

Property Rights Protection and Private Sector Development in Ethiopia

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ACRONYMS

FAO	Food and Agricultural Organization
FDRE	Federal Democratic Republic of Ethiopia
FSC	Federal Supreme Court
GDP	Gross Domestic Product
GTP	Growth and Transformation Plan
HPR	House of Peoples' Representatives
IP	Intellectual Property
OECD	Organization for Economic Cooperation and Development
PASDEP	Plan for Accelerated and Sustained Development to End Poverty
SDPRP	Sustainable Development and Poverty Reduction Programme
TRIPS	Trade-Related Aspects of Intellectual Property Rights
WTO	World Trade Organization

INTRODUCTION

Ethiopia has formulated various development strategies that include the Sustainable Development and Poverty Reduction Programme (SDPRP) for the period 2002/3 to 2004/5, the Plan for Accelerated and Sustained Development to End Poverty (PASDEP) for the period 2005/6 to 2009/10, and the current Growth and Transformation Plan (GTP).¹ The GTP is a five-year plan for the period 2010/11 to 2014/15. It, *inter alia*, aims at maintaining at least 11% average real GDP growth rate, meeting the Millennium Development Goals and ensuring the sustainability of economic growth by achieving all the objectives stated in the GTP “within stable macroeconomic framework.” The pillar strategies toward the attainment of the objectives of the GTP include “maintaining agriculture as a major source of economic growth” and “creating favorable conditions for the industry to play key role in the economy”.² The development of the private sector and its enhanced role are indeed crucial in both pillar strategies.

This research examines the role of legislative protection of property rights, law enforcement and judicial protection in Ethiopia’s private sector development. It also inquires into comparative experience in three legal regimes. The discussion on the role of property rights in private sector development is related to Ethiopia’s pursuits of enhancing national competitiveness and productivity and in effect accelerating economic performance in agriculture, industry and various services.

The World Economic Forum defines competitiveness as “the set of institutions, policies, and factors that determine the level of productivity of a country”.³ There is a growing consensus about the role of *institutions* in development; which according to the World Economic Forum are “determined by the legal and administrative framework within which individuals, firms, and governments interact to generate wealth”.⁴ Quality of institutions, including the property rights regime and contract enforcement, determines

¹ Federal Democratic Republic of Ethiopia *Growth and Transformation Plan 2010/11- 2014/15*, Volume 1, Main Text, Ministry of Finance and Economic Development (November 2010, Addis Ababa).

² E.N. Stebek (2013), “Development and Improved Living Standards: The Need to Harmonize the Objectives of Ethiopian Investment Law”, 2013(1) *Law, Social Justice & Global Development Journal* (LGD), p. 5.

³ World Economic Forum (2012), *The World Competitiveness Report 2011-2012*, Geneva, p. 4.

⁴ Ibid.

the level of security, stability, long-term perspectives and confidence towards investment decisions and enhancement of production.

Various research findings indicate that higher institutional credibility that guarantees more secure property rights of economic actors in the private sector is associated with higher levels of productivity and private sector development. Private sector share of GDP, enterprise restructuring activities and the level of gross domestic fixed investment can be used as indicators of private sector development. It is also believed that secure property rights are among the most crucial factors for economic development and growth. On the contrary, lack of durable property rights impede long-term investment, stimulate rent seeking activities and eliminate incentives for innovation and entrepreneurship by the private sector.

The themes of the research stated in the objectives of the study were divided among the legal experts who worked not only as individuals confined to their respective chapters in the research but also as a team in the context of a holistic approach to the research.

Objectives of the Study

The objectives of the study, as indicated in the terms of reference, are: i) to review the current state of property laws, regulations and enforcement mechanisms in line with the guiding principles of the development of market economy; ii) to draw some lesson of experience from countries in transition and developmental states like South Korea as well as the socialist market economy of the People's Republic of China, on how their laws protect private property rights; iii) based on the review study and lesson of experience, to recommend new laws, amendments and enforcement mechanisms that should be in place to facilitate the operation of market economy and the development of private sector in Ethiopia.

With particular attention to the private sector, the scope of work focusses on:

- a) The legislative protection of property rights;
- b) Administrative protection of private property rights by enforcement of law;
- c) Judicial protection of private property rights; and
- d) Comparative property rights regimes of three countries.

Methodology

This study is mainly doctrinal legal research and analyzes Ethiopian laws on property rights. It is also socio-legal research which includes some empirical research on how legal processes and institutions operate in the enforcement and adjudication of property rights. The inquiry includes overview of factors impacting the tenure, security, protection and enforcement of property rights. The research thus primarily relies on Ethiopian laws as primary sources while the socio-legal dimension of the research has benefited from a full day Focus Group Discussion conducted on 13 July 2013. The research report has further benefited from the Validation Workshop conducted on 29 October 2013.

Structure of the Study

The study has five chapters, including conclusions and recommendations. The contents and sequence of the chapters are based on the four themes stated above.

CHAPTER ONE

Legislative Protection of Property Rights in Ethiopia

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, using their own resources or credit through collateralization or transferring it to a more efficient user.⁵

Clearly defined property rights stimulate capital formation as a key device to raise capital for a poor country.⁶ Such clear delimitation of property rights fixes the economic potentials of assets, integrates dispersed information into one system, makes individuals accountable and assets fungible, networks individuals, protects and enforces transactions involving property rights through legislative, judicial and administered mechanisms.⁷ De Soto invokes cause and effect relationship between having title over a piece of property such as a farmland with enhanced confidence to undertake long-term investments using one's own capital, raising capital by collateralizing enhanced investment, easy transfer for more efficient use, productivity and effective judicial protection.⁸

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.⁹ 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.

⁵ 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).

⁶ Id., De Soto p. 5

⁷ Ibid.

⁸ Ibid.

⁹ Customary or informal practices over property rights are not envisaged here.

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.¹⁰

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.”¹¹ 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 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.¹²

The extent to which a country's property rights regime is properly specified requires the assessment of that country's property law together with judicial and administrative enforcement of the same. This chapter dwells upon examining legislative protection of property rights in Ethiopia while the themes of judicial and administrative enforcement are discussed in the next chapters.

¹⁰ Hernando De Soto (1989), *The Other Path* (New York, NY: Basic Books) p. 162.

¹¹ Id., p. 67.

¹² 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.

1.1 Ethiopia's Property Rights Legal Regime: An Overview

In Ethiopia, property rights get legal protection mainly under the Federal Democratic Republic of Ethiopia (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.

1.1.1 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 to transfer it otherwise subject to public interest and the rights of other persons.¹³ 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.¹⁴ 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.¹⁵ The Constitution empowers government to provide private investors with use right over land on the basis of payment arrangements.¹⁶ 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.¹⁷ The Constitution indicates that the particulars of these general features of private property will be specified by law.¹⁸ Private property can be subject to expropriation for public purposes subject to payment in advance of compensation commensurate to the value of the property.¹⁹ 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.²⁰

¹³ The Constitution of the Federal Democratic Republic of Ethiopia (hereinafter FDRE Constitution), 1995, Art. 40(1).

¹⁴ FDRE Constitution, Art. 40(2).

¹⁵ Id., Art. 40(3).

¹⁶ Id., Art. 40(6).

¹⁷ Id., Art. 40(7).

¹⁸ Id., Art. 40/6&7).

¹⁹ Id., Art. 40(8).

²⁰ Id., Arts. 51(19), 55(2) (g), 89(2) & 91(3).

The use of the words “labour” and “permanent improvements” in the Constitution indicates 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 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. 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 coffer the economic value of land lease should they transfer such lease right prior to undertaking more than fifty percent construction thereon.

1.1.2 The 1960 Civil Code

The Civil 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;²¹ 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 property²² and remedies (i.e., possessory action,²³ restitution²⁴ and self-help²⁵) 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].”²⁶

²¹ Ethiopian Civil Code (hereinafter Civil Code), 1960, Arts. 1126-1139.

²² *Id.*, Arts. 1151-1205.

²³ *Id.*, Arts. 1148-1149.

²⁴ *Id.*, Arts. 1149 and 1206.

²⁵ *Id.*, Art. 1148.

²⁶ See Background Documents of the Ethiopian Commercial Code of 1960 (ed. & trans. Peter Winship), (Addis Ababa, 1974) p. iv.

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 seized property of which another is a lawful owner, the court may award him with compensation equal to the material damage caused or/and an appropriate measure to make good the damage as well as in some cases moral damages.²⁷ 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.²⁸ The details of this unjust enrichment principle in regard to property are outlined in the Code.²⁹

The property rights provisions of the Code briefly mapped out are still applicable after 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.³⁰

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.

²⁷ Civil Code, Arts. 2053, 2054 and Art. 2112); (Arts 2090 and 2091).

²⁸ Id., Art. 2162.

²⁹ Id., Arts. 2168-2178.

³⁰ *Supra*, note 26.

1.1.3 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 significant roles in the protection of private property include the Commercial Code (1960), the Criminal Code (2004), the Civil Procedure Code (1965) and the Maritime Code (1960).

A closer look into the various provisions of the Commercial Code such as those relating to movables, immovables,³¹ business,³² intellectual property,³³ shares in the six types of business associations,³⁴ insurance policies³⁵ and commercial instruments³⁶ 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 conception of property under the Commercial Code of Ethiopia is broader than the one employed in Book III of the Code.

The Criminal Code devotes about seventy two articles to the protection of property.³⁷ This portion of the Criminal Code divides property into movable³⁸ and immovable³⁹ rights in property⁴⁰ (e.g., cheques and insurance), intangible property which includes⁴¹ trademark, copyright and goodwill and claims of creditors.⁴² 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

³¹ Arts. 5(1) & (2), 35(2) and 561 of the Commercial Code.

³² Art. 124 and 127 of the Commercial Code.

³³ Arts. 127(1)(a) and 148-149 of the Commercial Code.

³⁴ Arts. 250, 274, 283, 302, 345, 522 & 523 of the Commercial Code.

³⁵ 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.

³⁶ Arts. 715, 716 and 732 of the Commercial Code.

³⁷ Also see Arts. 849-862 of the Criminal Code “Petty Offenses” which deal with minor offenses directed against property.

³⁸ 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...”

³⁹ Arts. 985-688 of the Criminal Code.

⁴⁰ Arts. 692-716 of the Criminal Code.

⁴¹ Arts. 717-724 of the Criminal Code.

⁴² Arts. 725-733 of the Criminal Code.

claims of creditors directed solely against a person as property.⁴³ 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 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 on its part deals with the different procedures and mechanisms (e.g., injunction, pre and post judgment property attachment and declaratory judgment) that can be deployed 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.⁴⁴ 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.⁴⁵

1.1.4 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.

⁴³ 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.”

⁴⁴ Arts. 151-153 and Arts. 404-455 of the Civil Procedure Code.

⁴⁵ 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 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; Tsehail 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 legal regime governing private property outlined above (Sections 1.1.1-1.1.4) is backed by federal and state courts recognized in the Constitution which vests judicial powers in the courts, enjoins judges to be guided solely by the law and precludes the establishment of special or *ad hoc* courts that take judicial powers away from the regular courts or institutions legally empowered to exercise judicial functions and which do not follow legally prescribed procedures.⁴⁶ These constitutional clauses are affirmed and the respective jurisdictions of the courts are detailed out in the Civil Procedure Code and other recent procedure related laws.⁴⁷ A number of administrative tribunals are also set up under the legislation shortly recounted above to deal with property right matters. Judicial and administrative protection of private property envisaged in the laws is notwithstanding its protection through privately constituted forums such as arbitration.

1.1.5 Problems in Ethiopia's Property Rights Regime

In spite of the legislative framework 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 piecemeal 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.

⁴⁶ FDRE Constitution, Arts. 78(4), 79(1), & 79 (2).

⁴⁷ Federal Courts Establishment Proclamation No. 25/ 1996.

1.2 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 (adverse possession), 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 regarding individual and joint ownership, rights and duties of owner, usucaption, 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 shifted from private ownership to 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 as 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 improvement theory 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. Under the Code, a continuous and active use is not a condition necessary to retain possession over land while that is the case under the Constitution. 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.⁴⁸

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 rests on subjective factors. These legal rules also leave many unaddressed

⁴⁸ Civil Code, Arts. 1131-1134 versus Arts. 1135-1139 versus Arts. 1161-1164.

issues: for instance, the place and effect of moveable and immovable real property 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.⁴⁹ It is disputable if non-use by an owner of an immovable should lead to extinction of ownership.⁵⁰ Finally, it is unclear under the Code if provisions designed to regulate the acquisition and transfer of individual ownership over tangible property are extendable to intangible property and property rights less than ownership such as usufruct, servitude and right of recovery for there are gaps in the latter.⁵¹

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 when it relates to future immovables.”⁵²

“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 there could be exceptions to this rule, to the extent we are aware, and there is no such law in Ethiopia as yet. 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 present asset of the debtor, not on his future asset. Accordingly, a new security document is required each time a new asset (such as equipment) is acquired which must be secured.”⁵³

⁴⁹ 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.

⁵⁰ Dawit Mesfin v Government Housing Agency as cited in Muradu Abdo, Id, p .177.

⁵¹ Civil Code, Arts. 1151-1206 and Arts. 1184-1993.

⁵² Interview with Mr. Yazachew Belew, July 8, 2013; and Art.3050 of the Civil Code.

⁵³ Interview with Mr. Yazachew Belew, July 8, 2013.

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 decisive legal authority exists on the matter and hence unclear whether assignment by way of security may be validity created and enforced under Ethiopian law.”⁵⁴

As discussed above, the lawmaker has endeavoured 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.⁵⁵ This left real property registration and certification to few transitory provisions of the Code, customary practices, directives and municipal practices.⁵⁶ 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 ...⁵⁷

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

⁵⁴ Interview with Mr. Yazachew Belew, July 8, 2013.

⁵⁵ Civil Code, Arts. 1553 ff.

⁵⁶ Civil Code, Arts. 3343 ff.

⁵⁷ See the Preamble of the Draft Proclamation to Provide for the Registration of Immovable Property, (Addis Ababa University, Law Library: Unpublished, 1968).

expeditiously.”⁵⁸ This, stated in terms of benefits of registration of immovable property, means:⁵⁹ greater tenure security by providing a degree of certainty and security to the 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. ...”⁶⁰ 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”.⁶¹

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 to grant the country with a system of immovable property. The first endeavour is in regard to the rural land certification project being carried out by 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 the 2013 draft urban real property registration legislation, 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. This fragmentary and selective legislative practice has already led to the issuance of a controversial retroactive-prospective legislation that makes the decision of the Cassation

⁵⁸ Yohannes Heroui (2008), “Registration of Immovable Property: An Overview in Comparative Perspective”, 2:2 *Ethiopian Bar Review* 31, p. 177.

⁵⁹ 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.

⁶⁰ *Id.*, p. 661.

⁶¹ *Ibid.*

Division of the Federal Supreme Court nullifying unauthenticated contracts relating to immovable property inapplicable to banks and micro-financial institutions.⁶² It makes it difficult to tell with a degree of certainty as to which parts of it are revised or repealed and to what extent. This latter problem is visible in expropriation law, as we shall see below.

1.3 Problems with Regard to Ethiopia's Land Law Regime and Expropriation

1.3.1 Rural Land Law

Five 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).⁶³ The Federal Rural Land Proclamation has travelled a long distance in expanding land rights of the agricultural population and investors when compared to the right recognized under the Public Ownership of Rural Lands Proclamation of 1975.⁶⁴ 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

⁶² A Proclamation to Provide for the Amendment of the Civil Code, Proc. 639/2009.

⁶³ Federal Rural Land Administration and Use Proclamation No. 456/2005, *Fed. Neg. Gaz.* Year 11th Year 44.

⁶⁴ Public Ownership of Rural Lands Proclamation. No 31/1975, *Neg. Gaz.* Year 34 No 26.

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, 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 ...⁶⁵

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.⁶⁶

Many scholars do 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 land holders are smart enough not to gamble with the future of their families’ livelihood.”⁶⁷ 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.”⁶⁸

⁶⁵ 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 ጥላ መንግሥት፣ የገጠር መሬት ሥራት በኢትዮጵያ፣ በሕግ የተደነገጉ መብቶችና በአጣራ ብሔራዊ ክልል ያለው አተገባበር፣ Eth. J. L. Vol. 22 No. 2 (2008) pp. 155ff.

⁶⁶ Id., Solomon Bekure et al p. 10.

⁶⁷ Ibid.

⁶⁸ Ibid.

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

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.⁶⁹ A review of the federal and regional land laws show that they are quite sketchy. In regard to land leasing by smallholder 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 lease and restitution of the land subject to lease at the end of the lease period in good condition.⁷⁰ 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 a 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.

1.3.2 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

⁶⁹ Federal Rural Land Administration and Use Proclamation, Art.8.

⁷⁰ See, for example, Article 6 of the Oromia Rural Land Administration and Use Proclamation No. 130/ 2007, *Megeleta Oromia*, Year 15th No. 12.

custodian of land.⁷¹ This means a leasee of urban land cannot claim to collect lease price in regard to the land he has leased 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 lease contract on the part of the leasee, lack of compatibility between the use of land use and the urban plan, and if the land is required for development activity to be undertaken by government.⁷² 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 confer unchecked administrative powers. For example, the law states that where a leasee has failed to make payments within the specified time limit and accumulated arrears for three years, the appropriate body shall have the power to seize and sell the property of the leasee to collect arrears.⁷³ This administrative power to seize property is elaborated in the Model Regulation, clearly indicating the absence of judicial intervention in the process.⁷⁴ Another “seize and sale” 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 leasee fails to complete construction within the time limit, the lease contract shall be terminated and the appropriate body shall take back the land.⁷⁵ The person whose lease contract is terminated shall remove his property from the land within six months.⁷⁶ 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.⁷⁷

Second and more generally, this administrative authority given to city administrations is part of a wider legislative trend to increasingly empower the executive organ without judicial scrutiny. In regard to property, there are similar provisions in mining and water resources and tax laws.⁷⁸ This coupled

⁷¹ Proclamation No. 721/2011, Arts. 40(3) and 89.

⁷² Id., Art. 26(3).

⁷³ Id., Art. 20(6).

⁷⁴ See the Model Regulation issued by the Ministry of Construction and Urban Development (2012).

⁷⁵ Proclamation No. 721/2011, Art. 23(5).

⁷⁶ Id., Art. 23(6).

⁷⁷ Id., Art. 23(7).

⁷⁸ Mining Operations Proc. No. 678/2010; Ethiopian Water Resources Management Proc. No. 197/2000 and Income Tax Proclamation No. 286/2002.

with the judiciary's tendency to defer to the authority of the administration as witnessed in recent cases can pose a threat on private property.⁷⁹

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.⁸⁰

Fourth, there are significant omissions in the Lease Proclamation in regard to lease transfer. For instance, this law states that a leasee 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.⁸¹ In this situation, the leasee 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 leasee the lease payment he effected together with bank interest thereon, value of the construction undertaken and five percent of the transfer lease value.⁸²

But this legislation fails to provide for the situation where a leasee 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 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. Hence, in this latter scenario, it is unclear if the appropriate administrative body will involve in the transfer or use of the lease right as collateral or capital contribution or if the leasee can be allowed to pocket the entire transfer price.

Another question is the manner in which leasees 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 repealed and replaced by the Lease Proclamation. Retroactive application of the Lease Proclamation is contentious. Moreover, the Model Urban Land Lease Regulation (if and when adopted by regional states) and the respective individual contracts are not promising due to their limited nature.

⁷⁹ Focus Group Discussion, on Saturday, July 13, 2013, pointing out the Federal Supreme Court's Cassation Division tendency to qualify its earlier deference to decisions of administrative authorities in favour of some shift.

⁸⁰ Proclamation No. 721/2011, Arts. 26-31.

⁸¹ Id., Art. 24(1)&(2).

⁸² Id., Art. 24(2)&(3).

Fifth, the legal framework regarding urban land administration has shown repeated revisions through regulations and directives since the first lease law was issued in 1994. Following these frequent legislative changes, administrative structures in charge of urban land have gone through repeated restructuring, both changes creating lack of predictability in decision-making in connection with urban land allocation.

1.3.3 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.⁸³ This has been amplified by subsequent statutes, bilateral investment treaties,⁸⁴ investment proclamation,⁸⁵ the Lease Proclamation⁸⁶ and Expropriation of Landholdings for Public Purpose and Payment of Compensation Proclamation (the Expropriation Law) together with the accompanying regulations.⁸⁷ The principal legislation on the question of expropriation is the Expropriation Proclamation whose central aim is to expropriate land for investment purposes.⁸⁸ 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 issue 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 handcuffing such authorities.⁸⁹ Examination of

⁸³ See Art.40(8) of the FDRE Constitution.

⁸⁴ 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 varying use of terms in connection with compensation might require its own separate research.

⁸⁵ Investment Proclamation No 769/2012.

⁸⁶ Urban Lands Lease Holding Proclamation No. 721/2011.

⁸⁷ Proc. No. 455/2005 and Regulations No. 135/2007.

⁸⁸ 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 Draft Federal Land Expropriation Proclamation (hereinafter HPR Minutes of Sene 1, 1997 E.C.) p. 2 (Unpublished, on file with the author).

⁸⁹ 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.

the Expropriation Law reveals deficiency in 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. We take up each turn by turn.

The concept of public purpose may be articulated variously⁹⁰ 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.”⁹¹

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.”⁹² In this broad view, public purpose is conceived to include not only “uses directly beneficial

⁹⁰ 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 absolute discretion of the executive branch without the possibility of judicial review (e.g., Ethiopia and China).

⁹¹ Chenglin Liu, *Chinese Takings Law*, *supra* note 89, 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.

⁹² Bin Cheng, *The Rationale of Compensation for Expropriation*, 44 *Transactions of the Grotius Society* 267 (1958) p. 292.

to the public, such as roads, but also uses that promote the general welfare and prosperity of the whole community.”⁹³

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.” And 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 farm lands in peri-urban areas.⁹⁴

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. Article 3(2) of the Expropriation Law states as: “... no land lease holding may be expropriated unless the lessee has failed to honor the obligations he assumed under the

⁹³ Chenglin Liu, Chinese Takings Law, *supra* note 89, p. 326.

⁹⁴ The Urban Lands Lease Holding Proclamation No. 80/1993 *Neg. Gaz.*, Year 53rd No. 40.) reflected this view. The proclamation stated that the public interest would not be violated by the state expropriating property solely to generate money. According to the preamble, urban areas must be permitted to lease lands so that they can obtain sufficient revenues to provide much needed social facilities and infrastructure (*Ibid*). The earlier lease proclamation also followed the same pattern. See also Misganaw Kiflew, “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 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).

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.”⁹⁵

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.”⁹⁶ This suggests that the public purpose of expropriation as envisaged 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 and private persons as is the case in the present Expropriation Law. This restrictive interpretation of public purpose was in line with the tradition of the Code and post-revolutionary laws enacted by the Derg.⁹⁷ 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,

⁹⁵ HPR Minutes of *Sene 1*, 1997 E.C., *supra* note 88, p. 3.

⁹⁶ Art. 2(2) of the Appropriation of Land for Government Works and Payment of Compensation for Property Proc. No. 401/2004, *Fed. Neg. Gaz.* No. 42 Year 10th.

⁹⁷ 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: “ለሕዝብ አገልግሎት የሚጠቅሙ ንብረቶች ስለማስለቀቅ”, which suggests that the state authority is supposed to construct facilities accessible to the public in place of the property it expropriates. Art. 17(1) of the Public Ownership of Rural Lands Proclamation No. 31/1975 provides that: “The Government may use land belonging to peasant associations for public purposes such as schools, hospitals, roads, offices, military bases and agricultural projects”. *Neg. Gaz.* No 26, Year 34th.

water, etc” and further prescribing that land users shall be evicted from their possessions for public use understood in this narrow sense.⁹⁸

In addition to the question of scope of public purse, the Expropriation Law appears to implicitly say 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 amount of compensation.⁹⁹ 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

Among numerous possible issues over compensation during expropriation, we focus on compensability and criteria adopted to determine compensation. In connection with compensability, one expects loss of any property right including use right over land to be compensable upon expropriation.¹⁰⁰ The Constitution is both broad and narrow when it comes to the determination of compensable property. It is broad because the combined reading of sub-articles 2 and 8 of Article 40 of the Constitution sends the message that the expropriation of any sort of private property is compensable, regardless of whether it is movable or immovable or tangible or intangible. Conversely, the Constitution seems to narrow the scope of compensable property interests by adopting the 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. The attitude reflected in this 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.¹⁰¹ Thus if a person invests no labor or capital on his land, then he will not be entitled to receive any compensation should his land be expropriated.

⁹⁸ 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.

⁹⁹ 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).

¹⁰⁰ 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 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.

¹⁰¹ See Art. 40(2) *cum* (3) *cum* (7) of the FDRE Constitution.

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, not for the land itself. Thus, under this law, compensable interests are: utility lines,¹⁰² permanent improvements to land,¹⁰³ 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).¹⁰⁴ 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.¹⁰⁵ Thus if, for example, the state requires land held by a landholder, and 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-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.

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 what happened during 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.”¹⁰⁶ It was also stated at the time that: “the law envisages the possibility of providing a substitute land to peasants who lost their land

¹⁰² Art. 2(7) of the 2005 Expropriation Law (i.e. Proc. No. 455/2005).

¹⁰³ *Id.*, Art. 7(1).

¹⁰⁴ *Ibid.*

¹⁰⁵ 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.

¹⁰⁶ 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.

under expropriation where there is land available. But due to acute land scarcity in highland areas where most land expropriations would take place; a comparable substitute land is not feasible, which means resort to payment of meager amount of compensation that would not support the future livelihood of the victim of government taking”¹⁰⁷

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:

...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 price 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.¹⁰⁸

¹⁰⁷ 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 88, p. 4, 7, 8 and 12.

¹⁰⁸ 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 v 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 v 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.

This decision is in line with the Supreme Court's other rulings essentially upholding that use rights of a landholder does not have a transferrable economic value in the context of public ownership of land in today's Ethiopia.¹⁰⁹

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 approach¹¹⁰ and the less than full compensation approach reflected in the country's legislative past would result in under compensation.¹¹¹ In consonance with this observation, research reports have rightly problematized the adequacy of compensation being paid to affected chiefly urban residents and peasants.¹¹² This is confirmed by the recent attempt to review compensation rules by the Addis Ababa City Administration due to low compensation.¹¹³

c) Procedural Safeguards

The critical nature of due process and its connection with expropriation law has been emphasized in this manner: "... being deprived of land rights or lacking access to legal remedy to defend them is the ultimate state of vulnerability in tenure ..."¹¹⁴ Proper and effective procedural safeguards are therefore anticipated to contribute to the enhancement of land tenure in particular and property rights in general.

¹⁰⁹ 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).

¹¹⁰ See Art. 25(2) of the Investment Proclamation, Proc. 769/2012.

¹¹¹ George Krzeczunowicz, *The Ethiopian Law of Compensation for Damage* (Addis Ababa University, Faculty of Law, 1977) pp. 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.

¹¹² 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 Daniel W/Gebriel, Compensation, 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).

¹¹³ Validation workshop, 29 October 2013.

¹¹⁴ *Id.*, p. 340.

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 project.¹¹⁵ 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.¹¹⁶

Under the Expropriation Law, expropriation is just a matter of administrative decision and 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 expropriated the time within which the land has to be cleared and taking over the land¹¹⁷), only matters of compensation can be contested in the regular courts by way of review.¹¹⁸ 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 advance benefit to the public or 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. The Expropriation Law's removal of crucial matters from the purview of regular courts relies on the Code's tradition, in respect of expropriation, of limiting the jurisdiction of regular courts solely to matters of compensation.¹¹⁹

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

¹¹⁵ Dustin Miller & Eyob Tekalign, *supra* note 112, p. 363.

¹¹⁶ See Art. 1465 of the Code.

¹¹⁷ Art. 4 cum 5, 6 and 10 of the 2005 Expropriation Law.

¹¹⁸ 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 Lands 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.

¹¹⁹ See Arts. 1472, 1473, 1477, 1478, 1479, and 1482 of the Code.

hearings and consultations in the course of expropriation of land;¹²⁰ and that the compensation paid to those who lose their land is widely regarded as insufficient.¹²¹

1.4 Share Transfers and Business Premises Transfers under the Commercial Code

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 derivative of business formation and operation including insuring property, commercial instruments and bankruptcy.

a) 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,¹²² certain ambiguities relating to share companies deserve attention.

¹²⁰ Imeru Tamrat, *Governance of Large Scale Agricultural Investments*, pp. 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 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 (Bon: Center for Development Research, University of Bon, 2011) pp. 7-9 & 13-15, that documents irregularities in compensation payment including low amount of compensation in relation to people displaced, through temporarily, by an irrigation scheme.

¹²¹ 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 or 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 are 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.

¹²² See Muradu Abdo, Textbook, *supra* note 49.

A share company can issue two general types of shares:¹²³ 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.¹²⁴ 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.¹²⁵ 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.¹²⁶ It is unclear if these conditions also apply to the pledge or usufruct of a share.¹²⁷

b) The Issue of Business Premises during Business Transfers

The part of the Commercial Code that deals with definition and transfer of business excludes immovable property.¹²⁸ In this connection, it has been observed that:

The implication of excluding immovable property as constituent element of a business is that any legal transaction involving the business does not affect that immovable property serving as premises 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 premises as well. Thus unless agreed otherwise, and save the case where the seller was carrying out the business in leased premises, 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 premises, that is, he cannot force the seller to transfer the possession

¹²³ A share is indivisible. See Art. 328 of the Commercial Code.

¹²⁴ 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.

¹²⁵ This may be specified in the articles of association or by resolution of an extraordinary meeting by virtue of Art. 333 of the Commercial Code.

¹²⁶ 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.

¹²⁷ 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.

¹²⁸ Arts. 124 and 127 of the Commercial Code.

and ownership of the business premises; that he has to relocate his business elsewhere.¹²⁹

While this is the position of the law, in *Urgessa Tadesse v Saida Ali*,¹³⁰ the Federal High Court took a different stance, ordering “the latter to transfer to the former not only of the business she sold but also of the business premises on the ground that the premises 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 premises.”

The court held that the right of lease over the business premises is an element of the business per Article 127(2) (c) of the Commercial Code; if the lease right over the premises is an element of the business, the premises itself, by analogy, is an element of that business. The court further argued that even though the premises 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 premises from forming part of the business element. 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.¹³¹

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.¹³²

¹²⁹ 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.

¹³⁰ *Urgessa Tadesse v Saida Ali*, (Federal High Court, 2002 E.C., Civil File No.56950), (Unpublished).

¹³¹ Yazachew Belew, the Sale of a Business, *supra* note 129.

¹³² Ibid.

1.5 Limitations in Ethiopia's Intellectual Property Law

Ethiopia's intellectual property law is embodied in four major pieces of legislation.¹³³ The description of each of these with emphasis to problematic spots is briefly made in this sub-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" and the main problem being its enforcement due to different practical factors including weak institutions and lack of awareness of the nature of intellectual property on the part of relevant actors. In fact, some go to the extent of asserting 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 incipient industry which is at the consuming rather than at the producing end. With regard to 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.¹³⁴ Finally, in general terms and to be specified in due course, there are certain limitations.

1.5.1 Copyrights

Copyrights are protected by 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.¹³⁵ This proclamation is comprehensive, up-to-date, and manifests overall clarity. And commentators

¹³³ 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.

¹³⁴ Ethiopian Intellectual Property Office Establishment Proclamation No. 320/2003 has conferred this broad power on the Office and previously trademarks patent and copyright used to be three different authorities.

¹³⁵ Preamble of the Copyrights and Neighbouring Rights Protection Proclamation No. 410/2010.

have dubbed it as strong law.¹³⁶ 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 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 cases 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.¹³⁷

The proclamation provides robust provisional remedies, civil and criminal remedies and administrative remedy in the form of boarder measure. 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 by the infringer. 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 under discussion provides for a strong criminal sanction stating that unless otherwise heavier penalty is provided for under the criminal law, whosoever 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 and 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 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, we raise some issues of lack of clarity.

¹³⁶ 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).

¹³⁷ 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.¹³⁸

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? Or is substantial contribution necessary? And the copyrights proclamation fails to provide for requirements needed to license or assign jointly owned copyright among co-owners thereof. Explicit legislative reference to the joint ownership provisions of the Code could avoid some of these specific issues.¹³⁹

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.¹⁴⁰ 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 it looks that 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.

¹³⁸ 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.

¹³⁹ *Id.*, pp. 84 & 89.

¹⁴⁰ 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.

1.5.2 Trademark Law

The governing law on trademarks is the Trademark Registration and Protection Proclamation which is meant to “protect the reputation and goodwill of businesspersons engaged in the manufacture and distribution of goods as well as services by protecting trademarks to avoid confusion between similar goods and services.”¹⁴¹ 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 others persons...”, by providing an indicative list of such visible signs which may be used as a trademark¹⁴² 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.¹⁴³ 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.¹⁴⁴ 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.¹⁴⁵ The owner in addition has the right to assign or license, in whole or in part, his trademark.¹⁴⁶

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,¹⁴⁷ civil remedies,¹⁴⁸ criminal remedies¹⁴⁹ and border measures at customs ports and stations.¹⁵⁰ 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

¹⁴¹ Trademark Registration and Protection Proclamation No. 506/2006, Preamble.

¹⁴² Id., Art. 2/12.

¹⁴³ Id., Art. 4.

¹⁴⁴ Id., Art. 26.

¹⁴⁵ Id., Art. 26.

¹⁴⁶ Id., Arts. 27 and 28.

¹⁴⁷ Id., Art. 39.

¹⁴⁸ Id., Art. 40.

¹⁴⁹ Id., Art. 41.

¹⁵⁰ Id., Art. 42.

consumers from misleading market conducts, and to establish a system that is conducive for the promotion of competitive market.”¹⁵¹

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 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.¹⁵² 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.¹⁵³ 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 likelihood of confusion in the case where the trademark used in connection with the product alleged to have infringed is not identical to the one used in the plaintiff’s product. This has created problem in disposition of cases.¹⁵⁴ Is the intent of the defendant relevant in the determination of 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 on case by case basis, the experience of other countries suggests that some indicators are necessary to minimize uncertainty in judicial decisions.¹⁵⁵

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

¹⁵¹ Preamble and Art. 27(2) of the Trade Practice and Consumers Protection Proclamation No. 685/2010.

¹⁵² Fikremarkos Merse, Textbook, *supra* note 138, p. 162.

¹⁵³ *Id.*, p. 165.

¹⁵⁴ 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 Merse, Textbook, *supra* note 134, the chapter on trademarks.

¹⁵⁵ USA maybe taken as an example in this regard.

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.¹⁵⁶ We note here the extent of circulation of the Intellectual Property Gazette and the ambiguity of the words a newspaper having “nationwide circulation” apart from the discretionary nature of publication therein.¹⁵⁷

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.”¹⁵⁸ A geographic indication shows a nexus between a given good, especially 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 feature. 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.

1.5.3 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.”¹⁵⁹ It has the policy backing of the federal government and has constitutional foundation.¹⁶⁰ There are separate laws that are meant to protect plant varieties and genetic resources.¹⁶¹

¹⁵⁶ Trademarks Registration and Protection Proclamation No. 506/2006, Arts. 12 & 16.

¹⁵⁷ Id., Arts. 43-45.

¹⁵⁸ Id., Art. 22.

¹⁵⁹ Inventions, Minor Inventions and Industrial Designs Proclamation No. 123/95 (hereinafter, The Patent Proclamation), Preamble.

¹⁶⁰ The FDRE Constitution, Arts. 51(19) and 55(2)(g).

¹⁶¹ Plant Breeders’ Rights Proclamation No. 481/2006; and Access to Genetic Resources and Community Knowledge, and Community Rights Proclamation No. 482/2006.

The patent proclamation defines a patent as a title granted to protect inventions; the invention may relate to a product or a process.¹⁶² 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.”¹⁶³ Such requirements for a patent to be eligible for protection are: novelty, inventive step and industrial applicability.¹⁶⁴ Upon the ascertainment of the fulfilment of these cumulative conditions by the relevant office, a certificate of patent is granted which 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 total of fifteen years from the date of filing of the application for protection with a possible extension for five years as well as to 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.¹⁶⁵ The law in question also sets out conditions relating to the grant and protection of and rights over utility models and industrial designs.¹⁶⁶

The Ethiopian patent law generally offers strong protection to inventors. Such strength is by itself treated as a weakness seen in light of encouraging domestic invention including through 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 1995.¹⁶⁷ Out of the 199 applications made during the year, 56 were granted. Out of these, 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 such time as they were able to change their position to the producers rather than net consumers.¹⁶⁸ They did so, “for instance, by weak intellectual property systems, by excluding sensitive technological

¹⁶² The Patent Proclamation, Art. 2(5).

¹⁶³ Id., Art. 2(3).

¹⁶⁴ Id., Art. 3(1).

¹⁶⁵ Id., Art. 16 and Art. 22, Art. 24.

¹⁶⁶ Id., Arts. 38-51.

¹⁶⁷ 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.

¹⁶⁸ Getachew Mengistie, *The Impact of The International Patent System in Developing Countries*, *Eth. J.L.* Vol. 23 No1 (2009) p.161ff.

fields from protection, by violating foreign rights, by using petty-patents and encouraging imitation, adaptation and reverse-engineering.”¹⁶⁹

Even though the aim of Ethiopia’s current patent law Ethiopia “...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. 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.”¹⁷⁰ 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.¹⁷¹ The good thing is that in preparing for a draft policy, the authorities appear to have understood 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.¹⁷² Utility models and industrial designs parts 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 models¹⁷³ and the same ambiguity is created in connection with industrial designs.¹⁷⁴ The requirement of universal novelty 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.¹⁷⁵

1.5.4 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

¹⁶⁹ 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.

¹⁷⁰ Ibid.

¹⁷¹ Feedback received during the Validation Workshop held on 29 October 2013.

¹⁷² Patent Proclamation, Art. 24.

¹⁷³ Id., Art. 45.

¹⁷⁴ Id., Art. 51

¹⁷⁵ Fikremarkos Merso, Textbook, *supra* note 138, p.192.

to country.”¹⁷⁶ 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-favoured-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. The country 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 conventions. The existing intellectual property law of Ethiopia has been informed by the provisions of the TRIPS Agreement and is in general in 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.¹⁷⁷ 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 foreign national will have to be corrected.¹⁷⁸ 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

¹⁷⁶ A Review of Ethiopia’s Accession to the WTO (on file with the author) p. 38.

¹⁷⁷ The TRIPS Agreement, Art. 16.

¹⁷⁸ Trademarks Registration and Protection Proclamation No. 506/2006, Art. 11.2.

the flexibilities of the TRIPS Agreement in those areas that are important to promote national socioeconomic development.”¹⁷⁹

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 in its status as a least developed country:¹⁸⁰ “...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 Agreement.”¹⁸¹ 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 weak and such countries shall look for other options, the extreme position 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.

1.6 Brief Remarks

There are legislative weak spots expressed in terms of important ambiguities, vagueness, loopholes, obsolescence and bestowal of wide administrative power with less possibility of 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.¹⁸² 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. And as made evident in the subsequent chapters of this research as well as feedback received during the Validation Workshop held on 29 October 2013, the question of security of property rights in Ethiopia is further confounded

¹⁷⁹ Fikremarkos Merse, 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.

¹⁸⁰ *Id.*, pp.171ff.

¹⁸¹ *Id.*, at 193.

¹⁸² 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.

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 extant expropriation and practice analyzed in this chapter 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.¹⁸³

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

Yet, in assessing the strength or otherwise of a property right regime, 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. Chapters 2 and 3 deal with the consideration of these two dimensions of property rights protection.

¹⁸³ Public Ownership of Rural Lands Proclamation, 1975; Urban Lands and Extra-houses Proclamation, 1975, and Government Ownership and Control of the Means of Production Proclamation, 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, 1994.

CHAPTER TWO

Law Enforcement in the Protection of Private Property Rights

Economic development involves the private sector, the public sector and a third sector which does not fall under the two categories. The latter includes civil societies, non-governmental institutions/organizations and social/cultural/religious entities. The functions and objectives of these three sectors have reinforcing correlation within the context of commonalities and variation. The pursuits of the entities share two elements, (a) the interest of private persons; and (b) social interest that transcends and at the same time facilitates the realization of private interests. As rational self-interest is expected to permeate the needs, behaviours and desires of the individual person, the wider context and setting in the form of the common good, shared aspirations or public interest (such as peace, stability, good governance, effective normative systems and institutions with competence and integrity) are required for the fulfillment of every individual's rational self-interest. The issue of property rights is relevant from both dimensions.

The issue of property rights has been subject of discourse from extremist and pragmatic perspectives. On the one hand, it is being given an overstretched conception of “do as you please” interpretation in which the private individual or the legal person purports as the master of natural resources, while the other extreme takes an acrimonious stance against private property. The latter runs the risk of the elite capture by paternalistic authorities who consider themselves as “custodians to public property” and expose public property to “rent seeking greed”, unregulated/unprotected open access and “the tragedy of the commons”. The former, on the other hand, may fall into the grips of business oligarchs who resort to speculative wealth accumulation rather than value-adding investment, innovation and entrepreneurship.

Safeguards against these extremes lie on the schemes that control and harness both tendencies so that (a) private property rights can be protected, without meanwhile being abused by the right holders; and (b) the stakes of the public in harnessing the evils of corporate greed is taken care of, and meanwhile this is not hijacked by “elite capture” which may be engaged in “rent seeking” predatory pursuits in the guise of “public interest”. Enabling factors such as good governance and institutional settings become crucial in the quest for the

avoidance of these pitfalls that emanate from the two extremes. It is against this backdrop that this chapter examines the administrative protection of property rights in Ethiopia. The chapter discusses the major laws and regulations that are relevant for administrative enforcement and protection of property rights.

Administrative law, *inter alia*, deals with the “nature and the mode of exercise of administrative power”.¹⁸⁴ Although administrative law primarily focuses on public interest, it meanwhile protects private rights through “the system of relief against administrative action”¹⁸⁵ and through schemes that safeguard the public against administrative abuse of power. To this end, administrative law governs “the creation and operation of administrative agencies” and it gives special importance to “the powers granted to administrative agencies, the substantive rules that such agencies make, and the legal relationships between such agencies, other government bodies, and the public at large.”¹⁸⁶ Although Ethiopia does not yet have a comprehensive administrative law which deals with these issues, certain parts of various proclamations stipulate laws that fall under administrative law. This chapter focuses on the provisions that deal with the establishment of various administrative entities that are in charge of implementing the laws that are relevant to the protection of property rights.

The mandate entrusted to administrative authorities includes not only implementing the proclamations enacted by the parliament but also includes the issuance of enabling legislation (namely Council of Ministers Regulations). These clearly involve administrative and legislative functions. However, the latter (i.e. the legislative function) is an incidental role because the issuance of regulations and directives is expected to be a purely instrumental role of implementing the proclamation rather than stretching the scope and/or content of the latter. Another aspect of administrative law relates to the tension between decision-making and judgments. As the latter is the task of courts, administrative entities are not expected to assume a judicial function in the guise of administrative decisions, with due exception to the vital role of administrative tribunals in resolving disputes subject to the need for schemes of control such as judicial review.

The extent to which ambiguities and discretionary power are avoided in the demarcation lines between administrative and legislative functions, or between administrative and judicial functions determine the level of checks

¹⁸⁴ Edward A. Harriman (1916), “The Development of Administrative Law in the United States”, *The Yale Law Journal*, Vol. 25, No. 8 (June 1916), p. 658.

¹⁸⁵ Ibid.

¹⁸⁶ <http://www.law.cornell.edu/wex/administrative_law>, Accessed 03 June 2013.

and balances against abuse of authority by administrative entities. This balance ultimately determines the degree of the normative and institutional safeguard in the protection of public interest and private rights as correlated and interdependent aspects of administrative responsibility and accountability.

There are various laws and regulations that deal with the enforcement of property rights by administrative organs at various levels. The following highlights the laws that deal with the administrative aspect of protecting property rights that are relevant to private sector development.

2.1 Executive Organs and Administrative Responsibilities Related to Property Rights

2.1.1 Constitutional Provisions

Subject to the public ownership of land¹⁸⁷ (highlighted in Chapter 1) sub-Articles 6, 7 and 8 of Art. 40 of the FDRE Constitution, *inter alia*, ensure the rights of investors to use land on the basis of payment arrangements established by law, full rights to immovable property which a person owns (including the right to alienate or bequeath), and the right of an owner of private property “to payment in advance of compensation commensurate to the value of the property” during expropriation for public purposes. Moreover the Constitution protects patent inventions and copyrights.¹⁸⁸

Article 8(3) of the Constitution stipulates that the sovereignty of Nations, Nationalities and Peoples of Ethiopia “shall be expressed through their representatives elected in accordance with this Constitution and through their direct democratic participation”. This organ of the Ethiopian government is entrusted with legislative powers; whereas “[t]he State administration constitutes the highest organ of executive power”¹⁸⁹ and the “judicial power is vested in its courts”.¹⁹⁰

This section gives particular attention to administrative organs under the executive as the core theme of the discussion is administrative protection of property. The “[h]ighest executive powers of the Federal Government are

¹⁸⁷ The constitutional provisions that deal with property rights articulate the scope and definition of private property (Art. 40, Sub-Art 1 & 2), and stipulate that “[t]he right to ownership of rural and urban land, as well as of all natural resources, is exclusively vested in the State and in the peoples of Ethiopia” and that “[L]and is a common property of the Nations, Nationalities and Peoples of Ethiopia and shall not be subject to sale or to other means of exchange” (Art. 40(3)).

¹⁸⁸ FDRE Constitution, Art. 51(19).

¹⁸⁹ FDRE Constitution, Art. 50(6).

¹⁹⁰ *Id.*, Art. 50(7).

vested in the Prime Minister and in the Council of Ministers”,¹⁹¹ and both are responsible to the House of Peoples’ Representatives”.¹⁹² The Council of Ministers “are collectively responsible for all decisions they make as a body” in the course of exercising their state functions.¹⁹³ This principle of responsibility of the executive is further embodied in Article 74 which stipulates that the Prime Minister “shall follow up and ensure the implementation of laws, policies, directives and other decisions adopted by the House of Peoples’ Representatives”.¹⁹⁴

In the course of conducting its tasks, the government is required to be transparent¹⁹⁵ and “[a]ny public official or an elected representative is accountable for any failure in official duties”.¹⁹⁶ This responsibility clearly extends to state governments under the federation. To this end, sub-Articles (a), (d) and (g) of Article 52(2) of the Constitution provide the following:

Consistent with sub-Article 1 of this Article, States shall have the following powers and functions:

- a) To establish a State administration that best advances self-government, a democratic order based on the rule of law; to protect and defend the Federal Constitution;...
- d) To administer land and other natural resources in accordance with Federal laws; ...
- g) To establish and administer a state police force, and to maintain public order and peace within the State.

2.1.2 Proclamation No. 691/2010

Proclamation No. 691/2010 defines the powers and duties of the executive organs. Each ministry shall “in its area of jurisdiction (a) initiate policies and laws, prepare plans and budgets, and upon approval implement same; (b) ensure the enforcement of the federal government laws; and (c) enter into contracts and international agreements in accordance with the law”.¹⁹⁷ It shall also “direct and coordinate the performances of the executive organs made

¹⁹¹ Id., Art. 72(1)

¹⁹² Id., Art. 72(2), First sentence.

¹⁹³ Id., Art. 72(2), Second sentence.

¹⁹⁴ Id., Art. 73(1).

¹⁹⁵ Id., Art. 12(1).

¹⁹⁶ Id., Art. 12(2).

¹⁹⁷ Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 691/2010, Art. 10(1).

accountable to it”.¹⁹⁸ Proclamation No. 691/2010 stipulates the powers and duties of various ministries. For the purpose of this study, certain provisions that deal with the tasks of the Ministry of Industry, Ministry of Trade and Ministry of Agriculture are relevant in relation with the relevance of their functions to property rights.

The Ministry of Industry is required to “promote the expansion of industry and investment” and “create conducive conditions for the acceleration of industrial development”.¹⁹⁹ To this end, its powers and duties include providing “support to industries considered to be of strategic importance”, creating an “enabling environment for domestic and foreign investment” and facilitating “the provision of efficient one-stop shopping services to investors”.²⁰⁰ Likewise, the Ministry of Trade has the powers and duties to “(a) promote the expansion of domestic trade and take appropriate measures to maintain lawful trade practices”; and “(b) create conducive conditions for the promotion and development of the country’s export trade and extend support to exporters”.²⁰¹

The functions of the Ministry of Agriculture include promoting “the expansion of extension and training services provided to farmers, pastoralists and private investors to improve the productivity of the agricultural sector”,²⁰² following up and providing “support in the establishment of a system involving rural land administration and use, and organize a national database”,²⁰³ and ensuring “the proper execution of functions relating to agricultural research, conservation of biodiversity and the administration of agricultural investment lands entrusted to the federal government on the basis of powers of delegation obtained from regional states”.²⁰⁴

These authorities are expected to facilitate the creation and enhancement of conducive conditions (for industrial and agricultural development, investment, domestic and export trade), and their performance in this regard can positively contribute to the pace and momentum of private sector development and Ethiopia’s sustainable development at large. This, *inter alia*, envisages addressing core impediments in the legal regime, the administrative setting and judicial practices. The challenges in the legal

¹⁹⁸ Id., Art. 10(2), First sentence.

¹⁹⁹ Id., Art. 20(1)(a), 20(1)(b).

²⁰⁰ Id., Art. 20(1)(c), 20(1)(d), 20(1)(e).

²⁰¹ Id., Art. 21(1).

²⁰² Id., Art. 19 (1) (a).

²⁰³ Id., Art. 19 (1) (n).

²⁰⁴ Id., Art. 19 (1) (o).

regime are briefly discussed in Chapter 1 while the issue of judicial protection will be highlighted in Chapter 3. The following sections of this chapter briefly highlight the challenges in the realm of administrative protection of property rights.

2.2 Land Use and Administration

2.2.1 Rural Land Use and Administration

The Federal Rural Land Administration and Land Use Proclamation No. 456/2005 defines rural land administration as follows:

Rural land administration means a process whereby rural land holding security is provided, land use planning is implemented, disputes between rural land holders are resolved and the rights and obligations of any rural land holder are enforced, and information on farm plots and grazing land holders are gathered analyzed and supplied to users.²⁰⁵

The objectives of this provision are clearly rural landholding security, land use planning, resolution of disputes, the enforcement of the rights and obligations of rural landholders, and the gathering, analysis and dissemination of information on farm plots and grazing land holders. Rural land use is further defined as “a process whereby rural land is conserved and sustainably used in a manner that gives better output”.²⁰⁶

The Proclamation states the responsibility of the Ministry of Agriculture²⁰⁷ and the responsibility of the regions.²⁰⁸ Article 17(1) of the Proclamation provides that “[e]ach regional council shall enact rural land administration and land use law, which consists of detailed provisions necessary to implement this Proclamation”. Accordingly, various regional rural land administration and use proclamations have been issued. They include:

- Benishangul Gumuz Regional State Land Administration and Use Proclamation No. 85/2010;
- Proclamation to Amend the Proclamation No. 56/2002, 70/2003, 103/2005 of Oromia Rural Land Use and Administration Proclamation No. 130 /2007;

²⁰⁵ Federal Rural Land Administration and Land Use Proclamation No. 456/2005, Art. 2(2).

²⁰⁶ Id., Art. 2(3).

²⁰⁷ Id., Art. 16.

²⁰⁸ Id., Art. 17.

- Tigray Land Administration and Use Proclamation No. 136/2007;
- The State of Southern Nations, Nationalities and Peoples Land Administration and Use Proclamation No. 110/2007;
- The Revised Amhara Regional State Rural Land Administration and Use Determination Proclamation No. 133/2006.

These proclamations share common features in offering wider discretion to regulatory offices in the allocation of rural land and the eviction of small-hold farmers. Yet, commendable progress has been made in the realm of land registration and the issuance of landholding certificates even if there is the need for another stage of registration ahead.

2.2.2 Urban Lands Lease Holding Proclamation and the Risks of Administrative Discretion

Urban Lands Lease Holding Proclamation No. 721/2011 has evoked much controversy in relation to its impact in the protection of property rights in urban houses and use rights on urban land. One of the issues relates to Article 6 of the Proclamation that embodies the stipulations on the ultimate conversion of old possessions to lease holding under the circumstances stated in the provision. The following are among the major factors that can affect security and tenure in private property rights:

- a) The definition offered to “public interest” as discussed in Chapter 1 is very wide and susceptible of administrative discretionary decisions. Proclamation No. 721/2011 defines public purpose as “the use of land defined as such by the decision of the appropriate body in conformity with urban plan in order to ensure the interest of the people to acquire direct or indirect benefits from the use of the land and to consolidate sustainable socio-economic development”.²⁰⁹ The issues that arise include “urban plan”.²¹⁰ Where there is a master plan with long-term perspectives and which are not susceptible to periodic changes, urban plan can be said to be predictable and long-term. But in light of the current observations in Addis Ababa, for example, where new plans are revised very frequently, this phrase opens a very wide room for discretion. The other issue that evokes inquiry relates to the phrase “direct or indirect benefits” which again is open to wide interpretation;

²⁰⁹ Urban Lands Lease Holding Proclamation No. 721/2011, Art. 2(7).

²¹⁰ Art. 2(8) of Proclamation No. 721/2011 defines urban plan as “structural plan, local development plan or basic plan of an urban center including annexed descriptive documents which are legally endorsed by the authorized body and have legally binding effect.”

b) Proclamation No. 721/2011 empowers the Ministry of Urban Development and Construction to “prepare model regulations, directives and manuals to be issued for the implementation of this Proclamation”.²¹¹ Even more so, “Regions and city administrations shall have the powers and duties to (1) administer land, in all urban centers, in accordance with [the] Proclamation”; and (2) issue regulations and directives necessary for the implementation of [the] Proclamation”.²¹² The caveat in this regard is the risk of gaps in harnessing the lawmaking function of administrative entities.

2.2.3 The Addis Ababa Charter in Relation to Property Rights

Article 9 of the Addis Ababa City Government Revised Charter Proclamation No. 361/2003²¹³ states the objectives of the Charter which include bringing about “the city’s speedy economic development through the encouragement and enhancement of investment and research”²¹⁴; making “the city a centre of commerce and industry of the country”²¹⁵ and “a naturally balanced, clean, green and favourable spot through the prevention of environmental pollution”.²¹⁶ The balanced attainment of these objectives not only requires effective performance on the part of municipalities, but also envisages the schemes of checks and balances against the risk of primacy to one of the objectives to the detriment of the other.

The powers and functions conferred on Addis Ababa City Government are very extensive. It has the “the power to make laws and exercise judicial powers specifically conferred on it by [the] Charter as well as executive powers and functions over matters that have not specifically been included in the details of the powers and functions of the executive organs of the Federal Government”.²¹⁷ Subject to this function, its powers and functions also include the issuance and implementation of “policies concerning the development of the City” and the approval and implementation of “economic and social development plans”.²¹⁸ Moreover, Addis Ababa City Government has the power to “constitute the executive bodies of the City Government and

²¹¹ Proclamation No. 721/2011, Art. 32(5).

²¹² Ibid, Art. 33.

²¹³ Arts. 41(1) (h), 41(2) (c), and 66 of the Charter are amended by Proclamation No. 408/2004 Addis Ababa City Government Revised Charter (Amendment) Proclamation.

²¹⁴ Addis Ababa City Government Revised Charter Proclamation No. 361/2003, Art. 9(6).

²¹⁵ Id., Art. 9(7).

²¹⁶ Id., Art. 9(8).

²¹⁷ Id., Art. 11(1).

²¹⁸ Id., Art. 11(2) (a), 11(2)(b).

to establish public enterprises, as legal entities, on its own or in partnership, as per applicable laws, with the private sector or other third parties”.²¹⁹ The following powers, in particular, are susceptible to discretionary application:

- a) the power to “administer, according to law, the land and the natural resources located within the bounds of the City;”²²⁰
- b) the power to “administer, develop or sell the houses nationalized as per Government Ownership of Urban Lands and Extra Houses Proclamation No. 47/1975 and administered by the City Government as well as other houses which the City Government built or otherwise obtained lawfully”;²²¹ and
- c) the power to “expropriate private property and/or clear and takeover land holdings designated as an object of public interest, subject to payment of commensurate compensation in accordance with the law”.²²²

The administration of “the land and the natural resources located within the bounds of the City” is usually dominated by the pursuit of the City Government to sell urban houses and sell land on lease as part of its annual plans to generate revenue from its leasehold land transactions. This has not only adversely affected the level of security to private houses and urban land use rights, but is also steadily reducing the green areas, parking spaces, river banks and neighborhood open spaces. The extensive power of expropriation as embodied in Addis Ababa City Government Charter and other laws deserves attention and is briefly discussed next.

2.3 Challenges in the Administrative Protection of Land Rights

2.3.1 The Definition of “Public Purpose” as Ground of Expropriation

Article 40(8) of the FDRE Constitution provides that “[w]ithout prejudice to the right to private property, the government may expropriate private property for public purposes subject to payment in advance of compensation commensurate to the value of the property”. One of the pertinent issues that determine the scope of administrative entities in the course of expropriation

²¹⁹ Id., Art. 11(2) (d).

²²⁰ Id., Art. 11(2) (g).

²²¹ Id., Art. 11(2) (h).

²²² Id., Art. 11(2) (i).

is the definition of “public purpose”. The Expropriation of Land Holdings for Public Purposes and Payment of Compensation Proclamation No. 455/2005 defines public purpose as follows:

Public purpose means the use of land defined as such by the decision of the appropriate body in conformity with urban structure plan or development plan in order to ensure the interest of the peoples to acquire direct or indirect benefits from the use of the land and to consolidate sustainable socio-economic development.²²³

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

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

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

Article 3(2) of Proclamation No. 455/2005 uses two standards in the definition of public purpose, because it provides an exception to land which is under leasehold. While land held under the permit scheme before the

²²³ The Expropriation of Landholdings for Public Purposes and Payment of Compensation Proclamation No. 455/2005, Art. 2(5).

enactment of the leasehold (which includes a significant portion or urban land and nearly the entire rural area in Ethiopia other than commercial farms), is subjected to the wider definition of “public purpose” lease hold is expropriated only if the leasee fails “to honor the obligations he assumed under the Lease Proclamation and Regulations or the land is required for development works to be undertaken by government.”

2.3.2 Notification, Property Valuation, Compensation and Complaint Procedures

Notification of expropriation is made in writing by the *woreda* or urban administration that has decided to expropriate a landholding, and the notification states “the time when the land has to be vacated and the amount of compensation to be paid”.²²⁴ The time for handing over the land to be vacated may extend until ninety days²²⁵, and shall not exceed 30 (thirty) days from the date of receipt of expropriation order “where there is no crop, perennial crop or other property on the expropriated land”.²²⁶ In case “a landholder who has been served with an expropriation order refuses to handover the land within the period specified in Sub-Article (3) or (4) of [Article 4], the *woreda* or urban administration may use police force to take over the land”.²²⁷

The basis and amount of compensation including displacement compensation are stipulated under Articles 7 and 8 of the Proclamation while Articles 10 and 11 deal with the modalities of valuation and complaint procedures. The compensation paid to the landholder covers the property on the land and permanent improvements made to the land.²²⁸ “The amount of compensation for property situated on the expropriated land shall be determined on the basis of replacement cost of the property”.²²⁹ The amount paid as “compensation for permanent improvement to land shall be equal to the value of capital and labour expended on the land”.²³⁰

Article 26 of the Urban Lands Leasehold Proclamation states the power of the appropriate body²³¹ with regard to clearing and taking over urban land.

²²⁴ Id., Art. Article 4(1).

²²⁵ Id., Art. Art. 4(3). The days will be counted from “the date of payment of compensation or, if he refuses to receive the payment, from the date of deposit of the compensation in a blocked bank account in the name of the *woreda* or urban administration as may be appropriate.”

²²⁶ Id., Art. 4(4).

²²⁷ Id., Art. 4(5).

²²⁸ Id., Art. 7(1).

²²⁹ Id., Art. 7(2).

²³⁰ Id., Art. 7(4).

²³¹ Art. 2(6) of Proclamation No. 721/2011 defines appropriate body as “a body of a region or a city administration vested with the power to administer and develop urban land.”

Article 26(1) provides that the appropriate body “shall have the power, where it is in the public interest, to clear and take over urban land upon payment of commensurate compensation, in advance, for the properties to be removed from the land”. The person displaced “shall be provided with a substitute plot of land within the urban centre the size of which shall be determined by the region or the city administration” (Art. 26(2)). The subsequent sub-Articles respectively deal with clearance upon default in violation of the various terms in lease contracts (26(3)) and illegally occupied urban land (26(4)).

The possessor of the land displaced under Art. 26(1) is served written clearing order which states “the time the land has to be vacated, the amount of compensation to be paid and the size and locality of the substitute plot of land to be availed.”²³² The period of notification shall not be less than 90 days.²³³ Grievances may be submitted to the body which has rendered the clearing order “within 15 working days after receipt of the order”,²³⁴ and appeal can further be lodged to the Urban Land Clearing and Compensation Cases Appellate Tribunal.²³⁵ The tribunal shall be “accountable to the council of the region or the city administration”²³⁶ and it “may not be governed by the provisions of the ordinary Civil Procedure Code while conducting its functions”.²³⁷

The decision of the Land Clearance Appeals Commission is final except for compensation. The finality clause embodied in the proclamation allows the aggrieved party to lodge an appeal only on the issue of compensation subject to “the right to file petition to the Cassation Division of the Federal Supreme Court if there is fundamental error of law”.²³⁸

There is variation between leaseholds and old possessions (*nebar yizota*) in the determination of compensation because no compensation is made for land use rights in old possessions upon their termination due to expropriation. There is also the issue whether the scope of use rights varies between a holder of urban land and rural land holding. According to Muluneh Wordofa “The word *yehizb* (public ownership) for rural land and *yemengist* (government

²³² Id., Art. 27(1).

²³³ Id., Art. 27(2).

²³⁴ Id., Art. 28(1).

²³⁵ Id., Arts. 29, 30.

²³⁶ Art. 30 (3).

²³⁷ Art. 30(8).

²³⁸ Muluneh Wordofa, President, Addis Ababa Land Clearance Appeals Commission (Focus group discussion summary), 13 July 2013.

ownership) for urban land (as used in the respective proclamations²³⁹ that nationalized land) may imply variation in the content of the use rights. Both proclamations give right to owners only in relation with the property on the land”.²⁴⁰ The issue that arises in this regard is whether the Constitution allows such a distinction, and whether the proclamations can validly distinguish between the scope of use rights in rural and urban land.

Even if the utmost efficient use of urban land calls for urban re-development, there is the need for win-win packages in which evicted persons who own the houses should be fully paid the amount that is earned by the municipality from an investor *pro rata* to the area of the land that is expropriated. Such win-win schemes, however, require a paradigm shift in the recognition of the economic value of a landholder’s use rights and the periodic enhanced value of such rights which should be fully compensated upon expropriation.

This evokes the issue whether the economic value of a landholder’s use rights is not recognized under the Constitution. Even if the literal reading of the Constitution is in the course of being interpreted by extremely narrowing down or denying the landholder’s claim over the economic value of use rights, Article 40(3) of the Constitution can also be interpreted as bare ownership as long as the use right over the land is bestowed on its holder, who is the usufructuary. In fact, the use right of an urban or rural landholder in Ethiopia goes beyond usufruct because the right can be transferred through inheritance and other means stated in the law.

The notion of public ownership of land clearly needs a pragmatic and purposive interpretation beyond its narrow literal interpretation. As Daniel WoldeGebriel²⁴¹ observes:

In various countries the landholding is public; for example, Israel, Hong Kong, etc., use the lease systems but the leasee has wide use rights. In UK, land in principle belongs to the Queen and this does not make her owner of the land in actual reality. When there is enhanced value of the use right, it is taken into account and the holder is compensated for the enhanced value upon expropriation.

The misconception of public ownership of land and the extremely narrow scope of land use rights perceived in Ethiopia is reflected in the valuation of compensation which does not take location and enhanced value into account.

²³⁹ Government Ownership of Urban Lands and Extra Houses Proclamation No. 47/1975; and Public Ownership of Rural Lands Proclamation. No 31, 1975.

²⁴⁰ Ibid.

²⁴¹ Daniel WoldeGebriel, Bahir Dar University, Institute of Land Administration (Focus group discussion summary), 13 July 2013.

For example, the lease bid advertised in Bole area (as can be seen from newspapers such as *Fortune* or *Capital*) is about 4 million Birr for 500 square meters (which in reality apparently goes beyond that amount during the bid), while the amount paid to the owner of the house is around Birr 400,000. It is the land that is being sold, because the house is brought down. Likewise, the amount paid to an evicted small-hold farmer in Addis Ababa area is around Birr 18 per square meter, while the lease rate can be Birr 12,000 or more per square meter.

This clearly excludes the value for the use right that the landholder loses as a result of expropriation. Yoseph Aemero notes that “property rights should not be restrictively interpreted to mean fixtures to the land. The person who uses land has use rights that will be terminated due to expropriation, and this should also be considered during expropriation”.²⁴² Instead of compensation commensurate with the value of the use right on the land, an urban landholder upon expropriation shall be entitled to “a plot of urban land, the size of which shall be determined by the urban administration, to be used for the construction of a dwelling house”²⁴³ and a displacement compensation “equivalent to the estimated annual rent of the demolished dwelling house or be allowed to reside, [free] of charge, for one year in a comparable dwelling house owned by the urban administration”.²⁴⁴ These entitlements for a plot of land and displacement compensation shall also apply *mutatis mutandis* to houses used for business undertakings.²⁴⁵

There are many types of loss that are not considered in the process of compensation. The valuation is not thus appropriate. Not only are enhanced values of the use right and location value left unconsidered, there are also indirect losses (such as trade loss) due to trade interruptions as a result of the expropriation process. A woman was offered Birr 300,000 by an adjacent investor so that he can buy her use right, she refused. The person filed an expansion project at the relevant administrative authority, and he managed to get the land on lease hold. She was paid only Birr 60,000; and the land was allocated to the same investor.²⁴⁶

²⁴² Yoseph Aemero, Former High Court Judge, Currently Attorney and Consultant at Law (Focus group discussion summary), 13 July 2013.

²⁴³ Expropriation of Landholdings for Public Purposes and Payment of Compensation Proclamation No. 455/2005, Art. 8(4)(a).

²⁴⁴ Id., Art. Art. 8(4)(b).

²⁴⁵ Id., Art. Art. 8(5).

²⁴⁶ Daniel WoldeGebriel, Bahir Dar University, Institute of Land Administration (Focus group discussion summary), 13 July 2013.

Valuation of the property situated on expropriated rural land is done by “a committee of not more than five experts having the relevant qualification to be designated by the *woreda* administration”.²⁴⁷ In the case of urban land expropriation as well, the urban administration designates a committee of experts with the relevant qualification for the valuation of the property on the land.²⁴⁸ The level of expertise, fairness and impartiality observed in the process of valuation is thus debatable.

Payment of Compensation for Property Situated on Landholdings Expropriated for Public Purposes, Council of Ministers Regulations No. 135/2007 has been enacted to implement the provisions that deal with compensation under Proclamation No. 455/2005. It states the determination of the amount of compensation in the case of total or partial demolition of buildings.²⁴⁹ Article 13 of the Regulations further provides a formula for the calculation of the compensation for buildings and relocated buildings. The provision of replacement of urban land is, however, “governed by directives issued by Regional States in accordance with Article 14 (2) of the Proclamation”.²⁵⁰ Although such replacement is commendable, the problem lies in its failure to distinguish between the economic values of the land expropriated and the land that is provided as replacement. The second challenge in this regard relates to the time that the replacement takes.

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

Under Proclamation No. 455/2005, complaint is lodged to “the administrative organ established by the urban administration to hear grievances related to urban landholdings” if a “holder of an expropriated urban landholding is dissatisfied with the amount of compensation”.²⁵¹ In case, however, “an administrative organ to hear grievances related to urban

²⁴⁷ Id., Art. 10(1).

²⁴⁸ Id., Art. 10(2).

²⁴⁹ Payment of Compensation for Property Situated on Landholdings Expropriated for Public Purposes, Council of Ministers Regulations No. 135/2007, Art. 3.

²⁵⁰ Id., Council of Ministers Regulations No. 135/2007, Art. 14.

²⁵¹ Proclamation No. 455/2005, Art. 11(2).

landholding is not yet established, a complaint relating to the amount of compensation shall be submitted to the regular court having jurisdiction”.²⁵² The submission of the complaint to courts of law is thus the exception rather than the rule.

Article 11 of the Proclamation further stipulates appellate procedures for compensation which “as may be appropriate” (depending on the entity that has rendered the decision) are submitted “to the regular appellate court or municipal appellate court within 30 days from the date of the decision”.²⁵³ It is, however, to be noted that an appeal submitted by any landholder who has been served with an expropriation order may be admitted only if it is accompanied by “a document that proves the handover of the land to the urban or *woreda* administration”.²⁵⁴ Moreover, the complaint regarding the amount of compensation shall not delay the execution of an expropriation order.²⁵⁵

2.3.3 Ambiguities, Conflict of Interest and Challenges

The focus group discussion has identified gaps regarding complaints upon expropriation. In Oromia, for example, ambiguities are created where the Investment Board and *woreda* courts decline from handling cases under the assumption that the other will handle the case. The same holds true for the role given to elders in adjudication. The issue arises whether the case should first be submitted to elders if it involves a dispute between an investor and a small-hold farmer. Clarity in such matters is thus crucial.²⁵⁶

In addition to such ambiguities, the issue of conflict of interest should be considered when an administrative entity that is empowered to determine expropriation is also entrusted with the task of adjudication of the issues on which it has vested interest. Adequate representation of stakeholders in the membership of administrative tribunals is one of the minimum conditions that is required. As Ayalew Melaku duly observes, “the composition of members in the Land Clearance Appeals Commission should be comparable with other

²⁵² Id., Art. 11(1).

²⁵³ Id., Art. 11(4).

²⁵⁴ Id., Art. 11(6).

²⁵⁵ Id., Art. 11(7).

²⁵⁶ Teshome Shiferaw, Justice, Oromia Supreme Court, (Focus Group Discussion Summary), 13 July 2013.

administrative tribunals in which the stakeholders outside the regulatory offices are represented. The Tax Appeals Commission can be a good example in this regard²⁵⁷.

The following were among the problems identified during the focus group discussion regarding the challenges in the administrative protection of property rights:

- a) Inconsistency is observed in various decisions of administrative tribunals; there are also inconsistencies between various laws in the regions vis-à-vis the Constitution and other federal laws;
- b) There are regulations that go beyond the stipulations in the proclamations they are meant to implement; for example, there is a directive issued by the Agency for Government Houses which goes beyond its administrative mandate. Legislation is inherently the power of the legislature, and what the executive has is a delegated power to enact regulations that implement and not that amend a proclamation/s;
- c) The narrow opportunity to appeal from administrative tribunals is problematic. For example, no appeal lies against the decision of the Privatization and Public Enterprises Supervising Agency. There are laws which allow appeal from the decisions of certain administrative tribunals, and this is a good practice which should be scaled up;
- d) The practice of foreclosures raises the issue of the debtor's right to due process. There are three types of foreclosure allowed: banks, tax authority and the new foreclosure scheme under the current lease proclamation (i.e., Proclamation No. 721/2011, Art. 20(6)) which entitles the regulatory authority to foreclose in the event of default in the payment of lease payments. The details of such procedures are not yet available;
- e) Contract enforcement is one of the crucial factors in private sector development. For example a certain company that was expecting the delivery of spare parts received packed plates. Fortunately the money was not yet sent, and the letter of credit was withheld, because the court's decision was swift. But in many cases court decisions are very slow. Courts should also pay attention to bilateral agreements whenever they are present;

²⁵⁷ Ayalew Melaku, President, Addis Ababa Court of Appeal, (Focus group discussion summary),13 July 2013.

- f) Urban landholding certificates are becoming susceptible to forgery and misrepresentation. There should be utmost prudence by the authority in charge of issuing the title certificates, and there should also be accountability so that the office shall be held responsible. The Office should update mechanisms of forgery control;
- g) A person who rents a house to another person encounters problems if the former forges a document and transfers ownership to himself. If the case is already under litigation, the police will refrain from the forgery investigation on the ground that the case is under litigation in a court of law. There is now a bill on registration of immovable property. It can be of some help for such fraudulent immovable property transfers. Yet there should be means of holding regulatory offices accountable in courts of law where they fail to control such gross frauds which significantly affect property rights;
- h) A typical example of inadequate administrative protection to the public is the case of Askalukan, in which about Birr 45 million was fraudulently taken from many citizens under the pretence of sending them to a sports event in South Africa. Accountability of administrative offices under such circumstances envisages robust administrative law.

2.4 Share Purchases and Intellectual Property

2.4.1 The Need to Protect Share Purchases from Companies under Formation

The number of advertisements about share purchases is steadily increasing. Even if the sectors that draw utmost attention vary, there have been certain incidents in which stock purchasers have lost their contributions. This clearly shows the gaps in the administrative protection schemes which should have assured that such invitations for stock sales are backed by the requisite level of guarantee and administrative protection so that the public can have recourse against defaulting founders of companies. The following observations were made during a focus group discussion held on July 13th 2013:

Problems of deceitful practices that occur in the course of company formation need due attention. The National Bank of Ethiopia protects the public that buys shares in financial institutions, while other sectors are unprotected. There were instances in which foreign investors were deceived; there are also incidences in which persons who bought shares in good faith were deceived. Founders who offer such shares for sale should be required to submit a certain guarantee. Such founders may

disappear or declare phony bankruptcy. There are provisions on share company formation which require the Ministry of Trade to undertake schemes of control. But it is not practised. Stock markets could have been of much help in this regard.²⁵⁸

This gap in the protection of share purchasers and its adverse impact was subject of discussion on Sheger radio in its morning program on 22 August 2013²⁵⁹ during which various listeners stated incidences of fraud. According to one listener, the problem is attributable to various factors including uninformed decision to buy shares without careful scrutiny into (1) the business plan, (2) the feasibility of the project, (3) integrity of the founders (4) the competence and experience of the founders. He further underlined that the most important factor lies on the issue whether there is adequate legal framework for protection and whether these laws are effectively implemented. He stated that the banking sector can be exemplary because the investments are secure and their annual dividends are steadily growing mainly because the National Bank of Ethiopia regulates various activities of the sector including the facts surrounding the formation of share companies that undertake banking activities.

Another listener stated the public's trust on advertisements under the presumption that a government authority monitors the process, and she noted that there will be five individuals who claim to have contributed the amount required by the law and show blocked account deposits, after which they change the category of the account and then withdraw their money including the amount collected from phony share sales. The problems in this regard were admitted by the official who was invited to the Studio from the Ministry of Trade²⁶⁰ and attributed the gap in the monitoring process to the inadequacy of the normative framework, and he stated that a directive that addresses the problem has been drafted.

2.4.2 Enforcement of Intellectual Property Rights in Ethiopia

As discussed in Chapter 1, Ethiopia's intellectual property rights regime is steadily increasing its conformity with TRIPS. The laws that are currently under operation include:

- Trademark Registration and Protection Proclamation No. 501/2006 ;
- Access to Genetic Resources and Community Knowledge, and Community Rights Proclamation No. 482/2006;

²⁵⁸ See Annex 1 for the list of the participants of the focus group discussion.

²⁵⁹ Thursday morning, Aug. 22, 2013, Sheger FM Radio.

²⁶⁰ Ibid, Deressa Kotu.

- Plant Breeders' Right Proclamation No. 481/2006;
- Copyright and Neighboring Rights Protection Proclamation No. 410/2004;
- Research and Conservation of Cultural Heritage Proclamation No. 209/2000; and
- Inventions, Minor Inventions and Industrial Designs Proclamation No. 123/1995.

The regulations further include:

- Council of Ministers Regulations No. 273/2012 on Trademark Registration and Protection; and
- Inventions, Minor Inventions and Industrial Designs Council of Ministers Regulations No. 12/1997.

Even though the Trademark Registration and Protection Proclamation No. 501/2006 was enacted in July 2006, it was largely a framework legislation until Regulation No. 273/2012 on Trademark Registration and Protection was issued by the Council of Ministers in December 2012. Meiring²⁶¹ appreciates Regulation No. 273/2012 and he states that it “makes provision for a statutory registration process in line with many other jurisdictions”. According to Meiring, before the enactment of the regulation, “the enforcement of trade mark rights could be a long, expensive and ultimately futile undertaking”, and this resulted from the procedures [which] “involved a long and uncertain traverse via the Federal Courts, the Trade Practice Investigation Commission (TPIC), the Federal Supreme Court and the Cassation Division”. He further states that “in order to institute trade mark infringement proceedings, it was not sufficient to prove ownership of the trademark and the existence of the infringing mark and product. The claimant also had to submit substantial evidence as to the history, use and reputation of the claimant’s trademark”.²⁶²

Many of these shortcomings have been addressed in the new law, which provides the Federal Courts with comprehensive powers, including the power to order injunctions and seizure of suspected infringing products on an urgent basis, without first giving notice to the defendant. The Courts also have the power to order damages. In addition to any civil remedies that a trademark owner may have, the new law makes it an offence to infringe registered trademark rights. Any person convicted of intentional

²⁶¹ Wayne Meiring, *Navigating the Intellectual Property Regime, Ethiopia* (MAY 2013) <www.lawyer-monthly.com>, Accessed 10 July 2013.

²⁶² Ibid.

infringement of a registered trademark right is liable to imprisonment for a minimum of five years, up to a maximum of ten years.

An important point to bear in mind for Ethiopia is that it is one of only two countries in Africa which provides for a Patent of Importation or Introduction. ... Once one has invested or started a new company in Ethiopia, any intellectual property (IP) which is developed by employees in the course and scope of their employment, such as new inventions, must be covered by the employee's employment contract so that it is clear that the rights belong to the company.²⁶³

Robust intellectual property rights are, in principle, conducive to innovation and can be among the factors that can attract investment. Yet, there is tension between the need of developing economies in technology transfers vis-à-vis the interest of developed economies to protect intellectual property. Private sector development in the Ethiopian context operates within this setting and there needs to be caution against both extremes of highly stringent IP laws to the detriment of indigenous technological development and the other extreme of outright piracy which is detrimental to the attraction of foreign direct investment.

It is to be noted that the most stringent IP regime cannot on its own attract foreign investment unless the core factors such as institutional capabilities including governance, etc., are adequately attractive. For example, Ethiopia's world ranking (in 2012) in Intellectual Property Protection is 83rd out of 130 countries in the world (and 13th out of 24 African countries)²⁶⁴ covered in the study. This does not, however, necessarily indicate its ranking in the attraction of foreign direct investment. During the same year, the ranking in the country's legal and political environment was 112th out of 130, and Ethiopia's rank in physical property rights protection was 101st out of 130 countries.²⁶⁵

As Biruk Haile notes:

There should be a holistic strategy rather than piecemeal legislation. The patent and the copyright regimes have different policy perspectives. The copyright regime focuses on the ones that are locally produced. A question arises whether local IP rights can be protected without the protection of foreign IP rights. This is influenced by the theory of development: institutional, human development, technology based,

²⁶³ Ibid.

²⁶⁴ <<http://www.internationalpropertyrightsindex.org/ranking>>, Accessed 15 July 2013.

²⁶⁵ Ibid.

etc. Various perspectives are also considered in policy formulation: imitation, technology transfer, local tech enhancement etc.

In the absence of IP protection, innovation will be weakened. A question can be raised whether Ethiopia can be a member of the Berne or Paris Conventions. This can enhance not only the protection of foreign IP rights but can also enhance domestic protection. Even though the pros and cons in this regard can be debatable, there should be a dialogue and an informed policy framework based on which a holistic law can be formulated.²⁶⁶

Issues of Ethiopia's upcoming accession to the WTO and its impact on telecommunications and banking were also briefly raised during the Focus Group Discussion. Biruk's response was that he is not promoting total denial of protection to local interests, but noted that it becomes difficult to protect local copyrights unless the same applies to foreign copyrights. If foreign sources are freely accessed and copied, local products of the mind can have lower demand and this results in weaker encouragement and innovation.

2.5 Brief Synthesis

Property rights in land deserve utmost attention because the laws on urban and rural land use and administration (that define the scope and tenure of the rights) can have impact on private sector development and Ethiopia's sustainable development at large. These laws confer on various administrative entities not only the power and functions of implementing the property rights enshrined in the Constitution, but also embody provisions that offer broader discretion to administrative offices in the enactment of laws that define "public purpose" and state the conferral and withdrawal of use rights on land. Moreover, administrative entities and administrative tribunals have adjudicative functions which are susceptible to conflict of interest as they are adjudicating cases that arise from administrative decisions.

The advantage of administrative tribunals relates to efficiency and effectiveness in contrast to judicial processes that might be susceptible to delay. However, experience in the complaints against expropriation and the amount of compensation show that equal attention ought to be given to the issue of impartiality, for example, through judicial review and stakeholder representation while members of administrative tribunals are appointed. Most importantly, the notion of land use right ought to be given a wider definition which should include what the landholder loses in terms of use right and the

²⁶⁶ Focus group discussion summary, 13 July 2013.

right to transfer the use rights through successions etc., which clearly goes beyond the fixtures (such as houses) on the land.

The narrow definition given to land use rights and the pursuits of administrative entities and tribunals to enhance the revenue of their respective offices clearly conflict with tenure security of the private sector in urban and rural land use rights. This adversely affects long-term investments, financial resources through collaterals and natural resource management. This fundamental problem in the conception of public property clearly influences the administrative decisions and awards of administrative tribunals, and it is further exacerbated by the legislative and adjudicative roles the executive offices play in the course of allowing and withdrawing use rights. These discretionary powers can at times extend to a point of reluctance to implement court decisions.

For example, there was a case whereby the regulatory office stated (after the Supreme Court's decision) that it has revoked the validity of the urban land holding certificate.²⁶⁷ Such challenges indeed call for enabling courts to have power to examine the process of such revocation and the process of its issuance whenever a case involves such issues.²⁶⁸ This is because the manner in which landholding certificates are issued and revoked can be problematic. Administrative entities are entitled to issue landholding certificates and also revoke them. Registration, verification and certification are done by the administrative entities. Courts should indeed be allowed to review the propriety of the process if a case involves issues of impropriety.²⁶⁹ There are encouraging developments in this regard because recent jurisprudence in the decisions of the Federal Supreme Court Cassation Division shows that courts are entitled to examine the legality of the procedures pursued by administrative organs in the issuance and revocation of landholding title deeds.

In *Taitu Kebede's Heirs v Tirunesh et al.*,²⁷⁰ the Federal Supreme Court Cassation Bench invoked Articles 1191-1198 of the Civil Code and held that "the issuance of ownership certificates for immovable property should be in conformity with the proper legal procedures. Their revocation should

²⁶⁷ Focus Group Discussion, 13 July 2013.

²⁶⁸ Ibid.

²⁶⁹ Ibid.

²⁷⁰ *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.

also pursue legal procedures”.²⁷¹ It found that “the lower courts should have evaluated the evidence produced by both parties and they have thus erred in rejecting the claim of the petitioners solely based on the revocation of title certificate, and this is not consistent with the objectives and content of the Civil Code provisions indicated earlier”.²⁷²

*Genet Seyoum v Kirkos Sub-City Kebele 17/18 Administration et al*²⁷³ clearly illustrates the conflict of interest involved when an administrative authority is allowed to revoke title deeds without judicial scrutiny. After the Federal First Instance Court decided in favour of the petitioner based on her landholding certificate, the administrative authority revoked the certificate during the appellate litigation at the Federal High Court and argued that it has new evidence, i.e., revocation of the land holding certificate thereby requesting dismissal of the case. The Federal High Court reversed the decision of the lower court based on the “new evidence”, i.e., revocation of the title certificate. However, the Federal Supreme Court (FSC) Cassation Division decided that revocation of title certificate by the administrative organ while the litigation is underway shall not lead to the immediate dismissal of the case thereby holding that courts can examine the validity and legality of the revocation. It observed that the petitioner (plaintiff at the lower court) should have been given the opportunity to contest the validity of the revocation, and it remanded the case to the Federal First Instance Court so that it can examine the arguments and evidence of both parties and decide on the validity of the revocation. The Cassation Division held that:

“...if the revocation of the title certificate is contested, decision should be given after examining whether the revocation is lawful, and the mere claim that the title certificate is revoked does not render it valid unless the issue is argued upon. The security of property rights enshrined in Articles 40(1) and 40(2) of the Constitution will be violated if it is held that the person whose holding certificate is revoked by an administrative organ does not have judicial recourse”.²⁷⁴

²⁷¹ Federal Supreme Court Cassation Decisions, Vol. 13, pp. 450 – 452, Abridged Translation, *EtLex*, Vol. 1, Ethiopian Legal Information Consortium, December 2013.

²⁷² *Ibid.*

²⁷³ *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.

²⁷⁴ Federal Supreme Court Cassation Decisions, Vol. 13, pp. 437 – 440, Abridged Translation, *EtLex*, Vol. 1, Ethiopian Legal Information Consortium, December 2013.

Likewise, in *Abadit L. v Zalambesa Town Administration & Berhane Z.*²⁷⁵, Cassation File No. 48217 (13 October 2010), the Cassation Division of the Federal Supreme Court found that a statement of claim that is submitted to courts of law against the improper revocation of landholding and ownership of a house can be adjudicated by courts and that it shall not be regarded as a purely administrative task which falls outside the jurisdiction of courts.

This is a commendable trend which should be buttressed by further consolidation of judicial scrutiny, in the absence of which administrative powers will be trapped in a setting susceptible to discretion and abuse of authority. Although agencies such as the Ombudsman,²⁷⁶ strong anti-corruption laws,²⁷⁷ and institutions in charge of enhancing the protection of human rights (which includes the right to property)²⁷⁸ are meant to harness and control various infringements of the law including abuse of authority by administrative entities, the strength and impact of such schemes are largely contingent upon the promulgation and implementation of administrative procedure law that determines the legal bounds and accountability of administrative bodies. Such law is, *inter alia*, expected to address the root causes of the problems related with (a) the administrative entities and procedures in decision-making, (b) complaint procedures in the course of protecting the rights, (c) rule making to apply (and not to alter) the laws enacted by the legislature, (d) enforcement of court decisions, (e) administrative hearings and their enforcement, and (f) prospects of judicial review if complaint is lodged against the decisions of administrative tribunals or after exhaustion of “administrative remedies”. The extent to which these problems are addressed determines the level of clarity and implementation of the laws relevant to the protection of property rights and the degree of safeguard against arbitrary and discretionary expropriation.

²⁷⁵ *Abadit L. v Zalambesa Town Administration & Berhane Z.*, File No. 48217 (13 October 2010), Federal Supreme Court Cassation Decisions, Vol. 11, pp. 249 – 251.

²⁷⁶ Institution of the Ombudsman Establishment Proclamation No. 211/2000.

²⁷⁷ Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No. 434/2005.

²⁷⁸ Ethiopia Human Rights Commission Establishment Proclamation No. 210/2000.

CHAPTER THREE

Judicial Protection of Private Property Rights in Ethiopia: Selected Themes

Protection of property rights and private sector development require complementarities between the judiciary, executive organs and administrative tribunals in the protection of private property rights. As highlighted in the earlier chapters, this envisages a legislative framework accompanied by the administrative aspect of the protection based on an administrative procedure law that should be pursued by administrative authorities and tribunals. Moreover, there should be an independent and competent judiciary with due integrity.

The judicial protection of private property rights determines the extent to which individuals and legal persons are ensured access, proper interpretation, efficient adjudication and appropriate judgment to their claims, counterclaims and defences whenever disputes are adjudicated in courts of law. This envisages competence, integrity, efficiency, judicial independence, predictability and consistency in judicial decisions. As an exhaustive analysis on all aspects of these themes requires wider discussion, this chapter focuses on the jurisprudence, consistency and predictability of high level Ethiopian court decisions (particularly at the level of the Cassation Division of the Federal Supreme Court) on selected themes related to private property with a view to highlighting the practical protection of private property rights in Ethiopia.

3.1 Cases that Involve Land Rights

The current landholding system in Ethiopia gives power to both the federal and regional states to enact laws pertaining to land. The Federal Supreme Court's Cassation Division decisions also bind lower courts in the interpretation of similar issues as per Article 2(4) of Proclamation No. 454/2005. Therefore, reference to the Cassation Division decisions on land rights is necessary to examine the protection of property rights that are relevant to private sector development.

Land rights are crucial in private sector development as no investment can be carried out without land.²⁷⁹ Article 1130 of the Civil Code gives recognition to land and buildings as immovables, and Article 1204 states the elements of ownership regarding the use, enjoyment of its fruits, and its disposal through donation, sale or inheritance, etc., as envisaged under Article 1205. Article 1206 of the Civil Code entitles the owner “to claim his property from any person who unlawfully possesses or holds it and may oppose any act of usurpation”. Conflicts may arise in these connections and in the course of disputes due to competing claims related to facts or the law. Disputing parties may settle their difference with or without the involvement of a third party, or through mediation or arbitration. Yet, going to courts of law becomes necessary when resolving a dispute becomes impossible by the parties themselves or through mediation or arbitration.

There are challenges in the course of access to adjudication because the process of litigation involves cost in time and money. For example, the following issues may lead to judicial disputes and there can be challenges related with the affordability of litigation, delay, predictability of decisions, etc., which affect the degree of the protection of property rights. The issues can include:

- Land expropriation;
- The need to consider the economic value of land use rights during expropriation;
- Mortgaging or sub-letting the premises to the person who buys the business as per Article 124 of the Commercial Code;
- The role of courts in examining the legality of landholding title revocation by an administrative entity;
- Real estate development;
- Transferring one’s business or house as a capital contribution;
- Incompatibility of laws relating to rural landholding and urban landholding with the FDRE Constitution;
- Issues relating to foreclosure rights of banks;
- Rental issues;

²⁷⁹ As stated in Chapter 1, land is no more within the realm of private property under the existing laws of Ethiopia: i.e., Proclamation No. 31/1975 that has made rural land public property, and Proclamation No. 47/1975 that renders urban land the property of the state and the Ethiopian people. Private citizens thus only exercise possessory rights not ownership right on rural or urban lands.

- Issues relating to period of prescription in the exercise of private property rights;
- Problems in connection with valuation of property in the event of expropriation as set out under Proclamation No. 455/2005;
- Jurisdiction of courts (Federal or Regional state courts) to adjudicate matters arising from taxes in connection with lands destined for extensive investments;
- Problems relating to execution of court judgments;
- Other property issues that may lead to litigation.

The following cases show few of the themes listed above and they give an overview of the problems in the adjudication of property rights that can affect private sector development. The problems are related to predictability and consistency.

3.1.1 The Need to Recognize the Economic Value of Land Use Rights

a) *G/Egizabher v Selamawit, FSC Cassation Division (File number 26130)*²⁸⁰

The case started in the Tigray National Regional State. The mother of Selamawit, Dinkinesh Demisu (deceased), was married to G/Egizabher. After the death of her mother, Selamawit claimed a house with 10 rooms as heir to her mother. The deceased had 5 rooms built on the land before she married G/Egziabher, and they built 5 more rooms on the land after their marriage.

The High Court of Tigray decided that the rooms built after marriage should be shared between G/Egziabher and Selamawit but part of the house built before marriage (i.e five rooms) would exclusively belong to Selamawit; and the court added that if it is possible, the land should be equally divided between the two. In case this is not possible, the court decided that the house should be sold and they should share the amount based on the proportion stated by the court. But there was a dissenting opinion which stated that since the land was what the deceased got before her marriage to G/Egziabher, the latter could only share from the values of five rooms built after marriage and not the land.

²⁸⁰ Alem Asmelash, (2010) “Comments on Some Land Rights Related Decisions of the Federal Supreme Court Cassation Division”, *Ethiopian Journal of Legal Education*, Vol. 3, No. 2, pp. 154-156 (abridged).

The dissenting opinion was upheld upon an appeal to Tigray Supreme Court, and the Tigray Supreme Court Cassation Division affirmed the decision of the Tigray Supreme Court. Petition was lodged to the FSC Cassation Division. The Division in rendering its judgment stated that individuals do not have ownership right over land but only that of possession. The court further stated that the mother of Selamawit had together with her husband built the extra five rooms after her marriage thereby conceding her possessory right on the land, and G/Egziabher's share on the house cannot be seen separately from the land built on it.

From the decision of the FSC Cassation Division, it can be inferred that the land and the house are intrinsic elements and that one cannot see the house separately from the land built on it so far as the current land laws are concerned. This interpretation evokes two questions: Can the immovable property be an intrinsic element of another immovable property? And are the rules of accession relevant to interpretation of the Division?

Regarding the first question, Article 1132 of the Civil Code of Ethiopia defines "intrinsic elements". Article 1130 merely states land and buildings as immovables, and the provisions that define intrinsic elements and accessories are Articles 1130 to 1134. Trees and crops are clearly stated as intrinsic elements of the land until they are separated or until they are "subject of contract" which envisages their separation. The *right in rem* over the trees is determined by the *right in rem* over the land, and as a result any other party who has claim over the trees or crops has *right in personam* over the person who has ownership/possessory title over the land and not a *right in rem* over the trees or crops as long as they are intrinsic elements of the land.²⁸¹ As Stebek notes:

The Civil Code is cautious with regard to buildings, and merely defines them as immovables under Art. 1130. It rather treats the scenario of separate claims over land and buildings under the provisions that deal with accession. Articles 1178 and 1179 of the Civil Code envisage two different scenarios whereby a person has constructed a building without the objection of the landowner (Art. 1179), or where the building is constructed against the will of the landowner (Art. 1178). If the landowner did not object to the construction of a building, the builder could own the building but still the landowner can evict the builder upon payment of compensation. In case, however, the house is built against the will of the landowner, the landowner may at his option evict the builder without the payment of compensation. Even

²⁸¹ Elias N. Stebek (2012), Case Comment, unpublished.

if land has come under public ownership in Ethiopia since 1975, these provisions can apply *mutatis mutandis* to ownership over land use rights, i.e., possessory rights over land.

Since the deceased and G/Egziabher were in wedlock, the five rooms were built without the objection of the deceased. Thus, the law on accession enables the landowner (in this case the landholder) to evict the builder but should pay compensation. This clearly means, *right in rem* over all the rooms (including the ones built during the marriage) belongs to the deceased while G/Egziabher is entitled to *right in personam*, i.e compensation for his share in the co-ownership of the five rooms built after the marriage.²⁸²

In estates owned by companies or in case of joint ownership, land use rights may be capital contributions and in effect, the ownership of the use right over the land goes to the company or the joint owners thereby rendering Articles 1178 and 1179 inapplicable. In the case of *G/Egizabher v Selamawit*, however, there were already five rooms over the land to which the deceased has landholding title, and issue of joint ownership of use rights over the land cannot arise.²⁸³ Therefore, the Cassation Division's decision does not seem to have legal basis. If equity is its basis, there can also be an argument in favour of Selamawit that it is inequitable and unjust to disregard the use right over the land that her mother had before the marriage.

Filippos Aynalem,²⁸⁴ in assessing the same issue, observes that the provisions of the Civil Code Articles 1178 and 1179 enable us to separate the right of land possession/ownership from ownership over the building built on it. He further notes that public ownership of land does not deny citizens to have possessory right that is worthy in the eyes of the law, and underlines that the Constitution protects the possessory right of the land.

In *G/Egizabher v Selamawit*, the accession rules embodied in the Civil Code have been unduly disregarded. The Division held that a person with a claim over a house shall also have a right over the use right on land no matter who the initial possessor of the land was, and the land cannot be seen differently from the house. Decisions of the Cassation Division bind lower courts with regard to interpretation. This binding interpretation thus applies to similar issues in all courts of law unless the Cassation Division amends it in its

²⁸² Ibid.

²⁸³ Ibid.

²⁸⁴ Filippos Aynalem (2009), “[Interpretation of Possessory Rights over Urban Land (Amharic)] የከተማ ቦታ ይዞታ መብት አተረጓጎም” *Journal of Ethiopian Law*, Vol. 23, No. 1, August 2009.

future decisions. It is to be noted that even interpretations in which the court had erred remain applicable on all lower court decisions that have pursued the interpretation because the Cassation Division's decisions to reverse its former erroneous interpretation can only have prospective and not retroactive effect based on its recent decision under File No. 68773.²⁸⁵

The impact of this interpretation in private sector development is that it discourages the expansion of family-owned business premises and rental property. In case of large-scale investments, land use rights can easily be capital contributions and spouses, joint owners, family members and shareholders can from the outset define their shared land use rights. In small-scale improvements (such as modest renovations for business activities, rentals, etc.), however, a spouse who has real right over residential or business premises can be reluctant against expansion or improvement of the property during marriage owing to the risk of its conversion to common property. This significantly affects private sector development, as the supply side of business premises envisages not only big constructions of company-owned malls, but also small and medium shop premises that can benefit from small-scale renovations, expansions and improvements.

b) *Ethiopian Roads Authority v Issa Mohammed (File number 30461)*²⁸⁶

The case started in Illubabor, Oromia National Regional State. Issa had license to produce sand on the land he was given through lease. But while a road was being built on the area, the Ethiopian Roads Authority took the already produced sand worth Birr 30,000 that belonged to Ato Issa. He instituted a case at the Oromia High Court, and the court ordered the Ethiopian Roads Authority to pay the amount. On appeal, the Oromia Supreme Court affirmed the decision of the High court. Thus, the case went to the FSC Cassation Division.

The Division held that by virtue of Article 6(18) the Ethiopian Roads Authority Re-establishing Proclamation 80/1997, the Authority can, for the purpose of road construction and maintenance and other purposes, use land and stone-like resources for free and is only obliged to pay compensation for properties of the land. It reversed the decision of the Oromia Supreme Court which had held that the Ethiopian Roads Authority Re-establishing

²⁸⁵ *Getachew Deyas and Fantu Tesfaye v Rukia Kedir*, File No. 68773, Federal Supreme Court Cassation Division Decisions, Vol. 13, pp. 623-625.

²⁸⁶ Cassation File No. 30461, *Hidar* 3, 2000 E.C., published in *Mizan Law Review*, Vol. 3 No. 2 (2009).

Proclamation 80/1997 does not allow the Authority to take away the sand found on a land held by another person. On the contrary, the Cassation Division remarked that since land and all natural resources are owned by the people and the government, the latter and the people should use the resources for free.

The Cassation Division held that even if Issa had the license to produce sand, the resources are owned by the government and the people, and the latter can legitimately take away the resources. Issa's plea for the value of the sand and for the expense incurred to produce the sand was rejected and the Cassation Division decided that the Ethiopian Roads Authority is not obliged to pay the amount.

The decision, as highlighted in Chapter 1, Section 1.3.3(b) above, does not recognize the economic value of use rights on land, and it takes the interpretation of Article 40(3) of the Constitution to its extreme application. This allows a government entity to take any resource obtained from land without compensation, even if a person extracts the resource based on a license to undertake a business activity.

The court should have made a distinction between the Authority's entitlement to extract sand and the act of confiscating another person's property which is already extracted and ready for transportation. Distinction should have also been made between ownership vis-à-vis and the limited scope of bare ownership (plus regulatory powers) that the state has over land on which a person has use right. While the state is the bare owner who is entitled to collect lease price, land rent, etc., the right to use and enjoy the products from the resource clearly belongs to the landholder.

Another case *Ethiopian Roads Authority v Genenew W/Yohannes* also involved sand taken by the Authority in which the FSC Cassation Division affirmed the decision it rendered in *Ethiopian Roads Authority v Issa* by stipulating that there is no legal ground for the Authority to be obliged to pay for the value of sand it took from Genenew.²⁸⁷ The FSC Cassation Division stated that all resources belong to the people and the government, and thus the government should not be obliged to pay compensation for the resources.

Apparently, the sand is not in its natural state in both cases. A person holding license to extract sand in a given location (stated in the license) spends time and energy to extract sand thereby adding value to it. Although Ethiopian Roads Authority is going to use the sand for road construction, it would have been fair to order the Authority to pay compensation for the

²⁸⁷ Cassation File No. 57593.

sand. This is a clear example of the Cassation Division's jurisprudence which disregards economic value to the use rights on land. This should indeed be rectified because private business development envisages recognition to the use value of land to which an individual or a legal person is entitled.

3.1.2 Judicial Authority to Examine Administrative Revocation of Landholding Title

In File No. 22719²⁸⁸ a petition to the FSC Cassation Division was lodged by Addis Ababa Urban Land Administration and Urban Development Bureau in which the petitioner sought reversal of the decision of lower courts which required the Bureau to withdraw its unlawful revocation of landholding and house ownership titles. The Bureau had revoked landholding title No. 32221 and house ownership title No. 17/3/91, an act that was contested by Negash as unlawful. The lower court examined the case and rendered its decision in favour of Negash Dubale in File No. 503/88 that required the Administrative Bureau to issue landholding and house ownership titles for House Numbers 1304, 1305 and 1306 situated in Higher 17 *Kebele* 20. Execution proceeding of the decision was further instituted under File No. 90/92 based on which the Bureau was ordered to allow the continued validity of the landholding title and the house ownership title.

The FSC Cassation Division ruled that as long as the Bureau has revoked the landholding and house ownership titles of the houses, there is no vested interest (as per Article 33(2) of the Civil Procedure Code) that justifies judicial litigation, and the lower courts should not have adjudicated the case. The Cassation Division held that the law confers authority over the administrative authority to provide or revoke such titles, and any grievance in this regard should have been instituted not in courts of law but in the complaint procedures of the relevant administrative authority. This decision and its aftermath clearly affect the protection of private property rights and private sector development.

The landholding and house ownership titles were issued to Negash which render him holder of property rights. As long as the revocation was contested in a court of law, the administrative authority is clearly duty bound to justify the legality of its actions. If it fails to do so, its act of revocation is clearly an *ultra vires* act which according to Article 401 of the Civil Code is of no effect. In other words, as long as the Bureau had no authority to revoke the

²⁸⁸ *Addis Ababa Urban Land Administration and Urban Development Bureau v Negash Dubale*, Federal Supreme Court Cassation Division Decisions, Vol. 6, pp. 176-178.

landholding and house ownership titles, it is *void ab initio*, and the revocation should have been declared of no effect.

Article 401(1) of the Civil Code provides that “Acts performed by the bodies referred to in [Article 394 ff] in excess of the powers given to them by law or without the observance of the conditions or formalities required by law shall be of no effect”. This applies even if it is not “expressly provided by law in such circumstances”.²⁸⁹ According to Art. 402, the nullity may be invoked by any interested party.

Administrative authorities should not thus be entitled to confer and revoke property rights at will, and it is the role of courts to examine and annul *ultra vires* acts. Or else, the ultimate fate of property rights holders would depend on the good intentions or adverse decisions of administrative authorities which may be arbitrary. Fortunately, there are recent developments in favour of a new line of interpretation in the Federal Supreme Court regarding the authority of courts to examine the legality of the issuance or revocation of landholding title deeds where it becomes an issue in the course of litigation.²⁹⁰ As indicated in Chapter 2, Section 2.5 above, the decisions of the Federal Supreme Court Cassation Division in File No. 67011 (*Taitu Kebede’s Heirs v Tirunesh et al*), File No. 64014 (*Genet Seyoum v Kirkos Sub-City Kebele 17/18 Administration et al*) and File No. 48217 (*Abadit L. v Zalambesa Town Administration & Berhane Z.*) illustrate this fact.

3.1.3 Contractual Benefits in the Absence of Landholding Titles

Teklemariam²⁹¹ built a house (House No. 367(b)), *Woreda 17, Kebele 15* and he rented it to Adane who in return, without seeking consent from the lessor rented some part of the house to Fetlework. The tenant refused to pay him the rent, and Teklemariam brought an action against him. Adane requested the court to allow the Addis Ababa Land Administration to intervene in the litigation on the ground that the lessor (Teklemariam) does not have landholding title for the land or house construction permit to build the house. Both lower courts rejected the objections and ordered the respondents to pay the arrears of the rent and handover the house to Teklemariam.

The lessees filed a petition at the FSC Cassation Division. The Cassation Division decided in favor of the intervener (Addis Ababa City Land

²⁸⁹ Civil Code, Art. 401(2).

²⁹⁰ Focus Group Discussion, July 13, 2013 (Issues Related with Property Rights and Private Sector Development in Ethiopia).

²⁹¹ *Addis Ababa City Administration v Teklemariam Mekonnen* (File Number 24269) Federal Supreme Court Cassation Division Decisions, Vol. 6, pp. 185-187.

Administration) on the ground that the lessor has no landholding title and house construction permit. The respondents (lessees) were required to handover the land and the house to the intervener (Addis Ababa City Land Administration) on the ground that urban land belongs to the state, and it cannot be owned privately.

The two grounds that constituted the basis for the decisions of the lower courts were first, no evidence has been produced which proves that the particular land under consideration is nationalized, and secondly the illegal construction of the house is an issue that can only be invoked by the relevant administrative entities and not by the lessees.

The issue in litigation should have been whether there is a contract between the parties in dispute, and the issue of title should have been a different issue that could have been handled by the relevant administrative offices. According to Article 1732 of the Civil Code, “contracts shall be interpreted in accordance with good faith having regard to the loyalty of confidence which should exist between the parties according to business practice.” The lessee who invokes the issue of landholding title clearly intends to avoid payment of the house rent, because the existence or nonexistence of landholding title or house construction permit is not among the relevant elements for the services obtained in the course of using the premises.

Even if there was a law that could have rendered such contracts untenable and invalid (owing to defects in the property rights of the lessor), the contracting parties should have, by virtue of Article 1815 of the Civil Code, been reinstated to their pre-contract positions because the provision clearly provides that upon invalidation of a contract “the parties shall be as much as possible be reinstated in the position which could have existed, had the contract not been made.”

According to Article 1179(1) of the Civil Code, “Whosoever has erected a building on land the property of another without the landlord objecting to the building shall be the owner of such building.” However, the relevant authority can order the demolition of any construction that is made without prior permit, according to Article 7(1) of Construction and Use of Urban Houses Proclamation No. 292/1986. Such houses are not built overnight and there is a house number given to the house. This implies that the administrative entity that has given number to the house is aware of its construction. The lessor could have been beneficiary in a regularization schemes undertaken by Addis Ababa City Administration in series of rounds. Many illegal holdings and constructions have been regularized where they do not violate the basic master plan and redevelopment plans of the city.

In another case, *Gezahegn Adinew v Dasash Baynesagn*,²⁹² the Federal Supreme Court Cassation Division has taken a different position over a relatively similar issue. The petitioner built a house on the land of the respondents based on permission obtained from them. Due to disagreement, the respondents evicted the petitioner from their land. The lower courts entitled Gezahegn to receive one fourth of the price of the house as per Art 1180(2) of the Civil Code, and required him to surrender the house to respondents. However, the FSC Cassation Division reversed the decision of the lower courts on the ground that land belongs to the state and peoples of Ethiopia, and hence respondents do not have the right to allow a house to be constructed on any piece of land that does not belong to them. On the basis of this decision, the petitioner became an owner of a house that he built on a piece of land given to him by individuals who have no legal power to do so.

The relevance of such cases to the theme of this study is that there ought to be predictability and consistency in case analysis and decisions.

3.1.4 Delay in Court Decisions and Challenges in the Enforcement of Court Decrees

Delay in court decisions and execution of judgments is among the challenges that adversely affect property rights protection and private sector development. For example, there has been a delay of six years to decide on the amount suggested by independent chartered accountants in relation to financial report submitted by the plaintiff in *Habteab Tesfa Building Construction Contractor v Ethiopian Telecommunications Corporation* (File No. 31934). The case is still pending at the Federal First Instance Court. While the claim involves Birr 400,000, the auditor's suggested figure is Birr 388,000. In *Bezawork Shimelash v Midroc Eth. PLC* (File No. 25287) the case that commenced on March 27, 2001 continued until the decision of the Federal Supreme Court Cassation decision rendered on 5 August, 2008.²⁹³

The challenges in the reluctance of various administrative organs to enforce court decisions and decrees can be illustrated by the following examples that are stated in the decision rendered by the FSC Cassation Division in *Tewelde Bisrat et al.*, Tahsas 04, 2004 E.C., File No. 67777²⁹⁴:

²⁹² *Gezahegn Adinew v Dasash Baynesagn*, File No. 30101, Federal Supreme Court Cassation Division Decisions, Vol. 6, pp. 203-205.

²⁹³ *Bezawork Shimelash v Midroc Eth. PLC* (File No. 25287), Federal Supreme Court Cassation Division Cassation Decisions, Vol.7, pp. 181-190.

²⁹⁴ *Tewelde Bisrat et al.*, Tahsas 04, 2004 E.C., File No. 67777, Federal Supreme Court Cassation Division Cassation Decisions, Vol. 13, pp. 266-270.

- a) In *Prosecutor v Tekabe*, Criminal Cases File No. 162887, the court ordered release on bail on Tir 2nd 2002 E.C. (January 10, 2010), but Tekabe stayed under detention in the Customs and Revenue Administration Police Station for ten months.
- b) Mesfin Kassahun (File No. 169690) was released 6 months after a court order for his release on bail was issued on Ginbot 24, 2002 E.C. (June 1, 2010).
- c) Hailu Worku and Louisa Farmeta (File No. 167550) were imprisoned for over eight months after the court's order that they be released on bail.
- d) Mengistu Abraham and Ahmed Mohammed (File No. 172759) and Bamlak Yismaw (File No. 170203) stayed for over 3 months at the Customs Police Station after court decisions of release on bail.

3.2 Subjecting Expropriation Disputes to Judicial Scrutiny

Some may argue that the imbalance created by the present expropriation laws of Ethiopia might be rectified if the judiciary was allowed to entertain major disputes relating to expropriation including the question of public purpose. Nevertheless, allowing persons affected by land expropriation to resort to regular courts might not necessarily work in favor of the poor if there is deficit in the independence of the judiciary in relation to cases that are deemed or perceived to matter to the authorities.

In Ethiopia, there had been a historic formal fusion between the judiciary and the executive impacting the present independence of the former. Assefa writes:²⁹⁵

In historic Ethiopia, adjudication of cases formed part and parcel of public administration. One finds a merger of functions within the executive, the administration of justice and the executive function proper. ... This blend of judicial and executive functions in the latter is not without implications. First and foremost, the judiciary never had a separate existence of its own as an institution. It was subject to all kinds of pressures from the other branches.

²⁹⁵ Assefa Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study* (hereinafter *Federalism and Accommodation*), (Netherlands, Wolf Legal Publishers, 2005/06) p. 390; see also Chi Mgbako *et al*, *Silencing the Ethiopian Courts: Non-Judicial Constitutional Review and its Impact on Human Rights*, 32 *Fordham International Law Journal* 1 259 (2008); where it is asserted that "The executive branch has the power to do as it wishes with no judicial checks on its activities..." at 289-290 & 296. See also Tigist Assefa, *Judicial Review of Administrative Actions: A Comparative Analysis* (LL.M Thesis, School of Law, Addis Ababa University,) (2010) available at <<http://etd.aau.edu.et/dspace/bitstream/123456789/2154/1/Tigist%20Asefa.pdf>> (Accessed: December, 22, 2011).

Currently, the country's judicial system has moved away from its earlier formal dependence towards its legal and constitutional independence. But there are doubts about its detachment in reality from the legacy of dependence. At present, the judiciary's formal independence is unambiguously stated in the FDRE Constitution, which declares that: "An independent judiciary is established... Courts of any level shall be free from any interference of...any governmental body, government official or from any other source...judges shall be directed solely by the law."²⁹⁶

Yet, "there is a perception that the autonomy of the judiciary in Ethiopia is weak..."²⁹⁷ And Assefa says "...external pressure on the judiciary has deep roots and is not without some hangovers on the new federal judiciary. Administrators at state level, even today, think that it is natural to order the judge..."²⁹⁸ "A long history of centralized governmental authority and a judiciary subjugated to the executive branch has fostered a weak judicial branch with reduced capacity to exercise genuine independence, as well as a reticence of other branches to treat the judiciary as either truly independent or co-equal."²⁹⁹ In particular, "...where government interests are at stake, direct interference has been noted..."³⁰⁰

According to the Global Competitiveness Report 2010-2011, in terms of juridical independence, Ethiopia ranks 89th out of 139 nations, which has shown an improvement from its previous ranking, but Ethiopia's standing is still low in the ranking index.³⁰¹ This is despite the fact that the country has put in place a judicial reform program whose key objective is "the promotion of professional and autonomous judiciary."³⁰² This is on the top of the

²⁹⁶ See Article 78/1 and Article 79/2& 3 of the FDRE Constitution.

²⁹⁷ African Development Bank: Country Governance Profile: Ethiopia (hereinafter Country Governance Profile) (2009) at <<http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/Ethiopia%20%E2%80%93%20Country%20Governance%20Profile%20EN.pdf>> (Accessed January 11, 2012) at 11; see also The Canadian International Development Agency, Independence, Transparency and Accountability in the Judiciary of Ethiopia (2008) (Unpublished, on file with the author) pp. 99-101 & 135-138.

²⁹⁸ Assefa Fiseha, Federalism and Accommodation *supra* note 18, p. 390.

²⁹⁹ The World Bank, Judicial and Legal Assessment Judicial and Legal Assessment (2004) at <<http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/EthiopiaSA.pdf>> (accessed January 11, 2012) pp. 19 & 21-23.

³⁰⁰ *Id.*, at 21.

³⁰¹ World Economic Forum, The Global Competitiveness Report 2010-2011 at http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2010-11.pdf, (last viewed December 21, 2011) at 155.

³⁰² Country Governance Profile *supra* note 20, p. 11.

numerous factors which inhibit the judiciary's assertiveness,³⁰³ accessibility, effectiveness and efficiency.³⁰⁴ Thus, in the current state of the judiciary, it is doubtful if the judiciary would assert its autonomy in respect of cases involving land expropriations if the question of public purpose and other expropriation questions were made subject to judicial challenge.

The above argument should not send the message that a judiciary that operates within a *modus operandi* of centuries of strong judicial tradition would necessarily award a generous compensation or adopt a restrictive notion of public purpose. The latter point can be illustrated by taking the 2005 *Kelo* decision handed down by the US Supreme Court.³⁰⁵ In this case, the court has upheld the decision of a city government to take land from one private person to give it to another for economic redevelopment purpose implying the interpretation by the judiciary of public purpose broadly to mean any project that would entail direct or indirect benefit to the public in the form of tax revenues and jobs.³⁰⁶

But the context of the *Kelo* case is different from the broader notion of public purpose in place in Ethiopia. Unlike Ethiopia, in the US, the public purpose test is unmistakably open to judicial scrutiny. And the *Kelo* expropriation took place in the context of comprehensive government

³⁰³ There is a tendency to restrict the turfs of its power even in cases which are deemed ordinary. This is particularly true when it comes to reviewing the actions of executive organs. For instance, in *Ethiopian Privatization and Public Enterprises Supervising Authority v Heirs of Nour Beza*, (Fed. Sup. Ct. Cassation File No. 23608, 2000E.C.) in the Decisions of the Federal Supreme Court Cassation Division Vol. 5 (Addis Ababa: Federal Supreme Court, 2001 E.C.) pp. 304-305, where the court has reasoned that "in the Ethiopian context, judicial power of the regular courts is not inherent but it emanates from the positive law and that where bodies other than regular courts are given by the law the power to render final and binding decisions then regular courts cannot size upon such matters even by way of review."

³⁰⁴ Federal Democratic Republic of Ethiopia: Comprehensive Justice Reform Program: Base Line Study Report (Amsterdam, Center for International Legal Cooperation, 2005) pp. 77-89 & 213-227.

³⁰⁵ See Annette M. Kim. "Land Takings in the Private Interest: Comparisons of Urban Land Development Controversies in the United States, China, and Vietnam." *Cityscape* 11.1 (2009): 19- 32. See also Antonio Azuela and Carlos Herrera-Martin (2009), "Taking Land Around the World: International Trends in Expropriation for Urban and Infrastructure Projects" in Somik V. Lall, Mila Freire, Belinda Yuen, Robin Rajack and Jean-Jacques Helluin (eds.), *Urban Land Markets Improving Land Management for Successful Urbanization* (Springer Netherlands); see also Daniel B. Kelly (2005), "The Public Use Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence" *Discussion Paper* No. 5 07/2005, Harvard Law School at http://www.law.harvard.edu/programs/olin_center/fellows_papers/pdf/Kelly_5.pdf. (Viewed January 11, 2012) W. Keating (Book Review), Rachele Alterman, *Takings International, A Comparative Perspective on Land use Regulations and Compensation Rights*, (Chicago, IL. ABA Publishing, 2010) p. 363.

³⁰⁶ Carol L. Zeiner (2010), "Eminent Domain Wolves in Sheep's Clothing: Private Benefit Masquerading As Classic Public Use, 28 *Virginia Environmental Law Journal* 1 pp. 10-11.

plan which passed through public hearings, followed by the approval of a democratically elected local government.

The US Supreme Court has delivered the Kelo decision in the context of property rights notion different from the one prevalent in Ethiopia. The Kelo case has been litigated in the country with a strong tradition of private property protection as opposed to Ethiopia where such protection has historically been weaker. In the Kelo case, those who have opposed the taking by the city government have argued, amongst others, that “the symbolic value of home and ownership” is “something that cannot be entirely compensated monetarily”³⁰⁷ perhaps because home ownership is seen as a kind of non-fungible property as articulated in Radin’s personhood theory of property as opposed to argument based on the deprivation of the subsistence asset of people in Ethiopia. In the Kelo case, the taking of private home from high or middle income persons took place in order to advance public interest in the context of city redevelopment with a view to attracting new businesses while takings in Ethiopia occur for economic development in the sense of taking farmland from low income rural people. Unlike Ethiopia, where the expropriation law is seemingly federalized, states in the US can issue their own expropriation law. For instance, after Kelo several states have passed statutes restricting the broad reach of the Supreme Court’s interpretation of the standard of public use.³⁰⁸

3.3 Selected Issues on Subletting Business Premises and Intellectual Property

3.3.1 The Right to Sublet Business Premises

In *Emebet Mekonnen v Woreda 20 Kebele 29*,³⁰⁹ the lessee sublet her business (a hotel) to another person without obtaining permissions from its owner, the *kebele*. Emebet had made improvements worth Birr 300,000 based on the permission she obtained from the *kebele*. The lessee later on refused to give the premises back to Emebet on the ground that the *kebele* has taken its premises back, and leased it to them. The *kebele* argued that it has terminated its lease with Emebet and let it to the new occupants using it for hotel business.

³⁰⁷ Annette Kim, *supra* note 305.

³⁰⁸ Chenglin Liu (2008), “The Chinese Takings Law from a Comparative Perspective”, *Journal of Law & Policy*, pp. 331-332.

³⁰⁹ *Emebet Mekonnen v Woreda 20 Kebele 29*, File No. 31264, Federal Supreme Court Cassation Division Decisions, Vol. 9, pp. 140-142.

Article 145(1) of the Commercial Code recognizes the right of the lessee to assign or sublet or to sell her/his business without obtaining permission from the lessor. This includes the transfer of the right to lease the business premises. During the litigation, the *kebele* invoked the Directive issued by the Government Houses Rental Agency which prohibits subletting business premises without its permission, and it argued that Emebet's acts violate this Directive and the lease contract with her is duly terminated. The High Court rejected the *kebele*'s arguments and decided that the *kebele* did not prove its authority to terminate the contract and did not submit evidence about the termination of the rental contract between Emebet and the *kebele*. It also stated that the term of sublease between Emebet and the persons who have refused to pay her the rent has not ended, and held that the sub lessees are bound to pay the arrears and damages.

This decision was reversed by the Federal Supreme Court, but ultimately reinstated by the Federal Supreme Court Cassation Division. The Cassation Division stated that Article 145(1) of the Commercial Code allows businessmen to sublet their business, including its premises, without prior permission from the owner of the premises. Likewise, the Cassation Division (under File No. 34586) recognized the right of a lessee to sell his business without obtaining the prior consent of the lessor, i.e., Agency for Government Houses). The Cassation Division's interpretation of Article 145(1) of the Commercial Code is indeed commendable, and such decisions have significant contribution in controlling abuse of powers by administrative agencies.

A case in point is the Directive issued by the Agency for Government Houses in November, 2011 to prohibit subletting or assigning business premises to a third party. This directive clearly violates Article 145(1) of the Commercial Code which is very fundamental in the smooth operation of business activities and private sector development. Federal courts are deciding in favor of the Agency for Government Houses citing this directive, while losing parties argue that the Agency does not have the power to issue such directive.

The decision of the Cassation Division in *Emebet Mekonnen v Woreda 20 Kebele 29* was rendered in January 2009, and it remains to be seen whether the Cassation Division will maintain its position, or uphold the newly issued Directive by the Agency issued in November 2011, even if the Directive clearly violates Article 145(1) of the Commercial Code.

3.3.2 Intellectual Property: Sample Cases

In *Ethio-Cermaic P.L.C v Ethiopian Intellectual Property Office & Ovorgiga Technology Limited*³¹⁰ the second respondent Ovorgiga Technology requested first respondent to register its trademark *Ethio Cement* encircled with ten stars. Ethiopian Intellectual Property Office (EIPO) did not hesitate to register this trademark. The petitioner stated its objections to the registration and the granting of certificate of registration and submitted its objections to first respondent (Ethiopian Intellectual Property Office). The petitioner claimed that it had obtained registration certificate under the trademark “*Ethio Cement*” to use it for marketing its cement products. According to the petitioner, allowing the second respondent to use this trademark will create confusion in a manner prejudicial to another trader. It claimed that using identical or similar distinguishing mark violates Article 141(2) of the Commercial Code, and the decision of the first respondent contravenes Trade Practices Proclamation 329/2003 and Trademark Registration Proclamation 501/2006. The FSC Cassation Division reversed the decision of the first respondent and decided that the second respondent cannot be allowed to use the trademark for marketing its product.

In another case³¹¹ the FSC Cassation Division rejected the filing of a legal action at the Federal Court of First Instance directly when one is dissatisfied by the decision of the Ethiopian Intellectual Property Office. According to the Cassation Division, a person aggrieved by the decision of the Ethiopian Intellectual Property Office shall file an appeal to the Federal High Court. This appears to be inconsistent with the position it took under File No. 57179 (i.e., *Ethio-Cermaic P.L.C v Ethiopian Intellectual Property Office & Ovorgiga Technology Limited*). The Cassation Division confirmed its position under File No 63454.³¹²

Article 17(1) of the Trademark Registration and Protection Proclamation No. 501/2006 recognizes the right of an aggrieved party to appeal to a court having jurisdiction in connection with registration of trademark. However, the court to which an appeal can be lodged is not identified under the Proclamation. According to Article 49 of the Proclamation, “Federal Courts shall have jurisdiction” but it does not specifically state whether it refers to the Federal Courts of First Instance or Federal High Court.

³¹⁰ *Ethio-Cermaic P.L.C v Ethiopian Intellectual Property Office & Ovorgiga Technology Limited*, File No. 57179, Federal Supreme Court Cassation Division Decisions, Vol. 12, p.544- 548.

³¹¹ *Ethiopian Intellectual Property Office v Tibebe Ayele*, File No. 59025, Federal Supreme Court Cassation Division Decisions, Vol. 12, pp. 549-553.

³¹² *Dat International Trading PLC owner Dr. Tenaye Abitew v EIPO & Civa Sante Pharmacy SA*, File No 63454, Federal Supreme Court Cassation Division Decisions, Vol. 13, pp. 378-382.

In spite of such challenges in terms of clarity and consistency, there are indeed commendable cassation decisions that give due attention to intellectual property rights. Cases in point are the decisions of the Federal Supreme Court Cassation Division with regard to the copyright protection that should be accorded to translation works in File No. 44520 (20 October 2009),³¹³ and the decision of the Cassation Division in File No. 68369 (January 13, 2012),³¹⁴ which held that the form in which ideas are expressed are entitled to copyright protection even if the ideas are not original. This duly indicates that copyright protection refers to original expressions which might not necessarily emanate from new ideas or information.

3.4 Challenges in Material and Non-financial Incentives

The judicial system in Ethiopia has relatively clear structure and it includes federal and regional level courts. However, there is an increasingly growing concern about the level of competence in many courts which can be attributed to the unsatisfactory remuneration and other factors which need to be addressed so that employees mobility rate can be reduced and judges with exemplary competence and integrity be retained. The level of public confidence in relation with competence, impartiality and integrity needs utmost attention in the absence of which property rights cannot obtain the level of protection commensurate with the needs of private sector development.

The judiciary can hardly attract and retain such judges under the current remuneration scale and prevailing non-financial incentives. Filipos Aynalem raises the question “What is the salary that justice deserves to be paid?” and compares the remuneration scale of judges with other legal services in the context of the steadily rising cost of living such as housing rentals and transportation. He, among others, raises the salary scale in the Commercial Bank of Ethiopia for the Head of Legal Services, i.e., over Birr 26,000 [an apparently deserved payment] vis-à-vis the extremely low salary range for judges which is:

- a) Birr 3,085 to Birr 5,243 for First Instance Court judges;
- b) Birr 4,186 to 7,061 for Federal High Court Judges; and
- c) Birr 5,051 to 7,890 for Supreme Court Justices.³¹⁵

³¹³ *Artistic Printing Press v Getahun Shiberu*, File No. 44520, Federal Supreme Court Cassation Division Decisions Volume: 10, pp 339-341.

³¹⁴ *Samuel Hailu & Horizon Printing Press PLC v Simret Ayalew*, File No. 68369, Federal Supreme Court Cassation Division Decisions Volume 13, pp. 576-581.

³¹⁵ Filipos Aynalem, “What is the salary that justice deserves to be paid?” (የፍትህ ደሞዳሽ ስንት ነው?), *Addis Guday*, Volume 7, No. 185, Tikimt 2, 2006 E.C. (October 10, 2013), pp. 22-23.

As reflected during the validation workshop, this raises the issue whether a country's treasury should generate revenue from court fees, or whether such fees can be ploughed back to the judiciary so that remuneration for judges can be significantly raised.

In the realm of non-financial incentives, the need to enhance rule of law, the independence of courts as enshrined in the Constitution and the tenure of judges were underlined during the validation workshop. These factors coupled with the level of judicial scrutiny that should be put in place to harness discretionary powers of administrative entities determine the degree of law enforcement and the fairness, efficiency and predictability of judicial decisions that can enhance the complementarities between laws, administrative decisions and adjudication.

CHAPTER FOUR

Selected Themes on Country Experience: China, South Korea and Singapore

This chapter examines lessons (in selected themes) that can be drawn from three countries that have commendable economic performances. In the interest of brevity, only a few themes have been considered in this chapter. Overlapping themes have also been avoided. The themes of the discussion include (a) lessons from China's land rights regime and administrative laws (b) comparative experience from the land rights regime in South Korea with particular reference to the salient features of developmental states; and (c) land rights in Singapore and an overview of entrepreneur perceptions about its institutions.

These countries are chosen because of their relevance to the Ethiopian land law regime. As Ethiopia's land laws from 1975 to 1991 pursued an ideological path that was significantly influenced by the Soviet Union and China, the current land reform pursuits in China can be relevant. South Korea's experience is relevant because the path it has undergone as a developmental state can inform the pursuits of countries who are in the course of espousing the path. Even if Singapore is a city state which is drastically different from countries like Ethiopia, the economic value given to land use rights in the context of public ownership of land renders its experience relevant to Ethiopia.

4.1 China's Land Rights Regime

4.1.1 Options and Challenges in Land Rights

The economic reforms in China since 1979 are reflected in its legal regimes and economic policies including property rights.³¹⁶ These reforms are gradual and cautious even if market forces are steadily allowed to have impact in the economy. China still considers its economy as "socialist" but with "Chinese characteristics".

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

³¹⁶ See Land Administration Law (promulgated on June 25, 1986, revised Dec. 29, 1988, Aug. 29, 1998, and Aug. 28, 2004, effective Aug. 28, 2004); and Law on Land Contract in Rural Areas (promulgated., Aug. 29, 2002, effective March 1 2003).

or by administrative villages.³¹⁷ For nearly three decades from 1979, China has opted “to avoid widespread social conflict over land” and “the central government decided – with good reason – to leave collective land ownership undefined” along with a similar ambiguity in the definition of the ‘state-owned land’ because “it was unclear which administrative level represented ownership”.³¹⁸ In spite of these ambiguities, China de-collectivized the post-1949 village communes and introduced Household Contract Responsibility Systems for agricultural land (or cropland) in such a manner that productivity and incentives could be encouraged without a hasty reversal from the collective ownership regime. Accordingly, households entered into contracts with the collectives which own the land and to which they are members.

These ambiguities in collective land ownership had various downsides including administrative abuse from executive office holders:

As it is unclear which level of the collective is legally entitled to represent land ownership, corrupt local cadres have a powerful incentive to sell land that is not theirs. The clearest example of such dark practices was the dishonourable discharge in October 2003 of Tian Fengshan, Minister of Land Resources. Tian was charged with corruption and land theft during his term as Governor of Heilongjiang Province from 1995 to 1999. Over the years, many farmers have been faced with forced eviction from their land as entire villages have been sold for real estate development. It was estimated that over the period 1985-96 the total loss in arable land due to construction activities amounted to 1.3 million ha. Since China has only one third of the world country average of arable land, these losses also threaten China’s food security.³¹⁹

Even if the village collective continued to retain the bare ownership of rural land in China, the administrative village leased out land to individual households (under the Household Contract Responsibility System) which led to fragmentation and challenges to environmental planning and protection. After long deliberations and rehearsals in various policy options, China has in 2007 enacted its property rights law.

³¹⁷ Peter Ho (2005), *Institutions in Transition: Land Ownership, Property Rights and Social Conflict in China* (Oxford University Press). “In 1998 there were 739,980 administrative villages as against almost 1.5 million natural villages” (p. 193).

³¹⁸ Id., p. 188.

³¹⁹ Id., p. 190 [citing Garrie van Pinxteren, “Chinese Minister Ontslagen” (Chinese Minister Sacked), NCR Handelsblad (23 October 2003), p. 4.; and Ministry of Agriculture, China Agricultural Development Report (Beijing: Nongye Chubanshe, 1997), p. 100.

4.1.2 China's 2007 Property Rights Law

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

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

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

Paragraph 3, Article 10 of the Chinese Constitution (as amended by Article 20 of Amendment 4 to the Constitution of the People’s Republic of China – 2004) reads: “The state may, for the public interest, expropriate or take over land for public use, and pay compensation in accordance with the law.” This stipulation replaces the former version which provided that “The state may, for the public interest, take over land for its use in accordance with the law.” The word “for its use” now reads “public use”, and the payment of compensation is also included.

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

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

Rural land is collectively owned and this includes all resources not owned by the state (Art. 58). There can also be collectively owned urban property (Art. 59). Under these regimes, land can be transferred to individuals or legal persons through contract arrangements. Articles 124 to 134 deal with farmland use rights. These rights can extend to thirty years, or up to fifty years for grassland, and up to seventy years for forests (Art. 126). There are recent policies (highlighted below under Section 4.1.3) that seek to extend such timeframes into indefinite time.

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

“The owner of the right to the use of land for construction use shall, according to law, be entitled to possess, utilize and obtain profits from the State-owned land, and have the right, by utilizing such land, to build buildings and their accessory facilities” (Article 135).

“The ownership of the building, structure and their accessory facilities built by the owner of the right to the use of land for construction use shall belong to such owner, unless there is evidence to the contrary sufficient to invalidate that” (Article 142).

“Except as otherwise provided for by law, the owner of the right to the use of land for construction use shall have the right to transfer, exchange, make as capital contribution, donate or mortgage the right to the use of land for construction use” (Article 143).

“Where the owners of the right to the use of land for construction use transfer, exchange, make as capital contribution, donate to others or mortgage the right to the use of land for construction use, the parties concerned shall enter into corresponding contract in writing. The term of such contract to be determined by parties concerned shall not exceed the remaining duration of the right to the use of land for construction use” (Article 144).

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

In the property rights discourse, utmost focus is not given to “who ‘owns’ land”, but rather to “the formal and informal provisions that determine who has a right to enjoy benefit streams that emerge from the use of assets and who has no such rights”.³²⁰ Even if the ownership of land in China is vested in the state or the collective, the 2007 Property Rights Law clearly defines the nature and scope of use rights. Not only are the rules regarding the elements of use rights defined, the enforcement mechanism is also stipulated.

4.1.3 Current Pursuits of Further Reform in Rural Land Rights

Since 1978/79, China is steadily moving along the path of various reforms including property rights. It has “moved from a communal system of farming to a system that grants more extensive land-use rights to individual households” enabling rural China to march toward greater prosperity.³²¹

The Land Administration Law gives farmers thirty-year contractual rights to the land they farm and the Law on Rural Land Contracting strengthens this right by more specifically enumerating requirements for land contracting and the transfer of contractual rights.... Realizing the need for [further] rural reform, the government has issued two policy directives that outline measures to increase land tenure security

³²⁰ Shimelles Tenaw, K.M. Zahidul Islam & Tuulikki Parviainen (2009), “Effects of Land Tenure and Property Rights on Agricultural Productivity in Ethiopia, Namibia and Bangladesh”, University of Helsinki, Department of Economics and Management, Discussion Papers No. 33, Helsinki 2009, p. 8 [citing (Bromley 1991, Eggertsson 1990, Libecap 1989)].

³²¹ Robin Dean and Tobias Damm-Luhr (2010), “A Current Review of Chinese Land-use Law and Policy: A “Breakthrough” in Rural Development”, *Pacific Rim Law & Policy Journal*, Vol. 19, No. 1, p. 121.

with the goals of doubling farmers' incomes by 2020 and maintaining the country's grain supply. ... In order for the policy directives to be more effective, the Chinese government should define who exercises collective ownership rights over farmland, implement a rural registration system, and educate farmers concerning that system. By taking these steps, China will better ensure that conditions in its rural areas will begin to match the prosperity that was envisioned for them thirty years ago.³²²

Further reform in rural China can indeed increase “the prosperity of the countryside” which, *inter alia*, “would benefit the Chinese economy as a whole by increasing domestic demand”.³²³ Policy documents issued after the 2007 Property Rights Law (known as the 2008 Decision and the 2009 No. 1 Document of the Chinese Communist Party) “promote three major changes to rural land-use law”.³²⁴

First, the Policy Documents indicate that the contractual land-use terms will expand from thirty to an indefinite number of years. Second, the CCP and the government institute reforms that will spur the growth of rural land-use rights markets. Finally, the CCP and the government reinforce their commitment to maintaining the agricultural use of farmland by mandating that agricultural land not be converted to non-agricultural uses.³²⁵

4.1.4 China's Administrative Laws

Various laws have been enacted in China toward due process in administrative procedures, transparency, accountability, judicial review and the redress available in the event of abuse of authority. The purpose of China's Administrative Procedure Law (enacted in 4 April 1989, and in force on 1 October 1990) includes “protecting the lawful rights and interests of citizens, legal persons and other organizations, and safeguarding and supervising the exercise of administrative powers by administrative organs in accordance with the law” (Art. 1). Any “citizen, a legal person or any other organization” is entitled to bring a suit to court if he/she/it “considers that his/her or its lawful rights and interests have been infringed upon by a specific administrative act of an administrative organ or its personnel” (Art. 2). The court shall thereupon “exercise judicial power independently with respect to administrative

³²² Ibid.

³²³ Id., p. 123 [citing Fei-Ling Wang, (stating that “raising the purchasing power of the rural Chinese majority would probably provide the Chinese economy with a great push in the years ahead”)].

³²⁴ Id., p. 138.

³²⁵ Ibid.

cases, and shall not be subject to interference by any administrative organ, public organization or individual”, and to this end the courts “shall set up administrative divisions for the handling of administrative cases” (Art. 3). These benches are required to “base themselves on facts and take the law as a criterion” (Art. 4), and “examine the legality of specific administrative acts” (Art 5).

According to Article 11 of the Administrative Procedural Law of the People’s Republic of China, courts (subject to the exceptions stated under Article 12) are required to “accept suits brought by citizens, legal persons or other organizations against any of the following specific administrative acts”:

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

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

Series of legislation have also been promulgated that incorporate elements of administrative law, such as the Legislative Law (2000), Administrative Supervision Law (1997), Administrative Punishment Law (1996), State Liability Law of the People's Republic of China (1994) and others. The lessons that can be drawn in this regard relate to the specificity of the functions of administrative authorities, the procedures of redress and judicial review. There is, however, criticism regarding the level of the implementation of these laws. As Liu Jianlong observes, "the effectiveness of the law in controlling public powers" is modest in China and he attributes this problem to the following factors:

Firstly, the judiciary is not independent. Independence is not only an essential feature of a constitutional state and an essential element of rule of law but also a guarantee for an effective judicial system as well. The Constitution of 1982 and the three procedural laws have clearly specified that the courts exercise their trial powers independent of any interference from administrative organs, social organizations and individuals. In practice, the courts are vulnerable to and sometimes even dominated by such interference.... In this regard, it is necessary to guarantee the financial and personal independence of the courts and the judges.

Secondly, the mechanical dogmatic approach adopted by most judges ... could be the result of poor education of the judges.... Hence, improvement of the education level of the judges is of utmost concern.

Finally ... [s]ome of the provisions of the Administrative Procedure Law, 1989 seem to be out of tune with the demands of contemporary society and need to be amended....³²⁶

4.2 Features of Developmental States and an Overview of South Korea's Experience

4.2.1 Salient Features of Developmental States

The overall property rights index of developmental states shows that they rank higher than other Asian States. Hong Kong, Singapore, Japan, South Korea and Taiwan rank as the highest in comparison to all countries in Asia.³²⁷ The scores are 90 each for Hong Kong and Singapore, 80 for Japan and 70 each for South Korea and Taiwan. A developmental state goes extra miles (beyond

³²⁶ Liu Jianlong (2011), "Administrative Litigation in China: Parties and Their Rights and Obligations", *NUJS Law Review*, Volume 4, April-June 2011, p. 229.

³²⁷ <<http://www.globalpropertyguide.com/Asia/South-Korea/property-rights-index>>, Accessed 03 August 2013.

day-to-day state functions) and involves itself in pursuits of creating conducive conditions for the development and economic performance of the private sector. What characterizes a developmental state does not relate to restrictions it imposes on private property rights, but its level of state intervention in empowering and supporting economic actors while at the same time retaining its autonomy from rent-seeking individuals and companies among economic actors.

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

As states expand their size, their range of functions, and the amount of resources they control, the proportion of economic activity that becomes incorporated into rental havens will increase correspondingly, and economic efficiency and dynamism will decline. Conversely, to the degree that the economic power and prerogatives of the state can be curtailed, prospects for growth, efficiency, and welfare will be enhanced. Therefore, the sphere of state action should be reduced to the minimum, and bureaucratic control should be replaced by market mechanisms wherever possible.³²⁸

This, however, assumes the existence of the conditions for the effective operation of what Adam Smith regarded as the “*invisible hand*” of market mechanisms that operate in the interest of the common good while everyone pursues his/her self-interest. The caveat in this regard is the need to consider the two assumptions of *being informed* and *being rational* that are inherent in Adam Smith’s notion of utmost freedom of exchange based on self-interest. Smith did not thus envisage the sorts of “self-interest” permeated by greed, corruption and atomistic individualism but rational self-interest that renders informed choices and decisions based on due respect to the legitimate interest of others.

Most importantly, “free market” envisages exchange of goods/services which presumes the capability, opportunity and access for individuals, legal persons and economic systems to produce the goods and the services to be marketed. In other words, the one on the buying end should also be able to produce and sell goods and/or services commensurate to what he/she/it buys. This seems to assume a setting whereby economic actors operate in a subjective state of competence and responsibility *plus* the social and global

³²⁸ Peter B. Evans (1989), “Predatory, Developmental, and Other Apparatuses: A Comparative Political Economy Perspective on the Third World State”, *Sociological Forum*, Vol. 4, No. 4, p. 564.

trading environment which does not offer free ride to certain hegemonic economic actors.

Adam Smith would have possibly argued differently under the current state of affairs. There was thus state intervention to facilitate the take-off phases of economic systems, and this includes countries such as Germany during their kick-start phases of industrialization. This shows that although the notion of the developmental state is relatively recent, there have been states that pursued policies beyond the minimal state functions of maintaining peace, security and national defence.

The developmental state assumes wider roles and actively involves itself in creating an enabling environment for economic actors. Unlike socialist states that control the economy through central planning and state ownership of the means of production, developmental states do not substitute nor dominate economic actors by putting themselves at the wheels of ownership. Instead, they assume a significant role in the economic life of the society through policies, strategic planning and decisions in contrast to the non-interventionist state that allows very wide roles to local, regional and global market forces. Invariably, developmental states pursue the capitalist mode of production, but strive to have political, financial, structural and administrative policy space and influence in the process.

Developmental states take up tasks that go beyond regulatory functions and also undertake entrepreneurial activities as a necessary part of economic transformation.³²⁹ States, according to Evans, may be developmental or predatory depending upon “the way in which they affect development”.³³⁰... [They] “foster long-term entrepreneurial perspectives among private elites by increasing incentives to engage in transformative investments and lowering the risks involved in such investments” and the consequences of their actions promote rather than impede transformation and development.³³¹

Amsden holds a similar view when she states that the two major features of a developmental state are the capacity to discipline big business and dispensing assistance to the business sector. She cites Korea, Japan and Taiwan as examples for more effective

³²⁹ Elias N. Stebek, *Mizan Law Review*, Vol. 6. No. 2 [Citing Peter B. Evans (1989), “Predatory, Developmental and other Apparatuses: A Comparative Political Economy Perspective on the Third World State,” *Sociological Forum*, Vol. 4, No. 4, p. 562.

³³⁰ *Ibid.*

³³¹ *Id.*, pp. 562, 563.

industrialization in comparison with other late industrializing countries. These achievements, according to Amsden, are attributable to the state's "power to discipline big business and thereby to dispense subsidies to big business according to a more effective set of allocative principles".³³²

Evans makes a distinction between developmental states and "predatory" states and he notes that in the latter case, "[t]hose who control the state apparatus seem to plunder without any more regard for the welfare of the citizenry than a predator has for the welfare of its prey." According to Evans, the East Asian NICs are examples of a developmental state, while countries such as Zaire [of the late 1980s] illustrate what he considers as the "predatory state" and Brazil [of the late 1980s] as the "intermediary" case.³³³

Vartiainen, [identifies] three salient features of a successful developmental state *Primarily*, the developmental state must be strong to impose its collective developmental objectives, be meritocratic and ought to be "insulated from both the market and the logic of individual utility maximization". *Secondly*, the state should have "thick external ties [*embeddedness*] to the economy's organized agents such as corporations, industrialists, associations and trade unions." And *thirdly*, there must be "a relationship of *mutual dependence* or *mutual balance* between the state and the rest of the economy" in such a manner that the state is "able to 'discipline' economic actors such as firms and trade unions, while appreciating that their privileged positions ultimately depend on the success of the economy".³³⁴

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

³³² A. H. Amsden (1989), *Asia's Next Grant, South Korea and Late Industrialization*, New York: Oxford University Press, p. 144.

³³³ Evans p. 563, in Stebek, *supra* note 329.

³³⁴ Stebek, *supra* note 329; Citing Juhana Vartiainen, "The Economics of Successful State Intervention in Industrial Transformation" in *The Developmental State* (1999), Edited by Meredith Woo-Cumings (Cornell University Press) pp. 218-219.

of interventions by developmental and predatory states are thus drastically different. While a developmental state “empowers and monitors economic actors” and uses strong “meritocratic institutions that monitor economic actors towards the country’s developmental strategic objectives”, predatory states “are not only corrupt but also make use of coercive institutions that scare economic actors and intimidate entrepreneurs in the guise of regulatory intervention”.³³⁵

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

4.2.2 Lessons from Korea about the Limits of Developmental States

The lessons that are examined regarding South Korea’s achievements relate to the policies of its developmental state during the 1960s and 1970s. As Korea’s experience indicates, there is a phase of obsolescence of the developmental state during which its role in enhancing economic development outlives its usefulness because wider state intervention in the economy eventually becomes undue patronage and red tape, as marked by the massive labour unrest of the 1980s and Korea’s 1997 economic crisis. One of the lessons that can be learnt from Korea’s experience is that the developmental state nurtures and facilitates the coalescence of an economic system to which it at a later stage becomes an impediment.

The concurring motives of both major actors in the process (i.e., the developmental state and the large capitalist firms) are different. Unlike the conventional modern minimal state which is usually part of the capitalist economic system, the developmental state does not promote its own class interests, but rather targets at the bigger picture of economic development of the nation at large.

From the very beginning, the Korean developmental state demonstrated a commitment not simply to “growth” or “development” but to capitalist development. At the heart of the state’s economic strategy was a policy of developing and supporting large national capitalist firms. That the state sought to dominate and control these firms does

³³⁵ Id., pp. 328-329.

not alter the fact that developing private capital was the Korean developmental state's *raison d'être*. The state may not have acted at the behest of the capitalist class – which it itself created – but it was committed to acting in its interests (Cumings, 1979).³³⁶

Despite such tension in the concurrent motives of the state and the major economic actors, the ultimate outcome of teaming up brought about outstanding achievements throughout the 1960s and this setting enabled quick recovery from the crisis of the early 1970s. “In 1960, South Korea was poorer than many sub-Saharan African countries.... Since then [it has] left far behind not only these African countries, but also others like Mexico and Argentina which had been much richer”.³³⁷

In 1960 South Korea was one of the poorest 25 countries in the world. Its Gross Domestic Product (GDP) per capita was just USD 82 (in 1960 prices). United States (US) policymakers' assessment of the country as a “hopeless case” appeared apposite at the time (Hart-Landsberg, 1993). However, the performance of the Korean economy over the next four decades or so could not have been more different from that predicted by such policymakers in 1960.... Korea was now a member of the Organisation for Economic Cooperation and Development (OECD) and one of the few countries that appeared to have successfully graduated from the Third World.³³⁸

In 1961, i.e., the initial year of Korea's developmental state, GDP per capita of various African countries was higher than South Korea's USD 92. For example, African countries that had higher GDP per capita (in US dollars) as compared to South Korea include: Algeria (221), Benin (96), Cameroon (119), Chad (111), Congo Democratic Republic (199), Congo (146), Ivory Coast (164), Egypt (151), Gabon (343), Ghana (187), Kenya (95), Liberia (161), Madagascar (134), Morocco (169), Niger (145), Nigeria (95), Senegal (262), Sychelles (270), Sierra Leone (148), South Africa (430), Sudan (103), Tunisia (202), Zambia (218), Zimbabwe (283).³³⁹ There has been extensive discourse on the factors that have brought about this development.

³³⁶ Iain Pirie (2008) *The Korean Developmental State: From dirigisme to neo-liberalism*, (Routledge), p.6.

³³⁷ Dani Rodrik (1995), “Getting Interventions Right: How Korea and Taiwan Grew Rich”, *Economic Policy*, Vol. 10, No. 20 (Apr., 1995), p. 55.

³³⁸ Pirie, *supra* note 336, p. 1.

³³⁹ Source of data: World Bank <[http://en.wikipedia.org/wiki/List_of_countries_by_past_and_future_GDP_\(nominal\)_per_capita](http://en.wikipedia.org/wiki/List_of_countries_by_past_and_future_GDP_(nominal)_per_capita)>, Last visited: 10 July 2013.

South Korea's GDP per capita for the year 2012 was 22,590 USD (GNI in power purchase parity is USD 28,231³⁴⁰). The GDP of African countries in 2012 that had higher GDP per capita figures (in 1961) as compared to South Korea is as follows.³⁴¹ Ethiopia's 2012 GDP in USD is included in the table below even if its 1961 figure is not available in the data above.

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

Country HDI Profile of South Korea (2012): Human Development Indicators³⁴²

Human Development Index Ranking (2012): 12th

Health	Life expectancy at birth (years)	80.7
Education	Mean years of schooling (of adults) (years)	11.6
Income	GNI per capita in PPP terms (constant 2005 international USD) ...	28,231
Inequality	Inequality-adjusted HDI value	0.758
Poverty	MPI: Multidimensional poverty index (%)	n.a.
Gender	GII: Gender Inequality Index, value	0.153
Sustainability	Carbon dioxide emissions per capita (tonnes)	10.5
Demography	Population, total both sexes (thousands)	48,588.3
Composite indices	Non-income HDI value	0.949
Innovation and technology	Fixed and mobile telephone subscribers per 100 people	162.3
Trade, economy and income	Income index	0.833

³⁴⁰ <hdrstats.undp.org/en/countries/profiles/KOR_print.html> Last visited: 25 July 2013.

³⁴¹ Compiled from: <<http://data.worldbank.org/indicator/NY.GDP.PCAP.CD>> Last visited: 25 July 2013.

³⁴² <hdrstats.undp.org/en/countries/profiles/KOR_print.html>, Last visited: 23 July 2013.

S. Korea's Human Development Index (1980 to 2012): Comparison between OECD and World Average³⁴³

Year	Korea (Republic of)	Very high human development	OECD	World
2012	0.909	0.905	0.888	0.694
2011	0.907	0.904	0.887	0.692
2010	0.905	0.902	0.886	0.690
2009	0.898	0.898	0.882	0.685
2008	0.895	0.898	0.881	0.683
2007	0.890	0.896	0.879	0.678
2006	0.882	0.892	0.875	0.672
2005	0.875	0.889	0.871	0.666
2000	0.839	0.867	0.849	0.639
1995	n.a.	n.a.	0.824	0.618
1990	0.749	0.817	0.800	0.600
1985	n.a.	n.a.	0.776	0.578
1980	0.640	0.773	0.756	0.561

Rodrik recalls the “extremely well-educated labour force relative to their physical capital stock” which rendered “the latent return to capital quite high” and the active support of the state in “subsidizing and coordinating investment decisions” and the role of government policies that were “managed to engineer a significant increase in the private return to capital”.³⁴⁴ The other factors noted by Rodrik include an “exceptional degree of equality in income and wealth”, effective government intervention and “keeping it free of rent seeking. The outward orientation of the economy was the result of the increase in demand for imported capital goods”.³⁴⁵

In the early 1960s and thereafter the Korean and Taiwanese governments managed to engineer a significant increase in the private return to capital. They did so not only by removing a number of impediments to investment and establishing a sound investment climate, but more importantly by alleviating a coordination failure which had blocked economic take-off. The latter required a range of strategic interventions — including investment subsidies, administrative guidance and the use of public enterprise.... That government intervention could play such a productive role was conditioned in turn by a set of advantageous initial conditions: namely, a favourable human capital endowment and relatively equal distribution of income and wealth.³⁴⁶

³⁴³ Ibid.

³⁴⁴ Rodrik, *supra* note 337.

³⁴⁵ Ibid.

³⁴⁶ Id., p. 57.

The support provided by the government went beyond export subsidization and further included increase in subsidy on export credits, exemption of exporters from the commodity tax and the business activity tax, and reduction of income tax on export earnings.³⁴⁷

There were also direct cash grants on exports, but these were phased out by 1965 (Frank *et al.*, 1975). However, the incentive effects of the devaluations and the cash grants were eroded by expansionary macroeconomic policies that led to rising inflation in 1962-3 and a renewed gap between official and parallel exchange rates in 1963. A large devaluation in May 1964 served once again to unify the currency. After 1965, export subsidy programmes were expanded further. In that year, the existing practice of giving priority to exporters in acquiring import licenses was formalized and expanded. Exporters were allowed automatic access to duty-free imports of raw materials and intermediate inputs up to a limit. This limit was determined administratively, on the basis of firms' and industries' input-output coefficients plus a margin of "wastage allowance" (Frank *et al.*, 1975).³⁴⁸

Bagchi³⁴⁹ observes various factors that contributed to Korea's economic success during the 1960s and 1970s. He recalls Korea's colonial experience under Japan since 1910, US influence until the late 1950s and the land reform that triumphed over landlordism. He observes that the Korean government obtained a large stock of industrial assets from the confiscation of Japanese property "and a substantial percentage of the cultivable land which could then be distributed to the Koreans" followed by significant land reform measures.³⁵⁰ "As a result of the land reform process, between 1947 and 1965, the percentage of full owners among farm households increased from 16.5 to 69.5, whereas that of pure tenants declined from 42.1 to 7.0 only". This land reform which was pro-peasant relatively equalized rural incomes and assets thereby eliminating land "as an asset for speculation or as a lever for keeping actual producers dependent".³⁵¹ Bagchi regards this as one of the conducive conditions and further identifies "a strong and realistic sense of nationalism" as another significant factor in Korea's economic success.³⁵²

³⁴⁷ Pirie, *supra* note 336, p. 61.

³⁴⁸ Ibid.

³⁴⁹ Amiya Kumar Bagchi (2004), *The Developmental State in History and in the Twentieth Century* (New Delhi: Regency Publications).

³⁵⁰ Id., p. 41.

³⁵¹ Id., p. 42.

³⁵² Ibid.

The other conditions identified by Bagchi that assisted the pursuits of the developmental state in Korea are the gains in import substitution efforts during the 1950s, commendable achievements in education, “privileged access South Korea enjoyed to U.S. capital and U.S. markets, especially in the 1960s and 1970s, export-led growth that had a strong foundation from the achievements obtained in the earlier decade and institutional capabilities that steadily developed since the 1950s.³⁵³ Bagchi notes the sustained improvements in productivity through rising levels of education of the workforce, learning by doing and learning by using, and exploitation of economies of scale through the favoured treatment of large firms especially in exports”.³⁵⁴

Eventually higher expenditures on R&D [Research and Development], a determined tying up of R&D set-ups run by the government and industrial firms, and a deliberate restructuring of industry with emphasis on such sectors as shipbuilding, electronics, automobiles, iron and steel, and petrochemicals made South Korea one of the champion performers in domestic investment and saving, the growth of national income, and exports of manufactures (Bagchi, 1987, chapter 3; Amsden, 1989, chapters 4-6). In this process, the close collaboration between government and business, and the effective monitoring by government of strategic business decisions played a highly important role. As the South Korean manufacturing sector developed, and South Korea began generating large surpluses vis-à-vis the U.S.A., the Korean government played a less interventionist role in the economy; and many of the formal restrictions on entry of foreign goods and foreign capital were relaxed, partly under the pressure of the US government and foreign transnational corporations.³⁵⁵

³⁵³ Id., p. 44.

³⁵⁴ Id., pp, 44-45.

³⁵⁵ Id., pp. 45-46. “In the 1990s, the South Korean DS [developmental state] entered into a phase of precocious maturity and decline. Several factors contributed to this. The deliberate promotion of “chaebol” by the South Korean government up to 1982-83, and in many cases, even beyond that date, created a number of South Korean transnational corporations which set up branches and subsidiaries in many countries of the world, including the U.S.A., Canada and major European countries.

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

Korea's experience indicates the eventual limits in the pursuits of developmental states. These limits are influenced by the contradictions that are inherent in developmental states. The first contradiction relates to the role of the state as the "provider of long-term goals for the economy" and the eventual decline of its positive role in the economy.

The developmental state establishes "comprehensive economic development plans, long-term goals, and projections for the entire economy", furnishes "capital for investment through domestic and foreign capital loans, capital assistance for research and development, and technology and technical assistance through national and regional research facilities" and further "acts as a mediator with multinational corporations for foreign direct investment and technology transfers, establishes trade offices for expertise on exports and imports, provides tax breaks and tariff exemptions, and eases regulations".³⁵⁶ These services are offered to the private sector because the latter initially "lacks resources and knowledge". In the long run, however, the state becomes a hindrance to the "modern economy's vitality and speed by becoming bureaucratic 'red tape'" when the pursuits of the developmental state become successful.³⁵⁷

In its own best interests, the private sector challenges the state's ability to perform such services and demands to provide them itself. The contradiction of the institution of the developmental state is qualitatively different from states where there is no a priori assumption that a transition of power will take place when goals are successfully attained. For example, in a welfare state various apparatuses assume vital functions in executing welfare policies and providing welfare services (Offe, 1984). The welfare state attempts to remedy the problems left unresolved by the private sector. Successfully providing welfare services to the public does not change the fundamental assumption that the private sector is incapable of and/or unwilling to provide these services, and that the state must provide them. In a *laissez faire* state, the state assumes from the beginning a relatively confined (regulatory rather than developmental) and augmentative role in relation to the private sector. Even with successful economic growth, no significant transition of power to the market is needed, since the private sector is in charge from the beginning.³⁵⁸

³⁵⁶ Eun Mee Kim (1993), "Contradictions and Limits of a Developmental State: With Illustrations from the South Korean Case" *Social Problems*, Vol. 40, No. 2 (May, 1993) p. 231-232 [citing various sources].

³⁵⁷ *Id.*, p. 232.

³⁵⁸ *Ibid.*, [citing Evans 1987].

The second contradiction that emerges upon the success of developmental states is the steady blurring of its autonomy in the course of economic development. The autonomy of the developmental state emanates from the fact that it does not emerge as a representative for “the landed or capitalist classes, which insulates state officials from the influence of their own class interests”. As the developmental state succeeds, its autonomy is gradually eroded because “[d]evelopment brings wealth and power to new classes and social groups (Koo 1990; Suh 1984), who use their newly acquired status to press for more independence” and this “threatens the core of the developmental state, which is its autonomy and its mandate to intervene in the economy”.³⁵⁹ Kim states that “South Korea’s military junta government in 1961-63 were not part of the small, wealthy capitalist class, but instead had rather modest backgrounds. President Park Chung Hee himself was from an impoverished peasant family”.³⁶⁰

However, the separation of state elites from landed or capitalist classes is only a short-lived phase in the process of capitalist development. Successful and very rapid development brought drastic changes not only to the economy, but to the society as well. The historical class distinction between state officials and merchants and industrialists was no longer clearly applicable (Koo 1990), and the upper class in a new social order included merchants and industrialists as well as state officials (Suh 1984). Moreover, through intermarriages between the offspring of capitalists and state elites (forbidden during the Yi Dynasty), the class distinction has become even more blurred (Shin and Chin 1989). The process of fusion of state elites and capitalist elites weakened the fabric of state autonomy.³⁶¹

The steady erosion in the autonomy of the developmental state is further enhanced by the tension between “the self-limiting” features of the state which remains an autonomous political and administrative entity while the core social groups, i.e., labour and the “capitalist class [grow] in size and in political influence with development” and these “newly strengthened classes and groups can significantly challenge the state’s power and its mandate in economic relations”.³⁶²

³⁵⁹ Id., p. 232.

³⁶⁰ Ibid.

³⁶¹ Id., pp, 232-233.

³⁶² Id., p. 233.

4.2.3 Lessons from Land Rights in South Korea

In the realm of secure property rights South Korea, along with Taiwan, stands fourth out of 32 Asian countries ranking after Hong Kong, Singapore and Japan.³⁶³ South Korea has gone a long way to arrive at its current land law regime. Korea's feudal landholding system gave way to reforms since the end of WWII.

Up until World War II the country was largely agrarian, with a feudal land system. Peasant unrest over land rights and high rents was common, and many regimes met their downfall because of this problem. The land tenure system was reformed many times, but remained a feudal system. Following World War II, the country was split into North and South, with both countries enacting major land reform and outlawing tenancy on agricultural lands. While the economy in the communist North has stagnated, South Korea has developed a modern, market economy. South Korea's rapid growth has created new land problems and the need for modern, computerized systems of land information.³⁶⁴

South Korea's 1948 Constitution embodied agricultural land reform and it marked a departure from its feudal landholding system. South Korea's Agricultural Land Reform Amendment Act (ALRAA) was in force since March 1950. The act enabled individuals to own agricultural land under three conditions: "first, any individual can own agricultural land but only if he or she cultivates or manages it for himself or herself; second, one can own [approximately] three [hectares] at maximum; and third, tenancy arrangements and land-renting activities are legally prohibited."³⁶⁵

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

³⁶³ <<http://www.globalpropertyguide.com/Asia/South-Korea/property-rights-index>>

³⁶⁴ Justin Maloney (2000) , Land Tenure History and Issues in the Republic of Korea (University of Maine, Department of Spatial Information Science and Engineering) May 2000, p. 7. <<http://www.spatial.maine.edu/~onsrud/Landtenure/CountryReport/Korea.pdf>>

³⁶⁵ Ibid, [citing Jeon, Y.-D. and Y.-Y. Kim (2000). "Land Reform, Income Redistribution, and Agricultural Production in Korea." *Economic Development and Cultural Change* 48(2): 253.

farming and an increase in owner-cultivating households from 349,000 in 1949 to 1,812,000 in 1950 (Jeon and Kim 1990).³⁶⁶

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

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

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

³⁶⁶ Ibid.

4.3 Land Rights in Singapore and Entrepreneur Perceptions

4.3.1 Land Rights in Singapore

The ideology of People's Action Party (PAP) as of the early 1960s included social engineering, economic growth, modesty in lifestyle, Asian values, and meritocracy.³⁶⁷ As an island city state, Singapore devised a land law regime that could enable the state to have a wide policy space in the construction of residential, office and commercial premises. Its housing project targeted at rehousing the whole population. The project has been realized to over 80 percent of the population which lives in self-owned apartments. "The government also allows citizens to borrow from the centralized pension system for home purchase, another incentive that has helped push the percentage of owner-occupiers to such high levels".³⁶⁸

The legal framework on Singapore's real property traces its roots to English common law. All land in Singapore belongs to the state, and there is a distinction in land titles, namely freehold and leasehold estates. The power of the state in freehold estate is limited to the exercise of "police powers and the right of eminent domain".³⁶⁹ "Freehold estates form a small minority of private land holdings in Singapore and are no longer granted by the government" while "[l]easehold is the primary form of land ownership in the country. Leasehold estates are granted by the government, typically for 99-year terms. The 1992 State Lands Act made the 99-year term the standard except for rare exceptions."³⁷⁰

The general categories of the freehold and lease estates include various specific types of titles within the framework of the principle that land belongs to the state and may be granted to individuals or legal persons. "The grantees do not really own the physical land itself but periods of time over the land during which they can exercise their rights of ownership. These time periods are called 'estates'."³⁷¹

³⁶⁷ David E. Anderson (2002), "Land Rights and Economic Opportunities, an exploratory comparison of Singapore and Taiwan", In: Douglas, I., Huang, S. L. (Editors) *Urbanization, East Asia and Habitat II, Taipei*, TW: CIER Press, p. 171.

³⁶⁸ Belina Yuen (2007), "Squatters No More: Singapore Social Housing", *Global Urban Development Magazine*, Vol. 3. Issue 1, November 2007, Available at <<http://www.globalurban.org/GUDMag07Vol3Iss1/Yuen.htm>>, Accessed 04 August 2013.

³⁶⁹ National Association of Realtors <<http://www.realtor.org/intlprof.nsf/all/singapore?OpenDocument&Print=Yes>>, Accessed 01 August 2013.

³⁷⁰ Ibid.

³⁷¹ Soicher Mihaela Ecaterina (2004), *The Applicability in Singapore of the Principle of Reasonable Access to Land Open for Public Use* (LL.M Thesis, University of Singapore), p. 1.

... [T]here are four kinds of estate in land, namely the freehold fee simple estate, the freehold life estate, the estate in perpetuity created by the State Lands Act, and the leasehold estate. Ownership of land in Singapore refers to ownership of one of these types of estates.

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

We can thus distinguish two categories of land in Singapore: *private land*, enjoyed by the individuals and corporations that are granted estates in land by the State, and *State land*. ...³⁷²

A person who owns the freehold fee simple estate “owns the property indefinitely, without the need to pay any rent, and upon his death, the property passes onto his successors. The second freehold estate is the life estate, which is much rarer, and confers ownership for the duration of the person’s lifetime”.³⁷³ Leasehold estates, as stated above are usually granted for 99 year leases. “An estate in perpetuity is an interest in land, created by a grant of land to an individual by the State in perpetuity, subject to terms and conditions agreed upon by the two parties. Such an interest may also be governed by the State Lands Act”.³⁷⁴

4.3.2 Entrepreneur Perceptions about Singapore’s Institutions

Singapore is well known for its rate of development, low unemployment rates, nearly corruption-free government, and its attraction to foreign direct investment and foreign workforce. It is “a small island city-state with a total land area of 640 square kilometres” and has gone through challenges when it obtained its internal self-government (1959), “joined the then newly formed Federation of Malaysia in 1963” from which it withdrew and became an independent republic in 1965.³⁷⁵

³⁷² Ibid.

³⁷³ <<http://singaporelegaladvice.com/types-of-property-and-home-ownership-in-singapore/>>, Last accessed: 04 August 2013.

³⁷⁴ Ibid.

³⁷⁵ Sock-Yong Phang (1996), “Economic Development and the Distribution of Land Rents in Singapore: A Geogist Implementation”, *American Journal of Economics and Sociology*, Vol. 55, No. 4 (Oct., 1996), p.490.

At the time of its independence, the Singapore government was confronted with a host of political and economic problems soon compounded by the closure of British military bases in Singapore. Rapid population growth, a severe housing shortage evidenced by chronic overcrowding in dilapidated buildings and squatter slums, and the need for employment creation topped the list of problems. Three decades later, Singapore has become a model for economic development. ... There is virtually no unemployment and approximately one fifth of the labor force is comprised of foreigners. The national savings rate is 51 percent while the home ownership rate is 92 percent.³⁷⁶

Surveys were conducted about the institutional settings which included private property rights in Hong Kong and Singapore before Hong Kong was united to China. “The surveys of Hong Kong and Singapore were part of an attempt to gain a world-wide private sector assessment of institutional quality... in June 1997, i.e., just before the handover of Hong Kong to China”.³⁷⁷ The themes of the survey (on entrepreneur perceptions) were predictability of rule making, perception of political instability, security of persons and property, predictability of law enforcement and corruption, and expectations of future developments in these areas of private sector concerns.³⁷⁸

The results of the survey showed that “entrepreneurs in both Singapore and Hong Kong gave top marks to the institutional infrastructure” with ratings “very similar for both city-states and in most cases they were clearly higher than

³⁷⁶ Ibid.

³⁷⁷ Beatrice Weder and Aymo Brunetti (2000), “Another Tale of Two Cities: A Note on Institutions in Hong Kong and Singapore”, *Journal of Institutional and Theoretical Economics (JITE) / Zeitschrift für die gesamte Staatswissenschaft*, Vol. 156, No. 2 (June 2000), p. 317.

³⁷⁸ *Predictability of rule making*: ... [1] the extent to which entrepreneurs have to cope with unexpected changes in rules and policies; [2] whether they expect their governments to adhere to announced policies; ... [3] the degree to which entrepreneurs are informed about important changes in rules; [4. whether they] can voice concerns when planned changes affect their business; [5. whether]... entrepreneurs have to cope with unpredictable retrospective changes in laws and regulations.

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

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

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

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

for all other countries surveyed”.³⁷⁹ Hong Kong’s score regarding perception of changes in government was significantly higher than Singapore’s owing to “the fairly centralized political system of Singapore”³⁸⁰ which caused higher perception in change of laws. However, this perception about Singapore was not related to entrepreneurs’ perception of “unconstitutional government changes accompanied by far-reaching policy surprises”.³⁸¹

For practically all the questions regarding the predictability of rule making, the ratings for both Singapore and Hong Kong were more favorable than for an average of OECD country.... About 90% of responding entrepreneurs in both Hong Kong and Singapore said that in general they expected government to stick to announced policies.... Very few entrepreneurs, both in Hong Kong and Singapore, feared retrospective changes in regulation which could be important for their business. By comparison, in Africa this fear was expressed by over 50% of entrepreneurs. ...³⁸²

...There is virtually full agreement by entrepreneurs in both Hong Kong and Singapore that property rights security is not a problem ... [T]hey said that they felt completely confident that the state authorities would protect their person and property from criminal actions and that theft and crime were absolutely no problem for their businesses....

On the question of judiciary reliability, in both countries over 80% of entrepreneurs responded positively, compared with only 60% in the average of the OECD, and only 20% in the average of less developed countries.

Finally, [with regard to] ... corruption all entrepreneurs responded very positively... Overall, the private sector surveys suggest that the quality of institutions in Hong Kong and Singapore was extraordinarily benign....³⁸³

³⁷⁹ Id., p. 319.

³⁸⁰ Id., p. 321.

³⁸¹ Id., p. 321.

³⁸² Id., p. 319.

³⁸³ Id., p. 321.

4.4 Brief Synthesis

The definitions of land expropriation differ in various countries. Yet, “there are common characteristics” they share in that the “expropriation should be for ‘public use’, carried out on behalf of the public, and it should base on just compensation”.³⁸⁴

In general, compensation should be for loss of any land acquired, for buildings and other improvements to the land acquired, for the reduction in value of any land acquired, for buildings and other improvements to the land acquired, for the reduction in value of any land retained as a result of the acquisition, and for any disturbances and other losses to the livelihoods of the owners or occupants caused by the acquisition and dispossession (FAO 2008).³⁸⁵

In the Ethiopian context, the definition of “public purpose” and the amount of compensation need careful reconsideration. First, the definition of “public purpose” is extremely wide as compared to all the countries considered in this chapter; and secondly, failure to give economic value to land use rights have rendered the amount of compensation (upon land expropriation) in Ethiopia mainly confined to the fixtures and houses on the land. Neither the socialist theory of public ownership in land (which still influences Chinese land rights) nor the notion of state ownership of land as practised in Singapore explain the denial of compensation for the economic value to land use rights that are terminated upon expropriation.

China pursues socialism with “Chinese characteristics” and yet it clearly recognizes the urban land holder as “*the owner of the right to the use of land for construction*”. This clarity in the law extends to the administrative and judicial systems that give economic value to land use rights that are compensated upon termination due to expropriation. The fact that China is in the course of further reforms toward indefinite terms in use rights and other issues including compensation will further enhance the tenure and security of property rights.

As South Korea’s experience indicates, developmental states have distinct features which indeed enhance economic development, and it is these factors that determine the classification of a state into one of the stations between predatory and developmental statehood. And finally, the lessons from Singapore’s land regime indicate that individuals and companies can own *estates*, i.e., the years during which one can have use rights even if the state

³⁸⁴ Yin Lei (2010), Developing Online Participatory Model (OPM) for Land Expropriation in China (MSc Thesis, International Institute for Geo-Information Science and Earth Observation, Enschede, the Netherlands), p. 2.

³⁸⁵ Id., p. 18.

has bare ownership. The duration of the *estates* according to Singapore's land law may be for an indefinite duration, 99 years, or lesser number of years based on the category of the *estates* a person is entitled to. The lessons that can be drawn from Singapore do not only relate to the various forms of secured use rights in land (even under legal regimes of state ownership) but also the level of institutional competence and integrity that are among the foundations of private sector development and economic prosperity at large.

CHAPTER FIVE

Conclusions and Recommendations

The conclusions briefly stated in this chapter derive from the analysis and discussion embodied in the preceding chapters, and the chapter also forwards the synopsis of the recommendations that have emerged from the research. The concept of the “Problem Tree” (Solution Tree Analysis) informs our conclusions and recommendations. It is a concept which lists down the core problems observed in a given setting, phenomena or social reality. It attempts to identify the cause and effect relationship among the problems listed; and to sort out the roots, stems and branches in the causal relationship among the problems identified. Moreover, it articulates problems in a negative form and then transposes them into their positive variation so that they can become solutions to the problems that are identified.

The core problems identified in Chapter 1 are legislative ambiguities, gaps, obsolescence and bestowal of wide 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 and private sector development. This is substantiated by various measurement indices among which the World Bank’s ease of doing business measurement and the Index of Economic Freedom show the declining trend in Ethiopia’s overall position during the last two years. It is to be noted that the Index of Economic Freedom uses elements including property rights, and Ethiopia’s position (146th ranking) has regressed by 2.6 percent as compared to the preceding year.

The discussion in Chapter 2 shows the scope of authority vested in various administrative authorities. It includes the power to enact regulations and directives, and the discretion in various realms that impact upon the scope of property rights such as the authority to define “public purpose” for the purpose of expropriation, conduct expropriation, determine the amount of compensation, and provide final decision on complaints against expropriation. This occurs in the midst of lacunae in administrative procedure laws and judicial review. For example, revocation of title has become Pandora’s Box that can easily be used by administrative entities to the detriment of due process enshrined in the Constitution and secured property rights. The judicial protection of property rights (briefly discussed in Chapter 3) has thus been substantially marginalized due to the legislative gaps and the challenges of administrative

discretion, in addition to which there is much to be done toward addressing the challenges involved in the pursuits of realizing the level of independence and competence of the judiciary as envisaged in the Constitution.

The “Problem Tree” clearly shows that most of the legislative, administrative and judicial challenges are attributable to:

- a) the gaps in the laws that deal with property rights and lack of a comprehensive property law, including the law on the registration and certification of immovable property;
- b) the tension between the constitutional principle of public ownership of land which recognizes use rights *vis-à-vis* the scope (and economic value) of land use rights that are articulated in various proclamations and FSC Cassation Division decisions;
- c) the conflict of interest involved in the functions of various administrative authorities that are entrusted with rule making, adjudication (of administrative complaints) and implementation of the same without adequate judicial scrutiny and in the absence of administrative procedural law which is yet a draft since 2001³⁸⁶; and
- d) the tension between the role and independence of the judiciary enshrined in the Constitution and facts on the ground with regard to the appointment, tenure, remuneration, financial independence, and retention of experienced and competent judges.

The various challenges observed in the study mainly emanate from these four factors that can be regarded as roots in the “problem tree”. Moreover, various problems such as the insecurity encountered by many citizens after share purchases from certain (newly formed) share companies, the discretionary stance taken by administrative offices such as the Agency for Government Houses in denying the lessee’s rights to transfer business premises, insecurity in title deeds due to forgery, and many others are identified in the study. These problems can be related with the bigger picture of institutional capabilities and good governance. For example, annulment of ‘*ultra vires*’ administrative acts and accountability of public offices and officials in courts of law as redress for the harm done (that is attributable to abuse of power or failure to perform public duties) are issues that can be addressed by the law of administrative procedures.

This study is not meant to prescribe quick-fixes to the problems discussed, but rather opts to identify the core problems in the protection of property rights and private sector development in Ethiopia. Once the core root problems are

³⁸⁶ The Draft Federal Administrative Procedure Proclamation, Justice and Legal Systems Research Institute, 2001, (Unpublished, on file with the authors).

identified, the solution thereof merely requires transposing the problems onto solutions. And needless-to-say, the path to the solutions can be informed by natural reason, analysis and experiential cognition in addition to which the comparative experience in the good practices of the countries discussed in Chapter 4 can be helpful.

The lessons that can be drawn from China's economic success show that the various proclamations that embody Ethiopia's property rights regime with regard to the scope, tenure and security of urban and rural land use rights are narrower than the Chinese model of public ownership. Nor are administrative authorities in Ethiopia subjected to rules of procedure and accountability contrary to China's robust administrative law regime. Ethiopia's land use rights regime is also drastically different from Singapore's model of public ownership of land which accommodates a spectrum of very wide land use rights. Moreover, South Korea's experience as a developmental state during its initial decades of economic take-off shows the need for creating enabling conditions for economic actors, and this, *inter alia*, includes the legislative, administrative and judicial protection of property rights commensurate with the demands of economic empowerment.

The core *recommendations toward policy dialogue* that emerge from the study can be summarized as the need to:

- a) enact a comprehensive property law (and address the gaps, ambiguities and outdated provisions, and also enact the draft registration law of immovable property) in lieu of piecemeal legislation;
- b) recognize secure ownership rights of citizens over the economic value of land use rights;
- c) enact the Draft Administrative Procedure Proclamation (drafted in 2001 and) which has provisions that, *inter alia*, deal with public participation in administrative rule making; review of agency rules; principles and procedures in decision-making; compensation for losses caused by public authority; procedures for the review of administrative tribunals; and judicial review;
- d) formulate a comprehensive intellectual property policy that informs Ethiopia's intellectual property laws with coherent and pragmatic perspectives which balance the need to enhance foreign and domestic investment *cum* innovation, and at the same time assure the necessary policy space and objective settings for technology transfer;

- e) put in place stronger schemes of control and monitoring by the Ministry of Trade, Ministry of Industry and Ministry of Agriculture so that sale of shares in newly formed share companies that are open to public share sales can be credible;
- f) address the challenges (including the remuneration scale and non-financial incentives) toward the realization of an independent and competent judiciary as enshrined and envisaged in the Constitution; and
- g) provide training on property law to the judiciary and other relevant administrative bodies.

The most difficult policy challenge in the Ethiopian context relates to land use rights. The Constitution recognizes private property, and at the same time stipulates that land is public property. However, it recognizes use rights on land and leaves the particulars to be determined by law. The various laws that are discussed in this study do not *per se* deny use rights over land, but fail to recognize its economic value and restrict the scope of its transfer in the event of expropriation and sale. This is where the laws impact upon private sector development.

On the one hand, there are push factors toward *laizez faire* windfall rent gathering by selling land obtained in the guise of “real estate development”, large scale farming and “investment projects” on which the holder might have made meager or no investment. On the other hand, there is a corresponding pull factor on the part of administrative agencies in overreacting to this challenge and steadily narrowing down the scope of the ownership of use rights (rural or urban landholders should be entitled to).

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

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ANNEX 1: FOCUS GROUP DISCUSSION

Themes of Discussion

Venue: Intercontinental Hotel

Date: Saturday, 13 July 2013

Time: 8:30 am -12:30; 2:00 pm to 4 pm

Theme: Property Rights Protection in Light of Ethiopia's Private Sector Development

1. Aspects of Ethiopian property law:

- a) with significant ambiguities and vagueness,
- b) that are incompatible with the FDRE Constitution,
- c) which confer wide powers upon administrative authorities,
- d) that require updating, and
- e) which manifest frequent changes in regulations and directives as well as in administrative structures.
- f) Reflections on Ethiopia's post-1991 piece-meal approach to reform of its property law as embodied in the Civil Code.
- g) Implications of these for private sector development.

2. Law enforcement in the protection of property rights:

- a) The role of administrative entities in decision making regarding protection of property and complaint procedures, (E.g. the protection given in banking and insurance vs. other spheres of production);
- b) Rule making to apply the proclamations enacted by the legislature and regulations issued by the Council of Ministers (including the compatibility of regulations enacted the Council of Ministers with the respective proclamations);
- c) Enforcement of court decisions;
- d) Administrative hearings and their enforcement;
- e) Overall performance of administrative tribunals;

- f) The role of administrative entities in decision making regarding protection of property and complaint procedures, (E.g., the protection given in banking and insurance vs. other spheres of production.
- g) Prospects of judicial review if complaint is lodged against the decisions of administrative tribunals or after exhaustion of “administrative remedies”.

3. Judicial protection of property rights

- a) Predictability, consistency and efficiency in judicial protection of property rights;
- b) Complementarities or gaps between the judiciary, executive organs and administrative tribunals in the protection of property rights.

ANNEX 2: PARTICIPANTS OF FOCUS GROUP DISCUSSION

Venue: Intercontinental Hotel

Date: Saturday, 13 July 2013

Time: 8:30 am -12:30; 2:00 pm to 4 pm

Participants of the Focus Group Discussion

- Ato Ali Mohammed, Justice, Federal Supreme Court.
- Ato Ayalew Melaku, President, Addis Ababa City Court of Appeal.
- W/ro Atsede Abay, Head, Land Management and Development Office, Addis Ababa City Administration.
- Dr. Biruk Haile, Head of the School of Law, Addis Ababa University.
- Ato Daniel WoldeGebriel, Bahir Dar University, Institute of Land Administration.
- Ato Muluneh Wordofa, President, Addis Ababa Land Clearance Appeals Commission.
- Ato Tesfaye GebreYesus, Justice and Prosecutor's Training Institute, Former judge.
- Ato Teshome Shiferaw, Justice, Oromia Supreme Court.
- Ato Yoseph Aemero, Consultant and attorney at law, former Federal High Court judge.

Private Sector Development Hub

Ato Hailemikael Liqu, Manager, Private Sector Development Hub.

Ato Bulti Terfassa, Expert, Private Sector Development Hub.

ITAB Consult

Ato Itana Ayana, research coordinator.

Legal Experts involved in the research

Dr. Elias Nour

Ato Hailu Burayu

Ato Muradu Abdo

ANNEX 3: VALIDATION WORKSHOP

**Ethiopian Chamber of Commerce and Sectoral Associations
Private Sector Development Hub**

Validation Workshop on Property Rights Protection and Private Sector Development in Ethiopia

Venue: Intercontinental Hotel

Date: 29 October 2013; Time: Afternoon 2:30 PM

Chairperson: Woizero Mulu Solomon, President, Ethiopian Chamber of
Commerce and Sectoral Associations

Private Sector Development Hub

- Ato Hailemikael Ligu, Manager, Private Sector Development Hub.
- Ato Bulti Terfassa, Expert, Private Sector Development Hub.

ITAB Consult

- Ato Itana Ayana, research coordinator.

Legal Experts involved in the research

- Dr. Elias Nour
- Ato Muradu Abdo
- Ato Hailu Burayu

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- The chairperson made opening remarks before the presentation.
- Profile of the research coordinator and the researchers were stated by Ato Hailemikael Ligu (Manager, Private Sector Development Hub).
- Presentation (45 minutes)

Participants who forwarded feedback and comments on the research report

- Ato Aman Assefa, Ethiopian Bar Association;
- Ato Amin Abdella, Ethiopian Economists Association;
- Woizero Atsede Abay, Head, Land Management and Development Office, Addis Ababa City Administration;
- Ato Beyene Bekele, Tadem Cos Consultancy;
- Ato Getnet Temechew, Development Bank of Ethiopia;
- Ato Kefene Gurmu, Wugagen Bank;
- Ato Muluneh Wordofa, President, Addis Ababa Land Clearance Appeals Commission;
- Ato Seid Abdo, Petram;
- Woizerit Sewhareg Adamu, Ethiopian Chamber of Commerce and Sectoral Associations;
- Ato Tameru Wube, Ethiopian Chamber of Commerce and Sectoral Associations;
- Woizero Yeshiwork Yimer, Dashen Bank;
- Ato Yohannes WoldeGebriel, Director of Arbitration Institute, Addis Ababa Chamber of Commerce and Sectoral Associations;
- Ato Yoseph Yehulashet, Ethiopian Intellectual Property Office;
- Ato Zebene Fikre, Ethiopian Lawyers Association.

Feedback

(The feedback was offered after tea break)

Various positive comments and words of appreciation were forwarded by nearly all the participants. The research report has been validated by the participants. The following points were forwarded for consideration:

- a) The research can show the impact of various laws on property enacted in 1975 and thereafter (Rural Land Proclamation, Urban Land Extra Houses Proclamation etc.) as their impact is still current and they still have supporters. The issue of compensation in these proclamations should also be stated. The impact of these proclamations on private property informs the solutions to be recommended at this stage. The issue of compensation under these proclamations can also be assessed.
- b) As long as the influence of these proclamations continue it is difficult to offer solutions for problems related to private property.
- c) With regard to nationalized houses, the measures taken are inconsistent. In Tigray, for example, nationalized houses have been returned to their owners, while this is not so in other places such as Addis Ababa.
- d) The inconsistency in court decisions can be elaborated further. For example, FSC Cassation decisions on unregistered and unauthenticated immovable property sales, versus Proclamation No. 639/2009.
- e) There are double standards in enacting a law that protects only banks (by amending the Civil Code, i.e., Proclamation No. 639/2009) in relation to contracts related to immovable property concluded without authentication or verification.

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- f) The FDRE Constitution, Article 49 states that Addis Ababa shall have the power of “self-government”. The Constitution further states that the particulars shall be determined by law. The functions of law making, interpretation and enforcement that Addis Ababa Charter confers on the City Government should thus be seen along with the issue whether the phrase “self-government” envisages such functions.
- g) The study will have a very wide scope if it is expected to cover issues such as compensation under proclamations on nationalization of land (rural and urban).
- h) The tension between the public ownership of land and the private ownership of houses needs more clarity under the Ethiopian legal regime.

- i) There is capital gains tax of 30%. Can such issues be relevant to this study because this tax can be examined in light of its adverse impact on investment promotion?
- j) The Constitution needs clarification in relation with the stipulation under Articles 40 and 89(5).

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- k) Most of the problems related with the protection of property rights lie in the implementation rather than the absence of law. For example, a certain individual (obtained land on lease). After he was issued construction permit, he was asked to change it because the soil was found to be unfit for the number of floors stated in the permit. But getting the new permit took a very long time, and the land was taken back, the reason being failure to utilize it within the time given for construction.
- l) Founders of a share company are liable in relation to the securing of the share purchases by the public. This is embodied in the Commercial Code, and the problem mainly lies in the enforcement of the law.
- m) The conclusions of the study could have gone to the extent of recommending amendments in the Constitution. As long as land is publicly owned it inevitably becomes conducive to corruption.

*

- n) Article 2(1) of the Banking Business Proclamation No. 592/2008 stipulates about influential shareholders. It was possible to have shares up to 20% in a bank, but the ceiling is lowered to a maximum of 5%. In light of the upcoming WTO accession, this adversely affects the development of banks and their scope of capital accumulation.

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- o) The land law is mostly in the minds of administrative officials and not in the written laws. We cannot assertively identify Ethiopia's land law.
- p) There is ambiguity in the constitutional provisions that are relevant to land law.
- q) The core issue is how Ethiopia should use its land effectively, and this calls for clarity in the land law regime.

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- r) Who owns land? Urban land has no owner. Vacant spots are illegally settled and then regularized by giving title deeds to people who have seized the land.

- s) “Public purpose” should be restrictively interpreted. Roads, hospitals, etc., are clearly meant for public purpose. But extensive interpretation of “public purpose” brings about insecurity and instability to land holders. There cannot be development without peace, security and stability.
- t) There are share companies that are being established, and then embezzled in the course of their formation. There is the law, but the implementation is not effective. There is the risk that the public can lose confidence in share purchases.

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- u) We have laws that regulate shares, but we need stock markets analogous to what the Ethiopian Commodity Exchange is doing.
- v) Even if the gap between the laws and their implementation might be inevitable, we have to strive towards narrowing down the gap as much as possible.
- w) There is a challenge in relation to the level of the professionals at the various institutions. Lawyers should be active in social engineering and should be committed.
- x) The state policy of land ownership is clear; focus should thus be made on the aspects of distribution rather than aspiring toward the amendment of the constitution of land ownership.
- y) Administrative procedure law is very important.
- z) Raise in the salary of judges is important; however, it should be noted that raise in salary alone may not eliminate corruption. Other factors such as appointment, promotion, tenure, etc., of judges should be taken into account in addition to benefits.
- aa) There should be more efficient schemes of notary services rather than requiring hundreds of shareholders to the Documents Authentication and Registration Office.

*

- bb) The framework for private sector development could have been clarified in the research. Is it the free market, developmental state or the socialist framework which serves as the framework for private sector development?

cc) The selection of South Korea is justified, but the choice of China and Singapore on the issue of comparative experience seems to need more clarification because China is a socialist state, and Singapore is a city state.

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dd) It is not realistic to expect changes in constitutional provisions.

ee) Problems of implementation may arise from the law and modes of operation.

ff) The Constitution envisages fair compensation, but the facts on the ground are different. Efforts are underway to rectify the concerns in the level of compensation.

gg) There should be public hearing before directives are issued.

hh) There is the need on the part of the public to exercise its rights.

ii) There are efforts to address some of the problems such as the issue of third party buyers in good faith needs attention when title certificates are revoked.

*

jj) The methodology will benefit from the express statement about the theoretical framework used in the research

kk) Non-financial incentives should also be taken into account in relation to judges. Independence while doing their function is one of these incentives.

*

ll) Efforts are underway to formulate intellectual property policy.

mm) There is a widespread tendency of failing to consider products of the mind as property.

nn) Banks, for example, do not consider intellectual property as collateral.

*

oo) The IP regime deserves utmost attention particularly in light of Ethiopia's upcoming WTO accession.

pp) The major eight international conventions on IP need utmost attention.

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qq) Ethiopia's IP regime is very generous with regard to both product and process.

- rr) Ethiopia is on the consuming and not on the supply side of IP.
- ss) The current developed countries had at times focused on transferring technology through copying rather than strong IP protection.

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- tt) The issue of IP protection is very relevant, and effective implementation should be in place.
- uu) The problem does not only relate to protection, but the issue of adequacy of the laws as well.
- vv) For example there is the problem of brand protection, owing to imitation. Eg. Vimto.

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After the feedback, it was stated that the session is meant to gather comments which can be considered before the submission of the final research report. Some clarification was given on certain issues, and the researchers expressed their gratitude for the comments provided. They also promised that the comments will be incorporated in the final report as much as possible. Where there are diverse comments such as the case of amendments to the Constitution it was stated that primary attention can be given to what can be feasible without the potential for polarized positions during policy dialogue.

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The chairperson, Woizero Mulu Solomon (President, Ethiopian Chamber of Commerce and Sectoral Associations), stated her reflections with regard to the views forwarded, expressed her appreciation for the presentation, feedback and the discussion. The workshop ended at 5:30 PM.