

# Reforming Ethiopia's Expropriation Law

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## Abstract

Ethiopia is increasingly using expropriation as the single most important device to take land particularly from small landholders to supply it to corporate farmers and industrialists with a declared intention of boosting economic growth. This is happening in the context where expropriation laws are inadequate to protect peasants and pastoralists. The state is not paying cash compensation for land use rights, compensation for property on the land is paltry, and uniform rehabilitative schemes are absent. There are also no sufficient administrative and judicial mechanisms in place to restrain the government in exercising its power of expropriation. This is lax expropriation system that runs counter with the country's Constitution which pledges tenure security for small landholders. This article recommends enhanced judicial scrutiny of expropriation, recasting land use rights as human rights, and emphasis on the quality of projects that necessitate expropriation. Ethiopia should expedite these and related measures in the interest of justice, securing the livelihoods of the masses and national stability.

## Key terms

Expropriation, public purpose, compensation, land use rights and rehabilitation

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## Introduction

Ethiopia's recent economic growth has generated unprecedented demands for land for urban expansion, infrastructure, manufacturing, corporate farming and mining. The state is trying to meet these rising demands through two main routes. The first is through invoking the 'empty land' narrative (i.e., unoccupied land) which, *inter alia*, entails the designation of communal lands as 'government owned land' in order to render use of expropriation unnecessary.

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The other is use of the power of expropriation which focuses on land taking primarily from smallholders. This article focuses on the latter.

In Ethiopia, there is lack of comprehensive data on how frequently and extensively, for what purposes as well as with what impact the state is actually using its power of expropriation. This hampers an empirically grounded study of expropriation.<sup>1</sup> However, legal research through the analysis of Ethiopian law of expropriation, and its substantiation by various research findings and some fieldwork reveal a trend that raises concern. The trend implies a reordering of the land tenure system of Ethiopia increasingly in favor of capital.<sup>2</sup> This implies a remaking of the extant land tenure system which is dominated by smallholder agriculture through expropriation of land from such smallholders for ‘public purpose’ to lease it out to capital. This in turn suggests the beginning of a shift from a land tenure system dominated by subsistence farm holdings to a system whereby land is increasingly deployed to the service of commercial farmers and industrialists with a declared purpose of enhancing economic development. This shift contradicts state policies and laws that at the same time pledge to enhance the tenure security of small landholders through the ‘land for all’ narrative.

The first section considers the present state of Ethiopian expropriation law and practice in light of three basic ingredients of expropriation; namely, public

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<sup>1</sup> This is true in other jurisdictions as documented by Antonio Azuela and Carlos Herrera-Martin (2009), “Taking Land around the World: International Trends in Expropriation for Urban and Infrastructure Projects” <DOI 10.1007/978-1-4030-8862-9\_13>, pp. 337, 342 & 359 (accessed March 13, 2011). In the Ethiopian case, the following recent studies with some empirical element should be credited: Daniel W/Gebriel (2009a) *infra* note 21; Girma Kassa (2011) *infra* note 21; Belachew Yirsaw, (2013) *infra* note 47; Daniel Weldegebriel (2014d) *infra* note 47; Anthony Harris (2015) *infra* note 76; Daniel Woldegebriel (2013c) *infra* note 139.

<sup>2</sup> A rise in the use of expropriation by the Ethiopian state is contrary to what has been asserted as a decline in some other jurisdictions. For example, Antonio Azuela and Carlos Herrera-Martin, note 1, pp. 337, 344, 347, 350-351 & 358, have stated that the power of eminent domain has generally declined globally in the sense that states are facing difficulties in expropriating private property because of structural adjustment programs, social resistance (motivated by opposition to the very idea behind certain mega projects, contesting public purpose or for cultural reasons, general anti-expropriation public sentiment, and a strong tradition of an independent and assertive judiciary, rising expropriation costs to the state due to improved compensation or question of post-expropriation rehabilitation and strict legal restrictions and pro-investor international commitment of the concerned country). Such decline is reflected legislatively by demanding governments to pay market value of the property they take, and subjecting them to more stringent procedures, even if such trends do not include the definition of public purpose. Contrary to these developments elsewhere, expropriation in the Ethiopian context and broadly in the context of the so called emergent economies is well alive and in fact on the rise generally without significant constraints.

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purpose, compensation and legal recourse. The section also provides a brief discussion of incompatibilities between federal and regional expropriation laws, and between bilateral investment treaties and the expropriation law of the country. The second section examines the 'transformative expropriation' purportedly advanced by the Ethiopian government. That is, it presents the manner in which the state explains its expropriation law including the underlying thinking behind Ethiopia's expropriation law. The third section considers three forms of reforming Ethiopia's expropriation regime. These are judicial scrutiny, recasting land use rights as human rights and post-expropriation development.

These three sections are informed by the lessons that Ethiopia can draw from comparative experiences of India, Ghana and Kenya. These countries are chosen because they are predominately agrarian countries with massive smallholder population, and they have registered recent economic growth that has enhanced the demand for land which primarily comes from smallholders *via* expropriation. Law reforms in these jurisdictions also involve land matters including issues of eminent domain that give due emphasis to the need for adequate compensation and effective access to regular courts.<sup>3</sup>

The overall argument of the article is that current expropriation laws are inadequate to protect small landholders because they over-privilege economic development projects. This is related with the fact that the Ethiopian state is not legally obliged during expropriation to pay compensation for land use rights nor is it obligated (or at times not feasible) to give a substitute land. It is also argued that compensation for property on the land is inadequate and that legally and institutionally backed uniform rehabilitative schemes are not built into expropriation measures. The discussion and analysis in the following sections show that legal mechanisms to harness the government in exercising its power of expropriation are insufficient. This brings Ethiopia close to countries with "high economic growth rates in which strong states, with corresponding weak rule of law, make extensive use of the power of eminent domain..."<sup>4</sup>

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<sup>3</sup> In the case of Ghana, the Report of the Constitution Review Commission of Inquiry (2011), <[www.ghana.gov.gh/images/documents/crc\\_report.pdf](http://www.ghana.gov.gh/images/documents/crc_report.pdf)> (accessed 12 August, 2014) has devoted one chapter to land and natural resources, where the issue of adequate compensation is raised and got accepted by the Government of Ghana in its White Paper on the Report the Constitution Review Commission of Inquiry (2012), <[ghanaoliwatch.org/images/Articles/crc\\_white\\_paper\\_report.pdf](http://ghanaoliwatch.org/images/Articles/crc_white_paper_report.pdf)> (accessed 12 August, 2014) that also set up a Constitution Review Implementation Committee. Kenya in fact has gone ahead of Ghana in commissioning land matters, land policy formulation and adoption in 2009, setting up a constitution review commission, followed by an adoption of a revised constitution in 2010 and then enactment of three land acts in 2012.

<sup>4</sup> Antonio Azuela and Carlos Herrera-Martin, *supra* note 1, p. 334.

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## 1. Elements of Expropriation

The power of expropriation in Ethiopia is vested in the state by virtue of Article 40(8) of the FDRE Constitution (the Constitution) which provides that “the government may expropriate private property for public purposes subject to payment in advance of compensation commensurate to the value of the property”.<sup>5</sup> This has been amplified, in addition to bilateral investment treaties, by the following statutes:

- Expropriation of Landholdings for Public Purpose and Payment of Compensation Proclamation (the Expropriation Proclamation), 2005,
- Payment of Compensation for Property Situated on Landholding Expropriated for Public Purposes Regulations, 2007,
- The Civil Code of Ethiopia, 1960, Articles 1460-1488,
- Urban Lands Lease Holding Proclamation, 2011, Articles 26-31,
- Investment Proclamation, 2012, Article 25, and
- Regional rural land use and administration laws.

This article pays attention to the Expropriation Proclamation since it is the principal instrument which governs expropriation in contemporary Ethiopia. The central objective of the Expropriation Proclamation is to take land for investment activities.<sup>6</sup> It has three main aspects: provisions relating to public purpose, compensable property, and procedural recourses. If properly formulated and implemented, the requirements of public purpose, of compensability and of procedural recourses would have the effect of disciplining government authorities since such procedures would force the state to carefully re-examine its projects, thereby serving as a buffer zone for property holders and preventing overtaking without necessarily handcuffing such authorities.<sup>7</sup> Upon examination of the Expropriation Proclamation from the perspective of peasants, one observes that the law is deficient in these three counts. This section considers these three components of Ethiopia's expropriation law in the sense of permanent physical takeover of farmland by

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<sup>5</sup> The Constitution, Article 40 (8).

<sup>6</sup> Deliberations of Public Hearing Organized by the Standing Committee for Legal and Administrative Affairs of the House of Peoples' Representatives on the Expropriation Proclamation, May 2005 (hereafter May 2005 Deliberations) (Unpublished, on file with the author) p. 2.

<sup>7</sup> Chenglin Liu (2008), “The Chinese Takings Law from a Comparative Perspective”, *Journal of Law and Policy*, vol. 26, pp. 302-3, it is stated that there are at least four administrative costs associated with expropriation: costs relating to procedural guarantees including public hearing to determine the existence of public purpose, costs of appraising the amount of compensation, the compensation itself and costs of litigation, and these four costs would hinder governments from rampantly engaging in takings.

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documenting the state of expropriation law in Ethiopia and the practice thereof with a focus on farmland expropriation.<sup>8</sup>

### 1.1 Public purpose

The main aim of public purpose in connection with expropriation is to restrain the discretionary power of government authorities. Public purpose can be understood in different ways. Yet, one finds a couple of general articulations. They may be referred to as minimalist and maximalist views of public purpose.<sup>9</sup>

The adoption of the *minimalist* conception precludes state authorities from undertaking expropriation to transfer the property of one person in order to enrich the patrimony of another, i.e. taking private property for solely private purpose. The test of *public purpose* under this view concerns itself with the question: *what is done with the expropriated property?* If the property taken is used to exclusively benefit private persons, then the expropriation cannot be said to have been done for a public purpose. Hence in this view, public purpose shall be interpreted to mean: "private property taken through eminent domain must provide its intended use to the public. The public must be entitled, as of right, to use and enjoy the property".<sup>10</sup> On the other hand, the *maximalist* view holds that public purpose includes:

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<sup>8</sup> This Article does not consider issues of regulatory taking, which is the case where the state 'excessively' interferes with property rights in such a way that it is seen as good as physical takeover of the property itself. For this, refer to John A. Kupiec (2008), *Returning to Principles of "Fairness and Justice": The Role of Investment-Backed Expectations in Total Regulatory Taking Claims*, *B.C. L. Rev.*, vol. 49; Michael C. Blumm (2005), "Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses", *Harv. Envtl. L. Rev.*, vol. 29; James Gordley (2008), "Takings", *Tul. L. Rev.* vol. 82; and Joseph L. Sax (1964-1965), "Takings and the Police Power", *Yale L. J.*, vol. 74.

<sup>9</sup> Antonio Azuela and Carlos Herrera-Martin, pp. 353-354 state that public purpose might be addressed at constitutional level confining its application to matters of public use only (e.g., many common law countries); or the constitutions might come up with a detailed list of things which are deemed to constitute public purpose or leave the matter for legislative action, in the latter category legislation might be issued that come up with a limitative precise list of matters that constitute public purpose (e.g., Japan) or the definition of public purpose might be left to the judiciary (e.g., USA). Or as the present Article shows, the concept of public purpose can be left for the discretionary of the executive branch without the possibility of judicial review (e.g., Ethiopia and China). The discussions in this subsection of the Article (Sub-section 1.1) are primarily based on the author's article entitled "Legislative Protection of Property Rights in Ethiopia: An Overview" (2013), *Mizan Law Review*, vol. 7:2, pp. 184-187.

<sup>10</sup> Chenglin Liu *supra* note 7p. 326; see also Jarrett Nobel (2009-2010), "Land Seizures in the People's Republic of China: Protecting Property while Encouraging Economic Development", *Pac. McGeorge Global Business & Dev. L. J.*, vol. 22, p. 368.

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...anything which tends to enlarge the resources, increase the industrial energies and promote the productivity of any considerable number of inhabitants or a section of the state, or which leads to the growth of towns and creation of new resources for the employment of capital and labor, contributes to the general welfare and prosperity of the whole community.<sup>11</sup>

In this broad view, public purpose is conceived to include not only “uses directly beneficial to the public, such as roads, but also uses that promote the general welfare and prosperity of the whole community.”<sup>12</sup>

The Expropriation Proclamation subscribes to both minimalist and maximalist approaches but for different purposes. Some articles of this expropriation legislation have been influenced by the maximalist perspective, especially when the authorities seek to expropriate land from non-investors chiefly from peasants and pastoralists. For instance, Article 2 (5) of this law defines public purpose as: the use of land defined as such by the decision of the appropriate body in conformity with urban structure plan or development plan in order to ensure the interest of the peoples to acquire *direct or indirect benefits* from the use of the land and to consolidate sustainable socio-economic development (emphasis supplied).

Article 3(1) of the same provides that the appropriate government authority has the power to expropriate land for the public purpose:

... where it believes that it should be used for a better development project to be carried out by public entities, private investors, cooperative societies or other organs, or where such expropriation has been decided by the appropriate higher regional or federal government organ for the same purpose.

Such legal description is as good as having none because the authorities can attach the ‘public purpose’ label to virtually any project of their liking. As the observations during a focus group discussion indicated:

The definition given to public interest in rural and urban land laws is extremely broad and vague. Its meaning permits to take property from one person and give it to another without the need to establish any public purpose at all. What is public interest: when a road is to be built or a factory is to be established or a restaurant to be opened, a residential villa to be constructed in place of another residential house, etc? It is not a constraining factor at all.<sup>13</sup>

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<sup>11</sup> Bin Cheng (1958), “The Rationale of Compensation for Expropriation”, *Transactions of the Grotius Society*, vol. 44, p. 292.

<sup>12</sup> Chenglin Liu *supra* note 7, p. 326.

<sup>13</sup> Summary of Focus Group Discussion on Property Rights Protection. The discussion involved land law specialists, judges and land administrators, July 13, 2013,

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This expansive approach to public purpose is pursued as a trend in the acquisition of urban land including farm lands in peri-urban areas.<sup>14</sup> The Urban Land Lease Holding Proclamation, 1993, reflected this view in stating that the public interest would not be violated by the state expropriating property solely to generate money. According to the preamble, urban areas must be permitted to lease lands so that they can obtain sufficient revenues to provide much needed social facilities and infrastructure. Its successor, the Urban Lands Lease Holding Proclamation, 2002, is even more explicit about this broad notion of public purpose. It, under Article 2(7), defines public interest as: "...that which an appropriate body determines as a public interest in conformity with Master Plan or development plan in order to continuously ensure the direct or indirect usability of land by peoples and to progressively enhance urban development". This is reiterated in the Urban Planning Proclamation, 2008, which describes public purpose, in Article 2(5), as that which "continuously ensures direct or indirect utilization of land by people and thereby enhances urban development."

However, when the state expropriates land from investors, public purpose is construed restrictively to mean taking property including land held by investors under lease only for the purpose of undertaking publicly used projects. This, in legal terms, makes it more difficult to expropriate land held by an investor under lease than that held by a private person. Thus, Article 3(2) of the Expropriation Proclamation states: "...no land lease holding may be expropriated unless the lessee has failed to honor the obligations he assumed under the Lease Proclamation and Regulations or the land is required for development works to be undertaken by government." What is stated in this provision was documented during its enactment:

... in case where land under lease contract is to be expropriated, public purpose would be construed narrowly to permit land taking when government needs the land or where the investor could not honor his obligations under the lease contract because land is inextricably linked to investment.<sup>15</sup>

This differentiated understanding of public purpose is a departure from the past since previous expropriation legislation of the country understood public purpose narrowly and uniformly without distinguishing peasants from investors.<sup>16</sup> For example, the predecessor of the Expropriation Proclamation, that is, the expropriation law issued in 2004, was enacted exclusively with intent

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<sup>14</sup> See Misganaw Kiflew (2009), "The Current Urban Land Tenure System of Ethiopia", in *Land Law and Policy in Ethiopia since 1991: Continuities and Changes*, Muradu Abdo, (ed.) *Ethiopian Business Law Series* vol. 3, pp.187-8.

<sup>15</sup> May 2005 Deliberations, *supra* note 6, p. 3.

<sup>16</sup> Daniel Weldegbriel (2013b), "The History of Expropriation in Ethiopian Law", *Mizan Law Review*, 7:2.

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to obtain land for government projects. Accordingly, this expropriation statute embodied a *restrictive interpretation of public purpose* for it conceived public purpose in terms of land taking for public works. It defined ‘public works’ as:

the construction or installation, as appropriate for public use, of highway, power generating plant, building, airport, dam railway, fuel depot, water and sewerage telephone and electrical works and the carrying out of maintenance and improvement of these and related works and comprises civil, mechanical and electrical works.<sup>17</sup>

This indicates that the public purpose of expropriation as envisaged in this 2004 expropriation legislation was meant to enlarge land in the public domain of the state, not to expand property in the private domain of the government and private persons as is the case in the current Expropriation Proclamation. Additionally, this restrictive interpretation of public purpose goes in line with the tradition of the Ethiopian Civil Code of 1960 (the Code) and laws enacted by the Derg.<sup>18</sup>

Some regional rural land laws include provisions that incorporate the narrower rendition of public purpose. This is witnessed for example, by using such expressions as ‘public uses’ and “public common service obtained from infrastructure such as school, health, road, water, etc” and by further stipulating that land users shall lose their holdings only for public use understood in this narrow sense.<sup>19</sup>

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<sup>17</sup> The Appropriation of Land for Government Works and Payment of Compensation for Property Proclamation, 2004.

<sup>18</sup> The Civil Code of Ethiopia, Article 1464, reflects this view in providing that a competent authority cannot initiate expropriation for the exclusive aim of obtaining money: ‘(1) Expropriation proceedings may not be used for the purpose solely of obtaining financial benefits. (2) They may be used to enable the public to benefit by the increase in the value of land arising from works done in the public interest.’ Expropriation may ultimately bring money to the treasury but that must not be its sole purpose. The Amharic version of the title of that section of the Code which deals with expropriation reads: *le hizbe agelgelot ymitqemu nebrtoch sele maseleqeqe*, which means the state authority is supposed to construct facilities accessible to the public in place of the property it expropriates. The Public Ownership of Rural Lands Proclamation, 1975, under Article 17(1), provides that: “The Government may use land belonging to peasant associations for public purposes such as schools, hospitals, roads, offices, military bases and agricultural projects.”

<sup>19</sup> The Southern Regional State Rural Land Administration and Use Proclamation, 2007, Articles 2(23), 7(3) and 13(11); the Oromia Regional State Rural Land Use and Administration Proclamation, 2007, Article 6 (10 &11).

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## 1.2 Compensation

There are good reasons to require the state to compensate for expropriation. The time honored principle that no one including the state shall be permitted to enrich themselves at the expense of another is one reason. If the state were not required to compensate private property holders for taking their property, people would be unlikely to invest their time, labor, energy and resources in developing and improving their property and investors would be discouraged from investing in the country. Both would adversely affect economic development. That is another justification. Finally, the constitutionally enshrined requirement to pay compensation prevents wanton, destructive and arbitrary taking of private property. Compensation during expropriation should ideally aim at putting affected people into the position they would have been had the expropriation not been undertaken. It should not worsen their situation through under-compensation, nor should it enrich them through over-compensation. Those are the basic parameters in measuring the amount of compensation.

Of late, researchers have generally questioned the adequacy of compensation being paid to affected people in Ethiopia.<sup>20</sup> There is empirical support for their findings. For example, a peasant who lost a farmland recounts:

I was paid 120,000 Birr, calculated [at] 6 Birr per meter square. I spent some of this money to celebrate the wedding of my two daughters. I spent the remaining money for food and other daily basic needs. Now I am left with nothing while my family is displaced. My sons have migrated to Addis Ababa and work on their labor while my daughters have dropped out of school and work as housemaids.<sup>21</sup>

Similarly, another farmer said,

I lost my two hectares of land in 2004 E.C. for private investors. My land was valued for only 90 cents per meter square and 9,000 Birr per hectare. I used to harvest 18 quintals of *teff* per hectare every year before my land was taken and 36 quintals on the two hectares of land expropriated. I was paid

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<sup>20</sup> Dustin Miller & Eyob Tekalign (2008), "Land to The Tiller Redux: Unlocking Ethiopia's Land Potential" *Drake J. Agric. L.*, vol., 13, p. 363; Imeru Tamrat (2010), "Governance of Large Scale Agricultural Investments in Africa: The Case of Ethiopia" <<http://siteresources.worldbank.org/EXTARD/Resources/336681-1236436879081/5893311-1271205116054/tamrat.pdf>> (visited January 11, 2012) pp. 11-14; see Daniel W/Gebriel (2009a), "Compensation During Expropriation" in *Land Law and Policy in Ethiopia Since 1991: Continuities and Changes* (Muradu Abdo, ed.) *Ethiopian Business Law Series*, vol. 3. (Addis Ababa: Addis Ababa University Faculty of Law), pp. 232-233; see also Girma Kassa (2011), "Issues of Expropriation: the Law and the Practice in Oromia", (LL.M Thesis, Addis Ababa University, unpublished, Graduate School Library).

<sup>21</sup> As quoted in Girma Kassa, *supra* note 20, p. 107.

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only 18,000 Birr for the two hectares of land. This money was insignificant and I could not buy food for three years with this money. My family has been displaced and we are now leading a devastated life.<sup>22</sup>

And, as a focus group discussion revealed, “Compensation is low for ... rural land expropriation. It is much less than the loss incurred by affected people; the amount being paid worsens people’s existing situation instead of making it up for the losses they incurred due to the expropriation”.<sup>23</sup>

Generally, the condition is not any better in urban context. Evidence shows that,

... the money paid as compensation to replace a demolished house is short of the necessary sum. It could not replace any standard house as per the requirements of the city regulations. The prices of materials and labor, the two most important components of valuation calculation, are not frequently updated in a way that reflects the existing market and inflation rates. The depreciation allowance deducted from the estimated value takes away more than half of the sum.<sup>24</sup>

A recent directive issued by the Addis Ababa City Administration clearly shows the insufficiency of compensation during expropriation.<sup>25</sup> Several aspects of the expropriation law contribute to the insufficiency of compensation. The issues that need some discussion in this section are: compensable interests, basis of reckoning displacement compensation, substitute land, normative contradiction and lack of uniformity, the concept of a landholder, and implementation matters including lack of rehabilitation scheme.

*a) Compensable interests:*

In the Ethiopian context, the loss of any property right including that of land use rights is, in principle said to be compensable upon expropriation.<sup>26</sup> However, the Constitution is both broad and narrow in respect of the determination of compensable property. It is broad because a joint reading of sub-articles 2 and 8

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<sup>22</sup> *Ibid.*

<sup>23</sup> Summary of Focus Group Discussion *supra* note 13.

<sup>24</sup> Daniel W/Gebirel, *infra* note 138, p. 282.

<sup>25</sup> See the Revised Addis Ababa City Administration Directive No. 16 2006 E.C. for Payment of Compensation for Property Situated on Landholding Expropriated for Public Purposes.

<sup>26</sup> Payment of Compensation for Property Situated on Landholding Expropriated for Public Purposes Regulations (hereafter the Regulations), 2007 in Article 19 states that there shall be no payment of compensation with respect to any construction or improvement of a building, any crops sown, perennial crops planted or any permanent improvement on land, where such activity is done after the possessor of the land is served with the expropriation order. The discussions in this portion of the Article (Sub-section 1.2 a) are drawn on p. 188,

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of Article 40 of the Constitution conveys a message that the expropriation of any sort of private property is compensable, regardless of whether it is movable or immovable, or corporeal or incorporeal. Conversely, the Constitution seems to narrow down the scope of compensable property interests by adopting the labor theory. This means that individuals are entitled to have private property in property on land that is linked to their labor or capital or enterprise. The position reflected in the Constitution<sup>27</sup> appears to be allowing compensation to the extent of labor or capital value added to lawfully possessed land that has been expropriated but not for the economic value of use rights over the land.

The Expropriation Proclamation has the Constitution's approach in providing for the manner in which people affected by land taking might get compensated for the property on the land, not for the land itself. Thus, pursuant to this legislation, compensable interests are: utility lines,<sup>28</sup> permanent improvements to land,<sup>29</sup> property situated on the land which can be removed and relocated, property which can be removed for consumption (e.g. standing crops) and property which cannot be relocated (e.g., a house).<sup>30</sup>

This expropriation law does not consider loss of land use rights due to expropriation as compensable unless the administration is able and willing to give land in the form of displacement compensation to the affected person. In other words, the law in question does not view the taking of land from a landholder as an expropriation.<sup>31</sup> Thus, no compensation is payable (perhaps excepting displacement compensation) if, for example, the state requires land held by a landholder, and there is no property on or improvements to such land. This is because no expropriation is considered as having been undertaken in respect of such land. The expropriation law in question assumes that the State is merely retaking public land in this case, not taking private property, which is conceived as taking labor-related tangible immovable property belonging to the landholder situated on the land.

Even in cases where there is property on land subject to taking, compensation relates to the property, not to the land *per se*. It is stated that,

Compensation is given only to fixtures on land and land has no economic value to the holder upon expropriation. Land's value is zero. Land's economic value is fully captured by the state. The Constitution says land is the joint property of the state and the people. If land is really a joint property,

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<sup>27</sup> The Constitution, Article 40 (2, 3 & 7).

<sup>28</sup> The Expropriation Proclamation, Article 2 (7).

<sup>29</sup> *Id.*, Article 7(1).

<sup>30</sup> *Ibid.*

<sup>31</sup> See the use of the phrase, "shall be given compensation proportionate to the *development he has made on the land and the property acquired...*" in the Expropriation Proclamation, Article 7(3) (emphasis supplied).

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it means your right as a landholder is short of ownership including the right to reap the economic value of your land use rights. But the expropriation law does not permit you to capture enhanced value of land. Yet, the individual shall be allowed to share the enhanced value of the land instead of being diverted to state treasury as a whole.<sup>32</sup>

The rule that there shall be no monetary compensation where there is no property to be removed from the land at the time of expropriation invited objection and criticism during the enactment of Ethiopia's present Federal rural land law. In connection with which, it was stated that:

The right to use rural land would be made secure not by merely issuing land certificate but by fully protecting the rights of peasants as provided for in the Constitution. Complaints among peasants indicate that like what happened during the Derg period, there is an increasing tendency to evict farmers from their lands in the name of promoting the interest of the people without payment of commensurate compensation.<sup>33</sup>

The idea of not treating use rights over land as having economic value upon expropriation has nevertheless found its way into the current rural land law of Ethiopia. Courts have also subscribed to it. The Cassation Division of the Federal Supreme Court has decided that:

...the earth and rock related materials are natural resources and as natural resources are owned by the people and state, the people and state may use these resources without any payment. Therefore, even if the respondent has obtained from the relevant regional authority lease right to extract sand and gravel, as sand is a natural resource,... he cannot have ownership over sand, and ... the respondent is entitled to claim for the price of extracting the sand but not for the price of the sand itself since such claim has no legal basis. The decision of the lower court that awards the price of the sand in the form of compensation is hereby reversed.<sup>34</sup>

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<sup>32</sup> Interview with a land law specialist, July 13, 2013. See also Solomon Fikre (2015), "The Challenges of Land Law Reform, Smallholder Agricultural Productivity and Poverty in Ethiopia", <<http://warwick.ac.uk/wrap/71012>>, accessed September 9, 2015, pp. 226-27.

<sup>33</sup> Deliberations of the Parliamentary Public Hearing Organized by the Standing Committee for Rural Development and Pastoral Affairs of the House of Peoples' Representatives on Draft Federal Land Administration and Use Proclamation, March 2005 (hereafter March 2005 Deliberations), pp. 6-7.

<sup>34</sup> *The Ethiopian Roads Authority v. Issa Mohammed*, Fed. Sup. Ct. (Cassation File No. 30461, 2007), *Mizan Law Review*, 3:2 (2009), p. 379. There are also two other similar cases, though disposed on different grounds. In *the Ethiopian Roads Authority vs. Kebede Tadesse* (Fed. Sup. Ct., Cassation File 34313, March, 2008, Unpublished, on file with the author), the respondent (the latter) alleged that the applicant took away 10,859 cubic meter sand and occupied the quarry land leased by him from a regional government,

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It should be noted that such interpretations in this rulings of the Federal Supreme Court's Cassation Division are legally binding on all levels of federal and regional courts in the country.<sup>35</sup> Various rulings of the Supreme Court essentially uphold that land use rights of a landholder do not have a transferrable economic value in the context of people's ownership of land in today's Ethiopia.<sup>36</sup>

The narrow conception of compensable interests goes beyond and above counting out economic value of land use rights. There is a related idea of cost replacement approach which is embodied in the Expropriation Proclamation. Article 7(2) of the Proclamation stipulates that the "amount of compensation for property situated on the expropriated land shall be determined on the basis of replacement cost of the property". The application of the approach excludes legitimate interests. It has been correctly pointed out as follows:

Even though it is possible to reach market value through the use of replacement cost approach, the Ethiopian replacement cost approach is defective as compared to the international practice. It does not at all give market value for the displaced people. For example, it does not consider the value of ... the location on which the building rests ... it [also] disregards all incidental and consequential damages, such as additional cost incurred as a result of change in location, reduction in market value for property leftover after partial expropriation, lost income because of delay in expropriation process, and business closure as a result of public construction works.<sup>37</sup>

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causing an interruption of current and of future income therefrom. The Cassation Division disposed of the case on procedural grounds. Also in the *Ethiopian Roads Authority vs. Genene W/Yohannes* (Oromia Supreme Ct. File No. 57593, 2008, (Unpublished, on file with the author), the respondent claimed that he had a license to extract sand and gravel; that the applicant took the quarry land from him for the purpose of a road project. He sought compensation for the expenses incurred in connection with making the quarry land ready for extraction of materials as well as for a certain quantity of sand, mined and readied for sale, taken by the applicant from him. The Oromia State Supreme Court decided partly in favor of the respondent and partly rejected his claim on the ground of lack of evidence.

<sup>35</sup> Federal Courts Amendment Proclamation, 2005, Article 2, provides "Interpretation of a law (sic) by the Federal Supreme Court rendered by the cassation division with not less than five judges shall be binding on federal as well as regional council at all levels."

<sup>36</sup> *GebreEgziabher v. Selamawit*, Federal Supreme Court Cassation Division Cassation, File No. 26130, 2008; for comments on this case, see Alem Asmelash (2010), "Comments on Some Land Rights Related Decisions of the Federal Supreme Court Cassation Division", *Journal of Ethiopian Legal Education*, 3:2, pp. 153-160; see also Filipos Aynalem (2009), "the Interpretation of Rights over Urban Land", *Journal of Ethiopian Law*, 22:1.

<sup>37</sup> Daniel W/Gabriel *infra* note 138, p.282.

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Nor do projects compensate for quarry land and indirect expropriation brought about by particles from quarry sites that cause damage to adjacent farmlands and crops.<sup>38</sup> Moreover, the cost replacement method suffers from lack of clarity. Even though the method pledges to entitle replacement cost upon expropriation, it does not provide clear answers to questions such as: what does replacement cost mean? Does it exclude depreciation? Does it mean the amount paid to a person whose house is taken must enable her/him to construct a similar type of house? The challenges are further exacerbated because authorities require a person who lost a house, say, made of mud, to build a house at a standard that may require corrugated sheets, steel, cement and stone even if the amount paid as compensation renders such inputs unaffordable. The issue as to who bears this additional cost if the person is financially unable to do so<sup>39</sup> was among the questions raised during a focus group discussion.

Ethiopia should draw lessons from Ghana's good practices in this regard. Article 20(2) of the Constitution of the Republic of Ghana (1992) provides that "[t]he various claims for which an expropriated owner may be compensated are: market value of the land taken; or replacement value of the land taken; and cost of disturbance; and other damage (severance and injurious affection)".<sup>40</sup> Kenya follows a similar normative approach.<sup>41</sup>

*b) Reckoning displacement compensation:*

The rules on displacement compensation evoke concerns. If a rural landholder's land is expropriated permanently and where substitute farm land is unavailable, the displacement compensation is equivalent to ten times the average annual income that was secured during the five years preceding the expropriation of the land.<sup>42</sup> In case of a rural landholder whose land has been expropriated provisionally and substitute farmland is unavailable, displacement compensation for lost income shall be paid until the repossession of such land, which shall be based on the average annual income secured during the five years preceding the expropriation of the land<sup>43</sup> provided, however, that such payment shall not exceed ten times the average annual income the rural smallholder had secured during the five years preceding the expropriation of the land.<sup>44</sup> The displacement compensation to be paid to rural landholders who have lost their land either

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<sup>38</sup> Interview with a practicing lawyer, Southern Regional State, September 25, 2012.

<sup>39</sup> Summary of Focus Group Discussion, *supra* note 13.

<sup>40</sup> The Constitution of the Republic of Ghana (1992).

<sup>41</sup> The Constitution of the Republic of Kenya (2010)

<sup>42</sup> Article 8 (1) of the Expropriation Proclamation.

<sup>43</sup> Such displacement compensation should in the first place be the average annual income of such provisionally taken property times the number of years for which the property is taken. See Article 18 of Regulations No. 135/2007.

<sup>44</sup> Article 8 (2) of the Expropriation Proclamation.

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permanently or provisionally shall only be equivalent to the average annual income secured during the five years preceding the expropriation of the land where a substitute land is available.<sup>45</sup>

These rules of displacement compensation have shortcomings. *First*, these provisions are arbitrary in selecting the ten year criterion if, during expropriation, small landholders lose their land use rights for an indefinite period of time. The same can be said regarding the five-year threshold as basis of calculating compensation. 'Five years' or 'ten years' appear to be magic numbers that do not offer valid justification. *Second*, the selection of five years as a factor in reckoning compensation is backward looking. In doing so, it counts against landholders because it does not take present and future inflation into account.<sup>46</sup>

*c) Substitute land:*

Another factor that contributes to inadequate compensation in today's Ethiopia relates to the impracticality of providing in kind compensation in the form of land because of land scarcity. As rightly observed, "[d]ue to acute land scarcity in highland areas where most land expropriations would take place, a comparable substitute land is not feasible, which means resort to payment of meager amount of compensation, which would not support the future livelihood of the victim of government taking".<sup>47</sup> This is in spite of the fact that the law envisages the possibility of providing a substitute land to peasants who lost their land under expropriation where there is land available and that it is perhaps a popular kind of compensation. It is remarked that "... households who are evicted are farmers who face difficulty in starting a new livelihood if they do not get another piece of land to farm because this is the only skill they have".<sup>48</sup> Even where a substitute land is available, the meaning of the terms 'comparable', 'fertility', 'location' and 'size' that accompany the notion are not clarified. In

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<sup>45</sup> Article 8 (3) of the Expropriation Proclamation.

<sup>46</sup> Daniel W/Gebriel, *infra* note 138; Belachew Yirsaw, (2013), "Expropriation, valuation and compensation practice in Ethiopia", *Property Management*, 31:2, pp. 132-58; and Daniel Weldegebriel (2014d), "Compensation for Expropriation in Ethiopia and the UK: A Comparative Analysis", FIG Congress 2014 Engaging the Challenges – Enhancing the Relevance Kuala Lumpur, Malaysia 16--21 June 2014.

<sup>47</sup> See the Minutes of the Deliberations of the Parliamentary Standing Committee for Rural Development and Pastoral Affairs of the House of Peoples' Representatives on Draft Federal Land Administration and Use Proclamation, March, 2005 pp.19 & 25; see March 2005 Deliberations note 29, p. 4 and May 2005 Deliberations note 5, pp. 4, 7, 8 and 12.

<sup>48</sup> Solomon Bekure *et al* (2006), "Removing Limitations of Current Ethiopian Rural Land Policy and Land Administration," Workshop on Land Policies & Legal Empowerment of the Poor, November 2-3, 2006, World Bank Washington D.C.

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effect, Regions have failed to pass directives that clarify these components of a substitute land.

*d) Contradiction and lack of uniformity:*

One of the sources of lack of uniform treatment is lack of detailed regional laws on compensation:

Regions do not have detailed law on expropriation. Where there is a gap, the regions act arbitrarily. For example, Amhara Region pays compensation for naturally standing trees on land subject to compensation but Oromia Region does not pay compensation in this case as they think that the property on the land must be the result of capital or labor.<sup>49</sup>

Besides, there is conflict between federal and regional laws regarding public purpose and the approaches toward compensation. Three regional land laws appear to have adopted a narrow interpretation of the term ‘public purpose’ while one regional land law uses the term ‘actual compensation’; pre-expropriation public hearing is required in another regional land law.<sup>50</sup> Thus, in spite of an apparent upward delegation by regional states of their power to pass expropriation laws to the Federal Government, regions still tend to assert some legislative power over expropriation.<sup>51</sup>

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<sup>49</sup> Interview *supra* note 32.

<sup>50</sup> This tension arises due to a reluctance on the part of regions to discontinue legislating on expropriation matters even if they have apparently delegated their power to legislate on this to the federal government; for the narrow interpretation of public purpose, see the Southern Regional State’s Rural Land Administration and Use Proclamation and the Oromia Rural Land Use and Administration Proclamation; The Benishangul Gumuz Region rural law defines public purpose seemingly in narrower sense compared to the federal legislation as: “a service given to the public directly or indirectly, such as government office, school, health service, market service, road, religious institutions, military camps, and the likes, and includes activities assumed important to the development of people by the Regional Government and to be implemented on the rural land.” Benishangul Gumuz Region Rural Land Administration and Use Proclamation, 2010, Article 2.24. The Tigray Regional State Revised Rural Land Use and Administration Proclamation No. 136, 2007, Article 25 for use of the word ‘actual compensation’. The Amhara state’s legislation demands public hearing of the *kebele* residents where it is found that the purpose of land expropriation is directly interrelated with development of local community or where the community itself is being a payer of compensation thereof: “Where a landholder or user who may concern the matter has legal ground of rejecting the request of land expropriation, he may submit his complaints to the government office next to the body that has given the decision within 15 days from the date of his communication of the notice in writing.” Amhara Rural Land Regulations, 2007, Article 29 (2).

<sup>51</sup> See May 2005 Deliberations *supra* note 6 where it was stated that regions agreed to surrender their power to pass expropriation law to the national government.

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There is lack of uniformity in the rules as well. One manifestation of absence of uniformity in the rules is "Lack of standardized valuation and compensation methods and procedures [which is] causing different valuations by different land taking agencies, resulting in different compensation values for similar lands".<sup>52</sup> Expropriation laws of Ethiopia are meant to apply uniformly across the country without factoring in the specific notion of property that prevails in the pastoral areas. The definition of property in terms of things attached to the land which is a product of labor and/or capital implies the rejection of customary land rights.

There is a differentiated treatment between investors and other persons in relation to public purpose and compensation. This emanates from bilateral investment treaties Ethiopia signed with 29 countries as of the end of June 2012.<sup>53</sup> The bilateral investment treaties have become incompatible with the Expropriation Proclamation as the former (as opposed to the latter) embody market value approach to compensation in the tradition of liberal property rights notion which is promoted by developed nations in the international arena.<sup>54</sup> The treaties also appear to envisage a broad right to judicial review. For example, the bilateral investment treaty Ethiopia has signed with the United Kingdom of Great Britain and Northern Ireland requires payment of, "prompt, adequate and effective compensation. Such compensation shall amount to the market value of the investment expropriated..."<sup>55</sup> In terms of recourse to the courts, it provides "The national or company affected shall have a right ... to prompt review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment ...".<sup>56</sup> Therefore, a joint reading of the Expropriation Proclamation and the BITs implies three hierarchies. These are investors protected under BITs, investors without BITs and other persons. The most legislative protection is given to those investors who come from a home country which has signed a BIT with Ethiopia.

*e) A landholder:*

The law addresses the issue of who might be entitled to receive compensation in such a manner that would exclude certain individuals who could rightly be

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<sup>52</sup> Solomon Bekure *et al infra* note 62.

<sup>53</sup> UNCTAD, *World Investment Report 2013: Global Value Chains: Investment and Trade for Development*, (United Nations Publication, Switzerland, 2013) p 101.

<sup>54</sup> Martha Belete *infra* note 129 and Alec R. Johnson *infra* note 129.

<sup>55</sup> Article 5 of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Federal Democratic Republic of Ethiopia for the Promotion and Protection of Investments (unpublished, on file with the author).

<sup>56</sup> *Ibid*; Article 4 of The Agreement between the Republic of Turkey and The Federal Democratic Republic of Ethiopia Concerning The Reciprocal Promotion and Protection of Investments (unpublished, on file with the author) is worded in a similar fashion.

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regarded as enjoying property interest in land subject to expropriation. Under Article 5(2) and Article 13(1) of the Expropriation Proclamation, compensation shall be paid to “holders of expropriated land.” It defines a holder in Article 2(3) as “an individual ... [who] has lawful possession over the land to be expropriated...” The concept of landholder is further amplified by subsequent laws defining it to mean he/she who produces “proof of legitimate possession of the expropriated landholding...”<sup>57</sup> By incorporating an individualistic notion of landholding, this formulation of the law excludes secondary land users from demanding compensation. The restrictive appreciation of the term landholder leaves out millions of individuals in peri-urban areas that obtain land informally to provide themselves with a shelter. The law should in principle<sup>58</sup> be formulated broadly along the line of the Code, that is, in such a manner that any person who establishes the existence of a property right in their favor over the land expropriated is given the opportunity to demand compensation.<sup>59</sup> In relation to the effect of gaps in inclusiveness, it is observed that:

... the use of the power of eminent domain is depriving people not recognized as owners of the land of their means of subsistence. Tenants, herders, and agricultural laborers are among those paying the highest social cost of expropriation because they are not recognized as holding any property rights.<sup>60</sup>

Ethiopia’s legal regime can benefit from the experience in Kenya whose law of compulsory land acquisition provides leeway to compensate occupants in good faith including customary land rights holders that may not hold title to the land.<sup>61</sup>

*f) Gaps in Implementation:*

Some projects go ahead toward implementation with little or no budget for compensation for people who will lose their possessions. A report puts the situation as follows:

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<sup>57</sup> The Regulations, Article 22.

<sup>58</sup> Exceptions might be provided as is stated in the Regulations, Article 19 and in the French version of Article 1414 as translated by Bilillign states: For this, see Bilillign Mandefro (1973-1975), “Revised Unauthorized Unofficial Translation of Arts. 1126-1674 of Book III of the Ethiopian Civil Code (1960) From the French Original Draft” (Addis Ababa University, Law Library Archive).

<sup>59</sup> The Code, Articles 1461, 1466 (2), 1468 (1) and 1471, read together suggest that any interest in an immovable might be compensable, even though the emphasis in those provisions appears to be on ownership, servitude and usufruct.

<sup>60</sup> Antonio Azuela and Carlos Herrera-Martin, *supra* note 1, p. 358.

<sup>61</sup> Nelson Awori (2012), “Review of the Land Bill (2012) and the Land Registration Bill (2012)”, Land Development and Governance Institute, (accessed November 19, 2013).

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...regional agencies, mainly municipalities that are zoning large expanses of land ... are facing cash flow problems. While they are evicting farmers ... they have to pay compensation immediately, [but] they will be leasing the land and receive fees in the future. There is no bridging finance available ... This is leading to undervaluing ... land and property to match the available funds which are unfair to those losing their lands and have to establish new livelihoods ...<sup>62</sup>

As an informant states:

Local government officials pressurize those who demand compensation before handing over the land by saying land belongs to the state and such demand is not proper. If they do not budge, they are likely to be tagged as 'obstructor of development or anti-development element.' The designation can entail locking them up in prison. Local governments tend to carry out projects such as health clinics and schools which require land expropriation without any budget for compensation.<sup>63</sup>

And it was said,

In case where expropriation is carried out for federal projects, compensation is paid if there is a total taking; but due to corruption, the amount of compensation paid to the person whose land is taken is low because evaluators and local officials take a good amount of it. The state pays it but the money goes to the wrong pocket. The state even complains about payment of exorbitant compensation which discourages the initiation of new projects.

Paltry compensation also arises from lack of implementation of the valuation aspects of the Expropriation Proclamation. Even if "...the law says that the property valuation shall be made by private experts and that in the meantime by a committee ... there are no expert valuers or institutions that give license to expert valuers. Thus, valuation of property continues to be made by committees".<sup>64</sup>

There are frequent changes in the rules pertaining to capacity building that has bearing on the implementation of valuation provisions. Article 12 of the Expropriation Proclamation provides that the Ministry of Federal Affairs (now the Ministry of Federal and Pastoral Affairs) shall give technical and capacity building support to regions and prepare national valuation formula for the determination of compensation. These responsibilities seem to have been

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<sup>62</sup> Solomon Bekure *et al* (2006), "Removing Limitations of Current Ethiopian Rural Land Policy and Land Administration", Workshop on Land Policies & Legal Empowerment of the Poor, November 2-3, 2006, World Bank Washington D.C.

<sup>63</sup> Interview with a Supreme Court Judge, Southern Regional State, September 25, 2012.

<sup>64</sup> *Ibid.*

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transferred to the Ministry of Works and Urban Development, which became the Ministry of Urban Development and Construction, the Ministry of Urban Development, Housing and Construction (and at present, the Ministry of Urban Development and Housing).<sup>65</sup> The transfer appeared to have occurred even before the former commenced implementation. Frequent power transfers make it difficult to clearly identify the public authority in charge of ensuring the implementation of the provisions of the Expropriation Proclamation including issues of expert valuations.<sup>66</sup>

There is also an outright breach of a clear rule in the process of expropriation as exhibited by cases where compensations are paid well after dispossession in violation of the clear constitutional right that forbids dispossession before compensation.<sup>67</sup> An informant had recalled the following:

My farmland was taken by the local government administration to build a school. I had permanent crops such as *enset* [aka false banana] on the land. I was allowed to prematurely consume such crops as they were constructing the school. They promised me a substitute land. They did not give it to me yet. Nor did they pay me compensation. Now I have vacated the land. It has been two years since they took possession of my land. I repeatedly went to the administration pleading for compensation and a substitute land. It seems to me that there is no hope of getting it.<sup>68</sup>

*g) Rehabilitation:*

The compensation approach alone is inadequate to restore the livelihood of those affected by expropriation even where compensation is adequate. To this end, there is a law which provides that local authorities undertaking expropriation shall, to the extent possible, rehabilitate the expropriated in addition to the payment of compensation for property on the land and displacement compensation.<sup>69</sup> The following illustrates the need for rehabilitation toward new livelihoods in addition to compensation:

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<sup>65</sup> The Expropriation Proclamation and Article 36 (7) of Powers and Duties of the Executive Organs Proclamation No. 691, 2010.

<sup>66</sup> *Ibid.*

<sup>67</sup> Daniel W/Gebriel *infra* note 138

<sup>68</sup> Interview with a Member of Land Use and Administration Committee, September 19, 2012.

<sup>69</sup> The Regulations, Article 13 (1); see also the preamble of the same, which stipulates that the purpose of expropriation law is 'not only paying compensation but also to assist displaced persons to restore their livelihood.' It is a mistake to consider, as some writers have already done, displacement compensation as compensation for the land rights peasants have lost as a result of expropriation because the law gives displacement compensation, though a reduced one, even to those peasants who have received a substitute farmland. See, for example, Daniel W/Gebriel *supra* note 20, pp. 215-219.

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A negative aspect of rural land taking by federal and regional agencies is that households who are evicted are farmers who face difficulty in starting a new livelihood if they do not get another piece of land to farm because this is the only skill they have. Mechanisms are not in place to train them in new skills and provide them with social, financial and management advice in starting new livelihoods. Few are those that find new employment in the enterprises developed on their old farms. Some evictees squander the compensation they receive not knowing what to do with it. This needs serious attention by both the federal and regional governments.<sup>70</sup>

Daniel captured the situation fittingly by indicating the gaps in the clarity of the law regarding the duty of the government toward the resettlement and rehabilitation of evicted smallholder farmers:

...the requirement of resettlement and rehabilitation program during expropriation event lacks clarity. Apart from a confusing provision in the Constitution, there is no specific legal basis nor a systematic policy and measures in place for resettlement of displaced farmers. In other words, whether the government is required to resettle and provide rehabilitative assistance to those people who are displaced as a result of expropriation procedure is not clear.<sup>71</sup>

Assisting expropriated peasants to start generating regular income from non-farming sources would be more sensible where the state could not provide them with "a substitute land which can easily be ploughed and generate income".<sup>72</sup> Even though the option of substitute land is favored equally both by the expropriator and the expropriated, it is becoming difficult, if not impossible, in peri-urban areas where land is scarce. Thus, the concept of rehabilitation suggests helping the expropriated resume their normal farming life or helping them change their calling entirely where a substitute farmland is unavailable. But the notion of rehabilitation is not elaborated in the law, and the nature of the rehabilitation strategy is not clarified. Nor is the source of the rehabilitation fund indicated.<sup>73</sup> The practice is inconsistent.

Whereas in projects that are supported by the World Bank, the state and private investors are trying to carry out resettlement and rehabilitation programs, in most other cases, there are no such practices performed either by a public or private operators. Only in selected huge public projects does the state try to give resettlement and rehabilitation assistances. This creates a

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<sup>70</sup> Solomon Bekure *et al* (2006), *supra* note 62.

<sup>71</sup> Daniel W/Gebriel *infra* note 138, p. 187.

<sup>72</sup> The Expropriation Proclamation, Article 8 (3).

<sup>73</sup> The Regulations, the Preamble and the Expropriation Proclamation, Article 13(1); see also May 2005 Deliberations note 6, pp. 8-10.

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double treatment of displaced people in the absence of clear and comprehensive guidelines as to when and how this should be provided. The result of this disregard leaves farmers untended with all the cash money in their hands and unwise decisions in their 'minds'. This eventually leads to a spendthrift behavior of the farmers which made them end up in poverty.<sup>74</sup>

As another study suggests, absence of principled rehabilitation program is not just extravagant spending of monetary compensation award. It is also about imprudent investment, for instance, in the form of depositing money in bank and thus exposing it to the vagaries of inflation. Harris says, in addition to increasing their consumption expenditure,

...by far the biggest and most striking result is that most of the compensation payment is left in the bank...With the exception of a few households that made very large investments, most households have done very little with their money.... Land in Ethiopia also serves as more than just a productive asset: it serves as insurance and security in old age when it is used for sharecropping. Compensation payments should assist households in making the transition from small-scale agriculture to other income generating activity and yet, in this short time period, it seems that the majority of households are not able to do so.<sup>75</sup>

There is thus the need for a policy and legal measures which underline that "people affected by development projects should be able to improve, or at least be well-off after the project as without the project".<sup>76</sup> In this respect, there is a need to introduce the concept of social impact assessment, which would require projects to be preceded an assessment aimed at "analyzing, monitoring and managing the intended and unintended social consequences, both positive and negative, of planned interventions and any social changes brought about by those interventions".<sup>77</sup>

If we take the experience of India as an example, it is recognized at policy level that "traumatic, psychological and socio-cultural consequences on the displaced populations ... call for affirmative state action for protecting their rights and the need for active participation of affected persons".<sup>78</sup> India has recently introduced a draft bill which considers land acquisition and

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<sup>74</sup> Daniel W/Gebriel *infra* note 138, p. 280.

<sup>75</sup> Anthony Harris (2015), "Expropriation, compensation and transitions to new livelihoods: Evidence from an expropriation in Ethiopia", CSAE Working Paper WPS/2015-04

<sup>76</sup> Gebre Yntiso (2008), "Urban Development and Displacement in Addis Ababa: The Impact of Resettlement Projects on Low-Income Households", *Eastern Africa Social Sciences Research Review*, 24:2, p. 59.

<sup>77</sup> Saptak Sanyal and Aditya Shankar (2008-2009), "Property Rights and Sustainable Development in India", *Colum. J. Asia. L.*, 22:2, p 254.

<sup>78</sup> Saptak Sanyal and Aditya Shankar, *supra* note 77, pp. 248-249.

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rehabilitation of affected people as two sides of the same coin.<sup>79</sup> This is on the top of payment of the market value of the land to the affected people. The Indian draft land acquisitions bill construes people affected by land acquisition broadly to include those working on the land who are taken as tenants. Ethiopia can also emulate from Ghana where the 1992 Constitution of that country in Article 20(3), provides for resettlement of “displaced inhabitants on suitable alternative land with due regard for their economic well-being and social and cultural values”.<sup>80</sup>

The Indian and Ghanaian approach to land acquisition is lacking in Ethiopia. As indicated above, Ethiopia needs to work out the details of the notion of rehabilitation of evictees which is vaguely mentioned in the law. In the context of farmers who lose their lands for urban expansion purposes, this rehabilitation scheme might, for instance, mean putting an alternative livelihood framework “to integrate them into the urban economy and society...” by offering them with “Access to credits and savings opportunities” and giving them the requisite training in alternative livelihood strategies tailored to their specific local circumstances.<sup>81</sup> Whatever mode of rehabilitation strategy may be adopted in Ethiopia, it is imperative that the country move away from the mere compensatory approach it is pursuing at present.<sup>82</sup>

### 1.3 Procedural safeguards

Procedural safeguards with regard to expropriation suggests observance of *due process of law* whose absence has been equated with “...being deprived of land rights or lacking access to legal remedy to defend them” which constitutes “the ultimate state of vulnerability...”.<sup>83</sup> Proper and effective procedural safeguards are believed to contribute to the protection of property rights for they have a restraining effect both on the executive and the legislature.

However, the expropriation law in force in Ethiopia manifests a deficiency in this regard. The Constitution, in its draft stage, included a clause providing for a public forum at which the concerned public authorities would be required to

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<sup>79</sup> The Draft Land Acquisition and Rehabilitation and Resettlement Bill, Foreword I, July 2011, at <[www.thehindu.com/multimedia/archive/.../The\\_Draft\\_National\\_738172a.pdf](http://www.thehindu.com/multimedia/archive/.../The_Draft_National_738172a.pdf)> (accessed January 4, 2012). Interestingly this bill also seeks to absolutely prohibit acquisition of “multi-cropped, irrigated land” for non-agricultural uses; and it also provides that the land would be taken away from the developer if he fails to use it for the intended purpose for five years.

<sup>80</sup> The Constitution of the Republic of Ghana (1992).

<sup>81</sup> Kenate Worku (2008), “The Expansion of Addis Ababa and Its Impact on the Surrounding Areas: A Preliminary Study of the Nefas Silk Lafto District”, *Journal of Oromo Studies*, 15:2, p. 126 & 127.

<sup>82</sup> Gebre Yntiso *supra* note 76.

<sup>83</sup> *Id.*, p. 340.

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prove that expropriation was the only available option under the circumstances. The draft also required the authorities to establish a genuine case of public interest and compelled them to give an opportunity for potential land losers to explain their own version of the intended project.<sup>84</sup> However, this was removed from the final version of the Constitution. Thus, as the law stands, the requirement of public consultation is absent; it shows a regression in this regard from the Code which in early 1960s required the authorities to organize a public inquiry under certain conditions.<sup>85</sup>

Under the Expropriation Proclamation, expropriation is crafted largely as a matter that involves reaching a decision by an executive organ followed by simple notification of such decision to the expropriated. The process requires going through a series of administrative decisions. Some of these include reaching a decision on public purpose, determining whether the land has been lawfully acquired, fixing compensation and notifying the expropriated the time within which the land has to be cleared and taking over the land.<sup>86</sup> Among these, matters of compensation can be contested in the regular courts by way of review.<sup>87</sup> The expropriated cannot contest certain aspects of decisions of the authorities be it in an administrative or in judicial forum. This is true, for instance regarding the need for a specific project or whether the project advances public interest. This also holds true in connection with legality of the land possession and the appropriateness of the timing of dispossession. These issues appear to be left entirely to the discretion of the authority undertaking the expropriation. In such matters the administration reigns unchecked. The Expropriation Proclamation's exclusion of vital matters from the purview of regular courts relies on the Code's tradition of confining the power of regular courts to compensation issues. It has been remarked, "Looking into the Ethiopian procedure reveals the conspicuous absence of courts in the process. The involvement of courts in the process is minimal in that most cases do not even reach the courts".<sup>88</sup> A judge described the restrictive nature of the expropriation law as follows:

There are restrictive provisions in the expropriation law. People can appeal to regular courts only on compensation issue. The law prevents them from

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<sup>84</sup> Dustin Miller & Eyob Tekalign, *supra* note 20, p. 363. Discussions in this sub-section (Sub-section 1.3) are based on "Legislative Protection of Property Rights in Ethiopia: An Overview" (2013), *Mizan Law Review*, vol. 7:2, pp. 188-190.

<sup>85</sup> The Code, Article 1465.

<sup>86</sup> The Expropriation Proclamation, Article 4 cum Articles 5, 6 & 10.

<sup>87</sup> The 2005 Expropriation Proclamation, Article 11, and May 2005 Deliberations *supra* note 6, p. 9 and the Urban Land Lease Holding Proclamation, 2002, Article 18(4), which, as revised in 2011, has also retained the position that courts may entrain appeal from the expropriated only in respect of compensation issues.

<sup>88</sup> Daniel W/Gebriel *infra* note 238, p. 187.

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coming to court where they want to raise legal issues not related to compensation. Affected persons are required to adduce evidence showing that they have handed over the property to the authorities as a condition for appeal in regular courts; but many petitioners do not meet this requirement because they do not know this requirement of the law. As a result, those affected by expropriation file cases to the regular court before handing their land over to the authorities. We are constrained by the law. We reject their case telling them that the law does not allow them to go to the court to challenge expropriation before they hand over the property in question to the authorities. It narrows judicial remedies.<sup>89</sup>

A property law expert also says "Courts should be empowered in regard to property. Their involvement shall be enhanced. Property disputes which do not entail the involvement of courts shall be reduced. Currently, power in regard to expropriation ... gravitates towards the administration".<sup>90</sup> It has further been stated:

Property is insecure. The Constitution says people have full private ownership over property attributed to their capital and labor. But authorities change directives regarding land and immovable property frequently. The law says [landholders] shall be given 90 days to clear their property after receiving expropriation order. But occasionally [they] are ordered to remove their property in less than 90 days. The authorities in charge of land matters possess wide discretionary power. They can revoke land certificates without judicial scrutiny and they can do so easily. There shall be laws which allow review of decisions of administrative authorities in regard to revocation of land certificates.<sup>91</sup>

The Expropriation Proclamation, therefore, appears to imply that the expropriated cannot challenge the decision of administrative bodies regarding the existence of public purpose, be it in administrative or judicial forum. The law conveys this message by restricting appeals to matters pertaining to the denial or amount of compensation.<sup>92</sup> The law seems to take the decision of the concerned executive authority on the existence or otherwise of public purpose in a given project as a final one. And in making the issue of determination of public purpose non-justiciable, the Expropriation Proclamation has followed the path taken by the Code.<sup>93</sup>

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<sup>89</sup> Summary of Focus Group Discussion *supra* note 13.

<sup>90</sup> Interview *supra* note 32.

<sup>91</sup> Summary of Focus Group Discussion *supra* note 13.

<sup>92</sup> The Expropriation Proclamation, Article 11.

<sup>93</sup> The Code, Articles 1473-1479.

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...[A]ll property owners in Ethiopia, especially those who live in the city center and the verge of it are under perpetual threat of expropriation. Even those land holders in transition zone (between center and periphery) are, in principle, under the risk of losing their land, because someone with better economic means may claim their land for “better use” of it. The role of courts in interpretation and restricting the administrative decision of public purpose is not known. The silence of the law may be interpreted in some quarters and by some courts as if courts are denied such power. In current Ethiopia where the independence of courts is not encouraging, the tendency will be that they may not ‘dare’ to restrict the government from its decision of expropriation.<sup>94</sup>

Kenya and Ghana are better than Ethiopia in empowering courts to review a wide range of expropriation issues. Article 20(2) of the Constitution of Kenya states that compulsory acquisition of property by the State shall “only be made under a law which makes provision for a right of access to the High Court by any person who has an interest in or right over the property whether direct or on appeal from any other authority, for the determination of his interest or right and the amount of compensation to which he is entitled”. This constitutional requirement has been elaborated in Kenya’s Land Acquisition Act.<sup>95</sup>

Likewise, Ghana possesses a relatively similar normative framework. Yet, both countries face practical drawbacks. This means one should be able to see the practice under the veneer of robust legal stipulations. A review of Kenya’s law of compulsory land acquisition shows that sufficient guidance is included at the level of the Constitution, stipulating for prompt and fair compensation; providing leeway to compensate occupants in good faith who may not hold title to the land and land administration, and hence decentralization of expropriation to county level.<sup>96</sup> The problems in the implementation of the law of compulsory acquisition of land rights in Ghana are summarized as follows:

... [The problems include] the acquisition of lands far in excess of actual requirements, unpaid compensation in respect of some of the acquisitions, change of use of compulsorily acquired land as against the purpose of the acquisition, lands occupied by the state without any acquisition, depriving the land owners the opportunity to demand compensation. The result is loss of public confidence in the state machinery for the management of land,

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<sup>94</sup> Daniel W/Gebriel *infra* note 138, p. 217.

<sup>95</sup> See Section 28 (1) of the Act.

<sup>96</sup> Nelson Awori (2012), “Review of the Land Bill (2012) and the Land Registration Bill (2012)”, Land Development and Governance Institute, (accessed November 19, 2013). Wafula L. Nabutola (2009), “Compulsory Purchase and Land Acquisition in Kenya”, (7th FIG Regional Conference Spatial Data Serving People: Land Governance and the Environment – Building the Capacity, Hanoi, Vietnam) p. 20.

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leading to tension between the state and customary land owners, massive deliberate encroachment of state lands, and challenging the state's legitimacy to claim control over compulsorily acquired lands.<sup>97</sup>

Inadequate compensation, failure to take the value of land into account during compensation, narrow interpretation of the term 'landholder or landowner' in a way that excludes some legitimate property right holders and lack of representation of affected persons in the process of determination of compensation are issues of concern in Ghana's expropriation regime.<sup>98</sup> Hence, the lesson that can be taken from the eminent domain laws and practice of the two countries is that even fairly elaborate constitutional provisions supported by long established subsidiary expropriation laws could lead to a wide interpretation of public purpose, a paltry compensation and frequent violation of legal procedures. These lessons show that the problems do not merely relate to the embodiment of the rights in the law, but also pertain to their justiciability and access to courts in order to prevent arbitrary or corrupt official behaviors.

## 2. Government Narrative: 'Transformative Expropriation'

The discussion and analysis here-above imply a loose expropriation legal framework that tilts towards the state. This lopsided expropriation legal arrangement is reflected in the construction of public purpose, the removal of land use rights from compensable items, payment of insignificant amount of compensation, and above all, making virtually all administrative decisions pertaining to expropriation immune from judicial review. As a result, checks and balances have been removed. It has cleared the road for the government to transfer land to the private sector with few shackles.

Once the land expropriated from peasants is transferred to investors, legally speaking, it becomes harder for the state to expropriate such land from the latter.

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<sup>97</sup> Wordsworth Odame Larbi (2008), "Compulsory Land Acquisition and Compensation in Ghana: Searching for Alternative Policies and Strategies", FIG/FAO/CNG International Seminar on State and Public Sector Land Management Verona, Italy), p. 1.

<sup>98</sup> Wilfred K. Anim-Odame (2011), "Compulsory Acquisition and Compensation in Ghana: Principles & Practice", Paper presented at the American Real Estate Society Conference in Seattle-Washington, USA <[http://www.afrer.org/docs/pdf/DrWilfredAnim-Odame\\_Paper.pdf](http://www.afrer.org/docs/pdf/DrWilfredAnim-Odame_Paper.pdf)> (accessed November 13, 2013); P. K. Asamoah (2012), "Government's Compulsory Land Acquisition and The Right to Property: the Case of Mining Communities in Ghana", (Masters Thesis, University of Oslo) pp. 48-50 <<https://www.duo.uio.no/bitstream/handle/10852/34056/ASAMOAH-xMASTER.xpdf.pdf?sequence=2>> (accessed November 11, 2013); Albert Adu-Gyamfi (2012), "An Overview of Compulsory Land Acquisition in Ghana: Examining Its Applicability and Effects", *Environmental Management and Sustainable Development*, 1:2. pp. 187, 188 & 201.

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This comes from its own legislative commitments as embodied in bilateral investment treaties and the Expropriation Proclamation. The land use rights of peasants, after it is transferred to the investor through the instrumentality of eminent domain, becomes part of the domain of more secure long term lease right. This seems to be a bid to offer the necessary legal security to the property of investors in a country that is trying to change its previous anti-private property impulse.

This in turn is meant to attract more investments leading to the creation of more tax revenues, more and secure jobs, acceleration and increase in the volume of capital inflow and transfer of technology and ultimately bringing about economic development. As one of the poorest countries, Ethiopia puts a premium on economic growth and consequently aspires to raise the income level of its poverty-stricken population. With this in mind, the state decidedly favors the transfer of land from peasants to investors through takings. In so doing, the state aspires to fundamentally alter the existing structure of the Ethiopian economy, which is dominated by subsistence agriculture where land is held in the hands of the majority.

The state thinks that such land tenure transforming mandate comes from the idea that land is the ‘common property’ in the sense that every Ethiopian has an indivisible ownership claim over every piece of land located within the bounds of the Ethiopian territory.<sup>99</sup> Yet, each Ethiopian citizen may not necessarily realize this ownership right in the sense of being entitled to a share in every plot of land. The state seems to believe that it is incumbent upon it, as a holder and manager of this common resource in the form of trusteeship, to ensure that all citizens would at least indirectly benefit from the use of such common asset.

This line of analysis views expropriation as a beneficial measure in the sense that land would be taken from the multitude who are using it for subsistence purposes and be transferred to investors who are supposed to invest on it to benefit the majority through the creation of jobs and the development of economic and social infrastructure. In this policy context, land would be given swiftly and cheaply to what the state calls *limatawi balehabt* (‘developmental investors’) and such developmental investors in return are required to use the land so given for the intended project within the agreed time-frame. Failing this would entail, land retaking and monetary sanctions. This seems to be a sound rendition of expropriation in the context of the state’s economic policy which is anchored on the idea of rapid ‘inclusive economic growth’.<sup>100</sup>

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<sup>99</sup> Article 40 (3) of the Constitution, which provides “Land is a *common property of the Nations, Nationalities and Peoples of Ethiopia...*” (Emphasis supplied).

<sup>100</sup> Government of Ethiopia (2001), “Rural Development Policies and Strategies of Ethiopia”, (Addis Ababa, The Ministry of Information).

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This vision of land expropriation will not, however, bear these anticipated fruits automatically.<sup>101</sup> Its fruitfulness is rather contingent upon the monitoring and follow-up capacity of the state authorities, the integrity of the process of land expropriation, the officials in charge as well as the soundness of investment projects. It also rests on the willingness of officials to take effective measure against those investors who take land for speculative purposes. The vision of transformative land takings also hinges on the capacity of investors to put the land they take to use for productive activities.

Nevertheless, empirical studies suggest that expropriated lands are often taken for speculative purposes, or the purposes for which projects are approved are unilaterally changed; researches also indicate lack of consistent and effective sanctions against those investors who leave such land unused for several years.<sup>102</sup> These failings have readily and frequently been admitted by the authorities themselves.<sup>103</sup>

At the heart of this beneficial expropriation in Ethiopia is an increasing trend for redefining the notion of property rights in land. The country is retaking land that was expropriated from landlords and redistributed to peasants after the 1974 revolution. In 1975, it took the issuance of a single legislation to wipe out the system of exploitative absentee landlordism and to transfer land to poor tenants and farm workers in the Ethiopian countryside. Now it might take a series of

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<sup>101</sup> Jill Zimmerman (2005), "Property on the Line: Is An Expropriation Centered Land Reform Constitutionally Permissible", *S. African L. J.*, vol., 122, pp. 416ff. The Ethiopian state's articulation of expropriation appears to be similar to what Zimmerman calls transformative expropriation arguing in the South African context that "the state should invoke expropriation to obtain land for redistribution purposes but compensation with significantly below market value, which course of action has support in the constitution; market value should not be the central or even predominant factor in this kind of expropriation." See also A J Van Der Walt (2006), "In Reconciling the State's Duties to Promote Land Reform and to Pay 'Just and Equitable' Compensation for Expropriation", *S. African L. J.*, vol. 123, pp. 23ff for the critique of this position of Zimmerman.

<sup>102</sup> The field researches also reveal that investors, with limited capital and experience acquire land, which lead to leaving the land so taken idle for many years while some investors with financial capabilities and as well as the requisite experience are finding it difficult to obtain agricultural investment land, in particular in the southern state. For this, see Dereje Seyoum, Access to Rural Land and Compensation Payment Schemes for Agricultural Investment in Amhara Regional State in the Proceedings *infra* note 138, pp. 33-35 & 45. And also see Letta Abebe and Dejene Chaka, Access to Rural Land and Compensation Payment Schemes for Agricultural Investment in Oromia Regional State in the Proceedings *supra* note 138, pp. 42 & 93-94. Nigusse Abebe, Perspectives on Access to Rural Land and Compensation Payment Schemes for Agricultural Investment in the Proceedings *supra* note 138, pp. 21-22.

<sup>103</sup> See the Proceedings of the Workshop on Land Policies & Legal Empowerment of the Poor, November 2-3, 2006, World Bank Washington D.C. *supra* note 62.

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acts of expropriation to undermine the effects of such redistributive action. The state that sided with poor peasants is now tending to ally with capital on the assumption that such an alliance would advance the interests of the general public.

Finally, at the heart of the beneficial expropriation thinking is an economic notion of land rights, i.e., “an ethic that regards economic development and monetary return as evidence of the land’s highest and best use”.<sup>104</sup> In other words, the scheme of beneficial expropriation of land upheld by the Ethiopian state is conceived as simply one of the factors of production that changes hands through the intermediary of the state from peasants to investors in order to advance economic development.

### 3. Reforming Expropriation in Ethiopia

The preceding sections reveal a lax expropriation regime. Based on this finding, the sections imply reform concerning compensable interests, basis of calculating compensation, substitute land, normative contradiction and uniformity, notion of a landholder and significant implementation problems including lack of rehabilitation scheme. The current section considers the potential of rethinking the country’s expropriation law through enhanced judicial security, recasting land use rights as a human right and ensuring quality of post-taking projects.

#### 3.1 Judicial scrutiny

Scholars have sought to rectify the imbalance attributable to the present expropriation laws of Ethiopia by allowing the judiciary to entertain major disputes relating to expropriation including public purpose.<sup>105</sup> Unfortunately, the law regarding the role of courts is vague because the law neither allows nor prohibits court litigation on the question of public purpose. Moreover, the legal framework on the possibility of reviewing final decisions of lower courts in relation to compensation through cassation is silent. In this regard, it is opined that “The law does not explicitly permit cassation. It is not proscribed either. Hence, parties have the right to seek review by way of cassation”.<sup>106</sup> The dictum ‘what is not prohibited is assumed to be allowed’ can also be invoked in connection with public purpose. The access to justice clause enshrined in Article 37 of the Constitution might be construed to this end. This is a mere argument with the possibility of a counter-argument.

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<sup>104</sup> Lynton Kieth Caldwell (1986), “Land and the Law: Problems in Legal Philosophy”, *U. Ill. L. Rev.*, vol. 19, p. 329.

<sup>105</sup> Daniel Behailu (2015), *Transfer of Land Rights in Ethiopia: Towards a Sustainable Policy Framework*, (The Hague: Eleven Publishing) and Daniel W/Gebriel *infra* note 138.

<sup>106</sup> Summary of Focus Group Discussion *supra* note 13.

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In the Ethiopian case, allowing people affected by expropriation to resort to regular courts might not necessarily work in favor of the poor because of deficit in the independence of the judiciary in relation to cases that are deemed or perceived to matter to the authorities. Currently, the country's judicial system has moved away from its earlier formal dependence towards its legal and constitutional independence. This is so because the judiciary's formal independence is unambiguously stated in the Constitution, which declares that: "An independent judiciary is established... Courts of any level shall be free from any interference of ... any governmental body, government official or from any other source ... judges shall be directed solely by the law."<sup>107</sup>

There are misgivings about the judiciary's detachment, as a matter of fact, from the legacy of dependence. History is one factor. In Ethiopia, historically, there had been a formal union between the judiciary and the executive adversely affecting the former's present independence. Assefa observes:<sup>108</sup>

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

Perception is another reason. It is stated that "There is a perception that the autonomy of the judiciary in Ethiopia is weak..."<sup>109</sup> Assefa says "...external

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<sup>107</sup> The Constitution, Article 78 (1) and Article 79 (2& 3).

<sup>108</sup> Assefa Fiseha (2005/2006), *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study*, (Netherlands, Wolf Legal Publishers) p. 390; see also Chi Mgbako *et al* (2008), "Silencing the Ethiopian Courts: Non-Judicial Constitutional Review and its Impact on Human Rights", *Fordham International Law Journal*, 32:1, pp. 289-290 & 296, where it is asserted that "The executive branch has the power to do as it wishes with no judicial checks on its activities..." See also Tigist Assefa (2010), "Judicial Review of Administrative Actions: A Comparative Analysis" (LL.M Thesis, School of Law, Addis Ababa University) <<http://etd.aau.edu.et/dspace/bitstream/123456789/2154/1/Tigist%20Asefa.pdf>> (viewed December, 22, 2011). Discussions in this sub-section (Sub-section 3.1) are based on a Comment the present writer co-authored with Hailu Burayu and Elias N. Stebek under the title "Judicial Protection of Private Property Rights in Ethiopia: Selected Themes" (2013), *Mizan Law Review*, vol. 7:2, pp. 360-363.

<sup>109</sup> African Development Bank (2009), "Country Governance Profile: Ethiopia" (hereinafter Country Governance Profile) <<http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/Ethiopia%20%E2%80%93%20Country%20Governance%20Profile%20EN.pdf>> (accessed January 11, 2012) p. 11; see also The Canadian International Development

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pressure on the judiciary has deep roots and is not without some hangovers on the new federal judiciary. Administrators at state level, even today, think that it is natural to order the judge...<sup>110</sup> Past legacy contributes to this perception: “A long history of centralized governmental authority and a judiciary subjugated to the executive branch has fostered a weak judicial branch with reduced capacity to exercise genuine independence, as well as a reticence of other branches to treat the judiciary as either truly independent or co-equal.”<sup>111</sup> In particular, “...where government interests are at stake, direct interference has been noted...”<sup>112</sup>

The issue goes far beyond *de facto* executive intervention. The legislature appears to have played a role in the process by passing successive legislation having the impact of stripping regular courts of jurisdictions.<sup>113</sup> Further, as the Global Competitiveness Report has it, measured in terms of juridical independence, Ethiopia ranks 89 out of 139 countries, which has shown an improvement from its previous ranking, but Ethiopia’s standing is still low in the ranking index.<sup>114</sup> The underperformance is in spite of the fact that the country endeavoured to reform the judiciary whose central aim was “the promotion of professional and autonomous judiciary”.<sup>115</sup> This is notwithstanding other factors which impede the assertiveness,<sup>116</sup> accessibility, effectiveness and efficiency of the judiciary.<sup>117</sup>

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Agency (2008), “Independence, Transparency and Accountability in the Judiciary of Ethiopia” (Unpublished, on file with the author), pp. 99-101 & 135-138.

<sup>110</sup> Assefa Fiseha, *supra* note 108, p. 390.

<sup>111</sup> The World Bank, Judicial and Legal Assessment (2004), <<http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/EthiopiaSA.pdf>> (accessed January 11, 2012) pp. 19 & 21-23.

<sup>112</sup> *Id.*, p. 21.

<sup>113</sup> Yared Legesse (2014), “Court Stripping: A Threat to Judicial Independence” in *The FDRE Constitution: Some Perspectives on the Institutional Dimension* Ethiopian Human Right Series, vol. vi (Addis Ababa University, School of Law).

<sup>114</sup> World Economic Forum, *The Global Competitiveness Report 2010-2011* <[http://www3.weforum.org/docs/WEF\\_GlobalCompetitivenessReport\\_2010-11.pdf](http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2010-11.pdf)>, (last viewed December 21, 2011) at 155.

<sup>115</sup> Country Governance Profile *supra* p. 109.

<sup>116</sup> There is a tendency to restrict the turfs of its power even in cases which are deemed ordinary. This is particularly true when it comes to reviewing the actions of executive organs. For instance, in *Ethiopian Privatization and Public Enterprises Supervising Authority vs Heirs of Nour Beza*, (Fed. Sup. Ct. Cassation File No. 23608, 2000E.C.) in the Decisions of the Federal Supreme Court Cassation Division Vol. 5 (Addis Ababa: Federal Supreme Court, 2001 E.C.) pp. 304-305, where the court has reasoned that “in the Ethiopian context, judicial power of the regular courts is not inherent but it emanates from the positive law and that where bodies other than regular courts are given by the law

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The deference of the judiciary to executive measures is another factor. This is manifested, for example, in the decision of the Federal Supreme Court which has prohibited courts from reviewing decisions regarding nullifications of title deeds by administrative bodies.<sup>118</sup>

Therefore, given the above accounts of the judiciary's present standing and historical inertia behind it, it is unclear to expect this branch of the government would scrutinize expropriation issues such as determination of public purpose and rehabilitation should they be challenged before it.

### 3.2 Redefining land use rights as human rights

Some rightly classify expropriation into two categories on the basis of the link between property (subjected to expropriation) and one's livelihood.<sup>119</sup> The contrast between the categories represents expropriation of a mere economic asset *versus* that of a subsistence asset. When land is taken from investors, the government is depriving them of a mere asset, but not the foundation of their livelihood; when property such as land is taken from small landholders the government is depriving them of a livelihood asset.<sup>120</sup> Subscribing to this dichotomy calls for more stringent protection when expropriation is invoked with regard to livelihood asset than when it is used to expropriate an economic asset. However, what is reflected in the expropriation law of Ethiopia is the opposite; in the country's eagerness to attract investment, it seems, it is making it legally easier for the state to deprive a livelihood asset than is the case with a mere economic asset. There is thus the need to depart from this *status quo* by creating a nexus between livelihood resources such as land and the *right to life* (as land rights of smallholder farmers are indispensable for the right to life).

Section 1.2(g) has already implied this linkage when it proposed the mandatory rehabilitation strategy, i.e., tying land use rights to loss of land, a critical livelihood asset, which in effect means linking such right to the wider concerns of livelihood. Within the scheme of the Constitution, land rights and

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the power to render final and binding decisions then regular courts cannot size upon such matters even by way of review."

<sup>117</sup> Federal Democratic Republic of Ethiopia (2005), "Comprehensive Justice Reform Program: Base Line Study Report" (Amsterdam, Centre for International Legal Cooperation), pp. 77-89 & 213-227.

<sup>118</sup> Yemane Kassa, (2011), "The Judiciary and Its Interpretive Power in Ethiopia: A Case Study Of The Ethiopian Revenues And Customs Authority" (LL.M Thesis, School of Law, Addis Ababa University); Hailu Butayu *et al* (2013) "Judicial Protection of Private Property Rights in Ethiopia: Selected Themes" *Mizan Law Review*, 7:2. Elias N. Stebek (2013) "Role Conflict between Land Allocation and Municipal Functions in Addis Ababa", *Mizan Law Review*, 7:2.

<sup>119</sup> Antonio Azuela and Carlos Herrera-Martin, *supra* note 1, p. 339.

<sup>120</sup> *Ibid.*

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more generally the right to property are, however, labeled as democratic rights as opposed to a human right. Though argued to be “a classification without significant impact”,<sup>121</sup> the categorization of land rights as democratic rights formally means, in essence<sup>122</sup> the state can more easily restrict or trump the land rights of citizens. If the democratic rights path is followed, the state can issue lax expropriation laws, as it has done at present, that mandate it to take land from the people in the name of development.

One can nevertheless plausibly interpret other provisions of the Constitution to take land rights out of the democratic rights box. Following the foot path of the Indian courts,<sup>123</sup> though rendered in connection with public employment, it is plausible to link the land rights of peasants to the right to life clause of the Constitution, which is seen as “emanating from the nature of mankind” and “inviolable”.<sup>124</sup> Land rights in Ethiopia are (more often than not) the sole source of livelihood for smallholder farmers. They constitute an indispensable factor for the rural population and are thus part and parcel of their constitutional right

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<sup>121</sup> Gedion Timothewos (2010), “Freedom of Expression in Ethiopia: The Jurisprudential Dearth”, *Mizan Law Review*, 4:2, p. 211; see also Tsegaye Regassa (2009), “Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia”, *Mizan Law Review*, 3:2 p. 303.

<sup>122</sup> See the text of the two sub-articles of Article 10 of the Constitution. See also Abadir Mohamed (2008), “The Human Rights Provisions of the FDRE Constitution in Light of the Theoretical Foundations of Human Rights”, (Addis Ababa: Addis Ababa University Faculty of Law) p. 85. The reading preparatory documents show that the dichotomy of rights under the constitution as human and democratic was a deliberate one. For this see Gedion Timothewos, *supra* note 121 p. 209.

<sup>123</sup> See where a court in India has decided in *Delhi Transport Corporation vs D.T.C. Mazdoor Congress* on 4 September, 1990 <<http://www.indiankanoon.org/doc/268805/>> last viewed December 22, 2011) that the right to public employment is part and parcel of the right to life enshrined in the Indian Constitution. The Court has reasoned: “The right to life, a basic human right, assured by Article 21 of the Constitution comprehends something more than mere animal existence; it does not only mean physical existence, but includes basic human dignity. The right to public employment and its concomitant right to livelihood receive their succour and nourishment under the canopy of the protective umbrella...of the Constitution. The right to life includes right to livelihood. The right to livelihood, therefore, cannot hang on to the fancies of individuals in authority. The employment is not a bounty from them nor can its survival be at their mercy. Income is the foundation of many fundamental rights and when work is the sole source of income, the right to work becomes as much fundamental. Fundamental rights can ill-afford to be consigned to the limb of undefined premises and uncertain applications. That will be a mockery of them.”

<sup>124</sup> The Constitution, Article 10 (1) and Article 15.

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to life; this would accord such rights sanctity by removing them away from easy reach of state authorities.<sup>125</sup>

Characterization of land rights as a dimension of the right to life suggested here is not the same as the human rights approach advanced by the UN agencies with regard to evictions. This discourse of the UN agencies articulates evictions within the rubric of social, economic and cultural rights of affected people in particular their housing right –primarily in urban settings. The human rights approach as advanced by the UN agencies rejects any eviction projects, and hence housing rights as human rights trumps all other societal concerns. Here property right as a type of human right underlies the housing rights campaigners.<sup>126</sup> This way of presenting human rights has been rightly critiqued as failing "...to acknowledge the economic implications of policy options."<sup>127</sup>

Land as an aspect of the constitutional right of peasants proposed here is also in a sharp contrast with the economic development perspective, an approach formulated by international economic agencies such as the World Bank, the International Monetary Fund and USAID that would, if applied in the context of present Ethiopian land tenure, over privilege the objective of economic development. At the heart of this latter position is economic utilitarianism grounded in private property rights ideas of Boserup and North.<sup>128</sup> A concrete application of this economic development discourse is encapsulated in free trade agreements where the paramount issue is the protection of the property rights of investors underpinned by the belief that opportunities created by the investors would trickle down to the poor.<sup>129</sup>

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<sup>125</sup> Such interpretation however cannot come from Ethiopian regular courts for they are not mandated to interpret the Constitution; it might come from the House of Federation, a political organ vested with sole and ultimate authority to interpret the constitution. See Article 62 of the Constitution which authorizes the House of Federation, the upper house, to entertain constitutional interpretation.

<sup>126</sup> Antonio Azuela and Carlos Herrera-Martin, *supra* note 1p. 346.

<sup>127</sup> *Id.*, pp. 358-359.

<sup>128</sup> Ilya Somint (2007-2008), "The Politics of Economic Development Takings" *Case W. Res. L. Rev.*, vol. 58, where, among others, the author argues for the importance of the accountability of those who decide on economic development takings. Somint says that the question that must be answered in the affirmative is: are those who decide on economic development takings accountable to the electorate (political power of the land holders) given the lack of knowledge on the part of the electoral about the effects of economic takings, given the long time it takes before one reaps, if any, the benefits of economic takings?

<sup>129</sup> Martha Belete (2014), "Standard of Compensation for Expropriation and Nationalization of Foreign Investment in Ethiopia", *Journal of Ethiopian Law*, 26:2; and Alec R. Johnson (2010), "Rethinking Bilateral Investment Treaties in Sub-Saharan Africa", *Emory Law Journal*, vol. 59

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The economic development discourse seems to incline toward efficiency for it welcomes transfer of land from 'less efficient' users, peasants, to more efficient users, investors, as long as the former get 'just compensation'. But it is argued that: "Economic development theories that inspire land tenure reforms in many countries ignore the human rights dimension; free trade agreements focus on the interests of investors. If land policies are to be based on solid foundations, all these dimensions must be considered".<sup>130</sup> On the other hand, the argument that treats land rights of peasants in Ethiopia as an aspect of their constitutional right to life seeks to combine the merits of the human rights and the economic development approaches while removing their deficiencies. To this end, it corrects the imbalance in land takings that at present tilts toward the authorities without at the same time making it impossible for the authorities to use their eminent domain power.

In sum, the presentation of land rights of peasants as an integral part of their constitutional right to life is not sufficient in itself. It requires concrete expression in legal rules, as has been recommended in the context of Indian draft land acquisition bill discussed above. The draft is meant to restrict the state in the course of land expropriation. It tightens up the definition of public purpose, puts in place mandatory and effective public hearing and consultation mechanisms, allows interested persons to object to land acquisition, thereby "limiting the type and amount of agricultural land that can be expropriated at any given point in time,"<sup>131</sup> making the amount of compensation adequate, and revising the expropriation laws so that loss of land of the poor occurs only upon the fulfilment stringent conditions. In effect, payment of compensation does not merely consider loss of property on the land such as standing crops. These and other specific legal remedies have also been suggested to revamp expropriation laws of other countries.<sup>132</sup>

### 3.3 Post-expropriation development

The fact that farmland is expropriated for economic development from people who use it for subsistence purpose may not always mean that judicious development will occur. As the authorities in Ethiopia readily and frequently

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<sup>130</sup> Antonio Azuela and Carlos Herrera-Martin, *supra* note 1 pp. 358-359.

<sup>131</sup> This is suggested by Saptak Sanyal and Aditya Shankar, *supra* note 77 p. 244.

<sup>132</sup> *Ibid.* Such measures include: the largest amount of the compensation for loss of land shall go to land losing farmers, not to village collectives and local governments, and the process of land taking shall be made democratized and complementary measures should be taken to list down matters that constitute public interest, unlisted ones shall be subject to approval by state council).

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admit, expropriated lands lay idle for lack of the requisite capital and/or for want of proper follow up.<sup>133</sup> As Girma notes:

The authorities expropriate land from farmers under the guise of advancing more important purposes... Many `investors` take the land not to invest but to sell it underground with high price... Others change the original purpose for which land was expropriated. And most rural land... stays idle.... Public authorities are not ready to take any measure against those who fail to develop the land within the agreed time. ...<sup>134</sup>

In other situations, the land expropriated might be put to inimical development activities such as the ones that ruin the environment. Or, development might take place to the sole benefit of investors without addressing the felt need of society such as secure employment.<sup>135</sup>

In the context where land is acquired for speculative purposes or put to inimical use, it is necessary to give special attention to the quality of development during pre-expropriation public hearings and consultations. Quality post-expropriation development means ascertaining at the time of expropriation the probability of the occurrence of development which contributes to the reduction of "concentrated poverty." Dana argues:

If we want eminent domain ... for good development, we should consider eminent domain reform that ties the availability of eminent domain to the characteristics of the development that will replace current land uses. One such reform would be an eminent domain test that would make eminent domain available when the anticipated new development would have features that are likely to contribute to reductions in the concentration of poverty. Such reductions arguably are a social good in themselves.<sup>136</sup>

Broadly speaking, each project requiring land expropriation has to raise and prudently answer the question: "...what kinds of development and what kinds of communities, we as a society, state and national polities, believe will best advance the public welfare.?"<sup>137</sup> This requires giving as much attention to the nature of development to take place after expropriation as we do pay attention to the amount of compensation due and the judicial processes at the disposal of affected people.

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<sup>133</sup> One frequently reads news that some regional states cancel land lease contracts leading to land restitutions.

<sup>134</sup> Girma Kassa, *supra* note 20, pp. 80-82.

<sup>135</sup> David A. Dana (2007-2008), "Reframing Eminent Domain: Unsupported Advocacy, Ambiguous Economics and the Case for a New Public Test", *Vt. L. Rev.*, vol. 32.

<sup>136</sup> *Id.*, p. 168.

<sup>137</sup> *Id.*, p. 169.

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## Conclusion

Review of the law and the available field research shows that Ethiopia's expropriation regime exhibits many limitations.<sup>138</sup> Deficits are reflected in a broader definition of public purpose, lack of legally required public hearings and consultations, requirement of production of a landholding certificate to be eligible to receive compensation (implying the exclusion of some affected people especially informal landholders and property owners from payment of compensation), compensation scheme that is widely regarded as insufficient, limited judicial scrutiny of issues of expropriation and lack of institutional rehabilitation scheme to help those who have lost their livelihood to secure alternative means.<sup>139</sup>

Decades ago, Harrison Dunning argued for the abolition of the public purpose limitation stating that even a steadily widening notion of public purpose was:

unsuited to a modern, development oriented African state. Such a state is expected to engage in all fronts of development-planning, initiating, and often producing. In these circumstances, every development project, even one managed by private persons for their own profit directly serves the

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<sup>138</sup> Daniel Woldegabriel (2013c), "Land Rights and Expropriation in Ethiopia", PhD thesis, School of Architecture and the Built Environment, Sweden, Royal Institute of Technology); Imeru Tamrat, *supra* note 20, pp. 11-14; Ethiopian Land Tenure and Administration Program: Study on the Assessment of Rural Land Valuation and Compensation Practices in Ethiopia, Final Main Report (unpublished, on file with the author, 2007); Dustin Miller & Eyob Tekalign, *supra* note 20, pp. 362-363. See also the Proceedings of a Consultative Meeting on Rural Land Transactions and Agricultural Investment, (hereafter the Proceedings) (Gizachew Abegaz and Solomon Bekure (eds.), (Addis Ababa: Ethiopia-Strengthening Land Administration Program, 2009). Also see Irit Equavoen and Weyni Tesafi (2011), "Rebuilding Livelihoods after Dam-Induced Relocation in Koga, Blue Nile Basin in Ethiopia", Working Paper Series No. 83 (Bon: Center for Development Research, University of Bon) pp. 7-9 & 13-15, that documents irregularities in compensation payment including low amount of compensation in relation to people displaced as a result of irrigation project.

<sup>139</sup> The researches further indicate that people affected by expropriation proceedings lack knowledge of their rights to judicially challenge the decisions of the authorities even regarding compensation or even when they know about their rights they think it is either impossible or futile to bring the authorities to justice or when people are right conscious and daring enough to challenge those decisions in regular courts, the regular court judges lack knowledge of the relevant expropriation laws. An affected farmer said, "The government has all the powers, i.e., the court, the police, the prosecutor all belong to the government. We fear that there might be revenge from the authorities. We have no recourse to appeal against the decision of the authorities. Even if we are able to do it there is no probability of winning the case. It is like struggling with a mountain to demolish it." As cited in Girma Kassa, *supra* note 20, p. 115.

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public interest ... The power of eminent domain must be viewed positively and even the most broadly worded public purpose limitation encourages a negative, restrictive approach. Moreover, if the definition is expanded to include any conceivable project, the limitation is being simply retained for ornamental or sentimental reasons and is misleading.<sup>140</sup>

Dunning characterized the concept of public purpose as 'alien or obsolete legal doctrines inhibiting development' in African countries.<sup>141</sup> He argued that the requirement of payment of compensation should however be retained but linked directly to development, for example, by "denying compensation for undeveloped property..."<sup>142</sup> He further suggested simplified procedures in order to expedite the taking of property by the state at an early stage in the process.<sup>143</sup>

Under Dunning's schema the state would be allowed to exercise its eminent domain power unshackled by conditions. In his scheme, the costs of economic development projects would be cheaper and the implementation of the projects in poor African countries swifter; the land so taken would be put to economic development conceived in its broader sense; people would benefit from the jobs created by the developmental state by raising their level of income; and perhaps, the state would exercise its power of eminent domain judiciously in spite of lack of legal constraints.

However, the idea of unhindered expropriation was advanced at the time when development was equated with economic growth through a robust state, which assumes that if the nation grows, then there is development. Experience has taught mankind to the contrary. Eminent domain has been exercised in the name of development to dis-empower the poor. The view which would like to see lax expropriation requirements appears to interpret land rights merely in economic terms to be compensated directly with the payment of lower amount of compensation and indirectly through the creation of jobs and availability of infrastructure. Yet, it has been amply settled in land tenure literature that to the poor, land is worth more than an economic asset; land gives them a place in a community. It is a means through which they voice their concerns in a given locality. Expropriation, when invoked inappropriately, detaches the poor from that locality.

One can easily subscribe to Dunning's suggestion that speed, simplicity and fairness ought to mark a system of good eminent domain.<sup>144</sup> Yet, his argument

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<sup>140</sup> Harrison Dunning (1968), 'Law and Economic Development in Africa: The Law of Eminent Domain', *Colum. L. Rev.*, vol., 68, p. 1313.

<sup>141</sup> *Id.*, p. 1315.

<sup>142</sup> *Id.*, p. 1314.

<sup>143</sup> *Id.*, pp. 1311-1312.

<sup>144</sup> *Id.*, pp. 1313-1314.

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for the removal of key restraints against the state's expropriation power unjustifiably favors the efficiency side of the matter at the expense of justice and fairness. One could not agree more with Sue Farran's observation that:

... often economic development is taking place so rapidly that the victims of it are left behind and long-term consequences are conveniently ignored in favor of short-term gain. Moreover, inequalities of wealth combined with inequalities of political power can result in a self-perpetuating system of human rights denial, especially where those who most benefit seek to preserve the unequal *status quo*.<sup>145</sup>

To argue for controlling the power of the executive by subjecting it to political and legal processes in its exercise of the power of expropriation is not to argue for paralyzing the state. It is rather to argue for subjecting the state to the rule of law.<sup>146</sup> It is about a quest for *balance* between private and public stakes in the exercise of the power of expropriation. At stake in expropriation proceedings that do not maintain this *balance* are the loss of livelihoods, erosion of the rule of law and adversities in the stability of the country. ————— ■

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<sup>145</sup> Sue Farran (2009), "Land as A Fundamental Right: A Cautionary Tale", *Victoria U. Wellington L. Rev.*, vol., 40, p. 402.

<sup>146</sup> For an account of the development of the rule of law in Ethiopia, see Assefa Fiseha (2013), "Customary Dispute Resolution Mechanisms and the Rule of Law: Areas of Convergence, Divergence and Implications", in *Law and Development, and Legal Pluralism* (Elias N. Stebek and Muradu Abdo, eds.), *Law and Development Series No. 1*, (Addis Ababa: Justice and Legal Systems Research Institute).

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