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**The Jurisprudence of the Council of Constitutional Inquiry and of the House of Federation
on Property Related Claims: A critical Study**

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Declaration

I have hereby declare that “The Jurisprudence of the Council of Constitutional Inquiry and of the House of Federation on Property Related Claims: Critical Study” is my own original work which has not been presented for any degree in any University and the sources used have been duly acknowledged and cited.

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ACRONYMS

CCI	the Council of Constitutional Inquiry
E.C	Ethiopia Calendar
EEPC	Ethiopian Electric Power Corporation
Fed.Neg.Gaz.	Federal Negarit Gazeta
FSC	Federal Supreme Court
FIC	First Instance Court
FSCCD	Federal Supreme Court Cassation Division
FDRE	Federal Democratic Republic of Ethiopia
G.C	Gregorian calendar
HoF	the House of Federation
HoPR	the House of Peoples' Representatives
PDRE	Peoples of Democratic Revolution Ethiopia
Proc	Proclamation
U.S.A.	United State of America

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Abstract

This paper aims to examine the interpretative and methodological approaches used by the CCI and the HoF in resolving property related constitutional issues. There are increasing number of property related claims reaching the Council and the House. Of the complaints lodged before the CCI/HoF, a good proportion has to do with land related property claims. This research has found out that decisions on property rights by government officials generally fail to adhere to the letters and spirit of the Constitution. By employing doctrinal and case analysis methods of research, this paper conclude that the property-rights related jurisprudence of the Council and the House has not yet developed.

Key words: Constitutional interpretation, Constitutional review, Decision, Due process of law, Duration laps rights, Effect, Enforcement, Expropriation, Jurisprudence, Property, Proportionality, Public purpose, Public interest, Recommendation, Taking.

CHAPTER ONE

INTRODUCTION

1. Background of the Study

The constitutional jurisprudence of the House of Federation serves as the main source of law for the interpretation and enforcement of the Constitution. It also serves as a guide to the indirect application of the Constitution through the interpretation of secondary laws. As is the case with all other constitutional rights, constitutional property rights are affected by the case law emerging out of the House's decisions.

Private property rights are given constitutional recognition in Ethiopia both at the federal and states' levels. In this regard, the Ethiopian constitutional dispensation has similarity with that of the US and some other constitutional systems.¹ Accordingly, laws or government decisions that undermine private property rights can be challenged for consistency with the Constitution.

As one may infer from the FDRE Constitution, government has the original power to take private property for public purpose so long as it pays compensation.² Taking private property rights may be either physical or regulatory taking for public purpose. The condemnation of private property is normally justified on two grounds: public purpose and payment of compensation.³ However, article 40 of the Constitution⁴ being very general in nature begs various questions such as: What kind of government action of taking of private property amount to a legal taking or violation constitutional property rights? What is the meaning of 'public purpose' that justifies the taking

¹ The FDRE Constitution, 1995, Article 40 states "Every Ethiopian citizens has the right to ownership of private property, it shall not be limited unless prescribed by law and for public purpose or public interest and payment of compensation". The US Constitution provides in part: "No person shall be.... deprived of ...property, without due process of law); "nor shall private property be taken for public use, without just compensation"; "nor shall any State deprive any person of life liberty, or property without due process of law"(see Amendments V and XIV). Likewise, German, Canada, and France constitutions protect property rights.

² FDRE Constitution, 1995, Article 40(2&8) stipulate that the right to ownership of private property is limited on account of public interest and may be expropriated for public purpose subject to payment in advance of compensation to the value of the property.

³ Ibid

⁴ Ibid

private? What is the nexus between ‘taking’ and ‘public purpose’ to legitimize government action and/or decisions?

The notion of ‘public purpose’ in the taking of private property has proved to be a problem of considerable difficulty. The courts of the U.S.A. have recognized that the “Fifth Amendment’s guarantee [is] designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”⁵ The law in the US now is that the state might properly make “a choice between the preservation of one class of property and that of the other” but it can’t exceed “its constitutional powers by deciding upon the destruction of one class of property [without compensation] in order to save another which is of greater value to the public.”⁶

The Ethiopian property legal regime (below the Constitution) is full of confusion owing to frequent changes. This problematic situation characterizes not only the primary legislation but also regulations, directives and other administrative rules.⁷ The lack of predictability of laws and arbitrary decisions of government officials make constitutional interpretation necessary in order to safeguard constitutional property rights of owners. This study aims to closely explore the property rights jurisprudence of the CCI and the HoF. It will critically examine the interpretive approaches used by these institutions in deciding cases involving property rights claims.

2. Statement of the Problem

A large proportion of the cases brought before the CCI involve property-related claims. The reasons have to do with the earlier pointed out lack of clarity in the applicable laws and the apparent constitutional issues the laws’ applications prompt. Furthermore, this study contends that the practice in regards to the implementation of property rights do not seem to be in line with the constitutional requirement. Viewed from comparative perspective, the Ethiopian constitution

⁵ William B. Lockhart & et al (6th ed., 1986): Constitutional Law Cases-Comments-Questions, pp.408-409.

⁶ Id

⁷ Elias N. Tsebek and Muradu Abdo (2013): “Property right protection and private sector development in Ethiopia”, Ethiopian Chamber of Commerce and Sectoral Associations with the Swedish Agency for International Development Cooperation, Sida. Addis Ababa.

also displays some problems that are exploited by the government especially in the case of expropriation of private property for so called ‘public purposes’.

Aggrieved persons have increasingly been looking towards the CCI and the HoF for relief. However, the decisions of these bodies display serious limitations in regards to clear disposition of disputes and consistency, among others. There is also a related problem of the enforcement of decisions made by the House. The Constitution states the House has the power to interpret all Constitutional disputes, but there are no clear means of enforcement of its decisions and there is a practical debate on the effects of its decisions. Therefore, it is imperative to critically examine the jurisprudence of the decisions of the CCI and of the House decisions related to property claim.

3. Research Questions:

This thesis aims at investigating the interpretive and methodological approaches used by the CCI and the HoF to review the Constitution in relation to property connected cases. By doing so it wants to find out whether or not property rights jurisprudence has emerged and what its strengths and weaknesses are.

The following specific questions will guide the investigation.

- i How do the CCI and the HoF decide on constitutional disputes involving property claims in Ethiopia?
- ii How do the CCI and the HoF go about balancing the tension between the government’s power over eminent domain and owner’s right to maintain his property against government appropriation?
- iii What approaches or decision-making parameters or approaches do these bodies use in interpreting property rights claims brought before them?
- iv What is the effect of decision of the House?
- v How are the decisions of the CCI and the HoF enforced?

4. Objective of the Study

4.1 General Objective

The general objective of this study is to scrutinize, describe and explain the jurisprudence of the House Constitutional interpretation related to property claims as well as to explore the jurisprudence of some relevant Countries' Constitutional interpretation systems in relation to property rights claims. It aims to critically assess the jurisprudence of the CCI and the House relating to constitutional property rights cases.

4.2 Specific Objective

The specific objectives of the study are the following:

- Critically examination of the interpretive approaches of the CCI and HoF as regards property rights claims through the study of their decisions and opinions;
- Drawing conclusions about the state of the property rights jurisprudence of the Ethiopian Constitution interpreters;
- Assessment of the parameters used by the Ethiopian constitution interpreters to determine public purpose vis-à-vis the protection of the constitutional property rights of individuals in expropriation decisions;
- Offering comparative insight into approaches of constitutional interpretation involving property claims from jurisdictions such as the US and Germany.

5. Significant of the Study

This research will make a contribution to knowledge by showing the state of affairs of constitutional jurisprudence in Ethiopia in general and in relation to constitutional property rights in particular. It is hoped that its findings will help improve the practice and offer perspective for further research..

6. Methodology of the Study and Sources of Data

I have employed doctrinal research methodology and qualitative method. Primary and secondary materials have been used focusing on textbooks, legislations, journal articles and Court

decisions. Moreover, constitutional interpretation approaches and case laws from jurisdictions such as the United States America; Germany, France, and Canada have been consulted.

Pertinent laws of the country have been critically examined. Several cases decided by the CCI and the HoF have also been collected and analyzed. Discussion with judges of Oromia Supreme Court has also been conducted in order to obtain the judiciary's experiences and perspectives.

7. Structure of the paper

The paper is organized in to four Chapters. This introductory chapter has presented the background of the study, research questions, and methodology and data sources of the thesis. In Chapter 2 the concept, regime protection, and interpretation of property clause of the Constitution will be discussed. Chapter 3 of the Paper will analyze the jurisprudence of the Council of Constitutional Inquiry and the House of Federation on Property Rights. Under this Chapter laws and cases on taking of property as well as the effect and enforcement of decisions of the House will be critically examined. Chapter 4 of the paper concludes the thesis.

CHAPTER TWO

THE LEGAL REGIME FOR THE PROTECTION OF PROPERTY RIGHTS

2.1 The Concept of Property

Before discussing the constitutional protection given to property rights, it will be useful to examine the meaning attached to the term 'property'. As far as the Ethiopian law is concerned, the concept of property has not been properly defined. In fact, defining 'property' as a concept is a difficult task although doing so seems a logical first step to have conceptual reference for property rights. Nonetheless, we note that attempts have been made by scholars and theorists to define the notion of property. Among these, Wilbert E. Moore wrote that property consists of "institutionally defined and regulated rights of persons, or other social units, in scarce values."⁸ Willard Hurst defined property as a "legitimate power to initiate decisions on the use of economic assets."⁹ These definitions emphasize what actions can be lawfully taken by the holder of property rights; and the objects of property in 'scarce values' or 'economic assets'.

Bentham, a utilitarian theorist, defines property as the collection of rules that governs the exploitation and enjoyment of resources.¹⁰ He explained Property as "a basis of expectations" founded on existing rules. Property is institutionally established understanding that extant rules governing the relationships among men with respect to resources will continue in existence.¹¹ Men will not labor diligently or invest freely unless they know they can depend on rules which assure them that will indeed be permitted to enjoy a substantial share of the product as the price of their labor or their risk of savings.¹²

⁸ Sheldon F. Kurtz and Herbert Hoven Kamp (1987): Case and Materials on American property law, West publishing, St. PAUL. MINN. PP. 3-6

⁹ Ibid

¹⁰ Joseph William Singer (1993): Property law Rules, Policies and Practices, Boston, Toronto Lond . pp. 11-13

¹¹ Id

¹² Id

John Locke provided, in labor theory, property as rights:

Though men as a whole own the earth and all inferior creatures, every individual man has a property in his own person; nobody else has any right to. The labour of his body and the work of his hands are strictly his. So when he takes something from the state that nature has provided and left it in, he mixes his labour with it, thus joining to it something that is his own; and in that way he makes it his property. He has removed the item from the common state that nature has placed it in, and through this labour the item has had annexed to it something that excludes the common right of other men: for this labour is unquestionably the property of the labourer, so no other man can have a right to anything the labour is joined...¹³

Another jurist Salmond defined property as proprietary rights in rem.¹⁴ Property includes not all a personal rights, but only his proprietary as opposed to his personal rights. The former constitute his estate or property, while the latter constitute his status or personal condition.¹⁵ Property rights in rem, the term includes not even all proprietary rights, but only those which are both proprietary and rem.¹⁶ The law of property is the law of proprietary rights in rem, the law of proprietary rights in personam being distinguished from it as the law of obligations. According to this usage a freehold or leasehold estate in land, or a patent or copy right, is property; but a debt or the benefit of a contract is not.¹⁷

The conceptions of property in the Federal Democratic Republic of Ethiopia Constitution (hereafter 'FDRE Constitution') have been influenced by different theories. Locke's definition of property rights has been incorporated in Article 40 sub-article (2) and (7) of the FDRE Constitution. The Constitution defined private property as a tangible or intangible product which has value and is produced by the labour, creativity.¹⁸ The term 'labor' is an indication of Lockean influence. Also the expressions of 'labour' and 'permanent improvements' in the

¹³ Jonathan Bennett (2017): "Johan Lock Second Treatises of Government."

¹⁴ P.J.FIZGRALD.M.A (12th ed., 2004):Salmond on Jurisprudence, Indian Economy Reprint, Universal Law. Pp.411-412

¹⁵ Id

¹⁶ Id

¹⁷ Id

¹⁸ Constitution of Federal Democratic Republic of Ethiopia, Neg. Gaz., 1st year, No. 1. 1995

Constitution indicate that private property in connection with land is defined and justified in terms of labor. The concept of property is not only identified under the Constitution, but it is also encompassed under secondary laws of the country. One of them is the Ethiopia Criminal Code¹⁹ which divides property into movable and immovable.

The criminal law uses the term ‘property’ in its broadest sense as any appropriable subject matter which has pecuniary value. It designates tangible and intangible things as property.²⁰ It also describes the claims of creditors directed solely against a person as property. The criminal law for the purpose of protection describes both rights in *rem* and in *personam* as property.²¹

The notions of proprietary in *rem* incorporated in Ethiopia legal regimes. Even if property is divided as immovable and movable or tangible and intangible or corporeal or incorporeal, the law of property is the law of proprietary in *rem*.²² The concept of property rights in *rem* includes the owner who owns a right to the aggregates of its use that are enforceable against the whole world.²³

Although property can be designated in different ways, broadly speaking, a given property is either corporeal property that gives the rights of ownership in material things or incorporeal property that gives the rights of ownership on any other proprietary rights in *rem*.²⁴ The division of property into corporeal and incorporeal is one of the multitudes of subsidiary classifications recognized in the property law of Ethiopia.²⁵ Corporeal thing is any product a human person can perceive whereas an incorporeal thing is any product that humans cannot perceive, but which has economic value.²⁶ In addition, the concept of property as aspect of business is categorized into

¹⁹The Criminal Code of Federal Democratic Republic of Ethiopia, Neg. Gaz., proclamation No.414/2004, see, e.g., its articles:662/1, 665/3,669/1,681//2,665/3,692-716,717-724,725-723..

²⁰ Muradu Abdo (2012): Ethiopia property law, a text book, Addis Ababa University School of law.

²¹ Id

²² Id Pp 21-46

²³ Id

²⁴ See Muradu Abdo “Commentary on subsidiary classification of goods under Ethiopian property law: Commentary”, Mizan Law Review, Vol. 2, No. 1 (Jan. 2008). And the title of Book III of the Code which is entitled “ Goods” as well as the reading of article 1126 of the same implies that the subject matter of property rights under the Code is goods, in the code we find the term “Goods” and “things” interchangeably to mean over which the property rights may be established .

²⁵ Id

²⁶ Id; and FDRE Constitution, 1995, Article 40(2). Article 40(2) defines private property in terms of tangible and intangible product with value. The property rights which can be classified under the object of incorporeal property rights include patents, Copy rights, goodwill, Trademarks, leases, Servitude, Securities.

incorporeal elements. Such elements are goodwill, trade mark, commercial real right, and intellectual property rights which are subjected to special laws. Businesses are dealt in the Commercial Code, but the Commercial Code²⁷ of Ethiopia does not define the subject matter of property. However, various provisions of the Code stipulate movable and immovable things, businesses, intellectual property, shares in businesses, insurance policies, and Commercial instruments over which property rights can be established.²⁸ The Commercial Code “captures within its scope the protection of the commercial interest. The conception of property under the commercial Code of Ethiopia is broader than the meaning attached to it under the Civil Code Book III.”²⁹

The above analysis indicates that the concept of property in the Ethiopia legal system is not well-defined and is only broadly described. So it is difficult to easily single out the subject of property, the nature of property rights, the holder of property, the restrictions thereof, enforcement of the right infringement and the specific remedies afforded to property right violation. This no doubt gives rise to indeterminacy of property related rights obviating the need for interpretation of the law, including constitutional interpretation. In Ethiopia Regional and national laws, legislations and Regulations protect and regulate property rights. However, the national laws have shortcomings which can indeed contribute to uncertainty in the administrative, in the extent interfere into property rights and in its enforcement of property rights.³⁰

²⁷ Commercial Code of the Empire of Ethiopia (5th may,1960), Neg. Gaz., 19th year, No.3

²⁸ Id.

²⁹ Muradu Abdo, supra note no. 24, PP 46-47.

³⁰ Elias N.Stebek and Muradu Abdo (2013): “Property Rights protection and Private Sector Development in Ethiopia”, Ethiopian Chamber of Commerce. Their analysis indicated that there are frequent changes in regulations and directives and pertinent administrative structures are creating confusion and lack of predictability especially with regard to urban land. There is incompatibility between the Constitution and the Code since the former uses the improvement theory as a sole justification to continue to exercise use right over land while the latter rests on other justifications including prior occupation as a reason for obtaining property in land. Under the Code, a continuous and active use is not a condition necessary to retain possession over land while that is the case under the Constitution. These legislative shortcomings in Ethiopia’s property law regime can indeed contribute to uncertainty in the administrative and judicial enforcement of the vulnerable points and legislative challenges relate to the law and legislative (1) the Civil Code, (2) urban land law, (3) rural land law, (4) expropriation, (5) the Commercial Code. There are aspects of the existing Ethiopian property law that require either new legislation or revision in order to clarify significant ambiguities and vagueness, address conceptual incompatibilities and policy ambivalence, qualify or remove aspects which bestow wide powers upon administrative authorities and update (or eliminate) obsolete provisions.

2.2. Protection of Property Rights

Property right is given protection in international and regional human right instruments, national constitutions and other sub-constitutional laws. The Universal Declaration of Human Rights Article 17 states that “everyone has the right to own property alone as well as in association with others” and “[n]o one shall be arbitrarily deprived of his property”.³¹ The African Charter on Human and People Rights in Article 14 states “the right to property shall be guaranteed by the government, it may only be encroached upon in the interest of public need or in the general interest of the community and accordance with the provisions of appropriate law.”³² Rules and principles of these international instruments are applicable to Ethiopia by virtue of Articles 9(4) and 13(2) of the FDRE Constitution which state, respectively, that ratified treaties are the integral part of the law of country and that fundamental rights and freedoms in the Constitution shall be interpreted in conformity with the principles of international human rights instruments adopted by Ethiopia.³³

The protection of property rights concerns relations not only among the owners of particular rights but also among the owners and others. Each right that accompanies ownership of property is limited by rights of others or by interests of societies.³⁴ Similarly, the holder of rights or interests of property needs legal protection which must be obtained by legitimate means.

The specific enforcement of the legal protections given to property rights could be exemplified by the U.S. Supreme Court’s decisions over the years. In its decisions in *Board of Regents v. Roth*,³⁵ the Court noted that a person who alleges the violation of his “property” rights or interests to have shield of procedural due process: (1) “clearly must have more than an abstract need or desire to it, (2) must have more than a unilateral expectation of it, (3) he/she must,

³¹ Universal Declaration of Human Rights, Adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948.

³² “African Charter on Human and Peoples Rights” Adopted in Nairobi June 27, 1981 and entered into force October 21, 1986.

³³ FDRE Constitution, 1995, *Neg. Gaz.*, 1st year, No.1

³⁴ *Supra* note No. 10

³⁵ 408 U.S. 564, 92 S.Ct. (1972), cited in William B. Lockhart, Yale Kamisar, Jesse H. Choper, and Steven H. Shiffrin (1986): *Constitutional Law, Cases-Comments-Questions*. 6th ed., pp, 594-595.

instead, show legitimate claim of entitlement to it”³⁶. Thus, once the property rights have been obtained legitimately, it confers upon the holder of such property a series of decision making powers.³⁷ These powers/rights/ are described as “self-regarding” and “other-regarding powers.”³⁸ “Self-regarding power that the property holder himself or herself may do or direct be done with the property”; other-regarding powers for instance all persons (not just specific individuals) are required to refrain from interfering with a property holder’s rights.”³⁹

It is a well known principle that in the U.S.A, legitimately obtained property rights have been shield from arbitrary interference by the government. Consequently, the government may not impose any disadvantage on an individual’s property interests, including the deprivation of property that the individual possesses in accordance with legal rules, unless it follows proper procedures. Property rights serve “twin roles- as protector of individual rights against other citizens and safeguard against excessive government interference”.⁴⁰ Government has two mutual powers, the power to define and defend the property rights so it establishes the basic frame work of legal relationships.⁴¹ Nonetheless, when it defines property rights, it may leave individuals vulnerable to infringement of their property rights. Hence property law not only protects the right holder against other person’s power but also it serves as a safeguard against unjustified government power. The Constitution of FDRE stated how property law regulates the relationships between individuals, between individuals and societies, and between individuals and government. Sub-article 1&8 of article 40 of the Constitution guarantee property rights in the following terms: “unless prescribed otherwise by law, every Ethiopian citizen has the right to ownership of private property in a manner compatible with the rights of others”; “government may expropriate private property subject to compensation”. Article 9(1) ensures the supremacy of this stipulation by stating that “any law, customary practice or decision of an organ of the state or a public official which contravenes the Constitution shall be of no effect.”⁴²

³⁶ Willam Cohen and Jonathan D.Varat (1997): Constitutional Law, Cases and Materials, 10th ed. Westbury, New York press, Inc. p.1071.

³⁷ Supra note, No.20, p, 25

³⁸ Ibid

³⁹ Ibid

⁴⁰ Supra note No.9 , p.1173

⁴¹ Id

⁴² FDRE Constitution, 1995, article 40 and 9

The U.S. Supreme Court, has, in interpreting the Constitution, invented the doctrine of “police power” that governments are limited in the exercise of their power in regulating the creation and transfer of interests in property, disposition and use of property. The due process clause of the Fifth and Fourth Amendments to the US Constitution provide that no state shall deprive any person of property without due process of law.⁴³ “Due Process” limits the police power of taking property. When property is taken by or under State power of “eminent domain,”⁴⁴ it must be for a public purpose and is subjected to due process. Attacks on the validity of both Federal and State exercise of power of eminent domain raise for judicial consideration of the extent to property may be taken and whether the a purpose contemplated is in fact a public purpose.⁴⁵ There is, of course, a role for court to play in reviewing a legislature’s judgment of what constitutes a public purpose, but it is an extremely narrow one, the Court will not substitute its judgment for a legislature’s judgment as to what constitute a public purpose “unless the purpose is palpably without reasonable foundation.”⁴⁶ Hence, “the Court will not strike down a condemnation on the basis that it lacks a public use or public purpose so long as the taking is ‘rationally related to a conceivable public purpose.’⁴⁷ Judicial deference is required because in the American legal system it is accepted that legislatures are better able to assess what public purpose should be advanced by an exercise of the taking property.⁴⁸

Therefore, the government has in principle the power to take private property on grounds that are “reasonable and reasonably related to the public purpose subject to just compensation. It is only unreasonable or arbitrarily interference with the use of private property that is unconstitutional.”⁴⁹ In *Pennsylvania Coal Co. v. Mahon*, the U.S. Supreme Court ruled that the

⁴³ Henry Rottschaefer (1939): Hand Book of American Constitutional Law, St. Paul., MINN. West Publishing Co. P.516

⁴⁴ “Black Law Dictionary” defined the term “eminent domain”: “the inherent power of a governmental entity to take privately owned property and convert it to public use, subject to compensation for the taking.”; Grotius believed that the state possessed the power to take or destroy property for benefit of social unit, but he believed that when the state so acted , it was obligated to compensate the injured property owner for his loss; Blackstone, too, believed no general power to take the private property, except compensation.”

⁴⁵ Edward L. Barrett, Jr. William Cohen (1981): Constitutional Law Case and Material, 6th ed. Mineola, New York. P.582.

⁴⁶ Loannis G. Dimitrakopoulos (2007): “Individual Rights and Liberties under the U.S. Constitution”. The Case Law of the U.S. Supreme Court, Martinus Nijhoff publisher Boston. Pp. 817-818

⁴⁷ Ibid.

⁴⁸ Ibid

⁴⁹ Chester J. Antieau (1960): Modern Constitutional Law, vol. I. Rochester, New York. Pp. 206-208

regulation of the use of private property will become unconstitutional “when it goes so far as to become a taking” of the property.⁵⁰ If the use of private property were subjected to unbridled, uncompensated qualification under the police power, “the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed].”⁵¹ This decision gave birth to the Court’s regulatory taking jurisprudence.

In another case *Missouri Pacific R. Co. v. Nebraska*⁵², the U.S. Supreme Court, stated that “Property may not be taken even if compensation is offered, unless the taking is for “public purpose”. Thus taking private property arbitrarily without there being a public purpose justification and paying compensation does not coalesce with the notion of rightful governmental taking.

The German Constitutional Court for its part has made clear that taking cannot be justified simply by providing adequate compensation. Article 14 of the German Constitution guarantees property itself, not of its equivalent in money.⁵³ Consequently the Constitutional Court has scrutinized attempted “takings carefully to ensure that constitutional limitations other than the compensation provision have been observed.”⁵⁴ The Court also argued that “the guarantee of property rights is not primarily a material but rather a personal guarantee.”⁵⁵ Article 14 of the German Constitution⁵⁶ states “property and inheritance are guaranteed.” German Constitutional Court has interpreted this provision as guaranteeing the existence private property as a legal institution.⁵⁷ Further, it has expressly characterized the right to private ownership of property as “an elementary basic right”. However, there is asymmetry on the degree of protection of property rights between the U.S. Supreme Court and the German Constitutional Court.

⁵⁰ Ibid.

⁵¹ William Cohen and Jonathan D. Varat (10th ed. ,1997) : Constitutional Law Case and Materials, the Foundation Press, INC. P.561

⁵² 164 U.S. 403 (1896)

⁵³ Article 14 of Basic Law for the Federal Republic of Germany Print version last amended on 23 December 2014

⁵⁴ “European and International Jurisprudence”, German Law Journal Review of Developments in German, Vol. 09, No.12, (2008), www.germanlawjournal.com , pp.2081-2308

⁵⁵ Ibid

⁵⁶ Basic Law for Federal Republic of Germany last amended on 23 December 2014.

⁵⁷ Id, (BVerfGE 24, 367, 389 (Hamburg Flood Control Case)

Thus we can safely conclude from the above summary that property rights are protected from unjustified government interference both in the US and German legal systems. There is a constitutional guarantee to due process for those who are affected by government's decision to take property for public purposes. The 1995 FDRE Constitution however does not explicitly guarantee the right to "due process" of law. But it can be argued that elements of due process principle can be read into the relevant provisions of Article 40.

2.3. The extent of protection Property Rights Clause of the Constitution of the FDRE

The extent of legal protection varies depending on interest being protected.⁵⁸ One type of property interest may primarily protect economic goals, while another type may primarily protect personal privacy. Property rights involve many different kinds of interests and social contexts. The Ethiopian Constitution's property clause⁵⁹ protects property interests.

Thus, one may ask: What is the extent of protection given by the property clause of the FDRE Constitution? Is property treated as a fundamental right with equal status to liberty, to life, to the right to vote etc.?

As we can see the structure of the FDRE Constitution,⁶⁰ it categorizes property rights under part two on 'Democratic Rights'. There is no apparent reason stated as to why property rights are categorized under Democratic Rights that emanate from juridical and political status. The Minutes of the Constituent Assembly that ratified the Constitution simply show that the debate was focused on whether 'private property' or 'property' to be incorporated into the Constitution; and who can own private property: "any person" or "only Ethiopian citizen." The debate finally concluded incorporating "private property" in the Constitution and bestowing the right of private property ownership on "every Ethiopian citizen."⁶¹ Nothing is stated in the Minutes as regards the status of property rights and the function of property clause of the constitution. Unlike the

⁵⁸ Supra note, no. 16

⁵⁹ FDRE Constitution, 1995, *Neg. Gaz.*, 1st year, No.1 Article 40

⁶⁰ FDRE Constitution, 1995, *Neg. Gaz.*, 1st year, No.1

⁶¹ የሕግ መንግሥት ኮሚሽን 88ኛ መደበኛው ስብሰባ ቃለ ጉባኤ፣መጋብት 29 ቀን 1996፣ቁጥር 000233. www.abysiniaw.com

constitutional systems of the US and Germany,⁶² it is not possible to say that property rights are given the status of fundamental rights in the Ethiopian legal system.

Gregory S. Alexander, cited above, has precisely compared and argued on the asymmetry between the courts and their constitutions' approach of treatment of protection to property rights. He stated that American courts generally do not recognize (at least not openly) the functional differences just drawn; the German Constitutional Court sharply and explicitly does.

The German court distinguishes between those property interests whose function is primarily or even exclusively economic, especially wealth-creating, and those that primarily serve a non-economic interest relating to the owner's status as a moral and/or political agent. Only the latter are protected as fundamental constitutional interests. "Property is a fundamental right, accorded the highest degree of protection, in German constitutional law only to the extent that the affected interest immediately at stake implicates the owner's ability to act as an autonomous moral and political agent."⁶³ But it does not mean the German Constitution treats property as a fundamental right across the board. German constitutional law treats property as a derivative, or instrumental, value in the general constitutional scheme. "It strongly protects a particular property interest only to the extent that the interest immediately serves other, primary Constitutional values, in particular, human dignity and self-governance."⁶⁴ Thus the German Constitutional Court has adopted an approach that is both purposive and contextual, while the American Supreme Court has not. The FDRE Constitution did not say anything about the extent of its property clause. This issue has not been addressed by the Council of Constitutional Inquiry (CCI) and House of Federation (HoF).

⁶² Gregory S. Alexander (2003): "Property as a fundamental Constitutional Right? The German Example", Scholarship @ Cornell Law: A Digital Repository, http://scholarship.law.cornell.edu/clsops_papers . Visited May 2017

⁶³ Id.

⁶⁴ Id

2.4. How to interpret the limitation in the property clause of the Constitution of the FDRE

Property rights are not absolute. It may be proscribed if certain legal requirements are fulfilled. The FDRE Constitution, in its Article 40(1), provides that property rights can be limited on account of “public interest if prescribed by law”. Article 40(8) also stipulates that private property may be expropriated “for public purpose subject to payment in advance of compensation commensurate the value of property”. Sub 1 of article 40 of the Constitution further provides that the right to dispose of private property by sale or bequest or to otherwise transfer such property should be done in a manner compatible with the rights of other citizens.

As noted earlier, Article 40 (1) of the Constitution states that the existence of “public interest” could be the ground to limit or even extinguish a given private property and no mention is made of the notion of “[just] compensation.” Instead, it simply states that deprivations are subject to the conditions provided for by law. In theory, of course, that law could provide for just compensation, but there is no guarantee in the Constitution for owners or possessors of property against deprivation of their property rights without just compensation.

In contrast Article 40(8) of the constitution has imposed two conditions on public officials/government/ taking: first condition the “public purpose,” and if that test of public purpose is met, the second condition is that the holder of the property must be paid compensation. Article 40 (1&8) stated two concepts “public interest” and “public purpose”, both requirements may serve as justification condemnation private property rights.

As one may infer from the FDRE Constitution, government has the original power to take private property for public purpose so long as it pays compensation,⁶⁵ but that the process of intrusion into property rights requires protection from illegal deprivation. As stated in the Constitution, subject to payment in advance of “compensation commensurate to the value of the property” the government may expropriate private property for “public purpose”.

Overall, the provisions of Article 40 of the Constitution could be subjected to a number interrogative examinations owing among others to their generality. For example the following

⁶⁵ FDRE Constitution, 1995, *Neg. Gaz.*, article 40(2 & 8) stipulate that as the right to ownership of private property is limited for public interest and is expropriate for public purpose subject payment in advance of compensation to the value of the property .

questions are relevant: what kinds of government action amount to interference to property rights? What is a “public purpose”? What is the nexus between taking property and public purpose? These and other related questions are in need of resolution. The current proclamation No. 455/2005 stated expropriation of landholdings for public purpose and payment of Compensation, defines “public purpose” as:

The use of land defined as much as by the decision of the appropriate body inconformity with urban structure plan or development plan in order to ensure the interest of the people to acquire direct or in direct benefits from the use of the land and to consolidate sustainable socio-economic development.

Nevertheless, this definition is very broad to clearly enumerate the types of activities tantamount to “public purpose.” The definition employs the “direct” or indirect benefits” that it offers to society as the standard.

Proclamation lease holding of urban lands 721/2011 defines “public interest” as: “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 consolidate sustainable socio-economic development.”⁶⁶ According this proclamation there are two elements will be well considered here: one it is only the appropriate body that is empowered to determine certain activity entails “public interest.”

The other element the direct and indirect usability of the land by the people can be deemed to entail public interest. Therefore, the scope of public interest in this proclamation is also broader. The definition infer the guardian of public interest to be served by appropriate body, it is the government officials power to determine “direct and “indirect” “public interest.”⁶⁷ Once the object is within the authority of the “government” the right to realize it through exercise of

⁶⁶ FDRE proc. No. 721/2011, 2011, Neg. Gaz., article 7

⁶⁷ Federal Democratic Republic of Ethiopia Minister of Urban Development and Construction (ታህሳስ 2005): የከተማዉ የልማት ግብ እና ፍላጎት የከተማ መሬት ዝግጅት ዕቅድ የከተማዉን የልማት ግብ እና ፍላጎት ታሳቢ ያደረገ መሆን ይገባዋል። “የከተማዉ የልማት ግብ ከሀገራዊ የዕድገት እና ትራንስፎርሜሽን ዕቅድ እና ከከተማዉ በተጨማሪነት የሚተለም ግብን መሰረት ያደረገ ይሆናል”። “በዚህ መሰረት የከተሞችን የልማት ግብ ታሳቢ በማድረግ ለመኖሪያ ቤት፣ ለኢንዱስትሪ፣ ለአካላዊ እና ጥቃቅን ተቋማት፣ ለማህበራዊ፣ ለነዚህ ተግባራት የ ግል ንብረት ይወሳዳል።

eminent domain is clear. The scope of the power and application of the power to determine the affairs will not be limited. For the power eminent domain is merely the means to the end. Here one of the means chosen is the use of private enterprise for redevelopment the area.⁶⁸ This makes the project a taking from one business for the benefit of another business man or from the peoples for the benefit of one individual or one company.

The public purpose or public interest requirement stated in Constitution and legislation is not understandable with the scope of government's taking power. There is, of course, the role for the House to play in reviewing a legislature's judgment of what constitutes a public purpose or public interest. The House's review has to balance the two interests; however the House has never been able to develop a standard more meaningful than balancing the public purpose or public interest against private Constitutional property.

If we may take the question of 'public purpose' or public interest, we see that the FDRE Constitution left it without any definition making it subject to the absolute discretion of the legislative and executive branches of the government. The concept of public purpose may be articulated variously but broadly speaking one finds two conceptions of public purpose, which can be described as the minimalist and maximalist views of public purpose.⁶⁹

The test of public purpose under the minimalist view concerns with "what is done with the taking of the property. If the property taken is used to benefit one or few persons then the taking cannot be said to have been done for a public purpose." "Hence in this view, public purpose shall be construed to mean: "the private property taken through eminent domain must provide its intended use to the public. The public must be entitled, as of right, to use and enjoy property."⁷⁰ The maximalist view, in contrast, supposes that public purpose includes: "...anything which tends to enlarge the resources, increase the industrial energies and promote the productivity of any considerable number of inhabitants or section of the state, it considers the general welfare and prosperity of the community."⁷¹

⁶⁸ Ibid

⁶⁹ Supra note no. 20, p. 26

⁷⁰ Id

⁷¹ Id

The FDRE Constitution stipulates private property can be limited to protect the public interest and the rights of all citizens. Article 40 (1) of the Constitution has stated limitation of property rights when “prescribed by law”. It is the legal proscription that the text of the constitution has prescribed. Whereas article 40 (8) of the constitution stipulates the government may expropriate private property for public purpose subject to payment compensation in advance. But, sub-article 8 of 40 did not expressly stipulate the limitation on the government power even if it pays compensation can it expropriate private property without for public purpose justification .Thus it is seemed required interpretation the conditions of under article 40(8) of the Constitution free government power taking property . The FDRE Constitution in its Chapter three connotes that limitation of rights can be done when “prescribed by law” or based on “procedures established by law”, or “determine by law”, or “in accordance with specific law”, or “be limited through law”, or by “appropriate law.”⁷² From these expressions one might get into dilemma whether the makers intended procedural or substantive limit of rights. The makers did not use anywhere in the Constitution the phrase of “due process or “procedural due process” or “Substantive due process”.

The Minutes of the Constituent Assembly say nothing, and there is yet no jurisprudence of CCI and HoF on these matters. One might say the makers of the Constitution sought to provide, instead, that any law either procedural or substantive would safeguard the “property rights” against tyranny of executive or administrative action or judicial decision. It is possible sound to read into the Constitution described both substantive and procedural due process. Decentralized or centralized systems of constitutional review prove that interpreters develop jurisprudence regarding the requirements of taking property for public purpose. In this regard, lessons could be drawn from the decisions of U.S. Supreme Court, Supreme Court of Canada, and German Constitutional Court.

⁷² See FDRE Constitution, 1995, Neg. Gaz. Its provisions stated limitation of rights as follow: Art. 17 " Right of liberty may be limited on the grounds and in accordance with procedures are established by law"; article 15 " a person may be deprived of his/her life for a punishment for serious criminal offence determined by law" ; Article 26 "Right to privacy may be restrict in compelling circumstances and in accordance with specific laws whose purpose for safeguard of national security or public purpose.."; Article 27 " freedom to express on manifest one’s religion of belief may be subjected to restriction as are prescribed by law to protect public safety , peace, health , education , public morality” , and Article 29 “ The right of though, opinion can be limited through laws...”

According to William Cohen and Jonathan D. Varat analysis of the jurisprudence of U.S. Supreme Court on the taking property, there are three discrete categories of regulatory action or administrative decisions as compensable without case-specific inquiry into the public interest advanced in the restraint. The first encompasses regulations that compel the property owner to suffer a physical “invasion” (at least permanent invasion) of his property has to be compensated, no matter how minute the intrusion, and no matter how weighty the public purpose behind it.⁷³ The second situation is about the categorical treatment appropriate where regulation denies all economically beneficial or productive use⁷⁴; and the third situation arises when regulation requires that property be made physically available for public use.⁷⁵

Moreover, Decentralized and centralized Constitutional review systems have developed proportionality principle to test degree of government intrusion in property rights. Both systems use the principle of reasonableness to test government power of interference into individual’s rights. In spite of some Scholars’ arguments that proportionality and reasonableness represents different ideas, indeed, both principles are related and their application leads to similar result, their closeness on the continuum of limitations on government discretion. There is an experience where the two principles coexist effectively.⁷⁶ Proportionality incorporates three sub principles: “Suitability that the tendency of the course of action to achieve the desired end, necessity requires the least intrusive, and proportionality in the narrow sense.”⁷⁷ Regarding proportionality in the narrower sense, “the burden resulting from the measure must not be excessive in relation to the public interest concerned.”⁷⁸ Jurisdictions like Canada, German and U.S.A. Courts have applied the proportionality test extent government power interference into property rights for public purposes. France employs the principle of proportionality to create a means of effective control over growing executive discretion and government intervention into private affairs. U.S. Courts have largely applied ends-means proportionality to ensure that there is a congruent relationship between the evil and the means used. More important, the U.S. Supreme Court has

⁷³ Supra note, No.34, pp. 542-544

⁷⁴ Ibid.

⁷⁵ Ibid

⁷⁶ E.Thomas Sullivand and Richard S. Frase (2009): Proportionality principles in American law controlling excessive government actions, Oxford University Press, Inc. pp. 26-31

⁷⁷ Id

⁷⁸ Id.

explicitly used the term “proportionality” in several matters that came under its review in particular property permit conditions (In *Dolan v. City of Tigard*; In *Nollan v. California Coastal Commission*).⁷⁹

In essence, Canada and German jurisdictions follow the same path when they apply proportionality test. Since the test requires a means-ends comparison, both Courts start by ascertaining the purpose of the law under review. Only a legitimate purpose justify limitation a property rights. Once the claimant has proved a violation of a right guaranteed, the government must satisfy the “measures limiting a constitutionally protected right must serve an important objective that relate(s) concerns”⁸⁰ and once an important public objective or end has been established, the selected means to attain it must be ‘reasonable and demonstrably justified this determination involves “a form of proportionality test.”⁸¹

The test involves the balancing of public and individual interest based on the three steps proportionality principle test. First step, while the Canadian Court requires the means must be ‘rationally’ related to the objective; the German Constitutional Court asks whether the law is ‘suitable to reach its end’; Second step, the Canadian Court asks in pursuing its end the means should “impair as little as possible the right’ or ‘minimal impair’; the German Court ask ‘the necessary’ to reach end or ‘less intrusive means exists’ that will likewise reach the end; Third step, both countries test a cost-benefit analysis, which requires a balancing between property right interests and the good in whose interest the right is limited. That public objective and actual effects of the means adopted for its attainment must be proportionate to an important public end or objective.⁸²

The House of Federation the body given the power to interpret the Constitution has not yet adopted any clear interpretative approaches in its decisions. Moreover, the FDRE Constitution does not say anything about the relevance foreign jurisprudence. However, Proclamation No. 251/2001 which was enacted to consolidate the House of Federation (HoF) authorizes the HoF to identify, develop and implement principles of constitutional interpretation as it deems

⁷⁹ Id
⁸⁰ Id
⁸¹ Id
⁸² Id.

appropriate.⁸³ This enables the HoF to look into foreign comparative jurisprudence in consolidating its own principles of interpretation.

To conclude the chapter, the concept of property has not properly defined by Ethiopian laws. Also, the laws are vague in limiting property rights in that the public purpose or public interest requirement stated in the Constitution and legislation is not understandable with the scope of government's taking. Only a legitimate purpose justifies limitation a property rights. This determination involves a form of proportionality test. However, this test is not incorporated in Ethiopia laws to justify government power for taking private property. In addition, the Ethiopia Constitution does not say anything about the relevance of foreign jurisprudence. However, the House of Federation is a body that has been given the power to interpret the Constitution and it has been expected to adopt any clear interpretative approaches in its decision. It is the House's role to fill the legal gaps and practical problem through Constitutional interpretation. How far the practical experience of the House Constitution interpretation and taking Constitutional property rights are compatible with Constitution will be examined in the following analysis of practical cases and laws.

⁸³ See Article 7(1) of proclamation no.251 /2001, a proclamation to consolidate the HoF of FDRE and to define its power and Responsibilities , Neg. Gaz., 7th year, no.41

CHAPTER THREE

THE JURISPRUDENCE OF THE COUNCIL OF CONSTITUTIONAL INQUIRY AND THE HOUSE OF FEDERATION ON PROPERTY RIGHTS CASES

3.1. Introduction

This chapter will present analyses of the recommendations and decisions of the CCI and of the HoF relating to property rights claims brought before them. It will do so by taking some property rights claims entertained by these bodies over the past years. As discussed in the chapter 2, the Ethiopia Constitution permits the limitation of property rights on account of public purpose in a manner prescribed by law.⁸⁴ However, such an infringement will not be unconstitutional if it takes place for a reason and a purpose most people would regard as particularly important. The existence of a limitation clause in the Constitution does not mean the property rights can be limited for all kinds of reasons. The need for taking and limiting property has to be exceptional that the intended public purpose will be served by limitation.

Earlier in Chapter 2, the thesis has discussed the property rights jurisprudence of liberal societies such as the USA. It might need emphasizing that this thesis does not argue for the wholesale emulation of that jurisprudence. The thesis rather argues that the interpreters of the Ethiopian Constitution need to adopt a principled approach to uphold the rights guaranteed by the Ethiopian Constitution.

This chapter is organized as follows. The next section 3.2 provides a short overview of the relevant laws along with the analyses of some case. Section 3.3 provides analyses of effect and enforcement decisions of the House.

⁸⁴ Article 40 (1) of the Constitution

Laws and Cases on Taking of Property

3.2. Physical Taking of Property

3.2.1. The Laws

Ethiopian laws including FDRE Constitution permit physical taking or expropriation of private property for public purpose and with the payment of commensurate compensation. Some proclamations such as the expropriation landholdings for public purpose and payment of compensation No.455/2005 and the lease proclamation 721/2011 regulate private property rights. However, some provisions of these laws arguably encroach on constitutionally guaranteed property rights of those subjected to them.

The Lease Proclamation No. 721/2011 stipulates a lease period of minimum 15 and maximum 99 years. The period varies depending on the level of urban development, sector of development and service.⁸⁵ The proclamation provide as a principle the lease contract can be renewed based on the written desire expressed by lessee 2 to 10 years before the expiry of contract. However, when the municipality wants for other activities or if the master plan opts for other purposes the lease will not be renewed. The effect of non-renewal of lease rights is that the land will be taken by the government and the owner removes his property from the land without compensations.⁸⁶ The lease proclamation states “public interest” as a ground for the government to take the land thereby limiting private property. As I have argued in chapter 2, “public interest” has a wider meaning than “public purpose” that is stipulated under article 40 of the Constitution. Thus, any appropriate urban administration authority is empowered to ‘take over private property on the land with the land without paying any compensation for the value of erected property on the land once the lease period comes to an end.’⁸⁷ Daniel Weldegebriel criticized this saying that the “the possible problem that may be forwarded against such provision is that may create tenure insecurity and hysteria when expire date approaches.”⁸⁸

⁸⁵ Article 18 (1(a/1) &2 (1/a & b) of the lease proclamation 721/2011

⁸⁶ See Article 18 and 19 of the lease proc. 721/2011

⁸⁷ See Article 20 (6) of proc. 721/2011

⁸⁸ Daniel Weldegebriel Ambaye(2012): “Land Rights in Ethiopia: Ownership, equity, and liberty in land use rights.”Peer Reviewed Paper FIG Working.

3.2.2. The Cases

Although the CCI and the HoF have not yet directly dealt with cases involving public purpose/interest based expropriation matters, the ordinary courts, particularly the Federal Supreme Court's Cassation Division has decided issues interpreting legislation by indirectly applying the constitution as they do not have the power to review constitutionality issue. When it is alleged that the Cassation Division's decision violates Constitutional property rights, the injured party may seek the final remedy from the House of Federation which has the power to review Constitutionality. It is the House's power to protect and to ensure supremacy of the Constitution by directly applying the Constitution and interpreting the Constitution upon the recommendation of the Council.

The decision of the House shall consist of the justification for whether constitutional interpretation is necessary.⁸⁹ However, as examination of the determinations made by the HoF and the CCI show, their interventions so far do not clearly show consistency of interpretation. Their decisions lack predictability and consistency, and do not show adequate reasoning about why a case before them need or does not need constitutional review. Below, I shall attempt to examine some recommendations and decisions of the CCI and of the HoF to further explain my arguments.

One of the cases that ended up before these bodies was the cases of *Tolessa Wirtu (claimant) v. Ethiopia Electric Power Corporation (EEPC) Fincha Nesh Hydro Electric Project*.⁹⁰ The Claimant brought the case to an ordinary court claiming that his property was taken by the defendant without payment of compensation. After receiving unfavorable decision from the Federal Supreme Court's cassation Division, he resorted to the Council for Constitutional review.

The Claimant alleged that he made an investment on 250 hectares of land which was confiscated without compensation for relocating people who were displaced as a result of the defendant's (EEPC) hydroelectric construction project in the area. His main claim was to be compensated for the property lost or taken. The lower court decided in favor of the claimant (Tolessa Wirtu) saying that the defendant had to pay compensation.

⁸⁹ Article 15 of the proc. 251/2001

⁹⁰ Ato Tolessa Wirtu v. Ethiopia Electric Power Corporation, File No. 950/05, the CCI session Nov.15/2008 E. C .

The Federal Supreme Court (FSC) having assessed additional evidence reversed the decision of the lower Court. The FSC's Cassation Division maintained the decision of the FSC. After exhaustion of the regular Courts' possible remedies, the Claimant sought the House's constitutional review through the Council, alleging that the decisions of the government organs and the Cassation Division's decision violated his constitutional property rights stated under article 40(7).

The CCI while dealing with the complaint embarked upon its own investigation and gathered evidence from different concerned bodies. The evidence it looked into conclude those produced by the Ethiopian Institute of the Ombudsman which made physical investigation of the property in dispute by going to the location. The Council also received evidence from Oromia Investment Board. The Council established that the claimant's property was taken for development purpose without any compensation. Moreover, it discovered that the decisions of the FSC and the Cassation Division were based on inaccurate evidence produced by Horo Guduru Zonal Administration. Its own inspection revealed that the Complaint's property was taken because of an administrative malpractice and that procedurally, the claimant's constitutional property rights were violated.

However, the CCI rejected issue of unconstitutionality of the decisions of the courts stating that the "claimant has the right to recourse and to seek review of judgment in ordinary court that gave judgment according to article 6 of the Civil Procedure Code." I believe the decision is not sound. The Council should have determined that there was a violation of constitutional rights and submitted its recommendation of Constitutional interpretation to the House because of the following reasons.

First, the decisions of the government officials and organs, including the Cassation Division's decision, which were founded on a malpractice and that followed unconstitutional procedures did violate the constitutional property right stipulated in article 40 of the constitution that is undergirded by the affirmation of the claimant's natural rights on his own labor and his invested capital and resources. The claimant invested his own labor into the taken property; he gained a natural right to control that property by virtue of his intrinsic right to his labor. An appropriation of property into which one does not invest his labor without acceptable justification is an impermissible appropriation that violated the supremacy of the Constitution. Secondly, the

process followed in making the decisions of taking the property in question seems to have violated due process of law.

Thirdly, it was an arbitrary decision as prior notice was not given to the claimant to expropriate. Neither was there a notification of property valuation nor compensation assessment and payment of commensurate value of the property paid. The claimant should be protected against uncompensated taking of property, the state whether Federal or Regional cannot lawfully take property unless it pays for it. If the government is pursuing a valid public measure in exercising its right to expropriate, it is just that the costs of its action be shared by the citizenry as a whole, and not borne only by the deprived owner.

Finally, it was not clearly identified whether the project undertaken for public purpose was proportional with the cost of the constitutional property rights. The private property taken through eminent domain must provide its intended use for public purpose. The action of the government must satisfy the Council and the House that the public purpose that is promoted by the action outweigh and compensated for whatever limitation are imposed on individual property rights-that it will do more good than harm and proportional.

There are other cases that the House decided upon recommendations of the Council. The case of W/ro Birke Legasse (Claimant) v. Black Diamond and Bole Kifle Ketema Wored 11 Administrative (Defendants) is one of those.⁹¹

The history of the case shows that the Claimant had land which she was using for agriculture which she inherited from her deceased family. The Ethiopian Roads Authority used the land without her consent; it dug sand from the land claiming for the purpose of development and dispossessed her without compensation. After the Roads Authority left the place without any payment of compensation to her, the first defendant in the case, a private Company (Black Diamond PLC) took over the land to dig out sand without compensation to the plaintiff in regards to the deprivation of her use right over the land in question. The second defendant (Bole kifle Ketema Administration) was unwilling to restrain the first defendant from its act.

⁹¹ The House decision in the 5th parliamentary period, 1st year and 3rd regular session, 15 May 2008 E.C.

The Claimant filed a suit to ordinary Courts alleging that the actions of the defendants deprived of her property without compensation. However, all levels of the regular court rejected her case stating that she did not have the rights to enable her to bring the claim. The Court's justification and main argument for rejection stated as: "Before the first defendant took over the land to dig out the sand, the Claimant did not have holding right of the land thus she could not have right and interest to bring the claim and file a suit."⁹² The Complaint then brought her complain to the CCI.

The Council found that the complainant's constitutional rights have been violated and recommended constitutional interpretation on the matter to the house. Its recommendation stated that 'the complainant's land user right was taken without relevant compensation in violation of article 40(8) of the Constitution' The House also found that the Federal First Instance and Appellant Courts' decisions violated property rights of the complainant and by the operation of article 9(1) of the Constitution "their decisions should not have any effect"; and the complainant's Constitutional land use right has to be respected."

But the problems of the recommendations are:

First, the CCI did not analyze its recommendation according to the doctrines of constitutional review, it simply cited provisions of the Constitution and recommended to the House; Secondly, the House also adopted and ratified the recommendation as it is without identifying and implementing principle of constitutional interpretation. As the facts of the case show what was done by the defendant company was a pure act of deprivation of private property. That it is not justified in any way public purpose. No benefit to the public at large and to the general welfare and to prosperity of the community has been demonstrated. The public purpose requirement needs to be measured in light of the benefit to the general welfare and prosperity of the community. Thus the action was done by the private Company in this case was not reasonable and was an unjustified violation of constitutional property rights.

Thirdly, recommendation and decision could have been analyzed in light of doctrines and principles of constitutional interpretation. If it were done in that manner, it would have

⁹² Id

contributed to the development of constitutional rights jurisprudence applicable to constitutional property rights in Ethiopia. Constitutional review is not an easy job, it is a decision of giving life to constitutional document in the society and it is not only interpreting the Constitution to the present dispute but it is interpreting it in light of past and in light of the future as well as vindicate the constitution and deter future infringements. Thus the Council and the House's recommendations and decisions both lack desirable constitutional interpretative methodology

3.2.3. Constitutional Review of Regulatory Taking of Property

Regulatory taking of property is one of the mechanisms by which government limits the private property for public purpose. There are cases in which the private property rights of individuals are interfered with without payment of compensation for the installations of water pipe, Electric cable, etc.

In such cases, unlike the physical taking of private property, government has the power to encumber private property by proclamation or regulation or directive without preventing owner's full rights. Through passing law, the government may act on private property without destroying the economic benefit of private property, for instance by undertaking installations of cable of telecommunication service, electric wires, and water pipe over and under the ground. When government acts within the legitimate sphere and makes a diminutive infringement on private property interests as "damnum sine injuria"⁹³—damage without a wrongful act—then thus is loss or harm for which there is no legal redress.

However, the question is what regulatory intervention into private property rights amounts to expropriation? If regulation of the type described above goes too far, how does the HoF review the constitutionality of the governmental regulatory interference into constitutional property rights? When government acts have disproportionately negative effects on property holders' rights, it is tantamount to destroying individual constitutional property rights without

⁹³ "Black's Law Dictionary" (4th ed.) explains "Damnum sine injuria" as: "there are many forms of harm of which the law takes no account, the reasons for its permission by the law are various and not capable of exhaustive statement."

compensation. Thus because it is a kind of government regulation that affects use property rights which constitutes expropriation or taking of it, this requires the protection of the Constitution. .

The Amahric version of Article 40 (8) of the FDRE Constitution states that the government can ‘take’ private property for public purpose. The Amharic equivalent of the word ‘take’ seems to give the meaning that amounts to taking of property which includes regulatory taking and physical taking of property.

The English version of Art 40(8) uses the word ‘expropriation’, both versions provide the pre-conditions of public purpose and compensation to take property. Similarly, Proclamation No. 455/2005 (Art. 3) provides that rural or urban land holdings can be expropriated for public purpose against payment in advance of compensation. This Proclamation defines ‘public purpose’ too broadly and equates it with development activities. Regulations No.135/2007⁹⁴ enacted to enforce Proclamation No. 455/2005 emphasizes not only paying compensation but also the assistance to displaced persons to restore them to their livelihood.

Article 26 of Proc. 721/2011⁹⁵, the Lease Proclamation, stipulates the power of appropriate body where it is in the public interest, to clear and take over urban land upon payment of commensurate compensation, in advance, for the properties to be removed from the land. Urban Planning Proclamation No. 574/2008⁹⁶ states that any urban land holder whose land holding is dispossessed as a result of implementation of urban plans shall be paid compensation, pursuant to the relevant laws. Its scope of application is to all urban centers throughout the country. According this Proclamation “development “ means the carrying out of building, engineering works, mining of any substantial change in the life of any structure or neighborhoods; and no development activity may be carried out in an urban center without a prior development authorization.

Proclamation No. 574/2008 entertains a notion of ‘development freeze’. According to article 49, chartered city or urban administration has the power to introduce development freeze “when the development is likely to increase the value of property, and consequently affect any future action

⁹⁴ Council of Ministers Regulations No. 135/2011, Fed.Neg. Gaz., 13th year No.36

⁹⁵ Urban land leas holding proc. 721/2011, Fed. Neg.Gaz, 18th year No.4

⁹⁶ Urban plan proclamation, Fed. Neg.Gaz., 14th year No.29

of expropriation in the case of change land utilization.” The power given to government could amount to a restriction on one’s property preventing owners from developing their property and thereby sustain economic loss. However, this power has not been put to use yet as my interview with Ato Melaku Gebeyhu, head of the Office of assessment of compensation for expropriated property of the City Administration of Addis Ababa.

But the question remains whether the exercise of the power to freeze by the government should be considered as a regulatory taking of private property and be subjected to some compensation for those affected by such decision. In my view, the disproportional regulatory interference into constitutional property rights without compensation deprives owners of the recognized elements of the bundle of property rights. Thus compensation needs to be paid in accordance with Art 40 of the Constitution whenever the law curtails the potential economic exploitation and abridges the economic value of property rights.

3.2.4. Decision on Leased Business Right Case

As stated in Ethiopia Commercial Code a business is element of intellectual property and consists incorporeal and corporeal elements organized for the purpose of carrying out of the commercial activities.⁹⁷ Incorporeal (intangible) elements forming a business those are goodwill, trade name, trade mark, and commercial lease rights. Corporeal elements of a business are equipments, goods or merchandizes.⁹⁸

Since they are rights, they can obviously be assignable: leased, licensed, sold etc. It is possible to put a dichotomy between businesses and premises/ house/ in which the business is carried out. The sale of business does not entail the sale of the premises, the same interpretation also goes lease of one element of business does not entail the lease of premises in which business is carried out unless otherwise agreement of lease contract of lease stated.⁹⁹ The implication of excluding immovable property as non-constituent element of a business is that any legal transaction involving the business does not affect that immovable premise is not part of the business.¹⁰⁰ The

⁹⁷ Article 5 and 124 Commercial Code of Ethiopia

⁹⁸ 127 & 128 Com. Code

⁹⁹ Article 151 (2) Com. Code

¹⁰⁰ Yazachew Belew (2010): *Journal of Ethiopia Law*, Vol. XXIV No.2. pp 95-96

owner of the business has the rights of mortgage and leases his business.¹⁰¹ When a person carries on a business in an immovable which he does not own but which is leased to him, his lease right of business is secured by law.

Any provision in the contract of lease premises which prevent the lessee from assigning the contract of lease or sub-letting the premises to the person who buys the lessee business, or sub-lease dependent on the lessor's consent shall be of no effect.¹⁰² This right neither explicitly nor impliedly is repealed by authoritative law maker. The FDRE Constitution recognizes the protection of property rights: "every Ethiopian has the right to ownership of private property with certain restrictions."¹⁰³ Constitution declares protection for every property whether it is tangible or intangible. Thus Constitutional protection is afforded equally for business property rights as any other property since it is intangible (incorporeal) products. Despite the fact that in practice there is wrong perception about business rights, judicial decisions seem improperly interpreted Constitutional business rights. Instance the case of Tatek Hauilamariam (1st Applicant) and Government House Agency (2nd Applicant) v. Ayale Habtesilassie (Respondent).¹⁰⁴ Government House Agency leased premises/house/ in which the business was carried out to respondent (lessee), later on lessee leased his business to the first applicant. Following business lease, the Agency cancelled unilaterally the lease between it and Respondent asserting the lessee violated his obligation to inform the Agency according to Regulation No. 4/2004 prior to lease his business. Then the Agency leased the premises /House/ to first Applicant. The Respondent filed a suit to Court, he alleged the Agency wrongly interprets Regulation No. 4/2004; the cancellation and the lease between applicants violated his business rights.

The Courts considered the case all the way finally Federal Supreme Court Cassation Division (FSCCD) majority decided in favor of the Respondent and cancelled lease contract premises between applicants. The majority's main argument for his decision "leasing business without informing did not violate the purpose of article sub article 3 article 6 of proc. No. 555/2007;

¹⁰¹ Articles 177(1) & 194-205 Com. Code

¹⁰² Articles 142- 145 Com. Code

¹⁰³ Sub-article 1 of article 40 of the Constitution of FDRE.

¹⁰⁴ Decision of the House of Federation,(15 May, 2008 E.C.)

Leasing business rights is different in its nature and its legal effect from lease contract of premises.” Contrary majority’s decision, the minority decided argued “article sub 3 of article 6 of proc. No.555/2007 empowered the Agency to take measure against the lessee who did not bear his responsibility; Agency acted on sufficient policy basis and justification; it also argued Agency has power to take measure against a lessee who leased premise with less value and sub-leased with high price without any value add and who done illegal acts.” The minority decision mainly stated trace “though purpose of article 145 (1) of Commercial code is to prevent obstacle of business and facilitate efficient business, but it does not take into consideration political, economic and social situation when proc. No.555/2007 was enacted, it changed the existed situation when Commercial Code was enacted and amended article 145(1) of the Commercial Code.”“The relevant provisions of Commercial law have to be interpreted in manner conformity with the present Constitution and its subsequent enacted laws.” Agency and first Applicant complained majority decision violated their Constitutional property rights and petitioned to House Constitutional review. Then CCI/ HoF considered the issue and adopted minority decision. The House decided majority decision violated Constitution.

However, contrary to the decision of the minority and the house’s interpretation, law stipulated the rights and obligation of the lessee and the lessor. Sub-article 3 of article 6 of proc. 555/2007 gave power to Government House Agency (the lessor) “give and execute expulsion orders against lessee who breached lease obligation and cancel the lease contract premises.”¹⁰⁵ But it didn’t stipulate causes of cancellation lease contract premises when the lessee breached lease contract. Causes of cancellation are stated in the Regulation No. 4/2009 which enforces proc.555/2007. The Regulation stated the causes of cancellation lease contract as : when lessee fully transfer of the House (premises) to third person; when the lessee illegally built on the House without permission of the lessor/ Agency/ and change type of business; When proved contrary to regulation, the lessee perform acts which impair social security and healthy; when without the lessor contractual agreement the premises has been possessed by third person ; when the House has been closed and functionless ; and when the lessee sold his business to outsider the his/her family (outside of Husband, wife, children). From these causes, therefore one may infer, neither the Regulation, nor the proclamation impose obligation on lessee to

¹⁰⁵ Sub article 3 article of Proclamation No. 555/2007. Fed. Neg. Gaz. 14th year, No.2

inform the lessor when the owner leased his/her business right to third person. Thus, first we deduce the obligation between the agency and the lessee that stated in the lease contract contradicts with proclamation and Regulation.¹⁰⁶ Secondly, decision of the Council and the House as well as lease contract contradict with Constitutional business rights. It is unarguable enforcement contract between parties has to be interpreted with the purpose of relevant law when agreement of parties contravene with law were made by authoritative law makers, the law prevail over contractual agreement. Hence, the majority Cassation Division's decision was properly interpreted law on facts; the case Constitutional interpretation could have not needed.

As in the Constitution stated when public purpose and interests or other citizen rights are required to limit Constitutional property rights, the justifications are founded in article 40 of the Constitution of FDRE. Limit property rights has to be interpreted in light of the spirit of Constitution. However, the minority decision and the CCI/House interpretation show shallow and unreasonable because it inserts new concepts such as policy, political, economic and social situation into proclamation was not intended. Whatever, government decision must be conform to the fair intent of the constitutional limitation, private contract on his property rights are not subjected to unlimited modification under judicial decision. The owners of property expectations are not shaped by what the Courts say, rather the expectations protected property rights by Constitution are guided by objective Constitution rules that can be understood as reasonable by all parties involved.

3.2.5 Decisions on the duration lapse of Property Rights

3.2.5.1 Introduction

The notions of 'prescription' and 'limitation' are directly related to the concept of lapse of duration in property rights. It is therefore necessary to introduce these notions before considering the decisions of courts and the HoF/CCI on cases involving lapse of duration in property rights.

¹⁰⁶ Agreement of premise lease contract between Second applicant and Respondent (14/11/2003 E.C)

The essential difference between prescription and limitation is that in the former case title can be acquired only by possession as of right. That is the antithesis of what is required for limitation, which perhaps can be described as possession as of wrong.¹⁰⁷

The distinction to be made between prescription and limitation appears to depend on whether the claimant's right to an action has been barred or if the right in the object has been altered by duration in another's possession. Prescription is a means of acquiring or losing rights by the passage of time under conditions prescribed by law and it refers to the impact of the passage of time on the underlying right to ownership while limitation focuses on the action or claim.¹⁰⁸ Both terms lead to similar objects, the possible extinction of a claim or right, but prescription appears wider because it allows for the possibility of the acquisition of rights¹⁰⁹. Also the distinction between them is of fundamental consequence on a right in rem, the duration of prescription not to bar the owner may be asserted against any person except the one against whom a claim has been barred and prescription affects the substantive property rights (ownership), but limitation period does not usually have the same effect as prescription. Both prescription and limitation periods are set out by legislation.¹¹⁰

When an action of property rights is brought it is up to the defendant to plead limitation and not up to the Court to invoke limitation. Defendant may waive his right and limitation period may not negate substantive rights. As Biruk Haile writes "limitation does not primarily kill the plaintiff's substantive right but affects right of action."¹¹¹ Limitation relates to action that affects procedural rights (rights of action) if the defendant fails to raise limitation as preliminary objection, he/she will not have the opportunity to raise it in the course of litigation and when the judgment was entered against his/her substantive property rights it will validly be enforced

¹⁰⁷ Tessa Davis (2011): *Journal of Transnational Law and policy*, vol. 20.

¹⁰⁸ The Jersey Law Commission (2008) "Consultation paper prescription and Limitation." Whiteley Chambers, Don Street St. Helier.

¹⁰⁹ Ibid

¹¹⁰ We do not find the duration lapse property rights in Ethiopia Constitution of 1931 and the revised 1955, the 1987 of Constitution of and the 1995 FDRE Constitution, all the prescription and period of limitation concerning property rights are stipulated in Ethiopian Civil, Commercial and Penal Codes and in different proclamations.

¹¹¹ Biruk Haile (2012): Period of limitation Applicable to Claims over immovable property under the Ethiopian law: Gateway to Hindsight Security of legality of Nationalization of Immovables ? Case Analysis, *Jimma University Law Journal*. pp. 178-192

against him/her.¹¹² Prescription on the other hand is intended to prevent a plaintiff from taking an unreasonable length of time to commence proceedings to enforce rights. The imposition of lapse of time on property rights has thus been justified on the basis of fairness, certainty and public policy.¹¹³

The reasons why a period of limitation for bringing legal actions to enforce substantive rights is to “encourage right-holders to commence proceedings within a reasonable time before evidence is lost”, “to avoid court congestion which becomes in the public interest to bar futile action.”¹¹⁴ Moreover, “the law wants time limit for which enable the defendant calculate and keep records proof, it be unjust to subject the defendant to limitless action.”¹¹⁵ At the same time we have to care for innocent plaintiffs who have genuine claims but for reasons beyond their control, would be deprived of redress.

3.2.5.2. Decisions of the CCI and of the HoF on the duration lapse of Property Rights

In the case of *Aster Kebede and Genet Getachew(claimants) v. Debrebrahan City Administration Kebele 06* (Defendant).¹¹⁶ Claimants Filed a suit to Court alleging their deceased’s House was illegally taken by defendant out of the condition stated in proclamation No.47/67. The defendant, on its part, raised both preliminary objection and substantive defense. In its preliminary objection, the defendant stated that it possessed the house for a long period of time and the claim has been banned by period of limitation. The courts all the way to the federal Cassession Division decided in favor of the defendant. The Cassession Division justified its decision saying that the defendant has possessed the House for 23 years and a claim for its restitution after such a long period of time has been banned by period of limitation. The claimants submitted a constitutional complaint to the CCI alleging that the Cassation Bench’s decision violated their constitutional property rights recognized in article 40 of the FDRE Constitution. However, CCI rejected their petition on the main arguments: “Claimants’ petition is an issues of fact and law,

¹¹² Article 244 (1)(f) & 3 of Ethiopian Civil procedure Code , *Neg. Gaz.* No.3, 1965

¹¹³ “ Comment on prescription period: Reason and purpose of prescription” : www.justice.gov.za

¹¹⁴ *Supra* note No. 111

¹¹⁵ *Id*

¹¹⁶ Council of Constitutional Inquiry (File No. 1546/08)

these was properly litigated courts decided; The allegation that petitions, documents and evidences was produced in different government organs and institutions, by Claimants may interrupted period of limitation was properly entertained by all the way courts provided justice, thus there is no complaints property right violated and it is no need constitutional interpretation.”

The case of Bayush Bekele (claimant)v.Kolfe Keraniyo District 11 Addis Ababa City Administration and Tobe Fercha.¹¹⁷ The claimant filed a suit in ordinary court claiming the ownership of the House. She alleged that her deceased private House. It is not expropriated according to proc.47/75; it is illegally taken by the City administration (first defendant) and rented to 2nd defendant. She presented documentary evidences which show that the owner (deceased) built the house and the tax has been consecutively paid in the name of the owner. The first Defendant, on its part, raised both preliminary objections and substantive defenses. The preliminary objections relates to the defendant has possessed the house for a long period of time and it contended the claimant’s right of action was barred by period of limitation. The courts rejected the claim based on preliminary objection. The claimant submitted a constitutional complaint the CCI, alleging the house is not expropriated according to proclamation 47/75, the courts’ decision on period of limitation violated constitutional property rights that stipulated in article 40 of the Constitution FDRE. However, CCI rejected the claimant’s petition reasoning that “ the courts’ decision has not violated claimant’s property right stipulated in article 40 and economic, social and cultural rights in article 41 of the constitution and the decision is supported by evidence , and the law recognized the government’s has property right on the House.”

However, in the case of *Ethiopia Chat Agricultural Development and Industry imputes Share Company (Claimant) v. Agency for Government Houses (Defendant)*¹¹⁸, the Council made a decision that departed from the aforementioned decisions. The claimant filed a suit in the Federal First Instance Court stating that the defendant was illegally taking the Claimant’s house since 1982 G.C (1974 E.C.) and is renting with 100 birr to other person. The defendant refused to deliver the House to the Claimant. And the Claimant sought the court order the defendant’s delivery of the House and the right to claim compensation as the defendant illegally used the House. The defendant, on its part, raised both preliminary objection and substantive defense.

¹¹⁷ Council of Constitutional Inquiry (File No. 1598/08)

¹¹⁸ Council of Constitutional Inquiry File No.1621/08

The preliminary objection are: the defendant has possessed the house for a long period of time and the claim is banned by period of limitation, the ordinary Court does not have jurisdiction to consider issue of nationalized property by proclamation 47/67. The First Instance Court (FIC) analyzed both side's submissions and decided that the house in dispute was the property of the claimant and the defendant has to deliver to it. The Federal High Court conformed First Instance Court's decision. However, the Federal Supreme Court's Cassation Division reversed lower Courts' decision based on preliminary objection that defendant has possessed the house for a long period of time and the claimant's right to restitute the house has been banned by lapse of time.

The claimant submitted a constitutional complaint to the CCI, arguing that the Cassation Division's decision violated its Constitutional property right stipulated in article 40 of the Constitution. The CCI analyzed the case on the bases of claimant's petition and it recommended that there is a need for constitutional interpretation. The CCI stated that "the claimant bought and owned the house after proc.47/67 was enacted, but the defendant did not present evidences which it nationalized legally, FSC Cassation Division's decision which was based on the government's possession of the house for a long period of time operating to ban property rights is a violation of the Constitution."

In a final case to consider here: *Muhedin Yohans v. the defendants Nazi Ali and Ali Abdo*,¹¹⁹ the claimant, filed a suit in an ordinary Court, alleging he gave six hectares of land covered by 'Chat' to the 2nd defendant and intending for usufructury use but he sold it to the 1st defendant. The Claimant requested invalidation of the contract of sale of land and the reinstatement of the land with the plants on it. The first defendant, on his part, raised both preliminary objection and substantive defense. The preliminary objection was that the defendant has possessed the land from 1988 E.C and the claim was banned by period of limitation. The Courts including the Federal Cassation division decided the claim was banned by period of limitation.

The Claimant made submitted a petition to the CCI for constitutional interpretation. On the basis of the recommendation of the CCI the House decided that "article 40 (3) of the Constitution stipulated that the people and government are the owner of urban and rural lands and the contract

¹¹⁹ HoF's decision File No. 017/08, 4th parliamentary duration 5th year 2nd session 2 Oct. 2009 E.C.

of sale of land contradict with constitution, as a result period of limitation does not ban the sale of lands.” It recommended that “the courts decisions be quashed based on article 9(1) of the Constitution.

The above decisions of the House and the recommendations of the Council clearly manifest lack of uniformity, unfairness, uncertainty and lack predictability. On the one hand the House and Council hold the view that possessing property for a long period of time would constitute limitation and prescription in order to ban the right to restitute property that was illegally taken through unwritten directives and oral orders while on the other hand their decisions demonstrate lapse of long period cannot be put up as a defense against restitution of property to its rightful owner.

Moreover, the agreement of sale of land will never create rights for the buyer on the land and the property or investment on the land even if the property remained in the possession of the buyer for a long period of time. The Cassation Division, the House and the Council’s decisions did not put exact duration which constitutes long enough time to ban reclamation of immovable property that passed from one hand to another. The decisions point at different prescription periods for immovable property that might create inequalities between those claiming against public institution and those against private defendant. No doubt laws usually provide for different length of time limits for different action taking into account different relevant factors, but establishing different limitation period of time for the similar claims regarding immovable property will create lack of objectivity and will create legal uncertainty. Moreover, the House’s decisions did not account for the fruits of the labor of those who were in possession of the land. The decisions contradict with the stipulation of Article 40 (2) of Constitution of FDRE.

Prescription and limitation of periods as relating to immovable property and their objectives are not set out by legislation in Ethiopia; there is uncertainty about duration lapse claims of ownership of immovable things as shown by the earlier discussed cases. A claim of immovable property incorporates the value and sentiment of society. It is important to set out precise longer period of limitation than movable property.¹²⁰ As my personal experience in the judiciary shows, the judicial practice shows that are two arguments regarding prescription in regards to

¹²⁰ Supra note No.111

immovable property owing to the absence of clear cut determination of the matter in the law. The first argument states the absence of time lapse in claims of immovable property; while the other argument holds that the Civil Code's provision on in personam will apply to in rem, hence the ten year period of prescription in article 1677 cum 1845 applies to claims relating to immovable property as well.

Proclamation 47/75¹²¹ which nationalized all urban extra-houses and urban land, stipulated that when the government expropriates extra-urban houses it may pay compensation to the owner, family or organization having right on the houses. The proclamation No. 110/1995 and its amendment proclamation No. 193/2000 give the owner the right to restitution of property that was illegally taken contrary to proclamation 47/75 and the Ethiopia privatization Agency was given the power to investigate and decide on claims of ownership in respect of properties confiscated in extra-legal manner through directives edicts. Proclamation 572/2008¹²² limited the right to retribute after its effective date of 22nd April 2008, its article 3 stated claims of restitutions of property was unlawful taken and confiscated in extra-legal manner through directives as well as through written oral orders to be submitted to the Agency pursuant to proclamation no.110/995 shall be barred by period of limitation at expiry of three months after the effective date of proclamation No 572/2008.

The proclamation 572/2008 not only limited claims of restitution of private property unlawfully taken by government, but it also stipulates criminal penalty which will be imposed on any person who hamper its implementation or violate its provision (Art.8).

The imposition of prescription has to be justified on the basis of fairness, certainty and public policy and they have to be proportionate and be balanced with individual interests. It was obvious many owners whose property was unlawfully taken and confiscated through directives as well as through oral orders had submitted their claims to Agency. However, the proclamation unfairly discriminated against those who were yet to submit their claims. Moreover, the three

¹²¹ A proc.No.47/75, of Ethiopian provisional Military Administration Council, provides government ownership urban land and extra-houses.

¹²² A Proc. No. 572/2008 to provide for period of limitation for submission of restitution claims and for the repossess of public properties taken through unlawful restitution, Fed. Neg. Gez., 14th year, no.24, Addis Ababa 22nd April, 2008.

months limit was grossly inadequate and therefore limited the right of access to court and, this limitation was unjustifiable under the constitution.

It may be worth noting that Proclamation No. 572/2008 was aimed at counteracting the decisions of the courts and the CCI/HoF that validated the claims submitted by some persons whose houses were illegally expropriated.

3.3. Effects and Enforcement of Decision of the House of Federation

3.3.1 Effect of Decision of the HoF

The Constitution creates legal rights and obligations. The consequence of constitutional supremacy is that any law, customary practice, decisions of an organ of state, or of a public official or any act which contravenes Constitution shall be not effect.¹²³ When the House declares unconstitutionality of any decisions or practice, or law it automatically makes the inconsistency in question of no effect to the extent of the inconsistency. In addition to Article 9(1), Article 13(1) of the Constitution is also relevant for the enforcement of the decisions of the HoF. The latter provides that federal and state legislature, executive and judiciary are all bound to respect and enforce the provisions of Chapter three of the Constitution. Also, Art 9(2) of the Constitution noteworthy because it obligates all citizens and political organization, other associations as well as their officials to ensure its observance and to obey it. Sub article 1 of article 11 of proclamation 251/2001¹²⁴ provides the decision of the House on constitutional interpretation shall have general effect which has applicability on similar Constitutional matters that may arise in the future. And if part of a given law is decided that it is unconstitutional, except to other condition, the effect of final decision shall remain limited to only the very law.

The FDRE Constitution itself provides little guidance on constitutional remedies and it does not dictate any particular remedy for the violation of Constitutional rights. This may leave room for a flexible approach to award constitutional remedies. So far, the remedies given by the HoF are limited to declaration of invalidity of laws and official decisions. However, the source of

¹²³ See Article 9(1) of the Constitution of FDRE

¹²⁴ Article 11(1) of proc. 251/2001

Constitutional remedies may be from the Constitution itself or from legislation.¹²⁵ There are three major types of constitutional remedies: declaration of nullity its equivalent terms no effect; prohibitory and mandatory interdicts; and awards of constitutional damages.¹²⁶ The reasons why such constitutional damages is necessary are there are certain situations where a declaration of invalidation and nullification or an interdict makes little sense and award of damage is the only form of relief and deter the future infringement and substantial awards of damages may encourage victims to come forward and litigate, which may in itself serve to vindicate the Constitution and to deter further infringements.¹²⁷

The issue in front of the House may not simply be whether the piece of legislation or governmental official decision is unconstitutional. The harm caused by violation of constitutional rights is harm to society as a whole.¹²⁸ The violation impedes the realization of the Constitution. Therefore the object in awarding a remedy should be, at least two purposes, to vindicate the Constitution and deter future infringements.¹²⁹ In general Constitutional remedies are thus forward-looking, community-oriented and structural rather than backward looking, individualistic and retributive.¹³⁰

As noted above, the constitutional supremacy clause automatically makes any unconstitutional law or customary practice and unconstitutional decisions of no effect. Usually, the House's decision has prospective effect from the date of the decision by nullifying the legislation which amount to repeal and invalidating the public official's decision.¹³¹ In the sense that the decision is final and has no further appeal or review, the effects of the decision handed down is binding on every one and it produces an 'erga omnes effect'. Whereas those decisions are mostly binding

¹²⁵ I believe it can be construct from article 9, and sub-article 7 & 8 of article 40 of the Constitution of FDRE, and article 11,12, and 16 of proc.251/2001

¹²⁶ Johan de Waal, Iain Currie and Gerhard Erasmus (2001):The Bill of Rights Handbook, 4rd ed., Pp.169-175

¹²⁷ Id

¹²⁸ Individuals who loss Constitutional guarantee of Constitutional property will not be encouraged to invest their labor and their money in market which may contributes for the Country's economic development, creates labor opportunity and indirectly benefits society. A more promising way of thinking about Constitution in terms of its being "supreme law" (art. 9), put differently Constitution is what validate ordinary law, official decisions or administrative bodies who rule the social affairs. Thus constitutional interpretation should be taking into account its effect and its implication on society at large.

¹²⁹ Supra note, No.154.

¹³⁰ Id.

¹³¹ Sub article 1 of article 16 of the proc.251/2001, Fed. Neg. Gaz.

on the parties to decided cases, as practical matter adherence to the doctrine of precedent the prior decisions are dispositive of similar subsequent cases not because parties to the subsequent case are bound by the prior decision but because the ordinary courts including the Cassation Division judges in new case is bound by the prior decision of the House¹³². The House's decision has the effect of precedent when it overrules unconstitutional decision, and an act or unconstitutional law is definitely and formally deprived of all authority. The House shall publicize the decision in a special publication to be issued for this purpose.¹³³ However, the practice shows it is difficult for ordinary citizens to access the House's decisions. Let alone the accessibility of the decisions to citizens, it is difficult even for Courts and governmental institutions to find the decisions.

Although the rule is that the House's decision on constitutional issues comes into effect as of the date of the passing of the decision¹³⁴, the House may determine that the decision is given a retrospective effect. The House has to take factors into account when determining whether to limit the retrospective effect of its decision. In general, the retroactive decision has to balance the disruptive effect of annulment against the need to give effective relief to the applicant and similarly situated people.¹³⁵ The interest of individuals must be weighed against the interest of avoiding dislocation to the administration of justice and the desirability of a smooth transition from the old to the new and the interest of avoiding the dislocation and inconvenience of undoing transactions, decisions or action taken under the legislation.¹³⁶ I believe as far as the need to give effective relief is concerned; it has to recognize the importance of affording successful litigants the relief. Moreover, the litigants before the House should not be singled out for relief and that all people who are in the same situation should be afforded relief on similar cases.¹³⁷

¹³² See article 83 and article 62(1), article 8 and sub-article 1 of article 9 of the Constitution of FDRE, and sub-article 1 of article 16 of proclamation 251/2001 binding effect of decision of HoF.

¹³³ Sub article 1& 2 of article 11 of the proc.251/2001

¹³⁴ Article 1 of article 16 of the proc. 251/2001

¹³⁵ Supra note No.127, pp 182-183

¹³⁶ Id

¹³⁷ Article sub 1 article 11 of proc. 251/2001

3.3.2 Enforcement of the Decision of the HoF

The House's decision on Constitutional review is final and is not subject to any appeal. It has binding effect between the parties or the litigants.¹³⁸ However, the House does not have direct power to enforce or execute its decisions. The FDRE Constitution does not contain a specific provision defining the mechanism of enforcement of the decision of the House.

Perhaps owing to this and other reasons, the implementation of the decisions of the House in practice has proved problematic. For instance, ordinary courts do not make reference to the decisions of the House in matters involving similar past decisions of the House. My discussion with Oromia Supreme Court's Judges¹³⁹, revealed that they have different opinions on the enforcement of the decisions of the House. Most of them claim the House's decisions lack clarity and lack accuracy, and the decisions do not identify and implement principles of Constitutional interpretation. They raised cases the House verdict period of limitation on the land use rights do not have uniformity thus the judge can't forecast the decisions of the House. They also said that it is difficult for them to take the House's decisions as precedent and implement it. They deem decisions of the House not have erga omnes effect. Moreover, those judges argued there is no mandatory legislation which obliges the Court to cite the decision of the House as precedence.

Others believe the decision of House of Federation is amount to interference into judicial independence where it reverses the Court's decision because they doubt the neutrality of the House's members as they the member of the executive who judge their own case. A lot of those judges do not know the decision of the House very well because they do not have access to the decisions. Thus, creating mechanisms of access decisions of the House to the public, and publication in special publication to be reached every judiciary as well as everybody is needed. Also awareness on the power of the House and the effects of its decisions need to be created.

To sum up, the examination of the cases, of the recommendation and of the decisions show that the House has not yet adopted any clear interpretative approaches in its Constitutional decision.

¹³⁸ Article 11 (1) of proc.251/2001

¹³⁹ Oromia Supreme Court honorable Judges: Deseleng Lemi, Urga Getahun, Dereje Mengistu, Tesfaye Boresa, Nur Bushira, Dobe Daba, Kalbesa Gerba and Bejiga Kefeni.

The decisions of the House and the recommendations of the Council clearly manifest lack of uniformity, unfairness, uncertainty and lack predictability. The House and Council hold the view that possessing property for a long period of time would constitute limitation and prescription in order to ban the right to restitute property that was illegally taken, while on the other hand, their decisions demonstrate lapse of long period cannot be put up as a defense against restitution of property to its rightful owner.

The Constitutional property right is at stake, it is subjected to government discretion power taking. As the analysis of the cases indicates some provisions of the laws encroach on constitutional property rights of those subjected to them. Also, the analysis indicates that the law unfairly discriminates against between the owners of property claims. Also, the imposition of prescription has not been justified on the basis of fairness, certainty and public policy. The House verdict period of limitation on the property rights do not have uniformity thus the concerned bodies can't forecast the decision of the House.

Finally, one can say that even if the HoF decision has got a binding effect, it is not accessible to all the concerned bodies.

CHAPTER FOUR

CONCLUSION

The Ethiopian Constitution (article 40) protects private property rights and prescribes the ground for the restriction or limitation of private property rights. The condemnation of private property is normally justified on grounds of public purpose and payment of compensation.¹⁴⁰

However, article 40 of the Constitution has been exposed to various kinds of issues. The most important of the issue is the lack of precise meaning for the notion of ‘public purpose’. The indeterminacy of this notion has made it very difficult to speak with certainty as to which government action of taking of private property is consistent with the constitutional requirements and which are not. This problem has been compounded by the fact that the government attached a broad meaning to the concept of public purpose thereby widening its legal power of taking private property. This in effect impedes the owner of property right to use, to invest, and it impedes permanent improvements on his property. In averting the problem experiences of comparative study Constitutional interpretation of the foreign Courts decisions show that they have applied the proportionality test to the extent that government power interference into private property rights for public purpose.

The paper has shown that there are increasing numbers of constitutional complaints submitted to the HoF through the CCI. The study has shown that the broad interpretation given by legislation to the notion of public purpose has given rise to widespread actions of taking of private property by the government that have ended up before court and then before the CCI and HoF.

The study has also found out that other primary laws of the country, for instance the expropriation holdings for public purpose proc. 455/2005, the lease proc. 721/2011, and privatization proc.574/2008 also do show gaps in relation to land-related property rights. However, examination of the cases, of the recommendations of CCI and of the decisions of the

¹⁴⁰ The FDRE Constitution, 1995, *Neg. Gaz.*, article 40 “Every Ethiopian citizens has the right to ownership of private property, it shall not be limited unless prescribed by law and for public purpose or public interest and payment of compensation.”

HoF show that the House to interpret the Constitution has not yet adopted any clear interpretative approaches in its decision to fill the gaps.

This paper has also found out that the decisions of the HoF lacks predictability. As the examination of the determinations made by the HoF and the CCI show, their interpretations so far do not clearly show consistency of interpretation. For instance, the decision on lapse duration claim property rights, view that possessing property for a long period of time would constitute limitation and prescription in order to ban the right to restitute property that was illegally taken through unwritten directives and oral orders while on the other hand, on the same matters, their decisions demonstrate lapse of long period cannot be put up as a defense against restitution of property to its rightful owner.

The House as the final interpreter of constitutionality of laws and decisions of organs and officials of the state is required to do away with these vices. The adoption of some interpretive approaches by the House (and also by the CC) may help it to overcome these problems.

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