

DIVERGENCE BETWEEN THE LAW AND THE PRACTICE ON THE RIGHT TO SELL OF RURAL HOUSES IN ETHIOPIA: EVIDENCE FROM THE AMHARA NATIONAL REGIONAL STATE

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Abstract

In Ethiopia, rural land holders as well as practitioners are left with uncertainty regarding the right and freedom to sell properties they produced on their land-holding for dwelling purposes and like. The message conveyed by the FDRE Constitution and rural land legislations in this respect has not been clearly understood and applied. This paper aims to investigate the real content of the legal provisions and the practice with respect to the sale of rural houses in Ethiopia by providing empirical evidence from Amhara National Regional State (ANRS). The research applied both qualitative and quantitative research methods. The qualitative method was used to analyze data collected through focus group discussion (FGD) and key informant interviews. 5 FGDs were conducted with a total of 85 rural land-holders in each of the Five selected woredas and with Nine judges selected from the Bahir Dar Area High Court and the Supreme Court of ANRS. To analyze relevant laws, I applied doctrinal analysis. I also applied comparative law method to compare the Ethiopian land transfer regime with that of China and Vietnam. The quantitative method was applied to present data collected through questionnaire. Questionnaire survey was applied to collect information from two groups of respondents: 50 rural land administration and use staff in the selected Five woredas (districts) and a total of 30 judges working in courts representing the Five selected woredas. The data obtained was presented by a simple statistical tool using figure, tables and percentages. The study has found out that the law does not prevent the sale of rural houses in Ethiopia as it is the case in Vietnam and China. However, the study showed that the law has been understood by both the people and experts to prohibit the practice of sale of rural houses. The study suggests that a clearer and more complete legislative coverage as well as an active and better oriented staff in land administration and use offices and courts should be ensured in order to enforce existing land policy properly.

Keywords: Rural houses, sell practice, land law, ANRS, Ethiopia

INTRODUCTION

Land right or real property right gives the individual a number of rights. Schlager and Ostrom provided a model for understanding the different powers or actions a land right can entitle the owner. According to them, these powers are access, withdrawal, management, exclusion and alienation or land transfer.¹ A comprehensive model to property rights especially to the

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¹ Schlager, E. & Ostrom, E, *Property-Rights Regimes and Natural Resources: A Conceptual Analysis*, 68 (3) Land Economics, 249–254 (1992). Other authors have updated these rights who identify eight rights under three major

ownership right has been provided by A. M. Honore who listed 11 'incidents of ownership' that have come to be known as 'the bundle of rights': the right to possess, the right to use, the right to manage, the right to the income, the right to the capital value of the object, the right to security against expropriation, the right of transmissibility or transfer through sale, gift, bequest, the right of absence of term, the duty to prevent harmful use, liability to execution and the incidence of residuary.² Anthony Scott identified a minimum of six fundamental characteristics of property rights: duration, flexibility, exclusivity, quality of title, transferability, and divisibility.³ O'Driscoll and Hoskins⁴, on their part, consider that the two essential elements of property rights are the exclusive right of individuals to use their property and the ability of individuals to freely transfer it. From these works, one can understand that the right to transfer property is considered as one of the fundamental characteristics or attributes of property rights.⁵ Many countries in the 'developed world' have created a property institution system for the free and convenient transfer of land among their citizens.⁶ Exercising a right of transfer of a property right also known as the right to alienation involves the right to sell or lease out the property object and associated rights to the sale or lease.⁷ However, the ability to bequeath property is better treated outside the right to transfer.⁸ The most obvious justification for the right to transfer land is to provide the possibility of transferring resources to their highest or best valued use.⁹

The jurisprudence with regard to rural property transfer in particular has not been well-settled in Ethiopia. With respect to rural lands, there is a question of whether the land laws permit sale of rural houses, which are mostly used for residential purpose and animal keeping. As will be evident in later discussions, legal framework on real property rights is not detailed; understanding of relevant legislation is low; and political orientation is not in terms of existing legislation and policy. The key questions are whether rural land parcels on which houses are constructed can be seen differently from those without construction, and, whether, in the case of rural lands, the land on which a house is constructed may be treated differently from the house constructed. These questions become relevant because the Constitution of Federal Democratic Republic of Ethiopia (FDRE) has a provision which states that urban and rural land is owned by

sets of property rights. The three sets of rights are use rights, control rights and authoritative rights. Use rights include two rights, namely, use of direct benefits and use of indirect benefits; control rights include management, exclusion and transaction, and monitoring rights; authoritative right includes definition and allocation of rights. See Thomas Sikor, Jun He and Guillaume Lestrelin, *Property-Rights Regimes and Natural Resources: A Conceptual Analysis Revisited*, 93 World Development, 338–340 (2017).

² Honore AM (1961), Ownership, Making Law Bind: Essays Legal and Philosophical cited in Muireann Q, *Property and the Body: Applying Honore*, 33 (11) Journal of Medical Ethics, 631– 634 (2007). See also Jeremy Waldron, *What Is Private Property?* 5 (3) Oxford Journal of Legal Studies, 313–349 (1985).

³Anthony, Evolution of Individual Transferable Quotas as a Distinct Class of Property Right (Edited version of a paper presented at the NATO Conference on Rights-Based Fishing, Reykjavik, 1988) cited in John Sheehan & Garrick Small, Towards a Definition of Property Rights (Paper presented at the Pacific Rim Real Estate Society (PRRES) conference, Christchurch New Zealand, 2002)19.

⁴ Gerald P. O'Driscoll Jr. & Lee Hoskins, Property Rights: The Key to Economic Development (Policy Analysis, No.482, 2003).

⁵ See also Jean-Philippe, P *The Evolutionary Theory of Land Rights as Applied to Sub-Saharan Africa: A Critical Assessment*, 27(1) Development and Change, 29 – 86(1996).

⁶ See generally Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere else?*(Black Swan Publisher, 2000) 160–218.

⁷ Schlager and Ostrom, *supra* note 1, at 251.

⁸ Id. at foot note 8.

⁹ Id. at foot note 8.

the state and the people and hence not subject to sale and other forms of transfer.¹⁰ On the one hand, the Constitution has provisions which stipulate that private property is protected.¹¹ Further it is provided that an individual can transfer property developed on his land (private property) through sale or other means.¹² On the other hand, this research has revealed that in practice rural houses may not be sold in ANRS because their sale may be treated as the sale of rural land (See Section 3). So there is an apparent diversion between the general practice and the law. This diversion creates conundrum on the question of whether selling investments on land is constitutional and legal in Ethiopia. This conundrum might open the room for varied application of the same matter in different areas and with regard to different experts or agencies in the region especially the agencies which deal with rural land administration and use. Further, this diversion between the law and practice may limit the great potential that the transaction in real property has in accruing economic, social, and moral values to society (See Section 5). The negative impact that this situation impinges on the economic development of Ethiopia in general and ANRS in particular can never be underestimated.

The objective of this study is to see critically into the practice of rural house transfer in Ethiopia and investigate whether such practice is in conformity with the rules in the FDRE Constitution (1995) and the relevant land administration and use laws at Federal and regional level. The issue of sale of rural houses has not been addressed in previous research which means this research is of paramount importance both in its own merit as well as initiator for debate and further research on the issue of land transactions in rural Ethiopia. The paper explores the dilemmas, arguments and disputes on the question of whether sale of rural houses is a lawful practice in Ethiopia. It explores the legislative framework, evaluates the practice on the sale of rural houses and, finally shows the gap between the content of the law and the practice by providing empirical evidence from ANRS, one of the largest regional states in Ethiopia. To this end, the researcher framed four specific research questions in order to obtain results. These questions relate to (1) whether or not rural house sale is deemed legal in ANRS in particular and in Ethiopia in general, (2) whether or not the attitude on sale of rural houses is in terms of the spirit of the law, (3) whether or not there exists any practice of rural house sale and the challenges impacting on it, and (4) how sale of rural houses can be justified legally and economically.

The paper is organized into five main sections. The first part deals with the research method employed in the paper. The Second Section espouses the status and scope of the right to transfer rural property in present day Ethiopia. This part furnishes a bird's eye view of the land ownership and policy features in the country. It also provides for the land ownership legislation of China and Vietnam with the view to infer the similarities and differences with respect to the scope of land rights as compared to Ethiopia. The Third Section deals with the perceptions and attitudes on the law regarding sale of rural houses. That is, the interpretation of the law and the level of interests and demands on the sale of rural houses. The Fourth Section deals with on the practice of sale of rural houses and the challenges faced on the attempt to sale rural houses in

¹⁰ Constitution of the Federal Democratic Republic of Ethiopia Proclamation, 1995, Proc No 1/1995, *Fed Neg Gaz*, Year 1, No.1, Art. 40 (3).

¹¹ *Id.* at Art. 40 (1). A private property is defined as a thing which has value and is produced by the labor, creativity, enterprise or capital of a person: At Art. 40 (2).

¹² *Id.* at Art. 40 (7).

ANRS. The Fifth Section part deals with the justifications for allowing the practice of sale of rural houses in Ethiopia in general and in ANRS in particular.

1. RESEARCH METHODOLOGY

Ethiopia is presently divided into 11 regional states and 2 city administrations. The ANRS has pioneered rural land registration in Ethiopia.¹³ Land registration has already been carried out in most parts of the region like several other regions in the country.¹⁴ The practice of sale of rural houses can best be traced through the system of registration. This is because, first, one of the well-known functions of land registration or formal property systems is the fostering of real property transactions including sale.¹⁵ Second, sale practices that are conducted outside of the land registration system are generally not given state protection and are generally considered as unlawful. There are two reasons why ANRS is purposely selected as case study. First, the land registration system in the different regions of Ethiopia including ANRS is generally similar at policy level. This is because regions undertake land registration under a similar overarching legal and policy framework envisaged in the FDRE Constitution and the national and administration and use law.¹⁶ The law gives the regions the power to administer land located in their region in line with Federal legislation.¹⁷ Therefore, an exaggerated difference is not expected among the regional land administration laws. Second, ANRS is facing many land disputes. Although in principle the recent land registration reforms in Ethiopia have resulted in the reduction of disputes as compared to the previous times when there had been no formal land registration¹⁸, this does not mean that land dispute has decreased significantly. In fact, there are situations whereby the land registration system itself could generate more disputes especially when the system is not up-to-date and efficient.¹⁹ The disputes include the ones arising in relation to sale and other transactions with respect to rural houses (See Section 4). The author himself, as legal practitioner (Since 2009), has witnessed a large flow of court cases on land in general and land transactions in particular in ANRS.

¹³ Abab, S. A. An Assessment of Rural Land Registration and Land Information System in Amhara Region, Ethiopia: A Land Administration Perspective (Unpublished MSc Thesis, the Royal Institute of Technology (KTH), Stockholm, Sweden, 2007) 29; Shibeshi, G. B.. Cadastral Procedure and Spatial Framework for the Development of an Efficient Land Administration System for the Rural Lands of ANRS (Amhara National Regional State) of Ethiopia (PhD Dissertation for Obtaining a Doctorate Degree at the University of Natural Resources and Life Sciences Vienna, Austria, 2014) 27.

¹⁴ Abebe, G., Gebremeskel, T. and Bennett, R. Implementation Challenges of the Rural Land Administration System in Ethiopia: Issues for Land Certification and the Information System (Paper presented at the World Bank Conference on Land and Poverty, Washington DC, 2015); Adenew, B. & Abdi, F. Land Registration in Amhara Region, Ethiopia (Research Report 3, Central Research Department of the UK's Department for International Development, 2005); Persha, L., Greif, A., Huntington, H. Assessing the Impact of Second-Level Land Certification in Ethiopia (Paper presented at the World Bank Conference on Land and Poverty, Washington DC, 2017).

¹⁵ De Soto, supra note 6, at 36–38.

¹⁶ Federal Democratic Republic of Ethiopia Rural Land Administration and Land Use Proclamation, 2005, Proc. No. 456/2005, *Fed Neg. Gaz.*, Year II, No. 44.

¹⁷ Id. at Art. 17 (1).

¹⁸ Holden, S.T., Deininger, K., Ghebru, H. *Tenure Insecurity, Gender, Low-cost Land Certification and Land Rental Market Participation in Ethiopia*, 47 (1) *The Journal of Development Studies*, 31–47 (2011).

¹⁹ Berhanu Adenew and Fayera Abdi, Land Registration in Amhara Region, Ethiopia (Research Report 3, Central Research Department of the UK's Department for International Development, 2005) 24; Zerfu Hailu, Land Governance Assessment Framework Implementation in Ethiopia Final Country Report Supported by the World Bank (2016) 40.

ANRS has 216 *woredas* and Five representative *woredas* were selected as study sites because they are the easiest to gather information in terms of their being near in distance from where the researcher works and lives (convenience sampling). The *woredas* selected as study sites were Bahir Dar Zuria *woreda*, Gondar Zuria *woreda*, Fogera *woreda*, Gozamen *woreda*, and Guangua *woreda*. *Woreda* rural land administration and use offices and courts are located in the towns of Bahir Dar, Gondar, Woreta, Debre Markos, and Chagnie where rural land administration and use offices of Bahir Dar Zuria *woreda*, Gondar Zuria *woreda*, Fogera *woreda*, Gozamen *woreda*, and Guangua *woreda* respectively are located. Given the nature of the research being highly founded on legislative analysis in relation to sale of rural houses, the practice in these Five *woredas* is believed to represent the practice in ANRS. This is because, as we mentioned earlier, all *woredas* administer land according to uniform legal framework²⁰, institutional apparatus and leadership under the auspices of the Bureau of Rural Land Administration and Use.

The research applied quantitative and qualitative research methods of data analysis. The quantitative method was used to analyze data obtained through questionnaire. The questionnaires were distributed for land administration staff and judges in the sample *woredas*. 50 land administration staff were selected to respond to the questions in the questionnaire survey. The sample respondents were selected using purposive (non-probability) sampling with the view to contact staff with better training background in land administration and surveying and have longer experience in office in this field. The sampling population that is the total number of land administration and use staff in ANRS was 822. Similarly, 30 sample judges were chosen purposely from the sampling census of 1300 judges in all *woreda* courts of ANRS. An effort was made to get the judges with better exposure to land matters by talking to the respective Presidents of the courts.

In order to investigate the question of whether rural house sale is deemed legal in ANRS, I have employed a special qualitative research method known in the legal field as doctrinal analysis. Being a distinct social science, ‘law’ has developed its own research approach based on the doctrinal methodology. Doctrinal analysis principally involves the critical reading of statutes and court judgments with little or no reference to the real world.²¹ The pure doctrinal analysis has however been criticized for its ‘intellectually rigid, inflexible and inward-looking’ approach of understanding law and its operation.²² Therefore, it has become necessary to support this method by empirical analysis involving questionnaires and the like.

The questionnaires were applied to collect data in order to answer especially the 2nd, 3rd, and 4th research questions identified in the Introduction. Further, three FGDs were conducted first with 85 randomly selected rural land-holders coming from Bahir Dar Zuria *woreda*, Fogera *woreda*, and Gozamen *woreda*. The second FGD was applied with respect to Nine purposely selected high profile judges in ANRS working in Bahir Dar Area High Court and the Supreme Court.²³

²⁰ Currently, the Proclamation being applied in the region is: The Revised Rural Land Administration and Use Determination Proclamation, 2017, Proc No 252/2017, *Zikre Hig*, Year 22, No 14.

²¹ McConville, M., Chui, W. H., (Eds), *Research Methods for Law* (Edinburgh University Press, 2007).

²² Vick, D. W. Interdisciplinary and the Discipline of Law, 31 *Journal of Law and Society*, 163–193 (2004). Waldron, *supra* note 2, at 313–349.

²³ FGD with Kegne Bezabeh, Getaye Admas, Kasahun Yehunie, Ato Mulu, Solomon Goraw and others (total Nine), National Regional State Supreme Court and High Court Judges (Bahir Dar, 2018)

The FGDs were applied as a supplementary tool in order to support and validate (triangulate) the data obtained from the questionnaires.

I have taken additional measures to enhance the reliability or validity of the conclusions obtained in this study. With respect to analysis of what Ethiopia's law says on the scope of the right to sell of rural houses, I have applied a comparative law method. Comparative law method was applied by taking two countries, namely, China and Vietnam, for comparison in the context of international experience with regard to land transfer. These countries were selected because of their similar, if not identical, land ownership policy to Ethiopia, i.e., collective ownership of land.²⁴ It is good to see the different approaches on the right to transfer real property taken by jurisdictions with related land ownership policy. Further, I have undertaken key informant interviews with three selected judges with long experience in the courts working in Bahir Dar and Debre Markos area to support the FGDs with judges.²⁵

2. THE STATUS AND SCOPE OF THE RIGHT TO TRANSFER RURAL PROPERTY IN ETHIOPIA

2.1. Ethiopia's Land Policy on Land Ownership and Transfer

Sale of land was a lawful practice before the change of regime in 1974 and the coming into force of landmark land nationalization proclamations²⁶ following the change. After the coming into force of these legislations the regime of private property ownership to land was abrogated and entirely replaced by the regime of public or collective ownership of land. The reform introduced by these legislations brought about the first uniform tenure system in Ethiopia whereby all rural and urban land was declared to be the property of the state. The system of public ownership of land continued unabated during the post-*Derg* era. Land policy derives from the FDRE Constitution and the proclamations arising from it. The FDRE Constitution prescribes that the right to ownership of rural and urban land, as well as of all natural resources, is vested in the State and in the peoples of Ethiopia.²⁷ Theoretically, the State and the peoples, together, have all rights of property. Just as in the case of the *Derg* era, individuals are prohibited from indefinitely transferring land by sale and other means of transfer and exchange.²⁸

In Ethiopia, unlike the practice in the majority of countries in the world, there are distinct land administration systems as well as legal frameworks for urban and rural lands although the overarching land policy is the same. In addition to the rural-urban dichotomy in land administration, there is, in fact, one major difference between the land tenure in rural areas and that in urban areas. That is the land tenure of rural areas, as will be discussed later, is called 'land

²⁴ Holden, S. & Bezu, S. Land Valuation and Perceptions of Land Sales Prohibition in Ethiopia (Conference, Milan, Italy, International Association of Agricultural Economists, 2015).

²⁵ Interview with Mr. Habtamu Wuletaw and Mr. Berihun Adugnaw, ANRS Supreme Court Judges (Bahir Dar, 2018); Interview with Mr. Abush Waga, Awabel *Woreda* Court, East Gojjam Zone (Debre Markos, 2018).

²⁶ These proclamations are known as the Public Ownership of Rural Lands Proclamation No 31/1975 and Government Ownership of Urban Lands and Extra Houses Proclamation, 1975, Proc No 47/1975, *Neg Gaz*, Year 34, No 41.

²⁷ FDRE Constitution, *supra* note 10, Art.40 (3).

²⁸ *Id.*

holding’ whereas the land tenure of urban lands is called ‘leasehold system’. Proclamation No. 80/1993 introduced the leasehold system for the first time and leasehold system became the only officially recognized urban land holding system. Urban Lands Lease Holding Proclamation No.721/2011 which replaced previous lease legislations (Proc. No.272/2002 and Proc. No.80/1993) is the law being enforceable at present.²⁹ Transfer of urban leasehold right is, in principle, a right. Accordingly, the urban leasehold law allows a transfer of lease right in the form of sale, mortgage and contribution in Share Company which is common practice in urban areas.³⁰ That is, the matter of sale of urban buildings is relatively clearly governed.

The present applicable rural land administration and use law, which replaced the Federal Rural Land Administration Proclamation No. 89/1997, introduced the concept of ‘land holding right’.³¹ The concept of ‘holding right’ has been directly applied by the rural land use and administration laws of South,³² Afar³³, Somali³⁴ and ANRS³⁵ while other regional states use the term ‘possession right’ instead.³⁶ The meaning attached to the term ‘land holding right’ sheds light on the scope of rural land rights in Ethiopia in the present era. FDRE land law defines land holding right as:

The right of any peasant farmer or semi-pastoralist and pastoralist to use rural land for purpose of agriculture and natural resources development, lease and bequeath to members of his family or other lawful heirs, and includes the right to acquire property produced on his land thereon by his labour or capital and to sale, exchange and bequeath same.³⁷

The analysis of this definition and other provisions of federal rural land administration and use proclamation depicts that land-holders have various rights on their land. Thus, they have the right to use and enjoy rural land; the right to lease or rent land to fellow farmers or to investors³⁸; the right to pass it through inheritance or donation to members of their family³⁹; the right to undertake development activity solely or jointly with an investor⁴⁰ and the right to acquire and

²⁹ Urban Lands Lease Holding Proclamation No.721/2011.

³⁰ Id at Art. 24.

³¹ Federal Democratic Republic of Ethiopia Rural Land Administration and Land Use Proclamation, 2005, Proc. No, 456/2005, *Fed Neg. Gaz*, Year II, No. 44. The legislation generally recognizes three types of land holding, namely, state/government holding, communal holding and private holding. See Art. 2 (11), (12) and (13). The ANRS land legislation puts this classification succinctly. See ANRS Rural Land Proclamation No 252, *supra* note 20, Art.6.

³² The State of Southern Nations, Nationalities and Peoples Land Administration and Use Proclamation No. 110/2007, Art. 2(6).

³³ The Afar National Regional State Rural Lands Administration and Use Proclamation No 49/2009, Art. 2(6).

³⁴ The Ethiopian Somali Regional State Rural Land Administration and Use Proclamation No 128/2013, Art. 2(4).

³⁵ ANRS Rural Land Proclamation No 252, *supra* note 20, Art 2(24).

³⁶ See the Benishangul Gumuz Regional State Land Administration and Use Proclamation Number 85/2010, Art. 2(4); “The Proclamation to Amend the Proclamation No. 56/2002, 70/2003, 103/2005 of Oromia Rural Land Use and Administration Proclamation No. 130 /2007, Art. 2(7). However, it is better to use the word ‘holding’ instead of ‘possession’ because first the former term is in line with the Federal law’s use of the term and second possession has a different meaning in the Ethiopian Civil Code as an ‘actual control which a person exercises over property’(Articles 1140–1150). Also there has to be a uniform application of terms within the land laws of all regions in the country as much as possible.

³⁷ FDRE Rural Land Proclamation Proc. No, 456/2005, *supra* note 31.

³⁸ Id. at Art. 8(1).

³⁹ Id. at Art. 8(5) & Art. 5(2).

⁴⁰ Id. at Art. 8(3).

transfer property produced on land. Further, an investor land holder who has leased rural land may present his land right as collateral/mortgage.⁴¹ This mortgaging right is now being extended to other rural land holders. Thus, the ANRS Proclamation No 252/2017 provides that any rural landholder may mortgage his land use right to a financial institution for not more than Thirty years.⁴²

The regional rural land administration and use proclamations provide similar stipulations on the content of the rights on land. The ANRS Proclamation No 252/2017 provides that:

“holding right” means the rights of any farmer, semi-pastoralist or any other person vested with rights on land to be the holder of land, to create assets on the land, to transfer an asset he created, not to be displaced from his holding, to use his land for agricultural and natural resource development and other activities, to rent his land, to transfer it in the form of donation, succession and includes the like.⁴³

The South, Somali and Afar land proclamations define ‘holding right’ as the right of any peasant or semi-pastoralist and pastoralist to use rural land for the purpose of agriculture, animal husbandry, and natural resource development, to lease and bequeath to members of his family or other lawful heirs, the right to acquire property produced on his land thereon by his labour or capital and to sale, exchange and bequeath same.⁴⁴ The Oromia proclamation provides for the right to use and lease land holding, transfer it to his family member and dispose property produced thereon, and to sell, exchange and transfer the same.⁴⁵

While in the *Derg* era, sale, lease, land exchange, and mortgage of land were prohibited, in the post-*Derg* era, only sale of land is unequivocally prohibited. Other forms of alienation are slowly being permitted. Rent right (sometimes called lease) is a common right in all land legislations; land to land exchange is specifically permitted such as in Article 20 of the ANRS Rural Land Administration and Use Proclamation No. 252/2017; mortgage, as we mentioned earlier, is now extended to all land-holders in ANRS, since the coming into force of the new Rural Land Administration and Use Proclamation No.252/2017.

In the eyes of the law, prohibition of sale of land does not imply the prohibition of sale of other immovable. Despite public opinion and practice in the country discussed in later sections, the constitution and the land administration proclamations generally stipulate the right to private ownership and the sale of the private belongings. Indeed, the constitution stipulates clearly that ‘[e]very Ethiopian citizen has the right to the ownership of private property’ and that this right includes the right to dispose of such property by sale.⁴⁶ While such stipulation is general, for immovable property, the constitution specifically stipulates that ‘[e]very Ethiopian shall have the full right to the immovable property he builds and to the permanent improvements he brings about on the land by his labour or capital. This right shall include *the right to alienate*, to

⁴¹ Id. at Art. 8(4).

⁴² Id. at Art. 19 (1).

⁴³ ANRS Rural Land Proclamation No 252, *supra* note 20, Art. 2(24).

⁴⁴ South Land Administration and Use Proclamation, *supra* note 32, Art. 2(6); Somali Land Administration and Use Proclamation, *supra* n 34, Art. 2(4); Afar Land Administration and Use Proclamation , *supra* note 33, Art.2 (6).

⁴⁵ Oromia Land Administration and Use Proclamation, *supra* note 36, Art. 6(1).

⁴⁶ FDRE Constitution, *supra* note 10, Art. 40 (1).

bequeath, and, where the right of use expires, to remove his property, transfer his title, or claim compensation for it.’⁴⁷ In this provision, the term ‘full right to the immovable property’ and ‘the right to alienate’ the property, taken together, may be interpreted to mean private ownership of the property.

In most regional proclamations too, the sale of rural houses and other developments is lawful. As we just mentioned above, the ANRS, South, Somali and Afar regional states’ proclamations provide for the right to sell developments on land that includes rural houses. In this regard, the Oromia state land proclamation is exceptional. It provides for more restrictive scope of land rights as compared to the others. It stipulates that ‘any peasant or pastoralist, or semi pastoralists who has the right to use rural land shall have the right to use and lease on his holdings, transfer it to his family member and dispose property produced there on, and to sell, exchange and transfer the same without any time bound’.⁴⁸ This apparently looks fine and consistent with the idea in the Federal land legislations and other regions’ legislations. It is also normal when it clearly stipulates that, in any condition, the right to sell property does not include the land.⁴⁹ However, what is worrying is the fact that it prohibits the selling of fixed assets like coffee, mango, avocado, papaya, orange etc. Worse yet, it holds that ‘any individual or organ who bought houses and other buildings built on rural land shall be obliged to take off his property’.⁵⁰ This implies that the sale of rural houses or buildings is deemed unlawful, contrary to the rule in the FDRE Constitution as well as the Federal rural land legislation.⁵¹

In conclusion, we can see that, in Ethiopia, an individual farmer or communal land user group is entitled to private property or ownership for the property he builds on the land such as houses, trees, crops, and so on. That is, he has an ownership right. Therefore, the individual has all bundles of rights over this private belonging including the right to sell the immovable built on his land. The Civil Code provisions on sale of immovable property⁵² will, therefore, apply in this case to govern the contractual relationship between the seller and the purchaser.

2.2. REAL PROPERTY TRANSFER IN CHINESE AND VIETNAMESE LEGAL SYSTEM: SOME LESSONS FOR ETHIOPIA

No single nation can remain an island with absolutely a distinct type of property regime. Accordingly, Ethiopia’s collective/state ownership regime has resemblance to other countries’ property regime in the world. China and Vietnam are one of the countries to which Ethiopia’s property ownership regime has similarity. The Chinese Property Rights Law categorizes property ownership into three: State (Public) Ownership, Collective Ownership and Private Ownership.⁵³

⁴⁷ Id. at Art 40(7) [emphasis added].

⁴⁸ Oromia Land Administration and Use Proclamation, *supra* note 36, Art. 6(1).

⁴⁹ Id. at Art. 6(6).

⁵⁰ Id. at Art 6(8).

⁵¹ For a discussion on issues relating to Federal–State power division on rural land administration and legislation making and possible recommendations, see Melkamu, B. *Critical Gaps in Land Governance with Respect to the Land Registration System in Ethiopia*, 15(2) Mizan Law Review, 419–454 (2021).

⁵² The Civil Code of the Empire of Ethiopia Proclamation, 1960, Title X, Proc. No. 165/1960, *Neg. Gaz*, Extraordinary Issue, No. 2. Title 18, Ch. 1.

⁵³ Chinese Property Rights Law (2007), Ch.V.

The rules show that individual ownership embraces mainly houses to which the right of inheritance and other legal rights and interests are attached.⁵⁴ Further, a legal person such as an enterprise or other entity shall have the right to possess, utilize, obtain benefit from and dispose of its real properties.⁵⁵ More provisions on what the owners can do with respect to houses are provided. The Law states a fundamental principle that a person has the right to 'the use of land for construction' in rural and urban areas.⁵⁶ The person has the right to possess, utilize and obtain profits from such land and has the right to build buildings on it. Further, he has the right to transfer, exchange, make as capital contribution, donate or mortgage the land.⁵⁷ Such land may be acquired by means of assignment or transfer by auction or invitation to bid and not by sale from others.⁵⁸ It is stated that the ownership of the building and similar structure built by the person with the right to 'the use of land for construction' shall belong to such person be it individual, collective or even the state.⁵⁹ The Law also states that a transaction with regard to the land for construction use includes the buildings and related structure on the land and vice versa.⁶⁰ As we mentioned earlier, the right to the use of land particularly for construction of residential housing use belongs to the collective owners; but the person with the right to use such land has also the right to build residential houses.⁶¹

It should be noted that the right to transfer or sale houses is not clearly provided in the Chinese Law. But it may be gathered from various rules which indirectly address the matter. For example, Article 147 provides that where the buildings and similar structures on land for construction use is transferred, exchanged, made as a capital contribution or donated, the right to the use of such land for construction use as being occupied by such buildings shall be disposed of together. We can therefore see that houses are saleable both in rural and urban areas.

In Vietnam, the land resource is owned by the entire people as represented by the state as stipulated in the Constitution.⁶² Articles 54, 167 and 179 provide for the bundle of rights of land use for organizations and individuals over real property.⁶³ These include land assignment, land lease, recognition and protection of the land use right, the right to exchange, transfer, bequeath, donate, mortgage and to contribute as capital. The word 'transfer' of land use rights is defined as the transfer of land use rights from one person to another by ways of exchange, transfer, inheritance or donation, or capital contribution.⁶⁴ So the word is applied both narrowly and broadly. In its narrow sense, it seems to include the right to sell houses and 'other land-attached assets' to land. Although the law is not clear enough to recognize the right to sale of rural houses, the right may be inferred from other provisions. Thus, it is provided that one of the cases of land

⁵⁴ Id. at Art.64.

⁵⁵ Id. at Art.68.

⁵⁶ Id. at Art. 135.

⁵⁷ Id. at Art.143.

⁵⁸ Id. at Art.137.

⁵⁹ Id. at Art. 142.

⁶⁰ Id. at Arts. 146–7.

⁶¹ Id. at Arts. 152–5.

⁶² Vietnam Constitution (2013), Art. 53.

⁶³ Id.

⁶⁴ Vietnamese Land Law (2013), Art. 3 (10).

use whereby a certificate of land use rights is granted to persons is when ownership of houses and ‘other land-attached assets’ through purchase is obtained.⁶⁵

The other important issue in the Vietnamese Land Law is the status of the right with respect to houses and ‘other land-attached assets’ to land: is the right ownership right or land use right? The answer is not clear. On the one hand, there are provisions which do not seem to entitle ownership of house. For instance, the Law stipulates a fundamental principle that the State guarantees ‘the lawful rights to use land and land-attached assets of land users’.⁶⁶ Further, Article 104 dictates that a certificate granted for ‘land-attached assets’ which include houses, other construction facilities, production forests, and perennial crops is not an ownership certificate per se but ‘a certificate of land use rights and ownership’. From these latter provisions, it seems that houses are not privately owned. On the other hand, there are different provisions which mention the right of ownership of these properties. For instance, Article 95(1) states that land registration is voluntary in the case of ‘ownership of houses and other land-attached assets’. When we see this and other similar provisions it seems that houses can be indeed privately owned.

The moment is now ripe to have a few words as a matter of comparison among the Chinese, Vietnamese, and Ethiopian real property rights regime. The Chinese Law provides more elaborated types of ownership of real property as individual ownership, collective ownership and public ownership. Ownership to the land and to the permanent assets or houses on the land as well as various rights both on the land and such assets is clearly presented. The right to the sale of houses may also be easily implied from the Law. The Vietnamese Land Law recognizes only public ownership of real property; citizens having only land use right. Of course, they are provided with various bundles of rights with regard to this land use. The ownership as well as the right to sale of houses is permitted albeit in a vague manner. In Ethiopia, land ownership is only public ownership.⁶⁷ The status of ownership of permanent assets like houses attached on the land is, relatively, the most confusing one. Indeed, there is clear provision giving the right to private property on these properties but I consider that this means private ownership, at least, a special type of private ownership within the overarching frame of public ownership of land. As we have discussed already, the various bundle of rights with regard to this private property including sale are clearly provided both with regard to rural and urban lands. It can be concluded that the Chinese property rights regime is the most advanced as compared to the Vietnamese and Ethiopian real property rights regime. The latter countries need to do more to come up with clearer and more advanced real property rights. Especially, Ethiopia should come up with detailed provisions on the types of real property ownership. The finding to be presented in the following parts of the paper strengthens the need for clear and elaborate property rights legislation as the key to enhanced real property transfer in rural areas.

3. SALE OF RURAL HOUSES: PERCEPTION ON ITS LEGALITY AND THE EXTENT OF ITS DEMAND

⁶⁵ Id. at Art. 99(1)(g).

⁶⁶ Vietnamese Land Law (2013), Art. 26 (1).

⁶⁷ State, communal, and private holding should not be confused with state ownership of land because all land held by communal groups and individuals as well as state entities is owned by the state and the people as per FDRE Constitution Art. 40 (3).

Perceptions and the resulting interpretations of rules in legislation may affect the practice with respect to that specific legislation. Thus, it is useful to view the attitudes different persons have on the issue of what the legislation says about sale of rural houses. The land administration and use staff (50) and judges (30) were asked a few questions as to what their office believes regarding the legality or otherwise of sale of rural houses and policy support for the activity. All land administration and use staff respondents (100%) and 43 % of the judges said that sale of rural houses is unlawful, i.e. existing legal framework and policy does not support it. As compared with the response of land administration staff, the judges' response for 'yes' and 'no' is proportional.

In a similar manner, FGD with land-holders also indicated that most land-holders believed the sale of rural houses is unlawful.⁶⁸ There is, they responded, strong control by the *kebele* officials on the construction of rural houses and transactions relating to them. FGDs and interviews with judges also showed similar opinion.⁶⁹ Therefore, it can be concluded that the overall opinion regarding sale of rural property in ANRS is against the actual terms and meaning of the law. As we discussed before, the Constitution prohibits the sale of land; however, prohibition of sale of land does not actually tantamount to the prohibition of sale of developments or constructions on land. The FDRE Constitution as well as most rural land legislations permit the right of land holders to private property and the full right to alienate the immovable property they built on their land-holding. This right is part of the concept of bundle of 'land holding right'. Surely, a rural house is a typical immovable property that a rural land-holder builds or permanently improves on his land by employing his labor, capital and skills. As such, the individual has a full private property or ownership right on this immovable and, as a result, can transfer it through sale and other means.

From among the judge respondents who replied that the sale of rural houses is lawful (57%), about half (47%) held that the sale of rural houses is consistent with the FDRE Constitution, the Civil Code (1960), rural land administration and use laws and Federal Supreme Court cassation division decisions. According to these respondents, since sale of urban houses is lawful, by analogy, the sale of rural houses is also lawful. The other half of the respondents (53%) provided that transfer of rural houses is possible in the case of mortgage and sale following court order with respect to attachment for claim security.

The respondents who held the position that the sale of rural houses is unlawful and devoid of policy support were asked to add their own justifications and explanations according to their interpretation of existing land law. The majority of the land administration staff (42%) clearly holds the position that the sale of rural houses is not lawful as the legislative framework does not allow or clearly stipulate the right to sale rural houses. According to some respondents (30%), the sale of rural houses amounts to the sale of rural land on which the house is constructed which is clearly prohibited by law. The respondents strengthened their argument by saying that enforcement institutions are not ready to process applications for registration of contracts on sale

⁶⁸ FGD conducted with land-holders in Woreta, Debre Markos and Bahir Dar, 2018.

⁶⁹ FGD, *supra* note 23; Interview, *supra* note 25.

of rural houses, if any, in ANRS (28%). The justifications and explanations given by 13 judges (43%) who responded that sale of rural houses is prohibited are similar. Among these, 46% of the judges replied that the Ethiopian legal system, that is, the FDRE Constitution, the federal and regional land proclamations do not permit and address the sale of rural houses; 39% replied that the sale of rural house amounts to the sale of land on which the house is constructed which is prohibited by law; 15% held that there is no enforcement institution which accepts and formalizes sale of rural houses through effecting registration and authentication, issuance of title certificates, maps and land use plans, etc. The assertion that land administration institutions do not carry out tasks of house sale registration is absolutely true. This is even contrary to Ethiopian land legislation which puts a mandatory requirement of registration for transactions on immovable property.⁷⁰ Asked if any rural land-holder has come to their office to demand service of registration or other similar service, most of the land administration and use staff respondents (94%) responded that no land-holder has come to their office to seek the support of their office for transfer of rural house through sale. Only 6% of the respondents replied that rural land-holders visit their office to get service such as registration. Even then, the respondents confessed that they would tell the land-holders that they would not accept their application on the ground that sale of rural houses is unlawful and that there is no institutional procedure to process the transaction. But this weakness of enforcement institutions is not surprising because we cannot expect institutions to enforce sale while actually they believe that the sale of rural houses itself is not permitted by the law. For institutions to carry out their duties, they must first be in a position to understand and apply the existing law which permits sale of rural houses. Similarly, this understanding is needed if land-holders have to visit the land administration and use offices for the service of enforcing rural house sale. It is clear that the prevalent public and expert understanding against sale of rural houses has negatively affected the practice of land administration offices. On the contrary, the existence of aware institutions and staff has a positive impact on the increase of the practice on rural property transfer and the corresponding increase in economic productivity accruing from formal property market system.

Not only is there misinterpretation of the law on sale of rural houses, the demand and appetite for the transfer of rural houses is also generally low. Land-holder respondents indicated that they have low demand on the sale of rural houses for fear of displacement, fear of eviction from other land not part of the sale, and the like.⁷¹ Similarly, the majority of land administration staff (76%) believes that the sale of rural houses should not be allowed by the law whereas only 24% believe it should be allowed. Judges' responses on the same issue were generally similar to those given by land administration staff. 70% of the judges responded that sale of rural houses should not be lawful whereas 30% said the sale of rural houses should be lawful. Another study about perceptions of land sales prohibitions in Ethiopia taking study sites from Oromia region and Southern Nations, Nationalities and Peoples (SNNP) revealed strong resistance to allowing land sales in Ethiopia⁷² which may imply disinterest on sale of rural houses too.

Land administration and use staff who replied that the sale of rural house should be unlawful (76%) were also asked about their justifications as to why they believe that the sale of rural

⁷⁰ Melkamu, B. & Alelegn, W. *Issues on the Role of Formal Requirements for Validity of Immovable Transactions in Ethiopia: the Case of Amhara Region*, 6(1) Bahir Dar University Journal of Law, 49–86 (2015).

⁷¹ Id.

⁷² Holden & Bezu, *supra* note 24 at 23.

houses should be unlawful. The most common justification (37%) was that sale of rural houses, if permitted, would displace land-holders from their ancestral origin, from their family, and from their remaining land (unsold properties). They held that sale of rural houses would cause migration, tenancy, and monopoly of holding by the few, rich and powerful individuals and families. This would create unfair distribution of wealth and poverty. They also believe that it would result in an improper use or wastage of sale money. In addition, the practice of sale of rural houses would prevent a fair and efficient use of the land resource. The second justification the respondents (10.5%) provided was that the sale of rural houses would promote illegal construction especially along roads and around cities and towns such as Bahir Dar. Their fear is that the land-holders would, if allowed, construct substandard and unplanned houses in rural areas with the purpose merely of gaining money. This practice would create bad-looking houses as well as promote illegal or unplanned settlements. The same number of responses (10.5%) indicated that sale of rural houses should not be allowed because land-holders do not have knowledge of valuation of the house to determine its proper price and how to use the sale money. In this way, once they relinquish their land, they would be harmed socially and economically. Less common explanations include sale of rural houses would cause bad governance and boundary conflict (8%), reduce farm land productivity (8%), cause the sale of rural lands in the name of sale of houses at all (5%), and sale of rural houses should not be allowed because there is no demand for the sale and purchase of rural houses (5%). 8% of the respondents held that to be lawful, the sale of rural houses should be practiced or allowed only as per the Rural *Kebele* Centers Land Provision Administration and Use Directive No. 8/2012. The directive, which was latter incorporated in the current rural land administration and use law,⁷³ was adopted to prevent land sale including what it calls illegal constructions or houses. Hence, houses built in the rural *kebele* centers cannot be sold, mortgaged as well as transferred to a third party in any means unless the requirements of design and building quality are ascertained by the pertinent *woreda* rural land administration and use office.⁷⁴ Other less important responses (8%) include if a house is sold, land fertility would be damaged, the buyer would close the passage routes for neighbors contrary to previous peaceful relations, and there is no awareness of the use of sale of rural houses. The justifications the judges provided as to why they do not support sale of rural houses is generally similar to the reasons given by land administration staff.⁷⁵

4. SALE OF RURAL HOUSES IN ANRS: THE PRACTICE AND ITS CHALLENGES

Despite contrary practice with respect to sale of rural houses and prevailing low appetite for sale, it became clear that there is an informal practice of sale of rural houses in particular circumstances.⁷⁶ Typical indicators were found in Debre Markos and Woreta. In Debre Markos, the respondents mentioned that sale is practiced with respect to security for the debt they have with the Amhara Credit and Savings Association (ACSI). This, for example, happened in Abesheb *Kebele* in Elias *Woreda*, Lai Dega Amsteya *Kebele* in Senan *Woreda*, etc. When the land-holder fails to return the loan ACSI sells the house, according to the respondents. ACSI which was established in 1997 has a long practice of holding the land use rights of land-holders

⁷³ ANRS Rural Land Proclamation No 252, *supra* note 20.

⁷⁴ *Id.* at Art.31 (7).

⁷⁵ FGD, *supra* note 23.

⁷⁶ FGD *supra* note 68.

as security (mortgage) in ANRS even before the adoption of Proclamation 252/2017 which officially allowed collateral on rural lands for all land-holders for the first time in Ethiopia. In Woreta, respondents mentioned that a wide practice of sale of rural houses exists in the case of rural lands adjoining rural towns and *kebele* centers such as in places known as Kenti Marwa, Euls Maksegnt, Aba Gunda, Amba Beleda Maksegnt, Marwarka, and Asika. This was mostly done with the intention of selling the land in a disguised manner.

Court practice also revealed the existence of such practice. Asked as to whether they entertained land disputes, 67% of the judge respondents responded affirmatively. From among these respondents, 45% responded that the most common cause of dispute is the claim to enforce or execute the ownership of rural house transferred according to the contract of sale. This occurs when another party, i.e., the seller moves to invalidate the sale by alleging that the sale contract is unlawful. This is caused by the gap created between the common understanding that an individual can make money out of any of his property and the wrongly understood law and policy that the sale of rural house is unlawful.⁷⁷ Those who are aware of this gap induce others to buy their property through contract and after some period of time they move to invalidate the same contract in order to get the property back at the expense of the buyers. The other causes of dispute are related to rural houses attached due to the execution of court judgment and mortgaged as security for loan (20%), and contracts with respect to houses in rural towns with no document of title and plan (20%). Other remaining causes accounted together for 15%: demolishing of house constructed on rented land, dispute on the issue of whether the sale includes a piece of land which is part of compound in which a sold house is situated, nuisance to a neighbor after buying the house, division of houses during divorce, and dispute caused during division of property built through (money and land) contribution by different persons.

Although most respondents were not in favour of rural house sale (Section 3), they were asked to express their experience with regard to the major factors they identify as negatively impacting on the practice of sale of rural houses in ANRS including the low demand for the activity. 70% of the land administration and use staff (35) and 86.7% (26) of judge respondents replied to the question. As well as assisting to check the reliability and integrity of the position they held against sale of rural houses, this question was helpful to know the gaps in the consciousness level of respondents and land-holders about the real property rights, duties, rules, laws and policies, and institutional or bureaucratic mechanisms for the enforcement of these real property rights. According to the land administration and use staff, the most common problem (46%) is the lack of awareness on the existing rules, laws and policies and the rights and restrictions these laws impose. This means, at least, there is a great deal of problem on the understanding and interpretation of the rules on the sale of rural houses as enshrined in the FDRE Constitution and other proclamations. The other responses include lack of settled practice on sale of rural houses (23%), lack of complete legal framework to address the issue of sale of rural houses (17%), and the absence of an institution for enforcing sale of rural houses and for raising awareness about the right to sell real property (14%). On the part of judges, lack of awareness on the legal framework and the land rights, lack of settled practice on sale of rural houses, lack of complete legal framework, and absence of enforcement institutions accounted for 42%, 23%, 8%, and 27% respectively.

⁷⁷ FGD, *supra* note 23.

Finally, judges were asked if they observed problems regarding the meaning, definition or interpretation of the term 'rural houses'. I asked this question in order to know the difference between undeveloped land and developed land because, the law, as we discussed before, attaches different consequences for each of these properties with regard to sale. The majority of the judges, i.e. 20 judges (67%) believed that there is such problem. They provided two most common explanations. First, the rural land legislation lacks clear definition of rural houses and rural lands. Second, because the FDRE Constitution prohibits sale of land which may, according to them, by interpretation, include the land on which houses are built, land holders may not find it feasible to sell only the building, i.e. the roof and walls. Other less important explanations were given. One reason is that the law does not give adequate clarity on whether sale of rural houses is permitted or prohibited although the issue of sale of land is clearly provided by the law. This can be illustrated by the fact that the rural land administration and use laws in ANRS do not include sale as a mechanism of acquiring rural house or as a mode of transfer of land rights while inheritance, donation and public grant or distribution are clearly mentioned as modes of real property transfer in the law.⁷⁸ Even if the proclamations recognize the right to sell the developments or improvements on rural land, they should also have governed the mechanisms of transferring developments on land parcels from one person to the other rather than limiting themselves with provision of modes of transfer with respect to undeveloped land only.⁷⁹ It is quite possible that some land administration and use staff and judges would assume that the sale of rural houses is unlawful, among other things, because the law is not clear or complete on this issue. As we discussed earlier, there is attitudinal or awareness problem with regard to the issue of the sale of rural houses. Lack of complete and clear law permitting or prohibiting sale of developments on rural land is one cause of the knowledge gap. Similarly, the awareness problem regarding the existing legal framework on real property rights could be the main reason as to why the land administration and use staff, judges, and land-holders hold the opinion that the sale of rural houses is or should be prohibited.

The clarity problem that exists in the legal framework itself can be expressed in other ways. Our jurisprudence has very little and vague coverage of the meaning of the terms 'rural houses' and 'rural lands'. The Ethiopian Civil Code (1960), the landmark legislation on defining legal terms in the Ethiopian legal system, provides that an immovable property includes land and buildings. But neither of these terms is defined separately and clearly. Registration of permanent improvements on land including rural houses is also not addressed in the rural land registration legislation.

Also the relationship between a house and the land on which such house is built is merely poorly defined as intrinsic and accessories in the Civil Code (1960). It is very difficult to decide, based on these rules, that houses are intrinsic elements of the land on which they are built or vice versa. In fact the Cassation Bench of the Federal Supreme Court has decided that the land is an intrinsic element of the house which is built on it.⁸⁰ This case involved an issue of whether the applicant can own the land jointly with the defendant in the same way as she can jointly own the house

⁷⁸ANRS Rural Land Proclamation No 252, *supra* note 20, Art.11.

⁷⁹See eg. Id, Art. 2(4) which allows sale of property produced on land but no other provision is included in the legislation regarding this right.

⁸⁰Meseret Fisseha vs. Kelbesa Abew, *Federal Supreme Court Cassation Bench*, File No. 25281, 2008.

built on this land. The court decided that joint ownership of the house implies joint ownership of the land as the land is an intrinsic element of the house. However, although decisions of the Cassation Bench are binding on other courts in the country,⁸¹ a single court decision may not establish a settled jurisprudence with regard to the relationship between land and building built on it. In the face of this, it is not surprising if some judges, as we just mentioned earlier, believe that ‘because the Constitution prohibits sale of land persons may not find it feasible to sell only the house or building, i.e. the roof and walls’ as, for them, sale of rural building means sale of the land on which the building is laid.

The position of respondents to the effect that the sale of rural houses is prohibited might have also been influenced by the behaviors and cultures in the political field in Ethiopia. There are things which low-class politicians or cadres perform for political reward and acceptance by their bosses. Observation reveals that when a higher political official sets a certain direction for a task in a particular forum, the lower political cadres perform the task even in a manner more intended by the former. So the categorical position that sale of rural houses is prohibited might have well followed from the Federal Government’s strong political statements that land can never be sold or transferred. The Ethiopian Peoples’ Revolutionary Democratic Front (EPRDF) led government strongly opposed private ownership as well as marketability of land as it frequently expressed it in its strategies and political election debates.⁸² Privatization, EPRDF argued, would lead to the concentration of land into the hands of a few urban based unscrupulous capitalists, evictions of land-holders, as well as it leads to other disastrous economic, social and political consequences.⁸³ The hard and fast position that rural houses may not be sold is the result of a radical and extreme interpretation and application of the ideological and constitutional premise that land cannot be sold, a policy which EPRDF promised to maintain until its peril. Worse yet, the sale of rural houses has been understood as synonymous with the sale of rural lands. It is feared that if allowed, the sale of rural houses, can be used as a pretext to sell the land, a phenomenon which might really occur.⁸⁴ But allowing sale of rural houses is one thing; preventing sale of land in the pretext of sale of houses is another thing.

Overall, these problems could negatively impact on the practice of and appetite for sale of rural houses in ANRS and beyond.

5. SALE OF RURAL HOUSES OR NO SALE?

As we discussed in the previous sections, the majority of respondents not only misinterpret or misunderstand the law, but also they do not support sale of rural houses. Most reasons they provided such as displacement, tenancy, improper use of sale money, etc. imply the unfair judgment on rural land-holders on the ground that they have no knowledge of the consequences of sale of property and of knowledge of use of money. But, these are just unwarranted assumptions. The peasants and pastoralists have accumulated a greater knowledge as to how best

⁸¹Federal Courts Proclamation Reamendment Proclamation No.454/2005.

⁸²EPRDF is now changed into Prosperity Party (PP) but the latter has not yet shown any changes in the land policy.

⁸³See e.g. Getahun, B. T., *Historiographical Review of the Current Debate on Ethiopian Land Tenure System*, 7(2) African Journal of History and Culture, 48 (2015); Holden & Bezu, *supra* note 24, at 23.

⁸⁴Maria Cederborg Olsson och Karl Magnérus, *Transfer of Land Rights in Rural Areas A Minor Field Study in the Amhara Region, Ethiopia* (unpublished MSc Thesis, The Royal Institute of Technology (KTH), 2007) 33.

they can use their land from a generations–old practice and wisdom. They know which property should be sold and which should not, and at what price it should be sold. They also know what money can do better for their lives. However, at the moment, land–holders do not find pressing economic need to sale their rural houses.⁸⁵ This study also showed that if they wanted, the land–holders often found ways of transferring their property in a disguised manner. The research has found out that both land administration and use staff and judges witnessed disguised property transactions in the form of long rental, land exchange, donation, succession, informal sales, contribution, exchange land with movable property, debt security and so on.⁸⁶ We can, therefore, safely conclude that the fundamental factor driving land holders to decide to sell or not to sell rural houses is not the lack of knowledge of the benefits and consequences of sale but the economic principle of supply and demand based on their inherent rational thinking. Any human being should be assumed to be rational; and, knowledge comes from experience as well. The values or rationales of property such as liberty or freedom, security, happiness, efficiency, equity, sustainability, utility, prosperity, and stability⁸⁷ require that land–holders be free to decide on the use and management of their property. Yet, clear and elaborate property rights legislation coupled with efficient property enforcement institutions should be in place to play positive role in reducing any problem of bargaining position between rural property sellers and strong buyers.

The other justification that the sale of rural houses would promote illegal construction especially along roads and around the peripheries of cities and towns has some grain of truth in it. But the solution to this problem should not be the prohibition of one of the fundamental rights of citizens to property.⁸⁸ Rather, the state should devise mechanisms of controlling illegal and substandard property constructions and transfers without however negating that basic right to sell developments on land. For that matter, a right is not without limits. Rather, rights are accompanied by restrictions and obligations such as planning and design restrictions.⁸⁹ So ANRS must allow sale of rural houses in practice and properly put in place the proper restrictions and obligations such as the need to construct rural houses in compliance with certain socio-economic and planning conditions. The other reason provided which says that the sale of rural houses reduces household land farm size and productivity is not a strong reason. First, the land–holders are, as we mentioned earlier, rational in that they can decide what amount of property to sell. Second, when a house is sold, the seller may do some more productive activity with the money and the buyer may invest with the new property he purchased. The reason that the sale of rural houses would encourage disguised sale of rural land is true but the state has to devise means to control illegal or disguised land sales without, however, barring the fundamental right of property, i.e., the right to transfer real property.

⁸⁵ Holden & Bezu, *supra* note 24, at 23.

⁸⁶ FGD, *supra* note 23.

⁸⁷ Gary Chartier, *Economic Justice and Natural Law* (Cambridge University Press, New York, 2009) 33–40; Elinor O., *Private and Common Property Rights* (2000) 332; Gregory S. Alexander et al, *A Statement of Progressive Property*, 94(4) Cornell Law Review, 743–744(2009); Waldron, *supra* note 2, at 332, 349.

⁸⁸ See generally Gebreamnuel, D. B., *Transfer of Land Rights in Ethiopia: Towards a Sustainable Policy Framework* (eleven international publishing, Hague, Netherlands, 2015)182–192.

⁸⁹ Pamela, O'Connor; Sharon Chirstensen & Bill Duncan, *Legislating for Sustainability: A Framework for Managing Statutory Rights, Obligations and Restrictions Affecting Private Land*, 35(2) Monash University Law Review, 233–261(2009).

The study has already found out that, still, in the eyes of a fair number of judges, the sale of rural houses is permitted by law (Section 3). We have also seen that the percentage of judges who are in favour of sale of rural houses (30%) is greater than the percentage of land administration and use staff who support sale of rural houses (24%). This implies that persons with greater knowledge on the meaning of property rights legislation (i.e., judges) tend to understand the right to sale much better than land administration and use staff implying that continuous relevant training should be essential in this regard to enhance full awareness on the legislation.

Indeed, as far as the sale of land is prohibited by law, the practice of sale of land in other covers or in a disguised manner, in a way that defeats the very notion of the prohibition of sale of land, must be prohibited. That is quite convincing and in conformity with sound jurisprudence. The first problem, however, is when the sale of an improvement on land is equated with the sale of the land. An undeveloped land is different from a developed land because of the difference in economic value between the two. Investment is made by way of labor, money or skills to change undeveloped land to a developed land. Second, it is equally important to understand that the sale of improvements on land such as house is a useful economic activity, a fact which, in Ethiopia, has not yet been properly appreciated. A sale of rural property or its prohibition has to be seen in light of its benefit in economic and social terms also. As De Soto accurately described, the concept of property will have full meaning when it is determined in legal and economic terms.⁹⁰ De Soto has demonstrated that the major stumbling block that keeps the Third World, as clearly opposed to the West, from benefiting from capitalism is its inability to produce capital from land asset through an active land market system.⁹¹ It has been proved that the free transfer of property with the help of a regular, formal, integrated system of property representation by different means (mainly cadaster and land register) can generally be useful for the purpose of generating capital and economic growth.⁹² The benefits of free and formal property transfer may not be different in Ethiopia. The sale of rural houses should be seen in this perspective. Although, as we mentioned before, the demand for sale of rural houses is low, this would certainly change as the economic and livelihood system changes. Further, sale of rural houses should not be confused with the sale of land. That is, any practice to sell a house by rural land-holders should not be construed automatically as the means to sell the land itself. As the sale of rural houses is lawful under the Ethiopian legal system, the land laws in ANRS and throughout the country should be properly understood and applied to exercise this right. Indeed, there was some, although to quite a lesser extent compared with the opposite position, sound position in favour of sale of rural property. Out of the land administration and use staff who supported the activity (24%), 42% hold that the sale of rural houses can change the life style, increase social status, enhance movement, and increase the income and wellbeing of rural land holders. 17% hold that the sale of rural houses, if permitted in practice, would help solve crisis and hardships in the life of households through bringing alternative source of money. The same number of respondents (17%) provided that sale of rural houses should be allowed in the same way as transactions with respect to personal properties is allowed because land-holders have put their labor and capital on the property. Other respondents hold that the sale of rural houses encourages development on property (8%), strengthens the bundle of rights (8%), and enhances economic efficiency by saving the demolishing of houses following the movement of the user

⁹⁰ De Soto, *supra* note 6, at 215.

⁹¹ *Id.* at 5.

⁹² See generally *Id.*

to towns or other places in order to change residence or for other reason (8%). Judge respondents who supported sale of rural houses (30%) provided two important justifications. First, they argued that sale of rural houses should be treated like personal properties and that this practice brings economic benefits such as facilitating mortgage and other real property transfers to third parties and get more income to improve livelihoods (44%). Second, they state that it widens the scope of bundle of rights for the land holders (33%). Some of the judges (23%) provided additional justifications: sale of rural house enhances urbanization, allowing sale of rural houses is a matter of rule of law to actually implement the law, allowing sale of rural houses might reduce the chance for disguised land sales, and sale improves the value of the property.

CONCLUSION AND POLICY OPTIONS

In Ethiopia, there is a wide perception that sale of rural houses is unlawful despite a legal and policy framework which permits the activity. In the land legislations and the Constitution, the two major forms of rights which embody the right to sale of rural houses are 'land-holding right'; and 'private property' developed on a private land-holding. The most common problem is that the FDRE Constitution and the land administration and land use laws are wrongly interpreted as prohibiting the practice of rural house sale in Ethiopia in general and ANRS in particular. It is believed that the sale of rural houses amounts to the constitutionally prohibited sale of rural land. According to respondents, the sale of rural houses, if permitted, would, among other things, displace land-holders from their ancestral origin, and would create unfair distribution and use of wealth and exacerbate poverty. It is also feared that the sale of rural houses would promote illegal construction especially along roads and around cities and towns such as Bahir Dar.

The result on the question regarding opinion of the land-holders indicated that, generally, the demand on the side of the people to sell rural houses is low. However, it was observed during the FGD with land holders that few expressed their need for freedom to sell their rural houses, if they want to for any reason. Despite all reasons and justifications in favor of prohibition of sale of rural houses by most respondents and generally existing low demand and considerable challenges for rural house sale, in practice, land-holders sometimes exercise sale of rural houses. This is carried out in the form of collateral agreements with ACSI, in relation to court judgment and so on. These activities were, surprisingly, carried out informally outside of the land administration and use institutions especially before the adoption of ANRS rural land administration and use proclamation number 252/2017. Further, no land-holder has visited the land administration and use offices for the registration of house sale transactions; nor does such an office accept applications for registration of rural property sales.

The knowledge and awareness problem on the part of land administration and use institutions is a visible problem too. No institution is ready to execute or enforce the sale of rural houses in Ethiopia such as by registration. It was found out that there is strong control by the *kebele* officials on the construction and sale of rural houses. In addition to the most common gap of awareness on the existing rules, laws and policies and the rights and restrictions they impose, lack of clear and comprehensive legal framework governing the matter, lack of established practice or system on sale of rural houses, and lack of clear definitions on key concepts such as 'land' and 'building' and lack of clarity on the relationship between these concepts affected the

practice of sale of rural houses in ANRS in particular and in Ethiopia in general. Coupled with the absence of jurisprudential works on the clarification of such terms and rules embodying the terms, these problems would create a negative impact on the protection and management of the property rights of citizens. In addition, these problems would highly reduce the potential which our land resource would have on economic development and prosperity. So ANRS in particular and Ethiopia in general should allow sale of rural houses in practice and properly put in place the proper restrictions and obligations such as the need to construct rural houses in compliance with certain socio-economic and planning conditions to avoid unwanted activities such as unplanned constructions along roads and on peri-urban areas. While at present the demand for sale of rural houses is low and the majority of respondents believe that the sale of rural houses should not be allowed, this demand will certainly increase in short time in line with the fast social and economic changes in the country. Towards this end, the Government should revise the land laws to clearly provide the types of immovable ownership and the bundle of rights this ownership shall entail by taking the example of China. Awareness and incentive mechanisms should also be set to motivate the community to exercise their right to sell their property in line with changing socio-economic conditions in the country. Similarly, increasing the capacity and awareness of land administration and use staff will also play a crucial role in fostering rural property transfer.