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PROPERTY LAW

USUFRUCT, SERVITUDE, RIGHT OF RECOVERY, PROMISE OF SALE RIGHT OF PRE-EMPTION AND EXPROPRIATION

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CHAPTER FOUR

USUFRUCT

4.1 Definition and Nature

It is to be recalled that patrimonial rights are of two types, of which one is real rights. Again, these real rights are further classified into principal and accessory real rights.

As you may recall accessory real rights are those which exist solely to guarantee or secure payment of a debt. We have said that they are an accessory or dependent of a right in personam. Pledge and Mortgage are best examples to these types of real rights.

On the other hand, we have said that principal real rights are those that exist over/in/ upon an object of property independently of any particular personal right their holder may have. Of all the principal rights that a person may have over an object of property, ownership is the most compressive, co-extensive, exclusive and relatively perpetual real right. It can be expressed metaphorically as the mother of all the other principal and accessory real rights; others are off springs of it. Or, as expressed before in Property and Land Law I, ownership is an umbrella real right; others are dismemberments or divisions or curve outs of ownership.

Of course, ownership cannot be equated as the sum of those dismembered real rights. As those adherents of the bundle of rights explain, simple mathematics does not explain the truth; so many residuary real rights and prerogatives remain inherent in the right of ownership even after the curving out or peeling off those known bundle of real rights-usus, fructus and abusus-and other commonly known real rights.

Generally, the content of ownership is so wide that it is impossible to list exhaustively. But, individuals are not free to create or establish any number of real rights from this wide content. Instead, the legislature determines the type, nature and scopes of those divisions or dismemberments; hence we talk about the doctrine of numerous clauses. A critical reading of Arts. 1204 and 1205 as well as contemporary legal literature proves the truth fullness of our assertions above.

The owner is said to have the power to use the object himself (usus), the power to take "fruits" from it such as crops and rents (fructus) and the power to dispose of it by destruction or alienation (abusus). The owner may alienate one or two of these bundles of rights, and may retain only the abusus. It is possible to transfer the usus or the fructus or both the usus and fructus to another person and still to be treated as an owner. In such cases, the bag of ownership will contain the abusus and any other residuary prerogatives and incidences of ownership. Such an owner in law is referred as bare or naked owner or simply owner.

The other person who gets the usus and fructus is said to have usufruct-a combination of the usus and fructus. It means that this person will have the power or right to use the object himself (usus) and the power or right to take the "fruits" from it (fructus). The person who enjoys these two principal real rights curved out of right of ownership, referred as the usufructuary or beneficiary, is said to have usufruct.

Thus, usufruct may be defined as the right to use, and enjoy or exploit its fruits with out affecting the abusus of the naked owner. Art.1309 (1) defines it as follows:

> *"Usufruct is the right of using and enjoying things or rights subject to the duty of preserving their substance."*

This definition shows that usufruct comprises of two principal real rights: the right of using (usus) and the right of enjoying, more accurately, the right of exploiting (fructus) of a thing or right. These two principal rights that form up usufruct are necessarily derived out of the womb of ownership. In a nutshess, therefore, usufruct may be defined as the right of using and enjoying (exploiting) a thing or right the ownership of which is vested in another, with the duty of preserving the thing or right.

As every other right, usufruct has its own corollary duty. That duty is the duty of the usufructuary to preserve the object of the right. This object of the right and duty can be a movable or an immovable, a corporeal or incorporeal thing. Art.1309 (2) does not properly contain the intended idea. Not only land but also other immovables can be objects of usufruct. Even rights and an inheritance (patrimony) can be objects of such right.

The usufructuary has the best exclusive rights. He or she retains the usus and fructus. One big principal real right, i.e. abusus, only remains in the naked owner. So usufruct is said to be the second best real right only next to right of ownership.

4.2 Sources of Usufruct

Dear student, read Art.1310 which proclaims, among other things about the acquisition and transfer of usufruct by cross-referring to those modes/mechanism of acquiring and transferring right of ownership. It runs:

> *"(1) Unless otherwise provided, the rules governing the acquisition, transfer or loss of ownership of corporeal chattels shall apply to the acquisition, transfer or loss of an usufruct relating to corporeal chattels.*
>
> *(2) Unless otherwise provided, the rules governing the acquisition; transfer or extinction of credits and other incorporeal rights shall apply to the acquition, transfer and extinction of a right of usufruct relating to credits or other incorporeal rights or an inheritance."*

How an odd cross-reference! How a senseless extrapolation! Imagine how the four modes of acquisition of individual right of ownership or transfer of ownership are to be analogized to the establishment of usufruct. Actually, this is an impossible attempt at analogizing and extrapolating. Hence we need no more time to simply play a foolish game! Better to seek logical and real solutions for the question: how does this right come to exist?

If one makes a quick at Arts. 849& 850, and Arts. 929 and 931, as will as the spirit of Arts.1316 and the following, one arrives at the following conclusion. That is, usufruct may arise from?

- Law, or
- Will, or
- Contract.

An owner of a given corporeal or incorporeal thing or an owner of a movable or an immovable may prescribe in his testamentary disposition that his usus and fructus (usufruct) over an identified object of property be devolved to the named legatee. Or, an owner of any of those objects of property may transfer the usufruct of the object to another person by retaining the abusus right or power. Also, the law, as Art.850 does, or the courts that apply the law may be grounds for the establishment of usufruct.

4.3 Types of Usufruct

We have said that usufruct though the second widest right that brings so many benefits to the right bolder entails an obligation to maintain or preserve the object of the right.

And, unlike right of ownership, usufruct's life span is very limited, utmost it may remain intact until the death of the usufructuarty (if human being) or until thirty (30) years (if a juridical person). Read Art.1322. We will discuss this from another perspective later on.

In addition, the beneficiary of the usufruct will be required to restore the thing to the owners which is the subject matter of their relationship. This restoration has to be in kind (Art.1317).But; sometimes this may not be practically possible.

It is also to be recalled that even incorporeal things and consumable corporeal substances may be subject –matters of usufruct (Arts, 1309, 1327, 1347-1352)

All these background issues now take us into the discussion of types of usufruct. If the thing (subject-matter of the usufruct) can be used and enjoyed by the usufructuary without changing its substance, the usufruct is said to be a "perfect usufruct". If, however, the thing cannot be used or enjoyed except by "consuming" it, the usufruct is said to be an imperfect (quais) usufruct.

As will be shown below, the obligation of the usufructuary having imperfect usufruct of a thing is simply to restore its estimated value at the termination of usufruct. On the other hand, where usufruct is perfect, the usufructuary must return the thing itself, in its original condition except for normal wear and tear, and deterioration which have not been caused by his lack of prudence. E.g. Arts.1326, 1327, and Arts.1309&1317.

4.4 Rights and Obligations of Usufructuary and Bare Owner

Usufruct is a principal real right. It exists in (upon) over an object of property-whether movable or immovable, corporeal or incorporeal. The right holder is known by the name usufructuary or beneficiary. The right holder's right exists in the thing or object of another. The rights are usus and fructus.

On the other hand, usufruct involves not only the usufructuary but also the bare owner. The bare owner's abusus right and other residuary and incidences of ownership exist in the thing (object) of his own. But his object of property is encumbered by the usufructuary's real rights. This brings the idea of jura in re aliena (property in the corporeal object of another) as well as the idea of jura in re propria (property in the corporeal or incorporeal thing of one's own). Do you remember these categories of rights in remdear student? Please refresh your mind on this matter by referring to Property and Land Law I relevantly.

From the foregoing background, then, we have at least two right holders, the bare owner and the usufructuary, over one and the same object of property. But the types their real rights are different. The bare owner's real right is that type which we call as a jura in re propria because his real right, the abuses and other residuaries and incidences exist in his own corporeal or incorporeal thing. The usufructuary's real right, on the other hand, exists in the corporeal objects of property of the bare owner, hence the usufructuary's right is a jura in re aliena, or in the incorporeal objects of the bare owner such as credits, patrimony or universalities, etc.

Since these two types of real rights exist simultaneously over/in/upon one and the same corporeal or incorporeal, movable or immovable object of property, and further because these rights are real rights that bring about exclusion of all others except the right holder, it is vital to discuss the scope of application of each of them in terms of the rights and obligations of the parties involved.

So, the next section deals with rights and obligations of the usufructuary and the bare owner. The Ethiopian civil code has incorporated a number of rights and obligations of the usufructuary and bare owner. These rights are to be found scattered from Art. 1309 through 1358. As these are not systematically provided in a way that is identifiable for a casual reader, it needs critical observation and contextual reading. It would require us an extraordinary time, space and energy

to bring all the types of rights and duties of each of the parties in an easily accessible and comprehensive manner. Therefore, what we have made is to provide certain exemplary rights and duties of these parties in separate sub-sections as follows.

4.4.1 Rights of the usufructuary

To begin with, the usufructuary's right originates from the very nature of the relationship and the definition. Simply, the usufructuary's right begins from the right to use the object of another (usus) and the right to collect the fruit or profit of that thing (fructus). This is expressly provided under Art. 1309(1). Besides this article, these basic rights of the beneficiary are indicated under Arts. 1326(1), 1328(1), 1311(1) etc. These provide:

> *Art.1326 (1) "The usufructuary of a corporeal chattel may use it for normal purposes having regard to its nature.''*
>
> *Art.1328(1) "The usufructuary shall become the owner of the natural fruits produced by the thing at the time when such fruits are in good faith separated from the thing according to its destination or custom.''*
>
> *Art.1311 (1) "The usufructuary shall be entitled to the possession, use and enjoyment of the thing.''*

The above-cited provisions show that the usufructuary has a right in rem that comprises the right to use and collect or have collected the fruits with a fundamental reservation, i.e. the duty to preserve the substance of the thing given on usufruct.

As can be understood from Art.1311 (1), a usufructuary has the right to take possession of the thing either personally or through his agent. Again, he has the right to institute a possessory action in his own name against any person including the bare owner who has interfered with or usurpted his possession. In this regard, Art.1341 asserts that:

> *"(1) the usufructuary may claim the thing to which the usufruct extends.*
>
> *(2) He may bring all actions relating to the possession of such thing.''*

As you know from Property and Land Law I Course, one of the legal consequences of legal possession is to entitle the possessor to protect ones possession using force (self-help) or to bring possessory action before a court of law with a view to avoid the interference or disturbance or to get the restoration of the thing of it has been snatched or taken away or that the possessor is evicted from the control of the thing. This possessory action may be brought even against the owner of that thing.

The usufructuary has the right to administer the thing. Art.1311 (2) provides that the usufructuary shall administer the thing. Even this may be treated as the duty of the usufructuary.

The usufructuary has the right to lease the thing to which the usufruct extends, according to Art.1331 (1). It is thus up to the usufructuary either to use the thing personally by having control and possession of the thing or to collect the fruit of the thing by leasing it to a third party.

It is also possible for the usufructuary to establish another right in rem over the thing to which the usufruct extends in so long as such a measure (act) does not impair the right of the owner. This seems the a countrario reading spirit of Art.1318 (1), which runs as follows:

> *"The usufructuary may not charge the thing to which the usufruct extends with any right in rem capable of impairing the rights of the owner.''*

Besides all those stated above, the usufructuary has the right to request the inventory be made (Art.1316) and also can insure his interest with an insurance company (Art.1320 (1)).

In exercising these and other rights, the usufructuary is expected always to be mindful of the interest or right of the owner. His activities should not injure or affect the substance (thing) beyond the normal wear and tear and deterioration. Since he will be expected to restore the thing (unless the usufruct is an imperfect type) he should not exceed the scope of the rights he is allowed to exercise. And this actually relates to his duty.

4.4.2 Obligations of the Usufructuary

Here also we need only to touch up on some of the major duties of the usufructuary that exist in parallel to his rights. As you easily imagine the primary and formost obligation of a usufructuary is that which is provided under Art.1309(1), i.e.. the duty to preserve the substance.

Usufruct is a type of real right whose duration cannot exceed beyond the life of the usufructuary (in case of human beings or beyond thirty years (in case of legal person) as Art.1322 stipulates. At the termination of the usufruct, the usufructuary is expected to restore the thing for the owner. Hence, the duty to preserve the substance of the thing for which the usufruct extends and the duty to restore such thing, when the term of the usufruct expires go hand in hand. He should not alter the destination of the thing (Art.1330).

Art.1317 provides that:

> *"(1) the usufructuctuary shall restore the thing to the owner upon termination of the usufruct.*
>
> *(2) He shall be liable for the loss or deterioration of the thing unless he can show that such loss or deterioration occurred without any fauct on his part."*

Thus, maintaining and properly handling of the thing is what is normally expected of the usufructuary. In case he causes an injury to the thing he shall be accountable to his own or some others act.

The usufructuary is expected to administer the thing (Art.1311 (2)). Besides, as Art.1312 expressly provides, in the exercise of his rights, the usufructuary shall comply with the rules of sound management. What does this mean dear student? It means, in brief, that the usufractuary has to be a prudent paterfamilias, i.e., he is expected to manage and administer the thing as reasonable owner of that thing could apply.

Another obligation of the usurfructuary relates to the sharing of expenses with the naked owner. While the owner shall bear the extraordinary charges provided under Art.1315, the usufructuary shall:

- Bear the normal costs of upkeep of the thing and management expenses, as well as the payment of interest up on debts charged thereon(Art.1313);
- Pay annual taxes and other charges on the thing which are normally paid out of the income (Art.1314 (1)).

Additionally, the usufructuary must be co-operative to conduct inventory whenever asked by the bare owner (Art.1316).

Still further, the usufructuary should not charge the thing, to which the usufruct extends with any right in rem if it is likely to impaire the right of the bare owner. In particular he may not give the thing in pledge without the consent of the owner. This prohibition seems not to totally ban as can be read from (the implicit reading) Art.1318.

Another clear obligation of the usufructuary is the duty to restore the things themselves to the naked owner, and not the value at which they were assessed, upon termination of the term or any other cause, of the usufruct (Art.1321(3). Actually, he may also be required by the owner to produce security or surety during the usufruct period (Art.1324)

One thing that needs to be mentioned before passing is that, exceptionally, the usufructuary may only be required to replace the value of the thing calculated at the time of establishment of the usufruct in case the object of the usufruct involved a consumable thing. In other words, the obligation to restore the thing itself, or the obligation to maintain the substance and not to alter it cannot be realized in imperfect (quasi) usufruct. This is because those consumable things cannot be used in usufruct without destroying or alienating them.

The above obligations are the main ones and not the only. Hence, one should also consult other provisions in the civil code.

4.4.3 Rights of the Bare Owner

The bare owner is the person that holds the ultimate power or right over an object of property. It is only the owner that can destroy or alienate his own object. Of course, the usufructuary may exceptionally consume (hence destroy) if the object of the usufruct relates to consumable things as provided under Art.1327(1) – which provides that in such cases the usufructuary become owner of such thing.

As the bare owner is the person that holds the ultimate right, he can dispose his abuses right. Even he can dispose of the thing in certain instances. Art.1323 reads (under the title of "owner disposing of the thing'')

"(1) without prejudice to the provisions of Art.1315, any act whereby the owner disposes of the thing or right to which the usufruct extends shall not affect the rights of the usufructuary."

As the saving clause of this provision shows, the bare owner may sell things or rights to which the usufruct extends if the usufructuary does not lend him the necessary sums without interest in order to pay extraordinary charge on the thing(Art.1315(1)).

The bare owner has the right to demand the preservation of the thing by the usufructuary (Art.1309 (1)). He even has the right to request for a sound management (Art. 1312). As provided expressly under Art.1316, he can require inventory to be conducted. If he thinks and can show that his rights are in jeoparedy in respect of that thing, he is entitled to require sureties from the usufructuary. And in case of failure on the part of the usufructuary to provide surety, he can apply to the court for the thing to be vested in a curatory. (Art.1324)

A bare owner can prohibit the establishment of a right in rem over the object by a usufructuary provided that it is prejudicial to his right. If the usufructuary disregards the prohibition, he can terminate the usufruct without compensation-(Art.1318).

From the reading of Art.1327 (1), it is possible to infer another right of a bare owner, i.e. he has the right to demand restoration of the thing without alteration upon termination of the term of the usufruct-see also, Arts.Art.1330 (2).

Generally, the bare owner has many rights that can't be exhaustively listed. The above are more known rights. So we advise you, dear colleague, to go through the other provisions that deal with the rights of the bare owner and also to understand the scope of these rights.

4.4.4 Obligations of the Bare Owner

We have shown that at least two persons shall have different real rights in one and the same object of property simultaneously. Each of these real rights are enforceable against any person in the world except the respective right holders. As bare ownership and usufruct are principal real rights, they are free from any dependency on personal relationships. They are not dependent upon personal rights and obligations. Hence each real right holder can exclude each other in their

respective rights. Consequently the bare owner can not prohibit or interfere with the rights of the usufructuary as he wishes. He is under duty to recognize and observe not only the usus and fructus rights of the usufructuary but also the attendant rights and other incidental entitlements of the latter.

Obviously, the obligation of the bare owner begins in his duty to deliver the object of property to the usufructuary. It goes without saying that without delivery of the thing the other party, the usufructuary, cannot enjoy his right meaningfully.

After delivery of the thing the bare owner is under duty to recognize, respect and honor the possession, use and enjoyment of this thing by the usufructuary (Art.1311(1). The administration of the thing, as we have seen, is left to the usufructuary. Hence the bare owner has to respect all these.

Generally stated, the bare owner is duty bound to respect the exercises of various rights by the usufructuary, including the obligation to tolerate or accept the leasing or establishment of non-prejudicial real rights on the thing by the usufructuary. Besides these obligations not to obstruct or interfere, the bare owner in certain cases is expected to perform some activities towards the usufructuary for the latter to enjoy his real right.

For example, payment of extraordinary charges (Art.1315(1)), making inventory (Art.1316), preparation of work plan(Art.1333), reimbursing the debts paid by the usufructuary in respect of a mortgage charging the thing, (Art.1340(2)), etc.

As we have mentioned time and again, the institution of usufruct involves at least two persons that exercise different real rights over one and the same object of property. As these real rights inhere or exist in the same object, it may appear to be very complex to demarcate the boundary of these two types of real rights. Yet, in practice it is not that much complex as each of the usufructuary and bare owner will be confined to their respective rights and obligations provided by law, or their agreements or testimonial dispositions.

Hence, we leave you with this general guideline: just look into the respective rights and obligations of each of the parties involved that will give you the boundary between these real rights.

4.5 Termination of Usufruct

As you may remember, ownership is said to be the most perpetual and permanent of the world of real rights. Despite such general statement, we have seen before that ownership also expires or extinguishes. Hence we have taken some time studying causes or grounds of termination of right of ownership. This gives us a good background to our discussion of termination of usufruct. Simply stated in this contest, let alone usufruct, which is a division of ownership, even ownership terminates.

In other words, that usufruct expires is not open to debate. What is crucial here will be rather to identify what causes this termination.

What brings the termination of usufruct may partly be inferred from the grounds of termination of ownership. In this regard, loss of the object of the real right and the waiving of the real right on the part of the real right holder may be mentioned. With regard to loss of the object, however, we have to be careful not to confuse the termination of usufruct with that of imperfect usufruct that continues to exist in case of consumable things under Art.1327.

As can be gathered from various articles of the Civil Code the grounds of extinction of usufruct include:

- Total destruction of the thing (Art.1319 (1)).
- Expropriation /requisition(Art.1319(2), Arts.1343-1345),
- Death of usufructuary (Art.1322(1));
- Lapse of the time agreed in the contract or lapse of the time provided in the will (Art.1322(1));
- Lapse of thirty years in the case of legal entities where they are usufructuary parties(Art.1322(2));
- Unilateral act of termination by the bare owner in cases where the usufructuary impairs the interest of the bare owner (Art.1318(3)), etc

Besides the above causes, it seems obvious that the bare owner and the usufructuary can terminate consensually.

Each one of the causes of extinction of usufruct need to be separately treated. However, the scope and nature of this course will not allow us to delve into each case beyond this. Yet, it should be emphasized that usufruct's life span is utmost life time. It cannot continue to operate after the death or dissolution of the usufructuary. Unlike many other real rights, it can not be transferred to heirs or successors in the event of death. Thus, in the literature one may read life estate or personal servitude used interchangeably with usufruct.

Other than those listed grounds of extinction of usufruct one may find again unique reasons that causes the extinction of special cases of usufruct. Those special cases of usufruct are to be found from Arts. 1347- 1352(usufruct of credits and incorporeal rights) and Arts.1353-1358 (rights of occupation of premises).

4.6 Right to Use and Habitation of Premises

To begin with, the right of occupation of premises is referring to the right to live in a house or to occupy a part thereof (Art.1353). Unlike many other ordinary cases of usufruct, this right of occupation of premises exhibits the following unique and distinct features:

- It is given only to physical persons. Juristic persons cannot be beneficiaries;
- The usufructurary is expected to enjoy the real right personally; he cannot lease or let other persons to occupy the premise;
- The object of such right involves only houses (buildings);
- The right available to the usufructuary is only the right to use;
- The usufructuary is duty bound to make ordinary repairs and bear the expenses there to;
- This right cannot be assigned or devolved through inheritance; and
- The number of physical persons allowed to live in the houses/buildings is limited.

Non-observance of any of the above distinct features may thus be ground of termination of such special usufruct.

4.7 Summary Questions

1. Define usufruct

2. Usufruct is said to be one of the dismemberments of ownership. Explain

3. What are the sources of usufruct?

4. Describe the unique features of imperfect usufruct in contrast to perfect usufruct.

5. State some of the rights and obligations of a usufructuary.

6. State some of the rights and obligations of a bare owner.

7. “The usufructuary may not substantially alter the thing to which the usufruct extends nor change its purpose.” Comment

8. Can a usufructuary charge the object of the usufruct with right in rem? Why or Why not?

9. What are the causes or grounds of extinction of usufruct?

CHAPTER FIVE

SERVITUDE

5.1 Definition and Nature of Servitude

Some individuals may not be able to make most advantageous use of their land or building under their possession without some right over those of their neighbors. For instance, one's land may have no water while that of one's neighbor has plenty, and one will thus wish to have the right to use that water. One may intend to pipe the water across his neighbor's land; or the most convenient access to the highway from one part of one's land may lie over the land of his neighbor. Or, you may wish to be sure that if you build up to the boundary of your land (in your possession) your neighbor will not subsequently darken your window by building up to the boundary of his side.

It may be possible for one to get use of another's land or building or be sure of the most advantageous use of ones immovable by making a contract with those neighbors. Yet such contract will confer only a right in personam for such a person and may even be an inadequate one. If the neighborly contracting party sells or transfers his right over such an immovable, one will be required to conclude another contract with the transferee; and, this time one will be in a disadvantageous position to bargain the terms of the contract.

On the other side if this person who has been getting use of another's immovable by virtue of agreement intends to transfer his right over his own immovable, he cannot pass on or may not be able to pass on his rights to the transferee which thus brings in a reduction in the price of the transaction.

All these are due to the dependency of the right in personam only to the contracting parties. Thus it is important not only that the right should be enforceable against any subsequent transferee of his neighbor's immovable, but also that it should be enforceable by any subsequent transferee of ones immovable. Not only must the burden 'run with' ones neighbor's immovable, but also the benefit must 'run with' his own or your own. Here in lies the essence of servitude, also called as praedial servitude or real servitude to distinguish it from personal servitude or estate (usufruct). This will bring us to the definition(s) of servitude.

Then, servitude may be defined as a right in rem over a definite plot of land or a building and annexed to another plot of land or building (i.e. vested in the owner for the time being of the land or building). It may also be defined as a charge laid on an estate (immovable) for the use and utility of another immovable belonging to another owner. According to Art.1359 (1) of the Ethiopian Civil Code it is:

> *"a charge encumbering a land,… called the servient tenement, for the benefit of another land, … called the dominant tenement.''*

From the definitions given above, one observes that servitude is a type of right or charge (encumbrance). This may sound awkward to a non-lawyerly mind, for it may appear to be a paradox to speak as a right and obligation (encumbrance) simultaneously. A critical and lawyerly mind look at of the case however shows that servitude is a type of right in rem from the angle of the right holder and a type of encumbrance in rem from the angle of right holder of an immovable against whom another is to derive benefit.

Servitude is a type of real right curved out of right of owner ship or in another perspective an incidence (may be addition) of the right of ownership of another. It is a right /encumbrance benefiting or burdening immovable. It either confers certain advantages of use without exhausting the utility of the burdened immovable or deprive the owner of the burdened immovable of certain specified prerogatives of his ownership.

For a better understanding let's take you back to our previous discussion of *jura in re propria* (Rights in re propria) and jura in re aliena (rights in re aliena). As we have seen rights in *re propria* are those rights that exist against /in/ upon material (corporeal) things such as land, buildings and other movables, and immaterial (incorporeal) things such as patents, copyrights and trade marks.

On the other hand *jura in re aliena* are rights that one has against (upon) in /over object of property of another. This is a clear case of encumbrance or charge. For the person who benefits over the object of property of another it is an addition or part and parcel of his own ownership. Strictly speaking this represents an incidence right to ones ownership of land or building. For the person whose object of property is subjected to the interest of the other immovable, it is really an

encumbrance or charge. The scope and realization of the right of ownership of such a person suffers from such real obligation.

Thus, one observes that servitude is one of the real encumbrances. It is a charge that exists over /against the immovable of one for the benefit of another immovable. The charge is said to be an immovable rather than to the owner of an immovable. This is infact a fictional personification of the relationship. The truth is that persons carry on obligations and derive interests in relation to their own immovables.

A closer look at of servitude, at least involves the following ingredients:

(a) Existence of two different immovables, one owing the servitude to the other;

(b) Existence of two different people, one person owning the benefited immovable and the other person owing the encumbered immovable; and

(c) The existence of the object of benefiting the immovable favored by establishment of the servitude.

Those are basic features of servitude. As a charge (burden) laid upon one immovable for the use, benefit or advantage of another immovable, it necessarily embraces, at least two immovales. One of the immovables owes the benefit to the other immovable; it owes the servitude. It suffers from the encumbrance; such immovable is identified as the servient Tenement. In short the servient tenement is the immovable burdened with the real servitude.

On the other hand, there is at least one immovable that gets or derives benefit from the servient tenement. Such immovable that gets the real benefit from the other immovable is referred to as Dominant Tenement. Thus, dominant tenement is an immovable in whose favour (or in whose owner's favour) the servitude is established.

The servient tenement and dominant tenement, which may be adjacents or if not adjacents that which are in the vicinity, should have different owners. The owner of the servient tenement must be different from the owner of the dominant tenement. There is no such real right /obligation attached or encumbered on ones immovables.

As stated, servitude is a type of real right or a type of real obligation. As a real right, it can be enforced against every person in connection to those immovables. Such real obligation on the other immovable exists to benefit the dominant tenements (its owner). Without some benefit or use or advantage, servitude is unthinkable. It does not exist as such in the vacuum-necessarily there should be at least one immovable that derives benefit from the encumbrance.

A closer examination of the nature of servitude exhibits different benefits to owner of the dominant tenement and accordingly different restrictions upon the owner of the servient tenement. It may impose on the owner of the servient tenement the duty to:

- Abstain from doing a particular thing;
- Permit a certain thing to be done on his immovable;

Or

- Toleration of certain activities on his immovable;
- Prohibition of certain material acts;
- Restriction of certain rights belonging to him by virtue of his ownership.

That the owner of the dominant tenement enjoys or derives the benefit from such impositions upon the owner of the servient tenement is so obvious to warrant further explanation.

From the foregoing discussions, one gathers that servitude entails encumbrance upon the servient tenement. The obligation exists as against the servient tenement, and not against the person of the owner of the immovable. The benefit also exists in favour of the dominant tenement, and not in favour of the person of the owner of the dominant tenement. Hence, any person who may come to own the servient tenement suffers from the real restriction or encumbrance; and any person who may come to own the dominant tenement derives the benefit from the established servitude. The rights and obligations exist in respect of the immovables. Thus, generally speaking there is no positive or affirmative obligation on the owner of the servient tenement.

In this regard, Art.1359 (2) provides:

> *"A servitude imposes on the owner of the servient tenement the obligation to submit to the commission of some acts by the owner of the dominant tenement or to refrain from exercising some rights inherent in ownership.''*

Art.1360 goes to declare in an express manner that there is no affirmative obligation on the part of the owner of the servient tenement, unless it exists as incidence of the real obligations and real rights. It runs:

> *"A servitude may only accessorily cast upon the servient owner the burden to commit any act.''*

This clearly shows the distinction between rights *in rem* and rights *in personam*. In the latter case the rights and duties follow the person of the parties involved in the juridical relation ship. We may life Art.1369 which represents a personam relationship between an owner of a given immovable and another person who is entitled to use another's immovable in a licence agreement. In such cases the right does follow the person of the right holder and the duty does follow the person of the duty holder - not the immovables!

Before passing to the next sub-section, we would like to inform you, dear student, that Art. 1359 and following provisions seem to refer land as the only immovable involved in servitude. But this is not always the case; buildings may also be objects of servitude. But, it is clear that movables and incorporeal immovables can't be objects of servitude.

5.2 Sources of Servitude

As mentioned before, servitude is a limitation of the ownership of the owner of the servient tenement and an addition to the ownership of the owner of the dominant tenement. And, by its nature, servitude is perpetual, it follows the immovables benefited and burdened. Of course, there could be temporal limitations.

The existence of servitude, as we have seen, must be justified by some benefit or advantage in favour of the dominant tenement. Though in a sense servitude is an encumbrance, a liability, on the other side of the coin its represents advantages. It is there recognized by law because it facilitates the most advantageous exploitation of resources in an efficient manner. It enables

owners of the dominant tenements to benefit more from their own immobvables. In some cases it is the natural obligation of neighbourly owners of servient tenements to submit for the commission it is a social obligation for other persons, owners of servient tenements, to tolerate or refrain from doing certain acts on their own immovable for the benefit of others. For a better understanding read the following articles in the various parts of the Civil Code:

Art.1220 pipes

> *"(1) An owner shall, against full payment in advance of compensation for the damage thereby caused, allow the installation on his land of water, gas or electrical lines or similar works to the benefit of other lands.''*

Art.1221. Right of way-principle

> *"An owner whose land constitutes an enclave or whose access to public ways is not sufficient to enable him to exploit his land may demand right of way from his neighbour against payment of compensation proportionate to the damage that may be caused there by.''*

Art.1246. Duties of Land owners below

> *"(1), the owner of land on a low level shall accept the flow of water from land on a higher level where such water flows naturally and not artificially.*
>
> *(2), the owner of the land below may not set up a dike to prevent such flow."*

Art.1247 Drainage

> *"(1) Where the owner of the land above constructs drainage works on his land, the land owners below shall accept without compensation the water flowing there from.''*

Art.1249. Taking of Water. 1. Right of owner

"(1) An owner who requires water bordering his land for irrigation or other purposes may build on the neighbouring riparian's land the works necessary for the taking of water.

(2) He shall have access to such neighboring land for the purpose of constructing or maintaining such works,"

Art.1252. Acqueduct-1. Right of owners

"An owner who wishes to make use for domestic or irrigation or other purposes of water which does not cross or border his land may apply to the court to be allowed to bring such water through other persons land against payment in advance of a fair compensation.''

Art. 1362. Creation of Servitude—1. Contract or will

"(1) A servitude may be created by agreement between the dominant and servient owner.

(2) It may be created by a will in which the owner of a land divides such land between two or more persons."

Art.1371. right of way and Rural servitude

"(1) Rights of way such as the right to traverse a parcel of land on foot, with animals,during to dead season, across fields or out of a wood shall be of such extent as is recognized by local custom.

(2) Rights of pasture, wood-cutting, watering animals, irrigation, an other rural servitudes shall have the same extent.''

Art.1372. Means necessary fro the enjoyment of servitude

"(1) The existence of a servitude shall entail the existence of the means necessary for the enjoyment of such servitude.

(2) Who ever benefits by a right to draw water from a well shall enjoy a right of way to such well."

All these are examples of various servitudes. A rough reading of the above provisions and others not included here (eg. Arts.1366, 1218) would show that servitude may originate from:

- natural location (geographical location) of immovables
- law (legal prescription, and court order); and,
- juridical acts(contracts and wills)

5.3 Types of Servitude

Servitudes are so many varieties. It is impossible to list out all possible varieties in an exhaustive manner. For systematic purposes, and with a view to practical applications, here servitudes are divided into:

(a) Affirmative and negative servitudes;

(b) Urban and rural servitudes;

(c) Continuous and discontinuous servitudes;

(d) Apparent and non-apparent servitudes; and

(e) Natural, legal and conventional servitudes

Within each one or the other category of servitudes one may find such specific kinds of servitude as right of way, aqueduct, support of structures, taking of water, soil or wood, prohibition not to erect buildings, or right of view, right to pasture, right to drain water, etc.

Now, we shall proceed to give brief explanation of those types of servitudes put in broad categories.

(a) Affirmative and Negative Servitudes

Servitudes which confer on the owner of the dominant tenement the right to take certain materials from the servient tenement or to use this immovable for certain purposes are termed affirmative servitudes.

On the other hand, servitudes which deprive the owner of the servient tenement of certain prerogatives of his ownership i.e. prohibit certain material acts or the exercise of certain rights are termed non-affirmative of negative servitudes.

Art.1359(2) seems to consist of such varieties of servitude.

(b) Urban and Rural Servitudes

Urban servitudes are those servitudes established for the use of houses and other buildings in cities and towns. On the other hand, rural servitudes are those types of servitudes that are mostly found in rural areas. These are servitudes established for the use of lands for different purposes. Art. 1371 lists out some kinds of rural servitudes including right of way, rights of pasture, wood-cutting, watering animals, irritation and other rural servitudes.

One may cite right of way to public places, religious institutions, market places, and right of view, right to drainage of water, support structure etc. as examples of urban servitudes.

(c) Continuous and Discontinuous servitudes

Servitudes are either continuous or discontinuous. Continuous servitudes are those whose use are or may be continual without the act of man. On the other hand, discontinuous servitudes are such as need the act of man to be exercised. Continuous servitudes involve the maintenance of a certain state of affairs which is beneficial for the dominant tenement and that once these servitudes are established; they last indefinitely and procure by themselves the expected advantages.

In contrast to continuous servitudes, discontinuous servitudes require for their use and preservation successive or repeated acts of man.

We may cite the servitudes of aqueduct, drain and view as examples of continuous servitudes and servitudes of passage and of way, of drawing water from a well or a spring, of pasturage, of

watering animals at pond or spring of another, of extraction of materials from the servient tenement as examples of discontinuous servitude.

(d) Apparent and non-apparent servitudes

Apparent servitudes are those that are to be perceivable or visible by exterior works. Non-apparent servitudes, on the other hand, are those that have no exterior sign of their existence.

This classification is expressly recognized under Arts. 1366-1368 of the Ethiopian Civil Code.

(e) Natural, Legal and Conventional servitudes

Natural servitudes come from the natural or geographical lay of the dominant and servient tenements.

Legal servitudes, on the other hand, come from the law or judicial order.

To the opposite of these two, conventional servitudes originate from the agreement of parties or a unilateral act of owner of dominant tenement. e.g. Art. 1362

5.4 Rights and obligations of Right holders of Dominant and Servient Tenements

It is to be recalled that servitude only applies to corporeal immovables unlike usufruct that involves movables and immovables whether corporeal or incorporeal. Furthermore, we have stated that servitude is a type of real right, one of the dismemberments of ownership, which differs from personal (obligatory) rights that confer rights merely over the person of a determined debtor. Yet, it is also to be mentioned that it gives rise to certain incidental and correlative duties imposed on the owner of the things burdened.

In this section, we shall confine ourselves to the discussion of real rights and obligations keeping in mind that sometimes there may be accessory personal obligations on the part of the owner of the servient tenement.

To enter into the full discussion of the rights and obligations of the right holders of the dominant and servient tenements we need to refresh what we have said in relation to the content of

servitude. It has been expressed that servitude brings about imposition on the owner of the servient tenement requiring him to:

- abstain from doing a particular thing; or
- Permit a certain thing to be done on his immovable.

In other words, the content of servitude may be the toleration of certain activities on the servient tenement, the prohibition of certain material acts; or the restriction of certain rights belonging to the owner of the servient tenement by virtue of his ownership. The departure for the following discussions lies in these general features and contents of servitude.

5.4.1 Rights and Duties of Right Holder of Dominant Tenement

Generally speaking, servitude is an addition to the right of ownership of the owner of a dominant tenement. Hence the right holder of the dominant tenement is entitle to the enjoyment of the addition to his real right over the immovable. This relates to the enjoyment not only of incidents of every type of real right but also of extra ordinary addition. And What is added or expanded is not an accessory or annex to the dominant tenement but a principal and fulfleged real right that can be asserted against the world at large (Art.1364)

Depending on the source, type and extent of the specific servitude, the right holder of the dominant tenement has the right to enjoy and derive the utility of his own immovable at the expense of the servient tenement. As explained before servitude is justified, on the utility that one derives from the encumbrance imposed on the other immovable. Hence by virtue of his position as a right holder of a dominant tenement, one can commit or accomplish certain material acts over the servient tenement and benefited thereby.

The right holder of the dominant tenement can also demand the abstainsion (refraining) or tolerance of the right holder of the servient tenement. This includes the right to prohibit certain activities or works of the right holder of the servient tenement, and the right to compel this person when the right holder of the dominant tenement commits certain activities.

Further, the owner of the dominant tenement has the right to use the servient tenement to the extent and manner described in the contract or will, or in accordance with the natural lay of the

immovable as well as in a manner that conforms to local custom.(cf Art. 1221, 1246,1247,1249,1252,1370-1372 etc.)

In the use and enjoyment of his right, the owner of the dominant tenement is also expected to observe his real obligations recognized by law and/or expressed in the will or contract which constituted the servitude. These may include payment of compensation, exercise of ones rights so as to cause minimum inconvenience to the servient owner, etc. In this regard, it is pertinent to have a look at of Arts.1220, 1221, 1246(3), 1250, 1254, 1370-1376. Art. 1375 in particular provides for the duties of the dominant owner as follows:

> *"(1) the dominant owner shall exercise his rights so as to cause minimum inconvenience to the servient owner.*
>
> *(2) He shall exercise his rights in accordance with the instrument creating the servitude and may not make on the dominant or servient tenement any alteration which would increase the burden of the servitude.''*

We should not take time and space in bringing all relevant specific duties of right holders of dominant tenements. Dear student, would you please go through those articles mentioned above for details? We hope you can do that.

5.4.1 Rights and Duties of Right Holder of Servient Tenement

As mentioned time and again, servitudes may impose on the owner of the servient tenement the duty either:

- To abstain from doing a particular thing; or
- To permit a certain thing to be done on his immovable.

Thus, the real obligations of the right holder of the servient tenement are most of the time very clear to tell. The rights available for the owner of the dominant tenement bring about corollary duties of the owner of the servient tenement. The latter will be restricted from exercising his rights related in his ownership; he will be prohibited from performing certain activities over his

own immovable or he will have to tolerate, when the owner of the dominant tenement performs some activities on his immovable (servient tenement).

The extent and scope of obligation of the servient tenement varies from case to case. This may differ in accordance with the agreement of parties or the wills. It also varies depending on the type of the specific servitude. Art.1370 (1) provides that the rights and obligations created by a servitude shall be as specified in the entry of such servitude in the register of immovables. This is especially applicable to those servitudes created through contract and will. Incidentally, we have to note that such servitudes shall be of no effect unless evidenced by writhing and shall be of no effect on third parties unless registered in the registers of immovables at the place where the servient tenement is situate(Art.1362-1364).

After providing the general rule in sub-(1), Art.1370 (2) goes on to proclaim:

> *"Within the limits specified in sub-art.(1), the extent of a servitude may be ascertained having regard to the manner in which the servitude was created or peacefully enjoyed in good faith for a long period of time."*

Furthermore, the Civil Code provides other specific obligations of the owner of the servient tenement from Arts.1371-1380, which we think is uneconomical to reprint here. Yet, what Art.1379 provides needs to be mentioned specifically. According to this article "the servient owner may do nothing to reduce or impair the use of the servient tenement."

With regard to the rights of the owner of the servient tenement we may generally state that he has the right to be compensated for the loss he incurs due to the encumbrance on his immovable. Those articles which we have been discussing (Arts. 1220, 1221, 1250, 1252, 1254, etc) are good illustrations for such rights available to the owner of the servient tenement. Also other specific rights are to be found scattered in the civil code. See for example Arts, 1374, 1377(3), 1378(2) and Art.1380.

5.5 Extinction of Servitude

Let's once again recall the essential features of servitude, which incidentally also characterize its difference from usufruct. It is said that servitude necessarily requires at least two immovables

one of which owes the obligation to the other. These immovables need to be owned by different persons. The servitudes have for their object the use or benefit of the immovable in favour of which it is established.

Servitudes are perpetual; they do not terminate upon the lapse of any period of time. This perpetuity is a consequence of their qualification as inseparable component parts of the ownership of an immovable.

But, the contract or will may determine the life span of servitudes. Also other factors may terminate its existence.

The following are grounds that lead into or bring about the extinction of servitudes:

- Maturity of the time fixed for servitudes in the contract or will;
- Destruction of either of the tenements or both of them;
- Prescription;
- Division of the dominant or servient tenement(partially);
- Struck off from the registers of immovalbes;
- Redeeming servitude;
- Merger of the ownership of the two tenements, etc

The contracting parties or the testator may freely determine the duration of servitude. Obviously such servitude expires when that date stipulated in the creating instrument matures. It also goes without saying that destruction of either of the immvables or one of the immovables brings about termination of the servitude. Even fundamental changes in the topography or natural lay of these immovables due to natural and environmental circumstances may bring about extinction of servitude.

Failure to derive the benefit from the servient tenement for years may lead into extinguishment of the encumbrance especially in apparent servitudes. (Art.1382)

When we come to the division of dominant and/or servient tenements, in principle they are not grounds of termination of the established servitudes. Indivisibility is one other characteristic of servitudes. Art.1377 (1) provides:

> *"Where the dominant tenement is divided, the servitude shall be maintained for the benefit of the owner of each now parcels but the burden of the servitude may not be increased in consequence thereof."*

Again Art.1378 (1) reads:

> *"Where the servient tenement is divided, the servitude shall remain annexed to each new parcel of land."*

Thus, in principle division of either or all of the tenements is not a cause of termination of servitude. Nonetheless, sub-art. (3) of Art. 1377 and sub-art. (2) of Art.1378 envisage possibilities of partial extinction of servitudes. These go in the following lines respectively:

> *"Where the servitude benefits one parcel only, the servient owner may require that the corresponding entry be struck off the register of immovable as regards the other parcels."*

And,

> *"Where the servitude can materially not be exercised on a parcel, the owner there of may require that it be struck off the register of immovables as regards his parcel of land."*

Further still, Art. 1381(1) proclaims that a servitude entered in the register of immovables shall be extinguished where the entry is cancelled. You may read sub (2) and (3) for more details.

As Art. 1383 expressly provides, servitude may be redeemed where:

(a) It is contrary to the interests of the national economy or some other public interest; or

(b) The benefits it entails for the dominant tenement are out of proportion with the inconvenience or damage it occasions to the servient tenement. The procedures are as provided under Arts. 1384 and 1385.

What is more, merger of ownership of the two tenements is another clear ground of termination of servitudes.

Dear student, this is generally all about servitude. We hope you have gained some useful insights from the discussions. You might even tried to relate the issues raised with prevailing realities in your localities. To your surprise many of the issues relating to servitude fall under the jurisdiction of social courts. Do you think these are in the common knowledge of social court judges? Please take some time to discuss issues of servitude with such judges and local elderly people, particularly on rights of way, drainage, support structures, and installations of electrical, water and telephone cables and pipes.

Hopefully, you will get much more from such informal discussions.

5.6 Summary Questions

1. How do you define servitude?

2. What are the essential features of any servitude?

3. Discuss the various sources of servitude in brief.

4. List and then give brief explanations of the common types of servitude.

5. Compare and contrast servitude with usufruct.

6. "Servitude shall run with the land notwithstanding that the servient or dominant owner changes." Comment.

7. Write brief explanations about

(a) Conventional servitude;

(b) Legal servitude; and

(c) Natural servitude

8. It is to be noted that servitudes are different from personal obligations such as acquired in licence to use ones land through agreement. Yet, it may be difficult to distinguish conventional servitudes from such mere personam arrangements. Art.1365 of the Civil Code provides a rule of interpretation of doubtful cases.

It runs:

> *"Where it is doubtful whether a provision in an instrument creates a servitude running with the land or imposes a personal obligation on the owner of such land, such equivocal provision shall be deemed to impose a personal obligation and not to create servitude."*

Please discuss the idea in this article.

9. What is the difference between apparent and non-apparent servitudes? What is the legal consequence of distinguishing between the two?

10. List the causes of extinction of servitudes.

CHAPTER SIX

OTHER RIGHTS IN REM: RIGHT OF RECOVERY, PROMISE OF SALE AND RIGHT OF PRE- EMPTION

6.1 Right of Recovery:

6.1.1 Definition and Source

Dear student, do you know about right of recovery? What is it? What is (are) its sources(s)? Do you remember what you have seen under Art.1125, on assignment of rights to a succession? What about that which is provided under Art.1261, on transfer or disposition of a share in joint ownership? Please go back and read those articles and refresh your memory.

Now, let's begin from the meaning of the expression "right of recovery"

Fortunately, we do have an article devoted to the definition of Art. 1386 defines the right of recovery as:

> *"the right of a person to recover against payment a particular thing given to a third party in ownership or usufruct."*

From this definition one learns that right of recovery, also known as right of repurchase, is a type of special right in rem. What type of right in rem? It is a special type of real right that enables some persons to legally compel third party acquires of things for consideration in ownership or usufruct to transfer these things against payment. Who are the beneficiaries? What kinds of objects of property are subject to such real right? And what are the preconditions to exercise such a right? What is the justification for such preferential treatment of certain individuals? These and related issues need to be analyzed here.

This right of repurchasing is said to be relic of ancient practices and legal tradition. This is a right which is available only for close consanguine relatives of a seller, co-heirs and joint owners. The right is available for these beneficiaries as against strangers, third party buyers of certain types of objects of property.

The right of recovery is a type of real right of a person to recover repurchase (against payment) of certain things when that thing is transferred to a third party in ownership or usufruct for consideration. To understand the operation of this right, please refer to Arts. 1388 cum Art. 1261, Art, 1125 & Arts. 1389 – 1398.

According to Arts. 1388 (1) and 1261(1) the joint owners of a given object of property have a legal right of recovery where a share in the thing jointly owned is disposed of (transferred through act of sale). It is to be recalled that each joint owner has the right to alienate his share in the thing to any person of his own preference. The joint owners shall be legally entitled to compel the third party buyer of that share to sell it to them.

According to Art. 1125(1) the co-heirs have a right of legal right of recovery (it wrongly says "legal pre-emption") against the person to whom rights to a succession have been assigned, excepting the case where the assignment has been made in favour of one of the co-heirs. NB that Art. 1125(2) cross refers Arts. 1386- 1409, which is about right of recovery and not of pre-emption!

From the above discussion, we understand that right of recovery is available in cases of sale of "share" in a thing jointly owned and in the hereditary estate, which according to Art. 942 is a distinct estate. Besides these two instances, Art. 1389 seems to add another room for the exercise of this right of recovery. It provides that the relatives by consanguinity of a person who alienates a land shall have a legal right of recovery. Nevertheless, this latter addition lost its enforceability since the nationalization of rural and urban lands in 1975.

Thus, currently the objects of property for the exercise of this right are only share in a corporeal thing and share in the incorporeal hereditary estate. The beneficiaries are only those remaining joint owners and co-heirs. The right is to be exercised against strangers, third party buyers that are not joint owners and co-heirs. The rationale is to prevent a new comer from joining the remaining joint owners and to protect the transfer of family property within the family.

For a beneficiary to exercise this right against a third party acquirer certain conditions need to be fulfilled. Art. 1389 provides that the beneficiary of a right of recovery may exercise it where:

(1) The owner of usufructuary of a thing alienates his ownership or usufruct for consideration; or

(2) The thing is seized at the request of a creditor of the owner.

And the time for exercising this right is also provided for under Arts. 1400 and 1401.

The source of this real right is the law. It is the declaration of the legislature under Arts. 1125, 1261 and those under Arts. 1386 – 1409 that recognize the existence of such a right for certain beneficiaries. Though principally this right of recovery is one specific type of real right, its application is not as extended as many others. Its applicability and scope is very limited. It is exercisable only in cases of alienation for consideration to stranger third parties. Even more, this right to recover or repurchase from a stranger buyer is not transmissible and alienable to another person other than those specifically provided by law. This is expressly provided under Art. 1397. Sub-art. (1) Of this article provides that "all the rights of recovery provided by law shall be personal to him who benefits thereby under the law."

And the next two sub-articles provide that rights of recovery are inalienable and may not be exercised by the creditors of the beneficiaries.

6.1.2 Conditions to enjoy the right and its applicability at present

Though the preconditions to the exercise of the right of recovery have been highlighted above, we need here to address the issues specifically, including the applicability of the right at the present time.

Briefly stated, the following are the necessary conditions to exercise right of recovery:

- There has to be translative act for consideration (i.e. sale of ownership or usufruct):
- The subject matter must relate to "share" in the thing jointly owned or in the inheritance;
- Contract of sale must have been concluded between one of the joint owners or co-heirs with another non-joint owner or non-co-heir to transfer that share for the latter for consideration;

- The beneficiaries need to act timely (they have to declare their intention to repurchase the share to the buyer within two months from having been informed that the ownership or usufruct of the "thing" has been transferred to a new owner or usufructuary (Art.1400);and

- The beneficiaries have to pay-reimburse-the price of the "thing" to the original buyer (the person against whom this right is exercised) and this is clearly provided under Arts. 1405 & 1406.

Nowadays right of recovery cannot be exercised over land, as land has become one of the things falling under public domain. Though originally Art. 1389 seems to proclaim only about land, Arts. 1396 and the following seem to include other immovables such as houses and buildings situated in non-town areas. Thus it appears today that right of recovery can be exercised against such immovables.

Clearly, the beneficiaries of the right can exercise their right in case of sale of ownership or usufruct of share in a thing jointly owned and in the sale of share in a hereditary estate (inheritance). These are clear areas for the application of the right of recovery at present.

6.3 Promise of sale and Right of pre-emption

6.2.1 Definition, source and scope

In this sub-section, we shall define promise of sale and right of pre-emption; we shall also identify the sources and scopes of these rights.

As stated above, these two real rights are very special kinds. In a sense they are restrictions on the abusus right of an owner and are related to contractual relationships, and hence personam in many respects. Yet, they fall under the category of real rights. They are not to be treated under the law of contracts but within the Law of property. Really, they feature unique characteristics of rights in rem.

Art. 1410 offers the definition of these two rights in rem. According to sub-art.(1) a promise of sale is defined as:

"an agreement whereby the owner of a thing undertakes to sell such thing to a specified person, should such person wish to buy it."

So, promise of sale is primarily a type of contract. Nevertheless the contract gives rise to rights and obligations that are in rem in nature. The obligation of the owner of that thing which is the subject matter of the contracting party exists upon that thing. The right of the beneficiary of the agreement follows the thing.

A promise of sale is a contract in which the owner of a specified movable or immovable corporeal thing agrees to sell it to a specified person if such person decides to buy it. The contract comes into **force when the beneficiary makes a decision to buy the thing subject to the agreement.** Well, in such agreement, the owner must have preferred to sell his thing not at the time of the agreement. Or at the time of agreement the beneficiary, must have not decided to buy that thing. In case the latter wishes to exercise his right under the agreement, the owner of the thing will be required to sell the thing. For the owner of the thing, therefore, promise of sale is a limitation, a real obligation upon the ownership of that thing – indeed a special type of encumbrance.

After the conclusion of the contract, the owner cannot lawfully transfer or assign his right of ownership over the thing to any person of his preference (choice). His undertaking requires him to wait until the beneficiary declares his wish to buy it within the specified period of time in the contract.

After making the agreement, the owner of thing cannot create rights in rem such as usufruct, servitude, mortgage and pledge over such thing unconditionally. In this regard, Art. 1416 provides:

"(1) whosoever has promised to sell a thing to another may not alienate such thing nor charge it with a right in rem for so long as the promise is effective.

(2) notwithstanding the provisions of sub-article (1), the thing may be pledged or mortgaged but for an amount not exceeding the price fixed in the agreement where by the promise was made."

During the life span of the promise of sale, the owner's right of ownership remains so restricted. During this period, he has no right to:

- Alienate the thing; and
- Charge the thing unconditionally, despite some exceptions.

The owner of the thing is also duty bound to give notice of the motion of his creditors if they preferred to attach that thing to settle their interest against the owner. Art. 1417(1) states that:

> *"Where the thing to which the promise of sale relates is attached, the owner shall give notice there of to the person in whose favour the promise was made."*

Here the obligation of the owner is to give notice. Then it is up to the beneficiary to decide to buy that thing attached by the creditors of the owner. As expressly provided under Art. 1417 (2) the beneficiary may lose his right if he fails to buy the thing before the thing is sold by auction.

On the other hand Art. 1410(2) gives the definition of a right of pre-emption. It goes:

> *"A right of pre-emption is a right deriving from an agreement wher by the owner of a thing undertakes to sell such a thing in preference to a specified person, should the owner decide to sell it."*

Thus, a right of pre-emption is an agreement between the owner of a given movable or immovable corporeal thing and another person called the beneficiary of right of pre-emption. Here again we observe another real right coming out of contract. In the agreement the owner of the thing undertakes to sell that thing to the beneficiary if he (the owner) decides to sell the thing. The decision in this case needs to come not from the beneficiary like in the case of promise of sale but **from the owner of the thing**. In other words, the beneficiary will be able to exercise his right in rem over the thing **if the owner decides to sell it**. On the other hand, once the owner of the thing decided to sell the thing, he cannot sell it to another person of his choice but to the beneficiary. The idea in this case is that when the owner of the thing makes up his mind to sell his own thing, there might be several competitive buyers and the owner must not sell to the

other buyers. He should rather sell it to the beneficiary. Accordingly, a right of pre-emption is a preferential real right.

A right of pre-emption is also a restriction, an encumbrance on the ownership right of the owner of the thing. Should the owner decide to sell his own thing, he shall not sell it to anybody but only to the beneficiary. Once a right of pre-emption is established, the owner has to sell it to the beneficiary if he decides to sell it within the time fixed in the contract. If he sells to another person, the beneficiary can follow (pursue) the thing and reclaim from any buyer provided all other conditions to exercise this right are met.

Art. 1418 provides another restriction on the right of owner of the thing subject to contract of right of pre-emption. Sub-art (1) initially states:

> *"Unless otherwise agreed, whosoever has granted a right of pre-emption on a thing may create rights in rem on such thing."*

If expressly agreed or reserved, the owner can't establish other rights in rem over that thing. Unlike the owner of the thing that is subject to promise of sale here the owner is not generally prohibited from creating in real rights. This is reasonable as the owner is not decided to sell that thing yet, when the owner decides to sell it, he shall inform the beneficiary all the charges existing on the thing (Art. 1418(2)). Also, where the thing is attached the owner shall give notice thereof to the beneficiary (Art. 1418(3)).

When we come to the source of promise of sale and right of pre-emption, both originate from contract of parties. Unlike right of recovery that only comes from the law, these two special kinds of rights in rem come from agreement of parties (Art. 1410(1) & (2)).

The scope of both of these special kinds of rights in rem is indicated under Arts. 1411 and 1415. According to Art. 1411(1) for these rights to be restrictions on right of ownership, they have to relate to an immovable or a specific movable. And according to sub-art. (92), Art. 1412 ff shall apply to the in rem relationship while the conditions relating to the contract between the parties is to be governed by that part of the civil code which deals with contracts in general.

Though these rights are real rights, they are limited in many respects. The rights are not transmissible or attachable. According to Art. 1415(1), the rights that arise from these agreements attach only to the persons in whose favour the promise of sale or right of pre-emption is created. Further sub-art. (2) expressly declares that these rights may not be alienated by the beneficiaries. Also these rights cannot be inherited by heirs and cannot be attached by creditors (Art. 1415(2) & (3)).

Next we shall examine the conditions and validity requirements of each of these rights in rem and their legal effects.

6.2.2 Requirements and Legal Effects

This sub-section deals, briefly with the ingredients and validity requiremts of promise of sale and right of pre-emption. It also explores the legal effects of these special kinds of rights in rem.

As highlighted hereinabove, the thing over which a right of promise of sale and pre-emption are to be established should be either an immovable or a specific movable. This is clearly enacted under Art. 1411(1). As the gist of this and the following articles of the civil code show, these things should be corporeal objects of property. Additionally, the movable intended to be the object of the right has to be described and specified; one cannot make his totality of movables subject to either of these rights in rem. The movable has to be identified or singled out from the other objects of property of the owner.

Secondly, the agreement relating to each of these rights in rem need to be in written form. Further the written agreement shall contain:

- The price of the thing; and
- The specific time for the exercise of the right established.

Art. 1412, titled as “conditions for validity”, goes to provide:

> *“An agreement [relating to a promise of sale and a right of pre-emption] shall be of no effect unless it is made in writing and specifies the time within which and*

price for which the person in whose favour the agreement is made may require its performance."

Clearly, for these agreements to produce legal effect, must be made in writing. The contracts must specify the time within which and the price for which the beneficiaries may invoke as a right. That the beneficiaries should be identified goes without saying. Failure to observe any of these requirements entails nullity.

Regarding the time element, Art. 1413 has already set governing norms. It states:

"(1) No agreement [relating to promise of sale and right of pre-emption] shall be effective for more than ten years.

(2) Where the period fixed in the agreement is longer than ten years, it shall be reduced to ten years."

When we come back to the legal effects of such agreements, Arts. 1422 – 1425 proclaim those additional consequences against third parties. The legal effects of these rights in rem as between the contracting parties have already been discussed above.

In respect of the legal effects of these real rights against third parties we have to see what is provided for under Arts. 1422 through 1425. According to Art. 1422, if the agreement relates to registered immovables; the agreement should be registered in the register of that immovable; for otherwise, it can't affect third parties. If the agreement, relates to other immovables not registered still the agreement, to be effective against third parties, should be registered in the registry of the court of the place where the immovable is situated. Failing such registration, the agreement affects only those third parties that know or should have known the agreement (Art. 1423). Yet, the lack of a uniform system of registration at the national level as we have seen before makes these requirements inapplicable.

As to agreements that relate to corporeal movables, only those third parties that knew or should have known them shall be affected.

In sum, validily made promise of sale and right of pre-emption agreements exhibit certain features of real rights. The beneficiaries can assert their parties in the manner described above.

As Art. 1425(1) expressly prvides, beneficiaries can set up their rights against third parties; they may require any third party who has acquired the ownership of those things in violation of their rights to surrender such things. This right to follow and reclaim of course need to be exercised within six months from the third party having taken possession of the immovable(what about movables? e.g. Arts. 1424 & 1425(2)?)

Dear student, now you can compare and contrast right of recovery with promise of sale and right of pre-emption. We hope you can do that. Hence we have refrained from providing these by taking further time and space. We urge you to trace every possible point of similarity and difference for better and comprehensive understanding.

6.3 Summary Questions

1. Define each of the following:

   (A) Right of recovery

   (B) Right of promise of sale, and

   (C) Right of pre-emption

2. Discuss the sources and scopes of each of the above (1) real rights.

3. Compare and contrast promise of sale and right of pre-emption.

4. What distinguishes right of recovery from

   (a) Promise of sale?

   (b) right of pre-emption?

5. Describe the ingredients of valid promise of sale and right of pre-emption agreements.

6. Read Arts. 1125 and 1261. Determine whether the provisions in these articles are referring to the application of the rules of right of pre-emption or right of recovery.

CHAPTER SEVEN

PUBLIC DOMAIN AND EXPROPRIATION

7.1 Public Domain

7.1.1 Definition and Nature of Public Domain

It is to be recalled that one of the classifications of objects of property, things, relates to things of the private domain and public domain. The Ethiopian civil code appears to recognize such classification. In providing norms about things that fall under the category of public domain under Art. 1444 and the following articles, it clearly distinguishes between things of the private domain and those others that fall under public domain.

As we have seen sofar "private domain" is a catchword that expresses the regime of private ownership of things. In other words, private domain refers to those things that fall under the individual (sole) ownership of things and those others that are either jointly or communally owned. The right holder, the owner, may be only one, single, person or it may involve several persons. And the word "person" includes not only humans but also juristic entities such as the state and its agencies as well as many varieties of corporations, associations and social clubs.

Of the many varieties of juridical persons, the state is characterized by a number of distinguishing features. As every human persons and juridical persons it engages in horizontal juridical relationships. It concludes contracts and participates in every day transactions as a buyer or seller, as a creditor or debtor. It bears rights and obligations. It owns objects of property, it acquires or transfers right of ownership of things as every other human and non-human thing having the recognized legal status. Therefore, Art.1444 (1) goes on to provide that: property [objects of property (things)] belonging to the state or other administrative bodies shall be subject to the provisions relating to property (things privately owned." Thus the state may be an individual (sole) owner of things or it may own things together with other humans or fictions entities as a joint owner. In such cases, that law which is applicable to ordinary individual persons, whether natural or fictions, shall be applicable to it.

On the other hand, the state is a political entity that represents a given territory and population having its own government which is is sovereign and independent of another organ or human

persons. It symbolizes the political and legal entity which embraces every national (citizen) and more or less defined geographical territory which is sovereign and independent. Though functionally divisible to legislative, executive and judicial orgains, it generally is a symbol as well as real functioning entity of a given population and territory which is independent and sovereign. Thus, the various nations, nationalities and peoples of Ethiopia and the territories occupied by these entities as recognized under international law, are referred to as the Ethiopian state. As such the Ethiopia state is independent and sovereign. It administers its peoples and territory independent of any other person. It is not simply a summation of the peoples living in the country. And this political entity has its own distinct rights and duties assertable at international and national arena. It bears rights and obligations. It enters into various forms and types of juridical relationships with others. It owns things in proprietary relationships. And public domain is about such things which fall under the ownership of the state in this aspect.

Thus public domain refers to ownership of things by the whole nations in an indivisible and unlimited sense of the collectivities and its territorial integrity acting in concert. Those things that fall under the ownership of the whole nation are said to be things of the public domain.

According to Art. 1444 (2) such things shall be subject to the provisions of this section (Arts. 1445-1459). Where a given thing forms part of the public domain, it means that those other provisions dealing with privately owned things are inapplicable to it. Strictly speaking, the civil code which deals with the civil relationships is not a pertinent place to deal with public domain. Things that fall under this category of things cannot be acquired or transferred in accordance with those provisions of the civil code that deal with privately owned things. Not only norms of acquisition and transfer but also those norms such as dealing with management and utilization, enjoyment and alienation, proof, prescription and extinction are all different from the regime that governs the private domain. Thus, things of the public domain are to be regulated by public laws; such as constitutional laws and other administrative laws. The inclusion of Title IX (Arts. 1444 and the ff) in the civil code is a bit puzzling one.

7.1.2 Things of Public Domain

In early Roman law, “public things” constituted one of the categories of things not susceptible of patrimonial rights. Public things were property of the Roman people and their use was free to all

citizens. The incidents of public ownership were regulated by rules of law other than those of the civil law.

In the Justinian legislation the term public things applied to public property which was insusceptible of private ownership as serving a public property purpose, it also applied to property of the state or its political subdivisions which was susceptible of private ownership and subject to the rules of civil law like any other property held by private person. This term also applied to things which were 'public" only in a technical sense, as destined to public use.

According to continental /civilian doctrine, property of the state and of its political sub-divisions is distinguished into property of the public domain and property of the private domain. This classification as we have seen is recognized under Art. 1444 of the Ethiopia Civil Code. Writers are not however in agreement as to which things belong to the public and to which to the private domain or as to the criteria for the distinction.

According to one line of thinking, the essential characteristic of property within the public domain is that such object of property is not susceptible of private ownership. Such things are regulated by rules of pubic law exclusively. As a result, to the public domain belong all things of the state and its political subdivisions which is outside the sphere of the civil law.

A somewhat different line of thinking finds the essential characteristics of things within the public domain in dedication to public service. Consequently, all things of the state and its political subdivisions serving a public purpose are within the public domain.

According to a third line of thinking, the essential characteristics of things within the public domain are dedication to public use. Consequently the public domain is co-extensive with things which are subject to public use. Such things are insusceptible of private ownership one because they are "state" property but because they are dedicated to public use.

Coming back to the Ethiopian Civil Code, Art. 1445 goes on to provide that:

> *"Property [object of property] belonging to the state or other administration bodies shall be deemed to form part of the public domain where:*

(a) it is directly placed or left at the disposal of the public; or

(b) It is destined to a public service and is by its nature or by reason or adjustments, principally or exclusively adapted to the particular purpose of the public service concerned."

These are the criteria to differentiate things of the public domain and private domain in general. But each one of the criterion are too vague to have a clear understanding of things of the public domain.

Fortunately, we do have further provisions in the civil code that provide expressly some items of the pubic domain to aid us in understanding the criteria set at Art. 1445. According to Art. 1446, the following things are listed as falling under the public domain, if owned by the state or its political subdivisions. These are:

(a) roads and streets, canals and railways;

(b) seashores, port installations and lighthouses;

(c) Buildings specially adapted for public services such as fortifications and churches.

Again Art. 1447 goes on to include waterways, lakes and underground accumulations of water. Then Art. 1448 follows and runs.

> *"Movables which are placed at the disposal of the public by a public service or entrusted to the custody of a public service shall be deemed to form part of the public domain."*

To all these listings and general principles is added rural and urban land as well as extra houses nationalized by respectively, and urban land as well as extra houses nationalized by the Dergue proclamations, proc. No. 31/ 1975 and proc. No. 47/1975. Again Art. 40 of the FDRE constitution enacts under sub-art. (3) As follows:

> *"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*

the common property of the Nations, Nationalities and Peoples of Ethiopia and shall not be subject to sale or other means of exchange."

Thus, what was envisaged in the civil code during the 1960 in respect of land has changed in the 1970s and thereafter.

In summary, we may limit ourselves here by stating some of the essential features of things of the public domain in conclusion.

That is things of the public domain are:

- Inalienable unless declared exceptionally (Art.1454)
- Not to be acquired by possession in good faith or usucaption; or by occupation – i.e., insusceptible of private ownership (Art. 1455 & 1457)

The scope and variety of things falling under the public domain may be narrow or wide depending on the legal system and prevailing ideology of countries as well as convenience to do so.

The use and enjoyment of things of the public domain is regulated by rules of the public law. In the following section we shall inform us about the use and administration of certain things of the public domain.

7.1.3 Ownership and use of Land, Water and Other Natural Resources in Brief

Still we are not here to conduct an in-depth discussion on the topic at hand. The issues are matters of constitutional and administrative law simply we try here to give a hint on the use and administration of those things of the public domain.

As mentioned time and again, land has become a thing that falls, under the public domain since 1975. And art. 40(3) of the constitution have made it very clear that land is under the ownership of the Ethiopian peoples. On behalf of the Ethiopian Nations, Nationalities and peoples, the Federal Democratic Republic of Ethiopia, the Ethiopian state owns the land.

AS things stand now, individuals, whether peasants, pastoralists or private investors (what about urban duelers?) have only a right to obtain land to use by making under their possession. While the peasantry and pastoralists have the right to obtain land without payment and to be protected in their possession (Arts. 40(4) & (5) FDRE constitution), private investors have the right to obtain and use of land on the basis of payment arrangements (Art. 40(6) FDRE constitution). It is a puzzling thing that the constitution does not provide a rule about the urban, poor, dwellers!

The further detailed matters relating to the use and administrations of rural and urban lands are regulated by various administrative laws. In respect of rural land use and administrations, the House of peoples' Representatives has enacted the Federal Rural Land Administration Proclamation No. 89/1997. Art. 4 of this proclamation reaffirms that land belongs to the Ethiopian peoples and states that it can not be subjected to sale or to other means of exchange. Then it goes to enact the rules of distribution of rural lands to the peasantry and pastoralists and also to provide about the rights of these sections of the Ethiopian population, i.e. the **holding right**.

Art. 2(3) define "holding right" as:

> *"The right any peasant shall have **to use** rural land **for agricultural purposes** as well as to **lease** and, while the right remains in effect, **bequeath** it to his family member; and includes the right to acquire property thereon, by his labour or capital, and to sell exchange and bequeath same."*

Because Art. 52 (2) (d) of the FDRE constitution provides that National Regional states are empowered to administer land and other natural resources in accordance with Federal laws, Art. 5 and 6 of proc. No. 89/1997 give detail conditions of land administration and determine the contents of the land administration laws of Regional councils to be enacted in the future. /see also Art. 8 of this proclamation about heretofore enacted laws of Regional councils/. It is beyond the scope of this course to deal with the detailed rights and duties of peasants and pastoralists that have holding rights over rural lands.

In respect of urban lands, we do now have the Re-enactment of urban Lands Lease Holding proclamation No. 272/2002. According to the preamble of this proclamation, lease is taken as a

cardinal land-holding system to transfer urban land to users to the extent possible and in accordance with Master plan. Again "lease" is defined under Art. 2(1) of this proclamation as:

> *"Lease-hold system in which use right of urban land is transferred or held contractually."*

Thus, urban land holding is to be obtained for consideration and through a permit system. The payments declared to be a "fair price" though in practice it may be otherwise!

Once a person obtains land through the lease system, the use of that urban land has to be as provided under Art. 12, i.e. for the prescribed activity or service. According to Art. 13(1) any lease-hold possessor may transfer, or undertake a surety on, his right of lease-hold (as distinct from the land); and he may also use it as a capital contribution to the amount of the lease payment he has made. Other detailed rights and obligations are to be found in the proclamation and other Regulations to be issued or already issued by Regional or city Governments (Art. 5 & 12).

When we come to the ownership and use of Water, we have currently the Ethiopian Water Resources Management Proclamation No. 197/2000 which repealed proc. No. 92/1994 and a substantial part of Arts. 1228-1256 of the Civil Code. Art.5 of this proclamation states:

> *"All water resources of the country are the common property of the Ethiopian people and the state."*

The Proclamation is applicable to water resources management on the water resources that exist all over in Ethiopia. This proclamation enacts in detail about the use and administration of water resources. Principally the uses of water resources have to be made through permission of pertinent governmental bodies. Art. 12(1) gives the exceptional cases. It reads:

> *"Any person shall utilize water resources for the following purposes without holding a permit issued by the supervising body [Ministry of Water Resources or its delegates]:*

(a) dig water wells by hand or use water from hand – dug wells;

(b) Use water for traditional irrigation, traditional mining and for traditional animal rearing, as well as for water mills."

Except in these cases the use and management of water resources (which includes water resources development, utilization, conservation, protection and control) is to be accomplished through permits. Again analysis of the rules on the use and administration of water resources is beyond the scope of this course.

Lastly, natural resources such as forests, wild animals, fish, minerals, petroleum and other substances are treated as things of the public domain (Art. 40(3) FDRE constitution) and the use and administrations of each of them is regulated by separate proclamations. It is beyond made in these respects.

To conclude, the rural and urban lands, water resources and other natural resources are among the things of the public domain. The use and administration of each of the common goods is regulated by various public laws. The rights and obligations of persons that come into the use of these things are as defined in those specific public laws.

7.2 Expropriation

7.2.1 Definition and Nature of Expropriation

To begin from the beginning, the term expropriation is also known by the following expressions; eminent domain, forceful or compulsory takings, condemnation, expropriation proceedings and compulsory sale. Each one of them may be used to refer an aspect of the sovereignty of every state to require the surrendering of right of ownership of immovable objects of property from private domain to the public interest.

Accordingly, the law in force until the 1990s in Ethiopia, Art. 1460 civil code, defines it as:

> *"Proceedings where by the competent authorities [administrative bodies] compel an owner to surrender the ownership of an immovable required by such authorities for public purposes."*

From this definition one observes that expropriation is a compulsory taking of the immovable of an individual or person by an administrative organ of the state for public purposes. Though this and the following articles of the civil code are now inapplicable, for there is another proclamation in force, the definition still gives a good background about the general idea of expropriation.

As expropriation pertains to the relationships between the political organs of the state and private owners of immovables, there are rules of the public law that regulate such relationships. In this regard we need to mention Art. 40(8) of the FDRE constitution, where in we can also derive out the meaning of expropriation. This sub-article states:

> *"Without prejudice to the right to private property, the government may expropriate private property for public purposes subject to payment in advance of compensation commensurate to the value of the property."*

According to this constitutional provision expropriation is referring to the act of government compelling the surrender of private ownership of things to public purposes subject to compensation.

The very relevant law in force today is the Expropriation of landholdings for public purposes and payment of compensation proclamation No. 455/2005.

Though expropriation is a measure of taking of private immovable by the state against the will of the owner, it is different from nationalization in that the latter is an ideologically motivated measure of taking of any movable or immovable with or without compensation.

Since expropriation relates to immovables only it also differs from requisition which is applicable to the compulsory taking of movables of private owners by the state.

Again expropriation is different from confiscation as the latter envisages the condemnation of the owner of the thing as a criminal perpetrator. Still it is different from sequestration, which refers to the taking of immovables of private owners for the strategic importance of warfare, and from the police power of the state which relates to the measure of a state in emergence or dangerous situation to prevent the occurrence of some thing evil against the public.

Historically, expropriation was treated as an expression of the sovereignty of the state over its people and their things, and there was no compensation to be paid in such eventuality. Through time, with the recognition of the sanctity of private ownership of things there came severe restrictions against such power. It has become clear that the state cannot require the surrender of ownership of immovables without first establishing the public interest or public purpose criterion and without paying compensation to the condomenee (the private owner compelled to surrender his immovable).

The public purpose or interest issue is at the very core of expropriation. It is this justification that legitimizes the action of the state. Furthermore, these days, the "public interest" or "Public purpose" is interpreted widely to embrace many societal interests. In earlier days individual owners of immovables used to be required to surrender their objects to the state when the state intended to construct highways, roads, railways, schools, hospitals and similar infrastructures. Even in those cases the state organs were required to comply with series of procedures.

Today, however, expropriation measures may be taken to conduct development works, to construct dwelling houses, to expand investment and other services as well as for redevelopment activities in urban shanty areas and houses. This is expressly recognized in the preamble of proc.No. 455/2005.

7.2.2 Elements and Preconditions of Expropriation

From the reading of Art. 40 (8) and Art. 3 (1) of proc.No. 455/2005 it is possible to list out the elements that constitute measure of expropriation. These are:

- Existence of privately owned immovable;
- The existence of public interest(purpose) that opposes the continued enjoyment of the privately owned immovable, (public utility); and
- Payment of compensation to the condomenee.

Art. 2(5) proc. No. 455/2005 defines "public purpose" broadly as:

> *"the use of land defined as such by the decision of the appropriate body in conformity with urban structure plan or development plan in order to ensure the interest of the peoples to acquire direct or indirect benefits from the use of the land and to consolidate sustainable socio-economic development."*

This definition is so wide that it enables the political organ of the state to take away the immovable of private owners restricting the latter only to satisfaction by compensation.

Art. 3(1) of the above-mentioned proclamation provides the organ of the state entrusted with this power of expropriation. It reads:

> *"A Woreda or an urban administration shall,* ***upon payment in advance of compensation*** *in accordance with this proclamation, have the power to expropriate rural or urban landholdings for* ***public purposes*** *where it believes that it should be used for a* ***better development*** *project to be carried out by* ***public entities***, ***private investors***, ***cooperative societies*** *or other organs, or where such expropriation has been decided by the appropriate higher regional or federal government organ for the same purpose."*

From the above provision, one notice that lower administrative organs of the state and higher organs of the federal and regional governments are authorized to expropriate rural and urban landholdings. There is no stringent precondition to take such a measure by any of these organs. It suffices that they believe that the landholdings will be useful for better development projects. Furthermore, unlike earlier practices, such development projects can be carried out not only by the state but also by private investors, cooperative societies and other organs.

The other precondition other than the belief of the state organ as to the public utility is the requirement of giving notification of expropriation order to the affected person. Art. 4(1) provides:

> *"where a woreda or an urban administration decides to expropriate a landholding in accordance with Article 3 of this proclamation, it shall notify the land holder, in writing, indicating the time when the land has to be vacated and the amount of compensation to be paid."*

Further details about the period of notification and payment or deposit of compensation are provided in the next sub-articles.

7.2.3 Assessment of Compensation

We have seen that expropriation not only requires the existence of public purpose but also it presupposes advance payment of compensation to the affected person(s). That compensation has to be paid to the condomenee is not open to doubt at this time.

What is debatable is rather the amount of compensation and the mode of assessment thereto.

Art. 40(8) of the FDRE constitution enact payment in advance of compensation commensurate to the value of the property. Part Three of proc.No. 455/2005 provides about the details of determination of compensation. Art. 7 proclaim about the basis and amount of compensation while Art. 8 refer to displacement compensation. Again Art 9 goes on to provide norms about valuation of property. Analysis of those articles in the proclamation is beyond the scope of this course. For better information however, we have reproduced what is provided under Arts. 7 and 8 as follows:

Art. 7. Basis and Amount of Compensation

(1) A landholder whose holding has been expropriated shall be entitled to payment of compensation for his property situated on the land and for permanent improvements he mad to such land.

(2) The amount of compensation for property situated on the expropriated land shall be determined on the basis of replacement cost of the property.

(3) Where the compensation referred to under sub-Article (2) of this Article is payable to an urban dweller, it may not, in any way, be less that the current cost of constructing a single room low cost house in accordance with the standard set by the concerned region.

(4) Compensation for permanent improvement to land shall be equal to the value of capital and labour expended on the land.

(5) The cost of removal, transportation and erection shall be paid as compensation for a property that could be relocated and continue its service as before.

(6) Valuation formula for determining compensation for various properties and detail prescriptions applicable thereto shall be provided for by regulation.

Art.8. Displacement compensation

(1) A rural landholder whose landholding has been permanently expropriated shall, in addition to the compensation payable under Article 7 of this proclamation, be paid displacement compensation which shall be equivalent to ten times the average annual income he secured during the five years preceding the expropriation of the land.

……..

(4) An urban landholder whose landholding has been expropriated under this proclamation shall:

(a) be provided with a plot of urban land, the size of which shall be determined by the urban administration, to be used for the construction of a dwelling house, and

(b) be paid a displacement compensation equivalent to the estimated annual rent of the demolished dwelling house or be allowed to reside, free of charge, for one year in a comparable dwelling house owned by the urban administration.

The remaining sub-articles are omitted; you may refer to the proclamation as a whole.

Mind you that the constitution enacts, compensation commensurate to the value of the property expropriated; but here, in the proclamation a variety of arrangements and mode of assessments are established.

It is one of the areas where uncertainties prevail. As expropriation measures are in extensive use in urban areas for condominium projects and other investment activities, one should rather give due attention to this mode of assessment of compensation.

7.3 Summary Questions

1. Define public domain?
2. Compare and contrast public domain and private domain?
3. What are the Criteria to distinguish things of the public domain from that to the private domain in Ethiopia?
4. What do you understand by:
    (a) Holding right? And
    (b) Lease hold?
5. What rights do people have in regard to water resources?
6. Define “Expropriation”.
7. What differentiates expropriation from
    (a) Nationalization?
    (b) Requisition?
    (c) Sequestration?
    (d) Confiscation?
    (e) Police power of the state?
8. Discuss the preconditions to effect lawful expropriation measure.
9. What amount of compensation is payable to the private owner of:
    (a) rural house?
    (b) Urban dwelling?

(c) Urban business house?