Chapter six

Expropriation

- Expropriation is a relatively recent phenomenon for Ethiopia
- It was introduced by Emperor Minilik the II
- Much development has been witnessed **on the nature and use of expropriation** with the economic and social changes and developments of the country.
- Specially the civil code allocated **a number of provisions** for the treatment of expropriation
- This part of the code **was suspended for 20 years during the Derg regime**
- It was then repealed by the 2004, then revised in 2005 and the latest one, 2011

- Expropriation as a means of land acquisition by sovereign governments has been exercised as a matter of right but for and upon two fundamental reasons: **for public purpose** and **upon payment of compensation** for the property lost.
- These two provisos survived and strengthened in modern world legislations although there are still contentious debates on ***the expansive nature of public purpose*** and the **fairness of compensation**.

Concept and Nature of Expropriation

- Expropriation assumes different names in different legal systems. While in the United States it is known by the name ***"Eminent Domain",*** in the United Kingdom and continental Europe it is termed as "**Compulsory Purchase**" and ***"Expropriation***" respectively.
- Ethiopia, being follower of the continental legal system, uses **the term expropriation.**

Some definitions of the term

- The most authoritative legal dictionary, Black's Law Dictionary, defines eminent domain 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**."
- An older legal dictionary, 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."

- It is also defined in Nichols as "**the power of the sovereign** to ***take property*** for **'public use' without the owner's consent**."
- 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.**
- **But,** What is missing from the definitions is the "**compensation" element.**

- However, **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**

In Ethiopia

- In Ethiopia, **the first systematic definition** for the concept was given in the 1960s Ethiopian Civil Code.
- 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** "

Comprehensive definition

- 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.
- This definition is complete.
- It has the following elements:

1. First of all, ***expropriation or eminent domain is a right that is exercised by the state itself***
2. The second element is that the state or the organs authorized to take such lands must **follow some procedure**. In the U.S., 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.

3. The third point is “**public use.”**

- expropriation principle includes the requirement of “public interest” **as one limitation on the state power of expropriatio**n.
- 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.**

4. The appropriation or taking. There are several types of appropriation which can occur through expropriation: ***total appropriation***, ***partial appropriation***, ***temporary appropriation***, **easement and right of way being the main ones.** 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.16 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 former case, he loses the entire or part of the property.

5. The fifth point 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.***

6. 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 to the power of government

- The **assessment of compensation is extremely complicated**, and different countries incorporate different valuation methods within their expropriation legislation to reach market value.
- Nevertheless, the existence of compensation makes expropriation tolerable and
- differentiates it from **other government actions**, such as **confiscation, nationalization**, and **eviction,** in that these **three are devoid of the state obligation to compensate for the taking**

Types of expropriation

- Direct and
- Indirect (creeping) expropriation.
- The only difference is their way of implementation.

Nature and power of expropriation

- There are different theories on the **nature of the eminent domain power.**
- Matthew Harrington,18 an American professor of law, identified and developed three theories
- They are developed based on the jurisprudence, legal systems, and court decisions of the continental/ civil law and the common law legal systems.
- The first theory conceives eminent domain as **“reserved right”** of the sovereign;
- the second presumes eminent domain as “**inherent right**” of the state; and
- the third theory argues that eminent domain power emanates from ***“consent”*** of the governed.

Reserved Right Theory

- **based upon the principle that the state had an original and absolute ownership of the whole property possessed by the individual members of it antecedent to their possession of it**, and that **their possession and enjoyment of it was derived from a grant by the sovereign and was consequently held subject to an implied reservation that it might be resumed, and that all individual rights to such property might be extinguished by a rightful exertion of this ultimate ownership by the state.**

- Pufendorf termed this power as ‘‘***exercise of transcendental property’’*** whereby the sovereign resumed possession pursuant to the tacit agreement implicit in the original grant that the property might be resumed to meet the necessities of the sovereign.
- According to this theory, **a citizen’s possession of property is subject to an implied reservation that the state might retake the property at any time for a public purpose.** In this view, an individual’s ownership of property is limited to a mere possessory right, at least with respect to the government. The right to hold property is, therefore, subject to a tacit agreement between the citizen and the sovereign that the property might be reclaimed by the latter to meet public necessity, and the citizen holds his land with such awareness and cannot complain of injustice when it is lawfully exercised.

- was ***received and incorporated*** into **the laws of continental system**, and many earlier courts in the U.S. accepted this theory in reasoning their decision.
- The consequence of such a reserved-rights theory is that it **has the potential to deny compensation to the landowner and to eliminate the necessity of going through all the judicial procedures**.

Inherent Powers Theory

- the **state's power to take land for public use came to be regarded as a power which inheres in the right of the state to govern the polis**—which is to say, **inherent in its ''police power''**—and was not dependent on any pre-existing property right.

- governments have the sovereign power **to enact any regulation affecting persons or property located within their borders, subject to such limitations as might be imposed by their respective constitutions**.

- Currently, the principle of inherent power seems **dominantly accepted everywhere.** It is said that the power of eminent domain is **an inherent attribute of sovereignty and exists even without constitutional recognition**; therefore, constitutional provisions relating to eminent domain **must be construed as limitations upon, rather than grants of such power**

- Such right or power antedates constitutions and legislative enactments, and **exists independently of statutory or constitutional sanction or provision.** Thus, modern laws only try to recognize it and prescribe limits for its application. A reading of the expropriation laws of most countries reveals that they confirm the state's authority to confiscate private property, but impose two conditions on the exercise of such authority: the taking must be for a public use, and just compensation must be paid to the owner.

Consent Theory

- Although it seems the above two theories propagate two different ideas, ***in reality, the underlying principle is one and the same.*** Both inherent powers and reserved rights theories **permit no real restraint on the sovereign's exercise of the power of eminent domain.** A sovereign's eminent domain power is absolute and total. It is superior to all other property rights, and every owner of property holds his land subject to the right or power of eminent domain

- Hence, **a third theory based on the consent of owners is developed**.
- The theory of consent ***is best understood as being a function of the theory of consent inherent in the representative government***. That is to say, **the power to take property for public use resides in the legislature, and not the executive, because such takings require the consent of the owner and that consent can be given directly or through his legal representatives.** In this respect, takings by eminent domain are on the same footing as takings through taxation.
- Just as the sovereign lacks the power **to levy taxes without consent of the legislature,** so too does it lack the power to take property from a subject without similar consent.

Principles of expropriation

- According to the **FAO guideline**, when enacted their expropriation legislations, countries should consider the following principles:

- Protection of d**ue process and fair procedure**
- ***Good governance***
- *Equivalent compensation*

- The **problems that may arise when compulsory acquisition is not done properly are**

- **Reduced tenure** security
- ***Reduced investments*** in the economy:
- ***Weakened land markets***:
- ***Opportunities created for corruption and the abuse of power***
- *Delayed projects*: Appeals against unfair procedures may hold up the acquisition of land, and thus block projects and increase costs.
- **Inadequate compensation paid to owners and occupants**:

The Justification for Expropriation

- How can expropriation be **reconciled with the institution of private property**?
- in the private property versus expropriation discourse, ***the conflicting interests are that of the individual and the society,*** and apparently, individual interest cedes to the interest of society.
- n justifying the social interest over that of the individual, four types of theories are present below.

Economic Justifications

- **Economic justification**

Another justification for expropriation is the need to ensure the efficiency of land use. Efficiency means the most productive use of resources to satisfy competing
material wants. Hence a plot of land may be expropriated if the diversion of its use can bring about higher benefit to society.

- ***Natural right theories***

property right is a result of a civil society (and sometimes a pre-social institution) and it could be restricted by the state as it sees it fit

- ***Social contract theories***

the right to property is restricted by a social contract made between the people and the government, by which men are agreed to pass part of their liberties to the government

- ***Utilitarianism***

A theory of moral philosophy called utilitarianism. As per this justification, a certain act is justified if it brings maximum welfare for the greatest number of peoples. The act is not measured by itself but, by its consequence

- ***Theory of justice (distributive justice)***

- Which justification is employed in ethiopia? Read the preamble.

Preconditions for expropriation

- By **competent authority**
- ***Public purpose***
- Following ***legal procedure*** (due process)
- Equality or ***non-discrimination***
- ***Commensurate compensation*** to be paid in advance

Who is the competent authority in ethiopia?

- the ***role of the legislature is to enact expropriation legislation*** that *determines the powers and roles of different actors*.
- See article 3 of the proclamation

Procedural steps

- The proclamation provides one clear step concerning the issuance of **notice of expropriation order**:
  - where a woreda or an urban administration decides to expropriate a landholding …***it shall notify the landholder, in writing, indicating the time when the land has to be vacated and the amount of compensation to be paid***
- **What other procedures to be followed?**

1. Making inquires

Once the application for land and the accompanying “business plan” and “land plan” are made to the relevant authority, **the latter must at least make the following inquiries:**

1.1. ***Ensuring Eligibility***

1.2. ***Approving Public Purpose***

1..3. **Weighing Pros and Cons**

2. ***public discussion***

3. **Inventory of Assets (identification, designation of the land and counting the assest**)

4. ***Valuation of Properties***

5. ***notification***

6. *Payment of Compensation, Appeal and Appropriation of Land*

Public Purpose

- is also known by different names such as ***public use, public advantage, public welfare, public benefit, or public interest.***
- In ethiopia; art. ***40(8) of the FDRE cons***. ,
- In one literature, ***it says that the meaning of "public interest" is close to public concern in general, while "public purpose" is narrow in its scope and limited to the projects for the use***
  of the public, under the law of expropriation

Valuation and Compensation During Expropriation

- Expropriation ***is a forced sale and is distinguished from confiscation in that the owner will be compensated for the property taken.*** Besides the requirement of public purpose, ***payment of compensation is the second, but equally important***, **limitation on the government's power of expropriation**

- Valuation is ***the process of determining the current worth of an asset***, mostly real property

Valuation Approaches

- There are ***three common methods used to determine value of the property being appraised.*** These are
- the ***sales comparison approach***,
- the ***income capitalization approach***, and
- the *cost approach*.

Sales Comparison Approach

- Sales comparison approach is a valuation technique in which ***the value of the real property is determined by comparing the property recently sold in the "market" to the land being appraised***.

Income Capitalization Approach

- typically used in situations ***where markets are relatively inactive,***
- It is most applicable to **agricultural land and investment properties.** In this approach, an appraiser analyzes **a property's capacity to generate future benefits and capitalizes the income into an indication of present value**
- the value of the land derived from this approach is ***the estimated present value of future benefits***, including streams of incomes during the lifetime of the property and
  proceeds from the sale of the property

Cost Approach

- is the valuation technique in which appraisers add property value to the depreciated value of improvements so as to determine the value of the subject property. In this approach, ***the value of a property is derived by*** adding the estimated value of the land to ***the current cost of constructing a reproduction or replacement for the improvement*** and then **subtracting the amount of depreciation**

- this approach is based on the assumption that ***cost equals value***. The reliability of the cost method depends on the validity of the assumption that cost and value are equal; however, there are many circumstances where such an assumption is not justified

- To appraise a property, using cost approach, *appraisals require information on cost of land,* **cost of building (improvement),** and ***cost of depreciation***. The cost method valuation is based on the cost of building less depreciation plus the site value. The approach recognizes the value of the site for a particular use. **But if there is no market for land, then it is the cost of the building that is taken into accoun**

Justification for compensation

- ***Indemnity theory***
- ***Taker's gain***

terminologies!

- Depending on the legislation of each country, it may be termed as ***compensation***, ***fair compensation,*** just compensation, **reasonable compensation,** adequate compensation or any other, like '***commensurate compensation' in Ethiopia***

The standard

- the fundamental principle that guides valuations under expropriation laws is ***the payment of fair market price or market value.*** In other words, ***market value is generally taken as a test for the existence of just compensation.***
- The reason why market value is favored by courts or legislators is that because ***it is believed that the amount of compensation is believed to cover the damage sustained by the owners.*** The amount of compensation will enable owners to go to the market and fetch similar/identical property for the same price. The former owner should neither suffer a detriment nor reap a windfall profit.

- Therefore, the objects of compensation under the present legal regime are buildings, plants and other similar things, save the ground or land itself.

The case of ethiopia

- The choice of valuation method will depend ***upon the purpose of valuation***, **type of interest being appraised**, ***type of property,*** p***hysical and other features of the property,*** **availability of relevant data,** and ***government regulations***.
- The valuation method followed in Ethiopia for the purpose of estimating the amount of compensation is the ***"cost approach***.
- In this approach, value is estimated as what it would cost to replace the structure.
- There are two methods of estimating this: the reproduction cost (cost of duplicating the subject property's structure completely) and the replacement cost (cost of building a similar structure, but using modern construction methods and materials). W
- hen estimating building costs, the appraiser can either use replacement costs or reproduction costs. Although there is no clear cut standard in selecting reproduction or replacement costs, the replacement cost is the approach required in Ethiopian laws.

Compensable Interests and Determination of Compensation

- A general reading of the Proclamation and the Regulation reveals that the following interests are compensable.
  - A ***property situated on the land***
  - ***Permanent improvements to the*** land
  - ***Loss of land***
  - ***Relocation of property***
  - ***Lost income***, in case of ***temporary loss of land***

Mode of payment

- Full monetary
- Partial monetary
- Land to land

Appeal and the Role of Courts

- of all the expropriation procedures, courts have clear mandate ***in hearing cases related to compensation***. Of course, this power is **limited to the denial or inadequacy of compensation**. Further, the ***courts can hear some of the cases only by appeal,*** not as first instances