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Bahir Dar University Journal of Law

ISSN 2306-224X

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MESSAGE FROM THE EDITORIAL COMMITTEE

The Editorial Committee is delighted to bring Volume 6, No. 1 of *Bahir Dar University Journal of Law*. The Editorial Committee extends its gratitude to those who keep on contributing and assisting us. We are again grateful to Emily Boersma who did the painstaking editorial work of this issue.

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

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

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

Disclaimer

The views expressed in this journal do not necessarily reflect the views of the Editorial Committee or the position of the Law School.

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Revisiting the Application of the Ten Year General Period of Limitation: Judicial Discretion to Disregard Art 1845 of the Civil Code

Andualem Eshetu Lema[♣]

Abstract

The period of ten year stipulated in Article 1845 of the Civil Code is widely accepted as a General Period of Limitation (GPoL) and is often applied to all civil claims irrespective of the origin and nature of obligations unless a special period of limitation has been fixed by law. However, due to the absence of a clear rule regarding the dimension and scope of its application, the general applicability of Article 1845 has been contested on different occasions. Thus, this article examines the issue of whether the period of ten year is appropriate for all civil claims or not while assessing the instances where such GPoL could be disregarded by the discretion of the court under the guidance of certain considerations. Accordingly, it canvasses the issue of whether the court should always apply the ten year GPoL by the mere fact that the law provides neither a special period of limitation nor exclusionary rule, or ought there be a little room where the court may apply some other period of limitation to other similar claims by analogy; or exempt certain claims from the subject of limitation before the move to apply Article 1845 of the Civil Code, which is explicitly stipulated for contractual claims. This article concludes that even though the argument advocating for the general application of the ten-year period in the absence of special periods of limitation is a widely shared view, the door should not be totally closed for judicial discretion whereby the period maybe disregarded on the basis of different considerations. However, since the reliance on judicial discretion to override a limitation period would render the law too uncertain, the author maintains that Ethiopia should adopt a separate and relatively comprehensive statute of limitation that clearly provides, inter alia, the dimension and scope of application of the ten year GPoL and lists of claims exempted from the subject of limitation to avoid the misuse of Article 1845 of the Civil Code.

Key Words: Period of Limitation, General Period of Limitation (GPoL), Special Period of Limitation, Judicial Discretion, Exclusionary Rules, Cassation Decision

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Introduction

With a view to protect the defendant from dormant claims, different periods of limitations are stipulated in our civil laws. The ten year GPoL stipulated under the general Contract of the Civil Code is one of such legally fixed time limits.[1] Despite the existence of limitation provisions, however, the legal framework governing the period of limitation in civil cases has a number of lacunas compared to criminal cases. The existence of a number of cassation decisions on different aspects of periods of limitations[2] confirms the controversial nature of the issue and the existence of huge legal gaps throughout the jurisprudence of limitations of actions in civil cases in Ethiopia in general and the scope of application of Article 1845 of the Civil Code in particular.

Even though the ten year period stipulated in Article 1845 of the Civil Code is widely accepted as a GPoL in civil cases, irrespective of the nature of the claim or the origin of the obligation thereto[3], the dimension and scope of its application has been contested at different times. As revealed in various cassation decisions there is a general tendency of applying the ten year GPoL during the absence of special limitation periods. Moreover, courts often do not have the discretionary power to apply a given legally fixed period of limitation on other similar claims by analogy or exempt certain claims from the subject of limitation depending upon different policy

[1] Civil Code of the Empire of Ethiopia, Proclamation No. 165 of 1960, (hereinafter the Civil Code of Ethiopia or the Civil Code), Art. 1845.

[2] One can frequently find limitation period related cases in each published volumes of '*Decisions of the Federal Supreme Court Cassation Division*' that reached its 17th volume during the writing up of this article. From the existing published volumes one can count more than 140 cassation decisions given on different aspects of periods of limitation in civil cases including labor, succession, property, sale, and other contractual and extra contractual cases. Especially issues related with the subjectivity or otherwise of a certain civil claim by the rule of limitation of action, the calculation, interruption, suspension, and extension of period of limitations, when and by whom the defense of lapse of period of limitations should be raised, which limitation periods apply on the case at hand, which factors constitute sufficient cause for delay so that the claims could be instituted after the lapse of time as well as the dimension and scope of application of the ten year general period of limitation stipulated in Art. 1845 of the civil code are among the points of discussions before the Federal Cassation Division.

[3] See Art. 1845 Cum with Art. 1676(1) and Art. 1677(1) of the Civil Code, where the general applicability of the ten-year period of limitation has been justified to contractual or non-contractual claims respectively.

considerations before the rush to apply the ten year GPoL, which is principally fixed for contractual claims.

However, here it should be noted that the trend of applying the ten-year period to all civil claims by the mere fact that special periods have not been fixed by law and irrespective of other considerations may result in the misuse of period of limitation contrary to the intention of the legislature. Accordingly, the court's discretion in determining the applicability or otherwise of the ten-year GPoL and the factors that could be taken into consideration while limiting its ambit of application are discussed in this article. However, due to the absence of a clear rule that authorizes courts to exercise a little discretion in disregarding the ten year GPoL and thereby apply some other periods of limitation by analogy or exempt certain claims from the subject of limitation, the argument that advocates for judicial discretion in this regard should not be seen as argument *lex lata* (based on the law as it currently is) but argument *de lege ferenda* (the law as it ought to be). Therefore, the article principally aims to identify the possible considerations that could be taken by courts in disregarding the application of the ten year GPoL with a view to revisit the application of Article 1845 of the Civil Code.

Section one discusses about the concept of period of limitation and the justifications thereto. It further presents the types of periods of limitations in civil cases and the way they are recognized under the Ethiopian legal system. Section two examines the rationale for adopting different rules and lengths of periods of limitation in the Ethiopian context depending upon the nature of cases as civil, criminal, substantive or procedural. Section three briefly presents the manner that limitation periods are designed in our civil laws and the determinant factors that could be taken into consideration while identifying the appropriate period of limitation. Section four examines the legal gaps and challenges that may pave the way for the misapplication or interpretation of limitation provisions. The fifth, and the main, part of the article examines the different instances where the ten year GPoL could be disregarded by the discretion of the court under certain guiding conditions.

1. The Concept of Period of Limitation: Meaning, Type and Purpose

The concept of periods of limitation, which date back to the ancient Roman law[4], are a fundamental part of all legal systems, including Ethiopia, even though the purpose, the degree and the detailed rules of implementation may vary from country to country depending on the type of the legal tradition they adopted and the nature of the individual cases involved.[5] Limitation periods impose time limits within which a party must bring a claim, or give notice of a claim to the other party under the pain of loss of right.[6]

Limitation periods have long been understood to be part of the defendant's arsenal in the litigation battle. As a device more appropriately described as '*a shield than a sword'*, a limitation period operates to bar an action, irrespective of its merit, if not commenced within the amount of time prescribed by statute.[7] But the bar is not automatic and the court cannot plead limitation in civil cases by its own initiation unless specifically pleaded by the defendant.[8]

Depending upon the civil or criminal/substantive or procedural natures of claims that the stipulated periods are intended to govern, periods of limitations may have the form of civil/criminal or substantive/procedural as the case may be. In substantive laws of civil cases, the limitation provisions, or otherwise called 'prescriptions', set a rule whereby someone may lose a right to make his claim based on the lapse of time, or where the one who

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[4] Martin Clausmitzer, 'The Statute of Limitation for Murder in Federal Republic of Germany'*, the International and Comparative law quarterly,* Vol. 29, No 2/3, Cambridge University Press on behalf of the British Institute of International and Comparative law, 1980, p. 474.

[5] Tilahun Teshome, '*Basic Principles of Ethiopian Contract Law',* (2nd ed., Published by the Book Center, Addis Ababa), 2002, p. 182.

[6] Kok, '*Statutory Limitations in International Criminal Law*', PhD Thesis, Amsterdam Center for International Law (ACIL), 2007, p. 27.

[7] Janet Mosher, 'Challenging Limitation Periods: Civil Claims by Adult Survivors of Incest', *University of Toronto Law Journal,* Vol. 44, No. 2, 1994, p.169.

[8] Ibid, p. 182. See also Art. 1856(1) of the Civil Code in tandem with Art. 244(3) of the Civil Procedure Code of the Empire of Ethiopia (1965) (hereinafter the Civil Procedure Code of Ethiopia).

was not originally the owner of a certain property may acquire the ownership right thereof if he is able to prove the fact that the instant property has been possessed by him for a long period of time coupled with other legal requirements.[9]

At this juncture, however, it is important to note that although the term 'prescription or period of prescription' and 'limitation or period of limitation' are often used interchangeably; they are actually two different but related concepts. Prescription, as defined under the Black's Law Dictionary (which is an authoritative source for the meanings of terms in law), is a general term that consist two concepts; namely 'liberative' and 'acquisitive' prescriptions.[10] '*Liberative prescription'* which is applicable in the law of obligation in general is the one that exonerates debtors from their obligations while the creditors lose their right to demand the same.[11]Accordingly, Blacks' Law Dictionary defines the term 'liberative prescription' as 'a *bar to a law suit resulting from its untimely filing'.* The term is essentially the civil law equivalent of 'limitation', which is defined as '*a statutory period after which a lawsuit or prosecution cannot be brought in court.*'[12]

While the term 'acquisitive prescription' is defined as '*a mode of acquiring ownership or other legal rights through possession for a specified period of time.*'[13] This rule was known to the Romans as usucaption[14] which has

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[9] T. Teshome, *supra note* 5, p. 181.

[10] On one hand, the Black's Law Dictionary defined the term 'prescription' as '*the effect of the lapse of time in creating and destroying rights*.' In this sense, it can be termed as '*negative prescription or extinctive prescription'*. On the other hand, the term 'prescription' is also defined as 'the *acquisition of title to a thing (esp. an intangible thing such as the use of real property) by open and continuous possession over a statutory period.'* In this sense, it can be termed as '*positive prescription* or *acquisitive prescription.'*(See *Black's Law Dictionary*, 18th ed., Garner, Editor in Chief, 2004). Accordingly, there are two kinds of prescriptions that bar substantive claims in civil cases namely *liberative* and *acquisitive* prescriptions.

[11] T. Teshome, *supra note* 5, p. 181.

[12] Here the term 'limitation' can also be termed as 'limitations period'; 'limitation periods'; 'limitation of action' or 'a statute of limitations' (see Black's Law Dictionary, *supra note* 10).

[13] Ibid

[14] Ibid, here the term 'usucaption' is defined as '*the acquisition of ownership by long possession begun in good faith; esp. the acquisition of ownership by prescription*.' It can also be termed as *usucapio, usus or usucapion..*

descended to modern jurisprudence under the name of 'prescription'.[15] Accordingly, '*acquisitive prescription' or 'usucaption'* provides a rule by which the person who appropriates a property, which has no claimant, in his possession for a long period of time can be the owner thereof at the time when the period prescribed under the law has expired along with other legal requirements.[16] As argued by scholars, this type of prescription is the result of the philosophy, dictating the historical nexus of possessory right (long possession) with the origin of ownership right.[17]

From the aforementioned discussion, one can understand that the term 'prescription' is a generic term consisting of two concepts viz. liberative and acquisitive prescriptions, which connotes '*limitation*' and '*usucaption*' respectively, making the term *prescription* wider than *limitation*. Therefore, in the strict sense of the term, 'prescription' or 'period of prescription' does not necessarily imply limitation or period of limitation although such terms are often used interchangeably.

When we come to the Ethiopian arena, the concept of 'liberative prescription' has been widely prescribed in our civil laws, including the Civil Code, which is the prominent civil law of the country, under the name of 'limitation', 'period of limitation', 'periods of time', 'limitations of action' or '*yirga'* in Amharic, having the effect of exonerating the respective debtors from their obligations.[18] Regarding the concept of 'acquisitive prescriptions', there are certain provisions of the Civil Code that prescribe the concept under the name of 'usucaption' or 'prescription', as

[15] Herry S. Maine, *Ancient Law*, 17th ed., 1901, p. 236.

[16] T. Teshome, *supra note* 5, p. 181.

[17] Paton, George W., *A Text Book of Jurisprudence* (3rd ed., Oxford at the Clarendon Press), 1964, pp. 485-489.

[18] See for example, Art. 338, 1000, 1346, 1845-1856, 2065, and 2143 of the Civil Code, Art. 318 of the Federal Revised Family Code, and Art. 162-166 of the Labour Proclamation No. 377/2003, Federal Negarit Gazeta, 10th Year No. 12, Addis Ababa, 26th February 2004, (hereinafter Labour Proc.). However, there are also different limitation provisions which used phrases like, '*…under pain of losing right…*', '*…the claim shall be barred if not brought within …*', or '*…may no longer avail himself of…*' and the like, which partly shows such provisions are dealing about period of limitation, although such kinds of expressions may not necessarily and always imply period limitation (See for example, Art. 402(2), 1149(2), 1158(3), 1165(2), 1174(3), 1488(2), 1810, 2298, 2299 and 2892 (3) of the Civil Code).

the case may be, although one cannot frequently find such kinds of prescriptions in our civil laws compared to the widely recognized concept of 'liberative prescriptions'.[19] With respect to the acquisition of immovable property, for example, the concept has been recognized under Article 1168 of the Civil Code where the ownership of immovable property may be acquired by '*usucaption*'[20], except for certain cases where such a rule cannot be applied.[21] The Civil Code also recognized the concept while

[19] See for example, Art. 1168 and Art. 1366 of the Civil Code which uses the term 'usucaption' and 'prescription' respectively to connote the concept of 'acquisitive prescription' with respect to immovable property. However, unlike the term 'prescription', which has been used under our Civil Code to connote both acquisitive and liberative prescriptions as the case may be (See for example, Art. 1366/1367 which used the term 'prescription' to connote acquisitive prescription in one hand; and Art. 1192 and 1382 which used the same term to connote liberative prescription), the Civil Code consistently used the term 'usucaption' to connote acquisitive prescription and in the manner that seems that the Code used the term only in relation with immovable property (See for example, Art. 1168, 1493(1), 1639, and 2065 of the Civil Code).

[20] Art. 1168 of the Civil Code. As provided in the provision, usucaption is a rule where the possessor of immovable property who has paid for fifteen consecutive years the taxes relating to the ownership of an immovable shall become the owner of such immovable. However, here it is important to examine the scope of applicability of this provision (i.e. to which kind of immovable properties the rule of usucaption applies?). This required examining what the term 'immovables' under Art. 1168 of the Civil Code currently implies along with the concept of ownership of immovable properties, particularly the ownership of land. In this regard, according to Art. 1130 of the Civil Code, land and buildings are considered as immovable properties under the Ethiopian law. Thus, obviously the term 'immovables' under Art. 1168 of the Civil Code refers to both 'land' and 'building' so that the ownership of land can also be acquired through usucaption. This is because, the Civil Code has enacted at the time where 'private ownership' of land was a rule. But currently it is important to note that land is the property of the state and the people (See Art. 40(3) of the FDRE Constitution). Accordingly, individuals cannot own land by any means including usucaption. Nevertheless, I believe that the state ownership nature of the land shall not erode the applicability of the concept of usucaption stipulated under Art. 1168 of the Civil Code on land, as part of the immovable property. Although at present individuals cannot own land, they have holding rights on rural and urban lands. Therefore, Art. 1168 of the Civil Code can be applied on such land and the holding rights thereto by *mutantis mutandis*.

[21] There are different provisions of the Civil Code dealing about exceptional instances where the rule of usucaption cannot be applied. See for example, Art. 1168(1) of the Civil Code which excludes land found under the system of 'rist' or 'family land' from the subject of usucaption. However, at present, since there is no system of '*rist*' to be applied on land or buildings, there is no way where such exception of Art. 1168(1) could be applied [regarding the concept of 'rist' and its validity in the present Ethiopia, see '*Decisions of the Federal Supreme Court Cassation Division*' in the cases of *Elfnesh Amare vs Girma Amare* (CFN 34011, Megabit 25/2000 EC., Vol. 6, pp. 282-284); and *W/ro Tsehaynesh Adem eta vs heirs of Eshetu Tesfaye* (CFN 30158, Sene 19/2000 EC., Vol. 7. pp. 201-206)]. Moreover, property forming part of the 'public domain' and land owned by an 'agricultural community' cannot be acquired by usucaption (See Art. 1455 and Art. 1493(1) of

dealing with '*acquisition of servitude by prescription*' where an apparent servitude may be acquired by enjoyment for ten years.[22] However, unlike the case for immovable properties, the Civil Code of Ethiopia does not clearly stipulate a mechanism whereby the ownership of movable properties can be acquired through 'usucaption' (possession for a given period of time) although some of the provisions of the Civil Code dealing with the acquisition and extinction of ownership seem like rule of 'usucaption' from the outset.[23]

Another point that needs to be addressed here is the issue of terminologies that have been used to prescribe the concept of acquisitive and liberative prescriptions. Accordingly, it is important to examine the usage of such terms (limitation, usucaption and prescription) and their connotations in our civil laws. As mentioned above, the concepts of liberative prescription and acquisitive prescription are often prescribed in our civil laws under the name of 'period of limitation or limitation' and 'usucaption or prescription' respectively. However, the Amharic version of the Civil Code used the same term '*yirga*' to prescribe both kinds of prescriptions, creating confusion between the two concepts.[24] Actually, when the Code used the term

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the Civil Code). See also Art. 1314(2) of the Civil Code. Therefore, when we apply Art. 1168 of the Civil Code by *mutatis mutandis*, it is important to consider such exceptional instances.

[22] Art. 1366 of the Civil Code.

[23] For example, the following provisions of the Civil Code seemed that they are providing the rule of 'usucaption' for movable property, although actually they are not. In this regard, see for example Art. 1151 (which provides the concept of *res nulliu,* where the possession become the owner of the chattel which has no master); Art. 1193(1) Cum Art. 1192 (which provides the rule of '*presumption of ownership*' , where the possessor of the chattel may remain as the owner of the property since the true owner cannot rebut such presumption of ownership after the expiry of the ten year period of limitation stipulated under Art. 1192 of the Civil Code); Art. 1157(1) Cum Art. 1192 (the rule on 'object found') where the owner of the object lost may not require its restitution from the finder, if he has lost the ownership thereof, for example in accordance with the limitation rule of Art. 1192; and Art. 1192 of the Civil Code itself (where the *acontrario* reading of the provision seems to allow the person who has possessed the chattel for ten year to acquire the ownership thereof although it principally addresses the issue where the owner of a chattel shall lose his ownership rights (i.e. the concept of period of limitation) rather than the acquisition of ownership through possession or use of the chattel for ten year).

[24] Many civil laws of the Country, including the Civil Code, often used the term "limitation" and in Amharic '*yirga*' to connote limitation of actions. However, the heading of Art. 1192, Art. 1150(1), 1382 and 1639 of the Civil Code for example used the term 'prescription' while the Amharic version of the same provisions used the term '*yirga*', creating a confusion with the concept of 'period of limitation' to which the Code also used the same term '*yirga'*.

'usucaption' or other similar wordings that goes in line with the concept of Article 1168, I believe that it should be construed as implying acquisitive prescription rather than a limitation.[25] But with respect to the usage of the term 'prescription', it is difficult to say that our Civil Code uses the term consistently to prescribe one concept (either the concept of limitation or usucaption) since it often uses the same term indifferently to connote both concepts.[26]

Beyond the usage of terms, a question may arise as to whether the rule of usucaption recognized under Article 1168 of the Civil Code amounts to a period of limitation or not under the Ethiopian legal system. Although, some writers categorize acquisitive prescription (usucaption) as a limitation as if both kinds of prescriptions deal with the concept of limitation of action, they are indeed two different but related concepts.[27] Actually, the express call of Article 1169 of our Civil Code for the application of limitation rules in matters of usucaption[28] and the indiscriminate use of the term '*Yirga'* for both concepts under the Amharic version of the Civil Code may create confusion in demarcating a clear line between the two. However, in the case of *Abdule Mohammed v Zebenay Haile*, the Cassation Bench decided that the rule of limitation is different from a rule on which the right of ownership may be acquired by long possession (usucaption).[29]

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[25] In this regard, actually except Art. 1168 of the Civil Code (the Amharic version of which used the term 'yirga') the other provisions of the Code stipulating the concept of acquisitive prescriptions (as prescribed either under the name of 'usucaption', 'prescription' or some other wordings) did not used the Amharic term '*yirga*' to prescribe the concept of acquisitive prescription or usucaption. Rather, the Code often used phrases that stipulates the requirement of 'long possession or use' to invoke the rule of usucaption (See for example, the Amharic versions of Art. 1314, 1366, 1367, 1455, 1493(1), and 1639 of the Civil Code).

[26] For example, from the wordings of Art. 1150(1), Art. 1366 and Art. 1367 of the Civil Code, which used the term 'prescription', it seems that the Code is intended to use such term to connote the concept of *usucaption* or acquisitive prescription rather than limitation although the Amharic version of the Code used the same term '*yirga*' for both concepts indifferently. On the other hand, from the usage of the term 'prescription' in some other provisions of the Civil Code (for example Art. 1192, 1382 and 1639), one can observe that the Code also used the same term to imply the concept of period of limitation, showing the inconsistent usage of the term in our Civil Code.

[27] T. Teshome, s*upra note* 5, p. 181.

[28] See Art. 1169 of the Civil Code which referred to Art. 1852-1856 of the same Code.

[29] See *Abdule Mohammed v Zebenay Haile*, '*Decisions of the Federal Supreme Court Cassation Division*', CFN 53328, Vol. 11, Tikimt 18, 2003 E.C., pp. 536-538. Here, the Court argued that

Shifting to the issue of the rationale for a statute of limitation, one can provide different rationales that amplify the importance of adopting limitations of actions though the justifications may be different depending upon the nature of cases or the policy objectives associated with the claims at hand.[30] Regarding civil periods of limitations of substantive claims, the justifications can be seen from the angles of both plaintiff's and defendant's rights as beneficiaries of the rule. In this regard, firstly, limitation periods are justified with a view to protect creditor's right in particular and the integrity of judicial decision making in general. Since the interest, as well as the evidentiary capacity, of the creditor to establish his case is presumed to be weakened with the passage of time[31], the existence of a time limit may serve as 'alarm clock' that warns the dormant creditor to exercise his right in due time before the evidentiary capacity thereto deteriorates.[32]

Moreover, due to the large possibility of the production of false evidence by the creditor on the one hand and the lessened capacity of the debtor to defend the same due to the length of time passed, on the other hand, stale claims raise the possibility in which the court will be required to decide upon an incomplete and/or inaccurate factual records compromising the integrity of its decision-making.[33] Thus, in this regard, the statute of limitation is designed to ensure that justice is done, since the danger of innocent parties being convicted is considerably reduced.

At this juncture, some argue that the barring of stale and forgotten rights under the rule of limitation and according a better concern and protection for the newly achieved ones would play a significant role in protecting the social peace and security in a sustainable manner and to minimize the

unlike the mode of acquiring ownership right by long possession (usucaption), limitation is a rule on which a law suit may be barred due to the mere fact of untimely filling. The person who acquired the immovable property by usucaption may not defend the suit brought against him by merely showing the lapse of the period. Beside the lapse of the period, he has to defend the suit and establish his ownership right by proving the fact that he has paid the tax relating to the ownership of the immovable property for 15 consecutive years as lay down in Art. 1168 of the Civil Code.

[30] J. Mosher, *supra note 7*, pp. 184-192 where the justifications for period of limitation are discussed under three categories, diligence, repose (certainty) and evidentiary.

[31] T. Teshome, *supra note* 5, p. 181.

[32] P. George, *supra note* 17, p. 452

[33] J. Mosher, *supra note* 7, p. 190.

disrupting effects of unsettled claims on commercial transactions.[34] From this point of view, limitation rules are also designed to prevent fraudulent and stale claims from arising after all evidence has been lost or after the facts have become obscure through the passage of time or the defective memory, death or disappearance of witnesses.[35]

Secondly, the justification for a period of limitation may lie on the widely accepted view that the law shall stand to protect the right of the active debtor rather than the dormant creditor.[36] The defendants should not be worried forever due to the inaction or delay of the plaintiff in exercising his right; therefore, the former has to be relieved from his liability at one point via the defense of limitation.[37] While acknowledging that a limitation period runs against the interest of the plaintiff, proponents of limitation periods argue that the defense of limitation protects a variety of interests shared by defendants as a group. Thus, one can say that limitation periods have been largely shaped by the interests of the defendant.[38]

In conclusion, the purpose of a statute of limitation is ensuring that the legal claims are pursued in a timely fashion. This serves two purposes. First, by providing a set time frame within which claims may be pursued, a statute of limitations provides a sense of predictability and finality to disputes. Second, it is easier to gather evidence on events that have happened recently than it is for events that have taken place years ago.[39]

2. Rationale for Adopting Different Rules and Length of Periods of Limitation

The rules governing limitation of actions and the amount of time prescribed therein often vary depending upon the nature of cases as civil vis-à-vis

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[34] Planiol, Marcel in Collaboration with J. Ripert, '*Traite Elementaire de Droit Civil*', Translated by the Louisiana State Law Institute, Vol. 2, Part I and 2, 11th ed, 1939, p. 345.

[35] Alan Rosenfield, 'The Statute of Limitations Barrier in Childhood Sexual Abuse Cases: The Equitable Estoppel Remedy', 12 *Harv. Women's LJ,* 1989, p. 206.

[36] P. George, *supra note* 17, p. 452.

[37] T. Teshome, supra note 5, p. 181.

[38] J. Mosher, *supra note* 7, p. 169.

[39] Kok, supra note 6, p. 28.

criminal and substantive vis-à-vis procedural.[40] While recognizing the adverse effects of criminal violations on the state and the society (unlike civil cases where the effects of the violation limited to the victim alone),legal scholars argue in favor of longer criminal period of limitation that increases with the seriousness of the crime charged and the degree of the sentence passed.[41] Accordingly, it is common to observe longer periods of limitation in criminal cases than in civil cases with a view to ensure a wide opportunity in which unnoticed crimes could be charged and thereby narrow down the possibility in which criminals may evade punishments under the benefit of shorter limitation periods.[42] There are also cases where the criminal liability of persons could not be barred by period of limitation depending upon the seriousness of the crime[43] and the specific policy

[40] J. Mosher, *supra note* 7, p. 182.

[41] M. Clausmitzer, *supra note 4*, p. 479. However, this does not mean that civil periods of limitation should be too short. Rather, a statute of limitation governing civil suits must afford a reasonable period in which an action can be brought. This is because the statute of limitation would be unfair and against the constitutional right of access to justice if it immediately curtails an existing remedy or provides so little time that deprives an individual of a reasonable opportunity to start a law suit.

[42] Charles Doyle, '*Statute of Limitation in Federal Criminal Cases: An overview*', Congressional Research Service, 2012, p. 3. In this regard, for example the "United Nation Convention against Corruption" required state parties to fix a long period of limitation in their domestic laws for corruption related crimes (See Art. 29 of the United Nations Convention Against Corruption, General Assembly Resolution 58/4 OF 31 October, 2003). However, with respect to allowing longer period of time for criminal cases, one may ask the issue of evidence which could be deteriorated with the passage of time. Nevertheless, unlike the civil cases where the task of collection and arrangement of evidences are handled by individuals, in criminal cases such activities are conducted by government institutions; having systematic data handling mechanisms. Thus, unlike civil cases, the chance of losing evidences collected against the accused person is too minimal in criminal cases since such evidences are on safe hands. Furthermore, the evidences deposited and stored in such manner (for example, the deposition of a witness taken at preliminary inquiry or the statement made in police investigation) may be put in evidence before the trial court even if the witness is dead or insane, cannot be found, or absent with the passage of time (See for example, Art. 144 and 145 of the Criminal Procedure Code of Ethiopia). Therefore, at least from the side of the public prosecutor, adopting longer period of limitation in criminal cases neither entail risk of losing evidences nor hinder the prosecutor to put such depositions in evidence before the trial court. However, from the side of the accused person, the adoption of longer period of limitations for prosecution would be prejudicial to him since it reduces the chance of producing defense evidences and thereby challenge the evidences brought against him. Nevertheless, I believe that the interest of the accused person in this regard shall be sacrifice for the sake of public interest.

[43] For instance, by way of custom of international law, genocide, crime against humanity, and war crimes are usually not subject to statute of limitations. This custom has been codified in a number of multilateral treaties [See for example, the "Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity", G.A. res. 2391(XXIII), Annex,

reasons of the country.[44] The adoption of such exclusionary rules are intended to avoid the instances in which serious criminals may go unnoticed for certain years and then be safe from prosecution against the interest of justice.[45]

When we examine the Ethiopian Criminal Code in this regard, it provides limitation periods ranging from three years up to twenty five years and five years up to thirty years for prosecution and sentencing claims respectively depending on the gravity of the crime committed[46], which are relatively long time limits compared to its civil counterpart as laid down under the Civil Code and other civil laws of the country.[47] On the other hand, unlike civil cases where the court shall not regard the limitation unless pleaded[48], in criminal cases the appropriate judicial or executive authorities are required to consider the barring of the charge or sentence by their own motion (*sua sponte)* with a view to protect the defendant's right of defense from being jeopardized by dormant charges.[49] Thus, one can say that the rules of limitation in criminal cases are designed in the manner that compromised the two sides of interests, the deterrence purpose of the

23U.N. GAORSupp. (No.18), U.N.Doc. A /7218(1968), entered in to force Nov. 11, 1970], Art 40. Similarly, in Ethiopia Art. 28(1) of the FDRE Constitution excluded the criminal liability of persons who commit crimes against humanity, such as genocide, summary executions, forcible disappearances or torture from the subject of limitation.

[44] For instance, in the United States 'fraud upon the court' and 'heinous crimes' (crimes that are considered exceptionally heinous by the society like a first degree murder) have no statute of limitation (See Kok, s*upra note* 6, p. 45). Moreover, one can notice how a 30-year limitation period for murder in the Federal Republic of Germany had generated controversy as to its applicability to "Nazi crimes" where the abolishment of period of limitation for prosecuting Nazi crimes was favored by most legal scholars. For more on the issue see M. Clausmitzer, *supra note* 4, pp. 473-479.

[45] C. Doyle, *supra note* 42, p. 2.

[46] See Art. 217 and 224 of the Criminal Code of the FDRE, Proclamation No. 414/2004, 9th of May, 2005, Addis Ababa (hereinafter the Criminal Code), which provide ranges of periods of limitation for criminal prosecutions and penalties respectively.

[47] Currently the fifteen- year period provided under Art. 1000(2) of the Civil Code can be considered as a maximum period of limitation in civil case. And the ten -year period of limitation provided under Art. 1845 of the same Code is the second maximum period of limitation.

[48] Art. 1856(2) of the Civil Code.

[49] Art. 216(3) and Art. 223(2) of the Criminal Code of Ethiopia. See also Art. 42(1)(c) of the Criminal Procedure Code which required the public prosecutor to refuse proceedings where the prosecution is barred by limitation.

criminal law (that could be achieved partly through the provision of longer periods of limitation for charging and sentencing) on the one hand, and the protection of the defendant's interest from being violated by dormant charges (by providing a rule where the court is bound to plead limitation by its own motion) on the other hand.

However, whatever the purpose of providing limitation periods and the length of time limits stipulated thereto, it is necessary at the outset of any new civil or criminal claim to determine whether it has been barred by a limitation or not. That is why the defense that the suit or the charge has been barred by limitation is provided as a ground of preliminary objection in both civil[50] and criminal[51] cases.

The rules of limitation and the length of time limits may also vary depending on the substantive or procedural nature of the limitation periods. The length and the applicable rules of limitation in procedural cases are designed in a manner that does not distort the purpose of procedural laws relating with speedy trial and saving the golden time of the court.[52] Accordingly, the rules applied to substantive periods of limitation may not necessarily apply to procedural periods of limitation. For example, regarding periods of limitation stipulated in procedural laws, the court shall raise the barring of limitation by its own motion even though it has not been pleaded by the litigant parties.[53]

Moreover, with a view to encourage the early settlements of court litigations, shorter limitation periods are often stipulated in procedural laws to govern procedural related claims in court proceedings compared to substantive laws. The 1965 Civil Procedure Code of Ethiopia, for instance

[50] Art. 244(2)(f) of the Civil Procedure Code of Ethiopia.

[51] Art. 130(2)(c) of the Criminal Procedure Code of Ethiopia.

[52] A. Sedler (1968), '*Ethiopian Civil Procedure*', Faculty of law, Haile Sellasie University, Addis Ababa, p. 2. He provided that the purpose of procedure is to insure that the legal disputes will be handled in a fair and orderly way and as expeditiously and economically as possible

[53] See *Gadise Arega v. Werkantifu Bekele (CFN 17361, 'Decisions of Federal Supreme Court Cassation Division*', Vol. 1, Hamle 25, 1997 E.C.)

provides two main type of period of limitations: for appeal[54]and execution[55]claims in addition to the time limits stipulated therein to govern different kinds of procedural claims in relation to court proceedings.[56] However, in the manner that goes with the purpose of procedural laws, almost all time limits stipulated in the Ethiopian Civil Procedure Code are relatively short; ranging from a few days up to months except for when the ten year limitation period is fixed for the application of the execution of judgment by the judgment holder.[57] We can also find such kinds of shorter periods of limitation in our Criminal Procedure Code too.[58]

Apart from the existence of differences in the length of periods of limitation depending upon the civil, criminal, substantive or procedural nature of cases, one can also observe such differences among civil periods of limitation stipulated for different substantive claims. Here it is important to note that the adoption of different civil periods of limitation with different length of time limits is not incidental. Rather, the legislatures have reasons while fixing shorter or longer periods of limitation for different types of civil claims. Even though civil laws often provide short period of limitations, the length of the time limits may be varied depending upon the

[54] See for example Art. 323(2) and Art. 306(2) of the Civil Procedure Code, Art. 22(4) of the Federal Courts Proclamation No. 25/1996, and Art. 138(3) of the Labor Proc. No. 377/2003 which provide short periods for different kinds of appeals.

[55] See Art. 384 of Civil Procedure Code which stipulate the ten-year period of limitation.

[56] See for example, Art. 49, 53, 301(1), 302(1) (b), 306(2), 329(1), 340(2) and 355(2) of the Civil Procedure Code.

[57] The rationale behind that the Civil Procedure Code provides such a long period of limitation for execution of judgment in contrast with other procedural time limits may be attributed to different reasons. First, the substantive rights of the judgment holder recognized under the substantive law would be at stake if a short period of limitation had been stipulated for execution of judgments. This is because the recognition of one's right under a given court judgment does not guarantee its enforcement unless the law provide a sufficient time with in which the judgment holder can enforce his rights. Second, since execution claims are an independent claims demanded after the end of the court proceeding, the notion of speedy trial reflected in procedural laws cannot be violated due to the stipulation of long period of limitation for execution of judgment unlike other procedural claims brought by the litigant parties to do things in relation with court proceedings while the case is pending. Moreover, as ordinary type of civil obligations a court judgment creates an obligation on the judgment debtor to allow the execution of the same. Accordingly, execution claims can be considered as substantive rights of the judgment holder than procedural rights which further justify longer time limits for execution of judgment.

[58] See for example, Art. 165(3), 187(1) (2) and Art. 198 of the Criminal Procedure Code.

particular type of cause of action, the nature of the claim and the particular objective of the legal regime governing the claim at hand.[59]

Depending upon the nature of the cause of action and the possible means of proof, the Ethiopian Civil Code for instance stipulated short period of limitation for extra contractual/tort claims compared to contractual claims.[60] As argued by the drafter of the Ethiopian Civil Code, the justification for adopting a short period of limitation in tort cases is related to the origin of tort liability and the means of proving it.[61] Although the fact that the less reliable evidence could be produced, the longer the time that has passed since the origin of cause of action, works for all cases; it is more prevalent in tort cases where the origin of liability do not presuppose any written agreement unlike the case of contract. As a result of the absence of written documents that could be produced to prove tort claims, victims have been forced to rely solely on oral evidences where the weight and credibility of witness testimonies are usually deteriorates with the passage of time. That is why the Civil Code provides a two-year period of limitation for extra-contractual claims; this is relatively short time limit compared to the ten year GPoL stipulated to govern contractual related claims.

Moreover, depending upon the specific objectives of the law governing the relations, a short period of limitation may be stipulated with a view to encourage early settlements of disputes so that the disrupting effects of unsettled claims on commercial intercourse would be minimized.[62]

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[59] J. Mosher, *supra note* 7, p. 182.

[60] See the two-year period of limitation stipulated for tort based claims under Art. 2143(1) of the Civil Code and the ten year general period of limitation stipulated for contractual based claims under Art. 1845 of the same Code.

[61] See *Bekele Tsegaye v. ETSO Trading Company* (1984), Supreme Court Law Report, Vol. 1, Addis Ababa, 1990 G.C., Ethiopia, p. 19-21. In the instant case the former Supreme Court argued (by referring to the commentary written by Reni David, the drafter of the 1960 Civil Code of Ethiopian) that the justification behind the stipulation of short period of limitation for extra contractual claims under Art. 2143 of the Civil Code (i.e. two year) is due to the absence of written documents to prove the case and its reliance on witness testimonies as the usual means of proof where the evidentiary capacity and the credibility thereof would be reduced with the passage of time.

[62] J. Mosher, *supra note* 7, p. 186.

Consequently, it is also common to observe short limitation periods under the Ethiopian labour and commercial related laws.[63]

Therefore, from the aforementioned discussions, one can understand the importance of taking certain factors into consideration in the interpretation and determination of the scope of application of a given period of limitation which *inter alia* includes the types of cause of action and the general policy objective of the special law at hand.[64] As will be discussed later, such considerations would be used to reduce the misapplication of limitation periods and to find the true intension of the legislature.

3. Determinants in Identifying the Appropriate Period of Limitation in Civil Cases in Ethiopia

The task of determining the appropriate periods of limitation in civil cases in Ethiopia is not always easy. As we can understand from different provisions of civil laws, the determination of the applicable period of limitation in civil cases *inter alia* depends upon the type of cause of action, the nature of the case at hand and the form of the relief sought, unlike the criminal case where the Criminal Code of Ethiopia provides the general rules and principles governing limitation periods of prosecutions and penalties based on the gravity of the crime and the sentence thereof rather than the individual kind of crime.[65]

The stipulation of different limitation periods for contractual, extra contractual, property and succession related claims evidence the fact that the 'type of cause of action' has been used as a litmus paper in categorizing and fixing limitation periods in civil cases.[66] Beside the type of cause of action, the individual type of the case where a given claim can be categorized needs to be identified to determine the applicable period of limitation. Once a

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[63] For instance, the majority of period of limitations stipulated in the Commercial Code of the Empire of Ethiopia of 1960 (hereinafter the Commercial Code of Ethiopia) and Labor Proc. No. 377/2003 are one and less than one year.

[64] Nigel P. Gravells 'Time Limit Clauses and Judicial Review: the Relevance of Context', *the modern Law Review,* Vol. 41, 1978, p. 388.

[65] Art. 217 and Art 224 of the Criminal Code of Ethiopia.

[66] For example, see Art. 1845 and 2143 of the Civil Code which provide a general period of limitation for contractual and extra contractual related claims respectively.

contractual obligation has been identified as a cause of action, identifying the nature of the case at hand, for example, as sale of movables, sale of immovable, donation or labour is important to identify the controlling law of limitation. Moreover, since special limitation periods, if any, are often fixed by law depending on the individual types of claims, identifying the form of the relief sought has paramount importance in determining the controlling period of limitation. For example, the time limits stipulated in Article 2298 and 2892(3) of the Civil Code are designed to apply for the specific types of claims; namely, warranty related and forced performance claims by the buyer of movable and immovable property respectively. Similarly, different periods of limitation have been fixed in the labour law depending on the form of the relief sought.[67] These show a period fixed for one type of claim may not necessarily apply for other related claims although they emanate from the same cause of action.

Moreover, even though special periods of limitation are often fixed by law depending upon the individual type of claim or the form of the relief sought, the applicability or otherwise of a given period of limitation may also be subject to certain '*conditions of application*' that further require the court to examine whether or not the claim at hand fits with the attached statutory conditions or terms before applying a given legally fixed period of limitation. As a result, a given limitation provision may be disregarded on the ground of statutory conditions if the claim at hand does not fit with the stipulated '*conditions'*.[68] The need to consider the above determinants can evident how the task of determining the controlling period of limitation may be a difficult task in civil cases especially where the legal provisions are not clear regarding the conditions required to be fulfilled to confidently apply the period therein.

[67] Art. 162(2) and (3) of the Labour Proc. No. 377/2003.

[68] In this regard, there are certain cassation cases where the applicability of special periods of limitation has been disregarded by the court on the ground of statutory conditions. See for example the binding interpretations given by the Federal Supreme Court cassation division in file numbers 25664, 42346 and 38935 regarding the scope of application of the limitation periods provided in Art. 1000, Art. 2441(1) and Art. 2892(3) of the Civil Code respectively.

4. Determination of Period of Limitation in Civil Cases in Ethiopia: Gaps and Challenges

The legal framework governing civil period of limitation in Ethiopia has a number of lacunas[69] compared to criminal cases.[70] As said before, the existence of a number of cassation decisions on different aspects of limitation reveal the controversial nature of the issue in civil cases. At this juncture, one can pinpoint different possible factors that may contribute to the existing gaps in the legal regime governing civil periods of limitation in

[69] In addition to the lacunas to be discussed in due course throughout the body of the article, one can at least identify the following gaps in the legal regime governing limitation of actions in civil cases in Ethiopia. (1) The general provisions of the Civil Code dealing about 'limitation of actions' (Art. 1845-1856 of the Civil Code) do not provide or recognized exceptional circumstances where some of such provisions may not be applied, by taking into account the special nature of the claim or the objectives of the special laws governing such claims, making their blind application via Art. 1676 and 1677 to be absurd with respect to certain cases. (2) Except the argument that can be made based on Art. 1676 and 1677 of the Civil Code, the special laws and their respective limitation provisions, if any, (as found in different books of the Civil Code and in other separate civil legislations) do not often make an explicit or implied references to such Civil Code provisions dealing about 'limitation of actions' including the ten year period of limitation stipulated under Art. 1845. These cumulatively may erode the confidence of the interpreter/ judge to confidently apply such provisions to other special cases particularly when their application seems absurd in the circumstances of the case at hand. (3) In certain instances, one can observe 'multiplicity/overlapping of periods of limitations'. In this regard, for example, it is not clear as to whether the two year period of limitation stipulated under Art. 1810(1) or the ten year period stipulated under Art. 1845 of the Civil Code will apply with respect to actions for the invalidations of the contract since both provisions are found in the general contract part of the Civil Code. (4) Since some of the subsequent implementation provisions following Art. 1845 of the Civil Code are designed by taking into account the ten year period of limitation, their general application may be absurd. For example, while providing the length of period that shall begin to run upon each interruption, Art. 1852(2) of the Civil Code state that *'[s]uch period shall be <u>of ten year</u> where the debt has been admitted in writing or established by a judgment*'[.] According to the blind application of this provision to other cases for which the special laws provide a shorter period of limitation on the basis of Art. 1676 and 1677, this means it is the ten year period that shall run upon interruption of, for example, a three-months special period of limitation stipulated under special laws, making it application absurd. (5) Moreover, Art. 1852(1) does not provide the possible numbers of interruptions allowed. Rather it simply states, *'[A] new period of limitation shall begin to run upon <u>each interruption</u>*', allowing fresh ten-year period of limitation to begin to run upon each interruption unlimitedly. And this is obviously absurd and even against the very notion of limitation. At this juncture, Art. 164(3) of the Labour Proc. No. 377/2003 for example, limited the number of possible interruptions to three, stating that '*…a period of limitation interrupted on such ground may not be interrupted on such ground may not be interrupted for more than three times in the aggregate*.'

[70] See Art. 216-228 of the Criminal Code which provides clear and detailed rules governing limitations of actions in criminal cases concerning prosecution and sentencing.

Ethiopia. The way that periods of limitations are organized in our civil laws, the absence of rules that clearly provide the dimension and scope of application of the GPoL and the lack of exclusionary rules that help to identify lists of claims which are exempted from the subject of limitation are among such factors that pave the way for the inconsistent application or interpretation of limitation provisions in general and Article 1845 of the Civil Code in particular.

4.1. The Organization of Periods of Limitation

Limitation periods generally are issues of law, in common law and civil law legal systems, even though the manner of their organization is different.[71] In most common law jurisdictions, limitation periods in civil cases are imposed by a separate statute or an enactment often named as '*Limitation Acts or statutes of limitation'*.[72] In contrast, in civil law jurisdictions, limitation provisions are typically part of the Civil Code and are often known collectively as period of prescription.[73]

In the former case, those limitation statues have detailed provisions that provide conditions under which a legally fixed period of limitations can be enforced, suspended, interrupted and waived. Besides having those general execution provisions, the statutes often annexed schedules of periods of limitation that contains the description of the suits (based on category of cause of action and the types of reliefs sought), the applicable period of limitation thereto and the time from which the period begins to run.[74]

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[71] Juha Raitio, 'Legal Certainty, non- Retroactivity and Periods of Limitation in EU Law', *Journal of Legisprudence,* Vol. 2, issue 1, 2008, p. 2.

[72] Vince Morabito, 'Statutory Limitation Periods and the traditional Representative Action Procedure', *Oxford University Common Wealth Law Journal,* Vol. 5, Issue 1, 2005, p. 114.

[73] Kok, *supra note* 6, p. 42.

[74] A ME Gee, '*A Critical Analysis of the English law of Limitation Periods*', 1990, p. 123. For instance, in England limitation periods and the execution rules attached thereto are imposed by statute, primarily the Limitation Act 1980 (LA 1980) which provides different limitation periods for different types of cause of actions including a claim for negligence, tort, contract, a claim for the recovery of land, proceeds of sale of land or money secured by a mortgage or charge, a claim for arrears of rent, an action claiming personal estate of a deceased person and the like. Moreover, beside those limitation periods provided by LA 1980, there are also other acts providing limitation periods for certain kinds of actions. For example, limitation period for product liability claims is provided under Consumer Protection Act 1987.

It is patent that a separate statute of limitation would make the task of finding the appropriate periods of limitation and the enforcement rules thereto easy for judges, advocates and litigant parties.[75] One can find a wide range of rules under a separate limitation statute with better clarity and exhaustion than under the scattered limitation provisions as stipulated in different legal instruments. Consequently, a separate statute of limitation will reduce the chance where important rules of limitation may be overlooked by the legislature and thereby facilitates the instances where the appropriate periods of limitation can be determined with reasonable certainty and clarity.[76] Moreover, the adoption of uniform a rule of limitation could minimize the adverse effects of the uncertainty of the law of limitation on commercial transactions and thereby contribute for the development of trade.[77]

However, it is important to note, that even though a separate statute of limitations may set up limitation periods for many different types of claims, it does not mean that it can provide a comprehensive limitation rule. As a result of this, the gap in a given limitation statutes are often filled by special pieces of legislations which may set the limitation period for certain types of special claims. For instance, the Limitation Act of 1980 is a prominent civil statute of limitation in England. However, since it is not all encompassing, limitation periods have been provided by other statutes for certain types of special claims.[78]

When we examine the organization of civil periods of limitation in Ethiopia, unlike the common law legal system, we cannot find a separate statute of limitation enacted to govern a wide range of limitation of actions in civil cases. Rather, provisions prescribing periods of limitation are found throughout different regional and federal laws, in a scattered manner, along

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[75] Kok, *supra note* 6, p. 43.

[76] Ibid.

[77] See for instance, '*Convention on the Limitation Period in the International Sale of Goods*' (The 1974 Limitation Convention) as amended by the 'Protocol amending the Convention on the Limitation Period in the International Sale of Goods' (The 1980 Protocol), United Nations on International Trade Law, New York, 2012, which required state parties to adopt uniform rules of limitation with a view to facilitate the development of world trade.

[78] See A ME Gee, supra note 74.

with other provisions. Consequently, different periods of limitation are part of our Civil Code[79], Commercial Code[80] and other prominent civil laws[81] of the country depending on the types of cause of action and the relief sought, though there are still a number of special claims for which special periods are not yet fixed by law.

Among the substantive Ethiopian laws of civil cases, relatively detailed provisions governing limitations of actions are stipulated in the general contract part of the Civil Code under the section '*limitation of actions*'[82] followed by the Labor Proclamation where the latter provides particular provisions governing period of limitation in labor disputes.[83] Whereas when we look into other civil laws of the country, we cannot find particular rules, which provide how the given periods of limitation fixed to govern particular categories of claims may be raised, enforced, suspended, interrupted or waived. Usually only one or two limitation provisions, if any, have been incorporated under different categories of civil laws, which often provide just the length of a time limit[84] without stipulating the particular enforcement rules thereto.

The failure of special laws to provide their own particular enforcement conditions for the given category of claims coupled with the absence of a

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[79] See for example, the general rules stipulated in the general contract part of the Civil Code to govern limitations of actions in contractual claims (Art. 1845-1856 of the Civil Code) and other special periods stipulated under different books of the Civil Code (for example see Art. 172, 338, 402(2), 973, 993, 1000, 1149, 1192, 1810, 2143, 2187(2), 2298 and Art. 2892(3) of the Civil Code).

[80] See for example, Art. 607, 642, 674, 807(2), 817(2) (3), 855, and Art. 881(3) of the Commercial Code of Ethiopia.

[81] For example, special periods of limitations are provided under Art. 162 and Art 71 of the Labor Proc. No. 377/2003 and Income Tax Proclamation No. 286/2002 respectively. Similarly, Art. 318 of the Federal Revised Family Code provides special period of limitation.

[82] Art. 1845-1856 of the Civil Code.

[83] Art. 162-166 of the Labor Proc. No. 377/2003

[84] For instance, [Art. 973, Art. 974(2) and Art. 1000 of the Civil Code] and [Art. 1149(2), Art. 1158(3), Art. 1165(2) and Art. 1192 of the Civil Code] are among the limitation provisions which provides different periods of limitation to govern succession and property related claims respectively. We can also find similar limitation provisions in other civil laws of the country. But none of them provides nether their own particular rules of enforcement nor explicitly referred to limitation provisions stipulated for contractual obligations as stipulated on Art. 1846-1856 of the Civil Code.

clearly stipulated general enforcement rules to be applied to all civil periods of limitation have been consequently creating confusion about the general applicability or otherwise of those limitation provisions stipulated in the general contract part of the Civil Code[85] to other special categories of claims in certain instances.[86]

Moreover, due to the absence of a clearly stipulated GPoL to be applied to all civil claims, on one hand, and due to the lack of exclusionary rules that provides lists of exempted claims from the subject of limitation, on the other hand, the scope of application of the ten- year GPoL stipulated in Article 1845 of the Civil Code had been subjected to different arguments. This may likely pave the way for its inconsistent and inappropriate application.

4.2. The Dimension and Scope of Application of the Ten Year GPoL

Due to the various numbers of claims and the variation of special periods of limitation with changing conditions (depending upon the types of cause of action, the types of claim or the individual form of the relief sought), it is difficult for the legislature to stipulate special periods of limitation for each and every type of claim, making the existence of claims without special periods of limitation inevitable. The situation, however, would be more prevalent in the absence of a separate statute of limitation and in the system where special periods are stipulated in a scattered manner like the case of

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[85] Art. 1846-1856 of the Civil Code.

[86] Those enforcement provisions ranging from Art. 1846 up to Art. 1856 of the Civil Code *inter alia*, deals about the conditions as to how the period stipulated in Art. 1845 may be raised, enforced, interrupted or waived. Since Art. 1845 provides only about the general applicability of the ten year period of limitation, the question may arise as to the scope of application of those subsequent execution provisions to enforce other special periods of limitation fixed in other specific laws. For example, the Cassation Decision given under CFN 47784 excludes the application of Art. 1853 of the Civil Code on litigations arising from employment relationship by taking into consideration the special nature of the Labour law governing the relationship at hand (the employer-employee relationship). This means, according to the decision, the employee cannot use the rule provided under Art. 1853 to set aside a defense of limitation raised by the employer in labor disputes [See *Commercial Bank of Ethiopia Vs Alemtsehay Ayana* (CFN 47784, '*Decisions of the Federal Supreme Court Cassation Division*', Vol 9, Tahisas 20, 2002 EC]. However, saving certain exceptional cases, one may argue that such limitation provisions (Art. 1846-1856 of the Civil Code) could be used to enforce all periods of limitation in civil cases irrespective of the source of obligation unless a contrary rule is provided by special laws (See Art. 1676 and Art. 1677 of the Civil Code).

Ethiopia. Consequently, one cannot find relatively comprehensive periods of limitation for a number of civil claims in civil cases from the existing few and scattered legal provisions which, in turn, poses a question about whether such claims are subject to limitation or not. The situation would be more difficult in the absence of rules that clearly stipulate a GPoL, the scope and dimension of its application.

A. Divergent Arguments about the Ten Year GPoL: Absurdity of its Application to all Civil Claims

There have been different lines of arguments about whether the law clearly stipulated a general period of limitation or not that could be applied to all civil claims irrespective of the nature or type of obligations. Particularly, before the time when the Cassation Division of the Federal Supreme Court gave its binding interpretation[87] regarding the scope of its application, there were legal professionals who argued that the ten year limitation period stipulated in Article 1845 of the Civil Code is designed to govern only contractual claims so that the ten year period cannot be considered as a GPoL to all civil claims.[88]

The proponents of the above argument asserted that the specific content of Article 1845 by itself reveal the fact that the period specified therein is intended to govern only contractual claims which are related with the performance, non- performance or invalidation of the contract. The argument urges for the isolated reading of the provision, insisting that Article 1677(1) of the Civil Code shall be interpreted as if it only implies to the possible application of other provisions of the title other than the provision that fix a period of limitation (i.e. Article 1845). Thus, according to this view, there is no provision that principally requires every type of civil claim to be subjected to limitation in our civil laws unlike the criminal case where the Criminal Code clearly provides a rule that makes all criminal

[87] See Art. 10(4) of Federal Courts Proclamation No 25/1996 as added by the amendment clause of Art. 2 of Federal Courts Proclamation Re Amendment Proclamation No 454/2005 which established the '*doctrine of precedent*' where interpretations or decisions given by the Federal Supreme Court Cassation Division would have a binding effect on lower courts entertaining similar cases.

[88] T. Teshome, *supra note* 5, p. 186.This argument seems emanated from the isolated reading of the Provision (Art. 1845) while ignoring Art. 1676 and 1677 of the Civil Code.

prosecutions and penalties subject to limitation unless otherwise exclusionary rules are stipulated by law.[89] They further argued that even if Article 1845 is said to be implicated under the general rule of Article 1677(1), the provision is still open to interpretation as to what kinds of obligations could be constituted in the meaning of the term '*other obligations other than contractual obligations*', which in turn creates difficulty in confidently determining whether the ten year GPoL is really appropriate for all civil claims whose specific laws are silent about the issue.

However, based on the policy objectives justifying periods of limitation, the above argument does not hold water. Except for certain instances where the application of the ten year period of limitation could be contested, it is a shared view that the ambit of its application can extend to obligations other than contractual ones as long as special periods of limitations have not been fixed by law.[90]

As revealed by different decisions of the Federal Supreme Court Cassation Division[91], the ten year period of limitation has been currently taken as a GPoL in civil cases under two dimensions. Firstly, based on the wordings of Article 1845 of the Civil Code, the ten year period of limitation has been applied to all '*contractual claims*' irrespective of the nature of the contract

[89] Art. 216(1) of the Criminal Code of Ethiopia.

[90] T. Teshome, *supra note* 5, p. 186.

[91] See for example, *Grma Shiferaw vs. Christian Charity and Development Organization* (CFN 32545, '*Decisions of the Federal Supreme Court Cassation Division*', Vol. 6, p. 351, Ginbot 14/2000 E.C.), *Werknesh Amede vs. Tilahun Amede* (CFN 29363, Cassation Decisions, Vol. 8, pp. 313-315, Hidar 18, 2001 E.C.), *Weldesadik Birhanu et al vs. Sintayew Ayalew* (CFN38935, Vol. 8, p. 343, Megabit 3/ 2001 EC), Dinke Tedla Vs Abate Chane (CFN 17937, Vol. 4, p. 80, Megabit 20/1999), *Tegegn Yimam vs. Kasahun Desalegn* (CFN 25664, Vol. 6, p. 239, Ginbot 7, 2000 E.C.), Heirs of Genet Damte Vs Yilma Asefa et al (CFN 38152, Vol. 6, p. 268, Miyazia 29/2001), *Yismaw Dires vs. Yibeltal Fikir* (CFN 31748, Vol. 6, p. 385, Yekatit 18/2000 E.C.), and *Hajira Abro vs. Hashim Haji Aleko* (CFN 34940, Vol. 8, p. 329, Tahisas 28/2001 EC). The Cassation decisions cited above confirmed the general applicability of the ten year period of limitation to civil claims arise from contractual as well as non- contractual obligations. The above decisions show the possibility where the period fixed under Art 1845 of the Civil Code, which is obviously stipulated for contractual related claims, can also apply to other civil claims such as family, succession, property, and others as far as special periods of limitation have not been stipulated by law.

or the parties involved.[92] Secondly, based on the cumulative reading of Article 1677(1) and Article 1845 of the Civil Code; the period has also been applied to other kinds of obligations than contractual obligations.[93]

At this juncture, it should be noted that the ten year period of limitation should be applicable without affecting special rules stipulated in special laws, if any, in the manner that goes with the prominent rule of interpretation that dictates 'the *special rule prevail over the general rule*'.[94] In this regard, the wordings of Article 1845 and Article 1677(2) of the Civil Code forwards two messages. On one hand, it implies the general application of the ten year period to all civil claims unless otherwise special periods of limitations are provided by law.[95] On the other hand, it implies the non-applicability of the GPoL if '*exclusionary rule*'[96] has been provided

[92] Art. 1976(1) and Art. 1845 of the Civil Code. Here, since the provision Art. 1845 of the Civil Code is found under the title '*contracts in general*', it directly governs limitations of actions related with different types of special 'contracts'. Accordingly, this contractual general period of limitation may apply to those contractual claims arises from special contracts for which the law did not fix special periods of limitation. For instance, we can find such special kinds of contracts under Book V of the Ethiopian Civil Code (e.g. contracts relating to the assignment of rights, contracts for the performance of services, contracts for the custody, use or possession of chattels, contracts relating to immovable, administrative contracts, and those relating with compromise and arbitral submission) and Commercial Code (e.g. insurance contract, contract for hiring business and contract of sale of business). Beside various claims emanated from the above illustrated special types of relations, claims arise from agency and employment relations (as laid down under Book IV, Title XIV of the Civil Code and Labor Proclamation No. 377/2003 respectively) can also be subjected to the ten year period of limitation in the meaning of Art. 1845 of the Civil Code, taking into account the special provisions stated in those special legislations.

[93] Art. 1677(1) Cum with Art. 1845 of the Civil Code. Since the Civil Code provisions dealing about '*limitation of actions'* including Art. 1845 are part of provisions of '*the title'* in the meaning of Art. 1677(1), the door is open to apply the ten- year general period of limitation to all civil claims irrespective of their sources of obligation. According to this argument ascertaining the absence of special periods of limitation is enough to apply the ten- year period to other cases.

[94] T. Teshome, *supra note* 5, p. 183.

[95] For instance, since the law of sale and sale of immovable provides their own specific limitation periods under Art. 2298 and 2892(3) for proceedings based on warranty and action for the forced performance of the contract by the buyer of movable and immovable property respectively, the general period of limitation stipulated under Art. 1845 of the Civil Code cannot be applied.

[96] Even though it is hard to find exhaustive or illustrative lists of exempted claims in our civil laws, the wordings of certain limitation provisions reveal the existence of exclusionary rules. For instance, one can observe what has been stipulated in Art. 1850 and Art. 1000(2) of the Civil Code. Consequently, based on Art. 1850 of the Civil Code one may argue that a creditor whose claim is secured by a pledge may exercise the rights arising out of the pledge at any time notwithstanding that the principal claim is barred by limitation. Similarly, the inheritance claims of family

by law, exempting certain claims from the subject of limitation which, in turn, return allows the plaintiff to bring his claim at any time irrespective of the time bar. Therefore, before rushing to apply the GPoL, one should examine the fact that neither special periods nor exclusionary rules have been provided by law.

Nevertheless, as will be discussed later, the author of this article strongly holds that allowing the application of the ten-year period of limitation to all civil claims, by the mere fact that special periods of limitation have not been fixed by law, would be absurd, or at least unfair, with respect to certain kinds of claims. This is particularly true in the condition where the nature of the claim or the very objectives of the specific law governing the claim at hand justifies either short periods of limitation or exemption, as the case may be, rather than the blind application of the ten-year period, which is the second longest civil period of limitation in Ethiopia. In this regard, actually there are certain binding cassation decisions which have disregarded the ten-year period of limitation and instead applied some other alternative periods by analogy or exempted certain claims from the subject of limitation, taking into account, *inter alia*, the very nature of the claim at hand and the purpose of the special law thereof.

B. The Absence of Exclusionary Rules

Unlike civil laws, the Criminal Code provides a general rule that declares all prosecution and execution claims to be a subject of limitation unless expressly exempted.[97] For instance, Article 28(1) of the FDRE Constitution

immovable cannot be barred by limitation and can be brought at any time as stipulated under Art. 1000(2) of the Civil Code. However, here it should be noted that due to the constitutional provision bestowing the ownership of land to the state and its people coupled with the non-applicability of the concept of '*family immovables*' on buildings, one may say that the application of the instant exclusionary provision has been ceased due to its unconstitutionality. Thus, one may argue that currently there is no actions considered as '*actions relates to family immovable*' in the meaning of Art. 1000(2) of the Civil Code upon which the exemption could be applied. For more on the issue see Cassation Decisions given in the case of *Elfnesh Amare vs. Girma Amare* (CFN 34011, "Decisions of the Federal Supreme Court Cassation Division", Vol. 6, Megabit 25, 2000 E.C.; and *Tsehaynesh Adem and Hailu Sisay vs. Heirs of Eshetu Tesfaye* (CFN 30158, '*Decisions of the Federal Supreme Court Cassation Division*', Vol. 7, Sene 20, 2000 E.C.)

[97] Art. 216(1) and Art. 223(1) of the Criminal Code. Consequently, in criminal cases unless the law expressly excluded certain types of crimes from the subject of limitation, all criminal actions and

clearly excludes '*crime against humanity*' from the subject of limitation.[98] Whereas, it is less likely to find such kind of clearly provided exclusionary rules in our civil laws even though there are provisions '*resembles to exclusionary rules',* which often use the term like '*whenever*'[99] or '*at any time'*.[100]

Due to the absence of exclusionary rules that clearly provide a list of exempted claims, the issue of whether a certain civil claim is a subject of limitation or not has been a point of discussion at different occasions before our courts**.**[101] For instance, the wordings of Article 1756(3) of the Civil Code which says '*[P]ayment shall be made <u>whenever</u> a party requires the other party to perform his obligations*' seems that such a claim is not subject

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penalties can easily be categorized and fall under the broad '*basket*' so that there would not be any difficulty in locating the controlling period of limitation.

[98] Art. 28(1) of the FDRE Constitution illustrates crimes such as genocide, summary executions, forcible disappearances or torture as examples of "crime against humanity", which shall not be barred by statute of limitation. However, since the above four kind of crimes are just an illustrative example, the exclusionary rule stipulated under Art. 28(1) of the Constitution can also be extended to other similar crimes as far as they could be construed as 'crimes against humanity', as defined or to be defined by international agreements ratified by Ethiopia and by other laws of Ethiopia.

[99] For instance, see Art. 1756(3) of the Civil Code.

[100] For instance, see Art. 1062, Art. 1168(1) and Art. 2837 of the Civil Code. Moreover, even though they are not clearly stipulated, the wordings of Art. 338(2) and Art. 2299(2) of the Civil Code resembles with exclusionary rules. However, there are also cases where the law provides exempted claims in clear terms. For instance, Art. 71(3) of the Income Tax Proclamation No. 286/2002 expressly allowed the tax authority to conduct the assessment of tax at any time. It provides that '*[I]n case where the tax payer has not declared his income or has submitted a fraudulent declaration, <u>no time limit provided in any other law shall bar</u> the assessment of the tax by the Tax Authority*', clearly excluding the application of the ten- year general period of limitation.

[101] At this juncture, a question may arise as to the possible rationales of adopting such exclusionary rules in civil cases. Actually, there is strong public interest in criminal cases justifying such rules. However, unlike criminal cases, it seems difficult to justify the requirement to have such kinds of exclusionary rules in civil cases in the name of 'public interest' mainly because of the fact that civil violations are often considered as violations against the victim rather than the state and the society in general, making the application of the notion of 'public interest' in civil cases to be minimal. Nevertheless, one can still imagine some of the reasons justifying such exclusionary rules in civil cases or at least allowing the creditor to exercise his right in some other ways that do not contravene with the very concept of limitation. In this regard, the legislator may adopt such exclusionary rules for example, by taking into account the law of 'equity' or 'fairness', by taking into account the very notion or purpose of period of limitation, or due to some other policy reasons where the objective of the special law governing the claim at hand could be achieved under the rule allowing the claimant thereof to bring such violations at any time.

to limitation. But as confirmed by the cassation decision in file number 32545[102], the provision which applies in the condition in which a time of payment is not fixed in the contract, does not enable a party (the seller) to bring an action for the payment of the price against the other party (the buyer) at any time (i.e. after 10, 25, or 50 years etc.). There cannot be any justifiable reason to assume that the law has intended to exclude the claim for the payment of the price of the good sold from the subject of limitation. Rather, since a special period of limitation has not been fixed by law regarding payment related claims, the ten year GPoL shall apply. And the period shall start to run from the date the right under the contract could be exercised by the seller, which is actually the date when the seller can claim the payment of the price.[103] As a rule, the seller can actually claim the payment simultaneous with the delivery of the thing where the payment is due on delivery.[104] Therefore, one can say that the seller has to bring his claim for the payment of the price of the good sold under Article 1756(3) of the Civil Code within ten year from the date of delivery. The above decision shows the fact that the mere usage of terms like '…*whenever*…' and '…*at any time*...' in a given limitation provision do not necessarily imply exclusionary rules.

On the other hand, there are also cases where provisions consisting of such terms are declared as exclusionary rules, as the case may be, depending upon the particular nature of the contract, the spirit, purpose or content of the legal provisions. For instance, the cassation division gave a binding

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[102] See *Girma Shiferaw vs. Christian's Relief Development Agency* (CFN 32545, '*Decisions of the Federal Supreme Court Cassation Division*', Vol. 6, Ginbot 14, 2000 E.C.)

[103] The last phrase under Art. 1846 of the Civil Code while providing the day when the period of limitation shall start to run (i.e. '*[T]he period of limitation shall run from the day...when the obligation is due or the rights under the contract could be exercised*') is intended to govern the conditions where the non- performance thereto cannot be determined by the mere observance of the failure of the debtor to perform his obligation on the due date just like the claim of the seller for the payment of the price under Art. 1756(3) of the Civil Code. Art. 1756(3) applies in the condition where the time of payment is not fixed in the contract. So one cannot identify a particular due date from where a seller can demand claims based on the non- performance. That is why Art. 1846 of the Civil Code provides another option that the period of limitation may start to run, that is from the day the rights under the contract could be exercised, other than from the day when the obligation is due.

[104] See Art. 1756(2), Art. 2310 Cum. Art. 2278 of the Civil Code.

interpretation that suits demanding the partition of inheritance[105] or termination of antichresis[106] shall not be barred by limitation as proclaimed under Article 1062 and Article 3128(2) of the Civil Code respectively. As we can understand from the above binding cassation decisions, determining the issue of whether the exclusionary rule has been stipulated or not based on the mere observances of statutory terms like '*whenever*' or '*at any time*' may lead us to hasty conclusions. Therefore, given the absence of clearly stipulated exclusionary rules, the issue ought to be determined on case by case bases after examining the intention of the legislator, the spirit, purpose or contents of the law governing the claim at hand.

Shifting to the possible mechanisms for resolving or at least filling the above discussed legal gaps surfaced in the legal framework governing civil periods of limitation in Ethiopia, one may look into two options. The first option is waiting for the legal gaps to be filled over time under the rule of

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[105] See *Tsige W/Mriam et al (6 people) vs. Siyum Kifle (CFN* 38533, '*Decisions of the Federal Supreme Court Cassation Division*', Vol. 10, Hidar 8, 2002 E.C). See also Art. 1062 of the Civil Code in tandem with Art. 996, 1000(1), 1000(2) and Art. 1060 of the Civil Code. In the instant decision, the Cassation Division argued that in the conditions where the heirs of the inheritance had instituted an action of '*petitio haereditatis'* within the required time limit and thereby the succession has been liquidated, each of the co-heirs may *at any time* require that the partition of the inheritance be effected based on Art. 1062 of the Civil Code. The decision also confirmed that since the action brought for petitio haereditatis and the action for the partition of the inheritance are two different claims governed by two distinctive legal provisions, the period of limitation stipulated in Art. 1000 of the Civil Code for petition haereditatis action may not apply to bar the heir's claim demanding partition of the inheritance property**.** See also the Cassation decision given in the case of *W/ro Mulushewa Bogale et al vs. Ato Mesfine Bogale* (CFN 44237, '*Decisions of the Federal Supreme Court Cassation Division*', Vol. 10, Megabit 20, 2002 E.C.)

[106] See *Niguse Haile and Mamitu Leta vs. Huresa Debela and Lelise Raya,* (CFN 72463, '*Decisions of the Federal Supreme Court Cassation Division*', Vol. 13, Megabit 26/2004 E.C.) .In this case the court argued that the debtor who delivered his immovable property to the creditor under the contract of antichresis may at any time terminate the antichresis by performing the obligation secured by the antichresis even after the lapse of the time fixed for the payment of the debt as stipulated in Art. 3128(2) of the Civil Code. And if there is no time fixed in the contract for the payment of the obligation, the debtor may at any time terminate the antichresis as far as he is ready to perform his obligation. Moreover, the court argued that there is no legal base where the creditor who has possessed the house secured by the antichresis can be the owner thereof by the mere fact that the debtor, the true owner of the house, is failed to pay his debt for many years. Rather, as provided in Art. 3128(1) of the Civil Code, the creditor who is tired of using the house may at any time renounce his right of antichresis (See Art. 3128(2) Cum. with Art. 3117-3130 of the Civil Code).

precedent. In this regard, since most of the issues involving period of limitations are issues of law rather than issues of fact, there are chances where the decisions of the lower courts on different aspects of periods of limitation involving basic error of law would be corrected by binding decisions of the Federal Supreme Court Cassation Division.

However, though the binding precedents could create a sequence of consistent decisions in similar cases overtime[107], this alone cannot provide a complete solution for the existing legal gaps. Since the cassation bench cannot give a binding legal interpretation through its own initiation unless the alleged errors of laws have been presented to it by litigant parties, it would be difficult to expect each and every type of controversy to be settled under such a system of legal precedent. While waiting for the issues to be exhausted this way, the adjudication of cases, which are not yet covered by cassation decisions, will be subjected to broad judicial discretion, which could be exercised at least in the guess of 'interpretation'.[108] And such discretionary power exercised under the name of interpretation may in return erode the uniform application of the law on like cases, making the right to have equal treatment before a law and access to justice at stake.

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[107] Vincy F. and Francesco Parisi, 'Judicial Precedent in Civil Law Systems: A dynamic Analysis', *International Review of Law and Economics,* Vol. 26, 2006, p. 521.

[108] Here, it should be noted that although the Ethiopian judiciary in general and the Cassation Bench in particular cannot make laws on behalf of the legislature against the principle of separation of power (including the fixing of substantive periods of limitation, which are statutory by nature), practically there are different instances showing little deviation from such principle in the name of interpreting legal rules. A closer encounter with the practice of Ethiopian courts clearly shows that there are considerable unpredictability and uncertainty in case law so much so that identical cases have quite different outcomes (See Kalkidan Aberra, 'Precedent in the Ethiopian Legal System', *Ethiopian Journal of Legal Education*, Vol. 2, No.1, 2009, p. 37). This is also true with respect to cases involving periods of limitations. In this regard, for example from the judicial decisions resulted in the numerous appeals that appear before the court of cassation, one can observe that the lower courts have decided many cases involving periods of limitation contrary to the interpretation of the law, showing the great chance where the lower judiciary may misuse its power of interpretation and there by exercise broad discretion thereof in the manner that seems that they are 'making laws' rather than 'interpreting laws'. Therefore, while waiting numerous controversial issues of limitation to be exhausted through Cassation decision, the adjudication of cases which are not yet covered by cassation decisions may be subjected to judicial discretion, as practically exercised under the guess of 'interpretation'.

Second, given the drawbacks of the precedent system[109] it is more likely to observe inconsistent or wrong interpretations of laws by the cassation division.[110] The uncertainty and unpredictability of decisions in turn maximize the possibility that an experienced judge will fall to injustice.[111]

Therefore, as the second and most appropriate option of filling the existing gaps, the legislature shall come up with a separate and relatively comprehensive statute of limitation rather than waiting for legal precedents to exhaust the controversial issues of limitation. Thereafter, it would be logical to expect the legal gaps to be filled either by cassation decisions or some other statute that would provide special periods of limitation for certain types of special claims.[112]

5. Revisiting the Scope of Application of the Ten Year GPoL: Little Judicial Discretion in Determining the Controlling Period of Limitation

5.1. Conditions Justifying the Non-Applicability of Article 1845: Searching for Alternative Periods of Limitation

There are two sides of the argument regarding the scope of application of the ten year GPoL stipulated in Article 1845 of the Civil Code. As mentioned earlier, the first and the widely accepted view favors the general applicability of the ten-year period to all civil claims unless otherwise special periods of limitation or exclusionary rules are stipulated by law. According to this view, the mere failure of the law to provide special

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[109] David Vong, '*Binding Precedent and the English Judicial Law Making*', available at <https://www.law.kuleuven.be/jura/art/21n3/vong.pdf>, pp.341-342, last visited January 3, 2015. See also Peter Blume, The Unbearable Lightness of Precedent, available at <www.scandinavianlaw.se/pdf/48-2pdf>, accessed on December 5, 2014.

[110] Workneh Alemnew, '*Contract Form Concerning Immovable: Analysis of the Cassation Decisions of the Federal Supreme Court*', in The Cassation Questions in Ethiopia, a symposium publication by school of law, AAU, 2014, pp. 167-173.

[111] Robert A. Sprecher, '*The Development of the Doctrine of Stare Decisis*', 1947, p. 501.

[112] Beside those provisions of limitation periods found in different Codes and Proclamations, the writer able to find one 'limitation specific law' enacted to govern period of limitation for special claim in Ethiopia. This proclamation is named as '*Period of Limitation for Submission of Restitution Claims and the Repossession of Public Properties Taken through Unlawful Restitutions Proclamation No. 572/2008*'.

periods of limitation neither means that such claims are exempted from the subject of limitation nor that the court has discretion to apply some other period of limitation by analogy. Rather, whenever the law fails to provide a special period of limitation, the ten year GPoL shall apply to all types of civil claims via Article 1676 and Article 1677 of the Civil Code on contractual and non-contractual claims respectively.

According to this argument, allowing the analogical application of some other period of limitation fixed for a certain type of claim to other similar claims, in the absence of express or implied reference made to that effect, would make the purpose of stipulating a GPoL meaningless. It should also be noted that the inconsistency and unpredictability of court decisions would be prevalent in a system where the application or otherwise of limitation predominantly depends on judicial discretion.[113]The arbitrary application of periods of limitation in this regard may also adversely affect the constitutional right of claimants to access justice and the right to equal justice to like cases.

However, on the other hand, applying a certain GPoL at all times and to all claims, by the mere fact that special periods have not been fixed by law, may be against the very nature and purpose of the special law governing the claim at hand, making its application inappropriate with respect to certain claims. Here, the second argument comes into being: supporting the possibility where the GPoL could be disregarded at the discretion of the court under certain considerations.[114] Consequently, one may argue that even though advocating the application of Article 1845 of the Civil Code in the absence of a special period of limitation is acceptable with a view to insure certainty and uniformity, the door should not be totally closed to the discretionary power of the court to apply some other alternative periods of limitation through interpretation, where the blind application of such GPoL may seem absurd given the circumstances of the case. However, this shall not be construed as if courts are allowed to fix periods of limitation. Since substantive periods of limitations are statutory in their nature, the court

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[113] See, <www.lawcommission.justice.gov.uk/docs/cp151-Limitation-of-Actions-consultation.pdf>, last accessed on May 5, 2015.

[114] D Morgan, '*Limitation and Discretion: Procedural Reform and Substantive Effect*', 1982, p. 23.

cannot fix such periods on behalf of the legislature. Nevertheless, this shall not prohibit courts from extending the application of a given special period of limitation to some other similar claims through interpretation of the limitation provision, while taking into account certain guiding factors justifying the application thereof.

Actually, in the task of determining the controlling period of limitation identifying the types of causes of action that the claim will be pursued under and the type of the relief sought are critical.[115] Once the court identifies the kind of the claim or the relief sought, it shall apply the special period of limitation fixed to that effect, if there is any. But if not, the ten year GPoL may apply to such claims through Article 1676 and Article 1677 of the Civil Code. Nevertheless, as already reiterated above, there are different instances where the blind application of the ten-year period of limitation becomes illogical, which in return calls for revisiting its scope of application depending upon certain guiding factors, as the case may be. At this juncture, the author of this article also believes that given the existence of the large numbers of civil claims without special periods of limitation in the Ethiopian legal system, it is difficult to argue that the legislature is intended to govern all those claims by the ten year GPoL, using the mere 'general reference' made under Article 1676 and 1677 of the Civil Code and irrespective of any other considerations. This is because the special nature of the case, the objectives of the special law governing the case at hand or

[115] However, here it should be noted that the task of identifying the nature of the relief sought is not always easy. Owing to the possible similarities among different kinds of claims, one may confuse to identify the type of the claim that the plaintiff intended to demand and thereby identify the controlling period of limitation. From the Cassation decision cited below, one can understand how far the nature of claims and the way they are reflected under the pleading may lead to confusions while identifying the form of the relief sought. The issue was as to whether the claims at hand shall be determined as '*petitory action' or 'action for the restoration of possession/action for the cessation of the interference'* as laid down under Art. 1192 and Art. 1149(2) of the Civil Code respectively. In juncture, it has been said that courts shall examine the nature and contents of claims while identifying the type of claim and thereby determining the controlling period of limitation. The decision shall not be rested solely up on what has been indicated in the heading/title of a given statement of claim as the relief sought. See *Asefa Ayele vs. Fikadu Mulugeta* (CFN 49985, '*Decisions of the Federal Supreme Court Cassation Division*', Vol. 11, Hidar 28, 2003 E.C.) and *Mergitu Negasa vs. Tsehay Ligaet al* (CFN 34406, Vol. 6, Miyaziaya 7/2001 E.C.)

some other policy reasons may demand either a short alternative period of limitation or exemption, as the case may be.

Therefore, with a view to reduce the misapplication of the ten-year period of limitation, adopting the system where such a long period of limitation (which is principally put in place for contractual claims) could be disregarded at the discretion of the court seems advisable. But to control arbitrary court discretions in this regard, the author urges the lawmaker must adopt some guiding factors or principles that the court shall take into account when disregarding the ten year period and applying some other shorter alternative period of limitation instead.

In this regard, different guiding factors could be taken into account while limiting the scope of application of the ten year period of limitation on a case by case bases in the manner that do not affect the constitutional right to access justice and the original intention of the legislature. As demonstrated indifferent Cassation decisions, the similarities among the natures of claims, the degree of the legal protection accorded to the right at hand, the overall purpose of the law and the maximum period of limitation stipulated for other claims that arise from the same cause of action are among those conditions that should be used to determine whether the legislature is intended to govern the claim at hand by the ten year GPoL or not. Some such factors are discussed as follows with relevant cassation decisions.

A. The Similarities among the Nature/Origin of Claims: The Rule of Analogy

Above all, it should be noted here that as part of the legal framework governing civil cases, the rules of limitation of actions including the determination of the controlling period of limitation is subject to interpretation.[116] Thus, if we say the rule governing limitations of action is subject to interpretation, obviously the court will have room to determine the ambit of a given legally fixed special period of limitation and thereby extend the scope of its application, as the case may be, before rushing to apply the ten year general period of limitation to all civil claims contrary to the purpose of the special legal regime governing the case at hand.

[116] G. Nigel, *supra note* 64, p. 390.

Actually, the task of identifying the controlling rule of limitation would be easy if the law itself gave room in which other similar claims could be easily categorized by *mutantis mutandis*[117] or if '*an internal general period of limitation*' has been fixed by law that could apply to all other claims other than those the law provides a special period of limitation.[118] However, the point of contestation arises in the condition where the law provides special periods of limitation in the manner that only works for particular types of claims without living a clear space in which other similar claims could be easily assimilated with.[119]

At this parlance, the author believes that in the first place, the stipulation (or otherwise) of a special period of limitation should be exhaustively examined under the law directly relevant to the claim at hand before seeking the application of Article 1845 which is principally provided to govern contractual related claims. In addition, to the direct law governing the claim at hand, one should also critically examine the existence (or otherwise) of other alternative periods of limitation in more relevant and specific laws to the case at hand compared to the general contract part of the Civil Code where Article 1845 is stipulated. Consequently, the author believes that the failure of the directly relevant law to provide a special period of limitation does not necessarily mean that such a claim cannot be governed by other relevant alternative limitation provisions provided under other more specific relevant law other than the general rule of Article 1845.[120] For instance,

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[117] For instance, see the phrase '*…other similar payments…*' under Art. 162(3) of the Labour Proc. No. 377/2003 where bonus or overtime payments can be easily assimilated by analogy.

[118] See for example Art. 162(1) of the Labour Proc. which provides one- year general period of limitation for claims arise from employment relations in general.

[119] For example, the only limitation provision in the "ordinary law of sale" of the Ethiopian Civil Code is Art. 2298 that provides one- year period for warranty related claims of the buyer. The law of sale as governing a special type of contract does not stipulate special periods for other possible claims that could be brought by the contracting parties like claims for the invalidation of the contract, payment of the price and other claims based on the non- performance which pose a question as to whether or not the legislature is intended to govern all such claims by the ten year period of limitation stipulated in Art. 1845 of the Civil Code while the nature of the claims required early settlements to minimize disrupting effects of unsettled claims on commercial intercourses.

[120] In this regard, I believe that, the phrase '*unless otherwise provided by law…*' under Art. 1845 of the Civil Code shall be construed broadly as if it connotes two possible special periods of limitations. Firstly, it implies to those special periods of limitation fixed by the directly relevant

regarding the claim of peasants for the restoration of the possession of farmland or the cessation of the interference from other persons, both the federal and regional land administration and use proclamations do not provide a special period of limitation. But since the nature of the claim obviously poses the issue of property law, the cassation division looks into the period provided in Article 1149(2) of the Civil Code as an alternative limitation provision though it later disregards its application on the bases of 'constitutional test'. Moreover, it goes to Article 1845 of the Civil Code on the belief that it is under such longer GPoL that the constitutionally guaranteed rural land related rights of peasants can better be secured.[121] But here it should be noted that had the issue of the 'constitutional test' is not addressed in the instant case; it seems that the period stipulated under Article 1149(2) of the Civil Code would have been applied by the Court. Moreover, the consideration of Article 1149(2) of the Civil Code by the court, as the legal provision stipulating an alternative period of limitation alone shows the possibility in which a given civil claim may be subjected to competing alternative periods of limitation other than the ten year GPoL. Therefore, since there is a possibility where a given claim may be governed by one or more categories of legal regime, before reaching a conclusion, that a special period of limitation has not been fixed by law and would go for Article 1845, one needs to examine whether or not the claim at hand could be governed by a period stipulated in other, more relevant and special laws.

special law, governing the claim at hand. Secondly, if the law directly relevant to the claim at hand fails to fix such special period of limitation, the above phrase shall be construed to imply to those periods of limitation stipulated under other relevant, alternative and more specific law (compared to the general contract part of the Civil Code), where the claim at hand can be assimilated with such more special and alternative periods of limitation by reason of their 'origin' or 'nature'. A similar construction can also be made for other claims other than contractual claims from the in tandem reading of Art. 1677(2), which states, "…*by reason of their origin or nature*", at least with respect to the general application of Art. 1845. Therefore, I believe that where the law directly relevant to the claim at hand failed to fix a special period, the court shall further examine the existence or otherwise of other special periods of limitation in other relevant, alternative but more special laws using its power of interpretation before the move to apply the ten year general period of limitation.

[121] See *Shelema Negese vs. Feyisa Mengistu,* 'Decisions of the Federal Supreme Court Cassation Division' *(CFN 69302,* Vol. 13, Tahisas 20, 2004 E.C.)

To this effect, however, the limitation provisions stipulating special periods should not be interpreted too narrowly in the manner that makes the provisions inapplicable to other similar claims. Given the difficulty in stipulating special periods of limitation for each and every type of claims, applying the ten year GPoL to all cases by interpreting a given limitation provision, in a narrow manner, would be against the intension of the legislature. At this juncture, the author believes that the tendency of applying Article 1845 is often due to the court's devotion in finding or creating conditions of application which are not clearly stipulated in a given limitation provision in the name of interpretation.[122]

To avoid narrower ways of interpretation, firstly, the conditions stipulated in the given limitation provision should be read cumulatively with other provisions of the law. Otherwise, the isolated reading of the limitation provision could cause the court to overlook conditions that are really constituted under the given limitation provision and pave the way for the inappropriate application of the ten year GPoL. For instance, in the case of

[122] For instance, in the cases of *Dinke Tedla vs. Abate Chane*, '*Decisions of the Federal Supreme Court Cassation Division*' (CFN 17937, Vol. 4, Megabit 20, 1999 E.C.) and in *Tegegne Yimam Vs Kasahun Desalegn* (CFN 25664, Vol. 6, Ginbot 7, 2000 E.C.), the Federal Supreme Court Cassation Division considered the identity or the status of the litigant parties as the condition to determine the scope of application of the period provided in Art. 1000 of the civil code which is not clearly provided under the provision. Here the cassation division decided that the period fixed under Art. 1000 can apply on 'petitio haereditatis' action if the dispute is among and between heirs. In other words, in the conditions where a true heir brought a claim against non- heirs for the restoration of inheritance property illegally possessed by the latter, the applicable period would be ten year as provided in Art. 1845 against the spirit of Art. 1000. However, this does not mean that the strict observance of statutory conditions is always against the intention of the legislature and considered as creating new conditions. There may be instances where the objective of the law could be better achieved under the narrower interpretation of the provision as the case may be. For instance in the case of *Weldetsadik Birhanu et al vs. Sintayew Ayalew* (CFN 38935, '*Decisions of the Federal Supreme Court Cassation Division*', Vol. 8, Megabit 3, 2001 E.C.), the Cassation division decided that unless in the condition where the seller inform the buyer in unequivocal manner that he will not perform his obligation as laid down under Art. 1789 of the civil code, the claim of the buyer of the immovable property for the performance of the sale contract should not be barred by one year period provided under Art. 2892(3) of the Civil Code. Instead the ten year general period of limitation should apply on the case. Here, the writer believed that given the large legal protection accorded to the rights attached with immovable properties, the strict observance of the statutory conditions via the narrower interpretation of Art. 2892(3) by the court and goes to apply Art. 1845, which provides a better chance to exercise such right seems in line with the intention of the legislature.

Aynalem Abebe vs. Degefa Gurmu[123], the lower courts argued that the time limit under Article 1000 of the Civil Code does not apply on the litigation that intends to ascertain whether the one who possessed the inheritance property is a true heir or not as if the provision applies only during the condition where the restitution of the inheritance property has been demanded by the claimant by alleging that he is a true heir. Later, the Cassation division criticized the lower court's decision and blamed the narrower interpretation of the provision for the erroneous interpretation arrived at without taking into account Article 999 of the Civil Code, which provides the scope of the possible claims to be constituted under a '*petition haereditatis*' action. The lower courts also committed a similar error in the case of *Ethiopian Electric power Corporation vs. Fate Ali*[124] due to the narrower interpretation and isolated reading of the limitation provision while determining the applicability or otherwise of the period stipulated in Article 2143 of the Civil Code to compensation claims brought by the heirs of the victim following the death of the later. In this case, the lower court disregarded the two year period of limitation to bar compensation claims brought based on the death of the victim and opted for the ten year GPoL, arguing that the fact of ''*death*'' cannot be considered as the '*damage suffered*' in the meaning of Article 2143 of the Civil Code.[125]

Second, the similarity among the nature of the claims at hand and the legal framework they are categorized in can be another guiding factor that should be considered while interpreting limitation provisions and determining the applicable period of limitation for the claim at hand before rushing to apply Article 1845. At this juncture, in most jurisdictions of common law countries, it is the cause of action rather than the form of the remedy that

[123] See *Aynalem Abebe vs. Degefa Gurmu* (CFN 25567, '*Decisions of the Federal Supreme Court Cassation Division*', Vol. 6, Hidar 12, 2000 E.C.) Here the Cassation Division decided that the period under Art. 1000 of the Civil Code can be applied to the claim made for the acknowledgement of his status of heir as well as the claim for the restitution of the property of inheritance.

[124] *Ethiopian Electric Power Corporation vs. Fate Ali* (CFN 34544, '*Decisions of the Federal Supreme Court Cassation Division*', Vol. 9, Tikimt 11, 2001 E.C.)

[125] However, the cumulative reading of Art. 2143 with Art. 2144 and other extra contractual provisions reveals the fact that the two- year period of limitation fixed in Art. 2143(1) of the Civil Code can also be used to bar those compensation claims resulted due to the death of the victim.

mainly controls the determination of period of limitation, although in some jurisdictions the form is still held to control.[126] Since statutes of limitation are meant to prevent injustice when time has destroyed the evidence, the form of action or remedy would seem to be immaterial, which in return, paves the way for the analogical application of limitation provisions fixed for one type of remedy to another.[127]

When we come to the Ethiopian judicial experience, in the case of *Ethiopian Insurance Corporation vs. Aregash Kebede*[128] for instance, the Cassation division gave a binding interpretation that the claim for compensation brought in the form of maintenance by the spouse, ascendants or descendants of the victim in the case of fatal accident is subject to the same period stipulated in Article 2143 of the Civil Code. Here, the court argued that in the condition where the bases of the compensation claim(in the form of maintenance) brought as per Article 2095 of the Civil Code arises from extra contractual relations and not from any legal relation, the two year period provided in Article 2143 should be applied. Actually, when we examine the nature of the claim provided under Article 2143 and 2144 and Article 2095, one can observe certain differences. Article 2143 of the Civil Code provides the time in which a claim for compensation could be brought by the victim himself or by the victim's heirs (after his death as representative) *for the material damage he has suffered*; whereas, Article 2095 of the Civil Code provides the instance where the spouse, ascendants and descendants of the victim can bring a claim for compensation in the form of maintenance *for the material damage they have suffered* due to the death of the victim. However, even though there are slight differences between the two claims, applying the two-year period of limitation stipulated in Article 2143 to the case of Article 2095 seems logical since the two claims are arising out of the same legally recognized relation (i.e. Extra-

[126] The Yale Law Journal, Vol. 35, No. 4, '*Limitation of Actions- Gravament of Action Determinative as to Which Period of Limitation Applies*', Feb, 1926, pp. 508-509. Available at <http://www.jstor.org/stable/788645>, last visited on Nov, 2014.

[127] Ibid

[128] *Ethiopian Insurance Corporation vs. Aregash Kebede* (CFN 16062, '*Decisions of the Federal Supreme Court Cassation Division*', Vol. 3, Hidar 19, 1998 E.C.)

contractual). Here, imagine how it would be against the intension of the legislature had Article 1845 been applied.

Similarly, in the case of *Megertu Negasa vs. Tsehay Lega*[129], the Cassation division decided that the compensation claims arising out of unlawful enrichment should be governed by the two year period of limitation, as stipulated in Article 2143 of the Civil Code for extra contractual cases. Here the cassation division acknowledged that the chapter dealing with unlawful enrichment does not provide a period of limitation for compensation claims; however, the court did not seek to apply the ten year period of limitation. Rather, it applied Article 2143 by analogy by taking into account the similarities among the source and natures of unlawful enrichment and extra contractual related obligations. This means the placement of the two obligations under the same title of the Civil Code and the extra contractual nature of the unlawful enrichment claims lead the court to construct the analogy, making compensation claims arising out of both extra contractual and unlawful enrichment relations to be subjected to the same limitation provision (Article 2143 of the Civil Code).

B. The General Purpose of the Law Governing the Claim at Hand and the Maximum Period of Limitation Provided therein

Besides similarities among the nature of claims, one may use policy grounds/objectives to deduce that the legislature is not intended to govern the claims at hand by the ten year GPoL. Such policy grounds, *inter alia*, may take into account the special purpose of the law governing the claim at hand and the maximum periods of limitation provided therein for other similar claims.

For instance, in labour case the law provides a one year period maximum period of limitation for claims arising out of 'employment relationships'[130] though it also leaves room for the application of other periods of limitations and the execution rules thereof stipulated in other relevant laws as the case

[129] *Megertu Negasa vs. Tsehay Lega* (CFN 34406, '*Decisions of the Federal Supreme Court Cassation Division*', Vol. 6, Miyaziya 7, 2000 E.C.)

[130] Art. 162 (1) of Labour Proc. No. 377/2003.

may be.[131] Thus, in the conditions where the law provides the period of one year as the maximum period of limitation to a given category of claims, it is difficult to expect that the legislature is intended to govern other similar claims (for which special periods have not been fixed by law) by the ten year GPoL.

The fact that the stipulation of a one-year period as a maximum period of limitation also implies the intention of the legislature to dispose labour cases within short period of time which actually goes with the general purpose of the labour law. As envisaged in the preamble, one of the purposes of the labour law is to ensure that worker-employer relations to be governed under the basic principles of rights and obligations with a view to enable them to maintain industrial peace and work in the spirit of harmony and cooperation

[131] Id, See Art. 162(1) which states, *'[u]nless a specific time limit is provided otherwise in this Proclamation or other relevant law, an action arising from an employment relationship shall be barred by limitation after one year from the date on which the claim becomes enforceable[.]'. See also Art. 162* (5) which provides, '*[t]he relevant law shall be applicable to the period of limitation which is not provided for in this Proclamation*' [.] However, here it is not easy to determine what the term '*…other relevant law…*' implies under Art. 162(1) & (5) of the Labour Proclamation. Particularly, with respect to Art. 162(1), it is difficult to find such special periods of limitation stipulated in other relevant law while the claim at hand is arising from an 'employment relationship'. Because, such special period stipulated in other relevant law to prevail over the one year 'internal general period of limitation', the said other relevant law should fix such special period in relation to the action arising from an employment relationship. At this juncture, determining as to whether the claim at hand is arise from an 'employment relationship' or not, by itself, is not also always easy. Nevertheless, I believe that there is no way where Art. 1845 of the Civil Code can be considered as '*other relevant law*' in the meaning of Art. 162(1) of the labour Proclamation, because after all it does not provide 'specific time limit'. If there is not such specific time limit in 'other relevant law', there is no way that one can apply the ten year period via Art. 1676 in the presence of the more specific 'internal general period of limitation' (i.e. the one year period stipulated under Art. 162(1) of the Labour Proc.).When we come to Art. 162(5), I believe that the term 'relevant law' may imply three things. Firstly, it may be referring to the execution limitation provisions of the Civil Code (Art. 1846-1856) other than those the labour Proclamation provides special rules (Art. 163-166). Secondly, from the in tandem reading of Art. 162(1) and 162(5), one can understand that the term 'relevant law' may be implying to those periods of limitation stipulated in other laws in relation to those claims not arising out of employment relation. For example, if the employee and the employer entered into loan contract, the claim arising out of such relation is out of the employment relations so that it shall be governed by other relevant law (the ten year GPoL since the part of the Civil Code dealing about loan contract does not provide special period). Thirdly, the term 'relevant law' may be referring to those procedural periods of limitation as stipulated under the Civil Procedure Code of Ethiopia unless special rules have been stipulated under the Labour Proclamation (See for example, Art. 138(3) and Art 180 of the Labour Proc.).

towards the all-round development of the country.[132] In order to achieve the above objectives of the law, it is sound to argue that all other claims arise from employment relationships shall be governed by the maximum period of limitation stipulated in the labour law, which is one year[133], as an '*internal general period of limitation*' for labour cases rather than hastening to apply the more general period of limitation stipulated for contractual claims in general. Accordingly, the author believes that before hurrying to apply Article 1845 to other specific claims, it is important to take into account the maximum period of limitation fixed in that particular law governing the claim at hand and examine whether the application of the ten year GPoL would distort the specific objective that the special law intended to achieve. Thus, the specific objectives of the law that governs the claim at hand should always be taken into consideration while interpreting and applying the provisions of the law including limitation provisions.

In this regard, even though the case is not directly dealing with the scope of application of Article 1845, the interpretations given in Cassation file number 53527[134] illustrate the need to interpret and apply limitation provisions in the manner that does not distort the purpose the particular law stands to achieve. The issue of the case was to determine whether the claim of the worker for the execution of the judgment ordering his reinstatement should be governed by the one year period as stipulated in Article 162(1) of the labour proclamation or the ten year period of limitation as stipulated in Article 384 of the Civil Procedure Code. Here, the court argued that period of limitation for execution of judgment in labour cases shall be governed by Article 162(1) of the labour proclamation, which provides a maximum one year period for all claims arise from employment relation, rather than the ten year period provided in Article 384 of the CPC.[135] The court arrived at this

[132] Id, see the Preamble.

[133] Id, see Art. 162(1) which provides one year as internal general periods of limitation that can apply to all claims arise from employment relationships.

[134] *Ethiopian Postal service Agency vs. Bedaso Melkato* (CFN 53527, '*Decisions of the Federal Supreme Court Cassation Division*', Vol. 11, Meskerem 27, 2003 E.C.)

[135] Here, it is important to note that Art 384 of the Civil Procedure Code that provides a period of limitation for the execution of judgments in civil cases can be considered as 'relevant law' in the meaning of Art. 162(5) of the Labour Proclamation.

conclusion by taking into account the maximum period of limitation stipulated therein and the specific objectives of the labour law.[136]

In conclusion, even though the period provided in Article 384 of the CPC indeed applies to all claims related with the execution of judgments in civil cases, this case, at least by analogy, shows the possibility where shorter limitation periods would be justifiable depending upon the particular purpose of the law governing the case at hand. The writer also believes that similar justifications can be used to disregard the ten year GPoL stipulated in Article 1845 of the Civil Code.[137]

5.2. Exempting Certain Claims from the Subject of Limitation in the Absence of Exclusionary Rules: The Issue of Judicial Discretion

From the very purpose of periods of limitation every type of claim is expected to be barred by periods of limitation as a rule. If we say being subject to limitation is a rule, the exclusionary rules shall be considered as exceptions and be interpreted narrowly. Consequently, in order to say a certain claim is not barred by period of limitation confidently, the law shall provide a clear exclusionary rule to that effect. Thus, as a principle, the failure of the law to provide a special period of limitation for certain civil claims neither means that they are automatically excluded from the subject

[136] At this juncture, the court asserted that allowing workers to open execution files up to ten year after the date of judgment would be against the very objective of the labour law, as proclaimed in the preamble of the labour Proclamation. Because unless the worker performed his duties while being at time and place of work, the employer cannot increase or enhance the production. Consequently, the court concluded that governing the application for the execution of judgment in labour dispute cases by the one- year period of limitation, which is the maximum period stipulated in the labour law, goes with the specific purpose of the labour law.

[137] However, although the writer used the above discussed cassation case just to give emphasis to such justifications given to disregard the application of Art. 384 of the CPC and to urge for the analogical application of the same justifications in disregarding the ten year general period of limitation, he did not agree with the assertion of the court that the claim for the execution of judgment in the case of labour disputes has been addressed by Art. 162(1) of the Labour Proclamation. In this regard, I believe that the chapter of the labour proclamation dealing about period of limitation in general as well as Art. 162(1) in particular are not intended to govern procedural periods of limitation (for example, the period for the execution of judgment). Instead, the limitation provisions including Art. 162(1) are principally put in place with respect to substantive periods of limitation. Therefore, I do not believe that the period for execution of judgment can be assimilated under the meanings of 162(1), which is dealing about substantive periods of limitation rather than procedural periods of limitation.

of period of limitation nor that a court can fix a period at its own discretion. Rather, principally they will be governed by the ten year GPoL as stipulated under Article 1845 of the Civil Code. However, due to the absence of exclusionary rules in our civil laws, a question may arise as to whether the rest of all claims are subject to limitation or not.

In Ethiopia, we cannot find a legal provision that authorizes courts to exclude certain claims from the subject of limitation in the conditions where neither special period of limitation nor exclusionary rules have been provided. But even though there is no legal provision that provides room for court discretion, as revealed under cassation decisions, there are different instances where a given claim can be exempted from the subject of limitation under justifiable grounds. For instance, the cassation decisions given in file numbers 43600[138], 28686[139], 42824[140] and 44025[141] urge the

[138] See *Dawit Mesfin vs. Government House Agency (*CFN 43600, '*Decisions of the Federal Supreme Court Cassation Division*', Vol. 10, Tir 5, 2002 E.C.) (See Art. 1677, 1206, 1188-1192 of the Civil Code cumulatively). According to this decision a petitory action brought under Art. 1206 of the Civil Code by the owner of immovable property shall not be barred by limitation. Unlike Art. 1192 which applies in the case of corporeal chattel, the property law does not provide a condition where the owner may lose his ownership rights on immovable property on the grounds of limitation or prescription. However, as revealed in the instant case, the mere absence of special period of limitation to the petitory action brought by the owner of immovable property does not necessarily imply the application of Art. 1845 of the Civil Code. The court insists that given the large legal protection accorded to the ownership rights of immovable property, it would be unreasonable to expect that the law failed to provide a special period of limitation for petitory action concerning immovable property, while providing the same for movable property, because it was intended to govern the former claim by the ten year general period of limitation.

[139] See *Government House Rental Agency Vs Gizaw Mengeta (CFN 28686, 'Decisions of the Federal Supreme Court Cassation Division*', Vol. 6, Hidar 24, 2000 E.C.) The court argued that in the condition where the breach of the contract has been continued (during the continuing breach of contract), the claim brought against the defendant to stop the act of violation or to demand the order of cancellation shall not be barred by limitation. In this case the present respondent has been used the house for hotel business contrary to the purpose stipulated in the terms of the contract of lease for more than 20 years without the consent of the present applicant where the latter required the cancelation of the contract thereafter. In the instant case, the court rests its decision on Art. 1846 of the Civil Code by arguing that in the condition where the violation of terms of a contract has been continued, it is difficult/impossible to determine as to the time when the act of violation has started or discontinued from the nature of the contract so that the applicant's claim for the cancellation of the contract and the return of the possession of the house shall not be barred by limitation and thus can be brought at any time.

[140] See *Birhan Tesema vs. Tamirat Ayane*, (CFN 42824, '*Decisions of the Federal Supreme Court Cassation Division*', Vol. 11, Hidar 8, 2002 E.C.) The decision confirmed that injunction claims

need to leave space for judicial discretion where the court may exempt certain claims from the subject of limitation on the grounds of policy by taking into consideration the overall nature of the claim, the legal protection given to the right at hand and the intention of the legislature. The writer also believes that before rushing to apply the general period of limitation provided in the general part of the Civil Code via Article 1677(1) of the CC, the reasons behind that, whether the claim shall be excluded from the subject of period of limitation or not, first be examined in relation to the provisions of the law having direct relevance to the case at hand.

However, since exclusionary rules are exceptions, the court should not be liberal when exercising such discretion. In this respect, for instance, even though the cassation division in files number 43600[142] declared that given the large legal protections accorded to the ownership right of immovable property a petitory action concerning immovable property cannot be barred by limitation, it does not mean that all petitory actions are excluded from the subject of limitation. If the point of contention is on the ownership rights of immovable property which have emanated from succession, sale or donation contracts, the issue of whether a petitory action brought by the alleged owner is barred by limitation or not should be governed by the part of the law governing the case at hand namely succession, sale and donation related limitation provisions of the Civil Code rather than property law.[143]

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brought by the neighbor of the defendant demanding the cessation of nuisance (sound pollution) as per Art. 1225 of the Civil Code shall not be barred by limitation. And the period stipulated in Art. 1149 of the Civil Code cannot apply to such claims brought under Art. 1225 of the same Code. The court further argued that since the nuisance is inevitable and will be continued as far as the activities creating nuisance continues, the passage of time after the commencement of the activity can not hinder the applicant to demand the cessation of nuisance. And there shall not be any legal ground that allows once created nuisance to be continued on the ground of limitation.

[141] See *W/t Tsehay Haile et al (4 people) vs. W/ro Felka Begna*, (CFN 44025, '*Decisions of the Federal Supreme Court Cassation Division*', Vol. 10, Hamle 22, 2002 E.C.) Here the cassation division decided that in the condition where the property of inheritance has been jointly administered by co-heirs, the claim for succession brought by one of the heir who jointly possessed the property against the other co-possessor shall not be barred by limitation. Otherwise governing the claim brought by the possessor against another co-possessor by rule of limitation would be against the notion of period of limitation.

[142] See *Dawit Mesfin vs. Government House Agency, supra note* 138.

[143] See *Yeshareg Kebede and Hana Admasu vs. Yeshiwork Mokenin* (CFN 71537, '*Decisions of the Federal Supreme Court Division*', Vol. 14, Tahisas 02, 2005 E.C.)

Accordingly, a petitory action brought by the donee, for instance, shall be barred by limitation unless he is able to execute the donation contract before the expiry of ten year from the date of donation.[144]

Concluding Remarks

Due to the absence of a separate and comprehensive limitation statute, the legal regime governing civil periods of limitation in Ethiopia are incomplete with a number of lacunas. The existence of a number cassation decisions on different aspects of periods of limitations can evidence the lack of clarity of the law in this regard. This is particularly true with respect to the dimension and scope of application of the ten year GPoL stipulated under Article 1845 of the Civil Code.

Although the argument advocating for the general application of the ten year period of limitation in the absence of special periods to that effect is a widely shared view, the immediate rush to apply such a long period, which is principally fixed for contractual claims, to all claims and at all times without any consideration would make its application illogical, particularly with respect to certain kind of claims. To reduce such blind application of the ten year GPoL to inappropriate cases, this article calls for the need to revisit its scope of application at least by way of allowing some space for judicial discretion, where the court can apply either some other period of limitation to other similar claims by analogy or exempted certain claim from the subject of limitation on the basis of certain guiding considerations. In this regard, the similarities among the nature/origin of claims, the form of the law under which the claims could be categorized, the overall purpose of the law governing the claim at hand, and the maximum period of limitation provided therein for other similar claims arising from the same cause of action could serve as a litmus paper to determine whether the legislature is intended to govern the claim at hand by the ten year GPoL or not and thereby identify the controlling period of limitation.

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[144] See *Adefres Bekele vs. Yikum Bekele* (CFN 42691, '*Decisions of the Federal Supreme Court Cassation Division*', Vol. 10, Megabit 22/2002 E.C.). Here, on the ground that the part of the Civil Code that deals about contract of donation does not provide a special period for such claim, the court applied the ten year general period of limitation of Art. 1845 via Art. 1676(1) of the Civil Code.

However, since the reliance on judicial discretion in overriding a limitation period would render the law too uncertain, it is advisable rather to adopt a separate and relatively comprehensive statute of limitation that clearly provides, *inter alia*, the dimension and scope of application of the ten year GPoL and lists of exempted claims. Furthermore, rather than having a single GPoL, it is advisable to have different '*internal general periods of limitation*' for certain categories of claims as the case may be, taking into account the very objectives of the special laws governing such claims. This would reduce the inappropriate application of the GPoL, which is usually a longer period, to all types of claim contrary to the nature or objectives of the special laws governing certain kinds of civil claims.

Issues on the Role of Formal Requirements for Validity of Immovable Transactions in Ethiopia: the Case of Amhara Region

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Abstract

This article deals with the question of formal requirements and their relevance to the validity of transactions relating to immovable properties both in urban and rural settings. The article discovers that while some rules try to mention the types of formal requirements and their effect on the validity of legal transactions on immovable properties, there is still a problem of lack of coherence within each of the legislations as well as among the various legislations. Similarly, there are divergent interpretations of these rules. One cause, we argue, is the failure to demarcate the distinction among multiple existing formal requirements. In particular, legal professionals have been confused with the difference between authentication and registration requirements. This research aims to supplement the current discourse on the issue by critically identifying the different formal requirements described in various laws, both the long existing Civil Code and the relatively recent urban and rural land use and administration legislations, and advancing more comprehensive arguments on the issue. To do so, it provides a theoretical definition of the relevant concepts based on international standards and links these definitions to the definitions given under our law. In addition, it analyses a few sample court cases decided by the Amhara region Supreme Court as well as offering supplementary information from a few key informants and a focus group discussion.

Key Words: Formality Requirement, Authentication, Immovable Registration, Immovable Transaction, Validity

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1. Introduction

This article deals with the relationship between formal requirements to immovable transactions and their role in the validity of those transactions. To put the discussion in perspective, it is good to dispense few paragraphs on these terms. Under the Ethiopian legal system, an immovable property includes land and buildings which means that both have an equal, parallel status.[1] Land which is the typical example of an immovable property is a vital asset for peoples' livelihood in Ethiopia. As Pankhrust noted, land 'was of crucial importance to the country's economic and social life besides determining questions of social class; it was the basis of administration, taxation and military service'.[2] As land consists of various forms of rights, interests or benefits[3] which are of high economic, social, and political significance, immovable transactions assume high importance in transferring these benefits from one person to the other in different ways.

Immovable transactions are the procedures that are necessary for owners or proprietors to dispose legally of their ownership or other immovable property rights and for a new person to acquire them. Immovable transaction is the process whereby rights in a unit of property are transferred between two or more parties such as sellers and buyers, lessors and lessees, mortgagors and mortgagees, testators and beneficiaries, donors and donees and so on. Because land and buildings are so important, society has constructed safeguards to regulate immovable property transactions, which

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[1] The Civil Code of the Empire of Ethiopia Proclamation, 1960, Art. 1130, Proc. No. 165/1960, *Neg. Gaz.*, Extraordinary Issue, No. 2, (hereinafter 'ECC'). In fact, there is a possibility that a building could be considered as an 'intrinsic element' to the land to which it belongs according to the definition given under Art. 1132 of. In most other legal systems, a building is considered to be part of the land to which it is attached, or a fixture. Thus, the Swedish Land Code provides that '[a] property unit includes a building, conduit, fence and other facility constructed in or above ground for permanent use, standing trees and other vegetation, natural manure. *Land Code 1970* (Sweden) Ch 2 S 1 Par 1.

[2] Richard Pankhurst, *Land and Economic History of Ethiopia* (H.S.I. (Addis Ababa) University Press,1968, p. 35 cited in Mekbeb Tsegaw, Contracts Relating to an Immovable and Questions of Form- Current Issues, *Ethiopian Bar Review*, 2007, Vol.2, No. 1, p. 158.

[3] Immovable (real) property interests are the rights, restrictions and responsibilities recognised and regulated by law or custom. The Ethiopian law governs these interests mainly in the ECC and land holding and registration laws in both urban and rural areas adopted both at the national and regional level.

require that specific procedures be followed. Rules determine when immovable property rights are transferred, who may transfer them and to whom they are transferred. Legal and practical/conventional requirements vary considerably among different jurisdictions of the world and among smaller legal entities, as can also be seen from this research.

Immovable transactions require the fulfilment of different formalities usually referred to as requirements of form.[4] According to Black, a form is defined as '[t]he legal and technical manner or order to be observed in legal instruments or in the construction of legal documents or processes.'[5]

The remainder of this article proceeds with the discussion of different formal requirements- written form that includes signature by parties and attestation by witnesses, authentication, and registration; this will be provided in section two. The third section addresses the effects of each of these requirements on validity of immovable transactions. The fourth section deals with the law and practice in the Amhara region and the last section furnish concluding remarks.

2. Requirements for Immovable Transactions

2.1 Written Form

Written form implies putting the terms of the transaction on paper or deed. This is contrasted with an oral form where the terms of the transaction are to be found in the minds and mouths of the parties to the transaction. A transaction made in written form is more secured and certain than the one undertaken in oral form[6] as it indicates the seriousness of parties and is more inconvenient for them to revert.

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[4] See generally Workneh Alemnew, *Form of Contracts Relating to Immovables in Ethiopia: Analysis of the Position of the Federal Supreme Court Cassation Division* (LLM Thesis, Addis Ababa University College of Law and Governance School of Law Graduate Studies, 2014), p. 19-26. But some writers doubt whether requirements other than writing form are to be considered as requirements of form. See eg Mekbeb; supra note 2, p. 162.

[5] Henry Campbell Black, *Black's Law Dictionary* (Revised Fourth Ed, 1968), p. 780 quoted in Mekbeb, supra note 2, p. 161.

[6] William P Anson, *Principles of English Law of Contract* (Oxford University Press, 19th ed, 1945), p. 67 cited in Workeneh, supra note 4, p. 19.

The matter of using either written form or verbal form is dependent on the choice of the parties just as entering into a transaction contract is entirely their choice at freedom. The ECC stipulates: '[u]nless otherwise provided, no special form shall be required and a contract shall be valid where the parties agree.'[7] Exceptionally, the law may stipulate that transactions of some sort need to follow a special, written form. 'Where a special form is expressly prescribed by law such form shall be observed.'[8] Contracts relating to immovable properties,[9] contracts made with a public administration, contracts of guarantee or suretyship, and contracts of insurance are expressly required to be made in written form in the ECC.[10] Any other contract in respect of which a written form is required by any other special law shall also be in a deed form.[11]

In addition, written form can also be agreed to be followed by the parties themselves regardless of the legal requirement for doing so.[12] Once this agreement is made, which can also be done orally or otherwise, the transaction with respect to which such agreement is made 'may not be deemed to be completed until it is made in the agreed form.'[13]

A written form comprises of two other formal requirements: signature of contracting parties, and attestation by witnesses. A signature is 'a formal device which indicates that some important legal consequences may follow from a document in which a signature is affixed.'[14] It is 'a formal ground of legal liability as well as proof of contractual intention.'[15] A signature binds

[7] ECC, Art. 1719(1).

[8] Id, Art. 1719(2).

[9] Art. 1723(1) of the ECC provides that '[a] contract creating or assigning rights in ownership or bare ownership on an immovable or an usufruct, servitude or mortgage of an immovable shall be in writing'.

[10] Id, Arts. 1723-25.

[11] Id, Art. 1725(c).

[12] Id, Art. 1719(3).

[13] Id, Art. 1726.

[14] P S Atiyah, *An Introduction to the Law of Contracts* (Oxford University Press, 4th ed, 1989), p. 193 quoted in Workeneh, supra note 4, p. 20.

[15] Workeneh, supra note 4, p. 20.

the signatory and precludes him/her from pleading that he/she has no knowledge of the contract or the terms thereof.[16]

The ECC clearly stipulates that a contract required to be made in writing must be signed by all contracting parties and be attested by two witnesses.[17] To this effect, the parties shall affix their handwritten signature.[18] When a party cannot write, he may sign by putting his/her thumb-mark or finger print.[19] A blind or illiterate person may not be bound by his signature or thumb-mark unless it is authenticated by a competent body.[20]

The second component of written form is the need to be attested by witnesses.[21] To attest means 'to affirm to be true or genuine, to certify to the verity of a copy of a document formally by signature.'[22] Even if the law does not define the meaning of 'attest', attestation is undertaken by affixing the signature of the witnesses.[23] A witness must be capable before the law, which is to say that he/she must be of age and not judicially interdicted;[24] but a witness is not required to be a citizen or to be of a certain sex.[25] The task or duty of witnesses is to certify that a contract is made and ascertain the terms of the contract.[26] This becomes more important when the document evidencing the contract has been destroyed, stolen or lost.[27]

Formal requirements of property transaction have different consequences. The law stipulates that '[w]here a special form is prescribed by law and not

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[16] Atiyah, supra note 14, cited in Workeneh, supra note 4, p. 20.

[17] ECC, Art. 1727.

[18] Id, Art. 1728(1).

[19] Id, Art. 1728(2); Rene David, *Preliminary Draft on the Ethiopian Civil Law* (translated by Michael Kindred, Haile Sellassie I University, Faculty of Law, 1973), p. 34 cited in Workeneh, supra note 4, p. 21.

[20] ECC, Art. 1728(3).

[21] Id, Art. 1727(2).

[22] Black, supra note 5, quoted in Workeneh, supra note 4, p. 22.

[23] Workeneh, supra note 4, p. 22.

[24] ECC, Art. 1729.

[25] Id, Art. 1729(2).

[26] Id, Art. 1730.

[27] Id, Art. 2003.

observed there shall be no contract but a mere draft of a contract.'[28] This is provided in an even clearer manner with regard to a contract of sale of an immovable property when it is provided that '[a] contract of sale of an immovable shall be of no effect unless it is made in writing.'[29] It also provides that a contract required to be in writing shall be of no effect unless it is attested by two witnesses.[30] However, the effect of failure of signature is not so clearly provided as the case of 'witnesses'. The law merely states that a written contract must be signed without directly mentioning the effect of the failure to sign.[31] But as a written form includes signature and witnesses, and failure to meet the written requirement results in the nullity of the contract, it follows that a contract not signed by the parties shall be of no effect.

2.2 Authentication and Registration

Authentication and registration are the other fundamental requirements for the transfer of property rights from one person to the other. The two concepts are often confused with one another by lawyers and judges.[32] The

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[28] Id, Art. 1720(1). A 'special form' usually refers to a 'written form' as opposed to informally or orally made contracts. Yohannes Heroui, Registration of Immovables under the Ethiopian Civil Code: An Overview in Comparative Perspective, *Ethiopian Bar Review*, Vol.2, No.2, 2008, pp. 31, 71. The FDRE Supreme Court Cassation Division (*'FSCCD'*) has also decided to the same effect. See eg **ጎርፌ ገ/ሕይወት እና እነ አበራሽ ዱባርጌ** (2 ሰዎች)፣ **የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት፣ መ.ቁ**. 21448፣1998 **ዓ.ም**. (hereinafter '*Gorfe* case'); **መሰረት በቀለ እና ኤልሳ ሶሞኔላ፣ የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት፣ መ.ቁ**. 57356፣2003 **ዓ.ም**.

[29] ECC, Art. 2877. The same is true of a 'contract creating or assigning rights in ownership or bare ownership on an immovable or an usufruct, servitude or mortgage of an immovable': at Art. 1723 (1). But the FSCCD has ruled that a contract of house rent is not required to be made in writing as it considered rent as not creating or assigning right in ownership, usufruct, servitude or mortgage on an immovable. **የኪራይ ቤቶች አስተዳደር ድርጅት እና ሶስና አስፋው፣ የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት፣ መ.ቁ**. 15992፣1997 **ዓ.ም**.

[30] ECC, Art. 1727(2).

[31] Id, Art. 1727(1).

[32] See eg Workeneh, supra note 4, pp. 36,77,87; Addisu Damte, *Form Under the Ethiopian Law of Contracts with Particular Emphasis on Transfer of Ownership of Immovables and Special Corporeal Chattels: the Law and Practice* (LLB Thesis, Addis Ababa University, Faculty of Law, Addis Ababa, Ethiopia, 2001), pp. 27–30. In his critique to the *Gorfe* case, Mekbeb confuses registration under Art 1723(1) of the ECC, i.e. authentication, with land register requirement under Art 2878 of the ECC. See Mekbeb; supra note 2, p. 165. Judge Ali also seems to confuse the two in the analysis of his dissenting opinion in a certain case. See **መኳንንት ወረደ እና እነ መስከረም ዳኛው፣የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት፣ መ.ቁ**. 34803፣ 2001 **ዓ.ም**. Ato Berihun confuses registration of land rent with authentication of same. See Berihun Adugna Mihret, Contracts

central question of whether registration is a validity requirement for immovable transactions in Ethiopia will be addressed more easily once we establish clarification of the concepts. Thus, this section will elucidate the two concepts, their similarities and differences in thorough detail.

2.2.1 Authentication

Article 1723 (1) of the ECC provides that a contract relating to an immovable property, whether under rural setting or urban setting, must be in writing and registered with a court or notary.[33] The ECC mentions the term 'notary' and the equivalent term 'public officer' in a number of other provisions especially those relating to marriage contract and will.[34] This provision is of special concern for us because, as we noted, it has caused quite a lot of confusion among lawyers of all kinds and levels in Ethiopia and the Amhara region. The source of the confusion is the use of the term 'registration' in the English version of this provision.[35] The question is whether the term 'registration' in this provision refers to authentication or to immovable registration, a concept illustrated in later parts of this paper.[36]

Article 1723 provides that the act of registration is to be undertaken by notary. Notaries are:

Relating to Rural Land Holding: Form, Registration and its Legal Effect in Amhara Region, *ANRS Justice Professionals Training and Legal Research Institute Law Journal,* Vol 2. No. 1, 2007, pp.186–7 (written in the Amharic language). Similarly, some courts argue that Art. 2878 of ECC on land registration prevails over Art. 1723 of the ECC on authentication, implying that the two requirements are synonymous. See the decision of the Federal Supreme Court in **እነ ሙሉሸዋ ተፈራ እና እነ ሀብቴ ዘርጋ፣ ፌደራል ጠቅላይ ፍርድ ቤት፣ መ.ቁ**. 21784 cited in Yohannes, supra note 28, p. 51. In Amhara region, discussion with judges has showed a prevalent existence of such confusion in the law and practice. Focus Group Discussion ('FGD') with Kegne Bezabeh, Getaye Admas, Kasahun Yehunie, and Solomon Goraw, Amhara National Regional State Supreme Court and High Court Judges (Asinuara Hotel, Bahir Dar, 24 March 2016).

[33] It should be noted that authentication by the courts has no legal basis at all unlike authentication by notary offices. See below n 136. See also Addisu, supra note 32, pp. 46–49.

[34] See eg ECC, Arts. 630, 632, 891, 962, 964, 967. It should also be noted that the ECC is not the only law which mentions or deals with the institution of notary or equivalent institutions. See Bezawork Shimelash, The Legal Status of Our 'Notaries' in Addis Ababa, *Wonber: Alemayehu Haile Memorial Foundation's Bulletin,* 15th Half Year, 2015, pp. 98, 111-114.

[35] The Amharic version of this provision, which is a controlling version, does not use the term 'registration'. It simply says that the act be made before a notary.

[36] See Section 2.2.2 below.

> *public officials instituted for the purpose of receiving all acts and contracts to which the parties are required by law, or desire, to invest with the character of authenticity attaching to the acts of the public authority, of establishing the date thereof, of having the custody of the originals, and of furnishing copies.*[37]

They are well known public officers worldwide who undertake the act of authentication who do so by a public seal and signature.[38] Consistent with the international practice,[39] in the absence of any contrary legal provision which provides for a different function of notaries in Ethiopia, we can argue that Article 1723 deals with authentication, and not immovable registration.[40]

So why does the ECC under Article 1723 use the term 'registration'? The reason is that, firstly, it is not unusual to use the term 'registration' in relation to authentication. As can be seen from the above definition given for 'notaries', one of the functions of notary is to have the custody of the originals of acts authenticated. In this sense, notarial acts are drawn up in originals and copies; the originals remain in the notary office, whereas certified copies are given to the parties.[41] The notary is required to keep a daily journal or record of all the acts which are received.[42] The acts are kept in chronological order, indicating whether the act is a sale, lease, will, etc.,

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[37] Amos and Walton's, *Introduction to French Law* (2nd ed, Clarendon Press, Oxford, 1963), p. 24 quoted in Yohannes, supra note 28, pp. 52–3. Cf Authentication and Registration of Documents' Proclamation, 2015, Proclamation No. 922/2015, *Fed. Neg. Gaz*, Year 22, No. 39 (hereinafter 'ARD'), Art. 2(5).

[38] Pothier, *A Treatise on the Law of Obligations, or Contracts* (Volume I, A Straham, London, 1806) cited in Yohannes, supra note 28, p. 54.

[39] For a comparative study of notary at an international level, see generally Thomas Gebreab, *The 'Notariat' in Ethiopia: Its Present Functions and Status in Comparative Perspective* (LLB Thesis, Addis Ababa University, Faculty of Law, 2000); Bezawork, supra note 34.

[40] The FSCCD has also claimed that Art 1723 of the ECC refers to authentication and not registration of immovables. See *Gorfe* case and the reasons given for its interpretation to this effect. But note that the ECC does not use the term 'authentication'. Sileshi Gizaw, *Critical Analysis of Provisions of the Civil Code Pertaining to Proof in Relation to Contracts* (LLB Thesis, Addis Ababa University, Faculty of Law, 2004), p. 39. But there are other several provisions in the ECC which mention the word 'authenticate'. See Arts. 2007, 2009, 2010, 1967, 1970, 1989.

[41] Yohnnes, supra note 28, p. 55.

[42] Id, p. 57 (citation omitted).

and bound into volumes.[43] This activity is much the same as the activity of registration per se as will be further elaborated below.[44] So it is not surprising, if not appropriate, that the term 'registration' is being used. In fact, the authentication laws use the term 'registration'.[45] According to the ARD, 'to register a document' means 'to register a document in a register prepared for the purpose by giving identification number or to register and deposit a document which is required by law to be deposited with authentication and registration institution'.[46] Secondly, the information kept in the notary has much similarity to that kept in a land registration office.[47] Yohannes has argued that this is the reason why Article 1723 of the ECC has used the term "registration" to refer to "authentication" although the latter may be a more appropriate term.[48]

But what is the meaning of authentication? According to the ARD, 'to authenticate a document' means:

> *to sign and affix a seal by witnessing the signing of a new document by the person who has prepared such document or the person it concern and after ascertaining that this formality is fulfilled; or to sign and affix a seal on an already signed document by ascertaining its authenticity through an affidavit or specimen signature and/or seal.*[49]

Authentication is the way of ascertaining that a written instrument or document has a status of being genuine or trustworthy.[50] It involves administering and witnessing the conclusion of different types of contracts and other instruments.[51] This implies that the terms of the instrument (rights and duties), signatures and identities of the parties to the contract and

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[43] Ibid.

[44] See Section 2.2.2 below.

[45] See ARD, Art. 18. See also ECC Arts. 558(2), 891(2).

[46] ARD, Art. 2(3).

[47] Yohnnes, supra note 28, pp. 57-8.

[48] Id, pp. 56, 64.

[49] ARD, Art. 2(2).

[50] Sileshi, supra note 40, p. 39. The term "authentic" means genuine, true, real, trustworthy, credible, etc: at Ibid (citation omitted).

[51] Sileshi, supra note 40, p. 41.

witnesses are ascertained.[52] Authentication, therefore, conclusively establishes three things: namely, that an act was in fact so executed, that the recitals and agreements expressed in the act are accurate reports of the parties' intentions,[53] and that any fact that the act recites to have occurred, did occur.[54] The effect of authentication is fighting against fraudulent, that is illegal and immoral, activities.[55] Further, authentication proves the date of conclusion of the instrument.[56] When an instrument passes through the stage of authentication, it is referred to as an "authentic act".[57] Now, let us see the other term: immovable registration.

2.2.2 Registration

Registration, that is, land or immovable property registration is another formal requirement for immovable transactions in Ethiopia. The ECC is clear on this when it says '[a]n entry in the registers of immovable property shall be required for the purpose of transferring by contract or will the ownership of immovable property'.[58] This requirement is envisaged with regard to several other transactions and under different land registration and use laws both at national and regional levels. At the national level, the Urban Landholding Registration Proclamation[59] and the Rural Land Administration and Land Use Proclamation[60] provide for the requirement of registration. At the regional level, the Amhara Revised Rural Land

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[52] Ibid.

[53] The ARD states that a document authenticated and registered in accordance with the Proclamation shall be conclusive evidence of its contents which can be challenged only with the permission of a court for good cause: at Art 23.

[54] Yohnnes, supra note 28, p. 54.

[55] John M Mzauile, et al, *Evidence Cases and Materials* (5th Ed, Brooklyn the foundation press, Inc 1965) cited in Sileshi, supra note 40, p. 41. See also ARD, Art 13(1).

[56] See ECC, Art. 2015; Commercial Code of the Empire of Ethiopia, 1960, Proc. No. 166/1960, *Neg. Gaz.*, Gazette Extraordinary No. 3, Arts. 891(3), 761(2).

[57] See ECC, Art. 2010.

[58] See Id, Art. 1185.

[59] Urban Landholding Registration Proclamation, 2014, Proc. No.818/2014, *Fed. Neg. Gaz.*, Year 20, No. 25, Pt. V (hereinafter 'FULRP').

[60] Rural Land Administration and Land Use Proclamation, 2005, Proc. No, 456/2005, *Fed. Neg. Gaz.*, Year 11, No. 44, Art. 6 (hereinafter 'FRLAUP').

Administration and Use Proclamation[61] provides for registration. After reading of the ECC and other recent laws, we can see that the formal requirement of registration may be required for many transactions such as sale, lease, will, etc.[62] In order to better understand the term, let us see it from an international perspective first and then from an Ethiopian point of view.

2.2.2.1 The Meaning of Land Registration from an International Perspective

There are two well known land registration systems in the world, namely, 'cadastre' and 'land register'.[63] The term 'cadastre' is used mainly in continental Europe (notably in France) where it was originally linked to taxation purposes (fiscal cadastre), as opposed to the Anglo-American world.[64] An authoritative definition of cadastre is given as follows:

> *A Cadastre is normally a parcel based, and up-to-date land information system containing [a] record of interests in land … It usually includes a geometric description of land parcels linked to other records describing the nature of the interests, the ownership or control of those interests, and often the value of the parcel and its improvements. It may be established for fiscal purposes (e.g. valuation and equitable taxation), legal purposes (conveyancing), to assist in the management of land and land use (e.g. for planning and other administrative purposes), and enables Sustainable Development and environmental protection.*[65]

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[61] Amhara National Regional State Revised Rural Land Administration and Use Determination Proclamation, 2006, Proc. No. 133/2006, Zikre Hig, Year 11, No. 18, Arts. 23 and 24 (hereinafter 'ARLAUP').

[62] See Section 2.2.2.2 below.

[63] Other terms often used in the cadastral literature, sometimes interchangeably include land titling, land certification and formalisation. For a detailed discussion on the meaning of each of these terms, see Melkamu Belachew, *Modelling Legislation for a Sustainable Cadastral System* (PhD thesis, the University of Melbourne, Melbourne Law School, 2015), pp. 28–29.

[64] Gerhard Larsson, *Land Registration and Cadastral Systems: Tools for Land Information and Management* (Meddelande, 2nd ed, 2000), p. 24 cited in Melkamu, supra note 63, p. 24.

[65] The International Federation of Surveyors (FIG), *FIG Statement on the Cadastre* (Pub. No 11, 1995) quoted in Melkamu, supra note 63, p. 24.

This definition suggests three major components of a cadastre.[66] First, a cadastre contains information about a particular piece of land- parcels or lots, property units or legal land objects. Second, we see that cadastre contains a record of proprietor's or holder's interests in land and his/her identity.[67] These interests constitute the substantive components of a cadastral system and are best referred to by the generic compound term 'rights, restrictions and responsibilities', a term frequently used in the cadastral system literature and now in our legal system especially in the ULRP.[68] Third, a cadastre can be established to achieve a combination of purposes or functions. It may be established for fiscal purposes, land use planning, legal purposes (conveyancing) and so on. The cadastre established for legal purpose is also referred to as a juridical cadastre[69] or legal cadastre and serves as a legally recognized record of land tenure. It is closely related to land registration[70] (land register) and hence may be considered to be equivalent to the latter.

The term 'land register' (also sometimes referred to as 'land registration') is normally an up-to-date and ownership-based record system. The term is used more or less exclusively in the Anglo-American world (traditionally known as the common law world), although the German land registration

[66] See also Milt Reimers, "Stuck in No Man's Land": How Developing Countries Can Allocate Property Rights as a Means to Improve Their Citizens' Welfare and Grow Their Economies, *Loyola Journal of Public Interest Law*, Vol. 11, 2010, pp. 1,15–6 (citations omitted) cited in Melkamu, supra note 63, p. 24.

[67] The information with respect to the proprietor may include a name, as well as possibly the individual's date and place of birth. Reimers, supra note 66, p. 15 (citations omitted) cited in Melkamu, supra note 63, p. 24.

[68] See, eg FULRP, Art. 30.

[69] See generally Rohan Bennett, *Property Rights, Restrictions and Responsibilities: Their Nature, Design and Management* (PhD Thesis, University of Melbourne, 2007), pp. 71–5; Peter F Dale and John D McLaughlin, *Land Information Management: an Introduction with Special Reference to Cadastral Problems in Third World Countries* (Clarendon Press, 1988), p. 13; J D McLaughlin and S E Nichols, *Resource Management: The Land Administration and Cadastral Systems Component* (1989), p. 82 (citation omitted) all cited in Melkamu, supra note 63, p. 25.

[70] Jaap Zevenbergen, *Systems of Land Registration Aspects and Effects* (PhD Thesis, University of Melbourne, 2002), p. 28 cited in Melkamu, supra note 63, p. 25.

system (*Grundbuch*) also refers to the same concept.[71] Henssen defines land register as:

> *a process of official recording of rights in land through deeds or as title on properties. It means that there is an official record (land register) of rights on land or of deeds concerning changes in the legal situation of defined units of land. It gives an answer to the questions who and how.*[72]

In light of the above definition, land registration (used in its narrow context or 'land register') can be considered as part of cadastre. However, there has been confusion regarding the relationship between the two and their use. This confusion arises because the registration of information about land parcels has traditionally been carried out separately from the registration of data about interest holders or proprietors. Along these lines, it was claimed that cadastre focuses on the question of 'where' and 'how much' whereas land registration focuses on the question of 'who' and 'how'.[73] The 'where' refers to the location of the land parcel and its boundaries; and the 'how much' refers to the size of the land parcel. With respect to land registration, it answers the question 'who' because its main focus is the identification of the proprietor, and the question 'how' because it indicates the manner or mode of transaction by which the proprietorship is transferred from the previous proprietor to the new one, such as in a sale contract.

2.2.2.2 The Meaning of Land Registration from the Ethiopian Context

The concept was little understood under the Ethiopian legal system due to lack of settled and comprehensive legislative framework, absence of consistent and modern land registration practice and tradition, absence of appropriate law curricula on land registration and the consequent lack of trained professionals on land registration. But these circumstances began to rapidly change towards the end of the 20th century, following the adoption of new rural land registration and use laws and large scale launching of land

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[71] Zevenbergen, supra note 70, p. 27 cited in Melkamu, supra note 63, p. 26.

[72] Jo Henssen, *Basic Principles of the Main Cadastral Systems in the World,* <http://www.fig.net/commission7/reports/events/delft_seminar_95/paper2.html> accessed on 08 August 2016.

[73] Id, p. 72.

registration or certification projects in various parts of the country.[74] Similar procedures were adopted with regard to urban land since the adoption of the ULRP in 2014.

In order to obtain a full picture of the manner in which our legal system defines the terms, let us first quote the definitions. According to the RLAUP, '"[L]and registration" means the process whereby information on the expression of rural land use right and holding is gathered, and analysed'.[75] The ULRP states:

> *"[R]egistration" means the process by which a landholding right, restriction, and responsibility is registered in the legal cadastre register.*[76]
>
> *"[L]egal cadastre" means an updated landholding information system containing a record of the rights, restrictions and responsibilities on a defined legal boundary for each landholding demarcated as parcel on map.*[77]

The ARLAUP states that '"[l]and registration" means an activity of registering the detailed information about location, area, boundaries, fertility grade, and the identity of the holder on the book concerning the rural land'.[78]

Apart from ARLAUP, all the other land registration and use laws define land registration as a method of recording or registering, gathering and analysing relevant information about a landholding right, restriction, and responsibility. The former, however, provides a different definition. It provides that land registration is a method of recording information about 'location, area, boundaries, fertility grade' of a parcel of land. Even if it includes registering 'the identity of the holder' of land, this is not equivalent to 'rights, restrictions and responsibilities'. But the practice of land registration in the Amhara region actually tends to the definitions given under the other laws as the land holding rights are registered. On the other

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[74] These programs began following the coming into force of the Federal Rural Land Administration Proclamation No 89/1997 which was later replaced by the FRLAUP.

[75] FRLAUP, Art. 2(15).

[76] Id, Art. 2(18).

[77] FULRP, Art. 2(5).

[78] ARLAUP, Art. 2(20).

hand, apart from ULRP, the other mentioned laws do not mention the word 'cadastre'. The former does not use the term 'cadastre' but 'legal cadastre' which, as we mentioned earlier, refers to 'land register'.

From the illustrative definitions provided above, it can be concluded that the trend in our legal system is towards a 'multipurpose cadastre' system whereby the two tasks, i.e. cadastre and land register, are designed to be undertaken in an integrated or uniform manner. From the reading of the letters of the law, there is no need to keep a separate record for land parcels, on the one hand, and proprietors, on the other hand. Instead, a simple and pragmatic approach whereby the different data are envisaged to be maintained at a same system, is being followed.

However, the definition given for each of the terms in question – cadastre and land register– under our legislation remains cloudy, at least at a theoretical or conceptual level. It is thus useful to stay in tune with international definitions delivered earlier until our laws become more precise.

With regard to the scope of registration, the law stipulates that all rights, restrictions, and responsibilities stipulated in contracts relating to immovable property shall be registered.[79] The contracts may be related to 'total or partial sale, donation, inheritance, assignment of share, contribution in kind', mortgage, lease, sub-lease, rent, property attachment, and 'other act or event' as may be permitted by law shall be registered.[80] In addition, 'all decisions, orders rendered or contracts concluded by a legally authorized organ to extinguish, reduce, expand, modify or amend rights, restrictions or responsibilities' shall be registered.[81] The Amhara region laws also provide for the registration of rights, restrictions, and responsibilities.[82]

[79] FULRP, Art. 30(1).

[80] Id, Art. 30(2) (4) (5); FRLAUP, Art. 6(5) (6).

[81] FULRP, Art. 30(3).

[82] See eg, ARLAUP, Arts. 23, 24. For a more detailed discussion on this matter, see Berihun, supra note 32, pp. 184–195

2.2.3 Comparison between Authentication and Registration

Both authentication and registration deal with transactions on immovable property. Both intend to bring certainty and security in transactions.[83] Authentication makes it more difficult for persons without capacity to create the semblance of a valid title.[84] Both engage in registration of documents as well as conserve the information. Especially in the case of deed registration, the deed or document or transaction is registered.[85] In this regard, Yohannes notes:

> *[Deed] registration essentially means "transcription" or "recordation". It is the copying of an act relating to the disposition of a right…by an official usually known as the Registrar or the Conservator of Registers. When an act (deed) is presented to him for registration, the conservator makes a summary of the deed and records it in the special register… [T]he system is essentially a registration of owners rather than a registration of land. The registers are kept according to the names of persons and it is the list of the names of owners that forms the index of the Registers.*[86]

But the two formality requirements are quite different from each other, mainly in their focus in purpose and nature. Authentication certifies the authenticity of an act but registration keeps information on immovable property and property rights thereof. But since an act authenticated embodies information on immovable property rights, there is, to that extent, similarity. That is why Yohannes has claimed that 'a visit at the notary's

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[83] See Yohannes, supra note 28, p. 59.

[84] Thomas, supra note 39, p. 20.

[85] 'A deed is a record of a particular transaction and serves as evidence of this specific agreement, but it is not itself a proof of the legal right of the transacting parties to enter into and consummate the agreement'. United Nations (1973), *Report of the Ad Hoc Group of Experts on Cadastral Surveying and Mapping* cited in Larsson, supra note 64, p. 18. The other type of land registration is called title registration where the title/ownership itself is registered and is itself a proof of ownership and its correctness is secured or guaranteed by the state. UN, supra note 85. While deed registration focuses on the owner, the title system focuses on the land parcel and registers properties by presenting "what is owned by whom". S Enemark, I Williamson and J Wallace, Building Modern Land Administration Systems in Developed Economies, *Spatial Science*, Vol 50, No.2, 2005, pp. 51, 53.

[86] Yohannes, supra note 28, p. 40.

office where the land is situated would yield, to the prospective purchaser, much the same information as a visit to the land registry would'.[87]

In the case of land registration, the law stipulates that all rights, restrictions, and responsibilities stipulated in contracts relating to immovable property shall be registered.[88] The contracts may be related to 'total or partial sale, donation, inheritance, assignment of share, contribution in kind', mortgage, lease, sub-lease, rent, property attachment, and 'other act or event' as may be permitted by law shall be registered.[89] In addition, 'all decisions, orders rendered or contracts concluded by a legally authorized organ to extinguish, reduce, expand, modify or amend rights, restrictions or responsibilities' shall be registered.[90] The Amhara region laws also provide for the registration of rights, restrictions, and responsibilities.[91]

Similarly, authentication can normally be undertaken with respect to instruments relating to diverse types of rights, restrictions, and responsibilities. In this regard, Yohannes notes that it is not only contracts that affect title, or ownership, which have to be "registered" pursuant to Article 1723 of the ECC but also all registrable interests to land which are also indicated under Title X of the ECC in Articles 1568 to 1574 of the ECC.[92]

Another difference between the two is that authentication information is private to the parties[93] in the contract whereas registration information is public in line with the principle of publicity.[94] The principle of publicity implies that the land registers are open for public inspection, and that the published facts can be upheld as being more or less correct by third parties in good faith so that they can be protected by law.[95]

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[87] Id, pp. 57–8.

[88] FULRP, Art. 30(1).

[89] Id, Art. 30(2)(4)(5); RLAUP, Art. 6(5)(6).

[90] FULRP, Art. 30(3).

[91] See eg, ARLAUP, Arts. 23, 24.

[92] Yohannes, supra note 28, p. 58; See also ARD, Art. 9(1) (a) cum. Art. 17.

[93] See ARD, Art. 21.

[94] Yohannes, supra note 28, p. 58.

[95] Henssen, supra note 72.

Depending on the specific jurisdiction, authentication may be a requirement or precondition for registration in a legal register institution. In many Civil Law countries, such as France, only documents drawn in authentic form are allowed to be registered in the land register as this assures the efficient operation of a registry system.[96]

3. Effects of Formal Requirements on Validity of Immovable Transactions

What is the effect of registration and authentication on the validity of immovable transactions in Ethiopia in general and in the Amhara region in particular? The moment is now ripe to directly deal with this issue. However, the law is not very clear in regard to the effect of registration and authentication on validity although, as we have seen earlier, the effect with regard to non-fulfilment of the formal written requirement is clear enough.

3.1 Authentication vs. Validity

With regard to authentication, Article 1723(1) of the ECC stipulates that '[a] contract creating or assigning rights in ownership or bare ownership on an immovable or an usufruct, servitude or mortgage of an immovable shall be in writing and registered with a court or notary'. But what if parties to a contract fail to meet this requirement? Unlike the written form requirements, the law does not mention the effect of this failure; it simply makes the requirement 'mandatory' which does not necessarily imply non-validity of non-fulfilment.[97] In the absence of clear provision, a gap is created and this is filled in by interpretation of the pertinent rules. This has certainly led to a difference among lawyers and judges. The FSCCD has reached different rulings on the issue.

Before the *Gorfe* case which was decided in 1999 E.C,[98] the courts, especially the Federal Supreme Court, held that authentication by court or

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[96] Rodolf B Schlesingor, *Comparative Law: Cases-Text-Materials* (5th ed, 1988) 20 cited in Thomas, supra note 39, pp. 19, 81. In contrast, Thomas notes that '[I]n the Anglo-American system of conveyancing, there is no requirement that the contract or deed be drawn by any particular person or official': at pp. 19, 20.

[97] But note that Judge Ali Mohammed says this is a directory, not mandatory provision. Workeneh, supra note 4, p. 68.

[98] *Gorfe* case, supra note 28.

notary was not necessary to validate contracts on immovable property.[99] The main relevant reasons given for this position were that Article 1723(1) does not put the consequence of failure to authenticate a contract, that the ECC under Article 2877 provides that failure to meet the written requirement invalidates a contract relating to immovable property while it fails to provide the same consequence for authentication,[100] and that Article 2877 which requires a written form requirement for validity prevails over Article 1723(1), a provision that renders neither written form nor authentication a validity requirement, according to the principle of legal interpretation- the special prevails over the general.[101]

In the *Gorfe* case, however, the FSCCD held that a contract of sale of an immovable can only be valid if both requirements of writing and authentication are fulfilled.[102] This means that a contract of sale of immovable property will be deemed inexistent or null and void failing to meet these requirements.[103] According to the court, public policy demands that special protection be given to contracts relating to immovable properties.[104]

In a later ruling, the same court ruled that non-fulfilment of Article 1723(1) does not result in the invalidation of a sale contract (of immovable property) provided that both parties admit the conclusion of the contract.[105] However,

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[99] See, eg, **ማሞ ደምሴ እና አያሌው ገ/እግዚአብሄር፣ ፌደራል ሰበር ሰሚ ችሎት፣መ.ቁ**.18380፣ 2000 **ዓ.ም**.

[100] **እነ ሙ·ሉሽዋ ተፈራ እና እነ ሀብቴ ዘርጋ፣ ፌደራል ጠቅላይ ፍርድ ቤት፣ መ.ቁ**. 21784 cited in Mekbeb, supra note 2, p. 154.

[101] Mekbeb, supra note 2, p. 166.

[102] See *Gorfe* case cited in Yohannes, supra note 28, p. 51. See also **መሰረት በቀለ እና ኤልሳ ሶሞኔላ፣ የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት፣ መ.ቁ**. 57356፣2003 **ዓ.ም**; **ሽፈራው ደጀኔ እና ጸሀይ ተስፋዬ እና ሲሳይ ከበደ፣ ፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት፣ መ.ቁ**. 78398. In another case, the FSCCD held that the authentication formality may not be required to validate sale of immovable provided that the authentication office does not exist in time or in place. See **ቀይ አፈር ገዳሞች እና ኤርሚያስ ገሰሰ፣ ፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት፣መ.ቀ**. 98079፣ 2006 **ዓ.ም**. cited in Berihun, supra note 32, p. 183.

[103] For discussion of the meaning of these concepts, see generally Yohannes, supra note 28, pp. 65-68.

[104] *Gorfe* case cited in Yohannes, supra note 28, p. 33.

[105] **አልጋነሽ አበበ እና ገብሩ እሸቱ እና ወርቂቱ እሸቱ፣ ፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት፣ መ.ቁ**. 36887፣ 2001 **ዓ.ም**. In another case, the FSCCD ruled that any objection regarding authentication requirements under Art. 1723(1) of the ECC may not be raised by the court but by the parties to

this ruling sparks several concerns. Does it make a difference if it is proved that the parties have actually concluded the contract but either of them alleges that he/she has not concluded it? Is this to be considered as denial? That is, is denial or admission a matter of fact/proof or merely of party allegation? If it is a matter of fact or evidence, it will not be a problem as the law provides that the court may order verification by expert devices when a party to a contract denies the alleged handwriting and signature on a non-authenticated document (such as sale and will) established against him/her.[106] If we consider it as a matter of mere party allegation, it is inconceivable how a party may need to admit the conclusion of the contract and at the same time run to invalidate it. That is to say, if a party wants to invalidate a contract, he/she will most likely deny the very formation or conclusion of the contract even if the contract actually existed. On the other hand, if a contract is actually concluded (and this is proved) but one party simply alleges that it does not exist, i.e. he/she denies it, it is not sound for the court to run to invalidate it based on such mere allegation. It is not wise to make validity of contracts to immovable property be dependent on mere allegation of parties. We believe that the need to ensure security in immovable transactions warrants extraneous safeguards. So, it seems that this ruling has brought about more problems than it solves.

Some judges, do not agree with the position of the Federal Supreme Court in the *Gorfe* case. Thus, Judge Ali Mohammed, in his dissenting opinion, argues that the court's interpretation and application of Article 1723 ECC is flawed.[107] He makes his argument on the basis of distinction between 'mandatory' and 'directory' provisions of the law. If a legal provision prescribes that a result such as one of invalidation will follow when a requirement is not met such as a requirement of authentication, then that provision is mandatory.[108] A directory provision, in contrast, is a 'statutory

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the suit. **የህጻን ኮከቤ ተረፈ ሞግዚትና አስተዳዳሪና እነ አያሌው ካሳዬ** (2 ሰዎች) **፣ፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት፣ መ.ቁ**. 43825፣2002 **ዓ.ም**. cited in Berihun, supra note 32, p.183. But this is not true for 'void' contracts: at p. 184.

[106] ECC, Art. 2007 cum. Art. 2008.

[107] See **መሀዲን ፋሪስ እና እያሱ ብ/ማርያም፣ ፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት፣ መ.ቁ**. 29233; **መኳንንት ወረደ እና እነ መስከረም ዳኛው፣የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት፣ መ.ቁ**. 34803፣ 2001 **ዓ.ም**.

[108] See Black, supra note 5 cited in Workeneh, supra note 4, p. 69.

provision which does not relate to the essence of things to be done, and as to which compliance is of convenience rather than substance'.[109] This means failure to observe a directory provision does not result in invalidation of a contract. In light of this, Article 1723 of the ECC is a directory provision, not a mandatory provision.[110]

Several other lawyers also do not consider the rulings of *Gorfe* case, and the like, appropriate.[111] They argue that the interpretation in *Gorfe* case has a negative impact on social, economical, political, cultural and moral affairs of the people and thus should be overruled.[112] In particular, it is feared that 'given the sky rocketing prices currently being witnessed in the housing market, the ruling of the Court may embolden unscrupulous sellers to renege on contracts already sealed and even disown transactions long considered closed'.[113]

Let us see the practice with respect to other transactions to further show the inconsistency between the law and the practice. With regard to house rent, the FSCCD decided that authentication was not required for its validity as, according to the court, it does not fall under the terms 'contract creating or assigning rights in ownership or bare ownership on an immovable or an usufruct, servitude or mortgage of an immovable' in Article 1723(1) of the ECC.[114] In *Ato Alehegn G/Hiwot* vs. *Woizero Atenesh Bekele* et al, the court ruled that authentication is not a requirement for a donation contract as far as the fulfilment of the forms governing a public will is ensured as per Article 2443 of the ECC.[115] Another exception is a contract of mortgage. In this regard, a law was issued which clearly cancelled the application of Article 1723, i.e. the authentication of mortgage instruments. This law states

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[109] **መኳንንት ወረደ እና እነ መስከረም ዳኛው፣የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት፣ መ.ቁ**. 34803፣ 2001 **ዓ.ም**.

[110] Ibid

[111] See eg, generally Mekbeb, supra note 2; Workeneh, supra note 4, pp. 102–104.

[112] See eg, Workeneh, supra note 4, p. 102.

[113] Yohannes, supra note 28, p. 31; Mekbeb, supra note 2, p. 169.

[114] **የኪራይ ቤቶች አስተዳደር ድርጅት እና ሶስና አስፋው፣ የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት፣ መ.ቁ**. 15992፣1997 **ዓ.ም**.

[115] **አለሽኝ ገ/ሀይወት እና እነ አጤነሽ በቀለ፣ ፌደራል ጠቅላይ ፍርድ ቤት፣ መ.ቁ**. 39803. See also **እነ ሲሳይ ካብትይመር እና እነ አበበች ታደሠ፣ የፌደራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት፣ መ.ቁ**. 17742.

that 'a contract of mortgage concluded to provide security to loan extended by a bank or micro financing institution may not be required to be registered by a court or a notary'.[116]

Let us now see the essence of the ARD with regard to the issue at hand. The ARD clearly provides that authentication is a validity requirement in only three cases. These cases involve documents that shall be authenticated and registered in accordance with the appropriate law, a power of attorney or revocation of power of attorney, and memorandum and articles of association of business organizations and other associations, and amendments thereof.[117]

Other than these specified documents, the law clearly provides that the notary shall authenticate and register only if requested by the concerned parties.[118] The term 'documents that shall be authenticated and registered in accordance with the appropriate law' is worth inquiring in relation to Article 1723 of the ECC. As Article 1723 provides, authentication shall be made to transactions on immovable property, can we consider that to be the 'appropriate law'? Unfortunately, this does not seem to be the case because Article 9 of the ARD excludes transactions on immovable property from the list of the transactions that require authentication for their validity. In fact, these transactions are mentioned clearly but they are deemed to be 'documents submitted for authentication and registration'[119] which places them under the transactions to be authenticated 'if requested by the concerned parties'. This is therefore the latest addition to the inconsistency as it contradicts the rulings of the court such as in the *Gorfe* case.

These authors believe that further investigations need to be made to suggest the most appropriate position to hold regarding the effect of authentication on immovable transactions. The current international standards need to be considered as well. The socio-economic importance of authentication needs

[116] A Proclamation to Provide for the Amendment of the Civil Code, 2009, Proc. No. 639/2009, *Fed. Neg. Gaz*, Year 15, No. 46.

[117] ARD, Art. 9(1).

[118] Id, Art. 9(2).

[119] Id, Art. 17(1).

to be measured properly before determining its effect especially given the other formality requirement of immovable registration.[120]

3.2 Effect of Immovable Registration

While the effect of authentication is determined by the FSCCD, the effect of land registration is not. Like in the case of authentication, however, the law requires land registration in many immovable property transactions. In particular, Article 1185 of ECC states that '[a]n entry in the registers of immovable property shall be required for the purpose of transferring by contract or will the ownership of immovable property'. In addition to sale contracts and wills with regard to immovable property, other transactions also require this formality in one way or another although, as will be noted, not necessarily for their validity.

However, what is the effect of failure to register in a land registration authority? The general direction of our law is that land registration, although compulsory, is not a requirement for validity of transactions to immovable property.[121] The active provisions of the ECC such as Article 1185 do not say anything about the effect of failure to register.[122] But in the suspended part, the ECC provides that '[t]he keepers of registers of immovable property may not decide on the validity of acts which are presented to them for registration in the registers'.[123] Despite its suspension, municipalities

[120] In general, a formality requirement can be used for at least three consequences: to determine the validity of the transaction, to prove the existence of the transaction, and to protect the interest of third parties. Mulugeta M. Ayalew, Ethiopia, in International Encyclopedia of Laws: Contracts, in J. Herbots, Alphen aaden Rijn, NL (ed.); *Kluwer Law International*, 2010, p. 65 cited in Berihun, supra note 32, p. 167, 180. See also Fekadu Petros, Effect of Formalities on the Enforcement of Insurance Contracts in Ethiopia, *Ethiopian Journal of Legal Education*, Vol. 1, No.1, 2008, pp. 4–7; Franziska Elizabith Mybrugh, *Statutory Formalities in South African Law* (Doctorate Degree Dissertation, Stellenbosch University, 2013), p. 21; Yoseph Aemro and Filipos Aynalem, *Form and Legal Interpretation of Contracts for the Transfer of Immovable Property* (Federal Justice Organ Professionals Training Center, 2003 E.C.), pp. 122-123 all cited in Berihun, supra note 32, p. 180.

[121] See also Berihun, supra n 32, p. 184.

[122] As we noted earlier, these types of provisions are referred to as 'directory' provisions. See Section 3.1.

[123] ECC, Art. 1637.

have long been referring to the provisions in this part.[124] More clearly, the urban landholding registration law provides that '[t]he mere registration of any document annexed with the application for registration may not constitute proof of its validity'.[125]

So, what is the effect of immovable registration in Ethiopia? The ECC provides that '[t]he sale of an immovable shall not affect third parties unless it has been registered in the registers of immovable property in the place where the immovable sold is situate.'[126] This means that a sale contract relating to immovable property can be raised against any third person if the contract is already registered in the land registry. This is also interpreted to mean that as between the contracting parties, registration of a sale contract is not necessary to be raised against each other.[127] That is, non-registration does not affect validity of the contract of sale between the parties to the contract. The same applies with regard to other transactions namely lease[128] or rent, servitude, usufruct, pre-emption, promise of sale.[129]

Mortgage registration seems to be an exception. Thus it is provided that '[a] mortgage, however created, shall not produce any effects except from the day when it is entered in the register of immovable property at the place where the immovable mortgaged is situated'.[130] This means that registration of the mortgage instrument is a requirement for the validity of that instrument between the mortgagor and mortgagee. Another exception is found in the Amhara region with regard to land exchange where it is

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[124] See Zewditu Teferi, *Registration of Immovables in Ethiopia-Law and Practice* (LLB Thesis, AAU, Faculty of Law, 1993), pp. 37-8.

[125] FULRP, Art. 29(3).

[126] ECC, Art. 2878.

[127] See the decision of the Federal Supreme Court in **እነ ሙሉሸዋ ተፈራ እና እነ ሀብቴ ዘርጋ፣ ፌደራል ጠቅላይ ፍርድ ቤት፣ መ.ቁ**. 21784 cited in Yohannes, supra note 28, p. 51; Mekbib, supra note 2.

[128] But note that Art. 2899 of the ECC on registration of lease is no more applicable as it is impliedly repealed by recent land registration laws dealing with the same matter.

[129] ARLAUP, Art. 23(1) and (4), 18(5), 17(6); FULRP, Art. 30; FRLAUP, Art. 6(6); Condominium Proclamation, 2003, Proc. No 370/2003, *Fed. Neg. Gaz.*, Year 9, No 95, Art. 4; ECC, Arts. 2899, 1364, 1310(1) cum. Art. 1185, 1422, 1423. In fact, Art. 1310 (1) refers to corporeal chattels. While this is logical given the fact that usufruct, unlike servitude, applies also to corporeal chattels, it is not unreasonable to extend registration requirement to usufruct of immovable property.

[130] ECC, Art. 3052.

provided that the exchange shall be effective only upon registration in the immovable registration office.[131] In the case of donation, the enforcement directive of the land administration legislations (the ARLAUP and its enforcement regulation) requires registration for validity.[132] But given the fact that the consequence of failure to meet this requirement is not indicated in the ARLAUP and the regulation, its applicability or validity is questionable.[133]

That registration of a transaction is required to affect third parties implies that the purpose of land registration is publicity. All persons will be able to know all information kept in the land register. Thus, the ECC provides that '[t]he buyer shall be deemed to know all the rights and burdens affecting the immovable which have been registered in the registers of immovable property in the place where the immovable is situated'.[134] Publicity is one of the principles of land registration.[135] The principle of publicity implies that the land registers are open for public inspection, and that the published facts can be upheld as being more or less correct by third parties in good faith so that they can be protected by law.[136]

As it is known, land registration is in its infancy stage in Ethiopia both in practice and law. Workneh Negatu et al note that '[m]ost of the land certification undertaken in Ethiopia is very recent or, if longer in duration (e.g. in Tigray), was too poorly implemented to bring about impacts'.[137] The land register system is not yet in a position to give true service especially due to factors such as institutional drawbacks and updating problems. Bad governance problems in land administration are rampant. Given these circumstances, the title certificate which the land register institutions give

[131] The Rural Land Administration and Use System Implementation Regulation No 51/2007, *Zikre Hig*, Council of the Amhara National Regional State, Year 12, No 14, Art. 8 (hereinafter 'regulation').

[132] Directive for the Implementation of the ANRS Rural Land Administration and Use Determination Proclamation No. 133/2006 and the Rural Land Administration and Use System Implementation Regulation No 51/2007, Art. 12(7).

[133] See also Berihun, supra note 32, p. 204.

[134] ECC, Art. 2881.

[135] Henssen, supra note 72.

[136] Ibid.

[137] Workneh Negatu et al, *Impact of Land Certification in Gerado Area, Amhara Region*, 2012, p. 5.

can only be little trusted. So, it is clearly inappropriate to use land registration to determine the validity of immovable transactions at the present time both in Ethiopia and, more specifically, in Amhara. The position the law has taken at present is good although the government needs to improve the land register practice and law continually to set up the more useful land registration system, i.e. title land registration.

4. The Practice in Amhara Region

Having previously seen the laws and the diverse interpretations of the laws, the authors need to see how the courts in the Amhara region perceive and interpret the formal requirements of authentication and immovable registration. In order to enhance a comprehensive understanding of the whole process with regard to the formal requirements, that is, their meaning and their operation, we first proceed with the analysis of their status in the region. Then, the authors proceed to discuss the practice with regard to the relationship between the formal requirements and their role on the validity of immovable transactions in the context of the case study region.

4.1 Authentication Practice

No law clearly regulated the powers and functions of notaries in Ethiopia until the adoption of the Authentication and Registration of Documents' Proclamation No 334/2003.[138] However, notarial practices existed long before this law in all parts of the country. Yohannes notes:

> *The institution of notary was first introduced into the country by the Italians during their brief period of intrusion (1935-1941). An Italian was commissioned as a notary for the city of Addis Ababa around the years 1939 or 1940. After the departure of the Italians, notarial services were discontinued for some time until around 1945 when the Registrar of the High Court commenced providing these services. Initially confined to Addis, the service was soon extended to other localities and, in remote areas, even Registrars of Awraja and Wereda courts began rendering such services. It is said that this was made possible by a circular issued by the Ministry of Justice which circular,*

[138] This law together with its amending proclamation Authentication and Registration of Documents (Amendment) Proclamation, 2005, Proc. No 467/2005, *Fed. Neg. Gaz.,* Year 11, No 57 is now repealed by ARD, Art. 39.

> *in addition to conferring notarial powers upon registrars, also outlined the nature of the functions to be performed. This circular was soon superseded by the Civil Procedure Code which nowhere assigns to the courts or their officials functions akin to those of a notary. Nonetheless, registrars continued performing their previous functions as if nothing affecting their powers has happened.*[139]

At present, a Federal Acts and Documents Registration Office is in charge of notarial services at the national level under the Ministry of Justice.[140] Different structural arrangements existed before this one was established.[141] Hence, it is possible to argue that notarial offices existed long before the adoption of the Authentication and Registration of Documents' Proclamation No 334/2003 although their structure has been designed differently at different times and the source of their statutory authority was not clear.[142] Regional states and the cities of Addis Ababa and Dire Dawa are authorized to issue regulations for the proper functioning of notaries in their sphere.[143]

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[139] Yohannes, supra note 28, pp. 59–60 (citations omitted).

[140] Authentication and Registration of Documents (Amendment) Proclamation, 2005, Proc. No 467/2005, *Fed. Neg. Gaz.*, Year 11, No 57, Art. 2(1) cum. Authentication and Registration of Documents' Proclamation, 2003, Proc. No 334/2003, *Fed. Neg. Gaz.*, Year 9, No. 54, Art. 20(2). But a different federal institution will be established under ARD, Art. 38(1) cum. Art. 4.

[141] Yohannes, supra note 28, p. 60.

[142] For example, a law called the Proclamation on Definition of Powers and Duties of the Government of Ethiopia Proclamation No 8/1987 authorised the Ministry of Justice to ensure the organization of notary offices and supervise their activities although this was not realised. Bezawork, supra note 34, p. 118; Thomas, supra note 39, p. 87. *Contra* Yohannes, supra note 28, pp. 59, 61, 62. Yohannes argued that the Authentication and Registration of Documents Proclamation, 2003, Proc. No 334/2003, *Fed. Neg. Gaz.*, Year 9, No. 54 established notarial offices in the country for the first time, that the Civil Code provisions on notary were dead law before the enforcement of this proclamation. He further argues that the provisions on registration or authentication with the courts such as Art. 1723 of the ECC are not effective laws as neither the Civil Procedure Code nor other special laws passed to date enable the courts to perform such functions: at p. 61.

[143] Authentication and Registration of Documents Proclamation, 2003, Proc. No. 334/2003, *Fed. Neg. Gaz.*, Year 9, No. 54, Arts. 19(1), 20(2) cum. ARD, Art. 38(1). But so far, the Amhara region has not adopted any laws on the subject; it applies the laws of the Federal government. Interview with Tarekegn Abebe, Head, Advocates, Acts and Documents Registration Division, ANRS Justice Bureau (23 September 2009 E C).

In the Amhara region, like is the case in other regions,[144] the Justice Bureau is supposed to discharge this task. The Bureau derives this power from Proclamation No.230/2015.[145] Specifically, there is a separate unit under the Bureau called Advocates, Acts and Documents Registration Division which is supposed to undertake authentication of instruments relating to immovable property. The ARD provides that before authenticating documents relating to the transfer of properties for which title certificates are issued under the law, the notary shall ascertain that the transferor of the property has a title certificate for the property in accordance with the relevant law and that the property is not mortgaged or is not attached by a court order.[146] In addition, the notary shall ensure that 'the person who has signed or is about to sign the document has legal or contractual right or authority to sign the document'.[147]

However, scrutiny of the practice shows that authentication of transactions relating to immovable property has not been done in this way since 2001 E.C.[148] With respect urban areas, any immovable property transaction is processed in the Municipality during the land registration process, as will be noted below. So there is a big challenge here. The law, as we have already seen, promotes authentication by notary offices; the courts, as we shall see, also require authentication for transactions for them to be valid. On the other hand, our observations and field visits, as will also been seen in the subsequent section, demonstrate that there is no legal and practical ground to say that that the immovable registration offices and municipalities are undertaking authentication before they undertake immovable registration. The practice and the law are far apart from each other. To fill the gap created in this way, either the practice should come to terms of the law or

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[144] Thomas, supra note 39, p. 94.

[145] Amhara National Regional State Executive Organs Re-establishment, Organization and Determination of Their Powers and Duties Proclamation, 2015, Proc. No 230/2015, *Zikre Hig*, Council of the Amhara National Regional State, Year 21, No 1, Art. 24(20).

[146] ARD, Art. 15(1), (2).

[147] Id, Art. 15(3).

[148] Interview with Tarekegn Abebe, Head, Advocates, Acts and Documents Registration Division, ANRS Justice Bureau (23 September 2009 E C). According to him, only a will is authenticated or registered by the notary office.

vice versa. Otherwise, there will certainly be tremendous insecurity in immovable transactions.

4.2 Land Register Practice

4.2.1 Urban Land

Land registration is the responsibility of the Urban Works and Development.[149] The Bureau of Works and Urban Development is in charge of direct control or following up of the Municipality in this regard.[150] Though regulations to implement the national law, i.e. ULRP, are yet to come into force in the region, land registration in the regional cities has been handled by the Municipality in practice.[151]

The procedure of land registration is described below.[152] In the case of sale and donation, the parties come to the land registration office with a written application for land registration. They submit the written contract signed by the parties and the witnesses, as evidence of ownership mainly through a priory issued title certificate given in first registration and all other necessary documents.[153] The land registration officer checks if there are any encumbrance or attachments to the land such as mortgage restrictions. A surveyor goes to the field and checks if the property is constructed according to plan and design and whether the property is really located in the place as mentioned in the sale contract. A notice is posted for 5 days for any possible third party objection. A property transfer expert also visits the

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[149] The practice of land registration is the same throughout the country in that the Muncipality or Urban Administration is in charge. For discussion with regard to the experience of Addis Ababa, see eg Wubetu Assefa, *Rights and Obligations of the Seller and the Buyer with Respect to Transfer of Ownership of Immovables and Special Movables in Ethiopia: the Law and the Practice* (LLB Thesis, Addis Ababa University, Law Faculty, 2000), p. 46, Addisu, supra note 32, pp. 45–52; Thomas, supra note 39, p. 105.

[150] Amhara National Regional State Executive Organs Re-establishment, Organization and Determination of Their Powers and Duties Proclamation, 2015, Proc. No. 230/2015, *Zikre Hig*, Council of the Amhara National Regional State, Year 21, No 1, Art. 16(10).

[151] See Melkamu Belachew, *An Administrative Approach to the Need for Effective Real Estate Registration in Bahir Dar City: A Tool for Safeguarding Dwellers' Real Property Rights* (MSc Thesis, the Royal Institute of Technology (KTH), Stockholm, Sweden, 2008), p. 34.

[152] These procedures are described to us during our interview with Ato Mehret Wale and Ato Derso Engedaw, Experts at Bahir Dar City Administration (Bahir Dar, 23 September 2009 E.C).

[153] Ibid, Interview.

site to estimate the value of the building. The value is sent to the Finance Office in a letter which charges a property tax of 5% for residential properties and 22% for other properties.[154] The property is then made to enter the lease system which means the buyer will make an additional lease payment according to the lease law. Finally, the Municipality approves the sale or donation contract and opens a file for the new owner which contains the contractual document, acquisition document, the parcel map, the design plan, and receipt for tax payment. That is, it undertakes land registration by transferring the title to the buyer or other new proprietors, as the case may be. The file of the transferor is considered as a dead file but is kept in the archive for any future reference.

With regard to mortgage, the party brings a letter from the loan provider requesting to check if the property is burdened by another encumbrance or court attachment and, if not, to put the mortgage restriction with regard to the property. The party also brings a mortgage and loan contract which has been entered with the loan provider. The land registration officer also checks the title certificate of the borrower. A transaction/service fee is paid to the finance office. The verified information is sent back to the loan provider/bank which finally approves the loan.

With regard to succession, the party brings the court judgement and asks the Municipality for title transfer. The beneficiary pays 3% of the estimated value as property tax. After checking all necessary matters, the title is transferred to the heir.

The House Valuation and Title Transfer Section of the Land Development and Management Office, under the Municipality, is in charge of land registration. The kinds of register are property register in a database, sale and donation transfer register, inheritance and court execution register, mortgage register, register of owners (file). Property rental transactions are not registered at all in the Municipality.

4.2.2 Rural Land

Land registration started with a renewed vigor in the late 1990s through out Ethiopia. Until these recent legal and practical breakthroughs, "customary

[154] In the case of succession, the charge is 3%.

rules" of land registration were applied despite various attempts at adopting statutory rules for land registration including the suspended rules of land registration under Title X of the ECC.[155] According to Yohannes Heroui, these customary rules refer to the "Rule of Ownership of Land in Addis Ababa of 1907" because, he argues, the drafter of the ECC cannot be deemed to be unaware of this rule.[156] While this is persuasive, it is not, however, correct to confine the application of customary rules to the 1907 rules. Customary rules may also relate to any other draft rules that were adopted at different times including the registration rules under Title X of the ECC and other attempts after 1960.[157]

While there have been, as the authors noted, various attempts at introducing modern forms of land registration in Ethiopia since the landmark 1907 rules, it is astonishing to see the lack of a standardised national system of land registration after such long time in this ancient country.[158] The authors think the reason is lack of commitment on the part of the governments. As it is well known, land registration systems are public services which naturally demand a high level of commitment and good governance.[159]

In the Amhara region, major steps began to be taken in 2000 for laying down a modern land registration system. This was when the ANRS first law on rural land administration was issued,[160] which was later replaced by a

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[155] See Zewditu, supra note 124, pp. 36–38. Art. 3364 of the ECC provides that '[t]he customary rules relating to the formalities to be complied with so that the transfer or extinction of the ownership of immovable property may be set up against third parties shall apply.

[156] Yohannes, supra note 28, p. 49. For a summary of the main content of these rules: see at pp. 50-51.

[157] In 1972 a draft land registration proclamation was adopted. See Tarekegn Tefera, *The Requirement of Registration in the Transfer of Ownership under Contract of Sale* (LLB Thesis, Addis Ababa University, Faculty of Law, 1990), p. 30. Tarekegn also notes that the basis for the system of registration conducted by the Municipality of Addis Ababa for a long time was Legal Notice No 112/40 although he also admitted that the Municipality applied customary rules as that rule did not meet the needs of land registration: at pp. 31, 32.

[158] Id, p. 39.

[159] Good governance is a critical success factor for having a sustainable land registration system in any modern nation. Melkamu, supra note 63, pp. 78-81.

[160] Its full title was the Amhara National Regional Rural Land Administration and Usage Determination No. 46/2000.

new law.[161] In 2002, with the help of SIDA, the region launched a land certification program in two pilot field sites, Gerado area in Dessie Zuria *Woreda* in South Wollo and Addisse-na-Gulit *kebele* in Gozamen *woreda* in East Gojjam.[162] At present, almost all rural land parcels in the region are certified under what is referred to as first level registration while second level registration is also in progress.[163]

The practice of rural land registration is described below.[164] In the case of gift/donation and land exchange, the parties apply for land registration in the *Kebele* land registration office through a standard application form prepared by the land registration office. In this application, the party brings a book of title certificate. A notice is posted for any possible third party objection for 15 days. The parties fill in a standard contract form for the transaction. The *Kebele* land registration office sends the form which consists of the name and signature of the parties, witnesses and the views of the *Kebele* land committee members to the *Woreda* land registration office. The latter will verify if all aspects of the transaction procedure are done correctly. It requests the finance office to collect the necessary land fee. Finally, it transfers title by updating the information in the standard registration book and the land register data base called ISLA (Information System for Land Administration). The copy of the land registration book is also updated in the *Kebele* land register institution. In addition, the copies of the approved contract of transfer will be issued to both parties and the *Woreda* land registration office.

The procedure of registration of land rental contract is the same as the procedure in donation and land exchange. Upon approval of the contract, the *Woreda* land registration office shall enter a note of the rental information parallel to the corresponding parcel, the subject of rent. Registration of lease

[161] This law is the ARLAUP.

[162] Gebeyehu Belay et al, Lessons from Systematic Evaluation of Land Administration Systems. The Case of Amhara National Regional State of Ethiopia, *World Development*, Vol. 68, 2014, pp. 282-295.

[163] Interview with Abeba Yayneshet, expert, Bahir Dar Zuria *Woreda* Land Administration and Use Office (Bahir Dar, 23 September 2009 E.C).

[164] These procedures are described to us during our interview with Abeba. Interview with Abeba Yayneshet, expert, Bahir Dar Zuria *Woreda* Land Administration and Use Office (Bahir Dar, 23 September 2009 E.C.).

for commercial purposes, however, is the task of the Investment Office, not the land registration office. Also mortgage of investment land is not registered in the land registry. The procedure in the case of land transfer by succession is also the same. After all the procedures are undertaken at the *Kebele* land registry level, the *Woreda* land registration office will transfer title to the party in whose favour the court has decided to be a beneficiary of inheritance, or in favour of beneficiary of a will, as the case may be.

4.3 Court Practice with Regard to the Effect on Validity

In the Amhara region, the discovery of court decisions reveals that their rulings on the question of the effect of immovable registration on validity of immovable transactions are not consistent.[165] However, our investigation shows that the courts usually decide in favour of a party who has presented an unchallenged evidence of registration in the land registration institutions with respect to both urban and rural lands.[166] Let us review a few sample cases to substantiate our argument. To begin with the case which shows the most common issue, let us consider the *Ibrahim Muhamud et al* vs. *Deboch Zewdie* case.[167] The petitioners wanted to reverse the decisions of the lower courts. The argument of the defendant in his original pleading was that the petitioners had unlawfully taken his land and planted eucalyptus trees. The petitioners denied the allegation. The Supreme Court framed the issue of who the land in dispute belonged to. It approved the decision of the lower courts which ruled in favour of the defendant based on the fact that the defendant had presented a title certificate issued by the land register institution. In the *Tiblet Tesfa* vs. *Abuhay Tadese* case,[168] the appellant required the return of the full rental money as the defendant failed to cause the registration of the rental contract. The court held that the defendant had to return the rental money paid equivalent to the one year period in which

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[165] See Berihun, supra note 32, p. 197. For some more discussion on the effect of immovable registration on validity: see at pp. 197–204.

[166] This is, in fact, in line with ARLAUP which provides that '[t]he person who is granted the land holding certificate in his name shall, unless a contradictory written document is submitted, be considered legal holder of the land': at Art. 24(4).

[167] **ኢብራሂም ሙሀመድ እና እነ ደቦቄ ዘውዴ፣ የአብክመ ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት፣ መ.ቁ.** 23764 ፣ 2005 **ዓ.ም**.

[168] **ትብለጥ ተስፋ እና አቡሀይ ታደሠ፣ የአብክመ ጠቅላይ ፍርድ ቤት፣ መ.ቁ.** 34089 ፣2005 **ዓ.ም**.

the appellant held the land out of the total rental period of 25 years. This means the court ruled that the rental contract was invalid due to failure of registration. In the *Lema Tekle* vs. *Kinfe Adisu* case,[169] the petitioner ran to reverse the decision of the lower courts which held that the petitioner must return the land to the defendant which he held through rent. The Supreme Court held that petitioner must return the land to the defendant because the rental contract he relied on was not registered in the land register institution. In the *Yezanu Motbaynor* vs. *Heirs of Getachew Abate* case,[170] the appellant requested that the defendants must return the lands they held to her as she was the lawful successor of a deceased woman due to her being a family member. The defendant argued that he got the lands through donation/gift contract allegedly registered in the land register institution. The ANRS Supreme Court held that defendant's claim was not tenable because there was no evidence to show that the donation contract was registered and that the donation contract did not embody the signature of the 'donor'. In the *Asrat Mekonen and Banchayehu Asres* vs. *Kinde Abera and Yektie Tarko* case,[171] the appellants requested that the rental contract be cancelled because the defendants failed to discharge their obligation of paying the rent in kind (share-cropping). The defendants argued that they rented the land for 25 years and hence could not return the land before the expiration of the rental period. The court held that the rental contract cannot be invalidated as it was registered in the land register and hence the defendants may not return the land. In the *Mosit Anteneh* vs. *Checkol Alemu* case,[172] the appellant appealed to reverse a decision of the lower High Court which ruled that the appellant must return to the defendant the land the appellant's deceased husband allegedly took through rent. The ANRS Supreme Court reversed the decision and held that appellant may not return the land to the defendant because the evidence from the land register institution showed that the land was registered in the name of the appellant's deceased husband during the first registration process and then passed to the appellant. This means had

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[169] **ለማ ተክሌ እና ክንፌ አዲሱ፣ የአብክመ ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት፣ መ.ቁ**. 23770፣2005 **ዓ.ም**.

[170] **ይዛኑ ሞትባይኖር እና የጌታቸው አባተ ወራሾች፣ የአብክመ ጠቅላይ ፍርድ ቤት፣ መ.ቁ**. 33427፣2005 **ዓ.ም**.

[171] **እነ አስራት መኮንን** (2 **ሰዎች**) **እና እነ አስረስ ክንዴ** (2 **ሰዎች**)፣ **የአብክመ ጠቅላይ ፍርድ ቤት፣ መ.ቁ**. 33666፣ 2005 **ዓ.ም**.

[172] **ሞሲት አንተነህ እና ቸኮል አለሙ፣ የአብክመ ጠቅላይ ፍርድ ቤት፣ መ.ቁ**. 32993፣2004 **ዓ.ም**.

the defendant presented evidence of a registered rental contract with the appellant; he could have gotten a remedy of payment of damages or perhaps the termination of the rent.

The defendant evidence may assume two forms. One is an attachment of a certified copy of a title certificate or land registration book with the copy of a pleading. Another form is a letter written by a land register institution to the effect that the land in dispute is registered in someone's name. The latter is used when the party has for some reason failed to attach the title certificate.

From the foregoing cases, the authors can see the common practice[173] that if land is registered in someone's name and if the land registration office proves this in an unchallenged manner, then that party has a conclusive evidence of his valid land holding right to the land.[174] This shows that the usual practice is in favour of title registration rather than deed registration. The registration is the sole source of title to land, i.e., land holding right. In other words, registration determines validity of the transaction which is the initial cause of transfer of title from one person to the other. This is in clear contradiction with the law, both the national and regional, which, at least by interpretation, provides that immovable registration is not a requirement for validity of immovable transactions.[175] While making land registration necessary and mandatory in relation to many transactions,[176] the Amhara land registration law provides that '[u]nless any activity concerned with the right and obligations related to land is submitted and registered in *Woreda* branch office of the Authority, it may not be an objection to the third

[173] However, in rare cases the courts may hold the opposite position that registration does not affect validity. See eg Berihun, supra note 32, pp. 197-204.

[174] But we should also note that an immovable transaction although registered may be rebutted in certain circumstances especially after the FSCCD's landmark ruling that land registration evidence given by a land registration office is not a conclusive evidence and may be rebutted by other evidences. See **ጥላሁን ንበዜ እና እነ መኩተ ታይሉ** (2 ሰዎች)፣ **የፌደራል ጠቅላይ ፍ/ቤት ሰበር ሰሚ ችሎት፣ መ.ቁ**. 69821፣ 2004 **ዓ.ም**. In another case, the court decided in favour of the appellant when it held that registration of a gift contract alone does not cure the other defects in the contract. The court saw that the contract does not fulfil the requirements under Art 881 cum. Art 2443 of the ECC, namely, that it was not read in the presence of the testator and of four witnesses. See **አባተ ካሣ እና ተሻለ ከፋለ፣የአብክመ ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት፣ መ.ቁ**. 24918.

[175] See Section 3.2.

[176] See ARLAUP, Arts. 23(1), 17(6), 18(5).

parties'.[177] This implies that registration has nothing to do with the validity of the immovable transaction as between the parties to the transaction.[178] This contradiction between the court practice and the law will certainly continue to contribute to the existence of different decisions regarding the effect of immovable registration on the validity of transactions.

With regard to authentication requirement, the courts are trying to follow the FSCCD in relation to the question of validity. That is, authentication is a requirement of validity of the transaction concerned. The problem, in this regard, though, is the courts mostly confuse authentication with land registration.[179] To complicate matters more, we have already seen that authentication is not actually carried out by notary offices or immovable registration offices with respect to urban land and rural land. Most likely, this is the reason why the courts have wrongly, as we indicated above, made registration a validity requirement in most of their decisions. For most courts, when the FSCCD made authentication a validity requirement in the *Gorfe* case, that was the same as rendering immovable registration a requirement of validity of immovable property transactions.

5. Conclusion

The application of the formal requirements with regard to validity of immovable transactions is not well-settled in the Amhara region and in Ethiopia at large. Four problems have been observed. First, there is a considerable degree of misunderstanding regarding the relationship between authentication and immovable registration requirements among legal professionals. Second, there is lack of a comprehensive legal umbrella with regard to these requirements. The laws fail to unequivocally address the effect of these requirements on validity of various kinds of transactions both in rural and urban areas. Third, there is inconsistency between the essence of the laws and the court decisions on the relationship between the formal requirements and validity. Fourth, the practice of authentication with regard to immovable transactions is entirely neglected as the notary, as well as

[177] Id, Art. 23(4). The law also provides this in the case of mortgage in clear contradiction to what the ECC says. See Id, Art. 19(4).

[178] See Berihun, supra note 32, pp. 200-201.

[179] FGD, supra note 32.

immovable registration offices, never perform this task, particularly in the last a few years. The security of immovable property transactions is therefore at stake due to these unsettled and unpredictable practices.

Current Trends in the Legal Research of Ethiopian Law Schools: A Move from Doctrinal to Empirical Legal Research

Nega Ewunetie Mekonnen[♣]

Abstract

This paper examines the priority and culture of non-doctrinal (empirical) legal research in Ethiopian law schools. It explores how legal education in the past and the old LL.B. Curriculum affect the nature of legal research in Ethiopian law schools. The author argues that the nature of articles published in Ethiopian law journals, term papers, assignments and senior essays written by law students, absence of a course in the old curriculum on legal research, skill oriented and interdisciplinary courses contribute much toward having had solely doctrinal legal research. Additionally, this paper shows the current trend of moving from the traditional doctrinal legal research to the non-doctrinal (empirical) legal research in Ethiopian law schools. Through examining how the revised LL.B. Curriculum, the newly opened LL.M. graduate programs and the attempt to conduct empirical legal research by law instructors contributes to the move to non-doctrinal (empirical) legal research, the challenges of legal research faced by Ethiopian law schools are also revealed. Finally, the author concludes that though there have been some attempts toward positive change, sufficient priority is not given to non-doctrinal (empirical) legal research in Ethiopian law schools.

Key Terms: Doctrinal Legal Research, Interdisciplinary Legal Research, Legal Research, Mono-Disciplinary Legal Research, Non-doctrinal (Empirical) Legal Research.

Introduction

Following the adoption of the Reform Document on legal education and training in Ethiopia in 2006, considerable attention has been given to both legal education and legal research. The Reform Document, among other things, pointed out the problems of the curriculum that was in place. The curriculum's failure to focus on skill oriented courses and its inclination towards theory based courses stood out as a major problem of the

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curriculum.[1] The Reform Document also singled out the fact that in the area of conducting research, law schools in Ethiopia lagged behind their supposed responsibility. One of the major categories of problems that the Document identified was competence problems. Poor research methodology training at the undergraduate level and lack of (non-existence) graduate programs where students hone their research skill were, among other things, identified as problems of research capacity.

Nowadays it has been accepted that legal problems can not be identified and addressed simply by interpreting legal provisions and cases decided by a court of law. The legal researcher should go beyond the mere analysis and interpretation of legal provisions and case laws. Legal research should address the real problem affecting the society. Legal researchers should investigate through empirical data how law and legal institutions affect or shape human behavior and what impact on society they create.

From the findings of the Reform Document, we can understand that legal research, in general, and empirical legal research, in particular, was at the infancy stage of development. Even if the Reform Document did not address the priority of doctrinal legal research and empirical legal research separately, one can understand from experience that the latter type research was still, neglected and cornered by the law schools. However, following the adoption of the national LL.B. Curriculum based on the guidelines set in the Reform Document, and the opening of graduate programs in law, the culture of conducting empirical legal research is beginning to develop. The incorporation of skill oriented, interdisciplinary and legal research methodology courses in the revised LL.B. Curriculum; the opening of the graduate law programs in different law schools, and the focus of these programs on conducting empirical research are encouraging the growing culture of empirical legal research in Ethiopian law schools. However, this does not mean that challenges in law schools have not been faced in moving from the traditional doctrinal legal research culture to that of empirical legal research. Absence of the basic tools to find existing laws and lack of uniform rules of citation are some of the challenges that law schools have faced in conducting empirical legal research.

[1] FDRE, *Legal Education and Training Reform Document*, Addis Ababa, 2006 (unpublished).

In this article, the author assesses the nature of legal research in the early days of the opening of the Faculty of Law at the then Haile Selassie I University and examines what the current practice of legal research in Ethiopian law schools look like; specifically, how the law schools are shifting toward the tradition of developing empirical legal research is. To show the current trends in Ethiopian law schools, the author examined journal articles published by law schools, surveyed the content of LL.M. thesis, interviewed editor-in-chief of journals and instructors who had taught legal research methodology in the LL.M. program, and legal researchers, and analyzed relevant documents.

The first section of this article introduces different types of doctrinal legal research. The nature of non-doctrinal or empirical legal research is addressed in the second section; the meaning and the priority of interdisciplinary research is discussed in the third. The fourth section examines the trends of legal research in Ethiopian law schools and the last section singles out the current changes and problems that Ethiopian law schools have faced.

1. Doctrinal Legal Research

This section discusses the nature of doctrinal legal research and the approach and methodology of doctrinal legal research. The nature of doctrinal legal research is addressed in relation to empirical and socio-legal research.

1.1. Nature of Doctrinal Legal Research

Legal research in the past was dominantly doctrinal. The word 'doctrine' is derived from the Latin noun *'doctrina'* which means instruction, knowledge or learning.''[2] In the context of legal research, doctrine refers to legal concepts in legislation and cases decided by a court of law. It should not be also forgotten that in addition to the primary legal sources, the researcher is also expected to refer to books, journal articles, commentaries and other secondary sources of law. Therefore, according to the traditional doctrinal legal research method, what is expected from the researcher is to ascertain

[2] Terry Hutchinson and Nigel Dunca, Defining and Describing what We Do: Doctrinal Legal Research, *Deakin Law Review*, Vol. 17, No.1, 2012, p. 84.

the meaning of the law enshrined in legislation and case laws. This was not only the culture of legal research in the past, but also today legal research is predominantly doctrinal. This is because [h]istorically, law was passed on from lawyer to lawyer as a set of doctrines, in much the same way as happened with the clergy."[3]

Doctrinal legal research was not only considered as the tradition of legal research, it was also considered as the appropriate legal paradigm[4] and the natural research method of the legal profession. At this point, one may raise the following questions: What is the priority and the importance of doctrinal research method in other disciplines? Do other disciplines employ a doctrinal research method? In other disciplines, however, doctrinal research methodology is not known and even it is hardly taken as a scientific research method. Terry Hutchinson and Nigel Dunca explain this fact in the following words:

> *Where does the doctrinal methodology 'fit' in terms of the spectrum of scientific and social research methodologies used in other disciplines? The doctrinal method lies at the basis of the common law and is the core legal research method. Until relatively recently there has been no necessity to explain or classify it within any broader cross-disciplinary research framework.*[5]

It must be because of this that some commentators argue that doctrinal research method is not a separate research methodology but it is simply a scholarship.[6] For the critics of doctrinal legal research, one of the limitations of doctrinal legal research is that it is limited to investigating what the law is. It fails to look in to how the law functions in the society and

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[3] *Ibid.*

[4] Research paradigms are world view, believes and philosophical foundations in research. They are directly or indirectly linked to the *axiological*, *ontological*, *epistemological*, and *methodological* pillars and assumptions. Positivism (post positivism, post empiricism), constructivism, transformative and pragmatism are the major research paradigms. *A paradigm may be viewed as a set of basic beliefs (or metaphysics) that deals with ultimates or first principles. It represents a worldview that defines, for its holder, the nature of the world", the individual's place in it, and the range of possible relationships to that world and its parts, as for example, cosmologies and theologies do* (Egon G. Guba and Yvonna S. Lincoln, Competing Paradigms in Qualitative Research, p. 107).

[5] *Id.*, p. 85

[6] *Id.*, p. 83

the way the law affects legal institutions. It does not also look in to the economic, social, political and cultural impact of the law. However, social scientists who undertake research related to the law have employed a different approach. In this regard, Emerson H. Tiller and Frank B. Cross point out that:

> *Legal researchers have extensively dealt with doctrine as a normative matter but have given little attention to the manner in which it actually functions. Social scientists, who have done important descriptive work about how courts actually function, have largely ignored the significance of legal doctrine. Consequently, we are left with a very poor understanding of the most central question about the law's function in society. Fortunately, recent years have seen the beginning of rigorous research into this question. As legal researchers increasingly conduct quantitative empirical research and collaborate with social scientists, we may hope for an efflorescence of this research and greatly enhanced understanding of legal doctrine.*[7]

Even if similar critiques were raised from other disciplines, doctrinal legal research had been the dominant, if not the only, approach employed by legal researchers until the 1960s. It was after this period that a new approach of studying the law was borrowed from other disciplines and incorporated as the second approach of legal research method. As will be discussed in detail, [the] second legal tradition which emerged in the late 1960s is referred to as 'law in context' [non-doctrinal (empirical) research]. In this approach, the starting point is not law but problems in society which are likely to be generalized or generalisable.[8]

In relation to the nature of doctrinal legal research, there is an ongoing qualitative quantitative debate. As will be further discussed below, there are two types of non-doctrinal legal research: qualitative and quantitative non-doctrinal research. The debate is whether doctrinal legal research is

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[7] Emerson H. Tiller and Frank B. Cross, What is Legal Doctrine? *Northwestern University Law Review*, Vol. 100, No. I, 2006, p. 518.

[8] Mike McConville and Wing Hong Chui, *Introduction and Overview, in* Mike McConville and Wing Hong Chui, (eds.), *Research Methods for Law*, Second Edition, Edinburgh University Press, Edinburgh, 2007, p. I, [hereinafter Mike McConville and Wing Hong Chui, *Research Methods for Law*]

qualitative or quantitative in nature. Conventionally the meaning and nature of quantitative and qualitative research are described as follows:

> *Quantitative research deals with numbers, statistics or hard data whereas qualitative data are mostly in the form of words. Qualitative researchers tend to be more flexible than their quantitative counterparts in terms of the structure to research. […]Objectivity is commonly ascribed to quantitative studies, and to achieve this, the researcher attempts to rule out bias through random assignment of subjects, the use of a control group in experiments and statistical manipulation.*[9]

From the reading of this paragraph one can simply understand that what is important in quantitative research is the measurement of the behavior or the phenomenon. In quantitative research, among other things, the researcher should be able to *objectively* measure or quantify the behavior or the phenomenon being investigated. In contrast to quantitative research, qualitative research is more flexible, and what is important is the meaning that the researcher gives to the phenomenon being studied.

Given the aforementioned differences between qualitative and quantitative research, the question is: Where can we place doctrinal legal research? In other words, the issue is whether we do have an *objective* or *subjective* approach of ascertaining and understanding the law. It can be argued that [i]f the law can simply be discovered using a systematic approach and the same law would be found no matter who was carrying out the research, then it could be argued that doctrinal research was quantitative.''[10] Ian Dobinson and Francis Johns argue about the possibility of considering doctrinal legal research as quantitative. They point out that doctrinal legal research can be characterized as being quantitative as there is somehow an objective approach to finding the law.[11]

Ian Dobinson and Francis Johns seem to have made a distinction between doctrinal legal research undertaken by legal academics and the legal reasoning technique employed by legal practitioners, especially by judges.

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[9] *Id.,* p. 48.

[10] *Id.,* p. 21.

[11] *Ibid.*

This is because they argue that [t]his assumption about the law is at odds with the type of reasoning that judges apply. Judges reason inductively, analyzing a range of authorities relevant to the facts, deriving a general principle of law from these authorities and applying it to the facts in front of them.''[12] Unfortunately, Ian Dobinson and Francis Johns fail to justify why the law finding approach employed by the legal academics is scientific and objective, unlike the reasoning technique used by legal practitioners and judges, apart from stating the perspective of the social science which considers inductive judicial reasoning as a qualitative research methodology. [13] However, considering the inherent nature, purposes and functions of quantitative research it is hardly possible to consider doctrinal legal research as quantitative.[14]

1.2. The Approach and Methodology of Doctrinal Legal Research

As it has been noted above, the main objective of the traditional doctrinal legal research method is to ascertain what the law is as enshrined in legislation and cases decided by the court of law. Therefore, if the objective is find what the law is, the legal researcher is expected to have some tools or methods of finding out what the laws are. Unfortunately, unlike disciplines in the social science and humanities there is no a well developed and universally accepted research methodology of doctrinal legal research. Even [s]ome commentators are of the view that the doctrinal method is simply scholarship rather than a separate research methodology.''[15] The following scenario tells us a lot about the issue of distinct legal methodology:

> *What data is contained in the research? How was this data collected? At some point there must be a statement, however brief, concerning the method of collection of the data - for example: 'This study will include a doctrinal analysis of legislation and case law.' Is this sufficient? Should funding agencies, examiners and*

[12] *Ibid.*

[13] *Ibid.* It has to be noted that even if these writers try to show the possibility of having doctrinal quantitative legal research in the subsequent paragraphs they argue that as legal research involves the process of selecting and weighing materials according to their hierarchy doctrinal legal research is qualitative in nature.

[14] See discussions *infra* on the nature, purposes and functions of quantitative legal research.

[15] Terry Hutchinson and Nigel Dunca, s*upra* note 2, p. 83.

> *reviewers expect more detail from legal scholars? Should scholars be including a statement concerning the breadth and depth of the literature, legislation and case law being examined, together with a list of the pertinent issues in proving the argument or thesis? Even accepting that it would be difficult to formulate a thesis without stating the major issues, is it then possible to delineate how these issues are going to be analyzed? Is it feasible for doctrinal researchers to describe the legal reasoning techniques being used together with any theoretical underpinnings involved in the analysis? Is it possible to unpack the doctrinal method in this degree of detail?*[16]

It is evident that it is not common to have a separate methodology section in traditional doctrinal legal research. The doctrinal legal researcher hardly articulates what type of legal information they are going to gather, how are they going to analyze the information gathered, and how they are going to interpret the data/information that has been collected. [17]

Despite the argument about the existence of doctrinal legal research methodology it is important to have some discussion on the existing process of doctrinal legal research. Some writers who have undertaken research on the area suggest a particular research methodology to be employed by doctrinal legal research. The suggested methodology is not inherently a legal research methodology. It has been established and adopted from the qualitative research methodology employed by disciplines in the social sciences. In doctrinal legal research the researcher is expected to identify laws and secondary legal sources relevant and related to the problem under

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[16] *Id.*, pp. 98-99.

[17] For instance, from the survey of doctrinal research papers undertaken by Australian Universities the point under discussion has been identified as follows:

An examination of the database demonstrates that only 16 of the 60 theses include a methodologies chapter (26.6 per cent), 21 discuss methodologies as part of another chapter, and one deals with the methodology in an appendix. Therefore, only 38 of the 60 law theses (63.3 per cent) include a discussion of the methodology as part of the thesis. Non-doctrinal methodologies are treated more expansively, with extensive descriptions and lengthy chapters. Where the thesis represents traditional legal research, significantly less, and sometimes no attention is given to explaining the methods used in conducting the research. Fifty-six per cent (n=34) of these legal theses are of a research nature that is unlikely to require ethics clearance. These numbers obviously differ from those in social science disciplines which rely largely on empirical method demonstrating that law is still essentially a 'scholarly' endeavour. (*Id.* p. 100).

investigation. The identification of relevant legislation, cases and secondary materials in law can be seen as analogous to a social science literature review.[18]

Mike McConville and Wing Hong Chui are of the opinion that the requirements of literature review identified by A. Fink can be adopted and used by analogy as doctrinal legal research methodology. [19] These requirements are:

- Selecting research questions
- Selecting bibliographic or article databases
- Choosing search terms
- Applying practical screening criteria
- Applying methodological screening criteria
- Doing the review
- Synthesizing the results

The very idea of borrowing research methodology from other disciplines is innovative. The most important question is whether these requirements can be applied in the context of doctrinal legal research.[20] Much work and effort is expected from doctrinal legal researchers to contextualize these requirements and develop research methodology that fits doctrinal legal research.

2. Non- Doctrinal (Empirical) Legal Research

Empirical research refers to statistical studies, i.e., those that involve the application of statistical techniques of inference to large bodies of data in an effort to detect important regularities (or irregularities) that have not been previously identified or verified.[21] In the context of legal research, the meaning of empirical research goes beyond statistical studies and it includes case studies and legal history.[22]

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[18] Mike McConville and Wing Hong Chui, *supra* note 8, p. 22.

[19] *Ibid.*

[20] *Id.*, p. 23.

[21] Peter H. Schuck, Why Don't Law Professors Do More Empirical Research? *Journal of Legal Education*, Vol. 39, 1989, p. 323.

[22] *Ibid.*

The act of borrowing research methodologies from other disciplines in general and from the social sciences in particular is a relatively recent phenomenon. Naturally, legal research is doctrinal. Later, it was realized that legal problems cannot be effectively addressed by doing the traditional doctrinal legal research. Legal problems should be broadly understood and accordingly solved in their political, social and economical context. This view paved the way for the incorporation and adoption of empirical research methods and interdisciplinary research in the legal science. This is because [s]ocio-legal scholars point to the limitations of doctrinal research as being too narrow in its scope and application of understanding law by reference primarily to case law [and legislation]."[23] In the following sections, a brief overview on the types of empirical legal research is provided.

2.1.Qualitative Legal Research

As mentioned above, empirical research in general and the qualitative-quantitative classification and debate are historically important in the social science and humanities. But this does not mean that lawyers do not employ qualitative research methods.[24] What is uncommon for legal researchers is the qualitative-quantitative paradigm debate.[25] This section discusses the meaning, nature and the importance of qualitative legal research method.

The term qualitative research can be defined in different ways. To define this term, what is important is to understand the word quality. Quality refers to the what, how, when, and where of a thing - its essence and ambience.''[26] What is important in qualitative research is the experience, the understanding, or the meaning that the researcher gives to the population under study. Therefore, qualitative research is all about the definitions,

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[23] Mike McConville and Wing Hong Chui, *supra* note 8, p. 5.

[24] Lisa Webley, *Qualitative Approaches to Empirical Legal Research, in* Peter Cane and Herbert Kritzer (eds), *Oxford Handbook of Empirical Legal Research*, 2010, p. 1.

[25] *Over the years there has been a large amount of complex discussion and argument surrounding the topic of research methodology and the theory of how inquiry should proceed. Much of this debate has centered on the issue of qualitative versus quantitative inquiry – which might be the best and which is more 'scientific'.* (Catherine Dawson, *A Practical Guide to Research Methods*, 3rd edition, Spring Hill House, Begbroke, Oxford, 2007, (first published in 2002) p. 16)

[26] Bruce L. Berg, *Qualitative Research Methods for Social Sciences*, 4th edition, A Pearson Education Company, Boston/ London /Toronto/ Sydney/Tokyo/Singapore, 2001, (first published in 1989) p. 3.

meanings, concepts, characteristics, symbols, metaphors, and description of the phenomenon being investigated.[27]

The most important question one needs to ask is about the circumstances or conditions under which qualitative method, but not the quantitative, is appropriate and important. This question will directly lead to the methodological question. If the researcher is doing empirical research, one of the issues that need to be considered carefully is the methodology to be employed. Method is relevant and to ignore methodological standards may result in unreliable research [output]."[28] There has been an ongoing debate and paradigm war about whether it the qualitative or the quantitative method that should be employed. It is beyond the scope of this work to go into the details of the debate on research paradigms and the research methodology.. However, it is generally accepted that qualitative research is recommended if the researcher wants to undertake a more narrative understanding of the phenomenon being studied, or if a richer and deep understanding of the group under study is the objective.[29] Qualitative researchers believe that knowledge is not something that objectively exists, rather it is constructed through the communication, interaction, the perception and the interpretation and the meaning that the researcher gives to the population under study.[30] Accordingly, as the aim of qualitative research is the deep understanding of the opinions, feelings and the attitudes of research participants, interviews, focus group discussions, observation and document analyses are used as data collection tools in a qualitative research. The researcher, in turn, is expected to analyze and interpret the collected data using these data collection tools.

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[27] *Ibid.*

[28] Wendy Schrama, How to Carry out Interdisciplinary Legal Research? Some Experiences with an Interdisciplinary Research Method, *Utrecht Law Review*, Volume 7, No. 1, 2011, p. 150.

[29] Scott W. Vanderstoep and Deirdre D. Johnston, *Research Methods for Every Day Life, Blending Qualitative and Quantitative Approaches,* 1st edition, John Wiley & Sons, Inc. San Francisco, 2009, p. 8 (hereinafter Scott W. Vanderstoep and Deirdre D. Johnston, *Research Methods for Every Day Life*).

[30] *Id.,* p. 166.

2.2.Quantitative Legal Research

Depending on the nature of the research problem, research objective and research questions formulated the researcher may find it important to employ quantitative research method. Unlike qualitative research, quantitative research deals with the numerical assignment of the phenomenon under study.[31] Quantitative research deals with numbers, statistics or hard data whereas qualitative data are mostly in the form of words."[32] Generally, quantitative research can be defined as a research method which […] refers in large part to the adoption of the natural science experiment as the model of scientific research, its key features being quantitative measurement of the phenomena studied and systematic control of the theoretical variables influencing those phenomena."[33] Unlike qualitative research in a quantitative research is believed to be free from the researcher's personal values, bias and subjectivity, and the researcher is believed to report the findings objectively.

Before employing quantitative research method, as it has been stated above, one of the most important points that the researcher needs to consider is the objectives of the research and the nature of the research questions. The researcher has to check; among other things, what type of data can help meet the research objectives and to answer the research questions before deciding on the use of quantitative research method. Therefore, as one can understand from the above definition, if the phenomenon under study can be measured and quantified in terms of number, and if the researcher is able to identify variables from the theoretical framework, then the quantitative research method can safely be employed. Accordingly, it is recommended that quantitative research method can be widely used in the field of criminal law and criminology, corporate law, and family law.[34] For instance, in the United States, quantitative methods have been used in leading criminology

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[31] *Id.,* p. 7.

[32] *Id.,* p. 48.

[33] M. Hammersley, *'What is Social Research?'* in M. Hammersley (ed.), *Principles of Social and Educational Research: Block I,* Milton Keynes: Open University Press, 1993, p. 39

[34] Wing Hong Chui , *Quantitative Legal Research, in* Mike McConville and Wing Hong Chui, *Research Methods for Law*, Edinburgh University Press, Edinburgh, 2007, p. 47 (hereinafter Mike McConville and Wing Hong Chui, *Research Methods for Law*).

and criminal justice journals.[35] *Crime and Delinquency*, *Criminology*, *Justice Quarterly*, *Journal of Research in Crime and Delinquency*, *Journal of Criminal Justice*, *Journal of Quantitative Criminology*, *Journal of Criminal Law and Criminology*, and Criminal *Justice and Behavior* are some of the journals that published quantitative articles. [36] Questionnaire is widely used as a data collection tool in quantitative studies.

The characteristic of qualitative and quantitative research respectively is summarized by Scott W. Vanderstoep and Deirdre D. Johnston as follows:[37]

Characteristic	**Quantitative Research**	**Qualitative Research**
Type of data	Phenomena are described Numerically	Phenomena are described in a narrative fashion
Analysis	Descriptive and inferential Statistics	Identification of major themes
Scope of inquiry	Specific questions or Hypotheses	Broad, thematic concerns
Primary advantage	Large sample, statistical validity, accurately reflects the population	Rich, in-depth, narrative description of sample
Primary disadvantage	Superficial understanding of participants' thoughts and feelings	Small sample, not generalizable to the population at large

3. Interdisciplinary Legal Research in Ethiopia

Interdisciplinary legal research refers to legal research which incorporates insights from other non-legal disciplines.''[38] The tradition of legal research

[35] Claire Angelique R.I. Nolasco, Michael S. Vaughn and Rolando V. del Carmen, Toward a New Methodology for Legal Research in Criminal Justice, *Journal of Criminal Justice and Education*, Vol. 21, No. 1, 2010, p. 3.

[36] *Id.* p. 4. In these journals out of the total 1,299 articles published from 2004 to 2008, 1,011 (77.8%) of them were quantitative articles. This figure shows us that quantitative method is more appropriate for legal research on criminal justice and criminology.

[37] Scott W. Vanderstoep and Deirdre D. Johnston, *Research Methods for Every Day Life*, *supra* note 29, p. 7.

[38] Wendy Schrama, *supra* note 28, p. 147.

in the past was not only doctrinal but also mono disciplinary. Legal researchers stick to what the law says as enshrined under legislation or case laws. Therefore, legal research was an island where researchers from other disciplines did not keep in touch with them. However, this has changed in the last few decades and nowadays it has become common for researchers from other disciplines to come together and join legal researchers. For instance, in the United States, the use of economics and philosophy to evaluate legal doctrines dates back to the 1950 and 60.[39] Legal researchers can learn from researchers in other disciplines. The traditional mono-disciplinary legal research can also borrow methods from other disciplines which will contribute much to the development of empirical research. It is therefore natural that scholars in other disciplines-particularly the social sciences would want to assess the quality of work being done by legal scholars […]''[40]

Even if there is a move in the law schools away from the traditional mono-disciplinary legal research toward the interdisciplinary approach, it does not mean that all legal research projects should be combined with methods and concepts from other disciplines. The method to be employed should be interdisciplinary if and only if the law as it is" cannot properly address the problem being investigated. In other words [w]hen the aim of a certain research project is to find legal answers on the basis of legal data an external non-legal perspective is not required."[41] Therefore, the nature of the research design in general and the research method in particular (including interdisciplinary research) depends on the nature of the research question. For instance, if the research question is formulated in such a way to understand the intention of the law maker behind silent legal provisions, the researcher would not be expected to employ methods and concepts from

[39] Richard A. Posner, the Present Situation in Legal Scholarship, *Yale Law Journal*, Vol. 90, No. 1113, 1981, p. 1125.

[40] Richard L. Revesz, A Defense of Empirical Legal Scholarship, *the University of Chicago Law Review*, Vol. 69, 2002, p. 170.

[41] Wendy Schrama, *supra* note 28, p. 148.

other disciplines.[42] This and other similar research questions can be properly addressed without employing interdisciplinary research.

However, if the research objective is to assess the law in action, the researcher will find it important to borrow'' methods and concepts, and to collaborate with researchers from other disciplines.[43] For instance, in our legal system, the law is clear on the appointment of guardians and tutors.[44] The law clearly provides the requirements that the court of law should take into account in appointing a person other than the parents of the child as a guardian and tutor. In this case, it is better if the court makes its decision in consultation with psychologists and social workers. A legal researcher working on a similar research problem would benefit from being involved with researchers from other related disciplines.

To effectively undertake interdisciplinary legal research, legal researchers are expected to have and develop the culture of teamwork and coauthoring. In Ethiopian law schools, interdisciplinary legal research in general and the culture of teamwork and coauthoring journal articles in particular is at infant very early stage of development.[45] For instance, [t]he Articles published in the Journal of Ethiopian Law provide [an] example of how little we cooperate in research and publications."[46] However, recently the tradition of co-authoring journal articles seems to have been developing.[47] The team

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[42] Schrama calls this the internal consistency or the internal effectiveness of the law. According to Schrama interdisciplinary research is not necessary to address the *internal consistency* or the *internal effectiveness* of the law. See Wendy Schrama, *supra* note, 28.

[43] Schrama calls this the external effectiveness of the law which refers to refers to the external consistency of the legal system with the context and culture in which it functions." See Wendy Schrama, s*upra* note, 28.

[44] See Articles 219ff. of the Revised Family Code of the Federal Democratic Republic of Ethiopia on organs of protection of minors, Proclamation No. 213/2000.

[45] See the discussion *infra* under Section 4 on legal research in Ethiopian law schools.

[46] Tadesse Lencho, Scholarly Productivity-Has Academic Tradition or Culture anything to do with it? *Ethiopian Journal of Legal Education*, Vol. 2, No. 2, 2009, p. 107.

[47] For instance, journal articles by Abebe Assefa and Wondmaggn Gebrie, Enforcement of the Principle of Legality after Ethiopian Revenue & Customs Authority v. Ato Daniel Mekonnen, in *Bahir Dar University Journal of Law*, Vol. 2, No. 2, (2012); Goce Naumovski & Dimitri Chapkanov, Convergence of Trademark Law and E-Commerce: Overview of US, EU and China Regulations on Trademarks and Domain Names, in *Mizan Law Review*, Vol. 8, No. 2, (2014), Martha Belete Hailu & Tilahun Esmael Kassahun, Rethinking Ethiopia's Bilateral Investment Treaties in light of Recent Developments in International Investment Arbitration, in *Mizan Law*

should preferably bring together lawyers and social scientists. In this regard, a good example is the research undertaken on exit exam by a team of experts including from other disciplines. There is similar research underway on externship.

When we come to the priority given to interdisciplinary research in the journals published by Ethiopian law schools, *Journal of Ethiopian Law* had given a high priority to interdisciplinary in the first two decades after its inauguration. In evaluating the Haile Sellassie I University-Northwestern Research Project in the Eighth Annual Report from the Dean, Dean Cliff F. Thomson stated that:

> *The project involved intensive field work for six months on research topics of importance to Ethiopia. It was not a new project at the Faculty, but this past year was only its second trial since 1968-69, and we added the important element of involving our students in the writing as well as the research for the completed articles. Again expertly directed by Associate Professor Beckstrom of Northwestern University Law School, the project teamed three Northwestern law students and three students from our Faculty with scores of student- researchers from the School of Social Work and our Faculty. The research was interdisciplinary, and focused upon the socio-economic-political and legal aspects of juvenile in trouble, and upon the economic potentials and problems of traditional commercial institutions in Mercato.*
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> *The preceding Northwestern- HSIU [Haile Sellassie I University] project resulted in three published articles, and our expectation is that the same quality will be achieved this time. More important, I believe our students have had a superb opportunity to receive the benefits which arise from close professional supervision in the intricacies of field research into often sensitive topics.*[48]

Review, Vol. 8, No.I , (2014); Amos O. Enabulele & Bright Bazuaye, Setting the Law Straight: Tanganyika Law Society & anor v. Tanzania and Exhaustion of Domestic Remedies before the African Court, in *Mizan Law Review,* Vol. 8, No. I, (2014); Hailu Burayu, Elias N. Stebek & Muradu Abdo, Judicial Protection of Private Property Rights in Ethiopia: Selected Themes, in *Mizan Law Review,* Vol. 7, No. 2, 2013; Aron Degol and Abdulatif Kedir, Administrative Rulemaking in Ethiopia: Normative and Institutional Framework, in *Mizan Law Review,* Vol. 7, No. I, 2013.

[48] Cliff F. Thomson, Eighth Annual Report of the Dean, *Journal of Ethiopian Law*, Vol. 8, No.I, 1972, p. 17. The journal articles by the Northwestern University research project were on local

Unfortunately, what was established in those early days of the inauguration of the *Journal of Ethiopian Law* did not last long and were never well developed. Issues published in the Journal after the 1970s were not empirical and interdisciplinary as intended by the founding deans and the staff of the then Haile Sellassie I University.

Among the law journals published by the second generation Ethiopian law schools, *Mizan Law Review* developed the practice of publishing interdisciplinary works.[49] Therefore, *Mizan Law Review* is the leading pioneer in coauthored journal articles and interdisciplinary works.

In the earlier days of the Faculty of Law of Haile Sellassie I University, it was common to organize seminars on interdisciplinary issues. For instance, the Faculty in cooperation with the College of Business held a series of ten informal seminars on law and economic development during 1964-65."[50] Topics on legal and economic frameworks of development, Ethiopia's second Five Year Plan, development of Ethiopian natural resources, Ethiopian manpower needs, investment law and sources of investment, credit institutions in Ethiopia, and the role of parliament in a developing country were discussed and instructors from other departments and officials from the parliament were invited.[51] I referred to this historical account for the following reason: Organizing and hosting interdisciplinary seminars and workshops inspires legal researchers to think of research ideas. Such seminars and workshops should also create the forum of socialization which would ultimately result in co-authorship and collaboration in research. However, this legacy did

courts administration, divorce procedures 10 years after the Code, and labour relations. An article on the effect of customary law in development was also published by Norman J. Singer. See the Seventh Annual Report of the Dean, *Journal of Ethiopian Law*, Vol. 7, No. 2, 1970, p. 316.

[49] Two interdisciplinary works by Aleksandar Stojkov, Goce Naumovski, & Vasko Naumovski, Economics of Copyright: Challenges and perspectives, in *Mizan Law Review*, Vol. 7, No. 1, 2013; and by Elias Nour , Ambiguities and Inconsistencies in the ' Prescriptions' toward 'Development' in *Mizan Law Review*, Vol. 6 No. 2, 2012, are published in the Journal.

[50] James C.N .Paul, Thomson, Second Annual Report of the Dean, *Journal of Ethiopian Law*, Vol. 2, No. 2, 1965, p. 523.

[51] *Id.*, p. 524.

not last long and was not succeeded by the second generation law schools or even by the Faculty of Law of Addis Ababa University.

4. Trends in the Legal Research of Ethiopian Law Schools

The history of formal legal education in Ethiopia is traced back to 1963, the year in which the first law school in the history of the country was opened at the then Haile Selassie I University. Even if the attention given to empirical research at Haile Selassie I University and later at Addis Ababa University was insignificant, the importance of the empirical research was emphasized immediately after the opening of the Law Faculty. Here it is important to see the observation of one of the deans of the Faculty of Law of the then Haile Selassie I University:

> *…what I submit is desperately needed and deserves greater Law Faculty research effort from now on is the description and critical evaluation of how Ethiopian law and legal institutions actually operate, and from such observations what modifications in and additions to the law and its institutions are needed. This is a very difficult form of research for it requires slight reliance on libraries or archives and heavy reliance on data gathering through interviews, questionnaires and participant observation.*[52]

However, due to a variety of reasons, the aspiration of the Dean did not come true in Ethiopian law schools. In the following sections discuss the priority given to doctrinal and empirical legal research in Ethiopian law schools and the challenges of legal research faced by Ethiopian law schools.

4.1. Doctrinal Legal Research: The Effect (Legacy) of the *Old Curricula*

In the old curriculum of Ethiopian law schools[53] no proper attention was given to the non-doctrinal (empirical) legal research. In this section the

[52] Quintin Johnstone, Sixth Annual Report of the Dean (1968-69), 6 J. Eth. Law, 22, June 1969, quoted in Tadesse Lencho, *supra* note 46, pp. 104-105.

[53] *The old curriculum* refers to the respective conventional curricula implemented by Ethiopian law schools before the adoption of the 2006 new curriculum. The new curriculum implemented in 2006 was revised and harmonized, and adopted as a modular LL.B. curriculum in 2012/13 Academic Year.

author shows how the old curriculum laid a fertile ground for doctrinal legal research as opposed to the socio legal (empirical) ones. To do so, in the following paragraphs present a survey of journal articles, senior essays written by graduating LL.B. students, and discuss the place given to skill oriented and interdisciplinary courses in the old LL.B. curriculum. Finally, a survey is provided of the collection of law school libraries on non- doctrinal research.

To understand the priority given to doctrinal legal research by Ethiopian law schools in the past one can survey the nature of published journal articles. In the history of legal education in Ethiopia the first legal journal was published by the Faculty of Law of the then Haile Selassie I University in 1964. The second generation law schools at Bahir Dar University, Mekelle University, Haramaya University, Jimma University and Gondar University are also publishing their own law journals. What makes all these journals the same is the priority they have given to doctrinal works. The author assessed the content of four journals: *Ethiopian Journal of Legal Education*, *Mizan Law Review*, *Journal of Ethiopian Law* and *Bahir Dar University Law Journal*.

From this assessment, the author understands that in the *Journal of Ethiopian Law*, in its issues published in the 1960s an1970s, a priority was given to empirical works.[54] When we come to the publications of the second generation law schools, almost all issues (with only a few exceptions) have been devoted to finding authorities in primary and secondary legal sources.[55] Among these journals *Mizan Law Review* and the *Ethiopian Journal of Legal Education* give a higher priority to empirical works.

[54] See Eighth Annual Report of the Dean, *Supra* note 48 on the priority given to empirical works in the Journal of Ethiopian Law.

[55] The following are instances of published empirical works:

1. Mulugeta Getu, Ethiopian Floriculture and its Impact on the Environment: Regulation, Supervision and Compliance, *Mizan Law Review*, Vol. 3 No. 2, 2009, (the author has used empirical data obtained through interview to enrich his article).
2. Taddese Lencho, Scholarly Productivity: Had Academic Tradition or Custom anything to do with it? *Ethiopian Journal of Legal Education*, Vol. 2, No. 2, 2009, (the author used questionnaire as a n empirical data collection tool).

Other evidence that assesses the priority of doctrinal legal research in the Ethiopian law schools is the contribution of the LL.B. graduating students. In the old curriculum graduating LL.B. students had to work on a senior essay which was a partial fulfillment for the Bachelor of Laws. In this regard, the author has assessed senior essays written by students at Addis Ababa University School of Law and by the newly established law schools.

From the content analysis of journal articles the author comes to the conclusion that most of the senior essays written by students at the newly established law schools are doctrinal by nature. Very few works are devoted to show whether the practice is in line with the law. However, most of these types of works are restricted to the analysis of documents and cases decided by the court of law. Therefore, strictly speaking they cannot be taken as empirical works. Few students try to conduct empirical research and use interviews and questionnaires as data collection tools. However, these

3. Hussein Ahmed, Overview of Corporate Governance in Ethiopia: the Role, Composition, and Remuneration of Boards of Directors in Share Companies, *Mizan Law Review*, Vol. 6 No. 1, 2012, (this author used interview to collect empirical data).
4. Endalew Lijalem, the Doctrine of Piercing the Corporate Veil: its Legal and Judicial Recognition in Ethiopia, *Mizan Law Review*, Vol. 6 No. 1, 2012, (this author used interview to collect empirical data).
5. Seyoum Yohannes, Eritriea- Ethiopia Arbitration: A 'Cure' Based on Neither Diagnosis Nor Prognosis, *Mizan Law Review*, Vol. 6 No. 2, 2012, (this author used interview to collect empirical data).
6. **አስቻለዉ አሻግሬ፣ የታክስ ክፋዮች ቅሬታ አፈታት ሥርአት በኢትዮጵያ** (Tax Appeal Procedures in Ethiopia), *Mizan Law Review*, Vol. 8 No. 1, 2012, (this author used interview to collect empirical data).
7. Fekadu Petros, Effect of Formalities of on the Enforcement of Insurance Contracts in Ethiopia, *Ethiopian Journal of Legal Education*, Vol. 1, No. 1, 2008, (the author used interview as an empirical data collection tool).
8. Mulugeta Getu, Law Schools' Access to Legislation and Decisions: Current Trends and Suggested Outlets, *Ethiopian Journal of Legal Education*, Vol. 3, No. 2, 2010, (the author has used interview and questionnaire as empirical data collection tools).
9. Gadissa Tesfaye, Quality Assurance in Legal Education: Choosing Lead Organ/s in Responding to the Current Reality and Challeges in ethiopia, *Ethiopian Journal of Legal Education*, Vol. 3, No. 2, 2010, (the author has used interview as an empirical data collection tool).
10. **ፊሊጳስ አይናለም፣ ሳይፋቱ (ዲ ፋክቶ) ፍቺ፣** *Mizan Law Review*, Vol. 2 No. 1, 2008, (this author used interview and key informants to collect empirical data).

empirical works fail to justify, among other things, why interviews and questionnaires are used as data collection tools, the sampling techniques employed to select interviewees and research respondents, the size of the population from which the interviewees and research respondents are selected, the sample size (the number of interviewees and research respondents), and the types of interviews used. Generally, these and other methodological issues are left untouched in these empirical works. Therefore, strictly speaking, it is difficult to consider these works full-fledged empirical works.

Other features of the old LL.B Curriculum can be seen from the perspective of the priority given to legal research as a course, skill oriented and interdisciplinary courses. In the old curriculum, legal research methodology was not offered as a course. Students did not have the opportunity to acquire the necessary skills in legal research in general and empirical legal research in particular. What the students were required to do was just to read senior essays written by former graduating students and adopt the style and the approach used by these former students. However, as it has been discussed above, almost all senior essays written by former graduating students were doctrinal by their nature. Therefore, students did not have the opportunity to learn informally about methods of empirical legal research even from the works of former law graduates. The absence of skill oriented and interdisciplinary courses are two more factors that contributed for the dominant tradition of doctrinal legal research in the old curriculum.

4.2. The Current Trend: The Move to Empirical Legal Research

Though the tradition of legal research in Ethiopian law schools in the past was predominantly doctrinal, we are seeing the trend of moving toward the socio-legal and the empirical. In this section, the author shows how the legal research conducted by Ethiopian law schools is being moved in to the socio-legal and the empirical research. Accordingly, the effect of the revised LL.B. Curriculum, the post graduate LL.M. programs, the effort of law instructors to conduct empirical research, and finally the challenges to empirical legal research faced by Ethiopian law schools will be discussed.

4.2.1. The Effect of the Revised LL.B. Curriculum

The revised LL.B. Curriculum has contributions to the emerging tradition of empirical legal research in Ethiopian law schools. As will be discussed here, the curriculum contributes much for the new trend of empirical legal research because of the incorporation of skilled oriented, interdisciplinary, and legal research courses.[56]

4.2.1.1. Incorporation of Skill Oriented Courses in the Revised LL.B. Curriculum

One of the departures of the newly implemented revised modularized LL.B. Curriculum from the older one is the incorporation of skill oriented courses in the former. Courses like Legal Writing, Legislative Drafting, Pre-Trial, Trial and Appellate Advocacy/Moot Court, and Clinical programs on Restorative Justice, Domestic Violence, Child Rights, and the Right of Prisoners are included in the new curriculum.[57] What these clinical programs share in common is the priority given to the development of interviewing skills, identifying the gap between the law and practice, and field work reporting.[58] The courses also provide students the opportunity to practice their legal knowledge and skills in a real-world working environment.[59] Engaging students in these courses and enabling them to acquire the aforementioned skills will help them considerably to develop the skill in empirical legal research.

4.2.1.2. Incorporation of Interdisciplinary Courses in the Revised LL.B. Curriculum

Offering interdisciplinary courses both in the undergraduate and post graduate programs is very important in terms of its contribution for the development of the tradition of empirical research by students and law instructors are concerned. That is why law schools in the United States, in the United Kingdom, and in other universities around the world are offering

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[56] It has to be also noted that even for the conventional courses, 30% of the course is supposed to be practice-oriented. See sample course syllabi, particularly their assessment and delivery part.

[57] The National Modularized Curriculum of the LL.B Program in Laws, Bahir Dar University, School of Law (hereinafter the National Modularized Curriculum).

[58] *Ibid.*

[59] *Ibid.*

in their postgraduate programs courses like socio-legal studies, feminist legal studies, and critical legal studies.[60] Accordingly, the revised LL.B. Curriculum incorporates some interdisciplinary courses that would encourage and pave the way for both law students and instructors to undertake an empirical legal research. Psychology and Forensic Science, and Sociology and Criminology have been incorporated as interdisciplinary courses in the national modularized LL.B. Curriculum.[61]

The first course, Psychology and Forensic Science, has two parts: Psychology and Forensic Science. The first part of this course endeavors to introduce students with the subject matter of psychology, covering the meaning, goals, historical development, subfields, theoretical perspectives and research methods used in psychology."[62] If students are introduced to the basics of research methods in psychology, they will be able to integrate their knowledge and skills that they have acquired from this course with their substantive legal knowledge. The second part explores the relationship between forensic psychology, law and psychiatry, and the role of forensic science and psychologists in connection with offenders, victims, criminal responsibility, insanity and civil incapacity."[63]A legal researcher who wants to conduct empirical legal research on the law of criminal procedure in general, and on the law of evidence in particular may find it important to import ideas and concepts from this course.

Sociology and Criminology is the second interdisciplinary course. Like the first one, this course has also two parts: sociology and criminology. The course on sociology deals with culture, socialization and society and law, and focuses on the relationship between social and legal systems.[64] The second part of this course presents on the making and breaking of law and society's reaction to such conduct.[65] Therefore, this part of the course will help students to deeply understand the causes and consequences of crime as

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[60] Mike McConville and Wing Hong Chui, *Research Methods for Law*, *supra* note 34, pp. 4-5

[61] The National Modularized Curriculum, *supra* note 57.

[62] *Ibid.*

[63] *Ibid.*

[64] *Ibid.*

[65] *Ibid.*

individual and social phenomena.[66] Students as prospective legal researchers on criminal justice system and constitutional law can benefit much from this course.

4.2.1.3. Incorporation of Legal Research Methodology as a Course in the Revised LL.B. Curriculum

One of the major departures of the revised national LL.B. Curriculum is the incorporation of course on legal research methodology. The course on Legal Research Methods intends to explain the nature, scope, significance, types, tools, and models of legal research and scientific methods of inquiry into the law."[67] Offering a course on legal research methodology equips students with the necessary skill and knowledge that will help them undertake not only empirical legal research but also the doctrinal. As can be understood from the course objectives, students are expected to be able to itemize the basic techniques of selection, collect and interpret primary and secondary data in legal and socio-legal research, and explain the significance and role of legal research in the reform and development of law and in the socio-economic development of the country.[68] The course gives emphasis to empirical legal research that is based on the analysis and interpretation of primary data. Generally, it can be concluded that this course aims at equipping students with the basics of legal research methods.

4.2.2. The Effect of Postgraduate Programs

One of the objectives of graduate programs is to enable students to conduct and original and independent research. Course work, directly or indirectly, should enable students to build an academic foundation that will help them to effectively and successfully undertake their research. In some law schools, a candidate for the graduate program should demonstrate the ability to undertake research in law.[69] The following section surveys the impact of the graduate program in general and legal research methodology as a course in particular.

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[66] *Ibid.*

[67] *Ibid.*

[68] *Ibid.*

[69] A.W.R. Carrothers, *University of British Columbia Law Review*, the Graduate Program, Vo. I, No. 5, 1959-1963, p. 562.

To achieve the aforementioned objective, graduate law schools in Ethiopia are offering a course on legal research methodology. The syllabus of legal research methodology introduces students to the nature of the traditional doctrinal legal research and how it is different from empirical research. The syllabus of almost all law schools contains a topic on empirical research methods, and there are increasing efforts towards inculcating empirical research chapters in the Legal Research Methodology Course.[70] However, the actual time allocated to cover this topic is not adequate.[71] Again, there are reasons for this; notably, inadequate skill on the part of the instructors who handle these courses.[72] For instance, quantitative data analysis and interpretation technique require statistical knowledge. However, it may be a daunting task for most law instructors to deliver a lesson on quantitative research methods.

Another impact of the graduate program on the current trend of legal research can be seen from the perspective of the nature of LL.M thesis written by graduate students. From the content analysis of LL.M thesis of Bahir Dar University School of Law, the author discovers that there is an improvement and progress from year to year towards empirical works. For example, more than 80% the LL.M. thesis conducted in the 2014--15 academic years were empirical. Although the number of empirical works is increasing from overtime, generally, LL.M. students are not confident in conducting empirical research.[73] While a few of them select research topics that require empirical research, most of them prefer to do purely doctrinal research.[74] The reasons for this trend include: lack of empirical research skills; lack of adequate time to carry out empirical research and reluctance to undertake a highly demanding empirical research compared to the doctrinal one.[75] Limited or absence of financial resource is one of the

[70] Interview with Mizanie Abate (PhD), Assistant Professor of Law at Addis Ababa University College of Law and Governance Studies. Dr. Mizanie has taught so many times *Advanced Legal Research Methodology* in the LL.M. Program

[71] *Ibid.*

[72] *Ibid.*

[73] *Ibid.*

[74] *Ibid.*

[75] *Ibid.*

reasons why most LL.M students in the past did not have the interest in empirical legal research.[76]

4.2.3. Empirical Legal Research Conducted by Law School Instructors

Nowadays, law schools are allocating a modest budget to finance the research project of law instructors.[77] However, most of the law instructors have little or no interest in conducting research in general, let alone empirical research.[78] There may be multiple factors for this lack of interest including the financial administration process, lack of skill, the perception that their research output will not be used for various reasons.[79] But few instructors at different law schools are expending serious efforts to undertake empirical legal research. These empirical works are presented at national workshops, seminars and different symposia, and at the university level. Another related problem is that law instructors are not developing the goals of publishing their empirical works. What comes to the minds of most law instructors is that empirical works based on primary data are not worthy of publication.[80] There is also unwarranted stereotyping among legal scholars including professors who consider empirical research as something social science style.[81] For these law instructors, it is only a doctrinal legal research that deserves publication. And they test the quality of their work accordingly.[82] However, compared to the past, there is an improvement.[83]

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[76] Interview with Ermias Ayalew, former Assistant Professor of Law, Coordinator of the LL.M. program, and Head of the Office of Research and Publication at Bahir Dar University School of Law. Ermias had taught *Advanced Legal Research Methodology* in the LL.M program. According to Ermias LL.M. students take into consideration the relatively longer time needed to conduct empirical research as one of the most important factors to completely avoid it.

[77] For example, in 2014/15 fiscal year Birr 800,000.00 was allocated a research fund to Bahir Dar University School of Law.

[78] Interview with Ermias Ayalew, *supra* note 76.

[79] *Ibid.*

[80] Interview with a law instructor (anonymous) at Bahir Dar University School of Law.

[81] Interview with Ermias Ayalew, *supra* note 76.

[82] Interview with a law instructor (anonymous) at Bahir Dar University School of Law, *supra* note 80.

[83] Interview with Mizanie Abate (PhD), *supra* note 70.

Although there are researchers who have done and are doing empirical research; generally, researchers still prefer to doctrinal research.[84]

As it has been continually stressed, the traditional doctrinal legal research persists and legal researchers are trading–off empirical legal research for the traditional legal research. At this point, it is important to look into the reasons why law schools and legal researchers refrain from undertaking empirical legal research. The author borrows the reasons stated by Peter H. Schuck for the poor culture empirical legal research in the law schools of the United States and contextualizes it in our context. Schuck classifies the reasons into two. The first reason is related to the reaction and the concern of different stakeholders. He argues that […] if opinion leaders to whom deans look for legitimation-alumni, the elite law schools, political leaders, the bar, and foundation executives-viewed empirical research as more important than the more traditional modes of legal scholarship, the schools would make it their business to support it."[85] In the context of our system, we can also think of the contribution and the pressure expected from the judiciary and judges, bar associations, regional justice bureaus and the Ministry of Justice, and other stakeholders. Law schools jointly undertake research projects financed by these institutions. The cooperation between law schools and different institutions can be seen as an opportunity to develop the culture of empirical research.[86] The contribution and the pressure from judges, practitioners and public prosecutors are also highly important for the development of the culture of empirical research if the forum for the interaction between legal academics and these professionals is created.

Under the umbrella of the second reason: inconvenience, lack of control, tedium, uncertainty, ideology, resources, time, tenure and training are the disincentives for avoiding empirical legal research.[87] The following paragraphs a discuss some of these disincentives to show how they

[84] *Ibid.*

[85] Peter H. Schuck, Why Don't Law Professors Do More Empirical Research? *Journal of Legal Education*, Vol. 39, 1989, p. 331.

[86] From his experience the author knows that research problems in the financed research projects need empirical inquiry.

[87] *Supra* note 85, p. 331.

negatively affect the development of empirical legal research in our law schools.

Inconvenience: Doing empirical research projects is more inconvenient than the traditional doctrinal legal research. To effectively undertake doctrinal legal research what the researcher needs, among other things, is good library collection and access to the internet. It is enough for the doctrinal researcher to confine himself to his desktop. But if someone is interested in doing empirical works she has to go out of her office and the library and go to the field to collect data. Data collection as one of the most important steps in empirical works is complicated and inconvenient in terms of time money and other resources.

Lack of control: In doctrinal works the researcher has the full control over his ideas, opinion and arguments. With empirical work, however, the scholar's ideas may be the least of her problems.''[88] With empirical works data collectors, research respondents and other participants are not in the direct control of the researcher. This would obviously push the researcher away from empirical studies.

Tedium: According to Schuck, tedium is the third disincentive. As it has been mentioned, before our students, both graduate and under graduate students, find it tedious to undertake empirical works. Our students have little interest to engage themselves in empirical works.[89]

Uncertainty: Because of the different steps involved, ranging from the data collection to interpretation, in empirical works the researcher may not be certain about the findings of the study. The researcher has to wait until the data are analyzed and interpreted. With empirical studies, however, both the process and the outcome are totally different; the researcher knows only after the course of the study what the outcomes of the research will be.

Resources and time: Empirical studies are time consuming and cost the researcher a lot in of financial and other resources. The researcher needs to finance different activities in the course of data collection e.g., to pay,

[88] *Ibid.*

[89] Interview with Muhammed Daud, Lecturer of Law and former LL.M. student at Bahir Dar University School of Law.

among other things, for data collectors, research supervisors, research respondents and participants, and for transport and accommodation. Unless these and other related costs are funded, it will be hard for the researcher to shoulder them single handedly. Data collection as one of the most important steps in empirical works is burdensome in terms of time, money and other resources. [90]

5. Challenges to Legal Research Faced by Ethiopian Law Schools

5.1. Absence of Basic tools to find the Law

One of the features of legal research that distinguishes it from research in other disciplines is the importance and the use of the law as an ingredient or as a source of data. Therefore, if the law is the principal source of information in legal research, the researcher should be equipped with the basic tools to find the law. The researcher needs to have the necessary skills of finding the law. King George III once stated that 'if he asked a legal question of a layman, he found that he neither knew the law nor where it could be found; whereas, if he asked the same question of a lawyer, he observed that he also did not know the law, but that he did know where to find the law.'[91] From what King George III stated we can understand that one of the skills that a legal researcher needs to acquire is the means and the tools of finding the law.

Legal encyclopedias, case digests, legislation annotators, and online legal information aggregators are the basic tools to find the law as secondary data. These tools are highly used by law schools especially in the United States.[92] When we come to our system we do not have a legal encyclopedia, case digests or a legislation annotator.

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[90] Interview with Worku Yazie, Assistant Professor of Law and former Editor-in-Chief of Bahir Dar University Journal of Law.

[91] Jelf, *Where to Find the Law*, cited in Frank Hall Childs, *Where and How to Find the Law to the Use of the Law Library*, p. 1929.

[92] *The English and Empire Digest* in the UK, *the Australian Digest* in Australia, *Abridgment of New Zealand Case Law* in New Zealand, the *Canadian Encyclopedic Digest* and *the Canadian Abridgment* in Canada, and the *American Digest System* in the United States are the most important case digests.

Legal encyclopedias are publications that cover the law of a certain jurisdiction and support the discussion with primary legal sources such as legislation and case laws.[93] In other jurisdictions it is common for legal researchers first to refer to legal encyclopedias as a starting point in their research journey. *Halsbury's Laws of England* (published in the United Kingdom by LexisNexis Butterworths), *the Laws of Scotland: Stair Memorial Encyclopaedia*, *Halsbury's Laws of Australia*, *Halsbury's Laws of Hong Kong*, *Halsbury's Laws of India* and *Laws of New Zealand*, all published by local LexisNexis companies are the most important legal encyclopedias used in other jurisdictions.[94] Therefore, legal encyclopedias can be used as tools of finding secondary legal data that define and explain primary legal sources. However, unlike the practice in other jurisdictions, in Ethiopia there are no legal encyclopedias. Therefore, it would be difficult, especially for an average researcher, to identify the relevant primary legal sources that would define and explain the problem being investigated.

The second tool that can be used to find the law is case digest. This tool does not only provide an overview of an area of law it also it digests case facts and holdings, and categorizes them under a comprehensive legal taxonomy.[95] Therefore, one can imagine how much easier it may be for a legal researcher to find the appropriate and relevant case law which will help support an argument with judicial authority. In Ethiopia, there has been an attempt by the Federal Supreme Court to publish the decisions of the court. The publications are available in both hard and soft copy. Publishing the decisions of the court can be taken as one step forward; however, that is not enough unless an action has been take by the concerned bodies to prepare the case digests.[96]

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[93] Mike McConville and Wing Hong Chui, *Research Methods for Law, supra* note 34, p. 24.

[94] *Ibid.*

[95] *Id.*, p. 25.

[96] The Justice System and Legal Research Institute, the Ministry of Justice, the Federal Supreme Court, the Consortium of Law Schools can be taken as interested stake holders as far as the preparation case digests on the decisions of federal courts is concerned. Regional Justice Bureaus, Supreme Courts, justice system and legal research institutes and law schools in the respective regional states can take the initiative of preparing case digests in the regional states.

One of the practical problems that a legal researcher may face is the means of knowing changes to legislation. Legislation can be amended and repealed. Legislation annotators are also used to check the currency and the judicial consideration of legislation.[97] Therefore, there has to a means of knowing changes to legislation. Legislation annotator is the law finding tool which is used in other jurisdictions to know changes to legislation.

In addition to the aforementioned traditional law finding tools, the access to online databases is an important source of information. The number of law schools that have access to online legal information aggregator in general and subscribed legal information aggregator in particular is very small.[98] Another related challenge is a poor collection of law school libraries on legal research and empirical legal research. From this survey, the author also understands that law schools do not have an adequate library collection on legal research methods and particularly on empirical legal research. There is lack of textbooks, journal articles and periodicals, and other reading materials on these areas.[99]

5.2. Absence of Uniform Rules of Citation

Another challenge encountered by Ethiopian law schools today is the absence of a uniform rule of citation. Whenever a researcher takes the idea or the opinion of others, the researcher must give credit to the owners of the idea and properly cite the sources from which the idea was taken. This enables the reader to find and read the material that has been cited. Citing the sources from which the idea has been taken is not an end by itself. We need to a have also a conventional way of showing or citing our sources. Almost all disciplines have adopted their own conventional way of citing to authorities. Law schools in other jurisdictions have successfully adopted

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[97] Mike McConville and Wing Hong Chui, *Research Methods for Law, supra* note 34, p. 27.

[98] For example the Law School at Bahir Dar University had the opportunity to the Hein online legal information aggregator. However, the School could not renew the terms of the contract because the practical problems in relation to the online procurement of the service. It should be also born in mind that there are free access online legal information aggregators. But compared to the subscribed ones the source of information that can be accessed from these data bases may be limited.

[99] This author has taught legal research methodology in the LL.B and LL.M programs. As the library collection at Bahir Dar University is poor, he has provided his students with the soft copy of books, journal articles and other reading materials.

their own uniform rule of citations. Some of these rules of citation have been used nationally and even internationally. A *Uniform System of Citation* or the *Bluebook* and the ALWD Citation Manual are widely used by law schools in the United States and in other countries.[100]

When we come to the experience of Ethiopian law schools they have neither adopted a national uniform rule of citation nor adapted a rule of citation used by law schools in other systems. The author has surveyed *Bahir Dar University Journal of Law*, *Ethiopian Journal of Legal Education*, *Journal of Ethiopian Law* and *Mizan Law Review* to show the absence of uniform rule of citation in Ethiopian law schools. *Bahir Dar University Journal of Law* provides rules of reference or manuals of citation. The rules of reference guide the writer how books, contributions in edited books, articles in journals, legislation, codes, treaties, resolutions, cases and internet sources can be cited. The manual gives examples of citation of the aforementioned sources. The manual also provides how quotations, footnotes and references in footnotes can be used.[101] The author observes that the rules of citation have been properly observed in almost all issues of the journal. *Journal of Ethiopian Law* also adopts the same rule of citation.

Unlike Bahir Dar University Journal of Law and *Journal of Ethiopian Law*, the *Ethiopian Journal of Legal Education* and *Mizan Law Review* do not have their own manual on rules of citation. The author even observed inconsistency of citation in *Mizan Law Review*. For example, two authors use their own rules of citation in citing journal articles. There are also some inconsistencies of citation in the *Ethiopian Journal of Legal Education*. These journals lack standardization, which is one of the principles of citation form.[102] We can understand two important points from this: the first one is the absence of national rule of citation that can be used by all Ethiopian law schools and the second one is that some law schools

[100] The *Bluebook* has been adopted by the Review Association at Harvard, Yale, Colombia and the University of Pennsylvania. And the ALWD Citation Manual is developed by the Association of Legal Writing Directors of the United States.

[101] For more information see the citation manuals of *Bahir Dar University Journal of Law*.

[102] For more information on the principles of citation form see Paul Axel-Lute, Legal Citation form: Theory and the Practice, *Rutgers Law School Library Journal,* Vol. 75, 1982.

(journals) even fail to adopt a consistent rule of citation. This will negatively affect the effort of production and dissemination of knowledge.[103]

Concluding Remarks and Suggestions

It was not only the experience of Ethiopian law schools but it was also the culture of law schools in other jurisdictions to stick to the traditional doctrinal legal research. These days, it has become clear that it is not possible to properly address all legal problems by using doctrinal legal research approach. To properly understand the law it is important to investigate the impact of the law on legal institutions and the impact that the law has created on the society it is necessary to employ one of the methods in socio-legal or empirical legal research. These issues cannot be properly addressed by conduction only the traditional doctrinal legal research.

Accordingly, in our law schools, there is a move from the traditional doctrinal legal research in to the socio-legal empirical legal research. In the old LL.B. Curriculum legal research methodology was not offered as a course. In the new modularized LL.B. Curriculum legal research methodology, interdisciplinary and other skill oriented courses are offered. The contribution of these courses in equipping students with the skill of socio-legal empirical legal research is clear. A course on advanced research methodology is also offered for post graduate LL.M. students. In the course an emphasis is given to the socio-legal empirical legal research. Post graduate LL.M. students are also assigned to develop a research proposal by using empirical legal research methods. From the survey of the LL.M. theses, it can also be seen that most of the works of students are empirical. There are also some attempts by law instructors to undertake empirical legal research. Unfortunately, the empirical works done by law instructors are infrequently published and disseminated. The culture of getting empirical works published is at its budding stage of development.

Even if there is a move from the traditional doctrinal legal research toward the empirical, there are a number of challenges that law schools have faced.

[103] See the 2006 Legal Education and Training Reform Document, *supra* note1, to know more about the challenges and the standards it set for future improvement.

One of these challenges is lack of a sufficient library collection. There are very few reference and teaching materials on empirical legal research. The second challenge is absence of basic tools that can be used to find Ethiopian laws. In the current system, there are no legal encyclopedias, case digests, and legislation annotators. The existence of these and other law finding tools make it more feasible for legal researchers to find and use the relevant law. As we are in the age of information, access to the internet in general and subscribed internet legal sources in particular, is irreplaceable. But most of the law schools are not connected to the internet. Even those which are connected to the internet do not have access to the subscribed legal information databases.

In order to overcome the problems related to lack of specific attention to empirical legal research, I suggest that law schools and other relevant institutions should organize trainings on empirical legal research. Law journals, reviews and proceedings are also expected to encourage the publication of empirical works. I also suggest that adequate and encouraging budget should be allocated for those instructors/legal professionals who seek to undertake empirical legal research. Finally, law instructors must ready themselves to learn about empirical research methods and skills in preparation to become empirical researchers.

Converting Old Possessions into Lease System in Ethiopia: Decades of Unsuccessful Endeavors

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Abstract

Dual urban land tenure arrangements have continued to exist in urban centers of the Ethiopia since the beginning of 1990's. However, despite the fact that the lease system began to be implemented for more than a decade ago, we are still witnessing the existence of urban land lease holdings and old possessions side by side. The attempt to have a unified tenure arrangement began with the current government following the enactment of the first urban land lease proclamation in 1993. However, this attempt has turned out to be unsuccessful so far, due to various reasons. Similarly, an unsuccessful effort was witnessed during the implementation period of the 2002 subsequent urban land lease proclamation. However, like its preceding urban land lease laws, even if the law aims to achieve otherwise, no feasible change has been observed in unifying the urban land tenure system after the coming into force of the existing Urban Lands Lease law in 2011. Using a doctrinal approach, this article aims to examine why the government is unable to start the process of implementing the law in unifying the urban land tenure system. More specifically, the major possible challenges the government may encounter in converting old possessions into lease holdings and the corresponding benefits that can be accrued to the lease holders, as well as the government, will also be addressed. Moreover, in order to substantiate the argument forwarded in this article, interviews were also conducted with relevant experts in the field from the two concerned authorities of Amhara region. Based on the primary data and analysis of various legal documents, the authors argue that if there is a need to have a unified tenure arrangement in urban areas of the country through converting old possession into lease holdings and if there is a need to rectify previous failures, especially after the enactment of an unambiguous and unequivocal regulation by the Council of Ministers, then a different approaches and strategies must be adopted.

Key Words: Old Possession, Lease System, Urban Land, Conversion

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1. Introduction

As is the case for many developing countries, land has a special place in the socio-economic and political life of Ethiopians. If we take the economic facet only, land has been a source of wealth, economic growth, employment and a source of basic survival for an overwhelming majority of the population of the country and it will remain so, at least, for foreseeable future.[1] In relation to urban land, the country is witnessing rapid level of urbanization which is drastically changing the physical, social, economic, political and administrative structures of the cities.[2] After assuming power, in transforming the tenure arrangement, the Transitional Government of Ethiopia enacted a new urban land governing law in 1993[3], where the first urban lands lease holding law was promulgated. Unlike the permit system that was operational during the Derg regime, this new urban land law has introduced a lease system and dating this moment, many towns in Ethiopia are now governed through this lease system.[4]

This first proclamation, however, was replaced by Proc. No. 272/2002.[5] Since land and interests in it are dynamic in nature, the above proclamation could not govern some issues that occurred after its promulgation. Hence, at the end of 2011, the federal parliament (the HPR) enacted the current urban land lease proclamation.[6] Apart from bringing all forms of land tenure systems outside of the lease system to an end, the legislation requires the conversion of all previous holdings in the form of permit system to

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[1] Bacry Yusuf et al, Land Lease Policy in Addis Ababa, 2009, p. 14, in Yared Berhe, Conversion of Old Possessions to Leasehold and Its Implication on Tenure Security of Holders of Old Possessions, *Mekelle University Law Journal*, Vol.3 No. 1, 2015, p. 91

[2] Ibid

[3] Proclamation No 80/1993, a proclamation to provide for the lease holding of urban lands, 1993 (hereinafter cited as Proc No 80/1993)

[4] Daniel W/G, *Ethiopian land law text book*, Bahir Dar University, Institute of Land Administration, 2013, p. 77

[5] A proclamation to provide for the re-enactment of lease holding of urban lands, Proclamation No. 272/2002, Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, 8th year No. 19, Addis Ababa, 14th may, (hereinafter cited as Proc. No. 272/2002)

[6] Federal Democratic Republic of Ethiopia, Proclamation No. 721/2011, a proclamation to provide for lease holding urban lands, Federal Negarit Gazeta (hereinafter cited as FDRE Lease Proc No 721/2011)

leasehold.[7] Though these proclamations (Proc. No.80/1993 and Proc. No.721/2011) opt for the conversion of old possessions to the lease system, thereby, urban centers will be governed through uniform systems, this has been a difficult task since the laws are designed with vague expressions with reference to old possessions and there is always difficulty of implementation. Converting old possessions to the lease system was not an easy task in the first two land lease proclamations and is same is true in the present proclamation also. The conversion has been considered one of the measures that the new proclamation has introduced towards the uniformalization process in the current lease proclamation and a challenging task with possible discontentment from the general public.[8]

Recently, due to little action taken by the government, the overall issue of old possessions has become a source of worries for urban landholders and a point of discussion for scholars from different disciplines. However, so far, there are few studies done by scholars concerning the basic issues associated with old possessions in the prevailing lease system in Ethiopia. The works have incorporated issues on conversion of old possessions into lease system though they far from comprehensively discuss the possible issues during conversion of old possessions to the lease system. In order to present the main ideas of this article and its approach to the issue, let us first overview some of the previous works on the issue. In this regard, Fikerabinet Fikadu's work titled, "Ethiopian Urban Land Policy and Laws; Constitutionality of Access and Land Rights", addressed issues related to the size of old possessions; expansion of old possessions; limitations and restrictions on transactions and mortgaging properties attached with old possessions and the manner of conversion of old possessions to the lease system. However, the discussions in his work did not extensively address the challenges of conversion of old possessions to the lease system; nor did it address how the conversion is treated under subsidiary legislation nor the possible benefits that may result from conversion and strategies to be adopted during conversion of old possessions to the lease system.

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[7] Yared Berhe, Conversion of Old Possessions to Leasehold and Its Implication on Tenure Security of Holders of Old Possessions, *Mekelle University Law Journal*, Vol.3 No. 1, 2015, p. 89

[8] Belachew Mekuria, Overview of the Core Changes in the New Ethiopian Urban Land Leasehold Legislation, *Mizan Law Review*, Vol. 5 No. 2, Dec. 2011.

In Addition, Daniel W/Gabriel in his PhD Thesis, titled "Land Rights and Expropriation in Ethiopia", discussed the fate of old possessions in a lease system, already adopted in Ethiopia, within a single page. The paper defined "old possession and the manner of transfer of old possessions to the lease system in pursuant to the new urban lands lease holding proclamation. Since the paper's central theme was not to deal with the issue of old possessions, it left many issues untouched concerning old possessions.

Therefore, this article deals with the various benefits that the government, individual landholders and the entire community might acquire following the conversion of old possessions into the lease system; the possible challenges that may actively work against successful conversion of old possessions to the lease system (taking into account the experiences of the previous lease proclamation); the strategies that shall be adopted before the government enters into total conversion of old possessions to lease system if the Council of Ministers enacted the expected regulation to this effect; the position of subsidiary legislations in relation to providing rules modalities for conversion of old possessions to lease system and others.

Hence, this article examines the challenges and prospects in converting old possessions into the lease system primarily in the current Urban Lands Lease Holding Proclamation. Though the sources of data used in this article are both primary and secondary, it is generally a doctrinal legal analysis. Scrutiny of urban land governing laws of the past and the present with specific attention to old possessions; moreover, relevant information was also collected from various websites and different published and unpublished materials, journals, magazines and newspapers. Also, the authors interviewed pertinent experts on the field from Bahir Dar City Administration and the Amhara National Regional State Bureau of Urban Development. Finally, a descriptive method is employed in order to analyze the data obtained from the above sources.

To that end, this article is organized into four parts. Part one is the introduction; the second part is devoted to describe the manner in which the three urban land leasehold laws have managed the issues of old possessions. The third part is discusses issues relating to conversion of old possessions into lease system and, in this part, a particular emphasis is allotted to the currently governing urban land leasehold laws of the country. Furthermore, the

implications of conversion of old possessions and, in some cases, the reasons behind the hesitation of the government to have immediate action to handle the conversion including the possible challenges that can be encountered in the process and the possible benefits are considered. Lastly, concluding remarks and recommendations are provided.

2. Old Possessions in the Three Urban Land Lease Holding Proclamations

The urban land tenure arrangement of the country has gone through different changes during different regimes. The changes have been necessitated due to the prevailing socio-economic conditions of the country but it also swing along with the political ideology of the ruling government. For instance, Emperor Menelik II promulgated the 1907 decree, which had duly recognized private ownership of land that allowed wider rights in the use, inheritance and sale of urban lands. The edict was mainly declared by the emperor to give security of land rights and to authorize and enable those countrymen and foreigners to buy land in the town of Addis Ababa according to the law.[9] Apart from private ownership of land during this era, there were also other systems of urban land ownership arrangements.[10] The era of Emperor Haile Sellasie I also recognized private ownership of land. Article 24 of the 1931's Constitution guaranteed private land ownership rights of individuals and protected landholders from begin deprived by anyone of their movable or land property unless for public purposes.[11] Private ownership of urban land was also recognized under Article 44 of the 1955 Revised Constitution and it was also expressly recognized under the 1960 Ethiopian Civil Code.[12]

Nonetheless, following the overthrow of the imperial regime in 1974 with the so called slogan "land to the tiller", the Derg Regime held the throne and took

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[9] Brightman Gebremichael, *Heartrending or Uplifting: The Ethiopian Urban Land Tenure System Reform of post-1991 and Its Reflection on Tenure Security of Permit Holders*, paper submitted to review , 2015, p. 3

[10] These tenure arrangements may include government land, church land, communal land, rist and gult lands.

[11] See Article 27 of the constitution of the Empire of Ethiopia, Negarit Gazetta, 16 July 1931

[12] The Civil Code of the Empire of Ethiopia, Proclamation No.165/1960 Neg. Gaz. Extraordinary, year 19 No. 2 (hereinafter Ethiopian Civil Code), Art. 1126 & ff deal with the issues on private ownership of movable and immovable properties

different actions that radically altered the social, political and economic structure of the country. One such reform was with regard to the urban land tenure system. The slogan, though primarily seeking a change in the rural land tenure, the military government's action extended to reform the urban land tenure to which formally changed the nature of urban land rights.[13]

The proclamation was a new introduction in the urban centers; its central theme being nationalization of all urban lands without payment of compensation and promulgating public ownership of urban land.[14] During this regime, the permit system was the prominent means to access urban land by the citizens who wished to build a dwelling. The lands distributed by the military government to individuals , in addition to the holdings acquired during the imperial regime, have been a continued base for the subsequent development of old possessions in the different urban land lease holding proclamations of both the transitional and the current governments.

2.1 Old Possession under Proclamation No. 80/1993

According to the preamble of this proclamation, the need for the coming into force of the law includes, the high rate increment of urban dwellers which resulted in unplanned expansion of urban centers which further complicated problems associated with the allocation of urban land; shortage of existing houses for residence purposes and the need to build houses expeditiously, and so forth. Concerning its scope of application, the proclamation rules that it shall not apply to urban lands previously utilized for building dwelling houses.[15] Immediate application of the lease proclamation on possessions held in permit was not envisaged and in strengthening this fact, the Proclamation proclaimed the following:

> *"…the regulations of urban land holding for private dwelling houses which were in force prior to the enactment of the present*

[13] Brightman Gebremichael, 2015), supra notes 9.

[14] Proclamation No. 47/1975, the "Government Ownership of Urban Lands and Extra Houses Proclamation, July 26, 1975, Arts. 3(1), 3(2) and 13(1) reveal that public ownership of urban land had been recognized and nationalization of all urban lands (without compensation) and extra-houses was made possible and if necessary another single business house. Due to the approaches adopted under the proclamation, an individual or family can no longer own more than a single dwelling house as all "extra" houses were taken by the government.

[15] Proc. No. 80/1993, supra notes 3, Art. 3(1)

> *proclamation shall continue to be in force, provided, however, that where a dwelling house is transferred to another person in any manner other than inheritance, the person to whom the said house is transferred shall hold the land in accordance with the lease holding system provided for in this proclamation".*[16]

According to the above provision, transfer of old possessions, in any modality, to third party (save inheritance) will result to an immediate conversion of the entire possession into the lease system. Still, however, no clear information about what might happen when some part of the possessions is transferred to third parties, while the remaining parcel is held by its holder. It usually happens that landholders prefer to transfer part of their holdings to others; thereby generating money in return. In such a case, there were no clear rules to govern the status of the remaining/non-transferred land or the entire land at hand.

Concerning buildings that were built for a purpose other than dwelling houses, the proclamation further rules that "*any person who, prior to the coming into force of the proclamation lawfully holds an urban land other than that which is designated for the construction of dwelling houses, shall apply to the appropriate town administration within the time specified by the said administration in order to get for the urban land he holds a lease holding title document in accordance with Article 6 of the new proclamation*."[17]

Hence, unlike lands used for dwellings, lands used for other purposes will be automatically changed to the lease system upon application of the landholder in accordance with Article 6 of the proclamation. Even if lease was the prime mode of acquisition of land after the coming into force of the proclamation, exceptionally, land may be given without lease arrangements if it is to be utilized for investment that the government encourages or for social services establishments or for other purposes which directly benefit the public.[18] But the reading of various provisions in the proclamation does not clearly show whether these lands should be treated by the prevailing lease system or the permit system. Also, there was no clear indication regarding the manner of the

[16] Ibid, Art. 3(2)

[17] Ibid, Art. 15(1)

[18] Ibid, Art.13

possible use of a land in an old possession as collateral; the proclamation did better in determining the use of a lease holding land as collateral.[19] The proclamation was not able to attain wholesome conversion of old possessions into the lease system which was aggravated due to the absence of a regulation relevant to implement the proclamation.

2.2. Old Possessions under Proclamation No. 272/2002

Since Proc. No. 80/1993 failed to achieve objectives such as enhancing urban land revenue, ensuring transparency in land transfer, promoting economic development of urban centers through involvement of investors, and the need to widen the scope of the lease system to cover permit holdings (the conversion of old possession into the lease system), it was replaced with Proc No. 272/2002. As stipulated in its preamble, the objective to introduce this later proclamation was to provide market driven exchange value. It was also assumed to encourage investment, provide housing and infrastructure, control undesired expansion of cities, and combat speculation and non-transparent system of plot allocation. The prevalence of good governance is assumed to be a fundamental requisite for the development of an efficient, effective, equitable and well functioning market. With this system, the government was expected to collect enough money to run urban infrastructure and transfer all urban landholdings into the lease system.[20]

Unlike its predecessor, this proclamation has a clear provision which declares that it will be enforced on old possessions as well. On this basis, the proclamation shall be applicable to an urban land held by the permit system, or by other means prior thereto, as well as to an urban land permitted thereto.[21] Pursuant to this provision, the scope of application of the proclamation shall include urban lands held by the permit system. The essence here is different treatment of old possessions in isolation with leased lands was not envisaged and it opted to govern all the land in urban centers by the lease system.

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[19] Ibid, Art. 10

[20] Sileshi Tefera et al, *Land Lease Policy in Addis Ababa*, Produced and distributed by the Addis Ababa Chamber of Commerce and Sectoral Associations with financial support from the Swedish Agency for International Development Cooperation, Sida, 2009, p. 4

[21] Proc No 272/2002, Supra notes 5, Art. 3(2)

The exception, however, is any urban land which has not been under a lease holds system, as per the time and conditions to be set by the concerned region or city government.[22] That means based on the time and conditions to be determined by concerned regions or city governments, there will be some urban lands that will not be governed by the lease system. Also, the application of the proclamation for any town, which has not been under a lease hold system, would be as per the time and conditions to be set by the concerned region or city government.[23]

Unless for either of the above scenarios (which are dependent or conditional upon the possible decisions of the city or regional governments), the proclamation will be applicable for urban lands held in permit too; this could be considered a deviation from its predecessor. Since, at least, permit holders shall effect payments for the lease price and enter into lease contracts with the government, this law seems to follow unfair treatment of possessions taken in permit as it allows them to be governed by the lease system. In fact, even during the periods where the previous legislation was in force, it was not an easy job to convert old possessions into the lease system. Taking the above stipulations into account, it could be argued that the following questions were not properly addressed in this proclamation.

- Does it mean the operation of the proclamation for old possessions is in reality automatic save the exceptional circumstances above given the fact that it was not possible to administer the entire land by lease system in the periods where proclamation No. 80/1993 was in force?
- Is it practically possible to employ similar principles for leased lands and permit possessions given these two holdings are different in various respects. Or do the provisions of the proclamation equally apply to old possessions and other lands alike (will similar principles shall apply for the two simultaneously)?
- Can we imagine the proclamation can properly administer the entire urban land without prior conduct of successful conversion

[22] Ibid, Art. 3(2)(a)

[23] Ibid, Art. 3(2)(b)

of urban lands into the lease system? Or how can the proclamation be enforced on permit holdings without prior conversion of the holding into the lease system?

2.3. Old Possessions under the Current Urban Land Laws

In the present land tenure arrangement of the country, for urban lands, a leasehold system is introduced and for rural lands, a holding type of land use right for an unlimited time is applied. This shows that the rural and urban lands are independently administered and governed by different institutions. Concerning the status of old possessions, controversies exist when one looks at the currently governing proclamation which is enacted with various lease principles in a motive to ensure a unified land tenure arrangement in urban centers of the country.[24]

2.3.1 What is an Old Possession?

Old possession is defined under the current proclamation as "*a plot of land legally acquired before the urban center entered into the lease hold system or a land provided as compensation in kind to persons evicted from old possession.*"[25] According to this definition, there are two types of holdings which are treated as old possessions. The first is related to those lands that were acquired before a certain urban center entered into a lease system; and the second is related to lands that an old possession holder acquired in the form of compensation for the lands taken away by the government through expropriation.

Thus, all land acquired and held during the imperial era, the Derg era, and after that, outside the lease system, is considered as old possession. Besides, replacement land given to owners whose land was expropriated may also be considered as old possession since the land was given without lease contract.

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[24] FDRE Lease Proc No 721/2011, Supra note 6, Art 4 listed the principles of lease in Ethiopia. accordingly, the right to use of urban land by lease shall be permitted in order to realize the common interest and development of the people; the offer of lease tender and land delivery system shall adhere to the principles of transparency and accountability and thereby preventing corrupt practices and abuses to ensure impartiality in the process; tender shall reflect the prevailing transaction value of land; the urban land delivery system shall give priority to the interests of the public and urban centers to ensure rapid urban development and equitable benefits of citizens and thereby ensure the sustainability of the country's development.

[25] Ibid, Art. 2(18)

Although it is difficult to put the exact figure, the number of old possessions in Addis Ababa, for example, may constitute half of the total properties in the city.[26]

But nothing is implicated in the proclamation concerning the status of those urban lands that were acquired outside the lease principles before the coming into force of this system in the country but allowed to continue in that state by an appropriate organ.

In the same fashion, the Amhara Regional State Urban Lease Implementation Directive defined old possession as:

> *"ነባር ይዞታ" ማለት የከተማ ቦታ በሊዝ ስርዓት መተዳደር ከመጀመሩ በፊት በሕጋዊ መንገድ የተያዘ እና ሊዝ ተግባራዊ ከሆነ በኋላ ለነባር ይዞታ ተነሺ በምትክ የተሰጠ ቦታ ወይም ሊዝ ከመተግበሩ በፊት የተያዘ ሆኖ አግባብ ባለዉ አካል ከሊዝ ስሪት ዉጭ እንዲቀጥል በህግ እዉቅና የተሠጠዉ ቦታ ነዉ።"*[27]

This definition, similar to what is provided in the federal proclamation, recognized lands gained in permit, and those lands given as a replacement to the holders due to expropriation decisions, as possessions in permit. In addition to the federal proclamation's definition, those urban lands, that were acquired outside the lease system before the coming into force of the lease system in the country, but allowed to continue in that state by an appropriate organ, are properly addressed and they are simply old possessions that shall continue in that state until conversion is made. Hence, in this legal instrument, old possessions are defined to encompass more lands above and beyond the federal proclamation's definition.

The Addis Ababa city land lease regulation has defined old possessions in a similar fashion with the federal urban lease proclamation as follows:

> *"ነባር ይዞታ" ማለት ከተማው በሊዝ ስርዓት መተዳደር ከመጀመሩ በፊት በሕጋዊ መንገድ የተያዘ ወይም ሊዝ ተግባራዊ ከሆነ በኋላ ለነባር ይዞታ ተነሺ በምትክ የተሰጠ ቦታ ነው።*[28]

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[26] Daniel W/G, 2013, Supra notes 4, p. 77

[27] See the Amhara Regional State Industry and Urban Development Bureau Urban Land Lease Implementation Directive No. 1/2005, Art. 2(6)

[28] Addis Ababa City Administration urban land lease regulation No.49/2004, Art. 2(8)

From all the above definitions given to old possessions, it can inferred that there is a huge area of lands obtained during the permit system and which is now falling to the fate of conversion to the lease system when the proposed guideline is enacted by the Council of Ministers for mass conversion.

2.3.2 The Scope of Proclamation No. 721/2011 in Governing Old Possessions

The proclamation has no immediate or automatic application to all urban areas in the country. A grace period is provided to some towns and the task of assigning these towns is left to regional cabinets. For this, the proclamation specifies that:

> *"Regional cabinets may specify urban centers to which this proclamation remains inapplicable for a certain period: provided, however, that such transitional period within which the proclamation remains inapplicable in any urban center may not be more than five years starting from the date of the coming into force of this proclamation."*[29]

Hence, to the maximum of five years dating the introduction of the proclamation, there may be some urban centers where the proclamation will not automatically apply for which they will be governed through the permit system. In these towns, therefore, whatever kind of transfer is made on the land, it will not result the conversion of the old possession into the lease system. However, when the urban centers supply land in this transitional period, the delivery shall be through tender and the benchmark shall be the annual land use rent of the locality.[30] In general, dating the coming into force of this new proclamation, leasehold is the only means of land acquisition mechanism in Ethiopia as it is clearly stated in the proclamation that "without prejudice to the provisions of Article 6 of this Proclamation, no person may acquire urban land other than the lease holding system provided under this Proclamation".[31]

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[29] FDRE Lease Proc. No. 721/2011, supra notes 6, Art. 5(4)

[30] Ibid, Art. 5(5)

[31] Ibid, Art. 5(6)

3. Conversion of Old Possession into the Lease System

3.1. Modalities of Conversion

In the current lease proclamation, it is said that the fate of converting old possessions into the lease system will be decided by the Council of Ministers upon a detailed study to be made in the future.[32] In other words, all "old possessions" will not be converted in mass at once to leaseholds before the detailed study is conducted in the future. The proclamation, in the meantime, requires the conversion of old possessions into the lease system in one of the following events whether there is total conversion or not.

- Where a property attached on an old possession is transferred to a third party through any modality save inheritance (Article 6.3)
- Informal settlements that have been regularized pursuant to the regulations of regions and urban administrations (Article 6.4)
- Where an application to merge an old possession with a lease hold is permitted (Article 6.6)

The first modality for conversion of old possessions is when a property is transferred to a third party and property transfer in this case includes sale, exchange or donation, except for inheritance. It must be noted that since land is not saleable, the subject matter of "transfer" is not the land itself but the immovable on the land, i.e. building. From this perspective, whenever a house resting on old possession is sold, exchanged, or donated, the new owner shall possess the land on lease basis.[33]

On the other hand, when an informally held possession is regularized by an appropriate organ, this possession will be converted to the lease system. Land may be held and construction of houses may be carried out without the permission of the urban land administration offices. Normally while houses are found built without the permission, the usual measure taken in such cases is demolition of the informal settlement. However, in some cases, there might be measures to regularize and formally register these

[32] Ibid, Art. 6(1)

[33] Daniel W/G, 2013, supra notes 4, p. 78

settlements.[34] Hence, the regularized possessions will be governed as per the principles in the lease system. And the third possibility where an old possession will be converted to the lease system is where an old possession is to be merged or amalgamated with a piece of land already leased. Hence, even if these two parcels have been governed through different systems (one through the lease system and the other in permit), once they are merged or amalgamated, the entire possession will be converted to the lease system.

3.2. Issues on Conversion of Old Possession to the Lease System

Article 6 of the new proclamation is meant to govern the conversion of old possessions into the lease hold system. The rules for total conversion shall be made by the Council of Ministers upon a detailed study submitted by the Ministry of Urban Development and Construction.[35] Unlike Article 5(4) of the proclamation, which sets the maximum time limit of five years within which the urban centers may suspend the enforcement of the proclamation, Article 6(1) except providing the possibility that the Council of Ministers may come up with the urban land conversion modalities into a lease system, it does not set the time limit when the regulation would be issued. The provision also states that the process of enacting the regulation should not preclude the revision of the rental rate applicable to old possessions.

This particular provision may have multifaceted implications. To begin with, since the time limit is not set yet and no visible action is begun by the authorized organ, the process of enacting the regulation may take a very long time. Due to this, the old possession tenure arrangement will continue to exist along with the lease system for a period that cannot be easily predicted. In addition, the inclusion of the last statement on the provision regarding the possibility of making revision on the old possession rental amount may also indicate that such regulation may not be soon reached since there is a possibility to increase the rental amount to be paid on old possessions leaving the possibility of providing conversion rules on timely basis. Hence, there is a possibility of delay of enacting the much expected regulation.

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[34] Id

[35] See FDRE Lease Proc. No. 721/201, supra note 6, Arts. 6(1) and 2(22)

Moreover, when the provision indicates that "the modality of converting old possession into leasehold shall be determined by the Council of Ministers …" it is confusing in terms of the type and nature of these modalities whether the Council of Ministers will adopt different modalities than those stated under sub Article 3 of the same provision. This is because sub Article 3 states that "where a property attached on an old possession is transferred to a third party through any modality other than inheritance, the person to whom the property is transferred becomes the possessor through lease holding" *(emphasis added).* By looking at the way the provision is framed, it appears restrictive. Thus it is not clear what can be introduced and determined by the Council of Ministers other than those modalities dealt with indirectly under the proclamation and explicitly under the Civil Code of Ethiopia.[36]

If the Council of Ministers is endowed with a delegated authority of putting the details of those modalities already recognized under the various governing laws of the country, there may not be any confusion. Thus, rather than framing the provision as if the council will come up with new modalities, it may have been better if it were about setting the circumstances to be adhered during the conversion of old possession into the lease system through those modalities already identified by the proclamation itself.

In the meantime, taking into account the manner through which the lands in old possession were acquired, the proclamation requires a minimum lease price to be paid by the landholder whenever his/her land is converted into a lease system.[37] If the lease rent is much greater than the rent paid for the old possession, the payment can be perceived as a burden by the landholders. The Amhara National Regional State Urban Land Lease Holding Regulation has also confirmed the approach adopted under the federal proclamation in stating "without prejudice to the provisions indicated under Article 6 (3), (4) and 6 of the proclamation [referring to the federal proclamation], old possessions shall continue as they are until it is determined through public

[36] Ethiopian civil code, it has expressly dealt with how individuals may acquire various kinds of right over a certain property and at the same time it has also dealt with the modalities through which a person can transfer his ownership rights, usufractuary right through sale, donation/gift, rent. The property owner may also lose his ownership right through foreclosure etc.

[37] FDRE Lease Proc. No. 721/2011, Supra notes 6, Art. 6(7)

discussions and undertaking detailed study pursuant to Article 6 (1) of the proclamation".[38]

At this level, the Proclamation anticipates the entry point for conversion to be the incidents of transfer of property on old possession of land to a third party through any modality other than inheritance. In these transfer cases, the old possession shall be subjected to conversion to the leasehold system. Apart from transfers, the case of consolidating a leasehold land with a previously permit-based holding would also result in uniformalising the entire possession into leasehold.[39]

The Amhara Regional State urban lease law provides a series of rules that shall be considered when a land held through permit system is converted into the lease system. Accordingly, service of the holding/land for a person to whom the holding is transferred shall be determined as per basic plan of the urban or development plan of the locality and its period of contract shall be on the basis of period of lease fixed for the service in the proclamation;[40] a contract shall be concluded on the basis of land use as indicated on basic plan of the locality;[41] when it is to be transferred to a third party, it shall be made to a lease hold in accordance with size of the plot specified on the document submitted thereof .[42] The law also stipulates different rules concerning what shall be done when the size of the land is increased or decreased. Accordingly, if the size of the plot obtained through site measurement is less than that of the size obtained in the document, it shall be determined upon the size of the plot obtained through field measurement, provided, however, that if the size of the plot obtained through site measurement is greater than that of the size obtained in the document, it shall be determined by directives.[43]

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[38] Regulation No.103/2012, The Revised Amhara National Regional State Urban Land Lease Holding Regulation, Council of the Regional Government Regulation Zikre-hig of the council of the Amhara National Regional State in the federal democratic republic of Ethiopia, Bahir Dar 11th, September 2012 (here after Reg. No 103/2012), Art. 6.

[39] Belachew Mekuria, 2011, Supra notes 8

[40] Reg. No.103/2012, supra notes 38, Art. 7(1)(a)

[41] Ibid, Art.7(1)(b)

[42] Ibid, Art.7(1)(c)

[43] Ibid, Art.7(1)(d)

The authors hold that the conversion of old possession into a lease system will not be an easy task and, in some cases, it may also come up with unintended consequences mainly for the following reasons:

- Even though Article 6 of the proclamation empowers the Council of Ministers to determine the modality of converting old possessions into leasehold on the basis of detailed study to be submitted by the ministry, there is no action, as far as the best knowledge of these authors, taken by any of the concerned bodies. Due to this reason, the old possessions will remain as they are for unforeseeable period of time. And this is in compromising every objectives of the lease system and in creating uncertainty on the part of the old possessors.
- Under Article 3(1) of Proc. No. 80/1993 it has been stated that the proclamation will be applicable on all urban centers except those holdings used for residential purposes. And under sub-art.2 of the same provision, transfer of any dwelling houses to a third party through any modality than inheritance will shift the old possession tenure into a lease system. Moreover, pursuant to Article 15 of same proclamation, holders of an urban land for any other purpose than construction of residential dwelling were expected to apply for the concerned organ within the time limit to be determined by the town administration for conversion of their holding from old possession into a lease system. Even though this approach could be considered as one lesson even for the upcoming regulation, it would have been more clear and practicable if the provision has also addressed as to what will happen if the landholder become unwilling to apply.
- Under Article 3(1) of Proc. No. 272/2002 as well it was stated that the proclamation shall be enforced on urban lands held through permit system, leasehold or by any other means. Moreover, Article 3 (2, (a)) also provides the authority to determine the timeframe when a certain old possession should be converted into a lease system and when a certain town to shift its urban land tenure arrangement into a lease. Nonetheless, currently with regard to the issues stated herein above, Article 3 proclaimed that, save those exceptional circumstances, the lease law shall be enforced on all urban centers in

Ethiopia without making any difference on the land use type. Therefore, except setting a certain time limit for adopting a lease system in a certain urban centers upon the decision of the regional cabinets under Article 5(4) and the four year period in order to regularize the possessions held without the authorization of the appropriate body as per Article 6(4) and (5), most of the provisions which deals with old possession are a redundancy of what has been said for more than a decade. Therefore, unless the council of ministers become pragmatic and committed in taking measures in adopting feasible and appropriate strategies and finally enacting the regulation, it will be once again rhetoric and is very difficult to see uniform urban land tenure system in the country in the near future.

- There is no specific time limit set for all urban centers within which they should convert permit holdings into lease holdings. In order to avoid the same mistake that has been made while enacting the proclamation i.e. the failure to set the time limit for the Council of Ministers to enact the regulation, while such regulation is finally formulated and approved, a specific time limit should have set for all urban centers with in which they should convert their old holdings into a lease system. Otherwise, the process of having a similar tenure throughout our urban centers will be remote.
- It is clear from the acontrario reading of Article 6(6) that when two adjacent old possessions of a person are merged, the newly created plot shall also continue in that state. Since the law requires that the holding shall be in a lease system if either of the plots to be merged is under the lease system or if both of them are under lease, for a stronger reason, when two old possessions are merged, they shall continue with same status. However, one of the reasons for the existing lack of success for conversion of old possession into lease during merger is related with the size of the lease holding to be merged and the ultimate consequences of the payment. This is to say that given the ultimate consequence of payment of lease rent for the

entire holding after conversion[44] and due to lack of awareness of the purpose and benefits of the lease system, the old possessors may not incline to merge and convert their possession into a lease system.

3.3. Payment of "Lease Benchmark Price" and Plot Size Determination upon Conversion

When an old possession is converted into the lease system, there is no guarantee that the old possession will be maintained as it had been in the past. This means the land use (residential, business, building height, etc), land size and shape, land rent/tax, initial land payment, and so on shall be determined based on the current or existing rules (such as structural and local plans, land lease regulations etc).[45] This, without doubt, will cause a fluctuation in land size (large size of lands may be reduced and small plots may be enlarged) and the lessee will be compensated for any fixture on the land in case his land is reduced, and he is obliged to make lease payment for the addition in case his possession is enlarged.[46]

In line with the proclamation, it is also possible to say that the effect of transfer of land right or status of landholding in the event of the above three situations is that people will pay lease benchmark price,[47] which shall be set by every urban center, multiplied by the area of the land size. The calculation of this price takes into account the cost of infrastructural development, demolition cost as well as compensation to be paid to displaced persons in case of built up areas, and other relevant factors.

The concerns of the general public are whether or not landholders [old or new] would pay for their holdings even though there is no transaction made on the land. In other words, could they be surprised by a load of debt of

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[44] The payments for an old possession is very minimal and it is very tempting that the old possessors wants stick with it because currently for a person who is holding 300 m^2 of old possession, for instance, pays less than hundred birr per year. But if it is through a lease system, obviously even taking the minimum lease price the holder will pay much greater amount of money for the holding.

[45] See Daniel W/Gebriel, 2013, Supra notes 4, p. 79

[46] Id

[47] FDRE Lease Proc. No. 721/2011, supra notes 6, Art. 2(11) has been defined this term as "the threshold price determined by taking into account the cost of infrastructural development, demolition cost as well as compensation to be paid to displaced persons in case of built up areas, and other relevant factors".

lease price without any activity of the above sort? The proclamation says that it should be decided after thorough research is conducted by the Council of Ministers. The years are now passing without concrete actions taken by the government to relieve the fears of the general public as to whether they have to pay for their holdings even in the absence of any transaction done on the land.

The question at this juncture is: would the person be required to pay the lease bench price (and generally comply with the mandatory lease principles) for the possession he has before and the additions? If the intention of the legislature favors for payment to the entire possession, that appears unfair to the possessor now since he had been complying with payment obligations during the permit system now and before (at least, taxes for his possession).

As has been indicated under sub Article 2 (a) and (b) of Article 6 of the proclamation, during conversion of old possession into a lease system, there is a possibility by which the holding size of the old possessor could be maintained as it is reduced or increased in line with guidelines to be stipulated under the regulation to be issued by the Council or City Administration. If the size is to be reduced, the holder will be entitled with compensation for the loss of properties attached to the land.[48] However, this particular approach begs a few questions i.e. what will happen if the plot to be reduced has no improvement? Should this particular plot be taken by the government without compensation of any sort? Does it not open the possibility of taking part of one's holding that would ultimately create tenure insecurity? What will be the maximum plot size of urban centers? What will be the base to determine such maximum holding size?

The issues of reducing the size of old possessors will create serious resentment towards the government. Especially since the regulation and all directives will be issued by the executive organ, unless various concerns are considered, it may provide unnecessary discretions for this branch of the government and it may also result in restricting individuals' constitutional rights of property. With regard to the issue of compensation, in almost all of

[48] Ibid, Art. 6(2)(a)

the existing rural land laws, any rural landholder who losses his holding for the sake of public interest shall be given compensation. Therefore it could be tenable to argue that this rule should also be equally enforced in the case of reduction of urban land during the conversion of old possession into a lease system.[49]

Most likely, the size of their land might be reduced due to scarcity of land in most urban centers of the country. The land in the permit system could reach up to 500 m^2 but now in Addis Ababa city, for instance, the amount of land allotted for residential purpose is 75 m^2 and in Bahir Dar, it is 150 m^2. The controversy here is that holders are compensated only for the property removed from the land but not for the loss of the land itself. Though the existing land policy (public ownership of land) might be a defense on the side of the government, the writers argue in case of reduction of urban land, there must be a ground to strike a balance between the interests of the public and the landholders. In order to even strengthen our argument, since the law under sub Article (2)(b) of article 6 rules that in case there is any chance by which the holding of the old possessor increases, the holder will be required to pay a lease rent for the additional holding. Thus, if the law requires additional payment for the added holding, it will also be fair to provide the possibility of payment of compensation when the size of the holding is reduced during conversion.

Furthermore, in case there is increment, the holder will be treated in accordance with lease principles and will be required to effect payment. The payment to be made for the additional land obtained shall be treated in conformity with the relevant lease principles.[50] That means, the inherent principles in the lease system that would apply on those urban lands acquired afresh shall apply to holdings in permit whose size is increased as a result too. The holder should conclude lease contracts with the government,

[49] Pursuant to Art. 40/3 of the FDRE constitution, "*The right to own rural and urban land, as well as of all natural resources belongs only to the state and the people of Ethiopia. Land is an inalienable common property of the nations, Nationalities and peoples of Ethiopia* …." If this is the case, even if the reduction of the urban land during conversion is not strictly for 'public purpose', so long as their holding is reduced, compensation should have been given for the reduced holding. Otherwise the urban landholder's right to land guaranteed under the constitution will be at stake.

[50] FDRE Lease Proc No 721/2011, Supra notes 6, Art. 6(2)(b)

which shall include restricted lease period based on the purpose of the land and the urban center the land is located. And the holder shall conclude a contract of lease with the appropriate body that shall include the construction start-up time, completion time, payment schedule, grace period, rights and obligations of the parties as well as other appropriate details.[51]

In general, since there is population pressure in urban centers now, it is most likely that the land size of old possessors will be decreased as a result of conversion. In the major cities and other urban centers of the country the size of land being delivered to urban dwellers is continuously declining. In any case, a decision in favor of decreasing the size of land holding to a lesser extent will go against the landholder's property rights that are guaranteed under the constitution.

3.4. Conversion of Old Possessions under Subsidiary Legislations

According to Article 33 of the proclamation, regions and city administrations shall have the powers and duties to issue regulations and directives necessary for implementing the Proclamation. This being the case, the Ministry of Urban Development, Housing and Construction (now the name is changed to Ministry of urban Development and Housing) has prepared a model land lease regulation two months after the issuance of the proclamation. This document was submitted for discussion primarily in Addis Ababa, Dire Dawa and some regions. Though this model land lease regulation is not a binding document, it is expected that it will significantly influence the subsequent regulations to be issued by regions and city administrations.[52]

According to the current lease proclamation, as a matter of principle old possessions, upon any dealings other than inheritance, should be converted into the lease system. However, depending upon the intention of the proclamation, pertinent provisions of the law are elaborated under various subsidiary legislations. In this regard, Article 8 of the regulation (i.e. the

[51] Ibid, Article 14 and 16

[52] See Ethiopian land law, *Ethiopian Legal Brief* <http://chilot.me/tag/ethiopian-land-law/>

model lease regulation of the FDRE Ministry of Urban Development, Housing and Construction) which is enacted to enforce the proclamation provides the exceptional scenarios by which old possession shall not be transferred into the lease system. While formulating these exceptional modalities, it is perceived that the ministry has based itself on the scope and intent of the proclamation which is enacted by HPR.

Though most of the modalities adopted under the regulation are consistent with the terms of the proclamation, the legitimacy of some of these exceptions must be questioned as it goes contrary to the hierarchy of law in the legal jurisprudence. In the well accepted hierarchy of laws, regulations are inferior laws that are to be promulgated with a purpose of implementing a certain proclamation on the issues similar to it. When the regulations attempt to govern issues that are contrary to the proclamations or include further illustrations that are not foreseen by the proclamation, at least to the extent of the provisions that go against the proclamation, it shall be made void. While the proclamation restricted the mode of conversion shall always be made upon any transfer save inheritance, the regulation shall only have the discretion to maneuver within the ambit of its superior law and it shall not contradict with the proclamation. According to Article 7 of the regulation, the following exceptional circumstances are set and the previous holder(s) of old possession shall continue to be within the old possession tenure arrangement;

- When an old possession is divided among heirs/legates upon their interest.
- When divorced couples who hold possession divide it in accordance with relevant laws.
- When one of the divorced husband and wife or some of the heirs/legates, *up on payment of its value* to the other/s agree to take over the whole of the old possession. (emphasis added)
- A replacement land provided to holders of old possession whose land was lost by expropriation.

- Holdings acquired before the coming into force of the lease system and decided by the administration to continue as an old possession in accordance with the law.
- Restituted holdings which were nationalized contrary to Proc. No. 47/2007.
- Holdings which were transferred to a third party due to different circumstances before the coming into force of the proclamation but whose title deed is in issued in the name of the transferee.

As it can be easily observed from the above stated exceptions, it is possible to infer that most of the modalities are somehow consistent with the intent of the proclamation. However, in some cases, the regulation has gone a little further and has included some exception which might be perceived as a bird's-eye view of the issues. Nonetheless, in other cases, the regulation has also included few seemingly contrary exceptions. For instance, the third exception can be questioned in line with the intent of the proclamation. This is because if either of the heirs or divorcees have reimbursed the value[53] of the property, in effect such arrangement tantamount a transaction concluded between the heirs or the divorcees. Thus, if this circumstances result in the transfer of one's holding/property to another person especially based on pecuniary dealings, it seems that the modality is apparently contrary with the proclamation. Because the proclamation does not have the intent to include those monetary based transactions as an exception like the case of inheritance.

Most of the above stated exceptional scenarios are also adopted under The Revised Amhara National Regional State Urban Land Lease Holding Regulation No. 103/2002. However, the regulation has also provided further additional scenarios that favor for non-conversion of old possession into the lease system. Accordingly, among the various scenarios that will not result the conversion of old possessions into the lease system, it is provided that "non-documented holdings shall be caused to have a holding certificate in

[53] It is also confusing whether such value refers to the value of the property attached to the land or the land itself.

accordance with a directive to be issued by the Bureau."[54] So does this mean that the regularizing of holdings held without authorization of the appropriate body shall remain as old possessions? Unlike what is stated under Article 6(2) of the Addis Ababa city administration urban land lease regulation No.49/2004, if this is the intent of the regulation, it may contradict with what has been stipulated under Article 6 (4) of the proclamation. Generally, the overall issue here is in contrary to what proc. No. 721/2011 stipulated, the above subsidiary laws, that repeatedly referred the proclamation, go beyond establishing those scenarios that shall not result conversion of old possessions into the lease system.

3.5. Benefits and Challenges of Conversion of Old Possessions into the lease system

Conversion of old possessions to the lease system will benefit not only the government, but also produce incentives to the individual landholders and third parties too. However, the conversion does not only entail benefits; rather, it has also its own challenges. The following sub-sections address these issues. Accordingly, if old possessions are totally/wholly converted to a lease system they may entail the following benefits:

A. Benefits

The benefits could be seen from the perspective of the government, the landholders and third parties. On the side of the government, there will not be two types of land tenure arrangements in towns (some part of the urban land administered under the lease system while the remaining land by old possessions). Uniform land tenure and simplified land administration will prevail in urban areas. A better land information system that will help for increased levy of tax since it will help to expand tax bases; and it will bring about coordination among stakeholders. Also it will generate revenue for the government so that the latter will invest much in infrastructure and other services. The tax collected from old possessions is not yet satisfactory. Accordingly, if one holds 300 m^2 land, the annual rent will approximately be 42 Birr. In case of a lease, however, the revenue to be collected would be

[54] Reg. No.103/2012, supra notes 38, Art. 8(5)

incomparable. Furthermore, the government will easily control rent seeking behaviors and the problems of partiality since the lease system urges the need for proper information handling.

Also, from the landholders' perspective, conversion of old possessions to lease hold will have a multi-faceted advantages including, the right to mortgage lease rights since as it is provided in the proclamation, the lease holder can mortgage his rights to the extent of payment he has already made; the holder will get grace period concerning the lease price payment; the holder can safely transfer his lease holding rights so long as he completes half of the construction (in the old system, however, one need to complete/finish the construction before transferring it; landholders will benefit with better infrastructural services since supply of infrastructures may take the first step before land is delivered through the lease system at least legally speaking; better secured tenure wise, landholders will be provided with certificates that ensure the holder's holding on the land and protects from any form arbitrary eviction. Additionally, from the perspective of third parties, the right to sub-lease is conferred.

B. Challenges during Conversion

From the interview results that the authors have conducted with some experts on the field and from the general concerns of converting old possessions into lease system that have been confronted by the different lease proclamations so far, the following are considered as challenges during conversion.

- Rent seeking behaviors of different stakeholders: It exists in each stage of conversion scenarios and methods like during preparing legal cadastre, in preparing legal maps (certificates) for landholders, and transfer of holding rights. The problem could be exacerbated since professionals may not act responsibly and the checking mechanisms to curve from their misbehaviors are not properly implemented to the degree required. Also while zoning a certain land use, the prices there would be determined through ranges (just like zone A may be from 500-1000 birr). Here, professionals usually abuse the ranges to fix the amount either to

the maximum or minimum range level based on their personal interests.

- The lease proclamation was not able to get the general public trust during its draft stage and even after it was officially promulgated. There was frustration on the side of the people; they were not aware of the possible advantage they will get if they opt for lease.
- Conversion usually entails payment burden on leaseholders basically when there is a quest for expansion of holdings as one means of converting old possessions into lease system. The payment for the new added parcel will be summed up/added with the old one.
- There are problems of coordination between and among stakeholders especially to properly administer lease payments.
- Since converting old possessions to the lease system is a vast task, it needs various preconditions and efforts. Just like a well organized land bank, land preparation for the organ that will deliver land through lease principles and the like. However, in reality these channels are not properly organized.
- Surveying instruments are not found in sufficient manner. It is not a doubt that the role of survey instruments will play in proper administration of land. Even if there are some important instruments, our professionals lacked the skills to use them to the required level possible. After people acquire land, there are cases where the size of the land will vary (increase or decrease).
- Possible oppositions from old possessors: It should be noted that the essence of old possession as it is incorporated in the current lease holding proclamation might be opposed by old possessors in various occasions due to either of the following grounds:[55] on one hand, due to the restriction imposed by the law old

[55] Araya Asgedom, *Salient Features of the new Ethiopian Urban Lands Lease Holding Proclamation No.721/2011 and its Implications on the Ethiopian Economy,* LLM thesis, Addis Ababa University, January 2013, p. 129

possessors cannot sell their possessions for a good price, because buyers are subjected to two payments when buying old possessions. On this basis, absence of the freedom to sell their holding at better prices might hinder the possessors from solving their economic problems. On the other hand, old possessors cannot currently obtain a good amount of loan by mortgaging their old possession because location value will not be taken into consideration and banks are not sure how much lease will a buyer pay in case the debtor defaults. Also, as stated in the proclamation, after conducting a study, the Council of Ministers may approve the study and decide for mass conversion of old possessions to lease holdings. In consequence, such possessors might be subjected to payment of lease price which might be beyond their capacity. Also, if the Council decides for old possessions to remain as they are, as the increase in the existing rental rate is one possible alternative put under the proclamation, if the rental rate increases without taking the capacity to pay for an average old possessor, old possessors will be subjected to either the sale of their possession at a discount price or they will be entering into a huge debt.

3.6. What shall be done before Towns Convert Old Possessions into the Lease System?

As indicated above, the process of conversion of an old possession into the lease system is not an easy task. It may require multifaceted activities and involvements of various stakeholders. The process of converting old possession must also been made very cautiously because it may be wrongly perceived by the urban landholders and escalate the contentions that we have observed following the enactment of Proclamation No.721/2011. The proclamation and the model lease regulation are silent with regard to the kinds of preparatory tasks that should be carried out prior to the conversion of old possession into a lease system. However, the Amhara Regional State Lease Implementation Directive No.1/2005 provides the following as a prerequisite to be fulfilled before the commencement of the conversion. Accordingly, towns which are shifting their tenure arrangement completely into a lease system shall carry out the following tasks. They are required to

complete the allocation of their human resources, preparation of structural plan of the institution, prepare the land grade and make it approved and determine the initial lease price.

Generally the following strategies can be adopted in successfully converting old possession into lease holding:[56]

- Awareness creation on the old possession holders about the benefits of converting their holdings into a lease system.
- Registration of entire holdings in the urban centers in order to identify the tenure arrangements of each plots, their size and rightful holder.
- Increasing the rent price of old possessions in comparison with the lease price or to narrow the gap between these two payments, to ease the existing resistant to pay the lease rent.
- To train involved governmental agencies to tackle existed corruption and rent seeking behaviors and in order to make accurate measurements of parcels.
- The entire land administration system must be built on the principles of accountability and transparency.

4. Conclusion and Recommendations

As this article has demonstrated, the overall issue in the lack for mass conversion of permit holdings to the lease system in Ethiopia today is due to the absence of clear legislations and elite political and legal administration in the area of land to successfully manage these possessions. The attempt to convert old possession into the lease system has also been intended previously but failed. The current governing urban land lease proclamation, unlike its predecessors, authorized the Council of Ministers to enact detailed regulation with the aim of converting old possessions into the lease system. But so far there is no regulation enacted by this organ and this is creating paramount challenges in total conversion of old possessions and having a unified tenure arrangement in urban centers of the country.

[56] Interviews with Mr. Swahle Abu, Amhara National Regional State bureau of urban development, land and land related property registration core process head, held at his office on 18/01/2008.

One of the challenges in converting old possession is lack of awareness on the part of the landholder about the benefits of the lease system. Moreover, lack of trust on the very purposes of the proclamation; payment burden on the landholders who intend to convert their holding into a lease holding; questionable readiness of the municipalities to convert old possessions into a lease system and their minimal role in creating the required awareness and failure of the council of Ministers to begin a thorough study and discussion on the expected regulation are among the identified challenges for converting old possession into the lease system.

In the process of conversion, various strategies shall be adopted by different stakeholders. Among others, awareness must be created to the society about the benefits of converting their holdings into a lease system; registration and adjudication of entire holdings must be carried out in all urban centers in order to identify the tenure arrangements of each plots, their size and rightful holders; increasing the rent price of old possessions in comparison with the lease price or to narrow the gap between these two payments, so as to ease the existing resistant to pay the lease rent and training involved governmental agencies so as to tackle existed corruption and rent seeking behaviors and in order to make accurate measurements of parcels.

Therefore, based on the above discussions the following recommendations are forwarded:

- ✓ The Council of Ministers shall come up with the detailed rules for converting old possessions into the lease system. Especially in tackling previously existed gaps in various urban land law with regard to conversion of old possession, this regulation should be framed in containing required specifics and it has to be also feasible and set the time frame for the conversion of old possessions into a lease system.
- ✓ The urban land lease model regulation has greater clarity on which possessions could not be converted into the lease system compared with the proclamation. However, legally speaking, in some cases it deviates from what the proclamation rules, therefore, the deviations must be rectified.

The issue of plot size determination and payment of lease price upon increase in size for the land one holds in permit shall be fair for the landholders. Whereas, during decrement of holding size, the landholder should be compensated for not only the loss of improvements but also for the land reduced, maybe by taking into account our approach of paying compensation for the loss of agricultural land.

CASE COMMENT

The Power to Transfer Employees: A Case Comment

Zerihun Asegid[♣]

Introduction

The power to transfer an employee is a source of competing claims between employers and employees. The two contracting parties are not fairly matched on the issue whether transfer is a bargaining subject or is within the exclusive mandate of the employer.[1] Literally, transfer denotes the movement of an employee from one job position to another position of equivalent rank, level or salary without affecting the employment contract.[2] It also includes the change in workplace of an employee in case where the undertaking has branches in different localities. The total relocation of the undertaking from one to another location can also entail transfer of its employees. Generally, transfer is taken as movement of an employee from one department, section, shift, job, plant or place to another, without resulting in change as regards salary or other benefits.[3]

There are several reasons for effecting transfer of employees. The following may be some of the causes that trigger either the employer or employee or both of them to initiate the process of transfer. [4] First, transfer may be necessary to meet the organizational requirement when there are changes in technology, volume of production, change in organizational structure, and fluctuation in market conditions. Second, it may also be used to reduce interpersonal conflicts, such as between employees. Third, employees may

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[1] For other sources of conflict of authority between employers and employees, see Richard A. Clapp, Management's Prerogatives vs. Labor's Rights, *Western Reserve Law Review*, 1953

[2] Joselito Guianan Chan, Labor Laws of The Philippines, *Pre-Week Guide on Labor Law*, 2006, p. 7 [hereinafter Joselito Guianan Chan, Labor Laws of The Philippines]

[3] For comparisons between transfer, promotion and demotion, see Achan Naku & et al., The Impact of Permanent Employee Transfers on Performance Levels at United Nations Development Program South Sudan Country Office, *International journal of Innovative Research in Management*, Issue 3, vol. 9, 2014, p. 39

[4] Kalpana R, 'Types and Reasons for Transfer of Employees in an Organization (*Business Management Ideas*)
<http://www.businessmanagementideas.com/organisation/types-and-reasons-for-transfer-of-employees-in-an- organisation/2495> consulted on Dec. 18, 2016

need it to satisfy their desire to work in a friendly atmosphere or native place. Finally, it may be used to punish employees for violating the disciplinary rules.[5]

Currently, there are two trends in the regulating transfer of employees in different jurisdictions. One approach is leaving the issue of transfer to the agreement of the employer and employee. In principle, what shall be the express elements of an employment contract is a matter of agreement between the employer and employee.[6] But, statutes may designate some basic particulars or information as mandatory subjects of negotiation and express elements of the contract. Parties are supposed to have common understanding and agreement on such matters in their contract. The particulars include the name and address of the employer and employee, the date on which employment begins, the rate of wage, description about title and type of the job, the place of work and mobility requirements, if needed.[7] Hence, a given employment contract is not valid unless it incorporates agreement on such particulars. The job description is an essential element to ensure an employee is aware of what is expected from him. The agreement on the place of work indicates where an employee is placed to work. There are circumstances where by an employee is hired by a company that has outlets in different places. The type of job and place of the work are matters that could bring transfer of the employee after the formation of the contract.

As shown above, there are a number of justified reasons for employers to change the contract after the employment has begun. Many employers draft contracts to include clauses which allow changes to be made on working places, methods, shift patterns, etc. These clauses, those which remain lawful as far as they do not conflict with labor laws, contain overriding terms which entitle the employer to act unilaterally. In relation to transfer, an employer can lawfully relocate his employees if there is "mobility

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[5] Ibid

[6] Barry Cushway, *The Employer's Handbook, An Essential Guide to Employment Law, Personnel Policies and Procedures*, Revised 5th Edition, Cambridge University Press, 2008, pp. 47-48 [hereinafter Barry Cushway, The Employer's Handbook]

[7] Ibid

clause" in the employment contract.[8] Such clause usually purports to require the employee to work at a location other than the one where he is initially based. An example of such clause in employment contract is as follows:[9]

> *"The Company has the right, as a term of your employment, to change your normal place of work to any other company premises. If we do so, you may, at our discretion, be entitled to financial or other relocation benefits."*

In exercising this power, the employer has an implied duty to act reasonably and to give reasonable notice of the planned relocation.[10] For instance, it is unreasonable to suggest that the worker should start working overseas in one day's notice. In the absence of mobility clause, an employer who is contemplating transferring his employee should in advance get the full consent of the employee. In other words, the employer must make an offer to vary the original terms of the employment contract concerning the type or location of the job. It is the basic principle of law of contract that an employment contract, like any other contract, is once made, can be varied with the agreement of both parties.[11] The unilateral modification by the employer is not allowed. If the employee is forced to move without his consent, this will be a breach of the contract of employment. The employee may oppose the move and can bring claim of constructive dismissal.[12] In one foreign case, an employee was found to have been constructively dismissed when she was required to relocate from Vancouver to San Francisco. The Court found that the employment contract did not contain an express contractual term that allowed the company to transfer the employee

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[8] Deborah J. Lockton, *Employment Law*, 4th Edition, New York: Palgrave Macmillan, 2003, p. 37 [hereinafter Deborah J. Lockton, *Employment Law*]

[9] Barry Cushway, The Employer's Handbook, Supra Note 6, p. 224

[10] Deborah J. Lockton, *Employment Law,* Supra Note 8

[11] C. Barrow and J. Duddington, *Briefcase on Employment Law*, 2nd Edition, Cavendish Publishing, 2000, p. 47

[12] Constructive dismissal occurs when the conduct of an employer causes an employee to resign. The conduct may leave the employee feeling that he has no other choice but to resign. In such case, the employee is entitled to treat himself as having been "dismissed" and the employer's conduct is often referred to as a "Repudiatory Breach". Landau Law Solicitors, 'Employment Law-Constructive Dismissal' <www.landaulaw.co.uk/constructive-dismissal/> consulted on Dec. 15, 2016.

to San Francisco.[13] When the employee refuses to accept the transfer, the employer may bring the impasse to an end by having recourse to some legally recognized way outs. In United Kingdom, the refusal could be a reason for the employer to claim the redundancy and hence dismissal of the employee. But, redundant employee shall be offered a redundancy package with benefits like, redundancy pay and time-off to find a new job.[14]

The second approach leaves the regulation of employees' transfer with the managerial prerogative of the employer. Management prerogatives are those rights and privileges which management (employers) believe is only for them and employees should not venture into those areas. These prerogatives are non-negotiable and are therefore not subject to individual or collective bargaining.[15]

The concept of management prerogative is the natural product of the employers' position. It is held that employers have property rights over their own business. They possess inherent autonomy to direct their business operations in order to pursue their own objectives.[16] Issues recognized as falling within the management prerogatives include the type of goods or services rendered by the employer, entry into new markets, pricing of goods and services, defining positions and their requirements, budgeting and closure of a business. Except as provided by labor laws, employers are free to regulate all aspects of employment, such as hiring, work assignment, working methods, time, place and manner of work, tools to be used, processes to be followed, supervision of workers, transfer of employees, work supervision, suspension of workers, discipline, dismissal and recall of workers.[17] Accordingly, employers are presumed to have exclusive power

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[13] Wilson v. UBS Securities Canada Inc. et al., Supreme Court of British Columbia, Judgment, 2005, at <http://employmentlaw101.ca/07-types-of-unilateral-changes-that-may-trigger-a-constructive-dismissal/#fn-498-17> (consulted on Dec. 15, 2016)

[14] Barry Cushway, The Employer's Handbook, Supra Note 6, p. 249

[15] Chris Obisi and et. al, Organization Effectiveness: Beyond Workers' Rights and Management Prerogatives, *International Journal of Asian Social Science*, 2013, p. 205

[16] N. Patrick Crooks, Management Prerogatives No Longer Include Right To Make Unilateral Decision To Subcontract, *Notre Dame Law Review*, Vol. 38, Issue 3, 1963, p. 290

[17] Bernadette M. Tomboc et. al, Management Prerogatives and Employee Participation, Working Paper Series

on transfer of employees even though mobility clause is not inserted in the employment contract. Absence of the clause does not affect the employers' unilateral power on making transfers. Employers have the right to command while employees owe the duty to obey. This relationship is an attribute of contract of employment and touchstone of managerial prerogatives.[18]

The privilege to transfer employees is not usually without legal limitations. When exercising their management prerogatives, employers may be required to follow some procedures or fulfill duties. Statutes or courts may develop criteria for the exercise of valid management prerogative by employers. For instance, even if it is the right of the employer either to continue or close his business, he is required to pay contract termination benefits if he chooses the closure of the business. In Philippines, employers shall exercise their managerial powers without violating the following criteria: [19]

- *There is nothing to the contrary in the terms of the employment;*
- *The management has acted bona fide and it is in the interests of its business;*
- *The management is not actuated by any indirect motive or any kind of mala fide;*
- *The transfer is not made for the purpose of harassing or victimizing the workman;*
- *The transfer does not involve a change in the conditions of service.*

In Endico v. Quantum Foods Distribution Center case, the Supreme Court of Philippines stated the underlying feature of managerial prerogatives in the following words.

> *In the pursuit of its legitimate business interests, especially during adverse business conditions, management has the prerogative to*

2004-04, Unpublished, Center for Business and Economics Research and Development (CBERD), Philippines, 2004, p. 5

[18] Douglas Stanley, Prerogative in Employment, *McGILL Law Journal*, Vol. 20, 1974, p. 395

[19] R. Venkataraman, *Labour Law Journal Digest: Standing orders to end*, Vol. 8, Wadhwa Publishers, 1979, pp. 130-131

> *transfer or assign employees from one office or area of operation to another provided there is no demotion in rank or diminution of salary, benefits and other privileges and the action is not motivated by discrimination, bad faith, or effected as a form of punishment or demotion without sufficient cause. This privilege is inherent in the right of employers to control and manage their enterprises effectively. The right of employees to security of tenure does not give them vested rights to their positions to the extent of depriving management of its prerogative to change their assignments or to transfer them.*[20]

It is also stated in the Industrial Relations Act of Malaysia that the employer is in the best position to judge how to distribute his employees between different jobs or branches. Therefore, he should have the exclusive power to decide on the transfer of his employees. An employee who refuses transferring is guilty of insubordination. The refusal constitutes willful disobedience of a lawful order of an employer.[21] In the light of Section 13(3) (b) of the Act, such prerogative is, however, not absolute as it must be exercised in good faith. It cannot be exercised unreasonably and arbitrarily to the detriment of the employee. The employer must ensure that the status and remuneration of the employee are not affected. The employer shall also make sure that the transfer is not *mala fide* or unfair labor practice or an act of victimization. The transfer should not take place to the prejudice of the employee, such as causing economic loss to him and his family. The onus of showing the existence of such vitiating circumstances that undermine the proper exercise of the employer's prerogatives lies with the employee. Whether a transfer is *mala fide* or not is a question of fact for the court to decide.[22]

To recapitulate the discussion, the first approach emphasizes that the type of job and place of work are essential elements of employment contract. Any change to these elements, can only be made by either the mutual agreement

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[20] *Endico v. Quantum Foods Distribution Center*, G.R. No. 161615, The Supreme Court Philippines, First Division, January 30, 2009

[21] Joselito Guianan Chan, Labor Laws of The Philippines, Supra Note 2, p. 3

[22] Hew Soon Kiong, 'Laws on Transfer of Employees'
<http://www.talentwork.com/articles/files/hr/09/index.html?iframe=true&width=700&height=100%> consulted on Dec. 15, 2016

of the two parties or mobility clause. According to the second approach, employers do not need the help of either the consent of the employee or mobility clause to make transfer. They have an inherent right over transfer and can relocate their employees by a unilateral decision.

Transfer of Employees under Ethiopian Labor Law

When one examines the Labor Proclamation,[23] there is a reasonable ground to conclude that transfer is more of a contractual matter of the two parties than the personal concern and power of the employer. The Proclamation dictates that employment contract shall include mandatory agreements of the two parties on some matters. These agreements are part of the express elements of the contract. Article 4(3) of the Proclamation explains "A contract of employment shall specify the type of employment, place of work, the rate of wages and its method of calculation, manner and interval of payment and duration of the contract". This provision makes it clear that type of employment (job) and place of work are the essential parts or elements of employment contract. That means it is a mandatory requirement of the law that the employment relationship is not created until agreement reaches on the location and type of job. For instance, if the employee agrees to teach students in Addis Ababa City for a given salary, the contract is said to be clear on the type of employment and place of work. Any different expectation from the side of the employer, let me say teaching in Bahir Dar City, is against the contractual agreement of the two parties.

It must be borne in mind that employment contract is not subject to any special form in Ethiopia. With the exception of few cases, there are no legal requirements about the form that a contract of employment must be in writing. However, the Proclamation stipulates that the contract must be clear in terms of indicating the type of service to be rendered by the employee. It must also identify the location in which the employee is required to work. [24] The Proclamation further stresses that the employment contract shall be

[23] Labor Proclamation, 2003, Proc No. 377, *Federal Negarit Gazetta*, Year 10, No. 12, [hereinafter Labor Proclamation]

[24] Regarding contents of employment contract, the Ethiopian Labor law displays similarities with the Employment Rights Act (1996) of United Kingdom. See Barry Cushway, The Employer's Handbook, Supra Note 6, pp. 47-48

made in such a manner that its terms are certainly defined and the two contracting parties are left with no uncertainty as to their respective rights and duties.[25] If the contract is silent regarding one of its essential elements like place of work, it might be subject to invalidation since its formation is defective in the eyes of the law.[26] The employee cannot execute his duties unless such elements are known.

Unlike the case of termination, the Labor Proclamation does not list out reasons for amendment of employment contract. The only restriction imposed by the law is change of ownership of an undertaking does not bring variation of the contract. The employment contract will continue, as it is, with the new owner of the undertaking.[27] Parties in the employment contract can modify their contract for any reason. Amount of salary, place of work, type of job and duration of working hours could be some of the reasons that trigger amendment of the contract. In conclusion, transfer is one of those matters which are subjects of amendment by the agreement of the employer and employee.

The Labor Proclamation allows parties to vary the conditions of a contract of employment that are not determined under the Proclamation through collective agreements, written agreement of the two parties and work rules.[28] The contents of employment contract are not limited to the express elements specified in Article 4(3) of the Proclamation. They also encompass other matters dealt under collective agreement and work rules. The employee is also bound by such instruments. Issues regulated under the individual employment contract, such as amount of salary and place of work, can be amended by the written agreement of the employer and employee. Those matters which are initially dealt under either the collective agreement or work rules can be modified by subsequent collective agreement or work rules respectively. Taking into consideration the absence of participation of the employee in drafting of work rules, it is not logical to

[25] Labor Proclamation, Supra Note 23, Art. 4(2)

[26] The Civil Code of Ethiopia, 1960, Art. 1714, Proc. No.165/1960, *Negarit Gazzeta*, year 19, No.2

[27] Labor Proclamation, Supra Note 23, Art. 16

[28] Id, Art. 15

conclude that matters which shall be regulated under the employment contract can be varied by work rules.[29] For instance, the amount of salary agreed and specified in the contract cannot be altered by a work rule. The same reasoning applies to place of work and type of job. Contrary to the general rule on variation of contract,[30] the Labor Proclamation provides that the amending employment contract must be in writing even if the original contract was concluded orally.

In addition to the employment contract, transfer of employees may also be regulated by a collective agreement entered into between trade unions and employers.[31] Such agreement can be used to devise transfer rules and procedures applicable on all employees of a certain undertaking. The transfer rules may be changed or repealed by subsequent agreements of the trade unions and employers. Generally, transfer could be governed either by the individual employment contract or collective agreement. In case where both instruments regulate the issue differently, we may confront with the question of which one shall prevail. The Labor Proclamation laid down a guiding rule that the one which is more favorable to the employee shall prevail.[32]

Article 13 (2) of the Labor Proclamation is usually taken as a provision which gives managerial prerogatives to the employer. The provision clearly states that the employee is duty bound to obey instructions given by the employer. There is, however, a caveat to this rule: the employee is required to obey only instructions that do not contradict the employment contract. The employee should not be compelled to work at a place which is not indicated in his contract of employment. This is also supported by a reading of Article 12(1) (a) of the Proclamation that states the employer shall give work to his employee in accordance with the employment contract. As long

[29] Based on Art. 4(5) and 15 of the Proclamation, it may be argued that collective agreements or work rules may vary terms of employment contract as far as the amendment is beneficial to the employee. In other words, more favorable working conditions and benefits, such as increase of salary, may be brought by either the collective agreements or work rules. Since the change increases the well-being of the employee, this line of argument does not contradict our legal analysis under this section.

[30] The Civil Code of Ethiopia, Supra Note 26, Art. 1722

[31] Labor Proclamation, Supra Note 23, 129 (3)

[32] Id, Art. 4(5), see also The Civil Code of Ethiopia, Supra Note 26, Art. 2518

as there is no mobility clause in the contract or a collective agreement, the employer cannot transfer the employee to a different area without the consent of the latter. If the employer does so, it amounts to violation of the contractual right of the employee. What if the employer changes the workplace unilaterally? Even if the Labor Proclamation instructs the employee to accept orders in the light of their contract, it does not tell us the effect of such change of the employer that run counter to the contract.[33] In the light of the general principle of contract law, one may say that the employer can demand performance from his employee only to the extent that is specified in the contract. In the words of Rene David, "contracts are law for the parties. What must be given [performed] by the parties is what they have agreed to give [perform]." [34] The Federal Supreme Court Cassation Division (hereinafter, FSCCD) has, however, held that the employee shall not refuse a transfer order by his employer even if it is contrary to the employment contract. The FSCCD noted that the employee can bring his case before the competent organ after having reported to his new workplace. In the Court's opinion, if the employee refuses to move to the new workplace, he/she could be dismissed as per Article 27 of the Proclamation.[35]

The Labor Proclamation provides some exceptions whereby the employee may be forced to accept the transfer offer or face the termination of his employment. This is when there is either:

- Total relocation of the undertaking/ organization/ from one locality to another or
- Cancellation of the post for which the employee is hired and he is offered work in another place.[36]

[33] The labor law of South Africa provides that employees or trade unions can oppose unilateral change of employment contract by the employer by exercising their right to strike. (Labour Relations Act 66, Sec. 64 (4), 1995

[34] Rene David, 1973, *Commentary on Contracts in Ethiopia*, Haile Sellasie University, p. 42

[35] Addis Spare Parts Import and Distributor PLC vs Ato Kassahun Kebede, Federal Supreme Court Cassation Division, Civil File No. 37778, Vol. 8, November. 04, 2001 E.C,

[36] Labor Proclamation, Supra Note 23, Art. 28(1)(c)(d).

The first exception deals with the case of business relocation. Employers may choose new working environment for different reasons. Tax incentives, merger, acquisition, access to raw materials, entry to new markets and lower labor costs are among the usual driving forces for relocation of businesses. These factors would help employers to develop new competitive position.[37] When relocation occurs, employees have two options; either to transfer with the business or quit their job. In the second exception, there is no transfer of the business. Due to organizational restructure or other related measures, the existing post of the employee may be cancelled or replaced by a new one. This could bring either the transfer of the employee, if s/he accepts the new assignment, or the termination of the employment contract. Except for these situations, the Labor Proclamation has not recognized managerial prerogatives of the employer to assign workers as it pleases the employer. In conclusion, the Labor Proclamation of Ethiopia does not recognize management prerogative over transfer of employees.

Summary of Case [38]

In the case between the Ethiopian Orthodox Tewahdo Church Patriarchate Head Office and Ato Yibeltal Atnafu, the Office was an employer and Ato Yibeltal an employee.[39] The FSCCD transcript depicts that the employee was working as an operator of printing machine for 28 years. On July 15, 2000 E.C, a fight broke out between the employee and his two colleagues for unknown reason. The employee filed a criminal charge through the office of the public prosecutor. The immediate supervisor of the employee told the latter to drop the charge and to resolve the problem through arbitration and if not, he would be reassigned to work in furniture workshop (at a different location). But, the employee opted to pursue the charge,

[37] Linda K. Stroh, Does Relocation Still Benefit Corporations and Employees? An Overview of the Literature, *Human Resource Management Review*, Vol. 9, No. 3, 1999, p. 280

[38] There are other cases as well-disposed by the FSCCD on the issue of transfer. For instance, in the case between Muger Cement Enterprise vs. Ato Hailu Mengistu, the Cassation Division ruled that transfer is a unilateral power of the employee even if there are contrary provisions in the collective agreement. It based its decision on the concept of management prerogative, Articles 13(2) and 13(7) of the Labor Proclamation. (Muger Cement Enterprise Vs. Ato Hailu Mengistu, Federal Supreme Court Cassation Division, Civil File No. 40938,Vol. 8, March 24, 2001 E.C)

[39] Ethiopian Orthodox Church Patriarchate Head Office Vs. Ato Yibeltal Atnafu, Federal Supreme Court Cassation Division, Civil File No. 44033,Vol. 8, July 22, 2001 E.C

instead of the arbitration. The employer (the office) wrote a letter of transfer on September 22, 2001 E.C stating that the employee was transferred from printing office to furniture factory. The employee strongly opposed the letter issued by the Office and filed a suit to the Federal First Instance Court. He argued that the transfer was made contrary to their agreement. He claimed that he was forced to change his workplace for the sole reason that he brought legal action against those individuals who inflicted a physical injury on him. The employee requested the Federal First Instance Court to invalidate the transfer and reinstate him to his previous position and workplace. In response to this, the employer defended its action stating that employees are legally obliged to work under the direction and control of employers. Employers have the mandate to assign their employees at a position or place that serves the best interest of their undertaking, particularly for the purpose of increasing productivity, efficiency and bringing industrial peace. In order to realize such objectives, the employer contended that it has managerial prerogative to transfer his employees. The issue of "what and where to work" is the sole concern of that belongs to the employer. After hearing both parties, the Federal First Instance Court annulled the transfer made by the employer on the ground that the employer violated Article 15 of the Labor Proclamation and it shall reinstate the employee to his previous position and workplace. The Federal High Court rejected the appeal of the Office and confirmed the decision of the lower court. The case was finally brought to FSCCD by way of cassation. The applicant (the Office) pleaded that the lower courts have committed fundamental error of law while deciding the case in favor of the respondent (employee). The respondent contrarily argued that the transfer was illegal since it changed his post from printing machine operator to a carpenter and an inevitable change in his working place. The FSCCD framed the issue "whether the transfer was legal or not". After examining the arguments put forwarded by the two parties, it smashed the lower courts' decision and decided that the transfer did not violate the Labor Proclamation. According to it, arguments raised by the respondent do not override the management prerogative of the employer to change the workplace of its employees. It ruled that an employer can transfer his/her employee by virtue of his management prerogative. It also went on to say that as far as the current

salary of the employee is not affected, the Labor Proclamation does not prohibit the employer from making transfer if its purpose is either to bring industrial peace or to serve the interest of the undertaking. Thus, the lower courts' decision is found to contain fundamental error of law.

Case Comment

In the cases dealing with transfer of employees, the FSCCD has drawn the conclusion that the employer shall have management prerogative over transfer of employees. The writer finds the conclusion defective for the following reasons.

Firstly, many of the cassation decisions on transfer violate the commonly accepted rule of interpretation. When the law made by the legislature is clear, judges shall not deviate from the exact words of the law and search for the intention of the legislature. According to George Krzeczunowicz,[40] "Where the provisions of a law are clear, the court may not depart from them and determine by way of interpretation the intention of the legislature." On the issue at the hand, Article 4(3) of the Labor Proclamation clearly states that both the employer and employee shall agree on type and place of the job under the employment contract. By ignoring Article 4(3) and invoking Article 13(2) of the Proclamation, the FSCCD empowered the employer to unilaterally change the type and location of the job of the employee as far as the salary and other financial benefits as stipulated in the employment contract or collective agreements are not affected. But, Article 4(3) of the Proclamation clearly specifies that the type and place of job must be indicated in the employment contract. Article 13(2) of the same Proclamation on the other hand states employee shall follow instructions of the employer that are consistent with the employment contract. Therefore, the employer cannot order his employee to work at a place which is different from the one mentioned in the contract. The Cassation Division has set the binding interpretation by violating these clear provisions of the Labor Proclamation. Interestingly, the Federal First Instance and High Courts were constantly invalidating the unilateral decision of the employers

[40] George Krzeczunowicz, Statutory Interpretation in Ethiopia, *Journal of Ethiopian Law,* Vol. 1 No. 2, 1964, p. 318

arguing that transfer of employees requires the mutual consent of the two parties.

The procedural history of transfer-related cassation cases revealed that many of employees argued and opposed transfer alleging that the move contradicted their employment contract and collective agreements. Unfortunately, such arguments were not well received by the FSCCD. Instead, the main references for its decisions were whether there is reduction of salary or not, whether the transfer is made for industrial peace or not and whether the transfer is made to increase productivity or not. Why not the FSCCD makes reference to employment contracts? The writer is of the opinion that the tacit rejection of the above arguments put forwarded by the employees is a clear violation of their contractual rights. If the FSCCD followed the spirit of the Labor Proclamation, it would have considered the agreements of employer and employee as one criterion for the validity of transfers. [41] Even in countries where management prerogatives are given much weight, employers are not allowed to exercise management prerogatives if there is contrary agreement in the employment contract. Hence, unless the employment contract allows the employer to relocate the employee through mobility clause, the former should not be allowed to have an extended exclusive power over transfer of employees. It is also apparent from the decisions that the FSCCD is not treating elements of employment contract in similar fashion. On the one hand, it holds that salary and other financial benefits, as stipulated in employment contract, shall not be affected by the unilateral action of the employer. On the other hand, it recognizes that the employer can by himself vary the employment contract regarding the type and location of the job. Thus, it is self-contradictory to

[41] In the case between Lulit Ayalew vs Ethiopian Insurance Corporation, the Cassation Division pronounced that the employer cannot have management prerogative over transfer if it does violate collective agreement. In earlier decisions, even if employees opposed the transfer made by their employers on the basis of collective agreement, their arguments were rejected by the Cassation Division. Now, this decision indicates a partial return from its previous position as it is considering transfer in the light of the terms of collective agreement. Though the move is commendable, it is still not enough in the light of the intent of the Labor Proclamation. (Lulit Ayalew vs Ethiopian Insurance Corporation, Federal Supreme Court Cassation Division, Civil File No. 105997, Vol. 18, April 26, 2007 E.C)

allow the employer to unilaterally change some terms of the contract, but not the others.

Secondly, the decision rendered by the FSCCD lacks constitutionality. The FDRE Constitution, as the supreme law of the land, assigns the power to make laws to the legislative organ of the government.[42] This power may be delegated to the executive organ only when the legislature consents so. The judiciary is instituted for the sole purpose of interpretation of laws. The latter refers to searching for the meaning of existing laws without deviating from the intention of the legislature. Under the modern principle of separation of powers, interpretation of laws belongs to the courts.[43] The Constitution never allows the judiciary to bring new rules into the existing proclamations or regulations of the Country nor to change the same laws. The much debated Federal Courts Proclamation (as amended)[44] also does not allow the FSCCD to make laws. It only states "interpretation of a law by the Federal Supreme Court rendered by Cassation Division with not less than five judges shall be binding on federal as well as regional council [courts] at all levels…."[45] Various legal scholars agree that the Proclamation does not empower the Cassation Division to make laws, like the doctrine of *stare decisis* in common law legal system. The main reason d'être behind the enactment of the Proclamation are first to bring uniform interpretation and application of laws for similar issues and second to correct cases that contain fundamental error of laws.[46] If that is so, the Cassation Division cannot change the clear terms of the Labor Proclamation. It is worth discussing the question what if lower courts refuse to be bound by such precedents or rulings of the FSCCD. There are no practical cases or incidents which could be used as benchmark to answer this question. Based on the discussion made so far, it can be concluded that the decisions in focus

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[42] The Constitution of the Federal Democratic Republic of Ethiopia, 1995, Art. 55(1), 55(3), 77(13), 79, 80 *Federal Negarit Gazetta*, 1st Year, No. 1

[43] George Krzeczunowicz, Supra Note 40, p. 316

[44] The Federal Courts Proclamation Re-amendment Proclamation, 2005, Proc. No. 454/2005, *Federal Negarit Gazetta*, 11th Year, No. 42

[45] Id, Article 10(4)

[46] **ዮሴፍ አዕምሮ**, **በኢትዮጵያ የሰበር ስርአት የመጨረሻ ውሳኔ ምንነት፣ አሊ መሀመድ**, **መሰረታዊ የህግ ስህተት**, *in* Muradu Abdo (ed.) , *The Cassation Questions in Ethiopia*, Addis Ababa University, School of Law 2014, p. 19, 109

are inconsistent with the Constitution as well as the Proclamation. Until the legality of such precedent or cases is challenged, the FSCCD will continue to erode the constitutional mandate of the legislature.

Thirdly, the decision on transfer of employees practically creates favorable environment for constructive dismissal and creates opportunity for employers to abuse their dominant position. It is known that under the Labor Proclamation overt actions of dismissal of an employee have serious repercussions against the employer. For instance, if the employer terminates the employment contract contrary to the grounds and procedures laid down under the Labor Proclamation, he will face the obligation either to reinstate the employee to his job with back pay or to compensate the employee with up to six month salary and wage in lieu of notice period. The employer is also criminally held liable.[47] In fear of these liabilities, the employer may not directly fire the employee, but transfer the latter to an area which is very far away from his home town or family. In this regard, the practical problem is stated by one legal practitioner as follow.[48] [49]

> *በሥራ ላይ እያለ ሙሰናን ለበላይ አካል ለማስተላለፍ እንቅፋት የሚሆኑ፣ ከቅርብ ኃላፊዎች ጋር የግል አለመስማማት ያላቸው፣ በዘር ወይም በሃይማኖት ከበላይ ኃላፊ ጋር አንድ ያልሆኑ፣ በዕውቀታቸውና ሐሳባቸውን በገሀድ በመግለጽ ከአሠሪው ጋር የማይስማሙ ሠራተኞች በግዴታ እንዲዛወሩ ሲደረግ እናስተውላለን፡፡ የዝውውሩ ዋና ዓላማ ድርጅቱን ለመጥቀም ወይም ከባለሙያ ልምድ ለመጠቀም ሳይሆን ሠራተኛው በዕርምጃው ምክንያት ተበሳጭቶ ድርጅቱን እንዲለቅ ለማድረግ ነው::*

Literally translated,

> *It is observed that employees who might be exposing corruption or who have personal disagreement or different social status (in terms of ethnicity*

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[47] Labor Proclamation, Supra Note 23, Art. 43, 44, 184(2)(C)

[48] **ጌታሁን ወርቁ, ሥራንና ሠራተኛን የማያገናኝ ዝውውር ዕጣ ፈንታ, *ሪፖርተር*, የካቲት** 12 2008 **ዓ.ም**.

[49] The writer of this comment personally observed a case of an employee working in a private bank. The employee was a married woman and mother of one child. She was working as a secretary in a branch of the Private Bank in Chiro Town of West Hararghe. According to her claim, she was repeatedly subject to sexual harassment by her immediate manager. Since she was not willing to submit to the sexual lust of the manager, she was given a transfer letter that stated she shall report to her new workplace, Humera Branch, within a week from the date when she received the letter. She reported the case to the head office of the Bank in Addis Ababa to no avail. Finally, she was forced to quit the job since it was unthinkable to leave her family and home town and move to Humera.

> *or religion) with their immediate managers are forcefully being transferred. The aim of the transfer is not to pursue the interest of the undertaking or to exploit the personal skill of the employee, but, to dismiss him constructively.*

One may argue that bad intentioned transfers could be challenged on the ground of provisions that regulate and sanction constructive dismissal. Compensation and other benefits may be claimed just by showing that the transfer constitutes constructive dismissal. Even if it is a generally accepted notion that resignation due to unfair transfer amounts to constructive dismissal, this may not, however, work well in Ethiopia. First, the Labor Proclamation does not explicitly recognize illegal transfer as a ground for constructive dismissal.[50] Second, it is a learned experience that the FSCCD has broadly interpreted management prerogatives to encompass majority of transfer cases. Hence, employees might not be well positioned to succeed in claims of constructive dismissal.

The unilateral measure of transfer has also serious financial implications on employees. When examining and deciding cases, the FSCCD gives at most emphasis on whether the transfer affects the existing salary and other financial benefits of the employee or not. Transfer by its nature is a source of additional expenses and inconveniences to the employee. Transportation of household goods, house rent and etc. are burdens for the majority of employees in Ethiopia. In the legal systems of other countries, employers usually offer relocation benefits to employees when there is transfer. As a matter of obligations, such benefits may also be required by statues or precedents. Even in those countries that give principal recognition to management prerogatives, transfer is not allowed if it causes high economic loss to the employee and his family. In Ethiopia, the FSCCD is not accustomed with the culture of considering such circumstances. It simply examines whether there is a reduction of the existing benefits or not. The interpretation and application of management prerogatives in Ethiopia do not follow the duty to share the financial hardships of transfer between the employer and employee. Generally, the unilateral measure of transfer (by the

[50] Labor Proclamation, Supra Note 23, Art. 32

employer) is affecting the right to employment security and financial conditions of employees.

Conclusion and Recommendation

The aim of this case comment was to examine the decisions of the FSCCD on the power to transfer employees in light of the Labor Proclamation. The Proclamation left the regulation of transfer of employee to be decided either by employment contract or collective agreement. But, the FSCCD has decided in a number of cases arguing that transfer is a managerial prerogative of the employer, hence the employee could be transferred to another workplace or position without his consent. Failure to move to a new workplace or position is fault with serious consequences, including dismissal without notice. In the light of both the FDRE Constitution and Federal Courts Proclamation (as amended), the decision of the FSCCD in the case between the Ethiopian Orthodox Tewahdo Church Patriarchate Head Office Vs. Ato Yibeltal Atnafu has the result of amending the Labor Proclamation and hence it lacks validity, as the FSCCD does not have the power either to amend or repeal existing laws of the Country. It also violated the cardinal rule of interpretation, i.e., "when the law is clear, there is no need of interpretation of such law. The law must be applied as it is". In addition, the main objective of having the labor laws as well as involvement of the government in the relationship between the two parties is to help the weaker party, the employee, from unfair and abusive exercise of power by the stronger party, the employer. This basic objective of the law is now being compromised because of the decisions of the FSCCD. In many practical cases, transfer is used as a costless tool of dismissal of employees, without payment of termination benefits.

Finally, the writer suggests that the FSCCD should reverse and replace the existing binding interpretation on transfer by another one that is consistent with the objective and clear terms of the Proclamation. Transfer should be a bilateral concern of and decided by both parties. Employers should be allowed to have exclusive power or right on transfer only on exceptional grounds, such as by inserting mobility clause in the employment contract.

የተመረጡ ፍርዶች

የስ/መ/ቁ.102662

የካቲት 15 ቀን 2008 ዓ/ም

ዳኞች፡- አልማው ወሌ ዓሊ

መሐመድ ተኽሊት ይመሰል

እንዳሻው አዳነ ቀነዓ ቂጣታ

አመልካች፡- ወ/ሮ አልማዝ ለሼ- ጠበቃ ኤርሚያስ ደስታ ቀረቡ፡፡

ተጠሪ፡- አቶ በቀለ በላቸው- ወኪል ትርፍነሽ በቀለ ቀረቡ፡፡

መዝገቡ ተመርምሮ ተከታዩ ፍርድ ተሰጥቷል፡፡

ፍርድ

ጉዳዩ ጋብቻ ፈርሷል ሊባል የሚችልበትን አግባብ የሚመለከት ነው፡፡ጉዳዩ የተጀመረው በአማራ ብሔራዊ ክልላዊ መንግስት የደብረብርሃን ወረዳ ፍርድ ቤት ሲሆን ክሱን ያቀረቡት የአሁኑ አመልካች ናቸው፡፡ የክሱ ይዘትም፡- ከአሁኑ ተጠሪ ጋር በአገር ባህል የጋብቻ አፈጻጸም ስርዓት ጋብቻ ፈጽመው ለአርባ አመታት ያህል አብረው መኖራቸውን፣ ይሁን እንጂ ከመስከረም 2006 ዓ/ም ጀምሮ ሊስማሙ ባለመቻላቸው በመካከላቸው ሰላም እንደሌለ ገልፅው ጋብቻው ፈርሶ የጋራ ንብረት እንዲካፈሉ ይወሰን ዘንድ ዳኝነት መጠየቃቸውን የሚያሳይ ነው፡፡ የአሁኑ ተጠሪ ለክሱ በሰጡት መልስም ከአመልካች ጋር ባልና ሚስት የነበሩ መሆኑን ሳይክዱ አመልካች ከአስራ ዘጠኝ አመታት በፊት ቤቱን ጥለው መሄዳቸውንና ተለያይተው የሚኖሩ መሆኑን ጠቅሰው ክሱ በይርጋ ሊታገድ ይገባል በማለት የመጀመሪያ ደረጃ መቃወሚያ ያስቀደሙ ሲሆን በፍሬ ነገር ረገድ ደግሞ ከአመልካች ጋር ያፈሩት የጋራ ንብረት የሌለ መሆኑን ዘርዝረው ክ ውድቅ ሊሆን ይገባል ሲሉ ተከራክረዋል፡፡

የግራ ቀኙ ክርክር በዚህ መልኩ የቀረበለት የሥር ፍ/ቤትም ጉዳዩን መርምሮ በአመልካች እና በተጠሪ መካከል የነበረው ጋብቻ ከአስር አመታት በፊት ፈርሷል የሚል ድምዳሜ ደርሶ የአመልካች ክሱ በይርጋ የታገደ ነው በማለት ውድቅ አድርጎታል፡፡ በዚህ ብይን የአሁኗ አመልካች ቅር በመሰኘት ይግባኛቸውን ለሰሜን ሸዋ አስተዳደር ዞን ከፍተኛ ፍርድ ቤት ቢያቀርቡም ተቀባይነት አላገኙም፡፡

ከዚህም በኋላ አመልካች የሰበር አቤቱታቸውን ለክልሉ ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት አቅርበውም በጉዳዩ ላይ በተሠጠው ብይን መሰረታዊ የሆነ የሕግ ስህተት የለም ተብሎ መዝገቡ ተዘግቶባቸዋል፡፡ የአሁኑ የሰበር አቤቱታው የቀረበው ይህንኑ ውሳኔ በመቃወም ሲሆን ይህ ችሎት የቀረበውን አቤቱታ መርምሮ ተጠሪን በመጥራት ግራ ቀኙን በጽሑፍ አከራክሯል፡፡እንዲሁም የወረዳው ፍርድ ቤት ዋና መዝገብ እንዲመጣ አድርጓል፡፡

በአጠቃላይ የክርክሩ ይዘት ከላይ የተመለከተው ሲሆን ምላሽ ማግኘት የሚገባው የጉዳዩ ጭብጥ በተጠሪና በአመልካች መካከል ጋብቻ በሁኔታ ፈርሷል ተብሎ በበታች ፍርድ ቤቶች መወሰኑ ተገቢነት አለውን? የሚለው ነው።

ከክርክሩ ሂደት መገንዘብ የተቻለው የወረዳው ፍርድ ቤት የግራ ቀኙን ምስክሮች ሰምቶ በአመልካችናበተጠሪ መካከልየነበረውጋብቻ በሁኔታ ፈርሷል በማለት በአመልካች በኩል የቀረበውን ክርክር አልተቀበለውም።

ፍርድ ቤቱ ወደዚህ ድምዳሜ የደረሰው በአመልካችና በተጠሪ መካከል የነበረው የጋብቻ ግንኙነታቸው ከ1987 ዓ/ም ጀምሮ ተቋርጦ ግራ ቀኙ ለየብቻ መኖር መጀመራቸው ተረጋግጧል በሚል አቢይ ምክንያት ነው። ይህ የወረዳው ፍርድ ቤት የፍሬ ነገር ማጣራትና የማስረጃ ምዘና ድምዳሜ በዚህ ረገድ ተመሳሳይ የሆነ ስልጣን ባለው የዞኑ ከፍተኛ ፍርድ ቤት ሙሉ በሙሉ ተቀባይነት አግኝቷል። አመልካች በዚህ ችሎት አጥብቀው የሚከራከሩት ግራ ቀኙ ሌላ ትዳር መስርተው የራሳቸውን ሕይወት የማይኖሩ መሆኑን፣ አልፎ አልፎ በጤና ምክንያት አመልካች ለፀበል ወደ ሌላ ቦታ ከመሄዳቸው ውጪ አመልካችና ተጠሪ ያልተለያዩና እስከ መስከረም 2006 ዓ/ም ድረስ አንድ ላይ የሚኖሩ መሆኑን ዘርዝረው ለጉዳዩ አግባብነት የሌለው አስገዳጅ ውሳኔ ተጠቅሶ መወሰኑ ያላግባብ ነው በሚል ነው። እኛም ጉዳዩን ይህ ሰበር ችሎት በመ/ቁ. 14290፣ 20983፣ 31891፣ 67924 እና በሌሎች በርካታ መዛግብት ከሰጣቸው አስገዳጅ ውሳኔዎች ጋር አገናዝበን ተመልክተናል።

በመሰረቱ የወረዳው ፍርድ ቤት ለውሳኔው መሰረት ያደረገውና ይህ ሰበር ሰሚ ችሎት በሰ/መ/ቁጥር 31891 ሌሎች ከላይ በተጠቀሱት መዛግብት በሰጣቸው አስገዳጅ ውሳኔዎች በባልና ሚስት መካከል ያለ ጋብቻ በፍ/ቤት በተሰጠ የፍቺ ውሳኔ ፈርሷል ባይባልም የተጋቢዎች ተለያይቶ ለረጅም ጊዜ መኖር፣ በዚህም ጊዜ ሌላ ትዳር መሥርቶ መገኘት የቀድሞው ጋብቻ በሕጋዊ መንገድ ተቋርጧል ሊያስብል ይችላል በማለት በአዋጅ ቁጥር 454/97 አንቀጽ 2(1) መሰረት በየትኛውም እርከን የሚገኝ ፍርድ ቤትን የሚያስገድድ የሕግ ትርጉም የሰጠበት ጉዳይ ነው።

ከዚህም ውሳኔ ይዘትና መንፈስ መረዳት የሚቻለው የጋብቻ መፍረስ በተጋቢዎች የረዥም ጊዜ መለያየት ሊከናወን የሚችል መሆኑና ፍርድ ቤቱም በዚህ አግባብ የፈረሰውን ጋብቻ እንደገና እንዲፈርስ ውሳኔ የሚሰጥበት አግባብ የሌለ መሆኑን ነው። በሰ/መ/ቁጥር 67924 የተሰጠው አስገዳጅ የሕግ ትርጉም ደግሞ በቤተሰብ ሕጉ አግባብ የመተጋገዝና የመተባበር ግዴታቸውን ሲወጡና የነበሩና ያልተለያዩ መሆኑ ከተረጋገጠ ጋብቻ በሁኔታ ፈርሷል ለማለት የማይቻል መሆኑን በመዝገቡ ከተረጋገጡ ፍሬ ነገሮች በመነሳት የተወሰነ ነው።

ወደ ተያዘው ጉዳይ ስንመለስም አመልካችና ተጠሪ በሕጉ አግባብ ጋብቻ መሰርተው ልጆችን ከወለዱ በኋላ በ1987 ዓ/ም ጀምሮ በአካል ተለያይተው ለአስራ ዘጠኝ አመታት ያህል ሳይገናኙ የኖሩ መሆኑን ከግራ ቀኙ ምስክሮች ቃል የተረጋገጠ መሆኑን የበታች ፍርድ ቤቶች ደምድመዋል። ይህ ሰበር ሰሚ ችሎት ያስቀረበው የወረዳው ፍርድ ቤት

ዋና መዝገብም የግራ ቀኙ ምስክሮች የመሰከሩት የፍሬ ነገር ነጥብ በይዘቱ የበታች ፍርድ ቤቶች ከደመደሙት ጋር ተመሳሳይነት ያለው መሆኑን ተገንዝቦአል፡፡

በመሆኑም አመልካች ከተጠሪ ጋር እስከ መስከረም 2006 ዓ/ም ድረስ አልተለያየንም በማለት የሚያቀርቡት ቅሬታ በስር ፍርደ ቤት ዋና መዝገብ ውስጥ በምስክሮች ከተነገረው የምስክርነት ቃል ይዘትና ፍሬ ነገሩን የማጣራትና ማስረጃን የመመዘን ስልጣን ያላቸው ፍርድ ቤቶች ከደረሱበት ድምዳሜ ውጪ በመሆኑ ተቀባይነት የሚሰጠው ሁኖ አልተገኘም፡፡በዚህ ረገድ አመልካች ያቀረቡት ቅሬታ ለዚህ ችሎት በኢ.ፌ.ዲ.ሪ.ፐብሊክ ሕገ መንግስት አንቀጽ 80(3(ሀ)) እና አዋጅ ቁጥር 25/1988 አንቀጽ 10 ድንጋጌዎች አግባብ የተሰጠውን ስልጣንም ያላገናዘበ ሁኖ አግኝተናል፡፡

በመሰረቱ ጋብቻ በተጋቢዎች መካከል የመተጋገዝ፣የመከባበርና መደጋገፍ እንዲሁም አብሮ የመኖር ግዴታን የሚጥል መሆኑን ከክልሉ የቤተሰብ ሕግ አዋጅ ቁጥር 213/1992 አንቀጽ 60 እና 61 ድንጋጌዎች ይዘትና መንፈስ የምንገነዘበው ጉዳይ ነው፡፡

ከዚሁ አኳያ በተጠሪና በአመልካች መካከልየነበረው ጋብቻ ይህ ሰበር ችሎት አስቀድሞ በተመሳሳይ ጉዳይ ከሰጠው ውሳኔ አንጻር ተቋርጧል? ወይንስ አልተቋረጠም? የሚለውን ለመወሰን ከፍ ብሎ በአመልካችና በተጠሪ መካከል በጋብቻ ውስጥ በግራ ቀኙ የሚጠበቁ ግዴታዎች ባግባቡ ሲተገበሩ ያልነበሩና እነዚህን ግዴታዎችን ለመወጣት ደግሞ በአመልካች በኩል ያጋጠመው ሁኔታ በሕጉ የተጣሉባቸውን ግዴታቸውን ለመወጣት የማያስችል የነበረ መሆኑ ባልተረጋገጠበት ሁኔታ አመልካች ከተጠሪ ጋር አልተለያየንም፣ በጤና ችግር ምክንያት አልፎ አልፎ ለፀበል ሌላ ቦታ እሄድ ነበር በማለት የሚያቀርቡት ክርክር በክርክሩ ሂደት በማስረጃ የተረጋገጡትን ፍሬ ነገሮችን መሰረት አድርጎ ያልቀረበ ሁኖ አግንተነዋል፡፡

ከዚህም በተጨማሪ በተያዘው መዝገብና ይህ ሰበር ችሎት አስገዳጅ የሕግ ትርጉም የሰጠባቸው መዛግብት የያዟቸው መሰረታዊ ፍሬ ነገሮች ከዚህ መዝገብ ከተረጋገጡት እውነታዎች ሙሉ በሙሉ የተመሳሳይነት ያላቸው ሁኖ እያለ አመልካችም ሆነ ተጠሪ ሌላ ትዳር መስርተው ሕይወታቸውን በመምራት ላይ አይገኙም በማለት በሰ/መ/ቁጥር 31891 የተሰጠውን አስገዳጅ የሕግ ትርጉም በመተውና ግንኙነቱ ያልተቋረጠ ተጋቢዎችን መሰረት ተደርጎ በመ/ቁጥር 67924 የተሰጠውን ውሳኔ መሰረት በማድረግ አመልካች መከራከራቸው ከአዋጅ ቁጥር 454/1997 አንቀጽ 2(1) አተገባበር ጋር የሚጋጭ ሁኖ አግኝተናል፡፡

ስለሆነም የአመልካችና የተጠሪ ግንኙነት ከ1987 ዓ/ም ጀምሮ በሁኔታ የፈረሰ በመሆኑ እና ለጉዳዩ አግባብነት በላቸው ከላይ በተጠቀሱት መዛግብት በተሰጠው ትርጉም መሰረት የጋራ ንብረት ጥያቄም በአስር አመት ያልቀረበ በመሆኑ የተጠሪ ክስ በይርጋ የታገደ ነው ተብሎ ብይን መሰጠቱ የሚነቀፍበትን የሕግ ምክንያት አላገኘንም፡፡ ሲጠቃለልም በጉዳዩ ላይ የተሰጠው ውሳኔ መሰረታዊ የሆነ የሕግ ስሕተት የተፈጸመበት ሁኖ ስላላገኘነው ተከታዩን ወስነናል፡፡

ውሳኔ

1. **የደብረብርሃን ከተማ ወረዳ ፍርድ ቤት በመ/ቁጥር** 0108191/06 **በ**22/08/2006 **ተሠጥቶ በሰሜን ሸዋ መስተዳደር ዞን ከፍተኛ ፍርድ ቤት በመ/ቁጥር** 0114418 **በ**30/08/2006 **ዓ/ም፣ በክልሉ ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት በመ/ቁጥር** 030-5041 **ግንቦት** 19 **ቀን** 2006 **ዓ/ም የተሰጠው ውሳኔ በፍ/ብ/ሥ/ሥ/ሕ/ቁጥር** 348(1) **መሰረት ጸንቷል፡፡**

2. **በአመልካችና በተጠሪ መካከል በአገር ባህል የጋብቻ አፈፃጸም ስርዓት ተመስርቶ የነበረው ጋብቻ ለረዥም ጊዜ ተለያይቶ በመኖር ምክንያት ፈርሷል በማለት ወስነናል፡፡**

3. **በዚህ ችሎት ለተደረገው ክርክር የወጣውን ወጪና ኪሳራ የየራሳቸውን ይቻሉ ብለናል፡፡**

ትዕዛዝ

ከደብረብርሃን ከተማ ወረዳ ፍርደ ቤት የመጣ መዝገብ ቁጥር 0108191/06 **በመጣበት አካሂሀን ይመለስ ብለናል፡፡ መዝገቡ ተዘግቷል ፤ ወደ መዝገብ ቤት ይመለስ፡፡**

የማይነበብ የአምስት ዳኞች ፊርማ አለበት፡፡

ወ/ከ

የሰ.መ.ቁ. 08862

የካቲት 21 ቀን 2003 ዓ/ም

ዳኞች፤ ፀጋዬ ወርቅአየሁ

ጌትነት መንግስቱ

ፍቅሬ ጥላሁን

አንዳርጌ ላቀ

ዩሐንስ ቢሻው

አመልካች ---------- የአ.ብ.ክ.መ ሥነ-ምግባር እና ፀረ-ሙስና ኮሚሽን ቀረቡ

ተጠሪ ---------- አውግቸው መኮነን ጠበቃ ተሾመ መኮንን ቀረቡ

መዝገቡ የተቀጠረው ተጠሪ መልስ የሚያቀርብ ቢሆን ለመጠባበቅ ነው፡፡ የካቲት 21 ቀን 2003 ዓ/ም የተፃፈ ሰባት ገጽ መልስ አቅርበው ከመዝገቡ ጋር ተያይዟል፡፡ አመልካች የተጠሪው ጉዳይ ታይቶ ያስቀርባል የተባለበት ነጥብ ከ10 ዓመት በላይ የሚያስቀጣ ስለሆነ ጉዳዩን በማረሚያ ቤት ሆኖ እንዲከታተልልን ሆኖ ለዚህም የክልሉ ፖሊስ ኮሚሽን ተጠሪን ካለበት አድራሻ አፈላልጐ እንዲያቀርበው እንዲደረግልን በማለት አመልክተዋል፡፡

የተጠሪ ጠበቃ በበኩላቸው ጉዳዩ እየታየ ያለው በይግባኝ ደረጃ በመሆኑ በሥ/ሥርዓት ህጉም ሆነ በሥነ ምግባር አዋጁ ላይ በይግባኝ ደረጃ ባለ ክርክር ተከራካሪዎች ዋስትና እንዲነፈጋቸው የሚያደርግ ባለመሆኑ የቀረበው የአመልካች ክርክር ተቀባይነት ሊኖረው አይገባም፤ ይህ የሚታሰፍ ቢሆን ይህ ፍ/ቤት የማያየው ተጠሪ ሊከራከር ይገባ ነበር አልነበረም በሚለው ነጥብ ላይ በመሆኑ ተከላከል ከመባሉ በፊት ዋስትና እንዲነፈገው የቀረበው ክርክር ተቀባይነት ሊኖረው አይገባም ከሁሉም በላይ ደግሞ ተከላከል ቢባል እንኳ አንቀጽ ሊቀየርና ዋስትና ሊያስፈቀድ በሚችል አንቀጽ ሊቀይረው ስለሚችል ተቃውሞው ተቀባይነት ሊኖረው አይገባም ብለናል፡፡ በግራ ቀኙ በኩል የቀረቡትን መከራከሪያዎች አግባብነት ካላቸው ህጐች ጋር በማገናዘብ መርምረን ተከታዩን ብይን ሠጥተናል፡፡

ብ ይ ን

አመልካች ተጠሪው በሥር ፍርድ ቤት የተከሰሱበትና በዚህ ችሎት ይስቀርባል ተብሎ በመታየት ላይ ያለው ጉዳይ ከአሥር ዓመት በላይ በሆነ እስራት የሚያስቀጣ ስለሆነና ይህም የሚያስከለክል በመሆኑ ተጠሪን የክልሉ ፖሊስ ከአለበት በመያዝ ለማረሚያ ቤት እንዲያስረክበው ጠይቀዋል፡፡

የተጠሪ ጠበቃ በበኩላቸው በዚህ ደረጃ ላለ ክርክር የሥነ ሥርዓት ህጉም ሆነ የሥነ-ምግባር አዋጅ ዋስትና እንዲነፈጋቸው የሚያደርግ አይደለም፤ ይህ ቢታሰፍ እንኳን ጉዳዩ ታይቶ ተጠሪ ይከላከል ሲባል ድንጋጌው ካልተቀየረ የሚፈፀም ስለሆነ በአመልካቹ የቀረበው መቃወሚያ ተቀባይነት የለውም ባይ ናቸው፡፡

ለቀረበልን ጥያቄ እና በጥያቄው ላይ ለቀረበው መቃወሚያ ብይን ከመስጠታችን በፊት ጉዳዩን ምንነት እና አመጣጡን ከመዘገቡ ግልባጭ ገባ ብለን አይተናል። እንዳየነውም ተጠሪ በከፍተኛው ፍርድ ቤት አምስት የተለያዩ ክሶች በአንድ መዝገብ ተመስርቶባቸው ከነዚህ ክሶች ውስጥ ለአቤቱታው ምክንያት በሆኑት ሶስት ክሶች መከላከል ሣይስፈልጋቸው በነፃ እንዲሠናበቱ ተወስኗል። ይህ በይግባኝ ሰሚው ፍ/ቤት ተቀባይነት አግኝቷል። ይህ ሠበር ሰሚችሎት ደግሞ በአመልካች የሠበር ቅሬታ አቅራቢነት ታይተው በ1996 ዓ/ም የወጣውን የኢፌድሪ የወንጀል ህግ 407/2/ እና 408/2/ የተመለከቱትን ድንጋጌዎች ተላልፈዋል በሚል በተጠሪ ክስ ቀርቦ መከላከል ሣይስፈልጋቸው በነፃ እንዲሠናበቱ በሥር ፍ/ቤቶች የተሠጠውን ውሣኔ ተገቢነት ለማጣራት በሚል በሁለቱ ክሶች ተጠሪ መልስ እንዲሠጡበት ሆኖ ጉዳዩ ለምርመራ ባደረበት ሁኔታ ነው ይህ የዋስትና ክርክር የቀረበልን።

እኛም ተጠሪ በሥር ፍ/ቤት የተከሠሱበት እና አሁን በሠበር ያስቀርባል የተባሉት የወንጀል ድንጋጌዎች የተከሠሠን ሰው የዋስትና መብት የሚያስከለክሉ ናቸውን? ናቸው የሚባል ከሆነስ ህጉ በመጀመሪያ ደረጃ በሚታይ የክስ ክርክር እና በይግባኝ ወይም በሠበር ደረጃ በሚኖር ክርክር ልዩነት ይፈጥራል ወይ? የሚሉትን ነጥቦች በመጨበጥ ምላሽ ለመስጠት ለጉዳዩ ዕልባት መስጠት ያስችላሉ ብለን አምነናል።

በዚህ መሠረት እንዳየነው አሁን በሠበር ደረጃ እየታዩ ያሉትና ተጠሪ በከፍተኛው ፍርድ ቤት ተከሰው በነፃ እንዲሠናበቱ የተወሰ ነው በ1996 ዓ/ም የወጣውን የኢፌድሪ የወንጀል ህግ አንቀጽ 407/2/ እና 408/2/ የተጠቀሱባቸው ሁለት ክሶች ናቸው።

በኢፌድሪ መንግስት የተሻሻለው የፀረ ሙስና ልዩ የሥነ ሥርዓትና የማስረጃ ህግ አዋጅ ቁጥር 434/1997 ዓ/ም አንቀጽ 4/1/ በሙስና ወንጀል ተጠርጥረው የተያዙ ሰዎች የተከሠሡበት ወንጀል ከአስር አመት በላይ ሊያስቀጣ የሚችል ከሆነ በዋስትና መልቀቅ አይቻልም ሲል ደንግጓል። አሁን በያዝነው ጉዳይ በሠበር ችሎት ያስቀርባል ተብለው እየታዩ ካሉት ሁለት ክሶች ውስጥ አንደኛው ብቻ ከአስር ዓመት በላይ ያስቀጣል። ወንጀሎቹም በወንጀል ህጉ ምዕራፍ 2 ስር የሙስና ወንጀል ተብለው ከተዘረዘሩት ውስጥ የሚካተቱ በመሆኑ ተጠሪ በሥር ፍ/ቤት ተከሠው በፍ/ቤቶቹ በነፃ የተሠናበቱበት ውሣኔ አግባብነት በዚህ ችሎት ያስቀርባል ተብሎ በመታየት ላይ ያለው ጉዳይ በዋስ የመለቀቅ መብትን የሚነፍጉ ናቸው ብለናል።

ሆኖም ግን በዋስትና ወረቀት የመለቀቅ ጉዳይን በሚመለከት በተጠሪ ጠበቃ የሥነ ሥርዓት ህጉም ሆነ በሥነ ምግባር አዋጅ አንድ በዋስትና የሚያስከለክሉ ክሶች በሠበር ደረጃ ሲታይ ተፈፃሚ እንዲሆን አልደነገጉም የሚል መከራከሪያ ቀርቧል። ይህ መከራከሪያ በጠበቃው በግልጽ ባይነሣም ህጉ የተከሠሡ ሰዎች ዋስትና ተከልክለው በማረሚያ ቤት ሆነው ጉዳያቸውን የሚከታተሉበት አግባብ የደነገገው በመጀመሪያ ደረጃ ክሱ በፍ/ቤት በሚታይበት ጊዜ ነው፤ በይግባኝ ወይም በሰበር ደረጃ በሚሆንበት ጊዜ ህጉ በዝምታ ያለፈው ከመሆኑ እና ተያያዥነት ባላቸው ሌሎች መነሻዎች የመነጨ ነው የሚል ግምት አለን።

በእርግጥ በ1954 ዓ/ም የወጣው የኢትዮጵያ የወንጀለኛ መቅጫ ስነ ሥርዓት ህጉ ዋስትና በሚያስከለክሉ ወንጀሎች የተከሠሡ ሰዎች በማረሚያ ቤት ሆነው ጉዳያቸውን የሚከታተሉበት ድንጋጌ ያለው በህጉ ሁለተኛ መፀሀፍ የመክሰስና የምርመራ ሥነ ሥርዓትን በሚለከተው ምዕራፍ ሶስት ውስጥ ነው፡፡ ይህ አይነት ድንጋጌ ጉዳዩ በይግባኝ ወይም ከዚህ በላይ በሚኖረው ክርክር በድጋሚ አልተካተተም፡፡ በተመሣሣይ በተሻሻለው የሙስና ልዩ የሥነ ሥርዓት እና የማስረጃ ህግ አዋጅ ቁጥር 434/1997 ስለዋስትና ክልከላ የሚደነግጉት ድንጋጌዎች የተዋቀሩት ስለዋስትና የፍርድ ቤት ስልጣን የሚል ርዕስ በተሠጠው የአዋጅ ክፍል ሁለት የተከታተ ሲሆን ድንጋጌው በይግባኝ ደረጃ ተፈፃሚ ስለመሆኑ ወይም ስላለመሆኑ ሣይደነግግ በዝምታ አልፎታል፡፡

በወንጀል ተጠርጥረው የተያዙ ሠወች በዋስ የመፈታት መብት በህገ መንግስቱ አንቀጽ 19/6/ የተፈቀደ ሲሆን በሚከሠሡበትም ጊዜ እንደጥፋተኛ ያለመቆጠር መብት /አንቀጽ 20/3/ የተከበረ መብት ነው፡፡ ይሁን እንጅ ህገ መንግስቱ አንቀጽ 19/6/ በህግ በልዩ ሁኔታዎች በዋስትና የመለቀቅ ጥያቄን ላለመቀበል እንደሚችል ደንግጓል፡፡ አሁን በያዝነው ጉዳይም ቢያንስ በመጀመሪያ ደረጃ ለሚኖር ክርክር በዋስ የመለቀቅ መብት በህግ የተገደበ መሆኑን አይተናል፡፡ አጠያያቂው ጉዳይ ይህ ክልከላ ተፈፃሚነቱ በይግባኝ ወይም በሠበር ደረጃ ጉዳዩ በሚታይበት ጊዜ ቀጣይነት ያለው በመሆኑ ጉዳይ ነው፡፡

አንድ ሰው ወንጀል ፈጽሟል ተብሎ በሚጠረጠርበት ጊዜ ከምርመራ ጀምሮ በፍርድ ወይም በፍትህ ስርዓቱ የመጨረሻ ውሣኔ ሰጭ አካል አይቶ የግለሠቡን ነፃነት ወይም ጥፋተኝነት የሚኖርን የሥራ ሒደት ለማሣየት ነው የወንጀለኛ መቅጫ ህጉም ሆነ የሙስና ልዩ የሥነ- ሥርዓት ህጉም ወጡት፡፡ የአንድ የወንጀል ተጠርጣሪ ጉዳይ የምርመራም ሆነ የፍርድ ሂደት የሚመራው የሥነ- ሥርዓት ህግ/ህጐች/ በሚያዋቅሩት አንድ የስራ ሂደት ነው ካልን እንደ ጥቅም፤ ምርመራ፤ ክስ፤ የክስ ሂደት፤ ፍርድ፤ ቅጣት፤ ይግባኝ፤ የይግባኝ ክርክር ውሣኔ፤ የሠበር አቤቱታ፤ የሠበር ክርክር የሠበር ውሣኔ ወዘተ-- የሚሉት በሂደቱ ያሉ ደረጃዎች ሲሆኑ አንዱ ለሚቀጥለው መሠረት ሆኖ በአብዛኛው በቅደም ተከተል የተቀመጡናቸው፡፡ ይህ ባህሪያቸው ለምሣሌ በፍርድ ሂደት ባሉ ደረጃዎች ውስጥ በመጀመሪያ ደረጃ ባለክስ ስለከሣሸም ሆነ ስለተከሣሸ የተደነገጉ መብትና ግዴታዎች ቀጥሎ ለሚኖሩት እንደ ይግባኝ ባሉ ደረጃዎች በልዩ ሁኔታ እስካልተደነገገ ድረስ እንደጠቅላላ መርህ ተወስደው ተፈፃሚነታቸው እስከ መጨረሻው የሚቀጥል ነው፡፡

ስለሆነም ህግ አውጪው ለአንድ ጉዳይ ሲል ሲደርስበት ያሰበው ዓላማ ካለ አንድ ተከሣሸን በአንድ የፍርድ ሂደት የነገሩ ጭብጥም ሆነ የተከራካሪዎች ማንነት ሣይለወጥ ለወሰደው የፈለገው የጥንቃቄ እርምጃም ሆነ ሊደርስበት ያለመው ግብ የክስ ሂደቱ ከመጀመሪያ ክሱ ወደ ይግባኝ ብሎም ወደ ሠበር ደረጃ ሲሸጋገር አንድ መሆኑ እስከቀጠለ ድረስ ህጉ በመጀመሪያ ክስ ሂደት ዋስትና ስለመከልከል ደንግጐ በድንጋጌው ሊወሰደው ያሰበው የጥንቃቄ እርምጃና ግብ እስካልተለወጠ ድረስ ተፈፃሚነቱ እስከ መጨረሻው ደረጃ እንደሚሆን ግልጽ ነው፡፡

የተከሰሱ ሰዎች በተወሰኑ የወንጀል አይነቶች በዋስ የመለቀቅ መብታቸው ቀሪ ሆኖ በማረሚያ ቤት እንዲቆዩ ህግ አውጭው ለወሰደው የፈለገው የጥንቃቄ እርምጃም ሆነ

ሊደርስበት ያሰበው ግብ አንድ በወንጀል ተከስሶ በመጀመሪያ ደረጃ ፍርድ ቤቱ በነፃ ከተሠናበተ በኃላም ከወንጀሉ ነፃ የመሆኑ አጠያያቂ ስለመሆን ከበላይ ባሉ ይግባኝ ሰሚና ሰበር ሰሚ ፍ/ቤቶች/ችሎት/ ሲታመንበት በሚኖር ክርክር ጊዜም ተመሣሣይና የማይለዋወጡ ናቸው።

በመሆኑም በተጠሪ ጠበቃ በኩል ህጉ በይግባኝ ደረጃ በዝምታ የዋስትና ጉዳይን ማለፋን አጽንኦት ሰጥተው ደንበኛቸው በውጭ ሆነው ጉዳያቸውን እንዲከታተሉ ያቀረቡት መከራከሪያ ተቀባይነት የሌለው ነው። ጠበቃው በአማራጭ ያቀረቧቸው መከራከሪያወች ከላይ የታየው ዋናው መቃወሚያቸው አወንታዊ ምላሽ ማግኘቱን ታሣቢ በማድረግ በመሆኑና የችሎቱ ምላሽ አሉታዊ በመሆኑ ማየቱ አላስፈለገንም።

ሌላው በተለይ መ/ስናን በሚመለከት ፍ/ቤት በመፍቀድ ወይም በመከልከል በሚሠጠው ውሣኔ ላይ ይግባኝ ለማለት እንደሚችል በመለቀቁ ላይ ይግባኝ ከተባለ ብቻ/አንቀጽ 5/2/ ልዩ የሥነ ስርዓት ህጉ የመለቀቁ ውሣኔ ይታገዳል ከተባለ ይህ ግለሰብ ክስ ቀርቦበት ከክሱ በነፃ ሲሰናበት እና የመሰናበቱ አግባብነት በይግባኝ ሰሚው ፍ/ቤት ጥያቄ ውስጥ ሲገባ ጥፋተኛ ተብሎ የመቀጣት ዕድሉ እንደመጀመሪያው ሁሉ *ሀምሣ፤ ሀምሣ* በመቶ ስለሚሆን በዚህ ሁኔታ ከእስር እንደተለቀቀ የነገሩ መታየት ይቀጥላል የሚለው ሀሣብ ምክንያታዊ ያልሆነ እና ከህጉ ዓላማ ውጪ ነው የሚል እምነት አለን።

በአጠቃላይ ተጠሪ ተላልፈዋል ተብለው ለዚህ ክርክር ምክንያት የወንጀል ድርጊት የዋስትና መብትን የሚያስነፍግ ሆኖ ሣለ ጉዳያቸው በሠበር ደረጃ በመታየቱ ብቻ የዋስትና መብት መከልከል በደንበኛቸው ላይ ተፈፃሚ እንዳይሆን ያቀረቡት መቃወሚያ የህግ መሠረት የሌለው ስለሆነ ተጠሪው ጉዳያቸው ውሣኔ እስከሚያገኝ ድረስ በማረሚያ ቤት ሆነው ጉዳያቸውን ሊከታተሉ ይገባል ብለናል። ብይኑ በአብላጫ ድምጽ የተሠጠ ነው።

ት ዕ ዛ ዝ

1- ተጠሪን የክልሉ ፖ/ሊስ ከአሉበት አፈላልጐ በመያዝ ለማረሚያ ቤት እንዲያስረክባቸው ታዝዟል። ይፃፍ።

2- ዋናውን ጉዳይ በሚመለከት አስቀድሞ መርምሮ ለመወሰን የተየዘው ቀነ ቀጠሮ አልተለወጠም።

ያስቻሉት ዳኞች ፊርማ አለበት።

የሐሳብ ልዩነት

ስሜ ከዚህ በላይ በተራ ቁጥር አንድ የተገለፀው ዳኛ በአብላጫው ድምጽ በተሰጠው ውሳኔ ያልተስማማሁበትን ምክንያት እንደሚከተለው እገልፃለሁ።

ተጠሪ የተከሰሰበት ወንጀል ከመሠረቱ ዋስትና የሚያስከለክል ነው። በዚህ መሠረት በመጀመሪያ ደረጃ በነበረው ክርክር የዋስትና መብቱ ተነፍጎ ጉዳዩን በማረሚያ ቤት ሆኖ ሲከታተል ቆይቷል። በመጨረሻም የዓቃቤ ህግ ማስረጃ ተመዝኖ ተጠሪ በነፃ እንዲሰናበት ተወስኗል።

በውሳኔው ዓቃቤ ህግ ቅር ተሰኝቶ ይግባኝ ባቀረበ እና አቤቱታው በበላዩ ፍርድ ቤት ታይቶ ያስቀርባል በተባለ ጊዜ ክርክሩ ዕልባት አገኘ ድረስ የተጠሪ ቆይታ ምን ይሆናል በሚለው ላይ ፍርድ ቤቶች የተለያዩ አቋሞች ሲያንጸባረቁ ይታያል። በኔ እምነት ይህን የመሰለ ጥያቄ ለመመለስ መነሻው የወ.መ.ሥ..ህ.ቁ. 193 መሆን እንዳለበት ይሰማኛል። ይህ ድንጋጌ በይግባኝ ሰሚው ፍርድ ቤት በመልስ ሰጭነት የሚከራከሩ መልስ ሰጭዎች በይግባኝ ሰሚው ፍርድ ቤት ራሳቸው ወይም ጠበቃቸው ያልቀረቡ እንደሆነ ክርክሩ በሌሉበት ስለሚቀጥልበት ሁኔታ ይናገራል። በይግባኝ ክርክሩ እንዲቀጥል ለማድረግ መልስ ሰጭ ወይም ጠበቃው መቅረባቸው ብቻ በቂ መሆኑን ያመለክታል። በይግባኝ ክርክር ጊዜ የመልስ ሰጭዎች በአካል መገኘት አስፈላጊ አለመሆኑን የሚያሳይ ነው (appearance is not mandatory)። የክርክሩ ምክንያት ከመሠረቱ ዋስትና የሚያስከለክል ቢሆንም ባይሆንም መልስ ሰጭ የሆነው ሰው እንዲቀርብ ህጉ ግዴታ አይጥልበትም። ባይቀርብም እንኳ ጉዳዩ በሌለበት ሊታይ የሚችል በመሆኑ ተጠሪ በማረሚያ ቤት እንዲቆይ ስለሚደረግበት ሁኔታ መነጋገር አይቻልም። በዚህ ምክንያት የተጠሪ ዋስትና ተነፍጎ በማረሚያ ቤት እንዲቆይ ይደረግልን የሚለው ክርክር ተቀባይነት ያለው አይደለም።

ዋስትና ህገ-መንግስታዊ መብት ነው። አይገደብም ማለት ግን አይደለም። የህብረተሰቡ ጥቅም ሊነኩ ይችላሉ በሚባሉ ዋና ተብለው በተለዩት የወንጀል ዓይነቶች እና በሌሎች በልዩ ሁኔታ በተዘረዘሩት ምክንያቶች ከፍርድ በፊት ዋስትና ሊከለከል ይችላል። ከፍ ያለ ጉዳት በህብረተሰቡ ላይ እንዳይደርስ ለመከላከል ነው። ይህን በመሰለ ሁኔታ የግለሰቦች ነፃነት እንዲገደብ ህብረተሰቡ ይሻል። በጠቅላላው ህብረተሰብና በግለሰቦች ጥቅም መካከል ያለውን የጥቅም ግጭት ለማስታረቅ የተቀመጠ ሚዛን ነው። ይህ ግን በመጀመሪያ ደረጃ ለሚደረጉ ክርክሮች የሚያገለግል ነው። በይግባኝ ደረጃ ሲሆን ነገሩ ይለወጣል። ይግባኝ የክለሳ ሥርዓት ነው። በመሆኑም መጠነኛ ልዩነቶች አሉት። ይህንን ከግምት ውስጥ ማስገባት ያስፈልጋል። ስለሆነም በይግባኝ ክርክር ጊዜ መልስ ሰጭ መቅረብ ሳያስፈልገው ጠበቃው ከቀረበ ይኸው በቂ ሆኖ ክርክሩን መምራት ይቻላል። ዓላማው በመጀመሪያ ደረጃ ክርክር የግለሰቦችን ነፃነት ለመገደብ ምክንያት የሆነው ስጋት በይግባኝ ክርክር ጊዜ የማይኖር፣ ቢኖር እንኳ በእጅጉ የሚቀንስ በመሆኑ ነው። በዚህ ጊዜ የመልስ ሰጭ በአካል መገኘት እምብዛም አስፈላጊ አይሆንም። ይህን የምልበት ምክንያት በመጀመሪያ ደረጃው ክርክር ከላሹ የሰበሰበው ማስረጃ ከመቅረቡና ከመመዘኑ በፊት ተከሰሾች በዋስትና ቢለቀቁ በህብረተሰቡ ጥቅም ላይ ከፍ ያለ ጉዳት ሊደርስ ይችላል የሚል ግምት በመኖሩ ዋስትና መከልከሉ ተገቢ ቢሆንም ፍርድ ቤቱ ማስረጃውን መዝኖ በነፃ እንዲሰናበት ከወሰነለት፣ ነፃነቱ በፍርድ ከተረጋገጠለት በኋላ ግን መልስ ሰጭ እንደመጀመሪያው ክርክር ሁሉ ለህብረተሰቡ የነበረው አስጊነት በዚያው ደረጃ ይቀጥላል ተብሎ የሚታሰብ ስለማይመስለኝ ነው። የተሰበሰበቡት የከሳሽ ማስረጃዎች ከመመዘናቸው በፊትና ነጻ እና ገለልተኛ በሆነው ፍርድ ቤት ተመዝነው መልስ ሰጭዎቹ በነፃ ከተሰናበቱ በኋላ የመልስ ሰጭዎች አስጊነት በተመሳሳይ ደረጃ ላይ ይገኛል የሚል ዕምነት የለኝም። ማስረጃው ተመዝኗል። ጥፋተኛ ለማድረግ የሚያበቃ ሆኖ ግን አልተገኘም። ስለሆነም ከፍርድ በፊት የነበረው የህብረተሰቡ የመጀመሪያ ስጋት በፍርድ ሂደት የመልስ ሰጭ ነፃነት ከተረጋገጠ በኋላ በነበረበት ሁኔታ አይቀጥልም። በይግባኝ ደረጃ ሥጋት አይኖርም ማለት ነው። ሥጋቱ ቢኖር እንኳ

ከፍርድ በፊት በነበረው ሁኔታ ስጋቱ ጥበቃ በሚያስፈልገው ደረጃ የግለሰቦችን ነፃነት እንዲገደብ ለማድረግ የሚያበቃ አይሆንም። እንዲህ ሲሆን የህብረተሰቡ ፍላጎት የግለሰቦች ነፃነት እንዲገደብ ከመፈለግ ይልቅ የፍርድ ቤቱ ውሳኔዎች እንዲከበሩ ጽኑ ፍላጎት አለው። ህብረተሰቡ ደህንቱን ከፍ ያለ ስጋት ላይ እንዳይወድቅ የሚፈልገውን ያህል በዕኩል ደረጃ የፍርድ ቤቶች ውሳኔ እንዲከበር፤ አስተማማኝነት እንዲኖረውም ይፈልጋል። ነጻ እና ገለልተኛ ሆኖ የሚሠራ፣ ዕምነት የሚጣልበት ፍርድ ቤት ያቋቋመውም ለዚሁ ነው። ስለሆነም የተጠሪን ነፃነት የሚያረጋግጠውን የፀና ውሳኔ በይግባኝ እስኪቀየር ድረስ ማክበር ይገባል። ጉዳዩ በይግባኝ ቀርቦ በመታየት ላይ በመሆኑ ብቻ ውሳኔው እንዳልተሰጠ ተቆጥሮ የመልስ ሰጭ ዋስትና ጥያቄ ውስጥ የሚወድቅበት ሁኔታ የለም። በይግባኝ በቀረበው ክርክር ተጠሪው አሊያም እርሱ መቅርብ ሳያስፈልገው በጠበቃው አማካኝነት ሊከታተል እንደሚችል መደንገግ ያስፈለገው ለዚሁ ነው። በመሆኑም የተጠሪ ዋስትና መነፈግ አለበት፤ ጉዳዩም ዕልባት አገኘ ድረስ በማረሚያ ቤት መቆየት አለበት ሊባል አይገባም። በዚህ የተነሳ የመልስ ሰጭ ዋስትና ተነፍጎ ማረሚያ ቤት እንዲቆይ ይደረግልኝ የሚለው ክርክር ተቀባይነት ያለው አይሆንም፤ የህጉ ፍላጎት አይደለም የምለውም በዚህ ምክንያት ነው።

በፀረ-ሙስና ህግ አዋጅ ቁጥር 434/97 አንቀጽ 5 ላይ በይግባኝ በመታየት ላይ ባሉ ጉዳዮች የተከሳሾች የዋስትና መብት ተነፍጎ በማረሚያ ቤት ሊቆዩ ስለሚችልበት ሁኔታ ይገልጻል። በምን ዓይነት ጉዳዮች ላይ የሚለውን ማየት ያስፈልጋል። በኔ ዕምነት ድንጋጌው ራሱን የቻለ የዋስትና መዝገብ ተከፍቶ ወይም በመጀመሪያ ደረጃ የፍሬ ነገር ክርክር ቀርቦ በዚህ የክርክር ሂደት በቀረበ የዋስትና አቤቱታ ላይ ፍርድ ቤቱ በሚሰጠው ውሳኔ ቅር የተሰኘ ወገን ይግባኝ ስለሚጠይቅበት ሁኔታ የሚገልጽ ነው። የዋስትና ጥያቄ ዋና መከራከሪያ ሆኖ ይቀርባል ማለት ነው። እንዲህ ባሉ ሁኔታዎች በዋስትናው ላይ መከራከሩ ትርጉም እንዳያጣ፣ ህጉ ጥበቃ ማድረግ የፈለገበት ዓላማም እንዳይሳት የሥር ፍርድ ቤት ውሳኔ ሳይፈፀም እንዲቆይ መባሉ ነው። ያሳምናል። ህጉ የሚናገረነውም ስለዚህ ጉዳይ ነው። ከዚህ አልፎ ግን የተጠቀሰው ህግ የመጀመሪያ ደረጃ ክርክር ታይቶ በፍሬ ነገሩ ላይ ውሳኔ ከተሰጠ በኋላ በጥፋተኛነት ውሳኔው ላይ የሚቀርብ የይግባኝ ክርክርን የሚመለከት አይደለም። ለተያዘው ጉዳይ አግባብነት የለውም። ከፍ ሲል በተጠቀሱት ምክንያቶች እንዲህ ያለው ጉዳይ የሚመራው በመደበኛው የወንጀለኛ መቅጫ ሥነ-ሥርዓት ህግ ነው። በዚህ ህግ መሠረት ደግሞ ተጠሪ በጠበቃው አማካኝነት ጉዳዩን በመከታተል ላይ ከሆነ፣ ባይከታተል እንኳ በሌለበት ጉዳዩን ማየት እየተቻለ ዋስትናው ተነፍጎ በማረሚያ ቤት እንዲቆይ ይደረግልን የሚለው አቤቱታ ተቀባይነት ያለው አይመስለኝም።

ስለሆነም የአብላጫው ድምጽ ይህንን ከግምት ውስጥ በማስገባት የተጠሪን ዋስትና ለማስነፈግ አመልካች ያቀረበውን አቤቱታ ሊቀበለው አይገባም ነበር በማለት በሃሳብ ተለይቻለሁ።

በሃሳብ የተለዩት ዳኛ ፊርማ አለበት

የሰ.መ.ቁ. 06939

መጋቢት 13 ቀን 2002 ዓ.ም

ዳኞች፦ዓለሙ ተደበበ
ፀጋዬ ወርቅአየሁ
ጌትነት መንግስቱ
ተፈሪ ገብሩ
ጌታዬ እንዳለው

አመልካች.....መሠረት ታዬ ቀረቡ

ተጠሪ.....እማሆይ ፈለጉሽ መለሰ ቀረቡ

መዝገቡን መርምረን የሚከተለውን ውሳኔ ሰጥተናል፡፡

ውሳኔ

ከመዝገብ ምርመራው እንደተረዳነው ክርክሩ የተጀመረው በባህር-ዳር ከተማ ወረዳ ፍርድ ቤት ሲሆን የአሁን ተጠሪ የሥር ከሳሽ አመልካች ደግሞ ተከሳሽ ነበሩ፡፡ የሚከራከሩት በውርስ ሃብት ነው፡፡ ተጠሪዋ የሟች ልጅ አበበ አሰሜን ሃብት ባለቤቱ የሆነችው አመልካች ይዛለችና ድርሻዬን ልትሰጠኝ ይገባል በማለት ጠይቀዋል፡፡

አመልካችም በክሱ ላይ የተጠቀሱትን ንብረቶች በተመለከተ ይበጀኛል የሚሉትን መከራከሪያ በዝርዝር በማንሳት የበኩላቸውን ሙግት አቅርበዋል፡፡

በዚህ የክርክር ሂደት ለሰበር አቤቱታው ምክንያት የሆነችው ኮድ 3 የታርጋ ቁጥር 04539 አ.ማ. የሆነችው ባለ አሥራ ሁለት መቀመጫ ሚኒባስ መኪና በተጠሪ አመልካችነት ሳትሸጥ፣ ሳትለወጥ፣ ወይም በማናቸውም መንገድ ለሦስተኛ ወገን ሳትተላለፍ ተከብራ እንድትቆይ እንዲደረግ ታሟል፡፡

ይሁንና ተጠሪ የተሰጠው የዕግድ ትዕዛዝ አመልካች በመኪናው መገልገላቸውን ያልገታ በመሆኑ በመኪናው በብቸኝነት መገልገላቸው እንዲቆም ለማድረግ መኪናዋ አገልግሎት መስጠት እንድታቆም ሊደረግልኝ ይገባል በማለታቸው ፍርድ ቤቱ በአቤቱታቸው መሠረት እንዲፈፀምላቸው ትዕዛዙን ለባህር-ዳር ትራፊክ ፖሊስ ጽ/ቤት ታህሣሥ 12 ቀን 2002 ዓ.ም አስተላልፎላቸዋል፡፡

ከሦስት ቀን በኋላም ታህሣሥ 15 ቀን 2002 ዓ.ም አመልካች ቀርበው አገልግሎት መስጠት እንድታቆም ትዕዛዝ የተላለፈባት መኪና በባንክ ዕዳ የተገዛች በመሆኗ ዕዳውን በወቅቱ ለመክፈል እንዳንችል ሆነናል በማለታቸው ፍርድ ቤቱ የተጠሪን አስተያየት ሳይጠብቅ መኪናዋ አገልግሎት እንዳትሰጥ ያስተላለፈውን ትዕዛዝ አንስቷል፡፡

ይህ ትዕዛዝ በተሰጠ በስድስተኛው ቀን ተጠሪ ቀርበው አመልካቾች መኪናዋን ያለአግባብ እየተገለገሉባት ስለሆነ በሥራ ሂደት አደጋ ቢደርስ ተጠያቂነቱን ማን መውሰድ አለበት የሚል ክርክር ሊያስነሳ የሚችልና በዚህ የተነሳም የማይገባ ዕዳ እንድንሸከም የሚያደርግ በመሆኑ መኪናዋ አገልግሎት መስጠቷ እንዲቀጥል መደረግ አልነበረበትም፡፡ ስለሆነም

በቀድሞው ትዕዛዝ መሠረት አገልግሎት መስጠቷ እንዲቆም ሊደረግልን ይገባል በማለት ጠይቀዋል፡፡

ፍርድ ቤቱም የቀረበለትን አቤቱታ ከተመለከተ በኋላ በጉዳዩ ላይ ግራ ቀኙ ስምምነት ማድረጋቸው ተገቢ ሆኖ አግኝቼዋለሁ በማለት በመኪናዋ አጠቃቀም ላይ አመልካች የበኩላቸውን አስተያየት እንዲሰጡ መጥሪያ ልኮላቸዋል፡፡ ይሁንና አጠቃቀሙን በተመለከተ ጊዜ ተሰጥቷቸው ሊስማሙ ባለመቻላቸው ፍርድ ቤቱ መኪናዋ በአገልግሎት መስጠት ሥራ ላይ ተሠማርታ መቆየቷ ሊመጣ ከሚችል አደጋ ጋር በተያያዘ በተጠሪዎች ላይ ከፍ ያለ ጉዳትን ሊያስከትል ይችላል በሚል ስጋት የቀረበለትን ምክንያት በመቀበል አገልግሎት መስጠቷ እንዲቆም እንዲደረግ በድጋሚ ትዕዛዝ አስተላልፏል፡፡

በዚህ ትዕዛዝ ቅር በመሰኘት አመልካች ለባህር-ዳር ዞን ከፍተኛ ፍርድ ቤት ይግባኝ ያቀረቡ ቢሆንም አቤቱታቸው ተቀባይነትን አላገኘም፡፡

ይህ የሰበር አቤቱታ የቀረበውም ይህን ውሳኔ በመቃወም ሲሆን ለክርክሩ መነሻ በሆነችው ከፍ ሲል ቁጥሯ በተጠቀሰው መኪና መገልገል እንዲቀጥሉ እንዲፈቀድላቸው የሚጠይቅ ነው፡፡

ተጠሪ በበኩላቸው ለቀረበው አቤቱታ በሰጡት መልስ የወረዳው ፍርድ ቤት ትዕዛዝ ጊዜያዊ አገልግሎት ያለው ትዕዛዝ ስለሆነ ይግባኝ ሊቀርብበት አይችልም፤ መኪናዋ ዕዳ አለባት የሚለው መከራከሪያ በማስረጃ ያልተደገፈ፤ የቀን ገቢዋን ለማወቅና ለመቆጣጠርም የሚያስቸግር፤ ዕዳ ለመክፈል የሚስችል የተሻለ ገቢ ያለው ሌላ ሃብት (ሱቅ) ያለ ከመሆኑ ጋር ተዳምሮ ሲታይ አቤቱታው ተቀባይነት ሊኖረው አይገባም በማለት ተከራክረዋል፡፡

እኛም የቀረበውን ክርክር ከህጉ ጋር በማገናዘብ መርምረናል፡፡ እንደመረመርነውም መልስ የሚሹት ጥያቄዎች የሥር ፍርድ ቤት ለክርክሩ ምክንያት የሆነችው ሚኒባስ መኪና አገልግሎት መስጠት እንድታቆም በማድረግ ረገድ የሰጠው ትዕዛዝ የይግባኝ አቤቱታ ሊቀርብበት የሚችል ነው ወይስ አይደለም? የሰበር ወይም ይግባኝ አቤቱታ ሊቀርብበት የሚችል ከሆነ መኪናዋ ሥራ እንድታቆም በማድረግ ረገድ የተሰጠው ትዕዛዝ መሠረታዊ የህግ ግድፈት አለበት የለበትም? የሚለው ነው፡፡ እንደቅደም ተከተላቸው እንደሚከተለው እናያቸዋለን፡፡

የመጀመሪያውን ጭብጥ በተመለከተ በፍትሐ-ብሄር ሥነ-ሥርዓት ህግ ቁጥር 320 (3) ላይ እንደተመለከተው ጊዜያዊ አገልግሎት ያላቸው ትዕዛዛት የሥረ-ነገሩ ፍርድ ከመሠጠቱ በፊት ይግባኝ ሊቀርብባቸው እንደማይችል ተገልጿል፡፡ በምሳሌነትም ቀጠሮ የመለወጥ፣ ዳኝነት ሳይከፈል በነፃ ለመክሰስ እንዲፈቀድ የሚቀርቡ ጥያቄዎች ላይ የሚሰጡ ውሳኔዎች ተጠቅሰዋል፡፡ የድንጋጌው ዓላማ በይዘታቸው ተከራካሪዎች ያሉበትን ሁኔታ (status quo) የማይቀይሩ ነገር ግን ዋናው ጉዳይ ዕልባት አግኝቶ በበላዩ ፍርድ ቤት በይግባኝ በሚታይበት ጊዜ አብረው ሊታዩ የሚችሉት በይዘታቸው ፍጻሜን (finality) ያላገኙ ጉዳዮች ሁሉ በተናጥል እየቀረቡ እንዳይታዩ ለማድረግ ነው፡፡ ይህም በፍርድ ቤቶች የሚቀርቡ ጉዳዮችን ፍሰት በመቆጣጠር አጠቃላይ የሆነው የዳኝነት አሠራር ሥልጠት ያለው እና ውጤታማ እንዲሆን ለማስቻል ነው፡፡ ስለሆነም አንድ ጉዳይ ይግባኝ

የሚቀርብበት ነው አይደለም? የሚለው ጥያቄ መታየት ያለበት በዚሁ መለኪያ መሠረት መሆን ይገባዋል።

የአሁኑ ጉዳይም ከዚህ በተለየ መንገድ የሚስተገናድ አይደለም። ለክርክሩ ምክንያት የሆነችው መኪና አገልግሎት እንዳትሰጥ ሲደረግ የተሰጠው ትዕዛዝ አመልካች ከዋናው ፍርድ በፊት ያሉበትን የኢኮኖሚ ሁኔታ (economic position) የሚቀይር ነው። ገቢ ከማግኘት ወደማጣት፣ ከትጉ ዕዳ ከፋይነት ተስፋ በሚያስቆርጥ ደረጃ ከፍ ወዳለ ዕዳ ተሸካሚነት የሚያሸጋግር ይሆናል። በማህበራዊ ደረጃም ቢሆን ዝቅ ብለን በምንገልጸው ምክንያት በኢኮኖሚክ እንቅስቃሴዎች ላይ ከፍ ያለ ተዕእኖን የሚያስከትል ነው። ያሉበትን ሁኔታ (status quo) በተመለከተም ውጤቱ ፍርድ እስኪገኝም ድረስ ቢሆን የማይተካ ጉዳትን በማስከተል ረገድ ፍፃሜ ያለው ነው ማለት ይቻላል። በመሆኑ እንዲህ ያለ የተከራካሪዎችንም ሆነ አጠቃላይ የሆነውን ማህበራዊ ሁኔታ የሚያዛባ ሲሆን ጉዳዩ ይግባኝ ሊቀርብበት የማይችል ፍሬ ነገር ነው ለማለት አይቻልም። ይግባኝ ሊቀርብበት የሚችል ነው። በአመልካችነት ከተቀመጠው ከአንቀጽ 320 (4) የምንገነዘበውም ይህንኑ ነው። ድንጋጌው በየቦታው ተሰባጥረው ከምናገኛቸው የሥነ-ሥርዓት ህጉ ዓላማዎች ከተገለጹበት አናቅጾች አንዱ ሲሆን በተከራካሪዎች መካከል ያለውን የኢኮኖሚ ሚዛን በመጠበቅ ፍትህን ማስፈን እና በዚህ ውስጥም ማህበራዊውን የኢኮኖሚ እንቅስቃሴ በማሳለጥ ዓላማም ላይ የቆመ ነው። በዚህ የተነሳም የወረዳው ፍርድ ቤት ዕግድ እንዲነሳ የቀረበለትን ጥያቄ ሳይቀበለው የቀረበት ሁኔታ ከፍ ሲል እንደተገለፀው ተከራካሪዎች ያሉበትን የኢኮኖሚ ሁኔታ የሚያዛባ እና የማይተካ ጉዳትን የሚያስከትል በመሆኑ ትዕዛዙ የይግባኝም ሆነ የሰበር አቤቱታ ምክንያት ሆኖ ሊቀርብ የሚችል ነው ማለት ነው። ስለሆነም ተጠሪው በዚህ ረገድ ያቀረቡትን አቤቱታ አልተቀበልነውም።

ወደሁለተኛው ጭብጥ ስንሸጋገር የዕግድ ትዕዛዝ ዓላማ ከፍርድ በፊት ተከራካሪዎች ያላቸውን የኢኮኖሚ ሚዛን (status quo) በመጠበቅ ላይ የተመሠረተ ነው። ይህን ዓላማ ከማሳካት አንፃር ለክርክር ምክንያት የሆነ አንድ ሃብት/ንብረት እንዲከበር ጥያቄ ሲቀርብ እንደነገሩ ሁኔታ የዕግድ ትዕዛዝ ሊሰጥ ወይም ላይሰጥ ይችላል። የዕግድ ትዕዛዝ የሚሰጥ በሚሆንበት ጊዜ ግን የተጠቀሰውን ዓላማ ለማሳካት በሚያስችል ደረጃ ተገቢ በሆነው መጠን ብቻ መሠጠት ይገባዋል። ከዚህ አኳያ አሁን የቀረበውን ጉዳይ ስንመለከት የወረዳው ፍርድ ቤት ለክርክሩ ምክንያት የሆነችው መኪና አገልግሎት መስጠት እንድታቆም የሰጠው ትዕዛዝ ተገቢነቱ ጥያቄን የሚያስነሳ ሆኖ ይታያል። ምክንያቱም የተጠቀሰችው ሚኒባስ መኪና እንዳትሸጥ፣ እንዳትለወጥ፣ ወይም በማናቸውም መንገድ ለሦሥተኛ ወገን እንዳትተላለፍ ታዟል። በጊዜው ሌላ ጥያቄ ያልቀረበ ከመሆኑ አንፃር ይህ በቂ ነበር። ገቢ በማጣት ረገድ ተጠሪ የሚደርስበት ጉዳት አለ የሚባል ከሆነም ጥያቄው ሲቀርብ ገንዘብ በማስያዝ ወይም በቂ የሆነ ዋስ በማቅረብ ወይም ሌላ አማራጭ በመከተል የተከራካሪዎችን የኢኮኖሚ ሚዛን መጠበቅ ይቻላል። ይህ ሳይሆን ወይም ከፍ ያለ ሚዛን የሚደፋ ጥቅም (compelling interest) አለ ሳይባል መኪናዋ አገልግሎት መስጠት እንድታቆም መደረጉ ተገቢ አልነበረም። ምናልባት አደጋ ሊከሰት ቢችል ባለዕዳ ልንሆን እንችላለን የሚለው ስጋት መኪናዋ እንድትቆም ለማድረግ በቀረበው ተመሳሳይ ምክንያት በቆመችበትም ቢሆን የተፈራውን የባለዕዳነት አደጋ ትዕዛዙ ለማስቀረት ያለው ሃይል

ዕምብዛም አይደለም (ግላዊ የሆነውን የተከራካሪዎችንና ማኅበራዊ የሆነው ዋጋ ግምት ውስጥ ሲገባ ማለት ነው)። ትዕዛዙ ህጉ የፈለገውን ውጤት ትርጉም ባለው መንገድ ለማስፈጸም ያለው ሃይል ሲመዘን ከጥቅሙ ይልቅ ጉዳቱ የሚያመዝን ሆኖ ይታያል። በተለይም ከፍ ሲል ከተጠቀሰው አማራጭ በተጨማሪ የሌላው ተከራካሪ ወገን ጥቅም ያለበት ሃብት በጁ ባለበት ጊዜ ለሚደርስ አደጋ የሚኖረውን ኃላፊነት ማን መውሰድ ይገባዋል የሚለውን በተመለከተ ህጉ በራሱ መፍትሄ የሚሰጥ መሆኑ ሲታሰብ መኪናዋ አገልግሎት መስጠት እንድታቆም የተሰጠው ትዕዛዝ ተገቢ እንዳልነበረ መገንዘብ ይቻላል።

ይህን የምንለው ያለምክንያት አይደለም። በመጀመሪያ ደረጃ ሚዛን የሚደፋ ምክንያት ሳይኖር (without a rational ground) አመልካች ንብረቱ ነው በሚለው ሃብት የመገልገል መብቱን በመገደብ አመልካች ከፍርድ በፊት ያለውን የኢኮኖሚ ደረጃ (status quo) የሚያሳጣ በመሆኑ ነው። ይህም መሠረታዊ የሆነ የፍትህ መዛባትን (fundamental miscarriage of justice) የሚያስከትል ይሆናል። ይህ ብቻም አይደለም። የመኪናዋ አገልግሎት መስጠት እንዲቋረጥ ለማድረግ የተሰጠው ትዕዛዝ ለህጉ ከተሰጠው ትርጉም አንፃር ሲታይ በአፈፃፀም ደረጃ አጠቃላይ በሆነው የኢኮኖሚው እንቅስቃሴ ውስጥ አንድን ንብረት ከአገልግሎት ሂደት ውስጥ በማውጣት በፍላጎትና በአቅርቦት ላይ ያለውን ሚዛን ሰው ሰራሽ በሆነ የማይገባ ጣልቃ ገብነት የተነሳ በተጠቃሚው ላይ የሚያስከትለው የኢኮኖሚ ጫና ከፍ ያለ ጉዳትን የሚያስከትል በመሆኑ ጭምር ነው። ከግብር አሰባሰብ አንፃር ቢታይም ተመሳሳይ ጉዳትን የሚያመጣ ነው። በመሆኑ የሥር ፍርድ ቤቶች የሰጧቸው ትዕዛዛት በተጠቀሱት ምክንያቶች መሠረታዊ የህግ ግድፈት ያለባቸው ሆኖ ተገኝቷል።

ስለሆነም የባህር-ዳር ወረዳ ፍርድ ቤት ታህሣሥ 30 ቀን 2002 ዓ.ም የሰጠውን ትዕዛዝ ሽረናል። በመሆኑም ለሰበር አቤቱታው ምክንያት የሆነችው ኮድ 3 የታርጋ ቁጥር 04539 አማ. የሆነችው ባለ አሥራ ሁለት መቀመጫ ሚኒባስ መኪና አገልግሎት እንዳትሰጥ የተሰጠው ትዕዛዝ በዚህ ውሳኔ ተነስቷል። ይህም ቀደም ሲል በወረዳ ፍርድ ቤት ትዕዛዙ ለተላለፈለት ለባህር-ዳር ትራፊክ ፖሊስ ጽ/ቤት ይገለጽለት። ይፃፍ። ይህ ትዕዛዝ ንብረቱ እንዳይሸጥ፣ እንዳይለወጥ፤ ለሦሥተኛ ወገን እንዳይተላለፍ የተሰጠውን ትዕዛዝ የሚመለከት ባለመሆኑ በዚህ ረገድ በወረዳ ፍርድ ቤት የተሰጠው ትዕዛዝ የተጠበቀ ነው።

ተጠሪ ሊደርስብኝ ይችላል የሚሉት የኢኮኖሚ ጉዳት ካለ ይህንኑ በመግለጽ በሌሎች አማራጮች መብታቸው እንዲከበር ለማድረግ ያላቸውን መብት ይህ ውሳኔ አይገድበውም።

የሥር ፍርድ ቤት ውሳኔው የተሻረ መሆኑን እንዲያውቀውና በውሳኔው መሠረት እንዲያስፈጽም ግልባጩ ይተላለፍለት። ይፃፍ። የውሳኔው ግልባጭ ለከፍተኛ ፍርድ ቤቱም ይተላለፍለት። ይፃፍ።

ኪሣራና ወጪ ይቻቻሉ።

መዝገቡን ዘግተናል። መዝገቡ ወደ መዝገብ ቤት ይመለስ።

Call for Contributions

The Law School of Bahir Dar University publishes a bi-annual peer-reviewed journal of law, the *Bahir Dar University Journal of Law* (BDU Journal of Law). The main aim of the *Journal* is to create a forum for the scholarly analysis of Ethiopian law and to promote research in the area of the legal system of the country in general. The Journal also encourages analyses of contemporary legal issues.

The assessment of various manuscripts submitted for Volume 6 Issue No. 2 is now underway. The *Journal* is now calling for contributions for its next issues. The Editorial Committee of the *Journal* welcomes scholarly *articles, notes, reflections, case comments* and *book reviews* from legal scholars, legal practitioners, judges and prosecutors and any legal professional who would like to contribute his/her own share to the betterment of the legal system of Ethiopia and of the world at large.

Any manuscript which meets the preliminary assessment criteria shall be referred to anonymous internal and external assessors for detailed and critical review. Authors may send us their manuscripts any time at their convenience.

Submissions should include:

- Full name (s) and contacts of author (s);
- Declaration of originality;
- A statement that the author consents to the publication of the work by the *Bahir Dar University Journal of Law*.

All submissions and enquiries should be addressed to:

The Editor- in-Chief,
Bahir Dar University Journal of Law;
E-mail: bdujol@yahoo.com

Guide for Authors

Aim and scope of the *Journal:*

The *Bahir Dar University Journal of Law* is established in 2010 G.C. under the stewardship of the School of Law Bahir Dar University. It aims to promote legal scholarship and critical inquiry. The *Journal* places the needs of the readers first and foremost in its composition and aspires to become a well-cultivated resource for the community of legal professionals. While, in principle, it is open for any kind of contributions on the subject matter of law or interdisciplinary issues related to law, it gives high priority to contributions pertaining to Ethiopian laws to encourage discourse on Ethiopian laws where literature is scanty.

Manuscript submission:

The *Bahir Dar University Journal of Law* invites submission of manuscripts in electronic format (Soft copy). Manuscript should be sent in Microsoft Word format as attachment to;

bdujol@yahoo.com

Contributions should be unpublished original work of the author. The form of contributions can be feature article, case comment, book review, or reflection paper.

Review procedure

The *Bahir Dar University Journal of Law* is a peer-reviewed journal. All submissions are reviewed by the editor-in-chief, one member of the editorial committee. The publication of feature articles is further subject to review by an anonymous external referee and final discussion and approval by the editorial committee. Please note that our evaluation process takes account of several criteria. While excellence is a necessary condition for publication, it is not always the only condition. The need for balance of topics, the *Journal's* particular area of interest which may change overtime, and the fact that an article discussing a similar topic has already been commissioned, etc., may also influence the final decision. Therefore, a rejection does not necessarily reflect upon the quality of the piece.

Time frame

You can submit your manuscript at any time. We do not have deadlines for submission of manuscripts. Each day we accept submissions and those qualified submissions will be commissioned for publication on a rolling basis. As soon as we receive your submission we will send you an acknowledgement email. We aim to give notification of acceptance, rejection, or need for revision within four weeks of acceptance, although exceptions to this timeframe may occur. In the event of final acceptance you will be notified when it will be published and in which issue of the *Journal* the paper will feature.

Language

All submissions need to be written in articulate and proficient language either in English or Amharic. Authors who lack good command of the language are encouraged to send their article to language editing prior to submission.

Size of contributions

The size of contributions shall be as follows:

- feature articles: Min 15 pages, max 40 pages
- case comments: Min 3 pages, max 15 pages
- Book Review: Max 3 pages
- Reflections: Min 3 pages, max 15 pages

Manuscript presentation

Bahir Dar University Journal of Law generally follows the style and citation rules outlined below.

Author's affiliation:

The author's affiliation should be indicated in a footnote marked by an asterisk and not by an Arabic number. Authors should refer to themselves in the third person throughout the text.

Headings:

Manuscripts shall have an abstract of approximately 200 words and introduction and the body should be arranged in a logically organized headings and sub-headings. Headings in the various sections of the manuscript shall be aligned to the left margin of the page and shall be as follows:

Abstract
Introduction
1. First Heading
1.1. Second Heading
1.1.1. Third Heading
1.1.1.1. Fourth heading
i. Fifth heading
a. Sixth heading
Conclusion

Italicization:

All non-English words must be *italicized*

Emphasis:

To indicate emphasis use *italics*.

References:

All contributions should duly acknowledge any reference or quotations from the work of other authors or the previous work of the author. Reference shall be made in the original language of the source document referred to.

Quotations:

Quotations of more than three lines should be indented left and right without any quotation marks. Quotation marks in the block should appear as they normally do. Quotations of less than three lines should be in quotation marks and not indented from the text. Regarding alterations in a quotation, use:-

Square bracket "[ ]" to note any change in the quoted material,
Ellipsis "…" to indicate omitted material,
"[sic]" to indicate mistake in the original quote.

Footnotes:

Footnotes should be consecutively numbered and be set out at the foot of each page and cross-referenced using *supra*, *infra*, *id* and *ibid*, as appropriate. Footnote numbers are placed outside of punctuation marks.

References in footnotes:

References in footnotes should generally contain sufficient information about the source material. In general, references should have the content and style outlined below in the illustrations for the various types of sources.

Books:

Brownlie,I., *Principles of Public International Law*, 6th edition, Oxford University Press, Oxford, New York, 2003(first published in 1966), p. 5, [hereinafter Brownlie, *Principles of Public International Law*]

Contributions in edited books:

Fleck, Dieter, the Law of Non-International Armed Conflicts, *in* Fleck, Dieter (ed.),*The Handbook of International Humanitarian Law*, Second Edition, Oxford University Press, Oxford, New York, 2008, p. 613, [hereinafter Fleck, *The Handbook of International Humanitarian Law*]

Articles in Journals:

Jinks, D., September 11 and the Laws of War, *Yale Journal of International Law*, Vol. 28, No. 1, 2003, p. 24.

Legislations:

Federal Courts Proclamation, 1996, Art. 8(1) & (2), Proc.no.25/1996, *Fed. Neg. Gaz.*, year 2, no. 13.

Codes:

Revised Family Code, 2000, Art. 7 (1), Proc.no. 213/2000, *Fed. Neg. Gaz.* (Extraordinary issue), year 6, no. 1.

Treaties:

Vienna Convention on the Law of Treaties, 1969, Article 31.

Resolutions:

Security Council Resolution 1368 (2001), at <http://www.daccessdds.un.org/doc/UNDOC/GEN/N01/533/82/PDF/N0153382.pdf?OpenElement > (consulted 10 August 2008).

Cases:

International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Dusko Tadic*, Appeals Chamber, Judgement, 15 July 1999, para. 120, at <http://www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.pdf> (consulted 7 August 2008), [hereinafter, ITY, Tadic case, Appeals Chamber, Judgement].

የኢትዮጵያ መድን ድርጅት vs. **ጊታሁን ሀይሉ፣ጠቅላይ ፍርድቤት ሰበር ሰሚ ችሎት፣ መ.ቁ**. 14057፣ 1998 **ዓ.ም**.

Format requirements:

All contributions should be submitted in Microsoft Word document format, written in 12 fonts, double space, Times New Roman (Footnotes in 10 fonts, single space, Times New Roman).

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