

Equal and Effective Protection for Ethiopian Urban Indigents: Constitutionality of the Existing Urban Land Tenure System and Access to Land

Legesse Tigabu*

Abstract

The FDRE constitution obliges the government to enact laws which ‘guarantee to all persons equal and effective protection without discrimination on grounds of race, nation, social origin, color....property or other status’ and formulate policies which ensure that ‘all Ethiopians get equal opportunity to improve their economic conditions’. All resource related laws, policies and measures introduced by the government are, therefore, expected to be in light of these grand constitutional principles. A legislation which apparently treats individuals equally may indirectly discriminate against a section of the society for it has failed to consider prevalent facts and this might have detrimental effect on the livelihood of those discriminated against. ‘Equal and effective protection’ would require laws, policies and measures which give due attention for substantive and not formal equality. In this work, the author examines the constitutionality of the existing urban land lease system in Ethiopia and its implication on urban indigent residents.

* LL.B. (Haramaya University), LL.M. (Central European University), Lecturer in Law, College of Social Science and Law, Jimma University. The author can be reached at legesstigabu@yahoo.com/legese.tigabu@ju.edu.et.

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1. Introduction

Laws and policies governing urban land are multifaceted. The competition over a plot of land in urban areas is very fierce, and it involves many stakeholders including the government to do business, build offices and apartments, construct infrastructures, bury cables and pipes, install poles and perform other activities. Though complex and perplexing the urban land laws and policies may be, they should not stand against the constitution and grand land policies (land policies introduced by the constitution). They should not, particularly, set aside the very constitutional declaration that land belongs to the people and state of Ethiopia.¹ A land administration system which ensures access to secured land tenure is vital to ensure sustainable development.² In other words, a lease system should not become impediment to access urban land for Ethiopians. A lease system should also avoid uncertainties as they could hinder urban development.³

The existing lease system has introduced transparent and accountable land transfer system⁴ and this in turn could minimize. Individuals cannot negotiate with and bribe public officials to get large tracts of land which are meant to enrich both the officials and the rent seekers who further transfer these plots of land to derive excessive money over bare land without adding value. Negotiation and similar procedures which are prone to corruption are banned once and for all. Though the existing urban land lease system has made the land acquisition system transparent and accountable, the substantive rules governing acquisition of land have actually made a significant portion

¹ See Article 40(3) of the FDRE Constitution

² Peter Dale, *The importance of land administration in the development of land markets - a global perspective*, University College London, England, 2000

³ Thomas J. Miceli, C.F. Sirmans and Geoffery K. Turnbull, *Land ownership risk and urban development*, Journal of Regional Science, Vol 43 No. 1, 2003, pp 73-94

⁴ See the preamble and Art 4 of the Ethiopian urban land lease holding proclamation no. 721/2011 and relevant provisions under the subsidiary urban land lease legislations.

of the society incapable of accessing urban land. This is evident when we see the urban land lease hold rules which prohibit acquisition of land other than through the lease system. Such lease system is, in principle, governed by the rules on tender. Allotment is open in exceptional cases for those who come up with especially relevant projects and at times for not-for-profit and government institutions. This article explores on these and related issues and is designed to have seven sections. Accordingly, section one, two and three examine the existing Ethiopian urban land lease hold system in light of the economic and social objectives of the constitution. Section four explores on the lease system and constitutional principles on land use rights. Section five addresses the constitutional right to use land and transfer and use of the leasehold right as a collateral or capital contribution. Section six examines the urban land clearing order and grievance handling. Finally, section seven provides conclusion and recommendations.

2. The Ethiopian urban land lease system versus the government's constitutional duty to ensure equal economic opportunity

The government is obliged to ensure that all resource related laws, policies, strategies and measures introduced by it are consistent with the constitutional economic objectives of the country.⁵ Such constitutional economic objectives require equitable distribution of wealth and inclusive development. It is in light of these grand constitutional objectives that the validity of the existing urban land lease system in Ethiopia has to be tested.

⁵ See Article 89 (1-8) of the FDRE Constitution

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Under the existing lease system, individual citizens who do not have the financial means to compete in lease tenders⁶ nor can make use of the modality of allotment to access urban land are denied equal opportunity with others in distribution of national wealth. Those who have been dealing over bare land and got rich overnight manipulating the previous lease system are now financially capable of offering highest prices in tender procedures and can easily drive out the majority whenever the government offers land lease bids. What is worse, there is no limitation on the number of lease bids an individual may participate in. The only limitation is that “no single bidder may be allowed to buy more than one bid document for the same plot.”⁷ As long as an individual is competing for different plots, there is no any limitation on the number of bid documents he/she may buy.

All these would mean that the dealing over the national wealth is between the rich and government. Thus, the government has failed to adhere to the constitutional economic objectives of the nation which are set under article 89 of the FDRE Constitution. This provision of the constitution has laid down the basic economic objectives of the country as those which require the government to “formulate policies which ensure that all Ethiopians can benefit from the country's resources and get equal opportunity to improve their economic conditions and to promote equitable distribution of wealth.”⁸ Ensuring equitable distribution of urban land is so important to foster steady and holistic urban development.⁹

⁶In urban land tender proceedings, the amount of the down payment and the lease price offered by a bidder determine his/her chance of winning. It is, therefore, natural that the bidders will present higher down payments and lease prices to win the bid. This would effectively push out the lower class from the urban land deal.

⁷ See art 11(2) of proclamation No. 721/2011

⁸ See article 89(1) of the FDRE constitution

⁹ Paul Hendler and Tony Wolfson, *the planning and “unplanning” of urban space 1913-2013: Privatized urban development and the role of municipal governments*, Land Conference Paper, South Africa, 2011

While all the sub articles under this provision strive to ensure equitable distribution of wealth, introduction of equal economic opportunities to citizens, advancement of public interest and protection of indigent people, a number of provisions under proclamation no. 721/2011 and subordinate urban land lease laws stood against the economic objectives of the nation. Art 5 of the proclamation, for example, has set the leasehold system as the only means to acquire urban land and this coupled with tender procedures (article 11) has made urban land unaffordable to the majority of urban residents. These provisions stand even against the urban land development and management policy of the country adopted in 2011¹⁰ and the basic purposes and principles of the lease proclamation itself. The preamble of the lease proclamation has considered accountability, transparency and equity in land administration as pillars of just and well-functioning land market. Paragraph three of the preamble reads:

*The prevalence of good governance is a foundational institutional requisite for the development of an efficient, effective, equitable and well-functioning land and landed property market, the sustenance of a robust free market economy and for building transparent and accountable land administration system that ensures the rights and obligations of the lessor and the lessee.*¹¹

The basic principles under the lease proclamation dictate that the land delivery mechanism should comply with the principles of good governance, prevent corruption and ensure impartiality in the process.

¹⁰ Federal Democratic Republic of Ethiopia, *the urban land development and management policy of Ethiopia*, Addis Ababa, 2011 (this policy was introduced before the enactment of the Ethiopian urban land lease holding proclamation No. 721/2011 to guide the adoption process of this proclamation. Yet, a number of provisions under the proclamation stand against an important objective set under the urban land policy which aims at making urban land accessible to the poor).

¹¹ Paragraph 3 of the preamble of proclamation No. 721/2011

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They also proclaimed that the delivery system should ensure equitable benefit to citizens.¹²

The allotment based land transfer modality (article 12) which is set as an exception to tender is not also of any help either in addressing the land question of poor people as this provision benefits only the rich men who involve themselves in manufacturing industries, not-for-profit organizations and government institutions. Therefore, the existing lease system is detrimental to the majority of urban residents and has fallen short of rules which ensure the constitutional economic objectives under article 89 of the FDRE Constitution. It is in the interest of the public at large to introduce mechanisms which make urban land accessible to the poor. Failure to do so would force a significant portion of the society live on the streets and that poses danger to the normal social fabric.

3. The existing urban lease system versus constitutional social objectives

The social objectives of the country endeavor to improve living conditions of citizens. Ethiopia, being a party to ICCPR and ICESCR, is under international obligations to progressively advance the living standards of all Ethiopians. Article 9(4) of the FDRE Constitution has also made these instruments integral parts of the law of the land and article 13(2) has even made the constitution subject to such human rights instruments ratified by Ethiopia for the purpose of interpretations.¹³ Hence, relevant laws, government actions and

¹² See art 4 of proclamation No. 721/2011

¹³ Article 13 (2) of the FDRE Constitution requires consistency of chapter three of the constitution with international human rights instruments where it has been primarily transplanted from. It reads “*the fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by Ethiopia.*”

decisions need to complement the government's obligation pertaining to progressively enhance socio-economic rights of individuals.

It is in light of this obligation of the state that article 90 of the FDRE Constitution stated that the country's policies should focus on improvement of social rights of all Ethiopians. This provision states that "to the extent the country's resources permit, policies shall aim to provide all Ethiopians access to public health and education, clean water, housing, food and social security."¹⁴The government, using the significant revenue it derives by implementing the lease system, may improve the social welfare. It can build infrastructure, schools, hospitals and communication networks. However, making urban land unaffordable to some section of the society would have serious implications on social rights of those who cannot access land and this becomes an impediment to progressive enhancement of citizens' access to food, clean water, health, housing, education and social security. Land is everything, particularly for those who don't have other means to generate income. If land is provided for these people for free or at lower prices, they can deal with their land to generate income or use their land to lead their livelihood. Individuals look for urban land not only to build residential houses but also to do other activities to survive. The bold activities on construction of condominium houses should not, therefore, be used as excuse for unsympathetic urban land transfer in Ethiopia. Thus, the existing urban land lease law, by failing to set accommodative land acquisition system, has defeated the grand social objectives stated under article 90 of the FDRE Constitution as it has pushed out the poor from urban land deal through tender procedures.

¹⁴ Art 90 of the FDRE constitution

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4. The lease system versus constitutional economic and social rights

Integrated land administration is crucial to foster sustainable development.¹⁵ Sustainable development would in turn bring about progressive improvement of socio-economic rights. Realization of economic and social rights, to a large extent, depends on having access to properties. That is why these rights are progressive by their nature and an immediate government action may not be possible. A comprehensive land administration system is, therefore, the one which addresses these and other interdependent issues in an integrated way.¹⁶ Available resources and their management determine these rights. Among the properties, the immovable (land and buildings) ones are so important in advancing socio-economic rights. Hence, access to some means of income in general and land in particular would be so vital in a comprehensive socio-economic rights development. Accordingly, article 41 of the FDRE Constitution has granted citizens “the right to engage freely in economic activity and to pursue a livelihood of his choice anywhere within the national territory”¹⁷ and imposed an obligation to ensure citizens’ access to resources on the state.

The government can realize the socio-economic rights and discharge its responsibilities mentioned above only when the relevant laws it adopts and the measures it takes aim at distributing resources including land equitably and allowing individuals get a means to generate income. Article 43(4) of the constitution has also strengthened the principles set under art 41. It proclaimed that “the

¹⁵European Environmental Agency, *Land in Europe: prices, taxes and use patterns*, EEA Technical report No 4/2010, Copenhagen, Denmark, 2010.

¹⁶ StigEnemark, *Underpinning Sustainable Land Administration Systems for Managing the Urban and Rural Environment*, Regional Land Conference, Marrakech, Morocco, 2003 pp.1-22.

¹⁷ See Art 41 of the FDRE constitution

basic aim of development activities shall be to enhance the capacity of citizens for development and to meet their basic needs.”¹⁸ In this regard, the urban land lease system has failed to live up to the constitutional standards for it has not set flexible urban land acquisition system which makes land affordable to the majority.

5. The lease system and constitutional principles on land use rights

As explained in the foregoing sections, in Ethiopia, ownership of land and natural resources is ‘vested exclusively in the state and peoples of Ethiopia’ (article 40(3) of the FDRE Constitution). This would mean that the constitution is clear enough on ownership of land and natural resources and, therefore, the Ethiopian government cannot enact laws or take executive actions which introduce different modalities of land and natural resources ownership. What the government can do is to regulate and administer land use rights. The most important thing in regulation and administration of land use rights is determining land use right acquisition modalities.

The FDRE constitution has mentioned the methods of land use right transfer to farmers and investors. But it has kept silent on how ordinary (non-investor) people living in urban centers may acquire land use rights. The constitution declared that Ethiopian peasants, pastoralists and semi-pastoralists have the right to acquire land use rights without any payment and that they may not be evicted from their holdings except through expropriation proceedings (payment of commensurate compensation) when the land is required for public purposes.¹⁹

¹⁸ See art 43(4) of the FDRE constitution.

¹⁹ See Art 40(4, 5 and 8) of the FDRE constitution.

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As long as transfer of land use right to investors is concerned, the constitution proclaimed that government should ensure the right of investors to use land on the basis of payment arrangements. This is stated under article 40 (6):

*Without prejudice to the right of Ethiopian Nations, Nationalities, and Peoples to the ownership of land, government shall ensure the right of private investors to the use of land on the basis of payment arrangements established by law. Particulars shall be determined by law.*²⁰

This provision doesn't make a distinction between urban and rural land.²¹ Thus, as land belongs to the public at large, the investors should pay rent and benefit the Ethiopian people whenever they use rural or urban land. Sub-articles 4-6 of article 40 of the constitution have tried to set the right balance between the right to use land and the public interest in the use of land. While sub-articles 4 and 5 allow farmers to have access to and use rural land without any payment, sub-article 6 dictates investors to pay rent if they want to realize their right to use urban or rural land.

What is left unregulated under the constitution is the mode of delivery of land to non-investor urban residents. Should they get land for free? No! Had this been the intention of the constitution, it could have mentioned this category of people as urban land users without any payment. Why the constitution has to mention farmers as rural land users free of charge and kept silent about non investor urban residents if it was meant also to allow these residents use urban land for free?

²⁰ See art 40 (6) of the FDRE constitution

²¹ As Art 40 (6) of the lease proclamation has not made any distinction between urban and rural land and because investors may rent and invest on both rural and urban land, transfer of any plot of land to investors is based on payment arrangements as the land owners, the state and people of Ethiopia, have to benefit from such arrangements following transfer of urban or rural land to profit makers.

To be precise, farmers and urban residents are not treated alike as long as acquisition of land use right in the respective areas is concerned.

Then, according to the constitution, should these non-investor urban residents acquire land use rights only based payment arrangements? The answer is no again. The constitution has mentioned only investors as those who are required to pay rent to secure land use rights. Had the intention of the constitution been to adopt an urban land delivery modality which requires all physical and legal persons to pay rent, the constitution would not have mentioned only investors.

What one can say here is that the constitution has neither intended to provide land to all non-investor urban residents for free nor close the room for free access to urban land when circumstances so require. The constitution seems to allow the government to come up with flexible urban land legislations and executive actions which can respond to prevailing facts. Accordingly, the constitution has granted the power to make land laws to the federal government and empowered the regional states to administer land in accordance with the federal laws.²² Unfortunately, the urban land lease hold law of Ethiopia has banned all forms of urban land acquisition other than the lease system and adopted non-holistic²³ land transfer system. By doing so, it has failed to be flexible; and treated investor and non-investor urban residents alike, which is definitely unfair.

6. The right to use land and transfer leasehold right as a collateral or capital contribution

An individual with urban land lease holding right, in addition to using this land for the purpose stated under the lease contract, may transfer,

²² See arts 51(5), 52(2) and 55(2) of the FDRE constitution.

²³ Non-holistic urban land administration system directly or indirectly excludes a significant portion of a society from getting access to urban land and land related services.

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give as collateral or use such land as capital contribution.²⁴ The constitutional right to property which includes ownership right and other property rights short of ownership has enabled individuals to acquire, transfer, use or dispose their property as the case may be.²⁵ The constitution has also stated that only legally prescribed limitations may be imposed on property rights. Among such limitations is the prohibition, under the constitution itself, of private ownership of land. The constitution has set this restriction would mean that land use right is a property right which, however, may not include sale of the land. As explained before even though an individual may have land related property right, he/she cannot own the land. Thus, land use right is a property right over which an individual may carryout different dealings short of sale of the land.

Though the constitution has set such general principles on property rights, it has kept silent on the issue as to whether individuals can transfer or give their use right as collateral or capital contribution. Of course, the constitution doesn't have to address such details and its silence may not be interpreted to be prohibition. The urban land lease hold proclamation has incorporated detailed rules on these issues. The most important principle in transfer, collateral or use of lease hold right as a capital contribution is that such arrangements may not change the lease period and prescribed purpose of the land.²⁶ The relevant provision reads:

Without prejudice to the period of lease determined pursuant to sub-article (1) of Article 18 of this Proclamation and the obligation to use the land for the prescribed purpose in accordance with sub-article (1) of Article 21 of this Proclamation, a lessee may transfer

²⁴ Art 24 of the lease holding proclamation no. 721/2011

²⁵ See art 40 of FDRE constitution

²⁶ See Art 24(1) of the urban lease holding proclamation no. 721/2011.

*his leasehold right or use it as collateral or capital contribution to the extent of the lease amount already paid.*²⁷

The other point worth considering here is that while the lessee is relatively free in transferring his holding right, she/he may use it as collateral or capital contribution only to the extent of the rent amount which has been paid. If the transfer of a lease holding right is before ‘commencement or half completion of construction’²⁸, however, the lessee has to go through restrictive procedures. In such cases, article 24(2) will apply.²⁹

This could discourage rent seekers who have been transferring urban land without adding any value to get rich overnight. Transfer through inheritance is an exception and this is appropriate given the fact that transfer through inheritance is not for consideration. What about donation? The government might have anticipated that transfer through donation as an exception may encourage individuals to use donation as a cover up while entering into other arrangements covertly. But, the proclamation could have prevented this by setting requirements like conclusion of contracts of transfer before the courts or concerned public offices and denying legal effect to the remaining ones.

²⁷ Ibid

²⁸ Half-completion of construction is defined by the subsidiary legislations enacted by the regional states to implement the lease proclamation. See the relevant provisions under these legislations.

²⁹ Art 24 (2) has imposed restrictions in unequivocal terms on urban land users who transfer their holding right before commencement or half-completion of construction to discourage urban land lease price speculators. Among others, such land users can transfer their holding only through auction. This provision reads “If a lessee, with the exception of inheritance, wishes to transfer his leasehold right prior to commencement or half-completion of construction, he shall be required to follow transparent procedures of sale to be supervised by the appropriate body.” Also see Art 24 (7) of the lease proclamation.

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There are also other questions left unanswered under the proclamation. Assuming that the contract of collateral or use of the land as capital contribution has been concluded before construction commences, adoption of restrictive principles under article 24 can be justified based protection of the interest of creditors as no value is added to the land and a significant amount of lease payment remains to be paid.

But, if such arrangements are concluded after construction commences, why the value of a collateral or capital contribution should only be to the extent of the rent amount paid? Why can't the value of already started, nearly completed or completed construction be used as a collateral or capital contribution along with the land use right? Why don't we give the land lease holders freedom to determine their property's (lease hold right + building) value through freedom of contract?

If the proclamation is making reference to the value of the land use right only even after construction is underway or completed that is not practical. One may say that the lease hold proclamation regulates primarily land use (lease hold) rights and, therefore, is not concerned with buildings. But, we cannot separate buildings from leasehold rights. Sale of a building, for example, automatically transfers the land leasehold right to the buyer.³⁰ In collateral or capital contribution arrangements, can we think of a possibility where a lease holding right is subject of such dealings but not the building on the land? If one answers yes, then creditors, when the debtor is in default, may exercise the lease hold right given as collateral only after dealing with the debtor on the fate of the building. Laws are not meant to create

³⁰ See Article 24 (6) of the urban land lease hold proclamation no.721/2011

such anxiety.³¹ Even the proclamation itself has recognized this and declared the following.

*Unless agreed otherwise, a building constructed on leasehold and its accessories shall be subject to the collateral or transfer where the right to the use of land is made as collateral or transferred. Similarly, the right to the use of land shall be subject to the collateral or the transfer where a building on leasehold and its accessories are used as collateral or transferred.*³²

If the prescribed purpose of the land doesn't require permanent improvement on the land or bare land is given as a collateral or capital contribution, what is declared under article 24(1) might work well as the lease holder won't construct buildings. For other cases, however, the lease law is far from being clear. The proclamation seems to allow lease holders to give their leasehold rights and buildings as collateral as separate interests. We may think of giving lease hold rights as collateral independently of permanent improvements on land. However, enforcement of creditors' rights finally results in removal of buildings to use the land or further dealings over the building. Hence, giving freedom to the individual to determine, through free market, the value of his lease hold right along with the improvements he has brought about would be better.

What is perplexing under the proclamation is this. Though the higher the amount of the lease paid the closer the time to the expiry of the lease period in most of the cases and thus the lower the market value of the lease hold right, the proclamation has envisaged higher capital

³¹The object of a land lease holding right is land and we cannot think of land without buildings once they are constructed on such land. Hence, right after permanent improvements are made on a plot of land, it is quite difficult to deal with the land use right alone setting aside the real property rights one may have over the permanent improvements (immovable properties) on such land.

³² See art 24(6) of the lease hold proclamation no. 721/2011

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contribution or collateral value for the lessee; because it employs the phrase to the ‘extent of the amount of lease paid’.

The use of lease hold right as a collateral before construction commences has to pass through even more restrictive procedures. In such cases, the lessee even cannot use his right as a collateral to the extent of the lease amount he already paid as three are deductions to be made. Art 24(4) has stated this clearly.

*Notwithstanding the provisions of sub-article (1) of this Article, where a lessee uses his leasehold right as collateral prior to commencement of construction, the collateral value may not exceed the balance of the lease down payment after considering possible deductions to be made pursuant to sub article (3) of Article 22 of this Proclamation.*³³

Accordingly, the collateral value is the down payment (which is 10% or more of the total lease payment as proclaimed under the lease proclamation) minus 7% penalty and the due lease payment from the time of taking possession to entering to this arrangement.³⁴ This would mean that right after possession, the lessee may give only below 3% of the rent she/he has paid in most of the cases. As banks will also consider an interest to be paid by the lessee for the loan they provide, the value of the leasehold right to be used as collateral becomes insignificant. Though the law has set such very restrictive procedures, it should be appreciated as it discourages deriving benefit from bare land and avoids conflict of interest between the creditors and government. Art 24(5) can effectively serve such purposes and it reads:

Where a lessee who has used his leasehold right as collateral in accordance with sub-article (4) of this Article is in default and a

³³ See art 24(4) of the urban land lease hold proclamation no.721/2011

³⁴ Ibid

claim, supported by a court execution order, on the collateral is presented, the appropriate body shall, upon terminating the lease contract, take back the land and settle the claim to the extent of the balance of the lease down payment after retaining the deductions to be made pursuant to sub-article (3) of Article 22 of this Proclamation, and return the surplus, if any, to the lessee.³⁵

The proclamation has also prevented the rent seekers from manipulating speculative market profits through transfer of their lease hold rights. Article 24 (7) warned such land lease holders that they may be prevented from further participation in bids if they repeatedly transfer their land use rights before completion of construction.³⁶ This sub article proclaimed this:

If any person repeatedly transfers leasehold right, without completion of construction, in anticipation of speculative market benefits, the appropriate body may bar him from participation in future bids.³⁷

However, the proclamation is not clear on how many of such transfers may result in prevention from further participation in land lease bids. In transfer of leasehold rights by whatever means, the transferee will assume all obligations which have been undertaken by the original lessee. The relevant provision has laid this:

The transfer of the leasehold right in any circumstance pursuant to the provisions of this Article shall unconditionally transfer all contractual obligations assumed by the lessee to the third party to whom the leasehold right is transferred.³⁸

³⁵ See art 24(5) of the lease hold proclamation no. 721/2011

³⁶ Art 24(7) of lease hold proclamation no. 721/2011

³⁷ Ibid

³⁸ Art 24(8) of lease hold proclamation no. 721/2011

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Thus, the most important principle in transfer of urban leased holding right that the transferee should take note of is that he is obliged to perform all the obligations the original lessee would have discharged had there not been transfer of such lease hold right.

7. Urban land clearing order and grievance handling

Under the existing Ethiopian urban land lease system, the government may take land back from landholders following termination of lease hold. A concerned authority may terminate an urban land lease hold right based on the following grounds.

- Use of the land for a purpose other than what has been intended under a lease contract.
- Expiry of the lease period and government's refusal to renew it.
- Expropriation of land for 'public purposes'.

The urban land use right holder may use this land only for the purpose sated under the lease contract as declared under article 21 of the urban land lease proclamation.³⁹ He may use the land for other purposes only when the concerned authority permitted so following an application by the land user. This can be done only when the new proposal is consistent with the urban plan.⁴⁰ Failure to comply with these land use rules results in termination of land use rights. While use of the land for a purpose not intended in the lease contract without the permission of the concerned authority is absolutely prohibited and has no excuse, complete failure to use the land may be justified in exceptional circumstances. This is so when the land is not used for the prescribed purpose due to force majeure, the concerned body may grant time extension. The relevant provision under the proclamation has put the following.

³⁹ Art 21 of the urban land lease proclamation no. 721/2011

⁴⁰ Ibid

*Notwithstanding the provision of sub-article (1)(a) of this Article, where it is ascertained that the land has not been used for the intended purpose as a result of force majeure as provided for under the civil code, the appropriate body may authorize time extension to compensate time lost due to the force majeure situation.*⁴¹

According to this provision, whether a given situation is a force majeure or not is determined based on the relevant provisions under the civil code. Article 1792 of the civil code has explained what force majeure mean and articles 1793 and 1794 have given examples of force majeure and situation which cannot be considered as force majeure.⁴²

If one or more of the circumstances mentioned under article 1793 happen or the situation can be considered as a force majeure by virtue of article 1792, the land use right holder may claim time extension following his failure to use the land for the intended purpose. On the other hand, article 1794 of the CC has set situations which may not be considered as force majeure.

Therefore, the lessee who has failed to use the land may claim time extension and escape termination of his lease hold right before expiry of the lease period only when he has failed to do so because of an unforeseeable circumstance which has absolutely prevented him from using the land for the intended purpose.

⁴¹ See Art 25(2) of the urban land lease proclamation no. 721/2011. Also see Arts 1792-1794 of the Civil Code of Ethiopia. These provisions have defined force majeure and mentioned examples of circumstances which could be considered as force majeure and others which could not.

⁴² Ibid

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The second ground for termination of urban land use right is expiry of the lease period.⁴³ As explained earlier, the urban land lease proclamation has set lease periods. After expiry of a lease period, the government does have the discretion to accept or refuse applications for renewal of a lease period. The lease proclamation has kept silence on how the government may exercise such discretionary power. But, the urban land lease laws of the regional states have emphasized on public purpose as primary ground for rejection of renewal request.⁴⁴

The third ground for termination of an urban land use right is expropriation or clearance order. Expropriation is an inherent right of the state and may be exercised at any time and against any landholder. Yet, two requirements should be satisfied before the government expropriates land use rights: the land should be required for a public purpose and commensurate compensation should be paid. The preamble of the expropriation proclamation no. 455/2005 has explained how expropriation is an indispensable power for the government. It reads:

“Urban centers of the country have, from time to time, been growing and the number of urban dwellers has been increasing and thereby land redevelopment for the construction of dwelling houses, infrastructure, investment and other services has become necessary in accordance with their respective plans as well as preparation and provision of land for development works in rural areas has become necessary.”⁴⁵

Expropriation proceedings serve public purposes while at the same time providing due compensation for those whose holdings are

⁴³ See the relevant provisions under the lease proclamation and subsidiary legislations adopted to implement this proclamation.

⁴⁴ See relevant provisions under the urban land lease regulations of regional states

⁴⁵ The preamble of expropriation proclamation no. 455/2005

expropriated. An important question that one may raise here is, what is 'public purpose' and how should we determine its scope?

Different laws of Ethiopia have defined this important precondition in expropriation proceedings differently. While the constitution, the C.C and expropriation proclamation no. 455/2005 employ the phrase 'public purpose', other laws including the urban land lease holding proclamation no. 721/2011 and regional land laws define this precondition broadly and employ the phrase 'public interest'.

Here, the phrase used by the constitution and its meaning should prevail over what is proclaimed in other laws as the constitution is the supreme law of the land. The relevant provision under the constitution has proclaimed that "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."⁴⁶

The civil code of Ethiopia has also employed the phrase 'public purpose'. The constitution might have taken this phrase from the C.C as this code is decades older than the constitution and was the only comprehensive legal document on land and other properties at the time of adoption of the FDRE constitution. The relevant provisions under the C.C have explained expropriation proceedings in unequivocal manner stating that '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.'⁴⁷

⁴⁶ Art 40(8) of the FDRE constitution

⁴⁷ See art 1460 of the civil code

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We use expropriation to place immovable properties under the public domain.⁴⁸ When land is expropriated, it forms part of the public domain and is held by the state or administrative bodies.⁴⁹ The infrastructures and services to be introduced on such land have to be directly placed at the disposal of the public.⁵⁰ What is bizarre under the C.C is that it has also used the phrase ‘**public interest**’⁵¹ which is ambiguous as will be explained later. It is not clear if the C.C is meant to give the same meaning to these phrases and use them alternatively. The expropriation proclamation employs the expression ‘public purpose’ like the constitution and C.C. But, it defines the scope of public purpose broadly as follows.

*"Public purpose" means 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.*⁵²

According to this definition, any possible direct or indirect benefit to the public may justify expropriation/clearing order. Thus, though this legislation concurred with the constitution and the C.C in using the phrase ‘public purpose’, it is similar, in substance, to the other laws which have broadened the scope of the precondition using the clause ‘public interest’.

The urban land lease proclamation is identical to the expropriation proclamation in defining expropriation precondition except the fact that it has used the clause ‘public interest’ instead of public purpose. Here is the relevant provision under the proclamation.

⁴⁸ See the provisions under title 9 of the civil code

⁴⁹ Art 1444 of the civil code

⁵⁰ Art 1445 of the civil code

⁵¹ See art 1463 of the civil code

⁵² Art 2(6) of expropriation proclamation no. 455/2005

*“Public interest” means the use of land defined as such by the decision of the appropriate body in conformity with urban plan in order to ensure the interest of the people to acquire direct or indirect benefits from the use of the land and to consolidate sustainable socio-economic development.*⁵³

The distinction between public interest and public purpose is not irrelevant. Given all the ambiguities and inconsistencies discussed above, interpreting ‘public purpose’ and putting its right meaning is indispensable to set the right balance between individual land use rights and the inherent right of the state to expropriate land to introduce public goods and services. If we use its narrow meaning, land holding right of an individual will be expropriated only when such land is required for public purposes which can benefit the society directly. This can ensure tenure security for individual land holders. The broad meaning (as some statutes set it using the clause public interest) on the other hand allows the government to expropriate individual holdings whenever it can establish any direct or indirect public interest. Perhaps, it is quite easy for the government to show at least indirect public interest in almost all cases. This undermines the land use rights of individual citizens.

Whatever meaning we might use, the most important assurances for individuals whose holdings are to be expropriated for public use are that notification of the clearing order and agreement over the amount of compensation preceding expropriation. Hence, government cannot take away the land until the individual agrees on the amount of compensation or the court decides on the commensurate compensation to be paid at times of disagreement. Article 27 (1) and the following of the urban land lease hold proclamation have set such important procedures.

⁵³ Art 2(7) of the urban lease holding proclamation no.721/2011.

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Where urban landholding is decided to be cleared..., the possessor of the land shall be served with a written clearing order stating the time the land has to be vacated, the amount of compensation to be paid and the size and locality of the substitute plot of land to be availed.⁵⁴

If an individual is dissatisfied with such clearing order, he can submit his grievance along with substantiating evidences to the ‘appropriate body’ within 15 working days following receipt of the clearance order.⁵⁵ The appropriate body is required to properly investigate a complaint submitted to it and announce its resolution to the claimant in writing.⁵⁶ The proclamation has not defined the ‘appropriate body’ which is assigned to handle such a crucial issue and such a gap may open a room for abuse of power and corruption. Its organization, accountability and working procedures should have been made clear under the proclamation. There are many departments under land administration offices and the applicants may get confused in identifying the appropriate body. To ensure clarity and uniformity, explicating the appropriate body is apt. The proclamation has not also set a definite time within which the appropriate body renders decisions. Such a gap can lead to delay in decisions and bad governance and thus needs to be addressed.

A claimant dissatisfied with the decision of the appropriate body can lodge an appeal to the Appellate Tribunal established by the proclamation. Article 29 (1) has set this rule and it reads:

An applicant who is aggrieved by the decision of the appropriate body rendered in accordance with sub-article (3) of Article 28 of this Proclamation may appeal to the Appellate Tribunal established

⁵⁴ Art 27(1) of the urban land lease proclamation no. 721/2011

⁵⁵ See art 28 (1) of the urban land lease proclamation no. 721/2011

⁵⁶ See art 28(3) of the urban land lease proclamation no. 721/2011

*under Article 30 of this Proclamation within 30 days from receipt of the decision.*⁵⁷

Here a point worth considering is that the ‘decision’ which might be appealed to the Appellate Tribunal is a decision only on a clearance order as can be inferred from articles 27(1) and 28(1). Hence, the remaining urban land related grievances against the concerned body can be lodged to the ordinary courts as the proclamation has not set special adjudication mechanisms for all land issues. For example, urban land users may institute a case before ordinary courts following decisions by a concerned body on start, half completion and completion of construction on a leased land, renewal of lease period, tender and allotment procedures, payment of lease price and related issues.

When the dispute is over land clearing order, the applicant may not submit an appeal against a decision given by the appropriate body to ordinary courts but to the Appellate Tribunal. The Appellate Tribunal is required to investigate the appeal and give its decision within 30 working days of submission of the clearing order related appeal.⁵⁸ Such decisions of the tribunal on all issues of law and fact are final except the issue of compensation. Article 29(3) of the proclamation has declared this in unequivocal terms. “Decisions of the Tribunal, except relating to compensation, on issues of law and facts including claims for substitute land shall be final.”⁵⁹

The constitutionality of this provision of the proclamation is questionable. Though there is no problem with the establishment of such quasi-judicial institutions which exercise judicial power, denying

⁵⁷ Art 29(1) of the urban land lease hold proclamation no. 721/2011

⁵⁸ Art 29(2) of the urban land lease hold proclamation no. 721/2011

⁵⁹ Art 29(3) of the urban land lease hold proclamation no. 721/2011

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the courts power to review decisions given by such bodies undermines the constitutional principle that “judicial powers, both at Federal and State levels, are vested in the courts”.⁶⁰ What is more, real property rights including land use rights are so important and should finally be protected through ordinary court proceedings.

The Appellate Tribunal established under the proclamation is not required to follow the provisions of the ordinary civil procedure law of the country. It will rather be governed by the procedures to be issued by the regional or city administration. Art 30(8) reads:“The Tribunal may not be governed by the provisions of the ordinary Civil Procedure Code while conducting its functions. It shall, however, be governed by expedient procedures to be issued by the region or city administration.”⁶¹

By virtue of article 78(4) of the constitution, no special or ad-hoc court which takes judicial power away from ordinary courts or legally empowered institutions and sets aside legally prescribed judicial procedures may be established. It is not clear if the expedient procedures to be issued by the regional or city administrations, as proclaimed by the proclamation, are regular laws which need to be published under *Negarit Gazeta*. Legally prescribed judicial procedures which the constitution refers to, are those rules set by laws published by the *Negarit Gazeta*. Therefore, expediency may not be an excuse for using executive rules which are not published. The lack of clarity under the proclamation may result in injustice as too flexible and unpublished procedures may be employed. This would lead to uncertainty.

⁶⁰ Art 79(1) of the FDRE constitution

⁶¹ See art 30(8) of proclamation no. 721/2011

The proclamation is also far from being clear on composition and independence of the Appellate Tribunal. As long as composition of this body is concerned, it doesn't say anything further than this: "the Tribunal shall consist of not less than five members drawn from different relevant bodies".⁶² Its independence is also questionable. Though the proclamation stated that "the Tribunal shall be free of any influence except the law"⁶³, it doesn't ensure its independence. Given the fact that the term office of a member of the tribunal is determined by the region or city administration,⁶⁴ members are selected from administrative organs and the tribunal is accountable to the council of the region or city administration,⁶⁵ it is quite difficult to consider such a tribunal as an independent and impartial organ.

The other important point worth considering here is the proclamation's deviation from the constitutional principle that compensation should be paid in advance. Though the proclamation allows an individual dissatisfied with the decision of the tribunal on compensation to submit an appeal to ordinary courts,⁶⁶ such an appeal is admitted only after the appellant has transferred the land required to be expropriated/cleared to the concerned body. The relevant provision under the proclamation has set this:

*An appeal under sub-article (4) of this Article may be admitted only if the appellant has handed over the land subject to the clearance order to the appropriate body and attached evidence to this effect.*⁶⁷

⁶² See art 30(4) of proclamation no. 721/2011

⁶³ Art 30(7) of the urban land lease proclamation no. 721/2011

⁶⁴ Art 30(9) of the urban land lease proclamation no. 721/2011. Also see the relevant provisions under the subsidiary urban land lease legislations.

⁶⁵ Art 30(3) of the urban land lease proclamation no. 721/2011

⁶⁶ See sub art 4 of art 29 of the urban land lease proclamation no. 721/2011

⁶⁷ See sub art 5 of art 29 of the urban land lease proclamation no. 721/2011

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This provision of the proclamation undoubtedly contradicts with article 40(8) of the constitution which proclaims the following.

*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.*⁶⁸

According to the constitution, payment of commensurate compensation in advance is a precondition for expropriation. The country's expropriation proclamation no. 455/2005 and other relevant laws have also set the same principle. It is only after the land user agrees on or the court determines (in case of disagreement) the amount of compensation to be paid that a plot of land may be expropriated. Therefore, the urban land lease proclamation, by making handing over of land to government a precondition to lodge an appeal against compensation related decisions made by the tribunal, has compromised the constitutional right of individuals.

8. Conclusion and recommendations

This work revealed the inconsistencies between the urban lease holding system and the constitution. Individual citizens who do not have the financial means to compete in lease tenders nor can make use of the modality of allotment (which is permitted in exceptional cases only for special projects, not-for-profit organizations and governmental institutions) to access urban land are denied an equal economic opportunity with others in distribution of national wealth. This is clear violation of articles 25 and 89 of the FDRE constitution. The current urban land lease holding law, by failing to set accommodative land acquisition system, has also defeated the grand social objectives stated under article 90 of the FDRE constitution. Progressive improvement of social rights (which is an obligation

⁶⁸ See 40(8) of the FDRE constitution

imposed on the state) couldn't be realized as long as land, which is the most important resource for mankind, is inaccessible to the lower class of a society. Such inflexible and unaffordable urban land transfer system would also paralyze the constitutional economic and social rights under article 41 of the FDRE constitution.

Though the constitution is clear enough on transfer modalities of rural land to farmers and rural and urban land to investors, it has kept silent on the mode of delivery of land to non-investor urban residents. The constitution allows the government to come up with flexible urban land legislations and executive actions on such issues so it can respond to prevailing facts. Unfortunately, the current urban land lease holding law of Ethiopia has banned all forms of urban land acquisition methods other than the lease holding system. It has, therefore, failed to be flexible; and treated investor and non-investor urban residents alike, which is completely undeserved.

What is more, the detrimental effects of the broad definition given to public purpose (i.e. direct or indirect public interest) under the urban land lease holding proclamation and related legislations have been examined. Adoption of such a broad definition in urban land expropriation (clearing order) proceedings would allow the government to take land back from individuals easily and that in turn makes urban land tenure insecure.

It is also further concluded that the constitutionality of urban land clearing order related dispute handling procedures set under the lease holding proclamation is doubtful. Though quasi-judicial institutions like the urban land Appellate Tribunal may be established, denying the courts power to review decisions given by such bodies undermines the basic constitutional principle that judicial power belongs to the courts. Art 29(3) of the lease holding proclamation, by denying such power of the courts, therefore, stands against the constitution.

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The author, therefore, suggests rectifying measures to be taken by the government. As the urban land acquisition modalities under the current urban land lease holding system stand against grand constitutional economic and social objectives of the country and have detrimental effects on economic and social rights of individuals, the government should assess the scope and nature of the problems associated with the existing lease holding system. It should then introduce informed and accommodative urban land lease holding system. The urban land lease rules which deny the courts' power to review decisions made by administrative tribunals should be repealed and the vague terminologies related to expropriation/urban land clearing order have to be clarified.