

# **Land Valuation for Expropriation in Ethiopia: Valuation Methods and Adequacy of Compensation**

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**Key Words:** Land, Expropriation, Valuation, Compensation

## **SUMMARY**

This paper presents the land rights in present Ethiopia and the type of valuation system followed during expropriation of land holdings. Expropriation is a compulsory surrender of land to the government for public purpose activities. Although land is owned by the state and the Ethiopian people, rural farmers are given the rights to use, lease/rent, or inherit the land which is in his holding. More over, the Constitution guarantees their holding rights in that no land may be taken by way of expropriation without advance payment of “commensurate” amount of compensation. It is argued in the paper that commensurate means equal or just compensation. But, because of the backward type of valuation system, cost replacement method, compensation being paid is not adequate and this creates insecurity on their land holdings.

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## INTRODUCTION

Land remains the single most important source of material wealth and social prestige in many societies of the world. Land holds the lion's share in the income generation of nations in that studies show real estate has been estimated to represent approximately one-half of the world's total economic wealth (Ling and Archer 2005: 3 ) Likewise, land holds a significant place in the lives of Ethiopian people. Agriculture is still the mainstay of the nation's economy in terms of income, employment and food security. Land is the primary source of economic welfare whereby people in the country can afford to obtain food, education and healthcare. It is also the means for a significant amount of foreign currency generation since agricultural products are the main export goods for Ethiopia.

In Ethiopia, land is the common property of the 'state and the people', and, hence, is not subject to sale, exchange or mortgage. Rural farmers and pastoralists are guaranteed a plot of land free of charge while urban residents can secure the same through ground lease arrangements. Rural farmers' right to the land is a kind of usufructuary right, which merely gives peasants possessory or "holding" prerogatives, including the rights to use and enjoy, rent, donate and inherit the land. In urban areas, its dwellers may obtain land on 15-99 years lease agreements depending on the purpose for which the land is needed and such right may be freely transferable. To secure such rights, the Constitution prohibits eviction of holders of the land without just cause and payment of compensation.<sup>1</sup>

Currently, Ethiopia is facing with rapid growing urbanization and modernization of infrastructures. Most towns and cities in regions have been expanding twice their size within the past ten years. After the downfall of the military junta, also called the *Derg*, in 1991, Ethiopia opened its doors for foreign and national investment. Moreover, recently the government has developed new master plans for existing and newly established urban settlements. As a result, a large area of land is required for private and public investment, for the expansion of urban areas or the establishment of new ones, and for construction of

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<sup>1</sup> . Generally, read Article 40 of the Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995. *Negarit Gazeta* Year 1, No.1; Federal Democratic Republic of Ethiopia Rural Land Administration and Land Use Proclamation, Proclamation No. 456/2005. *Negarit Gazeta*. Year 11, No. 44; and Re-Enactment of Urban Lands Lease Holding Proclamation, Proclamation No. 272/2002. *Negarit Gazeta*. Year 8 No. 19, accessible at the Ethiopian parliament website [www.ethiopar.net](http://www.ethiopar.net)

roads and other types of infrastructure in all areas of the country. Thus, presently large tracts of land are being taken by way of expropriation for roads, streets, irrigation works, private mechanized farming, horticulture investment, real estate development and other massive infrastructure developments.

Expropriation, as means of land acquisition for public works, has been a known concept of law since the ancient times of Greece and Rome. It has also been commonly applied in practice in Europe and America. In Ethiopia, it is believed that it was introduced, at least in law, during the Minelik II era. The concept is predominantly understood as the inherent power of the state over its territory under which all owners of property including land exercise their property rights subject to this power of the state. However, since this thinking is against the natural right of man to own private property, legislations and constitutions of different countries have been trying to limit its application by setting forth conditions. Parliamentary enactments and court decisions over time have refined and reduced the scope and application of the state power of expropriation. In respect of land, now, expropriation is exercised only in cases where designated land is used for a public purpose and accompanied by payment of fair compensation.

The purpose of this Article is to give a glimpse of the concept of expropriation and the valuation methods we follow today in Ethiopia and to assess the fairness of amount of compensation paid in the event of expropriation. Part I is about the fundamentals of expropriation. Part II considers the valuation method and systems; and Part III deals with the compensation schemes and compensable interests in Ethiopia. Then the Article closes with conclusions and possible recommendations. The Article bases itself on literature, analysis of the existing legal regime and cases.

## **I. CONCEPT AND DEFINITION**

### **1.1 Definition of Expropriation**

Although, conceptually, the issue of expropriation was introduced in the 1908 Menelik's land related legislation, the first systematic definition of the concept in the Ethiopian legal system is given in the Civil Code of Ethiopia, which provides: *Expropriation proceedings are proceedings whereby the competent authorities compel an owner to surrender the ownership of an immovable required by such authorities for public purposes* (The Ethiopian Civil Code Art. 1460)

In this definition, the idea of the taking of private land by the state or authorities without the consent of the owner for public purpose is clearly envisaged. The phrase "expropriation proceeding" is employed here instead of the word "expropriation" because

of a translation error from the original French version (Getachew 1975:6).<sup>2</sup> And yet, the rule, seen on its own, noticeably fails to include the principle of compensation. Of course, this does not mean that compensation is not included within the civil code rules of expropriation.

The currently issued federal land laws also fail to clearly and comprehensively define the concept of expropriation. Neither does the concept being defined in the Tigray (Proc. 136/2007) and Oromian (Proc. 130/2007) Revised Land Administration and Use Proclamations. Exceptionally, the Amhara Regional State Rural Land Administration and Use Proclamation defines it as follows:

*Expropriating land holding'' means taking the rural land from the holder or user for the sake of public interest paying compensation in advance by government bodies, private investors, cooperative societies, or other bodies to undertake development activities by the decision of government body vested with power.(ANRS Proclamation No. 133/2006 Art. 2(18)*

This legislation views the concept from the point of view of state or public ownership of land. Hence, the user of the land is a mere possessor, not an owner. But, the definition given is more comprehensive than that of the Civil Code. It covers the principles of 'public interest', 'compensation', and the prerogative power of the state and other delegated bodies.

Notwithstanding the merits of the above definitions of expropriation, in this Article, the author opts to adopt the following as a working definition of the concept of expropriation on the ground of its comprehensiveness:

*.....it is the right of the nation or state, or of those to whom the power has been lawfully delegated, to condemn private property for public use, and to appropriate the ownership and possession of such property without the owner's consent on paying the owner a due compensation to be ascertained according to law( Francis, Amendola, William, John, and Kennel).*

This definition seems more complete, since it includes all the basic elements. First of all, expropriation is a right exercised by the state itself or its sub-branches such as municipalities and other public companies or private companies and people legally authorized by the state/legislature. The state or municipality may want a certain parcel of land to build a road, town hall, or museum; or, in the case of public and private companies, they may want it to run utilities, such as telephone, power, or water lines.

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<sup>2</sup> It is said that the original French version has defined the term expropriation as follows: "expropriation is a procedure by which the administration obliges an owner to surrender to it the ownership of an immovable which it needs for the purpose of public utility."

The second element is that the state or the organs authorized to take such lands must follow some procedure. In the USA, it is known as condemnation of private property. In other countries, mainly European nations, it is referred to as an expropriation procedure. The main idea is that the state must initiate a condemnation or expropriation procedure before a court or other concerned organ, as the case may be, in order to observe due process of law. This means, the private owner shall be given the right to be heard and to negotiate on the amount of compensation, and finally, the court must approve of it. This procedure avoids arbitrary takings of land by the state without fair compensation.

The third point worth discussing is the issue of “public use.” The justifications offered for taking private land against the wish of the owner of the property are public use, public benefit, public good, public interest or public purpose. Terms like these are coined to express the same principle in different countries; although, in actuality, the meanings are different and sometimes controversial. This doctrine of expropriation stands in opposition to the right of private property. Hence, the law tries to minimize the power of the state of taking private property by putting the necessity of ‘public purpose’ as a limitation.

Public purpose as a limitation on the sovereign right of expropriation is well recognized in the current Ethiopian Constitution. Article 40 (8) of the Constitution prescribes:

*Without prejudice to the right to private property, the government may expropriate private property for public purposes subject to payment in advance of compensation commensurate to the value of the property.*

The Constitution does not say anything as to what constitutes a public purpose. This we can find in the other subordinate legislations of the Federal Government or other regional laws. The present Federal legislation defines “public purpose” as:

*the use of land defined as such by the decision of the appropriate body in conformity with urban structure plan or development plan in order to ensure the interest of the people to acquire direct or indirect benefits from the use of the land and to consolidate sustainable socio-economic development (Proclamation No.455/2005 Art. 2(5)).*

One may find even this definition too general to list down the kinds of activities that constitute public purpose. The basic standard that may serve to identify the types of activities which lie on public purpose is the ‘direct or indirect benefit’ that it gives to society. In this regard, the previous repealed Federal Expropriation Proclamation, (Proc. No. 401/2004) seems clearer. The Proclamation, under Article 2/2 listed the kinds of works that are considered as beneficial to the public as power generating plants, highways, airports, dams, railways, fuel depots, water and sewerage facilities, telephone and electrical works and other related activities were listed as public purpose activities.

“Public purpose” in the present proclamation is understood in its wider sense as providing a direct or indirect benefit to society. As a developing country, Ethiopia highly depends on whatever investment that can be made in its land. These investments or other project works may be made by public entities, private investors, cooperative societies (associations), or other organs of the federal or regional governments (Proclamation No.455/2005 Art. 3(1)).

The appropriation or taking, mentioned in the definition, is also an important aspect or stage in expropriation procedure. Expropriation differs from the police power of the state (that limits the use right of property on account of health, public safety, etc.) in that expropriation involves the loss of the core constituent right of disposal while in the case of the police power of the state what the owner loses is some part of his use right over his property.

The fifth point embodied in the definition is the absence of consent on the part of the owner. The power of expropriation is a sovereign power of the state to take private land without the consent of the owner. What makes it special is this absence of consent. Hence, it is an inherent and compulsory authority of the state recognized by law. The state resorts to such coercive proceedings because either private owners are totally unwilling to negotiate on the price offered to them or they put forth an unrealistically high price or compensation. In both ways, owners try to impede the public welfare that could be otherwise attained by using their land.

The last principle included in the definition is the obligation of payment of fair compensation. This principle is the most important guarantee to individual owners on their lawful possession. All major legal systems and constitutions include this concept as a guarantee to the owner and as a limitation to the government. The just compensation requirement demands that the state reimburse the owner for the value of the property interest taken and place the latter in as good a pecuniary position as if the property had not been taken. The assessment of compensation is extremely complicated, and different countries incorporate different valuation methods within their expropriation legislation. Nevertheless, the existence of compensation makes expropriation tolerable and differentiates it from other government actions, such as confiscation, nationalization, and eviction, in that these three are devoid of the state obligation to compensate for the taking. In Ethiopia, the constitution and all the subordinate land legislations guarantee an advance payment of “commensurate” or “appropriate” amount of compensation in the event of expropriation.

## **1.2 Theoretical Foundations of Expropriation**

On the nature and source of eminent domain power, two main theories exist. These are called as the “reserved rights” and “inherent powers” theories. The first theory was

formulated by European jurists. One such scholar, Grotius, espoused the view that the state had original and absolute ownership of all the property possessed by its individual members antecedent to their possession, and this gave rise to the “reserved rights” theory of eminent domain (Harrington 2001:1250). According to this theory, a citizen’s possession of property was dependent on a grant by the sovereign and his continued enjoyment of it was subject to an implied reservation that the state might retake the property at any time for a public purpose. In this view, an individual’s ownership of property is limited to a mere possessory right, at least with respect to the government (Harrington 2001:1250). The right to hold property is, therefore, subject to a tacit agreement between the citizen and the sovereign that the property might be reclaimed by the latter to meet public necessity, and the citizen holds his land with such awareness and cannot complain of injustice when it is lawfully exercised.

The consequences of such a reserved-rights theory are that it has the potential to deny compensation to the landowner and to eliminate the necessity of going through all the judicial procedures. The clearest objection to this theory has come from American courts, for whom reservation of rights in the sovereign “sounds too much like feudalism” (Harrington 2001:1251). The most obvious rebuttal to this theory is that it simply is not in accord with actual practice (Stoebuck 1972: 558). Historical precedents in America and England show no reservation of power in the hand of the sovereign. Even in continental Europe in the Roman period, there were items of evidence of compensation for the taking of private property (Matthews 1921 )

Confronted with many theoretical problems, as well as because of the nature of the American federalist structure, many courts in the United States eventually rejected the theory of reserved rights and came to view eminent domain simply as an inherent right of sovereignty. The state’s power to take land for public use came to be regarded as a power which inheres in the right of the state to govern the *polis* - which is to say, inherent in its “police power” – and was not dependent on any pre-existing property right. (Harrington 2001:1251) According to this view, governments have the sovereign power to enact any regulation affecting persons or property located within their borders, subject to such limitations as might be imposed by their respective constitutions. By adopting this approach, the American courts equated the source of power for eminent domain to other similar powers of the state, such as police powers and the power to levy taxes, which are inherent powers founded in the primary duty of government to serve the common needs and advance the general welfare of the people. Currently, the principle of inherent power seems dominantly accepted everywhere. It is said that the power of eminent domain is an inherent attribute of sovereignty and exists even without constitutional recognition; therefore, constitutional provisions relating to eminent domain must be construed as limitations upon, rather than grants of, such power. (*Comments Yale Law Review* 1949:599-600)

Although it seems that these theories propagate two different ideas, in reality, the underlying principle is one and the same. Both inherent powers and reserved rights theories permit no real restraint on the sovereign's exercise of the power of eminent domain. A sovereign's eminent domain power is absolute and total. It is superior to all other property rights, and every owner of property holds his land subject to the power of eminent domain. The taking of property by a government's exercise of its power of eminent domain per se is not a government infringement of the property owner's fundamental right to own property, since the power of eminent domain is a legitimate constitutional power .

Such power antedates constitutions and legislative enactments, and exists independently of statutory or constitutional sanction or provision. ( Francis, Amendola, William, John, and Kennel.) Thus, modern laws only try to recognize it and prescribe limits for its application. A reading of the expropriation laws of most countries reveals that they confirm the state's authority to expropriate private property, but impose two conditions on the exercise of such authority: the taking must be for a public use, and just compensation must be paid to the owner.

## **II. VALUATION AND COMPENSATION**

### **2.1 Compensation**

#### 2.1.1 Definition and Justification for Compensation

Expropriation is a forced sale and is distinguished from confiscation in that the owner will be compensated for the property taken. Payment of compensation is the second, but equally important, limitation on the government's power of expropriation. This is a fact generally found in all legal systems of the world, whether or not private property is respected. This means, even in countries where the private ownership of land is not yet allowed, like China and Ethiopia, payment of compensation for the holder of rights on the property is recognized by law.

Compensation is defined as “full indemnity or remuneration for the loss or damage sustained by the owner of the property taken or injured for the public use.” (Francis, Amendola, William, John, and Kennel). The compensation requirement under the law demands that the expropriator reimburses the expropriated for the property interest taken and place the latter in as good a pecuniary position as if the property had not been taken.

The reason compensation should be paid is justified on socio-political, as well as economic, theories. Compensation is a means to keep the balance of social justice. It protects the rights of the politically under-represented groups, (Ndjovu 2003: 21), requiring the government to bear the inconveniences resulting from expropriation. Hence,

it is argued that no single individual should bear the costs of government projects that are intended to be for the common good (Epstein 1993: 6). There is no strong reason to single out one individual and compel him to shoulder the entire burden for the benefit of the society at large. This also serves as a protection against arbitrary and unauthorized actions of the legislature or the executive branches of the government.

Economically speaking, if the government is forced to pay for what it acquires, this could discourage it from making unwise and foolish decisions (Ndjovu 2003: 21). It will always strive to make rational economic decisions that will bring beneficial development to all parties. In addition to this, the law has to give protection to the reasonable expectations of those who have relied on it. Should the law deny this protection and fail to protect property, owners might not be willing to take risks and invest on their properties, for the benefit may be reaped by others. Neither would banks be willing to lend money for such risky business.

### 2.1.2 Theories of Compensation

As stated above, there is no doubt that compensation must be paid during expropriation. However, with regard to the manners of determining compensation, legislations give different terms which often create confusion among valuers. Different countries use phrases like “just compensation,” “fair compensation,” “indemnification,” and so on. The Ethiopian Constitution provides, for its part, the word “commensurate” compensation, without further explanation. Hence, to shed some light on this confusion, an analysis of two conflicting theories in this regard is proper.

#### *2.1.2.1 Indemnity Principle*

Also called “owner’s loss” theory, under this theory, the owner is entitled to be put in as good a pecuniary position as he would have been if his property had not been taken. (Kratovil, and Harrison 1954:615). This principle is predominant in most western countries, though there are slight variations. This theory assumes that a “dispossessed owner would go out into the market and purchase with his compensation money a property roughly similar to that which had been acquired, any incidental loss or expense being met from the proceeds of the disturbance claims.” (Ndjovu 2003: 20).

In the United States, court decisions show that the compensation to be paid to the owner is not measured by the value of the land to the property taker (McCormick 1933:465). In France, as in the USA, compensation does not reflect what the taker has gained, but rather, what the owner has lost. Moreover, its purpose is to compensate for the taking and not to directly pay the cost of equivalent reinstatement (Picard 1990:57 ). In France, therefore, in addition to the market value of the deprived property, loss of rent, trading loss, moving expenses, dismissal benefits, severance damages, and the like are also

coverable, although the taker has got nothing from it. Similarly, in Sweden, the land owner and other parties affected by an expropriation are compensated on the basis of their loss; the gain made by the expropriator does not affect the award (Bjerken 1990:129). The only exception is during forced re-allotment, in which the owner may, in addition to the compensation for the injury of property, be awarded a *share of profit* (Kalbro 2004:59) the lost property may give to the future owner. If the compensation does not fully cover the economic injury to the property owner, compensation shall also be paid for “other damages.” (Kalbro 2004:34). Other damages, in this case, are removal costs and business losses.

In England, in addition to the full compensation of the land acquired, the expropriating organ is obliged to pay also “compensation for disturbance of interest and compensation for severance and injurious affection.” (Moore 2004:6) Severance occurs when the physical taking of the part of a parcel of land depreciates the value of the remaining land. And injurious affection applies to the depreciation in the value of the remaining land caused by the construction of and use of the works for which the part was taken. Hence, to put the owner of the expropriated property in the same economic position, these laws consider, during the course of valuation, the loss of the property owner. Whether the expropriating organ has got much or little benefit from the taking does not matter.

#### *2.1.2.2 Taker’s Gain*

This theory holds that “the government should pay only for what it gets” (Kratovil and Harrison 1954:615). This argument stems from the fear that to allow compensation for such items, as disturbance of a business on the land or other similar remote damages, would drain the purse of the government or other beneficiary for that matter. It is said that although it may make the owner whole, if paid, compensation for consequential damages, such as the future loss of profits, expenses of moving fixtures and personal property, the loss of goodwill that inheres in the location, should not be paid (Kratovil and Harrison 1954:615). This is because when the government or other expropriating organ takes only the land, having no use for any business operated thereon, it should pay only for what it gets, which is, of course, the market value of the land.

Both arguments try to answer the modality of and elements that should be included in assessments of compensation. As seen above, today, with the emphasis given to properties around the world, the former line of argument is prevailing.

#### 2.1.3 Notions of Market Value and “Just” or “fair” Compensation

It is common among the expropriation laws of most countries to usually attach the requirement of the payment of compensation. Based on the kind of legislation in each country, compensation to be paid in the case of expropriation may be termed as compensation, fair compensation, just compensation, reasonable compensation, adequate

compensation or commensurate compensation. In all Western countries and, as shown in Kitay, in most developing countries, the fundamental principle that guides valuations under expropriation laws is the payment of “fair market price” (Kitay 1985:50), or market value. Market value is generally taken as a test for the existence of just compensation. Market value, as defined in *Appraisal of Real Estate*, is:

*the most probable price, as of a specified date, in cash, or in terms equivalent to cash, or in other precisely revealed terms, for which the specified property rights should sell after reasonable exposure in a competitive market under all conditions requisite to a fair sale, with the buyer and seller each acting prudently, knowledgeably, and for self-interest, and assuming that neither is under undue duress. (Appraisal Institute 2001:22).*

Under the indemnity principle, the measure of compensation where all of a person’s land is taken is the fair market value of the property as of the time of the taking. Where only a part of the land is taken, however, the measure may be either of the following:

*Fair market value of the portion taken plus damages to the part not taken less any special benefits to the land not taken. This is the “value plus damages” rule. The measure may also be the difference between the market value of the entire tract before the taking and the market value of the remainder after the taking. This is the “before and after” rule (Wright and Gitelman 2000:157).*

In the United States, especially in its courts, market value has further been classified into two concepts. As said above, the market value of land is the amount that the property would be reasonably worth on the market in a cash sale to a willing buyer if offered for sale by a prudent and willing seller. This is called the “willing buyer-willing seller” test. The buyer would not pay more than the value of his expectation from the use of the land. The other approach is that market value signifies that the price offered must be what a reasonable buyer would pay for the highest and best use of the land. This is “the highest and best use” rule. (Wright and Gitelman 2000:157).

The idea is that if the highest and best use of the land is, for example, for urban housing, even though the land is currently undeveloped, the valuation must be based on the value of urban housing development. Thus, if farm land on the borders of a city is to be valued, the fact that it could be profitably subdivided into lots is relevant (McCormick 1933:462). This means, high compensation must be paid. Today, in the United States, the fair market value of the land for its highest and best available use is said to be the standard measure of compensation (Kratovil, and Harrison 1954:616).

## 2.1.4 Understanding of Compensation in Ethiopia

### *2.1.4.1 Compensation: the Approach Followed*

The Ethiopian Constitution, under Article 40(8), puts an obligation on the government to pay, in advance, compensation “commensurate to the value of the property” expropriated. This principle is also found in other regions’ constitutions. However, no further definition is given in the FDRE Constitution as to what “commensurate” means. Although its relevancy at the moment is controversial, the Ethiopian Civil Code has adopted the indemnity theory in determinations of compensation. Article 1474 (1) of the Code says that the amount of compensation or the value of the land that may be given to replace the expropriated land shall be equal to the amount of the actual damage caused by expropriation. That is, if the amount of compensation is equal to the actual damage, there is no possibility for the owner to be harmed or benefited as a result of the taking.

Currently, at the Federal level, we have two main urban as well as rural land proclamations, one Federal Lease Proclamation, and another Federal Expropriation Proclamation. In addition there is a detailed regulation that deals with the formulas and manners of compensation and valuation of expropriated properties (Regulation No.135/2007). This is a regulation to implement the expropriation proclamation No. 455/2005. All these laws are interconnected and the reading of these laws gives little evidence about the amount of compensation and the principle of market value. Yet, the writer believes that the principle enshrined in the Civil Code is still maintained by these laws. This argument is presented as follows.

As noted above, compensation, according to the Constitution, must be “commensurate.” The common dictionary meaning of this word is “equal”, “appropriate” or “adequate.” Article 7/3 of the Federal Land Administration and Use Proclamation (Proc. 456/2005), says a “holder of rural land who is evicted for purpose of public use shall be given *compensation proportionate* to the...” The Lease Proclamation (Proc. 272/2002) likewise states, under Article 15(3), that the “lease-hold possessor shall be paid commensurate compensation.” However, similar words are not mentioned in the main Federal Expropriation Proclamation nor are in its implementing regulation. Yet, this does not affect what has already been prescribed in the above laws. The words employed in all the proclamations are similar, which implies that compensation proportionate to the damage sustained must be paid. Other provisions which show the formula and manner of valuation also show that the loss of the owner should be given emphasis. For instance, cost of removal and erecting, transportation costs, etc are some of the compensable interests which benefits the taker nothing. In this case, it is safe to conclude that the concept of compensation should be understood as embodying the principle of indemnity.

#### *2.1.4.2 Import of qualifying Adjectives*

The other point worth discussing is whether or not the absence or presence of words like “just”, “fair” or “commensurate” can cause any substantive change in the concept of compensation itself. Can the word “compensation” fully stand with out word like “fair” or “just”? The term “just compensation” is generally understood as the “full monetary equivalent of the property taken” (Ndjovu 2003: 21), and its purpose is to leave the owner unharmed to maximum extent possible from government action. On the basis of this, some argue that since the idea of compensation itself implies a full and complete recompense, the word “just” apparently was added in order to emphasize the equality required of the exchange. (Alabama Section 1976: 418) It seems, thus, that the words “just,” “fair,” etc. are mere technical words without legal significance. A prominent lawyer in the area under discussion has said: “these words are merely epithets rather than qualifications and add nothing to meaning” (Sullivan 1990: 166). Hence, different adjectives added to the word compensation are there to give more emphasis, rather than having separate legal significance. In the same way, omission from or addition to Ethiopian laws words like appropriate or commensurate, or fair or just would not change the meaning of compensation as it is understood elsewhere.

## **2.2 Valuation**

### 2.2 1 Nature and Subjects of Valuation

The valuation process, whereby compensation is fixed according to law, is generally the most difficult, time consuming, and litigated part of the expropriation process (Kitay 1985: 50). A proper valuation process is the most important step for the land owner. This is because it is the way to reach just compensation. Although the constitutions of most countries contain “just compensation” phrases, they do not give any clue as to how to determine it. However, as mentioned above, market value is usually suggested to calculate the amount of “just” compensation (Ndjovu 2003: 43). Hence, just compensation has also been sometimes defined as “the fair market value of the property as of the date of the taking, determined by what a willing buyer and a willing seller would agree to, neither being under any compulsion to act” (Dennison 2006: 447). Valuation may be ordered either by the court or the administrative organ, as the case may be. In countries where the administrative organ facilitates the valuation process, an owner of land may dispute its validity and appeal to the courts. On the other hand, if it is the court that organizes and selects experts, then it will accept the valuation report as evidence to give its final expropriation decision. In both cases, the court may be an administrative court or a regular court.

The value of real estate property rights is the function of the property’s physical, locational, and legal characteristics (Ling and Archer 2005: 5). The physical characteristics include the age, size, design and construction quality of the structure, as

well as the size, shape, and other natural features of the land. For residential property, the locational characteristics include convenience and access to places of employment, schools, shopping, health center, and other places important to households (Ling and Archer 2005: 5). The locational characteristics of commercial properties may involve visibility, access to customers, suppliers, and employees, or other availability of reliable data and communications infrastructure (Ling and Archer 2005: 5).

### 2.2.2 Valuation Methods

Generally, there are three primary valuation methodologies for arriving at the fair market value of real property taken by way of expropriation: the comparable sales method; the income capitalization method; and, the replacement cost method. Since all are methods designed to reach fair market value, different countries use them alternatively, as the case may be, and courts do not tend to favor any of them, for they equally serve the purpose and are technical methods which need the opinion of expert valuers. For example, the USA practice shows that although courts have approved of each of these methodologies, they have consistently refrained from mandating that a specific methodology be used when appraising condemned property, requiring only that the method used be reasonable (Dennison 2006: 447). The reason is that because of the peculiar features of the property expropriated, appraisers may tend to use one or different methodologies at a time.

#### *2.2.2.1 Comparable Sales Approach*

The comparable sales approach simply requires searching for similar properties that have been sold in the marketplace within a reasonable time period preceding the taking date, and then adjusting the sales price of those comparable properties to reflect differences between the comparable and the subject property. The comparable sales method is considered the preferred method of ascertaining the fair market value of land taken by expropriation.

#### *2.2.2.2 Income Capitalization Approach*

Income capitalization is one of the recognized methods of determining a property's fair market value taken by expropriation. It gives value to the land in relation to the income it produces. The capitalization of income approach is generally used to value income producing property when it is completely taken. It usually consists of arriving at an independent value of the underlying land involved, and adding to it the value of improvements, by converting reasonable or actual income at a reasonable rate of return (capitalization rate) into an indication of value. The land and improvements may be capitalized together in a single process. The capitalization of income is not used to project future profits or to compensate the owner for lost profits, but rather, to calculate the fair market value of the land at the time of the taking. The income capitalization

approach is an accepted method for determining market value when there are no available comparable sales data, and the income is directly attributable to the land.

### *2.2.2.3 Replacement Cost Approach*

The replacement cost method values the expropriated property by determining the replacement or reproduction cost of improvements, less depreciation, plus the market value of the land. Hence, this predominantly serves to value buildings as well as utilities, but not the land itself. It is especially considered one of the better methods for determining a utility's fair market value (Dennison 2006: 447). Generally, it is assumed that landowners may be compensated fully by other approaches, especially where the property is not shown to be both unique in nature and location and also indispensable to the conduct of the landowners' business operations on the site from which a part is taken. So, mostly, buildings of a unique character are valued using this method. This approach can be used in countries where the market value of real property is not developed. The method develops the value in terms of current labour and materials required in assembling a similar asset of comparable utility (Ndjovu 2003: 45).

## 2.2.3 The Valuation Method and System in Ethiopia

### *2.2.3.1 Mandate to value*

In Ethiopia, there is neither an independent and developed valuation system, nor are there available professionals in the field. The reason may be related to the fact that land is not a privatized property in Ethiopia, which has resulted in the non-development of prolific real property market in the country. Although the Federal Expropriation Proclamation assumes the existence of certified appraisal professionals and a nationally adopted uniform formula for valuation (Art. 9(1) of Proc. 455/2005), this seems a dream to many today. In any case, the Ministry of Federal Affairs has been given the task of developing the capacity of a valuation system in the country, in collaboration with appropriate federal and regional government organs. In the meantime, however, valuation has to be carried out by committees comprised of different experts of different backgrounds who have the relevant qualifications (Art. 9(1) of Proc. 455/2005).

Based on this situation, regions and federal government have adopted or are adopting their own valuation formulas, although the Ministry of Federal Affairs has not yet given a clear direction in this regard. In most regions, the urban and rural land administrations have already adopted implementing regulations that contain mainly compensable interest and valuation formulas. Similarly and lately the federal government has also come up with Regulations No. 135/2007, which contains<sup>3</sup> basic valuation methods and assessment systems.<sup>3</sup>

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<sup>3</sup> Generally it can be said that there are no significant difference between Federal and Regional land related legislations, since regions are expected to follow federal laws. This is because administration of land is basically entrusted to federal  
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In both the urban and rural land regulations, the valuation of property is to be carried out by a committee of people. The Federal Expropriation Proclamation gives a direction that where the land to be expropriated is located in rural areas, the committee shall be headed by the *woreda* administrative head. Hence, regional rural land administration authorities have been given a mandate to constitute members of the committee and to appraise the property. Likewise, the urban administration, municipality, is given the same power to designate members of a committee to value the property. The exception is that if the property comprises public utility lines, then it is the owner of the property, say the Ethiopian Telecommunication Corporation, who is to estimate the value of the property (Art. 6 of Proc. 455/2005). By doing so, the Ethiopian law in general, adopted a valuation system of an administrative nature, as opposed to a judicial one as practiced in other countries.

### 2.2.3.1 Valuation Method

In Ethiopia, valuation rules are reflections of the existing tenure system. This is especially clearly depicted in the urban valuation and compensation regulations. Modern valuation systems, explained above, give market value for expropriated land and, during the calculation of compensation, location value has always been given a place. The existing land legislations, however, ignore location value for land. The general reason given is that land is public property and, hence, no compensation should be paid by the government for its own property. The problem, as we shall see below, is that it denies the holder of the land fair compensation. As we shall see later on, to mitigate its effect the holder may be given another land.

With regard to other fixtures on the land, especially buildings, the accepted valuation method is the cost replacement method. This is clearly shown under Article 7(1) of the Expropriation Proclamation:

*The amount of compensation for property situated on the expropriated land shall be determined on the basis of replacement cost of the property.*

Also, Articles 3 and 4 of Regulations No. 135/2007 incorporate similar principle in replacing a demolished building and fences. Well, as said above, even the cost approach is one way to get market value and thereby a fair or commensurate compensation for the property owner or holder. The point is to determine whether or not this approach serves its purpose in Ethiopia. A possible answer for this question will be considered later in this Article.

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government, and regions are to administer the land according to federal laws. See Art. 51(5), Art. 52(2)(d) of the FDRE Constitution. Proc. 456/2005 allows regions to issue laws and regulations to administer land in accordance with federal laws.

### III. COMPENSABLE INTERESTS AND MEASURE OF COMPENSATION

#### 3.1 Compensable Interests

When we say compensable interests, we are referring to the kinds of property interests that could be affected as a result of the expropriation action, although all of them may not be compensable. Property interests, in modern understanding, are described as bundles of rights. Of all property rights, the ownership right is the most complete one. Hence, the Ethiopian Civil Code defines ownership right as “the widest right that may be had on a corporeal thing” (Art. 1203(1)) This ownership right includes the rights “to use and exploit it” (Art.1205(1)), “to dispose of it for consideration or gratuitously” (Art. 1205(2)), and “to reclaim it from any person who unlawfully possess it or holds it, and oppose any act of usurpation”(Art.1206). Although the approach of the law seems gross, a thorough reading of the Code shows that there are other levels of benefits that accrue from it, such as the rights to lease, mortgage, engage a servitude, use as a usufruct, etc. Economists have also well understood this concept. Eaton’s definition, as cited by Cletus E. Ndjovu, has expressed property rights from legal and economic points of view as follows:

*Property rights are economic interests supported by the law. In real estate these property rights are referred to as bundles of rights because ownership of parcel of real estate may embrace a great many rights, such as the right to its occupancy and use, the right to sell it in whole or in part; the right to bequeath, the right to transfer by contract for specified periods of time, the benefit to be divided by occupancy and use of real estate.*

Real property rights in Ethiopia are related to immovable properties and rights emanating from them. Hence, land and buildings are mainly categorized in this group. As discussed in the introduction part, the right to land is limited since it is owned by the state and the public and, hence, not subject to sale, exchange or mortgage. Except for such limitations, people have the other remaining rights on the land including the rights to use and exploit it, to transfer it by inheritance (if it is rural land), to rent or lease it, to improve it and to sell its produce, and finally, to get compensation in cases of eviction or expropriation. In the case of a building, owners have the complete right over it except the usual limitations of police power which are common elsewhere. Therefore, in Ethiopia most rights emanating from real property and also personal property are compensable. The fact that land is owned by the state does not mean that its loss is not compensable.

A general reading of Articles 7 and 8 of Proclamation No. 455/2005 and the implementing regulations reveals that the following interests or rights can be compensated.

- A property situated on the land
- Permanent improvements to the land
- Permanent or temporary loss of the land

For lack of space the writer will focus on the most important types of compensation schemes especially those related to the dispossession of the land and the amount of compensation provided for it, both in urban and rural areas.

### **3.2. Amount of Compensation**

#### 3.2.1 Property Situated on the Land

The kinds of property included in this category are buildings, fences, utilities, graveyards, trees, permanent plants, crops, and grass. Generally, it is said that the amount of compensation for property situated on the land should be determined on the basis of replacement cost (Art.7(2) of Proc. 455/2005). However, for those unique properties which cannot be replaced, such as trees, crops and grass, the valuation regulation provides an alternative valuation system. In this part we shall focus only on buildings.

Regulation no. 135/2007, under Article 3, states that *the amount of compensation for a building shall be determined on the basis of the current cost per square meter or unit for constructing a comparable building*. The compensation for a house shall be based on the existing current cost of materials to build an equivalent house. Compensation for building also includes current cost of constructing floor tiles, septic tank and so on. This seems acceptable only if the demolished building had in the first place included such services. The same provision, under sub-article 2-b, says that compensation shall be paid for interrupted utility services. This amount is, of course, the amount that enables the owner to continue as a client of the service rendering company. The same principle also applies for a fence which is demolished as a result of the taking. This rule applies for all types of buildings whether in urban or rural areas of the country.

If only part of the house is demolished and the remaining part becomes useless for the purpose it was intended, then compensation shall be paid for the whole property. This is similar to the concept of “severance,” in which only part of the property is taken and as a result a reduction in value of the remaining property occurs. However, the requirement in Ethiopia seems more stringent, for it does not consider minor reduction in benefit. Because, if the owner insists to live in the remaining part, then compensation will be paid only for the demolished portion (see articles 3(3) and 4 of Regulation 133/2007). In other words, no compensation shall be paid for the part of land taken, only for the building.

Moreover, damages to property caused as a result of another project are not compensable. For example, the law does not compensate for loss of profit occasioned through public works such as roads, streets, etc. The entire city of Addis Ababa and a handful of other major cities have, for example, been undergoing massive infrastructure development

works including roads, underground cables, bridges, and water and sewage systems, resulting in the closure of businesses situated in the vicinity of the construction without any compensatory scheme.

Article 13(1) of the above mentioned regulation says that in calculating the valuation of a building, the committee shall take into account the current market price of construction or utility materials, costs of improvements to land, and unused lease rents. During investigation in the Bahir Dar municipality, the writer has come to understand that the expert valuers have been given a list of the costs of construction materials, prepared by the Regional Urban Development and Housing Bureau for this purpose. This list is provided to every town in the region. The idea is to adopt a central price guide for the cost of materials, applicable in urban areas of the whole region. There is no doubt that every region and the city of Addis Ababa as well follow similar practice. However, the problem with this approach is the list is not frequently updated. Currently, in Ethiopia, the price of construction materials is increasing at an alarming rate, and on top of that there is a high rate of inflation.<sup>4</sup> The list of the costs of building materials, therefore, should be responsive to the economic changes. Yet, the list which the writer was given was prepared a year before. This makes the amount of compensation unfair for the failure to update such lists makes their significance to the valuation process questionable at best.

### 3.2.2 Displacement Compensation in Rural Areas

Displacement compensation represents the compensation given for the loss of the land itself. It is a kind of compensation scheme that tries to compensate the loss of the entire land permanently or temporarily. In this part, what we shall see are the kinds of compensations given in the event of the loss of a land holding. This is also the most controversial and commonly disputed area.

Displacement compensation may be given in terms of money, full or partial, or in terms of land-to-land compensation.

#### *3.2.2.1 Full Monetary Compensation for Rural Farmers*

A person who loses his holding rights on land forever as a result of the expropriation process is entitled to monetary compensation for his loss. This is in addition to the compensation to be paid to him in respect of the property he owned on the land and the improvements he brought about on the land. Concerning this possibility, it is provided:

*A rural land holder whose land holding has been permanently expropriated shall, in addition to the compensation payable [for property*

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<sup>4</sup> According to the Ethiopian Central Statistics Agency ([www.csa.gov.et/CPI\\_docs/CPI\\_March\\_2009.pdf](http://www.csa.gov.et/CPI_docs/CPI_March_2009.pdf)) the overall inflation rate for March 2009 stood at 45.2%. It is the custom of the government not to react in accordance of the increase. For example, although the prices of goods increased as a result of the inflation and also government tax from sale of goods, the government doesn't make any increment on salaries or pensions.

*and improvements made on the land] be paid displacement compensation which shall be equivalent to ten times the average annual income he secured during the five years preceding the expropriation of the land. (Art. 8(1) of Proc. 455/2005, Art.16(3) of Regulation 137/2007)*

This mostly happens when parcels of land are required for big projects like dams, schools, hydropower stations, military installations or camps, airports, private investments, and so on. In this case, people may lose their whole holding. The amount of compensation is fixed at ten years annual income, based on the average annual income of the previous five years. The justification for fixing this amount is unknown, and probably baseless. Neither does it follow any of the valuation methods we discussed above. This provision has no economic or legal basis, and as a result, remains a source of discontent, complaint and frustration for most of the farmers who lose their holdings (Ato Bayeh, Interview).

As we saw above, the Constitution as well as other laws support the payment of commensurate or appropriate compensation. The source of debate is whether or not this amount of compensation is really commensurate. The writer identifies the following as source of discontent among affected people.

The first argument is that the amount of compensation is not enough in comparison to possessing the land itself. The land holder is a person entitled to use the land during his life time. "Using" means either cultivating the land himself or renting it to fellow farmers. In addition, after his death, the land devolves to his heirs or to other people he wishes to inherit, provided that he follows the rules. Hence, land for a rural farmer is a strong base and an unshakable life security. It provides the means by which he and his family, and perhaps generations to come, subsist.

Now, taking the actual damage he sustained, if we compare it to the amount of compensation paid, it seems inequitable. Justice demands other forms of valuation methods. At one time, the Environmental Protection, Land Administration and Use Authority of the Amhara Region, hereinafter known as EPLAUA, used to calculate compensation payment for the loss of land using the income capitalization method. This means in order to get the value of the land, future cash flows (annual incomes) were converted into present value using discounting processes. The discount rate applied was a bank's interest rate. Farmers at that time were said to be relatively happy with the arrangement (Ato Bayeh, Interview). The authority used to calculate compensations on the assumption that land is possessed for life and the benefit lost was life-long. The rationale was that since farmers are entitled to life time holding rights, the compensation should be based on the assumption of a life time income. The following is based on a practical example and shows the difference between the old and the new valuation formulas.

- Assume we have a farmer who lost 0.5 hectare of land.
- The amount of crop collected annually from the given land, on average, is 5 quintal.
- Market price for one quintal of produce is 150 birr. The bank interest rate is 3%
- Now using this figures annual income of 750 birr and Interest rate 3, when we calculate compensation using income capitalization method:

$$\text{Compensation} = \frac{\text{Annual Income}}{\text{Interest rate}} \times 100$$

$$\text{Compensation} = \frac{750}{3} \times 100 = 25,000 \text{ birr.}$$

- On the other hand applying the current calculation system it gives us:

$$\text{Average Annual Income} \times 10 = 750 \times 10 = 7,500 \text{ birr.}$$

Another alternative is the method sometimes used by courts to estimate compensation using extra contractual liability (tort) laws. In the case between *Awol Mohamed v. J&P Roads Construction Co* (Civil Case No.80702 of North Shewa High Court), the plaintiff demanded the payment of 120,000 birr for the loss of his land, since the defendant, while constructing a road from Addis Ababa to Dessie, had completely destroyed the plaintiff's land by putting a bridge on it. The North Shewa High Court of the Amhara Region, accordingly, decided for the plaintiff. The basis of calculating the compensation was the assumption that the plaintiff could collect annual produce of 20 quintals which could be sold for 300 birr per quintal. The other interesting assumption was the possibility of this person living for the next 20 years. The remaining is a matter of calculation, that is:

- 20 quintals X 300 birr per quintal X 20 years = 120,000 birr.

The other flaw with the law is that the calculation is measured on the basis of the average annual income over the past five years. Why not the present market value? Most farmers interviewed, as well as people from the land administration organs, share this concern and criticize the rule on this ground. The reason is that it is an accepted fact now in Ethiopia that the price of goods is increasing from year to year. The rate of inflation for consumer goods especially is more than the overall inflation rate mentioned above. This means the value of goods before three to five years ago does not reflect the current market situations of today, let alone for the coming ten years. It is like forcing the farmer to sell his crops today and tomorrow at yesterday's price. It should rather have considered the likely future increases in the inflation rate to calculate the present and future compensation to be paid. Well, it may need a lot of time and economic analysis to be exact, but a decent observer can also judge that the amount of compensation paid as displacement compensation to farmers cannot buy them an equal livelihood. It would not

even buy enough food for ten years. On the other hand, the money awarded as compensation could be recovered within fewer years, if the farmer is allowed to keep his land.

The third source of discontent among farmers of the Amhara region, especially in relation to the taking of land, is the special attachment farmers have to their land. The land, for a farmer, is beyond economic value. It has another dimension, too. Although not compensable, possession of land is a source of pride and dignity in the society. But most importantly, it is the only means and way of life farmers can understand and be confident of. Even at a generous compensation, farmers do not prefer compensation in terms of money. A study for the purpose of valuation, made by EPLAUA, evidences that among 90 farmers who had been asked to make choice between the two modes of compensation, only one farmer showed an interest in monetary compensation (Ato Bayeh, Interview). A similar question was raised by the writer while interviewing affected farmers of different areas and 100% of those queried favored land-to-land compensation. This has nothing to do with the amount of compensation awarded, but with the ways of life and the general economic development of the country. Uneducated and alien to urban life, most farmers do not want to change their profession, for farming is the only skill they know. Additional problems arise due to the lump payment of compensation to those who have lost their land. One time payment does not create a sustainable form of compensation because the sum is often squandered by farmers of little experience in handling cash capital.

### *3.2.2.2 Partial Monetary Compensation for Rural Farmers*

Sometimes, there is the possibility of dispossessing the farmer from his land for a temporary period of time. For example, land may be taken provisionally for workers camp or transporting quarries during road construction. Moreover, a land nearby a big project may be temporarily taken for different purposes, or because the holder cannot use it for farming. The mode of payment of compensation in this regard is given as follows:

*A rural landowner or holders of common land whose land holding has been provisionally expropriated shall, in addition to the compensation payable under article 7 of this proclamation, be paid until repossession of the land, compensation for lost income based on the average annual income secured during the five years preceding the expropriation of the land; provided, however, that such payment shall not exceed the amount of compensation payable under sub- article (1) of this article (Art. 8(2)Proc. 455/2005).*

More or less, the arguments raised above as to the insufficiency of compensation are also raised in such conditions. The other practical problem surfacing in relation to this practice is that the agency who took the land provisionally may not give it back in the same condition as it was before. For example, road companies tend to spoil and destroy the

fertility and usability of the land by mixing asphalt and other toxic substances which they use during the construction works. Fortunately, however, most land for such purposes is given from communal or state land. Nevertheless, there are cases which have even reached the courts. The nature of such cases is that the Ethiopian Roads Authority has left piles of stones and earth on their (farmers) land not removed after it has finished construction (Ato Addisu, Interview).

Sometimes, when the project works continued for more than three years, project owners were reluctant to pay more compensation. A good example of this situation is the condition of the farmers in the area surrounding the Koga Irrigation Project. To better understand the situation, a detailed explanation is given below in the case study no.6.

### 3.2.2.3 Land-to-Land Compensation

As seen above, compensation is usually defined as “full and complete equivalent, usually monetary...” The understanding of compensation everywhere, as well as in the Civil Code, is *generally* monetary compensation. Thus, land-to-land compensation is boldly and as a matter of principle introduced for the first time in the present proclamation. This kind of compensation is popular among farmers. The law in this regard says:

*Where the woreda administration confirms that a substitute land which can be easily ploughed and generate comparable income is available for the land holder, the compensation to be paid under sub-article (1) and (2) of this article shall be only be equivalent to the average annual income secured during the five years preceding the expropriation of the land. (Art. 8 of Proc. 455/2005).*

In practice, land-to-land compensation is effected when the *woreda* or *kebele* administration possesses extra land in the locality. It seems there is a common pool of land collected in different ways and waiting to be distributed to the younger generation. In principle, land is given to a person if it is classified from the beginning as private holdings as opposed to communal or state lands. This means, unless it is for a public use a state or communally held land may not be distributed or given to private individuals. Either they must be accommodated through another redistribution, which is unlikely and comes only under exceptional circumstances, or they must be given land from a common pool. Common pool land may be collected mainly in two ways: when a holder of land is deprived of his holding right and the government takes it back<sup>5</sup> or when a land remains without an heir (Art. 16(9) of Proc. 133/2007), Art. 9(1) of Proc. 456/2005). In effect, it

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<sup>5</sup> Proclamation 133/2006 of the Amhara region under art. 21 provides the following as conditions of depriving holding rights: engaged in non-farming activity, disappearance from locality for 5 consecutive years, fallowing land for 3 consecutive years, causing gross damage to the land, notifying the government withdrawal from farming activity. See also art. 10 of Proc. 406/2005.

is the assumption of Ethiopian land law that this common pool of land belongs to the society itself.

Now the question is whether or not land as compensation should always be given. Most implementing agencies favor this kind of compensation system in order to avoid the payment of money as compensation. Because, as stated above, in the case of land-to-land compensation, monetary compensation is to be made only for the crop on the land and to the extent of one year's annual income. On the other hand, if no land is to be given as compensation, then the implementing agency has to pay 10 years income. So, from the implementing agency's perspective, this system is preferable. But, at whose expense does such a system operate? Why should the society be the payer, rather than the organ who benefited by taking the land? The land which was given as land-to-land compensation could have been given to landless or unemployed youth in the area. There is no problem where the development works directly benefits the society such as schools, health centers, rural roads, and may be irrigation works. The problem lies when the land is to be taken for private investments such as private farm lands.

Another problem that may occur during land-to-land compensation involves the equitability of the compensation. In some areas, the new land to be given as compensation may not be equal in size, comparable in terms of fertility, access to roads and other facilities such as schools and clinics. Sometimes, the expropriated land might be an irrigable land which provides the holder three harvests a year, while the replacement property, depending on annual rain fall, may make harvest possible only once a year. This shows that the expropriated farmer may not get comparable land in fertility, size and location. The law tries to offer similar land *as much as possible*<sup>6</sup> but little to do with regard to compensation in the event of marked differences. Experience and practice have shown that the government rarely attempts to compensate such differences.

### Case # 1

Apart from this, demands for land-to-land compensation made by implementing agencies would amount to unlawful enrichment at the expense of the rural poor. Such claims are common in the region. For example, small and newly emerging towns that may not have enough money to pay as compensation have taken land and demanded that the nearby rural administration give land-to-land compensation to the expropriated farmers. The case of *Este* town, in south *Gonder*, is something relevant to cite here. Land was needed for expansion of the existing small town, and it was taken from farmers and given to urban dwellers for free. The town administration had no money to pay as compensation for the expropriated land. What was done, rather, was ordering the rural *woreda* administration to give other land, from the reserved or common pool, to the expropriated farmers.

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<sup>6</sup> Art 15 of Reg. 135/2007 provides: "Where land used for growing crops or a protected grass or pastoral land is expropriated for public purpose, the possessor of such land shall, as much as possible, be provided with a plot of land capable of serving a similar purpose."

## Case # 2

Sometimes, implementing agencies try to sue the rural administration to force it to give land-for-land compensation. The following case reveals this claim.

In the case between *Birhanu Tadesse, et al v. Orthodox Church of South Wollo Zone (Civil Case No.0747 of South Wollo High Court)*, the facts show that the Orthodox Church was given land belonging to the plaintiffs for development works around *Lake Haik*. The Church had not paid compensation. The Rural Land Administration also said that it had no reserve land to give as land-to-land compensation to the plaintiffs. Thus, the plaintiffs requested from the court either form of compensation or the return of their land. The court finally decided that since the Church and the rural administration failed to give compensation, the land should be returned to the holders. Moreover, the Church was ordered to pay one year's lost income to the plaintiffs as compensation.

The interesting point is the Church had instituted a suit against the land holders to force them to surrender the land and also against the rural administration to give other land to the farmers. In this case (*Civil Case No.132223 of South Wollo High Court*), the Church demanded surrender because the land had already been given to it by the rural administration, and it had no duty to pay money as compensation. Rather, it was the duty of the rural administration to provide them with replacement land. The court rejected the case on the basis of its earlier reasons. But the point is there are many similar claims from implementing agencies and urban administrations. They want to shift the burden of paying compensation to the people themselves. This shows the fact that "urban expansion" is sometimes made "at the expense of those people who have settled either inside or at the edge of towns" (Ndjovu 2003: 110).

## Case # 3

Another case that shows that our courts still enforce the holding of property rights is one that happened in a place called *Woreélu* in the *South Wollo Zone*, again. In a civil appeal case between *Atalel Tefera v. South Wollo Zone Rural Roads Office (Civil Case No.14946)*, the appellant had petitioned for compensation of money or replacement of land because the respondent had taken his land for production of a quarry. The respondent, the Amhara Regional State Rural Roads Authority, defended itself on the basis of Article 6(18) of the Regional Roads Authority Re-establishment Proclamation, which allowed it to "get and use quarry free of charge."<sup>7</sup> The Authority said that it was allowed to take land and quarries for free and replacement of the land should be given to the appellant by the *Woreda* Administration. But, the latter said that it had no extra land to offer. The lower court decided against the plaintiff. But, the high court decided in favor

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<sup>7</sup> Article 6(18) of the Amhara Regional State Roads Authority Proclamation, No. 80/2003, *Zikre Hig* No. 4, says the Authority shall have right to "use, free of charge, land and such other resources and quarry substances required for the purpose of construction and maintenance of rural roads and camp, storage of equipment and other required service; provided, however, it shall pay compensation in accordance with law for any property found on the land."

of the land holder on the ground that if the *Woreda* Administration is unable to give replacement land to the appellant, the regional Roads Authority must pay him compensation.

#### Case # 4

A common problem arises when the Federal Road Authority takes some land for new road construction or the expansion of existing roads. The objective of the Authority is to develop and administer highways and to ensure the standard of road construction and to create a proper condition on which the road network is coordinately promoted (Art. 5 of Proc. 80/1997). It claims that it is entitled to a right-of-way equaling 15 meters of land on each side of the national highway, as per a proclamation issued in 1944, although this is not shown in any of its modern day establishment legislations. The said Proclamation No. 66 of 1944 that provided for the classification of roads, said that starting from the center of the road, 15 meters on each side, the land shall be part of the road.<sup>8</sup> The justification is based on the safety of users of the road and the assumption of likely future expansion. Based on this rule, the authority refuses to pay compensation for property which is found within this 15 meter zone of the highway.

A lot of cases were raised in the road construction between *Tarmaber-Combolicha* when the road between Addis Ababa and Dessie was expanded. Today, similar complaints are being made in the present road constructions of *Woreta-Woldia*. A significant number of farmers whose land holdings were taken by the authority were complaining, at the time of this study, for want of compensation for the land taken by the authority. For example, a letter written to EPLAUAAR ) by the *Guba Lafto Woreda Administration* shows that 124 farmers of that area have been denied payment of compensation for their holdings of land, fixtures and improvements they made to the land.

The current validity of the 1944 legislation is questionable. Legal counselors of the authority, when asked by the writer, could not be sure of its validity. This is because since 1944, many laws which provided for different rules about land have been issued. Starting from that period, we have for instance, the 1955 Revised Constitution, the 1960 Civil Code, the 1975 Urban and Rural Land Nationalization Proclamations, the 1995 FDRE Constitution and the present day rural land redistribution legislations, one repealing the other.

#### Case # 5

The Regional Rural Roads Authority has similar objectives as its federal counterpart in the rural Amhara Region. It constructs and maintains rural roads. This Authority has also invoked the archaic rule of the 1944 proclamation. Two years ago, the Authority had a

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<sup>8</sup> A Proclamation to Provide for the Classification of Roads, Proclamation No. 66 of 1944, *Negarit Gazeta*, Year 3, No.10. In its definition for "Highways" Article 2 of the Proclamation says: "highways are roads leading to the principal cities of our empire, the shores, and ports, and shall maintain by the government. They shall have a total width of 30 meters, of which the central part shall be from 6 to 12 meter wide, with a footpath on either side, for pedestrians, from 1 to 2 meters wide."

plan to construct 700 kilometers of rural road within the next five years. A budget for this plan was allocated by the regional government, but not for compensation payable for land (Ato Fekadu, Interview). The Authority does not have the habit of paying compensation for the land it takes for the construction of rural roads. The reason given by officials of the Authority was that nobody asked for compensation for the land. Economically speaking, a road is very important for rural farmers; they can easily transport their produce to market; also, with the construction of rural roads, new social services may enter. Hence, every village in the region is happy to get this service. There are a lot of requests from every quarter of the region for new roads. Hence, whenever the Authority demands land it is usually happily provided. Farmers even want the road to pass through their land, so they are unlikely to impede it or demand compensation (Ato Fekadu, Interview).

Well, this may be true. The author evidenced even a road construction which shortens the road from 300 km to 70 (From a place called *Adet* to *Feres bet*). But, this amounts to the government benefiting from the ignorance and needs of the farmers.

#### **Case # 6**

The Koga irrigation and watershed management project is found within the Koga River Basin in Mecha Woreda of the Amhara Region. It is a joint African Bank and Ethiopian government financed work which is said to be a 405 million birr project. The main dam which has 1860m in length and 21m in height is to harness the water flow of the Koga River. The reservoir stretches over 1000 hectares of land and has a storage capacity of 83.1 million cubic meters of water to irrigate about 7200 hectares of command area. The dam includes a main canal that measures 19.7 km and 11 tankers which run along side it. It has also secondary and tertiary level canals inside the reservoir. The construction of the 1106 m long and 18.5 m high saddle dam, 6 km north of the dam, is now finalized. Its aim is to protect the nearby town of Merawi from flooding. So far, 2222 farmers have been either moved from their land or affected somehow by the project. Experts expect that by the end of the project, the land and properties of 3000 farmers would be affected by it. It is said that so far 10 million birr have been paid by way of compensation to farmers to reinstate the value of their demolished houses, trees, cash crops (coffee), and a three year compensation for the land itself (Ato Nibretu, Interview).

What happened in Koga was that when the government decided to build a dam in the area, as per the law, the inhabitants of the area were invited to participate in discussion. After they had been told about the pros and cons and the modality of compensation packages people agreed to contribute land for the construction of the dam. The people who live around that area agreed to give part of their land to those farmers whose land was taken for the construction of the dam. This was to be done in the form of a general re-distribution of land. As an exception, the law allows land redistribution so that land holders, on whose land the irrigation infrastructure and water dam are built, shall be provided with irrigable land substitutions (Art. 14(3) of Proc.133/2006 and 9(2) of Proc.

456/2005). Currently, land measurement and property identification works are finalized by professional surveyors, in addition to the construction of the dam. In the meantime, however, three years compensation had been given to those farmers whose land was taken and remain without replacement so far. The amount of compensation is based on a yearly basis. For example, if farmers become idle for two years because they have not yet gotten replacement land, then compensation which amounts to two years income would be given to them.

Five years ago, when the work was started, farmers were paid three years compensation for the time in which they would remain idle, or in other words for their lost income. The assumption was that the work would be finalized within three years. However, the work is not finalized so far and land not yet distributed. Now the complaint, which is legitimate, raised by the farmers is that additional compensation should be paid, for they are in their sixth year of dispossession (Ato Gebeyehu, Interview). According to the farmers, the vigor to pay compensation at first and mindfulness to listen to their problems no longer exists. Indeed, some farmers have exhausted the money they were originally given and now they are economically in a precarious situation.

### **3.2.3 Displacement Compensation in Urban Areas**

#### 3.2.3.1 Urban Dwellers

The law provides, more or less, the same modes of compensation examined above in relation to rural land for urban landholders. However, there are slight differences, as one can appreciate from the provisions of Proclamation No. 455/2005 of the Federal Expropriation legislation:

*Art.4. An urban land holder whose landholding has been expropriated under this proclamation shall:*

- a. be provided with a plot of urban land, the size of which shall be determined by the urban administration, to be used for the construction of dwelling house; and*
- b. be paid a displacement compensation equivalent to the estimate annual rent of the demolished dwelling house or be allowed to reside, free of charge, for one year in a comparable dwelling house owned by the urban administration.*

Now, this is compensation to be paid to him in addition to the monetary compensation given for his property situated on the land and any improvements he brings about on it. Basically, the controversial point is the size and location of the newly would-be given land. For example, the expropriated land may be of 500 m<sup>2</sup> size which was commonly held in the old days. Today, municipalities in most urban areas, give land for residential houses of not more than 250m<sup>2</sup>. Concerning the size and location of the replacement of

land regional governments are empowered to adopt their own law (Art. 14 of Proc. 135/2007). To this effect, the Amhara National Regional State, for example, has adopted Regulation on Urban Land Valuation (Regulation 28/2007) which under Article 20(1) stipulates: “replacement of land shall be made in accordance with the size of the holding or in accordance with the land provision practice of the urban administration.”<sup>9</sup> In other words, it is within the discretion of the municipality to decide the size of the land and the locality of the area. Therefore, there is no guarantee for a person whose land-holding is expropriated to get comparable land in size and location. Practice has also shown similar experiences in Bahir Dar and other bigger towns of the region. At the moment, for example, the Urban Administration of Bahir Dar city provides for residential housing only 150 m<sup>2</sup> of land. Thus, irrespective of the amount of land expropriated, whether 500 m<sup>2</sup> or 100 m<sup>2</sup>, people are given 150 m<sup>2</sup>. With regard to location, the usual phenomenon is that people from the center are relocated to the outskirts of cities and towns. A case in point is the case of 20 people who were relocated from the center to undeveloped area where there is no still access to water and electricity.<sup>10</sup> Similar cases can be found in the city and other towns of the region.

People are not compensated for location, and municipalities do not give location value for land. The market lease value of land at the center of town where these people used to live is very expensive compared to the undeveloped new areas in which they are living now. For example, although, lease laws provide rules that show that the lease value of land in a city or town is the same irrespective of the locality, in reality, however, we have evidence that locality matters. An old dwelling house at the center of the city of Bahir Dar can be sold for 500,000 -1,000,000 birr. Or, a plot of land may be sold 1000-2000 birr per m<sup>2</sup> in Bahir Dar. But, if one moves to undeveloped or relatively newer areas of the city, the price drops to about 200,000-300,000 thousand birr for a house and 300-500 birr per m<sup>2</sup> for bare spot. This means the municipality, after taking the land in the center without paying any thing for it, can sell it at a very high profit to others. The municipality, on the other hand, gives replacement land which it again expropriated from farmers at a cheap price to the expropriated at the periphery of the city or town. The holder of land has not gained any benefit by passage of time or by investing to increase the value of land. This can discourage property holders from investing much on the land holding they have now.

If we examine the practice of the Commercial Bank of Ethiopia (CBE), the largest state bank in the country, recently it adopted a valuation manual which gives location value for 37 urban areas in the country. The manual covers larger cities and important commercial

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<sup>9</sup> In Amhara Region, urban dwellers get land for residential housing either by way of lease or through land permit programs of the urban administration. Most land for business, industry or other investment may be given through lease arrangements. Urban land provision program is a system to provide land to urban dwellers for housing purpose without any payment to the land. This means the holding right is a lease one but provided for free. If the locality of the land is strategic or the neighborhood is developed, however, the urban administration tends to transfer the lease right upon payment arrangement, after an auction, of course.

<sup>10</sup> These people were relocated in 2005 to the eastern part of the city (*Kebele* 14), and they still live in a condition where no basic services are provided.

towns from across the country. For cities and towns except Addis Ababa the method of calculating the value is similar in that it provides different values for locations depending on their proximity to the main road or the city center. The location value of the residential or commercial building is maximum if found within the 50 meters zone of the main road and reduces accordingly when the plot is found far from the main road. For the city of Addis Ababa, valuation is based on locations divided by *woredas* and grades for areas. Thus, whenever the bank lends money, it calculates this location value in addition to the replacement cost of the building. This is a lot better than what is being followed by municipalities. Just to take an example, for the cities of Gonder, Awasa and Adama birr 600 and 665 per m<sup>2</sup> is provided for residential and commercial areas respectively which are found in the city center or within 50 m distance from main roads. In Addis Ababa the *Merkato* and *Piazza* areas are the most valuable localities for which the bank gives birr 4805 (up to 100m<sup>2</sup>), 4362 (101-200m<sup>2</sup>) etc (CBE 2006).

### 3.2.3.2 *Dwellers in the Outskirts of Cities/Towns*)

These are people who live on the borders of towns and cities whose land is being expropriated from time to time for the purpose of urban expansion. The rate and frequency of land expropriation of this nature is larger at times and becomes the concern of Federal and regional states. Records in the city of Bahir Dar show that in the year 2004/2005 the amount of land expropriated from farmers was 89 hectares while in the year 2006/2007 this amount shot to 500 hectares (Ato Solomon, Interview).

The Regulation on Urban Land Valuation of the Amhara region provides a different compensation scheme for rural farmers who lost their land to cities and towns. Farmers who lose their land to urban expansion, in addition to the compensation package given, as we saw above, to the rural farmers, they may also be given some other benefits. The most important of which is providing a land free of charge to build a house (Art. 28 of Regulation 28/2006). The regulation also allows other family members who have established their own families to get some amount of land to build a residential house.

However, this right may not be provided to any person. It is said only those farmers whose residential houses were located on the expropriated land would be given land for housing (Ato Tsehay, Interview). This means those farmers who live in some other place and use the expropriated land only for farming purposes will not get same benefit. Well, this is not, of course, clearly stated in the law; rather, it is the practice within urban administrations. The question that could be raised here is what if the farmer changes his place of residence? The only limitation in the law is that compensation may not be paid for property on the land and improvements to it, if this occurs after notice of expropriation has been served. Hence, in principle, all properties created before this date are compensable.

This may cause a problem which looks like the one raised by some economists. Some economists oppose payment of compensation because property owners intentionally make initial investment on a given land, knowing that there is some probability of a future taking of the property by the government. When a taking occurs, the initial investment is rendered worthless (Innes 2000:2). The argument is that land owners would make inefficient and useless investments. The fear of the writer, by the same token, is that because of speculations of the peripheral land would be included to the city, farmers may tend to invest much money on it intentionally to get other benefits. For example, a farmer who lives far from the border of the city but still possesses a land which is located near a town may change his residential house and build one near the town, if there are speculations that the land would be expropriated. Now, the benefit of building a house here is that he would get a land in the town which is more worthy than the one in the rural area. Though not squarely, this type of speculative move is anticipated and regulated by the Civil Code, Articles 1475 and 1476.

## CONCLUSION

The Ethiopian Constitution secures property right, among other things, by prohibiting arbitrary taking and evictions of ones holding rights in land. To this effect, it stipulates that a commensurate amount of compensation should be paid to expropriated real property. What has been investigated in this Article is whether or not land laws and practices uphold the constitutional principle.

The writer's conclusion is that there is no problem with the wordings of the Constitution. The fact that land is not owned privately by itself does not lead to the nonpayment of just compensation. It is rather the implementing proclamation and regulations which fail to implement it. The major problems identified by this Article are summed up as follows.

Because of the undeveloped real property market in the country, the valuation method followed is the replacement cost approach. This is partly attributable to the state ownership of land. The market price of houses and buildings is greatly based on the price of construction materials, instead of the value and location of the land, where the building is situated. During expropriation, in urban areas, land has no value. Expropriated people are not compensated for their losses associated with the location, which by itself affects their businesses, living conditions and standards, means of transportation, and access to facilities. The law provides that they should be given the replacement cost of the building and a land replacement to build their home on it. Moreover, there not guarantee to get equal size of land since it is the municipality that decides the location as well as the size of the land to be given to the expropriated person. Hence, expropriation in this respect has an adverse effect on the owner, and this shows that the constitutional guarantee for commensurate compensations is not observed and respected. The holder of the land does

not get a share of the benefit of his investment on the land, which is totally rather being reaped by municipalities.

In rural areas, the value of the land expropriated is based on the previous five years' average annual income of the farmer. This annual income shall be multiplied by ten and that is the value of the land to be given as compensation. The problem of this system is that it does not adequately compensate the farmer's loss. The farmer has a life time right in the land with life-long income and also the right to pass it onto generations to come. The argument is that ten year's annual income will not adequately compensate the loss of all the rights mentioned above. Moreover, the valuation system does not take the present market value of yield to calculate the future loss; rather, it goes back to the past five years which are irrelevant to the present or future value. Experience of annual increases of inflation in the country show that the prices of goods, including crops, are increasing at an alarming rate, and this makes the amount of compensation paid insufficient.

A uniform valuation formula was planned to be developed by the Ministry of Federal Affairs in cooperation with regional governments. However, this formula has not yet come into existence. This has invited every land administration in the federal as well as regional governments to go its own ways. Currently, in the Amhara Region, for example, the urban and rural land administrations operate by themselves, and this lack of coordination encourages them to adopt their own respective rules. This creates unreasonable differences in amounts of compensation and in the valuation formulas applied. A farmer, whose land is taken by a city municipality for urbanization purposes and a farmer who has lost his land for rural schooling may not get equal compensations and benefits; even assuming the size and fertility of the land are the same.

The other problem in this area is the non-existence of real property expert valuers. Property is simply appraised by civil engineers, agriculturalists, and members of the administrative organ, all of whom lack the proper education and experience in valuation systems. The two most common organs which have close interests in urban properties, the municipalities and banks, for instance, use civil engineers to assess the value of a real property. In rural areas, where the rural and urban land administration organs expropriate land, in order to estimate the value of crops, trees, and the bare land itself, appoint *kebele* or *woreda* chairmen, agriculturalists, and elders of the local people. These people serve as valuers so long as they assume the office. This means, experienced people in the area may not be easily found.

## **RECOMMENDATIONS**

Secured property rights have long been identified by the World Bank<sup>11</sup> and other researchers as key elements to bring about higher levels of investment and access to

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<sup>11</sup> See for example, K. Deininger, "Land Policies for Growth and Poverty Reduction", *A World Bank Policy Research Report*, A Publication of the World Bank and Oxford University Press, 2003, p. xix.

credit, to create easy property transfer, and to maximize resource allocation. One of the arguments in favor of state ownership of land in contemporary Ethiopia is that it is of little significance as to who really owns the land; instead, greater precautionary weight attaches to whether there are enough rules and regulations which provide guarantees and security to the holders of the land. Inadequate land securities tend to discourage holders of land from making additional investments on their land. People may prefer not to invest much for fear of eviction or expropriation without just compensation. Hence, one system of securing property rights is to provide adequate compensation in the event of expropriation.

Presently the government of Ethiopia is striving to create property security by establishing a property registration system, especially in rural areas. But it is futile if this effort is unaided by other means of property security systems, such as ensuring payment of adequate compensation during expropriation.

Therefore, the general recommendation is that the government should revisit all of the land related laws, in general, and the expropriation legislations, in particular, and create conditions in which people can rely on the effective rules of law. In order to reach good economic development, the government must first be successful in creating higher property security systems, good compensation systems, and modern and transparent valuation methods and systems. Further, officials of the state must act in accordance with such rules of the law.

Having said this, the following are some specific recommendations.

- The Ministry of the Federal Affairs should come up with the long awaited scientific valuation formula that should be uniformly apply across the country. It must also perform its duties by producing and building skilled valuers and appraisers of real property in the country.
- The Law should be revised in such away that enables valuers to use either of the three valuation methods as they found them appropriate. In other words, the replacement cost approach should not be the only alternative. In this way we can tackle the location problem.
- The other alternative is that even though we keep the replacement cost approach, the practice of the Commercial Bank of Ethiopia may serve us as a way out.
- Amount of displacement compensation for rural land must be valued on scientific basis. We especially propose the income capitalization method to value as was used by EPLAUA in the Amhara National Regional State.

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### **Interviews**

Interview made on April 2, 2007 with Ato Addisu Gelaw, Legal Advisor and Attorney of the Ethiopian Roads Authority Gonder District.

Interview made on May 2, 2007 with Ato Bayih Tiruneh, EPLAUA’s Land Administration Department Head.

Interview made on April 20 with Ato Fekadu Birhanu, General Manager of the ANRS Rural Roads Authority.

Interview with Ato Gebeyehu Belay, Current Department Head of Land Administration, at EPLAUA, May 2009.

Interview made on April 17, 2007 with Ato Nibretu Ayalew project Coordinator of the Koga Dam.

Interview made on April 30, 2007 with Ato Solomon Keffa, National United Nations Volunteer, and architect and urban planner at the municipality of Bahir Dar city.

Interview made on April 10, 2007 with Ato Tsehay Asmare secretary at the Bahir Dar municipality and special assistant to the mayor of the city.

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