The Power of Land Expropriation in the Federation of Ethiopia: The Approach, Manner, Source and Implications

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Abstract

Although the power of land expropriation is arguably an inherent power (I claim it is a constitutional power) of a state in any jurisdiction, the approach, the manner and the source of it varies among nations and is also a point of academic and policy debate. Particularly, in federations, as is the case in Ethiopia, apart from its implication for land tenure security of landholders, it can be also a source of power conflict/competition between the central and state governments. However, the implication of the approach, the manner, and the source of land expropriation power adopted in the Ethiopian land law regime over the land tenure security and central-state governments power conflict/competition have not been examined critically. Therefore, this study aims at setting the agenda for academic discourse and legal reform about the approach, the manner and the source of defining the power of land expropriation with the view to enhancing land tenure security and avoiding the potential power conflict/competition between the central and regional governments in the country.

Keywords: Power of land expropriation, Land tenure security, Power conflict/competition, Federation

Introduction

In developing countries like Ethiopia which incorporate the realization of sustainable development as a policy and legal agenda,[1] the government's need of land is critical to make available public facilities and infrastructure that ensure safety and security, health and welfare, social and economic enhancement, and the protection and restoration of the natural environment.

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[1] Constitution of Federal Democratic Republic of Ethiopia, *Proclamation No.1/1995*, Fed. Neg. Gaz. 1st year No.1, (hereinafter FDRE Constitution), Art.43 and 89.

To discharge this duty, the required land may not be in the hands of the government or on the market. Thus, in order to obtain land where and when it is needed, the government resorts to the power of expropriation. The power of expropriation is the right of a nation or state, or a body to whom the power has been lawfully delegated, to condemn private property for public use and to appropriate the ownership and possession of that property without the owner's or occupant's consent upon paying the owner due compensation to be ascertained according to the law.[2] It is arguably the inherent right or power of the state which can be exercised by the state itself or its delegates.

The land expropriation aspect of land tenure system is marred by two contradictions or competing interests. On the one hand, it is aimed at the betterment of the society at large through enhancing social and economic development and protecting the natural environment.[3] On the other hand, for those individuals or groups whose land is expropriated, it means displacement of families from their homes, peasants from their fields, pastoralists from their grazing lands and businesses from their neighbourhoods.[4] In addition, peculiar to federations, it can be a potential source of power conflict/competition between the central and federating state governments, and the development of double-standard[5] unless quick and clear apportionment of the power of land expropriation is done. Consequently, the tensions inherent in land expropriation require a balance

[2] See Henry Campbell Black, 1999, *Black's Law Dictionary*, 7th ed. West Publishing Co., St. Paul, MN *s.v.* 'expropriation' and 'eminent domain', and C. Francis, and et al, *Eminent Domain,* Corpus Juris Secundum, 29 A CJS EMINENT DOMAIN NO.2 as cited in Daniel Woldegebriel, *Compensation During Expropriation*, in Muradu Abdo (ed.), 2009, Land Law and Policy in Ethiopia since 1991: Continuities and Changes, Ethiopian Business Law Series Vol. III, AAU printing press, Addis Ababa, (hereinafter Daniel Woldegebriel, Compensation During Expropriation) p. 194. The definition of the notion of expropriation may slightly vary depending on which its theoretical foundation we base. The three theoretical justifications – reserved rights theory, consent theory and inherent power theory – influence our understanding of the concept. See Daniel W. Ambaye, 2015, *Land Rights and Expropriation in Ethiopia,* Doctoral Thesis, Springer (hereinafter Daniel W. Ambaye, Land Rights and Expropriation in Ethiopia), pp. 100-103; Matthew P. Harrington, 2002. "Public Use" and the Original Understanding of the So-Called "Taking" Clause. Hastings Law Review, Vol.53 (hereinafter Matthew P. Harrington, "Public Use" and the Original Understanding).

[3] Food and Agricultural Organization, 2008, *Compulsory acquisition of land and compensation*, Land Tenure Studies 10, Rome, Italy, (hereinafter FAO, Compulsory acquisition of land and compensation) p 1.

[4] Ibid.

[5] In my context it refers to the adoption of two different standards to treat the same subjects by different organs.

between the public need for land and private or group expectations of security of land tenure and property rights, and also putting a clear distinction and demarcation on the power and role of the central and state governments in relation to land expropriation.

One of the underlying elements and means to maintain the balance among the above competing interests is to clearly identify the state organ authorized to make decisions on land expropriation and avoidance of multiplication of institutions.[6] The clear authorization of the central or regional or both levels of government, the adoption of centralized or decentralized or middle-path approach in assigning the power of expropriation within a particular government level, and the identification of a specific authority within one level of government with the power of making the decision of expropriation have their own implication for land tenure security and the potential power conflict/competition at the different levels of government. Because the absence of clear demarcation about which level of government assumes the power of land expropriation and under what conditions tends to lead to power claim and conflict among the different levels of government. Moreover, the approach adopted in assigning the power within a particular level of government has its own implication for the land tenure security of landholders. Theoretically, it is argued that giving power of land expropriation to local levels with no oversight may result in losing land rights to discretionary bureaucratic behaviour[7] and in abusing and perpetuating tenure insecurity of landholders.[8] The same result may also be expected in the case of multiplication of authorities with the same power.

Therefore, in the Ethiopian federation, the search for an equilibrium between the above competing interests demands critically looking into whether the Ethiopian land law regime has adopted the approach, the manner and the source of land expropriation power that fits into the prevailing theoretical frameworks and the best experiences of other nations explained in Section 1.The author did this not with the view to producing and recommending a

[6] It does not refer to the aspect of implementation of the decision of expropriation.

[7] Klaus Deininger, 2003, *Land Policies for Growth and Poverty Reduction*: A World Bank Policy Research report, the World Bank and Oxford University Press, (hereafter Klaus Deininger, Land Policies) p. 8.

[8] FAO, Compulsory acquisition of land and compensation, supra notes 3, p. 13.

particular model in this regard. Rather, it was to situate the issue at hand within policy and academic framework to debate and propose pragmatic and feasible alternative ways forward.

To do this, the manuscript is composed of four sections apart from the introduction. The first section provides an overview about how the notion of the power of land expropriation is dealt with in the literature and other jurisdictions. Specifically, it highlights the different approaches, manners and sources of state power of land expropriation. This is followed by a section that examines the approach, manner and source of the power in the Ethiopian legal regime. Doing this helps to identify whether the Ethiopian approach to manner and source of defining land expropriation power is prescribed in a way not to open a loophole for perpetuating land tenure security, and power conflict/competition between the central and state governments. In the third section, an attempt is made to discuss where the Ethiopian case fits in all this and its implications for the land tenure security and power conflict/competition between the two levels of government. Finally, conclusions are drawn.

1. General Overview of the Power of Land Expropriation

The power of expropriation also known as 'compulsory acquisition', 'eminent domain', 'compulsory purchase', 'taking', 'condemnation', 'land acquisition and resumption' depending on the legal tradition followed and the nature of land ownership adopted is a common legal realm to all nations.[9] As a forceful deprivation of property right, it is recognized as a limit to any property right even in countries that have adopted individualistic and strongest property rights protection.[10] However, unlike the universal recognition, necessity and presence of the notion in everywhere, it is the most debatable and contentious aspect of land tenure system among academics and policy makers. Basically, the debate centres on the issues of its theoretical foundations and justifications, the requirements to be satisfied to make the taking legitimate, which branch of government – judiciary and executive –to have the power to make the expropriation decision, and about

[9] Id at p. 1; Daniel W. Ambaye, Land Rights and Expropriation in Ethiopia, supra notes 2, p. 95.

[10] Klaus Deininger, Land Policies for Growth and Poverty Reduction, supra notes 7, at p. 28.

the availability of redress in time of grievance in the expropriation proceedings.

The issue of how – approach and manner, and from where – the legal source of the power of expropriation assigned to the state emanates, becomes a point of discontent especially when it is assigned to the administrative/executive organ. Because it is a development agent, the impartiality and independence of the organ is questionable. To minimize abuse of power in such cases different mechanisms may be designed like securing of the consent of the community or giving power to a higher authority or to a local authority with the oversight of the higher authority.[11] Nonetheless, when the power of expropriation is assigned to the judiciary by declaratory judgment, it may not be a point of argument. It is because of the assumption that the judiciary is an independent and impartial institution in its decision making and the power of expropriation may not be exposed to abuse.

In a federal system, the very nature of the government adds additional flavour to the issue at hand. As a result, a dual level of government regulation of the power of land expropriation becomes an aspect of the apportionment of power between the central and state governments.[12] Then, where and how to assign the power of land expropriation needs special treatment in federations. Hence, the subsequent three sub-sections separately address the issue of the source, approach, and manner of power of land expropriation with the aim of developing an ideal general framework that keeps the balance among the competing interests and against which the Ethiopian situation is appraised in Section 2.

[11] FAO, Compulsory acquisition of land and compensation, supra notes 3, p 13; Paul De Wit *et al.*, 2009, *Land Policy Development in an African Context: Lessons Learned from Selected Experiences*, FAO Land Tenure Working Paper 14 (hereafter Paul De Wit et al. Land Policy Development) p 72. The abuse of power furthered when a mechanism is not devised about appeal to an independent organ when the affected party aggrieved with the decision of expropriation.

[12] Ilya Somin, 2011, *Federalism and Property Rights*, U. Chi. Legal F. Vol. 53: 88; Stewart E. Sterk, 2004, *The Federalist Dimension of Regulatory Takings Jurisprudence*, The Yale Law Journal Vol. 114: 203.

1.1. The Legal Source: Constitutional Matter or Statutory or Presumed Power?

In the quest for the legal source of the state power of land expropriation three different perspectives may be identified. It may be regulated under the written constitutional law as a constitutional matter like in most constitutions of nations. This is with the assumption that since it is a matter of establishing and maintaining a system for the allocation (and reallocation) of power over wealth among individuals, group and state, constitutional law should be devoted to governing it.[13] Alternatively, as a limit to the constitutional right to property it is supposed to emanate from the constitutional rules.[14] In contrast, in states like Canada and New Zealand the power of land expropriation is not regarded as a constitutional matter since the constitution of such states do not incorporate the right to property. Here, the power of land expropriation is statutory but not constitutional. In extreme cases we may theoretically think that the power of land expropriation neither be statutory nor constitutional. It may rather be regarded as a presumed power of a state without any constitutional or statutory sanction or recognition. This line of thought was prevalent, for instance, in pre-1968 Canada.

In fact, all the three thoughts about the source of the state power of expropriation are not random views. They are the outcomes of different theoretical/conceptual justifications which influence state power of expropriation. Mathew Harrington's formulation of three theories of the origin of the power of expropriation – the reserved right, inherent power and consent theories – clearly resulted in the development of the three views about the source of the power of expropriation. The thought of the power of expropriation that emanates from constitutional rules is influenced by the inherent power theory though in reverse.[15] According to this theory the

[13] John Henry Merryman, *Ownership and Estate (Variations on a Theme by Lawson*), 48 Tul. L. Rev. 917-945, 1973-1974, p. 916.

[14] Gregory S. Alexander, 2009, Property Rights in Vikram David Amar and Mark V. Tushnet (ed.) *Global Perspectives on Constitutional Law*, Oxford University Press, p. 59.

[15] I said it inverted way because this theory also does not expressly recognize that the power of expropriation of state emanates from the constitution. It rather considers constitutional regulation as a way to put limitation on the already existing power of state. This line of thought also does not fit into the current constitutional democratic state conception. Because in constitutional democracy the power of the state emanates from a constitutional rule by which the society empowers the state as an agent to maintain the peace, order and welfare of the people.

power of land expropriation is "regarded as a power which inheres in the right of state to govern its polis – which is to say, inherent in its 'police power'."[16] Governments, subject to limitations imposed on their respective constitutions and without depending on the pre-existing property rights, have the power to expropriate land. Here, the power of the state to expropriate land is not defined in the constitution as power granting but as limit to the power.

The assumption of state power of expropriation as statutory is, on the other hand, derived from the consent theory of the origin of the power of expropriation. According to the consent theory the state has assumed/secured the power of expropriation of property only upon the consent of the owner (society). The provision of the consent can be exercised through its representatives – parliament while legislating laws.[17] Therefore, the state has got the power of expropriation only because the legislation enacted by the parliament entitled it to do so.

Finally, the presumed power thought is derived from the reserved right theory about the origin of state power of land expropriation. In this theory it is assumed that initially the state has an original and absolute ownership of all property held by its inhabitants, and citizens' possession and enjoyment of the same is derived from grant by the state with implied reservation of the right to take it back.[18] The tacit reservation, in this juncture and context refers to the power of expropriation. Hence, as per this theory the state power of expropriation does not depend upon the constitutional empowerment or statutory declaration. Even in the absence of both, the state still has the power to expropriate land as it is the presumed power of state.

However, all the three theories as they stand entail the government to have strong power position and exercise unlimited power of expropriation. Particularly, the reserved right theory and inherent power theory make property rights insecure by making expropriation as a right/rule and the right

[16] Comments 1948–1949. *The Public Use Limitation on Eminent Domain: An Advance Requiem*. Yale L. J., Vol. 58: 599–614; Matthew P. Harrington, "Public Use" and the Original Understanding, supra notes 2, p. 1251.

[17] Matthew P. Harrington, "Public Use" and the Original Understanding, supra notes 2, pp. 1257ff.

[18] Id pp. 1249ff.

to property as an exception.[19] Moreover, in the era of constitutional democracy and human rights, the consideration of constitutional law as an instrument to prescribe limitation on state power of expropriation only as inherent power theory, does not go hand in hand with the current thoughts on constitutional law in general and the function of constitutional recognition of property rights in particular. As it is noted by Edwin Baker, the constitutional recognition of property rights aimed at guaranteeing the protective function, *inter alia*, to the right-holder.[20] Moreover, it is also with the view to protecting property rights from state encroachment through enactment of law.[21] Consequently, the defects of the theories of origin of the power of expropriation and the Bakerian thought of constitutional property rights' functions warrant the constitutional definition of state power of expropriation necessary.

1.2. Manner of Designation

In the above sub-section, I have noted and argued that the state power of land expropriation should derive from the constitution and it has to be treated as a constitutional matter. It is with the view to making the source of state power to be in line with the concept of constitutional democracy and to limit state encroachment on individuals' or communities' property rights in the making of law. The question that still remains, however, is how this power is supposed to be prescribed in the constitution, whether there is uniformity among the constitution of nations in this regard, and the factors which influence and force a given constitutional maker to adopt a particular perspective.

Apart from non-inclusion, the critical and comparative analysis of constitutions of nations reveals that there are four different ways of constitutional style in prescribing state power of expropriation. The difference among the constitutions in this regard lies in the amount of

[19] Id pp. 1252ff.

[20] Edwin Baker, 1986, *Property and its Relation to Constitutionally Protected Liberty*, Pal. L. Rev., vol.134, No.4, 741 (hereafter Edwin Baker Property). He argues in contrast to inherent power theory that constitutional recognition of property rights is made not with the view to put restriction on state power mainly. He, rather, perceives it as provision of constitutional guarantee to the property rights of individuals and defining of the exceptional scenarios for state encroachment.

[21] Id p. 766.

regulating and providing details on power of expropriation. Accordingly, in the first method, which I call the *inexactalist modality*, the state power of expropriation is provided in the constitution simply as the only limit to property rights. The constitutions which have adopted the *inexactalist modality* assert that the power to compulsorily acquire private property for greater societal interest is the single exception to fully protected private property rights. In this modality no further information and rules about the conditions and circumstances are provided in the constitution. It leaves determination of the details to the legislature or/and constitutional interpreter through constitutional deferral. The revised constitution of Rwanda best illustrates this modality. It states:

> Private property, whether individual or collective, shall be inviolable. The right to property shall not be encroached upon except in public interest and in accordance with the provisions of the law.[22]

The second modality is *requirementalist modality* as I call it. In *requirementalist modality,* besides recognising expropriation of property as a single exception to property rights, the constitutions mention general requirements to be undertaken in compulsory acquisition. The constitution enunciates the conditions and standards required to be observed and satisfied in expropriating such as due process of law, public use and just compensation. For instance, the Fifth Amendment of the Constitution of the United States of America has stipulated the state power of expropriation in the *requirementalist modality*. It states:

> No person [...] shall be deprived of [...] property, without due process of law; nor shall private property be taken for public use without just compensation.[23]

However, the problem with this modality, particularly as it stands in the USA Constitution, is that there is neither a clear definition of the requirements nor an indication about who should provide details of them – the legislature or court interpretation.

[22] The Constitution of the Republic of Rwanda of 2003, Revised In 2015, Chapter IV, Art.34 and Art.35.

[23] United States of American Constitution Amendment V.

The *limitationalist modality*, on the other hand, goes further to define the purposes for which the state can legitimately exercise its power of expropriation. Apart from referring to expropriation as the only restriction to property rights and listing down the requirements of due process of law, public use, and just compensation, the constitutions that adopted the *limitationalist modality* provide the specific projects for which state can use its power of expropriation to deprive property rights. The listing of the purposes in the constitutions has aimed to restrict further the state power of expropriation. The state does not have the power to expropriate property rights for purposes other than the ones listed in the constitutions or differing in nature. A good illustration for this approach is the constitution of Ghana. Ghana's constitution includes provisions detailing exactly what kinds of projects allow the government to use its power of compulsory acquisition and specifies that displaced inhabitants should be resettled on suitable alternative land.[24] In an illustrative manner it lists out the purposes as follows:

> the taking of possession or acquisition if necessary in the interest of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property in such a manner as to promote the public benefit.[25]

Finally, the state power of expropriation is also defined in some state constitutions in the *detailist modality*. In the *detailist modality* the constitution goes further to define each and every requirement needed to be satisfied in decision of expropriation. This modality leaves silly and slight things to the legislature and courts interpretation. The constitution itself provides all the details on the requirements of public use, due process of law, and just compensation. Chile's constitution, for instance, identifies the purposes for which land may be compulsorily acquired (public use), the right of property holders to contest the action in court (due process of law), a framework for the calculation of compensation, the mechanisms by which

[24] The Constitution of the Republic of Ghana of 1992, Chapter Five, Article 20.

[25] Ibid.

the state must pay people who are deprived of their property, and the timing and sequence of possession (just compensation).[26]

It is quite interesting to discuss why the above-mentioned wide-ranging differences in the regulation of the state power of expropriation are manifested among the constitutions of nations. As Rosalind Dixon explains it is the result of the constitutional makers' perception about the constitutional interpreter. The adoption of codified/detailed or framework-style approach in drafting of constitutional provisions depends upon the trust or distrust the makers have in the constitutional interpreter.[27] Moreover, she notes that the approach adopted can be determined by the existence or nonexistence of constitutional deferral through 'by law clause' or adoption of abstract or vague concepts in the constitution.[28] In her view, constitutional drafters adopt a detailed or codified approach, with less or no by law clause or abstract concepts, in constitutional norms drafting because they to some degree distrust the constitutional interpreters as they may not share the aims and understandings of constitutional drafters. In yet another approach, the constitutional drafters resort to framework-style constitutional, more bylaw clauses and abstract concepts, norm drafting when they highly trust and have faith in the constitutional interpreters as partners in the process of a constitutional design.[29]

Nevertheless, her binary divide – trust-distrust dichotomy – does not exactly tell us why the above four modalities of designation of state power of expropriation developed because her view warrants only the development of two styles of defining it. Consequently, unless we take the trust-distrust metaphor in the form of degrees, there are other additional factors that may influence the adoption of a particular modality. Moreover, the factors are also unique and peculiar to a given nation's constitutional making and may not be generalized to all constitutions. It requires separate research on the issue, and I will not delve into it in detail as it is not the concern of this article.

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[26] See Chile's Constitution of 1980 with Amendments through 2012, Chapter III, Art.19(24).

[27] Rosalind Dixon, 2011, *Constitutional Amendment Rules: A Comparative Perspective* in Rosalind Dixon & Tom Ginsburg (eds.) *Comparative Constitutional Law*, Edward Elgar.

[28] Rosalind Dixon, 2015, *Constitutional Drafting and Distrust*, I•CON 13: 819–846 p. 820.

[29] Ibid.

From land tenure security perspective, the modality that best serves is the one that governs, as far as possible, every element of the state power of land expropriation. Therefore, it minimizes, if not avoids, the possibility of encroachment of property rights on the making of laws or court interpretations. However, adoption of such modalities, on the other hand, contradicts another policy issue, that is the flexibility of land policy.[30] The amendment of a constitution is assumed to be not easy as there are stringent requirements attached to it unlike other policy instruments and decisions. However, land policy is required to be flexible and go hand in hand with the changes in the socio-economic and political conditions of a given country. Then, detailed and exhaustive regulations of the issue of state power of expropriation affect the timely change of a policy, which in effect make a land policy incompatible with socio-economic and political changes.[31] Therefore, an *optimal modality* that prescribes the general requirements and conditions for expropriation and leaves details to the legislature and court interpretation ensures both policy objectives – to secure land tenure and have flexible land policy.

1.3. Approaches to Designation

As seen in the above section, all constitutions mention the existence of the state power of expropriation. The constitutions as such do not specify a state agent or agents authorized to make the decision of expropriation. In a unitary form of state this might not be necessary. It can be done by the legislature in a subordinate legislation. A problem in the unitary state occurs if the approach adopted in designating the state authority with the power of expropriation exposes property right holders to abuse of power, variations of standard of treatments, and all in all threatens their land tenure security.

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[30] Klaus Deininger, Land Policies, supra notes 7, p. 51.

[31] With regard to the Ethiopian land policy, there is a claim that the constitutional regulation has effectively eliminated the possibility of flexible application of policy. (See for instance, Samuel Gebreselassie, 2006, *Land, Land Policy and Smallholder Agriculture in Ethiopia: Options and Scenarios*, Paper prepared for the Future Agricultures Consortium meeting at the Institute of Development Studies 20-22 March 2006, p 4). However, the claim is not supported with the critical analysis of the constitutional stipulations. The conclusion reached was just by taking the constitutional incorporation of land issue. Unless we analyse the specific land policy issue incorporated in the constitution and what is left to the subordinate legislation and policy decision, it is not a valid argument to regard the constitutional incorporation has made the land policy inflexible.

In federations like Ethiopia the problem goes beyond this and might have implications on constitutional division of power between the federation and the constituent units. As there is at least dual self-ruling level of government in federations, the assignment of state power of expropriation becomes an issue of division of power. One of the fundamental constitutional law contents unique to federations is the apportionment of power between the central and state governments.[32] Accordingly, it becomes reasonable to expect constitutions of federations to assign the power of expropriation either to central or state governments or to both. However, as is the case in Ethiopia, discussed in a later section, an express constitutional stipulation may not be provided for it. Through the canon of interpretations of the constitution one is able to identify which level of government is authorized with the power of expropriation. In the next section, I will discuss this issue in analysing the constitution of Ethiopia.

With respect to assigning the power to specific state authority, nations may adopt three different approaches. The approaches are designed only with the consideration and assumption of unitary state including the *centralization approach, decentralization/localization approach* and *a combined approach.*[33] Apart from the nature of the approach adopted, a clear identification of the authorized government bodies enhances land tenure security as it reduces opportunities for abuse of power.[34] In *the centralization approach*, as the name indicates, the power is highly centralized and assigned only to national level government. Here, any organ of the state submits the demands – initiation of expropriation – to an organ at a national level. Accordingly, it is only the national level authority that can decide on whether a given property right can or should be expropriated. This approach is adopted in the South African legal system where the power of expropriation of land is assigned to a ministerial level of the national

[32] See Ronald L Watts, 1998, *Federalism, Federal Political Systems and Federations*, Annual Review of Political Science Vol. 1: 117, p 121; William H. Riker, 1975, *Federalism* in Fred Greenstein and Nelson Polsby (eds.) *Handbook of Political Sciences,* Wesley Publishing Company, Volume 5, p. 101; Kenneth C. Wheare, 1964, *Federal Government*. Oxford: Oxford University Press, pp. 32-33. In their definition of federalism the issue of distribution of power between the central government and federating states is the basic characteristics that defines federalism from other forms of government.

[33] FAO, Compulsory acquisition of land and compensation, supra notes 3, p. 13.

[34] Ibid.

government.[35] As the Food and Agriculture Organization (FAO) notes the adoption of *centralization approach* enhances uniformity of standards, achievement of a coherent national land policy and the establishment of a body of core expertise.[36] In contrast, it can lead to delays in the acquisition of land and does not guarantee that processes will be implemented fairly.[37]

The decentralization/localization approach, on the other hand, demands the power of expropriation to be devolved to the regional and local level governments, and parastatal organizations. As an anti-thesis of *the centralization approach*, the *decentralization/localization approach* guarantees a timely acquisition of land. However, it opens the door to variation of standards among localities and creates difficulties to achieve national land policy coherently and the inability to establish a body of expertise in each locality.[38] Furthermore, it exposes landholders to abuse of power and threatens their land tenure security as the decisions at the local level can be influenced by elites who have the power to easily manipulate the rhetoric and use this power for their own advantage.

In the *combined approach* both national and local governments are entitled with the power of land expropriation. The local authorities are, however, not at liberty to make the decision of expropriation on their own. Rather, they are subject to the supervision and approval of higher authorities or/and to conducting public hearing and getting consent of the local community.[39] Addressing the defects of the other two approaches and avoiding or reducing opportunities for abuse of power by local governments in making the decision of land expropriation that land tenure security of private landholdings is maintained. Accordingly, it is recommended that *the combined approach* be adopted while designating the power of expropriation.

However, even with the adoption of *the combined approach* the problem of variations in standards, the difficulty to achieve coherent national land policy

[35] Republic of South Africa, Expropriation Bill, published in Government Gazette No. 38418 of 26 January 2015 (hereafter South African Expropriation Bill) Art.3(1)(a) and Art.4(2).

[36] FAO, Compulsory acquisition of land and compensation, supra notes 3, p. 13.

[37] Ibid.

[38] Ibid

[39] Ibid; Paul De Wit et al Land Policy Development, supra notes 11, p. 72.

and the inability to establish a body of expertise might occur. The problem is exacerbated when there are several local authorities and higher approving authorities. There are many different administrative authorities at the local, higher and national levels. If all administrative authorities at each level are entitled to expropriate land, then there is a high probability for the persistence of these problems. With the assumption that these problems might occur, the South Africa constitution, for instance, assigned power of expropriation to a single state authority and made it a non-delegable power.[40]

2. The Case in the Ethiopian Legal Regime

In the entire political history of modern Ethiopia, the state power and control over land rights are often a cause for protest and rebellion against it. The call for reduced/minimal state interference in the land rights of individuals or communities, *inter alia*, has caused the military overthrow of past political regimes – the monarchy and the *Derg* regime.[41] The same question is still on the table against the current regime.[42] However, this article confines itself to examining the contribution of legal reforms taken by the current regime in defining the state power of land expropriation to addressing the deep-rooted and persistent problem in the country's history. It analyses the reform against the ideal system to show where and how the state power of expropriation is defined as established in Section 1 above.

2.1. The Constitutional Base and Manner

Unlike the constitutions of other nations,[43] establishing the constitutional basis for state power of *land expropriation* from the Constitution of the

[40] See South African Expropriation Bill, supra notes 35.

[41] See for instance, Teshale Tibebu, 1995, *The Making of Modern Ethiopia: 1896-1974.* The Red Sea Press; Dessalegn Rahmato, 1993, *Agrarian Change and Agrarian Crisis: State and Peasantry in Post Revolution Ethiopia*, *Journal of the International African Institute, Vol. 63, No. 1:* 36; Gebru Tareke, 1991, *Ethiopia: Power and Protest: Peasant Revolts in the Twentieth Century,.* Cambridge University Press.

[42] Wibke Crewett and Bendikt Korf, 2008, *Ethiopia: Reforming Land Tenure*, Review of African Political Economy,No. 116: 203.

[43] In jurisdictions private ownership of land is prevalent, the constitutional basis about the state power to expropriate land can be deduced from the general rule about the expropriation of private property as land is one there. Whilst, in countries where private ownership of land is outlawed like in Ethiopia, the constitution specifically and expressly refers to land expropriation. The case in China best illustrates such constitutional approach. (See Constitution of the People's Republic of China, adopted in December 1982 Art. 10).

Federal Democratic Republic of Ethiopia (FDRE) is not an easy task. Because of the manner of the provisions of the state power of expropriation, the definition of 'private property', access to land and immunity against eviction are drafted, in conjunction with the prohibition of private ownership of land, we cannot find an express stipulation in the constitution about the state power of land expropriation.

Article 40(8) of the Constitution of FDRE expressly authorizes the government to expropriate 'private property'. In Sub-Article 2 of the same article 'private property' is defined in terms of the Lockean proviso of Labour Theory justifying the original acquisition of property rights. It defines 'private property':

> … *any tangible or intangible product* which has value and is *produced by the labour, creativity, enterprise or capital* of an individual citizen, associations which enjoy juridical personality under the law, or in appropriate circumstances, by communities specifically empowered by law to own property in common.[44]

From the perspective of state power of expropriation, the two elements in the definition get our attention and play a key role in delineating the scope of the power. The first one is the broader understanding of private property as any tangible or intangible product. As per this conception the state power of expropriation is not limited to tangible products as is the case in most situations. In Ethiopia, it can apply to both tangible and intangible products. In contrast, the phrase *produced by the labour, creativity, enterprise or capital* in the definition, on the other hand, apparently narrows the concept of 'private property' which in effect arguably confines the state to exercising its power of expropriation only on the property rights that are produced in this way. Because as the means of producing private property are exhaustively listed, property rights created through other ways are not regarded as 'private property' for *the purpose of Article 40 of the FDRE Constitution*.

Given that any Ethiopian can have ownership rights only over 'private property',[45] and the ownership of land is exclusively vested in the state and

[44] FDRE Constitution, supra notes 1, Art. 40(2).

[45] Id Art. 40(1).

peoples of Ethiopia,[46] it becomes absurd to consider the provisions that deal with state power of expropriation of 'private property' as applied to *land expropriation*. It is because the cumulative reading of Article 40(1-3) and (8) creates an impression that the state power of expropriation applies only to ownership property rights of individuals or communities. Accordingly, it may be argued that in order to deprive property rights over land, the state may not be required to go through and observe the requirements of expropriation. At the other extreme a counter-argument that claims that the Ethiopian state does not have a constitutional power to expropriate land rights of individuals and communities may also be forwarded.

These two extreme positions are the result of defects in the drafting of the provisions in Article 40 and the exclusive dependence on the same article to base and substantiate one's argument. Moreover, both thoughts have their own drawbacks. The first thought, for instance, exposes the landholders to arbitrary eviction and perpetuation of land tenure insecurity since the state is not required to follow and satisfy the requirements of expropriation. The second thought, on the other hand, undermines the social and economic wellbeing of the people by limiting the ability of the state to get required land for ensuring sustainable development and protection of environment.

Therefore, a search for a constitutional base for the state power of land expropriation requires one to adopt a contextual interpretation of the provisions in the same article and to consult other articles of the constitution itself.[47] First, common to all landholdings – urban and rural land – is being based on the *argumentum a fortiori*. That is if the constitution entitles the state with the power to expropriate 'private property' to which the owners have a better and complete property rights, the state will have the power to expropriate land to which the holders have a lesser and incomplete property rights.[48] Moreover, understanding the context of the constitution, particularly the section dealing with the national policy objective, one can clearly deduce that the constitutional makers have presupposed the state power of land

[46] Id Art. 40(3).

[47] For details see Brightman Gebremichael, 2016, *Public Purpose as a Justification for Expropriation of Rural Land Rights in Ethiopia*. Journal of African Law, Vol. 60:190 (hereafter Brightman Gebremichael, Public Purpose) pp. 201-203.

[48] Id p. 203.

expropriation. The economic and social policy objectives impose a duty on the state to promote and protect the health, welfare and the living standards of the Ethiopian people through ensuring access to public health and education, clean water, food, housing and social security.[49] The realization of these developmental goals requires acquisition of land for the development of infrastructure. It can be assumed that the makers of the constitution have presumed the state power of land expropriation since acquisition of land is the initial step to fulfil these policy objectives.[50]

Furthermore, based on the constitutional provision that defines property rights over immovables and permanent improvements made on land, it is still possible to establish the constitutional base of the state power of land expropriation. Particularly, when one critically reads the Amharic version of Article 40(7) of the FDRE Constitution it provides the possibility of termination (*sikuaret*, the English version says "expires," which limits the grounds of termination to lapse of duration) of land rights in general.[51] One possible and main reason for terminating land rights is the state power of expropriation.

In addition to the above common arguments, special constitutional provisions can be cited in support of the constitutional base of the state power of land expropriation taking the nature of the landholder and manner of accessing land into account. This line of argument works for expropriation of livelihood land and residential land, on the one hand, and investment land and again residential land, on the other hand.[52] The residential land in urban centres can be seen in both categories. With respect to livelihood land, as is the case with peasants and pastoralists who acquire land for free and who are protected against eviction,[53] we can deduce that the constitutional base of the state power comes from a different constitutional

[49] FDRE Constitution, supra notes 1, Art. 89(2) and 90.

[50] Brightman Gebremichael, Public Purpose, supra notes 47, p. 202.

[51] FDRE Constitution, supra notes 1, Art. 40(7).

[52] Viewing land expropriation from the perspective of such categorization is suggested by some scholars. A good example is Azuela and Herrera's, and Muradu's prediction. (see Antonio Azuela and Carols Herrera, 2007, *Taking land around the world: International trends in the expropriation for urban and infrastructure projects*, Lincoln Institute of Land Policy; Muradu Abdo Srur, 2015, State *Policy and Law in Relation to Land Alienation in Ethiopia*, (unpublished PhD Thesis), University of Warwick, School of Law, p. 153).

[53] FDRE Constitution, supra notes 1, Art. 40(4 and 5).

stipulation enshrined in Article 44(2) of the FDRE Constitution. The sub-article states:

> [a]ll persons who have been *displaced or whose livelihoods* have been adversely affected as a result of *State programmes* have the right to commensurate monetary or alternative means of *compensation*, including *relocation* with adequate State assistance.[54]

The provision talks about the rights of persons whose livelihood, like land rights of peasants and pastoralists, is affected by the state programmes. However, it tacitly empowers the state to displace or adversely affect the livelihoods of persons legitimately. One way is the expropriation of land. This constitutional provision can also be adopted and applied to establish the state power of expropriation of residential land in urban centres as well, because the phrase "…*who have been displaced*…" is accommodative enough to refer to them.

With respect to investment land and also urban residential land acquired under lease arrangement, the constitutional base of the state power of expropriation can be established by way of *assimilation*. Assimilation considers persons' property rights to land as an intangible private property in the context of the constitution because the nature of their land right and the way they acquire land can satisfy the two requirements of establishing 'private property' seen above. Here I am not claiming that they have an ownership right to land, as it is constitutionally outlawed.[55] Rather, they do have an ownership right over their property rights to land. Besides, they acquire their property rights to land on the basis of payment arrangements.[56] Then, their property rights to land are created by their capital, which is recognised as one of the alternative grounds to establish 'private property' in the constitution. Therefore, I argue that the land rights of investors and urban land lease holders do have an ownership right over their property rights to land, which is intangible, and as it is the product of their capital, we can regard it as 'private property'. The assimilation then leads to the application

[54] Id Art. 44(2).

[55] Id Art. 40(3).

[56] Id Art. 40(6); Federal Democratic Republic of Ethiopia, *Urban Lands Lease Proclamation No.721/2011* Fed. Neg. Gaz. Year 18, No.4 (hereafter Urban Land Proc. No. 721/2011).

of the constitutional state power to expropriate 'private property' and to give land rights to investors and urban residents.

These special provisions are not only aimed at the establishment of the constitutional base of the state power of land expropriation. They have also implications for the need to adopt different standards and differential treatment in the course of expropriation. Specially, with respect to expropriation of livelihood land, that of peasants and pastoralists, the constitutional recognition of the right to immunity against eviction and displacement, which is not given to other landholders, is an indication to provide them with a better protection than other landholders. The special treatment and standards may take the form of narrower conception of public use and a unique and better compensation, among others. Whether such special treatments are extended to peasants and pastoralists in subordinate legislation requires a further study.

All in all, from the above analysis it can be concluded that the constitutional base of the state power of land expropriation in Ethiopia is established through canon of interpretation. It is with the anticipation of two other counter-arguments and line of thoughts discussed above. The manner of designation also resembles the *requirementalist modality*. It simply states the requirements of expropriation – public purpose/state programmes and commensurate compensation – without making any indication about who should provide the details. Furthermore, the constitution has not also incorporated the other requirement of expropriation – due process of law. This in effect may lead the state to perpetuate land tenure insecurity by taking legislative measures which limit the landholders' ability to enforce land rights.

2.2. Ethiopian Approach to Designating the Land Expropriation Power

As noted in Section 1.3, the approach adopted in designating the state power of expropriation to specified authorities in federations like Ethiopia can follow one of two courses that should be given attention. First, the approach must make sure that it does not invite a power conflict/competition between the central and state governments. Second, it should not open a loophole for

abuse of power – threaten land tenure security, variance in the standards, difficulty to achieve coherent national land policy and inability to establish a body of expertise. Thus, the below analysis of the Ethiopian legal regime is made against these backdrops.

2.2.1. FDRE Constitution

Being one aspect of division of power between the federal and state governments in federations, first one must see and examine whether the constitution has provided and assigned the power to expropriate to either or both levels of government. In the FDRE constitution we can find an indication about which level of government has been constitutionally empowered with the power to expropriate land though not explicitly. It is rather inferred from the way the constitution has made a power division concerning land and other natural resources.

However, before directly looking at the power division on matters related to land, it would be paramount to synthesize the general approach of apportionment of power adopted in the FDRE Constitution. The FDRE Constitution has identified the levels of government with the power of land expropriation in the country. The FDRE Constitution has adopted *a modified exclusive listing and residual power approach* in apportioning government power between the federal and regional states. It has exhaustively listed out the exclusive power of the federal government and the concurrent power of both.[57] It reserves the residual power to the state governments.[58] The Constitution has also made further stipulations to modify this general approach, and that is why I call it *a modified* one. The modification has basically taken three features. These are the assignment of legislative powers on civil laws to the federal government upon the decision of House of Federations[59], the delegation of the federal government powers to the states (only downward delegation)[60], and designating the undesignated power of taxation by the joint decision of the House of Federations and the House of

[57] FDRE Constitution, supra notes 1, Art. 51 and 98.

[58] Id Art. 52(1).

[59] Id Art. 55(6).

[60] Id Art. 50(9) and 78(2).

Peoples' Representatives.[61] The modifications can be considered as protection to state governments' power from encroachment by the federal government.

Coming to the power of land expropriation, the analysis of the following two provisions of the FDRE Constitution in conjunction with the general approach and modifications about the power division discussed above give us an indication of which level of government is endowed with the power expropriate land. Articles 51(5) and 52(2(d)) of the FDRE Constitution respectively state:

> [the federal government] shall enact laws for the utilization and conservation of land…";and"[States have the power] [t]o administer land… in accordance with Federal laws.[62]

The cumulative reading of these two constitutional provisions indicates that the central government has been entrusted with the power of enacting laws on the *utilization and conservation of land, w*hilst the states are designated to *administer* it in accordance with the federal law. The provisions do not speak directly and expressly about the power of land expropriation in a strict sense. Rather, the essence of the phrases *enactment of law on land utilization and conservation* and *land administration* may indicate where the power exists.

The FDRE constitution does not have a definitional clause, and it has not given a definition, except 'private property', for abstract terms like the two phrases mentioned above. Therefore, we are forced to take literal understanding of the concepts as indicated in the literature. Particularly, since the federal government's power is limited to enactment of laws on land utilization and conservation, searching a meaning for *land administration*s suffices to resolve the issue at hand. Based on the general approach and modifications about division of power adopted in the constitution and discussed above, it is possible to deduce that the federal government does not possess the power of administering land in any way. However, whether the power of land expropriation is a component of land administration or not still requires determining what the notion of land administration refers to.

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[61] Id Art. 99.

[62] Id Art 51(5) and 52(2(d)).

The idea of land administration may not have universally accepted single definition. Since it reflects the socio-cultural context where it operates, its contents may vary from country to country and even within a country from time to time based on the changes in government land policy.[63] To illustrate this fact comparing the definition of the concept given by FAO and the federal rural land law of Ethiopia is enough. FAO defines land administration as:

> the way in which the rules of land tenure are applied and made operational; and it includes an element of enforcement to ensure that people comply with the rules of land tenure. It comprises an extensive range of systems and processes to administer:
>
> 1. land rights: the allocation of rights in land; the delimitation of boundaries of parcels for which the rights are allocated; the transfer from one party to another through sale, lease, loan, gift or inheritance; and the adjudication of doubts and disputes regarding rights and parcel boundaries;
> 2. land use regulation: land use planning and enforcement, and the adjudication of land use conflicts;
> 3. land valuation and taxation: the determination of values of land and buildings; the gathering of tax revenues on land and buildings, and the adjudication of disputes over land valuation and taxation.[64]

Setting aside the legality of doing so, in the federal rural land law of Ethiopia land administration is defined as:

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[63] Mulatu, Abebe, 2009, *Compatibility between Rural Land Tenure and Administration Policies and Implementing Laws in Ethiopia* in Muradu Abdo (ed.), *Land Law and Policy in Ethiopia since 1991: Continuities and Changes*, Ethiopian Business Law Series Vol. III, p. 5.

[64] Food and Agriculture Organization, 2005, *Access to rural land and land administration after violent conflicts*, Land Tenure Studies 8, Rome, pp. 23-24; see also Tony Burns, and Dalrymple, 2006, *Land Administration: Indicators of Success, Future Challenges*, Land Equity International Kate Pty Ltd, October 2006, pp.13-14, that has indicated that land administration system consists of the following major things:

a) the management of public land;
b) the recording and registration of private rights in land;
c) the recording, registration and publicizing of the grants or transfers of those rights in land through, for example, sale, gift, encumbrance, subdivision, consolidation, etc.;
d) the management of the fiscal aspects related to rights in land, including land tax, historical sales data, valuation for a range of purposes including the assessment of fees and taxes, and compensation for State acquisition of private rights in land, etc.; and
e) the control of the use of land, including land use zoning and support for the development application/approval process.

> 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 landholder are enforced, and information on farm plots and grazing land [holders] are gathered, analysed and supplied to users.[65]

The comparison of the above two concepts of land administration reveals that the definition in the Ethiopian rural land law is narrower than FAO's because it has failed to incorporate the issue of land valuation, taxation and limited implementation of the aspect of land use planning excluding the development of land use planning itself. However, the regional state laws, as is the case in the Amhara state rural land law, the concept of land administration is defined in broader terms than in the federal rural land law incorporating these two aspects as well.[66] Such differences, on the other hand, will lead to federal-state governments power conflict as the federal law seems to limit the regional states' constitutional power and gives some aspect to the federal government.

Again, from both definitions a direct indication about the incorporation of the idea of the power to make land expropriation decision is not mentioned as a component of land administration explicitly. However, since the idea of land use planning is considered as one component of land administration, we can say that the land expropriation decision-making is under the ambit of land administration. Land expropriation is one of the instruments to ensure the implementation of land use planning. The land use planning as a means of selecting and adopting the best land-use option presupposes the change of land-use from a previous user and purpose to a better land-use option.[67] This can happen if the planner, in our case the state government, is empowered to forcefully convert the purpose and transfer to the other in case the initial user fails to negotiate. That forceful taking happens in the exercise of the power of land expropriation.

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[65] Federal Democratic Republic of Ethiopia, *Rural Land Administration and Land Use Proclamation No. 456/2005*, Fed. Neg. Gaz. Year 11, No. 44, (hereafter cited as Rural land Proc. No. 456/2005) Art.2(2).

[66] Amhara National Regional State, *Revised Rural Land Administration and Use Proclamation No. 252/2017* (hereafter Amhara State Rural Land Proc. No. 252/2017) Art. 2(2).

[67] See Gregory K. Wilkinson, 1985, *The Role of Legislation in Land Use Planning for Developing Countries*, FAO, Rome; GIZ, 2012, *Land Use Planning: Concept, Tools and Applications*; *Graciela Metternicht, Land Use Planning, UN Global Land Outlook Working Paper*, September 2017.

Therefore, in the federation of Ethiopia, the power to make the decision of land expropriation is constitutionally assigned to the state governments. This is inferred from two basic arguments. The first one is from the general approach adopted in the constitution about the allotment of power between the federal and state governments. The constitution after making the exhaustive listing of the exclusive federal and concurrent powers of both, it has assigned the residual power to the state governments. In fact, it is also without disregarding the modifications made as seen above. However, the modifications seen above are not related to the issue of executive power or else they are intended to provide state governments with more power. Second, in the absence of contextual definition for the notion of the state governments' power of land administration in the FDRE constitution, the restoration of literal meaning of the concept reveals that the power of land expropriation is an aspect of land administration. Accordingly, the constitution's assignment of the power of land administration to state governments in effect implies that the power of land expropriation belongs to state governments.

The question that still remains is how the power is assigned to specific authorities within the regional states' administrative structure, and whether the subordinate legislation of the federal government is enacted in conformity with the above constitutional rule of the state governments' power of land expropriation. The next sub-section reviews the state land administration laws and the federal land utilization and conservation law to answer these questions.

2.2.2. The Land Laws

The relevant subordinate legislations related with the issue at hand and which can help to answer the aforementioned two questions include:

- The Federal Rural Land Administration and Use Proclamation No. 456/2005;
- The Federal Landholdings Expropriation Proclamation No.455/2005;
- The Federal Urban Lands Lease Holding Proclamation No. 721/2011; and
- The State Rural Land Laws.

For the sake of convenience, let us begin with how the federal laws have dealt with the state power of land expropriation. Examination of the federal laws has revealed two different implications in relation to the observation of the regional states' constitutional power of land administration in general and land expropriation in particular. The differences are the result of urban-rural land dichotomy. Regarding *the power to expropriate urban land,* the urban land law has apparently upheld the constitutional rule. The reading of Article 31(1) in conjunction with Article 2(6) of the Federal Urban Lands Lease Holding Proclamation No. 721/2011 establishes that the expropriation of urban land can be done only by the decision of the appropriate state authority.[68] Furthermore, it also avoids the possibility of multiplications of state authorities with the power to expropriate urban land. This is through requiring the power of expropriation to be carried out only by the specific state authority vested with the power to administer and develop urban land.[69] However, it indicates neither state higher authorities nor local authorities are entrusted with the power in which case reference has to be made to the special law that deals with the issue of land expropriation – the Federal Landholdings Expropriation Proclamation No.455/2005.

With respect to the power of expropriation of rural land, the federal legislation has provided stipulations which go against the constitutional rule. By entrusting the federal government with the power to make decisions about the expropriation of rural land, the federal rural land laws allow the federal government to share the state power. It is inferred from some provisions in the two other federal legislations mentioned above. Particularly, the Federal Landholdings Expropriation Proclamation No. 455/2005 Article 3(1) states:

> *[a] woreda [district] or an urban administration* shall … have the power to expropriate rural or urban landholdings for public purpose … or where such expropriation has *been decided by the appropriate higher regional or federal government organ* for the same purpose.[70]

[68] Urban Land Proc. No. 721/2011, supra notes 56, Art. 2(6) and 31(1).

[69] Ibid.

[70] Federal Democratic Republic of Ethiopia, *Expropriation of Landholding for Public Purposes and Payment of Compensation Proclamation No.455/2005,* Fed. Neg. Gaz. No.43, year 11 (hereafter Proc.No.455/2005) Art. 3(1).

The provision indicates the federal government's encroachment upon the state power of expropriation in two forms. First, it has specified and determined the approach of the power of expropriation to be adopted. By empowering the higher regional organ and the local government (district/urban administration) without the need of an approval from a higher authority, it demands states to adopt the *combined approach*. However, as part of their land administration power, it is up to the regional states to determine the adoption of a particular approach in designation of the power of land expropriation in their administrative structures.

Second, it has entitled the federal government with the power to make the decision of land expropriation. In contradiction to the constitutional principle discussed in the above sub-section the federal land expropriation law has made the federal government share the state power of land expropriation.[71] The Federal Rural Land Administration and Use Proclamation No. 456/2005 under Article 7(3) also reaffirmed the federal government's sharing of the state power of expropriation. The article states:

> [h]older of rural land who is evicted for purpose of public use shall be given compensation …[w]here the rural landholder is evicted by federal government the rate of compensation would be determined based on the federal land administration law. Where the rural land holder is evicted by regional governments, the rate of compensation would be determined based on the rural land administration laws of regions.[72]

My claim that the federal government's sharing of the state power of expropriation is against the constitutional rule does not deny the federal government's power to initiate land expropriation. As the federal government is responsible for projects of national importance or/and cross-regional states and major investments, it should assume the power of

[71] Since this aspect of the provision is different from the one mentioned in the urban land law, its applicability to the urban land expropriation is ambiguous. Even two competing canons of interpretation of law can equally be formulated. Taking the time of enactment of the legislation one may argue that the stipulation in the land expropriation law does not apply to the urban land expropriation since the recent urban land law prevails. Contrary, one may claim that the subject matters of the two legislations are different. The urban land law deals with the general matters of urban land tenure system, whereas, the land expropriation law deals with the special issue of land tenure, i.e. land expropriation. Therefore, on the basis of the special prevails over the general interpretation maxim, the Land expropriation law is special about land expropriation and prevails over the urban land law.

[72] Rural land Proc. No. 456/2005, supra notes 65, Art. 7(3).

initiating land expropriation and submit its demand to the concerned regional state authority. Apart from this, making the decision of land expropriation by its own motion amounts to the federal government's intervention in the regional states' constitutional power.

Moreover, to make thing worse, the specific authority of the federal government to expropriate land (though against the constitution) is not specified. Then, the failure to clearly identify the authorized government bodies will open opportunities for abuse of power.[73] Moreover, it will make all the federal government authorities assume power to make land expropriation decision. For instance, Daniel Woldegebriel, mentioned that at federal level, the Ministry of Agriculture, Ministry of Trade, Investment Agency, Ministry of Construction and Urban Development and Ministry of Mining are the most notable higher organs that give land expropriation decisions.[74] Such multiplication of authorities results in variation of standards, difficulty to achieve national land policy coherently and inability to establish a body of expertise in all the authorities. The South African approach best addresses such problems. In the South African expropriation bill, this power is expressly given to the minister of public works and is not even subjected to delegation.[75] However, the only problem with this approach is that it may slow down the land acquisition process.

The appraisal of the regional states' rural land law, on the other hand, reveals the adoption of three different approaches to the designation of the power of land expropriation in their respective administrative structure. For instance, when one goes through the Amhara State rural land law, it is possible to infer the adoption of the *decentralized approach* because the power to decide land expropriation is totally left to the *woreda* administration.[76] There is neither any indication of expropriation by higher state authority nor its oversight and approval of the decision by a *woreda* administration. This, in effect, opens the door to the demerits of the decentralization approach discussed in Section 1.3 to happen. However, in order to limit the

[73] FAO, Compulsory acquisition of land and compensation, supra notes 3, p.13.

[74] Daniel Weldegebriel, 2013, *Land Rights and Expropriation in Ethiopia*, Doctoral Thesis, Royal Institute of Technology (KTH) Stockholm, p.170.

[75] South African Expropriation Bill, supra notes 35.

[76] Amhara State Rural Land Proc. No. 252/2017, supra notes 66, Art. 26.

opportunity of abuse of power, in an exceptional case, the law required the *woreda* administration to get the consent and approval of the community where the demanded land is located. That is when the proposed project for which the expropriation of land is required is directly related to the development of the community.[77]

The Benishangul Gummuz State rural land law, on the other hand, indicates the possibility of the adoption of the *combined approach*. It states that both the *woreda* administration and the higher authority, the region's Environment Protection, Land Administration and Use Authority (EPLAUA) have the power to expropriate rural land.[78] However, it is not clear whether the decision of the *woreda* administration is subject to the approval and supervision of EPLAUA. What is clear is that the *woreda* administration is required to base its decisions to expropriate rural land on the information provided by EPLAUA. Therefore, the approach adopted in the Benishangul Gummuz State Law still opens the possibility of abuse of power.

Finally, in the other State Rural Land Laws, like in the Tigray State, no reference is made to a particular regional state authority that assumes the power to expropriate rural land. Such situations may force states to follow what has been adopted in the federal law. Thus, as discussed above such states seem to adopt the *combined approach* in which case the higher authority, for instance, Agricultural and Rural Development Bureau (in Oromia State),[79] and Environmental Protection, and Land Administration

[77] Id Art. 26(2). In Benishangul Gummuz State law also the same stipulation is made. (Benishangul Gummuz State Rural Land Proc. No. 85/2010, infra notes 78, Art. 33(2)).In the Southern Nations, Nationalities and Peoples, Afar and Somali State Rural Land Laws the participation of the concerned community is not limited to a certain expropriation decision as the case in Amhara State counter-part. All the expropriation decisions are required to be made with the consultation of the community. Nevertheless, the three State Laws are not clear with respect to the effect of the public participation on the expropriation decision. Whether the state authority is required to get the consent of the majority, as the case in Amhara State in the exceptional scenario, to approve the expropriation decision is not clearly delineated.

[78] Benishangul Gummuz National Regional State, *Rural Land Administration and Use Proclamation No. 85/2010* (hereafter Benishangul Gummuz State Rural Land Proc. No. 85/2010) Art. 2(19) and 33.

[79] Oromia National Regional State, *Proclamation to amend the Proclamation Number 56/2002, 70/2003, 103/2005 of Oromia Rural Land Use and Administration, Proclamation Number 130/2007*, Megelata Oromia, No. 12 Year 15 Art 26.

and Use Agency (in Tigray State),[80] and local governments, the *woreda* administration, are entrusted with the power. As it stands in the federal law then, the oversight and approval of the higher authority of the decision of expropriation made by the *woreda* administration is not required.

In sum, the approach to land expropriation power designation adopted in the land laws of Ethiopia is neither in the observation of the constitutional rule on division of power between the federal and state governments nor in a way that ensure check and balance, uniformity of standards, coherent land policy and ability to form a body of expertise. In violation of the FDRE Constitution the federal government has empowered itself with the power of land expropriation by its legislation. Arguably, the violation occurs in relation to the expropriation of rural land only. About urban land the federal law has reserved the power of expropriation of urban land to the regional states and city administrations. Moreover, some possibilities are provided particularly in the Amhara, Somali and Afar state laws in the form of conducting public hearing to minimize the abuse of power in the decision of land expropriation.

3. Where the Ethiopian Case Fits and its Implications

In the above two sections an attempt is made to analyse and discuss how and where the power of land expropriation is governed and designated to the state authorities and their respective implications for land tenure security (in terms of abuse of power, uniformity of standards, achievement of coherent national land policy, establishment of body of expertise) and federal-state government power conflict/competition in federations. In Section 1 a general analysis of comparative perspective has been undertaken in order to map the different sources, manner and approaches in defining the designation of state power of land expropriation. Then, I have made a proposal that the source of power of land expropriation should be the constitution of a nation and should be defined in the *optimal* modality manner, whereby the requirements of expropriation are incorporated and the power assigned to either or both levels of government in federations in a non-overlapping way, and deferral to further details is made in a clear manner. Furthermore, the adoption of the

[80] Tigray National Regional State, *Revised Tigray National Regional State Rural Land Administration and Use Proclamation No.239/2014*, Tigray Neg. Gaz. year 21 No.1 Art. 2(2).

combined approach, which assigns power to expropriate land to both the national/regional and local governments, should be subject to the approval of a higher authority and/or members of a community, strikes a balance between prompt acquisition of land and land tenure security of landholders. Still, multiplication of authorities with the power to expropriate land in the same administrative structure must be avoided. Moreover, I have argued that the implication of perpetuation of land tenure insecurity may persist even in the adoption of the combined approach as defined here.

Against the analytical frameworks elaborated in Section 1 and summarised above, Section 2 has tried to illustrate in detail how and where the state power of land expropriation is regulated in the federation of Ethiopia. The section at hand, on the other hand, aimed at providing brief explanations and findings of where the Ethiopian case fits into and the implications thereof on the land tenure security and federal-state government power conflict/competition.

To begin with, the source of state power of land expropriation in the FDRE Constitution neither adopted the entire non-regulation of property rights like the case in Canada (which is not advisable) nor explicitly incorporated as the case is in most written constitutions. It rather demands constitutional interpretation to establish its constitutional base opening three equally competing different line of thoughts and arguments. It can be validly and alternatively argued that the state in Ethiopia does not possess constitutional power to expropriate land, or it can do it without the need to go through the process and satisfying the requirement of expropriation; or as is the case in 'private property' it can have the constitutional power to expropriate land in observance and accordance with the requirements and processes of expropriation. It, then, provides the state with the benefit of the doubt and may choose the line of interpretation that favours its interest, which is taking land without following and satisfying the process and requirement of land expropriation. This line of thought, on the other hand, has the implication of perpetuating the land tenure insecurity of landholders.

The origin of the problem goes back to the way the provisions of the constitutional rights to property were drafted. Predominantly, as discussed in Section 2.2.1, the way the notion of expropriation was incorporated and

'private property' was defined in the Constitution, without the consideration of the nature of land ownership adopted, has caused the absurdity and vagueness of the constitution.[81] Nevertheless, the *assimilation approach* proposed for the investment and urban residential land, and the livelihood land conception of the peasants' and pastoralists' landholdings, provides a valid and best line of thought about the constitutional base to establish the state power of land expropriation in observance of the substantive and procedural requirements. That makes the manner of designation of power in the FDRE Constitution similar to the *requirementalists modality* with the defects attached thereto.

With respect to avoiding the possibility of federal-state power conflict/competition over the power of land expropriation (arguably established), the FDRE Constitution as a constitution of federation has made a clear delineation. Assigning the power to enact laws on land utilization and conservation to the federal government, it reserved the prerogative of land administration that consists of the power to expropriate land, among other things, to the regional states.[82] This inference is made from the general approach and modification of the division of power and function between the federal and state governments, and the ordinary connotation of land administration.

Disregarding the spirit of the FDRE Constitution, in its subordinate legislation the federal government intruded into the regional state power by empowering itself with the power to make the decision of land expropriation in relation to rural land in particular.[83] At the worst, it has created the impression that any national level development agents and authorities can assume power. In turn, the multiplication of responsible authorities creates the probability of variation of standards, undermine the achievement of coherent national land policy and establishment of body of expertise in all authorities.[84] Moreover, the federal government has also determined the approach to designation of power to be adopted in the regions. By entrusting the power to regional higher authorities and local administrations without

[81] FDRE Constitution, supra notes 1, Art. 40.

[82] Id Art. 50(9), 51, 52, 55(6), 78(2) and 99.

[83] Rural land Proc. No. 456/2005, supra notes 65, Art. 7(3); Proc.No.455/2005, supra notes 70, Art. 3(1).

[84] FAO, Compulsory acquisition of land and compensation, supra notes 3, p. 13.

approval and supervision of higher authorities, it recognised the *combined approach*.[85] Generally, the multiplication of authorities with the power to expropriate land in the absence of clearly defined, specific and unique situations and coordination among them, conflicting decisions about expropriation of a single land for different purposes may be made by different authorities. In such cases, it creates conflict among the authorities and difficulty to determine the prevailing one.

The approach adopted in the regional state rural land laws is also susceptible to the same problems as most of them have taken the stand of the federal law, that is either by cross-referring to the federal legislation or silencing (or providing the same stipulation in) the regional law about the issue. Leaving aside the approach followed by federal legislation, the Amhara state rural land law, for instance, adopted the decentralized approach totally designating the power to expropriate land to the *woreda* administration. With the exception of the development projects for which land expropriation requires getting the approval of the majority of the community, the approach opens a door to abuse of power *inter alia,* as the approval of the higher authority is not required.[86] In the same fashion but in a broader context, to minimize the possibility of the abuse of power the Southern Nations, Nationalities and Peoples, Afar and Somali States rural land laws have required the decision to expropriate land to be made in consultation with the community.[87] However, what the three regional states laws failed to indicate is what the effect of public hearing is. Whether the expropriating organ is required to get the consent of the community or conduct mere consultation is not clear.

Conclusion

The centrality of immunity against expropriation in the property regime is well recognized which Honore equated it with the right to security in his

[85] Proc.No.455/2005, supra notes 70, Art. 3(1).

[86] Amhara State Rural Land Proc. No. 252/2017, supra notes 66, Art. 26.

[87] See Southern Nations, Nationalities and Peoples Regional State, *Rural Land Administration and Utilization Proclamation, Proclamation No. 110/2007*, Debub Neg. Gaz.No. 10Year13 Art. 13(11); Afar National Regional State, *Rural Land Administration and Use Proclamation No. 49/2009* Art. 19(1); Ethiopian Somali Regional State, *Rural Land Administration and Use Proclamation No. 128/2013*, Dhool Gaz. Art. 18(1), respectively.

seminal work that lists out the bundle of rights.[88] Nevertheless, it has never been an absolute right in any jurisdiction because there may be a public demand for property and land in my cases. If a state, representing the public, required to get land through negotiation, the landholder may not be willing to hand over to the state for various reasons or may demand an inflated price. Hence, the idea of land expropriation prioritizing public interest over the private has emerged. However, care has to be taken not to abuse the property rights of individuals and communities under the guise of the power of expropriation for public interest.

One of the means to minimize, and possibly eliminate, the abuse of power and the threat to land tenure security of landholders is concerned with how and where the state power to expropriate land should be governed and established. Since it is an aspect of state power and a limit to citizen rights, constitutional establishment of it is recognised in most written constitutions of nations. In the recent trend of constitutional democracy, the state assumption of this power as an assumed or statutory power like in Canada creates, as Baker argued, the opportunity for encroachment on property rights through law making.[89]

The comparative analysis of the constitutions of different nations reveals that manner of the constitutional establishment of the state power of expropriation has not been the same. It takes one of the following four modalities depending on the extent of level of constitutional makers' trust on the constitutional interpreter among other things. These are *inextractalist* (refers to expropriation as the sole limit to property rights), *requirmentalist* (provides the requirements of expropriation, like public use, compensation and due process of law clauses), *limitationalist* (which goes further to specify the constituting elements of public use) and *detailist* (that gives every detail of each requirement).

The optimal suggested manner is to adopt the *requirmentalist modality* with a clear deferral about the details to be determined by legislature or/and court interpretation. It is with the view to making it serve both the protection

[88] Anthony M. Honore, 1961, *Ownership*inA.G. Guest (ed.), *OXFORD ESSAYS IN JURISPRUDENCE* 107 as cited in Stephen R. Munzer, 1990, *A Theory of Property*, Cambridge University Press, p. 22.

[89] Edwin Baker Property, supra notes 20, p. 766.

against interference to property rights through enactment of law and achieving of flexible land policy that can be easily changed to be compatible with the socio-economic and political changes in the country since constitutional amendments cannot get through easily for stringent requirements are attached to them.

Specific to federations, apart from the manner, to which level of government the power to expropriate land has been assigned requires constitutional determination. Given that there is at least dual level of government in federations and the main feature of their constitution is making apportionment of power and functions between the central and state governments, it is necessary to indicate to which level of government the power of land expropriation is assigned. Otherwise, it may cause power conflict/competition between the two.

Furthermore, the approach adopted in the assignment of the power to specific government agents/authorities has its own implication for the acquisition of land and land tenure security of the landholder. The adoption of the decentralization approach (assigning power of expropriation to local authorities) or the centralization approach (assigning power of expropriation to a higher and national authority) has their respective merits and demerits. The adoption of a combined approach, by which both the national/higher authority and local authorities entrusted with the power of expropriation, ensures the timely acquisition of land without undermining the land tenure security of landholders. In fact, this would be realized when the decision of local authorities is subjected to the approval and supervision of a higher authority or/and in public hearing. Moreover, attention must also be given not to create the multiplication of authorities to make land expropriation decision in the same situation because multiplication may cause conflicting decisions, variations in standards, incoherence in the national land policy, and inability to establish a body of expertise for all.

The case in Ethiopia is not free from problems related to the assignment of power to expropriate land. It begins from the absurdity in the FDRE Constitution. In Ethiopia the state power of land expropriation is neither expressly recognized nor excluded from the constitution. With the admission of the presence of the other two equally competing counter-arguments, the

state's constitutional power to expropriate land is established through the canon of construction by using the assimilation and livelihood protections approach, among others. The constitution has also assigned the power exclusively to regional states entrusting the federal government with the power to enact laws only on land utilization and conservation.

The manner of FDRE constitution's designation of the power of expropriation of land approximates the *requirementalist modality*. Without mentioning any deferral, it only specifies the requirements for public purpose and compensation. It has not made any references to the other requirements, like due process of law.

Furthermore, through its subordinate legislation the federal government has violated the constitutional rule in two ways. First, encroaching on regional state powers it entrusted itself with the power to make decisions of land expropriation. Second, it has also specified the approach to be adopted in designation of the power – *combined approach*. Furthermore, it has not specified the federal authority that can decide expropriation of land and subjected the local government (*woreda* administration) decision to the approval of a higher authority or/and public hearing. This has caused the multiplication of the federal development agents with the power of land expropriation. Then, it may result in variation in standards, and undermines the achievement of coherent national land policy and the establishment of a body of expertise.

Moreover, failure to subject the decision of local authorities to a higher authority's or/and community's approval opens a door to abuse of power since elites who have the power to easily manipulate the rhetoric use this power for their own advantage, among others. However, an attempt to mitigate the problem has been tried in some state rural land laws subjecting the decision to community approval (some exceptions are Amhara and Benishangul Gummuz State laws) or consultation (in Southern Nation, Nationalities and Peoples, Somali and Afar State laws).