qualify for a permanent establishment in case of construction, building, and service permanent establishment.

[9] *Id.,* Art. 5(2)-5(6).

[10] Philip Baker, Double Taxation Conventions: A Manual on the OECD Model Tax Convention on Income and Capital, Third Edition, Thomson/Sweet & Maxwell, London, (2009), p .5.

[11] *Id.*

[12] Benjamin Hoffart, Permanent Establishment in the Digital Age: Improving and Stimulating Debate through an Access to Markets Proxy Approach, *North Western Journal of Technology and Intellectual Property*, Vol.6, No..1 (2007), p. 112.

[13] Federal Income Tax Proclamation of Ethiopia, Proclamation No. 286/2002, *Federal Negarit Gazetta*, Year 8, No.34, (2002) (here after Income Tax Proclamation No.286/2002) The New Federal Income Tax Proclamation no 979/2016 was issued, repealing Income Tax Proclamation No 286/2002, Petroleum Income Tax Proclamation No 296/1986 and Mining Iincome Tax Proclamation no 53/1993 with their subsequent amendments.

distinct from the current income tax proclamation number 979/2016[14]. Compared to the repealed proclaimation, the current income tax proclaimation has made a change of approach. However,, both the repealed and current Income Tax Proclamations have defined the term PE in similar ways; the repealed proclamation considered a PE as a resident person while the current income tax proclamation have regulated both PE and a resident person separately.[15] Again, article 2(9) (b) of the repealed proclamation has provided for a list of auxiliary or preparatory activities that cannot be considered as PE while the current income tax proclamation has excluded it.[16] Furthermore, in relation to agency permanent establishment, the repealed proclamation provided that the negotiation of contracts on behalf of the principal would never give rise to PE as the conclusion of contracts on behalf of the principal is mandatory.[17] But, under the current proclaimation, the negotiation of contracts on behalf of the principal would give rise to PE.[18]

The new income tax proclamation number 979/2016 has defined permanent establishment as "a fixed place of business through which the business of an enterprise is wholly or partly carried on''.[19] From this article, we can easily understand that the definition given to the term permanent establishment under the Ethiopian income tax regime is similar to that of the OECD and UN Model Conventions.[20] Besides, article 4(2) of the same proclamation provides for a list of activities that constitutes permanent establishment while article 4(3) provides for when construction or building project by nonresident enterprises constitutes a permanent establishment. Furthermore, Article 4(4) and 4(5) of the same proclamations have provided for agency permanent establishment. From the aforementioned facts, we can easily understand that both associated and unassociated types of the permanent establishment are recognized under article 4(2), and article 4(4) (5) of income tax proclamation number 979/2016, respectively. The income tax regulation of Ethiopia has also provided some issues on PE.[21] Though the Ethiopian income tax law defined the term

[14] Federal Income Tax Proclamation of Ethiopia, Proclamation No. 979/2016, *Federal Negarit Gazetta*, year 22 No.104, (2016), (hereafter called Income Tax Proclamation No.979/2016).
[15] See Income Tax Proclamation No.286/2002, Art.5 (4) and Income Tax Proclamation No.979/2016, Art. 4.
[16] Income Tax Proclamation No.286/2002, Art. 2(9) (b).
[17] Income Tax Proclamation No.286/2002, Art. 2(9) (c).
[18] Income Tax Proclamation No.979/2016, Art.4(4)(a).
[19] Income Tax Proclamation No.979/2016, Art.4.
[20] See Art.4 of the Income Tax Proclamation No.979/2016, and Art.5(1) of both UN and OECD Model Conventions.
[21] Federal Income Tax Regulation of Ethiopia, Regulation No. 410/2017, *Federal Negarit Gazeta,* 23rd Year, No.82, 2017 (hereafter called Income Tax Regulation No.410/2017), Art. 4.

permanent establishment so that it enables the tax authority to determine whether the nonresident enterprise is subject to taxes or not, various problems underlie the permanent establishment as provided under income tax law of Ethiopia. Currently, the traditional business trend which requires the physical presence is replaced with virtual business transaction. This paradigm shift would inevitably pose a challenge to the Ethiopian rule of permanent establishment. Besides, absence of clarification on some terminologies, and the issue of artificial avoidance of permanent establishment status that emerged as the new perspective to permanent establishment is another conundrum of the Ethiopian rules of permanent establishment. Such perplexities would open the room for base erosion and profit shifting, and then result in the loss of revenue for Ethiopia.

The aim of this article is, therefore, to examine the concept of PE as defined under the Ethiopian income tax law, to identify its shortcomings and to explore opportunities for proper regulation. To this end, doctrinal legal research methodology is employed to investigate the pertinent provision of income tax law of Ethiopia.

The article is divided into 4 sections. This first section provided introduction to the subsequent sections. The second section presents the general overview of permanent establishment. The third section explores permanent establishment as envisaged under the Ethiopian income tax law in lights of OECD and UN Model Convention. The fourth section analyzes major problems associated with permanent establishment under the Ethiopian income tax law. Finally, the article comes to an end with brief concluding remarks.

1. General Overview of Permanent Establishment.

The first approach to the Permanent establishment concept dates back to 1899 when Austria-Hungary and Prussia signed a tax treaty, which required a fixed place of business for the taxpayer to be liable in the source country.[22] Then, in 1927, it was enshrined in the model tax convention of the League of Nations (1927) and the modern notion was adopted by the Organization for the Economic Cooperation and Development ("OECD") tax Model Convention of 1963.[23]In 1927 a draft convention on double taxation by the League of Nations defined permanent establishment as "real Centre's of management, mining and

[22] Arvid Age. Skaar, *Permanent Establishment: Erosion of Tax Treaties Principle*, Kluwer Law and Taxation, (1991), p.65
[23] Cockfield, *supra* note 2.

oil fields, factories, workshops, agencies, warehouse, office, and depots".[24] Since then, permanent establishment has been used as a demarcation point to tax profits from business to overcome the problem of double taxation for non-resident taxpayers.[25] Accordingly, many countries have adopted the OECD model on the determination of permanent establishment in formulating their own guidelines. Originally, the permanent establishment principle was introduced mainly to avoid conflicts between countries and to avoid companies doing business in another jurisdiction being imposed tax twice. The principle of permanent establishment has been used to justify the fact that a contracting country foregoes its right to charge income in its jurisdiction[26]and to enable the other country to practice its right of taxing the profits attributable in its jurisdiction.[27]

Essentially, permanent establishment determines the right of a contracting state to tax the profits of an enterprise of the other contracting state. The definition of permanent establishment is used in bilateral tax treaties to determine the right of a State to tax the profits of an enterprise of the other State.[28] Specifically, the profits of an enterprise of one State are taxable in the other State if and only if the enterprise maintains a permanent establishment in the latter State and only to the extent that the profits are attributable to the permanent establishment.[29] If an enterprise fails to qualify as a permanent establishment, its profits will be exempted from income tax in the country of source and would only be subject to fiscal compliance in the country of residence.[30]

The concept of permanent establishment marks the dividing line for business between merely trading with a country and trading in that country.[31] If an enterprise has a permanent establishment, its presence in a country is sufficiently substantial that it is trading in the country. The main use of the concept of a permanent establishment is to determine the right of a Contracting State to tax

[24] Randolph J. Buchanan, The New Millennium Dilemma: Does Reliance on the Use of Computer Servers and Websites in a Global Electronic Commerce Environment Necessitate a Revision to the Current Definition of a Permanent Establishment, *SMU Law Review,* Vol .54, No.4, (2001), p. 2115.
[25] Cockfield, *supra* note 2.
[26] John K. Sweet, Formulating International Tax Laws in the Age of Electronic Commerce: The Possible Ascendancy of Residence-Based Taxation in an Era of Eroding Traditional Income Tax Principle, *University of Pennsylvania Law Review*, Vol.146, No.6, (1998), p.1949.
[27] Zaleha Othman &Mustafa Mahad Hanefah, Taxation of E-Commerce and Determination of Permanent Establishment, Malaysian *Accounting Review*, Vol.5, No.2, (2006), p.3.
[28] UN Model Convention, Art.7(1).
[29] *Id.*
[30] *Id.*
[31] Baker, *supra* note 10, P.2.

the profits of an enterprise of the other Contracting State.[32] It is vital in helping taxpayers worldwide to determine if they will have a taxable presence. It is very important here for jurisdictions to know whether the Resident state or Source state has a right to tax and collect revenue from the income generated by a person carrying out business activities in more than one state.[33] Also, it becomes equally important for the person carrying on business to know where to pay tax and where to file the return.[34]

There are several justifications for applying the permanent establishment concept to the allocation of taxing rights.[35] First, the principle of international justice or fair allocation of tax revenues requires ensuring source-based taxation in a case when the foreign enterprise utilizes the infrastructure and the beneficial economic environment of the source state. The advantageous economic conditions are implemented from the budget of the state; therefore, one can expect the enterprise to contribute to these costs.[36] Furthermore, ensuring neutrality between the different forms of secondary establishment is another justification.[37] If a foreign enterprise decides to carry out business in the source state by establishing a subsidiary, then this subsidiary will be a resident taxpayer of the source state and will be exposed to a tax burden that applies to all other resident taxpayers according to the domestic law of that state. Accordingly, allowing the source state to impose a tax on profit which is attributable to a permanent establishment will ensure neutrality between the business undertakings within the host states. It is especially true where the double taxation treaty contains the credit or exemption method to eliminate double taxation. In such cases the income of the permanent establishment is taxed exclusively by the source state, creating complete capital import neutrality.[38]

Furthermore, formulating the concept of permanent establishment as a threshold of business activity, below which the state of residence has exclusive taxing right regarding the business profits can be justified by practical reasons.[39] It entails that the enterprise, whose activity in the source state does not reach that

[32] *Id.*
[33] *Id.*
[34] Pragna Patel, Essay on International Taxation, Permanent Establishment, p.2 available at http://www.fitindia.org/downloads/Pragna_Patel_2011.pdf last accessed on 05 July 2019.
[35] Reimer, Ekkehart, Permanent Establishment in the OECD Model Tax Convention, In Permanent Establishments, A Domestic Taxation, Bilateral Tax Treaty and OECD Perspective, 6th edition, Kluwer Law International, Netherland, (2018), p. 11.
[36] *Id.*
[37] *Id.,* p. 12.
[38] *Id.*
[39] *Id.*

threshold, is relieved from compliance and administration costs in that state which would be disproportionate to the minor business presence of the enterprise.[40]

In a nutshell, Permanent establishment is a benchmark in determining whether the source state has a jurisdiction to impose a tax on a non-resident company that derived profits in the concerned host state. That means it determines the right of a contracting State to tax the profits of an enterprise of the other contracting State. Thus, a country may not tax the business profits of an enterprise unless that enterprise has a permanent establishment in that State.[41]

2. The Ethiopian Rules on Permanent Establishment in Light of OECD and UN Model Convention

Both OECD and UN Model Conventions have defined permanent establishment as "A fixed place of business through which the business of an enterprise is wholly or partly carried on".[42] From this definition, we can easily understand that three cumulative elements should be fulfilled for the existence of permanent establishment. Though, both OECD and UN Model Conventions failed to define these elements, commentary on article 5 of OECD Model Conventions has provided what constitutes *"fixed'', "place of business''* and "*when the enterprise is said to be carried on wholly or partly at the fixed place''*. Accordingly, fixed refers to a link between the place of business and a specific geographic point, as well as a degree of permanence concerning the taxpayer.[43]

A place of business refers to some facilities used by an enterprise for carrying out its business, i.e. a facility such as premises or, in certain instances, machinery or equipment.[44] The mere presence of the enterprise at that place does not necessarily mean that it is a place of business of the enterprise. The facilities need not be used exclusively by that enterprise or for that business. However, the facilities must be those of the taxpayer, not another unrelated person. Thus, regular use of a customer's premises does not generally constitute a place of business.[45] The business of the enterprise must be carried on wholly or partly at the fixed place, this means usually that persons who, in one way or

[40] *Id., pp. 12*-13.
[41] OECD Model Convention, Art.7.
[42] See Art.5 (1) of both UN and OECD Model Conventions.
[43] Commentary on OECD Model Convention, *supra* note 7.
[44] *Id.,* paragraph 2.
[45] *Id.,* paragraph 4.

another, are dependent on the enterprise (personnel) conduct the business of the enterprise in the State in which the fixed place is situated.[46]

Furthermore, Article 5(2) of the UN Model Convention, which is the same as the OECD Model Convention, sets forth a non-exhaustive list of concepts which often constitute a permanent establishment in the State in which they are located: The term permanent establishment includes especially: "(a) a place of management, (b) a branch, (c) an office, (d) a factory, (e) a workshop, (f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources." Not only this but article 5(3),5(4),5(5) and 5(6) of both UN and OECD Model Conventions have provided for a list of activities that cannot be deemed to be a permanent establishment, conditions when construction or building project by non-resident constitutes permanent establishment, and agency permanent establishment, respectively.[47]

There are, however, significant differences between the permanent establishment rules under the OECD and UN Model Conventions.[48] The main point of distinction between two models can be summarized as follows; first, both OECD and UN Model Conventions deem a building site or construction or installation project to be a permanent establishment if the site or project continues for a certain period of time. The crucial difference between the two treaties is the length of time for which the concerned activities must continue for the site or project to constitute a permanent establishment. The OECD Model Convention deems a site or project to be a permanent establishment where the non-residents' work lasts for more than 12 months while the UN model treaty only requires a six-months project.[49]

The second difference pertains to service permanent establishment. Under the UN model,[50] a non-resident enterprise that renders services of any kind in the source country for one or more periods aggregating more than six months within any 12 months is deemed to have a permanent establishment in the source country. By the contrast, the OECD model treaty has no provision that allows a source country to treat the long-term provision of services as a permanent establishment and thus bypass the rule denying source countries any right to tax

[46] *Id.,* paragraph 7.
[47] See Art. 5(2)-5(6) of the both OECD and UN Model Conventions.
[48] Economic and Social Council Committee of Experts on International Cooperation in Tax Matters: Definition of Permanent Establishment: Finalized Amendments to Current Commentary on article 5 - Permanent Establishment, (2008), P.6
[49] see Art.5(3) of both the OECD and UN Model Conventions
[50] UN Model Convention, Art.5(3) (b)

business income unless the income is derived through a permanent establishment.[51]

The third difference is related to the delivery of a stock of goods. Accordingly, Under OECD based treaties list of what is deemed *not* to constitute a permanent establishment (often referred to as the list of preparatory and auxiliary activities), *delivery* of a stock of goods is mentioned while it is not mentioned in the UN Model Convention.[52] Therefore a delivery activity might result in a permanent establishment under the OECD Model Convention, without doing so under the UN Model Convention. This difference reflects a view that the presence of a stock of goods for prompt delivery facilitates sales of the product and earning of profit in the host country and represents a continuous connection with the source country, and as such may constitute a permanent establishment and be subject to source country taxation. The fourth difference is related to the insurance business. As far as the insurance business is concerned, under the UN Model Convention, there is a special provision specifying when a permanent establishment is created in the case of an insurance business.[53] But, when we come to the OECD Model Convention, we can't find any provision that addresses issues of the insurance business.

Whatever it may be, the OECD Model Convention shifts more taxing powers to capital-exporting countries.[54] Unlike the OECD Model Convention, the UN Model Convention reserves more for capital importing countries.[55] The United Nations Model Convention represents a compromise between the source principle and the residence principle and gives more weight to the source principle than does the OECD Model Convention.[56] In a similar fashion with the UN and OECD Model Conventions, the Ethiopian income tax proclamation has defined the term permanent establishment so that it would be a benchmark in determining when and how the business profits of the non-resident person are subjected to tax.[57] Though the definition provided for the term permanent establishment under the Ethiopian tax regime is similar to that of the OECD and UN Model Conventions, there are, however, significant differences between the

[51] *Id*
[52] See Art. 5(4) of both the OECD and UN Model Conventions
[53] UN Model Convention, Art. 5 (6)
[54] Donald. R. Whittaker, An Examination of the O.E.C.D. and U.N. Model Tax Treaties: History, Provisions, and Application to U.S. Foreign Policy, *North Carolina Journal of International Law& Commercial Regulation* Vol.8, No. 1, (2016), p. 44.
[55] *Id.*, p.46.
[56] *Id.*
[57] Income Tax Proclamation No.979/2016, Art. 4.

deemed permanent establishment rules under the two Model Conventions and Ethiopian income tax proclamation.

To begin with, similar to that of the UN Model Convention, furnishing of service would constitute a permanent establishment if it continues for a set of certain periods.[58] The UN Model Convention requires more than six months while service permanent establishment has not recognized as a tax base under the OCED Model Convention.[59] When we come to Ethiopia, the existing tax regime has recognized service permanent establishment subject to a certain condition. Accordingly, a non-resident enterprise that furnishes services including consultancy service by a person including through employee or by other personnel engaged by a person for such purpose, in the source country for periods aggregating more than 183 days within any 12 months is deemed to have a permanent establishment in the source country.[60] In this aspect, the Ethiopian tax regime is similar to that of the UN Model Convention than the OECD Model Convention.

Furthermore, in a similar fashion with what is provided under both the OECD and UN Model Conventions, building site or construction or installation project would be considered` a permanent establishment if the site or project continues for a set of period. The crucial difference between the OECD Model Convention and the Ethiopian tax regime is the length of time that activities must continue for the site or project to constitute a permanent establishment. The OECD Model Convention deems a site or project to be a permanent establishment where the non-resident's work lasts for more than 12 months while the UN Model Convention only requires a six-month project.[61] Surprisingly, the Ethiopian tax regime requires 183 days which is quite similar to the UN Model Convention.[62] Like that of the UN model convention, the Ethiopian tax regime favors a shorter period of 183 days for considering the construction site as a permanent establishment. This is important to increase revenue from taxes that are the highest source of finance for Ethiopia.

Another point of distinction between the Ethiopian tax regime and the international tax models (OECD and UN model) is concerned with providing a list of activities that cannot be deemed as a permanent establishment.[63]

[58] *Id.,* Art.4(3).
[59] UN Model Convention, Art. 5(3) (b).
[60] Income Tax Proclamation No.979/2016, Art.4(2)(c).
[61] See Art.5(3) of both the OECD and UN Model Conventions.
[62] Income Tax Proclamation No.979/2016, Art.4(2,c).
[63] See Art. 5(4) of both the OECD and UN Model Conventions.

Accordingly, both the UN and the OECD model Conventions have provided for a list of activities that cannot be deemed as a permanent establishment. But, we do not have any provision that addresses a list of activities that cannot be considered as a permanent establishment in our context.

3. Major Problems Associated with Rules on Permanent Establishment under the Ethiopian Income Tax Law

3.1. Problems in Relation to Taxation of Electronic Commerce

Due to technological advancement, the operation of a business in E-Commerce has been posing challenges to the determination of a permanent establishment for the purposes of taxation. The challenges to taxation of E-Commerce are challenges that are faced by governments globally.[64] Failure to protect the tax base of a country from the challenges arising in E-Commerce will result in an unfair environment in the taxation of resident and nonresident business[65], where non-resident business can avoid income tax due to mismatches that exist between income tax legislation and the operations of a business in E-Commerce. It is apparent that the concept of Permanent establishment was designed in an almost moldable approach that enables it to fit any kind of business reality. If we recognize that one fundamental element of existence for a Permanent establishment is the necessity of a geographical, physical location for the business to operate, it gets extremely difficult to determine where such location is when the business is carried out only by electronic means.[66]

The concept of a permanent establishment was developed in 1927, a pre-digital era where transacting with target markets placed reliance on physical premises.[67] The virtual environment, within which E-Commerce exists, has resulted in E-Commerce business not meeting the requirements for a fixed place of business in the determination of the existence of a permanent establishment in the jurisdiction within which business activities are conducted.[68] Business in E-Commerce, however, provides an environment where a business can operate virtually in any market jurisdiction, from any location in the world which

[64] Jinyan Li, Protecting The Tax Base in the Digital Economy, June 2014,p.27,available at http://www.un.org/esa/ffd/tax/2014TBP/Paper9_Li.pdf, last accessed on 31 March 2020
[65] *Id.,* p.28.
[66] Leonardo F.M. Castro, Problems Involving Permanent Establishments: Overview of Relevant Issues in Today's International Economy*, Global Bus. L. Rev.* Vol .2, No.2, (2012), p. 150.
[67] Visesh Choudhary, Electronic Commerce and Principle of Permanent Establishment Under the International Taxation Law, *International Tax Journal*, Vol.37, No 4, (2011), p 42.
[68] *Id.,* p. 39.

provides challenges to the application of the treaty concept related to a permanent establishment.[69]

So as to minimize the challenges posed regarding income taxation of businesses in E-Commerce, BEPS action plan by G-20 and OECD countries have provided three possible options namely; equalization levy, new nexus rule in the form of a significant economic presence and Withholding tax on certain types of digital transactions for the taxation of E-Commerce.[70] Solutions proposed in addressing tax challenges arising from the taxation of non-resident business can be categorized in the following manner.[71] i)Solutions which seek to preserve existing international tax system with minor changes that are effected to accommodate business in E-Commerce ii) Solutions which argue for a shift in the emphasis from source to a residence-based taxation iii) Solutions which argue that international tax rules are not sustainable in the ecommerce environment due to imbalances created in taxation between taxpayers, with the alternative proposal being that of introducing a consumption based tax or a special tax on transactions conducted over the internet.[72]

The first solution is related to the modification of a permanent establishment to accommodate the taxation of the electronic commerce. Accordingly, moving away from a "fixed place of business" to "a significant digital presence" is the main consideration.[73] OECD has suggested that there should be a possible modification to the permanent establishment principle to include business activities which are conducted digitally.[74] Businesses engaged in digital activities in a country may be deemed to have a taxable presence if a significant digital presence is maintained in the economy of the country in which the business transacts.[75] A significant digital presence would accommodate any business that is engaged in digital activities, where minimal physical elements are required in conducting activities of the business.[76] Experiences of Kenya

[69] Jean Philippe Chetcuti, The Challenges of E-commerce to the Definition of a Permanent Establishment: The OECD's Response, 2002, available at http://www.inter-lawyer.com/lex-e-scripta/articles/e-commerce-pe.htm last accessed on 31 March 2020.
[70] OECD, Additional Guidance on the Attribution of Profits to Permanent Establishments, BEPS action plan7, (2018) available athttps://www.oecd.org/tax/transfer-pricing/additional-guidance-attribution-of-profits-to-permanent-establishments-BEPS-action-7.pdf last accessed on 28 July 2019
[71] Choudhary, *supra* note 67, p.51.
[72] *Id.,* p.52.
[73] Pumla Zondo, E-Commerce and the Taxation in South Africa of Non–Residents, Master's Thesis, University of the Witwatersrand, (2017), P.59.
[74] OECD, Addressing the Tax Challenges of the Digital Economy, (2014),P. 143 available at http://www.oecd-ilibrary.org/taxation/addressing-the-tax-challenges-of-the-digital-economy_9789264218789-en, last accessed on 28 July 2019.
[75] *Id.,* P.144.
[76] *Id.*

can be taken as an example. Changes to the Kenyan Corporate Income Tax Act, which came into force last November 2019, has introduced the significant economic presence (SEP) as a remedy for the taxation of electronic commerce by non-resident companies.[77] According to the norm, SEP will be created when the non-resident companies have provided digital, technical, management, consultancy or professional services to resident person in Kenya.[78] The same is true for India. In 2018, India recognized virtual presence as constituting nexus for the purpose of asserting taxing rights and introduced the concept of Significant Economic Presence (SEP) in its tax laws.[79] Accordingly, SEP is inculcated to section 9 of the Income-Tax Act, 1961 ('ITA') from April 1, 2018.[80]

The other alternative is related to Electronic or virtual permanent establishment.[81] As an alternative to be applied to business in E-Commerce, the concept of a virtual permanent establishment has been suggested involving the modification of the concept of permanent establishment to include a virtual fixed place of business and a virtual agency.[82] The extension of a permanent establishment would include the creation of a permanent establishment in the event of a non-resident business maintaining a website on a server of another enterprise located in a jurisdiction.[83] The experiences of Spain can be taken as an example. The concept of a virtual permanent establishment has been considered in Spain where the application of the concept was tested in the 2012 case involving Dell.[84] In addressing the challenges associated with business operating in the absence of a physical presence or premises in the country where

[77] Digital Economy Taxation Think Tank, Non-Profit Organization, African Route: Kenya Digital Tax & Nigerian Significant Economic Presence as Nexus for 2020 Digital Economy Taxation,(January 2020), available at https://det3.eu/news/nigerian-significant-economic-presence-route-nexus-for-2020-digital-economy-taxation/#page last accessed on 31 March 2020.

[78] *Id.*

[79] Rishi Kapadia, & Mohit Rakhecha, Digital Tax: Why India's Approach to Taxing Google, Facebook Needs to Align with International Approach,(2019), available at https://www.google.com/amp/s/m.economictimes.com/small-biz/legal/digital-tax-why-indias-approach-to-taxing-google-facebook-needs-to-align-with-international-approach/amp_articleshow/68329809.cms last accessed on 31 March 2020.

[80] Delloite, Taxation of Non-Residents Through a Significant Economic Presence: Widened Scope Under the Indian Income Tax Law, (2018) available at https://www2.deloitte.com/in/en/pages/technology-media-and-telecommunications/articles/significant-economic-presence.html last accessed on 31 March 2020.

[81] Zondo, *supra* note 73, P. 60.

[82] OECD, Are the Current Treaty Rules for Taxing Business Profits Appropriate for E-commerce? Final report, (2005), p.65, available at http://www.oecd.org/ctp/treaties/35869032.pdf last accessed on 31 March 2020.

[83] *Id.,p.* 66.

[84] Gary D. Sprague, Spanish Court Imposes Tax Nexus by Finding a Virtual Permanent Establishment,(2013),available at http://www.bna.com/spanish-court-imposes-n17179871765 last accessed on 31 March 2020.

markets are located, the concept of a virtual permanent establishment has been considered in Spain.[85]

The other option is Characterization of income and imposition of a withholding tax.[86] A possible alternative to address the challenges of E-Commerce on income tax is related to the possibility of expanding withholding taxes to include payments for digital transactions.[87] A suggestion has been made for the imposition of a final withholding tax on payments made by a resident for digital goods and services which have been provided by the non-resident business. The withholding tax would be facilitated by financial institutions involved in paying the non-resident.[88] Experiences of Vietnam can be taken as an example. On 13 June 2019, the National Assembly of Vietnam passed a new tax administration law which will impact many non-resident enterprises selling goods and services into Vietnam via digital and E-Commerce business models.[89] Accordingly, withholding tax to tax income derived from E-Commerce, where payments to foreign enterprise will be subjected to a withholding tax is introduced by the new legislation

The final alternative is introducing an internet specific tax.[90] An introduction of an internet specific tax has been proposed to target E-Commerce transactions.[91] The introduction of an internet specific tax called a bit tax would result in digital data flowing over the internet being taxed.[92]The tax suggested would involve a progressive system of taxation applied, to tax the usage of data by non-resident businesses operating online.[93] The tax rate suggested to be applied for the internet specific tax would be based on the size of the operations conducted through E-Commerce or the turnover of the business.[94]

Coming to the context of Ethiopia, the Ethiopian income tax proclamation is not clear as to whether permanent establishment may be created via E-Commerce or not, and how the taxation of business profits that are attributed to E-Commerce ought to be regulated. Despite slight differences, the way Ethiopian income tax

[85] *Id.*
[86] Zondo, *supra* note 73, p. 62.
[87] Li, *supra* note 64, p. 446.
[88] OECD, *supra* note 74, p. 146.
[89] KPMG, Taxation of E-commerce in Vietnam,(2019) available at https://home.kpmg/us/en/home/insights/2019/07/tnf-vietnam-taxation-e-commerce-transactions-remote-digital-sales.html last accessed on 31 March 2020.
[90] Zondo, supra note 73, p. 62.
[91] Choudhary, *supra* note 67, p 53.
[92] *Id.*
[93] OECD, *supra* note 74, p. 147.
[94] *Id.*

proclamation defined permanent establishment is similar to that of the OECD and UN Model Conventions.[95] Among the elements of the definition of a permanent establishment, a place of the business test requires some physical existence in the source country. Accordingly, since the website is not a tangible object, it cannot be a place of business. Besides, the concept of "fixed place" in Permanent establishment is difficult to apply in E-Commerce as companies located anywhere can conduct business everywhere.[96] Hence, it is quite difficult to apply the notion of a permanent establishment in the case of E-Commerce.

Not only this but also the VAT proclamation of Ethiopia can be mentioned to justify the assertion that E-Commerce is not covered within the ambits of permanent establishment. Accordingly, the VAT Proclamation of Ethiopia provides that "*the supply of goods and rendering of services is taxable if it is carried out by a non-resident through a permanent establishment in Ethiopia or through the internet*".[97] From this article, we can easily understand that the supply of goods and services by the non-resident enterprises is subject to VAT provided that the concerned activity is undertaken either in the form of Permanent establishment or *the internet*. Accordingly, had the concept of permanent establishment been extended to E-Commerce, providing *the internet* as an alternative requirement for imposing VAT on the supply of goods and services by non-resident enterprises would not have been necessary. Hence, one can confidently argue that the definition of permanent establishment as envisaged under the income tax proclamation of Ethiopia did not extend to E-Commerce. Since the traditional concepts contained in the definition of a permanent establishment are inadequate to deal with the ever-increasing growth of E-Commerce in the digital era; the rules governing the taxation of E-Commerce should be added under Article 4 of the Federal Income Tax Proclamation No.979/2016. Prominently, I opt for the significance of economic presence (SEP) for the taxation of electronic commerce for Ethiopia.

3.2. Problems in Relation to Artificial Avoidance of Permanent Establishment Status

It is complex to speak about 'artificial avoidance', as what may be avoidance for one country may not be the same for another that interprets the PE principle

[95] See Art.4 (1) of the Income Tax Proclamation No.979/2016, and Art.5 (1) of both the UN and OECD Model Conventions.

[96] Rifat A., E-Commerce Taxation and Cyberspace Law: The Integrative Adaptation Model, *Virginia Journal of Law &Technology*, Vol. 12, No. 5, (2007), P. 9.

[97] Value Added Tax Proclamation of Ethiopia, Proclamation. No. 285/2002, *Federal Negarit Gazetta,* 8th year, No. 33, (2002), Art. 4(7).

in a different form.[98] This is obvious, for instance, with the Dell cases in Norway and Spain: whereas a typical commissionaire structure withstood the exam of the Norwegian Supreme Court, which ruled that there was no PE in such a situation, the same agreement was regarded as a PE in Spain.[99] As an international organization that works on tax, OECD does not elaborate much on what they mean exactly by artificial. Although the term artificial is given no specific definition in the Final Report on Action 7, the report elaborates on the different ways of avoiding PE status it wishes to address with its proposals.[100] In this situation, understanding the current problems of the PE ,and, therefore, defining what artificial avoidance of PEs is calls for a reference to the historical evolution of the concept since, without this historical perspective, it is not easy to fully comprehend the present problems of that institution.[101] The term artificial avoidance is first heard during the famous ruling by the European Court of Justice in the Cadbury Schweppes case.[102] Although this case primarily dealt with the application of controlled foreign corporation (CFC) legislation, the Court defined a wholly artificial arrangement as a fictitious establishment, not carrying out any genuine economic activity.[103]

Various multinational corporations have been and still are using the loopholes that are left in relation to the definition of permanent establishment to artificially avoid permanent establishment status so that their income would be exempted from taxes in source countries. Artificial avoidance of PE status through commissionaire arrangements and similar strategies, specific activity exemptions and splitting up of contracts concerning construction or building project and service permanent establishment are the prominent strategies by which multinational corporations have been using to artificially avoid permanent establishment status.[104]

[98] Adolfo Martín Jiménez*,* Preventing the Artificial Avoidance of PE Status, a Preliminary Documents Circulated at the United Nations Workshop on "Tax Base Protection for Developing Countries" (Paris, France 23 September 2014), p.13.

[99] *Id.*

[100] Gustav Einar, Dependent Agents After BEPS Especially with Regard to Commissionaire Arrangements, Master's thesis, Uppsala University, (2017), p. 22.

[101] Jiménez, *supr*a note 98, p.13.

[102] Arthur Pleijsier, the Artificial Avoidance of Permanent Establishment Status: A Reaction to the BEPS Action 7 Final Report, *International Transfer Pricing Journal***,** (2016), p. 443.

[103] *Id.*

[104] OECD, Preventing the Artificial Avoidance of Permanent Establishment Status, Action 7 – 2015 Final Report,(hereafter called OECD/G20 Action 7 – Final Report 2015)available at https://www.oecd.org/ctp/preventing-the-artificial-avoidance-of-permanent-establishment-status-action-7-2015-final-report-9789264241220-en.htm, (accessed on July 28, 2019).

Coming to the context of Ethiopia, artificial avoidance of permanent status is not adequately regulated. One of the rooms for artificial avoidance of the status of PE under Ethiopian tax law is related to commissionaire arrangement in relation to dependent agent. Article 4 (4) of the Income Tax Proclamation provides that when a person, other than an agent of independent status acting in the ordinary course of business, acts on behalf of another person (referred to as the principal) regularly negotiates the contracts on behalf of the principal or maintains a stock of goods from which the person delivers goods on behalf of the principal, the agent is the PE of the principal.[105] This can be taken as a good step as the negotiation of contract on the behalf of the principal would give rise to PE.

One of the gaps that MNEs have been using for artificial avoidance of PE status was the fact that negotiation of contracts on behalf of the principal would never give rise to PE as the conclusion of contract on the behalf of the principal was mandatory. Inculcation of negotiation of contract on behalf of the principal as a condition for the creation of PE was the remedy employed by the OECD Model Convention and Multilateral Instrument.[106] Hence, both conclusion and negotiation of contracts on behalf of the principal would give rise to PE. Coming back to the Ethiopian context, though inculcating negotiation of contracts on behalf of the principal as a condition for the creation of a PE is a good start, exclusion of the conclusion of contracts on behalf of the principal from the same article would inevitably lead to artificial avoidance of PE status. The dependent agent might go beyond negotiation and conclude contracts on behalf of the principal. Hence, had the Ethiopian income tax proclamation expanded the scope of the dependent agent by inculcating both conclusion and negotiation of contracts on behalf of the principal as a condition for the creation of PE, it would have given more sense.

Another strategy for artificial avoidance of permanent establishment status is splitting up of contract. Article 4(3) of the Income tax proclamation has provided about construction or building PE. Accordingly, "A building site, or a construction, assembly, or installation project, or supervisory activities connected with such site or project shall be PE only when the site or project or activities continue for more than one hundred eighty-three days."[107] If the building or construction project lasted less than 183 days, it does not create a PE irrespective of whether it is undertaken by related enterprises or not. The same holds for the furnishing of services. If the furnishing of services lasts less than

[105] Income Tax Proclamation No.979/2016, Art. 4(4).
[106] See OECD Model Convention of 2017, Art.5 (5) and Multilateral Convention, Art.12.
[107] Income Tax Proclamation No.979/2016, Art.4(3).

183 days, it does not create a PE irrespective of whether it is undertaken by related enterprises or not.[108] It seems that MNEs may divide their contracts into several parts, each covering a period less than 183 days and attribute it to a different company, of the same group, thereby avoid the formation of PE.

However, the councils of the minister's income tax regulation no 410/2017 have provided the remedy for fighting artificial avoidance status concerning construction or building site.[109] If two related enterprises undertake certain secret dealing in a way that enables them to artificially avoid PE status by splitting their activities with the principal purpose of benefiting from the threshold, they cannot succeed since the tax authority is authorized to add up the periods that spent on any connected activities conducted by a related person. The same is true for service PE.[110] Yet, failure of Ethiopian income tax proclaimation to clarify as to what constitutes connected activity or project could be a stumbling block for the implementation of the aforementioned article, and then open the room for artificial avoidance of PE status.

Another avenue by which the non-resident person has been and is still avoiding PE status is based on the specific activity exemption. The repealed income tax proclamation of Ethiopia has a list of activities that do not constitute a PE.[111] Providing a list of activities that do not constitute PE has tended to open the room for artificial avoidance of PE status through specific activity exemption. The new income tax proclamation has avoided a list of activities that do not constitute a PE. This could be taken as the positive aspects of the Ethiopian income tax proclamation as it closes the door or the room that enables the MNEs to artificially avoid a PE status through specific activity exemption.

Despite its tremendous role in fighting artificial avoidance of PE status, avoiding list of activities that do not constitute PE is not advisable. The key idea behind the exemptions is to allow a foreign enterprise to maintain a fixed place of business in the Source State "for the storage, display or delivery of goods without creating a PE there".[112] The rationale of the activity exemptions is that these activities are remote from the core, income-generating business activity, therefore they do not exceed the threshold which would justify the taxing right

[108] Income Tax Proclamation No.979/2016, Art. 4 (2) (c).
[109] Income Tax Regulation No.410/2017, Art. 4.
[110] Income Tax Regulation No.410/2017, Art. 4(1).
[111] Income Tax Proclamation No.286/2002, Art.2 (9) (b).
[112] John Gillespie, The Base Erosion and Profit-Shifting Project, Action 7: A Critical Analysis of the Preparatory/Auxiliary Extension and the New Anti-Fragmentation Rule in the 2017 OECD Model Tax Convention, Master's thesis, Uppsala University, (2018), p.15.

of the source state.[113] Hence, imposing taxes on preparatory or auxiliary activities that are not yet the normal business operation would tend to defeat the principal purpose of taxation and the motive of Ethiopia to attract foreign direct investment. In short, the tax should be imposed on an income accrued to our territory, and imposing taxes on an enterprise that has not yet acquired any income is quite paradoxical as it may hinder the free flows of international trade. Hence, it is imperative to provide for specific activity exemption by adopting anti-fragmentation rules.

3.3. Problems in Relation to Place of Management and Effective Place of Management

As provided under article 4(2) (a) of proclamation number 979/16, "*place of management''* is one element to determine whether the non-resident enterprise has a permanent establishment status or not.[114] At the same time, article 5(5) (b) of the same proclamation provides an "*effective place of management*" as a requirement in determining whether a certain body is resident or not.[115] Here, it is difficult to put a line of demarcation between the place of management and effective place of management. The term effective place of management is quite a controversial term that has been attracting the attention of the world communities. To mention some, South Africa is one of the countries where the interpretation of the term "effective place of management" is problematic. South Africa's Income Tax Act No. 58 of 1962 uses the terminology 'place of effective management' when determining the residency of companies. This term is not, however, defined in the said legislation and there is no South African case law specifically dealing with this matter.[116] Again, India is another country where the issue of effective place of management is problematic. Yet, India has introduced a mechanism for determining whether the given place is an effective place of management or not. If we look at experiences of India on this concern, the place of senior management and key management personnel's, place of

[113] Balazs Karolyi, The Challenges of Permanent Establishment Concept and the Response of BEPS Actions, Master's thesis, Tilburg University, (2017), p. 41.
[114] Income Tax Proclamation No.979/2016, Art, 4(2) (a).
[115] *Id.,* Art, 5(5) (b).
[116] Nirupa Padia & Warren Maroun, Determining the Residency of Companies: Difficulties in Interpreting 'Place of Effective Management', *Journal of Economic and Financial Science*, Vol.5, No 1, (2012), p.119

board of directors meeting and shareholders influence are taken as primary factors for determining effective place of management.[117]

The OECD Model Convention does not define the term 'place of effective management'. However, guidance is provided in the commentary on article 4 concerning the definition of a resident (OECD, 2000b) which states that:

> The place of effective management is the place where key management and commercial decisions that are necessary for the conduct of the enterprise's business are in substance made. The place of effective management will ordinarily be where the most senior person or group of persons (for example, a board of directors) makes its decisions, the place where the actions to be taken by the enterprise as a whole are determined; however, no definitive rule can be given and all relevant facts and circumstances must be examined to determine the place of effective management. An enterprise may have more than one place of management, but it can have only one place of effective management at any one time.[118]

A discussion paper entitled "the impact of the communications revolution on the 'place of effective management' as a tie-breaker rule" offers additional insights into the meaning of 'place of effective management' by suggesting that the place where the board of directors' meetings are held ,the strategic decisions are taken, the managers' and directors' offices are located, relevant legal documents are kept, and where essential acts in the life of a company are conducted should be considered in determining whether the place is really effective place of management or not.[119]

Furthermore, the UN Model Convention provides that the place where a company is actually managed and controlled, the decision-making at the highest level on the important policies essential for the management of the company takes place, the place that plays a leading part in the management of a company from an economic and functional point of view and the place where the most important accounting books are kept should be considered in determining whether the place is really effective place of management or not.[120] Owing to the aforementioned facts, unless the Ethiopian income tax proclamation clarifies

[117] Delloite, Place of Effective Management Recommendations on Guidelines to be Issued, (September 2015), p. 4 available at https://www2.deloitte.com/content/dam/Deloitte/in/Documents/tax/in-tax-place-of-effective-management-noexp.pdf last accessed on 31 March 2020.

[118] see Commentary on Art.4 of OECD Model Convention

[119] Burgstaller, E. & Haslinger, K, Place of Effective Management as a Tie-Breaker-Rule Concept: Development and Prospects. *International Tax Review*, Vol.32, No.8, (2004), pp. 376-387.

[120] United Nations (UN) Department of Economic and Social Affairs (DESA), United Nations Model Double Taxation Convention Between Developed and Developing Countries,(2012), p. 94 available http://www.un.org/en/development/desa/publications/double-taxation-convention.html last accessed on 31 March 2020.

the term "effective place of management", it might create controversy in determining whether a foreign enterprise is a permanent establishment or resident enterprise.

3.4. Problems in Relation to Interruption of Activity Via Force Majeure

In the case of construction or building sites and service permanent establishment, the use of a period as a yardstick can result in difficult negotiations with foreign authorities. The notion of Permanent establishment has been and still leads to different interpretations among countries and subsequently continues to confuse treaty interpretation.[121] Coming to the context of Ethiopia, the current income tax proclamation no 979/2016 has provided that a building site or construction activities would give rise to permanent establishment only when the site or project or activities continue for more than one hundred eighty-three.[122] What if the project is discontinued due to reasons beyond the non-residents' control within that total period? It may, in such cases, appear as punitive rather than practical. The same holds for service permanent establishment.[123] Accordingly, the determination of when a project commenced as well as non-exclusion of temporary discontinuations due to reasons beyond the control of nonresident may pose various questions. Though seemingly simple, the 183 days period may create difficulties. It has been noted that as there is no provision for temporary absences due to weather, for instance, a Permanent establishment can still arise, leading to unfair taxation standards.[124] While it may be difficult to monitor and enforce this, it would be advisable to have an exception for the one hundred eighty days provision to cover such abnormal circumstances, such as involuntary interruption of construction work due to floods, earthquakes, currency or monetary crisis, strikes and others. Hence, had the Ethiopian income tax law integrated the rules on the interruption of activities via force majeure, it would have given more sense.

[121] Castro, *supra* note 66, p .136.

[122] Income Tax Proclamation No.979/2016, Art.4 (3).

[123] Income Tax Proclamation No.979/2016, Art.4 (2) (C). The furnishing of services is considered as permanent establishment when activities of that nature continue for the same or a connected project for a period aggregating more than one hundred eighty-three days in one year. Here the silence of Ethiopian income tax proclamation as to when the project is said to be commenced, and what ought to be done to the period of 183 days when the project is discontinued by force majeure is quite cumbersome.

[124] See Kelleher, *supra* note 4, p.3.

3.5. Problems in Relation to the Elements of the Definition of Permanent Establishment

As it has been discussed, article 4 of new income tax proclamation has defined permanent establishment as "a fixed place of business through which the business of an enterprise is wholly or partly carried on''.[125] Though the Ethiopian income tax proclamation defined permanent establishment, it does not define the elements of the definition. That means, it does not define what constitutes fixed, place of business, and condition for determining whether the business is carried on through place of business or not. This would inevitably create a certain sort of confusion in determining whether a given activity by non-residents would give rise to the creation of permanent establishment or not.

In fact, the law should not be expected to provide a detailed explanation on each and every word that it has used since Legal provisions are needed to be crafted in an economical way. Yet, due to the complexities of the elements of the definition, the world communities have been facing challenges in implementing the rules on the permanent establishment. That is why the OECD Model Convention clarified the elements of the definition of permanent establishment through commentary.[126] Accordingly, fixed refers to a link between the place of business and a specific geographic point, as well as a degree of permanence concerning the taxpayer.[127] A place of business refers to some facilities used by an enterprise for carrying out its business, i.e. a facility such as premises or, in certain instances, machinery or equipment.[128] The business of the enterprise is said to be conducted through fixed place in a case when a persons who, in one way or another, are dependent on the enterprise (personnel) conduct the business of the enterprise in the State in which the fixed place is situated.[129] Nothing makes Ethiopia an exception. Hence, the existing tax regime should incorporate the definition for some controversial terms like fixed, place of business, and the condition under which certain business activities are said to be undertaken through a place of business.

Concluding Remarks

A permanent establishment is a connecting factor in determining whether the hosting country has the power to impose taxes on non-resident companies that engage in business activities within their territory or not. The concept of a

[125] Income Tax Proclamation No.979/2016, Art. 4(1).
[126] Commentary on OECD Model Convention, paragraph 2 to Art.7.
[127] Commentary on OECD Model Convention, supra note 7.
[128] *Id.,* paragraph 2.
[129] *Id.,* paragraph 7

permanent establishment was developed in 1927, a pre-digital era where transacting with target markets placed reliance on physical premises. The virtual environment, within which E-Commerce exists, has resulted in E-Commerce business not meeting the requirements for a fixed place of business in the determination of the existence of a permanent establishment in the jurisdiction within which business activities are conducted. To this effect, as E-Commerce has sparked considerable debate over the continued viability of the PE rules, numerous reform suggestions have appeared in the tax policy and law literature. BEPS action plan of G-20 and OECD countries have provided three options, namely: equalization levy, new nexus rule in the form of a significant economic presence, and withholding tax on certain types of digital transactions for the taxation of E-Commerce. Various countries have taken unilateral measures to ensure the taxation of electronic commerce via inculcation of significant economic presence, the permanent establishment without a fixed place of business, to their domestic tax legislation. India, Israel and the European Union can be taken as an example. Not only has this but also Kenya and Vietnam introduced a withholding tax system for the taxation of electronic commerce.

Similar to that of the UN and OECD Model Conventions, the Ethiopian income tax proclamation has defined permanent establishment as a fixed place of business through which the business of a person is wholly or partially carried on. Yet, it has various problems. Complete absence of rules on permanent establishment in relation to E-Commerce is the main problem of the Ethiopian tax system. Besides, its failures to define elements of the permanent establishment, absence of clarification in relation to the place of management and effective place of management that are provided as requirements for determining permanent establishment, and conditions for determining whether a certain body is resident or not, respectively, absence of exception for interruption of activities via force majeure in relation to construction or building service permanent establishment, and its failures to manage the currently overwhelming controversies in relation to artificial avoidance of permanent establishment status are also among the major problems of the Ethiopian tax system in relation to the permanent establishment.

Based on the aforementioned conclusion, my recommendation comprised of the followings:

Though Ethiopian income tax proclamation has defined permanent establishment as a fixed place of business through which business of person is wholly or partially carried on, it does not provide for what constitutes fixed,

place of business and condition for determining whether the business is carried on through place of business or not. Hence, the Ethiopian income tax proclamation should incorporate the definition for the aforementioned controversial elements of permanent establishment.

The issues of "*place of management''* under 4(2) (a) of proclamation number 979/16, and "*effective place of management''* under article 5(5) (b) of the same proclamation should be clarified as it creates controversy in determining whether a foreign enterprise is resident enterprise or just operating through a permanent establishment. The author recommends adopting the following parameters as a primary factor for determining the effective place of management: the place where the most senior person or group of persons (for example, a board of directors) make decisions; the place where the actions to be taken by the enterprise as a whole are determined; and place of board of directors meeting.

Business activities that are treated as exceptions to the general definition of the Permanent Establishment as laid down under Article 5 (4) of the OECD and UN Model Conventions should be included under Article 4 of the same Proclamation by introducing anti-fragmentation rule which enables tackling artificial avoidance of permanent establishment status.

The Ethiopian income tax proclamation should be amended and include remedies for artificial avoidance of permanent establishment status, and exception for interruption of activities via force majeure concerning construction or building service permanent establishment. In relation to artificial avoidance, sub (a) of article 4(4) of new income tax proclamation should be replaced with "regularly concludes or negotiates contracts on behalf of the principal", and the term "related person or enterprise or connected project or site" should be defined in relation to service and construction or building permanent establishment.

The Ethiopian income tax proclamation should be amended and incorporate rules governing the taxation of E-Commerce. Accordingly, the author recommends applying the significant economic presence criterion (permanent establishment without a fixed place of a business) for taxing electronic commerce. To this effect, the following provision should be added to article 4 of the new Ethiopian income tax proclamation of Ethiopia as sub article 6.

1) Notwithstanding with what is provided under sub article1 and 2, the non-resident person that engage in the electronic transaction is deemed to have

a permanent establishment, when it has a significant economic presence in Ethiopia.

2. Significant economic presence shall mean:

(a) transaction in respect of any goods, services or property carried out by a non-resident in Ethiopia including the provision of download of data or software in Ethiopia, if the aggregate of payments arising from such transactions during the previous year exceeds prescribed amount; or.

(b) Systematic and continuous soliciting of business activities or engaging in interaction with a prescribed number of users, in Ethiopia through digital means: Whether or not Agreement for such transactions or activities is entered in Ethiopia; or the non-resident has a residence or place of business in Ethiopia; or the non-resident renders services in Ethiopia.

A Reflection on Public Policy Exception in Private International Law under the New York Convention, European Union Instruments and Ethiopian Law

Abiyot Mogos[*]

Abstract

With the advent of globalization, an expansive increase in cross border transaction and socio-economic interaction has resulted in cross border law, judgment, and conflict of jurisdiction. This resulted in the development of private international law to ensure decisional harmony. Yet as a complete uniformity may sometimes run against public policy of concerned states, public policy exception is usually inserted. This piece reflects on the notion of public policy exception in private international law under the Ethiopian private international law rules in light of the European Union (EU) instruments and New York convention, and demonstrates how the EU experience could be helpful to improve the Ethiopian draft laws on the issue. Unlike EU, Ethiopia does not have comprehensive and binding laws of private international law other than some insufficient provisions under the civil procedure code (CPC) and the draft law. Even more, the existing Ethiopian rules under the CPC and draft law are crafted in manner that allow broader space to public policy exception including morality, are anti-foreign law or judgment in principle, less coherent and incomplete, and hence, are not as good as its EU counter parts to achieve the desired goal of private international law. Even if Ethiopia ratified the New York Convention, the scope of the Convention is limited to recognition and enforcement of award only. Hence, to have a complete and coherent Ethiopian legal regime on private international law, it is necessary to include pertinent stipulations on public policy exception under the EU instruments in the Draft proclamation.

***Key words*:** Ethiopia, EU, public policy, private international law

Introduction

Globalization has led to an expansive increase in cross-border transactions and socioeconomic interaction among citizens of different states or federating units. The cross-border interactions of individuals, which manifests in different

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spheres of life, often result in conflicting international legal situations in the form of cross-border law, judgment and conflict of jurisdiction, resulting from the existence of diverse legal orders on the globe. Such interactions of nationals and domiciliary of different states in areas of trade, commerce, and investment have necessitated the development of private international law.[1]

The objective of private international law at this juncture is to achieve decisional harmony by providing rules on each of its three sub-stages: choice of court, choice of law and the recognition and enforcement of foreign judgment and arbitral award.[2] However, as this may sometimes run against public policy of concerned states, public policy clause is usually inserted as safety valve.[3] Yet this in turn creates other problem of abusing the public policy exception, thereby making the normal operation of private international law an empty promise. Thus, the intricacies and lacunae in the operation of the law call for a balanced approach to the exception.

Looking into the literature on legal instruments pertaining to this problem, one could see that there is no full-fledged universal convention on the point except the case of the New York convention.[4] Yet there is an important development to address the issue under the EU framework.[5] This framework is a well-developed legislation widely considered as a major development into modernization of private international law. As such, many argue that modernization of private international law is nothing but Europeanization of private international law rule.[6] Thus, it can serve as a model for other states like Ethiopia in the development of rules in this regime of law.

With its citizens increasingly interacting with nationals of other states, Ethiopia needs a workable private international instrument regulating this interaction in employment, trade, commerce, and investment. Yet it has no comprehensive private international law except provisions dealing with enforcement of

[1] Araya Kebede & Sultan Kassim ,*Conflict Of Law Teaching Material*, Sponsored by Justice and Legal System Research Institute, (2009), P. 8.
[2] Burkhard Hess & Thomas Pfeiffer, Study on Interpretation of the Public Policy Exception as Referred to in EU Instruments of Private International And Procedural Law, European parliament, Brussels, (2011), p.20.
[3] Ibid.
[4] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, United Nations, New York, (1958) (hereinafter The New York Convention).
[5] Hess & Pfeiffer , *Supr*a note 2, p. 27.
[6] L.R. Kiestra, The Impact of the European Convention on Human Rights on Private International Law, PhD Thesis, University of Amsterdam, (2013), P.17.

judgment and arbitral award under the CPC.[7] The country has also ratified the New York convention, and this can be considered as part of the domestic law of the country in the wording of the Constitution[8] regarding enforcement and recognition of arbitral award. Besides, there is draft proclamation[9] which courts could resort to in entertaining cases containing a foreign element as persuasive interpretative guide in the absence of binding law applicable to the matter. Yet the body of rules in these documents is too incoherent to show the country's public policy rules in private international law.

This piece doctrinally reflects on the notion of public policy exception in private international law under the Ethiopian private international law rules in light of the EU instruments and the New York convention. It also makes analytical comparison of the Ethiopian and EU system on the issue. Further it demonstrates how the EU experience could be helpful to revisit the Ethiopian draft laws on issues not addressed under the CPC and the New York convention, and it takes a right approach to public policy exception in each sub-stage of private international law.

1. Basic Concept, Function and Justification of the Public Policy Exception

A Public policy is one of the escaping devices that preclude normal operation of conflict of law rules in each of the three components of private international law. It is mainly invoked in respect of the application of foreign law and non-recognition and enforcement of foreign judgment or award.[10] A related term "*ordre public*" possesses two distinct meanings.[11] First, it has a meaning similar to that associated with "public policy" in the common law: courts will not enforce acts the performance of which would contravene fundamental moral principles, or which would offend against some other overriding public interest. Turning to the meaning in civil law traditions, this term (ordre public) refers to

[7] Civil Procedure Code of the Empire of Ethiopia , Decree No.52/1965, *Negarit Gazetta*, (1965), (hereinafter Civil Procedure Code).

[8] The Constitution of Federal Democratic Republic of Ethiopia, Proclamation No.1/1995, *Federal Negarit Gazetta*, (1995), Article 9(4)

[9] Federal Democratic Republic of Ethiopia, Draft Federal Rules of Private International Law (hereinafter Draft Proclamation)

[10] Parameshwaran Anupama, Conflict of Laws in the Enforcement of Foreign Awards and Foreign Judgments: the Public Policy Defense and Practice in U.S. Courts, LL.M Thesis, University of Georgia school of law, (2002), p.1.

[11] Ibid., p.79.

legislative provisions which are mandatory or "*jus cogens*", i.e., provisions which cannot be contracted out or otherwise excluded.[12]

Despite some level of differences in the conceptualization of the notion in the two legal traditions, public policy is, in effect, a safety valve that precludes the normal operation of conflict of law rules in each components of private international law. Also, in the meanings, it is evident that the main function of public policy is to protect the fundamental values of the forum state against unacceptable results which may derive either from the application of foreign law or from the recognition of foreign judgments.[13] It usually operates in a negative way as it prohibits the application of foreign law or the recognition of a foreign decision contrary to the fundamental values of the *lexfori*[14] In this respect, public policy is used as a "shield" barring negative results from the forum.[15]

However, public policy also serves a positive function of ensuring application of the forum law to ensure sovereignty and secure benefit of nationals.[16] The proponents of public policy exception justify their position with these negative and positive functions that may be achieved through maintaining public policy exception. Some legal writers take a negative stance against public policy arguing that it represents an obstacle to apply foreign law or it is a ground for refusal of foreign judgments.[17] Yet many scholars adhere to the middle, golden approach which supports maintaining public policy as exception; while construing it narrowly to offset its negative consequences and avoid abusive resort.

2. Public Policy Exception under the New York Convention, European Union Instruments and Ethiopian Law

A considerable number of attempts had been made by the international community to come up with a comprehensive convention in the field of private international law along with meaningful approach towards public policy exception. Among these, the Hague Conference on Private International Law is mandated as the only intergovernmental organization with a legislative mission on issues of private international law.[18] Accordingly, the Hague Conference had produced the Convention on the Recognition and Enforcement of Foreign

[12] Ibid.
[13] Hess & Pfeiffer , *Supr*a note 2, p. 27.
[14] A. V. M. Struycken, *Public Policy in Its Private International Law Function*, (2004) P.395.
[15] Ibid.
[16] Ibid., p.400.
[17] Kiestra, *Supra* note 6.
[18] Hans Van Loon, The Hague Conference on Private International Law, *HJJ I,* Vol. 2 No. I , (2007)

Judgments in Civil and Commercial Matters in 1971, but it was ratified by only four countries including Albania, Cyprus, Kuwait and Portugal.[19] The Hague convention on choice of court[20] is also prepared under the auspices of the Hague conference but only 29 countries including EU member states ratified the convention. Under the auspices of the United Nations diplomatic conference, New York Convention on Recognition and Enforcement of Foreign Arbitral award was adopted, and ratified by 162 states including the EU and Ethiopia.[21] Besides, the issues of private international law are regulated under framework of regional integration like EU and domestic laws of individual states. This section discusses public policy exception under the New York convention, EU and Ethiopian private international law.

2.1. Public Policy Exception under the New York Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, widely known as the New York Convention, is the most important convention in the field of arbitration. The convention aims to provide a common legislative standard that requires courts of contracting states to give effect to private agreements to arbitrate, and recognize and enforce arbitration awards made in other contracting States. Article III of the Convention requires a Contracting State to 'recognize arbitral awards as binding' and enforce the awards according to the State's own rules of procedure, but State may not impose 'more onerous conditions or higher fees or charges' for the recognition or enforcement of awards under the New York Convention than it would impose for domestic award.

Article V of the Convention provides for grounds of non-recognition and enforcement of a foreign award which includes public policy exception. According to Article V (2) (b) of the Convention, recognition and enforcement of an arbitral award may be refused if the competent authority in the country, where recognition and enforcement is sought- finds that the recognition or enforcement of the award would be 'contrary to the public policy' of that country.

[19] Trimble Marketa, The Public Policy Exception to Recognition and Enforcement of Judgments in Cases of Copyright Infringement, Scholarly Works. Paper 564, (2009), p. 11.

[20] Convention on Choice of Court Agreements, The Hague Conference on Private International Law, (30 June 2005) (hereinafter Hague Convention on Choice Of Court)

[21] Ethiopia ratified of the New York Convention on 13 February 2020, and becomes the 162nd Contracting State.Source:http://www.newyorkconvention.org/news/ethiopia+ratifies+the+new+york+convention

However, though notion of public policy under this provision is not clearly defined to limit it, the general trend in most countries is to be in line with and faithfully observe the pro-enforcement rule under Article III, and narrowly interpreting the public policy exception.[22] For instance, English Courts have adopted a strong pro-enforcement policy and are reluctant to excuse an award from enforcement on grounds of public policy.[23] In United States, too, a precedent has shown that the courts narrowly interpreted this notion of public policy invoked under Article V (2) (b) of the convention.[24] For instance, the United States court in *Parsons & Whittemore v. RAKT*[25] explicitly noted that the defense of public policy must be limited to a situation where the enforcement would violate the most basic notions of morality and justices only.

At this juncture, it is important to note that the New Convention does not seem to impose obligation to apply a transnational notion of public policy in the recognition and enforcement of arbitrary awards as long as the state complies with the pro-enforcement obligation by narrowly construing its public policy on a case-by-cases basis. Thus, the Convention accommodates differences in the notion and application of public policy arising from fundamental social, economic, moral, and even constitutional differences underlying legal systems of States.[26] Hence, the Convention does not dictate a uniform interpretation of public policy, but encourages State courts to limit public policy grounds to principles considered fundamental within the legal system of the Enforcement State through its pro-enforcement obligation.

2.2. Public Policy Exception under the European Union Instruments

Under the EU instruments, the public policy clauses are a ground for the non-recognition of a foreign judgment and for the non-application of foreign laws. The three legal regimes governing the issues of judicial jurisdiction, and the recognition and enforcement of judgments within EU system in civil and commercial matters include the Brussels Convention,[27] the Brussels I

[22] Nivedita C. Shenoy, Public Policy under Article V(2)(b) of the New York Convention: Is there a Transnational Standard?, *Cardozo Journal of Conflict Resolution*, Vol. 20:770, (2018), p.90.
[23] Ibid., p.94.
[24] Joseph T. Mc Laughlint & Laurie Genevro, Enforcement of Arbitral Awards under the New York Convention Practice in U.S. Courts, *International Tax & Business Lawyer*, Vol. 3:249, (1986), P.259
[25] Ibid, citing Parsons & Whittemore Overseas Co. v. Soci&t6 General de l'Industrie du Papier (RAKTA), 508 F.2dp. 969 (2d Cir. 1974).
[26] Shenoy, *supra* note 22, p.102.
[27] The Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil And Commercial Matters (as amended by Various Accession Conventions), (27 September 1968) (hereinafter Brussels Convention)

Regulation,[28] and its recent amendment called the *Brussels I regulation recast*.[29] The essence of the Convention is largely covered by the Brussels I Regulation and the Brussels I Recast Regulation, both of which incorporate provisions on public policy exception to recognition and enforcement of foreign judgment.[30]

With regard to other areas that have been agreeably settled under international instruments, the Brussels instruments expressly recognize the applicability of other instruments rather than reproducing similar provisions in their respective instruments.[31] For instance, with regard to the recognition and enforcement of arbitral award, the Brussels instruments make express reference to the New York convention, and the same reference is made to the Hague convention on jurisdiction.[32] The issues of choice of law and public policy exception, on the other hand, are governed under Rome instruments, namely Rome regulation I[33] and Rome Regulation II[34] which deal with the applicable law in contractual and non-contractual matter respectively.

2.2.1. Public Policy Exception in Brussels Instruments

With regard to public policy, Article 27(1) of the Brussels Convention, which was applicable until Regulation 44/2001[35]came into force, states: "A judgment shall not be recognized if such recognition is contrary to *public policy* in the state in which recognition is sought." In the Brussels I Regulation, public policy clause is contained in Article 34(1), according to which "[a] judgment shall not be recognized if such recognition is *manifestly* contrary to public policy in Member State in which recognition is sought". Similarly, Article 45(1) (a) of the Brussels I Recast states: "On application of any interested party, recognition of

[28] Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, EC Council Regulation No 44/2001,(22 December 2000) (hereinafter Brussels Regulation I).

[29] Regulation on Jurisdiction and the Recognition and Enforcement of Judgment in Civil and Commercial Matters, EU Regulation No 1215/2012, (12 December 2012) (Hereinafter Brussels I Regulation Recast).

[30] See Article 34(1) of the Brussels I Regulation , Article 45(1)(a) of the Brussels I Regulation Recast

[31] See Chapter VII of Brussels I recast entitled "The Relation with other Instruments" which made reference many other instruments like New York Convention.

[32] With regard to public policy exception to choice of court agreement, Article 6 of the Hague Convention on choice of Court States "A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless giving effect to the agreement would lead to a manifest injustice or would be *manifestly contrary to the public policy* of the State of the court seized".

[33] Regulation on the Law Applicable to Contractual Obligations, EC Regulation No 593/2008 of the European Parliament and of the Council, (17 June 2008 (hereinafter Rome I Regulation).

[34] Regulation on the Law Applicable to Non-Contractual Obligations, EC Regulation No 864/2007 of the European Parliament and of the Council ,(11 July 2007) (hereinafter Rome II Regulation).

[35] The Brussels Regulation I, *supra* note 28

judgment shall be refused if such recognition is *manifestly* contrary to public policy in the members".

As can be inferred from the above provisions, the new Brussels I Recast Regulation retains and cumulates the earlier exceptional grounds of challenge from the Brussels I Regulation with respect to public policy. The difference between the convention, on the one hand, and the regulation and its Recast, on the other, lies in the word "manifestly" used under the latter. Even if the Public policy clause is the only ground for refusal of recognition and enforcement of an open nature under Brussels instruments, the term "manifestly" employed under the Recast clearly shows the intention to limit the use of public policy clause stringently. Certain limits in application of public policy are also set by the Brussels I Recast. Particularly, Article 45(3) of the instrument precludes the application of 'test of public policy' to rules relating to jurisdiction.

2.2.2. Public Policy Exception under the Rome Regulation I

The Rome regulation I provides for rules to determine applicable law in contractual obligation in civil and commercial matters. According to Article 21 of the Regulation, the application of a provision of the law of another country may be refused "if such application is *manifestly* incompatible with the public policy (*ordre public*) of the forum". Furthermore, Article 9 of the regulation addresses the application of so-called "overriding mandatory provisions". These mandatory overriding provisions are relevant in the context of public policy because they address a similar problem. To this end, Article 9 reflects the positive function of public policy, while Article 21 of the Regulation serves as a negative shield against an application of foreign provisions based on public policy. Moreover, Article 9 - which is the result of a rather intensive debate in the Member States - can be interpreted as a significant indicator for the relevance of public policy reservation in this area.

2.3. Public Policy Exception under the Ethiopian Law

Unlike the case of EU, Ethiopia does not have comprehensive and binding laws of private international law[36] except some fragment and insufficient provisions of judicial jurisdiction scattered in different codes such as the commercial code, the maritime code, and the civil code. Further unlike the case of EU, Ethiopia is not a party to the Hague Convention on choice of court, nor does it have binding laws on choice of law. Yet, with regard to the issue of enforcement of foreign

[36] Araya & Sultan, *Supra* note 1, p. 24

judgment and arbitral award, some stipulations have been provided under CPC though the recognition part is not dealt with.[37] In addition, as Ethiopia ratified the New York convention as of February 13/2020, the rules under the Convention,[38] together with the pertinent provisions of the CPC[39], can provide sufficient framework on issue of public policy exception to recognition and enforcement of award. Besides, there is also a Draft Private International Law rules proclamation comprehensively dealing with each ingredients of private international law and this draft proclamation, though not binding, may be referred by Ethiopian courts as persuasive guide for interpretation in absence of binding law applicable to the matter.

2.3.1. Public Policy under the Ethiopian Civil Procedure Code

Article 458 of the Ethiopian civil procedure code of provides for a general principle against execution of foreign judgment along with the conditions for allowing its execution. Also, the provision makes an express mention of compliance with public policy and morals as a major requirement for execution of such judgments. As such, the provision reads:

> Permission to execute a foreign judgment shall not be granted unless (a) the execution of Ethiopian judgments is allowed in the country in which the judgment to be executed was given; (b) the judgment was given by a court duly established and constituted; (c) the judgment-debtor was given the opportunity to appear and present his defense; (d) the judgment to be executed is final and enforceable; and (e) execution is not contrary to public order or morals.

Apart from this provision on execution of foreign judgments, the code also contains a provision dealing with enforcement of arbitral award. To this end, Article 461 of the code provides:

> (1)… Foreign arbitral awards *may not be enforced in* Ethiopia unless (a) reciprocity is ensured as provided for by Art.458 (a); (b) the award has been made following a regular arbitration agreement or other legal act in [sic][in accordance with the law of] the country where it was made; (c) the parties have had equal rights in appointing the arbitrators and they have been summoned to attend the proceedings; (d) the arbitration tribunal was regularly constituted; and (e) the award does not relate to matters which under the provisions of Ethiopian laws could not be submitted to arbitration or is *not contrary to public order or morals*; and, (f) the award is of such nature as to be enforceable on the condition laid down in Ethiopian laws…

[37]The Civil Procedure Code, Articles 456 *et al.*
[38]The New York Convention, Article V (2) (b)
[39]The Civil Procedure Code, Article 461

As can be inferred from the above provisions, the CPC provides anti-foreign judgment and arbitral award enforcement approach that generally limits the enforcement of foreign judgment or awards unless certain specified conditions are met. This is evident in the use of such negatively limiting phrases as "…*shall not be granted unless...*" under Article 458 and "…*may not be enforced in Ethiopia unless…"* under Article 461 of the CPC, both reinforcing the anti-enforcement approach by making the enforcement conditional on the fulfillment of all the stated conditions including the public policy.

In both cases, compliance with public policy and morals has been inserted as an exception, yet there is no guiding principle that could be used to limit this illusive concept of public order and morality. Though definition to the term is to be decided on a case-by-case basis, the pro-enforcement principle as in the case of the New York Convention and the EU instruments should be adopted so as to encourage narrow interpretation of the term.

2.3.2. Public Policy under Ethiopian Draft Private International Law

Under Ethiopian Draft private international law proclamation, the public policy clause has been inserted as a ground of non-application of foreign law and non-recognition and enforcement of foreign judgment or arbitral award. The starting point to deduce the inclusion of public policy exception in the Draft proclamation is the preamble of the proclamation which recognizes that the just and fair disposition of cases involving a foreign element may demand taking into account of this 'foreign element' to the extent of the applying foreign laws in so far as it does not contradict the public policy, fundamental principles and morals in the forum court.

Apart from the preamble, there are also operative and specific provisions that deal with public policy exception for choice of laws and recognition and enforcement under the draft proclamation. To this end, chapter III of the Draft proclamation lays down laws particularly applicable for a situation where Ethiopian courts may apply foreign laws in deciding cases involving foreign elements.[40] The proclamation, under this particular section, provides public policy exception as a ground to exclude application of foreign laws. Evidencing this, the relevant section reads: "The application of provisions of a foreign law shall be excluded if the outcome is incompatible with Ethiopian public policy or to fundamental principles of justice and fairness and to such principles as are

[40] The Draft Proclamation, Article 33 *et al.*

laid down in international human rights legislation".[41] Looking into this provision, one could see that the legislators unequivocally make public policy a major ground to safeguard public interest from any malice coming from foreign laws. This legislative intent is further reflected in the definition given to the term. For the purpose of the Proclamation, 'Public Policy' is broadly defined to include (a) fundamental principles of justice (b) some prevalent conceptions of good morals and (c) some deep-rooted tradition of common will[42], and this list is still open.

Turning to chapter V of the proclamation, there are provisions governing recognition and Enforcement of judgment. Article 85 of the proclamation provides for grounds of non-recognition and enforcement of judgment, of which public policy cause is a typical one. Specifically referring to this issue, Article 85(1) states that "A foreign judgment shall not be recognized and enforced in Ethiopia if its recognition or enforcement would be clearly incompatible with Ethiopian public policy or morals".

Article 88 of the Draft proclamation deals with rules on recognition and enforcement of arbitral award, and provides for ground of non-recognition and enforcement of foreign award, including public policy clause. It states:

> Foreign arbitral awards *may not be recognized and enforced* in Ethiopia unless: (a) the award has been made following a regular arbitration agreement or other legal act in the country where it was made; (b) the parties have had equal rights in appointing the arbitrators and they have been summoned to attend the proceedings; (c) the arbitration tribunal was regularly constituted; (d) the award does not relate to matters which under the provisions of Ethiopian laws could not be submitted to arbitration or is not contrary to *public order or morals*; and (e) the award is of such nature as to be recognizable or enforceable on the condition laid down in Ethiopian laws.[43]

As can be inferred from this Article, Public order and morality is one of the requirements for execution of foreign judgment in Ethiopia. However, unlike the case of applicable law[44], the draft proclamation does not enumerate the grounds on which foreign judgments could be denied execution for violating public order. Of course, one may resort to the definition given to public policy for the purpose of excluding application of foreign law as a starting point. Yet an express list of grounds for this specific purpose would make the proclamation more complete.

[41] The Draft Proclamation, Article 37(1).
[42] The Draft Proclamation, Article 37(2).
[43] The Draft Proclamation, Article 88.
[44] The Draft Proclamation, Article 37(2).

Another point worth considering in this document is the notion of morality. The concept of morality is not clearly defined under this Draft proclamation. According to Idris, the concept of morality, in this specific sense, refers to the fact that those foreign judgments appearing repugnant to the conduct, the customs, or accepted practices of the Ethiopian society would not be carried out.[45] Though like the case of public policy, defining morality could be difficult, unless approached on a case-by-case basis, a working definition with a space to accommodate a case-by-case context could have been provided as in the case of public policy (as indicated above). Yet this is one of the missing elements in the Draft proclamation.

3. The Need to Revisit Ethiopian Draft Law in Light of the EU Instruments

As has been stated above, unlike the case of EU, Ethiopia does not have comprehensive and binding laws of private international law other than the draft law. Further, even if the country has ratified the New York Convention on recognition and enforcement of arbitral award, the scope of the convention is limited to recognition and reinforcement of awards, and the convention has no rules on issues of choice of court, applicable law, and recognition and enforcement of foreign judgments. Moreover, the provisions of the CPC are limited to enforcement of foreign judgments and awards, omitting the recognition part. Hence, neither the New York Convention nor the CPC has relevance to the issues of public policy exception to choice of court, choice of law, and recognition of foreign judgment. Consequently, to have a coherent and complete Ethiopian legal regime on private international law, it is imperative to revise and enrich the Draft proclamation.

Unlike the Ethiopian Draft law and CPC, All EU instruments adhere to narrow interpretation of the public policy exception and uphold it only in explicit situations. For instance, Article 45(1) of the Brussels I Recast in principle dictates for the recognition of a judgment and allows for non-recognition and enforcement only if such recognition is manifestly contrary to public policy of the Member State. However, there is no such requirement of "manifest incompatibility with public policy" under the Ethiopian Draft proclamation as well as the CPC. As can be understood from its literal meaning, the word "*manifestly*" used under the EU instruments serves to limit the use of public policy clause as much as possible.

[45] Idris Ibrahim, The Law of Execution of Foreign Judgments in Ethiopia, *JEL* , Vol.19, (1999).

A similar wording of being "*manifestly contrary to the public policy*" is employed under Article 21 of the Rome regulation I to exclude application of foreign law, but there is no requirement of manifest incompatibility under its Ethiopian counter parts. Though the phrase *"clearly incompatible with public policy*" - used under Article 85(1) of the Draft proclamation - can serve a purpose similar to that of "*manifestly contrary to the public policy"* in respect of refusal of recognition and enforcement of foreign judgment, an equivalent phrase is not incorporated in the provisions dealing with public policy exception for purpose of exclusion of foreign laws (Article 37) and non-recognition and enforcement of arbitral awards (Article 88(d)). This leaves the word "public policy" alone with no qualifier under these provisions. Accordingly, unlike in EU Framework, the drafters of the Ethiopian proclamation use of the word public policy alone, omitting the phrase "*clearly incompatible or manifestly incompatibility"* which bears the key meaning for grounds of exclusion of foreign law and non-recognition and enforcement of arbitral award under Articles 37 and 88(d). This opens a door for broader interpretation of public policy clause, and hence can be easily abused to eclipse the rules. Even worse, public policy clause under the Ethiopian Draft law is used to include the other illusive and subjective term "public morality". However, there is no such reference to public morality under its EU counter parts.

The other areas of divergence between Ethiopian Draft laws and EU instrument is related to procedure of enforcement and the party upon whose initiation the refusal of recognition and enforcement of judgment on public policy exception could commence. Under Article 45 of the Brussels I Recast, any procedure regarding declaration of enforceability has been abolished. This, in effect, means judgment given in one Member State of the EU can be automatically enforced in another Member State, and it is upon application by an interested party (debtor) that a refusal of enforcement be initiated. However, under the Ethiopian Draft proclamation, there is no necessary requirement for application by the interested party (debtor). The judgment can be refused by the court - regardless of the application of the debtor - if it is found incompatible with the public policy.

This renders the Ethiopian approach anti-enforcement model that limits enforceability. From this, it can be understood that unlike the EU instruments which is pro-enforcement, the Ethiopian Draft proclamation is anti-enforcement from the outset. This can be inferred from the wording of Article 88 of the Draft proclamation which, in the relevant part, provides: "Foreign arbitral awards may not be recognized and enforced in Ethiopia unless..."

The stipulation in this provision sounds anti-enforcement in the sense that it makes enforcement conditional on the fulfillment (and presumably on the production of evidence to that effect) of all the conditions laid down in the law including the compliance with public policy of the country. In other words, unlike the case in EU instrument - which requires automatic enforcement of judgments in the absence of application for refusal of enforcement - foreign judgment or awards are not enforceable automatically under the Ethiopian Draft Proclamation.

Looking further into the limits contained in the Brussels Recast, one can see more disparities between the two laws. Article 45(3) of the recast states that the test of public policy may not be applied to the rules relating to jurisdiction. Yet there is no similar provision under Ethiopian Draft laws. It has also been provided under Article 45 of the Brussels recast that public policy cannot be raised if there is other ground of non-recognition and refusal that could be raised. However, there is no express provision governing the relationship between public policy and other ground of non-recognition or enforcement under the Ethiopian Draft proclamation. Finally, the relevant provisions of EU instruments make an express reference to the existing international conventions such as the New York convention and the Hague Convention on Choice of court. However, no reference was made to such instruments either as a gap filler or mandatory part of the Ethiopian Draft proclamation.

Overall, seen in light of the EU instruments, the Ethiopian Draft private international law rule is crafted in a manner that allows broader space to public policy exception including morality. Thus, these sets of rules are characteristically anti-foreign law or judgment, and they are not as good as its EU counter parts to achieve the desired goal of private international law. This is because the very purpose of private international law is to achieve decisional harmony by narrowly construing public policy exception. Yet the Ethiopian Draft proclamation, as it stands, is too weak to attain this goal of this regime of law.

Concluding Remarks

The emergence of faster and newer modes of transportation and communication in the globalized world has led to boom in offshore commercial transaction and socio-economic interaction among domiciliary of different states. This resulted in the emergence of cross border laws, judgment and concern about the fate of foreign judgment/awards, which in turn necessitated the development of conflict

of law rules to address. Meanwhile, as complete uniformity may cost the public policy of the States, the public policy clause has usually been inserted as an exception to choice of court, choice of law and recognition and enforcement of foreign judgment and awards.

In this piece of reflection, it is noted that both EU and Ethiopia insert public policy clause as a ground for non-application of foreign law and non-recognition and enforcement of foreign judgments or awards. Yet the way they do so is largely incomparable. Particularly, it is found that the provisions of Ethiopian CPC as well as the Draft Proclamation are crafted in manner that allow broader place to public policy exception including morality, while EU limits public policy only to the situation of grave and *manifest* incompatibility. Furthermore, the EU instruments are pro-enforcement and recognition of award in principle, allowing for refusal in limited exception, whereas the Ethiopian CPC as well as the Draft law are anti -enforcement in principle, both starting with the negative assertion against enforcement of foreign judgment or award.

Finally, even if Ethiopia ratified the New York Convention, the scope of the Convention is limited to recognition and enforcement of awards only. Moreover, since the provisions of the CPC are limited to enforcement of foreign judgments and awards, omitting the recognition part, neither the New York convention nor the CPC has relevance to the issue of public policy exception to choice of court, choice of law, and recognition of judgment. Hence, to have a complete and coherent Ethiopian legal regime on private international law, it is necessity to revise the Draft proclamation by adopting the pertinent stipulations on public policy exception under the EU instruments.

የሸሪዓ ሕግ፤ ምንነቱ፣ መገለጫዎቹ እና ምንጮቹ

አልዩ አባተ ይማም[*]

አህጽሮተ-ጥናት

ሸሪዓ በኢስላም የሃይማኖት ማዕቀፍ ውስጥ የሚገኝ መለኮታዊ የሕግ ሥርዓት ነው። ሸሪዓ ሲባል ሁለት የተለያዩ ነገር ግን ቀጥተኛ ዝምድና ያላቸው የሕግ ክፍሎችን ሊወክል ይችላል። አንደኛው ክፍል ለዝርዝር የሸሪዓ ድንጋጌዎች አተረጓጎም እና አዳዲስ ሕግጋትን ለመቅረጽ መንደርደሪያ የሆኑ ጥቅል የሕግ ዓላማዎችን *(መቃሲድ)*፣ መርሆዎችንና ንድፈ-ሐሳቦችን የሚመለከት ሲሆን፣ እነዚህን መሠረተ-ሐሳቦች በመለኮታዊ ምንጮች በማስደገፍ የሚያጠና ‹የሸሪዓ ሕግ መሠረተ-ሐሳቦች *(ኡሱል አል-ፊቅሕ)*› የተሰኘ ጥንታዊና ሰፊ የጥናት መስክ ይኖረዋል። ሁለተኛው ክፍል፣ በቀዳሚ የሸሪዓ ምንጮች ውስጥም ሆነ *በኡሱል አል-ፊቅሕ* አማካይነት የተደነገጉ፣ ዘርፈ-ብዙ ግለሰባዊና ማሕበራዊ ግንኙነቶችን የሚገዙ ዝርዝር ሕጎችን *(ፊቅሕ)* የሚመለከት ነው። የሸሪዓ ሕግ ቁርአን፣ *ሱናሕ* እና አመክንዮአዊ የሕግ ምርምር *(ኢጅቲሓድ)* የተሰኙ ሦስት ምንጮች ያሉት ሲሆን፣ በእነዚህ ምንጮች ላይ ተመርኩዞ የተዘረጋው የሕግ ማዕቀፍ አምልኳዊ *(ዒባዳት)* እና ዓለማዊ *(ሙዓመላት)* በሚል ሁለት ምድቦች ተከፍሎ ይታያል፡ ፡ ዓለማዊ የሸሪዓ ሕጎች፣ የግለሰብና የማሕበረሰብ ጥቅም የማስከበር፣ ሰላምና ደህንነትን የማረጋገጥ፣ ጉዳትና እንግልትን የመቀነስና የማስወገድ ዓላማ ያነገቡ ናቸው። የሸሪዓ ሕግ በባህርይው የሕብረተሰቡን የሁኔታዎች ለውጥ ተከትሎ ሊሻሻልና ሊለወጥ የሚችልበት የአመክንዮአዊነት፣ የተለማጭነት፣ የነባራዊነት ባህርያት ያሉት የሕግ ማዕቀፍ ነው።

ቁልፍ ቃላት: ሸሪዓ፣ *ፊቅሕ*፣ የሸሪዓ ምንጮች፣ ቁርአን፣ *ሱናሕ*፣ *ኢጅቲሓድ*፣ ተለማጭነት፣ አመክንዮአዊነት

መግቢያ

ኢትዮጵያ የልዩ ልዩ ብሔረሰቦችና ባህሎች መገኛ የመሆኗን ያህል የሐይማኖት ብዝኃነትም የሚንጸባረቅባት ሃገር ናት። የሕግ ሥርዓቱም ሲቀረጽ የሃይማኖት ብዝኃነቱን ተከትሎ ሊመጣ የሚችለውን ማሕበረሰባዊ ጥያቄ በሚመልስ አኳኋን ነው። በኢፌዲሪ ሕገ-መንግሥት አንቀጽ 27 መሠረት ማንኛውም ሰው ሐይማኖቱን በግልም ሆነ በቡድን የመስበክ እና የመተግበር መብት እንዳለው ያረጋግጣል። እንደ ኢትዮጵያ ባሉ የፌዴራል ሥርዓተ-መንግሥት በሰፈነባቸው ሃገራት ውስጥ ሐይማኖትን በግልም ሆነ በሕብረት እንዲሁም በተቋማዊ ቅርጽ የማራመድ መብት ካለው የብዝኃነት እውነታ እና ዓለማዊ አስተዳደር *(Secular Governance)* ጋር ተጣጥሞ የሚተገበርበትን ሁኔታ ከንድፈ-ሐሳባዊ የሕገ-መንግሥት ዳሰሳዎች ጀምሮ፣ የሰብዓዊ መብቱን ትንታኔ እንዲሁም ዓለም-አቀፍ ተሞክሮዎችን መሠረት በማድረግ ከሃገራችን እውነታ አኳያ ጥናት ሊደረግበት የሚገባ

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ርዕሰ-ጉዳይ እንደሆነ እየጠቆምኩ፣ የዚህ ጥናት ዓላማ የኢፌዲሪ ሕገ-መንግሥት በፈቀደው ወሰን ውስጥ በመሆን የሸሪዓ ሕግ፣ የሕግ ሥርዓቱ አካል በሆነው መጠን ሸሪዓዊ ፍትሕን ለሙስሊሙ ማህበረሰብ እንዲያደርሱ በተቋቋሙ የፌዴራልና የክልል የሸሪዓ ፍርድ ቤቶች እና ለሰፊው የኢትዮጵያ ሙስሊም ማህበረሰብ የሸሪዓን ምንነትና ባህርያት፣ በምንጮቹና መሠረታዊ የሕግ መርሆዎቹ ላይ ግንዛቤ መፍጠር ነው።

1. የሸሪዓ ሕግ ምንነት

1.1. ሸሪዓ እና ፊቅሕ

በኡሱል ኣል-ፊቅሕ እና በፊቅሕ ጥናት ውስጥ ‹ሸሪዓ› እና ‹ፊቅሕ› የተሰኙት ቃላት የኢስላምን የሕግ ክፍል ለማመላከት አንዱ ሌላውን እየተካ በተለዋዋጭነት ጥቅም ላይ የሚውሉ ቢሆንም፣ ሙያዊ አገባባቸውን ስንመለከት የተለያዩ ሆነው እናገኛቸዋለን። ሸሪዓ ሲባል በመለኮታዊ ራዕይ *(ወሀይ)* የተገለጸውን፣ በቁርአን እና በሱናሕ ውስጥ የሚገኙትን የሕግ ድንጋጌዎች የሚመለከት ሲሆን፣ *ፊቅሕ* ደግሞ የኢስላምን የሕግ ክፍል የሚያመለክት ቢሆንም በሕግ ሊቃውንት የሕግ ምርምር *(ኢጅቲሓድ)* ያደገውን የሕግ ክፍል የሚወክል ነው። ስለዚህ ሸሪዓ የ*ወሀይ* ውጤት ሲሆን፣ *ፊቅሕ* ደግሞ የምሁራን የምርምር ወይም የሕግ አመክንዮ *(ኢጅቲሓድ)* ውጤት ነው። በተጨማሪም ማንኛውም *ኢጅቲሓድ* መሠረቱና መነሻው ቁርኣናዊ የሕግ ድንጋጌዎች *(አያሕ ኣል-አሀካም/ፊቅሕ ኣል-ቁርኣን)* ወይም የ*ሀዲስ* የሕግ ድንጋጌዎች *(አሃዲስ ኣል-አሀካም)* ወይም በጥቅሉ መለኮታዊ ምንጭ በመሆኑ *ፊቅሕ* በራሱ የሸሪዓ መሠረቱን የጠበቀ እንደሆነ ይገነዘባል።[1]

የኢስላም ቀዳሚ ምንጮች በሆኑት ቁርአን እና *ሱናሕ* የተደነገጉት ሕጎች ብዛት በ*ኢጅቲሓድ (ፊቅሕ)* ካደገው አኳያ ሲታይ በጣም ጥቂት ነው። ቁርአን በጠቅላላው ካሉት 6235 አናቅጽ መካከል 350 ያህሉ ብቻ ሕግ-ነክ ድንጋጌዎች ሲሆኑ፣ ቀሪውና ሰፊው የቁርአን ክፍል በእምነት እና በግብረ-ገብነት ጉዳዮች ላይ የሚያጠነጥን ነው።[2] ስለዚህ ቁርአን እና *ሱናሕ* የሕግ ፍልስፍናዎቹንና መርሆዎቹን በመዘርጋት ለሰፊው የ*ፊቅሕ* ማዕቀፍ መሠረት ቢሆኑም፣ የሰውን የዕለት-ተዕለት እንቅስቃሴ በመግዛት ረገድ በማይነፃፀር ደረጃ መጠነ-ሰፊ የኢስላም ድንጋጌዎች የተዘረጉት በ*ወሀይ* (ሸሪዓ) አማካይነት ሳይሆን በ*ፊቅሕ (ኢጅቲሓድ)* የሕግ ምርምር አማካይነት ነው።[3]

የሸሪዓ እና *የፊቅሕ* ድንጋጌዎች፣ ለ*ኢጅቲሓድ* ካላቸው ተገዥነት አንጻር፣ በሁለት ምድቦች ተከፍለው ሊታዩ ይችላሉ፤ አምልኳዊ የሸሪዓ ሕግጋት *(ዒባዳት)* አንደኛውን ክፍል የሚይዝ ሲሆን፣ በዚህ ምድብ *ሥር* የሚመደቡት ሕግጋት ከዕለት ተዕለት የሰው እንቅስቃሴ *ጋር* ያልተያያዙ፣ የአምላክ ታዛዥነትን እና ተገዥነትን ለማሳየት የሚፈጸሙ የአምልኮ *ሥርዓቶች* ናቸው። ሁለተኛው ምድብ፣ ከሰው የርስበርስ ግንኙነትን ለመግዛት የተደነገጉ የሸሪዓ እና የ*ፊቅሕ* ሕግጋቶች *(መዓመላት)* ናቸው። የአምልኮ ሕግጋት ትንታኔዎች ዐቢይ በሚባሉት በ*ሶላሕ* (*ሥግደት*)፣ *ዘካሕ* (አስገዳጅ ምጽዋት)፣ በ*ሀጅ* ወዘተ. የአምልኮ ተግባራት

[1] Mohammad Hashim Kamali, Source, Nature and Objectives of Shariah, *Islamic Quarterly*, Vol. 33 (1989), p. 216.
[2] Ibid.
[3] Ibid.

ርዕስ ስር የሚብራሩ ሲሆን፣ በእነዚህ ርዕሱ-ጉዳች ላይ የሚደረገው የሕግ ትንታኔ እምብዛም ልዩነት አይንጸባረቅበትም።[4] ለዚህም ዋነኛ ምክንያቱ አምልኳዊ ሕጎች በኑሰስ (ግልጽ የቁርአንና የሱናሕ ድንጋጌዎች) እንደተገለጹ በቀጥታ ተግባራዊ የሚደረጉ በመሆኑ ነው። *የሙዓመላት* ሕጎች በአንፃሩ ለመጠነ-ሰፊ ሲጅቲሓድ በራቸው ክፍት የሆነ እና የኢስላም ሕግ ተለዋዋጭነት እና ነባራዊነት ባህርይ የሚንጸባረቅባቸው የሕግ ዓይነቶች ናቸው።

1.2. አቢይ ርዕሱ-ጉዳዮች እና አመዳደቦች

የኢስላም ሕግ በቀዳሚ ምንጮች ውስጥ እንደተደነገገው (ሸሪዓ) ወይም በሊቃውንት ምርምር *(ሲጅቲሓድ)* እንደተለየው *(ፊቅሕ - The Corpus Juris of Islamic Law)* በሁለት ምድቦች ተከፍሎ ይታያል። ይህ የሁለትዮሽ የኢስላም ሕግ አመዳደብ በአራቱም የሱኒ የሕግ ትምህርት ቤቶች *(መዛሒብ)*[5] እና በሸሪዓ የሕግ ክፍሎች ዘንድ ተቀባይነት ለማግኘት ችሏል። ዒባዳትን (አምልኮዎችን) የሚመለከቱ ሕግጋት አንደኛውን ምድብ የሚይዙ ሲሆን፣ እነዚህ ሕጎች ሰው ለፈጣሪው ሲል (ለራሱ ሲል) የሚፈጽማቸው አምልኳዊ ክንውኖችን የሚገዙና *ሥነ-ሥርዓቶችን* የሚዘረጉ ናቸው።[6] በሁለተኛው ምድብ ስር የሚመደቡት ደግሞ ዓለማዊ የሕይወት እንቅስቃሴዎችን እና ግንኙነቶችን *(ሙዓመላት)* የሚገዙ ሕጎች ሲሆኑ፣ የእነዚህ ሕግጋት ዓላማ ለሰው ጠቀሜታን ማስገኘት ወይም ጉዳትን ማስወገድ *(መስላሃሕ)* ነው።[7]

የዒባዳሕ ሕጎች በመርሕ ደረጃ በምርምር ሊተነተኑና ተጨማሪ ሥርዓቶች ሊታከልባቸው አይችሉም፣ ምክንያቱም ሕጎቹ የተደነገጉበት ምክንያትና ዓላማ በአመክንዮኣዊ ምርምር በርግጥ ሊደረስበት የማይችል በመሆኑ፣ እና በአምልኳዊ ክንውኖች ሂደት ውስጥ ምላሽ ሊያገኙ የሚገቡ፣ በሰው ዓለማዊ ሕይወት ውስጥ ችግርን ሊጋርጡ የሚችሉ ጭብጦች ሊፈጠሩበት የማይችል በመሆኑ ነው። *የዒባዳት* ሕግጋት ጥቅል የድንጋጌ ምክንያታቸው *(ዒለል)* አንድ ግለሰብ ለፈጣሪው ያለውን ታዛዥነትና ተገዥነት መለካት በመሆኑ፣ ከእያንዳንዱ የአምልኮ ሕግ ጀርባ ያለውን ምክንያት *(ዒላሕ)* በመመርመር ለሌላ አመክንዮአዊ የሕግ ምርምር *(ሲጅቲሓድ)* መነሻ ለማድረግ የሚቻልበትን ዕድል ማግኘት አይቻልም፤ ስለሆነም አምልኳዊ ሕጎች *በኑሰስ* (ግልጽ የቁርአንና የሱናሕ ድንጋጌዎች) እንደተገለጹ በቀጥታ ተግባራዊ የሚደረጉ ይሆናሉ።[8]

የሙዓመላት ሕግጋት ደግሞ ከማህበረሰቡ ወቅታዊ ተጨባጭ ችግሮች አኳያ መፍትሔ የማይሰጡ ወይም ለሚነሱ ጥያቄዎች ምላሽ የማይሰጡ ሆነው ከተገኙ፣ በሲጅቲሓድ አማካይነት አዲስ ድንጋጌዎች ሊታከልባቸው፣ ወይም ራሳቸው ሊሻሻሉ ወይም ሊቀየሩ ይችላሉ። ስለዚህ የዒባዳት ሕግጋት ሲጅቲሓድ የማይተገበርባቸው ሲሆን፣ የ*ሙዓመላት*

[4] Mohammad Hashim Kamali, *Sharia Law: An Introduction*, Oneworld Publications (2008), p. 43.

[5] በሱኒ ሙስሊም ውስጥ ካሉ *የፊቅሕ* ትምህርት ቤቶች መካከል አራቱ ማለትም ሀነፊ፣ ሻፊዒ፣ ማሊኪ እና ሀንበሊ ቀዳሚውን ስፍራ ይዘዋል። በሺዓ ሙስሊም ውስጥም እንዲሁ፣ ልዩ ልዩ የሕግ ኡሱል ትምህርት ቤቶች ይኖሯል። በሸሪዓ ታሪካዊ አነሳስ እና በሸሪዓ ትምህርት ቤቶች እድገት ላይ ሰፋ ያለ ግንዛቤ ለመያዝ፣ ኢልዩ አባቱ፣ የሸሪዓ እድገትና ቀዳሚ የሕግ ትምሕርት ቤቶች፡ ከኢትየጵያዊ ምልከታዎች ጋር፣ *Haramaya University Law Review* 8 (2019) ያንብቡ።

[6] Kamali, Source, Nature and Objectives of Shariah, *Supra note* 1.

[7] Ibid.

[8] Ibid.

ሕግጋት ደግሞ ለኢጅቲሓድ ተገዥና ክፍት ናቸው።[9] በሁለቱ የኢስላም የሕግ ክፍሎች መካከል ያለው ልዩነት ባህርያዊ ብቻ ሳይሆን፣ ተጨባጭ የሆነ ሕግ ውጤት ልዩነትም አላቸው። ይኸውም፣ የአምልኮ ሕግጋት በፍትሕ ተቋማት አማካይነት አፈጻጸም ሊያገኙ የማይችሉና ዳኝነት ሊጠየቅባቸው የማይችሉ *(Non-justiciable)* መሆናቸው ነው። ዒባዳት የአምላክንና የግለሰብን ቀጥተኛ ተዋረዳዊ ግንኙነት የሚመለከቱ እና በተጓዳኝ ያለ የግለሰቦች ወይም የሕዝብ ጥቅም ጣልቃ ሊገባበት የሚችልበት እድል የሌለ በመሆኑ፣ በፍርድ ቤት ወይም በመንግሥት የፍትሕ አስተዳደር ሥርዓት አማካይነት ተፈጻሚ ሊደረጉ አይችሉም። የሙዓመላት ሕጎች ደግሞ መነሻ ዓላማቸውም ሆነ ጥሰት ቢፈጸም የሰውን ምድራዊ ሕይወት በቀጥታ የሚዳስሱ በመሆናቸው በፍርድ ቤት ሊዳኙ የሚችሉ *(Justiciable)* ናቸው።[10]

የዒባዳት ሕግጋት እንደገና በአምስት ንዑስ ክፍሎች ሥር ይተነተናሉ፤ እነዚህም ንጽህና *(ጦሓራሕ)*፣ ሶላህ (ሥግደት)፣ ጾም፣ የሐጅ ጉብኝት እና አስገዳጅ ምጽዋት *(ዘካሕ)* ናቸው። ሁሉም የፊቅሕ ድርሳናት ማለት ይቻላል በዒባዳት የሕግ ማብራሪያዎች የሚጀምሩና የሕግ ትንታኔዎቻቸው በእነዚህ አምስት አቢይ የዒባዳት ርዕሶች ሥር ተደራጅተው የቀረቡ ናቸው።[11]

የሀነፊ የሕግ ትምህርት ቤት ሊቅ የሆኑት ኢብን ዐቢዲን አጠቃለው እንዳስቀመጡት፣ ኢስላም ማለት፣ የቀኖናዎች (የእምነት ማዕዘናት - *ኢዕቲቃዳት*)፣ የሥነ-ምግባር እሴቶች *(አዳብ)*፣ አምልኳዊ ተግባራት *(ዒባዳት)*፣ ግለሰባዊ ግንኙነቶች *(ሙዓመላት)* እና የወንጀል ሕጎች *(ዑቁባት)* ድምር ሥርዓት ነው።[12] የመጀመሪያዎቹ ሁለቱ በሕግ ክፍል ሥር ሳይሆን በእምነት *(ዓቂዳሕ)* ሥር የሚመደቡ ሲሆኑ ዒባዳት (አምልኮዎች) በምግባር የሚከወኑ እና ራሳቸውን ችለው መቆም የሚችሉ የአመለካከት ወይም የእምነት እሳቤዎች ባለመሆናቸው፣ *የፊቅሕ* አካል መሆናቸው አግባብነት አለው። ቀሪዎቹ ሁለቱ፣ ማለትም *ሙዓመላት* (ግለሰባዊ) እና *ዑቁባት* (ወንጀል) ጉዳዮች የሕግ አጅንዳዎች መሆናቸው ግልጽ ነው። በኢዕቲቃዳት፣ *አዳብ* እና *ፊቅሕ (ዒባዳት* እና *ሙዓመላት)* መካከል ያለው ልዩነት፣ ጉዳዮች ለዳኝነት ቀርበው ሕጋዊ መፍትሔ ሊሰጣቸው ከመቻላቸው አኳያ *(Functional Approach)* ታይተው መሆኑን ይገነዘባል፤ አለበለዚያ አንድን ሰው አምልኳዊ ተግባራትን እንዲፈጽም የሚያደርገው በቅድሚያ የያዘው የእምነት ቀኖና ነው፤ እንዲሁም አምልኳዊ ክንውኖች በፈጣሪ ዘንድ ጽኑእነት ይኖራቸው ዘንድ በትክክለኛ የእምነት ጽንሰ-ሐሳብ ላይ የተገነቡ መሆን ይጠበቅባቸዋል። በመሆኑም፣ ከላይ የተገለጹት ምድቦች የአንድ የሃይማኖት ማዕቀፍ አካል በመሆናቸው፣ እርስበርሳቸው የጠበቀ ትስስር እንዳላቸው ሊዘነጋ አይገባም።

የሙዓመላት ሕጎች ከዒባዳት የሚለዩት፣ የአምልኮ ተግባራትን በመከወን የሚገኘውን መለኮታዊ ምንዳ የሙዓመላት ሕግጋትን በመተግበር የማይገኝ በመሆኑ ሳይሆን፣ ሕጎቹ እስከተፈጸሙ ድረስ ለተግባሩ መነሻ የሆነው አሳብ *(ኒያሕ)* ለዳኝነት አወሳሰን ታሳቢ የማይደረግ መሆኑ ነው። ስለሆነም ሙስሊም (አማኝ) ያልሆነ ሰው ቢሆን እንኳ

[9] Ibid.
[10] Ibid, p. 217.
[11] Kamali, *Sharia Law: An Introduction*, *supra* note 4, pp. 43-44.
[12] Ibid, p. 44.

መዓመሳት ሕጎችን እስከተገበረ ድረስ፣ በሸሪዓ ፍርድ ቤት አይታ ሕጉ እንደተፈጸመ የሚቆጠር ይሆናል።[13] ዓለማዊ ሕጎች በትክክለኛው እሳቤ-መለኮት *(ኒያሕ)* ወይም ለፈጣሪ ታዛዥ ለመሆን በሚል የተፈጸሙ ከሆነ በፍርድ ቤት አይን ሕጉ እንደተፈጸመ ከመቆጠሩ በላይ እንደ አምልኳዊ ተግባራት ሁሉ መንፈሳዊ ፋይዳ ማስገኘት ይችላሉ። ባጭሩ በመንፈሳዊ (የእምነት) እና በሕግ መካከል ልዩነት ሲፈጠር፣ ከጽንሰ-ሐሳባዊ ትንታኔው አኳያ፣ እና ከዳኝነት እና ከአፈጻጸም አንፃር ካለው ልዩነት በመነሳት እንጂ በመካከላቸው ሊኖረው የሚችለው አሳባዊ (ሥነ-አዕምሯዊ) እና መለኮታዊ ትስስር እንደተጠበቀ መሆኑን ይገነዘባል።

2. የሸሪዓ ምንጮች

የሸሪዓ ምንጮች በመለኮታዊ ራዕይ የተገለጹ *(Revealed)* እና አመክንዮኣዊ *(Rational)* ተብለው በሁለት ምድብ ሊከፈሉ ይችላሉ። የራዕይ ምንጮች የሚባሉት ቅዱስ ቁርአን እና ሱናሕ ናቸው። አመክንዮአዊ ምንጮች ወይም አስረጂዎች በቁጥራቸው ብዙ ሲሆኑ በሰው አዕምሯዊ ምርምር *(ኢጅቲሓድ)* ላይ የተመሠረቱ ናቸው፤ ስለሆነም ሦስተኛው የሸሪዓ ምንጭ በጠቅላይ ቃል ኢጅቲሓድ ነው ማለት ይቻላል።[14] ኢጅቲሓድ የተለያየ ቅርጽ እና ቡተለያዩ የሕግ ንድፈ-ሐሳቦች ላይ ሊመሰረት ይችላል። ለምሳሌ፣ በቂያስ (ምስስሎኣዊ/analogy/ አመክንዮ)፣ ኢስቲህሳን (ርትዕ)፣ ኢስቲስሃብ (የቀጣይነት ግምት) ወዘተ. ይገኙበታል።[15] ኢጅቲሓድ ግለሰባዊ ወይም ቡድናዊ (የወል) ቅርጽ ሊይዝ ይችላል። የሕግ ምርምሩ የተደረገው በአንድ ብቁ በሆነ የሸሪዓ ሊቅ *(ሙጅተሒድ)* ከሆነ ግለሰባዊ ኢጅቲሓድ ሲሆን፣ በብዙኃን ሊቃውንት የተንጸባረቀ፣ የቀድሞ ወይም ዘመነኛ፣ አቋም ሲሆን ደግሞ ኢጅማዕ ይባላል።[16]

2.1. ቁርኣን

ቁርአን በቀዳሚ ምንጭነቱ በውስጡ የያዛቸው የሕግ ድንጋጌዎች በጣም ጥቂት እንደመሆናቸው እንደ ሕግ ሰነድ ሊወሰድ አይችልም። ቁርአን እንደ ሕግ መጽሃፍ ሳይሆን ራሱን ተግሳጽ *(ዚክር)*፣ መመሪያ *(ሁዳ)* በተሰኙ ሥያሜዎች ይጠራል። *ኢዮት አል-አህካም* የሚባሉት የቁርአን የሕግ ድንጋጌዎች፣ ከአጠቃላይ 6235 አናቅጽ መካከል ወደ 350 የሚሆኑትን ብቻ ይይዛሉ። እነዚህ ቁርአናዊ ሕጎች ለሰፊው የኢጅቲሓድ ድርሳን መንደርደሪያ በመሆን የቁርአኑን የሕግ ፍልስፍና ይመሠርታሉ።[17]

ከ350 የሕግ አንቀጾች መካከል 140 የሚሆኑት እንደ *ሶላሕ፣ ሀጅ፣ ዘካሕ* እና *ሰደቃሕ*፣ መሐላ ለመሳሰሉ አምልኳዊ ተግባራት የአፈጻጸም ሥነ-ሥርዓቶችን የሚደነግጉ ናቸው። ወደ 70 የሚሆኑ አንቀፆች ደግሞ ጋብቻን፣ ፍቺን፣ አባትነትን፣ የልጅ አያያዝን፣ ቀለብን፣ ውርስን እና ኑዛዜን የሚመለከቱ የቤተሰብ ድንጋጌዎች ናቸው። ወደ 30 የሚሆኑ አንቀፆች ደግሞ የወንጀል ድርጊቶችን እና ቅጣቶችን የሚደነግጉ ናቸዉ። 10 የሚሆኑ አንቀፆች

[13] Ibid, pp. 47-48.
[14] Kamali, Source, Nature and Objectives of Shariah, *supra* note 1, p. 219.
[15] Ibid.
[16] Ibid.
[17] አልዩ አባተ ይማም፣ ቀዳሚው የሸሪዓ ሕግ ምንጭ - ቁርኣን፣ *Hawassa University Journal of Law*, Volume 2, (July 2018), ገጽ 133።

ደግሞ ኢኮኖሚያዊ ጉዳዮችን፣ የአሰሪና ሰራተኛ ጉዳዮችን የሚመለከቱ ናቸዉ።[18] በቁርአን ውስጥ በሚገኙ ኣያት ኣል-ኣህካም ብዛትም ሆነ የጉዳዮችን ዓይነት መሠረት በማድረግ የተቀመጠው አኃዝ ላይ የምሁራን ልዩነት ያለ ሲሆን፣ ልዩነቱ ሊፈጠር የቻለው ጥቂቶቹ የሕግ አንድምታ አለው ብለው የተስማሙበት አንድ የቁርኣን አንቀጽ ላይ ሌሎች ደግሞ የሕግ አስረጂነት የለውም በሚል ሳይቀበሉት ይቀራሉ፤ አንዳንዶቹ ከቁርአናዊ ታሪኮች እና ዘይቤያዊ አገላለጾች ላይ ሳይቀር የሕግ ብያኔዎችን ይቀስማሉ።[19] ያም ሆኖ ቁርኣናዊ የሸሪዓ ድንጋጌዎች ቁጥራቸው ከላይ ከተጠቀሰው እምብዛም የማይርቅ መሆኑን ይገነዘባል።

ቁርኣናዊ የፊቅሕ ሕግጋት በአብዛኛው ልዩና ዝርዝር ከመሆን ይልቅ ጥቅል እና የመርሆነት ባህርይ ያላቸው ናቸው፤ ይህ ባህርያቸው ዘርፈ-ብዙውን የሰው የዕለት-ተዕለት እንቅስቃሴ እና መስተጋብር ለመቆጣጠር እና በኢጅቲሓድ አማካይነት ገዥ ሕግጋትን ለመዘርጋት የንድፈ-ሐሳብ መሠረት ይጥላል።[20] ከቁርአናዊ ጥቅል የፊቅሕ መርሆዎች ላይ በመመርኮዝ ሌሎች የኢጅቲሓድ መርሆዎችን በመለየት፣ ከእነዚህ መርሆዎች ላይ ሌሎች ዝርዝር እና ልዩ ልዩ ድንጋጌዎችን ለማውጣት አመቺ ሆኗል። ይህም የቁርአኑን የሕግ ፍልስፍና ምጡቅነትና እና በዘመን የማይወሰን ገዥነቱን ያረጋገጠ የሕግ ሥልጣኔ መገለጫ ነው። የልዩ ድንጋጌዎቹ ዓላማ፣ ለጥቅል የሕግ መርሆዎቹ የአተረጓጎም ማሳያ በመሆን በምሳሌነት የቀረቡ ናቸው። ቁርአን የመጀመሪያው የሸሪዓ ምንጭ እንደመሆኑ፣ በሁሉም የሕግ ርዕሰ-ጉዳዮች ላይ ጠቅላላ መርሆዎችንና መሪ ሕጎችን አካትቷል። እነዚህ ጥቅል መርሆዎች ደግሞ፣ ሙሉ በሙሉም ባይሆን በሱናሕ ተብራርተዋል፤ ከዚህ ውጪ ያለው ለኢጅቲሓድ ምሁራዊ ጥረት የተተወ ነው።[21]

በተጨማሪም የቁርኣን ሕግጋት ልዩ ከመሆናቸው እና ካላቸው ግልጽነት አንፃር *ቀጥዒ* (ወሳኝ/ግልጽ- *Definitive)* እና *ዞኒ* (አሻሚ - *Speculative*) ተብለው በሁለት ሊመደቡ ይችላሉ። *ቀጥዒ* የቁርአን ድንጋጌዎች ልዩ እና የተብራሩ በመሆናቸው ትርጉም አያስፈልጋቸውም፤ ስለሆነም ለኢጅቲሓድ ክፍት አይደሉም። *ዞኒ* የቁርአን ድንጋጌዎች ደግሞ ብዙውን የቁርአን የሕግ አንቀጾች የሚይዙ፣ እና ከቋንቋቸውም ሆነ ከሚያነሱት ሐሳብ አንፃር ግልጽ ባለመሆናቸው ለትርጉም ክፍት ናቸው። እነዚህ *ዞኒ* የቁርአን አንቀፆች ለሰፊው የኢጅቲሓድ እንቅስቃሴ መነሻ ማዕቀፍ በመሆን ያገለግላሉ።[22]

2.2. ሱናሕ

ሱናሕ ከቁርአን በመቀጠል በሁለተኛ ደረጃ የሚገኝ ኢስላማዊ የእምነትና የሕግ ምንጭ የሆነውን ነቢያዊ ፈለግ አርዓያነት የሚወክል ነው።[23] ስለሆነም *ሱናሕ* በይዘቱ አስገዳጅ *(ዋጂብ/ፈርድ)* ወይም ፍቁድነትን ወይም ሌሎች የሸሪዓ ድንጋጌ ቅርጾችን *(ሁክም ሸሪዓ)* ሊይዝ ይችላል። በሥነ-ቃላዊ ዘገባ *(ሀዲስ)* አማካይነት ከነቢዩ መሀመድ ወደ ባልደረቦች

[18] ዝኒ ከማሁ፣ ገጽ 134።
[19] ዝኒ ከማሁ።
[20] ዝኒ ከማሁ፣ ገጽ 145-146።
[21] Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, The Islamic Texts Society (1991), p, 32.
[22] Kamali, Source, Nature and Objectives of Shariah, *supra* note 1, p. 221.
[23] አልዩ አባተ ይማም፣ *ሱናሕ*- ሁለተኛው የሸሪዓ ሕግ ምንጭ፣ *Hawassa University Journal of Law,* (2018), Vol. 2, ገጽ 151.

(ሶሃቢዩን) እና የዘመኑ ማህበረሰብ፣ ከዚያም ወደ ተከታይ ትውልዶች በቃል እንዲሁም በመጠኑም ቢሆንም በጽኑፍ ተላልፎ ወደ እኛ የደረሱ ነቢያዊ ንግግሮችን፣ ተግባራትን፣ ተቆጥቦዎችን፣ እንዲሁም ግላዊ ዝንባሌዎችንና ምርጫዎችን የሚይዝ ነቢያዊ ፈለግ ነው።[24]

ሱናሕ (ሀዲስ) የሸሪዓ ምንጭ በመሆኑ ላይ፣ እና ክልክል እና የተፈቀደ *(ሀላል* እና *ሀራም)* የማድረግ አቅሙ ከቁርአን ጋር የሚስተካከል እንደሆነ *ዑለማእ* በአንድ ድምጽ ይስማማሉ። ለዚህም ተጠቃሹ ምክንያት በነቢዩ *መ*ሀመድ በኩል የሚተላለፉ ትዕዛዞችና ክልከላዎች ምንጫቸው ከአምላክ በመሆኑና፣ ለነቢዩ ትዕዛዝ ተገዥ መሆኑ ለአምላክ *መታዘዝ* ማለት እንደሆነ በራሱ በቁርአን ውስጥ በተደጋጋሚ የተገለጸ በመሆኑ ነው።[25] አል-ገዛሊ እንዳብራሩት ለነቢዩ *መ*ሀመድ የሚደርሷቸው አምላካዊ ራዕዮች ከፊሉ የቁርአን፣ ከፊሉ ደግሞ የሱናሕ ቅርጽ ይይዛሉ። በሁለቱ መካከል ያለው ልዩነት ቁርአን ቃል በቃል ከአምላክ የወረደ ፍጹም የፈጣሪ ቃል *(ወሂይ ሂሉር)* ሲሆን፣ *ሱ*ናሕ ደግሞ ሐሳቡ በመለኮታዊ ራዕይ ለነቢዩ የተገለጸ፣ በቋንቋዊ አገላለጹ ደግሞ የነቢዩ *መ*ሀመድ እንደሆነ *(ወሂይ ባጢን)* ብዙኃን ምሁራን ይስማማሉ።[26] ቁርአን ከአምላክ እንደወረደ ቃል በቃል በጽሁፍ የሰፈረ እና የተረጋገጠ እንደሆነ የሚታመን በመሆኑ፣ እና እስካለንበት ትውልድ ድረስም ቢሆን በይዘቱ ላይ ምንም አይነት ውሃ የሚያነሳ ጥርጣሬ ሳይነሳበት ተጠብቆ የደረሰ በመሆኑ ቁርአንን በተመለከተ የተዓማኒነት ምዘና ማዕቀፍ ማዳበር አስፈላጊ አልነበረም።[27] ከነቢዩ ሕልፈት ብዙም ሳይርቅ ከሦስት ዐሥርተ-ዓመታት (በ40 ዓመተ-*ሒ*ጅራ) በኋላ በልዩ ልዩ *ፖ*ለቲካዊ እና ቡድናዊ የእምነት አቋሞች ምክንያት የሐሰት *ሀዲሶች* መፈጠራቸው፣ እንዲሁም ዋነኛው የ*ሀዲስ* አሰባሰብ እና በጽሁፍ መስፈር የተከናወነው ከ*ሒ*ጅራ ከአንድ ምዕተ-ዓመት በኋላ በመሆኑ፣ ከነቢዩ ተገኙ የሚባሉ *ሀዲሶች*፣ በይዘታቸው እና በአዘጋገባቸው ላይ የተዓማኒነት ጥያቄዎች እንዲነሳባቸው ምክንያት ሆኗል።[28] በመሆኑም የ*ሀዲስ* ዘገባዎች ተዓማኒ እና በተከታታይ እማኞች የተላለፈ *(መ*ታዋቲር) ሊሆን፣ ወይም ደግሞ በተዓማኒነት ደረጃው አጠራጣሪ *(አሃድ)* ሊሆን ይችላል።[29] በየትኛውም የአዘጋገብ አይነት ቢሆን፣ *ሀዲሶች* የሸሪዓ ምንጭ (አስረጂ) ሆነው የሚቀርቡ መሆናቸው አከራካሪ አይደለም።[30]

*ሱ*ናሕ እንደ ሸሪዓ ምንጭ፣ የሕግ ድንጋጌዎችን በሦስት ደረጃዎች ሊደነግግ ይችላል። አንደኛ፣ በቁርአን የተገለጹ መርሆዎች እና ልዩ ድንጋጌዎችን በድጋሜ በ*ሀዲስ* ሲገለጹ እና ሲጠናከሩ ነው። በዚህ ሚናው *ሀዲስ* በቁርአን ከተደነገገው ድንጋጌ ላይ የሚጨምረው አዲስ ፍሬ-ሐሳብ ባይኖርም፣ ቁርአናዊ ድንጋጌዎችን በተለየ አነጋገር በመግለጽ ለአረዳድ ቀላል እንዲሆኑና አጽንኦት እንዲያገኙ ያደርጋል። ሁለተኛው የሱናሕ የምንጭነት ሚና በቁርአን የተገለጹ መርሆዎችንና ድንጋጌዎችን ወይም ግልጽ ያልሆነውን የቁርአን የሕግ ክፍል

[24] ዝኒ ከማሁ
[25] Kamali, Source, Nature and Objectives of Shariah, *supra* note 1, p. 222. ቁርአን፣ 4:80 እና 59:7 ይመለከቷል።
[26] Kamali, *Principles of Islamic Jurisprudence*, *supra* note 21, p. 14.
[27] አልዩ፣ ቀዳሚው የሸሪዓ ሕግ ምንጭ፣ *ግ*ርኔ *ማ*ስታወሻ 17፣ ገጽ 131-132 ይመለከቷል።
[28] አልዩ፣ *ሱ*ናሕ- ሁለተኛው የሸሪዓ ሕግ ምንጭ፣ *ግ*ርኔ *ማ*ስታወሻ *23*፣ ገጽ 161-162።
[29] ዝኒ ከማሁ፣ ገጽ 181-185።
[30] Kamali, *Sharia Law: An Introduction*, *supra* note 4, pp. 23-24.

ግልጽ በማድረግ ነው። ለምሳሌ፣ የቁርአኑን ጥቅል ድንጋጌ *(ዐም)* ልዩ *(ኻስ)* በማድረግ፣ ያልተገደበውን *(ሙጥለቅ)* የተገደበ/የተወሰነ *(ሙቀየድ)* በማድረግ ያብራራሉ። አብዛኛው የ*ሀዲስ* ዘገባ በእነዚህ ሁለት ምድቦች ሥር የሚወድቅ ሲሆን፣ እነዚህ *ሀዲሶች (አሃዲስ)* በአረጋጋጭነትም ሆነ በአብራሪነት ሚናቸው የቁርአን አካል እንደሆኑና ከቁርአን ተነጥለው ሊታዩ እንደማይችሉ ምሁራን ያስገነዝባሉ። ሦስተኛው የ*ሀዲስ* ሚና በቁርአን ያልተገለጸን አዲስ ሕግ በ*ሀዲስ* ሲደነግግ ነው፤ የዚህ አይነት ሀዲሶች *መሥራች* ሀዲሶች *(ሱናሕ አል-መአሲሳሕ)* ይባላሉ፤ ከቁርአን ጋር ትስስር ሳይኖራቸው፣ ራሳቸውን ችለው የሚቆሙ የሕግ ምንጮች ይሆናሉ።[31]

2.3. ኢጅቲሓድ

በሦስተኛ ደረጃ የሸሪዓ ምንጭ ሆኖ የሚቀመጡት አመክንዮኣዊ አስረጂዎች ወይም በሕብር ስማቸው *ኢጅቲሓድ* ናቸው።[32] *ኢጅቲሓድ* ማለት በልዩ ልዩ ጭብጦች ላይ ሕግጋትን ከምንጮቹ ለመቅሰም፣ በሸሪዓ ሊቅ *(ሙጅተሒድ)* የሚደረግ ምሁራዊ - አመክንዮኣዊ ጥረት ማለት ነው።[33] *ኢጅቲሓድ* በአንድ በኩል ምንጮችን በማጣቀስ፣ በመተርጎም፣ በመተንተን፣ ሕግጋትን መለየት ሊሆን ይችላል። በሌላ በኩል ደግሞ በአንድ ርዕሰ ጉዳይ ላይ የሸሪዓውን አቋም መግለጽ *(ፈትዋ)* ማለት ሊሆን ይችላል። ስለዚህ *ኢጅቲሓድ* ቀዳሚ የሸሪዓ ምንጮችን በመተርጎም ሂደት ለአንድ የሕግ ጥያቄ ብይን ላይ መድረስ ሊሆን ይችላል። በዚህ አይነቱ *ኢጅቲሓድ* እንደ ጭብጥ የተያዘው ጉዳይ መፍትሔ ቀድሞ በቀዳሚ ምንጮች ውስጥ ተለይቶ ወይም በግልጽ ያልተቀመጠ ቢሆንም ለችግሩ ፍንጭ የተመለከተ ሊሆን በዚህ *መንደርደሪያ* ሐሳብ ላይ በመመርኮዝ የሕግ ትርጉም *(ትርጉማዊ ኢጅቲሓድ)* ለመስጠት ይጋብዛል። ጭብጡ ከነአካቴው በምንጮች ውስጥ ያልተወሳ ከሆነ፣ ጠቅላላ የሸሪዓ ዓላማዎችን *(መቃሲድ አሸ-ሸሪዓሕ)* መሠረት በማድረግ አዲስ ፍርድ *(ሁክም)* ላይ የመድረስ ወይም በሌላ አገላለጽ አዲስ የሸሪዓ ሕግ ለመቅረጽ የሚደረግ አመክንዮኣዊ የምርምር ሂደት ደግሞ ፈጠራዊ *ኢጅቲሓድ* ይባላል።[34]

ኢጅቲሓድ የቁርአን እና የሱናሕ የሕግ መርሆዎችና ድንጋጌዎችን ከየወቅቱ እና ከማህበረሰቡ ተጨባጭ ሁኔታ ጋር እንዲዛመድ በማድረግ አግባብነታቸው እና ቀጣይነታቸው የሚረጋገጥበት *መሣሪያ* ነው። ሸሪዓ በመርህ ደረጃ ከሁኔታዎች መለዋወጥ ጋር ሊለወጥ ወይም ሊሻሻል ይችላል። ይህ የማሻሻያ ወይም የለውጥ ሂደት የሚተገበረው ደግሞ በየክፍለ-ዘመኑ ባሉ የሸሪዓ ሊቃውንት በሚደረግ ምርምር *(ኢጅቲሓድ)* አማካይነት ነው።[35] *ኢጅቲሓድ* የለውጥ እና የቀጣይነት *መሣሪያነቱን* ያህል በሸሪዓ ሕግ ውስጥ *መሻር (ነስኽ)* እንዳለ በጣት ከሚቆጠሩ ምሁራን በስተቀር ሁሉም የሚስማሙበት ጉዳይ ነው።[36] የ*ነስኽ* መኖር የሚያስረዳው ዋናው ቁምነገር ደግሞ በአንድ ወቅት ወይም ሁኔታ የወረደ መለኮታዊ ሕግ፣ በነባራዊው ሁኔታ መቀየር ምክንያት ሕጉ ሊቀየር እና በሌላ ሕግ ሊተካ የሚችል መሆኑን ነው። የሸሪዓ ዓላማ በማይለወጥ እና በማይሻሻል ግትር ሕግ፣ በሰው

[31] Kamali, Source, Nature and Objectives of Shariah, *supra* note 1, p. 222.
[32] Kamali, *Sharia Law: An Introduction*, *supra* note 4, p. 166.
[33] Ibid, pp. 162-163.
[34] Ibid, p. 162.
[35] Ibid, p. 166.
[36] Kamali, *Principles of Islamic Jurisprudence*, *supra* note 1, p. 139.

ምድራዊ ሕይወት ላይ ሥንክሣር ማብዛት ወይም በችግር የተሞላ እንዲሆን ማድረግ ሳይሆን ቀላል እና ምቹ ሕይወት እንዲመራ ማስቻል ነው፤[37] ለዚህም ሲባል በአንድ ወቅት ተገቢ የሆነ መለኮታዊ ሕግ፣ በሌላ ጊዜ አግባብነት ላይኖረው ስለሚችል ከሰው ሳይሆን ከራሱ ከአምላክ በሆነ የመሻር ተግባር *(ነስኽ)* እንዲለወጥ ተደርጓል።[38] ይህ ከሆነ ታዲያ የሸሪዓ ድንጋጌዎች ለውጥ ወይም ማሻሻያ ሳይደረግባቸው የሚተገበሩ ከሆነ ዓላማቸውን በማያሳካ፣ ብሎም ችግር በሚያባብስበት ሁኔታ ውስጥ፣ በኢጅቲሓድ አማካይነት እንዲለወጡ የማይደረግበት ወይም የማይሻሻልበት ምክንያት አይኖርም።

የሸሪዓ ሕግ አምልኳዊ ጉዳዮችን *(ዒባዳት)* የሚመለከት ከሆነ ለለውጥ ወይም ለሕግ ማሻሻያ ተገዥ እንዳልሆነ ወጥ የሆነ አቋም አለ። ምክንያቱም የእነዚህ ድንጋጌዎች ዓላማ ምድራዊ ሕይወትን መምራትና በትክክለኛው ጎዳና ላይ እንዲራመድ ማድረግ ሳይሆን፣ ሰው ለአምላኩ ያለውን ተገዥነት ለመለካት የተደነገጉ በመሆኑ ተጨባጭ እውነታዎችን መሠረት በማድረግ ሊቀየሩ የሚችሉበት አግባብ የለም።[39] የሸሪዓው ድንጋጌ አምልኮን ሳይሆን ዓለማዊ የኑሮ መስተጋብርን የሚመለከት *(ሙዓመላት)* ከሆነ ሕጉ የሕብረተሰቡን ነባራዊ እውነታ የተከተለና እያጋጠሙ ያሉ ችገሮችን ያገናዘበ መሆን ይገባዋል። ስለሆነም *በሙዓመላት* ላይ ያሉ የሸሪዓ ሕጎች በነስኽ አማካይነት እንደተለወጡ ሁሉ *በኢጅቲሓድ* አማካይነትም ይቀየራሉ፤ ይሻሻላሉ። የቁርኣንና የሱናሕ ድንጋጌ ልዩ እና ግልጽ በመሆኑ ምክንያት ለትርጉም ክፍተት የማይሰጥ በሆነ ጊዜ፣ ኢጅቲሓድ የማይፈቀድ መሆኑ የብዙኃኑ ምሁራን ስምምነት አለ። ይህ ቢሆንም ልዩ የቁርአን ድንጋጌዎች ነባራዊ ሁኔታውን በማገናዘብ ለውጥ የተደረገባቸው አጋጣሚዎች እንዳሉ ከነቢዩ ሙሀመድ ሕልፈት በኋላ ከተተኩ የኢስላም አመራሮች ታሪክ እንረዳለን።[40] ባጠቃላይ፣ ቀላል እና ምቹ ምድራዊ ሕይወትን ማረጋገጥ ወይም ‹ችግርን መቅረፍ› ወይም ተግዳሮቶችን ማስወገድ *(ረፍዕ ሐል-ሐረጅ)*› በተሰኘው ቁርኣናዊ መርሆ[41] መሠረት የኢስላም ሊቁ አል-ቀራፊ፣ በጉዳዩ ላይ እንዲህ ሲል ድምዳሜ ላይ ደርሷል፤ ‹‹የሕብረተሰብ ልማድ እና ነባራዊ እውነታ ተንተርሰው የተደነገጉ የሸሪዓ ሕጎች፣ ልማዱ ወይም ሁኔታው በመለወጡ ምክንያት ሊለወጡ ይገባል።››[42]

ኢጅቲሓድ በሸሪዓ ምንጭነቱ በሦስት ደረጃዎች ሊፈጸም ይችላል፤ አንደኛ፣ በመልዕክታቸው *(ደላላሕ)* ዞኒ የሆኑ የቁርአን አናቅጽ፣ ወይም በይዘትም ሆነ በዘገባ ሠንሰለታቸው *(ሪዋያሕ)* ምክንያት ዞኒ (ግልጽ ያልሆኑ/አጠራጣሪ) የሆኑ የ*ሀዲሰ* ዘገባዎች ላይ ከሕግጋቱ ዓላማ ጋር በሚጣጣም መልክ ትርጉማዊ ኢጂቲሓድ ይደረጋል። የዚህ *ኢጅቲሓድ* ዓላማ ግልጽ ያልሆኑ ቀዳሚ የሸሪዓ ድንጋጌዎችን ግልጽ ማድረግ ነው።[43] በሁለት ግልጽ ድንጋጌዎች

[37] ቁርአን፣ አል-ብቀራሕ፣ 2፡185 ይመለከቷል።
[38] ቁርአን፣ አል-ብቀራሕ፣ 2፡106፣ 16፡101 ይመለከቷል።
[39] Kamali, Sharia *Law: An Introduction*, *supra* note 4, p. 26.
[39] Ibid.
[40] Kamali, *Principles of Islamic Jurisprudence*, *supra* note 21, p. 218.
[41] Kamali, *Sharia Law: An Introduction*, *supra* note 4, p. 26.
[42] Ibid.
[43] Kamali, Source, Nature and Objectives of Shariah, *supra* note 1, p. 224.

መካከል ግጭት ቢኖር፣ የአስረጂዎች መጣረስን *(ተዐሩድ)* በሚገዙ መርሆዎች መሠረት አንዱን መምረጥ የሙጅተሒድ ተግባር ነው።[44]

ሁለተኛ፣ በሸሪዓ ቀዳሚ ምንጮች ምንም ዓይነት አስረጂ በማይገኝላቸው፣ ወይም *ኢጅማዕ* (የምሁራን የጋራ አቋም) በሌላቸው ጉዳዮች ላይ የሚደረገው ኢጅቲሓድ መነሻ ፍንጭ የማይገኝለት በመሆኑ፣ በዋናነት መንደርደሪያ በመሆን የሚያገለግሉት የሸሪዓ ጥቅል ዓላማዎች *(መቃሲድ አሸ-ሸሪዓሕ)* ናቸው። ይህ አይነቱ ኢጅቲሓድ ‹ኢጅቲሓድ ቢ ረዕይ› (በግል አስተያየት ላይ የተመሠረተ ኢጅቲሓድ) ይባላል።[45]

ሦስተኛ፣ ቀድመው በፊቅሕ የተሸፈኑ ጉዳዮች ላይ ያሉ ሕጎች፣ የተደነገጉባቸው መነሻ ክባቢያዊ ሁኔታዎች በመለወጣቸው ምክንያት የሕጎቹ አግባብነት የተቋረጠ ከሆነ እና ሕጎቹን ቃል በቃል እንዲፈጸሙ ማድረግ የሕጎቹን ዓላማዎችና ጠቅላላ የሸሪዓ ግቦችን ማሳካት የማይቻል ከሆነ፣ *ሙጅተሒዱ* ነባራዊ ሁኔታውን እና በተጨባጭ ያጋጠሙ ችግሮችን በማገናዘብ አዲስ ኢጅቲሓድ በማድረግ፣ የቀደምት ሕጎችን ሊቀይር ወይም ሊያሻሽል ይችላል።[46] የቀድሞው የፊቅሕ ድንጋጌ በቂየስ (ምስስሎኣዊ አመክንዮ)፣ በኢስቲህሳን (ርትዕ) ወይም በሌሎች የኢጅቲሓድ መርሆዎች አማካይነት ድምዳሜ ላይ የተደረሰበት ሊሆን ይችላል፤ አዲሱም ኢጅቲሓድ በእነዚህ መርሆዎች ላይ ተመርኩዞ የተለየ የፊቅሕ ድምዳሜ ላይ ሊደርስ ይችላል። በሁለቱ የኢጅቲሓድ ምርምሮች መካከል ያለው ልዩነት በተለያየ የማሕበረሰብ ተጫባጭ እውነታዎች ውስጥ የሚከናወኑ መሆናቸው ነው።

3. የሸሪዓ መገለጫ ባህርያት

3.1. የሸሪዓ ሃይማኖታዊ እና ዓለማዊ ገጽታዎች

ሸሪዓ ዘርፈ-ብዙ አምልኳዊ ሥነ-ሥርዓቶችን እና ዓለማዊ ግንኙነቶችን የሚገዙ ሕጎችን አቅፎ የያዘ ሰፊ የሕግ ሥርዓት እንደሆነ ቀደም ባሉት ርዕሶች ስር ተገልጿል። ይህ የሁለትዮሽ የሸሪዓ ባህርይ የሕግ ሥርዓቱን ሃይማኖታዊ እና ዓለማዊ (ግብረ-ገባዊ) ገጽታ የሚያንጸበርቅ ነው። ፍጹም ሃይማኖታዊነት ወይም መንፈሳዊነት ባህርይ ያላቸው፣ በዓለማዊ ሕይወት ላይ ምንም አይነት ተጽእኖ የሌላቸው ድንጋጌዎች፣ በመንግሥታዊ የፖለቲካ ማሕበረሰብ አስተዳደር ውስጥ ተፈጻሚ ሊደረጉ አይችሉም። ምክንያቱም ቅጣት አዘል በሆነ ዓለማዊ የፍትሕ አስተዳደር ተቋማት አማካይነት ተፈጻሚ እንዲሆን ቢደረግ፣ በሕብረተሰባዊ አኗኗር ውስጥ የሚጨምረው እሴት ካለመኖሩም በተጨማሪ፣ የአምላካዊ ሕግን ዓላማ አያሳካም። አምልኳዊ ሕጎች በግለሰብ ደረጃ፣ ከእምነትና ከተገዥነት በመነጨ ስሜት የሚተገበሩ እንጂ በውጫዊ ምክንያቶችና በቅጣት ፍርሐት የሚፈጸሙ ከሆነ፣ የእምነት ነጸብራቅነታቸው የሚወገድ በመሆኑ፣ እና በምትኩም የሚያመጣው ማሕበረሰባዊ

[44] Ibid.
[45] Ibid.
[46] Ibid.

ጥቅም ወይም የሚቀርፈው ችግር የሌለ በመሆኑ፣ በመንግሥት የፍትሕ አስተዳደር ሥርዓት ውስጥ የሚታቀፉ አይደሉም።[47]

ሸሪዓ ከዓለማዊ የሕግ ፍልስፍና በተለየ፣ ከአስገዳጅ *(ዋጂብ)* እና ክልክላ *(ሀራም)* የሕግ ቅርጾች በተጨማሪ፣ የተወደደ *(መንዱብ)*ና የተጠላ *(መክሩሕ)* የተሰኙ ሰፊውን የሸሪዓ ክፍል የሚሸፈኑ የሕግ ቅርፆች አሉት። እነዚህ የድንጋጌ ዓይነቶች በተበዳይ በቀረበ አቤቱታ መሠረት በፍርድ-ቤት ወይም በሌሎች የፍትሕ አካላት ሊፈጸሙ አይችሉም። ወይም በሕግ ቋንቋ ዳኝነት የሚጠየቅባቸው *(Justiciable)* አይደሉም። ስለሆነም፣ በዚህ ባህርያቸው የሸሪዓውን ሃይማኖታዊ ገጽታ በጉልህ የሚያሳዩ ናቸው።[48] እዚህ ላይ ሊሠመርበት የሚገባው ነጥብ፣ አንድ ድንጋጌ በቀዳሚ የሸሪዓ ምንጮች ውስጥ *መብሀ* (ፍቁድ) ወይም፣ *የመንዱብ* ወይም *መክሩሕ* ቅርጽ ቢሰጠውም፣ በመንግሥታዊ የሕዝብ አስተዳደር ማዕቀፍ ውስጥ ወቅታዊ ተጨባጭ እውነታዎችንና ሕዝባዊ ጥቅም ታሳቢዎችን *(Public Interest Considerations)* መሠረት በማድረግ *በኢጅቲሓድ* አማካይነት የአስገዳጅነት *(ዋጂብ)* ወይም ክልክላ *(ሀራም)* ቅርጽ ሊሰጠው የሚችል መሆኑ ነው።[49]

ወደ ሸሪዓ የሕግነት *(Positivistic)* ባሕርይ ስንመጣ፣ በሰዎች የርስበርስ ግንኙነት ውስጥ ፍትሕ፣ መልካም ሥነ-ምግባርና ሞራል እንዲሰፍን ለማድረግ፣ ከሰላምና ጸጥታ አንጻር የግለሰቦችንና የማሕበረሰቡን ደህንነት ለማስጠበቅ፣ የሕዝቦችን ፖለቲካዊ፣ ማሕበረሰባዊ እና ኢኮኖሚያዊ ልማትና መሻሻልን እውን ለማድረግ በየዘርፉ የተቀረጹ ጠቅላላና ዝርዝር የሸሪዓ ድንጋጌዎች፣ በቀጥታም ሆነ በተዘዋዋሪ መልኩ በምድራዊ አኗኗር ላይ ለውጥ ወይም ተጽእኖ የሚያሳርፉ በመሆኑ፣ በፍትሕ አስተዳደርና ተቋማት አማካይነት አስገዳጅ የአፈጻጸም ሥርዓት ሊዘረጋላቸው ይቻላል።[50] ግባቸውም ከላይ የተጠቀሱትን ምድራዊ ዓላማዎች በማሳካት፣ በግለሰብም ሆነ በማሕበረሰብ ደረጃ ቀላልና ምቹ ምድራዊ ሕይወት እውን ማድረግ *(መሷሊህ)* ነው።[51] ይህ ሲባል ሕጎቹን መተላለፍ፣ በምድራዊ የፍትሕ አስተዳደር ሊያስከትለው ከሚችለው የሕግ ተጠያቂነት ውጪ ከሕልፈት በኋላ በአምላክ ፊት አያስጠይቅም ማለት እንዳልሆነ ይገዘቧል።

3.2. ሸሪዓ እና አመክንዮ

ሃይማኖትን (እምነትን) እና ሕግን ለመረዳት የሚቻልበት ወሳኝ መሣሪያ አመክንዮ ነው። ሰው ምክንያታዊ ያልሆነን ሐሳብ መረዳት አይችልም፤ ቢሞክርም በቅን ልቦናው ሊቀበለውና ሊያምንበት አይችልም። ስለሆነም ኢስላም በእምነትም ሆነ በሕግ ገጽታዎቹ፣ የሰውን ምግባር መቅረጽ የሚችለው ምክንያታዊ ሆኖ ሲገኝ ብቻ ነው። ከዚህ ውጪ ያለው የእምነትም ሆነ የሕግ አቀራረብ በውጤቱ ንፍቅናና ማስመሰልን የሚፈጥር እንጂ እውነተኛ የአስተሳሰብና የተግባር ውጤትን አያመጣም።[52] አመክንዮ የሰው ግንዛቤ ቁልፍና ወሳኝ

[47] Muhammad Hashim Kamali, The Sharia: Law as the Way of God, Abdullah Ahmad Badawi (ed.), Islam Hadhari, A Model Approach for Develeopment and Progress, MPH Publishing, p. 164.
[48] Ibid.
[49] Kamali, *Sharia Law: An Introduction*, *supra* note 4, p. 47.
[50] Ibid, pp. 46-47.
[51] Ibid, pp. 27-33.
[52] Muhammad Hashim Kamali, Methodological Issues in Islamic Jurisprudence, *Arab Law Quarterly*, Vol. 11, No. 1 (1996) p. 14.

መንገድ መሆኑን ቁርአን በበርካታ አንቀጾች በአንክሮ ይገልጻል።[53] ስለዚህ በሸሪዓ እና በአመክንዮ መካከል ያለው ትስስር የተቃርኖ ሳይሆን፣ አመክንዮ ሸሪዓን መገንዘቢያ፣ ሸሪዓ ላይ መድረሻ ዘዴ ነው። የኢስላም የሕግ ማዕቀፍ ዘዴ በዋናነት ከመለኮታዊ ራዕዩ ይልቅ፣ *በዑለማእ* ግለሰባዊ-አመክንዮአዊ ምርምር የበለጸገ ከመሆኑ አኳያ፣ ‹የሊቃውንት ሕግ› የሚል መገለጫ የሚሰጠው ምክንያታዊ አስተሳሰብ ሸሪዓውን በመዘርጋት ረገድ ያለውን ከፍተኛ ድርሻ አጉልቶ ያሳያል። ከላይ አመክንዮ ሸሪዓን የምንረዳበት መሣሪያ ነው ሲባል፣ አንድ ልዩ ድንጋጌ የተደነገገበትን መንስኤ ምክንያትና *(ዒላሕ)* እና ዓላማ *(ሂክማሕ)* የሚለይበት መንገድ ነው ማለት ሲሆን፣ አመክንዮ ከሁለቱ የሸሪዓ ክፍሎች በ*ሙዓመላት* ሕጎች ላይ በተለየ ያለው ሚና እጅግ የጎላ ነው። የአምልኮ ሕግጋት *(ዒባዳት)* የተደነገጉበት ጠቅላላ ዓላማ፣ ሰው ለአምላኩ ያለውን ታዛዥነትና ተገዥነት ማሳያ መሆኑን መሠረት በማድረግ ጥቅል የድንጋጌ ምክንያት ማብራሪያ ማስቀመጥ ቢቻልም፣ እያንዳንዱ የአምልኮ ተግባራት በተናጠል ያላቸውን የድንጋጌ ምክንያትና ዓላማ ለመለየት የሚደረግ ምርምር ከግምትና መላምት ያልዘለለ ነው።[54] በሌላ በኩል፣ የሰውን የእለት-ተዕለት እንቅስቃሴ የሚገዙ መለኮታዊ ሕጎች *(ሙዓመላት)* ተጨባጭ ምድራዊ ዓላማና ግብ ያዘሉ በመሆኑ፣ ሕግጋቱ የተደነገጉበት ምክንያት *(ዒላሕ)* እና ሊያሳኯቸው ያሰቧቸውን ዓላማዎች በአመክንዮአዊ ምርምር መለየት ይቻላል።[55]

በአንዳንድ የቤተሰብ፣ የውርስ፣ የወንጀልና ሌሎች ጥቂት ጉዳዮች ላይ ያሉ ዝርዝር መለኮታዊ ድንጋጌዎች፣ ገኖናታቸው በጊዜና በቦታ ያልተገደበ እና (አከራካሪነቱ እንዳለ ሆኖ) የማይሻሩና የማይለወጡ ቢሆኑም፣ ከእነዚህ በጣት ከሚቆጠሩ ልዩ ድንጋጌዎች ውጪ፣ ሁሉም ሕግ-ነክ የቁርአን አንቀጾችና የ*ሀዲስ* ዘገባዎች፣ በልዩ ልዩ ርዕሰ-ጉዳዮች ላይ የሕግ መርሆዎችንና ለዝርዝር ድንጋጌዎች መንደርደሪያ የሆኑ ጥቅል መርሆዎችን የሚዘረጉ ናቸው።[56] የ*ተዕሊል* ምርምር በአምልኳዊ ሕጎች ላይ አግባብነት የሌለው ቢሆንም፣ *በሙዓመላት* ሕጎች ላይ ግን የሚፈቀድ ብቻ ሳይሆን፣ የሚበረታታ፣ እንዲሁም በአንዳንድ ሁኔታዎች ላይ ደግሞ አስገዳጅ ተግባር ሊሆን የሚችል ነው።[57] እጅግ ሰፊውን ድርሻ የሚይዘውና የግለሰብና የማሕበረሰብ መስተጋብሮችን የሚገዛው የሸሪዓ ክፍል ግን በ*ዑለማእ* አማካይነት በአመክንዮአዊ እሳቤ *(ኢጅቲሓድ)* የተዘረጋ በመሆኑ የየወቅቱን ማሕበረሰብ ተጨባጭ እውነታ ግምት ውስጥ በማስገባት አስፈላጊው ማሻሻያና ለውጥ ሊደረግበት የሚችል ነው።

የትኛውም የሸሪዓ ዓለማዊ ሕግ ያለአንድ ምክንያት ወይም ዓላማ አልተደነገገም።[58] እነዚህን የድንጋጌ ምክንያቶች በመመርመር *(ተዕሊል)* የሕጎችን አተረጓጎምና አፈጻጸም ለማቃናት፣ ብሎም በዓላማዎቹ ላይ በመንተራስ የሕግ ማሻሻያና ለውጥ የሚደረገው፣ ወይም ለአዲስ ሕጎች አቀራረጽ መንደርደሪያ የሚሆኑት፣ አመክንዮን መሠረት በማድረግ ነው።

[53] Kamali, *Sharia Law: An Introduction*, *supra* note 4, p. 54.
[54] Ibid, p. 55.
[55] Ibid.
[56] Kamali, Source, Nature and Objectives of Shariah, *supra* note 1, pp. 219-220.
[57] Taha Jabir Alwani, The Crisis of Thought and *Ijtihad*, *American Journal of Islamic Social Sciences*, Vol. 10, No. 2, p. 236.
[58] አልዩ አባተ፣ የሸሪዓ ሕግ ዓላማዎች *(መቃሲድ አሽሸሪዓ)*፣ *Bahir Dar University Journal of Law,* Vol. 7 No. 2, (2017), p. 271.

በተጨማሪም በቁርአን ውስጥ የመሻር *(ነስኽ/Abrogation)* ግንኙነት ያላቸውን ድንጋጌዎች ስናይ፣ የተሻሩ ድንጋጌዎች ከመነሻው የተደነገጉበት ምክንያት *(ዒላሕ)* በሌለበት ወይም ነባራዊው እውነታ በተለወጠበት፣ ገኖርነታቸው ሳይቋረጥ በየትኛውም ሁኔታ ላይ ተፈጻሚ እንዲሆኑ ቢደረግ ከምክንያታዊ አስተሳሰብ ጋር የሚጻረር በመሆኑ፣ በምትካቸው ለወቅቱና ለተጨባጭ ሁኔታው የተሻለና ተስማሚ በሆነ ድንጋጌ መተካቱ፣ ወይም በአጭር አነጋገር *ነስኽ* በቁርአን ውስጥ የመኖሩ ምስጢር፣ አመክንዮ ሸሪዓን በመረዳት እና በመዘርጋት ሂደት ላይ ቁልፍ ሚና ያለው መሆኑን የሚያስረዳ ነው።[59]

3.3. ሂደታዊነት እና ነባራዊነት

በግለሰብ እና በሕብረተሰብ ላይ ለውጥን ለማምጣት ከሚውሉ ዓይነተኛ መሣሪያዎች መካከል አንዱና ዋነኛው ሕግ ነው። ሌሎች ከሕግ ተርታ የሚሰለፉት ትምህርት (እውቀት)፣ ሃይማኖት እና ባህል ይገኙበታል። ሕግ የማህበረሰብን ወይም የሃገርን አኮኖሚያዊ፣ ማህበራዊ እና ፖሊቲካዊ ገጽታ ወደ ተሻለ ለመምራት እና ለመቀየር ወሳኝ እና ቀዳሚ ሚናውን መጫወት የሚችለው የሕብረተሰቡን ነባራዊ ሁኔታ ተከትሎ ቀስ በቀስ አመለካከትና ምግባርን የሚያስተካክልበትን ሂደታዊ አካሄድ *(ተንጂም/Gradualness)* ሲከተል ነው። በእድገት ደረጃው ከፍ ያለ እና ከማሕበረሰብ ተጨባጭ እውነታ፣ የሥልጣኔ ደረጃ እና ልማድ በጣም የራቀ ሕግ በማሕበረሰቡ ላይ በመጫን ሕጉ የወጣበትን ዓላማ ማሳካት ፈጽሞ የማይታሰብና፣ ብዙውን ጊዜ ሕጉ እንዲመራው ከታሰበው ሕዝብ በኩል አሉታዊ አጸፋ ሲያጋጥመው ይስተዋላል። ስለዚህ ሕግ ያነገበውን ዓላማ ለማሳካት እና ሊያሰርጸው የፈለገውን እሴት እውን ለማድረግ ከሕብረተሰቡ እውነታ እጅግም ሳይርቅ፣ በጣምም ሳይቀርብ የተጠናና የተመጠነ ርቀቱን ጠብቆ ደረጃ በደረጃ ሕብረተሰቡን ወደ ተሻለ የሚለውጥበትን ሂደት እንዲከተል ማድረግ ያስፈልጋል።

ከዚህ መርሆ አኳያ የሸሪዓን ባህርይ ስንመለከት፣ ቀዳሚ የሆኑት የቁርአን እና የሱናሕ ሕግጋት የወረዱበትን ታሪካዊ ዳራ ስንመረምር ሂደታዊ ሆኖ እናገኘዋለን። ቁርአን መውረድ ከጀመረበት ቅጽበት አንስቶ እስኪጠናቀቅ ድረስ 23 ዓመታትን መፍጀቱ ለዚህ አብነት ነው።[60] ቁርአን መጀመሪያ በወረደባቸው የነቢይነት ዓመታት ላይ ሙሉ በሙሉ የሕብረተሰቡን እምነትን እና አመለካከትን በመቅረጽ ላይ ያተኮረ ነበር። ነቢዩ ሙሀመድ መካህ በነበሩባቸው 13 ዓመታት ሲወርዱ የነበሩት የቁርአን አንቀጾች አምላካዊ ጽንሰ-ሐሳብን፣ መልካም ሥነ-ምግባር እና ግብረ-ገባዊ እሴቶችን የሚያስተምሩ ነበሩ። ሕግ-ነክ መለኮታዊ ራዕዮች በዋናነት መውረድ የጀመሩት ከኢስላማዊው ሥደት *(ሒጅራ)* በኋላ በመዲና ከተማ አነስተኛ የሙስሊም ማሕበረሰብ መመስረቱን ተከትሎ ነው።[61] ከዚህ የምንገነዘበው፣ ቁርአን በአወራረዱ የሚያናግራቸውን ሕዝቦች ተጨባጭ ሁኔታ ተከትሎ፣ ሙስሊሞች መካህ በነበሩበት ጊዜያት አስገዳጅ የአምልኮም ሆነ የሙዓመላት ሕጎችን መደንገግ ነባራዊ እውነታው የማይፈቅድና ከተግባር ይልቅ በቅድሚያ እምነትንና አስተሳሰብን መቅረጽ አንገብጋቢ ሆኖ በመገኘቱ ነው። ከዚያም በመዲና የሙስሊሞች ቆይታ፣ የነበረውን የእምነት

[59] Kamali, *Sharia Law: An Introduction*, *supra* note 4, p. 55.
[60] Ibid.
[61] Yasir Qadhi, *Introduction to the Sciences of the Qura'n*, Al-Hidayah Publishing and Distribution, UK (1999), p. 86.

ጥንካሬ እና ሕብረተሰቡ ያሳየውን የሕግ ተገዥነት አቅም ታሳቢ በማድረግ፣ ልዩ ልዩ ግንኙነቶችን የሚገዙ ሕግጋት መውረድ ጀመሩ። መዲናዊው የሕግ አወራረድም በራሱ ሂደታዊ ነው።[62] ሙስሊሞችን አስገዳጅ የሆኑ ትዕዛዛዊ ወይም ክልካይ የሆኑ ሕጎች የማሕበረሰቡን የለውጥ እርምጃ እና ዝግጁነት ተከትለው ደረጃ በደረጃ ሲወርዱና ልምምድ ወይም ሥልጠና በሚመስል መልክ ሲገለጹ የነበሩት መለኮታዊ ድንጋጌዎች፣ በሰው ልጅ ታሪክ ድንቅ የሆኑ ሰብዕናዎችን ማፍራት፣ እና ማሕበራዊ፣ ፖለቲካዊ፣ ኢኮኖሚያዊ እና ግብረ-ገባዊ ሚዛን የተጠበቀበት ሕብረተሰብ መፍጠር ችሏል።

3.4. ተለማጭነት እና ቀጣይነት

በብዙኃኑ ዘንድ እንደሚነገረው፣ ሃይማኖታዊ ሕግ በተለይ የሸሪዓ ሕግ ከአምላክ የወረደ ስለሆነ በማናቸውም ሁኔታ ቢሆን የማይቀየርና የማይለወጥ ነው። ስለሆነም ለሁኔታዎች መለወጥ እና ከተጨባጩ ጋር መጣጣም ለሚለው የሕግ ጽንሰ-ሐሳብ ተገዥ ያልሆነና ለየትኛውም ሕብረተሰባዊ ለውጥ ምላሽ የማይሰጥ ነው የሚል እሳቤ በሥፋት ይስተጋባል። ነገር ግን ይህ አመለካከት፣ ሸሪዓዊ መሠረት የሌለው ሲሆን፣ እንዲያውም ከዚህ አስተሳሰብ ፍጹም ተቃራኒ በሆነ መልኩ፣ ሸሪዓ ተለዋዋጭ ሁኔታዎችን ማገናዘብ እና ለአዳዲስ ጉዳዮች ምላሽ መስጠት፣ የሕግ ማዕቀፉ አካል እና ዋነኛ መለያ ባሕርይው እንደሆነ የመስኩ ምሁራን ያስገነዝባሉ።[63] ሸሪዓ፣ *ኢጅቲሓድ* እና በስሩ ያሉ እንደ *ኢስቲሰላሕ* (የሕዝብ ጥቅም)፣ የሕግ አፈጻጸም አማራጭ (ርትዕ - *ኢስቲህሳን*)፣ ተመሳሳይ አመክንዮ *(ቂያስ)* እና ሌሎችም የሕግ ምርምር መርሆዎች፣ ከቁርአን እና ሱናሕ፣ ቀጥሎ በሦስተኛ ደረጃ የሕግ ምንጭ በመሆን የሚያገለግሉበት ዋነኛ ምክንያት፣ ሸሪዓ በምሁራዊ የሕግ አተረጓጎም አማካይነት ለተለዋዋጭ ሁኔታዎች ያለው አግባብነት ቀጣይ እንዲሆን፣ ማሻሻል እና መለወጥ እንዲቻል ለማድረግ ነው፤ የምርምር መነሻ ንድፈ-ሐሳቦቹም ይህን የቀጣይነት *(Continutity)* እና የተለዋዋጭነት *(Adaptability)* ባህርይ ማሳኪያ መሳሪያዎች ናቸው።[64] ይህ ባይሆን ኖሮ ግን የሸሪዓ ሕግጋት መጀመሪያ ለወረዱበት ልዩ ሁኔታ እና ምክንያት ብቻ አግባብነት እና ጠቀሜታ ይኖራቸውና ከዚያ በኋላ የጊዜ ሂደትን ተከትሎ ለመጣው ማህበረሰባዊ ለውጥ ምላሽ መስጠት ባልቻሉ ነበር። ነገር ግን በኢጅቲሓድ እና በ*መቃሲድ* መርሆዎች አማካይነት የሸሪዓ ሕግ በጊዜና በሕብረተሰባዊ እውነታዎች ሳይወሰን ዘመን እና ትውልድ ተሻግሮ ገዥነቱ እንዲቀጥል ይችል ዘንድ የተለዋዋጭነትና የቀጣይነት ባህርይው የተረጋገጠ ነው። በተለይ ቁርአናዊ የሕግ ድንጋጌዎች *(አያት አል-አህካም)* በዋናነት የጥቅልነት *(ዓም)* እና ያልተለየ *(ሙጥለቅ)* ባህርይ ያላቸው መሆኑና ለትርጉም ክፍት የተደረገበት መለኮታዊ ጥበብ የሸሪዓውን ቀጣይነት እና ተለማጭነት ለማረጋገጥ ነው።

የሸሪዓ ዓላማዎችን *(መቃሲድ)* ማሳካት የሚቻለው እንደየሁኔታው የሚመጥን፣ በተጨባጭ ላጋጠሙ ተግዳሮቶች ችግር-ፈቺ የሆኑ ሕጎች ሲቀረጹ ነው። ሁኔታዎቹ ቢለዋወጡም ተፈጻሚ የሚደረገው ሕግ አንድ ዓይነት የሚሆን ከሆነ፣ የሕጉን ዓላማ እና መንፈስ ማሳካት አይቻልም። የሸሪዓ ሕግ ዓላማዎች በጠቅላላው ጥቂት የሚባሉ፣ ቋሚ እና

[62] Kamali, *Sharia Law: An Introduction*, *supra* note 4, p. 59.
[63] Ibid, p. 49.
[64] Ibid.

የማይቀየሩ ቢሆኑም፣ እነዚህን ዓላማዎች ከግብ ማድረስ የሚቻለው በየጊዜው እውነታውን ያገናዘቡ የተለያዩ ሕጎች ሲቀረጹ ነው።

የሸሪዓ የተለዋዋጭነትና የቀጣይነት ባህርይ ጥቅል የሸሪዓ ዓላማዎችን እንደማይመለከት ሁሉ የፂባዳት ሕጎችንም አይመለከትም። የአምልኮ ሥነ-ሥርዓትን የሚዘረጉ የቁርአን እና የሱናሕ ድንጋጌዎች በሁኔታዎች መለወጥ ምክንያት የማይለወጡ እና በማንኛውም ሁኔታ እንደጸኑ የሚቆዩ ናቸው።[65] አምልኳዊ የሸሪዓ ድንጋጌዎች፣ ለምሳሌ ያህል የሶላሕ፣ የፆም፣ የሐጅ ወዘተ ሕግጋት የማይቀየሩ ናቸው። በኢጅቲሓድ ሊጨመር ወይም ሊቀነስ ወይም ሊሻሻል የሚችል የአምልኮ ሥርዓት የለም። ምንም እንኳ የቁርአን የፂባዳሕ ድንጋጌዎች በጣም ጥቂት ቢሆኑም፣ በነቢዩ የተግባር ማሳያዎች *(ሱናሕ)* ዝርዝር አፈፃፀማቸው ተብራርቷል።[66] በተጨማሪም ልዩ እና ግልጽ የሆኑት፣ ጥቂት የ*መዓመላት* ሕጎች፣ ለምሳሌ ያህል በውርስ ሕግ ላይ ያሉት ድንጋጌዎች ዝርዝር እና ግልጽ ከመሆናቸው አኳያ ለትርጉም ያልተጋለጡ በመሆኑ ማሻሻያ ሊደረግባቸው አይችልም። ያም ሆኖ አብዛኛው የፍትሐ-ብሔር፣ የንግድ፣ የወንጀል፣ የፖሊሲ እና አስተዳደር *(ሲያሳሕ አሹሸርዒያሕ)* እና ሌሎች ዘርፎች ሥር ላይ ያሉት ሕጎች ጥቅልና ለትርጉም *(ኢጅቲሓድ)* የተጋለጡ መሆናቸው፣ ተለማጭነት የሸሪዓ ዓይነተኛ መገለጫ መሆኑን የሚያስረዳ ነው። ከጥቂት ጉዳዮች በስተቀር፣ ሁሉም ቁርአናዊ እና የሱናሕ ሕጎች የመርሆነት ባህርይ ያላቸው መሆኑ፣ ተለዋዋጭ ሁኔታዎችን መሠረት ያደረጉ ዝርዝር ሕጎች ለመቅረጽ፣ እና ከዚያም የሕግ ለውጦችና ማሻሻያዎችን ለማድረግ እንዲቻል ነው።[67]

የሸሪዓ ሕጎች ለኢጅቲሓድ ካላቸው ተጋላጭነት አንጻር፣ ወይም በሌላ አነጋገር፣ በሁኔታዎች መለዋወጥ ታሳቢነት ሊሻሻሉ ወይም ሊለወጡ ከመቻላቸው አኳያ በሁለት ጥቅል ክፍሎች ሊመደቡ ይችላሉ።፤እነዚህም *ቀጥዒ* (ወሳኝ - *Definitive*) እና *ዘኒ* (አሻሚ - *Speculative*) ይሰኛሉ። *ቀጥዒ* ማለት በቋንቋዊ አገላለጻቸው ለትርጉም ያልተጋለጡ፣ ራሳቸውን ችለው መቆም የሚችሉ ወሳኝ ድንጋጌዎች ሲሆኑ፣ *ዘኒ* ማለት ደግሞ ቋንቋዊ አጠቃቀማቸው ለትርጉም የተጋለጠ፣ ወይም ቋንቋዊ ችግር ባይኖርባቸው እንኳ ተዓማኒነታቸው አጠያያቂ በመሆኑ፣ ራሳቸውን ችለው ደንጋጊ (ወሳኝ) መሆን የማይችሉ ድንጋጌዎች ናቸው።[68]

አንድ የሸሪዓ ድንጋጌ በሁለት መመዘኛዎች መነሻነት *ቀጥዒ* ወይም *ዘኒ* ምድብ ሥር ሊወድቅ ይችላል። አንደኛው፣ ከቋንቋዊ አገላለጽ አንጻር ቁርአናዊ አንቀጹ ወይም የ*ሀዲስ* ዘገባው ጥቅል (*General/ዓምን*)፣ ወይም ያልተገደበ/ያልተለየ (*Absolute/ሙጥለቅ*)፣ ወይም አሻሚ *(ሙጅመል/Ambigious*) ከሆነ፣ ትርጉም የሚያስፈልገው በመሆኑ፣ ለኢጅቲሓዲዊ ትንታኔ እና ለተለያዩ ሐሳቦች እንዲሰነዘሩ በር የሚከፍት በመሆኑ፣ *ዘኒ* ድንጋጌ ይባላል። አብዛኛዎቹ የቁርአን ሕግ-ነክ አንቀጾች፣ ጥቅል መርሆዎችንና ለተለያዩ ትርጉሞች የተጋለጡ አሻሚ ድንጋጌዎችን ያዘሉ በመሆናቸው፣ በ*ዘኒ* ክፍል ሥር የሚመደቡ ናቸው፤

[65] Ibid, p. 50.
[66] Kamali, *Principles of Islamic Jurisprudence*, *supra* note 21, p. 31.
[67] Kamali, *Sharia Law: An Introduction*, *supra* note 4, p. 50.
[68] Kamali, Source, Nature and Objectives of Shariah, *supra* note 1, p. 221.

በመሆኑም ኢጅቲሓድ ሊደረግባቸውና አስፈላጊው የሕግ ለውጥና ማሻሻያ ቢደረግባቸው የማይከለክሉ ናቸው።[69]

ሁለተኛው የቀጥታ/ዞኒ መወሰኛ መስፈርት፣ የምንጩ ተዓማኒነት ነው። ቁርአንን በተመለከተ የተዓማኒነት *(ሱብት - Authenticity)* ጥያቄ ሊነሳበት የማይችል መሆኑ፣ በሁሉም ሊቃውንት ዘንድ የታመነና የተረጋገጠ በመሆኑ ቁርአን ከተዓማኒነት አኳያ ዞኒ ሊባል አይችልም።[70] ነገር ግን ሁለተኛ የሸሪዓ ምንጭ የሆነዉ ሱናሕ፣ ከነቢዩ ሙሀመድ ሕልፈት ከአንድ ምዕተ-ዓመታት በኋላ በዘገባዎች *(አሃዲስ)* የተሰባሰበ እና የተጠናቀረ በመሆኑ፣[71] በአዘጋገቡ ሂደት ውስጥ በመስኩ ምሁራን በተለዩ እንከኖችና ድክመቶች *(ዒለል አል-ሀዲስ)* የተነሳ ሕግም ሆነ ሌላ ሐሳብ ያዘለ የ*ሀዲስ* ዘገባ ተዓማኒነቱ አጠያያቂ ሊሆን ስለሚችል፣ ሕግ-ነክ ሀዲሶች *(አሃዲስ አል-አሀክም)* በዚህ መመዘኛ ዞኒ ክፍል ሥር ሊመደቡ ይችላሉ። በመሆኑም ለኢጅቲሓድ የተጋለጡ ይሆናሉ። ይህ ታሪካዊ እውነታ፣ በሱናሕ በኩል የተላለፈው የሸሪዓ ሕግ ለተለያዩ ሁኔታዎች ተለማጭ መሆን እንዲችል አድርጎታል።[72] ከተዓማኒነት በተጨማሪ፣ የ*ሀዲሶች* ቋንቋዊ አወቃቀር፣ እንደ ቁርኣናዊ ድንጋጌዎች ሁሉ ጥቅል *(ዐም)*፣ *ሙጥለቅ* (ያልተገደበ) ወዘተ. የድንጋጌ ቅርጾችን ሊይዙ የሚችሉ በመሆኑ፣ ይህ ቋንቋዊ ባህርያቸው የተለያየ ትርጉም እንዲሰጣቸው ምክንያት ስለሚሆን፣ በዚህ ረገድ ዞኒ እንዲሆኑና ሸሪዓው በኢጅቲሓድ አማካይነት የተለዋዋጭነት ባህርይ እንዲኖረው ያደርገዋል።[73]

ባጠቃላይ ቁርአን በጥቂት ጉዳዮች ላይ ልዩ እና ዝርዝር ሕግጋትን ያካተተ ቢሆንም በዋናነት ግን በሁሉም የኢስላም ርዕሰ-ጉዳዮች ላይ ማለት ይቻላል፣ ጠቅላይ የሕግ መርሆዎችን ብቻ በመዘርጋት በትርጉም አማካይነት ዝርዝር ሕጎችን የመቅረጹ ሥራ ለሕግ ምሁራን ተትቷል። ዝርዝር ሕግጋት የሚደነግጉት የቁርአን አንቀጾች ራሳቸው፣ በጥቅል መርሆዎች ሥር የሚካተቱ፣ ነገር ግን የመርሆዎቹን አተረጓጎም አቅጣጫ የሚያሳዩ የኢጅቲሓድ ማሳያዎች እንደሆኑ *ኢማም* አሹሻጢቢ ያስረዳሉ።[74] ይህን አይነተኛ የሸሪዓ ባህርይ መሠረት በማድረግ፣ በተለያየ ዘመናት እና ማሕበረሰቦች ውስጥ የነበሩ የሸሪዓ ሊቃውንት እንደ ወቅቱ እና አካባቢያዊ ሁኔታቸው፣ በዞኒ የቁርአን እና የሱናሕ ድንጋጌዎች ላይ የተለያየ አረዳድ እና አፈጻጸም ሲከተሉ ቆይተዋል።

ሌላው የሸሪዓውን የተለማጭነት ባህርይ የሚያስረዳው ነጥብ፣ መጠነ-ሰፊ የሆነ የሕግ አረዳድ ልዩነት *(ኢኽቲላፍ)* እና በውጤቱም ራሳቸውን ችለው መቆም የቻሉ የሕግ ጥናት ክፍሎች *(መዛሂብ)* መፈጠራቸው በራሱ፣ ሸሪዓ የተለያዩ የሕግ አተረጓጎሞችን፣ አፈፃጸሞችን እና ብዝኃነትን የሚያስተናግድበት፣ ብሎም የሚያበረታታበት ሰፊ መደብ ያለው መሆኑን መገንዘብ ይቻላል። የሸሪዓ ዋና ዓላማ የሕብረተሰቡን ጥቅም *(መሷሊሕ)* ማስጠበቅ፣ ጉዳትን ወይም ብልሹነትን *(መፍሰዲሕ)* መቀነስ/ማስወገድ እና ፍትሕን ማስፈን እንደመሆኑ፣ በውስጡ የያዛቸው ሕግጋት እነዚህን ታላላቅ ዓላማዎች ማሳካት

[69] Kamali, *Sharia Law: An Introduction*, *supra* note 4, p. 50.
[70] Kamali, *Principles of Islamic Jurisprudence*, *supra* note 21, p. 21.
[71] Jamila Shaukat, Classifcation of Hadith Litrature, *Islamic Studies*, Vol. 24, No. 3 (1985), p. 1.
[72] Kamali, *Sharia Law: An Introduction*, *supra* note 4, p. 52.
[73] Ibid.
[74] Kamali, Source, Nature and Objectives of Shariah, *supra* note 1, p. 220.

በማይችሉበት ሁኔታ፣ እንዲያውም ደረቅ አፈፃፀማቸውን መከተል ያልተጠበቀ ግለሰባዊና ማህበረሰባዊ ጉዳትን፣ ከፍትሕ እና ከርትዕ ጋር የሚቃረን ውጤትን የሚያስከትል ከሆነ፣ ሕጎቹ አስፈላጊውን ማሻሻያ ብሎም ለውጥ ሊደረግባቸውና ዓላማዎቹ እውን መሆን የሚችሉበትን የሕግ አረዳድ እና ባህል ማስፈን ያስፈልጋል። ሸሪዓው በምንም አይነት ሁኔታ ቢሆን ሊለወጥ ወይም ሊሻሻል አይችልም በማለት የሕጉን ቃላት ብቻ መከተል ያስፈልጋል የሚለው እይታ፣ ከግንዛቤ እጥረት መሆኑን እንደ ኢብን አል-ቀይም አል-ጀውዚያሕ እና ኢብን-ተይሚያሕ ያሉ የቀደምት ሊቃውንት፣ እንዲሁም እንደ ሙሀመድ ኢቅባል ያሉ የክፍለ-ዘመኑ የሙስሊም ተሃድሶ መሪዎች በአንክሮ ያስረዳሉ።[75]

ማጠቃለያ

ስለሸሪዓ ሕግ ምንነት፣ መሠረተ-ሐሳቦችና መገለጫዎች የሚያጠና *ኡሱል አል-ፊቅሕ* የተሰኘ ጥንታዊ የእውቀት መስክ ያለ ሲሆን፣ በመስኩ የድርሳናት እድገት መሠረት፣ ሸሪዓ በኢስላም ሃይማኖት ውስጥ የሚገኝ መለኮታዊ የሕግ ማዕቀፍ ሲሆን፣ ሁለት መሠረታዊ ምንጮች አሉት። እነሱም፣ *ራዕያዊ ምንጮች (ቁርአን እና ሱናሕ)* እና አመክንዮኣዊ ምርምር *(ኢጅቲሓድ)* ናቸው። በራዕያዊ ቀዳሚ የሸሪዓ ምንጮች ውስጥ የሚገኙ ሕጎች በአብዛኛው የጥቅልነትና የመርሆነት ባህርይ ያላቸው በመሆኑ፣ ለአመክንዮአዊ የሕግ ምርምር መነሻ እና መንደርደሪያ የሚሆኑ እንጂ፣ ዘርፈ-ብዙና ተለዋዋጭ የሕይወት መስተጋብሮችንና ግንኙነቶችን የሚገዙ ዝርዝር ሕጎችን አይደነግጉም። በመሆኑም ሰፊው የሸሪዓ ሕግ ክፍል *(ፊቅሕ)* በኢጅቲሓድ አማካይነት እንዲዘረጋ ምክንያት ሆኗል።። ከዚሁ ጋር ተያይዞ፣ ሸሪዓ፣ ‹የሊቃውንት ሕግ› የሚል መጠሪያ እንዳገኘ ተገልጿል። ሸሪዓ፣ በቀዳሚ ምንጮቹ ውስጥ በዋናነት የሕግ መርሆዎችን ብቻ ማካተቱ እና በጥቂት ጉዳዮች ላይ ብቻ ሲቀር፣ ጠቅላላው የሸሪዓ የሕግ ማዕቀፍ ኢጅቲሓዳዊ ምንጭ ያለው መሆኑ፣ ተጨባጭ እውነታዎችን የማገናዝብ፣ ሂደታዊ የለውጥ መንገድ የመከተል አቅም እና የተለማጭነት ባሕርያት እንዲኖሩት አስችሎታል።

በመጨረሻም በኢትዮጵያ የሸሪዓ ፍርድ ቤቶች ተፈጻሚ እየሆነ ያለው የቤተሰብ፣ የውርስ፣ የስጦታ *(ሐባ)* ወዘተ. የሸሪዓ ድንጋጌዎች፣ ከላይ በቀረበው የመግቢያ ዳሰሳ እና ከኡሱል አል-ፊቅሕ የጥናት መስክ ተቀንጭቦ እንደቀረበው፣ የሸሪዓ ጠቅላላ መርሆዎችን፣ ዓላማዎችን እና ባህርያትን መሠረት ያደረገና ያገናዘበ መሆን ይገባዋል።

[75] Ibid, p. 55.

Sharia Law: Its Nature, Characteristics and Sources

Alyu Abate Yimam[*]

Abstract

Sharia can be defined as a divinely inspired legal system that exists within the religious of framework of Islam. Sharia represents two distinct but directly related sets of laws. The first segment consists of theories, principles, and objectives that serve as foundations for the promulgation and interpretation of specific laws. There is an independent discipline devoted to the study of philosophical and juristic principles of Sharia law known as Principles of Islamic Jurisprudence *(Usul al-Fiqh).* The other part of Sharia is concerned with the regulation and guidance of every day interaction of individuals and society. This part of Sharia espouses detail legal rulings on the worldly matters *(Mua'malat)* on one hand and set of rules governing ritual matters *(Ibadat)* on the other. The *Mua'malat* laws have the objectives of realizing personal and public benefit, ensure peace and wellbeing and prevention of harm and corruption in a society. Sharia has all important attributes of rationality, gradualness and adaptability that are essential for effective governance of human relationships at all times and circumstances.

Key Words

Sharia*, Fiqh,* Source of Sharia, Quran, *Sunnah, Ijtihad*, Adaptability, Rationality

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