ANALYSIS OF ISSUES REGARDING RURAL LAND RIGHTS OF A SPOUSE ACQUIRED BY NON-ONEROUS TITLE IN OROMIA REGION

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ABSTRACT

This article examines the status of rural land rights of a spouse acquired by non-onerous title in Oromia Region through analysis of pertinent legal frameworks, interviews, court cases, laws of selected countries and available literature. The findings reveal that there are three approaches to rural land rights of spouses acquired by non-onerous title followed by different countries, i.e., uniform, pluralistic and contribution based approaches. Among these approaches, an approach that has legal ground in the Oromia Region is the uniform approach. That means, such rural land rights are considered as private holding of the spouse like other chattels. On top of these, from data analysis, it is revealed that exceptionality approach, which regards such rural land rights as common holding if another spouse has been using the land, has become dominant especially at the higher courts of the Region and the Federal Supreme Court Cassation Division. Unlike other jurisdictions, there is yet no legal basis to adopt this approach in the Region. To add complexity to the matter, existing decisions of the House of Federation (HoF) affirmed the uniform approach. Overall, inconsistent decisions were given on this issue. To rectify this inconsistency which negatively affects predictability of court decisions and public confidence in court of law, this study suggested that family and rural land laws have to be revisited, existing precedent system has to be enriched by legal reasons, and rural land rights enshrined under laws shall be properly implemented.

Key Terms: *Non-onerous title, Rural Land Rights, Spouse, Uniform and Exceptionality Approaches*

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INTRODUCTION

Land is the most crucial natural resource bestowed to human beings. The FDRE Constitution clearly upholds public ownership of rural land, which is literally stated as 'the right to ownership of rural … land … is exclusively vested in the state and in the peoples of Ethiopia'.[1] However, land principles in the FDRE Constitution were neither preceded nor succeeded by national land policy.[2] Other legal frameworks, which are relevant to this article, are the FDRE Rural Land Administration and Land Use Proclamation[3], Oromia Rural Land Use and Administration Proclamation[4], and Oromia Rural Land Administration and Use Regulation.[5] The Oromia RLUA Proclamation marked the peasants' right over land as 'possession'[6] unlike the FDRE RLALU Proclamation that employed the phrase 'holding right'.[7] Yet, both of them are more or less defined in similar vein. Hence, a bundle of rural land rights is currently disaggregated into ownership right and less than ownership rights. In other words, the ownership right is exclusively vested to the State and Peoples of Ethiopia while an individual peasant, pastoralist or semi-pastoralist is granted the less than ownership rights.

Property acquired by non-onerous title, which earned by a spouse before marriage or thereafter through donation or succession, is usually personal property of the spouse. Nevertheless, there is contentious disparity among

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[1] FDRE Constitution, Art.40 (3). See also B. Nega, B. Andenew and S.GebraSellasie, Current Land Policy Issues in Ethiopia' (EEPRI, Land Reform, 2003/3), P108 http://www.fao.org/tempref/docrep/fao/006/y5026e/y5026e02.pdf <accessed 12 August 2020>; WibkeCrewett and BenediktKorf, 'Ethiopia: Reforming Land Tenure' (Review of African Political Economy No.116, 2008), Pp203-204.

[2] Muradu Abdo, 'State Policy and Law in Relation to Land Alienation in Ethiopia' (PhD Thesis, University of Warwick, School of Law, 2014), P11; available at http://wrap.warwick.ac.uk/74132/1/WRAP_THESIS_Spur_2014.pdf <accessed on 26 Sept., 20 20>.

[3] The Federal Democratic Republic of Ethiopia Rural Land Administration and Land Use Proclamation No.456/2005 *Fed. Neg. Gaz.*,11th Year No.44 (hereinafter, the FDRE RLALU Proclamation). Like its predecessor (Proclamation No.89/1997), it does not explicitly repeal Proclamation No.31/1975.

[4] A Proclamation to amend Proc. No.56/2002, 70/2003, 103/2005 of Oromia Rural Land Use and Administration Proclamation No.130/2007, *Megeleta Oromia*, 15th Year No.12, (hereinafter the Oromia RLUA Proclamation).

[5] Oromia Region Rural Land Administration and Use Regulation No.151/2012, *Megeleta Oromia*, 17th Year No.151 (hereinafter, the Oromia RLAU Regulation).

[6] See Art.2 (7) of the Proclamation. Nevertheless, this term is not consistently used throughout the proclamation. Just to cite, Arts.2 (6), 6 (4) (5) (7), 10 use the term 'holding'.

[7] FDRE RLALU Proclamation, Art.2 (4).

legal scholars, especially, academicians, researchers, lawyers and judges, as regards legal status of a spouse's rural land right acquired by non-onerous title in Oromia Region. The centre of gravity for this controversy is whether a spouse's non-onerous rural land right will be personal property of the spouse, akin to other goods. According to some legal scholars, rural land rights acquired by non-onerous title should be considered as personal property of the spouse.[8] Essentially, this argument emanates from directly applying the family code provisions to land and other goods uniformly. Other legal professionals, however, argue that such rights shall be deemed as common property of the spouses because land has to be treated differently from other goods.[9]

As regards Ethiopia, almost there is no literature that directly deals with the issue at hand. A certain writer and judge noted that neither rural land law nor family law has stipulated status of such rural land and thus there is inconsistency of court decisions. Hence, he argued that a peasant woman shall equally share rural land acquired by her husband before marriage if she has been using it for a long period of time because the husband and the government has consented to and have recognized her use right.[10] But he had not adequately scrutinized relevant laws to reach on this conclusion. Another author also concluded that the Federal Revised Family Code (that is the same to Oromia Family Code regarding the issue at hand) uniformly recognize a woman's right to equal share of a common property, including land, upon divorce.[11] But he did not specifically deal with applicability or otherwise of this provision on spousal rural land right acquired by non-onerous title. Therefore, the legal status of a spouse's rural land right acquired by non-onerous title is not systematically investigated in the Ethiopian setting. That is why, analyzing this issue is quite imperative.

This article essentially is intended to determine the legal status of rural land right acquired by a spouse without onerous title in Oromia Region. In most jurisdictions, if not all, a property acquired through non-onerous title is

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[8] See Text to *infra* note 82.

[9] See Text to *infra* note 115, 135 & 138.

[10] Desalegn Berhanu, 'Rural Land Disputes Resolution Mechanisms in Oromia Regional State: A Case Study of Dugda Woreda Court in Eastern Shoa Zone' (AAU, LLM Thesis, 2018), P71.

[11] Hussein Ahmed, 'A Woman's Right to and Control over Rural Land in Ethiopia: The Law and the Practice, IJGWS (2014), Vol.2 (2), Pp145, 163.

considered as personal property of the spouse. Both the Oromia Family Code[12] and the Federal Revised Family Code[13] have similarly adopted this effect of non-onerous title. This is a legal status of the property acquired by non-onerous title. Whether this legal status is equally applicable on rural land right or not is systematically investigated in this article.

This article deals with the following two major questions. First, does the legal status of non-onerous title enshrined under the OFC apply to rural land right similar to other chattels? To put differently, is there any discrepancy between above-mentioned rural land laws and the OFC as regards legal status of a spouse's rural land right acquired by non-onerous title? Second, does the reality on the ground exhibit the ideal laws of spousal rural land right acquired by non-onerous title? In order to address these questions and other related legal issues, legislations primarily the FDRE Constitution, the pertinent rural land laws and the OFC were thoroughly scrutinized. Laws of some selected countries, which directly and explicitly deal with issue at hand, were also briefly overviewed. Additionally, court cases and decisions of the HoF were analyzed and interviews were conducted with Legal Researchers, Practicing Lawyers and Judges of the three levels of Oromia Courts as well. Following this brief introduction, the remaining of this article is divided into four major parts. The first part provides the essence of property rights in general and that of rural land rights in particular. The second part presents the general overview of rural land right of a spouse acquired by non-onerous title. Specifically, the notion of non-onerous title and approaches adopted by some countries regarding status of such rural land right will be discussed under this part. The third part tries to normatively and empirically analyze the status of such rural land right in the Oromia Region. The final part is a recap.

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[12] Oromia Family Code Proclamations No.69/2003 and No.83/2004, Art.76 (hereinafter OFC). Note that according to Art.2 of Proc No.83/2004, the re-numbered articles of the OFC are used throughout this Article.

[13] Revised Family Code Proclamation No.213/2000, *Fed. Neg. Gaz.*, 6th Year, Extra-ordinary Issue No.1, Art. 57 (hereinafter RFC).

1. RURAL LAND RIGHTS UNDER THE AMBIT OF PROPERTY RIGHTS

A brief discussion about notion of property is very important because the term property is sometimes improperly understood that it connotes only ownership right.[14] Legally speaking, property is not a thing rather it is a relationship between a person and a thing. It refers to rights/interests that a person claims and exercises over certain object.[15] To be considered as property, the right is not necessarily required to be ownership right. The term property may also refer to relationship between persons as regards to certain thing. It is a right to exclude or include other persons in the use of the thing.[16] Broadly, it implies correlation 'between the right holder, others and a governance structure'.[17]

The property rights over things, particularly over land, metaphorically consisting of a bundle of sticks/rights.[18] The bundle of rights existing on a plot of land can be unbundled into use right (the right to derive benefit thereof through cultivation/grazing), management right (the right to decide how and when to use the land and the purpose for which the land may be used), income right, capital right (the right to transform it), transfer right, and exclusion right.[19] Hence, among a bundle of rights, lack of the right to dispose land (for instance through sale) does not inhibit to be called property because sticks in the bundle can be divided to different persons in a decentralized bundle of rights system.

[14] See Text to *infra* note 110.

[15] Land and Property Rights (FAO 2010), P12, available at http://www.fao.org/3/a-i1896e.pdf <accessed 14 Sept. 2020>. See also the French Civil Code (1804), Art.544 that defines property as the right of enjoying and disposing of things in the most absolute manner; available at http://files.libertyfund.org/files/2353/CivilCode_1566_Bk.pdf <accessed 19 Sept.2020>. However, there is no definition of the term property under Ethiopian Civil Code and other laws of the country.

[16] *Ibid.*

[17] Wibke Crewett, Ayalneh Bogale and Benedikt Korf, 'Land Tenure in Ethiopia: Continuity and Change, Shifting Rulers, and the Quest for State Control', (CAPRI Working Paper No.91), P2, available at http://dx.doi.org/10.2499/CAPRIWP91 <accessed 14 Sep. 2020>.

[18] Land and Property Rights (n15). See also Wibke Crewett, Ayalneh Bogale and Benedike Korf (n 17), 3. A bundle of rights means attributes of ownership that comprise, according Roman law, *usus, fructus* and *abusus*. See Daniel Weldegebriel, Land Rights and Expropriation in Ethiopia (Doctoral Thesis in Land Law, 2013), P31, available at https://www.springer.com/gp/book/9783319146386 <accessed 25 August 2020>.

[19] *Ibid.*

Montgomery Witten noted that 'what is sometimes called the 'bundle' of land rights is, in almost all cases, fragmented and distributed over many holders so that an individual's rights in a particular parcel of land are actually quite restricted and limited by the rights of the State and other parties.'[20] For example, in Ethiopia land rights are distributed among various holders.[21] The bundle of rural land rights is disaggregated into 'ownership right' and 'less ownership rights' in Ethiopia. Then the state and the peoples of Ethiopia are exclusively bestowed the ownership right while the other holders are granted less than ownership rights, which are in tandem referred to non-uniformly in various rural land legal frameworks.[22] In Ethiopia, rural land-holding right is acquired for indefinite period of time either through government grant or from land-holder through inheritance or donation. It can also be acquired for a definite period of time by contract of lease, rent, share cropping and farming (out-grower mechanism).[23]

2. RURAL LAND RIGHT OF A SPOUSE ACQUIRED BY NON-ONEROUS TITLE: AN OVERVIEW

2.1 NOTION OF NON-ONEROUS TITLE

Truly there is no direct definition of non-onerous title. It is an opposite of onerous title.[24] It is also, as used under Art.76 of the OFC, more or less the same with lucrative title. Lucrative title is a title acquired without giving anything in exchange rather a person acquires anything by gift or succession.[25] Property acquired accordingly is treated as the personal property of a married person.[26] In the OFC context, however, non-onerous title can be broadly comprehended as a property that is acquired before marriage by any means or that is individually acquired during marriage through donation or succession.

[20] Montgomery Wray Witten, *The Protection of Land Rights in Ethiopia*, Afrika Focus Vol. 20 Nr. 1-2, 2007, Pp155-156.
[21] *Ibid.;* See also the FDRE Constitution, Art.40 (3) (4) (5) (6).
[22] Mainly 'use right', 'holding right', 'usufruct', and 'possession', which are not actually synonymous, are utilized. The rural land laws employed one of them or more interchangeably.
[23] The FDRE RLALU Proclamation, Arts.5 & 8. See also the Oromia RLUA Proclamation Arts.5, 6 (14), 9, 10.
[24] Black's Law Dictionary (9th edn), P 1624.
[25] *Id.,* P1623.
[26] Ibid.

This broad definition is employed throughout this article. Rural land right is basically acquired by lucrative title under the current Ethiopian legal system.

2.2 APPROACHES ADOPTED BY SOME SELECTED COUNTRIES

Alignment between land and family laws is another matter worthy discussion that may involve two major issues. First, it is tremendously needed to ensure enforceability of the land rights. Sometimes land rights protected by the land law might be circumvented by the family law.[27]Very importantly, the second issue is whether or not land is treated differently from other goods in marital relationship. In this regard, looking at laws of other jurisdictions is very imperative. Vietnam and Tanzania granted ownership of land to the public at large. Liberia and Kenya, however, followed private ownership of land. Yet, all of these countries have tried to address this issue in one way or another. Hence, these countries are purposively selected for the researcher believes that their experiences can be reckoned as most important approaches regarding issue at hand and lessons can be drawn thence.

In Vietnam, land is treated like other goods. The land use right obtained before the marriage or personally inherited by or given separately to one of the spouses or that is obtained through transaction with personal property during the marriage shall be personal property of the spouse.[28] But Liberia espoused legal pluralism, which means, pecuniary effect of marriage is a little bit different across various types of marriage. In civil marriage, land acquired by a spouse before or during marriage is considered as separate property of the spouse. In customary marriage, however, each spouse has a right to one-third of the other's real and personal property at the time of marriage regardless of one's contribution to acquisition of the property.[29]

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[27] Women's Secure Rights to Land (Landesa Rural Development Institute, Centre for Women's Land Rights), P4; available at https://www.landesa.org/wp-content/ uploads/ Landesa-Women-and-Land-Issue-Brief.pdf<accessed 26 September 2020>.

[28] Gina Alvarado and others, Property and Land Rights in Marriage and Family (Vietnam Land Access for Women (LAW) Program), Pp 13, 33, 37; available at https://www. land -links.org/ wp-content/uploads/2016/09/Toolkit_3.pdf <accessed 23 September 2020>. See also Law on Marriage and Family (2014) Arts.33 (1) 2nd Para., 43, 59 (4), 62 (1).

[29]My-Lan Dodd and others, 'Women's Land Rights in Liberia in Law, Practice and Future Reforms: LGSA Women's Land Rights Study' (2018), P9 available at https:// landwise. resourceequity.org/records/3044 < accessed 26 Sept. 2020>.

In Kenya, property (including land rights) acquired individually before or during marriage by a spouse is reckoned as personal property of the spouse. Nevertheless, the other spouse may get interest in the personal property if he/she contributed towards the improvement of the property.[30] Contribution can be monetary or non-monetary that includes, *inter alia*, domestic work and management of the matrimonial home, childcare, companionship, management of family business/property and farm work.[31] A spouse may contribute by his/her labour or other means to the productivity, upkeep and improvement of the land. By virtue of this contribution, the spouse acquires interest in the land 'in the nature of ownership in common' with the other spouse (in whose name the land is registered).[32] Likewise, in Tanzania, the spouse who contributes in such manner gets interest in the land 'in the nature of occupancy in common' with the other spouse.[33] Generally, in Kenya and Tanzania, contribution of another spouse is very decisive factor to determine whether or not the land is personal property and thus it seems that contribution of a spouse to the personal land transforms the land to a common property of the spouses. In nutshell, the above countries follow different approaches, i.e., uniform, pluralistic and contribution based approaches. These approaches are very essential to effectively carry out analysis of legal frameworks and collected data in the subsequent part.

3. THE STATUS OF RURAL LAND RIGHT OF A SPOUSE ACQUIRED BY NON-ONEROUS TITLE IN THE OROMIA REGION

Rural land right is not specifically addressed under both the RFC and the OFC, unlike Law on Marriage and Family of Vietnam. Yet, there are general provisions dealing with property of a spouse acquired by non-onerous title. Moreover, under the FDRE RLALU Proclamation, the Oromia RLUA Proclamation and the Oromia RLAU Regulation, there are provisions that regulate relationship between spouses as regards to rural land rights. Accordingly, this part firstly looks into general issues of matrimonial property and personal property under family laws of Ethiopia. Then it carries out

[30] Matrimonial Property Act (2013), Sect. 9 and Land Registration Act (2012), Sect. 93 (2).
[31] Matrimonial Property Act (2013), Sect. 2.
[32] Land Registration Act (2012), Sect. 93 (2).
[33] Land Act (1999), Sect.161 (2).

systematic investigation regarding the status of rural land rights of a spouse acquired by non-onerous title through analyzing relevant provisions of family laws and rural land legislations. Lastly, it presents collected data that include case analysis and interview. This is very important to identify whether the reality on the ground is in line with the letter and the spirit of law because judicial activism is immensely observed at the higher courts regarding the issue at hand.

3.1 MATRIMONIAL AND PERSONAL PROPERTY UNDER FAMILY LAWS OF ETHIOPIA

In general, common and personal property dichotomy is pecuniary effect of a marriage. 'The two extremes are full community and complete separation of property of husband and wife. Between them there exist several kinds of limited community.'[34] If common property of spouses is restricted to property acquired during marriage by their labour, it may be deemed as limited community.[35] The time and method of acquisition of a property are two yardsticks used to determine a limited community.[36]'Generally, *separate property* is property owned by a spouse prior to marriage and all property acquired after marriage by gift, inheritance or bequest. All other property acquired during marriage by a husband or wife is their *community property.*'[37]

Laws of some countries are acquainted with the notion of 'matrimonial home', a place where spouses have established their home.[38] In Kenya, matrimonial land is considered as common property of spouses regardless of who acquired it.[39] This lesson is glimpsed to explore later on whether such concept is recognized under our laws. In Ethiopia, according to Art. 57 of the RFC, 'the property which the spouses possess on the day of their marriage, or which they

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[34] Jan Gorecki, *Matrimonial Property in Poland*, The Modern Law Review (1963), Vol.26, P156.

[35] Caroline Bermeo Newcombe, *The Origin and Civil Law Foundation of the Community Property System: Why California Adopted it and Why Community Property Principles Benefit Women,* University of Maryland Law Journal of Race, Religion, Gender and Class (2011), Vol.11(1),P5.

[36] *Ibid.*

[37] Kenneth W. Kingma, *Property Division at Divorce or Death for Married Couples Migrating between Common Law and Community Property States,* ACTEC Journal (2009), P78.

[38] Black's Law Dictionary (9thedn), P559.

[39] Land Act (2012), Sect. 2 and Matrimonial Property Act (2013), Sect. 2, 6.

acquire after their marriage by succession or donation, shall remain their personal property.' Art.76 of the OFC has similar provisions. This is simply property of a spouse acquired by non-onerous title. The underlying justification of these provisions is to circumvent conclusion and dissolution of marriage that merely intends to get property.[40] If such property is exchanged by another property during marriage, the latter property will also be personal property of the spouse provided that this fact is approved by court.[41] According to Mehari Redae, this is needed to prevent unjust enrichment of common property or personal property of another spouse by the personal property in question.[42] He also noted that any court (including Cassation Division) may undertake this approval act because there is no time limit provided and there is no specifically empowered court of law.[43] A property conjointly donated or bequeathed to the spouses is considered as common property unless there is contrary stipulation.[44]

The other point is that even if there is 'a fabricated legal interpretations' by courts of the country, proof of joint contribution/effort to establish common property does not have legal basis in Ethiopian family laws.[45] The rebuttable legal presumption is that all property shall be deemed as common property regardless of in whose name it is registered. Sileshi Bedasie formulated that simplicity is a merit of this presumption.[46] It is also logical and fair to make common property a default regime in a country where marriage is culturally and religiously considered as property unionization.

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[40] See W/ro Askale Lema v. H/Mikael Bezzabih, Federal Supreme Court (hereinafter FSC) Cassation Division, Vol.5, File No. 26839.
[41] The OFC, Arts.78 and 81 (2). See also the RFC Arts.58 and 62 (2).
[42] Mehari Redae, *Content and Implementation of Federal Family Law* (in Amharic), (Addis Ababa, 2012 E.C) , P81.
[43] Id., P82.
[44] The OFC, Art.81 (3). See also the RFC, Art.62 (3).
[45] Jetu E. Chewaka, Bigamous Marriage and the Division of Common Property under the Ethiopian Law: Regulatory Challenges and Options, Oromia Law Journal, Vol.3 No.1, P110.
[46] Sileshi Bedasie, *Determination of Personal and Common Property during Dissolution of Marriage under Ethiopian Law: An Overview of the Law and Practice*, Oromia Law Journal Vol.2, No.2), P149.

3.2 LEGAL FRAMEWORKS

The FDRE Constitution guarantees right of peasants to obtain land for free and not to be evicted from their possession.[47] It also stipulates that women have the right to acquire, administer, control, use and transfer property. In particular, they have equal rights with men *with respect to use, transfer, administration and control of land*.'[48] That means, women shall be given equal protection of laws in this regard. However, this does not excessively enable women to encroach on rights of others, including legally protected personal property of their husbands and the vice versa.

The FDRE RLALU Proclamation Art.6 (4) states that where land is jointly held by husband and wife the holding certificate shall be prepared in the name of both joint holders.[49]Thus it can be argued that sole existence of marriage does not automatically result in joint holding certificate on private holding of a spouse.[50]In the same vein, the Oromia RLUA Proclamation stipulates that 'husband and wife holding a common land-holding, shall be given a joint certificate of holding specifying their names.'[51] This is what has been already provided by the FDRE RLALU Proclamation. Spouses have equal right of using the land registered in their names.[52] On the other hand, each spouse can have independently a holding certificate for his/her private holding.[53] The

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[47] The FDRE Constitution, Art.40 (4-5). Right of peasants over rural land is referred here as 'possession' but as 'usufruct' under Art.97. See the Oromia Regional State Revised Constitution, Proclamation No.46/2001, (hereinafter the Revised Constitution of Oromia Region), Arts.40 (4-5) and 47 (2) (j).

[48] FDRE Constitution, Art.35 (7) *(Emphasis added)*.

[49] At this juncture, the question that needs to be settled is which land is deemed as joint holding of spouses. The notion of 'joint holding' might be understood as a counterpart of 'joint ownership' which is known in bundled property rights of other goods. If persons (whether or not couples) jointly acquired holding right, such right will be deemed as joint holding.

[50] Rural Land Laws of some Regional States such as Afar and Southern Nations Nationalities and Peoples (SNNPs) stipulate that private holding pre-martially acquired is not affected because of marriage. See the Afar National Regional State Rural Lands Administration and Use Proc. No.49/2009, Art.9 (7) and the SNNPs Regional State Rural Land Administration and Utilization Proc. No.110/2007 (Debub Neg. Gaz., 13th Year No.10), Art.5 (5).

[51] The Oromia RLUA Proclamation, Art.15 (8). See also the Oromia RLAU Regulation, Art.15 (11)

[52] The Oromia RLUA Proclamation, Art.15 (9); Oromia RLUA Regulation, Art. 15 (16).

[53] Ziade Hailu and others, *Protecting Land Tenure Security of Women in Ethiopia*, Pp11-12; available at: https://www.uneca.org/sites/default/files/uploaded-documents/ CLPA/2019/

Oromia RLAU Regulation Art.15 (17) also states that 'persons who live together but each of them have their own land holding may be given individual land-holding certificate.' Hence, during marriage spouses may have joint holding certificate and separate holding certificate on joint land-holding and private land-holding respectively.

Upon dissolution of marriage by divorce, spouses shall have the right to share their land-holding that was registered by their name equally.[54] That means, only joint land-holding, which is initially eligible to be registered in the name of both spouses, is required to be shared by spouses equally. Private holding is, however, retaken by a spouse in question according to the family law because there is no contrary stipulation under the rural land laws.

According to Art.5 (13) of the Oromia RLAU Regulation, during divorce spouses or members of their families shall have the right to share or use in common *the residential areas* while they share *their holdings*.[55] This provision is a little bit confusing because it is not clear about which residential area it is talking. Does it apply to the residential area found in joint land-holding alone or any residential area? What does residential area mean? Is it synonym of the term 'premise' that is defined under Art.2 (14) of the Regulation? These questions are not clearly answered by the law. Thus it is difficult to determine whether or not the notion of 'matrimonial home' is statutorily recognized as common property in the Region. But the provision probably wants to give special emphasis to a residential area that is found in common land-holding. If this is what is contemplated by the provision, the residential areas in private holding won't be considered as common holding. In order to identify whether non-onerous rural land right of a spouse is *de jure* private holding or common holding, let's further look atsome issues under family law and rural land laws in the next sub-sections.

Papers/Womens-access-to-land-and-security-tenure/final_submission_259.pdf <accessed 02 October 2020 >.

[54] The Oromia RLUA Proclamation, Art.6 (13). See also the Oromia RLAU Regulation Arts.5 (7-11) and 15 (13).

[55] Emphasis added to Oromia RLAU Regulation Art. 5 (13).

I. The Family Law

Obviously, under the OFC, a property acquired by non-onerous title is deemed as a personal property. Conceptually the term property is a right that can be ownership or less than ownership. Thus any rural land right of a spouse acquired by non-onerous title is personal/private to the spouse.[56] However, income or fruit derived from this private land-holding shall be a common property. Accordingly, once a marriage is dissolved, it will be retaken by the spouse like other goods as per Art. 116 (1) of the code. Even when the marriage subsists, there are at least two things that make such land-holding different from a common land-holding.[57] First, each spouse has exclusive right to administer their respective private land-holding and to receive income thereof. Second, consent of another spouse is not necessary to make any juridical act relating to the land-holding.

II. Some Other Issues under the Rural Land Laws

The first issue is about rural land policy. To date Ethiopia does not have land policy document. There is no land policy that envisages rural land right acquired by non-onerous title is common holding. Secondly, looking at land holding certificate and its status might be helpful. Holding certificate is a certificate of title issued as proof of rural land use right.[58] Even if it is not clearly stated in rural land laws, there is no doubt as to refutability of holding certificate. It furnishes rebuttable presumption regarding who is holder of a land.[59] Putting differently, if joint holding certificate is improperly given on a private holding, the concerned spouse may rebut it by adducing other evidence. Because underlying justification of presumption of common property is that '… each spouse contributes labour or capital for the benefit of the community, and shares equally in the profits and income earned there from'[60] rather than encroachment of common property on personal property.

[56] Ziade Hailu and others, *supra* note 53, P12.

[57] The OFC, Arts.78, and 87 (*acontrarion* reading).

[58] The FDRE RLALU Proclamation, Art.2 (14), and the Oromia RLUA Proclamation, Arts.2 (21) and 15 (4). See also Art.15 (2) of the Oromia RLAU Regulation.

[59] See the Civil Code, Arts.1195-1196, and the Oromia RLAU Regulation, Art.25 (1). See also Ato Tilahun Gobeze v. Ato Meketa Hailu*et al*, the FSC Cassation Division, Vol.13, File No. 69821.

[60] Silashi Bedasie, *supra* note 46, P148.

Hence holding certificate is not conclusive evidence rather it is a prima facie evidence of having holding right.

Lastly, identifying the effects of jointly using such land right during marriage and contribution of another spouse is quite imperative. Commonly, spouses use private holding for livelihood of their family during subsistence of their marriage. Does this act transform the private holding to common holding? What about contribution of a spouse towards productivity, upkeep and improvement of private holding of another spouse? Regarding the first question, the land laws do not have answer but the family law has. According to the family laws, another spouse has a right to use income or fruits derived from the private holding of a spouse. Thus jointly using private holding *per se* does not transform it into joint holding.

There is also no legal framework as regards effect of another spouse's contribution towards productivity, upkeep and improvement of private holding of a spouse. The OFC, Art. 118, stipulates that court may award indemnity (not other rights) to a spouse at whose personal property expense personal property of another spouse is enriched.[61] Particularly, labour seems common resource of spouses during marriage. Hence, one may safely conclude that the contribution based approach is not recognized in laws of the Region. Overall there is no discrepancy between the rural land laws and the OFC as regards issue at hand. Thus, the uniform approach is adopted in the Region. This approach ensures equality of men and women by protecting their respective personal property. To do so, however, both of them have to be found on equal status. The disadvantage of this approach is that, it may create inequity by evicting a spouse from holding that he/she had been using during marriage. This problem is highly exacerbated when land is substantially in the hand of male or female only and when marriage subsists for a long period of time. Particularly, where there is patriarchal dominancy in acquisition of land right, invariably pursuing this approach could create injustice since it ultimately makes divorced women landless.

On the other hand, promoting personal property regime in all property rights is useful for women as useful as for men provided that both of them are given equal opportunity in the acquisition of the rights at the outset. In this regard,

[61] See also RFC, Art.88.

the 1960 Civil Code of Ethiopia and Proclamation No.31/1975 had played pivotal role by eliminating sex based discrimination as regards modes of getting land rights including succession.[62] The contemporary legal frameworks undoubtedly treat both men and women equally regarding acquisition of land rights.[63] Therefore, setting aside existing down-to-earth, the uniform approach can be theoretically considered as an egalitarian approach.

3.3 THE REALITY ON THE GROUND

As far as the reality on the ground is concerned, there are two approaches followed by different court cases and interviewees. Sometimes one can get these approaches followed in a single court. The journey to one of these approaches could be ignited only if one of the spouses alleges that the contested rural land is his/her private holding. Moreover, if this allegation is not adequately proved by evidence, the issue at hand won't appear at all because the legally presumed common property (or joint holding) is left un-refuted.

3.3.1 The Uniform Approach

The uniform approach means unvaryingly applying provisions of family laws which deal with property of a spouse acquired by non-onerous title to rural land and other goods. Cases and data collected through interviews that adopt this approach are analyzed hereunder.

A. Court Cases

In *Liku Dugasa v. Kebeda Disasa*, citing Art. 76 of the OFC, Woliso Woreda Court decided that 1.75 hectares rural land, which was acquired by a husband before marriage (through succession) and registered in his name alone, is not a common holding of the spouses.[64] In this case, the spouses have jointly used the land for 15 years. In *Kecini Bededa v. Megersa Huluka*, 0.75 hectare rural land that was acquired by a husband has been jointly used for not more than 2 years. In the same vein, 0.75 hectare rural land that was acquired by a wife has

[62] See the Civil Code, Art.837 and Public Ownership of Rural Lands Proclamation No.31/ 1975, Art.4 (1).
[63] Even affirmative action shall be accorded for women as per Art.3 (10) of the Oromia RLAU Regulation.
[64] WolisoWoreda Court, File No.52872 (2012).

been jointly used for around 6 years. Moreover, each land was registered in their respective names and separate holding certificate was granted accordingly. Thus it was decided that the rural lands are their respective private holdings.[65] Similarly, in *Tejitu Koru et al v. Mulu Merisa,* Sebeta Town Woreda Court decided that the 2nd wife does not have a right on rural land which was gained before marriage, by her deceased husband and the 1st wife.[66] The land was registered in the name of the deceased and has been used by both wives and the deceased during marriage. Thus the court said that a defendant (the 2nd wife) does not have any right on the land because it is common holding of the 1st plaintiff (the 1st wife) and the deceased according to the OFC.[67] To be noted that the defendant has used the land for about 30 years.

In *Yadete Urgecha v. Fikire Amena*, High Court of the Special Zone Surrounding Finfine (hereinafter High Court of the Special Zone) decided that rural land which a spouse acquired by succession before marriage is a private holding.[68] A husband, who was a defendant at a woreda court, had gained 12 hectares rural land by will and used it for 16 years individually and for 3 years and 8 months with a plaintiff. Based on Art. 40 (3) of the FDRE Constitution, rural land laws of the Region and Arts. 61, 76, 81 and 116 of the OFC, the woreda court decided that the land is common holding of the spouses.[69]But the High Court reversed this decision by directly applying Art. 76 of the OFC.In another case, rural land was gained by a husband before marriage (through government grant) and it was not included in contract of marriage. But the spouses have jointly used it for 4 years. Then Tole Woreda Court decided that it is a common holding of the spouses because they have jointly used it.[70] The High Court, however, reversed this decision articulating that there is no right acquired by a wife since she has not jointly used it for a long period of time.[71] What makes this case different from those provided herein above is that it is not explicitly based on Art.76 of the OFC. Rather the land was considered as a private holding owning to non-fulfilment of 'jointly using

[65] Dawo Woreda Court, File No.32132 (2012).

[66] Sebeta Town Woreda Court, File No.10692 (2012).

[67] It was however reversed by High Court which decided that it is common holding of the two wives and the deceased because the defendant has been using it. See High Court of the Special Zone, File No.39306 (2013).

[68] High Court of the Special Zone, File No.36252 (2011).

[69] MuloWoreda Court, File No.10416 (2011).

[70] Batire Geresu v. Kasehun H/Meskel, Tole Woreda Court, File No.19789 (2010).

[71] High Court of South West Shoa Zone, File No.41960 (2010).

it for a long period of time', which transforms private holding to common one, according to the court. As to be seen later, this issue appeared in exceptionality approach and developed by judicial activism.

In *Shimallis Korra v. Atsedu Adugnaet al*, the Oromia Supreme Court (hereinafter OSC) Cassation Division also regarded 0.625 hectare rural land that was acquired by a husband through succession as his private holding.[72]Yaya Gulale Woreda Court, at which the case was started, decided that the land is a common holding because it was not registered as private holding. High Court of North Shoa Zone confirmed this decision. The OSC Cassation Division, however, said that there is a fundamental error of law committed in these decisions because property acquired by non-onerous title is deemed as personal property. The Cassation Division further argued that even if it might be said that such land could become common holding by stay, it is only two years; that means, jointly using a land for two years is not sufficient to consider it as a common holding of the spouses. Generally, in above cases, the contested rural land is arable land on which crops are seasonally sown and harvested. Thus looking at how courts entertain rural land that is covered by fixed assets might be vital to get full insight.

In *Zeyituna Shukur v. Mohammednur Haile et al*, 0.25 hectare coffee tree, 0.5 hectare agricultural land and 0.125 hectare tree (*berzaf*) were gained by a husband before marriage and there is no seedling additionally planted during marriage. Accordingly, a court determined that the lands are private holdings as per Art.76 of the OFC.[73] In *Anima Aba-Jebel v. Abdo Aba-Oli*, Shebe Sombo Woreda Court also decided that coffee tree which the plaintiff (a wife) individually got from her father through donation is personal property.[74]The question here is that could planting fixed assets on such land convert it to common one. If fixed assets were planted on such rural land during marriage, still there would be no clear law to consider the land as a common holding.[75]

One more issue is that the rural land laws allow exchange of rural land with another rural land. Accordingly, rural land right of a spouse acquired by non-onerous title could be exchanged with another rural land during marriage. But

[72] See OSC Cassation Division, File No.282074 (2011).
[73] Gomma Woreda Court, File No.35930 (2009).
[74] Shebe SomboWoreda Court, File No.13226 (2012).
[75] Rather the Civil Code, Arts.1176-1177 could be used *mutatis mutandis* to regard it as private holding.

the question is that what status such an exchanged land has when marriage dissolved. In *Seble Shumiye v. Tibebu Mokonin*, a court decided that such land is a private holding because the spouses did not cultivate it during marriage.[76] In this case, coffee tree land which was individually gained by a defendant (husband) was exchanged with another coffee tree land during marriage. There was no additional coffee tree planted thereon after act of exchange and the spouses have not cultivated it. Art. 77 of the OFC (which requires approval of court) might be analogically employed in such case. If so, it would have been considered as a common holding because there was no such authentication adduced. Additionally, there are a lot of court cases which espoused the uniform approach.[77] Generally, in all these cases, the courts directly or indirectly applied Art.76 of the OFC.

B. Decisions of the HoF

The HoF has upheld the uniform approach in the following cases. In *Halima Mohamed v. Adam Abdi,* it decided that about 2 hectares of agricultural land which acquired by an applicant (Halima Mohammed) before marriage is her private holding.[78] This case was started at Cinaksen Woreda Court. The applicant had acquired the land with her ex-husband before she got married a respondent. Later on marriage she had with the respondent was dissolved and she claimed the land as her private holding. The court decided that it is her private holding. High Court of East Hararghe also confirmed this decision. Then the case was brought to the OSC Cassation Division which reversed the decisions. The Cassation Division argued that when a marriage is dissolved, spouses shall equally share a land use right they have jointly used, and accordingly the parties have jointly used the contested land for more than ten years. The Federal Supreme Court (hereinafter FSC) Cassation Division dismissed an application brought thereto. Finally, the case was brought to the HoF through the Council of Constitutional Inquiry (hereinafter CCI). The CCI underlined that the applicant did not acquire the land after she married the respondent and argued that the Oromia RLUA Proclamation Art.15 (8) (9), the OFC, the FDRE RLALU Proclamation and the RFC show that spouses may have common holding and their respective private holdings. Accordingly,

[76] Gomma Woreda Court, File No.46818 (2013).

[77] For instance, see Text to note 94, 97, 99, 101, 106, 107 & 109.

[78] HoF, 4th Parliament Year, 5th Year, 2nd Ordinary Session, Sane 18, 2007.

it recommended that the case needs constitutional interpretation because the Cassation Divisions' decisions encourage evicting women from their private holdings in contrary to Art. 35 (2) (7) of the FDRE Constitution.

The HoF also emphasized on the fact that the applicant gained the land with her ex-husband, who is a father of her three children, and they have been using it and raising the children accordingly. Holding this land, the applicant got married the respondent who has another marriage and land. Thus it unanimously decided that decisions of the Cassation Divisions shall be of no effect for they contravened with the applicant's rights (right of equality and non-eviction right) and the best interest of the children that enshrined in Arts. 35 (2) (7), 36 (2) and 40 (4) of the FDRE Constitution. Yet a couple of questions that could be raised here are, would the HoF give the same decision if the respondent did not have another land or if the respondent was wife and the applicant was husband or again if there were no children of the applicant born in the former marriage.

Another case was started at Menz Mama Midir Woreda Court between a wife and a child of her deceased husband.[79] Through his tutor, the child claimed that a rural land which was acquired by his deceased father before he got married the defendant in 1990 E.C. Actually, the deceased acquired the land in 1983 E.C and there is no act of making it a common holding when it was being surveyed during the marriage, particularly, in 1997 E.C. As a result, the court decided that the defendant (the wife) has no right on the land. High Court of Semen Shoa, the Amhara Regional State Supreme Court Cassation Division and the FSC Cassation Division have sequentially affirmed this decision. Lastly, the defendant instituted an application to the CCI.

Looking at a long period of time the defendant stayed in the marriage, the CCI argued as follows: "The defendant has improved the land use right conceiving it as a common holding; and she has contributed her intellect and capital to enhance its productivity and cultivation as well. Thus, she has a right through her contribution in bringing permanent improvement on the land pursuant to Art. 40 (7) of the FDRE Constitution."[80] As a result, the CCI said that the

[79] Kasahe Eshetu v. Tsiye Tamire, HoF, 5th Parliament Year, 4th Year, 1st Ordinary Session, Meskerem 29, 2011.
[80] *Ibid (Translation is mine).*

courts' decisions infringe Arts. 35 (1) (7) and 40 (3) (7) of the FDRE Constitution and thereby suggested that the defendant shall equally share the land. The HoF, however, underscored that rural land law of the Region[81] allows the spouses to hold their respective private holdings acquired before marriage unless they want to get joint holding certificate thereon (adding it to their common holding); but the deceased registered it as private holding and retained as such during marriage. When a marriage is dissolved, such land shall be regarded as a private holding. Then it concluded that considering the defendant as a co-holder, by the mere fact of being a spouse of the deceased, is contrary to the FDRE Constitution and the rural land law enacted accordingly. Therefore, the HoF decided that decisions of the ordinary courts do not contravene with Arts.35 (1) (7) and 40 (3) (7) of the FDRE Constitution. To be noted that the defendant has minor children born in the marriage and she does not have another rural land. Furthermore, the defendant and the deceased were jointly using the contested land for a long period of time. To put differently, according to this decision, non-onerous rural land right of a spouse is a private holding irrespective of jointly using it during marriage unless the spouses agreed otherwise.

C. Interviews

Some legal professionals also argued that such rural land shall be considered as private holding if conditions prescribed by the family law have been complied with.[82]The fact that spouses were jointly using the land during marriage, which usually employed to consider the land as a common holding, does not have a legal ground.[83] Similarly, another informant eloquently and sequentially explained as this approach has a legal ground.[84] The Oromia RLUA Proclamation states that spouses may get joint holding certificate on common holding but each of them may have private holding that is registered in their respective names. More importantly, it says that the spouses have the

[81] See Amhara Revised Rural Land Administration and Use Determination Proc.No.133/ 2006, Art.24 (3).

[82] Interview with Wakgari Dulume, a Legal Researcher at Oromia Justice Sector Professionals' Training and Legal Research Institute (hereinafter OJSPTLRI), 18 Nov. 2020. Interview with Tamiru Legesu, a Judge at DawoWoreda Court, 11 Dec. 2020. Interview with Biso Bekele, a Judge at the OSC, 12 Dec. 2020.

[83] Tamiru Legesu, *supra* note 82.

[84] Biso Bekele, *supra* note 82.

right to share their common holding when their marriage is dissolved.[85] Opponents of this approach usually relegate a person's right on land to mere use right from possession right that is not in line with objectives of the FDRE Constitution and the rural land laws. Rural land law provisions dealing with succession shall not be extended to issues of marriage because it is specifically dealt with by the law. Furthermore, Art. 35 of the FDRE Constitution does not envisage that a married woman equally share rural land, which is individually gained by her husband, by mere fact of using it during marriage.[86] Thus, there is no discrepancy between family law and rural land laws regarding the issues at hand. Only what has been cultivated on such rural land during marriage (including fixed assets) is considered as a common property but the land remains private holding.[87]

3.3.2 The Exceptionality Approach

This approach is mostly followed in court decisions and supported by most legal experts. According to this approach, rural land right shall be treated differently from other goods due to its unique nature. Various factors are used to substantiate it, for instance, jointly using and joint holding certificate. Court cases and data collected through interviews which espouse this approach are analyzed subsequently.

A. Cases of District Courts

In *Zekariyas Bedane v. Senayit Bekela*, 4 hectares rural land that was acquired by a husband through succession and registered in his name was decided as a common holding. The fact that it has been jointly used by the spouses for about 4 years is emphasized on to this end.[88] In *Tejitu Lelisa v. Kelbessa Bayisa*, 2.79 hectares rural land had been acquired by a defendant and his deceased wife before the second marriage. But the court decided that it is a common holding because the spouses have used it for about 14 years and they have joint holding certificate thereon.[89] In certain case disposed at Akaki Woreda Court, a rural land that was acquired by a husband through succession and jointly used by the spouses for more than 8 years was regarded as a common

[85] *Ibid.*
[86] *Ibid.*
[87] Biso Bekele and Tamiru Legesu, *supra* note 82.
[88] WolisoWoreda Court, File No.51414 (2013).
[89] DawoWoreda Court, File No.34101 (2012).

holding.[90] Likewise, in *Firehiwot Bekele v. Abule Deme*, the court employed the phrase 'jointly using such rural land during marriage' as a decisive factor that converts private holding to a common holding and accordingly quashed defense of a defendant because they have jointly used the land for more than 10 years.[91]

In *Atsedu Kebeda v. Buzune Dida*, a defendant had acquired the contested rural land through succession and accordingly it was registered in his name. But Sebeta Awas Woreda Court said that an individual has only a use right over land and in view of that the parties have used it for 26 years. Accordingly, it ordered that the parties equally exploit use right of the land.[92] *Gadissie Debele v. Tasisa Amente* is another case in which similar argument has been raised.[93] In this case, both spouses individually gained the same size rural lands by succession. Then they have jointly used the land acquired (before marriage) by a husband for 33 years and that acquired by a wife for 15 years. As a result, the court decided that the parties shall equally share both lands because they have been jointly using it. In all these cases, the same argument was employed to regard rural land of a spouse acquired by non-onerous title as a common holding. That is jointly using the land during marriage. However, the spouses have used the land for different length of time that range from 4 to 33 years.

B. Cases of High Courts

In one case, the contested 1.5 hectares rural land was acquired by a wife (respondent) through inheritance, during marriage, and holding certificate has been accordingly issued in her name. Thus, Mulo Woreda Court decided that it is her private holding.[94] But High Court reversed this decision enunciating that as regards rural land the crucial thing is jointly using and accordingly the

[90] Abebu Guta v. Teshome Biru, Akaki Woreda Court, File No.33386 (2012). High Court of the Special Zone confirmed this decision. On top of jointly using the land, the High court underlined that it is not proved as it was individually given to him by will as per Art.81 (3) of the OFC because he got a certificate of heir during marriage. But the case does not explicitly show as it was testate succession. See also High Court of the Special Zone, File No.38883 (2012).

[91] Akaki Woreda Court, File No.30172 (2011).

[92] Sebeta AwasWoreda Court, File No.59143 (2010). This decision was affirmed by High Court; see High Court of the Special Zone, File No.31877 (2010).

[93] Sebeta Awas Woreda Court, File No.82114 (2012).

[94] Legesse Worku v. Direbe Daba, Mulo Woreda Court, File No. 10937(2012).

spouses have jointly ploughed and used the land for 9 years.[95] In *Derartu Robi v. Gutema Amanu*, High Court of South West Shoa Zone said that there is a legal presumption as rural land which has been jointly used by spouses during marriage for a long time is a common holding.[96] This case was started at Dawo Woreda Court. A defendant replied that the contested 2.875 hectares rural land was acquired by him through succession. Admitting this fact, at the first hearing, a plaintiff however argued that she shall share the land because they have jointly used it for 24 years. But the Woreda Court quashed her claim stating that she does not have a right to share the land rather to use fruits derived thereof during marriage.[97] Nonetheless, the High Court reversed this decision by the mere fact that it has been jointly used by the spouses for 24 years.

High Court of Jimma Zone also decided, in *Nabet She Sherif et al v. Yizedin She Sherif et al,* 0.5 hectare of rural land that was acquired by a husband before marriage and has been used by the spouses for 14 years is their common holding.[98] At the lower court, the 2nd plaintiff (wife) claimed half of this land but the defendants (children of her deceased husband) replied that it was acquired by their deceased father before he got married the plaintiff and thus she cannot claim it. Accordingly, the court dismissed her claim based on Art.76 of the OFC. Particularly, the court enounced that a term property under the provision implies one's right over a thing that includes land rights. Moreover, it underlined that jointly using the land during marriage cannot make it a common holding.[99] Nevertheless, the High Court reversed this decision emphasizing on the fact that an individual has only land use right and the spouses have been using the contested land for 14 years.

In *Marema Ijigu v. Mohamed Hasen*, High Court of Jimma Zone reasoned out that there is no doubt as to rural land registered in the name of both spouses is their common holding.[100] By citing Art.76 of the OFC, woreda court decided

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[95] LegessaWorku *etal* v. Diribe Daba, High Court of the Special Zone, File No.39850 (2013).
[96] High Court of South West Shoa Zone, File No.43890 (2010). There is no legal provision particularly cited to show by which law this presumption established.
[97] Dawo Woreda Court, File No.27470 (2010).
[98] High Court of Jimma Zone, File No. 40666 (2010).
[99] GommaWoreda Court, File No.36180 (2009).
[100] High Court of Jimma Zone, File No. 41876 (2010).

that crop land, coffee tree land and tree land (*yebarzaf meret*) is private holding of the defendant (husband) because he acquired them, as it is, before marriage.[101] The High Court, however, articulated that the woreda court would have to make sure in whose name the land was registered and thus remanded the case so that the court identifies only this matter and decides as a common holding if it was registered in their names. The High Court took joint holding certificate as conclusive evidence of a common holding. There is also intrusion in the lower court's jurisdiction for it specifically dictated what decision the court has to give.

In these cases too rural land acquired by a spouse through non-onerous title was regarded as a common holding on account of jointly using it during marriage that is for 9 years and above. In the latter case, however, joint holding certificate was taken as a decisive factor to determine whether or not it is a common holding. But, as it has been previously glimpsed of, the certificate is not conclusive evidence rather prima facie of having holding right.

C. Cases of the OSC

In *Bushuna Jahi v.Tadelu Bedada* and *Beyessa Irko v. Mulu Aduna*, a rural land, which was exclusively acquired by a spouse/man through succession, was decided as common holding by woreda courts by the mere fact that it has been jointly used during marriage/irregular union. For the same reason, the OSC Central Appellate Bench dismissed appeals instituted against these decisions.[102] In the former case, the man and the woman (it was irregular union) have jointly used the land for around 7 years.[103] And in the latter case, the spouses have jointly used it for 27 years.[104] Some decisions of the OSC Cassation Division given upholding the exceptionality approach are also presented as follows.

In *Mulu Gutema v.Abbu Cakkiso*, the OSC Cassation Division said that the lower court would have to frame an issue of fact that whether or not the spouses have been jointly using the land.[105] In this case, the contested rural land was acquired by a defendant (wife) through succession and it was

[101] GommaWoreda Court, File No.37046 (2010).
[102] The OSC,File Nos.322814 and 322873 (2012).
[103] Ilfeta Woreda Court, File No.25714 (2012).
[104] Jibat Woreda Court, File No.24715 (2012).
[105] The OSC Cassation Division, File No.332007 (2012).

accordingly registered in her name. Hence, Negele Arsi Woreda Court determined it as her private holding as per Art. 76 of the OFC.[106] This decision was confirmed by High Court of West Arsi Zone and the OSC South Permanent Bench.[107] But the OSC Cassation Division stated that, according to Art.40 (3-5) of the FDRE Constitution and the Revised Constitution of Oromia Region, a person has only land use right and thus land is not considered as other property. Accordingly, even if rural land is acquired by one of the spouse only, another spouse shall acquire right on the land by mere fact of using it with the spouse. And rural land shall not be remained private holding of the spouse by looking at a way of getting it. Thus, it remanded the case to the lower court so as to elucidate the issue of fact.

Similarly, in *Chala Edeo v. Bube Hermi*, the OSC Cassation Division affirmed that if spouses use rural land together for a long period of time, when their marriage subsists, the land shall be their common holding.[108] In this case, which was initiated at Lemu and Bilbilo Woreda Court, rural land (both agricultural and grass land) was acquired by a defendant (husband) through succession and accordingly registered in his name. Moreover, the parties have jointly used the land for more than 20 years. Thus, the Woreda Court decided that it is not a common holding of the spouses and High Court of Arsi Zone also confirmed the decision.[109]

Then the plaintiff re-appealed to the OSC Eastern Permanent Bench which quashed decisions of the lower courts saying that it is clearly stated under Art.6 (1) of the Oromia RLUA Proclamation that a person has only land use right. Surprisingly, it also articulated that rural land is not a property rather it is a holding.[110] Hence it said that the lower courts erroneously cited the OFC to decide that the land is private holding whilst the plaintiff has undeniably used it for a long period of time. Lastly, the case was brought to the OSC Cassation Division which noted that the pertinent law is the Oromia RLUA Proclamation

[106] Negele Arsi Woreda Court, File No.37752 (2011).
[107] High Court of West Arsi Zone, File No.40346 (2012). See also OSC South Permanent Bench, File No.288649 (2012).
[108] The OSC Cassation Division, File No.320416 (2013).
[109] Lemu and BilbiloWoreda Court, File No.39041 (2011). See also High Court of Arsi Zone, File No.90232 (2012).
[110]Literally it says 'Lafti baadiyyaa immoo qabeenya osoo hin taane qabiyyee ta'ee, mirgi namni tokko qabus mirga itti fayyadamuuti.'

because Arts.76 and 81 (3) of the OFC talk about property a thing over which a person has ownership. Putting differently, to the Cassation Division, the term property under Art.76 of the OFC refers to only ownership right that does not actually embrace rural land. Consequently, it decided that there is no fundamental error of law committed because rural land which has been jointly used by spouses for a long period of time shall be regarded as a common holding. In another family case, the OSC Cassation Division considered rural land acquired by a wife through succession as a common holding on account of being jointly used during marriage.[111] The land was gained in 1993, a year after conclusion of marriage, and it has been jointly used by the spouses for about 20 years. By citing Art. 76 of the OFC, Lume Woreda Court (where the case arose) decided that it is private holding of the wife (a plaintiff). High Court of East Shoa Zone, however, reversed this decision because the parties have been jointly using it. The OSC Eastern Permanent Bench also dismissed an appeal of the plaintiff. And then, even if she brought an application to the OSC Cassation Division, it gave an order that there is no fundamental error of law committed because an individual has only a use right on land and nothing evidence is also adduced to prove that the land was individually given to the wife. Nonetheless, specific stipulation is needed, under Art.81 (3) of the OFC, only in the case of will rather than succession as a whole. Moreover, a person's right on land is beyond a use right according to the FDRE Constitution that might be expressed as ownership minus sale and barter rights.

To sum up, in aforementioned cases, rural land acquired by one of spouses through succession was considered as a common holding by mere fact of being jointly used by the spouses. However, the OSC Cassation Division does not clearly address how many years of jointly using it is sufficiently needed. For instance, in one case it gave a decision that jointly using a private holding for only two years is not sufficient to consider it as a common holding.[112]

[111] Demme Utte v. Midekso Degefa, the OSC Cassation Division, File No.336356 (2013).

[112] See Text to note 72. However, if there is a contract of marriage made thereon, duration is a matter that is indifferent; See for instance, Gizachew Nuguse v. Burtukan Mamo, the OSC Cassation Division, File No. 269617 (2010), in which after 10 days partition of the land was claimed and decided as a common holding.

D. Cases of the FSC Cassation Division

In *Chalume Mulatu et al v. Chaleshi Kelbessa,* a husband acquired 1.5 hectares rural land from his parents by donation and accordingly it was registered in his name. Although it is not precisely stated in the decision for how many years, the spouses have also jointly used the land for a long period of time. After the death of her husband, the defendant (wife) has been using it, registering in her own name and acquiring holding certificate thereon. Meanwhile, brothers of her deceased husband (plaintiffs) claimed the land stating that it is their parents' land which has been jointly used by their brother and parents. Ambo Woreda Court decided that the defendant does not have a right on the land and thus she has to leave it. High Court of West Shoa Zone said that the defendant's share in the land is one-eighth because she has been using it with the deceased. However, the OSC Central Appellate Bench decided that the defendant shall neither leave nor share it for the plaintiffs. The OSC Cassation Division also confirmed this decision.

Based on Art. 35 of the FDRE Constitution, Art.6 (13) of the Oromia RLUA Proclamation and Art. 15 of the Oromia RLAU Regulation, the FSC Cassation Division, on its part, argued that once a marriage is dissolved due to death of a spouse, a survived spouse shall continue to use a land that has been jointly used during marriage unless her/his right is lawfully terminated. Consequently, it decided that there is no fundamental error of law committed in the OSC's decision that considered the land as a common holding.[113] This indicates that by the mere fact of jointly using such rural land another spouse may get possession/holding right on it. However, the above-mentioned provisions do not support the conclusion reached on rather they imply that it is likely a private holding.

In another case, the FSC Cassation Division said that family law shall not be applied on rural land regarding it as another property.[114] In fact this case is about rural land upon which a contract of marriage was concluded during marriage but without complying with court approval requirement. Thus it decided that lack of court approval, prescribed by the family law, does not hinder the land from being a common holding. This case may indicate that

[113] The FSC Cassation Division, Vol.22, File No.138286 (2010).
[114] Desta Takela v. Tsega Tadiyes, the FSC Cassation Division, Vol.20, File No.114279 (2008).

rural land shall be differently treated and thus provisions of family law are not applied thereon. Generally, in the former case, the FSC Cassation Division regarded rural land rights of a spouse acquired by non-onerous title as a common holding on account of being jointly used during marriage. Yet again there is no clear legal ground established to substantiate this approach which may put its legality in question. What is worrisome is that the FSC Cassation Division did not give decision as to how many years of jointly using needed that might lead to turmoil instead of social security.

E. Interviews

Most legal professionals argued that rural land right of a spouse acquired by non-onerous title could be common holding of spouses if they jointly use it during marriage.[115] As regards legal ground of this argument, there is no uniformity among them. Firstly, most of them founded it exclusively on rural land laws and the FDRE Constitution.[116] An individual person has only use right over land that is acquired and maintained by mere fact of holding and consistently using it rather than by one's effort. That is why, leaving a rural land unused for two consecutive years, for instance, obliterates one's use right on it. Furthermore, any person who permanently lives with a land-holder sharing the livelihood of the later has a right to inherit the land. Thus *fortiori*

[115] Interview with Abdi Gurmessa (PhD Candidate), Legal Researcher at Oromia Supreme Court, 03 Dec. 2020. Interview with Tuli Bayisa and Addisu Bayisa, Advocates and Legal Counselors, 05 Dec. 2020. Interview with Milkiyas Bulcha, Advocate and Lecturer at Ambo University, 05 Dec. 2020. Interview with Rebuma Gejea and MosisaMegersa, Judges at High Court of South West Shoa Zone, 13 Nov. 2020. Interview with Eticha Getachew and Meserat Mammo, Judges at HC OSZSF, 19 Nov. 2020. Interview with Kamil Husen, Judge at Akaki Woreda Court, 24 Nov. 2020. Interview with Kebeda Berhanu, Judges at Sebeta Awas Woreda Court, 26 Nov. 2020. Interview with Desalegn Berhanu, Judge at OSC Eastern Permanent Bench, 18 Nov. 2020. Interview with Oluma Yigezu and Girma Biyazin, Judges at OSC Central Appellate Bench, 27 Nov. 2020. Interview with AlemayehuGadissa and AbdulselamSiraj, Judges at OSC Cassation Division, 23 Nov. 2020. Interview with Beharu Bonsa, Judge at GommaWoreda Court, 11 Dec. 2020. Interview with Lemi Lemessa, Judge at WolisoWoreda Court, 12 Dec. 2020. Interview with Azene Endalemew, Legal Researcher at OJSPTLRI, 18 Nov. 2020. Interview with Dula Tesemma and AsfewTesfaye, Judges at High Court of Jimma Zone, 18 Dec. 2020. Interview with Worku Legesse, Private Advocate and Legal Advisor at Ethiopian Women Lawyers Association, 22 Dec. 2020. Interview with Gizachew Beshiro, President of Shebe Sombo Woreda Court, 26 Dec. 2020; Interview with Gizawu Kebeda and Shiferaw Jarso, Advocates and Legal Counselors, 24 Dec. 2020.

[116] *Ibid.*

another spouse who jointly uses land with the spouse shall get use right on it.[117]

They also argued that if such rural land right is considered as a private holding, pragmatically women will be landless because most of rural land was acquired by men in such a manner backed by cultural influence. This in turn makes equality of men and women which is enshrined under the FDRE Constitution pointless and unfounded practically.[118] This approach is temporarily a pertinent way of re-distributing those lands concentrated in the hand of men until specific law is enacted to avert this asymmetry. Otherwise life of female peasants could be at stake for their livelihood highly depends on rural land.[119] Hence this is an appropriate legal interpretation that can attain justice.[120] Moreover, permitting another spouse to use it can be considered as implied consent to make communal holding and thereby loosing half of the use right there on.[121] Costs as to payment of tax and protection of the land are most likely covered by common property. This approach is also tacitly based on ensuring equity and accessibility objectives envisioned by the FDRE Constitution when it opted for public ownership of land.[122] To conclude, a spouse who gets rural land through non-onerous title does not have special right on it provided that it has been jointly used by the spouses during marriage.[123]

Secondly, it can be argued that jointly using such rural land ensues common holding because this amounts to modifying it.[124] Exertion of labour on such land is considered as making change thereon since modification on (rural) land is carried out in such a way which is slightly different from other goods. That means, 'jointly using' is a family law concept rather than that of rural land law. Therefore, jointly using such private holding during marriage may

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[117] *Ibid.*
[118] *Ibid.*
[119] Kamil Husen*, supra* note 115.
[120] Kamil Husen, Abdulselam Siraj, Dula Tesemma and Lemi Lemessa, *supra* note 115.
[121] Alemayehu Gadissa and Desalegn Berhanu, *supra* note 115.
[122] Desalegn Berhanu, *supra* note 115.
[123] Alemayehu Gadissa, *supra* note 115.
[124] Abdi Gurmessa, *supra* note 115.

transform it to common just as an effect of marriage instead of another way of getting rural land rights.[125]

To the proponents of this approach, the question that how many years of jointly using is suffice to ensue communality is very difficult for it is not prescribed by law. Thus majority of them believe that it is a judicial discretionary which requires looking it case-by-case to avert purposely designed 'land commerce under the guise of marriage'. Otherwise it may encourage a person getting married purposely to divorce after certain time and share such rural land rights.[126] General objectives and principles of family law such legal presumption of common property shall be taken into account to this end.[127] In particular, to some of them, a time limit stated in family law regarding pecuniary effect of irregular union might be adopted analogically[128] while others preferred two years by analogically adopting Art.1149 (2) of the Civil Code[129] or Art. 6 (16) of the Oromia RLUA Proclamation.[130] Still others opted for a reasonable period of time instead of specific duration.[131] Lack of another source of income, getting children thereon, protection and improvement of a land and so forth shall be taken into account above length of the stay.[132] On the other hand, some of them argued that marriage should not be suspected at the outset and thus if the spouses jointly used the land, it should be their common holding regardless of duration.[133] A time limit shall not be taken as a yardstick to determine communality because it obliges a spouse to stick on unwanted marriage just to get land.[134]

A couple of informants have slightly different standing because they differently observe rural land rights of a spouse acquired before marriage and that acquired during marriage by donation or will.[135] To them, the former one

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[125] *Ibid.*

[126] Abdi Gurmessa, Desalegn Berhanu, Tuli Bayisa, Kamil Husen, Lemi Lemessa, Oluma Yigezu and Girma Biyazin, *supra* note 115. Boja Gobena *infra* note 135.

[127] Abdi Gurmessa, *supra* note 115.

[128] Abdi Gurmessa and Tuli Bayisa supra note 115.

[129] Desalegn Berhanu, *supra* note 115.

[130] Dula Tesemma, *supra* note 115.

[131] Alemayehu Gadisa and Eticha Getachew supra note 115.

[132] Shiferaw Jarso, *supra* note 115.

[133] Milkiyas Bulcha and Abdulselam Siraj, *supra* note 115.

[134] Abdulselam Siraj, *supra* note 115.

[135] Interview with Dula Leta and Boja Gobena, Judges at OSC Central Appellate Bench, 27 Nov. 2020.

shall be common holding of the spouses if they have jointly used it during marriage. However, if rural land right is specifically given to only one of the spouses during marriage through donation or will, as per Art. 81 (2) of the OFC, it will be private holding irrespective of jointly using it.[136] Private holding of a spouse recognized under the rural land laws shall be understood in this context.[137] This can be taken as exception of the exceptionality approach.

Another legal expert also employed various dichotomizations although he generally accepts this approach.[138] He takes various matters into account such as whether or not a marriage is defective and what type of rural land is it. To him, there shall be no difference between non-defective marriage and irregular union saves what has been stipulated under family law. In case of defective marriage, however, Art. 126 of the OFC provides that a court determines the effect of dissolution of marriage on the basis of equity. So, rural land acquired in such a manner shall not be considered as common holding rather it is better to compensate another spouse with other goods if equity requires so.[139] In case of non-defective marriage, if such rural land is an arable land on which crops have being seasonally sown and harvested or an irrigation land, it will not be considered as common holding unless it has being jointly used for more than ten years.[140]

But where fixed assets are planted on such rural land, the land shall be regarded as common holding starting from when the seedlings sprout up. Likewise, rural land surrounding home (that is frequently called ‘matrimonial home’ in some jurisdictions) shall be regarded as their common holding to avoid insecurity emanating from homeless because even rental of house is not known in agrarian areas. In the latter two scenarios, existing jurisprudence of urban land developed by Cassation Division can be analogically utilized.[141] Somewhat differently, other contended that jointly using at least for 12 years

[136] *Ibid.*
[137] Boja Gobena, *supra* note 135.
[138] Interview with EshetuYadeta, President of North Shoa Zone High Court, 07 Dec. 2020.
[139] *Ibid.*
[140] *Ibid.* He noticed that there was a woman who got married five times and divorced each marriage after short years to share rural land acquired by husband. Considering it as a communal within a short lifespan undermines cultural and economic values of land.
[141] *Ibid.*

is needed for arable land whereas if the spouses have planted new fixed assets thereon or fundamentally changed pre-existing fixed assets, duration is a matter that is quite indifferent.[142] Sweepingly regarding such rural land as common holding could be as harmful as considering it private holding all the time.[143]

Finally, as to alignment between land and family laws, there is yet again no unanimity among the proponents of this approach. Some perceived as there is discrepancy between two laws. Boldly they argued that rural land is not considered as property and thus Art. 76 of the OFC shall not apply thereon because it implies private property instead of possession.[144] To some other informants, however, although there is no discrepancy between these laws, Art.76 of the OFC shall be applied on rural land without prejudicing its special nature.[145]

Even if it seems that the term 'property' under the provision envisages things, a court has to interpret it in a manner that embraces rights as well. Because exclusion of land rights from ambit of property amounts to undermining land that be considered as worthiest asset by small-holder community. This is a difference which exists between small-holder community and legal community as regards how they conceive rural land.[146]Before winding up discussion of existing practice, it is better to briefly look at strengths and weaknesses of the two approaches mentioned above and shed light on main causes of disparity of court cases.

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[142]Asfew Tesfaye, *supra* note 115. He analogically used Art.32 of the Oromia RLAU Regulation. Gizachew Beshiro also agreed with him as to arable land but regarding land of fixed assets he opted for at least 5 years.

[143] EshetuYadeta supra note 138. .He told that there are cases in which wives were killed by husbands in course of executing decisions given according to this approach. In the same vein, divorced women who had not shared such rural land usually engaged in small businesses such as distillation of liquor that exposes them to sexual exploitation and thereby sexually transmitted diseases. Thus due consideration has to be given to evenly avert these two social upsets.

[144] Rebuma Gejea, Mosisa Megersa, Kamil Husen, Meseret Mammo, Alemayehu Gadissa, Abdulselam Siraj, Desalegn Berhanu, Oluma Yigezu, DulaTesemma, Worku Legesse, Gizachew Beshiro, Shiferaw Jarso (n 115).

[145]Abdi Gurmessa, Asfew Tesfaye, Girma Biyazin, Tuli Bayisa, Addisu Bayisa, Milkiyas Bulcha and Eticha Getachew, *supra* note 115; EshetuYadeta, *supra* note 138.

[146] EshetuYadeta, *supra* note 138.

3.3.3 Windfalls and Drawbacks of the Approaches

As it can be inferred from the previous discussion, probably the uniform approach has a clear legal ground and this can be taken as its strength. As a drawback, there is likelihood of bringing injustice particularly on women if it is invariably followed. Likewise, the exceptionality approach has some strengths and weaknesses that are discussed in comparison with the uniform approach as follows. Although the exceptionality approach is preferable in ensuring equity, by covering legal loophole, it may create social instability for there is a sense of belongingness in the society. That is why a judgment founded on such an approach is practically either not executed or judgment-creditor is forbidden to use it after execution. Further, it is usually executed through payment of money to another spouse in lieu. In fact, this emanates from mismatch between how the law comprehends land and how the society realizes it.[147] Others also noted that consequence of this approach is not good in society because decisions given thereby sometimes become cause of crimes[148] and result in social and religious sanctions as well. In a society where culture and religion is strongly adhered to, a wife who shares such land is ostracized and considered as unbeliever (for instance Islam) respectively.[149] Again other concurred that this approach may undermine economic value of land unless it is properly regulated by clear law.[150] That means, it may encourage getting married to divorce after certain time and get one-half of such rural land. Hence, the protection given to such rural land is less than that is granted to a trivial movable thing owned by the same spouse.

On the other hand, directly applying what is stated under rural land laws and regarding only co-jointly acquired rural land as common holding could create structural/systemic injustice in the long run. That is why the uniform approach seems watertight argument theoretically but has a lot of drawbacks practically.[151] If both spouses have their own private holdings registered in their respective name, it does not matter. Otherwise, it is not fair to uphold the uniform approach. In this connection, married women may not get priority

[147] Gizachew Beshiro, *supra* note 115.
[148] A judgment-debtor does not wilfully execute such decision or he ploughs the land after execution. Sometimes such spouse kills another spouse during execution.
[149] Biso Bekele, s*upra* note 82.
[150] Desalegn Berhanu, *supra* note 115.
[151] EshetuYadeta, *supra* note 138.

right in succeeding their parents' rural land because mostly in Oromia Region they leave their parents' land and live on that of their husbands. Protection against eviction and equity are regarded as justifications of public ownership of land. Creating inclusive society and opportunity are also main objectives of the FDRE Constitution. Hence, exceptionality approach is acceptable looking from these perspectives.[152]

However, it can be argued that the family law has already provided a way out for this problem because the spouses may make contract of marriage to this end. The FDRE Constitution and rural land laws also enshrine equality of men and women in acquiring land. More importantly, seeking to ameliorate reality on the ground, at the expense of clear law, is unacceptable since our legal system is more of civil law.[153]

3.3.4 *Raison D'être* of Disparity of Court Cases

As discussed earlier, there is no uniformity of court cases disposition pattern regarding the issues at hand. Under this sub-section, the core reasons of this disparity are going to be touched briefly based on data collected through interview. Firstly, there is lack of clarity of law as regards issues at hand.[154] The rural land laws of the Region do not state spouses have a right to share a private holding rather common holding registered in their name. The family law also employs generic term property.[155] These laws do not explicitly and sufficiently regulate this matter. Jointly using concept which founded the exceptionality approach is also not clearly stipulated by law. On top of this, there is no reasoned and judicially noticeable precedent system because the exceptionality approach followed by the FSC and OSC Cassation Divisions would have to be enriched and seen a bold enough stance.[156]

[152] *Ibid.*
[153] TamiruLegesu, *supra* note 82.
[154] Desalegn Berhanu, Rebuma Gejea, Mosisa Megersa, Eticha Getachew, Kamil Husen, Abdi Gurmessa, Alemayehu Gadissa, Tuli Bayisa, Gizachew Beshiro, Gizawu Dabeta, Addisu Bayisa, Milkiyas Bulcha and Azene Endalemaw, *supra* note 115; EshetuYadeta, *supra* note 138.
[155] Dula Tesemma, *supra* note 115.
[156] EshetuYadeta, *supra* note 138.

Secondly, there is prevalence of customary practice that may influence court decisions.[157] Mainly in pastoralist areas of the Region, such as in Borena and Guji areas, rural land is considered as communal property of a tribe which is eventually not allowed to be divided for spouses rather women are given another property such as cattle. A wife who got married leaving her parents' land does not get land when divorced that is against women's rights.[158]This custom enormously induces hesitation in deciding to equally share such rural land by the mere fact of using it.[159] The culture of a society a judge comes from highly influences him to give decisions pursuing the uniform approach.[160]

Thirdly, to several respondents, there is also a gap of legal understanding.[161] Believing existence of discrepancy among relevant laws, some informants argued that there is sometimes lack of knowledge how to reconcile them.[162] Land policy adopted by the Constitution, which envisages equity, shall be taken as a legal ground instead of rural land and family laws.[163] On the contrary, others took that misperceiving as there is contradiction among the laws by itself emanates from lack of legal understanding.[164] Fourthly, looking it from feminist point of view in a sense that reluctance to directly apply clear laws lest it being injustice for women has exacerbated uniformity above all.[165] Fifthly, there is no advanced litigation process in every proceeding in general and in the issues at hand in particular. Litigants (including advocates) usually do not argue on law, policy and cassation decisions rather they focus merely on factual matters. This may restrain a judge to entertain issues that are not raised by the parties and it in turn prevents judges from rendering an informative judgment.[166]

[157] Abdi Gurmessa and Tuli Bayisa, *supra* note 115.
[158] Ibid.
[159] Gizachew Beshiro, *supra* note 115.
[160] Abdulselam Siraj, *supra* note 115.
[161]Kamil Husen, Kebeda Berhanu, Oluma Yigezu, Desalegn Berhanu, Shiferaw Jarso, Asfew Tesfaye & Rebuma Gejea, *supra* note 115.
[162] *Ibid.*
[163] Worku Legesse, *supra* note 115.
[164] Wakgari Dulume and TamiruLegesu *supra* note 82.
[165] Biso Bekele, *supra* note 82.
[166] EshetuYadeta, *supra* note 138.

Generally as regards status of rural land rights of a spouse acquired by non-onerous title, practically existence of two main approaches, i.e., uniform and exceptionality approaches, has been revealed based on views of legal experts and court decisions. Probably an approach that has lucid legal ground is the uniform approach. It can be said that the exceptionality approach is developed by judicial activism based on subtle legal interpretation, at the expense of clear law, intending to ensure the so-called fairness. Besides, weakness of this approach is that it usually excludes land from the ambit of property to justify irrelevancy of family law provisions. Incompatibility with social custom can be taken as another drawback of this approach. In fact, invariably pursuing the uniform approach may create social instability as recklessly adopting legally unregulated exceptionality approach. Uniformity of disposition of court cases is being risked due to rivalry of these two antagonistic approaches that in turn negatively affects predictability of court decisions and public confidence in court of law.

4. FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

4.1 FINDINGS

Non-onerous title usually denotes property acquired by donation or succession. Based on Ethiopia`s family laws context, it is broadly comprehended in this article as a property which a spouse acquired before marriage by any means or individually gained within marriage through donation or succession. Almost in all jurisdictions, such property is deemed as personal property of the spouse. As far as rural land right is specifically concerned, there are various approaches pursued by different countries. In this study, three main approaches, i.e., uniform, pluralistic and contribution based approaches, have been identified. Uniform approach treats rural land and other properties equally while effect of such land varies across types of marriage in pluralistic approach. In contribution based approach, contribution of another spouse is very decisive factor to determine whether or not such rural land is private holding.

Accordingly, it is found out that the Oromia Region family and rural land laws have adopted the uniform approach. The OFC states that property acquired by non-onerous title is personal property. It has employed the term ‘property’ that can be construed to embrace rural land rights. As a special law, the rural land

laws do not clearly lay down differently in order to leave out this general principle of family law. The FDRE Constitution ensures equality of women and men in acquisition, control, administration and transfer of land that shall not in any way include encroachment of one in another's rights. Hence, there is no apparent discrepancy between these laws as regards the issues at hand.

Yet, it is additionally identified that there are a lot of informants and court decisions, particularly the FSC and the OSC Cassation Divisions decisions that follow exceptionality approach which considers such rural land as common holding of the spouses if they have jointly used the land during marriage (in most cases for a long period of time). However, there is no specific legal provision cited to buttress this approach. Instead, it is usually pursued from equity point of view, at the expense of clear law, that can be considered as judicial activism. The OSC Cassation Division, along with the FSC Cassation Division, has been persistently following this approach and trying to ensure uniformity in such a manner. Moreover, there is a court case that took joint holding certificate as conclusive evidence and decisive thing to determine this issue. The article also revealed that the HoF, which is considered as a guardian of the FDRE Constitution, has frequently decided that court decisions given pursuing the uniform approach, which actually disregarded the fact that another spouse has been using it for a long period of time, do not contradict with the FDRE Constitution.

4.2 CONCLUSIONS

The main findings of this article revealed that the legal status of non-onerous title enshrined under the OFC applies to rural land right similar to other chattels because there is no contrary stipulation provided by rural land laws. Obviously, the FDRE Constitution is not supposed to deal with such a specific matter. Rather it generally guarantees equality of women and men before, during and after marriage. This indicates that there is no discrepancy among family laws, rural land laws and the FDRE Constitution regarding the issue at hand. Therefore, the uniform approach has a solid legal ground in the Oromia Region.

However, due to the FSC and the OSC Cassation Divisions' influence, the reality on the ground is swiftly shifting to the exceptionality approach. Yet, there is no clear legal ground to follow this approach unlike in other countries

such as Kenya and Tanzania. Thus, there is clear and consequential lack of uniformity of court decisions. Some causes of this inconsistency are lack of legal clarity, lack of legal understanding, lack of advanced litigation system and well-reasoned cassation decisions, prevalence of customary practice and revitalization of feminist view. In fact, customary practice seems to encourage that such rural land rights remain private holding of the spouse. Family law does not specifically deal with special nature of rural land rights. There are also a few ambiguities in rural land laws, for instance, regarding residential areas. Basically exclusion of rural land rights from the ambit of property that is frequently seen in most court decisions is unacceptable. Without any doubt, invariably pursuing the uniform approach may create social instability since getting rural land was largely patriarchic in the Oromia Region due to cultural influence. However, this cannot be sustainably ameliorated by judicial activism that sets aside clear law.

4.3 RECOMMENDATIONS

Based on the findings of this study, it is recommended as follows:

1. A comprehensive Rural Land Policy shall be issued both at the national and regional level so that the challenges in determining issues regarding non-onerous title can be determined in advance.
2. The OFC shall specifically deal with how rural land rights of a spouse acquired by non-onerous title could be converted to common holding of the spouses. That means the law has to clearly address this matter by taking into account, for instance, actual improvement jointly undertaken on the land rather than only lifespan of the marriage.
3. The Oromia RLUA Proclamation states that spouses shall have the right to share their land-holding that was registered by their name equally. This can be wrongly understood as every land-holding jointly registered is common holding or, in contrary to family law, every land-holding registered in the name of one spouse is a private holding. Therefore, a phrase that talks about co-registration shall be removed and it has to merely focus on the fact that a land is common holding of spouses.
4. The concept of 'residential areas' recognized under Art. 5 (13) of the Oromia RLAU Regulation, which is seemingly similar to the notion of 'matrimonial home' known in other jurisdictions, should be sufficiently

reinforced and clarified to ensure social security basically where one of the spouses does not have a private holding.

5. The rural land laws (and policy to be enacted) shall be contextualized to each type of rural land such as crops land, perennial/fixed assets land and irrigation land, and thereby status of rural land rights of a spouse acquired by non-onerous title should be determined taking these factors into account. The family law too must consider this matter when it stipulates what modification/improvement means concerning rural land. In this course, custom of society shall not be set aside unless it is incompatible with human rights.
6. The system of binding decisions of the cassation Division given on the issues at hand particularly has to be enriched by precise and appropriate legal reasons that can convince the lower courts.
7. Lack of effective implementation, which mainly lingered due to cultural influence, has created asymmetry of getting land-holding rights between men and women. This indicates that inequity, which is usually frightened to be happened to invariably adopt the uniform approach, could be safely ameliorated by proper implementation of this right than pursuing the exceptionality approach or rectifying existing defects in the laws.
8. Further researches need to be conducted on legal status of non-onerous rural land right of a spouse and other related matters such as yardsticks used to convert a private holding to a common holding, and effect of joint holding certificate given on a private holding.

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