

Appraising the Interplay of Ethiopian Cassation Division's and House of Federation's Jurisprudence on (In)applicability Discourse of Period of Limitation to Rural Land: Case Analysis

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Abstract

This analysis aims to appraise the nexus between Cassation division's and House of Federation (HoF)'s jurisprudence on (in)applicability discourse of prescriptive limitation to rural land claims. The Federal Supreme Court Cassation Division is the highest bench of Ethiopian regular court whilst the HoF is an institution empowered to interpret the constitution. While their decisions serve as laws, the decisions of the latter bind those of the former. Yet, both are established to guard constitutionally granted rights, and a right to land is one spectrum of these rights. In Ethiopia, land is a common property that could not be provided for sale. Thus, rural land law has exhaustively listed and limited schemes of access to rural land. Nonetheless, it is penumbra whether prescriptive limitation is applicable to rural land claims. As a result, different cases have been decided by these institutions at different time. The author assessed some of these institutions' decisions to appraise whether they have similar jurisprudence or not. The assessment reveals that cassation division has not yet developed clear jurisprudence, whilst the HoF has developed peasants' right of non-eviction jurisprudence. Thus, cassation division must develop clear jurisprudence that acknowledges the HoF's jurisprudence, and the legal and policy frameworks pertaining to land.

Keywords: Cassation Division, House of Federation, Prescriptive Limitation, Rural Land

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1. Introduction

In Ethiopia, property rights are constitutionally protected. The constitution and its subordinate rural land laws incontrovertibly and strictly control scheme of access to rural land. Hence, these laws have acknowledged only government grant, inheritance, gift and lease as the only modes of access to rural land.

However, the constitution and rural land law, except that of Amhara regional state¹, have not answered whether prescriptive limitation² could be used as scheme of access to rural land is permitted or prohibited. This silence paves the way for the persistence of controversies regarding the applicability of prescriptive limitation to rural land claims. Due to the controversies, cases with this issue have been repeatedly flooding to Cassation Division, and, to the HoF for interpretation of the constitution.

However, cassation division has not yet developed straightforward and catches-all-basket jurisprudence on the (in)applicability of prescriptive limitation to rural land claims. On some cases, it opines that prescriptive limitation is applicable to rural land, while on other cases, it argues that prescriptive limitation is inapplicable to

¹Amhara Regional State Rural Land Proclamation No.252/2017, article 55. This provision clearly states that anyone who is found using to rural land without lawful acquisition could not cling to statutory defense when he is required to leave it.

² Basically, prescriptive limitation refers to a legal principle that either abrogates existing rights or bestows non – existing rights, especially property rights. However, there is no consensus among scholars on the justification for inclusion and exclusion of this principle. Some open the battle of controversies over prescriptive limitation stating that one hundred years ago and century latter, we are searching for a satisfactory answer to the quest what is the justification for depriving a man of his rights, pure evil as far as it goes, in consequence of lapse of time. See Tyler T. Ochea and Andrew Wistrich, ‘The Puzzling Purpose of Statute of Limitation’ (1997) 28 Pacific Law Journal 453, 454. Moreover, there are ‘for, against and intermediate’ arguments over the applicability of prescriptive limitations to limit property rights. It is argued that the interplay of these arguments contributes for the development of other three categories of arguments; viz. plaintiff interest argument, defendant interest argument, and public interest argument to justify (in)applicability debates of prescriptive limitation. See [Ireland] Law Reform Commission, Report, ‘Limitation of Actions’ (December 2011) 18-22. Hence, it is understood that prescriptive limitation is the product of the interplay among plaintiff interest, defendant interest and public interest arguments

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rural land. Nonetheless, the HoF is consistently declaring that the application of prescriptive limitation to rural land claims contravenes constitutionally granted right against eviction, for peasants and pastoralists, from their possession of land.

Thus, even though the jurisprudence of these institutions ought to have been convergent, the Cassation Division's and the HoF's jurisprudence on the administration of prescriptive limitation are practically tracking to divergence.

With this issue in mind, this commentary is structured into five sections. The subsequent section will assess whether prescriptive limitation is applicable to rural land in Ethiopia. Then, section two and three will present the analysis of the jurisprudence of cassation division and the HoF on the (in)applicability discourse of prescriptive limitation to rural land claims. The penultimate section deals with the nexus between HoF's and cassation division's jurisprudence on applicability of prescriptive limitation to rural land claims. The last one is set for conclusions and recommendations.

2. The Legal Status on applicability of Prescriptive Limitation to Rural Land in Ethiopia

2.1.Prescriptive Limitation

Prescriptive limitation refers to the statutory rule that limits the various period of time available to a person to initiate different claims, which, unless otherwise commenced timely, statutory bars and extinguishes procedural and substantive rights. Law of limitation can be categorized into two main sorts. The first Sort is limitation, where the expiration of the time prescribed for the right itself is barred, and the second one is the expiration of the time the remedy is barred, but not the

substantive right itself.³ Sometimes the latter category is known as statutory limitation, while the former one is known as period of prescription.⁴

Notwithstanding to this cataloging, some argue since rule of limitation signifies a rule that allows person to bring claims [within] specific amount of time, running from specified date, within which to bring an action against the defendant and if does not begin proceedings within the time allowed, the action will be statutory barred. In here, the rule of limitation operates as a procedural defense to claim that has been brought outside the specified time⁵.

Yet, this does not seem a water holding postulation of the concept. Ethiopian cassation division,⁶ as showcase, had interpreted statutory and prescriptive limitations as they are conceptually two different things. Continuing its analysis, the division held that prescriptive limitation does not serve as a procedural defense like statutory limitation but as merit whether the defendant holds a given property according to the law for prescribed period of time.

On top of this, prescription *per se* has two categories – liberative and acquisitive prescription.⁷ While the former bars lawsuit, the latter serves as the acquisition of title to things [immovable property] by open and continuous possession over statutory period.⁸ Moreover, it is worth noting the concept of prescription is broader than that of statutory limitation. Statutory limitation is statute that

³ Ogbonah Medobic C. And C. C. Wigwe, ‘Statute Of Limitation Vis-À-Vis Compulsory Acquisition In Nigeria’ (2018) 8(1) Journal of Property Law and Contemporary Issues 406, 406

⁴ Biruk Haile, ‘Period of Limitation Applicable To Claims over Immovable Property under Ethiopian Law: Gateway to Hindsight Scrutiny of Legality of Nationalization of Immovable? Case Analysis’ (2012) 4(1) Jimma University Journal Of Law 178, 183-185

⁵ [Ireland] Law Reform Commission (n 2)1-2

⁶ Abdul Mohamed Vs Zebenay Haile (Federal Supreme Court, 2010, Cassation Civil Case No. 53328, Federal Supreme Court Cassation Division Decision, Vol.11, 536 – 538)

⁷ Tilahun Teshoma, Basic Principle Of Ethiopian Contract Of Law (Amharic version, 3rd ed., AAU Printing Press, 2007) 181

⁸ Black’s Law Dictionary (7th ed., West Publishing Co., 1979,) 1201

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establishes time limit for suing,⁹ while prescriptive limitation affects substantive [ownership] rights.¹⁰

Nonetheless, some note that these two notions have no difference in concept, rather their difference is only in the vernacular of different jurisdictions. Thus, for example, in English – statute of limitation, in Dutch – *verjaring*, in French – *prescription*, in Germany – *verjährung*, in Italian – *prescrizione*, and in Spanish – *prescripcion*.¹¹ At this juncture, it is better to look beyond the terminology game and conjure up that statutory limitation could either be the one that affect substantive rights or one that affect procedural rights only. Moreover, ordinary period of limitation is considered as procedural defense whilst prescriptive limitation is entertained as a merit of the case.

2.2. De Jure Schemes of Access to Rural Land in Ethiopia: Since 1991

Constitutionally, the federal government is empowered to enact the framework of land law, while regional states are entrusted to administer land according to federal laws.¹² Consequently, the federal Government issued framework rural land proclamation.¹³ Pursuant to this framework law, all regional states enacted their own rural land laws.¹⁴

As per these laws, rural landholder could not enjoy full ownership right over his/her land. Full ownership rights over land refers to ‘human territorial

⁹ Ibid 1201~1422, Medobic and Wigwe (n 3) 406

¹⁰ Biruk (n 4) 184 – 5

¹¹ R.A. Kok, ‘Statutory Limitation In International Criminal Law’ (PHD Dissertation, University Of Amsterdam 2007) 24

¹² Federal Democratic Republic Of Ethiopian Constitution Proclamation, 1995, Article 51(5) Cum 52(2)(D), Proclamation No.1/1995, *Fed Neg. Gaz.*, Year 1, No.1

¹³ Federal Rural Land Administration Proclamation, 1997, Proclamation No. 89/1987, *Fed Neg. Gaz.*, Year 3, No.54 (repealed). Now, Federal Democratic Republic Of Ethiopia Rural Land Administration and Land Use Proclamation, 2005, Proclamation No. 456/2005, *Fed. Neg. Gaz.*, Year 11, No.44.

¹⁴ As an example, one can take Oromia Regional state’s Proclamation to Amend the Proclamation No.56/2002, 70/2003, and 103/2005 of Oromia Rural Land Administration and Use Proclamation, 2007, Proclamation No.130/2007, *Megaleta Oromia*, Year 15, No. 12-138/1999.

imperative’, which denotes, ‘this land is mine, mine to use and enjoy’, ‘mine to treat as I wish’.¹⁵ However, access to rural land in Ethiopia is determined by rural land laws. These laws exhaustively list de jure schemes of access to rural land and these schemes are limited to government grant, inheritance and gift¹⁶ and lease.¹⁷ Save these schemes, access to rural land through other means is an unconstitutional act.

2.3. The Status of Legal Framework on (in)applicability of Prescriptive Limitation to Rural Land in Ethiopia

The federal and regional states rural land laws, except that of Amhara regional state,¹⁸ do not provide clear answer on whether prescriptive limitation is applicable to rural land or not. This silence paved the way for the persistence of polarized arguments on the (in)applicability of prescriptive limitation to rural land. Some scholars argue that period of limitation for all civil claims are a principle, while exclusionary rule is an exception by its nature. Thus, the failure of a given law to provide special period of limitation for certain civil claims does not mean that they are automatically excluded from the subject of period of limitation, rather they will be governed by the ten years’ general period of limitation that is stipulated under article 1845 of the Ethiopian civil code¹⁹.

According to this position, period of limitation is a default rule. However, cassation division in *Dawit Mesfin Vs Governmental Housing Agency* reversed the lower courts’ decisions that upheld default rule; arguing that Ethiopian law does not

¹⁵ Neil Meyer, ‘Introduction To Property Rights’ In Neil Meyer (ed.), *Property Rights: A Primer*, (University of Idaho, 2001) 4

¹⁶ Article 5 Of Both Federal and Oromia Regional State Rural Land Proclamation (Government Grant), Article 2(4) Of Federal Rural Land Proclamation, and Article 6(1) Cum 9 Of Oromia Regional State Rural Land Proclamation.

¹⁷ Article 2(4) Of Federal Rural Land Proclamation and Article 10 Of Oromia Regional State Rural Land Proclamation

¹⁸ Article 55 of Amhara Regional State Rural Land Proclamation No.252/2017

¹⁹ Andualm Eshetu, ‘Revisiting The Application Of The Ten Years General Period Of Limitation: Judicial Discretion To Disregard Article 1845 Of The Civil Code’ (2015) 6(1) *Bahir Dar University Journal Of Law* 1, 45

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provide period of limitation for some claims over immovable property. The Division, then, decided prescriptive limitation is inapplicable to claims over immovable property.²⁰ Yet, this decision did not convince some scholars. Biruk, for instance, argues against this decision stating that not only civil action but also criminal actions except grave crimes like genocide and crimes against humanity are limited by time.²¹

3. Cassation Division's Jurisprudence on Applicability of Prescriptive Limitation to Rural Land in Ethiopia

Cassation division²² is established to prop up uniform application of law in the country.²³ In effect, a precedent system is introduced in which all cassation division's decisions get a binding effect on all subordinate courts. Simply put, the Federal Supreme Court cassation division's decisions serve as a law. Some scholars even have the courage to opine that cassation division not only has the final judicial power in Ethiopia, but also makes laws.²⁴ Consequently, cassation division's decision is not only the business of parties to a case at cassation division, but it also involves public interest at large.

²⁰ Dawit Mesfin Vs Governmental Housing Agency (Federal Supreme Court, 2010, Cassation Civil Case No. 43600), Federal Supreme Court Cassation Division Decisions, Vol.10, 225-229); See also Governmental Housing Agency Vs Gizew Mengeta (Federal Supreme Court, 2007, Cassation Civil Case No. 28686, Federal Supreme Court Cassation Division Decisions, Vol.6, 251-253); Birhane Tesema Vs Temirat Ayane (Federal Supreme Court, 2009, Cassation Civil Case No. 42824, Federal Supreme Court Cassation Division Decision, Vol.11, 539 – 541); Tsehay Haile et al Vs Felka Begna (Federal Supreme Court, 2010, Cassation Civil Case No. 44025, Federal Supreme Court Cassation Division Decisions, Vol.10, 95 – 96). Assessing these cassation division's decisions reveal that, in Ethiopia, statutory limitation is not a default rule rather some claims are out of the reach of the effect of period of limitation.

²¹Biruk (n 4)185

²² Constitution (n 12) article 78 cum 80

²³ Federal Court Proclamation Reamendment Proclamation, 2005, Proclamation No. 454/2005, *Federal Neg. Gaz.* Year 11, No.42. See also Hussein Tura, Uniform Application of Law in Ethiopia, <https://heinonline.org/hol/cgi-bin/get_pdf.cgi?handle=hein.journals/ajls7§ion=14> accessed on 10 July 2021, and Muradu Abdo, 'Review Of Decision Of State Courts Over State Matters By The Federal Supreme Court' (2007) 1 (1) Mizan Law Review 60

²⁴ Aschalew Ashargre, 'Effect Of Non-Renewal Of Registration Of Contract Of Mortgage Under Ethiopian Civil Code: A Case Comment' (2010) 24(1) Journal Of Ethiopian Law 242

Since it is establishment, cassation division has interpreted rural land laws in relation to period of limitation on various cases. Yet, strict scrutiny its decisions reveal that cassation division's interpretation of rural land laws in relation to issue under consideration is riddled with inconsistent jurisprudences.

To begin with, in relation to private rural land holding rights, cassation division on *Abdella Ibrahim Vs Uso Abdi*²⁵ held that period of limitation could not applicable to claims to invalidate unlawful rural land related contract (disguised rural land sale). As per this decision, prescriptive limitation could not be used as a defense against rural land claims. Furthermore, it clearly sets that request for invalidation of unlawful contract could not be statutory barred.

Similarly, in relation to communal and state land holding right, the cassation division on *Maniahiloh Anteneh Vs Mechal District Environmental Protection and Land Administration Office*²⁶ held that no one could appeal to period of limitation

²⁵ *Abdella Ibrahim Vs Uso Abdi* (Federal Supreme Court, 2012, Cassation Civil Case No. 79394, Federal Supreme Court Cassation Division Decisions, Vol.14, 199 – 201.). In this case, Uso borrowed Birr 500 from Abdel after giving his farmland to Abdel by antichresis contract. Abdela was using to the farmland for 11 years and raised defense of period of limitation when he was required to leave the land. Lastly, cassation division held that period of limitation is inapplicable to unlawful contract. Similar position was held by the cassation division on *Getinet Tarko Vs Jamila Ali* (Federal Supreme Court, 2015, Cassation Civil Case No. 100671, Federal Supreme Court Cassation Division Decisions, Vol.18, 198 – 203), *Jemal Aman Vs Tewabech Ferede* (Federal Supreme Court, 2011, Cassation Civil Case No. 69291, Federal Supreme Court Cassation Division Decisions, Vol.13, Pp. 423 – 425), *Hailu Kidanu Vs Kechenu Duguma et al* (Federal Supreme Court, 2018, Cassation Civil Case No. 150773, Federal Supreme Court Cassation Division Decisions, Vol.23, Pp. 205 – 209), and *Demeketch Niri'a Vs Galeme Rabiso* (Federal Supreme Court, 2008 EC, Cassation Civil Case No. 110549, Federal Supreme Court Cassation Division Decisions, Vol.19, 352 –56)

²⁶ *Maniahiloh Anteneh Vs Mechal District Environmental Protection and Land Administration Office* (Federal Supreme Court, 2016, Cassation Civil Case No. 112906, Federal Supreme Court Cassation Division Decisions, Vol.19, 357 –259). In this case, Maniahiloh was given farm land by kebele administration and he had used to it for more than 10 years. Latter when he was requested to leave the said land, he raised issue of period of limitation and others. However, the cassation division held that as far as the land in dispute was not given by appropriate organ, he could not appeal to the defense of period of limitation. Similar position was held by the cassation on *Kuta-Ber Woreda Kebele 13 Administration Vs Habtamu Molla, Gishe Woreda Land Administration and Use Office V Getu Terefe, Chekol kume Vs north achefer Land Administration and Use Office cases*, Cited in Daniel W. Ambaye, *Applicability Of Period Of Limitation In Rural Land Dispute: Case Comment*, (2014) 5(1) Bahir Dar University Journal Of Law 222, 235, 237, 239.

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for defense as far as initially s/he accessed land unlawfully. Here, unlawful accessed to rural land means occupying rural land in extra – de jure schemes of access to rural land that has no recognition in Ethiopian rural land laws.

However, cassation division on Shelema Negesa Vs Fayisa Mengistu²⁷ held that period of limitation against the interferer of rural land holding rights is not provided either by the Constitution or rural land laws. Then, it decided that in such case, the court should apply article 1845 of civil code – the ten years general period of limitation. Likewise, on Worku Tadese Vs Jirata Elfata²⁸ cassation division interpreted and decided that if the entry of the occupation of rural land is not unlawful agreement, the one who has used the land for more than twelve years could not be evicted from the land he has occupied.

The foregoing appraisal of cassation decisions demonstrates that cassation division follows different jurisprudence based on the category of land holding system and the method in which the land was accessed. Consequently, prescriptive limitation is inapplicable to the land in state and communal holding whilst cassation division has not held straightforward position regarding rural land in private holding.

In one hand, it held that where rural land in private holding is occupied via unlawful contract prescriptive limitation is inapplicable, on the other hand, it construed that where land is not occupied through unlawful contract, prescriptive limitation is applicable. However, the cassation division fails to set what constitute

²⁷ Shelema Negesa Vs Fayisa Mengistu (Federal Supreme Court, 2012, Cassation Civil Case No. 69302, Federal Supreme Court Cassation Division Decisions, Vol.13, 426 – 429). In this case, the proved fact was Shelema bought Eucalyptus grown on the land in dispute from Fayisa's father and occupied it for more than 12 years thereof. This proved fact indicates the contract for sale of trees was a disguised contract of land sale.

²⁸ Worku Tadese Vs Jirata Elfata (Federal Supreme Court, 2017, Cassation Civil Case No. 140538, Federal Supreme Court Cassation Division Decisions, Vol.22, 445 – 449). In this case, the proved fact was the land in dispute was registered in the name of respondent (Jirata Elfata) and the applicant (Worku Tadese) was using to the said land only for grazing purpose for more than twelve years. While the lower courts decided in favor of respondent (Jirata Elfata), cassation division decided in favor of the applicant (Worku Tadese) stating prescriptive limitation is applicable.

unlawful contract. On Shelema Negesa Vs Fayisa Mengistu's case, the land was occupied via disguised land sale contract which was called Eucalyptus sale contract. However, cassation division simply passes over without assessing whether the land in dispute was occupied via unlawful contract or not, and they rushed to identify the applicable statutory limitation.

Similarly, on Worku Tadese v. Jirata Elfata's case, Worku was using rural land registered by Jirata for grazing purpose for more than twelve years. The act of intentionally and unlawfully bringing or permitting herds or flocks to pasture or stray on the property of another, and occupying private or public land are crime of causing damage to other's property by Herds or Flocks and Disturbance of Possession, respectively.²⁹ Thus, the act of Worku, using Jirata's land for grazing, is a criminal act. Nonetheless, cassation division did not consider this criminal act as an unlawful occupation of other's land, rather they capitalize on whether the land was occupied via unlawful contract or not and the time passed. However, failure to recognise criminal act as unlawful act was the critical mistake of the cassation division.

Thus, these cases' decisions make cassation division's prescriptive limitations (in)applicability jurisprudence regarding rural land in private holding unpredictable and penumbra. Moreover, Cassation Division has not yet developed clear jurisprudence on (in)applicability discourse of prescriptive limitation to rural land claims.

4. House of Federation's Jurisprudence on applicability of Prescriptive Limitation to Rural Land in Ethiopia

Takele argues that the powers of the HoF are analogous to the cassation powers of state and federal supreme courts, where the court almost exclusively entertains questions of law as opposed to questions of fact, scrutinising whether a

²⁹ The Criminal Code of the Federal Democratic Republic of Ethiopia 2004, article 685, 686

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fundamental error has been made in legal interpretation. Thus, the HoF does not have the power to apply the Constitution or other legislation to factual situations.³⁰ Put otherwise, the HoF scrutinizes only the constitutionality issue of law or decisions from the constitution's perspective. However, some research found that the public tends to consider the HoF as an appellate body after the Cassation Division rejects cases.³¹

In executing its power, the HoF has been repealing some laws and reversing cassation decisions. It, for instance, repealed article 8(1) of proclamation No.25/1988 and half wording of article 7(1) of proclamation No.434/2005 by stating that they are unconstitutional.³² In similar approach, the HoF has been reversing Cassation decisions that it considered were in conflict with the constitution. (In)applicability discourse of prescriptive limitation to rural land, if not the only, is one of the serious issues that have been observed by the HoF time after time. Regarding this issue, assessing different rural land related decisions of the HoF reveals that HoF, unlike cassation division, developed the jurisprudence of 'peasants' non-eviction from their possession.³³ The house makes article 40(4) of the constitution – peasant's rights to protection against eviction from their possession – a ground for its decisions. Pursuant to the HoF's jurisprudence, except for public purpose, any act that evicts peasants from their rural land possession is

³⁰ Takele Saboka, 'Judicial Referral Of Constitutional Disputes In Ethiopia: From theory To Practice' In Assefa Fiseha and Getachew Assefa (eds.) *Institutionalizing Constitutionalism and Rule Of Law: Towards A Constitutional Practice In Ethiopia*, (Ethiopian Constitutional Series, Vol.III, AAU Printing Press 2007) 78

³¹ Anchinesh Shiferaw, 'The Jurisprudence and Approaches Of Constitutional Interpretation By The House Of Federation In Ethiopia' (2019) 13(3) *Mizan Law Review* 419, 422

³² Melaku Fanta Vs Federal Ethics and Anti – Corruption Commission Prosecutor Team, (2018) 1(1) *Constitutional Issues Journal* 131 – 134. See also the analysis made by Dessalegn Birhanu, All about Words on the Procedure of Constitutional Interpretation in Ethiopia: A Comment On Melaku Fant Case, *Oromia Law Journal*, Vol.4, No.1, Pp. 207 – 221.

³³ Those cases decided by cassation division by upholding the applicability of prescriptive limitation and were taken to the HoF, HoF reversed the decision by assessing the decision from this jurisprudence. These cases will be assessed latter.

considered as an unconstitutional act. Prescriptive limitation is one of the acts that evict peasants from their possession.

HoF's jurisprudence is in line with the constitution and rural land laws as well as policy rationales behind making land a common property of state and people. The main rationale for making land a constitutional matters and a common property of state and people is to prevent the accumulation and concentration of land in the hands of a small number of urban and bourgeois land owners, who acquire large tracts of land through distress sales by poor peasants, which would lead to (a) subsequent peasant eviction and poverty, (b) the resurgence of exploitative tenancy institutions, and (c) undesirable rural-urban migration of the then landless peasantry.³⁴ To implement this policy reason, rural land laws exhaustively list and regulate schemes of access to rural land. Upholding the applicability of prescriptive limitation to rural land, since it evicts peasants from their possession, defeats this policy justification to make land a common property.

The HoF has been deciding cases with the issue under discussion adhering to this policy reasons. Appraising its decisions clearly indicate the jurisprudence of the house. In *Alemitu Gebre's (applicant) Vs Chane Desalegn's (respondent)*³⁵ case, the applicant rented his land to respondent for five years. On expire of the contract, the respondent made the land in his name, and was using and paying its tax for more than 16 years. When he was requested to return the land after 16 years, he argued that the land was rented for 50 years and applicant's right is barred by period of limitation as per article 1168(1) and 1145 of the civil code. Admitting the

³⁴ Wibke Crewett & Benedikt Korf, 'Ethiopia: Reforming Land Tenure' (2008) 116 *Review of African Political Economy* 203, 205

³⁵ *Alemitu Gebre Vs Chane Desalegn*, (2018) 1(1) *Journal of Constitutional Issues* 26 – 27, similarly, in *Tsahay Doyo Vs Tinsae Utale et al*, *ibid* 34 – 34, *Bancheamlak Dereselegn Vs Ababaw Molla*, *ibid* 10-13, and *Kebele Tesfa Vs Ayelign Deribew*, *ibid* 63-65; and *Defar Asefa Vs Diriba Ayane*, The House Of Federation, 5th Round Parliament, 4th Year, 1st Regular Meeting, 29 – 1 – 2011. In these cases, while the cassation division held prescriptive limitation is applicable, the HoF reversed cassation divisions' decision based on the right of peasant not to be evicted from their possession.

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defense of prescriptive limitation, the case was decided in favor of the respondent at all level of the lower courts.

Lastly, the applicant took this case to the HoF. Council of constitutional inquiry received the application and recommended the house that the courts' decision, since it evicts applicant from her possession, contradicts with article 40(4) of the constitution. The house also affirmed the recommendation. In other similar cases, the house held the same position. Thus, as per the jurisprudence of the HoF, prescriptive limitation is inapplicable to rural land claims and the avenue access to rural land through prescriptive limitation is clearly blocked.

5. The Interplay Between House of Federation's and Cassation Division's Jurisprudence on applicability of Period of Limitation to Rural Land

Nowadays, Ethiopia has two types of precedents that have legal status, viz. cassation division's judicial precedent and the HoF's constructional interpretation precedent.³⁶ Hierarchically, judicial precedent could be overturned either by legislature's legislations or the HoF's decisions or latter cassation division's decision whereas the HoF's precedent will be reversed only either by the latter interpretation of the HoF or by the act of Constituent power holders.³⁷ Thus, the HoF's precedent is superior to judicial precedent as well as all laws save the

³⁶ See Federal Courts Proclamation Reamendment Proclamation, 2001, Art. 2(4), Proclamation No. 454/2001, Fed. Neg. Gaz. Year 11, No. 42, and Consolidation of the House of the Federation and Definition of Its Powers and Responsibilities Proclamation, 2001, Art. 11, Proclamation No. 251/2001, *Negarit Gaz.* Year 7, No. 41. Article 2(4) of this Federal Courts confers power of interpreting of laws and reversing its own decision on latter time. Implementing this very article, Federal Cassation Division, is rendering a different legal interpretation some other time in the language of this proclamation but repealing, in conventional term, its prior interpretation. For instance, National Mineral Corporation Plc. Vs Dani Drilling Plc. (Federal Supreme Court, Addis Ababa 2009, Civil Case No- 42239, FDRE Supreme Court Cassation Decision Vol.10, 350. In this case, the cassation division expressly replaced its prior interpretation given on case No. 21849 in its judgment, which is act of express repealing.

³⁷ Constituent power resides in the people of a given state. It is the power of establishing and abolishing any form of government and constitutions. In other word, it signifies the unlimited power of the people.

Constitution. Thus, borrowing the aphorism of article 9 of the constitution, any law, customary practice or decision of any organ of state or a public official, which contravenes the HoF's precedent, shall be of no effect.

All the same, these institutions are constitutionally established to guard the constitution itself and constitutionally granted rights. To recap, the Cassation Division is established to defend and help the right to equality before the law of all human being everywhere within Ethiopian territory by developing jurisprudence that helps to uniformly apply laws. For better protection of this right, the constitution established dual cassation system – federal and regional states cassation system. In addition, the Federal Supreme Court cassation division is empowered to review all decisions of regional states' cassation divisions.³⁸

Likewise, in relation to constitutional interpretation, Ethiopian constitution adopted dual constitutional controlling system; and this poses the possibility of jurisdictional overlap, of federal and regional states, over constitutional adjudication.³⁹ Some authors maintain, in the structural adjustment of regional states of Ethiopian federalism, save the South Nation Nationalities and People (SNNP), and the Harari regional states, all other regional states have unicameral legislative house.⁴⁰ Thus, while the SNNP established council of nationalities to interpret the SNNP regional state constitution, other regional states have established the commission of constitutional interpretation.⁴¹

The very purpose of establishment of these two institutions dictates the need for congruency of the decisions of these institutions. Otherwise, their very establishment is superfluous. Therefore, the development of clear jurisprudence on

³⁸ Article 80(3) of FDRE constitution.

³⁹ Getahun Kassa, 'Mechanism Of Constitutional Control: A Preliminary Observation Of The Ethiopian System' (2007) 20(1-2) Afrika Focus 75, 95

⁴⁰ Zemelak Ayitenew, 'The Politics Of Sub-National Constitutionalism and Local Government' 'In Ethiopia' in Giacomo Delledonne et al (eds), *Re-Exploring Sub – National Constitutionalism (Perspective On Federalism, Vol.6, Issue 2, 2014)* 89, 92 -93

⁴¹ Kassa (n 39) 95

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the application and interpretation of law by these institutions is imperative. Moreover, the positive interplay between these two institutions has an essential and multidimensional significance on the development of Ethiopian legal system.

As has been discussed so far, the HoF's precedents and Cassation Division's judicial precedents have the relationship of higher and lower-level laws. The relationship between higher and lower level laws, in Hans Kelsen words, is the relation of determining or binding.⁴² Cassation Division's judicial precedent is subordinate to the HoF's precedent. Consequently, the HoF's precedents determine Cassation Division's judicial precedent. Thus, at this juncture, one may get sight of clue to identify binding and non-binding decisions of Cassation Division. This entails that subordinate courts do not have a duty to be bound by all Cassation Division decisions unconditionally, rather selectively - only those consistent with the HoF's precedent and pertinent laws.

Then, we have to select the binding decisions of the Federal Supreme Court cassation division and implement them accordingly, but not, as some say, all Cassation Division's decisions have unconditional binding force over all subordinate courts. Therefore, this chokes off the conventional argument, in Ethiopia, that all federal cassation division's decisions have unconditional binding force over all federal as well as regional states' subordinate courts.

Back to issue under discussion, cassation division has not yet developed a clear and straightforward jurisprudence for the application of prescriptive limitation to rural land. As was discussed, on some cases it held that prescriptive limitation is applicable to rural land claims, while on other cases, it held the opposite stance. In case where the land was accessed via unlawful contract, it held the view that prescriptive limitation is applicable to rural land claims. However, it has failed to

⁴² Hans Kelsen, Introduction To The Problems Of Legal Theory (Clarendon Press – Oxford, 1992) 77 – 78

give catch – all – basket definition for what constitutes access to rural land via unlawful contract. Fact constitutes unlawful contract in some cases is not considered similarly in others. Consequently, it has been holding fickle position on the issue under consideration.

On the other hand, the HoF's has developed straightforward and catch-all jurisprudence for the administration of prescriptive limitation in relation to rural land. Since it evicts peasants from their possession, as per HoF's jurisprudence, prescriptive limitation could not applicable to rural land. Thus, it is clearly put that prescriptive limitation is not applicable to rural land claims.

The above discussion highlights that there is a hole between these two institutions' jurisprudence on the (in)applicability discourse of prescriptive limitation apropos rural land. On top of this gap, the constitution and rural land laws, in non-confusing approach, have granted to peasants the rights against non-eviction from their possession. This right stretches to the extent of being protected against self-evictions, which stated in rural land laws.

The federal rural land proclamation, for example, states that peasant farmers, semi-pastoralists and pastoralists who are given holding certificates can lease land to other farmers or investors from their holding of a size sufficient for, the intended development in a manner that 'shall not displace them, for a period of time to be determined by rural land administration laws of regional states' based on particular local conditions.⁴³ Pursuant to this expression, Oromia rural land proclamation, for instance, empowers peasants, semi Pastoralist and pastoralist to lease 'half of their plot of land' for three years and fifteen years for traditional farming and mechanized farming, respectively.⁴⁴ As per these laws' expression, peasants have no right to waive their rural land holding right as they like by renting/leasing their entire plot of land for an unspecified period of time.

⁴³ Article 8(1) Of Federal Rural Land Proclamation No.456/2005

⁴⁴ Article 10(1-2) Of ORS Rural Land Proclamation No.130/2007

From this right perspective, while the HoF has insightfully developed jurisprudence in accordance of the constitution as well as rural land laws, Cassation Division has not yet developed consistent jurisprudence on the issue under discussion. Thus, Cassation Division should adhere to HoF's jurisprudence to resolve the (in)applicability discourse of prescriptive limitation to rural land claims. This is not only for the reason that the HoF's decision supersedes that of the cassation division, but also because its jurisprudence is in congruent to constitution, rural land policy and laws.

Conclusion

This commentary analyzed the jurisprudence of the HoF and Cassation Division on (in)applicability discourse of prescriptive limitation to rural land. The analysis divulges the (in)applicability discourse is the result of the status of rural land laws. Rural land laws, except that of Amhara regional state, silently pass over the (in)applicability of prescriptive limitation to rural land. This silence paves the way to controversial debates over the use of prescriptive limitation. Consequently, cases have been flooding the Cassation Division and the HoF to solve this discourse.

Cassation Division is the highest bench of regular courts established by the constitution to assist and preserve the uniform application of law in Ethiopia. Likewise, the HoF is an institution established to settle constitutional dispute and interpret the constitution.

Regarding the issue under discussion, to date Cassation Division has not yet developed consistent and convincing jurisprudence on the (in)applicability of prescriptive limitation to rural land – particularly in case of private rural land holding. On some cases, where it held that the land is occupied via unlawful contract, prescriptive limitation is inapplicable. On the contrary, it failed to clearly define what constitute unlawful contract. As a result, what is considered unlawful contract has not been consistently elaborated. Unlike Cassation Division, the HoF

has developed straightforward and catches-all jurisprudence that prescriptive limitation could not serve as one scheme of access to rural land. The HoF's jurisprudence is non-eviction of peasants from their possession. Consequently, since application of prescriptive limitation evicts peasants from their possession, it is inapplicable to rural land. On top of this, these two institutions' jurisprudence, rather than being complementary, has unfortunately become incompatible. Hence, litigants seem to invariably considering the HoF as an appellate court.

In recommendation, the Federal Cassation Division should revisit and develop clear jurisprudence on the administration and application of prescriptive limitation to rural land claims, and make its jurisprudence consistent and in line with the spirit of rural land laws and the HoF's jurisprudence. Moreover, the HoF should make its jurisprudence on the applicability of prescriptive limitation to rural land easily accessible to all public organs and the public at large – especially electronically. In the long run, a legislative intervention might be necessary in order to clarify and fill gaps that pertain to rural land.