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WHEN SHOULD EXPROPRIATION BE MADE? LAW AND ECONOMICS ANALYSIS OF ETHIOPIAN EXPROPRIATION LAW

Alekaw Dargie Asefa*

“ሀረርን ከአዲሱ የባቡር ከተማ ከድሬዳዋ ጋር ለማገናኘት መንገዱ በመሃንዲሶች ሲቀየስ በብዙ ቦታዎች ላይ የገበሬ የእርሻ መሬቶችን ማቋረጥ ነበረበት። ... ገበሬዎች ከእርሻ መሬታቸው ለመንገዱ ስራ እየተቆረጠ የሚወሰደውን ቦታ ላለማጣት ሲሉ ስራውን በመቃወም ለራስ መኮንን አቤት አለ። “የመንገዱ መዘርጋት እርሻችንን ያወድማል” በማለት የቦታ ግምት የቀረበላቸውን ክፍያ ጭምር አንቀበልም አለ። “የቀረበላችሁ ክፍያ ጥፋና ለተዳታችሁ ተመጣጣኝ አይደለምን?” ሲሉ ራስ መኮንን ጠየቁቸው። ገበሬዎቹም “ቅሬታችን በክፍያው መጠን ላይ አይደለም። እርሻችን እንዲወድም አንሻም” በማለት አምርረው ስራው እንዲቆም ጠየቁ። ራስ መኮንን ግን አልተቀበሏቸውም። ... መንገዱ ተሰርቶ እንዳለቀ ራስ መኮንን ቅር የተሰኙትን ገበሬዎች አቅርበው ስራውን ለማስፈጸም ስልጣናቸውን መጠቀሙ ግድ እንደሆነላቸው አብራርተው ሆኖም ግን ገበሬዎቹ ላሉት ቦታ ደግሞ ከዋጋው በላይ እጥፍ አድርገው ከፈሏቸው.....”¹

Abstract

The application of microeconomics principles to analyze laws is the most innovative legal reasoning. Although exclusive private property rights would create incentives for efficient resource utilization, it is common that governments expropriate private property for public purpose. It is established that expropriation can be conducted when two basic requirements, “public purpose” and “compensation”, are satisfied. In Ethiopia, the requirement of compensation in relation to conducting expropriation is extensively studied. However, the question as to when expropriation should be conducted is ignored. Examination of the requirement of compensation without studying as to when expropriation should or should not be made is like putting the cart before the horse. Therefore, this Article aims at examining the law and economics of when expropriation should or should not be made with particular reference to Ethiopian expropriation law. To this end, the provisions of the relevant Ethiopian laws, literature and applicable microeconomics principles are consulted. Noting that market is alternative means of efficient resource allocation, the Article argues that the government should resort to expropriation only if there is market failure. It also attempts to point out the criteria from law and economics insights on when expropriation should be conducted and when land taking should be left to the market. It is identified that the Ethiopian expropriation law does not incorporate expropriating criteria. Expropriation would be efficiently made when it is exercised under certain law and economic criteria which would serve as constraints to the power of the government to expropriate.

Keywords: *Economic analysis of law, holdout, sunk cost, transaction cost, public use*

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¹ ንጉሴ አየለ ተካ፣ ታላቁ ጥቁር ኢትዮ-አሜሪካ ዙዳግማዊ ምኒልክ (ኢ.ክ.ሊ.ፕስ ማተሚያ ቤት፣ 2010 ዓ.ም), p 150-160. See also Daniel Weldegebriel, *The History of Expropriation in Ethiopian Law*, 7(2) MIZAN LAW REVIEW, 298(2013). For the English translation, see *infra* note 62.

I. INTRODUCTION

The application of microeconomics principles to analyze range of laws, which is known as economic analysis of law or Law and Economics, is the most innovative legal thought since the code of Hammurabi.² It subjects law to a formal, scientific and quantifiable field of study. This explanative tool of economic analysis of law has drawn upon the principles of microeconomic theory.³ Economic analysis of law strongly assumes that incentives are the tenet of economics and that most individuals respond to such incentives. The incentives help economics have scientific theory to predict the effect of legal sanctions on the behavior of individuals.⁴

Exclusive private property rights create incentives for efficient utilization of resources.⁵ However, governments usually sanction private property through expropriation made for public purposes. It is also established that expropriation could be exercised upon the fulfillment of the two basic requirements: the public purpose and compensation requirements. Although the requirement of compensation has been extensively studied in Ethiopia, when expropriation⁶ should be made is largely ignored and, to the author's knowledge, no law and economics study has been conducted in this regard. Evaluating expropriation law from law and economics perspective by employing efficiency, public purpose, sunk cost, transaction cost and holdout is generally uncharted water in the Ethiopian legal system. The following paragraph clearly conveys the message, which also holds truth in Ethiopia, how expropriation is practically conducted.

Often it appears as if the public use finding or the public purpose that the government offers in order to condemn property under the Constitution is an inevitable certainty when public agencies decide to flex their eminent domain muscles, leaving the real battle to the proper measure of just compensation. The result of such an approach leaves private property an increasingly open target for public agencies to take land under a public purpose guise in order to turn over to private entities for the sake of "economic development."⁷

Therefore, examination of the requirement of compensation without dealing with as to when expropriation should be resorted to is like putting the cart before the horse. Payment of compensation as the only government constraint would lead to high probability of inefficiency⁸,

²NICHOLAS L. GEORG AKOPOULOS, *PRINCIPLES AND METHODS OF LAW AND ECONOMICS: BASIC TOOLS FOR NORMATIVE REASONING*, (Cambridge University Press, 2005), at 3. See also RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW*, (Wolters Kluwer Law & Business, 9th ed., 2012), at XIX.

³ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* (Pearson Education Inc) (2nd ed., 2012) p.11 (hereinafter, ROBERT COOTER & THOMAS ULEN).

⁴*Id.*, at 3.

⁵See RICHARD POSNER, *supra* note 2, at 30.

⁶Daniel W. Ambaye, *Land Rights and Expropriation in Ethiopia* (Doctoral Thesis, Royal Institute of Technology, Stockholm, 2015). See also Daniel W. Ambaye, *Land Valuation for Expropriation in Ethiopia: Valuation Methods and Adequacy of Compensation*, (FIG Regional Conference 2009). Expropriation has different nomenclatures. For example, it is referred to as eminent domain in USA, compulsory purchase in United Kingdom, Ireland, New Zealand, and Compulsory Acquisition in Australia.

⁷Peter J. Kulick, *Rolling the Dice: Determining Public Use in order to effectuate a "Public-Private Taking"-A proposal to redefine "Public Use"*, 3 L. REV. M.S.U.-D.C.L, 641 (2000).

⁸Thomas S. Ulen, *The Public Use of Private Property: A Dual-Constraint Theory of Efficient Governmental Takings*, in *TAKING PROPERTY AND JUST COMPENSATION: LAW AND ECONOMICS PERSPECTIVE OF THE TAKINGS ISSUE 170* (Nicolas Mercuro eds., Springer Science, New York, 1992).

and is likely to impose considerable net social costs.⁹ Therefore, this Article examines as to when expropriation should be made by employing law and economics criteria of expropriation under Ethiopian expropriation law. Although expropriation is states' inherent power, it should not be exercised without any constraint. It should also be noted that private market is a powerful institution to allocate resources between individuals. As a rule, exchanges among individuals and exchanges between the government and individuals should be voluntary.¹⁰

If governments expropriate private property in blanket, it may create economic inefficiency since property may be transferred from higher-valued use to a lower-valued use.¹¹ Expropriation is employed to assemble a large swathe of contiguous plot of land held by different landholders.¹² If a purchaser wishes to have complementary private properties from numerous independent landholders, there is, however, a possibility for holdout problem to emerge. Holdout problem would frequently occur in projects requiring the assembly of contiguous plots of land.¹³ Accordingly, economists argue that expropriation is justified to overcome holdout problem and they advise that it should be made only for those contiguous plots of land involving assembly.¹⁴

It is common that large-scale projects demand assembly of several fragmented and continuous parcels of land owned by various individuals.¹⁵ When land assembly is revealed, each individual imposes substantial cost by refusing to sell.¹⁶ The revealed information of land assembly provides monopoly power to each contiguous land owner by holding out for prices beyond market evaluation.¹⁷ The refusal of any one of the landholders to sell would in turn hamper completion of a beneficial transaction. Holdout offers incentive to seller to be the last seller to capture any rent that would emanate from scale effect. It is a supply side market failure externality which calls government intervention to expropriate contiguous plots of land to bring them into a single ownership. In this case, expropriation prevents individuals from refusing to sell their property to the government at a market price.

Generally, expropriation will prevail when private market alternative means of resource allocation fails. When expropriation should be conducted and when land taking transaction should be left to the market from the perspective of law and economics is the essence of this Article taking the case of Ethiopian expropriation law into account. To do this, it employs doctrinal research methodology of positive and normative economic analysis of law. Accordingly, it discusses the current Ethiopian expropriation law as it exists and examines it based on the "ought to be" of expropriation law.

⁹*Id.*

¹⁰*Id.*, at 169.

¹¹*Id.*, at 167.

¹² In this Article, landholder and land owner are used interchangeably although they have different implications under Ethiopian law.

¹³ Thomas J. Miceli & Free Riders, Holdouts, and Public Use: A Tale of Two Externalities, (*Department of Economics Working Paper Series Working*), at 1, available at <http://repec.org/>.

¹⁴ THOMAS J. MICELI & KATHLEEN SEGERSON, PRIVATE PROPERTY, PUBLIC USE, AND JUST COMPENSATION: THE ECONOMICS OF EMINENT DOMAIN, 2007, at 1-2.

¹⁵*Id.*, at 13.

¹⁶*Id.*

¹⁷*Id.*

The remaining part of the Article is structured as follows. Section two deals with as to when expropriation should be made using the law and economics expropriating criteria. Section three discusses and investigates Ethiopian expropriation law from the perspective of law and economics analysis. The last section provides conclusion and recommendation.

II. WHEN SHOULD EXPROPRIATION BE MADE?: LAW AND ECONOMIC ANALYSIS JUSTIFICATIONS

In this section, brief discussion is made with regard to one of the most important requirement-public purpose to be fulfilled for a government to exercise its power of expropriation. In addition, the section presents the justifications, such as transaction cost, holdout problems and sunk cost, of when expropriation needs to be conducted from the perspectives of law and economics analysis.

A. Public Use

As discussed above, expropriation is governments' inherent power that is replete with stringent requirements including the "public use" requirement. The "public use" requirement establishes that a government cannot take property unless a "public use" is involved. It is stated that "public use" should increase social welfare in a society.¹⁸ In *Thompson vs. Consolidated Utilities Corporation* 1937, it was decided that "one person's property may not be taken for the benefit of another private person without a justifying public purpose even though compensation be paid".¹⁹ It is also argued that public use implies the existence of the theory of public goods.²⁰ Once they are provided, public goods have non-excludability and non-rivalry attributes which encourage free-rider problems.²¹ This means that expropriation should be conducted only for public use whereby the government chooses the expropriated land to provide public service. To the extreme (narrow), all individuals should have the right to use the facility directly for the public use requirement to be satisfied. This conservative approach which equals public use as the use of an expropriated land for all the public was adhered in US Supreme Court which argued that expropriation is a right belonging to the government to expropriate property for the government's own public uses and not for those of another.²²

The extreme version of public use does not recognize the existence of public use when the government is transferring expropriated land to individuals or firms. This indirect public benefit fails to meet the public use requirement and is subject to criticism. It is argued that "public use" has become transformed into "public benefit".²³ The definition of public use has expanded to

¹⁸FRANCES PLIMMER & WILLIAM MCCLUSKEY, HANDBOOK OF CONTEMPORARY ISSUES IN EXPROPRIATION, 401(2019).

¹⁹*Id.*

²⁰RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (Harvard University Press, (1985), at 166.

²¹RICHARD O. ZERBE JR, ECONOMIC EFFICIENCY IN LAW AND ECONOMICS: NEW HORIZONS IN LAW AND ECONOMICS (Edward Elgar, Cheltenham UK, 2001), at 175

²²*Kohl v. United States*, 373-74.

²³Steven J. Eagle, Assembling Land for Urban Redevelopment: The Case for Owner Participation *in*, PROPERTY RIGHTS: EMINENT DOMAIN AND REGULATORY TAKINGS RE-EXAMINED (Bruce L. Benson ed., Palgrave Macmillan, 2010), at .8.

include public purpose based on physical, aesthetic and monetary benefit.²⁴ There are palatable justifications against the determination of public use, in the narrow sense, in the case of public-private takings and these are the following.²⁵ First, the narrow version of public use justification accords less private property protection. Second, it imposes huge economic costs on the society as it makes the market to function economically inefficient by reducing the cost for firms to buy property. And finally, it encourages hostage taking of expropriation process by interest groups.

Generally, broadening and narrowing the scope of public use is double-edged sword. Broadening the scope will ease the burden of the government to expropriate private property while it will simultaneously erode private property protection and compromise individual liberty. Broadening or narrowing the scope of public use could rather be justified by market efficiency as market may allocate resources efficiently. The market is more likely to reach a state of Pareto optimality whereby “no one can be made better off without simultaneously making at least one other person worse off.”²⁶ However, government intervention will be compulsory to achieve economic efficiency in the event of market failures. This shows that broadening or narrowing of the scope of public use should not be the base for decision making to expropriate.

In addition, public use, both in public-private and public expropriation, could create positive externalities. Expropriation is justified for provision of public goods and regulation of negative externalities. It is argued that not all projects need assembly of land and four scenarios are identified in this regard: private goods that need no assembly, private goods that need assembly, public goods that need assembly and public goods that need no assembly.²⁷ In case of private goods that need no assembly, such as in a transaction involving a sale of single parcel of land from one individual to another individual, expropriation is not justified as market could achieve efficiency in such case. In relation to private property that need assembly of plots of land, expropriation, once existence of public use is ascertained, should be allowed on condition that market fails due to holdout, transaction cost, sunk cost and others. On the other hand, expropriation should be permitted in public goods regardless of the need for assembly since it is justified by the public goods theory. Furthermore, “spillover benefit” argument associates the power of expropriation to the government’s role in providing public goods.²⁸

B. Transaction Cost

Coase expounds that transaction cost consists of all impediments to bargain and bargaining necessarily succeeds when transaction cost is negligible.²⁹ The Coase Theorem version is

²⁴DANIEL L. CHEN & SUSAN YEH, GOVERNMENT EXPROPRIATION INCREASES ECONOMIC GROWTH AND RACIAL INEQUALITY: EVIDENCE FROM EMINENT DOMAIN, at 3

²⁵Peter J. Kulick, Rolling the Dice, *Determining Public Use in order to effectuate a “Public-Private Taking”-A proposal to redefine “Public Use”*, 3 L. REV. M.S.U.-D.C.L., 662(2000).

²⁶RICHARD O. ZERBE JR, ECONOMIC EFFICIENCY IN LAW AND ECONOMICS- NEW HORIZONS IN LAW AND ECONOMICS 3(Edward Elgar, Cheltenham UK 2001).

²⁷THOMAS J. MICELI AND KATHLEEN SEGERSON, PRIVATE PROPERTY, PUBLIC USE, AND JUST COMPENSATION: THE ECONOMICS OF EMINENT DOMAIN, 15 (2007).

²⁸ Thomas J. Miceli, Free Riders, Holdouts, and Public Use: A Tale of Two Externalities, at 4, *available at* <http://repec.org/>.

²⁹ROBERT COOTER & THOMAS ULEN, *supra* note 4, at 85.

restated as “when transaction costs are zero, an efficient use of resources results from private bargaining regardless of the legal assignment of property right.”³⁰ Private bargaining between or among individuals could achieve efficiency even in the absence of property rights as far as transaction cost is zero. However, transaction cost runs from zero to infinity and the economic rationale for expropriation is failure of Coasean bargaining among numerous property rights owners.

Transaction costs are the costs of exchange which comprises of search cost, bargaining cost and enforcement cost.³¹ Striking negotiation is a tough task when threat values and cooperation is privately held information. Unless private information is converted into public information, it is a stumbling block for making a bargain. When transaction costs are endogenous to the legal system, the normative Coase Theorem states that law should be designed to lower transaction cost to encourage bargaining. The normative Coase Theorem offers solution to the problem by stating that “structure the law so as to remove the impediments to private agreements” to lubricate private bargaining among individuals.³² Bargaining could bring optimal allocation of scarce resources as long as the law removes impediments to private bargaining.

Thomas asked the question whether taking power can ever be efficiently assigned to a private party that is not a public utility and he answered it in affirmative and asserted that there can be expropriation “when the private party is engaged in providing a public good and there is high transaction cost associated with the acquisition of land for that provision.”³³

C. Negotiation Holdouts Problem for Land Assembly

Holdout is one form of market failures that may impede the completion of welfare increasing projects. Economists have marshaled arguments that the proper justification for takings is to overcome the holdout problem related to land assembly and they have opined that eminent domain should not be used for all public projects and private projects involving land assembly. When every individual seller strikes a voluntary deal with buyer in contiguous plot of land, the last one of the landholders, who refused to sell the contiguous plot of land, will be in amazingly unique bargaining position. The last plot of land holder who refused to transfer would have a power to charge the purchaser a much higher price than any of the other sellers who already relinquished their contiguous plots of land would do. Such last seller is usually referred to in the economic literature as a holdout and the problem is referred to as the holdout problem.

Hold out happens when the plots of land are contiguous and owned by several owners. Such “contiguity disrupts bargaining by creating opportunities for owners to holdout”.³⁴ It may be the case that many land owners may be willing to relinquish their ownership voluntarily to the state. However, it may also be the case that one or several landholders involve in holdout strategic behavior. When information is publicly available that the government wants assembly of land,

³⁰*Id.*, at 85.

³¹*Id.*, at 88.

³²*Id.*, at 91.

³³THOMAS S. ULEN, *supra* note 8, at 169.

³⁴ See ROBERT COOTER & THOMAS ULEN, *supra* note 4, at 177.

the government will be at a disadvantaged position to the negotiating table.³⁵ If one landholder alone holds out, he has a great leverage of charging exorbitant price and making the project designed for public purpose is impossible to fruition. The following quote explains this well:

Given the reality of the holdout problem, one might wonder how private firms ever succeed in purchasing the land they need to construct grand shopping centers and other large scale commercial developments. These projects often require negotiation with numerous individual landowners who hold small sections of the property that the developer will eventually need to proceed. Private companies frequently deal with the potential holdout problem by creating various facades behind which they can hide. Rather than disclosing their large commercial construction plans and negotiating with all the landowners openly, they hire many different individuals or property management companies to approach each landowner separately. The property owners never become suspicious that a large scale project is in the works, and therefore, do not attempt to exact an artificially inflated price from the buyers.³⁶

Holdout creates shortage of supply from private landholders' side. Assuming that the assembled land is increasing the pie from the assembled resource, it is compulsory that scarce resources should gravitate to their highest value uses and to benefit from optimal investment. The goal of efficiency maximization demands allocating goods to those who value them most. In holdout, the principle that states market allocates resources efficiently no longer holds clearly depicting the mantra dictating that the government should intervene through expropriation. Therefore, the government should only take private property with compensation to provide a public good when transaction costs preclude purchasing the necessary property from holding out individual.³⁷ The private property owner tends to be a monopolist, what is sometimes referred to as a "situational" monopolist³⁸ whereby hold out individual exploits the situation emerged.

For instance, Micheli analyzed holdout problem taking two owners of adjacent parcels of land whereby a buyer (be it a government or individuals, firms) approaches to acquire both parcels of land for welfare increasing project.³⁹ Micheli argued that this sort of arrangement has "scale benefit" or "complementarity" associated with the consolidation of contiguous parcels of land. The "scale benefit" denotes the external benefit that the owner selling first would confer on the last selling owner and this strategic behavior delays or prevents transaction from happening.⁴⁰ Holdout problem is the supply side failure.⁴¹ It yields no or extremely few voluntary exchange and imposes substantial costs on the developer seeking prices well in excess of true reservation prices that results in expropriation.⁴²

³⁵ Steve P. Calandrillo, *Eminent Domain Economics: Should "Just Compensation" Be Abolished, and Would "Takings Insurance" Work Instead?* 2 OHIO STATE LAW JOURNAL 451, 468 (2003).

³⁶*Id.*, at 469 at footnote 78.

³⁷ See ROBERT COOTER & THOMAS ULEN, *supra* note 4, p.177.

³⁸ THOMAS S. ULEN, *supra* note, 8, at 177.

³⁹ Thomas J. Miceli, *Free Riders, Holdouts, and Public Use: A Tale of Two Externalities*, at 5, available at <http://repec.org/>.

⁴⁰*Id.*, at 5.

⁴¹*Id.*, at 10.

⁴² Thomas J. Miceli and C.F. Sirmans, *The Holdout Problem, Urban Sprawl, and Eminent Domain*, 2007, p.4.

D. Relocation Sunk Cost

In economics, sunk costs are costs that have already been incurred and cannot be recovered. Firm expansion and more suitable premises are the main forces driving relocation.⁴³ A firm can expand its production activity through expansion at existing sites (on-site expansion) which is the cheapest way to enhance capacity because of sunk cost and moving costs.⁴⁴ Sunk costs are barriers to relocation of a firm. The following example can explain sunk cost as one ground of expropriation.

Let us assume that a private firm has constructed gas pipeline that crosses contiguous parcel of land which is owned by multiple owners. This investment has become lucrative business. Therefore, the firm wants to increase the amount of gas to transport which demands the expansion of the existing gas pipeline. This project affects several plots of contiguous land owned by multiple owners. The firm or individuals will not be able to negotiate smoothly as the holdout problem is the obvious leverage to multiple owners. Secret purchase cannot also be the possible option because contiguous plot of land holders have ample information about the investment that puts the firm in a hostage situation. In such a situation, therefore, the private market does not bring efficiency and this in turn calls for the intervention of the government which could be through expropriation. Even though there is no public purpose, the expropriation is justified by sunk cost. Therefore, to save relocation cost, the government will expropriate the contiguous land and transfer it to the firm or individual.

III. EXPROPRIATION UNDER ETHIOPIAN LAW: POSITIVE AND NORMATIVE LAW AND ECONOMICS ANALYSIS

The positive economic analysis of law explains legal rules and outcomes as they exist. It is not concerned with changing the legal rules for the purpose of making them better. It has been stated that while “a positive science is a body of systematized knowledge concerning “what is”; a normative or regulative science is a body of systematized knowledge discussing criteria of what ought to be as a system of rules for the attainment of a given end.”⁴⁵ It can be discerned from this statement that positive analysis is concerned with the “what is” while normative analysis deals with the “ought to be” aspect of existing legal issues. In this section, positive and normative analysis of the Ethiopian law of expropriation is briefly presented.

A. Expropriation Under Ethiopian Law: Positive Law And Economics Analysis

The 1960 Civil Code of Ethiopia had provisions dealing with expropriation.⁴⁶ Article 1460 of the Civil Code defines expropriation proceedings as “proceedings whereby the competent authorities compel an owner to surrender the ownership of an immovable required by such

⁴³ A.E. Brouwer, I. Mariotti & J.N. Van Ommeren, *The Firm Relocation Decision: A Logit Model*, p.2

⁴⁴*Id.*, at 2.

⁴⁵MILTON FRIEDMAN, *ESSAYS IN POSITIVE ECONOMICS*, (The University of Chicago Press, 1953), p.3.

⁴⁶ See CIVIL CODE OF THE EMPIRE OF ETHIOPIA, Proclamation No.165/1960, NEGARIT GAZETA, 19th Year No.2, May 1960, Addis Ababa, Articles 1460 -1488.

authorities for public purposes.”⁴⁷ In addition to the requirement of public purpose, the Civil Code recognizes the requirement of compensation as a constraint to the power of the government bodies to expropriate private properties.

Expropriation is also incorporated in different other Proclamations that have been promulgated from time to time after the Civil Code. For instance, Expropriation of Landholdings for Public Purposes and Payment of Compensation Proclamation No.455/2005 provides 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 where such expropriation has been decided by the appropriate higher regional or federal government organ for the *same purpose*.⁴⁸

As we could note from the above, the requirements of in advance compensation and public purpose need to be there for a woreda or urban administration to exercise its power of expropriating urban or rural landholding. We can also observe that the requirement of public purpose is fulfilled if the land is to be used *for a better development project* to be carried out by a public or private entity. On the other hand, the above Proclamation has defined public purposes, under its Article 2(5), as “the use of land defined as such by the decision of the appropriate body in conformity with urban structure plan or development plan to ensure the interest of the people to acquire direct or indirect benefits from the use of the land and to consolidate sustainable socio-economic development.” This definition makes it clear that both “direct” and “indirect” benefits could satisfy the requirement of public purpose so that the government can exercise its power of expropriation.

Currently, the applicable law with regard to expropriation in Ethiopian is the Expropriation of Land Holdings for Public Purposes, Payments of Compensation and Resettlement of Displaced People Proclamation No.1161/2019 which repeals the 2005 Proclamation.⁴⁹ Under the current Proclamation, “public purpose” is defined as a decision that is made by the appropriate government organ on the basis of approved land use plan or development plan or structural plan under the belief that the land use will directly or indirectly bring better economic and social development to the public.⁵⁰ Article 7 of the current Expropriation Proclamation offers priority right to the concerned landholders to develop the land facing expropriation either individually or in a group if they could present the capacity to develop in accordance with the plan.

Furthermore, the Rural Land Administration and Land Use Proclamation No.456/2005 provides that “holder of rural land who is evicted for purpose of public use shall be given

⁴⁷ *Id.*, Art.1460.

⁴⁸ *Expropriation of Landholdings for Public Purposes and Payment of Compensation Proclamation* No.455/2005, FED. NEGARIT GAZETA, 11th Year No. 43, Addis Ababa, 15 July 2005, Art 3(1).

⁴⁹ *Expropriation of Land Holdings for Public Purposes, Payments of Compensation and Resettlement of Displaced People Proclamation* No. 1161/2019, FED. NEGARIT GAZETA 25th Year No.90, Addis Ababa 23 September 2019, Art 28.

⁵⁰ *Id.*, Art 28.

compensation proportionate to the development he has made on the land and the property acquired or shall be given substitute land thereon.”⁵¹

In addition to the above subsidiary legislation, the power of expropriation for public purpose is also incorporated in the FDRE Constitution. Article 40(8) of the Constitution stipulates that the government may expropriate private property for public purposes subject to payment in advance of compensation commensurate to the value of the property. It is obvious from this that the FDRE Constitution recognizes that public purpose and payment of in advance compensation are the constraints against the exercise of power of expropriation. However, the Constitution under sub- Articles 1 and 8 of Article 40 employs two different phrases namely “public interest” and “public purpose”. The phrase “public interest” is wider than “public use” and both have different application.⁵² In Ethiopia, it is actually common that different phrases are employed in different legislation as well as in a single legislation to refer to the same concept.⁵³ As we can gather from the abovementioned proclamations, terms like “public use”, “public good”, “public interest”, and “public benefit” are employed to refer to public purpose. Be this as it may, it is clear that exercising the power of expropriation is constrained by the benefit of society, public use, public purpose, or public interest.⁵⁴

To have a glimpse on the practical application of the public purpose constrain on the exercise of power of expropriation in Ethiopia, there were instances showing that the practice was a bit worrisome in certain localities. Regarding the practice of expropriation in Oromia Regional State, for example, it was recorded that “...if a decision to expropriate property right of private individuals is passed, no one may question the purpose as to whether or not to constitute “public purpose” as it is simply presumed that taking is for “public purpose”⁵⁵ as long as the elusive and all-encompassing term “better development project” is justified. This means that privately possessed land has become an increasingly open target and, under the guise of public purpose, public agencies would give privately possessed land to private entities for the sake of “economic development”.

In Dukem town and Akaki woreda, land was expropriated from farmers and provided to individuals under the guise of investment and the individuals have used the expropriated land even to construct dwelling houses.⁵⁶ To the worst, there had also been cases where the investors

⁵¹Federal Democratic Republic of Ethiopia Rural Land Administration and Land Use Proclamation No. 456/2005, 11th Year No. 44, Addis Ababa, 15 July 2005, Art 7(3).

⁵²Bradley Virgill Slade, “Public Purpose or Public Interest” and Third Party Transfers, 17(1)PER / PELJ, 169 (2014).

⁵³CONSTITUTION, Proclamation No 1/1995, FED. NEGARIT GAZETA, 1st Year No. 1, 1995, Art 40. Article 40(1) of the Constitution employs “public interest” whereas Article 40(8) uses “public purposes”. Article 1460 of the Civil Code employs “public purpose” and the term “public interest” is used under Art 1463 and 1464(2), 1465(1), 1466. Moreover, Proclamation No. 1161/2019, while “public purpose” is stated in Article 2(1) of the current Proclamation No 1161/2019, Art 2(16) uses “public benefit”, and Art 5(1) the term “beneficial to the public”

⁵⁴FAO, COMPULSORY ACQUISITION OF LAND AND COMPENSATION. FAO LAND TENURE STUDIES 10(Rome 2008), at 4.

⁵⁵ Girma Kassa Kumsa, *Issues of Expropriation: The Law and the Practice in Oromia* (LL.M Thesis), (Addis Ababa University, School of Law, 2011), at 78-79.

⁵⁶*Id.*, at 80-81.

had clandestinely sold the land given to them at exorbitant price or had left it idle for years.⁵⁷ Furthermore, the government would pass the land taken from the farmers to individuals for big price in the form of lease price which infuriated farmers and they complained that they have been exploited under the guise of the fulfillment of more important purposes.⁵⁸

Like Oromia Regional State, similar problem was observed in the Amhara Regional State. For example, in a town called Chefa-Robit, the municipality expropriated land from farmers by paying compensation of 30 birr per meter square and transferred the same land through lease system ranging 80-150 birr per meter square which obliged farmers to participate in informal land transfer market before they fall to government expropriation prey.⁵⁹

Similarly, taking into account the broadly worded “direct” or “indirect” benefits and recording anecdotal evidence, Daniel wrote that “there is no visible limit to the state’s power of expropriating private property, even for private use purposes.”⁶⁰ He depicted the marred practice and stated the less protection currently accorded to private property compared to the protection provided under Article 1464 of the Civil Code which prohibits the expropriation of land for the purpose of solely obtaining financial benefit.⁶¹ In fact, Article 1464 of the Civil Code, although it is a novel provision, has no practical relevance as it is repealed.

At times, it has also been observed that voluntary exchange of property is shunned and individuals apply for expropriation to benefit themselves from expropriation. In this regard, Daniel has recorded the following;

An owner of a hotel wished to purchase a neighboring land (small residential house) to use it as parking lot. He offered the owner 300,000 birr for the house but the owner refused to sell her property. The hotel owner, afterwards, applied for expropriation of the neighboring land in order to expand his parking lots. Accordingly, the respective urban land administration started expropriation process and acquired the land for the hotel owner upon payment of 60,000 birr, one fifth of the previously offered price.⁶²

As it will be discussed below, cases like the above should be left to private parties as they would be able to purchase it through secret buying agents. Kelly recorded that “private parties that directly benefit from takings can obtain a concentrated benefit and often pay little for acquiring properties... [and thus] have a strong incentive to influence the eminent domain process for their own advantage.”⁶³ He vehemently argued that secret purchases and private influence provide socially desirable and constitutionally legitimate mechanism for distinguishing between public and private uses and promoting economic development.⁶⁴

⁵⁷*Id.*, at 81.

⁵⁸*Id.*, at 82.

⁵⁹ Abubeker Mohammed, *Land Expropriation for Cooperative Housing in Amhara Region, Ethiopia: Process and Impacts on the Peri-Urban Farming Communities*, 2018, at 11.

⁶⁰ See Daniel W. Ambaye, *supra note* 6, at 253.

⁶¹*Id.*, at 190.

⁶²*Id.*, at 192.

⁶³Daniel B. Kelly, *The Public Use Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92(1) CORNELL LAW REVIEW 1 (2006).

⁶⁴*Id.*, at 1.

B. Expropriation Under Ethiopian Law: Normative Law And Economics Analysis

It is already said that public use requirement is one of the constraints on government's power to expropriate. It is also established that advancement of social welfare could be done by the government itself or through private individuals or firms. Once the existence of a public purpose is ascertained, we also need to further investigate if the plot of land to be expropriated is contiguous plots of land demanding assembling although this does not also mean that expropriation is automatic once contiguity is found.

With respect to holdout strategy due to contiguity and as to when expropriation should be conducted, we can draw an important historical lesson from Ras Mekonnen when he ordered expropriation for the construction of the road connecting Dire Dawa and Harar as mentioned at the beginning of this Article. The excerpt can be taken as a textbook example which shows that expropriation should be exercised if several parcels of land are required for a public project such as road construction. Without expropriation, it would be possible that the multiple owners could have incentive to refuse or delay to relinquish their private property. This justifies the desirability of expropriation where there are holdout and transaction costs. The wisdom of Ras Mekonnen quoted in Amharic at the first page is recorded in English as follows:

A year before the road between Dire Dawa and Harar was projected, it was necessary to take the land required for the construction of the road. The local peasants who lost their land waited upon the governor... and complained saying that their farms would be ruined and as a result they could not accept a price offered for their land. Surprised, the Ras asked, 'But it is fair price, is it not?' and the peasants answered: 'It is not the price we complain of, most gracious lord; we don't want our farms destroyed.' The Ras thereupon ordered them out of his presence, saying, that there was but one Governor of Harar, and that he alone would say what might or might not be done. The road was constructed...and when it was all over, the Ras called the peasants before him, and telling them that he had been compelled to exert his authority in order to demonstrate his supremacy, he was now prepared voluntarily to pay them twice the value of their property...⁶⁵

From this historical wisdom, we could learn that expropriation was made since the required land was contiguous and owned by multiple owners which made the holdout problem obvious to arise.

When it comes to the relevant Ethiopian laws, as it is discussed above, they either employ broadly phrased provisions or explicitly mention direct or indirect benefits including private projects to establish the existence of a public purpose. In such scenarios too, the law and economics analysis dictates the government to leave private parties to tackle holdout problem using secret purchasing agents. However, it is admitted that secret purchase could not always address the possible holdout problem. This is particularly true when an investor wants to conduct expansion of its existing projects. Having already invested huge amount of money, which is now considered as sunk cost, the investor will be in unfavorable position. Expropriation should therefore come into picture as information is already revealed making secret purchase ridiculous.

⁶⁵ See Daniel Weldegebriel, *supra* note 1, at 298.

In the case of expropriation for public goods, on the other hand, the government is always revealing information for transparency sake and this makes holdout problem so costly. As a result, expropriation is justified in case of public goods. According to Kelly, the state is not able to employ secret purchasing agents as the transparency of democratic deliberation and the nature of public scrutiny forbid the government from keeping the secret.⁶⁶ The following tabular presentation, taken from Miceli⁶⁷, will make things clear as follows;

		Assembly required	
		No	Yes
Public good	No	Scenario I	Scenario II
	Yes	Scenario III	Scenario IV

In scenario I, there is no public purpose. Simultaneously, there is single owner of plot of land that needs no assembly of land. Hence, in relation to private goods that need no assembly, such as where a transaction involves a transfer by sale of single parcel from one individual to another individual, expropriation is not justified because the market itself could achieve efficiency in allocating scarce resources. Since the Ethiopian expropriation law also puts public purpose as one constraint, though it is broadly defined, it is the case that the government will not exercise its power of expropriation for cases that fall under scenario I.

Scenario II involves a private good demanding land assembly. In the case of private property that needs assembly of plots of land and if public use is established, expropriation should be allowed on condition that the market fails due to holdout problem. Being examined against scenario II, the Ethiopian expropriation law will not be in line with what economic analysis of law says. As discussed above, it is provided in the Expropriation Proclamation No.1161/2019 that “direct or indirect”⁶⁸ benefits could constitute the requirement of public purpose. Even though priority should still be given to the market even under scenario II, it does not seem the case in Ethiopia. The Expropriation Proclamation permits the government to expropriate private property as far as a public purpose exists; no matter it is an indirect benefit. As a brief attempt is made to highlight the practice of expropriation in Ethiopia, it is also discernible that the market is given almost no role to play through the mechanism of secret purchase.

Munch argues that when holdout strategy is anticipated, individuals incur costs to eliminate holdout incentives such as concealment of the buyer’s identity, purpose and plan of the

⁶⁶ See Daniel B. Kelly, *supra note* 64, at 5.

⁶⁷ THOMAS J. MICELI, *THE ECONOMIC APPROACH TO LAW*, 218 (Stanford University Press, 2004).

⁶⁸ *Expropriation of Land Holdings for Public Purposes, Payments of Compensation and Resettlement of Displaced People Proclamation*, Proclamation No. 1161/2019, FED NEGARIT GAZETA, 25th Year No.90, Addis Ababa 23 September, 2019, Art 2(1).

assembly, price of parcels and use of agents.⁶⁹ In a similar vein, Posner argues that holdout delays negotiation and extracts exorbitant price which imposes substantial cost for completion of projects.⁷⁰ On the other hand, however, private parties who may benefit from expropriation will have a strong incentive to influence the expropriation process for their own advantage.⁷¹ In this regard, the Ethiopian expropriation law would create great opportunity for private entities to push the government organ to expropriate even to obtain possession of a single plot of land.

Lastly, expropriation should be permitted in scenario IV since it is public good that needs assembly of land. Under scenario III too, where assembly of land is not required, expropriation is allowed which is justified based on the public goods theory as stated elsewhere above. In light of scenario III and IV, the position of the Ethiopian expropriation law is not therefore amenable to criticism.

The problem of transaction cost surfaces where information as to an existing project expansion is made public. This will trigger owners of contiguous plots of land to increase transaction cost hindering use of secret purchasing agents which, in turn, makes expropriation to be the last resort. Moreover, sunk cost is another convincing justification for government intervention through expropriation since, it is difficult to halt the expansion of a project or leave an already existed project owing to market failure. Simultaneous negotiation with multiple holders of the land would impose substantial cost on the firm. Moreover, secret buying is not an easy option as several landholders are engaged in the negotiation. Therefore, the government should save sunk costs in such a case by exercising its inherent power to expropriate.

IV. CONCLUSION

This Article has attempted to describe and prescribe the limit of expropriation from economic analysis of law. It is discussed that there are two common constraints, the requirements of public purpose and compensation, on the power of states to conduct expropriation. Public purpose as one of the constraints of expropriation has not gotten any attention from law and economics analysis in Ethiopia. This Article has attempted to examine the Ethiopian expropriation law (specifically regarding when expropriation should be made) from law and economics perspective. It has evaluated the expropriation law from law and economics expropriating criteria which are public purpose, transaction cost, holdout and sunk cost.

This Article argues that expropriation should come to the scene when there is a contiguous plot of land held by multiple holders. However, it is argued that the market should prevail for private goods, even for contiguous plots of land, so long as it functions perfectly through secret buying agents. For an already existing firm that wishes to expand its existing project, however, sunk cost would justify expropriation for private purpose. Seen against the expropriating criteria, it is identified that the current Ethiopian expropriation law does not incorporate the expropriating criteria that are informed by law and economics insights. For example, the existing Expropriation

⁶⁹ Patricia Munch, *An Economic Analysis of Eminent Domain*, 84(3) JOURNAL OF POLITICAL ECONOMY 479(1976).

⁷⁰RICHARD POSNER, *supra note 2*, at p.55.

⁷¹ See Daniel B. Kelly, *supra note 64*, at 34.

Proclamation does not incorporate the contiguity of the land, multiple owners' problem, already existing investment, transaction cost problems and other expropriating criteria to be considered while conducting expropriation.

On the basis of the aforesaid, this Article recommends that the Ethiopian government should not expropriate where the market functions well in case of private good if land is not contiguous and is not held by several landholders. Furthermore, when the land is contiguous and held by several landholders, the government should first push the investor to employ secret buying agent to deal with the landholders. In addition, when there is already existed project which touches contiguous plots of land held by multiple holders, holdout, transaction cost and sunk cost justifies expropriation for private benefits. To firmly implement these recommendations, the current expropriation law of Ethiopia needs to be revisited to incorporate rules that are informed by the relevant principles of law and economics.

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