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THE ENIGMA OF INFORMAL RURAL LAND DEALS IN ETHIOPIA: EVIDENCE FROM PERI-URBAN AREAS OF HAWASSA CITY

*Daniel Behailu Geberamanuel and Gemmeda Amelo Gurero**

Abstract

The 1995 FDRE Constitution and all statutes pertaining to the land law regime of Ethiopia either prohibited or strictly regulated transfer of rural land use rights. However, land transaction has been going on informally against prohibitions or strict requirements for transfer of rural land use rights. Thus, this study investigates nature, manner and status of informal rural land deals vis-à-vis formal statutes, court decisions, and expert views of key informants. The focus of this article is on peri-urban areas where transfer is made mainly for the construction of dwelling houses (squatting). In addition, acquiring land for other uses like farm land and small businesses (poultry, dairy farms, for planting perennials etc.) are considered. Consequently, informal rural land deals is defined in this paper as any transactions in land except those allowed by law. The nature of informal rural land deals include transferring land use rights through donation and inheritance without fulfilling legal conditions related to family member, minimum holding size, and willingness to live on agriculture by the transferee, and in a manner that does not displace the landholders. It also includes sale and mortgage in any manner, and rent without following preconditions such as: minimum holding size, rent period, consent of the family, registration and writing contract. Hence, informal land transition is found to be rife in the study area. The formal laws and institutions are unable or incapable to control it and in effect the rule of law is being undermined. The government is well advised to study the matter and bring order by paying attention to the realities on the ground.

Keywords: *land deals (transactions), land use rights, mortgage, peri-urban land, rural land,*

I. INTRODUCTION

Land is vital for life, directly or indirectly, as it is often a source of food, shelter, income and even at times social identity. Given this primal importance, institutions dealing with land (both formal and informal) have evolved over long periods and several studies have long pointed to the need for a careful and differentiated approach as a precondition for making clear policy in

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relation to land that can help improve both efficiency and equity.¹ For that, the 1995 Constitution of the Federal Democratic Republic of Ethiopia (here in after, FDRE Constitution) regulates and places umbrella policy framework. The Constitution confirms under Art. 40(3) that *'the right to ownership of rural land and urban land is vested in the state and the peoples of Ethiopia. Land... shall not be subject to sale or to other means of exchange.'*² Besides, Art. 89(5) of the FDRE Constitution entrusts the government with the duty to hold, on behalf of the People, land and other natural resources and to deploy them for their common benefit and development.

Hence, the umbrella land policy is underlined in the FDRE Constitution itself. Yet again, vesting ownership rights on government and people are an empty shell. One important message is that individuals cannot be owners, nor the people and the government are effective owners in terms of exercising the full ownership rights (*abusus, usus and fructus*). Thus, no one is an effective owner of land. Besides, this fact raised and invited debates (and controversies) on the import (inner message) of the land policy, and the debates are predisposed by three prevailing thoughts;

First, there is a great fear that opening up land markets provides inroads for involuntary dispossession of land from “poor and vulnerable” peasants and increased concentration of land. Second, there is a “safety net” type of argument that reinforces the justification for control of land by the state. It is assumed that a provision of a minimum guaranteed access to land is necessary to ensure the food security of peasant households. The third perspective is centered on search for market-based land tenure system recognizing importance of land as a key economic input.³

On the other hand, raging debates are there opposing the official stance of the government. However, currently, regional governments are given the right to administer land⁴ while the federal government enacts laws concerning land and natural resources which amounts to guiding norm/framework legislation. The regional states also adopt land laws towards accomplishing land administration endeavors.⁵ Accordingly, the Federal Rural Land Administration and Use

¹ KLAUS DEININGER, LAND POLICIES FOR GROWTH AND POVERTY REDUCTION, A World Bank Policy Research Report XVII (World Bank and Oxford University Press, 2003).

² Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995, FEDERAL NEGARIT GAZETA, 1st Year No.1, Addis Ababa, 21st August, 1995, (FDRE CONSTITUTION hereafter).

³ Teklu Tesfaye, Emerging Informal Land Markets: A Quest for Equitable and Efficient Land Tenure Systems International Conference On African Development Archives. Paper 41, at 1, (2001) http://scholarworks.wmich.edu/africancenter_icad_archive/41 (Accessed on 12 December 2016).

⁴ Article 52 (2) (d) of FDRE CONSTITUTION, in here, the power of regional governments to administer land in accordance with Federal laws is clearly recognized. The power to administer impliedly indicates making of laws to facilitate endeavors of land administration and to enact laws in the domain left by federal land laws based on particular local conditions. Besides, Art.17 of Federal Land Proclamation 456/2005 clearly reveals the existence of power of regional states to “enact rural land administration and land use law” which is consistent with it (Proc. 456/2005) in order to implement the land administration mandate. Accordingly, all of the regional states (Oromia, Tigray, Amhara, Afar, Gambella, Somali, Benishangul Gumz and SNNPRS) have adopted their own Rural Land Administration and Use proclamations in order to implement the federal rural land proclamations. It is also to be noted that the Afar and Somali regional states enacted, very recently, laws that cater to the needs of the pastoral society in reality to the situation of their regions. Federal Democratic Republic of Ethiopia Rural Land Administration and Land Use Proclamation No. 456/2005, FEDERAL NEGARIT GAZETA, 11th Year No. 44, Addis Ababa-15th July, 2005 (hereafter Federal Rural Land Proclamation).

⁵ Article 51(5) of FDRE CONSTITUTION, the federal government is constitutionally obligated to come up with the framework legislation to be used as a standard by the regional states while discharging their duty of administering

Proclamation No. 456/2005 provides the anchoring principles that guide enactment of regional laws. Hence, the Southern Nations, Nationalities and Peoples Regional State (hereinafter, SNNPRS) is one of the regions that have already enacted the rural land law that determines land use and administration in its own region (i.e., Proclamation No. 110/2007).⁶ The SNNPRS land laws, on the same token, recognize free access to rural land use rights with some restriction and at times total prohibition of transfer of land use rights.

Nevertheless, informal rural land transactions have been taking place in the nation (as well as in SNNPRS), which the formal law vows to discourage or prohibit. Where the land value is high, there are large land markets going on against the formal law. It has been observed that where the land is irrigable, a cash-crop area, or is peri-urban areas, land based transactions are enormous thereby allowing informal land deals to go on.⁷

Thus, the issues which this paper investigates are regarding the nature and manner of informal land deals, and what its status is under formal law, court practices and other land related government organs. Hence, the purpose of this paper is to investigate the extent and trend of informal land deals in peri-urban areas of Hawassa city and surrounding rural areas. It is also in the objective package that the nature, manner and status of such deals shall be investigated vis-à-vis the state land laws and practice thereto. Thus, the Second section is about the nature of informal rural land deals while the Third section considers manners of informal rural land deals. Section Four deals with status of informal rural land deals under the regional law, court practice and other concerned government organs. Finally, conclusion and possible recommendations are made.

Accordingly, the methodology adopted to reach our conclusions and findings are largely qualitative approach where cases are reviewed and key informants are interviewed. Besides, personal observations is often resorted to. Yet again, legal analysis is key instrument which is used to figure out the matter at hand.

II. UNDERSTANDING PERI-URBAN INFORMAL LAND DEALS

It is erudite to shed some light on the notion of '*peri-urban land*'. Peri-urban land is an area with immediate vicinity to a city or town with a potential to be included to the city

land and natural resources. Thus federal government has currently issued the guiding/framework legislation i.e. Federal Rural Land Administration and Land Use Proclamation No. 456/2005 which repealed the Federal Government Rural Land Administration Proclamation No. 89/1997 (Federal Rural Land Administration Proclamation No. 89/1997, 3rd Year No. 54, Addis Ababa - 7th July 1997). This federal guiding/framework law has left room to be determined by the rural land administration laws of regions on certain matters; such as the duration of rural land use right of other landholders (i.e. except peasant farmers, semi-pastoralists and pastoralists who shall have no time limit). Thus, regions can determine, as per Art. 7(2), a period for lease of rural land holding rights and as per Art. 8(1)), particulars obligations of rural land users (Art. 10 (1)), and the minimum rural land size holding (Art. 11). However, whether federal law has sufficiently left the room that enables the regions to accommodate their particular local conditions is difficult to assess as there is no yardsticks under the constitution against which it can be measured.

⁶ SNNPRS Land Administration and Use Proclamation No. 110/2007, DEBUB NEGARIT GAZETA, 13th Year No. 10 Hawassa, 19th Feb. 2007 (hereinafter SNNPRS Land Administration and Use Proclamation No. 110/2007)

⁷ See in general chapter three in DANIEL BEHAILU, TRANSFER OF LAND RIGHTS IN ETHIOPIA, TOWARDS SUSTAINABLE POLICY FRAMEWORK, Eleven International Publishing, The Hague (2015).

administration or already included but not formalized via executed city plan. These areas are areas between city administration and proper rural land and often its status is always in a *legal limbo*. Yet again, defining ‘*peri-urban informal land deals*’ in the context of Ethiopia is a daunting task. It can be understood as any transaction relating to land except those allowed by the formal land law. In other words, informal land deals is transacting in land rights completely under prohibited circumstances, or not fulfilling (or honoring) conditions provided by the formal laws meriting legal transactions. Thus, to elucidate informal rural land deals, one must be in a position to appreciate and understand the prohibitions and restrictions of the formal laws with regard to land rights transaction.

Currently, transfer of rural land use right is permitted, in some instances, in accordance with the formal law of the nation. It is to be noted that the FDRE Constitution and subsequent legislations provide for the public ownership of land and strictly curb any transfer, be it through sale or otherwise. However, short of transfer of ownership, transfer of use rights could be possible and there are some legal rooms for transfer of rural land via lease or rent, gift and inheritance under the limitations specified by the land laws.

Therefore, transfer of land rights in Ethiopia has to follow the land policy of the nation which curbs ownership transfer. According to the formal law of the country, transfer of land rights does not include sale or transfer of ownership title for obvious reasons. Hence, land holders can only transfer land use rights. This goes in line with the legal maxim that ‘*no one can transfer better title than he has*’. But this is not always true. For instance, if an investor rents land from a farmer who only has use rights, the investor can have a mortgaging right over the rented land.⁸

A. Sale of Peri-urban Land Use Rights: An Affront to the Formal Law

Article 40(3) of the FDRE Constitution clearly states that land is an exclusive common property of the state and the peoples of Ethiopia and is not subject to sale or other means of exchange. Thus, sale of land or land use rights is strictly prohibited. Ownership of land rests in the state and the people though this is also very impractical albeit land leasing (for consideration) to some extent. The idea is that the state should hold the land as a trustee of the people (true also in practice) and the law should prohibit the sale of land.⁹ The law prohibited any transfer of land through sale by landholders or beneficiaries of land or settlers on formerly state-owned land towards preventing them from selling or mortgaging their land. Such a restriction was justified as a temporary measure to prevent the beneficiaries of a land reform program from selling their land based on inadequate information or in response to temporary problems (preempting distress sell) or imperfections in product and financial markets.¹⁰ The stand of the present government

⁸ Article 8(4) of SNNPRS Land Administration and Use Proclamation No. 110/2007. Note, thus, investors who rent land either from the government or peasant farmers have the right to mortgage their lease right as security to banks. However, what is being mortgaged here is not the land itself but the lease right that the right to use the land for a given period of time as land is not private property in Ethiopia.

⁹ Mamo Hebo, *Disguised Land Sale Practices among the Arsii Oromo of Kokossa District, Southern Ethiopia*, 353 ASIAN AND AFRICAN AREA STUDIES, Vol. 6 No. 2 (2007).

¹⁰ See in general, Dessalegn Rahmato, *Agrarian Change and Agrarian Crisis: State and Peasantry in Post-Revolution Ethiopia, Africa: JOURNAL OF THE INTERNATIONAL AFRICAN INSTITUTE*, Vol. 63, No. 1, 36-55 (1993)

(after four decades of the radical land reform) is also along this line that market distortion leads to land accumulation by the few.

On the other hand, it can be argued that, precluding land reform beneficiaries from sales in the medium term would reduce efficiency by preventing adjustments in response to differential beneficiary abilities, and could, if combined with rental restrictions, cause large tracts of land to be underutilized. The danger of beneficiaries' undervaluing their land could be reduced through other means, and the goal of preventing small landowners from selling out in response to temporary shocks would be better served by ensuring that they have access to output and credit markets and to technical assistance, and by providing safety nets during disasters to avoid distress sales.¹¹

Thus, the formal law has strict stance against selling or mortgaging or another modes of transfer of land to preempt its purported effect of denying permanent use rights of the landholder. The easy way out taken by the government is to prohibit private ownership of land or denying active rental markets promoted by a secured tenure. Hence, the rigor of the law is being circumvented and there is a huge informal market for the land.

B. Mortgage of Peri-urban Land Use Rights

The land laws do not allow land use rights being used as collateral for loans. But, agricultural investors are permitted to collateralize their land use rights while small scale farmers (and subsistence farmers) are prohibited from doing so. The rationale provided for this prohibition is to shield rural landholders from exploitation by loaners and land speculators and also to abate the tide of rural to urban migration.¹² The government also argues that financial institutions are not interested to provide credits to rural land holders.

Many scholars do not agree with this and ask the question 'why are investors who lease land for a limited period are allowed to use their land use right as collateral while small scale landholders who have use right in perpetuity are not accorded the same privilege?'¹³ Furthermore, they question the validity of the government's argument that smallholders will lose the use rights they mortgaged in case of default on the loans and could migrate in masses to the cities and towns and that governments should play the role of *pater familia*.¹⁴ But, an overwhelming majority of rural land holders are smart enough not to gamble with the future of their families' livelihood.¹⁵ Currently, any rural landholder, except investor, who mortgaged his/her land use rights for whatever obligation is violating the law.

¹¹ DEININGER, *supra* note 1, at 122.

¹² See Margi Mcclung, *Making Land Rental Markets Work for Ethiopia's Rural Poor*, LANDSA BRIEF (2012).

¹³ Solomon Bekure et al., *Removing Limitations of Current Ethiopian Rural Land Policy and Land Administration (Paper Presented at the Workshop on Land Policies & Legal Empowerment of the Poor) 10 (The World Bank November 2-3, 2006, Washington D.C., 2006)*

¹⁴ See chapter one, DANIEL BEHAILU, *supra* note 7.

¹⁵ *Id.* Moreover, the countrywide survey conducted by the Ethiopian Economic Policy Research Institute in 2002 found out that only 4.5% of landholders are willing to sell their land if given the opportunity and 90% indicated that they will not consider selling whole or part of their holdings.

C. Rent/Lease of Peri-urban Use Rights Against Prescribed Conditions

Rent of rural land is permitted both under the Federal Rural Land Administration and Land Use Proclamation¹⁶ and SNNPRS Land Administration and Use Proclamation¹⁷ following prescribed conditions. Hence, in principle, a peasant or a pastoralist with landholding right is permitted to rent his or her land under the terms and conditions provided by the law. In other words, rent is permitted only in compliance with conditions and otherwise the transfer is informal or illegal.

The first condition is related to size of land. Peasants or pastoralists can rent their holding and use right to either other fellow farmers/pastorals or investors in a manner that does not displace them. Primarily, the farmer must be a true landholder, which she or he must validate via landholding certificate. Second, the rent must not displace the lawful user of the land. Besides, these conditions must also be taken and analyzed cumulative with the requirement of the minimum holding size of each farmer meant to counter land fragmentation. Thus, a farmer who wants to rent out land must have some extra land to the size of the minimum holding and the land to be transferred via rent must also respect the minimum holding size requirement.¹⁸ Under the SNNPRS land proclamation,¹⁹ the minimum holding size is 0.5 hectare. Hence, for a person to avail himself of the right to rent his/her use right and be able to transfer it, the size of the land must be at least one hectare, otherwise, it amounts to displacement. The lessee also must acquire the minimum land size, and this is so, dictated by rules of consistency and considering the justification for providing minimum land holding size which is to curb land fragmentation. Thus, land holder, to exercise rent right, his/her holding must be at least one hectare and larger.

The other condition is duration of contract. Federal Rural Land Use Proclamation leaves the power to determine rent period to regions according to their situation.²⁰ Accordingly, SNNPRS, like other regions, has determined rent period for the rent of rural land. The lease period vary depending on whether the lessee is a farmer or an investor and on the mode of land use. If rent is from peasants to peasants, the maximum rent period is five years and if the rent is to investors, the rent period extends to ten years, yet for the investors who cultivate perennial crops the rent periods may go up to 25 years.²¹ For investors, the law affords longer lease period and also such right is accompanied by the right to present his use right as collateral. Noted here is that the rent

¹⁶ Article 8 of Federal Rural Land Administration and Land Use Proclamation No, 456/2005.

¹⁷ Article 8(1, 2, 3) of SNNPRS Land Administration and Use Proclamation No. 110/2007.

¹⁸ DANIEL BEHAILU, *supra note 7*, at 58.

¹⁹ Article 11(1)(a) of SNNPRS Land Administration and Use Proclamation No. 110/2007. However, if it is irrigable land constructed by the expense of the government which is to be given to peasants, pastoralists or semi pastoralists, the size shall not be larger than half a hectare.

²⁰ Article 8(1) of Federal Rural Land Administration and Land Use Proclamation No, 456/2005, FEDERAL NEGARTI GAZETTA, 11th Year, No.44, Addis Ababa, 15th July, 2005 (hereinafter Federal Rural Land Administration and Land Use Proclamation No, 456/2005). This provides discretion to Regional States and thus Regional Rural Land Laws do not follow similar approach in the duration of the lease period. For instance, in Tigray, the peasant is allowed to rent his land for 20 years if the lessee uses modern technology, and 3 years if he/she uses traditional means of production. In Amhara Region, renting land is allowed for a maximum of 25 years irrespective of mode of land use. In Oromia region rental is allowed for a maximum of 3 years for those who apply traditional farming, and 15 years for mechanized farming.

²¹ Article 8(1) of SNNPRS Land Administration and Use Proclamation No. 110/2007.

right of the poor farmer over his holding shall not exceed five years with a number of conditions attached to it and minus the right to present his use right as a collateral.

The final condition is about securing the consent of all family members (not necessarily with blood tie) who have the right to use the land and registration by the competent authority.²² The rent agreement has to be registered with the local government and, hence, the contract has to be in writing regardless of the rent period. Therefore, any rent that do not fulfill the above requirements (minimum land size, rent period, consent of family, registration and writing contract) can be considered as informal land deals or illegal land transfer.

D. Donation of Rural Land Use Rights against Prescribed Conditions

Transfer of rural land rights through donation/gift is allowed with conditions. The first condition is that the donee must be family member of the donor.²³ Family member is defined as any person who permanently lives with landholder sharing the livelihood of the later.²⁴ From this it is understandable that a blood tie is not sufficient as well as not necessary condition to be called a family member and thereby satisfy the requirement. To transfer, the donee (transferee) can also be the one who permanently lives with the donor by sharing livelihood regardless of blood relations.

The second condition is respecting the minimum size of holding on both sides i.e., the donor and the donee.²⁵ Hence, in order for one to donate a use right, the minimum size holding of 0.5 hectare shall be met except in cases of irrigable land. Thus, the donor must possess a minimum of one hectare to be able to transfer. Nonetheless, it is not clear whether one can donate the entire holding and stop farming activity. The controlling principle is that donation has to be done in a manner that must not displace the land user.²⁶ The law provided minimum farm size to improve the structure of agricultural landholdings or to prevent further fragmentation and land miniaturization. Because excessive fragmentation of agricultural parcels can harm agricultural productivity in a number of ways. It increases the amount of land needed for paths and roads; increases time needed to get to plots; requires additional spending on fencing and boundary demarcation; increases the difficulties of management, supervision, and pest control; and makes investments in irrigation, drainage, and soil conservation, as well as the use of certain machinery more difficult.²⁷

²² See in general also DANIEL BEHAILU, *supra note 7* (chapter two) and Article 8(2) of Federal Rural Land Administration and Land Use Proclamation No. 456/2005. See also Article 8(2) of SNNPRS Land Administration and Use Proclamation No. 110/2007.

²³ Article 5(11) of SNNPRS Land Administration and Use Proclamation No. 110/2007.

²⁴ Article 2(7) of SNNPRS Land Administration and Use Proclamation No. 110/2007.

²⁵ Article 11(1) of SNNPRS Land Administration and Use Proclamation No. 110/2007. The minimum size of holding shall applies for both the donor and the donee. This is because the phraseology of the article ‘ the farm plot to be given in the future shall meet minimum size of holding’ indicate as it not limited to land given by government to peasant but also it includes land that is donated/given by peasant from his/her holding to family members. Besides, the reason for proving minimum size of holding, which is to avoid land fragmentation, is equally applies for both donor and donee.

²⁶ DANIEL BEHAILU, *supra note 7*, at 61.

²⁷ DEININGER, *supra note 1*, at 127.

The other condition is that the donee must live on agriculture. Thus, transfer of land use right through donation without fulfilling the above requirements (family member, minimum holding size, and agricultural purpose) is contrary to law and thus can be considered as informal land deals. In nutshell, to avoid the rigor of the law, people circumvent and engage in informal land deals and use any other possible trick to get a legal cover.

E. Inheritance of Rural Land Use Rights to Non-family Members

Inheritance is also another important means, which gives access and transfer to rural land use in Ethiopia in general and in SNNPRS in particular with conditions. The conditions required for donation equally apply here, and the focus is only on family membership requirements. The Federal and the SNNPRS land proclamations state that rural landholder shall have the right to transfer his rural land use right through inheritance to members of his family.²⁸ In both proclamations, the phrase '*family member*' is defined, as any person who permanently lives with the holder of the holding right and sharing the livelihood of the later.²⁹

Thus, unlike the Family Codes, in which blood and marital ties are important elements to identify a family member, under the federal and regional rural land proclamations, living under the same roof and sharing the same livelihood with the holder of the right are sufficient conditions. These provisions enable even a non-blood related family member to have inheritance right if they shared livelihood with the deceased by the operation of the law. As a result, a hired laborer who has been living for years with the farmer or a maid servant, who likewise lives with the family, may be eligible to inherit the holding rights. This definition of family members conflicts with the provision of the Civil Code of the nation, which clearly defines it along blood ties. The rationale behind the law is to prohibit children who are not sharing the livelihood of the deceased parent from accessing the land since they might have another source of livelihood or that they are not actual residents on the land.³⁰ This shows current federal and regional land laws restrict inheritance of rural land only to family members who are resident in rural areas while the country's succession law does not put any restriction to whom one can bequeath their property and rights.

Thus, in case of SNNPRS, inheritance is possible only to family members (i.e. a person who permanently lives with land holder sharing the livelihood of the later) and thereby testate (inheritance by leaving a will) is void if the beneficiary is not a family member as per the prescription of the law. Such restrictions are introducing distortions in child/parent relations and conservation of natural resources.³¹ Anecdotal reports indicate that city-dwelling children are beginning to reduce support to aging parents knowing that they will not bequeath their parents'

²⁸ Article 8(5) of Federal Rural Land Administration and Land Use Proclamation No, 456/2005. See also Article 8(5) of SNNPRS Land Administration and Use Proclamation No. 110/2007.

²⁹ Article 2(5) of Federal Rural Land Administration and Land Use Proclamation No, 456/2005; Article 2(7) of SNNPRS Land Administration and Use Proclamation No. 110/2007.

³⁰ DANIEL BEHAILU, *supra note*, at 56.

³¹ It can be argued that (revealing concerns of family members the author talked to) the potential heirs look after their family hoping that they inherit the property in land and could also invest in it in the meantime to benefit their family and eventually take it over.

property.³² Aging farmers are showing tendencies of cutting trees and paying less attention to conservation measures, knowing that when they die, their children and relatives may not benefit from these resources.

In general, the current mode of transferring land rights without fulfilling those inheritance conditions is contrary to law and informal whatever arguments against it. Yet again, the cover of inheritance is used to engage in the informal land deals to avoid leaving property to aliens.

III. INFORMAL PERI-URBAN LAND DEALS: THE GLARING TRUTH

The land transactions in peri-urban areas have developed its own informal norms. The process of acquiring and transferring a plot of land in the informal way is not chaotic, but follows its own process. The key activities or behavioral patterns of key actors as well as rules through which actors acquire and retain a plot of land from the informal market follow more or less predetermined procedures, norms and events. In short, it has its own established rules and 'customary' (shadow) institutions. These key activities/stages in the process of informal acquisition and development of land are:

- 1) Identifying a plot; 2) showing an interest in the plot; 3) studying the behavior of the transferee; 4) undertaking price negotiations; and 5) concluding and evidencing the transaction by traditional agreement or contract.³³ Besides, 6) in case of peri-urban areas getting tips from the inside circle of the government as to the future of the land, especially on its fate of being regularized.

Land transactions can be conducted in writing or orally.³⁴ The choice between either of the options depends on several factors. The strength of social relationship between the parties engaging in a land transaction influences the level of confidence and trust between them. Besides, the size of land, the future of the area on matters of regularization, and the amount of cash involved, are prominent among the major factors influencing the deal. When the transferor and the transferee are distant relatives or non-kins, or when the land is large and the money paid for it happens to be large, the agreement tends to be in writing and also involves other formal contracts in cases of peri-urban; for instance, loan contract involving greater amount of money than paid to the land as a guarantor of the land contract. But, the loan contract is to be pulled out if there is a non-performance issue on the part of the seller of the land.

Even though the contract is signed by transacting parties in front of community elders or chiefs, it is not valid and has no legal ground, since land is not for transaction. Yet again, these documents/contracts play a significant role in avoiding future land related conflicts between the transacting parties as elders use the same evidence to solve the matters amicably. Moreover, the behavior of the transferor also plays a significant role for the conclusion of land transaction. It is only after the informal transferee has built trust in the behavior and reliability of the transferor

³² Solomon Bekure et al, *supra note* 13, at 10-11.

³³ Achamyeleh Gashu, *Introducing Land Readjustment as an Alternative Land Development Tool for Peri-Urban Areas of Ethiopia*, at 47, Paper Prepared For Presentation At The 2016 World Bank Conference On Land And Poverty The World Bank - Washington Dc, March 14-18, 2016.

³⁴ Mamo Hebo, *supra note* 9, at 356.

that the process of negotiation for transacting will start often via the help of land brokers. It is also possible to say that informal land transaction is mainly built on trust and there is not much dispute yet after transactions, but in case of dispute elders play crucial role in solving the dispute amicably.³⁵ Often disputes arise as a result of price hikes in a very short period of time.

The following are modalities of peri-urban land transactions: share tenancy contracts/crop sharing arrangement, rent-out land for cash/fixed rental arrangement, and disguised land sales. Many people use the informal land deals to avoid the rigor of the law and for its mere convenience.³⁶

A. Sharecropping Arrangement: Customary Contracts

Sharecropping is a land rental arrangement whereby landholder and tenant share outputs according to a formula agreed on in advance rather than (in juxtapose to a fixed rent contract) a cash payment that has to be made irrespective of the productions obtained. It is more common among farmers who live in the same locality and whose knowledge of farming experience and trustworthiness of fellow farmers is strong. It is done by oral or traditional agreements. Farmers with long farming experience and ability to supervise labor often choose share tenancy, especially in communities where they have knowledge of farming and trustworthiness of their fellow farmers.³⁷ There are two modes of sharecropping arrangements.³⁸ One is where the landholder provides land and the tenant contributes labor and other variable, for instance inputs, farm jointly, and share output according to mutually agreed formula. Such arrangement provides a legal cover in areas where farmers fear open land transactions. Sharecropping has a backing of strong tradition but the formal law neither allows it nor prohibits it. Yet, the new draft Federal Land Law tries to regulate it.

The second modality is a more explicit land transaction where the tenant has a control (partial or full) over the rental land subject to commonly agreed rules and conditions. Any rental arrangement consists of a sharing rule that defines how output will be divided between tenant and landholder, and includes parameters on risk sharing as developed by the custom. These will affect the efficiency and the equity outcome. They do calculate benefit and risk sharing through the incentives for effort exerted as well as on the risk that each of the contracting parties has to bear. The final impact of these on productions, and on the chosen contract, will depend on the technology and the importance of long-term investment for soil fertility and other productivity-enhancing measures.³⁹

Sharecropping leads to permanent transfer of land to the tenant (transferee). A good entry point for transferee to get land through contract (locally called as *kontraata*) is the age-old *koota*

³⁵ Interview with farmer who has bought land and help others as broker (Datu, SNNPRS, and 25 December 2016).

³⁶ Zemen Haddis, *Towards Improved Transactions of Land Use Rights in Ethiopia, Paper Prepared for Presentation at the Annual World Bank Conference on Land and Poverty, at 11, The World Bank - Washington DC, April 8-11, 2013.*

³⁷ Teklu Tesfaye, *supra note 3*, at 4.

³⁸ *Id.*

³⁹ DEININGER, *supra note 1*, at 88.

(sharecropping) practice of the Sidama.⁴⁰ One first becomes a sharecropper and then in that status; the sharecropper keeps on extending loan after loan to transferor (land holder), and putting the landholder under loan bondage thereby taking over the land in the long run. This, lending money by sharecropper to the landholder to the point where the latter becomes heavily indebted and gives the former a bargaining chip to propose and enter into a contract. The sharecropper has every incentive to entice the landholder to transform their sharecropping *into kontraata* as he usually has permanent crops such as coffee, *khat* and sugar cane on the land.⁴¹ This sort of transaction is not backed by the law and can aptly be categorized as informal land deal. The deal is usually achieved in protracted debt bondage.

B. Renting Land for Cash: Fixed Rental Arrangement

Land renting is permitted under the formal legal regime with plethora of conditions discussed above. But, the prohibition of the law is largely ignored in areas where the land value is high, owing to the accessibility of water or the fact that the land is near to cities (peri-urban area) or in cash-crop areas.⁴² No leasing, except when involving investors, is done in the manner prescribed by the law.

Fixed cash or fixed output rental co-exists with share rental within the same localities. Its incidence tends to be high in areas where rural road infrastructure and markets are better developed and agricultural production is commercialized, especially among cash crop producers. Cash rental contract is common where the contractors who rent in land are either nonresidents or recent immigrants. Unlike share contracts that are mostly orally arranged, cash rentals are mostly based on written agreements. The rental rates are negotiated and vary depending on fertility of soil, scarcity of land, and resource endowment position of farmers including their financial status. There are two forces that appear to influence the choice of contracts:⁴³ transaction costs and risk attitude. The greater preference for sharecropping among farmers with long established social interaction suggests the costs for monitoring and enforcement of share contract are small compared to fixed rental arrangements. And, to the extent these farmers are risk averse, share contract provides a vehicle to pool and share risks. Nonetheless, as costs of transaction rise, farmers tend to shift towards fixed cash rental, especially among farmers with little social interaction. Farmers who lease out land shift uncertainty in production to farmers who lease in land, especially if these are non-resident farmers.

However, land held under these legally permitted short-term rental land contracts is rarely used to grow permanent crops. Application of improved or new technology such as chemical fertilizers is sparse and low in intensity, unless the immediate return is enormous, for instance via cultivating vegetables and fruits. Lessees invest little in on-site land conservation and

⁴⁰ Muradu Abdo, *State Policy and Law in Relation to Land Alienation in Ethiopia*, PhD Thesis 180 (University Of Warwick, School of Law 2014)

⁴¹ Achamyeleh Gashu, *supra note 33*, at 9.

⁴² DANIEL BEHAILU, *supra note 7*, at 116.

⁴³ Teklu Tesfaye, *supra note 3*, at 4.

improvement since the probability of capturing future benefit from current investment is low. As a result, the outcome is thin and speculative.

Short-term rental contracts will provide only limited incentives for users to undertake land-related investment.⁴⁴ For longer-term contracts to be feasible, long duration of land rights and high levels of tenure security are critical, and finding ways to ensure such tenure security is a key policy issue. While effectively implemented tenancy regulations can benefit sitting tenants, implementing such regulations is costly, and may, therefore, not be an efficient way of transferring resources to the poor, even in the short term. In the longer term, tenancy restrictions will reduce the supply of land available to the rental market and undermine investment, directly hurting the poor. Evidence from countries that have eliminated such restrictions suggests that doing so can not only improve access to land via rental markets, but can also increase households' participation in the nonfarm labor market and, by reducing the discretionary power of bureaucrats, improve governance.⁴⁵ A key policy issue is, therefore, how to sequence the elimination of such restrictions in a way that does not undermine equity and promotes efficiency.

Economists generally credit land rental markets with considerable potential to enhance productivity and equity by facilitating low-cost transfers of land to more productive producers and permitting participation in the nonfarm economy, thereby allowing consumption smoothing in response to shocks and accumulation of experience and capital.⁴⁶ Because the structure of land rental contracts will affect productivity outcomes and theory suggests that in many situations wealth constraints by tenants may make the first-best contract (fixed rent) infeasible, a major policy concern has traditionally been to avoid the suboptimal outcomes that may arise in this context. Yet, in nutshell, cash rent is also tied to debt bondage and facilitates ultimate sell of the land.

C. Disguised Land Sale

Despite what the people claims and government legislation dictates, land sale under different disguises and in a variety of forms does exist. Whether the deal is based on a written or oral agreement, the phrase '*land sale*' is carefully avoided and replaced by such words crafted as '*contract*,' '*gift*' or '*inheritance*' and '*land exchange*'.⁴⁷ Research also shows that, at present, among these modes of land acquisitions in the Sidama Zone, *farm-contract* is probably the dominant mode of farmland transfer next to donation and inheritance.⁴⁸ In all cases, respected members of the community from both sides are called upon to witness the transaction and the agreements on which the transaction is based.⁴⁹ Written land transactions were deliberately left vague and employ ambiguous statements or even records substantively different stories from the ones agreed upon between the parties involved. Peasants (society at large) are aware of prohibitions of land sale by state law and thereby they have adopted a number of innovative

⁴⁴ See in general, KLAUS DEININGER, MAKING LAND RENTAL MARKETS WORK FOR ETHIOPIA'S RURAL POOR: KEY ISSUES AND CHALLENGES AHEAD, WB (2005).

⁴⁵ DEININGER, *supra* note 1, at xxxvi.

⁴⁶ *Id.*, at 84-85.

⁴⁷ Interview with an Advocate in SNNPRS (Hawassa, 28 December 2016)

⁴⁸ Muradu Abdo *supra* note 40, at 177.

⁴⁹ Mamo Hebo, *supra* note 9, at 357.

ways to circumvent such prohibitions placed on land sale and other land transfer. Currently, there are three major ways through which people are undertaking disguised land sale in the focus area;⁵⁰

- (1) Explicit sale of property such as perennial crops and cash crops without mentioning the land *per se*;
- (2) In the form of farm field rent/contract (locally known as *kontraata*) stating that the rent is for life or fifty years or thirty years;
- (3) In the form of donation/inheritance but in reality the transferor receives money/price for the land.

In all cases, transactions are done either in the presence of elders and through signing contracts on a piece of paper which contains signatures of the seller and the buyer as well as witnesses. Often, the contract is made in writing with the attestation of three to seven elders drawn from each side. The written contract indicates, *inter alia*, heavy fines against a party who might opt to invalidate the contract, stating therein that part of the fine would go to the state treasury and part of it to the elders. Coupled with this is the obligation on the part of the transferor to repay the entire sale price if he demands restitution. Besides, at times separate loan contract is agreed upon to warrant against violation of the contractual terms for the sale of land.

Often the local land administration office is also baffled as the transferee comes for the registration of the land. The parties now conceal (as they approach the government for registration) their original agreement and come up with fabricated cover contract deliberately made to the agreement of the law but helps the transferee to get legal titles. All this is often facilitated by land brokers and government officials.

Still, it is difficult to identify and detect disguised land sale which is done under the cover of land donation, and sale of avocado, chat, coffee, sugar cane, etc. Such apparently simple transfers/transactions are backed by the law and it is in accordance with the sale of private property which is a constitutional right of individuals.⁵¹ Likewise, there is no limitation on selling private property (perennial crops) in SNNPRS unlike other regions such as Oromia region.⁵² In Oromia, selling of perennials such as coffee, mango, avocado, papaya, orange etc. shall be possible if and only if the land occupied by the product to be sold shall not exceed half of the total land holding of the individual and the product shall be sold for three years only.

Previous research among the *Sidama kontraata* practice shows the same in which *contract* is concluded between *akonatari* (transferor) and *tekonatari* (transferee).⁵³ It comes under different

⁵⁰ Interview, *supra* note 35.

⁵¹ Interview with Mr. Silashi Dasalegn, Rural Land Information (Registration and Certification) System Experts at SNNPRS Bureau of Agricultural and Natural Resource Development (Hawassa, 26 December 2016).

⁵² Article 6(3) of Oromia Rural Land Use and Administration Proclamation No. 130/2007. The rationale behind this restriction is to minimize the insecurity felt by peasant holders in coffee growing rural areas of the region, particularly, the peasant holders in coffee and khat growing area of the region have been evicted from their holdings as a result of sale of the products of coffee and khat to unscrupulous urban wealthy individuals. (Source: an Interview with Ato Aman Muda, Oromia Bureau of Agriculture and Rural Development, Head of Land Use and Administration Department, June 22, 2011 as cited by Girma Kassa, *Issues of Expropriation: The Law and the Practice in Oromia* (LLM Thesis Addis Ababa University School of Law 2011), at 28.

⁵³ Muradu Abdo, *supra* note 40, at 177.

disguised nomenclatures such as *contract* for the sale of coffee or *khat* or fruit trees (i.e., mango and avocado). It also comes under the rubric of: contract for land to ‘process coffee beans’ (business premises), land for lifetime use by the transferee (*tekonatari*), his children and their descendants forever and contract for sale of land to construct residential house.

In reality, contract does not relate to the sale of property on the land. It rather purely involves transfer of bare farmland for whatever purpose. Thus, if some assets such as crops, fruit trees, incomplete constructions and a hut on the land are transferred with the land, they are merely incidental to the transfer of the land and serve as a cover for the land transaction. Muradu noted that “*The contract relates to the land not things attached thereto nor is it an agreement concerning anything else*”.⁵⁴ The *akonatari*, often the head of a household, enters into a land deal with the *tekonatari* without securing the consent of his family members, which is contrary to what is required by federal and state land laws. And, the *contract* is not submitted for registration and approved at the initial stage by the concerned authorities who are kept in dark for fear of that they might hamper the transfer process. Yet, informally, the local authorities know about it simply because the land is being traded under their nose or with their informal cooperation.⁵⁵

This disguised land sale is prevalent especially in high value land such as peri-urban, cash crop and water accessibility areas. On the one hand, the fear of peri-urban local landholders that their land could be taken (be expropriated) and on the other hand, the acute demand for the land from the urban dwellers fueled by the inefficiency to provide affordable houses to the low income people in the inner-city, have created a huge market for the land to be sold and bought in the informal market.⁵⁶ Peri-urban landholders (farmers), by comparing the amount of compensations that they may be paid upon expropriation and the sales price that they are likely to receive on informal sale of their land, often opt for the informal land market. The informal land market pays them attractive price when compared to the compensation amount. Besides, the informal market is immediate, prompt and convenient.

The separation of land governance into urban and rural spectrum is another favorable ground for the widespread practice of informal transactions of land in the *transitional* peri-urban areas. Sometimes a power vacuum in the peri-urban areas might be created when the urban administration adopts a revised master plan that includes the periphery into the urban center without expropriating and putting the land into its domain. Then, this newly created administrative areas fall under no one’s jurisdiction or can be confused during the transition. For this reason, local farmers try to transform their agricultural land to residential plots by subdividing and then selling the plots without any interference from government bodies. Such illegal subdivision and transfer of agricultural plots have created unplanned and haphazard developments without public facilities and infrastructures.⁵⁷ At times such division can take also semi-planned structure where the sale is being facilitated by insiders of the government. Hawassa

⁵⁴ *Id.*, at 178.

⁵⁵ *Id.*, at 179.

⁵⁶ Achamyeleh Gashu, *supra* note 33, at 9.

⁵⁷ *Id.*, at 10.

City, concerning recently included peri-urban areas to the city, is reputed for this insider tips where the farmers are able to tell future roads sites and other infrastructures as they sell the land.

In other high value land areas (such as cash crop area and water accessible areas), the market for sale is prevalent for obvious reasons. As the rent allowed by the law is often for shorter period, it encourages rent-seeking and causes insecurity about contract terms that is likely to undermine the scope for long-term investment on such lands. Besides, distress sales can also provide supply for land in cash crop areas. Such sales happen during the time of unexpected misfortunes befalling the farmer (like illness, facing liability) small landowners (farmers) need immediate cash for use which forces them to put their land for offer thereby land sale is the sole option for them⁵⁸

Generally, prohibiting sale of land by the formal laws couldn't stop the informal rural land transactions. Peasants have circumvented and maneuvered those policies in order to undertake land transaction. Such adaptive strategies that are disguised as land sales by claiming to have sold plants (crops) and trees, have transferred farm fields on contract (*kontraata*), and land donation constitute some of the ways to transfer land informally in peri-urban areas surrounding the Hawassa City.

IV. STATUS OF INFORMAL RURAL LAND DEALS

A. Status of Informal Rural Land Deals Under Statutory Laws

Informal land deals are '*illegal transactions*' for they are being undertaken against the prescription of the FDRE Constitution and subsequent land laws. The effect of status of informal land deal is null and void as far as the law is concerned since land is not a private property in Ethiopia.⁵⁹ This position is well supported by the legal scholars like who once wrote:

The idea of making ownership over land *ex-commercium* is encapsulated under the Constitution which provides in Article 40(3) that "Land...shall not be subject to sale or to other means of exchange." Thus, legally speaking, any practice or decision which authorizes transfer of ownership over rural land shall be of no effect for it contradicts with one of the tenets of the Constitution. This conclusion is in line with the supremacy clause of the Constitution that stipulates that "any ...practice or a decision...which contravenes this Constitution shall be of no effect" as Art. 9(1) of constitution. Article 1716 (1) of the Civil Code also stipulates that "A contract shall be of no effect where the obligations of the parties or of one of them are unlawful..." Thus it is unlawful for the transferor to assume an obligation to deliver ownership or even use rights over rural land to the transferee for consideration. Similarly, it is illegal for the latter to assume an obligation to pay for the transfer of ownership or use rights in regard to rural land.⁶⁰

From this we can understand and deduce that the law is clear enough as to the effect of informal land deals, i.e. illegal, and thus have no effect from the very beginning and the defect cannot be cured. The scholars, judges, elders, CSOs and even the farmers themselves are baffled with this

⁵⁸ Interview with Mr. Mohammed Burka, Judge at SNNPRS Supreme Court Civil Bench (Hawassa, 27 December 2016).

⁵⁹ Interview with Mr. Mulugeta Aggo, President of SNNPRS Supreme Court (Hawassa, 27 December 2016).

⁶⁰ Muradu Abdo, *supra note* 40, at 184.

illegality of informal land deals. Farmers engage in disguised land sale knowing that explicit land sale is prohibited. Thus, they are transacting in a disguised form and using legal loopholes and legal covers with the assistance (at times) of government officials. This implies dissatisfaction with the law than lack of awareness. The extent they go to go-around the law is a witness that the law is either not to their liking or that they do not have much option than to use what is available at their disposal for their demands.

B. Court Practice Regarding Informal Rural Land Deals

Courts are baffled with the issue of land deals which stand in contradiction to the formal law. Here the issue is how courts in the study area (SNNPRS) treat informal land deal disputes in the context of constitutional provisions and subsidiary land laws which stand against it. It is noted, however, that most of the disputes relating to informal land deals are not brought to court rather it is solved through mediation by elders, chiefs and family members or friends.⁶¹ Achamyeleh also stated that informal land transactions related conflicts are mainly solved by the intervention of elders and/or leaders of traditional social institutions in the village.⁶² The conflicting parties prefer to take their cases to the socially respected elders and leaders of *idir*, a community based social institution, in the village, who are quite efficient in solving such disputes. Then those elders in the village act as mediators and bring the disputing parties together (face to face) and urge them to reach an agreement by proposing solutions. If the disputing parties cannot reach an agreement or if one of the disputing parties does not accept the solutions suggested by the mediators, the declining party may face social sanctions; like being excluded from social affairs in the community. In short, there could be costs to be paid for dishonoring elders or chiefs.

However, that doesn't mean no case has been brought to the court or no pending cases exist relating to informal land deal disputes. Yet again, it is useful to profile land related cases carefully to figure out the nature of the transaction. Often, respondents come with contract documents attesting land purchase, inheritance, donation or long term rent or witnesses attesting the same facts. Concerning this, SNNPRS Supreme Court Civil Bench judge states that;

Currently the numbers of cases relating to informal land deal disputes are increasing as a result of ever-increasing value of land. There are cases that were decided by SNNPRS Supreme Court. There are also pending cases in which the transferors transferred land 10 years ago and received money in return and now claim restitution of land via possessory action....where the transferees have built houses, planted trees and other crops on it.⁶³

Though, the cases often relate to rural lands but their implication is also clear for peri-urban land often purchased from farmers and resold. The land based dispute has huge implication in a case where it is initiated by transferor's family members invoking the concept of contract invalidation on the ground of the unlawful nature of the land deal. In frequent cases, they claim that under this contract there is a promise to deliver land ownership or land use rights contrary to the law of the land. Their pleading is based on the constitutional provisions which relates to land alienation

⁶¹ Interview, *supra* note 47.

⁶² Achamyeleh Gashu, *supra* note, at 48.

⁶³ Interview, *supra* note 51.

prohibition and its enforcement (Arts. 40(3), 9(2) and 13(2) of FDRE Constitution) and also Civil Code articles 1723(1) and 1727 relating to written form of contract.⁶⁴ Besides, Article 1808 (2) of Civil Code which provides “A contract whose object is unlawful...may be invalidated at the request of any contracting party or interested third party”. This is so, because “obligations to convey rights on things, if the latter are not in *commercio*, that is, are made non-transferable (non-conveyable) by law, the obligation is clearly unlawful” and one illustration of this is an attempt to transfer land ownership in Ethiopia.⁶⁵

Regarding practice of SNNPRS Supreme Court, Daniel found out that the regional Supreme Court has adopted a stance in which if one has been in continuous possession of the land for ten years and beyond, he or she shall be deemed the proper holder of the land in question and can use the constitutional right, which prohibits eviction.⁶⁶ He cited, for instance, case involving Mr. *Tilahun Wondo vs. Mr. Tadesse Shalo* in which the court ruled that if one used the land for more than ten years, the constitutional right, which bars eviction, comes to operation no matter how the land has been acquired.⁶⁷ In fact, the holder in this case presented evidence of sale contract at the *Woreda* court. The ruling of the court is meant to stop socio-economic crisis as such transactions are rife and prevalent everywhere. People genuinely thought that the transaction they have undertaken was legitimate and right and hence have been using the land for a longer period of time. Their livelihood also totally depends on the land. This consideration moved the court to the standing that where one used the land for ten years and beyond, the right not to be evicted from the land comes to operate. However, the constitutionality of this ruling is a point for contention. The standing of the Supreme Court of the SNNPRS could be a practical solution to the matter, yet the legality is questionable. The law is clear as far as the prohibition on land sale is concerned. Muradu also reiterated the wide absence of uniformity in handling informal land dealing disputes in the region.⁶⁸

SNNPRS Supreme Court adopted a uniform position in the disposition of cases through a circular approved by a forum which brings all court presidents in the region together. The circular, whose validity the Supreme Court traces to the region's courts establishments proclamation, states that all informal land dealings should be treated like any other ordinary agreements and as such those legal rules governing contracts in general shall apply to these deals as well. One of these stipulations is, Article 1845 of the Civil Code that provides “actions for the invalidation of a contract shall be barred if not brought within ten years.” The circular is a reaction to diverse practices of the courts regarding informal land deals.

The circular also assumes that the intention of the parties at the time of the conclusion of the contract is clearly to transfer ownership over land; there is no intention on the part of the parties to reconstitute the land at a certain point in the future. The land is assumed to have gone out of the

⁶⁴ For instance, the case between Mr. Feto Dangura vs Mr. Dubala Feto SNNPRS Supreme Court Cassation Bench File No. 64745, (08/11/2007 E.C.)

⁶⁵ Muradu Abdo, *supra note* 40, at 189.

⁶⁶ DANIEL BEHAILU, *supra note* 7, at 115.

⁶⁷ Mr. Tilahun Wondo vs. Mr. Tadesse Shalo, SNNPRS Supreme Court Cassation Division Case, File No. 36888 (2001 E.C.)

⁶⁸ Muradu Abdo, *supra note* 40, at 189-190.

hands of the transferor forever. Based on these premises, the circular divides agreements sought to be invalidated into two: those whose duration between the date of conclusion and that of filing of invalidation suit is ten or more years and those with less than ten years. The former shall be barred by a period of limitation while the latter shall be struck down, which should lead to the restitution of the disputed land to the transferor. The underlying purpose of the circular is ensuring stability of investment on land and giving effect to the constitutional rule of immunity against eviction by saving agreements whose duration is equal to or greater than ten years from being attacked by the transferor.

The courts would decide a contract which was concluded ten or more years ago in favor of the buyer based on the standard justification behind application of period of limitation, that is, allowing such deal to be attacked any time would make decision making difficult, if not impossible. This problem could arise due to destruction of the evidence or death of witnesses and restitution is not desirable lest it creates uncertainty on investment activities and reward those who slept on their rights. Yet, the main reason for the courts in giving sanctity to contracts is the principle of not evicting the transferee who is regarded as land improver.

President of SNNPRS Supreme Court also affirmed that:

Decisions on informal land deals dispute had been categorized into two: invalidation of agreement and ordering the transferee to return the land to the transferor if the transaction has not reached ten years; and favoring an agreement that reached ten years in which the transferee retains the land by applying the ten years period of limitation embodied in article 1845 of the Civil Code. Here what is considered in addition to period of limitation is the investment made on the land by transferee.⁶⁹

He added that currently the courts dominant practice is taking the positions to treat all informal land deals in the same way (i.e. invalidation of agreement and ordering restitution) regardless of duration of the transaction. This is because once the transaction is identified as informal or illegal its effect is clear which is null and void. And also the effect of void contract is clear that it is considered as non-existent from the very beginning and cannot be healed by a period of limitation. The federal court's position, including the cassation court is also to treat the matter as a void contract.

The current trend of court practice is in line with arguments of scholars for example Muradu⁷⁰ who argues that SNNPRS courts are applying contract principles as embodied in the Civil Code to dispose informal land deal cases which purport to transfer land ownership in violation of the spirit and letter of the Constitution. One clear violation of the tenets of the Constitution is the unambiguous constitutional stipulation that under no circumstances and by any actor whatsoever land ownership may be alienated. Further, the invocation of the period of limitation provision of the Civil Code itself is not convincing. When one reads the first limb of Article 1845 and Article 1810 (1) of the Civil Code jointly, one gets the message that contracts tainted with unlawful objects are not subject to prescription. This is so because the phrase "unless otherwise provided by law" yet article 1854 suggests so. This line of argument gets

⁶⁹ Interview, *supra* note 51.

⁷⁰ Muradu Abdo, *supra* note 40, at 192.

strength when one reads Article 1810 (1) which says “No contract shall be invalidated unless an action to this effect is brought within two years from the ground for invalidation having disappeared.” One might say that the ground for invalidation of a contract on account of unlawful object disappears when the law making such object unlawful is repealed, in our case by allowing ownership or use rights over rural land to enter commerce.

On the other hand, nullifying the contract of informal land deals has socio economic impacts. For example, if the buyer with huge family has invested on the land (or often their livelihood hinges on it) and has resided on that land for many years, and also has no other land elsewhere; these factors need to be considered while upholding the principles of the constitution. Besides, the seller has sold willingly to satisfy his/her need, and then claims restitution of land in bad faith bearing in mind increment of land value but using the cover of *illegality* of the contract. Though nullifying informal transaction is in line with law, it is punishing only the buyer (transferee). Both parties have involved in the illegal transaction and as such must share the burden of their illegal acts. In this regard, the courts simply state nullity of informal land transaction and order restitution of land without addressing the matters relating to the property on the land and repayment of price, and other attendant factors. For example one of the cases on which the court did so goes as follows:

The facts of case are that the father transferred a plot of land to his son for consideration receiving 13,000 birr. Later on, the father claimed for restitution of the land stating that the transaction is illegal. The son argued that he purchased the land. Besides, he planted permanent tree (like *bahirzaf*). The court decided that the transfer is illegal as per on Art 40(3) of FDRE Constitution and Art. 8 of SNNPRS land use Proc. No.110/2007. Hence, the son should return the land to the father. This decision will not preclude the son (respondent) from requesting repayment of his money.⁷¹

Concerning the decision of the court while nullifying the informal contract; it is necessary to decide as to how parties are possibly be reinstated back to the position which would have existed, had the contract not been made as per Art. 1815 of Civil Code. Of course, the effect of illegal contract is void but this does not make sense in the practical world. An acts that stayed for while cannot be made void. Instead, the concept of voidable contract needs to be favored inhere. Simply stating that the respondent can sue and ask for payment, will result in another new court proceeding which affects the parties and the resources of the courts. Thus, it is better if courts settle both parties’ interests i.e. restitution of land, fate of permanent property on the land and price paid at the time of the deal, livelihood issues and some deterring actions towards the willing seller as well. If the land has no permanent property raised by the buyer, and that a considerable time elapsed since the contract, the monetary value at the time of payment and now must be moderated. In case of permanent improvements made on the land, the buyer must take the property that can be moved without demolishing, and for the property that is intrinsic to the land, the seller should pay its value to retake the land. This is to protect the interests of both and

⁷¹ Mr. Feto Dangura vs Mr. Dubala Feto SNNPRS Supreme Court Cassation Bench File No. 64745 (08/11/2007 E.C.)

uphold constitutional principle of no sale of land. This is also the position of one SNNPRS Supreme Court judge.⁷²

However, in view of lasting solution, as the informal land transaction is getting bigger and is becoming a formidable challenge, the government is advised to recheck its stance (and rethink) its policies to spare harassment on both sides.

C. The practice of other Government Institutions and Informal Rural Land Deals

In addition to the courts, there are other actors such as land administration and use office of SNNPRS under region's Bureau of Agriculture and Natural Resource Development which register and issues land holding certificate. The office is mandated to administer land but with manifest structural deficiencies and shortage of man power. Unlike other regions, the office is not constituted to a bureau level but as an office with limited staff and budget. This office is also unable to control informal land deals. The expert who works on registration and certification asserts that:

Before 1996 E.C there was no certification and registration that could enable the office to control informal land transaction. From 1996 to 2003 E.C the first round of registration was carried out in the region and it covered 99.9% of the lands using traditional means like robe. This doesn't sufficiently convey the plot. This enabled the adjacent land holders to sell their land to each other. To counteract this, the office concluded a contract with a German Company to use GPS and GIS towards modern registration and certification, and the first trial began as of January 09, 2017 G.C. Yet, sometimes, even if there is strong registration and certificate, it is difficult to identify whether the transfer is sale or permitted transfer such as donation of land or sale of property on the land. For example, donation of land in the region is permitted only to family members, which is defined to include any person so long as the transferee can prove that the transferee permanently lives with the transferor sharing the livelihood of the latter. Using these facts, any person comes for landholding transfer registration and issuance of certificate in name of transferee. But, the reality is that transfer is for consideration which is often agreed up on by the parties including sale of land. In such cases the office has no ground to deny transfer registration and issuance of certificate in the name of transferee.⁷³

Thus, the absence of modern registration and certification has facilitated a way for informal rural land deals as the parties transact on trust and government organ cannot exactly know the extent and location of each farmers plot. Conversely, modern certification and registration will not totally control informal land deals as the transferor and transferee can agree between themselves for a sale, but for registration purpose they can claim donation or inheritance or any other legal cover.

Moreover, especially in peri-urban areas, many people live and work on land that they do not legally own in accordance with enforceable state law. Government also knows these facts. Yet again, there is ongoing practice of legalizing informal land deals in peri-urban area by government. One of the experts at Hawassa Municipality states that:

⁷² Interview, *supra* note 51.

⁷³ Interview, *supra* note 47.

There are many people who bought land from farmers and then built houses on it around Hawassa city. It is clear that they obtained the land illegally and built houses without permission. The government tried to clear such illegal construction but people reacted with use of force (they rebelled), and a huge commotion ensued and the situation became difficult for government. Demolishing these properties, some of which has high value, is a sheer wastage of resource which not only affects the owners but also the government itself. Hence, on a second thought, the government decided to formalize the landholding and as of 2008 E.C., those informal land holders are receiving lease holding certificate.⁷⁴

This shows that there is a trend and chance of formalization or legalization of informally acquired plots in the peri-urban areas on the part of the government. This also triggers the spread of informal land deals against the formal.⁷⁵ Hence, informal holdings may be converted into new formal rights through the process of formalization (legalization). This can be seen as specious for the government to act contrary to its law. The one that prohibits land sale (and at least effective land rental market) is the government itself. If the law fails short of satisfying the need of societies, what government can do best is changing the law and allowing free land transactions. On the other hand, it is a pragmatic solution. Instead of demolishing that property, it is good to legalize. Yet again, it is also wise not to allow the problem to take root in the first place. The impact of demolishing illegal settlements, for instance, is high in terms of crisis, security issues and property loss.

The absence of state recognition of local property rights affects peoples, which in turn impinges on people's socio-economic security and impedes development. Besides, the people are resisting including use of force against government since their eviction is putting their life in miserable conditions and this will affect the peace and security of the nation and it is affecting as it is now. Furthermore, it is also a brute fact that the government officials are also actors of the informal land deals and facilitators of the same as well.

Generally, the challenges of informal land deal is real and present, the undertaking of abating it (via regularization or other means) is insurmountable. The concerned government organs are also unable to control it (worse some are fueling it) and the government is compelled to legalize it, especially in peri-urban areas. Moreover, the current land laws which limit land transaction is not up to current societal need and not effective. A law that is not effective at implementation level is not law, rather is a hindrance or at least a nuisance. The government is well advised to rethink its policy and use land for development and security than using land as a factor for control, division and breeding corruption.

V. CONCLUSION AND RECOMMENDATIONS

Public ownership of land policy was adopted in 1975 in Ethiopia which among other sanctions against free transfer of land rights. The policy stayed effective, in Ethiopia, well above four decades. However, currently, there are incremental relaxations of the strict prohibitions; that

⁷⁴ Interview with Mr. Tesema Kakiso, Expert of Urban Land Administration at Municipality of Hawassa City (Hawassa, 28 December 2016)

⁷⁵ Achamyeleh Gashu, *supra note* 33, at 51.

broadens the use and transfer rights of the rural land, such as the rights to transfer land to heirs, to rent land, to donate land, and get compensation for investments on the land at times of expropriation. Even if, there is incremental relaxation on the prohibition of transfer of land rights, the basic creeds of the law did not change. Likewise, the 1995 Constitution and the subsequent laws only allow transfer of rural land use rights under strictly regulated scenarios. Transferring rural land use rights through sale, mortgage (except for investor who acquired rural land via lease), and others means of exchanging are prohibited unless provided otherwise by the law. Transfer through inheritance, donation and rent is allowed with preconditions, of which nonfulfillment such conditions makes it informal land deal. Yet again, the effectiveness of such prohibitions and conditions of the law are far from material.

Nevertheless, government laws and its implementations are far weaker to abate informal transactions (including prei-urban areas) which have existed under various disguises. Informal rural land markets (i.e. transacting land contrary to state law) is not current phenomena in Ethiopia. It is as old as public ownership of land policy are and even before. In the study area, the routines of informal rural land dealings are in forms of sharecropping, cash land rental against prescribed conditions, and disguised land sale. Within disguised land sale; there are three major ways through which people are transacting: sale of land under the cover of selling property such as perennial crops and planted trees; in the form of farm field contracts (locally known as *kontraata*) stating that the contract is for life or fifty or thirty years; cover contracts (like loan contract which can be pulled out if sellers violates his/her commitment); and in the form of donation but in reality they exchanging land for consideration.

However, the trouble is honoring these *customary contracts* whose object is unlawful as per the formal law of the land. The effect of a contract that has unlawful object is void which cannot be even preserved by period of limitation. Yet, the SNNPRS Supreme Court had adopted the position that informal land transaction should be considered as any other ordinary contract. Thus, land transactions (contracts) that stayed for ten years or more will be effective by the operation of the law, i.e. the claimant would be barred by period of limitation to claim invalidation of the contract. For those transactions with less than ten years' time span, courts invalidate the contract and order restitution of the land. But, currently courts are taking positions to treat all informal land deals in the same way (i.e. invalidation of agreement and ordering restitution) regardless of passage of time (years) of transaction, they differ (for some reason) the fate of the decision is annulment (as attested frequently) at the higher court level both in SNNPRS and Federal courts.

With regard to the land administration and use office practices, there is sheer incompetence to control informal land dealings, and even there is the practice of legalizing informal land transactions particularly in peri-urban areas. Such practice is encouraging the informal land deal and fueling the market. Besides, the bureaucracies in the formal land acquisition processes, the high standard of constructions and corruption attracts people to acquire land via the informal market.

Based on the foregoing discussions and findings, the authors would like to recommend the following points:

- Strengthening tenure security and allowing long term land transfer is a better policy option, and even going to the extent of allowing private ownership in selected high value land areas. Moreover, rural landholders already demonstrated the need for improved land transactions; thus, the law has to have a wide spectrum of land use rights. It is evidenced from the experience of Hawassa City and other major cities in the nation that informal land market is ever booming. Thus, it is erudite to harmonize the law to the reality on the ground.

- Extending and improving rural land holders' right to mortgage and access credits is an advisable line. Allowing mortgage of rural land use rights will enhance production efficiency for farmers who need money for agricultural inputs and related matters. Moreover, such effort must be accompanied by creating *agricultural bank* which would extend credits to farmers going to small scale modern farms and farm related businesses.

- Legalization of informally obtained landholding in Peri-urban areas and further abating its expansion is also another line for policy direction. Especially in peri-urban area, people involve in informal transactions as state-controlled land allocation is unaffordable and is not always sufficient and efficient enough to satisfy the ever growing demands. Thus, the very poor have not been able to afford land for housing. Even for the middle class, it is becoming increasingly difficult to acquire land through the formal lease system. Informal dealings complement partly the inefficiency of the formal system. Moreover, the demolition of informal settlement areas is the worst-case scenario, which results in eviction of the community and aggravates the local sense of insecurity and hence, regularization of the existing informal settlement and further strict regulation is the way out.

- However, the long term solution is for the government to rethink its land policy and allow free transfer of land rights, especially in identified high value land areas as first thing in order of importance.

- The courts are also advised to encourage the parties to settle land matters amicably pending the adjustment of the legal framework to the reality on the ground.

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