Legislative Protection of Property Rights in Ethiopia: An Overview

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Abstract

There are ambiguities, inconsistencies, gaps and outdated features in the legislative protection of some property rights in Ethiopia. Moreover, there is the bestowal of wide and undue discretion to various administrative authorities without judicial scrutiny. These problems clearly lead to discretionary and arbitrary administrative decisions and inconsistent court rulings thereby posing insecurity in the protection of property rights. Well-specified property rights stimulate private investment by encouraging property rights holders to invest on their property and they further facilitate the transfer of property to its most efficient user in the context of win-win equitable exchange. There is thus the need to enhance the clarity and coherence of Ethiopia's property law regime that especially regulates land use rights, expropriation, intellectual property, share purchases, and the transfer of business premises.

Key words

Property rights, land law, expropriation, intellectual property, Ethiopia

DOI http://dx.doi.org/10.4314/mlr.v7i2.1

Introduction

The assumption that a strong positive correlation exists between well-defined property rights and economic development is backed by prominent economists, philosophers and jurists. Well-specified property rights stimulate private investment by encouraging property rights holders to invest on their property,

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This article is an improved version of the first chapter of the research titled "Property Rights Protection and Private Sector Development in Ethiopia" which was submitted to Private Sector Development Hub at the Ethiopian Chamber of Commerce and Sectoral Associations. The author is grateful to Private Sector Development Hub for sponsoring the research in partnership with SIDA (Swedish International Development Cooperation Agency). The author is also grateful to the two assessors for their feed-back. The article, in earlier and present forms, has also benefited from the editorial work of Dr. Elias Nour, for which the author extends his heartfelt appreciation. The usual disclaimer applies.

using their own resources or seeking credit through collateralization or transferring it to a more efficient user.[1]

Clearly defined property rights stimulate capital formation as a key device to raise capital for a poor country.[2] Such clear delimitation of property rights fixes the economic potentials of assets, integrates dispersed information into one system and makes individuals accountable and assets fungible. It also facilitates networks between individuals, and duly protects and enforces transactions involving property rights through legislative, judicial and administrative mechanisms.[3] De Soto claims cause-effect relationship between effective title over a piece of property (which allows long term investments using one's own capital, through capital generation and easy transfer), on the one hand, and productivity (and hence general economic development), on the other.[4]

Well-defined property rights involve clear and comprehensive legal specification of who the holder of a given property is, singling out and characterizing the object of the property, the nature of the property right (e.g., ownership or usufruct), manner of its transfer, restrictions thereof, institutions which are mandated to enforce the right upon infringement and specific remedies attendant to property right violations.[5] Legislative specification of property rights should avoid significant gaps, ambiguities, vagueness and contradictions. That is why they should keep abreast of national and international developments.

On the contrary, ill-defined property rights breed insecurity. Besides, poorly defined property right cannot solve the undercapitalization of developing countries, *inter alia*, because:

> … a lender must make the same costly investments as a purchaser in order to make sure that the property right is under the borrower`s control and that, in the event of a default, the property can be obtained with the same rights as those enjoyed by the present owner. This increases the interest rate charged by lenders for loans guaranteed by an expectative property right [i.e., ill-defined property right] or its equivalent; worse still, it may simply prevent such transactions from taking place.[6]

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[1] Harold Demsetz (1967), "Toward a Theory of Property Rights", *The American Economic Review* 57(2); Douglas North (1990), *Institutions, Institutional Change, and Economic Performance* (New York, NY: Cambridge University Press); Hernando De Soto (2000), *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York, NY: Basic Books).

[2] Id, De Soto, p. 5.

[3] Ibid.

[4] Ibid.

[5] Customary or informal practices over property rights are not envisaged here.

[6] Hernando De Soto (1989), *The Other Path*. (New York, NY: Basic Books) p. 162.

Poorly defined property right produces an economic behaviour featured by short-termism; holders of ill-defined property invest in mobile assets; avoid long-term investments in fixed assets. As De Soto observes, holders of such type of property sell 'from barrows rather than from stalls made with proper building materials.'[7] Thus, ill-defined property right regime, which is prevalent in poor nations, cannot be the basis for capital formation vitally required for development.

Empirical evidence proves the nexus between clearly specified property and economic productivity, which is based on the experience of western societies in which well-defined (i.e., legal clarity in the contents of rights in a thing held by persons, registration of such rights and effective enforcement upon breach) property right supported by universal titling is widely believed to be correlated with economic advancement. Moreover, the data from World Development Indicators and International Country Risk Guide support the existence of a strong positive correlation between well-defined property rights and (a) the level of development expressed in terms of GDP per capita, (b) access to credit, measured as domestic credit to the private sector as a percent of GDP and (c) capital formation.[8]

This article offers an overview of legislative protection of property rights in Ethiopia relying on Ethiopian laws as primary resources augmented by scholarship, court cases, and some empirical evidence. It has five parts. The first part describes Ethiopia's property rights legal regime generically. The next portion identifies and discusses aspects of the Civil Code of Ethiopia (the Code) with the objective of identifying and explaining obsolete provisions, incompatibilities, ambiguities and gaps. The third part considers problems with regard to Ethiopia's land law and expropriation regimes. The fourth segment sketches transfers of shares and of business premise under the Commercial Code of Ethiopia. Finally, the shortcomings in Ethiopia's intellectual property law are treated. The concluding remarks emphasize the correlation between weak legislative protection of property (i.e., lack of implementation of clear provisions, gaps, ambiguities and vagueness in the law, lack of specificity, existence of outdated legal provisions and bestowal of unrestrained administrative discretion), on the one hand, and property right insecurity, on the other. The need for a separate research that assesses administrative and judicial enforcement of legislatively defined property rights is also suggested.

[7] Id., p. 67.

[8] Claudia R. Williamson (2010), "The Two Sides of de Soto: Property Rights, Land Titling and Development", *The Annual Proceedings of the Wealth and Well-Being of Nations*, 2009-2010, Volume II (Beloit College Press) pp. 99-101.

1. Ethiopia's Property Rights Legal Regime: An Overview

In Ethiopia, property rights get legal protection mainly under the FDRE Constitution (the Constitution), the 1960 Civil Code (the Code), other codes, some other pieces of legislation and laws that establish and define the powers and functions of judicial and administrative institutions.

1.1 The FDRE Constitution

The Constitution recognizes private property whose contents include the right to acquire, to use and to dispose of such property by sale or bequest or other means of transfer subject to public interest and the rights of other persons.[9] It defines private property as a tangible or intangible product which has value and is produced by the labour, creativity, enterprise or capital of a person.[10] It declares land as an exclusive common property of the state and the Peoples of Ethiopia not to be subject to sale or other means of exchange.[11] The Constitution empowers government to provide private investors with use right over land on the basis of payment arrangements.[12] Once use right over land is given to investors, they have full right to the immovable property they build and to the permanent improvements they bring about on the land by their labour or capital including the right to alienate, to bequeath, and, where the right of use expires, to remove their property, transfer their title, or claim compensation for it.[13] The Constitution indicates that the particulars of these general features of private property will be specified by law.[14] Private property can be subject to expropriation for public purposes subject to payment in advance of compensation commensurate with the value of the property.[15] Moreover, the Constitution recognizes patents and copyrights; it mandates the House of Peoples` Representatives to enact specific laws thereon, and imposes a duty on the government to support the development of the arts, science and technology.[16]

The use of the words 'labour' and 'permanent improvements' in the Constitution indicate that private property in connection with land is defined and justified in terms of labour or capital. This suggests that use right over land *per*

[9] The Constitution of the Federal Democratic Republic of Ethiopia, 1995 (hereinafter FDRE Constitution), Art. 40(1).
[10] FDRE Constitution, Art. 40(2).
[11] Id., Art. 40(3).
[12] Id., Art. 40/6).
[13] Id., Art. 40/7).
[14] Id., Art. 40/6&7).
[15] Id., Art. 40/8).
[16] Id., Arts. 51(19), 55(2)(g), 89(2) & 91(3).

se is not a transferable economic right by private persons. In effect, the phrase land 'shall not be subject to sale or to other means of exchange' is being interpreted to engulf both ownership and rights less than ownership such as use right over land, meaning land laws prohibit some landholders from selling or mortgaging use right. As discussed in this chapter, this interpretation is predominant in understanding land laws of Ethiopia particularly urban land laws which seek to divert to the state coffers the economic value of land lease should such lease right be transferred prior to undertaking more than fifty percent construction thereon.

1.2 The 1960 Civil Code

The Code is the core legislation governing private property in Ethiopia. Although it is half a century old, the Code is generally comparable to any modern property law. Among the five books that make up the Code, Book III is the one which exclusively regulates private property even if the remaining four books have important bearing on the protection of private property. Book III is drafted and arranged in a very detailed manner to eliminate significant ambiguities, vagueness and gaps. It defines resources which can be taken as private property, classifying and sub-classifying such resources;[17] it outlines the different types of property rights, the manner in which property can be acquired, transferred and extinguished; the right of the property holder to use his property and exploit it as he thinks fit; the restrictions attached to the exercise of private property[18] and remedies (i.e., possessory action,[19] restitution[20] and self-help[21]) available where the property rights so protected are infringed. It encompasses provisions on property rights registration, which is accomplished in well-structured and detailed 548 articles that are 'well suited to the needs of [Ethiopia] and to those persons and enterprises from other lands who are participating and sharing in the benefits of the commercial life [in Ethiopia].'[22]

A carefully drafted extra-contractual and unjust enrichment section of the Code states that where a person takes possession of property against the clearly expressed will of the lawful owner or possessor of the property or forces his way into another`s land or house or seizes property of which another is a lawful owner, the court may award him compensation equal to the material damage caused or/and other appropriate measure to make good the damage as well as in

[17] Ethiopian Civil Code, 1960 (hereinafter Civil Code) Arts. 1126-1139.
[18] Id, Arts. 1151-1205.
[19] Id, Arts. 1148-1149.
[20] Id, Arts. 1149 and 1206
[21] Id, Art. 1148.
[22] See Background Documents of the Ethiopian Commercial Code of 1960 (ed. & trans. Peter Winship), (Addis Ababa, 1974) p. iv.

some cases award moral damages.[23] Further, a person who has gained from the property of another without just cause shall indemnify the person at whose expense he enriched himself to the extent he has benefited from his property.[24] The details of this unjust enrichment principle in regard to property are outlined in the Code.[25]

The property rights provisions of the Code are still applicable despite the passage of five decades owing to the prospective strategic vision of the codifiers. The idea at the time of the enactment of the Code was that Ethiopia would be heading to the market economy which would trigger legal disputes including property rights litigation. The property law section of the Code was crafted to capture this future development of the country. This intention was captured fittingly by one of the draftspersons of the Commercial Code, which is equally applicable to the Code, when he said:

> above all it is essential to insist on the need to prepare a commercial code for Ethiopia which not only takes into account the present economic development of the country but also will encourage Ethiopia's future economic evolution. Thus one can consider it as a truth difficult to contest that the future Commercial Code of Ethiopia must be able to adapt itself easily to the unplanned transformations, which will probably take place in the commercial and economic life of the country at a rapid rate during the course of at least a generation, if not a half-century.[26]

The Code in general and Book III in particular was meant to facilitate Ethiopian`s gradual transition from semi-feudal society to a capitalist one by removing barriers, feudal or customary, to the commodification of land and thus ensuring the smooth and efficient circulation of property rights generally in the market.

1.3 Other codes of law

The core legislative protection of private property under Book III of the Code just sketched is augmented by other codes. The codes that play a significant role in the protection of private property include the Commercial Code (1960), the Criminal Code (2004), the Civil Procedure Code (1965) and the Maritime Code (1960).

A closer look into the various provisions of the Commercial Code such as those relating to movables, immovables,[27] business,[28] intellectual property,[29]

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[23] Civil Code, Arts. 2053, 2054 and Art. 2112); (Arts 2090 and 2091).
[24] Id., Art. 2162.
[25] Id., Arts. 2168-2178.
[26] *Supra* note 22
[27] Arts. 5(1)&(2), 35(2) and 561 of the Commercial Code.

shares in the six types of business associations,[30] insurance policies[31] and commercial instruments[32] shows that the underlying purpose of the provisions is legal protection of property in commerce. The Commercial Code seems to capture within its scope the protection of the commercial interests of all things which serve as the seat of commercial interest, be it a right *in rem* (a right against the whole world) or *in personam* (a right against a specific person). In fact, the concept of property under the Commercial Code of Ethiopia is broader than the one employed in Book III of the Code because the former is founded upon the concept of property which (in addition to rights over tangible and intangible things) regards multifarious commercial interests of economic value as property rights.

The Criminal Code devotes about seventy two articles to the protection of property.[33] This portion of the Criminal Code divides property into movable[34] and immovable[35] rights in property[36] (e.g., cheques and insurance), intangible property which includes[37] trademark, copyright and goodwill and claims of creditors.[38] One can see that the Criminal Code uses the term 'property' in its broadest sense as any appropriable subject-matter which has pecuniary value, encompassing tangible and intangible things. It also describes the claims of creditors directed solely against a person as property.[39] As is well known, a key purpose of criminal law is, *inter alia*, to safeguard the economic interests of persons in tangible and intangible assets including debts. Thus, the Criminal

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[28] Art. 124 and 127 of the Commercial Code.

[29] Arts. 127(1)(a) and 148-149 of the Commercial Code.

[30] Arts. 250, 274, 283, 302, 345, 522 & 523 of the Commercial Code.

[31] See Arts. 654-712 of the Commercial Code which indicate the possibility of insuring interests established over movable and immovable corporeal assets as well as intangible assets including human life.

[32] Arts. 715, 716 and 732 of the Commercial Code.

[33] Also see Arts. 849-862 of the Criminal Code "Petty Offenses", which deals with minor offenses directed against property.

[34] Arts. 665-684 of the Criminal Code. Also see Art. 665/3 which divides movable things in terms of value-those with `very small economic value`` and those with higher economic value. See also Arts. 669(1) and 681(2) of the Criminal Code which deal with ``sacred or religious objects or objects of scientific, artistic or historical value…`

[35] Arts. 985-688 of the Criminal Code.

[36] Arts. 692-716 of the Criminal Code.

[37] Arts. 717-724 of the Criminal Code.

[38] Arts. 725-733 of the Criminal Code.

[39] This inference is substantiated by Art. 662(1), one of the general provisions of Book IV of the Criminal Code, which employs the phrase: "Any interference with property and economic right or rights capable of being calculated in money forming part of the property of another.

Code protects, in relation to property, both rights *in rem* and rights *in personam* in a manner broader than that which is conceived under the Code.

The Civil Procedure Code deals with the different procedures and mechanisms (e.g., injunction, pre and post-judgment property attachment and declaratory judgment) that can be employed in the regular courts by a person seeking the protection and enforcement of property rights where dispossession occurs or where peaceful enjoyment of property rights is infringed, or where a person seeks a declaratory judgment with regard to a certain property.[40] The Maritime Code is also related to the protection of private property even if it may not have the prominence held by the other codes described above.[41]

1.4 Series of legislation other than the codes of law

Legislative protection of private property under Book III of the Code is further supplemented by a series of legislation including laws governing rural land, urban land, expropriation, copyrights, trademarks, patents and utility models and industrial designs, condominium, construction machinery, water resources, mining and foreclosures. These laws fill a number of gaps in the Code. They also aim at meeting the demands of the private sector in addition to attempting to make the law of private property as embodied in the Code compatible with provisions of the Constitution.

The legal regime governing private property outlined above is protected by federal and state courts recognized in the Constitution which vests judicial powers in the courts. The *Constitution* enjoins judges to be guided solely by the law and precludes the establishment of special or *ad hoc* courts (which do not follow legally prescribed procedures and) which take judicial powers away from

[40] Arts. 151-153 and Arts. 404-455 of the Civil Procedure Code

[41] We notice some outdated provisions in the Maritime Code (1960). Article 198 of this code provides that a carrier (ship-owner) shall be liable to pay 500 Birr per package or other units of measurements for losses resulting from loss of or damage to goods in the course of shipment. This should be assessed in light of the devaluation of Birr several times since the date of the coming into force of the Maritime Code, i.e., 1960 and Ethiopia is a party neither to the Hamburg Rules (835 Special Drawing Right) nor the 1979 Protocol (666.67 SDR). Another possibility is setting the amount in the bill of lading. Girma Kebede v. Ethiopian Shipping Lines Corporation et al, The High Court of Addis Ababa, Civil File No. 689/78, Ginbot 11, 1981 E.C.; Melese Asfaw v. Ethiopian Shipping Lines Corporation, Zonal Court of Region 14, Civil Appeal No. 1772/88, Sene 1992 E.C.; The Ethiopian Insurance Corporation v. Ethiopian Shipping Lines Corporation, Central Arbitration Committee, (a committee set up to resolve disputes between administrative organs of the state) File no. 71/77; Tsehai Wada, Package Limitation under International Conventions and Maritime Code of Ethiopia: An Overview, Eth. J. L. Vol. 21 (2007) pp. 114 *ff*. See also The Hamburg Rules and the 1979 Protocol in this.

the regular courts or institutions legally empowered to exercise judicial functions.[42] These constitutional clauses and the respective jurisdictions of the courts are detailed out in the Civil Procedure Code and other recent procedure related laws.[43] A number of administrative tribunals are also set up under the legislation stated above to deal with property right matters. Judicial and administrative protection of private property envisaged in the laws is also given protection through privately constituted forums such as arbitration.

1.5 Problems in Ethiopia's property rights regime

In spite of the legislative framework, stated above, that is devised to protect private property, there are problematic spots because, as the following analyses show, there are aspects of the existing Ethiopian property law that require either new legislation or revision in order to clarify significant ambiguities and vagueness, address conceptual incompatibilities and policy ambivalence, qualify or remove aspects which bestow wide powers upon administrative authorities and update (or eliminate) obsolete provisions. As the following analysis suggests, frequent changes in regulations and directives as well as pertinent administrative structures is creating confusion and lack of predictability especially with regard to urban land.

Ethiopia`s post-1991 piece-meal approach to the reform of its core property law as embodied in the Code requires reconsideration because such path can be a breeding ground for confusion and conceptual and policy incompatibilities. These legislative shortcomings in Ethiopia's property law regime can indeed contribute to uncertainty in the administrative and judicial enforcement of the law. The following sections focus on six vulnerable points and legislative challenges that relate to (1) the Civil Code, (2) urban land law, (3) rural land law, (4) expropriation, (5) the Commercial Code and (6) intellectual property law. The first, fifth and sixth challenges are addressed in Sections 2, 4 and 5 respectively while the challenges with regard to urban land law, rural land law and expropriation are discussed in Section 3.

2. Obsolete Provisions, Incompatibilities, Ambiguities and Gaps in the Civil Code

We observe a problem in the basic approach to the reform of the Code including the property law regime therein. There are a number of significant linguistic disparities between the governing Amharic version and the English version. This is witnessed in relation to effects of classification of things, usucaption,

[42] FDRE Constitution, Arts. 78(4), 79(1), & 79 (2).
[43] Federal Courts Establishment Proclamation No. 25/ 1996.

possession, possession in good faith, transfer of ownership and right of recovery.

Parts of the Code that assume private ownership of land obviously require updating. These include: articles that deal with individual and joint ownership, rights and duties of owner, usucaption (adverse possession), accession, usufruct, servitude, right of recovery, preemption and promise of sale. This updating is expedient in view of the post 1975 changes in Ethiopia's land law that has replaced private ownership of land by use right over land. As we discuss below, separate land legislation has been issued to reflect this significant development but the Code`s provisions have not been updated to reflect this basic change in the letter and spirit of land law. The modification of the Code`s provisions is required because their modified versions can still be applicable to govern issues related to land use rights. Existing land laws are replete with gaps and there is also a need to remove those provisions such as provisions related to *rist* land which are left to the back seat of history lest they confuse the unaware user.

There is incompatibility between the Constitution and the Code since the former uses the concept of improvement as a sole justification to continue to exercise use right over land while the latter rests on other justifications including prior occupation as a reason for obtaining property in land. The notion of improvement is inscribed in the Constitution under Article 40(7) that uses the phrase ''… the immovable property he builds and permanent improvements he brings about on the land by his labour or capital…''. This idea has been amplified clearly by rural and urban land laws, which in addition, introduce the idea of continuous and active use under the pain of dispossession. But, under the Code, a continuous and active use is not a condition necessary to retain possession over land. Within the Code itself, there are some conflicting provisions. For example, conflict arises between the provisions dealing with intrinsic elements and those dealing with accessories, on the one hand, and the provisions dealing with possession in good faith, on the other.[44]

The Code has indeterminate aspects. As an illustration, the determination of the degree of material attachment, the content of customary practice envisaged under Article 1132 of the Code as well as the question of ascertaining the existence of economic unity between things under the law of accessory rest on subjective factors. These legal rules also leave many unaddressed issues: for instance, the place and effect of moveable and immovable real rights in the scheme of the Code is unclear. Whether the concept of possession in good faith can apply to special movables such as motor vehicles is not entirely clear.[45] It is

[44] Civil Code, Arts. 1131-1134 versus Arts. 1135-1139 versus Arts. 1161-1164.

[45] Chalicia and Zewdu Mebratu cases as cited in Muradu Abdo (2012), *Ethiopian Property Law*, Textbook, (American Bar Association Rule of Law Initiative), pp. 235 and 238.

disputable if non-use by an owner of an immovable should lead to extinction of ownership.[46] Finally, it is unclear under the Code if provisions designed to regulate the acquisition and transfer of individual ownership over tangible property can be extended to intangible property and property rights less than ownership such as usufruct, servitude and right of recovery.[47]

While the rules concerning the creation, perfection (effectiveness) and enforcement of pledge and mortgage enshrined in the Code are generally comprehensive and clear, there are non-trivial gaps in connection with transfer of property through the use of security devices. *First*,

> a single security instrument on the present assets of [a business person] cannot cover its future assets because Ethiopian law does not recognize both fixed and floating charges. Therefore, multiple security documents need to be created. Ethiopian law does not recognize the English concept of charge. Security is only available in relation to property in existence and owned by the debtor or the third party furnishing security. For example, a mortgage shall be of no effect where it is created by a person who is not entitled to dispose of the immovable at the time of creating the security. It is also not valid even if the mortgagor subsequently acquires the right to dispose the property. Specifically, a mortgage is of no effect if it relates to future immovables.[48]
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> Pledge under Ethiopian law requires transfer of possession, actual or constructive. Article 2832 (2) of the Code states that a contract of pledge shall be of no effect where it stipulates that the pledge shall remain with the debtor. Although sub-article 1 of the same provision indicates that there could be exceptions to this rule, to the extent that we are aware, there is yet no such law in Ethiopia. Thus, as the law currently stands, pledge, like mortgage, is possible only in relation to property of the debtor that is in existence at the time of creating the security. Hence, under Ethiopian law, security by pledge or mortgage is possible only on the present assets of the debtor, not on his future asset. Accordingly, a new security document is required each time a new asset which must be secured (such as equipment) is acquired.[49]

Second, 'there is no clear law on the form of creating and perfecting security by way of assignment unless one argues that the rules governing assignment by way of sale should be applied by analogy; to the extent we are aware, no law

[46] Dawit Mesfin v Government Housing Agency as cited in Muradu Abdo, Id, p .177.
[47] Civil Code, Arts. 1151-1206 and Arts. 1184-1993.
[48] Interview with Mr. Yazachew Belew, July 8, 2013; and Art.3050 of the Civil Code).
[49] Interview with Mr. Yazachew Belew, July 8, 2013.

exists on the matter and hence unclear whether assignment by way of security may be validity created and enforced under Ethiopian law.'[50]

As discussed above, the lawmaker has endeavored to fill loopholes in the Code through ad hoc legislative approach. While such approach has addressed significant gaps in the Code, there are still some unaddressed matters. One such lacuna is lack of provisions in the Code dealing with immovable property registration and certification. The Code actually devoted one bit of it consisting of more than ninety articles to such matter, but such provisions were suspended at the time of the coming into force of the Code.[51] This left real property registration and certification to few transitory provisions of the Code, customary practices, directives and municipal practices[52] The country has not detached itself from this state even if as mentioned below there are some initiatives to devise a system of property rights registration. This causes the prevalence of informal transactions in rights in immovable property.

A system of registration of immovable property avoids undesirable consequences or enables to gain key benefits. As observed in the preamble of the Draft Proclamation to Provide for the Registration of Immovable Property:

> in the absence of reliable registers of rights in immovable property, owners … are unable to deal with it by sale or exchange and are not secure in their rights and cannot therefore plan measures of improvement, pledge their land to gain access to credit or work in complete assurance that the fruits of their toil will be theirs; much unproductive time, money and effort are spent on disputes over the ownership of land, other rights in land and boundaries to land … the prompt adjudication of land disputes and compilation of modern, up-to-date registers of immovable property … together with adequate cadastral maps, will contribute to the productivity of economic efforts …[53]

In other words, '… laws on registration aim at promoting security in real estate transactions so as to permit optimum utilization of real property as a basis of credit … disputes can usually be resolved more easily and expeditiously.'[54] This, stated in terms of benefits of registration of immovable property, means:[55] greater tenure security by providing a degree of certainty and security to the

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[50] Ibid.

[51] Civil Code, Arts. 1553 *ff*.

[52] Civil Code, Arts. 3343 *ff*.

[53] See the Preamble of the Draft Proclamation to Provide for the Registration of Immovable Property, (Addis Ababa University, Law Library: Unpublished, 1968).

[54] Yohannes Heroui (2008), "Registration of Immovable Property: An Overview in Comparative Perspective", 2:2 *Ethiopian Bar Review* 31, p. 177.

[55] These are discussed more fully in Tim Hanstad, "Designing Land Registration Systems for Developing Countries", 13 *Am. U. Int'l L. Rev.* 647 (1997-1998) pp. 657-665.

owner and others who have rights to immovable property; this stimulates private investment and agricultural development as persons are more willing to make long term investments and improvements to property; a register makes dealings with immovable property more expeditious, reliable and less expensive; registries can stimulate the establishment of a land market by removing "extreme procedural difficulties in transferring land, lack of [accurate] land market information, unclear delimitation of individual and group rights, insecure ownership and so on. …"[56] As Hanstad notes, "[a] functioning land market permits economies to use land more appropriately, ease the eventual migration of labor out of the agricultural sector, and generally facilitates the establishment of efficient and consistent land policies".[57]

Even if Ethiopia`s attempts in 1960, 1968 and 1980s to put in place a system of immovable property registration did not materialize, there are two current efforts toward a registration and certification system of immovable property. The first endeavour is in regard to the rural land certification project being carried out with the support of donors chiefly the USAID in several regions. It is advancing from a massive first level (or traditional) land certification phase to a more accurate second level registration and certification, which has started in different rural woredas as a pilot project. The second effort is supposed to take place under the Urban Landholding Registration Proclamation expected to be enacted soon, which appears to obtain its impetus from the emphasis by the Growth and Transformation Plan (GTP) on property rights registration. The more scientific second level rural land registration and certification project and the urban real property registration law, if and when enacted and backed by an administrative system, can facilitate dispute resolution and land rental markets as well as collateralization of use right by agricultural investors even though land in Ethiopia is not subject to alienation in the form of ownership.

Finally, it seems sound to move away from the current piecemeal amendments to the Code`s provisions regarding private property. The piecemeal approach makes the coherence of the Code tenuous. A recent legislation on land registration confines itself only to urban land.[58] This fragmentary and selective legislative practice has led to the issuance of a controversial retroactive-prospective legislation that rendered decision of the Cassation Division of the Federal Supreme Court (nullifying unauthenticated contracts relating to immovable property) inapplicable to banks and micro-financial institutions.[59] It

[56] Id., p. 661.
[57] Ibid.
[58] Urban Landholding Registration Proclamation, Proc. 818/2014 was enacted after the submission of this article and while its publication was underway.
[59] A Proclamation to Provide for the Amendment of the Civil Code, Proc. 639/2009; See *Gorfie Gebrehiwot v. Aberashe Debargie and Getahun Nega,* ''The Decisions of

makes it difficult to tell with certainty as to which parts of the decision are revised or repealed, and to what extent. The same problem is found in expropriation law, as we shall see below.

3 Problems with regard to Ethiopia's Land Law Regime and Expropriation

3.1 Rural land law

At least six regional states have so far passed their respective rural land law following the issuance in 2005 of the Federal Rural Land Use and Administration Proclamation (the Federal Rural Land Proclamation).[60] The Federal Rural Land Proclamation has travelled a long distance in expanding land rights of the agricultural population and investors when compared to rights recognized under the Public Ownership of Rural Lands Proclamation of 1975.[61] The former as opposed to the latter allows robust rights in land particularly through market transfer mechanisms including leasing, consolidating land holdings, sharecropping and entering into joint agricultural investment activities with investors; and the land holder who is an investor can collateralize his/her use right and contribute the use right to a business. While these are considerable improvements embodied in the Federal Rural Land Administration and Use Proclamation, there are four issues of concern that should be raised in relation to the private sector.

First, transferability of land use is subject to some restrictions. Lease of agricultural land by a small holder is subject to restrictions including in terms of size and of duration. That is, a smallholder cannot lease out his entire farmland and the lease is of limited duration as explained in the following quote:

> Although regional land laws permit leasing of rural land, there are serious restrictions limiting the benefits of leasing. First, landholders cannot rent 100% of their land. They can rent only that amount of land that does not displace them from the land; i.e. they should reserve enough land that yields sufficient output to sustain their family… Furthermore, it limits the efficient reallocation of land resources from those who want to earn their livelihood from off-farm employment opportunities and still retain their land resources as a safety net in case the off-farm employment sours. The land laws also put a limit on the number of years that smallholders can rent out their land,

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Federal Supreme Court Cassation Division of Ethiopia'', vol. 4. Civil Cassation Case No. 21448, (1999 E.C), pp. 39-47.

[60] Federal Rural Land Administration and Use Proclamation No. 456/2005, *Fed. Neg. Gaz.* Year 11th Year 44.

[61] Public Ownership of Rural Lands Proclamation. No 31/1975, *Neg. Gaz.* Year 34 No 26.

> particularly to other small scale farmers (less than 15 years). Allowing longer term leases (e.g. 30-99 years) encourages renters to engage in long term investment and development. Lifting and/or easing such restrictions facilitate the creation of land use right markets that assign economic value to and thus convert landholdings into valuable assets ...[62]

There is a contrary argument that lifting the restrictions, for example, by allowing farmers to engage in one time rental for a long period of time denies them future increase in rental value from the land. And there are differences in regional land laws in relation to conditions and restrictions attached to land use right transferability. For instance, the Amhara Regional State allows peasants to rent out their land for up to 25 years.

Second, while agricultural investors are permitted to collateralize their land use right, small farmers are prohibited from doing so.

> The rationale provided for this seems to be protecting rural land holders from exploitation by loan sharks and land speculators and also to stem the tide of rural to urban migration. That this restricts access of rural land holders to institutional credit is counter-argued by governments pointing out that institutional financiers are not interested in accepting rural land use rights as collateral.[63]

Some may not agree with this and ask the question: 'why are investors who lease land for a limited period allowed to use their land use right as collateral while small scale landholders who have use right in perpetuity are not accorded the same privilege?' Furthermore, 'they question the validity of the government's argument that smallholders will lose the use rights they mortgage and migrate *en masse* to the cities and towns and that government should play the role of Big Brother. An overwhelming majority of rural landholders are smart enough not to gamble with the future of their families' livelihood.'[64] The countrywide survey conducted by the Ethiopian Economic Policy Research Institute found out that 'only 4.5% of landholders are willing to sell their land if given the opportunity and 90% indicated that they will not consider selling whole or part of their holdings.'[65]

Third, laws regulating agricultural land lease, whether concluded between an investor and a small farmer or an investor and a government, leaves many issues

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[62] Solomon Bekure *et al*, Removing Limitations of Current Ethiopian Rural Land Policy and Land Administration (Paper Presented at the Workshop on Land Policies & Legal Empowerment of the Poor The World Bank (November 2-3, 2006, Washington D.C., p. 11, 2006); see also ሞላ መንግሥቱ፣ የገጠር መሬት ሥሪት በኢትዮጵያ፣ በሕግ የተደነገጉ መብቶችና በአማራ ብሔራዊ ክልል ያለው አተገባበር፣ Eth. J. L. Vol. 22 No. 2 (2008) pp. 155*ff*..

[63] Id, Solomon Bekure *et al* p. 10.

[64] Ibid.

[65] Ibid.

unaddressed. Some of these include: (1) whether renewal of the contract of lease relating to a farmland is possible; if so, for how many times? (This triggers a question because, to the knowledge of the writer, the possibility of renewal is nowhere mentioned and this universal silence in the law makes one doubtful); (2) Whether an investor's land use right secured through lease can be capital contribution in business undertakings during any phase of his agricultural development: without even starting to develop the land or after developing it but with fifty or less percent investment thereon or only after full development; (3) What are the possible measures by the government authorities in case an investor fails to develop the land within the agreed timeframe? (4) What about failure to pay the lease price? Is it clear that an investor who has leased in land from peasants or pastoralists can mortgage such use right?

Some of these issues may be addressed in a specific lease agreement signed by the parties. Some others can be regulated by the general contract and special contracts sections of the Code. Still some others can be addressed in the sketchy rules included in the Federal Rural Land Proclamation and regional land laws.[66] A review of the federal and regional land laws show that they are quite sketchy. In regard to land leasing by smallholders to commercial farmers, the laws do not go beyond announcing the possibility of land lease, setting the maximum period for lease, requiring the retention of land certificate by the small holder and restitution of the land subject to lease at the end of the lease period in good condition.[67] And, in regard to land leasing to large agricultural farmers by the government, there are issues which cannot be addressed by individual contracts, which look more or less templates, and the application of the pertinent provisions of the Code. Thus, there is a need to come up with comprehensive agricultural land lease legislation.

Fourth, as will be taken up below, there are concerns with key expropriation issues such as the nature of public purpose, amount of compensation and availability of adequate administrative and judicial recourse.

3.2 Urban land law

Urban land is governed in accordance with the Urban Lands Lease Holding Proclamation No. 721/2011 (the Lease Proclamation) issued by the federal legislature and numerous other regulations and directives. One of the basic pillars of the Lease Proclamation is that ground rent shall go to the people through the government that is under the Constitution mandated to be the custodian of land.[68] This means a lessee of urban land cannot claim to collect the

[66] Federal Rural Land Administration and Use Proclamation, Art.8.

[67] See, for example, Article 6 of the Oromia Rural Land Administration and Use Proclamation No. 130/ 2007, *Megeleta Oromia*, Year 15th No. 12.

[68] Proclamation No. 721/2011, Arts. 40(3) and 89.

market value of the land use right he has acquired through lease particularly where his investment on the land is less than fifty percent of the intended construction; what he can claim is the economic value of his investment on the land he leases in. As a good gesture, the law tends to restrict the grounds under which land under lease may be taken away, and states that this occurs only due to expiry of the lease period, breach of the lease contract on the part of the lessee, lack of compatibility between the holder's land use and the urban plan, and if the land is required for development activity to be undertaken by government.[69] The law`s attempt to regularize informal land holdings is also a promising legislative development. Notwithstanding this, we raise some specific areas of concern in the Lease Proclamation.

First, there are provisions in this law which confers unchecked administrative powers. For example, the law states that where a lessee has failed to make payments within the specified time limit and accumulates arrears for three years, the appropriate body shall have the power to seize and sell the property of the lessee to collect arrears.[70] This administrative power to seize property is elaborated in the Model Regulation, clearly indicating the absence of judicial intervention in the process.[71] Another 'seize and sell' power embodied in the Lease Proclamation relates to the case where construction is not completed within the timeframe. Thus, the law stipulates that where a lessee fails to complete construction within the time limit, the lease contract shall be terminated and the appropriate body shall take back the land.[72] The person whose lease contract is terminated shall remove his property from the land within six months.[73] Where a person fails to remove his property, the appropriate body may transfer it to a person who can complete and use the building or clear the land at its own cost and recover such cost from the lease down payment.[74]

Second, and more generally, this administrative power given to the city administrations is part of a wider legislative trend to increasingly empower the executive organ without judicial scrutiny. There are similar provisions in mining and water resources and tax laws.[75] This coupled with the judiciary`s tendency

[69] Id., Art. 26(3).
[70] Id., Art. 20(6).
[71] See the Model Regulation issued by the Ministry of Construction and Urban Development (2012)
[72] Proclamation No. 721/2011, Art. 23(5).
[73] Id., Art. 23(6).
[74] Id., Art. 23(7).
[75] Mining Operations Proc. No. 678/2010; Ethiopian Water Resources Management Proc. No. 197/2000 and Income Tax Proclamation No. 286/2002.

to defer to the authority of the administration as witnessed in recent court cases can pose a threat to private property.[76]

Third, as we shall consider below, expropriation provisions of the Lease Proclamation raise some serious issues relating to the definition of public interest, amount of compensation and judicial recourse.[77] *Fourth*, there are significant omissions in the Lease Proclamation in regard to lease transfer. For instance, this law states that a lessee may transfer his leasehold right or use it as a collateral or capital contribution prior to commencement or half completion of construction to the extent of the lease amount already paid.[78] In this situation, the lessee is required to sell the leasehold right or the incomplete construction under the supervision of the appropriate administrative body and this administrative authority shall retain the remaining balance after paying to the lessee the lease payment he effected together with bank interest thereon, value of the construction undertaken and five percent of the transfer lease value.[79]

But this legislation fails to provide for the situation where a lessee decides to transfer his leasehold right or use it as a collateral or capital contribution after undertaking half but short of completion of construction. This is assuming that upon full completion (more than half completion) of construction, the administrative authorities do not have power to intervene and thus the entire transfer value shall be retained by the lessee even if the law is moot on this. In this latter scenario, it is unclear if the appropriate administrative body will be involved in the transfer or use of the lease right as collateral or capital contribution or if the lessee can be allowed to pocket the entire transfer price.

Another question is the manner in which lessees who acquired land prior to the coming into force of the Lease Proclamation but who failed to commence or complete construction are to be treated. This is clearly an issue given the absence of a relevant provision in the 2002 urban land lease law replaced by the Lease Proclamation. Retroactive application of the Lease Proclamation is contentious. The Model Urban Land Lease Regulation (if and when adopted by regional states) and the respective individual contracts are not also enlightening in this respect due to their limited nature.

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[76] Focus Group Discussion, on Saturday, July 13, 2013, pointing out the Cassation Division of the Federal Supreme Court`s tendency to qualify its earlier deference to decisions of administrative authorities in favour of some shift; see for example, *Taitu Kebede's Heirs v. Tirunesh et al,* (File No. 67011, 20 March 2012), Federal Supreme Court Cassation Division Decisions, Vol. 13, pp. 450-452 and *Genet Seyoum v. Kirkos Sub-City Kebele 17/18 Administration et al,* File No. 64014 (7 March 2012), Federal Supreme Court Cassation Decisions, Vol. 437-440.

[77] Proclamation No. 721/2011, Arts. 26-31.

[78] Id., Art. 24(1)&(2).

[79] Id., Art. 24(2) &(3).

Fifth, the legal framework regarding urban land administration especially in the city of Addis Ababa has shown repeated revisions through regulations and directives since the first lease law was issued in 1994. Following these frequent legislative changes, in Addis Ababa City Administration, for example, administrative structures in charge of land have gone through rather repeated restructuring. Both changes have created lack of predictability in decision making in connection with urban land allocation.

3.3 Expropriation law

As already indicated, the power of expropriation is vested in the government by virtue of the Constitution, which empowers the government to take private property for public purpose with the payment of advance and commensurate compensation.[80] This has been amplified by subsequent statutes, bilateral investment treaties,[81] investment proclamation,[82] the Lease Proclamation[83] and Expropriation of Landholdings for Public Purpose and Payment of Compensation Proclamation (the Expropriation Law) together with the accompanying regulations.[84] The principal legislation on the question of expropriation is the Expropriation Proclamation whose central aim is to expropriate land for investment purposes.[85] This law has three aspects: provisions relating to public purpose, compensation and procedural recourse. If properly formulated and implemented, the requirements of *public purpose*, *compensability* and *procedural recourse* would have the effect of disciplining government authorities since such conditions and procedures would force the state to carefully re-examine its projects, thereby serving as a buffer zone for property holders and preventing overtaking without at the same time necessarily

[80] *See* Art.40(8) of the FDRE Constitution.

[81] Ethiopia has signed numerous bilateral investment treaties with several countries in which it has pledged to pay adequate or fair or appropriate commensurate compensation or market value of the property if and when it expropriates the properties of foreign investors. This variation in the use of terms in connection with compensation might require its own separate research. See, for example, Martha Belete (2014), ‘‘Standard of Compensation for Expropriation and Nationalization of Foreign Investment in Ethiopia’’, (unpublished, on file with the author)

[82] Investment Proclamation No 769/2012

[83] Urban Lands Lease Holding Proclamation No. 721/2011

[84] Proc. No. 455/2005 and Regulations No. 135/2007.

[85] The Minutes of the Deliberations of the Parliamentary Public Hearing Organized by the Standing Committee for Legal and Administrative Affairs of the FDRE House of Peoples` Representatives on the Draft Federal Land Expropriation Proclamation (hereinafter HPR Minutes of Sene 1, 1997 E.C.) p. 2 (Unpublished, on file with the author).

handcuffing such authorities.[86] Examination of the Expropriation Law reveals deficiency on these three counts, a succinct examination of which is provided as follows.

a) Public purpose

The principal objective of public purpose is to limit the discretionary power of government authorities in respect of expropriation. This hinges upon how we define it and whether it is subject to judicial scrutiny. The concept of public purpose may be articulated variously[87] but, broadly speaking, one finds two conceptions of public purpose, which can be described as the *minimalist* and *maximalist* views of public purpose.

The *minimalist* view would prohibit state authorities from undertaking expropriation to transfer the property of one person in order to enrich the patrimony of another. The test of public purpose under this view concerns: what is done with the expropriated property. If the property taken is used to benefit one or few persons then the expropriation cannot be said to have been done for a public purpose. Hence in this view, public purpose shall be construed to mean: 'private property taken through eminent domain must provide its intended use to the public. The public must be entitled, as of right, to use and enjoy the property.'[88]

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[86] Chenglin Liu, The Chinese Takings Law from a Comparative Perspective (Chinese Takings Law), 26 Journal of Law and Policy 301 (2008) pp. 302-3, where Liu states that there are at least four administrative costs associated with expropriation, namely, costs relating to procedural guarantees including public hearing to determine the existence of public purpose, costs of appraising the amount of compensation, the compensation itself and costs of litigation, and these four costs would hinder governments from rampantly engaging in takings.

[87] Antonio Azuela and Carlos Herrera-Martin, Taking Land, pp.353-354 describe the various levels and forms the notion of public purpose might be treated. They state that public purpose might be addressed at constitutional level confining its application to matters of public use only (e.g., many common law countries); or the constitutions might come up with a detailed list of things which are deemed to constitute public purpose or the constitution might leave the matter for legislative action, in the latter category legislation might be issued that come up with a limitative precise list of matters that constitute public purpose (e.g., Japan) or the definition of public purpose might be left to the judiciary (e.g., USA). Or as the present chapter shows, the concept of public purpose can be left for the discretion of the executive branch without the possibility of judicial review (e.g., Ethiopia and China).

[88] Chenglin Liu, Chinese Takings Law, *supra* note 85, p. 326; see also Jarrett Nobel, Land Seizures in the People`s Republic of China: Protecting Property while Encouraging Economic Development (Land Seizures in China), 22 Pac. McGeorge Global Business & Dev. L. J. 355 (2009-2010) p.368.

The *maximalist*, in contrast, thinks that public purpose includes: '…anything which tends to enlarge the resources, increase the industrial energies and promote the productivity of any considerable number of inhabitants or a section of the state, or which leads to the growth of towns and creation of new resources for the employment of capital and labour, contributes to the general welfare and prosperity of the whole community.' [89] In this broad view, public purpose is conceived to include not only 'uses directly beneficial to the public, such as roads, but also uses that promote the general welfare and prosperity of the whole community.'[90]

The Expropriation Law adopts both minimalist and maximalist notions of public purpose. In particular, this legislation has incorporated the maximalist perspective especially when the authorities seek to expropriate land from non-investors including traders. For instance, Article 2(5) defines public purpose to mean: 'the use of land defined as such by the decision of the appropriate body in conformity with urban structure plan or development plan in order to ensure the interest of the peoples to acquire direct or indirect benefits from the use of the land and to consolidate sustainable socio-economic development.'

Article 3(1) of the legislation under consideration stipulates that the relevant federal or regional or local authority has the power to expropriate rural or urban land for the public purpose: '…where it believes that it should be used for a better development project to be carried out by public entities, private investors, cooperative societies or other organs, or where such expropriation has been decided by the appropriate higher regional or federal government organ for the same purpose.' Besides, this expansive approach to public purpose is followed as a trend in respect of expropriation of urban land which includes farmlands in peri-urban areas.[91]

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[89] Bin Cheng, The Rationale of Compensation for Expropriation, 44 *Transactions of the Grotius Society* 267 (1958) p. 292.

[90] Chenglin Liu, Chinese Takings Law, *supra* note 85, p. 326.

[91] The Urban Land Lease Holding Proclamation No. 80/1993 *Neg. Gaz.*, Year 53rd No. 40.) reflected this view. The proclamation stated that the public interest would not be violated by the state expropriating property solely to generate money. According to the preamble, urban areas must be permitted to lease lands so that they can obtain sufficient revenues to provide much needed social facilities and infrastructure. Ibid. The earlier lease proclamation also followed the same pattern. See also Misganaw Kifelew, "The Current Urban Land Tenure System of Ethiopia, in Land Law and Policy in Ethiopia since 1991: Continuities and Changes" in Muradu Abdo, (ed.) *Ethiopian Business Law Series Vol. III* (2009) at 187-8.) Its successor is even more explicit about this broad notion of public purpose. Article 2(7) of the Re-enactment of the Urban Lands Lease Holding Proclamation No. 272/2002, defines public interest as: "…that which an appropriate body determines as a public interest in conformity with Master Plan or development plan in order to continuously ensure the

However, when the state takes land from investors, the concept of public purpose is understood in the minimalist sense to mean taking property including land held by investors under lease only for the purpose of undertaking publicly used projects, making it more difficult to expropriate leased land held by an investor than that held by a private person. According to Article 3(2) of the Expropriation Law, '… no land lease holding may be expropriated unless the lessee has failed to honor the obligations he assumed under the Lease Proclamation and Regulations or the land is required for development works to be undertaken by government.' What is stated in this provision was documented in the Minutes at the time of the ratification of this expropriation bill stating that: 'in case where land under lease contract is to be expropriated, public purpose would be construed narrowly to mean when government needs the land or where the investor could not honor his obligations under the lease contract because land is inextricably linked to investment.'[92]

This differentiated appreciation of public purpose is a departure from the past because previous expropriation legislation of the country conceived public purpose narrowly and in a uniform manner without distinguishing non-investors from investors. For example, the predecessor of the Expropriation Law, that is, the expropriation law issued in 2004, was legislated exclusively with intent to obtain land for government projects. Accordingly, this expropriation statute came up with a restrictive interpretation of public purpose for it conceived public purpose in terms of land taking for public works, which is defined as: 'the construction or installation, as appropriate for public use, of highway, power generating plant, building, airport, dam railway, fuel depot, water and sewerage telephone and electrical works and the carrying out of maintenance and improvement of these and related works and comprises civil, mechanical and electrical works.'[93] This suggests that the public purpose of expropriation as stipulated in this 2004 expropriation legislation was meant to enlarge land in the public domain of the state, not to expand property in the private domain of the government (within the meaning of Articles 1444 and 1445 of the Code) or reallocate land to private investors as is envisaged under the present Expropriation Law. This restrictive interpretation of public purpose in Proclamation No. 401/2004 was in line with the tradition of the Code and post-

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direct or indirect usability of land by peoples, and to progressively enhance urban development." The Urban Planning Proclamation No 574/2008 describes public purpose in Article 2(5) as that which "continuously ensures direct or indirect utilization of land by people and thereby enhances urban development".(*Fed. Neg. Gaz*., No 29 Year 14)

[92] HPR Minutes of *Sene* 1, 1997 E.C., *supra* note 84, p. 3.

[93] Art. 2(2) of the Appropriation of Land for Government Works and Payment of Compensation for Property Proc. No. 401/2004, *Fed. Neg. Gaz.* No. 42 Year 10th.

revolutionary laws enacted by the Derg.[94] Some regional rural land laws tend to gravitate towards the more restrictive appreciation of public purpose, for example, using the words 'public uses' and describing such words as "public common service obtained from infrastructures such as school, health, road, water, etc" and further prescribing that land users shall be evicted from their possessions for public use understood in this narrow sense.[95]

In addition to the question of scope of public purpose, the Expropriation Law appears to implicitly provide that those affected by expropriation cannot challenge the decision of administrative bodies regarding the existence of public purpose either before administrative tribunals or regular courts; the law conveys this message by restricting appeals only to matters pertaining to the denial or inadequacy of compensation.[96] The law takes the decision of the concerned executive authority on the existence or otherwise of public purpose (in a given project) as a final one.

b) Compensation

Compensability and the criteria adopted to determine compensation are among the numerous issues that can possibly arise in relation with compensation during expropriation. In connection with compensability, one expects loss of any property right including use right over land to be compensable upon expropriation.[97] The Constitution is both broad and narrow when it comes to the

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[94] Article 1464 of the Code reflects this view. It states that a competent authority cannot initiate expropriation for the exclusive aim of obtaining money: "(1) Expropriation proceedings may not be used for the purpose solely of obtaining financial benefits. (2) They may be used to enable the public to benefit by the increase in the value of land arising from works done in the public interest". Expropriation may ultimately bring money to the treasury but that must not be its sole purpose. The Amharic version of the title of that section of the Code which deals with expropriation reads: "le hizbe agelgelot yemitqmu nibretoch sele maseleqeq", which suggests that the state authority is supposed to construct facilities accessible to the public in place of the property it expropriates. Art. 17(1) of the Public Ownership of Rural Lands Proclamation. No. 31/1975 provides that: "The Government may use land belonging to peasant associations for public purposes such as schools, hospitals, roads, offices, military bases and agricultural projects". *Neg. Gaz.* No 26, Year 34th.

[95] See Arts. 2(23), 7(3) and 13(11) of the Southern Nations, Nationalities and Peoples` Region Rural Land Administration and Use Proclamation, No. 110, 2007, *Debub Neg. Gaz.* Year 13 No. 10; see also Article 6/ 10 &11 of the Oromia Rural Land Use and Administration Proc. No. 130, 2007, *Megeleta Oromia* Year 15 No 12.

[96] See Art. 11 of the 2005 Expropriation Law. And in making the issue of determination of public purpose non-justiciable, the Expropriation Law has followed the path taken by the Civil Code. (See Arts. 1473-1479 of the Code.)

[97] See Art.19 of Regulations No. 135/2007, which states that there shall be no payment of compensation with respect to any construction or improvement of a building, any

determination of compensable property. It is broad because the combined reading of sub-articles 2 and 8 of Article 40 of the Constitution implies that the expropriation of any private property is compensable, regardless of whether it is movable or immovable, or tangible or intangible. Conversely, the Constitution seems to have narrowed down the scope of compensable property interests by adopting a revised version of Locke`s labor theory in the sense that individuals are entitled to have private property in land that is linked to their labor or capital or enterprise and that they can neither, unlike Locke`s theory, claim ownership over nor the economic value of the land to which they mix their labor with. The attitude reflected in the Constitution appears to allow compensation only to the extent of loss of the labor or capital value that is added to lawfully possessed land that has been expropriated.[98] Thus this implies that if a person invests no labor or capital on his land, he will not be entitled to receive any compensation upon expropriation.

The Expropriation Law has predictably followed the path of the Constitution in providing for the manner in which people affected by land taking might get compensated for the property on the land, and not for the land itself. Thus, under this law, compensable interests are: utility lines,[99] permanent improvements to land;[100] property situated on the land which can be removed and relocated; property which can be removed for consumption (e.g. standing crops); and property which cannot be relocated (e.g., a house).[101] This law takes the clear stand that a mere right to hold the land (use right over a tract of land) lost as a result of expropriation is not compensable unless the administration is able and willing to give land in the form of displacement compensation to the affected person. In other words, the law in question does not view the taking of land from a landholder as an expropriation.[102] Thus if, for example, the state requires land held by a landholder, and if there is no property on or improvements linked to such land, then no compensation is payable because no expropriation has been undertaken in respect of such land.

The Expropriation Law assumes that the state is merely retaking public land in this case, not taking private property, which is conceived as taking labor-

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crops sown, perennial crops planted or any permanent improvement on land, where such activity is done after the possessor of the land is served with the expropriation order.

[98] See Art. 40(2) *cum* (3) *cum* (7) of the FDRE Constitution.

[99] Art. 2(7) of the 2005 Expropriation Law (i.e. Proc. No. 455/2005).

[100] Id., Art. 7(1).

[101] Ibid.

[102] *See*, for instance, the use of the phrase ``shall be given compensation proportionate to the *development he has made on the land and the property acquire*d….in Art. 7(3) of the 20005 Expropriation Law.

related tangible immovable property belonging to the landholder situated on the land. Even in cases where there is property on land subject to taking, compensation relates to the property, not to the land *per se*. Hence, the lost right to use and enjoy the land is not compensable under the Expropriation Law and it should be firmly put in mind that a substitute land during expropriation is due only and only if there is land at the disposal of the authorities and where the state cannot supply a substitute land, the affected person must settle with the monetary compensation minus the economic value of the land.

The rule that there shall be no monetary compensation where there is no property to be removed from the land at the time of taking triggered objection and criticism during the adoption of the present rural land law of Ethiopia, in connection with which it was stated that:

> The right to use rural land would be made secure not by merely issuing land certificate but by fully protecting the rights of peasants as provided for in the Constitution. Complaints among peasants indicate that like the Derg period, there is an increasing tendency to evict farmers from their lands in the name of promoting the interest of the people without payment of commensurate compensation.[103]

It was also stated at the time that:

> the law envisages the possibility of providing a substitute land to peasants who lost their land under expropriation where there is land available. But due to acute land scarcity in highland areas where most land expropriations take place, providing comparable substitute land is not feasible, which means resort is made to payment of meager amount of compensation, which does not support the future livelihood of the victims of government taking. [104]

The idea that use right over land would not be considered as having economic value has not only found its way into the current rural land law of Ethiopia but also cases decided by the Cassation Division of the Federal Supreme Court of Ethiopia have subscribed to it. For example, in *The Ethiopian Roads Authority v. Issa Mohammed*, the Cassation Division has decided that:

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[103] *See* the Minutes of the Deliberations of the Parliamentary Public Hearing Organized by the Standing Committee for Rural Development and Pastoral Affairs of the House of Peoples` Representatives on Draft Federal Land Administration and Use Proclamation Minutes Megabit 19, 1997 E.C. (hereinafter HPR Minutes *Megabit* 19 1997) pp. 6-7.

[104] *See* the Minutes of the Deliberations of the Parliamentary Standing Committee for Rural Development and Pastoral Affairs of the House of Peoples` Representatives on Draft Federal Land Administration and Use Proclamation, Minutes *Megabit* 12, 1997 E.C. p.19 & 25; see also HPR Minutes Megabit 19, 1997 E.C. p. 4; see HPR Minutes *Sene* 1, 1997 E.C., *supra* note 84, p. 4, 7, 8 and 12.

> …the earth and rock related materials are natural resources and as natural resources are owned by the people and state, the people and state may use these resources without any payment. Therefore, even if the respondent has been granted by the relevant regional authority lease right to extract sand and gravel, as sand is a natural resource,… the respondent cannot have ownership over sand, and … the respondent is entitled to claim for the [cost] of extracting the sand but not for the price of the sand itself since such claim has no legal basis. The decision of the lower court that awards the price of the sand in the form of compensation is hereby reversed.[105]

This decision is in line with the Supreme Court`s other rulings essentially upholding that use rights of a landholder do not have a transferrable economic value in the context of public ownership of land in today`s Ethiopia.[106]

Thus, on the question of compensability, as the law stands, those affected by expropriation are entitled to be compensated for the labor or capital-borne fruits over the land but not for use right over land. This position of the law on compensability coupled with the criterion adopted to determine compensation during expropriation, that is, a replacement approach[107] and the less than full

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[105] This case is an abridged version of the case decided by the Fed. Sup. Ct. (Cassation File No. 30461) on Hidar 3, 2000 E.C. (published in 3 *Mizan Law Review* 2 (2009) p. 379 between the two parties mentioned here. See also two similar cases, though disposed on different grounds. In the *Ethiopian Roads Authority* vs. *Ato Kebede Tadesse* (Fed. Sup. Ct., Cassation File 34313, Megabit 25, 2000 E.C., Unpublished, on file with the author), the respondent (the latter) alleged that the applicant took away 10,859 cubic meter sand and occupied the quarry land leased by him from the Oromia National Regional State Mining and Energy Bureau, causing an interruption of current and of future income therefrom. The Cassation Division disposed of the case on procedural grounds. Also in the *Ethiopian Roads Authority* vs. *Genene W/Yohanne*s (Oromia Sup. Ct. File No. 57593, Hamle 18, 2000E.C., Unpublished, on file with the author), the respondent claimed that he had a license to extract sand and gravel; that the applicant took the quarry land from him for the purpose of a road project. He sought compensation for the expenses incurred in connection with making the quarry land ready for extraction of materials as well as for a certain quantity of sand, mined and readied for sale, taken by the applicant from him. The Oromia Supreme Court decided partly in favor of the respondent and partly rejected his claim on the ground of lack of evidence.

[106] See *GebreEgziabher v. Selamawit*, Federal Supreme Court Cassation Division Cassation, File No. 26130, Yekatit 4, 2000E.C.; for comments on this and other cases, see Alem Asmelash, Comments on Some Land Rights Related Decisions of the Federal Supreme Court Cassation Division, 3 Journal of Ethiopian Legal Education 2 (2010) at 153-160; and for a critical comment on *Heirs of Amelwork Gelete v. Bishaw Asahme et al* see Filipos Aynalem, the Interpretation of Rights over Urban Land (in Amharic), 22 *Journal of Ethiopian Law*1 (2009).

[107] *See* Art. 25(2) of the Investment Proclamation, Proc. No. 769/2012.

compensation approach reflected in the country`s legislative past would result in under compensation.[108] In consonance with this observation, research reports have rightly raised the problems in the inadequacy of compensation paid to affected urban residents and peasants.[109] This is confirmed by the recent attempt to review compensation rules by the Addis Ababa City Administration due to the prevalent low compensation.[110]

c) Procedural safeguards

Due process of law is crucial in expropriation because '… being deprived of land rights or lacking access to legal remedy to defend them is the ultimate state of vulnerability in tenure …'[111] Proper and effective procedural safeguards therefore enhance land tenure in particular and property rights in general.

In our opinion, the expropriation law in force in Ethiopia manifests a deficiency in this regard. Miller and Eyob note that the Constitution, in its draft stage, included a clause providing for a public forum at which the concerned public authorities would be required to prove that expropriation was the only available option under the circumstances. The draft also required the authorities to establish a genuine case of public interest and compelled them to give an opportunity for potential land losers to explain their own version of the intended

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[108] George Krzeczunowicz, *The Ethiopian Law of Compensation for Damage* (Addis Ababa University, Faculty of Law, 1977) p. 172-174, where he analyzes the provisions of the Civil Code of Ethiopia that have adopted less than full compensation approach and said that there are aspects of these provisions which ``…constitutes a serious curtailment of the right to compensation.`` and that a person whose property is taken by the state through expropriation will be entitled to recover less compensation than if the loss was sustained otherwise.

[109] See Dustin Miller' & Eyob Tekalign, Land to The Tiller Redux: Unlocking Ethiopia's Land Potential (hereinafter Land to the Tiller) *13 Drake J. Agric. L*. 347 (2008) p. 363; Imeru Tamrat, Governance of Large Scale Agricultural Investments in Africa: The Case of Ethiopia (hereinafter Governance of Large Scale Agricultural Investments) (2010) at <http://siteresources.worldbank.org/EXTARD/Resources/336681-1236436879081/5893311-1271205116054/tamrat.pdf >(visited January 11, 2012) at 11-14; see ''Compensation During Expropriation'' in *Land Law and Policy in Ethiopia Since 1991: Continuities and Changes* (Muradu Abdo, ed.) *Ethiopian Business Law Series* Vol. 3. (Addis Ababa: Addis Ababa University Faculty of Law, 2009), pp. 232-233; see also Girma Kassa, Issues of Expropriation: the Law and the Practice in Oromia, (hereinafter Issues of Expropriation) (LL.M Thesis, Addis Ababa University, unpublished, Graduate School Library, 2011).

[110] Validation Workshop on Property Rights Protection and Private Sector Development in Ethiopia (29 October 2013) sponsored by the Private Sector Development Hub, Ethiopian Chamber of Commerce and Sectoral Associations.

[111] Id., p. 340.

project.[112] However, this did not appear in the final version of the Constitution. Thus, as the law stands, there is no requirement of public consultation showing a regression in this regard from the Code which half a century ago required the relevant authorities to undertake a public inquiry under certain conditions.[113]

Under the Expropriation Law, expropriation is a matter of administrative decision that includes notification of the same to the affected people. Among the series of administrative decisions (e.g., decision on public purpose, determining whether the land has been lawfully acquired, fixing compensation, and notifying the time within which the land is to be cleared and taking over the land[114]), only matters of compensation can be contested in the regular courts by way of review.[115] Those affected by expropriation cannot challenge the decisions of the authorities, for example, in relation to the need for a specific project or whether the project advances public interest in either an administrative or judicial forum.

Hence, the determination of whether the intended project would benefit the public, or the legality of the land possession or the appropriateness of the timing of dispossession seem to be left entirely to the discretion of the authority undertaking the expropriation. In such matters the administration reigns unchecked. One might argue that decisions of the authority other than compensation are subject to judicial review and that an express mention of compensation in the Expropriation Law does not mean other issues associated with expropriation are beyond the reach of judicial scrutiny. But this appears to be an argument with dubious legal foundation. The Expropriation Law`s removal of crucial matters from the purview of regular courts relies on the Code`s tradition of limiting the jurisdiction of regular courts (in respect of expropriation) solely to matters of compensation.[116]

In sum, review of the law and the available research findings show that there is a broader definition of public purpose and that there are no public hearings and consultations in the course of expropriation of land; [117] and that the

[112] Dustin Miller' & Eyob Tekalign, *supra* note 109, p. 363.
[113] See Art. 1465 of the Code.
[114] Art. 4 cum 5, 6 and 10 of the 2005 Expropriation Law.
[115] *See* Art. 11 of the 2005 Expropriation Law (i.e. Proc. 455/2005) and HPR Minutes *Sene* 1, 1997 E.C., *supra* note 85, p. 9 and see also Art. 18(4) of the 2002 Urban Land Lease Holding Law. This latter law, as revised in 2011, has also retained the position that courts may entrain appeal from the expropriated only in respect of compensation issues.
[116] *See* Arts. 1472, 1473, 1477, 1478, 1479, and 1482 of the Code.
[117] Imeru Tamrat, Governance of Large Scale Agricultural Investments, p. 11-14. See also Ethiopian land tenure and administration program (ELTAP): Study on the assessment of rural land valuation and compensation practices in Ethiopia, Final Main Report (2007); see also Dustin Miller & Eyob Tekalign, Land to The Tiller, pp. 362-363. See also Proceedings of A Consultative Meeting on Rural Land

compensation paid to those who lose their land is widely regarded as insufficient.[118]

4. Share Transfers and Business Premise Transfers under the Commercial Code: An Overview

The Commercial Code deals with the manner in which people use, among others, property in commerce in order to make profit by forming business in the form of sole proprietorship or a business association recognized by the law. The Commercial Code is designed to regulate issues that derive from business formation and operation including insuring property, commercial instruments and bankruptcy.

4.1 Regulation of transfers in share companies: clarities and ambiguities

On the positive note, the Commercial Code regulates transfer of shares held by members of a business association in a manner which is comprehensive, clear and in keeping with the contemporary needs of the business community. Even though the issue of transfer of shares is relevant to all forms of business organizations,[119] certain ambiguities relating to share companies deserve attention.

Transactions and Agricultural Investment, (hereinafter Proceedings) (Gizachew Abegaz and Solomon Bekure (Eds.), (Addis Ababa: Ethiopia-Strengthening Land Administration Program, 2009). Also see Irit Equavoen and Weyni Tesafi, "Rebuilding Livelihoods after Dam-Induced Relocation in Koga, Blue Nile Basin in Ethiopia", *Working Paper Series* No. 83 (Bonn: Center for Development Research, University of Bonn, 2011) pp. 7-9 & 13-15, that documents irregularities in compensation payment including low amount of compensation in relation to people displaced, though temporarily, by an irrigation scheme.

[118] The researches further indicate that people affected by expropriation proceedings lack knowledge of their rights to judicially challenge the decisions of the authorities even regarding compensation. Even when they know about their rights they think it is either impossible or futile to bring the authorities to justice or when people are right conscious and daring enough to challenge those decisions in regular courts, the regular court judges lack knowledge of the relevant expropriation laws. An affected farmer said, "The government has all the powers, i.e., the court, the police, the prosecutor all belonging to the government. We fear that there might be revenge from the authorities. We have no recourse to appeal against the decision of the authorities. Even if we are able to do it there is no probability of winning the case. It is like struggling with a mountain to demolish it." As cited in Girma Kassa Issues of Expropriation, p. 115.

[119] *See* Muradu Abdo, Textbook, *supra* note 45.

A share company can issue two general types of shares:[120] registered and bearer shares. Bearer shares are issued to 'bearer'. No entry of a holder is made in the share registry. They are transferred by delivery. Nothing more is required.[121] The holder merely needs to present them for redemption, payment of dividends or to participate in shareholders meetings. Registered shares are comprised of various classes of ordinary and preferred shares. The free transfer of shares is promoted. However, Articles 333 and 341 impose two conditions for valid transfer of registered shares. The transfer must comply with any restrictions imposed on the transfer or assignment of shares by the company.[122] The name of the transferee together with the number and type of shares now held by the transferee must be entered in the register of shareholders kept at the head office of the share company.[123] It is unclear if these conditions also apply to the pledge or usufruct of a share.[124]

4.2 The issue of business premises during business transfers

The part of the Commercial Code that deals with the definition and transfer of business excludes immovable property.[125] In this connection, it has been observed that:

> The implication of excluding immovable property as a constituent element of a business is that any legal transaction involving the business does not affect that immovable property serving as a premise of that business simply because [it] is not part of the business. For instance, the sale of the business does not automatically mean the sale of the premise as well. Thus unless agreed otherwise, and save the case where the seller was carrying out the business in a leased premise, what the seller of a business has to transfer is the business alone; that the buyer cannot claim to continue operating the business in the same premise, that is, he cannot force the seller to transfer

[120] A share is indivisible. See Art. 328 of the Commercial Code.

[121] See Art. 325 and 340 of the Code. They are a kind of negotiable instrument. They can be converted into registered shares by the holder.

[122] Which may be specified in the articles of association or by resolution of an extra-ordinary meeting by virtue of Art. 333 of the Commercial Code.

[123] See Art. 331 of the Commercial Code. An analogous register of shares shall also be maintained by any private limited company under Art. 521 of the same Code.

[124] It seems that for the exercise of such subordinate rights established over a share to be effective, communication to the share company is necessary, which may be inferred from Art. 329 of the Commercial Code for one cannot vote at meetings as a beneficiary of usufruct over a share in a given share company without some kind of communication to such share company about the creation of such right.

[125] Arts. 124 and 127 of the Commercial Code.

> the possession and ownership of the business premise; that he has to relocate his business elsewhere.[126]

While this is the position of the law, in *Urgessa Tadesse* vs. *Saida Ali*,[127] the Federal High court took a different stance, ordering 'the latter to transfer to the former not only the business she sold but also the business premise on the ground that the premise of a business is an element of the business even though it is an immovable property [reasoning that] goodwill constitutes the main element of a business and is highly associated with the location value of the business premise.'

The court held that the right of lease over the business premise is an element of the business per Article 127(2)(c) of the Commercial Code; if the lease right over the premise is an element of the business, the premise itself, by analogy, is an element of that business. The court further stated that even though the premise in which a business is carried out is an immovable property, since it has become part of the business element [by analogy] it shall be considered as a movable property, as the mere fact that a business is said to be an incorporeal movable property does not exclude its premise from forming part of the [elements of] business. The court [thus] introduced a new element of business contrary to the express list of Article 127 of the Commercial Code and the definition of business under Article 124 as a movable property.'[128]

Some find the Commercial Code`s failure to take immovable property linked to a business as part and parcel of such business as objectionable:

> The Ethiopian law recognizes the abstract notion of business as a going concern as a special type of movable property composed of both tangible and intangible assets, mainly its goodwill. While this approach can be praised as commendable, the tradition of leaving immovable property at the outskirt of business particularly where the immovable is destined to serve the business as its premise needs policy reconsideration.[129]

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[126] Yazachew Belew (2012), The Sale of a Business as a Going Concern under the Ethiopian Commercial Code: A Commentar**y (***hereafter the Sale of a Business***),** Ethiopian Journal of Law, Vol. 25 No. 1.

[127] *Urgessa Tadesse vs. Saida Ali*, (Federal High Court, 2002 E.C., Civil File No.56950), (Unpublished).

[128] Yazachew Belew, the Sale of a Business, *supra* note 125.

[129] Ibid.

5. Limitations in Ethiopia's Intellectual Property Law

Ethiopia`s intellectual property law is embodied in four major pieces of legislation.[130] The description of each of these with emphasis to problematic spots is briefly made in this section. We shall also raise issues attendant to the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement if and when Ethiopia accedes to the WTO.

The intellectual property law of Ethiopia is more or less clear, comprehensive and in touch with current global and national developments. Many commentators in the field describe the legal regime for intellectual property which the country has put in place as 'strong', the main problem being its enforcement due to different practical factors including weak institutions and inadequate awareness of the nature of intellectual property on the part of relevant actors. A holistic reading of the legal frameworks of Ethiopia regarding intellectual property gives the impression that the legislative strength of the country`s intellectual property law is so strong that, as a poor country, it has forced upon itself a rather strong intellectual property system in particular a patent system developed in the context of advanced nations, resulting in the sacrifice of the interest of an incipient industry which is at the consuming rather at the producing end. With regard to the institutional framework, it is indeed commendable that a single administrative entity, namely, the Ethiopian Intellectual Property Office is handling administrative matters regarding copyrights, trademarks, patent, utility models and industrial designs thereby showing a departure from the hitherto fragmented arrangement.[131] Yet, there are certain limitations.

5.1 Copyrights

Copyrights are protected by the Copyrights and Neighbouring Rights Protection Proclamation that aims at rewarding those who create literary, artistic and similar creative works. Such works play a major role in enhancing economic, scientific and technological development of the country.[132] This proclamation is comprehensive, up-to-date, and manifests overall clarity. And commentators

[130] We will not be focusing on Access to Genetic Resources and Community Knowledge Rights Proc. No. 482/2006 and Access to Genetic Resources and Community Knowledge, and Community Rights Council of Ministers Regulations No. 169/2009 and Plant Breeders` Right Proc. No. 481/2006.

[131] Ethiopian Intellectual Property Office Establishment Proclamation No. 320/2003 has conferred this broad power on the Office. Previously, trademarks, patent and copyright used to be three different authorities.

[132] Preamble of the Copyrights and Neighbouring Rights Protection Proclamation No. 410/2010.

have dubbed it as strong law.[133] It offers protection to literary, scientific and artistic works of the mind providing us with an illustrative list of protected works, leaving a room for future technological changes. It sets out the requirements necessary to obtain copyright such as originality and fixation of the original work of the mind on a material object as well as those subject matters that are not eligible for copyright protection. It offers an exclusive economic and moral right to authors or owners of a work of mind for a determined duration. The economic rights include the right to produce, reproduce, translate, adapt, import, display in public, perform and broadcast the work or transfer one or more of these rights through licensing or assignment. It stipulates for instances where the public may use a copyrighted work without payment or permission from the owner under the fair use doctrine. Notices and other administrative formalities are not required to get copyright protection for a work of mind.[134]

The proclamation provides robust provisional remedies, civil and criminal remedies and administrative remedy. It, thus, requires regular courts to provide prompt and effective provisional measures including in *audita altera parte*, a temporary injunction, award adequate material and moral damage, grant injunction, and order confiscation of the infringed work and impounding. A party affected by copyright infringement may demand compensation for unjust enrichment. The proclamation also envisages boarder measures which include retention by the customs authority of goods which in the opinion of the applicant constitute infringed goods. In addition, the copyright law provides for a strong criminal sanction.

Article 36(1) of the Proclamation provides that "Unless otherwise heavier penalty is provided for under the criminal law, whosever intentionally violates a right protected under this law shall be punished with rigorous imprisonment of a term not less than 5 years and not more than 10 years." Moreover, as stipulated under Article 36(2), "whosoever by gross negligence violates a right protected under this law shall be punished with rigorous imprisonment of a term not less than 1 year and not more than 5 years". The penalty, where appropriate, shall, according to Article 36(3) "include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements used in the commission of the offence".

Notwithstanding the above strong positive features in the copyrights law of Ethiopia, there are some areas that lack clarity.

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[133] Mandefro Eshete and Molla Mengistu, Exceptions and Limitations under the Ethiopian Copyright Regime: An Assessment of the Impact of Expansion of Education, *Journal of Ethiopian Law*, Vol., 25 No. 1 (2012).

[134] Civil Code, Arts. 2672-2697.

First, the nature of originality, as one of the requirements needed to extend copyright protection under the copyright proclamation, lacks clarity. For example, is independent creation by itself sufficient to obtain copyright? It seems that some degree of intellectual creativity is needed to get copyright over a work. Yet, there is no indicator in the law which helps us determine the degree to which a work has to have a creative input for it is to be recognized as copyrightable.[135]

Second, the proclamation does not specify the extent of contribution required to consider two or more authors as joint owners of a work. Is mere intention to create a joint work at the relevant time-at the time of the creation of the work-adequate irrespective of the magnitude of the contribution? Or is substantial contribution necessary? The copyrights proclamation fails to provide for requirements needed in case one the co-owners opts to license or assign jointly owned copyright. Explicit legislative reference to the joint ownership provisions of the Code could avoid some of these specific issues.[136]

Third, the proclamation does not articulate fair practice as an exception to copyrights. It does not use the term fair practice in relation to several legitimate exceptions and in cases where this standard is used in relation to quotations and reproduction for teaching.[137] In this regard, it might be useful to employ the *three-tests rule* applicable to all exceptions to copyright used in Article 13 of the TRIPS Agreement two of which are 'restrictions to copyright should not conflict with a normal exploitation of the work, and do not unreasonably prejudice the legitimate interests of the right holder.'

Fourth, the proclamation does not provide standards of proof in establishing infringement of copyright especially where the work is reproduced in part. Here, the degree of similarity between the work alleged to have infringed the plaintiff`s work is required to be established. The specific factors that should count in the determination of infringement are indicated neither in law nor in court jurisprudence.

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[135] Fikremarkos Merso, *The Ethiopian Law of Intellectual Property Rights: Copyrights, Trademarks, Patents, Utility Models and Industrial Designs,* A Textbook (Addis Ababa: The American Bar Association, 2012) p.65.

[136] Id., pp. 84 & 89.

[137] Daniel Mitiku, Fair Practice Under Copyright Law of Ethiopia: The Case of Education, (LL.M Thesis, Addis Ababa University, School of Law Library, 2010); see also Biruk Haile, Scrutiny of the Ethiopian System of Copyright Limitations in the Light of International Legal Hybrid Resulting from (the Impending) WTO Membership: Three-Step Test in Focus, Journal of Ethiopian Law, Vol. 25 No. 2 (2012) p.159 *ff*.

5.2 Trademark law

The governing law on trademarks is the Trademark Registration and Protection Proclamation which is meant to 'protect the reputation and goodwill of business persons engaged in the manufacture and distribution of goods as well as services by protecting trademarks to avoid confusion between similar goods and services.'[138] This is sought to be accomplished by defining a trademark as 'as any visible sign capable of distinguishing goods or services of one person from those of other persons…', by providing an indicative list of such visible signs which may be used as a trademark[139] and through a system of protection based on registration by stipulating that ownership rights of a trademark can be acquired and be binding on third parties upon the grant of a trademark registration certificate.[140] Once a trademark is acquired through registration, the owner has the right to use or authorize any other person to use the trademark in relation to any goods or services for which it has been registered.[141]And the owner has the right to preclude others from any use of a trademark or a sign resembling it in such a way as to be likely to mislead the public for goods or services in respect of which the trademark is registered.[142] The owner in addition has the right to assign or license, in whole or in part, his trademark.[143]

In terms of enforcement, the proclamation has followed the footstep of the copyrights proclamation set out above, namely like the latter, it has envisaged provisional measures,[144] civil remedies,[145] criminal remedies[146] and broader measures at customs port and stations.[147] It should be noted that this trademarks legal regime is augmented by aspects of Trade Practice and Consumers Protection Proclamation which desires to '…protect the business community from anti-competitive and unfair market practices, and also consumers from misleading market conduct, and to establish a system that is conducive for the promotion of competitive market.'[148]

We, however, notice few problematic aspects of the proclamation. The trademark proclamation rules out use of sound or smell as a trademark. This is implied from the use of the word 'visible' in the definitional article as it is made

[138] Trademark Registration and Protection Proclamation No. 506/2006, Preamble.
[139] Id., Art. 2/12.
[140] Id., Art. 4.
[141] Id., Art. 26.
[142] Id., Art. 26.
[143] Id., Arts. 27 and 28.
[144] Id., Art. 39.
[145] Id., Art. 40.
[146] Id., Art. 41.
[147] Id., Art. 42.
[148] Preamble and Art. 27(2) of the Trade Practice and Consumers Protection Proclamation No. 685/2010.

explicit in Article 6(1)(b). There seems to be no good reason, apart from possible practical difficulties of registration, for ruling out the use of sound or smell as a trademark. The Ethiopian lawmaker should have noted the use of Nokia`s default ringtone and smell of fresh cut grass for tennis balls.[149] It also seems that the use of the word 'colors' in plural form suggests that a single color is ruled out as a trademark. What seems to be permitted is the use of a combination of two or more colors.[150] The compatibility of these restrictions or exclusions with Article 15.1 of the TRIPS Agreement is doubtful.

The proclamation has not come up with guidelines to determine the likelihood of confusion in the case the trademark used in connection with the product alleged to have infringed the law is not identical to the one used in the plaintiff`s product. This has created problem in disposition of cases.[151] Is the intent of the defendant relevant in the determination of the likelihood of confusion? What about the strength of the trademark? How much similarity should there be and which aspect of the packaging is decisive in the determination of similarity? Is the sophistication or literacy of the relevant consumer population important? Are differences between the two goods important? While the issue of likelihood of confusion is to be decided case by case, the experience of other countries suggests that some indicators are necessary to minimize uncertainty in judicial decisions.[152]

The proclamation shows weaknesses in making a trademark about to be registered accessible via publication to any interested party in the face of Art. 15.5 of the TRIPS Agreement that imposes an obligation to publish trademarks and provide a reasonable chance for petitions to cancel the registration either before or immediately after registration. The proclamation requires the relevant office to publish a notice of invitation for opposition regarding the registration of the trademark or notify the registration of a trademark in the Intellectual Property Gazette or a newspaper having nationwide circulation, which may in the discretion of the office be supplemented by a radio or television broadcast or a website notice.[153] We note here the extent of circulation of the Intellectual Property Gazette and the ambiguity of the words a newspaper having

[149] Fikremarkos Merso, Textbook, *supra* note 135, p. 162.
[150] Id., p. 165.
[151] For example, J&P Coats Ltd v. Ethiopian Sewing Thread Company (Civil Case No. 1425/62, High Court; Benson Confectionery Ltd and Assefa Brothers Ltd (Civil Case No. 587/65) and more recent cases litigated over, for instance, batteries. See, Fikremarkos Merso, Textbook, *supra* note 135, the chapter on trademarks.
[152] USA maybe taken as an example in this regard.
[153] Trademarks Registration and Protection Proclamation No. 501/2006, Arts. 12 & 16.

'nationwide circulation' apart from the discretionary nature of publication therein.[154]

Finally, the trademark proclamation does not provide for protection of geographical indications; nor is there a separate law on this. According to the TRIPS Agreement, a geographical indication refers to'…indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.'[155] A geographic indication shows a nexus between a given good especially an agricultural product and its geographical origin in terms of quality and reputation. Such quality might be due to the quality of labor in that area or it can be the result of that place`s climatic or soil features. Article 22 of the TRIPS Agreement imposes specific obligations on a Member State in connection with wines and spirits and sets minimum standards for all geographical indications. Hence, when Ethiopia accedes to the WTO, enactment of law regarding geographic indications may be necessary to comply with the TRIPS Agreement.

5.3 Patent law

Patents are governed under the Inventions, Minor Inventions and Industrial Designs Proclamation No. 123/95 and the Regulations thereunder with the objective of incentivizing 'local inventive activities … thereby building up national technological capability… the transfer and adoption of foreign technology by creating conducive environment to assist the national development efforts of the country.'[156] It has the policy backing of the federal government and has constitutional foundation.[157] There are separate laws that are meant to protect plant varieties and genetic resources.[158]

The patent proclamation defines a patent as a title granted to protect inventions; the invention may relate to a product or a process.[159] It sets out conditions of patentability of an invention which is defined as 'an idea of an inventor which permits in practice the solution to a specific problem in the field of technology.'[160] The requirements for a patent to be eligible for protection are:

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[154] Id, Arts. 43-45.
[155] Id., Art. 22.
[156] Inventions, Minor Inventions and Industrial Designs Proclamation No. 123/95 (hereinafter, The Patent Proclamation), Preamble.
[157] The FDRE Constitution, Arts. 51(19) and 55(2)(g).
[158] Plant Breeders` Rights Proclamation No. 481/2006; and Access to Genetic Resources and Community Knowledge, and Community Rights Proclamation No. 482/2006.
[159] The Patent Proclamation, Art. 2(5).
[160] Id., Art. 2(3).

novelty, inventive step and industrial applicability.[161] Upon the ascertainment of the fulfillment of these cumulative conditions by the relevant office, a certificate of patent is granted. The certificate gives to a patentee the exclusive right to make, use or otherwise exploit the patented invention and prevent third parties from exploiting the patented invention without securing his consent for a maximum of fifteen years from the date of filing of the application for protection with a possible extension for five years. The patentee can also institute court proceedings against any person who infringes the patent by performing, without his agreement, any of these acts, or who performs acts which make it likely that infringement will occur.[162] The law in question also sets out conditions relating to the grant and protection of and rights over utility models and industrial designs.[163]

The Ethiopian patent law generally offers strong protection to inventors. Such strength may also be regarded as a weakness if it is seen in light of the need to encourage domestic invention including technology adaptation and imitation. This is illustrated by the total number of patent applications by foreign patent owners as opposed to that of domestic applicants since the issuance of the Patent Proclamation in 1995.[164] Out of the 199 applications made between 1995 and 2011, 56 were granted out of whom 55 were foreign nationals and only one was an Ethiopian national. The history of developed nations shows that they started out by being either largely pirate nations or with weak patent protection systems until they were able to change their position to the producers rather than net consumers.[165] They did so, 'for instance by weak intellectual property systems, by excluding sensitive technological fields from protection, by violating foreign rights, by using petty-patents and encouraging imitation, adaptation and reverse-engineering.'[166]

Even though the aim of Ethiopia's current patent law '…is to encourage local inventive activities, build national technological capability and transfer and adaptation of foreign technologies', it 'crushes itself by employing standards that cannot be met by domestic enterprises even in cases of minor inventions.

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[161] Id., Art. 3(1).

[162] Id., Art. 16 and Art. 22, Art. 24.

[163] Id., Arts. 38-51.

[164] Patent and utility models applications granted until 2012 taken and adapted from Teklay Hailemariam, The Socio-economic Impacts of Intellectual Property Rights Regime of Ethiopia (MA Thesis, Addis Ababa University, Department of Economics, 2012), p. 42.

[165] Getachew Mengistie, The Impact of The International Patent System in Developing Countries, Eth. J.L. Vol. 23 No1 (2009) p.161*ff*.

[166] Habtamu Hailemeskel, Designing Intellectual Property Law as a Tool for Development: Prospects and Challenges of the Ethiopian Patent Regime (LL.M Thesis, Addis Ababa University School of Law, 2011) p. v.

Ethiopia should, therefore, reform its patent law in a way that can contribute to its development efforts and enhance technical learning and accumulation of knowledge by domestic enterprises via increased exposure to foreign technologies.'[167] As a matter of practice, banks in Ethiopia have not yet started to appreciate the possibility of financing the development of a patent in respect of which a certificate has been duly issued.[168] The good thing is that in preparing for a draft policy, the authorities appear to have understood the need for the formulation of a comprehensive and well considered intellectual property policy as the starting point for these general problems.

In sharp contrast with copyrights and trademark laws of Ethiopia, the patent proclamation contains quite limited enforcement provisions.[169] Utility models and industrial designs provisions of the proclamation under consideration make a gross reference to the patent section thereof. This has created confusion in differentiating which of the provisions governing patent shall apply to utility models[170] and the same ambiguity is created in connection with industrial designs.[171] The requirement of universal novelty as to place in regard to industrial designs can be seen as a provision which puts applicants in a difficult position. The patent proclamation does not provide for specific provision about contents of infringement.[172]

5.4 The TRIPS Agreement

The TRIPS Agreement represents a comprehensive global attempt to link intellectual property to trade. It 'recognizes that the development of international trade can be adversely affected if the standards adopted by countries to protect intellectual property rights vary widely from country to country.'[173] It incorporates key principles and provisions of existing international conventions on intellectual property rights. Thus, it aims at bringing about harmonization of intellectual property rights regimes of those countries that have acceded to the WTO. The TRIPS Agreement embraces the principles of national treatment and that of the most-favored-nation. It is meant to extend immediately to a country that accedes to the WTO.

Ethiopia has been negotiating to accede to the WTO since January 2003. Ethiopia will be bound by the TRIPS Agreement if and when it joins the WTO even if it has not ratified any of the existing international intellectual property

[167] Ibid.
[168] Feedback received during the Validation Workshop held on 29 October 2013.
[169] Patent Proclamation, Art. 24.
[170] Id., Art. 45.
[171] Id., Art. 51
[172] Fikremarkos Merso, Textbook, *supra* note 135, p.192.
[173] A Review of Ethiopia`s Accession to the WTO (on file with the author) p. 38.

conventions. The existing intellectual property law of Ethiopia has been informed by the provisions of the TRIPS Agreement and is in general compliance with it.

Ethiopia's Copyright and Neighbouring Rights Protection Proclamation is in compliance with the TRIPS Agreement in terms of lack of requirements of notices and formalities and of provision of strong legislative remedies. Moreover, Article 23 of the Trademark Registration and Protection Proclamation which deals with well-known marks is compatible with TRIPS.[174] Article 25 of Inventions, Minor Inventions and Industrial Designs Proclamation providing for exceptions to the rights of a patentee seems to be in compliance with Article 30 of the TRIPS Agreement. On the other hand, reciprocity based priority date by an applicant who is a foreign national will have to be corrected.[175] The phrase 'otherwise exploit' under Article 22(1) of the Patent Proclamation should be made clear if it includes the language used in Article 28.1 of the TRIPS Agreement, namely 'making, using, offering for sale, selling or importing'.

The following observation can be applicable to Ethiopia`s intellectual property law assessed in light of the TRIPS Agreement, though made in regard to the patent proclamation:

> …some of its provisions are fully compatible with the Provisions of the TRIPS Agreement; some others are clearly in conflict with the TRIPS Agreement while a third category remains controversial. There may be a need to amend the provisions that are in direct and clear conflict with the TRIPS Agreement while striving to exploit to the maximum the flexibilities of the TRIPS Agreement in those areas that are important to promote national socioeconomic development.[176]

In broad terms, there may be two approaches to the design of intellectual property law by a poor nation. One may argue that Ethiopia should exploit the flexibilities available under the TRIPS Agreement to Ethiopia in its status as a least developed country: '…An important issue for Ethiopia as an acceding country is to identify the existing flexibilities and use them to promote public policy objectives as stated under Articles 7 and 8 of the TRIPS Agreement while at the same time striving to make its patent regime compatible with that

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[174] The TRIPS Agreement, Art. 16.

[175] Trademarks Registration and Protection Proclamation No. 501/2006, Art. 11.2.

[176] Fikremarkos Merso, Ethiopia's World Trade Organization Accession and Maintaining Policy Space in Intellectual Property Policy in the Agreement on Trade-Related Aspects of Intellectual Property Rights Era: A Preliminary Look at the Ethiopian Patent Regime in the Light of the Agreement on Trade-Related Aspects of Intellectual Property Rights Obligations and Flexibilities, The Journal of World Bank Intellectual Property Law, Vol. 15 No. 3 (2012) p.193.

Agreement.'[177] The other position is that the TRIPS Agreement sets the bar for intellectual property protection so high that the so called flexibilities embodied in it for least developed nations such as Ethiopia are manifestly inadequate and such countries shall look for other options, the extreme position of weak compliance standards being existence as a pirate nation. The policy and thus legal option should be explored between the TRIPS flexibility approach and that which points to the path of weaker compliance standards.

Conclusion

There are legislative weak spots expressed in terms of important ambiguities, vagueness, loopholes, obsolescence and bestowal of wide administrative power with inadequate judicial scrutiny. Apart from legislative weak spots, the relevant provisions of the Constitution examined above are scanty and they do not give sufficient guidance as compared to other African contemporary constitutions.[178] The deficiencies in the law have in some cases led to differing court decisions while others pose potential threats triggering general perceptions of property rights insecurity. These weaknesses have encouraged rule by directives that are more often than not unpublicized thereby creating undue subjectivity on the part of the relevant officials. The question of security of property rights in Ethiopia is further confounded often by the lack of strict implementation of the provisions of the law even where they are clear, *inter alia*, due to gaps in law enforcement. Furthermore, history plays its own part. For example, the existing expropriation and practice analyzed in this article needs to be understood in the backdrop of the Derg`s key legislative measures nationalizing rural land, urban land, extra-houses, commercial farms, factories and services all of which promised to pay compensation for the property on the land but never fulfilling such legislative promise.[179]

The challenges in the protection of property rights are reflected in Ethiopia`s ranking in two international indexes; namely, the World Bank`s ease of doing business measurement and the Index of Economic Freedom. In the former,

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[177] Id., pp.171*ff* and p.193.

[178] See, for instance, the 1992 Constitution of the Republic of Ghana, which devotes numerous provisions to the question of property in general and land and eminent domain in particular. The 2010 Revised Constitution of the Republic of Kenya contains even more detailed provisions on the matter at hand.

[179] Public Ownership of Rural Lands Proclamation Proc. No. 31, 1975; Urban Lands and Extra-houses Proclamation No. 46, 1975 and Government Ownership and Control of the Means of Production Proclamation No. 26, 1975. Post-1991 Ethiopia has witnessed the restitution (but not compensation) of properties taken through *kelate* (i.e., official order in violation of these proclamations) under the physical possession of the various units of the government in accordance with the Privatization Agency Establishment Proclamation No. 87, 1994.

Ethiopia`s overall position has been declining in the last two years; it has slipped back from 104th position in 2011 ranking to 127th in 2013. It was 111th in 2009, 107th in 2010 and 111th in 2012. Ease of doing business measures ten specific aspects of doing business which include property registration. In this regard Ethiopia has shown improvement from its 116th ranking last year to 112th in the current year. In regard to the Index of Economic Freedom (which also uses ten specific elements including property rights) Ethiopia's 2013 overall global ranking stands 146th, showing 2.6 percent regression from its place in 2012.

It should yet be noted that exploration of legislative protection of property rights alone does not portray a holistic picture of the property right protection regime. There is thus the need to examine administrative and judicial enforcement of legislatively defined property rights as well. Strong administrative protection of property rights presupposes the existence of administrative tribunals restrained by due process of law with possible judicial review. It also assumes consideration of whether competent, fair and impartial regular courts dispose property rights disputes efficiently and uniformly in line with the letter and spirit of the law. These are dimensions of property right protection that are beyond the scope of this article and hence deserve a separate study. ■

Overview of Country Experience in Land Rights and Developmental Statehood:

South Korea, Taiwan, China and Singapore

Elias N. Stebek ♣

Abstract

This article examines lessons that can be drawn from the land rights regimes of four countries that have commendable economic performance. It highlights the nature of land rights during the developmental statehood pursuits of three East Asian states (South Korea, Taiwan and Singapore) and a country that currently pursues socialist market economic policy, i.e. China. The themes that are considered include (a) lessons from the land rights regime in South Korea including the salient features of developmental states, (b) Taiwan's land reform during the early 1950s and land requisition for industrial use, (c) China's land rights regime and administrative laws, and (d) land rights in Singapore and entrepreneur perceptions about its institutions. These countries are chosen due to their relevance to the Ethiopian land law regime. The article highlights how South Korea and Taiwan carried out effective land reform by redistributing private land rights without resorting to nationalization. It is argued that neither the notion of state ownership of land as practised in Singapore nor current improvements in the scope of Chinese land use rights explain the denial of economic value to land use rights.

Key words

Land use rights, developmental state, land reform, property rights.

DOI http://dx.doi.org/10.4314/mlr.v7i2.2

Introduction

Since 1975, Ethiopia's land laws have pursued an ideological path that was significantly influenced by the Soviet Union and China. Land is still publicly owned in Ethiopia despite the post-1991 shift toward the privatization of various

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This article is a revised and expanded version of the fourth chapter of the research titled "Property Rights Protection and Private Sector Development in Ethiopia" which was submitted to the Private Sector Development Hub at the Ethiopian Chamber of Commerce and Sectoral Associations. The author is grateful to the Private Sector Development Hub for sponsoring the research in partnership with SIDA (Swedish International Development Cooperation Agency).

publicly owned enterprises and the policy declaration of market-based economic policy. The Ethiopian government currently pledges to pursue the economic policies of a democratic developmental state.

Country experience from selected countries can thus be relevant. The experiences of South Korea and Taiwan are relevant because the path they have undergone as developmental states until the 1970s and 1980s can inform the pursuits of countries who are in the course of espousing the path. The current land reform pursuits in China are relevant because they indicate the changes that are being made in a country that has not yet disclaimed (the Marxist version of) socialism, but still considers its economic system as socialist, with Chinese characteristics. Even if Singapore is a city state which is drastically different from countries like Ethiopia, the economic value given to land use rights in the context of public ownership of land renders its experience relevant to Ethiopia.

1. Features of Developmental States: The South Korean Experience

1.1 Salient features of developmental states

The policy setting of developmental statehood in South Korea (highlighted in this section) informs the discussion on land rights (in Section 2) that prevailed during the 1960s and 1970s. These decades mark the initial years of economic take-off for South Korea, after which the country's legal regime progressively marched onto a path of lesser state involvement. A brief discussion of the features of developmental states (with South Korea as an example)[1] is meant to offer an overview of the policy framework in which land rights were formulated in South Korea during its land reform of the 1960s and thereafter.

The overall property rights index of developmental states shows that they rank higher than other Asian States. Hong Kong, Singapore, Japan, South Korea and Taiwan rank as the highest in comparison to all countries in Asia.[2] The scores are 90 each for Hong Kong and Singapore, 80 for Japan and 70 each for South Korea and Taiwan. A developmental state goes extra miles (beyond day to day state functions) and involves itself in pursuits of creating conducive conditions for the development and economic performance of the private sector. What characterizes a developmental state does not relate to restrictions it imposes on private property rights, but its level of state intervention in

[1] The scope of this article does not allow an elaborate discussion on the path undergone by all East Asian developmental states during their economic take-offs.

[2] <http://www.globalpropertyguide.com/Asia/South-Korea/property-rights-index>, accessed: 03 August 2013.

empowering and supporting economic actors while at the same time retaining its autonomy from rent-seeking individuals and companies among economic actors.

The mainstream argument in favour of the non-interventionist minimal state and the need for wider space for market mechanisms is the following:

> As states expand their size, their range of functions, and the amount of resources they control, the proportion of economic activity that becomes incorporated into rental havens will increase correspondingly, and economic efficiency and dynamism will decline. Conversely, to the degree that the economic power and prerogatives of the state can be curtailed, prospects for growth, efficiency, and welfare will be enhanced. Therefore, the sphere of state action should be reduced to the minimum, and bureaucratic control should be replaced by market mechanisms wherever possible.[3]

This, however, assumes the existence of the conditions for the effective operation of what Adam Smith regarded as the '*invisible hand*'[4] of market mechanisms that operate in the interest of the common good while everyone pursues his/her self-interest. The caveat in this regard is the need to consider the two assumptions of *being informed* and *being rational* that are inherent in Adam Smith's notion of utmost freedom of exchange based on self-interest. Smith envisaged "*rational choice*" that presupposes informed self-interest and rational decisions that give due respect to the legitimate interest of others.

> … [A]ccording to Smith, men do not always act in their own interest. They can be mistaken about what it is (as when they are not as thrifty as they should be). When they know their interest they can be mistaken about what will best serve it (as when they overestimate the chance of success in an occupation). Or they may not consult their interest at all (as when the pursuit of pleasure drives them to ruin).[5]

Free market envisages exchange of goods/services which presumes the capability, opportunity and access for individuals, legal persons and economic systems to produce the goods and the services to be marketed. In other words, the one on the buying end should also be able to produce and sell goods and/or

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[3] Peter B. Evans (1989), "Predatory, Developmental, and Other Apparatuses: A Comparative Political Economy Perspective on the Third World State", *Sociological Forum*, Vol. 4, No. 4, p. 564.

[4] "In the *Wealth of Nations,* Smith writes of an invisible hand in the course of describing a particular condition that may or may not be present in a transaction on a competitive market. The condition is that in which a man who intends to benefit only himself in a particular way may, in the act of procuring that benefit, produce a benefit of a different kind for everyone including himself." William D. Grampp (2000), "What Did Smith Mean by the Invisible Hand?" *Journal of Political Economy*, Vol. 108, No. 3 (The University of Chicago Press, June 2000), p. 443.

[5] Id., p. 444 [citing (*Wealth of Nations*, pp. 346, 123, 907)]

services commensurate with what he/she/it buys. This seems to assume a setting whereby economic actors operate in a subjective state of competence and responsibility *plus* the social and global trading environment which does not offer free ride to certain hegemonic economic actors.

Although the notion of the developmental state is relatively recent, there have been states that pursued policies beyond the minimal state functions of maintaining peace, security and national defence. There was state intervention to facilitate the take-off phases of economic systems, and this includes countries such as Germany and USA during their kick-start phases of industrialization. This was advocated by Freidrich List (1789-1846), who, *inter alia*, addressed the issue of delayed (catch-up) development due to which 'a less productive economy' is 'confronted by a more productive one'.[6] List supported state involvement in protecting infant industries because products from countries with low levels of competitiveness will lose in the competition.[7] The extent to which the role of the state has diminished under the current realities of globalization has been subject to academic discourse.[8]

The notion of the developmental state is capitalist but still different from *laissez-faire* capitalism; It is also different from market socialism (such as the Chinese model of development) and soviet type command economies.[9] Yu-Shan Yu notes the features of property rights in *laissez faire* capitalism (private ownership and private control), state capitalism (private ownership and state control) and command economy (state ownership and state control),[10] and analyzes the Chinese economic reforms in comparison with these three economic systems. Chinese economic reforms did not (unlike capitalist developmental states such as Japan, Taiwan and the others) embrace private ownership as the mainstream property rights regime, and did not also cling onto the traditional soviet-model command economy. It rather allowed cohabitation of the private sector with the dominant public sector, and in particular, allowed market economy (blended with some regulation) to be at the wheels

[6] Dieter Senghaas (1991), 'Freidrich List and the Basic Problems of Modern Development', *Review (Fernand Braudel Center),* Vol. 14, No. 3 (Summer, 1991), pp. 451-452.
[7] Ibid.
[8] For an elaborate discussion against the assertions concerning 'the diminishing role of the state', *see* for example, David Levi-Faur (1997), 'Friedrich List and the Political Economy of the Nation State', *Review of International Political Economy*, 4:1. Spring 1997, 154-178.
[9] *See* for example, Yu-Shan Wu (1994), *Comparative Economic Transformations, Mainland China, Hungary, the Soviet Union and Taiwan* (Stanford University Press,).
[10] Ibid, p. viii.

accompanied by managerial autonomy of State Owned Enterprises (SOEs), particularly where they face demand unpredictability and market competition.[11]

With regard to the core features of developmental states, Chalmers Johnson argues that "the post-war Japanese economic 'miracle' should go primarily to conscious and consistent government policies dating from at least the 1920s"[12] and he explains the economic, political and social settings in which the Japanese model of development emerged and progressed. Yet he contests overgeneralizations of economic achievements out of context and underlines that "any social science … must deal with both the gereralizable and the particular, without ruling one or the other out of the court".[13] Johnson notes that the developmental state is "determined to influence the direction and pace of economic development by directly intervening in the development process, rather than relying on the uncoordinated influence of market forces to allocate economic resources".[14] In the course of the state's intervention in the development process, he notes the balance of power that exists between the state and economic actors:

> When the developmental state is working well, neither the state officials nor the civilian enterprise managers prevail over the other. The state is a 'catalyst' agency, in Michael Lands sense of the term, and the managers are responding to the incentives and disincentives that the state establishes.[15] This is not an easy combination to put together, but when it is done properly, it can produce miracles of economic development.[16]

The capitalist developmental state is interventionist because it assumes wider roles and actively involves itself in creating an enabling environment for economic actors. On the other hand, the developmental state does not control the economy through central planning and state ownership of the means of production because it does not substitute nor dominate economic actors who are at the wheels of ownership of the means of production.

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[11] For the factors that can potentially determine the degree of managerial autonomy of State Owned Enterprises in China, *see*, for example, S. Loukas *et al* (1993), 'Managerial Autonomy of State-Owned Enterprises: Determining Factors', *Organization Science* 4(4), November 1993, pp. 645 – 666.

[12] Chalmers Johnson (1999), 'The Developmental State: Odyssey of a Concept', in *The Developmental State*, edited by Meredith Woo-Cummings (Cornell University Press), p. 34.

[13] Id., p. 43.

[14] *See J*ohnson, Chalmers (1982), *MITI and the Japanese Miracle: The Growth of Industry Policy 1925- 1975*, (Stanford: Stanford University Press).

[15] Michael Land. 'The Catalyst State', *National Interest*, Spring 1992, pp. 5-12 [in Johnson *supra* note 12, p. 60).

[16] Johnson supra note 12, p. 60.

Instead, developmental states assume a significant role in the economic life of the society through policies, strategic planning and decisions in contrast to the non-interventionist thin (police) state that allows very wide roles to local, regional and global market forces. Invariably, developmental states pursue the capitalist mode of production, but strive to have political, financial, structural and administrative policy space and influence in the process. The tasks of developmental states go beyond regulatory functions and include activities that are necessary for economic transformation.[17]

States, according to Evans, may be developmental or predatory depending upon "the way in which they affect development".[18] Developmental states "foster long-term entrepreneurial perspectives among private elites by increasing incentives to engage in transformative investments and lowering the risks involved in such investments", and as a result they promote transformation and development.[19] As Amsden notes, "the two major features of a developmental state are the capacity "to discipline big business, and thereby to dispense subsidies to big business according to a more effective set of allocative principles".[20]

Evans makes a distinction between developmental states and 'predatory' states and he states that in the latter case, "[t]hose who control the state apparatus seem to plunder without any more regard for the welfare of the citizenry than a predator has for the welfare of its prey." According to Evans, the East Asian Newly Industrialized Countries (NICs) are examples of a developmental state, while countries such as Zaire [of the late 1980s] illustrate what he considers as the "predatory state" and Brazil [of the late 1980s] as the 'intermediary' case.[21]

> Vartiainen, [identifies] three salient features of a successful developmental state. … . *Primarily*, the developmental state must be strong to impose its collective developmental objectives, be meritocratic and ought to be "insulated from both the market and the logic of individual utility maximization". *Secondly*, the state should have "thick external ties [*embeddedness*] to the economy's organized agents such as corporations, industrialists, associations and trade unions." And *thirdly*, there must be "a relationship of *mutual dependence* or *mutual balance* between the state and

[17] Elias N. Stebek, Mizan Law Review, Vol. 6. No. 2 [Citing Peter B. Evans (1989), 'Predatory, Developmental and other Apparatuses: A Comparative Political Economy Perspective on the Third World State," *Sociological Forum*, Vol. 4, No. 4, p. 562.
[18] Ibid.
[19] Id., pp. 562, 563.
[20] A. H. Amsden (1989), *Asia's Next Grant,: South Korea and Late Industrialization*, New York: Oxford University Press, p. 144.
[21] Evans p. 563, in Stebek, *supra* note 17.

> the rest of the economy" in such a manner that the state can be "able to 'discipline' economic actors such as firms and trade unions, while appreciating that their privileged positions ultimately depend on the success of the economy".[22]

The core salient features of the developmental state can thus be summarized as: *first*, active involvement in creating *enabling conditions to economic actors* by enhancing opportunities and lowering risks, *second*, institutional capabilities based on *meritocracy* (which relates to both competence and integrity) and *thirdly*, *embedded autonomy* which requires close collaboration and disciplining initiatives in its relationship with 'the economy's organized agents' by at the same time retaining its autonomy from the opportunistic benefits that the relationship may, at times, create.

The purpose and features of interventions by developmental and predatory states are thus drastically different. While a developmental state "empowers and monitors economic actors" and uses strong "meritocratic institutions that monitor economic actors towards the country's developmental strategic objectives", predatory states "are not only corrupt but also make use of coercive institutions that scare economic actors and intimidate entrepreneurs in the guise of regulatory intervention".[23]

There are criticisms regarding the various aspects of authoritarianism in developmental states as observed in Asian countries. The current discourse on developmental states, in effect, uses the qualifier 'democratic'. This concept is in the course of being expressed as a policy orientation in various African countries including Ethiopia, a task which involves various commitments, challenges and opportunities.

The Economic Commission for Africa (in its 2011 Report) defines the developmental state as:

> "one that has the capacity to deploy its authority, credibility and legitimacy in a binding manner to design and implement development policies and programmes for promoting transformation and growth, as well as for expanding human capabilities. Such a state takes as its overall socio-economic goals the long-term growth and structural transformation of the economy, with equity".[24]

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[22] Stebek, *supra* note 17, p. 328; Citing Juhana Vartiainen, "The Economics of Successful State Intervention in Industrial Transformation" in *The Developmental State* (1999), Edited by Meredith Woo-Cumings (Cornell University Press) pp. 218-219.

[23] Id., pp. 328-329.

[24] Economic Commission for Africa (2011), *Economic Report on Africa 2011: Governing development in Africa – the role of the state in economic transformation*, Addis Ababa, Ethiopia., p. 7.

The Report notes that "[i]ssues of market failure abound, requiring the state's positive intervention".[25] It states that "free market forces will not drive economic transformation on their own" and underlines the central role of the state "in resource allocation and in efficient coordination of crucial economic activities" with particular attention to "developing infrastructure, human capital, and the financial market and setting up production facilities in the agricultural and industrial sectors".[26]

According to the Report this needs "a democratic socio-political environment that endows it with legitimacy and authority" and to provide "stakeholders with the voice and representation that enable them to have a sense of ownership of the country's national development programme".[27]

> The capacity of the developmental state for formulating and implementing such a programme has two component parts. The first consists of a political leadership that is committed to national development goals and that can motivate and guide the planning process. The second is a competent and professional bureaucracy that has the autonomy and power to implement the programme and respond swiftly to rapidly changing local and global conditions. Its personnel must be recruited solely on merit, well trained and adequately rewarded.[28]

1.2 Lessons from South Korea's economic performance

Pirie observes that the Korean developmental state "must be understood as a child of its time".[29] Korea's industrialization took place in the midst of "Japanese dominated regional production structures" and the involvement of "the US in shaping Korean political economy" in the context of the post-war global development project and the second industrial revolution".[30] Pirie notes South Korea's "initial underdevelopment and the security situation on the peninsula" which brought about "the project of state-led capitalist development".[31] While both the South Korean state and post-war core capitalist national industrial states focused very closely on promoting and subsidizing investments of large nationally owned firms, South Korea "was a dirigiste state in a world of interventionist states" and "Korean elites were attempting to

[25] Ibid.
[26] Ibid.
[27] Id., p. 8.
[28] Ibid.
[29] Id., p. 7.
[30] Ibid.
[31] Ibid.

develop a distinctive Korean capitalism in a world of interconnected but still distinct national capitalisms".[32]

The lessons that are examined regarding South Korea's achievements relate to the policies of its developmental state during the 1960s and 1970s. "In 1960, South Korea was poorer than many sub-Saharan African countries. ... Since then [it has] left far behind not only these African countries, but also others like Mexico and Argentina which had been much richer".[33]

> In 1960 South Korea was one of the poorest 25 countries in the world [FN 1]. Its Gross Domestic Product (GDP) per capita was just $82 (in 1960 prices). United States (US) policymakers' assessment of the country as a 'hopeless case' appeared apposite at the time.[34] However, the performance of the Korean economy over the next four decades or so could not have been more different from that predicted by such policymakers in 1960. ... Korea was now a member of the Organisation for Economic Co-operation and Development (OECD) and one of the few countries that appeared to have successfully graduated from the Third World.[35]

In 1961, i.e. the initial year of Korea's developmental state, GDP per capita of various African countries was higher than South Korea's US$92. For example, African countries that had higher GDP per capita (in US dollars) as compared to South Korea include: Algeria ($221), Benin ($96), Cameroon ($119), Chad ($111), Congo Democratic Republic ($199), Congo Rep ($146), Ivory Coast ($164), Egypt ($151), Gabon ($343), Ghana ($187), Kenya ($95) Liberia ($161), Madagascar ($134), Morocco ($169), Niger ($145), Nigeria ($95), Senegal ($262), Sychelles ($270), Sierra Leone ($148), South Africa ($430), Sudan ($103), Tunisia ($202), Zambia ($218), Zimbabwe ($283).[36] There has been extensive discourse on the factors that have brought about this development.

South Korea's GDP per capita for the year 2012 is $22,590 (GNI in power purchase parity is $28,231[37]). The GDP of African countries in 2012 that had

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[32] Ibid.

[33] Dani Rodrik (1995), "Getting Interventions Right: How Korea and Taiwan grew Rich", Economic Policy, Vol. 10, No. 20 (Apr., 1995), p. 55

[34] Hart-Landsberg, M. (1993), *The Rush to Development: Economic Change and Political Struggle in South Korea*, New York, Monthly Review Press [in Pirie, *infra* note 26, p. 1]

[35] Iain Pirie (2008), *The Korean Developmental State:* From dirigisme to neo-liberalism, (Routledge), p. 1.

[36] Source of data: World Bank <http://en.wikipedia.org/wiki/List_of_countries_by_past_and_future_GDP_(nominal)_per_capita>, last visited: 10 July 2013.

[37] <hdrstats.undp.org/en/countries/profiles/KOR_print.html> last visited: 25 July 2013.

higher GDP per capita figures (in 1961) as compared to South Korea is as Follows.[38]

Algeria $5,404	Cote d'Ivoire $1,244	Ghana $1,605	Niger $383	S. Africa $7,508
Benin $752	Egypt $3,187	Kenya $862	Nigeria $1,555	Sudan $1,580
Cameroon $1,151	Ethiopia $470	Liberia $422	Senegal $1,032	Tunisia $4,237
Congo Dem. Rep $272	Gabon $11,430	Madagascar $447	Sychelles $11,758	Zambia $1,469
Congo Rep $3,154	Gambia $512	Morocco $2,925	Sierra Leone $635	Zimbabwe $788

South Korea's Country HDI Profile (2012): Human Development Indicators[39] show that its performance in health, education, income, sustainability, innovation and technology, trade and economy, and other HDI indicators was indeed commendable. South Korea's Human Development Index (1980 to 2012) shows steadily increasing achievements.[40]

Rodrik recalls the "extremely well-educated labour force relative to their physical capital stock" which rendered "the latent return to capital quite high" and the active support of the state in "subsidizing and coordinating investment decisions" and the role of government policies that were "managed to engineer a significant increase in the private return to capital". [41] The other factors noted by Rodrik include an "exceptional degree of equality in income and wealth", effective government intervention and "keeping it free of rent seeking. The outward orientation of the economy was the result of the increase in demand for imported capital goods".[42] Rodrik further notes that in the early 1960s and thereafter, Korea and Taiwan alleviated the coordination failure in their economies which had blocked take-off and this "required a range of strategic interventions - including investment subsidies, administrative guidance and the use of public enterprise".[43] He further notes the favourable human capital endowment and relatively equal distribution of income and wealth.[44]

The support provided by the government went beyond export subsidization and further included increase in subsidy on export credits, exemption of exporters from the commodity tax and the business activity tax, and reduction of income tax on export earnings.[45] The support offered to promote exports also included "direct cash grants on exports" until 1965.[46] Moreover, exporters "were allowed automatic access to duty-free imports of raw materials and intermediate

[38] Compiled from: <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD> Last visited: 25 July 2013.
[39] <hdrstats.undp.org/en/countries/profiles/KOR_print.html>, last visited: 23 July 2013.
[40] Ibid.
[41] Rodrik, *supra* note 33.
[42] Ibid.
[43] Id., p. 57
[44] Ibid.
[45] Id., p. 61.
[46] Ibid.

inputs up to a limit" which "was determined administratively, on the basis of firms' and industries' input-output coefficients plus a margin of 'wastage allowance'."[47]

Bagchi[48] observes various factors that contributed to Korea's economic success during the 1960s and 1970s. He recalls Korea's colonial experience under Japan since 1910, US influence until the late 1950s and the land reform that triumphed over landlordism. He observes that the Korean government obtained a large stock of industrial assets from the confiscation of Japanese property "and a substantial percentage of the cultivable land which could then be distributed to the Koreans" followed by significant land reform measures. [49] "As a result of the land reform process, between 1947 and 1965, the percentage of full owners among farm households increased from 16.5 to 69.5, whereas that of pure tenants declined from 42.1 to 7.0 only". This land reform which was pro-peasant relatively equalized rural incomes and assets thereby eliminating land "as an asset for speculation or as a lever for keeping actual producers dependent".[50] Bagchi regards this as one of the conducive conditions and further identifies "a strong and realistic sense of nationalism" as another significant factor in Korea's economic success.[51]

The other conditions identified by Bagchi that assisted the pursuits of the developmental state in Korea are the gains in import substitution efforts during the 1950s, commendable achievements in education, "privileged access South Korea enjoyed to U.S. capital and U.S. markets, especially in the 1960s and 1970s, export-led growth that had a strong foundation from the achievements obtained in the earlier decade and institutional capabilities that steadily developed since the 1950s.[52] Bagchi notes the sustained improvements in productivity through rising levels of education of the workforce, learning by doing and learning by using, and exploitation of economies of scale through the favoured treatment of large firms especially in exports".[53]

In the course of achievements in Research and Development initiatives by government and industries, "a deliberate restructuring of industry" was made which focused on sectors such as "shipbuilding, electronics, automobiles, iron and steel, and petrochemicals".[54] The success in "domestic investment and

[47] Ibid, [citing Charles R. Frank et al (1975), Foreign Trade Regimes and Economic Development: South Korea, (New York: Colombia University Press)]
[48] Amiya Kumar Bagchi (2004), *The Developmental State in History and in the Twentieth Century* (New Delhi: Regency Publications).
[49] Id., p. 41.
[50] Id., p. 42.
[51] Ibid.
[52] Id., p. 44.
[53] Id., pp, 44-45.
[54] Ibid.

saving, the growth of national income, and exports of manufactures" were enhanced and, "the close collaboration between government and business, and the effective monitoring by government of strategic business decisions played a highly important role".[55] As the manufacturing sector of South Korea developed, large surpluses were generated in its exports, and "the Korean government played a less interventionist role in the economy; and many of the formal restrictions on entry of foreign goods and foreign capital were relaxed, partly under the pressure of the US government and foreign transnational corporations".[56]

1.3 Lessons from South Korea about the limits of developmental states

As Korea's experience indicates, there is a phase of obsolescence of the developmental state during which its role in enhancing economic development outlives its usefulness because wider state intervention in the economy eventually becomes undue patronage and red tape, as marked by the massive labour unrest of the 1980s and Korea's 1997 economic crisis. One of the lessons that can be learnt from Korea's experience is that the developmental state nurtures and facilitates the coalescence of an economic system to which it at a later stage becomes an impediment.

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[55] Ibid.

[56] Id., pp. 45-46. "In the 1990s, the South Korean DS [developmental state] entered into a phase of precocious maturity and decline. Several factors contributed to this. The deliberate promotion of chaebol by the South Korean government up to 1982-83 - and in many cases, even beyond that date - created a number of South Korean transnational corporations which set up branches and subsidiaries in many countries of the world, including the U.S.A., Canada and major European countries.

The latter now demanded freer entry for the investments and products of their firms into South Korea. Until 1993 or thereabouts, South Korea, following the Japanese example had kept inward foreign investment at bay. After that year, restrictions on foreign portfolio and direct investment were relaxed and a much greater mobility of capital was permitted in international transactions. This led to an inflow of foreign capital. Moreover, the Japanese *yen* and the Chinese *yuan* were substantially devalued from around the same date. These developments led to an overvaluation of the Korean currency, and South Korea ran up large deficits in its balance of payments. South Korean firms borrowed large amounts abroad to take advantage of lower interest rates abroad. By the beginning of 1997, South Korea was caught in a debt trap, and in the last quarter of that year, it had to seek IMF assistance in order to avoid declaration of debt default (Bagchi, 1998). The usual IMF conditionalities ended at least temporarily, South Korea's status as a DS." Bagchi, p. 46.

The concurring motives of both major actors in the process (i.e. the developmental state and the large capitalist firms) are different. Unlike the conventional modern minimal state which is usually part of the capitalist economic system, the developmental state does not promote its own class interests, but rather targets at the bigger picture of economic development of the nation at large. This creates tension in the developmental state's *raison d'être* of developing private capital which is manifested in its economic strategy "of developing and supporting large national capitalist firms" and its act of dominating and controlling these firms". The developmental state in South Korea did not act at the behest of the capitalist class – which it itself created – but it was committed to acting in its interests".[57]

Despite such tension in the concurrent motives of the state and the major economic actors, the ultimate outcome of teaming up brought about commendable achievements throughout the 1960s and this setting enabled quick recovery from the crisis of the early 1970s. However, Korea's experience indicates the eventual limits in the pursuits of developmental states. These limits are influenced by the contradictions that are inherent in developmental states.

The *first contradiction* relates to the role of the state as the "provider of long-term goals for the economy" and the eventual decline of its positive role in the economy. The developmental state establishes "comprehensive economic development plans, long-term goals, and projections for the entire economy", furnishes "capital for investment through domestic and foreign capital loans, capital assistance for research and development, and technology and technical assistance through national and regional research facilities" and further "acts as a mediator with multinational corporations for foreign direct investment and technology transfers, establishes trade offices for expertise on exports and imports, provides tax breaks and tariff exemptions, and eases regulations".[58] These services are offered to the private sector because the latter initially "lacks resources and knowledge". In the long run, however, the state becomes a hindrance to the "modern economy's vitality and speed by becoming bureaucratic 'red tape'" when the pursuits of the developmental state become successful.[59]

Unlike other forms of states, the function of the developmental state is transitional and the successful attainment of its goals causes a steady decline in

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[57] Pirie, *supra* note 35, p.6. [citing Cumings, B. (1979). 'The origins and development of the Northeast Asian political economy: industrial sectors, product cycles, and political consequences', *International Organization*, 38(1): 1–40]

[58] Eun Mee Kim (1993), "Contradictions and Limits of a Developmental State: With Illustrations from the South Korean Case" Social Problems, Vol. 40, No. 2 (May, 1993) p. 231-232 [citing various sources].

[59] Id., p. 232.

its importance. For example, "[t]he welfare state attempts to remedy the problems left unresolved by the private sector" and the successful provision of "welfare services to the public does not change the fundamental assumption that the private sector is incapable of and/or unwilling to provide these services, and that the state must provide them".[60] Likewise, the laissez faire state "assumes from the beginning a relatively confined (regulatory rather than developmental) and augmentative role in relation to the private sector. Even with successful economic growth, no significant transition of power to the market is needed, since the private sector is in charge from the beginning".[61]

The *second contradiction* that emerges upon the success of developmental states is the steady blurring of its autonomy in the course of economic development. The autonomy of the developmental state emanates from the fact that it does not emerge as a representative for "the landed or capitalist classes, [and this] insulates state officials from the influence of their own class interests". As the developmental state succeeds, its autonomy is gradually eroded because "[d]evelopment brings wealth and power to new classes and social groups (Koo 1990[62]; Suh 1984[63]), who use their newly acquired status to press for more independence" and this "threatens the core of the developmental state, which is its autonomy and its mandate to intervene in the economy".[64]

Kim states that "South Korea's military junta government in 1961-63 were not part of the small, wealthy capitalist class, but instead had rather modest backgrounds. President Park Chung Hee himself was from an impoverished peasant family".[65]

> However, the separation of state elites from landed or capitalist classes is only a short-lived phase in the process of capitalist development. Successful and very rapid development brought drastic changes not only to the economy, but to the society as well. The historical class distinction between state officials and merchants and industrialists was no longer clearly applicable (Koo 1990), and the upper class in a new social order included merchants and industrialists as well as state officials (Suh 1984). Moreover, through intermarriages between the offspring of capitalists and state elites (forbidden during the Yi Dynasty), the class distinction has become even

[60] Ibid, [citing Evans 1987]
[61] Ibid.
[62] Ibid, [citing Hagen Koo (1990) "From farm to factory: Proletarianization in Korea." American Sociological Review 55:669-81]
[63] Ibid, [citing Gwan-mo Suh (1984) Class Composition and Class Division in Contemporary Korean Society. Seoul: Hanul]
[64] Id., p. 232.
[65] Ibid.

more blurred (Shin and Chin 1989)[66]. The process of fusion of state elites and capitalist elites weakened the fabric of state autonomy. [67]

The steady erosion in the autonomy of the developmental state is further enhanced by the tension between 'the self-limiting' features of the developmental state which remains an autonomous political and administrative entity while the core social groups, i.e. labour and the "capitalist class [grow] in size and in political influence with development" and these "newly strengthened classes and groups can significantly challenge the state's power and its mandate in economic relations". [68]

2. Lessons from Land Reforms in South Korea and Taiwan

2.1 Land reform in South Korea

In the realm of secure property rights South Korea, along with Taiwan, stand 4th out of 32 Asian countries ranking after Hong Kong, Singapore and Japan. [69] Korea was largely agrarian under a feudal system until World War II and "the country was split into North and South, with both countries enacting major land reform and outlawing tenancy on agricultural lands. While the economy in the communist North has stagnated, South Korea has developed a modern, market economy". [70]

South Korea's 1948 Constitution embodied agricultural land reform and it marked a departure from its feudal landholding system. South Korea's Agricultural Land Reform Amendment Act (ALRAA) was in force since March 1950. The act enabled individuals to own agricultural land under three conditions: "first, any individual can own agricultural land but only if he or she cultivates or manages it for himself or herself; second, one can own

[66] Ibid [citing Eui Hang Shin, and Seung Kwon Chin (1989) "Social affinity among top managerial executives of large corporations in Korea." Sociological Forum 4:3-26].
[67] Id., pp, 232-233.
[68] Id., p. 233.
[69] ‹http://www.globalpropertyguide.com/Asia/South-Korea/property-rights-index›, Last visited: 22 October 2013.
[70] Justin Maloney (2000), Land Tenure History and Issues in the Republic of Korea (University of Maine, Department of Spatial Information Science and Engineering) May 2000, p. 7. ‹http://www.spatial.maine.edu/~onsrud/Landtenure/CountryReport/Korea.pdf›, last visited: 30 October 2013.

[approximately] three [hectares] at maximum; and third, tenancy arrangements and land-renting activities are legally prohibited."[71]

> Extremely low land prices during this period had helped make the ALRAA possible. With the breakdown of order in society following World War II, landlords saw the rents they were able to extract from tenants drop sharply, if they could collect them at all. Many were forced into selling their lands at low prices, and approximately 37% of the arable land was sold between 1945 and 1949. This huge supply of available land negated the effects of millions of returning refugees and made a major redistribution possible. As a result the ALRAA was very successful, resulting in the near-complete elimination of tenant farming and an increase in owner-cultivating households from 349,000 in 1949 to 1,812,000 in 1950.[72]

The instability and post-WWII challenges rendered reforms and radical changes indispensible in South Korea. While the tenants highly benefitted from the land reforms, the landlords were also compensated thereby creating a favourable setting for the enhancement of non-agricultural rural economic activities as well. Unlike North Korea, land was not redistributed without payments. Due to government intervention in expediting the payment of compensation to landlords whose land (beyond the threshold allowed to be owned) was distributed to tenants, the tenants made the payments at a prolonged period and a reasonable amount because the price of land was extremely low during the period.

This was in contrast with the land reform in North Korea which led to economic stagnation. In South Korea, the land reform was accompanied by land tenure and land security. It broadened the mass base in land ownership whereas North Korea pursued the path of nationalization without compensation to the landlords, and allocated the land to communes whose members did not claim individual tenure and security. While the land reform applied in North Korea culminated in economic stagnation due to the communal system, the South Korean experience indicates the merits in empowering smallholder farmers through the creation of an enabling environment for land purchase and ownership and at the same time availing compensation to former land owners (other than the ones that were regarded as illicit large scale possessions such as Japanese colonialists). Moreover, the land reform eventually led to farmland consolidation and modern agriculture rather than farmland fragmentation, and it

[71] Ibid, [citing Jeon, Y.-D. and Y.-Y. Kim (2000). "Land Reform, Income Redistribution, and Agricultural Production in Korea." *Economic Development and Cultural Change*, 48(2): 253.

[72] Ibid.

marked a strong basis for the emergence and coalescence of modern industrial economy.

South Korea's experience in land rights clearly shows that the smallholder farmer was empowered with secure property rights and tenure because he/she does not merely hold the land but owns it. Nor did it entail the risk of mass eviction though manipulations from property speculators because owners were required to cultivate or manage the farm, in addition to which a ceiling was made to the area of individual ownership of land. As South Korea's economy kicked-off and along with the maturity of its industrial economy the restrictions imposed during the initial stages of the land reform gradually gave way to farmland consolidation and modern agriculture with the optimal levels of tenure and security in land rights.

2.2 Land reform in Taiwan and requisition for industrial use

The land reform in Taiwan was conducted from 1949 to 1953. The reform involved rent reduction as the primary phase (1949), followed by the sale of public land in 1951 and the transfer of land to actual tillers (initiated in 1953)[73] through the compulsory purchase of farmland to resell it to tillers. As Koo observes:

> Taiwan underwent two distinct stages of agricultural development. The first phase from 1895 to 1945, while the island was under Japanese control, witnessed the introduction and extension of modern technology. There was large scale development of water resources and technological improvement in rice and sugar cane production under the promotion of the Japanese government. During the second phase-1945 to the present-the impetus to agricultural development was provided by the land reform program introduced after the end of the Second World War.[74]

The Nationalist Party (Kuomintang) had failed to address the reform motto of *land to the tiller* in mainland China until it was ousted by the communists in 1949. After it left the mainland, its power was confined in the island which was part of China until the Chinese Communist Party overthrew the Kuomintang. The affiliation of the Kuomintang with the landed gentry in mainland China did not make such reform possible. However, the party which was an outsider to Taiwan and unattached to its landed gentry, did not dare to repeat its mistake regarding land reform. As Hsiao notes, the Nationalist Party undertook land

[73] Anthony Y. C. Koo (1966), "Economic Consequences of Land Reform in Taiwan", *Asian Survey*, Vol. 6, No. 3 (Mar., 1966), p. 150.
[74] Ibid.

reform which "turned the rural sector from potential source of unrest into a fundamentally conservative social base".[75]

The *first measure* taken by the Nationalist government (Kuomintang) after it moved to Taiwan from the mainland was the reduction of rural land rent which fixed the maximum total yield to be given to the landlord at 37.5%. The reform also allowed temporary reduction of the sharecropping as land rent during crop failure.

The *second phase* of the land reform involved the transfer of land to the actual tillers when the government started to sell state-owned land to tenants. This reform was preceded by peasant movements in 1947 and 1948 against state-owned Taiwanese Sugar Company.[76] "More than fifty per cent of the farmland owned by the central and provincial government" was transferred and 'cultivators of public land, and other tenant farmers, were given first and second priority respectively for the purchase of public land" at a price "set at 2.5 times the annual yield of the annual crops … to be paid in twenty instalments over a period of ten years".[77]

The third phase of the land reform took place upon the enactment of the 1953 Land-to-the-Tiller Act[78] and the Regulations Governing the Implementation of the Act.[79] "There were 26 grades for paddy land and 26 grades for dry land."[80] The Act "limited land holdings to roughly three *cha* (about 2.9 hectares) of medium quality (7th to 12th grade) of paddy land or its equivalent."[81] All land in excess of this size was compulsorily purchased by the government for redistribution.

The landlords were compensated with a price of 2.5 of the annual yield of the land. They "were paid 70 per cent of the purchase bond in Commodity Bonds, i.e. ten-year bearer government bonds, redeemable in either rice or sweet potato,

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[75] Michael H. H. Hsiao (1988), "State and Small Farmers in East Asia with Special Reference to Taiwan", paper presented at Conference on Directions and Strategies of Agricultural Development in Asia-Pacific Region, Academia Sinica, Taipei, January 5-7, 1988 [in Ming Yu-Hom, infra note 47, p. 90.]

[76] Shih-jung Hsu and Hsin-huang Michael Hsiao (2001), "Taiwan's Land Reform Revisited: From the Vantage Point of Its Domestic Social Origins", Taiwan Historical Research, Vol. 8 No. 1, p. 123, June 2001, Issued October 2001. Institute of Taiwan History, Preparatory Office, Acadamia Sinica.

[77] Ming Yu-Ho (1997), "Law, Foreign Direct Investment and Economic Development in Taiwan", PhD Thesis, (University of Warwick School of Law, August 1997), p. 91.

[78] Enacted on January 20, 1953.

[79] Enacted on April 23, 1953.

[80] Ming Yu-Ho, *supra* note 77 (1997), p. 91. [citing Samuel P. S. Ho (1978) Economic Development of Taiwan 1860-1970, New Haven: Yale Univ. Press, p. 61).

[81] Ibid.

depending on whether the land was paddy-field or dry".[82] Moreover, these Bonds "paid a 4 per cent annual interest" and the remaining balance of 30 (thirty) per cent of the purchase price "was paid in shares of stock in four government enterprises shortly transferred to the private sector".[83] Such payment in stock shares in public enterprises "had the effect of converting investments in land into industrial assets and laying the foundation for the industrialization of Taiwan".[84]

During the period between May to December 1953, the land was sold to "its former tenant farmers at the same price it had been purchased" and the buyers received government loans to be paid "in ten annual instalments and a 4 per cent annual interest rate in rice (for paddy land) and in sweet potatoes, converted to cash (for dry land)".[85]

Ming Yu-Ho states three outcomes of the reform.[86] Agricultural production rose 43% from 1952 to 1960, and rice yield per hectare increased by 25% during the same period. Secondly, the reform and the compensation schemes directed former landlords to urban businesses thereby enhancing domestic investment. And the third impact of the reform was the industrialization that benefited from the conducive environment created by agricultural surplus and the enhanced entrepreneurship of former landowners whose interest changed from agriculture to businesses and ultimately to industrialization. "Under conditions prevailing in Taiwan, the improvement in the efficiency of agricultural production was a logical first step toward industrialization".[87] There were also other concurrent factors that facilitated industrialization. As Thuemmel notes, education institutions, "island-wide network of farmers associations" (that existed since 1944), and the fact that over a million educated and well-trained mainland Chinese fled to Taiwan have contributed to Taiwan's economic performance in addition to the land reform.[88]

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[82] Ibid [citing Simon Long (1991) Taiwan: China's Last Frontier, London: MacMillan, p. 78].

[83] Id., p. 92 [citing, Ralph N. Clough (1978) Island China, Massachusetts: Harvard University Press, p. 73].

[84] Thomas R. Bowden (1961), "Land Reform and Rural Development on Taiwan", *University College Review*, Institute of Ethiopian Studies, Vol. 1, No. 1 (Spring, 1961), p. 34.

[85] Ming Yu-Ho, *supra* note 77, p. 92 [citing Ralph N. Clough (1978) Island China, Massachusetts: Harvard University Press, p. 73 & Simon Long (1991) Taiwan: China's Last Frontier, London: MacMillan, pp. 162-63]

[86] Id., p. 93.

[87] Anthony Y. C. Koo (1966), "Economic Consequences of Land Reform in Taiwan", *Asian Survey*, Vol. 6, No. 3 (University of California Press , Mar., 1966), p. 157

[88] William L. Thuemmel (1969), Book Review "The Role of Land Reform in Economic Development: A Case Study of Taiwan" by Anthony Y.C. Koo; *The Journal of*

Various factors have contributed for the success of the land reform in Taiwan. These factors include the land survey carried out during the period of Japan's control and the compensation paid to landlords and the effective control of inflation against decrease in the value of compensation. Moreover, the National government was an outsider which had autonomy from the Taiwanese landed gentry. This enabled it to have utmost flexibility in decisions because the National government did not depend on the support of the landed gentry.

Sun Yat-Sen's principles have consistently influenced the National government's land use laws. One of Sun's core principles "is the *Principle of People's Livelihood*" whose realization envisaged the 'equalization of land rights' and the 'regulation of capital' with a view to securing "an even, nationalized distribution of the benefits of land as a natural resource, while preserving private ownership of land".[89]

Articles 142 and 143(1) of the 1947 Constitution of Taiwan (with amendments through 1987) provide the following:

> **Article 142**
> The national economy shall be based on the principle of people's livelihood and shall seek to bring about an equal distribution of land rights and regulate the use of private capital in order to ensure an equitable distribution of national income and a sufficient livelihood for the people.
>
> **Article 143**
> 1. All land within the territorial limits of [Taiwan] shall belong to the entire body of citizens. Private ownership of land, acquired by the people in accordance with the law, shall be protected and limited by law. Privately owned land shall be liable to taxation according to its value and may be purchased by the Government according to its value.

As Bishai observes "[t]his constitutional framework is based on Sun's notion of the state as mediator between the primary public ownership and the individual private owner".[90] After the land reform was implemented based on the *principle of people's livelihood*, there was the need to facilitate Taiwan's transition to industrialization. In effect, a Statute for Encouragement of Investment was promulgated on 10 September 1960 and subsequently had series of amendments. This law articulated the manner in which land was transferred to industries to enhance industrial economy.

Developing Areas, Vol. 3, No. 4 (College of Business, Tennessee State University , Jul., 1969), pp. 590-591.

[89] Martha Fitzpatrick Bishai (1991), "The Development of Industrial Land in Taiwan: A Legal Framework for State Control" , *The Journal of Developing Areas*, Vol. 26, No. 1 (College of Business, Tennessee State University, Oct., 1991), p. 54.

[90] Id., p. 56.

Chapter III of the Statute is titled "Acquisition of Land for Industrial Use," and Article 50 provided that "… the Executive Yuan shall first allocate public land areas to be designated as industrial land for industrial development purposes." It further stipulated that in the event that public land is insufficient for such allocation, "private land may be converted for use and designated as industrial land." After such designation, the land will be frozen. This measure includes prohibition of construction and transfer after which detailed plan of requisition is drawn. Thereafter "[t]he land administration sets a date on which the owners of the designated land are to negotiate and to 'agree upon the price of compensation for the land.' If agreement is not reached, the government (through its Committee for Assessment of Standard Land Value) assesses a price."

The Statute ensured that holdouts by land owners through exaggerated price offers shall not hamper the requisition, and at the same time recognized payment of the market price to the land. According to Article 56 of the Statute the land requisitioned in accordance with the Statute "shall be compensated for the market price through negotiation and agreement. The market price … means the prevailing price, in general transaction, of the land in the locality, used for the same purpose as the requisitioned land is used prior to its requisition". This provision allowed the state to set land prices where negotiation fails. "Most often, however, the state would actually purchase the land, develop it for industrial use, and then sell or lease it to the industrial user"[91] in order to "prevent the disastrous effects of land speculation".[92]

3. China's Land Rights Regime: An Overview

3.1 Options and challenges in land rights

The economic reforms in China since 1979 are reflected in its legal regimes and economic policies including property rights.[93] These reforms are gradual and cautious even if market forces are steadily allowed to have impact in the economy. China still considers its economy as 'socialist' but with 'Chinese characteristics'.

The three options that were deliberated upon in post-1979 China with regard to land rights were privatization, state ownership in lieu of the rights vested on the communes, and choosing among the variations of collective ownership managed by the villages themselves (i.e. natural villages) or by administrative

[91] Id., p. 58.
[92] Id., p. 61.
[93] *See* Land Administration Law (promulgated on June 25, 1986, revised Dec. 29, 1988, Aug. 29, 1998, and Aug. 28, 2004, effective Aug. 28, 2004); and Law on Land Contract in Rural Areas (promulgated., Aug. 29, 2002, effective March 1 2003).

villages.[94] China has opted "to avoid widespread social conflict over land" and "the central government decided – with good reason – to leave collective land ownership undefined" along with a similar approach in the definition of the 'state-owned land' because "it was unclear which administrative level represented ownership".[95] In spite of these gaps in specificity, China de-collectivized the post-1949 village communes and introduced Household Contract Responsibility Systems for agricultural land (or cropland) in such a manner that productivity and incentives could be encouraged without a hasty reversal of the collective ownership regime. Accordingly, households entered into lease contracts with the collective which owns the land and to which they are members.

These gaps in the definition of collective land ownership had various downsides including administrative abuse from executive office holders:

> As it is unclear which level of the collective is legally entitled to represent land ownership, corrupt local cadres have a powerful incentive to sell land that is not theirs. The clearest example of such dark practices was the dishonourable discharge in October 2003 of Tian Fengshan, Minister of Land Resources. Tian was charged with corruption and land theft during his term as governor of Heilongjiang Province from 1995 to 1999…. Over the years, many farmers have been faced with forced eviction from their land as entire villages have been [allocated] for real estate development. It was estimated that over the period 1985–96 the total loss in arable land due to construction activities amounted to 1.3 million ha. … Since China has only one third of the world country average of arable land, these losses also threaten China's food security.[96]

Even if the village collective continued to retain the bare ownership of rural land in China, the administrative village leased out land to individual households (under the Household Contract Responsibility System) which led to fragmentation and challenges to environmental planning and protection.

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[94] Peter Ho (2005*), Institutions in Transition: Land Ownership, Property Rights and Social Conflict in China* (Oxford University Press). "In 1998 there were 739,980 administrative villages as against almost 1.5 million natural villages". (p. 193).

[95] Id., p. 188.

[96] Id., p. 190 [citing Garrie van Pinxteren, 'Chinese Minister Ontslagen' ('Chinese Minister Sacked'), NCR Handelsblad (23 October 2003), p. 4.; and Ministry of Agriculture, China Agricultural Development Report (Beijing: Nongye Chubanshe, 1997), p. 100.

3.2 Compensation for expropriation of rural land under China's Land Administration Law

China's Land Administration Law (LAL) was enacted in 1988, and there have been two amendments in 1988 and 2004. It maintains socialist public ownership of land[97] which is defined as "ownership by the whole people and collective ownership by the working people".[98] The law classifies land into "land for agriculture, land for construction and unused land" and pledges to "keep the total area of land for construction under control".[99] The procedures of expropriation and the compensation paid upon expropriation are criticized in various literature. Yet, there are positive developments of steady reform.

According to Article 47 of China's Land Administrative Law, the compensation upon the expropriation of rural land includes (a) compensation for the land, (b) resettlement subsidies and (c) compensation for attachments and young crops on the requisitioned land.

> "Compensation for expropriated of cultivated land shall be six to ten times the average annual output value of the expropriated land, calculated on the basis of three years preceding such requisition. … The standard resettlement subsidies to be divided among members of the agricultural population needing resettlement shall be four to six times the average annual output value of the expropriated cultivated land calculated on the basis of three years preceding such expropriation. However, the maximum resettlement subsidies for each hectare of the expropriated cultivated land shall not exceed fifteen times its average annual output value calculated on the basis of three years preceding such expropriation".[100] …

In case the land compensation and resettlement subsidies stated above "are still insufficient to enable the peasants needing resettlement to maintain their original living standards, the resettlement subsidies may be increased" without, however, exceeding "30 times the average annual output value of the expropriated land calculated on the basis of three years preceding such expropriation".[101]

3.3 China's 2007 Property Rights Law

After long deliberations and rehearsals in various policy options, China has in 2007 enacted its property rights law. The amendment of Article 10 of the Chinese Constitution in 1988[102] was a fundamental step toward the enhancement

[97] Land Administrative Law of the People's Republic of China, Article 1.
[98] Id., Art. 2.
[99] Id., Art. 4.
[100] Id., Art. 47.
[101] Ibid.
[102] April 18, 1988.

of the scope of land use rights in China. The fourth paragraph of Article 10 of the Constitution, which provided that "no organization or individual may appropriate, buy, sell or lease land or otherwise engage in the transfer of land by unlawful means," was amended as: "No organization or individual may appropriate, buy, sell or otherwise engage in the transfer of land by unlawful means. The right to the use of land may be transferred according to law." This constitutional framework which allowed *the transfer of the right to the use of land* became conducive to legal reform in China's property rights regime.

The 2007 Property Rights Law of China recognizes three forms of ownership: state, collective and individual. It also embodies provisions on usufruct rights (Articles 117-123). The general stipulations on ownership (Articles 39 to 42), *inter alia*, include:

- "the right to possess, utilize, dispose of and obtain profits from its real or movable property in accordance with the laws" (Art. 39) ;
- "the right to establish usufruct and security right in property rights with regard to its real or movable property"(Art 40); and
- the obligee's duty not to do harm to the rights and interests of the usufruct and security right holders while the latter exercise their rights (Art. 40).

Article 42 of China's Property Rights Law allows, 'for the purpose of public interest', the expropriation of "collectively-owned land, houses and other real property owned by institutes or individuals" in accordance with the law. According to the same provision, the compensation for collectively-owned land includes "compensations for the land expropriated, subsidies for resettlement, compensations for the fixtures and the young crops on land", and it further provides that "the premiums for social security of the farmers whose land is expropriated shall be allocated in full, in order to guarantee their normal lives and safeguard their lawful rights and interests".

Paragraph 3, Article 10 of the Chinese Constitution (as amended by Article 20 of Amendment 4 to the Constitution of the People's Republic of China – 2004) reads "The state may, for the public interest, expropriate or take over land for public use, and pay compensation in accordance with the law." This stipulation replaces the former version which provided that "[t]he state may, for the public interest, take over land for its use in accordance with the law." The word 'for its use' now reads 'public use', and the payment of compensation is also included.

Property that belongs to the whole state means ownership by the whole people and "[t]he State Council shall, on behalf of the State, exercise the ownership" (Art. 45). Such property includes mineral resources, waters, sea areas (Art. 46). Urban land is also owned by the state (Art. 47) subject to the exception that "the right to the use of residential housing land shall enjoy the right to possess and utilize such land as collectively owned" (Art. 152). "All natural resources such as forests, mountains, grassland, unclaimed land and

beaches are owned by the State, with the exception of the resources that are collectively-owned in accordance with the law" (Article 48). There are also other resources that may be owned by the state in accordance with the law. These include outskirts of urban areas, wild animals, cultural relics, public facilities such as railways, roads, electric power, communications, gas pipes etc (Arts 46, 49, 51, 52).

Rural land is collectively owned and this includes all resources not owned by the state (Art. 58). There can also be collectively owned urban property (Art. 59). Under these regimes, land can be transferred to individuals or legal persons through contract arrangements. Articles 124 to 134 deal with farmland use rights. These rights can extend to thirty years, or up to fifty years for grassland, and up to seventy years for forests (Art. 126). There are recent policies (highlighted below under Section 3.4) that seek to extend such timeframes into indefinite time.

The person who has the land use right is "entitled to circulate such right by adopting such means as subcontract, exchange and assignment in accordance with the provision of the Rural Land Contract Law" subject to the condition that the "circulated term may not exceed the remaining period of the contract term." (Art. 128). Within the framework of state ownership of urban land, a person who holds use right over a plot of land is referred to as "*the owner of the right to the use of land for construction*". This shows that the holder of urban land in China owns not only the fixtures on the land but is also unequivocally considered as the *owner of the right to use the land*. The following provisions are cases in point:

- "The owner of the right to the use of land for construction use shall, according to law, be entitled to possess, utilize and obtain profits from the State-owned land, and have the right, by utilizing such land, to build buildings and their accessory facilities". (Article 135)
- "The ownership of the building, structure and their accessory facilities built by the owner of the right to the use of land for construction use shall belong to such owner, unless there is evidence to the contrary sufficient to invalidate that". (Article 142)
- "Except as otherwise provided for by law, the owner of the right to the use of land for construction use shall have the right to transfer, exchange, make as capital contribution, donate or mortgage the right to the use of land for construction use". (Article 143)
- "Where the owners of the right to the use of land for construction use transfer, exchange, make as capital contribution, donate to others or mortgage the right to the use of land for construction use, the parties concerned shall enter into corresponding contract in writing. The term of such contract to be determined by parties concerned shall not exceed the

> remaining duration of the right to the use of land for construction use". (Article 144)

Although urban land is in principle state-owned, "[t]he owner of the right to the use of residential housing land shall", as stated above "enjoy the right to possess and utilize such land as collectively owned, and the right to build residential house and its accessory facilities on such land". (Article 152). In other words, the scope of the use rights in urban land that is used for residential purposes may be comparable to the one held in rural areas as farmland.

In the property rights discourse, utmost focus is not given to "who 'owns' land", but rather to "the formal and informal provisions that determine who has a right to enjoy benefit streams that emerge from the use of assets and who has no such rights".[103] Even if the ownership of land in China is vested in the state or the collective, the 2007 Property Rights Law clearly defines the nature and scope of use rights. Not only are the rules regarding the elements of use rights defined, the enforcement mechanism is also stipulated.

3.4 Current pursuits of further reform in rural land rights

Since 1978/79, China is steadily moving along the path of various reforms including property rights. It has "moved from a communal system of farming to a system that grants more extensive land-use rights to individual households" enabling rural China to march toward greater prosperity.[104] Farmers are given thirty-year contractual rights under the Land Administration Law "and the Law on Rural Land Contracting strengthens this right by more specifically enumerating requirements for land contracting and the transfer of contractual rights".[105] With a view to further rural reform "the government has issued two policy directives that outline measures to increase land tenure security with the goals of doubling farmers' incomes by 2020 and maintaining the country's grain supply".[106]

Such reforms in rural China can indeed increase "the prosperity of the countryside" which, *inter alia*, "would benefit the Chinese economy as a whole

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[103] Shimelles Tenaw, K.M. Zahidul Islam & Tuulikki Parviainen (2009), "Effects of Land Tenure and Property Rights on Agricultural Productivity in Ethiopia, Namibia and Bangladesh", University of Helsinki, Department of Economics and Management, Discussion Papers n:o 33, Helsinki 2009, p. 8 [citing (Bromley 1991, Eggertsson 1990, Libecap 1989)].

[104] Robin Dean and Tobias Damm-Luhr (2010), "A Current Review of Chinese Land-use Law and Policy: A "Breakthrough" in Rural Development", *Pacific Rim Law & Policy Journal*, Vol. 19, No. 1, p. 121.

[105] Ibid.

[106] Ibid.

by increasing domestic demand".[107] Policy documents issued after the 2007 Property Rights Law (known as the 2008 Decision and the 2009 No. 1 Document of the Chinese Communist Party) "promote three major changes to rural land-use law".[108] Primarily, "the Policy Documents indicate that the contractual land-use terms will expand from thirty to an indefinite number of years".[109] Moreover, these reforms can "spur the growth of rural land-use rights markets" and reinforce the commitment to maintain the agricultural use of farmland by reducing the conversion of agricultural land to non-agricultural uses.[110]

3.5 China's Administrative Laws

Various laws have been enacted in China toward due process in administrative procedures, transparency, accountability, judicial review and the redress available in the event of abuse of authority. The purpose of China's Administrative Procedure Law[111] enacted 1989, include "protecting the lawful rights and interests of citizens, legal persons and other organizations, and safeguarding and supervising the exercise of administrative powers by administrative organs in accordance with the law".[112] According to Article 2 of the Administrative Procedure Law (APL), any "citizen, a legal person or any other organization" is entitled to bring a suit to court if he/she/it "considers that his/her or its lawful rights and interests have been infringed upon by a specific administrative act of an administrative organ or its personnel". The court shall thereupon "exercise judicial power independently with respect to administrative cases, and shall not be subject to interference by any administrative organ, public organization or individual", and to this end, the courts "shall set up administrative divisions for the handling of administrative cases".[113] These benches are required to "base themselves on facts and take the law as a criterion" and "examine the legality of specific administrative acts".[114]

Subject to the exceptions stated under Article 12 of the Administrative Procedure Law, courts are required to "accept suits brought by citizens, legal persons or other organizations against any of the specific administrative acts

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[107] Id., p. 123 [citing Fei-Ling Wang, (stating that "raising the purchasing power of the rural Chinese majority would probably provide the Chinese economy with a great push in the years ahead")].
[108] Id., p. 138.
[109] Ibid.
[110] Ibid.
[111] Administrative Procedure Law of the People's Republic of China, (enacted in 4 April 1989, and in force on 1 October 1990).
[112] Id., Article 1.
[113] Id.. Article 3.
[114] Id., Articles 4 and 5.

embodied in Article 1 which include confiscation of property, freezing of property, infringement of rights of the person or property, and other rights.[115]

Series of laws have also been promulgated that incorporate elements of administrative law, such as the Legislative Law (2000), Administrative Supervision Law (1997), Administrative Punishment Law (1996), State Liability Law of the People's Republic of China (1994) and others. The lessons that can be drawn in this regard relate to the specificity of the functions of administrative authorities, the procedures of redress and judicial review. There is, however, criticism regarding the level of the implementation of these laws.

As Liu Jianlong observes, "the effectiveness of the law in controlling public powers" is modest in China and he attributes this problem to three factors: the vulnerability of courts to interference from administrative organs, "the mechanical dogmatic approach adopted by most judges", and the need to update some of the provisions of the 1989 Administrative Procedure Law. [116] Jianlong states that the 1982 Constitution "and the three procedural laws have clearly specified that the courts exercise their trial powers independent of any interference from administrative organs, social organizations and

[115] Id., Article 1. The rights protected are the following:

(1) an administrative sanction, such as detention, fine, rescission of a license or permit, order to suspend production or business or confiscation of property, which one refuses to accept;
(2) a compulsory administrative measure, such as restricting freedom of the person or the sealing up, seizing or freezing of property, which one refuses to accept;
(3) infringement upon one's managerial decision-making powers, which is considered to have been perpetrated by an administrative organ;
(4) refusal by an administrative organ to issue a permit or license, which one considers oneself legally qualified to apply for, or its failure to respond to the application;
(5) refusal by an administrative organ to perform its statutory duty of protecting one's rights of the person and of property, as one has applied for, or its failure to respond to the application;
(6) cases where an administrative organ is considered to have failed to issue a pension according to law;
(7) cases where an administrative organ is considered to have illegally demanded the performance of duties; and
(8) cases where an administrative organ is considered to have infringed upon other rights of the person and of property.

Apart from the provisions set forth in the preceding paragraphs, the people's courts shall accept other administrative suits which may be brought in accordance with the provisions of relevant laws and regulations.

[116] Liu Jianlong (2011), 'Administrative Litigation in China: Parties and Their Rights and Obligations', *NUJS Law Review*, Volume 4, April-June 2011, p. 229.

individuals".[117] He thus underlines the need to guarantee the financial and personal independence of the courts and the judges and improve the education level of judges.[118]

4. Land Rights in Singapore and Entrepreneur Perceptions

4.1 Land rights in Singapore

The ideology of People's Action Party (PAP) as of the early 1960s included social engineering, economic growth, modesty in lifestyle, Asian Values, and meritocracy.[119] As an island city state, Singapore devised a land law regime that could enable the state to have a wide policy space in the construction of residential, office and commercial premises. Its housing project targeted at its whole population. Over 80 percent of the population now lives in self-owned apartments. "The government also allows citizens to borrow from the centralized pension system for home purchase, another incentive that has helped push the percentage of owner-occupiers to such high levels".[120]

The legal framework on Singapore's real property traces its roots to English common law. All land in Singapore belongs to the state, and there is a distinction in land titles, namely freehold and leasehold estates. The power of the state in freehold estate is limited to the exercise of "police powers and the right of eminent domain".[121] "Freehold estates form a small minority of private land holdings in Singapore and are no longer granted by the government" while "[l]easehold is the primary form of land ownership in the country. Leasehold estates are granted by the government, typically for 99-year terms. The 1992 State Lands Act made the 99-year term the standard except for rare exceptions.[122]

The general categories of the freehold and lease estates include various specific types of titles within the framework of the principle that land belongs to the state and may be granted to individuals or legal persons. "The grantees do

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[117] Ibid.
[118] Ibid.
[119] David E. Anderson (2002), "Land Rights and Economic Opportunities, an exploratory comparison of Singapore and Taiwan" [in Douglas, I., Huang, S. L. (Editors) *Urbanization, East Asia and Habitat II, Taipei*, TW: CIER Press, p. 171]
[120] Belina Yuen (2007), "Squatters No More: Singapore Social Housing", Global Urban Development Magazene, Vol. 3. Issue 1, November 2007, Available at <http://www.globalurban.org/GUDMag07Vol3Iss1/Yuen.htm>, Accessed 04 August 2013.
[121] National Association of Realtors <http://www.realtor.org/intlprof.nsf/all/singapore?OpenDocument&Print=Yes> , accessed 01 August 2013.
[122] Ibid.

not really own the physical land itself but periods of time over the land during which they can exercise their rights of ownership. These time periods are called '*estates*'."[123] Singapore's land law recognizes four kinds of estate in land, namely "the freehold fee simple estate, the freehold life estate, the estate in perpetuity created by the State Lands Act, and the leasehold estate".[124]

> Even though all land belongs to the State, it does not mean that there is no private property in Singapore. The individuals or the institutions that are granted estates of land by the State are true 'owners' and are entitled to certain rights over the land. The commonly accepted rights associated with the ownership of an estate in land are the rights to possess and to exclude all others from accessing the land, the right to use and enjoy it in the manner the owner likes subject to the existing rules, and the right to alienate it. [125]

Distinction is made between "two categories of land in Singapore: *private land*, enjoyed by the individuals and corporations that are granted estates in land by the State, and *State land"*.[126] A person who owns the freehold fee simple estate "owns the property indefinitely, without the need to pay any rent, and upon his death, the property passes onto his successors. The second freehold estate is the life estate, which is much rarer, and confers ownership for the duration of the person's lifetime".[127] Leasehold estates, as stated above are usually granted for 99 year leases. "An estate in perpetuity is an interest in land, created by a grant of land to an individual by the State in perpetuity, subject to terms and conditions agreed upon by the two parties. Such an interest may also be governed by the State Lands Act".[128]

4.2 Entrepreneur perceptions about Singapore's institutions

Singapore is well known for its rate of development, low unemployment rates, nearly corruption-free government, its attraction to Foreign Direct Investment and foreign workforce. It is "a small island city-state with a total land area of 640 square kilometers" and has gone through challenges when it obtained its internal self-government (1959), "joined the then newly formed Federation of Malaysia in 1963" from which it withdrew and became an independent republic

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[123] Soicher Mihaela Ecaterina (2004), The Applicability in Singapore of the Principle of Reasonable Access to Land Open for Public Use (LL.M Thesis, University of Singapore), p. 1.
[124] Ibid.
[125] Ibid.
[126] Ibid.
[127] <http://singaporelegaladvice.com/types-of-property-and-home-ownership-in-singapore/>, last accessed: 04 August 2013.
[128] Ibid.

in 1965.[129] There were various problems encountered by the government of Singapore upon independence which include rapid population growth, housing shortages and unemployment.[130] These problems are events of the past, because "Singapore has become a model for economic development" and there is virtually no unemployment in the country. [131] "The national savings rate is 51 percent while the home ownership rate is 92 percent".[132]

Surveys were conducted about the institutional settings which included private property rights in Hong Kong and Singapore before Hong Kong was united to China. "The surveys of Hong Kong and Singapore were part of an attempt to gain a world-wide private sector assessment of institutional quality... in June 1997, i.e., just before the handover of Hong Kong to China".[133] The themes of the survey (on entrepreneur perceptions) were predictability of rule making, perception of political instability, security of persons and property, predictability of law enforcement and corruption, and expectations of future developments in these areas of private sector concerns.[134]

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[129] Sock-Yong Phang (1996), "Economic Development and the Distribution of Land Rents in Singapore: A Georgist Implementation", *American Journal of Economics and Sociology*, Vol. 55, No. 4 (Oct., 1996), p. 490.

[130] Ibid.

[131] Ibid.

[132] Ibid.

[133] Beatrice Weder and Aymo Brunetti (2000), "Another Tale of Two Cities: A Note on Institutions in Hong Kong and Singapore", *Journal of Institutional and Theoretical Economics* (JITE) / Zeitschrift für diegesamte Staatswissenschaft, Vol. 156, No. 2 (June 2000), p. 317.

[134] "*Predictability of rule making*: ... [1] the extent to which entrepreneurs have to cope with unexpected changes in rules and policies; [2] whether they expect their governments to adhere to announced policies; ... [3] the degree to which entrepreneurs are informed about important changes in rules; [4. Whether they] can voice concerns when planned changes affect their business; [5. whether] ... entrepreneurs have to cope with unpredictable retrospective changes in laws and regulations.

Perception of political instability: ... whether government changes (constitutional and unconstitutional) are perceived to be accompanied by far-reaching policy surprises which could have serious effects on the private sec-tor.

Security of persons and property: ... [1] whether entrepreneurs feel confident that the authorities would protect them and their property from criminal actions, and [2] whether theft and crime represent serious problems for business operations.

Predictability of law enforcement and corruption: ... [1] the uncertainty arising from arbitrary enforcement of rules by the judiciary and whether such unpredictability presents a problem for doing business. [2] whether it is common for private entrepreneurs to have to pay some irregular additional payments to get things done".

The results of the survey showed that "entrepreneurs in both Singapore and Hong Kong gave top marks to the institutional infrastructure" with ratings "very similar for both city-states and in most cases they were clearly higher than for all other countries surveyed".[135] Hong Kong's score regarding perception of changes in government was significantly higher than Singapore's owing to "the fairly centralized political system of Singapore"[136] which caused higher perception in change of laws. However, this perception about Singapore was not related to entrepreneurs' perception of "unconstitutional government changes accompanied by far-reaching policy surprises".[137]

The rating for Singapore with regard to predictability of rule making was "more favorable than for an average of OECD countries" as "about 90% of responding entrepreneurs in both Hong Kong and Singapore said that in general they expected government to stick to announced policies".[138] The number of entrepreneurs who "feared retrospective changes in regulation which could be important for their business" was very few, while "by comparison, in Africa this fear was expressed by over 50% of entrepreneurs". [139]

Entrepreneurs in both Hong Kong and Singapore agreed that "property rights security is not a problem" and "they felt completely confident that the state authorities would protect their person and property from criminal actions and that theft and crime were absolutely no problem for their business".[140] With regard to the reliability of the judiciary "over 80% of entrepreneurs responded positively, compared with only 60% in the average of the OECD, and only 20% in the average of less developed countries".[141] All entrepreneurs responded very positively regarding the absence of corruption. "Overall, the private sector surveys suggest that the quality of institutions in Hong Kong and Singapore was extraordinarily benign".[142]

Conclusion

Comparative experience of other countries can inform Ethiopia's pursuits of addressing the challenges in the legislative, administrative and judicial

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The final question ... asks entrepreneurs about their expectations of future developments in the four main areas discussed above." Weder and Brunetti, *Ibid*. P. 318.

[135] Id., p. 319.
[136] Id., p. 321.
[137] Id., p. 321.
[138] Id.. p. 319.
[139] Id., p. Ibid.
[140] Id., p. 321.
[141] Ibid.
[142] Ibid.

protection of property rights. The denial of economic value to land use rights in any country that pledges to pursue developmental state economic policies is incompatible with the land policies and laws pursued by the developmental states of the 1960s such as South Korea and Taiwan which offer good examples regarding the role of the state at the initial phases of industrial kick-off. Moreover, the experience of Singapore that has a legal regime based on state ownership of land shows that security and tenure in land use rights can be put in place even under state ownership. A Legal regime that restricts the scope of land use rights can also take lessons from the steady reforms that are underway to widen the scope of China's land use rights regime even if China still espouses socialism blended with market-led economic policies.

There are lessons that can be drawn from the legal regimes of these countries in relation with the various proclamations in Ethiopia's property rights regime that deal with the scope, tenure and security of urban and rural land use rights. One of the major avenues that benefit from the experience of developmental states is expropriation. Although there can be various definitions of expropriation, they share common characteristics in that the "expropriation should be for 'public use', carried out on behalf of the public", and it should involve just compensation[143] which should not be confined to the value of the fixtures and houses on the land. Generally, "compensation should be for loss of any land, buildings, other improvements" or for their reduction of value "as a result of the acquisition, and for any disturbances and other losses to the livelihoods of the owners or occupants caused by the acquisition and dispossession (FAO 2008)".[144]

As the purpose of this article is to highlight some country experience in the legal regimes of four countries, the definition of public purpose, expropriation and compensation under Ethiopian law is beyond the scope of our discussion. What can be said in the context of this article is that the economic value to land use rights, definition of 'public purpose' and the amount of compensation upon expropriation need careful consideration. *First*, the extent to which the definition of 'public purpose'[145] is wider than the one that was used in the

[143] Yin Lei (2010), Developing Online Participatory Model (OPM) for Land Expropriation in China (MSc Thesis, International Institute for Geo-Information Science and Earth Observation, Enshede, the Netherlands), p. 2.

[144] Id., p. 18.

[145] According to Article 2(5) of the Expropriation of Land Holdings for Public Purposes and Payment of Compensation Proclamation No. 455/2005, 'public purpose' "means the use of land defined as such by the decision of the appropriate body in conformity with urban structure plan or development plan in order to ensure the interest of the peoples to acquire direct or indirect benefits from the use of the land and to consolidate sustainable socio-economic development."

developmental state policies of the countries considered in this article, and *secondly*, the issue whether economic value to land use rights is denied in Ethiopia thereby lowering the amount of compensation (upon land expropriation) can be informed by the lessons that can be drawn from the country experience discussed in the preceding sections.

As the experience of South Korea and Taiwan indicates, developmental states have features and policies which enhance economic development, and it is these factors that determine the classification of a state into one of the stations between predatory and developmental statehood. The land laws of developmental states clearly pursue the principle of equitable redistribution without denying private rights on land. China pursues socialism with 'Chinese characteristics' and yet it clearly recognizes the urban landholder as "*the owner of the right to the use of land for construction*". The fact that China is in the course of further reforms toward indefinite terms in use rights and other issues including compensation will further enhance the tenure and security of property rights.

And finally, the lessons from Singapore's land regime indicate that individuals and companies can own *estates*, i.e. the years during which one can have use rights even if the state has bare ownership. The duration of the *estates* according to Singapore's land law may be for an indefinite duration, 99 years, or lesser number of years based on the category of the *estates* to which a person is entitled to. The lessons that can be drawn from Singapore also relate to the level of institutional competence and integrity.

The land reform of developmental states (such as South Korea and Taiwan in the 1950s and 1960s) has indeed enhanced agricultural productivity and saving which ultimately facilitated industrialization. Moreover, the land laws in Singapore and the steady land use right reforms in China prove that private ownership of land use rights can co-exist with public ownership of land. The comparative experience discussed in this article thus shows that private ownership of land use rights and public ownership of land are not exclusive (either/or) opposites but aspects of land rights that can co-exist in harmony within a holistic spectrum of property rights. ■

Role Conflict between Land Allocation and Municipal Functions in Addis Ababa

Elias N. Stebek ♣

Abstract

The current accelerated growth of Addis Ababa has caused tension between the favourable aspects of urban redevelopment, and the corresponding wake-up calls against the risks of transforming various parts of the city into haphazard 'concrete jungle'. I argue that there is role conflict in municipality authorities that are entrusted with the power to lease out urban land, and at the same time carry out the regulatory function of revising and implementing urban master plans and providing municipal services. It is argued that the land provision function of municipalities (and their corresponding interest in enhancing revenue from lease) induces them to lease out urban land to the detriment of green areas, neighborhood play fields, public parks, open spaces, riverbanks, street alignments and adequate space for bus and taxi terminals (*menaheria*). Such role conflict not only enhances administrative discretion and corruption, but also weakens urban land holding security, represses municipal services and adversely affects the propriety and effectiveness of urban plans.

Key words

Property rights, role conflict, land rights, urban plan, expropriation, municipal services, Addis Ababa.

DOI http://dx.doi.org/10.4314/mlr.v7i2.3

Introduction

The commendable pace of urban redevelopment in Addis Ababa including infrastructure improvements evokes mixed feelings of appreciation *vis-à-vis* concerns for the adverse impact of declining open spaces and steadily increasing

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Some parts of this article are improved versions of sections in the second and fifth chapters of the research titled "Property Rights Protection and Private Sector Development in Ethiopia" which was submitted to Private Sector Development Hub at the Ethiopian Chamber of Commerce and Sectoral Associations. The author is grateful to Private Sector Development Hub for sponsoring the research in partnership with SIDA (Swedish International Development Cooperation Agency). I am also grateful to the two anonymous reviewers for their comments on the earlier draft of the article.

problems related with urban utilities, waste management, transport management, noise pollution, glaze, sewerage, and alternating extremes of urban warming and floods. Undoubtedly, urban redevelopment in the context of Addis Ababa and other Ethiopian cities is expedient. But a *caveat* that should accompany this pursuit is the concern for a holistic conception of wellbeing which recognizes the physical, psychological, economic, social and environmental dimensions of 'good urban life' in sustainable cities.

In legal regimes which recognize transfers in land rights as a predominantly private pursuit, municipalities merely play their conventional roles in urban planning, urban plan implementation and municipal services such as urban utilities (i.e., water supply, electricity, etc.), waste disposal, green area management, and many others. In other words, municipalities are custodians of the utilities (such as water supply and electricity), streets, parks, open spaces, etc. of the city they administer, and are not providers of land for construction. The intervention of the state under such circumstances is minimal, other than measures of expropriation for 'public purpose' such as roads and other public utilities, and few incidences of intervention to facilitate '*efficient*' utilization of urban land resources.

The other extreme relates to what was experienced in various countries as a result of 'Marxist' policies. Under this setting, the state intervened as the custodian of public property including urban land. However, land allocation was based on grants (and not lease sale), thereby rendering it usually insusceptible to conflict of interest between generating revenue through land allocation and commitment to a sound master plan. This is because land market was considered irrelevant in soviet-model command economies while on the contrary, the absence of land markets in a market-driven economy causes the inefficient allocation of land and loss of government tax revenue from private sales transactions.[1]

The function of municipalities in Ethiopia varies from the aforementioned two scenarios because it creates vested interest in municipalities to generate revenue from urban leasehold allocation of land which conflicts with their roles as sources and custodians of urban master plan and as entities that are expected to give prime attention to municipal services (in ensuring water supply, electricity, waste management, public parks, green areas, efficient transportation, and other public needs and amenities). It is against this backdrop that the following sections examine the conflict of interest on the part of municipal authorities in Addis Ababa which are in the midst of role conflict

[1] Li, L., & Isaac, D. (1999). Development of urban land policies in China. In J. J. Chen & D. Wills (Eds.), *The impact of China's economic reforms upon land, property and construction* (p. 17). Aldershot, England: Ashgate Publishing Ltd.

between their interest in enhancing revenue from land lease and their municipal responsibilities of implementing urban master plans and providing municipal services.

The first section highlights the need for balancing the tension between the transfer of urban land to its most *efficient* user and the *equity* to which the persons who are being dispossessed should be entitled. Section 2 examines whether the Ethiopian legal regime restricts the economic value of home ownership to roofs and walls. Sections 3 and 4 briefly discuss the challenges of administrative discretion in the definition of 'public purpose", urban plan revision, expropriation, complaint procedures, compensation and examples of arbitrary revocation of title deeds. Section 5 highlights the role conflict between Addis Ababa Municipality's functions as custodian of the city's master plan and as the provider of land on leasehold sales. And finally a brief reflection on the 'problem tree' is made in the sixth section.

1. Equity, Efficiency and Property Rights in the Context of Urban Redevelopment: An Overview

1.1 The balance between *rational self-interest* and *public interest*

Economic development involves the private sector, the public sector and a third sector which does not fall under the two categories. The latter includes civil societies, non-governmental institutions/organizations and social/cultural/ religious entities. These three sectors operate with the citizenry/populace as their foundation, which can be regarded as their *raison d'être.* The extent to which people are informed and engaged (as participants and beneficiaries) thus determines the degree of achievements in these three sectors.

The functions and objectives of these three sectors have reinforcing correlation within the context of commonalities and variation. The pursuits of the entities address (a) the interest of private persons; and (b) social interest that transcends and at the same time facilitates the realization of private interests. *Rational self-interest* is expected to be driven by the needs, values, behaviours and pragmatic desires of the individual person. This is accompanied by the wider context and setting of *public interest* (such as the common good or shared aspirations) which facilitates the fulfillment of a 'rational' individual's self-interest. The issue of property rights is relevant from both dimensions.

Property rights have been subject of discourse from extremist and pragmatic perspectives. On the one hand, there is an overstretched conception of 'do as you please' interpretation in which the private individual or the legal person behaves as the master of natural resources, while the other extreme takes an acrimonious stance against private property. The latter runs the risk of elite capture by paternalistic authorities who consider themselves as 'custodians of

public property' and expose public property to 'rent seeking greed', unregulated/unprotected open access and 'the tragedy of the commons'.[2]

The protection of private property rights thus involves managing the tension between the protection of *rational self-interest* of individuals (and companies), and at the same time ensuring the enhancement of *public interest*. The pull factors in this tension involve the extremist version of property rights claims, and/or the other extreme of paternalistic administrative discretion which may lead to arbitrary bestowal and withdrawal of property rights without judicial scrutiny.

Safeguards against these extremes lie on the schemes that control and harness both tendencies so that (a) private property rights can be protected without meanwhile being abused by the right holders; and (b) the stakes of the public are taken care of with due caveat against 'elite capture' which may be engaged in 'rent seeking' predatory pursuits in the guise of 'public interest'. Enabling factors such as good governance and institutional settings become crucial in the quest for the avoidance of these pitfalls that emanate from the two extremes.

As Krueckeberg notes, property is not merely an "object of possession or capital in isolation, but a set of relationships between the owner of a thing and everyone else's claim to the same thing".[3] Such understanding of property "highlights considerations of distributive justice that are particularly important in light of the issues in the contemporary debate about property rights".[4]

The land use rights of a person is fundamental to the individual, while at the same time there can be the consideration of social wellbeing which might necessitate expropriation for public use. This has "always been subject to reasonable constraints for the benefits of the entire community and society".[5] Moreover, there might also be land reallocation for a more *efficient* use of urban

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[2] The concept of the '*tragedy of the commons*' was formulated by Garett Hardin in 1968, *Science*, New Series, Vol. 162, No. 3859. (Dec. 13, 1968), pp. 1243-1248. It states that the competition among members of a community to augment one's use of a resource that is held in common leads to overconsumption and dissipation. It is based the assumption that what is commonly owned will be eventually overexploited and degraded. This assumption should not, however mean that common property or shared access to resources invariably encounters this tragedy, because rules of sustainable use can be established among the right holders in common property accompanied by the denial of access to others. *See* for example, Feeny *et al* "The Tragedy of the Commons: Twenty-Two Years Later" Human Ecology, Vol. 18, No. 1 (Mar., 1990), pp. 1-19.

[3] D. Krueckeberg (1995). 'The difficult character of property: to whom do things belong', *Journal of the American Planning Association*, Vol. 1, No. 61, pp. 301-9.

[4] Ibid

[5] Ibid.

land. This calls for a balance that can accommodate both interests in such a manner that *equity* in favour of the owner is maintained in the course of land allocation towards its most *efficient* utility.

1.2- Striking the balance between '*equity*' and '*efficiency*'

The property rights regime is among the areas of the law which are considerably altered in the course of social change. The fundamental changes made in Ethiopia's property law regime since the mid-1970s have caused ambiguities in interpreting the scope of property rights on immovable property. In light of the changes that were witnessed since 1975, Ethiopia's property law regime has gone through fundamental transformations which have brought about various issues that are susceptible to different perspectives of interpretation. In particular, misconceptions that undermine the scope of landholding rights in the context of public ownership have been conducive to a very narrow definition of land use rights. There is thus the need for rethinking beyond the walls and roofs in the valuation of urban house ownership.

A person who owns an urban house in Ethiopia has ownership right over the premises and use right over the land (subject to the duration of lease in case of lease holds). On the other hand, urban redevelopment necessitates the utilization of urban land by the most *efficient* user. This creates tension and harmony between '*equity*' in favour of urban house owners vis-à-vis the '*efficient*' use of land towards urban redevelopment through reallocation of land to developers. The extent to which these objectives are balanced through win-win schemes can protect the weaker party from inequitable trade-offs. In the Ethiopian context, the core issue is whether the law should only allow compensation for the corporeal elements of the house that is demolished upon expropriation such as walls and roofs, or for the wider right that includes incorporeal land use rights.

The discussion herein on the 'equity' and 'efficiency' balance does not need deeper theoretical engagement on themes such as the *Pareto Efficiency Criterion*, named after Vilfredo Pareto (1848-1923) nor the Kaldor-Hicks efficiency criterion which "corresponds with the utilitarian-ethical policy alternative" as proposed by economists Kaldor (1939) and Hicks (1939)".[6] The former argues against a policy alternative which "makes any member of society worse off than under the status quo".[7] The latter theory suggests that "we must compute net social utility (adding up the gains and the losses for each member of society) for each policy alternative to the status quo" so that the policy

[6] *See* Elias N. Stebek (2012). *The Investment Promotion and Environment Protection Balance in Ethiopia's Floriculture:* The Global Value Chain in Focus, PhD Thesis, University of Warwick School of Law, pp. 78, 79.

[7] Id., p. 78.

alternative that generates the largest gain in net social utility "can be taken as the efficient policy alternative".[8]

Discussion on the theory of 'efficiency' is outside the scope of this article, because the need for the most *efficient* use of land in urban redevelopment is apparent. On the other hand, however, '*Equity*' requires respect for the property rights, interests and wellbeing of urban homeowners. Arguments in favour of fair procedures and equitable compensation do not negate the transfer of land to more efficient users, and are not as rigid as the *Pareto Criterion* in the definition of 'efficiency'. This criterion "is problematic as it indirectly protects the status quo because it is difficult to come up with a policy alternative that would satisfy every member of a given society".[9]

The social benefits of '*efficient*' utilization of urban land, i.e. economic *efficiency* include their positive contribution in the supply of goods and services such as residential and office premises that can be rented to a significant number of end-users. The issue that arises in relation with these competing interests is whether one of them needs to be traded-off in favour of the other. While '*equity*' requires fair, prompt and adequate compensation commensurate with the current value of the property, the rationale of economic *efficiency* and productivity warrants assigning land to investors who would optimize the economic and social utility of the land which benefits not only the individual investors but the society at large. The issue that arises is whether there can be a win-win synthesis of *equity*-cum-*efficiency* in the course of reassigning urban land holding rights.

Urban redevelopment projects encounter various challenges. One of the challenges is the definition of '*public interest*'[10] and '*public purpose*'. As highlighted in Section 3.1, 'public interest' is given a very wide meaning under the Urban Lands Lease Holding Proclamation No. 721/2011. Section 4.1 further shows that the term '*public purpose*' embodies a relatively similar meaning under Proclamation No. 455/2005.[11] In both proclamations, the meaning given to 'public purpose' is broader than the traditional '*for-public-use project*' definition such as highways, public parks, schools, public hospitals and the like.

Roads, electric lines, public parks, street alignments, etc. benefit (and are accessible to) the public at large. Urban redevelopment projects that have these objectives are apparently of public interest. According to the 1960 Ethiopian Civil Code "the creation of land or streets"[12] can justify expropriation. Likewise, the relevant authorities "may, by way of alignment" take measures of

[8] Id., pp. 78, 79.
[9] Id., p. 78.
[10] Article 2(7), Urban Lands Lease Holding Proclamation No. 721/2011.
[11] The Expropriation of Landholdings for Public Purposes and Payment of Compensation Proclamation No. 455/2005, Art. 2(5).
[12] Article 1450(1), Ethiopian Civil Code.

expropriation in order "to widen or straighten existing roads or streets".[13] Likewise, Proclamation No. 401/2004[14] (which is repealed by Proclamation No. 455/2005) had pursued the traditional narrow interpretation of *works* carried out in the *public interest* as the sole grounds for expropriation.

This meaning of 'public interest' or 'public purpose' under the Civil Code of 1960 and under Proclamation No. 401/2004 did not cover the eviction of urban house owners from a certain location in Addis Ababa in order to reassign the land to an investor. No doubt, the new investment may not only entail profit for the investor, but may also bring about employment, tax revenue and other economic benefits. Based on such social utility, one can argue in favour of using the land for an investment project. However, this argument relates to '*efficient*' use of resources which is different from expropriation for '*public purpose*', a concept that needs restrictive interpretation.

Yet, not all 'investments' bring about positive economic and social benefits to the community. A case in point is reallocation of land that surrounds a lake to residential resorts or similar purposes without leaving a public walking path around the lake. Under such circumstances few 'investors' are allowed to have access to their boats and the lake, while the entire population and all potential tourists (of the current generation and the generations yet to come) are denied of the right to walk around the lake. Setting aside such speculative land acquisitions and rent gathering, the issue that needs to be addressed is whether there can be modalities that strike a balance between enhancing the *efficient* use of land in urban redevelopment and at the same time avoid inequitable eviction of land holders.

Meanwhile, it is worth to note that holdouts by landholders (who seek overstated compensation unwarranted by the market price of their land use rights and the premises on the land) hamper urban redevelopment. This does not, however, justify the other extreme of under-compensation upon eviction. The considerations of '*equity*' and '*efficiency*' are thus principles that should be pursued without trade-offs. Even though undermining the need for the utmost '*efficient*' use of urban land adversely affects urban development, mere focus on this pursuit by setting aside '*equity*' in relation with the property rights of urban landholders becomes single-faceted and violates property rights. As Scully observes, "[e]conomic progress and equity are not incompatible. Nations can move to a less restrictive rights regime and increase economic efficiency,

[13] Article 1450(2), Ethiopian Civil Code.

[14] Appropriation of Land for Government Works and Payment of Compensation for Property Proclamation No. 401/2004, Article 2.

economic growth, and equity".[15] The following section examines whether Ethiopian law justifies trade-offs against 'equity'.

2. Property Rights beyond the Walls and Roofs

2.1 Constitutional provisions on land use rights

Although land is publicly owned, pursuant to Article 40(3) of the Ethiopian Constitution[16], Article 40(1) stipulates that "Every Ethiopian citizen has the right to the ownership of private property." Subject to the prescriptions of the law and public interest, Article 40(1) guarantees, "the right to acquire, to use and, in a manner compatible with the rights of other citizens, to dispose of such property by sale or bequest or transfer it otherwise." The definition of private property under the Constitution[17] envisages "tangible or intangible product which has value and produced by the labour, creativity, enterprise or capital of an individual [… or a legal person]" or, "in appropriate circumstances, by communities specifically empowered by law to own property in common." The Constitution regards private property of individuals and legal persons as the product of one's "labour, creativity, enterprise or capital", and it also envisages the legal recognition of community ownership."

Subject to the public ownership of land, Article 40(6) of the Constitution recognizes the land use rights of private investors "on the basis of payment arrangements as established by law" and the provision states that the "[p]articulars shall be determined by law".[18] This constitutional recognition of land use rights accorded to investors extends to other citizens as well. For example, Articles 40(4)[19] and 40(5) [20] of the Constitution guarantee the land use

[15] Gerald W. Scully (1991). "Rights, Equity, and Economic Efficiency", Public Choice, Vol. 68, No. 1/3 (Jan., 1991), p. 212.

[16] Article 40(1) of the Constitution of the Federal Democratic Republic of Ethiopia reads: "The right to ownership of rural and urban land, as well as of all natural resources, is exclusively vested in the State and in the peoples of Ethiopia. Land is a common property of the Nations, Nationalities and Peoples of Ethiopia and shall not be subject to sale or to other means of exchange."

[17] FDRE Constitution, Art. 40(2).

[18] The provision reads "Without prejudice to the right of Ethiopian Nations, Nationalities, and Peoples to the ownership of land, government shall ensure the right of private investors to the use of land on the basis of payment arrangements established by law. Particulars shall be determined by law."

[19] "Ethiopian peasants have right to obtain land without payment and the protection against eviction from their possession. The implementation of this provision shall be specified by law."

rights of smallholder farmers and pastoralists. The joint reading of sub-Articles 4, 5 and 6 of Article 40 of the Constitution shows that land use rights have constitutional recognition in Ethiopia.

Moreover, a careful reading of Article 40(7), second sentence, shows that the right of an owner of an immovable property goes beyond the property that s/he has built and the permanent improvements made on the land. The provision reads:

> Every Ethiopian shall have the full right to the immovable property he builds and to the permanent improvements he brings about on the land by his labour or capital. This right shall include the right to alienate, to bequeath, and, *where the right of use expires*, to remove his property, transfer his title, or claim compensation for it. Particulars shall be determined by law. [Italics added]

The phrase "*where the right of use expires, to remove his property*" clearly shows that a house owner's rights can be restricted to the property on the land only when the duration of *the land use right expires*. This, in other words, recognizes the entitlement of an urban homeowner not only to the property on the land, but also to land use right, which apparently has economic value.

2.2 Urban land use rights –versus- mere holding and usufruct

The elements of ownership embodied in continental legal systems are the right to use (*usus*), the right to enjoy the fruits (*fructus*), and the right to dispose of (*abusus*). Article 1205 of the Ethiopian Civil Code[21] has adopted this approach.

The land use right which can be claimed by the urban house owner goes beyond mere holding on behalf of the state or the government, because a holder (as envisaged in the Civil Code) possesses a thing on behalf of another owner or possessor.[22] Although leaseholding does not confer ownership rights over the land, it is not exclusively restricted to '*usus*' (short of enjoying the fruits of ownership) because the leaseholder is entitled to construct buildings on the land and then own the buildings during the period of lease.

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[20] "Ethiopian pastoralists have the right to free land for grazing and cultivation as well as the right not to be displaced from their own lands. The implementation shall be specified by law."

[21] Article 1205 states the scope of ownership rights. Sub-Article 1 states the scope of the right to use and exploit property, and Sub-Article 2 recognizes the right to dispose of property 'for consideration or gratuitously.'

[22] *See* for example Civil Code, Arts. 1141, 1147.

In spite of current restrictions on transfer of leasehold under Proclamation No. 721/2011[23] on which a certain level of construction is not made, leasehold over land is not a *restrictive use right* (mere *usus*) comparable to a tenant's use right of a house s/he has rented from the owner. Instead, it is an *expansive use right* which includes the right to use, develop and exploit the land. Leasehold over urban land thus confers a wider right than usufruct under the Civil Code.[24] Article 24 of the Lease Proclamation[25] can also be cited in this regard because it recognizes the right to transfer or pledge leasehold rights under the circumstances stipulated in the provision.

The owner of an urban house is regarded as the *owner* of the building, and at the same time, as the *possessor* of the land based on *leasehold* or *old possession.*[26] In effect, property rights of urban house owners go beyond claims over the roofs and walls, but should also extend to the economic value of their rights to use the land. Upon expropriation, *equity* thus requires compensation not only to the roofs and walls, but also to the land use rights that are being transferred to the new holder.

The tension discussed in the preceding section between the considerations of '*equity*' and '*efficiency*' can be addressed by taking the market value received from the investor per square meter as a threshold. This amount should thus go to the landholder because it is not the public ownership over the land that is transferred, but the use right of the evictee. In other words, the principle of '*efficiency*' cannot justify the denial of compensation (commensurate with the market price paid by investors to municipal authorities) for the land use rights that a house owner loses.

2.3 Strong land use rights and the issue of enhanced re-development cost

Some writers argue that imperfect property rights can be conducive to the transfer of property to more efficient users[27] with relatively low investment cost. Proponents of this view state that the exposure of investors to heavy compensation adversely affects the momentum and dynamism of investment.

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[23] The restriction under Article 24 *et al* of Urban Lands Lease Holding Proclamation No. 721/2011 is meant to control speculative land transfers which are susceptible to corruption.

[24] *See* Civil Code, Articles 1309-1358 for the rights in usufruct.

[25] Urban Lands Lease Holding Proclamation No. 721/2011.

[26] Article 2(18) of the Urban Lands Lease Holding Proclamation No. 721/2011 defines '*old possession*' as "a plot of land legally acquired before the urban center entered into the leasehold system or a land provided as compensation in kind to persons evicted from old possession."

[27] *See* for example, Schmid, A (2008). *An Institutional Economic Perspective on Economic Growth* (Michigan Institute University Paper).

China is cited as an example for the benefits of relatively easier eviction owing to public ownership of land and the relatively modest levels of compensation to urban and rural landholders.

As Zhang observes, however, property rights in China are not imperfect with regard to the protection accorded to investors. He argues that even if there was initially weaker protection of land use rights upon the eviction of landholders, widespread discontent impedes long term development.[28] This was soon realized, and China's property rights protection regime is steadily strengthened particularly since the enactment the 2007 Chinese Property law.

The fact that most houses are government owned in Ethiopia makes it unlikely that compensation for the reallocation of land use rights based on the lease rates becomes a hindrance to urban redevelopment. It is to be noted that the need for striking a balance between '*equity*' and '*efficiency*' not only involves fair compensation and due process in favour of evictees, but also requires due protection against 'holdouts' from some landholders who may demand unrealistically overstated payments. Such encounters can be resolved by making reference to the price offered per square meter in the vicinity or comparable location during the preceding months. The most difficult challenge in the Ethiopian context is not thus the risk of such 'holdouts' but the tendency to trade-off 'equity' by administrative authorities that are, as the following sections indicate, vested with discretionary powers.

3. Avenues of Administrative Discretion

3.1 The definition of 'public purpose' and its susceptibility to arbitrary revision of urban plans

The definition of "public purpose" embodied in Proclamation No. 721/2011 is very wide and susceptible to administrative discretion. The Proclamation defines 'public purpose' as "the use of land defined as such by the decision of the appropriate body in conformity with urban plan in order to ensure the interest of the people to acquire direct or indirect benefits from the use of the land and to consolidate sustainable socio-economic development".[29] This definition has the following four *cumulative* elements:

(a) an appropriate body (i.e. municipality) can decide whether a certain use of urban land constitutes 'public purpose'; and,
(b) the decision should be made in conformity with urban plan; and

[28] Xiaobo Zhang (2006). Asymmetric Property Rights in China's Economic Growth, Paper presented at the session on "Land Rights and Social Security in China" of the Annual American Economics Association Meetings, Boston, January 6-8, 2006. International Food Policy Research Institute (IFPRI).

[29] Urban Lands Lease Holding Proclamation No. 721/2011, Art. 2(7).

(c) ensure the interest of people to acquire direct or indirect benefits from the use of the land, and
(d) consolidate sustainable socio-economic development.

The first and second elements raise queries related with the modalities of the issuance, revision and implementation of urban plan.[30] Where there is a master plan with long-term perspectives, urban plan can be said to be predictable, proactive and visionary. On the other hand, if a city mainly develops haphazardly, urban plans can be significantly dictated by unfolding realties of urban growth and administrative decisions rather than serving as proactive blueprints for structural and local urban development that consider prospective urban development needs including future transportation and utility expansions.

According to the Urban Planning Proclamation No. 574/2008, the purposes of urban planning include control against "the proliferation of unplanned urban centers" which should be "regulated and guided by sound and visionary urban plans to bring about balanced and integrated national, regional and local development"; and "the carrying out of development undertakings in urban centers", in such a manner that "they will not be detrimental to the general wellbeing of the community as well as the protection of natural environment".[31]

These basic principles enshrined in the preamble of Proclamation No. 574/2008 are further substantiated by the basic principles embodied in Article 5[32] which include:

- the promotion of balanced and mixed population distribution;
- safeguarding the community and the environment;
- preservation and restoration of historical and cultural heritages;
- balancing public and private interests; and
- ensuring sustainable development.

The Proclamation envisages city-wide structural plan[33] and local development plans[34]. The structural plan, *inter alia*, shows "the magnitude and direction of growth of the urban center", "principal land use classes", "housing development"; "the layout and organization of major physical and social infrastructure", "urban redevelopment intervention areas", "environmental aspects" and industry zone".[35] As stipulated under Article 11(3) of the

[30] Art. 2(8) of Proclamation No. 721/2011 defines urban plan as "structural plan, local development plan or basic plan of an urban center including annexed descriptive documents which are legally endorsed by the authorized body and have legally binding effect."
[31] Urban Planning Proclamation No. 574/2008, Paragraphs 1 and 3 of the Preamble.
[32] Id., Art. 5, Sub-Articles 6 to 10.
[33] Id., Art. 8(1).
[34] Id., Art. 8(2).
[35] Id., Art. 9(2).

Proclamation, local development plans give further details regarding the master plan and shall, as appropriate, state:

a) zoning of use type, building height and density;
b) local streets and layout of basic infrastructure;
c) organization of transport system;
d) housing typology and neighborhood organization;
e) urban renewal, upgrading and reallocation intervention areas; and
f) green areas, open spaces, water bodies, and places that might be utilized for common benefits.

Structural plans are valid for ten years[36] and local development plans are "implemented within the validity period of the structure plan".[37] The power to formally initiate urban plans is vested upon "chartered cities and urban administrations as well as the concerned regional and federal authorities".[38] Pursuant to Article 14 of the Proclamation, urban centers[39] "at all levels shall have the power and duty to prepare and review or cause the preparation and review of their respective structure and local development plans by certified private consultants or public institutions" and the provision further states that the particulars shall be determined by law.

After the preparation of the final draft of structure and local development plans, they shall be deliberated upon and approved by [city] councils and communicated to the concerned regional or federal authorities",[40] subject to the possibility of revision by the federal or regional governments[41] in the event of non-conformity with the requirements set forth under Proclamation No. 574/2008. Upon approval, chartered cities or urban administrations shall implement the structure and local development plans,[42] in the course of which they are empowered to "dispossess urban land holdings against paying compensation".[43]

Urban centers are also empowered to revise and modify the structure and urban plans[44] after the expiry of the plan implementation period [45] or before the

[36] Id., Art. 10.
[37] Id., Art. 12.
[38] Id., Art. 13(3).
[39] According to Art. 2(8) of Proclamation No. 574/2008 "Urban Center means any locality with established municipality or having a population size of 2000 or above inhabitants, of which 50% of its labor force is primarily engaged in non-agricultural activities."
[40] Proclamation No. 574/2008, Art. 16(1).
[41] Id., Art. 16(2).
[42] Id., Art. 20.
[43] Id., Art. 20(2).
[44] Id., Art. 23.
[45] Id., Art. 22(1).

expiry of this period of implementation "if the need arises".[46] Moreover, urban plans that are approved "may be modified with regard to a portion of an urban center where the need arises".[47] In the process of performing their urban redevelopment functions, administrative entities thus assume tasks of urban (master) plan revisions.

The preceding paragraphs show that municipalities are empowered to initiate, approve, implement, revise and modify city master plans which include structure and local development plans. An institution that is empowered to provide land on leasehold sales[48] is at the same time empowered to approve, implement and modify urban master plans. This dual function is susceptible to undue compromises against commitment to the urban master plan under the pretext of 'accommodation' (ማጣጣም). This can be observed from the increasingly dwindling riverbanks, open spaces and green areas of Addis Ababa. Cases in point are:

- constructions in riverbanks such as one of the tallest buildings in Addis Ababa at the entrance of Ghion Hotel,
- the big mosque under construction in a riverbank at Afincho Ber,
- premises rented out for boutiques, cafés and shops which are mushrooming in many churchyards (Lideta, Urael, etc) blocking 'dejeselam /ደጀሰላም' (spiritual moments of believers and slight bows while passing by churches),
- the heavy concrete concentration at Kazanchis which clearly proves the impact of haphazard rush to augment revenue from lease sales to the detriment of the municipal functions of maintaining balance between built-up areas and open spaces,
- blocked view of Yeka Mountain's green landscape by constructions such as Belle View Hotel, the ten-storey building at the foothills of the mountain (which faces Diaspora Square /Megenagna);[49]
- and many others.

Urban planning is required to ensure that houses (including their exterior paints) can melt into a harmonic landscape without disturbing its surroundings.[50] On the contrary, the examples stated above violate the objectives enshrined in

[46] Id., Art. 22(2).
[47] Id., Art. 22(3).
[48] The city administration is vested with the power to lease out land under the Urban Lands Lease Holding Proclamation No. 721/2011. *See* for example, Articles 4, 8-11, 14, 16-20, etc.
[49] Constructions on such locations should be rare, and in the event of exceptional permissions, the premises should have been a maximum of ground plus one with adequate frontal space and gardening to conserve the landscape greenery.
[50] *See* for example, <http://www.havsvidden.com/en/cliff-houses>, Accessed: 15 December 2013.

Proclamation No. 574/2008 because the Proclamation aims at urban development "regulated and guided by sound and visionary urban plans to bring about balanced and integrated national, regional and local development"[51] commensurate with the requirements of "the general wellbeing of the community as well as the protection of natural environment".[52]

3.2 'Public purpose' as ground of expropriation

As stated in the introductory paragraphs of Section 3.1, the third and fourth elements in the definition of public purpose under Article 2(7) of the Urban Lands Lease Holding Proclamation No. 721/2011 relate the definition of 'public purpose' with "the interest of people to acquire direct or indirect benefits from the use of the land", and "sustainable socio-economic development". The phrase 'direct or indirect benefits' is susceptible to a very wide interpretation, while the phrase "sustainable socio-economic development" can easily be watered down by administrative authorities even if its definition envisages the economic, social and environmental dimensions of urban development in the context of good governance.

Proclamation No. 721/2011 empowers the Ministry of Urban Development and Construction to "prepare model regulations, directives and manuals to be issued for the implementation of this Proclamation". [53] Moreover, "Regions and city administrations shall have the powers and duties to (1) administer land, in all urban centers …"; and (2) issue regulations and directives necessary for the implementation of [the] Proclamation".[54]

Such powers to administer land and to issue regulations can entail abuse of power if there are gaps in harnessing the rulemaking and administrative function of these administrative entities. These gaps exacerbate administrative discretion and abuse owing to the conflict of interest involved in the functions of administrative authorities that are entrusted with rule making, adjudication (of administrative complaints) and implementation of the same without adequate judicial scrutiny and in the absence of administrative procedural law which is yet a draft since 2001.[55]

Article 40(8) of the FDRE Constitution provides that "[w]ithout prejudice to the right to private property, the government may expropriate private property for public purposes subject to payment in advance of compensation commensurate to the value of the property". The definition of 'public purpose' is one of the factors that determine the scope of administrative entities in the

[51] Proclamation No. 574/2008, Preamble 1.
[52] Id., Preamble 3.
[53] Proclamation No. 721/2011, Art. 32(5).
[54] Ibid, Art. 33.
[55] The Draft Federal Administrative Procedure Proclamation, Justice and Legal Systems Research Institute, 2001, (Unpublished).

course of expropriation. Proclamation No. 455/2005 defines public purpose as follows:

> 'public purpose' means the use of land defined as such by the decision of the appropriate body in conformity with urban structure plan or development plan in order to ensure the interest of the peoples to acquire direct or indirect benefits from the use of the land and to consolidate sustainable socio-economic development.[56]

This definition is nearly identical with the definition given to 'public interest' in Article 2(7) the Urban Lands Lease Holding Proclamation No. 721/2011. As discussed earlier, the ambiguities in the definition of 'direct and indirect benefits' render arbitrary definitions of 'public purpose' possible thereby adversely affecting property rights. Article 3(1) of Proclamation No. 455/2005 gives a wide definition of 'public purpose' in the context of urban centers. It reads:

> A woreda or an urban administration shall, upon payment in advance of compensation in accordance with this Proclamation, have the power to expropriate rural or urban landholdings for public purpose where it believes that it should be used for a better development project to be carried out by public entities, private investors, cooperative societies or other organs, or where such expropriation has been decided by the appropriate higher regional or federal government organ for the same purpose.

Belief by a woreda or urban administration that a rural or urban landholding "should be used for a better development project to be carried out by public entities, private investors, cooperative societies or other organs" can thus constitute public purpose thereby rendering the definition contingent upon the 'belief' of administrative entities rather than clearly articulated objective thresholds that define 'public purpose'. This definition is also problematic because it renders privately owned houses vulnerable if, for example, there is an attractive leasehold price which predominantly goes into the accounts of the municipality rather than its full transfer to the evicted homeowner as compensation.

Even if the same definition of 'public purpose' applies for all forms of landholding, Article 3(2) of Proclamation No. 455/2005 gives a relatively favourable exception to leaseholds. It reads: "[n]otwithstanding the provisions of Sub-Article (I) of [Article 3], no land leaseholding may be expropriated unless the lessee has failed to honor the obligations he assumed under the Lease Proclamation and Regulations or [unless] the land is required for development works to be undertaken by government."

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[56] The Expropriation of Landholdings for Public Purposes and Payment of Compensation Proclamation No. 455/2005, Art. 2(5).

This exception uses two standards in the application of public purpose as defined in the proclamation. Land held under old possessions (which include a significant portion or urban land in Ethiopia), is subjected to the wider application of the definition of 'public purpose'. In contrast, the definition of 'public purpose' embodied in the proclamation applies to leasehold only if the leasee fails "to honor the obligations he assumed under the Lease Proclamation and Regulations or the land is required for development works to be undertaken by government."[57] However, unlike Article 3(2) of Proclamation No. 455/2005 which gives a relatively favourable exception to leaseholds (as opposed to old possessions) in the definition of public purpose, Article 25(1)(b) of the Lease Proclamation No. 721/2011 does not make such restriction in the definition of 'public interest' for the purpose of termination of leasehold.

3.3 Notification, property valuation, compensation and complaint procedures

Notification of expropriation is made in writing by the woreda or urban administration that has decided to expropriate a landholding, and the notification states "the time when the land has to be vacated and the amount of compensation to be paid".[58] The time for handing over the land to be vacated may extend until ninety days[59], and shall not exceed 30 (thirty) days from the date of receipt of expropriation order "where there is no crop, perennial crop or other property on the expropriated land".[60] In case "a landholder who has been served with an expropriation order refuses to handover the land within the period specified in Sub-Article (3) or (4) of [Article 4], the woreda or urban administration may use police force to take over the land".[61]

The basis and amount of compensation including displacement compensation are stipulated under Articles 7 and 8 of the Proclamation while Articles 10 and 11 deal with the modalities of valuation and complaint procedures. The compensation paid to the landholder covers the property on the land and permanent improvements made to the land.[62] "The amount of compensation for property situated on the expropriated land shall be determined on the basis of

[57] It is, however, to be noted that an act of reclaiming the leasehold right by a city administration upon a leasee's failure to honor the lease agreement does not constitute expropriation.
[58] Id., Art. Article 4(1).
[59] Id., Art. Art. 4(3). The days will be counted from "the date of payment of compensation or, if he refuses to receive the payment, from the date of deposit of the compensation in a blocked bank account in the name of the woreda or urban administration as may be appropriate."
[60] Id., Art. Art. 4(4).
[61] Id., Art. Art. 4(5).
[62] Id., Art. Art. 7(1).

replacement cost of the property".[63] The amount paid as "compensation for permanent improvement to land shall be equal to the value of capital and labour expended on the land".[64] These provisions have substantially reduced the amount of compensation that was provided under Article 1474(1) of the Civil Code which provides that "[t]he amount of compensation or the value of the land that may be given to replace the expropriated land shall be equal to the amount of the actual damage caused by expropriation".

Article 26 of the Urban Lands Leasehold Proclamation states the power of the appropriate body[65] with regard to clearing and taking over urban land. Article 26(1) provides that the appropriate body "shall have the power, where it is in the public interest, to clear and take over urban land upon payment of commensurate compensation, in advance, for the properties to be removed from the land". The person displaced "shall be provided with a substitute plot of land within the urban centre the size of which shall be determined by the region or the city administration".[66] The provision, i.e. Article 26, further deals with clearance upon default in violation of the various terms in lease contracts[67] and illegally occupied urban land.[68]

The possessor of the land displaced under Art. 26(1) is served written clearing order which states "the time the land has to be vacated, the amount of compensation to be paid and the size and locality of the substitute plot of land to be availed".[69] The period of notification shall not be less than 90 days.[70] Grievances may be submitted to the body which has rendered the clearing order "within 15 working days after receipt of the order",[71] and appeal can further be lodged to the Urban Land Clearing and Compensation Cases Appellate Tribunal.[72] The tribunal shall be "accountable to the council of the region or the city administration"[73] and it "may not be governed by the provisions of the ordinary Civil Procedure Code while conducting its functions".[74]

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[63] Id., Art. Art. 7(2).
[64] Id., Art. Art. 7(4).
[65] Art. 2(6) of Proclamation No. 721/2011 defines 'appropriate body' as "a body of a region or a city administration vested with the power to administer and develop urban land."
[66] Proclamation No. 721/2011, Art. 26(2)
[67] Id., Art. 26(3).
[68] Id., Art. 26(4).
[69] Id., Art. 27(1).
[70] Id., Art. 27(2).
[71] Id., Art. 28(1).
[72] Id., Arts. 29, 30.
[73] Art. 30(3).
[74] Art. 30(8).

The decision of the Land Clearance Appeals Commission is final except for compensation. The finality clause embodied in the proclamation allows the aggrieved party to lodge an appeal only on the issue of compensation subject to "the right to file petition to the Cassation Division of the Federal Supreme Court if there is fundamental error of law".[75]

The word 'yehizb (public ownership)' as used for rural land in Proclamation. No 31, 1975,[76] and 'yemengist (government ownership)' as used for urban land in Proclamation No. 47/1975[77] may seem to imply variation in the content of the use rights".[78] However, the Constitution does make such distinction between the scope of rural and urban land use rights.

As discussed in Section 1, the *efficient* use of urban land calls for urban re-development, and meanwhile, there is the need for win-win packages in which evicted persons should be fully paid the amount that is earned by the municipality. Such win-win schemes, however, require changes in Ethiopia's expropriation legal regime which should recognize compensation commensurate with the location value of the land use rights that are reallocated to another leaseholder. This requires the recognition of the economic value of a landholder's use rights and the periodic enhanced value of such rights which should be fully compensated upon expropriation.

This evokes the issue whether the economic value of a landholder's use rights is recognized under the Constitution. As highlighted under Section 2.1, Article 40(3) of the Constitution can be interpreted as bestowing bare ownership to the state if the use right over the land is held by a person who possesses the land. In fact, the land use rights of a landholder in Ethiopia goes beyond the elements of *usus* and *fructus* (stated above) because the right embodies some elements of *abusus* as land use rights can be transferred through inheritance and other means stated in the law.[79]

The notion of public ownership of land clearly needs pragmatic and purposive interpretation beyond its narrow literal interpretation. As Daniel Weldegebriel states:

> Today, whether in urban or rural areas of Ethiopia, huge amount of land is being expropriated for urban redevelopment, urban expansion, road

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[75] Focus group discussion summary, 13 July 2013. The Focus Group Discussion on "Property Rights Protection and Private Sector Development in Ethiopia" was sponsored by the Private Sector Development Hub, Ethiopian Chamber of Commerce and Sectoral Associations.

[76] Public Ownership of Rural Lands Proclamation No 31/1975.

[77] Government Ownership of Urban Lands and Extra Houses Proclamation No. 47/1975

[78] Ato Muluneh Wordofa, President, Addis Ababa Land Clearance Appeals Commission (.Focus group discussion summary, *supra* note 75.

[79] *See* for example Article 24 of Proclamation No. 721/2011.

> construction and other public activities. The valuation method adopted in the expropriation proclamation (Proclamation No. 455/2005) has a basic [flaw] in implementing the constitutional principle of payment of 'commensurate' amount. In urban areas, location has no value and owners are being compensated only the 'replacement cost' of buildings; government reaps the location value that was developed and grew at the expense of the land holder/dweller. … The usual criticism on the practice is that compensation is not adequate; does not reflect the market value at all; and does not follow the constitutional guarantee provided to land rights.[80]

Daniel[81] compares lease bid advertised in Bole area as can be seen from newspapers which can be over 4 million Birr for 500 square meters vis-à-vis the amount paid to the owner of the house which can be around Birr 400,000 (Four Hundred Thousand). The following illustrates the margin of economic value of land use rights that landholders are denied upon reallocation of the urban land:

> … [A]n owner of a hotel wished to purchase a neighboring land (small residential house) to use it as parking lot. He offered the owner 300,000 birr for the house but the owner refused to sell her property. The hotel owner, afterwards, applied for expropriation of the neighboring land in order to expand his parking lots. Accordingly, the respective urban land administration started expropriation process and acquired the land for the hotel owner upon payment of 60,000 birr, one fifth of the previously offered price.[82]

Yoseph Aemero notes that "property rights should not be restrictively interpreted to mean fixtures to the land. The person who uses land has use rights that will be terminated due to expropriation, and this should also be considered during expropriation".[83] Instead of compensation commensurate with the value of the use right on the land, an urban landholder shall, upon expropriation, be entitled to "a plot of urban land, the size of which shall be determined by the

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[80] Daniel Woldegbriel Ambaye (2012). "Land Rights in Ethiopia: Ownership, equity, and liberty in land use rights", *FIG Working Week 2012, available at* <http://www.fig.net/pub/fig2012/papers/ts02d/TS02D_ambaye_5521.pdf>

[81] Daniel WoldeGebriel, Bahir Dar University, Institute of Land Administration (Focus group discussion summary), 13 July 2013, *supra* note 75.

[82] Daniel Woldegebriel (2013). *Land Rights and Expropriation in Ethiopia*, PhD Thesis, Real Estate Planning and Land Law, Department of Real Estate and Construction Management, School of Architecture and the Built Environment Royal Institute of Technology (KTH), Sweden. p. 214.

[83] Yoseph Aemero, Former High Court Judge, Currently Attorney and Consultant at Law (Focus group discussion summary), 13 July 2013. *supra* note 75.

urban administration, to be used for the construction of a dwelling house"[84] and a displacement compensation "equivalent to the estimated annual rent of the demolished dwelling house or be allowed to reside, [free] of charge, for one year in a comparable dwelling house owned by the urban administration".[85] These entitlements for a plot of land and displacement compensation shall also apply *mutatis mutandis* to houses used for business undertakings.[86]

> There are many types of loss that are not considered in the process of compensation. The valuation is not thus appropriate. In addition to the enhanced value of the land use rights and location value that are left unconsidered, there are also indirect losses (such as trade loss) due to trade interruptions as a result of the expropriation process.[87]

Valuation of the property situated on expropriated rural land is done by "a committee of not more than five experts having the relevant qualification to be designated by the woreda administration".[88] In the case of urban land expropriation as well, the urban administration designates a committee of experts with the relevant qualification for the valuation of the property on the land.[89] The level of expertise, fairness and impartiality observed in the process of valuation is thus debatable.

Council of Ministers Regulations No. 135/2007[90] has been enacted to implement the provisions that deal with compensation under Proclamation No. 455/2005. It provides for the determination of the amount of compensation in the case of total or partial demolition of buildings.[91] Article 13 of the Regulations further provides a formula for the calculation of the compensation for buildings and relocated buildings. The provision of replacement of urban land is, however, "governed by directives issued by Regional States in accordance with Article 14 (2) of the Proclamation".[92] Although such replacement is commendable, the problem lies in its failure to distinguish between the economic values of the land expropriated and the land that is provided as replacement. Another challenge in this regard relates to the delay in the replacement of urban land.

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[84] Expropriation of Landholdings for Public Purposes and Payment of Compensation Proclamation No. 455/2005, Art. 8(4)(a).
[85] Id., Art. Art. 8(4)(b).
[86] Id., Art. Art. 8(5).
[87] Daniel Woldegebriel, Bahir Dar University, Institute of Land Administration (Focus group discussion summary), 13 July 2013, *supra* note 75.
[88] Id., Art. Art. 10(1).
[89] Id., Art. Art. 10(2).
[90] Payment o f Compensation for Property Situated on Landholdings Expropriated for Public Purposes, Council of Ministers Regulations No. 135/2007.
[91] Id., Art. 3.
[92] Id., Art. 14.

Good practice that can be noted at this juncture relates to the encouragement and support given to members of the business community (such as shop owners in Merkato area) to have leasehold by forming a private limited company, contribute capital, and build their premises according to the city's master plan. Under these schemes, the property rights of shop owners who had rented shops from the Agency for Government Houses are enhanced toward leasehold and this indeed facilitates private sector development.

Under Proclamation No. 455/2005, complaint is lodged to "the administrative organ established by the urban administration to hear grievances related to urban landholdings" if a "holder of an expropriated urban landholding is dissatisfied with the amount of compensation". [93] It is to be noted that the issue that can be contested is unduly restricted to the inadequacy of compensation. In addition to such restriction, "a complaint relating to the amount of compensation shall be submitted to the regular court having jurisdiction" can be made only if "an administrative organ to hear grievances related to urban landholding is not yet established".[94] The submission of the complaint to courts of law is thus the exception rather than the rule. This does not, of course, restrict the aggrieved person from appealing to regular courts.

Article 11 of the Proclamation further stipulates appellate procedures for compensation which "as may be appropriate" (depending on the entity that has rendered the decision) are submitted "to the regular appellate court or municipal appellate court within 30 days from the date of the decision".[95] However, an appeal submitted by any landholder who has been served with an expropriation order may be admitted only if it is accompanied by "a document that proves the handover of the land to the urban or woreda administration".[96] Moreover, the complaint regarding the amount of compensation shall not delay the execution of an expropriation order.[97]

4. The Need for Judicial Scrutiny in Title Deed Revocations

Administrative law, *inter alia,* deals with the institutional procedures which should be followed by administrative agencies "in dealing with the public" in the course of their actions.[98] It also includes "judicial (and to some extent

[93] Proclamation No. 455/2005, Art. 11(2).
[94] Id., Art. 11(1).
[95] Id., Art. 11(4).
[96] Id., Art. 11(6).
[97] Id., Art. 11(7).
[98] Peter L. Strauss (2002). *Administrative Law in the United States*, Second Edition (Durham: Carolina Academic Press), p. 147.

political) review of those actions".[99] The mandate entrusted to administrative authorities in Ethiopia includes not only implementing the proclamations enacted by the parliament but also enables them to issue of enabling legislation (namely Council of Ministers Regulations). These clearly involve administrative and legislative functions. However, the latter (i.e. the legislative function) is an incidental role because the issuance of regulations and directives is merely expected to serve an instrumental function in the implementation of the proclamation rather that stretching the scope and/or content of the latter.

Another aspect of administrative law relates to the tension between administrative decision-making and court judgments. As the latter is the task of courts, administrative entities are not expected to assume a judicial function in the guise of administrative decisions, with due respect to the vital role of administrative tribunals in resolving disputes (subject to the need for schemes of control such as judicial review).

The extent to which ambiguities and discretionary power are avoided in the demarcation lines between administrative and legislative functions, or between administrative and judicial functions determine the level of check and balance against abuse of authority by administrative entities. This balance ultimately determines the degree of the normative and institutional safeguard towards the protection of public interest and private rights as co-related and interdependent aspects of administrative responsibility and accountability. Unfortunately, however, Ethiopia has not yet enacted an administrative procedure law, a task which is long overdue.

The advantage of administrative tribunals relates to efficiency and effectiveness in contrast to judicial processes that might cause delay. However, experience in the complaints against expropriation and the amount of compensation show that equal attention ought to be given to the issue of impartiality through, for example, judicial review and stakeholder representation when members of administrative tribunals are appointed.

Most importantly, the notion of land use right ought to be given a wider definition, which should include what the landholder loses in terms of use right and the right to transfer the use rights through successions, sale, etc, which clearly goes beyond the fixtures (such as houses) on the land. Denial of economic value to land use rights adversely affects long-term investments, financial resources through collaterals and natural resource management. The narrow definition given to land use rights can be (as stated earlier) discerned from the lease proclamation[100] and from the expropriation proclamation[101]

[99] Ibid.
[100] Urban Lands Lease Holding Proclamation No. 721/2011.
[101] The Expropriation of Landholdings for Public Purposes and Payment of Compensation Proclamation No. 455/2005.

although the Constitution does not, in principle, warrant such restrictive stipulations.

This problem in the conception of public property clearly influences the administrative decisions and awards of various administrative tribunals. It is further exacerbated by the legislative and adjudicative roles of executive offices in the course of allowing and withdrawing use rights. These discretionary powers can at times extend to a point of reluctance to implement court decisions.

There are a number of cases whereby regulatory offices revoked the validity of urban landholding certificates (after a court decision).[102] This calls for empowering courts to examine the process of such revocation (ማምከን) and the process of its initial issuance whenever a case involves such issues.[103] Administrative entities are entitled to issue landholding certificates and also revoke them. Registration, verification and certification are done by the administrative entities. Courts should indeed be allowed to review the process to identify any form of impropriety in the case.[104] There are encouraging developments in this regard because recent jurisprudence in the decisions of the Federal Supreme Court Cassation Division shows that courts are entitled to examine the legality in the procedures pursued by administrative organs in the issuance and revocation of landholding title deeds

In *Taitu Kebede's Heirs v. Tirunesh et al,*[105] the Federal Supreme Court Cassation Bench invoked Articles 1191-1198 of the Civil Code and held that 'the issuance of ownership certificates for immovable property should be in conformity with the proper legal procedures. Their revocation should also pursue legal procedures".[106] It found that "The lower courts should have evaluated the evidence produced by both parties and they have thus erred in rejecting the claim of the petitioners solely based on the revocation of title certificate, and this is not consistent with the objectives and content of the Civil Code provisions indicated earlier". [107]

[102] Focus Group Discussion, 13 July 2013, *supra* note 75.
[103] Ibid.
[104] Ibid.
[105] *Taitu Kebede's Heirs v. Tirunesh et al,* (File No. 67011, 20 March 2012), Federal Supreme Court Cassation Division Decisions, Vol. 13, pp. 450-452.
[106] Federal Supreme Court Cassation Decisions, Vol. 13, pp. 450 – 452, Abridged Translation, *EtLex*, Vol. 1, Ethiopian Legal Information Consortium (December 2013), p. 258.
[107] Id., p, 260.

Genet Seyoum v. Kirkos Sub-City Kebele 17/18 Administration et al[108] clearly illustrates the conflict of interest involved when an administrative authority is allowed to revoke title deeds without judicial scrutiny. After the Federal First Instance court decided in favour of Dr. Genet based on her landholding certificate, the administrative authority revoked the certificate during the appellate litigation at the Federal High Court and argued that it has new evidence for the revocation of the landholding certificate thereby requesting dismissal of the case. The Federal High Court reversed the decision of the lower court based on the 'new evidence', i.e. revocation of the title certificate.

However the Federal Supreme Court Cassation Division decided that revocation of title certificate by the administrative organ while the litigation is underway shall not lead to the immediate dismissal of the case thereby holding that courts can examine the validity and legality of the revocation. It observed that the petitioner (plaintiff at the lower court) should have been given the opportunity to contest the validity of the revocation, and it remanded the case to the Federal First Instance Court so that it can examine the arguments and evidence of both parties and decide on the validity of the revocation. The Cassation Division held that:

> … if the revocation of the title certificate is contested, decision should be given after examining whether the revocation is lawful, and the mere claim that the title certificate is revoked does not render it valid unless the issue is argued upon. The security of property rights enshrined in Articles 40(1) and 40(2) of the Constitution will be violated if it is held that the person whose holding certificate is revoked by an administrative organ does not have judicial recourse.[109]

Likewise, in *Abadit L. v. Zalambesa Town Administration & Berhane Z.* [110], Cassation File No. 48217 (13 October 2010), the Cassation Division of the Federal Supreme Court found that a statement of claim that is submitted to courts of law against the improper revocation of landholding and ownership of a house can be adjudicated by courts and that it shall not be regarded as a purely administrative task which falls outside the jurisdiction of courts.

This is a commendable trend which should be buttressed by consolidating judicial scrutiny, in the absence of which administrative powers will be trapped in a setting susceptible to discretion and abuse of authority. Although agencies

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[108] *Genet Seyoum v. Kirkos Sub-City Kebele 17/18 Administration et al,* File No. 64014 (7 March 2012), Federal Supreme Court Cassation Decisions, Vol. 437-440.

[109] Federal Supreme Court Cassation Decisions, Vol. 13, pp. 437 – 440, Abridged Translation, *EtLex*, Vol. 1, Ethiopian Legal Information Consortium, (December 2013), p. 263.

[110] *Abadit L. v. Zalambesa Town Administration & Berhane Z.*, File No. 48217 (13 October 2010), Federal Supreme Court Cassation Decisions, Vol. 11, pp. 249 – 251.

such as the Ombudsman,[111] strong anti-corruption laws,[112] and institutions in charge of enhancing the protection of human rights (which includes the right to property)[113] are meant to harness and control various infringements of the law including abuse of authority by administrative entities, the strength and impact of such schemes are largely contingent upon the promulgation and implementation of administrative procedure law that determines the legal bounds and accountability of administrative bodies. Such law is, *inter alia*, expected to address the root causes of the problems related with (a) the administrative entities and procedures in decision making; (b) complaint procedures in the course of protecting the rights, (c) rule making to apply (and not to alter) the laws enacted by the legislature; (d) enforcement of court decisions; (e) administrative hearings and their enforcement, and (f) prospects of judicial review if complaint is lodged against the decisions of administrative tribunals or after exhaustion of 'administrative remedies'.

5. The Tension between Lease Sales and Municipal Functions

5.1- Conventional municipal services

A century ago, Maltbie used memorable words to state the fundamental change in the functions of municipalities of modern cities. He wrote: "The old city was the sovereign of its people. The new city is their servant".[114] The primary function of municipalities, *inter alia*, relate to urban planning, water and energy supply, drainage and sewerage, waste management, urban transport, roads, street lighting, parking areas, community health, education, protection of environment, markets, slaughterhouses and other functions.[115] Municipalities and townships in Ethiopia were given similar functions since the enactment of Proclamation 4/7 (1945)[116], as amended by subsequent laws. Article 4(iii)(a) of the Proclamation, *inter alia*, states tasks of municipalities as:

> … keeping of streets, squares, bridges, promenades and gardens, …; schemes affecting sewerage, alignment of buildings, and generally the

[111] Institution of the Ombudsman Establishment Proclamation No. 211/2000.

[112] Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No. 434/2005.

[113] Ethiopia Human Rights Commission Establishment Proclamation No. 210/2000.

[114] Milo Roy Maltbie (1900) *Municipal Functions*. [In Review by: Delos F. Wilcox Source: *Political Science Quarterly,* Vol. 15, No. 2 (Jun., 1900)] p. 335.

[115] *See* for example, the Constitution of the Republic of South Africa 1996 (Act No. 108 of 1996); Art. 156 (Powers and functions of Municipalities), Chapter VI of the Mizoram Municipalities Act, 20017 (As amended in 2009), India, and other legal instruments that state functions of municipalities.

[116] Consolidated Laws of Ethiopia , Vol. 1 (Faculty of Law, HSIU), 1972 , p. 133-135.

> whole of town public services such as water, light, paving of roads, cleansing, market areas, cemeteries slaughter houses and drains, theatres all public houses and baths and anything that is likely to contribute to the embellishment and the cleanliness of the town.

Sub-articles 'b' to 'f' of the provision further provide that municipalities and townships in Ethiopia shall offer fire safety services, poverty alleviation, hospitals, mental asylums, schools and other municipal welfare institutions, town health and hygiene services (not provided by the Ministry of Public Health), urban planning for buildings, large repairs, demolitions, the width level and construction of any new roads and generally for all works to be undertaken by private individuals.

These conventional activities of municipalities are similar in various countries. For example, municipal functions of cities in USA[117] include urban planning and the "regulation of land-use and construction of buildings". This regulatory function of municipalities clearly relates to the task of designing the master plans and the regulatory function of ensuring that land use and construction of buildings are conducted in accordance with the master plan. Other functions of US municipalities include municipal functions related to roads, bridges, water supply, public health, primary education, primary health care, sanitation, waste management, fire services, urban forestry, provision of urban amenities and facilities (such as parks, gardens, playgrounds), burials and burial grounds, cremations, vital statistics (including registration of births and deaths), street lighting, parking lots, bus stops and public conveniences, regulation of slaughter houses and tanneries, and the protection of the environment and the promotion of cultural, education and aesthetic aspects.[118] Moreover, municipalities pay particular attention to slum improvement and up-gradation, urban poverty alleviation, safeguarding the interests of weaker sections of society, including the handicapped and the mentally retarded.[119]

The argument that is usually raised by municipal authorities in Ethiopia relates to the challenges of increasing urban population. However, this factor has not led to scenarios of role conflict in countries such as India where there is a graver pressure of urban overpopulation. For example, Section 57 of Chapter VI of the Mizoram Municipalities Act, 2007 (as amended in 2009) India, contains list of powers and functions of the municipality nearly similar to the ones stated above. In addition to water supply, drainage, sewerage and solid waste management, the list includes:

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[117] *See* <http://municipal.uslegal.com/powers-functions-and-duties-of-municipality>, accessed 29 November, 2013.
[118] Ibid.
[119] Ibid.

- "communication systems including construction and maintenance of roads, footpaths, pedestrian pathway, transportation terminals, both for passengers and good, bridges, over-bridges, subway, ferries and inland water transport system",
- "transport system accessories including traffic engineering schemes, street furniture, street lighting, parking areas and bus stops",
- "community health and protection of environment including planting and caring of trees on road sides and elsewhere",
- "markets and slaughter house", and
- the "promotion of educational, sport and cultural activities, and aesthetic environment."

These municipal functions are performed in most cities by using "master plans, zoning, subdivision regulations, building codes, and other public policies to shape development" which are "normally adopted to help protect the urban and natural environment, gear infrastructure investments with development, and maintain and enhance property values …".[120]

In cities where land is publicly owned, such as Singapore, the legal regime does not entrust the same administrative authority with the functions of land grants and municipal services:

> The government [of Singapore] relies almost exclusively on the Central Provident Fund (CPF) scheme, a mandatory savings scheme to finance a range of different welfare services: housing, healthcare, insurance, tertiary education and retirement (Asher, 2004). On the supply side, the government is also directly involved in the provision of subsidized education and healthcare; the Housing and Development Board (HDB) has been the largest housing developer for the past three decades. That more than 85 percent of the resident population lives in HDB housing has been described by Pugh (1985) as a `symbol of pride, of nationhood, of the political achievement of the People's Action Party, and of government benevolence towards the public interest'.[121]

Singapore has thus entrusted the *Housing and Development Board* (HDB) with the task of housing development which operates, under the Ministry of National Development (MND). The ministry is in charge of the direction and

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[120] David E. Dowall and Giles Clarke (1996). "A Framework for Reforming Urban Land Policies in Developing Countries" *Urban Management and Land*, Policy Paper, The World Bank, p. 5.

[121] Sock-Yong Phang (2007). "The Singapore Model of Housing and the Welfare State", *Housing and the New Welfare State : Perspectives from East Asia and Europe*. (Research Collection School of Economics. Singapore Management University), p. 18.

implementation of policies that are related to land use planning and infrastructure development.[122]

Land use grants in China can be obtained from the government or from land use right holders who are entitled to transfer, pledge or lease their rights. China's Ministry of Land and Resources (MLR) and the local Land Resource Bureaus (LRB) are in charge of overseeing land use grants and registration. The power to allocate land use rights is the mandate of land administration departments[123] that are specifically established for the purpose. Moreover, Chinese law allows the contribution of land use rights as shareholders capital contribution (based on asset appraisal) in various economic undertakings including joint venture with foreign investors.[124] "China has, since the 1980s, separated land use rights from land ownership and opened up a new market track for the conveyance of land use rights to commercial users".[125] A case in point is the amendment made to the Constitution of the Peoples Republic of China adopted at the First Session of the Seventh National Peoples Congress on 12 April 1988. The amendment made to Article 10 of the Constitution reads:

> The fourth paragraph of Article 10 of the Constitution, which provides that "no organization or individual may appropriate, buy, sell or lease land or otherwise engage in the transfer of land by unlawful means," shall be amended as: "No organization or individual may appropriate, buy, sell or otherwise engage in the transfer of land by unlawful means. The right to the use of land may be transferred according to law."

This was meant "to legitimize the commercialization of land use rights".[126] Lin and Ho state two significant implications of this major Constitutional amendment: "First, it effectively separates land ownership from land use rights. While urban land remains owned by the state, its use rights can now be granted or transferred to commercial users. Second, it introduces a new market track into China's land system and, together with the traditional plan track, gives rise to a dual-track land-management system".[127]

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[122] Singapore Property Weekly Challenge 136, http://zaphibel.free.fr/web/gicwiki/index.php?title=Singapore_Property_Weekly_Challenge_136, Accessed : 5 October 2013.

[123] Article, 23, the Urban Real Estate Administration Law (1994).

[124] See for example China Briefing, Feb 19, 2014 <http://www.china-briefing.com/news/2014/02/19/obtaining-land-use-rights-for-fies-in-china.html> , Accessed : 24 September 2013.

[125] George C. S. Lin and Samuel P. S. Ho (2005). "The State, Land System, and Land Development Processes in Contemporary China", *Annals of the Association of American Geographers*, Vol. 95, No. 2 (Jun., 2005), p. 411.

[126] Id., p. 420.

[127] Ibid.

While the experience of municipalities in the US represents the practices in developed countries, the Indian experience shows that population pressure does not alter the nature of municipal services. The Singaporean and Chinese experience further indicates that public ownership of urban land does justify the denial of economic value of land use rights and the merger of land allocation powers with municipal functions.

5.2 The tension between urban planning and leasing out land

The Federal Urban Planning Institute Proclamation[128] envisages "the state-of-the art urban planning principles, a system that would ensure a healthy and sustainable development of growing urban centers".[129] The objectives of the proclamation include the achievement of a balanced urban system by way of preparing integrated urban plans that encompass socio-economic and land-use dimensions and that ensure plan-led development of urban centers that have strong linkages with their rural hinterlands and serve as centers of rapid development."[130]

The elements of Article 5(4) of the Proclamation are the following:

a) balanced urban system through the preparation of integrated urban plans;
b) the embodiment of socio-economic dimensions in the plan;
c) the inclusion of land-use dimensions in the plan;
d) the need to ensure plan-led development of urban centers
   - with strong linkages with rural hinterlands, and
   - that serve as centers of rapid development.

The *first* and *fourth* elements, i.e., integrated urban plans and plan-led development require urban planning whose formulation, management and implementation are professional and objective. As discussed under Section 3.1, the Urban Planning Proclamation No. 574/2008 vests extensive powers on municipalities in the preparation, approval, implementation, revision and modification of urban plans (i.e. structure plans and local development plans). The function of the Federal Urban Planning Institute is to provide support to municipalities and other pertinent offices in capacity building[131], research and consultancy[132], information support services[133] and urban plan preparation

[128] Federal Urban Planning Institute Proclamation No. 450/2005.
[129] Id., Preamble, paragraph 2.
[130] Id., Art. 5(4).
[131] See the powers and duties of the Urban Planning Institute, Proclamation No. 450/2005, Art. 6(1)
[132] Id., Art. 6(2).
[133] Id., Art. 6(3).

(which may include preparing urban plans upon the request of regions or urban centers or base maps that can be used in the preparation of urban plans). [134]

The basic principles[135] of urban planning embodied in Proclamation No. 574/2008 (as highlighted in Section 3.1) include "the promotion of balanced and mixed population distribution;" "safeguarding the community and the environment"; "preservation and restoration of historical and cultural heritages"; "balancing public and private interests"; and "ensuring sustainable development". Further discussion has also been made in relation with elements that should be embodied in local development plans as stipulated under Article 11(3) of Proclamation No. 574/2008. This provision, *inter alia*, envisages zoning of use type,[136] local streets and layout basic structure[137], organization of transport system[138], "green areas, open spaces, water bodies, and places that might be utilized for common benefits."[139]

However, there is manifest tension between municipal functions vis-à-vis the motives involved toward leasing out urban land. For example, an office (in Addis Ababa City Administration) in charge of parks and open spaces might submit a proposal in favour of allocating a certain open site in the city for "green areas, open spaces, water bodies, and places that might be utilized for common benefits." On the contrary, another office under the same municipality might propose the lease sale of the same location to enhance "urban renewal and upgrading"[140]. Such conflicting positions result from the role conflict inherent in the powers of the Addis Ababa City Administration.

A case in point is the fate of locations such as the space next to Wabi Shebelle Hotel on the way to Mexico Square. While an office in charge of the city's transport facilitation might propose the need for transport terminal, the offices entrusted with the tasks of land banking and leasing out land might have earmarked lease sale revenue and may possibly propose the sale of the location to maximize annual lease revenue. Such role conflicts are exacerbated by the municipality's discretion to revise master plans "where the need arises"[141] even before the expiry of the validity period of master plan.

Under these circumstances municipal authorities may tend to pay more attention to annual performance reports of enhanced revenue from leasing out land. This is so because reports on annual lease revenue might sound louder in

[134] Id., Art. 6(4).
[135] Proclamation No. 574/2008, Art. 5, Sub-Articles 6 to 10.
[136] Id., Art. 11(3)(a).
[137] Id., Art. 11(3)(b).
[138] Id., Art. 11(3)(c).
[139] Id., Art. 11(3)(f).
[140] Id., Art. 11(3)(e).
[141] Id., Art. 22(3).

reports than that of reporting the designation of certain locations for "green areas, open spaces, water bodies, and places that might be utilized for common benefits". The following illustrates this point:

> [G]reen areas benefit societies and the environment by providing clean air, maintaining biodiversity, helping cities build cheaper and long lasting drainage systems, and keeping down the heat during dry seasons. Unfortunately that is not true for Addis Ababa. "The per capita distribution of green areas and parks in Africa's urban cities is 7 square meters, but Addis Ababa only has 0.3 square meter distribution of green areas and parks".[142]

Kumlachew underlines the need to enhance the greenery of the city which is hailed as "the diplomatic capital of Africa" and he also states the challenges in the accessibility of the city's parks and green areas to the general public. [143] As Deininger *et al* duly observed:

> … In Addis Ababa, there is lack of clarity regarding the roles of central administration and the 10 sub-cities in allocating land and administering rights over land. In one case, the complexity led to allocation of public use areas to construction and housing and commercial buildings. Although the municipality agency responsible for the management of parks and green areas in Addis Ababa belatedly identified trespass of its mandate, no action was taken, because construction had already begun. The fact that the allocating authority felt secure in its mandate to manage the concerned areas, together with the delayed and ineffective response by the agency that was by law responsible for making decisions, illustrate the extent to which mandates are confused and the effect on land governance.[144]

In view of its growing population, the per capita green space needed in Addis Ababa deserves due attention. The lease-sale rush is not only eco-unfriendly, but adversely affects long-term lease revenue because a significant number of high rise buildings are being constructed (without alignments) but as chains adjacent

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[142] Emnet Assefa (2013). 'In Search of Greener Addis', *Addis Standard*, June 3, 2013, citing Dr. Kumlachew Yeshitila , Head of Ecosystem Planning and Management at the Ethiopian Institute of Architecture, Buildings, Construction and City Development (EiABC) of the Addis Ababa University, Presentation of a research paper at the Ghion Hotel entitled 'Green Areas and Parks in Addis Ababa' at a public debate organized by Forum For Social Studies (FSS) in collaboration with the British Council, March 22, 2013. *See*, http://addisstandard.com/in-search-of-a-greener-addis/, accessed: 12 December 2013.

[143] Ibid.

[144] Klause Deininger, Harris Selod, Anthony Burns (2012). *The Land Governance Assessment Framework: Identifying and Monitoring Good Practice in the Land Sector*, World Bank Publications, p. 96.

to (and at the edge of) the main streets, in effect, hindering long-term block based street alignments that could have availed more land in the backyard interiors. This is clearly inconsistent with the *third* element identified above, under Article 5(4) of Proclamation No. 450/2005 i.e. the inclusion of land use dimensions in the plan.

Moreover, role conflict renders it difficult for municipalities to attain sound social objectives in the interest of children, the elderly, the disabled, etc, in accordance with Article 9(5) of the Addis Ababa City Charter Proclamation[145] thereby hampering "the embodiment of socio-economic dimensions in the plan" which constitutes one of the elements under Article 5(4) of Proclamation No. 450/2005. Needless to say, societies that aim and aspire into the future pay due attention to children, a factor which is clearly missing in the construction boom in Addis Ababa. To borrow a few phrases from Forest Whitcraft's poem, "One hundred years from now" *what will matter most* is not the "kind of car [a person] drove" or the "kind of house [he/she] lived in" … but whether the person was "important in the life of a child".[146]

5.3 Role conflict in the Addis Ababa City Charter

Article 9 of the Addis Ababa City Charter Proclamation[147] makes incidental reference to municipal functions and it rather focuses on executive, legislative and adjudicatory functions of the City Government. Article 9(1) states the objective of the City government to "maintain good governance in which effectiveness, transparency and accountability" prevail in order to "make the City one in which expedient and equitable municipal services and reliable security and social harmony are ensured." According to sub-Articles 5 to 8 of Article 9, the "City Government shall have the objectives to":

- "make the City a place where the well-being and comfort of residents are safely kept and particularly where children, women, the disabled, the elderly and other disadvantaged segments of society avail themselves of special support; "[148]
- "bring about the city's speedy economic development through the encouragement and enhancement of investment and research;"[149]
- "make the City a centre of commerce and industry of the country; "[150] and

[145] Addis Ababa City Government Revised Charter Proclamation No. 361/2003.
[146] Forest E. Witcraft (1894 - 1967).
[147] Addis Ababa City Government Revised Charter Proclamation No. 361/2003. Arts. 41(1)(h), 41(2)(c) and 66 of the Charter are amended by Proclamation No. 408/2004 Addis Ababa City Government Revised Charter (Amendment) Proclamation.
[148] Proclamation No. 361/2003, Art. 9(5).
[149] Id., Art. 9(6).
[150] Id., Art. 9(7).

- "make the City a naturally balanced, clean, green and favourable spot through the prevention of environmental pollution".[151]

While Articles 9(5) and 9(8) clearly have social and environmental themes, Articles 9(6) and 9(7) have the objectives of speedy enhancement of investment and rendering the city center of commerce and industry. These objectives involve conflict of interests because a city which is a center of industry cannot avoid being immensely polluted. Speedy economic development which does not give due attention to social and environmental wellbeing is usually susceptible to trade-offs in favour of economic scores in spite of glaze, noise, overcrowding and pollution.

The balanced attainment of these objectives not only requires effective performance on the part of municipalities, but also envisages the schemes of checks and balance against the risk of giving primacy to one of the objectives to the detriment of the other. Striking the appropriate balance between these economic, social and environmental pursuits becomes possible only where there are checks and balance among authorities that are entrusted with the promotion of these pursuits. One of the pursuits can easily be over-emphasized to the detriment of the other if the same administrative authority undertakes all the pursuits. The risk under such circumstances is that the *economic-growth-first* paradigm (which gives primacy to economic growth and statistical scores) usually overshadows the social and environmental dimensions of sustainable development. Even worse, the adverse impact of this scenario is aggravated many fold under settings of corruption and rent seeking.

The extensive power and functions vested in the Addis Ababa City Government is apparent from the stipulations under Article 11 of the Addis Ababa Charter. Sub-Articles (f) to (i) of Article 11(2) provide the following:

> Without prejudice to the general provisions set forth under Sub-Article (1) of this Article, the City Government shall have the powers and functions to:
> (f) identify, determine and organize municipal services to be delivered at the level of the City, a sub-City and a Kebele; to provide efficient, effective and equitable services through the use of a variety of service delivery alternatives and the participation of the people and to ensure that a standardized, acceptable system of service delivery is in place;
> (g) administer, according to law, the land and the natural resources located within the bounds of the City;
> (h) administer, develop or [sell] the houses nationalized as per Government Ownership of Urban Lands and Extra Houses Proclamation No. 47/1975 and administered by the City Government as well as other houses which the City Government built or otherwise obtained lawfully;

[151] Id., Art. 9(8).

(i) expropriate private property and/or clear and takeover land holdings designated as an object of public interest, subject to payment of commensurate compensation in accordance with the law.

Addis Ababa Municipality has the "the power to make laws and exercise judicial powers specifically conferred on it by [the] Charter as well as executive powers and functions over matters that have not specifically been included in the details of the powers and functions of the executive organs of the Federal Government".[152] Its powers and functions also include the issuance and implementation of "policies concerning the development of the City" and the approval and implementation of "economic and social development plans".[153] Moreover, Addis Ababa City Government has the power to "constitute the executive bodies of the City Government and to establish public enterprises, as legal entities, on its own or in partnership, as per applicable laws, with the private sector or other third parties".[154] In particular, the powers embodied in Article 11(2), i.e. the power to administer urban land and resources[155] which include land expropriation and land allocation (based on the Land Lease Proclamation), the power to "administer, develop or sell the houses" [156], and the power to "expropriate private property and/or clear and takeover land holdings designated as an object of public interest"[157] are susceptible to administrative discretion.

5.4 The need for a coherent urban plan and neutral enforcement

Urban planners forward various options. According to Goodchild, *compact city* planning minimizes "impact of urban development on the countryside".[158] However, he underlines that "the search for higher densities should not go so far as to endanger popular demands for a sense of spaciousness and greenery".[159] *Compact city* planning is based on the assumption that "dense and concentrated cities will support the principles of sustainable development" [160] by reducing the pressure on the outskirts of cities and facilitating more efficient transportation.

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[152] Id., Art. 11(1).
[153] Id., Art. 11(2)(a), 11(2)(b).
[154] Id., Art. 11(2)(d).
[155] Id., Art. 11(2)(g).
[156] Id., Art. 11(2)(h).
[157] Id., Art. 11(2)(i).
[158] Barry Goodchild (1994). "Housing Design, Urban Form and Sustainable Development: Reflections on the Future Residential Landscape" *The Town Planning Review*, Vol. 65, No. 2 (Apr., 1994), p. 156.
[159] Ibid.
[160] Erling Holden (2004)."Ecological footprints and sustainable urban form", *Journal of Housing and the Built Environment*, Vol. 19, No. 1, Dimensions of housing and urban sustainability (2004), p. 104

Proponents of the *green city*, on the other hand, advocate for "a more open type of urban structure, where buildings, agricultural fields and other green areas form a sort of mosaic-like pattern". As the physical environment influences wellbeing and human behaviour, supporters of the green city focus on aspects of happiness and development beyond the glittering aspects high rise towers.

The efforts of urban planners and designers in the pursuit of "vital and livable cities" are informed by "the spirit of the times" which "sometimes meant the promotion of zoned, single-use urban forms" while "at other times, it meant the pursuit of a compact, spatially mixed and intensively used city" depending on "their alleged social, cultural and economic advantages".[161] Findings show that "urban compaction is not necessarily conducive to a more sustainable society" and "that greater emphasis should be put on how to determine which forms are suitable in a given locality".[162]

Adherents of the *decentralized* city forms argue against the congestion in compact cities, while the supporters of the *decentralized concentrated* urban form attempt to promote a synthesis.[163] As Tomita[164] *et al* noted:

> [I]t can be concluded that research focusing on a single aspect, such as the relationship between energy efficiency and transport or energy and urban form, is not likely to generate a reliable basis for the conception of a sustainable city or region.[165] As cities are different in form and structure because of factors such as topography, history, climate, and socio economic conditions etc., they cannot all fit the same formula when it comes to a question of a sustainable urban form.[166]

Cities are thus expected to pursue the models and sub-models that are suitable for their particular settings and circumstances. This is because "there are no simple answers and no appropriate models" which in effect requires specific

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[161] Albertine van Diepen (2002). Book Review, "Achieving Sustainable Urban Form by Katie Williams; by Elizabeth Burton; Mike Jenks" *Journal of Housing and the Built Environment*, Vol. 17, No. 1, State and market: Governing low-income housing in Asia (2002), p. 93

[162] Ibid.

[163] Yasuo Tomita, Daisuke Terashima, Amin Hammad and Yoshitsugu Hayashi (2003), "Backcast Analysis for Realizing Sustainable Urban Form in Nagoya" *Built Environment,* Vol. 29, No. 1, The Sustainable City: Transport and Spatial Development, p. 17

[164] Ibid.

[165] Ibid, citing Breheny, M.J. (ed.) (1992). *Sustainable Development and Urban Form*. London: Pion.

[166] Ibid, citing Frey, H. (1999). *Compact, decentralized or what? the sustainable city debate*, (Chapter 2). In Designing the City. London: E & FN Spon, pp. 23-35.

proposals "to be tested on a case by case basis in the light of existing policy commitments and specific environmental and economic objectives".[167]

As indicated earlier, the preamble of Federal Urban Planning Institute Proclamation No. 450/2005 pledges to adopt "the state-of-the art urban planning principles" and it also envisages "a system that would ensure a healthy and sustainable development of growing urban centers". This is reiterated under the preamble and Article 5 of the Urban Planning Proclamation No. 574/2008 which, *inter alia*, underline the need for sound and visionary urban plans to carry out development undertakings that positively contribute toward the "general wellbeing of the community" and "the protection of natural environment"[168] with a view to ensuring sustainable development. [169]

As Alison Brown observes, "[t]he adoption of goals for sustainable urban development requires an assessment of the effect of development on both the natural and human environment"[170]. She further notes that this suggests "integrated approaches to urban development, which combine social, economic, and environmental considerations, to give equitable access to resources both within and between generations".[171]

> In low- and middle-income countries, an important component of sustainable development strategies has been to find ways of increasing the access of low- income groups to land for shelter, by seeking more efficient use of land, or forms of tenure which improve the security of households.[172] It is argued here, however, that land for shelter is only one facet of the land resource so crucial to low-income households, and that land for livelihoods or social interaction is equally necessary in contributing to quality of life.[173]

Brown thus underlines the need to balance land use for shelter and urban space because"[t]he space immediately outside the house or shelter forms an extension of living space and a centre for social interaction".[174] In the context of Ethiopia,

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[167] Barry Goodchild (1994). "Housing Design, Urban Form and Sustainable Development: Reflections on the Future Residential Landscape" *The Town Planning Review*, Vol. 65, No. 2 (Apr., 1994), p. 156.

[168] Urban Planning Proclamation No. 574/2008, Paragraphs 1 and 3 of the Preamble.

[169] Id., Art. 5, Sub-Articles 6 to 10.

[170] Alison Brown (2001). "Cities for the Urban Poor in Zimbabwe: Urban Space as a Resource for Sustainable Development". *Development in Practice*, Vol. 11, No. 2/3 (May, 2001), p. 320.

[171] Id., pp. 320-311, citing Haughton, G and C. Hunter (1994) *Sustainable Cities*, London: Jessica Kingsley.

[172] United Nations Centre for Human Settlements (UNCHS) [Habitat] (1996) An Urbanizing World: Global Report on Human Settlements, Oxford: OUP.

[173] Brown, *supra* note 153, p. 321.

[174] Id., Alison Brown, p. 320.

the significance of urban space for traditional neighbourhood institutions such as *Idir*[175] is apparent.

Professor Mee Kam Ng states that gap in China's urban planning system "has led to considerable wastage of land resources and consequent environmental problems". She underlines the need for "the adoption of a sustainable urban planning system" which "will mean that the Chinese government cannot confine sustainable development to the technical arena and has to face the challenge of valuing costs and benefits of different development options to various stakeholders - an area in which the urban planning profession has much to offer".[176] She further notes that "[a]s economic reforms intensify, urban planners realise that planning and allocating land resources are not just a science but also an art that involves intense politics".[177] The question then becomes "whose values should be adopted in formulating a plan? And, is a legitimate and legally binding urban planning system in place to implement it?[178]

It is in the context of the professional thresholds and the intense involvement of various administrative interests that urban planning is designed and implemented. The challenges are graver in Ethiopia due to role conflict. Even if the Federal Urban Planning Institute[179] under the Ministry of Federal Affairs is in charge of capacity building, information support, preparation of urban plan (upon request), etc., it is ultimately the Municipalities that are (as highlighted in Sections 3.1 and 5.2) entrusted with the functions of preparing, approving, implementing, modifying and revising master plans. Their power to generate revenue through land lease naturally nurtures the interest to lease out more urban land, and this conflicts with their role as custodians of the city's master plan which requires balancing economic, social and environmental concerns. In effect, the provider of land has the functions of master plan approval, implementation, and revision analogous to a scenario whereby a cashier orders payments and also audits the cash flows.

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[175] *Idirs* are traditional grass-root institutions whose members render support during various events including times of difficulties such as mourning, participation in funerals, providing facilities such as tents, chairs, and other items during events of mourning, marriage and other occasions.

[176] Mee Kam Ng (2004). "The Role of Urban Planning in China's Sustainable Development", *The Town Planning Review,* Vol. 75, No. 4 (2004), p. iv.

[177] Ibid.

[178] Id., p. iii.

[179] See, Proclamation No. 450/2005. It is usually refereed to as the National Urban Planning Institute in various documents including its website.

6. Reflections on the 'Problem Tree'

The concept of the 'Problem Tree' (Solution Tree Analysis) lists down core problems observed in a given setting, phenomena or social reality. It then attempts to identify the cause and effect relationship among the problems identified. Moreover, causes (at various levels) that are articulated in a negative form are transposed into their positive variation so that they can become *objectives* and *strategies* towards solving the problems that are identified.

The core problems discussed in the preceding sections of this article show discretionary and arbitrary powers of municipalities in Addis Ababa along with conflicting roles in land allocation (in return for lease revenue) vis-à-vis other conventional municipal functions. This role conflict and discretionary authority occurs in the midst of gaps in judicial review and administrative procedural law.

In legal regimes where the sale of urban land rights are private pursuits, municipalities do not claim property rights over urban land and they merely undertake their municipal functions that include the preparation and management of integrated urban plans. In socialist economies such as the former Soviet Union (where urban land was public property), land grants were administrative; but the grants did not involve pecuniary benefit to the administrative authorities.[180] In effect, role conflict did not usually exist because regulatory offices could not derive pecuniary benefit from the land grants.

The challenge of role conflict occurs in settings which strive to unduly pursue fragmented (rather than synthesized) merger of certain elements from the two systems. In Ethiopia's land use rights regime, such fragmented collation results from picking the 'administrative authority of land allocation' limb from the soviet model and combining it with the 'land use rights market' element from the market economy model. A holistic synthesis indeed requires that the lease revenue received from the 'transfer of land use rights' be paid to the dispossessed and not to municipalities. Lack of pragmatic synthesis not only displaces and impoverishes evictees, but also unduly motivates municipalities to enhance lease revenue through land allocation thereby eroding the neutrality and vision required in the formulation and implementation of urban plans.

The normative challenge relates to the tension between the general constitutional principle of public ownership of land which recognizes land use

[180] For example, the need for land pricing that was proposed by various economists in the former Soviet Union during the 1960s was rejected in an official statement. According to the 1968 statement on land allocation policy, land grants free of charge were stated as "one of the greatest achievements of the Great October Socialist Revolution". Report by Deputy F. A. Surganov, Chairman of Council of the U.S.S.R. Agricultural Committee. *Pravda* and *Izvestia,* 14 December 1968. [*See* Edgar M. Hoover and Frank Giarratani (1984). *An Introduction to Regional Economics*, (New York: Alfred A. Knopf), Chapter 6].

rights *vis-à-vis* the denial of economic value of land use rights in various proclamations and judicial decisions. The Constitution recognizes private property, and at the same time stipulates that land is public property. However, it recognizes use rights on land and leaves the particulars to be determined by law. The laws highlighted in the preceding sections do not *per se* deny use rights over land, but fail to recognize its economic value, and restrict the scope of its transfer in the event of expropriation and sale.

It is to be noted that ownership of a thing by a person (or entity) does not preclude another person's claim of use right on the same thing. The fact that land is publicly owned does not thus preclude the landholder from use right claims over the land (including pecuniary benefits). Problems attributable to the either/or dichotomy in the conception of public property is one of the root causes that lead to restricted interpretation of land use rights in Ethiopia.

Two polarized interests permeate this tension. On the one hand, there are push factors toward *laizez faire* windfall rent gathering by selling land obtained in the guise of 'real estate development' and 'investment projects' on which the holder might have made meager or no investment. On the other hand, there is a corresponding pull factor on the part of administrative agencies in over-reacting to this challenge and steadily narrowing down the scope of the ownership of land use rights.

It is in the midst of this setting that the normative and administrative restrictions of land use rights are tightening up their grips on all sectors of the society rather than aiming at specific targets. This merely squares the circle, and entrenches rent seeking and corruption because it does not solve the problem but rather steadily widens the extensive discretionary functions of administrative authorities; and meanwhile it marginalizes and suppresses the economic potential that is inherent in the tenure and security of land use rights and private sector development.

Conclusion

Policies have lifespan unless they go through the phases of renewal and reinvention. Such pursuits of policy renewal start with a very modest step, i.e. *admission of a problem*. On the contrary, the easier options of '*denial*' and '*blame games*' merely reinforce problems and meanwhile erode opportunities toward preventive and curative solutions.

Two major concerns emerge from the discussion in the preceding sections. The *first* concern emanates from to the meager size of the pie that trickles down to urban landholders upon expropriation. As Cernea observes "[e]xpropriation of land removes the main foundation upon which people's productive systems, commercial activities and livelihoods are constructed" and this constitutes

"decapitalisation and pauperisation of displaced people, through the loss of both physical and man-made capital".[181]

The discretionary powers of municipal authorities in Addis Ababa in the assignment and revocation of land use rights, and their decisions of allocation to investors are, *inter alia*, influenced by revenue enhancement through land lease to the highest bidder. A rational regulatory pursuit towards efficiency, equity and the public good presupposes utmost attention to win-win mutual benefits in favour of investors, evictees and the public at large. On the contrary, however, municipal authorities seek a higher share from land lease revenue by squeezing down the compensation that reaches urban homeowners. In effect, municipal authorities do not pay evictees the amount received from the new leaseholder per square meter. It is to be noted that, the municipality is transferring the same land use right to the new investor, and whatever the investor is willing to pay is an amount which the evictee could have received from selling her/his house.

The need for *'efficiency'* justifies allocation of land to a person who can make use of it with optimal level of utility. However, the equally important need for '*equity'* requires that the evicted person be paid an amount which s/he could have received from the sale of the immovable through open market at the time of the eviction. This is a win-win option for all parties in which evicted homeowners, the municipality and the public at large would benefit from. It is to be noted that whatever goes into the pockets of citizens beefs up the economy by enhancing their purchasing (or job creation) power and wellbeing.

We can foresee practical problems with regard to the investor's financial capability in paying market price for privately owned houses. This can emerge where the site to be reallocated to investors affects the property rights of a significant number of urban house owners. Such issues are administrative rather than legal, and can prompt viable schemes such as measures against holdouts, long-term payment deals, and the empowerment of urban homeowners to utilize their land use rights as capital contribution in new investment projects thereby becoming shareholders *pro rata* to the market value of their land use rights.

The *second* concern that emerges from the role conflict in the functions of municipalities relates to the risk of haphazard disfigurement of cities mainly owing to the role conflict between the functions of municipalities as custodians of master plans toward sustainable cities, vis-à-vis the conflicting interest of municipalities to sell out more land on leaseholds to the detriment of aligned wide streets, open spaces, green areas, riverbanks and other public needs. This is

[181] Michael M. Cernea (1995). "Understanding and Preventing Impoverishment from Displacement; Reflections on the State of Knowledge," [In Chris McDowell, Editor, *Understanding Impoverishment: The Consequences of Development-induced Displacement* (Berghahn Books, 1996)], p. 22.

mainly attributable to the land banking function of municipalities which inherently conflicts with compliance standards of appropriate urban plans.

A case in point is the rush to maximize leased out plots adjacent to the main streets. Urban plans consider unfolding events in terms of decades and centuries. While rising population necessitates wider streets and wider pedestrian paths, the prospects of declining population, on the other hand, deserves more open spaces, balanced landscaping and relatively greener yards in front of buildings. Unfortunately, however, the current construction boom in Addis Ababa seems to be incongruent with both demographic scenarios, mainly because role conflict has blurred the long-term vision of municipal authorities onto the future.

Role conflict occurs when individuals or institutions encounter role expectations that are in conflict. Under such settings, the pursuance of one of the roles obstructs or at least compromises the accomplishment of the other function. Municipal authorities in Ethiopia have annual plans which include raising land lease revenue. They also evaluate their quarterly or annual performance on the basis of their achievements including lease revenue which in other words means area of land leased out during a given period. The 'success' of municipalities in their 'land allocation' function from 'land banks' does not thus prove the attainment of their conventional municipal functions as providers of public utilities and as custodians of public parks, urban green areas, open spaces, riverbanks and wider streets.

About two thousand years ago[182] Juvenal (of Ancient Rome) had raised a pertinent question as to 'who shall judge the judges?".[183] This query was forwarded as a *caveat* against the risks of discretionary authority and abuse in the absence of checks and balance. The need to address the adverse impact of role conflict and discretionary authority in Addis Ababa's municipalities thus calls for the empowerment of homeowners through stronger, wider and more effective land use rights. Secondly, there is the need for the total alienation of the land allocation function from municipalities by vesting this power on another co-equal public entity independent from the City Administration (with due participation of stakeholders). A short-term option (until the role conflict is resolved) can be considering master urban plans (approved by Addis Ababa City Council) as law[184] that shall be effective for at least ten years[185] unaltered by administrative decisions.

[182] *Circa* 100 AD.

[183] "Quis juret ipsos Jures?"

[184] This requires enactment in the city's official law gazette and adequate publicity in various media. This option has the downsides of rigidity and inadequate dynamism, which seems to be a lesser evil.

[185] According to Article 10 of the Urban Planning Proclamation No. 574/2008, the period of validity of structure urban plans is ten years.

The History of Expropriation in Ethiopian Law

Daniel Weldegebriel Ambaye ♣

Abstract

Expropriation is a compulsory taking of land by the state for public purpose and upon advance payment of fair compensation. After describing its nature and basic contents, this article attempts to construct the history of expropriation in Ethiopia based on primary and secondary sources. It covers the historical and legislative period of pre-2005 Ethiopia. It is argued in this article that because of lack of urbanism in pre-twentieth century Ethiopia and because of the strong religious ethic of the kings not to abuse their power, there was no much expropriation practice of urban land in Ethiopia before the establishment of Addis Ababa in the late nineteenth century. Expropriation received formal recognition after the 1908 Addis Ababa Land Charter. In all the historical records that are found, there is evidence of payment of compensation upon expropriation of urban land although it might not be conclusive.

Key words

Land, Expropriation, Compensation, History, Ethiopia.

DOI http://dx.doi.org/10.4314/mlr.v7i2.4

Introduction and Method

Expropriation is a compulsory taking of land[1] by the state for public purpose activities and upon advance payment of fair compensation. Expropriation is an

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[1] Land signifies in most countries as including the ground and any fixture thereon such as building and trees and associated rights such as servitude. Under Ethiopian law, property is classified as movable and immovable (Art. 1126 of the Civil Code, hereunder cited as CC.) Land and buildings are considered as immovables (Art. 1130 CC). Ethiopian law follows the French Civil Code Art. 518, which says "land and building are immovable by their nature". The difference is that while the Ethiopian Civil Code is ambiguous as to whether or not building is by default part of the land, the French Civil Code puts a clear stand by stating, under Arts. 552-554, "ownership of the ground involves ownership of what is above and below it." Unless restricted by statutes, the owner of land is considered as owning also the minerals inside the land and the airspace above the land. In Ethiopia, there is no such kind of encompassing provision in the Civil Code. On top of that, presently, as envisaged under Article 40(3)

inherent power of the state that stems from the very existence of the state, and hence it is argued that the constitutions only give recognition to it instead of authorization. Expropriation assumes different names in different countries such as, compulsory purchase in the United Kingdom (UK), expropriation in Continental Europe and eminent domain in the United States (US). Ethiopia, predominantly follows the Civil Law legal system, and uses the word: *expropriation*. In this article, the term expropriation is employed with due regard to the possibility of using the other two terminologies as well whenever necessary.

The purpose of this article is to briefly narrate the history of expropriation laws in Ethiopia in a bid to understand the past so that it can serve as a base toward evaluating the unfolding events witnessed so far in Ethiopia. This article is not as such investigating and evaluating the existing expropriation and compensation laws as I have already done that in great lengths elsewhere.[2] In this introductory part, an attempt is made to describe the methodology employed. Section 1 acquaints readers with the concept of expropriation and its limitations; Section 2 briefly narrates the history of expropriation in pre-1931 Ethiopia; Section 3 deals on the history of expropriation in post-1931 Ethiopia covering the period until 2004; finally Section 4 summarizes the important points. It is, however, to be noted that land confiscation and dispossession that occurred in Ethiopia as a result of feudal expansions during the various eras of Ethiopian emperors is outside the scope of this article. Moreover, the land nationalization measure carried out by the Derg in 1975 is not the subject matter of this article. Focus is rather made to the history of expropriation in Ethiopian law (which is different from nationalization and confiscation).

The article traces back the expropriation law and practice in Ethiopia until the enactment of the current law in 2005. Its purpose is to briefly account its

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& (7) of the FDRE Constitution, ownership of land is vested in the state and the people, while ownership of building is given to the individual. In spite of this duality of ownership of land and building, in this article expropriation of land shall mean also expropriation of other attachments (building and other fixtures thereon) on the ground since the loss of the ground would necessarily be followed by the loss of such proprieties and thus eligible for payment of compensation.

[2] Daniel W. Ambaye (2009a) Land Valuation for Expropriation in Ethiopia: Valuation Methods and Adequacy of Compensation, *7th FIG Regional Conference.* Hanoi, Vietnam; Daniel W. Ambaye (2009b) Compensation during Expropriation, In Muradu Abdo (ed.), *Land Law and Policy in Ethiopia since 1991: Continuities and Changes*, Ethiopian Business Law Series, AAU Faculty of Law, Vol. III; Daniel W. Ambaye (2013a) *Land Rights and Expropriation in Ethiopia*, Doctoral Dissertation, KTH, Stockholm; Daniel W. Ambaye (2013b) Compensation for expropriation in Ethiopia and the UK: Comparative Analysis, *Bahir Dar University Journal of Law*, Vol.3, No. 2, pp. 279-295.

practice rather than delving into detailed history of tenure or property right. The method followed is therefore historical research. Historical research is an examination of elements from history. From a social science perspective, history is an account of some past event or a series of events. Historical research, then, is a method for discovering, from records and accounts, what happened during some past period.[3]

This chronology of historical events describes important past events, people, developments, and the like. It also provides the reader with a sense of which things or events came before others. Historical research thus involves a process that examines events or combinations of events in order to uncover accounts of what happened in the past. This provides access to a broader understanding of human behavior and thoughts than would be possible if we were trapped in the static isolation of our own time. Therefore, understanding the historical nature of phenomena, events, people, agencies, and even institutions is important. One cannot fully evaluate or appreciate advances made in knowledge, policy, science, or technology without some understanding of the circumstances within which these developments occurred.[4]

The sources of data used by this article are primary and secondary data. Primary sources are original artifacts, documents, and items related to the direct outcome of an event or an experience.[5] They may include documents, photographs, recordings, diaries, journals, life histories, drawings, mementos, or other relics. Secondary sources involve the oral or written testimony of people not immediately present at the time of a given event. They are documents written or objects created by others that relate to a specific research question or area of research interest. Secondary sources may include textbooks, encyclopedias, oral histories of individuals or a group, journal articles, newspaper stories, and even obituary notices.[6]

This article relies on a desk review of primary and secondary sources to describe the nature of expropriation and to trace its historical application in Ethiopia. Constitutions, codes of law and proclamations which are considered as primary sources are consulted to trace the history of expropriation. Moreover, secondary sources such as books, journals and other related documents have been reviewed to analyze the definition, nature and historical genesis of expropriation.

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[3] Marshall, C. and Rossman, G. B. (1999). *Designing Qualitative Research* , Thousand Oaks, CA: Sage.
[4] Salkind N.J. (2008). *Exploring Research*, Englewood Cliffs, NJ: Prentice Hall.
[5] Id., p. 162.
[6] Brink, P. J. and Wood, M. J. (1989). *Advanced Design in Nursing Research.* Newbury Park, CA: Sage.

1. Conceptualizing Expropriation

Expropriation assumes different names in different legal systems. As stated in the introduction, it is known by the name "Eminent Domain" in the United States, "Compulsory Purchase" in the United Kingdom and "Expropriation" in continental Europe.[7] Ethiopia uses the term "expropriation". This article mainly uses the word 'expropriation' and also uses 'eminent domain' and 'compulsory purchase' depending upon the context or setting in which the concept is discussed.

Eminent domain can be defined as "the power to take private property for public use by the state, municipalities, and private persons or corporation authorized to exercise functions of public character."[8] Bouvier defines the term as "The superior right of property subsisting in sovereignty by which private property may in certain cases be taken or its use controlled for the public benefit, without regard to the wishes of the owner."[9] Eminent domain is also defined as "the power of the sovereign to take property for 'public use' without the owner's consent."[10] In all the definitions, eminent domain or expropriation is described as the power of the sovereign state or agencies delegated by it to compulsorily take land for public use purposes. What is missing from the definitions is the "compensation" element. Actually, when we look into the definition of eminent domain in earlier decisions of American courts or State Constitutions, compensation as an essential constituent of its meaning came later.[11]

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[7] A court in Louisiana, a state in the USA that follows a Civil Law (continental) legal system, once declared that *the term 'expropriation' used in our statutes is practically synonymous with the term "eminent domain."* See (Tennessee Gas Transmission Co. v. Violet Trapping Co., 200 So. 2d 428 (1967); In Louisiana, taking land for public use by eminent domain is called by the name "expropriation." *See* WEST'S LAS C.C. 2626; Both FAO and FIG study reports used the three of them interchangeably (FAO 2008. Compulsory Acquisition of Land and Compensation. *FAO Land Tenure Studies 10.* Rome: Food and Agriculture Organization of the United Nations; Viitanen, K., Falkenbach, H. & Nuuja, K. (2010). Compulsory Purchase and Compensation Recommendations for Good Practice. *FIG Policy Statement.* Helsinki International Federation of Surveyors.

[8] Black, H. C.(1990). Black's Law Dictionary. 6th ed. St, Paul, Minn.: West Group.

[9] Bouvier, J. (1984). Bouvier's Law Dictionary. 4th ed.: William S Hein & Co.

[10] Nichols, P. (2007) *1 Nichols on Eminent Domain* Matthew Bender & Company, Inc, §1.1

[11] Id., § 1.11. Example in *Jones v. Walker, 13 F. Cas. 1059, 2 Paine 688 (Va. Cir. Ct. 1800)*, "eminent domain" is defined as: "The right of society, or of the sovereign, to dispose, in case of necessity, and for the public safety, of all the wealth contained in the state." Looking into the State Constitutions of the early States in the USA, one can observe that in their eminent domain clauses, "most state constitutions omitted

In some modern definitions of the terminology, the element of compensation is still left out. For example, FAO's definition of the term could be a good example: "Compulsory acquisition is the power of government to acquire private rights in land without the willing consent of its owner or occupant in order to benefit society."[12] It must be admitted that despite the logical accuracy of the foregoing definition and despite the fact that the payment of compensation is not an essential element of the *meaning* of eminent domain, compensation is an essential element of the *valid exercise* of such power. The absence of an explicit provision requiring compensation for the taking of property should not be seen as evidence of a rejection of the compensation principle. On the contrary, compensation was a well established feature of takings by eminent domain in most countries, as we shall see in the next section.

In Ethiopia, the first systematic definition for the concept was given in the Ethiopian Civil Code enacted in 1960. The Code, under Article 1460, provides:

> Expropriation proceedings are proceedings whereby the competent authorities compel an owner to surrender the ownership of an immovable required by such authorities for public purposes.[13]

In this definition, the idea of the taking of private land by the state or authorities without the consent of the owner for public purpose is clearly envisaged. The phrase "expropriation proceeding" is employed here instead of the word "expropriation" because of a translation error from the original French version.[14] It is said that the original French version has defined the term as follows: "expropriation is a procedure by which the administration obliges an owner to surrender to it the ownership of an immovable which it needs for the purpose of public utility."[15] And yet, like the above definitions, the rule noticeably fails to include the element of compensation in its definition.

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any specific mention of a right to compensation." See Harrington, M. P. (2001). "Public Use" and the Original Understanding of the So-Called "Taking" Clause. *Hastings Law Review,* 53, p. 1276; Ratovil, R. & Frank, J. Harrison, J. (1954). Eminent Domain-Policy and Concept. *Cal. L. Rev.,* 42**,** 596-652, p. 596; Grant, J. A. C. (1930). The "Higher Law" Background of the Law of Eminent Domain. *Wis. L. Rev.,* 6, p. 70. According to Grant, only Vermont and Massachusetts required compensation during expropriation.

[12] FAO, *supra* note 7, § 2.1

[13] Article1460 of the Civil Code.

[14] Getachew Desta, (1975). *Expropriation: Law and Practice,* Unpublished senior thesis at the Faculty of Law of Addis Ababa University, Addis Ababa, p. 6. The original draft of the Civil Code was prepared by the French Comparative Lawyer, René David, in French, and then translated to English and from that to Amharic. There are many translation errors throughout the Code, Art, 1460 being one of them.

[15] Ibid.

Without undermining the above definition, the following one may be considered as a working definition in discussing the details, as it is more comprehensive. This definition elaborates the concept of eminent domain as follows:

> … it is the right of the nation or state, or of those to whom the power has been lawfully delegated, to condemn private property for public use, and to appropriate the ownership and possession of such property without the owner's consent on paying the owner a due compensation to be ascertained according to law.[16]

This definition seems more complete, since it includes all the basic elements. First of all, expropriation or eminent domain is a right that is exercised by the state itself or its sub-branches such as municipality and other public or private companies and persons legally authorized by the state/legislature. Sustainable development requires governments to provide public facilities and infrastructure that ensure safety and security, health and welfare, social and economic enhancement, and protection and restoration of the natural environment.[17] An early step in the process of providing such facilities and infrastructure is the acquisition of appropriate land. Government may use alternative land acquisition mechanisms such as purchase, to secure land for public purpose activities. But, it is impossible to rely totally on the land market as individuals may create a holdout on the projects or the land required may involve the interest of many owners that warrants the exercise of expropriation power. As we shall see in the next section, the expropriation power is inherent in the state power.

The second element is that the state or the organs authorized to take such lands must follow some procedure. In the US, it is known as "condemnation proceeding" while in other countries, mainly European, it is referred to as an "expropriation procedure." The main idea is that the state must ensure due process of law before appropriating the property. In the US, courts are usually involved in the proceeding, and the process consists of two phases: proceedings that relate to the existence of "public use" that justifies the taking, and proceedings to set the amount of compensation to be paid for the property taken.[18] The state or an authorized organ shall first petition the court for appropriation of the property and the owner will be given the right to be heard and to negotiate on the amount of compensation, and finally, the court must

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[16] Amendola, F. C. & et.al. (eds.) (2006). Eminent Domain *Corpus Juris Secondum.* 29A C.J.S: Thomson West, § 2 (hereinafter C.J.S.).

[17] FAO, *supra* note 7, p. 1.

[18] West's Encyclopedia of American Law (2005). *In:* J. Lehman. & *et al* (eds.) *Eminent Domain.* Vol.4, 2nd ed. San Francisco, London and Munich: Thomson Gale, p. 125.

approve it. In other countries, expropriation procedure is either purely administrative procedure or a hybrid of court and administrative decisions.[19] This procedure avoids arbitrary takings of land by the state without fair compensation.

The third point worth discussing is the issue of "public use." The doctrine of expropriation stands in opposition to the right of private property. Thus, expropriation requires finding a balance between the public need for land on the one hand, and the provision of land tenure security and the protection of private property rights on the other hand. In seeking this balance, the expropriation principle includes the requirement of "public interest" as one limitation on the state power of expropriation. This limitation or requirement is known by different names in different countries, such as public use, public benefit, public good, public interest, public purpose or public welfare.[20] The idea is that, there may be exceptional times and places in which the very foundations of public welfare cannot be laid without requiring concessions from individuals to give up their private property in the interest of the common good.

The appropriation or taking, mentioned in the definition, is the fourth important aspect or stage in expropriation procedure. There are several types of appropriation which can occur through expropriation. The major types include total appropriation, partial appropriation, temporary appropriation, easement and right of way. Under the Ethiopian Civil Code, the defunct expropriation rules show that expropriation may be used either to acquire or terminate rights *in rem* such as servitude, usufruct or lease.[21] Expropriation differs from such similar concepts like police power (termed in the USA) or regulations that limit the use right of the property due to health, public safety, etc., in that it involves the loss of the core constituent right of disposal. In the latter case, what the owner loses is some part of his use right over his property, while in the case of expropriation he loses the entire or part of the property.

The fifth point embodied in the definition is the absence of consent on the part of the owner. The power of eminent domain/expropriation is a sovereign power of the state to take private land without the consent of the owner. What makes expropriation different from other consensual types of land acquisition mechanisms is the complete absence of consent on the part of the property owner. It is true that many public and private organs do also collect land through purchase and similar transactions which are based on the willingness of the person. But, it may not be realistic to totally rely on the good will of the owner

[19] *See* details for example in Kitay, M. G. (1985). *Land Acquisition in Developing Countries: Policies and Procedures of the Public Sector,* Boston, Oelgeschlager, Gunn & Hain, Publishers, Inc.
[20] FAO, *supra* note 7, p. 10.
[21] *See* Ethiopian Civil Code, Articles 1460-1461.

to get land for different reasons. The state, hence, resorts to such coercive proceedings for two main reasons: first, owners may create a holdout on the public development activities either by totally refusing the sale of the land at any given price or by requesting unrealistically higher prices for the sale of their properties; and second, public development projects which demand long and continuous land holdings involve the interest of many owners and it may be difficult to reach agreement with all owners. In both scenarios, owners try to impede the public welfare that could be attained by using their land.

The last principle included in the definition is the obligation of payment of fair compensation. This principle is the most important guarantee to individual owners on their lawful possessions. All major legal systems and constitutions include this concept as a guarantee to the owner and as a limitation of the power of government. The just compensation requirement demands that the state reimburse the owner the value of the property interest taken and place the latter in as good a pecuniary position as if the property had not been taken. The assessment of compensation is extremely complicated, and different countries incorporate different valuation methods within their expropriation legislation to reach the market value.[22] Nevertheless, the existence of compensation makes expropriation tolerable and differentiates it from other government actions, such as confiscation, nationalization, and eviction, because the latter three are devoid of the state obligation to compensate for the taking.

2. Brief History of Expropriation in Ethiopia: Pre-1931

It is difficult to trace the historical genesis and application of expropriation in pre-twentieth century of Ethiopian history because either it was intentionally neglected by historians as land was not extensively used for public works or because of the deep-rooted assumption of ownership of land by the king. Although there is ample evidence on the nature and type of land use rights over a long period of Ethiopian history, expropriation is mentioned very rarely. We find some allusions here and there that might give us a clue on the existence and practice of expropriation; and yet, it is not conclusive to say that it existed in full practice before the enactment of the 1908 Addis Ababa Land Charter. An attempt is made to construct its history and genesis from the scant records that we found. For the sake of convenience, this section is divided into pre-1931 Constitution and post-1931.

As mentioned by different writers, national or foreign travelers, the powers of the Ethiopian monarchs had been absolute.[23] Therefore, we could assume that

[22] *See* generally Kitay, *supra* note 19.

[23] During his stay in Ethiopia in the 16th century, the Portuguese priest, Francisco Alvarez, testified that the power of the king was absolute (Alvarez, F. (1970)

the emperors could take land that belonged to any person, at their pleasure, although this may not have happened frequently for two main reasons: first, until the early twentieth century, there was no significant economic development in the country that warranted the taking of land for public construction activities; and second, the emperors who mostly relied on the teaching of the Christian morality would not resort to cruel measures of land confiscation unless the person commits serious crimes. Both of these assertions are backed by some evidence presented hereunder.

2.1. Urbanism

In Ethiopia, the power to take land for public purpose did not become a matter of great concern until the early twentieth century. Until this point in history, Ethiopia's need for public works was rather limited. The country's economy was predominantly agricultural, and urbanization was totally unknown.[24]

(Originally translated by John Stanley in 1881). *Narrative of the Portuguese Embassy to Abyssinia During the Years 1520-1527,* London, The Hakluyt Society). A hundred years later Almeida (a Jesuit priest) said "the Emperor confiscates and grants all the lands as and to whom he chooses"; (*see* Pankhurst, R (1966) *State and Land in Ethiopian History,* Addis Ababa, The Institute of Ethiopian Studies and the Faculty of Law, Haile Sellasie I University, p.121;) James Bruce a 17th century Scottish traveler to Ethiopia has also declared that "all the land is the king's; he gives to whom he pleases during pleasure and resumes it when it is his will; but the crown makes no violent use of its power in that respect."(Paul, J. C. N. & Clapham, C.(1972), *Ethiopian Constitutional Development I, a Source Book,* Addis Ababa, Haile Sellassie I University and Oxford University Press, p. 290); William. C Harris who lived in Shoa also noted that "The lives and the lands of every subject of Shoa belong *de jure* to Sahela Selassie, and of their persons and worldly substance he is absolute master" (Harris, W.C (1884) Highlands of Ethiopia, Longman, Brown, Green and Longmans, London, p. 167); An Ethiopian writer and Minister during the Imperial period also noted: "the Ethiopian Emperor has an uncontested and boundless power over the territories he rules. He is both the temporal and spiritual ruler" (Mahteme Sellasie, *infra* note 48).

[24] This is true with due regard to the existence of two previous capitals of the realm, namely Axum (100 BC-800 AD) and Gonder (17 -18 Century). The evidence that cities were absent in Ethiopia was conclusive after European travelers reached the high plateau during and following the fifteenth century. They commented not only upon the tent encampments, but also upon the total lack of urbanism in Ethiopia. One such commentary is Francisco Alvarez's narrative of the Portuguese Embassy to Ethiopia in 1520 states: 'In all the country there is no town which exceeds 1,600 households, and of these there are few, and there are no walled towns or castles, but villages without number.' (The estimate of houses would put the population of the largest town between 8,000 and 10,000.) Accounts written after Alvarez's time were not anywhere nearly so generous with their estimates of the population and number of towns. Jerome Lobo, visiting Ethiopia during the early 1600s, noted that the

Throughout most of its history, Middle Age Ethiopia remained a land of small villages and isolated homesteads;[25] hence, there were fewer motives for the leaders of the time to take land for public works. Modern urbanization started only with the establishment of the present capital, Addis Ababa in 1886. Although modern road construction works started on a small scale and for military purpose earlier during the middle of the nineteenth century, it was intensified only after the establishment of the capital.[26] Therefore, in the absence of historical records to that effect, it can be concluded that because of absence of urbanism and thereby a need for infrastructure, the level of expropriation was minimal.

2.2 Less abuse of power

Even if the power of the kings was said to be indisputable over the people and their properties, one needs to be cautious regarding whether this absolute power was also extended to all types of land rights. A glimpse into the Ethiopian history of property rights vis-à-vis the power of the sovereign kings shows that land which was said to be controlled by the king was transferred in the form of *rist* and *gult* rights to individuals and the church. While *gult* right was a fief right that was given to the nobility and empowered them with privileges of

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Ethiopians did not have cities since they lived in tents and in cottages only rarely built of stone. Visiting Ethiopia between 1624 and 1633, Manoel de Almeida said: 'Apart from the Emperor's camp there is no settlement in the whole empire that deserves the name of city, or even of town. They are all villages, some larger, some smaller, but such that no other name suits them. In the seventeenth century, a German scholar, Job Ludolf, wrote: 'Besides Aksum, there are no Cities in Habessinia, and but few towns.... The Habessines wonder to hear of so many great Cities among us ... [and] . . . the Habessines choose rather to live after the manner of Villagers... .' Ludolf believed that there had been a general regression in the technology of construction after the Ethiopian monarchs left Aksum (Gamst, F. C. (1970). Peasantries and Elites without Urbanism: The Civilization of Ethiopia. *Comparative Studies in Society and History,* 12**,** 373-392, p. 379).

[25] Pankhurst, R. (1990). *A Social History of Ethiopia,* Addis Ababa, Institute of Ethiopian Studies, Addis Ababa University, p. 275.

[26] As detailed by Richard Pankhurst, modern road building began during the reign of Emperor Tewodros II (1855-1868) with the intent of creating easy and rapid movement for his military and cannons. Assisted by foreigners he was able to link his capital, *Debre Tabor*, with three main routes to Gonder, Gojam and Gafat. To break Tewodros, the British had also resorted to road construction by starting from the sea. But quality and modern roads started to emerge with the establishment of Addis Ababa by Emperor Menelik II. The early half of the twentieth century was thus a time in Ethiopia which can be portrayed as a time of public works development and extensive use of expropriation. (*see* Pankhurst, R. (1968). *Economic History of Ethiopia 1800-1935,* Addis Ababa, Haile Sellassie I University Press. p. 284-289).

administration, tribute collection and adjudication over the peasant settled on the land, *rist* right confers actual use right to the farming population. This means *gult* right was like an office or position that required imperial blessing for its continuity or inheritance. On the other hand, *rist* right was a property right that could be mostly inherited among kin members.[27]

Historical records show that the indisputable power of kings was working in relation to *gult* rights. Kings used to take and give *gult* rights to the nobility at pleasure. On the other hand it is claimed that *rist* right of individuals was sacred and secure, in that even kings could not arbitrarily take it at whim.[28] There was less abuse of power when it comes to *rist* rights because of religious and moral grounds. As James Bruce, the eighteenth century Scottish traveler to Ethiopia, underlined, although the monarch had this absolute right over the land and the subjects in respect of taking, the emperor "makes no violent use of its power in that respect."[29] A similar conclusion was reached by the nineteenth century British traveler to central Ethiopia who after emphasizing the arbitrary power of the King of Shoa, noted that: "[v]iolent use is not often made of this arbitrary power, and it is rarely resorted to, except in cases of high treason or of offences against the state, which, in place of capital punishment, are visited by confiscation of property, with imprisonment for life."[30]

According to the evidence that is found, it is said that King Lalibella of the *Zagwe* Dynasty (early 13th century)[31] had made payments for the land he used to

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[27] For details on the nature of *gult* and *rist* rights see, Hoben, A. (1973), *Land Tenure Among the Amhara of Ethiopia: The Dynamics of Cognatic Descent*, Chicago, University of Chicago Press.

[28] *See* for example, Markakis, J. (2006). *Ethiopia: Anatomy of a Traditional Polity,* Addis Ababa, Shama Books, p. 103; see also Jemma who, based on the claims of different historians, argued that *rist* was perceived as "sacred hereditary property". Accordingly, whoever have had the rights to the *rist* land was considered to be a *ristegna*. A *ristegna* had almost absolute or an unchallengable control, use and inheritance rights over his or her possession. As far as political authorities, including the emporer or landlord interventions were concerned, there was no tenure insecurity or fear of being evicted from the rist land (Hussein Jemma (2004) *The Politics of Land Tenure in Ethiopian History: Experience from the South*, paper presented for the XI World Congress of Rural Sociology, Trondheim, Norway.) This was generally attributed to the deep-rooted protection provided by the ruling class to rist rights mainly for fear of God's presecution.

[29] Paul and Clapham, *supra* note 23, p. 290.

[30] Harrison, *supra* note 23, p. 167.

[31] The *Zagwe* dynasty ruled the country from approximately 1137-1270. Zagwe (in the ancient Geez language) means "that of the Agew" in reference to the Agew People that constituted its ruling class. King Lalibella (later Saint Lalibella) is the most celebrated king of this dynasty who built eleven rock-hewn monolithic churches

construct his well known churches. The hagiographer of the King compliments him for paying for the land on which he built his churches. "He attributes this to the king's special sense of piety and saintliness and asks a rhetorical question to demonstrate the traditional power of the monarch in the distribution of land: 'who would have forbidden the king if he had decided to take the land' (without compensation)?"[32]

Another evidence which is associated with Christian morality is the rule that was incorporated into the 15th Century law of the country, *Fiteha Negest* (The Laws of the Kings). There is a provision embodied in the *Fiteha Negest* that was influenced by the Biblical story of King Ahab.[33] By referring to the biblical story, the *Fitha Negest* provides: "Do not take wealth of any one by violence, and do not buy from him by force; neither openly nor by trick, in order not to be afflicted by God in this world and in the future…"[34]

Of course, this rule by itself is not as such telling about expropriation, but what is important is the message that it incorporates. The message here is that nobody (a person or a king) should take the property of another person by violence (such as theft and robbery) or buy by force (such as compulsory purchase). One may argue that this provision does not give the power of expropriation to the sovereign for it clearly forbids the taking of land without the consent of the owner. But, the implication is that in the event of pressing public necessity, the king would have no choice but to expropriate the land, and to rectify this wrong (transgressing the *Fiteha Negest*), he would make a recompense in kind or in cash to those who lost their property.

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from blocks of solid rock to be known as "New Jerusalem." The Churches of Lalibella are now in the list of the UNESCO World Heritage sites.

[32] Tadesse Tamirat. (1972). *Church and State in Ethiopia, 1270-1527,* Oxford, Clarendon Pres, p.98.

[33] *Holy Bible*. King James Version, 1 Kings 21:1-16. According to the Bible, Israel's King Ahab desired a vineyard owned by Naboth the Jezreelite to grow herbs on it. He offered Naboth his choice of either a new vineyard or "the worth of it in money." When Naboth refused to sell, Jezebel, Ahab's wife, conspired with others to put Naboth to death. As a result God punished King Ahab and his family by death.

[34] *Fitha Negest* (Amharic and Geez Version). Addis Ababa: Tesfa-Gebre-Sellassie Printing Press, Article 1544. The *Fitha Negest* (Law of the Kings) is a sophisticated compilation of legal prescriptions concerning both religious and secular matters written in approximately the 13th century in Egypt as a guide to Christian population living within the Moslem society. Originally written in Arabic, and incorporating laws from Old and New testament, Roman law, and some Moslem principles and the proceedings of the early councils of Nicaea and Antioch, it is believed that it was translated to *Geez* (official state and church language of ancient Ethiopia) in the 15th century, during the reign of Emperor *Zera Yaqob* (1434-1468) and had been serving as binding law in the imperial court.

When Emperor Fasiladas (1632-1667) established the then capital city of Gonder, he must have taken lots of land from farmers, or he must have built it on barren hilltops. There are extensive records that show the private ownership and free transaction of land in the Gonderine period.[35] In other words, land was held in private hands during that period. But, there is nothing important that is said about the expropriation of land in that era. Yet, we can assume that the later monarchs must have taken land either by purchase or expropriation from private owners for the construction of churches, royal castles, streets and market places during the subsequent century and half, following the establishment of Gonder by Fasiladas.

The church was a holder of large tracts of land property throughout the history of Ethiopia.[36] Emperors of different eras made the grants to churches and monasteries so that the latter would be supported from the income. However, sometimes, this smooth relationship between the church and the palace encountered difficulties, which resulted in the expropriation of church lands. For example, as a result of the clash he had with the Church on religious matters, Emperor *Susneyo*s (1607-1632) is said to have seized a substantial part of land belonging to the monastery of *Debre Bizen*.[37] In a later period, extensive land which caused tension was expropriated by *Ras Michael Sehul* of Tigre. According to James Bruce's records, as a result of the friction that Michael had with the Church authorities, a royal proclamation was issued at Gonder in 1771 ordering that "all lands and villages, which are new, or have been given to the Abuna by the king, shall revert to the king's own use, and be subject to the government, or the Cantiba [mayor] of *Dembea*, or such officers as the king shall after appoint in the provinces where they are situated."[38] In both cases, church land was taken or reverted to the kings' hands without compensation. Besides, there is no evidence which shows that the land was taken for the common good of society; rather it was taken because of power struggle between the monarchs and the Church.

We find a similar story, in a later period, when Emperor Tewodros II (1855-1868) wanted to reform the land tenure and the Church itself. Among others, he ventured to reduce much of the Church's land and transfer it to landless

[35] For example see Crummey, D. (2000). *Land and Society in the Christian Kingdom of Ethiopia: From the Thirteenth to the Twentieth Century,* USA, University of Illinios Press, p.183; Pankhurst: 1966, *supra* note 23, p. 52.

[36] *See* for example Daniel:2013a, *supra* note 2, pp. 48-50.

[37] Pankhurst: 1990, *supra* note 25, p. 33.

[38] Bruce, J. (1790). *Travels to Discover the Source of the Nile in the Years 1768, 1769, 1770, 1771, 1772 & 1773,* Edinburgh, R G. G. J. and J. Robinson, Paternoster-Row, Vol. 4, Book 7, Chap. 3: 78 (accessible on line).

tenants[39] and to his soldiers who used to live by plundering and raiding peasants.[40] The Emperor was complaining on the magnitude of Church land as compared to his own which was intended to be allotted to the soldiers. The clergy resisted the Emperor's plans but as the contemporary missionary, Henry Blanc said, "Theodore could not tolerate any power in the state but his own. He had fought hard to be the supreme ruler of Abyssinia …and when he thought the occasion favorable to do away entirely with his power and influence, he confiscated all the Church lands and revenues."[41] His ultimate aim was to transfer the Church land to landless peasants and soldiers for better use, as salary, and to make it more productive.[42] Although his attempt was not successful,[43] this, at least, may be considered as a good example of expropriation, if the establishment of modern salaried military (defense) could be considered as an act done in the interest of the public.

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[39] Tewodros passed a proclamation in 1856 which seems to institute property in *Shoa*. It decreed that land should belong to those whose fathers had already held it as fiefs and that persons without any such claim should look to the Emperor as their father (Pankhurst: 1968, *supra* note 26, p. 142.)

[40] Caulk, R. A. (1978). Armies as Preditors: Soldiers and Peasants in Ethiopia c. 1850-1935. *The International Journal of African Historical Studies,* 11**,** 457-493. For centuries soldiers used to get food from peasants either by force or through voluntary provision.

[41] Blanc, H. (2007) (Original 1868). *A Narrative of Captivity in Abyssinia: With Some Account of the Late Emperor Theodore, His Country and People,* Harvard, Harvard University, p. 150; See also Pankhurst: 1968, *supra* note 26, p. 143. All Church land was confiscated and the number of priests was limited to five to seven. The Emperor disliked monks and above all *dabtaras,* complaining that they "wore turbans on their heads and neither fought nor paid taxes", preferring to "live in cities with prostitutes and other people's wives." (Ibid.)

[42] Pankhurst: 1966, *supra* note 23, p. 95; Crummey, D. (1969). Tewodros as Reformer and Modernizer *The Journal of African History,* 10**,** 457-469. Crummey argued (at page 468) that Church lands were making no real contribution to the national economy since the larger part of them were uncultivated, partly through the indolence of the clergy, partly through the disincentive which they gave to any peasants who might want to till them by means of high taxes.

[43] With a clash that he had with Great Britain, the Emperor shot himself before the English put hand on him. And the opposition from the priesthood contributed significantly to his fall for they were prime movers and instigators of various regional rebellions made against him. The rebellions debilitated his power which created an opportunity for the British to win easily. After the death of Tewodros, leaders of different regions and by and large the succeeding Emperor, Yohannes IV, declared at once the restoration of Church lands to their former owners. (Pankhurst: 1968, *supra* note 26, p. 143.)

The sovereign's right in respect to the land in *Shoa* (central Ethiopia) was also similar, if not greater than that of the northern Ethiopia. In a similar fashion as noted above, it has been said that in *Shoa* "all the best portion of the soil pertain to his Majesty, and all the life as well as the property of every subject is at his sole and absolute disposal."[44] Yet, some evidence from this part of Ethiopia shows that expropriation to meet royal needs seems to have been accompanied by the provision of alternative land for the dispossessed. Richard Pankhurst, citing a contemporary English traveler of the time, Charles Johnston, relates that when *Sahel Sellasssie,* King of *Shoa* (1813-1847) erected his palace at *Ankobar,* many people had been evicted from their land. The Englishman was greatly interested in the matter and made careful investigation about the fate of the peasants. He particularly wanted to know whether "any injustice had marked this course." His informants all agreed that ample compensation had been given by the king to the peasants.[45]

Ethiopia witnessed considerable amount of road construction after Emperor Menelik II came to the throne in 1889. Many and impressive amount of roads were constructed in the city of Addis Ababa during his reign.[46] Another important accomplishment of his period was the construction of a 781 km railway from Djibouti to Addis Ababa and the establishment of new towns along the new railroad. In 1894, the railway company was established and the Emperor was asked to "grant to the company a continuous stretch of territory along the entire length of the line."[47] The amount of land, according to Section Eleven of the concession contract, was to be 1000 meters in width. But, a 1908 revised contract under Section Four indicates that the width of the land through which the railway pases would be 1000 meters from Djibouti to Dire Dawa, 200 meters from Dire Dawa to Awash, and 50 meters from Awash to Addis Ababa.[48] This shows the amount of land given decreased as the line came from the lowland desert to the highland populous areas of the country.

Although there is information on the sale and purchase of land in those newly established towns, such as Dire Dawa, whether the land utilized for the railways construction was acquired through purchase or expropriation is not known. Nevertheless, the assumption is that since the eastern part of the country in

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[44] Harris, *supra* note 23, p. 279.

[45] Pankhurst: 1968, *supra* note 26, p. 140; See also Pankhurst:1966, *supra* note 23, p. 81;

[46] For details see Pankhurst, R. (1961). Menelik and the Foundation of Addis Ababa. *The Journal of African History,* 2**,** 103-117.

[47] Id., p. 168.

[48] *See* the full versions of the 1893 and 1908 railroad construction concessions as reproduced in Mahteme-Sellassie, W. M. (1970). *Zekre Neger,* Addis Ababa, 2nd ed., pp. 440-449. The original agreement dictates that the first phase was to be built from Djibouti to Harar, and the second from Harar to *Enteto.*

which most of the railways are located was mostly a desert inhabited by the *Afar* pastoralists, the land might not have been purchased or expropriated. But, in towns and in the central highland plateaus, where the land was populated, the Emperor must have expropriated land for such purpose. Yet, there is no available information whether or not compensation was paid at that time.

Nonetheless, there is relevant information from the same period that seems to enlighten us on the tradition of the time concerning expropriation procedures and compensation. This interesting story was told by Robert Skinner, the head of American Mission in Ethiopia during the reign of Menelik II. He noted that in 1903, a year before the road between *Dire Dawa* and *Harar* was projected, it was necessary to take the land required for the construction of the road. The local peasants who lost their land waited upon the governor, Ras Mekonnen[49], and complained saying that their farms would be ruined and as a result they could not accept a price offered for their land. Surprised, the Ras asked, "But it is fair price, is it not?" and the peasants answered: "It is not the price we complain of, most gracious lord; we don't want our farms destroyed." The Ras thereupon ordered them out of his presence, saying, that there was but one Governor of Harar, and that he alone would say what might or might not be done. The road was constructed…and when it was all over, the Ras called the peasants before him, and telling them that he had been compelled to exert his authority in order to demonstrate his supremacy, he was now prepared voluntarily to pay them twice the value of their property, thus showing them that their Governor could be generous as well as just.[50]

This story is interesting in the sense that the concept of expropriation is fully explained by it. Road construction is a work considered as a public good in expropriation. We also see the absence of consent on the part of the peasants to surrender their land; it was rather compulsorily taken. We even see the compensation paid to the farmers in lieu of their lost land. The other important assumption that we may gather from it is that there was the tradition of payment of compensation in the event of expropriation. The Governor of *Harar* was a trusted General and a close counsel of the Emperor, and hence what he had done at that time must be based on tradition or the acts of the Emperor himself. Taking into consideration the fact that both the railroad and the gravel road were constructed at the same period, and the fact that both cousins (the Emperor and the Governor) shared the same principles and beliefs, we can safely conclude

[49] Ras Mekonnen was a cousin of the Emperor and a father of Teferi Mekonnon, the future Emperor Haile Sellassie. He was a trusted General and Governor of the eastern city of Harar and the surrounding Somali areas. *Ras* means literally "head" and it was the highest military title given by that time.

[50] Pankhurst:1966, cited *supra* note 23, p. 169; Pankhurst: 1968, *supra* note 26, p. 289.

that land owners who lost their property to the construction of the Ethio-Djubouti railroad must have received compensation.

One may also look into the historical developments of the time concerning property rights, all of which reinforce the above assertion, that the King must have been paying compensation. Emperor Menelik II was a leader who not only allowed the introduction of modern technology, but also established a cabinet of ministers to run the state. The Emperor in consultation with his ministers passed a series of edicts, among others, concerning land property. For example, his royal chronicler tells us that in January 1891, Menelik, after consulting the *Fitha Negest,* passed an edict concerning land found in *Shoa* (from *Wayt* to *Awash*). It shortly says that "no *rist* land shall be expropriated from the owner irrespective of his crimes; let his cattle be taken as penalty".[51] A general decree containing a similar intention was adopted by Menelik's council of ministers in 1908, which said that "…no one should be evicted from his *rist* land except those escapee killers" and persons guilty of treason.[52] Menelik's daughter, Empress Zewditu, had also passed similar edict in 1928 which guarantees protection of *rist* land. "The edict gave legal confirmation to the ownership right of all *rist*-holders, guaranteeing against expropriation for whatever crimes committed."[53] These series of edicts substantiate the principle and commitment of Emperor Menelik and his descendants to protect and guarantee private ownership of land in Ethiopia.

Menelik's final commitment to the protection of private property came in 1908 when he decreed the Addis Ababa City Land Charter that affirmed, once again, the protection given to private ownership of urban lands. It is in this charter, for the first time, that we find the principle of expropriation clearly set as an independent principle. Articles 25 and 27 of this legislation[54] are of particular significance to the topic under discussion:

> ***Article 25***
> For the safety and security of the city, private owners might be compelled to sell their land together with a house, if any, to the government. The amount of compensation payable shall be determined by government experts.

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[51] Tsehafe Tezaz Gebre Sellasie (1959 EC). *Tarik Zemen ze Dagmawi Menelik Nuguse Negest Ityopia (History of the Lives and Times of Menelik II King of Kings of Ethiopia),* Addis Ababa, Artistic Ltd., p. 179.

[52] Id. pp. 334-336.

[53] Bahru Zewde (2008). Economic Origins of the Absolutist State in Ethiopia (1916-1935). *In:* Zewde, B. (ed.) *Society, State and History: Selected Essays.* Addis Ababa: Addis Ababa University Press, p. 105.

[54] The 1908 Minelik's Addis Ababa Land Charter, as reproduced in Mahteme-Sellassie, *supra* note 48, p.170; with slight difference in translation, see also Pankhurst: 1966, *supra* note 23, p. 158.

Article 27

If there is building on the land, the government shall pay the amount agreed upon or should give an equivalent thing.

The Charter included all the necessary elements of expropriation: that land and any building on it might be compulsorily taken by government, that this was to be done where it was deemed necessary in the interest of public, that the owner would be compensated based on the assessment of experts, and that the compensation would be made either in money or in kind. The Charter was influenced by the French Civil Code (Code Napoleon) since the last clause of the charter referred us to "Code Napoleon in the event this edict is not sufficiently covering other different issues." In any case, what we gather from the reading of the expropriation provision of this decree is that expropriation procedure had to be done by the city municipality itself. Courts were unlikely to be involved either in deciding the existence of "public purpose" or fairness of compensation since nothing has been said about them. In the event of compensation assessment, "government experts" would assess the value of the land and the house thereon, if any. These experts were most likely urban engineers from the city municipality.

3- Expropriation in Ethiopia, Post-1931

3.1 The 1931 Constitution and 1955 Revised Constitution

Menelik's legislative initiative to safeguard private property was continued by his successors, mainly, by Emperor Haile Sellassie I, and "the crowning act in the process of reinforcing the security of *rist*-holders was the 1931 Constitution".[55] For the first time in the history of the country, a written constitution was adopted in 1931 which, among others, included protection accorded to private property. One constitutional provision (Article 27) was dedicated to the issue of expropriation to allow the sovereign to take land in case of public necessity.

Although unpublished with the Constitution itself, a supplement was added, of which Chapter Eight is of paramount importance. Chapter Eight of the supplement of the constitution contains three Articles (Arts.74-76) guaranteeing the inviolability of the property of the Emperor and the royal family, the princes, territorial governors and other Ethiopian citizens by banning, except in the event of ascertained public utility, expropriation of land as form of punishment for crime.[56] For the sake historical reminder, we reproduce these articles as follows:

[55] Bahru Zewde, *supra* note 53, p. 106.

[56] The 1931 Ethiopian Constitution as reproduced in Paul and Clapham, cited *supra* note 23, pp. 326-336; see also Mahteme-Sellassie, cited *supra* note 48, p.771 & 789;

Article 27

Except in cases of public necessity determined by the law, no one shall have the right to deprive an Ethiopian subject of any movable or landed property which he owns.

Article 74

It is determined by law that land and property hitherto in the hands of the Emperor and of members of the Imperial family, and all lands which they may acquire in future by purchase like any ordinary citizens shall, subject to the observance of the established regulations concerning land, be confirmed to them and shall be heritable to their descendants

Article 75

It is determined by law that similarly princes and territorial governors and all other Ethiopian citizens, who commit any sort of crime, shall be punished according to the provisions of the law, but landed property which they have hitherto held, or which they may acquire in future by purchase, shall not be confiscated.

Article 76

Nevertheless, if it is necessary for the Government to construct on another person's land installations for the public welfare, such as forts, roads, markets, churches, schools, hospitals, townships or any work of this kind, it is determined by law that if the Deliberative Chambers have declared it necessary, the land owner shall be given a fair price as determined by law, or, subject to the landowner's consent, he shall receive some other similar compensation, and he shall be compelled to surrender the property; but except in a case of this kind where the public welfare is involved, a person's land may not be taken from him with a view to benefiting an individual.

The main provision (Article 27) is brief and cannot tell whether it includes compensation. But the supplementary provision (Article 76) provides details and describes the former. Thus, where public welfare (purpose) requires, a privately owned land may be taken by government upon the declaration of parliament to that effect and payment of compensation as fixed by a different law.

What is interesting is that the Constitution, although written in the image of the Japanese Meiji Constitution,[57] incorporates in its expropriation declaration

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also it is found on some web pages, such as http://www.worldstatesmen.org/Ethiopia_1931.txt

[57] Bahru Zewde (2008). The Concept of Japanization in the Intellectual History of Modern Ethiopia. *In:* Bahru Zewde (ed.) *Society, State and History: Selected Essays.*, Addis Ababa University Press, Addis Ababa, p. 206; Marcus, H. G. (1994) *A History of Ethiopia*, University of California Press, Los Angeles, p. 134.

an English type of requirement when it demands parliamentarian approval of the project before expropriating the land.[58] The other important characteristic of this rule is that expropriation would not be made with the sole purpose of benefiting another individual. This rule by and large restricts the absolute prerogative of the sovereign powers of the king as well as territorial governors in interfering in the private holding or ownerships of individual citizens.

Although the constitution presumes that a different subsidiary legislation would be enacted pertaining to expropriation, this had not come to light during the lifetime of the constitution. Nevertheless, we have other decrees which incidentally mentioned it, such as the 1933 "Land Lease to Foreigners Decree" which under Article 8 reflects the principle enshrined in the constitution:

> The Government shall have the right to take any land deemed necessary for market, churches, fortifications, railways, or other similar services upon payment of due compensation.[59]

Significant developments have been occurring in Ethiopia following the Italian occupation of Ethiopia from 1936-1941 during which Italy invested much in infrastructure construction of the country. The Italians constructed thousands of kilometers of roads, bridges, urban streets, town halls, government and court buildings in Ethiopia within the five years of their occupation. They had also a plan, the execution of which had actually been started, to settle Italian farmers in Ethiopia. To this end, land was expropriated from private individuals in urban and rural areas to implement the Italian colonial policy. In spite of its scantiness, there is evidence that the colonialists used to pay compensation, although not adequate. The Ethiopians were paid much less than the market value for their land. In Addis Ababa, for example, between 1937 and 1938, property worth about ten million Italian Lire was confiscated for colonization and new urban planning, but less than two million Lire was paid by way of compensation.[60]

On the contrary, it seems, the Italians profited by selling land, which was expropriated from the local people. In Addis Ababa, for example, land taken from Ethiopians was parceled out into small plots and sold at prices between 15 per cent and 60 per cent higher than the price of compensation.[61] Large tracts of rural farm lands occupied by the Ethiopian state and private farmers were also confiscated to settle Italian farmers. The precise scale of such confiscations is

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[58] In England only Parliament has authority to take a land by compulsory purchase. In modern times, this authority is delegated to few public organs in order to avoid repetitive laws enacted for such takings. For details, generally see Denyer-Green, B. (2009) *Compulsory Purchase and Compensation,* London, EG Book.

[59] Pankhurst:1966, *supra* note 23, p. 208.

[60] H. M. Larebo (1994). *The Building of an Empire: Italian Land Policy in Ethiopia 1935-1941,* Oxford, Clarendon Press, p. 245.

[61] Ibid.

not easy to establish. Yet, cases suggest that the Italians, at an early stage, did not hesitate to take any land thought essential for the viability of settler farms. By the end of 1939, land given in this way to the settlers totaled 186,000 hectares, not including lands that were made part of the public domain but not yet allocated.[62]

After the expulsion of the Italian forces from Ethiopia in 1941, the Imperial regime of Haile Sellassie resumed office, and the old laws were restituted. The Italians neither declared nor left any legislation concerning land in Ethiopia. The 1931 Ethiopian Constitution rather had been operating for the next decade and half without any change. It was revised in 1955 and a new rule replaced the previous expropriation provisions. Although it was not as detailed as the former ones, Article 44 of the 1955 Revised Constitution embodied enough information regarding expropriation. It provided:

> Everyone has the right, within the limits of the law, to own and dispose of property. No one may be deprived of his property except upon a finding by ministerial order issued pursuant to the requirements of a special expropriation law enacted … and except upon payment of just compensation determined in the absence of agreement, by judicial procedures established by law…[63]

A detailed scrutiny of the rule reveals that unlike the 1931 Constitution, the revised one follows an American type of procedure by involving courts in the expropriation proceeding.[64] The constitution anticipated the issuance of a detailed expropriation proclamation in the future that would establish all the procedures of expropriation presumably including its public interest aspect. The assumption of the constitution seems to have been that an agreement would be arrived on the amount between the landowner and the ministerial authority that renders the decision of the expropriation; and otherwise compensation would be determined by a court of law.

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[62] Ibid.

[63] The Revised 1955 Constitution of Empire of Ethiopia: http://www.angelfire.com/ny/ethiocrown/Constitution.html

[64] The practice in the USA is that condemning organ such as city authorities tries to negotiate first with owners to acquire the land necessary for public use through purchase. If the owner refuses to sale the land, the authority initiates condemnation proceeding in court. The request is for the court to decide on the public use nature of the project and the amount of compensation to be paid. The judicial power of courts emanate generally from the fifth and fourteenth amendments of the US Constitution which deal with property right and due process of law respectively.

3.2 The 1960 Ethiopian Civil Code

The constitutional principle embodied under Article 44 of the 1955 Revised Constitution which provides "*everyone has the right, within the limits of the law, to own and dispose of property,"* was reproduced in detail in the 1960 Ethiopian Civil Code. The Civil Code allocated a substantial part of its section to property law in general and expropriation in particular.[65] The Civil Code was drafted by the French Comparative Lawyer, *René David*, and one can see the major influence of the French Civil Code on the Ethiopian property law and by extension on the expropriation provisions. Like the Roman law tradition of continental Europe,[66] "ownership" is defined under the Ethiopian Civil Code as "the widest right that may be had on a corporeal thing," and "such right may neither be divided nor restricted except in accordance with the law."[67] In the Roman law tradition, ownership is conceived as absolute[68] except that it may be sometimes restricted where it is provided so by law. Expropriation is one example of those restrictions or interferences on ownership.

The Code recognizes "alignment" and "expropriation" as the two methods of land acquisition modalities. Expropriation is used for the "creation of new roads and streets"[69] while alignment proceeding serves to "widen or straighten existing roads or streets."[70] As already pointed out above, expropriation has not been properly defined in the Code; what is defined is "expropriation proceeding." The purposes of expropriation are generally gathered from two different provisions of the law. They are to "acquire land for public purposes,"[71] and to "acquiring or extinguishing a rights of usufruct, servitude or other rights

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[65] Of the Civil Code, Book III, Titles VI-X are allocated for property. In particular, under Title IX, Arts. 1460-1488 are dedicated to expropriation.

[66] Article 544 of French Civil Code reads: **"**Ownership is the right to enjoy and dispose of things in the most absolute manner provided that they are not used in a way prohibited by statute or regulations." The Code is available at http://195.83.177.9/upl/pdf/code_22.pdf

[67] Article 1204 (1) & (2) of Ethiopian Civil Code.

[68] In the Roman law tradition ownership right is conceived as absolute. Although difficult to define, it connotes, among others, that ownership is the greatest right that a person can have on property, that it is inherently unrestricted and that it is the only right of its kind, that there is no lesser form of ownership. For details see Simpson, S. R. (1961). Towards a Definition of "Absolute Ownership": II. *Journal of African Law,* 5**,** 145-151; Birks, P. (1985). The Roman Law Concept of Dominium and the Idea of Absolute Ownership. *Acta Juridica,* 28.; Pierre, B. (1997). Classification of Property and Conceptions of Ownership in Civil and Common Law. *Revue Generale De Droit,* 28**,** 235-274.

[69] Ethiopian Civil Code, Article 1450(1).

[70] Id., Article 1450(2).

[71] Id., Article 1460.

in rem"[72] and to "terminate" any "prior lease contract"[73] on the immovable. Before resorting to the expropriation proceeding, the competent authority shall first declare the intended project is for public purpose and notify the owner of the land thereof; and where a public discussion appears to be necessary, the condemning authority shall consult the public before declaration of public purpose.[74]

What constitutes public purpose has not been clearly envisaged in a manner such as what we saw above under the 1931 Ethiopian Constitution. But, the Code gives a clue by stating that expropriation may be used "to enable the public to benefit by the increase in the value of land arising from works done in the public interest."[75] What we can assume is that roads and streets may increase the value of adjacent properties and this is what the law intends to say. On the other hand, expropriation proceeding may not be used for the sole purpose of obtaining financial benefits.[76] Concerning compensation, it has been said under Article 1474 that "the amount of compensation or the value of the land that may be given to replace the expropriated land shall be equal to the amount of the actual damage caused by expropriation;" and this compensation shall be one "which is assessed by the committee on the day when it makes its decision." Even if it can be said that the amount is fair compared to, for example today's compensation, it cannot be said that it is equal to market price.[77]

3.3 Expropriation in Post 1975 Ethiopia

The Civil Code expropriation provisions were partially suspended following the demise of the Imperial regime and the assumption of power by the Marxist Military Derg[78] regime which nationalized all rural[79] and urban lands and urban extra houses[80] and abolished private ownership of land. The very idea of sanctity of private property and the need to use expropriation under exceptional cases of "public interest" was defeated by the very nationalization act of the military

[72] Id., Article 1461(1).
[73] Id., Article 1461(2).
[74] *See* Articles 1463-1465.
[75] Id., Article 1464(2).
[76] Id., Article 1464(1).
[77] *See* for example, Daniel: 2013b, *supra* note 2; Also presented and published at FIG Conference, Kuala Lumpur, Malaysia, p. 17-18. http://www.fig.net/pub/fig2014/papers/ts01f/TS01F_ambaye_6821.pdf
[78] Daniel W. Ambaye. (2012) Land Rights in Ethiopia: ownership, equity and liberty in land use, FIG Conference paper, Rome. http://www.fig.net/pub/fig2012/papers/ts02d/TS02D_ambaye_5521.pdf
[79] Public Ownership of Rural Lands, Proclamation No. 31/1975. *Negarit Gazeta.* Year 34, No. 26.
[80] Government Ownership of Urban Land and Extra Houses, Proclamation No. 47/1975. *Negarit Gazeta* : Year 34, No. 41.

government. What makes nationalization different from expropriation is that the former is devoid of any compensation.

Rather, without mentioning the status of the Civil Code expropriation rules, the Derg inserted its own expropriation rules in its rural and urban land proclamations. The 1975 Rural Land Proclamation[81] embodied Article 17 (Power of Expropriation) which provides the following:

1) The Government may use land belonging to peasant associations for public purposes such as schools, hospitals, roads, offices, military bases and agricultural projects.
2) The Government shall make good such damage as it may cause the peasant association by decision to expropriate the holding.

Likewise, Proclamation 47/1975 provided the following regarding urban land:

Article 8: Power of Taking and Expropriation

1) Where a person, family or organization fails to utilize his or its urban land within the period to be specified by the Ministry, the Ministry may take back such land and put it to appropriate use.
2) The ministry shall, by giving compensation in kind, expropriate for public purpose urban land held by person, family or an organization.

Article 19: Expropriation of Houses

The Government may, by paying compensation, expropriate for public purpose an urban house held by any person, family or organization.

What is clear is that in the event of expropriation of urban and rural land, the compensation is to be made in kind, that is land to land. Since land was owned by the state, it is obvious, that the location of replacement land was of little consequence. It means, since land had no value, a change in location would not bring about a change in compensation amount.

It is unique to the rural land proclamation that it adopted a restricted approach to public purpose definition by confining it to the classical state activities such as roads, school, and military camps. Unlike the Civil Code, which is silent in this respect, Proc. No. 31/1975 follows the approach of the 1931 Constitution. This has not been, however, repeated in the urban land law Proc. 47/1975.

With regard to the expropriation of urban houses, Proclamation No. 47/1975 states that compensation would be paid. However, it does not bother to show the modality of property assessment. Whether it should be valued based on market value of the property or as cost replacement is not known. But in the absence of such rules, the assumption is that courts would use the Civil Code as reference.

[81] *Supra* note 79.

After the fall of the Derg and its replacement by the transitional government, there was no significant legal development concerning land expropriation except the 1993 urban land lease proclamation which incidentally mentions expropriation as a means to terminate lease contract[82]and the possibility of payment of compensation in such situation.[83] This approach was never changed in the subsequent lease Proclamation No. 272/2002 as well.

However, there was a change in the definition given for "public interest" and a new concept, "Clearance of Urban Land," was introduced representing the idea of expropriation.[84] The practice looks like what is known as "resumption" instead of expropriation. Resumption refers to the reclaiming of government land provided by lease contract upon reimbursement of a paid up lease price.

Significant change was introduced in respect of land ownership in general and expropriation in particular in 1995, following the adoption of the FDRE Constitution. The FDRE Constitution recognizes ownership right of private property in Ethiopia.[85] The definition of private property, however, excludes land as a subject of private property; its ownership is vested in the state and the people.[86] The constitution guarantees the right of owning and disposal of any property established on the land. It also guarantees this right by providing commensurate amount of compensation in the event of expropriation of private property for public purpose activities.[87] The difficulty in this regard is that there seems to be an apparent contradiction between Art. 40(3) of the Constitution that guarantees joint ownership of land by the people and the state and Art. 40(8), that denies compensation for the loss of land by expropriation.[88]

There was a time gap for the next ten years and attempt was made in 2004 to promulgate a new expropriation proclamation (Proclamation 401/2004).[89] This proclamation was brief and contained only sixteen provisions. Most of its contents are included in the present Expropriation Proclamation No. 455/2005,[90] the content of which is beyond the scope of this article. The significant characteristic of Proclamation No. 401/2004 was that unlike the Civil Code or

[82] Proclamation to Provide for the Lease Holding of Urban Land, *Negarit Gazeta,* Year 53, No. 40. Art.11 (1) (b).
[83] Id., Art. 11(3).
[84] See Articles Re-enactment of Urban Land Lease Holding Proclamation No. 272/2002, *Negarit Gazeta,* Year 8, No. 19, Art. 16.
[85] FDRE Constitution Art. 40(1).
[86] Id., Art. 40(3).
[87] Id., Art. 40(8).
[88] For detail on this argument, see Daniel: 2013a, *supra* note 2.
[89] Appropriation of Land for Government Works and Payment of Compensation for Property Proclamation No. 401/2004.
[90] Expropriation of Landholdings for Public Purposes and Payment of Compensation Proclamation No. 455/2005.

the current expropriation legislation listed down the type of activities that should be considered as *works* carried out in the *public interest*. The list under Article 2 included such activities as power generating plants, highways, airports, dams, railways, fuel depots, water and sewerage facilities, telephone and electrical works and other related activities. In this way, one can notice that the legislation had followed its predecessors by adopting a narrower concept of public purpose.

Conclusion

Expropriation is a forced taking of land by the state from private owners for public purpose activities and against payment of adequate compensation. What makes expropriation different from nationalization and confiscation is that the latter two are devoid of compensation. Looking into the Ethiopia's past, one may realize that these three measures, i.e. expropriation, nationalization and confiscation were implemented by monarchs and governments.

Even if confiscation might be predominant, considering the absolute power of the sovereigns of different ages, we prefer to argue here that there were also incidents of expropriation cases where the expropriating organ was paying compensation in kind or cash. Yet, lack of historical records about expropriation prevents us from being conclusive about its practice, which requires further research in the area.

However, expropriation saw continuous and recorded development since the reign of Emperor Menelik II in general and the promulgation of the 1908 Addis Ababa Land Charter in particular. The 1931 and 1955 Constitutions of the imperial era provided adequate protection to private property by exceptionally allowing expropriation measure only for public purpose activities. This protection was also given emphasis in the 1960 Ethiopian Civil Code which addressed expropriation adequately. Under the Civil Code expropriation was allowed only under strict public purpose cases, and in effect, it, for example, did not allow expropriation of land for pure financial gains that can be obtained from the reallocation of land to investment. However, the protection provided by the Civil Code to private property was sidelined after the nationalization of all land by the Derg in 1975.

As the nationalization of rural and urban land in 1975 was confiscation and not expropriation, the legal regime that defined 'public purpose' in its traditional context of public works such as roads, public utilities, etc. was not formally changed until Proclamation No. 455/2005 and others widened the definition of 'public purpose'. While the notion of public ownership of land has been inherited by the current Constitution and other laws which deny economic value for land upon expropriation, the laws that changed the Civil Code's definition of 'public purpose' have widened the grounds for expropriation. ■

The Myth of 'Tragedy of the Commons' in Sustaining Water Resources

Ayele Hegena Anabo ♣

Abstract

With growing concerns regarding natural resources security over the last fifty years, a range of movements, including the notion of *the tragedy of the commons* suggest how to enhance sustainability of natural resources. A case in point is the discourse on the necessity of introducing regulatory and market schemes for the challenges to the sustainability of the commons. This article, *inter alia*, highlights the literature on the *tragedy of the commons*, in order to understand its theoretical and practical strengths, and examine the applicability of its core ideas to current issues of water security. As contemporary water security problems are interconnected and complex, the article challenges the adequacy and effectiveness of coercive regulatory arrangements to individual water users' behavior in sustaining water security. It also examines the variation of new initiatives (in natural resources management) from the traditional perspectives of the *tragedy of the commons*. It is argued that introducing coercive regulatory institutional arrangements is not by itself sufficient because water security may require comprehensive regulatory and non-regulatory institutional arrangements at national and transnational levels (supplemented by comprehensive implementation strategies) to address a range of water pressures.

Key words

Tragedy of the Commons, the Commons, open- access, institutional arrangements, water security, water pressures

DOI http://dx.doi.org/10.4314/mlr.v7i2.5

Introduction

Where natural resources experience little pressure and in the absence of scarcity problems, regulatory intervention may not be so important.[1] The theory of the *tragedy of the commons* calls for the commons to be appropriated. When such

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[1] James Salzman and Barton H. Thompson (2010). *Environmental Law and Policy*, 3rd Edition, Thomson Reuters, p.47.

appropriation is not possible, the theory suggests the introduction of regulatory intervention, which limits the access to and use of the commons. Hardin's coercive regulatory remedy focuses on the behaviour and control of individual users in limiting access to and use of scarce natural resources. From a water security point of view, the focus of this theory is to introduce coercive regulatory schemes for the demand of water users. The implication of this remedy is that a lack of coercive regulatory instruments for water demand management is a root problem for the water resources tragedy.

This study argues that approaching water resources problems in terms of the regulation of individual water users' demand management may have its own positive contribution to enhancing water sustainability, if the institutional arrangements for demand management are comprehensive enough to address a range of water over-exploitation problems. However, contemporary water security challenges are diverse by their nature, and these problems do not always stem from lack of coercive regulatory institutions for water demand management.

Enhancing water security needs to be approached through multifaceted regulatory and other institutional arrangements, which are beyond the regulation of individual water users' behaviour. Such institutional arrangements should be introduced more inclusively and comprehensively to address the range of water security pressures, including controlling the behaviour of riparian states, which the tragedy of the commons has barely addressed. More importantly, regulatory rules by themselves may not bring about change without introducing effective implementation strategies. Considering all these challenges, the central argument of this study is that lack of proper institutional arrangements for water demand management may be part of the problem for contemporary water security challenges.

The academic inquiry in this article re-frames the tragedy of the commons debate in relation to water security, in the orientation that the regulatory arrangements themselves for the demand of individual water users should be comprehensive enough to address a range of water pressures. However, present day water security challenge may need non-coercive regulatory institutions. It is argued that the tragedy of the commons theory should be re-framed to an orientation that understands water security challenges from the perspectives of the interconnected and complex problems that need integrated water resources management with a view to addressing a range of water security threats.

1. Basic Assumptions of the Tragedy of the Commons Theory

1.1 The concepts of the tragedy of the commons

The fear of the ruin of scarce natural resources by human action is not a new idea. Hardin published an article in *Science Journal* in December 1968, entitled 'The Tragedy of the Commons'.[2] Subsequently, this notion has been widely discussed and has dominated scholarship in different disciplines. Since its publication, the article has been widely reprinted in scientific journals and quoted across disciplines.[3]

The tragedy of the commons theory embodies two key words: 'tragedy' and 'commons'. The word '*tragedy*' is not seen in the usual theatrical sense. Hardin stated that '[t]he essence of dramatic tragedy is not unhappiness. It resides in the solemnity of the remorseless working of things.'[4] Until the commons are ruined, rational individual users generate the maximum possible benefits, whilst leaving the cost of over-exploitation of the commons. Hardin further underlined the idea that '[t]his inevitableness of destiny can only be illustrated in terms of human life by incidents which in fact involve unhappiness. For it is only by them that the futility of escape can be made evident in the drama.'[5]

Similarly, the tragedy of the commons uses the word '*commons*' frequently. Hardin described 'commons' as a common pool of resources where access to natural resources is open to all persons.[6] These resources are freely available to anyone in the system and are unregulated. Similarly, Crowe defined the concept 'commons' as 'a social institution…some environmental objects, which have never been, and should never be, exclusively appropriated to any individual or group of individuals'.[7] In his description, Crowe includes such things as water, the atmosphere and living space as 'commons'.[8]An example that Hardin used is that of open-access pastureland, in which no user has the prerogative to exclude others from use, and all users are equally entitled to use it without any

[2] Garrett Hardin (1968). *The Tragedy of the Commons*, 162 SCI. 1243, 1244.

[3] Ian Angus, *Socialist Voice: Marxists Perspectives for the 21'st Century*, August 24, 2008.

[4] Hardin, *supra* note 2, pp. 1243-1248.

[5] Ibid.

[6] Ibid.

[7] Berly Crowe (1969). 'The Tragedy of the Commons Revisited', *Science, News Series* 166(399) 1103-1107.

[8] Ibid.

restriction. There have been criticisms against Hardin's usage of the term 'commons' to describe open-access resources.[9]

1.2 A large number of people as owners

Hardin's notion of the tragedy of the commons was not a new finding. It roots and assumptions are partly related with Aristotle's perspectives. Aristotle had stated that anything that 'is common to the greatest number has the least care bestowed on it'.[10] Noticeably, Aristotle observed that the nature of rights over a thing affects its prospects of care; it can either enhance the sustainability of resources, or may expose them to depletion and degradation. In those circumstances when the level of care a given thing receives is the least possible, the prospect for those resources may be depletion.

The underlying idea is that when something is under the control of the largest number of people, it becomes difficult to provide the maximum possible care that thing deserves. This idea implies that holding a thing in common is not by itself problematic; the crisis is most likely experience when a large number of people enjoy a common right over a thing. The contrary reading of Aristotle's premise implies that the care level of something is the maximum possible when the number of persons with property rights over the thing is small.

In terms of environmental resources, '…the creation or recognition of property rights' is considered as the scheme that remedies the problems of the commons.[11] Vesting property rights prerogatives on individuals or communities has been assumed to halt the short-term economic gain that can devastate the long-term benefits of resources.[12] Once the government creates or recognizes property rights over something then it leaves it for the market, with the assumption that no one would act against his or her own self-interest.[13] In contrast to something held in common by a large number, private property rights provide an incentive that encourages an owner to value and manage the resources for his long-term benefits. For instance, Carol contends that 'exclusive private property is thought to foster the well-being of the community, giving its

[9] Michael Taylor (1992). 'The Economics and Politics of Property Rights and Common Pool Resources', *Natural Resources Journal* 32; p 3 see also Dasgupta, Partha (1982). *The Control of Resources* , Cambridge, Mass.: Harvard Press , p.13.

[10] 'Politica', trans. B. Jowett, in Richard Mckenon (ed.) *The Basic Works of Aristotle* (New York: Random House, 1941), pp.1113-1316.

[11] Salzman and Thompson, *supra* note 1, p.47-48.

[12] Id., p.48.

[13] Ibid.

members a medium in which resources are used, conserved and exchanged to their greatest advantage'.[14]

One of the important differences between ordinary common rights and public property is the amount of people who enjoy the thing in question. In many cases, in ordinary commons, the number of persons with common rights may be too small, whereas, in public, it is too large.[15] Since a large number of users are involved, the care bestowed to the resources is the least possible, unless there are schemes to regulate users' behaviour. However, in those contexts where something is owned by a small or large group as co-owners, there has been care for the resources, since a group of people introducing self-regulation or a level of resources use is determined by a government's rules to ensure the sustainability of the resources.[16] The co-owning group excludes others from intervention, which adversely affects their interest.[17] In the case of public property rights, most of the time, a given thing is held in common by the largest number of people, and the government has the authority to control access and the extent of use in order to protect the common interest.[18] Noticeably, users of the commons are expected to abide by the rules that impose duty.[19]

1.3 Unregulated commons

Hardin noted that if the commons are left unregulated, the extent of exploitation relies on the judgment of the users themselves, and he doubts that individual rational users would work to sustain the long-term interests of the common users. Apparently, those individuals who exploit the commons excessively would leave fewer resources for those users who commit themselves. In the absence of any rules restricting the access and extent of use, such resources become open-access resources.

Ultimately, such exploitation of resources would lead the commons to a tragedy that might even lead the resources to the extent of extinction. For such adverse consequences, Hardin's theory criticizes the political-economic model

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[14] Carol M. Rose (1986). 'The Comedy of the Commons: Commerce, Custom, and Inherently Public Property', *Faculty Scholarship Series*. Paper 1828. Available http://digitalcommons.law.yale.edu/fss_papers/1828, last accessed 05 august 2013

[15] Daniel H. Cole (2002). *Pollution & Property: Comparing Ownership Institutions for Environmental Protection*, Cambridge University press, p. 11.

[16] Carl Dahlman (1980). *The Open Field System and Beyond: Property Rights Analysis of an Economic Institution*, Cambridge: Cambridge University Press, pp. 26, 132

[17] Daniel Bromley W. (1991). *Environment and Economy: Property Rights and Public Policy*, Oxford,: Basil Blackwell, pp. 25-6.

[18] Daniel H. Cole (2002). *Pollution & Property: Comparing Ownership Institutions for Environmental Protection*, Cambridge University press, pp 7-8.

[19] Ibid.

of leaving the resources as open-access. As a root cause of environmental challenges, the tragedy of the commons considers the absence of regulatory rules of the commons users' behaviour.[20] It assumes not only that the commons is a natural resource held in common by many individuals, but also that the access and extent of the exploitation of resources is unregulated.[21]The incentive is created since the cost of the exploitation of resources is externalized and is borne by the public at large, whilst rational individual users are maximizing short-term economic gain with no cost to pay.[22]

Hardin illustrated this problem by using open-access pastureland. With open-access pastureland, each rational herdsman makes an effort to maximize the gains from his or her herding in a plot of land.[23] In such situations, Hardin believed that a rational herdsman would receive most pasturelands benefits by adding more and more herds, whilst at the same time; these practices would lead the natural resources to ruin.

> The tragedy of the commons develops in this way. Picture a pasture open to all. It is to be expected that each herdsman will try to keep as many cattle as possible on the commons. Such an arrangement may work reasonably satisfactorily for centuries because tribal wars, poaching, and disease keep the numbers of both man and beast well below the carrying capacity of the land. Finally, however, comes the day of reckoning, that is, the day when the long-desired goal of social stability becomes a reality. At this point, the inherent logic of the commons remorselessly generates tragedy.[24]

The tragedy of the commons theory stresses that natural resources experience possible threats to their sustainability if they are left unregulated.[25] It is believed that, in 'open access', any user or group of users is unable to limit access and unwise use the commons.[26] The users' behaviour is uncontrolled, in terms of protecting common interests and environmental sustainability;[27] they are free to use the resources to the extent of their need. The fear for such resources is, without rules or limitations, people act less responsibly.[28] The openness (non-

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[20] Eban Goodstein (1995). 'The Economic Roots of Environmental Decline: Property Rights or Path Dependence?', *Journal of Economic Issues* 62, p. 1029.

[21] Salzman and Thompson, *Supra* note 1,.pp. 19, 47.

[22] Ibid, pp.20-21.

[23] Hardin, *supra* note 2, pp. 1243-1248.

[24] Ibid.

[25] Hardin , *supra* note 2, p. 1243.

[26] Cole, *supra* note 18, p. 6.

[27] Bonnie J. McCay (2009). *Right to Nature: Ecological, Economic, Cultural, and Political Principles of Institutions for the Environment* (Editors: Hanna, S., Carl Follke, F. and Makler, K. Island Press, Washington), p. 115.

[28] Ibid.

restriction) of the access and use of the resources facilitates those resources' ruin. As the incentives to exploit the use of resources increase, the users are encouraged to exploit the unregulated resources more and more.[29] Eventually, all users may resort to exploiting as their capacities allow, rather than reasonable use from what is available and from what the carrying capacity of the resources permits. 'Freedom in a common brings ruin to all.'[30]

The milestone underlining the tragedy of the commons is that if a resource is held in common by a large number of people, for use by all without limitation of access and use, and owned by no person or group, no one may wish to behave and use the resources in a manner that sustains the resources for long-term common use. The users exploit resources in a way that promotes short-term self-benefits while ignoring or undermining the long-term benefits. In such a situation, '[t]he result is individually rational in the short term – if the resource will be depleted, you might as well ensure you get your share –but collectively disastrous in the long term.'[31]The openness of the commons develops a dilemma for the commons use. This dilemma is described as '…individually rational behaviour is collectively deficient. Individuals' personal incentives work *against* the best long-term solution.'[32] Due to this, the commons held through public property may require more regulatory and non-regulatory schemes to enhance the sustainability of resources.

2. Averting the Tragedy

Identifying the conditions that lead to a ruin does not assure sustainability of the commons. It needs to find out mechanisms that can facilitate sustainable resources usage. The tragedy of the commons gives insight as to how to prevent the open access scarce resources from generating ruin for all.[33] The theory has identified two alternative solutions: the commons to be appropriated when such measure is possible, or be regulated by coercive rules if appropriation is impossible. Both remedies suggest defining institutional arrangements limiting access and use of the commons towards controlling the overuse of natural resources.

2.1 Appropriation of the open-access resource

The market-oriented remedy for the tragedy of the commons theory suggests that, if appropriation is possible, a government can establish rules assigning

[29] Ibid, pp. 19, 47.
[30] Hardin, *supra* note 2.
[31] Salzman and Thompson, *supra* note 1, p.20.
[32] Ibid.
[33] Hardin , *supra* note 2, pp. 1243-1248.

private property rights over scarce open-access resources; then, each resources owner uses natural resources in a way that is sustainable. The implication is that a 'rational individual' does not cause his or her own resources to be ruined by his or her own actions. Hardin's argument, suggesting appropriation of natural resources, supports privatization to regulate users' behaviour. Privatization of the commons assumes the owners defend abuse of the natural resources through property law. The assumptions are that publicly owned sectors are exposed to inefficient performance, are subject to 'state failure', and portray market forces as better devices to enhance economic efficiency.[34]

However, the market itself is naturally exposed to failure.[35] This demonstrates that free market is not a panacea for social, environmental and economic problems.[36] For instance, *Peritz* defined the term 'competition' as 'a process whereby firms fight against each other in order to secure customers for their products by adopting any means'.[37] *He further* described free competition as 'the most certain way of fixing the true worth of merchandise between buyers and sellers'.[38] The restraint or absence of a choice in any market affects competition.[39] Accordingly, the notion of competition itself is a mediating force that balances interests. Here, for competition to happen there must be competitors who compete in the same market to obtain maximum profits, and consumers who have choices of a specific service or product.[40]

Simply put, if efficient regulatory schemes are not in place, 'state failure' in the case of public control is replaced by 'market failure' in the case of private control. The essence of this idea is that privatization itself does not bring about competition if there are no possible competitors. Even in markets with many choices, leaving the market alone to its own devices (demand and supply) may give rise to unwanted outcomes.[41] Potentially, in an unregulated market, firms

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[34] UNCTAD Model Law, (2001b). The relationship between competition authorities and regulatory bodies, pp.12-18.

[35] Michal S. Gal (2004). *The Ecology of Antitrust Preconditions for Competition Law Enforcement in Developing Countries*, New York University School of law, pp. 22-38

[36] Erik Swyngedouw, (2005). 'Dispossession H20 : the contested terrain of water privatisation', *Capitalism Nature Socialism*, 16(1), p. 82.

[37] CUTS (2001). *Competition Policy and Law Made Easy'* Monographs on Investment and Competition Policy, pp. 6-8.

[38] Rudolph Peritz (1996). *Competition Policy in America*, (Oxford University press), p.1.

[38] Ibid. pp. 2-3.

[39] OECED (2000). *Hard Core Cartels*, Meeting of the OECD Council at Ministerial Level, pp. 12-13

[40] Ibid.

[41] Gal, *supra* note 35, pp.22-38.

may tend to impose restrictions that are anti-competitive practices by their nature. In such situations, it is often said that the government monopoly may have been replaced by a private monopoly, leading to 'market failure'.[42]

2.2 Restraint by coercive rules developed through outside agents

In cases where appropriation is impossible, the tragedy of the commons suggests the regulated access and use of commons. These rules involve 'Mutual Coercion Mutually Agreed Upon'.[43] Hardin believed that it might not be possible to limit the tragedy of commons through a mere 'verbal appeal'. The theory recommends the introduction of coercive rules that limit selfish individuals or groups. As a society, the users need to change their behavior towards the over-exploitation of the commons. To avert the tragedy of the commons, in addition to the creation or recognition of property rights, a range of regulatory and non-regulatory schemes have been developed.[44] One of these regulatory arrangements is prescriptive (coercive) regulation. In prescriptive regulation, the government may limit access or the extent of the exploitation of resources.[45] The rules limit the particular types of natural resources usage that a government considers unsustainable, and declares some resources uses are permitted. Through this, access to and exploitation of some natural resources are limited or stopped.

The Coercive rules are generally developed and administered by outside agents. It favors direct top-down natural resources management. This type of regulatory instrument is often considered as command-and-control regulation by a government agency, and it is doubtful that it brings about an effective change in the level of resources exploitation.[46] Once the users have attained the relevant level of limitation to access or use of the commons, the rule does not offer incentives to encourage further innovation that enhances sustainable resources use.[47] Due to this, the users may continue to rely on traditional and non-innovative regulatory mechanisms. However, some scholars argue that strict prescriptive regulation increases sustainable use through encouraging the production process and innovation designs.[48]

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[42] Ibid.
[43] Hardin, *supra* note 2, p.124.
[44] Salzman and Thompson, *supra* note 1, p.47.
[45] Ibid.
[46] Ibid.
[47] Ibid.
[48] Porter &Van der Linde (1997). 'Towards a New Conception of the Environment-Competiveness Relationship', 9 *Journal of Economic Perspectives* 97 , Issue 4, pp. 47-52.

Another regulatory means is financial penalties or charges that internalize the cost. This regulatory approach discourages unsustainable resource use through imposing fees.[49] It aims to provide incentives for each user to shape his or her behavior. A practical problem for introducing this scheme is identifying the appropriate fee, which accommodates the full social and environmental cost, since the valuation of the right fee is difficult.[50] Naturally, introducing and implementing the correct internalization of the social and environmental cost is increasingly dependent on the political willingness of a given country. For such a scheme to be effective, the fees should be high enough to send price signals toward sustainable resources use; however, environmental goods charges often tend more towards revenue-raising.[51] In contrast to financial penalties, financial payments could subsidize those people who use the resources in a beneficial way, in order to encourage sustainable resources use.[52] Both regulation and market instruments are designed to discourage harmful social behavior and encourage beneficial behavior. In this case, the government does not impose penalties or charges; instead, it subsidizes them.

3. Drawbacks of the Tragedy of the Commons

When Hardin demonstrated what he called the tragedy of the commons on pastureland, it was not about a 'common', which is owned by a group of users who own a thing collectively and restrict other users coming from outside a group, but it was about open-access resources. Hardin using the term 'commons' whilst describing 'open-access' or 'unregulated' resources has been seen as a misconception.[53] Stevenson noted that common property is not open access; the group has rights and duties to limit access and the extent of exploitation of resources.[54] Since such property has defined rights and duties upon group users and outsiders, the commons closely resembles private property, which gives the owner the right to exclude others' exploitation without his/her consent.[55]

Similarly, Dahlman contends that the commons has been regulated by quasi-governmental or governmental rules.[56] The access and use of the resources

[49] Ibid, p.50.
[50] Ibid.
[51] Ibid.
[52] Ibid.
[53] Taylor, *supra* note 9.
[54] Glenn Stevenson (1991). *Common Property Economics: A General Theory and Land Use Applications*, Cambridge, Cambridge University Press, pp. 58-9.
[55] Ibid.
[56] Salzman and Thompson, *supra* note 1, p. 21.

within a group are limited.[57]For instance, in England, common pastureland has persisted for centuries.[58] Such pasturelands were not open-access in their nature; instead, they were owned by a defined group that excluded any other group from intervention in the property rights they had. Often, the village court, the government or a quasi-government regulated their exploitation.[59] Similarly, Turkish fisheries have been governed through common property rights, and this system has persisted for a long period of time.[60] The fishers themselves have developed rules governing the extent of exploitation, to avert possible depletion.[61] The government has also developed regulatory rules limiting fishers.[62]

On the other hand, Bromley contends that 'a common property regime for the group becomes an open access regime for the individuals within the group.'[63] There are no rules limiting individual group members from access and use of the resources. However, practice indicates that the traditional common does not entitle the group to exploit the resources without restriction.[64] Their exploitation levels are limited by rules developed by themselves or the government.[65] The members in common pool resource cannot exclude its group's members; they exclude non-group members from access and use.[66] The main confusion regarding the tragedy of the commons may stem from confusing ordinary commons or common pool resources with open-access resources. With the ordinary commons, individual owners can have a range of prerogatives to control access and the extent of exploitation to make the resources sustainable. There are schemes that exclude users outside the group and regulate resources use within the group.[67]

Elinor Ostrom observed the commons from the perspective of real-world contexts, by carrying out empirical research on communal resources, such as fisheries, land irrigation systems and farmland. She considered open-access

[57] Ibid.
[58] Id., pp. 33-36.
[59] Id., p. 126.
[60] Fikret Berkes (1992). 'Success and Failure in Marine Costal Fisheries of Turkey', in Daniel W. Bromely (ed.), *Making the Commons Work*, San Francisco: Institute for Contemporary Studies, p. 167.
[61] Ibid.
[62] Id, p. 168
[63] Daniel W. Bromley (1991). *Environment and Economy: Property Rights and Public Policy*, Oxford,: Basil Blackwell, p. 149.
[64] Ibid.
[65] Ibid.
[66] Id, pp. 25-6.
[67] Taylor, *supra* note 9, pp. 6- 8.

resources and common pool resources as two different concepts. With open-accesses resources, she believed that there is no limit to the access of resources, and it is impossible to identify who the users are.[68] Open-access resources are characterized as those resources that are free to all users. She described common pool resources as large enough, and difficult to define who the users are, but it is not impossible to identify them.[69] Hardin's explanation of pastureland usage suggests that the word 'commons' refers to 'open-access 'resources, in which no individual has a claim to any part of the resources used by another user; the commons nature of resources allows the use of a portion of it for his/her own benefit, without any limitation from other users. For example, resources like the open sea and the atmosphere are classified as open-access resources, whereas rivers and lakes are categorized as common pool resources.[70]

The second criticism against Hardin's theory was related to the decision-making institutional arrangements and organizational structures that he proposed to avert the tragedy of the commons. Ostrom argued that, with common pool resources, users have their own rules, developed to utilize the resources and limit outsiders. The tragedy of the commons also does not suggest a management role for the users of scarce common resources. It is very vague as to what organizational remit is appropriate for enhancing the security of water and it is unclear which level of government that would be mandated to provide regulatory rules. Moreover, it seems to fail to recommend options for coercive rules.

Hardin's assumptions and the solutions he suggested fail to consider the community as part of the management to supplement the coercive regulatory arrangements, but the theory finally fails to demonstrate the practical and theoretical relevance of community management. Ostrom suggested an idea that recognizes, under certain circumstances, the possibility of managing natural resources by the community itself. She underlines the fact that, in some circumstances, community users formulate the rules that regulate common pool resources and enforce them without any government intervention.[71] Her work brings a self-governance system at the centre of sustaining scarce natural resources in defined circumstances.

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[68] Elinor Ostrom (2008). 'The Challenges of Common-pool Resources', *Environment: Science and Policy for Sustainable Development*, 50:4, p. 11.

[69] Elinor Ostrom (1990). *Governing the Commons: the Evolution of Institutions for Collective Action* (New York, Cambridge University Press), pp. 90-105.

[70] Ostrom and Hess (2001). *Artifacts, Facilities and Content: Information as a Common Pool Resource*, Conference on Public Domain, Duke Law School, November , pp. 9-11.

[71] Ostrom, *supra* note 69, pp. 90-105.

However, Ostrom described the following circumstances that should shape common pool resources management.[72] Primarily, the resources' boundaries should be defined, and the users' rights be clearly identified. Moreover, there must be established rules specifying the amount of resources that each user is entitled to exploit from the common pool of resources. The third aspect concerns collective choice arrangements. Many of the individuals who are affected by the utilization and protection of the resources should become involved in the group that makes or modifies the rules that govern collective action. The fourth aspect suggests that there must be close monitoring of the behaviour of users. This can be done by a body that is at least partially accountable to the users, or can involve the users themselves. The fifth idea involves imposing a graduated sanction on the wrongdoer, based on the context and nature of seriousness. The users or officials accountable to them, or both, can impose this sanction.

Another aspect is that there should be a low-cost conflict resolution system that resolves conflict between users, or between users and the officials managing the resources. Furthermore, there is the idea that users are not restricted to having their own institutions to manage resources by the government authorities. There must be a minimum standard that entitles the users to organize how they manage their resources. At the same time, they must be given long-term access to the resources. The final aspect is the introduction of multilayer governance for the appropriation, provision, monitoring, enforcement, and conflict resolution and governance activities.

Hardin's theory called for the intervention of increased government agencies rather than participatory management through developing self-rules. However, the local users are not the only cause of the tragedy of the commons; rather they come up with solutions that are supportive in sustaining the commons. With regard to this, Ostrom demonstrated the possibility of the introduction of cooperative arrangements for the commons through collective agreement on how to exploit the resources sustainably.[73]

The commons in the tragedy of the commons demonstrate that resources are kept open-access for a larger number of individuals. As the numbers of the commons users are too many, it becomes increasingly difficult to adopt such a cooperative system and limit free riders. Often, the transaction costs are too high both to reach an agreement and to implement it.[74] This collective action problem may limit introducing a self-governance system in water resources management.

Ostrom's practical evidence has shown the existence of long-lived irrigation communities that have been stable due to the decision-making of the users'

[72] Ibid.
[73] Salzman and Thompson, *supra* note1, p.19.
[74] Ibid.

community.[75] However, Ostrom did not entirely rule out or disagree with Hardin's theory, nor did she disagree in principle with the inevitability of the tragedy of commons in the absence of an institutional arrangement regulating the behaviour of users, or in situations where common pool resources management systems are weak or impractical.[76] She maintains the optimality of the use of privatization and coercive rules as devices in different circumstances. The common pool resources theory only works in exceptional circumstances, depending on the context of resources and the behaviour of the users.

What Ostrom totally rejected was the limited choices of decision-making within the institutional arrangements that the tragedy of commons theory proposes, and the way that 'commons' was conceptualized. She underlined that the government and market alone are not solutions to the threats of natural resources pressures. Her ideas were subsequently reinforced by Bosselman, who noted that a common pool resource is not a resource that is available to anyone to exploit. Rather, it is regulated by community norms as to how it is used and who participates in the utilization and protection of the resource.[77]

Another study conducted by Ostrom, in collaboration with other scholars, suggests that there is no single institutional arrangement that averts the challenges of water resources security. Rather, 'the best system of control is one, which meets the most critical challenges of the situation at hand'.[78] They suggested that the reason why a 'control system sometimes succeeds and sometimes fails is that the challenges of resources management vary with resource; characteristics of the resource users; and the environmental, social, economic, and political context of resource use – most of which change over time'.[79] This study further suggests that water resources management should be context-specific, changing with the factors that shape the contexts, and flexible enough to accommodate those changes.

More empirical research conducted by Ostrom concerning common-pool resources shows that the status of some common pool resources are, at present, better in some areas while the scenario is different in other parts of the world.[80]

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[75] Elinor Ostrom (2000), 'Collective Action and the Evolution of Social Norms', *The Journal of Economic Perspectives*, 14(3) American Economic Association , pp.150-153.

[76] Ibid.

[77] Fred P.Bosselman (1996). 'Limitation Inherent in the Title to Wetlands at Common Law', 247(15) *Stan. Envtl. J.L*, pp.283-284.

[78] Ostrom, Stern and Dietz (2003). 'Water Rights in the Commons', *Water Resources Impact* 5(2), pp. 9–12.

[79] Ibid.

[80] Elinor Ostrom (2008). 'The Challenges of Common- pool Resources', *Environment: Science and Policy for Sustainable Development*, 50(4), p. 10.

The cause for mixed outcomes in common pool resources management is the existence of variation in the contexts.[81] She suggested that the institutional arrangements regarding natural resources require updating regularly in the light of information and experience gained.[82] They should be framed as change-responsive.[83] This new orientation in common pool resources discloses the necessity of modifying institutional arrangements in relation to the dynamics of the context. She also noted the fact that common pool resources management should take into account the interests of users and provide a conflict resolution mechanism.[84]

In this study, she reinforced the idea that common pool resource management varies according to the scope of the area it covers, the number of users, and the nature of exploitation. She concluded that there is no particular ideal common pool resource management scheme; rather, it varies with the context.[85] She went on to argue that common pool resources may be governed through various institutional arrangements, but she grouped these institutional arrangements roughly into three: governmental, private and communal institutional arrangements.[86] These ranges of management institutions are not alternatives; they may only be effective if used with sufficient information regarding the context of the common pool resources problems. None of these policy options are free of the disadvantages incurred upon their use; it is wise to choose based on the circumstances in question. These institutional arrangements are not the best schemes in all contexts and at all times.

Whilst Ostrom places direct resource users at the centre of decision-making, the initial study of the common pool resource did not provide for the involvement of persons that have a stake in the specific natural resources other than direct users when the circumstances contended by Ostrom are met.[87] Accommodating the stakes of non-direct natural resources users is equally important in natural resources management, and this was undermined. In particular, in Ostrom's early study of the common pool resource, the inclusion of the 'outsiders' community's' interests was unclear. The impression is that the

[81] Ibid.
[82] Id, p. 17.
[83] Ibid.
[84] Ibid.
[85] Id., p. 11.
[86] Ibid.
[87] Elinor Ostrom (1990), *Governing the Commons: the Evolution of Institutions for Collective Action*, (New York, Cambridge University Press, pp. 90-105.

decision-making in common pool resource was dominated by the users' self-governance system.[88]

In such situations, it is said that the selfish users may not see far beyond their self-interest.[89] It is often said that such natural resources management is a constraint for economic development,[90] and may undermine the equitable use of natural resources for present and future generations.[91] The danger may be critical to 'voiceless' stakeholders that cannot protect their interests, such as the water environment.[92]

Whilst Hardin is correct in observing that the destiny of unregulated scarce resources is ruin and threats to the security of humans and the economy, the remedies he suggested fail to recognize the creditability of participatory natural resources management. The theory seems reluctant to consider local level empowerment in the management of scarce natural resources. Moreover, the theory relied purely on coercive rules, and neglected the benefits of non-coercive models of natural resources management. For Hardin, the users of commons are the threat to resources conservation. Natural resources, including water resources, need social learning, which involves the stakeholder in natural resources management.[93] Hardin's suggestion tends to favour a more centralized than polycentric decision-making process in water resources management.[94]

In the tragedy of the commons theory, issues such as distributional equity, community welfare and other social and cultural benefits are undermined.[95] Naturally, environmental concerns are too important to be left solely to the regulators. The involvement of the local citizens is crucial to protect the environment. The common users may change their behavior towards sustainable resources use or combat against unsustainable resource exploitation by others when they realize that unsustainable resource exploitation is already happening – or is about to start happening. In addition to such hard rules and market instruments, persuasion is a soft approach to force users to change their

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[88] Bonnie J. McCay (2009). Right to Nature: Ecological, Economic, Cultural, and Political Principles of Institutions for the Environment (Editors: Hanna, S., Carl Follke,F. and Makler, K. Island Press, Washington), pp.119-121.

[89] Ibid.

[90] Savenije and Zaag (2000). 'Conceptual Framework for the Management of Shared River Basins; with Special Reference to the SADC and EU', 2 *Water Policy*, p. 25.

[91] Christopher D. Stone (2010). *Should Trees Have standing?: Law, Morality, and Environment* (3rd Oxford press, Inc. New York), p. 172.

[92] Ibid.

[93] Pahl-Wostl and Hare (2004). 'Process of Social learning in Integrated Resources Management', 14 *Journal of Community & Applied Social Psychology*,pp.193-194

[94] Garrett Hardin, *supra* note 24, pp. 1243-48.

[95] McCay , *supra* note 88, p. 111.

behaviour.[96] To this end, governments engage in a range of activities that inform the danger and create awareness of unsuitable resources exploitation, and educate the users by showing the causes and possible dangers of the over-use of resources.[97]

The tragedy of the commons may be addressed more effectively through an adaptive governance system that takes into account specific contexts, rather than privatization or government regulation.[98] In addition, natural resources have been best governed and sustained for centuries through informal institutions, rather than the formal institutions that Hardin prescribed.[99] However, this is not to generalize that traditional institutions are the best fit in all places and contexts; depending on the nature of the problems, the contexts of the natural resources and the behaviour of the users, their level of effectiveness varies.

For instance, transcending water pollution problems, climate change and related challenges that are exacerbating the scarcity of natural resources may not be effectively managed through traditional institutional arrangements alone, although they have yet to supplement formal institutional arrangements.[100] Many challenges to the availability of water resources are local by their natures, but their impacts are transcending. Naturally, such challenges may require complex, polycentric and more comprehensive institutional arrangements than localized, fragmented or centralized arrangements.

The tragedy of the commons did not envisage the contribution of weak and ineffective institutional arrangements in the increasing insecurity of the sustainability of natural resources. Rather, Hardin focused on the absence of institutional arrangements. He noted that unregulated scarce natural resources are vulnerable to ruin, but over-simplified the possible solutions, suggesting privatization or government regulation.[101]

Moreover, in its initial stage, the common pool resource theory did not place due focus on how to manage the impact of one natural resource utilization on the adjacent water body. In real world, common pool resources do not exist in isolation; ecosystems are interconnected with their adjacent ecosystems. Pressures on the given land resources affect the uses and protection of adjacent water resources. The problems of unwise exploitation of land resources may not be limited to those resources or users. However, the early orientation of the theory indicates that the theory did not give adequate place for regulating a

[96] Salzman and Thompson, *supra* note 1, p.50.
[97] Ibid.
[98] Thomas Dietz, Elinor Ostrom, Paulc Stern(2003), 'The Struggle to Commons', 302 *Science*, p. 1910.
[99] Id., p. 1907.
[100] Ibid.
[101] Dietz, Ostrom and Stern, *supra* note 98, p. 1910.

range of factors, which may contribute for the threat of natural resources scarcity except demand management.

4. Some Issues in the Applicability of the Tragedy of the Commons for Water Security Management

4.1 Water security conceptualization

Water security may be seen as a catch-box, which brings a range of threats under scrutiny. For instance, the UN Human Development Report 2006 describes water security as '...ensuring that every person has reliable access to enough safe water at affordable prices to lead a healthy, dignified and productive life, while maintaining the ecological systems that provide water and also depend on it'.[102] Similarly, Garay and Sadoff defined water security as an '...acceptable quantity and quality of water for health, livelihoods, ecosystems and production coupled with an acceptable level of water-related risk to people, environment and economics'.[103]

The notion of '*water security*' encompasses sustainable availability of adequate quality water.[104] Water resources experience *water security threats* when they become inaccessible or unsuitable for satisfying the needs of humans and the ecosystem.[105] When conducting an assessment of the notion water security, it is necessary to investigate, 'whether or not adequate quality water is available for use, and whether individuals and ecosystems have access to adequate water'.[106] The quantity of available water alone does not guarantee water security. Rather, the available water must be of acceptable quality state to meet a range of needs. Inadequate quality or quantity of water means that the security of people and ecosystems is under threat. Then there must be responsive and comprehensive institutional arrangements that control factors contributing for water insecurity at different levels.

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[102] UN, Human Development Report (2006). *Beyond Scarcity: Power, Poverty and the Global Water Crisis*, p. 3.

[103] David Garay, Claudia Sadoff (2007). 'Sink or Swim? Water Security for Growth and Development', *Water Policy*, p. 545.

[104] UN –Water Thematic Initiatives (2006). *Coping with Water Scarcity: a Strategic Issue and Priority for System-wide Action*, August 2006, p. 4.

[105] Ibid.

[106] Patrica Wouters (2010), *Water Security: Global, Regional and Local Challenges*, IPPR, p. 7.

4.2 The degree of availability of adequate safe water

The earth is covered by around 1.4 billion km^3 of water in volume and, from this figure, fresh water constitutes only 2.5 per cent.[107] Around 97 per cent of the earth's water resources are salty water, which cannot be accessible without the process of desalination being carried out. Fresh water comprises a small portion of the earth's water, but its state of accessibility is constrained by the nature of its existence. Only 0.3 per cent of fresh water exists in lakes and rivers that are relatively easily available for human use.[108] Of the remaining fresh water, 30 per cent is ground water, while 70 per cent is situated within ice and snow cover in mountainous areas.[109]

Freshwater resources are not evenly distributed by place.[110] The availability of safe water resources varies regionally, seasonally and annually.[111] Periodic available water variation affects the availability of suitable water supplies.[112] Some geographical areas are humid, while others are semi-arid or arid; and even in humid zones water availability varies by place and time.

Analyzing the over-grazing of the pastureland by the commons, Hardin's commons theory widely focuses on demand regulation rather than the multifaceted, present-day water resources challenges. It seems that Hardin did not appreciate the challenges to water security that happen due to natural water scarcity. As has been discussed elsewhere, natural cause is one of the threats to water security.[113] Due to this, natural water scarcity challenges barely obtained recognition as contributing to water security challenges. The theory also fails to propose aspects relating to water supply management. Practically, it may not be possible to provide a proper solution to natural water security challenges by opting to manage water demand alone at all times and places.

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[107] United Nations Environment Programme, available <http://www.unwater.org/statistics_res.html> last accessed 03 Feb 2013

[108] Ibid.

[109] Ibid.

[110] Peter Gleick (1998). 'Water in Crisis: Paths to Sustainable Water Use', *Ecological Applications* 8(3), p. 574.

[111] UN-Water (2008). *Status report on Integrated Water resources Management and Water Efficiency Plans*, Prepared for the 16th session of the Commission on Sustainable Development- May 2008, p.3.

[112] William Howarth (2012), 'Planning for Water Security', *Journal of Planning & Environment Law*, p. 357.

[113] United Nations Department of Economic and Social Affairs (2012), *International Decade for Action: Water for Life 2005-2015*. available www.un.org/waterforlifedecade/gender.shtml last accessed 03 Feb 2013.

On the other hand, human-induced pressures also threaten the availability of freshwater resources.[114] Water resources are wasted, polluted and mismanaged by users in a way that is unsustainable.[115] In particular, when the available water resources are becoming scarce, human-induced pressures exacerbate the challenges to water security.[116] As a result, the human-induced pressures reduce water security.[117] Although the precise impacts of climate change will be varied around the world, it is predicted that climate change may cause greater uncertainty in rainfall patterns. As a result, availability of water resources is likely to change significantly. Temperatures rising by 2 to 3°C due to climate change would expose between 1.1 and 3.2 billion people to water scarcity problems.[118] With increasing climate change challenges,

> '[t]he greatest vulnerabilities are likely to be in unmanaged water systems and systems that are currently stressed and unsustainably managed due to policies that discourage efficient water use and protection of water quality, inadequate watershed management, failure to manage variable water supply and demand…'[119] 'In unmanaged systems there are few or no structures in place to buffer the effects of hydrological variability on water quality and supply.'[120] 'Similarly, in unsustainably managed systems, water and land use can add stresses that heighten vulnerability to climate change.'[121]

In unmanaged or poorly managed water bodies, unsustainable water exploitation, unsustainable watershed exploitation and other environmental pressures bring water resources to the brink of depletion. Increased pressures in water resources

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[114] Janos Bogardi *et al* (2011). 'Water Security for Planet under Pressures: Interconnected Challenges of Changing World Call for Sustainable Solution', *Current Opinion in Environmental Sustainability* 2011, 4, pp. 1-2.

[115] *UNDP, Human Development Report (2006)* Coping with *Water Scarcity. Challenge* of the *Twenty-first Century. UN-Water, FAO, 2007,* available www.fao.org/nr/water/docs/escarcity.pdf last accessed, 23 August 2012.

[116] Ibid.

[117] Second World Water Forum, Declaration of the Hague, Ministerial Declaration of the Hague on Water Security in the 21st Century, available http://www.worldwaterforum.net/index.htmal, last accessed 03 Feb 2013.

[118] Intergovernmental Panel in Climate Change(IPPC), (2007), *WGII Fourth Assessment Report*, p. 6.

[119] IPCC, (2001). *Climate Change: Impacts , Adaption, and Vulnerability*, A Contribution of Working Group II to the Third Assessment Report of International Panel on Climate Change [Watson, R.T. and the Core Writing Team [eds.]Cambridge Press, Cambridge, United Kingdom, and New York, NY, USA. p. 9.

[120] Ibid.

[121] Ibid.

result in increased vulnerability, whereas introducing many institutional arrangements that reduce the pressures will lessen this vulnerability.[122] This challenge is likely to exacerbate with increasing population growth.[123] This demonstrates that more safeguard measures may be needed to enhance water security by reducing human pressures.

4.3 Global trends of water resources scarcity

Globally, water scarcity has already threatened the earth.[124] In many parts of the world, the challenges to the security of water resources are expected to become critical.[125] The global water shortage map, which was published by Nature in September 2010, predicts that, by 2050, nearly 80% of the world's population will be exposed to high levels of water security threat.[126] Water security challenge continues to rise across the globe.[127]

Conventionally water scarcity was understood from semi-arid and arid countries perspectives. However, now, there are water security problems in both dry and wet countries.[128] Water security challenges are '… matters which are of wide geographical concern and extend well beyond the arid countries that have previously been seen as most vulnerable to threats of water insecurity.'[129] Water scarcity and drought affect both developed and developing countries, but the impacts are more damaging to economically developing countries[130] which are already experiencing water security problems.[131] Even in poor countries, the

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[122] Id., p. 31.

[123] COM/2007/ 414 final(2007), Communication from the Commission to the European Parliament and the Council Addressing the Challenge of Water Security and Droughts in the European Union, Brussels, p. 18.7.

[124] UNDP, Human Development Report (2006). 'Coping with Water Scarcity. Challenge of the Twenty-first Century.' *UN-Water,* FAO, 2007, available www.fao.org/nr/water/docs/escarcity.pdf, last accessed *23* August 2012.

[125] Oregon State University, Transboundary Freshwater Dispute Database, Available www.transboundarywaters.orst.edu/ accessed on 01 Feb 2013.

[126] Vorosmary *et al*, (2010). 'Global Threats to Human Water Security and River Biodiversity', *Nature*, pp. 555-6.

[127] Wouters, *supra* note 106, p. 4.

[128] Howarth, *supra* note 112, p. 357.

[129] Martha Grekos (2005), 'Climate Change, Water Security and Flooding: EFRA Committee Publishes Its Report,' *Journal of Planning & Environment Law*, p. 47.

[130] UN, Human Development Report 2006, *Water Scarcity, Risk and Vulnerability*, pp. 156-158.

[131] UNDP, Human Development Report (2006). *Coping with Water Scarcity. Challenge of the Twenty-first Century*. UN-Water, FAO, 2007, World Water Day, p.8, available www.fao.org/nr/water/docs/escarcity.pdf last accessed 23 August 2012

impacts of the problems in water security are likely to be high on the people 'such as small farmers, agricultural labourers and pastoralists'.[132]

4.4 Water as public good

As water resources are movable, it is too difficult to apply the traditional concepts of property ownership.[133] Geches noted that '[w]ater is legally and historically a public resource. Although private property rights can be perfected in the use of water, it remains essentially public; private rights are always incomplete and subject to the public's common needs.'[134] In France, for instance, the Institutes of Justinian declared running water among things that could not be owned privately or by a few commons, although it recognized the private right to use them in a restricted fashion.[135] Similarly, in the Supreme Court of the United States, Justice Holmes noted that 'A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it.'[136]

Across the globe, public/state control of the water resources in a natural water body is common, where the largest number of people enjoy public rights whilst many individual users enjoy private rights, which entrusts the right to the use of the resources. The beneficiaries do not possess property rights like ordinary thing. In the United States, the federal government regulates the use of rivers and lakes, and controls waste disposal to ensure that waterways remain navigable.[137] Water resources have been seen as the 'public property of the nation'.[138] In the United Kingdom, navigable water resources are public property.[139]

Similarly, in Ethiopia, all natural resources, including water resources, are public property; the ownership is vested upon the state and the people of Ethiopia.[140] This type of property right is not a private or ordinary common right

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[132] Smakhtin, Revenga and Doll (2009). UN water Scarcity Index, Year, Available http://www.grida.no/publications/vg/water2/ Accessed on 01 Feb 2013

[133] D. H. Getches (1997). *Water Law: In a Nutshell*. St. Paul, MN: West Publishing, p. 15.

[134] Ibid.

[135] David H. Geches (1990). *Water Law in Nutshell*, 2ed, St. Paul, MNN. West Publishing CO. p.15.

[136] New Jersey V. New York 283 U.S. 336, 342 (1931).

[137] Gilman v. Philadelphia, 70 US 713, 725(1865).

[138] Ibid.

[139] George Joseph Bell (1899), *Principles of the Law of Scotland*, Edinburgh: Law Society of Scotland, Butterworth, p. 299.

[140] The Constitution of Federal Democratic Republic of Ethiopia, Articles 40(3) and 51(11).

which confers ownership to a person or specific group of people with restriction against outsiders to use and develop a resource. Accordingly, in Ethiopia, the federal government is empowered to regulate the use of water resources across the country.[141] Under public ownership of water resources, public property rights are imposed against water resources users.[142] This duty affects how water resources are exploited.[143]

4.5 Water utilities privatization

Many environmental resources are not commoditized as ordinary resources. Privatization may not be seen as the right solution for those resources that are widely public in their nature, such as watersheds.[144] It is also impractical to allocate them in a proper sense, and allocation through creating private rights may favour some users and disfavour others.[145] It is contended that 'many things by law excepted from the ordinary rules of appropriation are reserved for the use of public'.[146] Due to these special characteristics a significant public intervention in resources such as freshwater is inevitable.[147]

In England, for instance, the privatization of the water utilities was a highly debated subject. There are arguments both for privatization and against it.[148] The opponents of privatization justify their resistance on the grounds of social equity. They contend that when control of the water services is transferred to the private sector, water users are seen as customers rather than citizens.[149] Normally, private companies work to maximize profit rather than to serve societal interests. They are answerable to the shareholders. In the fully privatized water sector, access to water resources is dependent on the 'willingness to pay', rather than enhancing access to water, particularly for those people who cannot afford to pay. The opponents to the privatization of water utilities doubt that the market creates economic efficiency, since water is naturally scarce, leading to a natural monopoly. Water privatization is considered to be simply replacing the state monopoly with a private monopoly,

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[141] Ibid.

[142] Daniel H. Cole (2002). *Pollution & Property: Comparing Ownership Institutions for Environmental Protection*, Cambridge University press, pp. 27-28.

[143] Ibid.

[144] Salzman and Thompson , *supra* note 1, p.7.

[145] Ibid.

[146] Bell, *supra* note 139 p. 299.

[147] FAO Land and Water Bulletin 3, (1995). *Water Sector Policy Review and Strategy Formulation ; A general Framework*, p.4.

[148] Karen Bakker (2002), 'From State to Market?: Water Mercandization in Spain', 34 *Environment and Planning,* A , P. 770.

[149] Ibid.

unless mechanisms are put in place to control the behaviour of private water utilities.[150]

If water resources are a pure commodity, their abstraction depends upon the capacity to abstract, and the water service payments would depend on the willingness to pay. The private water industry may not want to manage demand, so to reduce the demand would increase the cost of the water supply, thus reducing revenue.[151] As water is exposed to 'state failure', it is also exposed to 'market failure'.[152] Neither water privatization nor public control is a panacea to sustain water resources. In such contexts, the key concerns involve the manner in which these polarities can be harmonized by striking a balance to ensure the security of water resources in both public and private water services companies.

4.6. Participation

Hardin's assumptions and the solutions he suggested failed to favor inclusive management model, taking the community as part of the commons management to supplement coercive rules. Naturally, water resources problems are complex,[153] users are diverse,[154] the dynamics of water resources are uncertain,[155] the ecosystem is interconnected, and sources of water resources problems are not specific; therefore, providing one solution may not solve all ongoing water resources problems.[156] Natural resources management is not merely an economical or environmental construct; rather, it is a social, environmental and economic construct.[157] Upon water resources use and development, a given country needs to consider all possible consequences unsustainable resources exploitation. Specially, water resources security requires the governments that are committed to the objectives that address sustainable development.

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[150] Ibid.

[151] Greg Barrett and Margaret Wallace (2011). 'An Institutional Economics Perspectives: the Impact of Water Providing on Water Conservation in England and Australia', 25 *Water Resources Management* , p. 1326

[152] Karen J. Bakker (2003). 'A Political Ecology of Water Privatization', 70 *Studies in Political Ecology*, p.40.

[153] Pahl-Wostl (2007). 'The Implications of Complexity for Integrated Resources Management', 22 *Environmental Modelling & Software*, p. 561.

[154] Warner, Wester and Bolding (2008). 'Going with the Flow: River Basins as the Natural Units for Water Management', 10(2) *Water Policy*, p. 121.

[155] Ibid, p. 131.

[156] Ibid.

[157] Convention on Biological Diversity, Conference of the Parties (COP) 5, Principle 10.

A government institution may not have all the necessary information and experts to manage natural resources.[158] Sometimes, taking a given action may trigger other unexpected problems.[159] Participants go through various experiences and find out information about water resources to uncover solutions for water resources problems.[160] Thus, water resource problems may not find all their solutions from governments or single levels or institutions; rather, public and stakeholder participation is needed.[161]

It is often said participation enhances the inclusion of stakeholders' needs and aspirations within water resources management policies, and facilitates implementation.[162] Stakeholder participation is also characterized as: a platform used to weigh conflicting interests and decision-making through the broader consideration of water resources use; the protecting of social interests rather than individuals' needs through balancing these interests; and used as a tool for conflict prevention and resolution among water resources users.[163]

In situations where the government is part of the problem of water resource unsustainable exploitation, participatory water resources management model is one of the key schemes to regulate government behaviors. It creates a forum that helps to discuss and provide solutions that can mitigate the interests of different people.[164] Public and stakeholder involvement in decision-making enhances the validity and legitimacy of government decisions,[165] limits the discretion of administrative authorities by giving the public and stakeholders the opportunity to exert their influence on public authorities to render negotiated or mitigated

[158] Erik Mostert (2007). 'Social Learning in European river Management: Barriers and Fostering Mechanisms for 1o River Basins', *Ecology and Society* 12(1).

[159] Pahl-Wostl, *supra* note 153, p.561.

[159] Warner, Wester and Bolding, *supra* note 154, p. 131.

[160] Wolsink (2006). '*River Basin Approach and Integrated Water management: Governance Pitfalls for the Dutch Space-water-adjustment Management Principle'*, 37 *Geoforum*, p. 473.

[161] Ibid.

[162] Ibid.

[163] International Institute for Water and Environment Engineering (2010). *Technical Manual for the Integrated Water Resources Management*, pp. 86-100' available http://documentation.2ie-edu.org/cdi2ie/opac_css/doc_num.php?explnum_id=1524 last accessed March 2011.

[164] Frank Jaspers (2005), 'Institutional Arrangements for Integrated River Basin Management', 5 *Water Policy*, p. 243

[165] Jurgen Habermas, (1996). *Between Facts and Norms- contributions to a Discourse Theory of Law and Democracy* (Cambridge, MIT press) p. 228.

decisions,[166] and enhances the public acceptance of decisions that are made by government authorities.[167]

The use of local knowledge is also assumed to be a tool that could enhance a more effective local steering by reducing transaction costs, helping stakeholders to learn from their experiences, and using traditional knowledge for maximizing natural resource conservation efforts.[168] Participatory decision-making promotes environmental justice and sustainable use of natural resources, as well as balancing the development and protection of natural resources.[169] However, participatory water resource management is meaningful in an open government that gives legal remit for the stakeholders to influence government actions. Naturally, the level openness of a government is fully dependant on the overall democratic process and stage of democratization in one country. The democratic level that allows the extent of space to participate affects the status institutional arrangements toward the management of water resources.

For example, the European Water Framework Directive (WFD) underlines that the success of sustainability of water resources depends on participatory decision-making.[170] Under the European Water Framework Directive, each member state has an obligation to encourage the active involvement of all interested parties in the implementation of the Directive and the development of River Basin Management Plans.[171] The involvement of stakeholders may start from initial planning to the overall implementation process. The level of their involvement is not limited and is at the discretion of member states. In the case of public participation, member states are obliged to ensure that competent bodies inform and consult the public, including water users, regarding the timetable and work programme for the production of river basin management plans and updates.[172] To this end, each member state must publish and make available draft river basin plans and, before these are finalized, they are required to gain opinions and comments from the general public. This suggests that participatory resource management can be meaningful in the water resources governance only if governments release accurate, timely and usable information to the public.

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[166] Jonas Ebbeson '(1997). The Notion of Public Participation in International Environmental law, 8 Year Book of International Environmental Law, p. 56.

[167] Birnie and Boyle, (2002). *International Law and the Environment*, (OUP) pp. 261-4.

[168] Elinor Ostrom, (1990), *Governing the Commons: the Evolution of Institutions for Collective Action* (New York, Cambridge University Press), pp. 90-105.

[169] Birnie and Boyle, *supra* note 167, pp. 261-4

[170] The European Water Framework Directive 2000, Preamble Para.14.

[171] Id., Article 14.

[172] Ibid.

Public participation and stakeholder involvement in water resources may not be without drawbacks. The cost of participation is often regarded as disadvantageous. The people who have stakes in water use are too many; stakeholder participation demands a high cost if a stakeholder forum is actually needed to operate effectively, when compared with traditionally centralized schemes of natural resources management.[173] The proper utilization of water resources may need relatively complex negotiation, which consumes time and money, in order for balanced solutions to be found. In particular, if countries are economically weak with chronic water scarcity, it is not easy in practice to change stakeholder participation in water resources management.

Obviously, competition between needs arises, and this makes it difficult for members of large groups to take part in the decision-making. This disadvantage may be managed through a representative mode of participation that involves some persons or groups who share interests, rather than involving the whole group.[174] The problems with participatory decision-making may not end simply by using a representative mode of participation because there must be the right representation of stakeholders and fully vibrant participants.

It has been noticed that, in the context where the environment is voiceless, nature may be in peril and the interest of future generations' may not be protected.[175] The voiceless interests are ignored, and the outcome for the environment is precarious. Those short-sighted and self-interested users continue benefiting until the water resources are ruined. Moreover, participants in natural resources management may not be in equal positions to influence and provide fair and balanced decisions, as a result of which the dominant groups continue to generate their benefits through the disguise of participation.[176]

Furthermore, the selection process of participants may not be impartial, and the decision-making processes may allow some groups to impose their wishes on the other groups and public interests. Held states that '[i]t is not the single, isolated individual who is active in historical and political processes, but rather human beings who live in definite relations with others and whose nature is defined through these relations.'[177] Naturally, such participatory decision-making is neither negotiated nor democratic by its nature. Rather, it serves the

[173] Sarah Hendry (2008). 'River Basin Management and Water Framework Directive: in Need of a Little Help?', 19 *Water Law*, p. 150.

[174] Philppus Wester *et al* (2003). 'Stakeholder Representation in the River Basin Management in Mexico and South Africa', *World Development* 30(19), p. 797.

[175] Stone, *supra* note 91, p. 172.

[176] David Held (2006). *Models of Democracy* (3rd Polity Press, Cambridge) p. 107

[177] Ibid, p. 97.

interests of a few individuals at the expense of public interest.[178] On the other hand, a completely decentralized participatory decision-making process is unorganized when it comes to protecting common interests.[179] The danger of this type of decision-making may not differ too much from the tragedy of commons, which leads to uncontrolled resources being ruined by self-interested individuals.

5. Formal Rules toward the Control of Water Resources: Overview of Some Lessons from Europe's Experience

When there are no proper rules regulating users' behavior or implementation strategies, the exploitation of water resources as the commons is not free from the dilemma of individual water users. In particular, the water resources are exposed to the tragedy when water resources are unregulated in terms of over-abstraction and water wastage. In addition, a lack of rules for water system management may expose water resources to ruin. Equally, the destruction of water systems and water pollution from both point and diffuse sources endanger the long-term availability of water. Open-access natural resources or resources that receive the least care will eventually become ruined.[180]

5.1 Water abstraction permits

Developing responsive permit systems for water abstraction may limit the over-use of water as one of the tools to sustain water. For example, in England, the water abstraction permits were designed to protect the economic interests of permit holders through a 'first come, first served' principle.[181] The water regime was designed when water resources in England were perceived to be in surplus, and the population number was considerably smaller.[182] In England and Wales, at present, the Environment Agency nationally administers more than 50,000 licenses that are obtained by different sectors.[183] From this number, more than 80% of the permits are without a time-limit.[184] These licences are not

[178] Hanna and Jentoft (2009). *Right to Nature: Ecological, Economic, Cultural, and Political Principles of Institutions for the Environment*, (Editors: Hanna, S., Carl Follke, F. and Makler, K. Island Press, Washington) pp. 35-47.

[179] Ibid.

[180] Hardin, *supra* note 2 , p.1244; Cole, *supra* note 142, p. 178 & Bromley, *supra* note 63, p. 149.

[181] Environment Agency, Alternative Ways to Allocate Water Final Report, available www.environment-agency.gov.uk/research/library, last accessed 23 Feb. 2013.

[182] Ibid.

[183] Ibid.

[184] Anglican Water and Frontier Economics (2011). The Main Report , a Rights to Water?: Meeting the Challenges of Sustainable Development, p.18.

responsive to take immediate measures when availability is at risk unless compensation is paid for the permit owners or possessors.[185] They grant a historic right to the permit owner or possessor. The system did not accommodate the contemporary pressing concerns of water shortage.[186]

The Water Act of 2003 has introduced time-bounded permit system.[187] This new system requires permits to be issued on a time-limited basis and, starting from July 2012. In effect, the permit holders would no longer be entitled to claim compensation for any changes in their water abstraction permits under the circumstances determined by law.[188] The introduction of the new water abstraction system has many implications. Firstly, it shows that despite water property rights of permit holders over the volumes of water, water permits need to be seen differently from other property rights. Secondly, national interests on water security prevail over the property rights of individual licence holders.

The new water regime provides abstraction permits which normally expire after 12 years from their issuance with a common ending date.[189] The Environment Agency updates permit by considering the level of water resources in the catchment at any time.[190] However, the Water Act of 2003 does not fully shape the old permit system automatically. Changing this traditional permit system is expected to be formulated in the 2020s.[191] Until the 2020s, the Water White Paper promises to make better use of existing tools, and yet attempting to handle complex contemporary water resources problems.

5.2 Capacity to introduce regulatory tools

The tragedy of the commons does not demonstrate why the resources are open access and why there are no regulatory institutional arrangements. The discussion surrounding the tragedy of the commons demonstrates that averting the commons tragedy has been widely seen as needing the introduction of regulatory rules for the control of human behavior. It increasingly focuses on the

[185] Environment Agency, *supra* note 181.
[186] Ibid.
[187] Water Act 2003, s.19.
[188] Water Act 2003, s.27.
[189] Environment Agency, How Time Limits on Abstraction Licenses Work, available archive.defra.gov.uk/environment/quality/water/resources/abstraction/, published on 31/08/2010.
[190] Ibid.
[191] Water White Paper, Lacks Ambition and Urgency, Warns Environment Food and Rural Affairs Committee, 05 July 2012, available http://www.parliament.uk/business/committees/committees-a-z/commons-select/environment-food-and-rural-affairs-committee/news/water-white-paper-publication/ last accessed on 04/09/ 2014.

non-availability of rules rather than the strength of existing rules to reshape the exploitation of unsustainable commons. Undoubtedly, the availability of rules regulating natural resources is decisive for the sustainability of the commons; however, this may not be a root cause. The economic development, the nature of the resources themselves and related factors matter in defining comprehensive rules and implementing them effectively.

A given country cannot introduce and implement the rules without costs.[192] In the member states of African Union, the introduction of water policies and laws has been growing over the last ten years. Many African countries have already introduced water policies and laws that encompass a range of water security management systems. However, the state of these developments varies considerably between African countries. Practice shows that, once African countries formulate water policies, it takes years to adopt an integrated water law that translates policy into practice.[193]

Even if many African countries have formulated water policies and law, the comprehensiveness of these instruments is dependent on the priority given to it by each country, and their strength and commitment to introducing proper institutional arrangements for water management. A recent empirical study of African water resources management indicated that the introduction of water policies and laws is not coherent between countries, and that implementation outcomes are too mixed.[194] Some African countries have managed to develop them while others are at different stages due to various reasons.[195] Many countries in Africa are still without 'an operational water law', and 'in most countries the law is not yet fully implemented'.[196]

In many cases, lack of regulatory institutional arrangements and the capacity to implement them are root problems for natural resources degradation and unsustainable use. Within countries, the capacity to introduce such institutional arrangements and their implementation varies.[197] In African countries, including Ethiopia, the capacity to develop institutional arrangements for water security is

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[192] Carl Dahlman (1980). *The Open Field System and Beyond: Property Rights Analysis of an Economic Institution*, Cambridge: Cambridge University Press, PP 138-9.

[193] AMCOW, *Status Report on the Application of Integrated Approaches to Water Resources Management in Africa*, (2012), p. 10.

[194] Ibid, p.11.

[195] AMCOW, *supra* note 192, p. 17.

[196] Ibid, p.11.

[197] IPCC, (2001). Climate Change: Impacts , Adaption, and Vulnerability: A Contribution of Working Group II to the Third Assessment Report of International Panel on Climate Change [Watson, R.T. and the Core Writing Team [eds.] Cambridge Press, Cambridge, United Kingdom, and New York, NY, USA, PP.14-5

low compared with developed countries.[198] The economic capacity and related problems adversely affect the pace and effectiveness of introducing institutional arrangements that avert the susceptibility of water resources to scarcity.[199]

The ultimate cause of environmental problems does not only stem from lack of regulatory institutional arrangements.[200] Defining such arrangements is too costly.[201] The challenge is the economic capacity to introduce effective institutional arrangements for water resources management and to develop strategies that facilitate implementation.[202] This difference in capacity that affects water insecurity may be solved through developing integration among scales and effective cooperation within shared water resources. As water resources problems are shared problems for a range of scales, there should be schemes to harmonize policy and law. This does not rule out the necessity of effective regulatory arrangements at local and national levels; these attempts may not hold water unless there are strategies for effective implementation.

5.3 Water pricing

Institutional arrangements for water efficiency are considered as the primary focus for reducing water wastage leading to water security threats.[203] Efficient water utilization makes a positive contribution towards enhancing water security.[204] For efficient water utilization, water pricing is seen as a key economic regulatory scheme for incentivizing water users. The basic assumption of internalizing the water services costs is an economic premise that seeks to fully internalize prices of services and water resources in water pricing thereby pushing up prices as a result of which demand will go down. The more the cost of water increases, the more consumption drops since water is a price elastic economic good.[205] Under-pricing will lead to the over-exploitation of water

[198] Ibid.
[199] Ibid.
[200] Cole, *supra* note 142, pp 2-3.
[201] Yoram Barzel (2002). *Economic Analysis of Property Rights*, Cambridge, Cambridge University Press, p. 64.
[202] IPCC, *supra* note 197, pp.31-32.
[203] COM/2012/0673 final, Communication from the Commission to the European Union Parliament, the Council, the European Union and Social Committee and the Committee of the Regions a Blueprint to Safeguard Europe's Water Resources, available http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52012DC0673, last accessed 08 Sep. 2013.
[204] Ibid.
[205] Simone Bach (2008). 'Perspectives for European Water Management Law Report of Conference in Brussels', *JEEPL* 5(3)(4). pp. 341-348.

resources by failing to provide responsive incentive that shapes the behaviours of water users.[206] It assists to control water consumption.[207]

In water politics, internalizing the costs of water services and resources are disputed. Solanes notes that water is a special natural resource that makes it difficult for market forces such as demand and supply to regulate and allocate water for the users.[208] Likewise, Bach considers water as a heritage which must be protected through internalizing the costs of water services.[209] Such resistance to water cost internalization seems to emanate from the social dimension of water resources.

Within the European Union, the introduction of water pricing scheme was highly debated and had faced resistance.[210] Some countries have a long tradition of water pricing but other did not use it.[211] For instance, in Ireland, domestic water supplies were free, and the water supplies costs were covered through taxation.[212] Under the Water Framework Directive (WFD), member states are under an obligation to develop water pricing as a requirement.[213] Although water pricing was controversial when the WFD was adopted in 2000, the Directive introduced a rule for water pricing. Member states have to 'take account of' the principle of recovery of costs of water services and ensures adequate contribution of water users to the cost of water as an economic regulatory tool.[214] The member states oblige to internalize the costs of water services, including environmental and resource costs.[215]

Through the Water Framework Directive, the member states are expected to introduce water pricing policies that 'provide adequate incentives' for water consumers to use water efficiently.[216] The idea of water pricing aims to realise the sustainability of water resources by providing incentives for water users that

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[206] Ibid.

[207] B. Page & and M. Kiaika,(2003). 'The EU Water Framework Directive: Part 2 Policy Innovative and Shifting Choreography of Governance', *European Environment,* Volume 13, p. 5.

[208] Miguel Solanes and Fernando Gonzalez-vilarral, (1999). 'The Dublin Principles for Waters as Reflected in Comparative Assessment of Institutional and Legal Arrangements for Integrated Water Resources Management', available http://www.gwpforum.org/gwp/liberary/Tac3.pdf., last accessed 20 January 2011.

[209] Bach, *supra* note 205, pp. 341-348.

[210] Page and Kaika *supra* note 207.

[211] Ibid.

[212] Ibid.

[213] WFD Article 9.

[214] Page and Kaika *supra* note 207; See also Water Framework Directive, Article 9

[215] Water Framework Directive, Article 9.

[216] Ibid.

shape their behaviours and increase the appreciation of water use to enhance efficiency in water quality and quantity.[217] However, in cost recovery, the WFD did not come with rules that support its effective applicability throughout EU member states. The aspiration of full cost recovery was, for example, watered down by a vague statement which reads: 'to take into account the principle of recovery of cost'. This gives a wide room of discretion. As there is no common definition of water services, member states define it in their own way by flexibly narrowing down the concept.[218] That means its implementation is dependent on the willingness of each member state.

The practice has shown that within the water bodies of the European Union, cost internalization is not materialized effectively.[219] For the purpose of cost internalization, the scope of water services is often limited to drinking water and waste water treatment; this excludes regulation of major water consuming sectors, including water abstraction for agriculture.[220] Amongst the types of water uses, on average, 44 % of total water abstraction in Europe is used for agriculture, 40 % for industry and energy production, and 15 % for public water supply.[221]

Drinking water demand is the lowest in water consumption when it is compared with other sectors. As an economic incentive, the scope of application of water pricing needs to accommodate the realm of non-drinking water, and

[217] Andrew Farmer,(2010). 'Challenges of Developing a European Union Strategic Approach to Water Security', International Journal of Water Resources and Arid Environments 1(3), pp. 153-162.

[218] COM/2007/ 414 Final, Communication from the Commission to the European Parliament and the Council Addressing the Challenge of Water Security and Droughts in the European Union, Brussels, 18.7, 2007). Available at http://www.europarl.europa.eu/meetdocs/2004_2009/documents/com/com_com%282007%290414_/COM_COM%282007%290414_en.pdf , last accessed: 05 Sep. 2013.

[219] COM/2012/0672 Final/, Communication from the Commission to the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the Review of the European Water Scarcity and Drought Policy, available http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52012DC0672 , last accessed 08 Sep. 2013.

[220] Ibid.

[221] EEA, Water use by sectors, All Economic Sectors Need Water; Agriculture, Industry and Most Forms of Energy Production are not Possible without Water, Last modified: 18 Feb 2008, 12:34 PM, available http://www.eea.europa.eu/themes/water/water-resources/water-use-by-sectors last accessed 05 Sep. 2013.

needs to accommodate environmental and resources costs.[222] With regard to water consumption by the agricultural sector in EU,

> 'operational costs for the provision of water are only partly recovered for 10 member states and capital costs are often subsidized. An important share of water abstractions for agriculture in the EU is not priced, even in water stress areas, and there is no financial mechanism for recovering the environmental and resource costs of individual abstractions or for giving incentives to using water more efficiently'.[223]

Although water services require the inclusion of environmental and resources costs, both are left unconsidered.[224] In the Union, water pricing is not widely used and is hardly implemented beyond the sectors of drinking water supply and waste water treatment.[225] Water cost internalization policies do not generally take into account the level of sensitivity of water security challenges.[226] The Third Follow up Report to the Communication on water scarcity and droughts in the European Union indicated that many the European Union Member States including UK, the water-tariffs have been introduced recently or are under development in order to ensure water services cost recovery.[227]

The 'right-price-tag' on water services accommodates the full cost of water services.[228] In England, water cost internalization is not effective since water metering is not a compulsory requirement except in the areas where resources are in stress.[229] In many cases, in practice, regulatory rules for water resources do not accommodate compulsory rules obligating the installation of water meters for water used for a range of uses. Water prices are calculated at a flat-rate. In such circumstances, you are not expected to pay by the amount you use, and water bills hardly reflect the average price of water consumption.

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[222] Ibid.

[223] Ibid.

[224] COM/2012/0672 final, *supra* note 2019.

[225] COM/2007/ 414 final, *supra* note 2018.

[226] Ibid.

[227] European Commission, *Water Scarcity and Droughts in the European Union*, Report from the Commission to the European Parliament and the Council, Third Follow up Report to the Communication on Water Scarcity and Droughts in the European Union COM (2007) 414 final SEC(2011) 338 final, available http://ec.europa.eu/environment/water/quantity/pdf/special_report.pdf, Last accessed 05 Sep. 2013.

[228] Page and Kaika *supra* note 207.

[229] Future Water (2008). the Government's Water Strategy for England, pp. 26-28

In developing countries, the capacity to introduce right rules for water cost internalization is low.[230] Defining right institutional arrangements is too costly.[231] In such counties, to internalize the cost of water services including environmental and resource costs may not be materialized without substantial assistance from developed countries.

5.4 Water leakage management

Another problem related to water efficiency is leakage management. For instance, water leakage problems within European Union member states vary between 7% to 70% or more.[232] Although it may not be possible to avoid leakage altogether, introducing schemes that minimize water wastage within the European Union through leakages may contribute to reducing water security challenges. The idea of sustainable economic leakage levels is considered to benefit leakage problems within member states.[233] In England, water leakage was one of the concerns in respect of water availability.

Grekos noted the water companies need to do more to reduce leakage and the companies should take is to make best use of existing resources.'[234] For instance, in England, the UK Government has set out its water security aspirations for 2030 and some water companies have incorporated leakage reduction options to meet this target through their water resources management plans.[235] Despite the benefits of this scheme within member states and water bodies, its implementation may not be realized without setting compliance mechanisms that regulate the efficiency of the infrastructures that are used in water development.

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[230] IPCC (2001). Climate Change: Impacts , Adaption, and Vulnerability: A Contribution of Working Group II to the Third Assessment Report of International Panel on Climate Change [Watson, R.T. and the Core Writing Team [eds.]Cambridge Press, Cambridge, United Kingdom, and New York, NY, USA, pp.14-15.

[231] Barzel, *supra* note 201, pp, 64, 178.

[232] COM/2012/0673 Final, *supra* note 2019, available http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52012DC0673, last accessed 05 Sep. 2013.

[233] Ibid.

[234] Grekos, *supra* note 129, p.49.

[235] Defra (2011) Review of Ofwat and Consumer Representation in the Water Sector, available https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/69442/ofwat-review-2011.pdf last accessed 15 Sep. 2013, p. 44.

5.5 Water system management

Water pollution increases the cost of water treatment and constrains the availability of water.[236] Generally water pollution comes from two sources: point and diffuse sources. The former pollution comes from a particular identifiable source, including factories, storm sewers or pollutant discharges in discrete sites. In contrast, the diffuse source pollution comes from multiple dispersed sites.[237] A regulatory system may not easily control diffuse pollution unlike point source pollution.[238] One measure to manage diffuse source pollution is the creation of awareness amongst farmers of the best farming practices.

In England and Wales the Catchment Sensitive Farming Project, which is voluntary in nature, is seeking to tackle the agricultural diffuse pollution.[239] In this project, the farmers voluntarily engage by gaining advice and receiving incentives. This approach does not use coercive regulation to tackle diffuse pollution problems; instead, it gives emphasis to actions taken at the grass roots level and integrates with other catchment delivery mechanisms. For instance, the example of the Wessex Catchment in England shows how the Catchment Sensitive Farming Project has been conducted at a very local level within small areas to control the nitrate problem.[240] The project aims 'a low cost, sustainable solution to the pollution of drinking water.'[241]

Naturally, however, the lower level (catchment or below) is seen as appropriate to manage diffuse pollution problems. For instance, it has been estimated that water pollution alone costs England and Wales up to £1.3 billion per year.[242] From a pollutant-management point of view, the tragedy of the

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[236] National Audit Office, Tackling Diffuse Pollution, Printed July 2010, available www.eurosaiwgea.org/Environmental%20audits/.../2010%20-%20United last accessed 10 Sep.2013, pp. 4-5.

[237] Defra, Water for Life: Water and the Natural Environment, Published on 08-12-201, available http://archive.defra.gov.uk/environment/quality/water/documents/wwp-factsheet-natenvironment.pdf last accessed 10 Sep. 2013.

[238] Environment Agency, Diffuse source pollution, Environment Agency 2012

[239] Bob Middleton (2011), Delivering Outcomes Catchment Sensitive Farming, CIWEM, Catchment Delivery Conference, London, 23 November 2011, available www.ciwem.org/events/events-outputs.aspx last accessed 10 Sep. 2013.

[240] Luke de vial (2011), Catchment Management in at Wessex Water Emerging Lessons, CIWEM, 23 November 2011, available www.ciwem.org/events/events-outputs.aspx last accessed 08 October 2013.

[241] Ibid.

[242] National Audit Office, Tackling diffuse pollution, printed July 2010, available http://www.nao.org.uk/report/tackling-diffuse-water-pollution-in-england/ last accessed 05 Sep. 2013, p. 4

commons does not consider contemporary diffuse pollution problems in water resources management. Rather, it focuses on the point source at which pollution is discharged into a water body. Likewise, the theory considers the threats to water resources purely from a water-resources user's point of view.

In addition to direct pollution control and awareness creation, designations of protected zones are used to protect water resources from pollution.[243] In England, the Environment Agency may ask the Secretary of State to designate areas as water protection zones.[244] For instance, in 1999, a water protection zone was designated in the River Dee.[245] Moreover, code of good agricultural practices has been developed and is used in the protected zones.[246] The Environment Agency issues discharge consent and permit systems.[247] The Environment Agency is also entrusted with the responsibility to regulate water quality deterioration through pollution, effluents discharge or sewerage.[248] Although land use planning may have significant contribution to enhance balanced utilization of water resources, clear rules are required.

Water uses within river basin are interdependent; water users impose costs of their overexploitation on others unless there are schemes to manage these externalities.[249] Naturally, the management of the quality and quantity of water resources requires water system management. Upstream water users may not be encouraged to engage in watershed management unless there are policy instruments that compensate for their efforts.[250] Unwise use of a water ecosystem may deteriorate its adjacent water bodies. In the context of the current Nile basin system Stebek notes that:

> The current environmental degradation in upstream Eastern Nile basin is mainly attributable to the cumulative result of decades of deforestation and watershed mismanagement caused by the prolonged economic, social and political problems that Ethiopia has been forced to go through, and any external pressure towards this turmoil has directly contributed to the current state of the basin. Unless this trend is reversed, the forthcoming decades

[243] Water Resources Act 1991, ss. 92, 93, 94.

[244] Water Resources Act 1991, s. 87

[245] National Audit Office, Tackling Diffuse Pollution, Printed July 2010, available http://www.nao.org.uk/report/tackling-diffuse-water-pollution-in-england/ last accessed 05 Sep. 2014, p. 31

[246] Water Resources Act 1991,s. 97

[247] Water Resources Act 1991, s.89 ,89

[248] Water Resources Act 1991, s.84; Environment Act 1995 ss. 2(ii), 5

[249] FAO (1995). Land and Water Bulletin 3, Water Sector Policy Review and Strategy Formulation ; A general Framework, available http://www.fao.org/docrep/v7890e/v7890e00.htm last accessed 25 Sep. 2013, p.4.

[250] Ibid.

> might possibly witness the further degradation and desertification of the basin that could cause the eventual (albeit gradual) drying up of the watercourse and along with it: the probable end of Egyptian agriculture through surface fresh waters.[251]

The pastureland example used by Hardin illustrates how grassland sustainability can be adversely affected due to the over-exploitation of grassland by herders. In the case of water resources, the possible ruin of water resources can, according to Hardin's theory, be averted by regulating water users' over-exploitation. The linkage between the over-exploitation of one resource with another was not addressed by Hardin. Such isolated understanding of the commons problem may not enhance the sustainability of resources, but rather, enhance their demise. Not all water resources scarcity problems necessarily come from water over-use, wastage or water pollution. Indeed, the problems may be attributable to the degradation of adjacent or farther-away resources because such practices have their own adverse impact on water systems.

5.6 Transboundary challenges

The tragedy of the commons suggests government regulation towards individual behaviour regulation, but it does not consider the impact of government failures which may lead to the ruin of shared water resources. The theory does not thus include the government among the parties and factors that can contribute to the ruin of water resources. Even if the tragedy of the commons theory puts the government inside its theoretical ambit, it may be unlikely that the government could impartially regulate its behaviour through rules formulated by itself, particularly, if that government is part of the problem of natural resources over-use or quality deterioration. In shared water resources, tensions between governments are among the challenges in sustaining the resources.[252]

Notably, today, there are challenges in managing water resources in a way that is sustainable due to the action of governments for their short-term interests rather than riparian long-term common interests. A government may also run many large development projects that affect the availability of water and, as a government term of office is not long, short-term benefit-seeking by governments may be more problematic than by individuals.

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[251] E. Stebek (2007). 'Eastern Nile at Crossroads: Preservation and Utilization Concerns in Focus', *Mizan Law Review*, Vol. 1 No.1, p. 36.

[252] Lucia Dedtefno *et al* (2010). 'Mapping the Resilience of International River Basins to Future Climate Change –Induced Water Variability', 15 *Water Sector Board Discussion Paper Series*, the World Bank, p. 1.

There is usually mismatch between water resources and administrative boundaries. As a result, action on one affects the other.[253] The people at the local level 'are closer to the problems, often understand them better, and have to live with the consequences of the environmental policy. At the same time, if the problem is one of transboundary pollution, the locals do not live with the consequences of their pollution. Those downstream do.'[254] In nature, exploitation of water resources in parts of the water system affects the water users in other parts. Many of the water challenges are interconnected and interrelated, and world is currently encountering changing realities to which traditional institutional arrangements that focus on water quantity might not be adequately responsive.[255]

Hardin's theory to water resources is inadequate to address present-day complex challenges, and its application towards addressing a range of water threats requires rethinking. While, water and its ecosystems should not be seen in isolation, the tragedy of the commons overlooks such linkages. The theory is more localized to the commons problems, rather than considering wider opportunities.

Water security challenges, whether local, national or global, are inextricably linked.[256] In climate change, for instance, it was contended that '[t]he linkage among local, regional, and global environmental issues, and their relationship to meeting human needs, offer opportunities to capture synergies in developing response options and reducing vulnerability to climate, although trade-off between issues may exist.'[257] Climate change impacts on the water resources are a transcending and shared problem, which adversely affects the global community.[258]

Naturally, in such contexts, the institutional arrangements need to accommodate a range of factors contributing to water insecurity.[259] In particular, water security cannot only be achieved through institutional arrangements introduced at a national level to regulate water users' behavior; rather, it requires comprehensive policy and law at various levels.[260] For instance, at the European Union level, there was no water law designed to manage water

[253] *See* Salzman and Thompson, *supra* note 1, p.22.
[254] Id., p.23.
[255] UNDEP (2004). Industry and Environment: Water and Development Industry's Contribution, 27:1 , January –March , 2004
[256] Ibid, p.29.
[257] IPCC, *supra* note 197, p.4.
[257] Ibid, p. 29.
[258] Ibid, p.4.
[259] Ibid, p. 3
[260] Ibid, p. 4

resources by transcending administrative boundaries of member states. The laws and organizational structures were administrative boundary–oriented and fragmented, other than the ones that have been governed by treaties agreed upon between states sharing a water body.[261]

However, the European Water Framework Directive (WFD) has brought considerable change in the conventional water resources management organizational structures architecture of the Union. The WFD places water resources management at the river basin boundary level.[262] Upon completion of the first cycle of the WFD implementation period, however, the river basin approach was criticised for its inability to accommodate local needs in the planning process of water resources.[263] Markedly, river basin based water resources planning and management were contested for failure to accommodate 'local issues and locally planned action'.[264]

Across Europe, there are sixty-four transboundary water bodies that connect member states or non-member states.[265] The European Union shares many trans-boundary river basins with non-member states. The problems may be more complex when the water resources are shared with non-EU member state. In instances where a river basin crosses a boundary of a non-EU member state, the EU member state's obligation is to endeavour to secure cooperation through bilateral agreements.[266] Such cooperation is increasingly dependent on the willingness of the non-EU member state and the nature of their agreement.

The obligation of cooperation in shared water resources management between member states is relatively strict as compared to cooperation with non-member states.[267] This obligation is indispensable in the enhancement of integrated water resources protection and development. The failure of cooperation between states that share a river basin may not be an excuse to implement a WFD obligation, and a member state may implement this obligation within its administrative boundary, a sub-unit of a river basin.[268] The EU Water Framework Directive requires each member state to establish the

[261] Jans and Vedder Jan Jans and Hans Vedder(2008), Environmental law (3ed , Europa Law), p. 348.
[262] Ibid.
[263] Damian Crilly (2011). The Catchment Based Approach - Pilot Phase, CIWEM, Catchment Delivery Conference, London, 23 November 2011, available www.ciwem.org/events/events-outputs.aspx last accessed 05 Sep. 2013.
[264] Ibid.
[265] Wolf (1999). International Rivers of the World, 15 International Journal of Water Resources Development 387, pp. 404-8.
[266] WFD, Article 3(4).
[267] Ibid, Article 3 (4).
[268] Ibid, Article 3(5)

river basin district within its own jurisdiction or a coordinated management for the water bodies that transcend national boundaries.[269]

With shared water resources, institutional arrangements developed by a single country or level may not differ from the unregulated individual behaviour that can lead to the ruin of resources. Each level or government acting in an isolated manner may tend to over-use the resources. These levels formulate and render decisions independently, unless there are schemes to harmonize their actions. The tragedy of the commons theory considers the government as a single body (that can regulate individual resources users), and it does not envisage the regulation of government actions by supranational bodies. It thus undermines the significance of a multilevel governance approach (through regional and global bodies) in shaping institutional arrangements for water resources. Naturally, a water body is a complex system thereby making it difficult to determine a proper boundary, which requires taking into account the interconnectedness of the water system beyond the usual administrative boundaries and linkages.[270]

Conclusion

The major solutions suggested for solving the tragedy of the commons are either to appropriate the commons through developing institutional arrangements that confer private property rights prerogatives or, if the nature of the commons does not allow appropriation, to introduce coercive regulatory institutional arrangements that establish public rights and limit access to and use of the commons in relation to over-exploitation. For Hardin, the 'tragedy' is averted simply through the regulations introduced by the government to control over-exploitation and pollution by resource users.

In both remedies, the role of the government agencies is decisive. In the context of water resources insecurity, the remedies formulated by the tragedy of the commons introduce prescriptive regulation, regulatory institutional arrangements establishing public rights, whilst introducing private property rights to restrict access to and use of water resources. The core issue is whether the depletion and degradation of water resources can be effectively regulated solely through coercive rules. In this regard, the theory fails to propose non-coercive market rules and informal community arrangements that may be equally important to enhance water resources sustainability.

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[269] Ibid, Articles 3 (2), 3(3) 3(4)) & 3(5)

[270] WWF, (2000). *Adapted* from Integrated Water resources Management, Global Water Partnership Technical Advisory Committee Background Papers, No. 4, *Available* wwf.panda.org/about our earth/about freshwater/rivers/irbm, last accessed: 07 July 2012

Water resources have distinct characteristics from many other types of resource. This is mainly because water resource boundaries are usually large, the resources are uneven, uses and users are diverse and the resources are shared in a range of scales. Moreover, water availability is adversely affected not only by unsustainable water resources exploitation but also by water quality failures and water systems degradation. This is attributable to the interconnectedness of natural water systems with ecosystems. In many cases, water pressures transcend national boundaries, and water resources management cannot be effectively addressed in an isolated fashion. Actions in adjacent environments or in even farther locations may impact upon the availability of water. An isolated view of natural resources problems solely through the regulation of users' demands thus excludes a range of water pressures that transcend national frontiers.

The introduction of a more integrated water resources management is thus required to avert water insecurity. Water resources problems are interconnected and need to be approached holistically. By doing so, a wide range of water resources pressures must be recognized and managed at internal and cross-border levels. Hardin's theory hardly provides complete solutions to the contemporary water security challenges. Present-day water resources challenges thus need comprehensive solutions and institutional arrangements for water resources management.

It may require water demand regulation at a local level. However, regulatory institutional arrangements for water demand alone may not sustain water resources because the challenges may involve a range of water pressures. In addition to well defined and coercive regulatory institutional arrangements, water security may require non-coercive regulatory institutional arrangements and effective implementation mechanisms. Thus present day water security challenges may need fundamental change in managing the resources beyond Hardin's 'traditional' perspectives. In spite of the initiatives underway in water resources management, however, the concept of the 'tragedy of the commons' still has a big impact in the formulation of the policies, as a result of which there has not been much deviation from the 'traditional' way of managing water resources. ■

COMMENT

DOI http://dx.doi.org/10.4314/mlr.v7i12.6

Judicial Protection of Private Property Rights in Ethiopia: Selected Themes

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Introduction

The protection of property rights involves complementarities between the judiciary, executive organs and administrative tribunals. It envisages a legislative framework and administrative protection based on an administrative procedure law pursued by administrative authorities and tribunals. Moreover, It requires an independent and competent judiciary with due integrity.

The judicial protection of private property rights determines the extent to which individuals and legal persons are ensured access, proper interpretation, efficient adjudication and appropriate judgment to their claims, counterclaims and defenses whenever disputes are adjudicated in courts of law. This envisages competence, integrity, efficiency, judicial independence, predictability and consistency in judicial decisions. As an exhaustive analysis on all aspects of these themes requires wider discussion, this comment focuses on the jurisprudence, consistency and predictability of some high level Ethiopian court decisions (particularly at the level of the Cassation Division of the Federal Supreme Court) on selected themes related to private property with a view to highlighting the practical protection of private property rights in Ethiopia.

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This comment is an abridged version of the fourth chapter of the research titled "Property Rights Protection and Private Sector Development in Ethiopia" which was submitted to Private Sector Development Hub at the Ethiopian Chamber of Commerce and Sectoral Associations. The authors are grateful to Private Sector Development Hub for sponsoring the research in partnership with SIDA (Swedish International Development Cooperation Agency).

1 Overview of some cases that involve land rights

The current land holding system in Ethiopia gives power to both the federal and regional states to enact laws pertaining to land. The Federal Supreme Court's Cassation Division decisions also bind lower courts in the interpretation of similar issues as per Article 2(4) of Proclamation No. 454/2005. Therefore, reference to the Cassation Division decisions on land rights is necessary to examine the protection of property rights.

Land rights are crucial in private sector development as no investment can be carried out without land.[1] Article 1130 of the Civil Code gives recognition to land and buildings as immovables, and Article 1204 states the elements of ownership regarding the use, enjoyment of its fruits, and its disposal through donation, sale or inheritance, etc. as envisaged under Article 1205. Article 1206 of the Civil Code entitles the owner "to claim his property from any person who unlawfully possesses or holds it and may oppose any act of usurpation".

Disputing parties may settle their difference with or without the involvement of a third party, or through mediation or arbitration. Yet, going to courts of law becomes necessary when resolving a dispute becomes impossible by the parties themselves or through mediation or arbitration. The following cases show few of the themes that can give an overview of the problems of predictability, consistency and delay in the adjudication of property rights.

1.1 The need to recognize the economic value of land use rights

a) *G/Egizabher* v. *Selamawit,* FSC Cassation Division (File number 26130)[2]

The case started in the Tigray National Regional State. The mother of Selamawit, Dinkinesh Demisu (deceased), was married to G/Egizabher. After the death of her mother W/t Selamawit claimed a house with 10 rooms as heir to her mother. The deceased had 5 rooms built on the land before she married G/Egziabher, and they built 5 more rooms on the land after their marriage.

The High Court of Tigray decided that the rooms built after marriage should be shared between G/Egziabher and Selamawit but part of the house built before marriage (i.e five rooms) would exclusively belong to Selamawit and the court

[1] As stated in Chapter 1, land is no more within the realm of private property under the existing laws of Ethiopia: i.e., Proclamation No. 31/1975 that has made rural land public property, and proclamation No. 47/1975 that renders urban land the property of the state and the Ethiopian people. Private citizens thus only exercise possessory rights not ownership right on rural or urban lands.

[2] Alem Asmelash, (2010) "Comments on Some Land Rights Related Decisions of the Federal Supreme Court Cassation Division", *Ethiopian Journal of Legal Education*, Vol. 3, No. 2, pp. 154-156 (abridged)

added that if it is possible, the land should be equally divided between the two. In case this is not possible, the court decided that the house should be sold and they should share the amount based on the proportion stated by the court. But there was a dissenting opinion which stated that since the land was what the deceased got before her marriage to G/Egziabher, the latter could only share from the values of five rooms built after marriage and not the land.

The dissenting opinion was upheld upon an appeal to Tigray Supreme Court, and the Tigray Supreme Court Cassation Division affirmed the decision of the Tigray Supreme Court. Petition was lodged to the Cassation Division of the Federal Supreme Court. The Division in rendering its judgment stated that individuals do not have ownership right over land but only that of possession. The court further stated that the mother of Selamawit had together with her husband built the extra five rooms after her marriage thereby conceding her possessory right on the land, and G/Egziabher's share on the house cannot be seen separately from the land built on it.

From the decision of the Division, it can be inferred that the land and the house are intrinsic elements and that one cannot see the house separately from the land built on it so far as the current land laws are concerned. This interpretation evokes two questions: Can the immovable property be an intrinsic element of another immovable property? And are the rules of accession relevant to interpretation of the Federal Supreme Court Cassation Division?

Regarding the first question, Article 1132 of the Civil Code of Ethiopia defines 'intrinsic elements'. Article 1130 merely states land and buildings as immovables, and the provisions that define intrinsic elements and accessories are Articles 1130 to 1134. Trees and crops are clearly stated as intrinsic elements of the land until they are separated or until they are "subject of contract" which envisages their separation. The *right in rem* over the trees is determined by the *right in rem* over the land, and as a result any other party who has claim over the trees or crops has *right in personam* over the person who has ownership/possessory title over the land and not a *right in rem* over the trees or crops as long as they are intrinsic elements of the land. [3] As Stebek notes:

> the Civil Code is cautious with regard to buildings, and merely defines them as immovables under Art. 1130. It rather treats the scenario of separate claims over land and buildings under the provisions that deal with accession. Articles 1178 and 1179 of the Civil Code envisage two different scenarios whereby a person has constructed a building without the objection of the landowner (Art. 1179), or where the building is constructed against the will of the landowner (Art. 1178). If the landowner did not object to the construction of a building, the builder could own the building but still the landowner can evict the builder upon payment of compensation. In case,

[3] Elias N. Stebek (2012), Case Comment, unpublished.

> however, the house is built against the will of the landowner, the landowner may at his option evict the builder without the payment of compensation. Even if land has come under public ownership in Ethiopia since 1975, these provisions can apply *mutatis mutandis* to ownership over land use rights, i.e. possessory rights over land.
>
> Since the deceased and G/Egziabher were in wedlock, the five rooms were built without the objection of the deceased. Thus, the law on accession enables the landowner (in this case the landholder) to evict the builder but should pay compensation. This clearly means, *right in rem* over all the rooms (including the ones built during the marriage) belongs to the deceased while G/Egziabher is entitled to right *in personam*, i.e compensation for his share in the co-ownership of the five rooms built after the marriage.[4]

In estates owned by companies or in case of joint ownership, land use rights may be capital contributions and in effect, the ownership of the use right over the land goes to the company or the joint owners thereby rendering Articles 1178 and 1179 inapplicable. In the case of *G/Egizabher* **v.** *Selamawit*, however, there were already five rooms over the land to which the deceased has landholding title, and issue of joint ownership of use rights over the land cannot arise.[5] Therefore, the Federal Supreme Court (FSC) Cassation Division's decision does not seem to have legal basis. If equity is its basis, there can also be an argument in favour of Selamawit that it is inequitable and unjust to disregard the use right over the land that her mother had before the marriage.

Fillipos Aynalem,[6] in assessing the same issue, observes that the provisions of the Civil Code Articles 1178 and 1179 enable us to separate the right of land possession/ownership from ownership over the building built on it. He further notes that public ownership of land does not deny citizens to have possessory right that is worthy in the eyes of the law, and underlines that the Constitution protects the possessory right of the land.

In *G/Egizabher* v. *Selamawit*, the accession rules embodied in the Civil Code have been unduly disregarded. The Division held that a person with a claim over a house shall also have a right over the use right on land no matter who the initial possessor of the land was, and the land cannot be seen differently from the house. Decisions of the FSC Cassation Division bind lower courts with regard to interpretation. This binding interpretation thus applies to similar issues in all courts of law unless the FSC Cassation Division amends it in its future

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[4] Ibid.
[5] Ibid.
[6] Filipos Aynalem (2009), "[Interpretation of Possessory Rights over Urban Land (Amharic)] **የከተማ ቦታ ይዞታ መብት አተረጓጎም** *Journal of Ethiopian Law*, Vol. 23, No. 1, August 2009.

decisions. It is to be noted that even interpretations in which the court had erred remain applicable on all lower court decisions that have pursued the interpretation because the FSC Cassation Division's decisions to reverse its former erroneous interpretation can only have prospective and not retroactive effect based on its recent decision under File No. 68773.[7]

The impact of this interpretation in private sector development is that it discourages the expansion of family owned business premises and rental property. In case of large-scale investments, land use rights can easily be capital contributions and spouses, joint owners, family members and shareholders can from the outset define their shared land use rights. In small scale improvements (such as modest renovations for business activities, rentals, etc.), however, a spouse who has real right over residential or business premises can (upon second marriage, for instance) be reluctant against expansion or improvement of the property during marriage owing to the risk of its conversion to common property. This significantly affects private sector development, as the supply side of business premises envisages not only big constructions of company-owned malls, but also small and medium shop premises that can benefit from small-scale renovations, expansions and improvements.

b) *Ethiopian Road Authority* v. *Issa Mohammed* (File number 30461)[8]

The case started in Illubabor, Oromia National Regional State. Issa had license to produce sand on the land he was given through lease. But while a road was being built on the area, the Ethiopian Roads Authority took the already produced sand worth Birr 30,000 that belonged to Ato Isssa. He instituted a case at the Oromia High Court, and the court ordered the Ethiopian Roads Authority to pay the amount. On appeal, the Oromia Supreme Court affirmed the decision of the High court. Thus, the case went to the FSC Cassation Division.

The Federal Supreme Court Cassation Division held that by virtue Article 6(18) of the Ethiopian Roads Authority Re-establishing Proclamation 80/1997, the Authority can, for the purpose of road construction and maintenance and other purposes, use land and stone-like resources for free and is only obliged to pay compensation for properties of the land. It reversed the decision of the Oromia Supreme Court which had held that the Ethiopian Roads Authority Re-establishing Proclamation 80/1997 does not allow the Authority to take away sand found on the land held by another person. On the contrary, the FSC Cassation Division remarked that since land and all natural resources are owned

[7] *Getachew Deyas and Fantu Tesfaye v. Rukia Kedir*, File No. 68773, Federal Supreme Court Cassation Division Decisions, Vol. 13, pp. 623-625.

[8] Cassation File No. 30461, Hidar 3, 2000 E.C., published in *Mizan Law Review*, Vol. 3 No. 2 (2009).

by the people and the government, the latter and the people should use the resources for free.

The FSC Cassation Division held that even if Issa had the license to produce sand, the resources are owned by the government and the people, and the latter can legitimately take away the resources. Issa's plea for the value of the sand and for the expense incurred to produce the sand was rejected and the Cassation Division decided that the Ethiopian Road Authority is not obliged to pay the amount.

This decision does not recognize the economic value of use rights on land, and it takes the interpretation of Article 40(3) of the Constitution to its extreme application. This allows a government entity to take any resource obtained from land without compensation even if a person extracts the resource based on a license to undertake a business activity.

The court should have made a distinction between the Authority's entitlement to extract sand and the act of confiscating another person's property which is already extracted and ready for transportation. Distinction should have also been made between *ownership* vis-à-vis the limited scope of *bare ownership* (plus regulatory powers) that the state has over land on which a person has use right. While the state is the bare owner who is entitled to collect lease price, land rent, etc., the right to use and enjoy the products from the resource clearly belongs to the landholder.

The case *Ethiopian Roads Authority* v. *Genenew W/Yohannes* also involved sand taken by the Authority in which the Cassation Division affirmed the decision it rendered in the case *Ethiopian Roads Authority v. Issa* by stipulating that there is no legal ground for the Authority to be obliged to pay for the value of sand it took from Genenew.[9] The Cassation Division stated that all resources belong to the people and the government, and thus the government should not be obliged to pay compensation for the resources.

Apparently, the sand is not in its natural state in both cases. A person holding license to extract sand in a given location (stated in the license) spends time and energy to extract sand thereby adding value to it. Although Ethiopian Roads Authority is going to use the sand for road construction, it would have been fair to order the Authority to pay compensation for the sand. This is a clear example of the Cassation Division's jurisprudence which disregards economic value to the use rights on land. This should indeed be rectified because private business development envisages recognition to the use value of land to which an individual or a legal person is entitled.

[9] Cassation File No. 57593.

1.2 Judicial authority to examine administrative revocation of landholding title

In File No. 22719[10] a petition to the FSC Cassation Division was lodged by Addis Ababa Urban Land Administration and Urban Development Bureau in which the petitioner sought reversal of the decision of lower courts which required the Bureau to withdraw its unlawful revocation of landholding and house ownership titles. The Bureau had revoked land holding title No.32221 and house ownership title No. 17/3/91, an act that was contested by Negash as unlawful. The lower court examined the case and rendered its decision in favour of Negash Dubale in File No. 503/88 that required the Administrative Bureau to issue landholding and house ownership titles for House Numbers 1304, 1305 and 1306 situated in Higher 17 Kebele 20. Execution proceeding of the decision was further instituted under File No. 90/92 based on which the Bureau was ordered to allow the continued validity of the landholding title and the house ownership title.

The FSC Cassation Division ruled that as long as the Bureau has revoked the landholding and house ownership titles of the houses, there is no vested interest (as per Article 33(2) of the Civil Procedure Code) that justifies judicial litigation, and the lower courts should not have adjudicated the case. The Cassation Division held that the law confers authority over the administrative authority to provide or revoke such titles, and any grievance in this regard should have been instituted not in courts of law but in the complaint procedures of the relevant administrative authority. This decision and its aftermath clearly affect the protection of private property rights and private sector development.

The landholding and house ownership titles were issued to Negash which render him holder of property rights. As long as the revocation was contested in a court of law, the administrative authority is clearly duty bound to justify the legality of its actions. If it fails to do so, its act of revocation (**ማፃምኸን**) is clearly an *ultra vires* act which, according to Article 401 of the Civil Code, is of no effect. In other words, as long as the Bureau had no authority to revoke the landholding and house ownership titles, it is *void ab initio* (void from the beginning), and the revocation should have been declared of no effect.

Article 401(1) of the Civil Code provides that "Acts performed by the bodies referred to in [Article 394 *ff*] in excess of the powers given to them by law or without the observance of the conditions or formalities required by law shall be of no effect". This applies even if it is not "expressly provided by law in such

[10] *Addis Ababa Urban Land Administration and Urban Development Bureau v. Negash Dubale*, Federal Supreme Court Cassation Division Decisions, Vol. 6, pp. 176-178.

circumstances".[11] According to Art. 402, the nullity may be invoked by any interested party.

Administrative authorities should not thus be entitled to confer and revoke property rights at will, and it is the role of courts to examine and annul *ultra vires* acts. Or else, the ultimate fate of property rights holders would depend on the good intentions or adverse decisions of administrative authorities which may be arbitrary. Fortunately, there are recent developments in favour of a new line of interpretation in the Federal Supreme Court regarding the authority of courts to examine the legality of the issuance or revocation of landholding title deeds where it becomes an issue in the course of litigation. The decisions of the Federal Supreme Court Cassation Division in File No. 67011 (*Taitu Kebede's Heirs v. Tirunesh et al),* File No. 64014 (*Genet Seyoum v. Kirkos Sub-City Kebele 17/18 Administration et al)* and File No. 48217 (*Abadit L. v. Zalambesa Town Administration & Berhane Z.*) illustrate this fact.

1.3 Contractual benefits in the absence of landholding titles

Teklemariam[12] built a house (House No. 367(b)), Woreda 17, Kebele 15 and he rented it to Adane who in return, without seeking consent from the lessor rented some part of the house to Fetlework. The tenant refused to pay him the rent, and Teklemariam brought an action against him. Adane requested the court to allow the Addis Ababa land Administration to intervene in the litigation on the ground that the lessor (Teklemariam) does not have landholding title for the land or house construction permit to build the house. Both lower courts rejected the objections and ordered the respondents to pay the arrears of the rent and handover the house to Teklemariam.

The lessees filed a petition at the Federal Supreme Court Cassation Division. The Cassation Division decided in favor of the intervener (Addis Ababa City Land Administration) on the ground that the lessor has no landholding title and house construction permit. The respondents (lessees) were required to handover the land and the house to the intervener (Addis Ababa City Land Administration) on the ground that urban land belongs to the state, and it cannot be owned privately.

The two grounds that constituted the basis for the decisions of the lower courts were first, no evidence has been produced which proves that the particular land under consideration is nationalized, and secondly the illegal construction of the house is an issue that can only be invoked by the relevant administrative entities and not by the lessees.

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[11] Civil Code, Art. 401(2).

[12] *Addis Ababa City Administration v. Teklemariam Mekonnen* (File Number 24269) Federal Supreme Court Cassation Division Decisions, Vol. 6, pp. 185-187.

The issue in litigation should have been whether there is a contract between the parties in dispute, and the issue of title should have been a different issue that could have been handled by the relevant administrative offices. According to Article 1732 of the Civil Code, "contracts shall be interpreted in accordance with good faith having regard to the loyalty of confidence which should exist between the parties according to business practice." The lessee who invokes the issue of landholding title clearly intends to avoid payment of the house rent, because the existence or nonexistence of landholding title or house construction permit is not among the relevant elements for the services obtained in the course of using the premises.

Even if there was a law that could have rendered such contracts untenable and invalid (owing to defects in the property rights of the lessor), the contracting parties should have, by virtue of Article 1815 of the Civil Code, been reinstated to their pre-contract positions because the provision clearly provides that upon invalidation of a contract "the parties shall be as much as possible be reinstated in the position which could have existed, had the contract not been made."

According to Article 1179(1) of the Civil Code, "Whosoever has erected a building on land [which is] the property of another [person] without the landlord objecting to the building shall be the owner of such building." However, the relevant authority can order the demolition of any construction that is made without prior permit, according to Article 7(1) of Construction and Use of Urban Houses Proclamation No. 292/1986.

Such houses are not built overnight and there is a house number given to the house. This implies that the administrative entity that has given number to the house is aware of its construction. Many illegal holdings and constructions have been regularized where they do not violate the basic master plan and redevelopment plans of the city. Accordingly, the lessor could have been beneficiary in the regularization schemes undertaken by Addis Ababa City Administration in series of rounds.

In *Gezahegn Adinew v. Dasash Baynesagn*,[13] the Federal Supreme Court Cassation Division pursued a different line of interpretation over a relatively similar issue. The petitioner built a house on the land of the respondents based on permission obtained from them. Due to disagreement, the respondents evicted the petitioner from their land. The lower courts entitled Gezahegn to receive one fourth of the price of the house as per Art 1180(2) of the Civil Code, and required him to surrender the house to respondents. However, the FSC Cassation Division reversed the decision of the lower courts on the ground that land belongs to the state and peoples of Ethiopia, and hence respondents do not have the right to allow a house to be constructed on any piece of land that does

[13] *Gezahegn Adinew v. Dasash Baynesagn,* File No. 30101, Federal Supreme Court Cassation Division Decisions, Vol. 6, pp. 203-205.

not belong to them. On the basis of this decision, the petitioner became an owner of a house that he built on a piece of land given to him by individuals who have no legal power to do so. The relevance of such cases is that there ought to be predictability and consistency in case analysis and decisions.

1.4 Examples of Delay in court decisions and challenges in the enforcement of court decrees

Delay in court decisions and execution of judgments is among the challenges that adversely affect property rights protection. For example, there has been a delay of six years to decide on the amount suggested by independent chartered accountants in relation to financial report submitted by the plaintiff in *Habteab Tesfa Building Construction Contractor v. Ethiopian Telecommunication Corporation* (File No. 31934). The case is still pending at the Federal First Instance Court. While the claim involves Birr 400,000, the auditor's suggested figure is Birr 388,000

The challenges in the reluctance of various administrative organs to enforce court decisions and decrees can be illustrated by the following examples that are stated in the decision rendered by the Cassation Division of the Federal Supreme Court in *Tewolde Bisrat et al*, Tahsas 04, 2004 E.C, File No. 67777[14]:

a) In *Prosecutor v. Tekabe*, Criminal Cases File No. 162887, the court ordered release on bail on Tir 2nd 2002 E.C. (January 10, 2010), but Tekabe stayed under detention in the Customs and Revenue Administration Police Station for ten months.
b) Mesfin Kassahun (File No. 169690) was released 6 months after court order for release on bail was issued on Ginbot 24, 2002 E.C (June 1, 2010).
c) Hailu Worku and Louisa Farmeta (File No. 167550) were imprisoned for over eight months after the court's order that they be released on bail.
d) Mengistu Abraham and Ahmed Mohammed (File No. 172759) and Bamlak Yismaw (File No. 170203) stayed for over 3 months at Customs Police after court decisions of release on bail.

2. Subjecting Expropriation Disputes to Judicial Scrutiny

Some might argue that the imbalance created by the present expropriation laws of Ethiopia can be rectified if the judiciary was allowed to entertain major disputes relating to expropriation including the question of public purpose. Nevertheless, allowing persons affected by land expropriation to resort to regular courts might not necessarily work in favor of the poor if there is deficit

[14] *Tewolde Bisrat et al*, Tahsas 04, 2004 E.C., File No. 67777, Federal Supreme Court Cassation Division Cassation Decisions, Vol. 13, pp. 266-270.

in the independence of the judiciary in relation to cases that are deemed or perceived to matter to the authorities.

In Ethiopia, there had been a historic formal fusion between the judiciary and the executive impacting the present independence of the former. Assefa notes:[15]

> In historic Ethiopia, adjudication of cases formed part and parcel of public administration. One finds a merger of functions within the executive, the administration of justice and the executive function proper. …This blend of judicial and executive functions in the latter is not without implications. First and foremost, the judiciary never had a separate existence of its own as an institution. It was subject to all kinds of pressures from the other branches.

Currently, the country`s judicial system has moved away from its earlier formal dependence towards its legal and constitutional independence. But there are doubts about its detachment in reality from the legacy of dependence. At present, the judiciary`s formal independence is unambiguously stated in the FDRE Constitution, which declares that: ``An independent judiciary is established… Courts of any level shall be free from any interference of…any governmental body, government official or from any other source…judges shall be directed solely by the law.``[16]

Yet, "[t]here is a perception that the autonomy of the judiciary in Ethiopia is weak…"[17] Assefa states "…external pressure on the judiciary has deep roots and

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[15] Assefa Fiseha, Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study (hereinafter Federalism and Accommodation), (Netherlands, Wolf Legal Publishers, 2005/06) p. 390; see also Chi Mgbako *et al*, Silencing the Ethiopian Courts: Non-Judicial Constitutional Review and its Impact on Human Rights, 32 Fordham International Law Journal1 259 (2008); where it is asserted that "The executive branch has the power to do as it wishes with no judicial checks on its activities…" at 289-290 & 296. See also Tigist Assefa, Judicial Review of Administrative Actions: A Comparative Analysis (LL.M Thesis, School of Law, Addis Ababa University,) (2010) available at <http://etd.aau.edu.et/dspace/bitstream/123456789/2154/1/Tigist%20Asefa.pdf> (Accessed: December, 22, 2011).

[16] See Article 78/1 and Article 79/2& 3 of the FDRE Constitution.

[17] African Development Bank: Country Governance Profile: Ethiopia (hereinafter Country Governance Profile) (2009) at <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/Ethiopia%20%E2%80%93%20Country%20Governance%20Profile%20EN.pdf> (Accessed January 11, 2012) at 11; see also The Canadian International Development Agency, Independence, Transparency and Accountability in the Judiciary of Ethiopia (2008) (Unpublished, on file with the author) pp. 99-101 & 135-138.

is not without some hangovers on the new federal judiciary. Administrators at state level, even today, think that it is natural to order the judge…".[18]

> A long history of centralized governmental authority and a judiciary subjugated to the executive branch has fostered a weak judicial branch with reduced capacity to exercise genuine independence, as well as a reticence of other branches to treat the judiciary as either truly independent or co-equal.[19]

In particular, "…where government interests are at stake, direct interference has been noted…"[20]

According to the Global Competitiveness Report 2010-2011, in terms of juridical independence, Ethiopia ranks 89th out of 139 nations, which has shown an improvement from its previous ranking, but Ethiopia`s standing is still low in the ranking index.[21] This is despite the fact that the country has put in place a judicial reform program whose key objective is "the promotion of professional and autonomous judiciary".[22] This is on the top of the numerous factors which inhibit the judiciary`s assertiveness,[23] accessibility, effectiveness and efficiency.[24] Thus, in the current state of the judiciary, it is doubtful if the judiciary would assert its autonomy in respect of cases involving land expropriations if the question of public purpose and other expropriation questions were made subject to judicial challenge.

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[18] Assefa Fiseha, Federalism and Accommodation *supra* note 18, p. 390.

[19] The World Bank, Judicial and Legal Assessment Judicial and Legal Assessment (2004) at <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/EthiopiaSA.pdf> (accessed January 11, 2012) pp. 19 & 21-23.

[20] Id., at 21.

[21] World Economic Forum, The Global Competitiveness Report 2010-2011 at http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2010-11.pdf, (last viewed December 21, 2011) at 155.

[22] Country Governance Profile *supra* note 20, p. 11.

[23] There is a tendency to restrict the turfs of its power even in cases which are deemed ordinary. This is particularly true when it comes to reviewing the actions of executive organs. For instance, in Ethiopian Privatization and Public Enterprises Supervising Authority vs Heirs of Mr. Nour Beza, (Fed. Sup. Ct. Cassation File No. 23608, 2000E.C.) in the Decisions of the Federal Supreme Court Cassation Division Vol. 5 (Addis Ababa: Federal Supreme Court, 2001 E.C.) pp. 304-305, where the court has reasoned that `in the Ethiopian context, judicial power of the regular courts is not inherent but it emanates from the positive law and that where bodies other than regular courts are given by the law the power to render final and binding decisions then regular courts cannot size upon such matters even by way of review.``

[24] Federal Democratic Republic of Ethiopia: Comprehensive Justice Reform Program: Base Line Study Report (Amsterdam, Center for International Legal Cooperation, 2005) pp. 77-89 & 213-227.

The above argument should not send the message that a judiciary that operates within a modus operandi of centuries of strong judicial tradition would necessarily award a generous compensation or adopt a restrictive notion of public purpose. The latter point can be illustrated by taking the 2005 Kelo decision handed down by the US Supreme Court.[25] In this case, the court has upheld the decision of a city government to take land from one private person to give it to another for economic redevelopment purpose implying the interpretation by the judiciary of public purpose broadly to mean any project that would entail direct or indirect benefit to the public in the form of tax revenues and jobs.[26]

But the context of the Kelo case is different from the broader notion of public purpose in place in Ethiopia. Unlike Ethiopia, the public purpose test in the US is unmistakably open to judicial scrutiny. And the Kelo expropriation took place in the context of comprehensive government plan which passed through public hearings, and followed by approval from a democratically elected local government.

The US Supreme Court delivered the Kelo decision in the context of property rights notion different from the one prevalent in the Ethiopia. The Kelo case was litigated in the country with a strong tradition of private property protection as opposed to Ethiopia where such protection has historically been weaker. In the Kelo case, those who opposed the taking by the city government argued, amongst others, that "the symbolic value of home and ownership" is "something that cannot be entirely compensated monetarily"[27] perhaps because home ownership is seen as a kind of non-fungible property as articulated in Radin`s personhood theory of property as opposed to arguments based on the

[25] See Annette M. Kim. "Land Takings in the Private Interest: Comparisons of Urban Land Development Controversies in the United States, China, and Vietnam." Cityscape 11.1 (2009): 19- 32. See also Antonio Azuela and Carlos Herrera-Martin (2009), "Taking Land Around the World: International Trends in Expropriation for Urban and Infrastructure Projects" in Somik V. Lall, Mila Freire, Belinda Yuen, Robin Rajack and Jean-Jacques Helluin (eds.), *Urban Land Markets Improving Land Management for Successful Urbanization* (Springer Netherlands); see also Daniel B. Kelly (2005), "The Public Use Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence" *Discussion Paper* No. 5 07/2005, Harvard Law School at <http://www.law.harvard.edu/programs/olin_center/fellows_papers/pdf/Kelly_5.pdf> . (Viewed January 11, 2012) W. Keating (Book Review), Rachelle Alterman, Takings International, A Comparative Perspective on Land use Regulations and Compensation Rights, (Chicago, IL. ABA Publishing, 2010) p. 363.

[26] Carol L. Zeiner (2010), "Eminent Domain Wolves in Sheep's Clothing: Private Benefit Masquerading As Classic Public Use, 28 *Virginia Environmental Law Journal* 1 *pp. 10-11.*

[27] Annette Kim, *supra* note 28, p. 24.

deprivation of the subsistence asset of people in Ethiopia. In the Kelo case, the taking of private home from high or middle income persons took place in order to advance public interest in the context of city redevelopment with a view to attracting new businesses while takings in Ethiopia occur for economic development in the sense of taking farmland from low income rural people. Unlike Ethiopia, where the expropriation law is mainly federalized, states in the US can issue their own expropriation law. For instance, after Kelo several states have passed statutes restricting the broad reach of the Supreme Court`s interpretation of the standard of public use.[28]

3 Selected Issues on Subletting Business Premises and Intellectual Property

3.1 The right to sublet business premises

In *Emebet Mekonnen* v. *Woreda 20 Kebele 29*,[29] the lessee had sublet her business (a hotel) to another person without obtaining permissions from its owner, the Kebele. Emebet had made improvements worth Birr 300,000 (three hundred thousand) based on the permission she had obtained from the Kebele. The lessee later on refused to give the premises back to Emebet on the ground that the Kebele has taken its premises back, and has leased it to them. The Kebele argued that it has terminated its lease with Emebet and has let it to the new occupants who are using it for hotel business.

Article 145(1) of the Commercial Code recognizes the right of the leasee to assign or sublet or to sell his business without obtaining permission from the lessor. This includes the transfer of the right to lease the business premises. During the litigation, the Kebele invoked the Directive issued by the Government Houses Rental Agency which prohibits subletting business premises without its permission, and it argued that Emebet's acts violate this Directive and the lease contract with her is duly terminated. The High Court rejected the Kebele's arguments and decided that the Kebele did not prove its authority to terminate the contract and did not submit evidence about the termination of the rental contract between Emebet and the Kebele. It also stated that the term of sub-lease between Emebet and the persons who have refused to pay her the rent has not ended, and held that the sub-lessees are bound to pay the arrears and damages.

[28] Chenglin Liu (2008), "The Chinese Takings Law from a Comparative Perspective", *Journal of Law & Policy*, pp. 331-332.

[29] *Emebet Mekonnen* v. *Woreda 20 Kebele 29,* File No. 31264, Federal Supreme Court Cassation Division Decisions, Vol. 9, pp. 140-142.

This decision was reversed by the Federal Supreme Court, and ultimately reinstated by the Federal Supreme Court Cassation Division. The Cassation Division stated that Article 145(1) of the Commercial Code allows businessmen to sublet their business including its premises without prior permission from the owner of the premises. Likewise, the Cassation Division has (under File No. 34586) recognized the right of the lessee to sell his business without obtaining the prior consent of the lessor, i.e. Agency for Government Houses). The Cassation Division's interpretation of Article 145(1) of the Commercial Code is indeed commendable, and such decisions have significant contribution in controlling abuse of powers by administrative agencies.

A case in point is the Directive issued by the Agency for Government Houses (issued in Hedar 2004 Eth. Calendar, i.e. November, 2011) which prohibits sub-letting or assigning business premises to a third party. This directive clearly violates Article 145(1) of the Commercial Code which is very fundamental in the smooth operation of business activities and private sector development. Federal courts are deciding in favor of the Agency for Government Houses citing this directive (which is currently in the process of some revision), while losing parties argue that the Agency does not have the power to issue such directive. Cassation petitions are expected to be made soon.

The decision of the Cassation Division in *Emebet Mekonnen* v. *Woreda 20 Kebele 29* was rendered in January 2009, and it remains to be seen whether the Cassation Division will maintain its position, or uphold current or future administrative directives even if they violate Article 145(1) of the Commercial Code.

3.2 Intellectual property: Sample cases

In *Ethio-Cermaic P.L.C* v. *Ethiopian Intellectual Property office* & Ovorgiga Technology Limited[30] the 2nd respondent Ovorgiga Technology requested 1st respondent to register its trademark *Ethio Cement* encircled with ten stars**.** Ethiopian Intellectual Property Office (EIPO) did not hesitate to register this trademark. The petitioner stated its objections to the registration and the granting of certificate of registration and submitted its objections to 1st respondent (Ethiopian Intellectual Property Office). The petitioner claimed that it had obtained registration certificate under the trademark "*Ethio Cement*" to use it for marketing its cement products.

According to the petitioner, allowing the 2nd respondent to use this trademark will create confusion in a manner prejudicial to another trader. It claimed that using identical or similar distinguishing mark violates Article 141(2) of the

[30] *Ethio-Cermaic P.L.C* v. *Ethiopian Intellectual Property office* & Ovorgiga Technology Limited, File No. 57179, Federal Supreme Court Cassation Division Decisions, Vol. 12, p.544- 548.

Commercial Code, and the decision of the 1st respondent contravenes Trade Practices Proclamation 329/2003 and Trademark Registration Proclamation 501/2006. The Cassation Division reversed the decision of the 1st respondent and decided that the 2nd respondent cannot be allowed to use trademark for marketing its product.

In another case[31] the Cassation Division rejected the filing of a legal action at the Federal Court of First Instance directly when one is dissatisfied by the decision of Ethiopian Intellectual Property Office. According to the Cassation Division, a person aggrieved by the decision of the Ethiopian Intellectual Property Office shall file an appeal at the Federal High Court. It appears that this is not consistent with the position it took under File No. 57179 (i.e., *Ethio-Cermaic P.L.C* v. *Ethiopian Intellectual Property office &* Ovorgiga Technology Limited). The Cassation Division has confirmed its position under File No 63454.[32]

Article 17(1) of the Trademark Registration and Protection Proclamation No. 501/2006 recognizes the right of an aggrieved party to appeal to a court having jurisdiction in connection with registration of trademark. However, the court to which an appeal can be lodged is not identified under the Proclamation. According to Article 49 of the Proclamation, "the Federal Courts shall have jurisdiction" but it does not specifically state whether it refers to the Federal Courts of First Instance or Federal High Court.

In spite of such challenges in terms of clarity and consistency, there are indeed commendable cassation decisions that give due attention to intellectual property rights. Cases in point are the decisions of the Federal Supreme Court Cassation Division with regard the copyright protection that should be accorded to translation works in File No. 44520 (20 October 2009),[33] and the decision of the Cassation Division in File No. 68369 (January 13, 2012),[34] which held that the form in which ideas are expressed are entitled to copyright protection even if the ideas are not original. This duly indicates that copyright protection refers to original expressions which might not necessarily emanate from new ideas or information.

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[31] *Ethiopian Intellectual Property Office v. Tibebe Ayele*, File No. 59025, Federal Supreme Court Cassation Division Decisions, Vol. 12, pp. 549-553.

[32] *Dat International Trading PLC owner Dr. Tenaye Abitew v. EIPO Y Civa Sante Pharmacy SA*, File No 63454, Federal Supreme Court Cassation Division Decisions, Vol. 13, pp. 378-382.

[33] *Artistic Printing Press v. Getahun Shiberu*, File No. 44520, Federal Supreme Court Cassation Division Decisions Volume: 10, pp 339-341.

[34] *Samuel Hailu & Horizon Printing Press PLC –v. – Simret Ayalew*, File No. 68369, Federal Supreme Court Cassation Division Decisions Volume 13, pp. 576-581

Conclusion: Challenges in Material and Non-financial Incentives

The judicial system in Ethiopia has relatively clear structure and it includes federal and regional level courts. However there is increasingly growing concern about the level of competence in many courts which can be attributable to the unsatisfactory remuneration and other factors which need to be addressed so that judges with exemplary competence and integrity can be retained. The level of public confidence in relation with competence, impartiality and integrity needs utmost attention in the absence of which property rights cannot obtain the level of protection commensurate with the needs of private sector development

The judiciary can hardly attract and retain such judges under the current remuneration scale and prevailing non-financial incentives. Filipos Aynalem raises the question 'What is the salary that justice deserves to be paid?' and compares the remuneration scale of judges with other legal services in the context of the steadily rising cost of living such as housing rentals and transportation. He, among others, raises the salary scale in the Commercial Bank of Ethiopia for the Head of Legal Services, i.e. Over Birr 26,000 [an apparently deserved payment] vis-à-vis the extremely low salary range for judges which (subject to some variation in the future) was as follows in October 2013:

a) Birr 3,085 to Birr 5,243 for First Instance Court judges;
b) Birr 4,186 to 7,061 for Federal High Court Judges, and
c) Birr 5,051 to 7,890 for Supreme Court Justices. [35]

This raises the issue whether a country's treasury should generate revenue from court fees, or whether such fees can be ploughed back to the judiciary so that remuneration for judges can be significantly raised.

In the realm of non-financial incentives, there is the need to enhance rule of law, the independence of courts as enshrined in the Constitution and the tenure of judges. These factors coupled with the level of judicial scrutiny that should be put in place to harness discretionary powers of administrative entities determine the degree of law enforcement and the fairness, efficiency and predictability of judicial decisions that can enhance the complementarities between laws, administrative decisions and adjudication.

[35] Filipos Aynalem, "What is the salary that justice deserves to be paid?' (*Yefitih demozwa sint new*?), Addis Guday, Volume 7, No. 185, Tikimt 2, 2006 E.C. (October 10, 2013), pp. 22-23.

COMMENT

DOI http://dx.doi.org/10.4314/mlr.v7i12.7

Comments on FAO's Achievements toward a Public Domain in Plant Genetic Resources for Food and Agriculture

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1. "Public Domain" in "PGRFAs"[1]: An Overview

I start this comment with the overview of "public domain" in relation to *Plant Genetic Resources for Food and Agriculture* (PGRFAs). What is basically challenged under arguments beneath the 'public domain' is the claim of proprietary right by private entities over knowledge that is created or derived

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[1] **Acronyms**:

ABS	Access and Benefit Sharing
CBD	Convention on Biological Diversity
FAO	Food and Agriculture Organisation of the United Nations
IPR(s)	Intellectual Property Right(s)
ITPGRFA	International Treaty on Plant Genetic Resources for Food and Agriculture
IUPGR	International Undertaking on Plant Genetic Resources
MLS	Multilateral System under ITPGRFA
MTAs	Material Transfer Agreements
PGR**s**	Plant Genetic Resources
PGFRAs	Plant Genetic Resources for Food and Agriculture
PVP	Plant Variety Protection
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights
UPOV	International Convention for the Protection of New Varieties of Plants
WTO	World Trade Organization

from common resources with the purpose of regaining access to such common resources or claiming the share of the benefits derived by the private entity. Strathern notes the challenge stating that a resource belonging to the public domain remains in such domain, and underlines that "once public, it cannot be subject of proprietary claims".[2]

The 'public domain' in relation to intellectual property rights is claimed to be '(unlike the commons), a residual category created by intellectual property regimes themselves' and that it is often confused with the 'commons'.[3] Horowitz asks "if the public domain is nothing more than the holes in the intellectual property system, why reify it with theory and metaphor?" Still, Horowitz seems to endorse the answer from Boyle that 'language matters' which emanates from the fear that *the 'commons' are in danger of 'enclosure'*.[4] If we allow the 'property-centered approach to information' it will certainly make 'the public domain' disappear from the public consciousness.[5]

Most notably there is the danger that: "well-organized groups (such as the pharmaceutical companies) with stable, substantial and well defined interests face off against diffuse groups (the public) with high information costs whose interests, while enormous in the aggregate, are individually small".[6] Accordingly, this would result in an increased exclusion of the public by such 'enclosure' of the 'commons' and the need arises, at least, to maintain a public space that enables 'free access' if reclaiming of the 'commons' proves to be impossible.

Various scholars try to come up with different definitions for the 'public domain' depending upon what each perspective wants to justify. The competing interests and perspectives can, for instance, be in favor of intellectual property rights or in pursuance of limiting the extent of such protection.[7] Although definitions are surrounded by 'metaphor', the "public domain' can be described as:

> ...an institutional space, where human agents can act free of the particular constraints [such as property rights] required for markets, and where they

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[2] M. Strathern (2006). 'Intellectual Property and Rights: Anthropological Critique'. *In* C. Tilley *et al*. (eds.) *Handbook of Material Culture*: Sage, p. 453.

[3] Ibid.

[4] S. J. Harowitz (2009). 'Designing the Public Domain'.*Harvard Law Review* [Online]. Vol. 122, No. 5.[Accessed 7th Jan, 2010], pp. 1491. Available from World Wide Web: < http:// www.ssrn.com>

[5] Ibid.

[6] Ibid.

[7] *See* J. Boyle (2003). 'The Second Enclosure Movement and the Construction of the Public Domain'. *Law and Contemporary Problems*, 66 (1&2), p. 60.

> have some degree of confidence that the resources they need for their plans will be available to them.[8]

It may, however, be questioned as to whether the 'public domain' is the same as the concept of the 'common heritage' of mankind referred above as 'commons'. Chander and Sunder argue that this concept may not be as romantic as we think.[9] The mere fact that a resource belongs to the commons does not necessarily mean equal sharing in the utilization of such resources. According to Strathern, "common property rights imply co-equal ownership of rights, not equal shares to resources...".[10] Co-equal ownership rights in the form of group or 'corporate entity' gives individual members of the group the right to usufruct. How such usufruct rights may be managed could be diverse which likely impacts the sharing of the resource owned collectively. Thus, the ultimate surety that the group can get is that "the group's ownership cannot be extinguished by the actions of individuals".[11]

One noteworthy point, to be drawn from Strathern, is that we find a different notion in the concept of 'public domain' that it inherently endorses the existence of some form of private proprietary ownership and tries to save for the public a common pool especially on areas where public interest is dominant. In this regard, it is important to take note of Boyle's suggestion to be wary of long standing critics of 'anti-commons' that work in favor of enclosure since such claim of inherent endorsement could work in favor of more enclosure of the 'commons' to the private domain.[12]

Predominantly, what lies at the heart of the controversy resulting from claim of proprietary rights by private entities and subsequent denial of the public from access to such knowledge or resources is the issue of *regaining 'access'*. Hence, an effort to carve out a public domain would be the logical next step to be taken towards attaining this end. Such effort in relation to *Plant Genetic Resources for Food and Agriculture* (hereafter, PGRFAs) can be specifically appreciated to ensure access to such resources (e.g. seeds) for farmers against a claim of proprietary right by private entities that deny farmers their access to plant genetic resources or specifically PGRFAs.

Unfortunately, as Andersen states, legal restrictions on access to genetic resources have intensified the problem of the current genetic erosion in crop

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[8] Harowitz (*supra* note 4).

[9] A. Chander & M. Sunder (2004). 'The Romance of the Public Domain'. *California Law Review*: Vol. 92, No. 5, p. 2.

[10] Strathern, *supra* note 2, p. 454.

[11] Ibid.

[12] Boyle, *supra* note 7, p. 36.

varieties which heightens food insecurity.[13] These restrictions are of two forms: "intellectual property rights to plant genetic resources, and acts and regulations at the national level in a range of countries governing access to genetic resources"[14].

The controversy between patents or plant breeders' rights and regulation of access to plant genetic resources entails two forms of denial of access. The *first* factor relates to national regulation denying access to plant genetic resources from the centers of origin[15] such as Ethiopia. This is exacerbated by the diversity of those multinational companies and research centers even if this can be a moot issue considering the weaker bargaining position of developing countries. The *second* factor in the denial of access is the grant of exclusive monopoly rights (patents or plant breeders' rights).

Both forms of denial denote that any person must make payment in order to get access to plant genetic resources. While the *status quo* of plant genetic resources is in a state of devastating erosion, grants of such intellectual property rights deny the wider public and mainly farmers access to varieties that are collected or to varieties derived from the plant genetic resources available in the open source without any form of benefit-sharing.

Arguments based on the public domain 'theory' cannot be raised to get rid of intellectual property right claims and protection over plant genetic resources by private entities especially if we submit to Strathern's definition of the public domain as 'a residual category' that inherently endorses private monopoly rights. Such arguments may, however, be helpful in carving out a domain that enables free access to the 'public'.

The question that comes into one's mind will then be how it would be possible for the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) to ensure access to PGRFAs within a system that grants an exclusive or monopoly right over plant genetic resources to a private entity.

2. Background on PGRFAs

The International Undertaking on Plant Genetic Resources (IUPGR) was FAO's effort (in 1983) to potentially go beyond ensuring access to plant genetic resources and make a stronger claim of treating all plant genetic resources (PGRs) as "common heritage" of mankind. It was a non-binding instrument

[13] R. Andersen (2003). 'FAO and the Management of Plant Genetic Resources' *In* O. Stokke & Ø. Thommessen (eds.), (2003/2004): *Yearbook of International Co-operation on Environment and Development.* London: Earthscan, p. 2.

[14] Ibid.

[15] See <http://www.ibc.gov.et/biodiversity/components-of-biodiversity/plant-species-diversity>.

which did not provide for a public domain treatment but rather "took the position that all PGRs were to be treated as the common heritage of mankind".[16] It provided broad definition of "common heritage" that included commercial plant varieties protected by plant breeders' rights and plant patents in some jurisdictions and multilateral treaties of the developed nations. The underlying motive was that "if the PGRs of the developing world were freely appropriable, so too should be the proprietary varieties of the developed countries".[17] The International Undertaking on Plant Genetic Resources (IUPGR) never got wide acceptance (or failed) to culminate into a binding treaty mainly due to clear difference of the positions of the developed and developing countries.

Then, followed the negotiation, known as the "*keystone dialogue*", between the developed and the developing countries that resulted in "a recognition by the developing countries of the validity of IPRs [Intellectual Property Rights] in plant varieties" and that "common heritage" or free accessibility to and appropriation of farmers' landraces located in developing countries by developed countries did not mean access free of charge."[18] The focus of the dialogue in the international regimes, afterwards, was channeled to the issue of *ensuring access and benefit sharing* which was promoted by developing countries after having submitted to the validity of IPRs in plant varieties during the *keystone dialogue*.

The 1992 Convention on Biological Diversity (CBD) addresses the issues of access to genetic resources. Although it does not specifically refer to PGRFAs, it allows countries to put conditions for access based on "environmentally sound reasons" since the convention is mainly concerned about the conservation of biodiversity.[19] It also recognizes the sovereign rights of states over their PGRs[20]

On the other hand, the TRIPS (Trade Related Aspects of Intellectual Property Rights) Agreement under the World Trade Organization's legal regime demands

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[16] M. Blakeney (1998). 'Access to Biological Resources: Domestic and International Developments and Issues'. *MUEJL* [Online].Vol. 5, No. 3.[Accessed 7 Jan, 2010], p. 4. Available from World Wide Web: <http://www.murdoch.edu.au/elaw/issues/v5n3/blakeney53.html>

[17] K. Aoki & K. Luval (2007). "Reclaiming 'Common Heritage' Treatment in the International Plant Genetic Resources Regime Complex". *Michigan State Law Review*: Vol.1, p. 41.

[18] Ibid.

[19] Convention on Biological Diversity (CBD): Rio de Janeiro, (1992), Article 15. *Also see*: Varella (2003). *Access to Genetic Resources and Benefit Sharing: Main Aspect of Some Legal Frameworks*. Open meeting of the Global Environmental Change Research Community: p. 9. Available from World Wide Web: <http:// www.ssrn.com/abstract=674502>

[20] Aoki & Luval, *supra* note 17, p. 49.

protection of plant varieties by patents or *sui generis* system of protection (or a combination of the two).[21] UPOV (International Convention for the Protection of New Varieties of Plants) has been considered by developed nations as a model for *sui generis* ("of its own kind", i.e. a similar protection to patent right) as its provisions favor the interest of the developed nations. Provisions of UPOV provide protection similar to patent and most of UPOV members are industrialized countries.[22] In 2001, some amendments were, introduced[23] based on the 'keystone dialogue'.

3. The International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA)

The objective of the treaty is the conservation and sustainable use of PGRFAs and the fair and equitable sharing of the benefits arising out of their use so as to ensure sustainable agriculture and food security.[24] The ITPGRFA establishes a MLS (Multilateral System under ITPGRFA) as a "communal seed treasury".[25] Under Annex I, it specifies list of "most central food plants"[26] that are in the MLS and in the public domain as envisaged in Article 11.2. As Rosendal notes:

> ... the material, it is agreed, must remain freely available and not become subject to patents 'in the form received' from the FAO multilateral system, that is, international gene banks (Article 12.3). It is meant to contribute to securing farmers' rights to use and reuse their seeds and to retain access to breeding material.[27]

The presumption is that there would be no *Intellectual Property Rights* to claim without some modification to the PGRFAs. This is because PGRFAs "in the

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[21] WTO (1994), *Agreement on Trade Related Aspects of Intellectual Property Rights* (TRIPS), Geneva: WTO, Article 27.3 (b).

[22] "Intellectual Property Rights: Ultimate control of agricultural R&D in Asia" <http://www.grain.org/article/entries/30-intellectual-property-rights-ultimate-control-of-agricultural-r-d-in-asia>, p.6

[23] Aoki & Luval, *supra* note 17, p. 53

[24] International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), Article 1.1.

[25] L. R. Helfer (2004). 'Intellectual Property Rights in Plant Varieties: International Legal Regimes and Policy Options for National Governments'. *Food and Agriculture Org. of the United Nations, FAO Legislative Study*, No. 85, p. 87.

[26] G. K. Rosendal (2006). 'Balancing Access and Benefit Sharing and Legal Protection of Innovations from Bioprospecting – Impacts on Conservation of Biodiversity'. *The Journal of Environment and Development* [Online].Vol.15, No. 4.[Accessed December 31st, 2010], p. 434. Available from World Wide Web: <http://jed.sagepub.com>

[27] Ibid.

form received" from such MLS are in the public domain.[28] The commercialization of PGRFAs "in the form received" from the MLS entails the obligation to share the benefits thereof with the contracting parties.[29]

In order to ensure the "facilitated access", the ITPGRFA provides for the material transfer agreement (MTA); an agreement between a "provider" and "recipient" which the GB (Governing Body under ITPGRFA) adopts.[30] More specifically, "MTAs include *a provision that prohibits commercial use of the material transferred, as well as further transfer to third parties*. Almost all of the MTAs include a provision regarding intellectual property rights, with a view to either *restrict protection by the recipient of the accessed material as such, or establish a benefit sharing scheme in events where accessed material or related traditional knowledge is improved*."[31]

The major shortcomings of ITPGRFA in promoting the public domain for PGRFAs are as discussed below.

a) The Listing in Annex I of ITPGRFA

Where ITPGRFA recognizes the sovereign rights of states over their own PGRFAs[32], it is not clear why the "negotiated listing" of PGRFAs has excluded PGRs that may be essential for a certain state's food security. It has "notably"[33] excluded PGRs such as "soybean (four instances), tomato (three), sugarcane (two), cassava (two), palm oil tree (two), peanut, groundnut, cucumber, pepper, and pear" and that the listing in Annex I is "too limitative" .[34] Article 11.1 states that the listing in Annex 1 is based upon "criteria of food and security and interdependence. A point to note is that such exclusion goes against the very objective of the treaty especially when a certain essential PGR, "ought to" fall within PGRFAs' category. Such exclusion errodes ITPGRFA and indicates the difficulty to negotiate on specific listing of PGRFAs.

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[28] C. R. McManis (2007). 'Facilitated Access and Benefit Sharing under the New FAO Treaty: The Interface of Open-Source and Proprietary Agricultural Innovation'. *Washington University – IPSC*: p. 7. Available in [PPT] from World Wide Web: < http:// www.law.depaul.edu/centers_institutes/ciplit/.../ppt/Charles_McManisPPT.ppt>

[29] ITPGRFA (*supra* note 24), Article 13.

[30] Ibid, Article 12.4.

[31] M. Lightbourne (2006). 'Survey on the Concurrent Implementation of the FAO Treaty on Plant Genetic Resources and of Intellectual Property Rights'. *Intellectual Property Quarterly*. Vol. 2, p. 132.

[32] ITPGRFA (*supra* note 24), Article 10.1.

[33] McManis, *supra* note 28, p. 4

[34] Lightbourne, *supra* note 31.

b) Article 12.3 (b), ITPGRFA

This provision completely denies facilitated access to a country that cannot afford to pay such minimal fee. Thus, it retards the public domain by denying access to PGRFAs that are regarded by the treaty as falling within the public domain.

c) Access to individual farmers and breeders

This issue seems to have been neglected or otherwise intentionally left out from the treaty. As it is closely related to the purpose of the access sought to be facilitated in ITPGRFA, the issue needs examination of the phrase in Article 12.3 (a) which reads "[a]ccess shall be solely for the purpose of utilization and conservation for research, breeding and training for food and agriculture...". The provision tries to prevent access to those who may want to directly use the PGRFA for non-food industrial uses.[35] The treaty, i.e. ITPGRFA should have as a matter of purpose *ensured and promoted access to seeds* (as Plant Genetic Resources for Food and Agriculture) *for farmers and breeders as long as it is not used for direct commercial purpose*. As the treaty is drafted on the basis of recognition of the sovereign rights of states over PGRs, it should not have been silent regarding issues relating to individual access. Unlike Helfer's[36] assumptions, it may not be plausible to take a presumption that access is insured. In the absence of such access facilitation, the effort to carve out a public domain for PGRFAs seems to be largely unsuccessful, and the MLS (Multilateral System under ITPGRFA) should have embodied a mechanism to monitor states to this end in.

d) Benefit sharing mechanism

Once it is established that the listed PGRFAs are in the public domain, it follows that there is open access and that the commercialization of such PGRFAs entails a duty to share benefits. Article 13 provides for such arrangement. In fact, the fund from the benefit sharing will be used "to promote conservation and sustainable use of plant genetic resources, particularly by farmers and indigenous communities, whose rights and contributions the ITPGRFA expressly recognizes"[37] Since the focus of this comment is mainly on facilitated access to PGRFAs, I do not deal with benefit sharing in detail. But, two important points should be noted.

First, the provision has adopted mechanisms of benefit sharing such as exchange of information, access to and transfer of technology, capacity building,

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[35] "*...provided that such purpose does not include chemical, pharmaceutical and/or other non-food/feed industrial uses*", "ITPGRFA (*supra* note 24)", Article 12.3 (a).

[36] Helfer, *supra* note 25.

[37] Ibid.

and sharing of monetary and other benefits of commercialization. These are mainly difficult to implement due to their vague nature and their dependence on the will of states. The *second* problem relates to the phrase in Article 13.2(d)(ii) which reads "...shall pay ... except whenever such product is available without restriction to others for further research and breeding...". This stipulation relives intellectual property right holders in PGRFAs of the obligation to share the benefits from commercialization merely because it is made available without restriction to others for further research and breeding. Various Non-Governmental Organizations (NGOs) argue that this would harm the MLS (Multilateral System under ITPGRFA) because it takes away the minimum fund (0.77% of the selling price) needed for strengthening the system.[38]

e) Ambiguous issues in Article 12.3(d) of ITPGRFA

McManis points out two ambiguous issues in Article 12.3(d) of ITPGRFA (International Treaty on Plant Genetic Resources for Food and Agriculture). The *first* is as to "how much of improvement or modification is required before a genetic component of a PGRFA is no longer "in the form received" under the MLS?"[39] From the reading of the provision, it is clear that a recipient of PGRFAs cannot claim patent or PVP (Plant Variety Protection) without some modification or "in the form received" from the MLS (Multilateral System under ITPGRFA). However, the provision does not deal with how and when a PGRFA is said to be no longer "in the form received" from the MLS.

McManis states that the scope of this provision will be influenced by the interpretation of other treaty provisions such as TRIPS as envisaged in Paragraph 10 of the preamble of ITPGRFA. It provides, "nothing in this treaty shall be interpreted as implying in any way a change in the *rights and obligations* of the Contracting parties under *other international agreements*". Accordingly, developed countries would argue (under FAO and WTO dispute settlement) that 'inventions' within the meaning of TRIPS are not genetic parts or components in the form received under the MLS. On the other hand, developing countries will likely argue that genetic components of PGRFAs are not 'inventions' within the meaning of TRIPS and thus fall within the MLS. Neither argument would solve the failure of the provision to provide specific guidelines to distinguish a PGRFA which is no longer in the form received from the MLS.

The *second* issue raised by McManis reads "under what circumstances do IPRs 'limit' facilitated access to PGRFAs?"[40] It is stated in the provision that "[r]ecipients shall not claim any intellectual property or other rights that limit the

[38] McManis, *supra* note 28, p. 16.
[39] Ibid, p. 8.
[40] Ibid, p. 8-11.

facilitated access" to PGRFAs or their genetic parts or components". Of the existing IPR forms in PGRs, PVP under UPOV or other Plant Patents have their own different effect on limiting facilitated access. PVPs are less restrictive since there is a mandatory exception such as for "acts done privately and for non-commercial use or acts done for experimental purposes".[41] It can even arguably be said that PVPs do not 'limit' facilitated access. Patents for plants or genetic components are more problematic since they are governed by TRIPS.

Some may argue that 'limited exceptions' can be made under Article 30 of ITPGRFA and compulsory license issuing under Article 31. Yet, these may not be enough to clearly put instances that "limit" facilitated access. Even the MTA (Material Transfer Agreements) adopted by the GB (Governing Body under ITPGRFA) replicates the same problem.[42] There should thus be is a clear demarcation of public domain which, at least, has guiding principles for distinguishing an IPR that limits facilitated access from one that does not. Otherwise, the point of carving out a public domain for PGRFAs becomes ineffective.

f) ITPGRFA and the Regime Complex in PGRs

The legal and practical effects of the ITPGRFA will not only depend on how much countries are willing to commit themselves to implementing it, but will also be influenced by its relationship with other agreements relevant to the PGRs regime such as the CBD, UPOV and TRIPS.[43] Possible conflict with these treaties puts ITPGRFA in a weaker position of enforceability. Unlike the other treaties, TRIPS has 'teeth' whenever these treaties are in conflict, *inter alia*, due to retaliatory measures and sanctions.[44]

Conclusion

The need to limit exclusive intellectual property rights emanates from the 'public interest'.[45] To this end, the ITPGRFA (International Treaty on Plant Genetic

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[41] International Convention for the Protection of New Varieties of Plants (UPOV), Article 15. *Also see* McManis, *supra* note 28, p. 12

[42] McManis, *supra* note 28, p. 16

[43] C. Gerstetter *et al* (2007). 'The International Treaty on Plant Genetic Resources for Food and Agriculture within the Current Legal Regime Complex on Plant Genetic Resources'. *The Journal of World Intellectual Property* [Online]. Vol. 10, Nos. 3/4. [Accessed 15th January 2010], p. 259. Available from World Wide Web: < http:// www.interscience.wiley.com>

[44] Aoki & Luval, *supra* note 17, p. 55

[45] C. M. Correa (2001). *Options for the Implementation of Farmers' Rights at the National Level*, 8, South Centre, Geneva: p. 3. Available from World Wide Web: < http:// www.southcentre.org>

Resources for Food and Agriculture) makes a prudent effort to ensure facilitated access to PGRFAs through MLS. It pursues a realistic approach to avoid conflict with the interest of developed nations while trying to facilitate access to plant genetic resources and to carve out the residual category of PGRFAs by giving recognition to plant patents and PVPs (Plant Variety Protection). However, this is confronted by the shortcomings discussed above which makes it self-contradictory with its very objective. ITPGRFA is thus unable to effectively promote the public domain for PGRFAs in the midst of increasing pressure for the enclosure of biotechnology by the industrialized nations through international organizations such as the World Trade Organization. ■