

BALANCING PROPERTY RIGHTS AND REGULATORY INTERVENTIONS: ANALYZING EXCESSIVE BUT LAWFUL REGULATIONS UNDER THE FDRE CONSTITUTION: LESSON AND PERSPECTIVE

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Abstract

Despite the constitutional protection of property rights, the FDRE Constitution permits two forms of property intrusion under Article 40 (1 and 8): police power and expropriation (eminent domain) respectively. While expropriation involves the taking of private property on account of public purpose and against payment of adequate compensation, the police power allows the government to deprive property rights without compensation. However, the implications of such uncompensated limits through the state's police power should not be overlooked, especially when these regulations go beyond and substantially diminish the value or use of private property without outright expropriation. Without pretending to be a full comparative overview, the paper aims to assess other countries experience on balancing property rights protection and excessive regulation and draw a lesson. Accordingly, the paper finds that: while some States employ an 'invalidation' approach, challenging the constitutionality of excessive regulations and deeming them non-compensable, others opt to "judicially transform" such regulations into "regulatory taking" or explicitly recognize it as "indirect or constructive expropriation" making it compensable under the Constitution. Coming to the FDRE Constitution, arguably, excessive but otherwise regulation cannot be justified in either the police power or expropriation clause, rendering them non-compensable. In such cases, 'invalidation' becomes the likely outcome for such regulations. However, invalidation may not always be a practical option for regulations enacted for the public good. Further, the paper contends that while holding onto hope, 'neither judicial transforming nor explicit recognition of such regulation as regulatory taking' appear feasible within the current constitutional context. Instead, the paper suggests the explicit recognition of regulatory taking through specific laws (excessive regulatory laws), which safeguard property rights while aligning with broader regulatory objectives.

Keywords: FDRE Constitution, Excessive regulation, Expropriation Clause, Deprivation Clause, Regulatory taking, Property rights, Police Power

INTRODUCTION

The Federal Democratic Republic of Ethiopia (FDRE) Constitution recognizes private property under Article 40 (1) by including the right to acquire, to use and to dispose of such property by sale or bequest or to transfer it otherwise.¹ This provision tags public interest and the rights of others as a limitation on the

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¹ Murado Abdo, *Ethiopia's Property Rights Legal Regime: An Overview*, 7 Mizan L. Rev. (2013), p. 168. [hereinafter Murado A., *Ethiopia's Property Rights Legal Regime*].

property rights. This limitation is derived from the State's sovereign right to regulate property within its territory, often driven by social objectives such as environmental protection, public health, human rights, and labor protection.²

In addition to their police power, states can also limit property rights via expropriation or eminent domain. Like most Constitutions, the FDRE Constitution, under Article 40 (8) grants the government the power to expropriate private property for public purposes with adequate compensation.³ Such clause, in its original text in various Constitutions, denotes a situation where the government physically takes private property from an individual, as for instance, when a residential house is taken for a school or other purpose.⁴ This usually involves the transfer of the title from the owner to the government. In such case, it holds that private property has been taken by the government, thus bringing into operation the compensation requirement under Article 40 (8).

Nevertheless, intuitively, the basic premise of the expropriation or eminent domain rule is often easier stated than applied. This is because while the government employs its police power to regulate property in response to growing concerns about environmental protection, public health, and consumer rights, this power may overlap with its ability to take private property via its eminent domain.⁵ This happens where while regulation on account of public interest state's unreasonably interfere on constitutionally protected property rights. This interference via regulation prompts the crucial question of whether legal remedies are provided to redress the harm suffered by property owners as a result of regulatory interference or not, especially in the context of property regulations.

In this paper, the term "excessive but otherwise lawful regulations" or "regulatory taking" refers to regulations enacted for the benefit of the general public that, nonetheless, impose a sever and disproportionate burden on private property owners.⁶ These regulations remain legally valid until challenged by the property owner impacted by them. However, even when

² Daniel Weldegebriel, *Compensation for Expropriation in Ethiopia and the UK: A Comparative Analysis*, 3 Bahir Dar U. J. Law (2013). P. 253.

³ The Constitution of the Federal Democratic Republic of Ethiopia, Federal *Negarit Gazetta*, 1995, Art. 40 (8) [hereinafter FDRE Constitution].

⁴ Matthew P. Harrington, *Regulatory Takings and the Original Understanding of the Takings Clause*, 54 Wm. & Mary L. Rev. at 2053 (2004). <https://scholarship.law.wm.edu/wmlr/vol45/iss5/4>

⁵ *Id.*, at 2053.

⁶ Bezuidenhout, Karen, *Compensation for Excessive but Otherwise Lawful Regulatory State Action* (Ph.D. thesis, Stellenbosch University 2015), at 3.

challenged, these regulations will remain valid, provided that compensation is offered to the affected property owner.⁷

The concept of ‘regulatory taking’ or ‘excessive yet lawful regulation’ is not a novel concept within the realm of domestic Constitutional law. Notably, regulations primarily dealing with situations where a State’s regulations impose restrictions on private property use to an extent equivalent to expropriation without formally depriving ownership titles, is commonly known in various jurisdictions such as United State (US) as a ‘*regulatory taking* or *material expropriation*’ in Switzerland.⁸ Unlike direct expropriation, where the government takes actual ownership of a property for public purposes with adequate compensation, regulatory taking occurs when regulations limit how the property can be used, leading to a significant loss in value or utility.⁹

Regulatory taking involves balancing two competing interests: on one hand, there is the interest of the State’s to exercise its police power to regulate matters that serve the public interest, including public health, environmental protections, and other societal issues, and on the other, the interest of private property owners being protected from the state’s use of its police power that unduly infringes on their constitutionally protected property rights. To counterbalance these two competing interest, states adopt various approach. For instance, as shall be discussed below, some states’ invalidate such regulations by challenging their constitutionality, while others judicially transform them into constructive or regulatory expropriation, making them compensable. Some states expressly recognize excessive regulation as indirect or constructive expropriation and accompanied it with compensation under their Constitution.¹⁰

Coming to Ethiopia, the FDRE Constitution provides about the protection of private property under Article 40. This protection includes the rights of Ethiopian citizens to freely acquire, use, and dispose of such property. Nonetheless, these constitutionally protected property rights are not without limitations. In this regard, the Constitution allows two forms of limitations on private property, namely ‘*deprivation using police power*’ under Article 40 (1) and ‘*expropriation or eminent domain*’ under Article 40 (8). While the deprivation clause acknowledges reasonable property regulation without compensation, the expropriation clause

⁷ *Id.*

⁸ Russell Brown, *Legal Incoherence and the Extra-Constitutional Law of Regulatory Takings: The Canadian Experience*, 1 *Int’l J. L. Built Env’t* 179, at 180 (2009).

⁹ *Id.*

¹⁰ *Id.*

only allows direct taking which involves the transfer of titles or ownership with compensation.

The implications of these constitutional constraints merit close consideration, particularly in light of modern regulatory domains that address critical societal concerns such as environmental safeguards, human rights protections, and public health measures.¹¹ These regulatory frameworks often entail interferences with individual rights, including property rights.

In this context, the paper aim to examine the provision of the FDRE Constitution's related to the treatment of "excessive but lawful" regulations that disproportionately and severely affect the rights of property owner in their use and enjoyment of their constitutionally protected private property. Here, it is worthy to note that, discussing the legal treatment of regulatory taking under the Constitution introduces a considerable challenge. This is because, Ethiopia, unlike other countries, lacks a well-developed body of case law or jurisprudence regarding the legal treatment of regulatory taking. Even studies focus on property rights discussed in the following section focus on direct taking or expropriation of property. As a result, dealing with "excessive but valid" regulations that significantly affect property owners tends to raise more questions than it answers.

This, in turn, necessitates an examination of how such excessive regulations are treated in other jurisdiction. Thus, to provide a concise examination of how Ethiopia handles excessive but valid regulations in comparison to other countries, the paper employed a qualitative doctrinal legal research methodology. To do so, the experiences of the United States, Switzerland, and South Africa are highlighted. Here it is worthy to note that the comparison is made with the intention of drawing valuable lessons rather than performing an in-depth comparative analysis.

Besides, while acknowledging the disparities of the selected countries with Ethiopia in development, culture, politics, and legal system, it is crucial to note that such differences do not render them entirely incomparable. As Cruz pointed out, two legal systems with apparent difference in legal perceptions; rights attitudes; distributive justice perspectives; or overall conceptions, can be compared at micro level, so far as the aim is to demonstrate or highlight

¹¹ *Cato Institute, Property Rights and Regulatory Takings*, Cato Handbook for Policymakers at 147-148 (1999), <https://www.cato.org/sites/cato.org/files/serials/files/cato-handbook-policymakers/1999/9/hb106-21.pdf>.

different response to similar challenges.¹² Similarly, Gutteridge also endorse this assertion and alludes 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.¹³

Thus, despite those countries selected for comparison are significantly more advanced than Ethiopia, notably in Constitutional development and protection of private property, they face the common challenge in balancing exercising police power which unduly interferes on private property rights with the constitutional protected property rights. Therefore, this micro comparison made in this paper aims to examine how these countries respond to or manage “excessive yet valid” regulations in contrast to Ethiopia, with the goal of drawing a lessons from their experience.

The paper is organized in four parts as follow. The first part discusses the conceptual framework on the notion of regulatory taking. The second part conducts a comparative analysis, drawing on the experiences of the United States, Switzerland, and South Africa in dealing with “excessive yet lawful” regulations. The third part furthers the discussion with a specific focus on the property clause of the FDRE Constitution, and the lesson learned from the experience of those countries. The paper then ends the discussion with a concluding remark and the way forward.

1. UNDERSTANDING PROPERTY TAKING

The notion that the government must compensate private property owners when taking their private property for public purposes is a well-established legal principle deeply embedded in legal traditions throughout history.¹⁴ This principle serves as a crucial safeguard against the unjust expropriation of private property, ensuring that individuals are fairly compensated for the loss of their assets and protecting the fundamental right to private ownership.¹⁵ By requiring just compensation, this principle upholds the balance between the public's need for infrastructure and development and the protection of private property.

¹² P. D. Cruz, *Comparative Law in a Changing World* (London: Cavendish Publishing Ltd., 1999), at 3.

¹³ P. H. Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* (Cambridge: Cambridge University Press, 1941) at 73.

¹⁴ Epstein, Richard A., *Takings: Private Property and the Power of Eminent Domain* (Harvard University Press 1985).

¹⁵ T. Nicolaus Tideman & Florenz Plassmann, *Fair and Efficient Compensation for Taking Property under Uncertainty*, 7 J. Pub. Econ. Theory 401 (2005), <https://doi.org/10.1111/j.1467-9779.2005.00213.x>.

The term ‘taking’ embraces both ‘expropriation’ and ‘compulsory acquisition’. More precisely, under the U.S. law ‘expropriation’ refers specifically to permanent taking of title to property, whereas ‘taking’ includes both expropriation and ‘regulatory takings’.¹⁶ In this context, the term ‘private property’, ‘taking/ expropriation’, and ‘just compensation’ are crucial term of in discussing any Taking Clause. It is also conceivable that the first term conventionally denotes ownership rights or the group of rights inhering in the citizen’s relation to the physical thing, such as the right to possess, uses and disposes of it.¹⁷ This bundle of rights which comprises ownership of a particular thing is decisive in the constitutional context.¹⁸

Possession, use and disposition lies at the core of a compressive and coherent idea of ownership. An individual cannot be an owner of something if any of them are removed.¹⁹ That is why Epstein provided the impossibility to find a coherent account of ownership that can make do without any of its traditional elements.²⁰ In the context of the Taking Clause, when the government interferes on the property rights of the owner which affects one of the bundle of rights, the government should provide just/ adequate compensation.²¹ Here it is crucial to note that, the traditional understanding of ‘taking’ denotes when the government mandatorily transfer the legal title from the former property owner to the state. This direct taking or expropriation involves an open, deliberate and unequivocal intent, as reflected in a formal law or decree, to deprive the owner’s property through the transfer of title or outright seizure.²² This makes direct expropriation straightforward to identify and tends to be less controversial.

Conversely, since the use of eminent domain involving direct physical seizure is both straightforward and frequently criticized, governments may opt to leverage their police powers to accomplish objectives—address escalating costs associated with environmental preservation or accommodate other emerging societal needs—that would otherwise

¹⁶ Ruzza, Alice., *Indirect Expropriation in International Investment Law* (Ph.D. thesis, University of Trento, 2013) at 19.

¹⁷ Epstein, R.A., *Takings*, *supra* note 14, at 59.

¹⁸ *Cato Handbook for Policymakers* (7th ed.), *Property Rights and the Constitution*, at 347.

¹⁹ Merrill, T.W., *Ownership and Possession*, in *Law and Economics of Possession* 9 (Y. Chang ed., Cambridge Univ. Press 2015).

²⁰ Epstein, R.A., *Takings*, *supra* note 14, p.59.

²¹ *Id.*

²² Lin, L. & Alison, J.R., *An Analysis of Expropriation and Nationalization Risk in China*, 19 *Yale J. Int’l L.* at 7 (1994).

necessitate compensation under eminent domain.²³ As a result, private property owners may experience heightened governmental intervention, often results the domination of their property value without compensation.²⁴ This makes property owners to quest the government to extend the requirement of compensation under the eminent domain when governmental regulation or actions significantly affect their property value tantamount to taking.

Regulatory taking, in this regard, designates a situation where government-imposed regulations, intended at social protection, impose such a substantial burden on property owner that their effect tantamount to a direct expropriation or ouster, even though no physical seizure of the property has occurred.²⁵ Regulatory taking, thus, differ from direct expropriation in that the government instead of physically seize property, via regulations, impose excessive restrictions on the owner's and crippling their ability to utilize their property rights in a particular way previously recognized in law.²⁶

Nevertheless, unlike direct expropriation, regulatory taking involves complex issues in striking the appropriate balance between the government's legitimate regulatory authority via police power and the need to safeguard private property rights from excessive regulation which "in all fairness and justice" should be made with compensation.²⁷ This tension between public interest and private property rights lies at the heart of the regulatory takings discourse, and remains an active area of scholarly inquiry and legal debate—necessitates a closer examination of the line between acceptable regulations and unaccepted constitutional taking that requires just compensation.²⁸

1.1 Police Power and Regulatory Taking

States possess the inherent sovereign authority to regulate activities within their jurisdictions, such as those pertaining to socio-economic and political matters.²⁹ This authority is commonly known as 'police power'. The police power, which stems from the principles of

²³ Paul Turner & Sam Kalen, *Takings and Beyond: Implications for Regulation*, 25 Energy L.J. at 25 (1998).

²⁴ Stroup, R.L., *The Economics of Compensating Property Owners*, 15 Contemp. Econ. Pol'y at 55 (1997). <https://doi.org/10.1111/j.1465-7287.1997.tb00489.x>

²⁵ Cole, D.H, *When Property Regimes Collide: The "Takings" Problem*, in *Pollution and Property: Comparing Ownership Institutions for Environmental Protection* 154 (Eve Darian-Smith & Richard A. Lazarus eds., Cambridge Univ. Press 2002).

²⁶ O'Boyle, Patrick, *Expanding the Constitutional Protection of Property Rights to Address Regulatory Takings* (B.L. thesis, 2018) at 7.

²⁷ Merrill, T.W., *Anticipatory Remedies for Takings*, 128 Harv. L. Rev. 1630, at 1673 (2015).

²⁸ Schwindt, R. & Globerman, S., *Takings of Private Rights to Public Natural Resources: A Policy Analysis*, 22 Can. Pub. Pol'y at 205 (1996).

²⁹ Visser, Fritz, *The Principle of Permanent Sovereignty over Natural Resources and the Nationalisation of Foreign Interests*, 21 Comp. & Int'l L.J. S. Afr. 77, at 77-80 (1988).

sovereignty and territorial principles,³⁰ is best described as the ability and authority to enact laws and regulations to protect, promote and promote the general welfare of the people.³¹ Common application and example of the police power including measures related to public safety, health, environment, human rights, and the general well-being of its citizens.³² As a result, the police power is considered an essential aspect of a state's sovereignty and is recognized as a core function of government under both national and international legal frameworks.³³ However, the regulatory power of the government is not without limitation, as it must be exercised with the constitutional safeguards afforded to private property rights.³⁴

In the context of regulatory takings, as mentioned above, the tension between the government's right to regulate through its police power to achieve certain social goals and the need to protect private property rights has been the subject of extensive legal and scholarly debate. This tension stems from the need to counterbalance the on the one hand the state's inherent rights to regulate activities within its jurisdiction for the general welfare and on the other upholding constitutionally protected private property of owners.³⁵ As shall be discussed, scholars and Courts continue to grapple with the challenge of striking the balance between upholding the government's ability to enact necessary regulation on account of public interest while also safeguarding individual property rights.³⁶

On one side, proponents of police power argue that the government should have broad latitude to enact regulations in the public interest— as it has a fundamental duty to safeguard the health, safety, and well-being of its citizens. Notably, the advancement of the global standards of human rights, public health and environmental protection increasingly compels states to exercise their police power, even necessitating the amendment of domestic laws comply with their international obligations.³⁷ Doing so may at a time necessitates interferes on the constitutionally protected rights of property. Thus, demanding the government to

³⁰ *Id.*

³¹ Reagan, Tristan, *Dude, Where's My House: The Interaction Between the Takings Clause, the Police Power, the Militarization of Law Enforcement, and the Innocent Third-Party Property Owner*, 58 *Tulsa L. Rev.* 99, at 107 (2023).

³² Tomlins, C., *Necessities of State: Police, Sovereignty, and the Constitution*, *J. Policy Hist.* 20, 47 (2008).

³³ Richards, Edward P. & Rathbun, Katharine C., *The Role of the Police Power in 21st Century Public Health*, 26 *J. Sexually Transm. Dis.* 350, at 351 (1999).

³⁴ Oliver, P.C., *Sovereignty in the Twenty-First Century*, 14 *King's L.J.* 137 (2003).

³⁵ Brown, Ray A. & Hall, Howard L., *The Police Power and Economic Reconstruction*, 1 *U. Chi. L. Rev.* at 224 (1933).

³⁶ Ulen, Thomas S., *Regulatory Takings: Law, Economics, and Politics; Compensation for Regulatory Takings: An Economic Analysis with Applications*, 74 *Land Econ.* 570 (1998).

³⁷ Soloway, Julie, *Environmental Regulation as Expropriation: The Case of NAFTA's Chapter 11*, 92 *Can. Bus. L.J.* at 102 (2000).

compensate for every change in laws or interference on property rights would undermine its capacity to act for the general welfare, as some incidental impacts on property value should be borne without compensation.³⁸

Beside, some scholars have also advocated for the abolition of regulatory taking doctrine altogether. For instance, Sax noted that where the government is engaging in regulating certain acts for public purpose, i.e. engaging in zoning, nuisance abatement, conservation, business regulation, or a host of other functions, the court supposed to take it as a mere incidence of the lawful exercise of the ‘police power’ and thus non compensable.³⁹ Sax further his discussion by distinguishing ‘when regulation ends and taking begins’ as one of the fundamental challenge in applying regulatory taking doctrine within domestic and international investment arbitration. This distinction is crucial, as it impacts how regulations enacted for the general welfare are interpreted and whether they require compensation for the affected property owners. Commentators have also described this challenge as a “*crazy-quilt pattern of Supreme Court doctrine*”, indicating that there are no clear-cut rules or formula to determine where regulation ends and taking begins.⁴⁰

Furthermore, Byrne also consider regulatory taking doctrine as a problematic and flawed concept that should be eliminated.⁴¹ He supported his position referencing the established constitutional interpretation, traditions, and policies within the U.S. Context, and asserted that; the regulatory taking doctrine has become a powerful tool for constructive judicial activism aimed at undermining government authority over natural resource decision-making.⁴² To put aptly, he contended that the doctrine has been used to challenge a wide range of environmental regulations and land use controls, often favoring the interest of property owners over the public goods. Furthermore, the author criticized the application of the compensation requirement under the Taking Clause to instances of regulatory takings, as the original drafter of the Fifth Amendment, James Madison, intended the clause to apply

³⁸ Mostafa, B., *The Sole Effects Doctrine, Police Powers and Indirect Expropriation Under International Law*, 15 Austl. Int'l L.J. 267, at 296 (2008).

³⁹ Sax, J.L., *Takings and the Police Power*, 74 Yale L.J. at 36 (1964).

⁴⁰ *Id.*

⁴¹ Byrne, J. Peter, *The Regulatory Takings Doctrine: A Critical Overview*, in *Regulatory Takings and Resources: What Are the Constitutional Limits?* (1994). <https://scholar.law.colorado.edu/regulatory-takings-and-resources/2>.

⁴² *Id.*, at 1.

solely to cases of direct, physical seizure of property, rather than to regulatory actions that diminish property value without outright confiscation.⁴³

Likewise Schwartz also argued that regulatory taking has coercive effect on society's tool to solve some of its pressing problems.⁴⁴ He also further his arguments by pointing out that despite the ever increasing environmental degradation or unwarranted utilization of natural resource which causes climate change and clear social problem, the dramatic expansion of regulatory actions which are necessary to avoid environmental harms and other social problems faces the risk of colliding with the regulatory taking doctrine.⁴⁵ Thus, if the Constitution is a barrier to the decisive actions necessary to protect those it governs from the effects of climate change and overconsumption of resources, it is not serving the purpose. Thus, he recommends the court to reject regulatory taking doctrine in its entirety from the US jurisprudence.⁴⁶

In contrast, recognizing the constitutional foundation of the government's police power to regulate private property, various scholarly work and case law—both under domestic and international law, notably in investment-related cases—advocate for the concept of regulatory takings. Their argument is premised on the notion that the government's ability to regulate the use of private property is not absolute and is subject to important limitations. Thus, since private property rights are a fundamental rights protected by the Constitution, governments cannot justify its police power *per se* as a pretext to arbitrary infringes private property rights without just compensation.⁴⁷

In this sense, the requirement of compensation for regulatory interference on private property owner is justified on consideration of '*fairness and justice*'.⁴⁸ This principle demands that when a regulation "*goes too far*" and impose a disproportionate burden on a property owner, fairness necessitates the broader community—which gains from the regulation—to share the burden and contribute to the cost via compensation.⁴⁹ Furthermore, as Flynn observed,

⁴³ Treanor, W. M. *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694 (1985), as cited in Byrne, *Regulatory Takings Doctrine*, supra note 41.

⁴⁴ Schwartz, A.W., *No Competing Theory of Constitutional Interpretation Justifies Regulatory Takings Ideology*, 34 Stan. Envtl. L.J. 247 (2015).

⁴⁵ *Id.*

⁴⁶ *Id.*, p. 251.

⁴⁷ Strong, A.L., Mandelker, D.R., & Kelly, E.D., *Property Rights and Takings*, 62 J. Am. Planning Ass'n 5 (1996), <https://doi.org/10.1080/01944369608975667>.

⁴⁸ Byrne, J.P., *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 Ecology L.Q. 89, at 128 (1995).

⁴⁹ Pecorino, Paul, *Compensation for Regulatory Takings with a Redistributive Government*, 80 S. Econ. J. at 488 (2013).

constitutional limits on regulation are reached only when a law imposes a ‘public burden’ that an individual should not have to bear alone in a free and democratic society that treats each person with equal concern and respect.⁵⁰ Thus, when regulations enacted to benefit the public renders the property owner’s existing or vested to use property rights unreasonable—create a lasting and disproportionate burden on the owner—all fairness and justice requires this burden to be shared and distributed across society.⁵¹ And, he noted this regulation to be regarded as a regulatory taking, entitling the affected property owner to just compensation. This in turn, at least, mitigates the inequitable situation where a small number of individuals bear the financial burden that benefits the public at large.

In general, while the principle of just compensation for direct or physical taking is well-established, its application to excessive regulation which substantially deprives property owners of the use or economic value of property without physical seizure remains a source of ongoing debate. Therefore, the next section, tried to reveal how various states handle the two competing interest of regulations enacted on account of public interest via police power with the constitutional protection of private property.

2. EXPLORING ‘REGULATORY TAKING’ IN DOMESTIC LEGAL FRAMEWORK: BEST PRACTICE

The regulatory taking doctrine has a strong foundation in the constitutional jurisprudence of various nations.⁵² This doctrine has evolved significantly across different nations, with countries grappling with the complex interplay between the protection of private property and the protection of the public welfare.⁵³ This in turn, reflects the diverse approach and judicial interpretation surrounding property rights and the limits of government regulation. Given this, this section is dedicated to provide a comparative analysis to explore the evolution of the regulatory takings doctrine in various jurisdictions, how countries address the issue of excessive regulations enacted on account of public interest that can be deemed as a taking of private property across diverse legal systems.

⁵⁰ Flynn, Andrew S., *Climate Change, Takings, and Armstrong*, 46 Ecology L.Q. at 673 (2019), <https://doi.org/10.15779/Z380R9M45P>.

⁵¹ *Id.*

⁵² Flynn. *supra* note 50, at 673.

⁵³ Appleton, Barry, *Regulatory Takings: The International Law Perspective*, 11 N.Y.U. Envtl. L.J. at 35 (2002).

2.1 The United State of America Approach

The U.S. domestic legal system has a long and complex history of dealing with the balance between the constitutional protection of property rights and the government's authority to regulate rights for the broader public good.⁵⁴ This ongoing tension and debate has provided a robust foundation for the development and evolution of the doctrine that is considered *sui generis* after decades of evolution.⁵⁵ The Fifth Amendment to the U.S. Constitution guarantees fundamental property rights, stipulating that interference must be for a public purpose and followed by just compensation.⁵⁶ This taking clause can be triggered with two scenarios or lawsuits: 'condemnation' and 'taking'.⁵⁷ Accordingly, while 'condemnation' involves a formal or direct expropriation, where the government takes possession of a physical asset from a private property owner through legislation accompanied by compensation, 'taking' involves a regulatory action affecting property rights and compensation can only be sought through litigation.⁵⁸

Regulatory taking claims, involving situations where private property use is limited by governmental regulation, were initially overlooked.⁵⁹ Prior to the landmark case of *Pennsylvania Coal Co v. Mahon*, the original understanding and scope of the 'Takings Clause' of the Fifth Amendment were narrow, primarily focused on protecting physical seizure by governments.⁶⁰ In reinforcing this, Patashnik alludes that when the government imposes economic burdens on property owners through regulation, but does not physically appropriate property, courts were generally reluctant to find a taking in the regulatory context.⁶¹

⁵⁴ *Id.*

⁵⁵ Pucher Holmer, Magdalena, *Regulatory Expropriation under International Investment Law – A Case-Law Analysis* (Thesis, University of Lund 2006), at 6.

⁵⁶ Kokichaishvili, Ekaterine, *Standards of Foreign Investment Protection from Indirect Expropriation: Balancing the State's Power to Regulate and Investor's Property Rights* (LL.M. Thesis, Central European University 2015), at 12.

⁵⁷ Meltz, Robert, *Takings Decisions of the U.S. Supreme Court: A Chronology* (Congressional Research Service Report 2015), at 1. [hereinafter Meltz, *Taking Decisions of the U.S. Supreme Court*]

⁵⁸ Kiratipong, Naewmalee, *Indirect Expropriation: Property Rights Protection, State Sovereignty to Regulate and the General Principles of Law* (Ph.D. thesis, University of Wollongong 2017), at 165. <https://ro.uow.edu.au/theses1/157>

⁵⁹ Newcombe, A.P., *Regulatory Expropriation, Investment Protection and International Law: When Is Government Regulation Expropriatory and When Should Compensation Be Paid?* (LL.M. thesis, Univ. of Toronto 1999), at 201.

⁶⁰ Miceli, Thomas J. & Segerson, Kathleen, *Regulatory Takings: When Should Compensation Be Paid?*, 23 J. Legal Stud. at 752 (1994).

⁶¹ Patashnik, Josh, *Physical Takings, Regulatory Takings, and Water Rights*, 51 Santa Clara L. Rev. at 365 (2011).

However, after the *Pennsylvania Coal Co. v. Mahon* case the Supreme Court extended the compensation requirement of the Taking Clause to include regulatory taking.⁶² Notably, in this pivotal case, the Supreme Court made a groundbreaking decision by recognizes excessive regulations that substantially deprive property owners can trigger compensation under the “Taking Clause”, even without any physical occupation or enrichment of the affected property. This decision represented a major shift in the interpretation of the Takings Clause, and acknowledging the notion that when excessively burdensome regulations, despite its public use, effectively deprive property owners of the economically viable use of their property, would warrants just compensation for the affected individual.⁶³

Following this, substantial case law delves into the circumstances under which a taking will attract constitutional protection, necessitating the payment of compensation.⁶⁴ Owing to this, as the U.S. case law asserts when regulation interferes with property rights and affects property owners, it transforms into regulatory taking, warranting compensation. For instance, as Justice Holmes suggested, regulatory interference on property owner should no longer justified without compensation, when a law has a “substantial impact on property owner that cannot be justified with adequate reasons unless compensation is paid”.⁶⁵

Nonetheless, while transforming such excessive regulation to regulatory taking, determining ‘*how much is too much*’ were the major issue to distinguish regulations that fall under the ‘police power’ and ‘taking clause or eminent domain’. In this regard, Holmes's introduced the “diminution of values”—emphasizes on evaluating the reduction in the market value of a property due to regulation—as a standard to decide whether regulation is “too far” and hence compensable under the Taking Clause.⁶⁶ However, this does not mean that the government is supposed to compensate for every regulation that deprives the property owner; rather compensation should be extended for excessive regulation that is “too far”.⁶⁷

Furthermore, building the *Pennsylvania Coal Co. v. Mahon* case, Courts have established three key considerations to determine when regulation ends and taking began. These include: the severity of the economic impact on the property owner; the degree to which the regulation interferes with distinct or “reasonable” investment-backed expectations, and the nature and

⁶² Meltz, R., *Taking Decisions of the U.S. Supreme Court*, *supra* note 57, at 1.

⁶³ Appleton, *Regulatory Takings*., *supra* note 53, at 36.

⁶⁴ M. Sornarajah, *The International Law on Foreign Investment* 274 (3d ed., Cambridge Univ. Press 2010).

⁶⁵ Singer, Joseph W., *Justifying Regulatory Takings*, 41 Ohio N.U. L. Rev. at 634 (2015).

⁶⁶ Miceli & Segerson, *supra* note 58, at 752.

⁶⁷ *Id.*

purpose of the government action, such as whether it is physical invasion or a regulation aimed at public welfare.⁶⁸ Together, these three factors help to assess whether a regulation has “goes too far” and substantially deprive the owners economic valuable use of their property, thereby warranting compensation just compensation under the Taking Clause.

2.2 The Switzerland Approach

The Switzerland (hereinafter Swiss) Constitution recognizes the notion of regulatory taking, referred it as “material expropriation”.⁶⁹ To this end Article 22 (3) of the Swiss Constitution mandates the State to compensate property owners for regulatory limitations falling under the category of “material expropriation”.⁷⁰ Section 3 specifically states that “*for an expropriation, or for restrictions on the property equal to an expropriation, full compensation is due*”.⁷¹ This provision requires the application of the compensation requirement for both direct expropriation involving physical seizure and regulatory taking. Notably, the term “*restrictions on the property equal to an expropriation*”, indicates material expropriation or regulatory taking which involve regulations which severely limits property rights in such a way that is materially similar to those in a case of formal expropriation equivalent to expropriation.⁷²

Unlike other jurisdiction, the Swiss Constitution’s unique approach to property regulation is featured by its explicit recognition of compensation for ‘excessive’ regulation under the notion of material expropriation.⁷³ In applying material expropriation, as van der Walt and Riva contends, need to distinguishing formal expropriation from the ‘normal’ uncompensated regulation of private property use through the state’s police power, as well as regulatory restrictions on property use. These latter forms, described as ‘material expropriations’, are only considered valid when accompanied by compensation.⁷⁴ This makes compensation as a validity requirement for both direct expropriation and material expropriation.⁷⁵

⁶⁸ Meltz, R., *Taking Decisions of the U.S. Supreme Court*, *supra* note 60, at 3.

⁶⁹ Riva, Enrico, *Regulatory Takings in American Law and "Material Expropriation" in Swiss Law—A Comparison of the Applicable Standards*, 16 *Urban Lawyer* 425, at 430 (1984).

⁷⁰ *Id.*

⁷¹ *Id.*, at 427.

⁷² Oriet, Thomas A. *Comparative Landowner Property Defenses Against Eminent Domain* 94 (2021), Electronic Theses and Dissertations 8611

⁷³ *Id.*, at 429.

⁷⁴ Van der Walt, A.J., *The Property Clause in the New Federal Constitution of the Swiss Confederation 1999*, 15 *Stellenbosch L. Rev.* 326, at 327-28 (2004).

⁷⁵ *Id.*, at 97.

Besides formal recognition, the determination to determine when regulation ends and taking or material expropriation begin is entrusted to the Court.⁷⁶ In this context, the Federal Supreme Court employs two primary tests to evaluate the concept of material expropriation. The first one involves examining whether the restrictions significantly impair the owner's ability to utilize essential right arising from the property”, which followed by compensation. And the second one is the case of less intrusive but still considerable restriction of property rights, accordingly compensation is due only if single person or very few persons is affected in a way of breaching the principle of equal protection.⁷⁷

Generally, it is crucial to highlight that the explicit recognition of compensation for indirect or material expropriation under the Constitution effectively safeguards fellow citizens, from excessive governmental regulation. The Swiss example holds value for jurisdictions lacking explicit provisions for regulatory taking or indirect expropriation under the Constitution, suggesting a potential model for amending such laws. Therefore, Swiss law serves as a valuable comparative source for developing remedies to address citizen who has been suffering from property interference owing to excessive but otherwise lawful regulations without compensation.

2.3 The South Africa Approach

Balancing between the constitutional protection of property rights and the state's authority to regulate for the public goods, which may severely impact property owners, remains an unsettled issue with in South African constitutional jurisprudence.⁷⁸ The absence of explicit provision for constructive or indirect expropriation in the Constitution contributes in complicating efforts in balancing regulatory rights with the protection of property rights.⁷⁹ Notably, Mostert and Bezuidenhout asserted that; this uncertainty is further compounded by Section 25 of the 1996 Constitution, which addresses State interference with property through

⁷⁶ R. Dolzer, *Property and Environment: The Social Obligation Inherent in Ownership, A Study of the German Constitutional Setting*, IUCN Environmental Policy and Law Paper No. 12, at 21 (1976). While he discussed the German experience on regulatory taking, he provides that “individual sacrifice” and “intensity of the regulation” as a factor to determine compensable and non-compensable regulation that imposes an excessive burden, or individual sacrifice, to that owner, altering his legal position and enjoyment of property, while bringing benefits to the ‘public’ at large.

⁷⁷ Riva, *supra* note 69, at 432.

⁷⁸ Mostert, Hanri, *The Distinction between Deprivation and Expropriation and the Future of the 'Doctrine' of Constructive Expropriation in South Africa*, 19 S. Afr. J. Hum. Rts. at 569 (2003).

⁷⁹ *Id.*

‘deprivation’(section 25 (1)) and ‘expropriation’(section 25 (2)) without providing a clear distinction.⁸⁰

For instance, in her analysis, Bezuidenhout discussed the notion of ‘regulatory taking’, citing decision rendered by the South African constitutional court’s in *Reflect-All case*.⁸¹ The case involves the constitutionality of legislations pertaining to the planning of provincial roads, and whether it impugned provision arbitrarily deprives owners of their property contrary to section 25 (1) of the Constitution, hence amounting expropriation following compensation. In settling the case, the Court provided that characterizing the transportation-related regulations as amounting to expropriation would unduly constrains the government’s ability to reasonably balances the interest of private landowners and the broader public goods.⁸² However, the Court also acknowledges the possibility that regulations that impose more substantial or unequal regulatory burdens could potentially trigger the need for compensation in a future.⁸³

Nevertheless, in *Agri South Africa v Minister for Minerals and Energy* case, the Constitutional Court established title acquisition over an object by the State or another private entity as a defining characteristic of expropriation that require compensation.⁸⁴ Accordingly, the Constitutional Court’s seminal ruling in *Agri SA* recognized a formal acquisition of property by the State as a prerequisite for a successful claim of expropriation under Section 25 of the South African Constitution. Thus, arguably, by requiring demonstrated deprivation of ownership, control or possession, the Court logically closed the door to arguments relying solely on the indirect or ‘constructive’ effects of legislation or administrative actions upon land use.⁸⁵ Likewise, scholars, including Southwood,⁸⁶ and Gildenhuys,⁸⁷ contend that “no expropriation exists without some transfer or acquisition of rights”.

⁸⁰ Mostert, *supra* note 78. See also Bezuidenhout, *supra* note 6, at 98. Deprivation within the context of section 25 includes extinguishing a right previously enjoyed, and expropriation is a subset thereof, although additional requirements must be met for deprivation to rise to the level of expropriation under 25 (2).

⁸¹ *Reflect-All 1025 CC and Others v. MEC for Public Transport, Roads and Works, Gauteng Province Government and Another*, 2009 (6) SA 391 (CC) para. 65, cited in Bezuidenhout, *supra* note 6, at 107.

⁸² Bezuidenhout, *supra* note 6, at 107.

⁸³ Van der Sijde, Elsabé. *Reconsidering the Relationship between Property and Regulation: A Systemic Constitutional Approach* 144 (Ph.D. thesis, Stellenbosch University 2015).

⁸⁴ *Id.*

⁸⁵ *Id.*, at 105.

⁸⁶ Southwood, M.D. *The Compulsory Acquisition of Rights: By Expropriation, Way of Necessity, Prescription, Labour Tenancy, and Restitution* 15 (Juta & Co. 2000).

⁸⁷ I. Currie & J. de Waal, *The Bill of Rights Handbook* 553 (5th ed. 2005), cited in Van der Sijde, Elsabé, *supra* note 83.

Conversely, there are also other scholars who still attempt to argue that substantial or undue limitation of rights amounts to a practical or ‘constructive taking’, even without outright appropriation by the State. For instance, Van der Walt argues that in certain instances, expropriation might be viewed as the loss of property by its former holder rather than an acquisition by the State and suggests State acquisition should not be considered the sole defining characteristic of expropriation.⁸⁸

Despite this, in numerous decisions, Courts have consistently required a formal appropriation or outright taking by the state in order to find an expropriation under Section 25 of the Constitution. Given this, by prioritizing demonstrated transfers of ownership, control or possession away from the individual landowner, the scope of what constitutes an expropriation has largely been confined to cases involving outright, formal deprivation of title.⁸⁹ This narrow, formalistic approach makes it difficult to argue burdensome regulation alone could trigger compensation.

Besides, it has been argued that the South African jurisprudence has established that compensation claims relying solely on indirect expropriation face a high evidentiary bar. This is because the claimants will face with a significant burden in proving that a government’s regulatory action has gone beyond the permissible regulation, thus effectively deprived the substance of their property rights. This is challenging because these regulatory actions are often designed to serve the public interest, and courts tends to defer to the government’s rationale for implementing such measures, thus denying compensation. Faced with this strict standard, success for novel indirect deprivation arguments seems improbable.⁹⁰

However, the Courts do recognize other mechanisms beside expropriation claims that can provide relief. As evidenced elsewhere in case law, where regulations are found to be arbitrary or infringe rights in an unconstitutional manner, the default remedy is invalidating such actions rather than providing damages.⁹¹ This preserves some ability to challenge

⁸⁸ Van der Walt, A.J., *Constitutional Property Clauses: A Comparative Analysis* (1999), at 338.

⁸⁹ Mostert, *supra* note 78, p. 568.

⁹⁰ *Id.*, p. 576.

⁹¹ See, R. Dolzer, *Property and Environment*, *supra* note 76; see also Karen Bezuidenhout, *supra* note 7, p. 149-159. In a similar fashion, albeit, slight difference, in Germany, Mexico, & Thailand Constitution, “regulatory interferences with property rights that exceed the limits set by the Constitution/ Basic Laws in case of German are illegal and give rise to constitutional challenge of the validity of the legislation. This type of regulatory interference cannot be used as the basis to found a claim for compensation “rather the decision seems invalidating as an option for excessive regulations.

unreasonable infringement of property interests without requiring proof of indirect expropriation.

In general, while the South African courts have been hesitant to explicitly endorse or reject the concept of constructive expropriation or regulatory taking, Bezuidenhout observes that the country's jurisprudence reflects an ongoing discussion regarding potential alternatives, such as compensation, instead of invalidating excessive property regulations on account of its unconstitutionality.⁹² On the other hand, Mostert argues that, based on the current state of South African jurisprudence, the payment of compensation for cases where regulations exceed the limits cannot be envisioned.⁹³ However, it is important to acknowledge that the South African approach plays a crucial role in the development and formulation of the concept of constructive expropriation.

3. ESTABLISHING BOUNDARIES FOR PROPERTY RIGHTS LIMITATIONS UNDER THE FDRE CONSTITUTION

3.4 Police Power, Expropriation and Regulatory Taking

A strong property rights regime, lays the foundation for economic growth, personal freedom, and overall well-being of the society.⁹⁴ For individuals, property ownership entails opportunity, responsibility, and economic freedom, thus translate into investment, innovation, the possibility of wide scale exchange, and even improved governance which benefit the country in general.⁹⁵ That is why the protection of private property rights becomes one of the fundamental rights guaranteed in various Constitutions. In providing protection, constitutional property rights clause are designed to be flexible, often incorporation conditions that allows for limitation of these rights in order to achieve significant social objectives.⁹⁶

In this context, the FDRE Constitution under Article 40 (1) and (8) empowers the government with two primary tools—police power (deprivation clause) and eminent domain (expropriation clause)—that enable it to regulate, restrict, or acquire private property in order

⁹² *Id.*, at 98. Cite *Agri SA v Minister for Minerals and Energy*, 2013 (4) SA 1 (CC).

⁹³ Mostert, *supra* note 78, at 567.

⁹⁴ Trebilcock, Michael & Veel, Paul-Erik, *Property Rights and Development: The Contingent Case for Formalization*, 30 U. Pa. J. Int'l L. 397, at 400 (2008).

⁹⁵ *Id.*, at 408-409.

⁹⁶ Merrill, T.W, *supra* note 27, p. 457.

to address the needs of the public welfare.⁹⁷ While the police power allows the state to regulate and restrict the right to use property, eminent domain grants the authority to acquire private property for “public purpose” with just compensation.⁹⁸ These constitutional framework underscores that property rights, while fundamental, must be balanced against broader societal interest and the rights of the others.⁹⁹

3.4.1 Police Power or Deprivation Clause

Article 40 (1) of the FDRE Constitution while safeguards private property rights, it also empowers the government to exercise its police power and impose limitations on property rights.¹⁰⁰ The provision sets public interest as defined by specific law, and the need to protect the rights of others, as a prerequisite for limiting the rights to use and enjoyment of private property through police power.¹⁰¹ Despite the term ‘public interest’ is not defined under the Constitution, regulations or actions aimed at safeguarding public health and safety, preserving cultural heritage, protecting the environment, and managing land use through measures like zoning regulations can generally be regarded as serving a public purpose.¹⁰²

The second scenario where by property rights may be deprived under the Constitution is when ‘their exercise or use infringes upon the rights of others’.¹⁰³ Put differently, in situations where the utilization of property rights may detrimentally affects the rights of others, governmental authorities may impose reasonable constraints to reconcile conflicting interests. In this regard, the term ‘...in a manner compatible with the right of other’ under Article 40 (1) seems one indication of the “noxious use test”.¹⁰⁴ The noxious use test justifies regulation

⁹⁷ FDRE Constitution, *supra* note 3, Art. 40 (1) & (8). In addition to the Constitution, the Civil Code under Article 1205 guarantees property owner to use his property rights as he think fits. These rights can only be limited when a particular law deems so. Not only this, the Civil Code under Art. 1151-1205 provides about the restrictions attached to the exercise of private property. See Ethiopian Civil Code, Proclamation No. 165/1960, Federal *Negarit Gazeta*, 1st Year, No. 3, art. 1205(1) (1960) [hereinafter Civil Code]; See also Murado A., *Ethiopia's Property Rights Legal Regime*, *supra* note 1, at 169.

⁹⁸ *Id.*

⁹⁹ James E. Holloway & Donald C. Guy, *Weighing the Need to Establish Regulatory Takings Doctrine to Justify Takings Standards of Review and Principles*, 34 Wm. & Mary Envtl. L. & Pol'y Rev. 315 (2010). <https://scholarship.law.wm.edu/wmelpr/vol34/iss2/2>

¹⁰⁰ FDRE Constitution, *supra* note 3, Art. 40 (1). Here conceptual clarity is central to the regulation of the use of property with reference to section 40 (1), because “deprivation” is sometimes used interchangeably in the literature with “limitation” or “regulation” to signify that the use, enjoyment or exploitation of property is or can be restricted.

¹⁰¹ *Id.*, Art. 40 (1).

¹⁰² Legesse Tigabu, *Host States' Police Power and the Proportionality Test in International Investment Law*, 8 Jimma Univ. J. L. at 68 (2016). <https://doi.org/10.46404/jlaw.v8i0.4112>

¹⁰³ FDRE Constitution, *supra* note 3, Art. 40 (1).

¹⁰⁴ Robert M. Washburn, *Reasonable Investment-Backed Expectations as a Factor in Defining Property Interest*, 49 Wash. U. J. Urb. & Contemp. L. at 63 (1996).

of property rights as necessary and non-compensable when the property owner's conduct creates the need for regulatory interventions that diminishes his property value.¹⁰⁵ for instance, abuse of ownership rights, utilizing property rights in ways that infringe upon the rights of neighboring property owners, as provided under Article 1225 of the Civil Code—such as through excessive noise or smoke, unpleasant smell of pollution—can be taken as a typical instance for the recognition of noxious test that attracts regulatory measures aimed at uphold the rights of affected parties.¹⁰⁶ Sax, for instance, asserted property rights exercise or used against the interest of others should not be considered as property, thus can be regulated without compensation.¹⁰⁷

Furthermore, to enforce the limitation of property rights under Article 40 (1), the requirement of public interest or protection of the rights of others must be upheld through the principle of legality. Notably, the term “...*unless prescribed otherwise by law*...” denotes the principle of legality. This requirement entails the core for the scope of property protection under the Constitution, as it emphasizes that limitation of property rights must be based on clearly defined law. Conventionally, this principle prohibits any arbitrary restrictions of a constitutional right, and requires it to be grounded in a legal norm that can be directly or indirectly traced back to the constitution itself.¹⁰⁸ Affirmatively, Barak argued that this principle entails a “rule of law” component—formal and substantive meaning of the term.¹⁰⁹ While the formal aspect requires any limitations of rights to be made with duly enacted laws (procedural quality of the law), the substantive requirement dictates these laws to be align with broader principles of justice and fairness enshrined in the constitution.¹¹⁰

Emphasizing on the substantive part, Barak interpreted the notion of “rule of law” to encompass the ‘proportionality’ test recognized in constitutional jurisprudence.¹¹¹ The test requires any limitation on rights must pursue a legitimate aim, be necessary as a last resort, be minimal, uphold democratic values, and curtail rights only to the extent essential for

¹⁰⁵ See, Thomas J. Miceli & Kathleen Segerson, *supra* note 60, at 442.

¹⁰⁶ Civil Code, *supra* note 97, Art. 1225. See also Meltz, R., *Takings Law Today: A Primer for the Perplexed*, 34 Ecology L.Q. 307, at 323 (2007), [hereinafter Meltz., *Takings Law Today*]

¹⁰⁷ Sax, *Takings and the Police Power*, *supra* note 38, at 39.

¹⁰⁸ Barak, Aharon. *Proportionality: Constitutional Rights and Their Limitations*. Cambridge University Press, 2012, 107–28, at 107. <http://dx.doi.org/10.1017/CBO9781139035293>

¹⁰⁹ *Id.*, at 140

¹¹⁰ Paul Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, in *The Rule of Law and the Separation of Powers* 95, 95-115 (Richard Bellamy ed., Routledge 2017).

¹¹¹ Barak, *supra* note 108, at 129

achieving the objective.¹¹² Ahmed and Bulmer also asserted that the principle of ‘proportionality’ dictates that the limitation placed on rights must be proportional to the intended effect such a limitation.¹¹³ The aim for tagging this requirement is to protect individuals from arbitrary interferences.¹¹⁴ In this context, the term ‘*unless otherwise prescribed by law*’ under Article 40 (1) of the Constitution, arguably, is not an open invitation to the legislator to limit property rights of individuals without appropriate justification or in an arbitrary manner. This in turn protects the property owners from unreasonable and arbitrary interference via regulatory actions.

Conversely, Adem while assessing the constitutional basis and understanding of the ‘rule of law and limits on government power in Ethiopia’, contended that the FDRE Constitution lacks ‘proportionality test’—a feature present in most constitutions—which intends to protect individuals from unjustified and arbitrary governmental interference on fundamental rights.¹¹⁵ Given this, in the absence of proportionality requirement under the Constitution, arguably, the term “...*prescribed by specific law*...” under Article 40 (1) could potentially be interpreted broadly to justify various governmental actions or duly enacted regulation on account of public interest, regardless of the burden it imposed without sufficient compensation. This in effect allows the government to use its ‘police power’ to legitimize violation of property rights, which contradicts the principles of the ‘rule of law’ and instead upholds a regime of ‘rule by law’.¹¹⁶

In a nutshell, the deprivation clause in Article 40 (1) allows the government to exercise its police power, and regulate or limit private property rights for social welfare. However, arguably, the Constitution’s reliance on ‘claw back clause’, which refers the limitation of these rights to specific laws, without substantive requirements regarding the type and quality

¹¹² Curtice, M., Bashir, F., Khurmi, S., Crocombe, J., Hawkins, T., & Exworthy, T., *The Proportionality Principle and What it Means in Practice*, 35 *Psychiatrist* 111, 111-16 (2011), <https://doi.org/10.1192/pb.bp.110.032458>.

¹¹³ Ahmed, D. & Bulmer, E. *Limitation Clauses*. International IDEA Constitution-Building Primer 11, 2nd ed. (2017), at 14.

¹¹⁴ Curtice *et al.*, *The Proportionality Principle*, *supra* note 112, at 111.

¹¹⁵ Adem Abebe, *Rule by Law in Ethiopia: Rendering Constitutional Limits on Government Power Nonsensical*, CGHR Working Paper No. 1, Univ. of Cambridge, at 13 (2012).

¹¹⁶ *Id.*, at 4. Adem argued that Ethiopia's longstanding political culture empowers the government to enact laws as it wishes. This deeply entrenched belief; combined with the public's view that the government has the unfettered right to govern and exercise its legislative power to implement policies and ideologies regardless of the Constitution reinforces the predominant notion of "rule by law" rather than the more democratic principle of "rule of law". This unchecked legislative power could lead to a system where the government can pass laws and regulations that prioritize its own interests over the rights and freedoms of the people, undermining the democratic foundations of the country.

of laws used to limit these rights, renders the Constitution to offer minimal protection for property owners against excessive but valid regulations that unduly affect property rights.¹¹⁷

3.4.2 Eminent Domain or Expropriation Clause

Expropriation—eminent domain in some jurisdiction—conventionally connotes the mandatory acquisition of land or property by the state for activities that serve a public purpose; with the requirement of prior payment of fair compensation.¹¹⁸ This process is a accepted legal tool that permits governments to acquire land or other property for projects deemed to be in the public interest, such as the construction of roads, public facilities, or infrastructure development.¹¹⁹ The right to expropriate private property is stems from the government’s authority under “eminent domain” to acquire private property. On this account, Article 40 (8) of the Constitution, without prejudice the rights of private property, empowers the government to expropriate private property for public purposes with the payment of advance compensation commensurate with the market value of the property.¹²⁰ While the term “...without prejudice to the right to private property...” emphasizes the importance of protecting private property rights, the requirement of compensation is set as mechanism to balance these competing interests and reduce the impact on private property owners.¹²¹

Nevertheless, as argued by Murado, the legal and practical implementation of expropriation in Ethiopia, including the constitutional and legislative requirements of “public purpose,” “compensation,” and “procedural recourse,” has been characterized by significant legislative shortcomings.¹²² These legislative shortcomings, such as ambiguities, vagueness, loopholes, outdated provisions, and excessive administrative power with limited judicial oversight, have undermined the clear constitutional and legal standards required to safeguard the protections of property owners.¹²³

¹¹⁷ *Id.*

¹¹⁸ Daniel Weldegebriel, *The History of Expropriation in Ethiopian Law*, 7 *Mizan L. Rev.* 284 (2013). <http://dx.doi.org/10.4314/mlr.v7i2.4>

¹¹⁹ Martin Persson. *Compensation Practices in the Ethiopian Expropriation Process: A Case Study from Amhara National Regional State, Ethiopia*. (Master's Thesis, Lund University 2015).

¹²⁰ FDRE Constitution, *supra* note 3, Art. 40 (8)

¹²¹ *Id.*

¹²² Muradu Abdo, *Reforming Ethiopia's Expropriation Law*, 9 *Mizan L. Rev.* 304, at 327 (2015), <https://doi.org/10.4314/mlr.v9i2.3>.

¹²³ Hailu Burayu, Elias N. Stebek & Muradu Abdo, *Judicial Protection of Private Property Rights in Ethiopia: Selected Themes*, 7 *Mizan L. Rev.* 351, (2013). <http://dx.doi.org/10.4314/mlr.v7i12.6>

Responding to criticisms regarding the Constitution's lack of specific substantive and procedural requirements for the exercise of expropriation powers,¹²⁴ the current Expropriation Proclamation No.1161/2019 establishes four key principles to guide the process of expropriating property.¹²⁵ The principles dictate the authority to base expropriation on approved land use, urban or development plans; provide compensation and resettlement aid to restore and improve the livelihoods of displaced individuals; ensure consistency in compensation amount for similar properties and economic losses; and uphold transparency, participation, fairness, and accountability in the expropriation process.¹²⁶ Although these principles may not completely limit the government's expropriation authority, their proper and effective implementation could strengthen the protection of property rights by placing constraints on both the executive and legislative branches.¹²⁷

Generally, the aforementioned sections reveal the divergent nature of police power and the expropriation clause, both in their conceptual underpinnings and purpose. However, while the justification for defining these powers differs, they nonetheless overlap to some degree.¹²⁸ This overlap often arises when the exercise of police power or regulations becomes excessive, substantially limiting the use or value of property to the point where it is no longer useful to the owner, even without formal seizure. As has been discussed above, this interplay has paved the way for the emergence and recognition of the regulatory takings doctrine within various jurisdictions.

In this context, in pursuit of addressing this overlap, the following discussion addresses whether excessive regulation that effectively deprives an owner of the practical use of their property necessitates compensation, or if such regulation can be justified through the government's police power or eminent domain power under the FDRE Constitution.

3.5 Justifying Compensation for Excessive Regulation under the FDRE Constitution

The FDRE Constitution under Article 40 (1) authorizes the government to exercise its police power and restrict property rights in the public interest. Property rights restrictions under this

¹²⁴ Muradu Abdo, *Legislative Protection of Property Rights in Ethiopia: An Overview*, 7 Mizan L. Rev. at 205 (2013). <http://dx.doi.org/10.4314/mlr.v7i2.1>

¹²⁵ Expropriation of Land Holdings for Public Purposes, Payments of Compensation and Resettlement of Displaced People, Proclamation No. 1161/2019, Fed. *Negarit Gazeta*, 2019, art. 4.

¹²⁶ *Id.*

¹²⁷ Muradu Abdo, *Reforming Ethiopia's Expropriation Law*, *supra* note 122, at 303.

¹²⁸ Mostert, *supra* note 78, at 573-575.

provision are imposed without compensation. This is because exercising this police power and restricting property rights is presumed be rationally related to advancing the public interest and conform to due process principles. In some cases, these limitations may also need to meet a general proportionality test.¹²⁹ Contrary to this, Article 40 (1) fails to include additional requirements or guidelines, such as a general limitation clause that incorporates the principle of proportionality,¹³⁰ to ensure that limitations on property rights are assessed for adherence to constitutional principles.

The absence of an explicit proportionality requirement under the Constitution poses critical challenges in balancing governmental police power and safeguarding constitutional rights of property owner.¹³¹ This omission of *pram facially* grants the government latitude to justify regulatory restrictions on property rights solely on the Constitution's literal text. Consequently, any deprivation enacted through specific legislation and justified by a “public purpose” can easily meet constitutional standards outlined under Article 40 (1), potentially undermining protections for property rights. On the other, a compelling argument may be made from the perspective of normative constitutional interpretation which dictates—even without explicit proportionality requirement—limitations on constitutional rights must be guided by the principles of proportionality, rationality, and due process.¹³² These principles are fundamental to ensuring that constitutional governance respects both the letter and spirit of the law. This approach affirms the core rights of property owners while harmonizing them with broader societal interests.

In this regard, Sax argued that while regulatory laws enacted on account of public interest may limit property rights, when they impose unfair burdens that are not reasonably expected in a democratic society and where the property use causes no harm to others, such regulation should not be justified without compensation, even if the regulation benefits the whole community.¹³³ Building upon this proposition, we can posit that despite it needs a test of case law; it can be argued that government regulations or actions that go “too far” and result in the

¹²⁹ A.J. van der Walt, *Civil Forfeiture of Instrumentalities and Proceeds of Crime and the Constitutional Property Clause*, 16 *S. Afr. J. Hum. Rts.* at 3 (2000), <https://doi.org/10.1080/02587203.2000.11827587>.

¹³⁰ Adem, A., *Rule by Law in Ethiopia*, *supra* note 115, at 15.

¹³¹ See Kai Möller, *Proportionality: Challenging the Critics*, 10 *Int'l J. Const. L.* 709, 709–731 (2012), <https://doi.org/10.1093/icon/mos024>.

¹³² Barak Aharon, *supra* note 108, at 140

¹³³ Singer, Joseph William. *Justifying Regulatory Takings*. 41 *Ohio N.U. L. Rev.* at 648 (2015). https://digitalcommons.onu.edu/onu_law_review/vol41/iss3/4.

effective deprivation of the property owner's economic benefit cannot be justified under the police power established by Article 40 (1).

However, despite the aforementioned discussion, considering the property clause of the Constitution and the constitutional jurisprudence as it stands, it would not be hard for the government to justify regulation enacted for public purposes without compensation under Article 40 (1), even if it severely restrict the ability to enjoy the property rights equivalent to expropriation.

Expropriation clause under Article 40 (8) is the other important provision which vested the government with the power to expropriation private property. Unlike the deprivation of property using police power, exercising the expropriation or eminent domain power and expropriate private property including tangible and intangible for public purpose should accompanied with compensation.¹³⁴ The compensation requirement covers not only physical assets like land and buildings, but also intellectual property and creations from labor, creativity, or capital, such as trademarks, patents, and business operations.¹³⁵

Here it is worthy to note that, while the requirement of compensation is clear for physical expropriation—involving the government's acquisition of property rights from the former owner—the provisions is unclear regarding excessive regulations that tantamount of expropriation. However, the incorporation of intangible assets—which cannot be physically seized or expropriated but are instead affected by legal restrictions or limitations on the owner's rights to utilize, transfer, or profit from them—can be viewed as an expansion of the compensation requirement for regulatory limitations. On this sense, it is possible to hypothesize that any restriction on property rights through regulatory actions that do not entail physical seizure may trigger the compensation requirement under Article 40 (8). This is because such regulatory measures, even without physically taking possession of the property, can substantially diminish the value and utility of the intangible asset to the owner, effectively depriving them of their property rights

Beside, albeit in different context, using the Amharic and English version of the provision, Habib claimed the existence of a legal framework for applying the compensation requirement for regulatory taking under Article 40 (8) of the Constitution. Accordingly, he equated the

¹³⁴ Besides the Constitution, Article 1127 & 1128 of the Civil Code classifies goods into corporeals and incorporeals. See also Muradu Abdo, *Subsidiary Classification of Goods under Ethiopian Property Law: A Commentary*, 2 *Mizan L. Rev.* 85 (2008).

¹³⁵ FDRE Constitution, *supra* note 3, Art. 40 (8).

Amharic term “ጠብቅ ድ” with the English term “to take”, thereby indicating that the compensation provision includes not only physical expropriation but it also extends to regulatory takings as well.¹³⁶

Nevertheless, on a closer examination, Habib's claim can be viewed as overly simplistic for two reasons. On the one hand, save few countries such as Switzerland which explicitly recognize regulatory taking in its Constitution, regulatory taking is developed in the majority of jurisdiction, i.e., US,¹³⁷ Canada,¹³⁸ and arguably Germany¹³⁹ to mention a few, via judicial transformation of the ‘eminent domain or Taking Clause’. This is to mean that before the interpretation of the eminent domain clause to include regulatory taking, such constitutional text were meant to include only physical or direct taking. On the other, on historical account, during the *Derg* regime the government had regularly nationalized private property without the payment of compensation.¹⁴⁰ Given this, the provision of the ‘expropriation clause’ included under the FDRE Constitution is to rectify the fears that were developed by the practice of the previous regime’s confiscating or nationalizing private property without compensation.¹⁴¹

Besides, while examining the history of Ethiopia’s expropriation law, Daniel argued that the compensation requirement is generally applied when the government obtained or appropriate private property for public purpose.¹⁴² Of course there is no justification exists for the inference of this requirement of appropriation or compulsory acquisition of property by the state in the constitutional context, but it seems to be firmly embedded in the structure of Ethiopian expropriation laws.¹⁴³ For instance, considering the purpose of the Expropriation Proclamation¹⁴⁴—the primary legal framework governing expropriation in modern Ethiopia—one could argue that the expropriation clause under Article 40 (8) necessitates a

¹³⁶ Habib A. Abasimel, *The Jurisprudence of the Council of Constitutional Inquiry and of the House of Federation on Property Related Claims: A Critical Study*, Thesis, at 30 (2018).

¹³⁷ Matthew P., *supra* note 4, at 2055.

¹³⁸ Russell, *supra* note 8, at 180.

¹³⁹ Dolzer, *Property and Environment*, *supra* note 76.

¹⁴⁰ Ahmed M.M., Ehui S., Berhanu Gebremedhin, Benin S. & Amare Teklu, *Evolution and Technical Efficiency of Land Tenure Systems in Ethiopia*, Socio-economics & Policy Research Working Paper 39, ILRI (International Livestock Research Institute), at 8 (2002).

¹⁴¹ Danel, Compensation for Expropriation in Ethiopia and the UK, *supra* note 2, at 57-68.

¹⁴² Daniel, *The History of Expropriation in Ethiopian Law*, *supra* note 118, at 308.

¹⁴³ Muradu, *Reforming Ethiopia's Expropriation Law*, *supra* note 124, at 302.

¹⁴⁴ Proclamation No. 1161/2019, *supra* note 127, Article 2 (3) used the term displacement compensation for a land holder for the loss of use rights on the land as a result of expropriation. This shows appropriation of the property as a principal feature of the Proclamation.

complete or partial acquisition of benefits by the state.¹⁴⁵ This is referred as the requirement of appropriation or compulsory acquisition. Furthermore, unlike Habib, using a textual analysis of the Amharic term “ጠብቆ” and equated it with physical taking or appropriation of property, Tilahun reinforced Daniel’s argument that the compensation requirement under Article 40 (8) only applies to cases involving the appropriation of property—commonly referred to as “direct expropriation”.¹⁴⁶

Moreover, unlike police power this is regulatory in nature, acquisitive or appropriation of property—involving the transfer ownership of the property to the state for the greater public good—is the defining feature of expropriation.¹⁴⁷ This distinction underscores the unique nature of eminent domain, where the state's intention is to assume ownership for societal benefit, rather than merely regulating private property use. According to a strict constitutional interpretation, regulatory deprivation that does not involve the state’s acquisition of some advantage or benefit might be excluded from the compensation requirement.¹⁴⁸ Thus, despite it requires a test of time and case laws involving the interpretation of the Constitution, Article 40 (8) arguably seems to provide compensation for direct physical expropriation, rather for regulatory takings.

In a nutshell, the Constitution's property limitation clause—police power and expropriation or eminent domain—does not require compensation for excessively restrictive regulations that significantly limit property owners' use of their property, as long as no physical appropriation occurs. This suggests that property owners' interests are subjugated to the public interest, unfairly burdening them rather than distributing the burden equitably across the public. Thus, to strike a balance, it is crucial to explore how other legal systems reconcile the exercise of police power to protect the public interest with the safeguarding of private property owners from unduly burdensome regulations. In this sense, with the aim to identify potential solutions that Ethiopia could adopt to balance these competing interest, the subsequent

¹⁴⁵ Muradu, *Reforming Ethiopia's Expropriation Law*, *supra* note 122, at 302.

¹⁴⁶ Tilahun W. Hindeya, *An Overview of the Legal Regime Governing Minerals in Ethiopia*, 3 Bahir Dar Univ. J. L. at 54 (2012).

¹⁴⁷ See Daniel, *The History of Expropriation in Ethiopian Law*, *supra* note 118, at 289. We can also understand the scope of the expropriation clause from his definition, which he defines expropriation narrowly as *the act of compelling an owner to relinquish ownership, either through the complete or partial acquisition of the property*. This suggests that compensation applies only when the state directly takes ownership or possession of the property.

¹⁴⁸ It is important to note, however, that even if the state does acquire some benefit as a result of the regulation, this acquisition may not necessitate compensation if it falls under Article 40 (1) of the Constitution, or if the acquisition is incidental to exercising its police power. Forfeiture of property as a result of crime or civil case is best example for this.

section explores the approaches adopted in other jurisdiction in balancing the delicate balance between safeguarding private property rights and onerous regulations that serves the public interests.

4. LESSONS FOR ETHIOPIA

As observed in the comparative overview, countries develop diverse methods in addressing excessive or ‘too much’ regulation that deprive individuals property rights. For instance, in the U.S., despite the ‘Taking Clause’ of the Fifth Amendment is originally meant to physical taking, the Supreme Court expand the compensation requirement under the ‘Taking Clause’ to apply for regulations that substantially affect property rights.¹⁴⁹ Uniquely, the Swiss approach uniquely makes such regulation compensable by explicitly providing for it in its Constitution as a “maternal expropriation” and reinforcing it with case laws.¹⁵⁰ Besides, the South African approach inclines to invalidating excessive regulation by challenging its constitutionality.

Coming to Ethiopia, adopting the first solution—‘judicially transforming the ‘Taking Clause’ to cover excessive regulation as developed in the U.S, and Canada—appears challenging, if not impossible. This is because unlike other Countries which grant Constitutional interpretation to the Judiciary, the FDRE Constitution “stripped the court” from interpreting the Constitution¹⁵¹ and grant exclusive authority to the House of Federation (HoF) for adjudicating all constitutional disputes.¹⁵² In this sense, considering the inherent political composition of the HoF¹⁵³ and the expansive police powers conferred under Article 40 (1) to limit private property without corresponding proportionality requirement, it would be overoptimistic to anticipate the HoF to interpret the expropriation clause in a manner that provide compensation to property owner affected by excessively restrictive regulations imposed by Parliament or the Executive on account of the public interest.¹⁵⁴ Thus, arguably

¹⁴⁹ Josh Patashnik, *Physical Takings, Regulatory Takings, and Water Rights*, 51 Santa Clara L. Rev. 365 (2011). <http://digitalcommons.law.scu.edu/lawreview/vol51/iss2/1>

¹⁵⁰ Riva, *supra* note 69, at 425.

¹⁵¹ Yared Legesse, *Court-Stripping: A Threat to Judicial Independence*, in *Ethiopian Constitutional Series VI: The FDRE Constitution: Some Perspectives on the Institutional Dimensions* 102 (Addis Ababa Univ., 2010).

¹⁵² Getachew Assefa, *All About Words: Discovering the Intention of the Makers of the Ethiopian Constitution on the Scope and Meaning of a Constitutional Interpretation*. 24 J. Ethiopian L. 139, at 166

¹⁵³ Assefa Fiseha, *Federalism and the Adjudication of Constitutional Issues: The Ethiopian Experience*, 52 Neth. Int'l L. Rev. 1–30 (2005).. <https://doi.org/10.1017/S0165070X0500001X>

¹⁵⁴ Although the Federal Administrative Procedure Proclamation No. 1183/2020 aims to protect individuals' rights and interests by allowing courts to review the constitutionality of administrative agency actions in rulemaking and decision-making, it does not address the issue of compensation for overly restrictive regulations.

one may posit that; the Constitution's exclusion of the judiciary—an independent and impartial body uniquely positioned to safeguard individuals against the dual perils of governmental actions and regulations—from interpreting the Constitution may impede the extension of the compensation requirement under Article 40 (8) to cover regulatory takings.

Constitutional recognition of excessive regulation as ‘constructive or material expropriation’ and apply the compensation requirement similar to direct expropriation is another method adopted in Switzerland to address the issue of regulatory takings. This approach acknowledges that overly restrictive regulations can effectively deprive property owners of the economically viable use of their property, warranting just compensation, even in the absence of direct physical appropriation by the government.¹⁵⁵ However, adopting this approach, explicit recognition of regulatory taking, in Ethiopia, particularly with respect to the Constitution, may face challenges. Constitutional amendment is one clear challenge. Since the Constitution sets a high bar for amendments, requiring a two-thirds majority in both houses of parliament as well as the consent of the states as stipulated in Article 104¹⁵⁶—which effectively preventing it from being amended ‘legally’—¹⁵⁷ makes it impractical to explicitly recognize excessive regulation as a constitutional taking in the short term, though future possibilities remain hopeful.

As a last resort, invalidating excessive regulation by questioning its constitutionality is the other approach under consideration. The FDRE Constitution, as claimed by Adem, imparts on the supremacy of the Constitution by demanding both the legislative and the executive organ to ensure their measures in line with the constitutional constraints including the human rights provisions.¹⁵⁸ In this sense, by referencing Article 9 (4) and 13 (2) of the Constitution—which require the consideration of human rights standards in the interpretation and enforcement of constitutional rights—despite the absence of proportionality requirement in limiting rights under the Constitution, it can be argued that regulations enacted for the public good, but which substantially impair individual property rights, in all fairness and justice,

Notably, the explicit exclusion of Proclamations and Regulations—the key instruments of agency delegation—from such judicial review weakens oversight mechanisms. This limitation makes it unlikely that the expropriation clause could be expanded to cover regulatory takings, thereby restricting protections for individuals against governmental overreach in this domain. See, Federal Administrative Procedure Proclamation No. 1183/2020, Fed. *Negarit Gazeta* (2020).

¹⁵⁵ See Riva, *supra* note 69.

¹⁵⁶ FDRE Constitution, *supra* note 3, Art. 104.

¹⁵⁷ Yared Misrak, Yohannes Genet & Kassaye Muluye, *The Demands and Contests of Constitutional Amendment in Ethiopia: Analysis on the 1995 Federal Democratic Republic of Ethiopia (FDRE) Constitution*, 15 *Insight on Afr.* 88 (2023), <https://doi.org/10.1177/09750878221114384>.

¹⁵⁸ Adem A., *Rule by law in Ethiopia*: *supra* note 115, at 4.

contravene the protections enshrined in Article 40 (1). Consequently, individuals adversely impacted by such regulations may invoke Article 9 (1) to challenge their constitutionality¹⁵⁹ and advocate for the invalidation of such excessive regulations.¹⁶⁰

Nonetheless, invalidation of valid regulation that favors other social purposes such as environmental protection, health, consumer protection, etc., is not prudent and might not serve both the interest of individual property owners and the interests of the government to further other social ends. On the other, such nullification would not restore lost core property rights for those already affected, nor would it offer a viable solution for individuals who have reached a point where recovery of their property is no longer feasible. This is because the Constitution does not explicitly authorize the HoF to provide additional remedies or compensation for individuals who have suffered damage as a result of these invalidated regulations because of their unconstitutionality. This implies that property owners facing undue government interference often find themselves without recourse for constitutional damages, leaving them with no remedy.¹⁶¹

Furthermore, even challenging the constitutionality of excessive regulations may often prove unsuccessful. This is primarily attributable to the composition of the HoF¹⁶²—whose members are elected by State Councils—rendering it a predominantly political entity.¹⁶³ Given this, when interpreting the Constitution and deliberating on legal matters involving tensions between public interests and individual rights, the House is unlikely to demonstrate the impartiality and autonomy typically associated with judicial institutions, and invalidate regulations enacted by the Parliament or Executive, even if these regulations substantially affect property owners.

Therefore, expanding the compensation requirement under Article 40 (8) to cover excessive regulations—whether through judicial interpretation or constitutional interpretation, or expressly acknowledging regulatory takings via constitutional amendment—could offer more robust protection for property owners from overregulation. Nonetheless, as previously noted, given the current legal structure, these approaches appear less viable for balancing property protection and public interest competing priorities. Furthermore, invalidating legitimate

¹⁵⁹ FDRE Constitution, *supra* note 3, Art. 9 (1); See also *Id.*

¹⁶⁰ Chi Mgbako, Sarah Braasch, Aron Degol, Melisa Morgan, Felice Segura, & Teramed Tezera, *Silencing the Ethiopian Courts: Non-Judicial Constitutional Review and its Impact on Human Rights*, 32 Fordham Int'l L.J. at 285 (2008).

¹⁶¹ See Habib, *supra* note 136, at 42.

¹⁶² FDRE Constitution, *supra* note 3, Art. 62 (1).

¹⁶³ Assefa, *Federalism and the Adjudication of Constitutional Issue*, *supra* note 153.

regulations is unlikely to strike the appropriate balance. While these options are not completely off the table, it is crucial to explore alternative mechanisms that effectively safeguard both the public and private interests.

In this sense, explicit recognition of regulatory takings in specific laws offers a viable solution to strike a balance by safeguarding individuals from excessive government interference while still enabling the state to pursue legitimate public objectives. Not only this, it also provides clarity and predictability for both property owners and regulators thus promotes more balanced regulations and constrains judicial overreach, ensuring just compensation is awarded only where regulations disproportionately burden property rights, which helps address the inconsistency observed in the application of this doctrine in other jurisdictions.¹⁶⁴

CONCLUDING REMARKS

This paper has examined the complex interplay between the protection of individual property rights and the state's authority to regulate private property for public welfare—via police power and expropriation or eminent domain—as embodied under Article 40 (1) and (8) of the FDRE Constitution. The analysis has highlighted the critical need for a more nuanced approach to excessive regulations, which despite their intended purpose of promoting the common good, can unjustly undermine the rights of property owners. In this regard, the experiences of other countries in balancing these two competing interests were analyzed to draw valuable lessons.

Accordingly, examination of other countries experience, particularly from jurisdictions such as U.S., Switzerland, and South Africa, has provided valuable insights into how courts and constitutional provisions can effectively safeguard property rights against excessive state regulation. For instance, transforming the compensation requirement to regulatory taking with robust judicial review framework in U.S. and the explicit recognition of excessive regulations as compensable regulatory takings under the Constitution in Switzerland, serve as important benchmarks for considering potential reforms. Furthermore, although still evolving in expanding the compensation requirement, the South African courts' approach of invalidating unreasonable regulations serves as a valuable lesson.

¹⁶⁴ Mark Fenster, *The Stubborn Incoherence of Regulatory Takings*, 28 Stan. Envtl. L. J. 525 (2009) <http://scholarship.law.ufl.edu/facultypub/64>

Coming to Ethiopia, the Ethiopian Constitution permits property regulation for public purposes without compensation, while only allowing for compensation in cases of direct expropriation where property ownership is transferred to the state under Article 40 (1) and (8) respectively. This omission leaves property owners vulnerable to regulations that can drastically diminish the economic value of their property without any recourse. Furthermore, the lack of proportionality test to limit constitutional rights grants the legislature considerable discretion to enact potentially overreaching laws under the guise of public interest, further eroding protections for property owners.

A brief comparative analysis between the experiences of these countries and Ethiopia's constitutional framework has revealed significant gaps. To address these deficiencies, this paper advocates for the introduction or adoption of mechanisms that recognize the importance of property rights in the context of regulatory actions. In this context, judicial transformation, coupled with an explicit constitutional acknowledgment of regulatory takings, could provide essential safeguards for property owners as well as furthering the public goods. Adopting these approaches, though not feasible in the current constitutional context, would not only enhance individual rights but also fosters a more equitable approach to property regulation. Invalidating excessive regulation by challenging its constitutionality has become a common tool at an individual's disposal. This approach empowers property owners and citizens to assert their rights against overreaching governmental actions. However, invalidating regulation is not a prudent option for both the government and individuals.

Additionally, legislative reforms that classify excessive regulations as forms of indirect expropriation should be seriously considered. This would create a clearer legal pathway for property owners to seek compensation when faced with burdensome regulatory measures. Importantly, these changes would not undermine the state's capacity to pursue legitimate public welfare objectives; rather, they would establish a more balanced framework that protects property owners from undue hardships imposed by overregulation. Achieving this balance is crucial to ensuring that public interest initiatives are pursued without disproportionately infringing on individual rights.

Here it must be noted that; the paper does not advocate for absolute protection of property rights, as this could hinder the democratic process of enacting laws for the public good. Rather, it seeks to highlight the necessity of extending constitutional safeguards for property

rights against excessive or overly burdensome regulations. In doing so, the paper argues for compensation when regulations are arbitrary, excessively onerous, or impose individual sacrifices that should be borne by the general public.