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BAHIR DAR UNIVERSITY

INSTITUTE OF LAND ADMINISTRATION

Mortgaging Rural Land Use Right by Peasants in Ethiopia; The Law And Practice in West Gojjam Zone of Amhara National Regional State

By:

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Submitted in Partial Fulfillment of the Requirements for the Degree of Masters in Real Property Law, Bahir Dar University, Institute of Land Administration

September, 2022

Bahir Dar

Declaration

This is to certify that the thesis titled "Mortgaging Rural Land Use Right by Peasants in Ethiopia; The Law And Practice in West Gojjam Zone of Amhara National Regional State", submitted in partial fulfillment of the requirements for the degree of Master of Arts in Real Property Law at the Institute of Land Administration of Bahir Dar University, is original work carried out by me and has never been submitted to this or any other institution to get any other degree or certificates. The materials I used and help I received during the course of this study have been duly acknowledged.

Name of the student	Date	Signature
Animaw Achamyleh Getie	September, 2022	_____

Approval Sheet

Title of the Thesis

Mortgaging Rural Land Use Right by Peasants in Ethiopia; The Law And Practice in West Gojjam Zone of Amhara National Regional State

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Acronyms

ACSI	Amhara Credit and Saving Institution
ANRS	Amhara National Regional State
CR	Collateral Registry
CRO	Collateral Registry Office
FDRE	Federal Democratic Republic of Ethiopia
FI	Financial Institution
HoF	House of the Federation
MFI	Microfinance Institution
NBE	National Bank of Ethiopia
UNCITRAL	United Nations Commission on International Trade Law

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Abstract

This paper reviews mortgaging rural land use right by peasants in Ethiopia in general and the ANRS in particular, with special reference of West Gojjam Zone. The study found that both the ANRS rural land proclamation 252/2017 and Movable Property Collateral Proclamation 1147/2019 have entitled peasant rural land holder to access credit from Financial Institutions by collateralizing their use right of land. Despite off the recognition of this right, however, there are gaps and inconsistencies among these laws. These include, the prohibition of the land transfer rights of the mortgagor farmer, empowering different registering body of security right and determination of enforcement mechanisms.

The assessment of the practice in the study areas reveals, except ACSI, none of the financial institutions have been giving loan to farmers through taking their rural land use right as collateral. The reasons are basically lack of awareness about the existence of the legal recognition of such right of the peasant and fear of risks of default. On the other hand, the loan system of ACSI against collateral of rural land use right of peasant has gaps. Among others, the maximum amount of loan money that has been given is low. The contract period of the security agreement is a maximum of five years, discouraging long term investment. The terms of the security contract that are concluded between ACSI and peasants are favorable to the lender, in terms of, for instance, default clauses. Also due to the contract of rural land use mortgage, ACSI possesses the secondary level land holding certificate. In addition, the wereda rural land administration and use office have been, without any legally prescribed power, attaching the transfer right of the grantor peasant. This in turn, against the clearly provided laws and economical purpose of the laws, has been affecting the rights of the grantor peasants.

With the aim of solving these legal and practical gaps, the paper recommends that legislators should either amend the existing laws to have consistent laws or enact a single comprehensive legislation. Also it recommends, separate and generic financial institution should be established by the government with the sole aim of extending credit to peasants of the country and the region, through taking their rural land use right as collateral. Furthermore, it recommends that the ACSI standard form of contract, which similarly applies to all rural land use right mortgage contracts concluded with peasants, should be amended in line with the relevant rural land and security transaction laws of the country.

CHAPTER ONE

Introduction

1.1 Background of the Problem

Property rights to land that are secure and easily transferable have long been identified as a key element to bring about higher levels of investment and access to credit, facilitate reallocation of production factors to maximize allocate efficiency in resource use, and allow the development of an off-farm economy.[1] The way in which property rights to land are allocated can have far-reaching impacts on other social outcomes and there is agreement that providing the basis for secure and transferable land rights is an important function of the state.[2] Thus, the federal and state legislators, in Ethiopia, have enacted laws that regulate the right of peasant in relation to their rural.

The issue of mortgaging rural land use right by peasants has been one of the debating areas in our rural land tenure system. The reasons, partly, emanates from to the silence of pertinent rural land laws. Previously, none of the federal or the regional rural lands of the country were either clearly permitted or prohibited the peasant's right of rural land mortgaging. Due this, the general understanding was 'while agricultural investors are permitted to collateralize their land use right, small farmers are prohibited from doing so.'[3]

Currently, however, to 'better expand their right on using rural land so as to accommodate their living standard with the economical, social and political development where the region as well as the country has reached'[4] the federal movable collateral proclamation 1147/2019 and the ANRS rural land proclamation 252/2017 have clearly recognized the right of farmers to collateralize their use right of rural land holding. Furthermore, NBE has enacted different directives with the aim of implementing this right of land holders.

Understandably, having a law governing secured lending is not in itself sufficient to facilitate access to credit.[5] The law must possess the required qualities to permit firms to use diverse range of assets as collateral.[6] This because, the collateralization of loan contracts is at the intersection of several fields: in financial sector development, the possession of collateral largely determines

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[1]Samuel Gebreselassie; Land, Land Policy and Smallholder Agriculture in Ethiopia: Options and Scenarios, March 2006, p.4

[2] ibid

[3]Muradu Abdo: Legislative Protection of Property Rights in Ethiopia: An Overview, Mizan Law Review Vol. 7 No.2, December 2013, p.179

[4] The first paragraph of preamble of The Revised Rural Land Administration and Use Determination Proclamation No. 252/2017 of the Amhara National Regional State (here in after simply referred simply as proc.252/2017).

[5] Asress Adimi Gikay: Ethiopian Law of Security Rights in Movable Property; 2021, p.21

[6] ibid

whether certain categories of economic agents obtain access to the financial market and whether financial contracts are efficiently concluded, i.e. with least losses.[7] Collateral issues are also relevant in targeted promotion strategies, like small enterprise and private sector promotion, respecting poverty alleviation.[8] Therefore, collateral issues attract the interest of a broad range of agencies in the development community.[9]

Therefore, assessing the collateral laws of rural land use right of peasants in Ethiopian in general and ANRS in particular, in light of these accepted principles is demanded. Its efficiency and effectiveness in light of the prevailing land tenure and financial system of the country and the region should be analyzed.

As a new fact, much has not been researched on the issue. Therefore, this study is conducted to describe the concept of mortgaging rural land by peasants in West Gojam Zone of Amhara regional state. It also assesses the practice of mortgaging rural land use right by the peasants in West Gojam Zone.

1.2 Statement of the Problem

Extended land rights of peasants in rural land do have a contribution to the overall development of the country. To this effect, Ethiopian federal and regional states have been taking different activities. Among these are giving legal recognition to the rights of rural land holdings is the main one. The ANRS government has legislated proclamation No. 252/2017 entitling any rural landholder the right to mortgage his using right to financial institution which has been given recognition by the country's National Bank for not more than 30 years permitted by this proclamation.

Although the proclamation has entitled the rural land holders to mortgage their use right, it is criticized that the rules and enforcement procedures (if they exist at all) are not detail and clear to the wide application of it. In addition, still it is not clear whether legislations adopted by the government both at the federal and regional level regarding secured transactions in general and mortgage of rural land use right by peasants in particular are adequate, and whether the practice is compatible with the law in Amhara Regional State of West Gojam Zone.

Therefore, it is imperative to critically examine the laws as well as the practices in Amhara Regional State of West Gojam Zone, with regard to mortgaging rural land use right by peasants.

1.3 Research questions

This research will answer the following questions:

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[7] B. Balkenhol and H. Schütte: Collateral, Collateral Law and Collateral Substitutes (2nd Edition), p.4
[8] ibid
[9] ibid

- What is the extent of the farmers' rights over their rural landholdings in Ethiopia in general and Amhara National Regional State in particular?
- Do laws adopted in relation to mortgage of rural land use right in Ethiopia in general and Amhara National Regional State in particular effectively address issues of mortgaging rural land use right?
- Are the financial institutions giving loan to peasants by taking rural land use rights of peasants as a security in West Gojam Zone?
- What requirements are there to mortgage rural land use rights by the farmers?
- What are the effects of mortgaging rural land use rights by peasants?
- How far is the practice compatible with the law in the Amhara regional state of West Gojam Zone?
- What are the existing gaps regarding mortgaging rural land use right by peasants in West Gojam Zone?

1.4 Objectives of the study

1.4.1 General Objectives

The basic objective of this research is to examine the laws applicable to mortgaging rural land use right by peasantsin Ethiopia and in ANRS of West Gojam Zone in one hand, and the adequacy and the extent to which it is been practiced, on the other. In a nutshell, it is sought to determine whether the mortgaging of use right of rural land by peasant in West Gojam Zone is clearly and adequately provided by the law, and to examine whether there is a discrepancy between the law and the practice.

1.4.2 Specific objectives

This research is aimed to:

- Analyze the pertinent provisions of laws adopted in relation to mortgaging rural land use rights at the federal level and Amhara National Regional State;
- Determine the extent of peasants' rural land rights in Amhara National Regional State and the legitimacy of mortgaging rural land;
- Assess whether there are clear guidelines of law on how to mortgage rural land use rights in the region and West Gojam Zone;
- Examine whether the practice of mortgaging rural land use right by peasants in West Gojam Zone is going in line with the law;
- Assess whether the financial institutions in West Gojam Zone are giving loan to peasants by taking their rural land use rights as a security;
- Assess the enforcement mechanisms of rural land use right mortgage in the West Gojam Zone;
- Suggest possible recommendations for the problems which are revealed as research findings;

1.5 Significance of the Study

I believe that the study will contribute to the effort of strengthening the legal framework and practical performance of financial institutions concerned with mortgage of rural land use rights of peasants in the Amhara National Regional State of West Gojam Zone. Also, it could help the relevant government body to indicate the gaps in the practice which are limiting the achievement of goals of the law. Moreover, it could also be a base for potential researchers to conduct further studies on the issue.

1.6 Research Methodology and Design

In conducting the research, the researcher mainly focus on qualitative research approach. It is qualitative by the fact that the study is based on analyzes and interpretation of the laws, thoughts, academic opinions, logical reasons, justifications, based on the information obtained with structured and non-structured interviews and by employing narratives and/or documentary analyses. The target groups in collecting data are mainly peasants, personnel in financial institutions, academicians and government officials, believing that they are directly involved in the understanding and application of the existing laws and for the reason that they are facing a practical problem associated with the issues under study.

In West Gojam Zone there are about 17 woredas. The data is collected from three woredas, such as; North Mecha, Burie and Jabe Tehnan, selected based on the researcher's view that it would represent the facts in the zone and the convenience of accessing relevant data. The selection of these three woredas would represent about 17.6% of the total population in the zone.

Also mortgage contracts that are concluded between rural land holders and financial institutions are analyzed.

1.6.1 Primary Data:

1. **Interview and questionnaire**: The methods employed to obtain primary data include interview and questionnaire with different persons. Hence, interviews with drafters of the laws or government officials, academicians, pertinent managers and/or personnel in financial institutions and rural land holders who have mortgaged their rural land use rights as a security of loan are made. In addition questionnaires are also distributed to pertinent personnel financial institutions. The types of questions are structured and semi structured, depending on the respondents educational status.

2. **Documents:** In addition, primary documentary sources including the FDRE constitution, Federal Rural Land Administration and Use Proclamation No.456/2005, The Revised Rural Land Administration and Use Determination Proclamation No. 252/2017 of the Amhara National Regional State, The Revised Rural Land Administration and Use System Implementation, Council of Regional Government Regulation No. 159/2018, Civil code of the Empire of

Ethiopia, proclamation No. 165, Neg. Gaz., Year 19, No. 3, Ethiopian Commercial Code Proclamation No.1243/2021, Movable Property Security Right Proclamation No. 1147/2019, The Property Mortgaged or Pledged with banks Proclamation No. 97/1998, Commercial Registration and Licensing Proclamation No. 980/2016, Property Mortgaged or Pledged with Banks (Amendment) Proclamation No. 216/2000, Federal Supreme Court Cassation Bench decisions and other relevant laws, in relation to mortgage of rural land use rights by peasants in Amhara National Regional State and specific to the zone under study, are analyzed. Also rural land use rights mortgage contract agreements made between rural land holders and financial institutions are examined.

1.6.2 Secondary data

The study also has used the relevant literature materials as secondary sources.

1.7 Scope of the Study

The scope of the study of the research is limited to the study of mortgaging rural land use right by peasants in Ethiopia at large and the law and practice in Amhara National Regional State of West Gojam Zone, in particular. The study covers only peasants or farmers and does not cover commercial farmers or private investors. On the other hand, as a limitation, the acquisition of data from farmers and ACSI, and the time and financial constraint in preparing the study were burdensome.

1.8 Organization of the Study

The study is organized with four chapters. Chapter one contains the general introduction. It provides an overview of mortgaging rural land use right by peasants in Ethiopia; the Practice in ANRS of West Gojam Zone. As such, it contains; problem identification, objective questions of the study, literature review, and methodology, scope and limitation of the study.

Chapter two analyzes the rural land rights of peasants in Ethiopia in general and the ANRS in particular. Thus, it discusses the modes of accessing, nature, limitations and other aspects of rural land rights, as provided in the pertinent laws of the country and the ANRS.

Chapter three covers the conceptual framework of security right and the overview of legal regime of security in our legal. Hence, it assesses the existing secured transaction laws that govern security rights established over immovable and movable properties. Based on these laws the general overview regarding the establishment, effects and enforcement mechanisms of security right is presented.

Finally, under chapter four, the main issue of this research paper, i.e. mortgaging rural land use right in Ethiopia the law and the practice with particular focus on the West Gojam Zone of ANRS is discussed. It also includes the conclusion and recommendations based on the findings of the pertinent analysis and data.

1.9 Literature Review

The researcher has tried his best to find any literature that directly relates to the law and the practice of mortgaging rural land by peasants in Amhara regional state of West Gojam Zone. However, there is no any study found. Rather, the existing studies are generally about the mortgage in general and the need for the reform to be made regarding rural land tenure system to include mortgaging of rural land right to the peasants(studies made before the enactment of the Revised Rural Land Administration and Use Determination Proclamation No. 252/2017 of the Amhara National Regional State).

For instance, Sintayehu Demeke Kebede in his case based analysis examined mortgage and its validity requirements.[10] He discussed the peculiar validity requirements of mortgage based on the 1960 civil code and proclamation 639/2009 vis a vis the federal Supreme Courts' Cassation Bench decision on file number 21448 and Cassation File number 57356. He examined regarding the validity requirements of authentication and witnesses the laws and the cassation decision have been inconsistent and assessed it's in making transactions unpredictable and against the very principle of equality before the law.

Mekuriaw Alemenew assessed the legal framework of mortgage in Ethiopia and the practices with a reference to East Gojam Zone Administration, Amhara Regional State, Ethiopia.[11]He discussed the types of mortgage and the rights of contracting parties to mortgage agreement in light of the 1960 civil code and other subsequent laws. In his conclusion he found out that, looking at the practice, judges who are supposed to know and abide to follow the rules of the law are not in the strict sense applying the law as provided under the laws of the country.

Other propositions, which may have a slight connection to this research, are the needs for the abolishment of rural land rights restrictions regarding mortgage. It may be concluded by the writing of Murado Abdo, in Legislative Protection of Property Rights in Ethiopia.[12]In his article, he shows the existence of debates on the need for the abolishment of restriction regarding mortgage right of the rural land holders of the peasants.

More recently, Brightman Gebremichael, in his research work argued that the recognition of the right of mortgaging land use right of rural land holders raises constitutionality issue based on

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[10] Sintayehu Demeke Kebede: MORTGAGE AND ITS VALIDITY REQUIREMENTS: A CASE BASED ANALYSIS OF THE REQUIREMENTS OF AUTHENTICATION AND WITNESSES; International Journal of Law and Policy Review, Vol. 5 No. 2 July 2016

[11]MekuriawAlemenew: Mortgage on Immovable Property: The Law and the Practice in Ethiopia; with a Reference to East Gojame Zone Administration,Amhara Regional State,Ethiopia, THE INTERNATIONAL JOURNAL OF HUMANITIES & SOCIAL STUDIES, Vol 5, Issue 10 October, 2017

[12] Muradu, supra note 3

legislative power of the state.[13] He considers such enactment by the region is an intervention in the constitutional power of the federal government.[14] He stated;
"……..any attempt at broadening for instance the breadth of land rights of peasants, as in the Amhara State law by incorporating the right to mortgage, against the Constitution, unless changes are made. Nevertheless, such measures in state laws also cause the issue of constitutionality in light of division of power between the federal and state governments."[15] Despite off this, he does not further analyzed in detail the laws and the practice regarding mortgaging rural land use right by peasants in the region.

Kefale Aschale identifies, in Ethiopia, accessing credit by small scale farmers have been risky business with majority of farmers experiencing bad harvest or significant loss of livestock with no insurance coverage, which is partly attributable to lack of index and micro-insurance regulatory framework.[16] Major assets of farmers including agricultural products, future harvest, livestock and land use right remained collateral unworthy due to absence of movable property collateral registry.[17]

Summarily, these above studies do not directly assess the laws and the practices of mortgaging rural land use right by the peasants in ANRS of West Gojjam Zone.

Therefore, this research is believed to be unique in that it is sought to fill the gaps in the aforementioned and other previous researches due to their inability to reflect the current reality and their lack focus to the issue of examining the laws applicable to mortgage of rural land by the peasants in the Amhara region and West Gojam Zone. Moreover, it will be significant in bridging the gap existed in relation to the lack of understanding on the effectiveness of laws adopted in relation to mortgage of rural lands and their practical implementation in Amhara regional state of West Gojam Zone. It may also incite other researchers to further study the issue.

[13] Brightman Gebremichael GANTA: THE POST-1991 RURAL LAND TENURE SYSTEM IN ETHIOPIA: SCRUTINIZING THE LEGISLATIVE FRAMEWORK IN VIEW OF LAND TENURE SECURITY OF PEASANTS AND PASTORALISTS; Doctor Thesis, University of Pretoria, November 2018, P.164
[14] Id. P.378
[15] Id p. 410
[16] Kefale Aschale Gelaw: The Legal and Institutional Framework Governing Small-Scale Farmers Access to Credit in Ethiopia; Successes and Failures in the Case of the Amhara National Regional State, Master's Thesis, AAU, 2020, P.50
[17] ibid

CHAPTER TWO

RURAL LAND RIGHTS IN ETHIOPIA

2.1 Accessing Rural Land

To begin with, the FDRE Constitution under article 40 (4) and (5) provides the right of peasants and pastoralists to have a free access of land. Furthermore, in sub article 6 of the same it provides the duty of government to ensure the right of private investors to the use of land on the basis of payment arrangements established by law. Hence, unlike the economic policy of the country that is based on the free market principle the constitution has defined access to land on the foundation of egalitarian social equity paradigm.[18] Particularly, the constitutional makers have perceived access to rural land rights from the perspective of securing means of livelihood for all.[19] Rather than the economic value of land, what mattered most for constitutional makers of Ethiopia was to use access to rural land rights for guaranteeing all needy nationals with the means of living.[20]

These constitutional provisions, further, provide for the determination of particularities by the subordinate laws. Accordingly, Federal Democratic Republic of Ethiopia Rural Land Administration and Land Use Proclamation No, 456/2005 (here in after simply mentioned as proc. 456/2005) and respective constitutional and rural land laws of the regional states comes up with the details about the access of rural land. Article 5 of proc.456/2005 stipulates, in accordance with land administration law: Peasant farmers/pastoralists engaged in agriculture for a living shall be given rural land free of charge.[21] Also any citizen of the country who is 18 years of age or above and wants to engage in agriculture for a living shall have the right to use rural land; children who lost their mothers and fathers due to death or other situation: shall have the right to use rural land through legal guardians until they attain 18 years of age.[22]

Furthermore, subject to giving priority to peasant farmers/semi pastoralists and pastoralist, a) private investors that engage in agricultural development activities shall have the right to use rural land in accordance with the investment policies and laws at federal and regional levels;[23] b) Governmental and non-governmental organizations and social and economic institutions shall have the right to use rural land in line with their development objectives.[24]

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[18] Brightman Gebremichael Ganta, Access to Rural Land Rights in the Post-1991 Ethiopia: Unconstitutional Policy Shift, journal of Land and Rural Studies 7(1), 2019, p.11
[19] ibid
[20] ibid
[21] Article 5(1,a) of proc.456/2005
[22] Article 5(1,b) of proc.456/2005
[23] Article 5(4,a) of proc.456/2005
[24] Article 5(4,b) of proc.456/2005

Similar provisions, with the exception of regionalizing the residence requirement, are incorporated in the ANRS rural land law proclamation of 252/2017. Thus, in article 7 of the proclamation, any person who resides in the region and mainly engaged in agricultural activities or who wants to engage in the same activity can be the rural landholder.[25] The criteria of residence in ANRS and other regional state rural land laws is criticized as making 'peasant farmers are locked in on their land instead of searching for additional income by staying in urban areas for longer periods.'[26] And regional states may abuse residency requirement by misinterpreting it as nativity requirement and deny land to those who come from other regions.[27]

These above indicated mode of accessing rural land are administratively allocated way. On the other hand, there are also other ways a right of rural land could be accessed. These include accessing through market transactions like rent or non market access such as inheritance. In these latter ways of accessing, the allocators are private land holders. Hence, subject to mandatory rules, the nature and breadth of the right transferred depend on the right of transferor.

2.2 Rights in Rural Land

In general, land is the source of all material wealth as it provides us with all our needs to sustain on. Most importantly, it is a major economic asset from which people and nations get significant profit. Allocation of rights over a rural land is an important policy and economic issue of a country. For the bizarre and diverse nature of land rights, and the ability to fragment them in novel ways, appears to be limited only by failure of human imagination.[28] In addition, each of these rights may be held by one or more different parties. Thus, what is sometimes called the 'bundle' of land rights is, in almost all cases, fragmented and distributed over many holders so that an individual's rights in a particular parcel of land are actually quite restricted and limited by the rights of the State and other parties.[29] Bearing this in mind, here under the basic rights of rural land holder, as enshrined in pertinent federal and ANRS rural land laws are discussed

2.2.1 Use Right

One of the main rights granted to the peasant rural land holder is the use right. Use right of rural land refers holder's right to use the land by himself directly. It may includes consumptive and non-consumptive uses such as the right to occupy, visit, plant annual and perennial crops, make permanent improvements, gather fuel, poles, fruits, grass and minerals. This use right with no

[25] Article 7(1) of proc.252/2017
[26] Daniel Weldegebriel Ambaye: Land Rights and Expropriation in Ethiopia; Doctoral Thesis, Royal Institute of Technology (KTH), 2013, p.76
[27] ibid
[28] Montgomery Wray Witten: THE PROTECTION OF LAND RIGHTS IN ETHIOPIA; Afrika Focus, Vol. 20, Nr. 1-2, 2007, p. 155
[29] ibid

doubt includes the administration right or power over his holding. Hence, he can use, in line with the land use plan and without contravening legally provided limitations, to whatever he wants.

2.2.2 Transfer right

The right to transfer land holdings is another legally recognized right of rural land holder under our rural land laws. The forms of the transfer right rural land are different in kinds. This include, rent, succession, donation and exchange.

a. Rent

Any rural land holder can transfer his land holding through rent. Rent means a system in which any farmer causes the use of his rural landholding or right of use to be transferred to another person through contract for a limited period of time receiving either in kind or in cash benefit.[30] Per article 8(1) of proc.456/2004 peasant farmers, semi-pastoralist and pastoralist, who are given holding certificates can lease to other farmers or investors land from their holding of a size sufficient for, the intended development in a manner that shall not displace them, for a period of time to be determined by rural land administration laws of regions based on particular local conditions. Regional land laws, which are expected to be having the substance of administrative issues[31], have also comes up with more details rules of rent right.

Accordingly, proc.252/2017 of the ANRS under article 15 come up with detail rules regarding rent. Under sub article 1 of the same it provides the rent activity of a land holder should not result displacing himself from his holding. However, it does not indicate what activities are considered as displacing act. Hence, one may logically ask what types of rent activities can be considered as displacing him. I think the criteria is about the limitation in the size of the land, and not about the length of time of contract. This is because; the law has clearly provides the maximum time limits to contract periods.[32] Thus the law protects the land holders right from displacing activities through limiting the maximum period of the contract. So period of contract cannot be an issue while assessing whether the rent contract would result displacement.

Other rules that this proclamation further provides regarding rent are about the need to make the agreement in written form and the registration requirement. These rules can be referred as validity requirements. Hence, per article 15(3) any type of rural land rent contract should be made in written. And any land rent contractual agreement made up to the period of two years

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[30] Article 2(29) of proc.252/2017

[31] Article 52(2) (d) of FDRE constitution grants regional states with the power to administer land and other natural laws in accordance with federal laws. Though whether regions have the power to enact laws with regard to land is open to arguments, proc.456/2004 under article 17(1) gives them the power to enact land laws and accordingly all regional laws have such rural land legislations of their own.

[32] Sub 9 of article 15 provide the maximum period of rural land rent is 30 years concerning to permanent fruit plants or preferred tree types, and 10 years concerning annual crops. And if the agreement periods are beyond such periods the will be considered as made to this indicated periods of time.

should be registered being presented to the kebele administration where the land is found and to the office of the rural land administration and use when the agreement is longer than the period of two years.[33]

Furthermore, per article 54 of the proclamation, the relevant provisions of the 1960 civil code shall apply, as the cases may be.

b. Donation

The other way of transferring right of rural land holding is through donation. A donation is a contract whereby a person, the donor, gives some of his property or assumes an obligation with the intention of gratifying another person, the donee.[34] The recognition of such right of rural land holders can be inferred from article 8 of proc.456/2005. It states any person who is member of a peasant farmer, semi pastoralist and pastoralist family having the right to use rural land may get rural land from his family by donation, inheritance or from the competent authority.[35]

More detail rules are provided in the regional rural land laws. Proc. 252/2017 of ANRS under article 16(1) it is stipulated that any rural landholder can transfer the landholding as well as his use right through donation to a person residing in the Region and who are either a child or grandchild or any other family member who engaged in agricultural activity or wants to engage in this activity as far as it does not exceed the maximum ceiling of holding, or any other person who engaged in agricultural activity or wants to engage in this activity that the landholder believes he has served or has been serving him as far as the landholder gives the document approving in written. Any contract of donation should be in written; a contract donation agreement made in verbal shall not have acceptance before the law.[36] It should be noted that, any rural landholder can transfer, through donation, his holding right permanently and his using right for a limited period of time for different persons.[37]The article further provides detail rules including registration and other formalities.

Like that of rent, article 54 of the proclamation provides the application of relevant provisions of the civil code. Among others the civil code provisions of the personal nature of donation as stated in article 2434, and the necessity of acceptance of donation for its valid establishment, as stated in article 2436 should be wisely noted.

Art. 2434. - Personal nature of donation.

(1) A donation is an act purely personal to the donor.

(2) The authority given to make a donation shall be of no effect unless it specifies the property to be donated and the donee.

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[33] Article 15(8) of proclamation 252/2017
[34] Civil code article 2427
[35] Article 5(2) of proc.456/2005
[36] Article 16(7) of proc. 252/2017
[37] Article 16(5) of proc. 252/2017

Furthermore, article 2436 of the civil code provides the necessity of acceptance of donation by the donee. It states as follows;

> Art. 2436. - Acceptance by donee.
> (1) A contract of donation shall not be complete until the donee has expressed his intention to accept the liberality.
> (2) Such acceptance shall not be valid where it is expressed after the death of the donor or his having become incapable.
> (3) A donation may be accepted on behalf of the donee by his legal representative but not by his heirs.

c. Inheritance

The other mode of transfer right of rural land, which is different in its manner and time, is inheritance. The succession of the deceased may be either intestate or testate.[38] Additionally, it may be partly intestate and partly testate.[39]

The federal land administration proclamation 456/2005 under article 8(5) provides any holder shall have the right to transfer his rural land use right through inheritance to members of his family. This provision only allows the transfer to family members. Additionally, it does not provide the order of succession in cases where the holder dies without making a will.

However, the ANRS rural land law includes rules both to the recognition of right of the holder to transfer his holding through succession and the manner of devolution in cases where the holder passed away without leaving a will or in cases where such will is invalidated. Accordingly, to the case of testate succession, 'any person who is the rural land holder may transfer his holding as well as use right to any person engaged in agricultural activity or to any other person who wants to engage in this activity through will.'[40] Thus, the rural land holder can transfer, through will, his holding or use right to any person. However, the successor is required to be engaging or wants to engage in agricultural activities. Furthermore, the act of transferring the holding and use right through will shall be invalid if it disinherits the legal heir ship of the testator's minor children or harms the legal rights of his spouse.[41] Additionally, the will shall meet the criteria of public will clearly mentioned in the Civil Code, and should be submitted and registered by the pertinent wereda land administration and use office.[42] Regarding the form article 881 of the code provides as follows;

Art. 881. - Public will. - 1. Form.

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[38] Civil code article 829(1)
[39] Civil code article 829(2)
[40] Article 17(1) of proc. 252/2017
[41] Article 17(3) of proc. 252/2017
[42] Article 17(4) of proc. 252/2017

(1) A public will shall be written by the testator himself or by any person under the dictation of the testator.
(2) It shall be of no effect unless it is read in the presence of the testator and of four witnesses, and mention of the fulfillment of this formality and of its date is made therein.
(3) It shall be of no effect unless the testator and the witnesses immediately sign the will or affix their thumb mark thereon.

On the other hand, it also provides the devolution of the inheritance where one is found intestate or the given will is to be void. Hence, the right of the deceased rural land holder is transferred to deceased children, parent/parents or to any legally permitted other family member respectively who engaged in or wants to engage in agricultural activity.[43]

d. Right of Mortgaging Rural Land

Mortgaging rural land use right is the other right which a rural land holder may enjoy as a transfer right. Under the federal rural land law, mortgaging right of rural land is explicitly accorded to only private investors.[44] However, it does not provide as to the permissibility or otherwise of mortgaging right rural land of peasants or pastoralists. Due to this, it was perceived as a prohibited right.

On the other hand, however, as a pioneering to the rural land law regime in the country, article 19 of proc.252/2017 of ANRS has explicitly stated the right of any rural land holder to mortgage his land use right. As main issue of this research work, detail discussion and analysis is made in chapter four of this paper. And also the proclamation entitles any private investor that has taken the rural land through lease with such right of mortgage the using right on his rent land or a property he produced on the land or both to debt for the duration of the effective date of the contract.[45]

e. Exchange

In general, exchanging once property (right) through another property or any kind of right is one of the rights granted to the owner of the property. To the case of rural land, the federal[46] and rural land laws allows exchange of rural land with other land holding. To the case of ANRS, article 20(1) of proc.252/2017 states, any rural landholder can exchange his plot with another landholder found either in the kebele or in other kebele. They may also make an agreement on their holdings individually so as to make small plots ad joint and suitable for development.[47] As

[43] Article 17(5) of proc. 252/2017
[44] Proc.456/2005 under article 8(4) provides an investor who has leased rural land may present his use right as collateral.
[45] Article 24(1) of proc. 252/2017
[46] Article 11 of proc. 456/2005 provides the need to encouraging consolidation of rural land holdings
[47] Article 20(2) of proc. 252/2017

a validity requirement, the exchange agreement should be submitted to and be registered by the pertinent wereda rural land administration and use office.[48]

Exchange of rural land holdings of peasants is highly advantageous for agricultural development. That is the reason why the law states the provision of special incentive for those who make rural land exchange thinking to make adjacent their holdings.[49]

2.3 Rights on Improvements and Property Built on Land

The FDRE constitution under article 40(7) has given the land holder full right of ownership over improvements or immovable properties he built on his holding. Also, the same article states, this right shall include the right to alienate, to bequeath, and, where the right of use expires, to remove his property, transfer his title, or claim compensation for it. Subordinate federal and regional rural land laws also affirm such right of the holder. Accordingly, the ANRS rural land proclamation defines holding right to include '….any kind of wealth produced on land or both.'[50] The right of land holders to get compensation in case of expropriation is further provided in another separate legislation.[51] Thus, if the rural land holding is expropriated due to public purpose reason, he is, among others, entitled to compensation of different kinds, either in kind or money payment or both.[52]

2.4 Duration of Rural Land Right

The duration of land rights is the other legal construct of legal land tenure security that holds implications for the landholders' security of land tenure. Landholders have to be given a longer duration for one or more land rights to ensure security of tenure and development. In Ethiopia, proclamation 456/2005 stipulates that the rural land use right of peasant farmers, semi-pastoralists and pastoralists shall have no time limit.[53] Similarly, the ANRS rural land law provides that the holding right of rural land in the region shall not have time limit.[54] On the other hand, there are other right users whose rights on the land have limited duration time. These include private investors[55] and leasee.

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[48] Article 20(3) of proc. 252/2017
[49] Article 20(5) of proc. 252/2017
[50] Article 8(2) of proc. 252/2017
[51] Expropriation of Land holdings for Public Purposes, Payments of Compensation and Resettlement Proclamation No. 1161/2019
[52] As provided in article 11 of proc.1161/2019, where land is expropriated for public purposes compensation for the property and displacement shall be paid to the expropriated landholder. Subsequent provisions of the same law incorporates the kinds and manner of compensation, which among others, may include a substitute land and money payments calculated based on the different sets of income.
[53] Article 7(1) of proc. 456/2005
[54] Article 5() of proc. 252/2017
[55] Directive No.05/2010 E.C and Directive No.06/2010 E.C of ANRS regulate the rules regarding the ways of accesses of rural land for investment and the assessment of their development execution, respectively.

2.5 Restrictions of Rural Land Rights

These above discussed land rights are not an absolute right. Rather, the federal and the regional laws provide limitations to it. These limitations or restrictions range from temporary deprivation of enjoyment to permanently losing the whole sets or bundles of right of rural land. To begin with, under article 40(3) of the FDRE constitution 'the right to ownership of rural and urban land, as well as of all natural resources, is exclusively vested in the State and in the peoples of Ethiopia. Land is a common property of the Nations, Nationalities and Peoples of Ethiopia and shall not be subject to sale or to other means of exchange'. From these one can see that the defining principle to the land tenure system in general and restrictions of land rights in particular emanates from the grand law of the country.[56] As such, any rural land holder is prohibited from transferring his holding through sale or exchange by other means. Another constitutionally provided limitation, which also applies to all private property rights, is expropriation of land holding on the ground of public purpose.[57] Expropriation refers to taking of someone's immovable property for public purpose and upon payment of compensation.[58]

Subordinate legislations have also come up with ample of restrictions to this right of transfer in particular and rural land rights in general. For instance, proclamation 456/2005 in article lists the legal restrictions laid on the land use rights of rural land. These limitations are mainly based on the land use plan and slope of the land. From sub article 3-10 of article 13, it provides as follows;

13. Land Use Planning and Proper Use of Sloppy, Gully and Wetlands

> 3/ In any type of rural land where soil and water conservation works have been undertaken a system of free grazing shall be prohibited and a system of cut arid carry feeding shall be introduced step by step.
>
> 4/ The management of rural lands the slope of which is less than 30 percent shall follow the strategy of soil conservation and water harvesting. The details shall be determined by rural land administration laws of regions.
>
> 5/ Development of annual crops on rural lands that have slopes between 31-60 percent may be allowed only through making bench terraces.
>
> 6/ Rural lands, the slope of which is more than 60 percent, shall not be used for farming and free grazing; they shall be used for development of trees, perennial plants and forage production,
>
> 7/ Rural land of any slope which is highly degraded shall be closed from human and animal interference for a given period of time to let it recover, and shall be' put to use when ascertained that it has recovered. Unless the degradation is caused by the

[56] FDRE constitution article 9(1) states 'the constitution is the supreme law of the land. Any law, customary practice or a decision of an organ of state or a public official which contravenes this Constitution shall be of no effect.'
[57] Article 40(8) of FDRE constitution
[58] Daniel, supra note 26, p.101

negligence of the peasant farmers, semi pastoralist and pastoralist the users shall be given compensation or other alternatives for the interim period.

8/ rural lands that have gullies shall be made to rehabilitate by private and neighboring holders and, as appropriate, by the local community, using biological and physical works.

9/ Rural lands that have gullies and are located on hilly areas shall be rehabilitated and developed communally and as appropriate by private individuals.

10/ The biodiversity in rural wetland shall be conserved and utilized as necessary, In accordance with a suitable land use strategy.

Coming to respective regional law, the ANRS rural land laws provide the respective limitations on different aspects of land holders right. These include, restrictions on use right and transfer right. Accordingly, article 21 of proclamation 252/2017 provides grounds that would result deprivation of rural land holding right. Among others, a holder needs to be developing the holding according to the prepared land use plan and in areas where this plan is not yet prepared; he should not cause a serious damage on the land due to mal treatment.[59]

Regarding limitations on the transfer rights, for instance, article 15 provides a limit about manner, size and time of rent. Accordingly, a rural land holder cannot rent his holding to any activity other than agriculture.[60] And from acontrario understanding of sub article one of the same, the holder cannot rent his holding in ways that displace him. Furthermore, under sub article 9 it states the maximum period of rural land rent, based on this proclamation, is 30 years concerning to permanent fruit plants or preferred tree types, and 10 years concerning annual crops. Hence, as its appropriateness, an agreement to be found more than 30 and 10 years is presumed as for 30 and 10 years respectively in accordance with this proclamation.

[59] Article 21(1,e) of proc. 252/2017
[60] Article 15(2) of proc. 252/2017

CHAPTER THREE

SECURITY RIGHT; OVERVIEW OF CONCEPTUAL AND LEGAL FRAMEWORK IN ETHIOPIA

Introduction

Various types of obligations could be secured to ensure their compliance. In particular, loan transactions typically involve the risk of borrower default, and lenders therefore pursue various procedures to reduce default risk and to minimize the losses which may be incurred in the case of default. A debtor who intends to borrow money from either individuals or financial institutions grants a security by his property to creditors with a view to secure the payment of the principal debt, interest, costs and other expenses incurred in the collection and enforcement process. In the event of borrower's default, the collateral security is used for the repayment of the debt. Security, therefore, gives a creditor/lender greater assurance that the loan will be repaid.

In Ethiopia, loans could be secured by immovable properties and movables properties. The laws regulating security rights over immovable and movable property are embodied in separate legislations.

Therefore, in this chapter, the conceptual frame work of security right, in general, and its legal regimes in our system, mainly based on basic laws will be discussed. Furthermore, analyses and discussion of basic principles of such security transaction laws, as enshrined in these domestic laws is presented. This helps for the better understanding of concepts in relation to the main issue of the research, i.e. mortgaging rural land use right by peasants.

3.1 Definition of Security Right

Having a unanimous definition of terms is mostly an impossible task. The same holds for security right. Bearing this in mind, definitions provided among different instruments are discussed as follows.

To begin with, security is defined as "the allocation of an asset or property infavor of the creditor to guarantee the discharge of an obligation or obligations, whatever their legal nature, provided that such obligation or obligations is existing, prospective, ascertained, or ascertainable, conditional or unconditional and of a fixed or changing amount"[61] The asset that is allocated as a

[61] Article 1 of OHADA(Organization for Harmonization of Business Law in Africa) Uniform Act Organizing Securities, 2010

security is named as collateral. In other words, collateral is an asset pledged by a borrower to a lender until a loan is paid back.[62]

The UNICITRAL Guide defines security right as a property right in a movable asset that is created by agreement and secures payment or other performance of an obligation, regardless of whether the parties have denominated it as a security right.[63] This definition entails the following elements. First, it is a right established over movable property. So the definition excludes a security right established over immovable property.[64] Secondly, the definition identifies security right as the right that is created by agreement. Here again the narrower mode of scope creation is adopted, by disregarding the possibility of creation of security right either by law or decisions of court or arbitral organs. Finally, the purpose of security right, according to this definition, is to secure payment or performance of other obligations. This shows the adoption of wider perspective and flexibility in securing any legal obligations.

Almost similar definition is adopted under our movable collateral law. Article 2(44) of proc.1147/2019 defines security right as property right in movable property that is created by an agreement to secure payment or other performance of an obligation, regardless of whether the parties have denominated it as security right, and regardless of the type of property, the status of the grantor or secured creditor, or the nature of the secured obligation. Therefore, the definition implies similar references regarding; its nature of property right in movable property, its source of security agreement, and its purpose of securing payment or performance of other obligation, regardless of the parties denomination of it as a security right, with further unnecessary additions of words, such as "and regardless of the type of property, the status of the grantor or secured creditor, or the nature of the secured obligation".[65]

Security interest a right in an asset to secure payment or other performance of one or more obligations.[66] Accordingly, the definition concept of security interest is broader as it is referred a right in an asset to secure payment or other performance of one or more obligations and, accordingly, potentially covers security rights in immovable property and non-consensual security rights.

In this paper, accepting the latter definition, the terms 'security right' and 'security interest' are use used interchangeably.

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[62] B. Balkenhol H. Schütte : Collateral, Collateral Law and Collateral Substitutes (2nd Edition), p.7

[63] UNCITRAL Legislative Guide on Secured Transactions, p.13

[64] In fact this is made purposely, as the Guide explicitly limits its scope to rights created over movable property.

[65] I refer it as unnecessary due to the reason that the messages to be implied are already described by the preceding words, such as, "movable property" and "to secure payment or other performance of an obligation".

[66] UNCITRAL Legislative Guide on Insolvency Law, as indicated in supra note 63, p.439

3.2. Legal Regime of Secured Transactions in Ethiopian

There is no universally accepted way of regulating secured transactions law. In some States, secured transactions law embraces security rights in both movable assets and immovable property; in other States, the notion is restricted to security rights in movable assets.[67] In addition, in some States, secured transactions law embraces both security rights created by agreement and security rights created by law or judicial process; in other States, the notion is restricted to security rights created by agreement.[68] Moreover, in some States, secured transactions law embraces rights meant to secure the performance of any type of obligation; in other States, the notion is restricted to rights securing the performance only of monetary obligations.[69]

Despite off this, arguably, there are five parameters that will define the scope of a secured transactions regime: (a) the types of asset that are meant to be covered by the regime; (b) the parties (whether creditors or debtors) the regime is intended to cover; (c) the types of obligation that may be secured by a security right governed by the regime; (d) the types of legal transaction that will be regulated by the legal rules established by the regime; and (e) the extension of a security right in an asset to any proceeds arising from the asset.[70]

In Ethiopian rules that regulates secured transactions exists among different legislations. These laws includes; the Civil Code 1960, which regulates mortgages and other security rights in relation to immovables; the Commercial Code (Commercial Code of Ethiopia Proclamation No. 1243/2021); the Property Mortgaged or Pledged with Banks Proclamation (97/1998); the Movable Property Security Right Proclamation 1147/2019. With the aim of implementing the proclamation (1147/2019), NBE directives such as the Operationalisation of Movable Collateral Registry Directive (MCR/01/2020) and Codification, Valuation and Registration of Movable Properties as Collateral for Credit Directive No. 02/2020 are enacted. In addition to this, pertinent rural and urban land laws are relevant laws as they provide the right of the land holder to use it as collateral in securing their debts.[71]

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[67] UNICITRAL Guide, supra note 63, p.31
[68] ibid
[69] ibid
[70] Id, p.32
[71] Regarding urban lease holding see article 24 of Urban Lands Lease Holding Proclamation No. 721/2011. Regarding rural land laws proc. 456/2005 under article 8(5) entitles private investors with the right to collateralize their use right. currently, as we will see it in detail in the next chapter, the revised ANRS rural land law clearly recognizes the right of any rural land holder to mortgage his use right.

Additionally, international instruments such as, The Convention on International Interest in Mobile Equipment (Cape Town, 2001), which is ratified on 21/11/2003, are also the other governing laws.[72]

Looking at these laws, we can identify that different kinds of properties (rights) could be furnished as a security. Generally, they can be classified as movable and immovable property. Regarding secured transactions established over movable property, proc.1147/2019 is the main governing law. In article 2(27) of proc.1147/2019 movable property is defined as inventories, agricultural products, incorporeal assets, corporeal assets, the right to use land unless prohibited by pertinent laws, properties excluding land, house, and building, a security right under a hire-purchase agreement, security trust deed, trust receipt, commercial consignment, mortgage of a business, sale with ownership reserved, sale with right of redemption, security rights in certificated securities, and security rights in warehouse receipts. According to this definition, movable property embraces anything ranging from a corporeal chattel to an incorporeal asset and the right to use land. The broader notion of movable property under the proclamation provides the necessary flexibility to extend the meaning of movable property to anything other than land and building, resources that have a value which makes them susceptible for use as collateral.[73]
As it can be seen the definition also identifies business as movable property. It should be noted, however, regarding security right created over business, there are governing rules in commercial code.
Noticing the inclusion of business in the definition, and the scope of application of the proclamation, as stated in article 4, questions could be asked as why did the new commercial code, given the time of its enactment[74], come up with the laws regarding mortgage of business, while proc.1147/2019 has already considered it as a movable property and thereby regulated it accordingly?
In solving the issue, article 143(4) the commercial code has a direct relevance. It says 'the provisions of this law shall apply to mortgage established on business without prejudice to special rules embodied in relevant laws concerning the establishment of security rights over movable property.' Therefore, the rules in the commercial code regarding business mortgage applies as long as they are not contrary to the special rules in proclamation 1147/2019. Accordingly, while dealing business mortgage the rules embodied in the commercial code and proclamation 1147/2019 concurrently applies, as long as former does not contravene the latter.

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[72] As indicated in the preambles, the purpose of the Cape Town Convention and the protocols thereof is to modernize the legal rules governing the creation, registration, priority, and enforcement of international security interests in mobile assets and thereby to facilitate international financing of purchase of these assets.
[73] Asress: supra note 5, p.52. In article 3 the proclamation delimits the scope it applies. In sub article 2 of the same it lists out the inapplicability to security right in securities traded on exchanges(a); a mortgage of a ship with all accessories required for its use subject to the maritime code(b); an interest in an air craft subject to the registration by the Ethiopian Civil Aviation Authority(c); except otherwise provided in this proclamation, a lien or other interest given by law(d); and security right in proceeds of collateral if the proceeds are a type of asset that is outside the scope of this proclamation to the extent that other laws applies to security right in those types of asset and governs the matters addressed in this proclamation(e).
[74] Commercial Code of Ethiopia Proclamation No. 1243/2021 is proclaimed on the 12th Day Of April, 2021, whereas Movable Property Security Right Proclamation 1147/2019 is proclaimed on 7th august 2019

The civil code regulates security right established over immovables. Accordingly, article 3047(1) clearly specifies a mortgage may charge an immovable only.[75] Exceptionally, however, under the specifications made in the same code and other special laws, certain kinds of movables may be mortgaged.[76] This exceptional provision, however, for the purpose of security transaction issue, is amended by proc.1147/2019. This is because; as discussed below, the meaning of movable property, as described in article 2(27) of this proclamation, is broad to include all corporeal assets, with the exclusion of land, house and buildings.

Moreover, early before the enactment of proc.1147/2019, respective land laws of the country also provide the mortgageabilty of right in land. Regarding urban land, article 24(1) of Urban Lands Lease Holding Proclamation No. 721/2011 provides a lessee may transfer his leasehold right or use it as collateral or capital contribution to the extent of the lease amount already paid. On the other hand, article 8(4) of the Pro. 456/2005 allows an investor who has leased rural land may present his use right as collateral. As indicated in the previous chapter, the newly enacted rural land proclamation of the ANRS further allows the right of the peasants to mortgage use right of their land holding to secure a debt they borrow. As a main issue of this research, the latter type of rural land mortgage is analyzed in the next chapter.

3.3 Sources of Security right

By the term source, it is to refer the way security right could be created or established. Generally, security rights, in our legal system, could emanate from three different sources. These are; from the law, judgment or arbitral awards and the contractual agreement of the parties.[77]

3.3.1 Security Right Created by Law

The law of a given country may regulate certain social and economical interactions that create special relations among persons. An instance to this could be a legally created security right. In our legal system, legal security right could be established in both movable and immovable properties. About immovables, the civil code articles 3042 and 3043 enunciates two scenarios that legal mortgage could be created. These are legal mortgage of seller of immovable and legal mortgage of co-partitioner.

Regarding the first type, the civil code states, whosoever sells an immovable shall have a legal mortgage on such immovable as a security for the payment of the agreed price and for the performance of any other obligation laid down in the contract of sale.[78] The second type legal mortgage under the civil code is legal mortgage of co-partitioner or co- owners. According to article 1257(1) of the civil code a thing may be owned by several persons as joint owners thereof.

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[75] Article 1130 of the civil code states immovables are land and buildings.
[76] Civil code article 3047(2)
[77] Civil code article 3041 and cumulative reading of articles 2(30), 4(1) and others of proc.1147/2019. Regarding the mortgage of business, however, the commercial code under article 143(2) stipulates that mortgage may follow from the law or the contract.
[78] Civil code article 3042

And, among other entitlements, each joint owner may at any time apply for the thing jointly owned, if an immovable, to be divided.[79] Therefore, in cases where such division or partitions happened, a co-partitioner shall have a legal mortgage on the immovables allotted to his co-partitioners in accordance with the act of partition.[80] Such mortgage shall secure the payment of any compensation in cash that may be due to him or such other compensation as may be due by the co-partitioners where he is dispossessed of any property allotted to him.[81]

Concomitantly, proc.1147/2019 also indicates grounds with which a security right over movable property could emanate from the law. However, these scenarios are not articulated in a readymade ways, like that of the civil code. Rather, it requires a wholesome and detail understanding of rules of the proclamation, and thereby taking an inference. The first inference can be taken from the definition of the concept of security right, itself. As indicated above, article 2(44) of proc.1147/2019 describes security right as 'a property right in movable property created by an agreement that secures payment or *other performance of an obligation regardless of the form of the transaction, type of movable property, status of the grantor or secured creditor or the nature of the secured obligation'* (Emphasis Added). The phrase that says security right could be created from 'other performances of obligation' is broad to include legally obligations that have the status of secured obligation. More specifically, the proclamation recognizes two legal sources of security right over movable property. The first is in the case of non-consensual creditor. This can be inferred from the cumulative readings of articles 2(30), 55 and other relevant provisions of the proclamation (1147/2019). Provision of article 2(30) of the proclamation defines this category or type of creditor as creditor that has obtained a right in the collateral, on the basis of a court order or applicable law. An instance could be a tax lien right of a state.[82]

The second legal source of security right over movable security is a case of acquisition of security right. Hence, from articles of 2(2), 56-59 and others of the same, it is inferred that 'acquisition of security right' is the other mode of security right arising from the law. Article 2(2) of proc.1147/2019 defines acquisition security right as a security right in a corporeal asset or intellectual property, which secures the obligation to pay any unpaid portion of the purchase price of the asset or other credit extended to enable the grantor to acquire rights in the asset to the extent the credit is used for that purpose. Thus, this type of security right emerges from either a transaction or a credit which the lender has given to the debtor for the purpose of acquiring rights in the asset. It includes sale with retention of ownership, hire-purchase, and consignment.[83]

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[79] Civil code article 1272(1)
[80] Civil code article 3043(1)
[81] Civil code article 3043(2)
[82] Asres, supra note 5, p.31
[83] Id p.50

To the case of business mortgage article 144 of the commercial code provides the seller of a business[84] and the creditors of a bankrupt trader[85] as the two types of legal mortgagees. Hence, where a person sells a business and the price of the sale is not fully paid to him, the payment of the price or such part thereof as is still due shall be secured by a legal mortgage on the business sold.[86] The commercial code, further, provides a detail rules regarding the legal mortgage of sale of business. In article 145(2), it stipulates the non-application of this legal mortgage unless the sale contract is made in writing and such mortgage is registered. As a remedy and entitlement of mortgage privilege unpaid seller of a business may cancel the sale contract and take back the business.[87]

The second legally secured creditor of business mortgage under the commercial code is creditor of bankrupt debtor. Definition wise, bankruptcy is a legal proceeding initiated when a person or business is unable to repay outstanding debts or obligations.[88] Under the commercial code, the objective of bankruptcy proceedings is to timely, efficiently and effectively organize the liquidation of the debtor's business, whether by piecemeal liquidation or by a sale of business as a going-concern, in order to maximize the value of the assets available for recovery by creditors, to ensure for honest debtors a fresh start after a full discharge of their debts and to provide for sanctions against debtors and their management as well as creditors that are responsible for its bankruptcy.[89]

The bankrupt estate shall include:[90] a) all assets and rights, including usufruct, owned by the debtor; b) civil liability claims against third parties, including against de facto and de jure managers. Therefore, in order to secure the claims of the creditors, the commercial code establishes mortgage over the properties of the bankrupt trader.

3.3.2 Security Rights Created by Judgment or Awards

The other way of creating security right is through court judgment or arbitral award. In article 3044(1), the civil code states a court or arbitration tribunal may secure the execution of its judgments, orders or awards by granting one party a mortgage on one or more immovables the property of the other party. Also sub (2) of the same provision, as a requirement for its application, it provides, the judgment or award shall specify the amount of the claim secured by mortgage and the immovable to which such mortgage applies.

Regarding movable securities, in article 2(30) of proc.1147/2019, it is also provided that security rights could also be created by court order. Unlike that of the civil code, however, this law is silent about whether security right could arise from arbitral awards. In my opinion the same power of arbitral body should have been explicitly recognized. And despite of such silence, the

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[84] Commercial code article 144(1, a)
[85] Commercial code article 144(1, b)
[86] Commercial code article 145(1)
[87] Cumulative reading of article 146 and 147 of commercial code
[88] https://www.investopedia.com/terms/b/bankruptcy.asp, accessed on 22/6/2022
[89] Commercial code article 588(5)
[90] Commercial code article 729(1)

rules should be understood as a permissible, as it go in line with principle of functional approach of creating security right,[91] which the proclamation is said to have adopted.[92] Therefore, the sources of judicial mortgage are judgments, orders or awards of the court or arbitration tribunals. The purpose of this kind of mortgage is to guarantee the execution of such judgments, orders or awards.

3.3.3 Contractual Security Right

The third and the most prevalent way of creating security right is through contractual agreement of parties. As such, both immovable and movable security laws of our system stipulates in recognizing it. Regarding the security of debts created over immovables, the civil code provides that parties can create mortgage to protect an existing, a future or a conditional contracts.[93] As a party to the agreement mortgage could be created by the debtor or by some other person in favor of the debtor.[94] Article 3051 of the civil code has enunciated that the mortgage contract will remain valid unless the mortgagee is in bad faith. The Cassation Court delivered on this issue that the cancellation of an ownership certificate by government bodies would not invalidate a mortgage contract duly formed.[95]

Regarding security right over movables proc.1147/2019 in article 2(44), while defining security right it indicates security agreement as a source of security right. Also in article 3(1) while delimiting the scope the proclamation states its application to rights in movable property created by agreement to secure payment of credits or other performance of an obligation. And more explicitly, article 4(1) stipulates a security shall be created by security agreement, provided that the grantor has right in the asset to be encumbered or the power to encumber it. Security agreement means an agreement, regardless of whether the parties have denominated it as a security agreement, between a grantor and a secured creditor that provides for a creation of a security right.[96] Hence, the principal way of creating security right over movable right is through security agreement.

3.4 Validity Requirements for Creating Security Right

For a security right to have valid effect, there are legally prescribed requirements that must be fulfilled. The requirements are essential conditions, which provide legally sufficient circumstances for the valid establishment of security rights. These requirements include written

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[91] The functional approach to security interest ensures that transactions whose economic function is to secure payment of credit or performance of an obligation be treated as secured transactions and be subject to the law of security rights, Asres, supra note 5, p.49
[92] Id p.50
[93] Civil Code article 3046.
[94] Civil code article 3049
[95] Developmental Bank of Ethiopia v Kefyalew Mulat, cassation File no. 41388, Vol. 10
[96] Article 2(43) of proc.1147/2019

form, registration, and specification of the property and determination of the amount of secured debt. Here in below such requirements are discussed.

3.4.1 Written Formality

There are acts which the laws of a country mandatorily require it to be made in a specified form. In our system, the general rules of contract entail, as provided in article 1719(1) of the civil code, in principle, no special form shall be required for validity of contracts. However, under special circumstances the law requires the fulfillment of special a special form. In such cases, such form shall be observed.[97] Among such types of contracts mortgage is the main one.[98] The writing formality as enshrined in article 1727of the civil code, comprises two elements: (1) it has to be supported by a special document that has to be signed by all the parties bound by the contract; and (2) It has to be attested by two witnesses. As regards the effect of non-observance of written formality prescribed either by the law or by the contract, article 1720(1) of the civil code states that there shall be no contract but a mere draft of a contract. Hence, the contract or other agreement creating a mortgage shall be of no effect unless it is made in writing.[99]

Similarly, article 148(2) of the commercial code provides business mortgage shall not be binding as between the parties unless it is made in writing.

In relation to the movable security, the law provides, a security agreement must be evidenced by a writing that is signed by the grantor.[100] This entails the necessity of written form to creating security agreement.

3.4.2 Registration and Authentication

To begin with, "to authenticate a document" means to sign and affix a seal by witnessing the signing of a new document by the person who has prepared such document or the person it concern and after ascertaining that this formality is fulfilled; or to sign and affix a seal on an already signed document by ascertaining its authenticity through an affidavit or specimen signature and/or seal;[101] whereas, "to register a document" means to register a document in a register prepared for the purpose by giving identification number or to register and deposit a document which is required by law to be deposited with authentication and registration institution.[102]

Registration of juridical acts in general and security rights in particular is important in serving the contracting and third parties' interests. To the contracting parties, it better evidences the

[97] Civil code article 1719(2)
[98] Civil code article 1723(1)
[99] Civil code article 3045(1)
[100] Article 4 (5, a-c) of proc.1147/2019
[101] Article 2(2) of Authentication and Registration of Documents' Proclamation No. 922/ 2015
[102] Article 2(3) of Authentication and Registration of Documents' Proclamation No. 922/ 2015

contents of their agreement. It is also important to interested third parties as it notifies the encumbrance of the property which they are dealing or wish to deal.

In our legal system the objectives of authentication and registration are clearly provided in article 7 of proc. 922/2015. It provides;

Any activity or procedure of documents authentication and registration conducted at federal and regional level in accordance with this Proclamation shall follow the following objectives:

1/ creating cooperative spirit of working relationship among regional and federal institutions conducting document authentication and registration;

2/ ensuring the uniformity of the documents authentication and registration towards to the national vision and mission of the country;

3/ protecting citizens' rights of producing private property, use and transfer through legal means and thereby supporting the justice system and ensuring the rule of law;

4/ ensuring the documents sent from other countries to Ethiopia that they are not against law and moral; and the recognition of documents, in the receiving country, sent to other countries from Ethiopia;

5/ facilitating the efforts of building good governance and free market system;

6/ creating accessible working system by using new technological inputs and by enhancing the quality levels of institutional service;

7/ act in collaboration with stakeholders.

Regarding documents that are mandatorily required to be authenticated, article 9(1) of this proclamation lists as;

a) Documents that shall be authenticated and registered in accordance with the appropriate law;

b) Power of attorney or revocation of power of attorney;

c) Memorandum and articles of association of business organizations and other associations, and amendments thereof.

And the non authentication of these documents would result invalidity.[103] Additionally, under sub 2 of the same article the notary shall authenticate and register documents other than those specified under sub-article (1) of this Article, if requested by the concerned parties.

Under the civil code, a mortgage, however created, shall not produce any effects except from the day when it is entered in the register of immovable property at the place where the immovable mortgaged is situate.[104] Thus, registration is mandatory validity requirement for all types of mortgages whether it is legal, judicial or contractual. Once such registration is made accordingly, it will have effect for a period of ten years.[105] And per sub (2) of article 3058, the effect of such registration shall continue where, prior to the expiry of the period of ten years, a new entry is

[103] Article 9(1) of Authentication and Registration of Documents' Proclamation No. 922/ 2015
[104] Civil code article 3052
[105] Civil code article 3058(1)

made with a view to renewing the first registration. In such case, the first registration shall be effective for ten yean from the day when the new entry was made.[106]

The cassation division, however, erroneously decided in a way that defeats the mandatory requirement of registration, by stating the injunction order given in accordance with article 154 of the civil procedure code creates judicial mortgage.[107] It says, "an injunction order (given in accordance with article 154 of civil procedure code), prohibiting transfer in any ways, affirms the creation of mortgage (security right) over the property, which are at issue."[108] This decision is not in line with the provisions of the civil code that regulates judicial mortgage, in particular and mortgage in general. This is because, primarily, by saying that an injunction order would automatically create a judicial mortgage, it ignores the mandatory validity requirement of registration as stated in article 3058(1) of the civil code. Secondly, it erroneously assimilates the natures of injunction order and judicial mortgage. Injunction order, as indicated in article 154 and the followings of civil procedure code, is a temporary order by the court; "where in any suit it is proved by affidavit or otherwise: (a) that any property in dispute in the suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree; or (b) that the defendant threatens or intends to remove or dispose of his property with a view to defraud his creditors."[109] On the hand, judicial mortgage, as stated in article 3052(1), is created for the purpose of securing 'the execution of judgments, orders or awards by granting one party a mortgage on one or more immovables the property of the other party.' These provisions entail, procedurally, injunction order is given before judgment, whereas judicial mortgage is created after the judgment or award with the aim of securing the execution of the judgment or award. By nature, the two issues are not the same, as the injunction order is provisional, whereas judicial mortgage establishes a security right that would be enforced against the property encumbered if the judgment or award is not performed. And failure to comply with the former could result in a criminal punishment[110], in the latter; however, the order is always against a specified immovable property.

Nevertheless, a contract of mortgage concluded to provide security to a loan extended by a bank or a micro-financing institution may not be required to be registered by a court or a notary.[111] Regarding the registration of business mortgage, however, the law seems to take a different standing. In article 143(3), the commercial code states, any mortgage, whether legal or contractual, may not be invoked against third parties unless it is registered pursuant to the relevant law. Thus, failure to register business mortgage could still has an effect to the parties involved. This failure to register, with regard to third parties, however, shall not bear any legal effect.

Also, registration of security right, though not always mandatory, on movable asset is required. Specifically, article 13 of proc.1147/2019 states security right in movable property will be

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[106] Civil code article 3058(3)
[107] Commercial Bank of Ethiopia Vs Walelegn Ayalew etl. (two persons), cassation file no.29269, vol.7
[108] ibid
[109] Article 154 of civil procedure code
[110] Article 156(1) of civil procedure code
[111] Article 2 of Civil Code As Amended Proclamation No. 639/2009

effective against third parties if a notice is registered with the Collateral Registry (CR) by the secured creditor.[112] For this purpose, the NBE has come up with directives such as; Codification, Valuation and Registration of Movable Properties as Collateral for Credit Directive No. 02/2020 and Operationalization of Movable Collateral Registry Directive No. MCR/01/2020. In general, these laws (of movable collateral) have come up with novel registration systems. It has established a separate body i.e. Movable Collateral Registry Office (MCRO), having the mandate of "receiving, storing, and making information accessible to the public in registered notices with respect to security right and right of non-consensual creditors."[113] Accordingly, per article 4(1) of Directive MCR/01/2020 this peculiar registering body is established and housed in the NBE. Over all, the main purpose of the collateral registry is to establish a priority right, against competing third party claimants, on the property being pledged as collateral for credit which is determined based on the time of registration.[114] It provides information on the existing securities as related to specific movable properties.[115] It would significantly improve the mechanism for enforcing credit agreements concluded on movable properties as collateral.[116] Secondly, the registration system is an electronic one.[117] For the purpose of its implementation directive 01/2020 come up with detail rules. Among others, per article 5 to access CR, any secured creditor or authorized representative shall have User Account[118] approved by the Office.

However, the establishment of this electronic registry system has been criticized due to the country's low level of technological infrastructure. It is said;

> *The infrastructure necessary for the proper functioning of the electronic collateral registry is not present in Ethiopia today. Even in the United States, a country whose law the proclamation is modeled on; some states including* New York *still administer paper-based registration parallel with electronic registration. Essentially, this law, which assumes that Ethiopia is technologically more advanced than New York, would not be fully functional for the Ethiopian farmers or rural dwellers, the great majority of whom are either poorly literate or have no access to electricity and the internet. This defeats the overall purpose of the new law, which is to allow all Ethiopians to have access to finance through using their movable assets as collateral and to have a registration system that works for all. Since the National Bank's Collateral Registry*

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[112] Article 13 of proc.1147/2019 states three methods with which a security right established over movable asset could be effective against third parties. These are if; 1) a notice with respect to the security right is registered in the Collateral Registry by the secured creditor. 2) the secured creditor has possession of the collateral asset that is money, negotiable instruments, negotiable documents and certified securities subject to article 56. 3) the secured creditor has acquired over the right to payment of funds credited to a deposit account or an electronic security.

[113] Article 21 of proc.1147/2019

[114] ETHIOPIAN MOVABLE COLLATERAL REGISTRY: RELEVANCE, BENEFITS EDUCATIONAL & INFORMATIVE ARTICLE, Birritu Magazine (a quarterly magazine published by the National Bank of Ethiopia) No.130, p.22

[115] ibid

[116] ibid

[117] Article 2(5) of proc.1147 defines Collateral Registry as an electronic system about security right and non-consensual security right in movable property.

[118] User Account means a designated person or institution registry account that has met the terms and conditions of use of the Collateral Registry for the purposes of transacting on the Collateral Registry (article 2.16. of NBE Directive NO. 01/2020).

Establishment Directive *does not cover paper-based registration system and in the absence any other legislation that is not repealed by the new law, it is impossible to understand what the government thinks about registration of collateral in rural Ethiopia where access to the Central Collateral Registry is impossible*[119].

Therefore, we can conclude that the requirements of authentication and registration of security rights created over immovable and movable property have differences, regarding, for instance, the pertinent body and manner of registration.

3.4.3 Description of the Property and Specification of Secured Amount

In article 3048(1) of the civil code, it is required that the act creating the mortgage shall clearly specify the immovable mortgaged. Such act shall specify in particular the commune in which the immovable is situate, the nature of the immovable and, where appropriate, the number of the immovable in the cadastral survey plan.[120]

Not only this, it is also required that the specification of the amount of claim secured by the securities in general and mortgage in particular shall be clearly determined. Thus, the civil code provides, an instrument or a contract of mortgage shall not produce any effect unless it specifies in Ethiopian currency the amount of the claim secured by mortgage.[121] Similarly, as indicated in article 3044(2) in judicial mortgage, the court judgment or the arbitral award should specify the amount of the claim secured by mortgage and the immovable or immovables to which such mortgage applies. Though the later provision does not tell the effect of failure to specify the secured amount in the judgment or the award, the word "shall" in the legal provision makes it mandatory, and if not, as it can be inferred from the reading of the related articles of the civil code, the judgment or the award may not establish a judicial mortgage sustainable in the eyes of the law.

In relation to movable collaterals, article 6(1) of proc.1147/2019 states the collateral and the secured obligation shall be described in the security agreement in a manner that reasonably allows their identification. A description shall reasonably identify the collateral by specific listing, category, a type of collateral or quantity.[122] Regarding the amount of the obligation it

[119] Addis Standard News Paper, JUNE 9, 2021, infra note 186
[120] Civil code article 3048(2)
[121] Civil code article 3045(2)
[122] Article 6(2) of proc.1147/2019

may be described as all obligations currently owed and to be incurred in the future, generally or specifically, including by reference of the maximum amount secured by the secured right.[123]

3.4.4 Title or Authority to Collateralize

Another requirement for the valid establishment of security right is title or authority on the collateral or property. In other words, who could be a grantor of the property to be encumbered is important element of security right establishment, as the creation of security right with non-right holder of the collateral could result in invalidity. Regarding immovable collateral, the civil code in article 3049(2) states a mortgage shall be valid where it is created by a person who is the owner of the immovable under a title deed issued to him by the competent authorities. Furthermore, under sub article 2 of the same it states a person may not secure his debt by mortgage unless he is entitled to dispose of the immovable for consideration. Such right or authority to dispose the immovable has to exist at the time of the contract. In other words, a person may not mortgage the immovable claiming that he would subsequently acquire the right to dispose of the immovable.[124] Also the civil code under Article 3049 (3) stipulates, "A person may secure the debt of another by mortgage where he is entitled to dispose of the immovable gratuitously".

On the other hand, a security right over movable property could be created by the grantor provided that he has right in the asset or the power to encumber it.[125] Though the proclamation does not clearly lists out what right in the asset could include, we can understand that it is broad to include not only ownership right but also other property rights, such as use, servitude or lease, etc. Generally, it could be possible that over a single object of property, different persons may have different sets of right at the same time. The proclamation seems to acknowledge such fact and thereby recognize the possibility of creation of security agreement by such right holders at different status. For instance, under sub article 2 of article 4 it provides "a lessee under a hire purchase may create a security right in the capital goods. But the maximum amount realizable under the security agreement is limited to the goods value in excess of the amount owed to the lessor."

One important point that should be noticed, additionally, is the existence of differences between the rules of civil code and the proclamation regulating movable collaterals about the status of the asset at the time of the creation of the security. Hence, under article 3050(3) of the civil code, a mortgage shall be of no effect where it relates to future or non-existing immovable. Accordingly, the title or the authority to subject a property in mortgage will not produce any effect if it is acquired subsequently. Therefore, the title or the authority to dispose of a property in mortgage must exist at the time of its creation. On the other hand, this is not true to the case of movable

[123] Article 6(3) of proc.1147/2019
[124] Civil code article 3050(2)
[125] Article 4(1) of proc.1147/2019

security agreements. Thus, a security agreement may provide for creation of security right in a future asset.[126] Future asset means a movable property which does not exist or which the grantor does not have right in or the power to encumber at the time the security agreement is concluded.[127] Hence, the latter is more liberal than the former to enable the possible right holder of the future assets get required financial credits, which in turn allows investment and development.

3.5 Effect of Security Right

Once valid security right has been established fulfilling the above discussed requirements, it will bear its legal effect. By the term effect of security right, it is to mean the rights and duties it creates over the respective parties as well as third party, either in case of default or due to its mere establishment. These effects includes the priority right of the secured creditor, the limitations it create over the rights of the debtor, the extent of the claims which a secured creditor, the enforcement mechanisms, rights of third party, etc. In the following sections these effects of creation of security right are discussed, generally.

In relation to this, UNICITRAL, by assessing the experience of different legal systems, reveals the existence three different approaches. It describes such approaches as;

> "*Under one approach, a properly created security right in an asset is not only effective as against the grantor, but is also automatically effective as against all third parties that claim a right in the asset (this often referred to as the erga omnes effect of property rights). As the fundamental point of a security right is to permit the secured creditor to sell the encumbered asset and to be paid out of the proceeds of the sale in preference to a competing claimant, under this approach there is no advantage in distinguishing between effects as between the parties and effects as against third parties.*
>
> *Under a second approach, the security right is effective only as against the grantor, and an additional act, such as registration of a notice in a general security rights registry or delivery of possession of the asset to the secured creditor, is required to make the security right effective as against third parties claiming rights in the asset. This legal effect is referred to in the Guide as "effectiveness against third parties" or "third-party effectiveness". Typically, this additional act also serves as a basis for determining the priority of the security right as against competing claimants. The second approach flows from the recognition that most legal systems impose fewer formalities for the effectiveness of contractual obligations between the parties than they do when property rights are being created. In other words, under the second approach the security agreement is sufficient to make a security right in the asset effective as between the*

[126] Article 4(3) of proc.1147/2019
[127] Article 2(18) of proc.1147/2019

parties, but insufficient to establish effectiveness of the property aspects of the security right against third parties, such as other secured creditors, judgment creditors, the insolvency representative in the insolvency of the grantor, or subsequent transferees of the asset. Furthermore, this approach is based on the assumption that there is no need to subject effectiveness as between the parties to notification or registration, which could create an obstacle to transactions that serve security purposes but are based on informal sale or lease techniques (such as retention-of-title sales and financial leases)

The legal system in a few States is based on a third approach, which is a hybrid between the first two approaches. Under this approach, a security right is treated as being generally effective against all parties upon its creation, except for other secured creditors. That is, no additional act is necessary in order for a security right to be effective as against third parties other than other secured creditors. Purchasers, lessees, licensees, judgment creditors and insolvency representatives take subject to the security right, unless some other rule of law, such as a rule protecting the purchaser of an asset in the ordinary course of business of the seller, is applicable. Nonetheless, in order to protect the right of the grantor to use its assets to secure other credit, these legal systems usually also provide that the security right is not effective as against other secured creditors unless some additional act, such as the delivery of possession or registration in a general security rights registry, takes place. That is, special rules of third-party effectiveness and priority apply to protect the rights of later-in-time competing claimants that assert specific rights in the encumbered asset. This approach generally leads to the same results as the second approach, although there might be a slight variation in relation to the rights of judgment creditors and a grantor's insolvency representative."[128]

The following sections describe the effects of security right under the pertinent laws of our system.

A. Preferential Right of Security Rights

Once valid security right is created, it places a secured creditor with a preferential status than other claimants of the debtor or the property secured. When we say preference, we presuppose the existence of two or more creditors of the debtor/grantor that could either be secured or unsecured. Thus, albeit other legally prescribed circumstances, the general rule is secured or registered creditors are preferred over the unsecured or unregistered creditors. This preferential right, as discussed here under, consists the right of the creditor to satisfy its claims by the properties or rights that are attached to the collateral encumbered, the right to enforce or fully satisfy his (secured creditor) in priority to other creditors or third party, etc.

[128] UNICITRAL Guide, supra note 63 p.65-66

B. Property to Which Security Rights Extend

Preferential right over intrinsic elements and accessories: Regarding intrinsic elements the civil code article 3064(1) says mortgage shall charge the mortgaged immovable together with its intrinsic elements and accessories. Properties that are considered as intrinsic elements are defined in article 1132 of the code. These are; anything which by custom is regarded as forming part of the thing.[129] And; anything that is materially united to a thing and cannot be detached there from without destroying or damaging such thing. [130] Moreover, the code explicitly indicated trees and crops as intrinsic elements of the land until they are separated there from by contract or situations implying such separation.[131]

Also, sub 2 of article 3064 stipulates mortgage also charge any object expressly specified as an accessory in the act creating the mortgage. Accessories are anything which the possessor or the owner of a thing has permanently destined for the use of such thing.[132] Therefore, the mortgagee's rights are not only limited to the immovable itself. It also extends to intrinsic elements and accessories of the mortgaged immovable. The only limitation in enforcing his right over these properties, as stipulated in article 3065(1), is the interest of third parties, which he may not exercise his right over such properties if they are have been separated there from and transferred to a third party.

In relation to security right over movable property, though there exists differences in the naming, we can generally take that security right established over movable property also extends to intrinsic elements and accessories. For instance, regarding intrinsic elements, article 2(25) of proc.1147/2019 provides almost similar definition to mass or product. It is defined as "corporeal assets that are so physically associated or united with other corporeal assets that they have lost their separate identity." Furthermore, article 8 of the same explicitly states a security right in corporeal asset that is commingled in a mass of assets of the same kind or product extends to the mass or product.

Accessory to movable means a corporeal asset that despite the fact that it is physically affixed to an immovable is treated as movable property.[133]There seems no difference between the two definitions regarding the separate nature of it. And their character of affixation or destination is another common element in the two definitions. Proc.1147/2019, also, in article 4(4) and 53(1) provides security right may encumber and continue in an accessory to movable or immovable, and a security right is not extinguished by an affixation of the accessory to movable or

[129] Civil code article 1132(1)
[130] Civil code article 1132(2)
[131] Civil code article 1133
[132] Civil code article 1136
[133] Article 2(1.1) of proc.1147/2019

immovable property. In general, security right over movable collateral extends to intrinsic elements and accessories thereof.

Preferential Rights over Improvements and Buildings: Other kinds of property, which the civil code recognizes that the security preferential right extends, are improvements and buildings made on the immovable mortgaged. It states, the mortgage shall apply to any improvement made on the mortgaged immovable and to the buildings, plantations and crops made on such immovable.[134] However, his right over these properties is second to contractors of suppliers of such properties. As stipulated in article 3067 contractors and suppliers of improvements and buildings have priority right regarding the costs they have covered.

On the other hand, proc.1147/2019 does not clearly regulate whether such preferential right of security could apply to security interests created over movables. But article 50(2) proc.1147/2019 may entail such right of secured creditor. It provides the priority of security right covers all collateral described in a notice registered in the Collateral Registry, whether they are acquired by the grantor or come in to existence before or after the time of registration. Hence, improvements made on the movable secured after the establishment of the security right are considered as part of the collateral securing an obligation.

Preferential Right over proceeds: as defined in proc.1147/2019, proceeds means whatever is received in respect of the collateral, including what is received as a result of a sale or other disposition or collection, lease or license of the collateral, fruits, insurance proceeds, claims arising from defects in, damage to or loss of the collateral, and proceeds of proceeds.[135] The definition is broad to include 'natural fruits and civil fruits of the collateral, manufactured products resulting from the collateral as raw material, cash proceeds resulting from lease, sale, or other dispositions of the collateral are all products of the collateral for which different rules may apply in different countries.'[136] Moreover, when the collateral commingles with other goods either as a raw material in production process or as cash proceed, the law must make it clear whether the security agreement extends to all of these and under what condition(s).[137] Hence, the movable security law of our system provides, a security right in an asset automatically extends to its identifiable proceeds.[138] The law also ensures the extension of security right to the proceeds even if it is mixed or commingled with other assets.[139]

[134] Civil code article 3066
[135] Article 2(36) of proc.1147/2019
[136] Asres: supra note 5, p.162
[137] ibid
[138] Article 7(1) of proc.1147/2019
[139] Article 7(2) of proc.1147/2019

With regard to security right over immovables, mortgage extends to fruits such as rents as of the day of attachment of the immovable property by the secured creditor,[140] indemnities for insurance and compensation for expropriation.[141]

C.Priority of Security Right

As indicated above, the other main effect of legally valid security right is its entitlement of the secured creditor with the priority right. Pertinent laws of our system regarding security right explicitly stipulates such privilege right of the secured creditor. With the aim of clarity and specifity, the priority right of secured creditor under the civil code and proc.1147/2019 are analyzed separately, as follows.

1. Domain of Priority of Security under the Civil Code

As said, one of the basic rights of the secured creditor is priority right over the secured property. The creditor can only claim this right by validly registering or perfecting his right over the property secured. Where there exists multiple creditors or mortgagees the deciding parameter, in serving the interests primarily, will be the date of registration of such claims.[142] Even the due date of the claim will not be considered, as indicated in article 3081(2) of the code. And those creditors whose claims have been registered on the same day shall rank equally and be paid in proportion to the amount of their claims.[143] The other important issue regarding the priority right of the mortgagee is the sets of claims which will be entitled in primarily than others. In other words, kind of claims that the mortgagee will be severed are another basic content of this principle of priority of mortgages. In this regard, the code has listed out the mortgagee's claims that would be satisfied in priority to other creditors.

Priority right over the capital debt; Obviously, the mortgage shall secure the payment to the mortgagee, in priority to other creditors, of the registered amount of claim.[144] The payment of capital or the main debt which is the reason for the creation of mortgage has to be guaranteed to serve the purpose of mortgage. And the civil code has, validly stipulated, the primarily secured the payment of the capital or main loan money.

Priority right over interests; The other, as stipulated under article 3081(1), is the interest of the debt fixed in the rate of the registration of mortgage. Hence, mortgage also secures the payment of the interest to capital money. However, the article provides, this priority right, in claiming the interest, cannot exceed more than two years. Even the parties cannot agree the period to be beyond this indicated period of time. Here a question may be asked as to why the law has mandatorily limited the amount of interest claims to not exceed more than two years. In an

[140] Civil code article 3068(1)
[141] Civil code article 3069
[142] Civil code article 3081(1)
[143] Civil code article 3082
[144] Civil code article 3076

attempt to answer the question, though we cannot found out the reason detai'r of the legislator, we can expect, it has the aim of serving equity to other creditors. The law by placing the mortgagee on the status of primarily be satisfied his claims on the immovable encumbered by mortgage, effectually it endangers the interests of other creditors, as they can only be served by this immovable only if the value of it is in excess of the first mortgagees' claims. So by limiting the amount of the payment of interests of the debt to be only not more than two years, the law seems to balance the interests of other probable creditors of the (owner) immovable. It should be noted that, this limitation of period is only about the priority right. In other words, as it can be understood from the provisions of article 3059(3) and other general rules obligation, the mortgagee is entitled to claim the remaining amount of the interest as ordinary creditors.

Priority right over necessary expenses; In addition, the mortgage shall secure the repayment to the mortgagee, in priority to other creditors, of the necessary expenses made by him for the preservation of the mortgaged immovable and of the insurance premiums due by the owner and which have been paid by the mortgagee.[145]

Priority right over attachment costs; Furthermore, as prescribed under article 3079 of the code, it shall secure the repayment to the mortgagee, in priority to other creditors, of the normal costs arising from proceedings instituted by him for the attachment of the immovable.

Regarding the order of these payments, civil code articles 1752, 1753 and 1754 provides as follows;

> *Art. 1752. - Appropriation of payments. 1- Costs, interest, principal*
> *Where a debtor is to pay costs and interests in addition to the principal, any pert payment made by him shall be appropriated firstly to the costs secondly to the interest and eventually to the principal.*
>
> *Art. 1753. - 2. Choice by the parties.*
> *(1) Where a debtor owes several debts to the same creditor he may specify the appropriation of any payments made by him.*
> *(2) Where the debtor does specify the appropriation of a payment, such payment shall be appropriated to the debt specified by the creditor in the receipt unless the debtor forthwith objects to such appropriation.*
>
> *Art. 1754. - 3. Appropriation by law.*
> *(1) Where no appropriation is specified in the receipt, the payment shall be appropriated to the debt which is due, or, where no debt is due, to the debt which shall first became due.*

[145] Civil code article 3078

(2) As between debts due or debts which shall become due on the same day, the payment shall be appropriated to the debt which it was to the greatest advantage to the debtor to pay.
(3) Where the advantages to the debtor are equal, the payment shall be appropriated proportionately.

2. Priority of Security Right in Proc.1147/2019

Detail rules regarding priority right of secured creditor are provided under part five of the proclamation. Discussion of each and every of them is not at the scope of this research. Rather a brief overview of it is made hereunder.

To begin with, like that of the civil code principles, secured creditors of movable property have priority over other creditors, provided that it has perfected its security right. In relation to perfection, article 13 of proc.1147/2019 provides three methods with which security right could be perfected or effective against third parties. These are; firstly, registration of notice by the creditor, in the collateral registry, about his security right. Secondly, possession[146] of collateral asset that is money, negotiable instruments, negotiable documents, and certified securities, in accordance with article 56. Thirdly, where the secured creditor has acquired control over the right to payment of funds credited to a deposit account or an electronic security.
Thus, priority among competing security rights created by the same grantor in the same collateral is determined according to the order of registration, without regard to the order of creation, of the security right.[147] As such, the time of registration of a notice is the principal way of determining the priority of competing security rights that are perfected through registering notice.

With regard to competing security rights created by different grantors, a security right created by a grantor is subordinate to a security right in the same collateral created by another person if the grantor acquired the collateral subject to the security right created by the other person and made effective against third parties before the grantor acquired the collateral.[148]Furthermore, priority right over movable security right applies to proceeds. Article 51 of the proclamation states, subject to article 58, a security right in proceeds that is effective against third parties under article 14 has the same priority over a competing security right as the security right in the collateral from which the proceeds arose. In other words, provided that it is perfected in compliance with article 14, the priority of security right in the collateral extends to proceeds. Article 14 of the same provides rules about effectiveness of security right in proceeds, mass's and product's against third party. Also, article 68(1, a) provides a secured creditor in possession of the collateral has the right to be reimbursed and add to the secured obligation any reasonable

[146] Article 2(35) of proc.1147/2019 defines possession as the actual possession of a collateral asset by a person or its representatives, or constructive possession by an independent person that acknowledges holding it for that person.
[147] Article 46(1) of proc.1147/2019
[148] Article 47 of proc.1147/2019

expenses it incurs for the preservation of the asset, including the cost of insurance, payment of taxes and other charges.

Another main issue in relation to the priority of security rights over movable property, as provided in article 54 of proc.1147/2019, is the right of third party acquirers of the collateral. These parties are buyers, other transferees, leasee or licensee of the collateral. Thus article 54(1) states if the collateral is sold or otherwise transferred, leased or licensed while the security right in that asset is effective against third parties, the buyer or other transferee, lessee or licensee acquires its right subject to the security right except as provided in this Article. However, these third parties' rights are not affected if the secured creditor authorizes the transferor free from of or unaffected by security right.[149] We can understand that this rule is based on the presumption that these third parties acquiring have the knowledge of the establishment of security right, which could by making an inquiry at the Collateral Registry Office[150], or other perfection methods.

D. Right to Follow the Collateral

The other privilege of the secured creditor, which could somehow relate to the right over proceeds, is the right to follow the collateral. To begin with, regarding immovable, relevant provisions of the civil code shows that mortgage does not prevent mortgagor from transferring the immovable through sale.[151] Moreover, the civil code allows the grantor to create other rights in rem on it.[152] It even goes to the extent of prohibiting any agreement that restricts the right of the mortgagor to transfer the ownership of the mortgaged property.[153] It is not also possible to enter into agreements that restrict the right of the mortgagor to create a usufruct, servitude or any other right in rem on the mortgaged property.[154] These show the recognition of wider right of the owner of the immovable.[155]

On the other hand, in such circumstances, the law tries to make a balance by protecting the interest of a mortgagee through providing different mechanisms. This right, in general, is called the right to follow or right of pursuit. In other words, the mortgagee has the right to follow the immovable mortgaged regardless of to whomever it is transferred or to whatever right rem is created over it. Hence, the mortgagee who has registered his mortgage prior to the registration of the deed evidencing the transfer may attach the immovable in the hands of the person who

[149] Cumulative reading of article 54(2) and (3) of proc.1147/2019
[150] Article 24(3) proc.1147/2019 entitles any person with the right to submit to a Collateral Registry, to know whether the movable is encumbered or not, based on the form. And article 37 and 38 of the proclamation, further, provide the detail rules regarding search.
[151] Civil code article 3084(1)
[152] Civil code article 3088(1)
[153] Civil code article 3084(2)
[154] Civil code article 3088(2)
[155] In fact, civil code article 1204(1) defines ownership as the widest right that may be had on a corporeal thing.

acquired it.[156]This attachment will protect the mortgagee's right through notifying the transferee and other third parties that the immovable is encumbered by mortgage.[157] Also it will have an effect of preventing further transfers that may endanger the mortgagee's interest.

It should be noted, however, the transfer of the immovable or legal entitlement of mortgagee's right to follow does not release the debtor from the liability. Rather, article 3086 of the code provides, unless the person who acquired the immovable has undertaken to pay the debt, and provided that the mortgagee does not informed the original debtor in writing that he would continue to hold him liable, the transfer of the immovable mortgaged shall bring no change in the obligations of the original debtor. This implies mortgagee's right to get its credit back is not limited to the property mortgaged. It may also claim from other properties of the mortgagor. However, this does not apply to the mortgagor who has secured the debt of other person by his immovable property. Hence, he who has mortgaged his immovable to secure the debt of another person shall be presumed not to have bound himself on his other property.[158] In addition, unless he intentionally or negligently reduces or endangers the value of the immovable mortgaged, the person who mortgaged his immovable for debt of others shall be assimilated to the person who acquires an immovable mortgaged.

Regarding persons who acquired the immovable encumbered by mortgage, the civil code from article 3090-3104 provides their rights and any possible arrangements they may make. In principle, article 3090 stipulates, he who acquires an immovable mortgaged may, in his relations with the mortgagee, avail himself of the rights vested in the guarantor by the provisions of the Title of this Code relating to "Contracts in general".[159] Also the transferee may redeem the mortgage. Thus, he who acquires an immovable mortgaged may redeem the mortgage where he is not personally liable for the payment of the debt under the mortgage.[160]

Besides, the commercial code in article 154(1) stipulates that secured creditor may claim the business from a third party, as the mortgage follows the business into whatever hands it may fall. Under sub article (2) the third party to whom the business is transferred may avoid attachment of the business by paying fully all secured creditors.

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[156] Civil code article 3085

[157] Under civil code article 3093, transferee of the immovable is obliged to account or cease to be an owner of the fruits of such immovable only where such immovable is attached in his hand.

[158] Civil code article 3105

[159] From articles 1920-1951 the civil code regulates principles of surety ship. In these provisions the liability and the rights of the guarantor are regulated. Under article 1920 it provides, the principle that whosoever guarantees an obligation shall undertake towards the creditor to discharge the obligation, should the debtor fail to discharge it. Among the rights of the guarantor, in case he pays the debt of the default debtor, subrogation is the main one. To enable him to exercise his subrogation right the creditors shall hand over the document of title. Otherwise, the guarantor shall be relieved of his obligation towards the creditor where the guarantor's subrogation to the rights, mortgages and liens of the creditor can no longer be effected owing to the creditor's act or omission.

[160] Civil code article 3098

Also the right to follow the encumbered movable collateral is guaranteed in proc.1147/2019. As said above, provided that the security right is perfected, article 54 of the proclamation secures the priority right of the secured creditor despite of the transfer of the collateral. Generally, this right in other words entails right to pursue or follow the collateral in the hands of a third party acquirer.

3.6 Enforcement of Security Rights

It is presumed that parties to the loan agreement execute obligations on their part in line with the agreements. However, due to different reasons, this is not always true. Hence, either the lender or the borrower may fail to perform their obligation. Usually it is the borrower who fails to perform the obligation to the agreement. This is named as default. To curb the problem, states regulate legal arrangements as regarding the rights and obligations of the parties to the security right. Enforcement mechanisms that allow creditors to predict accurately the time and cost involved in disposing of the encumbered assets and the proceeds likely to be received from the enforcement process will have a significant positive impact on the availability and the cost of credit.[161] A secured transactions regime should, therefore, provide efficient, economical and predictable procedural and substantive rules for the enforcement of a security right after a grantor has defaulted.[162] At the same time, because enforcement will directly affect the rights of the grantor, other persons with a right in the encumbered assets and the grantor's other creditors, a secured transactions regime should also provide reasonable safeguards to protect their rights.[163]

In general, enforcement of security right involves main issues, such as; determining default, the selection of judicial or extra judicial proceeding, procedural steps, etc. The subsequent parts provide the analysis of relevant laws of enforcement of security rights in our legal system, mainly focusing on the issue of default and enforcement mechanisms.

3.6.1 Default

We cannot have an issue of enforcement without the occurrence of default. However, determining whether there happened default is not an easy task. Neither immovable nor movable collateral laws of our country provide the definition of default. Thus identifying default in our system requires critical analyses of the respective laws.

Accordingly, the civil code, regarding immovable securities, provides the instances of default to enable the mortgagee enforcing his right credits. To see some, firstly, the debtor's failure to pay the debts in the agreed time, obviously, results default. Secondly, where the immovable mortgaged is attached by the creditors of the mortgagor, the mortgagee may demand to be paid, out of the proceeds of the sale of the immovable, in priority to any other creditor.[164] Also where the immovable has been sold by the mortgagor, the mortgagee may attach it in the hands of the

[161] UNICITRAL Guide: supra note 63, p.276
[162] ibid
[163] ibid
[164] Civil code article 3059(1)

purchaser whose rights have been registered subsequently to the registration of the mortgage.[165] Fourthly, the reduction of the value of the immovable encumbered, by the intentional or negligent act of the owner or the third parties.[166] Additionally, article 3 of Proclamation No 97/998 stipulates that the lending bank, whose claim is not paid within the time stipulated in the contract, can sell the property mortgaged or pledged by auction upon giving a prior notice of at least 30 days to the debtor. According to this provision, the lending bank, unless it decides otherwise, can give prior notice of 30 days from the next day following the day on which the loan is scheduled to be paid but has not been paid accordingly.[167] Thus, according to the laws of power of sale foreclosure, the lending bank can give the notice immediately following the date on which the loan has to be repaid, even where the loan is scheduled to be repaid by installment, that is to say, failure to pay the first and single installment, may enable the bank to initiate power of sale foreclosure.[168]

Coming to movable securities, default may result, for instance, where the grantor transfers the collateral secured without the consent of the secured creditor.[169] Also the failure of the debtor to execute its obligation within the agreed period or manner has the effect of default.[170]

In addition to these legally prescribed grounds, the parties to the security agreement are not prohibited to specify, in their agreement, the scenarios that could be considered as default.

1.6.2 Judicial or Extra Judicial Enforcement Mechanism

1.6.2.1 Judicial Enforcement

Judicial enforcement mechanism of security interests refers the enforcement of security right by judiciary order. According to this enforcement mechanism creditors must sue their debtors, obtain judgment and then resort to other public officials or authorities (for example, bailiffs, notaries or the police) to enforce the judgment.[171] Such court administered enforcement of security rights are generally criticized as lengthy and inefficient.[172] Due to this, it is generally suggested that the involvement of court in the enforcement of security right be minimal.

> *"…The justification for a less formal approach lies in the fact that having the secured creditor or a trusted third party take possession and dispose of the assets will often be more flexible, quicker and less costly than a State-controlled process. A properly designed system can provide an efficient mechanism for maximizing the amount that can be achieved from the sale of the encumbered assets and thus protect the grantor and other persons with an interest in maximizing*

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[165] Civil code article 3059(2)
[166] Cumulative reading of articles 3073-3075 of the civil code
[167] ADAMU SHIFERAW ZEIF,KE: THE LAW AND PRACTICE OF POWER OF SALE FORECLOSURE IN ETHIOPIA; Master's Thesis, AAU, 2005, P.70
[168] ibid
[169] Article 6.4.4(d) of Directive No.02/2020, for instances, provides if the grantor transfer the farm product without the consent of the secured creditor, the latter may request the early settlement of credit. The same also applies to the case of security right over the land use right, as stipulated in article 7.4.3(c) of the same law.
[170] Cumulative reading of provisions of part seven (articles 76-88) of proc.1147/2019
[171] UNICITRAL Guide, supra note 63, p.283
[172] Asres: supra note 5, p.239

the amount obtained from the sale of the encumbered assets. Moreover, the knowledge that judicial intervention is readily available is often sufficient to create incentives for cooperative and reasonable behavior that obviates the need to resort to the courts. Finally, unlike the typical judgment creditor, most secured creditors are in the business of providing credit. Hence, a secured creditor's concerns about its reputation among potential future borrowers will normally impose constraints on its enforcement behavior."[173]

In Ethiopia, the roles of courts in the enforcement of security right are different depending on the property collateralized. The civil code governing security right in immovables strictly requires the involvement of courts. It even goes to the extent of prohibiting any contractual agreement that allows the creditor to appropriate or sell the immovable without due regard for the conditions prescribed by law.[174] Later on, however, this provision of the code was somehow amended to enable Banks to resort to enforcement without court order.[175]

Enforcing security right over movables is mainly governed by proclamation 1147/2019 and pertinent directives of NBE. In principle, these laws adopt out of court enforcement mechanism. The creditor is not mandatorily obliged to resort the court proceeding in cases of security right. Court involvement is mentioned in only limited circumstances. For instance, in article 77(1) the secured creditor is entitled to apply for a relief to a court where its right is affected by non compliance of another person with provisions regarding enforcement. It is not clear, however, what type of non compliance that could enable the creditor to apply for a relief to the court. Again in article 87(5) the proclamation states the secured creditor may collect payment from financial institutions authorized to receive deposits without a court order only if it has made its security right effective against third parties by control agreement pursuant to article 17(2). A contrario reading of this statement reveals if the secured creditor does not made effective its security right against third parties by control agreement, he needs to resort a court order for the payment from financial institutions authorized to receive deposits.

Generally, in enforcing the right of secured creditor the courts are required to follow the relevant provisions of civil procedure code. For instance, regarding enforcement of security right over an immovable property, the civil procedure code provide in the following ways.

Execution of mortgage claims under the civil procedure code

Among others the code provides the procedural regularities regarding the execution of claims over the immovable. Hence, where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the decree-holder, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree

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[173] UNICITRAL Guide, supra note 63, p. 283

[174] Civil code article 3060(1)

[175] Article 3 of property Mortgaged or Pledged with Banks Proclamation No. 97/1998 states an agreement authorizing a creditor bank with which a property has been mortgaged or pledged and whose claim is not paid within the time stipulated in the contract, to sell the said property by auction upon giving a prior notice of at least 30 days to the debtor and to transfer the ownership of the property to the buyer, shall be valid.

who refuses to vacate the property.[176] On the other hand, a court may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same.[177] This applies to any types of properties, with some adjustments to the currently governing land tenure system of the country.

Specific to the sale of the immovable property, the code further provides, where an order for the sale of immovable property has been made, if the judgment-debtor can satisfy the court that there is reason to believe that the amount of the decree may be raised by the mortgage or lease or private sale of such property, or some part thereof, or of any other immovable property of the judgment-debtor, the court may, on his application and on the conditions· laid down in Art 422(3)(i.e. the power the court to order sale by private contract at the request or with the consent of the judgment - debtor and after hearing the decree-holder), postpone the sale of the property comprised in the order for sale on such terms and for such period as it thinks proper, to enable him to raise the amount.[178]

Nevertheless, these provisions of the code were legislated during the private ownership regime of the land. Accordingly, those provisions of the civil procedure code that provides about the sale of the immovable cannot be applied to the land, as the FDRE Constitution prohibits the sale of land.

1.6.2.2 Extra Judicial Enforcement Mechanisms

The mechanism of enforcing security right through extra judicial ways entails the non involvement of regular courts. This enforcement mechanism consist different types of enforcing methods. These are self help possession, strict foreclosure, and private disposal of the collateral. In our system, identifying the available extra judicial or private enforcement mechanisms of security right requires assessing the pertinent rules of foreclosure proclamations (such as proclamation 97/98 and proclamation 98/98) and the laws of movable security (proclamation 1147/2019 and pertinent NBE directives). Accordingly, these laws recognize private enforcement mechanisms of self help possession, strict foreclosure and private disposal methods. The discussion of each is made as follows.

a. Self-Help Possession

Under newly regulated security law of movable collaterals secured creditor is given the right to possess the collateral without the involvement of the court.[179] Hence, the secured creditor may

[176] Civil procedure code article 402(1)
[177] Civil procedure code article 422(1)
[178] Civil procedure code article 439(1)
[179] Article 81 of proc.1147/2019

exercise this right, provided that the grantor has consented to this under the security agreement[180] or the grantor (or any other person) does not object during the possession of the collateral.[181] If the grantor or any other person in possession of the collateral objects to give possession to the secured creditor the Collateral Registry Office shall have the power and duty to order the police force to execute possession.[182] Supposedly, this provision applies where there has been a prior agreement for repossession and the debtor refuses to surrender the collateral.[183] The proclamation has not further stipulates about the issue of self help possession enforcement method. This inevitably, triggers questions such as; "*under what conditions the creditor can execute the repossession even in the instance where the debtor has consented to it in a prior agreement. If the creditor has security right in a car (a leased car), parked in a locked premise, can the creditor break into the premise? May the creditor take possession of the car from a parking lot without the debtor's knowledge and inform the debtor on the telephone of the repossession? Shouldn't the debtor be given a notice of the creditor's intention to repossess the collateral and thereby be given the opportunity to rectify the default?*"[184]

Due to this it is said "the proclamation has the most aggressive private enforcement clause in modern secured transactions law, not just because it fails to safeguard consumer debtors from abuses but because it goes further to empowering the Collateral Registry Office to order the police to effect repossession without a court proceeding."[185] And it "potentially deprives citizens' right of due process of law."[186] The creditor can take possession of the collateral upon the debtor's default without giving advance notice as far as the debtor has signed an agreement at the time of securing the loan.[187] A repossession clause in the loan agreement that might not have been presented to the consumer in clear and comprehensible manner can subject the consumer to such a harsh private system of justice.[188] In a country with low literacy level, low respect for rule of law, a high tendency for abuse of power, and police violence, the fact that this proclamation creates a collateral registry office with the power to order the police to execute decisions not passed by courts should be concerning to all Ethiopians.[189]

b. Private Disposition of the Collateral

Another private enforcement method, which the relevant collateral laws of our system have provided, is the right of secured creditor to dispose the collateral either through sale, lease, or license. Regarding immovables, Property Mortgaged or Pledged with Banks Proclamation No. 97/1998 provide the governing rules. Accordingly, as an exception to article 3060 of the civil code, article 3 of property Mortgaged or Pledged with Banks Proclamation No. 97/1998 states

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[180] Article 81(1,a) of proc.1147/2019
[181] Article 81(1,b) of proc.1147/2019
[182] Article 81(2) of proc.1147/2019
[183] Asres: supra note 5, p.245
[184] Asres: supra note 5, p.244
[185] Ibid
[186] The World Bank backed law of security rights in movable assets in Ethiopia has flaws that need to be addressed urgently; Addis Standard News Paper**;** By Asress Adimi Gikay, JUNE 9, 2021
[187] ibid
[188] ibid
[189] ibid

'an agreement authorizing a creditor bank with which a property has been mortgaged or pledged and whose claim is not paid within the time stipulated in the contract, to sell the said property by auction upon giving a prior notice of at least 30 days to the debtor and to transfer the ownership of the property to the buyer, shall be valid.'

Under this law, the power of foreclosure could emanate from two circumstances. These are where the mortgagor and mortgagee agree to its application thereof. According to article 3 of Proclamation No 97/1998, power of sale foreclosure can be created by the agreement of the lending bank and the borrower, if the borrower alone can produce the property to be mortgaged or pledged. The agreement that creates power of sale foreclosure is a mortgage or a pledge agreement in the wordings of article 3 of Proclamation No 97/1998.

Also, power of sale foreclosure could emanate from the operation of the law. Accordingly, by virtue of article 4 of Proclamation No 97/1998, banks are being empowered to exercise power of sale foreclosure over property mortgaged prior to the recently issued laws of power of sale foreclosure in the legal systems that prohibit creditors to exercise power of sale foreclosure over mortgage. While exercising this foreclosure proceeding, banks are mandatorily required to follow the provisions of Article 394-449 of the civil procedure code.[190] Failure to do this, will made the Bank liable for any damage it causes to the debtor in the process of selling by auction.[191]

Regarding security right established on movable property, from articles 82-84 proc.1147/2019 stipulates relevant rules of private disposition. Before disposing the collateral, the secured creditor is required to give ten (10) working days notification about its intention to dispose[192] to;[193]

- the grantor and the debtor,
- any person with right in the collateral that notifies the secured creditor in writing of those rights
- any other secured creditor that registered a security right notification with respect to the collateral, and
- any other secured creditor that was in possession of the collateral at the time when the enforcing secured creditor took its possession

[190] Article 6 of Property Mortgaged or Pledged with Banks Proclamation No. 97/ 1998.And Article 16 of Business Mortgage Proclamation No. 98/1998
[191] Article 7 of Property Mortgaged or Pledged with Banks Proclamation No. 97/ 1998.And Article 17 of Business Mortgage Proclamation No. 98/1998
[192] Article 83(1)of procc.1147/2019
[193] Article 83(1, a-d)

Content wise, the notification shall; indicate the collateral to be disposed[194], the grantor and secured creditor, [195]state the amount to be satisfied,[196] the manner of the intended disposition[197] and the time and place of disposition.[198]

Without doubt this notification helps interested parties to exercise redemption or other rights provided under the law. Notification is not, however, always required. Hence, under special circumstances, where the collateral; may perish before the end of ten working days after the creditor obtained possession of the collateral,[199] may decline in value speedily,[200] is of kind sold on recognized market,[201] or the cost of care and storage of the collateral is disproportionately large compared to its value.[202] Under these circumstances the creditor may dispose the collateral without giving notification. As an aspect of this disposition right, the creditor may chose the method, manner, time, place and other aspects of sale or other disposition lease or license, including whether to sale or otherwise to dispose off, lease or license collaterals individually, in groups or as a whole.[203] If the creditor opts to sell through public auction, he is mandatorily required to follow provisions of civil procedure code articles from 394 to 449.[204]

c. Strict Foreclosure

The third available private method in enforcing security right is strict foreclosure. Strict foreclosure can be defined as a private enforcement mechanism by which the secured creditor takes the collateral in full or partial satisfaction of the debt.[205] In our system, this enforcement mechanism is recognized as per article 85 of proclamation 1147/2019. To exercise this enforcement mechanism, the secured creditor has to submit its proposal, before the disposition of the collateral, to;[206] the grantor and debtor, any person that has notified the secured creditor its interest on the collateral, other secured creditor who has perfected its right or who was in possession of the collateral.

As we can understand from article 85(a) and (b), strict foreclosure could be full strict foreclosure or partial strict foreclosure. Full strict foreclosure means when the encumbered collateral is accepted in full satisfaction of the debt. On the other hand, partial strict foreclosure means when the creditor accepts the collateral in partial satisfaction of the debt. Thus, the secured creditor acquires the collateral in full satisfaction of the secured obligation unless he receives an objection in writing from any person entitled to receive such notice within fifteen working days

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[194] Article 83(2, b) of proc.1147/2019
[195] Article 83(2, a) of proc.1147/2019
[196] Article 83(2, c) of proc.1147/2019
[197] Article 83(2, d) of proc.1147/2019
[198] Article 83(2, e) of proc.1147/2019
[199] Article 83(5, a) of proc.1147/2019
[200] Article 83(5, b) of proc.1147/2019
[201] Article 83(5, c) of proc.1147/2019
[202] Article 83(5, d) of proc.1147/2019
[203] Article 82(2) of proc.1147/2019
[204] Article 82(4) of proc.1147/2019
[205] Asres: supra note 5, p.261
[206] Article 85(2, a-e) of proc.1147/2019

after the notice is sent to that person.[207] On the other hand, in case of proposal for acquisition of partial satisfaction of secured obligation, the secured creditor acquires the collateral only if he receives the affirmation consent of each addressee of notice in writing within 15 working days after notice is sent to that person.[208]

The virtue of strict foreclosure relative to private disposition is that it absolves the debtor from paying for deficiency if the value of the collateral does not cover the amount the debtor owes (in case of full strict foreclosure), while the creditor can avoid the commercial reasonableness standard of the disposition and filing suit for a deficiency judgment.[209]

[207] Article 85(4, a) of proc.1147/2019
[208] Article 85(4, b) of proc.1147/2019
[209] Catalin-Gabriel Stanescu, Self-Help, Private Debt Collection, and the Concomitant Risks, 135. Cited in Asres, supra note 5, p.265

CHAPTER FOUR

MORTGAGING RURAL LAND USE RIGHT BY PEASANTS IN ETHIOPIA; THE LAW AND PRACTICE IN WEST GOJJAM ZONE OF ANRS

Introduction

This chapter, as a main issue of this research work, analyzes the pertinent laws of mortgaging rural land by peasants and its practical trends in the study areas of ANRS. Thus, it assesses whether the existing rural land use right mortgage laws are sufficiently detail and enabling. In addition, it examines the practice of the mortgaging rural land use right by peasants in the study areas. Hence, whether all financial institutions which exist in the study areas are giving loan to the farmers by taking their rural land use right as collateral, is assessed. The problems which exists in regard to the gaps and contradictions in the pertinent laws, terms of rural land use mortgage contracts concluded between the lender and the grantor/debtor farmer, the rights and obligations of grantor/debtor peasant and creditor, as regulated in relevant laws, etc, of mortgaging rural land use rights by peasants are analyzed.

4.1. Constitutionality of Mortgaging Rural Land by Peasants

In the previous chapters, it is said that the FDRE constitution and federal rural land proclamation of the country have not clearly indicated as to the legality or otherwise of mortgaging rural land use right of peasants. Due to this there has been a debate among different stakeholders. But the general understanding was that mortgaging rural land by peasants is a legally prohibited and unconstitutional act. This understanding was even accepted by the House of the Federation (HoF). For instance, the House of the Federation, in one of its decision, states '….an agreement …for the transfer of the rural land as a payment to the debt amounts to the indirect sale and exchange of the rural land. This in turn is, based on article 40(3) and (4) FDRE constitution and other subsequent federal and ANRS land legislations enacted thereafter, a violation of the rule which states that land is a common property of the Nations, Nationalities and Peoples of Ethiopia and shall not be subject to sale or to other means of exchange and that peasants have the right of protection against eviction from their possession…' [210]

In the mid of these divergent arguments, the ANRS comes up with the explicit entitlement of peasant's right of mortgaging their rural land holding use right. However, still its constitutionality is questioned by some. For instance, Kefale, without further prescribing his reason, stated the issue as to whether ANRS has a constitutional mandate to issue a law that expands the rights of farmers beyond what is provided by the federal law is contentious.[211] On the other hand, though he does not regard such right of peasant as unconstitutional at all, Brightman claims the enactment of this rule by the regional legislator 'raises constitutionality questions'[212] based on (FDRE) constitutional legislation power of the regional states. In other words, his unconstitutionality argument is based on the lack of the state legislators' constitutional power to enact laws that grant mortgaging rural land rights to peasants, and considers such ANRS rural land laws as an intervention to the federal legislator power. He states;

> **"…***state legislative intervention is also prevalent in relation to defining the nature of rights in land of peasants and pastoralists….. The intervention in delimiting the bundle of rights in land has taken both the maximalist and reductionist approaches. In a sense it has taken both in the form of broadening and narrowing the bundle of rights from the one defined in the federal legislation. A good illustration about the maximalist approach is found in the 2017 Amhara State*

[210] House of Federation 4th parliament period, 5th year, 2nd regular session, date- Sene 18/2007 E.C, Kelebe Tesfa vs Ayelegn Derebew, published on volume 2 of decisions of House of Federation p.43 (translation mine)
[211] Kefale: supra note 16, p.42
[212] Brightman Gebremichael: supra note 13 P.164

law. There, the right to mortgage land is incorporated as the additional right, which is not in the federal and even in the previous Amhara State rural land law."[213]

As we can see the base for the argument is constitutional power division of the federal and state legislators as enshrined in articles 51(5), 52(2,d), 55(2,a)

However, many other lawyers and academicians accept the constitutionality of both mortgaging rural land use right of the peasants and that of the power of the regional legislative body to enact such right of the rural land holders. The bases of their argument are; firstly, the fact that the constitution prohibits sale and exchange of land by other means does not mean, it prohibits mortgaging.[214] Hence, in the absence of clear prohibition by the constitution and other pertinent rural land laws, mortgaging rural land should be taken as permissible right.[215] Secondly, the thing that is allowed to be mortgaged is only the use right of the rural land,[216] which in turn, will not defy the constitutionally prohibited acts of sale or exchange in one hand, and constitutional aim of protecting peasants right on land on the other hand.[217] Thirdly, the constitutionally granted power of the regions in administering rural land, as stipulated in article 52(2, d) of FDRE constitution, includes or enables the power to enact such rule.[218]

Among the two lines of arguments, the latter is, in the view of the researcher, logical and legally valid one. This is because, firstly, regarding the constitutionality of mortgaging rural land use right by peasant, there is no any constitutional provision that prohibit mortgaging rural land use right by peasants. As said it is only transactions of sale and exchange by other means of land that are clearly prohibited in the constitution. In absence of this explicit prohibition and guided by economic objectives aspired by the constitution[219] it should be taken as permissible act. In addition, the fact that those other rural land users, such as private investors[220], whose rights lesser in breadth and limited in time, are allowed to mortgage their right on the land imply the mortgage right of peasants right as they are the constitutionally privileged rural land right user,

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[213] Id p.378-379

[214] Ato Dessie Seyoum, Legal Drafting and Enactment Department Directorate Director at ANRS Justice Bureau, and member of drafting committee of proc.252/2017, interview made on 31/05/ 2022; Dr. Murado Abdo, instructor at Addis Ababa University, interview made on 09/06/ 2022; Dr. Habtamu Sitotaw, instructor at Bahir Dar University, Interview made on 11/06/2022 and Ato Adisu Molla, senior legal expert at ANRS Land Administration Bureau and member of drafting committee of proc.252/2017 interview made on 10/06/2022

[215] ibid

[216] ibid

[217] ibid

[218] DR.Muradu, supra note 214

[219] Under article 89 of FDRE constitution the economic objectives of the country is provided. Among others obliges the government(federal and regional) to formulate policies which ensure that all Ethiopians can benefit from the country's material resources, to improve the economic conditions, to protect and promote living standards of the working population of the country.

[220] Art.8(4) of proc.456/2005 and regional rural land laws of the country allow private investors to present his use right as collateral.

with the 'right to obtain land without payment and the protection against eviction from their possession'.[221]Furthermore, in case of default the mortgagor will not lose his holding right. Rather, as stipulated in article 19(3) proclamation 252/2017 the mortgagee or lender can only have a use right over the land until its credit is fully paid. Nevertheless, currently, proc.252/2017 is not the only legislation that recognizes this right of peasants. Rather, as indicated above, the federal government has enacted proc.1147/2019 with recognizing the right of collateralizing land use right.[222] The proclamation does not make any difference as the identity of the right holder, which can validly be taken as the other explicit recognition of the peasants' right to collateralize their rural land holding use right, in our legal system in general, breaking the silence of laws at the federal level.

Regarding the second issue of constitutionality, i.e. the constitutionality of enacting such right of peasants by ANRS legislator, I argue based on the constitutional provisions itself and other subordinate legislations. In articles 51 and 52 of FDRE constitution the powers of the federal and regional states are listed out. More specific to land, on the one hand article 51(5) provides the federal government has the power to enact laws for the utilization and conservation of land. And on the other hand article 52(2, d) of the same empower regional states to administer land and other natural resources in accordance with Federal laws. Besides proc.456/2005 under article 17(1) mandates the regional states to land administration and use laws. And rural land administration means the process whereby rural landholding right is provided, guarantee is secured, the rent and lease value of land is estimated, the land use plan is implemented, disputes arising between land users are resolved and obligations are enforced as well as data is distributed to users being collected and analyzed concerning the above indicated issues. As we can see this definition empowers the region to draft laws having the substance of entitling or recognizing landholding rights in line with the constitution the federal laws. Therefore, this ANRS law that allows peasants the right of mortgaging their rural land holding use right has a constitutional backing.

4.2 What Is Mortgaged?

In Ethiopia, the right to ownership of rural and urban land, as well as all natural resources, is exclusively vested in the State and in the peoples of Ethiopia.[223] And land is not subject to sale or to other means of exchange (the second sentence of same provision). Peasants and pastoralists are only granted holding right over the rural land, which means "the right of any peasant farmer or semi-pastoralist and pastoralist to use rural land for purpose of agriculture and natural

[221] FDRE constitution art.40(4)
[222] Article 2(27) consider land use right (unless prohibited by pertinent laws) as movable property. There are no any federal or regional land law, as far as the researcher endeavors, that explicitly prohibit mortgaging right of peasants. In addition the proclamation, in article 4, states its scope of application to movable property, including land use right.
[223] FDRE Constitution article 40(3)

resource development, lease and bequeath to members of his family or other lawful heirs, and includes the right to acquire property produced on his Land thereon by his labor or capital and to sale, exchange and bequeath same."[224] Therefore, any rural land holder can enjoy rights over his holding in line with such defined schemes and without contravening other restrictions.

In line with this, the ANRS rural land proc. 252/2017, under article 19(1), allows any rural landholder to mortgage his using right to financial institution which has been given recognition by the country's National Bank for not more than 30 years. This provision entails, firstly, the mortgagor can be any rural holder. This includes the peasants, pastoralists and investors. And, secondly, it is only a person who has a holding right that may collateralize the rural land. In other words, those who have right less than holding right (e.g. use right) cannot have a right to collateralize rural land. Thirdly, the right that is mortgaged is that of the use right of the land. Hence, it is not the holding right of the mortgagor that is encumbered. Such is also affirmed under proc.1147/2019 by explicitly recognizing holder's right to secure his debt with his land use right. According to this proclamation land use right is considered as a movable property. It under article 2(27) define movable property as;

> inventories, agricultural products, incorporeal assets, corporeal assets, ***the right to use land*** unless prohibited by pertinent laws, properties excluding land, house, and building, a security right under a hire-purchase agreement, security trust deed, trust receipt, commercial consignment, mortgage of a business, sale with ownership reserved, sale with right of redemption, security rights in certificated securities, and security rights in warehouse receipts (emphasis added).[225]

As a definition, land use right means a right given to a person by authorities through the issuance of a land holding certificate or that created by a contract agreement between the owner of the land holding certificate and other person.[226]

In general, it should be noted that, the law only allows the farmer to mortgage his use right. This in turn, has, as explained in subsequently, a profounding effect to the rights of the lender and the borrower.

4.3 Period of Security Right

The maximum period to which a contract mortgage of rural land use could stay valid is clearly delimited. Sub article 1 of article 19 of the proclamation permits such mortgage right for not more than 30 years. The period of 30 years is made on purpose to protect the interest of the

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[224] Proc. 456/2005, article 2(4)

[225] Article 2(27) of proc.1147/2019, this entails proc.1147/2019 is the other (federal) law that govern mortgaging rural land use right by peasants include the.

[226] Article 2(2.12) of Codification, Valuation and Registration of Movable Properties as Collateral for Credit, Directive No. 186/2020

farmers which otherwise may affect the life of, especially, peasants and pastoralists, as land to them is considered a means of livelihood, thereby any act in relation to their holding have a direct effect in their survivorship.[227] Accordingly, this prescribed period of time on one hand serves the development aim of the farmers, and on the others protects them from potential exploitation of their rights by the lenders.[228] So by limiting the period of contract the legislator aims at striking a balance in between the two unequally bargaining parties (financially unaware peasant and the financial institutions).

There exists, however, a criticism about the fairness of this legally prescribed period of time. Some say is very long, to probably affect the interests of the mortgaging land holder. The reasons, they claim are, firstly, a farmer who mortgaged his holding use right for a period of 30 years, and further extension, may pass away without enjoying his right on the land due to the encumbrance.[229] Furthermore, due to the low level of awareness on the part of the farmers, the financial institutions may take advantage in the process of the dealings; the ultimate effect could amounts to losing of enjoyment of use right over the land.

The prevailing practice of mortgaging rural land use right contracts concluded between ACSI and peasants is made for a maximum period of 5 years.[230] At the beginning of the trend, it was even lesser, a maximum of three years. This period of the contract is mostly fixed by the lending institution.[231] This does not mean, however, the period is an arbitrarily established trend, though not fully reckoned. Rather, article 6(3) of NBE Directives No.MFI/28/2016 provides the maximum repayment period of a loan extended by microfinance institution shall be;

- 15 years for housing loan and[232],
- 5 years for all other loans and advances[233]

Arguably, this period of mortgage contract adopted in practice is short, to create a problem on the debtor farmer and the lender, ACSI. In general, it is said, 'short term loans pose a serious problem for MFIs, which provide agricultural loans like for purchase of oxen for traction, dairy cattle and so forth.'[234] It increases administrative cost of MFIs as it requires significant human

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[227] Ato Adissu Molla, supra note, 214
[228] ibid
[229] Dr. Habtamu Sitotaw, supra note 214
[230] Rural land use right mortgage contractual agreements made between ACSI and different debtor farmers in the study area. For instance, agreement with farmer Alemayehu Engida on the date of 23/10/2014 E.C, with farmer Tegegn Adimassu concluded on 02/9/2014 E.C, of ACSI Finoteselam Branch in Jabi Tehinan Wereda. Also with farmer Engidaw Getie and Enyew Werku, concluded on the date of 22/04/2014 E.C and 13/05/2014 E.C respectively with ACSI North Mecha Branch in North Mecha Wereda. And mortgage loan contract between farmer Shitaye Liyew and ACSI at Burie branch made on 28/10/2014 E.C
[231] Ato Esubalew Mekonen, Manager of ACSI Burie Branch
[232] Article 6.3(1) of NBE Limit on Loans, Repayment Period and Provisioning Requirement Directives No. MFI/28/2016
[233] Article 6.3(2) of NBE Limit on Loans, Repayment Period and Provisioning Requirement Directives No. MFI/28/2016
[234] Kefale: supra note 16, p.48

resource and capital to recollect such loans each season.[235] From the perspective of farmers, short term loans force them to repay their loan before their investment began to reap fruits.[236] The pressure to repay in a single year encourages borrowers to focus on micro-economic activities that bring immediate returns and discourages investments that have longer gestation period and higher capital requirements such as agricultural and environmental conservation activities.[237] Additionally, it limits the possibility of getting higher amount of loan money. In other words, I believe, the longer the period of the contract the higher the loan money the farmer potentially would access, as such longer period would enable the debtor farmer in making stable and informed investment.

4.4 Financial Institutions

The law limits the mortgagee of rural land use rights to be only financial institutions recognized by the National Bank of Ethiopia.[238] Based on the definition of Banking (Amendment) Proclamation No.1159/2019 financial institutions are insurance company, bank, micro finance institution, a capital good finance company, a reinsurer, micro insurance provider, a postal savings, money transfer institution, a digital financial service provider, or such other similar institution as determined by the National Bank.[239] On the other hand, for the purpose of collateralizing movable property (including land use right) Codification, Valuation and Registration of Movable Properties as Collateral for Credit Directive No. 186 /2020 defines it means banks and microfinance institutions.[240] Accordingly, the latter definition is the guiding for the purpose of this research work.

Thus, by explicitly limiting the identity of potential lenders, the law prohibits farmers to access credit from individuals through mortgaging their rural land use right. Questions could be asked as to why the law only restricts financial institutions, which are even need to be institutions that are recognized by NBE, as lender, with the exclusion of other potential lenders. Above all, its validity, in light of achieving the development goal, which the proclamation itself aspires, and farmers' potential of accessing financial credit, can be criticized based on the following grounds. Firstly, given the availability of small number and far distant branch offices of financial institutions in region it may limit the accessibility of loan to them.[241] In the region, people in the rural areas are expected to travel a distance ranging from five to twenty kilometers to access

[235] ibid
[236] ibid
[237] ibid
[238] Article 19(1) of proc.252/2017
[239] Banking (Amendment) Proclamation No.1159/2019 article 2(9)
[240] Article 2(2.6) of Codification, Valuation And Registration Of Movable Properties As Collateral For Credit Directive No. 186 /2020
[241] Let alone banks, 'the number of microfinance operators in the ANRS is also extremely limited' (Kefale,supra note 16, p.46).

microfinance branches.[242] In terms of cost people spend 10 up to 30 Birr for transport in the endeavor to access branches.[243] In the study areas, there are no financial institution at kebele level, except that of satellite branches of ACSI, which only has a task of facilitating the loan activity of the institution[244]and having no power of giving loan through taking rural land use right of a peasants. This unavailability will no doubt limit the accessibility of loan. If, on the other hand, peasants were allowed to borrow money from any person, they may access the loan money they want, at least, from the individual lenders which could be their neighbors, with less cost and flexible term of agreements.

Secondly, the procedural bureaucracies in the financial institution may discourage the landholders in accessing credit through collateralizing their land use right. As pointed latter, currently, no financial institutions in the study area are giving loan to peasants, through taking land use right as a security, except that of ACSI. The loan system in this lonely financial institution by itself is, even, somehow bureaucratic. Any farmer who wishes or requests to get a loan from the financial institution cannot get it out rightly.[245] Rather, there are time taking and costly procedures and analysis of different facts regarding the applicant and the intended project he proposes to do with the loan he requested.[246] Thirdly, it let's farmers to mandatorily comply to the higher interest rate of the borrowing institution, as they cannot negotiate with the institution's fixed rate of interest, i.e. 17%.[247]

On the other hand, some argue that this restriction of the mortgagee to be only the financial institution is a valid articulation. This is because, if the farmers are allowed to borrow money from any person, it, against the intention of constitution (which considers land as means of survival to peasants and pastoralists of the country), could result in the abuse of their right in the land.[248] Also, they claim, it could help in serving accountability, as the government could easily control the agreement between the two rather than arrangements between the farmer and individuals.[249] However, this could be counter argued that, if the reason to make the arrangement was to protect the interest of the farmer's on the land, it could have been made on the other mechanisms. For instance, it could be controlled through registration and authentication formalities system.

Though the law allows any NBE recognized financial institutions to give loan to farmers by taking their use right of rural land as a mortgage, the practice, however, shows less interest on

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[242] Tewabe Aysheshim, Banking the unbanked rural population of Amhara region, (2012), as noted in Kefale, supra note 16, p.48
[243] ibid
[244] Ato Mekuriyaw Enkuhone, credit officer at ACSI Finoteselam Branch
[245] ibid
[246] ibid
[247] The observation of contractual agreements between ACSI and different borrowing farmers cited in supra note 227 and others
[248] Dr. Muradu Abdo, Dr. Habtamu Sitotaw, Ato Dessie Seyoum, Ato Addisu Moll; supra note 214
[249] ibid

the part of those institutions to use the opportunity. In the study area, though there exists more than fourteen financial institutions, the assessment shows it is only ACSI that gives loan to peasants through recognizing mortgaging use right of a peasants. The reasons, which these financial institutions provide for not giving loan by taking rural land use right of a farmers as a security are summarized as follows;[250]

a) ***Lack of the awareness*:** many of the personnel of the financial institutions do not know the existence of the legal rule that provide the right of peasants to mortgage their use right rural land holdings. They consider that mortgaging rural land use right by peasants is a legally prohibited act. Accordingly, they perceive, emanating from the land tenure system of the country that prohibits sale and exchange, mortgaging rural land use right is unconstitutional act.
b) ***Fear of risk in getting the credit back*:** also there are some who think giving loan to peasants by securing it through their rural land use right would be risky business. They claim, due to the traditional and backward nature of farming system of the peasants giving loan would be a risk, as claiming it back would be a challenging process. However, this claim is non experimented one, as they have never tried the practice of giving loan through mortgaging rural land use right of peasants, at least since the enactment of the law.
c) ***Absence NBE directive regarding mortgaging rural land by peasants:*** others give the onus of the problem to the gap between the law and the practice to the absence of the special directive enacted by the NBE to allow giving loan through taking rural land use right as mortgage. Thus, in the absence of the clear directive and guideline by the NBE, they say, giving loan through encumbering rural land use right of a peasants would be illegal. However, this is again unwarranted claim. This is because, as indicated in the previous chapter the NBE has enacted Codification, Valuation And Registration Of Movable Properties As Collateral For Credit Directive No. 186/2020 and Operationalization of Movable Collateral Registry Directive No.MCR/001/2020 that directly or indirectly govern rural land use right mortgage.
d) ***Lack of capacity of the institutions*:** some financial institutions only have a limited braches and capacities to let peasants' access credit from them. In addition, due to some legal and procedural arrangements, like Development Bank of Ethiopia, loan access has some special criteria. For instance, having business license is a mandatory to get a loan from such institutions and arrangements.

With the aim of solving this prevailing gap the NBE has been recommending banks to engage in participatory credit system.[251] It is said banks are currently giving loan to some specific borrowers, lacking diversification and participatory to the rural dwellers.[252] Therefore, it recommended that they should rectify this trend and thereby should make the credit system

[250] The researcher distributed questionnaires to the Banks and Microfinance institutions which are trading their business in the three study areas. The number of these FI counted more than 20.
[251] Yinager Dessie (Dr.), Governor of NBE, Reporter News Paper; August 17, 2022
[252] ibid

inclusive of other economic sectors.[253] Despite off this, as said, none of the existing banks or other MFI are giving loan to peasants.

4.5 Creation of Rural Land Use Right Mortgage

As repeatedly indicated article 19(1) of proc.252/2017 states 'any rural landholder may mortgage his using right to financial institution which has given recognition by the country's National Bank for not more than 30 years permitted by this proclamation.' The wording of this article seems to entail that mortgaging of rural land use right can only be created by contract. Such is clearer in the subsequent sub articles of the same. For instance, sub 4 of the same article provides the necessity of registration of the contract of mortgage. Based on these explicit indication of the rules it can be concluded that security right over peasants' rural land use right can only emanate from clear contractual mortgage agreement. Other sources of security right, such legal and judicial or arbitral judgment cannot create mortgage of rural land use right of peasant. This is because, in addition to the above indicted reason, firstly, of the clear prohibition in the law. For instance, regarding the possibility of creating judicial mortgage on peasants rural land use right, article 56 of proc.252/2017 states any rural land holder shall not be displaced from his holding by the execution order of the court judgment or his holding cannot be transferred for the payment of debt. This clearly shows the impossibility to create security right over the land use right of the peasant. Secondly, creating legal or judicial mortgage or security right would be against the very purpose of the proclamation. As stated in the first paragraph of the preamble of proc.252/2017 one of the reasons of enacting such law is to better expand the rural land holding rights of farmers with the aim of enhancing their economic and other interests.[254]

The other important point that needs be noted is the type of obligation that could be secured by land use right of peasant. The proclamation clearly specified loan debt as the only obligation that can be secured by such use right of peasant. The Amharic version better clearly indicates it. The title itself refers "በሜት የማጠቀም መብትን የብድር ዋስትና አድርጎ ስለማስያዝ", which literarily be translated as collateralizing land use right as a security of loan.[255] Furthermore, sub provision of the article and article 7 of NBE directive 02/2020 states about the pledging of land use right for the purpose of only securing credit or loan to the use right holder. In general, it could concluded that security right over rural land use right of peasant can only be created by express mortgage contract, and the only obligation that can be secured by it is credit or loan money debt of the borrower.

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[253] ibid

[254] In addition, Ato Dessie and Ato Addisu, supra note 214, states the sole aim in granting such right is to guarantee better right to farmers than burdening him.

[255] Accordingly, it can be understood as an exception to article 5 of proc.1147/2019. Under this provision a security right could secure obligations of any type.

4.6 Lending Procedure

The provision of loans to the peasants by ACSI goes through rigorous steps. Normally, the farmers who are seeking for credits apply with the prescribed 'loan request form' accompanied by their proposed project with which they plan to invest the credit they would get. The process involves contact between the ACSI and the applicant for loan, during which the lender would conduct a thorough investigation on the loan applicant and his farming or the project for which the credit funds would be utilized. These procedures, as inferred from the interview data from respective credit officers of ACSI and grantor farmers and physical observations of rural land mortgage contracts can be generalized as follows;

1. **Loan Request by the Farmer:** in the process of lending, it is normal practice that a request be put forward by an applicant. In his request the farmer describes the amount of the loan money he asks, the land he proposes to mortgage, and others. The lending institution officials take into consideration certain factors such as; a) performance of such farmer in the operations of their farming; b) the size of their farm undertakings; c) the nature of their farming operations; e) the personal integrity of the farmer, mostly assisted by respective government officials and the people living with the applicant farmer.
2. **Interview:** the interview between the loan officer and the applicant farmer is conducted in lending procedure. The loan interview provides an opportunity for the lender's loan officer to assess: a) the farmer's character and sincerity of purpose or project; b) applicant farmer's plan in utilization of the credit; c) actual amount of credit or loan sufficient for the project, which the farmer proposed; d) nature of applicant's farming operation;
3. **Site Visit by ACSI Officials**: the ACSI loan officers pay visit to the farming premises and rural land of the loan applicant farmer, which he proposed to collateralize. This is imperative because the loan applicant farmer may not supply the necessary information upon which a decision will be taken. The visit helps: a) To verify the claims of the farmer; b) To assess personally the nature of farmer's agricultural activity; c) To assess the location and valuation of land proposed for mortgage; d) Gather supplementary information for decision on the loan request.
4. **Valuation of the Land:** after these above provided procedures the land which the loan requesting farmer proposes to give as a security will be valued based on its fertility and size and also the cultivable capacity based on the yield production of the previous years. For valuation purpose, the type of products to be produced on the land is assessed. Then the amount of loan to be given will be determined.
5. **Conclusion of mortgage contract**; after going through the above indicated steps and preserving the legally binding requirements, finally, the contractual security agreement is made.

4.7 Validity Requirements of Creating Rural Land Use Right Mortgage

To validly create security right over rural land use right, the respective laws provide validity requirements that must be fulfilled. These include the requirements of written form, registration/authentication, etc. Here in under each of these requirements are discussed, in relation with the prevailing practice.

4.7.1 Written form

Article 19 of proc.252/2017 does not explicitly mention written form as a validity requirement. The mandatory requirement written form of loan security agreement can be inferred from the following legal analysis. Primarily, article 4(5) of proc.1147/2019 mandatorily requires a security agreement to be evidenced by written agreement. In addition, article 19(4) of proc.252/2017, states necessity of registration of contract of mortgage by the lender institution and the attachment of the copy of the mortgage agreement to the file of the mortgagor in Wereda land administration office. If so, registration can be accomplished to something which is produced in written document, we can indirectly infer that the law assumes written formality as a validity requirement. More importantly, the word 'copy' is normally used to a thing that is written. Furthermore, since the rules of the civil code, which necessarily require the written formality, do not contradict with this provision of the proclamation and since the proclamation is silent on the matter,[256] referring to them to fill this gap would be valid. Summarily, written formality is a mandatory requirement for creating security right over rural land use right. Failure to meet such mandatory requirement, as we can understand from cumulative readings of these above provisions of laws, shall result invalidity.

In practice, every rural land use right security agreement created between ACSI and different peasants is made in written form. The lending institution (ACSI) has prepared a standard contract form that contains the substance of the agreements. It, among others, has the title of the contract ('ACSI security contract'), the identity of contracting parties, the size and location of rural land encumbered by the mortgage, the amount of loan secured, the period of the contract, and rights and obligations of the mortgagor and mortgagee.[257]

4.7.2 Registration

Registration is the other validity requirement of rural land use right mortgage. However, there exist two separate laws that provide with the mandate of registration with different body. On the one hand, proclamation (252/2017) under sub article 4 of article 19 provides any contract of

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[256] Proclamation No.252/2017 article 59(2) only prohibit the applicability of any law, regulation, directive or customary practice on matters covered by this proclamation.

[257] Observation of the contractual agreements made between ACSI and farmers in the study area, as cited in supra note 227.

mortgage related to rural land use right shall be registered by the lender institution; the copy of this mortgage contract should be attached with the landholder's personal file being submitted to the wereda rural land administration and use office where the land is found. On the other hand, article 7.3 of NBE directive 02/2020 stipulates land use right that is being offered as collateral for credit shall be registered in the Movable Collateral Registry by the secured creditor using: tax identification number or equivalent of the person who owns the land holding certificate; and; by describing the unique parcel identification number of the land holding certificate on the field provided by the Movable Collateral Registry. Accordingly, looking at these provisions, one can validly raise questions such as; whether these provisions of the two distinct laws are contradictory or not? If they are contradictory, which law should be the prevailing, and thereby identify the institution tasked with the duty of registration? If they are not contradictory, how can they be implemented?

Regarding the first issue, it can be seen that the two laws provide different body of registration of security right over the land use right of peasant. Based on the current legal and factual capability of the country, I believe, upholding the two registration system would be acceptable and useful for the efficiency of this much needed economic empowering source. This is because; legally, the regional state can enact such rule of registration as an aspect of constitutional power of land administration. In addition, as a temporary remedy to expected gap, in implementing Collateral Registry system in the latter law, due to the prevailing technological capacity in the country, enforcing the system of manual registration by the lender institution have practical relevance. In the long run, however, implementing the Collateral Registry system has economic significance. Furthermore, I don't generally think that the two laws, in strict sense contradict each other. This is because, registration by the lending institution, as stipulated in the regional law, will not prevent registration by the CRO. Hence, the two laws could side by side be implemented, taking above all, the prevailing factual legal and technological scenarios in the country.

The other critical issue with regard to registration of security right over land use right is the lack of explicit rule about effect of failure to register it. Such gap could reasonably create divergence of understandings. In other words, on the one hand it could be argued that absence of such registration would make the mortgage contract invalid and non-existent. On the other hand, it could be said that lack of registration should not make the mortgage invalid to all cases. Rather, it must be binding to the contracting parties, as the purpose of registration is to notify the creation of encumbrance on it. However, third parties should not be bound by unregistered mortgage.

The second argument seems logical as it reasonable serve the interest of the contracting parties, while protecting the interest of innocent third parties. This argument could also be supported based on analogical application the provision of the proclamation regarding mortgage of rural land by investors. In article 24 (5) it states '…unless the agreement document is submitted to and be registered by the wereda rural land administration and use office where the land is found, it is impossible to be raised as objection against third parties.' This provision does not say

unregistered mortgage would be invalid at all. Rather, it only limits its binding effect in regard to third parties. This rule can help in understanding the intention of the legislator about rural land mortgage in general and rural land mortgage by peasants in particular. As there would be no reason to make a difference between the investors and peasants, the effect of unregistered mortgage of rural land mortgage by peasants should be similar to that of the rural land mortgage by investors.

4.7.3 Secondary Level Land Holding Certificate

The other important requirement the law necessitates for the enjoyment of right of mortgage of rural land use right or valid conclusion of mortgage contract is the need to hold secondary level of certificate.[258] Concept wise, landholding certificate is an evidence of the legally protected rights of the landholder.[259] It is also defined as a certificate issued by authorities, identified by unique parcel identification number, for the use of a certain plot of land.[260] It, among others contains land list, the name and photograph of rural landholder, the main rights and obligations of the landholder.[261] Until now, rural land holders in Ethiopia are given two types of land holding certificates. These are first level of land certificates or usually named as green book and secondary level land certificate. First level land certificates only contained limited information on parcel size and landholder details, lacking details on land boundaries.[262] On the other hand, second-level land certification is a systematic approach to the registration of rural land parcels, which collates both textual and spatial data on landowners and their land holdings.[263] Second-level land certification ensures that, through the demarcation process, the details of landholders (textual data) as well as their boundary parcels (spatial data) were verified and documented.[264] We can understand that it highly serves for ensuring tenure security. Thus, requiring secondary level of certificate as a precondition to exercise the mortgage right of a land holder is vital.

For the purpose of achieving these and other benefits of secondary level of land certificate, Ethiopian government and other concerned bodies have been continually performing important activities. For instance, the UK Aid-funded Land Investment for transformation Programme (LIFT) works with the Government of Ethiopia to deliver Second Level Land Certificates to smallholder farmers and to create a national database to manage and update second level land certificates data and land related transactions, the rural Land Administration System. Currently,

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[258] Regulation No.159/2018 article 9(3)
[259] Proc.252/2017 article 35(2)
[260] Article 2(2.11) of Codification, Valuation and Registration of Movable Properties as Collateral for Credit, Directive No. 186 /2020
[261] Cumulative reading of provisions of article 35 of Proc.252/2017
[262] INCLUSIVE LAND REGISTRATION AND THE CRITICAL ROLE OF SOCIAL DEVELOPMENT OFFICERS, A handbook for program design and implementation, p.4
[263] Id, p.3
[264] Id p.4

2.1 million peasants of ANRS have been given such secondary level land certificate.[265] From these, about 12000 farmers are able to get loan over 602 million birr from different lending institutions.[266]

Assessment of the practice in the study areas also shows that every loan agreement concluded between ACSI and different debtor peasants are based secondary level of certificate. In other words, the institution has been giving loan only to those farmers who have the secondary level of rural land certificate. The actual observation of contracts of mortgage concluded between ACSI and peasants shows the attachment or annexation of this secondary level of landholding certificate with such contractual mortgage loan agreement.

4.8 Effects of Rural Land Use Right Mortgage

Unlike that of the civil code of Ethiopia, the rural land laws of ANRS does not clearly and exhaustively provide the effects of mortgaging rural land use right by peasants. Rather, though not detail enough, it is under the movable collateral laws of the country that the right and duties, or effects in general, of the debtor and the creditor of rural land use right mortgage is regulated. The subsequent discussions devotes to the assessment of the effects of establishment of security right on rural land use right of rural land holding peasant, in light of the practices of the study area.

4.8.1 Property to Which Mortgage of Rural Land Right Extend

As discussed above, a mortgage of rural land by peasants encumbers only the use right of the land. This arrangement is coherent to the tenure system of the country, as FDRE constitution state land and natural resources are owned by the government. Therefore, the mortgagee, in case there happens default, could only exercise his right to the level of use right of land. Questions, however, could be raised whether the mortgagees' right would extend to the properties or claims which the mortgagor has (in relation to the use right mortgaged), by mere fact of their connection to the rural land/right, such as, intrinsic elements and accessories, buildings and improvements, other entitlements or claims accrued due to the contractual or legal arrangements. Based on the pertinent laws, under the following section, an attempt is made to answer this enquiry.

Intrinsic Elements and Accessories of Rural Land

Intrinsic elements, under the civil code, are;[267] anything which by custom regarded as forming part of a thing; and anything which is materially united to things and cannot be detached there from without destroying or damaging such thing. Mandatorily, trees and crops are intrinsic

[265] ANRS Land Bureau, accessed from Telegram social website of ANRS Justice Bureau on the date of august 04/2022
[266] ibid
[267] Civil code article 1132(1) and (2)

elements of the land, until they are separated or unless they are subject to contracts made for their separation from the land or implying such separation.[268] On the other hand, under article 2(25) of proc.1147/2019 almost similar definition is provided to mass or product. It defined as "corporeal assets that are so physically associated or united with other corporeal assets that they have lost their separate identity."

As provided in article 1136, accessories are anything which the possessor or owner of the thing has permanently destined for the use of such thing. Instances of such property could be '*tractor, or a pair of oxen, or a horse put by the owner/possessor of a land for the use of his land is considered as accessory. Similarly, a plot of land adjacent to a certain farm that is intended for the use of the farm or a private water well outside a certain farm and which the owner/possessor of the farm has destined for the use of such farm as a source of water is considered as an accessory to the principal thing, the farm.'*[269]

Accessory to movable to the case of proc.1147/2019 means a corporeal asset that despite the fact that it is physically affixed to an immovable is treated as movable property.[270]There seems no difference between the two definitions regarding the separate nature of it. And their character of affixation or destination is another common element in the two definitions.

Coming back to the question of whether the mortgagee of rural land use right of peasant would be entitled to exercise his right over these two sets properties, in principle, the answer is positive. This is because, primarily, as we can infer from the definitions provided, they are considered as part of the land (use right) in the eyes of the law, unless contrary agreements that establishes a separate security agreement. In particular, regarding intrinsic elements or mass or product, article 8 of proclamation provides that a security right in a corporeal asset that is commingled in a mass of an asset of the same kind or product extends to the mass or product. Additionally, article 14(3) of the same (proc.1147/2019) also provides that the effectiveness of a security right over a mass or product by mere fact of effectiveness of the corporeal asset, without further act. About accessories, cumulative readings of articles of 3(3), 4(4), 78 and other relevant provisions reveal that principally a security right over a corporeal asset also encumbers accessories. However, they can also be subjected to a separate a security right.

Secondly, analogical reference of rules governing mortgage of rural land use right by private investors supports such standing. The rules in relation to rural land use mortgage by the private investors provide similar to this above general principle. Hence, under article 24(2) it states 'unless there is a contrary provision in the contract to this, the property produced on the land is presumed as it is held with the land using right mortgaged. But (the second statement of the same

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[268] Civil code article 1133
[269] Fassil Alemayehu: Law of Property, Teaching Material; Prepared under the Sponsorship of the Justice and Legal System Research Institute, 2009, p.23
[270] Article 2(1.1) of proc.1147/2019

states) when the property developed on the land is specifically mortgaged, the land using right as well as the land on where the developed property is located may not be presumed as held with. From this provision, we can understand that, in principle, mortgage of rural land use right is also presumed to encumber the property produced on the land. There are, however, two exceptions to this principle. These are, firstly, if the parties to the contract of mortgage agree not to hold other property by the mortgage. In other words, if the mortgagor and mortgagee agree that the mortgage would not encumber other property or rights than the use right over the land, the mortgagee may not exercise his claims of mortgage over such property. Secondly, where the property developed could be mortgaged separately, his land use right as well as the land to which this developed property situate shall not be considered as encumbered by mortgage.[271] These mortgage legal arrangements stipulated to private investing mortgagor help in analogical applications to peasant mortgagors of rural land use right.

Therefore, it can validly be concluded that, mortgage of rural land use right of peasants also encumbers the intrinsic elements and accessories, unless these properties are subjected to contractual arrangement to their separation or unless such properties are mortgaged separately to that of the land use right of a holder.

The prevailing practice also goes in line with this understanding. The standard contract form and actual contracts concluded between ACSI and the farmers states '…in case where the borrower fail to pay debts, or fails to comply with the contractual duties, the lender, by only giving the 30 day prior notice to the debtor(grantor) and the wereda land administration office, and without waiting the due date of the period of the contract, may take the property on the land…'[272] We can validly infer from this contractual term that the term 'property on the land' is broad to include not only the intrinsic and accessories, but also other property that are associated on the land.

Right over Proceeds

Proceeds means whatever is received in respect of the collateral including what is received as a result of sale or other disposition or collection, lease or license of the collaterals, fruits, insurance proceeds, claims arising from defects in, damage to or loss of collateral, and proceeds of proceeds.[273] The recognition of the right of the secured creditor in the proceeds of the collateral

[271] It should be noted here that the wording between the Amharic and English version of the second paragraph of article 24(2) have slight differences. While the Amharic version stipulates inapplicability of mortgage over the property that could separately be mortgaged, the English version says "… When the property developed on the land is **specifically mortgaged** the land using right as well as the land on where the developed property is located may not be presumed as held with. As we clearly see from the wordings of the two versions, the later refers the property which is already mortgaged. However, the former (Amharic) version either mortgaged or non-mortgaged property, which, if need be, could be encumbered by mortgage. No doubt, in case of such disparities between the two version, the Amharic version would be governing one.

[272] Article 8 of the standard mortgage contract form of ACSI and contracts concluded between the bank and different farmers which I was able to observe.

[273] Article 2(36) of proc.1147/2019

is an important component of enhancing access to financing as secured creditors, in making lending decisions, take into account the risk of loss of the collateral without remedy, once the collateral is disposed of. Thus, the definition of proceeds is broad to include all the incomes in relation to the collateral movable and any claims arising from it. For instance, it includes income from; rent of the land use right, improvements in the land; and compensation or damages. Let's discuss each.

1) Rent/lease

Article 7.4.2 of Codification, Valuation and Registration of Movable Properties as Collateral for Credit, Directive No. 02/2020 provides the permissibility of transferring use rights of mortgaged land under exceptional circumstances. It states the debtor/grantor "*shall not transfer the land use right, being pledged for credit, to a third party without the consent of the secured creditor. This shall be clearly stated in the credit contract.*" Accordingly, a debtor peasant may transfer his use right of the mortgaged land on two grounds. These are, firstly, upon the consent of the mortgagee or secured creditor. Secondly, in cases where the credit contract does not clearly indicate for the prohibition of such transfer right of the debtor peasant. Thus, rent/lease, as a component of transfer right, can be exercised only under these provided grounds.

As discussed later, the practice of mortgaging rural land use right by the farmers results an attachment of the rural land mortgaged by the wereda rural land administration. Effectually, it prohibits the land holders right to transfer the rural land (the use right of which is mortgaged), in whatever modalities. Provided, however, that the lender consents for the transfer of the use right of the rural land mortgaged or the credit contract fails to clearly prohibits the transfer, and given the intension of the legislator were not the one that is prevailing the practice[274], it is imperative to assess the entitlement of the mortgagee or lender to the rent incomes of the land use right mortgaged. As far as the above cited laws concerned, the creditor can extend his security right to rent income of the land use right mortgaged under the two scenarios. Firstly, where the debtor defaults thereby the creditor dispose it through lease. Secondly, where the debtor has defaulted after he has rented or leased the land use right encumbered, and given the rent prices are not already paid to the defaulter.

2) Compensation or Damages

Compensation here is to mean the payments in case of expropriation of the land mortgaged and other damages that the land holder is entitled to be paid, based on different laws of the country.

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[274]Ato Dessie Seyoum and Ato Adissu Molla, supra note 214, claims the purpose of the law is to widen the rights of peasants over their rural land holding so as to enable them increase their income. This argument is supported by the preamble of the proclamation itself. It states "… , it is found necessary the farmers as well as semi-pastoralists better expand their right on using rural land so as to accommodate their living standard with the economical, social and political development where the region as well as the country has reached."(first paragraph of proclamation 252/2017).

Obviously, expropriation results the termination of the holding rights of a peasant over his rural land. Thus if the pertinent government body[275] decides to expropriate the mortgaged rural land of a peasant, consequentially, it would affect the interest of the mortgagee, as it can no longer secures its claim by the expropriated land use right. So there must be a mechanism that protects the interest of the lender or mortgagee. One of these should be letting the mortgagee to exercise its claims over the compensation paid to expropriated mortgagor. Hence, the mortgagee should be paid, in priority to others, its claims from the compensation payments of the expropriated land. The same should also apply in regarding other damages to mortgaged land holding of a peasant. In this regard, the researcher finds, though tried his best, no practical case that shows the trend about the extension of mortgage to the compensation payments due to the expropriated mortgagor.

3) Improvements over the land

Improvements on rural land can be understood as improvements made to the land like clearing, leveling and terracing the land, including the costs of water reservoir and other agricultural infrastructure and other decoration works.[276] The physical observations of contractual agreements made between ACSI and different farmers in the study area supports this argument. As indicated in above, the contractual agreement states the lender's right to exercise its security right over properties that are associated with the land, of which use right is mortgaged.

4.8.2 Effect of Rural Land Mortgage on the Rights Mortgagor

As discussed in chapter two, peasants are legally entitled with different land rights over their holding. These includes rights of transferring of land to third parties via succession or donation, exchanging by other rural land as well as renting, mortgaging to lending organizations, being served by a land or any kind of wealth produced on land or both.[277] Reasonably, study of the laws and practice of mortgaging rural land use right of peasant is expected to include analyses of as to the existence of any possible limitation of the enjoyment of these rights is expected. Accordingly, I assessed the issue as follows. To begin with, article 19 of proc.252/2017, surprisingly, does not provide the effect of mortgage (before default) on the land rights of mortgagor, which the land laws of the country in general and the regional laws have guaranteed. On the other hand, the rules under NBE Directive No.02/2020 and the practice, contrary to

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[275] Under article 5(1) of proc.1161/2019 it is provided that the appropriate Federal Authority, or a Regional, Addis Ababa, Dire Dawa cabinet shall decide on the basis of an approved land use plan; or master plan; or structural plan whether the expropriated land directly or indirectly brings better development and is beneficial to the public. Furthermore, based on sub article 5 of the same, a Woreda or City Administration may decide to expropriation land for public purpose, if delegated by a Regional፣ Addis Ababa, Dire Dawa cabinet.

[276] Expropriation of Land holdings for Public Purposes, Payments of Compensation and Resettlement Proclamation No. 1161/2019, under article 2(9), defines "Permanent Improvement" as improvements made permanently to the land like clearing, leveling and terracing the land, including the costs of water reservoir and other agricultural infrastructure and urban courtyard floors and other decoration works. So aside from the permanency spectrum improvements on the land could be defined in this provided way.

[277] Article 8(2) of Proc. 252/2017

article 5 of proc.1147/2019 and the purposes of pertinent rural land laws of the federal and regional states, prohibits transfer rights of granting rural land holder.

NBE Directive No.02/2020 article 7.4 stipulates the obligations of grantor of rural land use right mortgage. Among these duties one is the prohibition to transfer the land use right encumbered by mortgage. It states, the debtor or grantor;

> "*Shall not transfer the land use right, being pledged for credit, to a third party without the consent of the secured creditor. This shall be clearly stated in the credit contract;"*[278]

As provided in article *7.4.3,* if the grantor fails to comply with his duty;

> *a) the act shall be considered as offence and police shall take the necessary action,*[279]
> *b) shall take the responsibility for misleading the third party to whom the land use right is being transferred,*[280]
> *c) may be requested early settlement of the credit,*[281]
> *d) these provisions shall be clearly put into the credit contract and plainly explained to the debtor when the credit agreement is concluded;*[282]

From these provisions, we can infer that, firstly, peasants who mortgaged their land use right are principally prohibited to exercise his rights of transfer. Exceptionally, however, he may enjoy his right of transfer under two circumstances. These are; where the secured creditor consented or agreed to allow the mortgagor farmer to exercise his transfer and where the credit contract does not clearly stipulate as to the prohibition of such transfer right of the grantor peasant.

Also effects of failure to comply with the prescribed duties show strictness of the law in protecting the interests of the creditor. It should be noted, however, that the grantor is not automatically bear such effects. Rather, there are three cumulative requirements that must be met, to make the grantor liable for his non-compliance. These are the need for clearly indication of these consequences in the credit contract and the requirement of plainly explaining as to such consequential effects to the debtor, at the time of the conclusion of the credit agreement.[283] The third is the requirement that the debtor peasant shall be informed about these duties and other relevant requirements by development agents.[284] Development agent means a professional of the Ministry of Agriculture who pass to the farmers and pastoralists' new ideas developed by agricultural research provide information and technical advice on agriculture to support and enhance the sector production and productivity.[285]

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[278] Article 7.4.2 of Directive No. 02 /2020
[279] Article 7.4.3(a) of Directive No. 02 /2020
[280] Article 7.4.3(b) of Directive No. 02 /2020
[281] Article 7.4.3(c) of Directive No. 02 /2020
[282] Article 7.4.3(d) of Directive No. 02 /2020
[283] ibid
[284] Article 7.4.4 of Directive No. 02/2020
[285] Article 2(2.4.) of Directive 002/2020

The contractual agreement entered between ACSI and peasants in article 4 provides, the mortgagor cannot transfer his mortgaged land use right through rent, exchange or any other means, until the debt is fully paid. For this purpose, the original secondary level rural land holding certificates/documents are held in the hands of the lending institution.[286] Additionally, the respective wereda rural land administration office gives an attachment order prohibiting transfer of the mortgaged land by any means.[287]

However, an issue is, does the above rules of the directive and the practical trend ACSI adopted are compatible with pertinent security and rural land laws of the federal and the region. I argue they are not. The rationales are based on the economic and legal grounds. Legally, the directive by prohibiting the transfer right of the peasant is contravening article 5 of proc.1147/2019 and basic rural land rights of the peasant, as enshrined in FDRE constitution and pertinent federal and regional rural land rights. In article 5 of proc.1147/2019 it is stated that a security right (land use right) 'may secure one or more obligations'. In addition, the prohibition contradicts clear stipulation of article 9(2) of proc.252/2017. Article 9(2) of proc.252/2017 states any person given the right to use rural land may not lose this using right by any reason except the provisions by this proclamation or a regulation to be issued to implement this proclamation.[288] This will make the aforementioned provisions of the indicated NBE directive inapplicable. In addition, the attachment order which has been given by the wereda rural land offices is beyond its legally prescribed powers.[289] Due to this, the activity of the wereda office is unlawful.

Economically, it is unbalanced to peasants. This is because; as the limitation, arguably, would be narrowing the rights of the holder to ultimately hamper the development potential of him, especially taking the amount of loan given. The assessment of rural land use right mortgage contracts show that maximum amount of loan money that ACSI have given in the three study areas ranges from 40000-75000 birr, which is unfairly low, at least comparing it to the length of encumbrance period and the size of the land. For instance, a loan contract concluded between ACSI and farmer Shitaye Liyew[290] shows the loan money is 40000 birr, with five years of contract duration.[291] The size of the land encumbered is one hectar. Due to this, farmer Shitaye said, this act of attachment and dispossession of the secondary level land holding certificate is problematic. The reason he stated is that the size of the land and the loan money is unbalanced.

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[286] Article 5 of contract agreement between ACSI and farmers and by the physical observations made in different times over the study areas reveals the attachment of the secondary level of land holding of the mortgagee land holders' certificate in to the contract of loan as held by the Bank. Needless to mention, however, that this have the legal backing. As a right to the debtor, in article 7.4.5, and as a duty to the creditor, in article 7.5.2, of Directive 002/2020, the secondary level of land holding certificate should be released up on full payment of the debt. Hence, this indicates that the law provides for the holding of this certificate up on the hand of the creditor or the lender.

[287] The researcher observed the attachment orders given by the respective wereda rural land administration offices, which are attached in the files of the loan agreement held in lending institution.

[288] There are no any provisions in the proclamation or the regulation that stipulate for the limitation of rights of the rural land holder peasant due to mortgage encumbrance.

[289] Article 48 of proc.252/2017 provides the power and functions of the wereda rural land administration and use. And attaching power of the rural land mortgaged is given to it.

[290] Supra note 227

[291] In fact farmer Shtaye said he wants a shorter period of contract time to alleviate the burden.

Additionally, it is clearly against the economic ambition of the proclamation. As said above, the preamble of the proclamation, which normally reveals the intention and purpose of the law or legislator, states one of the reasons for the amendment of the previous laws is the necessity that the farmers as well as semi-pastoralists better expand their right on using rural land so as to accommodate their living standard with the economical, social and political development where the region as well as the country has reached.[292] If so, allowing mortgaging on one hand and limiting the basic right of the peasant in transfer right of holder cannot be economically coherent. Rather by the mere encumbrance of mortgage the holder is, in practice, deprived of the extended right over his holding, at least taking the amount of loan given vis a vis the size of the land encumbered and the effective period of the mortgage contract.

For instance, exchange of land holdings has an importance both to the holders and the development of the country in general. It seems with this purpose that the law provides for special incentive to given for those who make rural land exchange thinking to make adjacent their holdings.[293] To the land holding farmer the reasons he wants exchange could be to better develop the land at his convenience. For instance, it could be helpful to consolidation of land holdings, which in turn supports extensive agricultural farming and productivity.

Therefore, for these legal and economical reasons, mortgage of rural land use right by peasants should not bare the transfer right of the land holder.

4.8.3 Priority of Security Right of Rural Land Use Right

It is discussed that the priority of security right is about the priority in order of payments of debts of the debtor. Thus, while we are talking about priority of security rights, we presume the existence of two or more claimants of the debtor or the property. Perfection is another important element in claiming priority right of security. The concept of perfection refers the process by which security right is notified to third parties and thereby becomes effective against them.[294] As such, it helps to determine priority among creditors with conflicting proprietary rights in the collateral. In our system, Proc.1147/2019, under article 13, articulates methods with which security right could be perfected or effective against third parties. These are; firstly, registration of notice by the creditor, in the collateral registry, about his security right.[295] Secondly, possession of collateral asset that is money, negotiable instruments, negotiable documents, and certified securities, in accordance with article 56.[296] Thirdly, where the secured creditor has acquired control over the right to payment of funds credited to a deposit account or an electronic

[292] First paragraph of the preamble of proc.252/2017
[293] Article 20(5) of proc.252/2017
[294] Scott J. Burnham: The Glannon Guide to Secured Transactions; p.136
[295] Article 13(1) of proc.1147/2019
[296] Article 13(2) of proc.1147/2019

security.[297] Once security right is perfected through these methods, it will create priority right of security right.

Coming to the mortgaging of rural land use right by peasants, here again, the pertinent rural land laws of the region does not provide a rule about the priority right or otherwise effects of rural land use right mortgage by peasants. Therefore, proc.1147/2019 and relevant NBE directives regulates the issue of priority right over mortgage of rural land use right by peasants. As discussed in the previous chapter, articles of 45-65 of proc.1147/2019 have incorporated comprehensive rules of priority of security right over different sets of movable probity. These rules are somehow full of complexities and ambiguity, which could let 'outcomes do not make practical and commercial sense.'[298] As a security right over rural land use right is created for the purpose of securing the payment of the loan money, it is imperative to determine what types of payments that the debtor needs to pay, based on the principle of priority. Here under the claims of the lender of grantor peasant, which could be exercised under the package of priority right of the creditor are discussed.

i. The capital debt

It is known that the purpose of securities, including mortgage, is to guarantee the payment of the claims of the creditor. Among these claims of the creditor, the capital claim or principal is the main one. In line with this, in case where the borrowed peasant fails to pay his debt in accordance with the terms of the loan contract, the lending financial institution will have the right to claim his capital money, in priority to other claimants of the land or the debtor, provided that the mortgage is registered in priority to other claimants' interest over the debtor or the rural land.[299]

The practice in the study areas also supports such understanding of security of the payment of the main debt. Article 3 of the standard contract of mortgage of ACSI, and actual contracts made with different peasants provides, 'if the borrower fails to pay the loan in a manner and time of the agreement the lender is secured by the use right of farmer for the payment of capital debt, interests and also the expenses and costs.'[300]Therefore, the lender's claim of the main credit money will be secured by the mortgage, with the entitlement of priority claimant status.

ii. Proceeds

We have seen that a security right over the land use rights of a peasant automatically extends to the proceeds of such use right. Expectedly, the law recognizes the priority right of security right to also the proceeds of the land use right. Thus, article 51 of proc.1147/2019 stipulates; subject to article 58, a security right in the proceeds that is effective against third parties has the same

[297] Article 13(3) of proc.1147/2019
[298] Asres: supra note 5, p.207
[299] Cumulative reading of article 7.3 of directive 002/2020 and article 45(1) of proc.1147/2019
[300] Observation of loan agreements made between peasants and ACSI, as cited in supra note 227

priority over a competing security right as the security right in the collateral from which the proceeds arise.

iii. Interests

Every lending financial institution lends money for the purpose of getting profits. One of the means of getting such profits is interest payments. As such, it is one of the claims which the lenders are interested with. Due to this, they are the other claims that the law provide them to be mandatorily secured by the mortgage. In line with this, the contracts concluded by ACSI and different mortgagors provide the security of mortgage over the interest payments.[301] The issue, however, is whether there exist, like that of the civil code article 3077(2)[302], any limitations to the amount of the interest payments that are secured by the mortgaged land use right. The practice, seems, ignore such legally limited amount. This is because, the contracts concluded does not provide the amount as limited. Also once the proceedings for the purpose of satisfying the claims of the mortgage are applied they include also payments of the interests.[303]

iv. Expenses and Costs

The other claims that mortgage of rural land use right should enable the lender, in claiming based on priority principle, are costs and expenses. Due to the default of the mortgagor, the mortgagee may incur different costs in the process of satisfying its claims. A secured creditor in possession of the collateral has a right to be reimbursed and add to the secured obligation any reasonable expenses it incurs for the preservation of the asset, including the cost of insurance, payment of taxes and other charges.[304]

The practices of mortgage of rural land use right in study areas show the payments of expenses and costs, without the consideration of its kinds or sources. As said above, the contracts of mortgage concluded between ACSI and debtor peasants simply say 'costs and expenses', without specifically indicating the types and sources thereof. In the writer view, the costs or the expenses that should be secured, in priority or otherwise, must have been clearly expressed in the contractual agreements. This is because, the lender institution could illegally include expense or costs that may have unreasonable amount as costs or expenses to be claimed the security right.

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[301] Article 3 of the mortgage contracts concluded between the ACSI and different mortgaging rural land holder peasants.

[302] Under the civil code the amount of interest payments are limited in time. Hence article 3077(2) provides the mortgage shall secure the preferential payment of interest to an amount not exceeding two years interest.

[303] ACSI Vs Werkie Asmamaw, file no.27280; ACSI Vs Nurie Betew etl.(two persons), file no.27392; and ACSI Vs Adugna Gashu etl.(two persons), file no.26562, decided by Jabie Tehena Wereda Court.

[304] Article 68(1,a) of proc.1147/2019

4.9 Enforcement of Security Right on Rural Land Use Right of Peasants

A. Determination of default

As indicated in the previous chapter, enforcing of security right emanates from default. The pertinent laws in our system do not clearly define default or circumstances that are considered as default. So determination of default of rural land use right mortgage requires comprehensive understanding of relevant laws. Accordingly, the following facts are considered as default, thereby enabling the creditor in enforcing his security right land use right. These are;

- Peasants failure to pay the debt within the contractually agreed period of time
- If the grantor peasant transfers the rural land mortgaged without the consent of the creditor, and
- Failure to observe contractual obligations

Regarding the first ground, article 19(2) of proc.252/2017 provides;

> '*when the borrower is unable to return his debt* ***within the period of time indicated in the loan contract*** *and if the lender is found to be served by the land for the period of time specified in the loan contract; the scope of the right cannot exceed the right of use.*' (Emphasis added)

This provision clearly indicates that the borrower's failure to pay the debt within the agreed period is considered as one of the grounds of default. However, the provision does not define what the debt is. In other words, whether the borrower's failure to pay each of or totality of; the capital debt or the interests or other payments sufficiently constitute a default is not clear. To the researcher view, if the contractual agreement provides otherwise the debt indicated should be taken to refer the totality of both the capital and interest payment. Otherwise, it would be detrimental to the land use right of borrower peasant, given the consequence of enforcement.

Default that results from the transfer of the land mortgaged without the consent of the creditor is regulated under article 7.4.3 (c) of NBE directive 2/2020. Accordingly, if the debtor/grantor transferred the land use right pledged without the consent of the secured creditor, the secured creditor may request the early settlement of the credit. This shows how strongly the law protects the interest of the creditor.

Thirdly, parties to the loan agreement may include contractual terms that may result in default. In this regard the law does not prohibit such kind of terms, as long as they are not contrary to the basic principles.[305] In this instance, standard mortgage contract form of ACSI states "… if the

[305] Under article 76(2) of proc.1147/2019 it is stipulated that the grantor or any other person that owes payment or performance of any other secured obligation may not waive unilaterally or vary by agreement any of its rights under the provisions of this part (enforcement of security right) prior to default. Hence, as far as the agreement does not violate this mandatory stipulation it could validly enforced.

debtor fails to obey his obligation indicated in this contract, the lender may, without the need to observe the due date of the contract period, upon giving 30 days prior notification and without any additional procedures, take property on the land or use it through leasing…"[306]. This provision is so general to let any non observance of the obligations in the contract by the debtor be considered as a default. Actual cases also show the strictness on such terms of the contract.[307] I, however, think that debtor's non observance of every set of obligation should not be taken as a default. This is because; it may lead to unwanted consequences of the agreement. For instance, under article of the standard contract it obliges the debtor to ensure that the agreement be registered by the wereda rural land administration office. Making this as a default ground, for instance, if the debtor did not perform this obligation is not valid. This is because; primarily the law itself does not mandatorily provide the requirement of registration by the wereda rural land administration office, let alone obliging the debtor to ensure it is registered. Secondly, again the laws do not requires the registration of the agreement be made by the wereda rural land administration office. Rather, as per article 19(4) the registering body is the lender institution itself. Thirdly, basing on the purpose of registration, lack of registration would not totally affect the obligation of debtor regarding the debt.

B. Enforcement mechanisms (private or judicial)

While determining the enforcement mechanisms, either judicial or extrajudicial (private), in default of peasant is the primary task. In this regard the pertinent laws provide as follows;

> "In case of default, (creditor) shall exercise the land use right until such time of fully recovering the credit. This shall be carried out in accordance with the provisions of the Proclamation."[308]

> "….If the lender is found to be served by the land for the period of time specified in the loan contract; the scope of the right cannot exceed the right of use."[309]

As we can see, these provisions do not directly or expressly entail as to whether the creditor should resort to judicial enforcement mechanism or he is entitled to private enforcement mechanisms. But from the inference of the second paragraph of the first provision it can validly said that the creditor is entitled to private enforcement mechanisms regulated in proc.1147/2019.

As discussed in the previous chapter, proc.1147/2019 provides three kinds of private enforcement mechanisms, such as; self help possession, private disposition and strict foreclosure. The next valid enquiry will be, which of these mechanisms could be used while enforcing security right in rural land use right. Because of its nature or dimension, strict foreclosure cannot be a legally valid mechanism. This is because, strict foreclosure has the effect of permanent

[306] Standard mortgage contract form of ACSI article 8
[307] Cases cited in supra note 300
[308] Article 7.5.4 of directive 02/2020
[309] Article 19(2) of proc.252/2017, also article 9(4) of reg.159/2018

transfer of the collateral, which, however, is prohibited act in article 40(3) of FDRE constitution and article 56 of proc.252/2017.[310] The other two mechanisms, however, could be exercised, provided the legally mandatory requirements are complied.

Self help possession enforcement mechanism could be exercised over rural land use right under two separate situations. These are;

1. If the grantor has consented in the security agreement to the secured creditor obtaining possession without applying to a court,[311] and
2. If at the time the secured creditor attempts to obtain possession of collateral, the grantor or any other person in possession of the collateral does not object.[312]

From these two conditions we can infer the following elements. First, the creditor is not required to give prior notice to inform interested parties. This undoubtedly would create surprise or unwanted disturbance on the part of grantor or other interested parties. This may, in turn, hinder the applicability of this enforcement mechanism. Secondly, if the possession is based on consent of the grantor, this consent has to be given in the security agreement, prior to default. From the second paragraph, we can also infer that objection to possession can only be made by the grantor or any person in possession of that collateral. However, it is not clear what acts of the grantor or possessor could be taken as objection. Surely, silence could not be taken as objection as objection is something expressed. I believe the mere act of the grantor or possessor (e.g. speaking) in showing their opposition should be taken as objection. If the lender is not pursue his act to posses, the land the grantor and may use force or resort to court order, based on article of civil code, respectively. The provisions state as follows;

Art. 1148. - Protection of possession. - 1. Use of force.

(1} The possessor and the holder may use force to repel any act of usurpation or interference.

(2) Where the thing has been taken away from him either by violence or secretly, he may take it back forthwith, either by expelling the usurper or by seizing the thing from the hands of a usurper caught in the act or when running away.

(3) He shall refrain from any act of violence which is not justified in the circumstances.

Art. 1149. - 2. Legal action.

(1) The possessor or holder who is deprived of his possession or whose possession is interfered with may require the restoration of the thing or the cessation of the interference and claim compensation for damages.

(2) The action shall be barred if it is not brought within one year from the day of the usurpation or interference.

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[310] As per article 56 of proc.252/2017 any rural landholder is not displaced from his holding or his holding is not transferred to other party for debt payment by order of implementing court decision.

[311] Article 81(1,a) of proc.1147/2019

[312] Article 81(1,b) of proc.1147/2019

(3) The court shall order the restoration of the thing or the cessation of the interference unless the defendant can prove forthwith and conclusively the existence of a right in his favour justifying his conduct.

Therefore, if the lender does not stop its act of possession, in the absence of prior agreement to such right of possession or after the grantor peasant or possessor of the land has objected, the borrower or possessor may use justified force or bring legal action to the court.

On the other hand, once the lender has possessed the land, based on either a contractual close allowing the lender to possess the land or due to absence of objection by grantor or possessor of the land, the lender will have the following options;

- To develop the land by itself,[313] or
- Dispose or transfer the land use right through rent

If the lender wishes to develop or the land by itself, he will 'be served by the land for the period of time specified in the loan contract.'[314]

If, in turn, the creditor wish to transfer, he is bound to, first, give 10 day notification of his intention to dispose to grantor or other interested persons indicated in article 83(1) of proc.1147/2019. However, the borrower granting peasant is given a priority right as far as he agreed to take the land through contract from the lender.[315] This entails the existence of discrepancy between this provision of the regional rural land proclamation and article 82(2) of proc.1147/2019. In the latter provision it is stipulated that the secured creditor may select the method, manner, time, place and other aspects of disposition, including whether to dispose of it individually, in groups of as a whole. Under the movable security law, the secured creditor is entitled to chose the manner, which includes whether to rent the use right to the grantor directly or rent for other through public auction or otherwise. This shows the difference between the two laws. Due to this, one may ask which of these laws is to be followed by creditor. In fact, this specific provision proc.1147/2019 cannot be fully applicable to current land tenure system, as the FDRE constitution prohibits sale of land. However, excluding sell other dispositions could validly be applied. Coming back to the question, I think the rule under the proc.252/2017 should be binding. This is because; this law is special to the issue at hand. Hence, based on the generally accepted rule of interpretation that says the special rule prevails over the general, we should apply the rules governing mortgaging rural land by peasants. Additionally, given the recognition of strong protection of rights of land to peasants and pastoralists, we can deduce that giving priority to the borrower granting peasant have a constitutional backing. Furthermore, it will be

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[313] In article 19(2) of proc.252/2017 it is provided that "… if the lender is found to be served by the land for the period of time specified in the loan contract; the scope of the right cannot exceed the right of use." this clause of the article suggest, for the lender to possess the and thereby served by it, there needs to be a contractual term allowing the creditor. I believe, however, this clause is not in line with the purpose of security of debt, which is serving the interest of the creditor through the encumbered property, in case the debtor fails to perform the secured obligation. So the clause should be understood as referring the lender's right of developing the land by himself for the period of time specified in the contract.

[314] Article 19(2) of proc.252/2017

[315] Article 19(3) of proc.252/2017

beneficial to lender. This is because, as the current practice shows, it avoids the risk of finding of potential leasee.[316]

Finding cases of default of loans secured by rural land use right of peasants is not less prevalent. This does not mean, however, there are no defaults. Rather, if grantor peasant does not pay the debt, mainly with the agreed time, the usual method used to enforce the right that ACSI has is through formal and informal negotiations.[317] In such negotiation fails ACSI always resorts to judicial enforcement mechanism.[318] In all cases analyzed, the plaintiff, ACSI, instigates a suit based on article 284 of civil procedure code. The court, based on article 285 of the civil procedure code, summons the defendant, which the defendant always admits to have defaulted. Then the court renders judgment forthwith. After the judgment, the ACSI enforce its claim by disposing (renting) the land mortgaged, through public auction.

[316] Ato Getnet Dagnew; ACSI senior legal officer at West Gojam Zone says the institution is failing to find a leasee of defaulter's rural land use right. The reason, Ato Getnet reveals, is the farmer's reluctance to lease the land for fear of potential social distortion by creating antagonistic relation between the defaulter and leasee.
[317] Ato Mekureyaw Enkuahone, credit officer at ACSI Jabi Tehinan branch and At Esubalew Mekonen manager of ACSI Burie branch
[318] For instance, cases cited in supra note 300

Conclusion

Rural Land is lifeblood of peasants in countries like Ethiopia. It is not only the principal and sometimes the only means of generating income for livelihood, but also political, cultural, social as well as psychological asset for the peasants. Currently, the FDRE Constitution gives ownership right of the land to the state. And private ownership and sale and exchange by other means are also prohibited. Despite of these prohibitions, the constitution and other subsidiary legislations guarantees free access to rural land and rights against dispossession for peasants. They are also given a lifetime use rights over their holdings. Furthermore, the subsidiary rural land legislations of the federal and the Amhara Ntional Regional State entitle peasants with other extended rights. These includes the right to use the land, transfer (by rent, inheritance, donation, mortgage) the land, and own improvements and properties built on the land. In relation to the rights on rural land, the ANRS rural land proc.252/2017, as a pioneering to the current rural land regime of a country, explicitly recognizes the right of any rural land holder (including peasants) to use his land use right as a collateral in accessing credit.

The collateral laws of Ethiopia are scattered among different legislations. Generally, the civil code provisions of mortgage govern the security right created over immovable property. On the other hand, the recently enacted movable collateral proc.1147/2019 regulates security right over movable property. The latter defines movable property broadly, to include land use right. So besides the pertinent provisions of the ANRS rural land laws, the movable collateral proclamation and other NBE directives regulates the collateralization of rural land use right by peasant.

The analysis of these laws shows the existence of inconsistency and contradictions in between them. For instance, regarding registration of security right established on rural land use right of peasants, the ANRS rural land proc.252/2017 under article 19(4) mandates the lending institution with the obligation of registering such contract of mortgage or security. On the other hand, however, proc.1147/2019 establishes a separate and unitary Collateral Registry Office, with the task of electronic registry duty. Additionally, despite off the recognition of such mortgaging right of peasants and inconsistent to clear legal rules and the developmental purpose of the regional rural land law, the NBE directives limits the wider right of grantor peasant, such as transfer right, by mere encumbrance of the mortgage. Also there are gaps in these laws, regarding, for instance, the specific enforcement mechanism of security right in case of default of debtor peasant, effects if the developing agent does not inform the grantor/debtor peasant regarding his obligations listed under article 7.4 of NBE Directive No.02/2020.

The practice of mortgaging rural land use right by peasants in ANRS of West Gojam Zone is filled with many problems. These include the non-existence of lenders, contradiction with the relevant laws, burdensome bureaucracies, arbitrariness and abuse. Regarding the lenders, currently, despite off the existence of over 20 financial institutions, it's only Amhara Credit and Saving Institution (ACSI), the would be Tsedey Bank S.C, that has been giving loan to the

peasants in the study area. The reasons which the non-lending financial institutions provide emanates, mainly, from lack of awareness of the permissibility of mortgaging rural land use right of peasants under the pertinent laws, lack of governments promotion activities by either strongly persuading or incentivizing the lending institutions to adapt the trend of mortgaging rural land use right of peasants, non-experimented fear of risk of repayment of credits, etc. Even this lonely lender (ACSI) has been hesitant in extending loan to peasants through encumbering their rural land use right, which can be revealed from; the lengthy process of screening and study of the applicant lender and the land encumbered in deciding to give the loan, the amount of loan money which is being given, the short time of loan period, etc.

The encumbrance of rural land use right by mortgage has been limiting the right of the grantor. This is because, in all contractual loan/security agreement made between ACSI and grantor peasant, the latter is prohibited from exercising his transfer right, which could have been helpful to the peasant in accessing finance and productivity, which in turn, ensure development, in line with the aspiration of proc.252/2017.

The respective government organs have not been either established or actively involving in executing their legal obligations and assisting for the wider practicability of the mortgaging of rural land use right of peasants in West Gojam Zone, as provided in the pertinent laws. To mention some, there is no such development agent in the study area to assist, either by informing their rights and duties or otherwise, the peasants before, while or after concluding the security agreement. The respective wereda rural land administration offices, let alone supporting and incentivizing for the effective utilization of rural land rights as a collateral by peasants, are, attaching the rural land mortgaged, to effectually prohibit transfer and other rights, cooperating for the abuse and unlawful lending trend of ACSI.

The loan money extended to debtor peasant is low in amount, which may in strong probability affect the financial capacity of peasant in achieving its development aim. The determination of the maximum amount of loan that could be given to the mortgaging peasants is different among the study areas, showing absence of clear guideline. Also the period of the loan/security agreement, which is a maximum of five years, is affecting the accessibility of high amount of loan.

There are some contractual terms of the security agreement between ACSI and debtor peasants those are not clear, which effectually could affect the interests of the peasants. For instance, the provision that gives prerogative power to the lender to cancel the contract with merely giving 30 day notice, for the failure of the debtor to perform any of contractual duties, lacks clarity, and may abuse the right of the debtor/grantor for non-compliance of obligations, which could even are the legal obligations of the lender itself (e.g. non compliance of ensuring registration of the security agreement by the debtor, though pertinent laws oblige lender to ensure registration of the security agreement, article 6 of the standard contract of ACSI, however, burdens the debtor/grantor with such legal duty of the lender).

Regarding the enforcement mechanism, ACSI in all cases have resorted to judicial mechanisms. It institutes a suit, usually, a summary proceeding based on article 284 and subsequent provisions of the civil procedure code, which in almost all cases the defendant debtors have admitted. After securing such judgment the lender will proceed to possess the land, thereby transfer it through rent, by public auction. In all cases, however, the defaulter peasants have not been enabled to enjoy priority right to rent the land use right secured, as required in article 19(3) of proc.252/2017.

Recommendations

With the aim of solving the prevailing legal gaps of mortgaging rural land use rights in Ethiopia, with particular reference to West Gojam Zone of ANRS, I recommend the following ideas.

The respective federal and regional government organs should execute their obligations that would enable the effective ensuring of practical development of mortgaging rural land use right of peasants, to over all enhance the capacity of the peasants and the country in general. These includes; amending the current laws or enacting new legislations which help for effectiveness of mortgaging rural land use rights of peasants, establishing the specific organ, ensuring a mechanism of protection and promotion, capacity building and awareness creation activities, etc.

Regarding the gaps in the existing laws, as land right for peasants is a matter of survival, on the one hand, and base to the overall development of the country on the others, I recommend the issue to be regulated with specific legislation, the content of which shall base the special character of the rural land, and the land tenure system of the country. Such a single body of legislation aimed at regulating mortgaging rural land rights of peasants should, rather than narrowing and prohibiting the enjoyment of the rights guaranteed constitutionally and by pertinent rural land laws promote and aspire for the wider entitlement of debtor/grantor peasants.

In particular, it should enable and promote the right to transfer rural land use right with rent, inheritance or donation, exchange and with further encumbrance of security right. It also shall specify the effects or rights and obligations of parties to security agreement and third parties, the validity elements for the establishment of security right, the enforcement mechanism with more court controlled system, taking the special nature of the property and its effect on the interested parties. Furthermore, it should establish specific government organ having the duty of ensuring the wider practice of mortgaging rural land use right of peasants (which, I believe, should be through incorporating separate financial institution, with special task of extending loan to peasants by taking their rural land use right), promoting and incentivizing the currently lending financial institution, and mandatorily obliging (which, for instance, could be through laying the obligation meeting the standard of certain percentage extension of loan by rural land use right as a security) the non-lending existing financial institutions. The other government organs, such as the respective (rural) land administrative offices, agriculture offices, financial offices, etc, should execute and actively involves in developing the practice of mortgaging rural land use right of peasants.

ACSI should amend its current system of security right over rural land use right of peasants. These include; 1) the existing standard mortgage contract of rural land use right should be amended and reformulated to; enable the debtor/grantor peasants continue in enjoying the rights in their land encumbered, such as transfer and others; enable peasants in accessing sufficient amount of loan money through lengthening the contract period; clearly and reasonably specify grounds of default; take and execute its legal responsibilities, such as registration of security

agreement or right; the substance of the contract terms, as currently is, should not be one the one hand only burdening the debtor peasant with bulk of obligations, and on the other only specifying privileges to the lender; in other words, terms of such security/loan contract should be enabling for negotiation by, even, informing the peasants as its possibility; 2) ensure the priority right of the defaulter peasants, if he wishes, in getting the secured land right through rent in accordance with article 19(4) of proc.252/2017; 3) the procedures or criteria in accessing the credit should be clear, consistent and speedy.

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- Interview with Dr. Murado Abdo, Associate Prof. at Addis Ababa University, 09/06/ 2022
- Interview with Dr. Brightman G/Michael, Ass. Prof. at Bahir Dar university, 10/07/2022
- Interview with Dr. Habtamu Sitotaw, Ass. Prof. at Bahir Dar university, 11/06/2022
- Interview with Ato Adisu Molla, senior legal expert at ANRS Land Administration Bureau, 10/06/2022
- Interview with Shitaye Liyew, rural land use right mortgagor peasant
- Interview with Ato Esubalew Mekonen, Tsedey Bank manager at Burie branch, 21/06/2022
- Interview with Ato Mekuriyaw Enkuan, Credit and customor's service officer at Tsedey Bank Finote Selam branch, 20/06/2022
- Interview with Getnet Dagnew, senior legal officer at ACSI, on 11/11/2014 E.C

Annex

Questionnaire

Questioner filled by Banks and Microfinance Institutions

I. Name(optional)_____

II. II. Name of the Institution that you are working_____

III. III. Position _____

Instruction-

This questionnaire is prepared for the fulfillment of academic study in Bahir Dar University. The information gathered will only be used for this indicated purpose. So you are kindly requested to fill the relevant data based on the questions indicated.

1. Do your institution give loan to peasants by taking their rural land use right as collateral? If A) Yes B) No

2. If your answer in question No.1 is no. please state the reason/s

3. If your answer to question No.1 is yes, answer the following?

i. What are the requirements that the farmers need to fulfill to get loan?
ii. What are the procedures that would be followed to farmers get credit from the institution?
iii. What is the maximum period of the loan contract?
iv. How much is the maximum amount of loan that could be extended to the farmer?
v. What the minimum and maximum size of land that could be encumbered by the loan?
vi. What are the grounds of default?
vii. Does the institution give/create financial guidance and awareness to farmers?
viii. What enforcement mechanism does the institution apply to enforce its security right?