Expropriation of Urban Lands and its Implications for Tenure Security of Old Possessors

Melaku Gezahegn[*]

Abstract

One of the major issues that have come along with the re-enactment of the Ethiopian Urban Land Lease Proclamation Number 721/2011and that have triggered immense fear and worry among the public has been the clear determination of the government to convert all old possessions into a leasehold system. When an inquiry is made into the property right to land that old possessors acquired before and after the introduction of the leasehold system, and the implication of this proclamation is scrutinized in light of tenure security, there are issues that in fact are of great concern for old possessors. The most important issue that is underscored in this article is the dilemma that old possessors confront with regard to expropriation of old possession for 'public purpose'. Accordingly, old possessions could easily be expropriated by land administrative organs under the guise of 'public purpose' which is stated broadly, and old possessors could also be given a substitute plot of land which is far smaller than its former size. They could also be given a substitute plot of land which is lower than its former grade and which is located in the outskirts of urban centers that may have the effects of disrupting social ties and the already established business activities of old possessors. Except for claims for compensation, old possessors are also prohibited from lodging an appeal to regular courts against any decisions of land administrative organs connected with issues of the law and claims for a substitute of a plot of land. The outcome of all these problems is nothing but to exacerbate the situation and to make old possessors live under acute conditions of tenure insecurity until the overall conversion of old possession into leasehold system is completed. This article will try to analyze those legislations dealing with expropriation of old possessors in light of tenure security issues.

Keywords: *Land expropriation, old possessions, leasehold lands, tenure security*

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[*] LL.B (Bahir Dar University), LL.M in Natural Resource and Environmental Law (Bahir Dar University), Lecturer in Law, School of Law, Hawassa University. The author would like to thank the anonymous reviewers for their constructive comments. But, the author is solely responsible for any errors in fact or interpretation.

Introduction

Everywhere in the world, the issue of land holds an immense and significant position in the economic, political and social lives of human beings. This is particularly true as land is fundamental to the life of every society since it is the basic source of food, shelter and income that even goes to the extent of determining the status and the living standard of individuals.

When one looks at the issue of land in the Ethiopian context, land also holds a significant position in the day to day lives of citizens that even goes to the extent of denoting that to be 'landless is to be sub-human.'[1] More specifically, the special attachment of Ethiopians to their land was clearly enunciated under Proclamation No. 31/1975 that declared 'a person's right, honor, status and standard of living is determined by his relation to land.'[2] The reaction witnessed from the society after the issuance of the new Urban Land Lease Proclamation No. 721/2011 could also be taken as a good manifestation as to how land still holds the central position in the lives of Ethiopians.

This, in fact, is understandable as landholders are curious about the security of their tenure and the protection that they have over the land they hold. Land holders tenure security is defined as the degree of reasonable confidence against arbitrary deprivation of the land rights enjoyed or of the economic benefit deriving from them.[3] It includes both the objective elements (clarity, duration, robustness and enforceability of the rights) and subjective elements (land owner's perception of the security of the rights).[4] As is well articulated by Rahmato, the objective elements of tenure security are fulfilled when:

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[1] Paul, Brietzke, Land Reform in Revolutionary Ethiopia, *The Journal of Modern African Studies,* Vol. 14, No. 4, Dec. 1976, p.638

[2] Public Ownership of Rural Lands Proclamation, Proclamation No.31/1975, Negarit Gazetta, (1975), see the preamble. (Herein after Cited as Proc. No. 31/1975).

[3] Gudeta Seifu, Rural Land Tenure Security in the Oromia National Regional State, in Muradu Abdo (ed.), *Ethiopian Business Law Series, Land Law and Policy in Ethiopia Since 1991: Continuities and Changes*, Faculty of law, Addis Ababa University, Addis Ababa, Vol. III, (2009), p. 112. In fact this article only focuses on the analysis of legislations and emphasis will be given to the assessment of objective element of tenure security. And as such, the subjective elements of tenure security which requires an assessment of the subjective feeling of landholders will not be examined.

[4] Ibid, p. 112.

> The duration of the rights (the landholder has a right to the land on a continuous basis for good or for long enough to have an incentive to improve or invest on it), the assurance of the right (the feeling of assurance that the land rights are not overridden by the others) and robustness of the rights (that the landholder has the freedom to use, dispose of or transfer the land free from interference by others including the state). [5]

Moreover, effective legal protection against eviction or arbitrary curtailment of land rights, along with enforceable guarantees and legal/and social remedies against the loss of this rights are also important components that significantly affects tenure security of land holders.[6]

Thus, as expropriation is one essential component that has the effect of curtailing property right of landholders, the manner of its enunciation as well as its implication on landholder should be thoroughly scrutinized. To begin with, expropriation is generally understood to be the right of the state or of those to whom the power has been lawfully delegated to take private property for public use without the owner's consent and with payment of due compensation to be ascertained according to law.[7] Article 40(8) of the Federal Democratic Republic of Ethiopia`s Constitution clearly acknowledges the power of the state to expropriate private property for

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[5] Dessalegn Rahimato, Searching for Tenure Security? *The Land System and New Policy Initiative in Ethiopia*, FSS Discussion Paper No. 12 Forum for Social Studies, Addis Ababa, (2004). P. 35.

[6] United Nations Human Settlements Program (UN-HABITAT), Secure Land Right for All, (2008), P. 7. So as to say that landholders do have secured land right, they should have a land right which is long enough to enable them to invest on the land they hold. The land right should not also be easily overridden by others including the state and there should exist effective legal protection against eviction or arbitrary curtailment of land rights. In cases where these rights are curtailed, land holders should be provided with enforceable guarantees and legal/and social remedies against the loss of this rights.

[7] Daniel Woldegebriel, Compensation during Expropriation, in Muradu Abdo (ed.), Ethiopian Business Law Series, *Land Law and Policy in Ethiopia Since 1991: Continuities and Changes*, Faculty of law, Addis Ababa University, Addis Ababa, Vol. III ,(2009), from page 191-234. In this article a detail accounts of all those basic elements of expropriation are singled out by the writer. Accordingly, first expropriation is a right to be exercised by the state itself or its sub branches such as municipalities or other public companies or private companies legally authorized by the state. Secondly, the state or other organs authorized to take such lands must follow some procedure which warrant that the state must initiate an expropriation procedure before a court or other organs in order to observe due process of law. Thirdly, expropriation of private properties must be taken for public purposes. Fourthly, expropriation differ from the police power of the state in that it involves the loss of the core constituent right of disposal while in the later what the owner loses is some part of his use right over his property. Finally expropriation is a sovereign power of the state to take private land without the consent of the owner.

public purposes by paying commensurate compensation for the value of the property to be taken. Therefore, to implement the basic principles enshrined under the constitution, the country has enacted Expropriation of Land Holdings for Public Purposes and Payment of Compensation Proclamation Number 455/2005 and its implementing Council of Ministers Payment of Compensation Regulation No. 135/2007. These are the basic laws that dictate how private property of individuals is to be expropriated by the state for public purposes.

Even if both the proclamation and the regulation mentioned above do not define what expropriation is, it can be understood from the reading of Article 3 of Proclamation Number 455/2005 that a *woreda* or an urban administration can only expropriate rural or urban landholdings for public purposes upon payment in advance of commensurate compensation for a better development project to be carried out by public entities, private investors, cooperative societies or other organs.

Likewise, with regard to urban land, the Lease Holding Proclamation no 721/2011 also enunciates that a body of a regional or city administration vested with the power to administer and develop urban land has the power where it is in the public interest to clear and take over urban land upon payment of commensurate compensation.[8] Ever since leasehold system has been introduced in Ethiopia in the year 1993, the country's urban land has begun being administered by the leasehold system. Leasehold tenure system, however, is not fully implemented and there still exist urban lands which are acquired and being administered without the lease system. The lease proclamation designates these lands as 'permit holdings' or 'old possessions', which are defined as plots of urban land which are legally acquired before the urban center entered into a leasehold system or a land provided as compensation in kind to persons evicted from old possessions.[9]

This article will thus mainly analyze the tenure security of old possessors during expropriation proceedings of urban lands. This, in fact, is done by

[8] Lease Holdings of Urban Lands Proclamation, Proclamation No. 721/2011, *Federal Negarit, Gazetta.*, (2011), article 26(1) cumulative with Article 2 (Here in after cited as Proc.No.721/2011).

[9] Proc. No.721/2011, Article 2(18). It has to be also noted here that old possession is a synonym for permit holding.

comparing the implication of expropriation proceedings on old possessor's vis-à-vis leaseholders and sometimes its implication on both landholdings. Accordingly, the first section of this paper will try to address the historical account of old possessions and the manner of their treatment under different lease proclamation enacted so far. The second section will try to examine the basic elements of expropriation and its implication on old possessions. As such, issues related with public purpose, substitute plot of land, compensation and access to ordinary court will be thoroughly examined in this part. Finally, the paper will wrap up by providing a concluding remark.

1. Historical account of old possessions and their treatment under the leasehold system

In Ethiopia, before the introduction of leasehold system in 1993, urban land had gone through different tenure systems. It ranges from freehold urban land tenure system that among other things allowed urban dwellers to freely own, sale and transfer their plot of land before the year 1975, to government ownership of urban land and extra houses which came along with the enactment of Proclamation Number 47/1975.

Leasehold tenure system was introduced in Ethiopia through the enactment of the First Urban Lands Lease Holding Proclamation Number 80/1993.The question that followed after the issuance of this proclamation was how this new tenure system would treat those urban dwellers who acquired land before the introduction of the leasehold system. In fact, the approach adopted in this proclamation excluded all urban lands acquired before the introduction of the lease system from the ambit of the proclamation.[10] Permit holders (those who acquired land before the introduction of the lease proclamation), were left to be governed pursuant to the past arrangements that only oblige them to pay annual land rent and house tax.[11]

[10] Urban Lands Lease Holding Proclamation, Proclamation No. 80/1993, *Negarit Gazetta*,(1993), Article 3, (Here in after cited as Proc. No. 80/1993).

[11] Government ownership of Urban Lands and Extra Houses Proclamation, Proclamation no. 47/1975, *Negarit Gazetta*, Article 9 cumulative with Article 11(4), (Herein after cited as Proc. No. 47/1975). In fact, any transfer of dwelling houses in cases other than inheritance; and lands to be allotted for any other purpose than dwelling houses after the issuance of the proclamation were made to be governed by the Land Lease Proclamation No. 80/1993. See Article 3 cumulative with Article 4, 5 and 15 of the Proclamation.

The arrangements adopted under the first lease proclamation were totally changed with the enactment of the Second Re-enacted Urban Lands Lease Proclamation Number 272/2002 that repeal and replace the first lease proclamation. Accordingly, this proclamation was meant to administer both permit holders and lease holders under a single leasehold system. However, the application of the proclamation on permit holders was suspended until the then regional states and city administrations came up with their own specific regulations.[12]

Nevertheless, before the conversion of old possessions into leasehold system was carried out, Proclamation Number 272/2002 itself was repealed and replaced by Urban Land Lease Proclamation Number 721/ 2011. Like its predecessor, the new proclamation also declared leasehold as the only means of acquiring urban lands and states the mandatory conversion of all permit holdings (old possessions) into a leasehold system.[13] The application of this proclamation is also suspended until the Council of Ministers decided the manner of conversion of old possessions into leasehold system based on a detailed study to be submitted to it by the Ministry of Urban Development and Construction.[14] However, till now such a study is not submitted to the Council of Ministers and conversion of all old possessions into leasehold system is not carried out. In fact, such exception will remain intact for only cases of transfer through inheritance and any case of transfer of old possessions to third parties through any other modality other than inheritance could only be carried out through leasehold system.[15]

Such arrangements adopted in the second and third lease proclamations clearly left the fate of old possessors to be under the mercy of the concerned government organs given the mandate to decide on the manner of conversion of old possession into leasehold system. The new amendments also cast their own negative implication on old possessors who had indefinite land rights

[12] The Re-enactment of Lease Holding of Urban Lands Proclamation, Proclamation No. 272/2002, *Federal Negarit Gazetta*, Art. 3, (Here in after cited as Proc. No. 272/2002).

[13] According to Article 2(18) of Proc. no 721/2011, old possessions are plots of urban lands which are legally acquired before the urban center entered in to leasehold system or a land provided as compensation in kind to persons evicted from old possessions. It has to be also noted here that old possession is a synonym for permit holding.

[14] Proc.No.721/2011,Article 5 cumulative with Article 6.

[15] Proc. No. 721/2011, Art. 6(3),

only through payment of annual land rent and house tax under the previous land tenure system.[16] However, as the focus of this article is on the expropriation of old possessions and its implication on tenure security of old possessors, the next part of this paper will give much emphasis on the nature and extent of expropriation and its implication on tenure security of old possessors.

2. Expropriation of old possessions and its implication on tenure security of old possessors

As have been discussed before, expropriation is an inherent power of a state that can be enforced without the need to secure landholders/owners consent. However, there are preconditions that a given state is under obligation to honor. As is stated under the FDRE Constitution, expropriation can be carried out when doing so is in the public interest and with payment of commensurate compensation.[17] In this regard, the implementing proclamation, Expropriation of Landholdings for Public Purposes and Payment of Compensation Proclamation no. 455/2005, also re-affirms that rural or urban landholding could only be expropriated for public purposes and with payment of compensation. The proclamation also states that the reason for the expropriation should be 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.[18]

Likewise, it is also stated under Urban Land Lease Proclamation no. 721/2011 that the appropriate body shall have the power, wherein it is in the public interest, to clear and take over urban land up on payment of

[16] See. Proc. No. 721/2011, Article 16(1) and (2). Any person intending to acquire urban land shall conclude a lease contract which is for definite period of time and which among other things include the lease price. It is thus clear that as any arrangement of conversion of old possessors in to leasehold system could bring about changes in duration of holdings and payment of lease price, it is a matter of huge concern for old possessors.

[17] The Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, Federal Negarit Gazetta, (1995), Article 40(8)

[18] Expropriation of landholdings for public purpose and payment of compensation Proclamation, Proclamation Number 455/2005, (2005), Article, 3 (1) (Herein after cited as Proc. No. 455/2005).

commensurate compensation, in advance, for the properties to be removed from the land.[19]

What one can discern from the FDRE Constitution and the proclamations stated above is that government organs can expropriate private landholding for the purpose of public interest and with payment of commensurate compensation. The expropriation must also be for a better development project to be carried out by public entities, private investors, cooperative societies or other organs.

Moreover, landholders are given the right to get substitute plot of land in cases of expropriation of land and can only appeal to the court on grievances related with the amount of compensation paid.[20] Thus, it is of a paramount importance to specifically deal with issues related with 'public purpose,' substitute plot of land, compensation and the manner of grievance handling mechanisms related to expropriation proceedings of old possessors in light of tenure security.[21]

2.1 What is meant by public purpose and its implication on tenure security of old possessors

2.1.1 What is meant by 'public purpose'?

As has been discussed before, for any government to expropriate private land of individuals, the expropriation must be carried out for public purposes. A proper investigation of legislation of different countries reveals

[19] Proc. No.721/2011, Article, 26(1). Here one can easily note that the expropriation and the lease proclamations employ different terminologies of 'power to expropriate land holding' and 'power to clear urban land' respectively. However, from the reading of the Amharic version what one can see is that both proclamations enunciate "**መሬት የማስለቀቅ ስልጣን**" and "**የከተማ ቦታ የማስለቀቅ ስልጣን**" respectively. It is thus clear from the reading of the Amharic version that both proclamations discuss about the power to appropriate private landholdings of individuals and those government organs entrusted with the power to expropriate land. Hence, the writer might use those terminologies referred above interchangeably but with common connotation of taking of private holdings of individuals for public purposes.

[20] Proc. 721/2011, see Article 26(2) and Article 29 (3).

[21] In the following sub-topic, much emphasis is exerted on the negative implication of expropriation that uniquely affects old possessors than that of leaseholders. Here, even if discussions related with compensation and access to regular courts are of common concerns for both old possessors and lease holders, the writer is of opinion that the very nature and the manner of how 'public purpose' is envisaged in the expropriation legislation make old possessors to be more vulnerable than that of leaseholders. Hence, the writer will insist on the discussion of old possessors in fact with noting the common nature of the problem but with acknowledging the fact that old possessors are more vulnerable and affected by the expropriation proceeding than leaseholders.

the fact that the concept of public purpose is given different names. While in Europe it is known as 'public interest,' in the USA and Ethiopia it is known as 'public use' and 'public purpose' respectively.[22] Although the scope of application of the concept might differ from country to country, all the above terminologies have the same objective – acquisition of privately owned land by public entity.[23] When a reference is made to the definition of public purpose, defining the concept is not an easy task. This is mainly because, in every case, it is a question of public policy, the determination of which is dependent upon the facts and circumstances and on what the legislature seeks to accomplish.[24]

Based on what the legislator seeks to accomplish, public purpose might be stated to be broadly or narrowly construed. The broader view of public purpose gives discretion for governments to widely interpret public purpose and expropriate private property rights of individuals. At the heart of the broader view of public purpose lies the fact that it is not necessary that there be actual physical use by the public or the government. Anything which tends to enhance utilization of resources, increase industrial energy supplies, and promote the productive power of any considerable number of the inhabitants of a section of the state manifestly contributing to the general welfare and the prosperity of the whole community constitutes public use.[25]

On the other hand, the narrower view of public purpose limits government power to expropriate private property rights of individuals to activities that directly benefits the public. Here, public purpose is narrowly construed to be 'use by the public'.[26] At the heart of the narrower view lies the fact that the society should get benefit from the property appropriated as a matter of right

[22] Daniel Woldegebriel Ambaye , Land Rights and Expropriation in Ethiopia, Academic Dissertation for the Degree of Doctor of Philosophy, Royal Institute of Technology (KTH), Sweden, (2013), P. 188

[23] Ibid, p. 189.

[24] Ibid.

[25] Ibid, p 194. The writer adds that public uses are not limited to matters of mere business necessity and ordinary convenience, but may extend to matters of public health, safety, recreation, and enjoyment; besides, it includes the field of public welfare or public necessity or the prosperity of the community. The taking of property for aesthetic purposes may be also considered as taking for public use for different reasons like; public health, safety, utility, morals, general welfare, security, prosperity.

[26] Ibid, p. 193. It has to be noted here that with more public engagement and economic development, especially after the American Revolution, it is said, the "broader view dominated the courts ," and today it has become the most held view in the US Supreme Court.

and not as a matter of favor. If any benefits accrued from expropriation proceedings are solely to the benefit of a single individual, then such proceedings are just for private use and do not qualify as public purpose. This signifies that the transfer must assume some form of benefit accrue to society as a whole or partly.

Whether a state follows the broader or narrower view of public purpose, what matters most in light of tenure security of property rights of individuals is striking a balance between societal and individual interests. It is stated that ‘‘though states interpret ‘public interest’ differently, it generally signifies that the property, once intended for public purpose use, will benefit the community or country in general rather than a particular individual or group.’’[27] Similarly, private property of individuals must not be expropriated for personal use only and that governments should expropriate private properties for clearly identified public purposes.[28]

The meaning of public purpose is ultimately based on the widely accepted understanding that the general interest of the community or a section thereof, overrides the particular interest of the individual.[29] In South Africa, too, the term ‘public purposes’ is usually defined in contrast to ‘private purposes’.[30] As such, expropriating land by the state for the purposes of carrying out its administrative obligations such as building a road, a bridge or a hospital can be considered as projects done for the general interest of the public. On the other hand, an expropriation specifically carried out for the benefit of a private individual or for the benefit of the state’s commercial ventures would be private purpose, and would therefore not be permissible.[31] It is thus against this backdrop that we will try to see how public interest is envisaged under the pertinent expropriation provisions of the country and as to how it is applied with regard to old possessors and leaseholders.

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[27] Legal memorandum, Land Expropriation in Europe, January 2013, p. 2.

[28] Klaus Deininger, Land Policies for Growth and Poverty Reduction, a co-publication of the World Bank and Oxford university press, (2003), p. 173

[29] Brightman Gebremichael, Public Purpose as a Justification for expropriation of Rural Land Right in Ethiopia, *Journal of African Law*, Available on CJO, (2016) , p. 5

[30] Dr. Christina Treeger, Legal analysis of farmland expropriation in Namibia, Konrad Adenauer Stiftung publication, (2004), p.3.

[31] Ibid.

Urban Land Lease Proclamation no. 721/2011 defines 'public interest' 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 to consolidate sustainable socio-economic development.[32]

One can also see that a similar definition of what is meant by 'public purpose' is stated under Proclamation no. 455/2005.[33] It could be inferred from both proclamations mentioned above that public interest is left to be defined by the appropriate body (regional or city administrators vested with the power to administer and develop urban land)[34] in conformity with urban plan (structural plan, local development plan or basic plan of an urban center)[35] that has to directly or indirectly benefit the public in a manner that consolidate sustainable socio-economic development.

In fact, under the previous Proclamation no. 401/2004 which was repealed and replaced by the current Expropriation Proclamation no. 455/2005, those works which could fall under the category of public interest were sorted out. Accordingly, works related with highway, power generating plant, building, airport, dam, railway, fuel depot, water and sewerage, telephone and electrical works and other related works were sorted out to fall under the category of public use.[36] Under this proclamation, public interest is construed narrowly in light of those works that would directly benefit the general public. However, nothing of such kind of works that could fall under public interest is sorted out under the Expropriation Proclamation Number 455/2005. In this regard, the pertinent provision states that;

> A *woreda* or an urban administration shall, upon payment in advance of compensation in accordance with this Proclamation, have the power to expropriate rural or urban landholdings for public purpose where *it believes that* it should be used for *a better development project to be carried out by public entities, private investors, cooperative societies or other organs*, or

[32] Proc. No. 721/2011, Article, 2(7).

[33] See Proc. No. 455/2005, Article 2(5).

[34] Proc. No.721/2011, Article 2(6).

[35] Proc. No. 721/2011, Article 2(8).

[36] Appropriation of Land for Government Works and Payment of Compensation Proclamation, Proclamation Number 401/2004, (2004). Article, 2(2).

> where such expropriation has been decided by *the appropriate higher regional or federal government organ for the same purpose*.[37] (Emphasis added)

Thus, the determination of what sort of activities could justify 'public interest' is left to be broadly construed at the discretion of appropriate organs. What is given priority is a better development project that will be carried out by public entities, private investors, corporate societies or other organs. It is not even clear whether those development projects should directly or indirectly benefit the public.

One can thus hardly trace all those project proponents and those development projects which could justify expropriation of old possessions for public purpose, making it an amorphous term which could include anything that the appropriate body decides to fall under the wider basket of public interest. Such kind of a broader interpretation of 'public purpose' would give land administrative authorities a wider right to expropriate private landholding of individuals solely for the benefit of the state's commercial interest or for a private person. This in its turn would make landholders to live under acute conditions of tenure insecurity by depriving them of security of property rights and assurance against unabated government's encroachment on their property rights to land. The next sub-topic will try to shed light on how such an approach make old possessors live under acute conditions of tenure insecurity.

2.1.1.1 The implications of 'public purpose' on tenure security of old possessors

As it is discussed above, in cases of expropriation of old possessions, public interest is left to be broadly construed by land administration authorities. Nevertheless, a different approach is followed in cases of expropriation of leasehold lands than that of old possessions. For example, lease holders unlike those of old possessors are given a guarantee against the wider application of public interest as a means to take over leasehold lands prior to the expiration of the lease period. Accordingly, *leasehold lands cannot be taken over unless the lessee has breached the contract of lease, and the use*

[37] Proc. No. 455/2005, Art. 3(1).

of land is not compatible with the urban plan or the land is required for a development activity to be undertaken by the government.[38] The same protection is also accorded to leaseholders under the expropriation proclamation that no land lease holding may be expropriated unless the lessee has failed to honor the obligations he assumed under the Lease Proclamation and Regulations or the land is required for development works to be undertaken by the government.[39] Here, if the lessee is unable to use the land for the prescribed purpose within the period of time stated in the contract, it is stated that the leasehold land would be taken from him actually by returning the amount of lease price paid after reasonable deductions are made.[40]

On the other hand, as far as urban land is to be offered for lease holding after assessment is made about its compatibility with the urban plan, it is clear that the lessee is expected to make the use of the land compatible with the urban plan.

Actually, what is worrisome to leaseholders is that their land could be taken for those projects that will be undertaken by the government. On the other hand, landholding of old possessors could be taken for those projects not only to be undertaken by the government but also by public entities, private investors, corporative societies and other organs that are not even specifically enumerated under Proclamation no. 455/2005. It could reasonably be said that old possessors are more vulnerable to expropriation under the guise of 'public interest', which in fact is made to be broadly interpreted by city or regional land administrators. As to the writer, the wider interpretation and lack of clearly identified public purpose make old possessors lack a guarantee that their landholding would not be expropriated for the sake of personal or individual interests. This in fact is against landholders' tenure security which demands clear interpretation of public purpose and which prohibit expropriation of land for private purposes.[41]

[38] Proc. No.721/2011, Article, 26(3).

[39] Proc. No. 455/2005, Art. 3(2).

[40] Proc. No.721/2011, Article, 21(1) and 25(3).

[41] Deininger, supra note 28, p. 179.

This, on the other hand, render old possessors to live under acute conditions of tenure insecurity, which would come into the picture when landholders lack the degree of reasonable confidence against arbitrary deprivation of the land rights enjoyed and when they lack a guarantee to use their land on a continuous basis for good or for long enough to have an incentive to improve or invest on it.[42]

Hence, if at all maintaining tenure security of old possessors is sought, the broad discretionary power of the appropriate organs to determine public purpose should have been limited at least by the requirement of establishing an equitable balance between the social interests on one hand, and that of old possessors on the other hand. As the definition of public purpose lacks clarity, old possessors could hardly know their property rights clearly, which in fact is against the objective tenure security of old possessors. Thus, as old possessions are legally acquired lands as the proclamation itself enunciates,[43] some limitation on the interpretation of public interest should have been provided as their counterpart leaseholders.

2.2 The right to get substitute plot of land and issues related to tenure insecurity of old possessors

Persons displaced due to an action taken by regional and city administrations are given a right to get substitute plot of land.[44] Here, the most important issue with regard to substitute plot of land is related with the size of the land that a landholder is going to be provided with. As is stated under Article 26(2) of Proclamation no. 721/2011, the size of a substitute plot of land to be given to those urban dwellers whose land is taken over due to public interest is left to be determined by regional or the city administrations. In this regard, it is of a paramount importance to ask what the implication of this provision would be on tenure security of old possessors.

At this spot, the writer is of opinion that such discretionary power is given to regional or city administrations so that they could give a substitute plot of land which is disproportionate to the previous holding of old possessors

[42] Gudeta, supra note, 3 p.112 and see also Dessalegn Rahimato, supra note, 5, p.35.

[43] Proc. No. 721/2011, Article 2(18).

[44] Proc. No. 721/2011, Article, 26(2).

when it is compared with those of their counterpart leaseholders.[45] This can easily be inferred from a simple logic that had the legislator intended to provide a plot of land which is equal to the original size of old possessors, it could have been clearly provided in the provision at hand.

In line with this, under the Addis Ababa City Government Land Lease Regulation no. 49/ 2011 and the Model Draft Regulation No-/ 2011, those leaseholders who are to be displaced due to urban renewal programs are guaranteed not to be forced to leave their land before the termination of the lease term unless the lease land is needed for public purpose.[46] Even in such cases, too, they are guaranteed to be given a substitute plot of land which is the same as the size and the remaining lease term. Nevertheless, one can hardly find such similar guarantees with regard to the size of the land that old possessors are going to be given in similar cases of expropriation of urban land.

Hence, while lease holders are going to be given an equal size of a substitute plot of land, old possessors, on the other hand, are never guaranteed the same and the size of land that they are going to be given is left to be determined by the appropriate bodies. Moreover, even if the Model Regulation No-/2011 enunciated a precondition that dictates the substitute plot of land to be given to old possessors should take cognizance of grade, distribution standard, and infrastructural accessibility, the approach it followed in this regard is of no help to avoid tenure insecurity as it is a non-

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[45] *የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ 4ኛው የህዝብ ተወካዮች ምክር ቤት 2ኛ አመት የስራ ዘመን 1ኛ መደበኛ ስብሰባ ቃል ቧቃል ቃለ-ጉባዔ*, September, 30, 2004(E.C), See, p.30 (herein after cited as the minute of the parliament) (Unpublished, available at the library of House of Peoples Representative, Addis Ababa). See the minute of the parliament. During the ratification of Urban Lands Leasehold Proclamation No. 721/2011, Ato Girma Seifu, who at that time was a member of the parliament, had pointed out that 'giving the right to the appropriate body to determine the size of plot of land to those persons displaced due to public interest is not justifiable'. According to him, such discretionary power given to appropriate bodies should be restricted. He further asked that what if for example those whose 500 square meters of land is taken over are given 250 square meter of land? He further pointed out that persons displaced from their holding should be guaranteed to be given equal plot of land and the infrastructural accessibilities of the substitute land that they are to be given should also be taken in to consideration with what they held before and the law should be amended in such a manner.(Translation by the author)

[46] Model Draft Land Lease Regulation No.-/2011, Article, 23(1) and (2) and Addis Ababa City Government Regulation No. 49/2011, Article 22(1) and (2).

binding draft regulation and as the same is not enunciated under the lease proclamation.[47]

For example, regarding determining the size of substitute land, the Addis Ababa City Municipality Urban Renewal Directive no. 3/2002 after stating various rigorous procedures of ascertaining the size of plot of old possessors, it determines the substitute plot of land to be given to legally acquired old possessions. Accordingly, those old possessors whose landholding ranges between 201 and 250 square meters will be given 105 square meters of land, and those legal old possessors whose original holding is between 251 and 300 square meters are going to be given 150 square meters.[48]

On the other hand, while old possessors who hold between 301 and 350 square meters urban land will be given 175 square meters of substitute plot of land, those who hold between 351 and 400 square meters are allowed to be given 200 square meters.[49] Moreover, those old possessors whose landholding ranges from 401 to 450 and from 451 to 500 square meters are going to be given 225 and 250 square meters respectively.[50] Finally, those old possessors whose urban landholding is beyond 500 square meters, will only be given 350 square meters of substitute land.[51]

This actually means that whether an old possessor acquires 1500 square meters of land through legally spending much sum of money or not, actually what he can get as a substitute plot of land will definitely be only 350 square meters of land in fact without being paid nothing for the loss of the rest 1150 square meters of land.

This in its turn will definitely exacerbate tenure insecurity of old possessors who lack a sufficient guarantee for the continuous use of their holding. In this regard, unlike leaseholders who are guaranteed to be given an equal plot

[47] Model Draft Lease Regulation No.-/2011, Article, 23(1). One can witness that the same kind of approach is not followed under Article 24 of the lease proclamation and under the Addis Ababa City Lease Regulation.

[48] *በአዲስ አበባ ከተማ አስተዳደር ማዘጋጃ ቤት የነሳ ግምት የምትክ ቦታ አና ቤት አሰጣጥ መመሪያ ቁጥር 3/2002 (አንደ ተሻሻለው)* January 4/2003, (herein after cited as Urban Renewal Directive 3/ 2002), see part six, paragraph 21.1, p. 48 and part three of the appendix.

[49] Ibid

[50] Ibid

[51] Ibid

of land for what is taken from them, the landholdings of old possessions are made to be reduced in a substantial degree from what they hold before. The final upshot of all such uncertainties is nothing but to make old possessors live under acute condition of tenure insecurity.

Thus, as the Model Land Lease Regulation has no binding effect, the approach it follows regarding the manner of how a substitute plot of land is to be given to old possessors should be included under Article 26(2) of the current Land Lease Proclamation no. 721/2011. Such approach would have the effect of narrowing down the discretionary power given to regional and city urban land administration organs as it provides preconditions that should be taken into consideration in cases of giving substitute plot of land. Accordingly, the substitute plot of land to be given to old possessors should at least take into account the comparability of the size, grade and infrastructural accessibility of the substitute plot of land, which in fact is of a paramount importance to maintain tenure security of old possessors.

2.3 The right to get commensurate compensation and issues related to tenure insecurity of old possessors

The other important point that deserves proper scrutiny in light of tenure security is whether the amount of compensation to be paid for the loss of properties attached to old possession is commensurate enough to substitute the same house old possessors had before or not. As is stated under Regulation no. 135/2007, the compensation that is to be paid for the loss of a building is enunciated to be determined on the current cost per square meter or unit for constructing a comparable building.[52] Likewise, the amount of compensation for property situated on the expropriated land shall be determined on the basis of replacement cost of the property.[53] In calculating cost of construction and improvements, valuators are required to consider two basic components, i.e. current cost of construction materials and labor.

[52] Payment of Compensation for Properties Situated on Landholdings Expropriated for Public Purposes, Regulation no. 135/2007, (2007), Article 3(1). (Herein after cited as Regulation no. 135/2007). At this juncture, it has to be noted here that problems related with payment of compensation are not peculiar only to old possessions.

[53] Regulation No. 135/2007, Art. 7(2)

To illustrate what happens on the ground, a field study conducted by Walta Information Center is of an immense importance. According to this field study, from those old possessors and those who live in *kebele* houses and whose houses are demolished to clear the land for public interest projects, around 40% responded that the amount of compensation paid for the loss of their houses is in adequate.[54] As to the respondents, the compensation given so as to enable them to replace the same house is inadequate and that they incurred additional cost to build the same house.[55]

This clearly shows that in addition to the big loss that old possessors might incur with regard to the size, grade and location of a substitute plot of land, the amount of compensation that they are paid is claimed to be inadequate to replace what they had lost when their houses are demolished.[56] From this field study, one can see how the amount of compensation paid for properties attached to old possession is a matter of huge concern for old possessors.

More importantly, a study conducted by Daniel Woldegbriel on valuation and payment of compensation traces those major causes that deter landholders from getting commensurate compensation for their properties demolished during expropriation. According to the study, in practice, in order to calculate the cost of construction and improvements a central price index is prepared by the city administration (in Addis Ababa) or Urban Works and Development Bureau (in regional states). This price index that shows the current price of construction materials and labor cost is then distributed to each sub-city (in Addis Ababa) and town (in regions).[57]

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[54] በመልሶ ማልማት ሂደት ሰራ አሰፈጸሚው የሚያቀረበው አገለግሎት ፍጥነትና ተነሺዎች የሚያሳዩት ትብብር: የህዝብ አሰተያየት ጥናት: ዋልታ ኢኒፎረሜሽን ማዕከል , አዲስ አበባ: (2004) p. 39-40 (Unpublished, available at the office of Addis Ababa Land Administration Urban Renewal Department)

[55] Ibid. See also Haymanot Merawi, *የዙሪያ ባለቤትነት ሲሄፈግ ህገመንግስታዊ ጥያቄ ያስነሳል, Reporter Gazeta, Amharic edition*, issue 17, No. 7/1200, Tahisas, 2004, p. 29. This writer also stated that the compensation paid during demolishing of old houses around Sheraton Addis for urban renewal purpose is said to trigger an immense controversy in that the amount of compensation paid was said to be very small let alone to enable them to build the same kind of house they lost. (Translation by the author).

[56] See the Minute of the Parliament; supra note, 45, p. 29. During the ratification of the lease proclamation, Ato Girma Seifu had asked as to what is meant by commensurate compensation? He had also spoke about what he stated is a practical problem that was being witnessed. Accordingly, he stated that the government in practice gives 500,000 to the property that may worth 5,000,000. As to him, any urban development that makes the location value of the land to be expensive is not solely done by the government. Rather, it is by the people who were there while the area was devoid of any infrastructure.

[57] Daniel Weldegebriel, Supra note, 22, p. 240.

However, the crux of the problem identified with such system is that due to the fact that cost of labor and building materials are not periodically updated, urban dwellers whose house is demolished due to urban land clearance order are unable to get commensurate compensation as the law dictates.[58] The price index is not updated frequently in spite of increases in material prices and workmen's wages.[59] Such practice, in fact, is against one of the well accepted requirements of expropriation, i.e. that it must be accompanied by adequate, effective and prompt compensation.

The practice clearly inhibits landholders (both leaseholders and old possessors) from getting commensurate compensation in the case of urban land clearance order. It is thus plain that valuation and payment of compensation are among those major problems that exacerbate tenure insecurity of landholders.

2.4 Access to regular courts and its implications for tenure security of old possessors

The other sensitive issue related with tenure security of landholders is the manner of access to ordinary courts during clearance of urban land. It has to be noted here that the issue of access to ordinary courts is common to both leaseholders and old possessors. As such, any discussion related to old possessors is equally applicable to leaseholders. As is clearly stated in the proclamation, landholders are prohibited from taking an appeal to the regular courts against any decisions of administrative organs related to issues of law and claims for a substitute plot of land.[60] Accordingly, any person served

[58] Ibid, p. 245. The writer also sorted out that a person may not get a land comparable in size and location and that location is not given value (city administration gets disproportional profit), damages to property/business caused as a result of another project are not compensable. In his article, the writer recommended that so as to at least minimize those causes for tenure insecurity during valuation of properties, municipalities at least must update current price of building materials and valuation must also be done with professional valuators.

[59] Ibid

[60] Proc. 721/2011, Article 29(3). This in fact is not a new approach which was followed by Proc. no. 721/2011. Rather, the same kind of approach had been followed by the previous proc. No. 272/2002. As it was stated in the preamble of this proclamation, among the main reasons that necessitated the re-enactment of the second Lease Proclamation No. 272/2002 was the need to set up an order wherein legal claims arising from the lease proclamation could be handled. Accordingly, this proclamation envisaged provision that had never been enunciated under the first Lease Proclamation No. 80/1993 by specifically stating those organs authorized to clear urban lands for public purposes and the manner of instituting pleading on the organ that carried out the clearance and on issues of appeal against the

with a clearing order pursuant to a public interest or any other person alleging infringements of his rights or interests as the result of the order may submit his grievance within fifteen working days to the body of regional or city administration that has the power to clear and take over urban land upon payment of commensurate compensation.[61]

Likewise, any applicant who is dissatisfied with the decision of the above organs may appeal to appellate tribunal which shall be established by regions and city administrations themselves.[62] Here, it is interesting to note that save for claims related with compensation, the decision given by the tribunal after 30 days of application shall be final both on issues of law and facts including claims for substitute land, which is not appealable to the municipal or regular courts.[63] The pertinent question that has to be raised in this regard is why is an appeal to municipal or regional courts is prohibited both in issues of law and fact except only on the amount of compensation paid? And what is its implication on tenure security of land holders? Indeed, landholders' access to ordinary courts of law is of an important ingredient to bring about tenure security, and it is for this reason that one writer noted:

> [I]n order to maintain tenure security, the loss of landholders rights should occur only in exceptional circumstances and should be a result of *due process, the decision of a court of law*, or according to the provisions of a contract, in which case, the holder will be compensated in full for the land and/or the investments on it.[64] (Emphasis added)

Moreover, writers like Desalegn Rahimato strongly contend that for the existence of genuine tenure security "no decision on land should be binding

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decision of such organ. Accordingly, any decision rendered by the then regional or city administration vested to clear urban land was appealable to appeal commission that was set by the decision of the highest organ of regional or city government. Likewise, except for the amount of compensation paid, any decision that the appeal commission rendered was specifically made to be final both on issues of facts and laws. See Articles, 16-18 Proc. No.272/2002.

[61] Proc. No.721/2011, Article, 27(1) cumulative with Article 28(1).

[62] Proc. No.721/2011, Article, 29(1), and Article 30. Moreover, pursuant to sub Article, (2), (3) and (4) of Article 30 of this Proclamation, the appellate tribunal, which at least consists of five members drawn from different bodies is made to be accountable to the council of regional or city administration as the case may be, is given a power to confirm, vary or reverse a decision given by the regional or city administration regarding clearance of urban land.

[63] Proc.No.721/2011, Article, 28(3) and (4).

[64] Deininger, supra note 28, p. 12.

on right holders *unless it is made through the legal process and is the decision of legitimate courts*."[65] (Emphasis added). Here, it could be said that great emphasis given to courts of law for the maintenance of genuine tenure security seems is traceable from the fact that courts are neutral organs that would only render decisions being solely guided by what the law dictates and nothing else.

Moreover, prohibiting courts of law from adjudicating issues of law that is perceived as their inherent power and the constitutionality of such approach adopted under the lease proclamation is also arguable.[66]

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[65] Dessalegn, supra note, 5, P. 36. This writer also add that giving the courts the sole authority on land matters, including land disputes, dispossessions, land transactions, etc. is of a paramount importance to maintain tenure security.

[66] Even if under this paper, access to ordinary court is scrutinized in light of urban tenure security, the writer wants to shed some light as to the constitutionality of precluding the issue of claims for substitute plot of land from the reach of court of laws. For this writer, as from the deep reading of the pertinent provision of the FDRE Constitution, what one can gather regarding adjudicating matters is that both courts and any other competent bodies (like those established by regional or city land administrations organs) have a legitimate judicial power to render their decisions. This being the case, the problem lies with regard to precluding error of laws from the reach of ordinary courts trough appeal. For this writer, such kind of clear prohibition has its own negative repercussion in narrowing down the inherent constitutional power of ordinary courts to adjudicate judicial matter. This is mainly because;

firstly, as it is stated under Article 79(1) the FDRE Constitution, judicial power at both Federal and State levels is an inherent power of courts and it is vested in them. Thus, with the existence of different and multiple administrative tribunals, if the executive body is allowed to deal with issues of law wholly by itself, where is then the independent establishment of the legislative, executive and the judiciary and allocation of judicial power to courts that the constitution asserts and guarantees citizens to take justiciable matters to court of laws? Here, if the approach adopted under the current Land Lease Proclamation No. 721/2011 regarding the exclusion of error of laws from the jurisdiction of court of law is adopted by a number of administrative tribunals that are established and that are to be established, there would be no doubt that the inherent power of courts to exercise judicial power and the right of citizens to bring their case to court of laws and to appeal against the decisions of administrative organs on those matters containing basic error of law would clearly be curtailed.

Secondly, prohibition of appeal on issues of laws ignores the division that most of the time exists between issue of fact and law. In this case, it is a matter of common knowledge that while administrative bodies are more experts on issues of fact that they are usually exercising in their day to day activities, judges on the other hand, are experts on issues of laws in which they are specially trained. In this regard, one could witness a good division of issues of fact and issues of law in Article 112 of the Income Tax Proclamation No 286/2002 that among other things allowed appeal to court of laws against any erroneous decisions related with matter of laws. Such approach duly acknowledges the inherent power of courts on issues of laws than the approach adopted under the Land Lease Proclamation No. 721/2011.

It is thus this writer's strong belief that prohibiting error of laws committed by administrative tribunals from the reach of courts has its own negative bearing in narrowing down the inherent power of courts that the FDRE Constitution asserts with regard to adjudication of disputes.

Even if one can hardly deny the immense significance that administrative tribunals would contribute in adjudicating deputes, the manner in which they discharge their function should not be by curtailing the inherent power of courts to at least adjudicate error of laws like what the current lease proclamation did.

With regard to issues of landholder's tenure security, the approach adopted under the current Land Lease Proclamation no. 721/2011 casts its own negative repercussion for exacerbating tenure insecurity of landholders. This in fact is traceable from the fact that while courts do have constitutional back up to freely adjudicate matters brought before them being free from the influence of the executive body and being solely guided by the law and nothing else, the same is not true with regard to administrative tribunals which are part of the executive organ. [67]

This in fact leads to the lack of a neutral organ that would check the legality of decisions rendered by administrative tribunals. For example, what if urban clearance authorities expropriate old possessions and hand them over for others under the guise of better development, but actually for nothing? What if they give a substitute plot of land the size of which is far below what the law dictates[68] and the same is confirmed by appellate tribunals?

It can thus be said that the approach followed by the lease proclamation provides no guarantee to old possessors against any abuse of power that might be committed by both land administration authorities and appellate tribunals. Here, whatever the case might be, one can hardly deny the severe insecurity that pervades old possessors with regard to lack of neutral organs to check unjustifiable allotment of substitute plots of land.

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[67] The FDRE Constitution, see Article, 78(1), cumulative with Article 79(1) and (3).

[68] For example, under the Addis Ababa City Municipality Urban Renewal Directive No. 3/ 2002, see part six, paragraph 21.1, p. 48 and part three of the appendix. In this directive, an old possessor whose 500 square meter of land is cleared for public purpose is guaranteed to be given 250 square meter of land as a substitute. If such is the case, what if for example, administrative bodies give an old possessor 150 square meters of land as a substitute and the same is upheld by appellate tribunals while the law clearly guaranteed 250 square meter of land? Would giving compensation in this regard redress the injustice committed by the land administration organs? Here it is vivid that one could hardly respond in the affirmative.

Hence, if at all resolving issues of tenure insecurity that pervades landholders/old possessors and respecting the inherent judicial power of courts in adjudicating disputes is sought, appeal should not be limited only to matters related to compensation. Rather, as issues of land are interlocked with social and economic lives of the society, landholders should at least be given the right to appeal against erroneous decisions of land administrative organs related with error of law to independent courts of law that would positively contribute to enhancing tenure security of landholders.

Conclusion

Proper scrutiny of expropriation rules in light of the objective elements of tenure security warrants the assertion that currently old possessors are living under acute condition of tenure insecurity. Accordingly, the wider interpretation of public purpose, the possibility of giving a substitute plot of land which is less than in its grade, size and which might be located in the outskirts of urban centers could have the effect of exacerbating tenure insecurity of old possessors. Moreover, the inadequate scheme of compensation and limiting access to independent courts of law even with regard to the very sensitive issues of substitute plots of land are also major bottlenecks that negatively affects tenure security of old possessors. All such limitations casts their own negative repercussion on the objective elements of tenure security that require landholders to have clear, durable, robust and enforceable land rights.