

# **Compensation for Expropriation in Ethiopia and the UK: A Comparative Analysis**

**Daniel Weldegebriel AMBAYE, Ethiopia**

**Key words:** Land, Expropriation, Compulsory Purchase, Valuation, Compensation

## **SUMMARY**

Land expropriation, also known as compulsory purchase in the UK, is a common practice both in the UK and Ethiopia. The purpose of this paper is to compare and contrast the valuation systems and compensation methods used in Ethiopia and the UK in a bid to establish the level of amount of compensation paid for those who lost their property in the interest of society. The method of comparison employed is micro-comparison as opposed to macro level comparison which focuses on the general aspect of comparison. The findings of this study show that the principle of compensation as “the full recompense of the property lost” has been observed in the UK, while this has not been the case in Ethiopia mainly because land has no value to the holder.

# Compensation for Expropriation in Ethiopia and the UK: A Comparative Analysis

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## 1. INTRODUCTION

Expropriation is a forced taking of land by the state for public purpose activities and upon advance payment of compensation. Expropriation is an inherent power of the state that stems from the very existence of the state, and hence it is argued that the constitutions do give only recognition to it instead of authorization. Expropriation assumes different names in different countries such as, compulsory purchase in the United Kingdom (UK), expropriation in the Continental Europe and eminent domain in the United States (US). Ethiopia, being a follower of the Civil Law legal system, uses the terminology expropriation. In this paper, the three of the above terminologies will be used interchangeably whenever necessary.

The purpose of this paper is to compare and contrast the valuation systems and compensation methods in Ethiopia and the UK. The method of comparison employed is micro-comparison as opposed to macro level comparison which focuses on the general aspect of comparison. Section two acquaints readers with the concept of expropriation and its limitations; section three deals with the methodology and briefly describes comparative legal research methodology; section four is about conceptualizing valuation and compensation methods; section five describes briefly the compensation methods followed in the UK; section six is about compensation modalities in Ethiopia; and finally section seven gives analysis and conclusions.

## 2. CONCEPTUALIZING EXPROPRIATION

Sustainable development requires governments to provide public facilities and infrastructure that ensure safety and security, health and welfare, social and economic enhancement, and protection and restoration of the natural environment (FAO, 2008). An early step in the process of providing such facilities and infrastructure is the acquisition of appropriate land. Government may use alternative land acquisition mechanisms such as purchase, to secure land for public purpose activities. But, it is impossible to rely totally on land market as individuals may create a holdout on the projects or the land required may involve the interest of more owners that warrants the exercise of expropriation power.

The most authoritative Legal Dictionary, Black's Law Dictionary, defines eminent domain as "the power to take private property for public use by the state, municipalities, and private persons or corporation authorized to exercise functions of public character" (Black's Law Dictionary). An older legal dictionary, Bouvier, defines the term as "The superior right of property subsisting in sovereignty by which private property may in certain cases be taken or its use controlled for the public benefit, without regard to the wishes of the owner" (Bouvier,

1984). Eminent domain is also defined in Nichols as “the power of the sovereign to take property for ‘public use’ without the owner’s consent” (Nichols, 2007: §1.11). In all the definitions, eminent domain or expropriation is described as the power of the sovereign state or agencies delegated by it to compulsorily take land for public use purposes. What is missing from the definitions is the “compensation” element. In some modern definitions of the terminology, the element of compensation is still left out. For example, FAO’s definition of the term could be a good example: “Compulsory acquisition is the power of government to acquire private rights in land without the willing consent of its owner or occupant in order to benefit society”(FAO, 2008). It must be admitted, despite the logical accuracy of the foregoing definition and despite the fact that the payment of compensation is not a part off the *meaning* of eminent domain, it is still an essential element of the *valid exercise* of such power. The absence of an explicit provision requiring compensation for the taking of property should not be seen as evidence of a rejection of the compensation principle. On the contrary, compensation was a well established feature of takings by eminent domain in most countries, as we shall see in the next section.

In Ethiopia, the first systematic definition for the concept was given in the 1960’s Ethiopian Civil Code. The Code, under Article 1460, provides:

*Expropriation proceedings are proceedings whereby the competent authorities compel an owner to surrender the ownership of an immovable required by such authorities for public purposes*(The Civil Code of Ethiopia).

In this definition, the idea of the taking of private land by the state or authorities without the consent of the owner for public purpose is clearly envisaged. The phrase “expropriation proceeding” is employed here instead of the word “expropriation” because of a translation error from the original French version(Getachew, 1975:6). It is said that the original French version has defined the term as follows: “expropriation is a procedure by which the administration obliges an owner to surrender to it the ownership of an immovable which it needs for the purpose of public utility” (Ibid). And yet, like the above definitions, the rule noticeably fails to include the element of compensation in its definition.

Without undermining the above definitions, the following on may be considered as a working definition in discussing the details, as it is more comprehensive. This definition elaborates the concept eminent domain as follows:

*..it is the right of the nation or state, or of those to whom the power has been lawfully delegated, to condemn private property for public use, and to appropriate the ownership and possession of such property without the owner’s consent on paying the owner a due compensation to be ascertained according to law*(Nichols, 2007: §2).

This definition seems more complete, since it includes all the basic elements. First of all, expropriation or compulsory purchase is a right that is exercised by the state itself or its sub-branches such as municipality and other public or private companies and people legally authorized by the state/legislature. In both England and Ethiopia it is the legislator who is ultimately deciding about the use of the expropriation power. Legislator, through a special

statutes, authorize government agencies, companies and private individuals to expropriate land for public purpose activities.<sup>1</sup>

The second element is that the state or the organs authorized to take such lands must follow some procedure. In the US, it is known as “condemnation proceeding” while in other countries, mainly European, it is referred to as an “expropriation procedure.” The main idea is that the state must ensure due process of law before appropriating the property. In the UK, the process involves the administration and courts. Once an authorized public or private body, delegated by parliament, finds the activity for which the land is needed a public purpose, it serves a “notice of treat” on all interested parties. The notice should specify the amount of land and the purpose for which it is required (Denyer-Green, 2009:109-111; Compulsory Act, 1965). If the interested party (owner or another) fails to respond to the notice, or if he disagrees on the modality and compensation amount, then the case will be transferred to the land tribunal for its final decision (Denyer-Green, 2009:109-111). In Ethiopia, the process is purely administrative in nature wherein the public purpose nature as well as the decision to expropriation is carried out by the administration. Courts can involve only if there is a complaint about denial or insufficiency of compensation (Ethiopian Expropriation Proclamation 455/2005, Art. 11)

The third point worth discussing is the issue of “public use.” The doctrine of expropriation stands in opposition to the right of private property. Thus, expropriation requires to find the balance between the public need for land on the one hand, and the provision of land tenure security and the protection of private property rights on the other hand. In seeking this balance, expropriation principle includes the requirement of “public interest” as one limitation on the state power of expropriation. This limitation or requirement is known by different names in different countries, such as public use, public benefit, public good, public interest, public purpose or public welfare (FAO, 2008). The idea is that, there may be exceptional times and places in which the very foundations of public welfare cannot be laid without requiring concessions from individuals to give up their private property in the interest of the common good.

The usual debate raised in relation to public purpose is the scope of its applicability to private interest. There is no problem if land is required by a public body or company in the interest of society. The problem comes when land is demanded for a private use. It is the task of the legislator in Ethiopia to delimit the scope of expropriation power of the state. The Civil Code of Ethiopia, which is no longer applicable in expropriation cases, for instance, declared that land may not be expropriated for pure financial benefits (Ethiopian Civil Code, Art.1464). Under the existing expropriation proclamation, public purpose is understood as an activity that may be carried out by public bodies, private investors or non-governmental organizations and that provides *direct and indirect benefits* to the society (Ethiopian Expropriation

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<sup>1</sup> Parliament in both Ethiopia and the UK provides expropriation power to public agencies (municipality, planning agencies, public utility agencies), to companies, or private individuals. The difference is, while in the UK, parliament passed different legislations on the procedures and powers of these organs, in Ethiopia there is only one encompassing expropriation legislation that addresses all. On the UK side see DENYER-GREEN, B. 2009. *Compulsory Purchase and Compensation*, London, EG Books, pp. 21-28.

Proclamation 455/2005, Art.2.5). The “*direct and indirect benefit*” standard allows the Ethiopian government to exercise its expropriation power without limit.

In England, public purpose is not as such specifically defined in the statutes. Rather, the “public interest” definition which is stated in Article 1 of Protocol No. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is considered as binding in the UK as well:

*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law*(Council-of-Europe, 1952).

Concerning the interpretation of the “public interest” requirement of the European Convention, it is said that “in cases involving the transfer of property from one private person to another, the Court of Human Rights allows States to frame the purpose of a taking so broadly that it is difficult to imagine how a redistribution would serve a public interest in some way” (Allen, 2008: 78). The Court of Human Rights has stated that economic policy may justify the transfer of property amongst private persons. For example, the Court has found that “the public interest in managing the economy justifies consolidations of private agricultural land, majority buy-out rules in company law, and compulsory debt adjustment programs” (Ibid). The court has not given details on the relation between personal economic benefits and “public interest.” Instead, it seems, it was enough for the court if the State believes that the interference with property would have a positive impact on the economy (Ibid).

The appropriation or taking, mentioned in the definition, is also an important aspect or stage in expropriation procedure. There are several types of appropriation which can occur through expropriation: total appropriation, partial appropriation, temporary appropriation, easement and right of way being the main ones. Under the Ethiopian Civil Code, the defunct expropriation rules show that expropriation may be used either to acquire or terminate rights *in rem* such as servitude, usufruct or lease (see Ethiopian Civil Code, Art. 14060-61). Expropriation differs from such similar concepts like police power (termed in the USA) or regulations that limit the use right of the property due to health, public safety, etc., in that it involves the loss of the core constituent right of disposal. In the latter case, what the owner loses is some part of his use right over his property, while in the former case he loses the entire or part of the property.

The fifth point embodied in the definition is the absence of consent on the part of the owner. The power of eminent domain/expropriation is a sovereign power of the state to take private land without the consent of the owner. What makes expropriation different from other consensual types of land acquisition mechanisms is the complete absence of consent on the part of the property owner. It is true that many public and private organs do also collect land through purchase and similar transactions which are based on the willingness of the person. Even if this does not apply in Ethiopia, in England, for example, public authorities are delegated to buy land by agreement first, before they resort to compulsory purchase

proceeding (Denyer-Green, 2009:93; Compulsory Purchase Act, 1965: sec. 3; Local Government Act, 1972: sec. 120).

But, it may not be realistic to totally rely on the good will of the owner to get land for different reasons. The state, hence, resorts to such coercive proceedings for two main reasons: first, owners may create a holdout on the public development activities either by totally refusing the sale of the land at any given price, or by requesting unrealistically higher prices for the sale of their properties; and second, public development projects which demand long and continuous land holdings involve the interest of many owners and it may be difficult to reach agreement with all owners (Merrill, 1987:77). In both ways, owners try to impede the public welfare that could be attained by using their land.

The last principle included in the definition is the obligation of payment of fair compensation. This principle is the most important guarantee to individual owners on their lawful possessions. All major legal systems and constitutions include this concept as a guarantee to the owner and as a limitation to the power of government. The just compensation requirement demands that the state reimburse the owner for the value of the property interest taken and place the latter in as good a pecuniary position as if the property had not been taken.<sup>2</sup> The assessment of compensation is extremely complicated, and different countries incorporate different valuation methods within their expropriation legislation. Nevertheless, the existence of compensation makes expropriation tolerable and differentiates it from other government actions, such as confiscation, nationalization, and eviction, in that these three are devoid of the state obligation to compensate for the taking.

### 3. RESEARCH METHOD

#### 3.1 Comparative Law Method

Comparison is the operation which follows the determination of some identical or divergent elements at two phenomena. Zweigert and Kötz, authorities on comparative law, simply define comparison as “the process of comparing the different legal systems of the world” (Zweigert and Kötz, 1998: 2). Comparative law describes “*the systematic study of particular legal tradition and legal rules on a comparative basis*”(De Cruz, 1999:3). From this it follows that a comparative legal research methodology is a research method that is based on the comparison of legal systems or specific rules within two or more legal systems. The importance of comparative law as a tool of legal research has been summed up by Yntema as, “the constant refinement and extension of our knowledge of law” (Yntema, 1956:901).

Researchers use comparative method to compare and contrast the laws of different countries *on different scales, for different purposes and based on different factors/parameters*. Zweigert and Kötz identified four ways in which comparative study of legal systems can be beneficial: as an aid to legislature, as a tool of construction (interpretation of national law), as a

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<sup>2</sup> This position was held first by a USA Court (in *Olson v. United States*) and became an accepted principle in almost all countries. See details (Epstein, 1985: 182).

component of the curriculum of universities, and as contribution to the systematic unification of laws (Zweigert and Kötz, 1998:16-26).

Comparison may be made either at macro or micro levels. It is now reasonably well established to use the terms *macro-comparison* and *micro-comparison* in comparative legal studies (De Cruz, 1999:227). Macro-comparison refers to the study of two or more entire legal systems, while micro-comparison generally refers to the study of topics or aspects of two or more legal systems (Ibid). A macro-comparison research is done on such subjects as legal methods, procedures, roles of professionals, and style of codification. By contrast, in micro-comparison, researchers focus on a specific legal institution or problem to be solved.

Certain factors are considered to be relevant in legal comparisons on macro or micro level studies, respectively. Grossfeld lists the following determinative factors for macro-comparison: the cultural, political and economic components of society and a particular relation of the state and citizens (Grossfeld, 1990). Comparatists have also stressed on the need of “comparability”, a similarity of the comparable legal systems in terms of stage of legal evolution. In this regard, Gutteridge, for example, notes that “Like must be compared with like” by which he meant that “the concepts, rules or institutions under comparison must relate to the same stage of legal, political and economic development” (Gutteridge, 1941:73). As quoted in De Cruz, a similar warning was provided earlier by another comparative lawyer, Echmitthoff, who had argued for “*strict observance of comparability*”. The comparison must extend to the same evolutionary stage of the different legal systems which are being compared (De Cruz, 1999:221).

But this does not mean the door is completely closed for the comparison of legal systems found in different evolutionary development. Indeed, Gutteridge makes it open by pointing out that ‘comparability’ would not be a serious problem if the purpose of the comparison is to illustrate the differences that operate at different stages of legal, political and economic evolution. De Cruz as well stressed this line of argument by stating that “the choice of legal systems (for comparison) must, ultimately, depend on the main aims and objectives of the particular comparative investigation” (Id, 222). Comparison of the *incomparable*, if made focused, may be extremely useful and illuminating.

Concerning micro-comparison, it is true that the ‘comparability’ requirement is also applicable, but on less strict level. What is important is the purpose of the comparison. According to De Cruz, irrespective of their ‘incomparability’, two legal systems may be compared at a micro level if the intention is, for example, to trace the development of a particular institution, in a comparable society, at a comparable stage of its legal and economic development; or to illustrate the different varieties of responses to similar problems that existed in societies which have a totally different perception of law, or rights, or have a different attitude to distributive justice or, indeed, a totally different conception of all three (Id, 228). Caution is, though, needed on whether or not to impose a Western solution, if the comparison is between Western and non-Western legal systems.

### **3.2 Comparison-How**

The specific purposes of the comparison method are determined by the existing relations between objective properties of the compared categories. The comparison implies the use of logical instrument, like, classification, definition and analogies.

In this paper, comparative method is employed at micro level. A micro-comparison is made on the compensation systems of Ethiopia and the UK. It is obvious that both countries are found at different legal and economic development. Furthermore, the political ideologies which both countries follow in respect of property right are divergent. In the UK, even if in theory it is said the crown owns all land, private property right (freehold) to land is practically accepted. Individual holders of the land are guaranteed to use, exclude, and alienate their land freely. In contrast, in Ethiopia, the land ownership is vested in the state and the people, a principle which is inherited from the previous socialist government that prohibits the sale and exchange of land.

Yet the reason for comparing both systems is to show in boldly terms the big difference between the Ethiopian compensation system and that of a typical Western country where private ownership is sanctified. By presenting such differences it is possible to show that Ethiopia can borrow some good approaches without contradicting the existing status quo.

In analyzing the difference between both compensation systems, we use a doctrinal research method which is confined to the analysis of laws and cases. In other words, this research is short of empirical data analysis. Accordingly, from the Ethiopian side, we employed the Federal Constitution, Federal and Regional land related legislations, and the Expropriation Proclamation and Regulation. From the UK perspective, an attempt is made to review the statutes related to Compulsory Purchase, such as the 1965 Compulsory Act, the different Planning Acts, Human Rights Act of 1998, Land Compensation Act 1961, 1973, Local Government Act of 1972 and so on. Furthermore, books and journals dealing with the compulsory purchase and compensation systems of both countries are consulted.

## **4. CONCEPTUALIZING VALUATION AND COMPENSATION**

### **4.1 What is Compensation**

Compensation is defined as “full indemnity or remuneration for the loss or damage sustained by the owner of the property taken or injured for the public use” (Corpus Juris Secundum, 29A). The compensation requirement under the law demands that the expropriator reimburses the expropriated for the property interest taken and places the latter in as good a pecuniary position as if the property had not been taken (Epstein, 1985:182).

The reason for payment of compensation is justified on socio-political and economic theories. Compensation is a means to keep the balance of social justice. It protects the rights of the politically under-represented groups, (Ndjovu, 2003: 21) requiring the government to bear the inconveniences resulting from expropriation. Hence, it is argued that no single

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individual should bear the costs of government projects that are intended to be for the common good (Epstein, 1993:6). There is no strong reason to single out one individual and compel him to shoulder the entire burden for the benefit of the society at large. This also serves as a protection against arbitrary and unauthorized actions of the legislature or the executive branches of the government. As Joseph Sax has argued, a compensation guarantee serves as a check on self-interested acts of public authorities (Sax, 1964:36).

Economically speaking, if the government is forced to pay for what it acquires, this could discourage it from making unwise and foolish decisions (Ndjovu, 2003: 21). It will always strive to make rational economic decisions that will bring beneficial development to all parties. In addition to this, the law has to give reasonable protection to the expectations of those who have relied on it. Should the law deny this protection and fail to protect property, owners might not be willing to take risks and invest on their properties, for the benefit may be reaped by others. Neither would banks be willing to lend money for such risky business (Viitanen, 2002:3).

#### **4.2 Object of Compensation**

There are two theories concerning the amount or level of compensation that should be paid to the owner of the expropriated property: indemnity and taker's gain theories. Under the indemnity principle, which is also called "owner's loss" theory, the owner is entitled to be put in as good a pecuniary position as he would have been if his property had not been taken (Kratovil and Harrison, 1954:615). This principle is predominant in most western countries, though there are slight variations. It assumes that a "dispossessed owner would go out into the market and purchase with his compensation money a property roughly similar to that which had been acquired, any incidental loss or expense being met from the proceeds of the disturbance claims" (Ndjovu, 2003: 20).

In the United States, court decisions show that the compensation to be paid to the owner is not measured by the value of the land to the property taker (McCormick, 1932:465). In France, as in the USA, compensation does not reflect what the taker has gained, but rather, what the owner has lost. Moreover, its purpose is to compensate for the taking and not to directly pay the cost of equivalent reinstatement (Picard, 1990:57). In France, therefore, in addition to the market value of the deprived property, loss of rent, trading loss, moving expenses, dismissal benefits, severance damages, and the like are also coverable, although the taker gets nothing from it.

In England, in addition to the full compensation of the land acquired, the expropriating organ is also obliged to pay "compensation for disturbance of interest and compensation for severance and injurious affection" (Moore, 1990:6). Severance occurs when the physical taking of the part of a parcel of land depreciates the value of the remaining land. Injurious affection applies to the depreciation in the value of the remaining land caused by the construction of and use of the works for which the part was taken. Hence, to put the owner of the expropriated property in the same economic position, these laws consider, during the course of valuation, the loss of the property owner. Whether the expropriating organ gets much or little benefit from the taking does not matter.

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

A case in point is the Chinese compensation principle enshrined under Article 47 of the 1986 (as amended in 2004) Chinese Land Administration Law (LAL)(The People's Republic of China Land Administration Law). Paragraph 1 of Article 47 clearly states, “Land expropriated shall be compensated for on the basis of its original purpose of use.” Indeed, the details of the compensation for expropriation of arable land show that the farmer receives no market value for the loss of land. Rather a lump sum of money calculated at 6-10 years annual production is provided besides other minor payments.

The right to and extent of compensation amount is not mentioned in the Chinese Constitution (Bin, 2002:93). The basic rationale for using this principle in the PRC is that land is a collective property of the people, and individual persons are provided with “use right” for fixed period of time. So when the state expropriates land, what is taken is not private property, but use right. Or in other words, it is not expropriating but “resuming.”<sup>3</sup> Therefore, “the compensation in the expropriation of land is not for ownership but for land use rights, and paying that compensation is based on the national policy” (Chan, 2003:95).

Both arguments try to answer the modalities of and elements that should be included in assessments of compensation. Today, with the emphasis given to properties around the world, the indemnity principle is prevailing.

#### **4.3 Level of Compensation**

Most laws (constitutions or other minor legislations) which allow expropriation of private property usually add an adjective to the requirement of the payment of compensation. Depending on the legislation of each country, it may be termed as compensation, fair compensation, just compensation, reasonable compensation, adequate compensation or any other, like ‘commensurate compensation’ in Ethiopia.

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<sup>3</sup> Land expropriation refers to the case in which the government does not have ownership of the land. For example, the land occupant has the freehold interest in the land, and the government needs to acquire ownership of the land through a compulsory acquisition process. This kind of ‘land acquisition’ is also known as a ‘compulsory purchase’. Compulsory ‘land resumption’ refers to the case in which the government, not the land occupants, has the ownership of the land. For example, the occupants only have a leasehold interest in the land. Through the compulsory acquisition process, the government acquires the user rights and gets back the land it originally owns. This kind of compulsory land acquisition is known as ‘land resumption’ (CHAN, 2003:138).

In most Western countries<sup>4</sup> and, as shown in Kitay (1985:50), in most developing countries, the fundamental principle that guides valuations under expropriation laws is the payment of *fair market price* or *market value*. In other words, *market value* is generally taken as a test for the existence of just compensation.

Market value, as defined in *Appraisal of Real Estate*, is:

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

The reason why market value is favored by courts or legislators is that because it is believed that the amount of compensation is believed to cover the damage sustained by the owners. The amount of compensation will enable owners to go to the market and fetch similar property for the same price. The former owner should neither suffer a detriment nor reap a windfall profit. According to Denyer-Green (2009:194) this also turns an unwilling seller into willing seller during compulsory purchase procedure.

#### **4.4 Fairness and Objectivity of Market Value**

Researchers always question whether market value is really the fair and objective measure to determine compensation for expropriation. Although market value is taken as the most probable price that reflects the loss, it nevertheless is not an ideal one that gives full compensation to the losers of the property. The central difficulty of the market value formula for compensation is that it denies any compensation for real but subjective values (Epstein, 1985:183). Kalbro calls these subjective values as “individual values” or “reservation prices” (Kalbro, 2003: 59).

A reservation price is defined as, “the lowest price at which a property owner would sale the property without the threat of expropriation” (Norell, 2008:21). Reservation prices are, in short, those prices an owner would put for non-monetary values he has on the property, such as sentimental attachment, family history, removal of right to choose to sell, and similar personal values. Further, the purpose of the expropriation may also be another factor that alters the reservation value. It is argued that if people believe that the purpose is for social and public benefit, they tend to agree for lower compensation. On the contrary, if the land required is for private operators, such as Telecom Company, owners demand higher compensation amounts (Kalbro, 2003: 58). In general, since these sentiments have no monetary values, they are not considered during valuation. It is important to note that the market value for a given property can only be *assessed* or estimated, not calculated or exactly determined. Had the owner been allowed to fix the price, s/he would have added the

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<sup>4</sup> The term “just compensation” in the USA Constitution is understood by courts as “fair market value” (Paul, 1987:81, p. 81); the same conclusion is held in Europe as observed from the decisions of European Court of Human Right (Allen, 2007:288).

subjective or personal price on top of the market value. For this reason, it is said that market value does not give full compensation(Norell, 2008:59-60).

To tackle these problems, Epstein proposed fixing the amount of compensation somewhere between the market value and the reservation price of the owner (Epstein, 1985: 183). But since this approach still creates ambiguity about the amount, the same writer provided another solution. He proposed a bonus increase over the market value (Ibid). This proposal is now adapted by some countries that have included it in their legislations. The mechanism is to increase a percentage over the market value assessed by the valuator. For example, for many years now, a 10 percent bonus is allowed in England to home occupiers who lost the house by compulsory purchase (Id. 184; Comments, 1958:66). In addition to the fair market value for the property, home occupiers (if they happen to be occupiers as well) get 10 percent of the value of the home subject to a minimum of £4,000 and a maximum of £40,000; for businesses, the amount is 7.5 percent up to a maximum of £75,000 (Allen, 2008:84; British Land Compensation Act, 1973: ss. 29-30, 33).A recent legislation in Sweden as well allows for a 25 percent increase to the market value(Swedish Expropriation Act, SFS 2010:832, July 2010). The percentage increase over the market price will enable owners to acquire the lost property and regain part of the reserved price.

A slightly different but discriminatory approach concerning the increase on the market value is also proposed by Kalbro and Epstein. This approach proposes that instead of increasing the reserved price across the board, it is possible to impose the increase only in the case of private uses. If the expropriation is made for the interest of the public, the owner will be satisfied by the compensation of the market value, but if it is made for private economic gains, then an increase, in the form of profit sharing, can be made (Kalbro, 2003:58; Epstein, 1985: 184.)

## **4.5 Valuation Methods**

Valuation is the process of estimating the compensation amount for the property taken. In a typical Western country, the purpose of valuation during expropriation is to get a market value of the expropriated property. There are three common methods used to determine value of the property being appraised. These are the sales comparison approach, the income capitalization approach, and the cost approach.

### 4.5.1 Sales Comparison Approach

Sales comparison approach is a valuation technique in which the value of the real property is determined by comparing the property recently sold in the “market” to the land being appraised. Comparable sales approach is the most common method of land valuation which relies on market information to value the property. The underlying concept is that a recent sale from a willing seller to a willing buyer of a property (the comparable property) can best reflect the value of a similar land (the subject property) in the vicinity. This method models the behavior of the market by comparing the subject property under valuation with similar property or properties that have recently been sold, or for which offers to purchase have been made. It assumes that a rational and prudent buyer will not pay more for the comparable property, while a seller in the

same situation will not accept less for the same property. The sales price finally reached reflects the equilibrium of supply and demand for properties in a given market (Wyatt, 2005:128). Therefore, if the subject property under valuation were offered for sale in the same market about the same time, the transaction would be completed at approximately the same price.

#### 4.5.2 Income Capitalization Approach

An alternative to the comparative sales approach, typically used in situations where markets are relatively inactive, is called the income (or capitalization of income) approach. It is most applicable to agricultural land and investment properties. In this approach, an appraiser analyzes a property's capacity to generate future benefits and capitalizes the income into an indication of present value. In other words, the value of the land derived from this approach is the estimated present value of future benefits, including streams of incomes during the lifetime of the property and proceeds from the sale of the property.

This valuation approach derives land or building value by dividing annual net income from the property by an estimated capitalization rate. Under the income approach, valuation of a property is accomplished through capitalization. Capitalization is the division of a present income by an appropriate capitalization rate to derive the value of the income stream (UNECE, 1996: 38).

#### 4.5.3 Cost Approach

The cost approach is the valuation technique in which appraisers add property value to the depreciated value of improvements so as to determine the value of the subject property. In this approach, the value of a property is derived by adding the estimated value of the land to the current cost of constructing a reproduction or replacement for the improvement and then subtracting the amount of depreciation (Appraisal Institute, 2001:63). There would also be allowances made for depreciation that shall be reduced from the total value. The appraiser would base the appraisal on what it would cost to replace the existing facilities (Sayce et al., 2006: 16).

The replacement cost approach for structures in a typical developed country setting of active markets is based on the theory that the market value of an improved parcel can be estimated as the sum of the land value and the depreciated value of the improvements. In other words, this approach is based on the assumption that cost equals value. The reliability of the cost method depends on the validity of the assumption that cost and value are equal; however, there are many circumstances where such an assumption is not justified.

## 5. COMPENSATION IN THE UNITED KINGDOM

### 5.1 Compensation Principle

The essence of compensation in England is well expressed in what an Australian Court said in 1948 in the case of *Nelungaloo Properties Ltd v The Commonwealth*:

*Compensation prima facie means recompense for loss and when an owner is to receive compensation for being deprived of real property...his pecuniary loss must be ascertained by determining the value to him of the property taken from*

*him. As... the pecuniary value of the object is contained in the asset, the compensation cannot be less than the money value into which the owner might have converted his property had the law not deprived him of it*(Denyer-Green, 2009:197).

As already shown above, the indemnity principle requires equivalence in the damage caused to the expropriated person. This is clearly followed in the English laws as well. The statutory principle concerning the compensation level was first included in the 1845 Land Consolidation Act, and rewritten in the current Compulsory Purchase Act of 1965. Section seven of the Act partly reads as follows:

*In assessing the compensation to be paid by the acquiring authority ... regard shall be had...to the value of the land to be purchased by the acquiring authority.*

The meaning and implication of this principle was refined by courts in different times. For example, in its 1880 decision, the court in *Livingstone v Rawyards Coal Company* (1880) declares:

*In setting a sum of money to be given for reparation of damages, you should as nearly as possible get at that sum of money which will put the party who has been injured, in the same position as he would have been in if he had not sustained the wrong for which he is now gaining his compensation or reparation*(Ibid).

In *Horn v Sunderland Corporation* (1941), the court has again affirmed that “the principle of equivalence...is at the root of statutory compensation which lays it down that the owner shall be paid neither less nor more than his loss” (Id, p.196).

More elaborately, an 1868 decision based on the 1845 Act was delivered in *Penny v Penny* which calumniates the indemnity principle as follows:

*It is not the interest which has been acquired by the (acquiring authority) that has to be estimated, but the value of the interest taken from the person with whom the (acquiring authority) deals.*

## **5.2 Compensation Level**

From the forgoing discussion it can be deduce that the case laws and the statutes have urged for the use of a measurement more than a market value, the value of the land to the owner, as the measure of compensation amount in the event of compulsory purchase. But, a 1961 Land Compensation Act has finally set out market value as the measurement for compensation. Section 5 of this act specifically stresses that no additional allowance would be paid because of the compulsory act, and secondly, “The value of land shall... be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realize.” Therefore, the willing seller and willing buyer standard is introduced to determine its market price.

As a matter of principle, valuers are expected to consider “thehope value” or “highest and best use” of the land during their valuation. The idea is that if the highest and best use of the land is, for example, for urban housing, the valuation must be based on the value of urban housing development even if the land is currently undeveloped. This modality of valuation pays the owner the potential value of his land. In England, this principle was adopted as early as 1867 when the court decided that, “when the land has prospective value, say for building purposes, this could be taken into consideration, for otherwise the expropriated owner would not be compensated for his full loss-the value of land to him” (Id, p. 199). The court approved this on the ground that if the land had an adventitious value, beyond its mere agricultural or existing use value, and this value was marketable in the sense that a higher price could be obtained, the valuator could take this into account.

But this approach was later abandoned under with the introduction of the sec. 6 of the 1961 Compulsory Purchase Act and reemphasized by the Point Gourde principle of the Privy Council’s decision. The cumulative idea of above rules is that the market value would not include any value increase or decrease which results from the acquiring authority’s proposed scheme or actual development. In other words, any planning impact would be ignored for the valuation purpose.

### 5.3 Compensable Interests

#### 5.3.1 Land

Under English rule the taking of the land or an interest on the land is compensable. Land is understood under section 205(1)(ix) of the English Property Act of 1925as including the ground, fixtures on the ground, minerals and intangible rights:

*land of any tenure, and mines and minerals . . . buildings or parts of buildings and other corporeal hereditaments; also a manor, an advowson, and a rent and other incorporeal hereditaments, and an easement, right, privilege, or benefit in, over, or derived from land*(Goo, 2002: 27).

This is, however, with due regard to other special definitions given to land in special acts for specific reasons.

The above interests, land, are compensableas already shown in the 1965Compulsory Purchase Act. Section seven of the Act states:

*In assessing the compensation to be paid by the acquiring authority under this Act regard shall be had not only to the compensation value of the land to be purchased by the acquiring authority, but also to the damage, if any, to be sustained by the owner of the land by reason of the severing of the land purchased from the other land of the owner, or otherwise injuriously affecting that other land by the exercise of the powers conferred by this or the special Act.*

The owner of land or interest thereon who lost such interest by compulsory purchase is entitled to the value of the land taken. Details of the valuation technique of all assets and

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interests are beyond the scope of this study. But it is suffice to underline that it would be the responsibility of the real property valuator to use the best method applied (one of the methods discussed in sec. 4.5 above) in the profession to reach the market value of the expropriated property. Courts do not usually authorize a specific valuation method to be used for that is highly technical one.

### 5.3.2 Severance and Injurious Affection

The second clause of section seven of the Compulsory Purchase Act, cited above, mentions about injurious affection during partial compensation of land. The idea is that during valuation, assessors should consider not only the land taken, *“but also the damage... to be sustained by the owner of the land by reason of the severing of the land purchased from the other land of the owner, or otherwise injuriously affecting that other land...”*(Compulsory Purchase Act, 1965: Sec.7).

Severance occurs where the land acquired from the claimant contributes to the value of the retained land, so that when severed from it, the retained land loses value. Injurious affection is the depreciation in value of retained land as a result of the compulsory acquisition and the proposed use of all the land acquired by the acquiring authority. Severance can be said to be one cause of injurious affection to the retained land (Denyer-Green, 2009: 288). In both cases, what is important is that the land taken and retained must have been interrelated and the severance (taking) of part of the land must cause harm on the retained one. The harm could be a total loss of value or a depreciation or reduction in market value.

Severance may injuriously affect retained land because the loss of the part acquired depreciates the value of the retained, or because the claimant’s land is severed into two or more parts, such as a farm by a motorway, and the severed parts are depreciated in value because of the increased cost of working (Id, p. 292).

One aspect of injurious affection is when the use or execution of the land taken for the intended purpose causes the depreciation of the value of the retained land. Thus, if the land taken is used for road or railway construction, the undesirable effects of noise, dust, and blockage access that causes the reduction in the value of the retained value are compensable.

There are two possible methods for determining the loss to an expropriated owner in case of severance. The first is to value the land that is taken and add to this the decreased in value of the retained land. The second method is the “before and after” method in which the expropriated owner’s entire interest is valued before severance and from this is deducted the value of the land he retains.

### 5.3.3 Disturbance and Other Matters

Disturbance compensation is associated with the costs the owner incurred as a result of his moving and displacing to other places. Such costs included loss of good will, loss of profit, trade loss, relocation and resettlement expenses, legal costs and personal time expenses (Id, p.340-353). The source of this compensation modality under English law is Rule 6 of section 5 of the Land Compensation Act of 1961 which provides:



*The provision of rule (2) shall not affect the assessment of compensation for disturbance or any other matter not directly based on the value of the land(Land Compensation Act, 1961).*

The justification for the inclusion of this compensation package is to make the compensation equivalent to the loss sustained. In other words, the expropriated person would not have incurred extra cost for the above type of disturbance costs had he not been forced to do so under the compulsory purchase procedure.

The test for determining the eligibility of claim for compensation for disturbance and other matters are summarized in *Director of Building and Lands v Shun Fung Ironworks Ltd* (1999):

- a. Causation: the loss must be caused by the compulsory acquisition,
- b. Remoteness: the loss must not be too remote,
- c. Duty to mitigate: the claimant must act reasonably in seeking to mitigate his loss (Denyer-Green, 2009: 353).

#### 5.3.4 Additional Compensation

As already mentioned, the value to the owner has been replaced by the principle of market value and hence there seems a reservation on the fairness of the market value. Therefore, the law devises different type of mechanisms to give additional compensation to the owner of the lost property. A case in point is the housing loss payment recognized by the Land Compensation Act of 1973. The reading of section 29-33 reveals that additional percentage compensation may be provided to those who are displaced from their homes by compulsory purchase procedure.

The mechanism is to increase a percentage over the market value assessed by the valuator. In addition to the fair market value for the property, home owners get 10 percent of the value of the home subject to a minimum of £4,000 and a maximum of £40,000; for businesses, the amount is 7.5 percent up to a maximum of £75,000 (Allen, 2008:84; Land Compensation Act, 1973: ss 29-30, 33).

## **6. COMPENSATION IN ETHIOPIA**

### **6.1 Compensation Principle**

The compensation principle in Ethiopia is not clear. But one thing to say is that it does not fit to the indemnity principle which gives an equal or equivalent amount of compensation to the loss sustained by the owner of the expropriated property. The wide range of compensations provided in the English law that we saw above are good example (as compared to Ethiopian) as to how the state is concerned about the wellbeing of its citizens.

The defunct Ethiopian Civil Code Section on expropriation has provided something that looks like an indemnity principle. Article 1474 (1) of the Code says that the amount of

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compensation or the value of the land that may be given to replace the expropriated land shall be “equal to the amount of the actual damage caused by expropriation.” Yet this does not cover the potential damages, such as future highest and best use of land values. The Civil Code interests only on actual and real damages caused when the land was expropriated.

The current FDRE Constitution under sub-article 8 of Article 40 provides for advance payment of “commensurate” amount of compensation to the loss of private properties. But the constitution does not recognize land as a private property. What is considered as private property in the constitution is any other property planted or erected on the land by the skill, labor or capital of the person (sub-article 1). Therefore, the subject of compensation under the present legal regime is buildings, plants and other similar things, save the ground or land itself. This means the compensation valuation does not consider, among others, the value of location, and this significantly reduces the amount of compensation payable to the holder. Rather in the opinion of this writer the principle followed in today’s Ethiopia is the “taker’s gain” principle which stresses that the compensation paid must consider the original purpose of use of the land rather than its futuristic potential.

## 6.2 Compensable Interests in Ethiopia

A general reading of the Expropriation Proclamation and the Compensation Regulation reveals that the following interests are compensable.

- A property situated on the land
- Permanent improvements to the land
- Loss of land
- Relocation of property
- Lost income, in case of temporary loss of land

A brief explanation is provided as follows.

### 6.2.1 Private Properties (Properties and Improvements on and to the Land)

As mentioned above, the FDRE Constitution recognizes all properties situated on the land as private properties. And according to Article 7(1) of the Expropriation Proclamation, “A landholder whose holding has been expropriated shall be entitled to payment of compensation for his property situated on the land and for permanent improvements he made to such land.” While *property situated on the land* refers to building, structure or plants of any kind that have value, *improvement to the land* refers to any work made on the land that increases the value, productivity, or fertility of the land.<sup>5</sup>

In urban areas, *properties situated on the land* include buildings (residential, commercial, and industrial), fence, utility lines, religious buildings, burial structures, tree plants, and other structures. In rural areas, residential houses, farm houses, storage houses, livestock sheds and

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<sup>5</sup> These definitions are given based on the type and nature of properties mentioned in the Expropriation Proclamation (Proclamation 455/2005) and the Federal Compensation Regulation (Proclamation 135/2007).

shelters, fence, trees, crops and grass are considered as properties situated on the land. This can be inferred from the readings of the Compensation Regulation 135/2007.

When one looks into *improvements to the land*, based on the above definition, facilities (water and sewerage, streets etc) and area beautification may be considered as improvements to the land in the case of urban areas. In rural areas, land terracing, clearance and leveling works, irrigation canals and ducts, and water wells and reservoirs are examples of improvements to the land which cost the holder for their construction.

#### 6.2.2 Displacement compensation

The other property interest subject to compensation is the loss of the land itself. This is especially visible during the loss of rural land. The Expropriation Proclamation orders, under Article 8, that “displacement compensation” should be paid in the event of complete loss of the farm land by way of expropriation. This means that in the absence of replacement land in the locality, the holder of the land shall receive *displacement compensation*. The question one may raise here is the nature of displacement compensation; is it compensation in its proper sense? Or whether it is a kind of rehabilitation support? Determining its nature helps us to judge the fairness of the compensation provided for the complete loss of the landholding.

One may wrongly conceive the *displacement compensation* as compensation similar to those which are paid for the loss of private properties. But this writer differs from this conception for the reasons discussed below.

As already discussed earlier, the Ethiopian Constitution recognizes any property on the land as private property but not the land itself. Owners of property on the land are guaranteed with *commensurate* compensation to the loss of their private property in the event of expropriation (Ethiopian Constitution, 1995: Art. 40.8). The Constitution doesn't say anything about the loss of land. In other words, government is not supposed to pay commensurate compensation for loss of land. Besides, “compensation” is defined in the Expropriation Proclamation as “payment to be made in cash or in kind or in both to a person for his property situated on his expropriated landholding” (Art. 2.1). Further, Article 7(1) of the same proclamation adds *improvement to the land* (besides the property on the land) as interests subject to commensurate compensation.

So, what is really the subject of commensurate compensation is the private property (property situated on the land and improvement to the land) but not the land. The modality of compensation for complete loss of rural land is “replacement of land” or “displacement compensation”, a monetary compensation equivalent to ten years income. It can be easily inferred from the name that what is given to the peasant for loss of land is not compensation for lost private property (for land cannot be owned privately), but a compensation to assist a displaced person to rehabilitate against the loss of the perpetual use rights of land in another type of life style. Although the ten years' value of produce has no basic justification, at least it is believed that such amount of money would be enough to enable the farmer to start a new way of life.

This argument can be strengthened by looking into the Chinese Land Administration Law (LAL) of 1987 which is considered as a source of the Ethiopian expropriation law. Article 47 of the Chinese LAL provides for three types of compensations in the event of expropriation of cultivated land: *compensation for land, resettlement subsidies, and compensation for attachments and young crops on the requisitioned land* (The People's Republic of China Land Administration Law: Art. 47).

The Ethiopian expropriation proclamation adapts the last two compensations, i.e., resettlement subsidies and compensation for plants, while dropping the first type of compensation for the loss of the land itself.

### 6.2.3 Relocation Properties

The Compensation Regulation allows the payment of relocation compensation, a compensation paid in association with the cost incurred for removing, transferring, transporting and installing one's property. There are three things which fall under this category: utilities (Ethiopian Federal Compensation Regulation 135/2007, Art.3.2.b), relocated properties (Id, Art.10), and graves (Id, Art. 12). To avoid confusion, relocation of a house means the salvages of the demolished house and the furniture. In some cases, the house could be reinstalled if it can continue its service as before.

## 6.3 Compensation Level in Ethiopia

In Ethiopia amount of compensation is determined not by employing all types of valuation techniques which are found to be appropriate for the valuator. As a matter of principle, the law sanctions the third valuation approach, cost replacement approach, as the only technique to be employed in the determination of compensations of buildings, the most important type of assets. Article 7(2) of the Expropriation Proclamation says that:

*The amount of compensation for property situated on the expropriated land shall be determined on the basis of replacement cost of the property*(Ethiopian Expropriation Proclamation 455/2005, Art.7).

According to the present constitutional arrangement, ownership of land is vested in the hands of the people and the state (Ethiopian Constitution, Art. 40.3). And all rural farmers and pastoralists are guaranteed with plot of land free of charge (Id. Art. 40.4 &5). Such right (holding right) is a lifetime one and beyond in that it can not only be used and leased, but also be donated and inherited to family members. Farmers and pastoralists would not be evicted arbitrarily from their holdings without compensation when the need arises. The constitution guarantees an advanced commensurate amount of compensation for private property on the land in the event of expropriation (Id. Art. 40.8). As already mentioned, this does not include compensation for the loss of the land itself.

Based on this, the Expropriation Proclamation provides compensation, valued based on the replacement cost for structures in urban and rural areas. For instance, if an urban property is expropriated, the compensation shall be calculated by taking into consideration the replacement cost of a similar building. Valuers consider the current prices of construction

materials and labor. Then from this they reduce depreciation allowance. But they do not consider the value of land or location during the estimation. For this reason, the compensation estimated is usually low as compared to the market value of the properties. If owners are allowed to sell the property on their own, they could collect not only the value of the property on the land, but also the value of the land as well, which gives them hundred times more value.

Unlike the English laws, severance and injurious damages are not compensable in Ethiopia. If part of a building is demolished and renders the remaining part useless for the purpose it was intended, or the owner wishes to surrender the rest of the land, then compensation shall be paid for the whole property (Art. 3.3). If, however, the owner prefers to keep the remaining part, compensation will be paid only for the demolished portion (Art. 3.4). No compensation shall be paid for the part of land taken; it only applies for the building. In other words, there is no “severance” or “injurious affection” compensation, compensation payable for the depreciation in value of a retained land caused as a result of a loss of a part of the land.

Similarly, there is no as such compensation for depreciation of property or lost income as a result of project works, such as road constructions. Even if road constructions are prolonged for as many periods as three to four years, business closures and lost incomes are not compensable.

In case of agricultural land expropriation, one year’s compensation is given for the loss of plants on the land. Besides a ten years’ compensation calculated by taking an average income of the past five years is paid as displacement compensation. If replacement land is available, the ten years compensation is not necessary. No compensation for loss of land and no consideration for its future or potential use.

## **7. ANALYSIS AND CONCLUSIONS**

The UK and Ethiopia are found at different economic and social development. Indeed their legal and ideology are also different. But there is one fundamental premise which makes them similar, that land belongs to the crown or the state. Of course, this may be a symbolic one for the English, but a formal one for Ethiopia. In England, even if it is the crown, in principle, that owns all land and people are given some form of land use right (such as freehold), holders of the land are given a free right to exercise and get benefit from it. But, in Ethiopia even if the people are said to be joint owners of the land, they are denied adequate compensation for their properties in the event of expropriation.

The basic difference is that unlike in the UK, Ethiopian legislations do not give value to the land. Land is unsalable and hence no value is given during expropriation or mortgage. Besides, in the English compulsory purchase acts, the basic tenet behind the compensation is the complete recompense of damages caused to the expropriated. Based on the international practice and consensus, market value is taken as the measure of fair compensation to give full compensation. The different Acts provide for variety of types of compensation packages to reach full compensation. It seems, even it goes beyond market value since the Acts provided an additional percentage of the market value to the expropriated.

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On the contrary, the compensation principle in Ethiopia is not to give full compensation to the expropriated. Although from the name “replacement cost” one may guess that compensation would equal to what has been taken, this is not the case in reality. As a matter of fact, people are rather impoverished because of the expropriation, as the expropriation act either diminishes their livelihood or completely destroys it. From the whole system, it is the state alone that benefits when land is expropriated and transferred to others at profit.

By way of recommendation, within the existing state and public ownership of land framework, it is possible to borrow and copy what is being practiced in the UK. One possibility is that to start giving value to urban land during valuation of expropriation and narrow the gap between the market value of the property and its expropriation compensation amount. Even if it is difficult to give the whole land value increment/profit to the individual, it is possible to share the profit between the government and the holder of the land.

Further, there are many non-compensable damages caused during the expropriation practices. For example, severance or injurious affection is the commonest one. People usually lose part of their land for roads construction, but not compensated for the land taking. Most people are being relocated from their original places to the periphery and they have not been compensated for the inconvenience. Rather they are exposed to more hardships and transport expenses.

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## **BIOGRAPHICAL NOTES**

Dr. Daniel Weldegebriel AMBAYE is currently anAssistant Professor of Land Law and a Deputy Director of the Institute of Land Administration (ILA), Bahir Dar University, Ethiopia. He provides lectures in the areas of land law and policy at the post graduate programmes of ILA and the School of Law of Bahir Dar University. He has got his LL.B from Addis Ababa University and his MSc and PhD from the Royal Institute of Technology (KTH), Stockholm, Sweden. He formerly served as assistant Judge of the Federal Instance Court, Attorney of Commercial Bank of Ethiopia, and Assistant Dean of the Law Faculty at Bahir Dar University.

## **CONTACTS**

Dr. Daniel Weldegebriel Ambaye  
Institute of Land Administration  
P.O.Box. 1941  
Bahir Dar University  
Ethiopia.  
Mobile: +251 918 762501  
E-mail: [danambaye@yahoo.com](mailto:danambaye@yahoo.com),  
Web: [www.ila.edu.et](http://www.ila.edu.et)