Private Trust under Ethiopian Law: Constitution, Nature and Administration

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Abstract

A trust can be constituted for private interest as a private trust or for the public benefit as a charitable trust. Until Ethiopia promulgated a proclamation governing Charities and Societies in 2009, trusts had been primarily regulated under Ethiopian Civil Code of 1960. The Civil Code provides the legal regime for trusts recognizing, inter alia, that a person can establish trust for the benefit of any person, idea, or action. This shows that the Code has envisaged that a trust can be constituted as a private or charitable trust. However, currently, while charitable trusts are mainly governed under the Organization of Civil Societies Proclamation, private trusts remain under the ambit of the Civil Code. Given the fact that private trusts are not commonly known in Ethiopia, it is important to examine questions surrounding the nature of such institutions and how they are to be regulated in Ethiopia. The aim of the Article is, therefore, to elucidate the nature, purpose, formation and administration of these institutions in this country. To this end, doctrinal legal research approach is employed in the course of which pertinent legislations and literature have been explored, analysed and synthesized. The researchfound out, in the context of Ethiopian trust law, the feature and purpose of private trust is different from other comparable legal relationships such as agency, third party beneficiary contract, testate succession and bailment. The trustee is a major player while other parties such as the trust maker, beneficiaries, courts and the General Attorneys could be involved in the administration of trust.

Keywords*: Trust, Private Trust, Trustee, Administration, Ethiopia.*

Introduction

At a basic level a trust is a legal mechanism through which individuals transfer assets or property to others who will hold it legally in trust for the benefit of certain persons or for a particular purpose. Consistent with this conception, legal scholars such as Hepburn described, trust as "a three-party equitable relationship arising where the creator (settlor) confers an enforceable equitable interest in a person or a charitable institution (the beneficiary or the charitable purpose) in property (trust property), against the legal owner of that property (the trustee)."[1] A closer look into this

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[1] Samantha J Hepburn, Principles of equity and trusts law – 2nd ed., Principles of law series, Pty Limited, (2001), P. 263. www.cavendishpublishing.com.

definition shows that a trust is a conveyance of property in which legal title is given to a trustee and equitable title to a beneficiary. As such, in a trust relationship, the trustees actually own the assets, but are not allowed to benefit from those assets themselves. Instead, the trustees have a duty to use the income and capital of the trust for the benefit of certain persons or for a particular purpose. This is why this arrangement is called a "trust" – i.e. the trustees are in a position of trust and have a duty, among other things, to protect and secure the trust property, and to use the assets of the trust as instructed by the trust deed.

A person creating a 'trust' can establish it for the benefit of certain persons or for a particular purpose as long as the constituted trust does not offend public morals and orders.[2] Accordingly, a trust can be constituted for private interest as a private trust or to the public benefit as a charitable/public trust. Though public and private trust can be distinguished in a number of ways, the nature of beneficiaries is a common differentiating means between them. If the beneficiaries make up a large or substantial body of the public, the trust in question is a public trust.[3] Such forms of trust exist to accomplish a substantial social benefit for some portion of the public, and they largely last for an indefinite period of time or exist permanently.[4] In contrast to public trust, the beneficiaries for a private trust are narrow and specific groups such as children of the settlor.[5] Further, as a typical distinguishing feature between these two forms of the institution, the interest in public trust is vested in an uncertain and fluctuating body while the beneficiaries in private trust are definite and ascertained individuals.

Under the Ethiopian law, trust can be established for private benefits as a private trust or for public benefits as a charitable trust. These features of the institution are largely discernable under the relevant provisions of the Civil Code and the Proclamation for the Organizations of Civil Societies.[6] A closer look into these legislations shows that, until Ethiopia promulgated a separate law governing Charities and Societies in 2009, trusts had been primarily regulated under Articles 516 through 544 of the Civil Code.

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[2] Quizlet, Trusts: Characteristics and Creation, https://quizlet.com/103790919/chapter-6-trusts-characteristics-and-creation-flash-cards/ (accessed on 10 June 2019).

[3] Peter Hefti, Trusts and Their Treatment in the Civil Law, *the American Journal of Comparative Law*, Vol. 5:No4, (1956), p. 556.

[4] Nishith Desai Associates, Legal and Tax Perspective, Use of Trusts in Wealth Management and Succession Planning, (2017), p.5.

[5] Comparison of a Private Trust with a Public Trust, https://blog.ipleaders.in/comparison-of-a-private-trust-with-a-public-trust/ (accessed on 10 June 2019).

[6] The Civil Code of the Empire of Ethiopia, Proclamation No. 165/1960, *Negarit Gazeta*, (1960), (hereinafter the Civil Code) Articles 516- 544. See also the Organizations of Civil Societies Proclamation No. 1113/2019, Negarit Gazeta, (2019), (hereinafter the OCS proclamation). See for example, the Amhara National Regional State Charities and Societies Registration and Regulation Proclamation, Proclamation No. 194/2012. [hereinafter Amhara Charities and Societies Proclamation].

Yet with the coming into effect of Charities and Societies Proclamation No 621/2009, it has become clear that the Civil Code provisions would not be the primary legal regime, at least, as regards to what is called *charitable trus*t.[7]

The Civil Code had put in place legal regimes for trusts acknowledging, *inter alia*, that a person can establish trust for the benefit of any person, idea, or action.[8] This shows that, in Ethiopia, a trust can be constituted for private benefits as a private trust or for public benefits as a charitable trust. Currently, however, while public trusts are principally governed under charities and societies laws of the federal and regional governments[9], private trusts remain to be regulated under the Civil Code. Even though the legislative provisions for the regulation of private trust were in place for a long time, such institutions are not common in this country, or at least the establishment of such institutions is a recent phenomenon .Thus, it is worth examining issues surrounding the nature, formation, and the legal framework dealing with private trusts.

As signified under the Civil Code, the nature and regulation of private trust is analogous to other legal relationships such as will, agency, *a stipulation of contract* for the benefit of third party and bailment. In addition, the Civil Code clearly provides that the constitution of trust shall be subject, as regards the form and substance, to the rules relating to donations or wills.[10] Further, the relevant provisions of the Code on agency also apply to regulate the liabilities of a trustee.[11] Finally, trust in its generic form, is also related to property. While these features are attributes of trust in its generic form, Private trust constitutes neither of these features What then is private trust? The aim of this Article is, therefore, to explain the concept, formation, purpose and regulation of private trust in Ethiopia. To meet its purpose, the Article analysed related researches, pertinent provisions of the Civil Code, and other relevant laws.

The Article is organized under four Sections. The first section examines the concept of trust and the nature and purpose of private trust. Section two provides the concept of trust in general terms under Ethiopian law. The Third section characterizes private

[7] See Charities and Societies Proclamation No 621/2009, *Federal Negarit Gazeta*, 2009. Currently, at the Federal Government Level, for the public trusts, the applicable law is the OCS Proclamation.

[8] See the Civil Code, Art. 518.

[9] See the OCS proclamation. See for example, the Amhara Charities and Societies Proclamation. Except the Amhara National Regional State, other regional states do have a separate Charities and Societies. Hence, for public trust created in regions the applicable law is the Civil Code provisions (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(1), (2018)

[10] The Civil Code, Art.517 (2).

[11] See the Civil Code, Arts. 537(2) and 533.

trust under Ethiopian Law. In this section the formation, nature and administration of private trust, as regulated under Ethiopian law, are examined. Finally, concluding remarks and recommendations are provided.

1. The Concept, Character, Creation and Purpose of Trust: General

1.1 The Concept and Character of Trust

The concept of trust dates back to the time of the Roman Empire in the 7th century A.D.[12] In this legal system, only Roman citizens were allowed to own property and trust was one of the tools to ensure such ownership of property. As such Roman soldiers had used to transfer ownership of their property to trusted friends to make sure that their families were cared for where the soldiers were ordered to leave their locality for duty.[13] Later, trust had also become a familiar tool in the Roman Empire to protect lands from rogue governors and lords.[14]

While this relationship has such a long historical root, its modern form evolved from an early device known as 'use' which would arise where legal ownership was transferred to one party for the use of another.[15] This relationship was created by the transfer of property by the owner to a trustee for the benefit of a third person. As such, the rights of the beneficiary depend on the good faith of the transferee (trustee) who in law was to be the legal owner of property.[16] Trusts were also regarded as an instrument for the administration/protection of property in a family and in many societies its role expands to almost any socio-economic class and affairs.[17] Currently, it is one of the most widely utilized tools of property administration in instances such as succession, preservation and protection of assets.[18]

International instruments such as the Hague Convention also recognize such roles of trust. Evidencing this, the convention defines it as a form of "legal relationships created, *inter vivos* or on death, by a settlor when assets have been placed under the

[12] Randall W. McKee, What Everyone Should Know About Trusts? (2014), p.62. https://www.uwyo.edu/uwe/passiton/passingitonchapter7d-trusts.pdf, (accessed on 17 December 2019).
[13] Id.
[14] Id.
[15] Hepburn, *Supra* note 1, p 261.
[16] Joseph R. Long, The Definition of a Trust, *Virginia Law Review*, Vol. 8(6), (1922), p.428.
[17] McKee, *Supra* note 12, p 62.
[18] Angelique Devaux *et al* 'The Trust as More Than a Common Law Creature', *Ohio Northern University Law Review*, Vol. 41 No. 1, (2014), pp. 91-119.

control of a trustee for the benefit of a beneficiary or a specified purpose".[19] In this definition, the convention set out four major elements constituting the essence of the relationship. The first element is the settler who makes the trust. Second, there should be a trustee who will manage the trust assets and perform the functions of the trust in accordance with the terms of the trust and of the law. The settlor may appoint himself as a trustee.[20] The trustee may also be an individual or a corporation (such as companies).[21]

In most jurisdictions, not only individuals but corporations (such as private trust companies) also provide trusteeship services.[22] The third element is the person or class of persons in interest benefit the trust is created. The beneficiaries could be defined individuals (all of the settlor's children, wife, etc.) or the public.[23] In general terms, the beneficiaries are the only persons who are entitled to use or enjoy the income or assets of the trust. The last category of element consists of the "assets" inside the trust which are called the trust res, trust property, corpus, principal, or subject matter.[24] Common assets that can be used as a trust property include real estate, cash, bank accounts, stocks, shares, and personal property.[25] The assets constitute a separate fund and are not part of the trustee's own estate.[26]

In the administration of trust, the management and enjoyment functions of ownership are split between different persons and as such trustee and beneficiaries should not be identical.[27] The net effect of fragmenting management and enjoyment in turn results in fragmentation of title.[28] Accordingly, incidents of ownership are further divided between a trustee and beneficiary with the common usage of the terms 'beneficial owner' and 'legal owner' to describe the position of beneficiary and trustee

[19] The Hague Convention on Law Applicable to Trusts and Their Recognition, 1985, Article 2 https://www.jus.uio.no/english/services/library/treaties/11/11-02/law-trusts-recognition.xml.

[20] Bruno Herbots, Can The Most Characteristic Product of the English Legal Genius Survive in a Civil Law Environment? Vol.62, (2016).

[21] Andrew Rogerson, The Trust Concept, https://www.rogersonlaw.com/estate-lawyer/trust-concept/ [accessed on 11 May, 2019]; See also John Mcleod, Private Trust Companies, TTN New York Conference, (2014), p.1, https://www.ttn-taxation.net/pdfs/Speeches_NewYork_2014/NY14-JohnMcLeod.pdf [accessed 13 October 2020]

[22]Christopher Weeg, The Private Trust Company: A DIY for the Über Wealthy, 52 Real Prop. Trust & Est. L.J. 121 (2017).

[23] Andrew Rogerson, *Supra* note 21.

[24] McKee, *Supra* note 12, p. 62.

[25] McKee, *Supra* note 12, pp 64-65.

[26] James Douglas, Trusts and Their Equivalents In Civil Law Systems: Why Did the French Introduce The Fiducie Into The Civil Code In 2007? What Might Its Effects Be? Vol.4, (2012), https://www.jus.uio.no/english/services/library/treaties/11/11-02/law-trusts-recognition.xml.

[27] Hefti, *Supra* note 3, p. 554.

[28] Mcleod, *Supra* note 21.

respectively.[29] While the trustees hold the legal title, which is a nominal title, the beneficiaries assumes the beneficial ownership.[30] Upon transferring the title of the assets to a trustee, the assets cease to be the personal possessions of the settlor.[31]

Thus, an essential feature of every trust is that a trustee is an owner to the trust property but is bound to use the legal position as an owner for the benefit of another person or for the advancement of some purpose. [32] Once the settlor has dedicated certain assets as a trust, an asset automatically comes into being, protected by the right of action of the beneficiaries and by the court.[33] Besides, the assets constitute a separate fund and are not part of the trustee's own estate.[34] Unlike the common nature and mode of ownership right, benefits from a trust property belong to one party (beneficiary) while, at the same time, all the burdens belong to another party (trustee).[35] The feature distinguishing a trustee from the persons to whom benefits and burdens of property ownership belong is that title to property is vested in the trustee to be held for the benefit of the beneficiary.[36]

1.2. Creation of the Trust

A person may establish trust for the management of assets while he is alive or after his death.[37] During his life time, a settlor creates an *inter vivos* trust by donation inter vivos. *Inter vivos* trusts, the administration of which begins during the lifetime of the trust maker, may also continue after his death.[38] Yet this form of trust can be revocable or irrevocable. Revocable trust can be amended, added to, or revoked during its maker's competent lifetime. Irrevocable trusts, on the other hand, can't be changed after they are made. Irrevocable trusts serves varying purposes. Some of them might be used for purposes such as funding legacies for children while others are used to

[29] Hefti, *Supra* note 3, p. 554.
[30] Browne C. Lewis, The Law of Trusts, eLangdell® Press, Vol.3, (2013), http://elangdell.cali.org/
[31] And so they become immune to claims against the settlor from creditors, bankruptcy cases, family disagreements, financial setbacks, and lawsuits. See Peter Hefti, *Supra* note 3, p. 556.
[32] Douglas, *supra* note 26, p. 3.
[33] Hefti, *Supra* note 3, p.556. Once the trust is set up, the Settlor no longer has control over the assets. Nor does the Beneficiary have control; the Beneficiary may be unhappy about how the trust is managed, but the Trustee is not obliged to obey the Beneficiary's orders, and often a trust is set up precisely because the Beneficiary's desires are to be thwarted. See Eric Rasmusen, Not Principals and Agents, but Beneficiaries and Trustees, Working Paper, 3(2005) http://www.rasmusen.org/papers/backburner/trustees-rasmusen.pdf
[34] Herbots, *Supra* note 20, p.72.
[35] Jonathan R. Macey, Private Trusts for fhe Provision of Private Goods, *Emory Law Journal*, (37), (1988), p. 295.
[36] Douglas, *supra* note 26, p. 3.
[37] Frances H. Foster, The Dark Side of Trusts: Challenges to Chinese Inheritance Law, *Wash. U. Global Stud. L. Rev*, Vol.2(151), (2003), p.156.
[38] Id.

make gifts of property or life insurance.[39] Finally, it is important to note that *inter vivos* trusts are typically irrevocable after the death of the settlor.[40]

A person may also establish a testamentary or Will trust which is enforceable only after his death.[41] Such trust is established when an individual dies and the trust is detailed in his last will and testament.[42] This trust could also be considered a revocable trust as the will can be changed at any time during the lifetime of its maker.[43] However, once the testamentary trust is established, it will be irrevocable. Moreover, a trust may be short-lived in situations where a trustee receives money on behalf of a beneficiary. While the cession of a trust under such situations is determined based on a case-by-case basis, it may cease to exist after a few days or it may last for years. Yet in the case of a charitable trust it lasts for centuries.[44]

1.3. Types and Purposes of Trust

Trusts are mainly divided into private and public.[45] A public trust is created for the benefit of indefinite and fluctuating body of persons who cannot be ascertained at any point of time. For instance, the beneficiary could be the public at large or a section of the public following a particular religion, profession or faith. Such trusts are characterized by their eleemosynary ends. In consequence, their beneficiaries are not persons previously ascertained but frequently selected from a larger group. In terms of its ends, a public trust is generally a non-profit venture with charitable purposes and consequently it is also referred to as the charitable trust. Contrary to private trusts, charitable trusts aim to benefit the public by achieving a charitable purpose and are enforced by government agencies.[46] The trust designed for public benefits are important for relief of the poor, education, medical relief, preservation of environment

[39] McKee, *Supra* note 12, p. 63.
[40] Id.
[41] Investopedia, Inter Vivos Trust vs. Testamentary Trust: What's the Difference? https://www.investopedia.com/ask/answers/062515/what-difference-between-intervivos-trust-and-testamentary-trust.asp [last accessed on 9 April 2020].
[42] Id.
[43] McKee, *Supra* note 12, p. 63.
[44] Douglas, *supra* note 26, P. 3.
[45] Margaret Ryznar, Trusts in Social History of American Families: An Encyclopedia, Lawrence Ganong ed., (2014), http://ssrn.com/abstract=2311055. A business trust is created for almost any business venture with that particular goal of that business in mind. Complex business arrangements, most often in the finance and insurance sectors, sometimes use trusts among various other entities (e.g., corporations) in their structure.
[46] Law Commission, Review of the Law Of Trusts Preferred Approach Paper, *Law Commission issues paper; (31)*, (2013), p.17, www.lawcom.govt.nz.

and preservation of monuments or places or objects of artistic or historic interest, and the advancement of any other object of general public utility.[47]

Now we turn to the features of a private trust. A trust is called a private trust where it is instituted for the benefit of one or more individuals whose identity is ascertained beforehand.[48] That is, in this form of trust "there is no probate file for strangers to look at"; instead, the beneficiaries are already identified or defined under the trust document.[49] A couple of justifications are inferable behind these sets of conditionality. First, private trusts can only be enforced by beneficiaries through a legal action instituted against trustees.[50] Secondly, although the settlor may bring a legal action against the trustee, he may be a deceased or otherwise unable to bring a legal action. In such cases, there would be nobody to challenge the actions or inaction of the trustee unless there are definite beneficiaries.

In contrast to such cases of a private trust, a public trust does not need to have definite beneficiaries because it could be enforced by a relevant government organ.[51] Moreover, a private trust is completely private, created between persons who have a family relationship, and serves the interest of those involved – trustees and beneficiaries.[52] In some circumstances, such trusts may also be created by people who, while capable of managing their own affairs, nevertheless wish to be relieved of the burden of administration.[53] Yet irrespective of the mode of formation, all the rights and obligations of this institution belong to the two private parties.

Turning to its functions, one could see that private trust plays a key role in estate planning and protection of assets of a trust maker for spendthrift[54]. Further, people use it to protect assets in times of adverse political events such as war, excessive

[47] DEVAUX *et al*, s*upra* note 19, p 96.
[48] Desai, *supra* note 4, p.4.
[49] McKee, *Supra* note 12, p. 65.
[50] John Duddington, Essentials of Equity and Trust law, Pearson Education Limited 2006, p. 64, www.pearsoned.co.uk.
[51] Id.
[52] McKee, *Supra* note 12. p.65.
[53] Herbots, *Supra* note 20, p. 62.
[54] Trusts may be used to protect beneficiaries (for example, children) against their own inability to handle money.

expropriation, and social or political persecution.[55] They may also use it to protect their property from the claim of creditors.[56]

At this juncture, it is important to note that private trusts are mainly constituted for the benefit of people such as minors, persons of unsound mind or spendthrifts, who are not able to administer their property by themselves.[57] For example, "testators, in the creation of testamentary trust, are motivated by the incapacity of the beneficiary to act or a lack of maturity or inability by a beneficiary to manage substantial assets."[58] Similarly, an *inter vivos* private trust is especially useful when caring for someone (beneficiary) incapacitated by a physical or mental disability.[59]

In modern times private trust is widely used to create a structure that fosters family engagement for multiple generations.[60] Particularly, it may be used to own specific assets such as land or an interest in a family company, which would not be appropriate or practical for a settlor to divide between individuals.[61] Such arrangements in trust enable individuals to enjoy the assets although they do not own them. At the same time, it will be helpful to maintain the capital value of such assets for future generations.

2. Trust under the Ethiopian Legal System: An overview

The Civil Code is a starting point for the conceptualization of trust in the Ethiopian legal regime. It represents the start of a regulatory framework with regard to trust in the country. The Code recognized trust as one scheme by which a person may destine his property for the benefit of other individuals or purposes. As outlined in the last sections, trusts were primarily regulated under Articles 516 through 544 of the Code until 2009. Also, there exist separate legal frameworks in the regulation of private and public trusts following the promulgation of the Charities and Societies Proclamation No 621/2009. Particularly, charitable trusts are regulated under the charities and

[55] Mandaris, The Malta Private Trust - Explanation of Its Characteristics And Uses, (2018) p. 1, https://www.mondaq.com/wills-intestacy-estate-planning/727926/the-malta-private-trust--explanation-of-its-characteristics-and-uses [accessed on 9 October 2020].
[56] Jesse Dukeminier *etal*, Wills, Trusts, and Estates, 8th ed., (2009), p.609.
[57] Herbots, *supra* note 20, p. 62.
[58] Nel E, "The Testamentary Trust: Is it a Trust or a Will? Hanekom v Voigt 2016 1 SA 416 (WCC) " PER / PELJ (21) - DOI http://dx.doi.org/10.17159/1727-3781/2018/v21i0a2917, (2018).p.3.
[59] Dukeminier *et al* , Wills, Trusts, and Estates, 8th ed. (2009), p. 439.
[60] Mcleod, s*upra* note 21, p. 3.
[61] Nexgen, Specific Reasons of Setting up a Trust, https://www.nexgentransfer.com/special-purpose-trust.aspx (accessed on 12 January 2020).

societies laws of the federal and regional governments[62] while private trusts remain under the regulation of the Civil Code provisions.

The Code, under Article 516, defines trust as "an institution by which specific property is constituted as an autonomous entity to be administered by a person, the trustee, under the instructions given by the person constituting the trust." Similarly, the OCS Proclamation defines charitable trust as "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."[63] A closer look into these definitions shows that, In Ethiopia, trust is generally a legal device whereby ownership of property is split between the trustee, who has the right and powers of an owner, and the beneficiary.[64]

Also, one could see that the definitions constitute the major elements of trust such as the settler, trustee, the beneficiaries, and the trust property. For example, the definition in the Civil Code suggests that institutions such as the court and the Ministry of Interior (now the Federal General Attorney) may be involved in the trust administration. The court may be involved in cases of dismissal or revocation of the trustee, appointment of the trustee, judicial measures, and termination of the trust.[65] Also, the General Attorney has the mandate to approve private trusts constituted in a foreign country.[66] Moreover, the authentication and documentation offices could get involved in their authentication of the juridical act (will or donation) which constitutes the private trust.[67] From the beneficiaries' perspective, Article 518 of the Civil Code sets out that a trust may be constituted "for the benefit of any person, action or idea, provided it does not offend public order or morals." Accordingly, it can be contended that a settlor may constitute a trust for the benefit of persons such as his children, family, and a friend or to any other persons.

As the OCS Proclamation governs only charitable trusts, the Civil Code provisions on trusts would still be the applicable legal rules in relation to establishment and

[62] See *supra* note 9.
[63] See OCS Proclamation, Art 30.
[64] See the Civil Code, Article 527(1) , 528(2), 538, 539, 541.
[65] See the Civil Code, Articles 522, 521, 541, and 543.
[66] See the Civil Code, Article 546.
[67] Private trusts are created in accordance with the substance and form applicable for donations or will. Thus, as a form requirement, wills or donation upon the trust going to be established must be authenticated at the authentication and documentation office.

functioning of private trusts.[68] The OCS Proclamation is clear in characterizing charitable trust. As such it defines charitable organization as "an organization established with the aim of working for the interest of general public or third party.[69] Thus, while charitable organizations are mainly meant to serve the interest of the general public, there is a possibility of instituting such organizations working for the interest of third party. Yet even in the cases of working for the benefit of third parties, the sole aim of the organization shall be charitable purpose.[70]

In case of private trust, however, though the trust maker destines a property for the interest of a third party, the trust is not constituted solely for a charitable purpose. Thus, the subjects of the OSC proclamation are trusts which are constituted for sole charitable purposes. In other words, the proclamation is not applicable for trusts which are not constituted for sole charity purposes. Indeed, in labeling the purposes or determinations of constituted trusts, the meaning and scope of charitable purpose is worth examining. In Ethiopia, there have been attempts, in the repealed Charity and Societies Proclamation which defines charitable purposes, to set out activities that shall be deemed as a charitable purpose.[71] Surprisingly enough, under the current OSC Proclamation, however, areas considered as charitable purposes are not explicitly illustrated.

Moreover, the OSC Proclamation governs trusts having organizational status or legal personality. Even though, the benefit given for the third party could be labeled as charity purposes, to be governed under the OCS Proclamation, the constituted trust must be a registered entity holding legal personality. However, as can be understood from the Civil Code, private trusts have no legal personality.[72] In other words, private

[68] Yet, the trust provisions of the Civil Code could still govern cases of public trust as long as the provisions are not conflicting with the OSC Proclamation.

[69] OCS Proclamation. Article 2(4).

[70] Look at the specific definition given for each type of charitable organizations. For example, Article 31 of the OSC Proclamation.

[71] 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.

[72] Although there are some states that treat private trust as juridical person , majority of states do not bestow legal personality to private trusts. In Ethiopia, too, private trust is not made to have legal personality. In itself is not a legal entity, rather, it is an inimitable legal relationship whereby property is held by a person for the benefit of another person. The fact that a private trust is not a legal person can be understood from some provisions of the Civil Code. As it is discussed above, the property that makes part of the trust are not owned by the private trust as a legal person. More vividly, Article 526 of the Civil Code envisages that a person who claims to have interest on the property constituted in the trust will sue the trustee, not the trust. Needless to state, being able to sue or sued, or to own properties

trust is not an organization which administers the trust property at a body level. In Ethiopia, the constitution of private trust will be completed at the time of authentication of the juridical acts (will or donation) which establish the trust. Having legal personality is not an element in the constitution of private trust. Hence, in general terms, the OCS Proclamation does not regulate private trust as it applies for public/charitable trust organizations which are constituted *solely* for a charitable purpose. In the next section, the nature, character and regulation of private trust are examined based, primarily, on the relevant provisions of the Civil Code.

3. Private Trust under Ethiopian Law: Constitution, Nature and Administration

3.1. Creation and Nature of Private trust

It can be discerned from Article 516 of the Civil Code that certain elements should be satisfied in order for a private trust to be constituted. The elements are similar to those elements discussed in section II above. First, there should be a trust maker who must have the intention to create a trust. The trust maker needs to provide an express provision in the donation or will showing that he intends to constitute a trust. According to Article 517(3) of the Code, the intent shall be demonstrated with an express provision in the trust document. Secondly, there must be a trustee and a trust instrument naming ascertainable beneficiaries.[73] The beneficiaries do not have to be specifically enumerated in the trust instrument; however, they must be readily identifiable. To be regarded as ascertained beneficiary an express appellation of beneficiaries is not as such required. The trust maker may, sometimes, put beneficiaries with identifiable designations. For example, the person constituted a trust might put the beneficiaries as "my children" as they are identifiable persons. In some cases, the beneficiaries may be persons who are not yet born. Finally, Article 516 also shows that the trust must be funded with property which is referred to as the trust property (trust res or corpus).

Apart from these stipulations, the Civil Code also sets forth the means by which a trust may be created. The specifics for such process are provided under Article 517 of the Code. Accordingly, a private trust may be constituted by donation *inter vivos* or by a Will. Article 909 also clearly mentions that a will may be used as an instrument to constitute a trust. According to this same provision, while *inter vivos* trusts shall be

are among the attributes of personality. However, they are not applicable in relation to private trust in Ethiopia since the later is not a person.

[73] See the Civil Code, Arts. 516, 518.

created through a donation contract, testamentary trusts can be formed through a will. It is stipulated under this provision that a trust which is constituted by donation is known as *inter vivos* trust while a trust constituted by Will is known as testamentary trust.

Another provision worth considering in this respect is Article 517(2) of the Civil Code. This provision states that the constitution of a trust is subject, with respect to form and substance, to the rules relating to donation or Will.[74] Thus, the essential conditions and contents (substance) and the formality requirements applicable to the making of a valid Will and donation inter vivios shall be met. As such, inter vivos trusts shall be made in the form and substances governing in the making of donation inter *vivos*. It means that in constituting the trust, the essential conditions and formality requirements for validity of 'an *inter vivos* donation shall be met.

Thus, from the cumulative reading of Articles 517(2) and Article 2436 of the Civil Code, the beneficiary's acceptance of the trust created by donation inter vivos is a mandatory requirement for the creation of such trust. Such acceptance by the beneficiary would not be valid where it is expressed after the death of the trust maker or his having become incapable.[75] Moreover, as an essential condition, a trust may only relate to property belonging to the trust maker on the day of the constitution of the trust.[76] Also, as can be understood from the cumulative reading of Articles 517(2) and Article 2452 of the Civil Code, the trust cannot be created in relation to property which, on the day of the creation of trust, is the subject matter of a dispute.

The provisions of the Civil Code on donation are also important as regards to the form of constitution of a trust by donation. If the trust is to be created over an immovable, the formality for valid public will needs to be fulfilled.[77] Particularly, for such trust to be valid, (a) the trust maker or a person under his dictation should write it; (b) the document should be read in the presence of the trust maker and four witness, mention to the fulfillment of this formality and of its date is made; and (c) that the trust maker and the witnesses should immediate sign it should be satisfied.[78] While these elements are strictly required for the formation of trust related to immovable property under Articles 517(2) and Article 2452 , a slightly different requirement is provided under

[74] The scope is limited to substance and form. Substance means the contents written in the trust. And form has to do with the solemnity.
[75] See the Civil Code, Art. 2436(2) cum Art.517 (2).
[76] See the cumulative reading of Articles 517(2) and Article 2451 of the Civil Code.
[77] See Civil Code, Art. 2443 cum Arts.881-883.
[78] Civil Code, Arts.881-883.

Article 2444 and Articles 2451 through 2454 of the Code . Pursuant to Article 2444, an *inter vivos* trust involving corporeal chattels and bearers can be destined in trust either by delivery or using the form applicable to immovables. Further, if a person wants to create a living trust, a trust that takes effect during the maker's lifetime,[79] it needs to be made as a donation *inter vivos* as per the stipulations provided under Article 2451 through 2454.

It is also important to note at this point that although an *inter vivos* trust is constituted by donation, it is different from an ordinary donation *inter vivos*. A donation having no express provision indicating the intention of the donor to constitute trust would remain to be an ordinary donation.[80] Unlike an ordinary *inter vivos*, *inter vivos* trust is created for property administration by transferring the ownership title of the property to a trustee for the benefit of beneficiaries. Conversely, Article 2427 of the Civil Code envisages that the donor in an ordinary donation will transfer ownership over his property to the donee. Moreover, he may reserve for himself the usufruct of property donated by him as stated under Article 2453. If it is a trust, however, the trust maker has to transfer a legal ownership over the property to the trustee and the beneficial ownership to the beneficiary.

The constitution of testamentary trust is subject to the fulfillment of essential conditions of a valid will namely, capacity, consent[81], and legality. Another important feature of such trust is that a Will, constituting the trust, is inherently personal to the testator. Thus, a person may not delegate his testamentary power to whom the law gives to dispose of his estate in favor of ascertainable persons. It is one of the strict principles in jurisprudence that one cannot appoint another person as his agent to make a Will on behalf of him. This basic principle has been enshrined in Article 857 of the Civil Code. Accordingly, in constituting a valid trust, the trust maker shall create the trust by himself. The succession law of Ethiopia also obliges that the Will of one person to be made by a separate document. Accordingly, Article 858 of the Civil Code prohibits making of a Will by several persons through one and the same instrument.

[79] McKee, *Supra* note *12*, at 63.
[80] See Civil Code, Art. 517(3).
[81] Free and full consent is an essential condition for validity will. Hence, the trust maker shall make the trust without influence. As stated under article 867 of the Civil Code, a will made by the testator under the influence of force lacks the inherent element of will and hence it has no effect in the eyes of the law. Moreover, whenever the will is made in favor of a person due to the excessive influence of the beneficiary, it will be subjected to the revision of the court. The provisions of the Civil Code enshrined in Arts.868- 875 of the Civil Code govern the situation where a Will made by undue influence can be either invalidated or reduced by the court. From these and other rules of succession, free will of the deceased is one of the essential conditions for the validity of will. Thus, this requirement shall also be met in the constitution of trust created by will.

With respect to form, if the trust is constituted within a public will or holographic will, the requirements of the Civil Code for the public will and holographic will must be satisfied. Accordingly, a trust made in a "public will" should be made in writing by the testator himself or by any person under the dictation of the testator.[82] Besides, the trust document shall be read and signed in the presence of the trust maker and four witnesses mentioning the fulfillment of this formality and of its date therein.[83] In the case of a holographic will, the trust document must be wholly written by the maker himself.[84] Also, as stated under article 903(cum with 517(2)) of the Code, a trust constituted under a holograph will shall lapse where it is not deposited with a notary or in a court registry within seven years after it has been made. Here, one may wonder whether a trust can be constituted through an oral will. To address this issue, it is helpful to note that it can be made through this form of will. In such forms of will, the testator is allowed to regulate only limited matters. As specified under Article 893 of the Civil Code, a testator may only give direction as to his funeral, dispose legacies whose value may not exceed 500 Birr, and make provisions regarding guardian and tutor of his minor child. Although it may not be practically attractive, it can therefore be said that a person could use oral will to constitute a trust using legacies as far as the value of the property does not exceed Birr 500.

In terms of form, a trust made through an oral will is required to be made in the presence of two witnesses as it is stated under Article 892 of the Civil Code. In accordance with Article 902, it is also clear that such trust will come to an end if the trust maker is still alive on the third month of the oral trust. Moreover, there are cases where deposition of trust is required at the notary or in court. Currently, it is the Federal Documents Authentication and Registration Agency where legal documents can be deposited.[85] At regional levels, documents authentication and registration is being undertaken by an office organized as a unit within the regional General Attorney.

While these hosts of detailed specifications on requirements on making a valid will another important question may arise as to whether the trust maker can effectively transfer all property out of her estate during life and bypass inheritance law restrictions on disposition, including protections for her neediest survivors. As it is alluded above,

[82] See Civil Code Art. 517(2), 2443, Cum Arts, 881-883.
[83] See Civil Code Arts. 517(2) Cum Arts, 881-883.
[84] See Civil Code Arts. 517(2) cum Arts. 884.
[85] Proclamation to Provide For Authentication and Registration of Documents, Proclamation No. 922/2015, Art 8.

the trust property will not constitute part of the estate of the trust maker. In other words, the property constituted is separated and *autonomous entity or unit* to be used solely for the purpose set by the settler. Consequently, the property can never be part of the estate of the trust maker. Despite this, the Civil Code provisions on trust are silent with regard to the question raised here.

In the author's view, this issue can be approached on the basis of the rules of the Civil Code regulating dishersion. As a starting point to resolve the issue Article 517(2) of the Civil Code need to be considered. This provision states that constitution of trust by a will should be subject to the rules relating to will as regards to substance. Thus, if a trust maker, under the trust document, effectively transfers all property out of her estate during his lifetime without making any protections for her neediest survivors during the trust or termination of the trust, the trust shall not be valid. Article 938 of the Code is also closely consistent with this principle except the requirement of justified reasons to exclude the descendants of the trust maker from the trust. Thus, the cumulative reading of Article 517(2) and Article 938 of the code suggest that the trust maker can effectively transfer his property out of her estate during life by meeting the requirements of dishersion.

Turning to another perspective on the nature of trust under Ethiopian law, one can easily note that the feature of trust lies on the fragmentation of ownership between the trustee and the beneficiaries. The trustee holds the legal title for the benefit of the beneficiary who holds the beneficial ownership.[86] As a result, the trustee cannot use nor dispose the trust property for his own personal interest since the property is held for the interest of the beneficiary.[87] It is also noticeable that the nature of the ownership rights of the trustee is different from the ordinary notion of ownership right as regulated under the Ethiopian property law.

In relation to the concept of separation of ownership and enjoyment, it is important to further examine the nature of the ownership right that the trust will have over the trust property. Under Article 527 of the Civil Code, it is mentioned that the power of the trustee on the property which forms the object of the trust are "those of an owner." This provision does not directly state that the trustee is the owner of the property which needs, as the case may be, transfer of title deed and registration of the property in the name of the trustee. By virtue of Article 1205 of the Civil Code, an owner may use his property and exploit it as he thinks fit, including disposing it for consideration or

[86] See the Civil Code, Arts. 516, 527, 538 and 539.
[87] See the Civil Code, Arts. 516, 538 and 539.

gratuitously. Obviously, the widest ownership right will not be available to a trustee as regards to the object constituting the trust. As stated under Section II of this Article, although a trustee is an owner to the trust property, he is bound to use the legal position as owner for the benefit of another person or for the advancement of some purpose. Since the trustee is required to administer the trust as per the instruction given by the person creating the trust, the power in relation to the trust property will be limited.[88] For example, in the absence of power to sale by the court, the trustee is unable to dispose an immobile property which is the subject matter (trust property) of the trust.[89] In no case may the trustee alienate the property, which is the subject of the trust, by a gratuitous title.[90] Also, as stated under art 536 of the Code, the creditors of the trustee are not allowed to seize trust property either.

The Ethiopian Trust Law, as stated under Article 527 of the Code, does categorize the trustee as "owner" of the trust property. Indeed, the law does not state that the trust maker must "transfer" property to the trustee. Rather, it uses the phrase "of an owner". To this effect, it provides that "the powers of the trustee on the property which form the object of the trust are those of an owner." Understandably, the phrase as "an owner" suggests that, upon the creation of trust, a settlor must have transferred the trust property together with its ownership title to a trustee. Unless ownership is transferred to a trustee the latter may not be able to manage the trust property *as an owner*. Hence, in order to administer the trust property as an owner, having a legal title over the property is an essential requirement.

Besides, upon termination of the trust, Article 544 obliges the trustee to hand over "the property" which formed object of the trust "together with the documents which are required to prove the ownership of such property" to the persons who are entitled to it in the act of constitution of the trust. From the reading of Article 544, it is possible to infer that upon the creation of the trust, the settlor had transferred to a trustee the trust property together with the ownership title. This suggests that it is not possible to create a trust without transferring legal title to the trustee. The experience of other countries also shows that the transfer of ownership right to the trustee is an essential of trust.[91] As the legal ownership of the property is vested to a trustee and since the trust property shall be put as an autonomous entity, the trust will be protected from unexpected

[88] Civil Code, Art 528.
[89] See the Civil Code, Arts. 527(2).
[90] See the Civil Code, Arts. 527(3).
[91] Mohamed Ramjohn, Unlocking Equity and trusts, Fifth edition. ISBN: 978-1-315-74090-4 (ebk) , p. 77(2015)

grabbing activities of the trust maker.[92] It also serves as a ring-fencing of assets against possible losses due to business liabilities, family related liabilities arising from divorce/maintenance claims.[93] The other crucial matter worth of consideration whether a private trust has a legal personality, under Ethiopian law. This issue could be raised on two grounds. First, Article 516 of the Civil Code defines trust as an "institution" which may be understood to refer to a certain body. Second, trust in the Civil Code is regulated under law of persons parallel to association, endowment and committee, whereas[94] charitable trusts, in the current OSC proclamation, are regarded as legal entities.[95]

Although there are some states that treat private trust as juridical person[96], majority of states do not bestow legal personality to private trusts.[97] In Ethiopia, too, private trust is not made to have independent legal personality. It is rather an inimitable legal relationship whereby property is held by a person for the benefit of another person. The fact that a private trust is not a legal person can be understood from some provisions of the Civil Code. As it is discussed above, the property that makes part of the trust are not owned by the private trust as a legal person. More explicitly, Article 526 of the Civil Code envisages that a person who claims to have interest on the property constituted in the trust will sue the trustee, not the trust. Needless to state, being able to sue or sued, or to own properties are among the attributes of personality. However, they are not applicable in relation to private trust in Ethiopia since the later is not a person.

[92] As can be inferred from article 522 of the Code, after the creation of the trust, the settlor has no action against the trustee to perform the trust instead the settlor can apply to the court. Once the settlor has dedicated certain assets as a trust, it automatically comes into being, protected by the right of action of the beneficiaries and the control exercised by the courts. See the Civil Code, Arts. 516, 522, 520, 529(3), 538, 541, and 543.

[93] See the Civil Code, Arts. 516, 522, 520, 529(3), 538, 541, and 543.

[94] Associations are, as stated under Article 454 of the Civil Code, legal person that can perform civil act by their own name, can sue and be sued by their own name etc. The same holds for endowments as the provisions of the Civil Code on capacity of associations shall apply to endowments (the Civil Code, Arts 501 and 502). When we see endowments and the committees for charities; after they are approved by the then Minister of Interior, they will own the endowed property by their own name, and the administration is by directors by representing the institution (Art 494 cum Art 429). However, as regulated under the Civil Code trust is, in its own, not treated as a legal person in judicial proceedings since any lawsuit must be made against the trustees in its name. Had the trust is regarded as a legal person; trust related claims would have been made in the name of the trust. See the Civil Code, Article 526.

[95] The OCS Proclamation, Art 31.

[96] Devaux *etal*, *supra* note 18, p. 93.

[97] Mandaris, *supra* note 55, p.2.

3.2. Administration of Private Trust

While the trustee is the major player, there are different persons that would be involved in the administration of trust. The next section explicates the features of these persons, extent of their roles, power, and related issues of administration. The discussion takes each of the points for a deeper examination based on a closer reading of the pertinent provisions of the civil code and other pertinent legislative documents.

3.2.1. The Roles of the Trust Maker

Various provisions of the Civil Code envision the significant roles of the trust maker in the administration of a trust which he has constituted. In this regard, it is obvious that the trust maker can appoint the trustees or designate another person to do the same. This power of the trust maker is stipulated under Article 519 of the Civil Code. As per Article 522, the trust maker could also submit application to the court requesting the dismissal of a trustee if there is a just reason for so doing.[98] Thus, as can be understood from the Civil Code, the trust maker will not dismiss the trustee on his own.

As a creator of the trust, the trust maker has the power to give directions as to how the trustee should act while administering the trust. He may set limitations to the powers of the trustee and on the manner in which such powers must be exercised. These powers of the trust maker are provided under Articles 528 and 529(1) of the Civil Code. Yet the instructions given by the trust maker may not be fully materialized, particularly where the interest of the beneficiary requires deviation from them. As a result, Article 528(2) allows the trustee to seek court authorization to disregard the instructions of the trust maker. The trustee may not ignore the instructions of the trust maker without obtaining court authorization.

Yet, as can be understood from the reading of the same provision, in authorizing the trustee, by deviating from the instruction of the trust document, the primary consideration of the court shall be the interest of the beneficiary. In other words, deviance from the instruction is authorized where the interest of the beneficiaries so requires. Principally, as stated before, in other systems, characteristically, after the creation of the trust, the settlor has no action against the trustee to perform the trust.[99]

[98] Since a trust is, mainly, made for the interest of the beneficiary, the reason for the dismissal might have associated with cause affect the interest of the beneficiaries or if the trustee depart from the instructions arbitrarily.
[99] Hefti, *supra* note 3, p. 556.

However, under the Ethiopian Trust Law, the trust maker may have a say after the creation of the trust. For example, the trust maker may apply to the court for the revocation of trustee rights for just reasons.

The trust maker can also provide rules regarding the termination of the trust that he has constituted. As per Article 542, the trust maker may provide the time or the condition on which the trust will come to an end. In addition, he is entitled to prohibit the court from terminating the trust even if beneficiaries submit application to the court seeking the termination of the trust as stated in Article 543 of the Civil Code. Normally, trusts are created for the interest of the beneficiaries. Accordingly, upon the application of the beneficiaries, the court may declare the termination of the trust in case where the trust is not beneficial to the former. However, as noted above, this power of the court might be prohibited by the person constituting the trust, expressly, under the trust document.

Here, one may wonder whether the trust maker can prohibit this power of the court though the trust is not beneficial to beneficiaries. In the author's view, compelling the beneficiary to continue as a party in the trust relationship which is detrimental to him may not be plausible. This power of the trust maker shall be given in case where the beneficiaries are willing to go out from the trust for negligible reasons. Essentially, it should be understood and shall be presumed that the trust maker prohibits, in the trust document, the termination of the trust with a view to maintain the interest of the beneficiaries of the trust. Thus, if the trust is not functioning in the interest of the beneficiaries, it could be suspended by the court though the trust maker prohibits the power of the court to do so.

Moreover, the trust maker may, in the trust document, prohibit the income of the trust not to be attached in the hands of the trustee by the creditors of beneficiaries.. Where the income has been declared non-attachable, it may not even be validly transferred or subjected to obligations by the beneficiary of the trust.[100] The court may, however, on the application of the beneficiary of the trust or of one of his creditors, authorise the attachment or the assignment of the income if such is the interest of the beneficiary of the trust or if the claim which is brought forward in relation to a criminal offence or to a fraud for which the beneficiary of the trust is responsible.[101]

[100] The Civil Code, Articles 540(2).
[101] The Civil Code, Articles 540 to 541.

3.2.2. Trustees

As noted in the forgoing discussion, trust is administered by trustee/s. This section addresses appointnment, composition, powers, duties and liabilities of trustees under Ethiopian law.

I. Number and Appointment of Trustees

As stated under Article 520 of the Civil Code, trustees may be appointed by the settlor or by the person designated to appoint them. In situations where the person designated to appoint trustee fails to exercise his/her power, the trustee refuses to take the office, dies or becomes incapable, the court will designate a person as a trustee. This means that the trust will not fail due to lack of appointed trustee. Further, if the trust maker fails to appoint the trustee or fails to assign a person to appoint the trustee, the court will appoint the trustee. In sum, as can be understood from Article 520, the silence, over appointing the trustee, of the trust maker may not amount to the absence of the intention of the trust maker to constitute trust. The law limited the number of trustees to four. This is explicitly mentioned under Article 519(1) of the Civil Code. If more than four trustees are appointed, as per Article 519(2), the "first four" alone will exercise the functions of trustees. The other persons will replace, "in the order in which they are designated", trustees that refuse to exercise their functions, died or incapacitated.

Hence, from the provision, it is possible to understand that the order of names in the document is relevant. Understandably, the issue of *order of list of names of trustees* arises in case where the trust maker assigns many trustees in the trust document. Presumably, the trust maker is required to put the names of trustees with a clear sequential order depending on their level of prudence in the trust management. The person who is mentioned first would be regarded as the one who is trusted more than the one who is listed in the second list and so on. This standard could also be considered in other scenarios, if, for example, trustees are appointed at different times.

Finally, it is important to note that specific rules apply to the task of trusteeship where the numbers of trustees appointed are more than one. Under such circumstances, as can be understood from Article 524 of the Code, trustees shall administer the trust collectively. In other words, unless there is a contrary decision between the trustees themselves, decisions relating to the administration of the trust should be taken

collectively and with agreement between themselves. Yet, if they all are not able to agree on the decision, the decision of the majority will be upheld.

II. Powers, Duties and Liabilities of Trustees

It could be noted from various provisions of the Civil Code that a trustee has a fiduciary obligation to hold the trust property for the benefit of the beneficiaries. Accordingly, , the trustee has various duties and powers while administering the trust. Reflecting the trustee's fiduciary obligation, Article 525(1) states that the trustee should administer the trust like a "prudent and cautious businessman." As such, the trustee is required to take all necessary measures in to make sure that properties forming the object of the trust are not mixed with his own personal properties. This obligation is consistent with the fact that the trustee could not draw any personal benefit from the trust apart from the advantage that is expressly given to him in the act constituting the trust. This is mentioned under Article 531 of the Civil Code. The prohibition of mixing the properties of the trustee with that of the trust is also essential to enforce Article 536 of the Civil Code which bars creditors of the trustee to have any claim on the property forming the object of the trust.

Be the above as it may, one may wonder whether the trustee manages the trust for free if the act constituting the trust is silent as to the advantage that the trustee could obtain by assuming the position of trusteeship. In this regard, the Civil Code does not contain an express provision. However, as can be inferred form Article 532 of the Code, the trustee is entitled to be indemnified for all the expenses and obligations arising out of the administration of the trust. Thus, as long as he has incurred costs (including labour costs) in the trust administration, the trustee is entitled to be indemnified. Yet, remuneration or costs of labour may not be paid to him if the trustee has agreed to manage the trust gratuitously.

Moreover, rendering accounts of his administration of the trust and of the actual state of the property forming the object of the trust is part of the duty of the trustee. Accordingly, as stated under Article 534 of the Code, the trustee shall render an account of his administration and of the actual state of the property forming the object of the trust, to the person appointed in the act of constitution of the trust. In case where the person to whom the account rendered is not assigned under the trust document, the trustee shall render an account to any person who has an interest therein in accordance with the act of constitution of the trust. For example, the trustee may be required to render an account to the beneficiaries as a person having an interest in the trust.

Moreover, during the replacement of a trustee by another one, the trustee to be replaced shall render an account to the person who replaces him in the office of trustee.

The trustee is also given a number of powers to exercise in the course of trust administration. He has the power to represent the trust in judicial proceedings. Accordingly, Article 526(2) of the Code provides that the trustee is going to be sued in his capacity as a trustee by those persons who claim to have an interest on the property constituted in trust. More importantly, the trustee assumes an ownership power on the property forming the object of the trust. Yet it important to note that this power of the trustee to act as an owner is subject to certain limits. To this end, Article 527 of the Civil Code sets out essential limits on the power of the trustee to dispose properties constituting the trust. First, the trust is prohibited from disposing a property forming the object of the trust gratuitously. Second, the mere assumption of trusteeship position will not entitle the trustee to alienate immovable property forming the object of the trust. The trustee may alienate an immovable property if the power to do so is approved by the court provided that the power to alienate is not prohibited under the act constituting the trust. However, from contrary reading of Article 527(2) of the Code, this prohibition has to do only with an immovable property. In other words, the court may authorize the trustee to sale a movable property of the trust though it has been prohibited under the trust document.

Yet a critical examination is needed as to the extent to which the interest of beneficiaries could be maintained in this process.[102] The Civil Code contains provisions concerning the liabilities of the trustee in connection with its administration of the trust. In the trust administration, the duties of the agent, as stated under the law of agency, such as the duty of loyalty, the duty to inform and report, the duty of good faith, the duty of care, shall apply to the trustee in the trust arrangement too.[103] Pursuant to Article 525(1) of the Code the trustee, while administering the trust property, must act as *a bonus Paterfamilias* (prudent and cautious businessman). Further, according to Article 531 of the Code, in the trust management, trustee(s) may not profit from the trust.[104]

The liability which a trustee faces, as set out in the Civil Code, is twofold. First, as stated under Article 529(2) of the Code, a liability may manifest as a sanction against a

[102] Civil Code, Art 538 cum 516.
[103] See the Civil Code, Art. 533.
[104] Also, as stated under article 536 of the Code, in the trust administration, the creditors of the trustee are not allowed to seize the trust property either.

trustee for the ultra-virus act he makes in his relation with third parties. If a trustee transacts with third parties beyond its power stipulated in the trust document, the damage incurred on third parties shall be made good by the trustee himself. Further, unless it is proved that such third parties were or should have been aware of such provisions about the limit on the power of the trustee in the trust document, such limits cannot be raised as a defence against third parties.[105] Of course, the trustee may be relived from liability if he infringed the trust deed rules in good faith.[106] Secondly, a liability for damage incurred on beneficiaries or to persons who are to receive the property at the termination of the trust. As can be inferred from Article 533 of the Code, the trustee might be liable to pay compensation for damages sustained by beneficiaries or for persons who are to receive the property at the termination of the trust. Accordingly, as stated under Article 533 of the Code, a trustee will be liable for good management of the trust in accordance with the provisions relating to agency, to the beneficiaries of the trust, and to the persons who are to receive the property at the termination of the trust.

Finally, the trustee is liable if he administers the trust outside of his power given under the trust document and against the provision of the Code.[107] Moreover, according to Article 516 of the Code, he shall carry out activities in accordance with the trust document. If this duty is violated, as indicated under article 538(2) of the Code, the court will dismiss the trustee upon the application of the beneficiaries.

3.2.3. The Beneficiaries

Though the Civil Code does not specifically put about the beneficiaries of private trust, as stated before, naturally, the beneficiaries of private trust are identified or ascertained individuals. According to the Civil Code, the beneficiaries must be persons who are alive.[108] Nevertheless, unborn child can be beneficiaries of the trust as it can be ascertained. Also, it is generally stipulated that the trustee is responsible to administer the trust for the benefit of the trustees and in compliance with instructions given by the trust maker. However, the trustee may neglect the instructions of the settlor so long as doing so will be in the interest of the beneficiaries. Such departure from the instruction should, however, be exercised after securing court authorization in accordance with Article 528(2) of the Civil Code. More specifically, Articles 538 and 539 deal with the rights of the beneficiary in relation to the trustee and on the property of the trust. To

[105] Civil Code, Art. 529(1).
[106] Civil Code, Art. 529(3).
[107] See the Civil Code, Article 533 cum 2190.
[108] The Civil Code, Art. 518 [the Amharic version].

this end, Article 538(1) entitles the beneficiary to claim from the trustee the making over of the profits which the act constituting the trust makes accrue to him. Besides, as stated under article 544 of the Code, up on the termination of the trust the beneficiaries may be entitled to receive the trust property.

Finally, it is important to note that the provisions in the regime of the Civil Code also confer rights over beneficiaries. If these rights are jeopardized by the action or inaction of the trustee, the beneficiary may apply to the court seeking either of two remedies: dismissal of the trustee or provision of guarantee from the trustee.[109] Yet this power of the beneficiaries is limited in a number of ways. For example, the beneficiary has no right to dispose or administer the property forming the object of the trust. In relation to the property constituting the trust, he or she may only take actions to preserve his/her *right in rem* such as the interruption of a prescription and making publications with a view to informing third parties of the fact that certain property forms the object of the trust.[110] Nonetheless, the Ethiopian trust law fails to respond to beneficiary misconduct. It is particularly too lenient to sanction of heinous crimes. For example, the succession law and donation contract law penalizes murderer of a contributor of the property (in trust context a trust maker).[111] In other jurisdictions, when a trust maker killed in the hands of the beneficiary, the former has a right to change the beneficiary or revoke the trust.[112]

3.2.4. The Court

The role of the court in the administration of a trust may start from the time of constituting a trust. The court could also get involved during trust administration, termination and liquidation of trust. As stated under Article 520 of the Civil Code, the court may be involved in the appointment of the trustee even at the beginning of the trust. For example, as can be seen from the Civil Code, the court may be asked to appoint a trustee. The duty of the court to appoint a trustee could arise under the circumstances provided in Article 520 of the Civil Code. As already discussed, in one way or another, the court may involve in the appointment, revocation or replacement of trustees. In addition, according to Article 523(1), the court will also play a

[109] The Civil Code, Articles 522 and 538(2).
[110] The Civil Code, Art.539.
[111] The Civil Code, Arts. 830, 838, and 2448.
[112] Foster, *supra* note 38, p. 161.

significant role in the administration of a trust by providing, to the trustee, a document showing his capacity and his powers.[113]

As stated under the Civil Code, the trustee has the duty to undertake its functions in accordance with the instruction contained in the act constituting the trust. The court is, however, instrumental if such instructions of the trust maker do not safeguard the interest of the beneficiaries at it may allow the trustee to neglect the instructions stated under the trust deed. Also, when the purpose of the trust or the interest of the beneficiaries so requires, the court may authorize the trustee to sale and attach the trust property.[114] Moreover, as stated under article 535 of the Code, the court may adjust account reporting periods. Normally, unless otherwise prescribed by the trust deed, a trustee shall render accounts every year during the month when the trustee begins his management.[115] However, as stated under article 535(2), the court may for good cause authorise an interested party to ask for the accounts at an intermediate time or authorise the trustee to retard or modify the date fixed for the rendering of the accounts. In this regard, the interested parties can be beneficiaries or the trust maker, respectively, for whose interest the trust is created and as a person who destines his property in the trust.[116]

In addition, the court is also entrusted to certain roles during the termination and liquidation of a trust. In this regard, Article 543 of the Code entitles the court to declare termination of the trust when it thinks fit in the circumstance of the cases. This could be exercised at any time upon the application of the beneficiary. However, as noted above, this power of the court might be prohibited by the person constituting the trust under the trust document.[117] In essence, it should be understood and need to be presumed that the trust maker prohibits, in the trust document, the termination of the trust with a view to maintain the interest of the beneficiaries of the trust. Hence, if the trust is not functioning for the interest of the beneficiaries, the trust could be terminated by the court though the trust maker prohibits the power of the court to do so.

[113] The Civil Code, Art. 534.(2). Mainly, such document is important to show the capacity and power of the trustee, to smoothly transact with third parties in its capacity as trustee, in the management of the trust. If appropriate, the document should specify the period for which the powers have been granted to the trustee. If for example, the trustee is to be replaced by another trustee, the period when the power of the trustee shall be lapsed might be required to be specified.

[114] See the Civil Code, Arts. 527(2) cum 541.

[115] See the Civil Code, Art. 535(1).

[116] As the trust is mainly created for the interest of beneficiaries, it can be contend that they are interested parties to audit the trust assets. Besides, the trust maker would also be an interested party to check up how the trustee is administering the trust as per the trust document and for the purposes intended under the trust.

[117] See the Civil Code, Art. 543.

3.2.5. The General Attorney

Article 546 of the Civil Code sets forth that trusts constituted in a foreign country will not be able to carry out any activity in Ethiopia unless they have obtained the necessary approval from the then Ministry of Interior". Given the existing federal set up in Ethiopia, a question may arise as to which level and organ of the government is responsible to approve private trusts constituted abroad. As stated under Article 3 of the OSC Proclamation, it is the Organization of Civil Societies Agency that has the mandate to regulate the non-profits organizations including properties destined for certain purpose (trusts, endowments and committees). With regard to trust, however, it is obvious that the Agency regulates charitable trusts only.[118] In other words, in the context of foreign constituted trusts, the Agency registers or approves *public trusts* which are constituted abroad.[119] Consequently, one would wonder where a foreign constituted private trust should get approval. Yet, based on Article 546 of the Civil Code, it can be maintained that the Ministry of Justice could be responsible for the approval of private trusts constituted abroad.[120]

Conclusion

A trust is created when one party, the settlor/trust maker, grants some property to be controlled by a second party, the trustee, on behalf of a third party, the beneficiary. Until Ethiopia promulgated a separate law governing Charities and Societies in 2009, trusts were primarily regulated under Articles 516 through 544 of the Civil Code. Currently, at federal government level and in the Amhra national regional state government, charitable trusts are mainly governed under respective charities and societies laws while private trusts remain to be governed under the Civil Code Provisions. In other regional states, however, both public and private trusts are to be governed under the Civil Code provisions.

If a person needs to benefit other person (beneficiaries or heirs) without transferring the property directly to them, the trust is an appropriate legal device. Private trust is a legal relationship by which property is destined or transferred by the settlor to the

[118] The OCS Proclamation Art. 3, Article 31(1).
[119] The OCS Proclamation, Arts. 57, 3, and 31.
[120] In *dejure* and *defacto*, the Ministry of Justice has acquired the powers and responsibilities of the then Ministry of Interior. Proclamation No. 4/1995 Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation. Art. 23(9). See, for example, different Proclamations on Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 803/2013, Proc. No.916/2015 and Proc. No. 1097/2018, and see also Federal Attorney General Establishment Proclamation No. 943/2016.

trustee who manages that property for the benefit of someone else (the beneficiary). Private trust is peculiar, mainly, by the existence of fragmentation of the management and enjoyment functions of ownership. A trustee holds legal title for the welfare of the beneficiary, who holds beneficial ownership. Under the Ethiopia legal system, the feature and purpose of private trust is different from other comparable legal relationships such as agency, third party beneficiary contract and bailment. Neither of these relationships can replace the trust as an alternative to trust arrangement because administering a property with an arrangement of technical ownership (fragmentation of ownership) is solely possible through a private trust.

However, the existing private trust law of Ethiopia does not regulate the trust relationship adequately. Even though the Civil Code, with regard to substance and form, requires that the creation of trust shall be subject to the rules relating to donations or wills, the scope and denotation of substance is not specific enough to attain this. Hence, there is a need for more legislative actions clarifying the extent to which the rules governing succession and donation applies to private trust. In the absence of such clarity, knowing the extent of application of the rules of governing succession and donation to cases of private trust is difficult. To this end, the law needs to stipulate the scope of application of rules of succession and donation to private trust cases. Most importantly, the Ethiopian private trust law is unduly silent regarding the consequences of beneficiary's misconduct. In all kinds of private trust, the consequence of beneficiaries' misconduct has to be seriously revised. Although it could be possible to use the law of succession provisions for cases arising at the stage of creation of trust, the trust law is silent regarding the beneficiaries' misconduct arising during the trust administration.

Hence, the law needs to regulate the effect of beneficiaries' misconduct including at the time of trust administration. In general, if private trust is to work well, Ethiopia needs to regulate its constitution or formation and its administration in a clear and adequate way.