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Rakkoowwan Jiran: Haala Qabatamaa Naannoo Oromiyaa

The Legal Regime of Corruption in Ethiopia: An Assessment from International Law Perspective

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All About Words on the Procedure of Constitutional Interpretation in Ethiopia: A Comment on Melaku Fanta's Case

# Joornaalii Seeraa Oromiyaa

## Oromia Law Journal

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## **OLD WINE IN NEW BOTTLES: BRIDGING THE PERIPHERAL GADAA RULE TO THE MAINSTREAM CONSTITUTIONAL ORDER OF THE 21<sup>ST</sup> C. ETHIOPIA**

Zelalem Tesfaye Sirna\*

### **ABSTRACT**

*In sub-Saharan African countries where democracy and rule of law are proclaimed but in several circumstances not translated into practice, it appears vital to look into alternatives that can fill governance deficits. It is against this backdrop that “Old Wine in New Bottles: Bridging the Peripheral Gadaa Rule to the Mainstream Constitutional Order of the 21st Century Ethiopia” came into focus. The main objective of this article is, therefore, to respond to the search of alternative solution to hurdles democratization process, Africa as a region as well as Ethiopia as a country faces, through African indigenous knowledge of governance, namely the Gadaa System. Accordingly, institutional and fundamental principles analyzed in this article clearly indicate that indigenous system of governance such as the Gadaa System embraces indigenous democratic values that are useful in 21<sup>st</sup> century Ethiopia. In sum, three main reasons support this article: first, in Africa no system of governance is perfectly divorced from its indigenous institutions of governance; second, indigenous knowledge of governance as a resource that could enhance democratization in Ethiopia should not be left at peripheries; and third, an inclusive policy that accommodates diversity and ensures the advancement of human culture appeals.*

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## 1. INTRODUCTION

The question of rule of law and democracy across sub-Saharan African countries has led several scholars in recent time to search for the relevance of African indigenous institutions of governance as alternative solutions to leadership crises. Broadly speaking, in several respects, most of the indigenous peoples' indigenous institutions of governance across African states are more democratic and more egalitarian than the borrowed Western democratic principles. Moreover, although indigenous peoples of Africa are the ones who had established leadership system long before the formation of modern African states, following European colonial rule, their rights of self-determination continued to be undermined by the modern African states. The modern political history of Ethiopia has witnessed monarchical system, unitary state and now federalism which were not reinforcing and every regime started over from the scratch.

To this date, how constitutionalism and the rule of law should take root in Ethiopia is a challenging question. Although most of sub-Saharan African states adopted Western models of democracy, i.e. multi-party politics and parliamentary system as a guarantee to democracy, it did not guarantee rule of law and the good governance aimed for. Even worse one party rule could also flourish beneath the façade of multi-party politics and parliamentary system.<sup>1</sup> This indicates that though Western political values are philosophically sophisticated and transplanted to developing countries like Ethiopia, they are not translated into practice. Hence, at the heart of this article is the question of whether there is a way out to such leadership deficit through indigenous system of governance, a broad-based democratization, that permit a greater degree of popular participation.

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<sup>1</sup> Bahru Zewde, Historical legacy and the democratization process in Ethiopia (1994), in *Africa Zamani: An Annual Journal of African History*, Vol. 2, p. 7.

The general objective of this article attempts to link the two systems of constitutional governance systems: indigenous (the Gadaa democracy)<sup>2</sup> and modern constitutional principles. The specific objectives are to introduce the main features of Gadaa system as an indigenous knowledge of constitutional governance system<sup>3</sup>; to unveil the importance of Gadaa system in 21<sup>st</sup> century Ethiopia; and to analyze the concordance of Gadaa principles and institutions of the Borana people to contemporary FDRE and Oromia National Regional State constitution. Gadaa System, being an indigenous system of governance, how far is it compatible and viable in the face of the modern legal institutions and vice versa? Is there incompatibility between indigenous and modern virtues and institutions of governance? If so, is it possible and necessary to accommodate traditional values into modern system of governance?

Having said so, this article signifies that we need to study indigenous people's culture so that they may live and grow to become the enduring foundation of distinctive civilization for it has a lot to offer to human kind for the simple fact that “man's wider cultural identities must be allowed to grow, not by predatory expansion of one civilization but by the complementary integration of many diverse cultures.”<sup>4</sup> Therefore, this article opens a discourse on traditional versus modern governance systems and thus it presents an indigenous knowledge of governance as a complementary tool not only for the interests of indigenous peoples themselves but also for the peaceful co-existence of human organism in harmony and to add values in the spectrum of democracy as opposed to a monopoly of a single political culture, especially the Western.

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<sup>2</sup> The Gadaa System has been studied by several expatriate scholars such as Baxter 1978; Bassi 1996; Nikolas 2010; Leus 2006 and by native researchers like Asmarom 1973; 2006; Lemmu 1971; Dinsa 1975, and others. All have approached the study of Gadaa System with different academic backgrounds and cultural orientations, as a result, diverse interpretation of Gadaa institutions and its values could flourish. Despite this fact, this article has benefited from their works.

<sup>3</sup> It aims to make contribution to the field of what came to be conceptualized as Indigenous Knowledge (IK). Dozens of scholars (for example Agrawal 1995; Flavier, J.M. et al. 1995; Bentley, K.A. 2005) have conducted researches on the traditional ecological knowledge and natural resource conservation system.

<sup>4</sup> Asmarom Legesse, *Oromo Democracy: An Indigenous African Political System* (First full ed., Red Sea Press Inc., 2006), p. 236.

### 1.1. METHODS USED

This article used qualitative research method. It is found on the assumption that Indigenous Knowledge of Governance (IKG) could be utilized to complement the democratization process in Ethiopia. It is based on the Borana<sup>5</sup> people traditional governance experience. Where the primary sources were gathered through interviews, secondary sources were collected from literary works of domestic and expatriate scholars. However, when it comes to data gathering through observation, I was not lucky enough to observe ritual ceremonies and Gadaa Assemblies that often traditionally take place in the Borana Zone, since there were no ceremonies and/or assemblies conducted when the researcher was in the field in July 2012. To complement this limitation reliance on written sources were very crucial. Moreover, the diversity of research methods used allows “to triangulate, or cross-check, the accuracy of collected data and analytic statements.”<sup>6</sup>

In addition, research method variables such as: language (communication), status of informants, literacy, gender, age and personal experience of informants and the experience of field assistants, getting behind the masks or “gate keepers” were considered.<sup>7</sup> I had no language barrier since I was native speaker of the Oromo language. The Borana are a patriarchal society, it was the accounts from skilled men with knowledge of Gadaa System and Gadaa practitioners were relatively authoritative as well as authentic. Nevertheless, it has been addressed in the analysis part of this article that one of the drawbacks of the Gadaa political system is exclusion of women from political sphere.

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<sup>5</sup> The researcher could also conduct interviews and Focus Group Discussions (FGD) with elders from the Guji-Oromo of South Ethiopia. However, for the purpose of this article, the case of the Borana people experience is used.

<sup>6</sup> Riemer, F., Addressing Ethnographic Inquiry (in S. Lapan & M. Quarteroli (eds.), Research essentials. Jossey Bass Publishers, 2008), p. 207.

<sup>7</sup> Berrman Gerrald D, Behind Many Masks: Ethnography and Impression management, 2007 [1963], in Robben and Sluka (eds.), Ethnographic Fieldwork, Blackwell publishing.

## 1.2. CONCEPTUAL AND THEORETICAL OVERVIEW

### 1.2.1. Conceptualizing Indigenous Knowledge of Governance

Since 1980s several scholars<sup>8</sup> and international institutions such as the World Bank have characterized indigenous knowledge as significant resources for sustainable development. However, a few scholars have considered the importance of indigenous knowledge of governance in enhancing public participation, good governance; and constitute pluralistic society. As currently conceived, the term indigenous knowledge is interchangeably used with terms like local knowledge and/or traditional knowledge<sup>9</sup>.

When it comes to the definition of Indigenous Knowledge (IK) there is no unanimously attributed definition to either indigenous knowledge or indigenous knowledge of governance. However, there are attempts made by different scholars to define it. For instance Indigenous Knowledge (IK) may be characterized as: “the information base for a society, which facilitates communication and decision making.”<sup>10</sup> Whereas Warren, D., M., et al. characterize it as “local knowledge that is unique to a given culture or society. [. . .]. It is the basis of local-level decision-making in agriculture, health care, passed down from generation to generation by words of mouth”<sup>11</sup>. Thus, IK may be conceived as knowledge found on

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<sup>8</sup> For example: Watson, E., Examining the Potential of Indigenous Institutions for Development: A perspective from Borana, Ethiopia, *Development and Change* Vol. 34 No. 2, 2003, pp. 287-309; Agrawal, Arun, Dismantling the Divide Between Indigenous and Scientific Knowledge, *Development and Change* (1995), Vol. No. 26, pp. 413-439; and Gauri, Varun, “How Do Local-level Legal Institutions promote Development? An Exploratory Essay”, (Justice and Development Paper Series, Legal vice Presidency;The World Bank, 2009).

<sup>9</sup> As opposed to individual knowledge, indigenous knowledge presupposes collective knowledge, common knowledge of the people about means of subsistence, conflict resolution, leadership and others. Hence it could be regarded as a common resource. Among others, knowledge of governance is the prominent one.

<sup>10</sup> Flavier, J.M., et. al., The regional programme for promotion of indigenous knowledge in Asia, 1995 in Warren, D., M., L.J. Slikerveer and D. Brokensha (eds.) in: *The Cultural dimension of development: Indigenous knowledge system*; London, Intermediate Technology Publications.

<sup>11</sup> Warren, D. M., Linking Scientific and Indigenous Agricultural Systems, 1989 in: J. Lin Compton (ed.), *The Transformation of International Agricultural Research and Development* (Boulder, CO: Lynne Rienner) p. 1.



bonds between local communities and its knowledge. It is also described as cost effective and participatory, scattered but connected to rural life and passed down orally from generation to generations<sup>12</sup>. It is vital to note here that the scope of IK is not limited to agricultural or health practices only. Rather it is a very broad and dynamic concept that can be used in other studies such as governance, astronomy, ethics, and etcetera.

The concept of Indigenous Knowledge of Governance (IKG) is the derivative and extensive family of indigenous knowledge. For the purpose of this article, IKG represents an indigenous political system of governance that passed from generation to generation and functions distinctively parallel to the modern political institutions. To complement this operational definition, the UNDP definition of governance reads that it is:

*“the exercise of economic, political and administrative authority to manage a country's affairs at all levels. It comprises the mechanisms, processes and institutions, through which citizens and groups articulate their interests, exercise their legal rights, meet their obligations and mediate their differences”*<sup>13</sup>.

By analogy, IKG can be regarded as a system of governance that possesses traditional institutions designed for socio-political and economic purposes. Therefore, the subject matter of the study, the Gadaa System, properly fits into the concept of IKG since it embraces governance values and institutions that allow the people to enact laws, interpret and implement it for the best interest (social, political or cultural) of the society.

In relation to the importance of IKG there are two contradicting thoughts, viz.: the neo-traditional and neo-liberal views. Under the following subsections these two arguments are dealt with.

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<sup>12</sup> Ibid.

<sup>13</sup>UNDP (United Nations Development Programme), Governance for sustainable Human development (UNDP Policy Document, New York., 1997), p. 17.

### **a. The School of Organic Democracy or Neo-Traditionalist Position**

In positioning indigenous system of governance in modern political systems neo traditionalists<sup>14</sup> are committed to pull the peripheral social organizations of indigenous peoples to the centre. This school holds that traditional leadership has unique features and capacity to build democracy from below.<sup>15</sup> Precisely, this school does not consider traditional institutions of governance as threat to democracy or human rights but as compatible, in principle, with modern governance. Moreover, they consider it as a legitimate organs and valid mode of governance and it facilitates for consensual democracy.<sup>16</sup> This school considers that indigenous governance is linked to the life and the spirit of the people; as it is woven to socio-cultural traits, and tools of communication by which they conduct their daily business. As such, they conceive indigenous governance as a means of manifestation of destitution for proper governance.<sup>17</sup>

To understand the causes of this school, it is necessary to consider the premises the proponents of indigenous system of governance relies on: *Firstly*, traditional institutions of governance are indigenous or native to the land and to the people. Hence, it enabled the people to live in harmony long before the birth of modern African states and before introduction of multi-party political system. Accordingly, indigenous leadership had served as the “custodians of ancestral and community land; the custodians of culture, customary laws and traditions including history; the initiators and champions of development activities in their

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<sup>14</sup> Sklar, Richard, The Significance of Mixed Government in Southern African Studies, 1999 in Jonathan Hyslop (ed.); Bentley, K.A., Are Powers of Traditional Leaders in South Africa Compatible with Women's Equal Rights? Three Conceptual Arguments in: Human Rights Review, 2005 pp. 48-68; Kidane Mengisteab, African Traditional Institutions of Governance: The Case of Eritrea's Village Baito, 2003 in Olufemi Vaughan, (ed.) in Indigenous Political Structures and Governance in Africa ( Ibadan: Sefer), pp. 208-223.

<sup>15</sup> Sithole, Pearl and Thamsanqa Mbele, Fifteen years Review on Traditional Leadership (A Research Paper, Human Science Research Council, 2008), p. 10.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

respective areas of jurisdiction; and their role in the maintenance of law and order including presiding over and settling non-criminal civil disputes”<sup>18</sup>. *Secondly*, they underscore the fact that indigenous governance has unique attributes of leadership that fulfils specific social needs of a community unlike modern political institutions. Besides, people also value different qualities in the leadership. In this line, the values indigenous leadership has both socially and culturally makes it vital to supplement the inadequacies and deficiency of local government for which nowadays local administration choose to rely on traditional leaders to reach the local people. Therefore, traditional leaders owe “pragmatic social responsibilities towards their citizens with the notion of identity and social responsibilities”<sup>19</sup>. *Thirdly*, they reiterate that traditional governance is based on the custom and practice of the people since the time immemorial and case-by-case governance which in effect necessitated the regulation of human behavior and rendition of justice based on moral values and customary laws than envisaged laws enacted by a parliament. Moreover, this school asserts that traditional governance is akin to consensual (deliberative) democracy where people actually determine who will hold power as opposed to the rule/decision by single (elected) politician<sup>20</sup>. In deliberative democratic society, therefore, minority rights are not vetoed by majority instead they are accommodated. *Fourthly*, they sum their arguments that African communities are “communitarian”<sup>21</sup> than individual<sup>22</sup>. The society that

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<sup>18</sup>ECA,(Economic commission for Africa), Relevance of African Traditional Institutions of Governance, (Economic Commission for Africa, Publications and Conference Management Section (PCMS), Addis Ababa, Ethiopia,2007 ) p. 19.

<sup>19</sup> *Id.*, p.12. In places where state authority is weak or distant, people tend to prefer local-level legal institutions over official channels; and use them to address most day-to-day conflicts such as: disputes related to land, inheritance, domestic and family issues.

<sup>20</sup> Koelble, T., Democracy, Traditional Leadership and the International Economy in South Africa(CSSR Working Paper No.114, 2005), pp. 14-15.

<sup>21</sup> Communitarianism is a social philosophy that maintains that society should articulate what is good - that such articulations are both needed and legitimate. It is often contrasted with classical liberalism. Communitarians examine the ways shared conceptions of the good (values) are formed, transmitted, justified, and enforced. In other words, it is a theory or system of social organization based on self-governing communities (See: Christensen Karen and David Levinson (eds.), “Encyclopedia of

have numerous trait of commonness and built on inherent-collective interest shall be promoted on their own values instead of introducing alien values to the local communities. It is argued that for the continent to emerge out of the vicious cycle of military dictatorship and corrupt civilian regimes it has to re-examine its indigenous political system<sup>23</sup>.

### **b. Neo-liberal Approach or Democratic Pragmatism**

The opponents<sup>24</sup> of the school of organic democracy firmly argue against the proponents of indigenous governance claiming that it is inherently defective and they cast doubts as to their compatibility with democratic values and fundamental human rights principles. Moreover, the neo-liberalists (pro-state involvement) advocates for prioritization of individual rights in a sense that letting individuals to choose any institutions of his/her own plays a crucial role in democratization process. Besides, the proponents of this school ground their arguments on the following themes:

*Firstly*, this school argues that the principles of democracy demand state nations that “ensure access to democracy as a commodity to which all humans are entitled”<sup>25</sup>. In addition, they hold the view that the infiltration of democratic values through globalization and economic integration is inevitable and so that the modern institutions will sooner or later replace undemocratic institutions such as the traditional system of governance<sup>26</sup>. Therefore, they clearly argue that it would be futile for a government to continue to support indigenous political system<sup>27</sup>. *Secondly*, the

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Community: From the Village to the Virtual World,” Vol 1, (A-D, Sage Publications. 2003), pp. 224-228.

<sup>22</sup> Individualism is often seen as a problem in what it presupposes a false social ontology, by rationally atomizing society and dissolving a social bonds. What liberals do claim is that no constitutive attachment, either to state, nation, family or cultural group, must trump the claims of individuals and their basic rights.

<sup>23</sup> Bahru, *Supra note 1*.

<sup>24</sup> Ntsebeza, Luugisile, *Democracy Compromised: Chiefs and the Politics of the Land in South Africa*. (Leiden and Boston: Brill, 2005) .

<sup>25</sup> Karen & Levinson, *Supra note 21*, p30

<sup>26</sup> *Ibid*.

<sup>27</sup> Basically such argument goes against the traditional leadership abused by colonizers (for example: the British indirect rule policy and chieftaincy in South Africa) and of

proponents of neo-liberalists presuppose that “rural citizens under traditional authorities are not true citizens”<sup>28</sup>. This argument holds that rural people are subjects of undemocratic authorities that do not have system of accountability to the people. However, this argument emerges from the kinship based traditional leadership where traditional leaders do not “give everyone a chance to be elected and the system does not appear to have systems for recourse against unfair exercise of power”<sup>29</sup>. Moreover, this argument also relies on the gender inequality where the traditional political system favors male generation. Therefore, since traditional system excludes women from political right indiscriminately, in effect, it denies their citizenship rights and detrimental to women's right to equality. *Thirdly*, in decentralized form of traditional leadership, the assemblies and councils gather for long period of time to dispose socio-political and therefore, it is labor and time intensive. Moreover, direct participation of local people in decision-making would not be possible in broader context, especially in current world, where indirect democracy is efficient and cost effective. Thus, they argue that deliberative or consensual democracy model's practicality is next to impossible<sup>30</sup>.

In conclusion, it is necessary to link the dividing line between the two thoughts. At least in abstract sense, the debate about relevance of indigenous governance revolves around the objective and universal democratic based thesis vis-à-vis the cultural relativism synthesis to democracy. In this respect, one may argue that, "in the absence of objective method or scale for weighing these two core values against another [ . . . ] the choice between the two is entirely in the moral eye of the holder"<sup>31</sup>. Clearly, neo-liberalist follows color-blind approach, as a

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course it does concern not all modes of African traditional leadership. For example, as there is a mechanism through which traditional governance under Gadaa system holds traditional leaders' accountable; arguments of neo-liberalists, in this respect, cannot be the reflection of all types of traditional system of governance in Africa.

<sup>28</sup> Mahmood Mamdani, 1996, p30.

<sup>29</sup> *Ibid.*

<sup>30</sup> ECA, *Supra* note 18.

<sup>31</sup> Bentley, K.A., Are Powers of Traditional Leaders in South Africa Compatible with Women's Equal Rights? Three Conceptual Arguments, 2005 in Human Rights Review.

result, it would mean denial to group rights and ultimately it advances the cultural supremacy and/or imperialism at the expense of multiculturalism and legal pluralism. In this respect, the custom to which indigenous governance is aligned with is hastily assumed as "hindrances to universal democratisation without differentiation"<sup>32</sup>.

That is, like the modern political systems, indigenous system of governance has its own drawbacks and it has to be approached cautiously instead of categorically capitalizing on its limitations such as patriarchy and lack of gender equality. To this criticism, proponent of traditional governance, accepting the critic in principle, alternatively defend that such drawbacks need to be solved by "progressive and negotiated" means than punitive legislations<sup>33</sup>. Therefore, the drawbacks of traditional governance should not be over emphasized to the extent that it veils the importance of traditional institutions have, at least, to the people concerned<sup>34</sup>.

## **2. INTRODUCING OROMIA NATIONAL REGIONAL STATE AND THE BORANA PEOPLE**

The formation of Oromia National Regional State (ONRS)<sup>35</sup> is the product of ethnic federalism Ethiopia adopted in early 1990s. It was following the 1992 Proclamation of the Transitional Government of Ethiopia that the Oromia regional state was established in July 1992. In this regard, Article 2(b) of the charter reads that "the rights of Nations, Nationalities, and Peoples to administer its own affairs within its own defined territory and effectively participate in the central government on

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<sup>32</sup> *Id*, P12.

<sup>33</sup> *Ibid*.

<sup>34</sup> For example, it is undeniable fact that Gadaa system has incredible values that can enhance equal representation, equitable distribution of resources and division of labour across generations and allow men and women of all ages play a crucial role in social life (Asmarom, *supra* note 4, p 285).

<sup>35</sup> Currently ONRS comprises of 34.5% (almost 35 mil.) of the country's total population, and the Oromo language covers 31.6% of total language coverage following the Amharic language which is 32.7% (CIA, the World fact book). <http://www.cia.gov/library/publications/the-world-factbook/goes/et/html>

the basis of freedom, and fair and proper representation. It was based on this provision that all regional states including ORNS were constituted.

Following regional states formation, ONRS adopted its first constitution in 2001 and revised twice (in 2005 and 2006). ONRS Constitution is meant to be the reflection of plurality of state constitutions which is replica of self-rule inherent in the federal system. That is, the federal system is the cause for the multiplication of formal legal rules and among others the existence of a number of regional constitutions is an indication. Furthermore, Article 52(2) (b) of the FDRE Constitution recognizes that national regional states can enact their own constitutions. However, in its entirety ONRS constitution is similar to the FDRE constitution. The ONRS Constitution, like the FDRE Constitution, reifies the fundamental principles of human rights in its entirety. Moreover, it describes the vertical distribution of powers among the four administrative levels of ONRS, viz., the regional government, *zonal* administration, *Woreda* administration, and *Kebele* administration<sup>36</sup>. At all these levels, administrative and judicial institutions are established being a supreme legislative power vested in the ONRS Council, the *Caffe*. Comparable to the HoPR of Ethiopia, the ONRS Council is constitutionally recognized as the highest political authority over matters concerning to the region.

The ONRS *Caffe* has 537 seats and its members are elected by the people directly for a five years term office; and as a result they are accountable collectively to the people of the ONRS (Article 46(1), 48 (1), 48(6), 51(1) of ONRS Constitution). The adoption of the ONRS constitution did not pass through the traditional constitution adopting stages such as: drafting stage by constitutional drafts men, deliberation stage open to public discussion, and the adoption stage upon the decision of the constitutional assembly<sup>37</sup>. Rather it was adopted by simple majority vote of ORNS Council. This might have happen for two reasons: that ONRS

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<sup>36</sup> Berhanu Gutema, *Restructuring State and Society: Ethnic Federalism in Ethiopia* (SPIRIT, Doctoral Programme, Aalborg University, Denmark SPIRIT PhD Series, Thesis no. 8, 2007) P. 225.

<sup>37</sup> Tsegaye Regassa, *Sub-national Constitutions in Ethiopia: Towards Entrenching Constitutionalism at State Level*, *Mizan Law Review* (2009), Vol. 3 No.1, pp. 33-69.

Constitution was largely a direct copy of the already adopted federal Constitution both in its form and in its substance; and ONRS Constitution did not introduce unique institutions of governance susceptible to public deliberation (e.g. constitution embracing the Gadaa institutions). But, isn't it appropriate and possible for ONRS to introduce a unique and valid regional constitution based on constitutional Gadaa principles? This question is at the heart of this article.

While the FDRE Constitution is the supreme law of the country, ONRS is supreme law of the region (Article 9 (1) of FDRE Constitution and Article 9 (1) of ONRS Constitution). The supremacy of ONRS Constitution over regional laws is believed to be an indication of the self-rule. However, since all essential powers are given for the federal government and the residual power left for the regional states including ONRS, the latter's constitution lack potential legislative and executive power and its supremacy is symbolic, except on its respective competences. Whether other federal laws are also superior to the ONRS Constitution is not clearly addressed in the federal constitution. However, to argue that all federal laws are superior to the regional constitution negates at least the fundamental principle of federalism and it nullifies the purpose of adopting regional constitution.<sup>38</sup>

## 2.1. THE BORANA

The Borana people are part of the Oromo language speaking people<sup>39</sup> and belong to the East-Cushitic family in the Horn of Africa. The Borana live to the South of Ethiopia as well as in the Northern part of Kenya, "straddling the borders between the two countries"<sup>40</sup>. In the Southern

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<sup>38</sup> The cumulative reading of Article 39 (3), (4) of FDRE Constitution and Article 39 (4), (5) of ONRS Constitution indicates that where regional self-rule is transgressed and could not be rectified the right to secession can be sought as a last resort. But one has to be cautious not to take the right of self-rule and right to secession as easily pragmatic.

<sup>39</sup> The Oromo people who inhabit in Ethiopia predominantly are considered among the largest and the most widespread ethnic groups in Africa and are estimated to number between 35-40 million people (See also: Asmarom, *supra* note 4; Bassi 2005).

<sup>40</sup> Fayo, Godana, *Coping with Scarcity in Northern Kenya: The Role of Pastoralist Borana Gada Indigenous Justice Institutions in Conflicts Prevention and Resolutions for Range Resources Managements* (The Hague, The Netherlands, 2011), p. 24.



Ethiopia, the Borana number well around 1 million<sup>41</sup> while in Kenya they are over 300,000 people<sup>42</sup>. The general community unity and pattern of life is ordered along the rules and regulations of the Gada system of administration, which has a structured chain of command with Abba Gadaa *fite* (at apex)<sup>43</sup>. What perhaps surprises most scholars is how Gadaa System could be maintained among the Borana-Oromo without losing its originality. The plain reason is the fact that it was not discontinued by colonial rulers given the geographical location and the socio-economic activities of the people. Hence, they could maintain an indigenous administrative system.

What is peculiar among the Oromo people in general and the Borana in particular is an entrenched trend of dividing people into moieties and sub-moieties, clans and kinships and organizes it for the purpose of administration. Along the division of the society into sub-clans the powers and functions are also shared among the groups accordingly. Besides, the Borana social structure is made of different families, lineages, and kin that operated in a structured manner through different governments, and were visibly seen as political systems that, in turn, were also reinforced and given authority through organized systems<sup>44</sup>. The Borana are divided and organized into two macro-levels (moieties) known as Sabbo and Gona and the former has three sub-moieties and the latter has two sub moieties. The Borana co-exists peacefully as a unit irrespective of whether a person is from Sabbo or Gona. However, restriction is placed on endogamous marriage, i.e., a person from Sabbo marries only from Gona and vice versa; exogamous marriage is the rule.

Under the current federal structure, the Borana zone is located in the Southern part of ONRS. The Borana of Ethiopia is bordered by Nations

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<sup>41</sup> Ethiopian Central Statistical Agency Report, 2007.

<sup>42</sup> Ibid.

<sup>43</sup> *Supra note 39*.

<sup>44</sup> Aguilar, Mario I., *Reinventing Gadaa: Generational Knowledge in Boorana* ( Mario I. Aguilar (ed.), 1998) in: *The Politics of Age and Gerontocracy in Africa: Ethnographies of Past & Memories of the Present* (Trenton, NJ and Asmara: Africa World Press, Inc.) pp. 257-279.

and Nationalities and Peoples of South Ethiopia in the North; by two Oromo tribes in the North east, i.e. the Guji-Oromo and the Arsi-Oromo; by Somali people in the South-East, and by the Konso in the West. The Ethiopia Borana, under the current regional state structure is one of the nineteen<sup>45</sup> zones recognized by the ONRS. It encompasses thirteen districts and one town viz.; Abaya, Bule Hora, Dawa, Dhaas, Dillo, Dire, Gelana, Moyale, Malka Soda, Miyo, Teltele, Yabello, and Yabello town.<sup>46</sup> In contrast, the Kenya Borana currently occupies the upper part of the Eastern Province to the North of the country. It encompasses three districts namely; Isiolo, Marsabit and Moyale<sup>47</sup>.

### 2.1.1. General Overview of the Gadaa System of Governance

Gadaa System<sup>48</sup> embraces four basic indigenous<sup>49</sup> governance institutions, namely: Age-sets (*Hariyya*), Gadaa Council (*Adula*); Gadaa General Assembly (*Gumigayo*); and the religious institution (*Qallu*). The Borana age-set (*hariyya*) is an institution organized based on age and generational relationships. That is, a son gets introduced to a specific Gadaa grade, which correlates to the Gadaa council of his father, and subsequently changes his grade every eight years as a member of his cohort.

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<sup>45</sup> See: West Arsi, Arsi, Finfine special zone, West Wollega, East Wollega, Kellem Wollega, Horo-Gududru Wollega, East Showa, South-East Showa, North Showa, West Hararghe, East Hararghe, Borana, Guji, Ilu-Ababora, Jimma and Bale (Source: Oromiyaa.com ).

<sup>46</sup> See [http://oromiyaa.com/index.php?option=com\\_content&view=category&layout=blog&id=108&Itemid=607](http://oromiyaa.com/index.php?option=com_content&view=category&layout=blog&id=108&Itemid=607) visited on February 10, 2012.

<sup>47</sup> *Supra note 39*. Moyale is like a "rendezvous" for Kenya Oromo and Ethiopia Oromo. It is a district partitioned between Ethiopian regional states (Somale and Oromia) and Kenyan state where you can see governors from both countries are lined in one town.

<sup>48</sup> Structurally speaking, the term Gadaa has been defined in different disciplines in several ways. For instance, Gadaa is considered by social-anthropologists as "an age grade that divides the stage of lives of individuals from childhood to old age into a series of formal stages." Tadesse referring to the Gadaa System among the Guji stated that there are thirteen stages and transition ceremonies to mark the passage from one stage to the next. However, the formal Gadaa stage among the Borana does not exceed eleven Gadaa grades. Moreover, Gadaa divides powers and functions, accords rights and responsibilities along the age-sets.

<sup>49</sup> Gadaa was developed over five centuries with purpose to foster social, political, economic and military matters collectively. Structurally speaking, it is age and genealogical based grouping of male generation and division of labor among the classes.

There are eleven age-sets in Borana, viz. *Daballe*, *Gaamme-didiqqa*, *Gaammee-gugudda*, *Kuusa*, *Raaba*, *Gadaa*, *Yuba I*, *Yuba II*, *Yuuba III*, *Yuuba IV*, and *Gadamoojji*.

Whereas Qallu is non-secular institution interconnected with other Gadaa institutions and its role in the Gadaa system cannot be undermined, it is at the moral side of public administration. However, for the purpose of this work, age-sets and Qallu institutions are not discussed. Rather the two pivotal governance institutions: the Gadaa council (executive) and Gadaa General Assembly (legislative) are discussed and analogized to the modern government organs.

**a) The Gadaa Council (*Adula*) and Gadaa General Assembly (*Gumigayo*)**

Gadaa council is executive body of Gadaa government and it consists of six members. They are: a President (Abba Gadaa *fite* also known as Abba Gadaa *arbora*);<sup>50</sup> two vice-presidents (Abba Gadaa *knontoma*); and three senior councilors (*Hayyuu Adula*). The president and the two vice presidents form the Gadaa triumvirate or it may be considered as government by committee<sup>51</sup>. The three presidents are the most senior officers of the Gadaa Council.<sup>52</sup> And additional three senior advisors are available to both offices of the presidents (Abba Gadaa *arbora* and *kontoma*). Furthermore, all members of the Gadaa Council are regarded

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<sup>50</sup> Dialectically speaking, the nomenclatures of Gadaa leaders, among the central-Oromo, was slightly different from the Borana's experience: for example, Abba Bokku (father of scepter) used widely instead of Abba Gadaa. Hence, where Abba Gadaa is common among the Borana, Abba Boku is common to the central Oromo society. In substance, however, there was no substantial difference. Today, where the Borana could maintain their system, Gadaa System among Wollaga and other parts of Oromo groups was severely diminished, if not entirely abolished.

<sup>51</sup> Asmarom, *Supra* note 4, p63.

<sup>52</sup> Gadaa Council is an entity. As an entity, the concept of legal person and natural person applies to the Gadaa Council. That is, where a member of Gadaa Council acts in official capacity, it is regarded as if it were conducted by the Gadaa Council. Hence, while the members of Gadaa Council are mere agents, Gadaa Council is a separate body of Gadaa government. Accordingly, if a member commits a crime, he shall personally be responsible. However, for any activities carried out within the scope of their authority, it will be regarded as if it were conducted by the Gadaa Council and therefore, the responsibility goes to the Gadaa Council, not to the councilor(s).

as equals despite the fact that they exercise different functions and play different roles (Informant A). According to the Borana customary law, all the members of the Gadaa Council are required to live together from the moment of their election upto coming to power. In addition, after taking power, the three Abbaa Gadaas shall be constituted into two bands: *Olla Arbora* (neighbor of *arbora*) and *Olla Kontoma* (neighbor of *kontoma*).<sup>53</sup>

Besides, the Gadaa Council has assistants commonly known as *Jaldhaba* (executive officers) (Informant B). The executive officers (not less than six) are appointed by joint decision of clan elders and the Gadaa Council. Their appointment procedure is as follows: each clan presents candidates. Then, the clan leaders will have discussion with clan elders on the capacity and diligence of the candidate. In addition to the executive officers, the Gadaa executive body also embraces junior Gadaa councilors (*Hayyuu Garba*) (Informant A & B). Junior councilors are different from senior councilors in the following ways: while junior councilors are selected just before the power transfer ceremony, the senior councilors are elected at the *Kuusa Gada* grade along with the Abba Gadaa. Second, selected junior councilors are representatives of the five Gadaa classes (i.e, including the Abba Gadaa apex, junior councilors consists six members). Moreover, unlike the senior councilors, they are recruited by the outgoing Gadaa Council, but they serve with the incoming Gadaa class (Asmarom 2006).

*Gadaa General Assembly (Gumigayo)*<sup>54</sup> is the legislative body of Gadaa government. The Borana themselves perceive the function of the *Gumigayo* and describes it as *dubbii aadaa* (custom-talk) and *dubbii*

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<sup>53</sup> Asmarom, *Supra note 4*, p64

<sup>54</sup> The nomenclatures of Gadaa General Assembly across Oromo land were derived from the names of places where the assembly is regularly held. For instance, among the Borana *Gumigayo* is derivative of the names of two places, i.e. *Gumigayo* which refers to water well and *gumi* means assembly. However, among the central Oromo it is called *Chaffe* since the general assembly used to take place under highly respected Oda (sycamore) tree on the edge of prairie grass (*Chaffe*). It is from such meeting places that the term *Cha\_e* is given to the assembly. In this respect, De Salviac had to say “it is by virtue of such a metonym (use of the name of one thing for that of another) we designate the legislative corps [...]” (De Salviac2008 (1901): 211).

*seeraa* (law-talk)<sup>55</sup>. That is, the Gadaa General Assembly is committed to discuss and deliberate on customary laws and norms of the Borana as a whole. Therefore, it is not for the sake of analogy that one has to consider Gadaa General Assembly<sup>56</sup> as a legislative organ of Gadaa government; rather it is one of the well functioning Gadaa systems of governance among the Borana people. In principle, every Borana is allowed to convene to the Gadaa General Assembly. Differences in terms of age or status may not bar a person from attending it. However, convening individuals should have the capacity to deliberate on issues and/or they shall have vested interest in it. Most scholars consider it as the most inclusive political discussion and decision-making scene. It is considered so as it gives structural subsistence to the notion that in a democracy, power rests ultimately with the people so that they exercise by direct participation or by delegating power to some leaders of their choosing<sup>57</sup>. However, others argue that we cannot say it is representative since women do not participate directly in the Gadaa General Assembly and in any other political activities along side of the men. Generally speaking, the latter is one of the drawbacks of the Gadaa System.

When it comes to the powers and functions of the Gadaa General Assembly, it is discernible that it exercises supreme legislative<sup>58</sup> authority in Borana. The Borana strongly believe that the Gadaa General Assembly has the highest political authority as compared to the powers and functions of Gadaa Council and other Gadaa institutions (Informant C & D). Moreover, what makes it more interesting is not only the fact that the Gadaa General Assembly exercises ultimate authority but also

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<sup>55</sup> Asmarom, *Supra* note 4, p97

<sup>56</sup> The Gadaa General Assembly meeting takes place once in the middle of the term office (eight years) of the Gadaa class in power. It is mandatory for all living Abba Gadaas, Gadaa Council (inclusive of junior and senior councils), age-set councilors, clan elders and Abba Qallus to convene to the assembly.

<sup>57</sup> Asafa Jalata, *Oromo Peoplehood: Historical and Cultural Overview* (Sociology Publications and Other Works, 2010) available at ([http://trace.tennessee.edu/utk\\_soco\\_pubs/6](http://trace.tennessee.edu/utk_soco_pubs/6)); Dirribi Demissie, *Oromo Wisdom in Black Civilization* (Finfinne, Ethiopia, 2011).

<sup>58</sup> Broadly speaking, its function include (but not limited) to review laws, to proclaim new laws, to evaluate the men in power and settle major disputes that could not have been resolved at the lower possible levels of its judicial organ(s).

the fact that its supremacy is deeply rooted principle. Another peculiar feature of the Gadaa General Assembly is its impartiality and transparency. For example, where the discussion and deliberation is to be taken on issues that concerns Abba Gadaa in power, he has to withdraw from the assembly and will be replaced by another *Abba Gadaa*. Furthermore, all presidents (i.e. *Abba Gadaa fite* (apex) or *Abba Gadaa kontoma* (vices) and *hayyuu adula* (senior councilors) have to be excluded from leading deliberations that is concerned with amendment of the Gadaa constitution (i.e., laws dealing with powers and functions of Gadaa councilors, powers and privileges of *Abba Gadaas* and his assistants, and others). The reason for exclusion of *Abba Gadaas* is to avoid conflict of interests and to amend it impartially. Except on legislations that may raise conflict of interests, all presidents are not required to abstain from influencing the members of Gadaa General Assembly's decisions and they can even propose new laws for its adoption.

### **3. BRIDGING GADAA PRINCIPLES TO CONSTITUTIONAL FUNDAMENTAL PRINCIPLES**

One of the tasks of this article is to uncover the fundamental principles and morals upon which the Gadaa leadership is established. In order to know Gadaa principles, the researcher used to ask questions based on the common fundamental principles most democratic constitutions embrace. Among others, fundamental principles such as rule of law, accountability of state officials, transparency of government businesses, principles of equality, sovereignty of the people and supremacy of the constitution are the most notable ones. Based on the findings and the constitutional principles enshrined both in the FDRE Constitution and ONRS Constitution, a precise analysis is provided as follows:

**i. Rule of Law:** Conceptually, rule of law suggests that the law itself is the sovereign in a society. As an idea, the rule of law stands for the proposition that no person or particular branch of government may rise above rules made by fairly and freely elected political representatives. These laws mirror the morals of a society, and in a Western Democracy

they are supposed to be pre-established, formalized, neutral, and objective. Everyone is subject to their dictates in the same way. The rule of law, therefore, is supposed to promote equality under the law. Thus, rule of law should be clearly differentiated from rule by law; i.e. the latter does not necessarily mean that the law is legitimate for it might not satisfy most of the desideratum<sup>59</sup>.

However, the perception of rule of law among the Borana is a bit different. According to one of my informants, rule of law signifies not only liability of individuals rather it also means that everything and all beings have rules. That is the law stands not only for the benefit of individuals or to discipline officials but it also extends to animals. In this respect, the Borana say that *seerri muummee, seera saree!* Literally it may mean as, “a law for a minister is a law for a dog”. The implicit meaning of this statement is noted by Asmarom as follows: in principle, people are not required to raise dogs, some do; some do not, but those who do have an obligation to feed them irrespective of the fact that there are leftover foods or not. That is why the Borana states that there are laws for everything, even for the dog<sup>60</sup>. In a nutshell, the idea here is that the concept of rule of law is perceived not only as the law is superior to any person but it also extends to natural world (animals). Hence, it considers natural being not mere object of law but as subject of law. The principle of rule of law is at the heart of the Gadaa democracy. According to one of my informants the rule of law is entrenched value among the Borana society to the extent that the *Abba* Gadaa himself is subject of the same laws as ordinary Borana. For example, the *Abba* Gadaa and his cabinet are answerable to the Gadaa General Assembly in the mid of his term office. That is, politically speaking, the supervision of the conduct of *Abba* Gadaa by Gadaa General Assembly is the principle than exception. And legally speaking, where the Gadaa leaders commit serious offences they will be punished and can eventually be upr

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<sup>59</sup> Leon Louw, What is the Rule of Law?(African Regional Meeting of the Mont Pelerin Society Nairobi, Kenya,2007).

<sup>60</sup> Asmarom, *Supra note 4*, p201.

ooted from the office. This is a clear indication of genuine rule of law as opposed to rule of men.

Obviously, the FDRE Constitution stipulates that the Prime Minister and the Council of Ministers are answerable to the House of Peoples Representatives (HoPR).<sup>61</sup> Likewise, the ONRS constitution states that the president is answerable to the the Council of State (*Chaffe*) (Article 72(2) of FDRE Constitution and Article 57(2) of ONRS Constitution). However, to the question how and when the leaders of the country and the regional state can be impeached by the parliament and regional state council respectively is not clear. Even the term impeachment is not provided in the DRE Constitution: it is ambiguously stated as, ‘[. . . ] responsible to the House of Peoples' Representatives.’<sup>62</sup> In this respect, one may consider the Ethiopian House of Peoples' Representatives as a ‘rubber stamp’.

**ii. Principle of Single Term Office:** When it comes to the term office of the *Abba* Gadaa, the Gadaa constitution is straight forward. It is not ambiguous as the incumbent FDRE or ONRS Constitutions. As discussed elsewhere the term of office of the *Abbaa* Gadaa is limited to a single term office for eight years. It is one of the most fundamental and well observed principles across the Oromo land historically and currently at work among the Borana people<sup>63</sup>. Hence, an elected *Abbaa* Gadaa and his cabinet shall only serve one term office. There is no history in the Gadaa democracy where this principle has been transgressed among the Borana. However, from the focus group discussion held with the elders from the Guji reveals that this principle is not observed among the Guji people (members of the discussion were A, B, C, D, E and F). An *Abba* Gadaa may stay on power for even thirty years. This fact was also supported by one of my informants from Guji society.

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<sup>61</sup> The 1995 Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/ 1995, Art.72(2) *Federal Negarit Gazeta*, Year 1, No.1.

<sup>62</sup> *Ibid*: Article 72(2).

<sup>63</sup>The Borana people's experience indicates that the place and the date of transfer of power are fixed so that even a single day to stay in power after the end of the term office may not be tolerated.



Every Gadaa leaders remain in office for a formal eight years after which they have to hand over to the incoming Gadaa officials through a formal handing over ritual ceremony. Instead of re-electing the same person to the same office, like for instance the case of USA where a president can be re-elected and serve two terms (eight years), the Gadaa version of government provides a single term office of eight years with the mandatory requirement of checking the *Abba* Gadaa in power in the middle of his term office. The principles of accountability and impeachment of the Gadaa leaders, as discussed below, also supplements the absence of re-election of the leaders. One can imagine the cost of election campaigns different political parties make every five years in Ethiopia. Even in the US, for example, the fourth year of the first term office of the US president is occupied with re-election campaigns, fund raising and other similar activities. Under Gadaa system, the General Assembly serves this purpose (assessing the performance of leaders' in the first-half of the term office); it may endorse the presidents' continuation or uproot a leader before completion of his term. .

Unlike the presidents and premiers across sub-Saharan African countries, where they stay on power for unlimited period of time, the single term office principle under the Gadaa leadership reveals an incredible value of democracy. It is evident to see the price Africa pays often for the longevity of the term of office of its leaders. Consider the following comparative chronological term office among the US, Ethiopia and the Borana leaders:

<b>US Presidents</b>	<b>Term Offices</b>	<b>Political Parties</b>	<b>Ethiopian Leaders</b>	<b>Borana Leaders</b>	<b>Term Office</b>	<b>Borana Moeity</b>
Herbert Hoover	1929-33	Republican	H/Sellasie I	Bule Dabbasa	1929-36	Sabb o
Franklin D. Roosevelt	1933-45	Democrat	H/Sellasie I	Aga Adi	1936-44	Sabb o
Harry S. Truman	1945-53	Democrat	H/Sellasie I	Guyyo Boru	1944-52	Gona
Dwight D. Eisenhower	1953-61	Republican	H/Sellasie I	Madha Galma	1952-60	Gona
John F. Kennedy	1961-63	Democrat	H/Sellasie I	Jaldessa Liban	1960-68	Gona
Lyndon B. Johnson	1963-69	Democrat	H/Sellasie I	Gobba Bulee	1968-76	Sabb o
Richard Nixon	1969-74	Democrat	H/Sellasie I	Gobba Bulee	1968-76	Sabb o
Gerald Ford	1974-77	Republican	Col. Mengistu	Jiloo Aagaa	1976-84	Sabb o
Jimmy Carter	1977-81	Democrat	Col. Mengistu	Jiloo Aagaa	1976-84	Sabb o
Ronald Reagan	1981-89	Republican	Col. Mengistu	Boruu Guyyo	1984-92	Gona
George H. W. Bush	1989-93	Republican	Ato Meles Zenawi	Boruu Guyyo	1984-92	Gona
Bill Clinton	1993-2001	Democrat	Ato Meles Zenawi	Boruu Madha	1992-2000	Gona
George W. Bush	2001-2009	Republican	Ato Meles Zenawi	Liiban Jaldeessaa	2000-2008	Gona
Barack Obama	2009-present	Democrat	Ato H/M Dessalegn	Guyyoo Gobba	2008-present	Sabb o

*Table 1: Comparative leadership chronology of the United States of America, Ethiopia and the Borana.*

The term office of the FDRE Prime Minister and the term office of the ONRS President are ambiguously provided in the FDRE Constitution and ONRS Constitution. Article 72(3) of the FDRE Constitution reads:

*“Unless otherwise provided by this constitution the term office of the Prime Minister is for the duration of the mandate of the House of Peoples' Representatives”*

This provision with slight distinction is also provided under Article 56(2) of ONRS constitution as, the term office of the president is for the duration of the mandate of the Oromia State Council. These provisions are ambiguous, indirect and implicit. That is, since the term office of the HoPR and the State Council is five years one could say that the term office of the heads of governments is also five years (See: Article 54(1) of the FDRE Constitution). Besides, Article 56 of the FDRE constitution allows the formation of executive power by a political party that has got greatest number of seats. By implication, as long as one party could repetitiously win elections and inevitably endures the mandate of HoPR irrespective of the change of its members, the term office of the premier will also sustain for indefinite period of time. Which means, if a political party could win for a half of a century to come then the term office of the premier may remain so. If so, the demarcation of term office would be at the personal decision of a leader than constitutional limitation. Nevertheless, unlike the premier of the FDRE, the ONRS have experienced six<sup>64</sup> presidents over the last two decades.

### **iii. Minority Rights in Majority Rule or Consensual Democracy:**

Unlike any modern democracy where minority rights are not given voice, the Gadaa System embraces the minorities' views through its General Assembly meetings. For example, a single opponent is sufficient to stop the most serious measures. Hence, in Gadaa democracy, what matters is not only overwhelming majority decisions but also minorities' views

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<sup>64</sup> Hassan Ali (1992-1995), Kuma Demeksa (1995-2001), Junedin Sado (2001-2005), Abba Dula Gameda (2005-2010), Alemayehu Atomsa (2010-2014) and Muktar Kedir (2014 – present) (Source: World Statesmen.Org).

have to be convinced to be part of the majority vote. As soon as the *Abba Gadaa* hears the view of an opponent, he says the word of custom: *qabadhe* (stop the discussion). The chair person solemnly postpones the session to another day until consensus is reached. In this regard, Gadaa System potentially relies on deliberative system and there must be 'full' consent to pass any binding laws. Therefore, any laws passed by Gadaa General Assembly would not have serious deficit in its application since it is unanimously agreed law than imposed one. The concept of majority rule and quorum does not exist in Gadaa democracy. One of the drawbacks of the Gadaa General Assembly is that it is time consuming as compared to modern parliamentary system where majority vote fastens the decision to be passed. The principle leading the Gadaa General Assembly is not majority vote, but consensus.

Building consensus requires members of the *Gumigayo* convincing every deviating member and consequently it consumes time. Despite its limitations, consensual or deliberative democracy is far better than majoritarian democracy, especially in relation to protection of minority<sup>65</sup> rights.<sup>66</sup> In contemporary political system, establishing deliberative parliament is challenging given the diversity of minorities interests especially in multi-ethnic country like Ethiopia. However, at a regional state level consisting homogeneous society, ORNS for example, viable

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<sup>65</sup> The term minority is used in UN Human Rights system refers to national or ethnic, religious and linguistic minorities. It seems that recognition of minority status, be it national or ethnic, should be based on: objective criteria such as: non-dominance in terms of numbers or political power and possessing distinct ethnic, religious or linguistic characteristics and as well as on the subjective criteria of self-identification, i.e., a will on the part of the members of the group in question to preserve distinct characteristics. However, it require caution that sometimes indigenous peoples large in number but lack power and marginalised by small groups holding the power. Therefore, minority need not be only in terms of number but also of power. See: UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities Adopted by General Assembly resolution 47/135 of 18 December 1992

<sup>66</sup> Wheatley, Steven, *Deliberative Democracy and Minorities*, *European Journal of International Law*(2003), Vol. 14, No. 3, pp. 507-527. See also: Noel Alain, *Democratic deliberation in Multinational Federation; Critical review of International Social and Political Philosophy*(2006)", Vol. 9 No. 3 pp. 419-444.

(i.e., time efficient and representative) deliberative democracy can be sought.

**iv. The Principle of Accountability:** All Borana are equal before the Gadaa laws irrespective of their social status in the community. Gadaa laws are above all. Even the *Abba Gadaa* himself is subject to the same punishment as all other Borana if he violates the laws; same laws, same punishments. This is the evidence that shows us that the law is above everybody including the *Abba Gadaa*<sup>67</sup>. Gadaa leaders who engage in malpractices such as miscarriage of justice and fall short of their mandates may be removed from the office through the rule known as uprooting (*mura harkaa fuuchu* or *Buqqisu*). Once a leader is uprooted, he will automatically lose official capacity and he can no longer decide over any public cases. According to Borana the term uproot (*buqqisi*) covers not only the impeachment and removal of a Gadaa leader from holding any public office but it also extends to his offspring. Although an uprooted Gadaa leader may exceptionally be forgiven and reinstated to his previous position, it is not always the case. For instance, where the degree of the wrong committed by a Gadaa leader is such serious as to against humanities and national security, then there would not be a space for forgiveness. According to the oral tradition of the Borana *Abba Gadaa Wale Wachu* (1722-1730) first, he ordered an un-winnable war in which the incoming (*de facto*) *Abba Gadaa* was killed for nothing. As a consequence the national security and peace was put to jeopardy. Second, he ordered to prohibit a pregnant woman from using water for domestic consumption and for her domestic animals. Considering the gravity of the case the Gadaa General Assembly (*Gumigayo*) did not only uproot him and his council but also punished him to exile from the Borana land. The Borana saying in this regard reads: ``*Wale Wachu warri chuf sitti orme!*'' which means, *Wale Wachu*, all the people have estranged you.

In every mid-term of *Abba Gadaa's* office (i.e. in fourth year) the Gadaa Council convene to the whole society where each of them begins to

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<sup>67</sup> Bassi, Marco, *Decisions in the Shade: Political and Juridical Processes Among the Oromo-Borana* ( Red Sea Press,2005), P. 200.

confess publicly and in detail the faults which inexperience and lust for wealth have rendered him culpable, and promises to forget them, by virtue of equity and moderation, during the second half of the administration period<sup>68</sup>. This is clearly where the *Abba Gadaa* and his cabinet are held accountable in a transparent and where people can check up on his performances for the last four year and his determination to perform better in the remaining four year term office. Thus, instead of electing *Abba Gadaa* every four years they have devised a system where he can be checked and finish the single term office. Six points can be noted from this principle: transparency, rule by people, serious offense by Gadaa officials is no excuse and faults due to lack of experience may be forgiven, single term with mid-term supervision<sup>69</sup>.

**v. Period of Testing and Different Electoral View:** The most common understanding of election in West political culture as well as in academia is that any citizen can compete to be a leader and can win an election based on his charismatic, skill of speech and personal experiences. This is completely different from the principle of election under Gadaa System. What matters according to Gadaa is not only a personal look or skills but more attention is given to the pragmatic nature of a leader. In short, the people have to know him not in theory but in practice. As several literatures on the Gadaa system indicate, the time of election of a Gadaa leader takes place at the fourth Gadaa grade commonly known as *Kuusa* Gadaa grade. However, it is only at the sixth Gadaa grade known as the *Gadaa* that the *de facto* *Abba Gadaa* can take power through power transfer ceremony. That is, their service at the fourth (*Kuusa*) and fifth (*Raaba*) Gadaa grades is a testimony to be honorably inaugurated to the office or banned from coming to power. One could imagine if the modern

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<sup>68</sup> Asmarom, *Supra note 4*, PP214 -215.

<sup>69</sup> It is vital to note here that; first, the procedure of removing a Gadaa leader from the power is transparent function of the Gadaa General Assembly. Second, the purpose of removing an official through public process is “to ensure that morally upright elders and officials are the ones who adjudicate cases as they set a good example and represent the ideals of virtue that uphold the aspirations of all Borana to be at peace in a just and secure environment.” Third, the idea of uprooting is not based on firing or dismissing a leader from the office. It is rather devised in such a way that such a leader loses power to decide on natural resources, human relations, political, and legal matters.

nation states adopt this value in a sense that a *de facto* leader elected five or ten years ago could only come to power based on his achievements. The Borana describes giving a political power to a leader without pre-testing him as: “electing a man after hearing him give self-praising speeches is no wiser than marrying a woman after watching her sing and dance in the company of a crowd of admiring warriors”<sup>70</sup>.

**Vi. Principle of Division and Separation of Power:** Division of power and separation of power are two distinct concepts under the study of constitutional law. The former represents the power distribution between a central organ and its constituents. Hence, it is a vertical relation which may also extend to division of power. In case of the current Ethiopian federal system separation of power refers to a horizontal sharing of power among the government bodies (i.e. legislative, executive, and judiciary) at the federal and regional states level; whereas division of power refers to the vertical constitutional power-sharing between the federal and regional states.

Nevertheless, does the concept of division of power in its strict sense exist in Gadaa governance system? The answer to this question is positive, however qualified. That is, the concept of the division of power (vertical) between the centre and regional states follows a different approach as compared to modern system. Unlike the division of powers between the federal and the states, the Gadaa System of division of power follows generation and age-group based power division. It is the type of division of power in which every citizen involves actively in political and legal affairs of their country. One of the advantages of division of power across the generation has great value in creating egalitarian society. That is, all inclusive political system in which all citizens (can shoulder responsibilities and bear rights) are stratified and powers distributed to them. This is the main quality of the Gadaa

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<sup>70</sup> See *Supra note 55*. Once Gadaa leaders are elected at the fourth Gadaa grade they had to serve the people and could build trustworthiness, accountability, diligence and above all exhibit their capacity to defend the Gadaa constitution. Hence, the six months or more election campaign which might work in modern political system is not adequate under the Gadaa leadership to entrust a highest executive authority to a politician.

democracy. In developed and developing countries, the system of governance, the issue of inter-generational inequality are incumbent puzzle to the extent that redressing the inequality is almost impossible.<sup>71</sup>

**Vii. Presidential-Parliamentarian Form of Government:** Gadaa System of governance can be considered as polysepalous, that is, governance by more than one head as opposed to monosepalous (i.e. single head) led system of governance. Asmarom notes that “in polysepalous democracy one cannot find a monolithic `state' which crushes all power that is hierarchically subordinate to it”<sup>72</sup>. Put it differently, it is distinct power division (vertical: between the center and constituencies, in our case, between moieties) and separation of power (horizontal: among the bodies of the government) is highly respected. All the constituencies (the moieties) and clans' representatives and all bodies of Gadaa assemblies (senior council and junior councils), the office of *Abba Gada fite* (a president at apex), and the Gadaa General Assembly follows functions interdependently. However, *Abba Gadaa* has no authority to crush all the authorities of the clan councilors and Gadaa councilors to undertake whatever he feels right. To control all powers to the extent that all other Gadaa organs and institutions could not perform independently for the good of their clans and moiety is not the nature of Gadaa democracy at all. Unlike the direct election of Gadaa leaders by the people, the current Ethiopian premier is elected indirectly, that is conducted through the HoPR. In the same token, the ONRS President is nominated and elected by the State Council<sup>73</sup>. This is perhaps typical nature of parliamentary form of government. In presidential form of government, a directly elected president will be the head of state as well as head of government. Both the presidential system and the parliamentary system, have their own pitfalls and limitations. Among other things, parliamentary form of government is advantageous to a country ethnically divided and it is efficient in terms of legislative action

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<sup>71</sup> Asmarom, *Supra note 4*.

<sup>72</sup> *Id.*, p196.

<sup>73</sup> See: Article 73(1) of the FDRE Constitution and Article 56(1) of the ONRS Revised Constitution.



since the executive body is entirely based on the parliament. However, its main disadvantage is that the election of the premier is indirect so that its direct responsibility to the people is loose as compared to presidential system<sup>74</sup>. In contrast, in presidential system<sup>75</sup> the president is mostly elected by direct or direct-like popular support and directly responsible to the people. However, unlike parliamentary system, it is less efficient in speedy legislation and less accountable to the congress<sup>76</sup>. The nature of Gadaa System resembles to both presidential and parliamentary form of government. That is, it may be likened to presidential system especially in a relation to the direct election of its leaders (*Abbaa* Gadaa and the two vices) by the people for a fixed term office. However, when it comes to the responsibility of Gadaa leaders to the General Assembly and their membership of the Gadaa Assembly it exhibits the feature of distinct parliamentary system. In this sense, the Gadaa government can be regarded as presidential-parliamentary system<sup>77</sup>.

Now, the point is whether ONRS could adopt the Gadaa governance system which has presidential-parliamentary nature unique to the federal government. Academically speaking, as far as the regional state forms of

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<sup>74</sup> One of the advantages of the presidential form of government is the fact that the executive is stable by virtue of a fixed term policy. Since the existence of the executive does not depend on the congress's power, it is more stable than the parliamentary form of government where as a premier can be dismissed at any time. As the president is directly chosen by the people, it is argued by the proponents of this system that there is a high tendency for the system to be more democratic than a leadership chosen by a legislative body, even if the legislative body was itself elected, to rule.

<sup>75</sup> In presidential system the president enjoys ultimate power. S/he owes a complete political responsibility for all executive actions. The president appoints secretaries who are heads of his executive departments. Members of the cabinet and they serve at the pleasure of the president and must carry out the policies of the executive and legislative branches. However, the presidential systems frequently require legislative approval of presidential nominations to the cabinet as well as various governmental posts such as judges.

<sup>76</sup> Arend Lijphart, *Parliamentary versus Presidential Government* (Oxford University Press, USA, 1992).

<sup>77</sup> In a presidential-parliamentary system, the mode of the presidential election is identical. The president gains office via a direct or direct-like popular election. The term of incumbency is fixed. The president can dissolve the parliament, or has some legislative powers or both (Aurel Croissant/Wolfgang Merkel See:<http://library.fes.de/les/bueros/philippinen/50072.pdf>., Accessed April 4, 2012).

government do not contravene with the federal constitution, there is nothing wrong to form distinct form of government. It is not up to the FDRE Constitution to decide whether the ONRS president has to be elected by the Oromo people directly or by ONRS Council though the latter's constitution provides for election of the president by the State Council. Moreover, it is justifiable for ONRS to trace the system of governance to the Gadaa government and the reconstitution of this system as part of revitalization of political heritage and eventually supplementing the essence of federalism, i.e. preservation of diversity in the federation. In particular, it would constitute proper state constitutionalism where diverse regional constitutions gears towards betterment of the federal constitution and it may ensure the autonomy of ONRS as opposed to incumbent federal structure.

#### **4. FORESEEABLE PROSPECTS AND PITFALLS OF ACCOMMODATING GADAA SYSTEM OF GOVERNANCE**

##### **4.1. WHETHER DEMOCRATIC RIGHTS OF OROMO-WOMEN BE IN JEOPARDY**

The Gadaa System of governance has been criticized for gender insensitivity and it is a common critique against it. This critique is commonly backed by western political culture and liberal democracy. However, women's social reality among indigenous peoples needs to be approached cautiously. The reason is that democratic rights of indigenous women are intertwined with the beliefs and different world views which differ from the West. Hence, the danger of interpreting certain norm through the lens of one's own norm (for example through Western values) has its own contribution to such criticism.

The Gadaa leaders in Borana are well aware of this common criticism. One of my informants (informant R) stated that women are source of everything! Even the *Abba* Gadaa, the great leaders of the Borana, were given birth by women. He concludes that women owe special place in the Borana society. To the question I raised to these informants that whether

a woman may be elected to the office of Abba Gadaa (*father* of Gadaa), they reply that, they do not have *Haadha* Gadaa meaning mother of Gadaa in Gadaa system (Informants R and S). But one of the informant (informant R) substantiated his view that the wife of elected Abba Gadaa is equally treated like the Abba Gadaa himself.

My informants while answering to the question why women are excluded from Gadaa System, they state that the reasons are embedded in cultural, socio-economic, and biological factors. In particular, the Borana are semi-nomadic people surrounded by different ethnic groups where strong leadership needs to be in place, in the face of clashes and wars against intruding neighboring groups. In this regard, male generations' role is always at fore front. Furthermore, Gadaa system age-grading by itself is barrier to women participation: women need to give birth to children and to look after them which will not be respected if they had to pass through all Gadaa grades like the men do. Nevertheless, among the Borana women do participate in political activities indirectly through their song called *karile*. In their song, they use to criticize the poor decisions made by men. By doing so, they can force Gadaa leaders to alter any honorable decisions. Among other Oromo groups women are also represented independently through a tradition of *siqqe*<sup>78</sup> through that they may influence the Gadaa Assemblies. However, are these sufficing systems to guarantee Oromo-women political rights? Obviously, they are not adequate. Thus exclusion of women from Gadaa political system is clearly a weakness that cannot be undermined.

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<sup>78</sup> *Siqqe* (a stick) not merely is a term for material symbol; it rather refers to an institution, to women's organizations excluding men, which has both religious and political functions (Ostebo 2009: 1053). Ostebo presents the role of *Siqqe* given to a woman married through *Siqqe* marriage; it represents respect, special rights of women, and women married by *Siqqe* forms a separate category (institution) so that their rights are respected both individually as well as collectively. Kuwee Kumsa also states that "married women have the right to organize and form the *Siqqe* sisterhood and solidarity. Because women as a group are considered 'non-relatives' (*halagaa*) and excluded from the Gadaa grades, they stick together and count on one another through the *Siqqe*" (Kumsa 1991).

#### 4.2. WHETHER GADAA SYSTEM WORK ONLY IN SMALL COMMUNITY

Another critic against Gadaa democracy is related to its scope of applicability. This argument holds that Gadaa System best works in small community than at country or even regional level. The proponents of this view erroneously conclude that Gadaa is meant for local people. Among others, Hassan Mohammed argues that “. . . the system seems to have worked ideally for small groups whose members knew each other and met face to face when the situation demanded. With a large group spread over a wide territory the system did not work effectively. Instead of having one supreme assembly, several competing assemblies sprang up in different areas. That is why, although the Oromo nation was under a single Gadaa System, they did not have a common government; instead they had what became the confederacy governments” (Hassan Mohammed 1990: 12). Basically, Hassan is not denying the fact that the Oromo people were ruled under one Gadaa System rather he argues that the system had confederacy than centralized form of government. This argument, however, is defective due to the following reasons:

*First*, the existence of several autonomous assemblies across the Oromo land, historically, signifies its nature than its limitation. Hence the absence of strong central institution that pulls all autonomous Gadaa Assemblies across Oromo land under one umbrella was not due to the fact that Gadaa only works in small community rather it was for historical and political reasons. *Second*, Gadaa, as a system represents knowledge of governance that can be used in small or large community; a profound knowledge or idea has no boundary whether it is evolved in US by political scientists or by semi-nomadic people of East Africa. Hence, as far as the values and principles the Gadaa System embrace is universal democratic traits, it can not only be meant for small scale community. In this respect, Asmarom rightly asserted that one can even think of the Magna Carta in England or the Athenian direct democracy limited to a single city state were all small scale societies and thus justifying small

scale par excellence<sup>79</sup>. As that did not prevent modern nation states to borrow principles of democracy from Greek, so what does prevent us to borrow the principles of Gadaa democracy today?

### **4.3. EMBRACING POSSIBILITIES AND OVERCOMING TENSIONS THROUGH FEDERALISM**

Contemporarily, institutional transformation and application of Gadaa governance system at regional state level seems workable idea in light of ethnic federalism prevalent in Ethiopia. In principle, federalism is about self-rule and accommodation of diversity in unity; that is, diversity in systems of governance and plurality in laws and the adoption of distinct constitutions in a federation. When it comes to cultural rights, the feature of federalism Ethiopia exhibits today is multicultural federalism or what Lawrence Friedman calls “cultural pluralism” where local states are given mandate to promote their own language and heritage<sup>80</sup>. However, federalism in contemporary Ethiopian constitutional system is characterized by power centralization in some cases<sup>81</sup>. In this regard, it would be challenging to institutionalize genuinely plural legal systems. Keller puts this fact as follows: “[. . .] with the exception of linguistic and cultural autonomy, so far the constituent members of the ethnic federation cannot exercise administrative and political autonomy [. . .] an asymmetrical form of federalism that was overly centralized and operated almost like a unitary centralized state”<sup>82</sup>.

Having said so, there are possibilities for regional states, for example ONRS, to enact its own constitutions different from the federal constitution both in its form and substance without breaching the federal

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<sup>79</sup> *Ibid.*

<sup>80</sup> Friedman, Lawrence M., *The Legal System: A Social Science Perspective* (New York: Russell Sage Foundation, 1975).

<sup>81</sup> Obviously the 1995 FDRE constitution declares the federal system. As such, states are given different areas competences (See Art.52 of the same constitution). However, the constitution assigned some important powers like major revenue sources to the federal government.

<sup>82</sup> Keller, Edmond, *Understanding Conflicts in the Horn of Africa* (in Chandra Lakha Sriram and Zoe Nielsen, *Exploring Sub-regional Conflict: Opportunities for Conflict Prevention*. Boulder, Colorado: Lynne Rienner Publishers, 2004), p. 38.

constitution. Furthermore, the plurality of state constitutions, for instance, is very essential for the enrichment of the fundamental principles of the federal constitution itself. It also helps the constituents of the federation to exercise their power on matters that are specific to their region. And as a result, it could have eventually facilitated an environment of self-reliance and effective self-governing regional states. According to John Rawls, pluralism of laws is advantageous “for policies and courses of action likely to be effective and politically possible as well as morally permissible for that purpose”<sup>83</sup>. Therefore through legal pluralism, a subsidiary to federalism,<sup>84</sup> accommodating Gadaa principles is justifiable for efficiency and legitimacy purpose.

#### **4.4. THE PRINCIPLE OF GREATER PROTECTION: GADAA DEMOCRACY AS GREATER PROTECTOR OF A DEMOCRATIC CONSTITUTION**

A great lesson can be learnt from the U.S. experience of federalism especially when it comes to constitutional pluralism. The state constitutionalism in the U.S. is found on the principle of greater protection; that is, in the adoption and interpretation of the states constitutions, the guiding principle is the greater protection of the US federal constitution. For instance, where the principles a state followed is fundamentally sound and more progressive than the federal constitution is, then it is justifiable to adopt it even if a state's constitutional principles are different from the federal constitution. While dealing with dual constitutionalism Judith S. Kaye states that state courts in the U.S. have always tended to read their constitutions in order to provide greater protection than found under analogous provisions of the federal

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<sup>83</sup> Rawls, John, *The Law of Peoples* (Shute Stephen and Susane Hurley (eds.), On Human Rights : Oxford: Basic Books,1993), P. 68

<sup>84</sup>Federalism and legal pluralism are inextricably linked concepts. That is, where there is division of powers between the federal government and its constituents the existence of plural legal systems is inevitable. Obviously, constituents of the federation could have different laws which inherently follows from the powers and functions allotted to them in the federal constitution. For example, the division of legislative power between the federal government and the constituents inevitably allows states to enact their own laws. This, in effect, results in formal legal pluralism.

Constitution<sup>85</sup>. In this regard, the principle of greater protection quite works in case of US since the common law legal system allows the state courts to adopt liberal constitutional interpretation. However, when it comes to the case of Ethiopia, the power to interpret the federal constitution belongs to the House of Federation as provided under Article 62(1) of FDRE constitution. In the same way, the power to interpret the ONRS constitution belongs to Constitutional Interpretation Commission as provided under Article 67(1) of ONRS Constitution. Hence, the means through which state constitutionalism may stand for the greater protection of the federal constitutional principles is not through regional state courts, instead it is through Constitutional Interpretation Commission.

The fundamental principles Gadaa system embrace can be regarded as it stands for the greater protection of a democratic constitution. For example, one could think of the principle of eight years single term office of the leaders (see *table 1*); the principle of pre-testing an individual before being elected to the office, the principle of impeachment of leaders and others. Hence, as any indigenous values in contravention with universal principles of human and political rights cannot be relied on, indigenous principles that can enhance good governance and democracy cannot be relegated. Therefore, as indigenous institutions of governance inform modern governance system, the later also does: both driving towards the greater protection of democratic human values.

## 5. CONCLUDING REMARKS

Throughout this article, I have attempted to discuss the tension between two systems of governance: indigenous versus modern institutions of governance. Gadaa System embraces fundamental democratic principles such as rule of law, principle of single term office, principle of impeachment of leaders, pre-testing future leaders and others. However, Gadaa system has limitations such as the exclusion of women from direct political decision-making process. Given the ramifications to the

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<sup>85</sup> Kaye, Judith S., Dual Constitutionalism in Practice and Principle, *St. John's Law Review*, 1987, pp.399-429.

drawbacks, I have argued that, there is no reason why Gadaa system could not be a viable constitutional model in 21<sup>st</sup> century Ethiopia. In particular, as ethnic federalism recognizes distinctiveness of peoples' culture, language and historical background, for strong reason, indigenous peoples' institutions such as Gadaa system has to be allowed to function 'formally' along side of modern constitutions, or embraced by modern constitutions pragmatically for there are spaces to incorporate it under the context of constitutional pluralism.

Therefore, under the incumbent federal system of Ethiopia a pragmatic policy that accommodates Gadaa system of governance and a serious action that constitutes government bodies built on Gadaa principles are essential for full-fledged and inclusive democracy. However, until today, indigenous knowledge of governance is relegated, perhaps because of a prevailed fallacious impression that indigenous peoples' values are stumble to democracy and/or development. However, this article indicated that it is quintessential to revitalize Gadaa democracy leaving behind hastily generalizing it as contrary to democracy, or as if only meant for small community. Thus, I argued that, a federal system has to accommodate Gadaa rule into the 21<sup>st</sup> Ethiopian constitutional order. To materialize this, the federal as well as ONRS governments shall be committed to that end and looking beyond maintenance of the status quo for the best interests of today's people and generations to come.



## **QABIYYEE LAFAA FAAYIDAA UUMMATAATIIF GADI-LAKKISIISUUN WAL-QABATANII RAKKOOWWAN JIRAN: HAALA QABATAMAA NAANNOO OROMIYAA<sup>1</sup>**

**Alamaayyoo Waggaarii Nadhaa\***

### **ABSTRACT**

*This article explores legal as well as execution problems relating to the process of rural and urban land expropriation in Oromia regional state. And, it found that expropriation process in Oromia is encircled by execution as well as legal problems. Weak administration of public purpose, poor notification system, lack of advance payment of full compensation, lack of having uniform valuation methods and grievance handling mechanisms and poor rehabilitation works are among the major execution problems existing in the region. Among legal problems, insufficiency of displacement compensation stipulated under expropriation proclamation, vagueness of the expropriation proclamation on jurisdiction of courts and administrative tribunals, non-existence of directive which provides procedure for entertaining grievances in administrative tribunal and working procedure for valuating committee are the major ones. Accordingly, amending the expropriation proclamation and enacting necessary directive as well as providing training for participants in expropriation process is necessary to ensure a decent expropriation process.*

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<sup>1</sup> Bara bajataa 2006 qorannoowwan ILOQHQS<sup>o</sup>'n gaggeeffaman keessaa tokko mata duree 'Rakkoowwan Qabiyyee Lafaa Faayidaa Uummataatiif Gad-Lakkisiisuun Wal-Qabatanii Jiran: Haala Qabatamaa Naannoo Oromiyaa' jedhu dha. Barruun kunis qorannoo kanarraa gabaabbatee kan fudhatame dha. Odeeffannoon qorannichaa mala iddattoo kaayyeeffataan fayyadamuun godinaalee Oromiyaa jahaa (Shawaa Bahaa, Wallagga Bahaa, Shawaa lixaa, G/A/O/N/Finfinnee, Shawaa Kaabaa fi ArsiiLixaa);aanaalee godinaalee kana jalatti argaman kudha lamaa, fi Naannoo irraa waliitti qabameera. Haaluma kanaan, bar-gaaffiin 83, af-gaaffiin 136, hooggantoota fi ogeessota qabiyyee gad-lakkisiisuu irratti hojjatanii fi seektaroota garagaraa keessa jiranirraa kan waliitti qabame yoo ta'u; dabalataan, galmeewwan manneen murtii, murtii argatan 40 sakatta'ameera. Odeeffannoon funaanamees mala akkamtaan/qualitatively/xiinjalameera. Qorannichis qooda-fudhatootni bakka argamanitti Workishooppiif dhiyaatee yaada hirmaattotaatiin akka gabbatu ta'eera. Kana malees, bu'aan qorannoo kanaa Woorkishooppii biyyooleessaa 'National Workshop on Expropriation of Land and Valuation and Compensation Practice in Ethiopia' jedhu irratti dhiyaateera.

## SEENSA

Mirgoota namummaa sanadoota addunyaa adda addaa keessatti beekantii argatan keessaa tokko mirga qabeenyaa ti. Mirgi kunis mirgoota hedduu kan akka mirga abbaa qabeenyummaa, mirga abbaa qabiyyummaa, mirga fayyadamuu fi bu'aatti gargaaramuu fi kkf of keessatti kan haammatu dha. Waantota mirgi kun irratti hojiirra oolu keessaa tokko lafa dha. Itoophiyaa keessattis ta'e biyyoota guddachaa jiran biroo baay'ee keessatti jireenyi hawaasaa lafa irratti kan hundaa'e dha. Kanummarraa ka'uun heerri RDFI lafti qabeenya waliinii mootummaa fi uummattotaa akka ta'e tumeera. Kanaaf, sadarkaa fedaraalaa fi naannootti sirni itti fayyadama lafaa bu'a-qabeessa ta'e akka jiraatu labsiiwwan, danbiwwanii fi qajeelfamootni garagaraa bahanii jiru. Seerotni kunis namni dhuunfaan lafa irratti mirga abbaa qabeenyummaa qabaachuu akka hin dandeenye tumaniiru. Kanaaf, mirgi namni dhuunfaa lafa irratti qabaachuu danda'u mirgoota biroo mirga abbaa qabeenyummaa irra kan dhiphatu dha. Mirgootni kunis mirga lafa isaarratti umurii guutuu fayyadamuu, dhaalaan dabarsuu, kireessuu, fi kkf dha.

Abbaan qabiyyee lafaa, lafa isaarratti mirgi umurii guutuu fayyadamuu kan kennameef ta'us, mirgi kun daangaa mataa isaa kan qabu dha. Mootummaan qabiyyee lafaa nama tokkoo dantaa uummataatiif oolchuuf yeroo barbaade mirgi umurii guutuu faayyadamuu abbaa qabiyyee sanaa akka addaan citu taasisuu danda'a. Haata'uuti, mirga abbaa qabiyyuummaa lammiileen lafa irratti qaban kabachiisuudhaaf yeroo qabiyyeen lafaa dantaa uummataatiif akka gadi-lakkifamu ta'u adeemsi hordofamuu qabu labsiiwwan, danbiwwanii fi qajeelfamoota adda addaa keessatti tumamee jira. Kana malees, qaamoleen adda addaa adeemsa qabiyyee gadi-lakkisiisuu keessatti gahee taphachuu qabanis seerota kanneeniin teechifamaniiru.

Naannoo Oromiyaa keessatti investimantii fi hojii misooma adda addaatiif lafti magaalaa fi baadiyyaa akka gadi-lakkifamu ta'aa kan jiru yoo ta'ellee, adeemsi qabiyyee gadi-lakkisiisuu hangam akkaataa seerota keenya keessatti teechifameen raawwatamaa akka jiruu fi qaamoleen garagaraa itti-gaafatamummaa isaanirratti gatame hangam bahaa akka

jiran yeroo yeroodhaan sakatta'aa adeemuun tarkaanfiiwwan sirreeffamaa fudhachaa adeemuun barbaachisaa dha. Barruun kunis hanqinaalee gama kanaan jiraniif yaadota furmaataa kan agarsiisuu dha. Kana galmaan gahuufis kutaa saditti qoodamee dhiyaateera. Kutaan duraa, maalummaa qabiyyee gadi-lakkisiisuufi muuxannoo biyyoota muraasaa sakatta'uun agarsiisuuf kan yaalu dha. Kutaan lammataa, adeemsaalee qabiyyee gadi-lakkisiisuu seerota sadarkaa fedaraalaa fi naannoo Oromiyaatti tumamanii jiran sakatta'uun qabatamaan hangam hojiirra oolaa akka jiran kan xiinxalu dha. Kutaan sadaffaa fi inni xumuraa, yaada guduunfaa fi furmaataa kan kaa'u dha.

## **1. QABIYYEE FAAYIDAA UUMMATAAF GADI-LAKKISIISUU: SEENAA GUDDINAA, MAALUMMAA FI MUUXANNOO BIYYOOTA MURAASAA**

### **1.1. SEENAA GUDDINAA**

Adeemsi qabiyyee gadi-lakkisiisuu hojmaata bara dheeraa lakkoofsisee fi qaroomina Giriikootaa fi Roomaanota duriirraa eegalee kan beekamu dha.<sup>2</sup> Adeemsi haala kanaan biyyoota kana keessatti eegalame biyyoota Awuuroppaa fi Ameerikaa biroo keessattis babal'achuu danda'eera.<sup>3</sup> Sirnoota durii keessatti adeemsi qabiyyee gadi-lakkisuun seeraan beekanti argatee adeemsa seeraan taa'e kan hordofe osoo hin ta'iin hanqinoota baay'ee kan of keessatti qabu dha.<sup>4</sup> Haata'u malee, adeemsi haala kanaan eegalame yeroodhaa gara yerootti fooyya'insa taasisaa deemee haala amma irra jiru kanarra gahuu danda'eera. Addunyaa yeroo ammaa jirtu keessatti, biyyootni hedduun faayidaa dhuunfaa hoggantootaaf osoo hin ta'iin, dantaa uummata isaanitiif dursa kennuu jalqabaniiru. Kanarraa kan ka'e adeemsa isaanii seeraan daangeessuu fi qabiyyee gadi-lakkisiisuu duraa fi booda adeemsa hordofamuu qabu seera isaanii keessatti tumuun hojiirra akka oolu taasisaa jiru.

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<sup>2</sup> Dani'el Woldegebiriel Ambaye, Land Valuation for Expropriation in Ethiopia: Valuation methods and adequacy of compensation, F3. Kan argamu: [http://www.fig.net/pub/vietnam/papers/ts04c/ts04c\\_ambaye\\_3753.pdf](http://www.fig.net/pub/vietnam/papers/ts04c/ts04c_ambaye_3753.pdf); gaafa 09/07/2006 kan ilaalame.

<sup>3</sup> Akkuma lak. 2<sup>ffaa</sup>

<sup>4</sup> Olitti Yaadannoo 2<sup>ffaa</sup>, F38.

Haalli qabatamaa biyya keenyaas kanarraa adda miti. Akkuma biyyoota kaanii adeemsi qabiyyee gadi-lakkisiisuu sirnaawaa fi adeemsa seeraa kan hordofe hin turre. Akka biyya keenyaatti, sadarkaa seeraatti adeemsi qabiyyee gadi-lakkisiisuu beekamtii kan argate bara mootummaa Miniliki II yoo ta'u, seerichi adeemsaalee hordofamu qaban hunda tarreessuu baatus akka waliigalaatti deeggarsa seeraa akka qabaatu taasiseera. Adeemsi haala kanaan eegalame boodarra ulaagaaleen gurguddoo adeemsa qabiyyee gadi-lakkisiisuu keessatti barbaachisoo ta'an heera biyyattii dabalatee labsiiwwan, danbiiwwanii fi qajeelfamoota garagaraa keessatti akka hammatamu karaa saaqeera.<sup>5</sup>

## 1.2. MAALUMMAA QABIYYEE GADI-LAKKISIISUU

Adeemsa qabiyyee gadi-lakkisiisuutiif barreeffamootni garagaraa hiika adda addaa yeroo kennan ni mul'ata. Yaadrimee kanaaf hiikaan bal'aan kenname tokko gochaan kamiyyuu mootummaan yeroo nagaas ta'e yeroo waraanaa qabeenya dhuunfaa faayidaa uummataaf oolchuuf fudhatu akka qabiyyee gadi-lakkisiisuutti kan lakka'u dha.<sup>6</sup> *John Lewis* yaadrimee qabiyyee gadi-lakkisiisuu yeroo ibsu, "*The right or power of a sovereign state to appropriate private property for particular use for the purpose of promoting the general welfare*"<sup>7</sup> jechuun kaa'eera. Kunis mootummaan hojii faayidaa uummataa waliigalaaf jecha qabeenya dhuunfaa namootaa akka mirgaatti fudhachuu kan danda'u ykn fudhachuuf aangoo kan qabu ta'uu isaa kan ibsu dha.

Guuboon jechoota seeraa *Black's Law*, yaadrimee qabiyyee gadi-lakkisiisuu '*A governmental taking or modification of an individual property right especially by eminent domain or condemnation*'<sup>8</sup> jechuun hiikeera. Kunis mootummaan mirga qabeenya dhuunfaa (mirga abbaa qabiyyummaa, qabeenyuummaa fi kkf) hojii uummataaf jecha akka

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<sup>5</sup> *Olitti Yaadannoo Iffaa, F45.*

<sup>6</sup> Belachew Yirsawu, Expropriation, Valuation and Compensation in Ethiopia, Doctoral Thesis in Real Estate Planning, Royal Institute of Technology, F13 (Unpublished). Kan argamu: [http://www.kth.se/polopoly\\_fs/1.418707!/Menu/general/columncontent/attachment/Fil%201%20Alemu%20final%0main%20text.pdf](http://www.kth.se/polopoly_fs/1.418707!/Menu/general/columncontent/attachment/Fil%201%20Alemu%20final%0main%20text.pdf)

<sup>7</sup> *Olitti Yaadannoo Iffaa, F39.*

<sup>8</sup> Bryan A. Garner, *Black's Law Dictionary*, 7<sup>th</sup> edition, West Group, St. Paul, Minn, 1999, F602.

addaan citu taasisuu kan danda'u ta'uu agarsiisa. Guuboon kun dabalataan gaalee '*eminent domain*' jechuun hiikkoo armaan olii keessatti ibsame yeroo ibsu '*the inherent power of governmental entity to take privately owned property especially land and convert it to public use, subject to reasonable compensation for the taking*'<sup>9</sup> jechuun teechiseera. Kunis, qabiyyee gadi-lakkisiisuun aangoo mootummaa akka ta'ee fi mootummanis hojii uummataaf yoo barbaade lafa nama dhuunfaan qabamee jiru beenyaa madaalawaa kaffaluun fudhachuu kan danda'u ta'uu isaa kan ibsuu dha.

Kanaaf, hiikkoowwan qabiyyee gadi-lakkisiisuuf guuboo jechootaa fi ogeessotaan kennaman armaan olii irraa akka hubatamutti qabiyyee gadi-lakkisiisuun adeemsa qabiyyee ykn qabeenya dhuunfaa faayidaa uummataatiif karaa mootummaa beenyaa madaalawaa ta'e kaffaluun raawwatamu dha.

### **1.3. MUUXANNOO BIYYOOTAA**

Qabiyyee gadi-lakkisiisuun biyyoota adda addaa keessatti gaggeeffamaa kan jiru dha. Qorannoon kun hojimaata akka naannoo keenyaatti jiru seerota naannoo keenya irratti raawwatiinsa qaban waliin xiinxaluun rakkoowwan jiran kan adda baasu ta'us, adeemsa akka naannoo keenyaatti gaggeeffamaa jiru xiinxaluuf akka nu gargaaru biyyoota adda addaa keessatti haalli qabiyyeen itti gadi-lakkifamu maal akka fakkatu gabaabinaan ilaaluun barbaachisaa dha. Haaluma kanaan, biyyoota sirna seeraa kooman loow hordofan keessaa muuxannoo Afrikaa Kibbaa, biyyoota sirna siivil loow hordofan keessaa immoo muuxannoo Kaanaadaa fi Chaayinaa ilaalla.

#### **1.3.1. Muuxannoo Afrikaa Kibbaa**

Biyyoota adeemsa qabiyyee gadi-lakkisiisuuf beekamtii seeraa kennan keessaa tokko Afrikaa Kibbaa ti. Heerri biyyattiis, qajeeltoowwan waliigalaa adeemsi kun itti gaggeeffamu kaa'eera. Qajeeltoo waliigalaa heeraa irratti hundaa'uun adeemsi qabiyyee gadi-lakkisiisuu maal ta'uu

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<sup>9</sup>Akkuma lak.7ffaa, F541.

akka qabu seerri bu'uura heeraatiin tumamee fi Seera Qabiyyee Gadi-lakkisiisuu/*Expropriation Bill*/ jedhamuun beekamu bal'inaan ibsa itti kenneera. Adeemsaalee fi ulaagaaleen gurguddoo qabiyyee gadi-lakkisiisuu waliin wal-qabatee seera kana keessatti tumamanii jiran akka armaan gadiitti kan ilaalamani dha.

### **1.3.1.1. Faayidaa Uummataa**

Qabiyyee fi qabeenya gadi-lakkisiisuun kan danda'amu qabeenyii fi qabiyyeen sun faayidaa uummataa olaanaaf yoo barbaadame qofa akka ta'e heerri biyyatti tumee jira. Yaadni kunis seensa seera qabiyyee gadi-lakkisiisuu biyyattii keessatti ibsameera. Sirnoota darban keessatti lammileen biyyattii loogii isaan irratti taasifamaa tureerraa kan ka'e qabeenya uumamaa biyyattin qabdurraa qixa barbaadamuun fayyadamoo waan hin taaneef lammiin hundi qabeenya uumamaa biyyattiin qabdurraa fayyadamaa akka ta'u qabiyyee lafaas ta'e qabeenya biroo kamuu gadi-lakkisiisuun faayidaa uummataaf akka ta'etti kan lakkaa'amu ta'uu tumeera.<sup>10</sup> Dabalataan, bulchiinsa lafaan wal-qabatee lafti hojiiwwan misoomaa kan akka sararoota bishaanii fi ibsaa; akkasumas, kuusaa humna ibsaaf oolu faayidaa uummataaf akka ta'eetti fudhatama.<sup>11</sup> Kanaaf, akka muuxannoo biyya kanaatti laftis ta'e qabeenya biroo hojiiwwan armaan olitti ibsamaniif yoo fudhatamu faayidaa uummataaf akka ta'eetti fudhatama.

### **1.3.1.2. Qorannaa fi Haala Odeeffannoo Waa'ee Qabiyyee Gadi-lakkifamuu Itti Sassaabamu**

Adeemsi biroon akka biyya kanaatti gaggeefamu waa'ee qabiyyee gadi-lakkifamuu qorannoo gaggeessuu fi odeeffannoo sassaabuu dha. Yaadni kunis abbaan taayitichaa odeeffannoo waa'ee qabiyyee gadi-lakkifamuu walitti qabuuf dirqama kan qabu ta'uu kan agarsisuu dha. Kunis namootni qabiyyee fi qabeenya irratti mirga qaban yoo jiraatan qaamolee bulchiinsa lafaa naannoo sana jiranirraa qulqulleessuu kan gaafatu

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<sup>10</sup> South Africa Expropriation Bill, Chapter 4, Art. 10(b). Kan argamu: [www.ghostdigest.co.za/articles/the-new-expropriation-bill-/54379](http://www.ghostdigest.co.za/articles/the-new-expropriation-bill-/54379); gaafa 24/06/06 ALI tti kan ilaalame.

<sup>11</sup> *Akkuma lak. 10<sup>faa</sup>.*

dha.Dabalataan, beeksisa kennuun dura, abbootii qabiyyee lafa gadi-lakkisan barreeffamaan waamuu fi dubbisuu of keessatti kan haammatu dha. Qaamni qorannoo gaggeessu haayyama abbaa taayitichaatiin abbootii qabiyyee yookiin bakka bu'oota seeraa isaanirraa ragaawwan hanga beenyaa shallaguuf gargaaran walitti ni qaba. Kunis boodarra shallaggii beenyaa taasifamuuf kan gargaaru dha.<sup>12</sup>

### 1.3.1.3. Beeksisa

Beeksisni kennamu gosa lama kan qabu dha. Isaanis, beeksisa yaada qabiyyee gadi-lakkisiisuu/intention to expropriate/ fi beeksisa gadi-lakkisiisuu/notice of expropriation/ dha. Beeksisa yaada qabiyyee gadi-lakkisiisuu jechuun qorannaa gaggeeffameen abbaan taayitichaa qabiyyee gadi-lakkisiisuu yoo barbaade abbaa qabiyyichaa fi bulchiinsa lafaa naannoo sana jiru barreeffamaan dhimmicharratti deebii akka kennan kan itti beeksisu dha.<sup>13</sup> Beeksisni kennamu abbaan taayitichaa qabiyyee ibsame gadi-lakkisiisuuf fedhii kan qabu ta'uu, ibsa qabiyyee gadi-lakkifamuu, hanga beenyaa kaffalamuu fi akkaataa beenyaan kun itti shallagame, qabiyyee gadi-lakkifamurratti qaamni komii qabu guyyoota digdamii lama keessatti abbaa taayitichaa biratti komii isaa dhiyeessuu kan danda'u ta'uu kan ibsu dha.<sup>14</sup> Qaamni hanga shallaggii fi fedhii abbaan taayitichaa qabiyyee gadi-lakkisiisuuf qaburratti komii qabu barreeffamaan komii isaa abbaa taayitichaaf dhiyeessuu qaba. Abbaan taayitichaas qaama komii qabu waamuun dhimma isaa jaarsummaan ilaala. Yoo waliigalteerra gahamuu baate, abbaan taayitichaa qabiyyee gadi-lakkisiisuuf yookiin dhiisuu isaarratti murtii kennuu qaba.

Beeksisni gosti lammaffaa beeksisa qabiyyee gadi-lakkisiisuu yoo ta'u, kunis bu'uura armaan olitti ibsameen abbaan taayitichaa qabiyyee gadi-lakkisiisuuf yoo murteesse, itti aansuun abbaa qabiyyichaaf beeksisa qabiyyee gadi-lakkisiisuu kennuu kan qabu ta'uu kan agarsiisu dha. Beeksisni haala kanaan kennamus guyyaa qabiyyeen gadi-lakkifamu, guyyaa beenyaan kaffalamu, guyyaa beekisisicharratti ibsameen abbaan

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<sup>12</sup>Olitti Yaadannoo 10<sup>ffaa</sup>, Kwt. 10(1).

<sup>13</sup>Olitti Yaadannoo 10<sup>ffaa</sup>, Kwt. 11.

<sup>14</sup>Olitti Yaadannoo 10<sup>ffaa</sup>, Kwt. 12(4).

qabeenyummaa gara abbaa taayitaatti kan naanna'u ta'uu fi yoo abbaan qabiyyee hanga beenyaa ibsamerratti waliigaluu baate hanga beenyaa inni barbaaduu fi akkaataa itti shallage ibsu akka qabu ni agarsiisa.<sup>15</sup>

#### **1.3.1.4.Hanga Beenyaa fi Haala Shallaggii Isaa**

Haala shallaggii fi kaffaltii beenyaa ilaalchisee abbaan taayitichaa gatii gabaa irratti hundaa'uun beenyaan madaalawaa fi haqa-qabeessa ta'e namootaaf akka kaffalamu mirkaneessuuf dirqama qaba. Kana gochuufis dhimmootni ilaalamu qaban yeroo ammaa kana qabeenyichi maaliif tajaajilaa akka jiru adda baasuu, gatii gabaa meeshichaa, haala argannaa, kaayyoo gadi-lakkisiisuu fi gorsa boordii ilaalcha keessa haala galcheen tilmaamamuu qaba.<sup>16</sup> Kunis kan agarsiisu, akka waliigalaatti beenyaan kaffalamu gabaa yeroo ammaa qabeenyicha bituuf barbaachisurratti kan hundaa'u ta'uu dha.

#### **1.3.1.5. Gahee Mana Murtii**

Jalqabarratti qabiyyee faayidaa uummataaf gadi-lakkisiisuun gahee hojii qaamolee bulchiinsaa akka ta'e seerichi ni ibsa. Haata'u malee, manni murtii hojii qaamolee bulchiinsaa keessa deebiin/review/ ilaalu ni danda'a.<sup>17</sup> Akka muuxannoo Afrikaa Kibbaatti manni murtii aangoo keessa deebii qabuun murtii qaamolee bulchiinsaa yeroo ilaalu, qaamni sun dhimma sana ilaaluuf aangoo kan qabu ta'uuf dhiisuu isaa; adeemsi hordofame haqa-qabeessa ta'uu isaa; dogoggorri seeraa kan jiru ta'uu isaa fi kkf ilaalu dabalata.<sup>18</sup> Dabalataanis manni murtii hanga, yeroo fi haala kaffaltii beenyaa irratti murtii kennuu danda'a.

#### **1.3.2. Muuxannoo Chaayinaa**

Biyyoota guddina diinagdeen fooyya'iinsa olaanaa agarsiisan keessaa tokko biyya Chaayinaa dha. Jireenyi hawaasa biyyattii bal'inaan qonna irratti kan hundaa'e ture waan ta'eef, mootummaan biyyattii guddina

<sup>15</sup> *Olitti Yaadannoo 10<sup>ffaa</sup>, Kwt. 12(17).*

<sup>16</sup> *Olitti Yaadannoo 10<sup>ffaa</sup>, Chapter 5, Kwt. 15(3).*

<sup>17</sup> *Olitti Yaadannoo 10<sup>ffaa</sup>, Chapter 6, Kwt. 24(2).*

<sup>18</sup> South African Administrative Justice Act No. 20853, Art .6. Kan argamu: [http://www.saflii.org/za/legis/num\\_act/poaja2000396.pdf](http://www.saflii.org/za/legis/num_act/poaja2000396.pdf); kan ilaalame, Muddee 2006.



diinagdee biyyattii dhugoomsuu keessatti gaheen qotee-bultootni qaban olaanaa ta'uu hubachuun xiyyeeffannoo barbaachisaa kenneefii jira.<sup>19</sup> Chaayinaa keessatti babal'achuu magaalootaa fi piroojaktoota gurguddoo irraa kan ka'e hojiiwwan kanneen haala qajeelaa ta'een gaggeessuuf heera biyyattii fi seera bulchiinsa lafaa biyyattii keessatti qajeeltoowwanii fi adeemsi qabiyyee gadi-lakkisiisuu ifatti akka tumamu ta'eera. Qabiyyee seerota kunneenii akka itti aanutti gaggabaabsuun ilaaluun gaarii ta'a.

### 1.3.2.1. Faayidaa Uummataa

Qabiyyeen dhuunfaa yookiin waliinii kan gadi-lakkifamu faayidaa uummataaf yoo ta'e qofa akka ta'e qajeeltoo fudhatama argate dha. Biyya Chaayinaa keessattis ulaagaan kun heera biyyattiirraa kaasee seeroota biroo, fakkeenyaaf, seera bulchiinsa lafaa fi seera qabeenyaa fa'a keessatti qabiyyee gadi-lakkisiisuuf akka ulaagaatti taa'eera.<sup>20</sup>

### 1.3.2.2. Beenyya fi Haala Shallaggii Isaa

Akka muuxannoo Chaayinaatti, hangii shallaggii beenyaa seera bulchiinsa lafaa keewwata 47 jalatti tumamee jira. Bu'uura kanaanis beenyaan namoota qabiyyee isaanii gadi-lakkisaniif kaffalamu beenyaa kaffaltii gatii lafaa/land compensation fees/, kaffaltii irra deebisanii ijaaroo/resettlement fee/ fi kaffaltii ashaakiltii fi waantoota lafarratti hojjataman kan dabalatu akka ta'e seerri kun ni kaa'a. Beenyaa bu'uura kanaan kaffalamu keessaa kan qotee bulaa dhuunfaaf kaffalamu kaffaltii irra deebisanii ijaaroo fi kaffaltii ashaakiltiiwwaniif waantota lafaan wal-qabatanii ijaaramanii qofa dha.<sup>21</sup> Kaffaltiin beenyaa lafaa /land compensation fees/ qotee bultootaaf kallattiin kan kaffalamu osoo hin taane, qaama '*Rural Collective Economic Organization*' jedhamuuf kan kaffalamu dha. Kunis lafti baadiyyaa qotee bultootaan waliin qabamee kan jiru waan ta'eefi dha. Tumaan seerichaa kun beenyaan akkaataa kamiin shallagamuu akka qabus ni ibsa. Beenyaan qabiyyee lafaa kan shallagamuu qabu bu'aa lafichi waggoottan sadan darbaniif kenne giddu-

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<sup>19</sup> Xuenzi Zhong, Expropriating land for Public Purpose: What Can China Learn from Canada, F 3. (Kan hin maxxanfamiin)

<sup>20</sup> Id., F 31.

<sup>21</sup> *Ibid.*

galeessi isaa fudhatame waggaa 4-6 tiif baay'atee kan kaffalamuu yoo ta'u, kaffaltiin irra deebisanii ijaaruu/resettlement/ bu'aa waggaa lafichi kennu waggaa 4 hanga 6'tiin baay'isuun kan kaffalamuu dha. Haata'u malee, kaffaltiin kun bu'aa giddu-galeessaa kan waggoota sadan darbanii waggaa 15'niin baay'isuun argamu caaluu hin qabu. Beenyaan bu'uura armaan oliitiin erga shallagamee booda maallaqaan (in cash) kaffalama.<sup>22</sup>

### 1.3.2.3. Sirna Komiin Itti Keessumaa'u

Akka biyya Chaayinaatti komiiwwan qabiyyee gadi-lakkisiisuun wal-qabatanii ka'an keessummeessuuf aangoo kan qaban qaama bulchiinsaa /administrative tribunal/ ti. Kunis, manneen murtii komii qabiyyee gadi-lakkisiisuun wal-qabatanii ka'an akka hin keessummeessine seeraan kan daangeeffaman ta'uu agarsiisa. Yoo falmiin qabiyyee gadi-lakkisiisuu waliin wal-qabatee ka'e, adeemsi jalqabaa qaamoleen waliitti bu'an karaa hooggantoota uummataa naannoo sanii /local people government/ biratti dhiyaachuun dhimma isaanii jaarsummaan akka ilaalan ni taasifama. Qaamoleen walitti bu'an kunis adeemsa kanaan walitti bu'iinsa isaanii furuu hin danda'an yoo ta'e, gara mana murtii deemuun osoo isaan hin barbaachisiin qaama qabiyyee gadi-lakkisiisuu mirkaneesse biratti dhiyaatu. Qaamni kunis dhimmicharratti falmii gaggeessuun murtii ni kenna. Haata'uuti, falmiin haala kanaan gaggeeffamu adeemsa qabiyyee gadi-lakkisiisuu kan gufachisu miti. Kanaaf, akka biyya Chaayinaatti sababa falmiif jecha haalli adeemsi qabiyyee gadi-lakkisiisuu itti dhorkamu hin jiru jechuu dha. Dabalataan komiin mana murtii dhaquu baatus sadarkaa lamaan qaamolee bulchiinsaa biratti kan ilaalamu dha.<sup>23</sup>

### 1.3.3. Muuxannoo Kaanaadaa

Adeemsa qabiyyee gadi-lakkisiisuun biyyoota muuxannoo gaarii qabaniin fi qotee bulootni isaaniis bu'aa qabiyyee gadi-lakkisiisuu irraa argataniin fayyadamoo ta'an keessaa biyyi Kaanaadaa ishee tokko dha.<sup>24</sup>

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<sup>22</sup> *Ibid.*

<sup>23</sup> *Id, FF39- 40.*

<sup>24</sup> *Id, F4.*

Sirna bulchiinsa lafaa biyya kanaa yeroo ilaallu abbaan qabeenyummaa lafaa mootummaa, dhaabbattootaa fi namoota dhuunfaan kan qabame dha. Lafti qaamolee kanaan kan qabamee jiru ta'us, mootummaan faayidaa uummataatiif jecha dhaabbattootaa fi namoota dhuunfaarraa qabiyyee lafaa yeroo itti fudhatu ni mul'ata. Dabalataan, mootummaan feederaalaa lafa feedaraala jala jiru kan bulchu yoo ta'u, mootummaan naannoolee ammoo lafa sadarkaa naannootti jiru bulchu.<sup>25</sup>

Akka heera biyya kanaatti, naannooleen seera fi dambii mataa isaanii baasuu danda'u jechuun waan aangeesseef mootummootni naannoolee seera qabiyyee gadi-lakkisiisuu /expropriation act/ mataa isaanii baafatanii qabu. Seerota naannooleen dhimma qabiyyee gadi-lakkisiisuurratti baasan keessaa akka fakkeenya gaarii kan ta'u seera naannoo Ontariyoo ti.<sup>26</sup>Naannooleen biyyattii keessa jiran biroos seera kana akka fakkeenyaatti fudhachuun seera qabiyyee gadi-lakkisiisuu kan tuman waan ta'eef muuxannoo biyya kanaas seera kanarratti hundaa'uun kan ilaallu ta'a. Seerri kunis adeemsa qabiyyee gadi-lakkisiisuu bakka gurguddaa lamatti qooduun kan ilaalu dha. Isaaniis: adeemsa qabiyyee gadi-lakkisuun dura jiruu fi booda raawwatamu dha.

### **1.3.3.1. Adeemsa Qabiyyee Gadi-lakkisiisuun Dura Jiru**

Adeemsi kun adeemsaalee xixiqqaa kan akka beeksis kennuu, komiiwwan yoo jiraatan dhaggeeffachuu fi qabiyyee gadi-lakkifamu galmeessuu jedhan of keessatti kan haammatu dha. Beeksisni adeemsa qabiyyee gadi-lakkisuun dura kennamu beeksiisa yaada qabiyyee gadi-lakkisiisuu/intention to expropriate/ kan jedhamu dha. Kunis qaamni qabiyyee gadi-lakkisiisu pilaanii qabiyyee gadi-lakkisiisuu qaama dhimmi ilaalu biratti erga galmeessisee booda, guyyoota soddoma keessatti abbaa qabiyyeetiif beeksis kennuun isarraa kan eegamu ta'u kan agarsiisuu dha.

Adeemsi lammaffaan, mormiin yoo jiraate adeemsa mormiin itti dhagahamuu fi qulqullaa'uu dha. Kunis, abbaan qabiyyee bu'uura armaan

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<sup>25</sup> *Id, F40.*

<sup>26</sup> *Ibid.*

olitti ibsameen beeksisni kennameef guyyaa beeksisni isa gahee kaasee guyyoota 30 keessatti komii isaa ministeera qabiyyee gadi-lakkisiisuu mirkaneesse biratti dhiyeessuu danda'a. Ministeerri qabiyyee gadi-lakkisiisuu komiin isaaf dhiyaate komii ka'erratti falmii ni taasisa. Haata'uuti, kun kan raawwatamu abbaan qabiyyee falmiin akka gaggeeffamu yoo gaafate qofa dha. Falmiin gaggeeffamus kan xiyyeeffatu qabiyyee gadi-lakkisiisuun kun haqa qabeessa ta'uu fi kaayyoo yaadame kan galma geessisu ta'uuf dhiisuu isaarratti dha. Kanaafiis abbaan qabiyyee fi qaamni qabiyyee gadi-lakkisiisus ragaa yaada isaanii mirkaneessuu danda'u akka dhiyeessan ni haayyamamaaf Adeemsa kanas kan raawwachiisu gama minsteeraatiin qaamni '*Inquiry Officer*' jedhamu ni mudama. Qaamni kunis garee bitaa fi mirgaa ni falmiisisa akkasumas ragaa ni dhagaha. Gareen bitaa fi mirgaas ragaa isaanii gaaffii dursaa gaafachuu akkasumas ragaa garee biroo amoo gaaffii qaxxaamuraa gaafachuu danda'u. Kunis, adeemsi qaama bulchiinsaa kana biratti gaggeeffamu akkuma mana murtii ta'uu isaa kan agarsiisuu dha.<sup>27</sup>

Adeemsi gochaa qabiyyee gadi-lakkisiisuun dura raawwatamu inni sadaffaan pilaanii qabiyyee gadi-lakkisiisuu mirkaneessuu dha. Ministeerichi erga falmii gaggeesse booda qabiyyeen akka gadi-lakkifamu yoo murteesse qaama qabiyyee lafaa galmeessu '*Land Registry Office*' jedhamu biratti pilaanii qabiyyee gadi-lakkisiisuu mirkanaa'e /approved plan/ galmeessisuu qaba.

### **1.3.3.2. Adeemsa Qabiyyee Gadi-lakkisiisuun Booda Raawwatamu**

Adeemsa kana keessattis adeemsaaleen gurguddoon lama ni raawwatamu. Isaaniis, beeksisa gadi-lakkisiisuu kennuu fi beenyaa sirrii ta'e kaffalchisuu kan jedhamani dha. Adeemsi inni duraa, beeksisa gadi-lakkisiisuu yoo ta'u, kunis abbaan qabiyyee fi qaamni gadi-lakkisiisuu hanga beenyaarratti yoo waliigaluu baatan shallaggii gaggeessuun

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<sup>27</sup>Raymond G. Colautti, A primer on expropriation in Ontario, F6, (Kan hin maxxanfamne). Kan argamu:[http://colauttilaw.com/Publications\\_files/A%20PRIMER%20ON%20EXPROPRIATIONS%20IN%20ONTARIO.pdf](http://colauttilaw.com/Publications_files/A%20PRIMER%20ON%20EXPROPRIATIONS%20IN%20ONTARIO.pdf); gaafa 09/07/2006 ilaalame.

kaffaltii beenyaa murteessuun beeksisa kennamu dha. Adeemsa armaan olitti ibsameen pilaaniin qabiyyee gadi-lakkisiisuu galmaa'ee guyyoota 30 jiran keessatti hanga beenyaarratti abbaan qabiyyee fi qaamni gadi-lakkisiisuu yoo waliigaluu baatan ministeerri qabiyyee gadi-lakkisiisuu qaamolee lamaaniif beeksisa ni kenna.<sup>28</sup> Beeksisa qabiyyee gadi-lakkisiisuu kennuun qaamni shallaggii gaggeessu qabiyyee gadi-lakkisiisuuf haayyama abbaa qabiyyee lafaatiin ala, ajaja qaama 'Ontario Municipal Board' jedhamuun qabiyyee namichaa keessa galuun qabiyyee isaa tilmaamuu fi hanga beenyaa murteessuu isa dandeessisa. Kanaaf, beeksisni gosa kanaa qaamni shallaggii gaggeessu qabiyyee namaa keessa galuun tilmaama akka gaggeessu kandandeessisu dha. Haalli shallaggii isaas gatii gabaa irratti hundaa'uun hanga danda'ame abbaa qabiyyee iddoo isaa duraatti deebisuuf bifa dandeessisuun kan shallagamuu qabu dha.<sup>29</sup> Gatiin gabaas tooftaawwan mala gurgurtaa wal-fakkaataa (comparable sales approach) fi mala galii qabeenyicharraa argamu (Income capitalization Approach) fayyadamuun ni shallagu.<sup>30</sup>

Adeemsi inni lammaffaa kaffaltii beenyaa yoo ta'u kunis shallaggiin bu'uura armaan olitti ibsameen erga gaggeeffame booda beenyaan sun abbaa qabiyyeef kaffalamuu kan qabu ta'uu isaa kan ibsu dha. Kaayyoon seera qabiyyee gadi-lakkisiisuu biyya kanaa beenyaan guutuu fi sirrii ta'e akka kaffalamu taasisu dha.<sup>31</sup>

## **2. ADEEMSA QABIYYEE LAFAA FAAYIDAA UUMMATAAF GADI-LAKKISIISUU: XIINXALA HAALA QABATAMAA NAANNOO OROMIYAA**

Gochaan qabiyyee gadi-lakkisiisuu akkuma biyyoota addunyaa biroo keessatti raawwatamu, Itoophiyaa fi naannoo Oromiyaa keessattis bal'inaan gaggeeffamaa jira. Adeemsa kana sirnaawaa taasisuu fi qaamni qabiyyee gadi-lakkisiisuu aangoo isaa gar-malee fayyadamuun mirgi namoota qabiyyee isaanii gadi-lakkisanii akka hin miidhamneef adeemsa kana to'achuuf seerotni garagaraa sadarkaa feedaraalaa fi naannootti

<sup>28</sup> Olitti Yaadannoo 19<sup>ffaa</sup>, F24.

<sup>29</sup> Olitti Yaadannoo 19<sup>ffaa</sup>, FF7-8.

<sup>30</sup> Akkuma lak. 29<sup>ffaa</sup>.

<sup>31</sup> Akkuma lak. 29<sup>ffaa</sup>.

tumamanii jiru. Seerota sadarkaa feedaraalaatti tumaman keessaa Heera Mootummaa Rippaabilikaa Dimokiraatawaa Feedaraalawaa Itoophiyaa (kana booda heera mootummaa RDFI jedhamu), seera haa riiroo hawaasaa Itoophiyaa keewwata 1460-1488, labsii qabiyyee gadi-lakkisiisuu fi kaffaltii beenyaa feedaraalaa lakk.455/1997(kana booda labsii qabiyyee gadi-lakkisiisuu jedhamu), labsii waliigaltee liiziin qabannaa lafa magaalaa feedaraalaa lakk.721/2004(kana booda labsii liizii jedhamu) fi dambii lakk. 135/1999 caqasuun ni danda'ama. Seerota sadarkaa naannootti tumaman keessaa Heera mootummaa Naannoo Oromiyaa, Labsii Lafa baadiyaa 130/99(kana booda labsii lafa baadiyyaa jedhamu), dambii lafa baadiyyaa Oromiyaa lakk. 151/2005, dambii labsii liizii raawwachisuuf bahe lakk. 155/2005, fi qajeelfama 9/2005, labsii investimantii naannoo Oromiyaa lakk.138/2000 fi labsii qaamolee raawwachiftu irra deebiin hundeessuuf bahe lakk. 170/2004 adda dureen kan eeramani dha.

Kutaa kana keessatti ulaagaalee fi adeemsaalee naannoo Oromiyaa irratti raawwatiinsa qabanii fi seerota armaan olii keessatti caqafaman haala qabatamaa naannoo Oromiyaa xiinxaluuf akka gargaarutti bakka gurguddoo jahatti qooduun kan sakatta'aman ta'a. Dabalataan, kutaan kun ulaagaaleenii fi adeemsaaleen seerota kana keessatti tumamanii jiran sadarkaa naannoo Oromiyaatti hangam hojiirra oolaa jiru kan jedhu daataa kallattii garagaraan funaaname waliin wal-bira qabuun kan sakatta'u dha. Ulaagaaleen gurguddoo kunis:

## **2.1. FAAYIDAA UUMMATAA**

Akkuma muuxannoo biyyoota biroo fi hiikkoo qabiyyee gadi-lakkisiisuu hayyootni kennan keessatti olitti ilaalle, Itoophiyaa keessattis qabiyyeen kan gadi-lakkifamu faayidaa uummataaf yoo barbaadame qofa akka ta'e seerota adda addaa keessatti ibsameera.<sup>32</sup> Ulaagaan faayidaa uummataa jedhu biyyoota garagaraa keessatti kan hammatame ta'us, yaad-rimeen

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<sup>32</sup> Seerotni kunniinis Heera mootummaa RDFI, kwt. 40(8); labsii liizii kwt 2(7); labsii qabiyyee gad-lakkisiisuu .455/1997, kwt 2(5); dambii lafa baadiyyaa Oromiyaa lakk. 151/2005, kwt. 2(4) fa'i.

isaa sirna biyyi tokko hordoftu, yeroo fi iddoorratti hundaa'uun biyyaa biyyatti; iddoodhaa iddootti garaagarummaa qaba.<sup>33</sup>

Ilaalcha seerotni keenya hammatanii jiran yeroo ilaallu heerri mootummaa RDFI akka waliigalaatti qabiyyeen faayidaa uummataaf kan gadi-lakkifamuu qabu ta'uu ibsuun ala faayidaa uummataa jechuun maal jechu akka ta'e hin ibsu. Haa ta'u malee, labsiiwwan yeroo ammaa dhimma kana waliin kallattiin wal-qabatan labsii qabiyyee gadi-lakkisiisuu fi labsii liizii, akkasumas sadarkaa naannootti dambiin lafa baadiyyaa gaalee "*faayidaa uummataa*" jedhuuf hiikkoo walfakkaataa kennaniiru. Akka hiikkaa seerota kanneeniitti, qabiyyeen lafaa faayidaa uummataatiif gadi-lakkifame kan jedhamu yoo hawaasni kallattiinis ta'e al-kallattiin hojii hojjatammurraa fayyadamaa ta'uun guddinni hawaas-dinagdee itti fufiinsa qabu yoo uumame dha.<sup>34</sup> Hiikkoo kana keessatti 'hawaasni kallattiiniis ta'e al-kallattiin fayyadamaa yoo ta'e' qabiyyeen jedhu haammataamuun isaa biyyi keenya yaad-rimee faayidaa uummataa jedhu biyyoota bal'isanii ilaalan keessaa tokko akka taate hubachuun ni danda'ama. Akka waliigalaatti, babal'ina magaalotaa fi hojii bu'uuraalee misoomaatiif (karaa, hoospitaala, manneen barnootaa, manneen waliinii fi hidha lagaa adda addaatiif) qabiyyeen lafaa nama dhuunfaa yeroo fudhatamu akka faayidaa uummataatiif ta'eetti akka fudhatamu labsiin qabiyyee gadi-lakkisiisuu ni ibsa.<sup>35</sup>

Haala qabatamaa naannoo Oromiyaatiin qabiyyeen lafaa sababoota akka gadilakkifamu ta'u keessaa hojiiwwan daandii, babal'ina magaalaa,

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<sup>33</sup>*Hiikkaa yaad-rimeen faayidaa uummataa jedhu qabaachuu qabu irratti ilaalchi jiru bakka gurguddaa lamatti qoodama. Isaanis: Minimalist view /dhiphisanii kan ilaalan/ fi Maximalist view /bal'isanii kan ilaalan/ jedhamuun beekamu. Warreen ilaalcha dhiphisanii fudhchuu /minimalist view/ hordofan hojii hojjatameen namootni muraasni qofaan kan fayyadaman yoo ta'e, faayidaa uummataaf akka hin jedhamne yoo ibsan warreen ilaalcha bal'isanii fudhachuu /maximalist view/ hordofan immoo hojiin kamiyyuu humna indastirii, oomishitummaa yookiin badhaadhina dabaluu magaalootni akka babal'atanii fi carraan hojii akka uumamu taasisuun guddina hawaasa sanaaf kan fidu yoo ta'e faayidaa uummataaf akka jedhamu ni ibsu. Muradu Abdo, Ethiopian Property Law, School of Law, Addis Ababa University, F-369.*

<sup>34</sup>Labsii Qabiyyee Gadi-Lakkisiisuu fi Kaffaltii Beenya Feedaraalaa Lakk.455/97, Kwt 2(5)(hiikkaan kan barressaati).

<sup>35</sup>*Akkuma lak. 34<sup>ffaa</sup>, Seensa.*

ijaarsa dhaabbilee fayyaa fi bishaan dhugaatii kanneen adda dureen caqasamani dha.<sup>36</sup> Kana malees, ijaarsa dhaabbilee barnootaa, hojiiwwan invastimantii fi kkf sababoota gochaan qabiyyee gadi-lakkisiisuu akka raawwatamu taasisani dha.<sup>37</sup> Hojiiwwan kunneen dandeettii /potential/ humna indistirii dabaluu, oomishtummaa guddisuu, carraa hojii uumuu, fi guddina hawaas-diinagdee uumuu keessatti gahee olaanaa taphachaa kan jirani dha.<sup>38</sup> Sababootni kunis deeggarsa seeraa kan qaban ta'uu hubachuun ni danda'ama.

Haata'u malee, hanqinaaleen raawwii ni jiru. Hanqinaalee mul'atan keessaa tokko lafa invastimantiif kenname yeroo jedhame keessatti hojii murtaa'eef oolchuu dhabuun isa tokko dha. Adeemsa kenniinsa lafa invastimantii irratti fooyya'iinsi haa jiraatuyyuu malee ammallee abbootiin qabeenyaa tokko tokko haala oomishtummaa hin dabalteen faayidaa dhuunfaa isaaniitiif lafa qabatanii kan jiran ni jiru.<sup>39</sup> Kanaaf agarsiiftuu ta'uu kan danda'u istaatiksii jiru ilaaluun yoo barbaachise, hanga bara 2004 ji'a caamsaatti abbootii qabeenyaa 533 ta'an irraa lafti kaareemetirii 9863.24 akkaataa waliigaltee seenameen waan misoomsu hin dandeenyeef waliigalteen akka addaan citu ta'eera. Abbootiin qabeenyaa waliigalteen isaanii akka diigamu taasifaman baay'een isaanii humna osoo hin qabaatiin lafa qabachuun faayidaa hin malle argachuuf

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<sup>36</sup> Tasfaayee Tolaa, Q/bulaa A/Diggaa qabiyyee gadi-lakkise (Afgaaffii gaafa 17/04/2006 gaggeeffame); Ahimad kadir, Q/bulaa A/Shaaashannee qabiyyee gadi-lakkise (Afgaaffii gaafa 23/03/2006 gaggeeffame); Firrisaa Nuurasaa, Q/bulaa A/Diggaa qabiyyee gad-lakkise (Afgaaffii gaafa 17/04/2006 gaggeeffame); Baayyuush Fayyee, Jiraattuu Magaalaa Fichee qabiyyee gad-lakkite (Afgaaffii gaafa 01/04/2006 gaggeeffame).

<sup>37</sup> Taayyee Dibaabaa, Itt/ G/ Waj/ Bulchinsaa Go/ Shawaa Kaabaa (Afgaaffii gaafa 01/04/2006 gaggeeffame); Gazzahaany Zannabaa, itti/ Aa/ Bul/ Laf/ Eeg/ Naan/ Godina Arsii Lixaa (Afgaaffii gaafa 23/03/2006 gaggeeffame); Rundasaa Dinqaa, Kore/Shall/Beenyaa/Magaa/Ambuu (Afgaaffii gaafa 08/04/2006 gaggeeffame).

<sup>38</sup> Kabaa Hundee, Komishinara komishinii Invastimantii Oromiyaa (Afgaaffii gaafa 10/04/2006 gaggeeffame).

<sup>39</sup> Addisuu Xilaahuun, B/B itt/Gaf/Waj/Inv/Go/Wal/Bahaa (Afgaaffii gaafa 14/04/2006 gaggeeffame); Balaaynash Eebbaa, B/B/Itti/Waj/Inva/M/Dukam (Afgaaffii gaafa 18/03/2006 gaggeeffame); Inniyawu Adaree, Qon/Deg/Hor/ Waj/Inva/M/Dukam (Afgaaffii gaafa 18/03/2006 gaggeeffame).



kan socho'aa turani dha.<sup>40</sup> Kana malees, abbootiin qabeenyaa tokko tokko bara 1997 irraa kaasee hanga ammaatti lafa qabatani osoo irratti hin hojjatiin kan taa'an jiru.<sup>41</sup> Lafa investimantii faayidaa uummataaf qixa yaadameen hojiirra hin oollee gadi-lakkisiisuu irratti hanqinni kan jiru ta'uus hubachuun ni danda'ama.<sup>42</sup>

Kanaaf, daataawwan armaan olitti ibsamani fi af-gaaffii taasifameerraa akka hubatamu, lafa pirojaktii investimantiif akka gadi-lakkifamu taasifamu keessaa kan oomishitummaa dabalaa, humna indastirii guddisan, akkasumas carraa hojii uuman kan jiran ta'us, akka waliigaltee seenaniin hojjachuun oomishitummaa, humna industirii fi qabeenyaa dabaluu irratti hanqina kan qabanis jiru. Kunis, lafti hojii investimantiif akka gadi-lakkifamu taasifamu faayidaa uummataaf akka oolu taasisuu irratti hanqinni kan jiru ta'uu agarsiisa.

### 3. SIRNA BEEKSISAA

Labsii qabiyyee gadi-lakkisiisuu kwt. 4(1) jalatti beeksisni barreeffamaa hanga beenyaa kaffalamuu fi yeroo itti qabiyyeen gadi-lakkifamuu qabu agarsiisu karaa bulchiinsa aanaa yookiin karaa bulchiinsa magaalatiin abbaa qabiyyeef kennamu akka qabu tumeera. Labsiin liizii immoo kwt 27(1) jalatti beeksisni kennamu yeroo itti gadi-lakkifamu, hanga beenyaa kaffalamuu fi lafa bakka bu'aa kennamu kan agarsiisu ta'uu akka qabu ni ibsa. Dambiin labsicha raawwachuuf bahe lakk. 155/2005 keewwata 56(1-2) jalatti qaama qabiyyee liizii gadi-lakkisuuf beeksisni barreeffamaa kennamuufii kan qabu ta'uu tumeera. Seerota kana keessatti ifatti kaa'amu baatus muuxannoo biyyoota armaan olitti ilaalame irraa kan hubatamu kaayyoon beeksisaa daangaa yeroo kaawwame keessatti abbaan qabiyyee qabeenya isaa akka kaafatuu fi komii yoo qabaate qaama dhimmi ilaaluuf akka dhiyeessu kan isa gargaaru dha. Daangaa

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<sup>40</sup>Balaaynash Eebbaa B/B/Itti/Waj/Inva/M/Dukam (Afgaaffii gaafa 18/03/2006 gaggeeffame); Inniyawu Adaree, Qon/Deg/Hor/ Waj/Inva/M/Dukam (Afgaaffii gaafa 18/03/2006 gaggeeffame).

<sup>41</sup> Taayyee Dibaabaa, Itt/G/Waj/Bulchiinsaa Go/Sha/Kaabaa(Af-gaaffii gaafa 01/04/2006 gaggeeffame).

<sup>42</sup> Akkuma Lakk. 41<sup>ffaa</sup>.

yeroo qabiyyeen itti gadi-lakkifamu ilaalchisee qajeelfamni dhimmicharratti kan bahu ta'uu labsichi kan tume ta'us hanga ammaatti qajeelfamni kun bahee hin jiru. Garuu, yeroon akka qabiyyeen gadi-lakkifamuuf kennamuu qabu lafa qabeenya qabuuf guyyaa sagaltamaa gad-ta'uu akka hin qabne keewwata xiqqaa lama jalatti tumeera. Abbaan qabiyyee bu'uura keewwata 4(1) tiin beeksisni isa qaqqabe guyyaa beenyaa fudhate ykn immoo fudhachuu yoo dide guyyaa beenyaan kanfalamuufi qabu(guyyaa maqaa qaama ajaja kennuutiin lakkoofsi herregaa baankii cufaa banamee kaa'ameetii) eegalee guyyaa sagaltama keessatti qabiyyee gadi-lakkisuu qaba.

Akka naannoo Oromiyaatti sirni beeksisni qabiyyee gadi-lakkisiisuu ulaagaa seeraa kan eeggate ta'uuf dhiisuu isaa fi hanqinaalee jiran adda baasuuf daataan madda garagaraa irraa kan walitti qabame yoo ta'u, bu'aan argame akka agarsiisutti beeksisaa ulaagaa seeraan taa'ee jiru guutee kennuu irratti hanqinni kan jiru ta'uu isaati.

Hanqinaalee mul'atan keessaa inni jalqabaa beeksisni kennamu barreeffamaan ta'uu dhabuu fi bakka barreeffamaan kennamettis yeroo seeraan taa'ee gad ta'uun ni mul'ata. Kana malees, beeksisaa barreeffamaa kennurratti hanqina bal'aatu jira.<sup>43</sup> Haata'uuti, namoota qabiyyee gadi-lakkisuuf deeman waliin afaaniin mariin ni gaggeeffama.<sup>44</sup> Hawaasa mariisuu labsii qabiyyee gadi-lakkisiisuu keessatti akka adeemsa tokkootti kan haammataame ta'uu baatus seerri hariiroo hawaasaa keewwata 1465 keewwata xiqqaa 1 fi 2 jalatti hawaasa mariisuu kan danda'amu ta'uu ni ibsa. Haa ta'u malee, mariin erga taasifame booda akkaataa seerarra taa'ee jiruun beeksisni barreeffamaa hanga beenyaa fi yeroo itti gadi-lakkifamuu qabu ibsu kennamuu dhabuun isaa qaamni sun komii isaa haala sirnaawaa ta'een akka hin dhiyeessine isa taasisa. Osoo beeksisni barreeffamaa hanga beenyaa agarsiisuu isaaniif kennemeera ta'e, komii qabaatan qaama komii dhaggeeffatu biratti akka ragaatti

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<sup>43</sup> Nagawoo Eliyaas, B/B/Eej/Mis/Man/Laf/Mag/Arsi/Nagallee (Afgaaffii gaafa 24/03/2006 gaggeeffame).

<sup>44</sup> Girmaa G/Hiwoota, Ogeessa Shallaggii/W/L/Eg/Na/Mag/Bishooftuu (Afgaaffii gaafa 23/04/2006 gaggeeffame).

dhiyeeffachuu danda'u. Bakka beeksisni barreeffamaa kennametti akkaataa seerarra taa'een yeroo gahaa qabiyyee isaanii itti kaafatan kennuu waliin wal-qabatees hanqinni ni jira.<sup>45</sup> Dabalataan beeksisaa barreeffamaa namoota qabiyyee isaanii gadi-lakkisaniif kenname keessattis hanqinni kun kan jiru ta'uuni hubatama.<sup>46</sup>

Hanqinni lammaffaan beeksisni kennamu hanga beenyaa kan hin ibsine ta'uu isaati. Beeksisni kennamu hanga beenyaa kan ibsu yoo ta'e qaamni hanga beenyaa jedhamerratti komii qabu komii isaa dhiyeessuuf kan isa gargaaru waan ta'eef seerota biyya keenyaa fi biyya alaa keessatti beeksisni hanga beenyaa kan ibsu ta'uu akka qabu tumameera. Haata'u malee, haala qabatamaa naannoo keenyaa yeroo ilaallu sirni beeksisaa bakka baay'eetti hordofamaa jiru namoota qabiyyee isaanii gadi-lakkisuuf jiran mariisisuun dhimmicha irratti yaada akka kennan gochuun kan raawwatamu dha. Adeemsi kunis shallaggiin dura kan gaggeeffamu waan ta'eef hanga beenyaa namoota kanaaf kaffalamu kan ibsu ta'uu hin danda'u. Tilmaama beenyaa beeksisuu irrattis hanqinni ni jira.<sup>47</sup> Sababani isaas xiyyeeffannaan kan kennamaa jiru sirna beeksisaa osoo hin taane beenyaa kaffalamu irratti waan ta'eefi dha.<sup>48</sup>

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<sup>45</sup> Labsiin qabiyyee gad-lakkisiisu keewwata shan jalatti qaamni pirojektii gaggeessu qabiyyee isaaf barbaachisu waggaa tokkoon dursee bulchiinsa magaalaa ykn aanaa beeksisuu kan qabu ta'uu tumeera. Haa ta'u malee, pirojektoota qaamolee mootummaa federaalaatiin gaggeeffaman dursanii sadarkaa bulchiinsa aanaa ykn magaalatti kan hin beeksifne waan ta'aniif, beeksisaa akkaataa seera irra taa'een kennuuf hanqinni yeroo ni mudata. Fakkeenyaaf, sarara ibsaa Aanaa Giraar Jaarsoo keessa diriirsuuf yeroo qabiyyeen gad-lakkifamu projektichi ariifachiisaa waan tureef beeksisni kenname yeroo seerarra taa'e kan hin eegne akka ta'e ogeessi shallaggii keessatti hirmaate ibseera. (Eefreem Abbaba, Miseensa Koree shallaggii beenyaa Aanaa G/Jaarsoo fi Raw/Ad/Ho/Ijo/Hor/fi Ra/Gab/Mootummaa/M/Fichee (Afgaaffii gaafa 01/04/2006)).

<sup>46</sup> Fakkeenyaaf, xalayaan gaafa 03/06/2005 barreeffamee lakk.203/2005 ta'e karaa bulchinsa gandaan addee Asteer Siyuumiif kenname qabiyyee lafaa manni irra jiru ji'a lama gidduutti akka gad-lakkisan kan ajaju ture.

<sup>47</sup> Tashoomaa Gabbisaa, Pri/M/M/A/Giraar Jaarsoo (Afgaaffii gaafa 30/03/2006 gaggeeffame).

<sup>48</sup> Ida'oo Abdii, Itti/Gaf/Waj/Laf/Eeg/Naannoo/A/Shaashamanne (Afgaaffii gaafa 24/03/2005 gaggeeffame).

#### 4. SIRNA SHALLAGGII BEENYAA

Yeroo qabiyyeen gadi-lakkifamu faayidaan abbaan qabiyyee argatu inni guddaan beenyaa dha. Kaffaltii beenyaa ilaalchisee yaaddamootni (theory) lama akka jiran barreeffamootni ni ibsu. Isaaniis hanga beenyaa abbaan qabeenyichaa dhabe (owner's loss theory ykn indemnity principle) fi hanga bu'aa qaamni fudhate argatu (taker's gain theory) jedhamuun beekamu.<sup>49</sup> Heerri mootummaa RDFI yeroo mirgi qabeenyaa sababa faayidaa uummataaf akka addaan citu ta'u beenyaan madaalawaa kaffalamuu kan qabu ta'uu isaa haala waliigalaan kwt. 40(8) jalatti tumeera. Haa ta'u malee, heerichi beenyaan jedhame akkaataa yaaddama kamiin kaffalamuu akka qabu waan agarsiisu hin qabu. Seerotni naannoo kanarratti tumamanii bahanis beenyaan hanga miidhaa dhaqqabe waliin wal-madaalu kaffalamuu akka qabu kan ibsan waan ta'eef seerotni biyya keenyaa akkaataa yaaddama hanga miidhaa abbaan qabeenyichaa dhabe kan hordofu akka ta'e hubachuun ni danda'ama.<sup>50</sup> Beenyaan akkaataa yaaddama kanaan kaffalamu kaffaltiiwwan gosa akkamii akka haammatu labsiin qabiyyee gadi-lakkisiisu kwt 7 fi 8 jalatti tumameera. Kunis, beenyaan kaffalamu qabeenya abbaan qabiyyee laficharraa qabuuf, fooyya'iinsa dhaabbataa abbaan qabiyyee lafarratti taasiseef, dhaabbiidhaan ykn yeroof gadi-lakkisuuf/buqqaa'uu/, qabeenya kaasuuf, bakkaa bakkatti sochoosuuf, deebisanii dhaabuu fi kkf akka haala isaatti kan haguugu ta'uu hubachuun ni danda'ama.<sup>51</sup> Kaffaltiin kunis gosaan (in kind) ykn qarshiin kaffalamuu akka danda'u labsichi kwt 2(1) jalatti tumeera. Labsii lafa baadiyyaa kwt 6(11 fi 12) jalatti gosti beenyaa armaan olitti ibsame qotee bulaa qabiyyee isaa faayidaa uummataaf gadi-lakkiseef kaffalamuu akka qabu tumeera.

Hanga beenyaa armaan olitti ibsame bira gahuuf adeemsi shallaggii qajeeltoo irratti hundaa'ee gaggeeffamu qaba. Kunis maloota adda addaatiin kan gaggeeffamuu dha. Malootni kunis, mala gurgurtaa wal-

<sup>49</sup> Olitti Yaadannoo 2ffaa, FF 1 - 2.

<sup>50</sup> Akkuma Lakk.50<sup>ffaa</sup>.

<sup>51</sup> Ayyaanaa Toliinaa fi Dassaalany Birhaanuu, Moojulii Seera Qabeenyaa: Argannaa, Galmeessa, fi Faayidaa uummataaf qabeenya gad-lakkisiisuu, ILOQHQS, F103 (kan hin maxxanfame).

fakkaataa (comparable sales approach), mala galii qabeenyicharraa argamu (income capitalization approach), mala baasii qabeenyicha argachuuf bahee (original cost approach) fi mala baasii bakka buusuu (replacement cost approach) kan jedhamanii dha. Tooftaawwan qabiyyee gadi-lakkisiisuu armaan olitti ibsaman keessaa labsiin qabiyyee gadi-lakkisiisuu fi dambiin labsii kana raawwachiisuuf bahe tooftaa baasii bakka buusuutiif beekamti kan kenne dha. Malli kunis, qabeenya wal fakkaataa yeroo ammaa bakka buusuuf gatii barbaachisu irratti kan hundaa'u dha. Kunis biyyoota gatii gabaa sirritti hin beekamne qabanii fi ijaarsawwan amala addaa qaban keessatti bal'inaan hojiirra oolaa kan jiru dha.<sup>52</sup>

Haala shallaggii beenyaa ilaalchise kaffaltiiwwan biroo (qabeenya laficharra jiruu fi fooyya'iinsa laficharratti taasifameef) kaffalamu akkuma jirutti ta'ee, beenyaan buqqa'uuf kaffalamu galii gidduu galeessa abbaan qabiyyee waggoottan shanan darbaniif argate kudhaniin baay'isuun kan kaffalamu ta'a.<sup>53</sup> Shallaggiin kunis ogeessota qabiyyee gadi-lakkisiisuun ogummaa mirkanaa'e/certified/ qabaniin gaggeeffamuu akka qabu labsiin qabiyyee gadi-lakkisiisuu keewwata 9(1) jalatti tumeera. Haata'u malee hanga ogeessotni ogummaa kana qaban horatamanitti shallaggiin koreen gaggeeffamuu akka danda'u seerichi dabalataan tumeera.<sup>54</sup> Tumaan heeraa fi labsiiwwan garagaraa sadarkaa feedaraalaa fi naannootti tumamanii jiran hangam hojiirra oolaa akka jiran baruuf daataan maddoota garagaraa irraa waliitti qabameera. Bu'aan argamees akka agarsiisuutti beenyaa madaalawaa namoota qabiyyee isaanii gadi-lakkisaniif akka kaffalamu taasisuu waliin wal-qabatee hanqinni gama seeraa fi koree shallaggii gaggeessuun kan jiru ta'uun hubatameera.

**A) Hangi Beenyaa Seeraan Tumamee Jiru Gahaa Ta'uu Dhabuu**  
Akkuma armaan olitti ibsame, heerri mootummaa RDFI beenyaan madaalawaa namoota qabiyyee isaanii faayidaa uummataaf gadi-

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<sup>52</sup> Olitti Yaadannoo 33<sup>ffaa</sup>, FF384 - 385.

<sup>53</sup> Labsii Qabiyyee Gad-lakkisiisuu, kwt 8(1) fi dambii qabiyyee gad-lakkisiisuu, kwt 16(3).

<sup>54</sup> Labsii qabiyyee gad-lakkisiisuu, Kwt 9(2).

lakkisaniif kaffalamuu akka qabu tumeera. Seerotni bu'uura tumaa kanarratti hundaa'uun bahan labiin qabiyyee gadi-lakkisiisuu, dambiin qabiyyee gadi-lakkisiisuu, labiin bulchiinsa lafa baadiyyaa naannoo Oromiyaa lakk.130/99 fi seerotni biroo beenyaa kaffalamu qabu ibsa kennanii jiru. Qorannoowwan naannoo kanarratti gaggeeffaman adda addaas hanga beenyaa seerota qabiyyee gadi-lakkisiisuu keessatti tumaman mirga abbaan qabiyyee lafarratti qabu mirga umurii guutuu fayyadamuu, mirga dhaalaan dabarsuu, kireessuu fi kkf qabu waliin wal-bira qabamee yeroo ilaalamu hanga beenyaa seerota kanneen keessatti ibsame madaalawaa kan hin jedhamne akka ta'e ni ibsu.<sup>55</sup>Haalli qabatamaa naannoo keenyaa yeroo ilaalamus hanga beenyaa qabatamaatti kaffalamaa jiru namoota qabiyyee isaanii gadi-lakkisaniif gahaa akka hin taane ni hubatama.<sup>56</sup>

Kana malees, armaan olitti muuxannoo biyya Chaayinaa keessatti akka ilaalle beenyaan gatii lafaa/land compensation fee/ jedhamu namni tokko sababa laficha qabatee jiru qofaadhaaf akka kaffalamu yoo ta'u, akka biyya keenyatti garuu gosti beenyaa abbaa qabiyyuummaaf kaffalamu seeraan tumamee hin jiru. Kana malees, galiin gidduu galeessaa yeroo fudhatamu akka biyya keenyatti galiin waggoottan shanan darban ilaalcha keessa kan galu yoo ta'u, kunis gati gabaa yeroo irraa kan fagaate dha. Biyya Chaayinaatti garuu, galiin giddu galeessaa kan shallagamu galiin waggoota sadan darban ilaalcha keessa galchuuni dha. Kunis, kan biyya keenyaarraa gatii gabaa yeroof dhiyeenya kan qabu dha. Akka waliigalaatti, seerri hanga beenyaa fi haala shallaggii labsii qabiyyee gadi-lakkisiisuu fi dambiin isa raawwachiisuuf bahe beenyaa madaalawaa heeraan taa'ee jiru guutumaan guutuutti haguuguu irratti hanqina kan qaban ta'uu hubachuun ni danda'ama.

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<sup>55</sup> Yaadannoo Oliy Lakk. 2<sup>ffaa</sup>, F33.Dabalataan, Belachew Yirsawu, olitti yaadannoo lak.6, F186.

<sup>56</sup> Ballaxa Tafarraa, Walitti qabaa Koree Tilmaama Beenyaa, A/ Tokkee Kuttaayee (Afgaaffii gaafa 09/04/2006 gaggeeffame); Dhibbaa Danuu, Koree Shallaggii Beenyaa Aanaa Amboo (Afgaaffii gaafa 09/04/2006 gaggeeffame); Abdataa Hordofaa, Pri/M/M/A/Kuyyuu (Afgaaffii gaafa 02/04/2006 gaggeeffame ).

## **B) Hanqinaalee Sirna Shallaggii Koreen Gaggeeffamu Waliin Wal-Qabatan**

Hanqinaalee sirna shallaggii koreen gaggeeffamu waliin wal-qabatanii ka'an keessaa tokko rakkoo gahumsaa fi dandeetti miseensoota koree shallaggii ti. Af-gaaffii taasifameen bakka tokko tokkotti bulchiinsi aanaa ykn magaalaa namootaa ogummaa shallaggii hin qabne koree keessatti akka hammatan kan taasisu ta'uu hubatameera.<sup>57</sup> Dabalataan, miseensotni koree yeroo yeroon kan jijjiiraman waan ta'aniif ogummaa gahaa akka hin horanne kan isaan taasise akka ta'e af-gaaffii taasifameen ibsameera.<sup>58</sup>

Hanqinni lammaffaan immoo hanqina naamusaa miseensota koree tokko tokko biratti mul'atu dha. Fakkeenyaaf, ogeessotni shallaggii akka gaggeessan filataman namoota qabiyyee hin qabnee fi beenyaa argachuu hin malle haala fayyadamoo taasisuun shallaggii yeroo gaggeessan ni mul'ata.<sup>59</sup> Kanarraa kan ka'e shallaggiin yeroo lama yookin sadi irra deeddeebiin akka gaggeeffamu yeroon taasifamu jira.<sup>60</sup> Namoota beenyaa argachuu qaban waan argachuu malan keessaa hir'isuun akka isaanii kaffalamu taasisu.<sup>61</sup> Mana tokko irratti shallaggiin nama sadiif yeroon itti gaggeeffamullee ni quunnama.<sup>62</sup> Nama tokko fayyaduuf yaadamee shallaggiin yeroo gaggeeffamu akka jirus ragaaleen ni agarsiisu.<sup>63</sup>

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<sup>57</sup>Taklee Deebii, Raw/Wal/Diddaa/Qabiyyee lafaa, fi ogeessa shallaggii A/Guutoo Giddaa (Afgaaffii gaafa 16/04/2006 gaggeeffame).

<sup>58</sup>Amsaaluu Olaanii, Pri/M/M/O/Sh/Lixaa (Afgaaffii gaafa 08/04/2006 gaggeeffame).

<sup>59</sup>Fufaa Laggasa, Gorsaa Seeraa/Biiroo/Laf/Eegu/Naa/Or/ (Afgaaffii gaafa 11/03/2006 gaggeeffame); Maccaa Kadiir, /W/L/Eg/Na/God/Shawaa Bahaa fi ogeessa shallaggii, Afgaaffii gaafa 07/05/2006 gaggeeffame.

<sup>60</sup>Fufaa Laggasa, Gorsaa Seeraa/Biiroo/Laf/Eegu/Naa/Or/ (Afgaaffii gaafa 11/03/2006 gaggeeffame); Maccaa Kadiir, /W/L/Eg/Na/God/Shawaa Bahaa fi ogeessa shallaggii, (Afgaaffii gaafa 07/05/2006 gaggeeffame).

<sup>61</sup>Katamaa Nigussee, A/A/Kom/Nam/Far/Mal/Oro (Afgaaffii gaafa 16/03/2006) Godina Iluu Abbaa Booraa keessatti namoota qabiyyee isaanii faayidaa uummataatiif gad-lakkisaniif qarshii kaffalamuu qabu keessaa 25% hir'isuun waan kaffalameef dhimmi isaanii KNFMO ilaalamaa kan ture ta'uu ibsaniiru.

<sup>62</sup>Asaffaa Dagaffaa, A/A/Kom/Nam/Far/Mal/Oro (Af-gaaffii 16/03/2006 gaggeeffame).

<sup>63</sup>Gammachuu Gabree, A/A/Kom/Nam/Far/Mal/Oro (Af-gaaffii 16/03/2006 gaggeeffame).

Hanqinni inni sadaffaan tooftaa wal-fakkaataa ta'een shallaguu dhabuu dha. Seerotni qabiyyee gadi-lakkisiisuu irratti tumamanii jiran beenyaan madaalawaa gatii gabaa yeroo irratti hundaa'uun akka kaffalamu ni kaa'u. Haata'u malee, gatii gabaa qabeenyaa murteessuuf adeemsi hordofamu iddoodhaa iddootti gargaagarummaa kan qabu dha. Fakkeenyaaf, bakka tokko tokkotti gabaa irraa gatii gabaa gaafachuun haalli itti hojjatamu ni jira.<sup>64</sup> Bakka tokko tokkotti immoo nama qabiyyee gadi-lakkisee fi namoota naannoo gaafachuun gaggeeffama tureera.<sup>65</sup> Kana malees, bakka tokko tokkotti hanga oomishtummaa waajjira qonnaa, gatii gabaa ejensii gabaa irraa fudhachuun haalli itti shallagamus ni jira.<sup>66</sup> Kanaaf, tooftaa shallaggii irratti istaandardiin wal-fakkaataan waan hin jirreef shallaggiin garaggarummaa bakkaa bakkatti garaagarummaa kan qabu dha.<sup>67</sup>

Hanqinni arfaffaan gosoota beenyaa kaffalamuu qaban hunda shallaguu dhabuu dha. Akkuma armaan olitti ibsameen beenyaan abbaa qabiyyee lafaaf kaffalamuu qabu qabeenya laficharra jiru, fooyya'iinsa dhaabbataa laficharratti taasifamee fi beenyaan buqqa'iinsaa kaffalamuu akka qabu labsiin qabiyyee gadi-lakkisiisuu fi dambiin labsicha raawwachisuuf bahe tumeera. Ogeessotni shallaggii gaggeessan waantota shallagamu qaban hunda duguuganii shallaguu irratti hanqina qabu.<sup>68</sup>

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<sup>64</sup> Maccaa Kadiir, W/L/Eg/Na/God/ShawaaBahaa fi ogeessa shallaggii, Proojaktii Ethio Flora plc jedhamu irratti koreen shallaggii gabaa keessa deemuun gatii gabaa walitti qabuun kan shallagan ta'uu ibsaniiru.

<sup>65</sup> Waarisoo Hirphaa, Miseensa Koree Tilmaama beenyaa Aanaa Arsii Nagallee, Afgaaffii gaafa 25/03/2006.

<sup>66</sup> Girmaa G/Hiwoot, Ogeessa Shallaggii/W/L/Eg/Na/Mag/Bishooftuu, Maccaa Kadiir, /W/L/Eg/Na/God/Shawaa Bahaa fi ogeessa shallaggii, Af-gaafii gaafa 07/05/2006 gaggeeffame.

<sup>67</sup> Olitti yaadannoo Lakk. 64<sup>ffaa</sup>.

<sup>68</sup> Fakkeenyaaf, Nagaash Gammadaa(ol'iyyataa) fi Bulchinsa Magaala Galaan (D/kennaa),MMWO, Lak.G141409 ta'e irratti koreen shallaggii beenyaa gosa adda addaa erga shallaganii booda beenyaa buqqa'iinsaa osoo hin shallaggiin waan bira darbaniif manni murtichaa akka irra deebi'amee shallagamu ajajeera.



#### 4. YEROO KAFFALTII BEENYAA

Ijoowwan sirna shallaggii keessatti ilaalamu qaban keessaa tokko yeroo kaffaltii beenyaa ti. Biyyoota baay'ee keessatti beenyaan qabiyyee gadi-lakkisiisuun dura kan kaffalamu yoo ta'u, biyyoota akka Afriikaa Kibbaa keessatti garuu qabiyyee gadi-lakkisiisuun boodas kaffalamuu danda'a. Heera mootummaa RDFI yeroo ilaallu, keewwata 40(8) jalatti beenyaan qabiyyee gadi-lakkisiisuun dura kaffalamuu akka qabu ni tuma. Kaffaltiin kunis qarshiin ykn gosaan ta'uu danda'a.

Qabatama naannoo Oromiyaa yeroo ilaallu, beenyaa dursanii kaffaluu waliin wal-qabatee yeroodhaa gara yerootti fooyya'iinsi kan jiru ta'us, ammallee beenyaa dursanii kaffaluu waliin wal-qabatee hanqinni ni jira.<sup>69</sup> Sababoota gurguddoo beenyaan dursee akka hin kaffalamne taasisan keessaa tokko, bakka tokko tokkotti bulchiinsi aanaa sababa bajata gahaa dhabeef beenyaan al-tokkoon kaffalamuu qabu erga qabiyyeen gadi-lakkifame booda yeroo adda addaa akka kaffalamu gochuu dha.<sup>70</sup> Lamaffaa, abbaa qabiyyummaa dursanii qulqulleessuu dhabuu irraa kan ka'e qabiyyee gadi-lakkisiisuun dura beenyaa kaffaluu dhabuun ni mul'ata.<sup>71</sup> Sadaffaa, pirojektiiwwan sadarkaa feedaraalaatin gaggeeffaman waliin wal-qabatee bakka tokko tokkotti yeroon kennamu gabaabaa waan ta'uuf erga qabiyyeen gadi-lakkifame booda beenyaan kaffalamaa tureera.<sup>72</sup> Dabalataanis, bakka tokko tokkotti beenyaa osoo

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<sup>69</sup> Fakkeenyaaf, namoota qabiyyee isaanii akka gad-lakkisan taasifaman 20 keessaa namoota 14(70%) ta'aniif dursee kan kaffalame yoo ta'u namoota 6(30%) ta'aniif qabiyyee gad-lakkisiisuun dura kan hin kaffalamneef ta'uu ibsaniiru.

<sup>70</sup> Shifarraa Garramuu, Daldalaa M/Nagallee, nama qabiyyee gad-lakkise (Afgaaffii gaafa 24/03/2006 gaggeeffame). Rakkoo bajataarraa kan ka'e beenyaan 40% bajata bara 2005 irraa kaffalee beenyaan hafe 60% bajata bara 2006 irraa yeroo itti kaffalame jira. Dabalataanis, Waarisoo Hirphaa, Miseensa Koree Tilmaama beenyaa Aanaa Arsii Nagallee (Af-gaaffii gaafa 25/03/2006 gaggeeffame).

<sup>71</sup> Firrisaa Nurfasaa, Q/bulaa A/Diggaa, nama qabiyyee gad-lakkise (Afgaaffii gaafa 17/04/2006 gaggeeffame), Hojii bishaanii Interapirayizii Bishaanii Oromiyaan gaggeeffamu irratti aanaa diiggaa irratti abbaa qabiyyummaa dursanii qulqulleessuu dhabuu irraa kan ka'e beenyaa osoo yeroon hin kaffalamiin hafeera. Waaqtolaa Shifarraaw, Itt/Gaf/ Waj/Laf/Eeg/Naan/A/Diggaa (Afgaaffii gaafa 16/04/2006 gaggeeffame).

<sup>72</sup> Baqqalaa Asraat, Itti/gaf/Bul/La/Eegu/Na/A/Kuyyuu (Afgaaffii gaafa 02/04/2006 gaggeeffame)

hin kaffaliin ykn akkaawuntii cufaa buqqa'aatiin kanfalticha baankii osoo hin galchiin qabiyyeen akka gadi-lakkifamu yeroo ajajamu ni jira.<sup>73</sup>

## **5. SIRNA KEESSUMMEESSA KOMII**

Adeemsa qabiyyee gadi-lakkisiisuu keessatti hanga beenyaa, faayidaa uummataaf kan barbaachisu ta'uuf dhiisuu akkasumas adeemsa hordofamu qabu kan hordofe ta'uuf dhiisuu ilaalchisee komiiwwan adda addaa uumamuu danda'u. Kanarraa kan ka'e biyyootni adda addaa komiiwwan dhiyaatan adeemsa garagaraan akka furamuu taasisu. Chaayinaan falmiiwwan qabiyyee gadi-lakkisiisuun wal-qabatan manneen murtiin ilaalamuu akka hin qabne seeraan yoo daangeessitu, Afriikaan Kibbaa immoo manni murtii, murtii qaamolee bulchiinsaan kenname keessa deebiin/review/ ilaaluu akka danda'u seera isaanii keessatti tumaniiru.

Akka biyya keenyatti yeroo komiiwwan adda addaa dhiyaatan akkaataa itti keessummeeffaman ilaalchisee labsii qabiyyee gadi-lakkisiisuu kwt 11 jalatti tumeera. Bu'uura tumaa kanaatiin komiin dhiyaatu qaamolee bulchiinsaa fi mana murtiin akka haala isaatti ilaalamuu danda'a. Labsiin liiziinis keewwata 28 fi 29 jalatti abbaan qabiyyee lafa magaalaa komii isaa qaama qabiyyee gadi-lakkisiise, qaama bulchiinsaa komii dhagahuu fi mana murtii biratti akka haala isaatti dhiyeessuu akka danda'u tumeera. Adeemsa keessummeessa qaamolee bulchiinsaa fi mana murtii jiru akka kanaa gadiitti ilaalla.

### **A) Keessummeessa Komii Qaama Bulchiinsaa Komii Lafaan Wal-Qabatanii Ka'an Dhagahu Biratti**

Keessummeessa komii qaamolee bulchiinsaa biratti gaggeeffamuun wal-qabatee bulchiinsi magaalaa qaama komii kaffaltii beenyaa dhagahu hundeessuu akka qabu labsiin qabiyyee gadi-lakkisiisuu kwt 11(2) jalatti

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<sup>73</sup>Makonnin Gazzahaany (himataa) fi Ejansii Misoomaa fi Bulchinsa lafa Magaalaa Adaamaa (Himatamaa), MMA Adaamaa, Lakk.G 70561 (kan hin maxxanfamne). Galmees Hiisaa Usmaan (himataa) fi Bulchiinsa magaalaa Haratoo fi Woorlid viiziyinii damee Haratoo (himatamtoota), M.M.A.Jimmaa Gannatii, Lakk G.03810 (kan hin maxxanfamne), Mangistuu Maammoo(himataa) fi Waajji. lafaa fi Eegumsa naannoo(himatamaa), MMAAdaamaa, Lakk.G. 58425(kan hin maxxanfamne).

tumeera. Kanaaf, komiin kaffaltii beenyaa waliin wal-qabatee magaalota keessatti ka'u jalqabarratti qaama kanatti kan dhiyaatu ta'a. Qaamni kun adeemsa maaliin falmii gaggeessa yookin murtii kenna kan jedhurratti labsichi waan jedhu hin qabu. Haata'uuti, naannooleen dhimmicharratti qajeelfama baasuu akka danda'an labsiin kun kwt 11(3) jalatti tumeera. Biyyoota biroo fakkeenyaaf kanneen akka Kaanaadaa keessatti qaamoleen kunneen akkuma mana murtii falmii gaggeessuun, ragaawwan barbaachisoo ta'an xiinxaluun murtii kennu. Akka biyyaa fi naannoo keenyaatti qajeelfamni koreen kun itti hojjachuu qabu bahee hin jiru. Kanaaf, adeemsi koreen kun hordofu akkuma biyyoota biroo falmii gaggeessuun akkasumas ragaa dhagahuun yoo ta'e komii dhiyaatuuf sirritti qulqulleessuuf kan isaan gargaaru ta'a. Bakka qaamni kun hin hundeeffamnetti komiin beenyaa kallattiin mana murtiitti kan dhiyaatu ta'a.<sup>74</sup>

Qaamni komii dhagahu kun bulchiinsa magaalotaa irratti hundeeffamee kan jiru ta'uu fi adeemsa akkamiin hojii isaa gaggeessaa akka jiru baruuf bulchiinsa magaalotaa ilaalaman kudha tokko keessaa bulchiinsa magaalaa lama qofa keessatti qaamni komii dhagahu akkaataa seerri qabiyyee gadi-lakkisiisuu jedhuun hundeeffamanii jiru.<sup>75</sup> Qaamni kun akkaataa seerri jedhuun bulchiinsa magaaloota hunda irratti hundeeffame waan hin jirreef sirni keessumeessa komii qaamolee bulchiinsaa biratti garaagarummaa kan qabu dha. Bakka tokko tokkotti '*Adeemsa Iyyannoo fi Komii uummataa*'<sup>76</sup> jedhamutti yoo dhiyaatu bakka tokko tokkotti immoo yeroo komiin baay'atu qofa *koreen yeroo/ad hoc committee/*

<sup>74</sup> Labsii qabiyyee gad-lakkisiisuu kwt. 11(1)

<sup>75</sup> Af-gaaffii taasifameen qaamoleen kun dhaabbiidhaan kan hundeeffaman bulchiinsa magaalaa bishooftuu fi bulchinsa magaalaa A/Nagallee keessatti qofaa dha.

<sup>76</sup> Af-gaaffii Obbo Daani'eel Bashiir, Abb/Ad/Hoj/Iyy/Ko/Um/Mag/Dukam waliin taasifameen komiiwwan lafti koo sirritti naaf hin shallaggamne, beenyaan natti xiqqaatee fi kkf jedhan bulchiinsa biratti komiiwwan dhiyaatan akka ta'an ibsameera. Af-gaaffii obbo Daani'eel Beekaa, Ogeessa Keessummeessa iyyannoo fi komii uummataa Magaalaa Naqqamtee waliin taasifameen (gaafa 15/04/2006) hawaasni komii beenyaan nutti xiqqaate jedhu koree kanatti kan dhiyeessaa jiran ta'uu fi koreen kunis komiiwwan haala kanaan dhiyaatan akka sirreeffaman ajaja adda addaa kennaa kan jiru ta'uu ibsaniiru.

hundeessuun komiiwwan dhiyaatan yeroo keessummeessu ni mul'ata.<sup>77</sup> Kana malees, qaamni komii dhagahu akkaataa seeraan hundeeffamu dhabuun isaa fi qajeelfamni adeemsa keessummeessa komii tumu dhabamu isaarraan kan ka'e komiin adeemsa wal-fakkaataan keessummaa'aa hin jiru. Bakka tokko tokkotti komii ka'e sirrii ta'u isaa erga mirkanaa'e booda qaama komii kaasee fi qaama komatame walitti fiduun yaada isaanii akka kennan taasisuun tarkaanfiin sirreeffamaa akka fudhatamu ni taasifama.<sup>78</sup> Bakka tokko tokkotti koreen komii akka dhaggeeffatu hundeeffame komii dhiyaate qulqulleessuuf hawaasatti gadbu'uun maddi komii maal akka ta'e adda baasuun komii dhiyaate irratti murtii kan kennaa turan ta'uun isaa af-gaaffii taasifameerraa ni hubatama.<sup>79</sup> Bakka tokko tokkotti dhimmichi kallattiin waajjira bulchiinsaatti kan dhiyaatu yoo ta'u waajjirri bulchiinsaa dhimmicha koree addaan osoo hin ilaalchisiin komiin dhiyaate sirriidha jedhe yoo amane qaama dhimmichi isa ilaallatutti (fkn koree tilmaama beenyaa) ni erga.<sup>80</sup>

## **B) Keessummeessa Komii Mana Murtii Biratti**

Keessummeessa komii mana murtii biratti gaggeeffamu ilaalchisee labsii qabiyyee gadi-lakkisiisuu kwt 11(1) jalatti dhimmoota hanga beenyaan wal-qabatan irratti aanaalee fi bulchiinsa magaalotaatti kallattiin mana murtiitti kan dhiyaatan ta'uu yoo ibsu, keewwatni xiqqaan afur immoo bakka qaamni komii dhagahu jirutti ol'iyyannoon mana murtii idleetti deemuu kan danda'u ta'uu ibsa. Seerichi dhimmootni hanga beenyaan ala jiran haala maaliin keessummaa'u? Manni murtii idilee aangoo qaba

<sup>77</sup> Fakkeenyaaf piroojektii Intarpraayizii Bishaanii Oromiyaan gaggeeffamu waliin wal-qabatee komiiwwan koree yeroof biratti dhiyaatan 88 keessaa komiin namoota 25 furmaata argachuun beenyaan akka kaffalamuuf ta'eera. Tamasgeen Tolaa, Waliitti qabaa koree yeroo fi Ab/Ad/Hoj/Iyyannoo fi Komii uummataa A/Diggaa (Afgaaffii gaafa 16/04/2006 gaggeeffame); Eda'oo Abdii, Itti/Gaf/Waj/La/Eegu/Na/A/Shaashamannee (Afgaaffii gaafa 23/03/2006 gaggeeffame).

<sup>78</sup> Addunyaa Goobanaa, Ab/Ad/Ho/Ij/Iyannoo fi komii uummataa Go/Wal/Bahaa (Afgaaffii gaafa 18/04/2005 gaggeeffame).

<sup>79</sup> Tamasgeen Tolaa Waliitti qabaa koree yeroo fi Ab/Ad/Hoj/Iyyannoo fi Komii uummataa A/Diggaa (Afgaaffii gaafa 16/04/2006 gaggeeffame).

<sup>80</sup> Tsaggaayee, Itti gaafatamaa Waajjira Bulchiinsaa M/Adaamaa (Af-gaaffii gaafa 08/05/2006 gaggeeffame).

moo hin qabu? falmiin qabiyyee gadi-lakkisiisuu mana murtii kamitti dhiyaata? jedhan irratti labsichi iftoomina gahaa hin qabu. Labsiin liizii labsii qabiyyee gadi-lakkisiisuu irraa haala fooyya'aa ta'een keewwata 29(3) jalatti komiin mana murtiitti dhiyaatu komii beenyaa qofa akka ta'e ni agarsiisa.

Labsiin qabiyyee gadi-lakkisiisuu aangoo mana murtii irratti iftoomina kan hin qabne waan ta'eef, aangoo mana murtiin wal-qabatee ogeessotni seeraa ejjennoo garagaraa yeroo qaban ni mul'ata. Ogeessotni tokko tokko seerotni sadarkaa feedaraalaa fi naannootti tumamanii jiran murtiin faayidaa uummataa irratti qaama bulchiinsaan murtaa'e akkaataa keessa deebiin itti ilaalamuu danda'u tumanii hin jiran waan ta'eef, seerri waa'ee aangoo manneen murtii haala waliigalaan kaa'u Seerri Deemsa Falmii Hariiroo Hawaasaa (SDFHH) dhimma kanarratti raawwatiinsa akka qabu ni ibsu.<sup>81</sup> Bu'uura SDFHH kwt 15(2-e) tiin falmiin qabiyyee gadi-lakkisiisuu fi faayidaa uummataatiif oolchuu waliin wal-qabatee jiru mana murtii olaanaatti ilaalamuu akka qabu kaa'u. Ejjennoo ogeessota kanaa ilaalchisee bakka labsiiwwan qabiyyee gadi-lakkisiisuu waliin wal-qabataniin bahan falmii qabiyyee gadi-lakkisiisuu mana murtii kamitti akka ilaalamu ifaan waan hin tumneef, bu'uura SDFHH tiin aangoo mana murtii olaanaa ta'u isaarratti barreessaan kunis kan irratti waliigaluu dha.

Haata'u malee, murtii faayidaa uummataa irratti buulchiinsa aanaa ykn magaalaan kennamu manni murtii keessa deebiin ilaalu qabu jedhu akka yaada barreessaa kanaatti afuura labsiiwwan qabiyyee gadi-lakkisiisuu waliin kan demu waan hin taanef madaallii kan kaasuu miti. Faayidaa uummataa irratti murtii kennuu kan danda'u qaama dhimmichi isa ilaallatu/appropriate body/ akka ta'e labsiin qabiyyee gadi-lakkisiisuu kwt 2(5) jalatti yoo ibsu, labsiin liiziimmoo kwt 2(7) jalatti tumeera. Qaamni dhimmichi isa ilaallatu eenyu kan jedhu irratti labsiin qabiyyee gadi-lakkisiisuu ifaan tumuu baatus, labsiin liizii kwt 2(6) jalatti qaamni kun qaama lafa bulchuu fi kunuunsuuf aangoo qabu akka ta'e ni ibsa. Kanaaf, faayidaa uummataa irratti murtii kennuu waliin wal-qabatee

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<sup>81</sup> Olitti Yaadannoo 1<sup>ffaa</sup>, F61.

aangoo kan qabu qaama lafa bulchuu fi qabiyyee gadi-lakkisiisu malee mana murtii akka hin taane hubachuun ni danda'a.

Ijoon biroo labsii qabiyyee gadi-lakkisiisuu waliin wal-qabatee ilaalamu qabu dogoggorri adeemsa qabiyyee gadi-lakkisiisuu qaamolee bulchiinsaa biratti raawwatamu mana murtiin kan ilaalamu ta'uuf dhiisuu isaa ti. Bakka seerri waa'ee dhimma kanaa tumu ifa hin taanetti gaheen manni murtii murteewwan qaamolee bulchiinsaa irratti qabu seera bulchiinsaan kan hogganamu ta'a. Haa ta'u malee, akka biyya keenyaatti seerri bulchiinsaa qindaa'aan waan hin jirreef dhimmootni akkanaa qajeeltoo waliigalaa seera bulchiinsaan kan ilaalaman ta'u. Akkuma armaan olitti muuxannoo biyya Afrikaa Kibbaa keessatti ibsameen, manneen murtii qaamoleen bulchiinsaa hojii isaanii yeroo gaggeessan adeemsa seeraa kan hordofan ta'uuf dhiisuu isaanii ilaalu ni danda'u. Kana malees, manneen murtii murtiiwwan qaamolee bulchiinsaa irra deebiin ilaaluuf qajeeltoowwan ittiin hogganaman keessaa tokko qajeeltoo qajeelummaa dhabuu adeemsa/procedural irregularity/ dha.<sup>82</sup> Kanaaf, akkaataa qajeeltoo seera bulchiinsaatiin manni murtii dogoggora adeemsa qaamni bulchiinsaa raawwate sirreessuu danda'a. Kanaaf, qabiyyee gadi-lakkisiisuu waliin wal-qabatee dogoggorri adeemsa raawwatame akka sirratu manni murtii ajaja yoo kanne, qajeeltoo seera bulchiinsaa keessaa kan hin baane akka ta'e hubatamuu qaba.

Qabatamaatti, manneen murtii naannoo Oromiyaa falmiiwwan qabiyyee gadi-lakkisiisuu waliin wal-qabatan haala maaliin akka keessummeessan baruuf daataan madda garagaraa irraa walitti qabameera. Akkuma armaan olitti ibsameen seerotni qabiyyee gadi-lakkisiisuu waliin wal-qabatani jiran iftoomina gahaa kan hin qabne waan ta'aniif manneen murtii keessatti hojimaatni wal-fakkaataan akka hin jiraannee fi hanqinaaleen garagaraas akka uumaman karaa baneera.

Hanqinaalee kanaan wal-qabatani mul'atan keessaa tokko, bakka qaamni bulchiinsaa komii dhagahu hundeeffamee hin jirretti gaheen manneen

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<sup>82</sup>Shimalis H/wald fi Taaddasaa Gassasa, Moojulii Leenjii Seera Bulchinsaa Wiirtuu Leenjii Feedaraalaan Qophaa'e, Mana Murtiin Murtii Qaamolee Bulchiinsaa Irra Deebiin Ilaalu, F15.

murtii dhimmootni qaama bulchiinsaa komii dhaggeeffatuun akka ilaalaman ajajuu dha. Manneen murtii naannoo keenyaa tokko tokko falmiiwwan qabiyyee gadi-lakkisiisuun wal-qabatan dursanii qaamolee bulchiinsaa komii dhaggeeffatan biratti osoo hin dhiyaatin mana murtiitti dhiyaachuu hin qaban jechuun galmee cufaa jiru.<sup>83</sup> Bakka qaamoleen bulchiinsaa komii dhagahan hundeeffamanii jiranitti haala kanaan galmeen akka cufamu taasisuun deeggarsa seeraa kan qabu ta'us, bakka qaamoleen bulchiinsaa komii dhaggeeffatan hundeeffamanii hin jirreetti ajaja akkasii kennuun mirgi namoota qabiyyee isaanii gadi-lakkisaniin akka hin kabajamne kan taasisu dha. Kana malees, afuura labsii qabiyyee gadi-lakkisiisuu kwt 11 yoo ilaalle bakka qaamni bulchiinsaa komii dhagahu hin jirretti falmiin beenyaa gara mana murtiitti akka hin deemne kan dhorkumiti. Dabalataan, bakka qaamoleen bulchiinsaa hin hundeeffamnetti mirga kana mulquun mirga haqa argachuu lammillee heera mootummaa RDFI kwt 37 jalatti tumame waliinis kan walitti bu'u dha.

Hanqinni lammaffaan kanaan wal-qabatee dhiyaatu, hojimaatni wal-fakkaataan manneen murtii keessatti dhabamuu dha. Akkuma armaan olitti ibsameen labsiin qabiyyee gadi-lakkisiisuu aangoo mana murtii dhimmoota hanga beenyaan wal-qabataniin ala jiran irratti iftoomina kan hin qabne ta'uun isaa ibsameera. Sakatta'a galmee taasifameen manneen murtii tokko tokko falmiiwwan hanga beenyaan ala jiran fakkeenyaaf, adeemsa seeraa kan hin hordofne ta'uu fi dhiisuu isaa xiinxaluun murtii kennaa jiru.<sup>84</sup> Manneen murtii tokko tokko ammoo manni murtii falmii beenyaan natti xiqqaate jedhu malee falmiiwwan beenyaan naaf hin

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<sup>83</sup>Galmeewwan Yazabnash Bikis (himattuu) fi Koorpooreeshinii Baabura Lafaa Itoophiyaa (Himatamaa), MMOGSHB, Lakk.G.32765, gaafa 01/05/2005 kan murtaa'e (kan hin maxxanfamne); Ahimad Kadir (himataa) fi Mana Qopheessaa M/Shaashamannee (himatamaa), Lakk.G. 40947, gaafa 23/03/2006 kan murtaa'e (kan hin maxxanfamne).

<sup>84</sup>Mangistuu Maammoo (himataa) fi Waajji.lafaa fi Eegumsa naannoo (himatamaa), MMAAdaamaa, Lakk.G. 58425 gaafa 26/11/2004 kan murtaa'e, Inkooshee Galaalchaa (himattuu) fi Mana Barumsa Olumaa, MMA Diiggaa, Lakk.G 07188, gaafa 01/08/2005 kan murtaa'e.

kaffalamne jedhanii fi kkf ilaaluuf aangoo hin qabu jechuun galmee cufu.<sup>85</sup>

Kanaaf, labsiin qabiyyee gadi-lakkisiisuu aangoo manneen murtii ifaan kaa'uu dhabuu isaarraan kan ka'e hojmaatni wal-fakkaataan manneen murtii keessatti akka hin jiraanne kan taasisa ta'uu hubachuun ni danda'ama. Hojimaatni wal-fakkaataan manneen murtii keessatti dhabamuun ammoo mirgi namoota qabiyyee isaanii gadi-lakkisan haala wal-fakkaataan murtii akka hin arganne taasisa. Kun immoo amantaa uummatni sirna haqaa naannichaa irratti qabu akka gadi bu'u taasisa. Ijoowwan hanga beenyaa ala jiran ilaalchisee, akkuma armaan olitti qorataan kun ejjennoo isaa ibsetti, falmiiwwan dogoggoraa adeemsa qaamolee bulchiinsaan raawwataman sirreessuun qajeeltoo waliigalaa seera bulchiinsaa waliin kan deemu waan ta'eef manneen murtii ilaaluun yoo sirreessan gaarii ta'a.

## **6. NAMOOTA QABIYYEE ISAANII GADI-LAKKISAN AKKA OF-DANDA'AN TAASISUU**

Ulaagaa qabiyyee gadi-lakkisiisuun booda hordofamuu qabu keessaa tokko namoota faayidaa uummataatiif qabiyyee isaanii gadi-lakkisan akka of-danda'an taasisuun hojii misooma adda addaa keessa akka galan gochuu dha. Kanaaf, seerotni sadarkaa feedaraalaa fi naannootti tumaman dirqama namoota kana ijaaroo qaamolee adda addaarratti gatani jiru. Haata'u malee, seerootni kun namoota qabiyyee isaanii gadi-lakkisan akka of-danda'an taasisuu jechuun maal akka ta'e hin ibsan. Namoota qabiyyee isaanii gadi-lakkisan akka of danda'an taasisuu jechuun beenyaan gahaan akka isaanii kaffalamu gochuu irra kan darbu dha.<sup>86</sup> Kana malees, namootni akka of danda'an gochuu jechuun madda galii fi mana biroo akka argatan taasisuu kan dabalatu dha.<sup>87</sup> Qaamoleen

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<sup>85</sup> Galmee Haayiluu Galaachaa N-7(himattoota) fi Mana Qopheessaa Magaalaa Burraayyuu fi Koorpooreeshinii Humna Ibsaa Itoophiyaa (himatamtoota), MMOGAF, lakk.G. 20999, gaafa 12/03/2006 kan murtaa'e, Ahimmad Kadiir (himataa) fi Mana Qopheessaa M/Sh(himatamaa), Lakk.G . 40947, gaafa 23/03/2006 kan murtaa'e.

<sup>86</sup> Belachew Yirsawu, olitti yaadannoo lak.6, F35.

<sup>87</sup> Akkuma Lakk. 86<sup>ffaa</sup>.



dirqamni kun irratti gatames bulchiinsa aanaa fi magaalaa,<sup>88</sup> biiroo lafaa fi eegumsa naannoo,<sup>89</sup> biiroo industirii fi misooma magaalaa,<sup>90</sup> koree invastimantii sadarkaa sadarkaan jiranii fi boordii invastimantii<sup>91</sup> akka ta'an seerota waa'ee kanaa sadarkaa feedaraalaa fi naannootti tumamanirraa hubachuun ni danda'ama.

Qabatama naannoo Oromiyaa yeroo ilaallu, namoota qabiyyee isaanii faayidaa uummataaf gadi-lakkisan akka of danda'an taasisuu waliin wal-qabatee hanqinni bal'aan ni jira.<sup>92</sup> Bara 2003A.L.I keessa gama kanaan hojiiwwan gara garaa hojjetamaa kan turee ta'ullee, yeroo ammaa namoota irra deebisanii ijaaroo irratti hojiin hojjetamaa jiru laafaa dha.<sup>93</sup> Hojiiwwan kanaan wal-qabataniin hojjetamaa turan keessaa, qotee bulootni horii horsiisuu keessatti akka hirmaatan gochuuf muuxannoo godina biroo irraa akka fudhatan taasisu.<sup>94</sup> Qotee bulootni qabiyyee

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<sup>88</sup> Labsii Qabiyyee gad-lakkisiisuu, Kwt. 4(5).

<sup>89</sup> Labsii Qaamolee Raawwachiituu Mootummaa Naannoo Oromiyaa Aangoo fi Gahee Hojii Isaanii Murteessuf Bahe lakk. 163/2003 fooyyeessuuf bahee labsii lakk.170/2004 kwt 3(8) jalatti Biiron Bulchiinsa Lafa Baadiyyaa fi Eegumsa Naannoo lafa baadiyyaa hojii misooma adda addaatiif barbaadame ilaalchisee qaama dhimmi ilaaluu wajjiin shallaggii beenyaa akkaataa seeraatiin raawwachuu, kaffaltii beenyaa kanas osoo lafa isaanii gad-hin lakkisiin dura akka argatan, akkasumas namoota qabiyyee isaanii gadi-lakkisan irra deebi'anii akka of-danda'an qaamolee dhimmi isaan ilaalu waliin hojjachuu fi gargaaruu kan qabu ta'uu tumeera.

<sup>90</sup> Labsiin Eejansii Misoomaafi Maanajimantii Lafa Magaalaa lakk.179/2005 keewwata 8(15) jalatti dirqama namoota qabiyyee isaanii faayidaa uummataaf gadi-lakkisan ijaaroo qaama kanarratti gateera.

<sup>91</sup> Labsiin Bulchinsa Invastimantii Mootummaa Naannoo Oromiyaa irra deebiidhaan hundeessuuf bahe lakk.115/1998 fooyyessee labsii bahe lakk. 138/2000.

<sup>92</sup> Qaamoleen dhimmichi isaan ilaallatuu fi koreewwan investmentiin garagaraa namoota qabiyyee isaanii faayidaa uummataaf gad-lakkisan akka of danda'an taasisuuf dirqama isaanii bahuu waliin wal-qabatee haalli jiru maal akka fakkaatu baruuf gaaffiin ogeessota garagaraaf dhiyaatee namoota Afgaaffii gaafataman 83 keessaa namootni 51(61.5%)gad aanaa yoo jedhan, namootni 15(18.1%) ta'an gidduu galeessa jedhaniiru, namootni 4(4.8%) ta'an immoo olaanaa jedhaniiru. Kunis waajjiraaleen mootummaa dhimmichi isaan ilaallatuu fi koreewwan invastimantii namoota qabiyyee isaanii gad-lakkisan akka of danda'an taasisuu irratti laafina kan qaban ta'u agarsiisa.

<sup>93</sup> Fufaa Laggasaa, Gorsaa Seeraa/Biiron/Laf/Eegu/Naa/Oromiyaa (Afgaaffii gaafa 11/03/2006 gaggeeffame); Xaabushee Dabalee, Gag/Ad/Hoj/Deeg/Bul/wal/hor/fi To'a/Waj/Inv/G/A/O/N/Finfinnee (Afgaaffii gaafa 16/03/2006 gaggeeffame).

<sup>94</sup> Magarsaa Fayyeeraa, Itti/Gaf /Waj/Inv/Go/Sh/Lixaa (Afgaaffii gaafa 09/04/2006 gaggeeffame).

gadi-lakkisan misooma jallisiitiin akka fayyadaman taasisu.<sup>95</sup> Namoota qabiyyee akka gadi-lakkisan taasifaman oomisha shankoorra keessa akka galan taasisu.<sup>96</sup> Kanaaf, waggoottan muraasa dura namoota qabiyyee isaanii gadi-lakkisan ijaaruuf sochiin taasifamaa kan ture ta'us, sadarkaa eeggamuun bu'a qabeessa ta'uu hin dandeenye. Sababni isaas; tokkoffaa fedhiin namoota qabiyyee isaanii gadi-lakkisan laafaa ta'uu,<sup>97</sup> qaamoleen dhimmichi isaan ilaallatu xiyyeeffannaa gahaa kennuu dhabuu,<sup>98</sup> kanneen jedhan akka sababoota gurguddootti kan teechifamani dha.

## YAADA GUDUNFAA FI FURMAATA

Qabiyyee gadi-lakkisiisuun adeemsa dheeraa fi qaamolee garagaraa tuqu dha. Akka biyya keenyattis ta'e akka naannoo keenyaatti qabiyyee gadi-lakkisiisuun adeemsa mataa isaa kan qabuu fi qaamolee garagaraa keessa kan darbu ta'uun isaa seerota sadarkaa feedaraalaa fi naannootti bahan garagaraa keessatti ibsameera. Adeemsaaleenii fi ulaagaaleen seerota keessatti ibsaman kunis haala xiinxalaaf mijatutti bakka gurguddoo jahatti qoodamaniiru. Isaanis:faayidaa uummataa, sirna beeksisaa, sirna shallaggii beenyaa, yeroo kaffaltii, sirna keessummeessaa, komii fi namoota qabiyyee isaanii gadi-lakkisan akka of danda'an taasisuu kanneen jedhani dha.

Ulaagaalee fi adeemsaalee kanarratti xiinxala akka naannoo Oromiyaatti taasifameen sababa labsiin qabiyyee gadi-lakkisiisuu qajeelfamaan akkaata labsicharra taa'een waan hin deeggaramneef, labsichi mataa

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<sup>95</sup> Tulluu Tasammaa, Itt/Aanaa/Itt/Gaf/Waj/Bul/Laf/Eegu/Nan/Aanaa Aqaaqii (Afgaaffii gaafa 17/03/2006 gaggeeffame).

<sup>96</sup> Taajuu A/Kaayyoo, Pir/M/M/O/G/Arsi/Lixaa (Afgaaffii gaafa 23/03/2006 gaggeeffame).

<sup>97</sup> Obbo Kabaa Hundee, Komishinara Komishinii Invastimantii Oromiyaa (Af-gaaffii gaafa 10/04/2006 gaggeeffame); Taayyee Dibaabaa, Itti/Gaf/Waj/Bul/G/Sh/Kaabaa (Afgaaffii gaafa 01/04/2006 gaggeeffame).

<sup>98</sup> Qalbeessaa Garbaa/Ab/Ad/H/G/Siivilii/M/M/Sh/bahaa (Af-gaaffii gaafa 23/04/2006 gaggeeffame). Taganee Taayyee, B/B/Pir/M/M/A/Bishooftuu, Kabaa Hundee, Kom/Komi/Inv/Oromiyaa (Afgaaffii gaafa 10/04/2006. Af-gaaffii Obbo Taayyee Dibaabaa, Itti/Gaf/Waj/Bul/G/Sh/Kaabaa (Afgaaffii gaafa 01/04/2006 gaggeeffame). Yeroo lafti Warshaa Simintoo Darbaa kennamu namoota qabiyyee gadi-lakkisan ijaaruuf sadarkaa naannoo irraa kaasee hojiin hojjatamaa kan ture ta'u isaa ibsaniiru.

isaatiin iftoominni kan isa hanqatu waan ta'eef; akkasumas, qaamoleen qabiyyee gadi-lakkisiisan akkaataa seeraan tumameen hojii qabiyyee gadi-lakkisniisuuf xiyyeeffannaa gahaa kennuun dirqama isaanii bahuu dhabuu irraan kan ka'e adeemsi qabiyyee gadi-lakkisiisuu hanqina garagaraa kan qabu ta'uun isaa hubatameera.

Hanqinaalee garagaraa qabiyyee gadi-lakkisiisuun wal-qabatanii mul'atan kana furuuf yaadni furmaataa armaan gadii akeekameera.

- Labsii qabiyyee gadi-lakkisiisuu sirnaan hojiirra oolchuun akka danda'amu naannoon Oromiyaa qajeelfama baasuun irra jiraata.
- Dhimmoota labsichi iftoomina gahaa irratti dhabe fakkeenyaaf, kan akka aangoo mana murtiifi beenyaa buqqa'insaa/ displacement compensation/ irratti mirga namoota qabiyyee isaanii gadi-lakkisan akkaataa heerarra taa'een kabachiisuuf haala armaan olitti xiinxalameen labsicha fooyyeessuun barbaachisaa dha.
- Qaamoleen qabiyyee gadi-lakkisiisan dirqama isaanii sirnaan akka bahan to'anno taasisuun barbaachisaa dha.
- Namootni qabiyyee isaanii faayidaa uummataaf gadi-lakkisan akka of danda'an taasisuuf dirqama kana qaamolee garagaraaf kennuurra qaama addaa tokko itti gaafatamummaa kana adda-duraan fudhatu hundeessuun gaarii dha.
- Hojimaatni wal-fakkaataan manneen murtii keessa akka jiraatu abbootii seeraatiif leenjii qopheessuun barbaachisaa dha.

## **THE LEGAL REGIME OF CORRUPTION IN ETHIOPIA: AN ASSESSMENT FROM INTERNATIONAL LAW PERSPECTIVE**

**Berihun Adugna Gebeye\***

### **ABSTRACT**

*Corruption is a universal problem which compromises people's quest for development, peace, democracy, and human rights though its degree of severity varies. Due to its universality, there was global campaign against corruption and has resulted in an international regime of law. Law is one of the strategies of combating corruption; however, there are other strategies which should be implemented to contain corruption. Nonetheless, the article focuses on the legal measures for the fight against corruption by excluding other measures. It explores the strategies provided by the United Nations and African Union anti-corruption conventions with a view to evaluate the Ethiopian legal regime on corruption. Especially, it critically examines to what extent the legal regime of corruption in Ethiopia incorporate the measures provided by these conventions; to what extent the existing laws/institutions are adequate to prevent and combat corruption effectively; and the measures which should be taken. The article argues that the fight against corruption in Ethiopia is limited both in scope and design. It is suggested that revisiting the legal regime and incorporation of internationally accepted strategies are necessary to enhance the national fight against corruption.*

**Key Words:** Corruption, Federal Ethics and Anti-Corruption Commission, Ethiopia

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## INTRODUCTION

*“Just as it is impossible not to taste the honey or the poison that finds itself at the tip of the tongue, so it is impossible for a government servant not to eat up, at least a bit of the King’s revenue. Just as fish under water cannot possibly be found out either as drinking or not drinking water, so government servants employed in the government work cannot be found out taking money”.*<sup>1</sup>

The available scholarship reveals that corruption is endemic in all governments, and that it is not peculiar to any continent, region and ethnic group.<sup>2</sup> It cuts across faiths, religious denominations and political systems and affects both young and old, man and woman alike though it hurts more the poor and the vulnerable. Corruption is found in democratic and dictatorial politics; feudal, capitalist and socialist economies.<sup>3</sup> This does not, however, mean that the magnitude of corruption is equal in every society. Some countries are more corrupt than others. However, corruption is more readily condemned than defined and explained. It is a subject of research by many scholars from various disciplines.<sup>4</sup> Nevertheless, disagreements persist not only about how to curb it, but even about its definition, causes, forms and

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<sup>1</sup> CR. Kumar, ‘Corruption and Human Rights: Promoting Transparency in Governance and the Fundamental Right to Corruption-Free Service in India’, *Colum. Journal of Asian Law*. (2003), Vol. 17, No.3, p.1.

<sup>2</sup>See k. Ronald and B. chikulo (eds), *Corruption and Development in Africa: Lessons from Country Case Studies*, palgrave Macmillan press, (2000); P. Maldonado and G. Berthin (2003-2004), *Transparency and Developing Legal Frameworks to Combat Corruption in Latin America*, 10 Sw. J. L. & Trade Am.; V. Bhargava and E. Bolongaita (2004), *Challenging Corruption in Asia: Case Studies and a Framework for Action*, The International Bank for Reconstruction and Development / The World Bank; P. szarek (2010), *The European Union’s Fight against Corruption: The Evolving Policy towards Member States and Candidate Countries*, Cambridge university press.

<sup>3</sup>For details see J. Girling, *Corruption, Capitalism and Democracy*, Routledge Taylor & Francis Group, (2002).

<sup>4</sup> See for example, A. Miller, *The Erotics of Corruption: Law, Scandal, and political Perversion*, (State University of New York Press, 2008); Albany T Andrei and A. Matei, *The Corruption: An Economic and Social Analysis*, (2009); *Editura Economica*; K. Jain (ed), *The Political Economy of Corruption*, Routledge, London (2001); and M. Nuijten and G. Anders (eds), *Corruption and the Secrete of law-A Legal Anthropological Perspective*, Ashgate, Hampshire, England, (2007).

consequences. Such a lack of consensus reflects the complexity of the problem. Defeated by the problems of defining corruption, Justice Potter Stewart asserted that “I know it when I see it”<sup>5</sup>.

Talking about corruption in the international realm was a taboo before the end of the cold war.<sup>6</sup> But the end of the cold war has led to “the consolidation of democracy, political stability, and respect for the rule of law, as well as effective development and expansion of open and competitive markets”.<sup>7</sup> Besides, the compelling need to support corrupt regimes for national security reasons has removed partly.<sup>8</sup> It is after this that the international community began to bring the issue of corruption on board as corruption seriously threatens the stability of international order, the creation of democratic regimes and the emergence of open markets. Since then many nations and leading international organizations such as the United Nations, World Bank, International Monetary fund, the Council of Europe, the Organization of American States, the African Union, the Organization for Economic Cooperation and Development and many other regional and sub-regional organizations have articulated anti-corruption laws, policies, action plans and strategies<sup>9</sup> and all these have become the foundation for the international legal regime against corruption.

The problem of corruption in Ethiopia is pervasive though there are legal and administrative mechanisms to combat it.<sup>10</sup> The establishment of the

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<sup>5</sup> W. Robert, *Political Corruption in Africa*, 2nd ed, Dartmouth publishing company, Hampshire, England, (1991), p. 11.

<sup>6</sup> B. John and H. Fritz, ‘Tackling International Corruption No Longer Taboo’, 77 *Foreign Aff*, (1998), p.17.

<sup>7</sup> C. Hams, ‘Holding Public Officials Accountable in the International Realm: A New Multi-Layered Strategy to Combat Corruption’, 33 *Cornell Int’l L.J.* (2000), p.159.

<sup>8</sup> R. Ackerman, *Corruption and Government: Causes, Consequences and Reform*, Cambridge University Press, Cambridge, (1999), p.177.

<sup>9</sup> N. kale, ‘The Right to a Corruption Free Society as an Individual and Group Human Right: Elevating Official Corruption to a Crime under International Law’, *Journal of International Law and Politics*’1 L., p. (2000), 149-178.

<sup>10</sup> Freedom House, *Countries at the Crossroads 2011 - Ethiopia*, 10 November 2011, available at: <http://www.unhcr.org/refworld/docid/4ecba64d32.html> (last accessed 6 February 2013).

Federal Ethics and Anti-Corruption Commission marked the beginning of the institutionalized attack against corruption. In addition to establishing a specialized anti-corruption agency, Ethiopia adopted laws, rules of procedures, revised penal law to incorporate different acts which constitute corruption, and ratified international anti-corruption conventions adopted by the United Nations and the African Union to mention some. Despite these efforts, Ethiopia did not take those legislative measures devised by the international conventions which it is a party as expected. Due to such failure in legislative intervention, the fight against corruption in Ethiopia is limited both in scope and design.

It is a simple truth that law is simply a means to an end not an end by itself.<sup>11</sup> Hence, fighting corruption by law is one of the measures and one of the means to combat corruption. There are other strategies which are helpful to address the problems of corruption in societies. For instance, change in the value system of the society, assuring ethics in governance especially transparency, accountability and responsibility (in general terms guaranteeing good governance), adhering to the constitutional principles of separation of power with the system of checks and balances, and creating an enabling environment for the participation of the society, local and civil society organizations and the media in the decision making will have a significant impact in addressing the root causes of corruption.<sup>12</sup> However, the article specifically focuses on preventing and combating corruption through the instrument of law. The objective is to examine the Ethiopian legal response to corruption in light of international law of corruption so as to give constructive recommendations with a view to enhance the existing legal system.

The article is organized into three sections. The first section explores the literature on corruption with a view to locate it within the framework of the legal discourse and response which form the main part of the article.

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<sup>11</sup> For a detailed discussion see Brian Z. Tamanaha, *Law as a Means to an End: Threat to the Rule of Law*, Cambridge University Press, Cambridge, (2006).

<sup>12</sup> See J. Pope, *infra note 19*; A Body of Doctrinal Divinity, *infra note 21*; A. Ringera, *infra note 22* and K. Anukansai, *infra note 25*.

The second section examines and evaluates the strategies which are adopted by the international legal regime to fight corruption especially the United Nations Convention against Corruption and the African Union Convention on Preventing and Combating of Corruption. The third section is about the Ethiopian legal regime of corruption. The article investigated the legislative response of Ethiopia for the fight against corruption in light of its international treaty commitments. There is also a conclusion which summarizes the main parts of the discussion and the findings.

## **1. CORRUPTION: AN INTRODUCTION**

### **1.1 .THE DEFINITION OF CORRUPTION**

The term “corruption” comes from the Latin word *corruption* which means “moral decay, wicked behavior, putridity or rottenness”.<sup>13</sup> Defining the concept of “corruption” is not as easy as one recognizes its occurrence. It varies from region to region and remains largely contextual.<sup>14</sup> As the causes and effects of corruption are different depending on the context of the country, it is perhaps not surprising that it is difficult to formulate a single comprehensive definition that covers all the manifestations of corruption. However, literature unanimously recognizes that “corruption is an ancient, wide and pervasive problem that continues to be a factor in every-day live around the world. It can be said that corruption is a universal problem without universal definition. Sometimes, however, the definition of corruption is culturally relative. For instance, “one man’s bribe may be another man’s gift”.<sup>15</sup>

Even though there is no single universally agreed definition of corruption, it is defined in various ways. Usually corruption is defined as “an illegal act that involves the abuse of a public trust or office for some

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<sup>13</sup> M. Milic (2001), ‘*Endogenous Corruption in Privatized Companies*’, Collegium, Budapest, available at, <[http://www.cerge.cuni.cz/pdf/gdn/RRCI\\_17\\_paper\\_01.pdf](http://www.cerge.cuni.cz/pdf/gdn/RRCI_17_paper_01.pdf)> (last accessed 6 February 2013).

<sup>14</sup> *Ibid.*

<sup>15</sup> S. Underkuffler, ‘*Defining Corruption: Implication for Action*’, (2009), in I. Rotberg (ed), *Corruption, Global Security and World order*, (World Peace Foundation and American Academy of Arts & Sciences), pp. 27-46



private benefit”, or “the misuse of public office for private gain.”<sup>16</sup> Transparency International (TI), the leading anti-corruption campaigner defines corruption as “misuse of entrusted power for private gain”<sup>17</sup>. The World Bank (WB) also defined corruption as “an abuse of public authority for the purpose of acquiring personal gain”.<sup>18</sup> But for the purpose of this article, the working definition of corruption is a misuse of entrusted power for private gain against the rights of others.

## 1.2 .THE CAUSES OF CORRUPTION

Available researches show that the causes of corruption are diverse and depend on the different contextual environments. TI held that corruption is rearing its ugly head in more and more severe ways due to “the weakening of social values, with the broader public interest and social responsibility being subordinated to the enhancement of material status in the personal ethics of many”.<sup>19</sup> Besides, lack of transparency and accountability in the public integrity systems are contributing factors for corruption.<sup>20</sup> There is also a biblical explanation for the causes of corruption. After Adam broke the law and committed sin to his posterity, what follows upon this is, “the corruption of nature derived unto them from him”; by which is meant, “the general depravity of mankind, of all the individuals of human nature, and of all the powers and faculties of the soul, and members of the body”.<sup>21</sup> As Human nature is imperfect, corruption will exist in all human endeavors. Selfishness and greed are

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<sup>16</sup> D. Fantaye, ‘*Fighting Corruption and Embezzlement in Third World Countries*’, 68 *Journals of Criminal Law*, (2004), p. 171.

<sup>17</sup> Transparency International, *The Anti-Corruption Plain Language Guide*, (2009), <[http://www.transparency.org/content/download/45306/725785/file/TI\\_Plain\\_Language\\_Guide\\_280709.pdf](http://www.transparency.org/content/download/45306/725785/file/TI_Plain_Language_Guide_280709.pdf)> (last accessed 1 February 2013).

<sup>18</sup> D. Kaufmann, ‘*Corruption, Governance and Security: Challenges for the Rich Countries and the World*’, World Bank Global Competitiveness Report, (2004/2005) available at, <[http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/Kaufmann\\_GCR\\_101904\\_B.pdf](http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/Kaufmann_GCR_101904_B.pdf)> (last accessed 22 February 2013).

<sup>19</sup> J. Pope, *Confronting Corruption: The Elements of a National Integrity System*, TI Source Book, (2000), available at, < <http://www.transparency.org/content/download/2439/14493/file/sourcebook.pdf.zip>> (last accessed on 1 March 2013), p.7.

<sup>20</sup> *Id.* p. 8.

<sup>21</sup> A Body of Doctrinal Divinity, Book 3 - chapter 11, *Of The Corruption of Human Nature*, available at, <[http://www.pbministries.org/books/gill/Doctrinal\\_Divinity/Book\\_3/book3\\_11.htm](http://www.pbministries.org/books/gill/Doctrinal_Divinity/Book_3/book3_11.htm)> (last accessed 1 March 2013).

the constituting elements of human imperfection which leads to corruption.

As noted by Ringera in a speech delivered at the Commonwealth lawyer's conference, the causes of corruption are economic, institutional, political or societal.<sup>22</sup> The economic causes of corruption are related to pecuniary considerations, representing corruption that is need-driven as opposed to greed driven. This assertion is further confirmed by TI in attributing poverty and low salary as causes of corruption.<sup>23</sup> Increase of wants and inability to maintain one's family lives forces officials to compromise public trust and honesty for some fringe benefits. Institutional causes of corruption include "monopoly and wide discretionary powers for public officers, poor accountability, lack of effective and efficient enforcement of the law, absence of institutional mechanisms to deal with corruption, existence of a weak civil society, and the absence of press freedom".<sup>24</sup> Klitgaard shares the same view with Ringera by holding that corruption is prevalent when "someone has monopoly power over a good or service, has the discretion to decide whether you receive it and how much you get, and is not accountable".<sup>25</sup> The political causes of corruption arise from the structure and functions of political institutions, and the acquisition and exercise of political power. While societal causes refer to the attitudes and practices of the community. Hence, as the problem of corruption is multi-faceted, its causes are also diverse.

### 1.3 THE FORMS OF CORRUPTION

Corruption manifests itself in different ways in different circumstances. But there are some forms of corruption which recur in every system.

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<sup>22</sup> A. Ringera, Speech delivered at the Commonwealth Lawyers Conference, Nairobi, available at, <[http://www.kacc.go.ke/archives/speeches/COMMON WEALTH-CONFERENCE.pdf](http://www.kacc.go.ke/archives/speeches/COMMON%20WEALTH-CONFERENCE.pdf)> (last accessed 1 March 2013).

<sup>23</sup> J. Pope, *supra note* 19, p.9.

<sup>24</sup> A. Ringera, *supra note* 22

<sup>25</sup> K. Anukansai, 'Corruption: The Catalyst for the Violation of Human Rights', available at <<http://www.nacc.go.th/images/journal/kanokkan.pdf>> (last accessed 1 March 2013), p.7.

These are grand corruption, petty corruption, political corruption and systematic corruption.

Grand corruption occurs when a high level government official committed acts that “distort policies or the central functioning of the state, enabling him/her to benefit at the expense of the public good”<sup>26</sup>. It is a form of corruption which pervades the highest levels of a national government, leading to a broad erosion of confidence in good governance, rule of law and economic stability.<sup>27</sup> It distorts the functioning of the central government.

Petty corruption is an everyday abuse of entrusted power by low and mid-level public officials in their interactions with ordinary citizens, who often are trying to access basic goods or services in places like hospitals, schools, police departments and other agencies.<sup>28</sup> It is a situation where a public official demands or expects money for doing an act which he or she is ordinarily required by law to do, or when a bribe is paid to obtain services which the official is prohibited from providing.<sup>29</sup> Bribery, embezzlement, theft, fraud, extortion, nepotism, favoritism, and clientelism (classifications of corruption by the United Nations Office on Drug and Crime)<sup>30</sup> can be grouped under either grand corruption or petty corruption depending upon the amount of money lost and the sector where it occurs.<sup>31</sup> Political corruption on the other hand is the manipulation of policies, institutions and rules of procedure in the

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<sup>26</sup> TI Plain Language Guide, *supra note 17* p. 23.

<sup>27</sup> See C. Maria and K. Haarhuis, ‘Promoting Anti-Corruption Reforms: Evaluating the Implementation of a World Bank Anti-Corruption Program in Seven African Countries 1999-2001’, (2005), available at, <<http://ics.uda.ub.rug.nl/root/Dissertations/2005/KleinHaarhuis-Promot>> (last accessed 3 March 2013).

<sup>28</sup> Global Integrity and UNDP Oslo Governance Centre, ‘*A User’s Guide to Measuring Integrity*’ (Oslo: UNDP); U4 Corruption Glossary, (2008), available at <<http://www.u4.no/document/glossary.cfm>> (last accessed 3 March 2013).

<sup>29</sup> C. Sandgren, ‘*Combating Corruption: The Misunderstood Role of Law*’, 13 *International Lawyer*, (2005), p. 717.

<sup>30</sup> See UNODC, ‘*The Global Program against Corruption: UN Anti-Corruption Toolkit*’ (2004), available at, <[http://www.unodc.org/pdf/crime/corruption/toolkit/corruption\\_un\\_anti\\_corruption\\_toolkit\\_sep04.pdf](http://www.unodc.org/pdf/crime/corruption/toolkit/corruption_un_anti_corruption_toolkit_sep04.pdf)> (last accessed 3 March 2013).

<sup>31</sup> TI Plain Language Guide, *supra note 17*.

allocation of resources and financing by political decision makers, who abuse their position to sustain their power, status and wealth.<sup>32</sup>

Systematic corruption occurs where “corruption permeates the entire society to the point of being accepted as a means of conducting everyday transactions”.<sup>33</sup> It is a situation in which the major institutions and processes of the state are routinely dominated and used by corrupt individuals and groups, and in which many people have few practical alternatives to deal with corrupt officials.<sup>34</sup> It affects institutions and influences individual behavior at all levels of a political and socio-economic system. Such form of corruption is embodied in specific socio-cultural environments, and tends to be “monopolistic, organized and difficult to avoid”<sup>35</sup>.

Corruption in its various forms may occur both in the public and private sector.<sup>36</sup> Public sector corruption is a corruption which occurs in public offices and public enterprises and has a long history. Traditionally, corruption was considered as a public sector problem only. However, corruption can also distort the functioning of the private sector. Private sector corruption on the other hand occurs in individual business practices, business organizations, national and transnational companies, community based organizations and Non-Governmental Organizations (in general activities outside of the public office) and thereby affects the functioning of market systems and societies.<sup>37</sup>

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<sup>32</sup> See R. Hodess, ‘Introduction’, in TI, *Global Corruption Report 2004 - Political Corruption*, Berlin TI, (2004); and I. Amundsen, ‘*Political Corruption: An Introduction to the Issues*’, (CMI Working Paper 7, Bergen: CMI. (1999)).

<sup>33</sup> C. Heymans and B. Lipietz, ‘Corruption and Development: Some perspectives’, 40 *Institute of Security Studies Monograph Series*(1999), p.8.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> See the United Nations Convention against Corruption Art. 12 and African Union Convention on Preventing and combating corruption Art. 11.

<sup>37</sup> Global Corruption Report, Corruption and the private sector, Transparency International (2009).

## 1.4 .THE IMPACTS OF CORRUPTION

*“Corruption deepens poverty, it debases human rights; it degrades the environment; it derails development, including private sector development; it can drive conflict in and between nations; and it destroys confidence in democracy and the legitimacy of governments. It debases human dignity and is universally condemned by the world’s major faiths”.*<sup>38</sup>

Corruption is damaging for the simple reason that important decisions are determined by ulterior motives, with no concern for the consequences for the wider community. As Balogun describes it, “depending on its *form* and *gravity*, corruption is capable of rewarding indolence and penalizing hard work, undermining morale and *esprit de corps*, compromising a nation’s external security, threatening internal order and stability, and generally slowing down the pace of economic growth and sustainable development”.<sup>39</sup> Kumar also notes that corruption affects “economic growth, discourages foreign investment, diverts resources for infrastructure development, health and other public services, education, and anti-poverty programs”.<sup>40</sup> He further adds that corruption poses serious challenges for governance, as states cannot achieve the goals of development without ensuring corruption-free governance.

Corruption lowers investment, which in turn adversely affects overall economic performance.<sup>41</sup> Perhaps more importantly, corruption

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<sup>38</sup>The Durban Commitment to Effective Action Against Corruption, signed by 1600 delegates from 135 countries the October 1999 Anti - Corruption Conference sponsored by Transparency International, available at<[http://9iacc.org/durban/durban\\_commitment.html](http://9iacc.org/durban/durban_commitment.html)> (last accessed 3 March 2013).

<sup>39</sup> M. Balgun, ‘Causative and Enabling Factors in public Integrity: A focus on Leadership, Institutions and character Formation’, Public Integrity (2003) Vol.5, No. 2 (spring), pp.127-147, as quoted by RA. Johnson and S. Sharma, ‘*About Corruption*’, in RA. Johnson (ed), *The Struggle Against Corruption: A Comparative Study*, PALGRAVE MACMILLAN, P.10.

<sup>40</sup>CR. Kumar, ‘Corruption, Human Rights and Development: Sovereignty and State Capacity to Promote Good Governance’,(2005) *99 Am. Soc’y Int’l L. Proc.* 416. (2005).

<sup>41</sup> S. Knack and P. Keefer, ‘*Institutions and Economic Performance: Cross-Country Tests Using Alternative Institutional Measures*’, *7 Econ. & Pol.* 207, (1995).

undermines social welfare by redistributing a nation's wealth in a "manner that generates tensions or exasperates existing ones".<sup>42</sup> Keuleers notes that high levels of corruption significantly aggravate poverty.<sup>43</sup> Above all, corruption affects the integrity of the political system and neither allows for the protection of human rights and the promotion of human freedoms nor for the development of democracy.<sup>44</sup> It implies discrimination and injustice and disrespect for human dignity.<sup>45</sup>

While corruption violates the rights of all those affected by it, "it has a disproportionate impact on people that belong to groups that are exposed to particular risks; such as women, children, minorities, indigenous peoples, migrant workers, persons with disabilities, those with HIV/AIDS, refugees, prisoners and those who are poor".<sup>46</sup> In some cases, it is their vulnerability that makes certain groups easy victims of corruption. For instance, corrupt officials may extract money from migrant workers who lack a residence permit by threatening them with deportation in the knowledge that they cannot complain.<sup>47</sup>

Some would argue that corruption can have beneficial effects such as non-violent access to government affairs and administration, when political channels are clogged, or as a means of lessening the potentially crippling tension between the civil servant and the politician by linking them in an easily discerned network of self-interest.<sup>48</sup> However, counter-arguments are more acceptable. They focus on the fact that corruption

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<sup>42</sup> R. Sinder and W. Kidane, 'Combating Corruption through International Law in Africa: A Comparative Analysis', 40 *Cornell Int'l L.J.*, (2007), p.691.

<sup>43</sup> P. Keuleers, Speech on Corruption, development and human rights – *Fighting corruption as a means to achieve the Millennium Development Goals* on the 5th regional anti-corruption conference, 28-30 September 2005, Beijing, PR China.

<sup>44</sup> CR. Kumar, 'Corruption, Development and Good Governance: Challenges for Promoting Access to Justice in Asia', 16 *Mich. St. J. Int'l L.* 475. (2007-2008).

<sup>45</sup> *Ibid.*

<sup>46</sup> Transparency International, *Corruption and Human Rights: Making the Connection*, International Council on Human Rights Policy, (2009), available at <[http://www.ichrp.org/files/reports/40/131\\_web.pdf](http://www.ichrp.org/files/reports/40/131_web.pdf)> (last accessed 10 March 2013), p.7.

<sup>47</sup> *Ibid.*

<sup>48</sup> See C. Maria et al, *supra* note 27 and R. Ackerman, 'Corruption and Democracy', 90 *American Society of International Legal Proceedings*, (1996), p.83.

leads to economic inefficiency and waste, because of its effect on the allocation of funds, on production, and on consumption. Gains obtained through corruption are unlikely to be transferred to the investment sector as “ill-gotten money is either used in conspicuous consumption or is transferred to foreign bank accounts”.<sup>49</sup> Rose Ackerman further argues that corruption is able to feed on itself and thereby produce higher illegal payoffs that ultimately, outweigh economic growth.<sup>50</sup>

## 2. THE INTERNATIONAL LEGAL REGIME TO PREVENT AND COMBAT CORRUPTION

Any discussion of international measures to prevent and combat corruption must begin with the United States.<sup>51</sup> It is because the controversies surrounding President Richard Nixon's presidency relating to the Watergate incidents of 1972 could rightfully be characterized as the *sine qua none* of contemporary efforts to combat corruption by law.<sup>52</sup> The Watergate incident leads to the enactment of the Foreign Corrupt Practices Act (FCPA) in 1977. From 1977 to 1996, the FCPA was the only law that targeted international corruption though it binds only those multilateral companies in the United States in their interaction with foreign officials.<sup>53</sup>

It is after this national commitment of the United States to prevent and combat corruption that the regional and global commitment for corruption began to emerge. The Inter-American Convention against Corruption was the first international convention aimed at combating

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<sup>49</sup> *Ibid.*

<sup>50</sup> R. Ackerman, *supra note 8*.

<sup>51</sup> W. Schroth, ‘National and International Constitutional Law Aspects of African Treaties and Laws against Corruption’, 13 *Transnat'l L. & Contemp. Probs.* (2003), p.83.

<sup>52</sup> For details of the Watergates incident see, R. Snider et al, *supra note 46*.

<sup>53</sup> See A. Low et al, ‘*The Inter-American Convention Against Corruption: A Comparison with the United States Foreign Corrupt Practices Act*’, 38 *Va. J. Int'l L.* (1998), pp. 243-244.

corruption and thereby marked the beginning of an international legal regime to combat corruption.<sup>54</sup>

The Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Corruption Convention) was the second international convention on corruption. This convention was adopted by the efforts of United States with her trading partners at the OECD. United States did this due to the absence of parallel legal obligation in Europe to abstain from certain business practices in foreign countries and placed its business community in a disadvantageous position.<sup>55</sup>

In 1999, the Criminal Law and Civil Law Conventions on Corruption are adopted under the inter-governmental framework of the Council of Europe to deal with the problems of corruption by proposing criminal sanctions and civil remedies as solutions.

The increasing consciousness of the adverse global economic consequences of corruption brought previously regional efforts to combat corruption through international law to the global level.<sup>56</sup> As of November 15, 2000, corruption is criminalized internationally as a result of the coming into effect of the United Nations Convention against Transnational Organized Crime and as of October 31, 2003, the UN adopted a convention fully dedicated for preventing and combating corruption, United Nations Convention against Corruption. Africa like the other regions of the world adopted its convention on corruption named African Union Convention on Preventing and Combating Corruption in 2003.

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<sup>54</sup>*Ibid.*

<sup>55</sup> R. Snider et al, *supra note* 42, p. 4.

<sup>56</sup>*Ibid.*



These are not the only anti-corruption instruments in the world. There are other conventions, declarations, protocols, action plans and initiatives.<sup>57</sup> But the article did not address them all for the simple reason that Ethiopia is not a party to these instruments. Rather, the United Nations convention against corruption and the African Union convention on the preventing and combating of corruption will be critically examined and discussed with a view to examine the legislative framework for preventing and combating corruption in Ethiopia.

## 2.1 . UNITED NATIONS CONVENTION AGAINST CORRUPTION

The United Nations Convention against Corruption (UNCAC) was adopted by the General Assembly in its resolution 58/4 of 31 October 2003 at United Nations Headquarters in New York.<sup>58</sup> It is the first genuinely global, legally binding instrument on corruption and related matters and developed with an extensive international participation.<sup>59</sup> It is after this that corruption is no more the concern only of national and regional laws but also of international laws. It elevated anti-corruption actions at the international level in the form of legally binding obligations.

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<sup>57</sup> See for example, United Nations Declaration against Corruption and Bribery in International Commercial Transactions; Southern African Development Community Protocol against Corruption; Economic Community of West African States Protocol on the Fight against Corruption, Convention on the Protection of the European Communities' Financial Interests; Protocol to the Convention on the protection of the European Communities' Financial Interests; Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union; Council of the European Union Framework Decision on Combating Corruption in the Private Sector; the Anti-Corruption Action Plan for Asia and the Pacific and Good Governance for Development (GfD) Initiative of the Middle East.

<sup>58</sup>The Global Compact, '*Background Information on the Fight against Corruption*', (2003), available at <[http://www.transparency.org/global\\_compact\\_2003\\_background\\_information\\_on\\_the\\_fight\\_against\\_corruption\\_pdf](http://www.transparency.org/global_compact_2003_background_information_on_the_fight_against_corruption_pdf)> (last accessed 5 February 2013).

<sup>59</sup> See A. Argandona, 'The United Nations Convention Against Corruption and its Impact on International Companies, *Working Paper WP No. 656*, IESE Business School, University of Navarra, (2006), available at <<http://www.iese.edu/research/pdfs/DI-0656-E.pdf>> (last accessed 4 February 2013).

The UNCAC obliges states parties to implement a wide and detailed range of anti-corruption measures affecting their laws, institutions and practices. It is unique when compared to other conventions, not only in its global coverage but also in the detail of its provisions.<sup>60</sup> Objectives and coverage, definition of corruption, preventive measures, criminalization, remedies to victims and asset recovery are some of the main substantive rules of the convention. Against this background note, the sections below explore and analyze the approaches taken by the UNCAC to prevent and combat corruption globally.

### 2.1.1 Objectives

The purposes of the UNCAC are “to promote and strengthen measures to prevent and combat corruption more efficiently and effectively; to promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery; and to promote integrity, accountability and proper management of public affairs and public property”.<sup>61</sup> The substantive provisions are formulated to achieve this end. The UNCAC wants to strengthen measures against corruption through international cooperation and technical assistance among states. It further promotes measures against corruption by promoting values such as, integrity, accountability and proper management. UNCAC approach the problem of corruption from a political (i.e. international cooperation and technical assistance) and economic (asset recovery) point of view.

With these objectives, originally the convention was designed to cover corruption in the public sector, private sector and politics.<sup>62</sup> But due to the United States refusal to countenance any mandatory provision on transparency in political party funding, the provision on political party funding was tucked away in an article entitled ‘public sector’.<sup>63</sup> It is said

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<sup>60</sup>Explanation of the UNCAC, available at <[http://www.transparency.org/global\\_priorities/international\\_conventions/conventions\\_instruments/uncac](http://www.transparency.org/global_priorities/international_conventions/conventions_instruments/uncac)> (last accessed 5 March 2013).

<sup>61</sup> See, UNCAC, Art. 1.

<sup>62</sup> Transparency International, *Global Corruption Report 2004- Political Corruption*, Pluto press, London, (2004), p. 112.

<sup>63</sup> *Ibid.*

that, if the UNCAC fails to deal adequately with this, “one third of the subject matter of the convention is missing”, a reference to the need to equally address corruption in the public sector, the private sector and politics.<sup>64</sup> However, on the other hand, UNCAC aims to prevent and combat corruption both in the private and public sphere.

### 2.1.2 Measures

The UNCAC did not attempt to define corruption in clear terms though there were proposals for the definition of corruption.<sup>65</sup> The authors of the convention preferred to offer for a broad category of offences, rather than a definition of corruption. These are bribery (active and passive) both in the public and private sector;<sup>66</sup> embezzlement, misappropriation of funds and other diversions of property;<sup>67</sup> trading in influence,<sup>68</sup> abuse of functions,<sup>69</sup> illicit enrichment,<sup>70</sup> laundry of the proceeds of crime<sup>71</sup>, concealment<sup>72</sup> and obstruction of justice<sup>73</sup>. These are acts of corruption by which the UNCAC tries to prevent and combat by devising different measures.

The UNCAC adopts an approach to prevent corruption from being occurred in both the public and the private sector in the first place. With regard to the public sector, states parties are at discretion to implement effective anti-corruption policies<sup>74</sup> and create organizations specifically to fight corruption.<sup>75</sup> states parties must endeavor to ensure that their public services are subject to safeguards that promote integrity, transparency and accountability among civil servants and hiring based on efficiency

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<sup>64</sup> *Ibid.*

<sup>65</sup> A. Argandona, *supra note* 59 p.5.

<sup>66</sup> See, UNCAC, Arts.15, 16 and 21.

<sup>67</sup> UNCAC, Arts.17 and 22.

<sup>68</sup> UNCAC, Art. 18.

<sup>69</sup> UNCAC, Art. 19.

<sup>70</sup> UNCAC, Art. 20.

<sup>71</sup> UNCAC, Art. 23.

<sup>72</sup> UNCAC, Art. 24.

<sup>73</sup> UNCAC, Art. 25.

<sup>74</sup> UNCAC, Art. 5.

<sup>75</sup> UNCAC, Art. 6.

and merit.<sup>76</sup> Once hired, public officials must be subject to codes of conduct,<sup>77</sup> including measures such as declarations of assets, and disciplinary measures. States must also promote transparency and accountability in public procurement and management of public finances,<sup>78</sup> and must take measures to preserve integrity in especially critical areas such as the judiciary and prosecution services,<sup>79</sup> and to prevent money laundering<sup>80</sup>.

With regard to the private sector, states parties are required to “enhance accounting and auditing standards, develop codes of conduct, promoting transparency, keep the maintenance of books and records, and disallowing tax deductibility for bribes”<sup>81</sup>. The Convention also advocates for the participation of society in the prevention of and fight against corruption including access to the appropriate administrative and judicial bodies,<sup>82</sup> reporting to the national investigating and prosecuting authorities,<sup>83</sup> and the protection of reporting persons<sup>84</sup> and of witnesses, experts and victims.<sup>85</sup>

While most articles dealing with prevention of corruption commences with a mandatory obligation ‘shall’ but the manner in which they are implemented is subject to “the fundamental principles of the legal system of states parties”.<sup>86</sup> This implies that states parties are not obligated to implement a specific measure to prevent corruption. However, they are obligated to take measures to prevent corruption by taking into consideration their legal system.

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<sup>76</sup>UNCAC, Art. 7.

<sup>77</sup>UNCAC, Art.8.

<sup>78</sup>UNCAC, Art. 9.

<sup>79</sup>UNCAC, Art. 11.

<sup>80</sup>UNCAC, Art. 14.

<sup>81</sup>UNCAC, Art. 12.

<sup>82</sup>UNCAC, Art. 13.

<sup>83</sup>UNCAC, Art. 39.

<sup>84</sup>UNCAC, Art. 33.

<sup>85</sup>UNCAC, Art. 32.

<sup>86</sup>Transparency International, *Global Corruption Report 2004- Political Corruption*, *supra note 62*, p. 112.

Even though preventive measures are adopted, it may not always prevent the incidence of corruption. Due to this fact, States Parties must take legislative measures to establish as criminal offences not only active and passive bribery of national public officials<sup>87</sup>, but also active bribery of foreign public officials or officials of public international organizations<sup>88</sup>, embezzlement, misappropriation and other diversion of property by a public official<sup>89</sup>, money laundering<sup>90</sup>, obstruction of justice<sup>91</sup>, and participation as an accomplice, assistant or instigator in an offence of corruption.<sup>92</sup> States parties are also advised to take legislative measures to establish as criminal offences though not mandatory, the solicitation or acceptance by a foreign public official of an undue advantage<sup>93</sup>, trading in influence<sup>94</sup>, abuse of functions<sup>95</sup>, illicit enrichment<sup>96</sup>, concealment<sup>97</sup>, attempt and preparation for an offence of corruption<sup>98</sup>, bribery and embezzlement in the private sector.<sup>99</sup> But the optional strategy to criminalize the taking of bribes by public officials though the responsibility of the official's home country, it will leave with impunity bribes taken by officials of international public organizations as there is no home government which takes responsibility.<sup>100</sup>

Besides the punishment of offenders of corruption, the UNCAC imposes on states parties to ensure that victims of corruption have the right to initiate legal proceedings against those who are responsible in order to obtain compensation.<sup>101</sup> But, corruption in general and the institutionalized

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<sup>87</sup>UNCAC, Art. 15

<sup>88</sup>UNCAC, Art.16(1).

<sup>89</sup>UNCAC, Art. 17.

<sup>90</sup>UNCAC, Art. 23.

<sup>91</sup>UNCAC, Art. 25.

<sup>92</sup>UNCAC, Art.27(1).

<sup>93</sup>UNCAC, Art.16(2).

<sup>94</sup>UNCAC, Art. 18.

<sup>95</sup>UNCAC, Art. 19.

<sup>96</sup>UNCAC, Art. 20.

<sup>97</sup>UNCAC, Art. 24.

<sup>98</sup>UNCAC, Art.27 (2 and 3).

<sup>99</sup>UNCAC, Art.21 and 22.

<sup>100</sup> Transparency International, Global Corruption Report 2004- Political Corruption, *supra note* 62.

<sup>101</sup>UNCAC., Art. 35.

form of corruption in particular causes or creates mass victimization.<sup>102</sup> Victims of violations of human rights (as corruption is a violation of human rights) are often unable to bring their cases before judicial or quasi-judicial organs by themselves, partly as a result of their victimization.<sup>103</sup> Though such remedial provision is important, but the most victimized and vulnerable sections of the society like, women, children, indigenous peoples and the poor are not in the position to go through the legal avenues by themselves.

Public interest litigation or *action popularies* would have been important to address the issue of mass victimization. However, the UNCAC did not allow this since those who claim compensation for the acts of corruption must prove that they have a vested interest. That is, whether they suffer damage out of the acts of corruption. If it is a human rights issue one can avail of the procedural devices of public interest litigation to address mass claims which arise out of acts of corruption. Besides, the vulnerable sections of the society can have a voice through lawyers, civil society organizations and human rights activists; and they can get their compensation by availing public interest litigation.

Asset recovery, however, is the fundamental principle of the convention.<sup>104</sup> It is especially vital for developing countries where cases of grand corruption have exported national wealth to international banking centers and financial havens, and where resources are badly needed for the reconstruction of societies under new governments.<sup>105</sup> The substantive provisions then set out a series of mechanisms, including both civil and criminal recovery procedures, whereby assets can be traced, frozen, seized, forfeited and returned.<sup>106</sup> A further issue was the question of whether assets should be returned to requesting state parties

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<sup>102</sup> See CR. Kumar, *supra note 1*.

<sup>103</sup> See S. Yeshanew, 'The Justiciability of Human Rights in the Federal Democratic Republic of Ethiopia', 8 *Afr. Hum. Rts. L.J* (2008), p.273.

<sup>104</sup> UNCAC, Art. 51.

<sup>105</sup> P. Webb, 'The United Nations Convention against Corruption: Global Achievement or Missed Opportunity?' *Journal of International Economic Law* (2005) Vol.8 No.1, pp 191–229.

<sup>106</sup> See UNCAC, Art. 51-59.

or directly to individual victims. The result was a series of provisions which favor return to the requesting state party, depending on how closely the assets were linked to it in the first place.<sup>107</sup> Thus, funds embezzled from the state are returned to it, even if subsequently laundered<sup>108</sup> and proceeds of other offences covered by the Convention are to be returned to the requesting state party if it establishes ownership or damages recognized by the requested state party as a basis for return.<sup>109</sup> In other cases assets may be returned to the requesting State Party or a prior legitimate owner, or used in some way for compensating victims.<sup>110</sup> This chapter of the convention is having an ample benefit in minimizing the economic impacts of corruption though its effectiveness is measured to the extent of cooperation among states parties.

## 2.2 AFRICAN UNION CONVENTION ON PREVENTING AND COMBATING CORRUPTION

The African Union (AU) seeks a continental approach to the problem of corruption which is similar to human rights issues in the 1980s.<sup>111</sup> It is due to the regional peculiarities that the AU adopts a regional sensitive anti-corruption convention. The African Union Convention on Preventing and Combating Corruption (AU anti-corruption convention) is the most recent regional anti-corruption convention. The AU anti-corruption convention was adopted on 11 July 2003 at the AU summit in Maputo, Mozambique and entered into force on 5 August 2005.<sup>112</sup>

The AU anti-corruption convention came into effect as one of the mechanisms within the AU framework with the goal of achieving “the

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<sup>107</sup> D. Vlassis, ‘*The United Nations Convention against Corruption*’, Resource Material Serious No. 66, available at <[http://www.unafei.or.jp/english/pdf/RS\\_No66/No66\\_15VE\\_Vlassis1.pdf](http://www.unafei.or.jp/english/pdf/RS_No66/No66_15VE_Vlassis1.pdf)> (last accessed 4 February 2013).

<sup>108</sup> See UNCAC, Art. 15.

<sup>109</sup> UNCAC., Art.57 (3(b)).

<sup>110</sup> UNCAC., Art.57 (3(C)).

<sup>111</sup> Transparency International, *Global Corruption Report 2004- Political Corruption*, *supra note* 62, p. 117.

<sup>112</sup> The AU anti-corruption convention, available at <<http://www.africa-union.org/root/au/Documents/Treaties/Treaties.htm>> (last accessed on 4 January 2013).

legitimate aspirations and better life for the peoples of Africa, promoting and protecting human and peoples' rights, consolidating democracy, and enhancing economic and political development in the region by preventing and combating corruption".<sup>113</sup>

It provides a comprehensive framework on measures of prevention, criminalization, cooperation, asset recovery and education about corruption as strategies to prevent and combat corruption in the region. It is unique in containing mandatory provisions with respect to private-to-private corruption and on transparency in political party funding. The AU anti-corruption convention makes a clear reference to the impacts of corruption on human rights both in its preamble and in its objective.<sup>114</sup> It also gives emphasis to the human rights of offenders of corruption by guarantying them fair trial<sup>115</sup> and punishing those who make false and malicious reports.<sup>116</sup> The sections to come will explore and assess the contents of the AU anti-corruption convention especially its purpose and scope, its definition of corruption, measures such as prevention, criminalization, remedies to victims and asset recovery.

### 2.2.1 Objectives

In its statement of objectives, the AU anti-corruption convention aims to achieve five objectives. These are, "promote and strengthen the development of anti-corruption mechanisms in Africa,<sup>117</sup> promote, facilitate and regulate cooperation among states parties,<sup>118</sup> coordinate and harmonize policies and legislations between states parties,<sup>119</sup> remove obstacles to the enjoyment of economic, social and cultural rights as well as civil and political rights,<sup>120</sup> and establish necessary conditions to foster

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<sup>113</sup> See the preamble of the AU anti-corruption convention.

<sup>114</sup> The AU Anti-Corruption Convention, Art.2(5), Para 4 of the preamble, and Art. 2(4).

<sup>115</sup>The AU Anti-Corruption Convention, Art. 14.

<sup>116</sup>The AU Anti-Corruption Convention, Art.5(7).

<sup>117</sup>The AU Anti-Corruption Convention, Art.2 (1).

<sup>118</sup>The AU Anti-Corruption Convention, Art.2 (2).

<sup>119</sup>The AU Anti-Corruption Convention, Art.2 (3).

<sup>120</sup>The AU Anti-Corruption Convention, Art.2 (4).



transparency and accountability in the management of public affairs”<sup>121</sup>. It has also a statement of principles which guide states parties in the implementation of the convention.

The States parties to this convention undertake to abide by the following principles. These are, “respect for democratic principles and institutions, popular participation, the rule of law and good governance; respect for human and peoples’ rights in accordance with the African Charter on Human and Peoples Rights and other relevant human rights instruments; transparency and accountability in the management of public affairs; promotion of social justice to ensure balanced socio-economic development and condemnation and rejection of acts of corruption, related offences and impunity”<sup>122</sup>.

The AU anti-corruption convention covers corruption both in the public and private sectors.<sup>123</sup> The objectives and principles are equally applicable in public and private sector corruption. The AU anti-corruption convention also deals with political party funding.<sup>124</sup> It is one of the unique features of the convention in areas of coverage.

Taking into account the regional particularities of Africa, i.e., poverty, lack of good governance and democracy, and serious violations of human rights, the drafters of the AU anti-corruption convention took good governance and rights based approach in preventing and combating corruption.<sup>125</sup> The statement of objectives and principles of the AU anti-corruption convention reflects this assertion. Combating corruption without respect for fundamental principles of the convention will be futile.<sup>126</sup> Without ensuring accountability and transparency in public affairs, without respect for democratic principles and institutions such as popular participation, rule of law and good governance, the anti-

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<sup>121</sup>The AU Anti-Corruption Convention, Art.2 (5).

<sup>122</sup>The AU Anti-Corruption Convention., Art. 3.

<sup>123</sup>The AU Anti-Corruption Convention., Art.2 and 11.

<sup>124</sup>The AU Anti-Corruption Convention., Art. 10.

<sup>125</sup> R. Snider et al, *supra note* 42 p. 25.

<sup>126</sup>*Ibid.*

corruption campaign in Africa may not be effective. That is why the AU anti-corruption convention makes them fundamental principles in the implementation of the convention.

The rights based approach is apparent in both the statement of objectives and principles and some other articles of the AU anti-corruption convention. Removing the obstacles to the enjoyment of human rights as an objective and respect for human rights in preventing and combating corruption as a principle especially guarantying offender's fair trial, malicious prosecution and prohibition of double jeopardy shows that the convention takes a human rights approach in its strategies.<sup>127</sup> Conversely, the AU anti-corruption convention did not look from a human rights perspective the victims of corruption. Despite its clear reference to human rights, it adopts a crime control approach. It does not take a human rights approach to protect the victims of corruption.

### 2.2.2 Measures

Like UNCAC, the AU anti-corruption convention did not attempt to define corruption. Instead, it tries to list some acts and related offences which constitute corruption. For the AU anti-corruption convention, "corruption means the acts and practices including related offences prescribed in this convention".<sup>128</sup> Most of the acts of corruption and related offences are stated in article 4 of the convention which deals with the "scope of application". These acts and related offences include, bribery (both active and passive) in both the public and private sector,<sup>129</sup> any act or omission in the discharge of duties for the purpose of illicitly obtaining benefit,<sup>130</sup> diversion of property,<sup>131</sup> illicit enrichment,<sup>132</sup> the use or concealment of proceeds derived from the acts enumerated in the convention,<sup>133</sup> and participation as a principal, co-principal, agent, instigator, accomplice, accessory after the fact, in a conspiracy to commit

<sup>127</sup> See, AU anti-corruption convention, Art. 2(4), 3(2), 5(7), 13(3) and 14.

<sup>128</sup>The AU Anti-Corruption Convention, Art. 1.

<sup>129</sup>The AU Anti-Corruption Convention, Art.4 (1(a, b, e, and f).

<sup>130</sup>The AU Anti-Corruption Convention, Art.4 (1(c).

<sup>131</sup>The AU Anti-Corruption Convention, Art.4 (1(d).

<sup>132</sup>The AU Anti-Corruption Convention, Art.4 (1(g) and Art. 8.

<sup>133</sup>The AU Anti-Corruption Convention, Art.4 (1(h).

the enumerated acts,<sup>134</sup> and laundering the proceeds of corruption.<sup>135</sup> The convention can also be applicable for any other act or practice of corruption and related offences not described in the convention by the mutual agreement of two or more states parties.<sup>136</sup> By so doing, the AU anti-corruption convention covers a wide range of acts of corruption and related offences. In other words, it gives a wide definition for the term corruption.

States parties undertake to adopt “legislative and other measures to establish the acts stated in article 4 as offences;<sup>137</sup> strengthen national control measures to ensure that the setting up and operations of foreign companies in the territory of a state party shall be subject to the respect of national legislation;<sup>138</sup> establish, maintain and strengthen independent national anti-corruption authorities or agencies;<sup>139</sup> and adopt and strengthen mechanisms for promoting the education of populations to respect the public good and public interest’ and awareness in the fight against corruption and related offences”.<sup>140</sup> Besides, adopting “legislative and other measures to create, maintain, and strengthen internal accounting, auditing and follow-up systems, in particular, in the public income, custom and tax receipts, expenditures and procedures for hiring, procurement and management of public goods and services” also form part of the preventive strategy.<sup>141</sup>

There are also some specific preventive measures of corruption in the public sector. States parties should require public officials to declare their assets at the time of assumption of office during and after the term of office in the public service.<sup>142</sup> They are also required to establish an internal committee or a similar body which establishes a code of conduct

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<sup>134</sup>The AU Anti-Corruption Convention, Art.4 (1(i).

<sup>135</sup>The AU Anti-Corruption Convention, Art. 6.

<sup>136</sup>The AU Anti-Corruption Convention, Art. 1(2).

<sup>137</sup>The AU Anti-Corruption Convention, Art. 5(1).

<sup>138</sup>The AU Anti-Corruption Convention, Art. 5(2).

<sup>139</sup>The AU Anti-Corruption Convention, Art. 5(3).

<sup>140</sup>The AU Anti-Corruption Convention, Art. 5(8).

<sup>141</sup>The AU Anti-Corruption Convention, Art. 5(4).

<sup>142</sup>The AU Anti-Corruption Convention, Art. 7(1).

and monitors its implementation.<sup>143</sup> In addition, “develop disciplinary measures and investigation procedures in corruption and related offences;<sup>144</sup> ensure transparency, equity and efficacy in the management of tendering and hiring procedures in the public service;<sup>145</sup> and revoking the immunity of public officials for the purpose of investigation and prosecution of corruption” are measures taken by states parties to prevent corruption in the public sector.<sup>146</sup>

With regard to the private sector, states parties undertake to “adopt legislative and other measures to prevent and combat acts of corruption and related offences committed in and by agents of the private sector”.<sup>147</sup> The establishment of mechanisms which “encourage the participation of the private sector in the fight against unfair competition, respect for the tender procedures and property rights” also form a preventive strategy of corruption in the private sector.<sup>148</sup> The involvement of civil society and media by guarantying the right to access to information are also the preventive strategies of acts of corruption and related offences developed by the AU anti-corruption convention.<sup>149</sup>

The AU anti-corruption convention criminalizes acts of corruption and related offences.<sup>150</sup> It criminalizes those offences established by the convention and by the mutual agreement of states parties. The various acts explained above are criminalized. To this effect, the AU anti-corruption convention establishes jurisdiction for states parties to adjudicate acts of corruption and related offences.<sup>151</sup>

Despite the apparent reference to the impacts of corruption to human rights in the preamble, statement of objectives and principles; the AU

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<sup>143</sup>The AU Anti-Corruption Convention, Art. 7(2).

<sup>144</sup>The AU Anti-Corruption Convention, Art. 7(3).

<sup>145</sup>The AU Anti-Corruption Convention, Art. 7(4).

<sup>146</sup>The AU Anti-Corruption Convention, Art. 7(5).

<sup>147</sup>The AU Anti-Corruption Convention, Art.11 (1).

<sup>148</sup>The AU Anti-Corruption Convention, Art.11 (2).

<sup>149</sup>The AU Anti-Corruption Convention, Art.9 and 12.

<sup>150</sup>The AU Anti-Corruption Convention, Art.4, 5 (1), 6, and 8.

<sup>151</sup>The AU Anti-Corruption Convention, Art. 13.

anti-corruption convention did not stipulate a substantive provision to this effect. The AU anti-corruption convention though takes a rights based approach in preventing and combating corruption, it did not take rights formulation from the perspectives of victims of corruption. It neither provides for the compensation of victims of corruption nor provides any means by which the victims of corruption claim remedy for the violation of their rights. Though the AU anti-corruption convention brings some striking novelties to international efforts against corruption specifically by linking corruption and human rights, it does not spell out “the precise content of this relationship or reflect a coherent framework of remedies for individuals or groups whose human rights are violated as a result of corruption”.<sup>152</sup> Rather, it focuses on criminal sanctions, and leaves out victims, especially vulnerable and excluded individuals or groups, thus denying them direct access to remedies, such as compensation and restitution.<sup>153</sup>

Like the UNCAC, the AU anti-corruption convention devises a mechanism for asset recovery. In 2001, the TI-sponsored Nyanga Declaration on the Recovery and Repatriation of Africa's Wealth found that “an estimated \$20 to \$40 billion worth of assets have been corruptly misappropriated in Africa and shipped to foreign countries”.<sup>154</sup> The AU anti-corruption convention requires states parties to adopt legislative measures for the search, seizure, freeze, confiscation, and repatriation of corruption.<sup>155</sup> States parties are required to cooperate in asset recovery and assets derived from corruption should be returned to the requesting state even if extradition is not possible.<sup>156</sup> The AU anti-corruption

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<sup>152</sup> K. Olaniyan, ‘The African Union Convention on Preventing and Combating Corruption: A Critical Appraisal’, 4 *Afr. Hum. Rts. L.J.* (2004), p.74.

<sup>153</sup> *Ibid.*

<sup>154</sup> Press Release, Transparency International, ‘*The Nyanga Declaration on the Recovery and Repatriation of Africa's Wealth Illegally Appropriated and Banked or Invested Abroad*’, (2001), available at <[http://www.ipocafrika.org/cases/assestsrecovery/official\\_documents/NyangaDeclaration.pdf](http://www.ipocafrika.org/cases/assestsrecovery/official_documents/NyangaDeclaration.pdf)> as cited by R. Snider et al, *supra* note 42.

<sup>155</sup> AU Anti-corruption Convention, Art. 16(1).

<sup>156</sup> The AU Anti-Corruption Convention., Art.16 (2 and 3).

convention makes asset recovery not a mere criminal punishment but also a tool to further development objectives.<sup>157</sup>

### **3. THE LEGAL REGIME OF CORRUPTION IN ETHIOPIA**

As discussed in section 1, corruption is not a unique problem to a specific society or country. It is a universal problem which demands universal action. However, for the meaningful international intervention against corruption, the contribution and commitment of individual states to a campaign against corruption is having a paramount importance. In this regard, the role of states in ensuring international cooperation for the fight against corruption and in bringing accountability, transparency, integrity and rule of law to the governance practice is crucial.

Ethiopia had been both under imperial and military rules for a long time. Under these regimes the peoples' quest of democracy, human rights and good governance had been compromised. These regimes brought maladministration, corruption, poverty and socio-economic and political crisis to the people at large. All these lead to various revolutions which brought the end of both the imperial and the military regimes. After the end of the military rule and the coming into effect of the Federal Democratic Republic of Ethiopia's constitution (FDRE constitution), the ideals of democracy, human rights, good governance and development becomes both a legal and public discourse.

To further the practice of democracy, human rights, good governance and development in Ethiopia, the government believed that preventing and combating corruption will be of a great help. The government's commitment to fight corruption can be shown by its legislative action of criminalizing corruption by the criminal code, by the ratification of UNCAC and AU anti-corruption convention, by establishing the Federal Ethics and Anti-corruption commission with its special procedure and rules of evidence by proclamation. Recently, the parliament also enacted a proclamation for the disclosure and registration of assets with a view to

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<sup>157</sup> R. Snider et al, *supra note* 42, p. 24.

enhance transparency and accountability in the conduct of public affairs; and witness and whistleblower proclamation to safeguard the safety of those who cooperate with the law enforcement agencies.

Legislative action is one of the measures to fight corruption, but, it is not the only measure. There are also other measures as mentioned in the introductory part of the article which are helpful in fighting corruption though they are outside of this piece. Even the mere existence of law doesn't serve any purpose unless it is practically tested and there is a government commitment to implement it. Within this context, the legislative framework to fight corruption will have a huge impact in preventing and combating corruption. In this sense, the article aims to investigate the legislative framework of corruption in Ethiopia from UNCAC and AU anti-corruption convention perspectives.

### **3.1 .THE FEDERAL ETHICS AND ANTI-CORRUPTION COMMISSION**

After the adoption of the FDRE constitution, overall reform in the socio-economic and political system of the country was required. One of such reforms was the civil service reform program. The ethics sub program was one of the components in the national civil service reform program which was mainly designed to tackle corruption and improve the service delivery.<sup>158</sup> To strengthen the anti-corruption struggle the government established the Federal Ethics and Anti-Corruption Commission (FEACC) by proclamation in May 2001.<sup>159</sup>

The why of the FEACC are clearly stated in the preamble of the establishing proclamation. It is due to the fact that “corruption and impropriety hinders socio-economic and political development,

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<sup>158</sup>T. Shambo, Anti-corruption efforts in Ethiopia, conference paper presented on the theme Fighting corruption and safeguarding integrity, Global Forum V, Sandton, South Africa, 2-7 April 2007; see also Institute of Educational Research, Corruption in Ethiopia – submitted to the Ethics Sub-Programme of the Civil Service Reform Programme, 2001 Addis Ababa.

<sup>159</sup>Federal Ethics and Anti-corruption Commission establishment proclamation, Proclamation No. 235/2001, Federal Negarit gazzeta.

democratic process and sustainable development in the country”.<sup>160</sup> Besides, to create a corruption free society an independent government institution with a triple mandate of prevention, investigation and prosecution of corruption was deemed important. It is with these views that the FEACC was established.

The Anti-Corruption Authorities (ACAs) elsewhere has some common universal functions though not identical to fight corruption. These are investigation, prosecution, prevention, creating public awareness and disseminating education on the issue of corruption, and coordination of anti-corruption efforts and policies.<sup>161</sup> Not all ACAs integrate all of the above-mentioned functions in their anti-corruption efforts. For instance, while the Hong Kong Independent Commission Against Corruption model includes all functions except prosecution, other ACAs focus on just corruption prevention and education or may include investigation and prevention functions as well. In this regard, the determination of which functions ACAs include is usually consistent with the country’s national anti-corruption strategy.<sup>162</sup>

The FEACC seems to incorporate all functions which can be run by ACAs. It has the objective and power of educating the society about the evils of corruption; it has the role of prevention, investigation and prosecution of corruption offences and impropriety.<sup>163</sup> In its struggle to

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<sup>160</sup>*Id.*, Preamble.

<sup>161</sup> For a detail explanation see Alan, D. Watt and R. Williams, Why do developing country anticorruption commissions fail to deal with corruption? Understanding the three dilemmas of organizational development, performance expectation, and donor and government cycles, *Public Administration and Development*, (2007), Vol. 27 Issue 3, pp. 251 – 259; C. Nicholas, Mapping and Measuring the Impact of Anti-Corruption Agencies: A New Dataset for 18 Countries, The Quality of Government Institute, University of Gothenburg, (2008); and M. Patrick, Anti-Corruption Agencies: Rhetoric Versus Reality, University of Maryland, *The Journal of Policy Reform*,(2004) Vol. 8, No. 69 – 103,

<sup>162</sup> A. Tamyalew, A Review of the Effectiveness of the Federal Ethics and Anti-corruption Commission of Ethiopia, European Union and the International Bank for Reconstruction and Development /The World Bank, (2010).

<sup>163</sup>See The Revised Federal Ethics and Anti-corruption Commission Establishment proclamation, Proclamation No. 433/2005, Art 6 and 7.



avert corruption and endeavor to create a society who no longer tolerates the incidents of corruption and impropriety, the FEACC works in close cooperation with relevant bodies especially with investigation and prosecution offices both at the federal and regional level.<sup>164</sup> Even the FEACC can delegate its investigation and prosecution powers to the above mentioned offices.<sup>165</sup>

There is also a room by which the FEACC works with civil society organizations (CSOs) as there are CSOs which work on corruption issues. Nonetheless, the FEACC didn't utilize its opportunity of working with CSOs due to "concerns regarding the CSOs impartiality and individual political agendas".<sup>166</sup> However, up on the ratification of the UNCAC and AU anti-corruption convention, the government promises to work with CSOs and mass media. The AU anti-corruption convention calls states parties to create an enabling environment that will enable CSOs and mass media to hold governments to the highest level of transparency and accountability; especially it urges states parties to ensure the full participation of CSOs and the mass media in the fight against corruption.<sup>167</sup> Moreover, the UNCAC provides that, "Each State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption."<sup>168</sup> One of the important factors which impact the effectiveness of ACAs like FEACC is its collaborations with CSOs, mass media and non-governmental watchdogs.<sup>169</sup> In this regard, the activities of FEACC to let this happen is very minimal both from

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<sup>164</sup> *Id*, proclamation No433/2005., Art 8 and 9.

<sup>165</sup> *Ibid*.

<sup>166</sup> A. Tamyalew, *supra note* 162 p. 31.

<sup>167</sup> AU Anti-corruption Convention, Art 12.

<sup>168</sup> UNCAC, Art 13.

<sup>169</sup> J. Michael and J. Sahr, *Building a Clear Machine: Anticorruption Coalitions and Sustainable Reform*, (The World Bank Institutional Working Paper, Washington DC, The World Bank, (2002)).

practical and legislative points though it is given a mandate to undertake all acts necessary to implement those conventions at the time of ratification.<sup>170</sup>

The prevention, investigation and prosecution power of the FEACC is limited to the public sector. Cases of corruption in the private sector are beyond the reach of the FEACC. However, it is pretty clear that corruption may happen in every sector, categorically public sector, private sector and politics. A decision to exclude the private sector will be futile in the fight against corruption as the private sector contributes much to the national economy. The share of the private sector in Ethiopian GDP in 2008-9 was 84.8% and 80.1% respectively.<sup>171</sup> Hence, corruption in the private sector will adversely affect the development processes of the country; endanger human rights and fundamental freedoms of individuals, and hamper the anti-corruption struggle.<sup>172</sup> Moreover, both the UNCAC and the AU anti-corruption convention cover corruption both in the public and private sector. Under the AU anti-corruption convention, for instance, States Parties are required to take legislative and other measures to prevent and combat corruption and related offences committed in and by agents of the private sector.<sup>173</sup> Furthermore, UNCAC provides a detail account of measures which states should take to prevent corruption in the private sector. Even the provisions are of a mandatory character, “Each State Party *shall take measures*, in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where

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<sup>170</sup>See common article 3 of Proclamation No. 544/2007, a proclamation to provide for the ratification of the United Nations convention against corruption and proclamation no. 545/2007, a proclamation to provide for the ratification of the African Union convention on preventing and combating corruption.

<sup>171</sup> R. Kolli, A Study on the Determination of the Private Sector in Ethiopian Gross Domestic Product, Private Sector Development Hub/Addis Ababa Chamber of Commerce and Sectorial Associations, (2010), p. 69.

<sup>172</sup>For a detail discussion of the impact of corruption on human rights and development see B. Adugna, Rethinking International Anti-corruption Conventions: Elevating Corruption-Free service as a Human Right, *Lap Lambert Academic Publishing*, (2011).

<sup>173</sup>AU Anti-corruption Convention, Art 11.

appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures”.<sup>174</sup> However, the Ethiopian government in general and the FEACC in particular did not take such measures to date.

Both UNCAC and AU anti-corruption convention urge that independence of the ACAs be ensured.<sup>175</sup> There is a directly proportional relationship between the independence of ACAs and their success. Thus, the sovereignty of these bodies must be promoted and protected as far as possible and they must be given the opportunity to perform their mandates free of political interference. The revised establishment proclamation tries to guarantee the independence of the FEACC. The FEACC is free from any interference or direction by any person with regard to cases under investigation or prosecution or to be investigated or prosecuted.<sup>176</sup> The FEACC is autonomous only for its task of criminal jurisdiction. The cumulative reading of Article 4 with Article 3(2) has the intention and effect of according the Prime Minister the power to intervene in those areas of the Commission’s work which do not involve its prosecutorial and investigative roles. “In a word, the Prime Minister may intrude into such matters as the administrative procedures, organizational structure, strategic planning, budgetary dispositions and public profile of the FEACC.”<sup>177</sup>

Furthermore, the appointment and removal of the Commissioners of the FEACC will have an impact on the independence of the institution. The FEACC has two established executive posts, namely, Commissioner and Deputy Commissioner.<sup>178</sup> The Commissioner is nominated by the Prime Minister and appointed by the House of Peoples’ Representatives, while the Deputy Commissioner is appointed directly by the Prime

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<sup>174</sup>UNCAC, Art. 12.

<sup>175</sup> See Arts 6 and 36 of UNCAC and Art 5(3) of the AU anti-corruption convention.

<sup>176</sup>Revised Federal Ethics and Anti-corruption Commission Establishment proclamation, Art. 4.

<sup>177</sup>T. Mezmur and R. Koen, *The Ethiopian Federal Ethics and Anti-corruption Commission: A Critical Assessment*, *Law, Democracy & Development* (2011), Vol. 15, p.6.

<sup>178</sup>The Revised Federal Ethics and Anti-corruption Establishment Proclamation, Art 10.

Minister.<sup>179</sup> It is apparent that these executive positions are both political appointments, in which the wishes of the Prime Minister loom large. “Appointees who are perceived to be ruling party yes-men or women will hardly be in a position to secure the public confidence which is indispensable to the success of the anti-corruption programs of the FEACC.”<sup>180</sup> TI has recommended that an appointment mechanism which operates through parliamentary consensus, together with an external accountability mechanism such as multi-party Parliamentary Select Committee, can reduce opportunities of abuse of the appointments process or biased appointments.<sup>181</sup> The independence of the FEACC is questioned; even there are arguments that the FEACC was created principally to pursue powerful political figures who had fallen out of favor with the regime.<sup>182</sup>

With regard to removal of the executive bodies of the FEACC, there are three grounds for removal from office; violations of code of conduct, manifest incompetence and inefficiency and mental or physical illness.<sup>183</sup> Removal founded upon manifest incompetence and inefficiency are valid grounds, however, there should be an objective criteria. Otherwise, it will be prone to manipulation. Though, it is necessary to remove leaders who prove to be manifestly incompetent and inefficient; but it is necessary, too, to ensure that the ground of removal does not operate as a weapon of retaliation against “recalcitrant” anti-corruption leaders.<sup>184</sup> This may happen, for instance, in a situation where the FEACC has opted to investigate and possibly prosecute “protected” public officials.<sup>185</sup> It would appear that the crucial consideration here is the need for

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<sup>179</sup>*Id.*, art 10(1) & 10(2).

<sup>180</sup>T. Mezmur et al, *supra note 177* p. 7

<sup>181</sup> See J. Pope, *supra note 25*.

<sup>182</sup>EJ. Keller, Ethnic federalism, fiscal reform, development and democracy in Ethiopia, *African Journal of Political Science* (2002), Vol.7, No 21, p.19; See also J. Dizard, S. Kelly and C. Walker, *Countries at crossroads: a survey of democratic governance*, Maryland: Rowman& Littlefield Publishers, (2008), p. 315.

<sup>183</sup>The Revised Federal Ethics and Anti-corruption Establishment Proclamation, art 14(2).

<sup>184</sup>T. Mezmur, *supra note 177*.

<sup>185</sup>*Ibid.*

clearly delineated criteria of competence and efficiency. Absent such yardsticks, decisions on competence and efficiency stand to be bedeviled by political machinations.<sup>186</sup>

For instance, the first commissioner of the FEACC, W/o Enwey G/medihin, was removed from office before the expiry of her term of six years due to her decision to investigate the then chairman of the National Election Board, Ato Assefa Biru though he was released due to his acceptance of *Gile His*, self-critique.<sup>187</sup> W/o Enewey G/Medihin was removed from FEACC and appointed as a director of Government Housing Agency (*Yekiray Betoch Astedader*).<sup>188</sup> Even recently, the position of the Deputy Commissioner was vacant for ten months due to the removal of Ato Addisu Mengistu based on the allegation of his improper use of public property for private gain.<sup>189</sup> However, Ato Addisu Mengistu was transferred to the Ministry of Justice and assumes a post there.<sup>190</sup> Both Commissioners are members of the Ethiopian People's Revolutionary Democratic Front (EPRDF) and removed from office due to party critics or *gimgema*. However, the grounds for removal are stated in the proclamation and *gimgema* is not a ground for removal.<sup>191</sup> Even if it is said there is a violation of code of conduct, the violator should be brought to justice than assuming another post. It is a plain fact that the party affiliation of Commissioners and Deputy Commissioners will compromise the independence of the FEACC. It will be worse when the party politics gets involved in the FEACCs work.

In addition, even the investigation and prosecution of high level government officials on corruption charges has been a point of

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<sup>186</sup> *Ibid.*

<sup>187</sup> ስዮ አብርሃ ነፃነት እና ዳኝነት በኢትዮጵያ፣ ዜናዬ ማተሚያ ቤት፣ (2002)፣ ገፅ 63.

<sup>188</sup> *Ibid.*

<sup>189</sup> The Ethiopian Reporter, Feb 6, 2013.

<sup>190</sup> *Ibid.*

<sup>191</sup> The Revised Federal Ethics and Anti-corruption Establishment Proclamation No 433/2005, Art 14; and the Repealed Federal Ethics and Anti-corruption Commission Establishment Proclamation No. 235/2001, Art. 10.

controversy to the public.<sup>192</sup> It is not clear whether these officials are brought to justice due to their commission of the crime or their political dissent. There is diverse public opinion on these measures of the FEACC due to the perception of the public that the FEACC is not independent on the grounds mentioned above. Hence, the FEACC is unable to build public confidence due to its partisan affiliations.

### **3.2 SPECIAL PROCEDURE AND RULES OF EVIDENCE ON ANTI-CORRUPTION**

In addition to the ordinary criminal law and evidence rules which regulate criminal prosecution including corruption, the parliament enacted a proclamation on special procedure and rules of evidence on anti-corruption.<sup>193</sup> The special procedure and rules of evidence proclamation is provided with a view to effectively investigate and prosecute corruption offences.<sup>194</sup> Moreover, there is also a need to regulate a system under which a property acquired through a criminal offence could be restrained, administered and confiscated; and to provide for the rules of evidence compatible with offences relating to corruption.<sup>195</sup>

The proclamation deals with restraining and confiscation of property acquired by corruption offence, preparatory hearing, rules of evidence and protection of whistle blowers.<sup>196</sup> Under such headings there are detailed rules and procedures. Most of the rules and procedures are commendable to fight corruption if implemented properly. However, there are some rules which are in clear contradiction with procedural and evidence laws. For instance, if we see the confiscation procedure, the

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<sup>192</sup>Tamrat Layne (the then Prime Minister), Seye Abraha (the then ministry of defence), Abate Kisho (the then President of the Southern Nations, Nationalities and Peoples Region), and recently Melaku Fanta (Director of the Ethiopian Revenue and Customs Authority) and Gebrwahid W/giorgis (Deputy Director of the Ethiopian Revenue and Customs Authority).

<sup>193</sup>Anti-Corruption Special Procedure and Rules of Evidence Proclamation, Proclamation No. 236/2001, *Federal Negarit Gazzeta*.

<sup>194</sup>*Id.*, preamble

<sup>195</sup>*Id.*, Proclamation No 236/2001.

<sup>196</sup>*Id.*, Proclamation No 236/2001 See section two-six.

standard of proof expected to prove whether the person is benefited from the criminal conduct is that of the civil proceeding.<sup>197</sup> Nonetheless, corruption is a criminal offence and the standard of proof for criminal offence is proof beyond reasonable doubt not preponderance of evidence as in civil proceedings. Moreover, the proclamation also shifts the burden of proof from the prosecutor to the defendant “if the service is a government or a public service; if there is a ground which indicates a gratification has been sought, exacted a promise of, or received by the accused; and if the person who has sought or exacted promise of, or received gratification has a working relationship with the corrupter”.<sup>198</sup> But in criminal investigations, the prosecutor has a duty to prove the guilty of the defendant, not the defendant to prove his innocence in principle. However, the defendant has a right to prove his innocence by producing adverse evidence. In corruption cases however, the defendant may be found guilty not because the prosecutor proved his guilt beyond reasonable doubt but due to the defendant’s inability to prove his innocence.<sup>199</sup> More strikingly, the silence of the defendant may be considered as an admission of the offence of corruption.<sup>200</sup> Though there is a constitutional guarantee to remain silent.

The special procedure didn’t guarantee expressly the procedural rights of defendants though the constitutional rights are applicable. Even by an amendment, the right to bail is not available for the offence of corruption.<sup>201</sup> However, both in the statement of objectives and principles, the AU anti-corruption convention clearly states that the fight against corruption should be in conformity with human rights and

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<sup>197</sup>*Id.*, Proclamation No. 236/2001 Art. 24 see also Revised Anti-corruption Special Procedure and Rules of Evidence Proclamation, Proclamation No. 434/2005, Federal Negarit Gazeta, Art 33.

<sup>198</sup>Anti-Corruption Special Procedure and Rules of Evidence Proclamation, Proclamation No. 236/2001, Art 37.

<sup>199</sup> In Crimes of terrorism and crimes against the constitutional order, the burden of proof may be transferred from the prosecutor to the defendant. See Ministry of Justice, Criminal Policy of Ethiopia (2011), p. 33

<sup>200</sup>Anti-Corruption Special Procedure and Rules of Evidence Proclamation, Proclamation No. 236/2001, Art 38.

<sup>201</sup>Anti-Corruption Special Procedure and Rules of Evidence (Amendment) Proclamation, Proclamation No. 239/2001 Federal Negarit Gazeta. Art 2.

fundamentals freedoms.<sup>202</sup> In no way the fight against corruption will be successful by violating the human rights of corruption perpetrators.<sup>203</sup> In 2005 the special procedure and rules of evidence proclamation was revised.<sup>204</sup> The revised proclamation comes up with some procedural guarantees like the right to apply to court to be released on bail and the right to appeal to the higher court if aggrieved by the decision of the lower court.<sup>205</sup> In addition, it confers the Federal and regional high courts a first instance jurisdiction to adjudicate corruption offences failing under the jurisdiction of federal and regional government respectively.<sup>206</sup> It also repealed the rules of silence of the defendant as an admission.

The revised proclamation gives immunity to persons who provide substantial evidence as to the offence of corruption though they themselves are participants.<sup>207</sup> Moreover, in the case of hostile witnesses, the person who called the witness is authorized to raise leading questions to a prosecution or defense witness who, being unwilling to tell the truth, has given a statement contradictory from his previous statement.<sup>208</sup> The revised proclamation also has special rules which protect whistleblowers.<sup>209</sup>

There is also a rule regarding asset recovery. “Where the property acquired by corruption offence is a property of a public office or public enterprise or any other person, the appropriate organ shall inform such person to sue for the recovery of the property. The appropriate organ shall follow up the civil suit instituted by the public office or the public enterprise.”<sup>210</sup> Recovering assets is one of the measures which states parties are required to take to prevent and combat corruption as discussed

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<sup>202</sup>See the AU anti-corruption convention, Art 2 - 3.

<sup>203</sup>ሕፃ አብርሃ፡ 192 ላይ የተጠቀሰው.

<sup>204</sup>, Revised Anti-Corruption Special Procedure and Rules of Evidence proclamation, Proclamation No. 434/2005, *Federal Negarit Gazeta*.

<sup>205</sup>*Id*, Proclamation No 434/2005, Art 4 & 5.

<sup>206</sup>*Id*, Proclamation No 434/2005., Art 7.

<sup>207</sup>*Id*, Proclamation No 434/2005., Art 43, the repealed proclamation had also the same rule.

<sup>208</sup>*Id*, Proclamation No 434/2005, Art 44.

<sup>209</sup>*Id*, Proclamation No 434/2005, Art 48-54.

<sup>210</sup>*Id*, Proclamation No 434/2005., Art 32.



in section 2. Nonetheless, recovering assets is not sufficient by itself; the offense of corruption may bring damage to individuals, groups or peoples in general. Whenever, damage occurs as always will be, there should be a legal mechanism by which victims of corruption claim their compensation. The UNCAC urges signatories to take measures which can allow victims of corruption to claim compensation against those responsible for the damage.<sup>211</sup> As the justification of the special procedure and rules of evidence proclamation, as mentioned above, is to effectively fight corruption and devising procedures which are compatible to corruption; it is also necessary to devise a legal mechanism by which the victims of corruption are redressed. However, the proclamation didn't take into account the concern of victims of corruption; even if it attempts, it is only to the extent of recovering their own property.

As some commentators argue the proclamation did not take a human rights based approach of fighting corruption.<sup>212</sup> Moreover, it is also argued that the special procedure and rules of evidence are devised to dismantle the business of suspect corruption offenders.<sup>213</sup> Even if suspects may be free at the end of the trial, their properties (business) which are restrained will be dismantled due to improper use.<sup>214</sup> If it is the case, it will be against the right to property which is constitutionally guaranteed. Observance of constitutional and human rights principles in the fight against corruption will boost the public confidence on the FEACC, encourage COSs and media in particular and the society in general to fully participate and support the FEACCs struggle to avert corruption. Moreover, the objective of the criminal justice administration is to balance between the crime control and the due process model.<sup>215</sup> The public needs protection against crimes by “detection, apprehension,

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<sup>211</sup>UNCAC, Art 35.

<sup>212</sup>ሰዩ አብርሃም፣ 187 ላይ የተጠቀሰው.

<sup>213</sup>*Ibid.*

<sup>214</sup>*Ibid.*

<sup>215</sup> SK. Assefa, The Principle of the Presumption of Innocence and its Challenges in the Ethiopian Criminal Process, *Mizan Law Review* (2012), Vol. 6 No.2, p. 275.

prosecution and punishment of offenders” and at the same time the public also needs the observance of constitutionally guaranteed rights of suspects in the process.<sup>216</sup> The efficiency of the criminal justice administration is measured against the achievement of a balanced result between protection of the general public against crime and the right of the suspect and accused in the process.<sup>217</sup> Hence, it is important to respect the due process rights of corruption suspects in the struggle against corruption.

### **3.3. CORRUPTION UNDER THE CRIMINAL CODE OF ETHIOPIA**

The new Criminal Code of Ethiopia contains a fairly large list of acts which constitute corruption. These crimes are categorized under two sections which deal with crimes against public office. The first section deals with corruption crimes committed by public servants in breach of trust and good faith. These crimes are abuse of power, corrupt practices/bribery, acceptance of undue advantage, maladministration, unlawful disposal of object in charge, appropriation and misappropriation in the discharge of duties, traffic in official influence, illegal collection or disbursement, undue delay of matters, taking things of value without or with inadequate consideration, granting and approving license improperly and possession of unexplained property.<sup>218</sup>

When public servants commit these crimes, depending upon the circumstances and the offence they will be punished by simple or rigorous imprisonment not less than one year up to twenty five years and a fine of two hundred thousand.<sup>219</sup> In addition to public servants, councilors, arbitrators, jurors, trustees or liquidators, translator or interpreters engaged by the public authorities will also be criminally liable if they commit corrupt acts.<sup>220</sup> However, the criminal code makes

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<sup>216</sup>*Ibid.*

<sup>217</sup>*Ibid.*

<sup>218</sup> The Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No. 414/2004, Arts. 407-419.

<sup>219</sup> FDRE Criminal Code, Arts 407-419.

<sup>220</sup> FDRE Criminal Code, Art 410.

liable national public servants only. Nonetheless, the UNCAC in mandatory terms require states parties to criminalize bribery not only of national public officials but also foreign public officials and officials of public international organizations as corruption has an international dimension.<sup>221</sup> By the same token, the AU anti-corruption convention also criminalizes bribery by public officials or any other person in the performance of public duties.<sup>222</sup> Though the AU anti-corruption convention didn't expressly mention officials of foreign and public international organizations, it can include them all as it say any person running public duties.

More importantly, the criminal code lists acts of corruption are offences which will be punished if committed against public office as the title of the section clearly shows. Anyone with the exception of public officials is free to commit these offences in the private sector. Nevertheless, both the AU anti-corruption convention and the UNCAC criminalize corruption in the private sector as corruption in this sector greatly harms the society and the country at large.<sup>223</sup> Especially, the UNCAC provides the criminalization of bribery and embezzlement of property in the private sector.<sup>224</sup>

Furthermore, the UNCAC urges States Parties to adopt measures which are necessary to establish the liability of legal persons for participation in corruption offences.<sup>225</sup> The liability of legal persons can be "criminal, civil and administrative; however, such liability is without prejudice to the criminal liability of the natural persons who have committed the offences".<sup>226</sup> But, the criminal code did not consider the criminal liability of legal persons which participated in corruption offences as far as they are not in contact with the public offices.<sup>227</sup>

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<sup>221</sup>UNCAC, Art. 15 &16.

<sup>222</sup>AU Anti-Corruption Convention, Art 1(a &b).

<sup>223</sup>AU Anti-Corruption Convention, Art.11 and UNCAC, Art. 21 &22

<sup>224</sup>UNCAC, Art 21 & 22.

<sup>225</sup> *UNCAC, Art 26.*, Art 26.

<sup>226</sup> *UNCAC, Art 26*

<sup>227</sup> The FDRE Criminal Code, Art, 427(5).

The second section deals with crimes of corruption committed by third parties in connection with public office. The contrary reading of this section shows that third parties may commit corruption offences outside the realm of public office and left unpunished. Corrupt practices such as bribery, giving things of value without or with in adequate consideration, acting as a go-between, use of pretended authority and traffic in private influence are punishable acts if committed by third parties.<sup>228</sup> The punishment ranges from simple imprisonment or rigorous imprisonment up to fifteen years and a fine of fifteen thousand birr depending up on the offence and the circumstances.<sup>229</sup>

### **3.4. DISCLOSURE AND REGISTRATION OF ASSETS PROCLAMATION**

In order to develop and maintain public trust and confidence in government and its officials, it is important to develop and maintain systems of accountability and transparency.<sup>230</sup> These include putting in place the right legal, institutional and administrative arrangements that enable and support transparency and accountability in public service.<sup>231</sup> The disclosure and registration of assets proclamation is provided with a view to enhance transparency and accountability in the conduct of public affairs.<sup>232</sup>

Moreover, it also aims to avoid the possible conflict of interests, i.e. between public interest and private interest.<sup>233</sup> There are several mechanisms for dealing with conflict of interest in relation to elected and appointed officials and public servants. However, the most widely used

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<sup>228</sup> The FDRE Criminal Code., Arts 427-431.

<sup>229</sup>The FDRE Criminal Code, Arts 427-431

<sup>230</sup>G. Larbi, *Between Spin and Reality: Disclosure of Assets and Interests by Public Officials in Developing Countries*, (2005) (paper presented to conference on Redressing The State? Political Corruption in Development Policy and Practice, IDPM, University of Manchester).

<sup>231</sup>*Ibid.*

<sup>232</sup>A Proclamation to Provide for the Disclosure and Registration of Assets, Proclamation No. 668/2010, Federal Negarit Gazeta, Preamble.

<sup>233</sup>*Id., Proclamation No. 668/2010.*

mechanisms are those that try to avoid or minimize a conflict of interest from arising.<sup>234</sup> These include disqualifications from office and disclosure of personal interests.<sup>235</sup> Ethiopia opts to adopt the later approach by enacting disclosure and registration of assets proclamation. The proclamation is applicable to appointees, elected persons and public servants of the federal government and the Addis Ababa and Dire Dawa city administrations.<sup>236</sup> Regional governments will have their own disclosure and registration of assets proclamations; Tigray, Gambela, Southern Nations, Nationalities and Peoples, Oromia, Amhara and Benshagul Gumz enacted their respective proclamations and finalized their preparation to implement it.<sup>237</sup> However, all proclamations and regulations which are enacted to fight corruption are applicable both at the level of federal and regional governments. But in the case of disclosure and registration of assets proclamation, the same rule was not followed. Regional governments may have their own laws. One of the justifications for regional laws is to give each region a chance to incorporate its own peculiar features as regions are diverse in culture, custom and traditions. However, in the case of disclosure and registration of assets there is no compelling reason which justifies different laws.<sup>238</sup> If it is the case, the federal proclamation would have been applicable in the regions. There are also practical problems of enforcement; for instance, the FEACC registered the assets of 49, 833 appointees, elected persons and public servants; while the Tigray region Ethics and Anti-corruption commission registered the assets of 993.<sup>239</sup> Moreover, the other regions didn't begin registration.<sup>240</sup> More surprisingly the regional State of Somali, Afar and Harari didn't enact their own disclosure and registration

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<sup>234</sup> C. Gerald, Conflict of Interest: Legislators, Ministers and Public Officials, Transparency International, Berlin, (1998).

<sup>235</sup> *Ibid.*

<sup>236</sup> A Proclamation to Provide for the Disclosure and Registration of Assets, Proclamation No. 668/2010, Art 3.

<sup>237</sup> Annual report of the FEACC, Addis Ababa, 2012.

<sup>238</sup> Regional governments can enact laws by taking into consideration their peculiar features and consequently the nine regions may come up with different laws. If the nine regional laws are similar with themselves and the federal law, there may not be a need to have regional laws while the federal law can be applicable in the regions.

<sup>239</sup> Annual report of the FEACC, *supra note* at 237.

<sup>240</sup> *Ibid.*

of assets laws.<sup>241</sup> All these will have an impact on the national fight against corruption. Like its investigation and prosecution power, the FEACC can delegate its power of registration of assets to the regional Ethics and Anti-Corruption Commissions.

The review of disclosure practices shows that there are some basic questions which need to be addressed by disclosure laws.<sup>242</sup> These are i) who must disclose? ii) What must be disclosed? iii) What is the frequency of disclosure? iv) Where to disclose? v) Who has access to the information? Within these basic questions, the disclosure and registration of assets proclamation will be analyzed. By such standard the proclamation has a potential to further the fight against corruption in the federal government of Ethiopia.

Any appointee, elected persons or public servants are under obligation to register and disclose their assets.<sup>243</sup> In the definition part of the proclamation, the term appointees, elected persons and public servants are defined.<sup>244</sup> The legislative, executive and judicial organ officials; public servants and officials of public enterprises are under a duty to register and disclose their assets. The proclamation covers a wide range of appointees, elected persons and public servants; and thereby has an impact in safeguarding public confidence in the conduct of public affairs. The above mentioned persons are obligated to register and disclose their assets<sup>245</sup> “under their ownership or possession of themselves or their families and the sources of income and those of their families”.<sup>246</sup> However, common property acquired through inheritance and held by the

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<sup>241</sup> *Ibid.*

<sup>242</sup> L. George, Assessing Infrastructure for Managing Ethics in the Public Service in Ethiopia: Challenges and Lessons for Reformers, *International Review of Administrative Science*, (2001), Vol.68, No2, pp.251-262.

<sup>243</sup> A Proclamation to Provide for the Disclosure and Registration of Assets, art 4.

<sup>244</sup> For a detail list of persons who are obligated to register and disclose their assets see a Proclamation to Provide for the Disclosure and Registration of Assets , art 2 (4,5,6).

<sup>245</sup> *Id.*, Proclamation No. 668/2010 Asset means any movable or immovable or tangible or intangible property and includes landholdings and debts as per article 2(1).

<sup>246</sup> *Id.*, Proclamation No. 668/2010, Art 4(1).

heirs for private use, household goods and personal effects, and pension benefits are excluded from registration and disclosure.<sup>247</sup>

The FEACC is the custodian of the proclamation. It has a duty to register the assets of appointees, elected persons and public servants.<sup>248</sup> However, the FEACC can delegate fully or partially as the case may be to Ethics Liaison Units to register assets of appointees, elected persons and public servants.<sup>249</sup> Each Ethics Liaison Units should send the document of registration of assets to the FEACC within 30 days from the date of registration.<sup>250</sup>

In addition to its signal of government commitment to transparency and accountability, the disclosure of information on personal interest may be used as an early-warning mechanism, an indicator that a person whose financial profile and life style are inconsistent with his/her financial income should be required to explain the situation.<sup>251</sup> Such disclosure of information should be made on a regular basis; it is not a onetime activity. The frequency of disclosure and registration of assets in the proclamation is two years.<sup>252</sup> Within these two years' time if there are things which are inconsistent in the financial life of the appointee, elected person and public servant, they should explain it otherwise it can be an offense by holding unexplained property.<sup>253</sup> Even in times when the generated illegal income or asset may not be provable, the disclosure of information can be used as a separate vehicle for the detection of illicit enrichment and contribute to investigation and disciplinary procedures.<sup>254</sup>

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<sup>247</sup>Id., Proclamation No. 668/2010, Art 5 .

<sup>248</sup>Id., Proclamation No. 668/2010, Art 6(1).

<sup>249</sup>Id., Proclamation No. 668/2010, Art 6(2).

<sup>250</sup>Id., Proclamation No. 668/2010, Art 6(3).

<sup>251</sup>Organization for Economic Cooperation and Development (OECD, 2000), Trust in Government: Ethics Measures in OECD Countries, OECD, Paris.

<sup>252</sup>A Proclamation to Provide for the Disclosure and Registration of Assets, Art 7(3).

<sup>253</sup>Id, Proclamation No. 668/2010, Art. 13

<sup>254</sup> See Organization for Economic Cooperation and Development, supra note 251 and United Nations Center for Social Development and Humanitarian Affairs, (Crime Prevention and Criminal Justice in the Context of Development: Realities and Perspective of the International Cooperation: Practical Measures against Corruption,

With regard to the registered information, the public has access to all information regarding the registration of assets of an appointee, elected person or a public servant.<sup>255</sup> The FEACC and the concerned Ethics Liaison Units should make all information accessible to the one who wants once the person makes a written request to this effect.<sup>256</sup> Nonetheless, information regarding family assets is confidential unless the interest of justice or FEACC requires.<sup>257</sup> There is a calculated comprise between individual rights of privacy and public interest. The individual interest needs to be protected like the public interest.

The proclamation also puts some mechanism of avoiding conflict of interest. Whenever, there is conflict of interest appointees, elected persons and public servants have two duties.<sup>258</sup> The first is to refrain from giving decision or opinion on the case as well as from taking any action that may be inconsistent with their official duty or may compromise their loyalty. And the second is to disclose the situation to the concerned higher official. Accepting gifts, hospitality and sponsored travel is prohibited if it puts public interest in jeopardy though it is possible to accept when doing so is required for work relationship under the condition of deposit of the gift or disclosure to the FEACC or relevant ethics liaison units.<sup>259</sup> Following the event of conflict of interest, “any appointee, elected person or public servant should admit his fault and ask for apology or resign from office on his own initiative or required to do so by his superior”.<sup>260</sup> Furthermore, these persons are under a duty to avoid conflict of interest even after their post-employment for two years.<sup>261</sup> Such measures will have a huge contribution in safeguarding public trust if properly implemented and monitored.

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*International Review of Criminal Policy*, Nos. 41 &42, New York: United Nations, 1993).

<sup>255</sup>A Proclamation to Provide for the Disclosure and Registration of Assets, Proclamation No. 668/2010, Art 12(1).

<sup>256</sup>*Id.*, Proclamation No. 668/2010, Art 12(1)

<sup>257</sup>*Id.*, Proclamation No. 668/2010, Art 12(1)

<sup>258</sup>*Id.*, Proclamation No. 668/2010, Art 16.

<sup>259</sup>*Id.*, Proclamation No. 668/2010, Art 15.

<sup>260</sup>*Id.*, Proclamation No. 668/2010, Art 17

<sup>261</sup>*Id.*, Proclamation No. 668/2010, Art 18.



### 3.5. PROTECTION OF WITNESSES AND WHISTLEBLOWERS

Protection of witnesses is an essential element in preventing crimes. As crimes are committed within the society, the cooperation of the society with law enforcement agencies especially in terms of informing, testifying and preventing have a significant effect in making the streets free from crimes. At the same time, however, those persons who makes testimony or collaborate with law enforcement agencies in the prevention of crimes should be protected against retaliation measures by the wrong doer or some other persons. Especially in corruption cases the degree of protection to witnesses should be strong given the power and the money the accused may have and the measure s/he takes to destroy any potential evidence.

Due to the imminent danger to witnesses and whistleblowers, the UNCAC urges States Parties to take appropriate measures to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony to corruption offences.<sup>262</sup> Likewise, the AU anti-corruption convention also calls for States Parties to take legislative and other measures to protect informants and witnesses in corruption and related offences.<sup>263</sup> Equally important, the AU anti-corruption convention also requires States parties to adopt national legislative measures in order to punish those who make false and malicious reports against innocent persons.<sup>264</sup> However, on the contrary, the UNCAC seems in favor of protecting those who make reports against corruption offences in good faith and on reasonable grounds.<sup>265</sup> Even if the reports were false, it doesn't require signatories to punish those persons who made false reports.

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<sup>262</sup>UNCAC, Art 32.

<sup>263</sup>AU Anti-Corruption Convention, Art.5 (5).

<sup>264</sup>AU Anti-Corruption Convention., Art 5(7).

<sup>265</sup>UNCAC, Art 33.

Protection of whistleblowers in Ethiopia was part of the special procedure and rules of evidence proclamation.<sup>266</sup> However, it deals with whistleblowers only and the rules were not detailed. In 2010, a proclamation was enacted to protect witnesses and whistleblowers in criminal offences.<sup>267</sup> When we see the scope of application of the proclamation, it focuses on grave corruption cases and extends protection to witnesses and whistleblowers in its endeavor of fighting corruption. The protection provided will be applicable with respect to information or testimony or investigation under taken on a suspect punishable with rigorous imprisonment for ten or more years or with death without having regard to the minimum period of rigorous imprisonment.<sup>268</sup> Moreover, the protection will be given if two cumulative conditions are fulfilled. The first one is where the testimony or information of the witness or whistleblowers is the only evidence which proves the commission of the crime and the second one is where there is a “threat of serious danger to the life, physical security, freedom or property of the witness, the whistleblower or a family member of the witness or a whistleblower”.<sup>269</sup> However, for corruption crimes the punishment of which is below ten years, the proclamation will not be applicable. Due to the limited scope of application, one may infer that, corruption crimes the punishment of which is less than ten years will not be investigated and punished due to want of evidence though persons may have and failed to communicate due to the absence of protection.

Though the proclamation provides some protective measures to persons who are not protected, the measures are not strong and effective as they are related to payment of transport allowance and per diem, suspension of retaliatory administrative measure or taking some compensatory measure and the provision of counseling service to the witness or

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<sup>266</sup>See section 7 of the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No. 434/2005

<sup>267</sup>A Proclamation to Provide for the Protection of Witnesses and Whistleblowers of Criminal Offences, Proclamation No. 699/2010, *Federal Negarit Gazeta*.

<sup>268</sup>*Id.*, Proclamation No. 699/2010, Art.3 (1).

<sup>269</sup>*Id.*, Proclamation No. 699/2010, Art 3(1(a,b)).

whistleblower.<sup>270</sup> Even if the provisions of those protective measures need resource and economy, the fight against corruption should not be compromised for economical explanation. Since corruption consumes a large amount of money and the countries precious resources; so the fight against corruption should be pursued at any cost.

The protective measures available for witnesses and whistleblowers range from physical protection of person and property to concealing identity and ownership, to change in identity, to provision of self-defense weapon and immunity from prosecution for an offence for which he renders information.<sup>271</sup> Furthermore, “prohibiting an accused person from reaching the protected person’s residence, work place or school before or after a final judgment is delivered on the crime for which information is given; not to disclose the identity of a witness until the trial process begins and the witness testifies; hearing testimony in camera; hearing testimony behind screen or by disguising identity; producing evidence by electronic devices or any other method; provision of medical treatment free of charge at government hospitals in case of injury sustained as a result of retaliatory measure; covering costs of basic needs in case of incapacity to work as a result of retaliatory measure; in case of death as a result of retaliatory measure, covering funeral expenses and provision of pecuniary subsidy to family and assisting the protected person to secure job and education opportunity” are some of the protective measures.<sup>272</sup>

Despite the AU anti-corruption conventions call for the adoption of legislative measures to punish those who make false and malicious report against innocent persons, the proclamation didn’t address it. But by being a party to the convention, it is commendable to have such legislative measure to punish those who make false and malicious reports as it is equally important to safeguard the rights and freedoms of innocent people. The human rights approach of fighting corruption should be

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<sup>270</sup>*Id.*, Proclamation No. 699/2010, Art 3(2).

<sup>271</sup>*Id.*, Proclamation No 699/2010, Art 4

<sup>272</sup>*Id.*, Proclamation No. 699/2010, Art 4

adhered by States Parties such as Ethiopia to prevent and combat corruption.

### 3.6. ETHICS LIAISON UNITS

In addition to the FEACC which leads the fight against corruption at the national level, there are ethics liaison units in each public office or enterprise which coordinates ethical issues.<sup>273</sup> Ethics liaison units are established with three objectives in view. These are, “endeavor to create public employees who do not condone corruption by promoting ethics and anti-corruption education, work discipline, professional ethics, consciousness of serving the public and sense of duty among employees; prevent corruption and impropriety in public offices and public enterprises; and endeavor to cause acts of corruption and impropriety be exposed and investigated and appropriate actions are taken against the perpetrators”.<sup>274</sup>

In order to achieve these objectives, ethics liaison units are tasked with numerous functions such as raising awareness on corruption policies, laws and good conduct to officers and staffs of public offices and enterprises; continuous follow up as to the implementation of these laws and advising heads of public offices and enterprises.<sup>275</sup>

Ethics liaison units are accountable to the head of the respective public office and enterprise.<sup>276</sup> Due to this fact, the effectiveness of the ethics liaison unit to some extent depends on the commitment of the head of the public office or enterprise. Especially, on issues of ethical violations and corruption which may be made by high level officials, the determination of the ethics liaison units highly relies on the head of the public office or enterprise. Though there is a room for manipulation, the commitment and dedication of the ethics officer will play a significant role in bringing non-ethical and corrupt practices to the public. As the ethics officer is not removed without good cause, she will have as confidence in revealing

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<sup>273</sup>The Council of Ministers Regulation to Provide for the Functioning of Ethics Liaison Units, Regulation No. 144/2008, *Federal Negarit Gazeta*, Art 3.

<sup>274</sup>*Id.*, Reg. No 144/2008, Art. 4.

<sup>275</sup>*Id.*, Reg. No 144/2008, Art. 7.

<sup>276</sup>*Id.*, Reg. No 144/2008, Art 7.

non-ethical and corrupt practices.<sup>277</sup> More meaningfully, ethics liaison units can participate in an endeavor to create a corruption free society by dissemination of the ideals of public service, democracy, human rights, good governance and the evils of corruption. If they are allocated the necessary budget, human resource and independence, they can play a magnificent role in the respective public offices and enterprises in fighting corruption through investigation and awareness creation.

## CONCLUSION

Corruption has existed over millennia as one of the worst and the most widespread forms of behavior which is incompatible with the ideals of justice, democracy, the moral fabric of the society and human rights.<sup>278</sup>

Due to the universality of the problem, the international community devised a law with different measures to contain corruption. Hence, prevention, criminalization, remedies to victims and asset recovery are some of the measures which the UNCAC and the AU anti-corruption conventions urge States Parties to take both in the public and private sector.

Ethiopia joined this international movement against corruption by establishing a specialized anti-corruption agency, FEACC, and by ratifying the UNCAC and the AU anti-corruption conventions. Especially, after the establishment of the FEACC, the issue of fighting corruption in Ethiopia gets momentum. This is reflected in the adoption and revision of laws, rules of procedures and establishment of ethics liaison units. Though the above initiatives are essential ingredients in fighting corruption in Ethiopia, there are some loopholes in the legislative measures. First, the Ethiopian legal regime on corruption excludes the private sector though it contributes much to the national economy in terms of GDP and employment opportunity.

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<sup>277</sup>*Id.*, Reg. No 144/2008, Aart 16.

<sup>278</sup>Criminal Law Convention on Corruption, Explanatory Report, available at, <http://conventions.coe.int/Treaty/en/Reports/Html/173.htm> (last accessed 1 February 2013).

Second, the issue of independence of the FEACC in running its duties is questionable especially due to the government's involvement in tasks other than investigation or prosecution. Especially, the legal procedure and the practice of appointment and removal of the executive bodies of the FEACC fuels fire on its independence. Moreover, the FEACC is not in the position to work with CSOs and the media due to partisan concerns.

Third, the legal regime of corruption in Ethiopia didn't take a human rights approach; for instance, there is no adequate procedural guarantees for corruption perpetrators (the right to bail and appeal only are expressly provided in the Special Procedure and Rules of Evidence Proclamation), there is shift in the burden of proof (against the right of presumption of innocence), and there is a practice of improper use of restrained property (against the right to property). In general, it didn't take a human rights approach of fighting corruption as outlined by the AU anti-corruption convention. With regard to criminalization, as stated in the criminal code, it didn't cover corrupt practices/bribery which may be committed by foreign public officials and officials of public international organizations though the UNCAC mandatorily requires states to do so.

Fourth, there is no uniformity in the disclosure and registration of assets between the federal government and regional governments and within regional governments themselves. Some regions adopt their own laws; some are on the process and others didn't begin even the process. Due to such legislative measure, the implementation of disclosure and registration of assets laws at the national level is very low due to the fact that the regional governments didn't fulfill their own respective obligations. Even with regard to witnesses and whistleblowers proclamation, the scope of application is limited to grand corruption and excludes petty corruption and systematic corruption though the later types of corruption greatly affect the day to day lives of the society. Moreover, as a calculated compromise between individual right of freedom and public interest, there should be a law which punishes those who make false and malicious reports against innocent persons as

provided in the AU anti-corruption convention. However, this is not the case in Ethiopia.

More importantly, however, ethics liaison units can participate in an endeavor to create a corruption free society by dissemination of the ideals of public service, democracy, human rights, good governance and the evils of corruption. If they are allocated the necessary budget, human resource and independence, they can play a magnificent role in the respective public offices and enterprises in fighting corruption through investigation and awareness creation.

Finally, revising and incorporating the measures provided by the UNCAC and the AU anti-corruption conventions as discussed in the article will enhance the anti-corruption campaign in Ethiopia. The FEACC should take the lead in giving life to the measures envisaged by these conventions. To this end, especially, working with CSOs and the media is having a paramount importance.

## **ETHIOPIA'S ACCESSION TO THE WORLD TRADE ORGANISATION: LESSONS FROM ACCEDED LEAST DEVELOPING COUNTRIES**

Hussein Ahmed Tura<sup>\*</sup>

### **ABSTRACT**

*This article examines the experiences of least developing countries (LDCs) acceded to World Trade Organisation (WTO) in relation to their accession process, terms of accession and implementation of commitments with a view to drawing lessons which could be relevant to Ethiopia to devise successful strategies and avoid mistakes in an effort to gain maximum benefits from its WTO membership. Given that accession to the WTO is not an end in itself, Ethiopia should carefully and strategically negotiate to reap the potential benefits of membership in light of its long-term development strategies.*

**Keywords:** WTO Accession, LDCs, Ethiopia

### **Acronyms**

GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
LDCs	Least Developed Countries
MFTR	Memorandum on the Foreign Trade Regime by the Acceding Country
TRIPs	Trade Related Aspects of Intellectual Property
WTO	World Trade Organization

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## 1. INTRODUCTION

WTO was established to liberalize multilateral trade in the belief that liberalization of trade brings multiple benefits to the world population.<sup>1</sup> It had 30 LDCs, which were already members of the General Agreement on Tariffs and Trade (GATT), when it was established in 1995. As of March 2015, 32 countries completed their accession, which increased the number of members from 128 to 160, out of which only seven of them are LDCs: Cambodia and Nepal in 2004, Cape Verde<sup>2</sup> in 2008, Samoa and Vanuatu in 2012, Lao PDR in 2013 and Yemen in 2014. Currently, 35 LDCs are members of the WTO with eight more negotiating to accede.<sup>3</sup> Their application for membership was motivated by a desire to ensure predictable market access and become eligible for the special concessions available to LDCs under WTO rules.<sup>4</sup> Moreover, the countries hoped to use accession to the WTO as an incentive for accelerating domestic economic, legal and institutional reforms to create a stable business environment and attract foreign direct investment.<sup>5</sup>

Moreover, the establishment of the WTO represented a shift from a multilateral trading system based on diplomacy under the GATT regime

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<sup>1</sup> To this end, the preamble to the Agreement Establishing the WTO (Marrakesh Agreement) provides that “[t]he Parties to this Agreement, recognizing that their relations in the field of trade and economic [endeavor] should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand.” See Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 154, 33 I.L.M. 1167 (1994) [hereinafter WTO Agreement].

<sup>2</sup> Cape Verde graduated in 2007. Nevertheless, it negotiated its accession while it was still an LDC, and will be considered as one of the recently acceded LDCs in this analysis.

<sup>3</sup> Afghanistan (since 2004); Bhutan (since 2007); Comoros (since 2007); Equatorial Guinea (since 2007), Ethiopia (since January 2003); Liberia (since June 2007), Sao Tomé & Principe (since January 2005), Sudan (since October 1994), *WTO, Current State of Affairs on LDCs Accession to the WTO*: available at <http://www.ictsd.org/bridges-news/bridges-africa/news/the-current-state-of-affairs-on-ldcs-accession-to-the-wto> <visited 27 March 2015>.

<sup>4</sup> Simon Evenett and Carlos P. Braga, *WTO Accession: Lessons From Experience*: [www.academia.edu](http://www.academia.edu) <visited 11 March 2015>.

<sup>5</sup> *Ibid.*

to one that operates under the rule of law.<sup>6</sup> However, no guidance is given under Article XII of the Marrakesh Agreement on the terms to be agreed upon as it does not specify the procedures to be used for negotiating the terms of accession or the commitments expected from acceding countries or the scope and extent of demands that would be made by members. This makes the accession process demanding and time consuming.<sup>7</sup> It is also argued that the lack of clear guidelines of accession to the WTO has been allowing current member states to impose “WTO+” obligations on acceding countries, which is more burdensome especially on LDCs.<sup>8</sup>

Ethiopia has been in the process of accession to the WTO since 2003.<sup>9</sup> While the country exclusively reserves some service sectors such as financial institutions and telecom services to domestic investors,<sup>10</sup> the experiences of recently acceded LDCs show that liberalizing virtually all service sectors becomes a precondition to be a WTO member. The

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<sup>6</sup> *WTO Accession at Any Cost? Examining the Use of WTO-Plus and WTO-Minus Obligations for Least Developed Country Applicants*, 2008: <http://www.temple.edu/law/ticlj/ticlj22-1Nguyen.pdf>. <visited 12 March 2015>.

<sup>7</sup> Derk Bienen, *What Can LDCs Acceding to the WTO Learn from other Acceded Countries?* (BKP Development research and consulting discussion paper no. 01/2014. Munich), p5.

<sup>8</sup> *Supra* note 4.

<sup>9</sup> A working party was established by the General Council to examine its application on 10 February 2003. Ethiopia’s Memorandum on its Foreign Trade Regime was circulated in January 2007. The Factual Summary of Points Raised, prepared by the Secretariat, was circulated in March 2012. The Working Party met for the third time in March 2012 to continue the examination of Ethiopia’s foreign trade regime. [https://www.wto.org/english/thewto\\_e/acc\\_e/a1\\_ethiopia\\_e.htm](https://www.wto.org/english/thewto_e/acc_e/a1_ethiopia_e.htm) <visited on 12 March 2015>.

<sup>10</sup> Investment Proclamation No. 769/2012, Art. 7, *Fed. Neg. Gaz.* of the Federal Democratic Republic of Ethiopia, 18<sup>th</sup> Year No. 63, Addis Ababa (17th September, 2012); and Investment Incentives and Investment Areas Reserved for Domestic Investors Council of Ministers Regulation 270/2012, Art. 3. The following areas of investment are exclusively reserved for Ethiopian nationals:

- i. banking, insurance and micro credit and saving services;
- ii. packing, forwarding and shipping agency services;
- iii. broadcasting services; mass media services;
- iv. attorney and legal consultancy services;
- v. preparation of indigenous traditional medicines;
- vi. advertisement, promotion and translation works; and
- vii. air transport services using aircraft with a seating capacity of up to 50 passengers.

experiences also show that the process of accession and terms of commitments are so demanding which poses challenges to LDCs. On the other hand, it is argued that “commitments under General Agreement on Trade in Services (GATS) need not compromise the ability of the Ethiopian Government to pursue sound regulatory and macroeconomic policies.”<sup>11</sup>

This article examines the experiences of LDCs acceded to the WTO with a view to drawing lessons that will be helpful to Ethiopia to devise successful strategies and avoid mistakes in an effort to gain maximum benefits from its WTO membership. It is divided into six sections. Following this introduction, the second section briefly deals with the WTO accession process from legal point of view. The third section assesses the experiences of acceded LDCs during their accession process and accession negotiations. The fourth section highlights challenges encountered by acceded LDCs in the implementation of their accession commitments. The fifth section draws lessons from the experiences of LDCs that could be relevant to Ethiopia and other acceding LDCs. The last section forwards some recommendations.

## **2. WTO ACCESSION PROCESS**

### **2.1 LEGAL FRAMEWORK**

The WTO rules governing accession process are stipulated under Article XII of the Marrakesh Agreement.<sup>12</sup> Sub article 1 of this provision states that:

*[a]ny state or separate customs territory possessing full autonomy in its conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on the terms to be agreed between it and the WTO. Such accession shall apply to*

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<sup>11</sup> Tilahun Esmael Kassahun, “Ethiopia’s WTO Accession and Financial Services Liberalization: Striking the Balance between Trade Liberalization and Domestic Policy Space” *Mizan Law Review* (2012), Vol. 6 No.2, p240.

<sup>12</sup> *Supra* note 1.

*this Agreement and the Multilateral Trade Agreements annexed thereto.*

Closely resembling Article XXXIII of the GATT 1947, upon which its wording has been based, Article XII does not give any membership criteria, “terms to be agreed” and the procedure for negotiation. In other words, it does not identify any concrete steps nor does it provide any advice when it comes to the procedures to be used for negotiating the terms of accession. The deficit of Article XII regarding clear guidelines on how new members may join the WTO and the “terms to be agreed” opens door for burdensome accession experience.<sup>13</sup>

Taking such a challenge into consideration, the WTO members have committed themselves by the Doha Ministerial Declaration to “facilitate and accelerate” the accession process of LDCs which resulted in guidelines for the accession of LDCs that was approved by the General Council Decision in 2002.<sup>14</sup>

As far as *facilitation of the accession process* is concerned, Section III of the 2002 LDC Accession Guidelines stipulates that “efforts shall continue to be made, in line with information technology means and developments, including in LDCs themselves, to expedite documentation exchange and streamline accession procedures for LDCs to make them more effective and efficient, and less onerous.” It is argued, however, that the generality of this clause made the LDCs’ accession process burdensome, prolonged and demanding.<sup>15</sup>

With a view to further simplifying the accession process for LDCs, the 2012 Addendum to the 2002 LDC Accession Guidelines (paragraph 14) prescribes that “[m]embers shall refrain from reopening the accession package once negotiations have been completed and consolidated

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<sup>13</sup> Ratnakar Adhikari and Navin Dahal, *LDCs’ Accession to the WTO: Learning from the Cases of Nepal, Cambodia and Vanuatu*, (South Asia Watch on Trade, Economics & Environment, Kathmandu, Nepal), p5: <http://www.un-ngls.org/SAWTEE.doc>. <Last visited 12 March 2015>.

<sup>14</sup> WTO (2002), *Guidelines for Accession of Least Developed Countries*, WT/L/508: at [https://www.wto.org/english/thewto\\_e/acc\\_e/cbt...e/annex4\\_e.doc](https://www.wto.org/english/thewto_e/acc_e/cbt...e/annex4_e.doc). <Visited 26 March 2015>.

<sup>15</sup> Bienen, *Supra* note 7, p14.

schedules circulated for verification at the level of the Working Party.” Moreover, paragraph 17 stipulates for “periodic dialogues under the aegis of the Sub-Committee on LDCs with a view to deepening the understanding of issues relating to LDC accessions as well as to finding ways to address any difficulties encountered by the acceding LDCs” which could be taken as a potentially powerful tool.

Furthermore, section IV of the 2002 Guidelines prescribes for *technical assistance* that should be provided by the WTO members as follows:

*[e]ffective and broad-based technical cooperation and capacity building measures shall be provided, on a priority basis, to cover all stages of the accession process, i.e. from the preparation of documentation to the setting up of the legislative infrastructure and enforcement mechanisms, considering the high costs involved and to enable the acceding LDC to benefit from and comply with WTO rights and obligations.*<sup>16</sup>

In addition, paragraph 22 of the 2012 Addendum to the 2002 Guidelines states that:

*[t]he WTO Secretariat shall draw up technical assistance framework plans, based on inputs from the acceding LDCs, aiming at greater coordination and effective delivery of technical assistance at all stages of the process, making optimal use of existing facilities. The technical assistance framework plans will be demand driven and will be adjusted over time to reflect changes in acceding LDCs’ needs.*<sup>17</sup>

Acceded LDCs obtained limited supports, during their negotiation process, which was crucial to their negotiations. For instance, technical advice was given to Cambodian negotiators by group of experts from

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<sup>16</sup> WTO, *Guidelines for Accession of Least Developed Countries*, (2002) WT/L/508: at [https://www.wto.org/english/thewto\\_e/acc\\_e/cbt...e/annex4\\_e.doc](https://www.wto.org/english/thewto_e/acc_e/cbt...e/annex4_e.doc) (last visited 26 March 2015).

<sup>17</sup> WTO (2012), *Accession of Least-Developed Countries*, Addendum WT/L/508/Add.1.

UNCTAD.<sup>18</sup> Other bilateral and multilateral donors also provided help to the Cambodian government in conducting its accession negotiations.<sup>19</sup> Nepal also received technical assistance from UNDP, including support in the preparation of negotiating documents, building negotiating capacity and promoting public awareness of the WTO membership.<sup>20</sup>

## 2.2 PHASES OF WTO ACCESSION PROCESS

Procedures of accession to the WTO comprise four phases. In the first phase, a state or customs territory wishing to accede submits a formal written request to the WTO Director-General, who then circulates the request to all WTO members.<sup>21</sup> The WTO General Council considers the request and establishes a Working Party to closely examine the application that is open to all interested WTO members.<sup>22</sup> The applicant then submits to the Working Party a detailed memorandum on its foreign trade regime, describing, among other things, its economy, economic policies, domestic and international trade regulations and intellectual property policies.<sup>23</sup>

In the second phase, the Working Party members submit written questions to the applicant to clarify features of its foreign trade regime. After all necessary background information has been obtained; the Working Party starts meetings to focus on issues of inconsistency between the applicant's international and domestic trade policies and laws and the WTO rules and laws.<sup>24</sup>

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<sup>18</sup> Heike Baumüller, *et al* *Making WTO Membership Work for Least-developed Countries: Lessons from Nepal and Cambodia*, (International Institute for Sustainable Development, 2008), p5.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> *WTO Accession Explanation: How to become a member of the WTO*: [http://www.wto.org/english/thewto\\_e/acc\\_e/acces\\_e.htm](http://www.wto.org/english/thewto_e/acc_e/acces_e.htm) <visited 12 March 2015>.

<sup>22</sup> *Ibid.*

<sup>23</sup> Ratnakar Adhikar, Navin Dahal and Manisha Pradhanga, , *Ensuring Development-Supportive Accession of LDCs to the WTO: Lessons from Nepal*, (SAWTEE2008), p25.

<sup>24</sup> WTO Secretariat, *Accession to the World Trade Organization, Procedures for Negotiations under Article XII*, WT/ACC/1: <http://www.wto.org>. <visited 12 March 2015>.

In the third phase, an intensive multilateral and bilateral negotiation on the terms of accession goes on. The multilateral negotiations focus on the compliance with the WTO rules and disciplines while in bilateral negotiations each member of working party negotiates with the acceding country on the specific market access commitments.<sup>25</sup> The result of the negotiations is “the accession package” consisting of the Report of Working Party, the goods and services schedules, and the accession protocol.<sup>26</sup> The Working Party has the responsibility of determining the terms of accession and incorporating them in a draft Protocol of Accession, which is submitted to the General Council/Ministerial Conference.<sup>27</sup>

The final phase of accession process involves “the decision”. Once the final package, consisting of the report, protocol and lists of commitments is presented to the WTO General Council or the Ministerial Conference and a two-thirds majority of WTO members vote in favour, the applicant is free to sign the protocol and to accede to the organisation.<sup>28</sup> In most cases, the country’s own parliament or legislature has to ratify the agreement before membership is complete.

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

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> *WTO Accession Explanation: How to become a member of the WTO:* [http://www.wto.org/english/thewto\\_e/acc\\_e/acces\\_e.htm](http://www.wto.org/english/thewto_e/acc_e/acces_e.htm). <visited 12 March 2015>.

Table 1: WTO Accession Procedures <sup>29</sup>

Step	Procedure	
1.	The applicant sends a communication to the Director-General of the WTO indicating its desire to accede to the WTO under Article XII.	
2.	The communication is circulated to all WTO Members.	
3.	A Working Party (WP) is established and a Chairperson is appointed.	
4.	The WTO Secretariat informs the applicant about the procedures to be followed.	
5.	The applicant submits a Memorandum on its Foreign Trade Regime for circulation to all WTO Members.	
6.	The WTO Secretariat checks the consistency of the Memorandum with the outline format (Annex I) and informs the applicant and the members of the WP of its views.	
7.	WP members submit questions on the Memorandum and the applicant answers. (Repeat if necessary).	Acceding country submits initial offers on industrial tariffs, agricultural tariffs, services offer, existing regime on agricultural subsidies (ACC 4), descriptions of its services regime (ACC 5) and provides checklists on Agreement on Sanitary and Phytosanitary (SPS) Measures, Technical Barriers to Trade (TBT) (ACC 8) and Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) (ACC 9).
8.	The WP meets.	
9.	WP members submit and the applicant answers more questions on the Memorandum.	Bilateral negotiations between the applicant and interested WP members on concessions and commitments on market access for goods and services (as well as on the other specific terms of accession) are
10.	The WP meets again.	
11.	Repeat steps 9 and 10 above,	

<sup>29</sup> Posh Raj Pandey, Ratnakar Adhikari and Swarnim Waglé, *Nepal's Accession to the World Trade Organization: Case Study of Issues Relevant to Least Developed Countries*, 2014 (CDP Background Paper No. 23 ST/ESA/2014/CDP/23) p 6.



	until 12.	undertaken.
12.	The examination of the Memorandum is complete.	
13.	Terms and conditions (including commitments to observe WTO rules and disciplines upon accession and transitional periods required to make any legislative or structural changes necessary to implement these commitments) are agreed.	Concessions and commitments on market access for goods and services (as well as on the other specific terms of accession) are agreed.
14.	A WP Report is prepared.	The Schedule of Concessions and Commitments to GATT 1994 and the Schedule of Specific Commitments to the General Agreement on Trade in Services (GATS) is prepared.
15.	A draft Decision and a draft Protocol of Accession (containing commitments listed in the WP Report and the Schedule of Concessions and Commitments to GATT 1994 and the Schedule of Specific Commitments to the GATS) is prepared.	
16.	The WP adopts the 'accession package'.	
17.	The General Council/Ministerial Conference approves the accession package.	
18.	The applicant formally submits the instrument of ratification of the accession package.	
19.	The applicant notifies the WTO Secretariat of its formal acceptance.	
20.	30 days after step 19, the applicant becomes a Member of the WTO.	

Throughout these procedures, the burden is on the applicant to satisfy the demands of existing WTO members. As a result, the WTO accession process becomes very costly and complex; that the WTO accession process is taking longer and longer time to complete; that joining the WTO includes commitments that go beyond the Uruguay Round

agreements; and that the WTO accession process takes little account of the specific circumstances of applicant countries or their needs for special and differential treatment.<sup>30</sup> The basic problem is that the terms of WTO accession are not well defined in the WTO legal framework.

### 3. EXPERIENCES OF LDCs ACCEDED TO THE WTO

#### 3.1 DURATION OF ACCESSION PROCESS

Although the WTO members agreed “to facilitate and accelerate negotiations with acceding LDCs” at the 2001 Launch of the Doha Round of trade negotiations,<sup>31</sup> the accession process of acceded LDCs was not much shorter than that of other countries mainly because of capacity constraints and lengthy process in proceeding with the negotiations.<sup>32</sup> There is a clear tendency towards longer accession negotiations.<sup>33</sup> The seven LDC accessions have taken slightly longer ranging from 8.7 years (Cape Verde) to 17.2 years (Vanuatu).<sup>34</sup> In the case of Cambodia, the accession process (from application to full membership) lasted about 10 years while Nepal’s negotiations (from re-application) took a little over eight years.<sup>35</sup> Moreover, Republic of Yemen had to wait 14 years (from April 2000 to June 2014) to become the WTO member.<sup>36</sup>

Bienen argues that “[t]he trend towards longer accession negotiations have been explained by an observation that demands made by WTO members have become stronger and accession countries regardless of

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<sup>30</sup> Simon Evenett and Carlos Primo Braga, *WTO Accession: Lessons from Experience* (the World Bank Group, Trade Note 22 2005) p2: [www.worldbank.org](http://www.worldbank.org). <visited 12 March 2015>.

<sup>31</sup> Doha Ministerial Declaration, para. 42, (2001).

<sup>32</sup> Heike Baumüller, Ratnakar Adhikari and Navin Dahal, *Making WTO Membership Work for Least-developed Countries: Lessons from Nepal and Cambodia*, (International Institute for Sustainable Development 2008), p10.

<sup>33</sup> It has taken the 31 acceded countries 9.6 years from the formal request to become a WTO Member; while accessions that have been completed over the past ten years (i.e. since 2004) have lasted 13 years on average. *Supra* note 7, p7.

<sup>34</sup> *Ibid.*

<sup>35</sup> WTO Secretariat, information on current accessions: [http://www.wto.org/english/thewto\\_e/acc\\_e/completeacc\\_e.htm](http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm): <visited 12 March 2015>.

<sup>36</sup> *Ibid.*

their economic size have become more assertive regarding the level of commitments they are willing to make.”<sup>37</sup> Moreover, he finds that “accessions of LDCs tend to take longer because all WTO accessions involve a vast range of highly complex technical issues which require time to be negotiated, and especially so for countries with limited capacities.” Furthermore, “the scope of issues covered by WTO accession negotiations has expanded over time.”<sup>38</sup> Therefore, an acceding LDC could negotiate harder by taking more time amid the complex negotiation issues and procedural challenges.

### **3.2. COMMITMENTS OF ACCEDED LDCs**

#### **3.2.1 Tariff Bindings in Trade in Goods**

Despite WTO Members’ agreement to “exercise restraint in seeking concessions and commitments on trade in goods and services from acceding LDCs”<sup>39</sup>, acceded LDCs were asked to make concessions that not only are beyond their capacities and stage of development but also beyond the WTO requirements.<sup>40</sup> For instance, Nepal bound its tariff rates at 42% for agricultural products and 24% for industrial goods while Cambodia maintained only 28.1% for agricultural products and 17.7% for non agricultural goods. The two countries have some of the lowest average bound rates among the LDCs at 26% and 19% respectively.<sup>41</sup> Likewise, Cambodia’s maximum duty of 60% is one of the lowest among the LDCs. In contrast, most developed countries such as the EU (264%), USA (350%) and Japan (958%) have reserved the right to apply high tariffs on some products.<sup>42</sup> Besides, Nepal and Cambodia agreed to bind the vast majority of their tariff lines at 99.4% and 100% respectively. Quite the opposite, while over half of the LDCs have bound less than

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<sup>37</sup> *Supra* note 7, p7.

<sup>38</sup> *Ibid.*

<sup>39</sup> WTO (2002), *Guidelines for Accession of Least Developed Countries*, 2005 WT/L/508: at [https://www.wto.org/english/thewto\\_e/acc\\_e/cbt...e/annex4\\_e.doc](https://www.wto.org/english/thewto_e/acc_e/cbt...e/annex4_e.doc). (last visited 26 March 2015).

<sup>40</sup> Bau Muller, *Supra* note 18, p6.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

50% of their tariff lines, only nine incumbent LDCs have a 100% binding coverage.<sup>43</sup>

Although Nepal wanted to create a policy space for protecting the agricultural sector, should the need arises, by binding tariffs on agricultural products at an average of 60%, the developed member countries opposed such a proposal and Nepal was forced to bind its average tariff at 42% on the agricultural sector.<sup>44</sup> Even so, Nepal was successful in keeping bound tariffs both for agriculture and non-agriculture products at relatively high rates and maintained policy space through substantial “water” in its tariffs, compared to other acceding LDCs.<sup>45</sup> Table 2 shows the extensive market access commitments made by recently acceded LDCs during accession to the WTO.

*Table 2: Simple average, maximum and minimum bound tariffs of acceded LDCs (%)*<sup>46</sup>

Acceded LDCs	Agricultural goods- average final bound tariffs	Non-agricultural goods- average final bound tariffs	All goods - Average final bound tariffs	All goods- Maximum final bound Tariff
Nepal	41.5	23.7	26.0	100.0
Cambodia	28.1	17.7	19.0	60.0
Cape Verde	19.3	15.2	15.8	55.0
Samoa	25.8	20.4	21.1	100.0
Vanuatu	43.6	39.1	39.7	210.0
Lao PDR	19.3	18.7	18.8	90.0
Average LDCs	29.6	22.5	23.4	119.2
Average of original LDCs WTO Members			151	

<sup>43</sup> *Ibid.*

<sup>44</sup> Adhikar, *Supra* note 23, p5.

<sup>45</sup> Pierre Sauv , “Economic Impact and Social Adjustment Costs of Accession to the World Trade Organization: Cambodia and Nepal” *Asia-Pacific Trade and Investment Review* (2001), Vol. 1, No. 1, p29.

<sup>46</sup> Bienen, *Supra* note 7.

Compared to those of the original LDC members, the commitments of the newly acceded LDCs to the WTO are broader and deeper.<sup>47</sup> For instance, while Solomon Islands bound its average agriculture tariffs at more than five times, Bangladesh and Tanzania did the same at more than ten times their applied rates.<sup>48</sup> Although the gap between applied and bound tariffs in the non-agriculture sector is lower for Bangladesh, it is high for Tanzania and Solomon Islands.<sup>49</sup> On the other hand, binding coverage is high for Solomon Islands (100 per cent) and low for Bangladesh (15.5 per cent), which shows a trade-off between the level of bound tariff and the binding coverage (see table 3).

*Table 3: Bound and Applied Tariffs of Three LDCs (Founding Members of WTO)<sup>50</sup>*

Countries	Agriculture Simple average bound rates (%)	Agriculture Simple average MFN rates (%)	Agriculture Binding coverage (% of tariff lines)	Non-Agriculture Simple average bound rates (%)	Non-Agriculture Simple average MFN rates (%)	Non-Agriculture Binding coverage of tariff lines (%)
Bangladesh	192	17.6	100	34.4	14.3	2.6
Solomon Islands	72.7	14.8	100	79.4	9.2	100
Tanzania	120	19.9	100	120	11.5	0.2

<sup>47</sup> *Raj pandey etal, Supra* note 29.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> *Id.* p24.

### 3.2.2. Transition Periods

Acceded countries negotiate for transition periods to implement their accession commitments and membership duties. For instance, “30% of bound tariff lines are set at a higher rate upon accession and then reduced over a transition period.”<sup>51</sup> However, with the exception of Nepal and Cape Verde, acceded LDCs have negotiated transition periods for reducing bound tariffs only for a limited number of products. In this respect, Cambodia, Samoa, Vanuatu and Lao PDR used them for less than 100 tariff lines (out of more than 5,000) because of relatively high final binding overhang which does not require reduction of applied tariffs.<sup>52</sup> The acceded LDCs also committed to a gradual reduction of bound tariffs negotiated transition periods ranging from 3 to 10 years.

On the other hand, other non LDCs acceded to the WTO have negotiated better transition periods. For instance, Panama maintained 14 years of transition period while Vietnam succeeded in negotiating 12 years of transition period.

*Table 4: Use of transition periods of acceded LDCs*<sup>53</sup>

Country	No of bound tariff Lines	No of tariff lines with transition	Share of tariff lines with transition	Length of transition period (years)
Nepal	5,305	4,908	93%	9
Cambodia	6,823	4	0%	7
Cape Verde	5,794	3,538	61%	10
Samoa	7,694	26	0%	10
Vanuatu	5,060	98	2%	3
Lao PDR	10,694	48	0%	10
Average LDCs	6,895	1,437	26%	8.17

<sup>51</sup> Bienen, *Supra* note 7, p19.

<sup>52</sup> *Ibid.*

<sup>53</sup> Bienen, *ICL, Supra* note 7, p19.

Moreover, these countries made commitments to ensure that any changes made in their laws, regulations and practices would not result in a lesser degree of consistency with the provisions of relevant agreements and to implement the agreements progressively.<sup>54</sup>

### 3.2.3. Commitments on Trade in Services

In the area of services and investment, the acceded LDCs' accession packages are also described as overly extensive. Unprecedentedly, these countries made excessive commitments to liberalize trade in services, opening up all of the 11 service sectors under the WTO classification, some fully and others partially and with transition periods (including 70 sub-sectors in Nepal and 74 sub-sectors in Cambodia).<sup>55</sup> However, Bangladesh, also a LDC WTO founding member, liberalized only two sectors and 11 sub-sectors.<sup>56</sup>

Acceded LDCs did not put significant limitations.<sup>57</sup>

*The sectoral coverage and depth of commitments in these countries' schedules of commitments reflect their desire to utilize service commitments for overall economic development and trade promotion. Their commitments are in sectors that could contribute to improving the quality and efficiency of the services required by business, such as accounting, banking, insurance, management consulting, telecommunications and transport services. In addition, the commitments include sectors which contribute to developing skills required for a modern, knowledge economy (such as education, computer and related services) and also sectors which help improve health and environment conditions.*<sup>58</sup>

Cambodia, Cape Verde and Nepal allowed land lease for foreign investors and limited the employment of foreign nationals to intra-

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<sup>54</sup> Raj pandey, etal, *Supra* note 29, p24.

<sup>55</sup> Baumuller,etal, *Supra* note 18, p7.

<sup>56</sup> *Ibid.*

<sup>57</sup> Raj pandey, etal, *Supra* note 29, p24.

<sup>58</sup> *Ibid.*

corporate transferees like executives, managers and specialists.<sup>59</sup> Nepal was asked to open all services sectors in which it has made commitment for 100% equity participation by foreigners within a period of five years. Fortunately, it has succeeded in reducing foreign equity participation only up to 80% through active involvement of the voice of stakeholders and the firm stand of its negotiators,<sup>60</sup> whereby the Nepali nationals and domestic investors must participate as a precondition for the commercial presence of foreign service-providers in the country. Unlike Cambodia, which unbound subsidies, Nepal has reserved subsidies and tax benefits to wholly nationally-owned enterprises with a view to maintaining a policy space that enables it to encourage domestic service providers.<sup>61</sup> In addition, Nepal's schedule recognizes a special significance of environmental protection in which foreign investors are required to meet environmental standards.<sup>62</sup>

Although Nepal made better commitment than other LDCs like Cambodia with respect to market access, national treatment and sectoral regulations other than education, health and recreation services; *commitment of Nepal is generally ten times higher than that of Bangladesh*, which made commitments only in communication and tourism.<sup>63</sup>

While the commitments of acceded LDCs' cover all four modes of supply,<sup>64</sup> original LDC members such as Bangladesh, Tanzania and Solomon Islands made very limited commitments. For instance, Bangladesh made commitments only in telecommunications, and five-star hotels and lodging services; Tanzania committed only in hotels of four-stars and above.<sup>65</sup> Bangladesh also retained the right to restrict

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<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> WTO, "Report of the Working Party on the Accession of Nepal: Schedule of Specific Commitments in Services (2003e)." WT/ACC/NPL/16/Add.2.

<sup>62</sup> Raj Pandey, etal, *Supra* note 29.

<sup>63</sup> *Id.*, Raj pandey etal, p25.

<sup>64</sup> Pierre Sauvé, "*Economic Impact and Social Adjustment Costs of Accession to the World Trade Organization: Cambodia and Nepal*", Asia-Pacific Trade and Investment Review, (April 2000) Vol. 1, No. 1, p30.

<sup>65</sup> *Ibid.*



employment of foreign natural persons and to limit government subsidies and tax benefits to domestic service providers in its schedules.<sup>66</sup>

Table 5: GATS Commitment Index<sup>67</sup>

Sectors	Nepal	Cambodia	Bangladesh
Overall Index	33.34	49.08	3.36
Market Access	29.19	43.68	2.24
National Treatment	37.49	54.48	4.47
Business Services	30.32	31.58	0.00
Communication services	15.68	47.35	26.68
Construction/engineering services	14.73	50.00	0.00
Distribution services	54.45	66.09	0.00
Educational services	40.76	32.61	0.00
Environmental services	68.75	75.00	0.00
Financial services	47.58	64.29	0.00
Health/social services	25.53	23.40	0.00
Tourism/ travel services	66.73	69.12	33.09
Recreational/ cultural services	28.65	0.00	0.00
Transport services	13.25	25.29	0.00
Other Services	0.00	0.00	0.00

Much commitment was made by the acceded LDCs in mode 3, i.e., commercial presence, which is considered most significant by WTO members.<sup>68</sup> Besides, they liberalized commitments in mode 2, consumption abroad, without any limitations for their citizens consuming services (Vanuatu: 75; Nepal: 77; Lao PDR: 79; Samoa: 81; Cambodia: 89; and Cape Verde: 102).<sup>69</sup>

<sup>66</sup> Raj pandey etal, *Supra* note 29, p25.

<sup>67</sup> *Ibid.*

<sup>68</sup> Beinen, *Supra* note 7, p 22.

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

Bienen identifies the following conditions applied by acceded LDCs to mode 3 entry:<sup>70</sup>

- Economic needs tests;
- Conditions on the legal form of investments;
- Limitations on foreign ownership;
- Minimum investment thresholds;
- Conditions on recruitment of local staff;
- Requirements for joint ventures; and
- Phased or gradual opening of a sub-sector.

The main challenge faced LDCs was lack of regulations for all sectors which forced countries like Cambodia to leave sub-sectors unbound “until related laws and regulations are established.”<sup>71</sup>

### **3.2.4. Trade Related Aspects of Intellectual Property Rights (TRIPS)**

In relation to the TRIPS agreement, LDCs were required to undertake many obligations which are far beyond not only their particular capacities and needs but also beyond the requirement of WTO. For instance, as part of its action plan for implementing the TRIPS Agreement, Cambodia agreed to join the International Convention for the Protection of New Varieties of Plants (UPOV).<sup>72</sup>

However, the agreement leaves it up to its members to decide how they would like to protect plant varieties, be it through patents, a *sui generis* system (which could, but does not necessarily have to be UPOV) or a combination of both (Article 27.3b). For the purpose of flexibility, some countries opted to develop their own systems feeling that UPOV did not provide sufficient flexibility to ensure protection of the rights of farmers to freely save, re-use and exchange seeds.<sup>73</sup> Requiring Cambodia to

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<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*

<sup>72</sup> Nguyen (2008), *WTO Accession at Any Cost? Examining the Use of WTO-Plus and WTO-Minus obligations For Least-Developed Country Applicants.*; at <http://www.temple.edu/law/ticlj/ticlj22-1Nguyen.pdf>. <visited 12 March 2015>.

<sup>73</sup> *Ibid.*

accede to UPOV agreement has been considered a WTO “plus” provision since the General Council stated that being a signatory to the Plurilateral Agreements should not be imposed as a condition to membership.<sup>74</sup> In the case of Nepal, this requirement was dropped at the last minute following intensive lobbying efforts by Nepalese civil society groups.<sup>75</sup>

### 3.2.5. Special and Differential Treatment

The WTO agreements recognise the specific trade, development and financial needs of including LDCs. As per the 2002 LDC Accession Guidelines, both acceding and acceded LDCs are eligible for special and differential treatments starting from date of their membership. The Guidelines provide that “special and differential treatment, as set out in the Multilateral Trade Agreements, Ministerial Decisions, and other relevant WTO legal instruments, shall be applicable to all acceding LDCs, from the date of entry into force of their respective Protocols of Accession”.<sup>76</sup> Before the adoption of the LDC Accession Guidelines, countries were not entitled to any special and differential treatments under the terms of Article XII of the Marrakesh which gave rise to the following challenges:

*[n]egotiations must continue until WTO members are satisfied that no further concessions are possible; no matter the size of the applicant, bilateral negotiations could be protracted unless the applicant quickly concedes the vast bulk of the standardised demands of the (primarily large) WTO members; and although each accession is considered on its own merits, and there is, in legal terms, no setting of precedents, WTO Members are concerned about precedence in the sense that, whatever*

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<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> WTO (2002), *Guidelines for Accession of Least Developed Countries*, WT/L/508: at [https://www.wto.org/english/thewto\\_e/acc\\_e/cbt...e/annex4\\_e.doc](https://www.wto.org/english/thewto_e/acc_e/cbt...e/annex4_e.doc). <Visited 26 March 2015>.

*leniency is granted to one acceding country might be used as an argument by other acceding countries later.*<sup>77</sup>

Pursuant to the 2002 Guidelines:

*WTO Members shall exercise restraint in seeking concessions and commitments on trade in goods and services from acceding LDCs, taking into account the levels of concessions and commitments undertaken by existing WTO LDC Members. ... Acceding LDCs shall offer access through reasonable concessions and commitments on trade in goods and services commensurate with their individual development, financial and trade needs... Transitional periods/ transitional arrangements foreseen under specific WTO Agreements, to enable acceding LDCs to effectively implement commitments and obligations, shall be granted in accession negotiations taking into account individual development, financial and trade needs.*<sup>78</sup>

Despite the decisions of the WTO in 2002,<sup>79</sup> the cases of acceded LDCs show that the promises were not put into practice. In this respect, although LDCs are not required to undertake any reduction commitments with respect to agricultural export subsidies under the WTO Agreement on Agriculture,<sup>80</sup> Cambodia was forced to bind its agricultural export subsidies at zero, a commitment that no original LDC has been required to make.<sup>81</sup> With reference to this specific provision, Cambodia opposed the deprivation of its ability to utilize domestic export subsidies in order

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<sup>77</sup> Beinen, *Supra* note 7, p28.

<sup>78</sup> WTO, *Guidelines for Accession of Least Developed Countries* (2002), p.2-3. WT/L/508: at [https://www.wto.org/english/thewto\\_e/acc\\_e/cbt...e/annex4\\_e.doc](https://www.wto.org/english/thewto_e/acc_e/cbt...e/annex4_e.doc). <Visited 26 March 2015>.

<sup>79</sup> *Ibid.*

<sup>80</sup> Agreement on Agriculture, Marrakesh Agreement Establishing the World Trade Organization (1994), Annex 1A, Legal Instruments–Results of the Uruguay Round, 33 I.L.M. 1125, Art. 15 (2).

<sup>81</sup> Adhikari, Ratnakar/Dahal, Navin, *LDCs' Accession to the WTO: Learning from the Cases of Nepal, Cambodia and Vanuatu*, (Kathmandu: South Asia Watch on Trade, Economics & Environment (SAWTEE), 2003).

to support its agricultural industry.<sup>82</sup> The Working Party has been criticized for failing to grant the benefits favorable to LDCs under the Agreement since much of Cambodia's future economic development revolves around strengthening this industry.<sup>83</sup>

In addition, most of the acceded LDCs were forced to make commitments considered as excessive relative to their LDC status.<sup>84</sup> With regard to pharmaceutical patents, the 2001 Doha Declaration on the TRIPS Agreement and Public Health states that LDC members would be allowed until January 1, 2016 to implement or apply sections 5 and 7 of Part II of the TRIPS Agreement.<sup>85</sup> However, Cambodia was asked to adhere to a January 1, 2007 deadline for compliance to the entire TRIPS Agreement.<sup>86</sup> Before arriving at this date, Cambodia had originally requested a transition period for TRIPS compliance that would expire in 2009.<sup>87</sup>

Similarly, although the TRIPS Agreement provides transition period for LDCs, Nepal was asked to implement the most favoured nations and national treatment provisions contained in the TRIPS Agreement right from the date of accession.<sup>88</sup>

#### 4. IMPLEMENTATION OF WTO ACCESSION COMMITMENTS

WTO Members (including newly acceded LDCs) are expected to implement their accession commitments including reduction of applied tariffs, the opening of services, and/ or changes in regulation and administrative practices in accordance with the negotiated transition

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<sup>82</sup> Celine Charveriat & Mary Kirkbride (2003), *Cambodia's Accession to the WTO: How the Law of the Jungle is Applied to One of the World's Poorest Countries*, (OXFAM London, U.K): [http://www.oxfam.org.uk/what\\_we\\_do/where\\_we\\_work/\\_cambodia/downloads/Cambodia\\_accession\\_facts\\_final\\_Aug21.pdf](http://www.oxfam.org.uk/what_we_do/where_we_work/_cambodia/downloads/Cambodia_accession_facts_final_Aug21.pdf) <Last visited 11 March 2015>.

<sup>83</sup> Nguyen, supra note 72.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> Adhikar, *etal*, *Supra* note 23.

periods.<sup>89</sup> Violation of membership duties and accession commitments constitute legal responsibilities under the WTO's Dispute Settlement Body.<sup>90</sup>

The acceded LDCs undertook to implement ambitious legislative reform plans. For instance, Cambodia dedicated to pass no less than 47 laws and regulations by 2007 while Nepal was to enact 10 new laws and regulations and amend 25 existing laws and regulations.<sup>91</sup> However, both countries could not perform these plans at the scheduled time. Cambodia had adopted just only 24 of the 47 laws and regulations while Nepal had enacted three of the 10 new laws and adopted eight of the 25 amendments by the end of 2007.<sup>92</sup> Particularly, while Nepal lacks proper regulatory mechanisms in most of the services sector so far, none of GATS-related regulations have been adopted in Cambodia.<sup>93</sup>

Chea and Sok (2005) found that:

*The challenges facing Cambodia are two fold: enacting all necessary reform legislation for membership in time and carrying it out. As part of its accession to the WTO, Cambodia has made a large number of commitments in legal and judicial system reforms, including the enforcement of the rule of law and the establishment of a specialized commercial court. [...] Forty-seven laws and regulations are needed to fulfill WTO membership requirements. Fourteen laws and regulations have already been adopted, while the other thirty-three are to be passed within the next two years. [...] The schedule imposes the passing of more than two laws and sets of regulations per legislative working month. On past experience, however, the Cambodian parliament is not likely to meet the*

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<sup>89</sup> Bienen, *Supra* note 7, p 33.

<sup>90</sup> *Ibid.*

<sup>91</sup> Baumuller, etal, *Supra* note 18.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

*deadline; it has, on average, taken three months to adopt a piece of legislation.*<sup>94</sup>

Although Cape Verde agreed to enact legislation on customs valuation prior to its accession to the WTO<sup>95</sup>, it could not fully implement this commitment within the transition period agreed (2.5 years) and forced to renegotiate with members and the Secretariat in which it was granted a waiver for a year.<sup>96</sup>

Several factors are believed to cause the delays. Following the accession, the impetus to implement WTO-related reforms decreased quickly because outside pressure for reform declined significantly since there is no an international monitoring mechanism and consequence for not fulfilling accession commitments.<sup>97</sup> Furthermore, the progress was critically impeded due to limited capacities to draft, implement and enforce the laws and regulations and set up and manage the necessary institutions.<sup>98</sup> Multilateral and bilateral technical assistance activities have not been sufficiently comprehensive and effective even though they have happened after the countries' accessions.<sup>99</sup> The other challenge has been lack of coordination among the different donors. For instance, bilateral donors have tended to fund activities based on their national interests, such as to develop specific laws that were often drafted by foreign experts based on model laws from the donor countries.<sup>100</sup> Moreover, assistance has not been uniformly distributed among beneficiaries. Much of the assistance was directed to the ministries of

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<sup>94</sup> Samnang Chea and Hach Sok, (2005), *Cambodia's Accession to the WTO: 'Fast Track' Accession by a Least Developed Country*", in: Gallagher, Peter/Low, Patrick/Stoler, Andrew L (eds.): *Managing the Challenges of WTO Participation*, 45 Case Studies, (WTO/Cambridge UP, Case Study 8:[http://www.wto.org/english/ressp\\_e/casestudies\\_e/case8\\_e.htm](http://www.wto.org/english/ressp_e/casestudies_e/case8_e.htm) <visited 12 March 2015>.

<sup>95</sup> Full implementation of the Agreement on Customs Valuation would start from 1 January 2011 (2.5 years after accession).

<sup>96</sup> Bienen, *Supra* note 7, p33.

<sup>97</sup> Baumuller, etal, *Supra* note 18.

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*

<sup>100</sup> *Id.* p8.

trade and finance of the countries while assistance to other ministries remained inadequate.<sup>101</sup>

Generally, the technical assistance that the LDCs received after WTO membership has been inadequate. In particular, assistance has been lacking to help address constraints that prevent the countries from benefiting from WTO membership. As a result, WTO membership has not helped achieve key policy objectives related to trade, i.e. trade diversification and expansion.<sup>102</sup>

## 5. SUMMARY AND LESSONS FOR ETHIOPIA

The preceding sections show that the LDCs recently acceded to the WTO made broader and deeper commitments compared to those of the original LDC members. Their accession packages are generally deviated from the letter and purposes of the General Council Guidelines on the accession of LDCs. They were forced to accept more onerous terms of negotiations which go beyond their specific capacities and even the WTO requirements. These countries also faced variety of challenges in the course of their accession to the WTO due to lack of technical assistances and capacity to negotiate. It is expected that Ethiopia and other acceding LDCs may also face challenges similar to which the acceded LDCs had already encountered.

The following lessons could be drawn based on the experiences of LDCs in their accession process, negotiations and implementation of commitments:

1. Acceded LDCs had to pass through complex steps although the WTO members committed to simplify and streamline the negotiation process for LDCs. Furthermore, they faced challenges mainly because of imposition of strict demands from the developed WTO Members in the phase of bilateral negotiations.

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<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.*



2. The instances of commitments which the acceded LDCs were requested to make clearly show the tendency of the developed members to impose WTO+ conditions on LDCs. They were asked to make commitments that are not proportionate to their level of economic development, capacity, trade and financial needs. Their commitments are more onerous than the original LDC members as well as developing and developed country members. This shows that the WTO accession process is power based and one-sided.
3. Since the technical assistance that the acceded LDCs received after WTO membership was inadequate, they faced challenges to implement their accession commitments and to reap benefits from their WTO membership, particularly in realizing trade diversification and expansion.<sup>103</sup> Thus, it is learnt that technical assistance is vital not only in the process of accession but also to implement accession commitments so as to enable LDCs reap the benefits of WTO membership.
4. While countries like Cambodia agreed to accept more burdensome terms, Nepal was able to negotiate relatively more favorable terms of accession. Nepal was more successful than other LDCs because of the technical assistance it received during the accession process and chiefly due to stakeholder participation in the negotiation process. Thus, it is learnt that participation of stakeholders in the accession process is useful to ease the bargain against demands of the existing WTO members.
5. There should be some form of supervision in a country to implement the commitments made at the WTO as the implementation of the accession commitments has an implication on the credibility of the domestic policy regime. It is important to set a new deadline as soon as the time limit for the execution of a certain commitment expires.<sup>104</sup>
6. As part of WTO accession, ongoing commitment to trade reform is essential at the post-accession stage. However, the trade reform

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<sup>103</sup> Baumuller, etal, *Supra* note 18, p10.

<sup>104</sup> Raj Pandey, etal, *Supra* note 29, p29.

agenda should be forsaken if it is apparent to compromise development objectives like industrial development and protection of food security and livelihood.<sup>105</sup>

7. In addition to the implementation of WTO provisions and agreements at domestic level, execution of rules commitments sometimes requires legislative changes or the adoption of new laws and regulations in areas where domestic capability is insufficient. Given the significance of commitments on rules and disciplines for LDCs joined the WTO and short transition periods for the implementation of strictly difficult and multifarious rules of some WTO agreements, Ethiopia is expected to foresee required changes or development of new regulations. Early launch of the implementation process and identification of the regulatory changes and development of a comprehensive legal action plan is necessary.<sup>106</sup>

## 6. RECOMMENDATIONS

Ethiopia should not sprint to join the WTO by accepting onerous commitments that may be requested by the existing WTO members. It should negotiate more favorable terms in line with its development objectives and the potential benefits of the membership.

It should, in particular:

- a) ensure that tariffs are bound at a higher rate than the existing applied rates;
- b) negotiate for a transition period to implement accession commitments;
- c) maintain flexibility in tariff and domestic support and subsidy for agriculture like Nepal;
- d) negotiate to make use of the flexibility under GATS to open fewer sectors with limitations and conditions in line with its development situation and implementation capacities. In so doing, it should not repeat mistakes that most acceded LDCs committed by

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<sup>105</sup> *Ibid.*

<sup>106</sup> Bienen, *Supra* note 7, p38.

unconditionally accepting what was requested by the incumbent powerful members; and

- e) make use of the available support. This necessitates a rationalization of assistance by setting up a comprehensive trade related technical assistance plan.
- f) hold broader discussion on the implication of WTO membership with all relevant stakeholders including parliamentarians, business operators, researchers and civil society organizations.

## **THE CRIMINAL RESPONSIBILITY OF A PERSON WHO OWNS A VEHICLE APPREHENDED TRANSPORTING ILLEGAL COFFEE**

**Habtamu Bulti\***

### **ABSTRACT**

*A person who owns a vehicle apprehended transporting illegal coffee is punished by a fine of Birr 50,000 and an imprisonment of three to five years under Article 15(6) of the Federal Coffee Quality Control and Marketing Proclamation. The wording of the provision and different interpretation rules indicate that the crime is a strict or/and a vicarious criminal liability offence that punishes a person without the need for proving his guilty mind or guilty act. In practice, however, it is interpreted and applied inconsistently. Where some courts apply it as the direct meaning of the provision suggests, other courts penalize an owner of a vehicle apprehended transporting illegal coffee only where he carries out the illegal act personally. Furthermore, Article 23(6) of the Oromia Coffee Quality Control and Marketing Proclamation, which is intended to facilitate the implementation of the previous provision, conveys indefinite meanings as to the criminal responsibility of a person who owns a vehicle apprehended transporting illegal coffee. Hence, it further complicates the problem. Moreover, the provisions are encroaching on the fundamental human rights and the uniform application of the basic criminal principles in the country. In view of that, this article recommends that the Federal Legislature and Caffee Oromia should reconsider the criminal responsibility of a person who owns a vehicle apprehended transporting illegal coffee and reset the liability that goes with the spirit of the FDRE Constitution and the Criminal Code.*

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## INTRODUCTION

Coffee trade, which creates extensive job opportunities for Ethiopians and massively supports the economy of the country, is heavily affected by coffee quality problems and unlawful transactions. To reduce the factors that hold-down the income derived from coffee trade, the Federal Government of Ethiopia enacted Coffee Quality Control and Marketing Proclamation,<sup>1</sup> Regulation<sup>2</sup> and Directive<sup>3</sup> that aim at sufficiently supplying quality and competitive coffee to the global market. Pursuant to Article 12(4) of the Coffee Quality Control and Marketing Proclamation (hereinafter called the Federal Coffee Proclamation) any person who owns a vehicle or his agent is responsible to ensure the legality of coffee to be transported. Accordingly if a vehicle is apprehended transporting illegal coffee,<sup>4</sup> the owner of the vehicle or the agent who failed to discharge the obligation is punishable. Imprecisely, however, Article 15(6) of the Proclamation stipulates that any person who owns a vehicle apprehended transporting illegal coffee shall be penalized by fine and imprisonment. This provision fails to clarify the elements of the crime it establishes and the circumstance under which a person who owns a vehicle apprehended transporting illegal coffee is made criminally liable. The imprecision of the provision made legal practitioners interpret and apply the provision in contradictory ways. Some of them penalize a person who owns a vehicle apprehended transporting illegal coffee without proving fault and others penalize only where vehicle owners willfully or negligently allow their vehicle engage in illegal coffee transportation. The two differing decisions hold water independently. Where the first stand goes in line with other provisions of the proclamation and the circumstances under which it was promulgated,

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<sup>1</sup> Coffee Quality Control and Marketing Proclamation No. 602/2008.

<sup>2</sup> Coffee Quality Control and Transaction, Council of Ministers Regulation No. 159/2008.

<sup>3</sup> Coffee Quality Control and Transaction Directive No. 1/2009.

<sup>4</sup> The Federal and Oromia Coffee Proclamations did not clearly define the conditions under which coffee under transportation becomes illegal. Different provisions of the legislations, however, indicate that coffee under transportation that is not pre-inspected, unsealed or licensed can be labeled as illegal one.

the second one concurs straightforwardly with the general criminal law principles enshrined in the FDRE Criminal Code.

Article 19(3) of the proclamation authorizes regional states to issue laws necessary for the implementation of the proclamation. Pursuant to this authorization, (it can be argued that) Oromia Regional State promulgated a Coffee Quality Control and Marketing Proclamation<sup>5</sup> (hereinafter called the Oromia Coffee Proclamation). Article 23(6) of the proclamation establishes a criminal responsibility of an owner of a vehicle apprehended transporting illegal coffee in ambiguous wordings. It connects the subject of the sentence (an owner of a vehicle and a driver) with a conjunctive ‘and’. But it puts the next coming verb in singular. The subject-verb disagreement of the sentence made the provision render different and dissimilar meanings. All the possible meanings of the provision apparently stand inconsistent with Article 15(6) of the Federal Coffee proclamation.

Accordingly, this article assesses the meanings, applications and significances of the criminal responsibility of a person who owns a vehicle apprehended transporting illegal coffee under the Federal and Oromia Coffee Proclamations. It also evaluates the conformity of the liability with the basic criminal law principles.

## **1. ILLEGAL COFFEE TRANSPORTATION AND AN OWNER OF A VEHICLE: UNDER THE FEDERAL COFFEE PROCLAMATION**

### **1.1. THE MEANING OF THE PROVISION AGAINST OTHER PROVISIONS OF THE PROCLAMATION**

Article 15(6) of the Federal Coffee Proclamation reads that any person who owns a vehicle apprehended transporting illegal coffee, shall, in addition to confiscation of the coffee, unless punishable with a greater penalty as per any other relevant law, be penalized by a fine of Birr 50,000 and an imprisonment of not less than three years but not exceeding five years. Right from the start, the article deals with the

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<sup>5</sup> Proclamation Enacted to Decide Procedure of Coffee Quality Control and Coffee Trade in Oromia, Proclamation No. 160/2010.

criminal responsibility of a person who owns a vehicle apprehended transporting illegal coffee: it does not mention any act he failed to perform or a prohibited act he performed. Hence, the meaning of the provision is somewhat ornate and it needs interpretation.

There are different rules of interpretation that can be used to elaborate the meaning of a provision. Accordingly, the literal rule of interpretation, which is the most known one, provides that words of a statute must be given their plain, ordinary, and literal meaning.<sup>6</sup> The ordinary and plain meanings of the words are the representative of intention of the parliament. Where words of a statute are precise and unambiguous, therefore, there is no room for interpretation. In view of that, Article 15(6) of the Proclamation penalizes a person whose vehicle is apprehended transporting illegal coffee without the need for considering his guilty mind or/and guilty act.

On its part, the golden interpretation rule provides that words must be given their plain, ordinary, and literal meaning as far as they do not produce absurdity or an affront to public policy.<sup>7</sup> To mitigate some of the potential harshness arising from the use of the literal rule of interpretation, the golden rule provides that the meanings of words may be slightly modified to match with the rest of the instrument. Accordingly, the plain meaning of Article 15(6) is not absurd. It gives definite denotation that can be practically applied and gives sense. It also deters illegal coffee transaction and helps the country to derive more benefit from the lawful coffee marketing. Above all, as it is examined below, the ordinary meaning of the provision, most likely, agrees with the rest of the proclamation. Hence, it is more logical to insist on the plain meaning of the article even in accordance with the golden rule of interpretation.

The purposive approach is another interpretation rule that seeks the meaning of a provision with the intention of giving effects to its general purpose. It allows the court to look beyond the wording of the legislation

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<sup>6</sup> Finch Emily and Stefan Fafinski, *Legal Skills* (Oxford University Press, 2007), p72.

<sup>7</sup> *Ibid.*

to deduct parliament's intention in enacting a particular provision.<sup>8</sup> As expressed in the preamble of the proclamation, sufficiently supplying quality and competitive coffee to the global market is the general purpose of the proclamation. For adequately and sustainably exporting coffee is the primary goal, it can be argued that, illegal coffee transaction that reduces and interrupts coffee supply to the global market stands against the general purpose of the proclamation. Moreover, to control illegal coffee transaction it is not enough to penalize drivers and other instigators who personally involve in the illegal coffee transaction leaving behind the owner of the vehicle -the influential person and whose hand is invisible. For that reasons it is logical to argue that, it is more fruitful and falls within the general purpose of the proclamation to punish an owner of a vehicle apprehended transporting illegal coffee.

Intrinsic system of interpretation, searching a meaning of a provision within the context of the whole document, makes a meaning of the provision clearer. Article 15(4) of the Proclamation penalizes any person who unlawfully or inappropriate manner transports coffee by a fine of Birr 50,000 and an imprisonment of not less than three years but not exceeding five years. Accordingly, any person including an owner of a vehicle who involves in the illegal coffee transportation is answerable under this article. In other words, Article 15(4) punishes an owner of a vehicle who transports unlawful coffee by his vehicle or hires his vehicle for such activity or supports the transportation of same. For that reason, it is logical to argue that Article 15(6) is included to serve other purpose that is not covered by Article 15(4): a responsibility emanates from one's own undertakings.

Correspondingly, the punishment that Article 15(4) carries is the same as that established under Article 15(6) in imprisonment and fine. It is logical to argue that, had the legislature intended to penalize an owner of a vehicle who participates in the crime under the provision in different capacities other than the rest offenders, it would have established different punishments. It follows that Article 15(6) penalizes an owner of

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<sup>8</sup> Johnstone Quintin, *An Evaluation of The Rules of Statutory Interpretation*, Kansas Law Review (1954), Vol. 3, p14.



a vehicle who, at least, failed to control his vehicle from transporting illegal coffee but not for his involvement in the crime personally.

Article 12(3) of the proclamation provides that the owner of a vehicle that sustained malfunctions or against which a crime is committed while transporting coffee is responsible to report the same immediately to a concerned organ in the locality. A vehicle owner may not always be the driver of his vehicle to immediately witness the malfunctioning of the vehicle or the commission of a crime committed against it. Similarly, he may not be in a position to control his vehicle where he leases rents out it for long or short period of time. In all such circumstances, it is almost impossible for him to immediately report the malfunctioning of the car or the commission of a crime to a concerned organ situated at the place where such happenings take place. It is somewhat awkward to make him criminally responsible where he is not in the position to discharge the obligation. To uphold the interest of the country at the cost of an owner of a vehicle, the legislature intentionally made him bear the responsibility. In view of that, it is logical to argue that the wording of Article 12(3) also supports the direct meaning of Article 15(6).

The Coffee Quality Control and Marketing Directive under section 6.3.2.4 puts that an owner of a vehicle that transports coffee is fully responsible for the quality and amount of the coffee until it is delivered to the concerned organ at Ethiopian Commodity Exchange or at a port. While a vehicle is under the control of a leaseholder the quality or amount of coffee it transports to Ethiopian Commodity exchange or port may be damaged on the way. In such circumstances, primarily, the law makes the owner answerable for the damage of the coffee notwithstanding that the vehicle is under the control of the leaseholder. This provision also indicates that the law pays much attention to the quality and amount of coffee exported rather than the person who uses the vehicle. This civil responsibility also gives a clue that the law calculatedly made a person criminally responsible whenever his vehicle apprehended transporting illegal coffee.

Similarly, Article 12(4) of the Proclamation stipulates that an owner of a vehicle or his agent, before loading coffee, shall verify the coffee has

been prepared for transportation in conformity with the requirements provided by the law. As an agent is the representative of his principal the provision also informs and obliges the owner of a vehicle to load and transport only lawful coffee. Where the obligation is not fulfilled it makes him criminally responsible under Article 15(6). This article also establishes the idea that an owner of a vehicle apprehended transporting illegal coffee is criminally responsible where he failed to fulfill the obligation enshrined under Article 12(4).

## 1.2. THE APPLICATION OF THE PROVISION

Courts of the Oromia Region give various meanings to Article 15(6) and implement it in contradictory manner. They are primarily categorized into three. The predominantly used meaning goes in line with the Article 23 of FDRE Criminal Code principle which establishes that crime is only completed when all its legal, material and moral ingredients are present.<sup>9</sup> Accordingly, the courts insist that an owner of a vehicle is criminally responsible and punished under Article 15(6) only where he personally participates in the illegal coffee transportation by his vehicle.<sup>10</sup> They also support their argument by Article 12(4) of the Proclamation that puts obligation on an owner of a vehicle or his agent to verify the legality of coffee to be transported.

The provision puts obligation not only on the owner of a vehicle but also on the agent who has the opportunity to manage the vehicle. So, an owner of a vehicle should not be made always liable. The courts also rule in line of this argument. For example, in *Public Prosecutor vs. Rekik Begashaw*,<sup>11</sup> the defendant was charged under Article 15(6) for her vehicle was apprehended transporting illegal coffee. The Public Prosecutor did neither establish guilty mind nor guilty act. The defendant

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<sup>9</sup> Criminal Code of FDRE, Art 23(2). Article 57 of the Criminal Code also provides that a person is punished only where he has been found guilty thereof under the law. The latter article gives much emphasis on the importance of *mens rea* among the three elements of a crime.

<sup>10</sup> For example, see cases such as *Public Prosecutor vs. Hangasa Bite* and et.al, Gimbi District Court, File No. 15811 (June 2012) *Public Prosecutor vs. Bekele Gemechu*, Dendi District Court, file No. 26881 (August 2012)

<sup>11</sup> *Public prosecutor vs. Rakik Begashaw*, West Wollega High Court, File No. 19387 (August 2011)

adduced a written agreement that shows she leased out the car for chilli (pepper) transportation. Finally, the court ruled that Article 15(6) punishes an owner of a vehicle who in one or other involves in the commission of the crime. Correspondingly, in *Public Prosecutor vs. Abebe Haile*<sup>12</sup> and *Public Prosecutor vs. Negessa Bikila*<sup>13</sup> the courts ruled that an owner of a vehicle apprehended transporting illegal coffee is penalized only where he participates in the process of transporting the coffee or supported the undertaking in one of the capacities recognized in the FDRE Criminal Code.

The second applicable meaning given to Article 15(6) implies that an owner of a vehicle apprehended transporting illegal coffee is criminally penalized whenever the vehicle is under his control. Where a vehicle apprehended transporting illegal coffee is not rented/leased or managed by an agent, the owner is punishable under the provision though he participates not in the commission of the crime (for the reason that he failed to control the vehicle). Many cases have been discharged pursuant to this argument. For instance, in *Nurhusen Abdu vs. Public Prosecutor*<sup>14</sup> the defendant was charged under Article 15(6) for the reason that his vehicle was apprehended transporting illegal coffee. But he tried to defend himself that he sold the car a year before the commission of the crime. But the ownership title was not yet transferred to the buyer. Declining the defense, the High Court punished him by fine and imprisonment. The Appellate Court, Oromia Supreme Court, however, reversed the decision and reasoned that the vehicle was not under his control during the commission of the crime. A case between *Public Prosecutor vs Azmera Sinishawu*<sup>15</sup> also rendered in the same fashion. The court reasoned that a defendant is answerable only where he failed to discharge the responsibility enshrined under the proclamation: looking over the legality of the coffee to be transported.

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<sup>12</sup> *Public prosecutor vs. Abebe Haile*, Dendi Woreda, File No 6824 (September 2012)

<sup>13</sup> *Public prosecutor vs. Negessa Bikila*, Dendi Woreda, file No. 26823 (August 2012)

<sup>14</sup> *Nurhusen Abdu vs. public prosecutor*, Oromia Supreme Court, file No. 123260 (January 2012 ).

<sup>15</sup> *Public prosecutor vs. Azmera Sinishawu*, Dendi Woreda, file No. 12393 (August 2012).

The third meaning given to the article states that an owner of a vehicle apprehended transporting illegal coffee is penalized without the need to establishing further elements or criteria as to *mens rea* or/and *actus reus*. This stand goes in line with the straight and literal meaning of the provision. To cite an example, in *Public Prosecutor vs. Meri W/Yohanis*<sup>16</sup> and *Public Prosecutor vs. Huseen Abdu*<sup>17</sup> the defendants were owners of vehicles apprehended transporting illegal coffee. They adduced evidences which showed that they did not only participate in the illegal coffee transportation but also made agreements with the drivers not to transport the same in any circumstances. Without ensuring fault on the part of the defendants with regards to commission or omission, the courts penalized them under Article 15(6) of the Proclamation by fines and imprisonments. Supporters of this version of interpretation of the provision argue that, pursuant to Article 3 of the Criminal Code, the deviation of the provision from the general principles of the Criminal Code is acceptable. Graven also argues that for just exceptions it is possible to depart from the general principles of the criminal law.<sup>18</sup> Since, coffee plays crucial role in Ethiopian economy, it is possible to reason out that, it is acceptable to make the provision exception to the general principles of the Code with regards to *mens rea* and *actus reus* of the criminal elements.

### **1.3. IS ARTICLE 15 (6) OF THE PROCLAMATION A STRICT OR VICARIOUS CRIMINAL LIABILITY?**

In order for an accused to be found guilty of a criminal offence, according to the general principle of criminal law, the prosecution must prove that the accused committed the *actus reus* of the offence with the appropriate *mens rea*. However, there are two exceptions to this general principle: the strict and vicarious criminal liabilities.<sup>19</sup> Strict criminal liability is a liability for which guilty mind (*mens rea*) does not have to

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<sup>16</sup> *Public prosecutor vs. Meri W/Yohanis* and et.al, Western Wollega High Court, file No. 16360 (July 2010).

<sup>17</sup> Supra note 14.

<sup>18</sup> Philip Graven, *An Introduction to Ethiopian Penal Law* (Oxford University Press, 1965), P12.

<sup>19</sup> Peter J. Henning and Neil P. Cohen, *Mastering Criminal Law* (Oxford University Press, 2008), P73.

be proven in relation to one or more elements comprising guilty acts.<sup>20</sup> According to this principle, a person will be convicted even though he was genuinely ignorant of one or more factors that made his acts or omissions criminal. The defendants may not be culpable in any real way, i.e. there is not even criminal negligence, the least blameworthy level of guilty mind.

Strict liabilities are created by statutes. Unfortunately, statutes are not always clear enough in connoting crimes as strict liability offences: the courts are left to decide for themselves.<sup>21</sup> Courts can penalize a person without proving his guilty mind where the statute necessarily implies the non-requirement of the same. The test of necessary implication connotes an implication that is compellingly clear. Such an implication can be found in the language used, the nature of the offence, the mischief sought to be prevented and any other circumstances which may assist in determining what intention is properly to be attributed to parliament when creating the offence.<sup>22</sup> Additionally, necessary implication may arise not only from the statutory provision under review but also from the rules governing that provision to be deduced from other provisions. As the criminal responsibility of an owner of a vehicle apprehended transporting illegal coffee is created by a proclamation, the crime exactly fits with the first criterion of the strict criminal liability.

The seriousness of a crime is also used as a mechanism of ascertaining whether a crime is strict liability offence or not. Grave crimes that carry heavy sentences and bring about social stigma require the proof of blameworthiness and not categorized into strict criminal liability. In the case of *Sweet vs. Parsley*, Ms Sweet subleased a farmhouse outside Oxford.<sup>23</sup> She rented the house to tenants, and rarely spent any time there. Unknown to her, the tenants were smoking cannabis on the

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<sup>20</sup> Christine T. Sistare, *On The Use of Strict Liability in the Criminal Law*, Canadian Journal of Philosophy ((1987), Vol. 17, No. 2, P395.

<sup>21</sup> Richard G. Singer, *The Resurgence Of Mens Rea: III- The Rise and Fall of Strict Criminal Liability*, Boston College Law Review (1989), Vol. 30, Issue 2, No. 2, P341.

<sup>22</sup> Catherine Elliott and Frances Quinn, *Criminal Law*, 9<sup>th</sup> ed. (Cambridge, 1999), P41.

<sup>23</sup> Ibid.

premises. When they were caught, she was found guilty of being concerned in the management of premises which were being used for the purpose of smoking cannabis, contrary to the Dangerous Drugs Act of 1965. Ms Sweet appealed, on the ground that she knew nothing about what the tenants were doing, and could not reasonably have been expected to have known. The Appellate Court considered the crime as being a ‘true crime’ – the stigma had, for example, caused her to lose her job: they held that it was not a strict liability offence. The criminal liability of an owner of a vehicle apprehended transporting illegal coffee, however, carries five years imprisonment and a fine of 500,000 Birr. Since the punishment is grave, the crime falls short of squarely fitting with the second criterion of strict criminal liability.

Opposed to true crimes, strict liabilities are more often considered as regulatory offences.<sup>24</sup> A regulatory offence is one in which real moral issue is not involved. The requirement of *mens rea* is less strong for non-truly criminal offences.<sup>25</sup> Regulatory offences are the kind created by the rules on hygiene and measurement standards within the food and drink industry and regulations designed to stop industry polluting the environment in England. Similarly, most air safety regulations and operations of aircraft and un-manned rockets are enacted as strict liability offences in Australia.<sup>26</sup> In the case discussed above (*Sweet v Parsley*) the First Instance Court found the accused guilty of being concerned in the management of premises which were being used for the purpose of smoking cannabis, contrary to the Dangerous Drugs Act of 1965. The Applet Court also did not deny that the accused was responsible for the management of the premise. It reversed the judgment depending on the seriousness and consequential effects of the penalty. The ultimate objective of Article 15 (6) of the proclamation shares behaviors of regulatory offences: controlling the impacts of a business. Thus, the punishment described under the provision realizes the goal of controlling

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<sup>24</sup> G.Singer, Supra note 21, p362.

<sup>25</sup> In the case of *Sweet vs. Parsley*, Lord Reid acknowledged that strict liability was appropriate for regulatory offences, or ‘quasi-crimes’: offences which are not criminal ‘in any real sense’, and are merely acts prohibited in the public interest.

<sup>26</sup> Supra note 22.

a vehicle from transporting illegal coffee. Hence, there is a high possibility for the crime to be categorized into strict criminal liability offenses.

The fourth criterion deals with social concerns. Accordingly, crimes that affect public safety, health and economy of a country can be sorted out as strict criminal liability offence.<sup>27</sup> In many countries including England and United States, statutory rape crime attracts strict liability. Accordingly, the Sexual Offence Act of 2003 of England punishes an act of sexual intercourse with a person under age of 13 carries a life imprisonment punishment whether or not the accused has the knowledge as to the age of the child.<sup>28</sup> In the *R v G* the defendant in the case had only been 15 at the time of the alleged incident and the victim admitted that she had lied to him on an earlier occasion that she was above 13. The prosecution accepted the boy's claim that he had believed the 12-year-old girl to be 15, but he was nevertheless sentenced to 12 months detention.<sup>29</sup> Similarly, in United States statutory rape and drunk driving carry crimes that bear higher penalties which fall into this category. In the same way, in *Pharmaceutical Society of Great Britain v Storkwain*<sup>30</sup> a pharmacist supplied drugs to a patient who presented a forged doctor's prescription, but was convicted even though the House of Lords accepted that the pharmacist was blameless. The justification is that the misuse of drugs is a grave social evil and pharmacists should be encouraged to take unreasonable care to verify prescriptions before supplying drugs. In light of these practices, for a crime committed against coffee attracts social and state concern in Ethiopia the experience of many countries urge one to align Article 15(6) with strict liability offences.

Social policy also plays an important role in deciding an offence as strict liability. For example, in England, during the 1960s there was intense social concern about what appeared to be a widespread drug problem and

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<sup>27</sup> Supra note 19, P85.

<sup>28</sup> England Sexual Offence Act, 2003, Art 5 [http://www.legislation.gov.uk/ukpga/2003/42/pdfs/ukpga\\_20030042\\_en.pdf](http://www.legislation.gov.uk/ukpga/2003/42/pdfs/ukpga_20030042_en.pdf) (Accessed on March 31, 2015)

<sup>29</sup> *R vs. G* (2008) UKHL 37 (June 2008): <http://www.bailii.org/uk/cases/UKHL/2008/37.htm> (Accessed on April 15, 2014)

<sup>30</sup> *Pharmaceutical Society of Great Britain vs. Storkwain* (1986) 2 ALL ER 635.

courts imposed strict liability for many drug offences. Ten years later environment pollution had become one of the main topics of concern, and the justification of the decision depends on the importance of curtailing the impact. As mentioned above, coffee is the leading export item that earns foreign exchange to the country above other tradable commodity in Ethiopia, especially during the enactment of the proclamation. Its tradable volume and value, yet, fluctuates from time to time. Due to such fluctuations, during 2007-2010 Ethiopia was plagued by acute foreign exchange shortage; at the end of 2008, at the time when the Coffee Quality Control and Marketing Proclamation was promulgated. The foreign exchange reserves of the country dropped to less than one months of imports coverage.<sup>31</sup> To raise foreign exchange the government took many measures such as a trade balance improvement, better services trade performance, increased remittances and substantial official transfers.<sup>32</sup> Therefore, it is logical to argue that the then circumstance gives a clue that the parliament intentionally enacted Article 15(6) as strict criminal liability offence in order to increase coffee export volume and tackle the foreign exchange shortages. Accordingly, in general, it is reasonable to categorize the criminal liability of a person who owns a vehicle apprehended transporting illegal coffee into strict criminal liability.

In the same way, vicarious liability refers to legal responsibility for the actions of another.<sup>33</sup> It is the responsibility of any third party that had the right, ability or duty to control the activities of a violator. Pursuant to this liability, for example, the registered owner of a vehicle is expressly made liable by statute for fixed-penalty and excess parking charges even

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<sup>31</sup> Doing business in Ethiopia (2012) Country Commercial Guide For U.S Companies , page 3: <http://photos.state.gov/libraries/ethiopia/427391/PDF%20files/Final%202012%20Ethiopia%20Country%20Commercial%20Guide.pdf>, (accessed on May 16, 2014)

<sup>32</sup> Ibid.

<sup>33</sup> In the criminal law, courts and commentators use the term (vicarious liability) in several different ways. Sometimes, it refers only to cases that hold one criminally responsible for someone's conduct based on the relationship between them. In different time, it may be used to describe someone having liability for another's conduct even though he was not at fault. The term may also be used to refer to all situations in which one is held criminally liable for another's conduct.



if he is not at fault.<sup>34</sup> As discussed earlier, article 15(6) of the Federal Coffee Proclamation punishes an owner of a vehicle apprehended transporting illegal coffee though he was not the operator of the vehicle nor supported the commission of the crime at any degree. In view of that the criminal responsibility of an owner of a vehicle apprehended transporting illegal coffee can be fairly grouped into vicarious offences.

#### **1.4. ARTICLE 15(6) OF THE PROCLAMATION AND THE CRIMINAL JUSTICE SYSTEM OF ETHIOPIA**

Article 3 of the FDRE Criminal Code rules that the general principles enshrined in the code are applied to regulations and special laws except as otherwise expressly provided therein. Pursuant to Article 23(2) and 57(1) of the Code, a person who deals with coffee quality and transaction is criminally responsible only where he carries out a prohibited act with appropriate *mens rea* unless the application of the basic criminal principle is suspended by the Coffee Proclamation. However, the proclamation is not clear enough as to its deviation from the general criminal principles. Where the proclamation has not indicated the non-application of the basic criminal rules to coffee quality and marketing offences, therefore, the plain meaning of the provision does not stand up to the principles enshrined in the Criminal Code.

The absence of express diction, according to Article 3 of the Criminal Code, obliges judges to punish a person who owns a vehicle apprehended transporting illegal coffee only where he has contributed in the commission of the crime illegally transporting coffee. Interpreting the provision in view of that, however, refutes the very inclusion of the article in the proclamation for it overlaps with direct meaning of Article 15(4). Additionally, such interpretation neglects the overall meaning of different provisions of the coffee regulations: it appears to disagree with the intention of the legislature. The existence of the two confronting meanings and standings on Article 15(6) cancels out the general purpose of Article 3 of the Criminal Code: ensuring consistent agreements

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<sup>34</sup> Theodore J. Williams Jr., *Criminal Law- Municipal Ordinance Imposing Vicarious Criminal Liability Upon Registered Owner Of Automobile For Parking Violations Does Not Violate Due Process*, Tulsa Law Review, (1974), Vol. 10, Issue 2, P301

between the Criminal Code and especial criminal legislations and then uniform applications of criminal provisions in the country.<sup>35</sup>

Article 15(6) of the Proclamation punishes an owner of a vehicle apprehended transporting illegal coffee even where he do not perform the prohibited act or he is not mentally guilty of performing the act. Such criminal liabilities disagree with the right to choose and decide on one's own future. The right and competence of a person to control his character<sup>36</sup> is the central concern of criminal law. Similarly, as discussed above, the proclamation is not clear enough whether an owner of a vehicle apprehended transporting illegal coffee is punishable in accordance with strict criminal liability principle. The lack of clarity, however, resulted in contradictory applications of the law and perhaps made innocent individuals thrown into jail. H.L.A Hart argued that the clarity of a law and the criminal law's function of guiding behavior are taken as the key requirements of the rule of law.<sup>37</sup> The ambiguity of the law challenges the rule of law.

Article 20(3) of the FDRE Constitution stipulates that, during proceedings, accused persons have the right to be presumed innocent until proved guilty. Pursuant to this constitutional right an accused is presumed guiltless until the prosecutor proves he is blameworthy of the alleged facts. With regard to Article 15(6) of the Proclamation, it is not the prosecutor who proves the blameworthiness of a person who owns a vehicle apprehended transporting illegal coffee but it is the accused, largely, that disproves the assumption that he has the knowledge of the involvement of his car in illegal coffee transportation. In all cases presented to courts it was the accused that proved that he had no involvement in the carrying out of the illegal activities. For instance, in

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<sup>35</sup> Graven, Supra note 18.

<sup>36</sup> Charles Fried, *Nature and Importance of Liberty*, (W.W. Norton 2006), P39; Personal autonomy is a value that underlies the doctrine of *mens rea*. Limiting criminal liability to the blameworthy means that people are held "responsible" for what can be reasonably expected. It leaves men free from fear of restrictions... so long as they choose to act reasonably in view of the law's prohibition.

<sup>37</sup> H.L.A Hart's *Rule of Law: The Limit of Philosophy in Historical Perspective*, (Lacey, Nicola 2007) P13. <http://www.centropgm.unifi.it/quaerni/index.htm>, (assessed on May 8, 2013)

*Public Prosecutor v. Rekik Begashaw* (discussed before) the prosecutor proved the accused was only the owner of the vehicle apprehended transporting illegal coffee and the burden of disproving the assumption transferred to the accused. Hence, it logical to argue that, the wording of Article 15(6) of the Proclamation and its enforcement method challenge the right to be presumed innocent until proven guilty.

According to the Criminal Code,<sup>38</sup> rehabilitating a criminal is the chief purpose of a punishment. However, the main rationale of categorizing a crime as strict criminal liability and punishing a person accordingly lies on deterring other persons from involving in similar activities.<sup>39</sup> Penalizing a person not guilty of a wrong act and to make him example for others and reduce unwanted doings in the society directly contravenes individual rights. Additionally, the Constitution does not empower the state to use a person in such a manner.<sup>40</sup> Therefore, it is possible to argue that the purpose of Article 15(6) of the Proclamation fails to squarely fit to the rehabilitation underlying principle of the criminal justice system.

An owner of a vehicle may not be in a position to control his vehicle as to its involvement in illegal coffee transportation. For example, an owner of a vehicle who leased or appointed a managing agent on the vehicle for years is out of the reach of managing the vehicle. In that circumstance he may not be only devoid of guilty mind, but also participates not in the illegal activity in any capacity. Actually a person may not be penalized even according to strict liability without the person performed the *actus reus*. In the case of Article 15(6), however, many persons were penalized even where they did not perform the *actus reus* element of the crime depending on vicarious liability. Vicarious criminal liability, in principle, carries simple punishments,<sup>41</sup> but one that recognized in Article 15(6) is rigorous both in imprisonment and fine. In line with the degree of punishment, hence, the criminal responsibility of a person who owns a

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<sup>38</sup> For example, look at the preface of the Code.

<sup>39</sup> J.M. Kelly, *A Short History of Western Legal Theory* (1992), P 449 as quoted by J.G. Murphy and J. Coleman, *Philosophy of Law* (Cambridge University press 1990) P121.

<sup>40</sup> *Ibid.*

<sup>41</sup> J. Williams, *Supra* note 34.

vehicle apprehended transporting illegal coffee does not fully agree with the vicarious criminal liability itself.

The law of agency and Article 12(4) of the Proclamation give a clue that an owner of a vehicle can assign the power of management of the vehicle to a person who acts on behalf of him. Pursuant to Article 2211(1) of the Civil Code the assigned agent has the obligation to manage and control the vehicle from involving in illegal activities with due diligences. He is expected to verify the legality of coffee to be transported in accordance with the coffee regulations. In point of fact, Article 12(4) of the Proclamation personally warns an agent to make sure of the legality of coffee ready to be loaded on the vehicle he manages. Hence, the agent should have borne the outcome personally.<sup>42</sup> Nevertheless, the proclamation has not provided a provision that punishes or reprimands him, if he fails to discharge the responsibility. Failing to take the nature of crime put on the agent into consideration, Article 15(6) of the Proclamation penalizes an owner of a vehicle in general terms even where the vehicle transports illegal coffee due to the fault of the agent.

In general, the criminal responsibility of a person who owns a vehicle apprehended transporting illegal coffee sounds awkward to the criminal justice system of Ethiopia, especially with reference to the right of innocent individuals. Furthermore, it restricts vehicle owners to lease out vehicles, and thus brings impacts on restraining business transactions.

## **2. ILLEGAL COFFEE TRANSPORTATION AND AN OWNER OF A VEHICLE: UNDER THE OROMIA COFFEE PROCLAMATION**

Article 19(3) of the Federal Coffee Proclamation authorizes regional states to enact laws that are necessary for the implementation of the same. The Oromia Regional State issued Coffee Quality Control and Marketing Proclamation<sup>43</sup> to facilitate the implementation of the Federal

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<sup>42</sup> For the illegal coffee transportation is not falling within the ambit of personal principal-agent relations, the approval of the errors and faults committed by the agent pursuant to Article 2207 and 2214 of the Civil Code should not release him from the resulting consequences.

<sup>43</sup> Supra note 5.

Coffee Proclamation. It almost copied the Federal Coffee Proclamation provisions as to coffee quality control and marketing issues (including the criminal clauses). However, the provision deals with the criminal responsibility of a person who owns a vehicle apprehended transporting illegal coffee tends to disagree with the provision of the Federal Coffee Proclamation dealt with above. In view of that, this sub-topic scrutinizes the provision that deals with the criminal responsibility of an owner of a vehicle apprehended transporting illegal coffee under the Oromia Coffee Proclamation.

The Oromia Coffee Proclamation also establishes criminal responsibility of a person who owns a vehicle under Article 23(6)<sup>44</sup> in amorphous and ambiguous words. On one hand, the English version and the Afan Oromo and Amharic versions of the provision give completely different meanings.<sup>45</sup> On the other hand, the Afan Oromo and Amharic versions of the provision bear drafting problems. For example, the Afan Oromo version that reads, ‘*Abbaan konkolaataa fi konkolaachisaan kamiyyuu buna seeraan alaa fe’ee yoo shocho’e...*’ employs a verb in singular (*socho’e*) for the plural subject (*abbaa konkolaataa* and *konkolaachisaa*). The two versions connect an owner of a vehicle and a driver with a conjunctive word ‘and’ and made the subject plural.<sup>46</sup> The next coming verb (transport), however, was put in singular (transports) as though the subject was singular. The shortfalls in the sentence construction, in general, and the use of the word ‘and’, in particular, have brought about difficulties. For this reason, to make the sentence (provision) meaningful, as a solution, it is imperative to take the subject plural and the next

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<sup>44</sup> When the Afan Oromo and Amharic versions of the provision are put as they are read that an owner of a vehicle and a driver *transports* illegal coffee are penalized by a fine of Birr 50,000 and an imprisonment of not less than three years but not exceeding five years

<sup>45</sup> The English translation fails to agree with the Afan Oromo and Amharic versions. It simply punishes any person who commits manipulative acts to coffee quality and transactions with general terminologies and which somewhat obscure the smooth implementation of the same.

<sup>46</sup> ማንኛውም ባለሙኪና እና ሾፈር በሕገወጥ ቡና ጭኖ ቢንቀሳቀስ በወንጀል ሕግ የበለጠ የሚያስቀጣ ካልሆነ በስተቀር ቡናው ተወርሶ ብር 50000(ሃምሳ ሺህ) እና 3(ሦስት) ዓመት በታች ያልሆነ እና ከ5(አምስት) ዓመት ባልበለጠ እስር ይቀጣል።

coming verb in plural or to take ‘and’ as ‘or’ and put the next coming verb in singular.

To begin with, let us give ‘and’ its connective meaning and make ‘an owner of a vehicle’ and ‘a driver’ the subject of the sentence (provision): plural subject. Then the next coming verb (transport) becomes in plural. Accordingly, the sentence can be reconstructed as ‘An owner of a vehicle *and* a driver who *transport* illegal coffee are penalized by a fine of Birr 50,000 and an imprisonment of not less than three years but not exceeding five years’. Technically speaking, such construction makes the provision only punishes the two individuals where they engage in the crime jointly. Constructing the sentence in such a style also bears out other problems. For example, pursuant to this interpretation, an owner of a vehicle or a driver that transports illegal coffee on his own may not be punished. This side of the meaning of the provision lessens the effort to control illegal coffee transportation. Furthermore, it punishes an owner of a vehicle or a driver who personally engages in illegal coffee transportation. This conclusion, to some extent, becomes the replica of Article 23(4) of the same proclamation (discussed below).

Alternatively, to accord subject-verb agreement, it is important to make the subject of the sentence singular and the next coming verb in singular. Accordingly, the sentence can be reconstructed as, ‘An owner of a vehicle *or* a driver who *transports* illegal coffee is penalized by a fine of Birr 50,000 and an imprisonment of not less than three years but not exceeding five years’. To put differently, an owner of a vehicle is penalized by imprisonment and fine only where he personally transports illegal coffee: he is not punished for the fact that illegal coffee is transported by his vehicle. In line with this language, the provision appears to stand paradoxical with the plain meaning of Article 15(6) of the Federal Coffee Proclamation. As cases and practitioners make known, persons who are accused of their vehicles are apprehended transporting illegal coffee prefer to be treated under the Oromia proclamation to the Federal proclamation, and judges are always confused as to choosing the law they should put into effect.

Although the phraseology of the provision seems plain the purpose of the phrase ‘an owner of a vehicle’ is ambiguous and unclear. For the reason that a word ‘driver’ can take account of ‘an owner of a vehicle who drives a vehicle of his own’, it is possible to argue that, using the word ‘a driver’ only services the same goal. Hence, it is futile to use the phrase ‘an owner of a vehicle’. In the same way, if an owner of a vehicle was not treated as a driver, it was also possible to reframe the provision as ‘Any person who transports illegal coffee by his vehicle shall be penalized by fine and imprisonment’. For Article 23(4) of the proclamation penalizes any person who transports unlawful coffee being a driver or otherwise, and the word ‘any person’ encompasses an owner of a vehicle again it becomes useless to Article 23(6). The other side of the interpretation also gives the meaning that an owner of a vehicle who transports or makes to be transported unlawful coffee by his vehicle is punishable. The contrary reading of this interpretation indicates that an owner of a vehicle who transports illegal coffee by a vehicle belongs to another person is not penalized. This version of interpretation, however, contradicts Article 23(4) and the general purpose of the proclamation and it is almost unacceptable.

Pursuant to this interpretation Article 23(4) also punishes a driver who transports unlawful coffee opposed to Article 15(6) of the Federal Coffee Proclamation. A driver who transports illegal coffee is, as discussed above, penalized under Article 23(4); the Federal Coffee Proclamation also treats a driver under Article 15(4). The two articles punish a driver who transports illegal coffee by the same penalties. Therefore, it sounds meaningless to legislate two articles to punish a person for the same act. Hence, it can be said that, with regards to criminal responsibility of a driver, Article 23(6) is a mere repetition of Article 23(4).

Now let us presume that the word ‘and’ connects two titles- being a driver and an owner of a vehicle- rather than connecting two persons. Accordingly, the provision gives the meaning that a vehicle owner who transports illegal coffee being a driver of his vehicle is punishable by fine and imprisonment. This interpretation makes Article 23(6) deals only with a person who owns a vehicle as Article 15(6) of the Federal Coffee

Proclamation does. However, this side of the meaning of the provision also squarely falls within the meaning of Article 23(4) of the Proclamation for it punishes any person (including an owner of a vehicle that operates the same) who transports illegal coffee being a driver of his vehicle.

In general, due to drafting shortcomings or otherwise, the attempt of Article 23(6) of the Oromia Coffee Proclamation to reduce the practical dilemma created by the Federal Coffee Proclamation results in vain. It gives various meanings that lead practitioners implement the provision in contradictory manners. Furthermore, all possible meanings of the provision fail to make good agreement with the Federal Coffee Proclamation and it paves the way for conflict of laws.

### 3. CONCLUSIONS AND RECOMMENDATIONS

Article 15(6) of the Federal Coffee Proclamation penalizes an owner of a vehicle apprehended transporting illegal coffee even without the need for proving guilty act or guilty mind or both. The liability neither exactly matches with the *actus reus* and *mens rea* elements of a crime nor it is made exception to the basic criminal principles enshrined in the Criminal Code. The failure of the provision to conform to the rules of the Criminal Code has brought encumbrances to the endeavor to guaranteeing the uniform applications of criminal provisions in the Country.

The punishment can be grouped into both strict and vicarious criminal liability offences. But it has a proclivity for vicarious criminal liability. The provision imposes absolute liability that makes an owner of a vehicle criminally liable whenever his vehicle apprehended transporting illegal coffee (regardless of a showing that he is innocent).<sup>47</sup> As a result, the

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<sup>47</sup> With regards to vehicle ownership and criminal responsibility there are two types of liabilities in criminal justice system. The first is a criminal liability that provides the facts of violation and ownership together raise a *prima facie* presumption that the owner also a partaker of the commission of the crime in one or other. The second omits any reference to a *prima facie* presumption; it declares merely that whenever a vehicle participated in illegal activities the registered owner shall be subjected to the penalty for the violation. (J. Williams Jr., Theodore, *criminal law-Municipal ordinance imposing vicarious criminal liability upon registered owner of automobile for parking violations does not violate due process*, Tulsa Law Review, Vol.10, Issue 2, (1974), page 301.



provision shifted the burden of adducing evidences and proving from the prosecution to the accused. The practice also reveals the same. The public prosecutor proves only the ownership of a vehicle apprehended transporting illegal coffee and the defendant is presumed criminal. Opposed to the presumption of innocence recognized in the FDRE Constitution.

In principle, both strict and vicarious criminal liabilities are often considered as regulatory offences. Regulatory offences usually impose non-jail sentences such as fines. In rare cases, they carry imprisonments that are not rigorous. In view of that, Article 15(6) of the Proclamation should not have carried heavy penalties: an imprisonment of three to five years and a fine of Birr 50,000. Thus, it is totally unfair to penalize an owner of a vehicle with such potential incarceration and majority of fine who absolutely innocent of the involvement of his vehicle in illegal coffee transportation or who only failed to control his vehicle from transporting illegal coffee.<sup>48</sup> Therefore, it is recommendable that the Federal Legislature should bring the provision into agreement with the Constitution and the Criminal Code so as to ensure the fundamental human rights and freedoms as well as the consistent implementation of criminal liabilities in the country through the provision.

Regarding the criminal responsibility of a person who owns a vehicle apprehended transporting illegal coffee, Article 23(6) of the Oromia Coffee Proclamation tends to stand inconformity with Article 15(6) of the Federal Coffee Proclamation. With indeterminate number of subject of the sentence (the provision), it penalizes a person who owns a vehicle and transports illegal coffee being a driver of the same. Additionally, it punishes a driver who drives a vehicle apprehended transporting illegal coffee that already punished under article 23(4) of the same proclamation. In line of this interpretation, the provision becomes totally the replica of article 23(4) though it tries to be specific. As a result, it falls short of serving a purpose of its own.

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<sup>48</sup> Actually the Criminal Code of FDRE does not specifically recognize vicarious and strict criminal liabilities with reference to the criminal responsibility of natural persons. It only clearly recognizes them in the responsibilities of juridical persons under Article 23.

Due to a sentence construction problem the provision fails to pass a definite meaning. It passes meanings that other article entertains or contradicts with the general goal of the proclamation. Additionally, the English version and Afan Oromo and Amharic versions of the provision give dissimilar meanings. Hence, it is advisable that the *Caffee* Oromia should redraft the provision to get rid of the problem of sentence construction in such a way that it takes other provisions of the proclamation into consideration and conforms to the regulations and the goals of enacting the proclamation.

**YAADRIMEE KASAARAA AL-KALLATTII FI RAAWWII ISAA:  
SIRNA SEERAA ITOOPHIYAA KEESSATTI**

**Gammachiis Dhugumaa Dojaa\***

**ABSTRACT**

*In civil actions, whether contractual or extra contractual, a person who suffered injury as a result of the unlawful conduct of another will be entitled to compensatory damages. Different jurisdictions categorize recoverable damages as direct and indirect (consequential) losses. In contractual relation, consequential losses may be taken to mean losses which may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract as the possible result of the breach of it. Consequential pecuniary losses recoverable in tort concern analogous situations with those regarding breach of contract. Such consequential losses may include, inter alia, wasted expenditure and loss of profits caused by conduct of wrong doer. In Ethiopia, although the term “consequential loss” is not specifically stated in legislations, insurance policies frequently exclude the recoverability of consequential losses; the Federal Supreme Court Cassation Bench has also decided in some cases how and when consequential loss is recoverable. This article critically examines how the concept of consequential loss is included in Ethiopian laws and canvasses the recoverability of such losses in different causes of actions (contract, Tort, Insurance) with their tests. It explores the practice of some foreign jurisdictions in assessment of compensation for consequential losses in different cause of actions and evaluates with our current legal framework and practice.*

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## SEENSA

Dhaabbattootni inshuraansii biyya keenyaa tokko tokko imaammata (waliigaltee inshuraansii) qabeenyaa fi itti-gaafatamummaaf kennan irratti keewwata ‘yommuu miidhaan dhaqqabutti dhaabbatichi kasaaraa al-kallattii (consequential loss)<sup>1</sup> dhaqqabuuf itti hin gaafatamu’ jedhu fayyadamu.<sup>2</sup> Yommuu miidhaan ga’uttis keewwata kana bu’uureffachuun, yeroo tokko tokko immoo osoo keewwatni akkasii waliigaltee keessa hin jiraatiiniyyuu miidhaa dhaqqabe keessaa adda baasuun ‘kasaaraa al-kallattii ti’ waan ta’eef itti-gaafatamummaa hin qabnu falmii jedhu kaasu. Waa’een kasaaraa al-kallattii kun seerota biyya keenyaan adda bahee ifatti tumamee hin argamu. Haata’u malee, Dhaddachi Ijibbaata Mana Murtii Waliigala Federaalaa falmiiwwan kasaara al-kallattii hariiroo waliigaltee inshuraansii keessatti ka’an galmeewwan lakk.27565, 22162 fi 47076 irratti qajeeltoo garaagaraa bu’uureffachuun murteesseera. Dhaddachi Ijibbaataa dhimma isa jalqabaa irratti dhaabbatni inshuraansii kasaaraa al-kallattii miidhaa hordofuun dhufe kaffaluu dhiisuuf dursa waliigaltee daangessee waan hin qabneef itti-gaafatama yoo jedhu,<sup>3</sup> dhimma isa lammaffaa irratti immoo dhaabbatni inshuraansii balleessaa ofii isaa raawwate waan hin jirreef sababni beenyaa kasaara al-kallattii kaffaluuf hin jiru jedheera<sup>4</sup>. Dhimma isa sadaffaa irratti beenyaan miidhaa kasaara al-kallattii fi beenyaan miidhaa bu’uura Seera Hariiroo Hawaasaa (SHH)

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<sup>1</sup> Barruu kana keessatti ‘Kasaara al-kallattii’ kan jedhame Afaan Ingilffaan “consequential loss” kan jedhamu yoo ta’u yeroo tokko tokkos “Indirect loss” , “special loss” jedhamuun beekama (Glenn D. West and Sara G. Duran, *Reassessing the ‘Consequences’ of Consequential Damage Waivers in Acquisition Agreements*, The business lawyer (2008), Vol.63, P788 ilaalaa).

<sup>2</sup>Fakkeenyaaf, dhaabbatni Inshuraansii Awwaash uunka imaammataa haguuggii konkolaataa daldalaaf maamilli akka guutuuf qopheesse lakkoofsa 7 (II) (b) fi 7 (II) (m) irratti dhaabbatichi kasaaraa al-kallattiif itti gaafatamaa akka hin taane kaa’a.

<sup>3</sup> Dhaabbata Inshuraansii Itoophiyaa (Iyyataa) fi Obbo Damissee Warqinee faa (n-2) (waamamtoota) murtii Dhaddacha Ijibbaata Mana Murtii waliigala Federaalaa (2001), jildii 5, FF128-130.

<sup>4</sup> Dhaabbata Inshuraansii Afrikaa (Iyyataa) fi Obbo Bisiraat Gollaa (Waamamaa), Murtii Dhaddacha Ijibbaata Mana Murtii Waliigala Federaalaa (2001), Jildii 4, F101-104.

kew.1791'tiin gaafatamu adda adda akka ta'e ibseera<sup>5</sup>. Murtiiwwan Dhaddacha Ijibbaata Mana Murtii Waliigala federaalaa kunniin dhaabbattootni inshuraansii yeroo akkam beenyaa miidhaa kasaaraa al-kallattii kaffaluuf akka itti-gaafatamanii fi yeroo akkamii immoo akka hin gaafatamne irratti kallattii ifa ta'e kan hin argisiisne ta'uu isaaniirra iyyuu kasaaraa al-kallattii kan jedhamu kanneen akkamii akka hammatu ibsa gahaa kan kennan miti. Waliigalteewwan inshuraansiis keewwata inshuraansii kennaan beenyaawwan kasaara al-kallattii (consequential loss) ta'aniif itti hin gaafatamu jedhus daangaan raawwii waliigalteewwan akkasii hiikkoodhaaf kan saaxilame dha.

Hariiroo waliigaltee inshuraansii keessatti qofa osoo hin taane miidhaa hariiroowwan waliigaltee kanneen biroo fi hariiroo waliigalteen alaa keessatti beenyaan kasaara al-kallattii yeroo akkamii akka gaafatamu adda baafachuuf akkasumas falmiiwwan kanaan wal qabatanii ka'aniif fala bu'uura seeraa qabu kennuuf yaadrimeen kasaara al-kallattii kun seerota biyya keenyaa keessatti haala kamiin akka ibsamee fi haala kamiin hiikamuu akka qabu hubachuun barbaachisaa dha. Barreeffamni kunis yaaduma kana irraa ka'uun yaadrimeen kasaara al-kallattii biyya keenya keessatti haala kamiin akka hojiirra ooluu qabu irratti kallattii seerri keenya akeekkeen xiinxaluu irratti kan xiyyeeffate dha.

Bu'uuruma kanaan barruun kun kutaawwan shanitti kan qoodame yoo ta'u, kutaa isa jalqabaa keessatti yaadrimeen waliigalaa kasaaraa al-kallattii gabaabbinaan ni ibsama. Kutaa lammaffaa keessatti, kasaaraan al-kallattii biyyoota birootti hariiroowwan garaagaraa keessatti haala kamiin akka hojiiirra oolaa jiru ni ilaalama. Kutaa sadaffaa keessatti, yaadrimeen kun seerota biyya keenyaa keessatti haala kamiin akka ibsamee jiru tumaalee seera hariiroo hawaasaa fi seera daldalaa rogummaa qaban waliin sakatta'ama. Kutaa afraffaa keessatti hubannoo jiru murtiiwwan dhaddachi ijibbaata Mana Murtii Waliigala Federaalaa armaan olitti caqafaman irraa ka'uun xiinxaluun kutaa shanaffaa keessatti yaada waliigalaa dhiyeessuun kallattiin fuula duraa ni akeekama.

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<sup>5</sup> Dhaabbata Inshuraansii Afrikaa (Iyyataa) fi Aadde Xaayituu Amadee (Waamamtuu), murtii Dhaddacha Ijibbaata Mana Murtii Waliigala Federaalaa (2004), Jildii 12, FF 430-434.

## 1. YAADRIMEE WALIIGALAA KASAARAA AL-KALLATTII

Haalli shallaggii fi daangaan isaa garaagarummaa qabaatus, beenyaan miidhaa hariiroo waliigalteen alaa fi hariiroowwan waliigaltee garaagaraa keessatti gaafatama. Fakkeenyaaf, seerota biyya keenyaa keessatti hariiroo waliigaltee hojjetaa fi hojjechiisaa,<sup>6</sup> imalaa fi geejibsiisaa,<sup>7</sup> dhimma osoo waliigalteen hin jiraatiin itti-gaafatamummaa dhufu<sup>8</sup> keessatti beenyaan miidhaa gaafatamuu danda'a. Kana malees, hariiroo waliigaltee kamiyyuu keessatti gareen tokko dirqama waliigaltee keessatti ilaalame bahuu dhabuudhaan garee kaan irra miidhaan yoo gahe gareen dirqama gama ofii bahe miidhaa sababa raawwatamuu dhabuu waliigalteetiin irra ga'eef beenyaa gaafachuu ni danda'a.<sup>9</sup>

Hariiroo kamiyyuu keessatti miidhaan gahu akkuma gochi balleessaa raawwatameen yookin waliigalteen raawwatamuu dhabuu isaatiin battaluma kan dhaqqabu ta'uu danda'a. Fakkeenyaaf, qabeenyi tokko gochaa balleessaan osoo manca'ee gatiin qabeenyichaa ykn baasiin qabeenyicha bakka buusuuf barbaachisu miidhaa kallattiidhaan gocha sababa ta'e irraa maddu dha. Miidhaawwan kaan immoo sababa manca'iinsa qabeenyichaa irra ga'een kasaaraa dinagdee al-kallattiin dhaqqaban ta'uu danda'u. Fakkeenyaaf, qabeenyi miidhame hanga bakka bu'utti bu'aa qabeenyichaan hojjechuun argamu ture kasaaraa al-kallattii gochicha irraa maddu dha. Daangaan kasaara al-kallattii haala dhimmaa irratti waan hundaa'uuf gosoota miidhaa hariiroo hawaasaa kaan irraa salphaatti adda baafachuun rakkisaa ta'us, akka waliigalaatti maalummaa kasaara al-kallattii hubachuuf hiikkoo ogeessootni garaagaraa kennan waliin ilaaluun barbaachisaa dha. Akka ogeessi *Toomaas Diyaamondi* jedhamu ibsetti hariiroo waliigaltee keessatti kasaaraan al-kallattii sababa waliigalteen hin raawwatamiin hafeef miidhaa sadarkaa lammaffaa haala addaa miidhamaa ilaallatu irraa ka'ee kan dhaqqabudha jedheera.<sup>10</sup> Akka

<sup>6</sup> Labsii Hojjetaa fi hojjechiisaa, Lab. lakk.377/2003, kew. 95-106.

<sup>7</sup> Seera Daldalaa Itoophiyaa Itoophiyaa, Lab.Lakk 166/1952, kew.589-600.

<sup>8</sup> Seera Hariiroo Hawaasaa, Lab.Lakk. 165/1952, kew.2027-2163.

<sup>9</sup> *Akkuma 8ffaa*, kew.1790-1805.

<sup>10</sup> Consequential damages are those that arise as a secondary consequence of non-performance resulting from the injured party's special circumstances and typically

ibsa *Jeemsi T. Niyeestee*’ tti immoo kasaaraan al-kallattii sababa miidhaa ga’een bu’aa dinagdee dhabamee fi baasii dabalataa dhaqqabe hammata.<sup>11</sup> Gama biraatiin guboon jechootaa ‘*Black’s Law*’ hiikkoo kenneen ‘kasaarri al-kallattii miidhaa irraa kallattiin kan maddu osoo hin taane, miidhaa gahe hordofuun kasaara dhaqqabu dha’ jedha.<sup>12</sup> Hiikkoowwan kennaman keessaa hiikkoo *Gileen D. West* fi *Sara G. Duran* kennan yoo ilaalle:

*“Consequential damages” are simply those losses suffered as a result of a breach that would not have occurred in the absence of some special circumstances applicable to the non-breaching party that would not normally have been applicable to most other parties to a similar contract.*<sup>13</sup>

Bu’uura hiikoo kanaatiin hariiroo waliigaltee keessatti miidhaa al-kallattii kan jedhamu miidhaa raawwatamuu dhabuu waliigaltee hordofee dhaqqabu ta’ee garuu haala addaa garee dirqama ofii bahe qofa ilaallatuun kan dhaqqabe malee kanneen biroo dirqamni wal fakkaatu hin raawwatamiin hafe irra haala adeemsa uumamaan hin dhaqqabne akka ta’e dha.

Haata’u malee, miidhaawwan sababa haala addaan miidhamaa ilaallatuun (special circumstance) dhaqqaban kasaaraa al-kallattii jedhamuun kan beenyaa argamsiisan gareen lameen yeroo waliigalticha taasisanitti hariiroo gidduu isaanii tureen miidhaan (kasaarri) akkasii gahuu danda’a jedhanii yaaduu kan danda’an yoo ta’e dha.<sup>14</sup>

Hariiroowwan garaagaraa keessatti daangaan raawwii isaa adda addummaa qabaatus, akka waliigalaatti kasaarri al-kallattii miidhaa

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consist of the loss of profit that would have been made in transactions with third parties. Thomas A. Diamond, *Consequential Damages for Commercial Loss: An alternative to Hadley v. Baxendale*, *Fordham Law Review* (1994), Vol.63, P668.

<sup>11</sup>James T. Nyeste, *Recovery of Consequential Damages for Insurer’s Breach of Contract*, (2012) P1.

<sup>12</sup>“Consequential loss is a loss arising from the results of damage rather than from the damage itself” Jedheera. *Black’s Law Dictionary*, Brian A Garner.9<sup>th</sup> ed , P1030.

<sup>13</sup>Glenn D. West and Sara G. Duran, *Olitti yaadannoo Iffaa*, F 793.

<sup>14</sup> Glenn D. West and Sara G. Duran, *Olitti Yaadannoo Lakk. Iffaa*, F 783.

dinagdee kallaattiidhaan gocha balleessaa (tort) ykn waliigalteen raawwatamuu dhabuudhaan (breach of contract) gahu osoo hin taane, sababa miidhaa gaheen yookin raawwatamuu dhabuu waliigaltee hordofuudhaan kan gahu dha jechuun ni danda'ama. Haala kasaaraan miidhaa hordofee dhufu hariiroowwan garaagaraa keessatti shallagamu kutaawwan itti aananitti kan ilaallu ta'ee, akka waliigalaatti garuu, yeroo baay'ee kasaaraa al-kallattii kan jedhaman sababa miidhaa ga'een yookin dirqamni waliigalteen seename osoo hin raawwatamiin waan hafeef bu'aa hafe, baasiwwan dabalataa dhaqqaban, carraa darbe, galii citee fi qusannaa hafe dabalata.<sup>15</sup>

## 2. KASAARAA AL-KALLATTII SIRNOOTA SEERAA BIYYOOTA BIROO KEESSATTI

Yaadrimeen kasaara al-kallattii biyyoota sirna seeraa “civil law” fi “common law” hordofan keessatti hojiirra oolaa kan jiru ta'us, jalqaba miidhaawwan kaan irraa haala ifa ta'een adda kan baasanii fi ammas bal'inaan hojiirra oolchaa kan jiran biyyoota sirna seeraa “common law” hordofani dha. Biyyoota Ardii Awurooppaa sirna seeraa ‘civil law’ hordofan biratti itti-gaafatamummaa gocha balleessaafis ta'e waliigaltee keessatti beenyaan kasaara al-kallattii haalawwan muraasa keessatti qofa gaafatama. Fakkeenyaaf, koodiin seera sivilii biyya Faransaay keewwatni 1151 sababa waliigalteen hin raawwatamiin hafeef beenyaan miidhaa kallattii qofti akka gaafatamu tuma.<sup>16</sup> Kan biyya Jarmanii immoo beenyaan kasaara al-kallattii gaafatamuu kan danda'u ta'u illee, garee mirga akkasii gaafachuu danda'u irratti daangaa qaba.<sup>17</sup> Tumaaleen seera Hariiroo Hawaasaa Itoophiyaa irra jireessaan koodii seera sivilii biyya Faransaay irraa kan fudhatame yoo ta'e illee, akkaataa shallaggii beenyaa

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<sup>15</sup> Anthony Jucha, *Developments in the Law Relating to 'Consequential Loss'* (2010), P13.

<sup>16</sup> French civil code, Art.1151. Kanas; “Even in the case where the non-performance of the agreement is due to the debtor's intentional breach, damages may include, with respect to the loss suffered by the creditor and the profit which he has been deprived of, only what is an **immediate and direct consequence** of the non-performance of the agreement.” jechuun kaa'a.

<sup>17</sup> Margus Kingisep, *Scope of Claim for Consequential Damage in Delict Law*, *Juridical International* (2003), Vol.8, P205.



miidhaa waliigaltee irratti tumaan seera hariiroo hawaasaa biyya keenyaa kew.1801 haala qajeeltoo tumaa seera sivilii biyya Faransaay kew.1151 irraa adda ta'een daangaa isaa bal'isuun kaa'a. Bu'uura tumaa Seera Hariiroo Hawaasaa kwt 1801 kanaan, miidhaan waliigaltee sababa haala addaa abbaa mirgaa ilaallatu irraa kan ka'e waliigaltee raawwachuu dhabuun qofaa isaatti geessisuu danda'uun olitti kan hammate yoo ta'ee (greater than normal damage) fi abbaan idaas yeroo waliigalteen taasifamutti haala addaa (special circumstance) kana kan beeku yoo ta'ee beenyaa miidhaa kanaaf kan itti-gaafatamuu qabu ta'uu tuma.<sup>18</sup> Kanaafuu, akkaataan shallaggii beenyaa miidhaa hariiroo hawaasaa Itoophiyaa keessumattuu yaadimee kasaaraa al-kallattii ilaalchisee qajeeltoo sirna seeraa 'common law' waliin walitti dhiyeenya qaba jechuun ni danda'ama. Waan ta'eefuu, kutaa kana jalatti muuxannoo fi hojimaata biyyoota sirna kana hordofan irratti xiyyeeffanna.

Biyyoota sirna seeraa 'common law' hordofanitti dhimmi beekamaa biyya Ingiliz *Hadley v Baxendale* bara 1854<sup>19</sup> erga murtaa'ee asitti manneen murtii, keessattuu dhimma falmii waliigaltee irratti kasaara al-kallattii gosoota miidhaa kaan irraa adda baasanii ilaalaa turan. Qajeeltoon murtii kanaa bu'uuraan hariiroo waliigaltee keessatti sababa raawwatamuu dhabuu waliigaltee irraa kan ka'e miidhaa ga'uuf haala itti beenyaan kaffalamu ilaalchisee waliigalteen ifa ta'e bakka hin jiraannetti sirna hordofamuu qabu irratti manneen murtii qajeeltoo 'common law' hordofuu qaban ta'ee gargaaraa tureera. Bu'uura qajeeltoo kanaan gareen waliigaltee raawwachuu dhabuu isaatiin miidhaa ga'eef itti-gaafatamaa

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<sup>18</sup> Art.1801 (1) of the Ethiopian Civil Code provides that 'the amount of damages shall be equal to the damage actually caused to the creditor where the debtor on entering in to the contract was informed by the creditor of the special circumstances owing to which the damage is greater.' Art. 1801 (2) The provisions of sub-art (1) shall apply where non-performance is due to the debtor's intention to cause damage or to his gross negligence or grave fault.

<sup>19</sup> *Hadley v Baxendale* (1854) 9 Exch. 341: yaadni murticha irratti *kaa'ame* "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of it." <http://www.lawnix.com/cases/hadley-baxendale.html>

ta'e kasaaraa (miidhaa) kallattiif kan itti-gaafatamu yoo ta'u, haala muraasa irratti immoo kasaaraawwan al-kallattii ta'aniif kan itti-gaafatamu ta'a.

Biyyoota sirna seeraa kana hordofanitti yaadrimeen kasaaraa al-kallattii jalqaba dhimma waliigaltee irratti hojiirra oolus, yeroo ammaa kanatti hariiroo itti-gaafatamummaa gochaa balleessaa irraa madduu fi hariiroo inshuraansii keessattis daangaa itti-gaafatamummaa fi hanga beenyaa murteessuuf kan gargaaraman waan ta'eef, beenyaa miidhaa hariiroo garaagaraa keessatti gaafatamuuf akkamitti hojiirra oolchaa akka jiran armaan gaditti ilaalla.

## 2.1. HARIIROO WALIIGALTEE KEESSATTI

Hariiroo waliigaltee keessatti, sababa gareen dirqama isaa raawwachuu dhabeef miidhaa garee dirqama gama isaa raawwaterra gahuuf qajeeltoon waliigalaa beenyaan miidhaa itti shallagamuu qabu hanga danda'ameen osoo waliigaltichi raawwatameera ta'ee bakka ga'uu malutti deebisuu dha.<sup>20</sup> Qajeeltoon kunis beenyaa kasaaraa al-kallattiif qofa osoo hin taane gosootni beenyaa miidhaa waliigaltee irraa maddan hundi itti shallagamaniif bu'uura dha.<sup>21</sup> Gareen dirqama gama ofii bahe haala osoo waliigaltichi raawwateera ta'eetti deebi'a yeroo jedhamu, raawwatamuu waliigaltichaa irraa kan eeggatu ture (expectation damage) gaafachuu danda'a jechuu dha.<sup>22</sup>

Qajeeltoon waliigalaa kana ta'us sababa gareen tokko dirqama ofii osoo hin raawwatiin hafeef ykn yerootti hin raawwatiin hafeef miidhaa gahu hundaaf itti-gaafatamaa taasisuun immoo haqa qabeessa hin ta'u yaadni jedhu bal'inaan fudhatama argachaa kan dhufe dha.<sup>23</sup> Kunis ka'umsi isaa sababa gareen tokko dirqama ofii ba'uu dhabeef ta'us miidhaan ni ga'a

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<sup>20</sup> Robinson v Harman (1848) 18 LJ Ex 202, 1 Exch 850 at 855, 154 ER 363: The rule of the common law is that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed. (RJ Douglas Sc and J Faulkner, Claims for Consequential Pecuniary Loss (2007), P.8 ilaalaa).

<sup>21</sup> James T. Nyeste, *Olitti Yaadannoo lakk.11ffaa*, F784.

<sup>22</sup> Anthony Jucha, *Olitti yaadannoo lakk.15ffaa*, F2.

<sup>23</sup> Anthony Jucha, *akkuma 22ffaa*.

jedhamee hin tilmaamamne tokko ga'uu ni danda'a; sababa biraa dabalachuun miidhaan biraa (fagoo ta'e) ga'uu ni danda'a kan jedhu dha. Kana irraa kan ka'e biyyoota sirna seeraa 'common law' hordofanitti beenyaan miidhaa waliigaltee irraa maddu daangaa akka qabaatu taasifameera.

Safartuun daangaa itti-gaafatamummaa miidhaa waliigaltee irraa maddu jalqaba dhimma armaan olitti caqafamen, *Hadley v Baxendale* hundeeffame. Qabiyyeen isaas:

*Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.*<sup>24</sup>

Bu'uura qajeeltoo kanaan sababa waliigalteen hin raawwatamiin hafeef, beenyaan gaafatamu:

1. Miidhaa adeemsa uumamaan raawwatamuu dhabuu waliigaltichaan dhaqqabuu danda'u (damages fairly and reasonably be considered as arising naturally from the breach ) ykn;
2. Gareen waliigaltee raawwatan yeroo waliigaltee taasisanitti gareen tokko yoo waliigalticha raawwachuu baate miidhaa ga'uu danda'a jedhanii yaaduun ni danda'ama.

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<sup>24</sup> Hadley (himataa) v Baxendale(himtamaa) (1854) 9 Ex. 341 FF 354 - 355.(<http://www.lawnix.com/cases/hadley-baxendale.html>)

<sup>24</sup> Robinson v Harman (1848) 18 LJ Ex 202, 1 Exch 850 at 855, 154

Miidhaawwan garee<sup>1ffaa</sup> jalatti kufan miidhaawwan kallattii<sup>25</sup> yoo ta'an itti-gaafatamummaa miidhaa kanaan dhufu gareen lameen waliigalteedhaaniyyuu daangessuu yookin hambisuu hin danda'ani.<sup>26</sup> Gama biraatiin, miidhaawwan garee <sup>2ffaa</sup> jalatti kufan immoo miidhaawwan waliigaltichi raawwatamuu dhabuu isaa irraa al-kallattiin dhufan (consequential loss) yoo ta'an, miidhaawwan kun adeemsa yeroo hundaan dhaqqabuu danda'u ta'uu baatus hariiroo gidduu isaanii jiruun himatamaan miidhaan kun ga'uu danda'uu isaa kan tilmaamuu danda'u dha. Itti-gaafatamummaa miidhaa/kasaaraa kana irraa maddu gareen falmitootaa waliigalteedhaanis daangessuu danda'u.<sup>27</sup>

Haala kanaan miidhaa al-kallattii raawwatamuu dhabuu waliigaltee hordofee dhufu keessatti gareen miidhame yeroo waliigaltichi taasifamutti waliigaltichi sababa hin raawwatamiiniif miidhaa ga'uu danda'a jedhamee garee waliigalticha taasiseen tilmaamuu danda'u hammata. Miidhaan ga'uu ni danda'a jedhamee yaada nama dhamaqabeessaan tilmaamamuu kan danda'u yeroo waliigaltichi taasifamutti hubannoo gareen waliigalticha taasisan qaban yookin hubannoo gareen waliigalticha hin raawwatiin hafe qabu irratti kan hundaa'u ta'a.<sup>28</sup> Kunis gareen waliigaltee seenu tokko yeroo waliigalticha raawwatutti "osoon dirqama gama koo hin raawwatiin hafee miidhaa akkamiitu garee kaan irra ga'uu danda'a?" jedhee hanga tilmaamu jechuu dha.

Qajeeltoon kun yeroo ammaa kanatti biyyoota sirna 'common law' hordofan kanneen akka Amerikaa, Kanaadaa fi Awustraaliyaatti hanga itti-gaafatamummaa miidhaa waliigaltee irraa maddu daangessuuf kan gargaaru dha.<sup>29</sup>

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<sup>25</sup> Thomas A.Diamond, *Olitti Yaadannoo lakk.10ffaa*, F668-669.

<sup>26</sup> Yaadrimeen kun duraan dhimma "Croudace Construction Ltd v Cawoods Concrete Products Ltd" irratti kaa'ame waan ta'eef 'Croudace view' jedhamuun beekama. *Oltti Yaadannoo lakk.15, F 8.*

<sup>27</sup> Anthony Jucha, *Olitti Yaadannoo lakk.15ffaa*, F12.

<sup>28</sup> *Akkuma 27ffaa*, F4. "What was at the time reasonably so foreseeable depends on the knowledge then possessed by the parties, or, at all events, by the party who later commits the breach" jedha.

<sup>29</sup> Michael Polking Horne, *Exclusion Clauses: Navigating the Minefield*, Paris Energy Series (2012), No 6, P2.

## 2.2. ITTI-GAAFATAMUMMAA GOCHA BALLEESSAA IRRAA MADDU (TORT) KEESSATTI

Beenyaan kasaaraa al-kallattii hariiroo waliigaltee keessatti qofa osoo hin taane osoo waliigalteen hin jiraatiin itti-gaafatamummaa dhufu keessattis gaafatamuu danda'a.<sup>30</sup> Hariiroo waliigaltee fi itti - gaafatamummaa waliigaltee alatti dhufu keessatti beenyaan miidhaa al-kallattii gaafatamuu danda'us, daangaan haguuggii miidhaa kanaa garaagarummaa ni qabaata.

Itti-gaafatamummaa gocha balleessaa irraa maddu keessatti daangaan kasaaraa al-kallattii dhimmaa dhimmatti garaagarummaa ni qabaata. Fakkeenyaaf, itti-gaafatamummaa dagannoo irraa maddu yoo fudhanne akka waliigalaatti himatamaan kan itti-gaafatamu gochi yommuu raawwatamutti miidhaawwan gochichi hordofsisu yaaduun yeroo danda'amu dha.<sup>31</sup> Haala kanaan, namni balleessaa ofiitiin qabeenya nama biraa irraan miidhaa geessisee tokko gatii qabeenyichi baasu kaffala. Dabalataan miidhaan qabeenyicha irra ga'uu isaatiin abbaan qabeenyaa meeshicha fayyadamuun dantaa argachuu malu ykn bu'aa maallaqaa argachuu malu (lost profit) akka dhabu gamanumaan beekuun (tilmaamuun) ni danda'ama. Miidhaan kun miidhaa al-kallattii miidhaa qabeenyicha irra ga'e hordofuun dhufu waan ta'uuf, himatamaan kasaara kanaafis itti-gaafatamaa ta'a. Gama biraatiin garuu, himatamaan dagannoodhaan osoo hin taane, itti yaadee gocha balleessaa kan raawwate yoo ta'e hangi itti-gaafatamummaa caalmaatti kan bal'atu ta'a. Fakkeenyaaf dhimma biyya Ingilizsi *Doyle v Olby (Ironmongers) Ltd* irratti himatamaan balleessaa itti yaadee waan raawwateef kasaara al-kallattii ga'uu danda'a jedhamuu oliif itti-gaafatamaa ta'eera.<sup>32</sup>

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<sup>30</sup>Consequential pecuniary losses recoverable in tort concern analogous situations with those regarding breach of contract. Such consequential losses may include wasted expenditure, loss of profits and medical expenses.

R J Douglas Sc & J Faulkner, Claims for Consequential Pecuniary Loss (2007), P 18.

<sup>31</sup> *Akkuma lakk.30ffaa*, F19.

<sup>32</sup> [1969] 2 QB 158 at 167 per Lord Denning. An intentional wrongdoer is liable for all of the loss that flows as a direct consequence of the deceit including consequential loss not limited to losses that are reasonably foreseeable or within its reasonable contemplation. [www.thomsonreuters.com.au/product/AU/files/720502512/contract\\_p5\\_esso\\_v\\_mardon](http://www.thomsonreuters.com.au/product/AU/files/720502512/contract_p5_esso_v_mardon).

Akka waliigalaatti, biyyoota sirna ‘*common law*’ hordofanitti itti-gaafatamummaa miidhaa gocha balleessaa irraa maddu keessatti daangaan kasaaraa al-kallattii kan waliigaltee irraa maddu caalaa bal’ata.<sup>33</sup> Haala kanaan, miidhawwan gahan gocha itti-gaafatamummaa fide hordofanii kan dhufan ta’an illee namni yaada dhama qabeessa qabu gochi balleessaa raawwatame miidhaa jedhame kan dhaqqabsiisuu danda’u ta’uu gamanumaan kan tilmaamuu hin dandeenye yoo ta’e, itti-gaafatamummaan hin jiraatu jechuu dha.<sup>34</sup>

### 2.3. HARIIROO INSHURAANSII QABEENYAA KEESSATTI

Biyyoota akka Ameerikaa fi Ingilizzitti inshuraansiin qabeenyaaf kennamu miidhaawwan al-kallattii balaa tokko irraa maddan haguuggii inshuraansii qofaatti yoo argatan malee inshuraansii qabeenyichaaf galameen kan beenya’u miti.<sup>35</sup> Haala akkasii keessatti kasaaraan al-kallattii dhaqqabe sababa balaa haguuggiin kennameefiin ta’us inshuraansii qabeenyaaf kenname keessatti waan hin hammatamneef abbaan qabeenya kasaaraa al-kallattiif (business interruption policy or consequential loss policy) qofaatti inshuraansii bitata. Hariiroo waliigaltee inshuraansii qabeenyaaf kennamu keessatti kasaaraa al-kallattii kan jedhamu sababa balaa ykn miidhaa qabeenya irra ga’uun hanga qabeenyi miidhame hojii isaatti deebi’utti galii yookin bu’aa abbaan qabeenya argatu ture yoo ta’u, inshuraansiin kasaaraa al-kallattii (business interruption policy) kasaaraa kana bakka buusuuf haguuggii inshuraansii kennamu dha.<sup>36</sup> Haguuggiin inshuraansii kasaaraa al-kallattii sababa miidhaa qabeenya irra ga’een hanga qabeenyi miidhame hojii

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<sup>33</sup> Jeffrey Michael Cohen, Steven J. Brodie and Lynda Womack Kenney, Recovery of Extra-Contractual (Consequential) Damages in First Party Bad Faith Cases, P1.

<sup>34</sup> *Oltti Yaadannoo Lakk.30 ffaa*, fuula 20.

<sup>35</sup> Insurance of property prima facie covers that property only in respect of the loss attributable to its own value. consequential losses are not recoverable unless they are separately insured. Modern Insurance law, 4<sup>th</sup> ed., P225. Maurice v Golds borough, Re wright and pole.

<sup>36</sup> Material Damage and Business Interruption “All Risks” Policy Document, (<http://www.cila.co.uk/files/ABI%2520Blue%2520Book/Blue%2520Book%2520secti on%25202.pdf> p.18.)

isaatti deebi'utti galii fi bu'aa abbaa qabeenyaa irraa hafe beenya'uu dha. Faayidaa fi kaayyoo inshuraansii akkasii ogeessotni yoo ibsan:

*The purpose of business interruption insurance is to indemnify the insured against losses arising from the inability to continue the normal operation and functions of the business or industry insured.*<sup>37</sup>

Akka yaada kanaatti kaayyoon inshuraansii kasaaraa al-kallattii qabeenyi yookin daldallii haguuggii Inshuraansii qabu tokko dalagaa isaa idilee itti fufuu dadhabuu isaatiin kasaaraa irra ga'u beenya'uu dha.

Gama biraatiin, haguuggii inshuraansii qabeenyaaf kenname keessatti inshuraansii kennaan kasaaraa al-kallattii gochaa irraa maddeef itti-gaafatamaa ta'uu baatus, inshuraansii kennaan dirqama gama ofii sababa bahuu dhabeef kasaaraa kallattiis ta'e al-kallattii dhaqqabuuf itti-gaafatamaa ta'uu jalaa kan hafu miti. Kasaaraa al-kallattii waliigaltee inshuraansii irraa maddu yeroo jennu, miidhaa daangaa haguuggii waliigaltichaan ala dhufu dha. *Jeemsi T.Niyeesteen* kasaaraa al-kallattii kana yoo ibsu:

*'Those contract damages beyond the policy coverage which might not flow immediately and directly from the breach but which nevertheless were the foreseeable and probable result of the breach' jedheera.*<sup>38</sup>

Kunis, kasaaraan al-kallattii waliigaltee inshuraansii miidhaawwan daangaa haguuggiin kennameen alatti dhufan ta'ee beenyaa miidhaa osoo hin kaffalamiin hafee osoo hin taane sababa kaffaltii (yerootti) raawwatamuu dhabuun hordofsiisuu danda'a jedhamee yaadamuu ta'uu agarsiisa. Hariiroo inshuraansii keessatti dhaabbatni inshuraansii bakka waliigalteen ifatti hin kaa'amnetti kaffaltii yerootti raawwachuu diduu isaa irraan kan ka'e kasaaraa al-kallattii

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<sup>37</sup> Craig Russell, Blackman Steven and Burgess Davis, Business Interruption Coverage a Premier for Before and after the Storm.

<sup>38</sup> James T.Nyeste, *Olitti Yaadannoo lakk.11ffaa*, F1.

ga'uuf itti-gaafatamuu qaba moo hin qabu kan jedhu irratti biyyoota garaagaraa keessatti qabxii falmisiisaa ture dha. Kunis gama tokkoon dhaabbatni inshuraansii dirqama ofii yerootti raawwachuu dhabuudhaan miidhaa dhaqqabu (miidhaa al-kallattii dabalatee) akkuma waliigaltee kaanii kaffaluuf itti-gaafatamaa ta'a kan jedhu yoo ta'u, gama biraatiin immoo waliigalteen akkasii ofii isaatiiniyyuu kaffaltii maallaqaa waan ta'eef yeroo osoo hin kaffalamiin tureef dhala kaffaluu irra darbee miidhaa al-kallattiif itti-gaafatamummaa hin hordofsiisu kan jedhu dha.<sup>39</sup>

Haata'u malee, inshuraansii kennaan miidhaan ga'uu osoo beekuu sababa gahaa malee ykn ta'e jedhee kaffaltii yerootti raawwachuu yoo dide sababa kanaanis miidhaan diinagdee dabalataa inshuraansii fudhataarra yoo ga'e beenyaan miidhaa hanga maallaqa waliigaltee irratti ilaalameen qofa daanga'uu hin qabu yaadni jedhu kan fudhatama argachaa dhufe dha. Kunis yaadrimee kaayyoon haguuggii inshuraansii miidhaa ga'eef maallaqa kaffaluu qofa osoo hin taane, inshuraansii fudhataan sababa balaa haguuggii argateen miidhamee akka hin hafne yerootti akka argatu gochuu dha yaada jedhu kan bu'uureffate dha.<sup>40</sup> Kanaafuu, itti-gaafatamummaa ilaalchisee waliigalteen inshuraansii qajeeltoowwan seera waliigaltee kaaniin kan bitamu ta'a jechuu dha.<sup>41</sup>

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<sup>39</sup> Fakkeenyaaf, biyya Ingilizzitti akka dhimma '*The President of India v Lips Maritime Corporation [1987] 2 Lloyd's Rep'* irratti murtaa'etti dhaabbatni inshuraansii sababa beenyaa yerootti kaffaluu dhabeef dhala irraa kan hafe kasaara dabalataa kaffaluu hin dirqamu jedhamee murtaa'eera.

<sup>40</sup> Fakkeenyaaf Manni Murtii Amerikaa dhimma beekamaa "Bi-Economy" irratti yaadrimee kana bu'uureffachuun murteesseera. Kanas akka itti aanutti ibseera "The purpose of the insurance contract was not just to receive money, but to receive it promptly so that in the aftermath of a calamitous event the business could avoid collapse and get back on its feet as soon as possible. When an insured in such a situation suffers additional damages as a result of an insurer's excessive delay or improper denial, the insurance company should stand liable for these damages. This is not to punish the insurer, but to give the insured its bargained-for benefit." *Bi-Economy Market Inc. v. Harleysville Ins. Co.*, 10 N.Y.3d 187,856 N.Y.S.2d 505 (2008).

<sup>41</sup> Dhimma biyya Amerikaa "*Clark v. Standard Life and Accident Ins. Co.*", 68 Ill.App.3d 977 (1st Dist. 1979)" irratti manni murtii yaada kana bu'uureffachuun ibseera.



Haala kanaan dhaabbatni inshuraansii dirqama waliigaltee inshuraansiin seene raawwachuu dhabuu isaatiin miidhaa ga'uu danda'a jedhamee yaadamuu danda'uuf itti-gaafatamaa ta'a jechuu dha.<sup>42</sup>

### **3. KASAARA AL-KALLATTII: SEERA ITOOPHIYAA KEESSATTI**

Kutaa kana keessatti, yaadrimee kasaaraa al-kallattii seera Itoophiyaa keessatti hariiroowwan waliigaltee (general contract), waliigalteen osoo hin jiraatiin itti-gaafatamummaa dhufu (extra contractual) fi waliigaltee inshuraansii keessatti ilaalla.

#### **3.1. HARIIROO WALIIGALTEE KEESSATTI**

Hariiroo waliigaltee keessatti sababa raawwatamuu dhabuu waliigalteetiin miidhaa ga'uuf gareen dirqama ofii bahuu dadhabe yookin yerootti raawwachuu dadhabe beenyaa kaffaluu qabu waliigaltee keessatti caqasuu danda'u.<sup>43</sup> Hanga beenyaa kaffalamuu qabu bu'uura Seera Hariiroo Hawaasaa kew.1889 waliigalteedhaan daangessaniiru yoo ta'e itti yaadee ykn dagannoo/balleessaa ifa ta'een osoo hin raawwatiin kan hafe yoo ta'e malee waliigaltichi hanga beenyaa akka daangesseetti fudhatama.<sup>44</sup>

Gareen waliigalatee taasisan duraan dursa hanga beenyaa kana waliigaltee isaanii keessatti kan hin caqasne yoo ta'e, beenyaan bu'uura Seera Hariiroo Hawaasaa kew.1790-1805'tti shallagama. Bu'uura kanaan akka Seera Hariiroo Hawaasaa kew.1799 (1) tti hanga beenyaa waliigalteen raawwatamuu dhabuu isaatiin miidhaa ga'uu danda'u jechuun kan namni dhama-qabeessi yaaduu danda'u akka ta'e kew.1799

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<sup>42</sup> When an insurer fails to pay a valid claim, it may be liable to pay not only the benefits payable under the policy but also the amount of any additional loss suffered by the insured as a result of the insurer's failure to pay. *Brescia v QBE* [2007] NSWSC 598.

<sup>43</sup> Seera Hariiroo Hawaasaa, Oltti yaadannoo lakk.8ffaa, Kew.1889. Waliigalteen akkasii yoo jiraate, miidhaan qabatamatti ga'e jiraachuudhaa baatullee gareen dirqama hin baane beenyaa kaffaluuf itti gaafatamaa ta'uun isaa hin hafu. (kew.1892(1)).

<sup>44</sup> Akkuma 43ffaa, kew.1892(2).

(1) jalatti tumameera.<sup>45</sup> Haata’u malee, akka Seera Hariiroo Hawaasaa kew.1801’tti miidhaan qabatamaan gahe kan haala kanaan yaadameen olitti yoo dhufe abbaan idaa gaafa waliigaltichi taasifamutti miidhaan akkasii gahuu kan danda’u ta’uu hariiroo gidduu isaanii tureen kan beeku ture yoo ta’e, miidhaa olaanaa kanaaf kan itti-gaafatamu ta’a. Qajeeltoon kun yaadrimee itti-gaafatamummaa kasaaraa al-kallattii sirna “common law” waliin garaagarummaa kan qabu miti. Akkuma armaan olitti ibsame biyyoota sirna “common law” hordofanitti hariiroo waliigaltee keessatti kasaaraa al-kallattiif beenyaan kaffalamu yeroo waliigaltee taasisanitti sababa hariiroo addaa gidduu isaanii tureen gareen tokko yoo waliigalticha raawwachuu baate miidhaa ga’uu danda’a jedhanii yaaduu danda’ani dha. Kanaafuu, yaadrimeen itti-gaafatamummaa kasaara al-kallattii seera waliigaltee keenya keessatti kan hammatame ta’uu ni hubatama.

### **3.2. HARIIROO ITTI-GAAFATAMUMMAA WALIIGALTEEN ALA DHUFU KEESSATTI**

Hariiroo itti-gaafatamummaa waliigalteen ala dhufu keessatti qajeeltoon waliigalaa beenyaa miidhaa haala itti shallagamu Seera Hariiroo Hawaasaa kew. 2091 jalatti kaa’ameera. Bu’uura tumaa kanaan gareen seeraan beenyaa kaffaluuf itti-gaafatamaa ta’e beenyaa gochi itti-gaafatamummaa hordofsiise miidhamaa irraan ga’e waliin wal qixa ta’e kaffala. Haala kanaan gochi tokko itti-gaafatamummaa waliigalteen alaa kan hordofsiise yoo ta’e gareen itti-gaafatamaa ta’e miidhaawwan gochichi hordofsiiseef itti-gaafatamaa ta’a jechuu dha. Akka Seera Hariiroo Hawaasaa kew.2151 (2)’tti immoo miidhamaan miidhaawwan gocha tokko irraa maddan, miidhaa fuula duraa dabalatee, iddoo tokkotti walitti qabee yoo hin gaafanne yeroo biraa gaafachuu akka hin dandeenye kaa’a.<sup>46</sup> Kunis seerri itti-gaafatamummaa waliigalteen alaa

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<sup>45</sup> Beenyaan kun beenyaa miidhaa kallattiin raawwatamuu dhabuu waliigaltee irraa maddu dha.

<sup>46</sup> The victim may not bring a fresh action for compensation for other damage she has suffered unless such damage was caused independently of that for which she has already claimed compensation.

biyya keenyaa kasaaraa kallattii fi al-kallattii iddoo tokkotti gaafachuun akka danda'amu kan agarsiisu dha.<sup>47</sup>

Gama biraatiin, miidhamaan himannaa beenyaa dhiyeessu miidhaawwan kallattii fi al-kallattii iddoo tokkotti gaafachuu kan danda'u ta'us, miidhaan al-kallattii dhaqqabe haalawwan tilmaamamuu hin dandeenyeen kan babal'ate yoo ta'e, manni murtii qajeeltoo waliigalaa armaan olii irraa goruun tilmaama sammuu hanga miidhaa ga'ee gaditti akka kaffalamu murteessuu danda'a.<sup>48</sup> As irratti, manni murtii hanga beenyaa kaffalamuu qabu xiqqeessuu danda'a malee beenyaan kasaara al-kallattii fuulduraa akka hin gaafatamne kan daangessu miti.

### 3.3. HARIIROO INSHURAANSII KEESSATTI

Hariiroo inshuraansii keessatti amalaa fi haala beenyaan miidhaa al-kallattii itti-gaafatamu hubachuudhaaf gosoota inshuraansii biyya keenya keessatti kennaman adda baasuun ilaaluun barbaachisaa dha. Seerri daldalaa biyya keenyaa inshuraansii bakka gurguddoo lamatti hiree kaa'eera. Inshuraansii miidhaaf kennamu (insurance against damages) fi inshuraansii namaa (insurance for persons)' ti.<sup>49</sup> Inshuraansiin namaa inshuraansii jireenyaa fi inshuraansii sababa balaa fi dhukkubaaf galamu kan hammatu yoo ta'u, inshuraansii beenyaa waan hin taaneef hanga inshuraansii fudhataaf kaffalamu hanga miidhaan osoo hin daangofne waliigaltee irratti caqafamu dha.<sup>50</sup> Inshuraansiin miidhaaf kennamu inshuraansii miidhaa qabeenyaaf kennamu (insurance for objects)<sup>51</sup> fi inshuraansii itti-gaafatamummaa beenyaaf kennamu (insurance of liability for damages)<sup>52</sup> kan hammatu yoo ta'u, inshuraansii beenyaa jedhamuun beekama.

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<sup>47</sup> Kana malees akka Seera Hariiroo Hawaasaa kew.1677 (2) tti tumaaleen seera waliigaltee kutaa waliigalaa dhimma falmii hariiroo waliigalteen alaafis raawwatiinsa ni qabaatu.

<sup>48</sup> Seera Hariiroo Hawaasaa kew.2101.

<sup>49</sup> Inshuraansiin namaa- Inshuraansii jireenyaa; fi Inshuraansii sababa balaa fi dhukkubaaf galamu dha.

<sup>50</sup> Seera Daldalaa, *Olitti Yaadannoo 7ffaa*, kew. 689.

<sup>51</sup> *Akkuma 50ffaa*, kew. 675-684.

<sup>52</sup> *Akkuma 51ffaa*, kew.685-688.

Inshuraansii namaa keessatti hanga itti-gaafatamummaa dhaabbata inshuraansii hanga miidhaa fayyadamaa irra ga'e shallaguun osoo hin taane raawwatamuu yookin raawwatamuu dhabuu haala tokkoo irratti hundaa'uun qarshii waliigaltee irratti caqafame kaffala waan ta'eef, miidhaa kallattii fi al-kallattii fayyadamaa irra ga'e shallaguun hin barbaachisu. Ta'us, dhaabbatni inshuraansii kaffalticha yerootti raawwachuu dhabuu isaatiin miidhaan dabalataa kan dhaqqabe yoo ta'e, armaan gaditti kan ilaallu ta'a.

Inshuraansii qabeenyaa fi inshuraansii itti-gaafatamummaa miidhaa garee sadaffaa seenamuufis dhaabbatni inshuraansii miidhaa qabeenya irra ga'e yookin miidhaa garee sadaffaa irra ga'e bakka buusuuf waliigala. Inshuraansiin akkasii inshuraansii beenyaa waan ta'eef, hanga itti-gaafatamummaa dhaabbata inshuraansii qajeeltoo hanga miidhaa dhaqqabee waliin walqixa jedhu kan bu'uureffatu ta'a. Gama biraatiin immoo akka seera daldalaa kew.665'tti itti-gaafatamummaan dhaabbata inshuraansii hanga waliigaltee irratti caqafame qofaaf ta'a. Kanaan wal qabatee bakka waliigalteen ifa ta'e hin jirretti hariiroo inshuraansii keessatti yaadotni lameen kun haala kamiin waliin raawwatiinsa qabaatu kan jedhu adda baasuun qabxii ilaalamuu qabu dha. Keessumattuu, dhaabbatni inshuraansii kasaaraa al-kallattiidhaaf itti-gaafatama moo miti? kan jedhu akkaataa raawwii qajeeltoowwan waliigalaa armaan olii irratti kan hundaa'u dha.

Haala kanaan akka bu'uuraatti hanga itti-gaafatamummaa dhaabbata inshuraansii hanga waliigaltee irratti caqafame caaluu kan hin qabne ta'us miidhaan gahe kasaaraa al-kallattii dabalatee hanga waliigaltee irratti caqafame irra kan hin darbine yoo ta'e yaadrimee beenyaa (indemnity) waliin kan walitti bu'u hin ta'u. Kanaafuu, akka yaada barreessaa barruu kanaatti dhaabbatni inshuraansii imaammata irratti kasaaraa al-kallattiif itti hin gaafatamu jedhee kan daangesse yoo ta'e malee, hanga fiixee waliigaltee irratti caqafametti miidhaa kallattiif qofa osoo hin taane kasaaraa al-kallattii illee akka kaffalu yoo taasifame dhama-qabeessa dha.

Qabxiin biraa hariiroo waliigaltee inshuraansii keessatti ilaalamuu qabu inshuraansii beenya'u keessattis ta'e inshuraansii namaa keessatti hanga itti-gaafatamummaa dhaabbata inshuraansii beekamaa ta'ee (waliigaltee dhaan yookin hiikkoodhaan) dhaabbatni inshuraansii yeroo waliigaltee keessatti ilaalametti ykn yeroo gahaa ta'etti yoo kaffaluu baatee fi miidhaan dabalataa inshuraansii fudhataarra yoo gahe itti-gaafatama moo hin gaaafatamu kan jedhu dha.<sup>53</sup> Akka yaada barreessaa barruu kanaatti haala akkasii keessatti seerri daldalaa wanti ifatti tume jiraachuu baatus, akkuma armaan olitti ibsame waliigalteen inshuraansii akaakuu waliigaltee keessaa tokko waan ta'eef; akkasumas, akka seera daldalaa kew.1'tti bakka qaawwi jirutti tumaaleen Seera Hariiroo Hawaasaa roggummaa qaban raawwatiinsa kan qaban waan ta'eef akkuma waliigaltee kamiittiyyuu miidhaa ga'eef beenyaa miidhaa shallaguu kan dhorku hin jiru. Itti-gaafatamummaan miidhaa akkasiif haguuggiin inshuraansii kennamu kan daanga'u miti. Waliigalteen raawwatamuu dhabuu isaatiin miidhaan gaafatamuu danda'a yoo ta'e immoo miidhaa al-kallattii sababa waliigalteen inshuraansii yerootti raawwatamuu dhabeef gaafatamuu ni danda'a jechuu dha.

Kasaaraa al-kallattii dhimma inshuraansii bakka lamatti qoodnee ilaaluun barbaachisaa dha. Kasaara al-kallattii gocha itti-gaafatamummaa fide hordofuun dhufe (*consequential loss resulting from destruction of property*) fi kasaaraa al-kallattii waliigaltee raawwachuu dhabuu hordofuun dhufe (*consequential loss resulting from non performance/delayed performance of the insurance contract itself*). Fakkeenyaaf, konkolaataan haguuggii inshuraansii qabu tokko miidhaan irra ga'e hanga bakka bu'utti bu'aa hafe garee isa jalqabaa jalatti kan ramadamu yoo ta'u, dhaabbatni inshuraansii balaan gahuu osoo beekuu yeroo waliigaltee irratti ilaalametti qabeenya miidhameef beenyaa malu kaffaluu osoo qabuu sababa tursiiseef miidhaa dinagdee al-kallattiin dhaqqabe immoo garee lammaffaa jalatti kan ilaalamu ta'a jechuu dha.

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<sup>53</sup> Akka Seera Daldalaa Itoophiyaa kew.665 jalatti teechifame beenyaan yerootti kaffalamuu qaba. Yeroon kun imaammata irratti yoo hin caqafamne seera waliigaltee waliin ilaaluun gaarii ta'a (Kew.1756 fi 1771).

Fakkeenyaaf, inshuraansii miidhaa garee sadaffaa irra ga'uuf seenamu keessatti dirqamni dhaabbata inshuraansii itti-gaafatamummaa garee sadaffaan bu'uura tumaalee seera hariiroo hawaasaa kew.2027-2163 qabaatu beenya'uuf waliigala. Haala kanaan gama tokkoon itti-gaafatamummaa hariiroo seera waliigalteen alaan dhufu bakka bu'iinsa kan qabaatu yoo ta'u, gama biraan immoo dirqama kana ofii bahuuf dirqama waliigaltee irraa maddu ni qabaata jechuu dha. Beenyaan miidhaa al-kallattii gocha balleessaa miidhaa ga'e kan hordofu yoo ta'u; kan waliigaltee immoo dhaabbatni inshuraansii dirqama ofii yerootti bahuu dhabuudhaan miidhaa dabalataa gaheef itti-gaafatamaa ta'a.

### **3.4. ITTI-GAAFATAMUMMAA KASAARA AL-KALLATTII WALIIGALTEEN DAANGESSUU**

Itoophiyaa keessatti itti-gaafatamummaa kasaara al-kallattii daangessuuf waliigalteewwan kaan keessatti hedduu kan baratame ta'uu baatus, waliigaltee inshuraansii keessatti kasaaraa al-kallattii dhufuuf inshuraansii kanaan itti-gaafatamaa hin ta'u keewwata jedhu yeroo hammachiisan ni mul'ata. Fakkeenyaaf, unka imaammata inshuraansii Dhaabbatni Inshuraansii Awaash konkolaataa daldalaaf qopheesse lakk.7 (II) (b) fi 7(II) (m) irratti dhaabbatichi miidhaa al-kallattiif itti-gaafatamaa akka hin taane kaa'a.

Haata'u malee, tumaalee Seera Hariiroo Hawaasaa rogummaa qaban waliin yoo ilaallu; gareen lameen beenyaa miidhaa waliigalteedhaan daangessuu kan danda'an ta'us gosa miidhaa irratti hundaa'ee osoo hin taane maddi isaa ilaalamuu akka qabu hubatama. Fakkeenyaaf, akka seera Hariiroo Hawaasaa kew.1887' tti hariiroo waliigaltee keessatti gochi balleessaa yoo jiraate malee beenyaa miidhaa waliigaltee raawwachuu dhabuu irraa maddu waliigalteen hambisuun ni danda'ama. Gama biraatiin garuu, waliigalteen kan hin raawwatamiin hafe itti yaadee yookin dagannoo yookin balleessaa olaanaadhaan yoo ta'e, itti-gaafatamummaan isaa kan waliigaltee irratti caqafameen osoo hin daanga'iin hanga miidhaa dhaqqabe waliin qixa ta'uu akka qabu Seera Hariiroo Hawaasaa kew.1892 (2) jalatti tumameera. Hariiroo waliigalteen

alaa keessattis bu’uura Seera Hariiroo Hawaasaa kew.2147’n itti-gaafatamummaa beenyaa miidhaa waliigalteen daangessuun kan danda’amu ta’us, gareen balleessaa raawwate waliigaltee akkasiin itti-gaafatamummaa jalaa bahuu akka hin dandeenye tuma. Haala kanaan itti-gaafatamummaan (hariiroo waliigaltees ta’e, waliigalteen alaa keessatti) gocha balleessaa irraa kan madde yoo ta’e, beenyaan waliigalteedhaan kan daanga’u miti. Gareen beenyaa kaffaluuf itti-gaafatamaa ta’e balleessa ofii raawwate yoo hin qabaatne garuu, beenyaa kasaaraa alkallattii qofa osoo hin taane beenyaa miidhaa kallattiis waliigalteedhaan daangessuu kan danda’u ta’uu tumaalee kana irraa ni hubatama.

Hariiroo waliigaltee inshuraansii keessatti waliigalteen akkasii haala kamiin hiikamaa jira? kan jedhu dhimma qabatamaa waliin kaasnee armaan gaditti kan ilaallu ta’ee, akka waliigalaatti garuu seerri inshuraansii keenya wanti ifatti kaa’e jiraachuu baatus itti-gaafatamummaan dhaabbata inshuraansii kallattii lamaan armaan oliin ilaalamuu kan qabu waan ta’eef, yaadrimeen dhimma waliigaltee fi waliigalteen alaa akkuma barbaachisaa isaatti rogummaa qaba jechuun ni danda’ama.

#### **4. XIINXALA DHIMMOOTAA**

Kutaa kana keessatti dhimmoota dhaddachi ijibbaata Mana Murtii Waliigala Federaalaa murteesse lama fudhachuun yaadota armaan olitti ka’an waliin hanqinaa fi cimina jiru agarsiisuuf yaalla.

##### **4.1. DHIMMOOTA XIINXALAAF FILATAMAN**

**Dhimma 1<sup>ffaa</sup>: Galmee Dh/ Ij/Mana Murtii Waliigala Federaalaa Lakk.47076<sup>54</sup>**

Ka’umsi dhimmichaa himannaa waamamtuun mana murtii olaanaa naannoo Amaaraatti waamamaa irratti dhiyeessite yoo ta’u, qabiyyeen

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<sup>54</sup> Dhaabbata Inshuraansii Afrikaa fi Aadde Xaayituu Amadee, Murtii Dhaddacha Ijibbaata Mana Murtii Waliigala Federaalaa (2004),Jjildii 12, fuula 430-434.

himannaa ishees konkolaataan kiyya meeshaa fe’u balaan irra ga’ee himatamaan (iyyataan) haguuggii inshuraansii kennee kan jiru ta’ullee konkolaaticha akka suphisiisuuf yerootti beeksisus meeshaalee konkolaataa yerootti jijjiirsisuu didee konkolaatichi guyyoota 198 tiif waan dhaabbateef meeshaalee konkolaataa kana akka bakka buusuu fi sababa waliigaltee yerootti raawwachuu dideef konkolaataan yeroo suphuuf barbaachisuu olitti dhaabbatee galiin kiyya waan citeef beenyaa galii cite kana akka naaf kaffalu kan jedhu ture.

Iyyataan (Dhaabbatni Inshuraansii Afrikaa) bu’uura waliigaltee inshuraansii (imaammata) taasifameen faayidaa hafe kaffaluuf gaafatamuu hin qabu jechuun falmeera. Manni murtichaas konkolaataan osoo hin suphamiin kan ture sababa balleessaa himatamaatiini dha jechuun himatamaan konkolaaticha sababa yerootti hin suphisiisiin turee galii himataan dhabeef itti-gaafatamaa dha jechuudhaan konkolaaticha suphisiisuuf qarshii 139,000 (kuma dhibba tokkoo fi soddonii sagal) fi hanga murtiin kennamutti galii konkolaatichi guyyaattii argamsiisu qarshii 1500’n shallaguun qarshii 588,000 (kuma dhibba shanii fi saddeettamii saddeet) akka kaffaluuf murteesseera. Iyyataan murtii kana komachuudhaan Mana Murtii Waliigalaa naannichaatti oliyyanna dhiyeeffatus Manni Murtichaa hanga beenyaa qofa fooyyessuun murteesseera.

Iyyataan murtii kana komachuun Dhaddacha Ijibbaata Mana Murtii Waliigala Federaalatti iyyanna kan dhiyeeffate yoo ta’u, komii isaa keessaa tokko sababa balaa konkolaataa irra ga’een galii cite dhaabbatichi kaffaluuf itti-gaafatamaa akka hin taane waliigaltee immaammata inshuraansichaa irratti waliigalamee osoo jiruu akkasumas akka Seera Hariiroo Hawaasaa kew.1802 jalatti waamamtuun ammaa miidhaa dhaqqabu xiqqeessuuf dirqama gama ofii kan baate ta’uu osoo hin madaaliin murtiin kenname dogoggora bu’uuraa hiikkaa seeraa uumeera kan jedhu dha.

Dhaddachi ijibbaataas bitaa mirga erga falmisiisee booda qabxii kana akka ijoo dubbiitti qabachuun hiikkoo kenneen gaaffiin waamamtuu dhaabbatni iyyataan bu’uura waliigaltee taasifameen konkolaaticha yeroo



gahaa ta'e keessatti suphee deebisuu galii cite hanga gaafa murtiin kennamutti herregamee akka kaffalamuufi dha. Iyyataan immoo gaaffiin waamamtuu kun sababa balaa konkolaataa dhaqqabeen galii cite gaaffii beenyaa kasaaraa al-kallattii waan ta'eef, gaaffii akkasii immoo waliigaltee inshuraansii taasifameen kan hin haguugamne ta'uu ifatti imaammatachaan kaa'amee waan jiruuf fudhatama hin qabu jechuun falmus gaaffiin waamamtuu sababa miidhaa konkolaataa irra ga'eef galii cite iyyataan akka kaffaluuf miti. Iyyataan dirqama waliigaltee kana yerootti raawwachuu diduu isaatiin kisaara narra ga'e akka naaf kaffalu kan jedhu dha. Kanaafuu iyyataan manneen murtii jalaa tumaa faalla waliigaltee keenyaan beenyaa miidhaa al-kallattii akka kaffalu nutti murtaa'e jechuun falmiin dhiyeessan fudhatama hin qabu, gaaffiin iyyattuu sababa waliigalteen hin raawwatamiiniif miidhaa fi kasaaraa ga'e naaf haa kaffalu kan jedhuu fi Seera Hariiroo Hawaasaa kew.1790 fi 1791 kan bu'uureffate dha jechuun falmii gama kanaa kufaa godheera.

Dhaddachi ijibbaataa itti fufuun akka Seera Hariiroo Hawaasaa kew.1802 tti gareen waliigalteen hin raawwatamiin hafeef sababa waliigalteen hin raawwatamiiniif miidhaa irra ga'uu malu dirqama xiqqeessuu qaba. Haala kanaan dhaabbatni inshuraansii yeroo suphuuf gahaa ta'e ji'a sadii keessatti suphuu yeroo didu waamamtuun kasaaraa kana xiqqeessuuf dhamaatii gama ofii gochuun konkolaaticha hojiitti deebisuuf bu'uura Seera Hariiroo Hawaasaa kew. 1802(1) dirqama qaban hin baane. Iyyataan bu'uura kanaan kan falmate waan ta'eef waamamtuunis dhuunfaan suphisiisuun kasaaraa xiqqeessuu osoo dandeessuu kana waan hin raawwatiiniif bu'uura Seera Hariiroo Hawaasaa kw. 1802 (2) tiin konkolaaticha dhuunfaan suphisiisuuf hanga gahaa ta'e galiin baatii sadii (guyyaa sagaltamni) qofti gahaa dha jechuun fooyyessee murteesseera.

**Dhimma 2<sup>ffaa</sup>: Galmee Dh/ Ij/ Mana Murtii Waliigala Federaalaa lakk. 27565<sup>55</sup>**

Ka'uumsi dhimma kanaa himannaa beenyaa deebii kennaan 1<sup>ffaa</sup> waamamaa 1<sup>ffaa</sup> fi konkolaachisaa waamamaa 1<sup>ffaa</sup> irratti mana murtii godina shawaa bahaatti dhiyeesse yoo ta'u, qabiyyeen himannaa isaa konkolaataan qabeenyummaan isaa kan waamamaa 1<sup>ffaa</sup> ta'e konkolaataa taaksii isaatti bu'uun guutummaatti faayidaan ala waan ta'eef gatii taaksii qarshii 80,000 (kuma saddeettama), galii guyyaa taaksiin argamsiisu guyyaatti qarshii 100 kan guyyaa 211 qarshii 21,000 fi konkolaaticha harkisiisuuf baasii bahe qarshii 200, walumaagalatti qarshii 101,300 akka kaffalamuufiif gaafateera.

Dhaabbatni Inshuraansii Itoophiyaa konkolaataan himatamaa (waamamaa 2<sup>ffaa</sup>) miidhaa geessiseef aguuggii kennee waan jiruuf gidduu galee falmeera. Manni murtichaa bitaa fi mirga erga falmisiisee murtii kenneen konkolaataan taaksii rukkutame guutummaatti faayidaan ala waan ta'eef gatii konkolaatichaa qarshii 80,000, galii cite qarshii 18,300 fi konkolaaticha harkisiisuuf gatii bahe waamamaan 2<sup>ffaa</sup> fi iyyataan (Dhaabbatni Inshuraansii Itoophiyaa) akka kaffalan murteesseera. Manni Murtii Waliigala Oromiyaas murticha cimseera.

Dhaaddachi Ijibbaata Mana Murtii Waliigala Federaalaa dhimmicha iyyannoodhaan ilaalee murtii kenneen konkolaataan taaksii waamamaa 1<sup>ffaa</sup> (himataa jalaa) guutummaan guutuutti faayidaan ala ta'uu isaatiin galiin konkolaataan kun hojii irratti bobba'uun argamsiisu citeera. Kanaafuu, waamamaa 2<sup>ffaa</sup> n miidhaa konkolaaticha irra ga'eef qofa osoo hin taane galii himataa irraa cite kaffaluuf sababni itti-gaafatamaa hin taasisne hin jiru. Kana yoo ta'e immoo miidhaan tokko qofti filatamee akka kaffalu sababni taasifamuuf hin jiru. Akka Seera Hariiroo Hawaasaa kew 2090'ttis beenyaan kaffalamuu kan qabu hanga miidhaa ga'e wal madaaluudhaan waan ta'eef, waamamaan 2<sup>ffaa</sup> gatii konkolaatichaas ta'e galii cite akka kaffalu murteessuun sirrii dha.

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<sup>55</sup> Iyyataa Dhaabbata Inshuraansii Itoophiyaa Vs waamamtoota Damisee Warqinee faa (N-2)), murtii Dhaddacha Ijibbaata Mana Murtii Waliigala Federaalaa (2001), Jildii 5, FF128-130.

Iyyataan konkolaatichi manca'eera jedhamee gatiin konkolaatichaa erga kaffalamee dabalataan galiin cite akka kaffalamu murteessuun yeroo lammaffaa akka beenya'u gochuu dha jechuu irraan kan hafe sababa galii cite hin kaffalleef falmii waliigaltee yookin seera bu'uureffate hin dhiyeessine. Iyyataan falmii isaatiin gatii konkolaataa kaffalameen konkolaataa biraa bitee fayyadamuun galiin akka jalaa hin cinne gochuu osoo danda'uu ykn haguuggii inshuraansii kasaaraa dabalataa bitachuudhaan galiin isaanii akka hin hafne gochuu osoo danda'anii osoo kana hin raawwanne galii isa irraa cite gaafachuu hin danda'u jechuun kan falman ta'us iyyataan waamamaa 2<sup>ffaa</sup> inshuraansii kenneen galii cite akka hin kaffalle (kaffaluu dhiisuuf) kan waliigalan ta'uu hin dhiyeessine jechuudhaan kufaa godheera.

#### **4.2. YAADA XIINXALAA MURTIIWWAN KANA IRRATTI**

Kutaa lammaffaa jalatti yaadrimee bu'uuraa kasaara al-kallattii hariiroowwan waliigaltee, waliigalteen alaa fi inshuraansii keessatti ilaalleerra. Mata duree kana jalatti yaadota kana bu'uureffachuun murtiiwwan Dhaddachi Ijibbaataa Mana Murtii Waliigala Federaalaa kenne lamaan armaan olitti ibsaman irratti ciminaa fi hanqina kaasuun kan xiinxallu ta'a.

##### **A. Kasaara Al-kallattii Adda Baasuun Ilaaluu**

Akkuma armaan olitti ibsame jechi kasaaraa al-kallattii seera daldalaa fi seera hariiroo hawaasaa keenya keessatti ifatti caqafamee argamuu baatus hiikkoon waliigalaa yaadrimee beenyaa kasaaraa al-kallattii seerota kana keessatti hammatamee jira. Dhaabbiileen inshuraansii garaagaraa yeroo imaammata qopheessan keessatti keewwata dhaabbatichi miidhaa al-kallattiif kaffaltii hin raawwatu kan jedhu galchaa jiru. Dhimmoota armaan oliirraa akkuma hubatamu Dhaddachi Ijibbaataa Mana Murtii Waliigala Federaalaas dhimma itti-gaafatamummaa waliigalteen ala dhufuu fi Inshuraansii keessatti gosa miidhaa kana adda baasuuf yaaleera. Haata'u malee, hiikkoowwan seeraa Dhaddachi Ijibbaataa kun kennu murtii manneen murtii biyyattii kennan wal fakkaataa akka ta'u gochuu fi hubannoo waaltawaa uumuu kan qabu waan ta'eef hiikkoon kennu kan

iftoomina qabuu fi yaadrimee sirni seeraa keenya kaa'e irraa osoo hin goriin ta'uu qaba.

### **B. Kasaaraa Al-kallattii Waliigaltee fi Gocha Balleessaa Keessatti Gaafatamu**

Dhimma 1<sup>ffaa</sup> irratti dhaddachi ijibbaataa kaffaltiin beenyaa sababa himatamaan dirqama waliigaltee inshuraansiin gale yerootti bahuu dhabuu isaatiin kasaaraan dhaqqabe akka beenyaa kasaaraa al-kallattii hin taaneetti ibseera. Dhaddachi ijibbaataa kasaaraan al-kallattii hanga konkolaatichi suphamee ykn bitamee bakka bu'utti galii konkolaaticha fayyadamuun ykn ittiin daldaluun argamu ture jechuun isaa hanqina kan qabu miti. Kasaaraan akkasii gocha haguuggiin inshuraansichaa kenne irraa kan maddu dha. Gama biraatiin, dhaabbatni inshuraansii miidhaan haguuggii kenne dhaqqabuu isaa odeeffannoo osoo qabuu yerootti hin suphiin/ bakka hin buusiin yoo turee fi sababa kanaan Inshuraansii fudhataarra miidhaan yoo gahe Inshuraansii fudhataan sababa beenyaa hin gaafanneef hin jiru. Miidhaan akkasii gochicha irraa kan madde osoo hin taane, waliigalteen inshuraansii yerootti raawwatamuu dhabuu irraa kan maddu ta'ee amala isaatiinis sababa waliigalteen yerootti hin raawwatanneef kasaara hordofee dhufe (contractual consequential loss) ta'a. Dhaddachi ijibbaataa kunis dhimmicha irratti inshuraansii fudhataan beenyaa miidhaa sababa inshuraansii kanaan yerootti kaffaltii hin raawwatiin hafeef gaafachuu kan danda'u ta'uu murteessus kasaaraan akkasii ofii isaatiin iyyuu kasaara al-kallattii ta'uu kan dagate fakkaata. Maddi isaa garaagar ta'us miidhaan haala kanaan dhufu kasaara hordofee dhufe (consequential loss) ta'uun isaa hin hafu. Kanaafuu, hariiroo waliigaltee inshuraansii keessatti miidhaan beenya'amu kan gochaa fi kan waliigaltee irraa maddu ta'uu waan danda'uuf, yaadrimee kasaaraa al-kallattiis kallattii lameen kana irraayyuu ilaaluun barbaachisaa dha.

### **C. Akka Bu'uuraatti Itti-gaafatamummaan Miidhaa Kallattii fi Al-kallattii Ilaallata**

Dhimma lammaaffaa irratti dhaddachi ijibbaataa qajeeltoo Seera Hariiroo Hawaasaa kew.2090 bu'uureffachuudhaan gareen itti-gaafatamummaa hariiroo waliigaltee malee dhufuuf beenyaa kaffalu kan kallattii qofa osoo hin taane miidhaa al-kallattiifis (fakkeenyaaf galii cite, baasii

konkolaatichi itti harkifamee fudhatame, kkf) kaffaluuf ittigaafatamaa akka ta'e ibseera. Dhimmicha irratti dhaabbatni inshuraansii miidhaa al-kallattii garee sadaffaa irra gahuuf itti-gaafatamaa hin ta'u jedhee falmus, dhaddachichi dhaabbatni inshuraansii itti-gaafatamummaa akkasii hambisuuf inshuraansii fudhataa waliin kan waliigale ta'uu wanta dhiyeesse hin qabu jechuudhaan kufaa godheera. Qabiyyee murtichaa akkuma jirutti yoo ilaalle.

*አመልካችን መኪናው ወደሚል ተብሎ የመኪናው ዋጋ ከተከፈለ በድጋሚ የታጣጠ ገቢ እንዲከፈል መወሰኑ ሁለቴ እንዲካሰ ማድረግ ነው ከማለት በቀር የታጣጠ ገቢ ሊከፈል የማይገባበትን ክውል ወይም ክሕግ የመገጨ ሌላ ክርክር አላቀረበም :: በእርግጥ በሠበር ችሎት በሰጡት የመ/መልስ ላይ ለመኪናው ዋጋ በተከፈለው ገንዘብ መኪና ገዝተው በመጠቀም ገቢው እንዳይቋረጥባቸው ማድረግ ሲገባቸው ወይም የተቋረጠ ገቢን የሚተካ የመድን ዋስትና /Consequential loss policy/ በመግዛት ገቢያቸው እንዳይቋረጥባቸው ማድረግ ሲገባቸው ይህንን ሣይደርጉ የመጣባቸውን ጉዳት ሊጠይቁ አይገባም በማለት የተከራከሩ ቢሆንም አመልካች ለ2ኛ ተጠሪ በሠጠው የመድን ሽፋን ውል የታጣጠ ገቢ ላለመክፈል የተሰማሙ ለመሆኑ ወይም ሌላ ተመሳሳይ ክርክር አላቀረቡም::*

Bu'uura murtii kanaatiin dhaabbatni inshuraansii itti-gaafatamummaa beenyaa kasaaraa al-kallattii jalaa kan bahu duraan dursa waliigalteedhaan kan daangessee jiru yoo ta'e akka ta'ee fi akka bu'uuraatti garuu haguuggiin inshuraansii kasaaraa al-kallattiillee kan haammatu ta'uu kan agarsiisu dha. Yaadni kun murtii dhaddachichi duraan galmee lakk.22162 irratti dhaabbatni inshuraansii konkolaataa balaan irra ga'eef gatii isaa erga kaffalee balleessaan ofii raawwate waan hin jirreef kasaaraa al-kallattii kaffaluuf itti-gaafatamaa hin ta'u jechuun murtee kenne waliin kan wal faallessu fakkaata.<sup>56</sup> Akkuma armaan olitti

<sup>56</sup> Qabiyyeen murtichaa "... እንኹራንስ ኩባንያው ከዚህ በተጨማሪ በመኪናው መውደም ምክንያት ለደረሰው ጉዳት /consequential loss/ ተጠያቂ አይደለም:: መልስ ሰጪ የደረሰው ኪሣራ በአመልካች ጥፋት ምክንያት የደረሰ መሆኑን የሚያሳይ ማስረጃ አላቀረበም:: ይልቅንም መልስ ሰጪ የ 112 ቀናት ሂሳብ አስልቶ ያቀረበው የመድን ሽፋን ሰጥቶት የነበረው የሕብረት እንኹራንስ መኪናውን ለመተካት 112 ቀናት በመውሰዱ ነው:: በመሆኑም የአሁን አመልካች አፍሪካ እንኹራንስ በጉዳት ምክንያት የቀረ ገቢን ለመተካት ግዴታ ስለሌለበት ጥፋት መፈፀሙ የሚያሳይ ማስረጃም ስላልቀረበ መኪናው ለቆመበት 112 ቀናት የቀረውን ገቢ ብር 28,000 /ሃያ ስምንት ሺህ/ ሊከፍል ይገባል ተብሎ መወሰኑ አግባብ ሆኖ አላገኘውም:: jedha. Dhimma kana irratti gareen lameen imaammata irratti itti gaafatamummaa kasaara al-kallattii daangesuu isaanii wanti jedhame hin jiru.

mata duree 3.4. jalatti ibsame tumaalee seera Hariiroo Hawaasaa rogummaa qaban waliin yoo ilaalamu gareen itti-gaafatamaa ta'e gocha balleessaa kan raawwate yoo ta'e malee itti-gaafatamummaa akka waliigalaatti yookin gosaan adda baasanii daangessuun ni danda'ama. Haala kanaan maddi itti-gaafatamummaa garee beenyaa kaffaluu balleessaa ofii isaa yoo hin taane itti-gaafatamummaa kasaaraa al-kallattii waliigalteedhaan dursanii daangessuu wanti dhorku hin jiru. Waliigalteen itti-gaafatamummaa kasaaraa al-kallattii daangessu yoo hin jiraanne garuu bu'uura dhimma lammaffaa armaan olii kanaan murteessuun yaadrimee beenya'uu (indemnity) waliin waan deemuuf dhama qabeessa dha.

Gama biraatiin, inshuraansiin qabeenyaa fi inshuraansiin ittigaafatamummaa miidhaa garee sadaffaa irra ga'uuf kennamu inshuraansii bakka buusuun beenya'u (indemnity insurance) ta'us hanga dhaabbatni inshuraansii kaffaluu qabu akka seera daldalaa kew.665'tti hanga waliigalteedhaan caqafame waliin kan ilaalamuu qabu ta'uus dagatamuu hin qabu.

#### **D. Kasaaraa Al-kallattii Waliigalteedhaan Daangessuu**

Dhimma 1<sup>ffaa</sup> irratti falmiin iyyataa dhaabbatni inshuraansii miidhaa al-kallattii waliigalteedhaan (imaammata inshuraansiitiin) daanga'ee jira waan ta'eef, itti-gaafatamuu hin qabu kan jedhu dha. Dhimmicha irratti dhaddachi ijibbaataa gaaffiin himattuu beenyaa kasaaraa sababa waliigalteen hin raawwatamiin hafeeti malee kasaaraa al-kallattii sababa balaan dhufe miti jechuudhaan kufaa godheera. As irratti gaaffiin himattuu galii cite kan gaafa balaan gahe irraa jalqabee hanga gaafa murtiin kennamuutti galii cite hunda waan ta'eef, beenyaan himattuun gaafatte sababa konkolaataan yerootti hin suphamneef miidhaa gahe qofa jechuu yoo baannellee balaan gahe hanga yeroo konkolaaticha suphuuf gahaa ta'e baatii sadiitti galii sababa balaan cite (consequential loss) fudhatee galii sanaa booda hafe immoo galii sababa waliigalteen osoo yerootti hin raawwatamiin hafeef citetti fudhachuun fala dhama-qabeessa fakkaata. Gama biraatiin, murticha akkuma jiruun yoo fudhanne sababa waliigalteen yerootti hin raawwatamiin galiin konkolaatichi argamsiisu

ture mataan isaa miidhaa al-kallattii sababa waliigalteen hin raawwatamiin hafe (contractual consequential loss) hin ta'uu?<sup>57</sup> Yoo kana ta'e immoo waliigaltee inshuraansiidhaan kasaaraa al-kallattii daanga'e (exclusion) isa kam ilaallata? Kasaara al-kallattii gocha balaa irraa madde moo isa sababa waliigalteen hin raawwatiin hafe irraa madde? Kan jedhuuf deebii kan kennu hin ta'u. Kunis manneen murtii waliigaltee keessatti kasaaraan al-kallattii yoo daanga'u (exclusion clause) dhimma isa kamiif akka ta'e adda baafachuu akka qaban nutti agarsiisa.

## 5. YAADA GUDUNFAA FI FURMAATAA

Itti-gaafatamummaa hariiroo hawaasaa garaagaraa keessatti akka waliigalaatti "kasaaraan al-kallattii" miidhaa diinagdee taatee (gocha raawwachuu ykn dirqama bahuu dhabuu) itti-gaafatamummaa hordofsiiisu irraa madde ta'ee kan gareen miidhamee fi itti-gaafatamaa ta'an taateen ennaa uumametti geessisuu danda'a jedhanii yaaduu qaban hammata. Haala kanaan daangaan itti-gaafatamummaa dhimmaa dhimmatti garaagarummaa qabaatus, yeroo baay'ee kasaaraa al-kallattii kan jedhaman sababa miidhaa ga'een/dirqamni waliigalteen seename osoo hin raawwatamiin waan hafeef/ bu'aa hafe, baasiwwan dabalataa, carraa darbe, galii citee fi qusannaa hafe dabalata.

Jechi 'kasaaraa al-kallattii' jedhu seerota biyya keenyaan adda bahee ifatti tumamee jiraachuu baatus, yaadrimeen beenyaa kasaaraa al-kallattii seerota waliigaltee fi waliigalteen alaa keessatti hammatamee jira. Tumaaleen Seera Hariiroo Hawaasaa keewwata 1790-1805, 2091 fi 2051 waliin yoo ilaalame hariiroo waliigaltees ta'e waliigalteen alaa keessatti beenyaan miidhaa shallagamu kasaaraa al-kallattiillee kan hammatu ta'uu ni hubatama.

Hariiroo waliigaltee inshuraansii keessatti akka waliigalaatti dhaabbatni inshuraansii miidhaa gocha balaa tokko irraa dhufe beenya'uuf waliigala

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<sup>57</sup> Ibsa armaan olii lakk. 2 fi 3 jalatti kenname ilaalaa. Kasaaraan al-kallattii gocha gofaarraa osoo hin taane sababa waliigalteen hin raawwatamiin hafeenis dhaqqabuu danda'a.

waan ta'eef itti-gaafatamummaa gama lamaa kan qabate dha. Kunis gama tokkoon gocha itti-gaafatamummaa hordofsiise yoo ta'u, gama biraan immoo waliigalticha raawwachuu dhabuu yookin yerootti raawwachuu dhabuu irraa kan maddu ta'a. Kanaafuu, hariiroo inshuraansii keessatti miidhaan beenya'amu kan gochaa fi kan waliigaltee irraa maddu ta'uu waan danda'uuf, kasaaraan al-kallattiis akkasuma kan gocha irraa madduu (business interruption loss) fi kan waliigalteen raawwatamuu dhabuu irraa maddu (contractual consequential loss) adda baasanii ilaaluun barbaachisaa dha.

Qabatama jiru waliin yoo ilaallu dhaabbiileen inshuraansii imaammata qabeenyaa fi itti-gaafatamummaaf kennan irratti keewwata “yommuu miidhaan dhaqqabutti dhaabbatichi *kasaara al-kallattii* dhaqqabuuf itti hin gaafatamu” jedhu galchuun kan baratamaa dhufe dha. Falmiiwwan itti-gaafatamummaa beenyaa kasaaraa al-kallattii dhimmoota itti-gaafatamummaa waliigalteen alaa fi dhimmoota inshuraansii irratti ni mul'atu.

Dhaddachi Ijibbaata Mana Murtii Waliigala Federaalaas falmiiwwan kasaaraa al-kallattii kana bu'ureffachuun hiikkoo seeraa kennuuf yaaleera. Haata'u malee, hojimaatnii fi hiikkoowwan kennaman yaadrimee sirna shallaggii beenyaa biyya keenyaa waliin yoo ilaalamu hanqinni kan jiru ta'uu hubatama. Kanas murtiiwwan Dhaddacha Ijibbaataa Mana Murtii Waliigala Federaalaa armaan olitti fakkeenyummaaf ibsaman irraa akkuma hubatamu kasaara al-kallattii gocha irraa madduu fi kan waliigaltee yerootti raawwachuu dhabuu irraa maddu adda baasuu dhabuun rakkoo hiikkoo mul'atu dha. Kana malees, falmiiwwan dhaabbattootni inshuraansii taasisanii fi murtiiwwan kennaman kana irraa itti-gaafatamummaa kasaaraa al-kallattii akkamii waliigalteen daangessuun akka danda'amu fi daangaa raawwii waliigaltee akkasii irratti hubannoon jiru gahaa akka hin taane ni hubatama.

Walumaagalatti, yaad-rimee kasaaraa al-kallattii adda baasuun ilaaluuf tattaaffiin jiru kan jajjabeeffamuu qabu ta'ee hojimaatnii fi hiikkoowwan kennaman yaadrimee shallaggii beenyaa miidhaa sirni seeraa biyya



keenyaa akeeke waliin kan walsimu ta'uu qaba. Keessumattuu, hariiroo inshuraansii keessatti kasaaraan al-kallattii miidhaawwan gocha irraa maddanii fi waliigaltee raawwachuu dhabuu irraa maddan akka dabalatu adda baasanii ilaaluun barbaachisaa dha. Kana malees, beenyaan miidhaa waliigaltee daanga'u gosa miidhaa irratti hundaa'ee osoo hin taane madda isaatu ilaalamuu qaba. Haala kanaan, itti-gaafatamummaan (hariiroo waliigaltees ta'e waliigalteen alaa keessatti) gocha balleessaa irraa kan madde yoo ta'e, beenyaan waliigalteen kan daanga'u miti. Gama biraatiin, gareen beenyaa kaffaluuf itti-gaafatamaa ta'e balleessa ofii raawwate yoo hin qabaatne, beenyaa kasaaraa al-kallattii qofa osoo hin taane beenyaa miidhaa kamiyyuu waliigalteen daangessuu wanti dhorku hin jiru. Waliigalteen akkasii yoo hin jiraanne garuu itti-gaafatamummaan jiraannaan kasaaraa al-kallattiillee kan hammatu ta'uu dagatamuu hin qabu.

## **ALL ABOUT WORDS ON THE PROCEDURE OF CONSTITUTIONAL INTERPRETATION IN ETHIOPIA: A COMMENT ON MELAKU FANTA CASE**

Dessalegn Berhanu Wagasa\*

### **1. INTRODUCTION**

The procedure of constitutional interpretation governs as to how and where constitutional complainants are presented, determined, and finally enforced by the concerned official. In a nutshell, one may comfortably conclude that procedural rules, in essence, give effect (“life”) to the ends sought to be achieved by the Constitution.

However, the relevance of the constitutional complaint procedure is not yet familiar practice in Ethiopia. Nor is the distinction between objective and subjective purposes of the constitutional complaint well understood. This has been reflected when the House of Federation (herein after HoF) declared unconstitutionality of laws in *Melaku Fenta v. Federal Ethics and Anti- Corruption Commission Prosecutor Team*<sup>1</sup> (herein after Melaku case). The Federal Democratic Republic of Ethiopia (herein after FDRE) Constitution, particularly under Article 84 (2) has been less clear on the procedure to be employed in the process of adjudicating constitutional issues. It has created confusion particularly regarding the initiation of constitutional complaint.

If one considers the plain meaning of the provision, a law must be contested for its unconstitutionality. And constitutional interpretation could be undertaken if there is contestation of unconstitutionality of law, which bears a plaintiff versus defendant court drama. Then the contest or dispute over the unconstitutionality of legislations enacted by House of

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<sup>1</sup> The Former Director General of the Ethiopian Revenues and Customs Authority, Melaku Fenta V. Anti Corruption Prosecutor Team (Decision of HoF on Thursday, January 2, 2014 unpublished).

Peoples Representative (hereinafter HoPR) must be submitted to the Council of Constitutional Inquiry (here in after CCI).

On the other hand, Article 84(2) of the FDRE Constitution by itself provides ‘any court or any affected party has the right to challenge the unconstitutionality of laws (federal or state)’. In clear statement, any court or interested party has the right to submit the issue of unconstitutionality to the CCI. Accordingly, if any court or any affected party has the right to challenge the unconstitutionality of laws (federal or state), constitutional interpretation could be undertaken without the need for a dispute or contest, which bear a plaintiff versus defendant court drama. We should therefore ask what the meaning of Article 84 (2) is with the issues relating to initiation of constitutional interpretation.

In addition, for most, if not for all, in the past 23 years, declaration of unconstitutionality of laws enacted by HoPR is a new phenomenon in Ethiopia. Recently, the HoF has passed decision that declares laws enacted by HoPR did contradict with the FDRE Constitution for the first time in Melaku’s case. The reasoning of the HoF is that adjudication of cases by the Federal Supreme Court on the basis of its first instance jurisdiction violates individual’s constitutional appeal right. The decision on Melaku’s case is strange and has attracted the attention of many people. It is strange because, there is ‘prevalent’ perception that such kind of decision is not attemptable by the HoF. The scholarly comments thus necessary on decision rendered by the HoF and the argument that claim ‘unconstitutional declaration of unconstitutionality’ of laws in Melaku’s case. And it is also necessary to comment on the error of the latter that argued the unconstitutionality of decision of the HoF on the ground that content of the argument did not succeed in attracting enough criticism.

This case comment is written not in attempt to discuss constitutional interpretation and which organ is empowered to adjudicate constitutional complaint. Rather, it has purpose of analyzing laws that create confusion pertaining to the procedure of constitutional interpretation, particularly its initiation. Besides, it attempts to portray the chronology of events accompanying the first ever form of declaration of unconstitutionality of

laws enacted by HoPR as unconstitutional by the HoF. It also discusses the former perception and practice on the right to appeal in a case when the Federal Supreme Court has exclusive first instance jurisdiction. It argues the decision of the HoF in Melaku's case is used as a landmark decision of constitutional interpretation and shows the breakdown of the perceptions that the HoF is not independent, impartial to declare unconstitutionality of laws enacted by HoPR. The comment begins with summary of the Melaku's Case and emphasis on rulings of the Federal High court and the HoF. The next part provides discussion on procedure of constitutional interpretation, particularly its initiation in Ethiopia. The rest part gives analysis on the decision.

## 2. SUMMARY OF THE CASE

In Melaku's case, the Federal High Court referred the case to the CCI/HoF seeking for constitutional interpretation on the issue of jurisdiction. In this case, the Federal High Court's jurisdiction to try Melaku was challenged on the ground that the defendant, Melaku is a government official with a ministerial portfolio as well as member of the Council of Ministers and shall be tried by the Federal Supreme Court by citing Art.8 (1) of the Federal Courts Establishment Proclamation No 25/1996 and Art.7 (1) of the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No 434/2005<sup>2</sup>.

The court, presided by three judges, in its unanimous ruling, questioned the constitutionality of these articles considering that the defendant will be deprived of his constitutional right to appeal guaranteed under Article 20(6) if his case is to be tried by the Federal Supreme Court. Therefore, the court ruled that the issue as to which court should have jurisdiction to preside over the case needs constitutional interpretation and referred the

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<sup>2</sup> Article 8(1) of the Federal Courts Establishment Proclamation No 25/1996 provides that the Federal Supreme Court will have first instance jurisdiction on offences for which officials of the Federal Government are held liable in connection with their official responsibility. Similarly, Article 7(1) of the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No. 434/2005.provides that the Federal High Court will have first instance jurisdiction other than those cases for which the Federal Supreme Court has first instance jurisdiction.

case to CCI/HoF based on its own initiation. Finally, the HoF declared the unconstitutionality of Article 8(1) of the Federal Courts Establishment Proclamation; and Article 7(1) of the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation on the ground that if his case is to be tried by the Federal Supreme Court, the defendant would be deprived of his constitutional right to appeal.

### **3. PROCEDURE OF CONSTITUTIONAL INTERPRETATION IN ETHIOPIA**

Although the Constitution has been less clear on the procedures to be employed in the process of adjudicating constitutional issues, the ‘ law to re-enact for the strengthening and specifying the power of Constitutional Inquiry of the FDRE, proclamation No. 798/2013 has attempted to clarify some of the ambiguities.<sup>3</sup> An area of procedure of constitutional interpretation in Ethiopia includes the concrete review (in court proceeding) and individual complaints (out of court proceeding). Let’s briefly look both concepts.

#### **3.1. IN COURT PROCEEDING**

When the issue of constitutional interpretation arises in the court proceeding, the interested party cannot directly lodge his complaint before the CCI/HoF. S/he should rather present his request or complaint before court handling the case before submitting it to the CCI.<sup>4</sup> In such instances, once complaint is posed before the court, it cannot immediately declare a decision on the case. Rather it has two options: either to reject the complaint on the ground that it is not a legal issue to call for constitutional interpretation or to submit that complaint to CCI if the court is convinced that the complaint really demands interpretation in deciding the case.<sup>5</sup> In this regard, the proclamation seems to obligate the courts to refer all complaints of constitutional issues if it calls for

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<sup>3</sup> Proclamation to Re-enact for the Strengthening and Specifying the Power of Constitutional Inquiry of the Federal Democratic Republic of Ethiopia, Proclamation No. 798/2013 (hereinafter Procl. No 798/2013). Except for the general clauses that empower the HoF to 'interpret the constitution and to decide constitutional disputes' the FDRE Constitution is silent on the exact contours of the vague clauses.

<sup>4</sup> Ibid.

<sup>5</sup> Id., Proclamation No. 798/2013, Article 4(3)

constitutional interpretation. Also this fact obligates us to assert that depending on the circumstances of a case, the court has absolute discretion either to submit a case to the CCI if it believes that the complaint calls for constitutional interpretation or to reject the complaints if the court believes that the complaint does not need interpretation.

Whenever the court announces its rejection of the complaint and at the same time if the suspect is aggrieved by such rejection, the aggrieved can submit his grievance by way of appeal to the CCI within three months from receipt of the decision of the court.<sup>6</sup> In such a case, CCI may order the court to suspend until it decides on inquiry for constitutional interpretation of a case.<sup>7</sup>

### **3.2. OUT OF COURT PROCEEDING**

Constitutional complaint is said to be ensued out of court proceeding when fundamental rights and freedoms of any person is adversely affected or violated by the decision of any government organ or any public officials.<sup>8</sup> In such scenario, an individual is expected to first exhaust all available remedy from government institution having the power with due hierarchy to consider it.<sup>9</sup> On other hand, constitution firmly demands protection of those fundamental rights and freedoms as they are regarded as basic rights. That is to mean since these rights are considered as roots on which other rights base their existence, any violation of such rights and liberties will be shocking and seem to contradict with constitution.

Thus, in view of this fact interested party has a right to raise any form of constitutional complaint whenever s/he deems it calls for interpretation and then to question validity, legitimacy of the decision of public officials by posing it before CCI. But, as it has been clearly forwarded before what makes complaint too difficult is interested party cannot

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<sup>6</sup> Id., Procl. N. 798/2013, Article 4(5)

<sup>7</sup> Id., Procl. N. 798/2013, Article 6

<sup>8</sup> Id., Procl. N. 798/2013, Article 5 (1)

<sup>9</sup> Id., Procl. N. 798/2013, Article 5(2)

directly lodge it to the CCI before exhausting other procedural remedies be it judicial or administrative.

#### **4. THE PROCEDURE AT INITIATION OF CONSTITUTIONAL COMPLAINT**

Constitutional interpretation in Ethiopia involves some sort of inherent procedure. It begins from the very initiation of constitutional complaints by the courts or by any interested party up to final decision is rendered by the HoF. One among the various prescription of the Constitution is to rightly pin point those persons (either physical or legal) who would be entitled to initiate constitutional complaints. The FDRE Constitution has tried to expressly provide those persons who would initiate constitutional complaints as '*any court or any interested party*'.<sup>10</sup> From this, one can infer that initiation of constitutional interpretation by court is possible since the constitution by itself provides that as court could channel constitutional complain to the interpreter of the constitution. Generally, in Ethiopia whenever constitutional interpretation on issues before courts of law arises, courts of any level refer the case to CCI.<sup>11</sup> But, the courts do such task if they are convinced that law is repugnant to the constitutional right of the concerned party.

However, there may be a problem to ensure the right of accessibility to the interpreter organ in a case when 'any courts' refer all constitutional matters to the CCI/HoF. Look, how many courts are in the country. For instance, all First Instance Courts of the nine regional states, High Courts of the nine regional states, Supreme Court of the nine regional states; and all First, High and Supreme Courts of the federal and Dire Dawa city administration. From this fact, it is inevitable that huge number of constitutional cases could be referred to HoF via CCI which results a great load to this organ. Therefore, how could CCI which is the part timer organ effectively accommodate constitutional issues which need day to day activity that will be referred from all level of courts of the corner of

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<sup>10</sup> The Constitution of Federal Democratic Republic of Ethiopia (Proclamation number, 1/1995, Art. 84(2) (hereinafter FDRE constitution).

<sup>11</sup> Procl. No. 798/2013, Supra note 3, Article 4(1).

country on the matter of constitutional issues? From this angle, it is very difficult to think of having the proper protection of the fundamental rights and freedoms guaranteed under the constitution. Furthermore, as could be inferred from minute of constitutional assembly, the drafter of the constitution did not intend as courts refer all cases which entail constitutional issues to the HoF.<sup>12</sup> So that, it is not necessary for courts to refer all cases which entail constitutional issues rather as per Article 84 (2) of the constitution they should refer cases entailing only un/constitutionality of legislative acts to the HoF.

The other point is the FDRE Constitution fails to define the term ‘interested party’ and it becomes a matter of controversy to understand its meaning constitutionally. Some scholar states that ‘where an issue of constitutional interpretation or disputes arises in the course of litigation in a court, an interested party may mean a plaintiff or a defendant.’<sup>13</sup> Because, it is a plaintiff or a defendant whose interest is inevitably affected by the outcome of a case.

In spite of the controversy among the scholars, the term “interested party” is used to denote those whose interest is at stake directly or indirectly as a result of the operation of the law or the legislation enacted either by the federal or state legislature. Because, constitutionally, the term “interested party” could mean the defendant or the plaintiff or any party or any organ or any individual whose constitutional rights is affected by the operation of the law, by the decision of public officials as well as by any other customary practices. If the term interested party is understood and interpreted just like this, through what procedures could these parties initiate constitutional complaint? Initially, the interested party may apply to the court if the issue is ensued in court proceeding or

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<sup>12</sup> Minute of the Constitutional Assembly of the Transitional Government of Ethiopia, V.5, December 01-04, 1994. Discussion of the Assembly on Article 83, one member forwarded to the assembly his fear that “if courts are excluded from interpreting the constitution, it is difficult to say that there are courts in Ethiopia” and the response given from the house was that courts are not totally excluded from their traditional interpretation power.

<sup>13</sup> Ibrahim Indris, Constitutional Adjudication under the 1994 FDRE Constitution in *Ethiopian Law Review*(2002), Vol. 1, No.1, p. 82.



directly to the CCI as the application of a certain provision of the constitution requires interpretation. In doing so s/he should show the transgression or the violation of his constitutionally guaranteed right by the operation of certain federal or state legislation or by the decision of any organ of the government.

In short, the initiation of constitutional interpretation in Ethiopia operates within the above framework.

## **5. ANALYSIS ON THE INITIATION OF ONSTITUTIONAL COMPLAINT IN MELAKU’S CASE**

### **5.1. WHO COULD INITIATE CONSTITUTIONAL COMPLAINT?**

The procedure of initiation of constitutional complaint seems less familiar practice in Ethiopia. This is also observed in Melaku’s case. Let me begin with the argument of a group of people who argued that ‘unconstitutional declaration of unconstitutionality of laws in Melaku’s case. According to supporter of this argument, for instance, article headlined, ‘Unconstitutional Declaration of Unconstitutionality’,<sup>14</sup> Mulugeta Argawi argued that “*declaring unconstitutionality of laws in Melaku's case is unconstitutional, in and of itself*” on the ground that *HoF/CCI checked un/constitutionality of legislative laws without real controversy or dispute between the real parties to a case.*

The above argument rests basically on Article 84 (2) of the constitution. I think it is important to counter this line of argument by focusing on the laws themselves. The criticism of this line of argument rotates around purely legalistic thinking that a court of law cannot initiate or raise any constitutional matter until such a time that either of the parties raise the issue, which should, in turn, be disputed and contested by the other.

But, is this true in constitutional interpretation like that of civil suit? Who could initiate constitutional complaint under the FDRE Constitution? Of

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<sup>14</sup> Mulugeta Argawi, Unconstitutional Declaration of Unconstitutionality, *Addis Fortune* (Feb.9,2014), Vol. 14, No.719, Addis Ababa).

course, there are varying mechanisms of initiation of constitutional interpretation, but even then, courts do not follow civil procedures like that of civil suit. Constitutional interpretation is all about maintaining constitutionalism. Many cases have been raised as issues of constitutional rights (and hence constitutional interpretations) which were not exactly cases of one party against the other and there should not necessarily be two litigants fighting for a case. The only precondition for constitutional interpretation is people. There ought to be a section of the population adversely affected by the unconstitutionality of a law.

FDRE Constitution seems partially adopted concentrated system of constitutional interpretation particularly regarding the initiation of constitutional complaint since it has tried to provide those persons who would initiate constitutional complaints as ‘any court or any interested party’.<sup>15</sup> Here, it is obvious that if there is an issue of constitutional interpretation in court of law, the court can by its own initiation channel the case to the HoF. In Ethiopia, whenever constitutional interpretation on issues before courts of law arises, courts of any level can refer the matter to CCI.<sup>16</sup> But, the courts do such task if they are convinced that law is repugnant to the constitutional right of the concerned party.

If we take Germany's constitutional court experience, which is more similar to our system, the un/constitutionality of legislative act is not checked by regular courts like that of the US. There is no need to have litigants and disputes for the German Constitutional Court to decide on the unconstitutionality of a law or practice<sup>17</sup>. It has unique powers of making any legislation ineffective which it believes to be unconstitutional. It has even been criticized for playing politics due to its incessant interventions in the country's legislative system.<sup>18</sup> These examples show that there is no experience in other federal constitutional systems that can prove the idea that constitutional interpretation is in the

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<sup>15</sup> FDRE Constitution, Supra note 10, Article 84(2)

<sup>16</sup> Procl. No. 798/2013, Supra note 3, Article 4 (1).

<sup>17</sup> Martin Borowski, The Beginnings of Germany's Federal Constitutional Court, *Ratio Juris* (2003), Vol.16, No.2, p. 156.

<sup>18</sup> Ibid

way civil matters are adjudicated. Those who argued that the constitutions should be interpreted in the way civil matters are adjudicated and the courts should only refer constitutional issues when they ascertain the existence of disputes, contests, litigants and specific causes of action, failed to provide readers with a balanced view since their argument is not fair, critical and logical when we see from the legal and theoretical aspects of constitutional interpretation.

I believe that it is not normal for a lawyer to dwell on such big constitutional issues by picking up only two keywords, namely "dispute" and "contest", from just one constitutional provision and jump into unwarranted conclusions. It is not questionable that the defendant (Melaku) did not initiate the case. Nor did the prosecutors apply to the court for review of either Article 8 (1) of Proclamation No. 25/1996 or Article 7 (1) of Proclamation No. 434/2005. It was the High Court itself that invoked the question of (un) constitutionality of the pieces of legislation and forwarded it to the CCI. For instance, those who think in such a way that the court is prohibited from doing so under Article 84 (2) of the constitution; and their selection of the sub-article as the sole relevant provision for their argument and their failure to consider the problem through a comprehensive understanding of all relevant provisions in the constitution made them to rush to reach a devastating conclusion.

It is essential to read Article 84 (2) of the constitution more critically and show whether or not it was unconstitutional for the Federal High Court to have initiated a problem of unconstitutionality in Melaku's case. It is more helpful to read all the relevant constitutional provisions, the whole chapter of the constitution as it is and even the intent of the Constitutional Conference, which ratified the document, instead of cynically selecting one sub-article and then, out of it, just one or two points.

Article 84 (2) of the Constitution reads, "Where any Federal or State law is contested as being unconstitutional and such a dispute is submitted to it

by any court or interested party, the Council shall consider the matter and submit it to the HoF for a final decision". Let us now breakdown article 84 (2) and find out the true concept of "key" words - 'contest' and 'dispute' in relation to initiation of constitutional complaint.

If one is to go by the provision, a law must be contested for its unconstitutionality in court proceeding. The contest or dispute over the unconstitutionality of legislations enacted by HoPR must be submitted to the CCI. And any court or interested party has the right to submit the issue of unconstitutionality to the CCI.

Based on the above premises, if any court or any affected party has the right to challenge the unconstitutionality of a law, constitutional interpretation could be undertaken without the need for a dispute or contest, which bear a plaintiff versus defendant court drama. Thus, the words and spirit of the provision seem to clear and cannot lead anyone with an open mind to believe that it is only when there are contending parties in a courtroom that the issues of constitutionality of a law can exist. Laws, as we all know, are administered in the courtroom as well as in other government structures. Hence, the unconstitutionality of a law can come to the surface not only in the courtrooms, but also within the bureaucracy and even on the high street.<sup>19</sup>

Any court, or interested party, can directly apply to the CCI and challenge the constitutional nature of legislation. Analogy of the process of constitutional interpretation to a civil case court dispute is total fabrication. I think the issue seems to be put clearly. And the Constitution is not as such ambiguous in showing that the issue of unconstitutionality

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<sup>19</sup> The former president, Dr Negasso Gidada v Speaker of the HoF and Speaker of House of Peoples' Representatives of Federal Democratic Republic of Ethiopia (Decision of CCI of 25 February 2005, Unreported). In this case, question of unconstitutionality of the law was raised and brought before the CCI/HoF outside the courtroom without any contestation or dispute. This case was brought before CCI by single person. Therefore, to deal with the un/constitutionality of law, the existence of real dispute like in civil case between two parties is not mandatory.

can be raised both by the Court as well as by the contending parties, within or outside of the courtroom.

In Melaku case, Mulugeta wonders as to how the High Court submitted the question of constitutionality of the proclamations in a situation where neither the accused nor the prosecutor disputed and invoked it. He advises the court that ‘it should have declined jurisdiction because those provision of laws clearly deny it jurisdiction to hear the case.’<sup>20</sup>

Yet, this kind of position is subject to criticism. The reason is that court can submit constitutional issue to the CCI on its own initiation while adjudicating the criminal case of the accused. More importantly, article 84 (2) of the FDRE Constitution has empowered the Court to invoke issues of constitutionality whenever the need arises. This is a right track that was reflected in the document of the constitution itself and from the purpose of maintaining constitutionalism by all means. The constitutional mechanism of safeguarding constitutionalism is incontestable.

## **5.2. THE RIGHT TO APPEAL VERSUS FIRST INSTANCE JURISDICTION OF FEDERAL SUPREME COURT IN MELAKU’S CASE**

Article 8 of the Federal Courts Establishment Proclamation No. 25/1996 and Article 7(1) of the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No. 434/2005 empower the Federal Supreme Court to assume first instance jurisdiction in criminal cases in which officials of the federal government are charged in connection with their official responsibility. Both provisions grant the Federal Supreme Court, the country’s highest and final judicial organ, first instance jurisdiction over criminal suits involving government officials.

In such case, there are different views regarding the right to appeal when Federal Supreme Court entertain cases on the basis of its first instance jurisdiction. The first line of argument is that as far as Federal Supreme Court has supreme power and no higher forum available than it,

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<sup>20</sup> Mulugeta Argawi, *Supra* note 14

rendering decision on the basis of its first instance jurisdiction means the losing party automatically loses the right to appeal against the decision. As the supporter of this argument correctly argued, it is clear that there is no chance of appeal.<sup>21</sup> Because the losing party has been deprived of his constitutional right to appeal if his case has once been tried and decided by the Supreme Court. This is clearly the denial of the right granted under Article 20 (6) of the Constitution which declares the parties' right to appeal. And the right to appeal against a final decision guaranteed under the constitution is no longer available to the parties involved in the case.

The second argument which also indicates the earlier position of Federal Supreme Court is that the right to appeal is not violated when the Supreme Court handle and decide the case basing on its first instance jurisdiction.<sup>22</sup> Because, the main purpose of appeal is to attain the highest quality of justice rendered in the courtroom. According to supporters of this argument, 'though this practice seem to narrow the right to appeal, the disposition of the case by the competent judges puts persons tried by the highest court in advantageous position.'<sup>23</sup> As far as the judges that preside over the case are senior and more competent than judges in other low level of courts, there is no any doubt on the justice that would be rendered and it does not amount to violation of appeal right.<sup>24</sup> CCI also had similar position with the right to appeal in connection to the issue. In short, in the past there was a perception and practice that the laws grant the Supreme Court exclusive first instance jurisdiction did not amount to violating the appeal right of individuals.<sup>25</sup>

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<sup>21</sup> Wondwossen Demissie, Ethiopian criminal procedure, (American Bar Association, Addis Ababa University, 2012), P, 374

<sup>22</sup> Public Prosecutor v. Tamirat Layne, *et al.*, (Federal Supreme Court file No.1/1989. In this case, the Federal Supreme Court has the position that while establishing appeal systems adequate attention should be given to efficient and quality justice. So, first instance jurisdiction of Supreme Court does not amount to violating the right to appeal so long as highest quality of decision in the country is rendered by Supreme Court of the country.

<sup>23</sup> Wondwossen Demissie, *Supra* note 21, p. 375.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid*

However, when we see the position of the HoF in Melaku's case, in an overwhelming majority, it rendered Article 8 (1) of Proclamation No. 25/1996 and a similar provision, Article 7 (1) of Proclamation No. 434/2005, is 'null and void'. The provisions grant the Federal Supreme Court, the country's highest and final judicial organ, first instance jurisdiction over criminal suits involving government officials. This decision shows that HoF has changed the previous position and practice by arguing that when a case has been handled and decided by Supreme Court on the bases of its first instance jurisdiction; it violates the right to appeal of individuals. From this the decision in Melaku's case is the first ever breaking point of former position and practice of Federal Supreme Court and CCI on appeal right of individual. And this decision also portrays the chronology of events accompanying the first ever form of declaration of laws enacted by the HoPR as unconstitutional.

## 6. CONCLUSION

In Melaku's case, there is a view which claims that Article 84(2) of the FDRE Constitution should be interpreted as 'a law must be contested for its unconstitutionality. And Constitutional interpretation could be undertaken if there is contestation of unconstitutionality of law which bears a plaintiff versus defendant court drama<sup>26</sup>. Accordingly, declaring unconstitutionality of laws in Melaku's case is unconstitutional on the ground that HoF/CCI checked un/constitutionality of legislative laws without real controversy or dispute between the real parties to a case.

On the other hand, the author argues that the provision should be understood in such a way that any court or any affected party has the right to challenge the unconstitutionality of laws. In clear statement, any court or interested party has the right to submit the question of unconstitutionality of laws to the HoF via CCI. Accordingly, as it was properly done by the Federal High Court in Malaku's case, the court has the right to challenge the unconstitutionality of laws. Constitutional interpretation could be undertaken without the need for a dispute or contest which abide a plaintiff versus defendant. It is obvious that as it

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<sup>26</sup> Mulugeta Argawi, *Supra* note 14

was correctly done in Melaku's case if there is an issue of constitutional interpretation in court of law, the court can by its own initiation channel the case to HoF via CCI. Therefore, whenever constitutional interpretation on issues before courts of law arises, courts of any level can refer the case to CCI.<sup>27</sup> I think that is why the Federal High Court correctly followed this line of argument in the Malaku's case which is the best and considered as a landmark case in Ethiopia.

Lastly, in the history of the FDRE, declaring laws enacted by legislature as it contradicts with the Constitution is a new phenomenon in Ethiopia. In Melaku's case, the HoF declared laws that empowered the Federal Supreme Court to preside over a case on the basis of its first instance jurisdiction, violate the right to appeal. This decision is the first ever breaking point of the former position and practice of Ethiopian courts and CCI<sup>28</sup> on the right to appeal. It also attests the confidence of the HoF while it engages in constitutional interpretation. Because, the decision of the HoF breakdown the perceptions that the HoF is not independent, impartial to declare the unconstitutionality of laws enacted by the HoPR. This kind of practice should be appreciated and has great values in the protection of the rights provided under the constitution. Therefore, for its continuity, promoting such kind of practice and building the capacity of the HoF that could increase its confidence is very essential.

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<sup>27</sup> Procl. No. 798/2013, Supra note 3, Article 4(1).

<sup>28</sup> Right to appeal is not violated even if Supreme Court handle the case based on its first instance jurisdiction since the main purpose of the appeal is attaining the highest quality of the decision rendered in the courtroom. As far as the judges that preside on the case in Supreme Court has higher quality than judges in other low level of court, there is no any suspicion on the decision be rendered by the Supreme Court and it didn't amount to violation of appeal right.



# **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 haqaatiin Inistiitiyuuticha sadarkaa biyyaatti filatamaa, akka Afirikaatti beekamaa gochuu dha.

## **Toorawwan Xiyyeeffannoo**

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2. Qo'annoo fi Qorannoo

## **Duudhaalee Ijoo**

- Gahumsa
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- Maamila Giddugaleessaa Godhachuu
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2. Contributions may be submitted in Afan Oromo, English or Amharic
3. Submissions shall be computer typed, 1.5 space, in 12 font, Times New Roman; footnotes in 10 font, 1.0 space, Times New Roman (for Afan Oromo & English). These considerations also work for Amharic submissions except that the font size for footnote 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.
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