Rethinking Ethiopian Secured Transactions Law through Comparative Perspective:

Lessons from the Uniform Commercial Code of the US

Asress Adimi Gikay ♣

Abstract

Various countries have reformed their secured transaction laws recognizing the significance of modern secured transactions law in enhancing access to credit and economic development. Ethiopia has not undertaken comprehensive secured transactions law reform, despite the demonstrable mismatch between the legal regime governing security interests and the country's current political, economic and commercial realities. In-depth analysis of the Ethiopian secured transactions law is made in this article in the light of UCC[1] Art 9, English, and French secured transactions laws and the EBRD (European Bank for Reconstruction and Development) Model law and the experience of civil law jurisdiction of Louisiana. I argue that secured transaction law reform in Ethiopia can be implemented based on UCC Art. 9 with some adjustment in light of Louisiana's experience. The article uses the unitary concept of security interest and floating lien to exemplify the supremacy of the approaches and policies of UCC Art. 9 and its suitability as a model for potential secured transactions law reform in Ethiopia.

Key terms

Credit market, UCC, unitary concept/theory, functional approach, floating lien, floating charge, security interest, self-help repossession, efficiency

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♣ Asress Adimi Gikay, LLB, LLM, SJD, PhD Researcher, Scuola Universitaria Superiore Sant'Anna Pisa (SSSA), Piazza Martiri della Libertà, 33 56127 Pisa (Italia) C.F. 93008800505, Email: asress.adimi@gmail.com.

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[1] The Uniform Commercial Code (UCC) was published in 1952, as a uniform code to harmonize the commercial law of the states in the US through adoption.

Introduction

International organizations and states recognize modern secured transactions law as vital for economic development. The United Nations Commission on International Trade Law (UNCITRAL),[2] EBRD[3] and the Institute for Unification of Private International Law (UNIDROIT) are among the key advocates of modern secured transactions law at international level.[4] Central and Eastern European (CEE) countries, after the fall of communism have reformed their secured transactions laws as vital part of the transition to market economy and to sustain strong economy.[5] Various African countries such as Malawi,[6] Liberia,[7] Sierra Leone,[8] and Nigeria[9] have recently implemented comprehensive reforms, albeit not necessarily flawless.[10]

Frequently used acronyms:

BMP	Proclamation on Business Mortgages
CEE	Central and Eastern Europe
DCFR	Draft Common Frame of Reference
EBRD	European Bank for Reconstruction and Development
PMPBP	Proclamation on Property Mortgaged or Pledged with Banks
PMSI	Purchase Money Security Interest
ROT	Sale with Retention of Title
SMEs	Small and medium-sized enterprises
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	Institute for Unification of Private International Law

[2] UNCITRAL (2010), the UNCITRAL Legislative Guide on Secured Transactions Law, New York, UN. Hereinafter "UNCITRAL Legislative Guide."

[3] EBRD (1984) Model Law on Secured Transactions, London, EBRD. Hereinafter "EBRD Model Law."

[4] The UNIDROIT administers multiple legal instruments governing security rights including the 2001 Convention on International interest in Mobile Equipment, commonly referred to as "the Cape Town Convention" the three additional protocols, i.e., the Railway Rolling Stock Protocol, the Aircraft Protocol, Space Assets Protocol and MAC protocol (work in progress). All UNIDROIT works are available at http://www.unidroit.org/work-in-progress-studies/studies/security-interests (Accessed 31 Jan. 17).

[5] Croatia, Hungary, Poland, and Romania have recently reformed their secured transactions law in CEE. See Norbert Csizmazia (2008), Reform of the Hungarian law of security rights in movable property, *Juridica International,* XIV, 181-198, p. 182. see also, Patricia Živković(2013), Floating Security Interest- Comparative Analysis of US, English and Croatian Approaches, The Milestones of Law in the Area of Central Europe Conference Paper, Bratislava, Comenius University, pp. 1050-1058 & Catalin-Gabriel Stanescu(2015), *Self-Help, Private Debt Collection and the Concomitant Risks: A Comparative Law Analysis*, Switzerland, Springer Publising .

[6] Malawi enacted Personal Property Security Interests Act of April 2013. Available at https://stlrp.files.wordpress.com/2014/02/personal-property-security-act.pdf (Accessed 26 July 2017).

The major part of Ethiopia's secured transactions law has been in place since 1960, and it has not undergone wholesome secured transactions law reform although the country, like CEE countries, had a command economy for seventeen years.[11] In view of its current developmental goals and economic realities,[12] this article raises the issue of reform of Ethiopia's secured transactions law taking the cue from the US Uniform Commercial Code Article 9 (*hereinafter* UCC *A*rt. 9).[13]

1. UCC Art. 9, Civil Law Tradition and the Central Assumptions

A question arises whether legal transplantation or crafting a legal institution (concept) in a recipient system based on an institution (concept) with its origin in a foreign legal system is possible. If so, can civil law and common law traditions intermingle to any degree? What is the place of UCC Art. 9 in continental legal systems? Because the main thesis of this article is that secured transactions law reform in a civil law country –Ethiopia– can be implemented taking the cue from UCC Art. 9, designed in a common law country, it is crucial to first examine the above questions.

1.1 Is UCC Article 9 compatible with continental legal tradition?

In the past decades, significant developments have taken place in continental Europe with regard to the transplantation of Article 9 of UCC to continental legal systems or regarding the reconciliation of its approaches and policies with secured transactions laws of civil law countries. Developments at domestic level

[7] The Liberian Commercial Code (2010), Chapter 5.

[8] Supplement to the Sierra Leone Gazette Vol. CXLV, No. 39, The Borrowers and Lenders Act (2014).

[9] *See* https://securedtransactionslawreformproject.org/reform-in-other-jurisdictions/africa/nigeria/ (Accessed 26 July 2017).

[10] For dissatisfaction with the Nigerian Reform, See Iheme, W.C. and Mba, S.U. (2017) 'Towards Reforming Nigeria's Secured Transactions Law: The Central Bank of Nigeria's Attempt through the Back Door', *Journal of African Law*, pp. 1–23.

[11] Matthew J. Mccracken (2004), 'Abusing Self-Determination, and Democracy: How the TPLF Is Looting Ethiopia', 36 *Case W. Res. J. Int'l L*. 183.

[12] Ethiopia has recorded impressive economic development over the past two decided. According to IMF report, Ethiopian economy outperformed the economy of more than ten Africa countries between 2007-2011 and evidences suggest that it is the 73rd economy in the world among 228 countries and it is the second fastest growing economy in Africa next to Ghana. See the economist, available at http://www.economist.com/node/21554547 (Accessed 26 July 2017).

[13] In the US, the UCC Art. 9 governs secured transactions. It was first published in 1952 and adopted by all states in US in a form of a statute along with its revised versions.

aside,[14] Book IX of the Draft Common Frame of Reference (DCFR) governing security rights which has concepts borrowed from UCC Art. 9 can be taken as a prime example.[15]

The DCFR is a product of efforts among European scholars and practitioners to create a Pan-European private soft law instrument that reconciles the differences among private laws of European countries.[16] Two features of Book IX of the DCFR may be taken as evidence of the influence of UCC Art. 9. First, Book IX introduced the unitary concept of security interest though not exactly, as it is designed under UCC Art. 9.[17] Second, its drafters have shown the desire to encourage private enforcement of security rights in many European countries stating the "increasing movement seeking an alternative to traditional methods of enforcing security rights because of its delays, cost, and often disappointing results".[18] These are two facets of UCC Art. 9 –placing it in contrast with secured transactions law of a civil law tradition be it German, Scandinavian, or Napoleonic– that the DCFR attempted to embrace.

Before and in the aftermath of the DCFR, European scholars have examined the differences and similarities between UCC Art. 9 and secured transactions laws in continental Europe, revealing sharp differences between the two legal families in the field.[19] In determining the relationship between UCC Art. 9 and secured transactions laws in continental European countries, it can be argued that in part, the DCFR epitomizes the degree to which civil law tradition has received UCC Art. 9 so far.[20]

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[14] UCC Art. 9 inspired domestic secured transactions laws in Europe including in Poland (1996), Croatia (2006), Romania (2011), & Hungary (2013).

[15] The DCFR is the codification of the common core of European Private Law. The outline edition is available at:
http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf (Accessed 26 July 2017).

[16] Christian von Bar (2008), A Common Frame of Reference for European Private Law - Academic Efforts and Political Realities, *Electronic Journal of Comparative Law*, vol. 12.1.

[17] DCFR Section 1: IX. – 1:101.

[18] Christian von Bar & Eric Clive(2010), *Principles, Definition and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)*, London, Oxford University Press, 1st Ed, p. 5614.

[19] Jens Hausmann (1996), the Value of Public-Notice Filing under Uniform Commercial Code Article 9: A Comparison with the German Legal System of Securities in Personal Propert, *Georgia J. Int'l and Comp. Law*, Vol. 25, No. 3. *See* also Sjef Van Erp,et al(Eds) (2012),*The future of Secured Credit in EUROPE,* Munich: Sellier European Law Publisher.

[20] Tibor Tajti (2014), 'Could Continental Europe Adopt A Uniform Commercial Code Article 9 – Type Secured Transactions System? The Effect of Differing Legal Platforms', *Adelaide Law Review*, Vol. 35, No. 1, p. 178.

The DCFR should in theory influence legal reform in Europe and has done so in some countries in some fields of laws besides being applied in court.[21] Nevertheless, irrespective of the fact that it has not yet been used as a model for secured transactions law reform, it shows how far the rapprochement of UCC Art. 9 with the Secured Transactions Law of Continental Europe has come (with the *caveat* that Croatia, Poland, and Romania have implemented more comprehensive UCC Art. 9 based reforms).[22] The overview of the secured transactions law reform efforts in continental Europe shows that there has been an attempt to design secured transactions law in civil law countries based on UCC Art. 9 although the degree of the influence of the latter on Continental European Legal system could be debatable.

1.2. Two central assumptions: Transplantability and the convergence of common law and civil law traditions

Before examining the compatibility of UCC Article 9 with the Ethiopian civilian system, the validity of the two assumptions need to be discussed i.e., (a) the effective functioning of legal transplants under certain conditions, and (b) a trend of convergence between civil law and common law traditions. The profound debate in the existing literature on legal transplantation and the convergence of civil law and common law traditions should put the assessment of secured transactions law reform in Ethiopia (in the light of UCC Art. 9) in a context.

Legal transplantation has been an old phenomenon,[23] but the debate on whether legal transplants function is unsettled. Savingy argued that law is peculiar to the people, just as their language, manners, and constitution and therefore cannot be transplanted to or from elsewhere.[24] Legrande rejects legal transplantation on the ground that legal rules are results of a particular culture.[25] At the other extreme, Watson points to historical instances in which the transplantation of laws (to different socio-economic and political environments) has been successful and rejects the impossibility or undesirability of legal

[21] Lorna Richardso, The DCFR, anyone? (2014), *The Journal of the Law Society of Scotland*, Online Publication, Available at: http://www.journalonline.co.uk/Magazine/59-1/1013494.aspx. (Accessed on 07 August 2017).

[22] See *supra* note 5.

[23] Watson Alan (1993), *Legal Transplants: An Approach to Comparative Law*, USA: University of Georgia Press, 2nd Ed., pp. 21–22.

[24] Ibid, p. 21. *See* also A. Watson (2000), 'Legal Transplants and European Private Law', *Electronic Journal of Comparative Law*, Vol. 4. No. 4. Available at: https://www.ejcl.org/44/art44-2.html (Accessed on 08 August 5, 2017).

[25] Pierre Legrande (1997), Against a European Civil Code, *MOD. L. REV.*, Vol. 60, No. 1, pp. 44-45 & Pierre Legrande (1997), The Impossibility of 'Legal Transplants' 4 *Maastricht J. Eur. & Comp. L.*, pp. 111-124.

transplantation.[26] A similar view has been advanced by Sacco, who argues that legal borrowing is common phenomenon and the unique connection between law and the country where it originated should not always be taken for granted.[27]

Gunther argues that legal transplants can be legal irritants and thus irritate the functioning of the recipient system.[28] Other authors assert that transplants function effectively only when they are adapted to the local context of the recipient country[29] or if the necessary conditions in the recipient country such as independent judiciary and strong enforcement institutions are present.[30] Pistor *et al* provide evidence that transplants function effectively where the appropriate adaptation has been made to the context of the recipient country.[31]

Within a decade after the enactment of the Ethiopian Civil Code primarily based on the French Civil Code, an early appraisal of legal transplantation had shown discrepancy between the law on the book and in practice.[32] Regardless of how effective legal transplants function in Ethiopia, it is indisputable that foreign legal institutions have been part of the Ethiopian legal system for over half a Century now.

A related debate is whether the metaphor of legal transplantation sufficiently describes the various scenarios of circulation of legal norms from one legal system to another.[33] Borrowing legal norms ranges from a verbatim translation of a given field of law of a foreign country to borrowing a particular concept/institution whether unaltered or with significant modifications and

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[26] Watson (2000), *supra* note 24. "Legal transplants are alive and well as they were in the time of Hammurabi."

[27] Rodolfo Sacco (1991), Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II), *the American Journal of Comparative Law*, Vol. 39, No. 2, pp. 343-401, at 400.

[28] Gunther Teubner (1998), Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences, *MOD. L. REV.* Vo. 61, No, 1, p. 12.

[29] Pistor, Katharina and Berkowitz, Daniel and Richard, Jean-Francois (1999), Economic Development, Legality and the Transplant Effect. http://www.pitt.edu/~dmberk/dprlegal2.pdf (Accessed 08 August 2017).

[30] Kenneth W. Dam (2006), *the Law-Growth Nexus – The Rule of Law and Economic Development*, Washington D.C: Brookings Institution Press, p. 36.

[31] Pistor et al, *supra* note 29.

[32] *See* John H. Beckstrom(1973), Transplantation of Legal Systems: An Early Report on the Reception of Western Laws in Ethiopia, *The American Journal of Comparative Law,* Vol. 21, No. 3, pp. 557-583

[33] Máximo Langer (2004), From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure, *Harvard International Law Journal*, Vol. 45, No. 1, pp. 1-64."

variation in between. The question is whether the metaphor legal transplant encompasses these various forms of circulation of legal norms.

Langer argues that the legal transplant metaphor is inflexible because it does not capture various degrees to which a legal concept is changed or modified in the recipient legal system.[34] He proposes legal translation as a better metaphor to analyze the circulation of legal ideas, rules, practices, and institutions.[35] He distinguishes between three forms of legal translations, namely, (a) strict literalism, (b) faithful but autonomous restatement and (c) substantial recreation, variation etc.[36] Although this tool of analyzing legal borrowing is useful, it is not adopted in this article because this article is based on the notion that legal transplantation embraces not only the circulation of a norm or institution or a given legal regime in its entirety but also one or more concepts or institutions unaltered or adjusted to the recipient's legal system. In line with this, I argue that it is possible to transplant the unitary concept of security interest and the floating lien to Ethiopia with the necessary adjustment of these concepts to the Ethiopian local context. The specifics of the adjustment of the two institutions to the Ethiopian local concept depends on the existing security devices that are compatible or inconsistent with these institutions as well as other socio-economic and legal factors including the level of literacy.

The second underlining assumption of this article is a degree of convergence of common law and civil law traditions. The essential difference between the two legal traditions is that the main source of civil law is statutes and codes while it is judicial decisions in common law traditions.[37] Therefore, in civil law countries, the judge merely interprets and applies codified/written law whereas in common law countries, the judge can make the law whenever there is a gap. Moreover, traditionally, a civil law judge does not follow precedents while precedents bind a common law judge.[38] However, this depiction of the two legal families has been changing as common law countries have started using statutory laws and courts in civil law countries have started following some

[34] Ibid, pp. 30-31. "A kidney or an elm will look essentially alike in its original and receiving body or environment, but this frequently does not happen. Another problem with the metaphor of the transplant is that even when the reformers try to imitate a legal idea or practice as closely as possible, this new legal idea may still be transformed by the structure(s) of meaning, individual dispositions, institutional and power arrangements, systems of incentives, etc., present within the receiving legal system."

[35] Ibid, p. 32.

[36] Ibid, p. 33.

[37] Joseph Dainow (1966-1967), 'The Civil Law and the Common Law: Some Points of Comparison', *The American Journal of Comparative Law*, Vol. 15, No. 3, pp. 424-425.

[38] Ibid.

aspects of the case law method.[39] With respect to the shift within common law traditions, it suffices to state that the American Uniform Commercial Code represents a good example of a code in a common law country.

Some argue that civil law countries do not follow common law precedent system but rather pursue "reasoning with previous decision".[40] The European Court of Justice's (ECJ) that follows its own previous decision in a similar matter, though not required to do so, is taken as an example[41] Critiques suggest that unlike the common law system of precedent where courts distinguish between different cases based on facts, the practice of distinguishing facts is not common in the ECJ system.[42] Moreover, national courts are not bound by previous judgments of the ECJ although in practice this happens because the ECJ aims to ensure uniformity of interpretation and national courts stick to its earlier decisions in similar cases, as literature suggests.[43]

Apart from the ECJ and national supreme courts, lower level domestic courts have also developed the practice of citing precedents in civil law countries. For instance, the citation of precedents in Hungarian courts has increased from 27 % to 40 % between 2007 and 2012 averaging 33 %.[44] Similar developments are noticeable in other civilian systems including France and Germany where the doctrine of *jurisprudence constante* whereby courts use precedents as source of soft law are widely utilized.[45]

In Ethiopia, the "interpretation of laws by the Federal Supreme Court's Cassation Division with at least five judges is binding on federal as well as regional courts at all levels."[46] The enactment of the law that gives the cassation

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[39] *See* for instance Calabresi Guido (1998), *Common Law for Age of Statutes*, Cambridge, Massachusetts, & London: Harvard University Press.

[40] Jan Komarek (2013), 'Reasoning with Previous Decisions: Beyond the Doctrine of Precedent', *Am. J. Comp. L.* Vol. 61, No. 1 p. 150.

[41] Ibid, p. 156.

[42] Ibid.

[43] Gundega Mikelsone (2013), 'the Binding Force of the Case Law of the Court of Justice of the European Union', *Jurisprudence*, 20(2), p. 484.

[44] Zsolt Ződi (2014), Analysis of Citation patterns of Hungarian Judicial Decisions: Is Hungarian Legal System Really Converging to Case Laws? Results of a Computer Based Citation Analysis of Hungarian Judicial Decisions, p. 16. Available at: https://papers.ssrn.com/sol3/papers.cfm?Abstract_id=2410070 (Accessed 26 July 2017).

[45] Fon, Vincy and Parisi, Francesco, 'Judicial Precedents in Civil Law Systems: A Dynamic Analysis'. *International Review of Law and Economics*, Forthcoming; George Mason Law & Economics Research Paper No. 04-15; Minnesota Legal Studies Research Paper No. 07-19, p. 5. *See*: https://papers.ssrn.com/sol3/papers.cfm?Abstract_id=534504 Accessed on 08 August 2017).

[46] Federal Democratic Republic of Ethiopia, Federal Negarit Gazette, Legal Notice No. 42, Proclamation No. 454/2005.

division a superior interpretive power marks an introduction of a system in Ethiopia where the Federal Supreme Court Cassation Division's interpretation of a legal provision becomes binding[47] if it involves the interpretation of the same legal provision as applied to an identical issue and comparable facts.

The idea of legal convergence is not universally recognized. In the context of the European Union, Legrande, for instance, argues that there is no convergence of common law and civil law systems.[48] However, some recognize the trend of legal convergence of the two legal traditions and they examine its dynamics including whether it is merely a natural process, or whether it has ideological and political dimensions.[49]

The crossbreeding of institutions from the two legal families is unfolding in the field of secured transactions law in civil law countries. For instance, the Polish secured transactions law of 1996[50] and the Hungarian secured transactions law of 2013[51] clearly reflect the influence of UCC Art. 9. In these recipient countries, foreign concepts have been adapted to the local context.[52] Although the mutation of foreign legal concepts in the recipient systems may not necessarily yield overall positive outcome, it demonstrates that while legal family is relevant for transplantation, in the current globalizing world, it is not the determining factor and in the field of secured transactions, its relevance is diminishing.

1.3. Choosing the suitable model for reform

This article argues that secured transactions law reform in Ethiopia can be implemented based on UCC Art. 9 regardless of the different legal families Ethiopia and the US belong to. This argument calls for a paradigm shift since Ethiopian law is predominantly based on the French Civil Code, which is fundamentally different from its US counterpart. Such shift in the quest for more suitable model for secured transactions law reform in Ethiopia is necessary due to the inefficiency of French secured transactions law (*see infra* section 4.2). The article also demonstrates that English secured transactions law is unsuitable

[47] Ibid.

[48] Pierre Legrande (1999), 'European Legal Systems are not Converging', *International and Comparative Law Quarterly*, Volume 45, Issue 01, pp. 52-81.

[49] Ugo Mattei and Luca G. Pes (2008), *Civil Law and Common Law: Toward Convergence*, Oxford Handbook of Political Science, Oxford, New York: Oxford University Press, pp. 268-278.

[50] John A. Spanogle (2009), 'Secured Transactions Law in Eastern Europe: The Polish Experience as an Example', *Thomas Jefferson Law Review*, Vol. 31, No. 2, pp. 290-291.

[51] The 2013 Hungarian Civil Code adopted partially unitary concept of security interest and introduced out-of-court enforcement of security right.

[52] For instance, self-help repossession is borrowed from UCC Art. 9 and is substantially modified before it is incorporated into the Hungarian Civil Code.

model for reform as evidenced by its failure to facilitate efficient secured financing in the UK and its declining influence in other legal systems.

This article can inspire and encourage academic and policy discourse on secured transactions law reform in Ethiopia. The participation of scholars in shaping secured transactions law reform is crucial in the light of the trend that reforms based on international model laws promote one-size fits all templates that ignore the local contexts of the reforming countries. In Malawi, an African country with substantial technological and infrastructural impediments, a reform was implemented in 2013 based on the UNICTRAL Legislative Guide on Secured Transactions Law that mandates electronic collateral registry.[53] However, exclusively electronic registry was not implemented overnight even in countries with advanced technology.[54] Mandating electronic collateral registry in Malawi where the majority of the people have no access to electricity and the internet is thus problematic.[55] Ethiopia can learn from this and avoid such problems through open and participatory debate.

This article comparatively examines the secured transactions laws of the US, the UK, and Ethiopia. To provide a complete picture of secured transactions law reform in other emerging markets and civil law jurisdictions, it also analyzes the EBRD model secured transactions law and the secured transactions law of Louisiana. The Convention on Taking International Interests in Mobile Equipment and the Aircraft Protocol (*hereinafter* collectively referred to as "The Cape Town Regime")[56] that is ratified by Ethiopia [57] is also examined.

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[53] Personal Property Security Act of Malawi (2013), Section 49 states that "there shall be established a personal property security registry which shall be (a) electronic; (b) maintained for the purposes of effecting, amending and terminating registration under this act and (c) operated at all time, except precluded by maintenance, technical or security problems."

[54] Ontario had operated with hybrid filing system for decades until it implements exclusively electronic filing in 2007. In the US where electronic filing is utilized most efficiently, paper based filing is still allowed in the majority of states. *See* Marek Dubovec (2011), UCC Article 9 Registration System for Latin America, Arizona Journal of *International & Comparative Law* Vol. 28, No. 1, p. 123.

[55] Of over 16 Million total population of the country, in the year 2016, only about a million people have access to the internet: http://www.internetlivestats.com/internet-users/malawi/ (Accessed on 26, July 2017).

[56] The Convention on International Interest in Mobile Equipment (Cape Town, 2001).

[57] Ethiopia signed the Cape Town Convention on 16.11.2001 and ratified on 21.11.2003. The convention came into force on 01.03.2006. The signature, ratification, and effective dates of the Aircraft protocol are the same to that of the Convention.

Although the UK and US belong to the same legal family,[58] their secured transactions laws share little in common. Yeandle *et al* identify different factors that explain why London is arguably the biggest world's financial center despite the inefficiency of English secured transactions law.[59] A call for English secured transactions law reform in line with UCC Art. 9 has so far been rejected or stalled.[60] English secured transactions law has thus been evolving through sporadic reforms and judicial decisions and this has caused costly litigations.[61] There are countries that had designed their secured transactions laws based on English secured transactions law, and have switched to US law oriented regime.[62]

Nigeria, in its recent secured transactions law reform,[63] enacted a law that combines floating charge (English concept) and floating lien (US concept). These concepts cannot be concurrently used, and there is already a call for correcting what is considered as a fundamental error.[64] The Nigerian experience shows the potential danger involved in not comprehending the various models for reform.

The EBRD model secured transactions law is one of the alternative models for reform, but it is not suitable either (*see infra* section 8.1). Moreover, the secured transactions law of Louisiana is examined to assess whether its experience in adapting UCC Art. 9 to its civilian tradition may provide unique insights into reform in Ethiopia.

This article leaves out several issues that are significant for the effective functioning of secured transactions law because of space constraints. Issues such as the nexus between security rights and bankruptcy law, specific rules governing enforcement of security rights, consumer protection in enforcement

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[58] The Committee of American Association of Law Schools (1907), *Select Essays in Anglo-American Legal History*, Little, Brown & Company, Vol. 1.

[59] *See* Mark Yeandle *et al* (2005), *The Competitive Position of London as a Global Financial Centre,* London: London Corporation.

[60] *See* John de Lacy (ed) (2010), *The Reform of UK Personal Property Security Law*, Abingdon: Routledge-Cavendish, p. 83.

[61] *See* National Westminster Bank Plc V Spectrum Plus Ltd & Ors (2005) (Hereinafter referred to as "Spectrum") & Joshua Getzler and Jennifer Payne (Eds) (2006), *Company Charges: Spectrum and Beyond*, Oxford & New York: Oxford University Press.

[62] In Hungary, floating charge (Enterprise Charge) has been abolished by the 2013 Civil Code. *See* Csizmazia, *supra* note 5, p. 197. Australia also reformed its law in line with UCC Art. 9. See P Quirk (2009), Whether Australian secured transactions laws will transition from the English system to the Personal Property Securities Act? *Thomas Jefferson Law Review*, Vol. 31 No. 2, pp. 252–56.

[63] Registration of Security Interests in Movable Property by Banks and Other Financial Institutions in Nigeria (Regulations, No 1, 2015).

[64] Iheme & Mba, *supra* note 10, pp. 14-15.

of security rights, the organization of registry of collaterals, and others are not addressed in this article. Furthermore, this article does not provide a formula for drafting or a complete account of various economic and institutional factors upon which a successful reform depends. Examining these issues requires first acknowledging the broader problem with the system that is sufficiently explained by using the unitary theory of security interest and the floating security interest that this article aims to do.

2. The Raison D'être for Secured Transactions Law Reform: Enhancing Access to Credit

Secured transactions law reform is necessary to enhance access to credit[65] for businesses and consumers. Generally, businesses can raise money on equity market, but equity market alone is not adequate to satisfy the financing needs of businesses[66] and consumers. "In most countries, even in the US –which is usually thought of as a country with the most pronounced equity culture,– more financing is raised in credit markets than in equity markets."[67] Credit market requires efficient and fair system of secured transactions law that can facilitate lending and efficient enforcement of security rights, and thereby make credit cheaper.

There are three key ways in which secured transactions law makes credit cheaper. *First*, it makes credit more available by giving lenders better assurance of repayment or reducing the risk of default.[68] *Second*, it reduces interest rate as interest rates are fixed relative to the default risk.[69] *Third*, relative to unsecured lending, secured lending gives creditors better likelihood of enforcing their rights against the collateral in case of default and reduces the risk of being paid less or not being paid at all.[70]

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[65] The term credit is used in loose sense to mean money or valuable asset obtained by the debtor from a creditor pay back or returned as per the terms of the contract. This includes loan from bank or financial institutions, bonds and other securities. *See* Bryan A. Garner (Ed.) (2009), *Black's Law Dictionary,* USA: Thomson Reuters, 9th Ed.

[66] Joseph Stiglitz(1998), t*he Role of the Financial System in Development* - Presentation at the Fourth Annual Bank Conference on Development in Latin America and the Caribbean, LAC ABCDE, p. 3.

[67] Kenneth W. Dam (2006), Credit Markets, Creditors' Rights and Economic Development, John M. Olin Law & Economics, Working paper number 28, 2nd Series, p. 1.

[68] John Armour (2008), The Law, and Economics Debate about Secured Lending: Lessons for European Law Making, Centre for Business Research, And University of Cambridge Working Paper No. 362, p. 2.

[69] Ibid.

[70] Ibid.

The overview of the economic benefits of secured lending presented above can be criticized as over-simplification of otherwise a complex issue. Such a critique would be valid considering that scholars indeed do not agree on whether secured lending enhances net efficiency.[71] The center of the disagreement lies in that secured lending subordinates unsecured and involuntary creditors such as tort claimants to secured creditors unjustifiably and some propose the abolition of the priority of secured creditors over involuntary creditors.[72] Nevertheless, no sound argument calls for the abolition of secured lending in its entirety. The only question is therefore what the optimum secured transactions law for the country concerned is, that can enhance access to credit while balancing divergent interests of different stakeholders.

2.1. The case for comprehensive Ethiopian secured transactions law reform

The degree of discrepancy between secured transactions law and the prevailing socio-economic and commercial environment (which constitutes the main reason for secured transactions law reform) differ across jurisdictions. However, in the countries with shared history of communism in Africa such as Angola, Mozambique, and Ethiopia or CEE countries such as Hungary, Romania and others, the development of the private sector following the fall of communism and the resultant shift from state to private financing explains such a discrepancy.

2.2. Private sector development *vs* secured transactions law in Ethiopia

The core of secured transactions law in Ethiopia is embodied in the 1960 Civil Code.[73] Today, Ethiopia has a different political and socio-economic condition in contrast with the 1960s. It had passed through different economic systems over the years, i.e. "market-oriented mixed economy (pre-1974), state-controlled

[71] Jackson and Kronman argue that secured credit enhances efficiency. *See*, Anthony Townsend and Jackson, Thomas H. (1979), 'Secured Financing and Priorities among Creditors', *Yale Law Journal* ,Vol. 88, 1143, p. 11143. However, many other scholars challenge this argument on several grounds such as the unfairness of secured credit to involuntary creditors whose position is impacted by secured credit. *See* Brian M. Mccall (2009), 'It is Just Secured Credit! The Natural Law Defense of Some Forms of Secured Credit', *Indiana Law Review*, Vol. 43, No. 7, pp. 8-44,

See also: Lynn M. Lopucki (1994), 'The Unsecured Creditor's Bargain', *VA. L. REV.*, Vol. 80, No., p. 1964.

[73] Civil Code of the Empire of Ethiopia, Proclamation No. 165 of 1960, Negarit Gazeta, Gazette Extraordinary, 19th Year, No. 2. Hereinafter "the Civil Code." The Commercial Code of the Empire of Ethiopia, Proclamation No. 166 OF 1960, Negarit Gazette 19th Year No. 3. Hereinafter "the Commercial Code." The Maritime Code of the Empire of Ethiopia, Proclamation No. 164 of 1960, Extraordinary Gazette, 19th, No. 1.

central planning (1975-1991), and since 1991 a hybrid of state-controlled and market-oriented economic system."[74]

Since 1992, privatization has been taking place under the Ethiopian Privatization Agency, now the Ethiopian Public Enterprises Supervision, and Privatization Agency (EPESPA).[75] In 2012, the EPESPA reportedly put six public enterprises for bid.[76] In 2014, the government issued invitation to bid for eleven state enterprises.[77] In May 2016, the government transferred millions of dollars' worth agricultural farm to a private enterprise.[78] Although the specific policies, strategies, and laws differ, in CEE countries, after the fall of communism, privatization process started in a similar fashion as in Ethiopia, leading today to stronger private financial sector and modern secured transactions laws.[79]

The continuous privatization process has led to a shift from state to private financing thereby requiring parallel legal reform especially governing the financial market and secured transactions. Since Ethiopia has no Stock Exchange, the credit market is of paramount importance for the Ethiopian economy to fill the gap created by lack of strong stock market. Hence, the need for reforming the Ethiopian secured transactions law is exigent.

2.3. Synopsis of the Ethiopian secured transactions law

In Ethiopia, secured transactions-related laws are scattered across different codes and statutes. The Civil Code governs real estate mortgage, antichresis possessory pledge,[80] and the pledge of incorporeal assets.[81] The Commercial

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[74] Kibre M. (2008), *Policy-induced Barriers to Competition in Ethiopia*, Jaipur, CUTS International, p. 3.

[75] The Ethiopian Privatization Agency was established in 1994 by proclamation number 87/1994 and 146/1998.

[76] Visit: http://www.2merkato.com/news/alerts/2747-ethiopia-agency-to-privatize-11-enterprises (Accessed 27 July 2017).

[77] http://www.fiepr.org.br/cinpr/servicoscin/inteligencia-comercial/uploadaddress/Privatization_Opportunities_2013-2014%5B49683%5D.pdf (Accessed 06 August 2017).

[78] This deal struck between the government and the firm transferred Silea Agricultural Farm, public enterprise to Lucy Agricultural Plc (A Private Enterprise: http://allafrica.com/stories/201605180933.html (Accessed on 27 July 26, 2017).

[79] *See* Demetrius S. Iatridis & June Gary Hopps, Eds (1998), *Privatization in Central and Eastern Europe: Perspectives and Approaches,* Westport, Connecticut, & London: Praeger Publishers.

[80] The Civil Code Article 2287(1) and Title XVIII Chapter 4 Articles 3041 -3130 for Mortgages and Antichresis and Title XVII Articles 2825 – 2874 for pledges.

[81] The Civil Code Arts. 1128 & 2829.

Code governs business mortgage[82] and the pledge of transferrable securities.[83] Because the provisions of the Civil Code and the Commercial Code are considered obsolete in some regards, the legislature has enacted different statutes governing security interests including the Warehouse Receipts Law governing security rights in warehoused goods,[84] the Proclamation on Property Mortgaged or Pledged with Banks (PMPBP),[85] the Proclamation on Business Mortgages (BMP),[86] and other amendments to the Civil Code.[87] The financial leasing law, which removes hire purchase from the realm of secured transactions (as discussed later), should also be added to the list.[88]

The Ethiopian Civil Code has essentially introduced the key features of the French Civil Code. However, it has not been meaningfully reformed even though the political and socio-economic premises on which it is based have fundamentally changed. On the contrary, its French counterpart has substantially been reformed in 2006 and 2011.[89]

One may assume that the lack of reform in the Ethiopian secured transactions law is due to (a) the efficient functioning of the existing law, or (b) the failure to comprehend the problem, or (c) due to lack of political commitment. On the one hand, the Ethiopian government's ratification of the Cape Town regime governing international financing of mobile equipment shows its awareness of the significance of modern secured transactions law. Yet, the government ignores conspicuous problems with the general domestic secured transactions law, and it is thus fair to state that a mixture of factors have contributed to the *status quo.*

[82] The Commercial Code, Book I, Title V, articles 171- 193. The provision of the commercial code governing business mortgage is updated by a new law cited as Ethiopian Business Mortgage Proclamation No. 98/1998

[83] Pledging securities is governed by Arts. 950 -958 of the Commercial Code.

[84] The Proclamation to Provide for a Warehouse Receipt System, Proclamation No. 372/2003

[85] A Proclamation to Provide for Property Mortgaged or Pledged with Banks, Proclamation No. 97 of 1998, Federal Negarit Gazeta, No.16, 19th, February 1998.

[86] The Proclamation to Provide for Business Mortgages Proclamation, Proclamation No. 98 of 1998, Federal Negarit Gazeta, No. 17, 19th, February 1998.

[87] A Proclamation to Provide for Business Mortgages, Civil Code as Amended Proclamation, Gazeta, No. 46, 30th, June, 2009.

[88] The Capital Goods Leasing Proclamation No. 103/1998.

[89] Frederique Dahan and John Simpson (Eds) (2008), *Secured Transactions Reform and Access to Credit*, Cheltenham, and Northampton & MA: Edward Elgar Publishing Inc., pp. 259-272.

2.4. The ratification of the Convention on International Interests in Mobile Equipment and the Aircraft Protocol

Ethiopia has ratified the Cape Town Convention on International Interests in Mobile Equipment and the Aircraft Protocol,[90] international legal instruments administered by the UNIDROIT. The purpose of the Cape Town Convention and the protocols thereof is to modernize the legal rules governing the creation, registration, priority, and enforcement of international security interests in mobile assets and thereby to facilitate international financing of purchase of these assets.[91]

Unlike Ethiopia's general reluctance in ratifying various international legal instruments governing commerce,[92] its ratification of the Cape Town Regime is encouraging. Presumably, Ethiopia took the step to ensure strong international financing for the state-owned Ethiopian Airlines Enterprise Share Company.[93] However, there are sectors that are equally important economically, but financially more disadvantaged than the airlines in Ethiopia, mainly SMEs (small and medium-sized enterprises). The state-owned Ethiopian Airlines is comparatively better off as it is safeguarded from competition[94] and receives support.[95]

Three major attributes set apart the Cape Town Regime and the Ethiopian general secured transactions law. *First*, the Convention follows the unitary concept of security interest because it applies to security interests in mobile equipment, retention of title and assignment by way of security.[96] *Second*, it encourages private enforcement of security interests including self-help repossession.[97] *Third*, it automatically extends security agreements to proceeds.[98] This is in sharp contrast with the general secured transactions law, which

[90] The Cape Town Convention, *supra* note 56

[91] Id., the preamble to the Cape Town Convention

[92] Among others, Ethiopia is not a party to the CISG, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Ethiopia did not adopt the UNICTRAL model law on commercial arbitration.

[93] According to Star Alliance, Ethiopian Airlines won multiple awards. *See*: http://www.staralliance.com/en/about/airlines/ethiopian_airlines/ (Accessed 27 July 26, 2017).

[94] Under the Ethiopian Investment Proclamation No. 769/2012, Art. 6(1) (c) Air Transport Services using Aircraft with a Seating Capacity of more than Fifty Passengers is exclusively reserved to the government. This provision is aimed at protecting the only airlines industry from competition.

[95] *See* <https://www.ft.com/content/7be9f07e-c99d-11e5-be0b-b7ece4e953a0?Mhq5j=e4> Accessed on 05 August 2017).

[96] The Cape Town Convention, *supra* note 56Art. 1.

[97] Id., Art. 8(1).

[98] Id., Article 29(6).

follows non-unitary concept of security interest, permits private enforcement only exceptionally and does not generally extend security interest to proceeds.

There are now two parallel legal regimes of security interests in Ethiopia: The obsolete domestic secured transactions law and the modern Cape Town Regime, the latter aimed at boosting airlines industry financing. In Ethiopia, access to credit is a serious problem in all sectors,[99] even more so for SMEs that benefit the least from commercial bank lending.[100] The practice of implementing more efficient legal regime that benefits only the airlines industry does not seem to reflect sound policy framework.

3. Secured Transactions Law, Efficiency and Fairness

Piecemeal reform of secured transactions law, i.e., the one that responds to the needs of specific sectors or the failure to reform the law entirely while there is the apparent need, sustains inefficient and unfair credit market. Ethiopian secured transactions law has two major defects. These are inefficiency and unfairness.

3.1. Evidence of the inefficiency of Ethiopian secured transactions law

Inefficiency, *inter alia*, refers to high transactions cost, i.e., time and money spent in creation, registration, and enforcement of security interests by the parties and this can translate into the overall failure of the credit market.[101] Legal efficiency is a vital aspect of secured transactions law.[102] Secured transactions law achieves legal efficiency by maximizing economic benefit through encouraging simplicity, low cost, speed, certainty, and fitness-to-contexts in which it functions.[103] Moreover, the legal system must ensure transactional certainty such as the enforceability of validly created security rights.[104] Finally, the law must be fit to the context in which it functions including in terms of cost, speed, and suitability to the broader financial context.[105]

[99] Charles A. Schwartz et al (2007), *Ethiopian Commercial Law and Institutional Diagnostics*, USAID, p, 1.

[100] Ashenafi Beyene Fanta (2012), 'Banking reform and SME financing in Ethiopia: Evidence from the manufacturing Sector', *African Journal of Business Management*, Vol. 6, No. 19, p. 6067.

[101] Dahan, Frederique and Simpson, John (2009), 'Legal Efficiency for Secured Transactions Reform: Bridging the Gap between Economic Analysis and Legal Reasoning', *Penn State International Law Review*, Vol. 27: No. 3, p. 635.

[102] Ibid.

[103] Id., pp. 635-639.

[104] Id., pp. 636-637.

[105] Id., pp. 637-638.

Ethiopian secured transactions law does not meet the thresholds for legal efficiency. *First*, entering into security agreement in Ethiopia requires negotiating and drafting extensive agreements and seeking costly legal aid because apart from real estate mortgage, pledge and business mortgage, it is not clear whether certain non-possessory security interests must be registered, and where. A case in point is security interest in claims and other rights.[106] The parties entering into these kinds of transactions use costly mechanism to protect their respective rights. At the same time, third parties are generally deterred from dealing with claims and rights due to the risk of existing secret transactions overriding subsequent transactions or the risk of costly litigation. In other words, certain transactions remain secret posing what is commonly referred to as the ostensible ownership problem.

The problem of 'ostensible ownership' "arises when a debtor retains possession of collateral after conveying to a creditor, an unrecorded property interest or "secret lien."[107] In civil law countries such as Germany, the fact that retention of title transactions are not subject to registration is a challenge despite the rule protecting the third party acquirer in good faith of an encumbered asset of the debtor.[108] The challenge is similar in Ethiopia with respect to security rights in rights and claims.

Second, under the Ethiopian secured transactions law, the indiscernible statutory privileges and liens cause great deal of inefficiency. Due to lack of a single statute defining 'security interest', the scope of statutory privileges and liens and the conditions for their priority over consensual security interests is not clear. In this regard, the tax lien can be a good example.[109] The tax authority can file a single registration and acquire security right on all immovable assets of the defaulting taxpayer until the defaulter pays all the taxes.[110]

The absence of unified system of registration of security interests makes it difficult for subsequent consensual secured creditors to determine whether the debtor's assets are encumbered by tax lien and the tax law does not specify who

[106] The Civil Code Arts. 2863 et seq.

[107] Louis F. Del Duca, et al (2006), *Secured Transactions under the Uniform Commercial Code and International Commerce Code*, Anderson Publishing Co., p. 3. *See* also, Flint, George Lee Jr. & Alfaro, Marie Juliet (2004), 'Secured Transactions History: The First Chattel Mortgage Acts in the Anglo-American World', *William Mitchell Law Review*, Cincinnati, Vol. 30: Issue 4, p. 1405.

[108] Hausmann, *supra* note 19, p. 474.

[109] The Ethiopian Income Tax Proclamation, Art 80(1). The Tax Authority's lien right is recognized in almost all tax statutes such as the excise tax proclamation.

[110] Under The Income Tax Proclamation No. 286/2002. (Hereinafter "The Income Tax Proclamation"), Art. 80(4).

is in charge of registering tax lien.[111] In an apparent response, the government has introduced statutory duty on commercial banks to require tax clearance from the tax authority before they can extend loan to their customers.[112] The result is obviously an increased transaction cost.

Third, the Warehouse Receipts law represents another source of inefficiency. Under this law, a holder of negotiable warehouse receipt can collateralize the warehouse receipt and borrow from any authorized lending institution.[113] Moreover, the warehouse operator has lien on the warehoused goods for the cost incurred to which the depositor is liable.[114] In case of conflict between the security right of a bank and the lien right of the warehouse operator, the latter prevails. The warehouse operator can enforce its lien right by selling the goods through private or public auction upon notifying persons with interest in the goods.[115] Persons having claim in the warehoused good can pay the amount due to the warehouse operator and prevent the sale.[116] The defect in the solution lies in the fact that a creditor with security interest in a warehouse receipt simply takes possession of the receipt without registration and there is no public record where the warehouse operator can consult to identify persons having rights in the warehoused good. Thus, the duty of notification is impracticable.

In 2010, the Ethiopian Commodities Exchange (ECX) introduced internal working procedure, which requires registration of pledge of electronic warehouses receipts.[117] This procedure covers pledging of electronic warehouse receipts held only at the ECX in Addis Ababa. Pledging of non-electronic warehouse receipts is not covered by the rule. Moreover, since ECX is located in Addis Ababa, warehouse receipts held in other geographical areas are not covered by this internal rule. The warehouse receipt law was meant to help farmers to access credit using warehoused goods/receipts as collateral[118] but farmers neither have the access to the ECX, nor to electronic warehouse receipts. The problems highlighted above thus illustrate the need for revisiting Ethiopian secured transactions law in its entirety in light of efficiency and consistency.

[111] Id., The Income Tax Proclamation Art. 80(1).
[112] Kinfe Michael Yilma (2013), 'Notes on the Salient Features of Tax Lien under Ethiopian Law', *Mizan Law Review*, Vol. 7, No. 1, p. 157
[113] The Warehouse Receipt Proclamation, *supra* note 84, Art. 2(3) cum 20(4).
[114] Id., Art. 2(21).
[115] Id., Art. 19, states (1).
[116] Ibid.
[117] Revised Rules of the Ethiopian Commodities Exchange (2010), Article 9.5.2.1(d).
[118] *See* the Recitals to the The Warehouse Receipt Proclamation, *supra* note 84

3.2. The unfairness of the Ethiopian secured transactions law

Arguing for wholesome secured transactions law reform, Veneziano states that piecemeal reform is inequitable because it favors particular group of creditors.[119] The Ethiopian secured transactions law provides a concrete support for this claim. The Civil Code does not allow private sale of collateral by the secured creditor as a matter of principle.[120] The prevailing law –the PMPBP- provides otherwise.[121] Under the PMPBP, a bank can transfer the ownership of the collateral, to a third party by auction upon giving 30 days' notice to the defaulting debtor[122] in accordance with the Civil Procedure Code.[123] This law grants banks a more efficient enforcement tool.[124] The unavailability of an equally efficient enforcement mechanism for non-bank lenders discourages credit supply since their enforcement channel solely relies on court administered auction.

In another illustration, self-help repossession –the right to take possession of the collateral upon the debtor's default without state official involvement–[125] is permitted in Ethiopia as a remedy to a creditor, only in two exceptional cases, namely in case of aircrafts or aircraft engine collateral under the Cape Town Regime,[126] and leased goods under the leasing law.

Because self-help repossession might subject debtors to abusive practices including physical assault, trespass, psychological stress and other trickeries, [127] in the US where the device is extensively utilized and regulated, it is subject to *ex post facto* judicial control where the court determines whether it is conducted without breach of peace.[128]

Under the Cape Town Regime, self-help repossession is exercised subject to the consent of the debtor obtained in any form, before or after default.[129] By subjecting it to the consent of the debtor, the Cape Town Regime removes the

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[119] Sjef Van Erp,et al, *supra* note 19, p. 125.
[120] The Civil Code Arts 2951, 2854, & 3060 for mortgage.
[121] Federal Democratic Republic of Ethiopia, Property Mortgaged or Pledged with Banks Proclamation no. 97/1998,
[122] Id., Art. 3.
[123] Id., Art. 5 & 6.
[124] The first recital of the preamble of PMPBP preamble states "Whereas, it takes rather too long a time to obtain judgment, from courts of law, for sale of property mortgaged or pledged with banks and to subsequently have it executed…"
[125] UCC § 9-609(1). *See* also Ryan McRobert (2012), 'Defining Breach of the Peace in Self-Help Repossession', *Washington Law Review*, Vol. 87: 569, p. 569.
[126] The Cape Town Convention Art. 8(1) (a).
[127] McRobert, *supra* note 125, p. 569
[128] Ibid, pp. 569 et seq.
[129] Roy Goode (2013), *Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft*, Rome: UNIDROIT, 3rd Ed., p. 61.

duty to serve prior notice to the debtor before the repossession occurs. Presumably, because the subjects of the Cape Town Regime are professionals with comparable bargaining power, it foresees no unfair terms imposed by the parties on each other or abusive behaviors occurring during the repossession. This efficient tool of enforcement of security rights[130] is unavailable under general Ethiopian secured transactions law, except to financial leasing companies that can repossess the leased good from the defaulting lessee by giving a month's notice to the lessee.[131]

The permissibility of self-help repossession to two categories of creditors is not accorded to other creditors; and there is no sound policy to distinguish between banks and leasing companies from other creditors, that can be justified on the grounds of long-term efficiency and fairness. The law must be reformed to provide essentially the same channels of enforcement of security interests for all creditors, with differences that are justified by strong policy consideration.

4. Is the French Model Still Suitable for Ethiopia?

4.1. Overview of the legacy of French Civil Code in Ethiopia

There is an unsettled debate (between two views) on the degree of French law influence on the Ethiopian legal system. According to the first view, the two main substantive codes- the Civil Code and the Commercial Code of Ethiopia- are predominantly French civil law based. Brietzke states:

> The French draftsmen of the Civil and Commercial Codes (David, Jauffret and Escarra) claim to have used an eclectic approach based on comparative law methodologies, and to have consulted Western European, Middle Eastern, and North African Codes, as well as Anglo-American legal rules. Their approach appears less eclectic once we remember that the other codes which were consulted are heavily influenced by the French model, and that all of the rules examined are the products of a single (Western) legal culture, with a common core of categories and history.' Further, persons pursuing a comparative approach must possess sensitivity towards what Holmes would have termed the 'inarticulate major premises' of Ethiopia's legal system. There is evidence to suggest that the draftsmen lacked this sensitivity.[132]

On the contrary, René David, the drafter of the Civil Code claims that "[t]he primary sources of the Civil Code cannot be attributed to any one law but have been adapted from the laws of those nations with whom Ethiopia has "cultural,

[130] Stanescu, *supra* note 5, p. 1.
[131] The Leasing Proclamation Art. 6(1) & (2).
[132] Paul Brietzke (1974), Private Law in Ethiopia, *J. Afr. L.* Vol. 18, Issue 2, p. 150.

commercial, and maritime connections".[133] He states that the laws of Egypt, Italy, Greece, Switzerland, India and even the restatement of American law were consulted although French Civil Code played a general and pervasive role.[134]

Despite the alleged eclectic approach to the selection of sources and drafting technique, the Civil Code was predominantly French in substance and style because most of the codes claimed to be consulted by the drafters were influenced by the French Civil Code.[135] Incidentally, the choice of the Civil Code's draftsman coincides with the fact the advisor of the then Emperor of Ethiopia (Aklilu Habtewold) was French educated.[136] Although René David had impeccable resume for the task, one cannot doubt that his knowledge of French law and the fact that he represents French culture and identity could have highly influenced his drafting of the Ethiopian Civil Code.

4.2. French secured transactions law reform and its gaps

French secured transactions law has been reformed several times, but there are widespread complaints regarding its compatibility with the current commercial reality of France. The reform in France was prompted by the recognition of the outdated features and complexity of French secured transactions law. One of the latest comprehensive reforms took place in 2006.[137] Describing the problems with pre-2006 French secured transactions law, Marie-Elodie Ancel states:

> The French Civil Code provisions had more or less lost any relevance, as the possessory pledge does not suit modern economic life. Yet specific regimes had been created to such an extent and in such a piecemeal manner that stakeholders were confronted with a puzzling patchwork of legislation, which in fact suited nobody. Secured creditors had difficulties getting information on their debtor's existing encumbrances: a debtor could be in possession of assets that he in fact did not own. Moreover, these secured creditors' rights were in real danger when the debtor went into insolvency proceedings, unless they had a right of retention or a fiduciary transfer of title over the assets. Debtors, notwithstanding the numerous specific statutes, had difficulties using some of their assets as collateral: stock-in-trade for example could not easily be charged. Third parties, in particular unsecured creditors, also complained of the lack of transparency: multiple specific registers had been

[133] Norman J. Singer (1979), 'Modernization of Law in Ethiopia: A Study in Process and Personal Values', *Harvard International Law Journal*, Vol. 73, pp. 88-89.
[134] Ibid.
[135] Brietzke, *supra* note 132, p. 150.
[136] M. Aden (2012), A Call for New Ethiopian Civil Code, p. 4. Available at: http://www.dresaden.de/B--Ungedruckte-Arbeiten/VI_-Ungedruckte-juristische-Ar/NECC---Journal-Eth.-Law.pdf. (Accessed 05 August 2017).
[137] Ordinance No. 2006-346 of 23 March 2006 Relating to Security Rights.

created and existed side-by-side, making searching difficult; publicity of retention of title clauses and fiduciary transfers was not required, although it was required for some pledges and leasing contracts".[138]

The above quote succinctly summarizes the gaps of not only French secured transactions law but also its Ethiopian counterpart. Notwithstanding the recent reforms, French secured transactions law is still considered complex, because of its fragmentation. Marie-Elodie Ancel argues "…complexity was one of the main criticisms of French secured transactions law" and it "is now even worse because none of these previous devices has been repealed."[139]

In the first place, the influence of French law on the Ethiopian legal system is a historical happenstance rather than based no real historical, socio-economic, and cultural ties between the two countries. Moreover, recent reforms at national and international level do not take French secured transactions law as a model. It is thus rational for the Ethiopian secured transactions law to look for a model elsewhere.

5. The Unitary Concept of Security Interest: Contrasting US and UK Secured Transactions Laws

At first glance, UK and US secured transactions laws appear to be similar because the two legal systems belong to the same legal family.[140] The secured transactions laws of both jurisdictions contain a security interest that applies to present and future assets of a debtor that can generically be called "*floating security*." However, the influence of English secured transactions law on other legal systems is declining.[141] The unitary concept of security interest and the floating security interest (*see infra* section 7) are two of the concepts that show major contrasts between the two jurisdictions.

5.1. The unitary concept of security interest in the US

UCC Art. 9 is the origin of the unitary concept of security interest –the notion that all transactions that secure the performance of an obligation should be brought under the roof of a single statute regardless of their formal label.[142] "Even if parties to a transaction create a new device, never specifically named by UCC Art. 9, it falls under UCC Art. 9 if it purports to secure the performance

[138] Dahan & Simpson (Eds), *supra* note 89, p. 262.
[139] Id., p. 267.
[140] The Committee of American Association of Law Schools, Supra Note 58.
[141] The EBRD Model law is based on English secured transactions law and several countries have imitated this model to reform their laws. The UNICTRAL Model Law is based more on UCC Art. 9 and national legislatures have also implemented UCC Art. 9 oriented systems.
[142] UCC, § 9-109(1) (a).

of an obligation".[143] Although UCC Art. 9 is the origin of the unitary theory, various national laws and international legal instruments have embraced it.[144]

An important facet of the unitary theory is the functional approach to security interest described by Cindy as follows:

> The form of the transaction or the label the parties put on the transaction is irrelevant for determining whether Art. 9 applies. Rather, the determination of whether Art. 9 applies is based on the economic reality of the transactions. For example, transactions may be characterized as a sale or lease of goods but if in economic reality security interest is being created, Art. 9 will nevertheless apply […] It is also not required that the parties refer in their agreement to a 'security interest' being created under a 'security agreement' […][145]

The functional approach under UCC Art. 9 requires special attention because in some legal instruments, the unitary theory of security interest is adopted without explicitly incorporating the functional approach. For example, the DCFR does not explicitly state the functional approach as its foundation but most authorities argue that it adopts the unitary model.[146] Recent domestic and international legal instruments governing secured transactions follow this milder approach to the unitary theory where certain transactions that were traditionally outside secured transactions law are brought under the realm of secured transactions law without designing a catch-all principle under which non-listed security devices can be covered based on their functions.[147]

5.2. The non-unitary system of English secured transactions law

In the non-unitary or compartmentalized model, there is no unified concept of security interest that embraces every legal device that secures the performance of an obligation. In this model:

a. Security devices are scattered in various statutes or codes;[148]
b. Those codes or statutes provide different set of rules for the creation, registration and enforcement of the security interests in question; and

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[143] Id., p. 296.

[144] Australia, New Zealand, common law provinces of Canada, Malawi, Sierra Leone, and Liberia represent national jurisdictions and DCFR and UNICITRAL legislative guide on secured transactions law represent soft laws adopting the unitary concept.

[145] Cindy J. Chemuchin (Ed.) (2009), *Forms under the Revised Uniform Commercial Code Article 9 Committee,* Task Force on Forms under Revised Article 9, American Bar Association, 2nd Ed., p. 4.

[146] Tajti, *supra* note, 20, p. 150

[147] This is true for the Cape Convention governing security interests in mobile equipment and its additional protocols, and the Hungarian Secured Transactions Law as of 2013.

[148] Joseph J. Norton & Mads Andenas (Eds) (1998), *Emerging Financial Markets and Secured Transactions*, The Hague/Boston: Kluwer Law International, p. 6.

c. Certain legal devices may not even be considered as security devices and they are not thus covered by secured transactions law, even if they serve the same function as security devices.

The UK is one the countries that has a non-unitary system of security interest where multiple statutes and case law govern the creation, registration, and enforcement of different security interests. Two main statutes, –i.e., the Property Act,[149] and the Enterprise Act as amended in 2002– govern security interests.[150] The prevalence of the non-unitary concept of security interest has three implications on legal efficiency and overall credit market efficiency in the UK.

First, title financing or *quasi-securities* such as retention of title, [151]and financial leasing fall outside secured transactions law in the UK.[152] Although these transactions serve the same function as security interests, they are subject to different treatment thereby resulting in unjustified application of different legal regimes, as is the case in Ethiopia.

Second, under English law, there is no uniform set of rules governing registration of security interests. Accordingly, title-financing transactions are not subject to registration.[153] While floating charge, is subject to registration, the creditor has 21 days to register his/her charge, until the expiry of which, he/she has priority right over subsequent secured creditors.[154] A dishonest debtor can trick an unwary third party into extending loan by granting security right in an asset, which is already encumbered, by an unregistered security right and this problem is referred to as "the 21 day invisibility problem."[155] In this instance, even if the subsequent creditor gets its security right registered, the previous security holder can get its security right registered later and win in litigation for priority as long as the registration took place in 21 days.[156]

Third, English law has different set of rules on enforcement of security rights. The Enterprise Act gives the floating chargee the authority to appoint an administrative receiver who administers the property on behalf of the creditor and this procedure is not available to fixed charge holders, and the distinction

[149] The English Property Law Act 2007 reprinted in 2015.
[150] UK Enterprise Act Section 72(A) et seq
[151] *See* Clough Mill v Martin [1985], 1 WLR 111, 116, 119, 120–1, CA; Armour v Thyssen Edelstahlwerke AG [1991] 2 AC 339 HL, 351–2 (Lord Keith), 354 (Lord Jauncey).
[152] Hugh Beale (2012), *The Law of Security and Title-Based Financing*, Oxford: Oxford University Press, 2nd Ed., Section 7.01.
[153] Ibid, Section 1.31.
[154] Lynn M. Lopucki et al (2013), Optimizing English and American Security Interests, *Notre Dame Law Review*, Vol. 88, No. 4, p. 1797.
[155] *See* Law Commission, Registration of Security Interests: Consultation Paper No. 164 ¶ 2.37 (2002).
[156] Ibid.

between the floating and fixed charges is considered artificial (*See infra* section 7.2).[157]

Because of the non-unitary theory prevailing under English law, the legal regime is comparable to the one in Ethiopia where functionally similar transactions are treated differently without a sound basis for the distinction. Hence English secured transactions law offers no viable policy framework for reform in Ethiopia.

6. Why the Unitary Concept of Security Interest for Ethiopia?

UCC Art. 9 is regarded as the most comprehensive national secured transactions law in the world today,[158] and multiple national and international secured transactions legal instruments are inspired by it.[159] It is appealing to foreign legal systems partly because of its unitary concept of security interest.

By applying essentially similar rules to all security interests, the unitary concept eliminates the differential treatment of different transactions and parties. This does not mean that minor differences that are designed to fit the peculiarities of different types of assets or parties are eradicated entirely. It simply means that the essential rules should be similar, which is not the case in Ethiopia.

The single registration system imposed universally on all transactions (except security interests for which registration is not necessary such as possessory pledge) ensures that third parties do not incur cost of inquiring into the status of the debtor's property other than checking at the filing office or searching electronically where applicable.[160] In Ethiopia, real estate mortgage is registered twice in different registries and business mortgage is registered in another registry.[161] Security interests in intangible assets and in warehoused goods are generally unregistered. Various statutory privileges and liens are undefined and unregistered while tax lien is registerable in a registry that the tax law does not define.[162] Due to the inefficiency of the system, lending institutions more likely

[157] Getzler & Payne, *supra* Note 61, pp. 4 & 10.

[158] Bahaa Ali El-Dean (2002), *Privatization and the Creation of Market-Based Legal System: The Case of Egypt*, London, and Boston & Köln: Brill, p. 107.

[159] Tajti, *supra* note 20, p. 150.

[160] Dubovec, *supra* note 54, p. 123.

[161] Real estate mortgage is registered both with the Federal Document Authentication and Registration office and at the relevant office in charge of issuing title deed. The Business Mortgage Proclamation Art. 2, provides that business mortgage should be registered at the Ministry of Trade and Industry or the regional or city bureau of commerce and industry or a regional or city authority entrusted with the power to register mortgages.

[162] The Income Tax Proclamation, Art. 80.

settle with traditional real estate mortgage and possessory pledge as the only viable options.

During enforcement, UCC Art. 9 (*Section 9-609*) avails self-help repossession to all secured creditors.[163] In Ethiopia, only the banks benefit from private sale of collaterals while creditors of the Airlines Company and financial leasing companies benefit from self-help repossession. If the unitary concept is adopted, these differences would be eliminated, unless justified by a compelling policy reason(s).

6.1 Re-characterizing *title financing*

The functional approach to security interests challenges the dogmatic legal categorization that prevails in civilian systems[164] and requires new thinking that focuses on the economic reality behind transactions rather than their formal labels, an approach unfamiliar to the Ethiopian civil law system. Hence, it is crucial to show how this shift in approach affects certain transactions by using title financing as an example.

Title financing is a transaction where the financier has the title to the ownership of the asset while the debtor has possession within the framework of the relevant legal arrangement[165] including sale with retention of ownership, financial leasing, and consignment. Concerning the treatment of title finance in domestic laws, two patterns can be identified, i.e., (a) the treatment of title financing outside the realm of secured transactions law such as contract law and financial leasing law, and (b) their re-characterization as secured transactions.[166] Due to space constraint, this article discusses financial leasing to explain how it encompasses security agreement from the functional point of view.

6.2 Re-characterizing financial leasing in general

Leasing is defined as "a contract between two parties where one party [the lessor] provides an asset for usage to another party [the lessee] for a specified period of time, in return for specified payments."[167] During the lease term, the lessee makes periodic payments to the lessor at an agreed rate.[168] "At the end of

[163] UCC § 9-609 & 9-610. (b).
[164] Tajti, Tibor (2011), Consignments and the Draft Common Frame of Reference, *Pravni Zapisi: Godina Vol*. II, No. 2, p. 362.
[165] Philip R. Wood (1995), *Title Finance, Securitization, Derivatives, Set-off and Netting*, London: Sweet & Maxwell, p. 4.
[166] UNCTIRAL Legislative Guide on Secured Transactions Law, Recommendation 50-64.
[167] Mathew Fletcher, et al (2005) *Leasing for Development: Guideline for Emerging Economies*, Washington D.C., IFC, p. 1.
[168] Ibid.

the lease period, the equipment is either transferred to the ownership of the business/the debtor, returned to the lessor, discarded, or sold to a third party."[169]

Leasing is classified as operational and financial leasing. "The purpose of financial leasing is foremost, the financing of the leased asset and the aggregate of payments made by the lessee serves as a full compensation for the costs of investment made by the lessor".[170] To that end, the duration of the lease is linked to the life span of the leased good.[171] "In case of operational lease, the payments made by the lessee serve as a compensation for the use of the leased asset".[172] Only financial leasing is susceptible to creating security interest.

UCC Art. 9 distinguishes between true lease and secured sale (disguised security) and applies only to the latter.[173] The task of distinguishing between true lease and disguised security is carried out by courts on a case-by-case basis –something that has proved to be challenging.[174] This distinction is the criterion to determine whether secured transactions law applies to the transaction in question.

Under the UCC, financial leasing agreement is treated as secured transaction if it is not terminable by the lessee and if one of the following criteria is met:[175]

i. "The original term of the lease equals or exceeds the remaining economic life of the asset";[176]
ii. "The lessee is bound to renew the agreement for the remaining economic life or to become the owner of the asset";[177]
iii. "The lessee may renew agreement for the remaining economic life for no or nominal additional payment";[178] …
iv. "The lessee may become the owner at the end of the lease term for no or nominal additional payment".[179]

As Kronke notes, "[c]ourts have held that, even if none of the four criteria is met, the transaction may be characterized as a disguised security interest if the

[169] Ibid.
[170] D. Faber & B. Schuijling (2010), 'Financial Leasing and Its Unification by UNIDROIT', *Electronic Journal of Comparative Law,* Vol. 14, No. 3, p. 2.
[171] Ibid.
[172] Ibid.
[173] UCC § 1-203.
[174] Paglia, Laura J. (2012), 'U.C.C. Article 2A: Distinguishing Between True Leases and Secured Sales', *St. John's Law Review*, Vol. 63: Issue 1, Article 3, p. 7.
[175] *See* Herbert Kronke (2011), 'Financial Leasing, and its Unification by UNIDROIT – General Report', *Rev. Dr. Unif.*, p. 29.
[176] Ibid.
[177] Ibid.
[178] Ibid.
[179] Ibid.

lessor has no reasonable expectation of a meaningful residual value in the good".[180] The general policy guideline in distinguishing between true lease and disguised security interest is that the closer the transaction resembles sale, the more likely it is classified as disguised security. That means in particular that the transaction is subject to registration and enforcement rules of UCC Art. 9.

6.3 Financial Leasing in Ethiopia: Hire Purchase

I argue that in Ethiopia, financial leasing (particularly hire purchase) effectively creates security interest. Hire purchase is:

> …a type of leasing where lessor provides a lessee with the use of a specified capital goods, against payment of mutually agreed installments over a specified period under which, with each lease payment, an equal percentage of the ownership is transferred to the lessee and, upon effecting of the last payment, the ownership of the capital goods automatically transfers to the lessee.[181]

When the lessee defaults or is declared bankrupt, there are two remedies available to the lessor suggesting that hire purchase indeed serves the same function as a security device. In case of default, the lessor has the right to rescind the contract and take possession of the good by giving 30 days' notice to the lessee.[182] If the lessee is declared bankrupt, the lessor has priority on the leased good because "the lessor does not lose his/her ownership right on the goods even though the lessee is judicially bankrupt."[183]

The remedies available to the lessor are quicker, cheaper and therefore more efficient than those available to other secured creditors. It can be argued that hire purchase is a functional equivalent of security interest on the leased good. UCC Art. 9 re-characterizes financial leasing as secured transactions to ensure that the mandatory provisions applicable to security rights such as those relating to registration and enforcement are applicable to leasing arrangements under the conditions examined earlier.[184]

In Ethiopia, hire purchase must be re-characterized as secured transactions with the adoption of the functional approach. From the functional standpoint, why should the lessor not comply with legal requirements that a mortgagee complies with, including with stricter enforcement rules? Considering the scenario where the lessee might have acquired 90% of the ownership of the good by the time of defaulting on the latest installment, is it not unfair to treat

[180] Ibid.
[181] The leasing Proclamation Art. 2(4).
[182] Id., 6(2).
[183] Id., Art. 8(2).
[184] Kronke, *supra* note 175, p. 29.

this transaction as true lease and give the lessor a free pass from stricter enforcement rules of secured transactions?

Sale with Retention of Title (ROT) is another title financing transaction that is re-characterized as secured transactions under UCC Art. 9 [185] where it is subject to similar rules of registration and enforcement governing other security interests.[186] In Ethiopia, it can be argued that, ROT is functionally equivalent to security device. The Civil Code states:

> The provision whereby the seller reserves to himself, until payment of the price, the ownership of the thing, and the possession of which has been transferred to the buyer shall not affect third parties unless this has been entered into a public register kept for this purpose at the place where the buyer resides.[187]

The Ethiopian bankruptcy law recognizes the priority status of the seller with ROT by giving him/her the right to recover the movable sold with ROT, if the transaction has been registered.[188] The seller with ROT can recover the good from the bankrupt debtor in priority to other creditors –secured or unsecured– only by registering the ROT before the bankruptcy of the debtor is declared.

Pursuant to the Ethiopian Civil Code and the Commercial Code provisions, it can be concluded that by conferring a special priority status to a seller with ROT, Ethiopian law gives the seller a privilege equivalent to that of a secured creditor. Nevertheless, the more efficient and principled approach is to re-characterize sale with ROT as secured transaction and subject it to all the rules of enforcement applicable to the enforcement of security rights.

Financial leasing and Sale with ROT are two of the examples of title financing that are functionally equivalent to secured transactions but are outside the realm of secured transactions law in Ethiopia. The adoption of the unitary theory of security interest requires redefining the legal category of these and other similar transactions.

7. Floating Security Interest

When security interest is created on the debtor's present and after-acquired property, it is referred to as floating security interest.[189] One of the attributes of modern secured transactions law is that it "permits all property, whether existing

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[185] § 2-401(1), UCC. Section 2-401(1).
[186] *See* § 9-302 through 9-306 UCC governing registration/perfection.
[187] The Civil Code Art. 2287
[188] The Commercial Code Art. 1076.
[189] Arthur J. Harrington (1980), 'Insecurity for Secured Creditors: The Floating lien and Section 547 of the Bankruptcy Act', *Marquette Law Review*, Vol. 63, Art. 3, p. 449.

or to be acquired, to serve as collateral for loan".[190] This increases the debtor's borrowing basis and enhances access to credit. While this basic premise sounds simple, the challenge lies in regulating the details, as floating security involves complex questions of priority. In this regard, the US and UK laws have different approaches. Ethiopia has also its own version of floating security, but it is rudimentary as indicated in the following comparison between the three regimes.

7.1 *Floating lien* in the US and its efficiency

Under UCC Art. 9, the creditor can encumber the debtor's present and after-acquired property[191] through floating lien in the terminology of US secured transactions law.[192] Gilmore defines floating lien as "an interest in all the assets of a borrowing enterprise, whether owned by the borrower when the loan is extended or subsequently acquired."[193]

There is no single provision that creates floating lien Under UCC Art. 9; rather a secured creditor can use its different provisions to acquire security interest over present and future assets of the debtor. The *first* one is the provision under which a security interest attaches to an after-acquired property, in which case the security interest attaches and perfects the moment the debtor acquires rights in the property.[194] "The *second* set of provisions which are thought to contribute to the floating lien are those that allow the security agreement to cover future advances whether or not committed for".[195]

The *third* possible component of floating lien is the abolition of *Benedict vs Ratner* rule by UCC Art. 9[196] as a consequence of which security interest is not invalid or fraudulent merely because the debtor uses proceeds or acts as though there was no security interest, i.e. *exercises unfettered dominion over the collateral*.[197] The abolition of *Benedit vs. Ratner* rule allows the secured creditor to take security interests in the debtor's accounts receivables without being required to exercise control,[198] allowing the creditor's right to float over shifting assets of the debtor. Under UCC Art. 9, by using the clause "owned and after

[190] Heywood Fleisig, et al (2006), *Reforming Collateral Laws to Expand Access to Credit*, Washington D.C., The World Bank, p. 30.
[191] UCC, § 9-204(a).
[192] Harrington, *supra* note 189, p. 449.
[193] Grant Gilmore (1963), 'Purchase Money Priority', *Harvard Law Review*, Vol. 76:1333, p. 1333.
[194] UCC, § 9-204(a). Peter F. Coogan (1959), Article 9 of the Uniform Commercial Code: Priorities among Secured Creditors and the "Floating Lien." *Harvard Law Review*, Vol. 72, No. 5, p. 851.
[195] Ibid.
[196] Id., p. 853.
[197] UCC § 9-205(a).
[198] Coogan, *supra* note, 194, p. 853.

acquired assets" the parties can avoid specific description of the collateral relating to identification of collateral in the security agreement as long as the security agreement identifies the collateral reasonably.[199]

Floating lien can create monopoly over the assets of the debtor that can discourage subsequent lenders from providing loan; the phenomenon is called situational monopoly.[200] UCC Art. 9 resolves this problem by giving super-priority to Purchase Money Security Interest (PMSI).[201]

Generally, for a security interest to qualify as PMSI, (1) the creditor must have extended 'enabling' loan –a loan that made it possible for the debtor to acquire rights in property that it did not previously have and (2) the loan must be traced to identifiable, discrete items of property.[202] If the loan is extended for a purpose other than financing a particular item, there is no PMSI as it is the case when the loan cannot be traced to a particular item of good.[203] Any valid security interest created to secure the performance of an obligation incurred to finance identifiable collateral is PMSI.[204] The goal of PMSI super-priority is to ensure that where the debtor's present and future assets are encumbered, subsequent lenders are encouraged to supply credit to the debtor by virtue of the super-priority PMSI enjoys.

Floating lien thus widens the debtor's borrowing basis by permitting the debtor to grant security interest in after-acquired assets. In order to offset the pervasive effect of the device from subsequent lenders point of view, UCC Art. 9 gives super-priority to security interest of subsequent financiers of specific assets. The system is simple and functions efficiently.

7.2 *Floating charge* in the UK and criticisms lodged against it

The English version of floating security is significantly different from the American one. Under English law, floating charge developed gradually from a series of court cases.[205] Goode explains floating charge as follows:

> The creditor would take security over the debtor's present and future property but would contract to allow the debtor the liberty to manage the assets and dispose of them in the ordinary course of business as a going

[199] In Re Filtercrop, Inc., United States Court of Appeal, Ninth Circuit, 1998, 163 F. 3d 579. *See* also UCC §9-108.

[200] Townsend and Jackson, *supra* note 71, p. 1167.

[201] UCC (2002) § 9-103, (b) (1-3).

[202] Townsend and Jackson, *supra* note 71, p. 1165.

[203] Ibid.

[204] Scott J. Burnham (2007), t*he Glannon Guide to Secured Transactions, Learning Secured Transactions through Multiple-Choices, Questions and Analysis,* New York, Aspen Publishers, p. 36.

[205] Holroyd v Marshall (1862) 10 HLC 191 & In Re Panama, New Zealand, and Australia Mail Co., (1870) 5 Ch App 318 are two of the earliest cases on floating charge.

> concern free from the charge until such time the company ceased to carry on the business as a going concern or some other event occurred which by the terms of security agreement entitled the creditor to enforce his security and put an end to the company's power of disposition.[206]

Based on case law and literature, Goode assets that floating charge ought to have three characteristics.[207] *First*, "the charge must be created on class of the asset of the company present and future."[208] *Second*, "the company must have the right to change the asset from time to time in the ordinary course of business."[209] *Third*, "it must be contemplated in the charge agreement that until some step is taken by creditor, the company should carry on its business in any way as far as [it] concerns the particular class of assets."[210] In simple terms, floating charge "is ambulatory shifting in its nature, hovering over the asset which it is intended to cover until a particular event occurs to cause it to settle…"[211] Floating charge as a security device is available only to incorporated companies and farmers.[212]

Although both floating charge and floating lien cover present and future assets of the debtor, there are major differences between the two that have significant implication on the efficient functioning of secured transactions law. Floating lien attaches to particular assets of the debtor whenever the debtor acquires them and the lien becomes proprietary automatically.[213] By contrast, the floating charge fastens to specific asset only upon crystallization.[214] In other words, the floating charge becomes fixed charge, i.e. fixed to asset(s) of the debtor existing at the relevant time.[215] Hence, for floating lien to be fixed to specific asset, no other procedure or formality is required other than filing a notice which is a universal requirement. This makes floating lien relatively simple. By contrast, for floating charge to attach to a particular asset, crystallization is a prerequisite. "Under English law, determining the time at which crystallization occurs is a difficult task and is subject to costly

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[206] Roy Goode (1995), *Commercial Law*, London: Penguin Books, 2nd Ed., p. 731.
[207] Ibid. 732.
[208] Ibid.
[209] Ibid.
[210] Ibid.
[211] Ibid.
[212] David W. Carroll (1967), The Floating Lien and the Preference Challenge: Some Guidance from the English Floating Charge, *B.C.L. Rev*. Vol. 8: 243, p. 448.
[213] Ibid, 1840. *See* UCC § 9-204.
[214] Roy Goode (2010), *Roy Goode on Commercial Law*, London: Penguin Books 4th Ed., p. 732.
[215] Beale, *supra* note 151, Section 6.74.

litigation".[216] There is the call for the abolition of floating charge in the UK. Goode, for example had forwarded the following criticism on the floating charge in 2006":

> Corporate floating charges have now been with us for some years –plenty of time, one might think, for the courts to have worked out in detail their nature and priority. ... It is astonishing that after all this time we still extol the virtues of a security device which continues to generate controversy and differences of opinion among the judiciary as to its essential nature. [217]

In his book published in 2010, Goode softened his view toward floating charge arguing that "[n]otwithstanding the forceful arguments advanced by its critics, it is still too early to write an obituary of the floating charge".[218] In an extensively cited article, Riz convincingly makes the case against maintaining floating charge.[219] Riz argues first that floating charge is a weak security device because it ranks inferior to subsequently created fixed charge, statutory preferential claims and general unsecured creditors.[220] Second, it is an expensive device, which requires the floating chargee to monitor the global affairs of the debtor relative to a fixed chargee who monitors the use of a particular asset.[221] Thirdly, floating charge is exploitative because it is a mechanism of transferring insolvency wealth from unsecured to secured creditors and of sucking after-acquired assets into its ambit without the floating chargee providing further value.[222]

On whether floating charge shrinks the insolvency asset, based on evidence, Riz argues that the claim is exaggerated because of its weak priority position.[223] On this prong of his argument, Riz adds that the fact the charge holders negotiate for advantageous interest rate brings risk to unsecured creditors besides the fact that company charge registers do not show what amount the floating charge secures, aggravating its exploitative nature.[224]

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[216] Ohn Fitzgerald (2015), *Floating Charges, Crystallisation & Priorities between Creditors in a Winding u*p, Dublin: Byrn Wallace, Available at <https://byrnewallace.com/news-and-recent-work/publications/floating-charges-crystallisation-priorities-between-creditors-in-a-winding-up.html> Accessed: 09 August 2017).

[217] Getzler & Payne, *supra* note 61, p. 14.

[218] Goode, *supra* note 214, p. 737.

[219] Mokal, Riz (2003), *In The Floating Charge - An Elegy. Commercial Law and Commercial Practice*, Sarah Worthington, ed., Oxford: Hart Publishing.

[220] Id., p. 2.

[221] Ibid,

[222] Id., p. 3.

[223] Id., p. 6.

[224] Id., p. 3. .

After demonstrating that floating charge is not good as a security device, Riz argues that it is a residual management displacement device by which the chargee ousts a bad performing incumbent management of the debtor through the appointment of an administrative receiver.[225] He provides three reasons why the appointment of the administrative receiver does not make floating charge efficient.[226] *First*, the procedure of appointment is expensive and exploitative because the receivers act in the interest of small groups of appointers (banks) for repeat appointment.[227] He argues that although judicial control on receivers' remuneration is introduced by the parliament,[228] courts refrained from intervening unless remunerations fixed in the debenture agreement are plainly excessive and the determination of the amount is made by reference to the practice of other receiver's firms thereby putting the whole idea of controlling remuneration into a vicious circle.[229]

Second, receivers engage in rent seeking behavior by shifting cost from the fixed charge to floating charge with the view to increase recoveries under the fixed charge.[230] *Third*, receivers, owing an obligation to the creditor while at the same time being agents of the company can cause harm to junior claimants.[231] Riz also points out that the introduction of the administration by the 2002 Enterprise Act renders the institution of receivership useless.[232] The administration regime mandates the appointment of an administrator whose objective is to rescue the company overall in the interest of not only the floating chargee but also general creditors besides prohibiting the appointment of administrative receiver except for limited transactions.[233] Riz concludes that floating charge should be abolished.[234]

Floating charge remains controversial until today. In *Spectrum*, the National Westminster Bank entered into a debenture agreement taking security interest over the debt accounts of the debtor giving the debtor the right to dispose of accounts received in ordinary course of business while the debtor was required to pay the accounts received in an account opened at the lender bank.[235] The issue was whether the security agreement was floating charge or fixed charge.[236]

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[225] Id., pp. 6-10.
[226] Id., p. 15.
[227] Id., p. 15.
[228] UK Insolvency Act (1986) Section 36 (1).
[229] Mokal, *supra* note 219, pp. 15-16.
[230] Id., p. 16.
[231] Id., p. 16.
[232] Id., pp. 19-23.
[233] *See* UK Enterprise Act Section 72(A) et seq.
[234] Mokal, *supra* note 219, p. 25.
[235] National Westminster Bank Plc V Spectrum Plus Ltd & Ors (2005).
[236] Ibid.

The court of appeal ruled unanimously that because the debtor had the right to use the accounts received in ordinary course of business, the security agreement created floating charge.[237] The other perspective in the case was that the debtor was subject to the bank's control by being required to pay the accounts received in the bank account at the lender bank. It was argued that the debenture created fixed charge.[238] The decision in *Spectrum* was not welcomed by scholars and prompted criticisms.[239] Moss, for example, criticized the distinction between floating and fixed charge as artificial.[240] Therefore, under English law, the difficulty surrounding floating charge has continued.

The lesson that can be drawn for Ethiopia from the comparative analysis of floating lien and floating charge is that the former is relatively simple and efficient while the latter is complex and costly. For instance, Hungary had an *Enterprise Charge designed based on the floating charge*, which is abolished in 2013 as the system failed to function for over a decade. [241]

7.3 Floating security interest in Ethiopia: *business mortgage*

This article argues that the business mortgage –a security device that allows the debtor to give its business as collateral– under the Commercial Code[242] represents a floating security interest in Ethiopia. To grant business mortgage, the debtor must be a businessperson (trader), whether natural or legal person.[243] Second, although the parties can limit the scope of the business mortgage,[244] by default it applies to the debtor's business.[245] To assess whether business mortgage can qualify as floating security, it is essential to closely examine the definition of business under the commercial code.

The Commercial Code provisions governing business are complex with general rules, exceptions and cross-references, which makes it difficult to extract a concise definition of business. Article 124 of the Commercial Code defines business as "an incorporeal movable consisting of all movable property brought together for the purpose of carrying out the commercial activities listed under Art. 5.[246] This brief definition of business under Art. 124 does not give

[237] Ibid.
[238] Ibid.
[239] Sarah Worthington(2010), *An 'Unsatisfactory Area of the Law' – Fixed and Floating Charges Yet Again in Fixed and Floating Charges- Landmark Article*s, London: Chase Cambria Publishing.
[240] Getzler & Payne, *supra* note 61, pp. 4 & 10.
[241] Csizmazia, *supra* note 5, p. 197.
[242] *See* Commercial Code Art. 171-193.
[243] Id., Art. 171(1).
[244] Id., Art. 178(2).
[245] Id., Art. 171(1).
[246] Id., Art. 124. *See* also Art. 5 for the list of commercial activities.

complete picture of the components of business. Pursuant to Art. 124 and other provisions of the Commercial Code, the following can be listed as the major components of business:

- corporeal chattels, i.e., equipment and goods;[247]
- the right to lease the premise in which the business is located;[248]
- incorporeal assets such as goodwill, intellectual property rights, contractual claims arising from non-compete clause etc.…[249] and
- debts of the trader in exceptional cases.[250]

Based on the above components, it can be argued that *business* has broad scope and the assets that constitute it are not static, but rather depend on the nature of the business. If the trader buys and sells equipment, the equipment in its store shifts from time to time during the traders' normal course of trade. The trader may also acquire intangible assets such as a trademark that enhances the value of its business. The trader can subject these shifting assets to security interest by using business mortgage. In this sense, the business mortgage can be regarded as the Ethiopian version of floating security interest because the security interest floats over the shifting assets that constitute business. Literature suggests that in other civil law countries as well, security interest over the business of the debtor is considered as floating security interest.[251]

Asserting that business mortgage is a form of floating security does not necessarily mean that it is efficient or that the device covers all assets of the debtor. It simply means that the debtor can subject its presently owned and to be acquired assets to security right, allowing the security interest to float over the shifting assets of the debtor as long as those assets form part of the business of the debtor. With this scheme, a creditor who wishes to encumber all of the debtor's present and after-acquired property must combine business mortgage with series of other security agreements. These include real estate mortgage agreement, security agreement covering intangibles such as accounts receivables. Separate registration is required for each security agreement, and this entails unnecessary transaction cost.

Relative to the floating lien regime embodied in UCC Art. 9, the scope of business mortgage is limited, and expanding its scope by other security agreements increases transaction cost. Moreover, the position of purchase

[247] Id., Art. 128.
[248] Id., Art. 129.
[249] Id., Art. 124, 127, 130 et seq.
[250] Id., Art. 129.
[251] In Belgium, it is referred to as pledge over business, in France, pledge over business ("nantissement de fonds de commerce") and in Luxembourg, pledge on general business (gage sur fonds de commerce). See Deloitte Legal (2013), *Guide to Cross-Border Secured Transactions Law*, Luxembourg: Deloitte Legal, pp. 18, 55 & 85.

moneylenders is not clearly governed under the business mortgage scheme, except for a seller with ROT (Retention of Title). It is to be recalled that under UCC Art. 9, financiers of identifiable individual items are given protection if they obtain security interest in the item the purchase of which they financed has priority over any security right even if the latter is created and registered earlier. Under the Commercial Code, a business mortgage can cover shifting equipment/goods. However, there is no particular protection to a lender who extends secured loan to the debtor to finance specific equipment (computers for example) by taking security interest in the equipment in question if a business mortgagee concurrently wants to enforce its right against the equipment.

Since the business mortgage extends to equipment, in case of conflict between the business mortgagee and the subsequent financier of a specific asset, the former prevails. This possible scenario has the effect of discouraging lenders from dealing with the business debtor once it is known that the debtor has business mortgage. In order to resolve the problem, Ethiopian law should give default priority to PMSI holders and as it stands now, it does not do so.

8. Alternative Models for Reform

So far, it has been argued that the Ethiopian secured transactions law should be reformed based on UCC Art. 9. Critiques could challenge this on the ground that, relative to the Ethiopian context, the EBRD mode law and reform experiences of other civil law jurisdictions could be more relevant to Ethiopia. Two sets of civil law models of reform are examined below, i.e., the EBRD model secured transactions law representing an international model and the secured transactions law of Louisiana offering experience at domestic level.

8.1. The EBRD secured transactions model law

Shortly after its establishment in 1990, the EBRD developed model secured transactions law in 1994.[252] Although EBRD's reform initially focused on CEE countries,[253] today, it has extended its projects to Central Asia and Southern and Eastern Mediterranean including North African countries.[254] The EBRD model law is a result of comparative work and its source cannot be attributed to a single national secured transactions law.[255] The members of the advisory board of the model law were from countries representing different legal systems.[256]

[252] Jan-Hendrik Röver (2010), The EBRD's Model Law on Secured Transactions and its Implications for an UNCITRAL Model Law on Secured Transactions, *Rev. Dr. Unif.*, p. 485.
[253] Ibid.
[254] http://www.ebrd.com/where-we-are.html (Accessed on 26 July 2017).
[255] EBRD Model Law, see Introduction.
[256] Ibid.

The introductory remark to EBRD Model Law states that its drafters "have combined a civil law and a common law approach and have sought to draw on a broad range of legal and practical sources both in Central, Eastern, and Western European countries and elsewhere in the world".[257]

When examined closely, the EBRD Model Law has more similarity to English law than to UCC Art. 9 or secured transactions law of civil law countries. *First*, the Model Law does not follow the functional approach to security interest, same as English law[258] and secured transactions law of civil law countries. *Second*, its central security device, the enterprise charge is designed based on English law of floating charge with slight variation; while under English law the charge becomes fixed upon crystallization, the requirement of crystallization is replaced by specific identification of the property covered by the enterprise charge under the Model Law.[259] Hence, though the EBRD Model Law version of enterprise charge is not a complete extension of the floating charge from English law, it shares substantial features of the English law floating charge.

Under the Model Law, the enterprise charge holder has the right to appoint *a charge manager* similar to an *administrative receiver* under English law.[260] Lastly, as a general rule, the time for determination of priority of conflicting security interests is the date of creation, rather than registration, although there are series of exceptions to it.[261] This is yet another feature of English law, though slightly different.

I argue that to design secured transactions law based on EBRD Model Law is not substantially different from using English secured transactions law as a model. This argument is supported by the fact that in Hungary, for instance, the previous secured transactions law –designed mostly based on EBRD Model Law– has been replaced by new legal framework because of practical problems faced under the previous secured transactions law similar to the ones faced under English Law.

There have been three major secured transactions law reforms in Hungary, i.e., in 1996, 2000 and 2013, the first two reforms being inspired by the EBRD Model Law.[262] Under the 2000 secured transactions law, floating charge was the central security device. One of the problems with the enterprise charge in Hungary has been that it ranked below multiple security interests created on the

[257] Ibid.
[258] Röver, *supra* note 252, p. 496.
[259] EBRD Model Law Art. 4(1).
[260] EBRD Model Law Art. 16.
[261] EBRD Model Law, Art. 17(1).
[262] Csizmazia, *supra* note 5, p. 186.

same asset".[263] In an article published in 2008, Csizmazia had addressed the reform of the Hungarian Civil Code while the 2013 Civil Code reform was underway.[264] Csizmazia discusses the reason provided in the Civil Code drafting commission's draft and the expert draft proposal for the abolition of enterprise charge.[265] The explanation hinges on the fact that enterprise charge was rendered useless because "subsequent mortgages and charges registered in specialist registers have priority over the holder of the enterprise charge".[266]

The new secured transactions law of Hungary, which is, inspired more by UCC Art. 9 has abolished the floating charge that was inherited from English law through the EBRD Model Law. Among others, the new Hungarian Civil Code recognizes the concept of floating security (though uniquely designed) and clearly provides for PMSI super-priority.[267] It also introduced out-of-court enforcement of security right.[268] These are clear departures from EBRD Model Law and English law.

The above discussion shows that the EBRD Model Law is significantly English law based, at least in Hungary; the Model Law has been replaced by a new regime. Hence, any proposal that secured transactions law reform in Ethiopia can be based on the EBRD Model Law would have to show strong evidence as to why Hungary distanced itself from the EBRD Model Law other than dissatisfactions with it. This does not mean that the model law should not be consulted in designing comprehensive secured transactions law. It merely means that the core elements of Ethiopian secured transactions law should be designed based on UCC Art. 9 due to its better approaches and policy.

8.2. The civil law jurisdiction of Louisiana: A viable synthesis

Louisiana has secured transactions law that is slightly different from the rest of the states in the US because it maintained its civil law tradition although it also embraced UCC Art. 9. The question of interest for the purpose at hand is whether its legal system, which shares common legal history with the Ethiopian legal system, i.e., the French Civil Code, can inform secured transaction law reform in Ethiopia.

To maintain its predominantly French civil law tradition,[269] Louisiana has made certain adjustments to UCC Art. 9.[270] The four areas of major variation

[263] Hungarian Civil Code (2000). Section 266(3).
[264] Csizmazia, *supra* note 5, pp. 181-198(2008).
[265] Csizmazia, *supra* note 5, p. 197.
[266] Ibid.
[267] The Hungarian Civil Code (2013) Sections 5:89(4) & 5:122.
[268] Ibid, Section 5:132.
[269] A. N. Yiannopoulos (2008), The Civil Codes of Louisiana, *Civil Law Commentaries,* Vol. 1, Issue 1, 2008, pp. 1-6.

pertain to "(1) the scope of collateral, (2) filing system (3) priority rules governing the competition between security interests and statutory privileges and (4) remedies and damages".[271] Some of these variations were necessitated by the existence of competing legal rules that are considered as more effective while others were necessitated by the incompatibility of UCC Art. 9 rules with Louisiana's civil law tradition. The general ban on self-help falls into the latter category.

Under UCC Art. 9, the secured creditor can take possession of the collateral under Section 9-609 either judicially[272] or extra-judicially.[273] When the creditor pursues extra-judicial repossession, it has the duty to do so without breach of peace.[274] The standard of "without breach of peace" is not defined by UCC Art. 9, and is left to the determination of courts *ex post facto*.[275]

By Contrast, Louisiana in principle prohibits self-help repossession.[276] Hence, in Louisiana, the creditor has no right to repossess the collateral without court involvement except for one type of collateral, i.e., an automobile.[277] Under Louisiana's Revised Additional Remedies Statute, a secured creditor can repossess an automobile collateral (1) by sending notice to the debtor upon default,[278] (2) by clearly stating in the notice that "Louisiana law permits repossession of motor vehicles upon default without further notice or judicial process and (3) without breaching peace."[279]

Besides such limits to self-help repossession, Louisiana took further steps by illustratively listing down the conditions under which breach of peace occur under the revised additional remedies statute. For instance, there is breach of peace in case of unauthorized entry into the debtor's premise (locked or unlocked) by the creditor/repossessor to conduct the repossession or when the repossession takes place despite the debtor's oral objection.[280]

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[270] James A. Stuckey (2002), Louisiana is Non-Uniform Variations in U.C.C. Chapter 9, *La. L. Rev.* Vol. 62. No. 3.
[271] Id., p. 796.
[272] *See* William D. Warren & Steven D. Walt(2007), *Secured Transactions in Personal Property* , USA: Foundation Press, 7th Ed., p. 277.
[273] UCC § 9-609.
[274] Ibid.
[275] McRobert, *supra* note 125, p. 569.
[276] LA Rev Stat § 10:9-609. §9-609.
[277] *See* La. R.S. § 6:966 (2015).
[278] La. R.S. § 6:966 (2015). § 6:966(2).
[279] LA Rev Stat § 6:965.
[280] La. R.S. § 6:966 (2015), § 6:965. C.

Under UCC Art. 9, court decisions have been inconsistent with regard to determining the occurrence of breach of peace across states.[281] Generally, courts agree that there is breach of peace in case of the use of physical assault during the repossession.[282] Court decisions in borderline cases such as those involving trespass, the mere presence of law enforcement officer, emotional harm inflicted on third parties and verbal objection by the debtor during the repossession are inconsistent.[283] By listing down cases of breach of peace, Louisiana has attempted to avoid the possibility or reduce the frequency of breach of peace due to ambiguity of the law.

Louisiana did not adopt self-help repossession due to its incompatibility with its values, more precisely of keeping peace.[284] In multiple occasions, courts in Louisiana refused to affirm self-help repossession on the ground that it is against public peace or order.[285] It is in line with this tradition that Louisiana made modifications to the self-help repossession provision of UCC Art. 9.

The key lesson that can be drawn from Louisiana's law is that certain parts of UCC Art. 9 can be considered as incompatible with civil law tradition (or simply a legal system of any jurisdiction). This requires adjustment of UCC Art. 9 to the local context as is the case of self-help repossession in Louisiana. Thus, for secured transactions reform in Ethiopia, I argue that while reform based on UCC Art. 9 is possible, lessons can be learnt from the experience of Louisiana on ensuring its compatibility with the Ethiopian local context. In any event, the two features of UCC Art. 9 examined in this article, namely, the unitary theory and the floating security interest are not rejected by Louisiana. Hence I argue that in Ethiopia, although readjustments of UCC Art. 9 is possible and necessary, the essential features of UCC Art. 9 –especially its policies and approaches– are transplantable.

The adaptation of UCC Art. 9 to the local context of Ethiopia can be based on the experience of Louisiana. As noted earlier, many unique conditions in the transplanting country should indeed be taken into account. These include the

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[281] McRobert, *supra* note 125, pp. 570-571.

[282] Arkansas Supreme court held that violence is breach of peace, See Ford Motor Credit Co. V. Herring, 589 S.W.2d 584, 586 (Ark. 1979). Similarly, Tennessee court held breach of peace must involve violence. See 119. Mccall v. Owens, 820 S.W.2d 748, 751 (Tenn. Ct. App. 1991). 120.

[283] McRobert, *supra* note 125, pp. 582-591. See Chapa v. Traciers & Assocs., 267 S.W.3d 386 (Tex. Ct. App. 2008).

[284] Paul Joseph Ory (1991), Nonjudicial Disposition under Louisiana Commercial Law Chapter Nine, *La. L. Rev.* Vol. 51, No. 6, p. 1225.

[285] In Liner v. Louisiana Land and Exploration Company, Justice Tate stated "… this is done in the interest of preservation of peace in society and as a deterrent against self-help.' 319 So. 2d 766 (La. 1975). See also Guidry v. Rubin, 425 So. 2d 366, 371 (La. App. 3d Cir. 1982) & Grandeson v. International Harvester Credit Corp., 223 La. 504, 66 So. 2d 317.

level of economic and technological advancement, the perception of the society toward private justice, the level of literacy and the presence or absence of certain institutions. However, the experience of Louisiana gives insights on how an alien legal concept (self-help repossession) can be modified in order to make it compatible to the local context.

One could challenge this argument by identifying the differences between Louisiana and Ethiopia which include the fact that Louisiana is a state and not a country and that Louisiana is economically more advanced relative to Ethiopia. However, if drawing lessons from a foreign legal system solely depends on the identity of systems, there would never be a model to learn from because it is simply inconceivable for two jurisdictions to be exactly identical. It is for this reason that lessons gained from comparative studies are considered as a cue (and not as a rigid formula) in law reform.

Conclusion

The time for Ethiopian secured transactions law reform is long overdue. The only question is which law(s) or models can inform the reform. I argue that by departing from French secured transactions law, Ethiopia should take the cue from UCC Art. 9 in implementing comprehensive reform. Moreover, English law and EBRD model secured transactions law are substantially similar in policy and substance, and do not provide suitable policy framework for secured transactions law in Ethiopia. The analysis of secured transactions law of Louisiana and Hungary (to a certain extent) illustrates that UCC Art. 9 can indeed be adapted to civil law jurisdictions.

The discussion in the preceding sections warrants two major conclusions. The *fir*st is the need to adopt the unitary theory of and functional approach to security interest. Numerous countries have adopted the unitary theory of security interest, including the UNICTRAL Legislative Guide to Secured Transactions law representing an international legal instrument. *Second*, Ethiopia should design comprehensive floating security interest based on UCC Art. 9. English law is complex and inefficient in this regard, due to its failure to demarcate the boundary between fixed and floating charges and related enforcement problems. By contrast, UCC Art. 9 floating security interest is simple and efficient. The rudimentary Ethiopian version of floating security should be revamped taking the cue from UCC Art. 9.

Although the idea of a fundamental shift in legal thinking and approach due to the adoption of the functional approach seems to be incompatible to the Ethiopian legal system, experience shows that it is achievable. In the interest of building genuinely efficient and fair credit market and boosting economic development, a timely secured transactions law reform should be implemented in Ethiopia. ■