

# 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There are ambiguities, inconsistencies, gaps and outdated features in the legislative protection of some property rights in Ethiopia.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

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## 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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using their own resources or seeking credit through collateralization or transferring it to a more efficient user.<sup>1</sup>

Clearly defined property rights stimulate capital formation as a key device to raise capital for a poor country.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup> 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.<sup>6</sup>

<sup>1</sup> 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).

<sup>2</sup> *Id.*, De Soto, p. 5.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> Customary or informal practices over property rights are not envisaged here.

<sup>6</sup> 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.’<sup>7</sup> 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.<sup>8</sup>

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.

<sup>7</sup> Id., p. 67.

<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup> The Constitution empowers government to provide private investors with use right over land on the basis of payment arrangements.<sup>12</sup> 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.<sup>13</sup> The Constitution indicates that the particulars of these general features of private property will be specified by law.<sup>14</sup> Private property can be subject to expropriation for public purposes subject to payment in advance of compensation commensurate with the value of the property.<sup>15</sup> 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.<sup>16</sup>

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*

<sup>9</sup> The Constitution of the Federal Democratic Republic of Ethiopia, 1995 (hereinafter FDRE Constitution), Art. 40(1).

<sup>10</sup> FDRE Constitution, Art. 40(2).

<sup>11</sup> Id., Art. 40(3).

<sup>12</sup> Id., Art. 40(6).

<sup>13</sup> Id., Art. 40(7).

<sup>14</sup> Id., Art. 40(6&7).

<sup>15</sup> Id., Art. 40(8).

<sup>16</sup> 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;<sup>17</sup> 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<sup>18</sup> and remedies (i.e., possessory action,<sup>19</sup> restitution<sup>20</sup> and self-help<sup>21</sup>) 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].'<sup>22</sup>

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

<sup>17</sup> Ethiopian Civil Code, 1960 (hereinafter Civil Code) Arts. 1126-1139.

<sup>18</sup> Id, Arts. 1151-1205.

<sup>19</sup> Id, Arts. 1148-1149.

<sup>20</sup> Id, Arts. 1149 and 1206

<sup>21</sup> Id, Art. 1148.

<sup>22</sup> See Background Documents of the Ethiopian Commercial Code of 1960 (ed. & trans. Peter Winship), (Addis Ababa, 1974) p. iv.

some cases award moral damages.<sup>23</sup> 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.<sup>24</sup> The details of this unjust enrichment principle in regard to property are outlined in the Code.<sup>25</sup>

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.<sup>26 27</sup>

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,<sup>27</sup> immovables,<sup>27</sup> business,<sup>28</sup> intellectual property,<sup>29</sup>

<sup>23</sup> Civil Code, Arts. 2053, 2054 and Art. 2112); (Arts 2090 and 2091).

<sup>24</sup> Id., Art. 2162.

<sup>25</sup> Id., Arts. 2168-2178.

<sup>26</sup> *Supra* note 22

<sup>27</sup> Arts. 5(1)&(2), 35(2) and 561 of the Commercial Code.

shares in the six types of business associations,<sup>28</sup> <sup>29</sup> <sup>30</sup> insurance policies<sup>31</sup> and commercial instruments<sup>32</sup> 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.<sup>33</sup> This portion of the Criminal Code divides property into movable<sup>34</sup> and immovable<sup>35</sup> rights in property<sup>36</sup> (e.g., cheques and insurance), intangible property which includes<sup>37</sup> trademark, copyright and goodwill and claims of creditors.<sup>38</sup> 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.<sup>39</sup> 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

<sup>28</sup>Art. 124 and 127 of the Commercial Code.

<sup>29</sup>Arts. 127(1)(a) and 148-149 of the Commercial Code.

<sup>30</sup>Arts. 250, 274, 283, 302, 345, 522 & 523 of the Commercial Code.

<sup>31</sup>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.

<sup>32</sup>Arts. 715, 716 and 732 of the Commercial Code.

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

<sup>34</sup> 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...'

<sup>35</sup> Arts. 985-688 of the Criminal Code.

<sup>36</sup> Arts. 692-716 of the Criminal Code.

<sup>37</sup> Arts. 717-724 of the Criminal Code.

<sup>38</sup> Arts. 725-733 of the Criminal Code.

<sup>39</sup> 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.<sup>40</sup> 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.<sup>41</sup>

#### 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

<sup>40</sup> Arts. 151-153 and Arts. 404-455 of the Civil Procedure Code

<sup>41</sup> 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.<sup>42</sup> These constitutional clauses and the respective jurisdictions of the courts are detailed out in the Civil Procedure Code and other recent procedure related laws.<sup>43</sup> 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,

<sup>42</sup> FDRE Constitution, Arts. 78(4), 79(1), & 79 (2).

<sup>43</sup> 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.<sup>44</sup>

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.<sup>45</sup> It is

<sup>44</sup> Civil Code, Arts. 1131-1134 versus Arts. 1135-1139 versus Arts. 1161-1164.

<sup>45</sup> Chalcia 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.<sup>46</sup> 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.<sup>47</sup>

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.<sup>48</sup>

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.<sup>49</sup>

*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

<sup>46</sup> Dawit Mesfin v Government Housing Agency as cited in Muradu Abdo, Id, p .177.

<sup>47</sup> Civil Code, Arts. 1151-1206 and Arts. 1184-1993.

<sup>48</sup> Interview with Mr. Yazachew Belew, July 8, 2013; and Art.3050 of the Civil Code).

<sup>49</sup> 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.<sup>50</sup>

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.<sup>51</sup> This left real property registration and certification to few transitory provisions of the Code, customary practices, directives and municipal practices<sup>52</sup> 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 .<sup>53</sup>

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.’<sup>54</sup> This, stated in terms of benefits of registration of immovable property, means:<sup>55</sup> greater tenure security by providing a degree of certainty and security to the

<sup>50</sup> Ibid.

<sup>51</sup> Civil Code, Arts. 1553 *ff.*

<sup>52</sup> Civil Code, Arts. 3343 *ff.*

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

<sup>54</sup> Yohannes Heroui (2008), “Registration of Immovable Property: An Overview in Comparative Perspective”, 2:2 *Ethiopian Bar Review* 31, p. 177.

<sup>55</sup> 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. ...”<sup>56</sup> 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”.<sup>57</sup>

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.<sup>58</sup> 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.<sup>59</sup> It

<sup>56</sup> *Id.*, p. 661.

<sup>57</sup> *Ibid.*

<sup>8</sup> Urban Landholding Registration Proclamation, Proc. 818/2014 was enacted after the submission of this article and while its publication was underway.

<sup>59</sup> 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).<sup>60</sup> 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.<sup>61</sup> 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,

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

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

<sup>61</sup> 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 ...<sup>62</sup>

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.<sup>63</sup>

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.’<sup>64</sup> 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.’<sup>65</sup>

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

<sup>62</sup>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 W **?imC** PA£V7A

<sup>63</sup>**hAA** A+innc: Eth. J. L. Vol. 22 No. 2 (2008) pp. 155ff.

<sup>64</sup>*Ibid*, Solomon Bekure *et al* p. 10.

<sup>65</sup>*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.<sup>66</sup> 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.<sup>67</sup> 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.<sup>68</sup> This means a lessee of urban land cannot claim to collect the

<sup>66</sup> Federal Rural Land Administration and Use Proclamation, Art.8.

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

<sup>68</sup> 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.<sup>69</sup> 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.<sup>70</sup> This administrative power to seize property is elaborated in the Model Regulation, clearly indicating the absence of judicial intervention in the process.<sup>71</sup> 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.<sup>72</sup> The person whose lease contract is terminated shall remove his property from the land within six months.<sup>73</sup> 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.<sup>74</sup>

*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.<sup>75</sup> This coupled with the judiciary's tendency

<sup>69</sup> Id., Art. 26(3).

<sup>70</sup> Id., Art. 20(6).

<sup>71</sup> See the Model Regulation issued by the Ministry of Construction and Urban Development (2012)

<sup>72</sup> Proclamation No. 721/2011, Art. 23(5).

<sup>73</sup> Id., Art. 23(6).

<sup>74</sup> Id., Art. 23(7).

<sup>75</sup> 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.<sup>76</sup>

*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.<sup>77</sup> *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.<sup>78</sup> 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.<sup>79</sup>

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.

<sup>76</sup> 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.

<sup>77</sup> Proclamation No. 721/2011, Arts. 26-31.

<sup>78</sup> *Id.*, Art. 24(1)&(2).

<sup>79</sup> *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.<sup>80</sup> This has been amplified by subsequent statutes, bilateral investment treaties,<sup>81</sup> investment proclamation,<sup>82</sup> the Lease Proclamation<sup>83</sup> and Expropriation of Landholdings for Public Purpose and Payment of Compensation Proclamation (the Expropriation Law) together with the accompanying regulations.<sup>84</sup> The principal legislation on the question of expropriation is the Expropriation Proclamation whose central aim is to expropriate land for investment purposes.<sup>85</sup> 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

<sup>80</sup> See Art.40(8) of the FDRE Constitution.

<sup>81</sup> 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)

<sup>82</sup> Investment Proclamation No 769/2012

<sup>83</sup> Urban Lands Lease Holding Proclamation No. 721/2011

<sup>84</sup> Proc. No. 455/2005 and Regulations No. 135/2007.

<sup>85</sup> 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.<sup>86</sup> 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<sup>87</sup> 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.'<sup>88</sup>

<sup>86</sup> 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.

<sup>87</sup> 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).

<sup>88</sup> 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.’<sup>89</sup> <sup>90</sup> 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.’<sup>90</sup>

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.<sup>91</sup>

<sup>89</sup> Bin Cheng, *The Rationale of Compensation for Expropriation*, 44 *Transactions of the Grotius Society* 267 (1958) p. 292.

<sup>90</sup> Chenglin Liu, *Chinese Takings Law*, *supra* note 85, p. 326.

<sup>91</sup> The Urban Land Lease Holding Proclamation No. 80/1993 *Neg. Gaz.*, Year 53<sup>rd</sup> 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.’<sup>92</sup>

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.’<sup>93</sup> 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-

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)

<sup>92</sup> HPR Minutes of *Sene* 1, 1997 E.C., *supra* note 84, p. 3.

<sup>93</sup> 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 10<sup>th</sup>.

revolutionary laws enacted by the Derg.<sup>94</sup> 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.<sup>95</sup>

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.<sup>96</sup> 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.<sup>97</sup> The Constitution is both broad and narrow when it comes to the

<sup>94</sup> 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 34<sup>th</sup>.

<sup>95</sup> 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, *Dehub 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.

<sup>96</sup> 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.)

<sup>97</sup> 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.<sup>98</sup> 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,<sup>99</sup> permanent improvements to land;<sup>100</sup> 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).<sup>101</sup> 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.<sup>102</sup> 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-

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.

<sup>98</sup> See Art. 40(2) *cum* (3) *cum* (7) of the FDRE Constitution.

<sup>99</sup> Art. 2(7) of the 2005 Expropriation Law (i.e. Proc. No. 455/2005).

<sup>100</sup> *Id.*, Art. 7(1).

<sup>101</sup> *Ibid.*

<sup>102</sup> *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 acquired*.. ..in Art. 7(3) of the 2005 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.

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.<sup>103 104</sup>

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:

<sup>103</sup> 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.

<sup>104</sup> 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.<sup>105</sup>

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.<sup>106</sup>

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<sup>107</sup> and the less than full

<sup>105</sup> 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/Yohannes* (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.

<sup>106</sup> 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).

<sup>107</sup> 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.<sup>108</sup> In consonance with this observation, research reports have rightly raised the problems in the inadequacy of compensation paid to affected urban residents and peasants.<sup>109</sup> This is confirmed by the recent attempt to review compensation rules by the Addis Ababa City Administration due to the prevalent low compensation.<sup>110 111</sup>

### **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 ...’<sup>m</sup> 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

<sup>108</sup> 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.

<sup>109</sup> 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).

<sup>110</sup> 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.

<sup>111</sup> Id., p. 340.

project.<sup>112</sup> 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.<sup>113</sup>

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<sup>114</sup>), only matters of compensation can be contested in the regular courts by way of review.<sup>115</sup> 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.<sup>116</sup>

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;<sup>117</sup> and that the

<sup>112</sup> Dustin Miller' & Eyob Tekalign, *supra* note 109, p. 363.

<sup>113</sup> See Art. 1465 of the Code.

<sup>114</sup> Art. 4 cum 5, 6 and 10 of the 2005 Expropriation Law.

<sup>115</sup> 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.

<sup>116</sup> See Arts. 1472, 1473, 1477, 1478, 1479, and 1482 of the Code.

<sup>117</sup> 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.<sup>118</sup>

#### **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,<sup>119</sup> 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.

<sup>118</sup> 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.

<sup>119</sup> See Muradu Abdo, Textbook, *supra* note 45.

A share company can issue two general types of shares:<sup>120</sup> 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.<sup>121</sup> 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.<sup>122</sup> 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.<sup>123</sup> It is unclear if these conditions also apply to the pledge or usufruct of a share.<sup>124</sup>

#### **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.<sup>125</sup> 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

<sup>120</sup> A share is indivisible. See Art. 328 of the Commercial Code.

<sup>121</sup> 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.

<sup>122</sup> Which may be specified in the articles of association or by resolution of an extraordinary meeting by virtue of Art. 333 of the Commercial Code.

<sup>123</sup> 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.

<sup>124</sup> 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.

<sup>125</sup> Arts. 124 and 127 of the Commercial Code.

the possession and ownership of the business premise; that he has to relocate his business elsewhere.<sup>126</sup>

While this is the position of the law, in *Urgessa Tadesse vs. Saida Ali*,<sup>127</sup> 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.’<sup>128</sup>

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 outskirts of business particularly where the immovable is destined to serve the business as its premise needs policy reconsideration.<sup>129</sup>

<sup>126</sup>Yazachew Belew (2012), *The Sale of a Business as a Going Concern under the Ethiopian Commercial Code: A Commentary (hereafter the Sale of a Business)*, Ethiopian Journal of Law, Vol. 25 No. 1.

<sup>127</sup>*Urgessa Tadesse vs. Saida Ali*, (Federal High Court, 2002 E.C., Civil File No.56950), (Unpublished).

<sup>128</sup>Yazachew Belew, *the Sale of a Business*, *supra* note 125.

<sup>129</sup>*Ibid.*

## 5. Limitations in Ethiopia's Intellectual Property Law

Ethiopia's intellectual property law is embodied in four major pieces of legislation.<sup>130</sup> 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.<sup>131</sup> 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.<sup>132</sup> This proclamation is comprehensive, up-to-date, and manifests overall clarity. And commentators

<sup>130</sup> 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.

<sup>131</sup> 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.

<sup>132</sup> Preamble of the Copyrights and Neighbouring Rights Protection Proclamation No. 410/2010.



have dubbed it as strong law.<sup>133</sup> 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.<sup>134</sup>

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, whoever 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.

<sup>133</sup> 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).

<sup>134</sup> 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.<sup>135</sup>

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.<sup>136</sup>

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.<sup>137</sup> 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.

<sup>135</sup>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.

<sup>136</sup>*Id.*, pp. 84 & 89.

<sup>137</sup>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.’<sup>138</sup> 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<sup>139</sup> 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.<sup>140</sup> 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.<sup>141</sup> 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.<sup>142</sup> The owner in addition has the right to assign or license, in whole or in part, his trademark.<sup>143</sup>

In terms of enforcement, the proclamation has followed the footsteps of the copyrights proclamation set out above, namely like the latter, it has envisaged provisional measures,<sup>144</sup> civil remedies,<sup>145</sup> criminal remedies<sup>146</sup> and broader measures at customs port and stations.<sup>147</sup> 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.’<sup>148</sup>

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

<sup>138</sup> Trademark Registration and Protection Proclamation No. 506/2006, Preamble.

<sup>139</sup> *Id.*, Art. 2/12.

<sup>140</sup> *Id.*, Art. 4.

<sup>141</sup> *Id.*, Art. 26.

<sup>142</sup> *Id.*, Art. 26.

<sup>143</sup> *Id.*, Arts. 27 and 28.

<sup>144</sup> *Id.*, Art. 39.

<sup>145</sup> *Id.*, Art. 40.

<sup>146</sup> *Id.*, Art. 41.

<sup>147</sup> *Id.*, Art. 42.

<sup>148</sup> 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.<sup>149</sup> 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.<sup>150</sup> 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 a problem in disposition of cases.<sup>151</sup> 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.<sup>152</sup>

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.<sup>153</sup> We note here the extent of circulation of the Intellectual Property Gazette and the ambiguity of the words a newspaper having

<sup>149</sup> Fikremarkos Merso, Textbook, *supra* note 135, p. 162.

<sup>150</sup> *Id.*, p. 165.

<sup>151</sup> 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.

<sup>152</sup> USA may be taken as an example in this regard.

<sup>153</sup> Trademarks Registration and Protection Proclamation No. 501/2006, Arts. 12 & 16.

‘nationwide circulation’ apart from the discretionary nature of publication therein.<sup>154</sup>

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.’<sup>155</sup> 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.’<sup>156</sup> It has the policy backing of the federal government and has constitutional foundation.<sup>157</sup> There are separate laws that are meant to protect plant varieties and genetic resources.<sup>158</sup>

The patent proclamation defines a patent as a title granted to protect inventions; the invention may relate to a product or a process.<sup>159</sup> 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.’<sup>160</sup> The requirements for a patent to be eligible for protection are:

<sup>154</sup> Id, Arts. 43-45.

<sup>155</sup> Id., Art. 22.

<sup>156</sup> Inventions, Minor Inventions and Industrial Designs Proclamation No. 123/95 (hereinafter, The Patent Proclamation), Preamble.

<sup>157</sup> The FDRE Constitution, Arts. 51(19) and 55(2)(g).

<sup>158</sup> Plant Breeders' Rights Proclamation No. 481/2006; and Access to Genetic Resources and Community Knowledge, and Community Rights Proclamation No. 482/2006.

<sup>159</sup> The Patent Proclamation, Art. 2(5).

<sup>160</sup> Id., Art. 2(3).

novelty, inventive step and industrial applicability.<sup>161</sup> 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.<sup>162</sup> The law in question also sets out conditions relating to the grant and protection of and rights over utility models and industrial designs.<sup>163</sup>

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.<sup>164</sup> 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.<sup>165</sup> 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.'<sup>166</sup>

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.

<sup>161</sup> Id., Art. 3(1).

<sup>162</sup> Id., Art. 16 and Art. 22, Art. 24.

<sup>163</sup> Id., Arts. 38-51.

<sup>164</sup> 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.

<sup>165</sup> Getachew Mengistie, *The Impact of The International Patent System in Developing Countries*, *Eth. J.L.* Vol. 23 No1 (2009) p.161j^

<sup>166</sup> 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.<sup>167</sup> 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.<sup>168</sup> 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.<sup>169</sup> 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<sup>170</sup> and the same ambiguity is created in connection with industrial designs.<sup>171</sup> 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.<sup>172</sup>

#### **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.’<sup>173</sup> 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

<sup>167</sup> Ibid.

<sup>168</sup> Feedback received during the Validation Workshop held on 29 October 2013.

<sup>169</sup> Patent Proclamation, Art. 24.

<sup>170</sup> Id., Art. 45.

<sup>171</sup> Id., Art. 51

<sup>172</sup> Fikremarkos Merso, Textbook, *supra* note 135, p.192.

<sup>173</sup> 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.<sup>174</sup> 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.<sup>175</sup> 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.<sup>176</sup>

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

<sup>4</sup> The TRIPS Agreement, Art. 16.

<sup>175</sup> Trademarks Registration and Protection Proclamation No. 501/2006, Art. 11.2.

<sup>176</sup> 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.<sup>177</sup> 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.<sup>178</sup> 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.<sup>179</sup>

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,

Id., pp.171# and p.193.

<sup>178</sup> 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.

<sup>179</sup> 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 104<sup>th</sup> position in 2011 ranking to 127<sup>th</sup> in 2013. It was 111<sup>th</sup> in 2009, 107<sup>th</sup> in 2010 and 111<sup>th</sup> 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 116<sup>th</sup> ranking last year to 112<sup>th</sup> 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 146<sup>th</sup>, 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. \_\_\_\_\_ ■



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