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ቅጽ ፲ ቁጥር ፪ | ሰኔ ፪ሺ፲፪
Vol. 10 No. 2 | June 2020

In This Issue **በዚህ ዕትም**

በባሕር ዳር ዩኒቨርሲቲ ሕግ ት/ቤት በዓመት ሁለት ጊዜ የሚታተም የሕግ መጽሔት
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በ፪ሺ፪ ዓ.ም. ተመሠረተ
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ቅጽ ፲ ቁጥር ፪		ሰኔ ፪ሺ፲፪
Vol. 10 No. 2		June 2020

In This Issue	በዚህ ዕትም
Articles	ጥናታዊ ጽሁፎ
Selected Court Cases	የተመረጡ ፍርዶች

በባሕር ዳር ዩኒቨርሲቲ ሕግ ት/ቤት በዓመት ሁለት ጊዜ የሚታተም የሕግ መጽሔት
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MESSAGE FROM THE EDITORIAL COMMITTEE

The Editorial Committee is delighted to bring Volume 10. No. 2 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.

የባሕር ዳር ዩኒቨርሲቲ የሕግ መጽሔት
Bahir Dar University Journal of Law

ቅጽ ፲ ቁጥር ፪		ሰኔ ፪ሺ፲፪
Vol. 10 No. 2		June 2020

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Bahir Dar University Journal of Law

ቅጽ ፲ ቁጥር ፪		ሰኔ ፪ሺ፲፪
Vol. 10 No. 2		June 2020

Content

Articles

Selected Court Cases/የተመረጡ ፍርዶች

Address

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Foetal Personhood in the Jurisprudence of Abortion in International and Comparative Law*

*Razaq Justice Adebimpe***

Abstract

One of the most disputed issues concerning the foetus particularly vis-à-vis the law on abortion is its personhood. While there is unanimity among scholars on the need to be definitive on what foetal personhood is, there abound diametrically opposing arguments about its legal status. It is imperative to resolve this conundrum because of the effect of the findings thereon on abortion debates. This is because if the foetus is regarded as a legal person abortion would be homicide, except in self-defence. If otherwise, the procedure may be legal, even on request. Thus, determining the status of the foetus is the starting-point for resolving most of the issues on the jurisprudence of abortion. It is against this backdrop that this article examines the laws of selected countries and international and regional instruments on the status of the foetus in comparison with women's right to abortion. The article attempts to resolve the misgivings arising from the ascription to the foetus of certain pre-birth rights even while the foetus - the supposed bearer of those rights - is not yet born and in spite of the retention of the born-alive-rule in most legal systems. The article concludes that though the foetus is considered precious - even from conception - there is no basis for supposing that the foetus in-utero have inherent legal personality a fortiori the right to life as to reject women's right to abortion unless such provision is otherwise unequivocally imputed into the law of a country.

Keywords: Abortion, foetal rights, international law, personhood, women's rights

Introduction

There has been a serious controversy among scholars on the concept of foetal personhood in relation to the conundrum over women's rights to abortion. Resolving the controversy is inevitably the foundation for solving this foetus-related legal issue in abortion debate. It is in the light of this, and the renewed

* This paper is excerpted from the doctoral thesis "Liberalization of Abortion Law in Nigeria with Respect to Pregnancies Arising from Rape" by the author and awarded by the University of Ilorin in 2019. The author is grateful to Professor A.A. Oba and Dr. M.K. Adebayo who have overseen the various phases of the research with profound zeal. The author is also very grateful to the Editor-in-Chief and the anonymous reviewers for the scholarly comments.

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claim of foetal right to life that this article focuses on how the law approaches the question of foetal personhood vis-à-vis abortion.

The article is divided into four main sections. After this introduction, the first main section of the article entitled "theoretical discourse on foetal personhood" reviews the theoretical perspectives on the status of the foetus. In this section the author argues that foetuses are inchoate and not distinctive beings. The second section assesses the significance of the born-alive rule. In that section the author attempts to resolve the recondite arising from certain pre-birth rights that are usually accorded the foetus in spite of the retention of the rule in most legal systems. In the third section styled "overview of national legal systems on the status of the foetus" the author examines the legal systems of some selected jurisdictions on the status of the foetus. This provides informed explanations on the provisions of some national laws and how their domestic courts have construed foetal personhood in diverse situations. Importantly, the author provides statutory and judicial authorities for the supposition that domestic laws do not bestow personhood on the foetus in a way that reject women's rights to safe abortion. The fourth section designated "foetal's personhood in international law" brings to fore the developing jurisprudence in international and regional human rights laws on the status of the foetus. Then the author draws conclusions from the study.

1. Theoretical discourses on foetal personhood

This section of the article focuses on the theoretical perspectives to the discourse on what it takes to be regarded as a person. While discussing this, some emphasis is placed on the well-known 'born-alive' rule. However, issues regarding foetal personhood, particularly in the context of abortion, inescapably start from addressing another important question: whether foetuses are human beings. This is a question to which if answer thereto is in the negative would render follow-on discussions on personhood pointless. However, there exists a great deal of divergent views on foetal human-hood between the least ceiling of conception and a much higher ceiling of viability.

Genetics makes it known that human-foetus is, from conception possessed of all human cryptograms. John Noonan – a foremost proponent of this position asserted that the claim that it is at conception that the foetus becomes a man is premised on the fact that it is at that moment that "the new being receives [all

human] genetic code"[1] which make it a human being. So its later growth following conception is not developing to a human that it never was but becoming more human that it has always been.[2] Thus it is only plausible, and indeed unmistakable, to hold that the outcome of human copulation – the human foetus could be nothing else but a human-being.[3]

It is also from conception that the probability that semen could continue to develop to baby which was less than one out of well over a hundred million, changed to about eight out of every ten.[4] And it is from conception that the foetus may start to go through an unbroken sequence of developments ranging from make-up, shape and traits[5] with no significant transformation in its feature or traits. Hence, except perhaps for attitudinal explanations there is too little, if any, logically justifiable classification differentiating human foetus from human-beings.

However, more serious difference of opinions persists on foetal personhood. But most scholarly writers agree, more or less with the six psychological standards of personhood, namely, rationality; consciousness; ability to be regarded as person by other persons; capacity to act in response to stimuli; ability to communicate verbally and self-awareness as articulated by Daniel Dennett.[6] The Dennett's criteria have indeed been applauded by some writers as indispensable

1. John T. Noonan, An Almost Absolute Value in History, in Ronald Munson, (ed.), *Intervention and Reflection: Basic Issues in Medical Ethics,* Fifth Edition, Wadsworth, Belmont, (1996), pp. 66-69, [hereinafter Ronald, *Intervention and Reflection: Basic Issues in Medical Ethics].*
2. *Id.,* Robert P. George, Public Reason and Political Conflict: Abortion and Homosexuality, *Yale Law Journal*, vol.106, (1997), p. 2493; Teresa Iglesias, In Vitro Fertilization: The Major Issues, *Journal of Medical Ethics,* vol.10, No.1, (1984) pp.32-37. Cf. Jed Rubenfeld, On the Legal Status of the Proposition That 'Life Begins at Conception, *Stanford Law Review*, *(*1991), vol. 43, (1991) p. 625 stating that the contention that it is at conception that the foetus becomes a man is 'virtually unintelligible', and noting to the contrary that the foetus only grows to become a man.
3. As the French geneticist Jerome Lejeune asserted, the fact that after conception "a new human has come into being" is now evident: cited in Norman L. Geisler, *Christian Ethics: Options and Issues*, 2nd edition, Baker Academic, Michigan, (2010), p.49, [hereinafter Norman, *Christian Ethics: Options and Issues*].
4. Ronald, *Intervention and Reflection: Basic Issues in Medical Ethics, supra* note 1; see also George, *supra* note 2.
5. Machteld Nijsten, *Abortion and Constitutional Law: A Comparative European-American Study,* European University Institute, Florence (1990), p. 59-60.
6. Daniel C. Dennett, *Brainstorms: Philosophical Essays on Mind and Psychology,* Penguin, *(*1997), pp. 264-271. Cf. Christian Perring, Degrees of Personhood, *The Journal of Medicine & Philosophy,* vol. 22, No. 2 (1997) pp. 173-197.

attributes of persons[7] for though the specifics of the standard are arguable they offer strong basis for examining the concept of foetal personhood.

However, apart from the third condition stated above, namely, ability to be regarded as a person by other persons, none of the other criteria is met by the foetus. The foetus is not a rational being for lacking in ability to deal with or reflect on multifaceted concepts, and for not having the capacity to choose to work towards achieving any aspiration. For its defaulting in rationality the foetus would likewise be lacking in interest to continue living. Accordingly, abortion cannot generally be said to be detrimental to it. Consciousness requires that a "person" should be cognisant of his deeds and aspirations: the foetus obviously lacks capacity to do either of this. The foetus is also not mentally able to reciprocate others' act or omission to act with respect to it. The foetus also lacks the ability for verbal communication thus undoubtedly falling short of meeting at least five of the six criteria.

It has been argued, disagreeing with the Dennett's standards, that there are no stages in gestation that the foetus was not a potential person.[8] It has also been stated that all "persona nature" needed as a "person" are acquired at conception.[9] These submissions may be valid, if at all, only in three situations, namely: when not made in the context of abortion; when the harm to the foetus is with respect to weakening of the foetus ability after birth; and thirdly as to be averse to abortion at will. It should be added that, although abortion at will is antithetical to life, it is not akin to murder. In addition, though the fact that the foetus is possessed of human genetic cryptogram may be a basis to confer on it some measure of protection; this cannot match a woman's right to self-determination. Accordingly, a woman's claim to a safe abortion ought not to be contingent on the foetus' lack of legal personality, but enforceable as a matter of course. This is because a woman is, for all intents and purposes more important than the foetus who at best is only a potential person. Thus, notwithstanding the foetus' supposed potential personhood, the woman ought to be entitled to abort an

7. Jens David Ohlin, Is the Concept of Person Necessary for Human Rights? *Columbia Law Review*, vol.105, No.1, (2005) pp. 209-249. Bonnie Steinbock, *Life Before Birth: The Moral and Legal Status of Embryo and Fetuses,* Oxford University Press, (1992), p. 42.
8. Iglesias, In Vitro Fertilization: The Major Issues, *supra* note 2, at 32; Bernard N. Nathanson & Richard N. Ostling, *Aborting America,* Doubleday & Company Inc., New York, (1979), p. 216; Robert P. George & Christopher Tollefsen, *Embryo: A Defense of Human Life*, Doubleday, New York (2008) p. 58.
9. Francis J. Beckwith, Explanatory Power of the Substance View of Persons, *Christian Bioethics,* 2004, vol.10, pp. 33-54; Francis J Beckwith, *Defending Life: A Moral and Legal Case against Abortion Choice,* Cambridge University Press, (2007), p. 67.

incursion – unwelcome pregnancy. This, as might be expected, is in line with some countries' laws on abortion.[10]

However, to the extent that Dennett's criteria rules out not only the foetus but even infants, of legal personality on the basis of psychological conditions, it is not without flaw. Otherwise, it would, unimaginably, follow that new-borns can only be regarded as potential persons. Dennett's application of his criteria to infants is stretching his thoughts too far, for it is trite law that a foetus that has been completely detached from the mother, in a living state, is a person. Hence, it is submitted that it is preferable that the application of the criteria be restricted to the foetus.[11] Notwithstanding the supposed shortcoming however, Dennett's conditions have been acclaimed by commentators as important for personhood.[12]

Another perspective to foetal personhood is what has become known as the social recognition standard. This requires that to be recognised as a 'person' the foetus must have been socially recognised as such. Quickening by the foetus and applauding of same by the woman thereby making others to follow suit could be an indication that the foetus is socially recognised as a person. Social recognition standard has been enhanced by medical equipment such as the three-D technology and ultrasounds which make it possible for pregnant-women and medical doctors to, by the fifth month, know the gender of the foetus. So, it is now possible for the foetus to assume the pronoun "he" or "she" instead of "it". Some parents in fact christen their foetus as soon as they ascertained its sexual category. Such practice of naming the foetus has been said to be an indication of personhood.[13] Technology has also made it possible for doctors to distinguish

10. See the Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation no. 414/2004 (hereinafter the Criminal Code or the Code): Article 551, sub-article 1(a); and the Choice on Termination of Pregnancy Act, No.92 of 1996 of South Africa: §2 (d); (discussed in material detail post) allow abortion in case of rape resulting in pregnancy.
11. Elias N. Stebek, *Ethiopian Law of Persons: Notes and Materials,* Justice & Legal System Research Institute (2007) p.12-3; Henneretha Kruger, *et al*., *The Law of Persons in South Africa*, Oxford University Press, Southern Africa, (2010), pp. 22, 25; Jacqueline Heaton, *The South African Law of Persons*, 3rd edition, Butterworth, Durban (2008), pp.7-8; Ngaire Naffine, Who Are Laws Persons? From Cheshire Cats to Responsible Subjects, *The Modern Law Review,* vol. 66 No. 3, (2003) p. 346.
12. Jens David Ohlin, Is the Concept of Person Necessary for Human Rights? *supra* note 7; Steinbock, *Life Before Birth: The Moral and Legal Status of Embryo and Fetuses, supra* note 7; see also Loren E. Lomasky, *Persons, Rights and the Moral Community,* Oxford University Press, (1987), p.197.
13. Arnold Van Gennep, *The Rite of Passage,* Monika B. Vizedom & Gabrielle L. Caffee (trs.), Routledge, (2010), p. 62.

the foetus as a different entity from the pregnant-mother bearing them thus further enhancing social perception of the foetus.[14]

Accordingly, it has been asserted that what signals foetal personhood is its recognition by the mother and others.[15] A human-being is said to be transformed into a "person" not necessarily by the sum of his genetic materials or age-related capacity, but his being socially recognised. In other words, the foetus becomes a "person" when it is recognised as such by the mother by her decision to bring its gestation to term, thereby making other members of the public to also recognise it as a person.

Conversely, if the woman chooses abortion, then she must have decided also not to recognise the foetus as a person in a social context.[16] If the State purports to confer personhood on the foetus whilst the pregnant-mother chooses otherwise, it follows that the State rejects the mother's bodily integrity and privacy.[17] However, while progress in medical technology supports social recognition child birth remains the most important landmark.[18] This is because prior to birth the foetus mainly lives in obscurity, and is rarely identified as an independent being. Its birth is its evolution from obscurity to reckoning. In view of this, it is imperative to now turn the discourse to assessing the significance of the famous "born-alive" rule to the question of foetal personhood.

2. The significance of the "born-alive" rule

Under the (originally, common law) born-alive-rule, a person may not be liable for killing or harming the foetus in the womb until it is born, and born alive. In other words, to be regarded as a person one must have been wholly detached from its mother and afterwards lived and autonomously functioned.[19] It is

14. Nicole Isaacson, The 'Fetus-Infant': Changing Classifications of In Utero Development in Medical Tests, *Sociological Forum*, (1996), vol.11, p. 460; Robert H. Blank, *Mother and Fetus: Changing Notion of Maternal Responsibility*, Greenwood Press, New York, (1992), p. 105.
15. Marjorie R. Maguire, Symbiosis, Biology and Personalization, in Edd Doerr & J.W. Prescott, (eds.), *Abortion Rights and Foetal 'Personhood',* Centerline Press, Long Beach, C.A. *(*1989), p. 13.
16. *Id*.
17. *Id.*
18. See *infra* note 21.
19. Bryan A. Garner (ed.) *Black's Law Dictionary,* 8th edition, West Publishing Co., Paul Minn. (1990) p.179; Elias N. Stebek, *Ethiopian Law of Persons: Notes and Materials,* Justice & Legal System Research Institute (2007) p.12-3; Henneretha Kruger, *et al*., *The Law of Persons in South Africa*, Oxford University Press, Southern Africa, (2010), pp. 22, 25; Jacqueline Heaton, *The South African Law of Persons*, 3rd edition, Butterworth, Durban (2008), pp.7-8.

immaterial that it is for a very short while.[20] The rule is applicable in many jurisdictions including Nigeria, Ethiopia and South Africa *et cetera* where the foetus has to be fully born or otherwise completely detached from the mother and alive before it becomes a person.[21] Thus, an incomplete disjunction, no matter the extent, is not satisfactory for personhood. For that reason, it is not homicide to terminate the foetus' life until it has completely proceeded in a living state from the body of its mother[22] although the offender may, for instance (in Nigeria) be punished for other offences such as "killing an unborn child"[23] — a near equivalent of the now abolished crime of "child destruction" in English law.[24]

It is apposite to add however, that the protection afforded the foetus by the offence of "killing an unborn child" does not, in effect, make the foetus a legal person in the real sense of the doctrine. The protection is akin to that which is generally afforded animals against wanton killings,[25] notwithstanding that the law does not regard them as persons. Hence, the foetus too needs not be deemed a legal person before being afforded such kind of safeguard by law.

In addition, it is important to clarify the seeming ambiguity in the provisions of the Nigeria's criminal statutes. While on the one hand, the law provides that the foetus is not "a person capable of being killed" until it "has completely proceeded in a living state from the body of its mother",[26] on the other hand, it

20. Elias N. Stebek, *id*., Kruger *et al., id.,* Ngaire Naffine, Who Are Laws Persons? From Cheshire Cats to Responsible Subjects, *The Modern Law Review,* vol. 66 No. 3, (2003) p. 346.
21. Penal Code (Northern Nigeria Federal Provisions) Act Chapter P4 Laws of the Federation of Nigeria 2004 (hereinafter Penal Code Act) applicable to the 17 northern of Nigeria and the Federal Capital Territory: §5(2) of the Penal Code Act provide *inter alia* that "a child becomes a person when it has been born alive…" See Criminal Code Act Chapter C38 Laws of the Federation of Nigeria 2004 (hereinafter the Criminal Code Act) applicable to the 17 southern states: § 307 of the Criminal Code Act provide that "A child becomes a person capable of being killed when it has completely proceeded in a living state from the body of its mother". See also Civil Code Proclamation No.165/1960 of Ethiopia (hereinafter the Civil Code), Article 1 of the Civil Code states that "the human person is subject of rights *from its birth*…" By these provisions, the foetus is not regarded as a person. See also the South Africa's case of *S v. Mshumpa & Another* (2008) (1) SACR 126 at 56-62 in which the court held that to be qualify as a person and for a killing to be regarded as a murder the victim must have been born alive.
22. Penal Code Act, *id.,* § 5 (2); Criminal Code Act, *id.,* § 307.
23. Penal Code Act, *id.,* §§ *235-236*; Criminal Code Act, *id., § 328*.
24. Infant Life (Preservation) Act, 1929 of the United Kingdom: § 1(1).
25. Penal Code Act, *supra* note 21, §§ 207-208, 329-330; Criminal Code Act, *supra* note 21, § *495*. The sections refer to cruelty, mischief by killing, poisoning or maiming, tortures, infuriates, rendering useless any animal, failure to exercise reasonable care regarding their protection *et cetera*. The punishment thereof is three years imprisonment or fine, or both. Cf. the Criminal Code of the FDRE, *supra* note 10: Article 882, which though also prohibits cruelty or ill-treatment *et cetera* towards animals but only in the public places.
26. See *supra* note 21.

provides that any person who causes the foetus' death from the commencement of the process of labour "would be deemed to have unlawful killed the child."[27] It is submitted that this does not bestow personhood on the foetus. The intent of the law is only to prohibit wanton killing of a child in the course of child-labour. Otherwise, if the child is killed in the course of delivery (when it cannot be shown to have had a separate existence) it may neither be abortion nor homicide in Nigerian criminal law.[28] The provisions[29] may likewise be used to prosecute for a late abortion.

Furthermore, the law in most legal systems ascribes some other degrees of fictional rights like inheritance rights. This is in particular where a father dies while his wife is still pregnant. This is envisaged in Article 834 of the Ethiopian Civil Code.[30] It may also be applicable when a father dies in a situation that should enable the foetus receive damages or otherwise be indemnified. Those imputed rights inflame discussions as to whether the foetus is by being so attributed regarded as a person given that a non-person is generally not so recognised.

The question relating to the ascription of some degree of protections and rights to the foetus vis-a-vis the born-alive-rule may be construed in two diverse ways. On the one hand, it is possible to adhere to the plain connotation of the rule in order to validate the supposition that the foetus lacks legal personhood, and therefore, as a rule, lacks legal rights or legal capacities being only an addendum to its mother until it is born.[31] On the other hand, the foetus' personality could be regarded as being unique. This is in the sense that it has certain legal rights, though with no corresponding duties, provided that it is ultimately born alive. But foetal personhood in this, second sense, is merely a means of attaining, rather than attainment of rights. Thus, as provided in various legal systems the foetus has personhood only at life birth[32] but in order to safeguard or resolve specific post-birth concerns it is endowed with certain rights before birth. The laws do not, in such cases, see birth on its own as the sole determining factor for ascribing personhood. For example, to resolve issues related to interests at stake[33] of a foetus "(who is) merely conceived" in the bequest of its deceased

27. See the Criminal Code Act, *supra* note 21: § *328*; the Penal Code Act, *supra* note 21: §*236*.
28. It may neither be abortion under the Penal Code Act: §§ 232 and the Criminal Code Act: § 228; nor homicide under §§ 220-221 of the Penal Code Act and of the Criminal Code Act: §§ 316-317 respectively.
29. That is, §*328* of the Criminal Code Act, and the Penal Code Act: §236.
30. See *supra* note 21.
31. Kruger *et al*., *The Law of Persons in South Africa*, *supra* note 19, p. 22.
32. See *supra* note 21.
33. Article 834 of the Civil Code, *supra* note 21.

father Article 2 of the Ethiopia's Civil Code provides that it "shall be considered born, provided that he is ultimately "born alive and viable".[34]

It should be emphasised, however, that the ascription that the foetus has legal right to the inheritance, not at birth but from the point of the demise of the testator or intestate is purely a legal proposition. The ascription is based on a presumption, albeit rebuttable, that the deceased testator or intestate intended to benefit not just those that are alive prior to his demise but also the unborn foetus[35] so long as conception had occurred at the time of his demise.

The inheritance rights discussed herein may only be regarded as a legal apparition because the supposed right holder is not yet born. This is, in the same way as the naming right which is sometimes ascribed to the foetus by some people is only in theory. There may, however, be justifiable grounds to posit that the foetus or a human being need not be deemed to be persons in order to be accorded naming rights. This is just as certain animals and birds are also sometimes given proper names, although they are, certainly not, deemed to be persons. Thus, personhood in both cases is not, in the real sense of it, conferred on the unborn by virtue of those legal fictions, since those imputed rights are held over till the foetus is born alive when the rights are no longer fictitious.

3. Overview of national legal systems on the status of the foetuses

In evaluating legal personality in relation to the foetus, this section reviews some related legislations and judicial decisions of selected jurisdictions. It is important to state at the outset that while most of the cases are embracing and sometimes encompass loads of related and other issues; this section is, as much as practicable, centred on aspects of the decisions pertaining to foetal personhood in relation to abortion rights.

Starting from the United States, the Supreme Court decisions in the case of *Roe v. Wade,*[36] followed by successive cases on the matter reveal what the jurisprudence pertaining to foetal personhood in the U.S. is. The *Roe's* judgment concerned a single-lady that was disallowed to request for legal abortion. The

34. A child who lives for up to 48 hours after birth is presumed to be viable. But a child may be still be presumed viable if death occurred before the end of the period, as a result of a cause(s) other than deficiency in bodily makeup or health, since he/she would otherwise have survived but for that other cause(s): Article 4 sub articles 1-2 of the Civil Code, *supra* note 21.
35. Compare the South African case of *Ex Parte Boedel Steenkamp* 1962 (3) SA 954 in which the court stated in strong term that it will be ready to reject the legal apparition where the deceased testator had expressed a clear intention to exclude the foetus in the sharing of his assets.
36. 410 US 133 (1973).

proceedings drew global interest and the court was flooded by briefs from *amicus curiae* in defence of the two diametrically opposing sides of the controversy. Briefs opposed to abortion, in the main, contended that the foetus is not only "human" but also a "person" to be safeguarded by the State. On the contrary, briefs in support of the pro-choice contended that the foetus *in utero* is not a person, and that in the circumstance, the woman's rights to self-determination on abortion should be safeguarded. The court gave judgment denying foetal personality and recognised citizens' right to a safe legal abortion.

The court, per Blackmun, who wrote the lead judgment, started by a chronological assessment of abortion related policies. This ended with pronouncements rejecting foetal personality and implying that a pregnant-mother had always had a considerable right to abortion. The court affirmed that to confer personality on the foetus would automatically ruin women's right to privacy and abortion[37] as the foetus' right to life would thereby have to be constitutionally protected. It affirmed that the phrase "person" as used in the constitution was applicable only after birth of a child[38] and therefore cannot be used for the foetus.

Furthermore, the Court emphasised that exemptions provided in the various abortion laws of the United States (like that of most other countries — Nigeria and Ethiopia inclusive) are to preserve the life or health of the pregnant-woman. It was noted that established laws through the ages have at no time granted personhood to the foetus in the true sense of the phrase.[39] It is apt to hold that if the courts had considered the foetus to be a person, it would have had to regard abortion as culpable homicide in which case the exceptions (apart from for the purpose of saving a woman's life) would not have been permitted.

Following its decision denying the foetus of personhood, the court went on to declare the law criminalizing abortion as unconstitutional. But after reviewing the State law being contested under the "strict scrutiny" standard — the highest level of judicial review in the U.S.[40] the court overruled the submission that the state should not be concerned with safeguarding the foetus' "potentiality" to live.[41] The court ruled that the state's concern increases as the foetus grow,

37. *Id.,* at 154.
38. *Id.,* at 156-57.
39. *Id.,* at 162.
40. *Regents of the University of California v Bakke*, 438 US 265 (1978); see Evan Gerstmann and Christopher Shortell, The Many Faces of Strict Scrutiny: How the Supreme Court Changes the Rules in Race Cases, *University of Pittsburgh Law Review,* vol. 72, No. 1, (2010), p. 3.
41. *Id.,* at 159.

subject to constitutional limitations. In other words, the right to abortion is a qualified one that should be considered against the State's interest.[42] The Court recognised two interests which are deemed to be compelling enough to allow States to foist certain limits on the right to terminate a pregnancy; namely, that the State should safeguard maternal health[43] and the "potential life".[44]

The Court formulated a three-trimester framework by which the conflicting right to an abortion and the protection of a potential life is to be determined. Throughout out of the first trimester, when abortion was considered not as risky giving birth, the court held that a woman's right to privacy is at its strongest, and thus the State could not prohibit the procedure for whatever reason; except perhaps to lay down certain least safety measure, like stipulating that only authorised medical personnel may carryout abortion. Throughout of the second trimester, the court held that higher risk of abortion to woman's health gives the state sufficient interest to make health regulations on abortion[45] provided that such regulations were fair, and are made only to safeguard woman's health. From the third trimester when the foetus is believed to be viable,[46] it was held that the State had a "compelling interest" in safeguarding potential human life which interest prevails over the woman's right to privacy. Hence, the State may control or restrict the procedure in order to protect its interest in the potential life unless when the procedure is required to save the mother's life or health.[47]

While *Roe's* judgment was not originally intended to apply to issues unconnected to abortion, it has nonetheless been used as reference in some legal proceedings relating to the foetus other than in abortion. Two years after *Roe's Decision*, precisely in 1975, the court of appeals adjudicated the case of *Toth v. Goree*[48] in which the court laid down the principles for allowing 'viability' in cases involving loss of life and injury. In that case, following a motor accident a pregnant-mother had a miscarriage of a three months old pregnancy. It was held that a foetus which lacks capacity for survival outside the woman's uterus had no legal personality under the Wrongful Death Act. Also, relying on *Roe's decision* the court held in *The People v. Smith*[49] that the foetus having not yet

42. *Id*., at 150.
43. Id., at 150 and 163.
44. *Id*.
45. *Id*., at 163.
46. Viability is a stage in foetal development when the foetus is 'potentially able to live outside the mother's womb, albeit with artificial aid: see *ibid* at 150, 163.
47. *Id*., 163-164; *Planned Parenthood of Central Missouri v Danforth*, 96 S. Ct. 2831 (1976).
48. 237 NW 2d 297, 65 Mich. App. 296 1975.
49. 59 Cal. App. 3d, 751 1976.

been able to live autonomously from the mother did not meet the elements for indicting the assailant for culpable homicide.

However, the decision in *Roe v Wade* is not an authority for the supposition that it is impossible for a foetus to suffer unlawful fatality, or that the mother is not entitled to damages on its behalf. This is because there exist, in that circumstance, no clash between the woman and her foetus; the injury is rather to, or against both of them. Therefore, the decisions in *Toth v. Goree*[50] and *The People v. Smith*[51] were drawbacks to both the pregnant-woman who is assaulted and the foetus, especially because the woman's determination to carry the foetus to term has been sabotage. Thus, by causing miscarriage of the pregnancy other than in cases of abortion, the mother is bereaved. The mother may hence be entitled to damages; and to see that the assailant is penalised. Thus, it is inapt to allude to *Roe's case* as an authority in circumstances unrelated to abortion.

It is apposite to emphasise however, that while the court in *Webster v. Reproductive Health Services*[52] seems to have laid down some limitations on the right to seek abortion when a majority's decision held that abortion was a "liberty interest" and not a basic right, but none of the Justices on the panel suggested that the foetus is a person. The court ruled that what the law at issue did was only to "promote state's interest in safeguarding (potential) life". The decision neither negates *Roe's decision* nor departed from the original opinion that the foetus is not a person.

Jurisprudential developments in Canadian courts have also declined to impute legal personality to the foetus. *Medhurst v. Medhurst & others*[53] is a case concerning a father who tried, on behalf of a foetus, to stop his wife from terminating their pregnancy. On appeal, it was held that a father is not legally entitled to sue on behalf of a foetus because he – the father may only act in a representative capacity for a person. The same issue was dealt with in *Joseph Borowski v. Attorney General of Canada*[54] where it was contended that a clause of the Canadian Charter of Rights and Freedoms availed the foetus of right to life because the phrase "everyone" as used therein encompasses the foetus. On appeal, it was held that, as far as the Canadian law was concerned, foetuses had at no time ever been regarded as persons; and that if the Parliament had intended

50. *Supra* note 48.
51. *Supra* note 49.
52. 492 US 490 (1989).
53. [1984] 9 DLR (4th) 252.
54. [1989] 1SCR 342.

to bring about a change in law, then its choice of words would have been unequivocal.

Furthermore, a unanimous decision of the full panel of the Canadian Supreme Court in *Chantal Daigle v. Jean-Guy Tremblay*[55] is an authority for the supposition that the foetus supposed rights are intimately attached to that of the mother. In that case, a man took his erstwhile girlfriend Ms. Daigle to court seeking an injunction to stop the girl from going on with an intended abortion. On further appeal to the Canadian Supreme Court which upturned the order, it was held that though the foetus is at times treated like persons especially when the need arises to safeguard its post-birth concerns, it is not a person in law. Regarding the question as to the "father's right" it was held that, if any, it is not as to override the girl's determination. The court considered how the foetus' rights was treated under the Anglo-Canadian law, and found that it has always been indispensible that the foetus is born-alive in order to be considered as a person or granted the right to life.

In *R v. Mary C Sullivan & Another,*[56] two persons were engaged as midwives despite the fact that they were not registered as such. In the course of childbirth which was done at home instead of at a hospital, contractions ceased after the baby's head had become visible. The two "midwives" made unsuccessful efforts to stimulate contractions. After the woman was injured in the process, she was taken to a hospital where the child was severed from the women but dead. They were charged with negligence with respect to both the child and the woman. It was held that as negligence may only be committed with regard to persons, and that the defendants/mid-wives could not be liable regarding the child who died before birth since the child was not completely severed from its mother alive.

Similarly, in English law the foetus is not accorded rights as an independent being aside from the pregnant woman. In *Re F. (in utero),*[57] concerned about the wellbeing of the foetus of a mentally unsettled pregnant-woman a local authority applied to the court to give order making the foetus a ward of the court. The application was declined for want of jurisdiction. It was held that until after live birth which turns the foetus into a "person" the foetus lacked independent life beyond that of its mother and hence not bound by guardianship order, and so it could not be made a ward.[58] The Nigeria's law, as embodied in the two principal

55. [1989] 2 SCR 530.
56. [1991] 1 SCR 489, 502; *R v Henry Morgentaler & Others* 1 SCR 30 (1988), [1988] 44 DLR 385 SC (Canada).
57. [1988] 2 WLR 1288.
58. See also *Paton v Trustees of the British Pregnancy Advisory Service* [1978] 2 All ER 987.

penal statutes prohibits abortion[59] except for the purpose of "saving" the life of a woman.[60] The court in *R v. Edgal*[61] following the English decision in *R v. Bourne*[62] broadly defined the word "unlawfully" as used in section 228 of the criminal code to except efforts to save a woman's life and mental health. This is consistent with the principle in most jurisdictions where the phrase saving or preserving the life of a pregnant-woman has been construed as including efforts to save mental health, though it may not have been expressly stated in the law. [63]

Abortion may, on paper, be regarded as unlawful in Ethiopia. It is unlawful to the extent that it is regulated by the country's Criminal Code[64] and disallowed on request.[65] The law, strengthened by a procedural guideline[66] made pursuant to Article 552 sub-article 1 of the Code exceedingly liberalised the procedure. This is in the sense that the law permits the procedure on a number of, mainly women centred grounds such as, where a pregnancy is a result of rape or incest[67]; or when the woman, due to a physical or mental deficiency, or her

59. See the Penal Code Act, *supra* note 21, §232, which provide that "whoever voluntarily causes a woman with child to miscarry shall if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment for a term which may extend to 14 years or with fine or both". See also the Criminal Code Act, *supra* note 21: §228, which provide that "any person who with intent to procure miscarriage of a woman…is guilty of a felony, and is liable to imprisonment for fourteen years".
60. The Penal Code *ibid*.
61. [1938] 4 WACA 133.
62. [1938] 2 All ER 615, where it was held that though there may not be an instant threat to the life of a girl who became pregnant following a gang-rape; but because she could be mentally wreck if compelled to continue with the pregnancy an abortion may be allowed.
63. For more on Nigeria's law on abortion: see O. Odunsi, Abortion and the Law, in I.O. Irehobhude and R.N. Nwabueze (eds.), *Comparative Health Law and Policy: Critical Perspectives on Nigerian and Global Health Law,* Routledge, (2016) pp.197-216; TBE Ogiamien, *Abortion Law in Nigeria: The Way Forward* (Occasional Working Paper Series) (Women's Health and Action Research Centre, Benin 2000); R.J. Adebimpe, Liberalization of Nigeria's Abortion Laws with Focus on Pregnancies Arising from Rape: An Empirical Analysis, *African Human Right Law Journal*, vol. 20, No. 2, (2020) (forthcoming).
64. The Criminal Code, *supra* note 10, section II – Crimes against Life Unborn; Abortion: Articles 545 to 552.
65. Article 545, sub-article 1 *id*.
66. FDRE-FHD, Technical and Procedural Guidelines for Safe Abortion Services in Ethiopia (Family Health Department, Addis Ababa 2006).
67. Article 551, sub-articles 1(a). A woman seeking abortion under this heading is relieved of the evidentiary burden of proving rape or incest, or identifying of the offender: Article 552, sub-article 2.

minority, is unfit to bring up the child.[68] The Code also provide for mitigation[69] of the punishment for abortion done due to "extreme poverty".[70]

The case of *Christian Lawyers Association of South Africa & Others v. Minister of Health & Others*[71] is an authority for the supposition that the law does not regard the foetus as a person. It was a case in which the validity of the South Africa's Choice on Termination of Pregnancy Act[72] was contested. The Act permits abortion on request till the end of the 12th week of pregnancy.[73] Thereafter, abortion is allowed till the end of the 20th week on other specific grounds to wit rape, incest, and if the pregnancy would seriously affect the socio-economic condition of the mother.[74] The challenge to the Act was based on the ground that section 11 of the Constitution of the Republic of South Africa 1996[75] which provides that "*everyone* has the right to life" is applicable to the foetus. The question was whether the foetus was a holder of rights under the Constitution. The Court held that the phrase "everyone" in the contentious clauses exclude the foetus until after live birth. It was held further that to enable the foetus to bear the right to life would contravene some of the women's constitutional rights[76] that are clearly inalienable.

The fact that the law in most jurisdictions permit abortion of rape and incest related pregnancies accentuate the fact that what inspired lawmakers into penalizing abortion in those jurisdictions are mostly moral and perhaps religious considerations.[77] It is not aimed at protecting the foetus' right to life. A study of

68. Article 551, sub-article 1(d). A minor and a mentally disabled person cannot be required to sign a consent form to obtain an abortion. Also, all that is required to allow an abortion on the ground of age is to simply state that the girl is under the age of 18, see the Technical and Procedural Guidelines for Safe Abortion Services in Ethiopia, *supra* note 66.
69. Under Article 180 of the Code
70. Article 550. For fuller discussion on the Ethiopia's law on abortion, see Astrid Blystad *et al.*, The Access Paradox: Abortion Law, Policy and Practice in Ethiopia, Tanzania and Zambia, *International Journal of Equity in Health,* vol.18, No.126 (2019); Abadir M. Ibrahim, Rooting Life in the Ethiopian Constitution and Positive Law: A Holistic Approach to Rights Legislation Journal of Civil Legal Science vol. 3, No.126, (2014). Tsehai Wada, Abortion Law in Ethiopia: A Comparative Perspective, vol. 2, No. 1 *Mizan Law Review* (2008) 1-32.
71. (1998) (4) SA 1113, (1998) 50 BMLR 241, (1998) (11) BCLR 1434.
72. See *supra* note 10.
73. *Id.,* §2 (1) (a). Note that neither spousal nor parental consent is required to have an abortion during this period, *id.,* 5(1).
74. *Id.,* 2 (1) (b).
75. Act No.108 of 1996.
76. These include the right to human dignity: §10, right to life: §11; right to control over one's body including right to make decision concerning reproduction: §12(2) (a); right to privacy: §14; right of access to health care including reproductive health care: § 27 of the Constitution *Id.*
77. Abadir M. Ibrahim, Rooting Life in the Ethiopian Constitution and Positive Law: A Holistic Approach to Rights Legislation, *supra* note 70, p. 6.

the exceptions to those laws makes this evident. The law, for example in Ethiopia and South Africa do not penalise abortion of incestuous and rape related pregnancies.[78] Such exceptions hint on the purpose of the law. Or what else, apart from moral considerations, could have inspired criminalization of incest which, without more to it, is no more than a moral offence, and in which nobody suffers?

Furthermore, while the exceptions to the abortion law on grounds such as for protection of women's mental or physical incapacity; due to rape; being under age; and even mitigation of the stipulated punishment for abortion done on ground of "an extreme poverty"[79] are well thought-out, these importantly, further confirm that the laws are, if at all, only sparsely, intended to protect the foetus. It would be incongruous to suppose otherwise, for it would imply, and wrongly too, that the law has, by those exceptions ultimately given up the foetal right to life because of the stigma associated with rape, or because of being underage.

It is important to emphasise that most abortion laws provide for more severe punishment for providers than for a woman who procured her own abortion.[80] Also, in most jurisdictions, those who perform the procedure with the consent of the woman are less culpable than when it is done without the woman's consent.[81] If the foetus is regarded as a legal person then punishment for a woman who procured her own miscarriage; and that of the provider or anyone else who performed abortion with her consent would not have been any different because abortion would have been homicide. The whole essence of the born-alive rule validates this standpoint.

4. Foeta's personhood in international law

Findings from the review of the legislations and case laws emanating from the selected countries in the preceding part of this paper indicates that municipal laws do not accord personhood to the foetus vis-à-vis its pregnant woman. This part of the article analyses the provisions of related international and regional legal instruments.

78. See Choice on Termination of Pregnancy Act, *supra* note 10, §2(1); the Criminal Code of the FDRE, *supra* note 10, Article 551(1) (a).
79. See the Criminal Code, *supra* note 10, article 550; cf. with the Choice on Termination of Pregnancy Act, *supra* note 10, §2(1)(b) (iv) relating to the social and economic circumstances of a woman as a ground for abortion in South Africa.
80. See the Criminal Code, *supra* note 10, Article 546 (1); cf. with Article 548.
81. See the Criminal Code *supra* note 10, Article 547(1)-(2).

The leading human right instrument in respect hereof is the ground norm of human rights — the Universal Declaration of Human Rights.[82] The remarkable first clause of Article 1 thereof declares that "all human beings are *born* free and equal in dignity and rights". The purport of the word "*born*" as used in the clause is that enjoyment of human rights is after birth.[83] The intentional use of neither male nor female phrase "everyone" in the Declaration to refer to beneficiaries of human rights also has a post-natal application.[84] Likewise, that the phrase "*born* free" is relevant only after birth is in line with the rule requiring that provisions of treaties should be given "ordinary meanings" in the context in which they are used, and considering the intent of the treaty.[85] It is submitted that the "ordinary" connotation of lexis such as "everyone" and "all" as used in the Declaration such as "*everyone* has the right to life…"[86] and "*all* are equal before the law…"[87] *et cetera*[88] are inchoate until after birth. Therefore, that the right to life provision is not applicable to the foetus is not in contravention of Article 7 of the Declaration relating to equality and non-discrimination.

Moreover, a study of the *travaux preparatoires* of the Declaration showed that the choice of the word "born" in the clause "all human beings are *born* free…" was to leave out pre-birth usage of the rights enshrined in the instrument. It is instructive to add that a suggestion that would have removed the term "born" in order to safeguard pre-birth right to life was declined.[89] It was contended *inter alia* that right to life ought to be safeguarded from conception.[90] But prior to the rejection of the proposed modification, French delegates had clarified that the proclamation "all human beings are *born* free and equal..." implied that rights enshrined in the Declaration are applicable only "from the moment of birth".[91]

82. Universal Declaration of Human Rights (UDHR), United Nations, Treaty Resolution 217, UN Doc. A/810 (1948).
83. Ronda Copelon, *et al*., Human Rights Begins at Birth: International Law and the Claim of Fetal Rights, *Reproductive Health Matters,* vol.13, No. 26, (2005), p.121; Johannes Morsink, Women's Rights in the Universal Declaration, *Human Rights Quarterly,* vol.13, No.2, (1991) p. 233.
84. Morsink, *id.*
85. Vienna Convention on the Law of Treaties (VCLT), United Nations, Treaty Series, vol. 1155, (1969), Article 31(1).
86. See United Nations Universal Declaration of Human Rights (UDHR) *supra* note 80, Article 3,
87. *Id.,* Article 7.
88. *Id.*. Article 6 stating that '*everyone* has the right to recognition everywhere as a person before the law'.
89. UN GAOR 3rd Comm., 99th mtg. at 110-124 UN Doc. A/PV/99 [1948] 116; William A. Schabas, *The Abortion of the Death Penalty in International Law,* 2nd edition, Cambridge University Press, Cambridge (1997), p. 25.
90. *Id.*
91. UN GAOR 3rd Comm., 99th mtg. at 110-124, UN Doc. A/PV/99 [1948] 116 *ibid*.

The clause as thereafter adopted, that is, that the rights are applicable from birth was adopted by forty-five votes in its favour, nil against and nine abstentions.[92] It follows that foetuses are not intended to be accorded personhood *a fortiori* right to life in the Universal Declaration.

Successive legal instruments also support the supposition that international law does not regard the foetus as a legal person; and indeed holds that women's right trumps over that of the foetus as far as abortion is concerned. For instance, the history of negotiations leading to the adoption of Article 6(1) of the International Covenant on Civil and Political Rights[93] which guarantees rights to life to "every human being" shows that the right is not related to the foetus as far as abortion by a pregnant-woman is concerned. Record reveal that a proposal for modifications which averred otherwise, that is, that "the right to life" should "be inherent in human person from the moment of conception"[94] met outright rejection by 55 votes to none, and 17 abstentions.[95] This reveals that the right as entrenched in Article 6 was not intended to be prenatally applicable.

It is instructive to add that the Human Rights Committee, the body entrusted with the responsibility to monitor the implementation of the Covenant, has severally called attention to dangers to women's rights such as maternal deaths caused by unsafe abortions owing to outlawing of abortion by countries;[96] and it has acknowledged that laws prohibiting abortion infringe women's right.[97] In addition, the committee has implored state-parties to relax their restrictive penal legislations on abortion.[98] These standpoints would not have been taken if personhood is regarded as prenatally applicable.

Article 6 of the Convention on the Rights of the Child (the Convention or the CRC)[99] declares that "every child has the inherent right to life".[100] However, The Convention is silent about when precisely a human being becomes a child, and whether the provision applies prenatally. It is clear that the phrase "every

92. UN GAOR 3rd Comm., 183rd mtn. at 119, UN Doc. A/PV/183 [1948].
93. 16 December 1966, 993 UNTS 171 entered into force 23 March 1976.
94. UN GAOR Annex, 12th Session, Agenda Item 33, at 96, UN Doc. A/C.3/L654.
95. *Id.* at 113 & 119 (q).
96. *Human* Rights Committee, General Comment 28 on Equality of Rights Between Men and Women (68th Session 2000) para.10 (UN Doc. HRI/GEN/Rev.7).
97. *Id.*
98. Concluding Observations of the Human Rights Committee: Argentina, U.N. Doc. CCPR/CO/70/ARG, Para.14; Tanzania U.N. Doc. CCPR/C/79/Add.97, Para.15; Venezuela, UN Doc. CCPR/CO/71/VEN, para. 19.
99. General Assembly Resolution 44/25, Annex, UN GAOR 44th Session, Suppl. no. 49 166, U.N. Doc. A/44/49 (1989) entered into force on 2nd September 2 1990.
100. Cf. African Charter on the Rights and Welfare of the Child: Article 5(1) which provides that "every child has an inherent right to life…." O.A.U. Doc. CAB/LEG/24.9/49 (1990).

child" as used throughout the Convention does not apply before birth. It is required in construing words used in treaties to know the context in which they are made[101] and to look at the scope and purpose of a treaty. That approach will lead to the conclusion that the word "child" as used in the CRC is to be given its ordinary, rather than broad meaning. The ordinary connotation of the word "child", considering the intent of the treaty and the context in which the provisions are made excludes the foetus. It is submitted that if the drafters of the Convention had intended that the relevant clause is to be prenatally applied, they would have, as in practice, unequivocally stated so. Furthermore, it is submitted that the ninth paragraph of the Preamble to the Convention which states *inter alia* that "the child…by reason of his physical and mental immaturity needs special safeguard and care, including appropriate legal protection *before* as well as after birth" does not ascribe personhood to the foetus. On the question concerning the purport of the phrase "before birth", it is submitted that the clause, at most, only recognises the states' duty to support the child to be able to survive, grow and stay healthy after birth and this duty can be fulfilled by supporting antenatal care.[102] In any case, while preambular provisions of an instrument serve as an aid to its interpretation, they are not, on their own legally binding.[103] The Preamble to the Convention may therefore not be resorted to in aid to understanding of a clear term such as "child" which has its ordinary meaning stated in the Convention.[104] It is incongruous with the canon of interpretation that an aspect of the preamble which is not repeated on the body of the Convention could be resorted to unaided in lieu of the ordinary connotation of words as used in operative parts. Consequently, the word "child" as implied in the preamble purportedly requiring states to safeguard the child prior to birth cannot be relied on as a basis for affirming that the foetus has prenatal right to life.

Furthermore, the history of negotiations leading to ratification of the CRC shows that the obligation to take "special safeguards and care" of the child was not intended to preclude safe abortion. As initially written, the Preamble had no

101. Vienna Convention, *supra* note 83, Article 31 (1).
102. Ronda Copelon, *et al*., Human Rights Begins at Birth: International Law and the Claim of Fetal Rights, *supra* note 83, p.122.
103. *South West Africa* (*Ethiopia v. South Africa; Liberia v South Africa*) 1966 ICJ 6, (July 18) holding that though the preamble to the UN Charter represents ethical principles for legal stipulations outlined in the relevant articles they do not in themselves constitute rule of law; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures of Protection*, Order of 8 April 1993, ICJ 325, 391 (Sept.13): noting that the resolves and intents of member-states are condensed into Article1 of the UN Charter rather than in the preambles in order to ensure that they are justiciable.
104. Vienna Convention, *supra* note 85, Article 31.

mention of the need to take safeguards "before as well as after birth". It was the State of Vatican City that proposed the clause, but swift to add that the objective "was not to preclude the possibility of an abortion".[105] Hence, while the Convention acknowledges that the foetus is supposed to be protected, there is no basis to hold that it confer personhood or prenatal right to life on the foetus if doing so will deny a girl-child's rights to life,[106] health,[107] or to act in her best interest[108] and particularly when a pregnancy possesses threat to her health[109] which are all safeguarded in many other international instruments and retained by Article 41 of the Convention.

The above position is strengthened by the declaration made by the treaty's ad hoc committee that the phrase "before as well as after birth" is not meant to negate the purport of Article 1 of the CRC which defines the "child" as a person "below the age of eighteen years". It is for this rejection of foetal personhood that makes it possible for the treaty's committee to support safe abortion care[110] and to have appealed to state-parties to liberalise aspects of their restrictive laws on abortion.[111] The committee has also acknowledged that safe abortion is one of teenagers' rights to health by virtue of Article 24 of the Convention.[112] These would have been absurd if the foetus is regarded as a legal person under the Convention.

The European Convention on Human Rights (the Convention or the ECHR)[113] founded its right to life in Article 2 on the Universal Declaration.[114] The preamble to the ECHR amply refer to the Declaration, and proclaimed that the its aim is to take steps for the "collective enforcement" of rights stated in the Universal Declaration"[115] In view of this, it is apparent that the phrase

105. UN Commission on Human Rights, *Question of a Convention on the Rights of a Child: Report of the Working Group*, 36th Session, UN Doc. E/CN.4/L/1542 (1980).
106. *Id.*, Article 6.
107. *Id.*, Article 24.
108. *Id.*, Article 3.
109. *Id.,* Articles 1 and 24.
110. Committee on the Rights of the Child, General Comment no.4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child (33rd Session 2003), para.31.
111. Concluding Observations of the Committee on the Rights of the Child: Chad, UN GAOR Committee on the Rights of the Child, 21st Session, 557th mtg. para.30 UN Doc. CRC/C/15/Add.107; Nicaragua, UN GAOR, Committee on the Rights of the Child, 21st Session, 557th mtg. para.35 UN Doc. CRC/C/15/Add.108.
112. Concluding Observations of the Committee on the Rights of the Child: Guatemala, UN Committee on the Rights of the Child, 27th Session 40, U.N. Doc. CRC/C/15/Add.154.
113. 312 UNTS 221 (1953), as amended by Protocols 11 and 14, supplemented by Protocols 1, 4, 6, 7, 12, 13 and 16.
114. See s*upra* note 82.
115. Para. 6, *supra* note 113.

"everyone", in the context in which it is used in Article 2 and all over the European Convention, does not have a prenatal application.

In addition, the established jurisprudence of the European Convention on abortion as contained in the decisions of the Commission and the Court have repeatedly held that the foetus is not covered by the "right to life" under Article 2(1) of the ECHR. Further, it has been held that to confer the right to the foetus is to put unreasonable restraints on women's rights to safe abortion. In X *v UK,*[116] a husband sought to stop his wife's abortion. The Husband's claim that the right to life in Article 2(1) protected the foetus was unequivocally rejected. It was held that the phrase "everyone" in Article 2 and throughout the ECHR, did not cover foetuses.[117] Also, in *Vo. v. France*,[118] a doctor, while mistaking the applicant who was pregnant, for a different patient with almost the same name, did surgery that was meant for that other patient. In the course of the mistaken surgical operation, the doctor carelessly cut the applicant's embryo sac resulting in her miscarriage. The applicant pleaded that the doctor should be tried for unpremeditated homicide rather than trial for negligence or breach of regulation as laid down in French law. The European Court declined to regard the foetus as a "person" protected by Article 2 of the ECHR.[119] Thus, the Court refused to order trial for homicide.

As a final point, there is no basis to construe Article 4 of the African Charter on Human and Peoples' Rights[120] which provides that "every human being shall be entitled to respect for his life and the integrity of his person" as relating to the foetus. The clause is with respect to inviolability of right to life, but the phrase "every human being" mentioned in Article 4 is stated in Article 24 of same Charter as applicable to "individuals". This standpoint has been confirmed in the language of the Protocol to the Charter on the Rights of Women in Africa.[121] Article 14(2) (C) of the Protocol specifically requires state-parties to do the

116. Also cited as *Paton v. UK*, App. No. 8317/78, European Commission on Human Rights, 13 May 1980, 3, European Human Rights (Commission) Report, 408 (1981).
117. *Id.,* paras. 7-9 and 19. The decision in *X Case* was followed by the Commission in *R.H. v Norway,* App. No. 17004/90.73, ECHR Dec. & Rep. 155 (19 May 1992); and in *Boso v Italy*, App. No. 50490/99, ECHR (September 2002). Both cases were also by the husbands, to stop their wives from terminating pregnancies, on the ground of the foetus' right to life.
118. App. No. 53924/00, European Court of Human Rights, 8 July 2004.
119. *Id*., para. 80. See generally Tanya Goldman, 'Vo v France and Foetal Rights: The Decision Not to Decide' *Harvard Human Rights Journal,* (2005), vol. 18, pp. 277-282.
120. OAU Doc. CAB/LEG/67/3/rev.5, adopted 2 June 1981, entered into force 21 October 1986.
121. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women Africa AHG/Res.240 (XXX1), 31st Session CAB/LEG/66.6 adopted July 11 2003, entered into force in 25 November 2005.

needful to safeguard "rights of women by authorising medical abortion in cases of sexual assault, rape, incest and where continued pregnancy endangers mental and physical health of the mother, or the life of the mother or foetus". This clearly accentuates the view that the foetus does not enjoy personhood or right to life before birth. It would be incongruous for the Protocol to safeguard women's reproductive rights by allowing medical abortions in the circumstances mentioned while purporting to recognise the foetus prevailing right to life.

Conclusion

This article has examined the laws of a number of selected jurisdictions and the legislative histories, texts and/or as construed by treaty monitoring bodies, of relevant international instruments. This was with a view to determining whether the foetus is regarded as a legal person or otherwise conferred with the right to life vis-à-vis the woman's right to safe abortion. It is contended that national and international laws do not recognize foetal's personhood *a fortiori* a prevailing right to life against a pregnant-mother. It is not suggested however that the law should altogether disregard prenatal life. It is indeed thought as valid to suppose that the foetus need not be regarded as a "person" to be protected by the law, in the same way as the lives of certain animals and birds are protected, though they are not considered as "persons". In the same way, that the law could regard the foetus as a person, and yet allow abortion when its rights clashes with that of the pregnant-mother, in which case the law must take a position between the conflicting rights. But unless otherwise provided in domestic laws the foetal's legal standing is, and should be intricately tied to the pregnant- woman, though it may be able to seek redress for loss or harm felt in the uterus. This is effective only after live-birth.

The Mandate of Charitable Organizations to Engage in Businesses as Income Generation Activity: Theories, International Experiences and Ethiopian Law

Yibekal Tadesse Abate[*]

Abstract

The engagement of charitable organizations in business, as income generating activity, is a contentious subject. Those supporting charity trading see it as a venue of financial support for the missions of charities while others are against this move arguing that charity trading will degrade the defining virtues of charities – namely, that they operate outside of the for-profit marketplace. Theoretically, there are different lines of thought with regards to charity trading such as exclusivity doctrine, the doctrine of primary purpose trading, doctrine of ancillary trading, and the doctrine of non-primary purpose or unrelated trading. Countries adopt one or two of these theories and largely they view income generation activities from different perspectives– its relation with the primary purpose of the charity, asset protection of charities (the risk of business failure), and its effect on market competition. The Organization of Civil Societies Proclamation (OCS) of Ethiopia allows charities to engage in any lawful business activity without a condition of the element of relatedness to the mission of the charity and other concerns. Generally, there are doubts about the legitimacy and extent of engagement of charities in business. This article examines whether and to what extent, charities shall be allowed to engage in business activities. Following doctrinal research methodology, the article critically examined the theories, international practices, empirical evidences and legislations of non-profit organizations. Based on the analysis made the article concludes that as charities are inherently formed to pursue charitable purposes and since business activities as a secondary mission may distract them away from their central missions, their engagement in trade activities shall be limited only to charity purpose-related trading. Thus, the OCS law of Ethiopia needs to be re-visited in light of the foundational theories of the non-profit sector and major international experiences.

Keywords: Third Sector, Non-Profits, Charitable Organization, Organizational Existence, Charitable Purposes, Income generation, Business activity, Ethiopia

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Introduction

Charitable organizations are institutions created to provide public services on a non-profit basis. In the economic platform, they fall under the third sector, working on areas that cannot be done by the government (public sector) and the market (private sector).[1] Hence, there is a longstanding assumption that charitable organizations do not engage, as a mission, in commercial activities, nor do they exist primarily to generate profits.[2] Yet, nowadays, charities are engaging in trade and investment activities geared towards deriving revenue for ''charity purposes.'' This move of charities has become a point of contentious among scholars and practitioners in legal and economic policies. Some justify the acts of these institutions arguing that the business activities are meant for realizing the inherent goal of the institutions. Others, on the other hand, challenge their moves taking the view that it is against the virtues of charities and overstep their role in societies.[3] Be that as it may, with regards to charity trading, the international practices are also diverse.[4] While some countries allow charities to engage in business without limits, others permit this act with stricter conditions and requirements.[5]

In Ethiopia, the engagement of charities in trade and investment activities is prevalent.[6] Currently, the OCS proclamation allows charities to engage in

[1] Olaf Corry, Defining and Theorizing the Third Sector, in R. Taylor (ed.), *Third Sector Research*, DOI 10.1007/978-1-4419-5707-8_2, (2010), p.13, [Hereinafter R. Taylor, *Third Sector Research*].

[2] Salamon Lester M. and Helmut K. Anheier, The International Classification of Nonprofit Organizations: ICNPO-Revision 1, the Johns Hopkins Institute for Policy Studies, Working Papers of the Johns Hopkins Comparative Nonprofit Sector Project, No. 19. (1996), P. 3.

[3] Bosscher, Judith L., Commercialization in Nonprofits: Tainted Value? *SPNA Review*: Vol. 5: No. 1, Article 2, (2009), p.8. See also Angela M. Eikenberry and Jodie Drapal Kluver, The Marketization of the Nonprofit Sector: Civil Society at Risk?, *Public Administration Review*, Vol. 64, No. 2, (2004), p.136-138.

[4] Feasibility Study on a European Foundation Statute Final Report by Max Planck Institute for Comparative and International Private Law, (2009), p.87. See also Comparative highlights of foundation laws, the operating environment for foundations in Europe, (EFC), (2015), available at https://efc.issuelab.org/resource/comparative-highlights-of-foundation-laws-the-operating-environment-for-foundations-in-europe-2015.html[Hereinafter Comparative highlights of foundation laws].

[5] Ibid. See also the nonprofit laws of different countries at https://www.cof.org/content/nonprofit-law- [Last accessed on 11 March 2020]

[6] For instance, Endowment Fund for the Rehabilitation of Tigray (EFFORT), the Amhara National Regional Rehabilitation and Development Fund (better known as Tiret), the TUMSA Endowment Foundation for the Development of Oromia, and the Southern Regional Development Fund (then known as Wendo) are established pursuant to the Ethiopian Civil Code of 1960 as a charitable endowment. ''Under new Charities and Societies legislation which came into force in early 2009, endowment funds such as EFFORT fall under the category of charitable endowment.''(See Sarah Vaughan and Mesfin Gebremichael Rethinking business and politics in Ethiopia The role of EFFORT, the Endowment Fund for the Rehabilitation of Tigray Research Report, the Africa Power and Politics Programme (APPP) Research Report series, (2011)), p.36, [Hereinafter Sarah and Mesfin].) The Memorandum of association of TIRET, for example, confirms this fact (See TIRET Corporate

business activities without a condition of purpose related business test.[7] And practically, some charities are overstepping their role and becoming increasingly like private firms.[8] As a result, especially the engagement of charitable endowments — a form of charitable organization with political and other forms of affiliations — in business has become commonly the topic of political debate and research in this country. Accordingly, there are concerns about the legitimacy of trading by Charities operating in Ethiopia.

A couple of studies explored the features and operations of non-profit organizations in Ethiopia, yet much of these studies did not examine the legitimacy of the realistic operations of charities in the socio-economy of the country from the perspective of the organizational existence (paradigms) of the non-profits. As a way to fill this gap, this article investigated whether and to what extent charities shall be allowed to engage in business activities in Ethiopia. Based on the evidences from the investigation, the author recommends the business model to charities operating in Ethiopia, considering the foundational existence of charities, international practices, and the potential implications of the commercialization of charities. Finally, it is important to note that, as the issues related to charity trading are mostly raised in connection with charitable organizations, in terms of scope, this article aims at examining only cases of charitable organizations.

To achieve its ends, the article analyzes different books, journal articles, and non-profit laws of selected states dealing with the theoretical underpinnings and the international experiences regarding the engagement of charities in business

Establishment Memorandum of Association, May 19, 2006 E.C, the preamble). Also, Tiret endowment is registered by the Amhara National Regional State Bureau of Administration and Security Affairs, the then responsible organ to regulate charities, as charitable organization;(See Mamenie Endale, Some Legal Controversies Regarding Party-affiliated Endowments and Their Participation in Business Activities: The Case of EFFORT and TIRET Endowments, *Bahir Dar University Journal of Law* Vol .9, No.1, 2018, p. 80.) However, these endowments are engaged in different trade and investment activities. See also Toni Weis, Vanguard Capitalism: Party, State, and Market in the EPRDF's Ethiopia, Doctoral thesis, University of Oxford, (2015). See also Befeqadu Hailu, Special to Addis Standard, Analysis: Inside the Controversial EFFORT, available at http://addisstandard.com/analysis-inside-controversial-effort/ published on 16 January, 2017). Charities, operating in Addis Ababa, are also engaged in different business activities as an income generation activity (see Tesfaye Wegari, Perception of Selected Stakeholders on the Role of NGOs in Local Development: The Case Study of Kirkos Sub-City in Addis Ababa, Master's thesis, Addis Ababa university, (2015), p.47.

[7] See Organizations of Civil Societies Proclamation, Proclamation No. 1113/2019, *federal Negarit Gazetta*, (2019), Article 63 [Hereinafter the OCS Proclamation].

[8] In this regard, if we see the case of EFFORT and Tiret, though, they are charitable organizations, practically, they are known by their trade and investment activities rather than charitable activities. Some researchers express EFFORT is a conglomerate of businesses. They are, highly, engaged in the market in different sectors. The list of Companies of EFFORT available at: https://ecadforum.com/2017/07/01/the-effort-conglomerate-monopoly-in-ethiopia/. The lists of companies of TIRET available at: http://www.tiret.et/SitePages/Home.aspx).

activities. For the examination of the international experiences, the author reviewed the experiences of countries having different laws and models regarding charity trading. Accordingly, for each category of systems of charity trading, states are selected based on the availability of legal and reference documents. Meanwhile, the author has tried to incorporate countries from the developed and developing world.

To examine the situations of charitable organizations and in the attempt to propose approaches of charity trading, particularly in Ethiopia, the article analyzes the relevant laws, and review reports, research works and magazines written on issues relating to charitable organizations operating in the country.

These sets of themes in the article are organized under six sections. Section one characterizes the notion of non-profit organizations generally and charitable organizations particularly. Section two examines the organizational existence of charitable organizations in selected states and societies. Section three investigates the mandate of charities to engage in business activities under varying socio-economic and legal environments. In this section, the theories and international practices are examined comparatively. Section four presents a brief overview of charitable organizations under the Ethiopian legal system. As an extension to this, Section five explains the mandate of the charities to engage in business activities. Finally, the paper makes concluding remarks and forwards recommendations.

1. The Notions and Organizational Existences of Charitable Organizations

1.1. The Notions of Charitable Organizations: Overview

Nonprofit organizations[9] widely referred to as the "*third sector*" with government and its agencies of public administration being the first, and the sphere of business or commerce being the second.[10] As such, the popular definition of the third sector usually covers all types of organizations formed as grass root initiatives that are separate from the state (are neither financed by the state, nor are the state structures), and which are not created to maximize profits

[9] The terms nonprofit describes the entity's purpose that, by origin, a non-profit is operating outside of the for-profit marketplace. Besides, it indicates that the organization is barred from distributing its funds or net earnings, if any, to individuals who exercise control over it, such as members, officers, directors, or trustees. (See Tuula Mittilä, Commercialization of Non-Profit Organizations', the 19th Annual IMP Conference in Lugano, (2003), p.4. available at: https://www.researchgate.net/publication/266213552

[10] Helmut K. Anheier, Nonprofit organizations: theory, management, policy, ISBN 0-203-50092-X Master e-book ISBN (2005), p. 4.

(as opposed to for-profit entities like companies).[11] Thus, the non-profit universe is large and diverse, encompassing those organized for some "public benefit" and those that are organized for some "mutual benefit of their members.[12] In European states, the third sector is largely known by the name foundation and association.[13]

One of such forms of non-profit foundations is charitable organizations.[14] As a nonprofit organization, the primary objectives of charitable organizations are philanthropy and social well-being (e.g. educational, religious or other activities serving the public interest or common good).[15] The legal definition of a charitable organization (and of charity) varies across countries and contexts of regulations.[16] While countries define the institution in different ways, one can observe shared features of practice in their establishment and operations. For example, as a widely shared practice, an organization can be registered as a charity if its purposes are exclusively charitable and it is for the benefit of the public. Principally, charitable organizations are established by persons with volunteer time and charitable contributions.[17] Accordingly, a charitable organization must dedicate all of its resources to charitable activities (including related income generation activities) which it carries on as an institutional end.[18] In view of that, largely, countries require charities to pursue only public-benefit purposes tailored to that end.[19] In more practical terms, non-profit generally and

[11] Magdalena Popowska and Michał Łuński, Third Sector Characteristics and Importance, (2014), p. 32, available at https://www.researchgate.net/publication/, (Last accessed on 14 March 2019) Indeed, coming to terms with the diversity and richness of organizations located between the market and the state, understanding the set of institutions is challenging. In expressing the sector plenty of profusion of terms such as: "nonprofit sector," "charities," "third sector," "independent sector," "voluntary sector," "tax-exempt sector," "nongovernmental organizations," "associational sector," "philanthropy," are used. Perhaps the most certain and straightforward system for defining the nonprofit sector is the one provided in a country's laws and regulations.

[12] Barbara Bucholtz, Doing Well by Doing Good and Vice Versa: Self- Sustaining NGO/Nonprofit Organizations, *Journal of Law & Policy*, Vol. 17, (2009), p. 410.

[13] Douglas Rutzen etal, The Legal Framework for Not-for-Profit Organizations in Central and Eastern Europe, *the International Journal of Not-for-Profit Law*, Vol. 11, No 2, (2009), p. 4. See also Comparative highlights of foundation laws, *supra* note 4, p. 51. Public Foundations are included in charities realm (See at https://www.cof.org/foundation-type/public-foundations). Associations are membership-based organizations that are formed to the mutual interest of members.

[14] R. Taylor, Third Sector Research, *supra* note 1.

[15] Reiling, Herman T., Federal Taxation: What is a Charitable Organization? *American Bar Association Journal*, 44 (6), (1958), pp. 525–598, available at JSTOR 25720402

[16] Ibid.

[17] John O'hagan and Markpurdy, The Theory of Non-Profit Organizations: An Application to a Performing Arts Enterprise, *The Economic and social Review*, Vol. 24, No. 2, (1993), PP. 155-167

[18] Tamara Larre, Allowing Charities to "Do More [Good]" through Carrying on Unrelated Businesses, *Canadian Journal of Nonprofit and Social Economy Research,* Vol. 7, No 1, (2016), p 31.

[19] For example, if we see the charity laws of the Czech Republic, France, Hungary, Ireland, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, the United Kingdom Zimbabwe,

charitable organizations in particular have traditionally taken on the responsibility of providing basic human services to the disenfranchised and vulnerable segments of society.[20]

Drawing on the duties of these institutions and their place in the socio-economic sphere, scholars and policy practitioners identified the defining characteristics for such institutions. First, charitable organizations are institutionally separate from the government hence sometimes, as a form of non-profits; they are also called non-governmental organizations, structurally separate from the instrumentalities of government.[21] This does not mean, however, that they may not receive significant government support. For example, non-profits may receive supports from the government while performing public services.[22]

Turning to their mission, one can observe that they are established for the benefit of the public. To be a charity, an organization must pursue a charitable mission as its dominant and overriding purpose.[23] As ascribed by scholars in the relevant discourse, the mere stipulation of the purpose under statutory documents does not make the organization a charity.[24] The organization needs to have practical purposes that are 'wholly and exclusively charitable' and the organization operates for the benefit of the public.[25]

The third defining feature of charities is that no individual or group is allowed to benefit from the deposit and proceeds of the charitable organization (non-distribution constraint).[26] The income or fund of the charitable organizations will not be distributed to volunteers, managers or boards working in the organization. Moreover, the proceeds obtained from the sale of related activities must be plowed back into the basic mission of the charity.

The fourth important characteristic of charities is concerned with their origination. Because the initiative for the establishment of a charitable

Ethiopia, Zambia, Tanzania, etc., having a public benefit purpose is a requirement for establishing a charitable organization.

[20] Habibe İLHAN, Non-Profit Organizations as Providers of Public Goods, *Yönetim ve Ekonomi* 20/1 (2013), pp. 95-104, available at https://www.researchgate.net/publication/304147172 (Last Accessed on March 24, 2020)

[21] Helmut, *supra* note 10, p. 48.

[22] And sometimes, government officials may also sit on their boards. What is prohibited rather is that being served as an instrumentality of any unit of government and that it therefore does not exercise governmental authority.

[23] Brakman Reiser, D, Charity law's essentials. *Notre Dame Law Review*, 86, (2011), p. 2.

[24] Community Southwark, Charities and Trusts, available at https://www.communitysouthwark.org/charities-and-trusts/, [Last accessed on 23 April 2020]

[25] Ibid.

[26] Helmut, *supra* note 10, p. 48.

organization originates from volunteers; they are characteristically established with a meaningful degree of voluntary participation. In this sense, voluntarism manifests in two ways. First, the organization must engage volunteers in its operations and management, whether on the composition of its board members or through the use of volunteer staff and voluntary contributions. Second, *voluntary* also connotes the *non-compulsory* nature of the actions of the members."[27] The last feature worth considering in the characterization of charities is institutional character. To be regarded as a charitable organization, there must be an institutional structure at all levels.[28] Hence, from small charity committee to big charitable organizations, all the charities have a certain institutional element such as name, management structure, rulings, regular meetings, and some degree of organizational permanence.

Finally, it is important to note that, while these elements are taken as inherent institutional characters, charities may be established in different forms such as philanthropy[29], charitable trust, charitable endowment, charitable committee, or charitable society. Although the naming and presumably the focus of service for each of these forms varies, their goal remains the same – addressing civic and economic problems which the government or the market cannot access or afford to do so.

1.2. Organizational Existence of Non-profits: Theoretical Foundations

As the scholarly literatures shows, contemporary socio-economic platform is a composition of tripartite of sectoral divisions: the public (government) sector, the private (business or market) sector, and the not-for-profit sector (nonprofit or nongovernmental organizations). The three sectors are different in terms of their institutional ends and focus. Explaining this fact, Drucker states:

> *…. non-profit organizations do something very different from either business or government. Business supplies either goods or services. Government controls. A business discharges its task when the customer buys the product, pays for it, and is satisfied with it. Government discharges its function when its politics are effective. The "non-profit" institution neither supplies goods or services nor controls. Its "product"*

[27] Id, p. 49.
[28] Id, p. 47.
[29] It is "private initiatives, for public, common good, focusing on quality of life". This combines the social and scientific aspect of philanthropy, developed in the 20th century, with its original humanistic tradition.

> *is neither a pair of shoes nor an effective regulation. Its product is a changed human being.*[30]

From the remarks of the writer, one could observe that the nonprofit organizations have a distinct, yet complementary mission with the government and market sector. By occupying the space between the for-profit sector and the government, they place themselves at equilibrium point for both sectors and hence can serve as arbiters of both government and business.[31] As such, they are required to fill the third space, where needs have not been met because the private sector has not seen it as profitable and the public sector has either neglected these needs or not been able to afford to address them. Therefore, the non-profit sector defines a set of organizations and activities next to the institutional complexes of government, state, or public sector, on the one hand, and the for-profit or business sector, on the other.[32]

Hence, the engagement of nonprofit organizations in social welfare policy finds its roots in companion theories of government failure and market failure. For a better understanding of the notion of public failure and market failure, it is important to examine the theory underlying the organizational existence of non-profits. The theory which justifies the existence of non-profits for the reason of public failure is known as the public goods theory. According to this theory, the basic rationale for the existence or formation of the nonprofit organizations is to provide public goods of undersupply.[33] Thus, they are inherently established in response to governmental undersupply of public goods[34] or unsatisfied demand for public and quasi-public goods.[35]

Accordingly, the provisions of public goods by charities are basically financed by voluntary contributions from/and for individuals dissatisfied with the prevailing level of state provision.[36] Historically, it is perceived that ‘‘failures of

[30] Peter F. Drucker, Managing the Non-Profit Organization: Principles and Practices. NY: HarperCollins Publishers., (1992), p. xiv, available at https://www.harpercollins.com/9780062034755/managing-the-non-profit-organization/(Last accessed on 17 March 2019)

[31] Popowska and Łuński, *supra* note 11, p.40.

[32] Helmut, *supra* note 10, p. 4.

[33] O'hagan and Markpurdy, *supra* note 17, PP. 155-167.

[34] It must be noted that, every kind of public good is not open for the non-profit organizations. Thus, while it is said public failure, it is for the undersupply of non-pure public goods (public roads, bridges, environmental protection, public health centers, etc). Pure public goods are only done by the government.

[35] Burton Weisbrod, the advocator of public goods theory, states that “under satisfied demand for collective type goods is a governmental “failure” analogous to private market failures” With this statement he introduces the non-profit sector as a potential corrective measure for market failure.

[36] O'hagan and Markpurdy, *supra* note 17, PP. 155-167.

state-led development approaches throughout the 1970s and 1980s fueled interest in non-profits as a development alternative, offering innovative and people-centered approaches to service delivery, advocacy and empowerment."[37] However, no specific historical period is indicated as to when public failure occurred as a driving force for the formation of nonprofits'. As can be inferred from the premises of public goods theory, the meaning of government failure is the inability of the government to provide collective goods.[38] So, public failure could vary depending on the level of development of the country. In developing countries, the extent and type of government failure would be wider and hence requires an immense involvement of the non-profits in the socio-economy of the state. Yet, in developed economies, this gap on the part of the government is relatively low and local nonprofits show limited involvement in filling the gaps of government failure. Rather, they stretch their hands to fill the socio-economic gap prevailing in developing economies riddled with varying forms of government failure.

Now we turn to the other theory that justifies the intervention of non-profits for market failure reasons. This theory, widely known as the trust-related theory, holds that non-profits organizations are generally established as a "means to react to marketplace failures by filling economic void with volunteer time and charitable contributions."[39] A closer look into the tenets of this theory show that the development of non-profits is associated with information problems inherent in the goods or services provided and the trust dilemma.[40] Particularly, the non-profits exist because the demand for trust goods in market situations are not met by private firms.[41] The trade activities and processes of trust-related goods typically entail a conflict of interest between a seller and buyers. This is because, under conditions of information asymmetry, consumers are at a disadvantage and subject to profiteering by profit-seeking firms.[42]

[37] Nicola Banks and David Hulme, the role of NGOs and civil society in development and poverty reduction, Brooks World Poverty Institute ISBN: 978-1-907247-70-5, BWPI Working Paper 171, (2012), p.3.

[38] İlhan, *supra* note 20, p. 98.

[39] Id, p. 97.

[40] This theory perceived that the market lacked a trustworthy partner and a non-profit organization was a more credible producer of goods / services to the consumer.

[41] O'hagan and Markpurdy, *supra* note 17.

[42] Commonly information asymmetry would occur in the three scenarios that require the involvement of the non-profits for the provision of the goods and services. Firstly, the character of some goods and services, such as peculiar medical care, are not suitable to be appreciated by ordinary persons. Second, the real consumer of the goods and service might not be capable to judge the quality of the product. For example, in the child care service, children cannot evaluate the daycare services provided for them. Thirdly, sometimes, the consumer might not be the person who purchased the services and might not be able to transmit information about the service to the buyer. For example, since the parents do not

Thus, according to the trust related theory, as a solution to this trust dilemma and information asymmetry problems, the non-profit institutions are uniquely placed to provide such trust goods and services. As such, they can resolve this conflict as they are not motivated by profit and therefore are less likely to downgrade their products to maximize profits.[43] For example, in the US, health care, daycare, and other unaffordable social services are mainly provided by the non-profits, evidencing the substantial impact of the non-profits over profit-seeking enterprises in supplying trust goods.[44]

Generally, from the underlying tenets of these theories, it can be understood that the non-profits are primarily established for public benefit. Yet, one should not forget that charities, like any other organization, ultimately must cover the full economic costs of all their operations and they need to have financial sources for this end.[45] The next sections explore such possible source of revenue of charitable organizations.

2. Source of Revenues of Charitable Organizations: Overview

As part of their existence, charities commonly need to have certain amount of asset/fund to be registered legally.[46] In essence, they need to have their own "funding model" to carry out charitable activities, and as a source of finance, they combine different funding sources. These sources are the "funding model" of the non-profit sectors as taxation is the main source of revenue for the government and sales are for the private sector.[47] The conventional sources of funds of non-profits are funded through donations, in the forms of contributions, gifts, or grants.[48] One of such contributions, which charities largely rely on, is the goodwill of individuals channeled through grants and donations.[49] Besides, the government provides payments through different ways such as grants and

consume the service themselves, they cannot judge the exact quality of the care provided for children. In all the cases illustrated above, if the providers are the for-profit organizations the consumers will be affected as the for-profits organizations will abuse the service for their favor.

[43] Helmut, *supra* note 10.

[44] Helmut K. Anheier and Jeremy Kendall, Trust and voluntary organizations: Three theoretical approaches, Civil Society Working Paper 5, (2000), p. 4.

[45] Stacey Y. Abrams, Devolution's Discord: Resolving Operational Dissonance with the UBIT Exemption, *Yale L. & Pol'y Rev*., Vol 17, (1998), p.884.

[46] See comparative highlights of foundation laws, *supra* note 4, p. 8 &17.

[47] Burton A. Weisbrod, To Profit or Not to Profit: The Commercial Transformation of the Nonprofit Sector, The nonprofit mission and its financing: Growing links between nonprofits and the rest of the economy, in Burton A. Weisbrod eds, To Profit or Not to Profit: The Commercial Transformation of the Nonprofit Sector, Cambridge University Press, (1998), p.13.

[48] Ian Murray, Charitable fundraising through commercial activities: The final word or a pyrrhic victory? *Journal of Australian Taxation*, Vol. 11, (2008), pp. 138–207.

[49] Ibid.

statutory transfers (contributions by the government, as mandated by law, to provide general support to an organization in carrying out its public programs).

Still, another source of income for these organizations is program service revenue, which includes income earned from fees and charges generated through the pursuit of an organization's primary purposes.[50] For example, universities rely on tuition, and child and family service agencies generate fees and utilize it for service. In addition, in most jurisdictions, active and passive "fundraising activities" are main sources of revenue. Active fundraising such as obtaining money from 'the sale of any disc, badge, token, flower or other device for any charitable purpose' accepted in some contexts as common sources.[51] Still other forms such as the proceeds from selling tickets to any 'entertainment or function' (for example a sporting event, or bazaar) are also passive fundraising modalities of charities.[52]

Through time, these modalities and other business activities have developed into sources of income for charities. Yet, at the same time, such engagement in commerce is considered by some people as a method of shifting the financial dependence of charities from charitable donations to commercial sales activity.[53] Thus, while there is consensus on the fact that charities need to have "income generation activity" arrangements the extent and the model of the business activities for charities are subjects of contention. In the coming sections, this article examines the theories and international experience as to whether and to what extent charities are allowed to engage in business activities.

3. The Mandate of Charitable Organizations to Engage in Business activities: Models and International Experiences

As highlighted in last section, there is a broad consensus on both sides of the argument that charitable organizations shall be permitted to engage in "income-generation" activities as it would contribute to attain the institutional ends of the organizations.[54] Yet the cogency and extent of engagement of charities in business as a money-making venture is less established. As a result, there are practical as well as theoretical concerns on charity trading. Those who adhere to

[50] Example sources of program service revenue include school tuition, admissions costs to museums and concerts, royalties from educational publications, and registration fees for conferences or conventions.
[51] Murray, *supra* note 48, pp.138–207.
[52] Ibid.
[53] Brittany Fritsch *et al*, An Examination of the Tension Between Business and Social Mission Within Social Enterprises, Carleton Centre for Community Innovation, WP # 13-07 (2014), p.2.
[54] Legal Regulation of Economic Activities of Civil Society Organizations Policy paper, cutting-edge expertise in law affecting civil society, European Center for Not-for-Profit Law, (2015), p, 3.

the liberal approach of charity trading see opportunity, new energy and creativity, independence and sustainability in these moves of charities in business activities. In contrast, those who object to unrestricted trading argue that "attention to market forces, signified by changing reliance on earned income, will alter one of the defining characteristics of charities —namely, that they operate largely outside of the for-profit marketplace."[55] The next sub-sections further explore the mandate of charities to engage in the market as an income generating activity from the theories and international experiences perspectives.

3.1. Models and International Experiences

3.1.1. Exclusivity Doctrine

The argument in support of exclusive doctrine is founded on the premises that charitable organizations must exclusively pursue the charitable purposes for which they were organized and chartered.[56] In other words, as charities exist to perform activities that cannot be done by the public and private sector, they shall only ensure activities for which they are established. Thus, charities may not engage in trade as a reason of income generation and the resources of the charity shall not be spent on business activities to generate income.[57] Instead, the non-profits must retain their resources or spend excess funds on their charitable purposes. Charities may perform activities in the market sector with a motive of filling market failure. Nevertheless, charities must trade carefully to address the expectations of both government and business.[58]

3.1.2. The Doctrine of Primary Purpose Trading

The underlying assumption of this theory is that "non-profit organizations are driven by the mission, not by the profit."[59] As such, charities shall only engage in a primary purpose trading,[60] which contributes directly to one or more of the objects of a charity as set out in its governing document."[61] For example, if the primary object of a charity is to provide education it can charge fees for

[55] Judith, supra note 3, p. 8.
[56] Bucholtz, *supra* note 12, p. 412.
[57] Ibid.
[58] Weiting Zheng *etal*, Non-Profit Organizations as a Nexus between Government and Business: Evidence from Chinese Charities, (2018), p. 4, available at: https://www.researchgate.net/publication/ [Last accessed on 17 March 2019]
[59] Macfarlanes LLP, charities and trading – a complicated business, (2015), p.1. available at: https://www.macfarlanes.com/what-we-think/in-depth/2015/ [lasted accessed on July 13/2020]
[60] Guidance for charity Commission for England and Wales, trustees, trading and tax: how charities may lawfully trade, (2016), p.4.

providing an educational related service. Thus, this type of trading will normally, in any case, be carried on in *the course of carrying out the primary purpose*[62] of the charity.[63] According to this doctrine, the business shall be a means of performing one or more of the charity's main objects (as stated in its governing document) and hence carried out as part[64] of the charity's primary mission.[65] In other word, according to the primary purpose trading doctrine, charities are not allowed to carry out business with the main or sole aim of raising funds for a charity.[66] Further, primary purpose trade should be carried on by the charity itself rather than being hived down.[67] The work in connection with the trading is mainly carried out by beneficiaries of the charity, as that will normally be primary purpose trading.[68] Compatibly, this doctrine holds that the trade activities do not require the implementation of additional governance procedures.[69]

Mostly, in this scheme, as long as the commercial activity is related to the primary purpose, separate registration and subsidiary entity for the trading activities are not required; because the trade itself is considered as part and parcel of the primary purpose activity. In the primary purpose trading, the character and mission of charities sharply limit their ability to circumvent the "substantially related test. To qualify as a related activity, states require a substantial causal relationship between an activity and an organization's "primary purposes." A causal relationship exists only if the activity can be directly traced to the primary purposes (other than through the production of funds).[70] Thus, the policy or statutory design of the charitable purpose is an important factor to limit the extent of involvement of charities in business. Typically, considering the frameworks of policy designs of the respective

[61] Id., p. 9.

[62] 'Primary purpose trading' is a kind of trading that is directly referrable to the charitable purpose. For example, provision of educational services by a school or college in return for course affordable fees, holding of an exhibition by an art gallery or museum in return for admission fees, sale of tickets for a theatrical production staged by a theatre.

[63] Guidance for charity Commission, *supra* note 60, p. 4.

[64] In stating the 'relatedness' limitation; states use different wordings, while the intention is similar, such as "…closely connected to the main purpose, related to the main purpose, necessary to achieve the purpose, consistent with the charity established…"

[65] Pesh Framjee, Charities and trading – time for a rethink, (2019), p. 1, available at: www.crowe.co.uk. [last accessed on 17 March 2019]

[66] Guidance for charity Commission for England and Wales, *supra* note 60, p.4.

[67] Macfarlanes, *supra* note 59.

[68] Guidance for charity Commission for England and Wales, *supra* note 60, p. 9.

[69] Community Southwark, Implication of Charity Trading, (2016), p.1; available at https://communitysouthwark.org/sites/ [lasted accessed on May 23/2019]

[70] Suzanne Ross McDowell and Steptoe & Johnson LLP, Unrelated Business Income Tax, a Leadership Summit, N.W. Washington, D.C., (2008), p.4.

country, charities put their primary purpose in their governing document. The doctrine of primary purpose trading is followed in many countries. For instance, the Russian Federation[71], England & Wales[72], Australia[73], and Serbia[74], Ukraine[75], Poland[76], Malta[77], Croatia[78], Lithuania[79] Philippines[80] Sweden[81], Kosovo[82], Portugal[83], Slovenia[84], Indonesia[85] etc., are among the countries that adopt a primary purpose trading.

3.1.3. Ancillary Trading Model

This theory holds that charitable organizations can engage in ancillary trading which is complementary (or ancillary) to a charity's primary purpose. An ancillary trade is not, in itself, a means of performing the charity's objects, but is carried out in the course of performing those objects, and as an adjunct to the performance of those objects.[86] In this sense, the business activities are characteristically 'inevitable concomitant' or 'mere incident' of the charitable

[71] The Civil Code of The Russian Federation, Parts One, Two, Three and Four. see also Federal Laws No. 52-FZ , 1994, No. 15-FZ, 1996, No. 147-FZ, (2001) and No. 231-FZ , 2006 Article 50(4), available at https://www.wipo.int/edocs/lexdocs/laws/en/ru/ru083en.pdf [Last accessed 10 June 2019]

[72] Charities Acts (1992) and the Charities Act 2016, see at https://www.cof.org/content/nonprofit-law-england-wales [Last accessed on 20 March 2019]

[73] The Australian Charities and Not-for-profits Commission Act 2012 (ACNC Act), available at: https://www.cof.org/content/nonprofit-law-australia). [Last accessed on 17 March 2019].

[74] Decree on endowments and foundations, *Official Gazette* Of The RS, no. 88/2010, Article 45 https://www.cof.org/content/nonprofit-law-serbia [Last accessed on 17 March 2019].

[75] Law Of Ukraine on public-benefit charities, no. 5073-vi, (2012), Article 16(4), Available at: https://www.refworld.org/docid/5d667a354.html [accessed 14 June 2020].

[76] Law on Public Benefit Activity and Volunteerism (PBA Law), Art 20(4): available at: https://www.cof.org/content/nonprofit-law-poland [Last accessed on 17 March 2019]

[77] Comparative highlights of foundation laws, *supra* note 4. P. 23.

[78] Nonprofit Law in Croatia, Law on Foundations, *Official Gazette* No. 106/2018, Article 34. Available at: https://www.cof.org/content/nonprofit-law-croatia [last accessed on 17 March 2019].

[79] Law of Charity and Sponsorship Foundations, No.1-172, (1993) Art 4(3). Available at http://images.policy.mofcom.gov.cn/flaw/201411/2F91A511-EC02-442C-A9F7-14A28CDC241D.pdf [last accessed on 17 March 2019]

[80] Revised Corporation Code of the Philippines (RA 11232), (2019) (repealing the Corporation Code of the Philippines (Batas Pambansa Bilang 68)), Section 86, see at https://www.cof.org/content/nonprofit-law-philippines [last accessed on 15 March 2019]

[81] Comparative highlights of foundation laws, *supra* note 4, P. 23- 24.

[82] Ibid

[83] Ibid

[84] See Foundations Act, Official Gazette of the Republic of Slovenia Nos. 70/05 and 91/05, Art 2. available at: https://www.cof.org/country-notes/slovenia [last accessed on 23 March 2019].

[85] Nonprofit Law in Indonesia, Law No. 16 of 2001 on Foundations (Yayasan), (2001), Article 7. Available at: https://www.cof.org/content/nonprofit-law-indonesia.

[86] Macfarlanes, *supra* note 59, p.1. 'ancillary trading' is a kind of trading that is not directly referrable to the central mission of the charity. Nevertheless, it is part of doing what the charity does. An example of ancillary trading is the sale of drink by a theatre to audience members. Although the sale of drink does not fulfill the charitable purposes of a theatre charity, it will contribute indirectly by making sure that the audience feel welcome and enjoy the theatrical experience. It follows that the sale of drink to passers-by who do not attend the production does not contribute directly or indirectly to the purposes of the charity, and therefore cannot be classed as primary purpose trading or ancillary trading.

purpose.[87] Thus, an ancillary trade is one that by itself would not be a primary purpose trade but one that a charity would be expected to or obliged to carry out as part of carrying out its primary purpose.[88] For example, sale of brochures promoting a charity fundraising event can be exercised in the course of carrying out the primary purpose because it contributes indirectly to carrying out charity's primary purpose.[89] Accordingly, it is clear that purposes or activities may be characterized as ancillary or incidental to a charitable purpose where they do not have a direct effect on the mission.[90] In this realm, South Africa[91], Finland[92] Bulgaria[93], Romania[94], Albania[95], Hungary, Latvia, Italy, and Austria can be mentioned as typical examples with this experience.[96]

3.1.4. Non-Primary Purpose Trading or Secondary Purpose

This model asserts that charities shall be permitted to carry on non-primary purpose trading in order to raise funds.[97] The business activity neither in itself furthers the charity's objects nor auxiliary (ancillary) to the achievement of the purpose of the charity. It includes business activities conducted solely to generate income for charities. However, largely, charity laws require that the non-primary trading does not involve a significant risk to the assets of the charity.

States that can be mentioned under this model are France[98], Venezuela,[99] Slovakia[100], Germany[101], Denmark[102], Kenya[103], Montenegro[104], etc. These

[87] Murry, *supra* note 48, p. 167.
[88] Framjee, *supra* note 65, p. 1.
[89]Community Southwark, *supra* note 69, p.3.
[90] Murry, *supra* note 49, p. 169.
[91] Non-Profit Organizations' Act 71 of 1997 (as amended) ("NPO Act") and Companies Act of 2008 and Companies Amendment Act of 2011, Schedule 1 Para. 2(a)). Non-profits may carry on any business, trade, or undertaking ancillary to its stated objectives, i.e., the promotion of the public benefit or one or more cultural or social activities, or communal or group interests; see at https://www.cof.org/country-notes/nonprofit-law-south-africa (last accessed on 9 April 2020)
[92] Comparative highlights of foundation laws, *supra* note 4. P. 23.
[93] Ibid
[94] Governmental Ordinance 26/2000, amended by Law 246/2005 and Fiscal Code, Law 227/2015, Article 13-15. Charities may directly carry out economic activities that have an "accessory character" and are closely connected to the main purpose of the organization; see at https://www.cof.org/content/nonprofit-law-romania (last accessed on 8 May 2020)
[95] Law No. 8788, Dated May 7, 2001, On Non-Profit Organizations, the Assembly of the Republic Of Albania, (2001), Article 36. Available At: https://www.imolin.org/doc/amlid/Albania_Law%20No.%208788%20On%20Non-Profit%20Organizations.pdf [Accessed on 10 May 2020]
[96] Comparative highlights of foundation laws, *supra* note 4, p. 23-24.
[97] Community Southwark, *supra* note 69, p.3.
[98] Law No. 2003-709 of August 1, 2003 on Philanthropy, Associations, and Foundations. available at: https://www.cof.org/content/nonprofit-law-france (last accessed on 5 May 2020).

Countries recognize a non-primary trading, however, strictly regulate the trade activities from perspectives of the unfair competition[105], tax exemption[106], adverse effect on the primary mission.[107] Also, they require the proceeds from the trades to be plowed in the organization's main statutory activities.[108]

As a condition, some states require charities to set up a trading subsidiary[109] to raise funds through an unrelated business activity. Accordingly, in these states, if charities wish to make unrelated business activities, the business must be carried out by a non-charitable trading subsidiary ("hived down") rather than being carried on by the charity itself.[110] Largely, charities are only permitted to undertake substantial trading that is directly connected to their charitable purpose, while all unrelated economic activities may only be conducted through a specially established legal entity or a subsidiary.[111] These subsidiary companies are consequently treated in the same way as any other business entity.[112] In this category, for example, Bosnia and Herzegovina[113], Czech[114], Turkey[115] Romania[116] China[117] and Belarus[118] can be mentioned.

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[99] Código Civil (CC) (Civil Code) (1982), see Council on Foundations: Nonprofit Law in Venezuela, available at https://www.cof.org/content/nonprofit-law-venezuela (last accessed on 5 May 2020).

[100] Act No. 213/1997 on Non-Profit Organizations Providing Generally Beneficial Services, Section 30(1) and (2)), The National Council of the Slovak Republic, available at: https://www.cof.org/content/nonprofit-law-slovakia (last accessed on 12 May 2020).

[101] German Federal Civil Code (Bürgerliches Gesetzbuch, or BGB), Chapters II (Foundations, Sections 80-88) and Fiscal Code of 1976, as amended, Article 65. (last accessed on 5 May 2020), see also European Center for Not-for Profit Law, Legal Regulation of Economic Activities of Civil Society Organizations Policy paper, cutting-edge expertise in law affecting civil society, European Center for Not-for-Profit Law, (2015), p. 8.

[102] Comparative Highlights of Foundation Laws, *supra* note 4, P. 23.

[103] The Public Benefit Organizations Act, 2013, Section 65(1)). See at https://www.cof.org/content/nonprofit-law-kenya (last accessed on 9 May 2020).

[104] Law of Non-Governmental Organizations 2011; (amended in 2017), "Official Gazette of Montenegro, Article 29, available at: https://www.cof.org/country-notes/montenegro (last accessed on 9 May 2020). However, the business activities to be performed have to be envisaged by the organization's statute, registered with the Registry of Commercial Entities, and all profits are invested in the organization's main statutory activities.

[105] In this regard France can be mentioned, European Center for Not-for-Profit Law, *supra* note 101.

[106] In this regard Germany can be mentioned, European Center for Not-for-Profit Law, *supra* note 101. See also the experience of other countries at https://www.cof.org/country-notes/nonprofit-law-ireland.

[107] In this regard Slovakia can be mentioned. Act No. 213/1997 on Non-Profit Organizations Providing Generally Beneficial Services, Section 30(1) and (2)), The National Council of the Slovak Republic, see at https://www.cof.org/content/nonprofit-law-slovakia (last accessed on 12 May 2020).

[108] See the non-profit laws of different countries at https://www.cof.org/content/nonprofit-law-

[109] Any non-charitable trading company owned by a charity or charities to carry on a trade on behalf of the charity (or charities).

[110] Macfarlanes, *supra* note 59, p. 1.

[111] Framjee, *supra* note 65, p.4.

[112] Id, p. 3.

Generally, pertaining to the mandate of charitable organizations to take part in business activities, the international experience can be summarized in to two categories. The first category of experience shows that countries which permit the direct engagement of charities in any kind of economic activity without limit (non-primary business mode) so long as the profit return is to be used for the primary purpose. In this category, however, some countries require charities to establish subsidiaries to carry out non primary trade activities. Countries with the second category of experience, on the other hand, allow the direct engagement of charities under certain conditions (related or ancillary to the primary purpose trading). Looking into the global experience, one can see that, though all of the models have a comparable number of followers, almost all states have strictly prohibited charities from engaging in the trade activity that affects their primary purposes. Bearing the effect of a non-primary purpose trading on charitable missions, countries allow it with strict conditions, showing their suspicion to the model.

In choosing an optimum business model, different elements need to be considered. Basically, the foundational or organizational existence of charities has to be the uppermost determinant element. Under the guise of income generation, the non-profits shall not cross their natural sphere either directly or indirectly. Thus, as Gallagher states, "Charities must walk a careful line, balancing their commitment to their missions against the need for revenue streams that are adequate to the task."[119] Generally, the broad policy justification for the existence of charities reveals that an unlimited engagement of charities in business activities negates the basics for the establishment of charities in societies. Therefore, among the models, primary trading is a widely

[113] Federation of Bosnia and Herzegovina Law on Associations and Foundations, (2002), Article 4. See at https://www.legislationline.org/download/id/4643/file/BiH_law_associations_foundations_2002_en.pdf (last accessed on 19 April 2020)

[114] The Civil Code of the Czech-republic, Act No. 89/2012 as amended, available at : https://www.cof.org/content/nonprofit-law-czech-republic#Applicable_Laws (last accessed on 20 April 2020)

[115] European Center for Not-for-Profit Law, *supra* note 101, p.12.

[116] See Ordinance 26 on Associations and Foundations, *official gazette*, # 39 of 31, (2000), Art 47; Available at https://mk0rofifiqa2w3u89nud.kinstacdn.com/wpcontent/uploads/Romania_ordinanceeng.pdf?(last accessed on 9 May 2020)

[117] The "Charity Law of the People's Republic of China'', Chairman's Order 12th Congress No. 4, 2016, Article 9. Available at: https://www.chinalawtranslate.com/en/2016-charity-law/ [Last accessed 9 October 2020]

[118] Comparative highlights of foundation laws, *supra* note 4, P. 23-24.

[119] Gallagher, J. G., Peddling products: The need to limit commercial behavior by nonprofit organizations. Competing Visions: The Nonprofit Sector in the Twenty-first Century, Washington, DC: The Aspen Institute, (1997), p. 6.

recommended model to balance the sphere of charities and income generation activities.

4. Charitable Organizations in Ethiopia: An Overview

According to Jeffrey Clark, in Ethiopia, modern civil society organizations commenced in the 1930s following the advent of urbanization and economic development.[120] However, the legal framework for the regulation of civil society organizations was enacted and codified in 1960.[121] In terms of coverage, the operation of charities was very limited during the imperial period.[122] In the Derg regime too, charities were mainly regulated by the Civil Code. However, during the same period, the non-profits had no freedom to operate in the country and hence the sector was underdeveloped.[123] Compared to the Derg regime, after the TPLF/EPRDF[124] took power, the operation of civil society organizations has also been highly bridled.[125] Yet, the FDRE government had been using the Civil Code until 2009 to regulate these organizations. By 2009, the government issued a new Proclamation of Charities and Societies.[126] This Proclamation was critically challenged by local and international organizations as it contains rules that hamper the operation of non-profit organizations. As a result, this law had been repealed by the new OCS proclamation.

The OCS proclamation divides organizations of civil societies into "Local Organization" and Foreign Organization."[127] Under this Proclamation, the "organizations of civil societies" are defined as a non-governmental, non-partisan, not for profit entity voluntarily established at least by two or more persons and registered to carry out any lawful purpose.[128] The forms of the organizations include non-government organizations, professional associations,

[120] Jeffrey Clark, Civil Society, NGOs, and Development in Ethiopia: A Snapshot View. A document prepared by the NGO and Civil Society Unit of the World Bank's Social Development Department, Washington, DC: The World Bank. (2000), P. 4.

[121] Book I, Title III, of the Civil Code is the relevant part to govern the Civil Society Organizations. See the Civil Code of the Empire of Ethiopia, Proclamation No. 165/1960, *Negarit Gazeta*, (1960), (Hereinafter the Civil Code of Ethiopia)

[122] Dagne Negash, An Assessment of Challenges and Opportunities of Ethiopian Charities, Master Thesis, Addis Ababa University, (2017), p. 9.

[123] Getachew Tegegn, Assessment of Income Generation Practices and Challenges among NGOs operating in Addis Ababa: The case of Kolfe Keranyo and Lideta Sub-cities, MA thesis, St. Mary's University, (2017), p.11.

[124] TPLF= Tigray People Liberation Front, EPRDF= Ethiopian peoples' revolutionary democratic front.

[125] Ayele Angelo Ago, The Roles, Contributions and Challenges of NGOs in Ethiopia, MA Thesis, University of Reading, (2008), P. XXXVII.

[126] Charities and Societies Proclamation No. 621/2009, *Federal Negarit Gazeta*, (2009). [Hereinafter Charities and Societies Proclamation].

[127] See the OCS Proclamation, Article 2.

[128] Ibid, Article 2 (1).

mass based societies and consortiums.[129] As described under the definition, organizations of civil societies are membership organizations. Thus, membership is the basic element in the formation of civil society organizations.[130] The Proclamation aimed to govern both charitable organizations and professional associations.[131] Local organizations are broadly categorized into charitable organizations, board-led organizations and associations.[132] Charitable organizations, as a civil society organization, are created by the membership of persons and can be formed in different arrangements. Accordingly, the law recognizes different forms of charitable organizations, such as a charitable endowment[133]; a charitable trust;[134] and a charitable committee.[135]

As stated under the Proclamation, "charitable organization" is solely established to work for the interest of the general public or third party.[136] In other words, charitable organizations are, exclusively, established for charitable purposes. As can be understood from the international experience, countries define and set out the activities of the charities under policies and civil society laws.[137] However, the law in Ethiopia neither defines charitable purposes nor specifies charitable activities in the existing context. In Ethiopia, the sources of revenue of charities are diverse depending on the type of charity. As discussed above, historically, the majorities of charitable organizations in Ethiopia focused on emergency relief operations and were largely foreign charities which had heavily relied on

[129] Ibid.

[130] Id, Article 2.

[131] In terms of scope, as stated under article 3(3), the proclamation shall be 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 two Chartered city (Addis Ababa and Dire Dawa), charitable Organizations established by religious Organizations. Also, the proclamation excludes some activities which are beyond the scope of application of the Proclamation. Accordingly, Religious institutions except charitable organizations established by religious institutions, traditional institutions (Ekub, Edir and others) and Organizations formed under other laws are out of the scope of application of the Proclamation. Yet, Regional state governments have also their own non-profit laws.

[132] Id, Article 18.

[133] A "Charitable Endowment" is an organization by which a certain property is perpetually and irrevocably destined by donation, money or will for a purpose that is solely Charitable. (See OCS Proclamation, Article 21(1)).

[134] "Charitable Trust" is an Organization established by an instrument by which specific property is constituted solely for a charitable purpose to be administered by persons, the trustees, in accordance with the instructions given by the instrument constituting the charitable trust (See OCS Proclamation, Article 31(1))

[135] A "Charitable Committee" is a collection of five or more persons who have come together with the intent of soliciting money or other property from the public for purposes that are Charitable (See OCS Proclamation, Article 48)

[136] See The OCS Proclamation, Article 2(4).

[137] See the non-profits laws of countries at https://www.cof.org/content/nonprofit-law

foreign aid.[138] A small number of local charities were financing themselves through private donations, public collection and membership contributions.[139] However, charitable organizations working on human rights secure their full or substantial part of the budget from foreign sources.[140] Currently, charitable organizations generate their funds from private contributions, government grants, donor consortium, income generation activities (public shows, volunteer service, fundraising dinner and media calls) and commercial activities.[141]

5. The Mandate of Charities to Engage in Business Under the OCS Proclamation of Ethiopia

Concerning the mandate of charities to take part in business, the path of Ethiopia is unstable. As stated before, although non-profits have been started their operation in Ethiopia in the 1930s, the formal regulatory framework for non-profits was enacted and codified in 1960 under the Civil Code.[142] Thus, the Civil Code represented the start of a regulatory framework for the non-profit sector. However, while these institutions are expected to use up their funds *per se* for the not-for-profit activities, the Civil Code is silent with regards to the engagement of non-profits into economic activities. This was so until 2009.

In 2009, the government enacted Charities and Societies Proclamation No. 621/2009 which strictly regulate the resources and economic activities of charities and societies. This Proclamation represented the start of a regulatory framework containing an express provision on the income generation activities of the non-profit sectors. According to Article 103(1) of the Proclamation, "the Charities or Societies may, upon written approval of the Agency, engage in income-generating activities that are *incidental to the achievement of their purposes*..." [Emphasis added]. Incidental in a sense that the economic activity may not have a connection with the aim of the charity rather it is a kind of activity which is conducted in the course of the primary activity incidentally.[143]

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[138] Clark, *supra* note 120, P. 4.

[139] Yntiso Gebre, Reality Checks: The State of Civil Society Organizations in Ethiopia, *African Sociological Review,* Vol. 211, (2017), p.36.

[140] Abiy Chelkeba, Impact Assessment of the Charities and Societies Law on the Growth and Programs of Non-Governmental Organizations (A Survey Study of Addis Ababa City Administration, Addis Ababa, Ethiopia), Master of Laws (LL.M), Addis Ababa University, (2011), p. 27.

[141] Tesfaye, *supra* note 6, p. 47.

[142] Clark, *supra* note 120, P. 4.

[143] But, the Amharic version of the provision looks lucid and conveys a different message. The Amharic version enshrines that an endowment can conduct economic activities which are related/connected to the purpose of the charity "...ከአላማው ጋር ተያያዥነት ያላቸውን...). The trade and investment activities must be related to the purpose of the non-profit organization. The trade/investment shall be in itself as

Currently, the applicable law is the OCS proclamation No. 1113/2019. This proclamation has, among others, come up with a new form of business model in the income generation activities of the non-profits. Pursuant to Article 63(1)(b) of the Proclamation, "the Charities and associations have the right to engage in *any lawful business and investment activity* in accordance with the relevant trade and investment laws to raise funds for the fulfillment of its objectives" [italics added]. Yet, this wider position of the law triggers different concerns. Thus, it is important to appraise the unrestricted trading model of the Ethiopian proclamation from the perspective of the organizational existence of charitable organizations, the model of charity trading, international practices and other dependable concerns.

5.1. Appraising the Charity Business Model of the OCS Proclamation of Ethiopia: A Critical Analysis

As charities operating in developing countries have financial shortages to pursue their charity mission, designing means of income generation activity arrangements is imperative. This, in turn, necessitates countries to design charity trading models in light of the paradigms for the organizational existence of charities. In the coming sections, the article examines the charity trading model of Ethiopia in light of the theories for the organizational existence of charities, international experiences, and from the viewpoint of the potential concerns behind an unrestricted business activity of charities. An unrestricted business engagement of charities is characteristically against the organizational existence of charities. The charity sector is "viewed as one of value and voice for those in need, but the trend of commercialism is resulting in questioning such virtues for the sector and its role in the community."[144] Hence, unless states duly regulate the economic activities of charities, freewheeling business activity may threaten the integrity of the charities sector.[145]

Principally, a charitable organization benefits the public within recognized charitable activities, especially for vulnerable groups or other purposes that benefit the community.[146] A business sector, on the other hand, is a segment that

a means for the realization of the aim of the organization. Hence, as per the Amharic version (which is the controlling version in the Federal government laws); before 2019, Ethiopia had followed the primary purpose related model realm as there is a relatedness limitation to engage in business activities. The income generation guidelines also state the direct relatedness requirement. See Directive on Income Generating Activities by Charities and Societies, CHSA, Directive No. 7/2011. (Amharic, unpublished), Article 5.

[144] Bosscher, *supra* note 3, p.1.

[145] Bucholtz, *supra* note 12, p.404.

[146] İLHAN, *supra* note 20, pp. 95-104.

trades goods and services to consumers. By origin, non-profits are not created to make business either directly, or through companies. As a solution to market failure or as income generation activity, charities shall perform their activities within the spaces and tracks for which they are established. Nevertheless, in this respect, one may wonder about the finance of charities for the provision of their services in society. As it is established in the previous sections, charities, unquestionably, need to have finance for their services. Also; as can be inferred from the notion and formation of charities, there are accepted sources or coffers of finance for charitable activities. As such, charities are formed either through an endowment asset or voluntary contribution (regularly and irregular) or different grants.[147] Therefore, it must be understood that, as a source of revenue, charities shall mainly rely on 'charity funding models' such as donations and contributions.

Yet, under the guise of a source of income, charities shall not leave their setting and get into the commercial sector in an unrestricted manner. As the history of charities shows, as a source of revenue, arrangements of income generations are allowed exceptionally.[148] It is presumed that voluntary sectors are mainly financed by voluntary contributions, as tax is the main source for the government and sales for the private sector.[149] Yet, allowing charities to involve in the market in an unrestricted way would make charities an actor in the private sector. In effect, they will begin to perform activities that are naturally not supposed to do by charities and turn themselves into profit making organizations.

Studies exploring such concerns reveal that in Ethiopia, charitable endowments are involved in areas that can be filled by the private sector.[150] According to the researchers, the organizations gain the impetus from the industry policy of the country which clearly opens this space. The researchers rationalized that in some segments of business, the operation of charities cannot be justified by a market

[147] Tilcsik, A.; Marquis, C. Punctuated Generosity: How Mega-events and Natural Disasters Affect Corporate Philanthropy in U.S. Communities, *Administrative Science Quarterly*, (2013), 58 (1), PP. 111-148.

[148] Jams W. Woosm, Investment Practices of Endowments and Pension Funds, (2015), P.163. Available At: https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2517&context=lcp [last accessed on 17 March 2019]. Moreover, it is possible to infer from the Civil Code that, for example, charities are mainly expected to carry out their charitable purpose through property *destined for* that purpose. (See The Civil Code of Ethiopia, Book I, Title III).

[149] Burton A. Weisbrod, The nonprofit mission and its financing: Growing links between nonprofits and the rest of the economy, in Burton A. Weisbrod eds, To Profit or Not to Profit: The Commercial Transformation of the Nonprofit Sector, Cambridge University Press, (1998), p.13.

[150] Altenburg Tilman, Industrial Policy in Ethiopia, German Development Institute Discussion Paper 2/, (2010), p. 2

failure.[151] As a result, the charities are losing their track and become business enterprises bearing the name of charity, though.

Further, owing to the wide-ranging engagement of charities in business, they are losing their charitable missions and focused their stratagem on business. Let alone in the unrestricted trading model, at the time Ethiopia had adopted a related and ancillary trading model, many charities were engaged in the business widely to the extent of characterized as a commercial enterprise.[152] Also, sometimes, business-oriented charities tend to justify their wide-ranging engagement in business activities with non-charitable activities such as job creation and to regulate and influence the market capitalists. Yet, it is important to note that it is not the spirit of the law in permitting charities to engage in business activities.[153]

To mention one of the worst scenario in this instance, some charitable endowments are known, in public, by their business rather than by their charitable activities.[154] They are kinds of organizations that do not engage in "real" charity; their apparent charitable activity is simply a cynical marketing gimmick. Besides, they leave aside the limits and rationale of trading set for charities and they often re-invested the profits "to grow the business or increase market share, which can give rise to questions as to where the altruism and public benefit really lies."[155]

Moreover, as can be learned from foreign experiences, unrestricted charity trading entails disadvantages stemming from the management, control and cultural clashes between the two different activities - charitable and profit-making.[156] In effect, the administrators of charity organizations would be

[151] Sarah and Mesfin, *supra* note 6. p. 61. If we take the case of TIRET and EFFORT, both of them are working on business areas which can be done by the private sector.

[152] Belete Addis, Income Tax Privileges of Charities and Charity Giving in Ethiopia: A Critical Legal Analysis, LLM Thesis, Bahir Dar University, (2018), (Unpublished), p. 62.

[153] Ibid. See also Sarah and Mesfin, *supra* note 6, p. 32, In fact, governments sometimes use enterprises to regulate and influence the private sector. But this is not the task of non-profits. This is rather the role of public enterprises.

[154] As an example, EFFORT and TIRET can be mentioned. As these charitable endowments are operating business in different sector, the general public know them by their commercial character (See *supra* note 8), See also All African.com, Ethiopia: Party Affiliated Businesses Continue to Create Unfair Competition, Forum, (2002). Available at https://allafrica.com/stories/200211080664.html [Accessed on 10 March 2020] [Hereinafter, All African.com.].

[155] Belete, *supra* note 152, p. 63.

[156] Redochre, Charity Trading (2009), available at: https://redochre.org.uk/wp-content/uploads/2012/03/SE- Charity_trading_pdf.(last accessed on 9 April 2020)

involved in a mix of conventional selfishness and a kind of directed altruism.[157] Hence, entering into business may cause decision-makers to lose sight of the charity's mission and begin to focus on profits. In this regard, Kluvert, one of the scholars exploring the issue, expresses his concern saying:[158]

> *Nonprofit organizations have a pivotal role in mobilizing public attention to social problems and needs, serving as conduits for free expression and social change. However, these activities are significantly challenged in a marketized environment. The nonprofit sector's increased reliance on commercial revenue has caused a shift from services targeted to the poor to those able to pay. Additionally […] nonprofits that market-oriented organizations have shifted their focus from public goods such as research, teaching, advocacy, and serving the poor, to meeting individual client demands.*

Consistent with the remarks of this scholar, other studies have revealed that in cases where charities are extensively engaged in the market, "the stakeholders who were once donors or members become consumers or clients, and the focus of the organization shifts from creating networks of trust to creating opportunities for selling more products or services to individuals."[159] In the same way, in Ethiopia, as empirical evidences reveal, some charities view their business activities as inseparable part of their missions.[160] In effect, the attention for charitable activities is diminishing. Because of the development of business orientation in the charity sector, charities trailed in the provision of essential services (e.g., education, health care, etc.) are selling their service with commercial prices to non-target groups.[161] Therefore, to maintain the sphere and focus of charities, limiting the extent of involvement of charities in business is very important. This is because the moment charities take part in unrelated trade activity, the extent of escaping from their natural sphere (the third space) will be wider.[162] Though the prohibition on the distribution of surplus has been viewed as a safeguard against straying from the mission, prohibitions of unrestricted commercial engagements have been viewed as an important protective measure.[163]

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[157] Anup Malani & Eric Posner, The Case for For-Profit Charities, *Virginia Law Review*, Vol. 93, (2017), p. 2032.
[158] Eikenberry and Kluver, *supra* note 4, p.138.
[159] Id, P.137.
[160] Belete, *supra* note 152.
[161] Getachew, *supra* note 123, p.37.
[162] Larre, *supra* note 18, p. 36.
[163] Ibid.

Looking into the third area of concern in this respect, researches have confirmed that unrestricted charity trading in Ethiopia obstructed the market competition system of the country.[164] Particularly, it has been reported that the more charities are permitted to carry on unrestricted business, the impact they impose on the state of competition would be wider. Though charities are operating in the same relevant market with for-profit firms in the country, the former are operating in the market unfairly. In practice, they are perceived to have received preferential treatment, for example, in credit access, government contracts, foreign exchange allocation.[165] This is done not only in their charitable capacity but also in their trader capacity. In this regard, there is a long-standing complaint by the private sector that the subsidiary companies of charities are favorably treated by the government in different arrangements such as privilege to access auctions, and loans and other regulatory benefits.[166] As a result, the decent private sector cannot compete with the charity enterprises as the playing field is not level.[167]

At this juncture, it is worth mentioning the case of party-affiliated charitable endowments as illustrative instances of such concerns. As empirical evidences from many studies revealed, in Ethiopia, party-affiliated charities are seriously affecting the commercial sector.[168] According to researchers, extensive commercial engagements of their subsidiary commercial entities in profitable areas compel the private business to compete unfairly with favored charities.[169] There are practical situations, chiefly, connected to charitable endowments such as EFFORT that can raise clear concerns relating to domestic market dominance and acts of abuse of such market dominance.[170] Apart from the empirical evidences, practitioners and representatives of the business community such as members of the Addis Ababa Chamber of Commerce (AACC) have expressed their concern over the unfair competition practice of charitable endowment companies.[171]

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[164] Belete, *supra* note 152, pp.61-65. See also Mulu Gebreeyesus Industrial policy and development in Ethiopia: Evolution and present experimentation Working Paper No. 6, P. 25, available at: https://www.brookings.edu/wp-content/uploads/2016/07/L2C.

[165] Ibid, Mulu.

[166] All African.com, *supra* note 154.

[167] Ibid.

[168] Ibid. See also Berihun Gezehegn, the unregulated status of corporate groups and competition issues in Ethiopia: Abuse of market dominance and anticompetitive agreements, Master thesis, Addis Ababa university, (2014), p.109

[169] Sarah and Mesfin, *supra* note 6, p. 61

[170] Berihun, *supra* note 168, p.109, See also welkait.com, Tiret (ፕረት), available at https://welkait.com/?p=14184 [last accessed on 13 April 2020]

[171] All African.com, *supra* note 154.

The fourth concern, with regards to charity trading, is related to the risk of business failure leading charities to financial loss.[172] Although it is a less commonly identified concern, fiscal responsibility is a basic principle in the operation of charitable organization.[173] Among others, charities are required to take appropriate measures to reduce the risk of using assets for non-charitable purposes.[174] These actions of reducing or avoiding such risks may take different forms. For example, a restriction on carrying on business may provide some assurance to donors that their money will not be "wasted" on a failed business. Also, charities need to foresee how a money loss through a business (for example, a primary purpose trading) would erode resource of the charity and reduce societal benefits produced by the charity. Accordingly, they need to find safeguard against such risks. To this end, in many jurisdictions, charitable organizations purchase charity insurance to protect organization's property, possessions, money and reputation.[175]

Therefore, allowing charities to carry out any business may result in business failure of charities. However, if charities are operating in primary purpose trading, the possibility of their failure is lesser as it will be carried out allied to the charitable activities and largely depends on the lifecycle of the organizations. If the risks are safeguarded, the danger will be entirely avoided. In Ethiopia, the gravest risk to this, unlike other countries, the OCS proclamation permits charities to engage in 'non-primary purpose trading' without putting "the absence of a significant risk test."

Fifth, the marketization activities of charities reduce their social network with core constituencies, such as donors, community volunteers, and other non-profit organizations.[176] Maintaining and safeguarding the relationship of charities with the communities is fundamental principle that charities need to realize to deliver effective programs in the society.[177] The scholarly literature in this respect shows that high reliance of charities on business profits will flagging the social networks, social trust and cooperation of the society towards nonprofit

[172] Larre, *supra* note 18, p. 36

[173] Principles of International Charity, developed by the Treasury Guidelines Working Group of Charitable Sector Organizations and Advisors, (2005), p.3, available at http://wings.issuelab.org/resources/13943/13943.pdf [hereinafter Principles of international charity]

[174] Ibid

[175] Hiscox, Insurance, Charities and social enterprises, (2017), available at https://www.hiscox.co.uk/business-blog/whats-difference-charity-non-profit/ [last accessed on 12 March 2020]

[176] Eikenberry and Kluver, *supra* note 3, p. 137.

[177] Principles of International Charity, *supra* note 173, P. 3.

organizations.[178] Given their voluntary character charities give to society the opportunity to organize itself to promote social values and civic goals is very high.[179] Further, these social networks are essential for mobilizing collective action and addressing social problems.[180] However, when charities rely on commercial revenue and entrepreneurial strategies, there is less space to build networks among constituencies, hence discouraging cooperation and civic participation.[181]

Looking into the situation in Ethiopia, the level of relation between the society and charities vary depending on fundraising modalities. Charities which collect money through different events from the volunteers are very close to the society.[182] In such cases, the community concerned for charities and the charities also care for the community. Conversely, charities that are extensively engaged in market are not close to the society.[183] In Ethiopia, the gravest risk to this relationship such as association with a political position and stand-in as a commercial enterprise are affecting the relationship of the society and charities.

Despite all these deficiencies evident in the system, the nonprofit laws use the phrase "income generation" in regulating economic activities of charitable activities.[184] As can be inferred from the phrase "income generation activities", the fact that the type of trade is allied to the charitable activity is presumable. Normally, income generation activity is a means of source of income for charities through charging fee, income-producing shares and telethons.[185] In other words, disparate business activities are not foreseen under the notion of income generation activity. Besides, as income generation activities do not require the implementation of additional governance procedures in the charity organization, supposedly, the income generation activities need to be allied to the purpose of the charity.[186] Hence, under the pretext of income generation, charities shall not transgress into the market sector.

[178] Eikenberry and Kluver, *supra* note 3, p. 137.
[179] Popowska and Łuński, *supra* note 11, P. 40.
[180] Backman Elaine V. and Steven Rathgeb Smith, Healthy Organizations, Unhealthy Communities? Nonprofit Management and Leadership 10(4), (2000), p. 356.
[181] Eikenberry and Kluver, *supra* note 3, p. 137.
[182] In this regard, Muday and Macedonia charitable organizations can be mentioned as an example.
[183] Befeqadu, *supra* note 6.
[184] See the non-profits laws of different countries at https://www.cof.org/content/nonprofit-law- [last accessed on 9 June 2020]
[185] The Cambridge Business English Dictionary, Cambridge University Press, (2020), available at: https://dictionary. cambridge.org/dictionary/English/income-generating [last accessed on 9 April 2020]
[186] Community Southwark, *supra* note 69, p.1.

Moreover, permitting charities to engage in any business with the mere condition of the plow back of the proceeds to the primary purpose of charities cannot be a remedy to the glitches emanating from the unrestricted engagement of charities in trade and investment activities.[187]

5.2. Towards Designing Charity Trading Model

Looking back the analysis made on the international experience and the theories underlying the origination, existence and operation of charities, one would agree that the commercialization orientation of charities, as a primary activity, has to be sidestepped. In other words, allowing charities to involve in the market in an unrestricted way would make them actors of the private sector. Therefore, at any rate, it has to be known that charities need to perform within their natural sphere. Besides, the involvement of charities in the market on the basis of market failure is often associated with non-financial marketing objectives; they market for social change, which is referred to as a 'societal orientation.'[188]

Further, trading as a source of revenue shall not compromise the inherent role of charities. If charities have to involve in income generation activities, they shall be allowed to engage in trade activities which can be performed in the course of carrying out the primary purpose of the charity. In other words, the trading activities must 'bear a coherent relationship to the purposes sought to be achieved', or substantially connected to a furtherance of those purposes'. This is because the more charities take part in unrelated trade activity; the extent of escaping from their natural sphere (the third space) would be wider.[189]

Thus, bridling the income generation activities is important. In this regard, the appropriate trading models for the charity sector, including for those in Ethiopia, are the purpose- related trading models. Under these models, charities can generate income while keeping their natural sphere. To this end, primary purpose trading is the most appropriate charity trading model. While a primary-purpose model is commendable, permitting charities to engage in ancillary trading is also helpful for countries like Ethiopia where the support of the private sector is insignificant. Particularly, the incidental trading in an ancillary business would contribute to the promotion of the charity missions while preventing charities from transgressing into the market sector. So, without prejudice to the above propositions, as far as active businesses are concerned

[187] Larre, *supra* note 18, p 36.
[188] Liao *etal,* Market versus societal orientation in the nonprofit context. *Int J Nonprofit Volunt Sect Mark* 6(3), (2001), pp. 254–268.
[189] Larre, *supra* note 18, p. 36.

charities shall only be allowed to take part in primary purpose and ancillary trading.

At this juncture, it is important to note that, as a perquisite to making charities behave properly, their specific charitable purposes, which the country desires to pursue, have to be defined clearly within policy formulations and non-profit laws. Particularly, the defined space should be delineated in a way it shapes both the charitable purpose and the extent of charity trading. In cases where the primary mission of the charity is not definite, sorting a certain activity as a related or unrelated is difficult. Hence, as a part of formulation of charity trading, a clear delimitation of the natural spaces of the charities sector is critical. In Ethiopia, there have been attempts to define charitable areas since the emergence of such institutions in the country.[190] While this attempt starts in the early days, it is significantly visible in the repealed Charity and Societies Proclamation which defines the space of charities by illustrating activities that shall be deemed as a charitable purpose.[191] Surprisingly enough, under the current OSC Proclamation however, areas considered as charitable purposes are not explicitly illustrated, requiring the government, at the regional and federal levels, to explicitly define areas of the third sector generally and charities in particular. Another missing element in the legislation is a specific business model that balances the involvement of charities in business activities and proper operation to attain their inherent goals.

To this end, the government may allow certain forms of income generation activities, such as passive investments which pose no risk to an entity's charitable purpose. For example, a charitable entity may 'passively' invest funds by purchasing assets such as bond or shares to generate income for its activities. Of course, concerning passive income, the number of shares that charities hold should be limited. Unless the level of their capital participation is limited, they will become *de facto* owner of the commercial organizations.[192] So, there is a need to maintain a balance between the level of their capital participation and the smooth functioning of charities in their sphere.

[190] Dessalegn Rahmato *etal*, CSOs/NGOs in Ethiopia Partners in Development and Good Governance, A Report Prepared for the Ad Hoc CSO/NGO Task Force, (2008), P. 16.

[191] Charities and Societies Proclamation, Article 14(2). The relief of poverty, the improvement of animal welfare, advancement of human and democracy right, the promotion of conflict resolutions and reconciliation, the advancement of culture, education, and health are some examples of charitable purposes.

[192] In addition to take the focus of charities from charity activities, an extensive engagement in the passive investment will make charities as the operator of the market.

Furthermore, as recent research evidence reveals, most charitable endowments in Ethiopia use the proceeds of the business to start another business while it was expected to use it for charitable purposes.[193] Therefore, there has to be a maximum threshold on the extent of the reinvestment of trade proceeds that charities shall be allowed for. Unless there is a threshold limit in the reinvestment of passive income, the proceeds would not be plowed back to the charitable purposes to the required level.

Conclusion

The literature and the international experience explored so far establish the view that, as part of the third sector, charitable organizations shall work on areas that cannot be done by the government (public sector) and the market (private sector). Also, income generation is unavoidable phenomenon in the operation of charitable organizations. While charity trading as an income generation is part of the operation of these organizations, the global experience varies largely falling in two categories. In the first category, countries allowing charity trading under certain conditions (related or ancillary to the primary purpose trading). The second category of experience shows countries allow charities to do any lawful business including a non-primary business. In this category, however, some countries require charities to establish subsidiaries to carry out non primary trade activities. Cognizant of the effect of a non-primary purpose trading on charitable missions, these countries allow it with strict conditions, which show their suspicion to the model.

Turning to the Ethiopian experience, though it may appear premature to judge the success or setback of the new Civil Society regime, the noticeable limitations have already been observed. To be specific, charities are permitted to engage in any lawful income generation activities under the current legislation on charitable organizations.[194] Let alone in an unrestricted trading model, at the time Ethiopia adopted a related and ancillary trading model, many charities were engaged in the business widely to the extent of looking like a commercial enterprise. As a result, some of the charities are losing their charity mission and take their commercial activity as their central objective instead of using the business as a means to generate income for charitable purposes.

Finally, as empirical researches and media sources reveal, some charities are involving in business areas where the private sector is strong. This practice of

[193] Belete, *supra* note 152, P. 63.
[194] See OCS Proclamation, Article 63.

charities is against the organizational existence of charities. Such a wide-open position of the law will result in a range of adverse consequences such as losing focus to the central mission of charitable organizations, unfair competition, risk of business failure, and reduction of social trust and cooperation of the society towards the nonprofit organizations. So, the open position of the civil societies' organization legal regimes of Ethiopia shall be revisited in light of the organizational paradigm and major international experiences. Therefore, as an income generation activity charitable organization shall only be engaged in primary purpose and ancillary business activities. Alternatively, as a way to help them to conserve or manage their assets, they could be allowed to participate in passive investment with a threshold limit in the participation.

Analysis of the Regulation of Key Risk Factors to Road Traffic Accident in Ethiopia and Challenges for Enforcement

Bereket Eshetu [Ψ]

Abstract

Road Traffic Death is a common tragedy in many parts of the world, yet one that rarely receives the attention it merits. More than one million three hundred thousand fifty people globally, and three thousand five hundred people in Ethiopia are being killed in road accidents every year. Regrettably, working-age groups make up a large proportion of those killed and injured. Accordingly, this article examined how far comprehensive is the Ethiopian law in addressing key risk factors for traffic accident. Particularly, it examined the comprehensive regulation of key risk factors to road traffic deaths and injuries namely:–speeding, drink–driving, use of seatbelts, child restraints, and motorcycle helmets, in light of the globally accepted practices. The result showed, despite the effort made to incorporate several rules, there are still substantial loopholes in meting out the appropriate penalties. Further, the non-application of point demerit penalty system stipulated under the law, limited resource, understaffing and lack of patrolling vehicles/motorcycles, Traffic Controllers' lack of commitment for enforcing traffic laws, lack of publicity and poor road engineering works are, among others, identified as the major obstacles to effective enforcement of traffic regulation.

Key terms: Risk Factors · Road Traffic Deaths and Injuries· Speeding · Drink–Driving · Seatbelts · Child Restraints· Motorcycle Helmets, Ethiopia

Introduction

Road Traffic Accident (RTA) is one of the major phenomena of modern time threatening the social and economic well-being of societies across the globe. Due to road traffic accidents (hereinafter, RTA), over 3,000 people every day[1]

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Frequently used acronyms:

RTA = Road Traffic Accident
FDRE = Federal Democratic Republic of Ethiopia
WHO = World Health Organization

[1] World Health Organization (hereinafter, WHO), World Report on Road Traffic Injury Prevention: Summary, (2004), p.1, available on www.who.int, accessed on October 2020.

and 1.35 million people every year are being killed in the world.[2] It is also reported that more than 50 million people are injured or disabled each year.[3] Undesirably, RTA remains the leading cause for the death of children and young adults aged 5-29 years. Economically, it costs 3% of most countries' gross domestic product. Even though low and middle-income countries own 60% of the world's vehicles approximately, 93% of the deaths on the road occur in low and middle-income countries.[4]

In Ethiopia, the Federal Police Commission report envisages that, since 2012/13, more than 3,000 people have died and 6,000 people are injured each year due to RTA. Further, according to the 2018 WHO report, the number of road traffic deaths in the country has reached 4,352 people annually and its rate remains high at around 27 deaths per 100,000 populations.[5] The WHO reports – comparing the phenomena across countries shows that in countries with proactive RTA policies such rate is below 10%.

Examining the magnitude, features, and cause of the Ethiopian RTA deaths, studies identify several contributing factors to the problem. Particularly, a closer look into the records of the past five years shows that over 87% of all RTA in Ethiopia are attributed to driver fault, namely, speeding and denial of priority to pedestrians.[6] Studies also showed that RTA is [usually] attributable to a chain of multiple factors associated with the *road* and *environment deficiencies*, *vehicle defects,* and *road user errors/human factors*.[7] Environmental factors are related to the way roads are laid out and designed, the presence of road signs and markings, the design of junctions and pavement surfaces, etc.

The factors associated with defects of vehicles such as malfunction of the braking system, body, tire, and improper inspection are reported to be the major

[2] WHO, Global Status Report on Road Safety 2018, p.5, available on http://apps.who.int/iris, accessed October 11, 2020.
[3] WHO, Make Roads Safe: The Campaign for Global Road Safety United Nations Decade of Action for Road Safety 2011-2020, (2011), available at www.who.int/roadsafety/decade/of/action/plan/global/plan/decade.pdf accessed February 10, 2019.
[4] WHO*, supra* note *2.*
[5] *Id*, p. 322 & 323.
[6] A. Persson, Road Traffic Accidents in Ethiopia; Magnitude, Causes and Possible Interventions, Journal of Advances in Transportation Studies, Section A, No.15, (2008), p. 12.
[7] WHO, *supra* note *1*, p.5; B. Hutchinson, Principles of Urban Transport Systems Planning, (1974), Script Book Company, Washington D.C. p. 68; Atubi Augustus, Determinants of road traffic accident occurrences in Lagos State: Some lessons for Nigeria, International Journal of Humanities and Social Science, V.2 No. 6, special issue (2012), p. 259. Perhaps relevant literatures generally regard them as the major contributing factors of RTA.

causes of RTA deaths.[8] It has also been shown that these defects would become higher when the vehicle is getting older. Under the human factors category, agents such as drivers, animals, passengers, pedestrians, and bicyclists are reported to have contributed to RTAs, particularly to those occurring as a collision. For instance, drivers' behaviour such as speeding, driving under the influence of alcohol, non-use of seatbelts, under-age driving activity is among the recognized risk factors leading to RTA.

In most cases, these risk factors are interconnected and any measure taken against one will deter the other. Conversely, the presence of one of these inherently drives the occurrence of the other.[9] For example, driving under the influence of alcohol increases the likelihood of not complying with other traffic rules such as speeding, not using a seat-belt, or motorcycle helmet.[10] Thus, control actions should always take note of this interconnection among the risk factors causing RTAs.[11]

Informed by the insights on the nature of and interconnection among these risk factors, various road safety regulations were developed and documented as legal agreements at different institutional levels. To this end, the UN has so far codified 58 transport agreements and conventions, 13 of which have particular relevance to addressing various road safety issues.[12] One such relevant document is Resolution 64/255 proclaimed to stabilize and reduce RTA among UN member states.[13]

Ethiopia, as a member of this convention, is expected to commit itself to improve road safety which principally plays a crucial role in facilitating socio-economic developments to its citizens. Also, in the past two decades, there has been massive road network construction for domestic and border transport

[8] See for example, Tom V. Mathew, Transportation Systems Engineering, (2014), p. 42 section 2, available at https://nptel.ac.in/courses/105101008/downloads/cete49.pdf , accessed February 24, 2020.
[9] WHO, Save LIVES: A Road Safety Technical Package, (2017), p. 14, available at, http://apps.who.int/iris, accessed on March 2, 2020.
[10] Francesco Mitis and Dinesh Sethi, Reducing Injuries and Death From Alcohol-Related Road Crashes, (2013), available at www.euro.who.int/data/European-facts-Global-Status-Report-road-safety-en.pdf, accessed February 29, 2020.
[11] C. Tingvall, The Zero Vision, In: Van Holst H, Nygren A, Thord R, *eds*., Transportation, Traffic Safety and Health: The New Mobility, Proceedings of the 1st International Conference, Gothenburg, Sweden, Berlin, Springer-Verlag, (1995) p. 35–57.
[12] These legislations and soft laws are generally managed by the Inland Transport Committee of the United Nations Economic Commission for Europe (UN ECE).
[13] Resolution 64/255 proclaimed as '*Decade of Action for Road Safety* by the UN general assembly from 2011-2020.

services in this country.[14] Yet, such an increase in transport services has also placed a significant burden on the life of the population. Despite the increase in road access following government investment in road network expansion and the rise of the vehicle fleet, the country has no comprehensive national policy on the issue of road safety so far.[15] Further, the issue of road traffic safety is not explicitly stated in the proclamation that establishes various road safety agencies in Ethiopia.[16]

Considering the lack of consolidated laws and policy on road safety, on the one hand, and the development dynamics, on the other hand, one would argue that RTA is just a *disease of development or outcome of developmental activity inherent in developing economies like Ethiopia,*[17] Lagging behind the socio-economic dynamics of the country, the RTA laws and policy failed to address the phenomena which have been increasing over the years and becoming a day-to-day incidence in this country. Particularly, this Author argues, the legal stipulations surrounding RTA are not sufficiently articulated with considerable attention — given the fact that RTAs pose serious human threats comparable to similar threats like HIV/AIDS. Therefore, it merits critical examination as a step into finding a cure for it.

In Ethiopia, there are various road traffic laws applicable throughout the country, including the recent amendment proclamation on 'Driver's Qualification Certification License', i.e. Proc.No.1074/2018. However, the existence of poor transport legislation and failure of implementation is indicated as the main obstacle to reducing road traffic deaths and injuries.[18] Most traffic legislations in Ethiopia are old to properly address the contemporaneous situations.[19] Consequently, there are various amendments, deletions, and

[14] United Nation Economic Commission of Africa (hereinafter, UN ECA), Road Safety In Ethiopia; Case Study, UNECA/NRID/019, September 24, 2009, p. 8, available on http://www.repository.uneca.org/handle/10855/738, accessed February 10, 2019; FDRE Gov't Communication Affair's Office, Road Safety in Ethiopia, (May 2017), Booklet published by Content Development and Distribution General Directorate, p. 5.

[15] There is a strong assumption that, when there is high volume of vehicles, with inadequate infrastructure and irrational distribution of the development, there will be increasing traffic jam and associated road accidents. Peden M, *et al*. (eds.), World Report on Road Traffic Injury Prevention, published by WHO, Geneva, (2004), p. 72 &ff. Available at www.who.int, accessed February 10, 2019.

[16] Transport Proclamation, Proclamation No. 468/2005, *Federal Negarit Gazeta No.58* 6th August, 2005.

[17] Pratte D, Road Traffic Accidents in The Developing World, Student Journal, V.12 No.6 (1998), p. 13, available at https://journals.mcmaster.ca/nexus/article/viewFile/161/128, accessed March 1, 2019.

[18] FDRE Gov't Communication Affair's Office, *Supra* note *14,* p. 8.

[19] UN ECA, *Supra* note *14*, p. 27.

replacements.[20] Yet, transport legislation passed in such a way is still criticized as non-comprehensive and unclear in regulating different road safety issues.[21] Thus, this article aims to qualitatively assess the traffic legislation with a specific focus on key risk factors to road traffic deaths and injuries. Accordingly, it has closely examined, interpreted, and analysed traffic legislations in Ethiopia in light of the best global practices and experiences. Its scope is limited to the Speed Limit Regulation No.361/1969 and Road Transport Traffic Control Regulation No.208/2001 and Road Transport Traffic Control Amendment Regulation No.395/2017. Furthermore, to have a comprehensive exploration of the issue, major practical challenges thwarting the enforcement of traffic laws were assessed. In doing so, selective interviews are made with Key Traffic Controllers in two major cities with a high traffic fatality rate in the Amahara National Regional State (hereinafter, ANRS).

The article is structured under four sections. The first section explains the traffic legislation and institutional structure in Ethiopia. The second section analyses the overall regulation of key risk factors to road traffic deaths and injuries under the Ethiopian laws. Then, the third section uncovers the legal and practical challenges hindering efficient and effective enforcement of traffic laws. Finally, it concludes with a statement of the major finding of the investigation.

1. General Overview on Road Safety Legislations and Institutional Arrangement in Ethiopia

In Ethiopia, laws have been enacted at different times to govern the road transport sector. These laws govern various aspects of the road transport sector including road safety issues and also provide the powers and duties of the government organ responsible to enforce these laws. The next sub-sections brief highlights the road safety legislation and institutional arrangement stipulated in the pertinent legislation.

1.1. The Legal Framework

Even if Ethiopia has no comprehensive and defined road safety policy, various legislations are dealing with transport activity since the 1960s. As the subsequent economic and social development of the country over the last half a century required the transport service to be regulated in a more comprehensive,

[20] For instance, the standing Traffic Control Regulation (Road Code) is enacted in 1963, and it was later amended several times, until it has been totally replaced by Road Transport Traffic Control Regulation No 208/11, part of which is also amendment by Regulation No.395/2017.

[21] FDRE Gov't Communication Affair's Office, *Supra* note *14*.

safe, and efficient manner, several laws enacted over this period were amended and replaced by new legislations and different entities has assumed responsibility. Currently, those legislations relevant to road transport activities in Ethiopia are Transport Proclamation No. 468/2005, which replaces Proclamation No. 14/1992; Vehicles Identification, Inspection and Registration Proclamation No.681/2010; Vehicle Insurance Against Third Party Risk Proclamation No.799/2013; Driver's Qualification Certification License Proclamation No.1054/2018; National Road Traffic Safety Council Establishment Regulation No. 205/2011; Ethiopian Roads Authority Re-Establishment Regulation No.247/2011; The Road Transport Traffic Control Regulation No.208/2011 and its amendment Regulation No.395/2017; Ethiopia's Speed Limits Regulation No. 361/1969; Road Transport Tariffs Regulations No. 2/1992 and its amendment Regulation No. 51/1999, and The FDRE Criminal Code (2005). These sets of laws regulated various aspects of the transport system and most of them are promulgated after 2005.

Looking into the contents of some of these enactments, one can see that the 1960s Regulation provided provisions regulating the traffic operation and safety precautions namely, vehicle emissions, noise, drunk driving, and pedestrian's priority on pedestrian crossings, pedestrian road use, and carrying a passenger on trucks. However, the regulation was non-responsive to emerging road safety issues including seat belts, child restraints, motorcycle helmets, and mobile telephone. Thus, as a replacement to this legislation, Road Transport Traffic Control Regulation No.208/2011 was enacted in 2011, part of which was again amended by Regulation No.395/2017. However, the Ethiopian Speed Limit Regulation No.361/1969, which was enacted in 1969, is still in force.

Finally, it is important to mention that apart from these regulations enacted centrally, some Regional States and Autonomous City Administrations have also enacted regulations. For instance, the Addis Ababa City Administration has established the Road Traffic Safety Council in 2003 and set penalties in 1998. This was later amended in 2004.[22]

1.2. Institutional Arrangement

Legislations and regulations related to road safety are linked to the powers and duties of the different government bodies both at the federal and regional levels. The main government bodies at the federal and regional levels concerned with road safety include the Ministry of Transport (MOT), National Road Traffic

[22] UN ECA, *supra* note *14*, p. 30.

Safety Council (NRTSC), Federal Transport Authority (FTA), Regional Transport Bureaus, Ethiopian Roads Authority (ERA), Regional Rural Road Authorities, Road Fund Agency, Federal Police Commissions (FPC), Regional Police Commissions, and City Administrations.

As part of the executive branch of the government, the Ministry of Transport is responsible to supervise and coordinate transport sectors including FTA, ERA, and Road Fund Agency. Under Transport Proclamation 468/2005, it is also responsible to initiate policies and laws, prepare budgets, and ensure enforcement of federal laws.[23] The other institution with relevant power and duty to road safety is National Road Traffic Safety Council. Established by the Council of Ministers through Regulation No. 205/2011, this institution currently serves as a leading agency on road safety issues. Accordingly, it is vested with the power to formulate national road traffic safety plans and programs, review and evaluate the effectiveness of existing laws, standards, and directives, propose safety improvements, promote road safety issues, and organize forums on the prevention of RTAs.[24]

Turning to another development in the institutional arrangement, one could see that the Ethiopian Roads Authority is re-established by Regulation No. 247/2011 to develop and administer highways, and ensure the standard of road construction. As its major roles, it is also responsible for planning and formulating long and short-term plans and programs for road construction, design, maintenance. Particularly, it undertakes the duty of expanding and maintaining the federal road network to an acceptable standard and condition.[25]

Federal Transport Authority, the third institution with relevant power and duties to road safety, is accountable to the Ministry of Transport and responsible for regulating transport services i.e. road, rail, and water transport. According to Proclamation No.468/2005, its responsibilities are largely about vehicle safety and driver training and licensing. Based on the direction given by Federal Transport Authority, Regional Transport Bureaus, undertake vehicle inspection, registration and licensing, driver training and licensing, management of safe transport services to the public in their respective regions.

[23] A Proclamation to Provide for the Regulation of Transport, Proclamation No.468/2005, *Federal Negarit Gazeta*, 11th Year, No.58, 6th August, 2005 Art. 14.

[24] Council of Ministers Regulation to Provide for the Establishment of National Road Traffic Safety Council, Regulation No. 205/2011, *Federal Negarit Gazeta*,17th Year, No.30, March 30th, 2011, Art. 3.

[25] A Regulation to provide for the Re-establishment of the Ethiopian Roads Authority, Regulation No. 247/2011, *Federal Negarit Gazeta*, 17th Year, No.81, 8th July, 2011 Art. 4.

The fourth institution in charge of road safety is the office of Traffic Police. Traffic Police are organized at the federal and regional levels for the enforcement of traffic rules. This institution plays a twofold role in Ethiopia. Principally, they have the responsibility to enforce traffic laws in collaboration with Transport Controllers.[26] Secondly, they undertake accident investigation and reporting activities mainly for identifying priorities and plans of enforcement strategies and evidentiary purposes in a court of law.[27] Traffic law enforcement, accident investigation, and reporting are made at local police stations. Yet the monthly and yearly aggregated traffic accident data is reported to the next higher police station following the hierarchy to the Regional Police Commission Office. Each Regional Police Commission sends the regional aggregate traffic accident data to the Federal Police Commission Office which forms aggregate national statistics on a traffic accident. Finally, the Ministry of Health, at the federal level, and Health Bureaus, at the regional level, are also responsible to provide emergency medical services for victims of traffic accidents. In sum, the analysis of institutional arrangements shows that quite a several institutions are entrusted with the power and duties to ensure and power safety in the country.[28] Yet, this needs a working and comprehensive framework to consolidate the actions of these institutions to the desired end.

2. The Comprehensiveness of the Regulation on Key Risk Factors for Road Traffic Accident

Enacting traffic laws and regulations which specify acceptable road user behaviour is the first important step to develop a safer road environment.[29] These laws need to be comprehensive enough to capture all aspects of road safety and to coordinate institutions as effective actors in accomplishing this mission.[30] This section evaluates the comprehensiveness of key risk factors, i.e. speeding, drink–driving, and other forms of destructive driving, seat belts, child restraints, and motorcycle helmets under the Ethiopian road traffic legislation. It specifically focuses on the above factors based on the widely accepted practices. Unless a given traffic law comprehensively regulates all these factors, it is

[26] Council of Minister's Regulation to Provide Road Transport Traffic Control Amendment Regulation, Regulation No. 395/2017, *Federal Negarit Gazeta*, 26th, December, 2017 Art. 2(12).
[27] Although such responsibility is not explicitly stated under the regulation, it has become a long tradition for Traffic Police to take daily reports on RTA as one of the other governmental responsibility.
[28] WHO, *supra* note *2,* p.5.
[29] Dominic Zaal, Traffic Law Enforcement: A Review of the Literature, Monash University Accident Research Centre Report Documentation No.53, (1994), p. 6, available on, https://www.monash.edu/muarc/our-publications/muarc053, accessed March 3, 2019.
[30] *Id.*

hardly possible to reduce road traffic deaths and injuries.[31] Consequently, the legal assessment on the above risk factors is made according to the globally accepted road safety standards, as established by the World Health Organization (WHO) and countries with tested practices.[32]

2.1 Speed

Reducing traffic deaths and injuries caused by speed requires a range of measures aimed at balancing the safety and efficiency of vehicles. One such measure is to have a strong law that aims to reduce the incidence of driving fast for a given road type or prevailing conditions by maximizing compliance with the limits.[33] So, providing a clear legal framework on speed is a requirement for achieving compliance with speed limits. However, such law should be comprehensive enough to address important concerns of speed which commonly include: *setting the maximum speed limits*, *specifying enforcement techniques and tools used by enforcement bodies,* and *defining the appropriate penalties*.[34] Thus, to systematically manage and test the comprehensiveness of Speed Limit Regulation, the legal analysis needs to be made in terms of these important concerns. Finally, the compatibility of the 1969 regulation with the current road traffic situation in Ethiopia needs to be tested in general.

2.1.1 Maximum Speed Limits

As indicated at the beginning of this chapter, the Ethiopian Speed Limit Regulation was enacted in 1969 during the imperial time, and it has been still in force without any subsequent amendment. It defines the term '*Speed Limit*' as the maximum speed that one can drive a motor vehicle in a given situation.[35] Consequently, Art 5 has broadly laid down general principles, and hence any person cannot drive a motor vehicle with a maximum speed, without taking into consideration every reasonable circumstance that can give rise to RTA including the condition of road level or size, condition of the environment such as rain,

[31] WHO, Global Status Report on Road Safety 2009: Time for Action, p. 15; WHO, Global Status Report on Road Safety 2013: Supporting a Decade of Action, p. 12; WHO, Global Status Report on Road Safety 2015, p. 5. All are available on www.who.int, accessed on June 20, 2020.

[32] In general, it's found under Global Status Report's (2009-2015), WHO's Save Lives technical package, WHO's practical guide books for decision makers, legislators and practitioners, safe system approach and other scientific researches that provide evidence-based reduction measures against road traffic deaths and injuries.

[33] Global Road Safety Partnership (GRSP), Speed Management: A Road Safety Manual for Decision-Makers and Practitioners, Global Road Safety Partnership Publications, Geneva, (2008), p. 11, available at www.GRSProadsafety.org, accessed December 11, 2020.

[34] *Id*, p. 28.

[35] Council of Minister's Regulation to Provide Ethiopia's Speed Limit Regulation, Regulation No. 361/1969, *Federal Negarit Gazeta*, 1969, Art. 4(1)

snow, and fog, the number of residents in the area, condition of traffic flow, intersections and crossings, closed ways, and any other similar situations which encounter a motorist to drive safely without causing an accident.[36] Yet, in other situations, a motorist is prohibited to drive beyond the maximum speed limits stipulated under art 6, 7, and 8 of the same regulation. Therefore, speeding involves the behaviour of a driver who drives above the maximum legal limit and it envisages inappropriate speeding behaviour under road conditions specified earlier although it is within the legal limit.

Article 6 and 7 of the regulation set the 'default' maximum speed limit for rural and urban roads respectively. As per Art 6(1), outside urban areas/in rural areas, the maximum speed limit for private cars and motorcycles is 100 km/h on primary roads, 70 km/h on secondary roads, and 60 km/h on feeder roads. Whereas, as per Art. 6(2), for commercial vehicles, the maximum speed limits are 80, 60, and 50 km/h, on primary, secondary, and feeder roads respectively. Lastly, regarding motor vehicles and trucks with semi-trailers and trailers, the maximum limits are 70, 50, and 40 km/h on primary, secondary, and feeder roads respectively.

Yet, for public safety purposes, these speed limits can be reduced on any road/bridge either fully or partially against any kind of motor-vehicles by the Ethiopian Road Authority, as per Art. 8 (a) of the regulation. Further, in urban areas, Art.7 sets the maximum speed limit as 60 km/h for private cars and motorcycles, 40 km/h for single-unit trucks with a maximum gross weight of 3,500 kg and public transport vehicles, and 30 km/h for single-unit trucks exceeding 3,500 kg and trucks with trailers. Yet, like Art. 8(b) of the regulation, local municipalities can lower these speed limits when it is necessary and a competent body shall post the speed limit on visible public areas. In general, the stipulated maximum speed limits under the regulation are set by taking into account the type of road, type of vehicle/its carriage capacity, and volume and type of road users. Therefore, this is compatible with the recommended global best practice.[37] Nevertheless, some rules incompatible with these established practices are identified. First, as it is set out under Art. 7 of the regulation, in urban areas maximum speed limit is 60 km/h for private automobiles, unless it is not reduced in special cases by local authorities based on Art.8(2). However, today, the widely accepted global practice is to set the maximum speed limit to 50 km/h or less in urban areas for the general population and 30 km/h for

[36] *Id*, Art. 5(1) (a)-(g).
[37] Speed Limit Regulation No. 361/69, *supra* note *35,* Art. 26.

residential areas and sites where there are high volumes of pedestrian and/or cyclist traffic mixed with vehicles/motorcycles.[38]

While stressing the reason for such a limit, a study clearly shows what can the reaction of a driver can be in situations where a child runs into the road at a point about 35 meters in front of a car while a driver is driving his vehicle at various speeds.[39] If for example, a person drives at speed of 50 km/h on a given urban road, it can stop in time without the child being hit at a distance much before 35 meters. However, if the speed of the car is 60 km/h — since the distance covered in the driver's reaction time i.e. 36 meters is more than the distance to the child—the child will be touched by the car, but with a small chance of survival. Consequently, the possibility of death increases if a person drives at 65 km/h, 70 km/h, and 80 km/h, for the child could be hit before 35 meters from the area where he is situated.[40] This is so because the stopping distance for a vehicle after a driver reacts and brakes will be longer at a greater travel speed.[41]

Here, having a look at the 60 km/h maximum urban speed limit under the Ethiopian Speed Limit Regulation *vis-a-viz* the global best practice, one may observe that it is not fairly high. Nevertheless, several studies consistently found out that a significant increase in speed limit can increase road crash, injury, and fatality rates, whereas its reduction can help to cut these rates. For instance, according to the Power model, about a 5% increase in average speed can lead to an approximate 10% increase in crashes involving injury, and a 20% increase in those involving fatalities.[42] On the other hand, a 5% reduction in average speed is estimated to reduce the number of fatal crashes by as much as 30%.[43] More specifically, a study also demonstrates that an adult pedestrian has a 20% risk of dying if struck by a car travelling at 60 km/h, and the impact speed above the limit of 30 km/h increases the likelihood of injury or fatality.[44] Therefore, to

[38] WHO Global Status Report 2013, *supra* note *32* p. 42; WHO Global Status Report 2015, *supra* note *32* p. 36; WHO Save LIVES, *supra* note *9,* p. 16.
[39] Commonly, during accident deriver's reaction time can be a little as one second. But, a vehicle' reaction time in one trial is usually taken as in a range between 1.5 and 4 seconds. See for instance Evans L. *Traffic Safety and the Driver*, (1991) USA, Van Nostrand Reinhold.
[40] WHO Save LIVES, *supra* note *9,* p. 14; GRSP, *supra* note *33*, p. 7.
[41] GRSP, *supra* note *33*, p. 6.
[42] Nilsson G. Traffic Safety Dimensions and the Power Model to Describe the Effect of Speed on Safety, Lund University, Lund Institute of Technology, Sweden, (2004), p. 21.
[43] WHO, Ten Facts on Global Road Safety, (2013), available on http://www.who.int, accessed 3 May, 2019.
[44] Tefft B. Speed Impact and A Pedestrian's Risk of Severe Injury or Death, Journal of Accident Analysis and Prevention, V. 50, (2013) p. 871; Davis GA. Relating Severity of Pedestrian Injury to Impact Speed in Vehicle Pedestrian Crashes, Transportation Research Record No. 1773, (2001), p. 113; Rosén E,

have a meaningful reduction in road traffic death and injury, the law should have set urban speed limits at 50 km/h or less, as a maximum edge.

Secondly, although local authorities are given the power to reduce the speed limit of 60 km/h in residential areas, under Art. 8(b) of the Speed Limit Regulation, the extent to which authorities can lower such limits is not explicitly given as such. Legislation should govern its subject matter in a definite and clear manner. Otherwise, it will be subjected to broader interpretations that may result in myriad applications. The speed limits stipulated under the regulation were enacted to apply uniformly across all urban roads in Ethiopia and it is presumed that local authorities reduce the speed limit of 60 km/h uniformly at their residential areas. Yet, the minimum limit that authorities can reduce for this purpose is not set.

For instance, under the global experience, local authorities can lower the maximum urban speed limit up to 30 km/h for residential and built-up areas where there is a mix of vulnerable road users such as pedestrians or cyclists with traffic vehicles.[45] Since most vulnerable road users like pedestrians, cyclists, moped riders, and motorcyclists are higher in residential areas than a rural area, the probability of fatal or injury accidents is also higher when motor vehicles collide with them. In this respect, several studies indicate that usually, vulnerable road users survive if hit by a car travelling at 30 km/h, whereas the majority are killed if hit by a car travelling at 50 km/h. And, pedestrians would be exposed to a risk of about 80% of being killed at a collision speed of 50 km/h.[46] Equally, it should be noted that stipulating the limit far below 30 km/h will also have an impact on the proper traffic movement as slow vehicle motion can result in overcrowding/traffic-jam.[47] Given that, legislation should indicate a lower speed limit of 30 km/h in residential areas so that local authorities cannot set far more or less than that. Also, the maximum urban speed limit of 60km/h for private automobiles should be reduced to 50km/h based on these premises to have a meaningful reduction in fatalities.

Most road safety experts agree that the single most important contributor to the road death toll around the world is poor speed selection, commonly interpreted

Stigson H, Sander U, Literature Review of Pedestrian Fatality Risk as A Function of Car Impact Speed, Journal of Accident Analysis and Prevention, V. 43, (2011), p. 33.

[45] WHO Save LIVES, *supra* note *9,* p. 32.

[46] OECD, Speed Management Report, OECD/ECMT Transport Research Centre Paris, (2006), available on www.who.int/roadsafety/projects/manuals/speedmanual/en, accessed February 3, 2020.

[47] In this regard, Road Traffic Regulation No. 208/11 also prohibits and penalizes any motorist to drive with a slower speed at any road contrary to conditions provided by law in its Art. 5(3).

as the use of inappropriate vehicle speeds, or speeding.[48] Reducing to such a limit could be very crucial particularly from the point of view of today's frequent development of engine technologies in which most cars have a top speed that is well over maximum speed limits. For instance, according to a review made from various studies on speed limit changes by several countries such as South Africa, Belgium, Finland, France, UK, Germany, USA, and New Zealand, when a speed limit was reduced or a new limit was introduced and enforced as such, a significant reduction in road crashes ranging from 8% to 40% is found.[49] Moreover, although the setting of speed limits under Regulation 369/63 is set by the type of road and vehicle, it has omitted to specify according to the type of user namely, training drivers, novice drivers, and other users who are most likely to fall in a crash if they drive with the general speed limit allowed for others under global best practice.[50]

2.1.2. Rules on the Enforcement Mechanism/Tools to be used by Traffic Controllers

In 2006 EC, the Federal Transport Authority issued Directive No. 1/2006 on the use of car-mounted speed limit control device and speed measurement devices or police operated hand-held radar gun to enforce legally stipulated speed limits.[51] Accordingly, using a hand-held radar gun, Traffic Controllers are responsible to prosecute speeding motorist that exceed the legal limit. This requires attaching a car-mounted speed detection device on commercial and public transport vehicles to control speeding motorists.[52] However, the Directive failed to provide other automatic speed measurement devices namely, speed cameras which are identified as effective mechanisms to reduce road traffic injuries and fatalities both in rural and urban settings.[53] Similarly, concerning the enforcement of a radar gun, the directive did not specify the speed limit that the driver should be penalized for exceeding above the legal maximum. Yet, it is recommended that the level that police will penalize a driver for exceeding the legal speed limit also known as, '*enforcement tolerance'*, to be specified with a

[48] GRSP Speed Management, *supra* note *33,* p. 6.
[49] European Commission (EC), Managing Speeds of Traffic on European Roads (MASTER), Project of the 4th framework program, Final Report of European Commission, (1998), available at http://virtual.vtt.fi/master/, accessed January February 17, 2018.
[50] WHO, Strengthening Road Safety Legislation: A Practice and Resource Manual for Countries, (2013), p. 23&38, available on http://www.who.int/legislationmanual/en/pdf, accessed March 15, 2019.
[51] Federal Transport Authority Directive on the Use of Vehicle-Mounted Speed Limit Device, Directive No. 1/2006, Addis Ababa.
[52] *Ibid*, Art. 12 (c).
[53] Wilson C. *et al*., Speed Cameras for the Prevention of Road Traffic Injuries and Deaths, Cochrane Database of Systematic Reviews, Issue No. 2, (2011), p. 12.

lower level. For instance, Traffic Police use a speed limit of 3 km/h as allowable tolerance above the legal limit in several countries.[54]

2.1.3 Rules on Penalty Measures against Speeding Motorists

According to the point demerit penalty system provided under schedule B of Traffic Amendment Regulation 395/17, speeding is categorized as a third level traffic offense. If a motorist is caught by Transport Controllers for the first time, he/she is punishable two hundred (200) birr and substantially such amount increases to 300, 350, 400 birr when the demerit points reach to 6, 11, and 16 respectively. However, if the point reaches 21 and 27, the license of the driver's will be suspended for three and six months respectively, or one year if the point reaches above 28. A training/education provided by Transport Authority is also stipulated as an additional measure to suspension of license for a specified period.

However, every increase in the level of speed above the legal limits is generally regulated under the third category traffic offense without any difference. For instance, both a driver that exceeded the legal limit with 5km/h and the one who exceeds more than 20 km/h or more face an equal level of penalty. In contrast, it is essential to set the legal penalties at '*a sufficient level of severity'* to have an effective deterrence according to the global best practice. If appropriate regard is given to the risks associated with small increases in speeds above the legal limits, the penalties should reflect the relative risk to human life that a particular level of speeding poses.[55] Particularly, it is inequitable to suspend the license of a diver travelling at 5km/h above the limit, while others exceeding the limit by 25km/h or more are facing any more severe penalty. Therefore, if the same penalty is set equal to all speed infraction, it could be very lenient especially for those travelling at far more speed beyond the legal limit to effectively deter and change their behaviour. For instance, authorities indicate that vehicles/motorcycles which transport *kchat* from rural areas to cities often travel at a very high speed, and the stipulated 200 birr is found to be non-deterrent, although Traffic Police Controllers have repeatedly involved in punishing them. Moreover, the regulation has failed to specify another type of penalty called *'vehicle impoundment/confiscation'* which is found as the most effective measure against extremist or recidivist speeding drivers.[56]

[54] OECD, *supra* note *49*.
[55] Cameron M *et al*. Scientific Basis for the Strategic Directions of the Safety Camera Program in Victoria, (2003), Monash University Accident Research Centre, Melbourne Report No. 202, p. 72.
[56] GRSP, *supra* note *33*.

2.1.4. Incompatibility of the Speed Limit Regulation with the Current Road Classification in Ethiopia

Legislative actions require careful considerations in advance. Once enacted, legislation should not be amended day and night. Thus, it should consider the future social, political, economic and technological advancements of the society during its enactment. The language of the law should also be accommodative to future needs and developments. More than forty-years (40) have passed since the Speed Limit Regulation is enacted. Yet, Ethiopia has undergone many changes, and global economic, social, and technological innovations have brought significant advancement in the road infrastructure and vehicle fleet. From time to time, the road condition and vehicle fleet are becoming more and more complex.

Despite all this advancement, the Speed Limit Regulation has defined only three types of roads, i.e. *Primary*, *Secondary,* and *Feeder* based on the functional classification of roads.[57] However, nowadays, such classification has developed into five classes, including Trunk Roads, Major Link Roads, Regional Roads, Village Roads, and Special Purpose Roads.[58] Although the definition given to primary roads under the speed limit regulation is quite similar to today's trunk roads[59], there is a difference in other types of roads. Unlike the road classification made under the Speed Limit Regulation during a unitary system of administration, the sector is now organized in line with the federal/decentralization system of government. Accordingly, while Trunk and Major Link Roads fall under the administration of the Federal Ethiopian Roads Authority, Regional Authorities were entrusted with the responsibility for rural and city administration roads in their regional states.[60] Hence, the speed limit regulation should be enhanced in ways that can maintain the existing and emerging road situation by taking a lesson from prevailing circumstances and it is necessary to review the speed limits based on the global best practices to ensure that the level of safety.

2.2 Alcohol and Other Forms of Destructive Driving

According to Traffic Regulation No. 208/11, any motorist is prohibited to drive a vehicle/motorcycle under the influence of *alcohol, drugs*, *before or after*

[57] Speed Limit Regulation No. 361/69, *supra* note *35,* Art. 4(3).
[58] Ethiopian Road Authority (ERA), Road Sector Development Program (1997-2007), Second Draft, Final Report, Addis Ababa January, (1996), p. 58.
[59] Since both encompasses roads passing through several Awrajas/Regions.
[60] *Id*.

chewing kchat or *consuming narcotic substances,* including under physical difficulties such as exhaustion or poor mental condition.[61] Particularly, Art. 5 (7) (b) of the regulation stipulates the level at which a driver is deemed to be intoxicated based on a globally accepted system of measurement called Blood Alcohol Concentration (BAC) or Breath Alcohol Content (BrAC) limit.[62] A driver is deemed to be intoxicated if the alcohol percentage exceeds 0.8 gram per litter blood or 0.4 milligrams per litter breathe out pure alcohol as detected by an instrument made for this purpose. So, in Ethiopia, the BAC limit for the general population is ≤0.08 g/dl, which is not fairly matching with the current global best practice, i.e. 0.05 g/dl or less.[63]

Further, it has also failed to establish a lower BAC limit for a *young, novice, and commercial drivers*, which is adopted in most countries based on confirmation found from scientific studies.[64] When young persons are allowed to drive with the BAC level applicable for the general population, these types of drivers are usually put at high risk of RTA. For instance, it's indicated that young/novice persons driving with a BAC level of 0.04 g/dl are more than twice exposed to have a crash than adults and experienced drivers.[65] Similarly, commercial drivers are also considered as high-risk group drivers for alcohol-related crashes. As a result, setting BAC limits at 0.02 g/dl or less for both groups is widely acknowledged as an effective way to reduce RTA related to drinking–driving.[66] Therefore, Regulation No. 208/11 has failed to set a more stringent BAC limit for high-risk drivers such as young, novice, and commercial drivers.

Concerning enforcement, Art. 5 (7) (b) of the regulation provides that any driver suspected of intoxication should submit himself/herself for examination when requested by Traffic Controllers. According to the relevant literature, this is called the '*sobriety checkpoint'* alcohol test mechanism, in which police are authorized to systematically stop vehicles in places where there is a high possibility of drinking and give a breath test for any motorists suspected of

[61] Council of Minister's Regulation to Provide Road Transport Traffic Control Regulation No 208/11, Regulation No. 208/2011, *Federal Negarit Gazeta*, 17th Year No. 89, 26th, August, 2011, Art. 5 (7) (a) and sub. (2) & (3).

[62] The amount of alcohol present in the bloodstream, usually measured in grams per deciliter (g/dl).

[63] WHO Global Status Report 2013*, supra* note *31*, p. 16; WHO Global Status Report 2015 *supra* note *31,* p. 24; WHO Save LIVES' *supra* note *9,* p. 31.

[64] Zador PL, Alcohol-Related Relative Risk of Fatal Driver Injuries in Relation to Driver Age and Sex, Journal of Studies on Alcohol, V. 52, No.1, (1991) p. 310; Keall MD, Frith WJ, Patterson TL, The Influence of Alcohol, Age and Number of Passengers on the Night-Time Risk of Driver Fatal Injury in New Zealand, Journal of Accident Analysis and Prevention V. 36, No.4, (2004), p. 53.

[65] *Ibid*.

[66] WHO Global Status Report 2009, *supra* note *31,* p. 21; WHO Save LIVES' *supra* note *9,* p. 32; WHO Global Status Report 2013, *supra* note *31*, p. 16.

alcohol intoxication.[67] Although the stipulation of such a mechanism is favourable, the regulation has yet failed to specify the other mechanism called '*Random Breath Testing'* (RBT). Accordingly, drivers are randomly stopped even if they are not suspected of intoxication to give a breath test to determine whether their alcohol concentration is above the limit. Unlike the sobriety check-point system, any driver can be randomly stopped at check-points and is required to take a breath test including those stopped for any other offense.[68] In the case of a sobriety checkpoint, the common grounds for suspecting an intoxicated driver are irregular driving behaviour, involvement in an accident, or commission of traffic offense. Thus, Traffic Controllers targets only those drivers displaying such obvious signs of impairment.[69] But, such a decision to apprehend solely based on driving signs may not result in effective enforcement of drinking and driving rules and cannot provide a real and sustained level of deterrence. Consequently, RBT is found as an effective mechanism to enforce drinking and driving rules that prohibit, and thereby reduce injuries and fatalities.[70]

Concerning the penalty, the amendment Regulation 395/17 provides for fine and suspension of license according to the point demerit system.[71] However, the regulation failed to include '*vehicle impoundment*' as a penalty option for recidivist and serious offenders, which is commonly recommended by different studies[72]. Likewise, as per Art. 5 (7) (c) of Regulation 208/11, if a driver refuses to take examination he/she shall be presumed as intoxicated and only punished for drunk-driving. However, imposing such solitary punishment is found insufficient, and hence states are usually suggested to adopt further penalties.[73] Moreover, regardless of the severity of infraction above the established BAC limit, all drinking and driving motorists are punishable with the same amount of fine based on the point demerit system.

[67] Dominic Zaal, *supra* note *29*, p. 94.
[68] Magnusson P, Jakobsson L, Hultman S, Alcohol Interlock Systems in Sweden: 10 Years of Systematic Work, American Journal of Preventive Medicine, (2011), V.40 No.8 p. 378.
[69] Ross, H.L, Deterring the Drinking Driver, Legal Policy and Social Control Lexington' MA: Lexington Book (1982), p. 35.
[70] Jonah, B.A. & Wilson, R.J, Improving The Effectiveness of Drinking-Driving Enforcement Through Increased Efficiency, Journal of Accident Analysis and Prevention, V.15 No.6, (1983), p. 463; Peek-Asa C, The Effect of Random Alcohol Screening in Reducing Motor Vehicle Crash Injuries, American Journal of Preventive Medicine, V.16 1S, (1999), p. 57&ff.
[71] Traffic Amendment Regulation No.395/17, *supra* note *26,* Schedule B.
[72] WHO, Drinking and Driving: A Road Safety Manual for Decision-Makers and Practitioners. Geneva, Global Road Safety Partnership, 2007, at 93; Jonah, B.A. & Wilson, *supra* note *70*.
[73] United Nations Economic Commission for Europe (UN ECE), Consolidated Resolution on Road Traffic, Working Party on Road Traffic Safety, (ECE/TRANS/WP.1/123), (2010).

2.3 Seat-Belt and Child Restraint

Seat-belts and child restraints are '*secondary safety devices'* as they do not prevent crashes and are primarily designed to prevent or minimize injury to a vehicle occupant when a crash occurs. Thus, the use of seat-belts and child restraints can reduce the severity of injuries and the number of fatalities by preventing collision with the front seat or steering wheel or by preventing complete ejection from the vehicle or distributing the force of the crash over the strongest part of the body.

2.3.1 Seat-Belt

The most frequent and serious injuries occurring in frontal impacts to car occupants unrestrained by seat-belts are head, chest, and abdomen.[74] Studies indicated that passengers who were not wearing their seat-belts at the time of a collision account for the majority of road traffic injuries and fatalities.[75] Hence, failure to use a seat-belt is a major risk factor for road traffic deaths and injuries among vehicle occupants.

Article 5(3) (a) and (b) of the Traffic Regulation 208/11 prohibits any motor-vehicle drivers other than motorcyclists to drive on any road without a fastening safety belt. If such drivers have a passenger, he/she shall ensure that the passenger has a fastened safety belt. Failure to observe such rule entails fine punishment up to 250 birr if the driver is caught for the first time, and it will substantially increase based on a point demerit system, including suspension of license.[76] Accordingly, although the regulation has merely dictated mandatory use of seat belt by drivers and passengers, it fails to stipulate whether seat-belt use is mandatory for front and rear/back seat passengers instead of using the term 'passengers' in general. From the global best practice, one could see that mandatory seat-belt rules must clearly and specifically cover all car occupants including front and rear-seat passengers.[77]

Legislations in other countries set manufacturing standards on a seat belt, a mandatory requirement for seat belt fitting on imported/local manufactured

[74] Foundation for the Automobile and Society (FIA), Seat-Belts and Child Restraints: A Road Safety Manual for Decision-Makers and Practitioners, (2010), p. 6. Available on www.fiafoundation.org, accessed 11 December 2019.

[75] Mackay M, The Use of Seat-Belts: Some Behavioral Considerations, Proceedings of the Risk-Taking Behavior and Traffic Safety Symposium' from October 19–21, 1997, Washington, DC, National Highway Traffic Safety Administration, p. 14.

[76] Traffic Amendment Regulation No.395/17, *supra* note *26,* Schedule B.

[77] WHO Global Status Report 2013, *supra* note *31,* p. 26; WHO Global Status Report 2015, *supra* note *31,* p. 9; WHO 'Save LIVES' *supra* note *9,* p. 24.

vehicles, retro-fitting/upgrading requirements for older vehicles, or law that prohibits de-specification or damaging on a seat belt. Yet all these do not exist in the Ethiopian Legislations. For instance, in Malaysia, the owners of cars registered after 1995 without seat belt are given 3 years to fit rear seat-belts.[78] In Ethiopia, seat-belts fitting is not even observed as a requirement during the annual technical inspection of vehicles.

2.3.2 Child Restraint

Like a seat belt, it has also been shown that properly restraining children in vehicles reduce injuries and fatalities in the event of a crash. To this end, Art. 40(1) of Regulation 208/11 imposes an obligation on any motor-vehicle driver while transporting minors below the age of seven years to ensure whether they are accompanied by an adult person or hugged by an apparatus made for safety purpose. Accordingly, even if the term child restraint is not directly expressed under the regulation, it is clear that the wording '… *hugged by an apparatus made for safety purpose* …' under Art. 40(1) of the Regulation signifies the use of child restraint. However, the use of restraint while transporting minors below the age of seven is provided '*alternatively'* with that of the hug by an adult person.

Hence, as it stands in the law, the use of child restraint looks optional as a child can be hugged by an adult person without a need to fix restraint on the vehicle to hug a child. Probably, the intention of the legislator in making use of restraint alternatively to that of restraint may perhaps be due to the inaccessibility of child restraint in many low-income countries including Ethiopia. Hence, the use of child restraint for minors below the age of seven is not a mandatory requirement *per se* under the regulation. Unlike seat-belts, child restraints are not automatically installed in vehicles rather must be purchased and fitted by parents'/vehicle owners, hence, such an alternative stipulation for child restraint use would discourage parents to buy and use them. To this end, at least there should be mandatory use of restraint use for private automobiles that can be plug-in and attached to their vehicles.

Furthermore, although infants and children need a child restraint system that accommodates their size and weight, and can adapt to cope with the different stages of their development,[79] the regulation fails to specify such conditions.

[78] Kajang, Malaysian Institute of Road Safety Research (MIROS), Rear Seatbelt Use: Public Awareness and Practice, Research Report. Phase 1: Achievements of First 3-Month Advocacy Program, (2008), available on http://miros.gov.my/web/guest/reports, accessed 11 December 2018.

[79] Foundation for the Automobile and Society (FIA), *supra* note *74*, p. 7.

Moreover, minors below the age of 13 are also prohibited from a seat in the front seat of the vehicle neighbouring with the driver and hence they should only seat in other positions being fastened with a seat belt.[80] However, the Regulation fails to specify the type of restraint and the seating position that should be used in such cases since there could be a possibility that adult belts be used just to secure the vehicle-seat which can't serve the purpose to be achieved by using the suitable restraint that should be used by minors below the age of 13.

2.4 Helmet

Several studies have shown that the use of helmet by motorcycle riders is the most effective way to reduce fatalities and severity of head injuries. For instance, a study reveals that motorcycle helmets can reduce the risk of death by 42% and the risk of head injury by 70%.[81] To reduce death and injury of motorcyclists using a helmet, first, there should be a comprehensive law that covers all motorcycle riders to wear a helmet on every road including specification of the appropriate standard. Because of this, Art. 50 (1) of Regulation 208/11 prohibits any person to ride a motorcycle on any road without wearing a helmet made for such purposes. Similarly, sub 3 of the same provision prohibits a driver of a motorcycle to carry any passenger without putting on a suitable helmet. Although the regulation obliges any motorcyclist riders and passengers to wear a helmet, it fails to comprehensively govern other important issues on the helmet, which in turn can affect its enforcement.

Particularly, it fails to properly govern the *standard of the helmet* required to be used by a motorcyclist. Although Art. 50 (1) of the regulation has prohibited any motorcyclist to ride without putting a suitable helmet made for this purpose, the phrase '*suitable helmet made for this purpose'* is vague/general to properly state the required helmet standard. Since head and neck injuries are the main cause of death and related injuries among motorcycle users, only a quality helmet should be allowed to be worn.[82] Hence, helmets must meet the recognized safety standards with proven effectiveness in reducing head injuries to reduce the impact of road traffic crashes that leads to death. Although there are several internationally recognized quality standards, it is important that a particular government's helmet standard is suitable for the traffic and weather conditions

[80] Art 40(2) of Road Traffic Regulation No.208/11 is amended by Art.11 of the Traffic Amendment Regulation No. 395/17.

[81] Liu B *et al*., Helmets for Preventing Injury in Motorcycle Riders, the Cochrane Database of Systematic Reviews, Issue No.5, (2005), p. 45.

[82] WHO Global Status Report 2013, *supra* note *31,* p. 19, WHO Global Status Report 2015, *supra* note *31,* p. 25; WHO Save LIVES', *supra* note *9,* p. 32.

of the country, and is both affordable and available to users.[83] A comparable good practice is seen from the Kenyan Road Traffic Act that requires motorcycle drivers and their passengers to wear helmets that meet a national standard. Instead of articulating the standard itself, this law refers to a standard set out in a separate legal text by the Kenyan Board of Standards (KEBS), which established in 1974 as the body in charge of testing, approving, stamping, and monitoring a variety of products.[84] After all, while helmet legislative provision in the Road Traffic Act may remain constant over the years, the way it is written allows the standard to be modified and updated without the need to change the legislation.

Further, the regulation does not specify a minimum age at which children can ride a motorcycle as passengers including requirements for child helmets based on age or height. Unless a minimum age is prescribed, the situation becomes more complex for providing protective headwear for young children because the size and shape of the human head evolve rapidly during the first four years of life. In resolving such a problem, some countries in South-East Asia especially Viet Nam and Malaysia where motorcycles are commonly used as a family vehicle, have set a minimum child age to be a passenger including helmet standards.[85] In Ethiopia, too, since there is increasing use of motorcycles as transporting vehicles mainly in those large cities such as Bahir Dar and Hawasa, it is vital to legally state the minimum child age to be a passenger and with helmet standards. Moreover, except for fine and suspension of license, Regulation 395/17 has failed to provide temporary motorcycle impoundment as a penalty option which is highly recommended for recidivists under the global practice.[86]

3. Major Challenges for Effective Enforcement of Traffic Rules

The enforcement of traffic rules by Traffic Controllers is not free of challenges. These challenges are attributable to different factors. For clarity, the researcher has generally classified the factors into legal and practical challenges. The next sections examine the nature and cause of the challenges.

[83] Toroyan T. *et al*, eds, Helmets: A Road Safety Manual for Decision-Makers and Practitioners, World Health Organization, Geneva, (2006), available on www.who.int/roadsafety/projects/manuals/helmet, accessed 22 February 2019.
[84] WHO Global Status Report 2015, *supra* note *31*, p 26.
[85] *Id.*
[86] WHO, 'Strengthening Road Safety Legislation: A Practice and Resource Manual for Countries' (2013), p. 45.

3.1 Legal Challenges

The study reveals that there are legal challenges that jeopardize the effective and efficient enforcement of traffic law. Hence, this section strives to uncover the challenges related to the procedures and gaps in the penalty provisions of the Road Traffic Amendment Regulation No. 395/17.

3.1.1 Failure to Provide *'Warning Letters'* as Penalty Option

The Road Traffic Amendment Regulation 395/17 has employed different penalty measures to be applied against road users caught committing traffic offenses/s. These are *fine and suspension of license* from three months to one year, including training/educational measures based on a point demerit scheme.[87] However, the use of a *warning letter* as a penalty option for any road users committing traffic offenses is not provided at all. Nonetheless, as suggested by several researchers and as this writer also agrees mere reliance on fine and license suspension can affect the effective enforcement of traffic rules in different ways. First, the use of warnings particularly for *less serious traffic offenses* can be effective educational tools that lead to a more sustained modification in road user behaviour than traditional punishment-based strategies which usually focus on deterrence.[88] The idea is that regular use of fines as punishment without an option for minor traffic offenses can cause resentment among road users. Yet, if an earnest explanation of the offense committed is followed with a strong warning letter such could potentially create positive community attitudes towards enforcement activities by educating and promoting more appropriate road user behaviour.[89]

Further, the use of a warning letter for minor offenses as a penalty is a fair option. Sometimes it could be the case that a significant proportion of road users may not be aware that they have committed an offense due to lack of local knowledge or poor attention to the road environment. In such cases, there may be greater merit and fairness of punishment in issuing a warning to these offenders than issuing more severe penalties to those road users who wilfully breach traffic laws.[90] Moreover, the use of warnings in these situations can also increase the efficiency and effectiveness of enforcement activity. It could significantly reduce the time-consuming procedures associated with on-the-spot

[88] Southgate P. & Mirrlees-Black, C, Traffic Policing in Changing Times, London, Home Office Research and Planning Unit, and Research Study; No. 124, (1991), p. 36.
[89] *Ibid.*
[90] Wilden P.H., Phillis, W.G. & Cabon, T, The Use of Warning Letters as A means of Moderating Road User Behavior Journal of Behavior Modification, V.49 No.2, (1989), p.105.

fines by Traffic Controllers, fine processing tasks as well as the subsequent legal proceedings.[91] Thus, the use of a warning letter as a penalty option for minor offenses can save limited time and resource towards enforcing more serious traffic offenses.

3.1.2 Less Deterrent Financial Penalty System

As indicated elsewhere, Regulation No.395/17 has stipulated fixed fines for a different type of traffic offenses based on a *point demerit penalty system*. This system of penalty is used by most countries in the world and is also well recognized to have an impact on reducing the level of illegal road user behaviour and increase the efficiency of offense processing tasks particularly by reducing the workloads.[92] However, it fails to specify the financial amount of penalty and record points for speeding and drink-driving behaviours according to the *degree of severity* above the legal limit. It omits to stipulate temporary *impoundment/confiscation* of vehicle/motorcycle as penalty option for recidivists' and extreme behaviours'.

Furthermore, the way fine is imposed for the offense of passengers over-loading in public transport vehicles under Regulation 395/17 is less/non-deterrent. Under schedule B of the Regulation, over-loading more than 3 passengers in a public transport vehicle with a maximum capacity of 25 people or overloading more than 5 passengers on vehicles which with a capacity of more than 25 people is punishable with 150 birr, if the driver is caught for the first time and the penalty substantially increases based on point demerit system record system.[93] For instance, in a vehicle whose maximum capacity of carriage is 25 people if a driver carries one more passengers exceeding the maximum legal permit, i.e. 3 people, and similarly if another driver carries 10 people exceeding the same legal permit, both of them will be fined with 150 birr if they were caught for the first time. So, the amount of fine is similar for neighbouring any number of passengers above the legal permit. Accordingly, for instance, transport vehicles locally named as '*Dolphin'* with a maximum capacity of 15 people, which serve from Bahir Dar to Gondar or in other nearby cities often border more than 5 passengers over the legal limit as it is very easy to satisfy the amount of fine i.e. 150 birr from two or three of the over-loaded passengers themselves if they are caught by Traffic Controllers. As a result, the amount of fine usually remains

[91] Armour, M., A Review of the Literature on Police Traffic Law Enforcement, Proceedings of the 14th Australian Road Research Board Conference, V.14 No. 1, (1984) p.17.
[92] Dominic Zaal, *supra* note *29*, at 25.
[93] Traffic Amendment Regulation No.395/17, *supra* note *26,* Schedule B.

less deterrent or sometimes non-deterrent at all, to the extent that passengers' overloading seems to be legally permitted activity. In contrast, before the amendment of Regulation 208/11 overloading on public transport vehicles' is punishable with 100 birr for each additional passenger over the legal limit and it was relatively more deterrent.[94] Therefore, the amount of fine should have been equitably improved for having a higher risk of apprehension and deterrence on road users.

3.1.3 Challenges on the Suspension of Drivers' License

Under Regulation 395/17, license suspension is the other form of penalty which can be taken against repeated offenders based on the point demerit record system or directly against motorists who caused death or serious injury against a human person. However, the regulation omits to provide the effect of driving while under suspension. Even if driving a vehicle without a license is made punishable with a fine not exceeding 5,000 birr,[95] no further penalty stipulated for drivers who continue to drive while they are under suspension. The purpose of license suspension is to remove such drivers from the road for a certain fixed time to induce them to drive more responsibly in the future. So, the absence of a countermeasure to be imposed on drivers who continue to drive while they are under suspension can undermine the said value obtained from license suspension. Therefore, the law should have stipulated a countermeasure to be taken against those drivers who continue to drive being under suspension. For instance, a well-known countermeasure against drivers who continue to drive whilst under suspension is to introduce a legal rule allowing police to confiscate the vehicle of the offending driver.[96]

Besides, the Regulation fails to specify the initial time to be taken for the suspending license of a driver who has caused a fatal or injuries accident. According to schedule B of the Regulation, if a driver has caused the serious bodily injury of a fatal accident on a human person by committing any traffic offense, his/her license will be suspended for 6 months in case of serious injury or one year in case of death in addition to 22 and 28 recording points respectively.[97] However, since criminal prosecution is usually inevitable in these cases, police have to wait until the court pronounces guiltiness of the driver to suspend his/her license. If not, injustice will be made to the driver if the police

[94] Road Traffic Regulation No.208/11, *supra* note *61,* Schedule B.
[95] Traffic Amendment Regulation No.395/17, *supra* note *26,* Schedule B.
[96] Dominic Zaal, *supra* note *29*, p. 12.
[97] Traffic Amendment Regulation No.395/17, *supra* note *26,* Schedule B.

have instantly suspended every motorist who has caused serious injury or fatal accident as it deems necessary while the court decides the innocence of the driver. As a result, Traffic Controllers now are taking the time after conviction to suspend driver's license.[98] Hence, the Regulation should have indicated the initial time to be taken while suspending the license of a driver in the above situations.

3.2 Practical Challenges

Even in cases where the rules are clear, their practical implementation may not be effectively realized because of various obstacles. This section analyses those major challenges on the practical enforcement of the traffic laws.

3.2.1 Failure to Enforce the Point Demerit Penalty System

Point demerit scheme is introduced by Regulation 208/11 as means of linking road user behaviour with the imposition of severe penalty. Yet, it was later repealed by Schedule B of the new amendment Regulation 395/17. According to the system, points are allocated to various categories of traffic offenses and when a driver accumulates the highest point in the specified time, his/her driving license is suspended.[99] It was practically applied in 2015/16 (2007/8 EC) in Addis Ababa, Amhara, Oromia, and Tigray Regions using a mobile SMS platform as a means of notification. However, the system was functional only for a year (2017/2009 E.C) because of two major reasons. The first is the need for the uniform application of the system throughout the country.[100] The system was used only in the above three regions and Addis Ababa City. Hence, to uniformly apply throughout the country, it was suspended until those regions can commence its use. The second is due to the need for revising the existing SMS platform in line with new category offenses and fines under the amendment Regulation 395/17.[101] Because of these reasons, Traffic Controller is using and imposing only the fixed amount of fines set for a different type of offenses against any offender though he/she has consistently been involved in violating the rules. Consequently, except those drivers who have caused death or serious injury on individuals, it is not possible to impose penalty measure which results in the suspension and/or cancellation of drivers' license while

[98] Interview with Commander Meseret Debaleke, Chief Officer of Bahir Dar City Traffic Police Administration, 5 June, 2019; Interview with Commander Tezera Fisseha, Chief Officer of Gondar City Traffic Police Administration, 20 June 2019.
[99] Traffic Amendment Regulation No.395/17, *supra* note *26,* Schedule B.
[100] Interview with Commander Meseret Debaleke, *supra* note *98*; Interview with Commander Tezera Fisseha, *supra* note *98.*
[101] *Id.*

committing other traffic offense, for there are points currently recorded for each type of offenses committed by a wrongful driver and finally leads the imposition of such measures.[102]

The purpose of introducing a point demerit penalty system is to deter those road users who consistently violate traffic laws upon notifying each fault committed.[103] Likewise, officials indicated previously that, while the system has been in work, many drivers' license was suspended as a result of accumulating a maximum number of counts stipulated under the regulation.[104] The SMS platform has also contributed a lot to Traffic Controllers by enabling them to detect and send demerit counts to those drivers who reject to stop after committing an offense through their mobile numbers.[105] Unarguably, the above fact witnesses the failure of the government to provide in time the necessary administrative schemes essential to enforce the penalty system stipulated under the regulation.

3.2.2 Existence of Limited Policing Resources

Several studies suggest that to have a meaningful and immediate deterrence against the would-be traffic offender, Traffic Controllers should regularly and seriously engage in detecting, apprehending, and punishing every road user in an organized way.[106] However, due to limitations with policing resources, they might face a difficulty to maintain enforcement activity. There are several cases, in which policing resources could be limited, but the researcher identifies the following as major obstacles to effective enforcement of traffic laws in general and key-risk factors in the research settings.

The first is the *understaffing* of the Traffic Controller. For instance, Officials from Bahir Dar and Gondar indicate that because of *understaffing*, it is very difficult to conduct *regular and serious* policing activities not simply across every street in the cities, but even in those high traffic movements and accident

[102] As stipulated under Schedule A of the Regulation, a driver who has committed these types of offences is directly punishable with suspension of his/her driving license for a year. Whereas, as stipulated under Schedule B of the Regulation a driver who has committed other type of crimes for second/more second times and if its penalty recording point reaches to 28/more than that, he/she is punishable with suspension of his/her driving license for a year.

[103] Traffic Amendment Regulation No.395/17, *supra* note *26,* Schedule B.

[104] Interview with Commander Meseret Debaleke, *supra* note *98*; Interview with Commander Tezera Fisseha, *supra* note *98*.

[105] *Id.*

[106] Rothengatter, T, Automatic Policing and Information Systems in Enforcement and Rewardin Strategies and Effects, proceedings of the International Road Safety Symposium in Copenhagen, Denmark, September 19-21, 1990, at 64; Dominic Zaal, *supra* note *31,* p. 12.

black-spot streams.[107] Commonly, only two Traffic Police Controllers are assigned to work at a given traffic stream by shift during the day time only.[108] Thus, usually, a single Controller is expected to carry out the enforcement process i.e., detection, apprehensions, and punishment, which is very difficult to effectively monitor the traffic situation. As a result, Traffic Police Controllers are forced to give primacy for the selected type of offenses that are commonly observed in public/commercial transport vehicles such as detection of public vehicles, exit permit, and passengers overloading or they remain busy while investigating traffic incidences.[109] To mitigate such a problem of understaffing, Regulation 208/11 empowers the office of Traffic Controllers to delegate voluntary associations such as Traffic Students and Transport Associations, which can help traffic monitoring activity.[110] Although voluntary groups usually help in monitoring pedestrian road use, they work in streams like schools and market places and are not continuous.[111]

The second major resource limitation is related to *patrolling vehicles/motorcycles*. Almost all Traffic Controllers are involved in patrolling work without vehicles/motorcycles.[112] Consequently, the stationary enforcement mechanism is usually deployed by Traffic Controllers to conduct policing activities just retaining on new or previously known streets/intersections. Hence, the above facts indicate that the *Mobile Traffic Enforcement System* is not employed most of the times even though it is well recommended as an effective means to sustain the deterrent effect of enforcement.[113]

Moreover, the use of automated enforcement devices increasingly become a popular mechanism to reduce traffic policing resources while at the same time providing an efficient and effective means of detecting and deterring traffic offenders, especially in areas of the speed limit, red light traffic signal, high occupancy lane, and heavy vehicle enforcement.[114] This system normally

[107] Interview with Commander Meseret Debaleke, *supra* note *98*; Interview with Commander Tezera Fisseha, *supra* note *98*; Interview with Berhane Abebe, Officer of Transport Controllers in Bahir Dar City Administration, 4 June, 2019; Interview with Belayineh Chane, Officer of Transport Controllers in Gondar City, 23, June 2019.

[108] Interview with Commander Meseret Debaleke, *supra* note *89*; Interview with Commander Tezera Fisseha, *supra* note *89*; Interview with Berhane Abebe, *supra* note *107*; Interview with Belayineh Chane, *supra* note *107*.

[109] *Id.*

[110] Road Transport Traffic Control Regulation No 208/11, *supra* note *61* Art. 83.

[111] Interview with Commander Meseret Debaleke, *supra* note *98*; Interview with Commander Tezera Fisseha, *supra* note *98*.

[112] *Id.*

[113] Armour, M., A Review of the Literature on Police Traffic Law Enforcement, Proceedings of the 14th Australian Road Research Board Conference, 14(1), (1984), p. 17-24.

[114] Dominic Zaal, *supra* note *29,* p. 20.

consists of detection equipment, processing unit, camera, and video recording systems and able to determine whether or not an offense is being committed using the recorded image.[115] Therefore, the use of such devices can have an impact on driver behaviour and at the same time reduce traffic police resources. However, such types of enforcement devices are non-existent in Ethiopia.

3.2.3 Traffic Controllers General Concern and Compassion

Traffic Controllers bears a professional duty to undertake its policing activities against any wrongful road users with maximum care and concern. However, all Traffic Controllers are not equally concerned to control illegal behaviours to the extent they can do so. For instance, about speeding, use of seat belt/helmet, or other offenses, while some Traffic Controllers are seriously concerned in detecting and punishing each wrongdoer, others are hesitant to do so.[116] Consequently, this would lead other Traffic Controllers to remain reluctant to detect and punish potential wrongful road users. Hence, Traffic Controllers are not equally committed to detecting, apprehending, and punishing offenders even in the situations that they were able to do so.[117]

3.2.4 Absence of Supporting Activities on Traffic Law Enforcement

I. Publicity Works on Road Safety

The use of road safety publicity campaigns with traffic enforcement is well studied as being effective means for long-lasting change of road user's behaviour.[118] In general, road safety publicity activities denote various works that were designed to inform, advice, encourage, and persuade a target audience to undertake a particular behaviour. It mainly includes publicity works on specific policing activity, and educational/awareness creation campaigns by Traffic Controllers, volunteers, mass media, or other governmental and non-governmental agencies.[119]

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[115] *Id.*

[116] Interview with Inspector Nafkot Degu, Traffic Police Controllers in Bahir City, 5 June 2019; Interview with Wana Sajin Nigusu Aragawu, Traffic Police Controllers in Gondar City, 5 June 2018.

[117] Interview with Commander Meseret Debaleke, *supra* note *98*; Interview with Commander Tezera Fisseha, *supra* note *98*.

[118] Gundy, C.M., The Effectiveness of a Combination of Police Enforcement and Public Information For Improving Seat Belt Use, in Rothengatter & De Bruin (eds.), (1988), p. 26.

[119] Organization for Economic Co-operation and Development (OECD), Road Transport Research: Marketing of Traffic Safety, report prepared by the Scientific Expert Group, Paris, (1993), p. 112; Elliott, B., Road Safety Mass Media Campaigns: A Meta-Analysis, Report CR 118, Federal Office of Road Safety, Canberra, (1993).

Accordingly, publicity works on enforcement activities by Traffic Controllers against a particular behaviour like speeding, drinking and driving, seat belt and helmet use by motorists can increase *the perceived risk of apprehension* of road users.[120] Subsequently, it would raise their deterrence by increasing their expectation about new/additional enforcement activity, provided that such activities are observed. However, this type of policing activity is viewed very rarely on traffic rules including speeding, drink-driving, seat belt, child restraint, and helmet in both mainstreaming and local media.

There are ample awareness creation educational programs on road safety issues as conducted by Traffic Controllers in some cities using special public gatherings.[121] The type of medium used to convey publicity is also another determinant factor ~~by~~ for its effectiveness. For instance, several studies show that Television, Radio, or Press advertising ~~is~~ are the most effective medium for producing change relative to other mediums for it is possible to reach a large audience using these avenues.[122] However, awareness creation programs are undertaken by Traffic Controllers usually delivered by informal roadside announcements.[123] In respect of publicity activities on speed, public posting of speed information has been found as an important measure towards reducing the speeding behaviour of a driver.[124] However, legally enforceable speed limits or related information is observed only in the gate areas of some cities in Ethiopia. Moreover, although publicity campaigns organized by volunteer groups are also important ways to change the knowledge and attitude of road users and the community towards speeding, drink-driving, seat belt, and helmet use,[125] such type of programs are unknown in Ethiopia.

[120] Dominic Zaal, *supra* note *29,* p. 23.

[121] For instance there is the so called 'Traffic Safety Weeks' held by Traffic Police Controllers across various Cities in Ethiopia, with the purpose of creating community awareness in public gatherings such as markets, schools, religious institutions or in sport festivals regarding accident severity and pedestrians' road use. Yet, these awareness raising programs are targeted on safety rules to be observed by pedestrians and hence there is no particular program targeted towards other motorists and illegal traffic behaviors such as speeding, drink driving, mobile phone using, *kchat* impairment, seat belt and helmet non-use.

[122] Liedekerken, P.C. & van der Colk, H., Highway Driving Speed Reduction and Public Information Campaigns in the Netherlands, Swedish Road and Traffic Research Institute, Sweden, (1990).

[123] Occasionally, even if informative/educational road safety programs are broadcasted using Amhara TV and Radio (FM 96.1), they are not concerned on particular road safety issue/behavior and are not even continuously portrayed. Interview with Berhane Abebe, *supra* note *107*.

[124] Dominic Zaal, *supra* note *29,* p. 73.

[125] WHO Global Status Report 2013, *supra* note *31*, p. 25; WHO Global Status Report 2015 *supra* note *31* p. 16; WHO 'Save LIVES' *supra* note *2,* p. 31; Foundation for the Automobile and Society (FIA) *supra* note *74*, p. 55 & ff.

II. Environmental/Road Engineering Measures on Speeding

Maximum enforcement of speed limits stipulated under the law along with other preventative strategies can change the behaviour of speeding motorists against the specified limit. However, the task becomes difficult as motorists usually do not perceive or fail to remember speeding as a particularly deviant form of driving behaviour due to several reasons.[126] This has led researchers to look for other 'agents' of speeding, namely the *vehicle* and *roadside environment*.[127] In other words, by fitting a device that limits the maximum speeds of vehicles and using physical speed reduction or perceptual road treatments, it is possible to reduce the speeding behaviour of motorists.[128] In respect of vehicle device that limits driving over the allowed maximum speed, Directive No. 1/2006 has prescribed for the application of car-mounted speed limiting devices, especially in commercial and public transport vehicles. However, its practical application is not yet started in Ethiopia.

One of the most common road engineering treatments to reduce speeding is the use of various *'traffic calming'* measures such as roundabouts, raised pavements, speed humps, staggering' and narrowing.[129] Unlike the case of roundabouts and intersections, other *'traffic calming'* measures such as high pavements, speed humps, staggerings, narrowings, and painted roadway surfaces are rarely available across the streets in Ethiopia. And, several intersections in most streets have no red light traffic system or built roundabout, although they were known for frequent accident crashes.[130]

Adding, it is possible to reduce the speeding behaviour of drivers using *'perceptual speed control measures'* which requires a low cost of the application without any physical engineering measures on the road surface.[131] Commonly, such type of road treatment is used in Ethiopia through diagonal lines marked on

[126] R Fuller, Modification of Individual Road User Behaviour in Enforcement and Rewarding Strategies and Effects, proceedings of the International Road Safety Symposium in Copenhagen, Denmark, from September 19-21, (1990), p. 40.

[127] *Id.*

[128] P Cairney and M Townsend, Alternatives to Enforcement for Speed Management, Australian Road Research Board ARRB Vermont South, Vic, (1991), p. 6.

[129] Dominic Zaal, *supra* note *29,* p. 79.

[130] In Bahir Dar, for instance those wide intersections exist in front Yetebeberut gas station at Keble-14 and around Dippo at Kebele 13 has no built roundabout or red-light traffic system. Interview with Sajin Asefa Andarge, Officer Traffic Police Controllers at Zetengna (9th) Police station in Bahir City Administration, 5 June 2019; Interview with Wana Sajin Nigusu Aragawu, *supra* note *116*. In Gondar, even if some roads has downhill surface structure necessitating placement of speed humps as a solution against speeding motorists, most are without this traffic calming measure.

[131] Fildes, *et al*., Speed Perception 2: Driver's Judgments of Safety and Travel Speed On Rural Curved Roads and at Night, Federal Office of Road Safety, Department of Transport and Communications, Australia Canberra Report CR 60, (1989), p. 16.

the roadway or commonly called *'Pedestrian Crossing/Zebra'* usually nearby roundabouts or intersections. Accordingly, drivers are required to reduce their speed and stop while approaching in such places since they were set for pedestrian's passage.[132] Nonetheless, *Zebra-Crossing'* are visible in very few sections of the streets in Ethiopia, and even most of them are not observed upon losing their marks.[133] Moreover, the use of centre-line and edge-line road treatments including transverse striping on the edges and shoulder region of the road is also identified as a possible means to reduce speeding behaviours'.[134] However, except for a few streets, such types of treatments are not visible on most roads across the country.

3.2.5 Lack of Proper Knowledge and Training for Traffic Controllers

Every Traffic Controller should be educated and skilled with strategies of traffic law enforcement tasks and tactics to achieve maximum success. In particular, they have to possess basic knowledge of the law, mechanisms of targeting traffic areas with a high rate of non-compliance and enforce traffic rules, and provide effective advice and education to motorists. Nevertheless, except for the general policing training program provided by Police College, most Traffic Police Controllers in our country do not pass through a specific training program designed for traffic law enforcement.[135] As a result, since Traffic Police Controllers have no basic knowledge about traffic law enforcement, they were conducting such activities based on common practices, including the various scientific strategies of targeted enforcement operations.[136] Therefore, it is logical to say that, as things stand now, Traffic Controllers are not equipped with proper knowledge and skill that enables them to deploy and undertake those strategies aimed at increasing the overall effectiveness and efficiency of policing operations. However, if Traffic Controllers are provided with the required

[132] *Id.*

[133] For instance, Traffic Police Officials in Bair Dar and Gondar point that, the City Administration, which is responsible to mark new Zebra-Crossings or maintain existing ones has failed to carry out its function though they have repeatedly asked. And, even those streets built/marked with pedestrian walk way are narrow, or if it's in market place often used by *street vendors for selling various products* or used for *retaining construction materials such as soil, ashewa, and boulder* in some other roads.

[134] Fildes, *et al. supra* note *131*, p. 16.

[135] Interview with Commander Meseret Debaleke, *supra* note *98*; Interview with Commander Tezera Fisseha, *supra* note *98*; Interview with Berhane Abebe, *supra* note *107*; Interview with Belayineh Chane, *supra* note *107*. Occasionally, even if there are training programs given by the Federal Transport Authority like on the new amendment traffic regulation 395/17 very few Traffic Controllers were involved.

[136] Interview with Sajin Mebratu Setotawu, Traffic Police Controllers in Bahir Dar City, 5 June 2019; Interview with Wana Sajin Nigusu Aragawu, *supra* note *116*.

training programs on traffic law and its enforcement, it could help them to attain and maintain their commitment towards effective enforcement of traffic rules.

Conclusion

No doubt that enacting a comprehensive traffic law on key risk factors to road traffic deaths and injuries, i.e. speeding, drink-driving and other forms of destructive driving, use of helmet, seat belt and child restraints, would prove itself as the most effective way to reduce road traffic deaths and injuries provided that it is accompanied by strong enforcement schemes. In Ethiopia, there are relevant laws enacted to govern these risk factors, i.e. the 1969 Speed Limit Regulation No. 361/69 and Road Traffic Regulation No. 208/11, including its Amendment Regulation No. 395/17. And, such laws have tried to provide some important provisions regarding the key risk factors. Nevertheless, a critical inquiry made by this article found out that, still, the regulations are not comprehensive enough or not compatible, at least in some respects, with the global best practice in governing several aspects surrounding each risk factor. Furthermore, this article has uncovered several legal and practical challenges hindering effective enforcement of the traffic rules. In particular, the non-application of point demerit penalty system stipulated under the law, limited resource, understaffing and lack of patrolling vehicles/motorcycles, Traffic Controllers' lack of commitment for enforcing traffic laws, absence of continual training Traffic Controllers are, *inter alia*, the major obstacles to effective enforcement of traffic regulation. Thus, Ethiopia should take the issue of road traffic deaths and injuries seriously; it is imperative to review the traffic laws in line with the global best practice and to strengthen enforcement activities.

Legal Aspects of Multi-level Marketing (MLM) and Pyramid Schemes: Overview of the Ethiopian Legal Framework

Gizachew Silesh Chane[♣]

Abstract

The Multi-level marketing (also known as Network Marketing) has evolved as an alternative marketing strategy, modeled on the basic idea of the classical direct selling-the door-to-door selling. The MLM design compensates the door-to-door sellers not just for the sales they personally generate but for the sales generated by the people they recruit. This compensation scheme in MLM brought it close to pyramid scheme in design; makes it prone to abuse in the form of pyramid scheme. Indeed, it has been abusively used for operating pyramidal schemes; Regulators have been plagued with the problem of distinguishing MLM from pyramid scheme and sanctioning the misuses. No careful legal drafting is likely to provide a simple solution but reduces the perplexity in the factual analysis and enforcement decision making. The author in this article examined, using the doctrinal research method, the position of Ethiopian law regarding network marketing and how it deals with potential manipulation of network marketing for operating pyramid scheme. Ethiopian law on pyramidal scheme is drafted so generically and briefly, and without even mention of network marketing – the very mask in which pyramidal schemes operate. The researcher found out that such a design of Ethiopian law has resulted in legal uncertainty about the implication of operating MLM. Essential parametrizations of what is within the legal limit and when it is out there in the pyramid scheme are either vague or omitted. The author recommended the need for further elaborate rules on pyramid schemes and inclusion of some guiding standards on network marketing.

Key terms: Direct selling, Multilevel marketing/Network marketing, pyramid(al) scheme, referral selling

Introduction

Producers of goods and services may devise and implement various marketing approaches so as to reach their consumers. The conventional distribution channel involves a hierarchical arrangement of producers-wholesalers-store

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retailers.[1] Alongside this conventional distribution channel, business persons developed a practice, through time, whereby their products reach consumers where they are, without expecting them to show up and shop at the store. This marketing model is what we call direct selling which signifies, in its classic connotation, the door-to-door selling[2] as opposed to store retailing. Direct selling initially emerged as a short-term approach to reduce surplus inventory but it remained as a sustainable retail channel for companies to reach household consumers in their own home.[3] As time goes on, the classical direct selling has given rise to its variant form known as multilevel marketing (also known as "network marketing"[4]).

The terms multilevel marketing and network marketing are often used alternatively in the literature.[5] The use of the term network marketing capitalizes an aspect of the marketing system that it is based on social networks/connections of the individuals while the use of the term multilevel marketing indicates the multi-layer organizational structure of the network. Multilevel marketing is the conventional terminology in the legal literature but the term network marketing is a buzzword in the ordinary discourse. Thus, in this article both the term network marketing and multilevel marketing (MLM) are used interchangeably.

There is global surge in the direct selling industry from time to time. The statistics in 2019 depicts that direct selling in its classical sense together with the MLM as its variant form generated more than $180 billion retail sales across the globe.[6] The sector provided self-employment opportunity for about 119.9 millions distributors globally, and of this about 5.4 millions are in Africa.[7] As

[1] Jon M. Taylor, 'When Should an MLM or Network Marketing Program Be Considered an Illegal Pyramid Scheme?(2000), available at http://www.pyramidschemealert.org/PSAMain/regulators/PPSdefined.pdf, accessed 15 April, 2020,P.12.

[2] William W. Keep and Peter J. Vander Nat, 'Multilevel Marketing and Pyramid Schemes in the United States: An Historical Analysis', *Journal of Historical Research in Marketing*, Vol. 6, No. 4, (2014), available athttps://www.valueplays.net/wp-content/uploads/Keep-and-Vander-Nat_MLM-and-Pyramid-Schemes_Final.pdf, accessed April 16, 2020, p. 4.

[3]. Id., p. 2.

[4] Taylor, *supra* note 1, pp. 5-6, 8.

[5] Gerald Albaum & Robert A. Peterson, Multilevel (network) Marketing: An Objective View, *The Marketing Review*, Vol. 11, No. 4, (2011), available at https://fardapaper.ir/mohavaha/uploads/2018/09/Fardapaper-Multilevel-network-marketing-An-objective-view.pdf, accessed April 16, 2020, p.347.

[6] World Federation of Direct Selling Associations, Global Direct Selling - 2019 Retail Sales, (July 1, 2020), available at https://wfdsa.org/wp-content/uploads/2020/07/Sales-Seller-2020-Report-Final.pdf, accessed August 17, 2020. Global sales by product category shows that wellness products constitute 36%, cosmetics and personal care 29%, and household goods 12%followed by 6% sales pertaining to clothing and accessories.

[7] Id.

such the industry has been acclaimed for providing great economic opportunities for individuals.[8] It also benefits the small- and- medium-sized enterprises to build a business with low start-up and overhead costs.[9]

However, despite the much acclaimed advantages the direct selling industry allegedly offers, there arose misleading market conducts that disguise themselves as direct selling. Referrals and chain referrals (pyramid schemes) are the typical misleading market conducts that tainted the direct selling industry. In particular, the MLM has been used as bullet proof mask for operating a pyramid scheme. Owing to the thin distinction between the legal MLM and the illegal pyramid scheme, regulators continued struggling to identify whether a marketing scheme is an MLM proper or a pyramid scheme.[10]

Pyramid scheme is characterized as unfair commercial practice and universally outlawed but, in practice, there are numerous instances of their presence in most developed countries including the United States.[11] With the market saturation and strengthening enforcement in the developed world, coupled with the expansion of cyber technology[12], many fraudulent businesses are likely to draw their attention to the developing countries where the level of awareness on the part of consumer protection authorities and the general public is minimal.

So far, few foreign companies claiming to be operating network marketing business had experimented it in Ethiopia.[13] Qnet (formerly known as Gold Quest/ Quest Net[14]), that purports to be direct selling company but had a history

[8] Id.

[9] Software suggest, MLM Statistics You Need to Know in 2020, (November 13, 2019), available athttps://www.softwaresuggest.com/blog/mlm-statistics-you-need-to-know/,accessed on August 17, 2020.

[10] Central Bank of Sri Lanka, Danger Posed by Pyramid Schemes & Network Marketing Programs,(May, 2006) Pamphlet Series No. 4, available at https://www.cbsl.gov.lk/sites/default/files/cbslweb_documents/publications/Danger%20Posed%20by%20Pyramid%20Schemes%20%26%20Network%20Marketing%20Programmes%20%282006%29.pdf , accessed on 6 April 2020, p.2.

[11] Keep and Vander Nat, *supra* note 2, p.6.

[12]Apart from the traditional modes of communication such as presentations, group meetings, conference calls, and brochures and the likes, MLM programs are also promoted through internet advertising, social media and company websites. U.S. Securities and Exchange Commission, 'Beware of Pyramid Schemes Posing as Multi-Level Marketing Programs' (1 October, 2013), available athttps://www.sec.gov/investor/alerts/ia_pyramid.htm, > accessed on 15 March 2020.

[13] [A]ndthree, Gold Quest et al. in Ethiopia – Beware of Scam, (10 March, 2013), https://andthree.wordpress.com/2013/03/10/gold-quest-et-al-in-ethiopia-beware-of-scam/,accessed on 7 April, 2020.

[14] Daniel Frazier, Follow-up on the News: Internet Spat Breaks Out over Qnet and Multi-level Marketing in India: Reactions to Selling a Better Life, *Forbes Asia,* (5 November, 2012), available at http://www.forbes.com/sites/donaldfrazier/2012/12/18/followup-on-the-news-internet-spat-breaks-out-over-qnet-and-multi-level-marketing-in-india/#d0f0aa778dff, accessed 10 April, 2020.

of being labeled as pyramid scheme and sanctioned in many jurisdictions,[15] was operating in Ethiopia in the mid-2010s.[16] Few other potential suspects had been in Ethiopian market during that time.[17] The most recent example is the Tiens Ethiopia, a subsidiary of the Chinese based Tiens Group Co. Ltd.[18] The company purported to have been operating direct marketing but had faced judicial,[19] administrative[20] and public reactions[21] in some jurisdictions for alleged engagement in pyramid scheme. Yet it is still operating in many parts of the world.[22] Tiens Ethiopia had been in operation for about a decade until barred in February 2016 for engaging in pyramid scheme of sale.[23] It is also reported that Tiens restarted the business in Ethiopia reorganizing/renaming itself in three different companies, adopting similar marketing strategy.[24]

The need to protect consumers and create predictable legal environment for business persons is unquestionable. The current Ethiopian law-the Ethiopian "Trade Competition and Consumer Protection Proclamation No. 813/2013'"[25]-prescribes the dos and don'ts for business persons, including a prohibition regarding operating pyramidal schemes.[26] This law nowhere explicitly addresses issues pertaining to direct marketing, either in its classical sense or the MLM version. Although this silence apparently implies tacit recognition of the legality of operating MLM, the question of how to distinguish it from a pyramidal

[15] Weebly, Qnetis Banned/Shutdown in Many Countries, News Review Alert, (14 March, 2011), available at http://newsreviewalert.weebly.com/1/post/2011/03/march-14th-2011.html, accessed on 5 April 2020.Qnet is the main subsidiary of the QI Group of Companies which was founded in Hong Kong in 1998. The company was banned from operating in many countries for allegedly operating a pyramid scheme: Afghanistan (2008), Rwanda (2009), Iran (2005), Sri Lanka (2004), USA & Canada (2008), Syria (2009).

[16] [A]ndthree, *supra* note 13.

[17] Id.

[18] TIENS, available at http://www.tiens.com/en/index.php?m=content&c=index&a=lists&catid=9, accessed 18 April, 2020.

[19] A Million Dollar Scam: Tianshi International', Fraud & Scam Alert, (14 November 2010), available at http://fraud-scam-alert.blogspot.no/2010/11/tianshi-international-multi-million.html, accessed on 15 April, 2020.

[20] Id.

[21] Radio Free Asia, Tibetans Protest Alleged Scam (21 October 2009, available at http://www.rfa.org/english/news/tibet/pyramidscheme-10202009170044.html, accessed on 10 April, 2020.

[22] Global TIENS, available at http://www.tiens.com/en/index.php?m=content&c=index&a=lists&catid=14, accessed on 3 May 2020.

[23] Addis Fortune, Ministry Revokes Tiens Licence, Addis Fortune, Vol. 16, No. 824, (February 14,2016) [available at https://addisfortune.net/articles/ministry-revokes-tiens-licence/, accessed on 10 May 2020.

[24] BRANA PRESS, *Tiens Network Business Restart in Ethiopia*, (February 12, 2020), available at https://www.branapress.com/2020/02/12/tiens-network-business-restart-in-ethiopia/, accessed on 3 June, 2020

[25] Trade Competition and Consumers Protection Proclamation, Proclamation No. 813/2013, *Federal Negarit Gazetta*, (2013) (herein after Proclamation No. 813/2013).

[26] Id., Article 22.

scheme, and other ancillary questions require an in-depth analysis of Ethiopian law. Absent legal clarity, pyramid schemes may flourish with their misleading activity or else the enforcement authorities may be hyper reactive and close possible opportunities of network marketing. [27]

This article strives to outline the distinction between the pyramid schemes and MLM that has been a major source of confusion. It aims at explaining the notion of pyramidal scheme of sale as an illegal marketing scheme in the Ethiopian law as opposed to MLM that operates in similar line but within the legal limit. The structure is that, following this introduction, the first section provides theoretical framework on the concept of direct marketing, MLM/network marketing, referral selling and pyramid scheme. The second section highlights the varying stands regarding MLM in different jurisdictions pertaining to the issue of whether it is maintained as a legitimate marketing scheme or rejected as illegal scam. The third dwells on the legal response in dealing with pyramid schemes and network marketing under Ethiopian law. This section commences with a highlight of the relevant Ethiopian law and then proceeds to an in-depth analysis and exposition of the law applicable to MLM and pyramid schemes. At last, a brief conclusion is provided.

1. Conceptual Framework to Some "Marketing Approaches": Direct Selling, MLM/Network Marketing, Pyramidal Scheme, and Referrals.

As noted above, various marketing approaches could be devised and implemented by business persons so as to reach their consumers. The hierarchical arrangement that involves producers-wholesalers-store retailers is conventional distribution channel but not the exclusive one. Marketing strategies designed to reach consumers at their location, without expecting consumers to show up and shop at the store, are developed through time. Direct selling (classical) evolved as typical alternative to conventional distribution channel, and others that are allegedly a form of direct selling or that disguise themselves to be a variant direct selling have also evolved.

1.1. Direct Selling

The conceptual understanding of the direct selling in its classical sense does not seem to be controversial. Authors in the field summarized the genesis and

[27] Kevin Thompson, Pyramid Schemes: Saving the Network Marketing Industry by Defining the Gray, available at http://mlmhelpdesk.com/wp-content/Docs/Direct_Selling/MLM_Attorney_Kevin_Thompson_Pyramid-Schemes-Saving-the-network-marketing-industry-by-defining-the-gray.pdf, accessed on 3 May, 2020.

concept of direct selling as a marketing scheme that evolved from the selling tradition of the itinerant peddler who used to travel great distances to sell primarily unbranded products (to customers) into direct selling salesman who goes "door-to-door" selling branded products in an increasingly urbanized environment.[28] The US Direct Selling Association defines direct selling as ''the sale of a consumer product or service, person-to-person, away from a fixed retail location, marketed through independent sales representatives who are sometimes also referred to as consultants, distributors or other titles."[29] These definitions in common point out that direct selling signifies the door-to-door selling as opposed to store retailing.[30] Moreover, the latter definition informs that the sales persons are independent agents rather than salaried employees, and they may take varying designations. The EU directive -Directive 2011/83/EU on consumer rights- uses the term "off-premises contracts" which is defined as "a contract concluded with the simultaneous physical presence of the trader and the consumer, *in a place which is not the business premises of the trader*, for example at the consumer's home or workplace."[31] Thus, the classical meaning of direct selling limits itself to cases where salesmen go "door-to-door" selling products to consumers. Yet in the digital era, products could be promoted and sold between persons at distance[32] but they may be separately regulated.[33]

Although direct selling, particularly in its classical sense, is globally accepted trading scheme, it is not regulated uniformly. Direct selling associations are established across the globe,[34] and they do provide self regulation codes of conduct. Apart from that, in most instances, the regulatory rules applying to the conventional store retailing applies. But there appears to be reasons to specifically regulate certain aspects of direct selling somehow differently than

[28] William W. Keep and Peter J. Vander Nat, in their joint article entitled "Multilevel Marketing and Pyramid Schemes in the United States: An Historical Analysis", summarized the genesis and concept of direct selling, relying on Friedman's account of direct selling. Keep and Vander Nat, *supra* note 2, p. 1; W.A. Friedman, Birth of a Salesman: The Transformation of Selling in America, Harvard University Press, Cambridge, (2004), cited in Keep and Vander Nat, *supra* note 2, p. 1.

[29] Direct Selling Association (of US), What is Direct Selling?, available at http://www.massachusetts-top-hotels.com/directselling411com/, accessed on 4 August, 2020.

[30] Keep and Vander Nat, *supra* note 2, p. 1.

[31] Directive 2011/83/EU of the European Parliament and of the Council of European Union on Consumer Rights, (25 October 2011),(amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council) (herein after Directive 2011/83/EU), preamble Paragraph 21.

[32] Republic of South Africa Consumer Protection Act No 68, 2008(herein after South African Consumer Protection Act). Section 1 of the broadly defined ''direct marketing'' as approaching a person, either in person or by mail or electronic communication for promoting or offering to supply goods or services or requesting the person to make a donation of any kind for any reason

[33] See Directive 2011/83/EU), *supra* note 31, preamble Paragraphs 20 and 21.

[34] World Federation of Direct Selling Associations, Member DSAs, available at https://wfdsa.org/dsa-membership-by-country/, accessed on 5 July 2020.

the cases of transactions in store retailing. For instance, the EU directive underscored that "in an off-premises context, the consumer may be under potential psychological pressure or may be confronted with an element of surprise, irrespective of whether or not the consumer has solicited the trader's visit."[35]

The Chinese law provides separate legislation regulating direct selling to the details.[36] Art.3 of the Chinese Regulations on Direct Selling Administration defined "direct selling" as "a type of business mode, in which "direct selling companies"[37] recruit "door-to-door salesmen"[38] to sell products directly to ultimate consumers (hereinafter referred to as consumers) outside the companies' fixed places of business". Direct selling is subject to strict regulation: the companies applying to engage in direct selling need to meet certain requirements[39] and must get prior approval; only direct selling company and its branches may recruit door-to-door salesmen;[40] the door-to-door salesmen must conclude a sales contract with the company, must take vocational training and be certified by the direct selling company;[41] the company should clearly mark the price on the product for direct selling;[42] the commission to door-to-door salesmen *must drive exclusively from direct sells to ultimate consumers*, capped at a maximum of 30%; salesmen must be paid at least on a monthly basis;[43] a direct selling company must put into place a sound system of changing and returning of goods where door-to-door salesman requests so[44](a buy-back scheme as the literature calls it).

1.2. Multilevel Marketing (MLM)/Network Marketing

The fundamental idea behind the MLM is claimed to have been drawn from the traditional direct selling. Besides the door-to-door selling, MLM heavily relies on social networks; selling to friends, family, co-workers and neighbors instead

[35] Directive 2011/83/EU), *supra* note 31, Paragraph 21.
[36] The Regulations on Direct Selling Administration, the State Council Order of the State Council of the People's Republic of China, No.443, (2005)(hereinafter Chinese Regulations on Direct Selling).
[37] Id., Article 3, paragraph 2. Companies need prior approval as the term "direct selling companies" is employed to refer to the companies which sell products by way of direct selling upon approval.
[38] Id., Article 3, paragraph 3. The term "door-to-door salesmen" refers "to any personnel who sell products directly to consumers outside the fixed places of business.
[39] See Id., Articles 7and 8 cum Article 3, paragraph 2.
[40] Id., Article 13.
[41] Id., Articles16 and 18(1).
[42]Id., Article 23.
[43]Id., Article 24.
[44] Id., Article 25. The scheme works within 30 days as of the day of purchasing the direct selling product and on the condition that the product remains unopened.

of store retailing.[45] Admittedly, such direct access to potential consumers at their location is an aspect of the traditional door-to-door selling. However, MLM brings significant modifications in particular in relation to recruitment of the commissioned salesmen and the reward system.[46] In the conventional direct selling, the business person engaged in direct marketing recruits, trains, and supervises the door-to-door salesmen who reap commission on their sales to ultimate consumers. The MLM model shifted this task to the sales forces themselves:[47] each sales person recruiting new ones and creating a chain of direct and indirect recruits;[48] the sales persons engaged therein earn a commission from their own sales as well as from the sales generated by the direct and indirect recruits.[49]

This multi-level compensation scheme whereby the persons up the line are remunerated from sales of the down the lines draws its justification on account of cost effectiveness for the company;[50] the company is relieved off the task of recruiting, training, and supervision of new sales forces and concomitant cost. Instead, each sales person takes up this responsibility but not for free. Obviously, sales forces may not engage in that task in the absence of some incentives for their service. Theoretically, the sales forces, whether recruited by the company itself or sales forces of the company, they all are meant to retail products by reaching consumers wherever they are. Thus, MLM is conceptually a direct selling but with a multi-level compensation scheme.[51] The details of the compensation schemes vary among companies.[52]

This marketing model in its present sophisticated model has a short history but it has exploded fast.[53] As the model develops, many single-level direct selling companies adopted the MLM model.[54] Notable problems arose with such development. The MLM model created the tendency of some salespeople to

[45] Keep and Vander Nat, *supra* note 2, p.4.
[46] Id., p.5.
[47] Dennis W. Gaddy,Network Marketing: A Smart Choice for Today's Entreprenuer, available at www.communitysuccess.org, accessed 12 May 2020, p.5.
[48] Yuval Emek *et al*, 'Mechanisms for Multi-Level Marketing, available at http://www.eecs.harvard.edu/cs286r/courses/fall11/papers/rewards.pdf,accessed 12 june 2020, p.2.
[49] Keep and Vander Nat, *supra* note 2, p. 4.
[50] Taylor, *supra* note 2, p. 6.
[51] Albaumand Peterson, *supra* note 5, p.348.
[52] Taylor, *supra* note 1, p.11.
[53] Gaddy, *supra* note 47, p. 2. It was reported that in 1945, a business person by the name Carl Rehnborg of USA pioneered the introduction of such a multi-tired compensation plan to market his nutritional products, thatallowed any Nutrilite distributor to get a 3 percent commission from a downline on top of the regular commissions from one's own sales.
[54] Keep and Vander Nat, *supra* note 2, p.7.

over-sell by making false product claims[55], of course a problem that is not uncommon in traditional selling as well. But the opportunity of compensation derived from the sales of down line distributors led to a focus on endless recruitment of participants instead of sales to final consumers, resulting in confusion between MLM and pyramid schemes.

1.3. A pyramid scheme

'Pyramid Scheme' generally refers to a scheme[56] under which a person (usually known as promoter or operator) recruits one or more persons (commonly known as participants) who make a payment to get the right to recruit others and for which they receive an income.[57] The operator promises future rewards for each participant based on the number of people they recruit and recruits of their recruit (downlines).i.e. upline participants receive a certain portion of the monies paid by their downlines. The amount of reward for each participant depends on how far their downlines expanded in the hierarchical chain.[58] Thus, every participant strives for rapid expansion of his own downline so as to grab as much rewards as possible.

Unfortunately, as the recruitment structure grows, at some stage, there will be created a saturation point at which further recruitment would be virtually impossible, and the desired recoupment cannot be realized for the vast majority of the participants. Its failure at a certain stage is mathematically determined since the operator promises unlimited source of revenue for everyone in a finite

[55] Id., pp. 6-7.

[56] A 'scheme' refers to "a plan or program of action, especially a crafty or secret one; . . . a systematic or organized framework;" See Merriam Webster's Collegiate Dictionary, Tenth Edition.

[57] Keep and Vander Nat, *supra* note 2, p.9.

[58] Id., p. 10. The scheme usually commences with one person (usually known as promoter or operator) who recruits a fixed number of participants (say 10) each with a fixed amount of contribution (say $100). Each of these 10 members in turn will recruit their own recruits leading to a total of 100 new participants. As the recruitment continues, the number of participants expands rapidly "in an exponential manner at each stage," putting too few at the apex and too many at the bottom thereby creating a pyramid resembling structure.

Levels	Participants	TNR
1st level	1*10=10	10
2ndlevel	10*10=100	110
3rdlevel	100*10=1000	1110
4th level	1000*10=10, 000	11110
5th level	10, 000*10=100000	111110
6th level	100000*10=1000,000	1111110
7th level	1000,000*10=10,000,000	11111110
8th level	10,000,000*10=100,000,000	111,111,110

Legend: TNR=total number of recruits.

set of income sources (recruits).[59] Even though the extent of losers depends on the reward system in the organization's scheme, in any case, the scheme would inevitably expose the vast majority of participants to losses. Some studies in USA concluded that approximately 99% of the participants lose their money.[60] It is a wealth transfer mechanism from the large majority in the bottom to the few on the top. The studies also indicated that though pyramid schemes are outlawed, their abuses are often unreported.[61]

Legal systems somehow differ in the conceptualization of pyramid scheme, principally in terms of scope of acts that comes within the meaning of pyramid scheme. The EU directive on unfair commercial practices generically encapsulated the idea of "[e]stablishing, operating or promoting a pyramid promotional scheme" as cases "where a consumer gives consideration for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme rather than from the sale or consumption of products."[62] The consumers pay for the opportunity to fetch compensation, and that compensation is derived primarily from the participation fee of new recruit consumers, as opposed to sales to consumers. Thus, EU directive's definition of pyramid selling by and large coincides with the general description in the literature as provided in the beginning but a condensed one.

Chinese law is more elaborate and broader in its conceptualization of pyramid scheme. The

Chinese Regulation on Prohibition of Pyramid Selling offers a general description of the term "pyramid selling"[63] in the first place, and then the

[59] For instance, if we hypothesize on the above example where one participant recruits 10 members, at the 8th level, the number of participants will exceeded the total population of Ethiopia. It will take few other levels to subsume the world population, which in effect means that those at the bottom of the pyramid could not go anywhere for further recruitment. Hence, the large majority of participants at the bottom levels of pyramid scheme inevitably lose the money they paid to get in to the scheme. It is not only those at the very end of the level but several of participants in the hierarchy would be losers because the most recent recruitment layers typically do not qualify for rewards until their own downlines reach a certain stage.

[60] Jon M. Taylor, Serious Problems with the FTC's Revised Business Opportunity Rule, (hereinafter Taylor, Serious Problems with the FTC's Revised Business Opportunity Rule), available at https://www.ftc.gov/sites/default/files/documents/public_comments/business-opportunity-rule-535221-00006/535221-00006.pdf, accessed 6 June 2020, Appendix A

[61] Id., Appendix B.

[62] DIRECTIVE 2005/29/EC of the European Parliament and of the Council Concerning Unfair Business-To-Consumer Commercial Practices (Unfair Commercial Practices Directive), (11 May 2005) (herein after DIRECTIVE 2005/29/EC) , Annex I, Note14.

[63] Regulation on Prohibition of Pyramid Selling, Order of the State Council of the People's Republic of China No. 444, (2005) (herein after Chinese Regulation on Prohibition of Pyramid), Article 2. Article 2 defined pyramid selling as "such an act whereby an organizer or operator seeks for unlawful interests, disturbs the economic order and affects the social stability by recruiting persons, calculating and paying

Regulation has further classified pyramid selling into three types.[64] Article 7, on types of Pyramid Selling, provided that the following acts belong to the pyramid selling:

(1)An organizer or operator seeks for unlawful interests by recruiting persons to participate in pyramid selling, asking the recruiters to persuade others to participate in pyramid selling, calculating and paying remunerations (including material awards and other economic interests, the same below) to the recruiters on the basis of the number of persons a recruiter has directly or indirectly recruited in a rotating way;

(2) An organizer or operator seeks for unlawful interests by recruiting persons to participate in pyramid selling and asking the recruiters to pay fees explicitly or in any disguised form like purchasing commodities for obtaining the qualification for participating in pyramid selling or recruiting others to participate in pyramid selling; and

(3) An organizer or operator seeks for unlawful interests by recruiting persons to participate in pyramid selling, asking the recruiters to persuade others to participate in pyramid selling so as to form a multi-level relationship, and calculating and paying the remuneration to an upper-level promoter on the basis of the sales performance of the promoters below.

The first paragraph in Chinese law simply depicts pyramid scheme as a chain of recruitment where the recruits obtain payment based on the number of their subsequent recruits. It failed to explicitly indicate, or implicitly presumed the very essence of pyramid scheme that the income to the operator and the other participants is generated from downline recruits. The second paragraph points to the two types of pyramid schemes: naked-pyramid schemes[65] and product-based ones. Naked-pyramid schemes are blatant money transfer systems where operators engage in collecting participation fee from participants joining the scheme while product-based pyramid schemes employ products as "a false front to hide the true nature of the scheme";[66] the participants buy costly goods and/or services or attend expensive training seminars. The real profit is earned, not by

remunerations to recruiters on the basis of the number of persons a recruiter has directly or indirectly recruited or the sales performance, or asking the recruiters to pay a certain fee for obtaining the qualification for participation."

[64] Id., Article 7.

[65] Taylor, *supra* note 1, p. 6. Pyramid schemes could be naked-pyramid schemes or product-based pyramid schemes. The former is an obvious money transfer system while the latter one employs products as "a false front to hide the true nature of the scheme"-the participants buy costly goods and/or services or attend expensive training seminars..

[66] Id.

the sale of the product, but from the participation fee collected via the disguised products. The naked ones expose themselves to simple detection and legal action, and as such[67] existing pyramid schemes are product-based ones that disguise themselves as MLM.

The third paragraph provides somehow striking difference from the notion of pyramid schemes in many jurisdictions. Art. 7(3) of the Chinese Regulation abrogated any marketing scheme establishing a multi-level relationship whereby the remuneration to an upper-level promoter is calculated and paid on the basis of the sales performance of the promoters below.[68] Moreover, Art.3 of the Regulation on Direct Selling defines direct selling as "door-to-door" selling of products directly to ultimate consumers. This regulation has also commanded direct selling company and its branches to recruit their door-to-door salesmen, and prohibited any other entity or individual from engaging in recruitment of salesman. By so doing, Chinese law banned any marketing arrangement with multi-layer compensation scheme, without bothering to make any distinction between MLM and a pyramid scheme. Hence, the MLM schemes that are often taken as a variant of direct selling and enjoying legal protection in several jurisdictions constitute pyramid selling under the Chinese law.

1.4. Referral marketing

Referral marketing is the other marketing strategy that shared certain aspects of the classical direct selling. Within the disciplines of marketing, referral represents a business model whereby persons, known as intermediaries, operate business by referring buyers to sellers, who then negotiate directly on the terms of trade.[69] In return, intermediaries receive referral fees for the creation of the match and/or commissions based on sales. Thus, within the disciplines of marketing economics, referral selling is positively conceived as a legitimate strategy where by products will be promoted via word of mouth. However, referral selling brings about a legal concern and takes a somewhat different notion in legal parlance. For instance, South African consumer protection law prohibited referral selling in which section 38 (1) on referral selling provided:

[67] Id.

[68] Chinese Regulation on Prohibition of Pyramid Selling, *supra* note 63, Art. 7(3).Art. 7(3), in typifying the category of Pyramid Selling, stated that cases where, *inter alia*,an "organizer or operator seeks for unlawful interests by recruiting persons to participate in pyramid selling, asking the recruiters to persuade others to participate in pyramid selling *so as to form a multi-level relationship, and calculating and paying the remuneration to an upper-level promoter on the basis of the sales performance of the promoters below"* constitutes a pyramid selling.

[69] Daniele Condorelli *et at*., Selling Through Referrals, *Journal of Economics & Management Strategy*, Vol. 27, (2018), p. 699.

A person must not promote, offer, supply, agree to supply, or induce a consumer to accept any goods or services on the representation that the consumer will receive a rebate, commission or other benefit if—

(a) the consumer subsequently—

(i) gives the supplier the names of consumers; or

(ii) otherwise assists the supplier to supply goods or services to other consumers; and

(b) that rebate, commission or other benefit is contingent upon an event occurring after the consumer agrees to the transaction.[70]

Thus, the law conceives referral selling as a sales device whereby the sellers induce the buyers to acquire goods or services by promising a rebate, commission or other benefit in return for helping the seller enter into other sales with potential customers and such benefit is contingent on the materialization of sales to these other customers. It aims at protecting consumers from undue persuasion to acquire products that they might not have procured had it not been for the speculated reward promised by the seller. A consumer expecting such reward may in turn be tempted to unduly persuade other consumers to buy goods so as to fetch the promised reward. Thus, a referral selling where the reward is contingent upon the second consumer purchasing product would be similar to single level pyramid marketing.

Nevertheless, a mere promise of reward in exchange for recommending to the supplier other potential consumers or helping the trader supply goods does not constitute the prohibited "referral selling;"[71] rather it is a legally acceptable strategy where by products will be promoted via word of mouth.

2. The Legal Treatment of MLM /Pyramid Schemes in General

Attempts at providing conceptual distinction between pyramid schemes and MLMs succeeded only in offering a thin line of demarcation between the two. Especially product-based pyramid scheme entails inherent difficulty of distinguishing it from network marketing. Both involve a hierarchical chain of multi-level distributors backed by a promise of compensation from the downlines. Indeed, pyramid schemes do not exist *de jure* but *de facto:* they are a

[70] South African Consumer Protection Act, *supra* note 32, Section 38.

[71] Babener & Associates, MLM Laws in 50 States, available at https://mlmlegal.com/statutes.html, accessed on 5 June 2020.

matter of fact born out of businesses claiming to be in network marketing; they might easily swing from legality to illegality and *vis versa* even in the same legal system depending on the rigors of enforcement authorities.

In the normative theoretical discourse, pyramid schemes are absolutely discarded while MLM has been upheld by and large. The MLM model has great appeal for most people especially for marketers who find standard distribution channels tedious and expensive. It also earned credit for providing economic opportunity for millions of sales persons participating in the scheme. However, the multi-layered compensation in MLM has been criticized as a scheme of rewards unrelated to sales but for recruitment in the same fashion as it is in pyramid schemes.

Those in defense of MLM insist on the need for multi-level compensation as an incentive to expand their sales and reach every possible customer at the peripheries. Critics negate these allegations in that the distributions scheme with endless chain of recruitment goes far beyond economic reality. And in practice, it is not uncommon to discover that allegedly MLM companies are in reality pyramid schemes.[72] As such, some call for banning MLM just like a pyramid scheme. For instance, Jon M. Taylor, a consumer advocate who has made significant research on the subject of pyramid schemes and MLM, articulated that:

> *It appears that pyramid schemes are considered illegal …. But there is a business model that is at least as pyramidal and powerful as any illegal pyramid scheme—and in my opinion more pernicious because of its more pervasive effects. It is a phenomenon that has for the most part escaped recognition as a pyramid scheme …. Yet it costs consumers billions of dollars every year.... The business phenomenon of which I speak is multi-level marketing (MLM), more recently referred to as network marketing.*[73]

Others propose rectifying interventions short of abrogating MLM totally. According to Robert L. Fitz Patrick, the problem lies with the endless chain of recruitment of distributor: it is economically unrealistic and results in "intolerable capacity to mislead" due to its "unlimited income" proposition for

[72] Keep and Vander Nat, *supra* note 2, p. 6.

[73] Taylor, *supra* note 1, pp. 7-8. Taylor has been President of Consumer Awareness Institute (in America) since 1978 (for more than 42 years). See at https://www.linkedin.com/in/jon-taylor-12b6025/. He has also produced a number of research outputs on the issue of pyramid schemes and MLM. His research works can be accessed from his web site: www.mlm-thetruth.com.

all.[74] Intervention on that aspect of MLM would be optimal approach instead of a total ban.

Pyramid schemes are outlawed universally but the legal responses in relation to MLM vary across different legal systems. MLM is rendered illegal in China.[75] Chinese law permitted only direct selling[76] and avowedly outlawed any marketing arrangement with multi-layer compensation scheme[77], without bothering to make any distinction between MLM and a pyramid scheme.

In some legal systems such as the Singaporean law, the legislature opted for a functional definition of what marketing scheme or arrangement is legal and what is illegal, irrespective of its designation, the terminological differentiation between MLM and pyramid schemes taken to be wasteful endeavor and legally irrelevant. Thus, the Singaporean law states that[78] "[m]ulti-level marketing scheme or arrangement" has the same meaning as "pyramid selling scheme or arrangement," and promoting or participating in such a scheme or arrangement is illegal.[79] Yet a marketing scheme, in spite of its apparent similarity to the prohibited ones, is exempted from the prohibition provided that it meets the operational criteria as listed subsequently in a Ministerial order.[80] In Canada[81],

[74] Robert L. FitzPatrick, Identifying "Bright Lines" for Determining Illegality of Any Multi-Level Marketing Company under Section 5 of the FTC Act: An Open Letter to the Members of the US Federal Trade Commission and Officials of the Consumer Protection Bureau, (4 July 2014), available at https://www.truthinadvertising.org/wp-content/uploads/2016/10/Fitzpatrick-July-2014-Letter-to-FTC.pdf, accessed on 14 June 2020, p. 5.

[75] Chinese Regulations on Direct Selling, *supra* note 36; cum Chinese Regulation on Prohibition of Pyramid Selling, *supra* note 63.

[76] Chinese Regulations on Direct Selling, *supra* note 36. Article 3 of the Regulations on Direct Selling Administration defined "direct selling" as "a type of business mode, in which "direct selling companies" recruit "door-to-door salesmen" to sell products *directly to ultimate consumers* (hereinafter referred to as consumers) outside the companies' fixed places of business" [emphasis added]. Companies need prior approval to engage indirect selling.

[77] Chinese Regulation on Prohibition of Pyramid Selling, *supra* note 63, Article 7(3).Article 7(3), in typifying the category of Pyramid Selling, stated that cases where, *inter alia*, an "organizer or operator seeks for unlawful interests by recruiting persons to participate in pyramid selling, asking the recruiters to persuade others to participate in pyramid selling *so as to form a multi-level relationship, and calculating and paying the remuneration to an upper-level promoter on the basis of the sales performance of the promoters below"* constitutes a pyramid selling [emphasis added].

[78] Multi-Level Marketing And Pyramid Selling (Prohibition) Act (of Singapore), (Original Enactment: Act 50 of 1973, Revised Edition 2000 available at https://sso.agc.gov.sg/Act/MLMPSPA1973, accessed on 27 June 2020. (herein after Multi-Level Marketing And Pyramid Selling (Prohibition) Act of Singapore), Section 2(1).

[79] Id., Section 3(1).

[80] Multi-Level Marketing and Pyramid Selling (Excluded Schemes and Arrangements) Order (1st June 2000, Revised Edition 2002)(herein after Multi-Level Marketing and Pyramid Selling (Excluded Schemes and Arrangements) Order of Singapore), available at https://sso.agc.gov.sg/SL/MLMPSPA1973-R1?DocDate=20021001&ValidDate=20021001&ProvIds=, accessed on 27 June 2020, Section 2(1); Multi-Level Marketing and Pyramid Selling (Prohibition) Act of Singapore, *supra* note 75, Section 2(2).

the legislator maintained terminological difference and provided separate definitions and rules thereto so as to make distinction between MLM and pyramidal schemes, abrogating the latter but permitting the former as legal marketing scheme.

However, in several jurisdictions including Ethiopia,[82] the relevant laws simply prescribe prohibitive provisions targeting pyramidal schemes, without any reference or mention of MLM, leading to the implied conclusion that MLM or other marketing schemes that do not fall within in the prohibition are legal. They make no special rules for MLM, presuming MLM as a form of direct marketing and, in practice, the question of distinction between MLM and pyramid schemes continue to plague enforcement authorities.

3. The Ethiopian Law on Direct Selling/ MLM /Pyramid Schemes

Ethiopian consumer protection law was long reliant on various private laws such as the law of contract and extra contractual liability law as well as public laws including the criminal law and regulatory laws of different nature.[83] Separate legislation with direct recognition of consumer protection and trade competition has less than two decades of history.[84] The current governing law is the 'Trade Competition and Consumer Protection Proclamation No. 813/2013.'[85] Power and responsibility of enforcing the legislation is vested with the 'Trade Competition and Consumer Protection Authority under the supervision of Ministry of Trade (at federal level) and the regional offices.[86] The proclamation aspires to achieve the twin objectives of protection of the business community (from anti-competitive and unfair market practices), and protection of consumers from misleading market conducts.[87]

[81] For instance, Canadian law first defines MLM, and then described a pyramid scheme of selling as a form of MLM but it provided certain parameters for distinguishing between the two. See Competition Act (of Canada), (last amended on 9 March 2015) (herein after Canadian Competition Act), available at<https://laws.justice.gc.ca/PDF/C-34.pdf , accessed 20 August 2020, see generally Section 55.

[82] See, for instance, the Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010 (herein after Australian Consumer Law); South African Consumer Protection Act, *supra* note 32; Proclamation No. 813/2013), *supra* note 25.

[83] For instance, the law of contract protects consumers as contracting parties from duress and fraud. For a fairly detailed analysis of Ethiopian law on the topic, see Dessalegn Adera, The Legal and Institutional Framework for Consumer Protection in Ethiopia, Masters Thesis, Addis Ababa University, School of Graduate Studies, School of Law, (2011), see generally Chap. 2.

[84] The first standalone legislation was Trade Practice Proclamation No.329/2003, then replaced by the 2010 'Trade Practice and Consumer Protection Law Proclamation', which in turn was repealed by the current Proclamation No. 813/2013, *supra* note 25.

[85] Proclamation No. 813/2013, *supra* note 25.

[86] Id.

[87] Id., see the preamble.

3.1. The Ethiopian Law on Direct Selling and/ or MLM

Considerable part of Proclamation No. 813/2013 is devoted to the issues of consumer protection that envisioned the relation between business persons and consumers in the course of the convention store retailing transactions.[88] How the Ethiopian legal framework would treat marketing schemes other than store retailing such as direct selling could not be ascertained by a mere observation of the legal stipulations. Perhaps, whether the rules have contemplated transactions other than the conventional store retailing is questionable. One may wonder if the genesis of direct selling could be traced in the Ethiopian Commercial Code or subsequent laws. The Commercial Code, in the title captioned "auxiliaries and agents", defines and briefly regulates commercial employees, commercial travelers, commercial representatives, commercial agents, commercial brokers, and commission agents. Although activity of few of these auxiliaries gets closer to the idea of the off-business premises and unsolicited offer nature of direct marketing, none of these auxiliaries and their activities perfectly fit into the conception of the sales forces and their activities in direct marketing.[89]

However, in principle, business persons may innovate and apply infinite marketing strategies; that should be encouraged in so far as they refrain from engaging in misleading conducts harming consumers and fellow business competitors.[90] Moreover, Ethiopian law on trade competition and consumer protection has produced what the business persons have to do and must not do in the course of conducting their business activity. Undertaking direct selling or

[88] Proclamation No. 813/2013 defines business persons, wholesaler, retailer, and regulates their activities including display of prices at business premises. In the same vein, the Commercial Registration and Licensing Proclamation No.980/2016 defines and regulates, definition of business person, commercial agents, etc and requires mandatory registration in commercial registry, duty to obtain trade license, and so on. The whole sprits resonated around business persons and their activities, presupposes their activities at the business premises. Nowhere has it mentioned instances of direct selling activities and distributor thereto.

[89] Commercial travelers and commercial representatives are persons entrusted with the task of visiting clients and offering goods or services in the name and on behalf of the trader. This brings their activity closer to the idea of the off-business premises unsolicited of offer nature of direct marketing. Yet ccommercial travelers and commercial representatives are defined as employees while sales forces in direct selling actually independent commissioned persons. Moreover, the clients to be visited and offered products are retailers as opposed to consumers in the case of direct selling. On the other hand, commercial agents, commercial brokers, commission agents are traders doing their own business whose enjoyment linked to commerce of other business persons and their activities does not suggest door to door selling while sales forces in direct selling actually independent commissioned selling products by off-the business premises. See generally Commercial Code Proclamation, Negarit Gazetta, (1960), Articles 28-62; Commercial Registration and Licensing Proclamation No.980/2016, Articles 2 (7) & (9).

[90] Oya Pinar Ardic et al, Consumer Protection Laws and Regulations in Deposit and Loan Services: A Cross-Country Analysis with a New Data Set, The World Bank Research Working Paper 5536, (January 2011), available at https://www.cgap.org/sites/default/files/CGAP- Consumer-Protection-Laws-and-Regulations-in-Deposit-and-Loan-Services-Jan-2011.pdf,accessed 10 May 2020,p. 2.

MLM is not in the don'ts list. As far as factors that distort a fair deal and triggering government intervention do not arise, the parties to a deal-business persons and consumers-can effectuate the offer and acceptance at their own place of convenience, at the fixed business premises or off-the business premises. Accordingly, it is safe to conclude that direct selling and MLM marketing strategies are legally acceptable under Ethiopian law.

In practice as well, we do observe several street vendors everyday in every corner of towns and cities, roaming here and there selling various products including cosmetics and clothing. In most cases they do have stationary carts that changed the streets into business premises, leading to pedestrian traffic congestion and confrontation with road traffic officers and security forces. And yet their activities embed some aspect of the door to door roving in direct selling. There are also few vendors wandering from door-to-door, calling the special designations "*liwach liwach*" and "*quoralew*", inviting consumers at home to exchange or sell limited class of products. The Covid-19 pandemic seem to have given an impetus to the expansion of door to door selling; it is not uncommon to observe these days supply of home consumption goods at villages where people live collectively such as condominium residences. Moreover, as hinted in the beginning, there had been few foreign companies including Qnet and Tiens Ethiopia that purported to be operating network marketing businesses. It is also reported that Tiens restarted the business in Ethiopia reorganizing/renaming itself in three different business persons, adopting same marketing strategy.[91] With increasing globalization and expansion of digital technology, leading to exchange of business practices among others, direct selling and MLM, as well as their disguised forms will get their roots into the Ethiopian business culture.

Yet, the applicable rules regarding classical direct selling and MLM are uncertain. Some jurisdictions have devised graduated consumer protection rules, distinguishing between consumers in the ordinary course of transaction on the one hand and consumers in the case of direct selling on the other hand. For instance, the EU directive[92] capitalized the need for more protection to consumers in business person-to-consumer relations in the case of off-premises contracts than in the case of conventional store retailing. China has also put in

[91] BRANA PRESS, *Tiens Network Business Restart[sic] in Ethiopia*, (February 12, 2020), available at https://www.branapress.com/2020/02/12/tiens-network-business-restart-in-ethiopia/, accessed on 5 June 2020. The three suspect business persons are Richi Food Processing and Manufacturing PLC, Rise Real Trading and Wisdom Empire Trading. For details, check the video in the link.

[92] Directive 2011/83/EU), *supra* note 31.

place separate legislation addressing direct selling.[93] The absence of explicit recognition of direct selling and MLM and rules specifically regulating these marketing approaches, under Ethiopian law, results in the uniform application of the regulatory rules designed for the conventional store retailing to direct selling and MLM as well, in as far as relevant. Specifically, Article14 to Article 22 of Proclamation No.813/2013 governs any business persons-to-consumer relationship. Nonetheless, there are couples of the crucial matters concerning MLM/direct selling which can hardly be addressed by the mere application of the rules meant for the conventional store retailing.

Business persons operating direct selling/MLM sell their products through independent sales representatives who are usually referred to as distributors[94] or participants.[95] These distributors play essential intermediary role between the business person and final consumers while at the same time making a living for themselves. They are not employees of the business person but independent contracting parties. The relation between them mainly depends on their contractual terms. Yet distributors have weak bargaining power compared to the business person. As such some specific rules meant to protect distributors are incorporated in some jurisdictions that explicitly recognized direct selling/MLM.[96] Canadian law requires, for instance, that every distributor must have a buy-back guarantee or refund guarantee, exercisable on reasonable commercial terms; distributor must be clearly and fully informed, from the start, about the marketing plan including the existence of the buy-back guarantee or refund guarantee; as well as the compensation actually received or likely to be received by typical participants having regard to any relevant considerations.[97] The law in Singapore envisaged similar protection scheme[98] while Chinese law sets much more detailed and apparently more protective rules for salesmen in direct selling scheme. Legislations in other jurisdictions also set more details regulating the relation between operators and distributors of network marketing.[99] However, distributors of direct marketing/MLM in Ethiopia must

[93] Chinese Regulations on Direct Selling, *supra* note 36.
[94] Direct Selling Association (of US), *supra* note 29.
[95] See Canadian Competition Act, *supra* note 81.
[96] Id., Section 55(1) cum 55 (1)(1)(d); Multi-Level Marketing and Pyramid Selling (Excluded Schemes and Arrangements) Order of Singapore, *supra* note 80, Section 2.
[97] Canadian Competition Act, *supra* note 81, Section 55(2) cum 55 (1)(1)(d).
[98] Multi-Level Marketing and Pyramid Selling (Excluded Schemes and Arrangements) Order of Singapore, *supra* note 80, Section 2.
[99] For instance, the Taiwan MLM Act requires MLM participation agreements to contain the terms such as:
- operation plans
- qualifications to become a participant

merely count on their own contractual terms with the business person, subject to applicable contract laws.

The other matter worth mentioning under this topic is the ethical aspects of distributors of direct marketing/MLM. Two factors have led to special focus on the ethical aspects of network marketing. First, network marketing employs multilevel compensation scheme whereby the chain of recruitment creates income multiplier factor. The more one's downlines are the more rewards whereas the commission from actual sales to outside consumers remain linear or perhaps absent. Proclivity for recruitment and temptation to overstate product quality and income to new recruits are high. Second, unlike public announcement of advertisements that are subject to eye watches of the public and regulators in particular, the network marketing system relies on person to person recommendations. As such the propensity to overstate product quality and income to new recruits is by far higher thereby inviting strict stipulation and enforcement of ethical aspects of distributors.

Although Ethiopian law has provided rules against misrepresentation of products[100] and ethical standards in the advertisements of products,[101] these prescriptions are generically addressed to all marketing strategies, without addressing the special risks due to the unpublicized nature of adverts in networking marketing. Added to that, the rules directly concern the business persons,[102] and that there is no explicit reference to distributors. To sanction distributors involved in the mischief but defined as consumer, resort to the general rules of criminal law for their misleading engagement could be availed but still precise and direct rules of sanction in the specific legislation may achieve better results.

- the formula, standards and reasons for an MLM company to estimate the depreciation of the goods or services returned by a participant after the cooling-off period
- the events of default by participants and the procedure to be followed
- the method for dealing with a participant's request to return goods or services in the event that termination or rescission of the participation agreement is attributed to the participant's breach of contract or regulations
- Conditions and methods for the renewal of participant agreements.

See K&L Gates LLP, Introducing the New Multi-Level Marketing Governing Act, available at https://www.jd*supra*.com/legalnews/introducing-the-new-multi-level-marketin-55699/ accessed on 25 July 2020.

[100] Proclamation No. 813/2013), *supra* note 25, Article 22(1-3).

[101] Id., Article 19.

[102] Id., Articles 15-22. The rules of agency- acts of distributors are attributable to the operators- could be applied to discipline the business persons operating pyramidal schemes. Yet the distributors may not properly fall within that specific legislation.

3.2. The Ethiopian Law on Pyramid Schemes

Proclamation No. 813/2013 has abrogated "pyramid scheme of sale" but does so just in a single sub-provision, which makes it short of clarity.[103] Article 22 is of special importance to the case at hand, it listed several acts business persons must not do including the prohibition of pyramid schemes.[104] Article 22 (6) prohibits any business person from:

> *applying or attempting to apply a pyramid scheme of sale, based on the numbers of consumers, by announcing the granting of a reward, in cash or in kind, to a consumer who purchases goods or service or makes financial contribution and where other consumers through his salesmanship purchase the goods or the service or make financial contribution or enter into the sales scheme;*

The spirit of this provision is by and large similar to the foregoing discussion on pyramid schemes. The overall arrangement is that a person is induced to get in to the scheme by a promise of reward, and the reward is due on condition that he meets two cumulative requirements; he himself must pay consideration and should bring others into the system who would do the same. And a more important defining feature of the arrangement is that the reward is directly correlated with the number of consumers induced and recruited by that person. The payment of consideration by the consumer could be effected by purchase of goods or services. This predicts the product-based pyramid schemes. Consideration may also be effected by making direct financial contribution which is a case of naked- pyramid schemes. Moreover, to get the reward, the consumer owes the duty to bring other consumers. The new consumers induced and recruited "through his (consumer's) salesmanship" may end up into two categories: those that would join the sales scheme to play same role, and those who would purchase goods or service and stay outside the network.

3.2.1. Ethiopian law on pyramid scheme encompasses a broad range of illegitimate marketing strategies regardless of designation

The concept of pyramidal scheme of sale under Ethiopian law tends to be broad; it encompasses the so called "referral selling"[105]and pyramid schemes in the

[103] Id., Article 22(6).

[104] Id., Article 22. This provision provided a list of prohibited acts that supposedly harm the consumers. Operating pyramidal scheme of sale is among the list of acts that any business person must not commit.

[105] The rule against referral selling prohibits persuading a consumer to buy goods or services by promising future benefits contingent on the occurrence of some sales in futureas a results of efforts of

usual notion that depict "a multi-level hierarchy of several levels of distributors."[106]

Some jurisdictions treated referral selling separately[107] from pyramid scheme. Ethiopian law included "referral selling" within the general framework of the illegal pyramidal scheme, the basis for such inference being the fact that the consumers induced by the nominating consumer's "salesmanship" need not necessarily enter into the sales scheme" but make purchases. It appears to be sales to ultimate consumers. Yet the rationale behind the law is that a salesman (the referrer) for whom a reward is promised for each purchase by others is likely to induce and mislead consumers.

That brief provision has also prohibited pyramid schemes in the usual notion that depict "a multi-level hierarchy of several levels of distributors. The nominee consumers may end up in the scheme to play the same role which signifies cases of typical pyramid scheme that involves a chain of upline and downline participants. Moreover, the pyramidal scheme of sale depicted could encompass a broad range of illegitimate marketing strategies regardless of designation in so far as their operational characteristic falls within the ambit of the description for the prohibited scheme of sale. Such a broader scope is apparently depicted by the use of the term pyramidal (pyramid like) scheme (in the Amharic version).[108]

3.2.2. Ethiopian law on pyramid scheme confuses consumers to be protected and the accomplices to be prosecuted

In referring to persons taking part in pyramidal scheme, Ethiopian law uses the term 'consumer' which is defined as 'a natural person who buys goods and services for his personal or family consumption…and not for manufacturing activity or resale."[109] Couples of drawbacks are apparent in the use of the so defined term 'consumer' in pyramidal schemes context. In the first place, it is an oversimplification in the sense that not only natural persons but also juridical

the consumer.Referral selling is unlawful because the consumers should be protected from undue solicitation based on future expectation for which there is no guarantee that such sales will actually eventuate or may lead to high propensity to mislead other consumers. The whole idea is to avoid undue inducement of consumers.

[106] Tylor, *supra* note 1, p.12.

[107] South African Consumer Protection Act, *supra* note 32, Sections 38&43; Australian Consumer Law,*supra* note 82, Sections 44-46&49.

[108] There appears to be slight variation between the English and the Amharic version. The English version reads "pyramid scheme of sale" while the Amharic version reads as "ፒራሚዳዊ የሽያጭ ስልት", which implies "pyramidal scheme of sale." Pyramidal implies "like pyramid" and as such the Amharic version envisions a broader range of prohibited marketing strategies. See Proclamation No. 813/2013), *supra* note 25, Article 22(6).

[109] Id., Article 2(4).

persons may take part in pyramid schemes.[110] The second, and a more troubling issue, is that the indiscriminate use of the term consumer to refer both to those who would end up as ultimate consumers and also the others who culminate as (sales) intermediaries invites misconception on the status and role of the persons involved in pyramid scheme. In particular, the clause "…*granting of a reward… to a consumer who purchases goods …and where other consumers through his (the consumer's) salesmanship purchase the goods* …" suggests dual status as a consumer and distributor. Yet the persons involved in the scheme could be consumers victimized or distributors/participants who are accomplices aiding the pyramid scheme operator and benefiting therefrom. Indeed, the use of wordings like salesmanship/distributorship in pyramid scheme, a scheme which is not a legally recognized marketing scheme, is also inappropriate. Rather, these wordings are common in legally recognizable schemes such as MLM. But in pyramid schemes, we have participants to be sanctioned and consumers to be protected from such scammers. The lack of separate section dealing with pyramid schemes and absence of rules on direct selling/MLM might have cornered the drafters in the choice of appropriate terms. Where the rules on pyramid schemes are part of the regulations on consumer protection, the reference to consumers in dealing with protection of consumers from misleading conducts of business persons is not unexpected; not just Ethiopian law, the EU directive also uses the term consumer.[111]

In general, persons taking part in pyramidal scheme are often lured by the expectation of making business opportunity instead of the benefits as ultimate consumer.[112] Thus, their designation as consumers goes out of context as it creates the wrong perception that participants in pyramid schemes are real consumers. Several jurisdictions employ the term "participant"[113] instead of the wording "consumer". In jurisdictions such as Ethiopia that employ the term consumer, the end result would be apparent confusion between the consumers to be protected and the accomplices to be accused.

[110] See for instance, Australian Consumer Law, *supra* note 82, Sections 44-46 &164.
[111] Directive 2005/29/EC, *supra* note 62.
[112] Canadian Competition Act, *supra* note 81, Section 55.
[113] Id.; Multi-Level Marketing And Pyramid Selling (Prohibition) Act of Singapore, *supra* note 78, Section 2; Australian Consumer Law, *supra* note 82, Sections 44&45.Section 44 (1) prohibits participation in a pyramid scheme, and Section 44 (3) stipulates that"[t]o participate in a pyramid scheme is:
(a) to establish or promote the scheme (whether alone or together with another person); or
(b) to take part in the scheme in any capacity (whether or not as an employee or agent of a person who establishes or promotes the scheme, or who otherwise takes part in the scheme).

Pretty obvious that participants in pyramid schemes are offenders to be sanctioned. Some jurisdictions, well aware of the dangers posed by participants in pyramid schemes, clearly prescribed the severe sanctions participants may face.[114] Art. 43(2) of Ethiopian law also sets more severe criminal penalties for "[a]ny business person" who applies or attempts to apply pyramid scheme of sale.[115] However, not all participants in pyramid scheme would be trapped by the narrow definition of "business person"[116] as stipulated art.2(5). The very definition of "business person" has circumscribed the class of persons criminally liable for engagement in pyramid scheme. Thus, participants in a pyramid scheme other than those engaged regularly so as to qualify as business persons are not subject to sanction by virtue of this legislation. To penalize those involved in pyramidal selling mischief but defined by the law as consumers, resort to the general criminal law for their misleading engagement could be availed but still precise and direct rules of sanction in the specific legislation may achieve better results.

Labeling the participants as consumers, instead of income seeking participants, has also brought another challenge to consumer protection authorities. Pyramidal schemes harm not just ultimate the consumer but also the large portion of participants as the system would phase out before the majority of participants recoup even their initial investment. Actions by consumer protection authorities sometimes face the purported defense strategy by pyramid scheme operators[117] that the allegedly harmed participants are not consumers but income

[114] Australian Consumer Law, *supra* note 82. Section 164 -Participation in pyramid schemes:
(1) A person commits an offence if the person participates in a pyramid scheme.
Penalty:
(a) if the person is a body corporate—$1,100,000; or
(b) if the person is not a body corporate—$220,000.
(2) A person commits an offence if the person induces another person to participate in a pyramid scheme.
Penalty:
(a) if the person is a body corporate—$1,100,000; or
(b) if the person is not a body corporate—$220,000.
(3) Subsections (1) and (2) are offences of strict liability.

[115] Proclamation No. 813/2013, *supra* note 25, Article 43(2). It stipulates that any business person who violates Article 22(6) or (10) of this Proclamation shall be punished with a fine from 7% up to 10% of his annual turnover and with rigorous imprisonment from 3 years to 7 years. Cf. Article 43(3).

[116] Id., Article 2(5). It states that "business person" means any person who professionally and for gain carries on any of the commercial activities designated so by law appropriate law. Note also that business person must obtain business license and must be registered in the commercial registry. See arts. 5(1) & 22 (1) &(2) of Commercial Registration and Business Licensing Proclamation No. 980/2016 (amended by the new Proclamation No. 1150/2019). Most of the time participants in pyramid schemes as well as in the legitimate MLM are part-time workers.

[117] FitzPatrick, *supra* note 74, p. 8.

seeking investors, thereby attempting to defy the authority's standing to act on account of the power vested to it to protect consumers.

In sum, in jurisdictions such as Ethiopia where the law labeled participants in pyramid scheme as consumers, the outcome would be confusion between the consumers to be protected and the accomplices to be prosecuted; it is up to those interpreting and applying the law to make the distinction. Thus, one who begins as consumer but joins the scheme is a participant while those end users of products harmed by participants in the pyramid scheme are consumers.

3.3. Distinguishing the Legal MLM and the Illegal Pyramidal Schemes under Ethiopian law

Ethiopian law simply prescribes prohibitive provisions targeting pyramidal schemes without mentioning MLM. Yet MLM is a tacitly recognized marketing scheme that business persons can operate in Ethiopia. In light of the slippery nature of the distinction between legitimate network marketing/MLM and pyramidal schemes, what would be the defining line between the two in the context of Ethiopian law? The fact that the rule on pyramidal scheme is too brief, the lack of comparable guiding rules on MLM, coupled with the fact that the MLM business culture has not been well experimented and understood in Ethiopia would pose considerable difficulty in practice. Indeed, it is conceded that the distinctions between a legal MLM and a pyramid scheme devolve more to a "case-by-case" basis.[118] As the FTC (USA) once noted, 'identifying a pyramid scheme masquerading as an MLM requires a fact-intensive inquiry.'[119] This challenge could be eased by prescribing distinguishing criteria for the two. Under Ethiopian law, some of the features of pyramidal scheme as disguising criteria lack clarity and hence need more explanation. The major criteria adopted in Ethiopian law and/or in other jurisdictions are discussed below.

3.3.1. Whether there is participation fee or not.

The existence or absence of payment of participation fee is a common[120] and critical consideration to distinguish pyramid schemes from legitimate MLM. The existence of participation fee is not apparent in case of product-based pyramid schemes but in realty carried out by over pricing the products. A marketing scheme of pyramidal nature, as defined under Ethiopian law,

[118] Keep and Vander Nat, *supra* note 2, p. 16.
[119] Id., p. 15.
[120] Australian Consumer Law, *supra* note 82, section 44-46; Multi-Level Marketing and Pyramid Selling (Excluded Schemes and Arrangements) Order of Singapore, *supra* note 80, Section 2(c); Canadian Competition Act, *supra* note 81, section 55.

demands, among other things, the consumer to purchase goods or services or make financial contribution. It may give the wrong impression that the purchase of products even at market value by participants in the scheme may also constitute pyramid. This is problematic in the advent of marketing companies where a large portion of the revenue derives from internal consumption. The critical point is that purchase by participants must constitute a disguised payment of participation fee. A clear statement to that effect would have been advisable. Yet the phrase "…makes financial contribution" in Article 22 (6) provides a clue that in pyramid schemes there always exists a financial contribution to the operator from each subscriber, which is tantamount to payment of participation fee.

3.3.2. Whether the scheme concentrates on marketing of products or on compensation to be earned by participants.

As noted in the course of discussion, MLM operates on the premise of retailing through a network of distributors, distributors recruiting new distributors to do the same. Product based pyramid schemes also apply the same logic. The question then is does the scheme promote actual sales to consumers or recruitment benefits? Does the promotion of the scheme emphasize the entitlement of participants to the supply of goods or services or their entitlement to recruitment payments? Where lie the hopes for new participants: in the opportunities from selling products or opportunities in the recruitment of others?

This can be inferred from the overall promotional scheme used by the organization but mainly from the nature of the compensation system. As the FTC articulated in the Amway case,[121] a compensation system that pays commissions on consummated retail sales incentivizes retail sales while rewards on mere distributor purchases incentivize distributor purchases leading to simple chain of recruitments.

A particular problem in this regard is that when a product is said to be destined to ultimate consumers? Who are ultimate consumers? This standard pertains to the relative emphasis given to sales to outside consumers (external consumption) and participants' purchases (also known as internal consumption). Uncertainty reigns in the legal jurisprudence in relation to the issue of whether an operator with limited or no sale to outsiders but all in all depends on internal consumption would qualify as a legitimate MLM or pyramid scheme. What portion of these products should ultimately be destined to whom? It is contended

[121] FTC v. Amway Corp. (1979), 93 FTC 618 as cited in Keep and Vander Nat, *supra* note 2, p. 9.

that disregarding emphasis on external consumption would open the potential for ongoing recruitment to be the primary source for compensating participants, which is a typical feature of a pyramid scheme.[122] Competing explanations of internal consumption comes from the analogy with buying clubs, i.e., distributors enjoying a discount on products for personal use.[123] In USA, emphasis is placed on the presence or absence of external users for purposes of pyramid scheme analysis such as in the Koscot case.[124] But to what extent this has been taken seriously remained doubtful.[125] Indeed, some scholars noted that in reality many well-established direct selling companies in USA depends "heavily upon selling to itself"[126]-internal consumption. On the other hand, the Belgian Court of Appeals, in the of case Aankoop vs. Herbalife International Belgium, confirmed that internal consumption is a sufficient marketing strategy without further requirement of sales to outsiders.[127] The Court affirmed that 'personal use' of the products by the distributors is a legitimate destination of the products and for the payment of commission, and therefore, is a legitimate MLM.

Beyond the jurisprudential quandary, even where a legal system requires external consumption, MLM companies often fail to track sales outside their distribution network which exacerbates the problem. If any, the unverifiable nature of the data makes understanding the health of the industry difficult.[128] In conclusion, in view of all these intricacies, critical assessment of whether the

[122] Id.

[123] Id., p. 18.

[124] FTC v. Koscot Interplanetary Inc. (1975), 86 FTC 1180 as cited in Id., p. 9.This case involves a case where a multilevel marketing context in which people pay fees and buy product to participate in the venture is found to be a pyramid scheme in reality. Whether there are any retail sales (product sales to people outside the MLM) and what relation exists, in practice, between such external sales and the rewards paid in connection with recruitment was the focus of the analysis. FTC concluded that if there is no relation between recruitment rewards and sales to the ultimate users outside the MLM's network, the organization is just a perpetual recruitment chain.

[125] The FTC itself is quoted for contradictory statements on the issue. In the Koscot case, FTC was quoted for asserting that the absence or paucity of retail sales to ultimate users dooms an alleged MLM to be nothing but a pyramid scheme. On the other hand, in January 2004, in its advisory Opinion to direct selling associations (DSA), FTC's statement that "…the amount of internal consumption in any multi-level compensation business does not determine whether or not the FTC will consider the plan a pyramid scheme" has come to be the focal point of MLM with internal consumption. However, the same letter further defines an illegal pyramid scheme as "a multi-level compensation system funded primarily by payments made for the right to participate in the venture". Id.

[126] Keep and Vander Nat, *supra* note 2, p. 20

[127] R. Rajesh Babuand Pushkar Anand, Legal Aspects of Multilevel Marketing in India: Negotiating Through Murky Waters, *Official Journal of Indian Institute of Management,* Springer, Vol. 42, No. 4, (26 October 2015). In 2011, the Belgian subsidiary of a US direct selling company Herbalife ran into a legal trouble in relation to its multilevel marketing scheme. The Brussels Commercial Court ruled that the marketing scheme of Herbalife was indeed a pyramid scheme but reversed on appeal.

[128] Keep and Vander Nat, *supra* note 2, pp. 16- 17.

products purchased by participants are overpriced or at market value could be a vital point to stress.

As regards Ethiopian law, the relevant clue is the prohibition of the sale's scheme where the amount of reward is "based on the numbers of consumers." At first glance, it appears that Ethiopian law outlawed any sales scheme where the extent of reward correlated directly with the number of consumers. This could be a problem given that both legitimate MLM and pyramid schemes apply multilevel compensation scheme. Under normal course of things, more multilevel distributors results in more customer outreach and higher volume of sales. This may incidentally result in a situation where the amount of compensation is directly related to the number of consumers. Thus, does Ethiopian law totally ban marketing strategies with multiple compensation schemes? Does Ethiopian law ban sales scheme where a consumer/ sales person drives compensation from sales of others through his recruitment/ salesmanship? The prohibition of sales scheme setting a reward system based on the number of consumers tips us that the illegality arises where the reward is attached simply to numerical customer count ignoring the volume of marketed goods and services. In such a case, regardless of its name, the entity is nothing but a chain of recruitment. In other words, the law targets not the mere presence of multilevel compensation incentives but mere recruitment schemes in whatever disguise they appear.

So, under Ethiopian law, even where internal consumption is the only destination of products, the determinant factor should be whether the reward is directly related to consumption volume by participants or mere numerical count of participants. Is the reward merely related to the number of down lines or purchase volume by the downlines? Where consumption by participants happens to be the only or primary destination of products, this will open the opportunity for ongoing recruitment to be the primary source for compensating participants just like the typical pyramid schemes. It triggers suspicion and investigation, but not itself conclusive of existence of pyramid scheme as opposed to its being legitimate network marketing. The factual analysis should determine whether it is a simple recruitment chain or a genuine product marketing strategy

3.3.3. Whether there is inventory loading and lack of buy-back scheme.

Third, inventory loading-supplying the product to a distributor in an amount that is commercially unreasonable-and lack of a buy-back scheme signifies that a person operates pyramid scheme. To ensure that MLM does not harm the

innocent distributors via inventory loading, several jurisdictions[129] require the MLM operators to have a buy-back scheme and clearly inform this to the participants. Or else MLM operators assume the risk of signaling being pyramid scheme. The requirement of a buy-back scheme not just a distinguishing criterion but also an essential protective standard to distributors. Even where a person attempts to operate a mere recruitment scheme, the participants unable to recruit would not be victimized. As such the operator has lessor incentive to go on for pyramidal scheme.

Ethiopian law does not stipulate such a requirement, due to the absence of explicit recognition and regulation of MLM. However, an MLM operator that practically implemented buy-back scheme may prove itself in the factual analysis, if any investigation that it is not a mere recruitment chain. For instance, in the Amway (FTC v. Amway, 1979) case, where the FTC initiated investigation for alleged Pyramid Scheme operation, the FTC agreed that Amway was not a pyramid scheme mainly due to company strategies designed to ensure retail sales that includes the refund and returning scheme.[130]

3.3.4. Other useful considerations

Scholars have also suggested several other criteria that they believe to be of helpful tests for pyramid schemes. For instance, Taylor, from the American institute of consumer awareness, listed, among others, the following as characteristics of pyramid scheme as opposed to MLM:[131]

> *The presence of numerous levels of distributors more than is needed to get the products out to customers; the absence of demand for the products other than of distribution channel; the presence of several levels of beneficiaries upline who had nothing to do with the sale but receive as much or more total payout per sale than the distributor; indications that the products and "opportunity" cannot be sold without making exaggerated product and income claims; the products to distributors*

[129] Multi-Level Marketing and Pyramid Selling (Excluded Schemes and Arrangements) Order of Singapore, *supra* note 80, Section2(1)(c)(vii); Canadian Competition Act, *supra* note 81, Section 55.1 (1)(c)&(d).

[130] See Alia Malek, Legal remedies: What government can do to fight pyramid schemes, (14October 2014) available at http://projects.aljazeera.com/2014/multilevel-marketing/explainer.html, accessed on 25 Febraury 2016. Because of the three internal rules company, that are held to be mechanisms that incentivizing participants to actually sell the company's products to customers, Amway won the case. The three internal rules were:

1. Distributors had to buy back any unused and marketable products from their recruits upon request.
2. Distributors had to sell at wholesale or retail at least 70 percent of purchased inventory each month.
3. Distributors had to make at least one retail sale to 10 different customers each month.

[131] Taylor, *supra* note 1, p. 38.

being priced at a premium; promotions like you will never have to work again.

Over all, despite the lack of explicit rules on MLM in the Ethiopian proclamation, it is still possible to provide detailed distinguishing parameters either in the form of regulation or directives to be issued by the Ministry of Trade;[132] or at least some working guidelines by the 'Trade Competition and Consumer Protection Authority could be of immense help'.

Conclusion

Fuzzy conceptualization and inherent difficulty of distinguishing the various marketing programs that claims to be direct selling schemes have hampered effective enforcement of legal stipulations in the field of consumer protection. A prototype of this puzzle has been the distinction between the legal MLM (network marketing) and illegal pyramidal schemes. Pyramidal schemes as illegal arrangements and as such do not exist *de jure* but *de facto* under the guise of operating network marketing. A business entity that operates MLM at a time might easily swing from legality to illegality and *vis versa*.

The thin distinction between the two had been a headache for enforcement authorities, though not less for legislators. Discontent on the topic had led to various proposals. Some called for a ban on network marketing at the cost of missing possible opportunity while others suggested intervention in the particular design of network marketing specifically demanding restriction on unreasonable compensation from downlines and limiting recruitment chain (number of distributors) to what is economically realistic.

Few jurisdictions banned MLM totally. Most jurisdictions welcome MLM either by providing parallel rules permitting MLM and banning pyramid schemes; or by simply stipulating prohibitive provisions targeting pyramidal schemes thereby tacitly allowing MLM. Legislators have tried to set certain principal parameters for distinguishing legal network marketing from pyramidal schemes. The presence of participation fee payment by participants; compensation to participants being mainly derived from participation fee of new members instead of actual sales to ultimate users; and the absence of buy back guarantee to distributors have been taken indications of pyramidal scheme while the opposite characteristics of a business entity would make it supposedly a legal network marketing.

[132] Proclamation No. 813/2013), *supra* note 25, Article 46.

Ethiopian law has abrogated pyramidal scheme but tacitly acknowledged MLM/network marketing. It has characterized pyramidal schemes but still vague. The law is silent on buy-back and refund guarantee, which is in fact a notable omission of an essential yardstick. The buy back guarantee requirement saves those at attrition and also reduces propensity of network marketers to swing to pyramidal schemes. Moreover, it confuses the consumers to be protected and the participants to be prosecuted.

The absence of parallel provisions on network marketing is a significant limitation. Not only that silence on network marketing deprives easier and comparative understanding of the puzzling notions on network marketing versus pyramid schemes but also that rules on network marketing are essential if network marketing is to flourish. The few foreign companies in Ethiopia that claimed to be network markers did not have unquestionable stories. The lack of guiding rules on how legal network marketing businesses may operate could lead to frustration for the future engagement in network marketing however genuine it might be. If network marketing is to work well, separate rules including those on protection of distributors such as buy-back and refund guarantee, strict ethical standards for distributors, etc are required. The rule on pyramidal scheme also needs further elaboration. Despite the lack of explicit rules on MLM in the Ethiopian proclamation and the brevity of the rule on pyramidal scheme, it is still possible to provide detailed rules either in the form of regulation or directives to be issued by the Ministry of Trade; or at least some working guidelines by the Trade Competition and Consumer Protection Authority could be of significant help.

Ethiopian Law on Arbitral Interim Measures: Towards Dispelling the Ambivalence

Nigusssie Tizazu *

Abstract

The recognition and application interim measures amidst litigation proceedings could help the proper protection of the rights of the parties and increase the efficacy of process. This holds true for arbitration proceeding as well. Traditionally, the power to order interim and precautionary measures in arbitration proceedings have been exercised by regular courts virtually in all jurisdictions. Nowadays, that jurisprudence has changed in several jurisdictions. International institutions such as the UNCITRAL have facilitated the development of trends that vests arbitral tribunals more legitimacy, trust and power including the power to order interim measures. UNCITRAL Model Law on International Commercial Arbitration (hereinafter UNCITRAL Model Law) provides the baseline rules for arbitration in general. These rules vest arbitral tribunals the power to order interim measure. The model law has influenced several jurisdictions and it is shaping the rules regarding the power to order interim measures. The Civil Procedure Code (CPC) of Ethiopia which deals with arbitration does not seem to specifically address interim measures to be granted by tribunals. The implication of such legal silence on the exercise of the power to order interim measures by tribunals has not been researched well so far. This work examined legal stance and the practice of arbitration tribunals to order arbitral interim measures in Ethiopia. To this end, the study employed a qualitative research method focusing on reviewing documents (such as relevant laws, arbitral awards, case files, and related literature) and conducting a series of interviews. The analysis of Ethiopian law, arbitrators' practices, and decisions of courts showed that arbitrators have the power to grant interim measures but the legal discourse and the practice suffered uncertainties. This author argued for a bold step, in Ethiopia, to assure arbitral tribunals unquestionable power to order interim measures.

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Acronyms:
CPC-Civil Procedure Code
AACCSA-Addis Ababa Chamber of Commerce and Sectoral Association
ECX-Ethiopian Commodity Exchange
UNCITRAL-United Nations Commission on International Trade Law

Keywords: arbitral interim measures, competence of arbitral tribunals, *ex parte* attachment

Introduction

The designation of interim measures in civil litigation could be related to temporary injunction and attachment before judgment. In most states' arbitration laws or tribunal rules, mention has only been made regarding the types and conditions of granting interim measures than defining what they are. Consequently, interim measures take different types, forms and names.[1] Some rules use the term interim measures[2], or interim measures of protection and others use the term provisional measures[3] or conservatory measures.[4] The difference in terminology may show the superseding purpose of the measures that the laws or rules want to emphasize. The purposes of interim measures include keeping parties' interests or evidence from irreparable harm, preserving affairs, and facilitating later enforcement[5]. In some cases, like the European Union Court of Justice (EUCJ), interim relief is considered to be an aspect of the right to an effective judicial remedy and a fair trial for the protection of freedoms and rights.[6]

In most instances, parties in arbitration do not deal with competence to grant interim measures in their contract. So, the determination will be left largely to the national laws and rules of the institution selected.[7] As to the national laws, most statutes before 1985 (prior to the adoption of UNCITRAL Model Law) indicated that states were reluctant to take the power to grant interim measures

[1] Rafal Morek, Interim Measures in Arbitration Law and Practice in Central and Eastern Europe: The Need for further Harmonization, (2007), p.76.

[2] United Nations Commission on International Trade Law, Model Law on International Commercial Arbitration (UNCITRAL Model Law), (1985) with amendments adopted in (2006), Article 17. However, Article 9 uses the term 'interim measure of protection'

[3] International Centre for the Settlement of Investment Disputes (ICSID), Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings, entered into force October 14, (1966), Rule 39. It used the term "provisional measures". Swiss Private International Law Act (PILA), (18 December 1987), Article 183. It employed the terms 'provisional and conservatory measures'

[4] London Court of International Arbitration (LCIA), (October 1, 2020), Article 25. It uses the term interim and conservatory measures. International Chamber of Commerce (ICC), (March 1, 2017), Article 28. It calls conservatory and interim measures.

[5] Yesilirmark Ali, Provisional Measures in Commercial Arbitration, *Kluwer Law International*, (2005), p. 13, 20

[6] Mohmeded Shadat, A Critical Analysis of Provisional Measures in England and Wales, DPHIL thesis, Brunel University Law School, (2014), p.6

[7] Vivienne M. Ashman, the UNCITRAL Arbitration Rules and A Review of Certain Practices and Procedures, International Business Litigation & Arbitration Institute, (2001), p.765

away from courts of law.[8] The adoption of UNCITRAL Model Law can be taken as a landmark for recognizing arbitral tribunals' power to grant interim measures that considerably help for the independent and smooth functioning of arbitral tribunals especially in international commercial arbitration.[9] The UNCITRAL Model Law has attempted to create harmonization in the area and was eventually adopted by many states either through amendment of the old law or enactment of a new legislation.[10]

The UNCITRAL Model Law provisions are relatively detailed and extensive; they regulate the issuance of interim measures by an arbitral tribunal, the conditions, the recognition and the enforcement therewith.[11] In this work, the author uses the definition given under the UNCITRAL Model Law[12] for it encompasses the broad sense of precautionary and injunctive relief. The UNCITRAL Model Law under Article 17(2) defines interim measures as, "any temporary measure regardless of the form granted at any time prior to the issuance of the final award".[13]

Currently, many arbitration laws of states provide equal power to tribunals and courts in granting interim orders on the parties in the arbitration proceeding.[14] Yet, using an arbitration tribunal as a forum for obtaining interim measures in Ethiopia is minimal. This might be attributable to the old and limited application of the laws of arbitration, and the inadequate experience. This work examines the general trend regarding arbitral tribunals' power to order interim measures and the Ethiopian legal and practical setting in particular. *The study employed a qualitative research method: Ethiopian law on the subject critically examined; relevant documents such as arbitral awards, case files, and literatures are reviewed; and series of interviews are conducted so as to fetch the best output.*

[8] Italian Code of Civil Procedure, (1997), Book Four, Title VIII, Article 818. It provides arbitrators may not grant attachments or other interim measures of protection. Peoples Republic of China Arbitration Law, (1995), Article 46. It provides any request for interim relief must be referred to the courts. Civil Code of Ethiopia, Proclamation No. 165/1960, *Negarit Gazette*, (1960), Article 3329. It requires restrictive interpretation to powers of arbitrators. England Arbitration Act, (1889), (1934), they were characterized by prerogatives of courts.

[9] Mohmeded, supra note 6, p.89.

[10] Mohammed Muddasir Hossain, International Commercial Arbitration: The Need for Harmonized Legal Regime on Court Ordered Interim Measures of Relief, Master Thesis, University of Toronto, (2012), p.24

[11] UNCITRAL Model Law, *supra* note 2, Art.17–17I

[12] Ibid.

[13] United Nations Commission on International Trade Law, Digest of Case Law on the Model Law on International Commercial Arbitration, (2012), p.85.

[14] Alexander Goldstajn, Choice of International Arbitrators, Arbitral Tribunals and Centers: Legal and Sociological Aspects, Essays on International Commercial Arbitration, (1989), p. 46.

This article is organized in to six sections. Section one sets out an overview of interim measures. Section two articulates competence of courts and tribunals to grant interim measures. Section three discusses conditions to grant interim measures while section four describes enforcement of arbitral interim measures. Section five presents Ethiopian laws, cases and arbitral tribunals' practice in granting interim measures. The last section, section six, makes a summary of the whole discussions and concluding remarks.

1. Overview of Interim Measures

Proceedings usually take time and in effect evidences may be lost, and assets potentially usable in the final enforcement stage could be abused or concealed. Consequently, enforcement of the final award may become difficult. Thus, there is a need for protecting the *bona fide* party from the *mala fide* party.[15] In other words, arbitration should serve the rights of the parties in a moment that demands protection of parties' rights. Provisional remedies or interim measures are one way to prevent such assail.[16] Therefore, the protection of property and evidence that could be used for the satisfaction of the award would be among the main reasons that justify protective interim measures.[17] If such a mechanism is not available until the final adjudication, the winning party would only obtain a pyrrhic victory.[18] In judicial litigation and arbitration process, the availability or otherwise of provisional measures can have a substantial effect on the final result, especially when issues related to the protection of evidence and assets arise before or during the proceedings.[19]

In conceptualizing interim measures, it is often considered as synonymous with interlocutory orders mainly due to their temporary nature and regulatory character in a proceeding. However, more often than not, interlocutory orders are tailored in managing proceedings like rulings adjournment, party's conduct and attorney representation issues. Conversely, interim measures are of different kinds that include orders aiming at avoiding or minimizing loss, damage, or prejudice to parties (such as orders related to security of costs, preservation of

[15] E. Shuke*et al*(ed), Interim Measures in International Commercial Arbitration by Association for International Arbitration, (2006), p.26. Also see Christoph Liebscher*et al*(ed), Arbitration Law and practice in Central and Eastern Europe, Huntington, New York (2006), p.77

[16] Ibid

[17] Gary B. Born, Provisional Relief in International Arbitration**:** International Commercial Arbitration*,* 2nd ed. (2014), p. 2482

[18] Shuke, Supra note15, p.5

[19] Born, supra note 17, see also United Nations Commission on International Trade Law Working Group on Arbitration, Report of the Secretary General, 32nd Session, (1994). A report submitted by the UN Secretary General on Settlement of commercial Disputes clearly outlines the importance of interim measures and also the growing need for interim relief from the tribunals

evidence or assets, access to or use of property, cease and desist from infringement of intellectual property or other rights) and/or orders related to the continued performance of contract pending final award.[20] In addition, interlocutory orders are mainly used as tools that help courts to maintain the regulation of proceedings and mostly non-appealable before a final judgment is given. Moreover, decisions concerning interim measures, as opposed to the case in interlocutory order, could be appealable as stipulated in Article 320(3) of CPC, and it is also possible to take action for setting aside unreasonable grant of interim measures.[21]

The realms of interim measures also include orders given for not only ensuring the confidentiality of the information disclosed during the proceedings but also facilitating the enforcement of arbitral awards by depositing the assets that would be used to satisfy the award with a third party pending the resolution of the dispute.[22] The main types of provisional measures ordered for cases under arbitration are maintaining or restoring the *status quo* pending the determination of the dispute, taking action that would prevent or refrain from an action (that is likely to cause, current or imminent harm or prejudice to the arbitral process itself), providing a means of preserving assets out of which a subsequent award may be satisfied, and preserving relevant evidence and material to the resolution of the dispute.[23]

Most importantly, today, it is generally acknowledged that the legal basis for the arbitral tribunal's competence to issue 'interim orders of protection' or 'conservatory measures' lays in its competence to decide on the merits of the dispute.[24] In authorizing a private tribunal to decide on existing or future disputes between them, the parties have vested in the arbitrators' inherent power to issue measures of provisional relief connected to the subject matter of the dispute, which serves to safeguard the efficiency of the tribunal's decision-making.[25] Likewise, interim measures are central to the administration of justice by protecting parties' interest (from irreparable harm), and helping enforceability of judgments[26] as well as ensuring state commitment to human

[20] International Court of Arbitration Bulletin, Vol. 11, No.1, (2000), a range of interim awards made by arbitral tribunal under the ICC Rules.
[21] Lawrence W. Newma Colin Ong, Interim Measures in International Arbitration, (2014), p.192
[22] Dana Renee Bucy, How to Best Protect Party Rights: The Future of Interim Relief in International Commercial Arbitration under the amended UNCITRAL Model Law, American University Law Review, vol. 25 issue 3, Article 5, (2010), p.9.
[23] UNCITRAL Model Law, *supra* note 2, Article 17(2).
[24] Mohmeded, supra note 6, p. 78.
[25] Ibid, p.80.
[26] Peter Westberg, Interim Measures and Civil Litigation, Scandinavian studies, (2012), p.542

rights covenants.[27] Furthermore, the urgent nature of measures that do not go with the state court congestion calls for interim solutions to be given by tribunals.[28] Especially for developing states where there are corruption, delayed justice, and meager legal knowledge, the availability of arbitral interim relief would be a good alternative to fill these *lacunae* by using the expertise of arbitrators and conditions set in the rules to grant interim measures like *prima facie* success test. The p*rima facie* success test has once been disregarded in the federal courts of Ethiopia in the case of *Defret* film.[29] For these reasons, the acceptance of the arbitrator's power to grant interim relief has shown change in recent times.[30]

Provisional remedies may be needed when the tribunal has not been established. An emergency arbitration is a means used by international tribunals mainly by those established under the International Chamber of Commerce (ICC) Rules that permits provisional remedies until the formal tribunal is constituted.[31] Nevertheless, considering the contractual nature of arbitration, a tribunal should grant a request for interim measures mainly among parties themselves.[32] Asking for court assistance (such as an application to freeze the party's money in a bank or to produce documents in the hands of a third party) could be a remedy when a third party is involved. However, when parties in arbitration go to courts seeking provisional remedies, the courts should refrain from entertaining the main issue under the guise of examining conditions to grant interim measures of the case.[33]

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[27] International covenant for Civil and political rights (ICCPR), (1966), United Nations, Treaty Series, vol. 999, Article14, General Comment 32 signifies the importance of ADR that comprise arbitration in the access to justice and impose responsibility to states to work for developing it.

[28] Rafal, supra note 1, p.77.

[29] Zeresenay *Berhane V. Aberash Bekele, FFIC,* (2014). Difret is a 2014 *Ethiopian film* that based on the *true*-life *story* of *Aberash Bekele*, an *Ethiopian* girl who in 1996 at the age of 14 was arrested and charged with murder committed in a trivial of rape. The film is produced by Angelina Jolie Pitt and written/directed by *Zeresenay* Berhane. The film was banned from screen in the pretext of claim by Aberash Bekele and the lawyer of the real stories with the reason that while basing their story, the film making do not obtain their consent. Later, with the claim of 'copy right' Aberash obtained an injunction from Federal High Court to prevent the internationally acclaimed and award-winning film from being screened in Ethiopia for a case which is outside the scope of copyright. Had it been in arbitration the prima facie success test ought to have prevented the injunction from being granted

[30] Tijana Kojovic, Court Enforcement of Arbitral Decisions on Provisional Relief, Journal of International Arbitration, Vol. 18, no.5 (2001), p. 118.

[31] International Chamber of Commerce (ICC), Arbitration Rules, (2017), Article 29, Appendix V, Emergency Arbitrator Rules provides, a party that needs urgent interim measures "Emergency Measures" that cannot await the constitution of an arbitral tribunal may make an application to the Secretariat.

[32] Raymond J. Werbicki*,* Arbitral Interim Measures: Fact or Fiction, AAA Handbook on International Arbitration & ADR, (2010).

[33] Alison C. Wauk, Preliminary Injunctions in Arbitrable Disputes: The Case for Limited Jurisdiction, UCLA school of Law*,* Review*,* Vol. 44, (1997), p.2061

2. Competence of Regular Courts and Arbitral Tribunals on Interim Measure in Arbitration Proceedings.

Arbitration is not a standalone proceeding. Indeed, the there are numerous instances in which the arbitration tribunal badly needs the assistance of courts. Thus is well accepted and widely applied phenomenon but the question of when and to what extent the arbitration tribunal needs to rely on judicial assistance remains unsettled. Contentions regarding when and when the courts should not step in starts from the very begging of disputes. It is not uncommon to lodge objections, in judicial proceeding, alleging that courts are precluded from entertaining merit of cases owing to arbitration clause or agreement meant settle disputes via arbitration.[34] For instance, the Ethiopian CPC under Article 244(2) (g) recognized preliminary objection on the basis of the fact that disputes are subject to settlement by arbitration.

The point worth considering here is whether such ground of objection could be applied for interim measures. The answer goes in the negative that what is precluded from reach of the court is getting to the merit of the case which is the subject matter of arbitration agreement and interim measures are temporary in nature that do not have a determinative role on the final disposition of the cases. Thus, going to courts for interim measures does not go against the arbitration agreement rather it helps sustain the good move of the arbitral proceeding. Court involvement in the arbitration is advisable so long as it is to assist the process of arbitration. Art 17 (j) of UNCITRAL Model Law makes the power of court coextensive with the power given to arbitral tribunal.

States show their position regarding arbitral interim measures by their national legislation or court rulings. In most states, the traditional view of courts' residual power for adjudication remains intact so that clear statutory blessing is required for the option that calls arbitrators to grant such measures. Apart from the trends like the American legal and political culture of isolationism and centrism to judicial administration,[35] the legislations that impose prohibitions against tribunal-granted provisional measures in a number of states (including Austria, Spain and Greece[36]) have contributed to the slow advancement of interim measures by tribunals. In countries like Ethiopia, where the development of arbitration is slow and arbitral expertise is lacking and slow progress of justice

[34] Gabrielle Kaufmann Kohler et al, (ed), International Arbitration: Law and Practice in Switzerland, (2015), p.245

[35] Douglas D. Reichert, Provisional Remedies in the Context of International Commercial Arbitration, Berkeley Journal of International *Law*, Vol. 3, No. 2, (1986)

[36] Born, supra note 17, p.2438

to respond to new systems, arbitrators' audacity to grant interim measures will be questionable.

Although historic limitations on arbitrators' power have been removed in many states, some nations continue to impose mandatory prohibitions that forbid arbitrators from ordering provisional relief. For instance, in Italy, China, Thailand and Argentina, legislations still provide that granting of provisional measures in arbitration proceeding is exclusively to local courts.[37] Hence, courts predominantly own the authority to grant interim measures for long a while. So, states that do not clearly define arbitral tribunals' power on interim measures under their laws could possibly fall into ambivalence. The supremacy of the courts demonstrated in the courts' decision of England can be cited by way of example.[38] Indeed, owing to arbitration and/or arbitrability, some areas are reserved for regular courts, due to public policy. Regular courts have also seized matters like enforcing foreign award or interim measure as checking the body of arbitration. For this reason, the scopes of the arbitral interim measures granted by arbitral tribunals mainly rely on the area of *in rem* reliefs than *in personam* remedy, like arrest.[39]As law enforcement is reserved for executive bodies such as police, arbitrators obviously cannot assume the power to detain or take any similar measure. Still, an arbitral tribunal may, however, order a corporate entity to direct its subsidiary to take certain steps.[40]

Rena K[41] was one of the first cases in which the English court addressed the availability of interim measures in arbitration.[42] In Rena K, MV *Rena* was a container ship chartered by a Mauritian company ('the charterers') in 1977 under a voyage charter party to carry from Mauritius to Liverpool a cargo of sugar. Rena K arrived in Liverpool in July 1977 and the cargo owners applied *ex parte* for a *Mareva* injunction restraining the ship owners from dealing with the sum of money payable to their bankers in London in respect of freight due under the charter party. An interim injunction was granted. On 27 July, the Rena K was

[37] Ibid, p.2439
[38] Sandeep Adhipathi, Interim Measures in International Commercial Arbitration: Past, Present and Future, University of Madras, India, (2000), p. 17
[39] Tijana, supra note 30, p.780
[40] Douglas, supra note 35
[41]Rena K. (1978) 1 lioyd's Rep. 545; Ca, *Paczy v Haendler& Natermann*,122 Sol Jo 315 Court: Queen's Bench Division Judgment Date: 17/02/1978
[42] Sandeep, supra note 38, p.17; see also Charles N. Brower & W. Micheal Tupman, Court-Ordered Provisional Measures under the New York Convention, Journal of Int'l Law, (1986), p. 24,25

arrested. In Rena K case, the court decided that while staying the litigation in favor of arbitration, it had powers to attach the assets of the party.[43]

Equally, the International Convention on the Settlement of Investment Dispute (hereinafter ICSID)[44] contains interim measures under Art 47 of the convention and Art 39(1) of ICSID Arbitration Rules.[45] Regionally, apart from the movement to harmonize business law and arbitration in Francophone nations in Africa via the Organization of Harmonization of Business Law in Africa (OHADA), there is no different practice that flourishes in the area of arbitration in general and interim measure in particular.[46]

The practice still shows that the interplay between court-ordered interim measures and the tribunal's authority is unsettled. There are three options available regarding the interplay between court and tribunal regarding provisional measures. The first option portrays that granting of interim measures should exclusively be allocated to the court of law (for instance, Italy[47] and Greece).[48] According to this approach, the court would provide the same interim protection to parties in arbitration in the same way it does to parties in litigation. The second approach, which is the opposite of the former option, shifts interim measures of protection exclusively to the sphere of arbitration and leaves only the enforcement of the order of arbitrator's to the courts.[49] Despite the absence to find states that directly apply this approach; the English court-subsidiary model comes closer to it in defining preconditions for court access.[50] The last

[43] Ibid

[44] International Convention on Settlement of Investment Disputes between States and Nationals of Other States (ICSID), United Nations, Treaty Series, Vol. 575, (1966)

[45] Art. 47 of ICSID slightly narrow the provisional measures power of the tribunal to recommendation level

[46] Michael Ostrove*et al,* Developments in African Arbitration, (2018), available at https://globalarbitrationreview.com/benchmarking/the-middle-eastern-and-african-arbitration-review-2018/1169293/developments-in-african-arbitration last accessed on 29 September 2020

[47] Italy Legislative Decree no. 40 (2 February, 2006), Article 818, which amend article 806 *et seq* of the Civil Code of Italy provides "arbitrators may not grant attachment or other interim measures of protection, unless otherwise provided by law"

[48] J. K. Schaefer, New Solutions for Interim Measures of Protection in International Commercial Arbitration: English, German and Hong Kong Law Compared, Electronic Journal of Comparative Law, Vol. 2, No.2, (August 1998), p. 6 available at http://www.ejcl.org/ejcl/22/art22-2.html last accessed on 5 May 2019

[49] Ibid

[50] Albert J. van den Berg (ed.), New Horizons in International Commercial Arbitration and Beyond, International Council for Commercial Arbitration, Congress Series no.12, Kluwer Law International, (2005), p.213 available at https://books.google.com.et/books?id=OGxzLa9x9fEC&pg=PA213&lpg=PA213&dq=the+English+court-subsidiary+model+of+arbitration+and+court&source=bl&ots=cpTYtk7IPx&sig=ACfU3U0haAwPb0ZKJkMaYTF73T9da6A0kA&hl=en&sa=X&ved=2ahUKEwiri7H7x8TpAhUBLewKHUyeCPYQ6AEw

option is the *free-choice* model that offers free access to both the court and the arbitrator for interim relief.[51]

As the free choice model, the German CPC Sec. 1033 states that it is not incompatible with the arbitration agreement for the courts to order interim measures in matters involving the dispute. In accordance with section 36 and Article 9 of the Indian Arbitration and Conciliation Act, a party can request interim measures from a court before or during arbitral proceedings or at any time after the making of the arbitral award.[52]

The free choice model propounded by UNCITRAL Model Law gives parties liberty to seek interim measures from either the tribunal or court.[53] Countries like Australia, Austria, Canada, Singapore, Zambia and many others' have produced arbitration codes based on the Model Law.[54] The power of the arbitral tribunal to grant interim measures is plainly addressed in the Model Law jurisdictions; such as Austria, Canada, Singapore and Australia, and non-Model Law jurisdictions, for Sweden, Belgium and Japan.[55] Besides, Kenya, Zimbabwe, India, German and New Zealand are recent examples that already have adopted the Model Law for both domestic and international arbitrations.[56] In addition, England, Croatia, Poland, Ukraine and Switzerland adopted laws that specifically address interim measures to arbitral tribunals.[57] In all cases, national arbitration statutes now rest on the premise that the arbitrators' authority to grant provisional measures will be implied and that an express agreement is required to withdraw such power.[58]

Though a trend in favour of an arbitrator's competence to issue interim measure emerged under UNCITRAL Model Law,[59] writers like Alison C. Wauk, denounce arbitral interim measure for the reason that it results in unnecessary

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AHoECAoQAQ#v=onepage&q=the%20English%20court-subsidiary%20model%20of%20arbitration%20and%20court&f=false last accessed on 20April 2020

[51] Ibid

[52] Indian Arbitration and Conciliation Act, (1996), Article 9(1).

[53] Neil Andrews, the Modern Civil Process: Judicial and Alternative Forms of Dispute in England**, (**2008), P. 257 see also: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985 Model_arbitration.html. last accessed on 20April 2020

[54] Ibid (Laws of Croatia, Poland, Ukraine, German, Swiss, Hong Kong can be examples for adopting Free choice model)

[55] Ibid

[56] South African Law Commission, Report on the Investigation of An International Arbitration Act for South Africa, (July 1998), p.93 available at https://www.justice.gov.za/salrc/reports/r_prj94_dom2001.pdf last accessed on 25 September 2020

[57] Shuke, supra note 15

[58] Born, supra note 17, p. *2439*

[59] UNCITRAL Model Law, supra note 2, Article 17.

overlapping of powers between courts and tribunals.[60] However, the author believes that giving arbitrators' the power to grant interim measures provides a chance for parties to use a forum especially where courts are not easily accessible or already congested with cases. Moreover, taking arbitral interim measures as superfluous will turn a quest back to the need for arbitration as a complimentary adjudicatory venue.

Based on Article 3344(2) of the Ethiopian Civil Code which allows parties to use the court as an alternative, Ethiopia seems to adopt the *free choice* model. Article 3344(2) reads "the fact that a party to an arbitral submission applies to the court to preserve his rights from extinction shall not entail the lapsing of the submission". In practice, in spite of the ultra-virus instances, ultra-virus, interim measures are given by arbitrators.[61]

The other important issue that could be raised in the relationship between court and tribunal is the concept of *res judicata*. Where an application for interim measures is denied by a court, should that be a ground to preclude parties from bringing the same before tribunals? This issue gets much more importance in situations where the concurrent jurisdiction of the courts and tribunal is available. One US court ruled that the tribunal has the authority to grant interim relief even after the denial of such relief by the court.[62] In Ethiopia, except Article 5 of the CPC, neither the codes nor the other laws that comprise matters of arbitration address the *res judicata* issue relating to interim measures. This paper argues that parties should not be prohibited to go to a tribunal when they are dismissed by the court as the interim measures lack the character of finalizing case and do not amount *res judicata* in the strict sense. Because it is generally accepted that *res judicata* only applies to final and conclusive decisions on merit and does not apply to interim measures. With all these limitations, it would be proper to take into account new developments on a case for an application to be reconsidered by tribunals.

3. Conditions for Granting Arbitral Interim Measures

Needless to say, arbitrators should consider the interests of both parties in granting interim measures. Setting clear pre-conditions and requiring securities

[60] Wauk, supra note 33.

[61] Interview with Seyoum Bogale and Meseret Ayalew(arbitrators, Addis Ababa, 02/11/2007 E.C), and Zufan W/Gebriel, (deputy registrar, Federal First Instance Court (Ledeta), Addis Ababa, 25/10/2007 E.C).

[62] Sperry Int'l Trade, Inc. v Government of Israel, US District Court for the Southern District of New York, 532 F. Supp. 901, 2d Cir. (1982).

could help the justice system to balance parties' interests that will be used as instruments for procuring justice and efficiency. Equipping even-handed standards would place arbitration to be the most trusted and justly means of dispute resolution mechanism. Similarly, to avoid the use of interim measures as dilatory tactics in the process of arbitration, clear conditions are supposed to be devised for granting the measures. The examination of laws of countries regarding conditions to grant interim measures by tribunals demonstrates that they most frequently use generic phrases like "such provisional relief that it deems necessary or appropriate". Such standards are, however, dubious and open-ended that they may be exposed for abuse, and it needs to be filled by consistent practice or set clear conditions by statutes. In this regard, the 2010 UNCITRAL Arbitration Rules[63] require a demonstration of some clear standards. But there remains a difference in the conditions included for granting provisional measures among national laws and institutional rules.

The conditions for granting interim measures can be of procedural or general standards.[64] The general conditions are attributable to weighing the threat involved; whereas the procedural aspect of the requirement concerns the procedure that needs to be followed prior to examining the exigencies and conditions of the general requirement.[65] The procedural requirements include being an acceptable venue in the jurisdiction, application by parties to arbitrators, and decision on *ex parte*. General standards, on the other hand, consist of requirements relating to the imminence of the threat, the balance of party's interest, the proportionality of the order and the like.[66]

4. Enforcement of Interim Measures

The variation on enforcement of arbitral interim measures in practice hinges on the understanding and position of interim reliefs as an award. In states like the Netherlands that acknowledge interim measures as awards, the enforcement of interim measures follows the same procedure as that of enforcement of a final award.[67] Conceivably, the enforcement of an arbitrator's order as an award is a lengthy process in the domestic context for the reason that it may pass through

[63] United Nations Commission on International Trade Law Arbitration Rules, General Assembly Resolution 65/22, A/65/465, (as revised in 2010).
[64] Ian A. Laird *et al* (ed.), Interim and Emergency Relief in International Arbitration, International Law Institute Series on International Law, Arbitration & Practice, (2015), p.244.
[65] Interim Measures in International Commercial Arbitration, by Association for International Arbitration, (2007), p.45.
[66] Yesilirmak, supra note 5, p.34.
[67] Dutch civil procedure code, (1986), Article 1049 but the 2015 arbitration act demands the form of interim measure to be akin to award.

the administrative confirmation of enforcement or application of setting-aside[68] that defeats the urgent character and role of provisional measures. States like Switzerland and Germany on the other hand, follow an approach that does not consider interim measures as an award and uses court support that makes the enforcement process more suitable.[69] In states where such enforcement issues are not settled, the practice developed in domestic tribunals and court standards as well as customary practice encircling enforcement of awards will govern.[70]

Interim measures can be executed both voluntarily by parties and by assistance from the court. Voluntary compliance is the most cost-effective means of executing an order. Perhaps, the degree of submission under an emergency arbitrator's decision seems to require a kind of commitment beyond voluntary compliance. If parties fail to voluntarily comply, the award creditor can use the court enforcement mechanism.

Concerning transnational applicability of arbitral interim measures, enforcement of measures given abroad is minimal in the absence of international treaty agreements, reciprocity or unilateral prescription of state laws. The predominant international convention on the area, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter the New York Convention) is silent on the issue of interim relief. So, different positions have been held regarding the interpretation as to whether the New York Convention includes enforcement of interim measures or not. According to the USA and Australian courts, the reference to arbitral awards in the Convention does not include such interim measures made by an arbitral tribunal, but it is only an award that finally determines the rights of the parties.[71] Conversely, the English courts have not considered Article II (3) of the New York Convention as an obstacle to exercise their jurisdiction to order interim relief.[72] Currently, it is generally held that the New York Convention does not cover the enforcement of interim measures. For this reason, the renowned arbitrator, Mr. V Veeder, at the UN's 40th anniversary of the New York Convention complained that, 'for too long, there have been difficulties in enforcing an arbitrator's order for interim measures', noting that 'application excludes any provisional order from

[68] Shuke, supra note 15, p.31
[69] Ibid
[70] Mohmeded, supra note 6, p. 206
[71] *Resort Condominiums International, Inc v. Ray Bowl well,* (1995), The Supreme Court of Queensland, Com Arb. p. 628
[72] *Kastner v. Jason*, EWCA Civ. (2004) where a defendant breached the arbitral sanction and disposed of property to a third party without the consent from the tribunal and escaped to the USA with the proceeds of sale, thereby evading enforcement in England of the eventual final award. The provisional award was enforced under the New York Convention

enforcement abroad as a Convention.[73] At present, bilateral and multilateral accords and reciprocity principles would work as a source for executing arbitral interim measures against property found outside the seat of arbitration.[74] A unilateral prescription is a state declaration under its statutes to enforce arbitral interim measures in its soil regardless of the seat of arbitration. To date, a unilateral prescription is only found in German law.[75]

Enforcement problem in general could be corrected by imposing a fine on the failing party as punishment for costs incurred because of non-execution, or in matters relating to evidence, the tribunal may take negative inference if a party refuses to produce evidence before the tribunal.[76] Also, where the enforcement is carried out by asking court assistance failing to obey either order of interim measure by court seal or direct order of a court, it will entail contempt of court and penalty thereby.[77] Recourse against interim orders could be a remedy if procedural irregularity, *ultra-virus* or public policy concerns are proven by the alleging party.[78]

5. Arbitral Interim Measures in Ethiopia

In Ethiopia, the conundrum of arbitrators' power to order interim measures is reflected by the absence of clear permission in the laws i.e. the Civil Code whilst arbitration institution's rules such as that of AACCSA provides for that.[79] The possibility of granting interim orders by arbitrators is stipulated in the section of the Civil Code that governs mortgage (article 3044) and in other laws like the Cooperative Society Proclamation and the Labor Law.[80] The silence in the sections of the Civil Code and CPC that deals with arbitration leads to ambivalence on the part of arbitrators leading to failure to exercise this power in some cases and ultra-virus scenarios in others.

[73] V VVeeder, Provisional and Conservatory Measures in Enforcing Arbitration Awards under the New York Convention: Experience and Prospects, UN Publication.V.2, (1999), p. 21

[74] Ethiopian Mutual Legal Assistance in Civil and Commercial Matter with China, Ethio-china MLA agreement ratified on 2 May 2017(unpublished, attorney general international cooperative on legal affairs department)

[75] German Arbitration Act, (1998), Section 1062(2), tenth book of the Code of Civil Procedure

[76] Yesilirmak, supra note 5, p.28

[77] The Criminal Code of FDRE, proclamation no. 414/2004, Federal Negarit Gazette, (2004), Article 448(1) (c). It provides criminal liability for contempt of court

[78] UNCITRAL Model Law, *supra* note 2, Article 17(I) deals about grounds of refusing execution and enforcement of interim measures

[79] Addis Ababa Chamber of Commerce and Sectoral Association (AACCSA), Arbitration Rules for AACCSA, (2008)

[80] Cooperative Societies Proclamation, Proclamation No. 985/2016, Federal Negarit Gazette, (2016), Article 65 and Labor Law Proclamation, Proclamation No. 1156/2019, Federal Negarit Gazette, (2019), Article 144

Whenever there is no clear agreement between parties about interim measures, the determination will be left to *lex arbitri*. The absence of clear law would frustrate especially *ad hoc* tribunals not to grant interim orders because their decisions highly rely on the clear determination of state laws, as they do not have procedural rules like institutional arbitration. Institutional arbitrations do not also dare to grant interim measures as institutional rules remain unwarranted in areas where the position of *lex arbitri* is not clear. Besides, the absence of clear permissive regulation by a law enacted by the government entails volatile move by tribunals in using such power by their own directives or rules in the absence of parties' agreement.

On the other hand, Article 3344(2) of the Civil Code stipulates that there is no lapse of arbitral submission even if parties apply to a court to preserve their rights that allow courts to order interim measures for the case under arbitration. Nonetheless, interview with Federal First Instance Court registrar[81] and commercial bench judges[82] reveals that the acceptance of petitions by Federal Courts that seek interim measures from parties in the arbitration after the institution of the tribunal is minimal.

5.1. Assessment of Ethiopian Laws on Arbitral Interim Measures

The Ethiopian Civil Code and CPC, which deals with arbitration, do not specifically address interim measures by tribunals. Article 3345(1) of the Civil Code[83] and 317(1) of the CPC[84] only address the issue of procedure applied by arbitrators and do not clearly specify power on interim measures. Article 3345 of the Civil Code directs arbitrators to follow *procedures* prescribed by the CPC. Article 317 (1) CPC provides application of procedural rules, *'as near as may be, be the same as in civil court'*. Furthermore, Article 3044(1) authorizes arbitrators to grant safety measures to secure the execution of its judgments, and orders or awards by way of granting a mortgage on the immovable property of the other party. Though not comprehensive, such provisions can be used as a step forward to dispel the doubts regarding the appropriateness of the power to order interim measures by arbitrators. In addition, the provisions in the CPC dealing with interim measures give a clue that they are authoritative. So, one may interpret the combined readings of Article 317 of the CPC in tandem with

[81] Interview with Zufan W/Gebriel, deputy registrar, Federal First Instance Court (Ledeta), Addis Ababa, 25/10/2007 E.C

[82] Interview with Beresa Berhanu and Sentayehu Zeleke, judges, Federal First Instance Court, Ledeta 4th commerce bench, Addis Ababa, 25/10/2007 E.C

[83] Civil Code of Ethiopia, Proclamation No. 165/1960, Negarit Gazette, (1960), Article 3345(1)

[84] Civil procedure Code of Ethiopia, Decree No. 52/1965, Negarit Gazette, (1965), Article 317(1)

147-200 of the same as affirmation power of arbitral tribunals regarding interim measures.

Moreover, Article 65 of the Cooperative Society's Proclamation[85] gives wider power for arbitrators in this area. This law confers arbitrators the same power as civil court judges, among others, regarding the issuing of orders. As interim measures are procedural orders that are used by judges, this law in effect confers arbitrators the power to grant interim measures. However, this power should still be understood together with the limits stipulated under Article 66 that arbitrators, unlike judges, cannot oblige third parties. The ECX Revised Rules[86] vest the power to grant interim measures on arbitrators under Article 16.1.12. The section reads as follows:

> 16.1.12 *Discretion to pass interim orders*
>
> *The arbitrator(s) may issue such orders or directions as may be deemed necessary including orders or directions for safeguarding, interim custody, preservation, protection, storage, sale or disposal of the whole or part of the subject matter of the dispute or for its inspection or sampling without prejudice to the rights of the parties or the final determination of the dispute*.[87]

As observed from the rubric of the above provision, discretion is given to arbitrators with the ambit of caring not only for the final determination of the dispute but also for parties' rights. Generally, Ethiopian laws enacted after the codes manifested a desire for giving power to arbitrators to grant interim measures.

The point that is worth considering is whether the restrictive interpretations of the power of arbitrators promoted by the Civil Code[88] throws a shadow on the application of the Civil Procedure section that deals with interim measures[89] on arbitral tribunals. Answering the question of whether granting interim measures are considered as a jurisdictional matter to tribunals in the meaning of Article

[85] Cooperative Societies Proclamation, Proclamation No. 985/2016, Federal Negarit Gazette, (2016), Article 65

[86] Ethiopian Commodity Exchange Proclamation, Proclamation No. 550/1999 Federal Negarit Gazette, (1999), and Ethiopian Commodity Exchange Revised Rules, no. 5/2003, (2003), Article 16.1.12

[87] Ethiopian Commodity Exchange Revised Rules, no. 5/2003(bylaw, accessed from ECX office)

[88] Civil Code of Ethiopia, Proclamation No. 165/1960, *Negarit* Gazette, (1960), Article 3329 which read "The provisions of the arbitral submission relating to the jurisdiction of the arbitrators shall be interpreted restrictively"

[89] Civil procedure Code of Ethiopia, Decree No. 52/1965, Negarit Gazette, (1965), Article 147 *et seq to 179 & 200* Civil Procedure Code deals with different interim measures

3329 of Civil Code could be a way out to reach a solution. This provision deals with restrictions concerning the jurisdiction of tribunals. Article 3330 of the Civil Code would be of great help for interpreting the jurisdiction. Under this article, mention was made to the scope of jurisdiction that enumerates interpretation of submission, disputes regarding the 'jurisdiction of tribunal' and tests of the validity of the arbitral submission as areas constrained from the touch of the tribunal. Hence, one needs to check whether interim measures fall under this interpretation.

The author contends that interim measures are of different character than issues of competence stipulated under Art 3330 of the Civil Code. Because while the lists under Art 3330 of the Civil Code have the nature of preliminary matters of jurisdiction and validity of claims that have the effect of closing the files before entering into the merit, interim measures are about temporary remedies that aim to save parties' right or interest from loss and help the efficacy of the future award. So, it would be logical to hold that the restriction held under the Civil Code of Ethiopia regarding the tribunal's power does not stretch to interim measures. If the submission does not provide the jurisdiction of the tribunal, the tribunal will only be prohibited to rule on its competence of jurisdiction i.e. this provision is limiting *competence-competence* rule. As the exercise of granting of interim measures comes aftermath of determination of the competence of the arbitrator's jurisdiction, the tribunal power bestowed to grant interim measures remains intact. Accordingly, this construction can be taken as a safe way to conclude that the Civil Code does not prohibit arbitrators from freely ordering interim measures. Likewise, the regulation of water resource management that makes reference to the Civil Code and CPC for matters of arbitration not covered by the regulation could benefit from the above interpretations in granting interim measures.[90]

In conclusion, from the review of Ethiopian laws, it can be said that only interpretation of the Civil Code and CPC gives power to arbitral tribunals to grant interim measures. Indeed, the omissions in the codes have been taken over by wordings of later statutes that depict a shift to clear legal permission of arbitral tribunal in granting interim measures. The practices that reveal the arbitrators' tendency of granting interim measures in the country also points to the same trajectory.

[90] Ethiopian Water Resources Management Regulation, Regulation No 115/2005, Federal Negarit Gazette, (2005), Article 36

The draft arbitration and conciliation law of Ethiopia attempted to exhaustively deal with issues of interim measures.[91] It devotes one chapter to interim measures that manifested its base is on the UNCITRAL MODEL law. The chapter addresses, among others, the power of the arbitral tribunal to order interim measures, the conditions for granting interim measures, the grant of court-ordered interim measures as well as the recognition and enforcement of interim measures and set clear grounds thereof. The draft law also deals with modification, suspension and termination, as well as provision of security, disclosure and allocation costs related to interim measures**.**

5.2 The Practice of Institutional and ad hoc Tribunals

Little has been mentioned about the formation and function of institutional arbitration in Ethiopian laws. For this reason, only a few working institutions are available. To this end, works of arbitral institutions are neither boldly displayed nor able to contribute, as expected, to the development of ADR and arbitration. Undeniably, however, the existing institutions attempted to design their working rules of procedure with modern practices. Especially, Addis Ababa Chamber of Commerce and Sectoral Association (AACCSA), which provide arbitral service for members of the Chamber, assiduously engage in introducing trends of international chamber and studies related to arbitration.[92]

Under Article 3346 of the Civil Code, institutional rules constitute arbitral code making part of the arbitration agreement. For this reason, these institutional rules are helping as gap-filling rules in the area of laws that are not covered by state ordinance. Hence, when parties submit their cases to this institutional arbitration, the rules of the institutions will apply to parties unless the parties explicitly negate the rules under their contract. Thus, if the institutional rules included interim measures, no express agreement of the parties is needed for the tribunal to be ruled under it.

Despite the unevenness of the statutory declarations regarding the power of tribunals for interim measures, arbitral institutions have given the power to tribunals under their rules of arbitration. The leading arbitration institution, AACCSA rules (under Article 16 of the Revised Rule) and Article 29 of Ethiopian Arbitration and Conciliation Center rule portray the same. Likewise, ECX revised rule Article 16.1.12 provides arbitrator's authority to grant interim

[91] The new draft Arbitration and Conciliation Law of Ethiopia prepared in 2012 E.C and approved by council of ministers in 2013 E.C

[92] Interview with Ato Yohanes Woldegebriel, AACCSA director, Addis Ababa,08/10/2007 E.C

measures. Equally, Bahir Dar University Center of Arbitration Rules of arbitration**,** mediation and conciliation under Art 27 clearly declares interim measures.[93] In practice, both *ad hoc* and institutional arbitrators in Ethiopia work mostly with their power of interim measures.[94]

In the institutional arbitration of AACCSA) arbitrators grant interim measures, and when the requests come before the formation of the tribunal, AACCSA institution advises parties to go to court.[95] The other institutional tribunal currently functioning is the Ethiopian Commodity Exchange (ECX) Tribunal.[96] ECX Tribunal does not conduct more cases due to parties' tendency to settle differences by negotiation and conciliation. Future relationship of parties in ECX will matter a lot. Consequently, they prefer to settle cases amicably to be tried by arbitrators, in effect, the flow of cases to arbitration and the request of interim measures become minimal.[97]

Apart from institutional rules, tribunals in their decision reason out that Article 317 of the CPC gives equal power to arbitral tribunals as courts have to apply civil procedure rules that include provisional measures. For instance, in the case between *Yetegel Fere Home and Office Furniture Productions Union v Ethiopian Insurance Company*[98]*,* the tribunal held that any power given to state courts could also work to tribunals. The resolution of the tribunal and its basis is explained as follows:

> Parties once agreed to settle their dispute by arbitration, such contract is assumed the status of a binding law. So, the tribunal is deemed to be constituted by law.

[93] Bahir Dar University Center of Arbitration Rules of arbitration**,** mediation and conciliation, (2011 E.C), Article 27(1) which reads '**ተከራካሪ ወገኖች ጥያቄ ሲያቀርቡ ጉባኤዉ ጉዳዩን በተመለከተ ተገቢ ነዉ ብሎ ያሰበዉን ጊዜያዊ አገልግሎት ያለዉን ትእዛዝ መስጠት ይችላል**'

[94] Interview with Seyoum Bogale and Meseret Ayalew (arbitrators, Addis Ababa, 02/11/2007 E.C) reveal that *ad hoc* tribunals grant interim measures as any judges in court do. According to them, this is the understanding held by most ad hoc arbitrators. Tribunal order of the TV series *sews lesew drama and Nabkom energy plc (plaintiff) vs.Biruk films* plc (defendant), *unpublished,* manifest that tribunal directly order third parties.

[95] Interview with Ato Yohanes Woldegebriel, AACCSA director, Addis Ababa,08/10/2007 E.C

[96] Ethiopian Commodity Exchange Revised Rules, supra note 87.

[97] Interview with Ato Mulu Wordoffa, ECX lawyer, Addis Ababa, 27/10/2007 E.C

[98] Report of arbitral awards by Ethiopian Arbitration Conciliation Center vol. 1, (August 2000 E.C), p. 55-59 in the given case the plaintiff instituted a case with pauper. Defendant claimed security for costs from plaintiff with a fear that damages may not be reimbursed if rendered to its side for plaintiff fully lost its property due to accident. The tribunal finally accepted the case with pauper and denies the claim of guarantee for security of costs with a reason that the application in pauper indicate they will have no money even pledging for security.

> This tribunal refers Art 317 of CPC.[99] Any decision, order or decree given by court also could be rendered by tribunals. (Translation by the Author)

Practical instances of *Ad hoc* tribunal cases also manifest granting of interim measures even if parties in the arbitration do not give such power explicitly to such tribunals. For instance, the interim orders granted by the *ad hoc* tribunals of *Ethiopia Investment group PLC v. Desalegn Andualem*[100], '*sew lesew 'Sewlesew drama, Bisrat Gemechu* (plaintiff) *v. NebyuTekalegn, Solomon Alemu, Mesfin Getachew*, & Daniel *Haile*(defendants)[101] and *KLR Ethio- water drilling Plc.v Matoli joint venture* (respondent). In the first case, the *ad hoc* tribunal accepted the plaintiff's application for attachment of the defendants' building and ordered Addis Ababa 'Gulele sub city 'Wereda' 09 to attach house no. 786. On the other hand, the Tribunal seized for the 'Sewlesew' Drama and ordered Ethiopian Radio and Television Organization not to pay the income derived from the drama at its hand to a third party, to preserve 16.5% of its afterward income, and to be paid the remaining sum to spark film production and the respondents. The tribunal also ordered Buna International Bank (Addis Ababa *hayahulet* branch) to secure 16.5 % of the bank deposit in the name of *Sew lesew* until another order is issued by the tribunal.[102] In the KLR case, the applicant, KLR Ethio-water drilling Plc. requested payment for construction and together apply for the injunction of money payable to Matoli joint venture found at hands of the Ministry of Water works. And the tribunal ordered the Ministry of Water works to temporarily withhold money payable to the Matoli joint venture.

From the arbitral cases reported by the Ethiopian Arbitration and Conciliation Center (EACC)[103] and observing the *ad hoc* tribunal cases, the types of interim measure that parties require and the tribunals provide include conservation of property, securing costs, freezing accounts, and preserving status quo.

The crucial issue that demands an inquiry under this part is whether the arbitral tribunal can later review provisional orders granted by the court. The answer to such question depends on the state position on the purpose of giving power to

[99] Art 317(1) Civil Procedure Code declares that the procedure before an arbitral tribunal shall as near as may be as in civil court

[100] *Ethiopia Investment group P.L.C (plaintiff)v. Desalegn Andualem*(*defendant*), 29/8/2007 E.C ad hoc tribunal accepted plaintiff's application for attachment of defendants building and ordered Addis Ababa Gulele sub city Wereda 09 to attach house no. 786, unpublished

[101] *Sewlesew drama, Bisrat Gemechu* (plaintif) *v Nebyu Tekalegn, Solomon Alemu, Mesfin Getachew*, &*Daniel Haile* (defendants), 25/09/2006 E.C, arbitration tribunal held at Addis Ababa, unpublished

[102] Supra note 100

[103] Report of arbitral awards by Ethiopian Arbitration Conciliation Center vol.1 (August 2000 E.C), and Vol. 3, (November 2004 E.C)

courts to grant interim measures for cases under arbitration.[104] Ethiopian laws do not have clear provision on this issue. In a copyright infringement case that involves *Nabkom energy* plc (plaintiff) *v Biruk films* plc (defendant)[105], the claimant asked the tribunal to set aside the injunction order given by regular court for the film not to be seen in cinema.[106] In the Case, the tribunal left the question without determining and rendering a final award. The author suggests that it has no problem if the court order is later tried by an arbitral tribunal, as an interim measure is of temporary nature no *res judicata* issue would be raised. Also, as the main tribunal has the power to revise orders given by the emergency arbitrator, by considering the situation, there is no reason why it does not revise the courts interim measure. Because parties in signing arbitration contract give better power and position than arbitrators.

To wrap up, the practices of tribunals show that arbitrators grant interim measures in Ethiopia. In some cases, tribunals order third parties directly other than using courts.

5.3 Emergency Arbitrators and Court-Ordered Interim Measures in Ethiopia

As mentioned, the greatest need for interim measures arises often when the arbitral tribunal has not yet been established. This is so for it can take a longer period for a tribunal to fully constitute. For such critical time, institutional arbitration gives solutions by developing optional rules for emergency protection like the American Arbitration Association (AAA)[107] or implementing pre-arbitral referee procedure like the International Chamber of Commerce (ICC).[108] As a result, parties could obtain special arbitrator for the urgent situation. However, it is more baffling for *ad hoc* tribunals as they do not have an administrative body that could help the justice system provide immediate emergency protective and preservative orders of protection. In such cases, a court remedy would be the only solution left for parties. Generally, there are two options for parties to ask assistance for interim measures before the establishment of a tribunal. These are seeking an order from a state court or

[104] UNCITRAL Digest, supra note 13, p.95

[105] *Nabkom energy p.l.c v Biruk films p.l.c* published at Arbitral award report EACC vol.3, (November 2004 E.C), p. 397-402

[106] Arbitral award report EACC vol.3, (November 2004 E.C), p. 397-402

[107] The American Arbitration Association (*AAA),* Rules of arbitration, (October 1, 2013), Rule 38(a) and (b) provide "Optional Rules for Emergency Measures of Protection"

[108] International Chamber of Commerce (ICC), Rules of arbitration, (March 1, 2017), Article 29, provides a Pre-Arbitral Referee Procedure, parties to obtain urgent measures when difficulties arise in contractual relationships, prior to referral to arbitration.

using emergency arbitrators given that institutional arbitral tribunals have such options.

Concerning emergency arbitrator in Ethiopia, rules of arbitral institutions such as AACCSA and tribunal of ECX including Ethiopian Arbitration and Conciliation Center do not have provisions regarding emergency arbitrators. These tribunal procedural rules simply provide the fact that quest of party of such orders from the court is not incompatible with an arbitration agreement. Therefore, it seems possible to conclude that the function of emergency arbitrators is not regulated sufficiently and effectively in Ethiopia.

As there is no arrangement for emergency arbitration in Ethiopia, parties forced to resort to court[109] when urgency arises before establishing the arbitral tribunal. In such cases of pre-establishment of the arbitral tribunal (appointment of arbitrator/s), courts accept applications and grant the necessary interim orders. Article 3344(2) of the Ethiopian Civil Code envisages that filing for regular courts to preserve parties right shall not constitute a lapse of arbitration. Though Article 3344(2) of the Civil Code entitled parties to obtain interim measures from courts for the preservation of their rights, the Civil Code lacks specificity about what the phrase "preserving rights from extinction" includes. The author considers this phrase as wider in range that could be understood to include any interim measures of protection without being specified to any list. Because the heart of the *raison d'être* espoused by this law is the preservation of right. In practice, the nature of the measure does not matter for issuing interim measures by courts and regular courts grant any measure they deem appropriate for the circumstance.

Pragmatically, in most instances, parties bring the request of interim measure to courts together with the application for appointment of arbitrator/s.[110] In some cases, interim orders are also claimed in courts separately from the request of the appointment of arbitrators. The case involving Dr. *Yalem Ambaye v. Yemeskel Minch*[111] showed that the regular court granted interim relief for the application of interim measure sought without request for the appointment of an

[109] Interview with Ato Yohanes Woldegebriel, AACCSA director, tells to author that even his tribunal gives advice to parties to go to court when interim measure issue arises before the formation of tribunal

[110] *Yonas Bekele v Trans Africa resource co*, Federal First Instance Court, Civil File no. 218133, 16/4/07 E.C, unpublished. Also verified by Interview with Beresa Berhanu, judge, Federal First Instance Court, Ledeta 4th commerce bench, Addis Ababa, 25/10/2007 E.C

[111] *Dr. Yalem Ambaye* (plaintiff) *v Yemeskel minch*(defendant), Federal First Instance Court, civil file no. 217459, 30/12/06 E.C. Interim order granted *ex parte* then notice about the order send to defendant

arbitrator.[112] In addition, even if the request was denied in the case *Zelalem Merkeb v Mesraktsehay Cooperative Union & Ato Haylu Sahilu,*[113] the injunction application was separately brought. In all decisions, courts reason out that the acceptability of interim measures before the constitution of the tribunal is attributed to the urgent nature of the order and preservation of parties' rights. However, courts are not welcoming requests of the interim measure after the institution of the tribunal. In the Federal First Instance Court in the case between *Faders biloyed Co. limited v. EEPCO*[114] and in the case between *Zelalem Merkeb v Mesraktsehay Cooperative Union & Ato HayluSahilu,*[115] the court in its order held that interim measures claimed after the constitution of the tribunal have to be asked from such tribunal and not from the court.

The trend in the practice (the priority to tribunal whenever constituted) shows that the courts' role to grant interim measures in Ethiopia is sparingly applied whilst such priority is not advocated under Article 3344 of the Civil Code. Moreover, interviews with AACCSA tribunal reinforce such position; in a sense that tribunal priority is advocated so much so that if the tribunal is constituted interim order, is granted by such tribunal. Nevertheless, courts have to give interim measures even after the constitution of the tribunal as they are authorized by Art 3344(2) CC and failure to exercise this power may affect the party's right.

Regarding jurisdiction of courts where an application for an interim measure is instituted, the Federal Courts Establishment Proclamation No. 25/96 (as amended) under Article 14 gives the jurisdiction to First Instance Court to pursue the nature of application not computed by money.[116] Pursuant to this proclamation, jurisdiction to entertain interim measures falls under Federal First Instance Court. The practice goes in congruence with the fact that parties go to Federal First Instance Courts for obtaining an order of interim measures. However, in applying for temporary injunction Article 154 of the CPC of Ethiopia requires institution of a petition before a court as a precondition to granting the orders. This institution of a statement of claim before the court could later raise an issue of negating the submissions to arbitration tribunal. The

[112] Ibid
[113] *Zelalem Merkeb v Mesraktsehay Cooperative Union &Ato Haylu Sahilu,* Federal First Instance Court, civil file no.218945, 01/04/07 E.C
[114] *Faders biloyed Co. limited v. EEPCO,* Federal First Instance Court, file no. 216730, 29/11/2006 E.C
[115] *Zelalem Merkeb v Mesraktsehay Cooperative Union &Ato Haylu Sahilu,* Federal First Instance Court, civil file no.218945, 01/04/07 E.C
[116] Federal Courts Proclamation, Proclamation No. 25/1996, Federal Negarit Gazette, (1996), Article 14 Also, Civil procedure Code of Ethiopia, Decree No. 52/1965, Negarit Gazette, (1965), Article 18

practice, however, remedies this conundrum by arranging a separate filing system called *order files* that are tailored to serve orders of such kind. Thus, filing to state courts for interim measures even if corroborative with the petition do not constitute as inconsistent with arbitration agreements.

The laws governing arbitration in Ethiopia do not specifically lay down conditions to grant arbitral interim measures. Taking provisions of Article 147, 154 to 179 and 200 of the CPC that regulate the general section of litigation would help the justice system ensures a fair hearing and balancing parties' interest. This is because Article 317 of the CPC and Article 3345 of the Civil Code allow using these provisions as they state that arbitrators need to follow as nearly as possible to the procedure of court litigation. The Federal Supreme Court Cassation decision in *Gebrukore v. Amadeyiu Federech* case also reaffirms a position that arbitrators should use the CPC in their arbitral proceeding.[117] Furthermore, arbitral institutions' practice manifests that the conditions set in the CPC apply for granting or denying interim measures for parties in arbitration.[118]

In addition, granting interim measures upon the request of one party without hearing the other is exceptionally allowed. While examining *ex parte* application of interim measures, Article 157 of the CPC requires that notice to be given to the opposite party. To this end, Art 157 of the CPC provides order to be given without notice where it is persuaded that the object of granting an injunction would be defeated by delay. As to arbitral tribunal, the same principle is required to be applied by using Article 17 of the CPC and 3345 of the Civil Code that seeks arbitrators to follow as nearly as possible to the procedure of court litigation. Practically, whenever an interim measure application is instituted, the other party will be summoned and required to come up with a reason why such order should not be granted. In the case that involved *Ethiopia Investment group P.L.C* (*plaintiff*) *vs. Desalegn Andualem*(*defendant*), arbitrators ordered the defendant to know and attend the case with himself or via his attorney.[119] If, however, the order is given *ex parte,* article 158 of CPC

[117] *Gebrukore*v. *Amadeyiu Federech*, Federal Supreme Court, Cassation Division, File No 52942, 2003 E.C. By virtue of federal courts amendment proclamation no. 454/2005 Art 2(1) oblige Interpretation of a law by the Federal Supreme Court rendered by the cassation division with not less than five judges shall be binding on federal as well as regional council at all levels.

[118] Interview with Ato Mulu Wordoffa, ECX lawyer, Addis Ababa, and Ato Yohanes Woldegebriel, Director of AACCSA, Addis Ababa, 27/10/2007 E.C confirm that arbitrators use conditions of Civil Procedure Code in granting interim measures

[119] *Ethiopia Investment group P.L.C* (*plaintiff*) *V Desalegn Andualem*(*defendant*), 29/8/2007 E.C also see, supra note 114, *Dr. YalemAmbayev Yemeskelminch,* Federal First Instance Court granted *ex parte* order

confers the other party a chance to apply for setting aside of the order and the court may vary, discharge or set aside the order accordingly.

5.4. Enforcement of Arbitral Interim Measures in Ethiopia

In Ethiopia, there is no clear legal stipulation about enforcing arbitral interim measures though the AACCSA has no enforcement problem for parties that are willing in executing orders.[120] In other areas, indeed, arbitrators do have certain ways of enforcing their orders in practice. For example, in matters related to evidence, the tribunal may presume negative inference if a party refuses to produce evidence before the tribunal.[121]

It is generally admitted that arbitrators have no coercive power to enforce their orders. Thus, arbitrators need to ask court assistance for coercing especially third parties that are not a party to the arbitration agreement. Both the Civil Code and the CPC are silent on the enforcement of interim measures. However, the Cooperative Society's Proclamation comes up with rules of execution of orders amidst providing execution of arbitral dispositions in general. Under this law, arbitrators have been given equal power as civil judges. This seems to provide arbitrators with the power of granting any order including orders against third parties.[122] However, if there are such bodies that are required to comply, and failed to put the order into effect (by their own free will), the instance of requiring court assistance for enforcing arbitral rulings is provided under Art 66 of the same proclamation.[123] The wordings of Art 65 and 66 of the Cooperative Societies Proclamation reads as:

> "Any decision, order or award made under [the] Proclamation shall be taken as though made by a civil court, and, where appropriate, the courts shall have jurisdiction to order the enforcement of any such decision, order or award. The Arbitrators shall have the same power, with regard to the cases provided under Article 65 of this Proclamation, as a Civil Court for the summoning of witnesses, production of evidence, the issuing of orders or the taking of any legal measures." (Italics supplied)

[120] Interview with Ato Yohannes Woldegebriel, Director of Arbitration Institute of AACCSA, Addis Ababa, He explained that parties in arbitration at the institute executes because of good relation, with consent and with full believe in the institution service.

[121] Yesilirmark, supra note 5, p.28

[122] Cognizance is however required that, Arbitration, as private forum, demands voluntarily compliance of orders

[123] Cooperative Societies Proclamation, Proclamation No. 985/2016, Federal Negarit Gazette, (2016), Article 65,66

Generally, as it is done in other jurisdictions, voluntary compliance with arbitral interim measures or execution via the assistance courts are the two means of enforcing arbitral interim measures applicable in Ethiopia. Mr. Yohanis, the director of the **AACCSA** Arbitration Institute complains about the refusal of executive bodies to recognize arbitral interim measures directly.[124]

The director of arbitration institute of AACCSA explained that majority of their interim measures are enforced voluntarily.[125] Under the ECX tribunal also, almost in all instances, parties comply with orders for they do not want to lose a single day of a transaction by an injunction of their seat under ECX or trading under this body.[126] The reasons for the increase in adherence of orders of institutional tribunals could be parties' commitment to membership of tribunals' and honor of these institutional arbitrations.[127] The voluntary compliance is not limited to parties but, in some cases, third parties also demonstrate their will to accept interim orders that come from *ad hoc* arbitrators. For instance, in the case of *Ethiopia Investment Group Plc.* (plaintiff) *v Desalegn Andualem*(defendant), the *ad hoc* tribunal ordered Gulele Sub city Woreda 09 to halt the transfer of a building belonging to the defendant.[128] The order was complied. The cases submitted to institutional arbitration mainly request informative data like asking banks whether a party does have an account and orders to enforce only when they instantly believe that the institution voluntarily executes it.[129] This implies that institutional arbitration could give interim measures that involve third parties less often than *ad hoc* tribunals.

If parties to the arbitration agreement or third parties refuse or fail to implement the interim orders of arbitrators, seeking execution via state court is the remedy. In practice, there are two kinds of court-based execution of arbitral interim measures in Ethiopia. The first is by fixing the stamp or seal of the court on the paper that holds orders of arbitrators upon the judge's approval. For instance, in the case of *Cyber soft plc v Hansa luft bild (defendant)*[130] the arbitral tribunal

[124] Interview with Yohanes W/Gebriel, Director of AACCSA, Arbitration Institute, 08/10/2007 E.C
[125] Ibid
[126] Interview with Ato Mulu Wordoffa, ECX lawyer who work in the division of organizing arbitration panel, 29/12/2007 E.C in his word 'enforcement is automatic'
[127] Interview with Yohanes W/Gebriel, director of AACCSA arbitration institute, 08/10/2007 E.C (he pointed out that for his knowledge the number of cases that go to court for assistance of execution is not beyond four files. Also Interview with Meseret Ayalew and Zufan W/Gebriel, Federal First Instance Court (Ledeta) deputy registrar, 25/10/2007 E.C confirmed that its *ad hoc* arbitrators that mainly ask for court seal to be stamped on the leaf of interim orders and they do not remember questions from institutional arbitration
[128] *Ethiopia Investment group P.L.Cv Desalegn Andualem*(defendant), 29/8/2007 E.C, unpublished
[129] Interview with Yohanes W/Gebriel, director of AACCSA Arbitration Institute, 08/10/2007 E.C
[130] *Cyber soft plc v Hansa luft bild (defendant),* order granted on 27/10/2007 E.C, unpublished

granted interim order to be performed by Addis Ababa City Administration for payment due to the defendant under its hand. In the meantime, for effective execution, Cyber soft demanded seal of the court appearance on the order, by referring it to the Federal First Instance Court and the Court allowed the same to be done.[131] The main office of the registrar of the Federal First Instance Court (Lideta) experiences such a process. When a request for a stamp on the leaf of arbitral interim order comes from parties, the registrar will open a file in what they call *order files* (files that simply demand orders and their relief is not computed in terms of money), then it will be brought to the concerned bench (mostly commerce bench). If the judge accepts the application, he/she will order the stump to be sealed and the registrar will seal the stamp. Failing to obey either order of interim measure by the court seal or direct order by court will constitute contempt of court.[132]

The other way of executing arbitral orders via court is by direct order from the court. In this case, the court will order the interim measures mentioned in arbitral orders by *de novo* (afresh) basis, stating the ground that such order is an application by a party in the arbitration. Comparing to institutional tribunal, the question of court assistance mainly comes from parties under ad hoc tribunals.[133] The reason for such preponderance might be attributed to the membership dedication of parties to an institutional arbitration, stated above.

In all cases of court assistance in enforcing interim measures, judges invoke Art 154 of the CPC as a source of ruling and this does not apply the general provisions of enforcement of an award. The reason might be the cognizance of the temporary nature of the orders. This submission is indeed in consonance with the nature of interim measures. Even if one opts to apply the provisions of execution of award for enforcing interim measures, he/she cannot meet the imminent need of the execution that the interim measure demands.

Mention has already been made above that cross-border enforcement of arbitrator-granted interim measure is not easy. It is the bilateral and multilateral agreements and reciprocity principle that would give effect to the execution of provisional measures granted by arbitrators. Though Ethiopia currently ratified the New York Convention, the extra-territorial enforcement of arbitral interim measures in Ethiopia remains to be carried out via either reciprocity or by

[131] Federal First Instance Court, file no. 221839, the court ordered seal stumped to the arbitral interim orders of Cyber soft plc on 27/10/2007 E.C

[132] The Criminal Code of FDRE, supra note 77.

[133] Interview with Zufan W/Gebriel, deputy registrar of Federal First Instance Court, (Ledeta branch)25/10/2007 E.C

agreements with states. Because this Convention does not stipulate the enforcement of interim measure. An agreement like the Ethio-China Mutual Legal Assistance in Civil and Commercial Matter agreement (ratified on 2 May 2017) stated above can be used as a means of enforcement**.** Regarding an application procedure submitted to courts to execute foreign arbitral interim measures, parties might undergo the procedure of execution of the foreign award, in Ethiopian case Federal High Court.[134]

Conclusion

Parties to an arbitration agreement may demand justice for the protection of rights whose existence might be jeopardized otherwise. There seem to be, indeed, conflicting interests in the process of ordering interim measures. Those parties whose rights are at peril and due process right of the other party against whom the order is given must be balanced. Setting clear conditions by law for granting interim measures could help maintain a balance between such interests. The current practice in international arbitration, the institutional rules of various arbitration institutions and UNICITRAL Model Law show that the power to order interim measures is given to tribunals and courts alike.

In Ethiopia, nevertheless, there is no clear provision regarding the arbitral power, the type, the condition and enforcement of interim measures in the Civil Code and CPC sections that deal with arbitration. Of course, in other parts of the Civil Code and other statutes, there is a blessing of tribunals' authority to grant interim measures. In particular, Art 3344(2) of the Civil Code states that petitioning to the court to seek interim orders does not affect the right to bring the case for arbitration. However, courts tend to be reluctant to order interim measures after the formation of tribunal. Thus, arbitration tribunals may take this opportunity the install the practice and jurisprudence of tribunal's power to issue interim measures. Institutional arbitration rules in Ethiopia could be the pioneers to endorse the power of tribunals to grant interim measures.

Concerning the enforcement of arbitral interim measures, the practice of arbitration institute of AACCSA shows that members' cooperation could help them experience a trouble-free execution. Otherwise, enforcement of provisional measures in Ethiopia is also conducted via court either by affixing a seal on the arbitral relief or by directly giving orders. However, except under cooperative society proclamation which is limited to members of the cooperatives, court

[134] Federal Courts Proclamation, Proclamation No. 25/1996, Federal Negarit Gazette, (1996), Article 11(2)(c)

assistance in enforcing arbitral interim measures is not addressed precisely. Moreover, the statutes do not seem to set standards for the refusal of executing interim measures. The draft arbitration and conciliation law may, of course, give opportunity to address the problem. Until this law is put into practice, parties should be meticulous to specifically address the matter during the making of an arbitration agreement. In any case, the arbitral practice in granting interim measures needs to be encouraged and continue contributing its effort until the required change is made in the state's law. Last, but not least, in light of the benefits of arbitral interim measures, the interpretation of provisions of the Civil Code and the CPC should be used to make use of arbitral interim measures.

የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት

የሰ/መ/ቁ. 141625

ሐምሌ 26 ቀን 2010 ዓ.ም

ዳኞች፡- አለማው ወሌ
መስጠፋ አህመድ
አብርሃ መሰለ
ፈይሳ ወርቁ
ጳውሎስ ኦርሺሶ

አመልካች፡- ወ/ሮ አድና መላኩ
ተጠሪ፡- የወልዲያ ከተማ አገልግሎት ጽ/ቤት----ክክልሉ ፍትህ ቢሮ ፍሬሀይወት አበባቀረቡ

መዝገቡ ተመርምሮ ተከታዩ ፍርድ ተሰጥቷል፡፡

ፍ ር ድ

ይህ የሰበር አቤቱታ ሊቀርብ የቻለው አመልካች የወልዲያ ወረዳ ፍርድ ቤት በመ/ቁ 0104064 በቀን 24/02/2009 ዓ.ም ጉዳዩ በቀጥታ ክስ በፍርድ ቤት የሚታይ አይደለም በማለት የሰጠውን ብይን ፣የሰሜን ወሎ መስተዳድር ዞን ከፍተኛ ፍርድ ቤት በመ/ቁ 19155 በቀን 27/04/2009 ዓ.ም በፍርድ፣ የክልሉ ጠቅላይ ፍርድ ቤት ሰበር ሰሚ አጣሪ ችሎት በመ/ቁጥር 03-16739 በ27/06/2009 ዓ/ም በትእዛዝ በማጽናታቸው መሠረታዊ የህግ ስህተት የተፈፀመበት በሆኑ በሰበር ታይቶ ይታረምልኝ በማለታቸው ነው፡፡

ጉዳዩ የዳኝነት ሥልጣንን የሚመለከት ሲሆን በስር ፍ/ቤት አመልካች ክሳሽ ተጠሪ ደግሞ ተክሳሽ ነበሩ፡፡ የክሱ ይዘትም፡- በወልዲያ ከተማ 06 ቀበሌ ክልል ውስጥ የሚገኘውና አዋሳኙ በክሳቸው የተጠቀሰው ቦታ እንዳላቸውና በዚህ ቦታ ላይ ቤት ያላቸው፣ ባህር ዛፍና ሁለት እግር ጽድ ያፈሩ መሆኑን ይዞታውን ለረዥም ጊዜ ይዘው በሚገኙበት ሁኔታ ተጠሪ ህግና መመሪያን መሰረት ሳያደርግ፣ ለአመልካችም 500 ካ/ሜትር ይዞታ ሳይጠብቅላቸው ቦታውን እየሸነሸነ ለግለሰቦች እየሰጠ እንደሚገኝ፣ በቦታው ላይ የሰሩትን ቤት ያለምንም ምክንያት በደዘር መጋቢት ወር 2007 ዓ/ም ያፈረሰባቸውና አቤቱታቸውን ለሚመለከተው አካል አቅርበው የሚመለከታቸው አካላት እንደማንኛውም ባለይዞታ 500 ካ/ሜትር ይዞታ ለአመልካች እንዲጠበቅላቸው አስተዳደራዊ ውሳኔ የሰጡ መሆኑንና በዚህ አግባብ እንዲወሰንላቸው ለተጠሪም ሆነ ለሚመለከተው አካል አመልክተው መፍትሔ ያላገኙ መሆኑን ገልጸው ለክሱ ምክንያት ከሆነው ነባር ይዞታ ላይ 500 ካ/ሜት እንዲጠበቅላቸው፣ ክሕግ ውጪ በደዘር ለፈረሰባቸው ቤት ግምት ብር 100,000.00 (አንድ መቶ ሺህ ብር)፣ የባህር ዛፉና የፅዱ ግምትም እንዲከፈላቸው እንዲሁም ከ500 ካ/ሜትር በላይ ላለው ይዞታም ካሳ እንዲከፈላው ይወሰን ዘንድ ዳኝነት መጠየቃቸውን የሚያሳይ ነው፡፡ የአሁኑ አመልካችም ጉዳዩ በአዋጅ ቁጥር 721/2004 እና በአዋጅ ቁጥር 455/97 መሰረት በፍርድ ቤት በቀጥታ ክስ የሚታይ ያለመሆኑን፣ አመልካች በቦታው ላይ መብት የሌላቸው መሆኑንና ሌሎች የክርክር ነጥቦችን በማንሳት ተከራክሯል፡፡ የሥር ፍርድ ቤትም ስልጣንን መሰረት አድርጎ የተነሳውን የተጠሪን መቃወሚያ መርምሮ አመልካች

የከተማ ቦታ ይዞታን እንዲለቁ የተደረጉ በመሆኑ ጉዳዩ መታየት ያለበት በከተማ አስተዳደሩ ስር ለተቋቋመ የመሬት ነክ አቤቱታ ሰሚ አካል ነው እንጂ ለፍርድ ቤት አይደለም የሚል ምክንያት አስፍሮ ፍርድ ቤቱ ጉዳዩን በቀጥታ ክስ የማየት የስረ ነገር ስልጣን የለውም ሲል በብይን የአመልካችን ክስ ውድቅ አድርጎታል። በዚህ ብይን የአሁኑ አመልካች ቅር በመሰኘት ይግባኛቸውን ለሰሜን ወሎ መስተዳድር ዞን ከፍተኛ ፍርድ ቤት አቅርበው ፍርድ ቤቱም ግራ ቀኙን አከራክሮ የሥር ፍርድ ቤት የሰጠውን ብይን ተገቢ ነው በማለት አጽንቶታል። በመጨረሻም አመልካች የሠበር አቤቱታቸውን ለክልሉ ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት አቅርበው በአጣሪው ችሎት ተሰርዞባቸዋል። የአሁኑ የሠበር አቤቱታ የቀረበውም ይህንኑ በመቃወም ለማስለወጥ ነው። የአመልካች የሰበር አቤቱታ መሰረታዊ ይዘትም፡- የአመልካች ክስ መሰረታዊ ይዘት ከሕግ ውጪ የተወሰደው ቦታና የወደመው ንብረት በሕጉ አግባብ ታይቶ ባለይዞታነታቸው መብት እንዲጠበቅላቸውና ለወደመው ንብረት ደግሞ ካሳ እንዲከፈል የሚያሳይ ሁኖ እያለ የክሱን መሰረታዊ ይዘት ሳይገነዘቡ ጉዳዩ በቀጥታ ክስ በፍርድ ቤት የሚታይ አይደለም በማለት መወሰናቸው ያላግባብ ነው የሚል ሲሆን አቤቱታቸው ተመርምሮም ኣመልካች በሕገ ወጥ መንገድ ቦታዬ ተወስዶአል፣ ንብረቴም ወድሟል በማለት ያቀረቡት ክስ በአስተዳደራዊ መልኩ ብቻ የሚታይ ነው በማለት የሥር ፍርድ ቤቶች አዋጅ ቁጥር 721/2004 እና የሲዝ ደንብ ቁጥር 103/2004 በመጥቀስ የመወሰናቸውን አግባብነት ለመመርመር ሲባል ጉዳዩ ለዚህ ችሎት የቀረበ ሲሆን ተጠሪ ቀርቦም ግራ ቀኙ በዕሁፍ እንዲከራከሩ ተደርጎአል።

የጉዳዩ አመጣጥ አጠር ባላመልኩ ከላይ የተመለከተው ሲሆን ይህ ችሎትም የግራ ቀኙን ክርክር ለሰበር አቤቱታው መነሻ ከሆነው ውሳኔ እና አግባብነት ካላቸው ድንጋጌዎች ጋር በማገናዘብ ጉዳዩን ለዚህ ችሎት ያስቀርባል ሲባል ከተያዘው ጭብጥ አንጻር በሚከተለው መልኩ መርምሮታል።

ከክርክር ሂደት መገንዘብ የሚቻለው አመልካች ከነባር ይዞታቸው ውስጥ በሕጉ አግባብ ሊጠበቅላቸው የሚገባው ይዞታ መብት ያልተጠበቀላቸው መሆኑንና በይዞታው ላይ የነበሩ ንብረቶችም ኪሳራ ሳይከፈላቸው በዶዘር የወደሙባቸው መሆኑን ጠቅሰው ክስ የመሰረቱ መሆኑን፣ ተጠሪ የሚከራከረው ደግሞ ጉዳዩ ከህግ ውጪ የተያዘውን የከተማ ቦታ የማስለቀቅ ጉዳይ በመሆኑ ለተጠሪ በሕጉ ከተሰጠው ስልጣን አንፃር ጉዳዩ የከተማ ቦታን ማስለቀቅ ጉዳዮች አቤቱታ ሰሚ አካል ከሚቀርብ በስተቀር በቀጥታ ክስ በፍርድ ቤት የሚታይ አይደለም በማለት የሚከራከር መሆኑን ነው።

ፍርድ ቤቶች በህግ የሚቋቋሙ በመሆናቸው የዳኝነት ስልጣናቸው የሚመነጨውም ከህግ ነው። የማንኛውም ፍርድ ቤት ስልጣን በህግ ተወስኖ የሚሰጥ በመሆኑ ፍርድ ቤት የቀረበለትን ጉዳይ ተቀብሎ ከማስተናገዱ በፊት ጉዳዩን /ክሱን/ ለማየት በህግ የተሰጠ የዳኝነት ስልጣን ያለው መሆኑን የማረጋገጥ ኃላፊነት አለበት። በህግ የዳኝነት ስልጣን ሳይኖረ የሚሰጥ ውሳኔ የህግ መሰረት ያለው ነው ለማለት አይቻልም።

ወደ ያዝነው ጉዳይ ስንመለስ አመልካች በስር ፍርድ ቤት የጠየቁት ዳኝነት ከነባር ይዞታቸው ውስጥ 500 ካ/ሜትር እንዲጠበቅላቸውና በይዞታው ላይ የነበረው ንብረትም ከሕግ ውጪ በመወደሙ ካሳ ሊከፈለኝ ይገባል በማለት ነው። ተጠሪም ይዞታውን

ከሕግ ውጪ በመያዙ መውሰዱንና አመልካች በሕግ አግባብ የያዙት ይዞታ ደግሞ የተጠበቀላቸው መሆኑን ገልጾ ጉዳዩ የከተማ ቦታን ከማስተዳደር ስልጣኑ ጋር የተያያዘና በከተማ ቦታ ማስለቀቅ ጉዳዮች አቤቱታ ሰሚ አካል ቀርቦ ሊታይ ይገባል በማለት የሚከራከር መሆኑን ተገንዝበናል።

በመሰረቱ ካሳን አስመልክቶ የሚቀርቡ አቤቱታዎችና ይግባኝ በአዋጅ ቁጥር 455/97 አንቀጽ 11 በግልጽ ተደንግጓል። በከተማ አስተዳደር የከተማ መሬት ማስለቀቅ ይግባኝ ሰሚ ጉባኤ ካለ ካሳውን አስመልክቶ የሚቀርበው ቅሬታ ለዚህ አስተዳደራዊ አካል የሚቀርብ ስለመሆኑ ሕጉ የሚደነግግ ሲሆን የከተማው አስተዳደራዊ አካል ካሳውን አስመልክቶ በሚሰጠው ውሳኔ ላይ ቅሬታ ያለው ወገን ለመደበኛ ፍርድ ቤት ይግባኙን ማቅረብ እንደሚችልም ሕጉ ደንግጎ ይገኛል። እንዲሁም ይግባኝ ሰሚው ፍርድ ቤት የሚሰጠው ውሳኔ የመጨረሻ ስለመሆኑም ሕጉ ይደነግጋል። ሆኖም በአዋጁ መሰረት ይዞታው የተወሰደው ያለአግባብ ነው በሚል መሬት እንዲለቀቅ በተላለፈው ውሳኔ ላይ ቅሬታ ማቅረብ የሚቻልበት ሁኔታ በአዋጁ ውስጥ አልተካተተም።

የሊዝ አዋጅ ቁጥር 721/2004 በአንቀፅ 26() ስር አግባብ ያለው አካል ከቦታው ለሚነሳው ንብረት ተመጣጣኝ ካሳ በቅድሚያ እንዲከፈል በማድረግ የከተማ ቦታ ይዞታን ለሕዝብ ጥቅም ሲባል የማስለቀቅና የመረከብ ስልጣን እንደሚኖረው ሲደነግግ በተጠቃሹ ድንጋጌ ንዑስ ቁጥር አራት ስር ደግሞ አግባብ ያለው አካል በሕገ ወጥ መንገድ የተያዘን የከተማ ቦታ በአዋጁ አንቀጽ 27 መሰረት የማስለቀቂያ ትዕዛዝ በመስጠትና ካሳ መክፈል ሳያስፈልግ የሰባት ቀናት የፅሑፍ ማስጠንቀቂያ ብቻ ለባለይዞታው በአካል በመስጠት ወይም በቦታው በሰፈረው ንብረት ላይ በመለጠፍ የማስለቀቅ ስልጣን እንደሚኖረው ተመልክቶአል። የማስለቀቂያ ትዕዛዝን ወይም ማስጠንቀቂያ የሚመለከቱ አቤቱታዎች አቀራረብን በተመለከተም አዋጁ በአንቀጽ 28 ስር ያሰፈረ ሲሆን በአቤቱታዎች ላይ ስለሚኖረው ይግባኝም በአዋጁ አንቀፅ 29 ስር ሰፍሮ ይገኛል። በመሆኑም አዋጅ ቁጥር 721/2004 በሕገ ወጥ መንገድ የተያዙ የከተማ ቦታዎችን እንዲለቀቁ የሚደረግበት ስርዓት በግልጽ የተመለከተ ሲሆን አግባብ ያለው አካል በሚሰጠው ውሳኔ ላይ ቅሬታውን ለይግባኝ ሰሚው ጉባኤው ማቅረብ እንደሚችል ሕጉ መደንገጉ ጉዳዩ በቀጥታ ወደ ፍርድ ቤት የሚሄድበት አግባብ የሌለ መሆኑን የሚያሳይ ነው። ይግባኝ ሰሚው አካል ጉዳዩን የሚያስተናግደውም አቤቱታው በቅድሚያ መሬቱን እንዲለቅ ትዕዛዝ ለሰጠው አካል ቀርቦ መስተናገዱ ሲረጋገጥ መሆኑን በአዋጁ የከተማ ቦታን ማስለቀቅ ጋር በተያያዘ የሚነሱ ክርክሮችን በተመለከተ የተዘረጋው ስርዓት ያስገነዝበናል።

ወደ ተያዘው ጉዳይ ስንመለስም አመልካች ክሱን የመሰረቱት የነባር ይዞታ ባለመብትነት እንዲጠበቅላቸውና በተጠሪ የወደመ ንብረት ካሳ እንዲከፈላቸው ሲሆን የክሳቸው መሰረታዊ ይዘት የሚያስገነዝበውም የነባር ይዞታ መብትን የሚመለከቱ ህጎች የጠበቁላቸው መብቶች ሳይከበሩላቸው ሕጉቹ ተጥሰው ይዞታው የተወሰደባቸው መሆኑንና ይዞታው ሲወሰድም በላዩ ላይ የሰፈረው ንብረት የወደመባቸው መሆኑን በመሆኑ ነባር ይዞታን የሚመለከቱ ሕጎችንና የፍ/ብ/ሕ/ቁጥር 2035 ድንጋጌን መሰረት በማድረግ ጥያቄአቸውን መመርመርን የግድ የሚል ነው። ተጠሪ የከተማ ይዞታን

የማስተዳደር ስልጣን በሕጉ አግባብ የተሰጠው ቢሆንም ስልጣንን እና ኃላፊነቱን በሕጉ አግባብ አልተወጣም የሚል ክርክር ያለው ወገን ግን ጉዳዩን በፍርድ ቤት ወስዶ መብቱን ከማስከበር የሚከለክል ያለመሆኑን ከኢ.ፌ.ዲ.ሪ.ፕብሊክ ሕገ መንግስት አንቀፅ 37፣ 40(3)(4)፣79(1) እና 78(4) ድንጋጌዎች ጣምራ ንባብ የምንረዳው ጉዳይ ነው።

አመልካች ክሳቸውን ለመደበኛ ፍርድ ቤት ሊያቀርቡ የቻሉትም የሚመለከታቸው የከተማው አስተዳደር አካላት የነባር ይዞታ ባለመብትነታቸው እንዲጠበቅላቸው አስተዳደራዊ ውሳኔ ሰጥተው እያለ ተጠሪ ውሳኔውን ባለማክበሩ ምክንያት መሆኑን ከክሳቸው መግለፃቸው ሲታይ በአዋጅ ቁጥር 721/2004 አንቀፅ 26፣ 27 እና 28 ድንጋጌዎች በተመለከተው አካል በሚመለከተው አካል በተሰጠው ውሳኔ ቅሬታ አላቸው ለማለት የማያስችል በመሆኑ በተጠቃሹ አዋጅ በተዘረጋው የይግባኝ ጉባኤ መብታቸውን ማስከበር አለባቸው ሊባሉ የሚችሉበት የሕግ አግባብ የለም። ይልቁንም እሚመለከተው አካል ወስኖባቸው እያለ በተጠሪ ለጉዳዩ አግባብነት ያላቸው ሕጎቹ ተጥሰው የይዞታና የንብረት መብታቸው እንደተነካባቸው አመልካች በክሳቸው መጥቀሳቸውና ተጠሪም በሕጉ አግባብ ስልጣኑን በመጠቀም የወሰደው እርምጃ መሆኑን ጠቅሶ መከራከሩ በፍ/ብ/ሥ/ሥ/ሕ/ቁጥር 246፣ 247 እና 248 ድንጋጌዎች አግባብ የተጠሪ እርምጃ ሕጉን ተከትሎ የተከናወነ መሆን ያለመሆኑን የሚመለከት ጭብጥ በመያዝ ጉዳዩን ማጣራትን የሚጠይቅ በመሆኑ በአዋጅ ቁጥር 721/2004 ወይም አዋጅ ቁጥር 455/97 ድንጋጌዎች አግባብ በተዘረጋው ስርዓት መሰረት በቀጥታ ለፍርድ ቤት ሊቀርብ የሚችል አይደለም ወደሚለው ድምዳሜ የሚያደርስ አይደለም። ስለሆነም ከአመልካች ክስ መሰረታዊ ይዘት ሰንነሳ በስር ፍርድ ቤት የተሰጠው ብይንም ሆነ በክልሉ የበላይ ፍርድ ቤቶች ይህንኑ ብይን በማጽናት የተሰጠው ዳኝነት መሰረታዊ የሆነ የህግ ስህተት የተፈጸመበት ሆኖ አግኝተናል። በዚሁ መሰረት ተከታዩን ውሳኔ ሰጥተናል።

ው ሳ ኔ

1. *በወልዲያ ወረዳ ፍርድ ቤት በመ/ቁ 0104064 በቀን 24/02/2009 ዓ.ም ተሰጥቶ በሰሜን ወሎ መስተዳድር ዞን ከፍተኛ ፍርድ ቤት በመ/ቁ 19155 በቀን 27/04/2009 ዓ.ም በፍርድ፣ በክልሉ ጠቅላይ ፍርድ ቤት ሰበር ሰሚ አጣሪ ችሎት በመ/ቁጥር 03-16739 በ27/06/2009 ዓ/ም የጸናው ብይን በፍ/ሥ/ሥ/ሕ/ቁ. 348/1/ መሰረት ተሽሯል።*
2. *የወልዲያ ወረዳ ፍርድ ቤት በመ/ቁ_0104064 ክርክሩን እንዲቀጥል በማድረግ ከስልጣን ውጪ የቀረቡትን የግራ ቀኙን ሌሎች የክርክር ነጥቦችን በመመርመርና በማጣራት ተገቢውን ዳኝነት እንዲሰጥበት ጉዳዩን በፍ/ብ/ሥ/ሥ/ሕ/ቁጥር 341/1 መሰረት መልሰን ልከንለታል። ይጸፍ።*
3. *በዚኀ ችሎት በተደረገው ክርክር ግራ ቀኙ ያወጡትን ወጪና ኪሳራ የየራሳቸውን ይቻቻሉ ብለናል።*

መዝገቡ ተዘግቷል፣ ወደ መዝገብ ቤት ይመለስ ብለናል።

የማይነበብ የአምስት ዳኞች ፊርማ አለበት።

የአማራ ብሔራዊ ክልላዊ መንግስት ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት

የሰ.መ.ቁ. 22775

ሐምሌ 10 ቀን 2004 ዓ.ም

ዳኞች፦ ፀጋዬ ወርቅአየሁ
ጌትነት መንግሥቴ
ተፈሪ ገብሩ
አንዳርጌ ላቀ
ኃ/ማርያም ሞገሥ

አመልካች ...አዳሙ ያዛቸው
ጥገቴ ያዛቸው
መልካሙ ያዛቸው
ሰንደቁ ያዛቸው
ይርጋ ያዛቸው ------ወኪል አዳሙ ያዛቸው ቀረቡ
አበበ ያዛቸው
አገሬ አዛኘ
ናፈቀ ያዛቸው
በጎሳ ያዛቸው

ተ ጠ ሪ ..... ነገሱ ዘገየ --------ወኪል ሲስተር ማናለብሽ ያዛቸው ቀረቡ

መዝገቡ ያደረው ለምርመራ በመሆኑ መርምረን የሚከተለውን የሚከተለውን ፍርድ ሰጥተናል፡፡

ፍርድ

ከመዝገብ ምርመራው እንደተረዳነው በግራ ቀኙ መካከል የተነሳው የውርስ ክርክር በሰሜን ጎንደር መስተዳድር ዞን ከፍተኛ ፍርድ ቤት ውሳኔ አግኝቷል፡፡ አፈፃፀሙ በዚሁ ፍርድ ቤት ሲመራ ቆይቶ ታህሣሥ 201 ቀን 2002 ዓ.ም በዋለው ችሎት ፍርድ ቤቱ ተጠሪ በጀ ይገኛል የተባሉትን ንብረቶች በየድርሻቸው እንዲያከፋፍል የአምባ ጊዮርጊስ ከተማ አስተዳደርን አዟል፡፡ የክፍሉ ቀበሌም በተሰጠው ትዕዛዝ መሠረት ማከፋፈሉን፤ ነገር ግን ቤትን ለማከፋፈል ባለሙያ የሚያስፈልግ መሆኑን፤ ተጠሪ ላሟን ለማካፈል ፈቃደኛ አለመሆኗን ገልጿል፡፡ በድጋሚ ትዕዛዝ ተላፎለታል፡፡ ቀበሌው እንደፍርዱ አስፈጽሟል ማለት ስለማይቻል ቤቱን በጨረታ ለመሸጥ ተገምቶ ይቅረብ ተባለ፡፡ ላም ከነጥጃዋ እና ፍየል ተገምቶ እንዲቀርብም ታዘዘ፡፡ ከዚህ በኋላም ንብረቶቹ በጨረታ እንዲሸጡ ሐምሌ 22 ቀን 2002 ዓ.ም በዋለው ችሎት ተወስኗል፡፡ ግራ ቀኙ አልተካፈሉም የተባለውን ቤት በተመለከተ ምስክሮችን ሰምቶ እንዲያስፈጽም የወረዳው ፍርድ ቤት ታዘዘ፡፡

በዚሁ መሠረት የወረዳው ፍርድ ቤት ፍርዱን ስለማስፈጸሙ በመግለጽ መዝገቡን ዘግቷል፡፡ አመልካች በዚህ ውሳኔ ቅር በመሰኘት ይግባኙን በሌሎች ንብረቶች ላይ

ፍርዱን በማስፈጸም ላይ ለነበረው ለዞኑ ከፍተኛ ፍርድ ቤት ይግባኙን ያቀርባል። ፍርድ ቤቱም ጉዳዩ ከተመለከተ በኋላ በሰጠው ውሳኔ የወረዳው ፍርድ ቤት በውክልናው መሠረት የሠጠው ውሳኔ ወካዩ የከፍተኛ ፍርድ ቤት እንደሰጠው የሚቆጠር በመሆኑ ይግባኙ መቅረብ ያለበት ለጠቅላይ ፍርድ ቤት ነው ሲል ወስኗል።

ይህ የሰበር አቤቱታ የቀረበው በዚህ ውሳኔ ሲሆን ፍርዱ ሳይፈጸም እንደተፈጸመ ተቆጥሮ መዝገቡ መዘጋቱ ተገቢ አልነበረም፤ የከፍተኛ ፍርድ ቤትም ይህን ማረም ሲገባው ማለፉ ተገቢ ባለመሆኑ ፍርዱ ይሻርልኝ የሚል ነው። ተጠሪ በበኩሏ የሥር ፍርድ ቤት ውሳኔ መሠረታዊ የሆነ የህግ ግድፈት የለበትም በማለት ፍርዱ እንዲጸናላት ጠይቃለች። ክርክሩም በዚሁ ተጠናቋል።

እኛ መዝገቡን መርምረናል። እንደመረመርነውም ግራ ቀኙን ከሚያከራክራቸው ሃብት ውስጥ ቤትን በተመለከተ የሰሜን ጎንደር ከፍተኛ ፍርድ ቤት ውሳኔ ሰጥቷል። አፈፃፀሙንም ሲመራ ቆይቶ በመጨረሻ የተፈጠሩትን ተግባራዊ ሁኔታዎች ከግምት ውስጥ በማስገባት የወገራ ወረዳ ፍርድ ቤት በቤት ላይ የተሰጠውን ፍርድ እንዲያስፈጽምለት ወክሎ በሌሎች ንብረቶች ላይ የሰጠውን ፍርድ በራሱ ማስፈፀሙን ቀጥሏል። በዚሁ መሠረት የወገራ ወረዳ ፍርድ ቤት በቤቱ ላይ የተሰጠውን ፍርድ ማስፈጸሙን በመግለጽ መዝገቡን ዘግቷል። አመልካች ግን እንደፍርዱ ሳይፈፀም ተፈፅሟል መባሉ ተገቢ አይደለም በማለት ቅሬታ ተሰምቷቸዋል። ይህን ቅሬታቸውን በሌሎች ንብረቶች ላይ አፈፃፀሙን ለቀጠለው (የሰሜን ጎንደር ከፍተኛ ፍርድ ቤት ለወረዳው ፍርድ ቤት ውክልና በሰጠበት መዝገብ ላይ ነው) ቅሬታቸውን አቅርበዋል። ፍርድ ቤቱም በሰጠሁት ውክልና መሠረት የወረዳው ፍርድ ቤት ፍርዱን በማስፈጸም ሂደት የሰጠው ትዕዛዝ እኔ እንደሰጠሁት የሚቆጠር በመሆኑ በትዕዛዙ ላይ የተነሳውን ቅሬታ እኔ ለማየት አልችልም በማለት ቅሬታውን ሳይቀበለው ቀርቷል።

የቅሬታውን አቀራረብ እንዳየነው በቀድሞው መዝገብ ላይ የሚቀጥልበት ሁኔታ አልነበረም። ራሱን በቻለ መንገድ አዲስ ይግባኝ መዝገብ ተከፍቶ ሊታይ ይገባ ነበር። ቅሬታው አሁን የቀረበበት መንገድ የክርክሩን ይዘት መልክ እንዲያጣ፣ ክርክሩን በአግባቡ ለመገንዘብ የሚያዳግት፤ ነገሩን ለማጥራት እና በተገቢው መንገድ ለመምራትም አስቸጋሪ እንዲሆን የሚያደርግ ነው። ይህ ደግሞ ክርክሮችን በአግባቡ ተረድቶ በተቀላጠፈ መንገድ ለመወሰን ያለውን ዕድል ያጠባል። የሥነ-ሥርዓት ህጉ በተቀላጠፈ መንገድ ውጤታማ ውሳኔ ለመስጠት ያለውን ግብ ያሰናክላል ማለት ነው። ስለሆነም የሰሜን ጎንደር መስተዳደር ዞን ከፍተኛ ፍርድ ቤት ውክልና በሰጠበት መዝገብ ላይ አመልካች ይግባኝ ሲያቀርብለት ራሱን በቻለ መንገድ አዲስ የይግባኝ መዝገብ እንዲያስክፍት ማድረግ ሲገባው አቀራረቡ ትክክል እንደሆነ አድርጎ በመውሰድ በፍሬ ጉዳዩ ላይ የቀረበውን ቅሬታ ለማየት ሥልጣን የለኝም ሲል መወሰኑ ተገቢ ሆኖ አላገኘነውም። በቅድሚያ አቀራረቡ መታረም ይገባው ነበር።

ጉዳዩ አሁን ባለበት ደረጃ ግን የከፍተኛው ፍርድ ቤቱ ከወሰደው አቋም አንፃር ጉዳዩ ወደኋላ ተመልሶ አመልካች አቤቱታውን በሌላ መዝገብ እንዲያቀርብ እና ፍርድ ቤቱም የመሰለውን ውሳኔ እንዲሰጥ ጉዳዩን መመለስ የባለጉዳዩን ጊዜ እና ገንዘብ የሚበላ

በመሆኑ ተገቢ ሆኖ ባለማግኘታችን የተፈጠረውን ግድፈት በማለፍ አመልካች በፍሬ ነገሩ ላይ ያቀረበውን ቅሬታ መመርመሩን መርጠናል።

የከፍተኛ ፍርድ ቤት የአመልካችን ቅሬታ ላለመቀበል የሰጠው ምክንያት የወረዳው ፍርድ ቤት በውክልና መሠረት የሰጠው ማናቸውም ትዕዛዛት እኔ እንደሰጠሁት የሚቆጠር በመሆኑ በማስፈጸሙ ሂደት የሚነሱት ቅሬታዎች ለጠቅላይ ፍርድ ቤት እንጂ ለከፍተኛ ፍርድ ቤቱ ሊቀርቡ የሚችሉ አይደለም የሚል ነው። የከፍተኛ ፍርድ ቤት የሰጠውን ፍርድ እንዲያስፈጽምለት ለወረዳው ፍርድ ቤት ውክልና ሲሰጥ የወረዳው ፍርድ ቤት በአፈፃፀሙ ሂደት የሚሰጣቸው ትዕዛዛት የከፍተኛ ፍርድ ቤት እንደሰጠው የሚቆጠር መሆኑ ዕውነት ነው (የፍ.ብ.ሥ.ሥ.ህ.ቁ 374)። ይህ የሚሆነው ግን ይግባኝ ባልተባለባቸው የአፈፃፀም ትዕዛዛት ላይ ብቻ ነው። በትዕዛዛቱ ላይ ይግባኝ የሚባልበት ሁኔታ ሲኖር ግን ትዕዛዙን የከፍተኛው ፍርድ ቤት እንደሰጠው ሳይሆን የወረዳው ፍርድ ቤት ራሱ እንደሰጠው ይቆጠራል። ይግባኝ የሚቀርብበት ትዕዛዝ ሲኖር የከፍተኛው ፍርድ ቤት ይግባኙን ሊመለከት ይችላል ማለት ነው። የፍትሐ-ብ ሥነ-ሥርዓት ህጉ የእንግሊዝኛው ቅጂ በዚህ መንፈስ የተቃኘው በዚህ መንገድ ነው። የአማርኛው ቅጂ ግን ከዚህ የተለየ ነው። የከፍተኛው ፍርድ ቤት የወሰደውን አቋም የሚደግፍ ነው። በአማርኛው እና በእንግሊዝኛው ቅጂ ላይ እንዲህ ያለ መጣረስ ሲኖር የህጉን መሠረታዊ ግብ ከግምት ውስጥ በማስገባት ነገሩን ማየት የሚገባ ይሆናል። በመርህ ደረጃ ፍርድን የሚያስፈጽመው ፍርዱን የፈረደው ፍርድ ቤት ነው። ይህ ማለት ግን ፍርድን እንዲያስፈጽም ሌላ ፍርድ ቤት አይወከልም ማለት አይደለም። ለአፈፃፀም አመቺነት ሲባል ፍርዱን እንዲያስፈጽም ሌላ ፍርድ ቤት ውክልና ሊሰጠው ይችላል። ውክልና የተሰጠው ፍርድ ቤት ውክልናውን ከሰጠው ፍርድ ቤት ሥልጣን ጋር ዕኩል ሆኖ የሚቆጠር ቢሆንም እንደእንግሊዝኛው ቅጂ አባባል ይግባኝ የሚቀርብባቸው ትዕዛዛት ሲኖሩ ራሱ ተወካዩ እንደሰጠው ይቆጠራል። ይህ መባሉ የራሱ የሆነ አገልግሎት አለው። በእኛ ዕምነት ውክልና ሰጪው የበላይ ፍርድ ቤት ከተወካዩ ፍርድ ቤት ጋር በሁሉም ጉዳይ ላይ (ይግባኝ በሚባልባቸው ነጥቦች ጭምር) ዕኩል ሥልጣን እንዳለው መቁጠር በበታች ፍርድ ቤቶች እና በበላይ ፍርድ ቤቶች መካከል ያለውን የልምድ እና የትምህርት ዝግጅት ከዚሁ ጋር ተያይዞም በፍርድ ጥራት ረገድ ያለውን ልዩነት የሚያጠፋ ነው። ይህ ደግሞ በሥነ-ሥርዓት ህጉ የሥልጣን ዕርከን ልዩነት በመፍጠር ረገድ ህጉ ሊያሟላ የተፈለገውን ግብ የሚያሰናክል፤ ዝቅ ለሚሉ ፍርድ ቤቶች የሚሰጡ ውክልናዎችን ተገቢነትም (legitimacy) ጥያቄ ውስጥ የሚጥል ይሆናል። ይልቁንም በአንድ በኩል ጉዳዮችን በተቀላጠፈ እና ውጤታማ በሆነ መንገድ ለማየት፤ በሌላ በኩል በልምድ እና በትምህርት ዝግጅት ዕጥረት ምክንያት የሚፈጠረውን የተወካዩን ፍርድ ቤት ሥህተት እዚያው በቅርብ ለሚገኘው ወካዩ ፍርድ ቤት እንዲታይ ማድረግ የይግባኝ መብት በማጣበብ ረገድ የሚመጣውን ችግር በማስወገድ ፍትሐዊነትን ማስፈን ይቻላል። የሥነ-ሥርዓት ህጉ የእንግሊዝኛው ቅጂ እነኚህን መሠረታዊ የሆኑ የፍትሐ-ብሄር ህግ ዓላማዎች የሚያሳካ ነው። ስለሆነም የሥነ-ሥርዓት ህጉ ሊያራምድ ከሚፈልገው ግብ አንፃር ተጣጥሞ የሚሄደው የእንግሊዝኛው ቅጂ ነው የሚል ዕምነት አለን። በዚህ የተነሳም ልንከተለው የሚገባን ይህን ሊሆን ይገባል።

ስለሆነም እንደእንግሊዝኛው ቅጂ አገላለጽ የወገራ ወረዳ ፍርድ ቤት በተሰጠው ውክልና መሠረት በሰጠው ትዕዛዝ ላይ ይግባኝ የሚቀርብበት ትዕዛዝ ሲኖር ይግባኙን ማየት ያለበት ውክልናውን የሰጠው የሰሜን ጎንደር መስተዳደር ዞን ከፍተኛ ፍርድ ቤት መሆን አለበት። ከዚህ አኳያ የተጠቀሰው ከፍተኛ ፍርድ ቤት ጉዳዩን ለማየት ሥልጣን የለኝም ሲል ሰጠው ትዕዛዝ ተገቢ ሆኖ አላገኘነውም። የቀረበለትን ቅሬታ ተመልክቶ በፍሬ ጉዳዩ ላይ የመሰለውን ውሳኔ ሊሰጥበት የሚገባ ይሆናል። ይህ ሲሆን ግን ከፍ ሲል እንደጠቀሰው ክርክሩ ሊቀጥል የሚገባው የከፍተኛ ፍርድ ቤት ሌሎችን ንብረቶች ለማስፈጸም በቀጠለው የአፈፃፀም መዝገብ ላይ ሳይሆን ራሱን የቻለ የይግባኝ መዝገብ ተከፍቶ ሊሆን ይገባል። የቀረበውን የንብረት ማስከበር ጥያቄ በተመለከተ ፍሬ ጉዳዩ ዕልባት የተሰጠበት እና ጉዳዩን በያዘው ፍርድ ቤት ሊስተናገድ የሚችል በመሆኑ አልፈነዋል። ስለሆነም የሚከተለውን ውሳኔ ሰጥተናል።

ውሳኔ

የወገራ ወረዳ ፍርድ ቤት ከሰሜን ጎንደር መስተዳደር ከፍተኛ ፍርድ ቤት በተሰጠው ውክልና መሠረት በሰጠው ትዕዛዝ አመልካች ቅር ተሰኝቶ ያቀረበው ይግባኝ ራሱን የቻለ የይግባኝ ፋይል ተከፍቶለት እንዲቀርብ ማድረግ ሲገባው የፍርዱን ሌላ ክፍል ለማስፈጸም በያዘው መዝገብ ላይ የከፍተኛ ፍርድ ቤት ተቀብሎ ማስተናገዱ ተገቢ ካለመሆኑም በላይ ቅሬታውን ለማስተናገድ ሥልጣን የለኝም ሲል መወሰኑ ከሥነ-ሥርዓት ህጉ ዓላማ ጋር የሚጣጣም ሆኖ ባለማግኘታችን የከፍተኛው ፍርድ ቤት የሰጠውን ፍርድ ሽረናል። ኪሣራና ወጪ ይቻቻሉ።

ትዕዛዝ

የሰሜን ጎንደር መስተዳደር ዞን ከፍተኛ ፍርደ ቤት ፍርዱ የተሻረ መሆኑን አውቆ አመልካች ያቀረበውን ቅሬታ ራሱን የቻለ ሌላ የአፈፃፀም ይግባኝ ፋይል እንዲከፈት በማድረግ ፍሬ ጉዳዩን ተመልክቶ የመሰለውን እንዲወስን ጉዳዩን መልሰን ልከንለታል።

በዚህ ፍርድ ቤት ውሳኔ መሠረት እንዲያስፈጽም ግልባጩ ይተላለፍለት። ይፃፍ።

መዝገቡ ተዘግቷል። ወደመዝገብ ቤት ይመለስ።

የአብላጫው ድምጽ ዳኞች ፊርማ አለበት።

የሃሣብ ልዩነት

እኛ ስማችን በ3ኛና 4ኛ ተራ ቁጥር ላይ የተጠቀሰው ዳኞች ከሌሎች የስራ ባልደረባቻችን በአብላጫ ድምጽ በሰጡት ውሳኔ ላይ በሀሳብ እንደሚከተለው ተለይተናል። በመሠረቱ በፍታብሔር ሥነ-ሥርዓት ሕግ ሰባተኛ መጽሐፍ ስለ ፍርድ አፈፃፀም በሚለው መጽሐፍ ላይ አፈፃፀምን አስመልክቶ የተደነገገ መሆኑ ያታወቃል። መርሁም በፍ/ብ/ሥ/ሥ/ሕ/ቁ 371 ላይ የተቀመጠ ሲሆን ፍርድን የሚያስፈጽመው ፍርድ ቤት ፍርዱን የሰጠው ወይም እንደ ፍርዱ እንዲያስፈጽም የታዘዘ ፍርድ ቤት ነው። አሁን ክርክሩ የተነሳው እንደ ፍርዱ እንዲያስፈጽም የታዘዘው ፍርድ ቤት

ፍርዱን ከሰጠው ፍርድ ቤት ያነሰ የሥልጣን ደረጃ ሲኖረው የይግባኝ ሥርዓቱ ምን መሆን አለበት የሚለው ነው።

በእርግጥ በፍታብሔር ሕጉ ላይ የስር ፍርድ ቤት የሆነው ለአፈፃፀሙ አመቸነት ሲባል መወከል የሚቻል መሆኑ አልተከለከለም። ወካዩ ፍርድ ቤትም ተወካዩን ፍርድ ቤት ችሎሮች ሲያጋጥሙት የሚቆጣጠር ስለመሆኑ በፍ/ብ/ሥ/ሥ/ሕ/ቁ 374/2/ ላይ ተደንግጓል። ስለዚህ ተወካዩ ፍርድ ቤት በስልጣን ያነሰ ቢሆንም ወካዩ ፍርድ ቤት በቅርበት የሚከታተለው መሆኑን ያሳያል። በዚሁ ምክንያትም በውክልና ራሱ የሰጠውን ጉዳይ በይግባኝ ራስህ ተመልከት ሌላውን በውክልናህ ተቆጣጠር የሚለው የስልጣን መቀላቀልን የሚፈጥርና የፍትሐዊነት መርህን የተከተለ አይሆንም።

ስለ ይግባኝ ስርዓቱም የፍታብሄር ሕግ በቁጥር 374/1/ ላይ በግልጽ ፍርዱን እንዲያስፈጽም የተወከለው ፍርድ ቤት ፍርዱን ከሰጠው ፍርድ ቤት ጋር ዕኩል ስልጣን እንዳለው ይቆጠራል በማለት ግምት ወስዷል። ግምት መውሰድም ይህን መቀላቀል ለማስወገድ ታስቦ የተደረገ መሆኑን መረዳት ይችላል። የአብላጫው ድምጽም የአማርኛው የፍትሐብሔር ሕጉ አባባል ይህ መሆኑን ተቀብለው የእንግሊዝኛው ትርጉም ሚለውን በመቀበል ነው። በእኛ በኩል የእንግሊዘኛው አገላለፅ የአብላጫው ድምፅ የሚለውን ቢመስልም የአማርኛው ትርጉም ግን የተለየ ስለሆነ በሀገራችን ኩሕገ መንግስቱ የትርጉም መርህ ጅምሮ አማርኛ ልዩነት ባለ ጊዜ የበላይነት ስላለው በአማርኛው ትርጉም በመሄድ የከፍተኛው ፍርድ ቤት በይግባኝ አልመለከትም ማለቱን መሻር አይገባውም ነበር። መሰረታዊ የሕግ ስህተተም የለበትም።

ስለዚህ የአብላጫው ድምጽ የከፍተኛው ፍርድ ቤት በውክልና እንድፈፀም የላከውን የፍርድ አፈፃፀም በይግባኝ መመልከት አይገባኝም ማለቱ የሚነቀፍ አልነበረም በማለት በሀሳብ ተለይተናል።