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Examining Suitability of the Draft Ethiopian Personal Property Security Rights' Law to the Local Context

Asress Adimi Gikay[♣]

Abstract

In what could be regarded as a defining moment in secured transactions law reform in Ethiopia, a new legal regime governing security interests has been drafted under the aegis of the International Finance Corporation (IFC), evidently based on Article 9 of the Uniform Commercial Code (UCC) of US or legal systems (instruments) influenced by it. Pending the approval of the draft law by the Ethiopian parliament, this article examines whether it is suitable to the Ethiopian local context. It argues that while the anatomy of the draft law and its general approach are consistent to the theme of enhancing access to credit, which dictates secured transactions law reform across the globe, it suffers from shortcomings that must be addressed. First, the draft law mandates electronic collateral registration system in a country without the necessary perquisites for its successful operation. Second, by adopting the Personal Property Security Right (PPSR) approach, the draft law unnecessarily excludes security rights in immovable property from its umbrella and defeats the purpose of comprehensive secured transactions law reform, i.e., implementing a legal regime that covers all types of assets, parties, and transactions. Third, the draft law has alarming terminological problems resulting from drafter(s) misapprehension of or insensitivity to the existing legal regime. Fourth, the unclarity of the provisions of the draft law on floating security interest could potentially lead to costly court litigation. Fifth, in departure from UCC Article 9 or recently reformed secured transactions laws, the draft law entitles the creditor to take possession of the collateral upon the debtor's default, without putting in place the necessary tools to protect consumer debtors from potential abusive conducts of creditors. By empowering the Collateral Registry Office to order the police to assist the creditor in repossessing the collateral, it potentially subjects the debtor to extra-judicial deprivation of property right, with no judicial control mechanism. Based on comparative analysis of the key provisions and policies of UCC Article 9, the Draft Ethiopian PPSRs' law along with the laws of other civil law jurisdictions to a limited extent, this article concludes that the draft law is ill-suited to the Ethiopian local context. The paper

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suggests that its approval by the parliament be delayed for further public scrutiny and debate among the relevant stakeholders. It proffers policy recommendations for revision.

Key Words: Ethiopia, Security Interests, Functional Approach, Personal Property Security Right, Movable Assets, Self-Help Repossession, Local Context

Introduction

In Ethiopia, the time for secured transactions law reform has been long overdue. The reason is simple. The main body of the Ethiopian secured transactions law incorporated in the Civil Code and the Commercial Code of 1960, supplemented by subsequent piecemeal revisions through various statutes has been patently economically inefficient.[1]

In my paper published in September 2017, calling for secured transactions law reform in Ethiopia, I laid out the reasons for undertaking comprehensive reform.[2] I argued, *among others,* that Ethiopia should adopt the unitary theory and functional approach to security interest.[3] But I also cautioned that there are risks in implementing reforms that do not take into account the local context of the reforming country. In particular I argued that "the participation of scholars in shaping secured transactions law reform is crucial in the view of the trend that reforms based on international model laws promote one-size-fits-all models that ignore the local contexts of the reforming countries."[4] I provided an anecdote from Malawi, an African country with substantial technological and infrastructural impediments, where a reform was implemented in 2013 based on the UNICTRAL Legislative Guide on Secured Transactions Law that mandates electronic collateral

[1] Asress Adimi Gikay, 'Rethinking Ethiopian Secured Transactions Law through Comparative Perspective: Lessons from the Uniform Commercial Code of the US (2017), 11(1) Mizan Law Review 153-197.
[2] Ibid 165-175.
[3] Ibid 175-182.
[4] Ibid 162.

registry.[5] I pointed out that the mandating of exclusively electronic registry in Malawi, a decision that even countries with advanced technology do not take overnight was mistaken.[6] In Malawi, the majority of the people have no access to electricity and the internet, infrastructures that are necessary for the proper functioning of electronic collateral registry.[7] I noted that Ethiopia can draw lessons from that and avoid similar mistakes through open and participatory debate on the potential reform effort.

The Draft Ethiopian PPSRs' law, crafted under the umbrella of the IFC clearly ignores the local context of Ethiopia, as it appears to be an attempt to implement the one-size-fits-all model in Ethiopia. The lack of transparency in the drafting process was a clear indication of the fact that the draft law was indeed dictated by and written for the self-interest of its patron with the interest of the broader stakeholders and the draft law suitability to the local context of Ethiopia being secondary. One of the letters to which the draft law was annexed, sent out by the National Bank of Ethiopia was addressed only to the Ethiopian Bankers Association, Ethiopian Lawyers Association and the Association of Ethiopian Micro-Finance Institutions, seeking comments from these stakeholders.[8] The draft law was shared with the author by an informant under condition of anonymity. Considering that the draft law is designed mostly based on foreign law, fundamentally changing the approach to law of security interests in Ethiopia, it is questionable whether the aforementioned stakeholders were/are in the position to provide meaningful feedback. Hence, it is legitimate to ask as to why a reform that

[5] *See* The Personal Property Security Act of Malawi (2013), Section 49.

[6] Ontario had operated with hybrid filing system for decades until it implements exclusively electronic filing in 2007. In the US where electronic filing is utilized most efficiently, paper based filing is still allowed in the majority of states. *See* Marek Dubovec, UCC Article 9 Registration System for Latin America (2013), 28(1) Arizona Journal of *International & Comparative Law* 117, 123.

[7] Of over 16 Million total population of the country, in the year 2016, only about a million people have access to the internet. <http://www.internetlivestats.com/internet-users/malawi/>. Accessed on 30 January 2018.

[8] Ref. No.: FlS/ 22/2017. <https://i-libertarianrealist.blogspot.it/2018/05/the-draft-ethiopian-law-of-security_14.html.> Accessed 15 May 2018.

impacts businesses and consumers across Ethiopia has not been subjected to the participation and scrutiny of the public at large? Isn't transparency a value the World Bank (of which the IFC is the investment wing) stands behind? Is there a hidden motive for it? Or was it the Ethiopian government that advised the crafters that one of the important branches of commercial law be enacted without the participation of the people in the process? On what basis were the stakeholders who had access to the draft law chosen? For instance, shouldn't all academic institutions, in particular law schools have had access to the draft law?

The IFC has supported secured transactions law reforms across the globe.[9] The IFC both as reform advocate and an investor in sectors such as leasing and hotel industries promotes creditor-friendly secured transactions laws.[10] It deploys experts that promote its short-term and long-term interests with benefit of the legal reform to the broader stakeholders being secondary. An interested observer only needs to ask why the World Bank is helping African governments in reforming their laws. Self-interest is the only explanation for that. Nevertheless, the IFC also utilizes a limited transparency to create the impression of transparency in the eyes of the public and legitimacy for the reform. The Ethiopian draft secured transactions law was public only to the extent that certain stakeholders have/had access to it. This limited transparency allows the IFC to claim later that the successful legal reform it assisted was transparent and every stakeholder had the opportunity to influence the draft law. But reform is largely secretive as far as experts who could raise meaningful questions are concerned. This ensures that

[9] The IFC backed the Ghanaian Lenders and Borrower Act of 2009, the 2011 Secured Transactions Law of Romania, the 2013 Secured Transactions Law of Malawi, the 2014 Borrowers and Lenders Act of Sierra Leone, the 2015 Law of Registration of Security Interests in Movable Property by Banks and Other Financial Institutions of Nigeria.

[10] *See* Tigrai Online IFC, the investment arm of the World Bank is interested to finance Ethiopia Djibouti Fuel Pipeline Project(Tigrai Online, Nov. 15, 2016), <http://www.tigraionline.com/articles/ethio-djibouti-pipeline16.html> Accessed 28 January, 2018. *See* also IFC, IFC Makes its 100th Hotel Investment in Africa- Project will Improve Business Infrastructure, General Jobs, IFC, November 10, 2011,<http://www.ifc.org/wps/wcm/connect/news_ext_content/ifc_external_corporate_site/news+and+events/news/hotelinvafrica>. Accessed 28 January 2018.

legal provisions and policies that are not well-thought through are not questioned during the reform process. Hence, the secretive nature of the reform process run by the IFC and its loyal consultants is deliberate.

This article identifies five building blocks of the draft Ethiopian PPSRs' law and scrutinizes if those building blocks sufficiently respond to the needs of the stakeholders that should benefit from the reform, including companies, financial institutions, small businesses, and consumers.[11] In particular, it examines the suitability of electronic collateral registration system, the personal property security rights approach, terminological problems, the potential legal uncertainty associated with floating security interest and the unfitness of self-help repossession as enshrined in the draft law to the Ethiopian context.

1. Electronic Collateral Registration

Though the Ethiopian draft PPSRs' law does not specifically state so, all of its provisions governing collateral registry and registration foresee electronic registration, with no parallel paper-based registration system. One of the recitals of the draft law underlines that establishing single comprehensive electronic registration regime for secured transactions in movable property to determine priority rights among competing claimants is necessary. All of its provisions are dedicated to the details on how to file the registration including creating a user account at the collateral registry.[12] There is no single provision dedicated to paper-based registration in the draft law. It can therefore be concluded that the draft law is intended to implement exclusive electronic collateral registry. It is to be noted that, in Malawi, the 2013 Personal Property Security Act mandates exclusively

[11] The approach adopted in this paper is inspired by Tajti's five building blocks of UCC Art. 9. *See* Tibor Tajti (2002), Comparative Secured Transactions Law- Harmonization of Law of Security Interests in the United States of America, Canada, England, Germany, and Hungary, Budapest, Akademiai Kiado, p. 141.

[12] Art. 23(1) (a) of the draft law states that "any person may submit a notice to the Collateral Registry, if that person has established a user account with the Registry."

collateral registry by stating that "there shall be personal property security registry which shall be electronic."[13] Though the wordings of the relevant provisions of the Draft Ethiopian PPSRS' law are not as clear as its Malawian counterpart, considering that the lead consultant for the two counties is the same person,[14] and given the lack of any rule on paper-based registration under the draft law, it is fair to state that the draft law is based the policy of implementing electronic registration.

This policy choice is out of touch with the reality in Ethiopia. According to a 2017 World Bank data, Ethiopia ranks third in the world in terms of electricity access deficit,[15] with 71 Million people with no access to electricity based on 2014 statistics.[16] Although the situation has improved today, it has not changed radically. According to African Infrastructure Country Diagnosis report (2010), "the coverage of Information Communication Technologies in Ethiopia is the lowest in Africa."[17] As of 2010:

> *GSM signals cover barely 10 percent of the population, compared with 48 percent for the low-income country benchmark; and the GSM subscription rate is only 1.6 percent of the population in Ethiopia, compared with 15.1 for the low-income country benchmark. Furthermore, whereas the typical African country adds 1.7 percent of the population to the GSM subscriber base per year, the figure for Ethiopia is only 0.1 percent. Internet bandwidth in Ethiopia is only 0.3 megabits per second per capita,*

[13] The Personal Property Security Act of Malawi (2013) Section 49.
[14] < http://natlaw.com/staff/dr-marek-dubovec/> Accessed 14 May 2018.
[15] International Bank for Reconstruction and Development / The World Bank, 'State of Electricity Access Report'(The World Bank 2017) XIV
[16] Ibid 18.
17 Vivien Foster and Elvira Morella 'Ethiopia's Infrastructure: A Continental Perspective' (The International Bank for Reconstruction and Development / The World Bank 2010) 15.

> *compared with 5.8 megabits per second per capita for the low-income country benchmark.*[18]

The above data reveals that, as of 2010 more than 50 percent of the Ethiopian population living in rural areas does not have access to internet, a situation that has not substantially changed today. Even where there is access to the internet, there is limited internet bandwidth which means that a slow connection could render the operation of office works relying on the internet difficult, sometimes with intolerable degrees of blackouts for hours or even days. Electronic filing has obvious advantages in that creditors carrying out public notification of security interests do not need to go through the burdensome administrative procedures to comply with the traditional method of authenticated registration of security agreements. There is no need to wait in a long queue in front of the notary. Thousands of secured creditors could file registration at the same time, if the infrastructure works well. The same is true for searching in the collateral registry by interested third parties. Nonetheless, in a country where electricity is meagerly accessible to the majority of the people and where less than 50 % of the population has access to the internet, implementing electronic filing system is not a viable solution. Even if internet use grows above 50%, users who have the required internet bandwidth to file online registration would be limited. Certainly, rural Ethiopians would not benefit from the system in the near future. Hence, the drafting group clearly implemented a solution that does not reflect the local context of Ethiopia.

In order to ensure the access of the broader stakeholder to the collateral registry, certain countries adopted hybrid system i.e. electronic and paper based registration systems. Ontario (Canada) had operated with hybrid filing system for decades until it implements exclusively electronic filing in 2007.[19] In the United States

18 Ibid.
19 Marek Dubovec (n 6) 123.

where electronic filing is utilized efficiently, paper-based filing is still allowed in the majority of the states[20] including in New York.[21] When the countries that are the sources of the idea have not implemented it overnight, it is foolish for Ethiopia to implement exclusively electronic filing. Hence, the registration regime of the draft law must be revised to permit hybrid system.

2. The Personal Property Security Right Approach

The Draft Ethiopian PPSRs' law applies to "to all rights in movable property created by agreement that secure payment or performance of an obligation."[22] It does not apply to security rights in immovable properties. Hence, it governs what is commonly referred to in a generic term as Personal Property Security Rights. But why does the draft law aimed bringing about comprehensive reform exclude security rights in immovable properties? From the experience of other jurisdictions, two explanations can be given for the adoption of comprehensive law of PPSRs. These are historical accident and commercial necessity.

2.1. Historical Accident

To understand the historical reason for the divide between security rights in movable property and Security rights in real property, one has to go back to UCC Article. 9 which has clearly influenced the drat Ethiopian PPSRs' law. UCC Article 9 does not apply to security interests in real estate; it applies to security interests in personal property and fixtures.[23] Real estate mortgage being outside its scope is governed by state laws.[24]

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20 Ibid.
21 <https://www.dos.ny.gov/corps/fees_ucc.html> Accessed 14 May 2018.
22 The Draft Ethiopian PPSRs' law Art. 3(1).
23 UCC, Section 9-109(d) (11)
24 Andra Ghent, 'the Historical Origin of America's Real Estate laws' (Research Institute for Housing America 2012) 1.

UCC Article 9 excludes real estate mortgage from its ambit because state mortgage laws follow three different theories of mortgage- the title theory, the lien theory[25] and the intermediary theory,[26] making it difficult to provide uniform law on the subject matter. Under the title theory, the title to the property is transferred to the lender and the lender remains the legal owner of the property for the duration of the mortgage while in the lien theory, the mortgagor (debtor) is the owner for the duration of the mortgage.[27] In the states where the intermediary theory applies, the mortgagor remains the owner until default on the mortgage.[28]

The fact that mortgage of immovables is excluded from UCC Article 9 and is subjected to state real estate mortgage laws is considered to create problems in the US legal system. First, dealers of real estate do not have complete information as to the existence of security interests in fixtures from real estate records and as such have to bear the cost associated with checking various records including registrations made under UCC Article 9.[29] Second, both by real estate claimants and chattel-type secured parties need to be cautious of the classification of the collateral and may need to make double or triple registrations.[30] Hence, the relegation of real estate mortgage law from UCC Article 9 which has been dictated by differences in state laws is proven to have undesirable consequences. But the system could not be fixed due to the irreconcilability of the existing differences among state laws.

The explanation for the differences in state real estate laws in the US is historical. Most of the older states in the US adopted the title theory of real estate mortgage developed in England in order to circumvent usury law while younger states

25 Ibid 7.
26 <https://www.law.cornell.edu/wex/mortgage>. Accessed 30 January 2018.
27 Andra Ghent (n 24) p. 7.
28 <https://www.law.cornell.edu/wex/mortgage> Accessed 30 January 2018.
29 Coogan, Peter F. and Clovis, Albert L. 'The Uniform Commercial Code and Real Estate Law: Problems for Both the Real Estate Lawyer and the Chattel Security Lawyer' (1963), 38(4) Indiana Law Journal 536, 573.
30 Ibid.

adopted the lien theory as the usury laws were relaxed during the 19th century making it unnecessary to adopt the title theory.[31] If the primary reason real estate mortgage is not covered by UCC Article 9 is the different approaches adopted by state laws which in turn is explained by the historical origin of state mortgage laws, it can be argued that for countries where real estate mortgage law is uniform nationwide, there is no need to exclude it from secured transactions law reform.

In Ethiopia, the Civil Code governs mortgage of immovable properties nationwide.[32] States do not have the power to enact laws governing real estate mortgage (the constitutional basis for this can be debated but realistically speaking that is irrelevant to the topic at hand). Therefore, from historical perspective, there is no reason to have separate laws governing security interests in movable assets and in immovable assets in Ethiopia.

2.2. Commercial Necessity

The second reason the personal property security right approach is trending is that in many legal systems, despite the fact that movable assets represent a large portion of assets of businesses,[33] secured transactions laws tend to have no comprehensive legal regime for allowing debtors to access credit using movable assets as collateral.[34] Financial institutions tend to settle with real estate mortgage as it is simpler to enforce mortgage rights as real estate value tends to increase over time and real estates are readily available for foreclosure. Hence, recent reforms are aimed at facilitating the use of movable assets as collaterals to counter their underutilization. But this does not mean that security rights in immovable assets

[31] Ibid 15 - 19. Since mortgage transactions in which the debtor pays high interest rates were regarded as usurious, the title theory enabled the lender to get the title of the debtor's property and structure the transactions in such a manner that the debtor pays rents on the property instead of interest rate and this enabled the parties avoid violating usury law.
[32] The Ethiopian Civil Code Art. 3041 et seq.
[33] Heywood Fleisig, et al, Reforming *Collateral Laws to Expand Access to Credit* (The World Bank 2006) 7.
[34] Ibid ix.

should be disregarded or ignored. It simply means that a stronger legal framework for the use of movable assets including incorporeals assets should be put in place. In other words, creating a comprehensive legal framework that governs the use of movable assets as collateral is necessary. But it does not necessarily call for separating movable assets from immovable assets. In Ethiopia, certainly the context does not justify such a separation.

2.3. The Effect of Personal Property Security Right Approach in Ethiopia

Real estate mortgage plays a key role in financing in Ethiopia. The legal regime governing mortgage has been in place since 1960. It is as obsolete as the rest of the Ethiopian secured transactions law. There is neither historical, nor commercial reason to separate security rights in movable and immovable assets in Ethiopia. The only reason the draft Ethiopian PPSRs' law excludes security rights in immovable assets from its umbrella is that the law is based on the template model of the IFC. The lead consultant who also engaged in secured transactions law reform in Malawi and dozens of other African countries is promoting nearly copy-pasting approach.[35]

The problem in implementing personal property security law for Ethiopia is the differential treatment of secured creditors with interests in movable assets on the one hand and real estate mortgage creditors on the other hand, due to the application of different methods of registration for the purpose of notifying the public/third parties of the existence of security right.

A. Notice Filling for Creditors with Interest in Movable Assets

Under the draft Ethiopian PPSRs' law, the registration of security interest should contain the identifier of the grantor of the security interest (the debtor or the person

[35] Dr. Marek Dubovec whom the author met in 2015 at UNIDROIT headquarter in Rome has advised on secured transactions law reform in dozens of African countries including in Ethiopia < http://natlaw.com/staff/dr-marek-dubovec/> Accessed 14 May 2018.

who gave the property as collateral on the debtor's behalf), the identifier of the secured creditor or its representative, an address of the grantor and the secured creditor, a description of the collateral, the period of effectiveness of the registration, and any other information to be prescribed in the directive to be issued pursuant to the draft proclamation.[36] The draft proclamation's registration provisions incorporate what is termed as notice filing system as opposed to authenticated registration.

The notice filing system which was introduced by UCC Article 9 provides subsequent creditors (or third parties) general information on the existence of security interests attached to the property of the debtor. Essentially, notice filing system considers it unnecessary to provide the security agreement or its details to third parties; hence it requires disclosure of information that should be supplemented by further inquiry from the debtor by interested thirds parties.[37]

The notice filing system is based on the policy that subsequent creditors should inquire the details of the transaction from the earlier creditor(s). Subsequent creditors can require the debtor's approval of prepared statement of account that discloses the indebtedness of the debtor; failure of the debtor to give approval is sign that the debtor is hiding credit information and therefore it is helps subsequent creditor to decide not to extend credit to the debtor.[38] The theoretical benefit of this system is the reduced transaction cost; both in terms of time and money spent to comply with the registration. The draft Ethiopian PPSRs' law confers this advantage upon creditors with personal property security rights. But how about real estate mortgagors? Do they benefit from similar system? The answer is negative (*see infra* section B).

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[36] The Draft Ethiopian PPSRs' law Art. 26(1).

37 Robert I. Donnellan (1964), 'Notice and Filing under Article 9' (1964) 29 Mo. L. Rev.1, 1,

38 Jens Haussmann, 'the Value of Public-Notice Filing under Uniform Commercial Code Article 9: A Comparison with the German Legal System of Securities in Personal Property' (1996) 25 Georgia J. Int'l and Comp. Law 427, 444. *See* UCC (2010) § 9-210(b).

B. Authenticated Registration for Real Estate Mortgage Creditors

A comprehensive registration system requires registration of different types of transactions such as financial leasing, sale with retention of title and consignment in a single registry and makes it easier to inquire information on the status of assets, i.e., whether an asset is encumbered or not. But notice filing is also aimed at reducing the transaction cost involved in authenticated registration system, i.e., the amount of time and money spent in conducting the registration. Ethiopia has authenticated registration system for security interests which requires the security agreement to be authenticated and registered by a notary and the notary has substantial authority to that effect including to ascertain whether: the formalities for the relevant contract are met; the parties have the capacity and authority to sign the contract and others.[39] All acts creating or varying mortgage must be entered into a register of mortgages.[40]

The main advantage of authenticated registration system is its paternalistic nature because a state authority or a notary checks the validity of the security agreement giving the parties more opportunity to do so at the stage of registration. Its disadvantage is inflexibility and higher transaction cost because it requires unnecessary details regarding the transaction to be registered. Furthermore, because authentication requires the entire document to be produced to the authority in charge, the parties or their legal representatives must be physically present at the authority in charge and deposit copy of the relevant agreement entailing higher transaction cost.

With the enactment the draft Ethiopian PPSRs' law, real estate mortgage creditors are stuck with this old system of registration system while secured creditors governed by the new law benefit from efficient registration system. Why would

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[39] FDRE Acts and Documents Authentication and Registration Proclamation, No. 334/2003, Federal Negarit Gazzet, Legal Notice No. 54(Addis Ababa, 2003). *See* Arts. 2(1) & 4.

40 *See* Ethiopian Civil Code Art.1573.

consultants and policy makers who seem to be interested in implementing comprehensive legal regime and enhancing efficiency in transactions leave real estate mortgage out of the new legal framework? The reason is simple- there is no template model that encompasses both personal property and real property securities, and it requires much more effort to contextualize the readily available model to the local context.

3. The Functional Approach & Conceptual Flaws

The draft Ethiopian PPSRs' law follows the functional approach to security interests. First, it defines security agreement as an agreement, *regardless of whether the parties have denominated it as a security agreement*, between a grantor and a secured creditor that provides for the creation of a security right.[41] Second, it defines security right as "a property right in movable property that is created by an agreement to secure payment or performance of an obligation, *regardless of whether the parties have denominated it as a security right*, and regardless of the type of movable property, the status of the grantor or secured creditor, or the nature of the secured obligation."[42] But how is the functional approach incorporated in these definitions?

UCC Article 9 is the origin of the functional approach to security interests- the notion that all transactions that secure the performance of an obligation should be brought under the roof of a single statute regardless of the formal label the parties give them.[43] Under this approach, the characterization the parities give to the transaction in question or the failure of the parties to name their transaction as

[41] The Draft Ethiopian PPSRs' law Art. 2(43).
[42] Ibid Art. 2(44).
[43] UCC § 9-109(1) (a).

security agreement is irrelevant as long as the transaction in reality secures the performance of an obligation.[44]

The functional approach to security interests ensures that transactions whose economic function is to secure payment or performance of an obligation be treated as secured transactions and be subject to secured transitions law. By applying essentially similar rules to all security interests, the approach eliminates the differential treatment of different transactions and parties. This does not mean that minor differences that are designed to fit the peculiarities of different types of assets or parties are eradicated entirely. The draft Ethiopian PPSRs' law has enshrined this innovative approach to treating transactions.

The functional approach to security interests requires a shift from dogmatic treatment of transactions prevalent in civilian systems[45] to purpose assessment. Unsurprisingly, this approach is unfamiliar to the Ethiopian law of security interests. Hence offering a practical example to demonstrate the concept is useful.

One of the transactions that is treated as secured transaction using the functional approach is a title financing transaction. Title financing is a generic term referring to transactions where the financier has the title to the ownership of the asset while the debtor has possession within the framework of the relevant legal arrangement.[46] These transactions include sale with retention of ownership, financial leasing, and consignment. In legal regimes adopting the functional approach, title financing transactions are re-characterized as secured transactions.[47]

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[44] Cindy J. Chemuchin (ed.) *Forms under the Revised Uniform Commercial Code Article 9 Committee*, Task Force on Forms under Revied Article 9, 2nd Ed. (American Bar Association 2009), p. 4.

[45] Tajti, Tibor, 'Consignments, and the Draft Common Frame of Reference' (2011), 2 *Pravni Zapisi: Godina 358, 362*.

[46] Philip R. Wood, *Title Finance, Securitization, Derivatives, Set-off and Netting* (Sweet & Maxwell 1995) 4.

[47] *See* UNCITRAL Legislative Guide on Secured Transactions Law (2010), Recommendation 50-64.

The draft Ethiopian PPSRs' law re-characterizes financial leasing, hire purchase and sale with retention of title as security agreements.[48] While the approach takes Ethiopian secured transactions law in the right direction, the draft law raises serious conceptual/terminological concerns that reveal the lack of serious effort put into crafting it. More specifically, the draft law lists certain transactions to which it applies without defining the transactions in its definitional section even when the transaction is undefined under Ethiopian law in general. Accordingly, the draft law applies to "… financial lease, right under a hire-purchase agreement, *charge*, *security trust deed*, *trust receipt*, *commercial consignment*…"[49] Some of these terms including charge, security trust deed and commercial consignment are defined neither in the draft law, nor under the Ethiopian legal system in general. Defining these terms is one of the most arduous tasks. Commercial consignment and charge are used as examples here to explain the challenge.

3.1. Commercial Consignment

Consignment - a tripartite transaction whereby goods are delivered by the consignor to a consignee who deals in the goods with third parties[50] falls under UCC Article 9 under certain conditions. Consignment is title financing transaction because the consignor retains the title to the good delivered to the consignee. The purpose of consignment is to allow the consignee to sell the goods in consignment without having to take the risk of mismatch in demand and supply of the goods in question since the title to the goods in consignment remains with the consignor with the possibility for the consignee to return the goods to the consignor, should the former not be able to sell the goods. The specifics of the rights and duties of the parties is determined by contract subject to mandatory law.

[48] For further explanation, *see* Asress Adimi Gikay (n 1) 176-182.
[49] The Draft Ethiopian PPSRs' law Art. 3(1) (a).
[50] Richard W. Duesenberg, 'Consignment under the UCC: A comment on the emerging principle' (1970), 26 The Business Lawyer 2, p. 565.

A. Commercial Consignment in the US

Consignment has different variations. True (obvious Consignment), Non-Obvious consignment, Quasi-Consignment (Disguised Security) and Extended Consignment are the common four types of consignment out of which only the last three fall under UCC Article 9.[51]

The central problem consignment poses is ostensible ownership, i.e. the consignee appears to be the owner of the goods whose ownership remain with the consignor and thus leads third parties to believe that consignee is the owner.[52] To solve this problem, treating consignment as a secured transaction and subjecting it to registration is the solution adopted by UCC Article 9. However, under UCC Article 9, not all forms of consignments are treated as secured transactions. For instance, a true consignment- where the consignee is known to third parties to sell the goods on behalf of the consignor does not pose ostensible ownership problem and it does not fall under UCC Article 9.[53] This is because third parties dealing with a true consignee know that the consignee is not an owner and they do not need additional protection.

As the above overview shows, defining commercial consignment is not a walk in the park. Not all types of commercial consignments are subject to secured transactions law as they present different types and degrees of legal problems.

B. Consignment in Ethiopia

The draft Ethiopian PPSRs' law simply states that it applies to commercial consignment without defining it. In Ethiopia, there is no law that defines

51 *See* Tajti (n 45) 388-389.
52 Louis F. Del Duca, et al, Secured *Transactions under the Uniform Commercial Code and International Commercial Code* (Anderson Publishing Co. 2006) 3. *See* also, Flint, George Lee Jr. & Alfaro, Marie Juliet 'Secured Transactions History: The First Chattel Mortgage Acts in the Anglo-American World (2004) 30(4) William Mitchell Law Review 1404, 1405.
53 UCC (2002) § 9-102 (a) (20).

commercial consignment. The Ethiopian Commercial Code is the first code addressing consignment but only in the context of carriage of goods.[54] It also mentions consignment in the context of sale of goods and in other fields but none of them are relevant to secured transactions law.[55]

Continental Europeans legal systems locate consignment in the law of agency and sales disconnecting it from secured transactions law.[56] The same approach seems to be reflected under the Ethiopian law. With no substantive code or statute defining commercial consignment, the Ethiopian bankruptcy law recognizes an arrangement similar to commercial consignment where goods consigned to the debtor for deposit or for sale on behalf of the owner may, if they exist in kind, in whole or in part, be recovered from the debtor.[57] It is important to realize at this point that the bankruptcy law assumes that commercial consignment is governed by substantive law. The assumption is wrong to the author's best knowledge because there is no clear statutory definition for consignment. Moreover, the bankruptcy law intermingles bailment with consignment because it refers to goods received by the debtor not only for sale but also for deposit.

The fact that the draft law purports to apply to a commercial consignment without defining the concept clearly illustrates that the drafter(s) simply used a template model without critically examining the existing Ethiopian legal rules and concepts. This is apparent in the fact that commercial consignment is listed together with sale with retention of title, the latter having fairly clear definition under the Ethiopian Civil Code.[58] More revealingly, the draft law defines financial leasing,[59] hire-

54 *See* Ethiopian Commercial Code Art. 571 & Federal Negarit Gazeta, Legal notice No.58 6th September, 1960 & The Proclamation to Amend Carriage of Goods by Land 547/2007 Arts 4 & 12(1).
55 See Ethiopian Civil Code Art. 2236.
56 Tajti (n 47) 378.
57 Ethiopian Commercial Code Article 1074.
58 The Ethiopian Civil Code Art. 2287.
59 The Draft Ethiopian PPSRs' law Art. 2(2.18).

purchase,[60] corporeal asset[61] and possession[62] all of which have well-settled meaning under Ethiopian law relative to commercial consignment. There does not appear to be any other plausible explanation than that the drafter(s) lacked adequate understanding of the existing Ethiopian legal regime in defining well-settled concepts while leaving commercial consignment undefined.

3.2. Charge

Charge is another legal transaction the draft law covers. But the term has no meaning under the Ethiopian law of security interests or the Ethiopian law in general. The Ethiopian income tax law states that "where the tax authority has served a notice on the registering authority(of its preferential claim over the asset of the defaulting tax payer), the registering authority shall, without fee, register the notice of security as if the notice were an instrument of mortgage over or charge on such asset, as the case may be, and such registration shall, subject to any prior mortgage or charge, operate while it subsists in all respects as a legal mortgage over or charge on the land or building to secure the amount due.[63] The income tax law does not define what charge on an asset is.

Charge is a generic term that refers to security interest under English law and law of countries that are influenced by English law. Under English law, a charge can be fixed or floating charge (meaning a security right that attaches to specific asset or floats over the after-acquired assets of the debtors respectively).[64] In Germany,

[60] Ibid Art. 2(2.23).
[61] Ibid Art. 2(2.9).
[62] Ibid Art. 2(2.9).
[63] The Ethiopian Income Tax Proclamation No. 286/2002, Art. 80(4).
[64] *See generally* Roy Goode, *Commercial Law*, 2nd Ed, (Penguin Books 1995) 732. *See* also Asress Adimi Gikay (n 1) 184-188.

there are two well-known security devices governed by the Bürgerliches Gesetzbuch (BGB) - German Civil Code, i.e., Hypothec and Land Charge.[65]

Under the BGB, a plot of land may be encumbered in such a way that the person in whose favor the encumbrance is created is paid a specific sum of money from the plot of land.[66] The key difference between hypothec (the equivalent of real estate mortgage under Ethiopian Law) and land charge is that while "hypothec secures a personal claim against the owner of the property (or a third party) and is dependent on the existence of the specific debt, land charge is a "stand alone" security right, independent of a claim to be secured."[67] In Germany, the stand-alone land charge has some advantages. When the underlining contract of loan is invalid, hypothec as an accessory security ceases to exist while land charge survives.[68] Moreover, when a business debtor receives additional line of credit from a creditor the original land charge suffices to secure the new obligation of the debtor without additional steps being taken to that effect.[69]

The only security rights that can be acquired on immovable property in Ethiopia are mortgage and the least utilized antichresis; none resembles land charge as governed under German law. Under the Ethiopian Civil Code or Commercial Code or any other statute there is no definition of term "charge" comparable to the one under the BGB. Since draft Ethiopian PPSRs' law applies to security rights in movable assets, neither land charge, nor real estate mortgage and antichresis are

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[65] German Civil Code (BGB) in the version promulgated on 2 January 2002 (Federal Law Gazette [Bundesgesetzblatt] I page 42, 2909; 2003 I page 738), last amended by Article 1 of the statute of 27 July 2011 (Federal Law Gazette I page 1600). <http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p2598 > Accessed 30 January 2018.

[66] BGB Art. 1191(1).Translation service provided by Federal Ministry of in cooperation with Juris GmBH, <www.juris.de> Accessed 30 January 2018.

[67] David Cox et al, Endrik Lettau, Security over real estate: Germany compared to England and Wales (White & Case LLP, 2006), p. 21.<allaw.com/1-204-0956#.>Accessed 06 September 2017.

[68] Christian Hertel & Hartmut Wicke (2005), Real Property Law and Procedure in the European Union National Report Germany, European University Institute (EUI) Florence/European Private Law Forum in cooperation with Deutsches Notarinstitut (DNotI) Würzburg, p. 38.

[69] Ibid 39.

relevant it. Hence, the fact that the draft law uses this term without defining it is simply a drafting problem that must be remedied.

4. Floating Security Interest

Another problematic aspect of the draft law is its imprecision in addressing floating security right. When security right is created on the debtor's present and after-acquired property, it is referred to as floating security interest.[70] One of the attributes of modern secured transactions law is that it "permits all property, whether existing or to be acquired, to serve as collateral for loan"[71] to increases the debtor's borrowing basis and access to credit. To understand how the draft Ethiopian PPSRs' law allows the debtor to use its present and future assets as collateral by entering into one security agreement, it is expedient to start by explaining floating security interest under UCC Article 9.

4.1. Floating Security Interest in the US: Floating Lien

Under UCC Article 9, the creditor can encumber the debtor's present and after-acquired property[72] through floating lien in the terminology of US secured transactions law.[73] Gilmore defines floating lien as "an interest in all the assets of a borrowing enterprise, whether owned by the borrower when the loan is extended or subsequently acquired."[74]

There is no single provision that creates floating lien Under UCC Article 9, rather a secured creditors use different provisions to acquire security interest over present and future assets of the debtor. The first one is the provision under which the security interests attaches to an after-acquired property, in which case the security

[70] Arthur J. Harrington, 'Insecurity for Secured Creditors: The Floating lien and Section 547 of the Bankruptcy Act' (1980), 64(3) *Marquette Law Review* 447, 449.
[71] Heywood Fleisig (n 33), p. 30.
[72] UCC § 9-204(a).
[73] Harrington (n 70) 449.
[74] Grant Gilmore, 'Purchase Money Priority' (1963), 76 *Harvard Law Review* 1333, 1333.

interests attaches and perfects the moment the debtor acquires rights in the property.[75] "The second set of provisions which are thought to contribute to the floating lien are those that allow the security agreement to cover future advances whether or not committed for."[76]

The third possible component of floating lien is the abolition of *Benedict vs Ratner* rule by UCC Article 9[77] as a consequence of which security interest is not invalid or fraudulent merely because the debtor uses proceeds or acts as though there was no security interests, i.e. *exercises unfettered dominion over the collateral*.[78] The abolition of *Benedit vs. Ratner* rule allows the secured creditor to take security interests in the debtor's accounts receivables without being required to exercise control.[79]

Under UCC Article 9, by using the clause "owned and after acquired assets" the parties can avoid specific description of the collateral as long as the security agreement identifies the collateral reasonably.[80]

Floating lien can create monopoly over the assets of the debtor and may discourage subsequent lenders from providing loan; the phenomenon is called situational monopoly.[81] UCC Article 9 resolves this problem by giving super-priority to Purchase Money Security Interest (PMSI).[82]

Generally, for a security interest to qualify as PMSI, (1) the creditor must have extended "enabling" loan -a loan that made it possible for the debtor to acquire

[75] UCC, § 9-204(a). Peter F. Coogan (1959), 'Article 9 of the Uniform Commercial Code: Priorities among Secured Creditors and the "Floating Lien."'(1959), 72(5) *Harvard Law Review 838,* 851.
[76] Ibid.
[77] Ibid 853.
[78] UCC § 9-205(a).
[79] Coogan (n 75) 853.
[80] In Re Filtercrop, Inc., United States Court of Appeal, Ninth Circuit, 1998, 163 F. 3d 579. See also UCC §9-108.
[81] Anthony Townsend and Jackson, Thomas H., 'Secured Financing and Priorities among Creditors'(1979), 88 *Yale Law Journal*, 1143, 1167.
[82] UCC (2002) § 9-103, (b) (1-3).

rights in property that it did not previously have and (2) the loan must be traced to identifiable, discrete items of property.[83] If the loan is extended for a purpose other than financing a particular item, there is no PMSI as it is the case when the loan cannot be traced to a particular item of good.[84] Any valid security interest created to secure the performance of an obligation incurred to finance identifiable collateral is PMSI.[85] The goal of PMSI super-priority is to ensure that where the debtor's present and future assets are encumbered, subsequent lenders are encouraged to provide credit to the debtor by virtue of the super-priority PMSI enjoys.

To sum up, floating lien widens the debtor's borrowing basis by permitting the debtor to grant security interest in after-acquired assets. In order to offset the pervasive effect of the device from subsequent lenders point of view, UCC Art. 9 gives super-priority to security interest of subsequent financiers of specific assets.

4.2. The Draft Ethiopian PPSRs' Law and Floating Security Interest

There are three relevant principles under the draft Ethiopian PPSRs' law pertinent to floating. First "a security agreement may provide for the creation of a security right in a future asset, but the security right in that asset is created only at the time when the grantor acquires rights in it or the power to encumber it."[86] Second, "a security right may secure one or more obligations of any type, present or future, determined or determinable, conditional or unconditional, fixed or fluctuating."[87] Third, "the priority of a security right extends to all secured obligations, including obligations incurred after the security right became effective against third parties

[83] Townsend and Jackson (n 81) 1165.
[84] Ibid.
[85] Scott J. Burnham, *the Glannon Guide to Secured Transactions, Learning Secured Transactions through Multiple-Choices, Questions and Analysis (*Aspen Publishers 2007) 36.
[86] The Draft Ethiopian PPSRs' law Art. 4(4).
[87] Ibid Art. 5(1).

(save certain exceptions that are not relevant for the purpose at hand)."[88] These three principles enable the secured creditor and the debtor to enter into an agreement whereby the creditor's security right extends to future assets of the debtor provided that they are acquired by the debtor/grantor and become disposable. Furthermore, they enable the debtor to encumber his/her asset, with single agreement, for obligations that may be incurred in the future. But the relevant provisions of the draft law do not clearly indicate that the creditor's security right *can float over shifting assets of the debto*r. On the contrary, the draft law states that the priority of a security right covers all collateral described in the notice registered in the collateral registry, whether they are acquired by the grantor or come into existence before or after the time of registration.[89] Considering that the collateral description should sufficiently identify the collateral whether it is existing or future asset, it is difficult to say with certainty that this principle creates floating security interest.

A counter argument for the above would be based on the rules that give priority right to acquisition security right defined 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 (this is the functional equivalent of purchase money security interest under UCC Article 9).[90] Those provisions are meant to ensure that in case of conflict between the security rights of a secured creditor who has provided loan to the creditor by taking security interest in a future asset and the security right of the person who has sold that asset or granted loan for the purchase of that asset, the security right of the latter prevails.[91] Such a conflict can occur only if the non-acquisition security right holder can acquire such right in future assets of the debtor.

[88] Ibid.
[89] Ibid Art. 51(2).
[90] Ibid Art. 2(2.1).
[91] Ibid Art. 57.

But acquiring security right in future assets is not contestable under the draft Ethiopian PPSRs' law. What is unclear is whether this right can hover over the shifting assets of the debtor and survive the requirements of collateral description. In the US where floating security is well utilized, litigations on the effect of the after-acquired clause usually arise. In Re Filtercrop, the 9th Circuit Appellate Court faced "whether under Washington law, a security agreement that grants an interest in "inventory" or "accounts receivable," presumptively includes after-acquired inventory or accounts receivable."[92] The court held that the description does extend to after-acquired accounts receivables because there was no evidence to the effect that the intent of the parties was to limit their agreement to specific after-acquired receivables.[93] But the court held that the agreement does not extend to after-acquired inventories because the agreement contained an attachment of list of inventories that the court used as an evidence of the intent of the parties to limit the inventories to present inventories.[94] One of the questions to ask with respect to the draft Ethiopian PPSRs' law is the following: if the parties to the security agreement state in their agreement that the creditor's security right extends to the presently available assets of the debtor and accounts receivables, does this agreement cover all accounts receivables of the debtor without regard to their source and when the accounts receivables are due? What if the agreement applies to identified or listed inventories and to unspecified accounts receivables? At least in the US, these questions gave rise to litigation. It is difficult to assume that the situation would be any different in Ethiopia.

The problem could have been avoided by stating that the creditor can take security right in the present and future assets of the debtor by a single agreement and by at least by illustratively listing the scenarios in which an agreement does not apply to certain assets. One could find ample of cases from US courts to draw lessons from.

[92] In Re Filtercrop, Inc., United States Court of Appeal, Ninth Circuit, 1998, 163 F. 3d 579.<http://caselaw.findlaw.com/us-9th-circuit/1179673.html> Accessed 29/09/2015.
[93] Ibid.
[94] Ibid.

If the intention of the drafter(s) is not to give wide power to the parties to encumber future assets, it could clearly be stated that unless the future property is specifically identified by the parities, the security agreement does not extend to it. If the draft law enacted in its current form, courts would be congested by litigation on this issue.

5. Private Enforcement of Security Rights: Self-Help Repossession

Private enforcement refers to the enforcement of security rights without the involvement of the court. Efficient and fair procedure of enforcement of security rights serves the interests of both the debtor and the creditor. While creditors could enforce their claims at least cost, debtors would in turn benefit from increased access to credit that results from creditors' willingness to extend collateralized loan. Due to the fact that traditional court administered enforcement of security rights is generally lengthy and inefficient, private enforcement mechanisms remove the judiciary from the enforcement process and thereby reduces the cost of enforcement.[95] Self-help repossession which is enshrined in the draft Ethiopian PPSRs' law[96] is one aspect of private enforcement of security rights.

5.1. Self-Help Repossession

Self-Help repossession refers to the secured creditor's right to take possession of the collateral upon the debtor's default without the assistance of state official.[97] It is one of the controversial institutions in the discourse of secured transactions law reform, especially in civil law countries. Addressing how continental European lawyers perceive self-help repossession, Warren and Walt wrote "the Europeans

[95] *see* Catalin-Gabriel Stanescu (2015), Self-Help, Private Debt Collection, and the Concomitant Risks: A Comparative Law Analysis, Switzerland, Springer Publishing, p. 1.
[96] The Draft Ethiopian PPSRs' law Art. 83(1).
[97] UCC § 9-609.

tend to see it as another example of American Barbarism: You mean the creditor can just go and steal the property back?"[98]

5.1.1. Self-Help Repossession under the Draft Ethiopian PPSRs' Law

As part of providing wider room for private enforcement of security rights, the draft Ethiopian PPSRs' law entitles the secured creditor to take possession of the collateral upon the debtor's default without applying to a court, if the grantor has consented to it in the security agreement or at the time the secured creditor attempts to obtain possession of the collateral, the grantor or any other person in possession of the collateral does not object to the repossession.[99] Strikingly, the draft law states that "if the grantor or any other person in possession of the collateral objects to giving possession of the collateral to the secured creditor, the Collateral Registry Office shall have the power and duties to order the police force."[100] Many implementation problems arise from the self-help procedure under the draft law. To have clear idea about the self-help repossession procedure of the draft law, the overview self-help repossession under UCC Art. 9 and how the balance between efficient enforcement of security rights on the one hand and protection of consumer rights on the other hand is struck should be imperative. Furthermore, self-help repossession in other civil law jurisdictions is also examined to provide an insight into how the draft law should be improved.

5.1.2. Conditions for Exercising Self-Help Repossession under UCC Article 9

Under UCC article 9, the secured creditor has the option of repossessing the collateral under section 9-609 through either judicial[101] or non-judicial means.[102]

98 William D. Warren & Steven D. Walt, *Secured Transactions in Personal Property*, 7th ed (Foundation Press 2007) 269.
99 The Draft Ethiopian PPSRs' law Art. 83(1).
100 Ibid Art. 83(2).
101 *See* Warren and Walt (n 105) 277.

Non-judicial repossession should be conducted without breach of the peace.[103] The "without breach of the peace" standard being undefined by UCC Article 9 is left to the determination of courts, *ex post facto.*[104] The determination of breach of peace is easier in cases involving physical assault by the repossessor, whereas it is difficult in cases involving emotional harms or when it is conducted through tactics whose effect on the debtor are psychological than physical but that influence the debtor's behavior(for instance the mere presence of law enforcement officer).[105] The objective of subjecting self-help repossession to the without breach of the peace standard is to protect consumer debtors from abuses that can occur during self-help repossession.

Although discussing every possible scenario involving breach of the peace standard is not plausible, it is instructive to discuss some of the situations in which US courts found the violation or otherwise of the standard. McRoberts provides comprehensive, yet simple and policy based analysis of the "without breach of the peace" standard under UCC Article 9.[106] He emphasizes on the inconsistency of court decisions on the breach of the peace standard across states and federal courts in the US.[107] While there are cases where the courts tend to agree on, for example in cases involving physical assault or violence during the repossession,[108] there are borderline cases such as trespass, involving a law enforcement officer as mere observer during the repossession, emotional harm on third parties and the effect of

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102 UCC § 9-609.
103 Ibid.
104 Ryan McRobert 'Defining Breach of the Peace in Self-Help Repossession' (2012), 87 *Washington Law Review* 569, 569.
105 Ibid 570-571.
106 Ibid 117.
107 Ibid 578-594.
108 See Ford Motor Credit Co. V. Herring, 589 S.W.2d 584, 586 (Ark. 1979) & McCall v. Owens, 820 S.W.2d 748, 751 (Tenn. Ct. App. 1991). 120.

debtor's verbal objection during repossession where courts do not have a uniform view on.[109]

McRoberts argues that since the inconsistency in court decisions on breach of the peace in the US means unpredictability to creditor's involved in interstate trade, the fact that UCC Article 9 left breach of the peace standard undefined defeats the very purpose of the UCC.[110] He recommends amendment of UCC Article 9.[111]

Under UCC article 9, violation of the breach of peace standard could entail criminal liability in cases of grave breach such physical assault, compensatory damages, statutory and punitive damages as well as the secured creditor's loss of the right to deficiency claim.[112]

In the United States, despite all the legal tools regulating self-help repossession and limiting its boundaries, the occurrence of confrontation between repossession agents and debtors ending in tragic deaths of repossession agents or debtors is common.[113]

5.2.3. Self-Help Repossession in the Existing Ethiopian Legal Regime

In Ethiopia, self-help repossession is not allowed as a remedy to a secured creditor under general secured transactions law, whether under the Civil Code or any other statute. There are two exceptions to that, i.e., (a) the lessor's right to repossess a

109 McRoberts (n 104) 582-591. *See also* Chapa v. Traciers & Assocs., 267 S.W.3d 386 (Tex. Ct. App. 2008).
110 McRoberts (n 104) 587.
111 Ibid 594.
112 *See* generally UCC Sections 9-625 et seq.
113 Associated Press via NBC, Violence between Repo Men, Car Owners Rising, NBC News, 2/27/2009, <http://www.nbcnews.com/id/29427734/ns/us_news-life/t/violence-between-repo-men-car-owners-rising/#.WvtNnaSFPIU> Accessed 15 May 2018. *See* also Rick Lessard, Tow truck driver murdered repossessing vehicle 'never saw it coming, Fox61, Jan. 18, 2018, <http://fox61.com/2018/01/13/tow-truck-driver-murdered-repossessing-vehicle-never-saw-it-coming/>Accessed 15 May 2018.

leased good under the financial leasing law[114] and (b) the right of the creditor to repossess aircrafts and aircraft engines under Cape Town convention (CTC) and the aircraft protocol.[115]

The leasing industry is infant in Ethiopia which requires encouraging investors in this sector, *inter alia*, by creating conducive legal regime for the enforcement of lessors' right. The idea of efficient enforcement of security rights is equally important in the airlines industry, perhaps more pronounced as international financiers often seek legal framework for efficient enforcement. Regarding requirements for executing repossession, the leasing law and the CTC follow different standards.

Under the leasing law, the lessor can take possession of the collateral upon giving 30 days' notice to the debtor to remedy the default or the breach of contract.[116] What happens if the lessee does not surrender the good peacefully? What if the lessee has paid 90% of the price? Doesn't the lessee have stronger claim in the good than the lessor? If the latter is true, doesn't the law need to strike a balance may be by prohibiting self-help repossession in those circumstances?

Under the CTC, the secured creditor can take possession of the collateral upon the debtor's default if the debtor has agreed to it at any time.[117] Therefore, one difference between the leasing law and the CTC is that in the latter, the debtor's agreement to the repossession is a pre-requisite. If an agreement has not been reached in the security agreement or subsequently, repossession is not an option.

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114 *The* Capital Goods leasing Proclamation No. 103/1998 Article 5.

115 The Cape Town Convention, Article 8(1) and the Aircraft Protocol Article XI (2) Alternative A. Signed on 16.11.2001 ratified on 21.11.2003 and the convention came into force on 01.03.2006.*See* <http://www.unidroit.org/status-2001capetown> Accessed 31 January 2018. The signature, ratification, and effective dates of the Aircraft protocol is the same to that of the CTC. <http://www.unidroit.org/status-2001capetown-aircraft>Accessed 31 January 2018.

116 The Capital Goods Leasing Proclamation Art. 6.

117 The CTC Art. 8(1) (a).

Under the CTC as well as the aircraft protocol, notice to the debtor is not a requirement.

Based on the comparison of the Ethiopian leasing law and the CTC, I argue that the CTC is more informed in its enforcement regime. The CTC "While promoting its foundational policy, i.e., efficient enforcement of security rights, strikes the balance between the right of the creditor on the one and the debtor on other hand, by subjecting repossession to prior agreement."[118]

The Ethiopian leasing law not only ignores circumstances where the debtor might have better stake in the leased good relative to the lessor but also neglects the undesirable and unfortunate results that might occur during the repossession for instance resistance from the lessee and an ensuing exchange of potential physical violence. The draft Ethiopian PPSRs' law makes the process even worse (*see infra* section 5.5).

5.2.4. Prerequisites for Self-Help Repossession under the Draft Ethiopian PPSRs' Law

There are two conditions for pursing self-help repossession under the draft law - (1) default and (2) prior agreement of the debtor or absent such an agreement, lack of objection by the debtor during the repossession.[119] There are plethora of issues that arise under the self-help repossession clause of the draft law.

First, considering that this is relatively new legal procedure for Ethiopia, it takes time for consumer debtors to be familiarized with the procedure. Hence, with the current level of literacy in Ethiopia, creditors could impose standard self-help

[118] Asress Adimi Gikay and Cătălin Gabriel Stănescu (2018), 'The Reluctance of Civil Law Systems in Adopting the UCC Article 9 "Without Breach of Peace" Standard—Evidence from National and International Legal Instruments Governing Secured Transactions'(2018), 10 J. Civ. L. Stud. 100, 138.
[119] The Draft Ethiopian PPSRs' law Art. 83(1).

repossession clauses on debtors that could be hidden in a long security agreement that may not necessarily be brought to the consumer debtors' attention. This means that consumer could be taken by surprise when the secured creditor shows up to take possession of the collateral, with no court order and no prior notice. Second, in cases where there is no prior agreement for the repossession, the draft law merely states that the creditor can take possession of the collateral if the debtor does not object to it. What form should the objection take? Does the silence of the debtor when the creditor takes possession of the collateral constitute lack of objection? Does the mere statement by the debtor for instance as "it is my car, do not take it?" not accompanied by any other act constitute an objection capable of stopping the creditor from repossessing the collateral? What if the repossession agent shows up with an armed police officer?

It is surely intimidating enough for certain persons to see an armed police officer accompanying the repossessor, even if the police officer does not actually assist the repossessor. It could prevent the debtor from making reasonable objection to the repossession. In the US, a court has found that since "an officer's mere presence has the ability to intimidate the debtor into compliance with the repossession, the officer's involvement constituted a breach of the peace as a matter of law."[120] The draft Ethiopian PPSRs' law does not address these issues.

The draft law does not state under what conditions the creditor can execute the repossession even in the instance where the debtor has consented to it in a prior agreement. Assuming that 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

[120] *Stone Mach,* 463 P.2d at 652. *See also* Aaron Lowenstein, 'Law-Enforcement Officers, and Self-Help Repossession: A State-Action Approach' (2013), 111 Mich. L. Rev. 1361, 1367.

and thereby be given the opportunity to rectify the default? None of these questions are answered by the draft law.

The draft law also foresees that "if the grantor or any other person in possession of the collateral objects to giving possession of the collateral to the secured creditor, the collateral registry office shall have the power and duties to order the police force."[121] Supposedly, this provision applies where there has been prior agreement for repossession and the debtor refuses to surrender the collateral. However, this provision does not clarify what the Collateral Registry Office orders the police to carry out. Is it to carry out the repossession on behalf of the creditor? If so, can the police use force to that effect? What if the debtor protests the repossession on the ground that it did not default on its obligation? Aren't the creditor and the Collateral Registry Office acting as ultimate umpires in their own cases at the expense of the debtor's right to present his/her case before an independent judge? These are legitimate question to ask. To the author's best knowledge, the draft law 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 court proceeding.

5.2.5. Lessons from other Civil Law Jurisdictions on Self-Help Repossession

Most civil law countries are skeptical about self-help repossession. If they do embrace the procedure in their legal systems, they provide tools for protecting consumers from abusive enforcement practices.

In Romania, prior to 2011, self-help repossession was subjected to the express consent of the debtor where the repossession clause should be inserted in the

[121] The Draft Ethiopian PPSRs' law Art. 83(2).

security agreement in a specifically prescribed format i.e., in bold capital letters.[122] This requirement was introduced to ensure that the repossession clause is brought to the attention of consumers in the proper form.

In United States, the civil law state of Louisiana refused to adopt self-help repossession in its UCC Article 9 form by prohibiting self-help repossession as a general principle.[123] Hence, in Louisiana, the creditor has no right to repossess the collateral without court involvement except for one type of collateral, i.e., an automobile.[124] Under Louisiana's Revised Additional Remedies Act, a secured creditor can repossess an automobile collateral (1) by sending notice to the debtor upon default,[125] (2) by clearly stating in the notice that "Louisiana law permits repossession of motor vehicles upon default without further notice or judicial process and (3) without breaching peace."[126]

Besides limiting self-help repossession to automobiles and subjecting it to strict standards, the Louisiana Revised Additional Remedies Act illustratively lists the conditions under which breach of peace occur. For instance, there is breach of peace in case of unauthorized entry into the debtor's premise (locked or unlocked) by the creditor/repossessor to conduct the repossession or when the repossession takes place despite the debtor's oral objection.[127]

Louisiana is averse to self-help repossession due to the incompatibility of the procedure with keeping peace[128] as confirmed by courts in multiple occasions.[129] The ultimate result of Louisiana's stance on self-help repossession is the protection consumer debtors from abusive security rights enforcement practices.

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[122] Catalin -Gabriel Stanescu(n 95) 105.
[123] LA Rev Stat § 10:9-609
[124] La. R.S. § 6:966 (2015).
[125] Ibid § 6:966(2).
[126] LA Rev Stat § 6:965.
[127] La. R.S. § 6:966 (2015), § 6:965. C.
[128] Paul Joseph Ory, 'Non-Judicial Disposition under Louisiana Commercial Law Chapter Nine' (1991), 51(6) *La. L. Rev. 1253, 1254.*
[129] 319 So. 2d 766 (La. 1975) & Guidry v. Rubin, 425 So. 2d 366, 371 (La. App. 3d Cir. 1982).

In Ethiopia, a country which has much less literacy level, low respect for rule of law and high tendency for abuse of power and police violence, the draft law's failure to provide safeguards for consumer rights during enforcement of security rights by conferring on the creditor and the Collateral Registry Office the power to order the police is troubling. There is no legal provision under which consumer debtors can challenge the wrongful conducts that could occur during private enforcement of security rights and ask for redress.

General Recommendations

The new Ethiopian secured transactions legal regime marks the end of half a century old obsolete secured transactions law. The draft law introduced many novel approaches to the Ethiopian secured transactions law that could positively contribute to access to credit for businesses and consumers. First and foremost, it adopts the functional approach to security interests by defining all transactions that secure payment or performance of obligation as secured transactions. It disregards formal label of transactions for substance and function. It also introduced a notice filing system as a method of registering security rights that substantially reduces transaction costs relative to the traditional authenticated registration system. To that end, the establishment of a single collateral registry is another good step forward in the right direction. However, the draft law has several flaws that should be rectified before it is enacted. Most of these defects, as I argued extensively, are the result of the drafter(s) lack of regard for the Ethiopian local context.

The article has examined five flaws in the draft Ethiopian PPSRs' law in detail and has attempted to hint at possible areas of revision of the draft law and how to carry out the revision. Due to space constraint and the breadth of the issues addressed, it is indeed difficult to provide recommendations for the revision of specific provisions. But the key areas of improvement and the policy approach to be adopted are highlighted hereunder.

The first defect in the draft law is the implementation of electronic registry for a country with significant electricity and internet access impediment. As noted earlier, other jurisdictions including US states have adopted hybrid system, i.e., paper based and electronic registration system, something the draft law should seriously consider adopting. The second defect is the exclusion of real estate mortgage from the ambit of the law which has the consequence of subjecting real estate mortgage creditors to the costly and lengthy old method of authenticated registration. The author sees no economic explanation for why real estate mortgage should be excluded from the umbrella of the prospective law.

Third, the draft law has serious conceptual/terminological defects in that some of the security devices that it covers are defined neither in the draft law, nor in the Ethiopian legal system in general. This is the case for instance of commercial consignment and charge. The drafter(s) have either copied these concepts from foreign law or did not do the task of examining the Ethiopian legal system overall to determine the significance of defining these institutions or maintaining them at all. The author has clearly shown how defining concepts and terminologies is necessary. Fourth, the draft law does not clearly delimit the scope of floating security interest, which is problematic as it could result in uncertainty of transactions.

Since the draft Ethiopian PPSRs' law is a derivative of UCC Art. 9, there is ample of lessons to learn from both the text of UCC Art. 9 and case law to draft better provisions dealing with floating security interest. Fifth, the draft law introduced an unfamiliar procedure of private of enforcement of security rights- self-help repossession without its essential components that are devised to protect consumer debtors from potential abuses even in the most advanced systems as the US. Four essential aspects of self-help repossession are missing under the draft law These are the requirement of (1) advance notice in addition to (2) prior agreement, (3) the conducting of the repossession in a peaceful manner and (4) the right of the debtor

to challenge the repossession before a court and the power of the court to order return of the collateral if wrongfully possessed and to levy sanctions on secured creditors who involve in abusive conducts.

These requirements are found not only in the laws of emerging civil law countries such as Romania but also in the most advanced jurisdictions such as Louisiana or under the most liberally designed UCC Article 9. If the aforestated defects in the draft law are not acknowledged and fixed, Ethiopian policy makers and legislators should prepare for another round of reform and the costs associated with enforcement problems and further reform effort.