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**Barruulee**

**Articles**

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# **THE PLACE OF ENVIRONMENTAL PROTECTION IN THE GROWTH AND TRANSFORMATION PLAN OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA**

**Dejene Girma Janka (PhD)\***

## **1. INTRODUCTION**

The implementation of Ethiopia's Growth and Transformation Plan (the GTP *hereinafter*) is currently underway. It is directed, among other things, towards bringing about sustainable development and promoting the process of democratization. However, it does not include environmental protection in its visions or objectives. All the same, the non-inclusion of environmental protection in the GTP's visions or objectives may not mean that the GTP does not recognize the relevance of environmental protection to the attainment of its goals. Hence, in this article, I will examine whether the GTP recognizes the relevance of environmental protection to the attainment of its goals. Besides, I will examine the opportunities the GTP may have presented and which can be exploited to push for better environmental protection in the country during the time of the GTP. With this in mind, the article contains nine sections. The first section provides for a succinct introduction to the article while the second section deals with a brief introduction to the GTP. The third section briefly discusses the relevance of environmental protection in general. In the fourth section, the place given to environmental protection in the GTP will be examined. Section five deals with how one can use the GTP to advocate better environmental protection in the country in the years to come. In section six, a brief look at what happened under the *A Plan for Accelerated and Sustainable Development to End Poverty* (the PASDEP

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\* Assistant Professor, PhD, School of Law, College of Social Science and Law, Jimma University. E-mail: dejulaw@yahoo.com/dejene.janka@ju.edu.et. My article has benefited a lot from the comments of the unknown reviewers. I would, therefore, like to express my gratitude to them. However, any mistake in this article remains mine.

hereinafter) with regard to environmental protection will be seen to draw lessons from there. In section seven, I will briefly see the place of environmental protection in the Oromia GTP. Although the objective of this article is not to examine the place of environmental protection in the Oromia GTP, it is hoped that it will add value to the article if a section is devoted to it. Section eight provides for some examples of environmental protection measures that have been taken after the FDRE GTP was launched. Finally, the article will be concluded with possible recommendations.

## 2. THE GROWTH AND TRANSFORMATION PLAN

Ethiopia is currently implementing the GTP as a successor to the PASDEP.<sup>1</sup> The GTP is Ethiopia's strategic plan for the period 2010/2011-2014/2015.<sup>2</sup> It is directed towards the realization of Ethiopia's long-term visions. In the GTP, Ethiopia has put forward her long-term visions in general and in the economic sector in particular. Thus, the overall long-term vision of Ethiopia is:

*“to become a country where democratic rule, good-governance and social justice reigns, upon the involvement and free will of its peoples; and once extricating itself from poverty and becomes a middle-income economy as of 2020-2023.”*<sup>3</sup>

In the economic sector, the long-term visions of Ethiopia are:

*“to build an economy which has a modern and productive agricultural sector with enhanced technology and an industrial sector that plays a leading role in the economy; to sustain economic development and secure social justice; and, increase per capita*

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<sup>1</sup>PASDEP is the strategic plan of Ethiopia for the period 2005/06-2009/10. See, generally, FDRE Ministry of Finance and Economic Development, Ethiopia: Building on Progress A Plan for Accelerated and Sustained Development to End Poverty (PASDEP) 2005/06-2009/10, (2006).

<sup>2</sup>FDRE Ministry of Finance and Economic Development, Federal Democratic Republic of Ethiopia Growth and Transformation Plan 2010/11-2014/15, (2010).

<sup>3</sup> Id., Section 2.1.

*income of citizens so that it reaches at [sic]the level of those in middle-income countries.*<sup>4</sup>

In order to facilitate the realization of the above visions, the GTP intends to achieve the following major objectives: maintaining at least an average real GDP growth rate of 11% and meet the Millennium Development Goals (MDGs); expanding and ensuring the qualities of education and health services thereby achieving the MDGs in the social sectors; establishing favorable conditions for sustainable state building through the creation of stable democratic and developmental state; and ensuring growth sustainability by realizing all the above objectives within stable macroeconomic framework.<sup>5</sup>

Bearing the above visions and objectives in mind, one may wonder how Ethiopia plans to realize the visions and achieve the objectives it has set out in the GTP. In this regard, the GTP identifies what it calls *pillar strategies* which are sustaining faster and equitable economic growth, maintaining agriculture as a major source of economic growth, creating favorable conditions for the industry to play key role in the economy, enhancing expansion and quality of infrastructure development, enhancing expansion and quality of social development, building capacity and deepening good governance, and promoting women and youth empowerment and equitable benefit.<sup>6</sup> Thus, by using these strategies, it is believed that the major objectives of the GTP will be achieved thereby facilitating the realization of Ethiopia's overall long-term visions and her visions in the economic sector.

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<sup>4</sup>Ibid.

<sup>5</sup> See id., Section 2.2.

<sup>6</sup> See Id., Chapter Three.

It is, therefore, clearly discernable from the visions and objectives of the GTP that Ethiopia has planned to, *inter alia*, work towards, democratization with the intent to become a country where democratic rule, good-governance and social justice reigns, and bringing about sustained economic development in order to enable her citizens to get income comparable to what individuals in middle-income countries get. The question then is whether or not environmental protection can in any way contribute to the attainment of the above goals. This issue is addressed in the next section.

### **3. RELEVANCE OF ENVIRONMENTAL PROTECTION**

There is no question that every nation desires to bring about economic development. Thus, while countries generally take various measures to progress economically, developing and the least developed countries seem to turn every stone to bring about economic development. For instance, Ethiopia's decision to construct the *Gilgel Gibe III Dam* and the *Grand Ethiopian Renaissance Dam*, which are expected to produce about 1850 MW and 6000 MW of electric power, respectively, is a manifestation of how desperate the country is for economic development.<sup>7</sup> However, some of the measures taken to bring about economic development may not be environmentally benign. For instance, it is possible to bring about economic development by destroying the environment. Yet, for economic development to be real and meaningful, it has to be sustainable,<sup>8</sup> whereas making development sustainable requires, among other things, environmental protection.<sup>9</sup>

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<sup>7</sup> The construction of the *Gilgel Gibe III Dam* on *Gibe River* and that of the *Great Ethiopian Renaissance Dam* on *Abbay River* (commonly known as the Blue Nile) is underway.

<sup>8</sup> See World Commission on Environment and Development, *A Threatened Future, Our Common Future* (1987), ...(*hereinafter* cited as *WCED Report*)

<sup>9</sup> 'Sustainable development' has been an enormously influential concept in environmental law since at least the early 1980s and it is now extraordinarily widely accepted and

Consequently, it is necessary to integrate economics and the environment for the desired economic development may not come about in the absence of such integration. In other words, none can be sacrificed to obtain the other.<sup>10</sup> In this regard, as *Charles Caccia* said, “if we want to make a choice between economy and the environment, the choice, in the long term, turns out to be an illusion with awesome consequences for humanity” because there is no such choice.<sup>11</sup> Instead, we have to decide to choose both economy and the environment and pay due attention to them. If both economy and the environment are chosen and due attention is paid to them, they will reinforce one another. This is so because environmental stresses and patterns of economic development are linked to one another.<sup>12</sup> For example, agricultural policies may lie at the root of land, water, and forest degradation and energy policies are associated with the global greenhouse effect, with acidification,

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supported across the world. See Jane Holder and Maria Lee, *Environmental Protection, Law and Policy: Text and Materials*, 2<sup>nd</sup> ed. (Cambridge, Cambridge University Press, 2007) p. 217. Sustainable development seeks to meet the needs and aspirations of the present generation without compromising the ability to meet those of the future generations. Hence, far from requiring the cessation of economic growth, sustainable development supports it so long as we allow the future generations to satisfy their needs. Of course, economic growth always brings risk of environmental damage, as it puts increased pressure on environmental resources but policy makers guided by the concept of sustainable development will necessarily work to assure that growing economies remain firmly attached to their ecological roots and that these roots are protected and nurtured so that they may support growth over the long term. WCED Report, *supra* note 8, Paragraphs 49-50. Since the concept sustainable development is not free from problems, one cannot say that is a universally accepted concept. For more on the meaning of sustainable development, the reason why the concept is so complex and contestable, its core principles, and its strengths and weaknesses, see generally Neil Carter, *The Politics of the Environment: Ideas, Activism, Policy* (Cambridge, Cambridge University Press, 2001) pp. 195-222.

<sup>10</sup> According to Neil Carter, the concept of sustainable development is a direct attempt to deal with the tension between economic growth and environmental protection, which lies at the heart of environmental politics, by sending the message that it is possible to have economic development whilst also protecting the environment. See generally Neil Carter, *supra* note 10, pp. 195-222.

<sup>11</sup> Charles Caccia, Member of Parliament, House of Commons, WCED Public Hearing (1986) mentioned WCED Report, *supra* note 8, Paragraph 42.

<sup>12</sup> *Ibid.*



and with deforestation for fuel-wood in many developing nations.<sup>13</sup> On the other hand, these stresses threaten economic development thereby implying the need to completely integrate economics and ecology in decision making and lawmaking processes not just to protect the environment, but also to protect and promote economic development.<sup>14</sup> After all, it is said that economy is not just about the production of wealth; nor is ecology just about the protection of nature; they are both equally relevant for improving the fate of humankind.<sup>15</sup> In other words, both economic development and environmental protection can have the same end goal which is improving the quality of human life. This, in turn, implies that the two must not be seen as interests which compete to attain different goals.

So, the conclusion is that environmental protection, which requires the integration of the environment into every economic activity,<sup>16</sup> facilitates sustainable development. On the other hand, the likelihood of attaining sustainable development will be much lower if the environment is disregarded or not integrated into economic activities.<sup>17</sup> That is why

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<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> It is said that environmental protection should be the responsibility of all government organs, not only that of environmental protection organs which was the trend in the past although the ability to anticipate and prevent environmental damage will require that the ecological dimensions of policies to be considered at the same time as the economic, trade, energy, agricultural, and other dimensions. After all, it is the policies of other government organs that are causing environmental damages and thus they must be given the responsibility to protect it. See WCED Report, *supra* note 8, Paragraph 46.

<sup>17</sup> On the meaning and basic components of the environment which deserve protection, see P.C. Mishra and R.C. Das, *Environmental Law and Society: A text in Environmental Studies* (India, Macmillan, 2001) p. 1 and H.V. Jadhav and S.H. Purohit, *Global Warming and Environmental Laws*, 1<sup>st</sup> ed. (Mumbai, Himalaya Publishing House, 2007) p. 8. At this juncture, it must be noted that although the concept *sustainable development* is widely accepted, it is not without its environmental critics. In this regard, Michael Jacobs identifies three forms of resistance amongst those participating in environmental debates. The first is frustration or irritation, usually expressed from a policy-technocratic standpoint. Sustainable development is never properly defined, it is protested; everybody seems to think it means

environmental protection is said to be inherent in the concept of sustainable development.<sup>18</sup>

At this juncture, we should realize that the concept sustainable development is not free from criticisms. Indeed, some have criticized it as an ambiguous concept with a meaning that is contested and complex while others have characterized it as an empty slogan with little substance.<sup>19</sup> Nevertheless, the principle of sustainable development has been an influential concept in environmental law since at least the early 1980s and it is now widely accepted and supported across the world.<sup>20</sup>

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something different. How can the term be adopted as a policy objective unless its meaning is clarified and agreed upon? The second form of resistance is outright rejection. Not all environmentalists have endorsed the concept of sustainable development. Politically, its most outspoken opposition comes from those we might call ‘ultra-greens’. For them, the fuzziness of its meaning is integral to its purpose. Sustainable development is a smokescreen put up by business and development interests to obscure the conflicts between ecological integrity and economic growth, and between the interests of the rich North and poor South. Acceptance of the concept by environmental groups is a mistake, it is argued: a fatal co-option into technocratic ‘global management’ sideshows designed not to disturb the fundamental processes of capitalist exploitation. The third form of resistance comes from those we might call ‘cultural critics’, principally within academia. The argument here is that the discourse of sustainable development represents an inappropriate response to the ‘environmental problematic’. It derives from the same cultural sources – modernism, scientific positivism and realism, technocratic social democracy – as the problems it is trying to address. Despite good intentions, its inability to understand or reflect recent cultural changes in industrial societies leaves its programme liable to failure. For more on these points, see Michael Jacobs, ‘Sustainable Development as a Contested Concept’ in Andrew Dobson (ed.), *Fairness and Futurity: Essays on Environmental Sustainability and Social Justice* (1999), p. 22 which by itself is included in Holder and Lee, *supra* note 10, p. 218.

<sup>18</sup> WCED Report, *supra* note 8, Paragraph 42. See also Holder and Lee, *supra* note 10, p. 217.

<sup>19</sup> See generally Neil Carter, *supra* note 9, pp. 195-222. According to Louka, too, the term “sustainable development” has been decried by some as devoid of content, as a concept used to express different and often disparate worldviews; for example, developed countries and their NGOs have used the principle to underline the importance of environmental values, whereas developing countries have used the principle to buttress their right to development. See Elli Louka, *International Environmental Law: Fairness, Effectiveness, and World Order* (Cambridge, Cambridge University Press, 2006) pp.52-53.

<sup>20</sup> Holder and Lee, *supra* note 10, p. 217. According to Carter, although policy-makers the world over argued that they could have their cake and eat it, almost every country is now

In addition to making development sustainable, environmental protection also facilitates the enjoyment of the right to clean and healthy environment which generally involves the promotion of a certain level of environmental quality.<sup>21</sup> On the other hand, one can find different legal instruments which recognize this right. For instance, the African Charter on Human and Peoples' Rights vividly recognizes the right to satisfactory environment.<sup>22</sup> In

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committed, at least on paper, to the principles of sustainable development. See, generally, Neil Carter, *supra* note 9, pp. 195-222. According to Louka, despite these misgivings, however, the principle has assisted in reconciling in one phrase what before seemed irreconcilable – namely, environmental protection and development. For more, see Elli Louka, *supra* note 19, pp.52-53. Moreover, Sand also argues the concept sustainable development is now widely accepted because, among other things, some international instruments including the 1946 International Whaling Convention, the 1968, African Conservation Convention, the 1972 World Heritage Convention, the 1973 Convention on International Trade in Endangered Species, the Rio declaration, the 1992 Convention on Biological Diversity and the 1992 UNFCCC. There are also judicial practices in support of such the concept such as that of the ICJ. For more on this and related points see generally Philippe Sands, *Principles of International Environmental Law*, 2<sup>nd</sup> ed. (Cambridge, Cambridge University press, 2003) pp. 252-266.

<sup>21</sup> The right to clean and healthy environment should be understood here as a substantive environmental right. On the other hand, a substantive environmental right generally involves the promotion of a certain level of environmental quality. For more, see Tim Hayward, *Constitutional Environmental Rights* (New York, Oxford University Press, 2005), p. 29. However, according to the draft principles of the UN Sub-Commission on Human Rights and the Environment, the right may include, as its elements, freedom from pollution, environmental degradation and activities that adversely affect the environment, or threaten life, health, livelihood, well-being or sustainable development; protection and preservation of the air, soil, water, sea-ice, flora and fauna, and the essential processes and areas necessary to maintain biological diversity and ecosystems; the highest attainable standard of health free from environmental harm; safe and healthy food and water adequate to their well-being; a safe and healthy working environment; adequate housing, land tenure and living conditions in a secure, healthy and ecologically sound environment; not to be evicted from their homes or land for the purpose of, or as a consequence of, decisions or actions affecting the environment, except in emergencies or due to a compelling purpose benefiting society as a whole and not attainable by other means; timely assistance in the event of natural or technological or other human-caused catastrophes; benefit equitably from the conservation and sustainable use of nature and natural resources for cultural, ecological, educational, health, livelihood, recreational, spiritual or other purposes. This includes ecologically sound access to nature; and preservation of unique sites, consistent with the fundamental rights of persons or groups living in the area. *Id.*, pp. 29-30.

<sup>22</sup> African Charter on Human and Peoples' Rights, OAU, Banjul (The Gambia), adopted June 27, 1981, entered into force Oct. 21, 1986, OAU Doc. CAB/LEG/67/3.

Ethiopia, it is recognized under article 44(1) of the FDRE Constitution.<sup>23</sup> This shows that environmental protection could be facilitated if measures are taken to enforce this right.

In conclusion, environmental protection is necessary because it, among other things, promotes sustainable development and also facilitates the enjoyment of the right to clean and healthy environment. Of course, there is also an argument which tries to justify environmental protection claiming that environmental policy is qualitatively different from other policies basically because environmental policy is concerned with sustaining the ecological basis of life while other policies are concerned with the quality of life.<sup>24</sup> So, the implication here is that environmental policy needs a differential and preferential treatment so that the basis for life is preserved. This argument does not, however, seem to make a good case for protecting the environment because there are also other non-environmental policies which deal with issues of life and death, not only with the quality of life, such as policies dealing with sale of drugs, consumer safety, and automobile safety.<sup>25</sup> In other words, the policies we may have in these areas, which may certainly not be environmental, can sustain or endanger life. A case in point can be allowing pharmacies to sell any drugs to anyone without medical prescription or lifting maximum driving limits in cities.<sup>26</sup>

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<sup>23</sup> For more on the constitutionality of environmental right, see, generally, Tim Hayward, *supra* note 21, pp. 36 and the following.

<sup>24</sup> See, for example, Lawrence S. Rothenberg, *Environmental Choices: Policy Responses to Green Demands* (Washington, CQ Press, 2002) p. 3

<sup>25</sup> *Ibid.*

<sup>26</sup> There are also arguments favoring environmental protection but based on different grounds. For instance, arguments for environmental protection have been put forward from anthropocentric perspective, cultural perspective (indigenous peoples' perspectives) and religious perspectives. There are also arguments that claim that the environment has to be protected for its own sake or because other beings in nature have the right to be protected and humans do not have the right to destroy them. For more on these points, see generally

At any rate, in light of the above benefits of environmental protection, we will now proceed to examining how the GTP has planned to deal with environmental protection in the coming years. In other words, *does the GTP recognize the relevance of environmental protection* is the query the next section will try to answer.

#### **4. PLACE OF ENVIRONMENTAL PROTECTION IN THE GTP**

First of all, it is worth noting that the FDRE Constitution requires environmental protection, directly and indirectly. In this regard, one can mention different articles of the Constitution. For example, article 44(1) of the FDRE Constitution guarantees every person's right to a clean and healthy environment. On the other hand, the realization of this right necessarily requires environmental protection. Besides, article 92(1) of the Constitution imposes a duty on both the Federal and Regional Governments to endeavour to ensure that all Ethiopians live in a clean and healthy environment. By virtue of article 85(1) of the Constitution, this obligation could be discharged by paying due attention to environmental protection when they make and enforce laws, and policies (plans or programs), among other things. Therefore, since the making of any law, policy, plan, and program must have its root in the Constitution,<sup>27</sup> it is logical to think that the makers of the GTP were aware of the need to include stipulations dealing with the environment

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Dale Jamieson (ed), *A Companion to Environmental Philosophy* (Massachusetts, Blackwell Publishers, 2001) pp. 1-160.

<sup>27</sup> At this juncture, it is worth mentioning that Ethiopia has an obligation to protect the environment under the international environmental instruments it has thus far accepted as well. For example, Ethiopia ratified the Convention on Biological Diversity in 1993. It is also part of the 1992 Rio Declaration, a soft law. On the other hand, these laws require the protection of the environment by taking all possible measures such as making laws and formulating policies and plans and enforcing them. Hence, the inclusion of stipulations relating to environmental protection in the GTP enables the Country to discharge its international obligation to protect the environment. As such, it could be said that, in addition to the FDRE Constitution, the environmental provisions in the GTP have their roots in the international environmental protection agreements Ethiopia has accepted as well.

in the GTP with a view to ensuring environmental protection because the GTP cannot pay deaf ears to the constitutional stipulations in respect of environmental protection. This being the case, we will now see what the words of the GTP actually say about environmental protection.

As mentioned before, the GTP provides for the long-term visions of Ethiopia, the objectives that need to be achieved to facilitate the realization of these long-term visions and the pillar strategies that could be relied upon to achieve these objectives. Environmental protection is, however, not expressly mentioned either as part of the visions or objectives or pillar strategies of the GTP. Of course, this does not mean that the GTP denies the relevance of environmental protection to the attainment of its goals. First, one can read the requirement of environmental protection into the visions or the objectives or the pillar strategies of the GTP. For instance, as the previous discussions have revealed, Ethiopia has planned, under the GTP, to bring about sustainable economic development, whereas environmental protection is a *sine quo non* condition for the attainment of this goal. In other words, economic development becomes sustainable only if the environment is protected and that is why both economic development and environmental protection are regarded as interdependent and mutually re-enforcing elements of sustainable development thereby implying the difficulty involved in attaining one by ignoring the other. Moreover, it is possible to read the need to protect the environment into some of the pillar strategies of the GTP. In this regard, pillar strategy 3.4 of the GTP could be mentioned. It deals with enhancing the expansion and quality of infrastructure development which includes enhancing and expanding the energy sector in the coming five years. On the other hand, enhancing and expanding the energy sector implies, *inter alia*, using clean energy such as solar and wind

energy which, in turn, will have a positive contribution to environmental protection.

Second, and in addition to the above implied recognition of the need to protect the environment, the GTP expressly recognizes the relevance of protecting the environment. After recognizing environmental protection as one of its cross-cutting sectors development plan,<sup>28</sup> it declares that environmental protection has a vital contribution to make development sustainable.<sup>29</sup> Moreover, the GTP emphasizes that building a carbon neutral and climate change resilient economy and the enforcement of existing environmental laws are priority actions in relation to the environmental conservation.<sup>30</sup> Further, the GTP lists the objectives it intends to achieve in relation to environmental protection.<sup>31</sup> Accordingly, policies, strategies, laws and standards, which foster social and economic development to enhance the welfare of humans and *the safety of the environment sustainably*, will be formulated.<sup>32</sup> Besides, the government will spearhead the process of implementing these and already existing environmental policies, strategies, laws and standards to ensure their effectiveness. Hence, according to the GTP, it is necessary to formulate policies, strategies, laws and standards and ensure the effective implementation these instruments together with the ones already in place so that, ultimately, the safety of the environment is enhanced.<sup>33</sup>

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<sup>28</sup> GTP, supra note 2, Chapter 8.

<sup>29</sup> Id., Section 8.7.1.

<sup>30</sup> Ibid.

<sup>31</sup> Id., Section 8.7.2.

<sup>32</sup> Emphasis added.

<sup>33</sup> At this juncture, it may be necessary to mention the stand of the PASDEP on environmental protection which is a straight forward. PASDEP clearly states that Ethiopia's vision is to bring about environmentally sound development based on the 1997 Environmental Policy of Ethiopia. Moreover, in order to realize this vision, PASDEP recognized ensuring proactively the integration of environmental dictates in development.

Therefore, it is clear that the GTP recognizes the relevance of environmental protection. Of course, the GTP could be criticized for not giving equal weights to environmental protection and economic growth/development. In this regard, since that the GTP does not explicitly recognize the need to protect the environment as part of its visions or objectives or pillar strategies, it could, legitimately, be argued that the GTP is a biased document as it is in favour of economic development and social development. Now, we are in the era of sustainable development which requires paying equal attention to economic development, social development and environmental protection. Nevertheless, the reading of the text of the GTP indubitably shows that the environment is not given equal weight with the other elements, in particular, the economy. Nevertheless, the GTP could still be used to promote environmental protection. Accordingly, in the next section, we will briefly consider how one may possibly push, by exploiting the stipulations (implied and express) in the GTP, for the better protection of the environment under the GTP.

## **5. USING THE GTP TO FURTHER ENVIRONMENTAL PROTECTION**

The fact that the GTP recognizes that protecting the environment has a vital contribution to make development sustainable could be taken as the first opportunity to seize to push for and promote environmental protection. This is so because such recognition implies the need to protect the environment or consider environmental values in the course of promoting other national interests. For example, it is possible to demand the strict use of environmental impact assessment (EIA) in decision-making process because

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On the other hand, the GTP does not include environmental protection in its vision. See, generally, PASDEP, *supra* note 1, pp. 189-190.



such method helps decision-makers identify, in advance, the possible impacts of their decisions on the environment. On the other hand, if the impacts of a given decision on the environment are known beforehand, it will be possible to take measures to avoid or mitigate them.<sup>34</sup> Similarly, it is possible to demand old factories to upgrade their technologies to minimize the pollution they cause to the environment because some of the harms they cause may be irreversible.

The other opportunity to seize is the fact that the GTP declares the necessity to formulate policies, strategies, laws and standards which foster social and economic development to enhance the welfare of humans and the *safety of the environment sustainably*.<sup>35</sup> This creates an opportunity to push for policies, strategies, laws and standards in the field of environment so that the inadequacies, for instance, in the existing environmental laws will be remedied to eventually make our system of environmental law adequate. For example, one of the reasons why the 2002 EIA Proclamation is not adequate

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<sup>34</sup> See, for example, David Hunter et al, *International Environmental Law and Policy*, 3<sup>rd</sup> ed. (Thomson West, Federation Press, 2007) p 531. It is necessary that development agents use EIA as a tool for making decision to consider the possible impacts of their actions on the environment and to take measures to avoid or minimize such impacts. Indeed, current environmental laws recognize the importance of EIA as a tool capable of ensuring the integration of environmental values into decision-making process thereby promoting sustainable development and the enjoyment of the right to live in a clean and healthy environment. See Steven Ferrey, *Environmental Law: Examples and Explanations*, 3<sup>rd</sup> ed. (New York, ASPEN Publishers, 2004) p 1; Thomas F.P. Sullivan (ed.), *Environmental Law Handbook*, 14<sup>th</sup> ed. (Rockville, Government Institutes, 1997) p. 1. In Ethiopia, too, the EIA Proclamation endorses the need to use EIA by reiterating that EIA promotes sustainable development and fosters the implementation of the constitutionally guaranteed right to clean and healthy environment. See paragraphs 2 and 3 of the Preamble of the EIA Proclamation No. 299/2002. Actually, because Ethiopia has had laws aiming at the protection and preservation of the environment including the EIA Proclamation, some writers argue that the country is deeply concerned about its environment. See, for example, Khushal Vibhute, *Environmental Policy and Law of Ethiopia*, *JEL* (2008), Vol. xxii, No.1, pp. 76, 82-83.

<sup>35</sup> GTP, *supra* note 2, Section 8.7.2.

is because it contains a number of gaps, generalities and vagueness.<sup>36</sup> Moreover, it is because of the absence of some standards the federal EPA is authorized to issue that the Environmental Pollution Control Proclamation, Proclamation 300/2002, has not been effective. Likewise, it is due to the failure of our environmental laws to recognize ‘citizens suit’, also called *public interest litigation*, in its broadest sense that some environmental laws have failed to achieve their objectives fully. For example, article 11 of the Environmental Pollution Control Proclamation recognizes ‘citizens’ suit’. However, it does not allow bringing actions against environmental protection organs if they fail to discharge their duties such as issuing directives and standards, and monitor certain activities to ensure their implementation in manners not damaging the environment. Moreover, it does not allow ‘citizens suit’ against any person for failure to obey environmental requirements unless there is an actual or a potential damage to the environment following the non-observance of such requirements.

Based on the stipulations of the GTP, however, one may push for measures to be taken to make the system of our environmental laws adequate. This could mean the amendment of some laws like the EIA Proclamation and the Environmental Pollution Control Proclamation. It could also mean the issuance of some subsidiary instruments like regulations and directives in the case of the EIA Proclamation and some standards in the case of

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<sup>36</sup>In order for any system of EIA to be effective, it is clear that appropriate legal framework is necessary. See Economic Commission for Africa, Review of the Application of Environmental Impact Assessment in Selected African Countries (Addis Ababa, Economic Commission for Africa Print shop, 2005) p. 19 (Hereinafter cited as ECA). The EIA Proclamation is, however, not adequate. For example, although it allows public participation in the EIA process, it does not provide for how long this participation should stay; the Proclamation does authorize environmental protection organs to take measures against proponents of projects that are executed without passing through EIA; it does not indicate (by annexing to its text) the actions that are subject to EIA; it does not expressly require proponents of public instruments to do EIA, etc.

Environmental Pollution Control Proclamation to facilitate the enforcement of the existing proclamations.<sup>37</sup>

Making the system of environmental law adequate requires more than just making separate environmental laws. For example, it requires mainstreaming environmental protection into sectoral laws as well. In this regard, some important sectoral laws fail to provide for stipulations in favour of environmental protection while others contain such stipulations which still remain inadequate. For instance, the current Business Registration and Licensing Proclamation, Proclamation No 686/2010, recognizes the possibility to suspend or revoke license if environmental standards are not observed. However, it does not provide for environment related requirement such as conducting EIA to register business or issue business license. On the other hand, it is possible to use the stipulations in the GTP to push for the inclusion of stipulations that aim to promote environmental protection in this and other sectoral laws. The inclusion may come about in the form of amending the existing sectoral laws or by supplementing some of them by subsidiary instruments which require environmental protection.

Moreover, realizing that formulating policies, strategies, laws and standards alone is not enough, the GTP recognizes the need to spearhead in ensuring the effectiveness of the implementation of policies, strategies, laws and standards that are formulated for the purposes of enhancing, *inter alia*, environmental protection.<sup>38</sup> This may mean a number of things. First, it may mean establishing new institutional framework or building the capacity of

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<sup>37</sup> See, for example, Environmental Protection Organs Establishment Proclamation, Proclamation No. 295/2002, article 6(7), cumulatively with Environmental Pollution Control Proclamation, Proclamation No. 300/2002, articles 3 and 6.

<sup>38</sup> GTP, *supra* note 2, Section 8.7.2.

the existing ones with a view to making them capable of ensuring the effective implementation of instruments pertaining to environmental protection.<sup>39</sup> For instance, the Federal Environmental Protection Authority and the environmental protection organs in our regions do lack adequate manpower and material resources, among other things, to effectively discharge their duties.<sup>40</sup> Thus, the GTP could be taken as favoring strengthening the capacity of these organs by easing their problems. Second, ensuring the implementation of environmental protection-related instruments may mean seriously implementing the policies, strategies, laws and standards that are formulated to further environmental needs such as by punishing deviations there from.

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<sup>39</sup>Although appropriate legal framework is necessary for any system of environmental law to be effective, the presence of appropriate legal framework alone cannot facilitate the achievement of the objectives of environmental laws unless they are effectively enforced. On the other hand, effective enforcement requires, among other things, the creation of several institutions. This is why, like appropriate legal framework, well-functioning institutions are also important prerequisites to have an effective system of environmental law. See ECA, *supra* note 36, p. 19; *Enforcement* implies taking set of measures to achieve compliance within the regulated community. See US EPA, Principles of Environmental Enforcement cited in Robert L. Glicksman et al., *Environmental Protection: Law and Policy*, 5<sup>th</sup> ed. (New York, ASPEN Publisher, 2007). p. 983; William L. Andreen, *In Pursuit of NEPA's Promise: The Role of Executive Oversight in the Implementation of Environmental Policy*, *Indiana Law Journal* (1988-1989), Vol. 64, No.2, p 209.

<sup>40</sup> For example, in relation to EIA, I made interviews and discussions with the following officials: Mr. Solomon Kebede, EIA Expert and former Ex-head of the EIA Department at FEPA, on 22 Oct 2010; Mr. Alemayehu Geleta, EIA expert, Oromia Land and Environmental Protection Bureau, Environmental Protection Core Process Owner, 20 Oct 2010; Mr. WeldeberhanKuma, Environmental and Biodiversity Case Team Coordinator at the SNNPRS Land Administration, Use, and Environmental Protection Authority, 07 October 2010; Mr. YirgaTadesse, EIA Expert and Acting Business Owner, EIA Team, and Mr. Hadush Berhe, Environmental Education and Awareness Expert, Tigray Regional Government environmental Protection, Land Administration and Use Agency, 28 October 2010; Mr. Yitayal Abebe Ashetih, Ensuring Sustainable Environmental Protection Process Leader, Amhara Regional State Environmental Protection, Land Use and Administration Authority, 29 Nov 2010; Mr. Melisachew Fantie, EIA Report Review, Auditing and Monitoring Expert, Ensuring Sustainable Environmental Protection Process, Amhara Regional State Environmental Protection, Land Use and Administration Authority, 29 Nov 2010; Mr. Getachew Belachew, EIA Officer, EPA, City Government of Addis Ababa, 02 February 2011.

Further, one of the priority strategic directions of the GTP in relation to environmental protection is enforcing the existing environmental laws. At the moment, and putting the question of adequacy aside, Ethiopia does have a number of environmental statutes to protect the various aspects of the environment. To mention just a few, Wildlife Development, Conservation and Utilization Proclamation, Proclamation No. 541/2007, Solid Waste Management Proclamation, Proclamation No. 513/2007, Environmental Pollution Control Proclamation, Proclamation No 300/2002, Environmental Impact Assessment Proclamation, Proclamation No. 299/2002, Animal Disease Control Proclamation, Proclamation No. 267/2002, Water Resources Management Proclamation, Proclamation No 197/2000, Prevention of Industrial Pollution Council of Ministers Regulations, Regulation No. 159/2008, and Wildlife Development, Conservation and Utilization Council of Ministers Regulation, Regulation No. 163/2008 are among the laws that aim to protect the various aspects of the environment. However, many of these statutes are, however, not implemented as they ought to be. For instance, despite the existence of the Solid Waste Management Proclamation, Proclamation No. 513/2007, and the Environmental Pollution Control Proclamation, Proclamation No 300/2002, which prohibit polluting the environment by, *inter alia*, throwing solid wastes into ditches and on roadsides, we still see many people disposing their solid wastes at these prohibited areas. Moreover, despite the enactment of the EIA Proclamation in 2002 which requires project that may have significant adverse impact on the environment to pass through the EIA process before their implementation begins, most projects are still implemented without passing through the EIA process.<sup>41</sup>In both cases, the problem is attributable, among other things, to lack of adequate enforcement of the existing laws. On the other hand, the

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<sup>41</sup> Interviews, *supra* note 41.

GTP recognizes the relevance of enforcing the existing environmental laws. This is in particular important because so far most of our environmental laws have been suffering from implementation problems. Hence, during the period of the GTP, one can push for the enforcement of the new and the existing environmental instruments because, at the end of the day, the effective implementation of these instruments will contribute to the achievement of the GTP's objectives.<sup>42</sup>

At this juncture, it is important to note that some sectoral laws also contain provisions relating to environmental protection. For example, article 34 of the Mining Operations Proclamation, Proclamation No. 678/2010, requires licensees to conduct mining operation in compliance with environmental protection laws. Similarly, article 60(1) of the Proclamation states that “[e]xcept for reconnaissance license, retention license or artisanal mining license, any applicant for a license shall submit an environmental impact assessment and obtain all the necessary approvals from the competent authority required by the relevant environmental laws of the country.” This implies that anyone, save for artisan miners, who intends to carry out *exploration* or *mining* activity must conduct an EIA and obtain an environmental permit from the relevant federal or regional body before he/it is issued a license. Moreover, Business Registration and Licensing

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<sup>42</sup> Of course, one can also use the democratization aspect of the GTP to push for better environmental protection in the next five years. In this respect, since the enforcement of right is one of the features of democracy or the process of democratization and the right to clean and healthy environment is recognized under article 44 of the FDRE Constitution, one may seek this right to be realized which necessarily requires environmental protection. This could be called a right approach to environmental protection. This is an approach that tries to promote environmental protection by taking environmental protection as a matter of human rights. For more on this point, see Tim Hayward, *supra* note 21, pp. 27-31. However, it should be noted that adopting a human right approach is not a panacea for every environmental problem although such approach has a significant and distinctive role to play in addressing the problem. This means, the approach can be part of the solution to the problem. *Id.*, p. 25

Proclamation, Proclamation 686/2010, allows the suspension (article 37(1)(a)) and cancellation (article 39(1)(c)) of licenses if standards of environmental protection are not observed. Therefore, the GTP could be used not only to push for the effective application of environmental protection laws but also the different stipulations inserted into various sectoral laws to ensure environmental protection.

In conclusion, the GTP recognizes or puts sufficient emphasis on the need to protect the environment. As such, it presents many opportunities which, if seized, can promote environmental protection. It requires making the necessary instruments to guarantee the safety of the environment and ensuring the effective implementation of environment-related policies, strategies, laws and standards that already exists and that are yet to be issued. If converted to actions, these stipulations in the GTP are, indeed, capable of facilitating environmental protection.

## **6. ANY LESSON FROM THE PASDEP?**

The PASDEP was Ethiopia's five years strategic plan for the period 2005/06-2009/10.<sup>43</sup> It was formulated with the intent to lay out directions for accelerated, *sustained*, and people-centered economic *development* as well as to pave the groundwork for the attainment of the *MDGs* by 2015.<sup>44</sup> In order to achieve these objectives, the PASDEP provided for eight pillar strategies which are building all-inclusive implementation capacity; a massive push to accelerate growth; creating the balance between economic development and

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<sup>43</sup> The vision of Ethiopia, specifically in the economic sector, under the PASDEP was building an economy which has a modern and productive agricultural sector with enhanced technology and an industrial sector that plays a leading role in the economy; sustaining economic development and securing social justice; and, increasing per capita income of citizens so that it reaches at the level of those in middle income countries. See PASDEP, *supra* note 1, p. 44.

<sup>44</sup> *Ibid.* Emphasis added.

population growth; unleashing the potentials of Ethiopia's women; strengthening the infrastructure backbone of the country; strengthening human resource development; managing risk and volatility; and, creating employment opportunities.<sup>45</sup> Therefore, as we can see, and like in the GTP, environmental protection is not expressly included in the objectives or the pillar strategies of the PASDEP. Nonetheless, it could be said that the PASDEP also recognized environmental protection. First, laying out directions for *sustained development*, which is in the objectives of the PASDEP, is not possible without protecting the environment. Second, the PASDEP aims to pave a way for the attainment of the MDGs, whereas one of the MDGs is environmental sustainability.<sup>46</sup> As a result, it could be argued that PASDEP's objectives embodied environmental protection. Moreover, the PASDEP contained, like the GTP, various stipulations which specifically and expressly deal with environmental protection. For instance, it recognizes the need to protect the environment based on the 1997 Environmental Policy of Ethiopia and also the need to ensure proactively the integration of environmental dictates into development.<sup>47</sup> This also shows that the PASDEP paid attention to environmental protection.

Therefore, one could normally expect Ethiopia's record in relation to environmental protection during the PASDEP to be good. Yet, the reality on

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<sup>45</sup> PASDEP, *supra* note 2, p. 46.

<sup>46</sup> The Millennium Development Goals (MDGs) that the international community has agreed to achieve by 2015 are eight in number and they are eradicating extreme poverty and hunger, achieving universal primary education, promoting gender equality and empowering women, reducing child mortality rate, improving maternal health, combating HIV/AIDS, malaria, and other diseases, *ensuring environmental sustainability*, and developing global partnership for development. Therefore, environmental protection is included in the eight MDGs the international community has consented to achieve by 2015. This information is available online.

<sup>47</sup> For more on the stipulations of PASDEP, see generally PASDEP, *supra* note 1, pp. 46, 189-191.



the ground does not seem to coincide with such expectation as there was no significant step taken to protect the environment in particular in the field of making and enforcing environmental policies, strategies, laws and standards.<sup>48</sup> A case in point is the EIA Proclamation which was enacted before the PASDEP<sup>49</sup> but which remained inadequate throughout the time of PASDEP as it was neither supplemented by secondary laws that could not facilitate its effective implementation nor seriously used in practice. This is true, to some extent, for other environmental laws, too.<sup>50</sup> Therefore, the lesson one could get from the PASDEP (or the fate of its stipulations relating to environmental protection) is not to invest too much trust in the words of the GTP because its stipulations may not seriously be converted to actions. On the contrary, even if our record of environmental protection during the PASDEP was not good, we can still hope for the best during the time of the GTP because we are now observing some promising measures being taken such as integrating environmental protection into sectoral laws, investing in

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<sup>48</sup> For instance, in relation to the protection of the environment in general and the implementation of environment laws in particular, I made discussions with some persons at the Federal EPA, whose identities are kept anonymous, at various times such as in October 2010 and April 11, 2011.

<sup>49</sup> The EIA Proclamation was enacted in 2002.

<sup>50</sup> For example, most of the environmental laws that are in place at the moment are not supported by regulations which can facilitate their effective implementation despite authorizations from the House of Peoples' Representatives to issue such regulations. Moreover, we did not have new laws or amendments in some areas although laws dealing with some aspects of the environment were issued during this period. For example, from February 2005–July 2008, the House of Peoples' Representatives issued only six proclamations in the field of environment. From them, two were enacted to ratify a treaty, that is, the Kyoto Protocol Ratification Proclamation, Proclamation No. 439/2005 and the Comprehensive Nuclear Test-Ban-Treaty Ratification Proclamation, Proclamation No. 493/2006. The other four proclamations are Development Conservation and Utilization of Wild life Proclamation No. 541/2007, Forest Development, Conservation and Utilization Proclamation No.542/2007, Ethiopian Wildlife Development and Conservation Authority Establishment Proclamation No 575, and Radiation Protection Proclamation No 571. However, laws were not made in some of the most important areas. For example, there have not been any regulations issued under the Environmental Pollution Control Proclamation, Proclamation No. 300/3003. The situation is similar for the EIA Proclamation, Proclamation No. 299/2002, and the Solid Waste Management Proclamation, Proclamation No. 513/2007.

clean power sources, and undertaking conservation activities. (These measures will be discussed in detail later on).

## **7. PLACE OF ENVIRONMENTAL PROTECTION IN THE OROMIA GTP**

The Government of the Region of Oromia also has its own GTP for the year 2003-2007 E.C. That being the case, one may ask if this GTP recognizes the need to protect the environment as does the FDRE GTP. A cursory look at its pillar strategies reveals that, like the FDRE GTP, it does not include environmental protection. Nevertheless, this does not mean that environmental protection is not given attention in the Oromia GTP.

For example, one of the pillar strategies of the Oromia GTP is *bringing about fast and sustainable economic growth*.<sup>51</sup> On the other hand, it is obvious that environmental protection is an implied element in this pillar strategy as it is not possible to have *sustainable* economic growth without environmental protection. At this juncture, it is legitimate to closely examine this pillar strategy of the Oromia GTP and question if *fast* and *sustainable* are not oxymoron within the context of development. Indeed, although the term *fast* is vague, bringing about fast economic growth while trying to be sustainable is going to be a big challenge, not impossible.

Moreover, there are sections in the Oromia GTP which specifically deal with environmental protection. To begin with, section 4.16 states that in the last five years [during the PASDEP], monitoring activities were conducted 167 times in relation to 57 factories, as a result of which 15 factories from those

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<sup>51</sup>See section 2.2., *Karoora Guddinaa fi Tiraansifoormeshinii Waggaa Shanii (2003-2007) Mootummaa Naannoo Oromiyaa*, page 28.

which had problems were made to improve the manner of their operation to ensure environmental protection.<sup>52</sup> Regardless of this measure, this section of the Oromia GTP declares that attention must be given to the use of EIA in relation to the investment activities taking place in the Oromia Region to ensure environmental protection.<sup>53</sup> The fact that the Oromia GTP specifically mentions the necessity to use EIA is very important because such recognition reveals that there is enough awareness about the relevance of EIA to environmental protection by the Region's policy-makers.

Another important section in the Oromia GTP is Section 5.1.7. This section vividly declares that *to increase production and productivity and to conserve and transfer natural resources to the future generation, natural resources protection and conservation need serious attention which, in turn, requires the efforts of the Regional Government and the involvement of its people.*<sup>54</sup> This is a section with paramount importance because it recognizes that environmental protection is necessary not only for the present generation but also for the future generation.

Finally, it is worth mentioning that the Oromia GTP recognizes the need to include environmental protection in educational curriculum.<sup>55</sup> This is another scintillating stipulation because if environmental protection is made part of educational curriculum, it will be possible to cultivate sense of environmentalism and to increase environmental awareness at an early stage.

In conclusion, although the pillar strategies of the Oromia GTP do not include the need to protect the environment, the reading of its different

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<sup>52</sup> Id., Section 4.16, pp 8-9.

<sup>53</sup> Id., Section 4.16, pp 8-9.

<sup>54</sup> Id., Section 5.1.7, pp 100.

<sup>55</sup> Id., Section 6.1.1, pp 151.

sections reveals that it actually recognizes the importance of protecting the environment. In fact, it expressly recognizes that environmental protection is in the interest of both the present and the future generations. Hence, it can be safely argued that one can use the Oromia GTP, in the same way anyone can use the FDRE GTP, to advocate better protection of the environment of the Region in the years to come.

## **8. POST GTP ENVIRONMENTAL PROTECTION MEASURES**

It is now about two years since the GTP was launched. Hence, it would be appropriate to question what has been done since then in the field of environmental protection in line with what is stipulated in the GTP. For example, the GTP requires, among other things, formulating environmental policies, strategies, laws and standards, and implementing same to protect the environment. Thus, the question would be whether any measure has been taken in this regard.

Fortunately, it is possible to mention some positive measures that have been taken after the GTP was launched and which can promote environmental protection. For example, to mention some legislative measures, the FDRE Parliament enacted Investment Proclamation 769/2012. The Proclamation contains, unlike its predecessor, Proclamation 280/2002 and its amendment, some stipulations which could be used to contribute to environmental protection. In this regard, article 38 of the Proclamation states: “Any investor shall have the obligation to observe the laws of the country in carrying out his investment activities. In particular, he shall give due regard to environmental protection.” As one can discern from this article, the Proclamation attaches greater importance to environmental protection because, although it requires investors to observe all the laws of the country,

it in particular requires them to give due regard to environmental protection. On the other hand, investors can give due regard to environmental protection only if they observe the laws pertaining to environmental protection. At the moment, Ethiopia has myriad of environmental laws. Hence, according to article 38, investors must observe any of these laws they may come across in the course of doing their business.

At this juncture, it must be noted that legislative measures could be adopted by the regional governments as well. For instance, recently (in 2012), the Oromia Regional Government has enacted Environmental Pollution Control Proclamation to deal with issues of environmental pollution. Thus, despite its limited territorial application (as it applies only to the Oromia Region), the effective implementation of this Proclamation will undeniably contribute to the protection of the environment of the country in particular given the fact that Oromia is the largest region in Ethiopia.

As far as non-legislative measures are concerned, we can mention, for example, the various conservation activities that have been taking place at different levels to deal with environmental problems.<sup>56</sup> In this regard, it is nowadays common to watch reports, for example, on Ethiopian Television and Oromia Television about the different conservation activities such as planting trees and making terrace that are taking place.<sup>57</sup> This could be taken

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<sup>56</sup> Interview with Mr. Solomon Kebede, Director, Environmental Standards Program Directorate, Federal EPA, Addis Ababa, 26 January 2012. Of course, such measures were taking place even before the GTP was launched. Therefore, it could be argued that such measures are not necessarily meant to implement the GTP in respect of environmental protection. On the other hand, so long as they are taking place and they are able to contribute to environmental protection, one can take them as post GTP environmental protection measures.

<sup>57</sup> For example, on 26 and 27 January 2012, there was a program on TV Oromia about the plantation and terracing activities that were undertaken in around Harar by the local community. Similarly, there was a report on ETV on 28 January 2012, on 1:00 pm news,

as one of the necessary steps to protect the environment as these measures can deal with certain environmental challenges like soil erosion and deforestation.<sup>58</sup> For example, according to some studies, at the beginning of the 20<sup>th</sup> century, 60% of Ethiopia was covered by forest. At the moment, it is only about 3% of Ethiopia that is covered by forest. This shows that deforestation is/was one of the major environmental problems in Ethiopia.

At this juncture, one may wonder what type of miraculous deforestation happened to reduce Ethiopia's forest cover from 60% to about 3% in less than a century. According to one writer,<sup>59</sup> the fascist Italians are to blame for such horrendous deforestation. The writer states that automatic saws were first introduced to Ethiopia by the fascist Italian soldiers. Then, within five years of their occupation, these soldiers cleared 20% of the total forests of the country. Indeed, during this time, the Italians, in addition to satisfying their domestic need for forest products, became the suppliers of forest products to European markets. Sadly, after the Italians left, some Ethiopians substituted themselves in their shoes and continued to clear the forests and export them to foreign markets. In about 30 years, a relatively longer period as compared to the Italians' sojourn, the Ethiopians cleared more forests than

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about the soil conservation measures in the SNPPRS to facilitate the attainment of green development. Similarly, there was a report about soil conservation measures and plantation of trees in Oromia region to contribute to the green development. These reports show that the public is being mobilized to carry out environmental protection activities.

<sup>58</sup> According to someone at the Federal EPA, although the conservation measures that are taking place are necessary to deal with certain environmental problems, they are not based on prior study. For example, tree plantation leads to reduction of water run-off as it recharge underground water which may in turn affect the interests of people living downward. On the other hand, if such measure is based on prior study, a compromise formula could found whereby the interests of everyone concerned could be promoted. Interview with one Official at the Federal EPA who preferred to remain anonymous, Addis Ababa, 27 January 2012.

<sup>59</sup> ኮሎኔል መንግስቱ ኃይለማርያም፡ ትግላችን፡ የኢትዮጵያ ሕዝብ አብዮታዊ የትግል ታሪክ፤ ቅፅ 1፤ (አዲስ አበባ፤ ፀሃይ አሳታሚና አከፋፋይ ድርጅት፤ 2004 ዓ.ም.)፡ገፅ 60፡፡

the fascist Italians did. As a result, at the time the military government, the *derg*, took power, it was only 4% of the country that was covered by forests.

So, the above paragraph reveals that the tragic environmental catastrophe that happened to our forests occurred because the expulsion of the Italians was not followed by the expulsion of their automatic saws. Indeed, from the perspective of environmental protection, it could be argued that the automatic saws were some of unnecessary legacies of the fascist Italians' occupation. What is worse is the fact that soil erosion is corollary to deforestation. For example, according to some environmentalists, the wanton destruction of Ethiopia's forests led to a large scale erosion of the country's top/fertile soil.<sup>60</sup> On the other hand, the current measures of reforestation and afforestation will enable us to reclaim what we had lost in the bygone days. This will, in turn, contribute to soil conservation together with the other measures, such as terracing, that are being taken.

Another measure that one can mention as a positive post GTP step, in fact, as a giant step towards environmental protection, is the preparation of a policy document called *Ethiopia's Vision for A Climate Resilient Green Economy (CRGE)* or *Ethiopia's Climate-Resilient Green Economy: Green Economy Strategy*, 2011.<sup>61</sup> This document, which was presented by H.E. former Ethiopian Prime Minister Meles Zenawi on the Durban Climate Change Conference in South Africa, was prepared and approved jointly by the Office of the Prime Minister, the Ministry of Finance and Economic Development,

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<sup>60</sup> See Dessalegn Rahmato, *Environmental Change and State Policy in Ethiopia: Lessons from Past Experiences*, FSS Monograph Series 2 (Addis Ababa, Forum For Social Studies, 2001) p. 33 and the following.

<sup>61</sup> The document that outlines Ethiopia's Vision for A Climate Resilient Green Economy could be obtained from the Federal EPA.

and the Federal Environmental Protection Authority (EPA).<sup>62</sup> It aims at setting out the challenges and opportunities which climate change brings for Ethiopia, making a case for why carbon neutral and climate resilient development trajectory to green economy is a priority for Ethiopia and thus for the implementation of the GTP, explaining what the Federal EPA is doing on behalf of the FDRE to lead and coordinate an efficient and effective national response to climate change, describing the steps that are needed to transform Ethiopia's economy to carbon neutral and climate resilient, and clarifying the roles and responsibilities of stakeholders in the realization of Ethiopia's vision to bring about carbon neutral and climate resilient economy. In fact, Ethiopia has planned to be a carbon neutral economy by 2025.<sup>63</sup>

Therefore, the CRGE sets out lofty goals the attainment of which could contribute to environmental protection in Ethiopia. This necessitates considering the implementation side of the CRGE to know to what extent the protection of the environment is promoted by the CRGE. However, at the moment, this job cannot be done as it is too early to make any assessment about the impact of the CRGE on the ground.<sup>64</sup> Hence, any valuable assessment of the conversion of its words to actions has to wait a while.<sup>65</sup>

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<sup>62</sup> Interview with Mr. Solomon Kebede, *supra* note 56.

<sup>63</sup> See generally FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, Ethiopia's Climate-Resilient Green Economy: Green Economy Strategy/Ethiopia's Vision for A Climate Resilient Green Economy (2011) (available at the Federal EPA).

<sup>64</sup> Brief discussion with Mr. Dereje Agonafir, Director, Environmental Units Program Directorate, Federal EPA, 26 January 2012.

<sup>65</sup> It is important to note at this juncture that the CRGE focuses highly on tackling the problems posed by climate change. On the other hand, environmental challenges are not limited to climate change although climate issues have now become more topic as we can see from the repeated international conferences taking place at various places around the world. Of course, it is obvious that measures that are taken to deal with climate change problems can incidentally address other environmental issues. For example, afforestation or reforestation can soil erosion while serving as a carbon sink.



Another measure that could be mentioned as post GTP and that is capable of promoting environmental protection is the attempts that are being made to use clean energy sources.<sup>66</sup> For example, Ethiopia has recently started constructing wind power projects<sup>67</sup> which include the 300 MW Aysha Wind Farm near the Djibouti border, the 100 MW DebreBirhan Wind Farm north of Addis Ababa, the 100 MW Assela Wind Power Project southeast of Addis Ababa, and the 153 MW Adama II Wind Power Project.<sup>68</sup> Similar measures have been taken in relation to the construction of geothermal power plant as well.<sup>69</sup>

Therefore, the above examples reveal that measures that can promote environmental protection are being taken after the GTP was launched. Hence, if such measures are diversified and sustained in the years to come, we will have better environmental protection under the GTP.<sup>70</sup> Of course, although about two years have passed since the launching of the GTP, there has not been any environmental law that was issued to strengthen environmental protection in Ethiopia despite the fact that some laws are badly needed in certain areas of the environment. Yet, and once again, since

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<sup>66</sup> For instance, some cement factories have started using, to some extent, solar energy.<sup>66</sup> This is a contribution to environmental protection since it reduces, regardless of its magnitude, the use of fissile fuel which causes air pollution. Thus, other factories could also be required to use such source of energy to the extent possible. Interview with Mr. Solomon Kebede, *supra* note 56.

<sup>67</sup> According to Ethiopian Electric Power Corporation, Ethiopia has substantial wind power resources and hence it sees wind power as a clean energy complement to its hydropower generating capacity of the country. Andrew Burger, *Africa at the Energy Crossroads: Ethiopia Launches 6 Wind, 1 Geothermal Power Project*, available at <http://cleantechnica.com/2011/11/26/ethiopia-launches-six-wind-one-geothermal-power-project> (accessed on 28 January 2012)

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

<sup>70</sup> However, it is said that certain regressive measures are being taken side-by-side with environmental protection measures. For instance, the Ministry of Industry has allowed some cement factories to import and use coal which is taking place at the moment. Interview with one official at the Federal EPA who demanded anonymity, 27 January 2012.

the beginning shows that some of the words in the GTP are being converted to actions and the GTP has some years to go, there is every reason to believe that the words of the GTP may be converted to actions with a view to furthering environmental protection.

## **9. CONCLUSION AND RECOMMENDATION**

The GTP recognizes the need to protect the environment. It, among other things, recognizes the need to issue new instruments to protect the environment and to effectively enforce them together with the existing ones. As a result, although our experience does not warrant investing too much trust in the words of a document, one may expect the situation of environmental protection in Ethiopia to be better during the GTP provided, of course, that the opportunities that the GTP has presented are seized and exploited. In this regard, there is a beacon of hope since some measures-legislative and non-legislative-have already been taken. Hence, it is recommended that the words of the GTP must be put into effect to the fullest extent possible so that environmental protection is facilitated. This will ultimately facilitate the achievement of the overall objectives of the GTP. Thus, Ethiopia in particular the federal government must, *inter alia*, make laws or amend the existing environmental laws, as the case may be, with the intent to remedy the inadequacies or gaps or generalities they contain and pay serious attention to their effective implementation. Besides, regional governments should also take measures that are necessary to ensure environmental protection. In this regard, they can follow the suit of Oromia by, for instance, making their own environmental laws.

# DERIVATION OF RIGHTS: AFFORDING PROTECTION TO LATENT SOCIO-ECONOMIC RIGHTS IN THE FDRE CONSTITUTION

Amsalu Darge Mayessa★

## 1.1. INTRODUCTION

A country's constitution has the potential to be powerful vehicle for giving domestic legal effect to international standards on economic and social rights. Civil and political and socio-economic rights have received extensive protection via their inclusion as justiciable rights in the constitutions of various countries. For instance, the 1996 South African Constitution can be used as a model because it entrenches the two grand categories of human rights as directly justiciable rights in its Bill of Rights. This symbolizes a far reaching commitment on the national fora to the interdependent and indivisibility of all human rights.<sup>1</sup>

When it comes to Ethiopia, almost one third of the Articles of the FDRE Constitution are devoted to elaborating all categories of human rights.<sup>2</sup> Chapter three of the FDRE Constitution engrained Bill of Rights that stands in volume having thirty two articles<sup>3</sup> embracing civil and political rights extensively and very scant socio-economic rights. Ratification of

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<sup>1</sup>Sandra Liebenberg, 'The Protection of Economic, Social and Cultural Right in Domestic Legal System', in *Economic Social and Cultural Rights: A text book*. Second Rev.edn. A. Eideetal (ed.s), MartinusNijhoff Publishers(2001),p.56-76.

<sup>2</sup>Minase Haile, 'The New Ethiopian Constitution: It's Impact up on Unity, Human Rights and Development', *Suffolk Transnational Law Review*, Vol.20, No.1 (1996), p.53.

<sup>3</sup>Fasil Nahum, *Constitution for A Nation of Nations, the Ethiopian prospect*, the Red sea Press (1997),p.10

international and regional human rights instruments by Ethiopia is also a plus. To mention some: International Covenant on Economic, Social and Cultural Rights (ESCR), Convention on the Right of Child (CRC), the African Charter on Human and Peoples' Rights (ACHPR) and etc. Hence, these human rights are part and parcel of the law of the land.<sup>4</sup> The Bill of rights recognized in the FDRE constitution as fundamental rights and freedoms are bifurcated into "Human Rights" on the one hand and 'Democratic Rights' on the other hand. Socio-economic rights are embedded in the latter category. The classification seems only technical since all human rights are indivisible.<sup>5</sup>

Ethiopia has acceded to the ESCR on 11 Sep.1993 and hence, all the socio-economic rights enunciated under the ESCR are an integral part of the law of the land.<sup>6</sup> On the other hand, in the legal system of Ethiopia the FDRE Constitution is the supreme law of the land.<sup>7</sup> All citizens and all organs of the government, political organizations, etc have the constitutional obligation to respect and obey the provisions of the supreme law of the land.<sup>8</sup>

The most fundamental rights for instance, the right to clean water, food etc are impliedly protected under "National Policy Principles and Objectives (herein after NPPO)" (Art 90). It is therefore possible to boldly argue that there are no separate and specific provisions devoted to the right to health, to

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<sup>4</sup>FDRE Constitution Art.9 (4).

<sup>5</sup>Id, Art 10(1) of the FDRE constitution seem to consider the inalienable (indivisible) nature of human rights and art 9(4) also plainly remedy the situation by making cross- reference to the ACHPR which aptly maintained the notion of indivisibility and interdependency of human rights in its preamble.

<sup>6</sup>Gebreamlak Gebregiorgis, 'The Incorporation and the Status International Human Rights under the FDRE Constitution', *Ethiopian Human Rights Law Series*, Vo 1.2, Faculty of Law, (2008), p.37.

<sup>7</sup>FDRE Constitution Art 9(1).

<sup>8</sup>Id, Art 9(3).

housing, to education, to food and to clean water expressly. The later categories of rights are implicitly protected by the constitution.<sup>9</sup>

When we look at the right to health, there is no separate provision in the constitution pertaining to the same right, explicitly in an avowed manner; however, references to the right could be made indirectly to other provisions in the constitution. Hence, the FDRE constitution enshrines socio-economic rights both in the bill of rights and in what it calls NPPO which are important guide line for the three organs of government.<sup>10</sup> The implied recognition of socio-economic rights in the supreme law of the land paves the way to look for the derivation of rights.

## **1.2. FEATURES OF SOCIO-ECONOMIC RIGHTS UNDER THE FDRE CONSTITUTION**

As it has been avowedly stated herein above, socio-economic rights are recognized and protected under the FDRE constitution. These rights include the explicit and implied socio-economic rights. In this section, the author will try to reveal the feature of these rights and how they are enunciated in the same constitution that may also show whether the FDRE constitution accorded a balanced recognition of both sets of rights. Socio-economic rights found in the FDRE constitution are characterized by:

### ***1.2.1. Fewer in Number***

The provisions of economic and social rights enunciated in the FDRE constitution are very scant in number when compared to civil and political rights. There are only three articles that directly deal with these rights, but generally the constitution is constituted of 106 articles. On the other hand

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<sup>9</sup>Dejene Girma, 'Economic, Social and Cultural Rights and their Enforcement under the FDRE Constitution', *Jimma University Law Journal* Vol.1, No. 2, (2008), p.74-75.

<sup>10</sup>SisayAlemahu, 'The Constitutional Protection of Economic and Social Rights in the Federal Democratic Republic of Ethiopia', *Journal of Ethiopian Law*, Vol. 22, No.2, (2008), p.138.

civil and political rights have a wide coverage of the constitution. This aspect of constitutionalization of socio-economic rights reveals that socio-economic rights are not given the same emphasis like that of civil and political rights. It seems selective in the way it recognized these socio-economic rights. This aptly tells us the failure of the FDRE constitution to accord a balanced protection to the two grand categories of human rights. As T.S. Twibell said ‘Ignoring rights is not really a complex legal problem, it may be justified that Ethiopia lacks many resources due to its underdeveloped industrial and educational infrastructure.<sup>11</sup> However, socio-economic rights can be negatively protected.

### ***1.2.2. Broad and Very Vague***

Despite their terseness, those socio-economic rights enunciated in the FDRE constitutions are very broad and vague. If a certain law is broad and vague it always opens the door for controversy and contradiction. When such rights contested before the court of law; it is hardly possible to give content to the contested right and remedy the situation. For instance, in Art 41(3) what does the phrase “publicly funded social services” mean? Almost all the rights under the same articles are crude that it is difficult to identify the rights guaranteed and the extent of protection afforded to them.<sup>12</sup> Specifically Art 41(6) and (7) do not give rise to a right based approach rather, they impose duty on the government to ensure the enjoyment of the rights provided for in article 41(1) and (2) recognized in crude terms.<sup>13</sup> The only possible way of alleviating this problem is “interpretation” through which it is possible to expand the existing rights in order to cover the untouched areas of economic and social rights. The vagueness of socio-economic rights is not the only

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<sup>11</sup>T.S. Twibell, ‘Ethiopian Constitutional Law: The Structure of the Ethiopian Government and The New Constitutions Ability to Overcome Ethiopians Problem’, Vol. 21, No. 399, *Loy.L.A. International and Comparative Law Journal* (1999), pp.444-445.

<sup>12</sup>Sisay at note 10, p.139 and see also Twibell at note 11, pp.442-443.

<sup>13</sup>Dejene, supra note 9, p.83-85 and see also Sisay at note 10, pp.148.

feature of Ethiopian constitution, but also it is attributed to the ICESCR from its inception, Philip Alston put this situation clearly:

*It is generally agreed that the major short coming of the existing international arrangements for the promotion of respect for economic rights is the vagueness of many of the rights as formulated in the covenant and the resulting lack in the clarity as to their normative implications.<sup>14</sup>*

It is possible to argue that the vagueness of the right clearly hampers the normative development of the rights and enjoyment of the same before the court of law.

### ***1.2.3. Poorly Drafted***

This feature is mainly attributed to the constitutionalization of some fundamental socio-economic rights; among others, encompassing the right to food, to clean water, to health, to social security and etc under Art 90<sup>15</sup> of the constitution as ‘social objectives’ than directly justiciable rights. Arguably, the author boldly claims that these implied socio-economic rights are rights; hence, they should not have been put under National Policy Principles and Objectives which eluded their direct judicial protection. One can see and draw adequate lessons from the constitutionalization of socio-economic rights in the South African Constitution of 1996; in which the drafting of the relevant provisions in the South African Bill of Rights relating to socio-

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<sup>14</sup>Philip Alston, ‘No Right to Complain About Being Poor: The Need for an Optional Protocol to the Economic Covenant in AsbjornEide and Jain Helgesen (ed.s), *The Future of Human right protections in a Changing World: Fifty years since the four freedoms Address-Essays* in Honour of TorkelOpsah (1991), p.86.

<sup>15</sup>Art 90(1) of the FDRE Constitution provides that: to the extend the country’s resources permit, policies shall aim to provide all Ethiopians access to public health and education, clean water, housing, food and social security. It is totally a government obligation without the corresponding individual rights and tied up by the language of progressive realization.

economic rights were substantially influenced by the provisions of the ICESCR.<sup>16</sup>

### **1.3. JUSTICIABILITY OF ECONOMIC AND SOCIAL RIGHTS IN THE FDRE CONSTITUTION**

There exists dominant debate regarding the justiciability of socio-economic rights.<sup>17</sup> Many legal academics hold the view that it is inappropriate to include socio-economic rights as justiciable rights.<sup>18</sup> But here, it is essential to consider General Comment No. 9 of the Committee on Economic, Social and Cultural Rights, which expresses that states parties are under obligation to use all the means at its disposal to give effect to the rights recognized under the covenant. In this respect, appropriate means of redress or remedies must be available to any aggrieved individual or group.<sup>19</sup> In addition, the expression of the Committee is that some rights of the ICESCR are capable of immediate implementation reveals that the rights in question are justiciable irrespective of resource situation.<sup>20</sup> Granting remedies for violation of civil and political rights and putting socio-economic rights (other half of indivisible right) beyond the reach of courts would thus be arbitrary and incompatible with the notion of indivisibility.<sup>21</sup>

Economic and social rights as one part of the bill of rights are recognized under the FDRE constitution. All organs of the government including legislative, executive and judiciary at all levels, are under obligation to

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<sup>16</sup>Liebenberg, Supra note 1, pp.76.

<sup>17</sup>Henry J. Steiner et al (ed.s), *International Human Rights in Context, Law, Politics, Morals* (3<sup>rd</sup> ed.), Oxford University Press (2007), p.313.

<sup>18</sup>Liebenberg, Supra note 1, pp.58.

<sup>19</sup>General Comment No.9, Para. 9.

<sup>20</sup>Ida Elisabeth Koch, 'The Justiciability of Indivisible Rights', *Nordic Journal of International Law*, (2003) p. 5.

<sup>21</sup>Steiner, Supra note 17, pp.313.



respect and give effect to those rights provided for in the bill of rights.<sup>22</sup> Meaning, measures taken by Ethiopia should go beyond constitutional entrenchment that is the task of concretizing these rights and converting the same into legally consumable commodities.<sup>23</sup>

This aspect of giving effect to the obligation undertaken in the international treaty and constitutionally guaranteed socio-economic rights plainly binds the judicial body to enforce and respect those fundamental rights and freedoms. Therefore, imposing the responsibility of respecting, protecting and fulfilling the rights, on the judiciary, has given a justiciable dimension to these rights.<sup>24</sup> There is also another provision under the constitution that further rejuvenates the adjudicatory power of the court: ‘Everyone has the right to bring a justiciable matter to, and to obtain a decision or judgment by a court of law or any other competent body with judicial power.’<sup>25</sup>

It is evident that a claimant can bring any justiciable matter before the judicial body and get remedy. Here, the major issue is whether socio-economic rights are justiciable or not under the FDRE constitution. In our constitution the availability of socio-economic rights (as legal basis) under the fundamental rights and freedom is a proof for the justiciability of the same. Because the title of the chapter expresses that those rights which are believed to be of such nature are listed therein and socio-economic rights are one of them and subjected to some form of judicial enforcement (the setting element of justiciability).

It is therefore possible to boldly argue that the FDRE constitution protects economic and social rights by incorporating them in the bill of rights as

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<sup>22</sup>FDRE Constitution Art 13(1).

<sup>23</sup>Tsegaye Regassa, ‘Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia’, *Mizan Law Review*, Vol.3, No. 2, (2009), p.289.

<sup>24</sup>Sisay, *Supra* note 10, p.142.

<sup>25</sup>FDRE Constitution Art 37(1).

directly justiciable as well as by making pertinent international treaties ratified by Ethiopia part and parcel of the law of the land.<sup>26</sup> What is regrettable is that the claimable socio-economic rights as directly justiciable human rights are very meager in number. To mention some:

Article 41 of the constitution is with the title of “Economic, Social and Cultural rights.” It has 9 sub-articles that deal with different socio-economic rights. The first two sub-articles guarantee, the right to engage freely in economic activity and to pursue a livelihood of his/her choice and the right to choose his/her means of livelihood, occupation and profession.<sup>27</sup> These are a plainly guaranteed socio-economic right to work anywhere in the country without any qualification of the type of the work as long as it is not contrary to the law. Therefore, this right to work has a directly justiciable dimension before Court of law.<sup>28</sup> The other directly justiciable right is under sub-article 8 of the same provision which guarantee the right to receive fair prices; that is:

*Ethiopian farmers and pastoralists have the right to receive fair prices for their products that would lead to improvement of their condition of life and to enable them to obtain an equitable share of the national wealth commensurate with their contribution. This objective shall guide the state in the formulation of economic, social and development policies.*

This right has an aim of protecting the farmer’s and pastoralists socio-economic rights so as to enable them to receive fair price for their products which has the purpose of improving their living conditions. Not only this, but it has also extended the protection of their right to property which has

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<sup>26</sup>Sisay, Supra note 10, p.151.

<sup>27</sup>See art 41(1) and (2) of the FDRE Constitution.

<sup>28</sup>Dejene, Supra note 9, p. 91-93.

both the nature of civil, political and socio-economic rights. Sub-article 8 further stipulates that the government should use the right to receive fair prices as a guide in the course of formulating economic, social and development policies.<sup>29</sup>

Sub-art 3 of the same article, however, does not provide for the right to publicly funded social services embracing the right to health, housing, clean water and etc, for such rights are not explicitly guaranteed rights under our constitution and hence, they are not directly justiciable. If so, the right to equal access to publicly funded social services is not socio-economic right. Dejene said that “sub- article 3 is a tricky provision...at first glance; it appears that it grants the right to these services...does not provide for the right to health, housing, water or electricity. In short it does not provide the right to get social services.” He further argues that this sub-article does not seem socio-economic rights but civil and political rights for it talks about the notion of equality.<sup>30</sup> Therefore, Art 41 except sub 1, 2 and 8 does not provide for all rights falling within the realm of socio-economic rights in black and white letters as one would hope by reading at its caption.<sup>31</sup>

The other directly justiciable right is provided under art 42 which protect the right to work. It embraces rights among others, right to form associations like trade unions, and the right to equal pay for equal work for women, the right to strike, the right to reasonable limitation of working hours, to rest and leisure, to leaves and etc. The first two rights have the nature of civil and political rights, where as the latter illustrated rights are socio-economic rights in their very nature for they do entail positive obligation of the government.<sup>32</sup> It also accords protection to only workers who have already a job and earn

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<sup>29</sup>Id, p.88-89.

<sup>30</sup>Id, p.86-87.

<sup>31</sup>Sisay, Supra note 10, p.139.

<sup>32</sup>Dejene , Supra note 9, p.91-92.

their livelihood; however, it does not extend protection to those who are not able to earn their livelihood. In short, it does not impose obligation on the state to provide job for the jobless rather it protect work related rights for one cannot forces the government to provide him a job.<sup>33</sup>

One can see the terseness of socio-economic rights guaranteed under the FDRE constitution. Such rights even do not entail a government obligation to ‘fulfill’; however, to respect and protect and hence, it seems that as if the government evaded its obligation to fulfill by exempting the right to health, to food, to education and etc from the Bill of Rights.

Therefore, the only possible way of addressing such problems is looking for the impliedly guaranteed rights through the derivation of rights. Socio-economic rights are hazy under the FDRE constitution. Hence, they have to be read into other rights expressly guaranteed so as to ensure the justiciability of the same at the minimum threshold established independent of resources.

#### **1.4. INDIRECT JUSTICIABILITY: EXPLORING THE IMPLIEDLY GUARANTEED SERUNDER THE FDRE CONSTITUTION**

Under this section, the author will delve into looking at the workability of the indirect justiciability and also whether the FDRE constitution has acknowledged the notion of indivisibility and interdependence of the all human rights. Not only these two issues, but it also reveals other cross-cutting rights enunciated in the constitution which lay the ground for the better enjoyment of the latent socio-economic rights pre-empted in the constitution.

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<sup>33</sup>Id, p.91, sees also Sisay, Supra note 10, p.140.

From the very outset the FDRE constitution maintained the inalienability or indivisibility of human rights and fundamental freedom as the fundamental principles of the constitution.<sup>34</sup> That is, one can see the pre-empted notion of indivisibility in Article 10(1) which states: “Human rights and freedoms, emanating from the nature of mankind, are inviolable and inalienable.’ It is this notion that, in a solid way, established the idea of inherence, universality, indivisibility and inviolability of human rights.<sup>35</sup>

The Ethiopian constitution has entrenched both socio-economic rights and civil and political rights under the same chapter and within the same text. This aspect of constitutionalization, putting the two sets of rights under the same chapter and in the same text there by putting the same within the ambit of the Court reveal the integration of human rights. That is (Art 14-43) embodies civil, political, and very few socio-economic rights. The FDRE constitution also protected some socio-economic matters that guarantee the implied socio-economic rights under chapter ten. The judiciary is also obliged to respect and enforce the provisions of the chapter of human rights and fundamental freedoms<sup>36</sup> as well as guided by the principles embedded in chapter ten of the constitution.<sup>37</sup>

The notion of interdependency, indivisibility and interrelatedness of human rights in the FDRE constitution can also plainly be inferred from Art 9(4) which makes reference to international and regional human rights treaties

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<sup>34</sup>See Art 10(1) of the FDRE Constitution.

<sup>35</sup>Tsegaye , Supra note 23, p.301.

<sup>36</sup>See Art13(1) of the FDRE Constitution plainly states that the judiciary as one organ of the state, is duty bound to respect and enforce civil and political rights, including socio-economic rights, that enable them also to have a jurisdiction over cases involving the latter rights as well.

<sup>37</sup>See Art 85(1) of the FDRE Constitution with no ouster clause that enunciated some, but very important tacitly guaranteed socio-economic rights which fall within the ambit of judiciary and judges will take the National policy principles and objective as a guideline to give effect to some socio-economic matters enunciated therein while implementing the constitution, other laws and public policies.

ratified by Ethiopia as an integral part of the law of the land. For instance, Ethiopia acceded to the ACHPR in 1998.<sup>38</sup>

Socio-economic rights did not get a balanced protection as compared to civil and political rights under the FDRE constitution. But, such regrettable situations of socio-economic rights recognition can also be remedied via cross-reference to treaties by Art 9(4). The double-edged recognition of human rights in Ethiopia under the constitution both as part and parcel of the law of the land and as tools of interpretation of the fundamental rights and freedoms accords a heightened level of protection to human rights in the country.<sup>39</sup>

The FDRE constitution refers to international treaty for interpreting bill of rights as a guiding principle to maintain consistency with international treaties which may help the Ethiopian courts to give content to some rights in the FDRE Constitution. For instance, it point to the UDHR which embodies the two grand categories of human rights. It is therefore possible to claim that the FDRE constitution has laid down a fertile ground for the operationalization of the indirect approach to justiciability.<sup>40</sup>

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<sup>38</sup>Accession to the African Human Rights Charter Proclamation No.114/1998, Federal Negarit Gazeta, 4<sup>th</sup> year, No.1.

<sup>39</sup>Taken from 'Editorial Introduction', in *Ethiopian Human Rights Law series*, Faculty of Law, Vol.2 (2008), P.VI and see also Art 9(4) and 13(2) of the FDRE constitution.

<sup>40</sup>Art 13(2) of the FDRE Constitution states that; the fundamental rights and freedoms specified in this chapter shall be interpreted in a manner conforming to the principles of Universal Declaration of Human Rights: Here, one may easily deduce that the principles or notions embedded in the UDHR gives equal importance to both sets of rights and according equal treatment in one main text as indivisible and interdependent human rights. Therefore, it implied the very principles of integrating the two grand categories of human rights including socio-economic rights and civil and political rights, when judges consult international treaties in elucidating their meaning to give effect to the fundamental rights and freedoms enunciated in the chapter three of the FDRE constitution, they should also look into the visions pre-empted in the UDHR. In short, it is integrating the two sets human rights without any disparity.

The following discussion will look at cross-cutting rights entrenched in the FDRE Constitution, that help, to explore the implicit socio-economic rights protected in the same but not limited to the following.

#### ***1.4.1. Right to Equality or Non-Discrimination***

Before dealing with this notion it is better to see the statement made by the president of South African Constitutional Court. That is; Arthur Chaskalson, rightly explained cross-cutting rights when describing human dignity as:

*A foundational value of the constitutional order and a value implicit in almost all the rights enumerated in the Universal Declaration, arguing that human rights can only be protected in a state in which there is no equality of rights but also equality of dignity. There cannot be dignity in life without food, housing, work and livelihood.<sup>41</sup>*

As indicated herein above, Chaskalson, advocated for the protection of socio-economic rights, that realizes the better protection of all human rights.

Ethiopia under Art 25 enunciated the right to equality in the FDRE constitution. Hence, this article will have untold contribution in establishing the Violation of Socio-economic rights. Meaning, the violation of a given socio-economic rights may trample not just the specific socio-economic right in question but also the equality clause enunciated in the constitution. In such instances, the use of the right to equality, or, alternatively, proving discrimination has been shown to be an essential instrument as a means of signifying the violations of socio-economic rights.<sup>42</sup> This is an extension of cross-cutting right to the protection of socio-economic rights sphere, for the

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<sup>41</sup>ChidiAselmOdinkalu, 'Analysis of paralysis or paralysis by Analysis?, Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Rights', *Human Rights Quarterly*, Vol. 23 (2001), p.328-329.

<sup>42</sup>Takele Soboka, 'The Indirect Approach to promote Justiciability of Socio-Economic Rights of the African Charter on Human and peoples' Rights,' draft, accepted for publication in Rachel Murray (ed.) *Human Rights Litigation and the Domestication of International Human Rights in Africa* (forthcoming 2009), p.24.

former rights are not contested to be adjudicated before the Court. And they can be used as a means of ensuring the justiciability of socio-economic rights with ease. One can also infer from the ‘phrase equal accesses’ under Art 41(3) of the FDRE constitution that ensure every Ethiopia right to equal access to publicly funded social services. The phrase plainly makes a close tie between socio-economic rights and equality guarantee that also overlap with article 25.<sup>43</sup> Thus, these articles strengthen one another in according protection to socio-economic rights. Meaning, the government is obliged to amend or repeal laws or policies that have the effect of marginalizing or excluding particular groups from the enjoyment of publicly funded social services.<sup>44</sup>

The equality guarantee in the FDRE constitution in both instances; including Art 25 and 41(3) reveal non-discrimination in public sphere only. What if there exists discrimination in the private sphere? This article seems inadequate in protecting citizen’s right to work in the private sphere which has a direct relation with the right to life and pursue one’s livelihood. However, until legislation is enacted regarding this area, it would be better for our judges to remedy the situation via cross-reference to international treaty. For instance, art 26 of the ICCPR extends protection horizontally (private sphere) and vertically (public sphere) which is adequate in fighting discrimination and has myriad contribution especially in the private sphere.

Courts may also intervene and accord protection to socio-economic rights on the ground of equality guarantee and fight discrimination in the sphere of housing, health and water.<sup>45</sup> Thus, one can challenge the violation of socio-economic rights, implicitly guaranteed in the FDRE constitution before court

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<sup>43</sup>Dejene, Supra note 9, p.87.

<sup>44</sup>Rakeb Messele, the *Enforcement of Human Rights in Ethiopia: Research* Subcontracted by Action Professionals’ Association for the People (APAP), (UN published 2002), p. 38.

<sup>45</sup>Sisay, Supra note 10, p.142.



of law and can claim a redress on the legal basis of equality guarantee enshrined in the same constitution.

#### ***1.4.2. The Right to Life and Dignity***

The right to life enunciated under Art 15<sup>46</sup> of the FDRE constitution will have a great assistance in realizing the protection of socio-economic rights via the notion of indivisibility and interdependence of rights. There is a close interlink between the right life and dignity with that of the right to adequate standard of living that embody food, shelter and housing. Thus, it is possible to argue that the right to an adequate standard of living and health is part of the right to life and dignity.<sup>47</sup> Such aspect of integrated approach to human right was aptly revealed in the case of *Olga Tellies and others V Bombay Municipal Corporation and others*, (AIR (1986) SC 180), Paragraph 32 as cited in Steiner at note 17).

In that case, the Supreme Court of India stated that:

*The right to life does not mean merely that life cannot extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by the law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood, food, housing, water, work etc because no person can live without the means of living. If the right to livelihood not treated as part of the constitutional right to life, the easiest way to deprive a person of his right to life would be to deprive him of his livelihood to the point of abrogation.*

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<sup>46</sup>Art 15 o the FDRE Constitution and art 5 of the ACHPR which is made an integral part of the law of the land. The former deals with the right to life where as the latter deals with human dignity and also Art 24(1) of the FDRE constitution concords with the latter concept of right, which cannot be realized without adequate right to food, health, water and housing; hence, 'the right life with dignity.'

<sup>47</sup>Craig Scott, 'The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights', *Osgoode Hall Law Journal*, vol. 27, No. 4 (1989),P.874.

Accordingly, the same Court held that, the right to life at the same time encompasses; inter alia, the right to health, housing, clothing, food, water, work, others and anything that enables people to have a decent life. Therefore, it is possible to extend protection, to the socio-economic rights that are hidden in the constitution through the interpretation of the constitutional right to life. This will help us to reinvigorate some latent socio-economic rights under the FDRE constitution. Thus, the right to life is not a bare right rather it is a right to life with dignity as a human person.

When equal protection is given to both sets of rights, each right will receive the protection of the other. For instance, state cannot realize a right to adequate standard of living of its Citizens without according a due protection to right to food, housing, clothing, clean water and health. The same holds true for the right to life that appropriately depends on the right to health, food, housing and etc. This holds true that the failure to meet these rights, say, the right to health, and food, would inevitably jeopardize the enjoyment of those rights, say, the right to life and dignity which are explicitly recognized.<sup>48</sup>

#### ***1.4.3. The Right to Fair Hearing***

The right to fair hearing applies across the board to civil and political rights as well as socio-economic rights, and group rights.<sup>49</sup> For instance, the right to free legal assistance as a social dimension of the right to a fair trial was given primacy by European Court of Human rights in the Airey case. The court in the same case plainly revealed the relationship between the two sets of rights saying ‘...many of the civil and political rights have implications of economic and social nature... hence, the interpretation of the convention

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<sup>48</sup>Dejene, Supra note 9, p.95 and see also Scott, Supra note 47, p.875.

<sup>49</sup>Takele, Supra note 42, p.32.

may extend to the sphere of socio-economic rights.’<sup>50</sup> Another aspect of the protection of social and economic rights is access to courts that guarantee citizens right to a fair and public trial. This notion is also given primacy by the African Commission in which the Commission has thus declared the right to fair trial to be a fundamental right; the non observance of which undermines all other human rights.<sup>51</sup>

In case of Ethiopia Article 20(5) of the FDRE constitution guaranteed the right to legal assistance in the circumstances the accused does not have sufficient means to pay ...will have legal attorney at the state expenses. And art 37(1) of the same constitution stipulates the right to access to court of every Ethiopian citizen who has a justiciable matter. In the former article it seems narrow that it only applies to criminal cases, however, the latter provision seems to wider than the former. If a person has a right to claim for the right to food, but have no sufficient means pay for his private attorney, art 20(5) shall be interpreted to embrace legal assistance in civil cases so as to ensure the right of the victim’s access to justice. Therefore, it is possible to enhance the judicial protection of socio-economic rights thereby addressing from the angle of due process of law.

#### ***1.4.4. Remedies***

‘No right without remedies, no remedies without actions.’ ‘No actions without sanctions.’<sup>52</sup> This reveals that the existence of remedies has no importance, if it cannot be demanded or enforced.<sup>53</sup> Any person or group who

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<sup>50</sup>Airey V Ireland, Cited in Martin Scheinin, ‘Economic and Social Rights as Legal Rights’, in *Economic, Social and Cultural Rights: A text book*, second Rev. edn., AsbjornEideetal (ed.s), MartinusNijhoff publishers (2001), p.34-35.

<sup>51</sup>Resolution on the Right to Fair Trial and Legal Assistance in Africa, Adopting the Dakar Declaration on the Right to Fair Trial in Africa, Doc/05/26/ InF. 19, see also Scott at note 47, p.860.

<sup>52</sup>Pieter N. Drost, *Human Rights as Legal Rights*, 2nd printing, A. W. Sijthoff’sUitgeversmij, Leiden, (1965), p. 58.

<sup>53</sup>Ibid.

is a victim of an economic and social rights violation should have access to effective judicial or other appropriate remedies at both national and international levels.<sup>54</sup> But, in the first place redress for violation of human rights and fundamental freedoms should be available to victims within their own state.<sup>55</sup> Art 2(1) of the ICESCR proclaims that appropriate measures to implement the covenant should be taken by states and this might include judicial remedies. It specifically refers to non-discrimination requirement and cross refers to the right to remedy in the covenant on civil and political rights.<sup>56</sup>

Constitutional remedy is simply the relief that one obtains whenever these rights expressly or impliedly guaranteed under the constitution are violated. And the right to remedy when rights are violated is a right expressly guaranteed by global and regional human rights instrument like for instance, Art 8 of the UDHR and Art 2(3), 9(5), 14(6) of the ICCPR.<sup>57</sup> The remedy could be judicial, administrative or legislative remedy. As it was discussed in detail on the General Comment No.9, domestic system is the primary option for the effective protection of socio-economic rights. The role of judicial body in protecting these groups of rights is avowedly provided under the same that: ‘All federal and state legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provision of this chapter.’<sup>58</sup>

The responsibility is also shared among other organs of the government. For instance, the duty of the legislature is to enact laws that ensure the better

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<sup>54</sup>Dianah Selton, *Remedies in International Human Rights Law*, A Text Book, Second Edn., Oxford University Press (2000), p.17.

<sup>55</sup>Paul Sleggart, *The International Law of Human Rights*, Clarendon Press, Oxford (1992), p.69.

<sup>56</sup>Shelton, *Supra* note 54, p.18.

<sup>57</sup>*Id.*, p.14.

<sup>58</sup>See Art 13(1) of the FDRE constitution.

protection of the rights or to amend laws that violate these rights to be consistent with the constitutionally guaranteed human rights. Similarly, the duty of the executive may be to enforce these rights and address them to the needy person. The Court is therefore, bound by this article to safeguard socio-economic rights enunciated under the constitution, in respecting, protecting and enforcing the fundamental rights and freedoms.<sup>59</sup> One can see from the above wording that socio-economic rights could be subjected to judicial scrutiny and also be provided with judicial remedy. Here, there is no particular provision that excludes the judicial review of socio-economic rights entrenched in the constitution. Thus, as long as socio-economic rights are justiciable, judges have the power to decide on cases of socio-economic rights embracing the impliedly guaranteed rights based on the legal basis of Art 37(1) of the FDRE constitution. This is one of the constitutional remedy for the violation of those rights provided for in the chapter of human rights and fundamental freedoms.

### **1.5. RELEVANCE OF NPPO TO INDIRECT JUSTICIABILITY OF SOCIO-ECONOMIC RIGHTS**

In the foregoing discussions, it has been said that socio-economic rights guaranteed expressly under the FDRE constitution are very few. As a result, the need to look for the impliedly protected rights arises. We can find a number of hidden socio-economic rights in the constitution under the Chapter of NPPO.

In addition to incorporating socio-economic rights in the chapter of Bill of Rights, the FDRE constitution enshrined some substantive socio-economic matters (Implied rights), as social and economic objectives and the principles.<sup>60</sup> Public authorities of federal and member state government are

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<sup>59</sup>Sisay, Supra note10, p.142.

<sup>60</sup>Rakeb, Supra note 44, p.29.

obliged to be guided by these principles and objectives in the implementation of the constitution, laws and policies.<sup>61</sup> The constitution further strengthens that the government is duty bound to ensure that all Ethiopians get equal opportunity to improve their economic conditions and to promote equitable distribution of wealth among them.<sup>62</sup> It further provides that policies aim at providing all citizens access to health, education, clean water, housing, food and social security.<sup>63</sup> These NPPO are not directly justiciable; however, they may affect the interpretation of other rights by being read into those rights.<sup>64</sup> Therefore, these socio-economic objectives can be taken as guiding principles in the implementation of the provision of the constitution encompassing socio-economic rights provision. It is hence, possible to claim that, the NPPO under chapter ten (art 89 and 90) of the constitution are imposing other additional obligations on the part of organ of the government to implement socio-economic rights. The fact that the constitution does not provide for many socio-economic rights, it does not mean that the constitution cannot be used to claim the enforcement of other latent rights indirectly.<sup>65</sup> Therefore, one can claim the enforcement of the right to food or housing by invoking the constitution itself. One possible way of exercising these rights is by trying to read the same into the explicitly protected rights.<sup>66</sup> Note that NPPO does not take away the power of courts totally to adjudicate socio-economic rights impliedly rooted therein in a plain wording of the constitution. However, this induces us to look for the implied right theory in which implicit rights can possibly be derived from explicit rights including civil, political and socio-economic rights through indirect justiciability.

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<sup>61</sup>See FDRE Constitution Art 85 (1).

<sup>62</sup>Id, Art 89(2).

<sup>63</sup>Id, Art. 90(1).

<sup>64</sup>Rakeb, supra note 44, p.29 and see also Dejene, Supra note 9, p.93-95.

<sup>65</sup>Dejene, Supra note 9, p.93.

<sup>66</sup>Ibid.

**1. 5.1. Ensuring the Justiciability of Hidden Socio-Economic Matters under the NPPO**

According to the notion of implied Right theory,<sup>67</sup> it is possible to derive, implicit socio-economic rights from the NPPO in the constitution. The FDRE Constitution eluded the direct protection of the right to socio-economic rights embracing right to food, to education, to clean water and housing. This adversely and inevitably affects the right of the beneficiaries to boldly and effectively claim and enjoy their rights on the domestic plane. Indirect Justiciability; however, will remedy the situation at least temporarily to some extent. Hence, the Ethiopian constitution not only accords protection to explicit socio-economic rights, but also to the implied socio-economic rights.

Art 41 of the same constitution help us to derive new rights. For instance, the phrases “publicly funded social services” and “other social services” of sub-art (3) and (4) are too broad and open for interpretation. So, we can come up with the right to housing, social security, food and clean water from the same sub-articles.<sup>68</sup> Referring to regional jurisprudence will also be supportive.

The most famous case in this regard is the SERAC case (Social and Economic Right Action Center and Another V Nigeria (2001)):

*In its decision the African Human Right Commission dealt with the obligation of the state to ensure the realization (also by private parties). The decision also considered with socio-economic rights provided for in the African charter, and finds some ‘implied socio-economic rights’ in the charter.<sup>69</sup>*

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<sup>67</sup>Heyns and Killander. (ed.s) *Compendium of key Human Rights Documents of the African Union* (3<sup>rd</sup>ed.s), Pretoria University Press (2007), p.251.

<sup>68</sup>Sisay at note 10, p.140, and see also Dejene at note 9, p.93-95.

<sup>69</sup>Social and Economic Rights Action Center (SERAC) and Another V Nigeria (2001) AHRLR 60 (ACHPR 2001), as cited in Heyns and Killander at note 67, Para. 63.

In this particular case, the African Commission decided that even if the right to housing and food is not explicitly provided for in under the Charter, the violation of these rights adversely affects the right to property, health, family life and right to life with dignity. The same analogy could apply to the Ethiopian situation by reading the NPPO with the fundamental rights and freedoms.

For instance, access to food is only mentioned as part of social objectives in the FDRE constitution rather than the right itself, despite the fact that the right to food is not explicitly mentioned in the FDRE constitution, it is only 20 constitutions in the world which make reference to food.<sup>70</sup> Art 90 of the same, under the banner of social objectives, states that “to the extent the country’s resources permit, policies shall aim to provide all Ethiopians with access to public health and education, clean water, housing, food, and social insurance.” Food is thus regarded as a social objective rather than a directly justiciable human right.<sup>71</sup> Nevertheless, this is far from saying that Ethiopia does not have international obligation stemming from the right to food. For instance, the country voted in favor of the UDHR in 1948 (Art 25, right to food), as indicated earlier, Ethiopia also became state party to the ICESCR in 1993. Article 11 of the ICESCR (as interpreted by ICESCR General Comment No.12) puts duties on states to respect, protect, and fulfill the right to food.<sup>72</sup>

Arguably, by reading the NPPO with the fundamental rights and freedoms, the right to food could possibly be implied in the constitution and made justiciable as the minimum core right to free citizens from hunger and starvation. Article 43(1) which deals with the right to improved standard of

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<sup>70</sup>Alexander AttilioVadala, ‘The Right to Food in Ethiopia: Challenges and Opportunities’, in *Ethiopian Human Rights Law series*, Vol.1, No.2, Faculty of Law, (2008), p.191.

<sup>71</sup>Id, p.192.

<sup>72</sup>Ibid.



living, art 40(3-5) which covers land possession also indirectly implied the right to food. Therefore, to the extent that these provisions allow, the interpretation of the right to food should be construed in light of the obligation of the Ethiopian state under the ICESCR.<sup>73</sup>

In so doing, our court can extend protection to the implied socio-economic rights enshrined in the FDRE constitution. This will have untold contribution in advancing the justiciability of economic and social rights on the national fora. Not only this, but Courts can also refer to civil rights that are directly pertaining to socio-economic rights, for example, the right to life may comprises the right to health, food and clean water which are basic necessities for a life.<sup>74</sup> It is hence possible to argue that a number of economic and social rights are blurred in the constitution which does not give rise to direct justiciability and enjoyment of the same. Thus, the Court should read into the explicitly recognized civil and political rights including right to life, honor, security of a person and some few socio-economic rights within the same family entrenched in our constitution.<sup>75</sup> In such instances, the means to resolve the same problem is “interpretation” through which it is possible to expand the existing rights in order to cover the untouched boundaries of socio-economic rights.

## **1. 6. CHALLENGES TO THE DIRECT ADJUDICATION OF SOCIO-ECONOMIC RIGHTS IN THE FDRE CONSTITUTION**

In this section, the author will try to reveal factors contributing to the underdeveloped local jurisprudence on the justiciability issue in the FDRE

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<sup>73</sup>Id, p.193.

<sup>74</sup>Liebenberg at note 1, p.69.

<sup>75</sup>Id, pp.71-73.

constitution. There are some challenges to direct adjudication of socio-economic rights, but not only limited to the following grounds:

***1. 6.1. Vagueness and Generality of the Constitution Regarding SER***

It is plain that whenever there is a vague provision in relation to a certain right in the constitution, courts face difficulty in adjudicating the matter and to give a concrete remedy to the right in question. An interview made with Nega Dufisa judge at Oromia Supreme court reveals one of the blame to the constitution which is the source of controversy regarding the ingrained socio-economic rights. That is they are too broad and vague and difficult to give content and determine the scope of their protection.<sup>76</sup> Hence, the author firmly believes that the only means of alleviating this challenge, until legislation is enacted; is interpretation, to give content to some socio-economic rights. For instance, the right to clean water is lacking under chapter three of the constitution, thus it need a generous interpretation of the constitution dealing with NPPO and publicly funded social services. Thus, the court should accept it with an open mind and ready to do so.<sup>77</sup> The other aspect can also be deduced from Art 41(5) of the constitution which only talks about duty bearer, but not about the right holder which aptly reveal that it is poorly crafted, because it does not give rise to a right and undermines their justiciability.<sup>78</sup>

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<sup>76</sup>Interview with Nega Dufisa Judge of Oromiya Supreme Court, on October 8/10/2011.

<sup>77</sup>Interview with Tadele Nagisho, President of Supreme Court of Oromiya, on October 11/10/2011.

<sup>78</sup>Said that majority of the articles dealing with socio-economic rights are not framed as claimable individual rights; rather as duty of the government which also receives 'ever increasing resource,' hence, the obligation of the government cannot be easily made justiciable rights.

### ***1.6.2. Absence of Subordinate Legislation***

Legislation has been central to most national and international efforts to define and implement human rights. The notion of formulating human rights claims as legal claims and pursuing human rights objectives through legal mechanisms is pivotal for effective implementation and enforcement of socio-economic rights within domestic jurisdictions.<sup>79</sup> Article 2(1) of the ICESCR also places particular emphasis in the adoption of legislative measures to achieve the realization of the rights recognized in the covenant. The Committee on Economic, Social and Cultural Rights recognizes that ‘in many instances legislation is highly desirable and in some cases may even be indispensable in making socio-economic rights justiciable.’<sup>80</sup> To mention some of them it serves as providing a more precise, detailed definition of the scope and content of the rights encountered in the international human rights instruments and national constitution. For instance, legislation is needed to elaborate on the concept of ‘adequate housing’ in Art 11 of the CESCR<sup>81</sup> and the same is true for Art 43(1) of the FDRE constitution that elaborating the concept of “improved living standards” is possible through legislation. Legislation is also essential in stipulating the financial arrangements for the delivery of the rights, prescribing the exact responsibilities and functions of the different spheres of government at every level to give effect to the rights. And creating a coherent and coordinated institutional framework for the delivery of the rights; preventing and prohibiting violations of the right by

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<sup>79</sup>Jack Donnelly, ‘The Virtues of legalization’, in *the Legalization of Human Rights, Multi Disciplinary Perspectives on Human Rights and Human Rights Law*, Saladin Meckled and Basak Garcia (eds.), Landon and New York, Routledge Tylor and Francis Group (2006), p.68, See also Liebenberg, Supra note 1, p.79.

<sup>80</sup>See General Comment No. 3, Para.3.

<sup>81</sup>Liebenberg, Supra note 1, p.79.

both public official and private parties and providing concrete remedies to redress violations of the rights.<sup>82</sup>

The demands of most human rights advocates and victims of human rights violations typically involve either direct or indirect appeals for effective legal protection or redress.<sup>83</sup> The advantage of legislation is that it is usually more detailed and specific than open-textured constitutional norms.<sup>84</sup> Thus, the task of concretizing these vague and general rights in the constitution and international human rights adopted by Ethiopia and converting the same into legally consumable commodities arises. And hence, legislation can play an important role in ensuring that both the public and private sector respect these prohibitions and by providing effective, accessible remedies in the domestic fora.<sup>85</sup>

For instance, Ethiopia gave effect to the constitutionally entrenched right to work or labour<sup>86</sup> with Labour Proclamation that embrace around 191 detailed and specific articles. And Art 41(5) of the constitution is also specifically addressed by legislation in relation to persons with disabilities<sup>87</sup> by the proclamation that embodies 14 articles totally. It is enacted to enhance the

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<sup>82</sup>Ibid.

<sup>83</sup>Donnelly, Supra note 79, p.77.

<sup>84</sup>Liebenberg, Supra note 1, p.80.

<sup>85</sup>Tsegaye, Supra note 23, p.289, see also Liebenberg, Supra note 1, p.78.

<sup>86</sup>Labour Proclamation No. 377/2003, Neg. Gaz. 3. 10<sup>th</sup> year, No.12, 2004. For instance, the Preamble of the proclamation Para. 1 reads that: ‘...is necessary to guarantee the right of the workers and employers; and the 3<sup>rd</sup> paragraph states the rights of workers to, health and safety, working condition and work environment. It is further elucidated under Para.4 that “The proclamation was enacted by taking account into the Political, Social and Economic policies of the government and to be consistent with International Conventions and other legal commitments (including, may be Constitution art. 42, 35(5), (a), (b) (8)) to which Ethiopia is a party with a view to translating into practice. It is hence, avowed that one can see, the importance of legislation in giving effect to vague and too general Constitutionally enunciated socio-economic rights including International Human Rights ratified by Ethiopia as per art 9(4) if they are vague.

<sup>87</sup>Right to Employment of Persons with Disability, Proclamation No. 568/2008, Neg. Gaz.14<sup>th</sup> year, No. 20, 2008.

employment opportunities of persons with disabilities on equal manner and is designed to prohibit discrimination on the ground of their status which is lacking directly under article 25, 42, 41(3), and 35(8) of the FDRE constitution.<sup>88</sup> Besides that, the proclamation seems to convert the duty of the government under art 41(5) of the constitution.<sup>89</sup> It also provides for the rights of persons with disability to reasonable accommodation,<sup>90</sup> to occupy a vacant post in any office,<sup>91</sup> to participate in a training programme<sup>92</sup> and preferences<sup>93</sup> are given to them. One can see the importance of legislation in giving content to some socio-economic rights that are vague and too broad and it can also clearly set concrete remedies as evidenced in the above proclamations. Thus, legislation is undoubtedly instrumental in ensuring the justiciability and enjoyment of the right to work and work related rights when infringed by the government or private parties.

It can also be argued that the constitution merely requires more definitive legislation and that when such a governmental prerogative is rooted in the constitution. These socio-economic rights are, however, simply too broad and vague to form the basis for more detailed legislation.<sup>94</sup> Therefore, the absence of subordinate legislation aptly impaired the adjudication of socio-economic rights and claim a remedy. Tsegaye also argues that in the course of protecting human rights, including socio-economic rights in domestic fora, the tasks that are involved can thus be summarized as follows, ‘constitutional guarantee’, ‘legislative protection’, ‘judicial application’ and

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<sup>88</sup>Id, Art 2(4) and Para. 3.

<sup>89</sup>From duty of the government under Art 41(3) to the Right of the disabled persons to employment.

<sup>90</sup>Id, see Art 2(5) and Para.2 of proc. No. 568/2008.

<sup>91</sup>Id, 4(1), (a).

<sup>92</sup>Id, 41(b).

<sup>93</sup>Id, 4(2).

<sup>94</sup>Twibell, *Supra* note 11, p.441-442.

‘executive implementation.’<sup>95</sup> Thus, one can see that the role of legislation in according protection to constitutionally guaranteed socio-economic rights to get application before a court of law and an enabling tool for citizens to claim and enjoy their constitutional rights. Unless, constitutionally guaranteed vague and general socio-economic rights are backed by legislation, their direct enjoyment remains a mere wish which can never be realized. Hence, legislative protection ensures that state usually incurs the duty to proscribe any act or omission that poses a threat to rights.<sup>96</sup> For instance, accessible and effective national remedies are the primary means of protecting economic and social rights.<sup>97</sup> Constitutional incorporation of socio-economic rights does not by itself ensure compliance. States are required to ensure appropriate mechanisms for redressing violations of these rights through legislation.<sup>98</sup> Thus, legislation is crucial in concretizing the exact remedies in the domestic plane so as to enable the victim to get an easy access to the court of law and enjoy his/her right.

### ***1.6.3. Absence of Cases***

This is particularly related to the specific individual claims that might arise in relation to the enjoyment of socio-economic rights in particular states. And this is also pertains to lack of normative development.<sup>99</sup> Meaning, the idea of case law is mainly attached to the absence of law (i.e. an absence of case law frequently being equated with an absence of law).<sup>100</sup> There is no robust adjudication of socio-economic rights cases at local court that really did call for national appreciation and scholarly discussion in our national

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<sup>95</sup>Tsegaye, Supra note 23, p.307.

<sup>96</sup>Id, p.308.

<sup>97</sup>Liebenberg, Supra note 1, p.55.

<sup>98</sup>Mathew Craven, ‘The UN Committee on Economic, Social and Cultural Rights’, in *Economic, Social and Cultural Rights: A text book second revised ed.* A. Eideetal (ed.), MartinusNijhoff Publishers (2001), p.456 and See also Shelton at note 54, p.8-9.

<sup>99</sup>Id, p.467.

<sup>100</sup>Ibid.

fora.<sup>101</sup> This evidences the underdeveloped jurisprudence of our local courts on these rights.

#### ***1.6.4. Courts Lack Jurisdiction***

In relation to the problem with poor legislative drafting, courts lack jurisdiction to directly adjudicate those implied socio-economic rights enshrined under chapter ten of the FDRE Constitution. This is because these rights are only the guideline for the organs of the government and are not directly justiciable rights which lead to the incapacity of the courts to deal with directly, thus judges should look for indirect justiciability.

#### ***1.6.5. Constitutional Reference by Judges***

There is also a problem that most of our judges abstain from referring to constitutional provisions because they believe that constitutional matters are under the mandate of the House of Federation (HOF).<sup>102</sup> They refer to Art 83 and 84 of the constitution and argue that it is the HOF that has the duty to deal with constitutional interpretation. And also they justify that involving in such matters is trespassing into other organs duty which politicizes the judiciary; hence, judges should be neutral and should retreat from delving into politics.<sup>103</sup> But, with the author's view this is not a problem because Art 83 and 84 are about constitutional disputes, but referring to constitutional provision is not a task of interpretation. A reference to constitutional provisions has to be made because there are no legislations that elaborate socio-economic rights guaranteed by the constitution. In addition, adjudicating socio-economic rights is not delving into politics, for instance, if a reference is made to the General Comment No.3, paragraph10, of the UN which states that "a minimum core obligation to ensure the satisfaction of at

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<sup>101</sup>Interview with Almawu Wole, Judge of Federal Supreme Court Cassation Division on Oct.20/10/2011.

<sup>102</sup>Ibid and See also Tadele, Supra note 77

<sup>103</sup>Tadele, Supra note 77, See also Nega, Supra note 76.

the very least, minimum essential level of each of the rights is incumbent on every state party.” Thus, giving power for courts to handle these cases is not involving them into the duty of others organ, rather letting them do what they are legally empowered to do.<sup>104</sup> Also a recent UN publication noted that ‘it is not primarily the nature of economic and social rights that denies judicial enforcement but the lack of competence or willingness of the adjudicating body to entertain, examine and pronounce on claims affecting these rights.’<sup>105</sup> Therefore, it is primarily the failure of national courts to give judicial consideration to economic and social rights, which has meant that those rights have remained largely meaningless in practice.<sup>106</sup> It is the constitutional duty of our courts to identify ways or means and devise the mechanism of ensuring the justiciability and enforcement of international and constitutionally entrenched socio-economic rights on the domestic arena.

#### ***1.6.6. Lack of Awareness***

This factor is attributed to both judges and the public at large. As has been discussed earlier, the FDRE constitution has only entrenched very few socio-economic rights as directly justiciable rights. The impliedly guaranteed socio-economic rights are far from judicial scrutiny. The public, including, judges are not aware of the existence of justiciable socio-economic rights.<sup>107</sup> This clearly impairs citizens to boldly claim their rights. Hence, it is the duty of the government, to enhance the awareness of citizens through promotion

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<sup>104</sup>See art 9(2), judges have duty to obey and ensure the supremacy of the constitution, Art 13(1) and (3), empower judges to respect and enforce and even interpret the constitutions in light of international human rights instruments to which Ethiopia is party and art 9(4) further enable courts to boldly cross-refer to ratified treaties and entertain cases involving socio-economic rights, but not yet done by our courts in the area of socio-economic rights.

<sup>105</sup>Fons Coomans, ‘Some Introductory Remarks on the Justiciability of Economic and Social Rights in comparative constitutional context’, in *Justiciability of Economic and Social Rights: Experiences from Domestic System: A textbook*, FonsCoomans (ed.), Intersentia (2006), p.3.

<sup>106</sup>Ibid.

<sup>107</sup>Tadele, Supra not 77, see also Nega, Supra note 76 and Almwu, Supra note 101.



that help them to claim their constitutionally and internationally<sup>108</sup> guaranteed socio-economic rights. The citizens should first claim their right, and then judges will play their second role in the adjudication of the victim's right to food, health, work, education.

### ***1.6.7. Demanding Nature of the Rights***

It is submitted that socio-economic rights are demanding rights; meaning, they are resource dependent at their fulfillment stage, which is also undoubtedly true for civil and political rights.<sup>109</sup> This notion is clearly related to the above ground, for the judges with whom I made an interview answered me that socio-economic need state action, which seem to blurred their eyes, to look at them from other duty of the state to respect and protect which are resource independent. For instance, socio-economic rights could be negatively protected, that is prohibiting unlawful eviction (duty to respect on the part of the state) and protecting against others (duty to protect against third party.)<sup>110</sup>

Thus, the duty to respect and protect are not resource demanding, however, the judges failed to draw a clear line among the duties incumbent up on state parties to ICESCR. It is avowed that the language of progressive realization of the rights set forth in the covenant should depend entirely on the resources availability of a state, and should not be invoked by states as grounds for failing to implement a right when resources were available. Hence, care should be taken not to distort the meaning attached to the language of

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<sup>108</sup>Art 9(4) the FDRE constitution remedy the situation, when there is terseness of the existing economic and social rights, hence, ICESCR, CRC, ACHPR are part and parcel of the law of the land.

<sup>109</sup>Koch, Supra note 20, p.3-4.

<sup>110</sup>Scott Leckie, 'the Human right to Adequate Housing', in *Economic, Social and Cultural Rights: A Text book* second revised edition, A. Eideetal (ed.s), MartinusNijhoff Publishers (2001), pp155-156.

“progressive realization” which by itself has a limitation.<sup>111</sup> The other issue is that minimum threshold, is an immediate obligation that can be enforced and guilty of states in such instances are established independent of resources.<sup>112</sup> It is clear therefore that Ethiopian courts should boldly move towards enforcing these rights. In doing so, the country has to exhaust the available resources and even in the absence of resources should claim for international assistance and cooperation.<sup>113</sup> Simply blaming socio-economic rights only on the demanding nature of the rights, by putting aside the other duty of a state cannot relieve the state from responsibility. Thus, socio-economic rights should not be seen only from duty ‘to fulfill’ angle rather other duties of the state to ‘respect’ and to ‘protect’ should also be taken into account.

Here in above, it has been well elucidated that there are factors contributing to the underdeveloped judicial scrutiny of economic and social rights. This problem will be alleviated using the indirect justiciability temporarily. It is thus better to look at whether our courts have played any role to boost the justiciability of socio-economic rights using their constitutional mandate.

The role of courts in the enforcement of human rights enunciated in the constitution is one of the controversial issues in Ethiopia.<sup>114</sup> Yet, it is promising that the Federal Supreme Court Cassation Division has in the case

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<sup>111</sup>Philip Alston and Gerard Quinn, ‘The Nature and Scope of State Parties Obligations under the International Covenant on Economic, Social and Cultural Rights’, *Human Rights Quarterly*, Vol. 9 (1987), p.174.

<sup>112</sup>See General Comment No.3, Para. 10.

<sup>113</sup>Mathew C.R Craven, *The International Covenant on Economic, Social and Cultural rights: A perspectives on its Development*, Claredon Press, Oxford (1995), p.141.

<sup>114</sup>AssefaFiseha, ‘The Concept of Separation of Powers and Its Impact on the Role of Judiciary in Ethiopia’, in *Ethiopia Constitutional Law Series* Vol. III, Faculty of Law, (2010), p.24.

of *Tsedale Demise V Kifle Demise*<sup>115</sup> boldly interpreted expansively best interest of child clause of the supreme law of the land and the Child Rights Convention. And also in the case of *AbaditLemlem V Municipal City of Zalanbasa and others*<sup>116</sup> the same Court in the cassation division, courageously decided on the issue of justiciability of ‘right to housing’<sup>117</sup>; in which the court protected the victim from unlawful interference on the side of the government and private party; however, it did not directly refer to provisions dealing with socio-economic constitutional provisions, but decided the case on the basis of art 79(2) and 37 of the FDRE constitution. It is whether the issue is a justiciable matter or not pertaining to the decision of the lower Court (Tigray Supreme Court’s decision). It gives us a quick glance that to note the statement made by the lower court and how they viewed socio-economic rights that is: “one cannot get house and money from the government and the matter is clearly administrative matter, hence, cannot be seen by regular courts.”<sup>118</sup>

One can see that, how the Tigray Supreme Court willingly relinquished its constitutional mandate.<sup>119</sup> It is therefore, possible to argue that judges are retreating from adjudicating or applying constitutional provisions to the contrary what the constitution itself provides.<sup>120</sup> However, the court seemed

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<sup>115</sup>Tsedale Demise V. Kifle Demise Federal Supreme Court Cassation Division File No. 23632(2000).

<sup>116</sup>Abadit LemlemV.MunicipalCity of Zalanbasa and Others Federal Supreme Court Cassation Division File No 48217(2003).

<sup>117</sup>‘Right to housing’ is used by the author and not directly pointed out as of ‘right to housing’ by the Cassation Division, still this shows there is a retreat by judges to boldly claim the right as directly justiciable. This can be inferred from the failure of judges to cite the provision that directly addresses the issue as well. However, by any means the decision of the cassation division vindicated the victim to claim back her money and house snatched by the municipal city officials and third party (private persons). (File NO.48217/2003).

<sup>118</sup> See at note 116, File No 48217(2003).

<sup>119</sup> Takele Soboka, ‘Judicial Referral of Constitutional Disputes in Ethiopia: from Practice to Theory’, in *Ethiopia Constitutional Law Series*, Vol. 3, Faculty of Law, (2010), p.74.

<sup>120</sup>Art 10, 13(1) of the FDRE Constitution aptly tells us that the court at least, has a role in interpreting the provisions of human rights entrenched in the constitution.

to have been overly willing to restrict its own jurisdiction, and ignored cases that squarely fall in its normal adjudicative power.<sup>121</sup> The judiciary's duty in 'respecting and enforcing' the rights and freedoms cannot be meaningfully enjoyed by the right holders unless it is involved in interpreting the scope and limitation of those rights.<sup>122</sup> Besides, the existing means that may help the court to enhance the justiciability of economic and social rights they are not boldly utilizing the potential of integrated approach. Therefore, courts need to be bold enough to keep doing what it can respect, protect, promote and fulfill in the field of all human rights.<sup>123</sup>

This could be done through; first, courts should utilize the indirect approach to justiciability. Second, they should shoulder their constitutional obligation. Finally, they should draw lessons from others jurisdictions jurisprudence, if it is of great importance in enhancing the justiciability of socio-economic rights. Our courts are not utilizing the indirect approach to justiciability<sup>124</sup> so as to enhance the justiciability of the rights in their day to day activities. This was due to the belief that making socio-economic rights justiciable as claimable individual right seem to imposing unbearable burden on the government.<sup>125</sup> This can be evidenced and rebutted that other civil and political rights have budgetary implication, for instance, right to voting,<sup>126</sup> fair trial; legal assistance and etc are rights that need positive state actions at their fulfillment level.<sup>127</sup> And also judicial application of these rights gives

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<sup>121</sup>Takele, Supra note 119, p.74.

<sup>122</sup>Assefa, Supra note 114, p.25.

<sup>123</sup>Tsegaye, Supra note 23, p.306.

<sup>124</sup>Tadele, Supra note 77 and Almawu, Supra note 101.

<sup>125</sup>Ibid, see also Tsegaye, Supra note 23, p.309.

<sup>126</sup>Ethiopia in the 2010 "National Election" invested 189.5 million Ethiopian birr, to 'fulfill' the "right to vote" of its citizen at large, from Ethiopian Television at 7:00 PM, May 2010.

<sup>127</sup>Liebenberg, Supra note 1, p.58, See also Koch, Supra note 20, p.3.

an assurance that in cases of violations; there is a possible remedy by taking one's cases to courts.<sup>128</sup>

### **1.7. DRAWING ADEQUATE LESSONS FROM THE JURISPRUDENCE OF OTHER JURISDICTIONS: THROUGH CONSTITUTIONAL REFERENCE TO INTERNATIONAL TREATIES**

This section is devoted to explain and reveal what lessons can be learnt from the jurisprudence of other jurisdictions for general discussion about socio-economic rights. In doing so, it will attempt to address the issue that whether the Ethiopian courts can draw inspirations from other jurisdictions' jurisprudence. There is sound justifications for courts to draw inspiration in the interpretation of Bill of Rights and substantial benefit derived from such an approach. This notion is rightly put by Rudolf Von Jhering as follows:

*The reception of foreign legal institution is not a matter of nationality, but of usefulness and need. No one bothers to fetch a thing from a far when he has one as good or better at home, but only a fool would refuse quinine just because it did not grow in his back garden.*<sup>129</sup>

As has been discussed in the foregoing sections the FDRE constitution is not comprehensive for there are some socio-economic rights missing from. One can thus easily deduce from the above statement that the need for analogies arise because they help courts to elucidate the scope and content of a certain vague right in question. In doing so, courts better understand their constitutional system that is; it may identify a doctrine of foreign law and

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<sup>128</sup>Tsegaye, Supra note 23, p.308.

<sup>129</sup>Rudolf Von Jhering, *geist des römischenrechts auf den verschiedenestufen seiner Entwicklung* [the spirit of Roman law at different stages of its development], part i, 8f (b.schwabe 9th ed. 1955), cited in Jack Tsen-Talee, *Interpreting bill of rights: The value of a comparative approach*, Vol. 5, No.1, Oxford University Press and New York University Press (2007), p.122.

apply it in articulating the meaning and text of a domestic bill of rights, with suitable modifications if necessary.<sup>130</sup>

The interplay between domestic and international law depicts a relationship of dependence of the latter on the former for its implementation. Thus, the domestic legal system must provide a conducive legislative, judicial and administrative framework if treaty-based guarantee are to be translated into reality for domestic beneficiaries.<sup>131</sup> International law complements and overrides contrary domestic law in matters involving the protection of human and peoples' rights. There is, therefore, a need to bring domestic legislation, administrative rules and practices into concordance with international treaties.<sup>132</sup> This aspect of conformity is truly evidenced by Art. 13(2) of the constitution which obliges courts to interpret the bill of rights text in conformity with international human right treaties ratified by Ethiopia. The only benchmark to be met by treaties to be part of Ethiopian law is their ratification by the House of Peoples' Representatives. The notion that law passed by the same house will have a legal effect irrespective of their signing by the president warrant the conclusion that the publication, which is made after signature is one of formality but not mandatory precondition of validity.<sup>133</sup> It is therefore possible to conclude that the only vital procedure for the incorporation of the international and regional treaties in the Ethiopian law is ratification.<sup>134</sup> This paves the way for our courts to directly apply ratified treaties made part and parcel of the law of the land.<sup>135</sup>

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<sup>130</sup> Id, p.130.

<sup>131</sup> Takele Soboka, 'The Monist-Dualist Divide and the Supremacy Clause: Revisiting the Status of Human Rights Treaties in Ethiopia', *Journal of Ethiopian Law*, Vol.23, No.1, (2009), p.138.

<sup>132</sup> Id, p.141.

<sup>133</sup> Gebreamlak, supra note 6 p.45 and See also Sisay, Supra note 10, p.147.

<sup>134</sup> Ibid.

<sup>135</sup> Sisay, Supra note 10, p.147

By cross-reference, the Ethiopian court will alleviate the problems surrounding the fact that socio-economic rights provision of the constitution are very scant, vague or too general in their formulation.<sup>136</sup> Ethiopia has ratified a number of international and regional human rights treaties which explicitly recognizes the right to health, education, food, adequate standard of living; among others, including UDHR, ICESCR, ACHPR, CRC, ACWRC and etc. Above all, the constitution bolsters that these treaties shall be utilized as a guideline for interpretation in maintaining the uniformity of the Bill of Rights text with.

It is the power of courts to interpret rights, to decide their exact content and treaty provisions, this was further rejuvenated by art 3(1) of Federal Courts Proclamation that stipulates ‘federal courts shall have jurisdiction over international treaties and settle disputes on the basis of the same.’<sup>137</sup> This Proclamation further bolsters and extends the jurisdiction of Ethiopian Courts to apply international and regional human rights treaties ratified by Ethiopia. This aspect of cross-reference to international treaties via art 9(4) of the constitution was well grounded in the case of Tsedale Demise V Kifle Demise;<sup>138</sup> the Federal Supreme Court expansively interpreted the best interest of the child by directly applying art 3(1) of CRC and 36(2) of the constitution and vindicates the victim.

One can boldly claim that the argument that a treaty ratified should be published in the Negarit Gazeta to be implemented and claimed is rebutted by the Federal Supreme Court cassation division in the decision of the above case. It further reveals the realization of the duty of the judiciary to enforce those fundamental rights and freedoms in Bill of Rights text through judicial

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<sup>136</sup>Id, p.1 48.

<sup>137</sup>Federal Courts Proclamation, No. 25/1996, Federal Neg. gaz. 2<sup>nd</sup> year, No, 13, Addis Ababa (1996).

<sup>138</sup>See, supra note 115 and see also Assefa, Supra note 114, p.24-25.

application.<sup>139</sup> The direct incorporation or application of international instruments recognizing socio-economic rights within the domestic legal order can significantly enhance the scope and effectiveness of remedial measures and should be encouraged in all cases.<sup>140</sup>

The following discussion will point out some instances in which courts should refer to international treaties.

### ***1.7.1. Providing Remedies***

The power of the courts to grant, any order; that is, just and equitable, paves the way for the developments of a number of creative remedies. This is to redress violations of socio-economic rights.<sup>141</sup> However, the Ethiopian constitution on the issue of substantive remedy is silent; hence, the need for drawing inspiration arises in such instances. Thus, Courts should look into the other means remedy via cross reference. There are also a number of Comments on ICESCR which are used as an authoritative interpretation guideline. For instance, General Comment No.9 avowedly stated that states have to take legislative, administrative and judicial remedy to redress violation of socio-economic rights. This enables our courts to turn human rights (socio-economic rights specially) from mere rhetoric to legally claimable rights.<sup>142</sup> ‘Everyone should have the right to an effective remedy in case of an alleged violation of his/her fundamental rights as laid down in Art 8 of the UDHR.’ “At the minimum, national judiciaries should consider the

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<sup>139</sup>Sisay, Supra note10, p.142; see also art 13(1) of the FDRE constitution.

<sup>140</sup> ‘The Maastricht Guidelines on Violation of Economic, Social and Cultural Rights’, *Human Rights Quarterly*, Vol.20, (1998), Rule 26, Art 9(4) of Ethiopian Constitution rejuvenates this approach by making international and regional human rights instruments part and parcel of the law of the land and putting them within the ambit of the judiciary, this undoubtedly enhance socio-economic rights justiciability and enforceability(art 13(1) of the same and art 3(1) of federal courts proclamation also strengthen the same concept.

<sup>141</sup>Liebenberg, Supra note 1, p.70.

<sup>142</sup>Tsegaye, Supra note 23. P.312.



relevant provisions of international and regional human right laws as an interpretative aid in formulating any decisions that are pertaining to violations of socio-economic rights.”<sup>143</sup>

The other means of ensuring constitutional remedy is through referring to civil and political rights by courts at the time of adjudicating cases on violation of socio-economic rights. In this case most of civil and political rights are dependent on the fulfillment of economic and social rights. For instance, the most fundamental right i.e. right to life to be enjoyed one has to have best attainable mental and physical health and also to have this health status one has to at least get access to adequate food, clean water and shelter because without the fulfillment of these rights, it is more unlikely to survive. This is also what has been revealed by the South African Constitutional Court in the case between the governments of South Africa v Grootboom.<sup>144</sup> The same court also has drawn inspiration from the General Comment of the Committee on Economic, Social and Cultural Rights and the ICESCR provision relating to the right to housing.<sup>145</sup> Therefore, Ethiopian courts in interpreting the constitutionally guaranteed socio-economic rights should consult the ICESCR, ACHPR and other international instruments so as to give effect to treaty-based obligation. This enables the courts to give concrete remedies by referring to both international and regional human rights texts ratified by Ethiopia.

### ***1.7.2. Norm Clarification***

It is plain that as Bill of Rights are often embody broad statements of principle; it is arguably imprecise to conclude that foreign law can shed no

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<sup>143</sup> See the Maastricht Guidelines at note 140, Rule 24.

<sup>144</sup> HlakoChoma, ‘Constitutional Enforcement of Socio-Economic Rights’(South African case study) School of Law University of Venda, Thohoyandou 0950, south Africa, Vol.6, No.6(serial No.55) *US-China Law Review* (2009), ISSN 1548-6605, USA, p.44, for further reference see also Constitutional Court of South African Case CCT 11/00).

<sup>145</sup> Ibid and see also Steiner, Supra note 9, p.333-339.

light on their text.<sup>146</sup> The ICESCR and other regional and international treaties protecting socio-economic rights may be a source of interpretation for relevant constitutional norms.<sup>147</sup> The Committee on Economic, Social and Cultural Rights developed a number of General Comments on the issues of substance, namely, the right to housing, food, forced evictions, the right of persons with disabilities, the right of the elderly, the right to health and two on the right to education. These all were developed as a result of the Committee's perception of the difficulties facing states in the implementation of the rights in question. This is hence aimed at assisting state party to the ICESCR and other bodies in the implementation of the same. Thus, the General Comment has been the principal tool for normative development of socio-economic rights.<sup>148</sup> It therefore help national judiciaries to determine the scope and content of the rights protected under the constitution.<sup>149</sup>

In Ethiopia under art 43(1) one can indirectly claim the right to food which deals with the right to improved standard of living and also art 41 which generally talks about socio-economic rights. If Courts face difficulty in the normative content of the rights and their scope of protection they can refer to the Committee's normative development which are authoritative interpretation that serve as a guideline though not binding. This entirely depends on the attitude of judges toward self-executing nature of international and regional human rights treaties. Article 9 (4), 13(1), (2) of the FDRE constitution and Art 3(1) of Federal courts proclamation plainly remedy the situation.

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<sup>146</sup>Von Jhering, Supra note, 129, p.129.

<sup>147</sup>Liebenberg, Supra note 1, p.76.

<sup>148</sup>Mathew Craven, 'The UN Committee on Economic, Social and Cultural Rights', in *Economic, Social and Cultural Rights: A text book second revised ed.* A. Eideetal (ed.), MartinusNijhoff Publishers (2001), p.468.

<sup>149</sup>Id, P.469.

General Comment No. 12 claims for state to protect, promote, respect and fulfill the right to food. It is therefore possible to boldly claim that making cross-reference so as to draw inspiration from international and regional human rights treaties in such instances by Ethiopian courts to vindicate the victims of violation.<sup>150</sup> This inspiration has much help for our courts to afford an adequate protection to the citizens to whom the right is guaranteed and makes a judicial sense of human rights.<sup>151</sup>

A sort of relevance exists between the Ethiopian constitution and international and regional human rights that induces the Ethiopian courts to import a comparative jurisprudence and apply it. That is for instance, interpretation should be made in consonant with the ratified treaties which is designed to maintain a sort of similarity and better protection of the rights on the domestic fora. That is the ‘permissible clause’ one can comprehend from art 9(4) and 13(1) and (2) of the FDRE Constitution.

The UN Committee on Economic, Social and Cultural Rights further argued that:

*Legally binding international standards should be operated directly and immediately within the domestic legal system of each state party there by enabling individuals to seek enforcement of their rights before national courts and tribunals.*<sup>152</sup>

Therefore, arguably, the Ethiopian courts as per art 9(4) and 13(1) and (2) of the constitution are justified and hence, the FDRE constitution provided a workable environment for our courts to draw inspirations from other jurisdictions’ jurisprudence.

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<sup>150</sup>Id, P.192.

<sup>151</sup>Tsegaye, Supra note 23, p.310.

<sup>152</sup> See General Comment No.9, Para. 4.

## **1.8. CONCLUSIONS AND RECOMMENDATIONS**

In conclusion, economic and social rights are newly emerging areas of human rights that developed at the international arena and far from judicial scrutiny. However, these rights are about the well being of an individual and even are basic rights for the realization of civil and political rights. For instance, a starving man does not care about voting and seeking information.

The protection accorded to one set of the rights directly enhances the enjoyment of other categories of rights. By the same token, when a certain right is deprived, it undoubtedly marginalizes the enjoyment of the other categories of rights.

The FDRE Constitution has ingrained a very scant number of socio-economic rights as directly justiciable human rights. It also seemed too adhered, towards civil and political rights, thus one can safely say that there is no balanced protection accorded to both sets of rights i.e. the FDRE constitution seems selective in the recognition of socio-economic rights. This aspect of Selective justiciability eludes the direct protection of classical socio-economic rights.

Courts' lack jurisdiction to directly adjudicate socio-economic matters under NPPO that embraces implied socio-economic rights and failed to see the means enshrined in the constitution.

Accordingly, specialized trainings on indirect justiciability socio-economic rights protected by the constitution and ratified treaties should be arranged and given for judges and lawyers of the country.

Ethiopian judges should also approach economic and social rights from the civil and political rights dimensions that will help to elucidate the scope of protection and clarify the content of these rights in the FDRE Constitution.

Judicial activism by the Ethiopian judges should be courageously claimed so as to realize the constitutionally guaranteed rights of citizens.

The other basic obstacle to the direct justiciability of socio-economic rights is lack of subordinate legislation. Therefore, there should be subordinate legislation for the following reasons:

- To give effect to the treaty-based obligation.
- To give content and determine the scope of protection of the vaguely worded constitutional socio-economic rights.
- To enhance the protection of socio-economic rights.
- To provide with concrete remedies in case of violation of the rights in question established by the victim.

Judges should also refer to constitutional and treaty-based human rights guaranteed to the beneficiaries when the need arises in order to dispose the case at hand and remedy the victim without retreating from constitutional interpretation in the areas of chapter three. This would have countless contribution in utilizing the indirect justiciability which boosts the justiciability of socio-economic rights.

**BU'A QABEESUMMAA RIFOORMIIWWAN MANNEEN MURTII  
OROMIYAA: KALLATTII SI'OOMINA ABBAA SEERUMMAAN  
YOO MADAALAMU\***

Tafarii Baqqalaa Ayyaanaa\*\*

**ABSTRACT**

*As part of justice reform program, Oromian judiciary has implemented various reform programs which are all designed for ensuring judicial efficiency, accessibility, and independence and accountability. But, there is no comprehensive research that evaluates the effectiveness of these reform programs from these perspectives. This article aims to evaluate the effectiveness of the reform programs from the perspective of judicial efficiency based on universally accepted principles and standards like clearance rate, time to disposition in years, and congestion rate. Accordingly, the article concludes that although the implementation of the reform programs are highly effective in ensuring judicial efficiency in general terms, comparatively, appellate courts are less efficient than trial courts. The reason for this, inter alia, is the increase of the number of appealed cases from Woredas to high courts, and from high courts to Supreme court. Hence, it is good to take a strategic measure like increasing quality judgement of the lower courts that tackles the number of appeal cases to appellate courts.*

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\* Barruun kun qorannoo bara 2004ALI keessa gaggeeffame: *Bu'a Qabeessummaa Sagantaalee Fooyyaa'insaa Manneen Murtii Oromiyaa: Kallattii Si'oominaa, Dhaqqabamummaa, fi Bilisummaa fi Itti Gaafatamummaan Yoo Madaalamu* jedhu irraa kan fudhatame dha. Qorannichi sirna iddattootti fayyadamuun kan gaggeeffame yommuu ta'u, odeeffannoon mala adda addaan godinaalee shan (Shawaa Bahaa, Wallagga Bahaa, Shawaa Kibba-lixaa, Arsii Lixaa, fi Harargee Lixaa), aanaalee godinaalee kana jalatti argaman kudhanii, fi Finfinnee irraa funaanameera. Haaluma kanaan, bar-gaaffiin 114 abbootii seeraa fi abbootii alangaan guutameera; af-gaaffiin 116 hooggantootaa manneen murtii, waajjiraalee haqaa, waajjira poolisii, bulchiinsa manneen sirreessaa, abbootii seeraa, abbootii alangaa, poolisoota, abukaattota, fi abbootii dhimmaa wajjiin godhameera; mariin garee abbootii seeraa manneen murtii ol'aanoo Godinaalee 5 wajjiin gaggeeffameera; akkasumas, daawwannaan manneen murtii 15 keessatti godhameera. Dabalataan, Heeronnii fi seeronni, sanadoonni riifoormii, gabaasaaleen raawwii hojii Manneen Murtii Oromiyaa waggoota shanii (1999-2003ALI), fi hogbarruuwwan roqummaa qaban sakatta'amaniiru. Bu'aan qorannichaas woorkishooppiif dhihaatee yaada hirmaattotaan gabbateera.

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**SEENSA**

Jijjiiramni biyya tokko keessatti uumamu, keessumaa jijjiiramni siyaasaa sagantaa fooyyaa'insaa adda addaaf ka'umsa.<sup>1</sup> Biyyi keenyas bara 1987 A.L.I irraa kaastee Heera haaraa hojiirra oolchuun sirna haaraa waan diriirsiteef jijjiirama siyaasaa guddaa keessa seentee akka turte ifa galaa dha<sup>2</sup>. Yaadawwan haaraa Heerri kun of keessatti qabatee ka'e hojiitti hiikuuf fooyyaa'insa tokko tokko gaggeessuun barbaachisaa ta'a. Mootummaan is akkuma Heerri ragga'een sagantaalee fooyyaa'insaa adda addaa keessa kan seene kanumaafi. Sekteroota sagantaan fooyyaa'insaa irratti gaggeeffamaa turanii fi jiran keessaa sekterri haqaa isa tokko yommuu ta'u, qaamota sektericha ijaaran keessaa manneen murtii adda duraan waamamu.

Sirni bulchiinsa haqaa biyya keenyaa akka waliigalaatti, kan naannoo keenyaa akka addaatti rakkoowwan ciccimoo sadiin:

1. *dhaqqabamaa ta'uu dhabuu,*
2. *malaammaltummaa, aangooti gar-malee fayyadamuu fi giddu-lixummaa siyaasaa, fi*
3. *Hanqina baajataan kan xaxame dha.*<sup>3</sup>

Leenjii fi gahumsa dhabuun abbootii seeraa, daangeffamuun bilisummaa abbootii seeraa, dhabamuun sirna itti gaafatamummaa abbootii seeraa

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1 Christie S. Warren, Court Administration as a Tool for Judicial Reform: An International Perspective (Institute for Court Management, Court Executive Development Program Phase III Project, April 2001, F9).

<sup>2</sup> Heera kanaan sirni bulchiinsa biyyattii waaltawaarraa (unitarism) gara federaalawaatti waan jijjiirameef, jijjiiramni ta'e kan bu'uuraati jechuun ni danda'ama.

<sup>3</sup> Ministry of Capacity Building, FDRE Comprehensive Justice System Reform Program, Baseline Study Report, February 2005, F159.

mirkaneessu, bulchiinsi dhimmootaa dadhabaa ta'uu, fi kkf ammoo rakkoowwan biroo addatti manneen murtii ilaallatani dha.<sup>4</sup>

Hojiirra oolmaa rifoormiwwan manneen murtiif (akka biyyaattis ta'e akka naannoo Oromiyaatti) ka'uumsa kan ta'anis rakkoowwan kanneeni. Haaluma kanaan, Manneen murtii Oromiyaa keessatti yeroo adda addaatti rifoormiwwan adda addaa hojiirra oolaniiru; oolaas jiru. Sagantaa Fooyyaa'insa Bulchiinsa Manneen Murtii, Sagantaa Fooyyaa'insa Sirna Haqaa, Jijjiirama Bu'uura Adeemsa Hojii, fi Sirna Madaallii Bu'aa Karoora Tarsiimawaa (BSC) akka fakkeenyaatti maqaa dhahuun ni danda'ama. Rifoormiwwan kunniin maqaan adda adda. Hojiirra kan oolanis yeroo adda addaatti. Xiyyeeffannoon isaanii garuu, yaadrimeewwan gurguddoo sadii: si'oomina, dhaqqabamummaa, fi bilisummaa fi itti gaafatamummaa irratti akka ta'e hayyoonni ibsan ni jiru<sup>5</sup>. Yaadrimeewwan kunniin hojii abbaa seerummaa keessatti iddoo guddaa kan qabanii fi Heeraanis<sup>6</sup> kan

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<sup>4</sup> Akkuma lak.3ffaa.

<sup>5</sup> Fakkeenyaaf, Tadesse Memberetsehai, *The Three Basic Issues of Judicial Reform Program in Ethiopia*, Ph.D Thesis: <http://www.cba.org/SAJEA/en/pdf/events/forumreport.pdf>. Qabiyyee sanada rifoormiwwan kanaa yoo ilaallus kanuma mirkaneessuu dandeenya (Fakkeenyaaf, sanada SMBKT MMWO, F62 ilaalaa)!

<sup>6</sup> Fakkeenyaaf, Heera Mootummaa Rippaabilika Dimokiraatawaa Federaalawaa Itoophiyaa, fi Heera Mootummaa Naannoo Oromiyaa kwt. 20(1) jalatti [n]amni himatame erga himanni irratti dhiyaateen booda, yeroo gabaabaa malu keessatti mana murtii idileetti dhaddacha uummataaf ifa ta'etti dhagahamuudhaaf mirga akka qabu tumuun si'oomina abbaa seerummaaf beekamtii kennee jira. Kwt. 20(5)jalattis [n]amni himatame abukaatoo filateen bakka bu'amuu, yookiin abukaatoo ofii dhaabbachuuf dandeettii yoo hin qabaannee fi haalli haqni itti hir'atu danda'u yeroo mudatu, mootummaarraa abukaatoo argachuuf mirga akka qabu yoo tuman dhaqqabamummaa agarsiisu. Haaluma walfakkaatuun, [m]amni murtii sadarkaa kamittuu argamu, dhiibbaa qaama mootummaa, abbaa taayitaa, ykn qaama biraa kamiyyuurraa bilisa akka ta'e heerri mootummaa Rippaabilika Dimokiraatawaa Federaalawaa Itoophiyaa fi Heera Mootummaa Naannoo Oromiyaa walduraa duubaan kwt.79(2) fi kwt.63(2) jalatti ni tumu. Abbootiin seeraas sababa hanqina dandeettii fi badii naamusaa raawwataniin alatti hojii abbaa seerummaa irraa ka'uu akka hin dandeenye heerotni kumii ni ibsu. Tumaawwan kana irraa waanti hubatamu yaadrimeewwan si'oominaa, dhaqqabamummaa fi bilisummaa fi itti gaafatamummaa beekamtii heeraa kan qaban ta'uu isaati.



deeggaramani dha. Hojiiwwan hedduun manneen murtii keessatti hojjetamaa turanii fi jiranis dhimmoota kanneen irratti xiyyeeffatu.

Waan ta'eefuu, rifoormiiwwan Manneen murtii Oromiyaa keessatti gaggeeffamaa turanii fi jiran dhimmoota sadan kanneen irratti xiyyeeffachuun isaanii waanuma sirrii dha jechuun ni danda'ama. Haata'u malee, rifoormiiwwan kunniin qabatamatti kallattiiwwan xiyyeeffannoo sadan kanaan bu'aa maalii argamsiisan kan jedhu irratti qorannoon gaggeeffame hin jiru. Inni jirus<sup>7</sup> rifoormii tokko qofa fudhachuun irra keessa kan ilaale dha. Waan ta'eefuu, erga rifoormiiwwan kunniin manneen murtii keessatti hojiirra ooluu jalqabaniis as milkaa'inni argame maali? Maaltu hojjetame, maaltu hafe? jedhaniis qorachuun yaada furmaataa akeekuun barbaachisaa ta'a. Haa ta'u malee, yaadrimeewwan si'oominaa, dhaqqabamummaa, fi bilisummaa fi itti gaafatamummaa ofumaanuu babal'oo waan ta'aniif barruu gabaabaa akkasii keessatti rifoormiiwwan gaggeeffamanii fi gaggeeffamaa jiran bu'aa maalii akka argamsiisan madaaluuf hin mijatu. Kanaafuu, xiyyeeffannoon barruu kanaa si'oomina abbaa seerummaa mirkaneessuu keessatti rifoormiiwwan kunniin hangam tokko bu'a qabeessa ta'aniiru? kan jedhu qofa irratti ta'a. Kanaafis, barruun kun kutaalee saditti caaseffameera.

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<sup>7</sup> Fakkeenyaaf, bara 2002 A.L.I tti qorannoon bu'a qabeessummaa *Sagantaa Fooyyaa'insa Bulchiinsa Manneen Murtii* fi Wiirtulee Leenjii Qaamolee Haqaa madaalu Ministeera Ijaarsa Dandeettiin gaggeeffamee ture. Qorannoon kun bu'a qabeessummaa *Sagantaa Fooyyaa'insa Bulchiinsa Manneen Murtii Federaalaa fi Naannolee afurii* (Amaaraa, Tigiraay, Oromiyaa, fi Saba Sab-lammootaa fi Uummattoota Kibbaa) madaaleera. Haata'u malee, qorannichi naannolee afran kanneen akkuma mata-duree xixiqqaa tokkootti fudhachuun kan ilaale malee, haala gadifageenya qabuun kan madaale miti. Fakkeenyaaf, bilisummaa fi itti gaafatamummaan abbaa seerummaa Manneen Murtii Oromiyaa keessatti maal akka fakkaatu yommuu madaalu, akka malee dhiphisee bira darbe (Qorannicha fuula 40 ilaaluun ni danda'ama). Inniyyuu, odeeffannoo af-gaaffii fi bar-gaaffiirraa argame qofarratti kan hundaa'e dha. Akka qorataan kun hubatutti garuu, sirnootni manneen murtii keessatti diriiraniis jiran kan akkaa naamusaa, madaallii raawwii hojii, filannoo, guddinaa fi jijjiirraa abbootii seeraa maal fakkaatu dhimmoota jedhanillee qorachuu ni barbaachisa ture.

Kutaan duraa, yaadimee si'oomina abbaa seerummaa akka waliigalaatti ibsa. Haaluma kanaan, si'oominni abbaa seerummaa maali? si'oomina dhugoomsuu ilaalchisee yaadawwan (theories) jiran maal fa'i? si'oominni maaliin safarama? dhimmoonni jedhan kutaa kana keessatti haala gabaabaa ta'een ibsamaniiru. Kutaan lammaffaa, qabatamatti, si'oominni abbaa seerummaa Manneen murtii Oromiyaa keessatti maal akka fakkaatu ulaagaalee adda bahanii fi daataawwan walitti qabaman irratti hundaa'ee kan madaalu dha. Dhuma irratti, kutaan sadaffaa, yaadota gudunfaa fi furmaataa kaa'a. Hundayyuu, tokko tokkoon kaafnee mee haa ilaallu.

## **1. SI'OOMINA ABBAA SEERUMMAA: YAADOTA WALIIGALAA 1.1. MAALUMMAA**

Hayyuun *Andrew Hitt* jedhamu si'oomina abbaa seerummaa yommuu hiiku, “...*judicial efficiency is a timely disposal of cases, which would result in a steady flow of decisions released throughout the year rather than at the very end of or after the term*<sup>8</sup>” jedha. Akka hiikkoo kanaatti, si'oominni abbaa seerummaa yeroodhaan dhimmootaaf furmaata kennuu jechuu yommuu ta'u, yeroon kunis dhuma waggaaatti yookiin waggaa booda osoo hin taane, haala itti fufiinsa qabuun waggaa guutuu ta'uu kan qabu dha. Kanarraa ka'uudhaan si'oomina abbaa seerummaa waantota sadiin ibsuun ni danda'ama:

1. Hojii dhimmootaaf furmaata kennun kan wal qabatu dha.
2. Hojiin dhimmootaaf furmaata kennuu kunis itti fufiinsa waggaa guutuu ta'uu qaba.

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<sup>8</sup> Appellate Judicial Efficiency, <http://law.marquette.edu/facultyblog/2009/08/21/appellate-judicial-efficiency>, <Muddee 4, 2004 A.L.I kan ilaalame>.

3. Dhimmoonni furmaata argatan kun dhimma tokko yookiin dhimma lama qofa osoo hin taane, dhimmoota akka waliigalaatti mana murtiitti dhiyaatan ta'uu qabu.

Kanaaf, si'oomina abbaa seerummaa jechuun saffina yeroo dhimmoonni mana murtiitti dhiyaatan furmaata itti argatan jechuu yommuu ta'u, hojii abbaa seerummaa keessatti iddoo guddaa kan qabuu fi raawwii hojii manneen murtii madaaluuf akka ulaagaa guddaa tokkootti kan ilaalamu dha<sup>9</sup>. Guddina dinagdee biyya tokkoo waliinis hidhata kallattii ta'e kan qabuu fi sagantaalee fooyyaa'insaa manneen murtii keessattis akka dhimma ijoo tokkootti kan hammatamu dha.<sup>10</sup> Gabaabumatti, si'oominni abbaa seerummaa (haala qulqullina qabuunis ta'e osoo qulqullina hin qabaatiin) dhimmootaaf yeroo gabaabaa keessatti furmaata kennuu yaadrimee agarsiisu dha.

## **1.2. SI'OOMINA MIRKANEESSUUF HOJIIWWAN**

### **HOJJETAMUU QABAN IRRATTI YAADAWWAN JIRAN**

Hojii abbaa seerummaa keessatti si'ominni dhimma murteessaa akka ta'e olitti ibsuuf yaalleerra. Kanaaf, manneen murtii hunduu si'oomina kana dhugoomsuuf hawwiin qaban guddaa dha. Haata'u malee, yoo maal goone si'oomina kana dhugoomsuu dandeenya kan jedhu irratti yaadota adda addaatu jira. Fakkeenyaaf, barreeffamni olitti ibsame yaadota afur: baajata mana murtii dabaluu, dhaqqabamummaa gar-malee xiqqeessuu, malawwan

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<sup>9</sup> Richard Y.Schauffler „Judicial Accountability in the US State Courts Measuring Court Performance, Utrecht Law Review, [http://www.utrechtlawreview.org/volume 3, Issue 1\(June\), 2007, F121](http://www.utrechtlawreview.org/volume%203,%20Issue%201(June),%202007,%20F121); Professor Mohan Gopal, Evaluating Judicial Performance, National Judicial Academy, [http://www.njca.com.au/IOJT%20 conference/G, F2, <Fulbaana 27,2003 A.L.I kan ilaalame> ilaaluun ni danda'ama.](http://www.njca.com.au/IOJT%20conference/G,%20F2,%20Fulbaana%2027,%202003)

<sup>10</sup> Fakkeenyaaf, Baankiin Addunyaa guddinni dinagdee biyya tokkoo fi si'oominni abbaa seerummaa hidhata kallattii akka qabu cimsee amana (Research Institute of Economy, Trade & Industry, Toward Enhancing Judicial Efficiency-Role of ADR as Engine of Judicial Reform, <http://www.reit.go.jp/en/special/economics-review/016.htm> , F1 <Onkoloolessa 16,2004> kan ilaalame ilaalaa).

hiikkaa waldiddaa filannoo jajjabeessuu, fi adeemsota walxaxoo ta'an salphisuu <sup>11</sup> jechuun kaa'a. Arfanuu tokko tokkoon mee haa ilaallu:

### **1.2.1. Baajata Mana Murtii Dabalu<sup>12</sup>**

Yaadni kun rakkinni mana murtii inni guddaa hanqina baajataati kan jedhu irraa ka'a. Bakka baajatni gahaa ta'e hin jirretti, lakkoofsa manneen murtii, abbootii seeraa fi hojjettoota biroo dabaluunii, fi leenjiiwwan barbaachisoo ta'an kennuun hin danda'amu. Isaan kunniin hin jiran taanaan ammoo, si'oominni ni jiraata jedhamee hin yaadamu. Kanaaf, yaadni kun si'oomina abbaa seerummaa dhugoomsuuf baajata manneen murtii dabaluun ni barbaachisa jedhee amana.

### **1.2.2. Dhaqqabamummaa Gar-malee Daangessuu<sup>13</sup>**

Akka yaada kanaatti, manneen murtii akka malee dhaqqabamoo taasisuun si'oomina abbaa seerummaa xiqqeessuu ta'a. Sababni isaa, dhimma tokko mana murtii geessuuf daangaan hin jiru taanaan, dhimmoonni hundi, warreen sasalphoo ta'anillee gara mana murtii dhufu. Kun ammoo mana murtiitti hojii baay'isuun si'oominni akka harkifatu taasisa. Kanaaf, yaadni kun si'oomina abbaa seerummaa dhugoomsuun yoo barbaadame haala dureewwan tokko tokko kaa'uun dhaqqabamummaa manneen murtii daangessuun barbaachisaa dha ejjennoo jedhu qaba.

### **1.2.3. Malawwan Hiikkaa Waldiddaa Filannoo Jajjabeessuu<sup>14</sup>**

Yaadni sadaffaan kun si'oomina abbaa seerummaa dhugoomsuuf malawwan hiikkaa waldiddaa filannoo (ADR) diriirsuun barbaachisaa dha kan jedhu agarsiisa. Malawwan hiikkaa waldiddaa filannoo jiraannaan, dhimmoonni baay'een mana murtii osoo hin ga'iin achumatti fala argachuu danda'u.

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<sup>11</sup> Akkuma 10<sup>ffaa</sup>, F2.

<sup>12</sup> Akkuma lak.11<sup>ffaa</sup>.

<sup>13</sup> Akkuma lak.12<sup>ffaa</sup>.

<sup>14</sup> Akkuma lak.13<sup>ffaa</sup>.

Akkasumas, ogeeyyii seeraa manneen murtii fi ogeeyyii seeraa osoo hin ta'iin mala biraan namoota falmii hiikan jidduutti miira dorgommii waan uumuuf kaka'umsaan akka hojjetan godha. Yeroo kana, si'oominni abbaa seerummaa ni dabala jechuun yaadicha sababaan deggaranii ibsu.

#### **1.2.4. Adeemsota Walxaxoo Ta'an Salphisuu<sup>15</sup>**

Adeemsi manneen murtii ofuma isaatiiyyuu walxaxaa fi keessa darbuuf rakkisaa dha. Kun, keessumaa biyyoota guddataa jiran keessatti daran hammaata. Sababni isaas, biyyootni baay'ee haala qabatama isaanii waliin deemuu fi dhiisuu osoo hin yaaliin seerota biyyoota guddatanii kallattiin fudhachuun hojiirra kan oolchan waan ta'eefi. Kanaaf, akka yaada kanaatti, si'oomina abbaa seerummaa dhugoomsuuf manneen murtii bulchiinsa keessoo isaanii keessatti adeemsaalee walxaxoo ta'an salphisuu qabu jechuu dha.

Akka waliigalaatti, ibsa olitti godhame kanarraa hubachuun kan danda'amu, si'oomina abbaa seerummaa mirkaneessuun dhimma murteessaa ta'us, haala kamiin dhugoomsuun akka danda'amurratti yaadni adda addaa kan jiru ta'uu isaati. Yaadonni ka'an kun hunduu si'oomina mirkaneessuuf gahee olaanaa akka qaban tilmaamuun nama hin dhibu. Haa ta'u malee, yaada isa kamti caalaatti si'oomina kana dhugoomsuu danda'a kan jedhu haala qabatamaa biyya tokkoorratti hundaa'uun garaagara ta'uu akka danda'u dhimma hubatamuu qabu dha<sup>16</sup>.

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<sup>15</sup> *Akkuma lak.14ffaa*

<sup>16</sup> *Akkuma 15ffaa, F3.*

### 1.3. MAALIIN AKKA SAFARAMU

Manneen murtii si'oomina qabu yookiin hin qaban jechuuf safartuuwwan gargaaran hedduu yommuu ta'an<sup>17</sup>, baay'ina dhimmootaa tokkoo tokkoo abbaa seeraa gahu, hanga dhimmoota qulqullaa'anii, dhimma murteessuuf yeroo fudhatee, fi dhimmoota hunda murteessanii xumuruuf turtii yeroo fudhatu (*congestion rate*)<sup>18</sup> akka fakkeenyaatti caqasuun ni danda'ama.

#### 1.3.1. Baay'ina Galme'e Tokkoo Tokkoo Abbootii Seeraa Gahu (Case Load Rate)<sup>19</sup>

Safartuun kun gahee ida'ama dhimmoota naanna'anii (pending cases), fi waggaa kana keessa mana murtiitti dhiyaatan baay'ina abbootii seeraaf hiruun argamu dha. Baay'inni dhimmootaa bara darberraa bara kanatti ce'an yookiin dhimmoota haaraa gara mana murtiitti dhufan yoo dabale, dhimmi tokkoo tokkoo abbaa seeraaf qoodamu akkasuma dabala jechuu dha. Dabale jechuun ammoo si'oominni xiqqaachuu agarsiisa. Ida'amni dhimmootaa si'oomina safaruuf gargaaru kun gosa-gosaan (case- category, i.e, civil, criminal, commercial, etc), yookiin osoo gosa dhimmaan adda hin fo'iin akka waliigalaatti ta'uu danda'a.<sup>20</sup> Haata'u malee, sadarkaa walxaxinsa dhimmootaa beekuuf, yookiin dhimmoota murteessanii xumuruuf yeroo fudhachuu danda'u tilmaamuuf yoo gosa- gosaan ta'e caalaatti filatama.<sup>21</sup>

<sup>17</sup> Baay'ina galmeewwan waggaatti banamanii, baay'ina galmeewwan waggaatti murtaa'anii ykn cufamanii, dhuma waggaarratti baay'ina galmeewwan osoo hin murtaa'iin hafanii, umurii dhimmoonni mana murtii keessatti lakkoofsisan, baay'ina beellamaa, baay'ina abbootii seeraa, fi k.k.f hundi si'oomina safaruuf kan gargaarani dha. (Fakkeenyaaf, Maria Dacoliias, Court Performance around the World: A Comparative Perspective (World Bank Technical Paper) July 1999 fuula 10-20 ilaaluun ni danda'ama).

<sup>18</sup> Yeroo ammaa kana MMWO safartuuwwan kanneenitti fayyadamaa waan jiruuf maalummaa isaanii gaggabaabsinee ilaaluun hubannoof gaarii ta'a.

<sup>19</sup> Dr.Pim Albers, Performance Indicators and Evaluation for Judges and Courts (Council of Europe), F4, <http://coe.int/t/dghl/cooperation/cepej/ev,28/1/2003> irraa kan ilaalame.

<sup>20</sup> Akkuma lak.19ffaa.

<sup>21</sup> Akkuma lak.20ffaa.

Fakkeenyaaf, bara 2003 keessa sadarkaa MMWOtti baay'inni dhimmoota naanna'anii 8498; dhimmoonni haaraa dhufan ammoo 19,928 ture. Baay'inni abbootii seeraa mana murtii kanarra jiran 36 yoo ta'an, baay'inni dhimmootaa tokkoo tokkoo abbootii seeraa gahee kan shallagamu akka itti aanutti ta'a:

$$\frac{\text{Baay'ina dhimmoota naanna'anii} + \text{Baay'ina dhimmoota haaraa dhufanii}}{\text{Baay'ina abbootii seeraa}}$$

$$= \frac{8498+19,928}{36} = \frac{28,426}{36}$$

$$= \underline{\underline{789.6}}$$

Kanaaf, bara kanatti, abbaan seeraa MMWO tokko galmeewwan 789.6 hojjechuu qaba jechuu dha. Galmeewwan sadarkaa kanatti dhiyaatan ammoo galmeewwan manneen murtii biroon walbira qabamanii yoo ilaalaman cimoo fi walxaxoo dha. Kanaaf, si'oomina mana murtii irratti dhiibbaa qaba jechuun ni danda'ama.

### 1.3.2. Hanga Dhimmoota Qulqullaa'anii (Clearance Rate)

Kun baay'ina dhimmootaa mana murtiitti dhiyaatan (kan naanna'ee fi haaraa) keessaa dhibbeentaan hangamti furmaata argate (murtaa'e) kan jedhu beekuuf safartuu fayyadamnu dha<sup>22</sup>. Fakkeenyaaf, bara 2003 keessa sadarkaa MMWO dhimmoonni dhiyaatan 28,426 yommuu ta'an, kana keessaa murtii kan argatan 23,031 dha. Baay'ina dhimmoota qulqullaa'anii foormulaa itti aanu hordofuun shallaguun ni danda'ama:

$$28,426 = 100\%$$

$$23,031 = y$$

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<sup>22</sup> Maria Dakolias, Court Performance around the World, A Comparative Perspective (World Bank Technical Paper No.430) July 1999, F13.

$$Y = \frac{23,031 \times 100\%}{28,426}$$

$$\underline{\underline{Y = \%81.02}}$$

Hangi qulqullaa'inaa 100% jechuun galmeen hunduu murtaa'ee dhumeera; bara itti aanutti hin dabarre jechuu agarsiisa. Hangi qulqullinaa %100'n gadi yoo ta'e, tuulamni dhimmootaa jiraachuu agarsiisa. Akkuma hangi qulqullina dhimmootaa xiqqaachaa deemu tuulamni dhimmootaa dabalaa adeema jechuu dha. Fakkeenya olitti kennamerratti hangi dhimmoota qulqulleessuu MMWO 81.02% dha. Kun sadarkaa mana murtii kanatti bara jedhame keessatti si'ominni kan hafu ta'uu agarsiisa.

### **1.3.3. Dhimmoota Murteessuuf Yeroo Fudhatu (Waggaadhaan) (Time to Dispose Cases in Years)**

Kun baay'ina dhimmootaa wagga keessatti beellamaman (number of cases pending) baay'ina dhimmootaa murtaa'aniif (number of cases resolved) hiruun gahee argamu dha<sup>23</sup>. Gaheen kun ol ka'e jechuun dhimmi tokko jalqabee dhumuuf yeroo dheeraa fudhata jechuu dha. Gadi bu'eera taanaan garuu, dhimmichi jalqabee hanga murtaa'utti yeroo gabaabaa fudhata jechuu dha. Tokkoo ol ta'e jechuun ammoo manni murtichaa hanga galmeewwan bara darban beellamamaniyyuu hin murteessine jechuu agarsiisa<sup>24</sup>.

Fakkeenyaaf, bara 2003tti MMWO galmeewwan 5,395 beellamee, galmeewwan 23,031 ammoo murteesse. Dhimma tokko murteessuuf yeroo hangam akka fudhate beekuuf foormulaan fayyadamnu:

<sup>23</sup> Akkuma 22ffaa, F18.

<sup>24</sup> Akkuma lak.23ffaa, miiljalee 61ffaa ilaaluun ni danda'ama.



*Baay'ina dhimmoota beellamamanii*  
*Baay'ina dhimmoota murtaa'anii ta'a jechuu dha.*

$$= 5,395/23,031$$

$$= \underline{\underline{0.23}}$$

### **1.3.4. Dhimmoota Hunda Murteessanii Xumuruuf Turtii Yeroo Fudhatu (Congestion Rate)**

Kun dhimmoota naanna'anii fi haaraa dhufan akka waliigalaatti murteessuuf giddu galeessaan yeroo hangam akka fudhatu mala ittiin safarru dha.<sup>25</sup> Kana beekuuf, waggaa keessatti daataa istaatistikaawaa sadii argachuun barbaachisaa ta'a. Isaanis: baay'ina dhimmoota haaraa mana murtiif dhiyaatanii, baay'ina dhimmoota bara darberraa naanna'anii, fi baay'ina dhimmoota murtii argatanidha. Kanaaf, akkaataan shallaggii isaa:

$$\text{Congestion rate} = \frac{\text{Baay'ina dhimmoota naanna'anii} + \text{Baay'ina dhimmoota haaraa dhufanii}}{\text{Baay'ina dhimmoota murtii argatanii}}$$

*Baay'ina dhimmoota murtii argatanii ta'a jechuu dha.*

Bu'uuruma kanaan, fakkeenya olitti kenname ilaalchisee MMWO dhimmoota hunda murteessanii xumuruuf turtiin yeroo fudhatu:

$$(8498+19928) / 23031$$

$$= \underline{\underline{1.23}} \text{ dha.}$$

Kana jechuun manni murtii kun dhimmoota jiran maraaf furmaata kennee fixuuf giddu-galeessaan waggaa tokkoo ol itti fudhata jechuu dha. Safartuu kanaan si'oominni haala gaariirra jira kan jedhamu bu'aan shallaggii 1tti kan dhihaatu yoo ta'e dha.

<sup>25</sup> *Akkuma 24ffaa, F17.*

Ibsa olitti kenname kanarraa, caaseffamnii fi hojimaanni manneen murtii seera, siyaasaa, fi aadaa biyyootarratti hundaa'uun garaagarummaa yoo qabaatanis, si'oomina isaanii malawwan adda addaa irratti hundaa'uun safaruu akka dandeenyu hubachuun ni danda'ama. Haa ta'u malee, safartuuwwan kunniin guutuu fi hanqina kan hin qabne osoo hin taane, si'ominni jira ykn hin jiru jechuuf kallattii agarsiiftota akka ta'an dagachuu hin qabnu.

## **2. SI'OOMINA ABBAA SEERUMMAA MANNEEN MURTII OROMIYAA: XIINXALA DAATAA**

Kutaa tokkoffaa keessatti, yaadrimee si'oomina abbaa seerummaa bifa gabaabina qabuun ilaaltee jirra. Keessattuu, ulaagaalee si'oominni hojii abbaa seerummaa ittiin safaraman baay'ee akka ta'an ibsuun, isaan keessaa hangi qulqullaa'ina dhimmootaa, dhimmoota jiran murteessanii xumuruuf waggaaadhaan yeroo hangam akka fudhatuu, fi dhimmoota hunda murteessanii xumuruuf turtii yeroo fudhatu (congestion rate) akka fakkeeniyatti fudhachuun ibsi itti kennameera.

Kutaa kana jalatti ammoo manneen murtii Oromiyaa safartuulee kanaan yoo madaalaman maalirra akka jiran, si'oomina abbaa seerummaa dhugoomsuuf hojiiwwan hojjetaman maalfaa akka ta'anii, fi kana keessatti rakkoowwan qabatamaatti mul'atan maalfaa akka ta'an daataa istaatistikaawaa, af-gaaffii, bar-gaaffii, marii garee fi daawwannaa godhame irratti hundaa'uun kan xiinxalamu ta'a.

## 2.1. XIINXALA DAATAA ISTAATISTIKAWAA

### *Gabatee 1: Gabatee Sadarkaa Raawwannaa Galmeewwanii Ibsu*

<i>Bara (A.L. I)</i>	<i>Hanga qulqullaa'ina dhimmootaa (Clearance rate)</i>	<i>Dhimmoota murteessuuf yeroo fudhatu (Time to dispose cases in years)</i>	<i>Dhimmoota hunda murteessanii xumuruuf turtii yeroo fudhatu (Congestion rate)</i>	<i>Raawwii (% dhaan)</i>
1997	101.22	0.20	1.20	83.06
1998	97.11	0.28	1.28	78.39
1999	101.59	0.26	1.26	79.17
2000	94.24	0.35	1.35	73.91
2001	105.62	0.22	1.22	81.95
2002	108.89	0.10	1.10	90.94
2003	102.41	0.09	1.09	92.09

*Madda: Mana Murtii Waliigala Oromiyaa*

### 2.1.1. Hanga Qulqullaa'ina Dhimmootaa (Clearance Rate)

Akkuma gabatee oliirraa hubachuun danda'amu, hangi qulqullaa'ina dhimmootaa 1997-1999 jidduu jiru itti fufiinsaan guddataa ykn hir'achaa kan deeme miti. Garuu, bara 2000 -2002'tti waggoota sadiif itti fufiinsaan dabalaa deemee, bara 2003'tti ammoo % 6.48 n hir'ate. Hangi qulqullaa'inaa dabalaa deeme jechuun ammoo tuulamni dhimmootaa xiqqaachaa waan deemuuf, si'ominni jira nama jechisiisa. Akka waliigalaatti yoo ilaalle garuu, hangi qulqullaa'inaa kan bara 1998 fi 2000 irraan kan hafe hundi isaaniitiyyuu %100 ol. Kun waan lama agarsiisuu danda'a: tuulamni dhimmootaa gar-malee jiraachuu, ykn tuulamni dhimmootaa jiraatus manneen murtii keessaa bahuuf ciminaan

hojjechaa jiraachuu dha. Xiinxalli hanga qulqullinaa manneen murtii Oromiyaa kun isa lammaffaa kanaan kan walqabatu dha jechuun ni danda'ama. Kanaafis waantonni akka agarsiiftuutti gargaaran ni jiru. Hundaa ol, manneen murtii tuulama dhimmootaa hamaa keessa waan turaniif keessaa bahuuf tarkaanfiiwwan hedduu fudhachaa kan turan waan ta'eefi dha. Kana qabatama gochuuf gaaffiin, “*tuulama dhimmootaa salphisuuf manni murtii tarkaanfiiwwan fudhate qabaa?*” jedhu barreeffamaan abbootii seeraa fi abbootii alangaa 94f dhiyaateera. Kana keessaa, namootni 84 (%89.36) “eyyeen hojjetameera” yoo jedhan, 10 (%10.63) ammoo “lakki hin hojjetamne” jechuun deebisaniiru.

Warreen hojiin hojjetame jira jedhan kanneen armaan gadii akka fakkeenyaatti kaasu:

- ✓ Galmeewwan umrii dheeraa qabaniif dursa laachuun akkaataa dhufaati isaaniitti akka keessummaa'an gochuu
- ✓ Duulaan galmee hojjechuu
- ✓ Dhaddacha irra deebi'uun gurmeessuu
- ✓ Baajataa fi humna namaa dabaluu
- ✓ Gannaa fi bona hojjechuu
- ✓ Dhimmoonni jaarsummaan dhumachuu akka danda'an waltajjiwwan kora haqaatti fayyadamuun hawaasa hubachiisuu
- ✓ JBAH hojiirra oolchuun beellamni akka gaggabaabbatu gochuu fi kkf dha.

Warreen hojiin hojjetame hin jiru jedhan (%10.63) garuu maaliif akka ta'e sababaan deggaranii waanti ibsan hin jiru. Kanaafuu, hin jiru kan jedhame hubannoo dhabuu ykn gaafficha xiyyeeffannoon guutuu dhabuu irraa kan madde yoo ta'e malee gama kanaan hojiiwwan hojjetaman akka jiran hubachuun ni danda'ama.

### **2.1.2. Dhimmoota Murteessuuf Waggaadhaan Yeroo Fudhatu (Time to Dispose Cases in Years)**

Kun gahee galmee waggaatti beellamame galmeewwan waggaatti murtaa'aniif hiruun argamu dha. Gaheen argamu xiqqaa yoo ta'e, si'oominni jira jechisiisa. Akkuma gabatee 1 irraa hubachuun danda'amutti, gaheen kun ammas itti fufiinsaan dabalaa yookiin hir'achaa kan deeme ta'uu baatus, 0.09 fi 0.35 jidduu kan naanna'e dha. Qaphxii 1'ttis hin dhiyaanne. Bara 2000 irraa kaasee ammoo waggoota afuriif walitti aansee walduraa duubaan 0.35, 0.22, 0.10, fi 0.09 waan ta'eef hir'achaa deemee jira. Kun kan agarsiisu si'oominni tajaajila abbaa seerummaa jiraachuu dha.

### **2.1.3. Dhimmoota Hunda Murteessanii Xumuruuf Turtii Yeroo Fudhatu (Congestion Rate)**

Kunis akkuma dhimmoota qulqulleessuu fi dhimmoota murteessuuf yeroo fudhatuu itti fufiinsaan waggaa waggaatti dabalaa ykn hir'achaa kan adeeme akka hin taane gabatee oliirraa ni hubatama. Haa ta'u malee, bara 2000 irraa eegalee waggoota afuriif walitti aansee (walduraa duubaan 1.35, 1.22, 1.10, 1.09 waan ta'eef) hir'achaa deemera. Kana jechuun dhimmoonni mana murtii jiran marti furmaata argachuuf giddu galeessaan waggaa tokkoo ol kan itti fudhatu ta'us, waggaa irraa waggaatti yeroon kun gabaabbataa deemuu waan agarsiisuuf, safartuu kanaan si'oominni dabalaa adeemuu isaa hubachuun ni danda'ama.

#### **2.1.4. Raawwii**

Raawwii manneen murtii yoo ilaalles itti fufiinsaan dabalaa ykn hir'achaa kan deeme osoo hin taane, yeroo tokko ol bahaa yeroo biraa ammoo gadi bu'aa kan deeme ta'uu gabateen 1 ni agarsiisa. Ta'us, bara 2000 irraa eegalee waggoota afuriif (walduraa duubaan 73.91, 81.95, 90.94, fi 92.09) ta'aa waan dhufeef, itti fufiinsaan dabalaa deemuu gabaticha irraa hubachuun ni danda'ama. Raawwiin ofii isaatii safartuu si'oominaa ta'uu baatus, raawwii hojii fooyyeessuu keessatti si'oominni hojii akka galtee tokkootti waan gargaaruuf, waggootan afran kana keessatti si'oominnis yeroo irraa yerootti fooyyaa'aa deemeera hiikoo jedhu kennuu danda'a.

Akka waliigalaatti, xiinxala daataa istaastatikaawaa kana irraa hubachuun kan danda'amu, erga rifoormiiwwan manneen murtii Oromiyaa keessatti hojiirra oolani as si'oominni abbaa seerummaa yeroo tokko ol ka'aa yeroo biraa ammoo gadi bu'aa kan deeme yoo ta'ellee, bara 2000 irraa eegalee garuu walitti fufiinsaan dabalaa kan deeme ta'uu isaati.

#### **2.2. XIINXALA BAR-GAAFFII, AF-GAAFFII, MARI GAREE, FI DAAWWII**

Erga sagantaaleen fooyyaa'insaa manneen murtii keessatti hojiirra ooluu jalqabani as hojiiwwan si'oomina abbaa seerummaa dhugoomsuuf gargaaran hedduun hojjetamaniiru. Kanarrattis gaaffiin, *“si'oomina tajaajila haqaa fooyyeessuuf manneen murtii keessatti hojiiwwan hojjetaman jiruu?”* jedhu barreeffamaan abbootii seeraa fi abbootii alangaaf kan dhiyaate yoo ta'u, deebiin kennames kan armaan gadiiti.

*Gabatee 2: Gabatee si'oomina tajaajila haqaa dhugoomsuuf hojiiwwan  
hojjetaman jiraachuu agarsiisu*

<i>Qaama gaafatame</i>	<i>Meeqa akka gaafatame</i>	<i>Eyyee</i>	<i>Lakkii</i>
Abbootii seeraa	56	56	0
Abbootii alangaa	41	37	4
Ida'ama	97	93	4

Gabateerraa akkuma arguun danda'amu, abbootii seeraa fi abbootii alangaa 97 gaafataman keessaa namootni 93 (%95.87) ta'an si'oomina mirkaneessuuf hojiiwwan hojjetaman jiru yoo jedhan, namootni 4 (%4.12) ta'an ammoo hojiin hojjetame hin jiru jechuun deebisaniiru. Kana irraa ka'uun, si'oomina abbaa seerummaa dhugoomsuuf hojiiwwan hojjetaman Kan jiran ta'uu hubachuun ni danda'ama.

Hojiiwwan kunniin maalfa'i gaaffiin jedhus barreeffamaan, afaaniin, akkasumas marii gareerratti gaafatame deebiin kan kennameef yoo ta'u, deebiiwwan gaaffii kanaas akka itti aanutti cuunfamanii dhihaataniiru.

### **2.2.1. Hojiiwwan JBAH Hojiirra Oolchuun Walqabatan**

Si'oominni tajaajila abbaa seerummaa akkaataa itti dhugoomuu danda'u keessaa tokko adeemsaalee walxaxoo ta'an dhabamsiisuu akka ta'e olitti ilaalleerra. JBAH jalqabumarraa hojiiwwan haala uumama isaaniitiin walitti fiduudhaan gulantaa hin barbaachifne hambisuu dha. Kana waan ta'eef, hojiiwwan JBAH hojiirra oolchuun walqabatanii hojjetaman si'oomina mirkaneessuu keessatti gaheen qaban laayyoo miti. Manneen murtii

Oromiyaa baay’ee keessattis jijjiiramni bu’uura adeemsa hojii kun hojiirra oolee jira. Kana qabatama gochuuf yaadamee, abbootiin seeraa fi abbootiin alangaa gaaffii barreeffamaan “*mana murtii isin itti hojjettan keessatti JBAH’n hojiirra ooleeraa?*” jedhu akka deebisan ta’ee deebii armaan gadii argateera:

*Gabatee 3: Gabatee manneen murtii keessatti hojiirra oolmaa JBAH agarsiisu*

<i>Qaama gaafatame</i>	<i>Meeqa akka gaafatame</i>	<i>Eyyee</i>	<i>Lakkii</i>
Abbootii seeraa	58	55	3
Abbootii alangaa	39	35	4
Ida’ama	97	90	7

Akkuma gabatee 3<sup>ffaa</sup> irraa hubachuun danda’amu, abbootiin seeraa fi abbootiin alangaa 97 ta’an gaafatamanii 90’n (%92.78) “eyyee” yoo jedhan, namoonni 7(%7.21) ammoo “lakkii” hojiirra hin oolle jechuun deebisaniiru. Kanarraa ka’uun, rifoormiin kun bakka baay’eetti hojiirra akka oole hubachuu dandeenya. Hojiirra oolmaa rifoormii kanaan walqabatee hojiiwwaan si’oomina dabaluu keessatti gahee ol’aanaa qaban akka armaan gadiitti ibsuun ni danda’ama.

#### **a. Unkaalee Adda Addaa Qopheessuu**

Manneen murtiif gaaffiiwwan hedduun kan dhiyaatan yoo ta’u, isaan keessaa ol iyyanni naaf haa kennamu, dhorki kenname haa ka’u, murtiin naaf haa raawwatu, mirgi wabii naaf haa eegamu, himata ykn deebii akkan fooyyeeffadhu naaf haa hayyamamu warreen jedhan akka fakkeenyaatti



kaasuun ni danda'ama. JBAH'n dura, kana hunda abbaa dhimmaatu qopheeffata ture. Rifoormiiwwan manneen murtii hojiirra ooluun dura ammoo abbaa dhimmaatiin waraqaa fi kobbee bitadhuu kottu jedhamaa ture. Amma garuu, unkaaleen kunniin qophaa'anii kutaa odeeffannoo waan jiraniif, abbootiin dhimmaa osoo baay'ee hin dhama'iin achumaa fuudhanii itti guutuu qofa. Kana qabatama gochuuf, “*unkaaleen qophaa'anii taa'uun akka abbaan dhimmaa itti fayyadamuuf tola kennaman jiruu?*” gaaffiin jedhu barreeffamaan abbootii seeraa fi abbootii alangaaf dhiyaatee akka itti aanutti deebi'era:

*Gabatee 4: Gabatee jiraachuu unkaalee agarsiisu*

<i>Qaama gaafatame</i>	<i>Meeqa akka gaafatame</i>	<i>Eyyee</i>	<i>Lakkii</i>
Abbootii seeraa	61	57	4
Abbootii alangaa	38	26	12
Ida'ama	99	82	16

Namoota 99 gaafataman keessaa namoonni 82 (%82.82) “eyyee” jechuun yoo deebisan, namoonni 16 (%16.16) ammoo “lakkii” unki qophaa'e hin jiru jedhaniiru. Garaagarummaan kun mul'achuu kan danda'e, tarii, sadarkaa hojiirra oolmaa JBAH irratti hundaa'uuni. Bakka JBAH akkaataa barbaadameen hojiirra oolee jirutti unkaaleen kunniin hojiirra ooluu ifatti mul'atu. Bakkeewwan JBAH hojiirra oolchuuf haalawwan mijatoo hin taane jiranitti (fakkeenyaaf, bakka waajjirri hojii hin mijanetti) ammoo kun ifatti mul'achuu dhiisuu danda'a. Haa ta'u garuu, yeroo ammaa unkaaleen adda addaa qophaa'anii waan jiraniif, tajaajilamtoonni tola itti fayyadamaa jiru. Himataa fi deebii malee waanti alatti qophaa'u hin jiru. Kun si'oomina qofa

osoo hin taane, abbootii dhimmaa baasii adda addaa irraa waan oolchuuf<sup>26</sup> dhaqqabamummaa mirkaneessuu keessattis gahee guddaa qaba.

Haa ta’u malee, unkaalee kanaan walqabatee rakkoon mul’atu akkaataa dhimmi barbaaduu fi seeronni deemmii falmii kaa’aniin yeroo yerootti irra deebi’anii ilaaluu (reculibrate) dhabuu dha. Kun ammoo qulqullina hojii irratti dhiibbaa mataa isaa ni qabaata. Fakkeenyaaf, dhimmi ilaalamaa jiru dhimma ijoollee abbaan tokko ta’an garuu ammoo, haadhaan garaagara ta’an kan ilaallatu ta’uu mala. Unki qophaa’ee jiru garuu, ijoolleen hunduu abbaa fi haadha tokko irraa dhalatan tilmaama jedhuuni dha.

### b. Sirna Beellamaa

Akka qorannoo JBAH manneen murtii Oromiyaatti, umriin galmeewwanii haala armaan gadiin daanga’ee jira.

*Gabatee 5: Gabatee daangaa yeroo dhimmootni itti murtaa’an agarsiisu*

<i>Gosa dhimmaa</i>	<i>Yeroo itti murtaa’uu qabu</i>	<i>Ibsa</i>
Raawwii	Ji’a 1	Rakkoo addaan garuu caaluu mala
Gaaffii mirga wabii; gaaffii beellama	Sa’a 48	

<sup>26</sup> Fakkeenyaaf, Manni Murtii Aanaa Walisoo qorannoo gaggeesseen uunkaaleen kun guyyaatti giddu galeessaan qarshii kuma tokkoo fi digdamii-shan (1025) abbootii dhimmaaf kan qusate ta’uu mirkaneesseera (Af-gaaffii Obbo Mokonnin Kudhaamaa, Pirezidaantii Mana Murtii Aanaa Wolisoo waliin gaafa 14/03/2004 gaggeeffame). Mana murtii aanaa tokkotti qarshii hanga kanaa qusachuun erga danda’amee, guutummaa manneen murtii Oromiyaatti qarshii guddaa qusachuun akka danda’amu tilmaamuun ni danda’ama.

yeroo galmee himannaa tiraafikaa beellama addaa hin qabnee fi kkf		
Hojjetaa fi hojjisiisaa	Ji'a 2	
Falmii waliigaltee, falmii waliigalteen ala itti gaafatamummaa dhufu, falmii waliigalteewwan bulchiinsaa, falmii qabeenyaa	Ji'a 3	
Jeequmsi naaf haa dhaabbatu	Ji'a 1	
Falmii maatii	Ji'a 2	yeroo jaarsummaa maatii harka turu hin dabalatu
Dhaaltummaan naaf haa mirkanaa'u	Guyy oota 21	Gareewwan 2 yoo walfalman caaluu danda'a
Yakkoota ciccimoo kanneen akka ajjeechaa namaa S.Y kwt.539, 540, 541; yakka saamichaa S.Y kwt 670, 671 fi yakkoota aangoodhaan fayyadamu	Ji' 3	
Yakkoota xixiqqoo	Guyy	

(petty offences)	oota 10	
Yakkoota biroo	Ji'a 2	Haalli addaa jira
Iyyata guddifachaa mirkaneeffachuu	Ji'a 1	
Dhimmoota siiivilii biroon iyyata dhihaatu	Ji'a 3	

*Madda: JBAH Manneen murtii Oromiyaa, Karoora Manneen murtii Oromiyaa Bara 2002 keessaa kan fudhatame.*

Akkuma gabatee oliirraa hubachuun danda'amu haala addaan yoo ta'e malee, dhimmoonni kallattiin mana murtiitti dhiyaatan ji'oota sadii keessattis furmaata argachuu qabu. Yeroo daanga'ee taa'e kana waliin deemuuf beellama gaggabaabsuun dirqama ta'a. Manneen murtii keenyas kanuma gochaa jiru. Sirna beellamaa ilaalchisuun abbaan dhimmaa falmii lafa baadiyyaa qabu tokko waan duratti argee fi kan amma jiru akka itti aanutti waldorgomsiisa:

*Waggaa shanan har'aan dura falmiima lafaaf manuma murtii kana dhufeen ture. Yeroo sana, dhimmi koo xumura argachuuf waggaa lamaa fi ji'a shan fixe. Amma garuu, ergan jalqabee torban sadiyyuu hin guunne. Har'a beellama sadeffaa dha. Kan beellamames murtiidhaafi. Kan ammaa fi kan durii walbira yoo qabnu fardaa fi lafa <sup>27</sup>.*

<sup>27</sup> Af-gaaffii obbo Mokonnin Alamaayyoo, Abbaa dhimmaa Mana Murtii Aanaa Guutoo Giddaa, waliin gaafa Sadaasa 11, 2004 ALI gaggeeffame.

Ibsa olii kana irraa dhimmumti walfakkaataa ta'e, dhimmi lafa baadiyyaa, JBAHn dura xumura argachuuf waggaa lamaa fi ji'a shan yoo fixu, hojiirra oolmaa JBAHn as garuu, ji'a tokko osoo hin guutiin beellama sadiin murtii argataa kan jiru waan ta'eef, beellamni haalaan gaggabaabbachuu isaa hubanna. Yeroo ammaa kana manneen murtii Oromiyaa keessatti beellamni gaggabaabbachuu qofa osoo hin taane, kan kennamus sa'aatiini<sup>28</sup>. Haa ta'u malee, beellama kennuun walqabatee rakkoowwan armaan gadii ni jiru<sup>29</sup>.

1. Beellamni saa'atiin haa kennamu malee, bakka tokko tokkotti sababa hanqina humna namaa irraan kan ka'e sa'a beellamametti keessuummeessuu dadhabuun ni mul'ata. Kun, keessumaa, sadarkaa mana murtii ol aanaa fi Waliigalaatti caalaatti mul'ata.

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<sup>28</sup> Kana qorataan kun waayita daawwannaa manneen murtii gaggeessu gabatee beeksisaa manneen murtii irraa ofii isaatii argeera.

<sup>29</sup> Rakkoowwan kunniin af-gaaffiiwwan qaamolee adda addaa waliin gaggeeffame irraa kan argamani dha. Fakkeenyaaf,

a) Abukaattota dhuunfaa fi gorsitoota seeraa (Obbo Mohaammad Nuuree, Mudde 14,2004 A.L.I; Obbo Asaffaa Warqinaa, Sadaasa 18, 2004 A.L.I, Gammadaa Saafa'oo, Mudde 19, 2004 A.L.I)

b) Pirezidaantotaa fi abbootii seeraa Manneen Murtii Ol'aano (obbo Xilaahun Birruu,Pirezidaantii MMO Godina Kibba Lixa Shawaa, Sadaasa 15,2004 ALI; Obbo Dajanee Ayyaansaa,Pirezidaantii Mana Murtii Ol'aanaa Godina Harargee Lixaa, Mudde 2, 2004 A.L.I)

c) Hooggantoota Bulchiinsa Manneen Sirreessaa(Inispekter Darajjee Dirribsaa, Hoogganaa I/A fi A/A/Sirreeffamtoota Seeraa BMS Godina Arsii Lixaa, Sadaasa 25, 2004 A.L.I)

d) Hooggantoota Poolisii ( Komaandar Tashoomaa Fayyeeraa, Sadaasa 14, 2004 A.L.I; Komaandar I/A Abarraa Baqqalaa, Mudde 11, 2004 A.L.I)

2. Yommuu dhimmoonni dafanii murtaa'an hawaasni hubannoo dhabuu irraan kan ka'e akka waan dhimmichi sirritti osoo hin qoratamiin murtaa'etti ilaaluun mana murtii irratti komii kaasuun darbee darbee ni jira. Rakkoon akkasii kun hawaasa qofa osoo hin taane, abukaattota dhuunfaa birattis kan calaqqisu dha. Haa ta'u malee, dhimmi tokko waan si'oomeef qulqullinaan hin hojjetamne jedhanii gudunfuun dogoggora ta'uu mala.
3. Haala uumama isaanii irraan kan ka'e dhimmoota tokko tokko gabaabsanii beellamuuf nama rakkisa. Fakkeenyaaf, himatamaan nama dhukkuba sammuu qabu yoo ta'e, dhuguma dhukkuba sammuu qabaachuun isaa Hospitaala Amaanu'el Finfinnee jirutti mirkanaa'uu qaba. Kun immoo yeroo dheeraa fudhachuu waan danda'uuf, sirna beellamaa hojiirra oolchuu keessatti danqaa tokko ta'a.

Kana waan ta'eef, hojiiwwan JBAH hojiirra oolchuun walqabatani hojjetaman si'oomina abbaa seerummaa dhugoomsuu keessatti gahee ol'aanaa qabu. Haa ta'u malee, manneen murtii naannoo keenya hunda keessatti JBAH hojiirra oolchuuf haalli mijataan guutummaa guutuutti uumameera jechuun hin danda'amu. Kanaan walqabatee waanti akka rakkootti ka'u, waajjirri JBAH hojiirra oolchuuf gargaaru ijaaramuu dhabuu dha. Fakkeenyaaf, bakkeewwan qorannoon kun irratti gaggeeffame keessaa manneen murtii aanaalee Saassiggaa fi Mi'eessoo waajjira dullooma fi JBAH hojiirra oolchuuf hin mijannee keessatti hojjetaa jiru<sup>30</sup>.

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<sup>30</sup> Qorataan kun daawwannaa manneen murtii kanneen irratti gaafa 12/03/2004 fi 04/04/2004 ALI gaggeesseen kan hubate. Gabatee 3 irrattis namoonni 7(% 7.21) ta'an

Kanarraa kan ka'e, manneen murtii JBAH akka sirnaatti diriirfatanii kan qaban ta'us qabatamaan hojiitti hiikuu keessatti rakkoon isaan mudachaa jira.

### 2.2.2. Teekinooloojii Hammayyaatti Fayyadamuu

Waanti biraa si'oomina abbaa seerummaa mirkaneessu itti fayyadama teekinooloojiiti. Kana ilaalchisuun gaaffiin “*Teekinooloojii odeeffannoo diriirsuun itti fayyadamuurratti manni murtii hojii hojjete qabaa?*” jedhu barreeffamaan abbootii seeraa fi abbootii alangaa 98’tiif dhiyaatee deebii itti aanu argateera.

*Gabatee 6: Gabatee teekinooloojii odeeffannoo diriirsuun walqabatee hojii manneen murtii Oromiyaa hojjetan agarsiisu*

<i>Qaama gaafatame</i>	<i>Meeqa akka gaafatame</i>	<i>Eyyee</i>	<i>Lakkii</i>
Abbootii seeraa	59	46	13
Abbootii alangaa	39	28	11
Ida’ama	98	74	24

Akkuma gabatee kana irraa dubbisuun danda’amu, namoonni 74 (%75.51) “eyyee” yoo jedhan, namoonni 24 (%24.48) ta’an ammoo “lakkii” jechuun deebisaniiru. Kun kan agarsiisu, teekinooloojii odeeffannoo manneen murtii keessatti diriirsuun walqabatee hojiin hojjetame jiraatus uwwisa barbaadamuun walgaheera jechuun kan hin danda’amne ta’uu dha. Kun sababoota adda addaa irraa kan maddu ta’a. Fakkeenyaaf, bakkeewwan humni ibsaa hin jirretti teekinooloojiiwwan adda addaa fayyadamuun

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manneen murtii itti hojjetan keessatti JBAH’n hojiirra kan hin oolle ta’uu kan ibsan kanuma irraa ka’ameeti jechuun ni danda’ama.

rakkisaa dha. Akkasumas, meeshaalee kanneen bitee waliin gahuuf manni murtii humna dhabuu danda'a.

Akka waliigalaatti garuu, teekinooloojiiwwan odeeffannoo hojii si'oomsuu danda'an kan akka sagalee waraabduu, sagalee guddistuu, daataa beezii, maashinii footoo kooppii, faaksii, fi kkf manneen murtii keessatti hojiirra oolaa jiru.

Haa ta'u malee, dhimma kanaan walqabatee waantota lama akka hanqinaatti kaasuun ni danda'ama. Tokkoffaa, akkuma olitti tuquuf yaalame uwwisni teekinooloojiiwwan kanaa manneen murtii hunda hin dhaqqabne. Fakkeenyaaf, si'oomina hojii abbaa seerummaa mirkaneessuu keessaatti meeshaan sagalee waraabu gahee guddaa kan qabu ta'us, manneen murtii aanaalee hedduun meeshaa kana hin qaban.

Lammaffaa, itti fayyadama teekinooloojiiwwan kanaan walqabatee, keessumaa meeshaa sagalee waraabu irratti ogummaan itti fayyadamuu irratti hanqinni ni mul'ata. Kun jechi ragaa tasa hin waraabamiin akka hafu, ykn waraabamee gamisaan keessaa akka hafu waan godhuuf, hanqina dha. Haalli akkasii mudate jechuun ammoo irra deebi'uun ragaa dhagahuun dirqama ta'a. Yeroo kana, ragaan argamuu dhiisuu mala. Akkasumas, akkuma yeroon dheerachaa adeemu dubbiin dagatamuu waan danda'uuf, akka dura ragametti ragamuu dhiisuu mala<sup>31</sup>. Kun ammoo haqa baasuuf tattaaffii godhamu irratti miidhaa guddaa kan dhaqqabsiisu waan ta'eef rakkoo dha.

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<sup>31</sup> Akka fakkeenyaatti rakkoon akkasii kun qabatamaan Mana Murtii Ol'aanaa Arsii Lixaatti mudateera (Af-gaaffii Obbo Nuur Bushraa, Pirezidaantii Mana Murtii Ol'aanaa Arsii Lixaa; Qaasim Galgaloo, Itti Gaafatamaa Waajjira Haqaa Godina Arsii Lixaa, fi Komaander Tacaanee W/Sillaasee, Itti Gaafatamaa Qajeelcha Poolisii Godina Arsii Lixaa waliin walduraaduubaan gaafa Sadaasa 25 fi 22 bara 2004 ALI godhame).



### **2.2.3. Sirna Qabannaa Galmee Abbaa Qalamaa**

Galmee dafanii argachuu dhabuun, yookiin galmeen tasumaa baduun rakkoowwan manneen murtii Oromiyaa mudachaa turan keessaa isa tokko dha<sup>32</sup>. Rakkoo kana salphisuuf hojiiwwan hojjetaman keessaa tokko qabannaa galmee abbaa qalamaatti fayyadamuu dha. Sirni qabannaa galmee abbaa qalamaa kun dura manneen murtii Waliigalaa fi ol'aanaa keessatti hojiirra ooluu kan jalqabe yoo ta'u, boodarra babal'achaa dhufuun hanga bara 1999ALI' tti manneen murtii sadarkaa hunda walgaheera<sup>33</sup>. Kun galmee barbaadamu haala salphaan argachuuf kan nama gargaaru waan ta'eef, si'oomanii tajaajiluu keessatti gahee ol'aanaa taphateera.

### **2.2.4. RTD Hojiirra Oolchuu**

Muuxannoo biyyoota biroo fudhachuun tooftaa yakkoonni harkaa fi harkatti qabaman battalatti murtii itti argatan (RTD) manneen murtii keessatti hojiirra oolchuun dhimmoonni hedduun murtii argachaa turaniiru; jirus. Fakkeenyaaf, bara 2003 keessa sadarkaa Manneen Murtii Aanaa fi Ol'aanaatti dhimmoonni **6,879** tahan tooftaa kanaan murtii argataniiru<sup>34</sup>.

### **2.2.5. Baajata Dabalu**

Yaadonni akkaataa manni murtii si'oomuu itti danda'an ibsan keessaa tokko baajata mana murtii dabaluun lakkoofsa manneen murtii, abbootii seeraa, fi hojjettoota biroo dabaluunii, fi leenjii barbaachisaa ta'e (kompiyuutera dabalatee) kennuu akka ta'e olitti ilaaluuf yaalleerra. Gama kanaan manneen murtii Oromiyaa maal fakkaatu kan jedhu akka itti aanutti ilaaluun ni danda'ama.

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<sup>32</sup> Ministry of Capacity Building, FDRE Comprehensive Justice System Reform Program, Baseline

Study Report, Feb. 2005, F171.

<sup>33</sup> Gabaasa Raawwii Hojii Manneen Murtii Oromiyaa bara 1999 Caffee Bulchiinsa Mootummaa Naannoo Oromiyaaf dhihaate, F17.

<sup>34</sup> Gabaasa Raawwii Hojii Manneen Murtii Oromiyaa bara 2003 Caffee Bulchiinsa Mootummaa Naannoo Oromiyaaf dhihaate, F9.

*Gabatee 7: Gabatee baajata manneen murtii Oromiyaaf ramadame  
Agarsiisu (1996-2004ALI)*

Bara baajataa	Baajata waliigalaa
1996	24,757,604.00
1997	27,200,086.00
1998	31,711,340.00
1999	46,437,045.00
2000	80,229,474.00
2001	109,500,000.00
2002	152,733,529.00
2003	183,484,272.00
2004	256,172,756.00

*Madda: MMWO, Adeemsa Hojii Karoora, Baajata, Hordoffii, fi  
Gamaaggama*

Akkuma gabatee 6 irraa dubbisuun danda'amutti, baajatni manneen murtii Oromiyaa waggaa irraa waggaatti dabalaa adeemee jira. Kanuma bara 2003 fi 2004 fudhannee yoo ilaalle, garaagarummaa % 39.6'n akka dabale hubachuu ni dandeenya. Kana wajjiin humna namaas yeroo irraa yerootti haaraa qacaruu fi/ykn guddisuun guutamaa dhufeera. Fakkeenyaaf, kanuma abbaa seeraa qofa yoo ilaalle, bara 2000 ALI keessa kaadhimamtoota

abbootii seeraa 36 mana murtii ol'aanaaf; 58 ammoo manneen murtii aanaatiif,<sup>35</sup> bara 2001 ALI keessa gargaartota abbootii seeraa 22 manneen murtii ol'aanaaf; 200 manneen murtii aanaaleef<sup>36</sup>, calaluudhaan qaxariin isaanii raawwatameera. Bara 2002'ttis abbootiin seeraa 587 ta'an caffeeen muudamanii manneen murtii sadarkaa adda addaatti ramadamaniiiru<sup>37</sup>.

Kan keessa ture guddisuunis ni jira. Fakkeenyaaf, bara 2003 keessa abbootiin seeraa 10 gara Mana Murtii Waliigalaatti, abbootiin seeraa 9 gara Pirezidaantii manneen murtii ol'aanaatti guddataniiru<sup>38</sup>. Kanaafuu, humni namaas akkuma baajataa mana murtiif ramadamuu waggaa irraa waggaatti dabalaa waan dhufeef si'oominni abbaa seerummaa akka dabaluuuf galtee gaarii akka ta'e hubachuun ni danda'ama. Kana yoo jennu garuu, manneen murtii sadarkaa adda addaa irra jiran si'oomina walfakkaataa ta'e qabu jechuu akka hin taane hubatamuu qaba. Akkuma sadarkaan manneen murtii dabalaa adeemu si'oominni kenninsa tajaajila abbaa seerummaa xiqqaachaa akka deemu raawwii galmeewwanii irra hubachuun ni danda'ama. Fakkeenyaaf, mee raawwii galmeewwan manneen murtii sadarkaa addaa irra jiranii kan waggoota sadii fudhannee haa ilaallu:

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<sup>35</sup> Gabaasa Raawwii Hojii Manneen Murtii Oromiyaa Caffee Bulchiinsa Mootummaa Naannoo Oromiyaaf dhihaate kan waggaa 2000, F22.

<sup>36</sup> Gabaasa Raawwii Hojii Manneen Murtii Oromiyaa Caffee Bulchiinsa Mootummaa Naannoo Oromiyaaf dhihaate kan waggaa 2001, F13.

<sup>37</sup> Gabaasa Raawwii Hojii Manneen Murtii Oromiyaa Caffee Bulchiinsa Mootummaa Naannoo Oromiyaaf dhihaate kan waggaa 2002, F9.

<sup>38</sup> Gabaasa Raawwii Hojii Manneen Murtii Oromiyaa Caffee Bulchiinsa Mootummaa Naannoo Oromiyaaf dhihaate kan waggaa 2003, F 14.

*Gabatee 8: Gabatee Raawwii Manneen Murtii sadarkaa Adda Addaa**Irra Jiran Agarsiisu (Bara 2002-2004 ALI)*

Bara	Sadarkaa Mana Murtii	Raawwii (%dhaan)
2002ALI	Mana Murtii Waliigala Oromiyaa	75.6
	Manneen Murtii Ol'aanoo	89.00
	Manneen Murtii Aanaalee	92.50
2003ALI	Mana Murtii Waliigala Oromiyaa	81.08
	Manneen Murtii Ol'aanoo	90.75
	Manneen Murtii Aanaalee	93.09
2004 ALI	Mana Murtii Waliigala Oromiyaa	76.72
	Manneen Murtii Ol'aanoo	86.07
	Manneen Murtii Aanaalee	92.50

*Madda: Mana Murtii Waliigalaa Oromiyaa*

Gabatee olii kana irraa waanti hubatamu, waggoottan sadan kana keessatti (bara 2002-2004ALI) raawwiin hojii Mana Murtii Waliigala Oromiyaa raawwii hojii manneen murtii Ol'aanoos ta'e manneen murtii aanaaleen gadi ta'uu dha. Waggoottan sadanuu, raawwiin hojii manneen murtii ol'aanoo raawwii hojii Mana Murtii Waliigala Oromiyaa kan caaluu; garuu raawwii hojii manneen murtii aanaaleen gadi kan ta'e dha. Raawwiin hojii manneen murtii aanaalee ammoo raawwii hojii Mana Murtii Waliigalaa ta'e raawwii hojii manneen murtii ol'aanoo ni caala. Sadarkaa hangamiin akka caalu yoo ilaalle garuu, raawwii hojii Mana Murtii Waliigala Oromiyaa dhibbeentaa guddaan yoo caalu, raawwii hojii manneen murtii ol'aanoo garuu dhibbeentaa muraasaan caala. Fakkeenyaaf, kan bara 2004 fudhannee yoo ilaalle,raawwiin hojii manneen murtii aanaalee %3.5 raawwii hojii manneen

murtii ol'aanoo yoo caalu,raawwii hojii Mana Murtii Waliigala Oromiyaa garuu %16.90n caala. Kun ammoo si'oominni manneen murtii aanaalee hedduu guddaa akka ta'ee fi si'oominni Mana Murtii Waliigalaa ammoo harkifataa ta'uu agarsiisa.

Gabaabumatti, akka waliigalaatti, si'oominni manneen murtii Oromiyaa qaban gaarii ta'us, sadarkaa manneen murtii irratti hundaa'uun garaagarummaa akka qabu dhimma hubatamuu qabu dha.

### **3. YAADOTA GUDUUNFAA FI FURMAATAA**

Biyyi keenya bara 1987 A.L.I irraa kaastee Heera haaraa hojiirra oolchuun sirna bulchiinsa biyyattii waaltawaarraa gara federaalawaatti waan jijjiirteef, jijjiirama siyaasaa guddaa keessa seentee turte. Sirna bulchiinsa haaraa diriire kana hojiitti hiikuuf sekteroota adda addaa keessatti akka biyyaa fi naannootti rifoormiiwwan gaggeessuun dirqama ta'a. Sekteroota rifoormiiwwan keessatti gaggeeffamaa turee fi jiru keessaa sekterri haqaa isa tokko yommuu ta'u, manneen murtiis kanuma keessatti hammatamu.

Akka waliigalaatti, tajaajilli manneen murtiin kennamu si'oomina kan hin qabne, dhaqqabamaa kan hin taanee, fi bilisummaa fi itti gaafatamummaan kan keessatti hin dhugoomne ture. Rakkoowwan kunniin hundi mana murtii irratti uummanni amantaa akka hin qabaanne waan godhaniif, rifoormiiwwan hojiirra oolchuun maqsuu barbaachisa. Manneen murtii naannoo Oromiyaa keessattis rifoormiiwwan akka sagantaa fooyyaa'insa manneen murtii,sagantaa fooyyaa'insa sirna haqaa keessatti sagantaa-xiqqaa mana murtii, jijjiirama bu'uura adeemsa hojii (JBAH) fi Sirna madaallii bu'aa karoora tarsiiwaa irratti xiyyeeffate (SMBKT) jedhaman hojiirra oolaniiru;oolaas jiru.

Rifoormiiwwan kunniin maqaa fi yeroo hojiirra oolmaa isaaniitiin adda adda ta'anis xiyyeeffannoon isaanii yaadrimeewwan gurguddoo abbaa seerummaa sadan: si'oominaa, dhaqqabamummaa, fi bilisummaa fi itti gaafatamummaa dhugoomsuu waan ta'eef, galmaan walfakkaatu jechuun ni danda'ama.

Xiyyeeffannoon barruu kanaas bu'a qabeessummaa rifoormiiwwan manneen murtii Oromiyaa keessatti hojiirra oolaa turanii fi jiran kallattii si'oomina tajaajilaatiin madaaluu dha. Si'oominni abbaa seerummaa haala itti fufiinsa qabuun dhimmootaaf waggaa guutuu *yeroo gabaabaa ta'e* keessatti furmaata kennuu danda'uu mana murtii kan agarsiisu ta'ee hojii abbaa seerummaa keessatti iddoo guddaa kan qabuu fi guddina dinagdee biyya tokko waliinis hidhata kallattii ta'e kan qabu dha. Waan ta'eefis, manneen murtii hundi si'oomina kana dhugoomsuuf hawwiin qaban guddaa ta'us, yoo maal goone si'oomina kana dhugoomsuu dandeenya kan jedhu irratti garuu yaadota adda addaa, fakkeenyaaf, baajata mana murtii dabaluu, dhaqqabamummaa garmalee xiqqeessuu, malawwan hiikkaa waldiddaa filannoo (ADR) jajjabeessuu, fi adeemsota walxaxoo ta'an salphisuu jedhamantu jira.

Mana murtii tokko keessa si'ominni jira ykn hin jiru jechuuf safartuuleen kallattii agarsiisuu danda'an hedduun kan jiran yoo ta'u, hangi qulqullaa'anii, dhimmootaa dhimma murteessuuf yeroo fudhatuu, fi dhimmoota hundaaf furmaata kennuuf yeroo fudhatu (*congestion rate*) fakkeenyaaf kaasuun ni danda'ama. Erga rifoormiiwwan hojiirra ooluu jalqabanii as (1997-2003ALI), agarsiiftota kanaan si'oominni tajaajila manneen murtii Oromiyaa yoo madaalamu haala gaarii irratti argama. Tokko tokkoon ibsuuf:

- i. **Hanga Dhimmoota Qulqullaa'anii:** Waggoottan toorban darban keessatti hanga dhimmoota qulqullaa'anii walitti aansee dabalaa ykn xiqqaachaa kan deeme miti. Haa ta'u malee, bara 1998 fi

2000 irraan kan hafe hundi isaanii %100 ol. Hangi qulqullinaa %100 ol ta'e jechuun ammoo tuulamni dhimmootaa gar-malee jiraachuu, ykn tuulamni dhimmootaa jiraatus manneen murtii keessaa bahuuf ciminaan hojjechaa jiraachuu agarsiisa. Manneen murtii Oromiyaa tuulama dhimmootaa dhabamsiisuuf hojjiwwan hedduu hojjechaa turaniiru waan ta'eef, %100 ol ta'uun isaa ciminaan hojjechaa jiraachuu agarsiisa gara jedhutti nu geessa. Kanaaf, safartuu kanaan manneen murtii Oromiyaa yoo madaallu, si'oomina qabu.

- ii. **Dhimmoota Murteessuuf Waggaadhaan Yeroo Fudhatu:** Kun gahee galmee beellamame galmeewwan murtaa'aniif hiruun argamu dha. Gaheen argamu xiqqaa yoo ta'e, si'oominni jira jechisiisa. Kunis waggootan toorban darban keessatti itti fufiinsaan dabalaa ykn hir'achaa kan deeme ta'uu baatus, bara 2000ALI irraa kaasee waggoota afuriif walitti aansee xiqqaachaa waan deemeef (%1.35, %1.22, %1.10, %1.09), safartuu kanaan manneen murtii Oromiyaa si'oomina akka qaban hubachuu ni danda'ama.
- iii. **Dhimmoota Hunda Murteessanii Xumuruuf Turtii Yeroo Fudhatu (Congestion Rate):** Kun dhimmootni naanna'anii fi haaraa mana murtii dhufan yeroo hangam keessatti murteessanii fixuun akka danda'amu kan ittiin safarru dha. Kunis waggootan toorbaaf itti fufiinsaan dabalaa ykn hir'achaa kan deeme miti. Ta'us, bara 2000 A.L.I. irraa eegalee waggoota afuriif walduraa duubaan %1.35, %1.22, %1.10, % 1.09 waan ta'eef, hir'achaa deemee jira. Kunis si'oominni jiraachuu agarsiisa.

Agarsiiftotni kunniin hundi si'oominni tajaajila manneen murtii jiraachuu agarsiisu. Milkaa'ina kanaafis hojjiwwan baay'ee akka itti aanutti ibsamuu

danda'an kan hojjetaman yoo ta'u, sana keessattis hanqinootni mudatan ni jiru.

**a. Hojiiwwan JBAH Hojiirra Oolchuun Walqabatan**

Si'oomina dhugoomsuu keessatti hojiiwwan JBAH hojiirra oolchuun walqabatanii hojjetaman adda duraan caqasamu. Haaluma kanaan, unkaalee adda addaa qopheessuun tajaajilamtoonni akka fayyadaman gochuunii, fi sirna beellama haaraa hojiirra oolchuun saa'atiin beellamuun hojiiwwan gurguddoo hojiirra oolmaa JBAH'n walqabatanii hojjetamani dha.

Rakkoon guddaan hojiirra oolmaa JBAHn walqabatee mul'atu, waajjirri JBAH hojiirra oolchuuf mijataa ta'e ijaaramee ykn suphamee manneen murtii hunda walgahuu dhabuu dha. Kanaaf, hojiin waajjiraalee manneen murtii ijaaroo fi suphuu jalqabee jiru akkaataa JBAH hojiirra oolchuuf tolutti cimee itti fufuu qaba.

Sa'aatiin beellamuu waliin walqabatees rakkoon karaa abbootii dhimmaa fi karaa mana murtii darbee, darbee ni mul'ata. Karaa abbootii dhimmaatiin rakkinni mul'atu, hanqina hubannoo irraan kan ka'e sa'atii beellamni kennametti argamuu dhabuu dha. Saa'atiin keessummeessuun waan hin baramneef sa'atii jedhametti argamuu dhiisuun darbee darbee ni jira. Akkasumas, beellamni gabaabbatee yommuu kennamu, manni murtii dhimmichaa xiyyeeffannoon ilaalaa akka hin jirretti fudhachuun ni mul'ata. Gama mana murtiitiin, keessumaa sadarkaa mana murtii ol'aanaatti sa'a beellamametti keessummeessuu dadhabuun ni jira.

Kanaaf, rakkoo gama hawaasaatiin mu'atu furuuf waltajjiiwwan akka kora haqaatti fayyadamuun hubannoo uumuun barbaachisaa dha. Manni murtiis rifoormii sirna beellamaa hojiirra oolchuuf jalqabe haala walfakkaataa ta'een sadarkaa hundatti hojiirra oolchuuf tattaafachuu qaba.



### **b. Dhiyeessaa fi Itti Fayyadama Teekinooloojii Dabaluu**

Milkaa'ina si'oominaaf hojiin biraa manneen murtii Oromiyaa hojjetan dhiyeessaa fi itti fayyadama teekinooloojii dabaluu dha. Haaluma kanaan, teekinooloojiiwwan odeeffannoo hojii si'oomsuu danda'an kan akka sagalee waraabduu, sagalee guddistuu, daataa beezii, maashinii footoo kooppii, faaksii, fi kkf manneen murtii keessatti hojiirra oolaa jiru.

Haa ta'u malee, meeshaaleen teekinooloojii kunniin hundi (fakkeenyaaf, meeshaan sagalee waraabu) manneen murtii hunda wal hin geenye. Manneen murtii meeshaa sagalee waraabuu argatan birattis haala itti fayyadamaa irratti hanqinni dandeettii (skill gap) ni jira.

Kanaafuu, Manni Murtii Waliigala Oromiyaa uwwisa teekinooloojii manneen murtii hunda waliin gahuuf hojjechuu qaba. Akkasumas, dhiyeessa teekinooloojii duukaa itti fayyadama isaa irratti leenjii kennaa deemuu barbaachisaa dha.

Milkaa'uu si'oominaaf sababni kanneen qofa miti. Baajatnii fi humni namaa waggaa irraa waggatti dabalaa adeemuun, sirni qabannaa galmees abbaa qalamaa manneen murtii hunda keessatti hojiirra ooluunii, fi RTD hojiirra oolchuun yakkoota harkaa fi harkatti raawwataniif dafanii furmaata kennuu danda'uun si'oomina milkeessuuf hojiiwwan biroo hojjetamani dha.

Gabaabumatti, rifoormiiwwan manneen murtii keessatti hojiirra oolanii fi oolaa jiran si'oomina abbaa seerummaa dhugoomsaniiru jechuu dandeenya. Kana yoo jennu garuu, manneen murtii sadarkaa hunda keessatti haala walfakkaataa ta'een dhugoommeera jechuu akka hin taane hubatamuu qaba. Waanti qabatamaan mul'atu, akkuma sadarkaan mana murtii asii ol dabalaa adeemu, si'oominni hir'achaa deema. Ibsa biraatiin, manneen murtii dubbii jalqabaa dhagahanii fi ol iyyataan dhagahan wal bira yoo qabnu kanneen

dubbii jalqabaa dhagahan biratti dhimmoonni dafanii furmaata argataa jiru. Keessumaa, sadarkaa MMWO harkifannaan dhimmootaa ammallee hin furamne. Akka sababaatti, kan ka’u baay’inni dhimmootaa fi humni namaa wal hin simu kan jedhu dha. Dhugaa dha! Sadarkaa kanatti baay’inni dhimmootaa waggaa irraa waggaa dabalaa akka bulu daataan MMWO irraa argame ni agarsiisa. Haa ta’u malee, humni namaa sadarkaa mana murtii kana irra yeroo ammaa jiru abbootii seeraa 32 dha. Kana biratti ekspertootni abbootii seeraa gargaaran 12 jiru. Humni kun xiqqaa dha kan jedhamu miti. Sadarkaa Mana Murtii Waliigalaatti baay’ina abbootii seeraa kanaa ol baay’isuun Addunyaa biraattis kan baratame miti. Kana taanaan, humna namaa baay’isuun furmaata hin ta’u jechuu dha.

Kanaafuu, si’oomina abbaa seerummaa MMWO’ tti kennamaa jiru fooyyeessuuf baay’ina abbootii seeraa amma jiru caalaa dabaluurra qulqullina murtii manneen murtii jalaa dabaluu fi gahumsa abbootii seeraa MMWO cimsuu irratti hojjechuun filatamaa dha amantaa jedhun qaba. Yeroo kana, murtii kennamu irratti uummanni amantaa horachaa waan buluuf, ol iyyanni sadarkaa kanatti dhiyaatu hir’achaa adeema; si’oominnis kanuma faana dabala.

# CASSATION REVIEW OF ARBITRAL AWARDS: DOES THE LAW AUTHORIZE IT?

Birhanu Beyene Birhanu\*

## INTRODUCTION

Going through the Ethiopian arbitration law, Arts.3325-3346, the Civil Code, 1960 (hereinafter referred as C.C); and Arts. 244(2)(g),315-319 and 350-357, the Civil Procedure Code,1965( hereinafter referred as Civ.Proc.C)<sup>1</sup>, one can easily identify the three avenues of judicial review of awards, viz., appeal( Arts.350- 354,Civ.Proc.C), setting aside(Arts. 355-357, Civ.Proc.C) and refusal( Art.319(2) Civ.Proc.C)<sup>2</sup>. In the realm of review of judgments, in the Ethiopian legal system, there is such a review called Cassation. Cassation review of judgments was not “known” to the legislature which enacted the arbitration law. Cassation became the conspicuous part of the Ethiopian legal system for the first time in 1980 E.C., after the promulgation of the arbitration law.<sup>3</sup> This raises the question of *whether the avenue of cassation*

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<sup>1</sup>Note that Ethiopia, as a federal state, can have multiple arbitration laws enacted by individual states forming the federation. As things stand now, however, the sources of arbitration law of both the federal government and all the 9 states (forming the federation) are the C.C and the Civ.Proc.C.That is why I boldly use the phrase Ethiopian arbitration law to simply refer to those provisions of the C.C and Civ.Proc.C.

<sup>2</sup> Refusal is not clearly stated in the Ethiopian arbitration law. However, a close reading of art.319 (2) Civ.Proc.C reveals that courts can refuse enforcement. This provision requires an award to be homologated before it becomes as executory as court judgement. Obviously, there must be some instances where courts can review the award and may refuse its homologation and thus enforcement. For more, see Birhanu Beyene, *The Homologation of Domestic Arbitral Awards in Ethiopia: Refining the Law*, Ethiopian Bar Review( 2012), Vol.4,No.2 p.77 ( in this work it is argued that the grounds of refusal are what are provided under Art.356,Civ.Proc.C plus public policy violations)

<sup>3</sup> ዩኒቨርሲቲ ስብሰባ ስልጣን ስብሰባ ጥቂት ማህበራዊ ጥያቄዎች ዩኒቨርሲቲ (2003) Vol.3.No.1 p. 141. Note that cassation is considered as having a root in a kind of

*for the review of judgments is also available as an avenue for the judicial review of awards.* This work is firstly intended to Bench held that despite parties' agreement on the finality of an award, the award could be subjected to cassation review.<sup>4</sup> This work also evaluates this holding in light of the findings on its first question.

This paper is divided into 5 sections. Section (1) defines what cassation review of awards means and concludes that it means reviewing arbitral awards on the merit for “basic error of law” by the highest court.<sup>5</sup> Section (2) examines the Ethiopian arbitration law and the laws defining the cassation power of courts and concludes that let alone in the existence of finality agreement, cassation review is not available as a *default* avenue for judicial review of awards. The conclusion in section 2 leaves open the question “Can cassation review of awards be created by contract if it is not available as a default avenue?” In section (3), it is argued that cassation review of awards can be created by agreement. In section(4), the holding of the Federal Supreme Court's Cassation Bench in the case of *Beherawi Maeden Corporation* is critically examined in light of the analysis made and conclusions reached in sections (1) – (3). Section (5) presents the conclusions.

## **1. WHAT DOES CASSATION REVIEW OF AWARDS MEAN?**

In Ethiopia, cassation is one of the avenues for the review of judgments. Supreme courts (state supreme courts and the Federal Supreme Court) have

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judgment review mechanism called Revision (Arts, 361-370 Civ.Proc.C) which dates back to 1965.

<sup>4</sup> *Beherawi Maeden Corporation vs Danee Driling* , Federal Supreme Court Cassation Bench Decisions Reporter( 2011) Vol. 10, p.350

<sup>5</sup> Review on the ‘merit’ must be understood to mean a review which for procedural or other errors results in the reconsideration of the merit of the case to finally conform ,modify or reverse the final decision on the case.

cassation powers, meaning the power to review judgments on the merit for ‘basic error of law’.<sup>6</sup> The state supreme courts have the cassation power “over any final court decision on State matters”<sup>7</sup> and the Federal Supreme Court “over any final court decision.”<sup>8</sup> The cassation power is to be exercised to correct a judgment of not any error but of a “basic error of law”. There is no definite definition as to what this error means in the law. From the practice of courts exercising cassation power, however, it can be inferred that almost any material error<sup>9</sup> of law can qualify as “basic error of law”<sup>10</sup>.

Applications for the cassation review of judgments are first made to go through the panel of three screening judges who determine whether the error alleged in the application has been committed in the judgment presented for a review is a “basic error of law” and whether it *prima facie* exists. If the judges determine in the positive on both issues, the application gets accepted meaning it is referred to undergo a full hearing before a panel of five judges. Then the parties present their arguments in writing and orally. The bench, then, after the scrutiny of the judgment presented for the review and the arguments of the parties, passes a decision which either confirms, modifies

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<sup>6</sup> In the Ethiopian judicial system, we encounter a dual court system. The first system contains the federal court system while the second one comprises state court system. Both systems, generally speaking, are made of three tiers of courts, first instance courts, high courts and a supreme court at the top.

<sup>7</sup> The FDRE Constitution, Art.80(3)(b),

<sup>8</sup> Id., Art.80 (3) (a). The Federal Supreme Court exercises its cassation power over any final decision even on state matters. See .Murado Abdo, *Review of Decisions of State Courts over State Matters by the Federal Supreme Court*, Mizan Law Review,(2007) Vol.1,No.1,P.60

<sup>9</sup> The phrase material error is used to mean errors which are harmful in the line of “the harmless error doctrine” which generally holds that any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded. For more discussion see, Harry T. Edwards, *To Err is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?* New York University Law Review(1995),Vol.70,N0.6,p.1167

<sup>10</sup> See Murad Abdo, *The Requirement of Basic Error of law*, Wonber,(2008) 33. Also, see *Mengistu Abate vs Ye Bahir ena Transit Derejet*, Federal Supreme Court Decision Reporter (2001), vol.4, p.18.

or reverses the judgment.<sup>11</sup> So what is from just described, cassation review is similar to appeal except that it is limited to the review of “basic errors of law” while appeal is a review on the merit for factual and legal errors, including “basic errors of law” (whatever it means). When cassation review is translated to arbitral awards, it thus means reviewing arbitral awards by a supreme court on the merit for a “basic error of law”. Note that this work deals with the direct review of awards via cassation, not such a cassation review when an appeal from an award is lodged and the decision of the appellate court on the award is reviewed by way of cassation, actually, under that situation, what is being reviewed is the decision of the appellate court (a judgment) , not the award.

## **2. ANY STATUTORY BASIS FOR CASSATION REVIEW OF AWARDS?**

In this section, the relevant legal provisions of the arbitration law as enshrined in the Civ.C and the Civ. Proc.C, are examined to see whether cassation review of awards is provided as one of the avenues for judicial review of awards. Some lawyers<sup>12</sup> including the judges in the Federal Supreme Court Cassation Bench<sup>13</sup> have tried to find the answer in the law defining the cassation power of supreme courts. That law too is examined to see whether it is really intended to give such power to the supreme courts.

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<sup>11</sup> Of course, the bench may also give other orders like remanding the case according to Art.341, Civ.Proc.C. For example, see, *Tesfaye Molla vs Eshetu Molla*, Federal Supreme Court Cassation Bench Decisions Reporter (2003), Vol. 10, p.7( the bench remands the case.).

<sup>12</sup> Yohannes.Supra note 3, at p.143

<sup>13</sup> *Beherawi Maeden Corporation*, supra note 4.

## 2.1. NO BASIS IN THE ARBITRATION LAW

The cassation review of judgments means, as discussed above, review on the merit by the highest court for a basic error of law. If it is to be translated to arbitration, it means a review of awards on the merit for a basic error of law. The question, however, is: Does the Ethiopian arbitration law provide for such review of awards? It mentions only three avenues for judicial review of awards, namely, appeal<sup>14</sup>, setting aside<sup>15</sup> and refusal.<sup>16</sup> The fact that cassation review is not mentioned, one would conclude, reveals the legislature's intention of forbidding it as one of the *default* avenues of judicial review. This conclusion would not raise any eye brow if cassation review were not an avenue of judgment review incorporated into the Ethiopian legal system later than the enactment of the arbitration law. However, still, I argue that the conclusion is tenable at many levels.

The legislature of the arbitration law would not provide for cassation review of awards even if it knew that such review was there for review of judgments. The first evidence for this assertion comes from the legislature's non-incorporation of a form of judgment review, its existence it was aware of, as one avenue of judicial review of awards, on the top of appeal, setting aside and refusal. This review is of course called "revision"<sup>17</sup>, which is now scraped. The non- incorporation of revision as one of the avenues of judicial review of awards proves the fact that the existence of a certain reviewing mechanism in the realm of judgments does not mean that the same mechanism exists for the judicial review of awards. It also proves that the legislature of the arbitration law would not incorporate cassation as one form

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<sup>14</sup> Civ.Proc.C, 1965,Arts.350-354

<sup>15</sup> Id, Arts.355-357

<sup>16</sup> Id,Art.319(2)

<sup>17</sup> Civ.Proc. C., 1965, Arts.361-370

of judicial review of awards even if it knew its existence as one form of judgment review since the idea of revision is thought of as a progenitor of the idea of cassation review.<sup>18</sup> In other words, Ethiopian arbitration law does not anticipate the creation of a new avenue of judicial review of awards with the creation of new review mechanism in the realm judgment. If it anticipates anything, it cannot be cassation review of which idea can be traced in the idea of “revision”.

A reader is here reminded that what I am trying to show in this sub-section is whether or not cassation review of awards is envisaged in the domain of the Ethiopian arbitration law in any way, so I am not saying that the anticipation of a certain law cannot be changed by latter laws. The question whether or not the anticipation of the Ethiopian arbitration law, which is described in the final lines of the above paragraph, is changed in the law which has come into existence later is what is primarily addressed in the next sub-section (2.2). To give the quick answer, no change is made.

The second and very strong evidence of the Ethiopian arbitration law’s exclusion of cassation review of awards as *a default* avenue comes from Art.351, Civ.Proc.C. The grounds of appeal of awards enumerated under Art.351, Civ.Proc.C reveals the legislature’s intention of limiting appellate review of awards to a certain errors and “basic error of law” (whatever it means) is not intended to be one of those errors which prompts appellate review of awards. So, is it not circumventing what is provided under Art.351,Civ.Proc.C if it is held that cassation review (which basically will mean review of awards on the merit for “basic error of law”) is one of the avenues of judicial review of awards? The legislator is not expected to find a ground which it finds improper( as a default rule) for the review of the merit

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<sup>18</sup> See Yohannis, *supra* note 3 at p.133



of the award suddenly appropriate, just because it comes under a different name called cassation, but which actually means review on the merit? Note also that the Ethiopian arbitration law does not in any way insinuate that a birth of a new reviewing mechanism (such as cassation) in to the realm of judgement review opens the door for a new default avenue of judicial review of awards.

Of course, one here may raise an argument that even if the Ethiopian arbitration law is clear in excluding review of awards on the merit for ‘basic error of law’ (that is, cassation review) as a default rule, and in asserting new judgment reviewing mechanism does not mean new avenue for judicial review of award, the legislation which has brought the cassation review to the Ethiopian legal system must be understood to be having changed such stands in the arbitration law<sup>19</sup>. This logically leads to the examination of the laws defining cassation review in the Ethiopian legal system. The examination of those laws on cassation, however, does not in any way show the change of the positions expressed in the arbitration law. It is even; from the context they are promulgated, clear that the legislations on cassation power of courts are not intended to be a reference for the determination of the propriety or impropriety of an intervention by courts in to arbitration by way of cassation. The following section is in place to elaborate on this point.

## **2.2. NO BASIS IN THE LAWS ON THE CASSATION POWER OF SUPREME COURTS**

Even if the Ethiopian arbitration law is clear on its exclusion of cassation (note that Art.351, Civ.Proc.C excludes review on the merit for “basic error of law” as a default rule) as a default avenue of judicial review on awards, one may try to get an answer for the basic question of this piece in the rules

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<sup>19</sup> It is based on the rule of interpretation of statutes which provides that the latter prevails over the former.

stating the cassation power of supreme courts.<sup>20</sup> This is done with a view that what is prohibited in the former law can be allowed in the latter as the latter prevails over the former. So the question is: does it happen; does the new law on cassation change what is provided in the arbitration law?

The FDRE Constitution and the Federal Court's Establishment Proclamation No.25/96 define the cassation power of the Federal Supreme Court. The relevant provisions of the respective legislations are reproduced hereunder.

Art.80 (3) (a) of the FDRE Constitution goes: "The Federal Supreme Court has a power of cassation over *any final court decision* containing a basic error of law. Particulars shall be determined by law." (Emphasis added)<sup>21</sup>

Art. 10 of the Federal Courts Establishment Proclamation No. 25/1996 reads: "In cases where they contain fundamental error of law, the Federal Supreme Court, shall have the power of cassation over: 1) final decisions of the Federal High Court rendered in its appellate jurisdiction; 2) final decisions of the regular' division of the Federal Supreme Court; 3) final decisions of the Regional Supreme Court rendered as a regular division or in its appellate jurisdiction."

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<sup>20</sup> Of course only the provisions on the cassation power of the Federal Supreme Court are examined, nonetheless the conclusion with regard to them will also work for the cassation power of state supreme courts since the way cassation power of state courts is defined is similar to the way it is defined with regard to the cassation power of the federal Supreme Court except that state supreme courts have cassation power not on "any final court decision" but only on "any final court decision on *state matters*"( see, Art.80, FDRE Constitution)

<sup>21</sup> The Amharic version of this provision employs the term "ማናቸውንም የመጨረሻ ውሳኔ" (meaning any final decision) . But this phrase in no way can be understood to include arbitral awards, because the provision is intended to apportion judicial power among the various tiers of the court system, not to define the power of courts in relation to alternative dispute resolution mechanisms.

Neither of the two legislations, in defining the cassation power, however hard we stretch on the meaning of the words, provides that the Federal Supreme Court has a cassation review power over arbitral awards. If that is so, can we conclusively hold that the Federal Supreme Court has no cassation power over arbitral awards? Of course, the laws reproduced above are enacted with a view to apportioning judicial power among the different tiers of courts and defining the cassation power of the Federal Supreme Court in that context. Those laws are not meant to define the involvement of courts in alternative dispute resolution mechanisms such as arbitration. So it is not a valid approach at all to look in to the above cited provisions and conclusively generalize that the Supreme Court has no cassation power over arbitral awards, just because there is no hint about that in those legislations.

Likewise, it is not a valid approach to see the purpose of vesting the Federal Supreme Court with a cassation power in those provisions and confidently leap to a conclusion that the purpose empowers it to review arbitral awards via cassation. To begin with the purpose of endowing courts with the cassation power (that is to bring uniform interpretation of laws, to bring predictability to court's actions<sup>22</sup>) will neither be undermined nor boosted whether there is cassation review of arbitral awards or not, so long as cassation review of judgments continues. Even it can be argued that the ultimate purpose of cassation power of courts (that is, making the legal system work better) is achieved by not using this power when it comes to arbitration since arbitration calls for restraint on court's intervention.<sup>23</sup>

In general, it is a futile act to try to find an answer for the question whether there is statutory basis for cassation review of awards in the aforementioned

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<sup>22</sup> See the reasoning of the Federal Supreme Court Cassation Bench decision in *Behereawe Maeden Corporation*, supra note 4 p.352

<sup>23</sup> See more discussion on this point in section (4).

legislations defining the cassation power of courts in the judicial system in general. Doing so is like trying to find an answer for the question “should courts adjudicate a dispute submitted to them though there is an agreement submitting it to arbitration?” by looking only at Art.79(1), the FDRE Constitution. Because it states that the power to adjudicate disputes is vested in courts, so are we going to say that there is no way where courts should refrain from exercising their power of adjudicating disputes and from fulfilling the purpose they are intended for and thus courts must decline from enforcing arbitration agreements? Obviously, in such situations, our attention for answer must be shifted to arbitration laws too – specifically, in this case to Art 244(2), Civ. Proc. C. a provision which assures the enforceability of arbitration agreements in Ethiopia which is found in no conflict with the FDRE Constitution.<sup>24</sup>

By the same token, in searching for an answer to the question (whether there is a statutory basis for cassation review of awards), what is needed is a shift in emphasis. We need not approach the question from the angle of whether denying the cassation review of awards is usurping the cassation power of the Courts and thereby diminishing its purpose. Surely, the absence of cassation review of awards is not usurping supreme courts’ cassation power nor diminishing its purpose, rather it is being cautious of court’s intervention in to a dispute settlement mechanism which, for legitimate and fully justifiable reasons, calls for judicial exercise of restraint.

Without a clear exposition of an explicit or implicit inconsistency between the Ethiopian arbitration law and the law on cassation power of courts, the answer, on the cassation reviewability of awards, in the arbitration law

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<sup>24</sup> See, *Zemze Pvt.Ltd.Co. vs Ilebabour Zone Education Department*, Federal Supreme Court Cassation Bench Decisions( 2001), vol.2, p75( in this decision the bench affirms the enforceability of arbitration agreements)

(which is discussed in the above sub-section (2.1)) can hardly be brushed aside. It is not a valid approach at all to look for an answer for the question in the legislations defining the cassation power of the Federal Supreme Court in the context of allocating judicial powers among different levels of courts rather than in the arbitration law where the relationship between courts and arbitration is purposefully and with great sensitivity defined.

The promotion of arbitration as a dispute settlement mechanism is the purpose of the arbitration laws, in particular and the legal system, in general; isn't the cassation review the part of the legal system? So the relevant question deserving attention is: is it pro arbitration or anti-arbitration to have cassation review of awards? The position upheld in the arbitration law (that is, no cassation review of awards as a default rule) is pro-arbitration especially when it is seen in light of the fluidity of the meaning of "basic error of law" which in turn leads to pervasive intervention of the cassation benches into arbitration.<sup>25</sup> Such pervasive intervention sacrifices the finality benefit of arbitration; one of the pillars of arbitration, one of the benefits inducing disputants to go for arbitration rather than litigation in the first place. Note also that one can speculate cassation review of cases to take years before they are disposed.<sup>26</sup>

In seeing the whole matter through a "pro-arbitration vs anti-arbitration" lens, a reasonable question to arise here could be, finality of arbitration is a good thing but how much sacrifice (in terms of justice) should be paid to ensure the finality of arbitration? Is not cassation review of awards a pro-arbitration stance which balances the finality benefit of arbitration with its

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<sup>25</sup> See note 8, from the practice of cassation benches, we can infer that almost any error of law can qualify as "basic error of law".

<sup>26</sup> For example, in *Beherawee Maden Corporation* (cited supra note 4) the Federal Supreme Court Cassation bench took almost two years to finally dispose the case.

result needs to be just too? This argument may sound very sensible especially when it is seen that cassation review of awards will be limited to reviewing basic errors of law in the awards (assuming “basic error of law” is interpreted very strictly) and that no higher judicial body than cassation benches, unlike appeal from awards which allows the appellate court’s decision reversing the award could be subjected to further review by the next higher court.<sup>27</sup>.

However, this realization does not still shake us from embracing the position of Ethiopian arbitration law exposed in the above sub-section (2.1) [which goes: no cassation review of awards as a default rule], because we need to pay attention, in addition to the text of the law excluding cassation review, to modern arbitration concepts which tend to avoid altogether any kind of judicial review of awards on the merit since the review on the merit is deemed to be too much of intervention compromising benefits of arbitration such as finality, privacy. So what is needed is to examine the remaining possibility: can the parties create cassation review of awards by contract?

### **3. CAN PARTIES CONTRACTUALLY CREATE CASSATION REVIEW OF AWARDS?**

The examination of the Ethiopian arbitration law, as is done in the above section, reveals that cassation review of awards (which means review of awards on the merit for a basic error of law by the highest judicial body) is not provided as one of the default avenues of judicial review of awards. This is position of the arbitration law is not changed by the legislation on

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<sup>27</sup> For example, if the Federal high court reverses the awards of the arbitrators for the reason that it is wrong on its face on the matter of law (see Art.351 (a), Civ.Proc. C), a further appeal could be lodged to the Federal Supreme Court. However, it is also worthy of mentioning that an award reviewed by the cassation bench of a state supreme courts could be further reviewed by the cassation bench of the Federal Supreme Court if a party shows the state supreme court’s cassation bench commits basic error of law in reviewing the award. (See, Murado, supra note 7)

cassation powers of the supreme courts. The question is then: can parties create cassation review of awards by agreement? In other words, if they agree to submit the award for cassation review only when it contains basic error of law, is this agreement enforceable?

The issue of contractual expansion of judicial review of awards, in general is a matter to which Ethiopian arbitration law does not give away an easy answer, for example, it is not clear whether parties can expand the grounds of setting aside provided under Art.356, Civ.Proc.C.<sup>28</sup> The enforceability of such contracts expanding judicial review of awards had been the subject of numerous academic writings in USA<sup>29</sup> and court's ruling on the issue was also diverse until the USA Supreme Court ruled in 2008 that such agreements are not enforceable. In *Hall Street Associates, L.L.C. v. Mattel, Inc.*,<sup>30</sup> the Supreme Court held that arbitration agreements subject to the Federal Arbitration Act (FAA) cannot contractually provide for additional judicial review to correct findings of fact unsupported by the evidence, or erroneous conclusions of law.<sup>31</sup> It asserts that the FAA's statutory grounds

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<sup>28</sup> If parties, for example, agree to add "a manifest disregard of the law" as a ground of setting aside under Art.356, Civ.Proc.C, is this agreement enforceable? What if parties agree to expand the grounds of appeal under Art.351,Civ.Proc.C? But one writer states, in a matter -of -fact - tone, that "[a]dditional conditions and grounds of appeal may also be laid down contractually. As a result, broad judicial review of arbitral awards is possible" (Hailegabriel G. Feyissa, *The Role of Ethiopian Courts in Commercial Arbitration*, Mizan Law Review (Autumn 2010.), Vol.4, No.2, P.325

<sup>29</sup> For example see, Eric van Ginkel, *Reframing the Dilemma of Contractually Expanded Judicial Review: Arbitral Appeal vs. Vacatur*, Pepperdine Dispute Resolution Law Journal, (2003) Vol. 3,No. 2, p.157; Cynthia A. Murray, *Contractual Expansion of the Scope of Judicial Review of Arbitration Awards Under the Federal Arbitration Act*, St. Jhon's Law Review (2002), Vol.76,No.3, p.633 ; Karon A.Sasser, *Freedom of Contract for Expanded Judicial Review in Arbitration Agreements*, Cumberland Law Review(2000), Vol.31,p.337.

<sup>30</sup> 128 S.Ct.1396(2008).

<sup>31</sup> Note that the ruling is confined to parties' agreement expanding judicial review of awards under the federal arbitration act. This ruling does not govern parties' agreement expanding judicial review under state arbitration laws.

for “vacatur”<sup>32</sup> and modification of an award are exclusive and cannot be supplemented by contract.

The holding of the Supreme Court is by no means automatically acceptable. Even if the holding is claimed to be important to ensure the finality of awards by restricting court’s intervention grounds into arbitration, it, however, ignores other equally important feature of arbitration, party autonomy (contractual freedom). Here the reader can easily see how the Federal Supreme Court cassation bench in its holding in *Beherawwi Maeden Corporation* case (this case is discussed in section (4), below) that awards can be reviewed on the merit for basic error of law by the highest court (that means cassation review of award) despite the existence of the finality agreement is neither for “finality” of arbitral awards nor for “party’s freedom of contract, the two basic essences of arbitration.)

One criticism against the holding of the US Supreme Court’s for giving finality or efficiency precedence over parties’ autonomy in arbitration goes:

[M]andating efficiency over freedom in arbitration makes no sense; by allowing the parties freedom, they may pursue efficiency to the extent they desire—if they do not want it, they can move forward without it. While the court has an interest in efficient litigation, it has no cognizable judicial interest or claim to such efficiency in arbitration because arbitration is a dispute resolution avenue solely constituted by the choice and definition of the parties.<sup>33</sup>

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<sup>32</sup> The term used in the Ethiopian arbitration law for the same thing which ‘vacatur’ refers is *setting aside*, Arts.354-357,Civ.Proc.C

<sup>33</sup> Matthew M. Mitzner, *Snatching Arbitral Freedom From Hall Street’s Clenched Fist*, The Review of Litigation( 2009), Vol. 29, No.1 p.190



In general, the divide between proponents and opponents of the holding of the court in the *Hall Street* are the two competing interests of arbitration. In the words of a writer “Whether the Court rightly decided the question in *Hall Street* depends on one’s view of what is more valuable in arbitration—the freedom of the parties to choose for themselves how their disputes will be resolved, or the efficiency that results from binding awards.”<sup>34</sup>

The text of Ethiopian arbitration law does not prohibit (at least in explicit terms) parties agreement for judicial review of arbitral awards for “basic error of law” and thus arbitration principle of party’s autonomy (parties freedom to control the arbitration) dictates honoring such agreement. The fear reflected in US’s Supreme Court decision that the efficiency of arbitration could be damaged if parties are entitled to contractually expand cannot become so big to induce an Ethiopian court forego one of arbitration’s honorable principle - parties’ autonomy, because agreement for cassation review of awards is limited to legal errors and which are basic (basic error of law)<sup>35</sup> especially if the term basic error of law is defined narrowly. If a party calculates the benefits of finality of the arbitration against the risk of an award with “basic error of law” (given the phrase is strictly understood) enters into agreement for a cassation review of awards, such agreement must be honored in Ethiopia. In doing so, we can strike the right balance between the two competing policy objectives of Ethiopian arbitration law (finality and party autonomy). So long as the text of the law is not that much clear on the matter, reasons based on policy objectives are the best we can do.

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<sup>34</sup> Id. at P.188

<sup>35</sup> Not factual or other errors. Actually if parties agreed for cassation review of awards for factual errors, their agreement would not be enforceable, because parties are creating a new jurisdiction for cassation benches which is not vested on them by any law in the first place.

The important factor in the disputant's decision of preferring arbitration over litigation is its efficiency with its potential of producing a fairly just result. To reflect this factor which moves disputants away from litigation, an award need to be final (i.e., not open to further challenge in the court) unless there is a mistake in it which goes beyond the risk assumed in preferring arbitration in the first place.<sup>36</sup> These ideal qualities of an award can best be attained when parties are allowed to calculate and balance the efficiency of an arbitration process with the risk of ending up with an award of a certain error and consciously agree for a judicial review on the ground of that error. Not by the wholesale assumption of the precedence of the cleanness of an award from an error of some sort called "basic error of law" over party's want of the finality of the award and subjecting the award automatically to a judicial review on that ground. This just captures the point that the conclusion reached in section 3 that 'no cassation review of awards as a default rule'.<sup>37</sup> and the conclusion reached in this section that 'the avenue of cassation review of awards can be created by a contract' are far from being contradictory, but very much reinforce each other to reflect parties wish of having arbitration which balances efficiency with an eye for correcting errors.<sup>38</sup>

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<sup>36</sup> Note that when disputants submit a dispute to arbitration, they are assuming a possible risk of ending with an award with a certain error which they may not get it corrected by courts in exchange for its immunity from being an object of prolonged proceeding.

<sup>37</sup> 'No cassation as a default rule' means if parties' arbitration agreement is silent about judicial review of awards, then there is no cassation review, the law does not provide this avenue of judicial review.

<sup>38</sup> Note that creating cassation review by contract is not like creating jurisdiction of a court which is not already there. Because the cassation reviews of awards is not available as a default does not mean it is prohibited all in all. And a dispute is escaping cassation review just because arbitration is preferred, not because it is not reviewable by way of cassation. Thus if it is the preference of the party to get it back to the cassation bench, no reason to prevent him from doing so as long as he feels that the finality benefit of arbitration will not be that much compromised.

#### 4.BEHERAWE MAEDEN CORPORATION VS DANEE DRILLING, CRITICAL EXAMINATION

In *Beherawi Maden Corporation vs Danee Drilling*<sup>39</sup> the Federal Supreme Court Cassation Bench holds that cassation review of awards is proper even if parties agree the arbitral award to be final. In this case, the bench overruled its holding in the case of *National Motors Corporation*.<sup>40</sup> To quote, the bench’s reasoning:

ኖ. . . የአንድ ጉዳይ ለሰበር የመቅረብ ሁኔታ በሕገ - መንግስቱ ለፌዴራል ጠቅላይ ፍርድ ቤት የተሰጠ በመሆኑ ሥርዓቱ ሊጫወተው ከተፈለገው አቢይ አላማ አንጻር ሲታይ ጉዳዮቸው በግልግል ዳኝነት እንዲታይላቸው የተስማሙበት ወገኖች የግልግል ዳኝነቱ የሚሰጠው ውሳኔ የመጨረሻ ነው በማለት ስለተስማሙ ብቻ ጉዳዩ በሰበር ሥርዓቱ እንዳይታይ ፍላጎት አሳይተዋል ተብሎ መሠረታዊውን የሕግ ስህተት ላለማረም ምክንያት ሊሆን የሚችል አይደለም፡፡<sup>41</sup>

When the question whether or not a case is reviewable by way of cassation is evaluated in light of the role cassation review is intended to play, parties to arbitration agreement that the decision of arbitrators is final and their wish of avoiding cassation review of the

<sup>39</sup> Federal Supreme Court Cassation Decisions Reporter( 2011) Vol.10, p.350

<sup>40</sup> *National Motors Corporation vs General Business Development, Federal Supreme Court, Cassation Bench, File No.21849* (in this case the court held that a finality agreement avoids the cassation review of awards) .It is interesting to note that in the time between this case and that of the case of *Behereawe Maeden Corporation* , an article, criticising the bench’s reasoning and its holding on the *National Motors Corporation* case appeared on Ethiopian Bar Review ( the article is cited supra at note 3)and the arguments by the author in the article are repeated in the bench’s decision on the case of *Behereawe Maeden Corporation* . It is also interesting to note that the *National Motors Corporation* case is not reported in the reporter of the Federal Supreme Court Cassation Bench Decisions; I have gone through all the volumes I could not find it but the case is reported in the Ethiopian Bar Review (2009) Vol.3,No.1 , p.149 and in the Report of Arbitral Awards vol. 1, p.367

<sup>41</sup> *Behereawe Maeden Corporation*, supra note 4 p.352

case cannot be a reason not to correct a basic error of law in the case by way of cassation. [Translation is mine]

As elaborated in section (2), the courts' reasoning is not valid as it shifts its emphasis from how expansive or limited judicial review should be of arbitral awards to the general discussion of the power of cassation of Supreme Courts. When put syllogistically, the bench's reasoning will look like:

- Cassation power of the Federal Supreme Court is to ensure uniformity in the interpretation of laws in the legal system.
- Arbitration is the part of the legal system.
- Therefore, an arbitration process must be subjected to the cassation power of the Court.

However, is it not arbitration the part of the legal system where court's interference (especially on the merit of the dispute) is intended to be very limited?<sup>42</sup> Is it not arbitration the part of legal system where parties' wish of avoiding courts is honored even if that may lead to the situation that some mistakes of arbitrators cannot be scrutinized and corrected before courts at all? So it is uncanny to use the wholesale purpose of subjecting judgments to cassation review to draw a conclusion that arbitral awards must also be subjected to the same review.

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<sup>42</sup> See, Birhanu Beyene Birhanu, *The Degree of Court's Control on Arbitration under the Ethiopian Law: Is It to the Right Amount?* Oromia Law Journal (2012) Vol. 1No,1 , p.37 (A look at Art. 351, Civ. Proc. C., however, reveals that such errors –legal or factual- which are not apparent on the face of the awards cannot be grounds of appeal. Hailegabriel, however, mistakenly holds that such appeal is authorized under Art.351 (a) 11. Actually, Art.351 (a) allows appeal from an award if the factual or the legal error is so apparent that it can easily be grasped from a glance at the award. Due attention needs to be given to the phrase “*on its face*” in the provision. This provision does not invite appeal from awards just because the line of interpretation of the laws or facts adopted by arbitrators is found to be arguable. Construing the provision as authorizing courts to review arbitral awards with an arguable holding severely undermines the legislators' intention of limiting the grounds of appeal from arbitral awards.

It is like saying that:

- Courts are vested with the power to adjudicate disputes.(Art.79(1),FDRE Constitution)
- A dispute submitted to arbitration is one of those disputes.
- So they must be subjected to the adjudicative power of courts (but look at Art.244, Civ.Proc.C which prescribes courts to decline from entertaining disputes submitted to arbitration, no one how ever questions the unconstitutionality of this provision.<sup>43</sup>

Therefore, the cassation bench, in *Beherawe Maeden Corporation* case, make a mistake of implying that it is like usurping the cassation power of supreme courts just because awards are made not reviewable by way of cassation. However it must be noted that avoiding cassation review of awards is limiting court's interference into arbitration and thereby upholding parties' wish of avoiding courts which is manifested by opting for arbitration over litigation. As shown below, it can even be argued that the purpose of vesting supreme courts with the cassation power is achieved when this power is not exercised with regard to arbitration. So the benches assertion that the purpose of cassation power of courts automatically entails (even in the existence of a finality agreement) judicial review of arbitral awards on the merit for basic error of law is wrong.

The bench's assertion in the case that cassation review is needed for the creation of a better working legal system, not just to correct mistakes in an individual case, is fair and acceptable, but its inference from such a premise that 'so it cannot be avoided by a contract' is quite unwarranted, at least in a

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<sup>43</sup> See, *Zemzem* supra note 25

situation where parties to arbitration agree not to subject arbitral awards to cassation review. Just not honoring such agreements may be damaging, let alone facilitating, to the proper functioning of the legal system, which is the ultimate goal of the cassation review.

This is because disputants may not prefer arbitration as a dispute settlement mechanism if it is unavoidably followed by review of awards on the merit for “basic error of law”. That in turn means many cases, which would have been resolved via arbitration, will end up in courts and courts, overloaded with cases, will become less efficient. Arbitration, however, would be employed and court’s congestion could be eased if its finality is guaranteed (if parties know that they can escape cassation review.) So how come the bench holds the position that the purpose of cassation review (that is, for a better functioning of the legal system) warrants it not to honour parties agreement to escape the review? Its general purpose should have made it go the other way around.

In the decision, the cassation bench also makes a mistake of drawing unwarranted conclusion from that fact that Ethiopian arbitration law allows judicial review of awards under Arts.350-354 and 355 -357, Civ.Proc.C. It states:

አማራጭ የሙግት መፍቻ ዘዴዎች በኢትዮጵያ የህግ ስርዓት ውስጥ ተካተው የሚገኙ ሲሆን እነዚህን የሙግት መፍቻ ዘዴዎች ፍርድ ቤቶች የሚያበረታቱበት ሁኔታ እንዳለ ሁሉ የሚቆጣጠሩበት አጋጣሚም ያለ መሆኑን ከላይ የተመለከቱት የፍትህ ብሄር ህጉም ሆነ የፍትህ ብሄር ሥነ-ሥርዓት ህግ ድንጋጌዎች ይዘትና መንፈስ ያሳያል፡፡<sup>44</sup>

Alternative dispute resolution mechanisms are made the part of Ethiopian legal system. The contents and spirits of the provisions of

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<sup>44</sup> *Behereawe Maeden Corporation*, supra note 4 p.352

the civil code and the civil procedure code, which are cited above, shows that there is as much a room for court's control of these mechanisms as there is for court's encouragement of their use. (Translation is mine)

The question is how far courts are allowed to exercise control on alternative dispute resolution mechanisms. Conciliation is, for example, a method of alternative dispute resolution and the result of a successful conciliation, which is compromise<sup>45</sup>, is not reviewable at all by way of appeal<sup>46</sup>. In arbitration too, courts have a supervisory role, but does this role warrant courts to review awards on the merit for "basic error of law"? (Especially given that "basic error of law" means in practice any error of law). For example, in UNCITRAL Model Law review on the merit is altogether avoided<sup>47</sup> as it is considered too much of an intervention by courts.

In the above paragraphs, it is shown how the bench draws a wrong conclusion about the reviewability of awards by way of cassation depending on the role of cassation as defined in litigation, not on a different role it would have in arbitration. It is also shown how it overextends the theory that courts should exercise control over arbitration to the point they can review of awards on the merit for basic error of law. Now let us see how it

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<sup>45</sup> C.C,1960, Art.3324

<sup>46</sup> C.C, 1960, Art. 3312(1).

<sup>47</sup> See paragraph 15 of the explanatory notes on UNCITRAL Arbitration Model Law. It goes "... the Model Law envisages court involvement in the following instances. A first group comprises appointment, challenge and termination of the mandate of an arbitrator (articles 11, 13 and 14), jurisdiction of the arbitral tribunal (article 16) and setting aside of the arbitral award (article 34). These instances are listed in article 6 as functions which should be entrusted, for the sake of centralization, specialization and acceleration, to a specially designated court or, as regards articles 11, 13 and 14, possibly to another authority (e.g. arbitral institution, chamber of commerce). A second group comprises court assistance in taking evidence (article 27), recognition of the arbitration agreement, including its compatibility with court ordered interim measures of protection (articles 8 and 9), and recognition and enforcement of arbitral awards (articles 35 and 36.)"

misunderstands the rules of the Ethiopian arbitration law and misapplies the interpretation rule “the latter prevails over the latter”. It states:

የፌዴራል/ሥ/ሥ/ሐ/ቁጥር 351"ም" ሆነ 356 ድንጋጌዎች ይዘትና መንፈስ ሲታይ መሰረታዊ የህግ ስህተት ያለው የግልግል ጉባኤ ውሳኔ በሰበር ስርዓት የሚታይበት አግባብ ስለመኖሩ አይጠቁምም። በሌላ አገላለፅ ድንጋጌዎች የሚያወሱት በግልግል ታይቶ የተወሰነ ጉዳይ በይግባኝ የሚታይበትን ሥርዓት ብቻ ነው።<sup>48</sup>

When the content and the spirit of the provisions, Art,351 and 356,Civ.Proc.C are examined, they do not indicate it is not clear as to the reviewability of arbitral awards containing basic error of law by way of cassation. In other words, the provisions stipulate only about review of arbitral awards by way of appeal. [Translation is mine]

The quoted statements proves that not only the cassation bench fails to distinguish “appeal” (Arts. 350- 354, Civ.Proc.C) and “Setting aside” (Arts, 3555-357, Civ.Proc.C)<sup>49</sup> but also fail to grasp the spirit of Art.351, Civ.Proc.C, which clearly prohibits (at least as a default rule) review of

<sup>48</sup> *Behereawe Maeden Corporation*, supra note 4 at p.352

<sup>49</sup> Besides the difference on grounds (grounds of setting aside are enumerated under Art.356,Civ.Proc.C. while that of appeal under Art.351, Civ.Proc.C), the two procedures differ by the degree of interference which they authorizes courts into arbitration. Appeal authorizes courts to examine the merit of the arbitral award and correct the errors therein. At the conclusion of the appeal, the appellate court gives a judgment conforming, modifying or reversing the award. The judgement will then bind parties as a final resolution on the dispute between the parties unless of course the circumstances allow further appeal and it is pursued by the party unhappy about the judgment. The procedure of setting aside, on the other hand, does not authorize courts to examine the merit of the award. It simply authorizes them to see whether or not some procedural mistakes (enumerated under Art.356, Civ.Proc.C) are committed and to declare the award null and void, despite the holdings on the merit if it is given amidst of those procedural irregularities. Unlike appeal, at the end of the successful setting aside action, parties will then find themselves with an outstanding dispute to be yet resolved. If, in the setting aside action, the court finds that the procedural mistakes are not committed, parties will then find themselves that they are still bound by the award itself ( unlike appeal , not by a court judgment either modifying ,reversing or confirming the award)



awards on the merit for “basic error of law”<sup>50</sup>, because “basic error of law” is not among the grounds enumerated therein. So the bench made an error of taking the provision as if it had nothing to say about review of awards on the merit for “basic error of law”, or namely cassation review.

The bench also misapplies the interpretation rule; the latter prevails over the former, when it says:

የሰበር ሥርዓት ዓላማ ወጥ ለሆነ የህግ ትርጉም እና አፈፃፀም ከፍተኛ ሚና መጫወት ሲሆን ይህንንም በ1987ቱ ህገ-መንግስትም ሆነ ይህንኑ ተከትለው ከወጡ አዋጆች(25/1988 እና 454/97) የምንገነዘበው ነጥብ ነው። እነዚህ አዋጆች ከ1958ቱ የፍትህ ብሄር ሥነ-ሥርዓት ህግ በሁዋላ የወጡ ሲሆን ተቀባይነት ባለው የህግ አተረጎጥንም ደንብ መሰረትም ከ1958ቱ የሥነ-ሥርዓት ህግ ቅድሚያ ተፈጻሚነት ያላቸው ናቸው።<sup>51</sup>

The objective of cassation is to play a role for uniform interpretation and application of laws. This point is recognizable from the 1995 Constitution and those proclamations issued following it (proc.25/96 and Proc.454/2005). Since these legislations came latter than the 1965 Civil Procedure Code, they prevail over it according to an acceptable rule of interpretation.[Translation is mine]

The bench to resort to that kind of rule of interpretation should first have shown the legislations defining the cassation power of the supreme courts go against what is provided under Ethiopian arbitration laws. And as discussed in section (2.2) above, the laws defining the cassation power are enacted exclusively with litigations in mind , not alternative dispute resolution to litigation such as arbitration, so difficult to see any inconsistency between the laws defining cassation power of supreme courts and the arbitration

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<sup>50</sup>Of course, it is unless we count errors enumerated under Art. 351,Civ.Proc.C as “ basic errors of law”. However, from the practice of cassation benches, we know that errors which goes beyond those enumerated under Art351, Civ. Proc,C may be qualified as “basic errors of law”.

<sup>51</sup> *Behereawe Maeden Corporation*, supra note 4 at p.352.

laws defining, purposefully and with a sensitivity, judicial interventions into arbitration. The cassation power of courts as defined in those laws remains unfettered even if courts restrain from exercising such power on arbitral awards. So the bench has made a mistake in applying the interpretation rule as if there was inconsistency there; in other words as if the cassation laws had impliedly repealed certain arbitration law provisions such as Art.351,Civ.Proc.C.which prohibits review of awards on the merit for “basic error of law”

To summarize, in the case of *National Motors Corporation* (overruled), the bench emphasized on the similar nature of review of awards by way of appeal and by way of cassation as both means review on the merit and correctly looked for an answer in the Ethiopian arbitration law for the issue of propriety of cassation review of awards in the presence of a finality agreement. In its reasoning, the bench states that if review by way of appeal is not available due to a waiver agreement, it is meaningless to allow cassation review in the presence of the waiver agreement as it means the same thing as appeal,<sup>52</sup> meaning review on the merit.

However, the bench in overruling its holding in *National Motors Corporation* case, which it has done it in deciding the *Beherawee Maeden Corporation* case, shifts its emphasis to the difference in the role the two reviews are primarily intended to play in the realm of review of judgments, that is, appeal is primarily intended to correct mistakes which can affect individual interest while cassation is to correct mistakes of wider impact on the legal system( in short appeal is primarily for individual while cassation

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<sup>52</sup> Of course actually it would mean more pervasive intervention by court than appeal as the term basic error of law is defined very loosely.( See, Murado, supra note 7)

is for the system). Then the bench conclude that what is intended for the system must not be made amenable to individual's wish.

Nonetheless, it is flawed to hold that the purpose of cassation, which is facilitating the proper functioning of the system, can be achieved by doing the same thing to arbitration as to litigation. Because arbitration is a dispute settlement mechanism which generally calls for caution to court's interference into its realm. Of course, the purpose of granting supreme courts with a cassation power is achieved with regard to litigation by reviewing judgments for basic error of law but with regard to arbitral awards by not using that power (meaning by not reviewing awards on the merit for basic error of law). The cassation bench in holding that awards can be reviewed on the merit for basic error of law by the highest court despite the existence of the finality agreement is neither for "finality" of arbitral awards nor for "party's freedom of contract, the two pillars of arbitration, and thus its holding is against arbitration, that in turn means against the legal system which promotes arbitration as a dispute settlement mechanism.

## **5. CONCLUSION**

The laws defining the cassation power of supreme courts are not intended to give away answers as to courts' use of the power apropos arbitrations (which is out of court dispute resolution mechanism). The answer as to the propriety of cassation review of award lies within the arbitration law and the close examination of this law reveals that the review is not available as a "non-waivable avenue"( unlike the avenue of setting aside) and as default avenue, either( unlike appeal). The amount of time cases take before they are disposed at a cassation bench and the plasticity of the meaning of the term "basic error of law" which would be a ground calling forth cassation review of awards for all kinds of error of laws justifies why the avenue of cassation

is not provided in the Ethiopian arbitration law either as a “non-waivable avenue” of judicial review of awards or as a default avenue. What the arbitration law (especially such principles as parties autonomy, finality and privacy together) warrants that cassation review of awards is proper only when parties agree to that effect, which means when they create it by contract calculating the risk of ending up with an award with a “basic error of law” against their wish of, for example, bringing it to final as quickly as possible.

# **DETERMINATION OF PERSONAL AND COMMON PROPERTY DURING DISSOLUTION OF MARRIAGE UNDER ETHIOPIAN LAW: AN OVERVIEW OF THE LAW AND PRACTICE\***

**Silashi Bedasie \*\***

## **INTRODUCTION**

Marriage as one of the most important social institutions is a bedrock for a society in general and for a family in particular. It is a voluntary legal union founded on the free and full consent of the spouses. Once such a legal union is created, the union gives rise to the various legal effects, which are generally the derivatives of personal and pecuniary relations established between the spouses. The latter category in turn is mainly constituted of personal and common property of the spouses.

However, following the dissolution of the marriage on various grounds, those established legal effects of marriage would be terminated. The dissolution would consequently entail other various legal effects. One of such legal effects of dissolution of marriage is the liquidation of pecuniary effects. This inevitably imports the crucial issue of the determination of personal and common property at the end of the marriage. Therefore, this lies at the heart of the basic legal issues in this article.

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Such a very indispensable issue of determination, frequently arising in the course of liquidation of pecuniary relations, may primarily be settled on the basis of marriage contract or an agreement validly concluded between the spouses prior to termination of the marriage. Failing such agreements, eventually there comes into picture the operation of the law to dispose of the issues pertaining to the question of determination. This ultimately mandates the application of the cardinal legal presumption of common property with its unfettered rules. The legal presumption may be rebutted only by the required proof of personal property.

The law squarely provides that all property shall be deemed common property of the spouses unless proved to the contrary by the spouse claiming for personal property. As a result, the fundamental legal presumption would operate to determine common property while proof is a necessary condition for a claim of personal property. These basic principles of the law are of an immense importance for the determination of personal and common property, the application of which shall strictly be adhered to by the family arbitrators or the court, as the case may be.

The article, therefore, thoroughly dwells on the determination of personal and common property during dissolution of marriage where an attempt is made to draw a clear line of distinction between personal and common property. To this end, the article, in the first two sections, deals with issues pertaining to *how* and *by whom* the determination is made during dissolution of a marriage. The last section wraps up the article with some recommendations. However, this article does not address the various issues relating to some grey areas of pecuniary effects that are not clearly characterized as such. In particular, the article does not delve into the characterization of some exceptional proprietary assets or interests acquired

during or before the marriage. Despite their dubious character, it is worth noting that those assets or pecuniary interests would necessarily be subject to the dichotomy of pecuniary effects.

### ***1. Determination How Made***

Following dissolution of a marriage, the very indispensable issue which often crops up is the determination of personal and common property in the liquidation of pecuniary relations. Of course, the determination of personal and common property may primarily be made on the basis of the marriage contract or an agreement concluded between the spouses during dissolution of marriage. This latter agreement, the applicability of which is, however, hinged up on approval by the court, is concluded basically for the purpose of facilitating the smooth liquidation of pecuniary effects. Hence, in the presence of any of these agreements, the family arbitrators or the courts may fortunately be relieved of the controversies that may often emerge with regard to the question of determination. The priority is usually given to the agreement of the spouses to determine as to which items constitute personal or common property on the basis of which the liquidation of pecuniary relations will be made. It is only when there is no such an agreement, or where the agreement is invalid that a resort to the law would be made to determine the character of the properties.<sup>1</sup>

Nonetheless, in the absence of any agreement or if any, as a result of its inadequacy, the law steps into the matter to dispose of all the issues or those ungoverned issues pertaining to the determination of personal and common property of the spouses. Yet, though the law comes forth to take up the matters, the task of determination is not as automatic and mechanical as it

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<sup>1</sup> See Meharu Redai, የተሻሻለውን የቤተሰብ ህግ ለመገንዘብ የሚረዱ አንዳንድ ነጥቦች፣ ቅጽ አንድ፣ ሁለተኛ እትም፣ 2002 ዓ.ም፣ ገጽ 56

appears at first. There may still remain some challenges that require the family arbitrators or the courts to make a careful and closer scrutiny of the provisions of the law to dispose of the issues of determination amicably.

In any case, the determination of personal and common property by the operation of the law involves the application of the legal presumption of common property and proof of personal property that rebuts the presumption.

### ***1.1. Determination by Agreement***

During dissolution of a marriage, it is an inevitable consequence that the pecuniary interests of the spouses would be liquidated. The spouses usually come up with their claim over their personal and common property which indispensably necessitates the determination of the character of the properties. It is not unusual that disputes over the marital property arise between the spouses regarding the character of the property either to retake as their respective personal property or to share between themselves as their common property.

Then, the first possible solution to such controversy is a resort to the agreement of the spouses serving as a basic frame of reference for the amicable resolution of the matrimonial dispute. Worthy of note at this point is that the agreement of the spouses may refer either to their contract of marriage or an agreement concluded during dissolution of marriage to regulate the liquidation of their pecuniary relations.<sup>2</sup> In either case, the personal property of the spouses would be distinguished from their common property in accordance with the terms stipulated in their agreement.

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<sup>2</sup> See Revised Family Code, Art. 85 (1).



But, one has to note at this moment the difference in the purposes of both contract of marriage to be concluded prior to or on the date of marriage and other agreement concluded usually at the end of the marriage.<sup>3</sup> The difference is that unlike the former which generally regulates the overall pecuniary matters during marriage the purpose of the latter is confined only to regulating the manner of the liquidation of pecuniary effects of the marriage. Despite disparity in the purpose they are originally concluded for, they have the same importance for the purpose of distinguishing between personal and common properties since the subject matter of the agreements is often the same, i.e., pecuniary matters.

As regards the importance of contract of marriage to determine the character of a marital property at the end of the marriage, personal property could be distinguished from common property on the basis of the stipulations in the contract of marriage. The contract containing specification of property of the spouses facilitates the proof of the mutual rights of the spouses with regard to recovery and partition of their personal and common property respectively.<sup>4</sup> So, they might have agreed on or before the date of their marriage that all or only part of the property they acquired prior to marriage would remain their respective personal property. Yet, they can reiterate in the agreement that the property they acquire onerously during their marriage would fall within the realm of common property. The stipulations, if so

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<sup>3</sup> Basically, contract of marriage is not concluded in anticipation of the dissolution of the marriage and the consequences thereof, but to regulate the overall pecuniary relations existing between the spouses during marriage. However, therein the character of the property may, inter alia, be specified the point which is of crucial importance for the purpose of the distinction under discussion. Whereas the agreement concluded later at the end of marriage is exclusively in contemplation of the dissolution and solely for the purpose of providing for certain guidelines regarding the liquidation.

<sup>4</sup> Marcel Planiol and George Ripert, Treatise on the Civil Law, Vol.3, Part1, 11<sup>th</sup> ed.(1938), at 15.

made, are all the confirmation of what the law expressly provides for they cannot agree otherwise. All the property designated in marriage contract to remain personal must so remain as long as such a designation does not run contrary to the mandatory provisions of common property. The spouses could nevertheless enter it into common property by an approved subsequent agreement amending the original contract.<sup>5</sup> For instance, they may amend their marriage contract to convert the personal character of inheritance or personal gifts due to a spouse into a common property. Therefore, during dissolution of the marriage, the issue of determination would be resolved in accordance with the terms agreed up on in the contract of marriage.

The spouses might have also agreed further in their contract of marriage that all the property they acquired prior to and during marriage even gratuitously would wholly be part of their common property. Regarding the possibility to make such stipulation, our law is mute. One writer apparently agrees that there is no prohibition that such an agreement could freely be made by the spouses.<sup>6</sup> Further, as stated earlier, the practice of other legal systems clearly evidences such possibility. The practice is also evident from the decisions and reasoning of some of the decisions of courts in Ethiopia.<sup>7</sup>

It is thus worth noting that where there is such an agreement that entirely avoids the existence of personal property, there would be no such difficult task of determination to be carried out at the end of the marriage since a

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<sup>5</sup> *Id.*

<sup>6</sup> *See* Mehari, *supra* note 1, at 65.

<sup>7</sup> In particular, the possibility to contractually convert personal property into common property by marriage contract can be noted from the decisions of the Federal Supreme Court in its cassation division. *See* Biruk H/Eyesus vs Fanaye Abebe, Cass.FileNo. 38544/2002, and Senait H/Mariyam vs Abebech Worku, Cass. File No. 42766/2002, Federal Supreme Court Cassation Decisions, Vol.10, 2003, at 2-3, &17-18. *Nota Bene:* Unless indicated otherwise, all the cases cited in this article are in Ethiopian Calender.

mere reference to the agreement readily shows only the existence of common property.

Nonetheless, is it not reasonable to imagine the existence of personal property irrespective of the agreement of the spouses that purports to convert the entire personal property into common property? For instance, can a property donated or bequeathed separately to the spouses on condition that it will not enter the common property be converted into common property by the agreement? What about interests which by their very nature are not assignable? Indeed, these instances must be considered exceptional cases. Such exceptions are unavoidably recognized even in those legal systems where universal community system is adopted.<sup>8</sup> The same partly holds true in our legal system. That is, even if the spouses are permitted to make a stipulation to convert all their property into common property, there are still some exceptional assets, like maintenance allowance (save the exception)<sup>9</sup>, compensation<sup>10</sup> or family objects<sup>11</sup> due to a spouse as a result of bodily injury suffered by him/her, which are not subject to such stipulation and which should naturally remain personal. It should be noted that

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<sup>8</sup> Planiol & Ripert, *supra* note 4, at 133.

<sup>9</sup> See Revised Family Code, Art.205. Indeed, maintenance allowance due to a spouse is not expressly indicated to be personal. Thus, it is possible that the maintenance allowance received by a spouse from the debtors can be commonly used during the marriage. Nonetheless, it cannot be fully considered as a common property notwithstanding an agreement to this effect. The main reason is that the maintenance allowance, unlike a common property, cannot be claimed as such for partition upon dissolution of a marriage.

<sup>10</sup> See Civil Code, Art.2144. It is clearly stated by the law that compensation due to material damage suffered by a deceased spouse may be claimed by the heirs of the victim. Likewise, the compensation due to the liability of the deceased would be satisfied by the succession. Thus, even if the nature of the compensation does not prohibit its conversion into common property as such, the law has characterized it as a personal property that forms part of the succession that devolves upon the heirs.

<sup>11</sup> See Civil Code, Art.1094. As can be noted from the provision, family objects which are jointly owned by co-heirs including a spouse cannot be transmuted into a common property despite the willingness of the co-heir spouse as long as the other co-heirs object to such a transmutation or alienation.

compensation due to bodily injury is regarded as personal for it is characterized as such by the relevant law.

The other agreement that is of a great importance to distinguish between personal and common property is the agreement concluded between the spouses during dissolution of marriage. The purpose of such agreement, as stated earlier, is to regulate the manner of the liquidation of their pecuniary relations. Thus, the spouses can usually agree on their personal and common property and the manner of the partitioning of their common property between themselves.

The agreement made accordingly in contemplation of the end of the marriage and to regulate the consequences thereof should necessarily be approved by the court for its validity. Previously, under the Civil Code regime, the agreement was used to be brought before the family arbitrators who had the power to decide on the pecuniary issues between the spouses. Presently, under the Revised Family Code, such power has been taken away from the family arbitrators and vested on the court.<sup>12</sup>

In approving the agreement, the court has to closely examine the terms of the agreement so that they are not contrary to law and morality. For example, the agreement that completely converts an entire common property into personal properties to be owned exclusively by a spouse may be deemed to be contrary to the law. Moreover, an agreement that suffers from undue influence in such a way that it arbitrarily violates the rule of equal partition

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<sup>12</sup> Art 80 (2) of the Revised Family Code empowers the court to approve the conditions of the divorce agreed between the spouses along with the divorce agreement. *See also*, Art.103(2) of the Oromia Family Code.

in a common property or that goes against the welfare of their children can be subject to judicial scrutiny. Thus, where the court finds the agreement to be against the pecuniary interests of one of the spouses and the well-being of their children, it may give appropriate decisions to correct the defects therein.<sup>13</sup>

### ***1.2. Determination by the Operation of the Law***

It is possible that the spouses might have married each other without marriage contract or the contract might have been invalid, lost, or destroyed in its totality. Likewise, even during the dissolution of their marriage, the spouses may fail to conclude an agreement as regards the liquidation of the pecuniary consequence of their marriage or even if there is one, it may be rejected and rendered invalid by the court requested to approve it. In such instances, how could one distinguish between personal and common property without any agreement would be a painstaking question for the moment. Ultimately, the only way out to be opted for is a resort to the relevant provisions of the law provided in contemplation of such instances.

Hence, the second way of distinguishing personal property from common property is by the operation of the law. The operation of the law comes into application where the determination cannot be made by the agreement of the spouses for any reason mentioned herein above. The determination by virtue of the law eventually calls for the application of the relevant legal provisions.

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<sup>13</sup> *Id.* Art 80(3). *See also*, Art.103(3) Oromia Family Code.

To this end, the law has somehow tried to determine personal and common property based on the cardinal legal presumption of common property and proof of personal property respectively.

### ***1.2.1. The Legal Presumption of Common Property***

As is frequently mentioned herein this article, the presumption of common property is a cardinal principle of vital importance in the determination of personal and common property during the dissolution of a marriage. The significance of the fundamental principle becomes more vivid in its fullest application in particular where determination by agreement of the spouses partly or wholly proves to be of no help for reasons mentioned elsewhere in this article.

The legal presumption of common property as embodied in Art. 63(1) of the Revised Family Code may be regarded as the legal linchpin of the property aspects of the institution of marriage.<sup>14</sup> This can be noted from the aforesaid provision which provides that “*[a]ll property shall be deemed to be common property even if registered in the name of one of the spouses unless such spouse proves that he/she is the sole owner thereof*”(emphasis added). The generalization of “*all property*” to be presumed as common property without any further specification unquestionably draws the conclusion that the presumption exclusively operates in favor of common property (emphasis added). In effect, the purpose of the law basically seems to achieve unity in the material interests of the spouses and thereby attaining the development of common property (single patrimony) between them.

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<sup>14</sup> It must be noted that the legal presumption has been reiterated in verbatim under Art.79(1) of the Oromia Family Code.

Under French law, for example, the major part of the property of the spouses presumably enters the common property and only by exception do certain items remain in their personal ownership.<sup>15</sup> *A fortiori*, the presumption of ownership is in favor of the common property.

The theory underlying the legal presumption of common property seems to have been originally conceived of the notion of sharing of effort and results whose very purpose in turn is to keep intact the matrimonial union.<sup>16</sup> In other words, analogous to that of a partnership the reason behind common property is based on the fact that each spouse contributes labor or capital for the benefit of the community, and shares equally in the profits and income earned there from. And it is this philosophical underpinning that gives birth to the presumption of common property. The presumption is almost universal in that it has been enshrined in many laws of community property systems.<sup>17</sup>

Coming back to the aforementioned provision of our law, the comprehensive nature of the presumption hardly calls for a detailed elucidation. As has been noted from the wording of the afore cited provision, the presumption in a nutshell, encompasses “*all property*” with no subsequent qualification restricting the generic charter of the phrase. In effect, the law seems to have closed up many determinant matrimonial issues in favor of the presumption of common property.

Thus, the careful inference that can possibly be drawn from a closer reading of the provision is that all movables and immovable, no matter how and when they are acquired, fall within the scope of the presumption unless

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<sup>15</sup> See Planiol and Ripert, *supra* note 4, at 94.

<sup>16</sup> *Id.*

<sup>17</sup> Menell R.L. & Brykoff T.M., Community property in a Nutshell, 2nd ed., 1988, at 36.

proved to the contrary. The presumption is so significant, for instance, where both personal and common property are so intermixed that their separation is insurmountably impossible. In such a case, the resolution of the intricate issue rests on the application of the presumption that characterizes the intermixed property as a common property unless proved otherwise.<sup>18</sup>

The importance of this cardinal presumption for the determination of personal and common property during dissolution of marriage shall not be overlooked. The spouse claiming for a common property relies on the presumption that s/he bears no burden of proof. The proper application of the presumption itself totally makes it unnecessary that one need not look for evidence in support of his claim for common property. In other words, the spouse alleging that a certain matrimonial asset is a common property certainly benefits from the presumption as of right without any duty to adduce evidence to that effect. This legal significance is inherent nature of the legal presumption itself.

As a result, there is no onus of proof on the spouse maintaining that the property is common. Furthermore, the statement of the spouse who maintains that a given property is personal need not be used as a pretext to derogate from the presumption, unless such a statement amounts to a clear admission of the personal character of the property in question.<sup>19</sup>

Another point of noteworthy at this moment is with regard to the nature of the presumption. Accordingly, the legal presumption of common property is amenable to rebuttal by the spouse claiming the property to be personal. The

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<sup>18</sup> *Id.*, at 139.

<sup>19</sup> Ato Bekele Haile Selassie, “Settlement of Matrimonial Disputes in case of Divorce,” *J.Eth.L.*, Vol. XVIII, No –, 1997, at 87.



nature of the legal presumption, though not explicitly stated, should be understood as rebuttable as long as nothing is expressly provided to the contrary.<sup>20</sup> The standard of proof to rebut the presumption must not be less than the preponderance of evidence applicable in civil suits.<sup>21</sup> Only persuasive arguments as substantiated with evidence on the strength of proof would bar its enforcement and in all other cases,<sup>22</sup> the application of the presumption must remain unaffected. In the course of determining the character of a property in dispute, if at all a proper determination is to be made; there must be a full application of the presumption by complete observance of the rules implicit therein.

The glimpse of a look into the practice, however, shows that in spite of the unfettered rules embodied in the cardinal presumption of common property stringently mandated to be complied with in determining personal and common property, there is a gross deviation of the practice from the law. As it could be clearly noted from the discussion *infra*, some cases evidently indicate that sometimes the practice flatly goes astray from the law.

For instance, in one case<sup>23</sup> of manifold issues, both the High and the Supreme Courts rendered similar decisions that in effect eroded away the cardinal presumption of common property in determining the character of a certain house. The dispute was that the appellant-wife claimed the house as a common property which the respondent- husband considered exclusively his own.

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<sup>20</sup> See Mehari Redae, Dissolution of Marriage by Disuse: A Legal Myth, *J.Eth.L.*, Vol.XXII, No.2, 2008, at 43.

<sup>21</sup> See Bekele, *supra* note 19.

<sup>22</sup> *Id.*

<sup>23</sup> Bruktawit Gebru V. Alebachew Tiruneh, Supreme Court, Civ. App. No. 2133/78(unpublished).

The then Supreme Court, affirming the decision of High Court, deviated in its decision from the legal presumption of common property by rejecting the appellant's assertion that the house was an item of common property acquired during the continuance of the marriage. The court even went further in requiring the appellant to adduce evidence and corroborate her assertion which in fact is quite against the overall spirit and purpose of the presumption.

In its reasoning, the Court stated that the house was not built through the joint effort of the spouses. This kind of reasoning has obviously no legal basis. Nowhere in our law does there exist any distinction between property acquired by personal and joint effort of the spouses during marriage for the purpose of determining the character of a certain property. Also, the Court endeavored in futility to point out the fact that the house was constructed after the spouses had begun living apart, *albeit* prior to dissolution of the marriage. A quest for a specific time within the existing marriage was entirely of no legal significance to resolve the issue at hand. Because whatever the case may be, the separation of the spouses can never exclude any property acquired onerously during such period from its presumption as common property in so far as no formal dissolution of the marriage is made.<sup>24</sup>

Moreover, in an attempt to determine the character of the property, the Court engaged itself in making an inquiry into the source of the money used for the

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<sup>24</sup> However, it must be borne in mind that the current stance of the Federal Supreme Court is also a further confirmation of the misconstruction in the case at hand. Apparently, the same position is also held by some writers. *See* Mehari, *supra* note 20, p 42 (disagreeing with the court's ruling of *defacto* dissolution of the marriage, but in support of the exclusion of the operation of the legal presumption during the separation); Philipos Aynalem, in an article that appeared in *Mizan Law Review*, Vol.2, No.1, 2008, pp110-136 (supporting the rulings of the Federal Supreme Court Cassation Bench, which introduced a *defacto* dissolution of a marriage despite the limited causes of dissolution as per art.75 of the Revised Family Code).

building of the house. Setting aside the fundamental presumption, it unreasonably indulged itself into the inquiry of whether the house and the donated money with which the house was built constituted common property. Indeed, such an inquiry serves no purpose to determine the character of the house as far as it was built during marriage for which the mere application of the presumption suffices. Such an inquiry would have been relevant only in connection with the required court declaration, which was not at issue in the case at hand.

As is apparent from the foregoing comprehensive analysis of the case, for all the inquiries unnecessarily made, the Supreme Court, like the High Court, erroneously required the appellant to adduce sufficient evidence and to corroborate her claim of common property. In the case under consideration, all the attempts were entirely unnecessary exercise which rather amounted to a complete derogation from the presumption of the law to determine the character of the property. The import of the fundamental presumption of common property was blatantly overlooked by the courts.

In other similar case,<sup>25</sup> the then Awradja Court of Addis Ababa had deviated in its judgment when it grossly did away with the application of the presumption. The judgment was later reversed by that of the High Court which was further affirmed by the Supreme Court.

The point of contention in the case was that the wife claimed a certain house built during the marriage to be the common property of the spouses and be partitioned accordingly. The husband in his part contended that, even though

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<sup>25</sup> W/ro Tiruwork Aseffa V. the heirs of Ato W/Mariyam Wube, Civ. App. No 613/93, Federal Supreme Court Case Report, Vol. 1, Addis Ababa, 2002, at 8-23.

the house was built during the marriage, it was his own personal property for it was exclusively built with money personally borrowed from a bank.

The Court then held that the house at issue was the personal property of the husband. In rendering its decision, the court reasoned that since the house was built with money personally borrowed by the husband from the bank and the wife, in her part, failed to prove the construction of the house through their "joint effort", the house would be the personal property of the husband.

The Court obviously erred in requiring the wife to produce evidence to prove the fact that the house was jointly constructed to be considered common which was in fact not required by the law. Once she asserts that the house, having been built during the marriage, was their common property, whatever money used for the acquisition of the house, the presumption of the law operates in her favor. She has no burden to adduce evidence and prove the assertion. The court went astray and made a quest for the existence of joint effort to determine the character of the property. The absence of joint effort of the spouses has no bearing on the application of the presumption. Nowhere provided in our law is such a requirement of joint effort for the operation of the presumption.

In the same case under scrutiny, the court also overlooked the operation of the presumption as regards household furniture. Amazingly enough, the court unreasonably urged the wife to adduce evidence and show the community of some of the household furniture denied by the husband. In so doing, the court left no room for the application of the fundamental presumption of the law and shifted the onus of proof wrongly.

Likewise, in a certain case,<sup>26</sup> a similar fundamental error was committed by the High Court in determining the character of a certain car. The car was acquired by the spouses during their marriage but it was registered in the name of the husband. In the case, despite the persistent assertion of the wife that the car was commonly owned, the court gave a judgment that it would be the personal asset of the husband. The court simply based its decision on the fact that the registration of common property in the name of the spouse would suffice to prove the personal ownership of the car.

Such a decision of the Court is against the basic presumption of common property which stands operative notwithstanding the registration of the property in the name of the spouse claiming it to be personal.<sup>27</sup> Registration unlike in property law, it seems, has a relegated effect in family law with regard to proof of ownership of marital asset between the spouses. Registration alone is not decisive to exclude the operation of the presumption. In this case, too, for house hold furniture the court insisted on the production of evidence by the wife to prove her claim of common property.

It must be noted that all the preceding cases indicate the practice prior to the enactment of the Revised Federal Family Code and the Oromia Family Code. Even if they cannot evidence the current practice, which is pragmatically more relevant, their inclusion in this article is however important to indicate the trend and shade a light on the current *status quo* as there is no substantial difference in the legal principles *ante* and *post* the Revised Family Code. The

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<sup>26</sup> *Id.*, Supreme Court, Civ. App, No. 541/69, at 73-76.

<sup>27</sup> Art 63 (1) of the Revised Family Code expressly provides that unless the spouse proves the sole ownership of the property, it shall be deemed to be common property even if registered in his/her name.

following are more recent cases that highlight the current practice of some courts.

Accordingly, in one recent case,<sup>28</sup> the Oromia Regional High Court of Dandi affirmed a decision of Woreda Court that required the plaintiff-wife to adduce a sufficient evidence to substantiate her assertion of common property. To begin with a brief summary of the facts, involved in the case was a certain house allegedly built by the defendant-husband prior to the conclusion of the marriage with the plaintiff. The defendant argued that the house in issue was acquired before the marriage while he was in a marital bond with his former (now deceased) wife. In essence, he claimed that the house was his own personal property. On the other hand, the plaintiff argued that the house was repaired during their marriage and served as their common residential home. In other words, the plaintiff's argument was essentially based on the assertion that the subsequent improvement made to the property would change the house to a common property.

The Woreda Court decided that the property in issue was proved to be the personal property of the defendant. In its reasoning, the Court stated that the house so contested was a personal property as long as it was acquired before the marriage and no mention was made of its inclusion in the marriage contract for the second marriage. The ruling was affirmed upon appeal up until its remand as per Art.343 of the Civ.P.Code by the Oromia Regional Supreme Court in its cassation division.<sup>29</sup> It is quite clear that a property acquired prior to a marriage remains personal as long it is sufficiently proved to be so upon dissolution of the marriage. As such, there exists no error in the ultimate decision of the courts. Nevertheless, the important point here is

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<sup>28</sup> See Oromia Regional High Court, Civ.App,File No.26556/2001

<sup>29</sup> See Oromia Regional Supreme Court, Cass. File No.42922/2002.

the procedure it followed to reach its final decision. Procedurally, the flaw in the decision lies in the lower court's initial order of the plaintiff to prove the character of the property she claimed as common.

As can be noted from the case, the rulings of the courts apparently allude to the argument that the courts unreasonably required the plaintiff to prove the character of the property. This reflects the courts' neglect of the legal presumption of property which in effect relieves a person invoking it of the burden of proof. There is no burden of proof at all for a person relying on the presumption the existence of which shall be taken note of by the courts. The mere assertion made by the plaintiff was sufficient to trigger the operation of the presumption.<sup>30</sup> In contrast, the mere assertion by the defendant in indicating the time of acquisition of the property does not suffice to automatically characterize the property as personal property especially when the existence of substantial improvement is indicated. Nor does the non-inclusion of the property in the marriage contract conclusively warrant the personal nature of the property so claimed. There is no automatic characterization of personal property merely due its acquisition prior to a marriage and its non-inclusion in the marriage contract. Such an inference as was drawn by the courts is a misconstruction of the fundamental principle underlying the community of marital property. In particular, the case at hand indicates the issues overlooked by the courts in disregard of the appropriate weight inherent in the legal presumption.<sup>31</sup> The personal character of the disputed property has to be proved primarily by the interested spouse even if

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<sup>30</sup> As a rule of evidence, this is often the case with all legal presumptions the operation of which shall be permitted by courts without any further evidence. In other words, courts should take judicial notice of the existence and application of a legal presumption.

<sup>31</sup> Both Arts. 63(1) and 79(1) of the Revised and the Oromia Family Codes explicitly stipulates that any property shall be presumed to be common property. This is therefore applicable for all properties that may be claimed as personal properties on any grounds.

it was acquired before a marriage. The spouse who claims the property as common is required to adduce evidence in support of its assertion only after the legal presumption initially invoked is adequately rebutted.

In another case,<sup>32</sup> the Federal First Instance Court deviated from the unfettered rules of presumption of common property in ruling on the character of a house disputed between spouses during the dissolution of their marriage. The essence of the argument and the evidence submitted by the husband, in support of his allegation of personal property, were solely based on the assertion that the said property was acquired before the marriage. The court eventually determined the character of the contested property as personal irrespective of the wife's alleged acquisition of the property during marriage. Nevertheless, the decision by the court was subsequently reversed by the appellate court whose decision was ultimately upheld by the Federal Supreme Court in its Cassation division. The decision of the Federal High Court was based on the house register maintained by the relevant authority of the city administration. The evidence so examined was found to demonstrate the acquisition of the house after conclusion of the marriage.

Therefore, the point worth noting from the case at hand is the insufficiency of the evidence relied on by the lower court to overrule the application of the solid presumption of common property. This is clearly evident from the subsequent decision of the higher courts on the basis of the evidence disregarded by the lower court. It is also contrary to the rule of evidence for the court to reject the requested production and admissibility of the relevant evidence in possession of the appropriate administrative authority. The relevance of the immovable register (administrative documents) ought to

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<sup>32</sup> See *Argaw Abache v. Aster Abegaz's heirs*, Cass. File No. 39408/2002, Federal Supreme Court Cassation Decisions, Vol.10, 2003, p.4.



have been taken note of by the court. That is within the mandate of the court to take judicial notice of the public document. Thus, the court's disregard of the evidential significance of the document and its reliance on the wrong evidence undermines the purpose and importance of the basic legal presumption of common property.

A similar disregard of the legal presumption is also evident from a case<sup>33</sup> originating from Amhara regional courts. The disputed property was a sum of money paid to the respondent-husband in the form of rehabilitative subsidy up on his return from Brundi after a military service for the time he spent as a member of the peace-keeping force. It was not disputed that the money was acquired during the continuance of the marriage between the petitioner and the respondent. However, up on dissolution of the marriage and the consequent partition of the existing common property, the said money was claimed by the respondent as his own personal property while the same was claimed by the applicant as their common property.

In their decisions, the Woreda and high courts had determined the character of the disputed property as the common property of the spouses while the Regional Supreme Court ruled otherwise characterizing it as the respondent's personal property. In its reasoning, the Supreme Court stated that the property in issue could not be characterized as a common property as long as it was not acquired through the joint contribution of the spouses.

In analyzing the case at hand, it is important to mention that the relevant provision of the Regional Family Code, i.e., Art.73, is a verbatim copy of Art.62(1) and 78(1) of the Revised Family Code and the Oromia Family

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<sup>33</sup> See *W/o Addis Alem v. Corp. Akililu Abebe*, Cass. File No.31430/2000, Federal Supreme Court Cassation Decisions, Vol.5, 2001, at 237-39.

Code respectively. It is clear from the reading of the aforementioned provisions that none of them is indicative of the Court's "joint contribution or effort" as a necessary requirement for the existence of a common property. It is rather explicitly articulated by the provisions that a property acquired through the *personal effort* of the respective spouses shall remain their common property. The only overriding requirement for the existence of the common property and the legal presumption is the continuance of a valid marriage during the acquisition of the property.<sup>34</sup> The general assumption that the spouses would contribute to their common pecuniary interests does not necessarily entail a legal requirement for joint contribution. There is no need to resort to an interpretation and import a non-existent requirement into a clear and unambiguous legal provision. Thus, the Court's quest for a joint contribution in effect displaced the legal presumption of common property and excluded its proper application. This was well noted by the Federal Supreme Court, which consequently reversed the decision and characterized the disputed property as a common property.

Moreover, in a very recent case,<sup>35</sup> the Federal Supreme Court has explicitly limited the scope of the legal presumption to only property acquired during the spouses' in a marriage. In highlighting the salient facts of the case, the facts can be summarized as follows. The case involved a claim over a certain house, the character of which was disputed between an ex-wife (the

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<sup>34</sup> Admittedly, the conclusion of a marriage is not a license for a common property. Nonetheless, the existence of a common property necessarily depends on the existence of a valid marriage (save the case of irregular union). This implies that once a marriage comes into existence a property acquired by the *personal or joint efforts* of the spouses within the marriage shall remain a common property of the spouses. It should be noted that the law clearly provides for two possible alternatives for the acquisition of a common property. Despite the arguments of some writers in support of the court's stand, there is no legal ground for limiting the alternatives only to a "joint effort" or "contribution" requirement merely based on a general assumption.

<sup>35</sup> See *W/o Seniya Sheh Temam v. W/o Belaynesh Matebo & Ato Sherif Ahmed*, Cass. File No.43988/2003, Federal Supreme Court Cassation Decisions, Vol. 11, at 107-109.

respondent) and her ex-husband with his wife (the petitioner). The disputed house, which was claimed by both wives as their respective common property with the husband, was constructed in the period between 1990-1994. As can be learnt from the case, the marriage between the respondent with the husband was in existence between 1988-1994 while the marriage with the petitioner came into existence since 1980 and was still intact throughout the period of the suit. The co-habitation between the husband and the respondent lasted only for the first two years following their marriage.

The decision, which was initially rendered by the *Mesqa* Woreda Court of Gurage Zone, was successively affirmed by the appellate court and the Regional Supreme Court. The Woreda court ruled the disputed property as the common property of the husband and the respondent. The court rejected the claim of the petitioner (the third party intervener at the court) reasoning that she failed to prove the time and manner of the acquisition of holding right over the land used for construction. More importantly, the court also stated that the petitioner did not adduce a written evidence registered with the court, in which the property was indicated as a common property.

In contrast to the regional courts, the Federal Supreme Court reversed the decision of the lower courts. In support of its ruling, the Court stated that the application of the legal presumption in favor of the respondent contradicted the overall purpose of the legal regime for common property and the notion of private property under Art.40(1) of the FDRE Constitution. The Court's reasoning was solely based on the requirement of co-habitation and its presumed implication for common property. The Court emphasized that this would hold true as the disputed property was acquired during the time when the respondent deserted the co-habitation despite the legal existence of the marriage.

Despite the origin of the case from a regional state other than Oromia, a brief analysis of the salient issues is worth considering as the practice in Oromia regional courts is not entirely devoid of some recurring flaws. A closer scrutiny of the decisions of the regional courts and the Federal Supreme Court in the case at hand reveals the flaws in the rulings and the underpinning reasoning therein. As can be noted from the rulings of the regional courts, the courts clearly deviated from the similar legal presumption enshrined in the relevant law<sup>36</sup> in shifting burden of proof to the petitioner. It is a fundamental rule of evidence and explicitly stated legal principle that the petitioner who asserted the existence of a common property would bear no burden of proof concerning the time and manner of its acquisition. Surprisingly enough, the courts tried in futility to inquire into the rights pertaining to the land for the construction, which is obviously under communal ownership over which individuals acquire only possessory right. It suffices that the petitioner simply asserts the existence of the property in the marital union and its presumed character as per the legal presumption of common property. It is up to the contending party to discharge the burden of rebutting the outstanding legal presumption set in operation. The courts' gross neglect of the legal presumption is at odds with the overall spirit and purpose of common property.

Moreover, it is not necessary for the spouses to obtain any judicial declaration or make any agreement to confirm the character of a common property acquired during marriage. By providing for a mandatory legal presumption, the law itself makes further juridical acts unnecessary for the determination of the character of the property embraced by the presumption.

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<sup>36</sup> See Art.72(1) of the SNNP Family Code of the Southern Nations, Nationalities and Peoples Regional State, Family Code Proclamation No.75/2004, Debub Negarit Gazeta Extraordinary Issue No. 1/2004 [hereinafter, Family Code of SNNP].

Even if there do exist such evidences, their existence will offer no legal significance other than a mere confirmation of a matter regulated by the law. In short, the courts' inquiry for a written evidence registered with a court has no legal basis at all.

As regards the ruling of the Federal Supreme Court, the Court apparently endeavored to do away with the flaws committed by the regional courts. It rightly decided that the petitioner was entitled to share the common property with her husband without the need for the requested proofs. Nevertheless, the Court replaced the flaws in the previous decisions with another flaws of its own. This is evident from its ruling and reasoning whereby the Court denied the respondent the right to benefit from the legal presumption of common property. It appears fair and simple that a person who did not contribute to the labor and efforts invested in the acquired property should not free ride on the economic benefits derived thereof. Yet, this implicitly imports the notion of joint effort or contribution as a pre-condition for the ultimate share in the property. This appears to be the overriding presumption of the Court in seeking for the contribution, if any. No matter how fair this may appear, there does exist no such a requirement under the relevant provisions pertaining to the legal presumption. There is no "joint contribution or joint effort" requirement as such in the law to determine the character of a property and the share therein. Indeed, it the presumption of joint contribution is meant to encourage the existence of common property between spouses. However, this general assumption should not override the explicit rules of the law. It is too far away to equate the philosophy underpinning business partnership with the purpose behind marital property. Despite the general similarity with regard to common economic interests, the purpose of the latter goes far beyond ensuring pecuniary interests. As it is

partly based on the spouses' duty to assist each other and contribute to their common expenses, which are some of the several legal effects of a marriage, the existence of the legal presumption would also reinforce the integrity of personal relations between the spouses. The provision of the Constitution for private property is too general to justify the misconstruction by the Court. It only provide for a general principle to acquire private property. This does not preclude a spouse from sharing a common property acquired as a result of the personal effort of a spouse as long as the property is acquired during a marriage. The preclusion within the context of marital property would have a legal basis had the fabricated "*joint effort*" requirement of the courts been inserted into the existing relevant provisions.

Furthermore, the law does not restrict the application of the legal presumption only to a property obtained during a continuous co-habitation. Nor does the law equate the consequence of desertion of a co-habitation with that of a formal dissolution of marriage. As long as the marriage is intact between the spouses, its legal effects perpetuate to exist. The marriage can be deprived of its legal effects for non-cohabitation if the legislature so desires. The law has already regulated the consequences of legal relationship due to non-cohabitation.<sup>37</sup> It is not within the mandate of the courts to fictitiously construe to limit the scope of application in search of fairness. Indeed, it is beyond the scope of this article to grapple with legal consequence of the precedent set by the Federal Supreme Court. It suffices to mention that a decision that contradicts with the very scope of the Court's judicial power as set by the FDRE Constitution does not have any legal effect despite the legal force it purports to have based on a misconstruction of the legal provisions.

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<sup>37</sup> The direct consequence of non-cohabitation in particular following an agreement for separation is the presumed non-existence of sexual relation between the spouses in an action of disowning paternity. See Art. 186 of the Oromia Family Code.

Therefore, the foregoing cases as a whole vividly indicate the trends in the practice of the courts. As can be noted from the cases, the practice of the courts sometimes, if not often, derogate completely from the law in determining personal and common property during dissolution of marriage. In particular, the important rules enshrined in the cardinal presumption of common property are grossly overlooked. Serious legal errors are committed in determining personal and common property on the basis of the presumption.

### ***1.2.2. Proof of Personal Property***

It has been pointed out that the determination of personal and common property by operation of the law shall be made primarily on the basis of the presumption. This cardinal presumption of common property would only be rebutted by a preponderance of evidence.

Thus, it is absolutely necessary that a claim to personal property has to be substantiated sufficiently with the required proof. That means, proof is a condition for personal property and the onus of the proof is thus on the spouse insisting on the assertion of the sole ownership of a given property. Therefore, only a successful proof made by the spouse so claiming would determine the character of the property as a personal one.

Usually, a proof of personal property may pragmatically be a cumbersome task for the spouse under duty to adduce sufficient evidence in support of his/her claim. Often, relevant evidence may not be readily available. Besides, it strictly requires the court's meticulous consideration of the evidence adduced as proof of personal property. There may also arise complicated

issues necessitating cautious scrutiny by the court in determining the personal character of the property.

Before an attempt is made to bring into light the practice, the writer opts to highlight some major approaches followed in the course of the proof. Accordingly, there are some approaches on the basis of which proof of personal property is to be made. A closer scrutiny of the relevant provisions of our law indicates that the approaches, as followed by some foreign legal systems, are more or less enshrined in our law with certain limitations. Herein under are some of the selected approaches conforming to those embodied in our legal system?

#### **i. Proof on the Basis of Tracing**

As has been mentioned with special emphasis in this article, it is a general presumption that property acquired during marriage constitutes common property. The source of the property so acquired may however vary. In such a case, one method of rebutting the general presumption is to trace the acquisition to personal property based on its source. Thus, “tracing” is the process of determining the character of the property by identifying the source from which it is derived.<sup>38</sup> The approach is based on the notion that a property acquired subsequently retains the character of its source. For instance, if the property in question was acquired in exchange for entirely personal property during marriage, it will be personal property up on the demonstration of such a fact.

In this example, the approach as employed in foreign legal system merely refers back to the character of the source of the property acquired later.

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<sup>38</sup> Menell & Brykoff, *supra* note 17, p138.



However, under our law, the significance of the application of such a method to rebut the presumption in this instance is often incumbent upon the decisive declaration of the court approving the property so acquired to be personal. A mere indication of the source of a property through tracing alone is of no significance to determine the personal character of the property particularly when the source of the property is personal property.<sup>39</sup> This is one of its limitations when employed under our law. Nevertheless, where the property in question is acquired in exchange for a common property, the property would unconditionally be common. This also seems somehow to be superfluous for the property, even without tracing, shall automatically be common. Anyways, the spouse asserting that a certain property is his/ her own personal property can rebut the presumption by adducing evidence tracing to the source of the property. This approach can also be used to obtain a judicial declaration of the personal character of a certain property. The spouse requesting the characterization shall prove the source of the property by tracing. Thus, it is significant in the determination of personal property as it serves as a mode of proof required for the initial designation of the property. Moreover, its importance should not be underestimated as the approach can be used to supplement the other modes of proof explained below.

## **ii. Proof on the Basis of Time of Acquisition**

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<sup>39</sup> This can be noted from Art. 58 of Revised Family Code that a property derived from personal property would be personal only when it is so designated by the court (emphasis added). That is, declaration to that effect is a necessary condition.

In case the source of the property in question cannot successfully be traced or even if traced, where the approach proves to be of no help in determining the character of the property, then its time of acquisition is material. On the basis of this second approach, property acquired prior to marriage would be personal one up on production of evidence showing such time.<sup>40</sup> Therefore, during dissolution of a marriage, if any dispute arises between the spouses as to the character of a certain property, the determination would be made on the basis of the time of its acquisition.

The approach may not, however, function where there existed a valid agreement that had transmuted the property acquired prior to marriage into common property.<sup>41</sup> Thus, the mere reliance of the spouses on the approach may prove to be of no use where the other contesting spouse successfully produces the agreement showing the community of the property.

In connection with the approach at hand, despite its apparent simplicity, some delicate issues deserving special emphasis may crop up in determining the character of a property. Unavoidably, problems arise in case the process of acquisition overlaps both pre-and post-marriage period.<sup>42</sup> For example, what is the exact point at which an asset is said to have been acquired when there is a series of steps in the acquisition? The acquisition of a property is usually the net effect of a series of acts over a period of time. One may thus

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<sup>40</sup> Even if the property acquired prior to marriage shall remain personal property as per Art. 57 of Revised Family Code, proof being necessary to retake such property, the legal presumption of common property would be rebutted only when such time of acquisition is proved. *See also* Biruk H/Eyesus v. Fanaye Abebe, *supra* note 7, p.3.

<sup>41</sup> *Id.*

<sup>42</sup> This is not a mere hypothetical assumption. Time has shown that this has been practically the case in Ethiopia. Recently, the Federal Courts of Addis Ababa have been seized of a case evidencing the scenario. *See, fn.44, infra.*

hardly point out the exact time of acquisition to determine the character of the property.

For such a perplex issue, some foreign legal systems apply the theory of “*inception of title*” that fixes the character of the property at the time when a property interest is acquired.<sup>43</sup> The theory usually characterizes property at the point in time when it expands from a “*mere expectancy*” to a property interest which may vary depending on the nature of the property.<sup>44</sup> In this regard, it may be important to envisage instances like when property is acquired through prescription or adverse possession or like the case of insurance policy for which the process of acquisition may overlap both pre- and post-marriage period.

For example, an insurance policy purchased by the husband on his life and in which no one was designated as a beneficiary would be personal property of the spouse under the inception of right test up on its purchase through the first payment made prior to marriage despite the subsequent payments made during marriage.<sup>45</sup> In this regard, Art.659 of the Commercial Code of Ethiopia provides that the insurance policy shall come into force on the day when the policy is signed unless otherwise expressly specified to the effect that the policy shall only come into force after the first premium has been paid. Thus, the characteristic of the inception of title theory is that the

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<sup>43</sup> Menell & Brykoff, *supra* note 17, p144. (This classic theory is followed in Louisiana, Texas and New Mexico.)

<sup>44</sup> *Id.* This approach has been apparently adopted by the Federal Supreme Court in the Endalkachew v. Bizualem, in which the Court held the view that the acquisition of the property to be acquired through a draw is said to have occurred only when the draw for the property is won instead of the time when registration is made for the draw. See Endalkachew Zeleke v. Bizualem Mengistu, Cass. File No.51893/2002, Federal Supreme Court Cassation Decisions, Vol.10, pp.83-84.

<sup>45</sup> See Menell & Brykoff, *supra* note 17, p149.

character of a property remains that which it was at the inception of right unless positively changed by operation of law or act of the parties such as transmutation agreement or gift.

At this juncture, based on the foregoing example, the writer desires to draw the attention of the reader to contemplate the case where the insurance policy with no designated beneficiary is entered into during marriage. From a quest to this end in the cumulative reading of Art.705 and 706 (3) of our Commercial Code, it could be noted that where no beneficiary has been specified in a life insurance (whether the policy is entered into prior to or after the marriage), the capital to be paid by the insurer to the subscriber-spouse shall be regarded as the personal property of that spouse.

One may wonder at this instance whether there is an inconsistency between the aforecited provisions of the Code and Art. 62(2) of the Revised Family Code. In particular, the possible inconsistency is worth considering where the insurance policy is entered into during marriage. The writer's opinion is in the affirmative.

The Commercial Code, which specifically deals with life insurance as per the aforementioned provisions, characterizes the sum obtained thereof as the personal property of the subscriber-spouse, whereas the Family Code generally characterizes "*all property*" acquired onerously during marriage as common property unless declared personal as per Art.58(2) of the Code. In such a case, the apparent inconsistency can be removed by the operation of the rule of interpretation. As such, the relevant provisions of the Commercial Code arguably special to prevail over that of the Family Codes that are phrased in general terms. There is a strong reason to support this interpretation as the provision of the Commercial Code specifically

characterizes the insurance capital as a personal property. The Family Codes that generally regulate and determine the character of pecuniary interests have made no mention of such a property nor does it indicate its possible character.

Nevertheless, the recent cassation decision of the Federal Supreme Court has triggered the same issue that has been disposed of differently.<sup>46</sup> The Court ruled that the insurance sum due on a life insurance shall be partitioned between the subscriber's spouse and his/her heirs as long as the beneficiary was not specified in the insurance policy. In its reasoning, the Court noted the inconsistency between the two codes. Yet, it opted for positive rule of interpretation instead of the *lex speciale derogate lex generale* rule of interpretation as it found both provisions to be of similar legal status, i.e., special legal provisions. In effect, the court endeavored to strike a balance between the interests of the persons entitled to claim under the respective codes.

It has to be however noted that there is no legal basis to warrant the application of the approach despite its apparent fairness as both provisions are blatantly inconsistent to be read together and be given equally effective application. It is rather a case where either of the two shall be opted for in disregard of the other. The Court's attempt to fictitiously fill in the gap seems to be beyond the scope of its judicial mandate and slips into the realm of legislative power. In view of the earlier argument based on the interpretation of the provisions of the respective Codes, this writer holds a different position for the reasons made above.

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<sup>46</sup> See Genet Belay v. Fenet Teklu, Cass. File No. 44561/2002, Federal Supreme Court Cassation Decisions, Vol.10, 2003, pp 88-94.

In a nutshell, despite some complicated issues, the proof of personal property may be made on the basis of the date of its acquisition.

### **iii. Proof on the Basis of the Manner of Acquisition**

The manner of acquisition, like the foregoing ones, may also be used as a ground of proof of personal property. On this ground, the spouse claiming the property as personal one may prove it by showing unequivocally the manner in which the property was originally acquired. This approach may be of a great importance as far as the property is acquired gratuitously.<sup>47</sup>

In this respect, the spouse may rebut the presumption of common property showing that the property in question was acquired through inheritance or donation solely made in his/her favor. To this end, the spouse could produce the document such as the will or the act (instrument) of donation evidencing the gratuitous acquisition of the property. But, in case the spouse fails to prove these facts persuasively to the satisfaction of the court, the legal presumption remains intact to operate in favor of common property.

### **iv. Proof on the Basis of Declaration by the Court**

It has been expressly provided under Arts. 58(1) & 62(2) of the Revised Family Code that all property onerously acquired during marriage shall be the personal property of the spouse so acquiring it, subject to the declaration to be made to that effect by the court as per Art. 58(2) of the Code. That is, the declaration of the property as personal one by the court would eventually be used as a ground to rebut the presumption of common property during

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<sup>47</sup> *Id.* at 146. Because when the property is acquired onerously, from the very beginning, it shall be common property as per Art. 58(1) & 62(2) of the Revised Family Code.

dissolution of marriage where the spouse so claiming could simply produce evidence showing the declaration.

The declaration has an overriding importance as compared to those discussed herein above in that proof on the basis of the declaration is so simple as far as the declaration is made. The distinction between tracing and declaration by the court should be well noted. It is true that the judicial characterization of a property as personal involves tracing its source to onerous acquisition from a preexisting personal property. By contrast, proof on the basis of tracing does not necessarily depend on the existence of court's declaration. These exceptional cases are however few. A typical instance may be the case of the personal characterization of money procured in the form of damage due to a bodily injury sustained by one of the spouses.<sup>48</sup> Proof by tracing the source of the money would enable the court to characterize it as a personal property upon dissolution of the marriage. This exceptional scenario makes the approach still relevant without the need for a judicial declaration. Indeed, where there exists a court's declaration, a resort to the aforementioned approaches would be of no significance as such for the demonstration of the declaration itself suffices to rebut the presumption.

It must further be noted that such declaration should be made during the continuance of the marriage. Because when the marriage is terminated, the issue would normally be the determination of personal and common property in consequence of the liquidation of pecuniary relations rather than the declaration required under Art. 58(2) of the Revised Family Code. With this point in mind, a question may be posed as to whether separation of the

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<sup>48</sup> See Civil Code, Art.2144.

spouses without dissolution of the marriage has the same effect regarding the declaration.

In this instance, as opposed to the formal dissolution, the separation of the spouses does not prohibit the spouses from requesting the court for the declaration. Surprisingly, the Supreme Court, in one case,<sup>49</sup> held an erroneous view that Art. 648(2) of the Civil Code, which is a corresponding provision to Art. 58(2) of the Revised Family Code, is inapplicable to the spouses when they are living apart. There is nothing in the law suggestive of such a restrictive interpretation of the provision. It is totally against the purpose of the law to legally equate the separation of the spouses with the termination of their marriage. In fact, the law accords recognition to their right to agree to live separately that the way the court construed the provision lacks legal foundation.

An important point worthy of note is also that the scope of art 58(2) in accordance with which the declaration may be made by the court is limited only to *property acquired by onerous title*( emphasis added).<sup>50</sup> Thus, for a proof of a certain property acquired gratuitously, such as inheritance and donation, there is no instance to rely on the ground of the declaration since no declaration would totally exist for the property so acquired.

Generally, the proof of a personal property acquired during marriage may easily be made by showing the fact that the property has been declared personal by the court. But where there is no declaration to that effect by the

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<sup>49</sup>See Supreme Court. Civ. App. No. 2133/78 (unpublished) .

<sup>50</sup> Though this could explicitly be noted from the reading of Art. 58 & 62(2) of the Revised Family Code, in practice, the courts however seem to extend the scope of the provision to property acquired gratuitously as well. In the case under the preceding footnote, the then Supreme Court appears to have entertained the erroneous view that donations fall in the scope of Art. 648(2) of the Civil Code.



court the property shall *ipso jure* be part of the common property unless proved to the contrary on the basis of other grounds. Moreover, in the course of making the declaration itself, the court must be furnished with convincing evidence showing that the acquisition was made with onerous title of a personal nature. Inability to adduce the required evidence to buttress the request entails its rejection and consequently reinforces the application of the presumption.

As a recent case<sup>51</sup> indicates, there seems that disparity however exists among courts and judges in their interpretation of the effect and purpose of the required declaration. In the case, the Federal First Instance Court and Federal Supreme Court in Addis Ababa ruled contrary to the spirit and purpose of the required declaration. The disputed house purchased during marriage by the money obtained from the sale of a personal property acquired prior to the marriage was characterized as the personal property of the respondent-wife. Nevertheless, both courts followed slightly different lines of reasoning. The lower court's reasoning was essentially based on the fact that the property was exclusively acquired from the money derived from the sale of the pre-existing personal property. Moreover, the court required the applicant wife to prove the acquisition of the property through his personal effort during marriage. In effect, the court emphasized the source of the disputed property instead of the mandatory requirement of declaration by the court. On the other hand, the Supreme Court stated in its reasoning that the required declaration by the court to confirm the personal character of the disputed property would be applicable only as regards a dispute between the spouses and third party. In other words, the declaration is necessary only to safeguard the interest of third party when the character of the property is disputed. This

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<sup>51</sup> Gezahagn Dilnesaw v. Tewabech Demeke, Cass. File No. 37275/2001, Federal Supreme Court Cassation Decisions, Vol. 8, 2003, pp237-240.

is clearly against the very purpose of the required declaration which is basically designed to regulate the pecuniary interests of the spouses between themselves.

Even the decision of the Federal Supreme Court in its cassation division was subject to a split in opinions among the judges. The dissenting opinion was in support of the personal character of the property as long as there was no possible blend between the disputed property and other common property. In the opinion of the dissenting judge, the purpose of the declaration by the court is to avoid the possible intermingle between the properties. In other words, the declaration is unnecessary as long as intermingling is unlikely to arise. It is true that the declaration can be of an importance to retake a personal property from a common property. Nonetheless, this is not the primary purpose of the required declaration. The overriding purpose seems to avoid the possible conflict of interests between the spouses by confirming the character of the property as it undergoes changes affecting its character.

The other method employed, for instance, under French law to establish the character of the property is *property title*. Under its family law, in particular, for immovable's, property titles usually prove the origin of the property either as personal or common property.<sup>52</sup> This is apparently not the case in Ethiopia. Even if the property title is issued in the name of a spouse, the property is presumed to be common as long as it is acquired during the continuance of the marriage.

Therefore, in all the foregoing approaches, the spouse claiming for a personal property during dissolution of marriage is duty bound to adduce sufficient evidence to buttress her/his allegation. The approaches may be

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<sup>52</sup> Planiol and Ripert, *supra* note 4, p 267.

used separately or jointly depending on the nature of the case. In nutshell, for a proof of personal property, there are several grounds under our law on which a claim for personal property may be made.<sup>53</sup> Those grounds are, in one way or the other, embodied in the approaches comprehensively illustrated above and need not be reiterated further.

For any of the assertion made on any of those grounds, it is necessary that the claim must be substantiated with sufficient proof. The evidence required to substantiate such a claim may not always be of the same sort as the evidence has to be determined in light of the grounds for the allegation having due regard to the relevant provisions of the law.

In an attempt to bring into light an instance of the practice concerning the issue of determination, the writer has observed a certain case,<sup>54</sup> in which the then Awradja Court disregarded the stringent requirement of proof in relation to a claim for personal property. In the case, the husband alleged that a certain house constructed during marriage was his personal property. He claimed the house as his own arguing that it was constructed by him alone with his own money personally borrowed from a bank the debt of which was later satisfied by the proceeds from the sale of his personal property acquired prior to marriage.

In support of his assertion, he produced some documents showing merely the sale of his personal property but which does not totally indicate the fact that the proceeds thereof was really used to satisfy the debt. Surprisingly, the

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<sup>53</sup> The grounds are enshrined in Arts. 57 & 58 of the Revised Family Code/Arts. 73 & 74 of Oromia Family Code.

<sup>54</sup> W/ro Tiruwork Aseffa v. the heirs of Ato W/Mariyam Wube, Civ. App. No 613/93, Federal Supreme Court Case Report, Vol. 1, Addis Ababa, 2002, p 8-23.

Court relying on such insufficient evidence decided that the house was the personal property of the spouse. In reaching the decision, the court was fully aware of the fact that there existed no designation of such property acquired onerously during marriage to be personal one subsequent to its acquisition. Even the documents produced by the husband do not warrant the conclusion that the house was ultimately acquired with his own money. There existed no tenuous nexus between the documents evidencing merely the sale of his personal property and the acquisition of the property in dispute. It is possible that the alleged proceeds might have been used for other purpose rather than for payment of the debt.

Thus, in the writer's view, the purported evidence adduced was not sufficient to rebut the presumption of the common property at all. The failure to adduce the required proof should clearly entail the application of the presumption.

Similarly, in another case cited in the preceding section,<sup>55</sup> the respondent-husband asserted that a certain house was built with money received as a personal gift from one Miss Mattern. He thus claimed the house as his personal property even if it was built during marriage. To this end, he produced as a proof a mere letter indicating that a certain sum of money was sent from Switzerland in the name of the respondent. The Supreme Court was then erroneously satisfied with the letter as a proof of an act of donation consisting of the money.

In this case, one may rightly question the sufficiency of the bare letter as a proof of an act of donation. The mere letter *per se*, in the absence of any specification, does not necessarily constitute an act of donation for the mere

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<sup>55</sup> See *Bruktawit Gebru V. Alebachew Tiruneh*, Supreme Court, and Civ. App. No. 2133/78 (unpublished).

fact that a certain sum is specified therein. The sum could have been sent in consideration of something done by the respondent for Miss Mattern, the fact which the court failed to contemplate in the case under scrutiny.

Seemingly, the Court also went further and ventured to conclude that the purported “*donated sum*” would be considered as if it was exclusively granted to the respondent husband when made during the period of separation. This seems to be a clear misinterpretation of Art. 652(3) of the Civil Code which has been reiterated in verbatim under Art.62(3) of the Revised Family Code. As per the provisions, property donated jointly to the two spouses shall be common, unless otherwise stipulated in the act of donation.

Even assuming the letter in issue as constituting an act of donation during marriage in which there existed no specification (as it could be noted from the record of the case), the so-called donated sum shall be common in the absence of stipulation to the contrary. A mere separation of the spouses, when the donation was made, would not render the provision inapplicable in so far as the marriage was not legally terminated.

In general, in the case at hand, the respondent did not discharge his burden of proof as required by the law. The court also misconstrued the provisions of the law. The court gave credence to the respondent’s allegation quite liberally to the neglect of the stringent demand for proof of personal property.

Moreover, all the recent cases analyzed above to demonstrate the misapplication of the legal presumption are all relevant here to demonstrate the judicial practice with regard to the required proof of personal property.

Though reiterating the cases in their entirety here would simply amount to unnecessary redundancy, it suffices to draw the conclusion that the proof required for personal property would not be met as long as the legal presumption is misconstrued. All those cases in which the courts shifted the burden of proof, on various unwarranted grounds, up onto the spouse claiming for common property imply courts' failure to give due weight to the presumption.

This can possibly be noted from cases involving two major scenarios. Accordingly, the first instance is where the courts had initially denied the claimant the benefits due to him/her under the legal presumption of common property. This is evident from cases where the courts simply rejected the claims for common property from the very outset for want of evidence supporting the claims invoked. In this regard, the courts in effect avoided the subsequent burden of proof to be discharged by the other spouse challenging the assertion. This amounts to a gross neglect of the due consideration that should have been given to the stringent requirement of proof for personal property.

The second scenario evidencing the deviating practice of the courts is a case where courts accepted the claims of a spouse asserting personal property without sufficient evidence. In this regard, the Federal Supreme Court correctly noted in the *Argaw v. the heirs* case that the Federal First Instance Court of Addis Ababa had misconstrued the required degree of proof for personal property.<sup>56</sup> In particular, the decision of the Federal Supreme Court, in affirming the ruling of Federal High Court revealed the lower court's failure to consider the available immovable register in possession of the

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<sup>56</sup> See *Argaw v. the heirs*, *supra* note 32.

concerned authority despite the persistent request of the petitioner claiming the property as common property. The appellate courts correctly characterized the disputed house as a common property based on the evidence ignored by the lower court. As indicated above, the relevant documentary evidence was found to indicate the acquisition of the property during the marriage. Hence, even if there is no fixed degree of proof explicitly dictated by the law, it is a general and settled rule of evidence in civil suits that the courts should not simply be satisfied with an assertion without concrete evidence. Such a practice would undermine the very purpose of the fundamental legal presumption which can only be rebutted by a sufficient evidence.

The foregoing analysis of a few cases, therefore, indicate clearly the existence of disparity between the practice of the courts and the provisions of the law in determining personal and common property. Sometimes, the courts do not fully apply the cardinal presumption of common property. Furthermore, the strict requirement of proof in relation to a claim to personal property is often disregarded. It is also not unusual to find the misinterpretation of the provisions of the law in the course of the determination.<sup>57</sup>

## **II. DETERMINATION BY WHOM MADE**

The second major prong of the issue of the determination concerns the appropriate tribunal that is competent to decide on the issue. As such, this

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<sup>57</sup> Even though the author could not readily find recent cases, this trend is still apparently the case in some courts, both at federal and regional levels. In one pending case before Oromia regional courts of different levels, the author personally witnessed such a practice.

section would specifically indicate the power of the court and the family arbitrators under the Revised and Oromia Family Code on the issue of determining personal and common property, particularly during dissolution of marriage.

It should thus be noted at this juncture that the scope of this article does not go beyond indicating the specific power of the tribunals over the determination. It does not deal with the whole power of the tribunals over the entire pecuniary relations between the spouses apart from indicating their power in determining personal and common property usually at the end of the marriage.

## ***2.1.The Power of the Family Arbitrators and the Court under the Revised Family Code***

### ***2.1.1. The Adjudicatory Power of the Family Arbitrators***

In general, as opposed to their power under the 1960 Civil Code, the power of the family arbitrators over divorce and its effects under the Revised Family Code has been greatly reduced only to limited instances. For example, the former power of the family arbitrators to entertain a petition and pronounce a divorce has been totally done away with in favor of the court.<sup>58</sup> The court may merely direct the spouses to settle their dispute through arbitrators of their choice who shall make reports to the court regarding the outcome of their attempt to reconcile the spouses.

Following the dissolution of marriage by divorce, upon the refusal of the spouses to agree on the conditions thereof, the family arbitrators may also be authorized by the court to decide on the conditions of divorce which is in fact

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<sup>58</sup> As per Art. 117 of the Code, only the court is competent to decide on divorce, decide or approve the effects of divorce. *See also*, Art.98 of Oromia Family Code.



subject to the approval of such court. Hence, the power of the family arbitrators to determine personal and common property of the spouses as one of the conditions of the divorce depends *ipso jure* on the authorization from the court.

Moreover, they have been denied of their former power to designate a certain item of property as a personal property of the spouse making the request. The power has been vested on the court which had formerly no such power to designate the property.

Therefore, from the foregoing overview, it is clear that the former immense power of the family arbitrators under the previous Code in settling pecuniary disputes during dissolution of marriage has been shifted to the court. The reason behind such a gross shift of power may be attributed to the ineffectiveness of the institution as it was supposed to be.

### ***2.1.2. The Power of the Court***

As indicated under the proceeding topic, the adjudicatory power of the court over family matters under the current family law is too broad as dissolution of a marriage and its pecuniary matters, *inter alia*, exclusively fall within the competence of the court. For example, only the court is competent to decide on divorce as well as to decide or approve the effects of divorce, among which liquidation of pecuniary interest is so important.

Likewise, where the marriage is dissolved on other grounds, it is the power of the court to regulate the consequences thereof. Because, once the marriage is terminated by the order of the court as a sanction or by the declaration of absence, as the case may be, it is logically within the power of the court to settle, *inter alia*, matrimonial issues arising thereof.

The court, in determining pecuniary issues arising in relation to the liquidation of pecuniary effects may rely on the agreement of the spouses or the law or both as is thoroughly elucidated in this article. The court may thus base the exercise of its power on the agreement as its basic frame of reference for purposes of determining personal and common property at the end of the marriage.

In doing so, the court shall have due regard to the true expression of the intention and free consent of the spouses to avoid any adverse effect on the interest of the spouses. Where there existed no valid agreements or contract of marriage to serve as a frame of reference, as per Art. 83(2) of the Code the court may by itself or through arbitrators, or experts, or by any other means it thinks appropriate, decide on the conditions of divorce. In such a case, the court would determine personal and common property through the operation of the gap filling provisions of the law as elaborated earlier.

Finally, as is repeatedly mentioned in connection with various issues, as per Art. 58(2) of the Code, it is the power of the court to declare a certain item of property acquired onerously during marriage to be personal property upon request by the spouse concerned. In reality, however, most spouses do not request the court as they are unaware of the existence of such a requirement.<sup>59</sup>

In conclusion, the power of the court under the Revised Family Code to determine matrimonial issues is quite broader than that of the family arbitrators. Strictly speaking, the family arbitrators have no power to determine personal and common property of the spouses except when they

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<sup>59</sup> See Tilahun Teshome, “Reflections on the Revised Family Code of 2000,” The International Survey of Family Law, 2002, p 159.

are authorized by the court to do so. Even in such an instance, the decision of the arbitrators shall be subject to the scrutiny of the court.

### **III. CONCLUSION AND RECOMMENDATIONS**

#### ***3.1. Conclusion***

Repeatedly stated in this article is the core issue of determination of personal and common property to be made at the end of a marriage based on the agreements of the spouse. Such agreements, facilitating the smooth liquidation of pecuniary relations, would be used as a frame of reference for the purpose of the determination as they usually differentiate between the characters of the marital estate. Moreover, even the courts would be relieved of the controversies likely to emerge with regard to the question of determination.

Failing such agreement(s), the operation of the law ultimately comes forth to regulate the issues of determination arising during dissolution of a marriage. The determination when made in accordance with the law, therefore, involves the application of the legal presumption of common property and the subsequent proof of personal property that rebuts the presumption.

Undoubtedly, the presumption of common property is a cardinal principle of an immense importance in the determination of personal and common property during dissolution of a marriage. As enshrined in our family law, the comprehensive nature of the presumption hardly calling for a detailed elaboration has profoundly consolidated all the pertinent issues of determination in favor of common property. In doing so, the law has implicitly marginalized the existence of personal property subject to the strict requirement of proof.

Thus, the importance of this cardinal presumption for the determination of the character of certain property during dissolution of marriage being so paramount, the spouse claiming for a common property would rely on the presumption for which he/she bears no burden of proof. The proper application of the presumption itself bars *in toto* the need for adducing evidence in support of the claim. That is, there is no onus of proof on the spouse alleging that certain matrimonial asset is a common property.

As opposed to the principles of the law as outlined above, a look into the practice nevertheless evidences explicitly that despite the unfettered rules embodied in the cardinal presumption that shall carefully be applied to determine the character of marital property, there is a gross deviation of the practice from the law.

### ***3.2. Recommendations***

In view of the practical problems analyzed in this article, the following major recommendations should be taken into account to bridge the gap between the law and practice. First, in the course of determination of personal and common property, it is so imperative that the fundamental legal presumption of common property should fully be applied. There must be a complete observance of the unfettered rules implicitly embodied in the presumption. Second, the courts, adhering to the provisions of the law, shall not require the spouses claiming for common property to adduce evidence in support of his/ her assertion. There is no onus of proof on the spouse so asserting. Third, the pertinent provisions of the law applicable in the determination of the character of the property should be construed correctly in light of the spirit of the provisions and the purpose contemplated

therein. Fourth, no undue credence of probative value should be attached to the mere registration of a marital property in dispute, the consequence of which would in effect impede the complete application of the fundamental legal presumption. Registration alone is not decisive in itself to warrant the personal character of the property and preclude the operation of the legal presumption. Fifth, for proof of a personal property, the requirement of proof must be complied with, the failure of which shall entail the operation of the legal presumption. The courts should meticulously determine the sufficiency of the evidence adduced on the basis of the required standard of proof before derogating from the presumption.

**PERSPECTIVES ON COMMON PROPERTY REGIMES IN ETHIOPIA:  
A CRITICAL REFLECTION ON COMMUNAL LAND HOLDING RIGHTS  
IN BORANA OROMO PASTORALISTS CONTEXT**

*Jetu Edosa Chewaka*\*

**INTRODUCTION**

Perspectives on common property regime have been popularized when Hardin wrote on the “Tragedy of the Commons”. Hardin’s conception of common property analyzed how the uses of pasture “Commons” end up in tragedy due to its susceptibility to over-exploitation. In many parts of the world, Hardin’s theory, among other things “has been extremely powerful in analyzing and explaining over-exploitation in forests, overgrazing, abuses of public lands, population problems, ground water depletion, and other problems of resource misallocation.”<sup>1</sup> In order to avoid such tragedy, Hardin has offered the introduction of either private or public property regime as alternative possible solution. However, subsequent writers criticized Hardin’s work for his failure to distinguish open access from regime of managed common property resources. Different scholars have argued that the theory in which the supposed tragedy results really applies only to open access resources which of course Hardin himself has acknowledged that it should have been “Tragedy of the Open Access Commons.”<sup>2</sup> Conceptually,

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<sup>1</sup> Glenn G. Stevenson, *Common Property Economics: A General Theory and Land Use Applications* (Cambridge University Press, 1991), p.8

<sup>2</sup> Michael D. Kaplowitz (ed), *Property Rights, Economics, and the Environment* (Michigan State University, 2000), p. 65

Schlager and Ostrom have also observed that whilst private and state property rights are clearly understood, many people even prominent scholars conceive open access resource and common property regime with confusion.<sup>3</sup>

Today, the misconception on common property regime, by and large, is unfolded due to multifaceted studies conducted on community based property regimes that helped eminent economists to revise Hardin's theory of resource use in common property regime.<sup>4</sup> Yet, the assertions embedded in the same theory that common property regime such as communal grazing land causes inappropriate land use and administration has not gone away. Though Hardin's theory becomes old-fashioned, governments still justify their intervention in communal property regime under the guise of such obsolete theory. For African countries including Ethiopia, the theory rather becomes a gospel from which they derive the force of scientific validity for policy and legal intervention in dismantling pastoralists' communal land holding rights.<sup>5</sup>

This article offers a case, the pastoral commons of Borana Oromo in Ethiopia, where common property regime is proved to be efficient in the management and use of communal land including its natural resources. The article generally aims to trigger legal debates by critically reflecting on the adequacy of the legal regimes regarding communal land holding rights in pastoralist area of Ethiopia by juxtaposing the perspectives on common

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<sup>3</sup> Even scholars, who are meticulous theorists and observers of behavior related to natural resource systems, use the terms "open access" and "common property systems" interchangeably. See Edella Schlager and Elinor Ostrom, *Property Rights Regime and Natural Resources: A Conceptual Analysis*, *Land Economics* (1992), Vol. 68, No. 2, p. 249 (at footnote)

<sup>4</sup> Behnke, R. H. (1985), *Open Range Management and Property Rights in Pastoral Africa: A Case Study of Spontaneous Range Enclosures in South Darfur, Sudan* (London). <<http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/5267.pdf>> (Accessed on February 4, 2013)

<sup>5</sup> See Policy Framework For Pastoralism In Africa, *infra* note at 83, pp. 14-15

property regime. Regretably, however, the article will not deal with all aspects of communal land holding in different parts of Ethiopia. But, quite logically, it is necessary to justify why the article opted to treat communal land holding regime in Borana pastoralists' context. The first basic reason is related with the existence of multifaceted researches conducted on Borana pastoralists' area that clearly show the nature of communal land holding system and the magnitude of state intervention in such regime. It is not an exaggeration to say that the Borana Oromo pastoralists' area represents the most extensively studied ecological area in Ethiopian landscape. The second reason is that Borana Oromo pastoralists, as argued later on, could be a model for indigenous community based resource management that if properly harnessed would be used as cooperative mechanisms to address resource dissipation in rural area. The third reason is that the Borana Oromo cradleland represents a home for Oromo cultural heritage – such as the Oromo *gadaa* democracy, and the Oromo worldview intertwined in customary land rights. This area represents not only a “cattle corridor” but also a “cultural corridor” that call for serious attention. Therefore, this area has more to unfold the multifaceted aspects of common property regime in Ethiopia and deserves critical evaluation.

Against this backdrop, the article labours to address three related questions regarding communal land regime in Ethiopia. Firstly, what contending theoretical perspectives on common property regime could be consulted in order to critically assess the current policy and legislative intervention in the communal land holding regime? Secondly, does the existing legal framework adequately address the need and specificities of pastoralists' “historic and customary” communal land holding rights? Thirdly, what implication(s) could be drawn from both existing legal regimes regarding the administration and use of resources compared to the customary communal land



administration and land use system in light of the Borana Oromo pastoralists? In order to address these questions and other related issues, section one briefly describes different types of property regimes in an attempt to distinguish common property regime from other property regimes and resource uses. It then describes theoretical perspectives on common property regime. Section two examines communal property regime in Borana Oromo pastoralists' context. This section shows how land and its natural resource, as a community based property regime has been conceived in the historical past and its present overriding relevance to Borana pastoralist communities in particular and the Oromo people in general. Section three critically reflects on Ethiopia's policy path and legal frameworks on customary communal property regime. Section four draws conclusion based on the implications of the evaluation made thus far and the way forward at last.

## **1. COMMON PROPERTY REGIME: DISENTANGLING THE CONFUSION**

The use of land including its natural resources based on the institutions of common property has been recognized since the economic pre-history.<sup>6</sup> Particularly, the role of communal property system in resource management among indigenous peoples is gaining wide support from ecologists, political scientists and human rights scholars. But, the conception of common property is misunderstood by different scholars including modern day economists.<sup>7</sup> Therefore, it is important to brief on some semantic confusion and the theoretical assumptions that emanates from it.

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<sup>6</sup> Ciriacy-Wantrup and Richard C. Bishop, "Common Property" as a Concept in Natural Resources Policy, *Natural Resources Journal* (1975), Vol. 15, p. 713.

<sup>7</sup> *ibid.*

### **1.1. OF STATE, PUBLIC, AND COMMON PROPERTY REGIMES**

In the literature, the concept of common property is often confused with the concept of public property regime since the later term is often associated with the collective nature of property rights. Public property is used to describe collective property in which state on behalf of the public is responsible for controlling the property.<sup>8</sup> In other words, the right to ownership of public property is vested in a responsible public agency. According to this conception, although rights of use may be available for the public, the title does not rest with the public. Hence, in such property system, the problem of allocation is solved by social, economic and political principles based on collective interest of the society.<sup>9</sup> Some argue that this situation makes public property a particularly good vehicle for protecting or serving public interests since ownership is detached from the usual self-serving interests associated with private property.<sup>10</sup> It is also argued that public property scheme appears to reduce collective property of the public to a special form of private property, with the State casting the role of an owner.<sup>11</sup>

On the other hand, public property regime is criticized as it does not generate a specific normative meaning if one takes the structure of ownership compared to private property. Similar to private property, public authority typically may enjoy rights such as possessions, management and use to the exclusion of the others be it individuals, groups or the general public. Such kind of understanding is also reflected in Demsetz's definition of "state ownership of property" that implies a situation in which "the state may

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<sup>8</sup> Richard Barnes, *Property Rights and Natural Resources* (Hart Publishing, 2009) p. 154

<sup>9</sup> Enrico C., *The Elgar Companion to the Economics of Property Rights* (USA: Edward Elgar, 2004), p. 50

<sup>10</sup> Richard Barnes, at *supra* note 8

<sup>11</sup> *ibid.*

exclude anyone from the use of a right as long as a state follows accepted political procedure for determining who may not use state-owned property.”<sup>12</sup> So, public property may refer to state property in which state makes distinction between individuals who may or may not use such collective property.

As noted above, it could be argued that “although public property is structured in the same way as private property ownership with rights such as excluding others, is clear that the title is vested in a public agency responsible for controlling the property in the interest of the public.”<sup>13</sup> Yet, an important issue is whether public agency that holds the property clearly established use and access rules to ensure that such property is used to promote social, economic and cultural objectives of the public. Hence, the basic feature of public property lies not in the structure of ownership but in the way in which interest in the property is held.

Another term often related and used to describe common property regime is “communal ownership of property”. Once again, Demsetz defines “communal ownership of property” as “the right which can be exercised by all members of the community [in which] the community denies to the state or to individual citizens the right to interfere with any person’s right of community owned rights.”<sup>14</sup> In this regard, “the right to till and hunt the land and the right to walk a city sidewalk” are considered as the two classic examples of communally owned property provided by Demsetz. As we shall see later on, if the definition is related to communal property regime with defined user group capable of excluding others outside such community, one can say that communal property ownership refers to common property

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<sup>12</sup> H. Demsetz, *Toward a Theory of Property Rights*, American Economic Review (1967) Vol. 57, p. 347

<sup>13</sup> Richard Barnes, at *supra* note 8, p. 155

<sup>14</sup> *ibid.*

regime. But whether the classical examples given by Demsetz really refer to common property regime is doubtful. The above classical examples clearly refer to both open access and public property regimes.<sup>15</sup> Firstly, the right of the community to till and to hunt the land free of interference either from the state or individuals signifies open access resources. Secondly, the right to walk a city sidewalk as a communally owned property right, however, signifies the situation of “public goods” in which all members of the community enjoy the rights without any rivalry effect of such resource use without interference from the state or any individual. So, Demsetz’s communal property ownership is not clear as to whether it is construed to refer to common property regime or open access resources. As we shall note below, the contemporary conception of common property regime as distinguished from open access resource implies a “group property” where a well-defined set of user/s has access and control rights over the resource.<sup>16</sup>

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<sup>15</sup> For instance, David Feeny et al, define communal property as “the resource held by an identifiable community of interdependent users. These users exclude outsiders while regulating use by members of the local community. Within the community, rights to the resource are unlikely to be either exclusive or transferable; they are often rights of equal access and use.” See David Feeny et al, *infra* note 58, p. 4. Others also use the phrase “comprehensive communal property” to refer “a system in which no individual maintains an exclusive right to use pastoral re-sources; there are specific criteria that define who can and cannot become a member of the community of resource users; members of the group having usufructuary rights can expect to use the resources in the future, implying security of tenure; the community has developed a set of rules that guide how pastoral resources are to be used; and, there is a way of imposing sanctions on those who fail to adhere to these rules, which constitutes an enforcement mechanism.” See Susan Charnley, *Pastoralism and Property Rights: The Evolution of Communal Property on the Usangu Plains, Tanzania*, *African Economic History* (1997) No. 25, p. 99

<sup>16</sup> Mark Giordano, *The Geography of the Commons: The Role of Scale and Space*, *Annals of the Association of American Geographers* (2003), Vol. 93, No. 2 p. 367

## 1.2.OF COMMON PROPERTY REGIME AND OF OPEN ACCESS RESOURCE

The literature relating to what signify common property regime won greater attention after Hardin's influential article on "The Tragedy of the Commons." Hardin's understanding of the word "common property" in his "classic description of pasture commons, illustrates a common property regime that has been applied to "any natural resource used in common which is susceptible to overexploitation."<sup>17</sup> Subsequent writers such as Ciriacy-Wantrup and Bishop criticized Hardin for his failure to distinguish the concept of open access and that of common property.<sup>18</sup> According to these writers unlike open access resource, "common property is not "everybody's property."<sup>19</sup> The concept of common property implies that potential resource users who are not members of a group of co-equal owners are excluded.<sup>20</sup> This insight has proven to be very useful in distinguishing common property from open access resources, and has played an important part in challenging the impacts of Hardin's influential article which is about the "tragedy of open access commons" and not any "tragedy of the commons."<sup>21</sup> But, what are the salient features of common property regime that distinguishes it from open access resource?

According to Stevenson's "synoptic definition," the term common property is defined as "a form of resource management in which a well-delineated group of competing users participates in extraction or use of a jointly held,

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<sup>17</sup> G. Hardin, *The Tragedy of Commons*, Science (1968), Vol. 162.

<sup>18</sup> Ciriacy-Wantrup and Bishop at supra note 6, p.715

<sup>19</sup> *ibid.* see also Gordon, H. Scott, *The Economic Theory of a Common Property Resource: The Fishery*, of Political Economy (1954) Journal Vol.62, No. 128

<sup>20</sup> Ciriacy-Wantrup and Bishop at supra note 6. See also Bryan E. Burke, *Hardin Revisited: A Critical Look at Perception and the Logic of the Commons*, Human Ecology (2001) Vol. 29, No. 4, pp. 449-476

<sup>21</sup> Owen J. Lynch, *Promoting Legal Recognition of Community-Based Property Rights, Including the Commons: Some Theoretical Considerations* (Bloomington, USA: Indiana University,1999), p. 18

fugitive resource according to explicitly or implicitly understood rules about who may take how much of the resource.”<sup>22</sup> Common property performs this task says Stevenson, “within the framework of group control, even as private property accomplishes them under individual control.”<sup>23</sup> The number of users is limited, each user understands how much of the resource he or she may extract, and decisions about resource allocation are made by some group process.<sup>24</sup> Similarly, Ciriacy-Wantrup and Bishop defined the term common property to refer to “a distribution of property rights in resources in which a number of owners are co-equal in their rights to use the resource.”<sup>25</sup> As per these writers, such rights “are not lost through non-use (...) but, it does not mean that the co-equal owners are necessarily equal with respect to the quantities (or other specification) of the resource each uses over a period of time.”<sup>26</sup> They argue that, resources in such property regime are subject to the rights of common use and not to a specific use right held by several owners.<sup>27</sup> Like Stevenson, both of these writers argue that the concept of common property “implies that potential resource users who are not members of a group of co-equal owners are excluded.”<sup>28</sup>

On the other hand, “open access resource” is defined as a “depletable, fugitive resource that are open to extraction by anyone, whose extraction is rivalry and whose exploitation leads to negative externalities for other users of the resource.”<sup>29</sup> In other words, open access resources are susceptible to over-exploitation depletable since such resources are subject to use by any person who has the capability and desire to enter into extraction of it without

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<sup>22</sup> Stevenson, *supra* note 1, at p. 46

<sup>23</sup> *ibid.*

<sup>24</sup> *ibid.* p. 19

<sup>25</sup> Ciriacy-Wantrup and Bishop, *supra* note 6, p. 715

<sup>26</sup> *ibid.*

<sup>27</sup> *ibid.*

<sup>28</sup> *ibid.*

<sup>29</sup> Stevenson, *supra* note 1, p. 8

any exclusion. In this context, open access resources could be tagged as “everybody’s property” as it represents “nobody’s property”.<sup>30</sup> Therefore, the major departure between common property and open access resource depends on the concept of what implies property in the resource in certain users.<sup>31</sup>

Property implies rights and duties for both participants and non-participants in resource extraction; the absence of rights and duties means that the institution of property does not exist.<sup>32</sup> In this sense, “vesting property rights” means defining who may participate in resource extraction and to what degree, and designating who makes the management decisions regarding the resource. Hallowell and Becker used the concept of property rights to further show how they exist in common property but not in an open access situation.<sup>33</sup> According to these writers, “rights and duties are relationships between persons and property rights are specifically relationships between persons regarding use of a thing.”<sup>34</sup> Hence, the existence and observance of these rights, duties, and other relationships distinguishes property from non-property, as well as one type of property from another.<sup>35</sup>

One of the most fundamental ownership rights is the right to possess, which involves the right to exclusive physical control or the right to exclude others from the use or benefits of a thing.<sup>36</sup> In this sense, possession is important in the comparison between open access and common property, because

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<sup>30</sup> Ciriacy-Wantrup and Bishop, at supra note 6, p. 713

<sup>31</sup> *ibid*

<sup>32</sup> Stevenson at supra note 1, p. 63

<sup>33</sup> Hallowell, and A. Irving, *The Nature and Function of Property as a Social Institution*, *Journal of Legal and Political Sociology* (1943) Vol.1, No. 3-4, p.115

<sup>34</sup> *ibid.*

<sup>35</sup> *ibid*

<sup>36</sup> Becker, Lawrence C., *Property Rights: Philosophic Foundations* (Boston: Routledge and Kegan Paul, 1977), p.19

resources under open access are not possessed, whereas they are possessed under common property.”<sup>37</sup> The right to possession implies the positive right of holding the object and the negative right of excluding others from its possession, even if the object is not yet held.<sup>38</sup> This shows that in open access resources, neither the right to exclude another from extracting the resource and nor the security of possessing either particular physical units or a certain amount of the resource is present. Thus, unlike common property regime in which at least possessory rights rests in the defined communal user of resources, there is no possession in the situations of open access resources.<sup>39</sup> In the above context, describing open access resources (*res nullius*) as common property (*res communes*) is a self-defeating.<sup>40</sup>

### 1.3. THEORETICAL PERSPECTIVES ON COMMON PROPERTY REGIME

As previously noted, Hardin’s “Tragedy of the Commons” is the story that has been much debated since its publication, but the terrain it covers is not new.<sup>41</sup> Aristotle, writing in the Fourth Century BC, remarked that “*what is common to the greatest number gets the least amount of care.*”<sup>42</sup> As some argue, while there is little of philosophical interest in Hardin’s theory, it has had tremendous policy implications in analyzing and explaining over-exploitation in forests, overgrazing, abuse of public lands, population problems, ground water depletion, and other problems of resource misallocation which becomes one of the most important gospels of

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<sup>37</sup> *ibid*, p. 21

<sup>38</sup> *ibid*.

<sup>39</sup> *ibid*.

<sup>40</sup> Ciriacy-Wantrup and Bishop at *supra* note 6, p.715

<sup>41</sup> “The distribution of care and the Tragedy of the Commons – Hardin’s Misappropriation of Aristotle,” See at <<http://commoning.wordpress.com/2011/01/03/the-distribution-of-care-and-the-tragedy-of-the-commons-hardins-misappropriation-of-aristotle/>> (accessed on April 22, 2013)

<sup>42</sup> Aristotle, *The Politics*, trans and intro by TA Sinclair, revised and represented by TJ Saunders (Harmondsworth, Penguin, 1992) p. 1262



privatization in the early stages of neoliberalism.<sup>43</sup> As previously noted, the theoretical perspectives on common property regime are, by and large, the product of Hardin's misunderstanding of common property regime which ultimately resulted in conceptual ambiguities.

In general, three broad approaches emerge from the literature on the institutional arrangements to avert the tragedy of the commons which would have otherwise been the tragedy of the open access resources. The first approach, the property rights economics, holds the view that the problem of over-exploitation and degradation in commons can be resolved only by creating and enforcing private property rights.<sup>44</sup> The second approach advocates the change of common property to state property regime in which a public agency with a clearly defined ownership rights regulates such commons by devising rules.<sup>45</sup> The third approach holds the view that decentralized collective management of common property regime by their users could be an appropriate system for avoiding the tragedy of the commons.<sup>46</sup> According to this last approach, "in practice every society has its own means and adaptations to deal with natural environment – its own "cultural capital" and local level systems of resource management, which are based on the knowledge and experience of the resource users themselves."<sup>47</sup> The last approach gave birth to the justification of common property regime

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<sup>43</sup> Stevenson, supra note 1, at p. 38

<sup>44</sup> Demsetz, supra note 12. See also McCay, B.J. and Acheson, J.M., *The Question of the Commons: The Culture and Ecology of Communal Resource* (University of Arizona Press, 1987) p. 33

<sup>45</sup> Hardin, supra note 17

<sup>46</sup> Berkes, Fikrest (ed.), *Common Property Resources: Ecology and Community-Based Sustainable Development* (London, Belhaven Press, 1989) p.2. See also Wade, R., *The Management of Common Property Resources: Collective Action as an Alternative to Privatization or State regulation*, *Cambridge Journal of Economics* (1987), Vol. 11 No. 2, Jodha. N. S., *Common Property Resources and Rural Poor in Dry Regions of India*, *Economic and Political Weekly* (1986), Vol. 21 No. 27, p. 170. See also Chopra, et al., *People's Participation and Common Property Resources*, *Economic and Political Weekly* (1989), No. 24, p. 189

<sup>47</sup> Berkes, and Folke, C., *Investing in Cultural Capital for the Sustainable use of Natural Capital*, In: *Investing in National Capital: The Ecological Economics Approach to Sustainability*, A.M. Janson et al. (ed), (Washington, D.C. Island Press, 1994)

in resource management by rebutting the assumptions of the former two approaches. Let us investigate arguments for and against each approach as follows.

To begin with, the first approach contends that “a well-defined structure of property rights induces efficiency in the use of resources.”<sup>48</sup> The early thinking of property rights economics claim that “private property regime is the most efficient means of allocating resources and that it provides an incentive for the productive use of resources.”<sup>49</sup> Proponents of this approach hold the view that “common property regime is inefficient and will lead to the degradation of a resource as it becomes difficult to internalize externalities.”<sup>50</sup> They propose that the cure for such resource use problem is “the introduction of private property rights that help some externalities to disappear as the costs of negative externalities should be borne by those who cause them.”<sup>51</sup>

According to Angelsen, externalities are bound to occur where “a consumer’s welfare or a producer’s production is affected by variables whose values are chosen by others, without particular attention to the effects on the other actors’ welfare or production.”<sup>52</sup> For property rights economists, externalities in common property regime are borne by parties who did not create them and hence any cost-benefit analysis will be incomplete as it cannot be properly accounted for.<sup>53</sup> In other words, it is only when the full package of rights (use, management, transfer and income rights) is vested in a single person that efficient outcomes are achieved. However, as noted

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<sup>48</sup> Richard Barnes, *supra* note 8, at p. 41

<sup>49</sup> *ibid.*

<sup>50</sup> *ibid.*

<sup>51</sup> Demsetz, *supra* note 12 at p. 354. see also Carlisle Ford Runge, Common Property Externalities: Isolation, Assurance, and Resource Depletion in Traditional Grazing Context (1981) *American Journal of Agricultural Economics*, p. 596

<sup>52</sup> Cited in Stevenson, *supra* note 1

<sup>53</sup> *ibid.*

before, the conception of property rights in the context of common property regime is created due to the confusion of equating it with open access resource. Scholars such as Scott Gordon,<sup>54</sup> Demsetz's and Hardin's subsequent works are often criticized for creating conceptual and theoretical confusion that relates to common property regime. To repeat once again, Demsetz's definition of "communal ownership"<sup>55</sup> confused open access situation with common property regime despite his use of the terms "rights" and "ownership" which as we noted cannot exist in an open access regime. His assumption based on such confusion becomes clear when he goes on to speak of "everyone's" having the right to use the resource, a failure "to concentrate the cost" of extraction on the user, and the consequent overuse of the resource.<sup>56</sup>

Another group of economists however, recognized the defects in property rights theory and have tried to revise the conception on common property regime by refuting claims that private property is better at protecting resources than common property regimes. Hence, "the revisionists approach" has emerged with a view to revise Hardin's and the property rights paradigm."<sup>57</sup> Acheson tried to list flawed basic axiomatic assumptions of Hardin's model in a bid to show the problems of the theorization. Accordingly, the flaw include: that common property means the absence of property rights; that everywhere there is a level of technical capacity to over-exploit resources; that there is a general inability to craft effective local institutions for resource management; and finally that only private property

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<sup>54</sup> See H. Scott Gordon, *The Economic Theory of a Common Property Resource: The Fishery*, *Journal of Political Economy* (1954), Vol.62, pp.124-142

<sup>55</sup> Demsetz, at supra note 12, p. 354

<sup>56</sup> Stevenson, at supra note 1, p. 59

<sup>57</sup> *ibid.*

or government intervention represents a viable solution to resource management.<sup>58</sup>

The second approach like the first one contends that common property regime is inefficient in the use and management of resources and hence offers a policy advice to keep such property under the custody of state as a public property to which rights to entry and use could be efficiently allocated.<sup>59</sup> So, this approach implies that resource degradation was inevitable unless common property was converted to government regulation of uses and users in which the state should claim ownership rights by establishing legal and institutional frameworks.<sup>60</sup> Yet, this approach is criticized for the incapacity of the state to effectively and adequately control all natural resources that lies in its territorial sovereignty.<sup>61</sup> According to Richard Barnes, *de jure* state/public property regime in its practice becomes a *de facto* open access in two situations.<sup>62</sup> First, despite the existence of ownership right by the state or public a condition of *de facto* open access could be created because of conscious political decisions to guarantee all members of society access right to such state/public property resources.<sup>63</sup> Second, there exist conditions in which state/public property regime remains open-access because the entity assigned formal ownership of the resource cannot effectively exclude individuals or groups of individuals from such

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<sup>58</sup> Ibid.

<sup>59</sup> David Feeny et al., The Tragedy of the Commons: Twenty-Two Years Later, *Human Ecology* (1990), Vol. 18, No. 1, p. 2

<sup>60</sup> State property, or state governance, rights to the resource are vested exclusively in government which in turn makes decisions concerning access to the resource and the level and nature of exploitation. *ibid.*

<sup>61</sup> Richard Barnes, *supra* note 8 at p.2

<sup>62</sup> *ibid.*, See also Ostrom, at *infra* note 71 p. 337. "... the national governments lacked monetary resources and personnel to monitor the use of these resources effectively. Thus, resources that had been under a *de facto* common property regime enforced by local users were converted to a *de jure* government-property regime, but reverted to a *de facto* open-access regime."

<sup>63</sup> *ibid*

resource use.<sup>64</sup> Richard Barnes holds the view that “states nationalize resources absent the financial or institutional capacity to regulate it”.<sup>65</sup> Thus, these two scenarios will eventually result in the degradation of the state/public property through overuse, and therefore brings no real difference from the resource use in open access.<sup>66</sup> In the context of Ethiopia, Elias N. Stebek “raises the issue whether natural resources that are legally declared as government-owned are in fact open-access regimes as long as there is no effective control against the withdrawal of the resources by persons who have no right to do so.”<sup>67</sup> Elias noted that “lack or inadequacy of efficient and effective control in these attributes of property rights leads to *de facto* open access and resource dissipation.”<sup>68</sup>

The final approach provides pragmatic evidence to the study of common property regime and contends that property rights economics “does not account for the persistence of a number of communal arrangements, and that it conflates common property with the situations of open-access.”<sup>69</sup> According to this approach, overuse of resources is not caused by the breakdown of common property but includes situations where there are no property rights, hence no effective management of resources (“open-access”).<sup>70</sup> Ostrom states that “communal groups have established some means of governing themselves in relationship to a resource.”<sup>71</sup> Hence, according to Ostrom, the fact that a certain property right is collective or communal does not

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<sup>64</sup> *ibid*

<sup>65</sup> *Ibid.*, See also D Curtis, *Beyond Government: Organizations for Common Benefit* (London, Macmillan, 1991), p. 24

<sup>66</sup> Richard Barnes, *supra* note 8, at p. 2

<sup>67</sup> Elias N. Stebek, *Conceptual Foundations of Property Rights: Rethinking Defacto Rural Open Access to Common-pool Resources in Ethiopia*, *Mizan Law Review* (2011), Vol. 5, No.1, p. 30

<sup>68</sup> *ibid.* p. 38

<sup>69</sup> see McCay and Acheson, at *supra* note 44

<sup>70</sup> Stevenson, at *supra* note 1, p. 81

<sup>71</sup> E. Ostrom (1999), *Private and Common Property Rights* (*Encyclopedia of Law and Economics*, 2000), p. 339

necessarily lead to the conclusion that it is not well-defined since full members of communal groups have the “right to sell their access, use, exclusion and management rights to others, subject in many systems to the approval of the other members of the group.”<sup>72</sup>

In nutshell, the approaches taken may influence the role of individuals, community and states in addressing problems associated with management and utilizations of land and its resources. In a resource regime in which property rights are adequately defined, the right holders are successful in the efficient use and management of the resource by excluding others who do not have right to the resource in question be it private property or common property.<sup>73</sup> Conversely, a resource regime in which there are no property rights or property rights are not adequately defined is susceptible to the problem of resource misallocation.<sup>74</sup>

## **2. COMMUNAL LAND HOLDING SYSTEM IN BORANA OROMO PASTORALISTS AREA**

A proper understanding of the customary rules governing communal land holding rights and the use of the resources on it is indispensable to unravel the way one perceives about common property regime in the pastoralist context. This section tries to describe and reflect on the Oromo conception of common property in general. It then evaluates how Borana pastoralists and

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<sup>72</sup> *ibid.* Though Ostrom’s principles of common property resources provides for the rights of communal groups to have the right to sell their access, Ciriacy-Wantrup et al., however noted that the concept of common property could also be employed in situation where there exists “the right to use the resources, but not to transfer. Heirs of a common owner become co-owners themselves only through their membership in the group (tribe, village, etc.)” See Ciriacy-Wantrup, et al., at *supra* note p. 714 at foot note.

<sup>73</sup> Irwin B., *Managing Forests as Common Property: Collaborative Forest Management in Ethiopia*, in Zenebework Tadesse (eds., 2000), p. 119

<sup>74</sup> Bromley, D. W., *Environment and Economy: Property Rights and Public Policy* (United Kingdom: Oxford University Press, 1991), p. 22

scholars view the social, cultural, economic and political dynamics of communal land holding system.

## **2.1.THE OROMO CONCEPTION OF COMMON PROPERTY RIGHTS: A BRIEF INTRODUCTION**

The philosophical conception of property among Oromo people recognizes that *Waaqaa* (Oromo God) has already given us natural resources to properly subdue for our use.<sup>75</sup> This idea conforms to the Biblical conception in which the Book of Genesis tells us that God gave the earth to man for the support and comfort of his well being. Similarly, prominent political philosophers like Hugo Grotius, Thomas Hobbes and John Locke also confirmed the creation of “common goods” by Almighty God for the good of human race.<sup>76</sup>

Historically, early Oromo ancestors practiced pastoralism in which communal land is important to successfully yield productivity of livestock herding.<sup>77</sup> However, after the great expansion, “the traditional pastoral economy became integrated to a greater or a lesser extents with agriculture”.<sup>78</sup> As M. Hassen noted, an account from the Gibe states in present day Jimma and its surrounding demonstrated that “agriculture was more highly developed than in others as a result of long contact with traders and others from Shoa and the East coast”.<sup>79</sup> It could be said that presently, the majority of Oromo groups adopted mixed agriculture where land cultivation and herding is practiced side by side. Hence, in dominantly

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<sup>75</sup> Dirribi Demissie B., *Oromo Wisdom in Black Civilization* (Finfinne: Finfinnee Printing and Publishing S.C, Ethiopia, 2011), pp. 113-114

<sup>76</sup> Rebecca P. Judge, *Restoring the Commons: Toward a New Interpretation of Locke's Theory of Property, Land Economics* (2002), Vol. 78, No. 3, p.332

<sup>77</sup> Mohammed Hassen, *Oromo of the Ethiopia: A History of 1570-1860* (Trenton, N.J.: Red Sea Press, 1994), p. 22. See also Manoel de Almeida (1993) “The [Oromo] from the History of High Ethiopia or Abassia, *History of The [Oromo] of Ethiopia with Ethnology and History of South – East Ethiopia*, (Introduction by Donald N. Levine , African Sun Publishing), p. 59

<sup>78</sup> Mohammad Hassen, *supra* note 77

<sup>79</sup> *ibid.*

agricultural rural area of Oromia land is used based on private holding rights in which both cultivation and grazing land (in the form of reserved pasture for cattle) are kept separately. There also exists open access grazing land typically known as *goodaa* in which the cattle of every member of the local community feeds on it. But, currently it is observable that scarcity of land is forcing peasants adjacent to *goodaa* who rival over it for cultivation purpose.

However, as we shall see later on, there are also different Oromo groups who practice pastoralism in strict association with regulated communal pasture land holding. For instance, Oromo areas such as parts of Bale, Arsi, Karrayyu, Guji, and Borana are few to mention. In these pastoral areas, however, customary law doesn't support the utilization of pastureland by claiming private property rights over it. However, based on such observation of property regime in Oromo pastoralists area Baxter argue that Oromo conception of property right does not recognize the institution of private property. Baxter "appears to suggest that the Oromo do not have distinct property rights demarcation."<sup>80</sup> According to Baxter's argument, "the Oromos [sic] do not classify land and water, and hence territory as material resources which people can control or use because the utilization of all natural resources has a religious dimension across all Oromo."<sup>81</sup> He further asserts that the proper allocation and use of natural resources is bound by ritual activities rather than by political or territorial boundary."<sup>82</sup> For Baxter, it means that the Oromo people do not recognize the institution of private property ownership of valuable resources as land and water and therefore lacking the economic valuation of scarce resources efficiently. However, the Oromo term *gulummaa [qabiyyee dhunfaa]* signifies the conception of

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<sup>80</sup> Bichaka Fayissa, Aspects of Oromo Cultural Endowments and their Implications for Economic Development, *Journal of Oromo Studies* (1996), Vol. 3 No. 1 and 2, p. 41

<sup>81</sup> *ibid.*

<sup>82</sup> *ibid.*



private property rights and the term *waajirataa* indicate the conception of common property rights.<sup>83</sup> In other words, in the context of pastoralism, while the herds belong to individuals and their family, grazing lands, water points and natural forests belong to the community as a common property regime.<sup>84</sup>

Accordingly, the problem with Baxter's observation is that he failed to provide the conceptual basis of what underlies "distinct property rights" within the context of "access to common resources". He makes no argument to support his contention that the property arrangements of Oromo pastoralists which he describes "common resources" necessarily yields lower benefits than private property regime.<sup>85</sup> Thus, Baxter failed to consult a wealth of evidences that witness the possibility of economic valuation of natural resources in the set up of community based property rights regime. Other writers such as Bichaka Fayissa also criticized Baxter for his failure to examine private property ownership in agricultural areas of Oromia region.<sup>86</sup> Therefore, Baxter's particular evaluation of property rights in pastoral Borana area suffers from lack of conceptual and empirical analysis of access to common resources within the context of community based property rights.

Yet, most importantly, a close examination of Baxter's statement hints at the notion that somehow the Oromo conception of common property rights system is intertwined with the dynamics of Oromo cultural, political and ritual systems in which the utilization of land and its natural resources are effectively enforced by customary laws within such collectivity. This shows

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<sup>83</sup> Dirribi Demissie, *supra* note 75, at p. 114

<sup>84</sup> Getachew Kassa, An Overview of Root Causes of Problems That Currently Affect Borana Pastoralists of Southern Ethiopia, in Mustafa Babiker (ed) "Resource Alienation, Militarization and Development Case Studies from East African Dry lands" (Organization for Social Science Research in Eastern and Southern Africa, Addis Ababa, 2002), p. 67

<sup>85</sup> Baxter, PTW, "One Possible New Perspective for Oromo Nationalism," Proceedings of the Oromo Studies Association, (University of Toronto, Ontario Canada, 1993)

<sup>86</sup> Bichaka Fayissa, *supra* note 78

that the conception of land and other natural resources as a property in Borana Oromo area reflects its *par excellence* not only in their economic livelihood but also in their social, cultural and political life. Therefore, once again, as Bichaka noted, “the pastoral Oromo can be [rather] assisted to diversify their activities into livestock and food production for domestic consumption and export” without undermining their communal property regime and indigenous ecological knowledge of resource management.<sup>87</sup> Eventually, as the above discussion reveals, it should be made clear that the issues of communal land holding in pastoralists context lies at the heart of common property rights debate. The following sub-section is devoted to investigate prespectives on communal land holding regime in the context of Borana pastoralists context.

## **2.2 CUSTOMARY COMMUNAL LANDHOLDING REGIME IN BORANA OROMO PASTORALIST AREA**

In the arid and semi-arid plains of southern Ethiopia lives people, the Borana Oromo, whose ingenuity, strength and customs have stood the test of time for centuries. The Borana communities live in the Borana Zone of Oromia Regional State along the Ethio-Kenyan border. The Borana community predominantly practice cattle herding based on nomadic transhumance in strict association with natural resources management.<sup>88</sup> Many scholars argue that historical and cultural legacies of the Oromo people are preserved in Borana cradleland and still known for functioning Oromo gada democracy. The present day Borana including Guji and Karrayyu plateaus “represents part of the remaining core area or cradleland of the southern highlands and

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<sup>87</sup> *ibid.*

<sup>88</sup> Boku Tache, *Pastoralism under Stress: Resources, Institutions and Poverty among the Borana Oromo in Southern Ethiopia* (PhD Thesis, Department of International Environment and Development Studies, Norwegian University of Life Sciences, 2008), p. 1

rangelands from which the original Oromo culture expanded and conquered half of present-day Ethiopia.”<sup>89</sup> According to Asmarom “the core rangeland area contains historical Oromo shrines still worshipped by the population.”<sup>90</sup> More specifically he noted that the reason why Borana Oromo becomes reluctant to abandon or modify pastoralism is attributable to the fact that “subjectively Borana view themselves as the custodian of Oromo heritage and are least likely, among all Oromo populations to trade their identity for some other identity.”<sup>91</sup>

Based on such unique way of life, African Commission’s Working Group listed Oromo pastoralists such as Borana and Karrayyu of Ethiopia and Orma and Borana of Kenya as some examples of “indigenous” communities in Africa.<sup>92</sup> However, Kealeboga and Wachira noted that the identification and listing of these groups by the African Commission’s Working Group faced stiff resistance by a state delegate of Ethiopia at the launch of the African Commission’s 36<sup>th</sup> ordinary session.<sup>93</sup> These writers observed how the State delegate of Ethiopia contested the authenticity of the statistics and identification of certain groups as being indigenous peoples in Ethiopia.<sup>94</sup> In this ordinary session, the delegate averred that there were no official statistics relied upon to make conclusions about groups who could be

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<sup>89</sup> Asmarom Legesse, *Oromo Democracy: An Indigenous African Political System* (Red Sea Press, 2000), p. 62

<sup>90</sup> *ibid.*

<sup>91</sup> *ibid.*, Such subjective criterion of self-identification is recognized under the ILO Convention No. 169, which attaches fundamental importance to whether a given people considers itself to be indigenous or tribal under the Convention and whether a person identifies himself or herself as belonging to this people.

<sup>92</sup> ACHPR and IWGIA, *Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities* (Adopted by The African Commission on Human and Peoples’ Rights at its 28<sup>th</sup> ordinary session, Addis Ababa, 2006), pp.17-18. See also Kealeboga N Bojosi and George M Wachira, *Protecting indigenous peoples in Africa: An analysis of the approach of the African Commission on Human and Peoples’ Rights*, *African Human Rights Law Journal* (2006), Vol. 6 No 2, pp. 399-400.

<sup>93</sup> *ibid.*, See Kealeboga N Bojosi and George M Wachira

<sup>94</sup> *ibid.*

identified as indigenous in the country.<sup>95</sup> Kealeboga and Wachira argued that “such a contestation shows how states’ in Africa continued to deny the existence or categorization of certain peoples as being indigenous in their territories”<sup>96</sup> in order to keep the recognition of such people’s rights at bay.

Despite the aversion of Ethiopia’s delegate as noted above, studies conducted on Oromo tribal groups such as Guji, Karrayu and Borana reveals their distinct way of life even from the mainstream Oromo people. Their indigenous *gadaa* democratic institution is intertwined with their way of life as a way of preserving their religion, culture and identity.<sup>97</sup> For instance, Boku Tache observed how customary rules based on the *gadaa* system are designed to regulate social, economic and political life of Borana community in strict association with communal land holding and natural resource management.<sup>98</sup> The Borana pastoralists’ community has long established system of regulating communal pastureland holding based on customary rules, called “*seera marra bishaanii*,” literally mean “the law of pasture and

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<sup>95</sup> *ibid.*

<sup>96</sup> *ibid.*, The major reason why states continued to deny the existence of indigenous communities in their territory could be attributable to the rights associated with such a term, particularly, the rights to their communal lands and territories; to maintain their cultural traditions, religions; exercise their customary law; to govern themselves through their own institutions; to represent themselves through their own organizations; to control their own natural resources; and etc.

<sup>97</sup> See Policy Framework for Pastoralism in Africa: Securing, Protecting and Improving the Lives, Livelihoods and Rights of Pastoralist Communities (Department of Rural Economy and Agriculture, African Union, Addis Ababa, 2010), p. 11. According to this policy framework, “pastoral culture is a core part of Africa’s culture, history and heritage. In common with other peoples in Africa, pastoral groups have their own languages and traditions, a rich body of oral and written stories and poetry, and songs and music.” See also Baxter, P.T., Pastoralists are people. Why development for pastoralists not the development of pastoralism, *Rural Extension Bulletin* (1994), Vol. 4, p. 12–25.

<sup>98</sup> Boku Tache, *Pastoralism under Stress: Resources, Institutions and Poverty among the Borana Oromo in Southern Ethiopia*, (PhD Thesis, Norwegian University of Life Sciences, 2008), p.1. “The past success of Borana pastoralism was based to a large extent on robust customary resource tenure rights and the gada institutions for managing the grazing lands. The gada is the supreme political authority and custodian of the Borana laws and regulations (*aadaa seera Borana*)”. See Boku Tache & Gufu Oba, *Policy-driven Inter-ethnic Conflicts in Southern Ethiopia*, *Review of African Political Economy* (2009), Vol. 36, No. 121, pp. 409-426

water.”<sup>99</sup> Communal pastureland in Borana refers to “the vast area to which clan members and their families have only access rights encompassing all migration routes during normal as well as drought years.”<sup>100</sup> In Borana pastoralist community, rangeland is the property of the community as a whole and their customary law and institution does not recognize the holding of private land for pasture in any forms.<sup>101</sup> According to Asmarom Legesse, “members of the Borana community share common interests in natural resource, which they own collectively.”<sup>102</sup> This issues raises whether communal pastureland holding rights represent well-defined common property regime capable of efficient use and management of rangeland resources.

In this regard, Asmarom also noted Borana collectivity as a solution. He observed that “an enduring group of kinsmen in Borana has considerable influence on the life of the individual members on his behaviors and thoughts.”<sup>103</sup> The Borana “lineage is fairly effective in coercing individuals to fulfill his obligations to the kin group, to his peer group and to his gadaa class... as the privileges, rights, duties and social identity of individuals are imbedded in the lineage.”<sup>104</sup> Hence, such social cohesion helps to enforce customary rules on its users on collaborative basis in order to assure a balanced and sustainable management and utilization of common pastureland. For instance, elders in mixed-clan localities manage the

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<sup>99</sup> Boku Tache D., Range Enclosures in Southern Oromia, Ethiopia: An innovative response or erosion in the common property resource tenure? (University of Sussex, 2011), p. 5. See also Marco Bassi, Boku Tache, The Community Conserved Landscape of the Borana Oromo, Ethiopia: Opportunities and problems, Management of Environmental Quality: An International Journal (2011), Vol. 22 Issue 2 pp. 174 - 186

<sup>100</sup> PFE, IIRR and DF, “Pastoralism and Land: Land tenure, administration and use in pastoral areas of Ethiopia (International Institute of Rural Reconstruction, 2010), p.26

<sup>101</sup> Boku Tache, supra note 53, at p. 6

<sup>102</sup> Asmarom Legesse, Gadaa: Three Approaches to the Study of African Society (Macmillan publishing, 1973), p. 37-38

<sup>103</sup> *ibid.*

<sup>104</sup> *ibid.*

utilization of communal pasture reserve enclosure, locally known as *kaloo* (enclosed pasture) through collaborative customary rules that “determines the closing and opening at appropriate times.”<sup>105</sup> Furthermore, the rule that regulates the management and utilization of pasture depends on the seasonal mobility and availability of water and pasture resources in both dry and wet seasons.<sup>106</sup> Such mobility from one *madda* (pasture territory) to another was appraised by scholars as important for “the regeneration of pastureland and well-being of livestock.”<sup>107</sup>

On the other hand, customary rules also regulate access by “excluding outsiders who do not belong to the Borana clan.”<sup>108</sup> However, by maintaining the priority usage rights of the owners, customary rules govern the resource sharing arrangements based on reciprocity which allows access to other pastoralists in accordance with strict rules aimed at controlling and managing pastoral resources under regulated access.”<sup>109</sup>

Consequently, Borana communal land is recognized as being one of “the most efficient and well-managed rangeland in the arid lands of Eastern

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<sup>105</sup> Johan Helland, *Pastoral Land Tenure in Ethiopia* (Chr. Michelson Institute, Bergen, Norway, 2006), p.12

<sup>106</sup> Boku Tache, *supra* note 99. The acceptance of such collaborative behaviors also coexists with strong social disapproval and the threat of sanctions of groups who attempt to close their primary grazing areas to other users entirely. See also Desta, S. and D. L. Coppock, *Pastoralism under Pressure: Tracking System Change in Southern Ethiopia*, *Human Ecology* (2004), Vol. 32, pp. 465–486.

<sup>107</sup> Rachael E. Goodhue, Nancy McCarthy, *Traditional Property Rights, Common Property, and Mobility in Semi-Arid African Pastoralist Systems*, *Environment and Development Economics* (2008), Vol.14, p. 31. See also Susan Charnley, *Pastoralism and Property Rights: The Evolution of Communal Property on the Usangu Plains, Tanzania*, *African Economic History* (1997), No. 25, p.100

<sup>108</sup> A ‘primary’ user or user group is responsible for managing a grazing area, and often ‘secondary’ users must ask permission to graze from the primary user and abide by rules regarding water and pasture use promulgated by the primary user, or both. See Cossins and Upton, *The Borana pastoral system of southern Ethiopia*, *Agricultural Systems* (1987) Vol. 25 199–218. “Tribal grazing areas tended to strengthen the group sense of ownership over defined tracts of land, with a reluctance to let others ‘trespass’.” See Markakis J., *Pastoralism on the Margin* (Minority Rights Group International, London, UK, 2004), p.7

<sup>109</sup> Berhanu, W., and D. Colman, *Farming in the Borana Rangelands of Southern Ethiopia: The Prospects for Viable Transition to Agro-pastoralism*, *Eastern African Social Science Review* (2007), Vol. 23, No.3, p. 98

Africa.”<sup>110</sup> As Scoones noted, “the major factor that contributed for such exceptional success is attributed to the indigenous knowledge of the Borana, the wealth of the Borana institutions and their capacity to regulate access to natural resources through adaptation to changes in the pasture resources.”<sup>111</sup> Thus, compared to the north Ethiopian tradition of “*makinat*” (to straighten forest land for cultivation purpose) the Borana natural resource use and management through indigenous knowledge is appraised as “a typical concept of reverence to nature.”<sup>112</sup> Hence, it is fair to argue that the customary communal land holding system in Borana pastoralist community is characterized by defined user group capable of regulating access through enforceable customary rules.<sup>113</sup>

On top of the overriding importance of communal land holding and customary resource management, Asmarom, once more noted, that Oromo pastoralist “cradleland serve other Oromo people living far-flung as a pilgrimage to Borana to find their roots and rekindle their distinctive identity as a nation.”<sup>114</sup> Hence, this clearly shows that preserving the Borana way of life based on the *gadaa* democratic system, as a cultural heritage of Oromo, is important in holding the Oromo people together.<sup>115</sup>

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<sup>110</sup> See at Cossins and Upton, *supra* note 107. These writers credit the Borana system with eliciting a significant degree of cooperation regarding resource use. See also Gemedo Dalle et al., Indigenous ecological knowledge of Borana pastoralists in southern Ethiopia and current challenges, *International Journal of Sustainable Development & World Ecology* (2006) Vol. 13 No. 2, 113-130

<sup>111</sup> Elizabeth Watson, *Inter-institutional alliances and conflicts in natural resource management: preliminary research findings from Borana Oromia Region* (Marena Research Project working paper No. 4, University of Cambridge, 2001), p.12

<sup>112</sup> Elias N. Stebek, *Dwindling Ethiopian Forests: The ‘Carrot’ and ‘Stick’ Dilemma*, *Mizan Law Review* (2008), Vol. 2, No. 2, p.255

<sup>113</sup> Sabine Homann, *Indigenous Knowledge of Borana pastoralists in natural resource management: a case study from southern Ethiopia*, (Cuvillier Verlag, Gottingen, 2005) for further indepth analysis.

<sup>114</sup> Asmerom, at *supra* note 102, p.94

<sup>115</sup> Cultural heritage does not end at monuments and collections of objects. It also includes traditions or living expressions inherited from our ancestors and passed on to our descendants, such as oral traditions, performing arts, social practices, rituals, festive events, knowledge and practices concerning nature and universe or the knowledge and skills constantly recreated by communities and groups in response to their environment, their interaction with nature and their history that provides them with a

In short, it is important to note that pastoralist communities in general and Borana Oromo in particular have unique ways of life, and that their worldview is based on their special attachment with communal land. The land they traditionally use and occupy since time immemorial is critical to their physical, cultural and spiritual vitality. As such, land and natural resources are valued because of the social relationships that they symbolize as much as or more than any immediate or material uses the owner may have for them.<sup>116</sup> This unique relationship to customary land regime is expressed in terms of traditional use or presence, maintenance of sacred or ceremonial sites, nomadic herding, and customary use of natural resources in a sustainable way. For the Borana Oromo relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.

### **3.THE RECOGNITION OF CUSTOMARY COMMUNAL LAND HOLDING IN ETHIOPIA**

#### **3.1.THE POLICY FRAMEWORK OF COMMUNAL LANDHOLDING REGIME**

In the past, pastoralist way of life portrays the fact that the policy advice is based on stereotypical representations of pastoralist areas as backwards, prone to food insecurity, starvation, and hotbeds of violent conflicts.<sup>117</sup> Different scholars noted that pastoral way of life in Ethiopia was considered

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sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. See the 2003 UNESCO Convention for the Safeguarding of Intangible Cultural Heritage, Art. 2

<sup>116</sup> M. Gluckman, *Politics, Law and Ritual in Tribal Society* (Chicago: Aldine Publishing Co. 1965), p. 47

<sup>117</sup> Crewett, W., A. Bogale, and B. Korf (2008) *Land Tenure in Ethiopia: Continuity and Change, Shifting Rulers, and the Quest for State Control* (CAPRI Working Paper 91, International Food Policy Research Institute: Washington, DC.) <<http://dx.doi.org/10.2499/CAPRIWP91>>



by the “ruling elites” as “an outdated mode of life that needs to be directed toward the path of modernity through sedentary farming or urban life and on technical interventions that focus on sedentarization of pastoralists by making them agro-pastoralists who only move livestock, but not their homes.”<sup>118</sup> Yacob Arsano and several others described this public discourse as the “highland” bias – a kind of highlander, sedentary farming versus lowlander, pastoralist dichotomy.<sup>119</sup> It is widely discerned that such kind of portrayal continued to prevail in the state’s policies and politics towards the pastoralist communities which resulted in land tenure policies that have largely ignored their specificities and have continued to consider sedentarization as the precondition of progress in the pastoral rangelands.<sup>120</sup> Regarding resource management, Pankhurst many years back also noted that indigenous pastureland management systems have not been given policy attention in Ethiopia.<sup>121</sup> According to his observation, past development approaches of Ethiopia undermines indigenous knowledge of resource management.<sup>122</sup>

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<sup>118</sup> Hagmann, T., *Pastoral Conflict and Resource Management in Ethiopia’s Somali Region* (PhD dissertation, Switzerland: IDHEAP, Université de Lausanne, 2006).

<sup>119</sup> Yacob Arsano, *Pastoralism in Ethiopia: The Issues of Viability* (Paper presented at the National Conference on Pastoral Development in Ethiopia, Addis Ababa, 2000) The Amharic version of Art. 40 (5) of the FDRE Constitution use the term “zelan” to refer pastoralist. According to Yacob Arsano, the term “implies being uncultured, aimless wonderer, lawless and vulgar. This perception is shared by almost all the highlanders who were and still are politically dominant.” *ibid* p. 2

<sup>120</sup> Yacob Arsano, at *supra* note 117. See also FDRE Land Administration and Land Use Proclamation No. 456/2005, Art.11(5): “A settlement and villagization program to be undertaken at the request and participation of the community shall be undertaken taking into account the objective of land consolidation.”

<sup>121</sup> Abera Ogato, *Indigenous common Pasture Land Management in Chenchu Wereda, South Ethiopia* (MA Thesis, Department of Regional and Local Development Studies, AAU, 2006)) pp.11-12. see also Pankhurst A., *Resource Management Institutions in Post Conflict Situations: Lessons from Yegof State Forest, South Wello Zone*, In Alula P (ed.) *Natural Resource Management In Ethiopia* (Forum of Social Studies, 2001), p. 58

<sup>122</sup> See Scoones I., *New directions in pastoral development in Africa*, In Scoones I (ed.) *Living with uncertainty. New directions in pastoral development in Africa* (London: International Institute for Environment and Development IT publications,1995), p.1–36

Under the present regime, scores of policy documents unfold the move towards more “pastoralist friendly” policies. For instance, “Rural Development Policy and Strategy” recognized “the longstanding community traditions associated with the use of pasturelands and their considerable expertise and know-how.”<sup>123</sup> Similarly, “Ethiopian Environmental Policy Document” also underlines the fact that the policies of the government regarding tenure and access rights to land include “*recognition that the constitution ensures the rights of land users to a secure and uninterrupted access including grazing lands as well as the recognition and protection of customary rights over land.*”<sup>124</sup> (Emphasis added). Particularly, this later policy aimed at protecting such customary rights as far as they are ‘constitutionally acceptable, socially equitable and are preferred by local communities.’<sup>125</sup> More recently, “The Growth and Transformation Plan” (short for GTP) on pastoral development also recognized the link between the livelihoods of pastoralists with livestock resources.<sup>126</sup> The GTP clearly emphasized the importance of water resource development for livestock and human consumption, improvement of pastureland and development of irrigation schemes.<sup>127</sup> Like what happens in the past, the GTP in pastoral development also underlined the fact that sedentarization programs are going to be executed so as to enable pastoralists’ to establish settled livelihoods.<sup>128</sup> Regarding natural resource management, the GTP indicated that “natural resource management in the pastoralists’ area as an important component of *agricultural development* in pastoral areas.”<sup>129</sup> So, as one reads these policy

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<sup>123</sup> See FDRE Rural Development Policy and Strategies (Ministry of Finance and Economic Development Economic Policy and Planning Department, Addis Ababa, 2003), p. 54

<sup>124</sup> *ibid.*

<sup>125</sup> *ibid.*

<sup>126</sup> See “The FDRE Growth and Transformation Plan (2010/11-2014/15)” vol. 1: Main Text (Ministry of Finance and Economic Development, Addis Ababa, Nov, 2010) p. 46 and 53

<sup>127</sup> *ibid.*

<sup>128</sup> *ibid.*

<sup>129</sup> *ibid.*

documents, it doesn't take a rocket scientist to figure out the contradictions and policy fluctuations in pastoralist areas. Firstly, on the one hand, while the policy document states that pastoral development plan will be based on traditional pastoralist systems, on the other hand, it also talks about sedentarization. Secondly, while it stipulates the development of livestock through range resources, it on the other hand, also mentions irrigation schemes as key assets to pastoral development and settlement.

Therefore, as one can understand from the above discussions, a clearly defined land tenure policy in the context of communal land regime is ignored despite the superficially attractive aspects of the policy documents. There exists a widely held consensus among pastoralist experts that the policy advice is still suffering from the hangover of past "ill-conceived" pastoral development policy.<sup>130</sup> In the literature, the reason for such policy fluctuation emanates from two main competing arguments. The first argument for in support of such policy justification is based on the assumption that land and resource use in pastoralist areas are inefficiently utilized. Accordingly, scholars on this chorus provide arguments that customary land holding as a communal property regime in pastoralist areas are susceptible to degradation and that land which is an important factor of production is wasteful in pastoralist's area.<sup>131</sup> Specifically, they criticize that customary land tenure in pastoralist area discourages investment on the land, because the individual occupants cannot be sure of reaping the full profits from their investment.<sup>132</sup> It is argued that custom prevents the emergence of a market for land, since

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<sup>130</sup> Solomon T.B. et al., Cattle-Rangeland Management Practices and Perceptions of Pastoralists Towards Rangeland Degradation in the Borana Zone of Southern Ethiopia, *Journal of Environmental Management* (2007) Vol. 82, 481-494

<sup>131</sup> See generally Ambreena Manji, *The Politics of Land Reform in Africa: From communal tenure to free markets*, (New York, USA, 2006)

<sup>132</sup> *ibid*

transactions are confined to the traditional community unless private property system is opted.<sup>133</sup>

The second argument echoed the assumption that government should intervene in the pastoral way of life to provide a choice of life style – sedentarization. This argument basis its reasoning on the difficulty of providing public services to mobile pastoral communities unless they are willing to settle on a fixed area if possible as a cultivator if not at least as agro-pastoralist.<sup>134</sup> Group of scholars who lobby for government intervention in pastoral way of life comes from government policy makers, planners and NGO's.<sup>135</sup> This group of scholars believes that pastoralist areas are prone to drought, food insecurity and conflict over use of land resources. Therefore, settlements of pastoral communities and privatization of communal land regime were proposed as policy advice to bring about the long-term solution for such chronic problems.<sup>136</sup>

On the other hand, the bulk of the study, particularly in Borana Oromo pastoralist area, reveals the mounting substantial evidences against the above arguments. Quite to the contrary, there are group of scholars who argues that customary land tenure promotes productive investment as customary land laws vest land in a community, such as a clan or lineage.<sup>137</sup> These groups of scholars claim that individual occupants of the land do not have exclusive

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<sup>133</sup> *ibid*

<sup>134</sup> See Pastoralists Forum Ethiopia, International Institute of Rural Reconstruction and Development Fund, *supra* note 100, at p. 35-37

<sup>135</sup> Abdul B. Kamara (2005) *The Dynamics of Land Use and Property Rights in Semi-Arid East Africa: Ethiopia Case Study*. See at <[http://www.capri.cgiar.org/wp/..%5Cpdf%5Cbrief\\_dryl-11.pdf](http://www.capri.cgiar.org/wp/..%5Cpdf%5Cbrief_dryl-11.pdf)> (Accessed on April 23, 2013)

<sup>136</sup> Unlike resettlement of farmers from drought-prone settled areas that involves only a change of location, sedentarization for pastoralists, involves a complete change in lifestyle and a significant cultural transformation. See at Pastoralists Forum Ethiopia, International Institute of Rural Reconstruction and Development Fund, at *supra* note 100 p. 35

<sup>137</sup> Susan J. Buck, *Cultural Theory and Management of Common Property Resources*, *Human Ecology* (1989), Vol. 17, No. 1, pp. 101-116. See also Melanie G. Wiber and Peter Lovell *Property, Kinship and Cultural Capital: The Ethics of Modelling Kinship in Sustainable Resource Management* *Anthropologica*, (2004), Vol. 46, No. 1, pp. 85-98

rights to the land and they cannot freely dispose of the land through sale.<sup>138</sup> The claim that private property is better at protecting resources than customary common property regimes is refuted by scholars such as Elinor Ostrom.<sup>139</sup> According to Ostrom, the fact that a certain property regime is collective or communal does not necessarily lead to the conclusion that it is inefficient.<sup>140</sup> Full members of communal groups argued Ostrom “has the right to use, exclude others and manage their rights over the communal land subject in many systems to the approval of the other members of the group.”<sup>141</sup> Therefore, property rights under communal regime are utilized efficiently as customary institutions governing the commons provide allocative scheme without compromising the property regime.

In the same token, arguments against pastoral sedentarization largely drive from the studies of pastoral development issues in the context of East Africa. Many scholars noted that the classical paradigm for pastoral development in Africa based on sedentarization, privatization and intensification is futile and urged for a new paradigm based on mobility of livestock, common property management and extensive production systems.<sup>142</sup> According to Niamir-Fuller, for instance, the reason for shift in paradigm is precipitated by ‘the reevaluation of the value of traditional pastoral production and that the

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<sup>138</sup> *ibid*

<sup>139</sup> Elinor Ostrom (1933–2012) received the 2009 Nobel Prize in Economic Sciences for her groundbreaking research demonstrating that ordinary people are capable of creating rules and institutions that allow for the sustainable and equitable management of shared resources (for her analysis of economic governance, especially the commons). See at <<http://elinorostrom.indiana.edu/>> (Accessed on April 9, 2013)

<sup>140</sup> Ostrom, *supra* note 71

<sup>141</sup> Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press, 1990), p. For further analysis of Ostrom’s common property principles in Ethiopian context see also Shimelis Beyene and Dafa Gudina, ‘Reviving a Traditional Pasture Management System in Fentale, East Central Ethiopia’ *Journal of Ecological Anthropology* (2009), Vol. 13 No. 1 pp. 69-70

<sup>142</sup> Johan Helland, *Land Alienation in Borana: Some Land Tenure Issues in A Pastoral Context in Ethiopia*, in Mustafa Babiker’s (ed), *Resource Alienation, Militarization and Development Case Studies from East African Drylands* (Organization for Social Science Research in Eastern and Southern Africa, Addis Ababa, 2002), p. 47

classical pastoral development paradigm benefited only a very small minority of elite pastoralists.’<sup>143</sup> Similarly, Jahnke also noted that “an appropriate end point of pastoral development may be seen as a situation in which pastoralists manage their own resources at a higher level of productivity, and in accordance with ecological principles of sustained yield, while basically maintaining their characteristic life style.”<sup>144</sup>

### 3.2. THE LEGAL FRAMEWORKS OF COMMUNAL LAND HOLDING REGIME

During the Imperial regime, any permanently uncultivated and unsettled land was considered as no man’s land (*terra nullius*) and claimed to be public domain, hence, state property.<sup>145</sup> However, the important legal framework enacted during imperial regime yet obsolete and often unnoticed by the academia, practitioners and judges in the present time is the Ethiopian Civil Code provisions on “Agricultural Communities”.<sup>146</sup> This part of the civil code recognizes ownership [holding rights] of land by agricultural communities such as village or tribal groups to *collectively exploit in*

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<sup>143</sup> M. Niamir-Fuller, *Managing Mobility in African Rangelands: The Legitimization of Transhumance* (Intermediate Technology Publications, Cambridge, 1999), 1-2

<sup>144</sup> Jahnke H E, *Livestock Production Systems and Livestock Development in Tropical Africa* (Federal Republic of Germany, 1982), p. 101. See also Coppock D Layne (ed.) *The Borana Plateau of Southern Ethiopia: Synthesis of pastoral research, development and change, 1980-91* (ILCA, International Livestock Centre for Africa, Addis Ababa, Ethiopia, 1994) p. 189

<sup>145</sup> See The Revised Constitution of the Ethiopian Empire (1955), Art. 130(d): “all property not held and possessed in the name of any person, natural or judicial, including...all grazing lands... are State Domain.”

<sup>146</sup> See Ethiopian Civil code Articles 1489-1500. “the original draft on ‘Agricultural Communities’ had envisaged two types of communities based on the twin factors of religion and the mode of life of a community.’ He argued that while the first type of communities envisaged those of the chrsitan highlanders who lead sedentary mode of life based on agriculture and those who coneveive land as belonging to a family or a village. The second type of communities envisaged those non-christian pastoralsts [sic] who lived scattered throughout Ethiopia and those concieve of land as belonging to a tribe. It is based on this conception Bilillign argued that the term ‘Agricultural Communities’ in the Civil Code is used to cover the two types of communities described above. See See Bilillign Mandefro, *Agricultural Communities and the Civil Code: A Commentary*, Journal of Ethiopia Law (1969), Vol. 6 No. 1, pp.145-46

*conformity with the tradition and custom of the community concerned.*<sup>147</sup>

Bilillign noted that the social milieu in which this part of Ethiopian Civil Code is drafted purports to preserve custom and tradition and is not an innovation.<sup>148</sup> He argued that it is declaratory of existing custom which consequently became legally binding.<sup>149</sup>

During the Dergue regime “all rural lands were declared to be the collective property of the Ethiopian people.”<sup>150</sup> Yet, the traditional patterns of pastoralist’s customary communal land holding were confirmed and “the possessory rights of nomads over land they customarily use for grazing or other purposes” was duly recognized.<sup>151</sup> Cohen and Koehn argued that the government during this regime differently treated kinship and village tenure from freehold tenure by separate treatment in the proclamation.<sup>152</sup> According to these writers, the most important example of differential treatment is found in the law that requires nomads to form an association aimed at inducing nomadic people to cooperate in using grazing land or water rights.<sup>153</sup> However, they argue that the issues which remain unresolved are whether the government will improve the nomads’ economic potentials as ranchers, requires them to resettle as farmers or seize their land in the end for agrarian purposes.<sup>154</sup>

Following the suits of its predecessors, the Federal Democratic Republic of Ethiopian Constitution (FDRE Constitution hereinafter) clearly declared that ownership of rural and an urban land including natural resources as *a*

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<sup>147</sup> see art. 1489

<sup>148</sup> Billilign, at supra note, 146

<sup>149</sup> *ibid.*

<sup>150</sup> See Public Ownership of Rural Lands Proclamation, 31/1975, Art. 3

<sup>151</sup> John M. Cohen and Peter H. Koehn, Rural and Urban Land in Ethiopia, *African Law Studies* (1977), No. 14 p. 6

<sup>152</sup> *ibid.*

<sup>153</sup> *ibid.*, at p. 8

<sup>154</sup> *ibid.*

*common property* of the Nations, Nationalities and Peoples of Ethiopia and the State.<sup>155</sup> Here it is important to note how state/public property and common property were construed in Ethiopia. As one can see from the above legal regimes, the nomenclatures such as ‘state property’ or ‘public domain’ during Imperial regime; ‘collective property’ or ‘public ownership’ during the Dergue and finally and presently ‘common property’ were used to refer property rights to land, without any reference to the underpinning conceptual distinctions. So, as noted before, the ways one appreciates these terms are important to better grasp perspectives on common property regime in Ethiopian context. Based on these triggering issues the following questions are worth examination. Firstly, does the concept of “common property” logically extend to public property or state property? Alternatively, does it mean that common property is always state or public property? Secondly, can the State under the FDRE Constitution claim exclusive ownership rights to land and its natural resources? Thirdly, does the term common property in the FDRE Constitution also intend to refer to property own[ership] of pastoralists communities such as grazing land in common? Fourthly, does the use and administration of land and its natural resource efficient if state or government claims ownership rights by disregarding of community based property regime? The following sub-topics try to address these questions.

### ***3.2.1. Communal Property under the FDRE Constitution***

As previously noted, the ownership of public property is held by the state who tries to allocate such resources based on the collective interest of the society as the focal point. In Ethiopia, however, the term common property is used (as terms like state or public property could not be inferred from the FDRE Constitution) to refer to a property regime in which ownership rights

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<sup>155</sup> Federal Democratic Republic of Ethiopian Constitution (1995) Neg. Gaz. Proclamation No. 1, 1995, Art. 40(3)



of land and its natural resources are held by both the state and the peoples of Ethiopia. But, despite such ownership structure, the term state or public property, rather than common property, is widely used in both academic and public discourse. In this context, land including its natural resources as a common property of nation, nationalities and peoples of Ethiopia is used to describe state or public property in which state hold it in order to allocate this resources based on the interest and the common benefit of Ethiopian people. Such conception of state, public and common property convergence could also be understood from the reading of both FDRE Constitution and land administration and land use proclamation provisions. The first relates to the explicit use of the phrase ‘common property’ in article 40(3). The second relates to the duty of both federal and regional states to ‘enact laws for the utilization and conservation of land and other natural resources’ under article 51(5) and 52(2). The third relates to Article 89(6) which provides the duty of the government to hold land and other natural resources on behalf of the People and to deploy them for their common benefit. The fourth one relates to the provisions that provides for government ownership in article 5(3) of Proclamation No. 456/2005.<sup>156</sup>

However, the other reading of the same constitution poses ambiguity as to whether common property is really mean public property. Because, the FDRE constitution also provides other two possibilities in which common property regimes could be recognized. First, pastoralists have the right to free grazing land (though as we shall see its communal nature is often contested). Second, communities in appropriate circumstances may be specifically empowered by the law to own property in common.<sup>157</sup>

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<sup>156</sup> This provision considers government as being the owner of rural land and empowers it to change communal rural land holdings to private holdings it finds it necessary to do so.

<sup>157</sup> FDRE Constitution, *supra* note 155, at Art. 40(2)

Therefore, these provisions may imply common property regime to imply pastoralists communal property regime but does not necessarily imply public/state property regime.

More specifically, without prejudice to the preceding analysis, the difference between common property and state property is nuanced by the competing and dominant debates in favour of public or state land ownership and the doctrinal interpretation of what signifies the terms “state and people” used in Article 40(3) of the FDRE Constitution. Does the phrase “state and people” in Article 40(3) of the FDRE Constitution the same because people are normally represented by their state? In this regard, Abdullahi noted that understanding “state and peoples” as the same is “very dangerous and not in the spirit of the constitutional framework because it implies that all “peoples” rights’ under the constitution are the rights of the state.”<sup>158</sup> This writer noted that the manifestations made by the government favoring that land and its natural resources are public property and can only be owned by the state complicates the matter. Of course, it is beyond manifestation as the FDRE Rural Land Administration and Land Use Proclamation No. 456/2005 clearly illustrates the position of the government by including a clear provision declaring Government as the ‘owner of rural land, and communal rural land holdings.’<sup>159</sup> Hence, it is important to address whether “people’s rights” really means “state’s rights” under the FDRE constitution and if that

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<sup>158</sup> Mohammud Abdulahi, *The Legal Status of the Communal Land Holding System in Ethiopia: The Case of Pastoral Communities*, *International Journal of Minority and Group Rights* (2007), Vol. 14 p. 113

<sup>159</sup> See FDRE Rural Land Administration and Land Use Proclamation No. 456/2005, Art. 5(3) which clearly indicates that the Proclamation considers only one form of ownership of rural land: i.e. government ownership, whereas the Constitution under Article 40(3) bestows ownership of land on the state as a political-administrative entity and peoples as a social collective which may take the form of nations, nationalities and the Ethiopian people in general.” However, Art. 89(6) of the FDRE Constitution provide that “Government has the duty to hold, on behalf of the People, land and other natural resources and to deploy them for their common benefit and development.” In other words, the Constitution doesn’t entrust ownership to the Government.” See Elias N. Stebek, *supra* note 111, at p.268

is the case whether state property regime is apt to efficiently manage land and its natural resources.

To begin with the first issue, as Abdullahi argues people's rights and states' rights are very different under Article 39 of the FDRE Constitution.<sup>160</sup> Particularly, he noted that, "unlike state practice under international law in respect to the right to self-determination, which restrictively equates peoples with state and vests peoples' rights in the state, the FDRE Constitution recognizes this right of the people including secession."<sup>161</sup> Accordingly, Article 39 of the constitution does not vest the rights of the Ethiopian people in the state and thus cannot lead to an equation of peoples with state. Per this understanding, the right to self-determination is nothing but the right of the "nation, nationality and people" to exploit land and its natural resources within the territory of a certain Regional State.

In this context, article 39 of the FDRE Constitution guarantee the right to self-determination of the "nation, nationalities and peoples" to use and administer land including its natural resources as an expression of regional autonomy by enacting laws to that effect. However, such law making power is vested in the federal government by the FDRE Constitution. Regional states are only mandated to administer land and other natural resources in accordance with federal laws.<sup>162</sup> If land use law is to be enacted by the Regional States, it shall only consist of detailed provisions necessary to implement Federal Land Law.<sup>163</sup> It is based on this mandate that "Oromia Rural Land Use and Administration" (proclamation No. 130/2007) has been enacted. However, this raises the issue whether states are empowered to enact land administration and land use law that recognizes the specificities of

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<sup>160</sup> Abdullahi, *supra* note 158

<sup>161</sup> *Ibid*, at p. 121

<sup>162</sup> FDRE Constitution, *supra* note 155, at Art. 52 (2. d)

<sup>163</sup> FDRE Rural Land Administration and Land Use Proclamation No. 456/2005, Art. 17

its pastoral communities thereby encourages communal land holding systems currently in practice. As repeated several times in this paper, the FDRE Constitution clearly provides Ethiopian pastoralists with the right to free grazing land as well as the right not to be displaced from their own lands.<sup>164</sup>

As noted before, Oromo pastoralists' way of life is characterized by communality and hence suits to group rights but not individual rights. This very fact clearly demonstrates that the right of Ethiopian pastoralists to free grazing land under the FDRE Constitution is nothing but the right to their communal landholding system. Consequently, taking the justifications for the adoption of Article 39 and 40(3) together with Article 40(5), one can conclude that the FDRE Constitution has recognized the common property rights of Ethiopian pastoralists over their customary land holding system. The writer for stronger reasons argue that state council of Oromia has the constitutional power to enact land administration and land use law that clearly addresses the specificities of its pastoralists' communities in its regional territory. Needless to mention it, such power first and for most emanates from the right to self-determination over the exploitation of its resources within its constitutional territory.<sup>165</sup> Second, it emanates from the rights of Ethiopian pastoralists' in general and Oromo pastoralists in particular to free grazing land and the right not to be displaced from their own lands as enshrined under both FDRE and Oromia constitutions.<sup>166</sup>

The other issue relates whether land including its resources held by the state as noted before, could efficiently and adequately be managed through public property regime. As noted by Elias N. Stebek, the current public property

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<sup>164</sup> FDRE Constitution, *supra* note 155, at Art. 40(5)

<sup>165</sup> However it should be clearly noted that the [Federal] "government has the duty to hold, on behalf of the People, land and other natural resources and to deploy them for their common benefit and development." *ibid*, at Art. 89(6)

<sup>166</sup> The Revised Constitution of Oromia Regional State, Magalata Oromiya, Proclamation No. 94/1997, Art. 40(5)

regime in Ethiopia is vague and ineffectively implemented as “it is usually impossible to effectively exclude persons from the use and overconsumption of common pool resources in Ethiopia.”<sup>167</sup> He noted that in such state of affairs “*de jure* public property becomes *de facto* open access in which certain common-pool resources in the rural areas of Ethiopia such as forests [and pastures] are exposed to encroachment, unlawful logging and overgrazing.”<sup>168</sup> As proposed by Elias, the cure for such kind of ills is “to dully recognize and clearly define the property rights of indigenous communities and collectives so that the right holders can have vested interest in the preservation, protection and development of these resources.”<sup>169</sup>

In addition to what Elias has noted “*de jure* public property” also becomes *de jure* open access within the current Ethiopian communal property system. As noted before, the reason behind such assertion is that there exists legal rights designed for rural communities for the purpose of free grazing land without specifically identifying well-defined user groups of the *de jure* public property regime. Obviously, this situation in turn creates a condition of open access this time with a legal back up of free grazing land with the right to graze without interference from elders as previously done through local customary institutions. As we shall see in what follows, this situation turns *de facto* managed communal property regime in to *de jure* open access resources since such legal scheme undermines previously managed common property regime by weakening the existing customary institutions of resource management. This is because of the fact that the legal scheme gives rights to recalcitrant members of the community to defy customary law and customary institutions over resource use and management. Generally, in the absence of decentralized and adequately defined community property

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<sup>167</sup> Elias N. Stebek, *supra* note 67

<sup>168</sup> *Ibid.*

<sup>169</sup> *ibid.*

regime, it would be practically difficult for “the state and the peoples of Ethiopia” to effectively and adequately control such vast area of communal land in pastoralist area.. Having the above discussions, it is crucial to critically evaluate whether both federal and Oromia land administration and land use laws enacted so far conform to the above constitutional mandate and whether such laws takes the specificities and needs of Borana pastoralists communal land holding purposes.

### ***3.2.2. Communal Land Holding Rights under Rural Land Law***

To begin with, the “FDRE Rural Land Administration and Land Use Proclamation No. 456/2005” is enacted “for the utilization of and conservation of land and other natural resources...”<sup>170</sup> in general. As noted before, both the FDRE and Oromia constitutions clearly provides that the implementation of “Ethiopian pastoralists *right to free land for grazing and cultivation as well as the right not to be displaced from their own lands shall be specified by law*”<sup>171</sup> (Emphasis added). However, though the constitution provides for the mandatory enactment of “specific law” to implement this provision, a specific law that devotes to address the needs of Ethiopian pastoralists is not yet enacted. Rather, the concern of Ethiopian pastoralists are treated with the concern of Ethiopian peasants who lead sedentary life and depend on land cultivation under the generic rural land administration and land use legislation as a *one size fits all* approach. Had this been the intention of the legislature, separate treatment of Ethiopian peasants and pastoralists under separate sub-articles wouldn’t have been warranted.<sup>172</sup> Therefore, as the saying goes, it takes two to Ethiopian land administration and land use as “it takes two to tango”. Of course one may argue against

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<sup>170</sup> See FDRE Constituion, supra note 155, at Art. 51(5)

<sup>171</sup> ibid Art. 40(5)

<sup>172</sup> Ibid. Both Art 40(4) and 40(5) clearly hint the manadatory enactment of specfic laws to implement respective rights, ultimately showing the intention of the legislature to separately treat both groups.

such separate dichotomy in so far as pastoralists demand for communal land is adequately addressed under a single proclamation. But the issue that requires critical evaluation is whether this is really the case.

The main reason that necessitated the enactment of Proclamation No. 256/2005 is “to establish a conducive system of rural land administration that promotes the conservation and management of natural resources, *and encourages private investors in pastoralist areas where there is tribe based communal landholding system*”.<sup>173</sup> (Emphasis added). The *acontrario* reading of this preamble clearly shows that communal land holding system is going to be discouraged in order to encourage private land holding. As previously noted, customary communal land holding system is conducive to encourage community based resource management as witnessed by the Borana case. But, how could “*the conservation and management of natural resources is promoted*” in pastoralist area by demoting the existing communal land holding system that is intertwined with natural resource management?

Moreover, neither the definition of the term “pastoralist” nor that of “communal holding” in this very proclamation depicts the significance of such collective or group interests. The term “pastoralist” is defined to signify an individual who pursues the raising and producing of cattle by holding rangeland from one place to the other in order to support himself and his family.<sup>174</sup> This definition clearly individualized the term pastoralists irrespective of the communal nature of pastoral way of life and communal land use for grazing purpose. Strictly speaking, one can argue that this proclamation clearly recognized private holding of rangeland (grazing land) among pastoralist as a family land holding. This raises the problematic issue

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<sup>173</sup> See the prambular paragraphs of Proclamation No 456/2005, *supra* note 163

<sup>174</sup> FDRE Rural Land Administration and Land Use Proclamations No. 456/2005, Art. 2(8). See also Oromia Rural Land use and land Administration Proclamation No. 130/ 2007 Art. 2(14)

as to whether an individual pastoralist with his family could manage to ‘hold rights’<sup>175</sup> separated from his clan given the existing customary communal grazing landholding system in pastoralists’ area.

According to Beyene and several others the extensive allocation of land for private use in the pastoral areas is posing challenge to communal resource management such as pasture.<sup>176</sup> Beyene observed that change in property regime occurred by privatizing large pasturelands in pastoral areas in which 24 percent of land among pastoralists of southern Ethiopia has been put under private use either for cultivation or private ranches.<sup>177</sup> More specifically, the continuing enclosure of pastureland in the form of *kaloo* among Borana pastoralists by rich members of the pastoral community for private purpose while at the same time they are also sharing the communal grazing lands with others resulted in the breakdown of customary rules and institutions that govern common pastureland causing frequent conflicts even among members of the Borana pastoral communities.<sup>178</sup>

On the other hand, the term “communal holding” is defined as “rural land which is given by the government to local residents *for common grazing*,

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<sup>175</sup> “holding right” is defined as the right of any peasant farmer or semi-pastoralist and pastoralist ... to use rural land for purpose of agriculture and natural resource development, lease and bequeath to member of his family or other lawful heirs, and includes the right to acquire property produced on his land thereon by his labour or capital and to sale, exchange and bequeath same.” See *ibid* at Proclamation 456/2005, Art. 2(4). A closer look at this definition simply shows list of purposes of holding rights of rural land but holding right of rural land for the purpose communal grazing is ignored either by default or design.

<sup>176</sup> Fekadu Beyene, (2011), “Dismantling of common property, land use and pastoral livelihoods in eastern Ethiopia,” *Journal of Development and Agricultural Economics* Vol. 3 No. 10, p. 480

<sup>177</sup> *ibid*

<sup>178</sup> Demese Chanyalew et al, “Ethiopia’s Agriculture Sector Policy and Investment Framework: Ten Year Road Map (2010-2020)” (Addis Ababa, Ethiopia May 3, 2010) p. 114. “One reason for the deterioration of traditional institutions may be that there has been an increase in the cost of maintaining traditional rights or that the cost of negotiating the rules determining these rights has increased, perhaps due to a competing state-sponsored system of property rights.” See Fuys et al. (2006), ‘Securing common property regimes in a “modernizing” world: synthesis of 41 case studies on common property regimes from Asia, Africa, Europe and Latin America’, Paper presented at ‘Survival of the Commons: Mounting Challenges and New Realities’, the Eleventh Conference of the International Association for the Study of Common Property, Bali, Indonesia.



*forestry and other social services.*”<sup>179</sup> Thus, pastoralists as “local residents” may use land for common grazing as communal holding only upon the authorization of the government. But given the historic and customary rights of pastoralists to grazing land, why such authorization of the government is required as a prerequisite to use land for common grazing purpose is difficult to reckon. Similar provision is also found in Oromia rural land use and administration proclamation which too recognize the right of rural community to have access to rural land for grazing; religious or ritual places, water points and other social services.<sup>180</sup> At first glance, it seems that this provision ultimately addresses the needs and specificities of pastoralists’ communal landholding for grazing, religious and ritual activities. But, such free grazing land to rural communities does not clearly show whether it refers to rural areas of land cultivators, agro-pastoralists’ or pastoralists separately as defined user groups.

Another legal provision that strengthen the fact that federal rural land administration and land use discourages communal land holding regime in pastoralist area can be found in the definition of both “minimum size holding” and “minimum private land holding”. The former refers to size of pastoralists’ rural land holding the productivity of which can ensure the food security of pastoralist family or which suffices for grazing.<sup>181</sup> The later refers to rural land in the holding of pastoralist who is entitled by law to use rural land.<sup>182</sup> Therefore, these legal provisions clearly recognize private grazing land holding system which as noted before weakens communal pasture land

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<sup>179</sup> 456/2005 art. 2(12). See also Oromia Rural Land Administration and Land Use Proclamation No. 130/ 2007 Art. 2(5). According to this proclamation, the term “Communal Holding is used to refer rural land which the local community commonly uses for grazing, woodlots and other social purposes” irrespective of government authorization.

<sup>180</sup> Oromia Rural Land Use and Administration Proclamation No. 130/2007, Art. 5(4)

<sup>181</sup> See Proclamation No. 456/2005 Art 2(10)

<sup>182</sup> *ibid* art. 2(11). See also *supra* note 177, at Art. 2(6) that defines the term ‘private land holding’ in pastoralists’ context as rural land in the holding of pastoralists who are entitled by law to use the land

holding and customary institutions designed to sustainably utilize such resources. Yet, the trend as provided under Article 13 of this proclamation shows that in the future “a system of free grazing” is prohibited and a system of “cut and carry” feeding is going to be introduced step by step<sup>183</sup> This very fact clearly contradicts the constitutional rights of pastoralists to “free grazing land”.

In general, three types of property regimes can be identified in the pastoralist area. The first one is related to a regime in which grazing land is customarily hold by pastoralists’ in common as a community based property regime since time immemorial. The second is a regime in which “a member” of the pastoralist and his family hold pastureland for private purposes. The third, one is open access to rural land for grazing; religious or ritual places, water points and other social services to rural communities. However, such “use rights of the different types of landholdings in the country”<sup>184</sup> may possibly create potential conflict as different user groups rival over scarce resources by disregarding the customary law and institution. For instance, in areas where pure pastoralists exist but land is allocated to “a member” of a pastoralist, it seems probable that rivalry over grazing land would be created among such member of pastoralists who previously use resources in a collegial way. The same is true in rural area inhabited by predominantly pastoralists or agro-pastoralists and land cultivators. In this situation too grazing land encroachment for the purpose of land cultivation may negatively affect the grazing rights of rural communities who are pastoralists and could be a potential for conflict over resource use. Therefore, it may

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<sup>183</sup> See FDRE Rural Land Administration and Land Use Proclamation No. 456/2005, Art. 13(3). See also “Ethiopia – Strengthening Land Tenure and Administration Program, Training Manual on Rural Lands Policy and Administration: Short Term Training Course for Regional Judges of the Amhara, Tigray, Oromia and the SNNPR States of Ethiopia”(USAID and Ministry of Agriculture and Rural Development, 2006), p. 71 which describes the prohibition of free grazing to be gradually replaced by zero-grazing.

<sup>184</sup> See the Preamble of Proclamation No. 456/2005

practically remains difficult to administer such fragmented landholding regime in pastoralist's communities who outrightly reject individualized holding of rangelands for private use purposes.

#### **4. CONCLUDING REMARKS**

This paper critically examined the contemporary perspectives on common property regime in Ethiopian Borana Pastoralists context. Particularly, attempted is made to show how early misconceptions related to resource administration and use in common property regime has continued to influence policy makers to intervene in the administration of common property regimes. However, despite such untenable and old-fashioned conceptions of communal property regime, the paper has critically evaluated how the Borana Oromo pastoralists communities, are capable of efficient resource management in common property regimes and how Ethiopian policy and legal frameworks has attempted to approach it. In doing so, the paper argued that both policy and legal approach towards clearly defined pastoralist's communal land holding regime is still suffering from the past misconceptions about common property regime. It is true that both policy and legal documents clearly depict the determination of government to promote the proper management of land and its natural resources through pastoralists' knowledge and experience. But, it is easier said than done as the law is very clear beyond the iota of doubt since it discourages customary communal land holding rights and alternatively encourages private land holding regime.

More specifically and firstly, the current land use and administration legislations both Federal and Oromia are designed to suit the demands of land cultivators where communal land holding for grazing purpose is lost in both policy and legislative tatters. Second, the existing customary land

holding system and its accompanying customary institutions of resource administration is relegated, weakened and threatened through the deliberate introduction of “free grazing system” that creates *de jure* open access to “common/public property of the nations, nationalities and peoples of Ethiopia”. The implication of such legal and policy moves in the context of Borana Oromoo unfold its insurmountable problems that require immediate and prudent legal and practical responses.

To mention but few of such problems, firstly, it entirely affects the Oromo *gadaa* system, the remnants of Oromo cultural and political heritage in the cradleland which are embedded in the practice of pastoral way of life symbolized by the customary rights of communal land holding. It goes without saying that this situation brings a far reaching consequence on the social fabric of Oromo pastoralist communities – it probably erodes their culture, customary institution and religious practices.<sup>185</sup> Secondly, it affects their constitutional right to engage freely in any economic activity and to pursue a livelihood of once own choice.<sup>186</sup> Thirdly, it erodes their indigenous knowledge of resource use and administration through customary institutions which in turn undermines community based resource management. Fourthly, in the absence of legal regime that clearly defines customary land holding rights in pastoralist context it precipitates conflict among Borana groups and other ethnic groups as we are witnessing today due to the rivalry over pasture resource. In particular, such rivalry, by and large, is attributable to both

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<sup>185</sup> See FDRE Constitution Art. 41(9) that reads; “[T]he State has the responsibility to protect and preserve historical and cultural legacies ...” See also *ibid*, at Art. 39(2) which provides the rights of nation, nationalities and peoples in Ethiopia, “to develop and to promote its culture; and to preserve its history.”

<sup>186</sup> See FDRE Constitution Art 41(1 and 2) that reads: Every Ethiopian has the right to engage freely in economic activity and to pursue a livelihood of his choice anywhere within the national territory. Every Ethiopian has the right to choose his or her means of livelihood, occupation and profession.” (Emphasis added)

legalization of “free grazing systems” and private land holding systems in a previously managed common property regime.

It should be made clear from the outset that, the fact that the ancestors of Borana Oromo were pastoralists and hence the present groups also should remain pastoralists would be very difficult to succumb. It would, neither mean that Borana Oromo groups remain a museum of indigenous peoples where researchers, tourists and Oromo fellows alike pay tribute to their cultural heritage while they are suffering from draught, poverty and illiteracy. But for all its intention and purpose, to repeat the remark made by Jahnke and many other scholars, both federal and regional governments should genuinely design appropriate pastoral development policy and law that unequivocally guarantee pastoralists right to manage and utilize their own resources at a higher level of productivity, and in accordance with ecological principles of sustained yield, while basically maintaining their characteristic life style. Therefore, in view of the preceding critical appraisal of communal land holding regime in Ethiopia, the following recommendations are provided as the way forward.

First, it is crystal clear from the readings of both the FDRE and Oromia Regional State constitutions require the mandatory enactment of an enabling legislation. Therefore, the implementation of constitutional rights of pastoralists to free land for grazing and other purposes as well as the right not to be displaced from their own lands should be specified by law. Second, the major parts of Rural Land Use and Administration of Oromia Regional state are designed to suit land cultivators. However, a well-defined customary land right is crucial for the vitality of Oromo pastoralists as they represent the home for Oromo *Gadaa* democracy, which if not given serious attention, would endanger Oromoo cultural heritage. The state council of

Oromia Regional State, both under its constitution and under the Federal land administration and land use proclamation is mandated to enact not only detail laws that adequately address the demands and specificities of Oromo peasants, but also Oromo pastoralists in its territory. It goes without saying that a threat to their communal customary land rights in Borana, Karrayu, and Guji Oromo is a threat to Oromo cultural heritage preserved in that very “cultural corridor”. Therefore, given this unique importance of Oromo pastoralists, the state council of Oromia should enact a specific legislation that specifically addresses their customary land rights. Third, the potentials of indigenous community in the proper resource management should be harnessed as a suitable condition for cooperative behaviors and co-management or as shared responsibilities with government bodies. Yet, this situation could happen only by recognizing customarily well-defined communal pastureland holding regime such as the Borana case, within the broader context of public property regime in Ethiopia. The author firmly believes that unless community based property rights are put in place, the current legal conception of land including its natural resources as “the common property of the nations, nationalities and peoples of Ethiopia” possibly creates *de facto* open access that result in the real “tragedy of the commons”. Therefore, the government both at federal and regional level should not only encourage indigenous customary institutions of resource management through community based property regime but also provide clear policies and guidelines that could be applied to existing institutions in pastoral areas. Finally, I will conclude by two advices one provided by Hernando De Soto and the other by the Ethiopian Civil Code. De Soto writes:

*“Where have all the lawyers been? Why haven’t they taken a hard look at the law and order that their own people produce? The truth is*

*that lawyers in these countries are generally too busy studying Western law and adapting. They have been taught that local practices are not genuine law but a romantic area of study best left to folklorists. But if lawyers want to play a role in creating good laws, they must step out of their law libraries into the extralegal sector, which is the only source of the information they need to build a truly legitimate formal legal system.*"<sup>187</sup>

Ethiopia's Civil Code reads:

*"No law which is designed to define the rights and duties of the people and to set the principles governing their mutual relations can ever be effective if it fails to reach the heart of those to whom it is intended to apply and does not respond to their needs and customs and to the natural justice."*<sup>188</sup>

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<sup>187</sup> Hernando De Soto, *The Mystery of Capital. Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2000), p. 187

<sup>188</sup> See the Preface of Civil Code of the Empire of Ethiopia (1960)

# **Ergama, Mul'ata, Toorawwan Xiyyeeffannoo fi Duudhaalee Inistiitiyuutii Leenjii Ogeessota Qaamolee Haqaa fi Qo'annoo Seeraa Oromiyaa**

## **Ergama**

Leenjii ogeessota qaamolee haqaa itti fufiinsaan kennuun gahumsaa fi qulqullina olaanaa gonfatanii sirna heeraa fi seeraa kabajanii fi kabachiisan horachuu, gahumsa ogeessota seeraa mirkaneessuu fi rakkoowwan sirna haqaa irratti qorannoo fi qo'annoo gaggeessuun yaada haaraa burqisiisuun fooyya'iinsi sirna haqaa itti fufiinsaan akka jiraatu dandeessisuu dha.

## **Mul'ata**

Bara 2012 tti gahumsa hojii leenjii fi qo'annoo seeraa fi haqaa tiin Inistiitiyuuticha sadarkaa biyyaatti filatamaa, akka Afirikaatti beekamaa gochuu dha.

## **Toorawwan Xiyyeeffannoo**

1. Gahumsa Ogeessota Qaamolee Haqaa
2. Qo'annoo fi Qorannoo

## **Duudhaalee Ijoo**

- Gahumsa
- Iftoomina
- Maamila Giddugaleessaa Godhachuu
- Kalaqummaa fi
- Dursaani Yaaduu



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1. Submissions should be articles (not published elsewhere) related to legal, economic, political and social issues arising in relation to Oromian, Ethiopian, and other related International Laws. Contributions could also be other works such as essays, comments on legislation, book reviews, court cases (with or without comments).
2. Contributions may be submitted in Afaan Oromo, English or Amharic
3. Submissions shall be computer typed, 1.5 space, in 12 font, Times New Roman; foot notes in 10 font, 1.0 space, Times New Roman (for Afaan Oromo & English). These considerations also work for Amharic submissions except that the font size for foot note is 9.
4. The length of a contribution shall not exceed 30 pages for articles and essays. Other contributions like book reviews, case comments, etc shall range from five to ten pages.
5. The contribution should be organized into title page, introduction, body and Conclusion.
6. Footnotes should be numbered consecutively with superscript Arabic numerals in the text.

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