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Land Law

Teaching Material

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LAND LAW

TEACHING MATERIAL

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CHAPTER ONE

LAND LAW IN GENERAL

1.1 Course Introduction

The purpose of this course is to treat rules and laws applicable to land. For land is one form of property, it is also natural to discuss briefly about the nature and the philosophical backgrounds of property. Land was not properly addressed in the legal curriculum of our country and hence in this material a bold initiative is taken to include wide range of subject matters starting from simple concepts of land to concepts of rights and practices such as land register, cadastre, mortgage, lease, and the like.

Regardless of its paramount importance to us, Land Law has started to be treated as a separate specific subject of law only recently. It consists of rules regarding real property, i.e. land and buildings. Real property, land, is divided into property units.

For example, see the figure below showing property divided into units.

PU1	PU2	PU3

Fig.1 a certain real property divided into 3 units.

The treatment of Land Law is such defined by its object, real property, and this applies whether the rules concern private law or public law.

Land Law is of great importance to society in a wider sense, since all activity in one way or another is dependent on the space or the ground. This is the case regardless if it is a question

of a direct exploitation of the natural resources like woods and other natural assets or if this usage only is indirect possession of a building or similar. It is possible to say that the system of Land Law also called Real Estate Law is a fundamental prerequisite for a well functioning market economy.

The subject of Land Law can be divided into two parts, namely one that is mainly regulated through the Civil Code, and the other being regulated through other persistently emerging proclamations and regulations. We can refer to the former as General Land Law, and the latter as Special Land Law. The Special Land Law mainly regards the regulation and control of land usage. The special part covers environmental laws, planning laws, housing or building laws, lease laws, and water laws.

The provisions in the Civil Code give the basic definitions for important terms in Land Law such as land and immovable, “regulate” cadastre and land registration, regulate transfer of real property, lease, mortgage, just to mention a few.

The General Land Law and the Special Land Law have a lot of common areas and hence are to be treated as being supplementary to each other as they deal with similar object-real property. In this material, more attention is towards the General Land Law regulated by the Civil Code. But the Special Land Law will also be treated in a quite fair degree as many provisions of the Civil Code are either suspended or inadequate and obsolete in light of the many new circumstances that arose in the country after the adoption of the Civil Code.

1.2 Property in General

Overview

The word ‘property’ has many dimensions and people are not usually capable of defining it with out difficulty. As it is an underlying word for ‘Land Law’ we shall under this section attempt to define it and other affiliate terms such as real property, real estate and immovable property.

Objectives:

Having read this section, the readers would be able to:

- Define property.
- Identify the meaning and nature of several related but at times confusing words (property, real property, real estate), and
- Define these terms in the context of Ethiopian 'Land Law'.

1.2.1 The Concept of Property

The meaning of the term property varies, depending upon the context in which the word is used. In one sense, property means things-real or personal/movable, corporeal/immovable or incorporeal, and visible or invisible. But the word is also used to describe characteristics; a desk, for example, has unique properties of color, shape, and surface. In legal sense, property describes the relationship between people and things- that is, the right of a person to possess, use, or own things.

A wider definition of property as conceived in modern and even in medieval society, is fairly described by Hallowelln as a "complex system of recognized rights and duties with reference to the control of valuable objects ... linked with basic economic processes ... validated by traditional beliefs, attitudes and values and sanctioned in custom and law." Four factors in this definition are variables. The *persons* who have property can differ in their social roles and status. The *relationships* which are the constituent rights, powers, privileges, and immunities of property can vary almost indefinitely. The *objects* as to which property is recognized can differ from the songs and magical formulas of a primitive people, to the land, corporate shares, or copyrights of today. The *sanctions* can vary from the belief that disease will lay low an offender to the highly complex machinery of law courts and sheriffs.

More specific definition of the legal meaning of property was given by the English jurist Sir William Blackstone as "the free use, enjoyment, and disposal of all his acquisition, without any control or diminution, save only by the laws of the land." Black's law dictionary added an important element to the above definition: an exchange value, or the ability to sell property is

a critical factor for a thing to be a property. Concerning the importance of property in human life, Blackstone also observes: “there is nothing which so generally strikes the imagination, and engages the affection of mankind, as the right of property; or the sole and despotic dominion which one man claims and exercises over the external things of the world in total exclusion of the right of any other individual in the universe.”

In Blackstone’s definition, the concept of general property under the common law does not differ substantially from its meaning under Roman law: “property in its nature is an unrestricted and exclusive right. Hence, it comprises in itself the right to dispose of substance of the thing in every legal way, to possess it, to use it, and to exclude every other person from interfering with it.” To be specific in Roman law, property was defined as follows: *ius utendi et abutendi re sua, quatenus iuris ratio patitur*, 'the right to use and abuse a thing, within the limits of the law' (Justinian, *Code* 4, 35, 21). The French Code Napoleon of 1804 in a similar manner defines ownership of property under article 544 as: the right to enjoy and dispose of property in the most absolute manner, provided that one does no use it in a manner prohibited by law or regulation.” Similarly the 1960 Ethiopian civil code defines ownership right as follows:

Art. 1204.- *Definition.*
(1) Ownership is the widest right that may be had on a corporeal thing.
(2) Such right may neither be divided nor restricted except in accordance with the law.
Art. 1205. - *Scope of right.*
(1) Without prejudice to such restrictions as are prescribed by law, the owner may use his property and exploit it as he thinks fit.
(2) He may dispose of his property for consideration or gratuitoualy, *inter vivos* or *mortis causa*

In all cases whether during ancient times or in its modern conception, except for those personal chattels, the use and ownership of property (especially land) is limited by law for different land use purposes such as environmental, health, public good, town plan etc. See the details in the next chapters.

1.2.2 Property, Ownership, and the metaphor of Bundle of rights

One can see the definition given for property as confused with ownership. But what is ownership? Bryn Perrins in his book, *Introduction to Land Law*, defines property simply as "ownership." The word is derived from the Latin *proprius*, meaning one's own. My property is that which is my own, that which belongs to me. In its archaic means property signifies the corpus itself. But in the modern understanding of the concept property is law of ownership of the corpus and associated rights.

Hence ownership is a concept, an idea or the figment of the imagination. Leaving the jurisprudential hunt for final definition of the word it suffices at this point to define it as "right to assert that something is one's own, and that it is a right which, in principle, may be asserted against all comers." It is however important to explore briefly the content of the concept of ownership. In former times ownership was regarded as trinity of rights, described by Latin as *utendi, fruendi, abutendi*- a right of using, which implies exclusive use and excluding others from using it; enjoying the fruits, such as collecting fruits, rents, bank interests etc; and thirdly abusing, which signifies the destruction or in its constructive sense transferring the thing by way of sale, donation or inheritance.

Modern common law western treatises on property defined ownership as bundle of rights. This concept compares land ownership to bundle of sticks. Each stick in the bundle represents a separate right or interest inherent in the ownership. These individual rights can be separated from the bundle by sale, lease, mortgage, donation, or another means of transfer. The complete bundle of rights includes the following:

- The right to sell an interest
- The right to lease an interest and to occupy the property
- The right to mortgage an interest
- The right to give an interest away
- The right to do none or all of these things

The Anglo-American concept of ownership, fee simple ownership, is equivalent to the ownership of the complete bundle of sticks. Each right has its own value and the owner can separately use or apply one right while leaving the others as they are.

1.2.3 Major Concepts: Real Property, Real Estate, and Immovable

According to Black's Law Dictionary, Real estate means land and any thing permanently affixed to the land, such as buildings, fences, and those things attached to the buildings, such as light fixtures, pluming and heating fixtures, or other such terms which would be personal property if not attached. The term is generally synonymous with real property.

Under the same dictionary, the term real property is defined as land, and generally whatever is erected or growing upon or affixed to the land. Also rights issuing out of, annexed to, and exercisable within or about land.

Property law, in systems derived from English common law, is divided into personal and real property. Real property concerns itself with rights *in rem*, or relating to land. Personal property concerns itself with rights *in personam*, or relating to chattels. In the civil law system, there is a division between movable and immovable property. Movable property roughly corresponds to personal property, while immovable property corresponds to real estate or real property, and the associated rights and obligations thereon. Hence, the difference in terminology has no basic difference in the types of property. In Ethiopia, the properties of land and any fixture to land are termed as immovable which are otherwise understood in England or the United States as real estate or real property. The writers may use these terms in this material to describe land interchangeably whenever necessary.

Land: in the law of real property, the term land is including the surface of the earth, the land beneath the surface to the center of the earth, and the air above. The term also includes property permanently affixed to the soil, such as water collected in wells, houses, and fences.

The ownership of land may be classified according to the various types of interests raised from each and respective legal system.

What constitutes real property in Ethiopia?

Please read the following provisions carefully:

Art.: 1126. Various kinds of goods
All goods are movable or immovable.

Art. 1l30. Immovables
Lands and buildings shall be deemed to be immovables.

Please also read the following provision from the Swedish Land Code.

Chapter 1,Section 1.Real property is land. This is divided into property units…..

Chapter 2, section 1. A property unit includes a building, conduit, fence and other facility constructed in or above ground for permanent use, standing trees and other vegetation, natural manure….

What do you understand from the reading of the above provisions?
In Ethiopia, lands and buildings together constitute an immovable property. In other words, lands and buildings are what immovables are in our law. We have already mentioned that in the Civil Law from which much of our civil law is said to have been derived, immovable property, i.e. land is real property. This is true of the Swedish law. It follows that contextually, in Ethiopia immovable property is real property, and as immovable is land and buildings, it follows that land and buildings are real property. In short, in Ethiopia, real property is both land and buildings, and not only land.

Therefore, in Civil Law and Sweden, real property is only land; building is simply part of the real property, i.e. land. Whereas in Ethiopia real property is land and buildings, as can be derived from Art.1130 of the Civil Code, building is not defined through land, i.e. building does not seem to be part of land unit.

This kind of approach under our law seems to bear problems of interpretation and application. For example, what constitutes a real property unit in Ethiopia? Does building include the land on which it is constructed? If so to what extent-only the part on which the building stands or some more part? On what basis do we decide this? Assume Kinde constructs a house on the land owned/possessed by Degu, is the house a real property/immovable in this case? Further assume Degu disposes of this plot of land to Semahegn, to whom does the building belong now-Kinde, Degu, or Semahegn?

It is not easy to solve such issues under our law given the definition for immovable/ real property as constituting both land and buildings independently. But such and other questions are easily solved under the definition given for real property/immovable in Civil Law countries such as Sweden.

Be that as it may, for the sake of consistency to our law, through out this teaching material, when the term real property or real estate or immovable is used, it refers to land, or buildings, separately or both land and buildings. In other words, the term is not used to refer only to land and then buildings indirectly as it is the case, for example, in Sweden.

1.3 Theories of Property Rights

The theory that property exists as a natural right has had long and widespread acceptance. Many of the legal philosophers of Germany were expositors of this theory. As they expressed it the personal right of man, as determined by nature, is to possess a sphere of action sufficient to supply him with the means of support. This physical sphere should, therefore, be guaranteed to everyone, conditioned, however, upon his cultivating it by his own labor. Thus

all should labor and all should also have wherewith to labor. The right to possession is a direct right, inalienable, antecedent to all law, and instituted for the general good. This theory is one application of the approach that all activity of the human race is the planned product of divine wisdom or of some unavoidable and immutable nature of things.

Laveleye in the twenty-seventh chapter of his book on Primitive Property (1878) gives the following exposition and refutation of four of the theories advanced concerning the origin of property.

Occupation Theory

> "Roman jurists and most modern ones have considered occupancy of things without an owner as the principal title conferring property. *Quod enim nullius est id, ratione naturali, occupanti conceditur*, says the Digest. This theory can be easily maintained, so long as it only has to do with movables which can be actually seized and detained, like game taken in the chase, or goods found; but it encounters insurmountable difficulties when we attempt to apply it to the soil. In the first place, history shows that the earth is never regarded by men as *res nullius*. The hunting ground of hunting tribes, or the pastures of pastoral nations, are always recognized as the collective domain of the tribe; and this collective possession continues, even after agriculture has begun to fertilize the soil. Unoccupied land has therefore never been regarded as without an owner. Everywhere, in former times as in our own, it was considered as belonging to the commune or the State, so that there was no room, in former times any more than in our own, for acquisition by occupancy.
>
> "Most of the partisans of this theory do allow a sort of primitive community, *communion bororum primaeva*. But they add, that in order to obtain individual ownership of things which they took possession of, all men tacitly agreed to renounce, each for himself, this undivided right over the common domain. If it is the historic origin of property, that they seek to explain in this way, history knows of no such agreement. If it is meant as a theoretical and logical origin, in this case they lapse into the theory of contract, which we shall examine further on.

"M. Thiers, in his work *De la Propriete*, borrows the idea of Cicero, who, comparing the world to a theatre, asserts that every one makes the place he occupies his own: *Theatrum cum commune sit, recte tamen dici potest ejus eum locum quem quisque occupavit.* The example goes against the theory which he is endeavouring to establish; for, in the first place, the spectator is only in possession of his place, and his possession merely gives him a temporary right and not the perpetual ownership; and, secondly, he occupies but one place. Hence no one could at best make his own more than the portion of the soil which he actually retains and can cultivate. M. Renouard, in his excellent work, *Du Droit industriel*, recognizes this: 'Of strict natural right, the occupation of land present serious difficulty in execution. It only gives a right over the soil actually held in possession.' Without this limit, in fact, a single man might, by some manifest sign of his intention, occupy a whole province.

"Occupation is a fact resulting from chance or force. There are three of us on an island large enough to support us all, if we have each an equal part; if, by superior activity, I occupy two-thirds of it, is one of the others to die of hunger, or else become my slave? In this case the instinct of justice has always commanded an equal partition. Hence we do conceive of a right of acquisition, anterior and superior to the simple fact of apprehension, which it is called upon to limit and regulate ... .

Labour Theory

"The second theory of property would make labour its basis, This is the one adopted by economists, because, since Adam Smith, they have attributed to labour the production of wealth. Locke was the first to expound this system clearly, in his *Second Treatise on Civil Government*, Briefly, this is a summary of what he says on the subject:-

"God gave the soil to mankind at large, but as no one enjoys either the soil or that which it produces unless he be owner, individuals must be allowed the use, to the exclusion of all others.

"Everyone has an exclusive right over his own person. The labour of his body and the work of his hands therefore are likewise his property. No one can have a greater right than he to that which he has acquired, especially if there remains a sufficiency of similar objects for others. My labour, withdrawing objects from the state of community makes them mine. But the right of acquisition must be limited by reason and equity. 'If one exceeds the bounds of moderation and takes more than he has need of, he undoubtedly takes what belongs to others.'

"The limit indicated by Locke is, for moveable things, the amount which we may take without allowing them to spoil. For land, the limit is the amount which we can cultivate ourselves, and the condition that there be left as much for others as they require. 'The measure of property,' he says, 'nature has well set by the extent of man's labour and the conveniences of life; no man's labour could subdue, or appropriate all; nor could his enjoyment consume more than a small part; so that it was impossible for any man, this way, to encroach upon the right of another, or acquire to himself a property, to the prejudice of his neighbor, who would still have room for as good and as large a possession. This measure, we see, confines every man's possession to a very moderate proportion, and such as he might appropriate to himself, without injury to anybody.'

"So according to Locke the great principle is this: 'Every one ought to have as much property as is necessary for his support.'

"The necessity of private property results 'from the conditions of human life, which require labour and some material on which it may be exercised.'

"As Locke admits, on the one hand an equality of right in all men, and on the other hand the necessity for every man to have a certain portion of material, on which to live by his labour, it follows that he recognizes a natural right of property in every one.

"This theory is certainly more plausible than that of occupation. As M. Roder very justly remarks in his work, *Die Grundzuge des Naturrechts*, § 79, labour establishes between man and the objects which he has transformed a far closer connexion than mere occupation, whether symbolical or even actual. Labour

creates value; accordingly it seems just that he who has given birth to it, should also enjoy it. Moreover, as no one can legitimately retain more than that which he can cultivate, there is a limit which prevents usurpation. But no legislation ever allowed that labour or *specification* was alone a sufficient title to establish property. He who is not already owner of the land or the material transformed, acquires nothing by his labour but a right to compensation or to remove the buildings and plantations set upon another man's land. Kant had already remarked that the cultivation of the soil was not sufficient to confer the ownership. 'If labour alone,' says M. Renouard (*Du Droit industriel*, p. 269), 'conferred a legitimate ownership, logic would demand that so much of the material produced, as exceeds the remuneration of such labour, should be regarded as not duly acquired.'

"Nay more: according to this theory the owner would manifestly have no right to full value of land let to a tenant. The tenant would become co-proprietor in proportion as the land was improved by his labour; and, at the end of a certain number of years, the proprietor would entirely lose all right of ownership. In any case, he could never raise the rent; for to do so, would be to appropriate the profits of another's labour, which would obviously be robbery.

"If labour were the only legitimate source of property, it would follow that a society, in which so many labourers live in poverty and so many idlers in opulence, is contrary to all right and a violation of the true foundation of property.

"The theory so impudently adopted by most economists, and even by M. Thiers in his book, *De la Proprie'te'*, would therefore be a condemnation of all our modern organization. Jurists have violently opposed the theory. The summary of their objections may be found in M. Warnkoenig's work, *Doctrina juris philosophica*, p. 121, and in the *Naturrecht* of Ahrens. If labour is the source of property, why should the Institutes and the *Code civil* have said nothing of it? It may be said that labour ought to be the source of all property, but this principle would be condemnatory of the existing organization of society.

Social Contract

"In order to explain why men abandoned the primitive community, it has been asserted to have been in consequence of a convention, and thus property would be the product of a contract. This theory has even less to sustain it than the preceding.

"In the first place, when we seek to derive a right from a fact, we are bound to establish the reality of that fact, otherwise the right has no foundation. Now, if we go back to the historic origin of property, we find no trace of such a contract. Moreover, this convention, which we should to seek in the night of past ages, cannot bind existing generations, and consequently cannot serve as the basis of property at the present time. Convention cannot create a general right, for it itself has no value, except so far as it is conformable to justice. If property is legitimate and necessary, it must be maintained; but a decision taken by our remote ancestors will not entitle it to respect.

"Kant holds that *specification* creates a provisional ownership, which only becomes final by the consent of all the members of the society. Kant does not maintain that this consent was a historic fact: he speaks of it as a juristic necessity, or a fact the justice of which commands respect. But the moment we introduce the idea of justice, we are demanding of the general principles of law the sanction of human institutions, and to what purpose is it then to invoke a convention which has never occurred? It is enough to show that property is conformable to right.

"Without having recourse to abstract notions of justice or to the obscurities of historic origins, many writers of very different shades have maintained that property is the creature of law.

" 'Banish governments,' says Bossuet, 'and the earth and all its fruits are as much the common property of all mankind as the air and the light. According to this primitive natural right, no one has an exclusive right to anything, but everything is a prey for all. In a regulated government, no individual may occupy anything.

... Hence arises the right of property, and, generally speaking, every right must spring from public authority.'

"Montesquieu uses nearly the same language as Bossuet: 'As men have renounced their natural independence to live under political laws, they have also renounced the natural community of goods to live under civil laws. The former laws give them liberty, the latter property.'

"Mirabeau said, in the tribune of the Constituent Assembly, 'Private property is goods acquired by virtue of the law. The law alone constitutes property, because the public will alone can effect the renunciation of all and give a common title, a guarantee for individual enjoyment.' Tronchet, one of the jurists who contributed most to the formation of the *Code civil*, also said: 'It is only the establishment of society and conventional laws that are the true source of the right of property.' Touillier, in his commentary on the *Droit civil francais*, admits the same principle. 'Property,' according, to Robespierre, 'is the right of every citizen to enjoy the portion of goods guaranteed to him by law.' In his Treatise on Legislation, Bentham says: 'For the enjoyment of that which I regard as mine, I can only count on the promises of the law which guarantees it to me. Property and the law were born together, and will perish together. Before law, there was no property; banish law, and all property ceases.' Destutt de Tracy expresses the same opinion; and more recently, M. Laboulaye in his *Histoire de la propri'et'e en Occident*, formulates it with great exactness: 'Detention of the soil is a fact for which force alone can compel respect, until society takes up the cause of the holder. The laws not only protect property, they give birth to it. ... The right of property is not natural but social.' It is certain, in fact, as M. Maynz remarks, that 'the three legislations (Roman, German and Slavonic) which now divide Europe, derive from the State exclusively the absolute power over goods which we designate by the word property or ownership.'

"If Mr. Laboulaye and other authors of his opinion only intended to speak of a state of fact, they are right. If I have gathered fruits or occupied a spot of land, my right hand at first, and subsequently the power of the state, guarantee me the

enjoyment thereof. But what is it that my strong hand or the power of the state ought to guarantee to me? What are the proper limits of *mine* and *thine*? is the question we have to determine. The law creates property, we are told; but what is this law, and who establishes it? The right of property has assumed the most diverse forms: which one must the legislator sanction in the cause of justice and the general interest?

"To frame a law regulating property, we must necessarily know what this right of property should be. Hence the notion of property must precede the law which regulates it.

"Formerly the master was recognized as owner of his slave; was this legitimate property, and did the law, which sanctioned it, create a true right? No: things are just or unjust, institutions are good or bad, before a law declares them as such, exactly as two and two make four even before the fact be formulated. The relations of things do not depend on human will. Men may make good laws and bad laws, sanction right or violate it, right exists none the less. Unless every law is maintained to be just, we must allow that law does not create right. On the contrary, it is because we have an idea of justice superior to laws and conventions, that we can assert these laws or conventions to be just or unjust."

Utilitarian

"A relatively modern theory takes the position that property arose because of its utility. 'Who would care to save and renounce immediate enjoyment, if he could not reckon on further enjoyment? 'Landed property,' said Mill, 'if legitimate, must rest on some other justification than the right of the labourer to what he has created by his labour. The land is not of man's creation; and for a person to appropriate to himself a mere gift of nature not made to him in particular, but which belonged as much to all others until he took possession of it, is *prima facie* an injustice to all the rest. ... The private appropriation of land has been deemed to be beneficial to those who do not, as well as to those who do, obtain a share. And in what manner beneficial? Let us take particular note of this. Beneficial, because the strongest interest which the community and the human race have in

> the land is that it should yield the largest amount of food, and other necessary or useful things required by the community. Now though the land itself is not the work of human beings, its produce is; and to obtain enough of that produce somebody must exert much labour, and in order that this labour may be supported, must expend a considerable amount of the savings of previous labours. Now we have been taught by experience that the great majority of mankind will work much harder, and make much greater pecuniary sacrifices, for themselves and their immediate descendants than for the public. In order, therefore to give the greatest encouragement to production, it has been thought right that individuals should have an exclusive property in land, so that they may have the most possible to gain by making the land as productive as they can, and may be in no danger of being hindered from doing so by the interference of any one else. This is the reason usually assigned for allowing the land to be private property, and it is the best reason that can be given.' "

If property originated in considerations of general utility, it is quite understandable that its incidents from time to time should deserve constant reexamination as to their continued conformity to new wants and the new circumstances of a changing society.

Whether this pragmatic theory of the origin of property is true or untrue is not too important for our purposes. It is important, however, to believe, and to act as if we believed, that private property must find its justification solely in its social contribution.

Anti Property Argument

Marx is not the only one to have warned of problems in private property rights (at least as defined and awarded in western societies). Henry Gorge, Plato, Pierre-Joseph Proudhon, Jean Jacques Rousseau, and many early Christian philosophers also cautioned of property. Private property, it has been argued, inevitably creates a growing inequality of wealth which is morally unjustifiable and leads to social instability. Private property, it also has been urged, undermines good moral character. Recent scholars have argued that what some see as the

advantages of private property can be disadvantages to others. In response to the argument that private property increases "the psychic good of certainty," for example some argue that "to enhance certainty for one person is to impair certainty for another." These arguments have led some to reject private property entirely and others to urge limitations on property rights.

1.4 Land: Significance and Ownership

1.4.1 General concept

As we mentioned earlier, land is a surface of the earth that includes the fixtures on it such as buildings, fence, tree plants, and improvement to the land etc. Land provides the foundation for the social and economic activities of people. It is both a tangible physical commodity and a source of wealth. Because land is essential to life and society, it is important to many disciplines, including law, economics, sociology, and geography. Each of these disciplines may employ some what different concept of real property.

Within the vast domain of law, issues such as the ownership and the use of land are considered. In economics, land is regarded as one of the four agents of production, along with labour, capital, and entrepreneurial coordination. Land provides many of the natural elements that contribute to a nation's wealth. Sociology focuses in the dual nature of land as resource to be shared by all people; and as a commodity that can be owned, traded, and used by individuals. Geography focuses on describing the physical elements of land and the activities of the people who use it.

Lawyers, economists, sociologists, and geographers have a common understanding of the attributes of land:

- Each parcel of land is unique in its location and composition
- Land is physically immobile
- Land is durable
- The supply of land is finite
- Land is useful to people

1.4.2 The scope of right to land

Cujus est solum, ejus est usque ad coelum

He who is proprietor of land is proprietor also of every thing on it. All buildings, all natural fruits, and everything above as well as below the surface, belong to the owner of the land. This Latin maxim was also reaffirmed by the English judge Lord Coke when he said *cujus est solum ejus est usque ad coelum ad inferno*, the owner of the surface of the real estate has property rights in the air above the surface and in soil below. Hence using this medieval time concept of land some writers give definitions such as the following:

> *Land…includes not only the ground, or soil, but everything that is attached to the earth, whether by course of nature, as are trees and herbage, or by the hands of man, as are houses and other buildings. It includes not only the surface of the earth but every thing under it and over it. Thus in legal theory, the surface of the earth is just a part of an inverted pyramid having its tip, at the center of the earth, extending outward through the surface at the boundary lines of the tract, and continuing on upward to the heavens.*

The ancient dictum of Lord Coke, which gave the owner of the surface the rights *ad coelum* (literally, to heavens), was utterly long before the development of air travel. Change in technology and travel have raised a number of legal questions concerning the scope of real estate ownership, rendering the ancient concept of unrestricted ownership to the heavens depths unduly simplistic. Modern society limited this right for different reasons that not only in relation to aviations but also for the reason that the state wants to control natural resources below the ground.

1.4.3 Different Forms Ownership of Land

Conventionally speaking, the ownership of land may be classified generally in to three major and two minor categories: private, communal and public on the one hand, and joint and community ownership on the other. In the following a brief discussion is made about the nature of such ownership rights.

1.4.3.1 Private Ownership

This is the kind of land totally owned by private individuals. It belongs absolutely to an individual and as such the law provides an absolute protection against any intervention on such right by any other party. In principle individuals have an absolute right of use, exclusion, and disposition of their property. However, in reality private ownership right is not an absolute one for the state and the public using the law may limit such right. Private ownership of land is well known and developed concept and system in most countries. The Ethiopian Civil Code under article 1205 describes private ownership as the widest right man can exercise over his property. Today only few countries, most of which were part of the former USSR socialist republic and other former socialist and communist countries, including Ethiopia, prohibited private ownership of land. The present Ethiopian constitution basically prohibits the private ownership of land. According to the FDRE constitution Article 40(3) the right to ownership of rural and urban land as well as of all natural resources is exclusively vested in the state and the people.

1.4.3.2 Communal Ownership

Communal ownership of land refers to such property of land commonly owned by a community of a certain village or locality. In most cases common grazing lands, water wells, irrigation lands or river systems, common use forestry and mountains, fishing lakes etc are categorized under this system. There are many such kinds of arrangements in many part of the world. The village or the community need to have some regulation to control the use of the common property. In some systems the state intervenes to make laws and regulations for the community. In Ethiopia, although such kind of system is envisaged in more general way in the constitution, Federal and regional land laws provide specific rules for the protection of

community land such as grazing and irrigation lands. In reality there are many cases of irrigation and grazing lands commonly owned by villagers or particular people of the village.

Proclamation 456/2006, a proclamation that is provided for the Rural Land Administration and Land Use, defines “communal holding” under article 2(12) as "communal holding" means rural land which is given by the government to local residents for common grazing, forestry and other social services.

1.4.3.3 State/Public Ownership

This type of property constitutes all lands which are not owned by individual person/s or the community. In most countries, mountains, public highways, public halls, parks, trans-boundary Rivers and forest lands, lakes etc are owned and administered by the state. It must be noted that in western countries lakes, mountains and forestland can be owned by private people. The common similarity all countries show on the other hand is that public highways and trans-boundary Rivers are owned by the state. In Ethiopia, as stated above the state and the people together own these properties, and it seems the public in general or the state itself are also prohibited the absolute power of disposition of land in Ethiopia, sale.

The Federal Land Administration and Land Use Proclamation identifies under article 2(13) “forestlands, wild life protected areas, state farms, mining lands, lakes, rivers and other rural lands,” as state holding lands.

The civil code under articles 1444 and following tries to identity the kinds of real properties classified as state or public domain or properties. Although it is no more relevant for the current system of law, it may help students to understand the kind of real properties which can be owned by the state elsewhere.

Art. 1445. - *Public domain.* - 1. *Principle.*

Property belonging to the State or other administrative 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 of adjustments, principally or exclusively adapted to the particular purpose of the public service concerned.

Art. 1446. - 2. *Immovables.*

The following property, if owned by the State or other administrative bodies, shall be deemed to form part of the public domain:

(a) roads and streets, canals and railways; and

(b) seashores, port installations and lighthouse; and

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

1.4.3.4 Joint Ownership

In some systems it is a type of ownership of land by two or more persons in which each owns undivided interest in the whole. This kind of system, based on the kind of rules adopted by each and every country, may include starting from simple joint ownership of plot of land by two people up to ownership rights of hundreds of people in condominiums. In Ethiopia, the principle of joint ownership right is governed by the civil code or other land related recent laws as the case may be. Under the civil code (articles 1257 ff.) it is stated that joint ownership right may be determined by agreement of the parties. In the absence of such agreement the law presumes equal right to the thing. The right can also be freely exchanged, subject to the limitation of pre-emption, however. As a special case, a joint wall of two real properties is considered as a joint property in the code. In condominium or other such related buildings, common walls, roofs, parking lots, stairs and corridors are jointly owned and administered by the users of the building or their association.

1.4.3.5 Common Ownership

Property owned in common by husband and wife each having an undivided one-half interest by reason of their marital status. Common property in the FDRE Family law is the category of property within the marriage other than private property of one of the spouses. The nature of common property is that it can not be divisible and each of the spouses has equal right to the whole property. Hence the law demands joint consent and agreement for the sale, exchange,

mortgage or donation of common property. In today's Ethiopia husband and wife commonly possesses urban and rural land. Especially in rural areas, during divorce the farm land is being equally divided between the man and the woman.

Additional Reading

The concept of ownership is basically understood in the continental system as an absolute one while in the USA it is conceived as bundle of rights. In the following additional reading attached to elaborate more. Students are advised to read the whole article.

John Henry Merryman

Ownership and Estate (variations on Theme by Lawson)

48 Tul. L. Rev. 916, 918, 924-25, 927-28 (1974)

…Productive comparative study of the land law in civil and common law jurisdictions is difficult-perhaps impossible-without some understanding of a fundamental difference that can be summarized by saying that the former is a law of ownership and the latter is one of estate. While it is probably true that a few lawyers in either system know that there is a difference and that it is important, few have gone much beyond this general impression. In this essay, I attempt to provide something more substantial by discussing the differences between ownership and estate in the two systems and, more specifically, in the land law of Italy and that of a more or less typical common law jurisdiction in the United States. Italian property law is not exactly like that of any other civil law nation, but it probably comes as close to a "typical" civil law property system as any other and closer than most. Much of what is said here is accordingly applicable to the land law in other West European nations and throughout Latin America.

…Ownership is, as concepts go, a very powerful one, and those who employ it pay its price. The land law of Italy and other civil law nations, based firmly on Roman law, is a law of individual ownership. It is part of the tyranny of the concept of ownership that it strongly resists fragmentation. To say that I own a thing is to imply that you do not, for if it is yours

how can it be mine?' Such thinking thus tends to eliminate all intermediate possibilities between ownership and non-ownership. Consequently, when it becomes desirable to equate power over land with more than one person it seems preferable to do so by a device which, at least apparently, avoids dividing ownership. In every transaction ownership must be transferred *in toto* or not at all.

This, although simplified, gives some of the flavor of ownership in the Italian land law. Although its non-legal composition may vary from time to time with social and economic change, legal ownership remains exclusive, single, and indivisible. Only one person can own the same thing at the same time. But, since the requirements of society are such that power over land must frequently be divided between individuals, it becomes necessary to rationalize the dictates of theory and the requirements of practice.

The inconsistency between ownership and fragmentation can, of course, be exaggerated. Even in the civil law, land can be "owned" simultaneously by two or more persons *in comune,* a form of co-ownership much like our tenancy in common. But a functional division between beneficial and security title, or between legal and equitable title, or a temporal division into present and future estates, simply does not exist. Ownership is, in theory, indivisible in function and time.

The contrast with English theory is remarkable. In England, ownership resided in the king, and the distribution and retention of lands throughout the kingdom was carried out according to the theory of tenure. Those who actually occupied and used the great mass of English land were not owners of it but holders of derivative rights from the king or from the king’s tenants, and hence English land was concerned not with ownership and the rights and duties of owners but with tenure and the rights and duties of tenants. The concept of ownership simply did not come to into play.

This basic difference between Romanic ownership and the Anglo-American "estate" or "interest" in land can be illustrated by a simple metaphor. Romanic ownership can be thought of as a box, with the word "ownership" written on it. Whoever has the box is the "owner." In

the case of complete, unencumbered ownership, the box contains certain rights, including that of use and occupancy, that to the fruits or income, and the power of alienation. The owner can, however, open the box and remove one or more such rights and transfer them to others. But, as long as he keeps the box, he still has the ownership, even if the box is empty. The contrast with the Anglo-American law of property is simple. There is no box. There are merely various sets of legal interests. One who has the fee simple absolute has the largest possible bundle of such sets of legal interests. When he conveys one or more of them to another person, a part of his bundle is gone.

This basic difference has several possible theoretical consequences. First, tenure seems to be a more flexible concept than ownership. Consequently, it might be expected that the number and variety of institutionalized interests in land will be greater in tenure than in an ownership property system. In short, improvisation is likely to be inhibited by the theory of ownership and encouraged by that of tenure.

The much greater variety of permissible future interests (vested and contingent remainders, executor interests, powers of appointment, reversions, rights of entry, possibilities of reverter) in the common law than in the civil law (where they really do not exist) supports this prediction. It is further supported by the existence of the trust and the concept of separate legal and equitable interests and by the distinction between security interests and beneficial interests in and, both found in the common law but not in the civil law.

1.5 Some Basic Land Legislation

Overview

In the previous section, we have tried to define land and other immovbles both from a wider and local context. We have defined real property. In this section, we are going to see the different types of laws under the regime of ‘Land Law’. Land Law should some how have some understandable, if not watertight legislative limits and should not be conceived as a boundless subject. Hence we shall see the fundamental laws which we believe are to be addresses by the subject.

Objectives:

After going through this section, one would be able to:

- Appreciate the practical importance of a comprehensive legislation on immovable properties.
- Describe many of the existing laws in Ethiopia which regulate various aspects of immovable or real property.
- Explain the nature and meaning of each of these legislations.

1.5.1 Code on Immovable Property : Land Law in Prospect

Presently Ethiopian general immovable property legislation is found in different titles and parts of the Civil code. For example, the definition for immovable property is found in Title VI, some rights in rem, i.e. real property such as usufruct, servitude, in Title VIII, public domain, expropriation, association of land owners, and town planning in Title IX, register of immovable property in Title X, and contracts relating to immovable properties such as sale, lease and mortgage in XVIII of the Civil Code.

Do you think such arrangement is simple and workable?

Today, legal practitioners in Ethiopia actually find it difficult to apply the legal provisions in the Civil Code. In fact, it is not unusual to find a judge who even is not well aware of the meaning and existence of some provisions such as those on town planning and registration. No doubt, lack of adequate curriculum addressing real property has been one major factor for this. However, the location of those economically significant laws at different parts and contexts in the Civil Code is even more important contributing factor for the problem.

Starting from the careful conceptual analysis, real property or immovable property, on which quite much of our life is dependent especially in our agrarian society, must be dealt with comprehensively, covering all subjects of importance about the subject. Even a slight

confusion in this regard means a lot in terms of the implication in the economy and life. Because, in the absence of simple and complete legislation, land administration in Ethiopia at all levels will simply be impossible thus curtailing the effort towards sustainable economic development.

Therefore, the collection of all titles of the Civil Code dealing with immovable property and restructuring them in a comprehensive, simple, and logical order is a decisive measure which the present condition of the country seeks a lot. Quite many countries in the world are following this trend with many visible fruits of development and prosperity. For example, in Sweden, many matters relating to real property are regulated in a single legislation called "Land code".

Some of the advantages of having a systematically arranged legislation on immovable are:

- Immovable properties will get the degree of attention needed taking into account their importance to the economy.
- Practitioners and others involved in the subject will find it easy to apply in any dealing with real properties.
- Immovable legislation will start to contribute, as it must, vibrantly to our growth while it will stop to be an "untouchable zone".
- Immovable will be efficiently managed or administered thereby bringing the highly sought sustainable development.
- It will create a favourable condition to create other legislation while capitalizing on history and culture.

Nowadays, there are some moves toward a related direction. The Environmental Protection, Land Administration and Use Authority (EPLAUA) in the Amhara National Regional State has recently initiated a single, comprehensive legislation on Rural Land Administration. It is just a matter of time what the result of this initiative will be. Again, the use of such legislation is of an irreplaceable importance.

1.5.2 Real Property Registration Legislation

One critical area of Land Law that requires an active legal regime is registration of real property. Cadastre and land register are two important systems of effective administration of immovable properties. The problem is that in Ethiopia such laws generally do not exist or if they exist, they are rendered inapplicable. As we shall see in great detail, the Civil Code provisions on the registration of real properties are not activated and the recent rural land registration laws are not only inadequate but also have started to be applied only in few parts of the country (Amhara, Tigray and Oromia) in varying degrees. In fact, the start by itself is quite encouraging. In addition, laws on property formation measures such as partition, subdivision, and reallotment which are necessary preconditions to undertake cadastre and registration have not been put in place yet.

1.5.3 Planning and Building Legislation

The Civil Code has one chapter (Chapter 4) under Title IX dealing with town planning areas. Let us see the most basic among these provisions.

Art. 1535. - *Creation of area.*
(1) Town-planning areas may be created by Imperial Decree with a view to promoting the development of towns in an economically sound manner.
(2) The Decree shall fix in a precise manner the limits of the area.

Art. 1536. - *Plan.*
(1) The municipality shall draw up a plan relating to each town-planning area.
(2) The plan and any amendment thereto shall be of no effect unless approved by Imperial Decree and published in the Negarit Gazeta.

Art. 1537. - *Contents of plan.*
(1) The plan shall, where necessary, divide each area into sub-areas.

(2) It shall fix in a general manner the restrictions and servitudes which it may be necessary to impose on the rights of the owners within each sub-area.

Art. 1538. - *Carrying out of plan.*
(1) In carrying out the plan, the municipality may impose the necessary restrictions on the rights of the owners within the area.
(2) It may in particular impose servitudes not to build, rights of way or servitudes relating to municipal sewers and pipes.
(3) It may, where necessary, use expropriation proceedings.

Art. 1539. - *Compensation.*
(1) The owners whose rights are restricted or whose land is expropriated shall be entitled to compensation.
(2) Such compensation shall be fixed by appraisement arbitration committee in accordance with the provisions of Chapter 1 of this
Title (Art. 1473.1476).

Art. 1540. - *Building permit.*
No person may construct a building within a town-planning area unless he has given notice of his intention to build and been granted a building permit in accordance with regulations.

What do we understand from the reading of the above provisions?

The rules envisage the establishment of town planning, town plan, building permit and compensation during expropriation. Almost all of these and other matters in this part/chapter of the Civil Code are regulated in sounder manner under the recent laws which we shall subsequently discuss. Hence it appears that Chapter 4 of the Code is impliedly repealed by the newer legislations.

The present basic law on urban planning is the Urban Planning Proclamation No. 574/2008, adopted at national level and repealing the Preparation and Implementation of Urban Plans

Proclamation No. 315/1987. As usual, this law gives the states powers and duties to implement it which is commonly accomplished by adopting a similar legislation.

The reasons compelling the adoption of this law are:

- The need to regulate the proliferation of unplanned urban centres by sound and visionary urban plans.
- The need to bring about an integrated and balanced national, regional and local development.
- The need to take into account the existing federal structure of government and the central role of urban centres in urban plan preparation and implementation, and
- The need to create a favourable condition for public and private stakeholders to fully participate in the process of urban plan initiation, preparation and implementation on the basis of national standards.

And the objectives of the law are establishing a legal framework in order to promote planned and well developed urban centres; and regulating and facilitating development activities in urban centres and thereby enhance economic development of the country.

According to this important law, any process of urban plan initiation and preparation shall follow ten principles which are:

1. Conformity with hierarchy of plans,
2. Sharing the national vision and standards as well as capable of being implemented,
3. Consideration of inter-urban and urban linkages,
4. Delineation of spatial frame for urban centres in view of efficient land utilization,
5. Ensuring the satisfaction of the needs of society through public participation, transparency and accountability,
6. Promotion of balanced and mixed population distribution,
7. Safeguarding the community and environment,
8. Preservation and restoration of historical and cultural heritages,

9. Balancing public and private interests, and
10. Ensuring sustainable development.

Based on the national and regional development strategies and schemes three hierarchy of plans shall be considered. These are national urban development scheme, regional urban development plan, and urban plans. Further, the law recognizes two types of urban plans. They are city wide structure plan and local development plan.

According to Art. 9, a structure plan is defined as a legally binding plan along with its explanatory texts formulated and drawn at the level of an entire urban boundary that sets out the basic requirements regarding physical development the fulfilment of which could produce a coherent urban development in social, economic and spatial spheres. Any structure plan shall indicate at least the following:

1. the magnitude and direction of growth of the urban centre,
2. principal land use classes,
3. housing development,
4. the layout and organization of major physical and social infrastructure,
5. urban development intervention areas of the urban centre,
6. environmental aspects, and
7. industry zone

According to Art. 11, a local development plan is a legally binding plan depicting medium term, phased and integrated urban upgrading, renewal and expansion activities of an urban area with the view to facilitating the implementation of the structure plan by focusing on strategic areas. Any local development plan shall state, as may be appropriate:

1. zoning of use type, building height and density,
2. local streets and layout of basic infrastructure,
3. organization of transport system,
4. housing typology and neighbourhood organization,
5. urban renewal, upgrading and reallocation of intervention areas, and

6. green areas, open spaces, water bodies and places that might be utilized for common benefits, and
7. any other locally relevant planning issues.

Other principles include compensation, development permit and the right to land information. According to Art.27, any developer desiring to commence a development activity in an urban centre shall apply for a development permit. As per Art.21, any urban landholder whose land holding is dispossessed as a result of implementation of urban plans shall be paid compensation pursuant to the relevant laws. Lastly, by virtue of Art.35, any interested party is entitled to have information as to the development of a plot of land in the jurisdiction of an urban centre.

The other laws are related to buildings. Specially, condominiums are recent phenomenon in Ethiopia and a law was issued at national level called Condominium Proclamation No. 370/2003. The objectives of this proclamation are:

- to implement other alternatives of urban land use in addition to plots basis urban land use.
- to narrow the imbalance between demand and supply of housing.
- maintain beauty of the urban areas
- to improve land use and supply of houses, and
- to create favourable conditions to private developers and co-operatives.

The proclamation regulates such matters as registration of condominium, unit ownership, sale and lease of a unit, unit owners association, and amalgamation of association, common elements, and common expenses. It also repeals the Civil Code provisions on ownership of stories and suites of a building under Title VIII, Chapter 1, Section 2, and paragraph 2, Arts. 1281-1308 on a condominium governed under the same law.

Regional states have the power to issue and implement condominium legislations of the same nature. For example, the ANRS has issued in 2006 a law called the Amhara National Regional State Condominium Ownership Determination Proclamation No.141/2006.

1.5.4 Environmental, Forestry, and Cultural Heritage Legislations

Environment

Environmental legislations are available both at federal and regional level. At present, at the federal or national level, there are three proclamations dealing with the environment. These are the Environmental Protection Organs Establishment Proclamation No. 295/2002, the Environmental Pollution Control Proclamation No.300/2002, and the Environmental Impact Assessment Proclamation No. 299/2002.

The first proclamation assigns responsibilities to separate organizations for environmental development and management activities with the view to establish a system that fosters coordinated but differentiated responsibilities among environmental protection agencies at federal and regional levels. This proclamation re-establishes the federal environmental protection authority. Article 3 reads as follows:

3. Establishment
1) The Authority is hereby re-established as an autonomous public institution of the Federal Government.
2) The Authority shall be accountable to the Prime Minister.

By virtue of Art. 5, the authority has the objective of formulating policies, strategies, laws and standards, which foster social and economic development in a manner that enhances the welfare of humans and the safety of the environment sustainable. Toward this end, it shall spearhead in ensuring the effectiveness of the process of their implementation.

This law empowers regional states to establish or designate an independent regional environmental agency that shall be responsible for;

a) coordinating the formulation, implementation, review and revision of regional conservation strategies,
b) environmental monitoring, protection and regulation, and
c) ensuring the implementation of federal environmental standards

The major legislation is the Environmental Pollution Control Proclamation No. 300/2002. This law has been adopted to protect the environment, to safeguard human health and wellbeing, to maintain the biota and the aesthetic value of nature, and to eliminate or mitigate pollution as an undesirable consequence. More specifically, the law addresses control of pollution, management of hazardous waste, chemical and radioactive substance, and management of municipal waste.

The Environmental Impact Assessment Proclamation No. 299/2002 is the third legislation of importance to us. The main objectives of this legislation are:
-to help predict and manage the environmental effects which a developmental activity entails.
-to provide an effective means of harmonizing and integrating environmental, economic, cultural, and social considerations into a decision making process in a manner that promotes sustainable development.
-to foster the implementation of the environmental rights and objectives enshrined in the constitution, and
-to bring about administrative transparency and accountability, and involve the public in planning and decision making.

This law regulates such matters as considerations to determine impact, environmental impact study report, public participation in environmental impact study report, and others.

Forestry

Normally, in the Civil Code, trees are intrinsic elements of the land on which they stand and, as a result, are immovable properties. Historically, there were a number of legislations on forests. These include the State Forest Proclamation No.225/1965, Private Forest

Conservation Proc. No.226/1965, and Putative Forest Proclamation No.227/1965. At present, all these laws are repealed. The main legislations which regulate forest conservation, development and utilization are the Convention on Biological Diversity, 1994, to which Ethiopia is a party, the Forestry Conservation, Development and Utilization proclamation No.94/1994 and the Trade of Saw Logs and Veneer Logs Regulation No. 351/1968.

Under the major legislation, Proc. No.94/1994, there are three types of forests, namely, state forests, regional forests, and private forests. As per Art. 2(6) of the proclamation, "state forest" is,

> *"a forest which is to be demarcated by a regulation to be issued by the Council of Ministers upon the recommendation of the Ministry of Agriculture and that are given special consideration so as to protect the genetic resources, or conserved to keep the ecosystem with a programme that covers more than one region."*

According to Art.2(7), regional forests are "forests designated by the official Gazette of each region as being so which are not either a state or private forest, and found within a specific region or developed by the said region. They are owned by the regional states in the same context as state forests.

Private forests are forests developed by any private person, peasant association or associations organized by private individuals. The owners of private forests are required to develop forests in a sound manner, and replace trees made use of in different ways, just to mention few duties as per Art. 6(2). Related to private ownership of forests are community forests. This is a type of forest ownership by peasant associations or associations organized by private individuals. It includes planting community woodlots, agro-forestry, planting for catchments protection, windbreaks, shelter belts and road side plantation.

Cultural Heritage/Antiquity

According to Art. 2(a) of proclamation No.229/1966 and Export of Antiquities regulation of 1969, Art.3, antiquity includes the totality of cultural objects that are products of human activity originating prior to 1850 E.C. and objects of historical and archaeological interest dating from before 1850 E.C. that bear witness to the history and tradition of the country and is people. Accordingly, the following categories of objects may be considered as antiquities:

-Works of craft-such as tools, poetry, crosses, inscriptions, coins, weapons, jewellery, etc.

-Items of artistic interest-planting and drawings, produced entirely by human hand on any support and in any unilateral original prints and posters , and photographs, original artistic assemble, ages and montages in any material, works of statutory art and sculpture, etc.

-Manuscripts and incunabula-codes, books, documents or publication of special interest.

-Items of numismatic (medals and coins) and philatelic interest.

-Archives including textual records, map and other cartographic materials, sound recordings and machine recordable records,

-Ancient palaces, religious buildings such as ancient churches, monasteries, mosques, castles, obelisks, etc.

-Products of archaeological excavations conducted on land, underground, in the sea bed including the sites of such exploration and excavations.

-Places associated with historical events such as battle fields.

-Items resulting from the dismemberment of historical monuments,

-Materials of anthropological, pathological and ethnological interest, etc.

1.6 The scope of Land Law

Overview

We have seen the types of legislations that are widely related to land and buildings in one or another way. In the section to come, an attempt will be made to explain the major issues, problems and matters that are addresses under the wider subject. The major object of Land Law-real property- and appurtenances thereto will be further defined.

Objectives

Having read this part of the chapter, the student can:

- Point out and define the central subject of land law-real property.
- Mention the main subject matters of Land Law.
- Define fixtures in the context of the Civil Code.

1.6.1 Main Questions of Land Law

Land is also being regulated through the Civil Code and firstly evolves round questions regarding private law, i.e. the relationship between private legal subjects. Since the subject is related to an object, a main question is therefore how this object is being defined. As we have just seen, these questions are being answered through Title VI, Chapter 1 of the Civil Code and are therefore very important for the application and understanding of all subjects covered in the course. It is a question of deciding what a property unit is and what fixtures that are attached to this object, the real property.

Another main question consists of the provisions regarding transfer of property which are especially to be found in Title XVIII of the Civil Code. In order to create a valid purchase of a property unit, a few formalities must be acknowledged, i.e. a written contract containing certain minimum information. The rights and the duties of both the seller and buyer are also being regulated. Since a purchase of property often is an economically significant transaction for the parties, disputes often occur, i.e. the seller's responsibility for defaults in the object. The rules regarding sale of real property are also applicable, with some adjustments, regarding exchange and donation/gift of real property.

Yet another important part of Land Law concerns mortgage and antichrisis and is being regulated in Title XVIII, Chapter 4 of the Civil Code. Property units must be said to be the most important objects of credit, not only in Ethiopia, but also in other countries. The system regarding mortgage enables the property owner to pledge the property while still being able to use it.

Another important area is the grant of rights of user and servitude/easements. The Civil Code contains rules of how to create such rights, as well as what rights and obligations that oblige the parties. The provisions on usufruct and servitude are to be found in Title VIII, Chapters 2 and 3, respectively, of the Civil Code. Maybe the most important right of user is lease of houses/ tenancy, and the provisions are mainly forcing to the lessees/ tenants advantage. These provisions are to be found in Title XVIII, Chapter 2 of the Civil Code. These rules can be said to function as social security for the lessee, and regard what demands the tenant can make regarding the achievement that the landlord is providing and consequently the payment that the lessor/landlord is entitled to.

A wider version of lease is also an important part of Land Law and will be seen in light of rural land lease and urban lease having regard to the provisions of both the Civil Code and special provisions.

Yet another important area of Land Law is the rules regarding the protection against claims from third parties. This protection is in many cases depending on that a registration has been made in the land registration authorities. The Land register is to be kept by a competent body and is an official register containing information on real properties such as who the owner is and the area of the property. These rules also apply regarding the purchasers relation to different right holders. It can also be a question of a protection from other possessions of the property at the same time as a third party is protected from losses due to entering into agreements with some one other than the owner of the property.

1.6.2 The Object of Land Law

a. Introduction

Land Law evolves round several different questions all dealing with real property, i.e. the subject Land Law concerns this specific object-the real property. A fundamental question whilst studying the subject is therefore to establish the meaning of real property. Real property

is divided into property units and belonging to these property units are intrinsic elements and accessories (fixtures). Title VI, Chapter 1 establishes what is to be regarded as real property.

What is to be included in the term real property is also of importance for what objects that are subject to regulation in the Civil Code but also matters for other rules concerning Land Law. However, the importance of the delimitation is greater than that. Since the term personal property is not expressly regulated in the law, but is determined negatively (meaning that what is not real property according to the Civil Code is personal property) the term real property is of significance here too.

The historical starting point concerning the division between real and private property is explained by some objects being movable and others being immovable. One therefore historically spoke of res mobiles and res immobiles. This fundamental difference created a need for a detailed legislation that differed from one another depending on the type of object. A simple example of this consists of the different rules concerning the transfer of goods purchased.

As will be clear in the subsequent sections, this division based on the mobility criterion is the fundamental of the rules, but there are departures to these rules. For example, such things as refrigerators, washing machines and keys are not immovables in that sense but the law treats them as being so. If one were to state a main rule behind the legislation of today, one might say that the rules do divide the objects between movable and immovable, but that the closer division is being made on the basis of whether there is purpose connection or not.

The term real property and its extent govern the solution of a potential dispute in different situations. For example, one situation concerns what is to be a fixture to the real property and therefore should be included in a sale, unless the parties have agreed otherwise or reversely what should not be included and therefore be regulated outside of the rules regarding real estate. This is the same function that the rules on fixtures have when mortgaging real property.

Another situation may concern when two or more owners want to divide the real property amongst them and the problems related to ownership arise. The aim is to separate the land from the fixtures. In this situation, the division that the parties have agreed upon can be failed in a later dispute where claims on the property are being made by a third party or when one of the parties no longer is satisfied with the division.

b. Real Property

Dear student please note that the term "real property" is not used in our Civil Code and as a result not commonly used in Ethiopia. In some countries the term is defined to mean land. For example, Chap 1 Section 1 of the Land Code of Sweden establishes that "real property is land. This is divided into property units…." Further, under the Swedish Land Code, buildings and other similar structures are considered to be part of the land unit.

However, our law provides firstly that "All goods are movables or immovable" (Art. 1126 of the Civil Code) and then provides that "Lands and buildings shall be deemed to be immovables" (Art. 1130 of the Civil Code). Dear student, what do you understand from this definition? It appears that land and buildings are treated as separate objects under our law. In other words, buildings do not seem to be part of the land units (unless, in fact, they are considered as intrinsic elements of the land.) Land and buildings stand on their own and treated legally as such.

Now of the two approaches, i.e. the Swedish approach which defines building as part of the land unit, and the Ethiopian approach which defines building as separate object from a land unit, which one is better in solving potential disputes and for understanding? Do you recall what we said under section 1.2.3? Explain and give examples to show the problems.

What then would real property involve under our Civil Code? Obviously, under our law real property, the object of Land Law, would mean both land and buildings! As we noted earlier, in this material, we are not always going to mention the words "Land" and "Buildings"

together for the interest of place; rather what is mentioned of “Land” may, mutatis mutandis, apply to “Buildings”.

c. Fixtures (Intrinsic Elements and Accessories)

The rules concerning fixtures are to be found in Title VI, Chapter 1 of the Civil Code. Our law does not use the word fixture; instead it uses the words “Intrinsic elements” and “Accessories”.

Art. 1131. Intrinsic elements of goods 1. Principle
Unless otherwise provided, rights on, or dealings relating to, goods shall apply to all intrinsic elements thereof.

Art. 1132. 2. Definition

1. Anything which by custom is regarded as forming part of a thing shall be deemed to be an intrinsic element thereof.
2. Anything which is materially united to a thing and cannot be detached there from without destroying or damaging such thing shall be deemed to be an intrinsic element thereof.

Art. 1133. 3. Trees and Crops

1. Trees and crops shall be an intrinsic element of the land until they are separated there from.
2. They shall be deemed to be distinct corporeal chattels where they are subject to contracts made for their separation from the land or implying such separation.

Art. 1134. 4. Rights of third parties

1. A thing which becomes an intrinsic element of a movable or immovable shall cease to constitute a distinct thing.
2. All the rights which third parties previously had on such thing shall be extinguished.

3. Nothing shall affect the right of such third parties to make claims based on liability for damages or unlawful enrichment.

What can you observe from the reading of the above provisions?

First and foremost, we should understand that the provisions equally apply to both movable goods and immovable goods. Thus, any dealing relating to an immovable property be it land or house applies to the intrinsic element thereof, unless there is agreement to the contrary.

Illustration:

- A sells a house to B, then the sale contract covers the house and any intrinsic part of it.
- X, a farmer, leases a 5 hectare agricultural land to Y, the lease applies both to the land and any intrinsic element of same.
- C, a lessor/landlord, gives his 200 sq.m house to D, a tenant for a term of 3 years. The agreement applies to the house and any intrinsic element thereof.

But what is the meaning of an intrinsic element of a good? There are two ways whereby we can identify an intrinsic element of an immovable property. The first determining factor is custom. If a custom of certain people considers a thing as forming part of another thing, then that thing is an intrinsic element of the other. For example, if according to custom of Gojam, a stone is part of the land unit on which it is situated, then the stone is an intrinsic element of the land. A farmer who leases that land will transfer it together with all stones on that land. Secondly, a thing which is materially united to another thing and as a result cannot be separated there from without causing damage to it is said to be an intrinsic element of the thing. This is true irrespective of the custom of the area in which the thing is located.

A thing which was distinct before may by some act become an intrinsic element of another thing. Then the thing shall cease to constitute a distinct thing. At the same time, all the

rights which third parties previously had on such thing shall be extinguished although they are still entitled for compensation.

Trees and crops are always intrinsic elements of the land unit on which they stand. But when they are separated from it, they are no more part of the land unit. In that case, they will constitute a distinct corporeal chattel, i.e. personal property. In addition, if a transaction is made with respect to the trees or crops regarding or implying their separation from the land, they shall be deemed to be distinct corporeal chattels.

Are buildings intrinsic elements of the land unit on which the stand according to our law? Why? Why not?

Art. 1135. Accessories 1. Principle

In doubtful cases, rights on, or dealings relating to, things shall apply to the accessories thereof.

Art. 1136. 2. Definition

Anything which the possessor or owner of a thing has permanently destined for the use of such thing shall be deemed to be an accessory thereof.

Art. 1137. 3. Temporary separation from the thing

No accessory shall lose its character of accessory where it is temporarily detached from the thing to which it is destined.

Art. 1138. 4. Rights of third parties

1. The rights which third parties may have on a thing shall not be affected by such thing being destined to the use of a movable or immovable.
2. Such rights may not be set up against a third party in good faith unless they are embodied in a written document dated prior to the thing having been so destined.

What can you observe from the reading of the above provisions?

Once again, we should understand that the provisions equally apply to both movable goods and immovable goods. Thus, any dealing relating to an immovable property be it land or house applies to the accessory thereof, unless there is an un doubtful situation having effect to the contrary. We can imagine that such an un doubtful situation excluding the accessory from the application of the dealing relating to an immovable occurs when there is agreement to that effect.

Illustration:

- A sells a house to B, then the sale contract covers the house and any accessory thereof.
- X, a farmer, leases a 5 hectare agricultural land to Y, the lease applies both to the land and any accessory thereof.
- C, a lessor/landlord, gives his 200 sq.m house to D, a tenant for a term of 3 years. The agreement applies to the house and any accessory thereof.

But what is the meaning of an accessory of a real property? An accessory of an immovable property is a thing which the possessor or owner of the property has permanently destined for the use of the property. Therefore, there are two criteria whereby we can determine whether or not a thing is an accessory of a real property. One is that the thing, i.e. the accessory must have been placed or put to the use of the real property by the possessor or owner of the property. This can be referred to as “owner connection”. If any other person other than an owner or possessor places the thing, it cannot be considered as an accessory, but a personal property. The second important criterion is that the thing must have been placed to the immovable for permanent use of the immovable. This can be referred to as “purpose connection”. Hence both the owner connection and the purpose connection must exist together for us to treat a thing as an accessory of an immovable property. Any temporary separation of a thing from the property to which it is destined does not end its nature as accessory. This, however, does not mean that the owner is prevented from putting an end to the character of

accessory of such thing. With out affecting the rights of third parties in good faith, the owner can do so with the intention of permanently ending the accessory character of the thing.

The accessory can be physical or legal. For example, a permanent partition, lift, handrail, water pipe, heating, lighting, power plug and other such like instrument, central heating boiler, heating radiators, heater, tiled stove, inner window, awning, fire extinguisher, civil defence material and key are accessories to a building and are physical fixtures. On the other hand, a building or other facility constructed outside the property unit intended for permanent use in the exercise of a servitude/ easement in favour of the property unit but does not belong to the property unit where it is situated is an accessory to the property unit. And this is a legal accessory or legal fixture.

Assume that a previously distinct thing now becomes an accessory to a real property. Assume further that a third party had a right on the thing. What will happen to such right when the thing is converted into an accessory? In such case, the rights of third parties shall not be affected if two conditions are fulfilled. First, the owner must be in good faith whilst putting the thing as accessory. Second, the rights of the third party must have been embodied in a written document dated prior to the thing having become an accessory.

Can you please give one example for each above conditions?
Is there distinction between intrinsic elements and accessories regarding rights of third parties? Compare Art.1134 and Art. 1138 of the Civil Code.

Summary

Recently, Land Law has started to be treated as a separate specific subject of law. It consists of rules regarding real property, i.e. land and buildings. Real property, land, is divided into property units. Real property concerns itself with rights *in rem*, or relating to land.

In Ethiopia, immovable property, i.e. lands and buildings together constitute real property. This approach under our law is different from the other approach that defines land as real property. An example for the latter approach is the Swedish law. Land Law deals with the

rights and restrictions related to immovable property. Specifically, it deals with such matters as transfer of property, land registration and cadastre, lease, and mortgage. Legislations on immovable property cover land administration especially land register and cadastre, planning and building, environment, forestry, and cultural heritage.

Summary Questions

I. Multiple Choice

1. Which of the following is a real property under Ethiopian law?
   A. Building
   B. Land
   C. Tree
   D. Key
   E. All

2. One of the following matters does not fall directly under Land Law
   A. servitude
   B. Lease
   C. Capacity
   D. Sale
   E. None

3. One of the following laws does not fall directly under Land Law.
   A. Planning and building laws
   B. General contract provisions
   C. Land registration laws
   D. Forestry laws
   E. None of the above

4. Which of the following is an accessory?
   A. A permanent partition
   B. Lift
   C. Water pipe
   D. Heating
   E. All

II. True or False Questions

1. A dealing relating to an immovable property applies to the accessory thereof.

2. Trees become personal property where they are subject to contracts made for their separation from the land or implying such separation.
3. Our law, i.e. the Civil Code uses the words fixture, “Intrinsic elements” and “Accessories”.
4. Under Ethiopian law real property is land and buildings which is also the case in other countries including Sweden.
5. The main object of Land Law is personal property.

CHAPTER TWO

HISTORY OF TENURE SYSTEM IN ETHIOPIA

Introduction

Understanding the Ethiopian land tenure system is important to student of land law for it gives students general historical and factual ideas about the land holding system in the country. The Ethiopian land tenure system is also the concern of history, sociology, agriculture, and economics and as a result different writers from all these disciplines have written a lot of materials. In here we shall briefly discuss the types of land holding system in three broad historical periods and the content of the laws used for such systems: before the 1974 revolution, during the Derg Era, and the present system. The pre-evolution period is treated in one section because the land tenure system was basically the same for long period. Only the coming of the revolution fundamentally changed the millennia based land holding system.

Objectives

After finishing the study of this chapter, students will able to:

- Understand the concepts of *Rist* and *Gult* two tenure concepts of the pre 1974 era
- Know the land tenure system before the revolution
- Comprehend the implication of the revolutionary time land tenure laws
- Appreciate the stand of the FDRE constitution regarding the land holding system

2.1 Before the 1974 Revolution

2.1.1 Northern Ethiopia

Ethiopia was governed by kings and emperors for over two thousand years. The land holding system was generally a customary one in that there are no written laws which govern the holding system. A historical review of the land holding system of the feudalistic Ethiopia reveals that all land was owned by the king. Other private people, family or the church derived their claim to the land from imperial land grants, otherwise known a *gults*. Hence, land was predominantly owned or possessed by a few landlords, the Church, and sometimes individuals, especially in the north.

Based on historical and political factors, the land tenure system in the northern and southern parts of the country were different. In the north, from time immemorial land had been owned based on a lineage system. This land once entered in to the hand of individuals by way of grant, or inheritance etc continues to remain within the family. This was called *rist.* It signified the usufructuary rights enjoyed under the kinship system. All land so held was considered to be held by hereditary right, because the holder was *ipso facto* a descendant of the ancestral first holder. In the north, thanks to this kind of land-holding system, a peasant could claim a plot of land as long as he could trace his descent. Hence, individual's rights over *rist*-land holding were decided essentially on the bases of his or her membership to the lineage. These rights, as described by Markakis, "were inherent and hereditary, which could neither be abridged nor abrogated under different pretexts, such as absence of an individual from the locality." The same social customs prohibited an individual from alienating or selling the land. The holder of the *rist* land, called *ristgna*, had unchallengeable control, use and inheritance rights over his or her possession. When a person died, his/her land was divided equally among all his/her children regardless of sex or birth order. Some argue that the use-right was secured in the sense that political authorities, including the Emperor, or landlords were refrained from interventions. As a result, "there was less tenure insecurity or fear of being evicted from the *rist* land."

As discussed above *gult* lands were lands derived by imperial grants and unlike *rist* lands, which were not subject to sale and exchange, *gult* lands were sold and donated freely. Donald Crummey, in his book, Land and Society in the Christian kingdom of Ethiopia, has recorded

the sale, inheritance, and donation of *gult* land especially during the Gonderian period of the 16th and 17th century of Ethiopia.

The land grant condition reached its apex during the twentieth century. During Menelik's period, the emperor had been giving a vast amount of *gult* land to the ruling elite as a reward for loyal service to the régime, and to religious institutions as endowments. The individual or institution that held such land had the right to collect taxes from those who farmed it, and also exercised judicial and administrative authority over those who lived on it. Thus, a single estate of *gult* land, comprising perhaps one or two square miles, often included within its boundaries strip-fields, held as *rist* by scores (50-150) of farmers.

2.1.2 Southern Ethiopia

The pattern of land allocation in the southern territories incorporated into the empire by Emperor Menelik II, differed in important ways from the pattern in the north. The *gult* system was introduced in the southern part of the country in the 19th century, following Menelik's expansion to the region. From the 1870's under Menelik to the 1970's under Haileselassie, the crown alienated land which was occupied by local tribes in common. It was distributed to members of the imperial family, the clergy, members of the nobility, Menelik's generals, soldiers, and local agents of the state. Unlike the condition in the north, here most of the land was occupied not by peasants, but by the people of the upper ruling class. These people, by means of land grants, became absolute land owners. This kind of land ownership system was called *gult*. Peasants on such land became tenants (*gabar*) of the grantee and paid rent in addition to the usual taxes and fees. As explained by J:M Cohen: "those who received government land grant need not farm it themselves but could rent it under quite profitable arrangements to tenant farmers or lease it out to large-scale mechanized producers." After the Second World War and the expulsion of the Italian forces from Ethiopia, Emperor Haileselassie also continued this process. According to one study conducted by Gebru Mersha and et.al, of the nearly 5 million hectares allotted after 1941, only a few thousands reached the landless and the unemployed.

In the south, land measurement and property registration for tax purposes was introduced. This promoted private ownership and land sale. In northern Ethiopia, traditional land tenure had had a communal character, with peasants enjoying only usufructuary rights over the land *rist* land. In the southern part, especially, in the twentieth century, the steady process of privatization set in, with its implication of sale and mortgage. Some land lords even forced their peasants to buy the land. The historian Bahiru Zewde observes:

> The privatization process had a number of consequences. At the conceptual level, it was attended with changes in the connotation of some important terms. *Rist*, in origin of the usufructuary rights enjoyed under the kinship system, now denoted absolute private property. Likewise, the term *gabar* lost its exploitive associations and assumed the more respectable connotation of taxpayer. Absolute private ownership rights to land above all entailed unrestricted freedom to dispose of it, most significantly through sale.

This process was not without negative impact to the indigenous society, however. The renowned sociologist and expert on Ethiopian tenure system, Markakis, has concluded that the effects of the land grants and alienation were "eviction of a large number of peasants, the spread of tenancy, and emergence of absentee landlordism." Generally speaking, private tenure was recognized as the most dominant system during the final days of the Imperial regime, affecting some 60 percent of peasants and 65 percent of the country's population. Under this system, land was sold and exchanged; however, given that all the land was originally state property and that private holders had no absolute rights, this was different from the general concept of a freehold system. Serious land concentration, exploitative tenancy and insecurity have characterized the private tenure system.

Additional Reading on the institutions of gult and rist

The concepts of the institutions of *gult and rist* are too complex as they are differently applied in different part of the country. Even scholars give different pictures as described in the following. Additional reading is hereby provided from Habtamu Mengistie(2004) *Lord, Zega and Peasant: A study of property and agrarian relations in Rural Eastern Gojam.* Forum for Social Studies, Addis Ababa University, pp.7-10.

The nature of *rest* and *gult rights are fully encompassed by the definition that Hoben gives to the terms in his widely read book (Land Tenure among the Amhara of Ethiopia: The dynamics of the cognatic descent, Chicago/London, 1973). Hoben writes that gult rights entail "fief-holding rights" whereas rest rights confer "land-use rights." He adds that "[i]n its most general sense, rist refers to the right a person has to a share of the land first held by any of his or her ancestors in any line of descent." According to Hoben, rest refers to the theoretically inalienable and inheritable land right of peasants. The peasant had the right to claim rest land through both the paternal and maternal lines. The individual rest holder could have only a usufractary title because the ultimate title to the land lays in the "descent corporation" or the lineage. This evokes the view that under such system of land tenure no right of alienation by individuals could exist. This implies that the rest system of land holding has a communal character because of the undifferentiated complex of rights. What all this means is that many individuals could have concurrent and miscellaneous rights over piece of land.*

For Hoben , gult confers material advantages to and forms the basis of political power for the elite. It also plays a useful role in the administration of land and the people occupying it. The bundle of rights which the state transfers to the balägult could include adjudication, governship, and the right to collect tribute. Taddese Tamirat also shares essentially the same view with Hoben as regards the role of gult in the administration of the country and adds that it was equally significant in military mobilization. The bälägult simply enjoyed the right to tribute in the form of part of the annual produce from the land. However, they could not claim tributes as owners. Hoben writes that both rest and gult rights extended over the same land they complemented each other as such: "it is of fundamental importance to remember that rist and gult are not different types of land but distinct and complementary types of land rights." Thus the exact scope of right of bälägult and resängä is some what blurred or overlapping. These assertions by Hoben regarding the nature of rights of rest and gult have almost attained the status of the basic principles and have become "established" points of departure for analysis of class relationships and the land tenure system. Some difference of detail notwithstanding, this view shared by a number of scholars, including Donald Crummey.

Crummey argues that in regions where the rist system predominated, gult was the tribute right exercised by the non-farming elite, and that the bälaägult, in his capacity as pure tax and tribute collector, had absolutely nothing to do with the production process and with the land. He asserts, like Hoben, that the ristägnä had mastery over the means of production and enjoyed absolute autonomy of production.…Without abandoning the view that gult was essentially a tribute right Crummey further argues that tribute rights had acquired a character of property, being transferred by sale or otherwise without necessarily involving the state. In other words, the individuals at the receiving end of the buying an the selling process could accumulate tribute rights over large amounts of property. Tribute rights were thus exchanged, negotiated, fought over, etc. The selling and buying of tribute rights over land (i.e gult) provides additional evidence to the argument that gult was given and taken away only by the kings was incorrect, and that the gult holders exercised the right of transfer without necessarily obtaining permission or sanction of the kings.

Defining and delimiting the meanings and scope of gult and rist rights, Merid (**Merid Wolde Aregay. "Land Tenure and Agriculture Productivity, 1500-1855", Proceedings *of the Third Annual Seminar of the Development of History*. Addis Ababa, 1986)** *writes that gult "has never been a form of land tenure"; it was, he says, only "a system of defraying remuneration for services out of taxes and tributes which could have been collected in kind. Gult rights only conferred partial usufruct rights." He goes on to state that even rist rights did not allow "absolute ownership rights on the individual. It has done so on the lineage or descent group only." According to Merid, though the individual members of the descent group enjoyed perpetuity of tenure they could not have an absolute interest in an allotted portion of the descent property in land. The justification for the inalienability of rist land, according to Merid, was the desire to preserve it for the needs of the present and unborn individuals in the line of descent; in his words rist could not be alienated "because it belonged to the living and the yet unborn." One could, of course, give out his or her land on terms of tenancy. Merid adds a few other points to his description of the rist system: one is that membership in rist owning group could be obtained or acquired only through birth. The second is that there was no big private or individual ownership of land because of the workings of rist system of land. Because of the rist system big holdings of landed property soon melted away. The third point*

is that the most important and overriding interest of the village community and the lineage was to achieve solidarity. He writes in this connection that "throughout history community solidarity and the rist system have been reinforced and preserving each other. Individualism would have no place in the society." The rist system also created conditions for excessive litigation and invariably acrimonious relationships among members of the descent groups.

At this point it will be apposite to mention the work of a scholar who represents a dissenting opinion on some of the issues from the established scholarship. Shiferaw Bekele, in a work that surveys the literature on land tenure (**Shiferaw Bekele. "The Evolution of Land Tenure in the Imperial Era", Shiferaw Bekele (ed.)** ***An Economic History of Modern Ethiopia 1941-74.*** **Dakar: Codesria, 1995),** *has convincingly showed the inadequacy of existing interpretations of the principle of land holding. For Shiferaw, gult implies more than merely administrative control over land. He argues that scholars have all too often confused gult holdings as simply administrators by claiming the gult entails a right over tribute. In actual fact, when it was granting that gult the state was transferring land to the full ownership of the grantee. It thus involves a propritory right in land. He points out that although there are difference in certain peculiar details from place to place, there was a large measure of commonality in the basic principles and concepts pertaining to land ownership in Ethiopia. This was so particularly from the Gondärine period through early twentieth century Ethiopia. Shiferaw concludes that "…in the Gonderine era, what was granted was the land rather than tribute only." Unlike many scholars, he argues that the land so given by way of gult did not remain in the property of the original cultivators or ristägnä. There was no concurrent right of a miscellaneous character over land since it was individually or privately owned and the right of the bälägult and risrägnä were very clearly differentiated.*

By way of summary, it can be said that although there were different practices in the country the basic point is that *gult* was a grant of land to individuals and the church for some service rendered to the king. The gult land usually encompasses of large area of land and balagult prefers to put tenants on the land, through time become restägnä. The gultägnä on the other hand has the right to be an administrator, tax collector and adjudicator over the people in his gult land. Rist system is on the other hand a system which may be acquired either by royal

grant to individual person and the land continues to be cultivated by is descents, or by being ristägnä or tenant in some bälägult's land and continue to benefit on the land.

2.1.3 Urban Land Tenure

Modern urbanization in Ethiopia started with establishment of the capital of Addis Ababa, a third most important capital city in Ethiopia after Axum and Gonder, during the Minelik era. The earliest settlements in the city developed haphazardly around the king's palace and the residences of his generals and other dignitaries. The emperor granted large tracts of land to the nobility, important personalities of the state, the church, and foreign legations. This land holding system was perpetuated for long time, and as a result, although most land areas in urban areas were private property, most of it was owned by few landlords. As stipulated in the proclamation 47/1975, at that time extensive area of urban land and numerous houses were in the hands of an insignificant number of individual land lords, aristocrats, and high government officials.

The land mark legislation that recognizes private ownership of urban land was decreed in 1907 with 32 articles. The decree allowed Ethiopians and foreigners to purchase and own private land. However, government was allowed to take back the land holding for public interest purpose against payment of compensation.

During the reign of Haileselassie, private ownership of urban land was reemphasized by the subsequent Constitutions of the 1931 and 1955 as well as the 1960 civil code. All recognize the private ownership right of land in urban areas. Up to the coming of the 1974 Ethiopian Revolution land lords in different urban areas invest much in the development of housing for rental.

2.1.4 The Civil Code

The civil code was introduced in 1960, and enshrined the prevailing pattern of an almost unlimited exploitation of land by the owners (Art.1205). It attempts to regulate under articles 1489 and the following "agricultural communities"-presumably *rist*, *desa*, and nomadic tenures-and agrarian tenancies, but made few changes in the traditional arrangements, and was largely ignored. In other words, although the code in principle recognizes private ownership

of farm lands, the government had not taken practical measures to attain this goal, such as reforming the land holding system so that poor tenant farmers should get their own private land. It is said that there had been strong resistance for land reform from the landed parliament members. The provisions dealing with tenancies relied upon a freedom of contract which, given gross inequalities in property inequalities in property distribution and bargaining position, could only be exercised by landlords. If the parties were aware of these provisions and if they wanted them to govern their relationship, feudal or patron-client tenure relations could have continued under the guise of neutral facilitative law. Under article 2991 of the code, for example, the large maximum for rents paid in kind was *three-fourths* of the crop, while the traditional rental was half. Besides to the civil code there were attempts by the government to legislate laws regarding the rural lands.

Paul Brietzke, in his article, Land Reform in Revolutionary Ethiopia, concludes: "traditional tenures remained largely unaffected by the laws enacted, with great fanfare, from 1944 to 1974. Government investment in land reform, in terms of monetary and legal resources, were minimal, and legal maneuvers, far from promoting rural change, seemed to solidify further peasant suspicions of government intentions. As a result, rural people continued to rely on traditional land laws."

2.2 During the Derg Regime

In 1975, the military council, *Derg*, comprised of representatives of the different armed forces in the country, became successful in ousting the Imperial regime from power. As mentioned above the Emperor was criticized for the failure to implement a land reform. The Derg hence come with the slogan "land to the tiller". Following its assumption of power, the Derg had undertaken fundamental changes to the Ethiopian socio-economic and political arrangements. Among the many radical measures, the land reform proclamation of February 1975 was said to be the predominant one. Cited as Proclamation No. 31 of 1975, it was a proclamation providing for the "public ownership of rural lands" and generated a great deal of support for the regime, especially from the peasantry population. This is because the land had in essence

been given to the tiller. All tenants or hired labourers had acquired possessory rights over the land they tilled. At one stroke, the law abolished all forms of landlordism and tenant-ship, and thereby liberated tenants from any kind of serfdom or payments of rent or debt to the previous land owner (article 6(3)).

This proclamation transferred all land privately owned by landlords, peasants, organizations, the church, and so on to public ownership and prohibited all forms of private ownership henceforth. Large scale farms operated by private individuals or organizations had been either distributed to peasants or transferred to the ownership of the state (art.7). The law also denied any form of compensation for the land and any forests and tree-crops thereon, while providing that fair compensation should be paid for movable properties and permanent works on the land.(Art.3) It should be noted that peasants had only usufruct rights over the land. The law specifically prohibited transfer of land by way of sale, exchange, succession, mortgage, antichresis, lease or otherwise, except that inheritance was possible for one's spouse, minor children and sometimes children who had attained majority.(Article 5)

Since the fundamental tenet of the proclamation was the equalization of land holdings among the rural peasants and "transformed rural Ethiopia into a society of self-labouring peasants," it was stated that each farming family should be allotted with 10 hectares of land and any kind of hired labour should be prohibited, except under few circumstances. For example, Article 4 (5) of the proclamation states that this rule did not apply to a woman with no other adequate means of livelihood or where the holder dies, is sick, or old, to the wife or the husband or to his or her children who have not attained majority.

In June, of the same year, the government enacted a new law for the nationalization of urban land and extra rentable houses (proclamation No. 41/75). Accordingly, all urban lands and extra houses of the wealthy urban dwellers were confiscated without any compensation. By extra houses are meant all those dwelling units on which an owner had drawn some amount of rental income prior to the date on which the proclamation was issued regardless of size or amount of monthly rent. The proclamation placed under *kebele* administration all those units that were rented for 100 Birr or less per month and gave the custody of all those units that had

monthly rent of more than 100 Birr to the Agency for the Administration of Rental Housing (AARH).

The policy objectives of the proclamation were mainly two:

a. to provide the broad urban dweller with credit facilities and urban lands for the construction of dwelling and business houses
b. to appropriately allocate disproportionately held wealth and income as well as the inequitable provision of services among other dwellers.

Concerning urban land, as stated above, the proclamation put all land in the hand of the state. No urban land was to be transferred by sale, antichresis, mortgage, succession, or otherwise (Art. 4(1).) a person requiring land for the purpose of building a dwelling house was to be granted free of charge up to 500m^2 in accordance with the directive of the ministry of public works and Housing (Art. 5(1).)

The proclamation also allowed ownership of only a single dwelling house (Art. 11(1).) the transfer of private houses by succession, sale and barter was permitted (Art. 12(1).) All extra houses became government property and no person, family and organization was allowed to obtain income from urban land or house (Art. 20(1).)

Summary

The general picture was that the previous landlord was replaced by the state, the latter with even much power to intervene. In urban areas the law prohibited further private investments in housing investments which resulted in acute shortage of houses in urban areas. Concerning rural land, even though at first the land reform was successful, series land distributions and erroneous state policies led to the insecurity of holdings, and thereby gave little incentive for the peasant to invest in his holdings. Some argue that the redistribution of land was neither remarkable compared to the land distribution in Latin America, nor was it equitable. Dessalegn Rahmato, on his part, concluded that the end product of the land reform was that it failed where it succeeded. As a result, the history of Ethiopia during the Derg regime has been partly recorded as a history of growing rural poverty, food shortages, famine, and escalated rural insurgency and civil war.

2.3 Existing Property System

2.3.1 Land Policy

The present government came to power after it ousted the previous military government in May, 1991. It was hoped that it would introduce some major changes in the land holding system. When the present constitution came into the picture in 1995, however, it was confirmed that no major changes were to be made to the previous land tenure system. There are no fundamental differences between the legal framework of the *Derg* and the present government on rural land issues. In practical terms, there are more similarities in land administration between the two regimes than differences.

Even though the new government adopted a free market economic policy, it has decided to maintain all rural and urban land under public ownership. According to the 1995 Federal Democratic Republic of Ethiopia (FDRE) Constitution, all urban and rural land is the property of the state and the Ethiopian people. As one writer (Gebresellasie) says: "by inserting the land policy in the constitution, the current government has effectively eliminated the possibility of flexible application of policy." The argument forwarded by the ruling party for the continuation of land as public/state property rests solely on the issue of security. In particular, it has been said that private ownership of rural land would lead to massive eviction or migration of the farming population, as poor farmers are forced to sell their plots to unscrupulous urban speculators, particularly during periods of hardship. Some studies show otherwise, however. The economist Berhanu Nega and et.al conclude that farmers would not sell their land wholly or partially if given the right to own their plots. Another study, conducted by the World Bank, reveals that most farmers would rather rent their land during stressful periods compared with any other alternative, such as selling it. In other words, in addition to all the other benefits of rental markets suggested in the literature, the availability of formal land rental markets will serve as a caution to enable farmers to withstand unfavorable circumstances by temporarily renting their land rather than selling it.

The usual argument against the state/public ownership of land is an opposite argument to the argument given by the state, which is lack of security. Government critics on land policy

argue that absence of tenure security for land users provides little or no incentive to improve land productivity through investment in long-term land improvement measures. It may aggravate land degradation through soil mining and problems of common resource use. The fear of the critics and supporters of private ownership of land is, among other things, that government may use land as political weapon by giving and taking it away as the case may be. However, supporters of the public ownership of land reject such fears as groundless; on the contrary claim that government provides more security as is now taken by regional governments. A good example is the land registration and certification processes which are being conducted in Tigray, Amhara, Oromiya, and the Southern regions which enable farmers to have a land certificate for their holdings. This gives protection and security to the holder.

2.3.2 Land Legislations

A. Constitution

Article 40 of the Federal Constitution, which relates to "Right to Property," provides:

> The right to ownership of rural and urban land, as well as of all natural resources, is exclusively vested in the State and in the peoples of Ethiopia. Land is a common property of the Nations, Nationalities and Peoples of Ethiopia and shall not be subject to sale or to other means of exchange. (Sub-Article 3).

Regarding its means of acquisition, sub-article 4 states that Ethiopian peasants have right to obtain land without payment and the protection against eviction from their possession. Likewise, concerning the pastoralists of the lowland areas, sub-article 5 declares that Ethiopian pastoralists have the right to free land for grazing and cultivation as well as the right not to be displaced from their possession. The Constitution has also shown the way to acquire land by private individuals. Sub-article 6 of the same provision stipulates:

> Without prejudice to the right of Ethiopian Nations, Nationalities, and Peoples to the ownership of land, government shall ensure the right of private investors to the use of land on the basis of payment arrangements established by law.

Other important provisions concerning the security and rights of land-holders are provided under sub-articles 7 and 8 of the same provision. Sub-article 7 declares that every Ethiopian shall have the full right to the immovable property he builds and to the permanent improvements he brings about on the land by his labour or capital. This right shall include the right to alienate, to bequeath, and, where the right of use expires, to remove his property, transfer his title, or claim compensation for it. The right to land is also secured in that the state has the duty to pay compensation during expropriation. Sub-article 8, which is related to expropriation, 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.

The power to enact laws for the utilization and conservation of land and other natural resources in the country is exclusively given to the Federal Government (Art. 51(5) of the Constitution) Regional governments have the duty to administer land and other natural resources according to federal laws.(Art. 52(2)(d))of the Constitution). The first law of this nature was enacted in July of 1997 and was titled "Rural Land Administration Proclamation, No. 89/1997." This law has, however, been repealed and replaced by the more recent Proclamation No. 456/2005, otherwise known as ''Rural Land Administration and Land Use Proclamation''. Likewise, based on such Federal Rural Land Use Proclamations Regional states (Tigray, Amhara, Oromia, and SNNPR) ensue to adopt similar rural land laws.

B. FDRE Proclamation NO. 456/2005

As stated above, this law is entitled as "Federal Democratic Republic of Ethiopia Rural Land Administration and Land Use Proclamation." It was adopted in July, 2005. It replaces its predecessor, Proclamation No. 89/1997. The scope of application of this law is throughout the country, as envisaged under Article 4 of the proclamation. Regional governments are given the power to enact rural land administration and land use laws, which consists of the detailed provisions necessary to implement this proclamation. (Article 17(1))

Reemphasizing Article 40 of the Federal Constitution, the proclamation states: “peasant farmers/pastoralists engaged in agriculture for a living shall be given rural land free of charge.”(Art.5(1)(a). Any person who is a family member of a peasant farmer, semi pastoralist or pastoralist having the right to use rural land may obtain rural land from his family by donation, inheritance or from the competent authority.(Art.5(2)). Thus, the means of acquisition of rural land is either through family inheritance or donation, or through government provision. Since land is owned by the State and the people, peasants’ title to the land is only of a usufractury nature. In the proclamation this kind of use-right is termed as ‘‘holding-right’’. Article 2(4) defines ‘‘holding right’’ in the following manner:

> The right of any peasant farmer or semi-pastoralist and pastoralist to use rural land for purpose of agriculture and natural resources development, lease and bequeath to members of his family or other lawful heirs, and includes the right to acquire property produced on his land thereon by his labour or capital and to sale, exchange and bequeath same.

Hence, the law permits holders to use, lease, and bequeath (transfer to family members by way of inheritance or donation) their holding rights. Similarly, Article 8 of the same proclamation which deals with “transfer of rural land use rights” stipulates in detail the possibilities of leasing holding rights in part to investors, or jointly develop the land with investors. Surprisingly Article 8 (4) says that an investor who has leased rural land may present his use right as collateral. So, if there is someone who is willing to lend money to the investor securing his use right emanating from the lease agreement, then it is possible to hold it as mortgage collateral. The law does not, however, yet allow mortgage of the land by the holder of the right himself or by a fellow farmer who rented the land. The same also applies to sale of such land. One more limitation is that transfer of holding-rights, by way of inheritance or donation, is only applicable to family members. A family member is identified here in a different manner from that of the Federal Family Code. The proclamation defines a “family member” as “any person who permanently lives with the holder of holding rights sharing the livelihood of the later.” (Art. 2(5)). Thus, unlike the Family Codes, in which blood and marital ties are important elements to identify a family member, under the Federal Rural Land Proclamation, living under same roof and sharing the same livelihood with the holder of the right are sufficient conditions. As a result, a hired labourer who has been living for years with

the farmer or a maid servant, who likewise lives with the family, may be eligible to inherit the holding rights.

Another important provision of the proclamation related to property rights is Article 7 that deals with the duration of use right. According to article 7 (1), "the rural land use right of peasant farmers, semi-pastoralists and pastoralists shall have no time limit." This reminds us of the freehold land system of the United Kingdom where all land is symbolically owned by the Crown and the later grants rights to individuals. The essence of the freehold estate in the UK is that it defines the length of time for which the right to the land will last. The two forms of freehold estates existing today are the "life estate" and the "fee simple". A life estate gives a right to the land for the life of the holder; whereas, a fee simple is a right capable of lasting indefinitely and which will pass on death of the holder by will or through intestacy.

From duration point of view, the Ethiopian land holding system is similar to the fee simple, in that both rights are given for an indefinite period of time. The fee simple continues notwithstanding the death of the grantee (holder of right), and notwithstanding the absence of a will, as there are rules that enable the property to pass intestate to the nearest relative. If there are no relatives within the prescribed classes, then the property will go to the Crown. Likewise, Proclamation No. 456/2005 gives a perpetual right to the right holder. Upon his/her death, the right will transfer to heirs by law, who are family members. Here one difference between the two is that in the case of fee simple the grantee/holder can transfer/inherit it by will to whomsoever he wishes it to have. But in the Ethiopian case, inheritance or donation is possible only to family members. It seems testate (inheritance by leaving a will) is void if the beneficiary is not a family member.

If the "holders are deceased and have no heirs or are gone for settlement or left the locality on their own wish….the land shall be distributed to peasants…who have no land and who have land shortage" (Art. 9(1). Under both systems, if there is no legitimate heir, the land will devolve back to the state. See also article 852 of the civil code

C. Lease Proclamation No. 272/2002

The other kind of land holding system, which prevails in urban areas of the country, is the lease system. For the last 18 years, leases have been in place as the cardinal landholding system for the transfer of urban land to users, to the extent possible and in accordance with Master Plans. Pursuant to Article 4 of the Lease proclamation, an urban land can be permitted to be held by lease:

a. In conformity with plan guidelines where such a plan exists, or, where it does not exist, in conformity with the law which Region or City government makes, as the case maybe, and
b. On auction or through negotiation; or
c. According to the decision of Region or City government.

The main point is that unlike rural farmers and pastoralists, urban dwellers are not entitled to get land for free. In reality and when municipalities have regulations, under exceptional circumstances, however, when people organize and create an association for the development of residential housing, and when the city municipality considers it as an incentive for the development and expansion of urban areas, land may be granted for free. Moreover, in small towns where the lease law is not operational land may be given free of charge.

Based on the urban development and type or sector of development, the law provides different time limits for the contract of a lease. Hence, for example, the law sets for any town a maximum ceiling period of time of:

a. up to 99 years for: housing (personal and leasable), scientific, technological study and research facilities, government offices, non-profit- making philanthropist organizations, and religious institutions;
b. up to 15 years for urban agriculture;
c. as per government agreement, for diplomatic missions and international organizations.

For the city of Addis Ababa, 60 and 50 years have been set for industry and commerce, respectively. In other cities and towns, not designated as of the grade of Addis Ababa, 80 and 70 years are stipulated for the above mentioned activities, respectively (Art. 6(1). This holding

right, emanating from the lease agreement, may be terminated because of termination of contractual period or because of the need to appropriate the land for public interest, among other reasons.

Summary

The Ethiopian tenure or land holding system as classified in the three historical period is generally shows the policies of the different regimes. The feudalistic Ethiopia was controlled by feudal lords and the land holding system was basically arranged in such away that benefits the feudal lords, not the peasant or urban dwellers. During the imperial eras the notion of private ownership of land was in principle introduced, but was not really enforced for traditional tenure system was more dominant one. The motto of the Revolution "land to the tiller" was practically applied during the Derg era. And yet the proclamations have taken away the hope of private ownership of land for once and for all. Hence, farmers were given only the use right. The FDRE constitution and following land laws broaden this use right and allowed those rights of inheritance, lease, and donation which were prohibited by the Derg proclamation. The common element of both the Derg and FDRE land policies is however important one which denies individual people from owning and there by having the sole right of exchanging and selling land.

Additional readings

Although the most basic form of property consists of rights in land, some nations do not recognize this form of property. Ethiopia is one of these nations. In the following an attempt is made to show relevant provisions of the states of Vietnam and Saudi Arabia.

Civil Code of Vietnam

Article 205: The land, mountains and forests, rivers and lakes, water resources under ground, resources from the sea, continental shelf and airspace, and the capital and property invested by the State in enterprises and facilities in the branches and fields of economy, culture, social welfare, science, technology, foreign affairs, and national defence and security, and other property stipulated by law to be of the State, come under ownership of the entire people…

Article 221: Legitimate income, savings, residential houses, means of daily life, means of production, capital, fruit, and other legitimate properties of an individual are privately owned properties.

Basic Law of Government, Kingdom of Saudi Arabia

Article 14: All God's bestowed wealth, be it under the ground, on the surface or in national territorial waters, in the land or maritime domain under the state's control, are the property of the state as defined by law….

Additional Reading on debate of the State vs. Private ownership of land

Economists, politicians and social scientists provide arguments pro and against the current state ownership of land. Defenders of private ownership of land argue that it promotes individual liberty, political stability, and economic prosperity. Following is an exemplary and summarized analysis taken from the writing of the publication of the Ethiopian Economic Association /Ethiopian Economic Policy Research Institute (EEA/EEPRI), *Land Tenure and Agricultural Development in Ethiopia*, 2002. pp. 28-29.

The current debate on land tenure and policy

Despite the constitutional provision that security vested the ownership of land to the state, rural land policy in Ethiopia has remained to be one of the sources of disagreement and focus of debate among politicians, academics, and other concerned parties. This is not surprising given the agrarian nature of the Ethiopian economy and the role of land in the social and political history of the country.

In an assessment of the land policy debate in present day Ethiopia Yigremew Adal shows that there is an unfortunate focus on ownership issues and a dichotomy of views on state versus private ownership. The government and the ruling party advocate state ownership of land while experts and scholars in the field, western economic advisors, international organizations such as the World Bank, and opposition political parties favour private

ownership. However, despite some attempts there has not been a thorough and systematic study of the patterns, diversity and rationale of alternative views on land tenure.

The main plank of the view advocating state ownership is that private land ownership will lead to concentration of land in the hands of few people who have the ability to buy resulting in the eviction of the poor peasants and thus aggravating landless potentially leading to massive rural-urban migration of people left without any alternative means of livelihood. The empirical validity of this claim is one of the issues that the rural household survey has to address.

Critics of the current land holding system and those that advocate some kind of free hold largely base their arguments on a set of hypothesis about the behaviour of economic agents and the familiar property rights argument partially backed by some empirical results from Ethiopia and other lands. Since most of the arguments are variations in the same, they can be summarized using the more coherent formulation in Borrows and the Roth directly:

1. *Individualization of land tenure (leased and freehold ownership) increases tenure security of the landholders, thereby reducing economic costs of litigation over land disputes.*
2. *Individualization increases investment by increasing tenure security and reducing transaction costs. Higher tenure security increases expected investment returns, thereby increasing the demand for capital (including credit) for fixed-place investment. The supply price of credit decreases because the cost of lending is reduced by improved credit worthiness of projects, and higher collateral value. Both supply and demand effects increase investment.*
3. *Individualization will cause a land market to emerge. Land will be transferred to those who are able to extract a higher value of product from the land as users that are more productive bid land away from less productive users.*

Others based their arguments against the present land tenure system from the property rights perspectives. Some of the arguments include:

1. *Current rights are not completely specified, so that they cannot serve as a perfect system of information about the rights that accompany ownership.*
2. *All or some of the current rights are not exclusive, so that all rewards and penalties resulting from an action do not accrue directly on the person/s empowered to take action.*
3. *current rights are not freely transferable, so that rights failed to gravitate to their highest value use, and*
4. *Some or all of the current rights are not enforceable and completely enforced.*

CHAPTER THREE

LEASEHOLD

Introduction

In the common law real estate rights are broadly classified as freehold, unlimited right over property, and leasehold which is a right to the real property limited by time. Generally lease is defined partly as estate/right in land which endures for a fixed period of time, such that its maximum duration is known before the term begins. There are three essentials for a legal lease: the tenant must have exclusive possession, the duration of the term must be certain, and the legal formalities must be satisfied.

The word "lease" depending on the context in which it is used, means either leasehold interest-a term of years- or the document which creates the interest. Similarly, the word "tenancy" changes its meaning with the context. Some times both may be used interchangeably in case of lease of a house. Lease in this chapter shall mean lease of a land or ground, while tenancy refers to the lease of a house. An attempt is made in this chapter to classify lease system in Ethiopia in to three parts in which we shall discuss lease of houses or tenancy, lease of rural lands (agricultural farms) and thirdly lease of urban lands.

Objective

After completing the study of this chapter students will able to:

- Have a knowledge on the different types of lease systems
- Understand the Ethiopian tenancy laws
- Analyze the FDRE urban land leasehold system
- Appreciate the possibilities of rural land lease system

3.1 Lease in General

3.1.1 Scope and Definition

"Lease" under the FDRE lease proclamation 272/2003 has been define as "lease-hold system in which use right of urban land is transferred or held contractually (Art. 2(1). The 1960 Ethiopian civil code under article 2896 on its part defines lease as follows:

> *The lease of an immovable is a contract whereby one of the parties, the lessor, undertakes to ensure to the other party, the lessee, the use and enjoyment of an immovable, for a specified time and for a consideration fixed in kind or otherwise.*

Hence the concept of the word "lease" which is employed in the above laws is one similar to what is coined in the common law as "Leased fee" which means an ownership interest held by a landlord with the rights of use and occupancy transferred by the lease to others. The rights of the lessor (the leased fee owner) and the lessee are specified by contract terms contained within the lease. And "leasehold" means the interest held by the lessee (the tenant or renter) through a lease transferring the rights of use and occupancy for a stated term under certain conditions.

Here the definition and scope of lease provided in the proclamation is different from the scope of the term defined in continental legal system. A typical definition of lease is one given by Planiol which states lease as: "*A contract whereby one person engages himself to furnish to another person the temporary enjoyment of a thing for a price proportional to the time.*"

The similarity one can find in all the above definitions is that firstly, lease right emanates from contractual agreements. Secondly, the right transferred to the lessee (tenant) is the use and occupancy of the property. Thirdly this interest is transferred for consideration- that the lessee must pay in the form of rent. And fourthly, in both systems lease right provides only personal rights to the lessee, not real rights for the lease right generally may not be sold or mortgaged. The basic difference one can observe from the definitions however Planiol's definition of lease can encompass movable and immovable, for the word "thing" can connote both movable

and immovable. In the common law as well as under the Lease proclamation no. 272/2003 leases are applied to real property or land. A systematic search and analysis of the civil code also shows that the code follows the common law approach.

Additional Reading

On the definition and scope of the term "lease" **K.W. Ryan** in his book ***An Introduction to the Civil Law*, The law book co. of Australasia Pty Ltd, 1962, pp. 98** provides the following:

In Art. 1709 C.C.(in France), a lease is defined as a contract by which one party undertakes to let another to have the benefit of a thing for a certain time in exchange for a certain price which the other undertakes to pay him. The German definition is more restrictive. Art. 535 B.G.B. provides that by a lease the lessor is bound to allow the lessee the use of the leased thing during the term of the lease, and the lessee is bound to pay the lessor the agreed rent. It will be seen that a German lease (Miete) gives the lessee only the use of the thing. An agreement granting him the use of the thing and the enjoyment of its fruits is termed a Pacht, and is separately regulated in the B.G.B. The distinction between a Miete and a Pacht, between a lease according the bare use of property and one according the enjoyment of its fruits and profits is of Germanic origin. A further matter which appears from both definitions is that the term "lease" is used for agreements relating to the temporal use of movable as well as immovable property. This is in accord with the Roman, in which the object of locatio conduction rei could be property of any kind. The Civil law of letting is at the same time the law of hiring. Nevertheless, in both French and German law the distinction between a lease of immovables and the hiring of movables is far from unknown and it has been accentuated in the post-war emergency legislation.

Use and purpose of lease

Lease is another means of land holing system. Lease may be of private or public one. For both the state and private individuals lease is a means of income for it is also another form of land market. The income from land lease has significant part in the over all GDP of a country in general and in the real estate transaction income in particular. In the absence of an effective

land taxation system, one of the means by which local governments increase revenues is through public land leasing. There is evidence that land leasing has been happening on a large scale. Some countries secure a particular place for lease purpose. For example, the city of Sydney, in Australia, is a good example. In Sydney the only means of land acquisition is lease. They call is ground lease for the state or municipality, as the case may be, transfer the ground land by way of lease. In other words, to collect rent from transfer of land by way of lease, states may reserve particular land for this purpose. On the other side of the coin, lease is a means of acquisition of land. In industry and agriculture lease is preferable since the business may not be long lasting. Some times it is easy, if not cheaper, to get land by way of lease rather than purchasing. Eve the procedure, for example in Ethiopia, is shorter and easier than land grant for land lease policy is more responsive to demand of land supply. From private lease point of view, those who could not afford to buy land from the land lords had the only choice of leasing land.

3.2 Lease of Houses/Tenancy

This is a place where we shall discuss about lease of housing. The housing that we are talking about may be residential or commercial. In countries where the real property market is flourished these are very common systems of conveying one's house to another renter. Yet for public purpose and social welfare reasons most counties in the western world regulate the ceiling of rent that should be paid for a residential house. In Ethiopia, there are two systems of rental: private and public. The government owns a lot of urban houses after it nationalized them using Proc. 47/1975, a proclamation to provide for the ownership of urban land and extra houses. The Rental Agency administers these houses. It puts a regulated and mostly fixed rate of rent for its tenants. On the other hand, private owners of residential and commercial houses are at liberty to put the market price for rent. This is a contract that is totally controlled by the civil code. In this section a discussion will be made based on the civil code tenancy provisions (2896-3018).

General principles

Lease of immovable is a contract (Art. 2896) and hence the general rues of Contract in general (Arts. 1675-2026) may be applied whenever necessary, especially concerning formation and

effect of contract, as indicated under Art. 1677. A combined reading of articles 1723 and 2898 reveals that a lease contract needs not to be made in writing. More over, articles 1571 and 2899 strengthen this fact by dictating that lease agreements made for more than five years and do not enter into registry may not affect third parties. Article 2946 stipulates that the municipality may prepare a model contract form for the lease of houses with in its jurisdiction. Yet it is not mandatory for the parties to follow it. It seems, the option is left to the contracting parties.

Lease provides an interest to the lessee, which may not be affected by any encumbrance made on the property or transfer of the property itself. Unless otherwise expressly agreed between the lessor and the lessee, a contract of lease may be set up against a third party who acquires the ownership or usufruct of the immovable given on lease after the delivery of the immovable to the lessee (art. 2932). The only exception is in case of expropriation where the state may take away the property for reasons of public benefits.

Concerning the duration of the lease agreement, the contract may be made for determinate or indeterminate period of time. In any case it may not be fixed for more than 60 years and any contract mad for more than 60 years shall deemed to have been made for 60 years (Art.2927).

Obligations of Lessor

A. Delivery of property and warranty of peaceful enjoyment

The lease imposes on the lessor various obligations all of which spring from a single principle: the lessor is bound to procure for the lessee the enjoyment of the premises for the duration of the lease. This principle is embodied in our civil code under articles 2900 (Delivery) and 2911(peaceful enjoyment of immovable). The lessor shall deliver the lessee the immovable given on lease and its accessories, in a state to serve for the use for which it is intended in terms of the contract or according to its nature (Art. 2900). The lessor has also the obligation to deliver the house in good condition or free of defect. As per article 2904(1) “where at the time of delivery, the thing has defects of such nature that its normal use is appreciably diminished, the lessee may demand the rescission of the contract.” Besides to the

rescission of the contract, the lessor may also be subject to liability of payment of damages as envisaged under articles 2905-06. However, if the defect was apparent, means if the defect on which the lessee's claim is based is apparent or where he knew or should have known of the defect on the making of the contract, he may not revoke the cancellation of contract and or payment of damages. Read article 2907. In other words, the lessee must first look in to the house and ensure whether it is suitable and ok. An exception to the apparent rule is provided in the next article 2908(1) which states: "Where the thing is in such a state as to constitute a serious danger to the life or health of the lessee or of those who reside with him or of his employees, the lessee may require the rescission of the contract even in a case of an apparent defect or of a defect of which the lessee knew at the time of the contract." And sub article (2) emphasizes: "Any stipulation to the contrary shall be of no effect."

Note: is a cracking on the wall which is visible apparent? What about a licking roof? Or noisy neighborhood? What about a wall that sends electric vibrations and currents?

Comment: generally speaking the lessor has the duty to inform all about the defects, if any. If one looks to what the lessee justifiably can anticipate, the responsibility of the lessor would be very far reaching. As a limitation of this responsibility, there is the duty of examination for the lessee.

It can be point out that in the extent that one might speak of a duty to inform, this is not as general as regarding the examination of duty for the lessee. It can therefore not be claimed that the lessor is obliged to inform the lessee of every default to his knowledge in order to escape responsibility. The lessor is especially responsible for defects which cannot be found through normal examination.

Art. 2911. The lessor shall warrant to the lessee the peaceful enjoyment of the immovable during the currency of the lease.

Peaceful enjoyment of the leased house is the main interest of the lessee. Our civil code (under articles 2912-2915) provides rules which guarantee this enjoyment. First point is that

the lessor must refrain from any personal act which would interfere with the lessee's enjoyment of the property. For example, the law provides that the lessor may not make alterations in the house without the consent of the lessee (art.2912) since it disturbs his peaceful enjoyment. Another one is that the lessor warrants that the lessee will not be disturbed by third parties who have legitimate claims on the leased property. This concept is envisaged under article 2913. The general point made in this article is that third party claimant of the leased property should made their claims against the lessor not the lessee. The lessee shall be entitled to reduction of rent in case of molestation by such party.

On the other hand, the lessee is not warranted for illegitimate claims and molestations made by a third party. In such a case the lessee may take action in his own name against such third parties (Art. 2914(2)). The third point is that the lessor shall pay the burdens and taxes charging the immovable (Art. 2915).

Note: which of the following is warranted by the lessor

- A third party brings a possessory action against the lessee/tenant.
- A neighborhood hooligans disturbing the lessee
- A third party brings an action against the lessee for tort based damages which is caused by the fall of a brick from a fence.

B. Repairs

A house let needs a periodic repair and maintenance for its enjoyment and habitability. The lessor shall maintain the immovable in good condition and make therein during the currency of the lease such repairs as are necessary and are not repairs incumbent upon the lessee (2916). Basically, the duty to repair a house leased may be determined by the contract of lease. Hence, based on the contractual agreements both the lessor and the lessee are duty bound to repair the house (Read Arts. 2916, 2919, 2953). In the absence of such a clause in their contract, however, the code comes up with a solution under article 2954.

Art. 2954. - 2. *Which repairs are incumbent upon lessee.*

1) The repairs which in the contract of lease are placed at the charge of the lessee shall be deemed to be repairs incumbent upon him.
(2) Unless otherwise agreed, repairs necessary to the doors, windows, floorboards, tiling, taps and water drains shall be deemed to he repairs incumbent upon the lessee.
(3) The works of cleaning and maintenance which become necessary by the enjoyment of the thing shall also he deemed to be repairs incumbent upon the lessee.
Art. 2955. - *Old age* or *force majeure*.
(1) No repairs which are deemed to be incumbent upon the lessee shall be at the charge of the lessee where they are occasioned only by old age or force majeure.
(2) The contract of lease may derogate such rule by an express stipulation

When the type of repair is at the charge of the lessor and because of their urgent nature cannot be repaired without delay by the lessor, the lessee may repair them at his cost and may retain the cost from the rent (read art. 2920).

3.2.3 Obligations of the Lessee

A. Necessary Care

The lessee can do nothing which diminishes the usefulness or agreeableness of the premise let. To emphasize this point the code under article 2921 underlines two things, first that the lessee should use the property with “care” and for the “purpose” it is intended to be used. Secondly, the lessee may not make alterations in the immovable or its mode of exploitation that would extend beyond the period of lease. In particular, the lessee is duty bound to furnish the house in a way that suits its nature and purpose (read art. 2949).

Another point worth mentioning here is the duty of concern for neighbors. The lessee shall have the consideration which is due to the other persons who dwell in the house a part of which has been given to him or lease (art. 2948(1)). So this applies to co-tenants who share same building or premises. But, what about neighbors? The general rules on ownership under property laws may be applied here *mutatis mutandis*, and one provision of such nature is article 1225 which forbids abuse of ownership in a way that causes nuisance or damage to

neighbors. This may happen by sending smoke, soot, unpleasant smell, noise or vibration in excess of good neighborhood.

Examples: Comment

- A lessee who leased a residential house used it for a grocery
- A lessee above two story apartment uses firewood to cook his food. The apartment was not including traditional *midija.*
- A lessee emits high volume sounds from his tape recorder during party hours of mid night.

B. Payment of Rent

A lease is made generally for consideration and receiving rent is an important benefit to the lessor. Hence payment of rent is second important obligation of the lessee. The time and amount of rent shall b decided by the free agreement of the parties in their agreements (Arts. 2923, 2950). As we try to mention above the ceiling of rent in many countries today is fixed and control for economic, social and moral reasons. Our code simply adopts the principle of freedom of contract and allows the parties to decide about the amount.

What are the pros and cons of controlling rent ceilings?

Additional Reading

Most countries in Europe have controlled the ceiling of rent of urban residential houses. This is in an attempt to control the unreasonable high prices of lease prices and also to ensure the right to housing. The International Covenant on Economic, Social and Cultural Rights recognizes the right of all individuals to an adequate standards of living, including adequate food, clothing, and housing (Article 11). General comment 4 stresses that “housing” includes adequate privacy, space, security, lighting, and basic infrastructure-all at a reasonable cost. Ratifying parties are required to report their housing policies and their success in meeting housing needs every four years. Should affordable housing be a basic right that every society assures its citizens? Following are related excerpts of such nature.

John Sprankling, Raymond Coletta and M.C. Mirow, (2006) *Global Issues in Property Law*, American casebook series, Thomvson West. Pp61-63

Comparative Perspectives on Leaseholds

1. **Germany**

The Federal Constitutional Court of Germany has held that a tenant's interest in a rental apartment is a constitutionally-protected property right. In its decision (89 BVerfGE 1 (1993)), the court noted:

> Housing represents for everyone the center of the private existence. The individual depends on the usage of it for the satisfaction of elementary needs of life as well as for the securing of freedom and the development of his personality. The majority of the population, however, cannot refer property for the satisfaction (of housing needs) but is forced to rent housing. The right to occupy of the tenant in such circumstances serves functions (that are) typically being served by owned property. This importance of housing has been taken into account by the legislator in arranging (landlord/tenant law). The guarantee of property unfolds its functions to secure freedom in both directions. The tenant who is in compliance with his lease is being protected against losing his housing if (such a deprivation of housing) is not due to permissible justifications of the landlord. Housing, as the physical center of the free development of the personality and a free sphere of self-responsible activity, cannot be taken away by a cancellation of a lease without strong justifications.

2. **Cuba**

The housing market in Cuba is tightly controlled. Under the Urban Reform Act of 1960, leaseholds were converted from private to state ownership and the occupants were given usufractuary interests by the state. Existing rental agreements were declared illegal and the government worked to define the leasehold arrangements. Under Article 50 of Cuba's 1988 Housing Law, a scale for rent pricing was established. Normally, rent is capped at twenty percent of an individual's income. However, for lower income residents, rent cannot exceed ten percent of household income; and, in the "cuarterias" Slums), individuals live rent free. Rent is fixed by the municipal government and is paid monthly to the people's Saving Bank.

3. **France**

In France, a resident tenancy must have a fixed term of at least three years. Rent is usually fixed for the entire term, although it can be increased annually up to the increase in the National Index of Construction Costs, calculated by the government statistical agency. While the statute contains provisions for early termination by the landlord or tenant (a tenant can provide three month's notice to quit at any time, or one month notice if she needs to vacate because of a job loss or other specified reasons), the leasehold term provides substantial stability.

…..in her article Renting homes: Status and Security in the UK and France- A Comparison in the Light of the Law Commission's Proposal, 67., Jan7Feb (2000), Jane Ball argues that France's extended fixed-term leasehold gives tenants added stability and time to plan for work and family. It also provides a more secure platform upon which to insist on tenant rights, such as property repair and habitability concerns.

Note: Should Ethiopia need similar policy that favors lessees? Should our civil code be revised in such away that creates a forum in which both landlord and tenants should be treated equally, if not favourig the tenant?

3.2.4. Sub-Leasing

According to Black's Law Dictionary Sublease is a lease executed by the lessee of land or premise to a third person, transferring the same interest which the lessee enjoys, but for shorter term than that for which the lessee holds. In Ethiopia, unless agreed otherwise, subletting a premise is in principle possible. The only requirement on part of the lessee is that he should give notice to the lessor (Art. 2957). Concerning the status of the relationship between the lessor and the lessee on the one hand and the third person who is subleasing on the other hand the code provides sufficient provisions. The relationship between the lessor and the lessee remains intact whether the lessor has consented to the sublease or not (read art. 2960). The sub-lessee is also bound to pay rent directly to the lessor, but his liability is limited only to the amount of rent payable (art.2962). Finally, a sublease shall be terminated if the principal lease is to be terminated as indicated under article 2964.

3.2.5 Termination of Lease Contract

A contract of lease may be terminated for various reasons. The following are some of the reasons stated in the code:

- Total loss or destruction of the property let Art. 2929
- Failure to observe contractual agreements by the lessor Art. 2930
- Failure to observe contractual agreements by the lessee Art. 2931
- Expiry of lease term Art. 2965
- Termination upon notice, for indeterminate lease agreements Art. 2966

Additional Reading

Concerning the lease of premises and the general rules of lease France and Germany have similar rules. **K.W. Ryan** in his book ***An Introduction to The Civil Law*, The law book co. of Australasia Pty Ltd, 1962, pp. 97-101** provides an exemplary brief analysis comparing the two systems with that of the common law.

Tenancy

The history of the term of years in English law reveals the transformation of the rights of the tremor from a mere personal right to bring an action of covenant against the lessor who had evicted him into a proprietary right, an estate in the land itself. The civil law has experienced a similar development, but one which was more tardy and is even yet incomplete. Under the Roman consensual contract of *location conduction rei,* the rights of the lessee were only *iura in personam.* If the lessor evicted the lessee during the currency of the lease, the lessee could recover damages only. If the lessor alienated the demised property, the purchaser could evict the lessee, whose only recourse was an action for damages against the original lessor. This latter rule was expressed in the middle ages in the maxim “sale breaks hire.” This adage was inconsistent with the customary law of both France and Germany, which had recognized that a lease conferred a real right on the lessee. In France, the Roman law conception of the nature and effect of a lease become accepted, but the practice developed of inserting in contract of sale a clause obliging the purchaser to uphold the lease, and by virtue of Art. 1743 C:C.(French CivilCode) this clause is now implied in leases for fixed term. The purchaser is subrogated to the obligations of the lessor and is bound to uphold the lease. However, French

law has remained true to the Roman law in refusing to accord possessory rights to the lessee against either a third party or the lessor himself. In the *Gemeines Recht*, the maxim "sale breaks hire" was applied until the promulgation of the B.G.B.(German Civil Code). The rule is now exactly the reverse. Art. 571 B:G:B. provides that if the demise property is alienated, the purchaser takes the place of the lessor so far as the rights and obligations under the lease are concerned; and if the purchaser does not fulfill his obligations, the lessor is liable as a surety who has waived the *beneficium excussionis.* Moreover, the lessee in German law has possession of the demised property and with it the right to bring the possessory action.

……..

There is a remarkable difference between the position of the parties to a lease at common law and in the civil law. In the absence of express provisions the common law imposes on the lessor an implied covenant for quite enjoyment, an obligation not to derogate from his grant and in certain cases an implied condition of fitness for habitation. The covenant for quite enjoyment gives the lessee the right to recover damages from the lessor if the lessor or persons claiming under him physically interfere with the lessee's full beneficial user of the premises; but the covenant does not extend to disturbance by a third party claiming under title paramount. The civil law goes much further in protecting the tenant. Art. 1719(3)C.C. obliges the lessor to assure to the lessee during the term of the lease the quite enjoyment of the missed premises. The lessor must refrain from any personal act which would interfere with the lessee's enjoyment of the property. In addition, the lessor warrants that the lessee will not be disturbed by *troubles de droit* as opposed to *troubles de fait* of third parties-that is by interference based on a legal claim to or over the property as opposed to interference not supported by such a claim. For the latter type of disturbance the lessee's remedy will lie only against the interfering third party. Art. 541 B.G.B. also gives various remedies to a lessee if he is wholly or partially deprived of the use of the property by virtue of the right of a third party.

……

In relation to implied condition of fitness, the position at common law is that the landlord gives no warranty that premises are reasonably fit for habitation, unless a house is let furnished or for any particular use. The civil law rule is strikingly different. Art. 1721 C.C. gives the lessee an implied warranty against latent defects of the thing which restrict its use. The lessor's liability for latent defects is independent of whether he knew or ought to have

known of their existence; but he is not liable for defects which the lessee knew or should have known existed. The B.G.B. goes even further. Art. 539 B.G.B. provides that if the demised property is at the time of delivery of possession affected by a defect which destroys or impairs its fitness for the agreed use, or if such a defect arises during the term of the lease, the lessee is entitled to an exemption or reduction of rent for the period during which the fitness of the property is destroyed or impaired. The same rule applies where an agreed quality of the property is lacking or ceases to exist. These rights are not however accorded to a lessee who is aware of the defect when the lease is contracted. To this principle Art. 544 B.G.B. imports an exception. If a dwelling or other place intended for occupation by human beings is in such a condition that its use would entail a serious danger to health the lessee is entitled to terminate a lease immediately by notice even though he was aware of the dangerous condition of the premises when the lease was made.

Rural Land Lease

3.3.1 General

Rural land lease can also be termed as agricultural land lease as known elsewhere. However, in Ethiopia, there is another form of lease of rural land for investment purpose. The purpose of this part of the discussion is to discuss briefly the types of rural land leases recognized by Federal and Regional rural land proclamations. For the purpose of clarity we shall use the Rural land Proclamations of the Federal (Proc. No. 456/2006), Oromia (Proc. No.130/2007), Amhara (Proc. No. 133/2006) and Tigray regions (Proc. No. 136/2007).

Lease is one form of land holding rights recognized by rural land proclamation. The Federal rural land administration and use proclamation No. 456/2006 in its definition of “holding rights”, among others, include lease as one form of right. Hence, rural farmers are allowed to lease or rent their land to any person who wishes to involve in the agricultural sector.

3.3.2 Types of Rural Land Lease Arrangements

The readings of the federal rural land proclamation and that of others reveal that there are three types of lease arrangements concerning rural land holding.

- Leasing farm land to other farmers
- Leasing farm land to investors
- State lease land to investors

Leasing to fellow farmers

Conditions

Farmers usually rent out their land to a fellow farmer on the basis of share cropping or on cash base. Studies show that the first one is prevalent. Farmers may rent their land to fellow farmers for different reasons, some of which may be need of cash money, lack of capacity to farm the land (because of old age, widow or divorcee woman, sickness, poorness, large area, temporary departure from the area etc.) The law makes a limitation as to the size of the land which should be rented, which is "a size sufficient for, the intended development in a manner that shall not displace them…" It means, at least, the farmer should not rent all his land or a significant part of which would left him with insufficient produce for his livelihood.

The second requirement seems that the farmers need to have a land holding certificate. As you shall see it in the next chapter, efforts are being made in every region to identify and register every plot of rural land so as to issue possession certificate to farmers. Hence, the practicality of this prerequisite is depending on the issuance of such certificates.

The third requirement is that consent of some interested person. The federal legislation needs the consent of other "members who have the right to use the land" (Art. 8(2)), while the Tigray needs the approval of a spouse (Art. 6(2). The Oromian one comes up with different approach, in that the rent is valid "if it is registered and approval by Oromia Agricultural and Rural development Bureau Art. 10(3)."

Lease Period

Although not mention in the Federal Proclamation, the maximum lease period is fixed in the regional proclamations. According to article 10(2) of the Oromian law, "duration of the agreement shall not be more than three years for those who apply traditional farming, and fifteen years for mechanized farming." The Tigray legislation agrees with the three year

period concerning the traditional farming mechanism but prescribes 20 years for the modern farming mechanism one (Art. 6(3).

Leasing to investors

The farmer may lease out his land to an investor, a licensed person who wishes to involve in agriculture. This kind of arrangement is made between the holders of the land and the investor only. Of course, the above requirements are also applied for this type of lease agreement. The difference between the first and this one is that the lessee in the first one is a fellow farmer, and here an investor. The question that can be raised is whether the investor can use the land for other investment purposes or not? The purpose of the law seems that to provide investors an opportunity to rent land for agriculture purpose. It is also against the interest of the farmer and the locality to use the farming land for other purposes. The other good reason is that since each farming plot shall be designated as farming land (according to land use regulations) it is highly improbable to change the land use right (agriculture) to other purposes, such as mining and etc.

The law also provides a mechanism that enables the landholder to develop his land jointly with the investor. Hence, without losing a substantial right, the farmer may be benefiting from the material and technology of the investor.

State lease of land to investors

The FDRE Constitution, under Art. 40(6), gives an opportunity for investors to get land in rural areas. Accordingly the government is obliged to "ensure the right of private investors to the use of land on the basis of payment arrangements established by law." the Federal and Regional rural land legislations have also upheld this principle. The leased land may be for the purpose of agriculture, like big commercial agricultural lands, or for any other investment purposes (mining, quarry, industry.) The common type of such investment activity in Ethiopia is the horticulture investment wherein investors heavily lease rural land for the growing and collection of flowers and commercial fruits. As we shall see it later on, such investment is possible to mortgage.

Selected Readings from the Federal and Oromian Rural Land Proclamations
Federal

8. Transfer of Rural Land Use Right

1) *Peasant farmers, semi pastoralist and pastoralist who are given holding certificates can lease to other farmers or investors land from their holding of a size sufficient for, the intended development in a manner that shall not displace them, for a period of time to be determined by rural land administration laws of regions based on particular local conditions,*

2) *The rural land lease agreement to be concluded in accordance with Sub-Article (1) of this Article shall secure the consent of all the members who have the right to use the land and be approved and registered by the competent authority,*

3) *A landholder may, using his land use right, undertake development activity jointly with an investor in accordance with the contract he concludes. Such contract shall be approved and registered by the competent authority.*

4) *An investor who has leased rural land may present his use right as collateral.*

Oromia

Art. 10. Renting of Private Holding

1) *Without prejudice to Article 7(1) any peasant, pastoralist or semi pastoralist has the right to rent out up to half of his holding.*
2) *Duration of the agreement shall not be more than three years for those who apply traditional farming, and fifteen years for mechanized farming.*
3) *Land renting shall be valid before the law, if and only if it is registered and approval by Oromia Agricultural and Rural development Bureau. The agreements made prior to this Proclamation shall be treated according to this proclamation.*
4) *Necessary support shall be made to make the valuation of land for renting coincide with the prospective return from that land.*
5) *Any organ who rented rural land is obliged to apply proper preservation and conservation for the duration he holds the land.*
6) *Any agreement made on land renting shall bear the consent of all individuals who have rights on that land.*
7) *For any rented land, the land tax shall be paid by the name of the landholder.*
8) *Any land holder, having the right to use land, can make special agreement with any investor to develop his holding. The agreement shall be registered and approved by Agricultural and Rural development office in the vicinity.*

Art. 11. Land Renting** by **Government

1) *The government can rent out the land not held by the peasants or pastoralists or semi pastoralists.*
2) *The agreement to be made by Sub-Article 1 of this Article shall protect the benefits of the peasants, pastoralists or semi pastoralists.*
3) *The renting price of rural land by government shall be subject to revision as necessary.*
4) *The duration of the renting agreements shall be decided by the government.*

Art. 12. Investment Land

1) *In accordance with the existing investment law of the Region, any private investor shall have access to rural land and is obliged to conserve accordingly.*
2) *Private investors are obliged to plant indigenous trees at least on 2% of the given land.*
3) *The investment land shall be determined in the way that it shall protect the natural recourses of the surrounding.*

3.4 Urban Land Lease

3.4.1 Scope

Today, in Ethiopia, lease is the "cardinal" and "exclusive" land-holding system to transfer urban land to users in accordance with the master plans of each urban area. Hence, unlike the housing sector, urban land is governed by a special legislation, namely, the Lease Holding of Urban Lands Proclamation No. 272/2002. And yet the civil code may be applied whenever necessary. The scope of application of the law is "to an urban land held by the permit system, or by lease-hold system or by other means prior" to the coming of the proclamation "as well as to an urban land permitted hereafter."

3.4.2 Leasehold right

The leasehold right is a right to use the land for fixed period of time against payment of agreed amount of money. The assumption is that any person who fulfills the requirements is entitled to get land by way of lease. Pursuant to article 4 of the urban landholding lease proclamation, an urban land shall be permitted to be held by lease:

a) in conformity with plan guidelines where such - a plan exists, or, where it does not exist, in conformity with the law which Region or City government makes, as the case maybe, and
b) on auction or through negotiation ;or
c) according to the decision of Region or City government.

The Amharic version of sub-c is different from the English one in that the former is applicable to urban dwelling houses. Means the regional government may approve directive which

allows urban dwellers to get land for housing free of charge, without negotiation etc. This is said because in practice this is happening in all urban centers of the country. The lease regulation of the city of Addis Ababa and other regions clearly show that urban dwellers may get a fixed land for residential houses free of charge. This is one character this lease legal framework shares with the proc. 47/1975.

Once a person gets land by one of the three mechanisms, he/she is entitled to get leasehold title deed. This is a certificate that proves the lessee's rights to the land. What kind of rights does this title deed provide? Once if a person buys the lease right s/he has the right to construct a building of different nature (residential, commercial, industrial) as per the agreement and the master plan. Hence the right of use and enjoyment is one right conferred on the lease right holder. Another right is that the lease right can be inherited, donated, or mortgaged provided that the beneficiary's rights are limited by the period of the lease term. Finally, the lease can be sold or exchanged to any person. Article 13 of the proclamation provides the kinds of rights. As per sub-article 1 of this article "any lease holder may transfer, or undertake surety on (mortgage), his lease-hold; and he may also use it as a capital contribution to the amount of the lease payment he has made."

It must be noted that this right shall be enjoyed so long as some form of construction/activity has been taken place; in other words bare land is not subject to all the above rights. This point is also understandable from the reading of Article 12 and Article 13(2) (3) of the proclamation. Article 12 requires the leasehold possessor to "begin to use the land for the prescribed activity or service within the period of time set…" The time set for commencement of activities may vary from 18-30 months as the case may be as emphasized in different municipal regulations. The second point is that the concept of real estate that we discuss in the beginning, that land constitutes the ground and the building, is reemphasized once again under article 13. This article in short says that mortgaging a use right of land includes a building constructed on it and the accessories thereto, and conversely the mortgage of a building and its accessories includes the use right of the land. Similarly, sub 3 of same article says that land right and the construction upon it are inseparable in that during default of payment both rights should be transferred to the creditor.

As one can clearly observes that leasehold right provides all the rights and privileges that private land can do. The only difference is the degree of security and restriction. Concerning this point, Farvacque and Mc Auslan give interesting explanation:

> *Essentially, the crux of the legal difference between freehold and leasehold is that the freeholder (private owner) is bound by the laws of the land and nothing else. Whereas the leaseholder is bound, in addition, by the terms of the lease laid down by the landlord. The leaseholder is then less free and unrestricted in his or her use of land than is the freeholder (p.199.)*

As we shall discuss below even private ownership is not an absolute one, it is subject to different limitations, such as town plan, public interest, environment etc. The clear difference between the private ownership of land and the leasehold right is the time element, in that the latter is limited by time as we shall discuss it later on. The limitation in time may create some how insecurity on the lessee and as a result inhibits the lessee from making further investments. On the other hand it can be said that for those lease agreements taking longer years, such as 99 or 70 years, people may not be inhibited from making additional investments.

Additional Reading

As part of the public/private land ownership debate, many people argue in favour and against the system from leasehold point of view. Those who argue in favour of public ownership of land claim that the urban land lease holding arrangement is beneficial as practiced in many countries including China**. Nega Woldegebriel (*Who are Benefiting? The Urban Land Lease Policy, Case study of Addis Ababa*, Lund, Sweden, 2005 pp. 10-11,12)** forwards the following argument.

Leasehold tenure-ship and its implication

Land tenure could be expressed as the possession and use of land by individuals or groups for limited or unlimited period of time. According to Oxford dictionary (1998), tenure is defined

as the condition or form of right or title, under which real property is held. Ethiopia has endorsed different tenure systems.

In theory, public leasehold does appear to be a compromise because the system allows the state to remain as the landowner and lease the development. The use rights of land go to private individuals. However, in practice, it does not matter who the landowner could be. It could be the government or private landlords who have real control over land but what matters would be depending on how lease conditions are constructed (Bourassa and Hung Hong 2003).

Chen (1990) has pointed the comparison of the land policies of China and western countries. He has stated out that,

> *What distinguishes the private ownership and public ownership over land is their differing point of departure. In the west, where land has long been privately owned, the state exerts control by regulation: in China, where the point of departure is state ownership, similar results are achieved in a more proprietary manner- through the use of leasing contracts.*

What is being reflected by Chen (1990) sounds quite right for countries in transaction. What was discovered one among the most reasonable route to the transaction into a vibrant land and housing market has been the adoption of a public leasehold policy. This option could be regarded as a transitory alternative to the building of a well functioning market economy. This is what Ethiopia is trying to achieve. In particular a shift of land holding from strict public ownership to semi-private or to full private would bring social unrest. It needs to consider the steps performed a country like China where there was a profound communist regime and a country with a highest population of the world. Moreover, China's experience in this regard is often cited as one of the best practices in stimulating the urban land and housing sector along the free market lines. Thus, Tung Pi Chen's conclusion in this case is an additional testimony to the success story.

As Knaap et.al. (2003) have described regarding the separation of use rights and land ownership.

> *In the current property rights regime, use rights for specified period (eg 40 to 70years) can be obtained from the state through the up-front payment of land use fees. The fees are determined by the location, type and density of the proposed development. This separation of land ownership and use rights allows the trading of land use rights while maintaining state ownership of land.*

Knaap and his colleagues have point out three advantages, which the Chinese government has achieved. First, market mechanisms could help and guide the allocation of land resources; second, land use fees would provide local government with a new resource of revenues, and third, by retaining state ownership, social and political conflict would be minimize.

Theoretically, leasehold would bring social, economical and environmental benefits. All would agree with the idea of the economic advantage of land.

> *Economists frequently refer to land along with labour, capital, and management as one of the basic factors of production. Land as property has legal connotations and could be described as individuals or groups have been exercise rights of ownership and use they hold in land. And from stand point of the average investors, land must be purchased or leased like other capital goods, so land could be described as capital.*
> (Raleigh Barlowe 1958)

….Where land is state owned, the mere advantage of the local governments is, they can reserve land for housing construction and infrastructure developments. In addition, the purpose of land lease would be reserving land for residential uses with no cost. Otherwise the high cost of land would affect the low and middle income groups. For instance in Canberra Australia, among all purposes of land leasing, reserves land for buildings, foreign embassies and other public infrastructure appears to be most achievable (Bourassa and Hung Hong 2003).

3.4.3 Lease periods

As we try to touch it in the preceding part, lease is different from private ownership because its enjoyment right is limited in time. Unlike rural land, urban land is granted to urban dwellers and investors on the bases of restriction. In the current property right situation, use rights are provided for a specific period (it could be for 15 or 99 years) obtained from the landowner who shall be the state through ground rent payment. Therefore the landownership and use rights are separated and make the state out of full control over the land. Article 6 of the proclamation provides different periods of years for different types ground leases.

Art. 6: Period of Lease

1) The, period of lease shall vary depending on the level of urban development and sector of development activity or the type of service and shall have the ceiling of:

a) In any town:

1) up to 99 years for housing (personal and leasable), science, technology; research ,and study, government office, non-profit-, making philanthropist organization, religious institution; ,
2) up to 15 years for urban agriculture;
3) as per government agreement for diplomatic missions and international organizations;

(b) In Addis Ababa and in a town designated as of the grade of Addis Ababa:

1) up to 90 years for education, health, culture, sports;
2) up to 60 years for industry;
3) up to 50 years for commerce;
4) up to 50,years for others.

(c) In other towns not designated as of the Grade of Addis Ababa;

1) up to 99 years for education, health, culture, sports;
2) up to 80 years for industry;
3) up to 70yem for commerce;
4) up to70 years for others.

Students are invited to make more research on what the law means by cities designated as grade of Addis Ababa. It is also a good research area to investigate the different lease

regulations issued by the city of Addis Ababa and other regions concerning the ceiling of the lease period and manner of payment, area of land allowed free of charge for residential areas and etc.

Now the next logical question is what will happen after the expiry of the period of the lease agreement? Should the lease continue or be terminated? What will happen to the improvements made to the land? Think about it and compare your guess with what we shall discuss below.

3.4.5 Renewal and Termination of lease permit

Lease holding right may be terminated for good reasons; the state has no right to revoke this right whenever it wishes. Like any contractual agreement the expiry of the lease contract may be a reason for termination of the lease hold right. However, unlike lease of housing, the lessee has a better position. The municipality may not take back the land whether before or upon the expiry of the lease agreement unless the land is needed for public interest based works.

The lease hold possessor has the right to request for renewal of the period of lease agreement, 10 to 2 years before the final day of the agreement.

Art.7: Renewal of Period of Lease

> *1) Period of lease may, upon the termination thereof, be renewed for the lease-hold possessor as per the agreement to be reached, unless the urban land is wanted for public interest. Where the lease period is not renewed upon termination on account of the land being wanted for public interest however, compensation shall not be paid to the lease-hold possessor.*
>
> *2) Period of lease shall be renewed for the lease-hold possessor in pursuance with the stipulations of Sub-Article (1) of this Article if only he has applied in ,writing to the appropriate body, to that effect within 10 years and not exceeding2 years before the termination of the period of lease.*
>
> *3) The appropriate body must notify to the applicant in writing its decision within 1 year after the application has been lodged with it. It shall be deemed as though it has*

agreed to the renewal if it fails to do so within I year after the receipt of the application

One can clearly see that renewal is the rule. The lease holder must apply as early as possible to secure his/her rights. The municipality is given a maximum of one year to notify its decision to the lessee. The assumption is that unless the ground is needed for more socially advantageous activities (for public interest) the municipality shall renew the agreement. It must also be noted that the terms of agreement especially the rent and manner of payment as well as other conditions shall be based on current conditions. In other words, the renewed lease agreement may not contain similar particulars as that of the expired one.

This approach is also well known in different countries. The reason behind protecting the lease hold possessor is that because of the investments already made on the ground. People may build residential houses, commercial, agricultural, industrial and so on buildings on the ground, and it would be unjust and unfair if the government is going to take back the land just to sale it to another person. This would create insecurity upon lease holders which would again discourage them from making additional investments on the ground land they leased. It is also categorically against the interest of the state for demolition and reconstructing of structures is expensive one. Secondly, people will not build good buildings for fear of losing them.

Art. 15. *Termination* of *Lease-hold and Payment* of *Compensation*

1) The lease-hold of urban land shall be terminated:

(a) where the lease-hold possessor has failed to use the land in accordance with Sub-Article (1) of Article 12;

(b) where it is decided to use the land for a public interest; or

(c) where the period of lease is not renewed

The lease proclamation provides three basic reasons for the termination of the contract. It seems the first and third reasons are happening on account of the failure of the lease-hold possessor him self. Because, failure to commence the activity on the ground within the agreed

time and in accordance with the plan and failure to request renewal of the lease agreement are impugned on the lease-holder himself. The second reason is however, accountable to the state, and as a result the lease-hold possessor shall be "paid commensurate compensation" for his lose of the property. In case of the first and third cases however there is no any compensation to be paid.

Expropriation of leasehold right and Compensation

As we shall dealt it with, when discussing expropriation at the last part of this material, expropriation is one means of land acquisition for the state. It is a procedure whereby the state takes away private owned land property for public interest without the consent of the owner and against payment of fair amount of compensation. The subject of expropriation is not only privately owned land and building but also leased land. The lease proclamation gives hints of such possibilities under articles 7(1), 15 (1) (b), and 16. Expropriation of leasehold land may be effected during the expiry of the lease agreement (7(1)), or before the expiry of the agreement as can be inferred from Article 15 (1) (b), and 16 (1). According to article 7, the state may refuse renewal and take back the land when the land is needed for public purpose. The law also emphases that in such case compensation is not to be paid. Hence we can argue that the taking back of the land doesn't amount to expropriation. Only leasehold right which is active is compensable. Do you think it is just to deny compensation for the property constructed?

Art 16: Clearance of Urban Land

> *(1) The appropriate body may clear and take over an urban land which it decides it is necessary to commit for a public interest by issuing clearance order in writing to the concerned person. It shall also publicize the order through other alternative means.*

The point is that where a leasehold right has been taken away by the state for good reasons/public interest (such as to build hospital, roads, schools, etc), the state must compensate the leasehold possessor for the property on the land and the remaining lease rent. Regulation No.135/2007 that provides for "The Payment of Compensation for Property

Situated on Landholdings Expropriated for Public Purposes," under article 13 provides the formula. Now concerning compensation for buildings the amount of compensation should be calculated by taking the following in to consideration:

- cost of construction (current value) .
- cost of permanent improvement on land
- the amount refundable money for the remaining term lease contract

The leasehold possessor is going to be refunded if he had made full or prior payments the rent. The fact that lease hold right is a secured one and can give protection to the holder is even more clear when one looks to sub article 2 of article 16 which concerns squatting. That illegal settlers (squatters) may be evicted from the land they hold with out any payment of compensation.

Summary

Lease of land in Ethiopia, as we discuss, can be classified in to housing, urban land (ground land lease) and rural (agricultural) land lease. Since buildings are privately owned lease or rent of houses is based on freedom of contract than some social policy, as favored by many western countries. The ceiling of the rent is not fixed and the agreement can be terminated upon expiry of the agreement, it doesn't give the lessee the sole right to continue the lease. Rural farmers have been given a hereditary lifetime possession right to the land which includes right to use, inherit, donate and rent or lease. Rural farmers may lease their holding to a fellow farmer or to an investor. The government may also lease part of its holdings in rural areas to investors who wish to engage in agriculture or other areas of investments. The urban lease system is a complex one and a source of huge income to municipalities. The government compromises the policy of state ownership of land by introducing the lease system to hold land in urban areas. It is believed that this will allowed Ethiopia to develop a real estate market in the absence of land ownership. The role of the State as landowner is thus effectively restricted to the allocation of undeveloped land.

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CHAPTER FOUR

REGISTRATION OF IMMOVABLE PROPERTY

Introduction

Problems concerning the appropriate use of land resources and improved management of land are important all over the world. Due to this, they must be given greater attention. Information related specified units of immovable property units is a cornerstone of Land Information Systems since data concerning ownership and other property rights, boundaries, areas, land uses, market and assessed values, buildings, etc., are all interrelated. This chapter is devoted to the problem of developing efficient information systems based on such land units by way of putting in place efficient land registration and cadastre. It presents the meaning and nature, types, and purposes of cadastre and land register. It also treats the types of institutions of cadastre and land registration.

Objectives

At the end of this Chapter, the student will be able to:

- Define registration of immovable properties.
- Explain the significance of cadastre and land register.
- Distinguish between various types cadastre and land registration.
- Identify the types of institutions of registration of immovable property.

4.1 Cadastre and Cadastral surveying

Overview

Cadastre is one main method of Land Information Systems. Cadastre is just a system of writing or recording individual land parcels or real properties. In this section we shall try to elaborate the concept and meaning of cadastre, cadastral agencies and its essential contribution to our legal system and economic growth.

Objectives

Having read this section, one can:

- Define cadastre.
- List down the advantages of cadastre.
- Compare and contrast rural and urban cadastre systems in Ethiopia, and
- Identify the institutions of cadastre.

4.1.1 Meaning of Cadastre and Cadastral Surveying

A cadastre is just a system of writing or recording individual land parcels or real properties. In other words, it is a systematic description of the land units within a given area. Technically, this description is made by the cadastral maps which represent the graphical indices of the individual parcels showing the relative location of all parcels in a given region, and by written or textual records which represent the attribute files of the cadastre, in parallel. The most essential information in the textual files is the identification number and the area of the unit, usually differentiated by the type of land use.

A cadastre normally provides parcel-based information (parcel-based Land Information System). A parcel is a unit of land with homogenous tenure interests, having a unique owner/tenant, land class and use, and bounded by wall, fence, bond or boundary markers. The information is geographically referenced to unique and well defined units of land. The individual parcels are defined by formal or informal boundaries demarcated or permanently marked with stones, concrete beacons, fences, hedges, ditches and so on. Each parcel is given a unique code or parcel identifier which may include addresses, co-ordinates, or lot numbers shown on a survey plan or map.

The definition of cadastre has varied from time to time depending on the increased improvement it witnesses. A very authoritative definition is given by Professor Jo Henssen:

> *Cadastre is a methodically arranged public inventory of data concerning properties within a certain country or district, based on a survey of their boundaries. Such properties are systematically identified by means of some separate designation. The outlines of the property and the parcel identifier normally are shown on large scale maps which, together with registers, may show for each separate property the nature, size, value and legal rights associated with the parcel. It gives an answer to the question where and how much.*

This definition is very appropriate for the existing cadastral situations. Nevertheless, another even more authoritative definition, called Cadastre 2014, is given implying the highest stage of improvement for cadastre:

> *Cadastre 2014 is a methodically arranged public inventory of data concerning all legal land objects in a certain country or district, based on a survey of their boundaries. Such land objects are systematically identified by means of some separate designation. They are defined either by private or public law. The outlines of the property, the identifier together with descriptive data, may show for each separate land object the nature, size, value and legal rights or restrictions associated with the land object.*
>
> *In addition to this descriptive information defining the land objects, Cadastre 2014 contains the official records of rights on the legal land objects.*
>
> *Cadastre 2014 can give the answers to the questions of where and how much and who and how.*

The basic differences between these two definitions can be summarised in to three. Firstly, in Cadastre 2014, the land parcel can be demarcated or defined by either private or public law; but Henssen's definition seems to refer only to the private property law aspect. Secondly, Cadastre 2014 clearly suggests that the cadastral data may show also restrictions on top of the rights for each parcel. But Henssen's definition does not or does

so only impliedly. Finally but most importantly, Cadastre 2014 represents a comprehensive real estate registration system by going to the extent of replacing the traditional, separate institutions of 'Cadastre' and 'Land Registration'. To the contrary, Henssen recognises the two institutions distinctly.

The Cadastre is a public, up-to-date land information system (LIS) that efficiently supports public administration of real estate. There is a growing need all over the world for land information as a basis for planning, sustainable socio-economic development and control of land resources. LIS is an important concept. The best known definition for it is given by FIG:

> *A Land Information System is a tool for legal, administrative and economic decision-making and an aid for planning and development which consists on the one hand of a database containing spatially referenced land-related data for a defined area, and on the other hand, of procedures and techniques for the systematic collection, updating, processing and distribution of the data. The base of a land information system is a uniform spatial referencing system for the data in the system, which also facilitates the linking of data within the system with other land related data.*

There are different opinions regarding the relationship between LIS and systems for geographical information (GIS). The above definition seems to place GIS under the umbrella of LIS. But the more convincing claim is that LIS is the subset of GIS. This opinion is expressed in the following figure.

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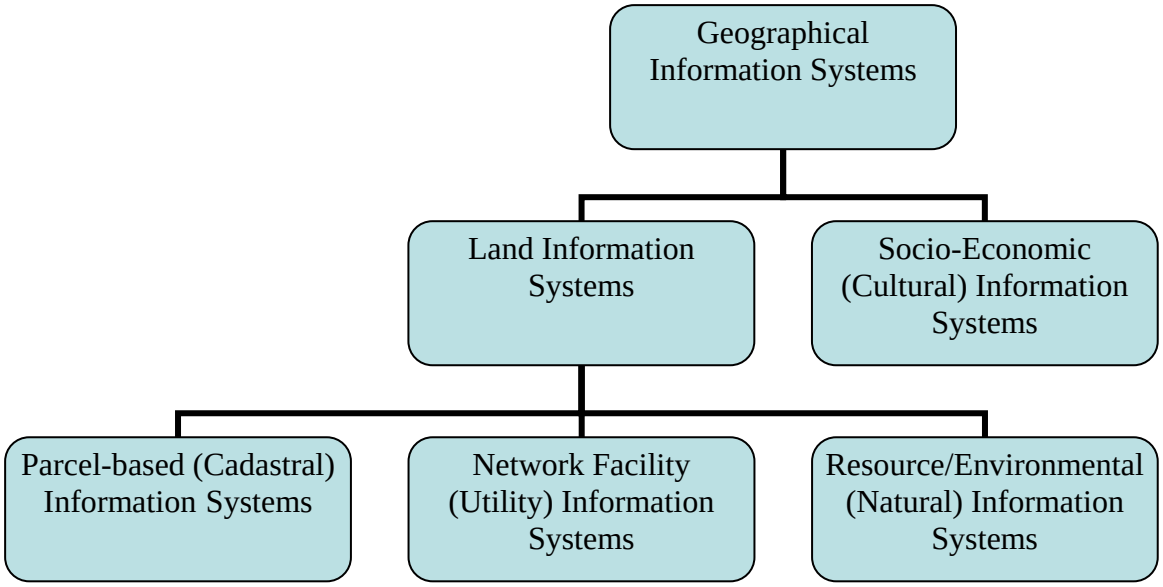


Fig. 1 Hierarchy of geographical information systems

In any case, cadastre and LIS are just the two sides of a coin. Nobody can understand the one without the other. Land which is the nucleus of the two concepts can be viewed from three different respects: land as a physical object, land as fiscal object and land as a legal object. Land as a physical object refers to the land use planning. Land as a fiscal object is addressed through a public valuation as a basis to levy land related taxes, important public revenue. Land as a legal object refers to the public provision of security of property rights to land such as ownership, mortgage, easements and leases.

In order to cope with the great diversity of needs, the Bogor Declaration states that cadastral systems should:

- Be simple and effective,
- Be adaptable to rates and patterns of populations,
- Provide access to land, security of tenure and trading of land rights,
- Provide a vast array of options,
- Include all types of lands- state or private, and
- Be part of a national spatial data infrastructure.

Only then we can consider a cadastral system as an effective tool for safeguarding the society's property rights thereby promoting economic development.

What do you think is cadastral surveying? Have you ever heard the word "surveying" before? You do not have to necessarily be an Engineer or surveyor in this regard. Nowadays, these words are becoming very powerfully used within the legal regime.

Boundaries are the main object of cadastral surveying. Normally other features, such as roads, water courses, land use boundaries, buildings, etc. are included, but the primary purpose of cadastral surveying is to define the land unit both on the ground and in the cadastre and land register. Cadastral surveying essentially involves the determination of the boundaries on the ground, the survey of the boundaries, and the demarcation of the boundaries.

What then is demarcation?
Demarcation is an operation which includes both legal and technical aspects. Let us consider two types of cases.

1. The exact position of the boundaries is fixed on the ground in the presence of the parties. If dispute arises, the boundary should be determined by an officer or a court. After the positions of the boundaries have been fixed, they are permanently marked with pipes, stones, concrete beacons, etc., if existing fences, hedges, and ditches are not considered sufficient demarcation.
2. The boundaries are, as far as possible, recognized on the ground. When necessary, they may be surveyed or identified in aerial photos in combination with simple ground surveying.

4.1.2 Classification of Cadastre

There are many ways by which cadastres are classified. Though the ultimate purpose is fundamentally the same, that is to support sustainable development, there are different forms of managing cadastre among countries all over the world and even within a single country. The factors that influence the format and management of cadastre are the variations in history, culture, pre-existing land tenure arrangements, area, physical and

economic geography, population size and distribution, the level of technology, traditional institutional arrangements, land and property law arrangements, and land policy priorities.

Thus cadastres may be classified based on the primary function for which they are established. Some cadastres may be formed for taxation, others for supporting real estate transaction, and still others for land distribution. Cadastres may be classified based on the types of rights registered. For example, some cadastres may record ownership rights as in many European countries, others use or possession rights as in present Ethiopia, and still others may register other interests such as mineral leases. Cadastres may be classified according to location and jurisdiction. Hence some countries may have separate cadastral institutions for urban and rural areas while many others may have a unified cadastre. Also some countries may have a centralised cadastre and others may have a decentralised one. Cadastres may also be classified based on the method of collecting land information. These can be collected through ground surveys tied to geodetic control, also called conventional system, or through uncoordinated ground surveys and measurements also called non-conventional system, or through aerial photography, or by digitising existing historical records, etc.

4.1.3 Purposes of Cadastre and Sustainable Development

Why does a society need cadastre? What are the justifications for an effective cadastre? How does it accelerate sustainable development? These questions must be clearly and adequately addressed to help policy and decision makers at various levels adopt a clear vision and strategy for land administration.

Firstly, a cadastre helps a society to ensure its sustainable development in quite many ways. **Cadastre brings about a guaranteed ownership and secured land tenure.** The compilation of land information in the cadastre should provide formal identification and, in some systems, legal proof of ownership. All interested persons should be certain as to which people have interests in the land parcel and to what extent (limitations).

Cadastre provides security for credit and improves investment. Certainty of ownership and knowledge of all the rights that exist in the real estate provides confidence for banks and financial organisations to provide funds so that land owners can invest in their land. Mortgaging real estate is one way to acquire capital for investing in improvements. Real estate owners can then construct or improve buildings and infrastructure or improve their methods and management of the land, for example by introducing new farming techniques and technologies.

Further, developing trusted and enduring systems of land tenure and land transfer encourages investment in a wider sense. This means where confidence is lacking in land tenure (ownership or possession), no investment will be risked, no improvement or development will be made onto the real estate, and consequently no economic or social benefit will be achieved thereby rendering cadastre impotent to contribute to the development of the economy.

Cadastre helps develop and monitor land markets. As the famous Hernando de Soto nicely puts, "Any asset whose economic and social aspects are not fixed in a formal property system is extremely hard to move in the market." On the other hand, the introduction of a cheap and secure way of transferring real property rights means that those who wish to transact in land can do so with speed and certainty. There is no way for dispossessing owners without their interest as their property right is guaranteed. A real estate owner or possessor can see the status of his/her property right as an underlying principle of cadastre is that it must be public. Any person irrespective of who he is and where he comes can buy/lease a real estate with full confidence knowing that the person whose name is recorded in the cadastre is the only guaranteed and true owner/possessor.

Cadastre being the clear means of formally representing real estates, whether by paper or computers, helps all persons across the world **convert their tremendous assets (e.g., houses, land parcels, forests, etc.) into a usable capital and wealth.** In his widely accepted book '**The Mystery of Capital',** Hernando de Soto has adequately demonstrated that the major stumbling block that keeps the Third World, as clearly opposed to the West, from benefiting from capitalism is its inability to produce capital. The reason for this inability is the failure to

set an effective cadastre and land registration or formal representation. Hernando de Soto puts this in succinct terms:

> *Capital, like energy, is also a dormant value. Bringing it to life requires us to go beyond looking at our assets as they are to thinking actively about them as they could be. It requires a process for fixing an asset's economic potential into a form that may be used to initiate additional production.* (Emphasis added).

Cadastre highly enhances real estate taxation. Effective cadastre will improve efficiency and effectiveness in collecting land and property taxes by clearly identifying the real estate owners. The more so because developing countries like Ethiopia need to increase their tax-based revenue from land to reduce aid dependence. Fiscal cadastre has been historically the starting point for modern cadastre in many parts of the world.

Cadastre is an effective tool to protect State lands. Some land may be reserved for the State to benefit the community. The State land or property must be protected for example from encroachment by farmers onto land beside roads, schools, or prison office lands, etc. or from attempts by squatters to settle on vacant land that is being held for future use.

Cadastre helps reduce land disputes. Cadastre involves surveying of land boundaries and demarcation. This can reduce the dispute over land and its boundaries which otherwise gives rise to expensive court litigation there by creating court congestion. Land cannot be put onto the market or to better use where a lawsuit is pending as no potential investor is likely to be committed to develop the land in such a scenario.

Cadastre plays quite a significant role in formulating, facilitating and monitoring land reform or policy. It provides excellent opportunities for identifying problems associated with the development and implementation of land policies. The FIG Statement on the Cadastre identifies many matters which can be monitored and controlled with the assistance of Cadastre:

- The size of parcels, both maximum and minimum, for instance to prevent excessive fragmentation,
- The shape of parcels, to avoid uneconomical subdivision design or inefficient road and water system, etc.,
- Reallocation of land rights to improve social and economic policies through subdivision, land consolidation, land reallotment, etc.,
- Land use, for instance agriculture or to ensure that low-cost public buildings are allocated to the right group of people,
- Control and measures taken to implement social programs to improve access to land ownership by women and minority groups,
- Valuation of land for the collection of government taxes and rates,
- Collection of contributions to improve common facilities, such as water systems, etc.,
- The value of land as a result of development, and
- Acquisition of land for public or common purposes.

Cadastre can effectively facilitate urban planning and infrastructure development. Urban centres need redevelopment and effective land use and infrastructure development planning. An effective cadastre should permit the integration of records of real estate ownership, land value and land use with sociological, economic and environmental data in support of physical planning.

Cadastre supports environmental management. An effective multi-purpose cadastre can be used to record conservation areas and give details of archaeological sites and other areas of scientific or cultural interest that may need to be protected. It can further be used in the preparation of environmental impact assessment and in monitoring the consequences of development and construction projects.

Cadastre is used to produce statistical data. Statistical data is important to decide for long-term strategic planning and short-term operational management.

In summary, we can observe that a secure and complete documentation or representation of legal and physical land objects significantly supports the efforts to create sustainable development. The Bathurst Workshop underlies:

> *Land is equally an asset for economic and social development. As an object with secure land rights it has the capacity to underwrite and accelerate economic development through the treatment of land rights as marketable commodities. Its capacity for wealth generation, for attracting and locating investment, and for opening up opportunities for the development of the financial sector is critical to sustainable economic and social development. On the other hand, for many communities the 'commodification' of the land may not support sustainable development or, alternatively, the concept of treating land rights as a commercial commodity may be unacceptable. Such communities may regard sustainable development as an integral part of the social structure.*

Cadastre can also help create political stability. The type of land tenure and land rights happens to be strong subjects of social and political debates. They have also a strong influence on the emotional feelings of individuals and organisations about the role they play within a society. As a result, no country can sustain stability within its boundaries unless it has a cadastre system that promotes internal confidence between its people, its commercial enterprises, and its public organs. Recognising that land is the source of all wealth lies at the heart of good government and effective public administration with strong legal and political basis.

Finally, **cadastre supports the economy in a different sense.** Once an effective multi-purpose cadastre is in place any interested individual or institution can get complete information related to a single land parcel. These helps the users save their time, energy and money. Economically, these savings will be passed on to the customers making products and services less expensive. Hernando de Soto is quoted to have said:

> *I predict that in the next 150 years the countries in Latin America and elsewhere joining these 25 (countries with a developed economy) will be those that spend their energies ensuring that property rights are widespread and protected by law, rather than those which continue to focus on economic policy.*

4.1.4 Features of Effective Cadastre

It is a good thing to put some guide lines as to what an effective or modern cadastre should consider. The first thing is that of scope. Geographically, it should be set at a country wide level to fully meet its goals and also avoid some unwanted results such as economic inequality. It should have permanent continuity. Second, it must be of an official nature run by a trusted and independent administrative agency. Third, a cadastre must function based on sound, detailed and practical legislation. Fourth, a cadastre should be available to any interested users through well developed procedures that are well publicised, simple to follow, inexpensive and responsive to customer needs (user -driven). Fifth, a good cadastre should develop a well-functioning financial regime. While the cost of initially establishing the cadastre is usually fully borne by the government investment, its subsequent maintenance should be based on cost recovery system, or even could be designed to generate additional revenue for the government. Sixth, a good cadastre should develop a career structure that ensures that staffs are well motivated and trained in their respective tasks.

Lastly, IT should be widely applied in maintaining the cadastral system. However, computerisation should not be considered to replace the wider cadastre. Fernando de Soto argues quite persuasively that property creation programmes will fail as long as governments believe that only perfectly knowing and having all the physical or technical things- surveying, mapping, and computerising- will guarantee all information required to issue property titles. He observes:

> *The propensity in some countries to squeeze the issues related to property into the departments of mapping and information technology has obscured the real nature of property. Property is not really part of the physical world: its natural habitat is legal*

and economic. Property is about invisible things, while maps are resemblances of physical things on the ground. Maps capture the physical information of assets but miss the big picture. With out the pertinent institutional and economic information about extralegal arrangements (and then replace these by the law and formal property system) they cannot capture the reality outside the bell jar. They are thus unable to do their real job, which is to help anchor the property aspects of assets in physical reality so as to keep virtuality and physicality in sync.

This, however, should never give the message that IT and mapping are not important to cadastre. It means that cadastre should be appropriately adapted to work in an extra legal environment, and geared toward avoiding the legal and political problems which means replacing the extralegal, the informal by the legal and formal system.

4.2 Land Registration

Overview

In the last section, we have seen cadastre as one main method of Land Information Systems. We discussed about the nature of cadastre, cadastral agencies and its essential contribution to the economy. In the present section, we shall discuss about land registration, a very related matter to cadastre and another important means of maintaining Land Information Systems. Specifically, we shall see its meaning, importance, and procedures. Further, we will see the agencies involved in land register.

Objectives

Having read this section, one can:

- Define land register.
- Distinguish between cadastre and land register.
- Explain the importance of land register.
- Compare and contrast rural and urban land register systems in Ethiopia, and
- Identify the institutions of land register.

4.2.1 Meaning and Importance of Land Register

In an attempt to understand land registration and especially its relationship with cadastre, a hair-splitting mode of identifying terminologies is indispensable. It seems that it is possible to use the term cadastre in a broad and narrow sense. Broadly, it can be understood to include land registration. In a narrower sense, it does not include land registration as it is understood to mean simply a systematic description of the land units within a given area. Now we should be interested to identify land registration from this narrow meaning of cadastre.

Some writers refer cadastre as 'land register' but this is clearly confusing as the term 'land register' is used to denote the register of title, i.e., land registration. Hence, if at all distinct terminology is apt to be used, we should never use land register or land registration to refer to cadastre. It has been suggested by some that land registration be called 'legal cadastre'. This term seems to be interesting as it shows the traditional focus of land registration, as will be explained below. Gerhard Larsson prefers to use the term '(legal) land register'. But here we prefer to use the term 'land register' or land registration at least for precision. But what is land register all about and how does it differ from cadastre?

We have mentioned before that land can be used in three respects- land as a physical object, land as a fiscal object, and land as legal object. Land as a legal object refers to the public provision of security of property rights to land such as ownership, mortgage, easements and leases. This is what we call here land register or land registration. This is a legal land record which does not serve the purposes of valuation for taxation or the description of land units, but is intended to include the description and the determination of rights to the land and encumbrances thereto. Land register is normally an up-to-date and ownership-based record unlike cadastre which is normally an up-to-date and parcel-based information system.

In light of this, Professor Jo Henssen provides:

> *Land registration is a process of official recording of rights in land through deeds or as title on properties. It means that there is an official record (land register) of rights on land or of deeds concerning changes in the legal situation of defined units of land. It gives an answer to the questions who and how.(emphasis added.)*

Land registration answers the question who because it is ownership or owner-based; and the question how because it answers the manner by which the ownership title is transferred from the previous owner to the new one, such as sale transaction. As we mentioned before, cadastre answers the question where and how much. The 'where' refers to the location of the land parcel and its boundaries; and the how much refers to the size of the land parcel.

We can summarise the basic differences between cadastre and land registration in the following table.

Cadastre	**Land Register**
1. Parcel-based	1. Ownership/owner based
2. Information about the parcel	2. Information about the interests/rights and restrictions
3. Answer where? And how much?	3. Answers who? And how?

Table1.Summary of the traditional distinction between cadastre and land register.

It is advisable to note that this is more of a conceptual difference and that it is not practically useful. In the practical aspect of land management, the difference becomes much gray than black and white. Thus when we talk of cadastral information system, we inevitably deal with the owners or possessors; similarly, when we talk of land registration, we inevitably deal with cadastral mapping referring to the land parcel (especially in the title registration) and the location and size issues, and so on. Gerhard Larsson has observed:

> *Even though there is a conceptual difference between the cadastre and the (legal) land register, it must be admitted that in practice a clear distinction is not always evident. There is, however, still a distinctive difference in essence, purpose, and focus between the two types of registers.*

Having observed the small distinction between the two registers, a question will crop up in our minds: why is there traditionally such a widely-told distinction (theoretical) between cadastre and land register? It seems that this has to do with institutional and profession-related matters. It was initially believed that land registers, taking in mind that they are legal aspects, are better handled by legal institutions and professionals who better understand the legal (both substantive or validity and procedural) requirements. These could be Ministries of Justices, Courts and Lawyers. On the other hand, cadastres being technical matters were believed to be well managed by different institutions and professionals such as Cadastral Authorities, Surveyors or Engineers. We can easily observe this in the institutional set up of many countries in world relating to real estate registration.

Additional Reading

Regarding the importance or purpose of land register, please go back and recall the importance of cadastre as they are very similar in this regard. For your better understanding, please read the following interesting excerpt from Hernando De Soto.

Hernando De Soto, *The Mystery of Capital: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE*, (Great Britain, Black Swan edition, 2001)

…Walk down most roads in the Middle East, the former Soviet Union or Latin America, and you will see several things: houses used for shelter, parcels of land being tilled, sowed and harvested, merchandise being bought and sold. Assets in developing and former communist countries primarily serve these immediate physical purposes. In the West, however, the same assets also lead a parallel life as capital outside the physical world. They can be used to put

in motion more production by securing the interests of other parties as 'collateral' for a mortgage, for example, or by assuring the supply of other forms of credit and public utilities.

Why can't buildings and land elsewhere in the world also lead this parallel life? Why can't the enormous resources we discussed in Chapter 2 - $9.3 trillion of dead capital - produce value beyond their 'natural' state? My reply is: Dead capital exists because we have forgotten (or perhaps never realized) that converting a physical asset to generate capita by using your house to borrow money to finance an enterprise, for example - requires a very complex process. It is similar to the process that Einstein taught us whereby a single brick can be made to release a huge amount of energy in the form of an atomic explosion. By analogy, capital is the result of discovering and unleashing potential energy from the trillions of bricks that the poor have accumulated in their buildings.

There is, however, one crucial difference between unleashing energy from a brick and unleashing capital from brick buildings: while humanity (or at least a large group of scientists) has mastered the process of obtaining energy from matter, we seem to have forgotten the process that allows us to obtain capital from assets. The result is that 80 per cent of the world is undercapitalized; people cannot draw economic life from their buildings (or any other asset) to generate capital. Worse, the advanced nations seem unable to teach them. Why assets can be made to produce abundant capital in the West but very little in the rest of the world is a mystery.

Clues from the past (from Smith to Marx)

To unravel the mystery of capital, we have to go back to the seminal meaning of the word. In Medieval Latin 'capital' appears to have denoted head of cattle or other livestock, which have always been important sources of wealth beyond the basic meat they provide. Livestock are low-maintenance possessions; they are mobile and can be moved away from danger; they are also easy to count and measure. But most important, from livestock you can obtain additional wealth, or surplus value, by setting in motion other industries, including milk, hides, wool, meat and fuel. Livestock also have the useful attribute of being able to reproduce themselves. Thus the term 'capital' begins to do two jobs simultaneously, capturing the physical dimension

of assets (livestock) as well as their potential to generate surplus value. From the barnyard, it was only a short step to the desks of the inventors of economics, who generally defined 'capital' as that part of a country's assets that initiates surplus production and increases productivity.

Great classical economists such as Adam Smith and Karl Marx believed that capital was the engine that powered the market economy. Capital was considered to be the principal part of the economic whole - the pre-eminent factor as in such phrases as capital issues, capital punishment, the capital city of a country. They wanted to understand what capital is and how it is produced and accumulated. Whether you agree with the classical economists or not, or perhaps view them as irrelevant (maybe Smith never understood that the Industrial Revolution was under way, maybe Marx's labour theory of value has no practical application), there is no doubt that these thinkers built the towering edifices of thought on which we can now stand and try to find out what capital is, what produces it and why non-Western nations generate so little of it.

For Smith, economic specialization - the division of labour and the subsequent exchange of products in the market - was the source of increasing productivity and therefore 'the wealth of nations'. What made this specialization and exchange possible was capital, which Smith defined as the stock of assets accumulated for productive purposes. Entrepreneurs could use their accumulated resources to support specialized enterprises until they could exchange their products for the other things they needed. The more capital was accumulated, the more specialization became possible, and the higher society's productivity would be. Marx agreed; for him, the wealth capitalism produces presents itself as an immense pile of commodities.

Smith believed that the phenomenon of capital was a consequence of man's natural progression from a hunting, rural and agricultural society to a commercial one where, through interdependence, specialization and trade, he could increase his productive powers immensely. Capital was to be the magic that would enhance productivity and create surplus value. 'The quantity of industry', wrote Smith, 'not only increases in every country with the increase of the stock [capital] which employs it, but, in consequence of

that increase, the same quantity of industry produces a much greater quantity of work.

Smith emphasized one point that is at the very heart of the mystery we are trying to solve: for accumulated assets to become active capital and put additional production in motion, they must be fixed and realized in some particular subject 'which lasts for some time at least after that labour is past. It is, as it were, a certain quantity of labour stocked and stored up to be employed, if necessary, upon some other occasion.'2 Smith warned that labour invested in the production of assets would not leave any trace or value if not properly fixed.

What Smith really meant may be the subject of legitimate debate. What I take from him, however, is that capital is not the accumulated stock of assets but the potential it holds to deploy new production. This potential is, of course, abstract. ***It*** *must be processed and fixed into a tangible form before we can release it - just like the potential nuclear energy in Einstein's brick. Without a conversion process - one that draws out and fixes the potential energy contained in the brick - there is no explosion; a brick is just a brick. Creating capital also requires a conversion process.*

This notion - that capital is first an abstract concept and must be given a fixed, tangible form to be useful - was familiar to other classical economists. Simon de de Sismondi, the nineteenth-century Swiss economist, wrote that capital was 'a permanent value, that multiplies and does not perish ... Now this value detaches itself from the product that creates it, it becomes a metaphysical and insubstantial quantity always in the possession of whoever produced it, for whom this value could [be fixed in] different forms.'3 The great French economist Jean Baptiste Say believed that 'capital is always immaterial by nature since it is not matter which makes capital but the value of that matter, value has nothing corporeal about it'4. Marx agreed; for him, a table could be made of something material, like wood, 'but so soon as it steps forth as a commodity, it is changed into something transcendent. It not only stands with its feet on the ground, but, in relation to all other commodities, it stands on its head, and evolves out of its wooden brain grotesque ideas, far more wonderful than table-turning ever was.

This essential meaning of capital has been lost to history. Capital is now confused with

money, which is only one of the many forms in which it travels. It is always easier to remember a difficult concept in one of its tangible manifestations than in its essence. The mind wraps itself .around 'money' more easily than 'capital'. But it is a mistake to assume that money is what finally fixes capital. As Adam Smith pointed out, money is the 'great wheel of circulation', but it is not capital because value 'cannot consist in those metal pieces'.6 In other words, money facilitates transactions, allowing us to buy and sell things, but it is not itself the progenitor of additional production. As Smith insisted, 'the gold and silver money, which circulates in any country, may very properly be compared to a highway, which, while it circulates and carries to market all the grass and corn of the country, produces itself not a single pile of either'.

Much of the mystery of capital dissipates as soon as you stop thinking of 'capital' as a synonym for 'money saved and invested'. The misapprehension that it is money that fixes capital comes about, I suspect, because modern business expresses the value of capital in terms of money. It is hard to estimate the total value of a collection of assets of very different types, such as machinery, buildings and land, without resorting to money. After all, that is why money was invented; it provides a standard index to measure the value of things so that we may exchange dissimilar assets. But as useful as it is, money cannot fix in any way the abstract potential of a particular asset in order to convert it into capital. Third World and former communist nations are infamous for inflating their economies with money while not being able to generate much capital.

The Potential Energy in Assets

What is it that fixes the potential of an asset so that it can put additional production into motion? What detaches value from a simple house and fixes it in a way that allows us to realize it as capital?

We can begin to find an answer by using our energy analogy. Consider a mountain lake. We can think about this lake in its immediate physical context and see some primary uses for it, such as canoeing and fishing. But when we think about this same lake as an engineer would by focusing on its capacity to generate energy as an additional value beyond the lake's natural state as a body of water, we suddenly see the potential created by the lake's elevated

position. The challenge for the engineer is finding out how he can create a process that allows him to convert and fix this potential into a form that can be used to do additional work. ***In*** *the case of the elevated lake that process is contained in a hydroelectric plant that allows the lake water to move rapidly downward with the force of gravity, thereby transforming the placid lake's energy potential into the kinetic energy of tumbling water. This new kinetic energy may then rotate turbines, creating mechanical energy that may be used to turn electromagnets that further convert it into electrical energy. As electricity, the potential energy of the placid lake is now fixed in the form necessary to produce controllable current that may be further transmitted through wire conductors to faraway places to deploy new production.*

Thus an apparently placid lake may be used to illuminate your room and power the machinery in a factory. What was required was an external man-made process, which allowed us, first, to identify the potential of the weight of the water to do additional work; and, second, to convert this potential energy into electricity that may be used to create surplus value. The additional value we obtain from the lake is not a value of the lake itself (like a precious ore intrinsic to the earth), but rather a value of the man-made process extrinsic to the lake. It is this process that allows us to transform the lake from a fishing and canoeing kind of place into an energy-producing kind of place.

Capital, like energy, is also a dormant value. Bringing it to life requires us to go beyond looking at our assets as they are to thinking actively about them as they could be. It requires a process for fixing an asset's economic potential into a form that may be used to initiate additional production.

Yet, while the process that converts the potential energy in the water into electricity is well known, the one that gives assets the form required to put in motion more production is not known. In other words, while we know that it is the penstock, turbines, generators, transformers and wires of the hydroelectric energy system that convert the potential energy of the lake until it is fixed in an accessible form, we do not know where to find the key process that converts the economic potential of a house into capital.

This is because that key process was not deliberately set up to create capital, but for the more

mundane purpose of protecting property ownership. As the property systems of Western nations grew, they developed, imperceptibly, a variety of mechanisms that gradually combined into a process that churned out capital as never before. Although we use these mechanisms all the time, we do not realize that they have capital-generating functions because they do not wear that label. We view them as parts of the system that protects property, not as interlocking mechanisms for fixing the economic potential of an asset in such a way that it can be converted into capital. What creates capital in the West, in other words, is an implicit process buried in the intricacies of its formal property systems.

The Hidden Conversion Process of the West

This may sound too simple or too complex. But consider whether it is possible for assets to be used productively if they do not belong to something or someone. Where do we confirm the existence of these assets and the transactions that transform them and raise their productivity if not in the context of a formal property system? Where do we record the relevant economic features of assets if not in the records and titles that formal property systems provide? Where are the codes of conduct that govern the use and transfer of assets if not in the framework of formal property systems? It is formal property that provides the process, the forms and the rules that fix assets in a condition that allows us to realize them as active capital.

In the West this formal property system begins to process assets into capital by describing and organizing the most economically and socially useful aspects about assets, preserving this information in a recording system - as insertions in a written ledger or a blip on a computer disk and then embodying them in a title. A set of detailed and precise legal rules governs this entire process. Formal property records and titles thus represent our shared concept of what is economically meaningful about any asset. They capture and organize all the relevant information required to conceptualize the potential value of an asset and so allow us to control it. Property is the realm where we identify and explore assets, combine them and link them to other assets. The formal property system is capital's hydroelectric plant. This is the place where capital is born.

Any asset whose economic and social aspects are not fixed in a formal property system is extremely hard to move in the market. How can the huge amounts of assets changing hands in a modern market economy be controlled if not through a formal property process? Without such a system, any trade of an asset, say a piece of real estate, requires an enormous effort just to determine the basics of the transaction: does the seller own the real estate and have the right to transfer it? Can he pledge it? Will the new owner be accepted as such by those who enforce property rights? What are the effective means to exclude other claimants? In developing and former communist nations such questions are difficult to answer. For most goods, there is no place where the answers are reliably fixed. That is why the sale or lease of a house may involve lengthy and cumbersome procedures of approval involving all the neighbours. This is often the only way to verify that the owner truly owns the house and there are no other claims on it. It is also why the exchange of most assets outside the West is restricted to local circles of trading partners.

As we saw in the previous chapter, these countries' principal problem is not the lack of entrepreneurship: the poor have accumulated trillions of dollars of real estate during the last forty years. What the poor lack is easy access to the property mechanisms that could legally fix the economic potential of their assets so that they could be used to produce, secure or guarantee greater value in the expanded market. In the West every asset - every piece of land, every house, every chattel - is formally fixed in updated records governed by rules contained in the property system. Every increment in production, every new building, product or commercially valuable thing is someone's formal property. Even if assets belong to a corporation, real people still own them indirectly, through titles certifying that they own the corporation as 'shareholders'.

Like electric power, capital will not be generated if the single key facility that produces and fixes it is not in place. Just as a lake needs a hydroelectric plant to produce usable energy, assets need a formal property system to produce significant surplus value. Without formal property to extract their economic potential and convert it into a form that can be easily transported and controlled, the assets of developing and former communist countries are like water in a lake high in the Andes - an untapped stock of potential energy. Why has the genesis

of capital become such a mystery?

Why have the rich nations of the world, so quick with their economic advice, not explained how indispensable formal property is to capital formation? The answer is that the process within the formal property system that breaks down assets into capital is extremely difficult to visualize. It is hidden in thousands of pieces of legislation, statutes, regulations and institutions that govern the system. Anyone trapped in such a legal morass would be hard pressed to figure out how the process works. The only way to see it is from outside the system - from the extralegal sector - which is where my colleagues and I do most of our work.

For some time now I have been looking at the law from an extralegal point of view, to understand better how it functions and what effects it produces. This is not as crazy as it seems. As the French philosopher Michel Foucault has argued, it may be easier to discover what something means by looking at it from the opposite side of the bridge. 'To find out what our society means by sanity', Foucault has written, 'perhaps we should investigate what is happening in the field of insanity. And what we mean by legality in the field of illegality.'8 Moreover, property, like energy, is a concept; it cannot be experienced directly. Pure energy has never been seen or touched. And no one can see property. One can only experience energy and property by their effects.

4.2.2 Classification of Land Register

Through out the world, there are two basic types of land registration component of the cadastre. They are the deeds system and the title system. The differences between the two concepts relate two the degree of state involvement and judicial setting of the country. In the deed system only the deed or document or transaction is registered. “A deed is a record of a particular transaction and serves as evidence of this specific agreement, but it is not itself a proof of the legal right of the transacting parties to enter into and consummate the agreement.” Deeds systems provide a register of owners focusing on “who owns what”. They are rooted in the Roman culture (France, Spain, Italy, Benelux, in South America, and parts of Asia and Africa which are influenced by this culture) and in most of the United States.

On the other hand, in the title system, the title/ownership itself is registered and is itself a proof of ownership and its correctness is secured or guaranteed by the state. While deed registration focuses on the owner, the title system focuses on the land parcel and registers properties by presenting “what is owned by whom”. The title system is rooted in the German and is found in central European countries –Germany, Austria, and Switzerland. Different versions of this system are also found in Eastern European and Nordic countries, UK, and Australia (Torrens system).

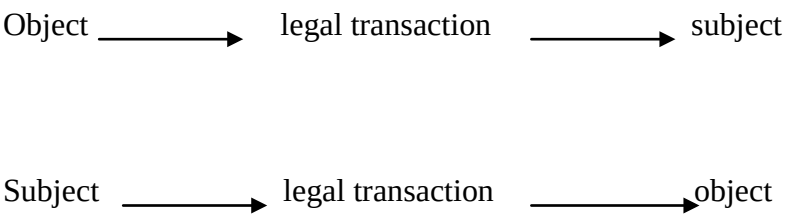


Fig.2 Difference of focus between deed system and title system.

Although deed registration can generally be implemented more quickly cheaply than the other alternative and the laws and procedures of title registration systems (including examination of

documents and cadastral plans) may be more complex, the latter systems are considered more useful. The FIG statement on the cadastre has this to say:

> *….in principle, title registration systems have benefits in terms of greater security of tenure and more reliable information. Furthermore, users do not have to search through old documents to find information on ownership; they can rely on the information on the title register. This usually results in lower transaction costs.*

Due to these and other reasons such as the progress of IT, the title system is being accepted as a better solution. As a result, the difference between the two concepts has become grey.

4.3 Unifying Land Register and Cadastre: Trends to a Multipurpose Cadastre

Overview

In the last sections, we have dealt with the important methods of land management-cadastre and land register. In this section, we shall briefly look at the growing trends towards treatment of the two methods in a unified fashion. Traditionally, the two systems were conceived as being distinct subjects because of the difference in historical emergence.

Objectives:

At the end of this section, the students will be able to:

- appreciate the importance of unifying cadastre and land register, and
- analyse some reasons justifying the move to a multipurpose cadastre.

For long, land register and cadastre have been handled by separate registry and institutions. However, they are increasingly coming together to form a unified or integrated registry. Some countries such as Austria, Hungary, and Sweden (the Land Data Bank System) have this harmonised or unified land registry system called multipurpose cadastre. Also most experts assume that the functions do not require two separate registries. As we have seen before,

Cadastre 2014 replaces the traditionally separate institutions of cadastre and land register and represents a comprehensive land recording system.

There are many reasons for the highly growing need for multipurpose cadastre. Firstly, we have globalisation and technology development which support and facilitate the establishment of multifunctional information systems with regard to land rights and land use regulations. The other global driver is sustainable development which demands for comprehensive information on real estate and on environmental conditions. Stig Enemark once said, “The concept of sustainability also includes the demand for establishing comprehensive land policies, including institutional issues such as good governance and equitable access to land and property.”

Mario BLAZEVIC enumerates the following direct benefits of harmonisation of land registry:

- Create an efficient land administration system and real property market,
- Faster registration,
- Harmonise data between the two systems,
- Improve customer relations and service provision; organize awareness campaigns among stakeholders, aimed at supporting professionals, financial institutions and real property holders.

It is highly advisable to note that the two words are highly interrelated both in meaning and importance. Though there is as we mentioned some conceptual difference between them, we should remember that usually one leads to the other and vice versa.

4.4 Ethiopian Legislation on Immovable Registration

Overview

Our last discussions focused on the general significance and application of registration of real property. In this section, an attempt will be made to consider the understanding and coverage of registration of real property in our country. Both the strong sides and limitations will be highlighted taking into account both the legislative framework and practices.

Objectives

This section will help the student:

- explain the importance of detailed laws covering many parts of registration of real property and related matters,
- identify the provisions of the Civil Code addressing registration of real property and limitations thereto.
- distinguish the present federal and regional legislations addressing rural land registration, and
- evaluate the urban real property registration system and problems thereof.

4.4.1 The Need for Legislation

One feature of an effective cadastre is that it is founded on a strong and practical legislation. All systems depend on a sound legal framework of land laws and specific laws on land registration and cadastre. Land laws must establish an effective cadastre and indicate registrable rights including those other than ownership. In this regard, governments must play the role of facilitating the operation of a land and property market, enable a mortgage market to function and ensure that citizens enjoy security of tenure by providing particular laws.

Land registration must be established on solid legal ground. John Manthorpe recognises seven important elements that land registration laws have to address which are:

- Creating the institutional authority responsible for ensuring the impartial maintenance of land registers.
- Determining the method by which a register for the whole jurisdiction is to be compiled (systematic or sporadic).
- Establishing systems and procedures for land transfer and registration of other interests in land.
- Specifying if the land titles are to be guaranteed by the State (such as paying compensation in case of error).
- Defining rules for original adjudication of registered title.
- Specifying if the land register is title system or deed system, and
- Creating arrangements whereby subordinate rules and regulations can be made by the registration body to facilitate development and administrative change.

4.4.2 The 1960 Civil Code

Though inapplicable, the fundamental legislation on real property registration is the Civil Code. One title, Title X, is devoted for this purpose and is entitled as "Registers of Immovable Property". The title includes 93 articles governing this important area of high economic significance. These provisions are contained in 4 chapters. The Code does not provide different chapters or sections for cadastre and land register; it regulates cadastre and land registration in a unified approach.

It is of particular importance to mention that the title on register of immovables is not yet applicable as its operation has been suspended. Sadly, the Civil Code provides the following provisions:

Art. 3363. - *Registers of immovable property.*
(1) Title X of this Code relating to registers of immovable property shall not come into force until a date to be fixed by Order published in the Negarit Gazeta.
(2) Until such date has been fixed, the provisions of the following Articles in this Chapter shall apply in lieu of the provisions of Title X.

Art. 3364. - *Transfer or extinction of ownership.*
The customary rules relating to the formalities to be complied with so that the transfer or extinction of the ownership of immovable property may be set up against third parties shall apply.

Art. 3365. - *Easements and restrictions to ownership.*
The customary rules relating to the formalities to be complied with so that easements, promises of sale, rights of pre-emption or provisions preventing attachment or assignment may be set up against third parties shall apply.

From the above provisions, we understand that the provisions on register of real property are not binding. Instead, customary law will be applicable to govern different situations.

Though this is unfortunately the case, we shall discuss the major parts of the Title on register of immovables for different reasons. Firstly, we are very hopeful that the government will soon take measures to apply these provisions as the importance of real property registration for sustainable development is understood quite better than any time before. Secondly, although, these provisions may not be complete and up to date due to the various changes that occurred in Ethiopia after their adoption, they meet the minimum standards for cadastre and land registration and could, if applied, contribute irreplaceably to the country's development. Third, the awkward customary practices far behind in the administration of real property including cadastre and land register.[1]

Coming back to our main discussion, Chapter 1 of Title X regulates "keeping of registers and publicity". The principle of registration of real property is provided under Art. 1553:

Art. 1553. Principle
Registers of immovable property shall be kept, in each Awradja Guezat of the Empire of Ethiopia, by the keepers of registers of immovable property.

What do you learn from the reading of the above provision? What makes and what does not make sense?

We can understand that the provision has already recognized the irreplaceable importance of real property registration, i.e. registration of land and buildings irrespective of the mode of ownership to land. It is also clear that this provision invariably includes both cadastre and land registration. In other words, in our context (context of the Civil Code) "registers of immovable property" means real property registration which in turn means cadastre and land registration.

[1] Regarding rural land registration, the present government has recently issued laws (Proc. No.456/2005 (Federal) and Proc. No. 133/2006 (Regional, Amhara) regulating few matters of registration, disregarding the Civil Code Provisions.

The word “Awradja Guezat” is an obsolete word at present and may contextually mean “Region”.

Please carefully read the following 4 provisions:

Art. 1556. - *Principal registers.*
In each place of conservation and for each district, a register of property and a register of mortgages shall be kept.

Art. 1557. - *Register of immovables.*
Where the state of the cadastre allows the adoption of such system, a register of immovables shall be kept in each district.

Art. 1558. - *Register of owners.*
Where the state of the cadastre does not allow the drawing up of a register of immovables, a register of owners shall be kept in each district instead of such register.

Art. 1559. - *Other registers.*
The Ministry of Agriculture may, by a general directive, or by a directive specially applicable to one or more places of conservation, prescribe the keeping of additional registers.

What are the main types of registration of an immovable property? How many types of real property registration are envisaged by the above provisions?

There are two principal types of real property registration, namely, a register of property and a register of mortgage. In addition, where the situation allows, a register of immovable shall be maintained. If the situation does not allow the establishment of a register of immovable, a register of owners shall be kept. The law also makes it possible the keeping of additional registers. Let us try to explain the meaning, nature, and content of each of these types of registration of real property.

c. Register of property

What is property? Property here refers to the interests or rights attached to an immovable object, i.e. land or buildings. And what is register of property?

Art. 1567. *Register of property.* - 1. *Principle.*
All acts, public or private, made inter vivos or mortis causa purporting to recognize, transfer, modify or extinguish the right of ownership of one or more persons over an immovable shall be entered in the register of property.

So register of property means registration or record of acts such as contracts which establish, transfer, modify or extinguish ownership right over land or building. But we should understand that the interest or right over an immovable is not only ownership; it can also be other such as use right and possession. This definition conforms to what is normally referred to as land registration as we saw earlier.

What are acts? Please carefully read the following provisions of the Civil Code:

Art: 1568. 2. *Particular acts concerning property.*
In particular, the following shall be entered in the register of property
in conformity with Art. 1567:
(a) acts of sale, donation, contribution in a partnership, partition *com*promise and contracts creating joint ownership, where such acts have an immovable as their subject-matter; and
(b) acts by which an heir or a legatee accepts a succession or a legacy relating to an immovable; and
(c) judgments which pronounce the annulment, revocation or dissolution of the acts abovementioned; and
(d) judgments which give a decision as to the ownership of an immovable upon an action for the recovery thereof; and
(e) judgments which pronounce the sale by auction of an immovable as a consequence of an attachment effected by the creditors.

Art. 1569. - 3. *Acts concerning other rights over immovables.*

The following shall also be entered in the register of property:
(a) all acts purporting to create, recognize, transfer, modify or extinguish a right of bare ownership or usufruct or a right of habitation over an immovable; and
(b) all acts purporting to create, recognize, modify or extinguish a servitude; and
(c) all acts purporting to create, transfer, modify or extinguish a contractual restriction of a right of ownership or of usufruct relating to an immovable.

Art. 1570. - 4. *Legal actions.*
Legal actions which aim at obtaining a judgment recognizing, transferring, dissolving or extinguishing the right of ownership or another right in rem over immovables shall also be entered in the register of property.

Art. 1571. - 5. *Leases and acts concerning rents not fallen due.*
The following shall be entered in the register of property:
(a) leases relating to a dwelling-house or apartment, concluded for a period of more than five years; and
(b) assignments of rents not fallen due, covenanted for a period of more than three years; and
(c) discharges for rents not fallen due given in advance to a lessee or farmer-tenant for a period of more than three years.

We understand that all types of acts related to ownership, those related to rights other than ownership, leases and court judgements relating to immovables are registered in the register of property.

d. Register of Mortgages

As you may study in your course on Security Devices, Mortgage is a system by which debtors may borrow money by giving their immovable as a security. Actually in Ethiopia, it emanates from contract and the law or court judgment. The Nature and formation and effect of mortgage is discussed under article 3041 and following of the civil code, while its registration is discussed somewhere else.
And what is register of mortgage?

Art. 1573. - *Register of mortgages.* - 1. *Principe.*
The following shall be entered in the register of mortgages:
(a) all acts purporting to create, modify or extinguish a right of mortgage or antichresis; and
(b) all acts purporting to transfer a debt secured by a mortgage or a right of antichresis or purporting to assign the benefit of priority attributed to such right by the law.

Art. 1574. - 2. *Attachment.*
Applications for the judicial sale of an immovable on the initiative of a creditor, whether or not enjoying a right of mortgage on such immovable, shall also be entered in the regjster of mortgages.

In the modern economy, mortgage plays a tremendous role by enhancing financial transactions in the credit market and security for creditors. Recording the acts that establish such an important mechanism is by far important. This is achieved through register of mortgages.

e. Register of Immovable

The third type of registration of real property in the Civil Code is register of immovables.

Art. 1575. - *Register of immovables.* - 1. *Principle.*
(1) Every immovable existing within the district shall be registered in the register of immovables under its number in the cadastre, and a leaf be assigned to it.
(2) The register shall contain, on each of its leaves, a summary description of the immovable made with the object of its individualization.
(3) All acts subject to registration which concern the immovable shall be mentioned on the leaf with an indication of their reference number in other registers and of their date.

Art. 1576. - 2. *Conformity with cadastra1 survey plan.*
(1) The registration and the description of each immovable in the register of immovables shall be made according to the measurements and indications of the cadastral survey plan.

(2) The register of immovables shall be kept in permanent and absolute conformity with such plan.

What do you understand from the reading of the above provisions? Register of immovable involves the entrance of an immovable property in a cadastre system having a distinct number and leaf. It also involves the description of the immovable property unit which involves, among others, the area, location, boundary description and level of fertility. This is in conformity with what we traditionally refer to as cadastre as we mentioned before.

Moreover, all acts subject to registration which concern the immovable shall be mentioned on the leaf with an indication of their reference number in other registers mainly in the register of property. From this we can understand that the different types of registration of real property such as register of property and register of immovables are interdependent and support each other.

Another important point worth mentioning here is that registration and description of real property during register of immovables is made based on the cadastral surveying that precedes the registration. The register of immovables shall be kept in permanent and absolute conformity with the cadastral survey plan.

Do you recall the meaning of cadastral surveying? If not, please go back and refer to the term.

d. Register of Owners

As was mentioned, when register of immovables is not feasible in the circumstances, then register of owners shall be kept. What does register of owners mean?

Art. 1583. - *Register of owners.* - 1. *Principle.*

The register of owners shall contain, classed in alphabetical order, leaves relating to each one of the persons who, in an act registered in one of the principal registers, are indicated as being owners of an immovable situate in the district.

Art. 1584. - 2. *Immovable owned in common*
(1) Where an immovable belongs to several owners a leaf shall be drawn up in the name of each joint owner.
(2) The position of each one shall be mentioned in the leaf relating to him.

Art. 1585. - 3. *Ownership of several immovables.*
Where a person owns several immovables in a district, there shall be drawn up in his name as many leaves as he has separate immovables.

Register of owners involves the registration of the names of the persons who are indicated as owners of a real property according to acts relating to register of property or register of mortgages. It does not matter whether a single real property is owned or possessed by several persons or a single person owns or possesses several immovable objects.

e. Effects of Registration

Certainly, registration of real property has some legal effects. Please read carefully the following provisions and try to apprehend some of the major effects of registration.

Art. 1637. - *Duty to register acts.*
(1) The keepers of registers of immovable property may not decide on the validity of acts which are presented to them for registration in the registers.
(2) They shall register such acts without delay when the formalities required by the law have been performed by the interested persons.
(3) The registration of an act in the registers of immovable property shall not constitute a decision as to its validity.

Art. 1638. - *Certain date.*
The registration made in the registers of immovable property shall confer a certain date to the acts to which such registration relates or which are filed in the archives of the place of conservation as complementary or supporting documents.

Art.]640., - *Ignorance of a registration.*
(1) No person may take advantage of the fact that he did not know of a registration entered in the registers of immovable property.
(2) Nothing shall affect the liability of the keeper of the registers and of the State, where such ignorance is due to a fault in the functioning of the service.

Art. 1641. - *Conflict between two registrations.*
(1) Where two persons have required from the same person a right subject to registration, the one whose right has been registered first in the registers of immovable property shall be preferred.
(2) The right of the second shall be extinguished insofar as it is in opposition to the right which has been registered first.
(3) Nothing shall affect the rights of such second person against the person from whom he has acquired the immovable.

Art. 1642. - *Rights registered on the* same day.
(1) Where two rights which are incompatible with each other are entered in the register on the same day, preference shall be given to the person whose title is the older.
(2) Where the titles are equally old or the priority of one in relation to the other cannot be established, preference shall be given to that number of the registration which in the register comes before.

Art. 1644. - *Bad faith.*
(1) The bad faith of the person who has requested the registration or required the right to which the registration relates shall not affect the validity of the registration.
(2) In such case the person to whom the registration is prejudicial may claim damages by proving in a clear manner the bad faith of the defendant.

Art. l646. -- *Notice of registration to the owner.*

(1) The person who has registered a right in the registers of immovable property shall, within eight days, serve on the owner of the immovable to which such right relates a copy, certified by the keeper of the registers, of the form which has been entered in the registers.
(2) He shall be liable for the prejudice that may be caused to the owner of the immovable or to third parties by reason of his failing to comply with such formality.

One important thing mentioned here is the relationship between registration and validity of the act such as contract relating to the immovable. Registration has nothing to do with validity of the contract/act.

Do you remember factors affecting validity of contracts in your study of Law of Contracts course? Please once go to Art. 1678 of the Civil Code and recall them. Here we are clearly told that "The registration of an act in the registers of immovable property shall not constitute a decision as to its validity." If so, legally speaking, what has registration to do with? It has to do with publicity. Please read the following provisions of the Civil Code:

Art. 1561. - *Publicity of registers.* 1. *Principle.*
The registers of immovable property are public.

Art. 1562. 2. *Registers of immovables and of owners.*
(1) Keepers of registers shall, on request, deliver a certified true copy of the leaf concerning a particular immovable which is to be found in the registers of immovables.
(2) They shall, on request, deliver a certified true copy of the leaf or leaves concerning a particular owner which are to be found in the register of owners.
(3) They shall, where necessary, deliver a certificate showing that the leaf of an immovable does not contain any registration or that no leaf concerning a particular owner exists in the register.

Art. 1563. - 3. *Principal registers* or *supporting documents.*
(1) Keepers of registers of immovable property shall on request deliver certified true copies of the acts which are registered in the registers of property or of mortgages.
(2) They shall on request deliver certified true copies of the supporting documents kept by them.

Art. 1564. - 4. *Form of copies* or *certificates.*
All copies and all certificates delivered by the keeper of registers of immovable property shall be of no effect unless they bear the seal of the place of conservation, the signature of the keeper or of a person authorized to deliver the copy or the certificate, and an indication of the date on which the copy or the certificate was delivered.

Art. 1565. – *Fees to be charged.*
(1) The Ministry of Agriculture shall fix the fees to be charged in respect of the various registrations in the registers of immovable property.
(2) It shall fix the fees to be charged in respect of the delivery of copies or certificates by the keepers of registers.

What we understand is that the registration of real property is open to the public and that the registration authority or officer has the primary task or duty of giving any requested information as to the various types of register-property register, register of mortgages, register of immovables and register of owners. Any interested part has the right to have access to this land related information for any purpose or transaction with owners, possessors, or immovables. The government will in return get considerable income by charging fair fees for the important service it is rendering through efficient supply of immovable information. Dear student this is actually just the most important operation of Land Information Systems in almost all parts of the world today.
Once the registration is kept public and accessible to the public, no one can argue on the ground of lack of knowledge about any information contained in the register of any type. In fact, the real property registration officer can be held liable for any professional fault committed relating to the task.

Have you now seen that by virtue of the Civil Code provisions just mentioned here, registration does not affect the validity of the contract as between the contracting parties? But we should mention here that today on the part of the courts this issue is very controversial and that the

Federal Supreme Court has recently decided that registration affects validity of the contract on a real property. What is your position? Please read the attached case?

4.4.3 Rural

Dear student, the Civil Code provisions on registration of real property do not make specific reference to rural and urban land separately. It may be understood that they apply to both rural and urban land. Indeed, there is no strong reason to have different laws and structures for registration of property with respect to rural and urban land.

Nowadays, the Ethiopian government has issued various land legislations both at federal and regional levels. Such laws also principally deal with registration of real property. It is really a big question if these provisions are as complete as the provisions of the Civil Code on registration, and if they are meant to serve same purpose as the Civil Code.

Setting aside that issue, the Government of Ethiopia proclaimed the Federal Rural Land Administration proclamation no. 89/1997. On top of this, the Federal Government recently enacted the Federal Rural Land Administration and Land Use proclamation no. 456/2005 by repealing the former one. This law is generally directed towards addressing land tenure problems.

More specifically, the need to establish a conducive system of rural land administration that promotes the conservation of natural resource is considered as a means to solve the later. In addition, putting legal conditions in place which are conducive to enhance and strengthen the land use rights of farmers, pastoralists and private investors are stipulated as objectives in the same provision. Above all, the necessity to establish an information database that enables to identify the size, direction and use rights of the different types of land holdings in the country is also one area of interest to the Federal Government. In the official document of the Federal Government called SDPRP, it is stated that the users' rights of farmers shall be protected through registration and provided with certificate of user rights.

In addition, the Federal Government five years strategic plan document explains some action to be taken pertinent to land administration and land management issues. According to the same document, it is believed that "to develop and strengthen the natural resource information system, the establishment of database at Woreda level will be conducted. The plan encompasses the establishment of natural resource database in 550 Woredas that are found in the country. The same source further states that, in the next five years around 6.7 millions households will receive first level certificate. In addition to this, studies and research will be conducted in the next 5 years in pastorals and Agro-pastoralist area of the country which focus on the identification of the property rights and the development of methodology to record these rights.

The Federal constitution Article 52 (2) (d) empowers Regional states to Administer land and natural resources. However, member States of the Federal Government land and natural resources laws shall be implemented in accordance with the law enacted by the Federal Government.

After 1997 some policy initiatives are made towards establishing sound land management and land administration system through rural land registration and certification in Oromia, Amhara, Tigray and Southern Nation Nationalities and People Regional States. Accordingly, several of these states have adopted rural land administration laws. For example, ANRS has endorsed its own land law proclamation no. 46/ 2000. This proclamation enables the state to determine the administration and use of the rural land. Article 6(3) of the same states that, "so long as the land users utilize the land according to the established rules, this proclamation assures and secures their holding and use rights" It further states that "The objectives of the rural land administration and use policy and proclamation are directed towards enabling the peasant to work for sustainable development and making the same the beneficiary of such development by ensuring tenure security" To implement the objectives of this law the state enacted proclamation no. 47/2000 that established the agency called Environmental Protection, Land Administration and Use Authority (EPLAUA).

The Regional council of ANRS later replaced the Rural Land Administration and Use Proclamation no. 46/2000 by proclamation no. 133/2006 for several reasons. This law dictates

that, “any Rural Land given to the right users shall be measured and the cadastral maps get prepared by the authority in traditional way or modern tool. Hence, a system of unique identifier shall be designed and implemented to clearly understand each parcel of land. The demarcation that indicates the boundary shall, also, be made on the land”

On the other hand, Article 23 of the same is dealing about rural land registration and data maintaining. Sub-Article 1 of this Article stipulates that any land measured by the authority shall, pursuant to this proclamation be registered in rural land registration book. To implement the provision indicated under sub-Article 1 of this Article the land registration shall be carried out including the information explaining the full name of the land holder, the means of holding acquired, boundaries of the land, the fertility status, the land use type and the obligation of the land holder.

On top of this, Article 24 sub-Article 1 of the same states that any person, granted rural land shall be given the land holding certificate in which the details of the land is registered by the authority prepared by his name and his photograph fixed thereon. Accordingly, the holding certification is deemed to be legal certificate of the holder. Proclamation no. 133/2006 is supplemented by a regulation.

Other regional laws include A Proclamation Provided to Determine the Administration and Use of Rural Land in Tigray Proc.No.23/1997 (amended in 2002), A Proclamation to Provide for Oromia Rural Land Use and Administration Proc.No.56/2002 (and a regulation thereof in 2003), and A Proclamation to Provide for Rural Land Use and Administration in the Southern Nations, Nationalities and Peoples of 2003.

For a comprehensive understanding, please look at the following table which gives a summary of each of the pertinent laws based on the criteria of certification.

	Federal 2005	Amhara 2006	Oromia 2002	SNNPR 2003	Tigray 1997 and its amendment 2002
Certificates/ book		If jointly owned,	Husband and wife	Joint	It is issued in the

of holding/title deed		it should be issued in the name of both spouses Spouses may agree for joint ownership after marriage.	shall be jointly certified to their common holding land. In case of polygamy, a husband is allowed to get a joint certificate with only one wife and the other gets independently. If land is rented out, the book of holding remains with the holder.	certification of husband and wife. Title deed remains with the holder if land is rented out	name of the household head only, i.e., the name of the spouse does not appear in the certificate.

Table: **Synopsis of Rural Land Administration and Use Proclamations on certification**

4.4.4 Urban

Dear student, it was already mentioned that the Civil Code provisions on registration of real property do not make distinction as between rural and urban land. Apart from that, while there are emerging laws with regard to rural land registration, urban real property registration, if at all exists, is done with out legislations; there are different customary activities here and there.

It is worthy of mention here that the various laws on rural land use and administration have followed a separate direction in the sense that they address rural land and disregard the urban one. That leaves the urban land registration almost unregulated which is really astonishing and even dangerous.

In a recent study made regarding real property registration in Bahir Dar city, many experts (both local and international) preferred that the urban real property registration be made by the same body and laws relating to the rural land registration in the respective region.

The responses from 20 interviewees (10 from EPLAUA and 10 from the Municipality and Bureau of Urban Works and Development) is shown in the following table:

Question	Answer
Of the two real estate registration authorities (the Municipality/EPLAUA) which do you think is better to effect real property registration?	EPLAUA: 16 Municipality: 4

.Institutional arrangement in operating real estate registration in Bahir Dar

The justifications given for choosing EPLAUA for handling the real property registration both in rural and urban areas are many. The first is the far better available human, legal, technical and financial resources already available in EPLAUA. The second justification is related to the commonality of the nature, principles, objectives and significances, evaluation frameworks and technologies of real property registration in respect of both the rural and urban land. The third reason is the saving of human, financial and technological resources. The fourth is related to the need for the uniformity of the responses given to similar various problems in land administration. The fifth reason is related to payment of compensation during expropriation. This needs to be done based on similar rules to attain the required fairness and equality. The last reason pertains to the urban expansion that is happening in Amhara region at an alarming rate. With similar institutions and laws being involved in the land administration in the region, it will be quite easy to administer the newly incorporated rural lands to the urban territory. We can add to these the current global trend in the world towards multipurpose cadastre and cooperation.

What is your position with regard to this issue? Do you agree with the above assertions? Why? Why not?

4.4.5 Real Property Registration Authorities

It is now time to say few words about the institutional set up of real property registration in Ethiopia. The Civil Code has the following to say about this matter:

Art. 1553. - *Principle.*
Registers of immovable property shall be kept, in each Awradja Guezat of the Empire of Ethiopia, by the keepers of registers of immovable property.
Art. 1554. - *Organization of the places of Conservation of registers.*
(1) The appointment and the status of the keepers of registers of immovable property and of their assistants shall be as prescribed by the Ministry of Agriculture.
(2) The same Ministry shall prescribe the material organization of the places of conservation of the registers of immovable property and ensure the regularity of their functioning.
(3) It shall take the necessary measures for the keeping and the conservation of' registers of immovable property.

What these provisions tell us is that registration of real property will be widely applicable in all parts of the country. And it is the Ministry of Agriculture that has the primary task of establishing the registration offices together with the required personnel and other matters.

Actually, at present, the authorities of registration of real property are different for rural real property and urban real property. As to the rural property, the federal land administration and use proclamation makes it clear that the regional governments can establish authorities for the purpose. Accordingly, states have established public organs for addressing environmental protection, land administration and use activities. For, example in ANRS, the Environmental Protection, Land Administration and Use Authority was established in 2000 by proclamation. The same is true for other regional states.

Regarding urban real property, it is again important to remember that legislation is non-existent to address registration of property, especially the land register component. Even worse, the registration practice is presently quite incomplete, covers very few urban places, and quite traditional. For example, in Bahir Dar cadastre was started in September 1999. Spatial data collection was done through detail topography surveying work. Parallel to the surveying work, field investigation (collection of attribute data) was done. When we see the scope of the project coverage and work performed at that time, ground surveying and socio-economic data collection work was completed in 8 Kebeles (former Kebeles 03,04,05,06,12,13,15 and 16) out of the former 17. The completed number of plots was 7,100 on an area of 820 hectares.

But, since 2004, the data collection and updating activities had stopped, which hampered the completion of the intended project. That means the real property registration process had ceased to operate. The reasons for this are: lack of general awareness of cadastre, lack of understanding the significance of cadastre on the part of the administrators in the municipality, operating the system by simple guess with out clear guidelines and procedures (e.g., no regulations), lack of correct attribute and socio-economic data, lack of fairness and independence where the powerful people were advantaged at the cost of the weaker people, non-conformity with the physical planning resulting in such as closing roads. These problems in turn resulted in division of opinion among the task force themselves- whether it should continue or not in that way; and chaos in the urban people. Only in 2006, a new project was designed to commence the stopped real estate registration system. Time will reveal if the new project is going to be successful.

Other cities also experienced such cadastral practice in quite sporadic fashion. In Ethiopia, the cadastral systems, when they exist, are handled by municipalities. The municipalities normally attempt the activity without any coordination with the rural authorities of same purpose. On the other hand, land register, i.e. registration of contracts of sale of building are conducted by Justice Offices whose related tasks are given by various legislations. In fact, in the land registration process, the copy of these acts will also be archived in the municipalities after the justice offices prove that the contracts are made in validity.

Additional Reading

Please read the following excerpt regarding land registration procedure in Addis Ababa city and Bahir Dar City.

The Addis Ababa Municipality has been practicing in transferring and registering immovable properties for long without authority. There are proclamations 49 and regulations 50 as to the establishment of the town of Addis Ababa as an at body and as to the issue and registration of new title deeds in case of sale and gift of property for the registration of any contract concerning land respectively. The collection of fees and issuance of new title deeds is possible if and only if there is registration.

But later on a legislation is issued which obliges the Urban Administration to effect the registration of ownership right of immovable, especia11y houses, and the transfer of ownerships. So it is the Urban administration, particularly the "contract and Registration Main Section", which transfers ownership rights over immovable properties when, for example, the owner sells his property to a certain buyer.

The Need for Modern Real Estate Management in Urban Ethiopia: the Case of Bahir Dar City (MELKAMU Belachew Moges, Ethiopia) from www.fig.net

Land Registration Procedures (in Bahir Dar)

For land registration to be effected, there has to be some act or decision based on which ownership is transferred from one person to the other. This could be sale, donation, succession, or court decision for debt. The direct observation of the practice reveals that the procedure is different depending on the cause of transfer.

In the case of sale and donation, the parties must first go to the Justice Office. Whereas in the case of succession or will they need not go to the Justice Office and instead can go directly to the Municipality though the Office can register the will document in case of request. This is true of transfer due to court decision with regard to debt. The Municipality checks and receives the court decision and transfers ownership title to the applicant. In these cases of succession and debt based transfer, the amount of fee to be paid by the applicant is decided by the court.

Looking at the steps of land registration in the more common situations of sale and donation, the procedure is the result of the interplay between the Justice Office and the Municipality. The parties to the contract must bring together the valid contract of sale, acquisition document, the parcel map, the design plan, and receipt for tax payment during their application for registration. The 'notary' ensures that all these are fulfilled before ordering further process.

Having insured the fulfilment of all required documents, it sends a letter to the Municipality requesting to check if the building is really located in the place as mentioned in the sale contract, if it is free from debt or court attachment, and requesting the estimated value of the property. At the same time, it sends another letter to the Ethiopian Commercial Bank if the Bank has not taken the building as security for debt. The requested bodies respond accordingly including statement as to the date of acquisition, the type of land use, address and area of the property.

Then the Justice Office sends the estimated value of the building to the Finance Unit (located in the Municipality's compound) in a letter. This Unit charges 2% of the value as tax and the Justice Office is notified about this fact.

Finally, the Justice Office approves the sale or donation contract, and maintains its own file for each applicant which contains the contractual document, acquisition document, the parcel map, the design plan, and receipt for tax payment. It then sends a letter to the Municipality stating that it has approved the contract and requests the transfer of ownership title to the applicant. The Municipality does so and opens a new file for the new owner. The file of the transferor is considered as dead file but is kept in the archive for any future reference.

What is the procedure in the municipality around you? Is it the same as or different from that in Bahir Dar?

Summary

Registration of immovable properties includes cadastre and land registers, which are important means of developing efficient information systems not only in Ethiopia but also in any country.

A cadastre is just a system of writing or recording individual land parcels or real properties. In other words, it is a systematic description of the land units within a given area. Technically, this description is made by the cadastral maps which represent the graphical indices of the individual parcels showing the relative location of all parcels in a given region, and by written or textual records which represent the attribute files of the cadastre, in parallel. The most essential information in the textual files is the identification number and the area of the unit, usually differentiated by the type of land use. It normally provides parcel-based information.

Cadastre serves quite several purposes: it brings about a guaranteed ownership and secured land tenure, it provides security for credit and improves investment, it helps develop and monitor land markets, it highly enhances taxation, it helps reduce land disputes, it helps facilitate urban planning and infrastructure development, and so on.

Land register or land registration, on the other hand, refers to Land as a legal object. Stated otherwise, it refers to the public provision of security of property rights to land such as ownership, mortgage, easements and leases.

For long, these two methods have been handled by separate registry and institutions. However, nowadays, they are increasingly coming together to form a unified or integrated registry. Some countries such as Austria, Hungary, and Sweden (the Land Data Bank System) have this harmonised or unified land registry system called multipurpose cadastre.

In Ethiopia, the fundamental legislation on real property registration is the Civil Code though inapplicable. One title, Title X, includes 93 articles governing this important area of high economic significance. The code envisages two principal types of real property registration, namely, a register of property and a register of mortgage. In addition, where the situation allows, a register of immovable shall be maintained. If the situation does not allow the establishment of a register of immovable, a register of owners shall be kept. The law also makes it possible the keeping of additional registers.

The Civil Code does not make distinction as to rural land registration and urban land registration. However, the Ethiopian government has issued various rural land legislations both at federal and regional levels. Such laws also principally deal with registration of real property, i.e. rural land.

It is worthy of mention here that the various laws on rural land use and administration, unlike the provisions of the Civil Code, have followed a separate direction in the sense that they address rural land and disregard the urban one. That leaves the urban land unregulated especially in matters of registration; and the registration practice is presently quite incomplete, covers very few urban places, and quite traditional.

At present, the authorities of registration of real property are different for rural real property and urban real property. As to the rural property, the federal land administration and use proclamation makes it clear that the regional governments can establish authorities for the purpose. Accordingly, states have established public organs for addressing environmental protection, land administration and use activities. For, example in ANRS, the Environmental Protection, Land Administration and Use Authority was established in 2000 by proclamation. The same is true for other regional states.

In urban areas, municipalities handle the cadastral systems, when they exist. The municipalities normally attempt the activity without any coordination with the rural authorities of same purpose. On the other hand, land register, i.e. registration of contracts of sale of building are mostly conducted by Justice Offices whose related tasks are given by various legislations. In the land registration process, the copy of these acts will be archived both in the municipalities and the justice offices; however practices may vary from place to place in the country.

Summary Questions

I. Multiple choice questions

1. A system of writing or recording individual land parcels or real properties is best described by the word:
    A. Cadastre
    B. Land register

C. Cadastral surveying
D. Land information system
E. All

2. A unit of land with homogenous tenure interests, having a unique owner/tenant, land class and use is:
   A. Parcel
   B. Lease land
   C. Property
   D. A and B
   E. None

3. One of the following factors is used to classify cadastre:

   A. Function
   B. Type of right in question
   C. Location and jurisdiction
   D. Method of data collection
   E. All

4. One of the following is not a function of cadastre and land register:

   A. Guarantee ownership and related rights
   B. Enhance security for credit and investment
   C. Promote separation of powers
   D. Develop and monitor land markets.
   E. None of the above.
5. Which of the following factors does characterize an effective cadastre?

   A. Geographical coverage
   B. A trusted and independent administrative agency
   C. IT application
   D. All
   E. None
6. According to Hernanado De Soto, capitalism triumphs in the west and fails everywhere else mainly due to a matter related to:
   A. Real property registration
   B. Election
   C. Economic policy
   D. Economic Liberty
   E. None of the above

7. A unified system of cadastre and land register is called multipurpose cadastre. As Cadastre 2014 represents a comprehensive real property registration system.
8. Which of the following types of cadastres is recognized under the Civil Code?
   A. Register of property

B. Register of mortgage
C. Register of immovables
D. Register of owners
E. All

Part II. True/False Questions

1. LIS is a broader concept than GIS.
2. Cadastre and land register are conceptually identical.
3. One difference between cadastre and land register is that the former includes data about the rights on the parcel and the latter about the parcel.
4. The Civil Code provisions on registration of real property provide different provisions for rural and urban land.
5. In Ethiopia, there is a tendency to adopt a unified system of real property registration for rural and urban land.
6. In Ethiopia, the wider practice is that land registration is undertaken by the courts.

CHAPTER FIVE

LAND CONSOLIDATION[2]

Introduction

In many parts of the world, rural conditions have deteriorated and there is growing inequality between rural and urban areas. Much rural infrastructure has deteriorated considerably. Villages are becoming less attractive places in which to live. Schools and other rural public and cultural facilities are suffering from lack of attention. Rural roads are in poor condition, power and water supply systems are less reliable, and communications and media infrastructure is inadequate. There is high unemployment, and migration to urban areas is resulting in a declining and ageing rural population. Agriculture has developed into a dualistic structure of a relatively small number of large-scale farms and many millions of micro farms. There is an almost complete absence of the competitive, commercial family farms that are necessary for a globalizing economy, and little is done to encourage people who are capable of creating competitive farms to do so.

Potential entrepreneurial farmers are unlikely to invest their time, energy and money if they believe the quality of their life will be unsatisfactory. If the local school does not give children a good education, if local medical facilities are not available, if there are no recreational areas to enjoy on the weekends, if roads make travel difficult and dangerous, and if electricity is often unavailable, those who could be successful commercial farmers may decide to follow a different career if it offers them a better quality of life.

Migration of potentially successful commercial family farmers from rural areas will result in agricultural production being left increasingly to either very large agricultural enterprises or to those who have no other choice in life: the elderly, the infirm, and those who are too poor to invest in agricultural improvements needed to make existing farmers viable. Many owners of

[2] This chapter is adapted from an article published by FAO and can be found on http://www.fao.org/documents/show_cdr.asp?url_file=/DOCREP/006/y4954e/Y4954E00.HTM

micro farms will be forced to withdraw from agriculture because of age or illness, and many of their heirs have no interest in agriculture. A scenario such as this will cause continuing degradation of the rural space and agricultural production will continue to spiral downwards just when it should be becoming stronger.

To prevent such a situation from occurring, rural development projects and programmes are essential. Integrated rural development initiatives to enhance the quality of life must include improvements to agricultural production, employment, infrastructure, public facilities, housing and the protection of natural resources. In order for such integrated rural development initiatives to increase the attractiveness of rural areas, they must be comprehensive, multidisciplinary and cross-sectoral. Integrated rural development projects must provide a suitable environment for people who want to become successful commercial farmers; they must address the needs of subsistence farmers who currently have no other choice; and they must provide opportunities in the nonagricultural sector. To be successful, such integrated rural development must take into account the land tenure structure which includes vast numbers of small and fragmented farms. Land consolidation can be an effective instrument in rural development. Agricultural development is one area in which land consolidation plays a vital role. Land consolidation can facilitate the creation of competitive agricultural production arrangements by enabling farmers to have farms with fewer parcels that are larger and better shaped, and to expand the size of their holdings. But because of the extensive nature of fragmentation and the growing importance of rural space for non-agricultural purposes, land consolidation has become an increasingly important instrument in strategies and projects to enhance the quality of rural life through improving natural resource management and environmental conservation, providing infrastructure and services, creating employment opportunities and ameliorating conditions in villages.

Land consolidation can be used to improve the tenure structure in support of rural development by addressing land fragmentation. Fragmentation can occur in several ways, for example:

- As a fragmented farm, i.e. a farm that comprises a number of parcels located some distance from one another.
- As fragmented ownership, i.e. a farmer's holding that includes land owned by the farmer as well as land leased from others. The leased land may be owned by a neighboring

farmer or it may involve a case of "absentee ownership" with the owner living in a distant city.

Land consolidation can assist farmers to amalgamate their fragmented parcels. For example, a farmer who owns one hectare divided into five parcels may benefit from a consolidation scheme which results in a single parcel. Although the farm size remains the same, a larger and better shaped parcel may allow the farmer to introduce better farming techniques. However, such micro farms are not suitable for most competitive agricultural practices and land consolidation can also provide farmers with opportunities to increase the size of their farms, for example by acquiring land from state land reserves and land banks, or by having access to land of others through sales or improved leasing arrangements. Land consolidation projects should result in the amalgamation of fragmented parcels but they should also include other appropriate measures to establish an improved tenure structure that supports rural development. The emphasis of such projects should be on providing practical and needed solutions to problems faced by farmers and other residents of rural areas.

Land consolidation projects should support attempts to make agriculture more competitive, for example through the promotion of commercially viable family farms. However, a goal of establishing medium-sized commercial farms may take a number of years to achieve and so land consolidation projects may have to support other farming models, such as part-time farming that combines market-oriented production with nonagricultural sources of income, as well as subsistence farming for those who have no other alternatives.

Land consolidation projects will result in substantial changes in land tenure arrangements and these actions are executed under the leadership of a state entity. Nonetheless, *land consolidation* is *not a form of expropriation,* either fully or partly. Land consolidation schemes should not dispossess people of their rights to land. It may offer opportunities for land owners to sell their land to others but this should be done willingly. Land consolidation should not result in making people landless. Instead it should enable all land owners to benefit, and this should take priority over benefits to the state. For this to happen, active participation of farmers and other rural residents in the process is essential.

Many countries in the world have implemented land consolidation. For example, a number of countries in Central and Eastern Europe have expressed interest in introducing land consolidation programmes to improve rural livelihoods and the use of rural space. While systematic, comprehensive land consolidation may be the long-tem goal of a country, there is a more immediate need for knowledge on starting land consolidation activities. This chapter aims to show what should be considered in initial land consolidation pilot projects and in the development of a strategy to move from pilot projects to an ongoing progranmme.

The chapter starts by showing why land consolidation should be considered within agricultural and rural development policies and programmes. It describes the essential elements of land consolidation and how it can be introduced in different situations.

5.1 What is Land Consolidation?

General Objectives

Having gone through this chapter, the students will be able to:

- Explain the meaning and nature of land consolidation.
- List down the major elements or components of land consolidation.
- Mention the various types of land consolidation.
- Indicate some preconditions for land consolidation, and
- Appreciate the importance of land consolidation.

Overview

Land consolidation is sometimes incorrectly interpreted to be only the simple reallocation of parcels to remove effects of fragmentation. In reality, land consolidation has been associated with broader social and economic reforms from the time of its earliest applications in Western Europe. For example, the first consolidation initiatives of Denmark in the 1750s were part of a

profound social reform to free people from obligations to noble landlords by establishing privately-owned family farms. The consolidation of fragmented holdings did result in improved agricultural productivity but this was not the only objective of these reforms. In this section, we will see that land consolidation project may address a wide range of rural development objectives, ranging from agricultural improvement to village renewal and landscape development and protection.

Objectives:

At the end of this section, you will be able to:

- Mention the various activities and problems addressed by land consolidation systems.
- Mention the different types of land consolidation.
- Outline the major steps in a comprehensive land consolidation, and
- Explain the preconditions for land consolidation.

5.1.1 Scope of land consolidation schemes

Land consolidation has always been regarded as an instrument or entry point for rural development. Early concepts of rural development were virtually the same as agricultural development because of the predominant role of agriculture in rural areas at the time. Improving the agrarian structure was viewed as being identical to maintaining the social viability in rural areas; what was good for the farmers was good for rural areas. An overall objective of early projects was thus to increase the net income from land holdings by increasing the volume of production and decreasing its costs. With this focus on agricultural development, these projects served to consolidate parcels and enlarge holdings and included provisions such as irrigation and drainage infrastructure to improve water management, construction of rural roads, land leveling, soil improvement measures and changes to land use such as converting agriculturally inferior land into forest land or wetlands.

Such agricultural improvements are still essential but rural space is now no longer regarded as one of agricultural production alone. Concepts of rural development have become much broader and have expanded to include increased environmental awareness and a wide range of nonagricultural applications. The emphasis of land consolidation projects has shifted from a focus on restructuring agriculture to one of achieving more efficient multiple use of rural space

by balancing the interests of agriculture, landscape, nature conservation, recreation and transportation, especially when land is required for the construction of major roads.

Environmental conditions are being given increasing priority. Roads are being constructed to suit the landscape. Water bodies are being restored, often with buffer zones. Land consolidation projects are also used for the protection of wetlands and to change land use patterns especially in areas endangered by frequent floods or soil erosion.

Land consolidation now encompasses activities of village renewal. Projects include providing adequate land for new houses and workplaces to improve living and working conditions. Along with the changing rural economy, buildings previously used for agriculture are renovated and converted to other social and commercial uses.

In line with other changes in the concept of rural development, land consolidation now places increasing importance on gender inclusion, participatory approaches and the use of mediation and alternative dispute resolution in resolving conflicts.

Land consolidation projects have also served to modernize tenure arrangements by eliminating outdated rights of use, including some rights of access, grazing, hay-making, timber-felling, fishing and boating, and the extraction of peat, clay and sand.

In early consolidation projects the resettlement of farmers was often considered important. Family farmsteads, originally placed in old established villages, were resettled at the external perimeter of the consolidation project area. As access to motor vehicles became more widely available, traveling from village to field was easier and modern villages became viewed as more suitable for retaining the rural population than isolated farmsteads. In some cases, farming families were moved from congested areas to more distant zones, often with considerable reluctance. Such resettlements are less likely to be a feature of land consolidation in many places since rural areas are not overly congested and, in contrast, their populations are declining. However, there may be occasions where farmers spend more time traveling between fields than working the land and resettlement may be a solution if families are willing to relocate.

5.1.2 Approaches to land consolidation

Overview

The most effective consolidation instrument of rural development is comprehensive land consolidation but at times other approaches such as simplified consolidation, voluntary group consolidation, and individual consolidation initiatives can bring benefits. This section provides an overview of these different approaches.

a. **Comprehensive land consolidation**

This includes the re-allocation of parcels together with a broad range of other measures to promote rural development. Examples of such activities include village renewal, support to community based agro-processing, construction of rural roads, construction and rehabilitation of irrigation and drainage systems, erosion control measures, environmental protection and improvements including the designation of nature reserves, and the creation of social infrastructure including sports grounds and other public facilities.

Procedures for land consolidation projects vary from one country to another but they generally involve the initiation of the project, design of the project, inventory of existing land rights and land values, elaboration of the detailed consolidation plan showing the new parcel layout, implementation of the plan, and finally a concluding phase in which final records are produced. The following box lists typical steps.

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STEPS IN COMPREHENSIVE LAND CONSOLIDATION

1. Initiation of the land consolidation project.
   a) Request for initiation of a project.
   b) Analysis of the situation and identification of what is needed and wanted
   c) Preparation of an initial concept plan that states the aims of the proposed project and approximate estimates of costs and sources of financing.
   d) Approval of the request by participants and the state.
   e) Formation of a local management team with representation from the community
2. Design of the project.

a) Selection of consultants to design the project.
   b) Precise definition of the area and scope of the project.
   c) Preparation of cost-estimate and schedule for the project.
   d) Evaluation of projected costs and benefits.
   e) Preparation of cost-sharing formula.

3. Inventory of the existing situation.

a) Identification or adjudication of boundaries and the legal status of parcels, including lease rights, mortgages, and easements or servitudes.
b) Delimitation of important environmental areas.
c) Determination of the value of parcels.
d) Handling of objections related to boundaries, ownership and valuations.

3. Elaboration of the detailed land consolidation plan.
   a) Preparation of the draft consolidation plan showing the new parcel layout, location of new roads and other public facilities, and identifying those roads and facilities which will be removed.

b) Presentation of several plan alternatives with cost-benefit and environmental impact assessments.
   c) Review of the options for consolidation by participants.

d) Preparation of the final detailed consolidation plan to accommodate comments of participants.

e) Handling of objections.

f) Approval of the detailed consolidation plan.

5. Implementation of the detailed consolidation plan.

a)Selection of contractors for construction works, etc.

b)Construction of public works (agricultural improvements, levelling, drainage, new roads with bridges and culverts, etc.)

c)Survey of new boundaries on the ground.

6. Concluding phase.

a)Working out compensation and apportionment of costs.

b)Final updating of the cadastral map.

c)Issuing and registration of new titles.

The allocation of responsibilities for carrying out these steps also varies between jurisdictions. There is usually a clear division between responsibility for overall supervision, control and monitoring functions, and responsibility for implementation. The responsibilities for the supervising agency should be defined in legislation. One of the first considerations in proposing a land consolidation pilot project is determining the roles and responsibilities of the various parties.

Comprehensive land consolidation projects usually have extensive public works and so they require the participation of a large number of central government agencies such as the Ministry of Agriculture, Ministry of Justice, Cadastre Offices, Registry Offices, Ministry of Public Works, Ministry of Environment, Ministry of Transportation and Ministry of Rural Development.

With the trend towards decentralization, projects increasingly involve local and regional governments, municipalities, water boards or water associations. These bodies are usually prepared to play active roles and to cover part of the costs.

The participation of farmers' groups and other representatives of civil society have always been considered necessary but, along with the importance attributed to participatory development, their involvement is becoming greater and is occurring at the earliest stages of the process.

Comprehensive land consolidation projects introduce major changes throughout the project site, and they generally require the participation of all owners in the project area. In many countries land

owners can be drawn into a project against their will. People may be required to participate even if they oppose the project as long as they will not lose as a result of it. The success of a project thus depends to a great extent on the initial steps taken to obtain the support and cooperation of farmers and other stakeholders who would be affected by the project.

Information and communication is essential. People must understand how they will benefit from the project and how the changes will impact on them. Providing information on the financing of the project, including who will contribute to financing, is important as it influences opinions of farmers. Providing information on the benefits of the project is equally important. Failure to communicate effectively results in misunderstanding and even misleading rumors. Negative views that are needlessly caused usually result in more difficult negotiations, delays and higher implementation costs. Information must be tailored to the knowledge and attitudes of different groups of stakeholders such as farmers and other residents of the area, and politicians at the local, regional and national level.

Because there are so many competing interests of the various stakeholders, objections may be raised regarding the initial inventory of ownership, boundaries and values of parcels, and in the preparation of the detailed consolidation plan showing the re-allocation of parcels. The role of mediation in resolving some of these disputes is becoming increasingly important.

A traditional principle has been that an owner should not be worse off after consolidation than before it. Projects often aim at ensuring that an owner's holding after consolidation is equal in value to the original holding; if the value of the holding is smaller after consolidation, equivalency can be achieved by paying financial compensation. From one perspective, if a farmer received poorer quality land after consolidation, the amount of land allocated should be suitably larger than the original holding to ensure equivalency. The development of transparent rules defining the natural yield potential of land can be important in defining values. However, soil quality is not the only factor in valuation and the value of a parcel can be affected by its position relative to other parcels, roads, farm buildings and homesteads. "Equal value" is thus not only a question of soil values but includes all factors that have a substantial impact on the use of the land.

The principle of equivalency may be difficult to apply in practice, particularly when topographic conditions limit the arrangement of new parcels. Even where land is not irrigated, variations in water conditions and supplies can have a considerable influence on the location of farms and the

arrangement of parcels. The existence of vines and fruit trees further adds to the complications of ensuring equivalency. These valuation problems are usually overcome by including farmers respected by community members in the land valuation teams or committees along with valuation experts.

Instead of merely maintaining the same value after a project, land consolidation offers the opportunity for some owners to enlarge their holdings. This may be done as other farmers choose to exit from agricultural activities. In some systems, a farmer participating in a project may be bought out completely or partially to provide additional land for consolidation purposes. Land banks are also used to allow farmers to increase their holdings and to cover requests for land for public facilities such as new roads, recreational sites and ecological protection areas. The transfer of state land reserves to a land bank should be addressed in a national land consolidation strategy. Privatisation of land could take place through land consolidation projects and a land bank could buy land in other areas for specific purposes of future projects and to provide alternative land for compensation for land used for public facilities, etc.

Some systems place limits or restrictions on rights during the project. For example, owners and tenants may not be allowed to make changes which affect the property values without authorization after the valuation inventory has started.

Ensuring that the project is cost-effective is crucial. Geographic information systems and satellite positioning systems are now routinely used to reduce time and costs of surveying and planning. Several countries have developed semi-automated systems for use in designing the new layout of reallocated parcels.

Project management is important in order for the project to keep to budgeted costs and the time schedule, to maintain rapport with participants, and to ensure the legitimacy of all decisions and actions. Technical management skills are also important as huge amounts of data are collected and used.

b. **Simplified land consolidation.**

Some countries have introduced simplified versions of consolidation. Simplified land consolidation optimizes conditions in the agricultural sector through the re-allocation or exchange of parcels, and the provision of additional lands from land banks. These simplified projects are often combined

with the rehabilitation of infrastructure· and sometimes the provision of minor facilities. They do not include the construction of major public works, but they can provide the framework for their construction at a later stage. Procedures for simplified land consolidation projects tend to follow those of comprehensive projects but some of the requirements may be relaxed.

c. **Voluntary group consolidation.**

Some countries provide for mutual agreement with no element of compulsion. As consolidation is entirely voluntary, all participants must agree fully with the proposed project. As a result, voluntary projects tend to be small, and voluntary consolidation tends to be best suited to address small and localized problems. In some countries, voluntary projects usually have fewer than ten participants but in Denmark almost all land consolidation projects are carried out in a completely voluntary process and are typically based on negotiations with about 50 land owners, although some projects have involved about 100 participants.

d. **Individual consolidation**

Consolidation of holdings can take place on an informal and sporadic basis. The state is not directly involved and so these initiatives do not include the provision of public facilities. However, the state can play a significant role in encouraging consolidations that improve agriculture by promoting instruments such as joint land use agreements, leasing and retirement schemes.

5.1.3 Preconditions

A number of conditions should be in place before a land consolidation project can be undertaken. Stakeholders should be willing to participate actively in the decision-making process of a project. The process should be demand driven and a project site must be identified where local citizens and community authorities are interested in land consolidation. For the project to be most effective, reallocation of land parcels will need to be consistent with the rural development and agricultural sector strategy, and the protection of natural resources. A land bank is very important in a comprehensive land consolidation programme but it should not be considered to be a prerequisite for a pilot project. However, the site selected for the pilot project should have adequate supplies of land owned by the state or local government that can be used for exchanges, to enlarge holdings and to locate public facilities. While specific land consolidation legislation may not be needed for a pilot project, appropriate legislation must exist to provide a legal basis for the project. These

conditions may not exist and so may have to be developed.

5.2 The Importance of Land Consolidation

Overview

Life in many rural areas is characterized by decreasing opportunities to earn a decent living in both the agricultural and non-agricultural sectors. This situation occurs for many reasons, and efforts to enhance the quality of rural life must combine improvements to agricultural production, employment, infrastructure, housing and the protection of natural resources. Such integrated rural development must take into account the land tenure structure which includes vast numbers of small and fragmented farms. This section illustrates why and how land consolidation can be an effective instrument in advancing rural development and it highlights the need for countries to develop their own strategies for land consolidation.

Objectives
Having read this section, the students will be able to:

- witness the contribution of land consolidation to improve rural conditions.
- explain the principles of modern land consolidation.
- mention matters to be covered by a land consolidation strategy, and

-cite cases of land consolidation project in Ethiopia.

5.2.1 The rural situation and land tenure

In many parts of the world, rural conditions have deteriorated from time to time. There is growing inequality between rural and urban areas, with most of the poor now living in rural areas. These areas are characterized by declining populations that are increasingly represented by women and the elderly. Rural-urban migration has been a predominantly male phenomenon and women now make up a large percentage of the rural poor. Household members in rural areas are much older than those in urban areas and increasingly households are headed by the elderly.

High unemployment is a common feature of rural areas. In most countries, the agriculture sector

accounted for the greatest decline in employment.

Rural infrastructure has often deteriorated considerably and many rural roads, irrigation systems and erosion control measures are in poor condition. The roads and irrigation and drainage systems that were originally designed to suit the cultivation of large tracts of land have often not been reconstructed to suit the new smaller family farms. Power and water systems are prone to breakdown and other rural public and cultural facilities such as schools, libraries and community centres have also suffered from lack of attention.

Environmental degradation has sometimes increased from time to time, for example, through the deforestation of valuable species, inappropriate tillage of soils and a failure to maintain a balance of nutrients in the topsoil.

The agricultural structure comprises some very large farms and many millions of micro farms, with an almost complete absence of intermediate-sized competitive, commercial farms. For many farmers, their strategy is one of trying to survive with no clear vision of how to advance.

Which of the following criteria of land tenure structure apply to Ethiopia in your view?

- The great majority of farms are very small, usually under five ha and with many smaller than one ha.
- Farms comprise a number of parcels.
- Parcels are often some distance apart, and can be in different administrative districts.
- Parcels are often awkwardly shaped for agricultural purposes. Some parcels are very narrow and long.
- Farms are often owned by the elderly.
- Farms are often jointly owned by a number of people.
- Farm owners are often absent, with many living in urban areas.
- Owners sometimes do not have legal titles.

Farmers wanting to enlarge their holdings face many difficulties. The main way in which land is transferred is through inheritance, and land markets are weak. People wanting to transact with land have great difficulty in determining what land might be available for the purpose, and they often face problems in identifying who holds rights to the land. Records may refer to the original, often deceased, owners and present heirs may be difficult to locate, especially if they are not local residents. Delays in clarifying ownership/possession and issuing title add to the problems.

5.2.2 Rural development and land consolidation

An important part of policy practiced in many parts of the modern world is to reduce disparities between urban and rural areas by improving the rural situation. Upgrading conditions in rural areas requires sustained programmes and projects that lead to the development of farms, villages and small towns, and the rural space in which they exist. Because rural communities have diverse needs, an integrated approach to rural development should include:

- Improving the agricultural sector by enabling farmers to become more efficient and competitive, and better integrated in agricultural chains.
- Encouraging alternative ways of agricultural production such as the implementation of agri-environmental measures and good agricultural practices.
- Strengthening the rural economy by promoting broad-based growth, including supporting

non-farm activities and providing access to credit, markets and infrastructure support.

- Improving social conditions by promoting employment opportunities and providing increased access to social services, water and sanitation.
- Providing greater protection of natural resources and for their sustainable management.
- Ensuring greater participation in the development process by those usually left out of it.

The success and sustainability of rural development programmes will depend to a large extent on how they address the vast numbers of 'small and fragmented parcels. Growing numbers of land owners are being forced to withdraw from agriculture because of age or illness. Many of their heirs have no interest in agriculture and are divorced from village life. Other land owners wish to consolidate and enlarge their holdings. Projects supporting agricultural development, natural resource management and broader aspects of rural development must address the consolidation and enlargement of holdings. Land consolidation can be used as a highly effective instrument in rural development, providing land owners with new opportunities to improve their situation.

Land consolidation can lead to *improvements in agriculture.* Allowing farmers to acquire farms with fewer parcels that are larger and better shaped, and to expand the size of their holdings enables them to become more competitive. Improving the tenure structure can facilitate the adoption of new agricultural technologies leading to a more prosperous and efficient agricultural sector. Benefits from land consolidation include increases in gross income of farmers and a reduction in the working hours in the field.

PRINCIPLES OF MODERN LAND CONSOLIDATION

- The objective should be to improve rural livelihoods rather than to improve only the primary production of agricultural products.
- The end result should be community renewal through sustainable economic and political development of the whole community, and the protection and sustainable management of natural resources.
- The process should be anticipatory, democratic and community-driven in practice and not only in concept.
- The intervention should be to assist the community to define new uses for its resources and then to reorganize the spatial components accordingly.
- The approach should be comprehensive and cross-sectoral, integrating elements of rural and broader regional development including the rural-urban linkages.

Land consolidation can promote *improved management of natural resources.* Rationalizing the tenure structure can facilitate environmental protection and can support better land use planning and land management. As a consequence of economic development, increasing amounts of agricultural land are identified for industrial and housing purposes, highways and other projects. Land consolidation can help in addressing potential conflicts over changes to the use of land. Projects can use land consolidation to provide alternative land as compensation to owners of agricultural land designated for other purposes.

Improved planning of water and other resources often requires the readjustment of parcel boundaries. The structure of land can have a substantial influence on the geo-ecological and bio-ecological resources. The size and shape of parcels, the slope and type of land use can work to either cause or prevent the degradation of soils and landscapes. Increasing the size of micro-parcels can enable farmers to use less intensive methods and to decrease adverse environmental effects.

Land consolidation can play an important role in *improving rural development.* When applied as an instrument of rural development, land consolidation can improve the efficiency and cost-effectiveness of public and private investments in transportation and communication networks, utilities and irrigation systems. By facilitating renewal of communities, land consolidation can promote social stability. Many communities that have experienced land consolidation show increases in the number of new jobs created which in turn lead to increases in tax yields. Potential conflicts between the promotion of economic growth in the agricultural sector and the protection of the environment can be avoided through integrated local land planning and the effective coordination of all interests. Land consolidation projects can serve to provide the framework for implementing such integrating local land planning.

Land consolidation projects also serve to *improve land administration systems* as they provide an opportunity to clarify and update ownership records. The better quality of information on land rights in turn facilitates the development of land markets and the management of land conflicts.

5.2.3 The need for a land consolidation strategy

Important structural changes to agriculture can occur effectively only if land consolidation is part of integrated rural development. Without a concerted effort, structural changes are likely to be limited

in scope and to occur at a much reduced rate. Farmers recognize the problems of land fragmentation but the market and voluntary efforts to consolidate have not made significant impacts. A land consolidation strategy is needed to ensure that necessary resources and assistance can be provided to farmers and other rural residents in a coherent manner.

A land consolidation strategy should recognise that *rural society is diverse.* Non-agricultural interests must be considered along with those of agriculture. The farming sector itself comprises groups having very different interests and aspirations. Subsistence farmers very often have no other opportunities. Some owners use subsistence farming as a temporary coping strategy while for others it is a permanent condition: land consolidation cannot make them landless. Part-time farmers often maintain farms only as a sideline to supplement their incomes and do not necessarily want to expand their operations. Small family farms that wish to increase their production for the market, and larger-scale commercial farms, are usually interested in expanding their operations. The needs of farmers are also diverse. Some do not want changes. Others want to reduce problems of fragmentation and poorly shaped parcels, and yet others want also to increase their holding size. Some farmers need assistance with extension services, credit, machinery, processing facilities and marketing while others have addressed some or all of these problems. Land consolidation must be attractive not only to large-scale farmers; it must appeal to a broad cross-section of rural society.

The strategy should accept that *not all fragmentation* is *a problem.* In some cases fragmentation is beneficial as it reduces risk by giving farmers a greater variety of soils and growing conditions, especially in mountainous areas. Having fields at different elevations, or maintaining coastal and upland parcels, enables farmers to grow a wider variety of crops. Some fragmentation can be neutral. A concern of early land consolidation projects was the time taken to move between fields, and while this remains an important issue, it has become less of a concern as improved access to trucks and other motorized equipment has allowed farmers to travel more quickly and less expensively from one field to another. Fragmentation of holdings will and should occur as farmers respond to changing market conditions by periodically expanding and contracting their operations by leasing land in or leasing it out. It will not be possible or even desirable to eliminate land fragmentation entirely. Land consolidation must address cases where land fragmentation is a problem and not impose a solution where it is not needed.

The strategy should ensure that land consolidation *protects and enhances the environment.* Land consolidation is not automatically beneficial and the strategy should ensure that efforts do not make the situation worse. An over reliance on certain technical aspects of consolidation in projects has resulted in degradation of nature and the landscape, and in over-production at the cost of the environment and bio-diversity. Poorly designed projects have resulted in land degradation by encouraging the use of unsuitable land for agricultural purposes and have caused the drying up of wetlands through the construction of inappropriate drainage systems. Rivers were canalized and hedges removed, resulting in soil erosion through unchecked rain runoff, and in damaged habitats of native plants and rare animals. Land consolidation should not cause environmental damage.

The strategy must recognize the *need for diverse local solutions.* Land consolidation must take into account local agricultural, economic, social and environmental characteristics, and must be based upon expectations and needs of the local rural populations. Consolidation projects in mountainous areas, or in forested ones, will be quite different from those on agricultural plains. The influences of environment and culture, along with financial constraints and other limitations, will make a range of consolidation approaches necessary.

At the same time, a land consolidation programme will have to *accommodate national and sub-national priorities* as well as local ones. The strategy should address:

- Institutional issues: what tasks should be done at what level by which institution, and how will participatory, local level "bottom-up" involvement be implemented.
- Financial issues: how will money to pay for land consolidation be sourced, and how can the process be made cost-effective.
- Legal issues: what will be the legal basis for implementing land consolidation.
- Capacity building: how can participants at all levels and in all sectors acquire the knowledge and skills they need to carry out their responsibilities.
- International cooperation: how can countries gain access to the technical and financial resources of donors.

The strategy should look at a *phased approach to land consolidation* due to the complex nature of rural development. While the ultimate goal of a country may be a comprehensive land consolidation programme, it may be necessary to proceed with a learning phase. Land consolidation measures should provide experience and information on institutional, financial,

legal and technical matters relevant for the design of the comprehensive programme.

5.3 IMPORTANCE OF A LAND CONSOLIDATION PILOT PROJECT

A land consolidation pilot project is a way to lay the foundation work to be carried out under a long-term programme. A pilot project pioneers new approaches and techniques, and thus its initiation, design and implementation may differ from the operations of later projects. Many of the organizational and legal elements that would be taken for granted when implementing projects within a mature programme will have to be established and tested in a pilot. Such pilot projects are a vehicle procedures and gaining experience and information needed for the long-term programme. Pilots thus allow for a phased approach to land consolidation. Before beginning any land consolidation work, rules governing responsible procedures must be defined and approved. This section describes areas in which such rules will be needed and identifies requirements that must be met to start the project.

When starting a pilot project, the process may be more iterative than in the case of projects in a long-term land consolidation programme. What is included in the scope of the pilot project (e.g. agricultural improvements, environmental protection, public facilities, village renewal, etc.) will depend on the location selected for the pilot project. The selection of the project site in turn will be affected by the willingness of a local community and its farmers to participate in the project. This willingness will depend on the improvements to be provided and the way in which the costs will be shared between central government agencies, local governments and individuals. Securing donor funding will affect the financing of the project and what is included in the scope of the project.

Who will be assigned legal responsibility for the land consolidation? A government agency should be assigned overall legal responsibility for land consolidation. In countries with long-term land consolidation programmes, the land consolidation agency typically has experts in agriculture and agriculture engineering, land administration, environment and landscape management, rural infrastructure, water management, finances and project management. This level of expertise will typically not exist in the lead agency in a country which is planning a pilot project. The pilot project should serve to identify how the necessary skills and expertise

can be acquired.

The lead agency should initiate the development of a national land consolidation strategy that identifies land consolidation as an instrument of rural development. It will also be responsible for getting land consolidation pilot project activities started. During the project, work may be contracted to various individuals or companies under the final responsibility of the lead agency for the project. The lead agency will have to coordinate with various line ministries that would become involved in a pilot project, the local government where the pilot projects will be sited, and perhaps donors.

Some of the rules that will need to be established when working towards the pilot project are summarized in the following box:

ESTABLISHING THE RULES, ROLES AND RESPONSIBILITIES

Before a project can start, the following questions will need to be answered:

- Who will be assigned legal responsibility for land consolidation, i.e. what is the lead government agency?
- Who else will participate and how will efforts be coordinated?
- How long should the project take?
- How can additional lands be acquired for public facilities and enlargement of farms?
- Which community will be selected for the pilot?
- What will be included in the pilot project? What improvements and benefits will be provided?
- Will the benefits exceed the costs?
- How will costs be shared?
- How will leases, servitudes and mortgages be treated in the project?
- How will the request for the project be initiated and approved?
- Who will supervise the design and implementation of the project?
- How will the adjudication process be carried out?
- How will the valuation process be carried out?
- How will changes that are made during the project to ownership and valuation be handled?
- How will the detailed consolidation plan be prepared and approved?
- How will the consolidation project be implemented?
- How will the change to property rights occur?

Therefore, a sound land consolidation project must answer all these questions.

Please read the following excerpt to further understand the possibility of application of Land Consolidation in Ethiopia:

Tenagne Kebede, Land Consolidation Practices and Possibilities in Amhara Region: the Case of Koga Irrigation Project, (Sweden, Stockholm, Royal Institute of Technology, 2007) at 39-49.

The ongoing Land Consolidation (in Koga Irrigation Project)

The regional as well the federal government put up Koga Irrigation project as an element of strategy to construct large and medium level irrigation project to increase irrigated land which contribute a lot to the development of agriculture sector and the economy of the region as well as the country, by increasing the earnings of subsistence farmers living in the target area. Currently the focus of land administration is only in registration and measuring of land and issuing certificate to landholders. Land consolidation stated insignificantly in the land law, quoted "the interesting persons are encouraging through providing free service regarding measuring and registration activity, they will not pay to change the book of holding". However, to enhance LC, the law ought to include additional means of incentive.

a) *Grouping of fragmented plots in an average of two ha size following the irrigation system design (in some places it can be down to 1 ha)*
b) *Consolidated fragmented plots will be located only into one block as a parcel*
c) *Enhancing farm plot arrangement, together with plot size, shape and layout, through a suitable grouping of smaller and rough shaped plots into regular size and shape*
d) *Consolidating farmer's small, non-adjoining plots scattered in many locations into comparatively large ones. This kind of simple consolidation is likely to be best suited to address the project area problems.*

The consolidation which is going on Koga Project is initially starting by grouping scattered parcels and having one regular shaped and larger size of land approximately equivalent in land quality and

size to the original land. The implementation method is grouping of land to a size of an average of 2 ha, by following the tertiary canal design under the principle of proportionality to previous holding of entitled holder. The relevance of proposed plan will be piloted within two kebeles.

This system will make it possible to create feasible agricultural production arrangements by enabling farmers to have farm in one place with better shape and opportunity to employ modern farming inputs on their holding and pave a way for better form of land consolidation in the future. The total land parcels before land consolidation/grouping and redistribution were about 25500. Sources from register pointed out on an average, each farmer may posses 5-6 parcels and one farmer has 12 plots with a size of about 2.4 hectares. The proposal of land consolidation plan to redistribute land after grouping is to that each farmer shall have one parcel. After land consolidation the expected number of parcels will be more or less to be 10000.

Land consolidation ways applied here to encourage the introducing and implementing of appropriate land use planning for sustainable use of natural resource and environment protection associate with soil improvement and leveling. As per experts, it is difficult to conclude land consolidation is the only remedy for the present problem. The structural influences enforced land fragmentation like population growth, land redistribution and lack of non-farming employment opportunities are the main constraint in the region.

As per land register 2005 and woreda experts and data collected during group discussion, one farmer has unto 64 -102 plots having a total size of 1.04ha. Therefore where is the applicability of minimum holding size? The issued law put restriction not to fragment the land size bellow 0.2 ha in rain fed agric and 0.06ha in irrigated agriculture.

Need to Resurveying and Registration

According to Ato Bayeh Tiruneh the cadastral surveying carried out before land consolidation has its own purpose some of it is, to collect information on the number of parcels possessed by each farmers, to know the number of beneficiary farmers and to know the number of farmers possessing more than one plots in the command area (to survey information for land redistribution).

Based on these objective about 25455 parcels are surveyed and registered and mapped on the

project site. But the recent proposal drawn by LRT for grouping and redistribution plan indicates the need of resurveying the parcel in order to refine the previous activities.

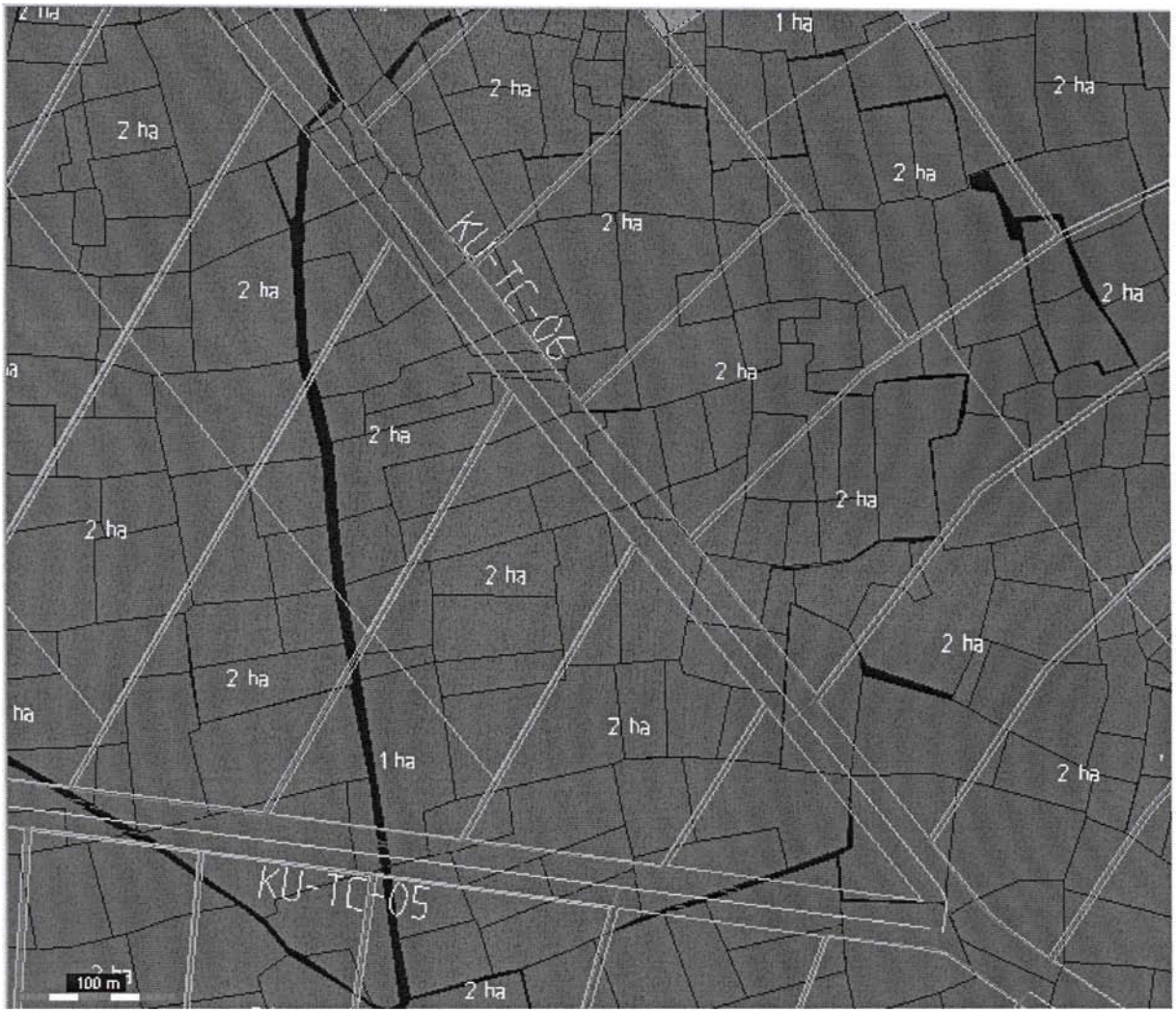
As per LRT proposal the reported re-surveying and re-registration activity ought to be implemented to be sure of the size and the eligible individual for each plot. The first registration and cadastral surveying activity is employed in the whole command area and additional kebeles. However some plots in between remained unregistered and surveyed. Therefore to make reliable and valid data/information, the team starts new surveying and registration.

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Ambomesk kebele plot layout before land grouping and redistribution/consolidation

SCALE 1:2200



Plot lay out after land grouping/ land consolidation

The Koga irrigation project consultant company also did some surveying activity with the support of high satellite imagery at lower level to the resolution of 1 m[49]. The accuracy of measuring and demarcation is the hot issue, as stated by Lars, since it is associated with compensation. As per Ato Bayeh Tirune, head of land Administration, registration in the region achieves success in securing of use right, some how reducing land disputes there is a rough data collected from courts that indicate reducing of land litigation and paved a way to the possibility of future over all land transaction.

Demarcation of Plots

Land registration and demarcation of individual plot boundaries took place in all woredas in traditional way of measuring during 2004. The borders of the command areal Kebele's and individual plots were demarcated with modern equipment like total station in 2005.

Parcels ofland which will be allocated to individual beneficiaries might be less than their previous holdings, taking into account the principle of proportional redistribution. According to Land Redistribution Committee/LRT the boundary of the project and each farmers parcel will be demarcated with white colored stones to reduce or avoid disputes that can be emerged later on.

Implementation Principles and Methods

The implementation follows principles and methods (land consolidation is the under going activity of the project). Currently it starts in two blocks located in two kebeles as a pilot and it will be completed almost in June 2007. So many correction measures will be carried-out during and after the completion of this paper. The main principle in land grouping is that every eligible person should have one rectangular irrigated parcel. The other principle is that every entitled person may obtain a proportional size of land when it is compared to previous holding. Approximately every eligible individual may have a loss of 20% of his holding to substitute lands for farmers who loose their lands for the dam and other constructions (i.e. if one individual possesses I ha of land he may loose 20% of his holding to compensate the expropriated farmers).

In the method priority will be given for eligible individuals and then losers may follow (meaning the first farmers to obtain irrigable lands are previous holders).

Most individual holders use extremely low-sized land areas, in which subsistence farming is practiced as a solution as permitted in the land law and there can be two kinds of possessions i.e. possession in groups and individually. The minimum size of irrigable land stated in the law is 0.06 hectare, so possessors should be grouped under the limited holding size.

The EPLAUA team proposes the following activities:

- *To train Land Redistribution Committee and Land Administration and Use Committee (LAUC) since they are responsible to land redistribution after land grouping.*
- *Re-measuring and re-registering of parcels located in command areas through employing cadastral surveying.*
- *Refining the re-registration activity through hearing of concerned farmers*
- *Grouping of and with an average of two hectares (the grouping and redistributing is based on the tracery canal design that is arranged in two hectares size).*
- *If possible the responsible body (LRC) will make an effort to allocate irrigable land with perennial trees to the entitled possessor.*
- *Recognition and demarcation of degraded farm land will be done by LRC.*
- *The LRC committee will consider the distance from farmstead to parcel in Gott (sub-village) level .*
- *During land redistribution priority will be given to those who have land in command area.*

There are also some other activities that will be employed during land grouping and redistribution-land consolidation. The team of experts' and stake holders jointly need to develop a single yet flexible mechanism to adopt the wide variety of needs of entitled users by considering the land redistribution (e.g. groups, individuals, governmental and

non governmental holdings).

To prevent further fragmentation, which is progressively more considered as an impediment to agricultural development, land consolidation agenda is to be started and implemented with the support of government at individual level based on voluntary farmers.

Farmers vs. Public Needs Regarding Land Consolidation

Land consolidation is an important tool for rural development, but the economical, social and political conditions are not in direction to it. Integrated land consolidation requests huge amount of capital. Depending on the Ethiopian condition, simple land consolidation in irrigable as well as rain fed agriculture can be effective. Some activities such increment of land exchange can be indicative for its functionality.

Simple land consolidation/grouping and distributing is significant and, if run successfully, it possibly will build a considerable contribution to rural poverty reduction. The main opportunities to enlarge food security and household incomes are being missed because of insufficient handling of natural resource. The most critical management challenge is how to address public needs.

Farmers recognize the impact of land fragmentation even in the rain fed agriculture. The difficulty there is absence of designed means to run away from the problem and having fragmented plot has an important role in subsistence agriculture. At the moment to facilitate LC the only traditional way as suspected by the government and concerned organization is land exchange. Even this traditional way does not get enough support by the government, except the issue stated by the Amhara region land law and in regional government land policy to the possibility to implement it. The good thing is there is an emergency of giving official attention to the negative influence of land fragmentation, not only in land management, however the pressure on agric development and extension activity also acknowledged.

When land reallocations implement some land with a property may allocate to another

one. To compensate the expropriated person, the farmer who might get the property will not be in a position to pay. To solve this problem a long term credit system should be arranged.

Under present condition to meet farmers and public needs EPLAUA or anther responsible body should design a possible way of implementation and show the need of raising an awareness of land consolidation with a full support of the government. Another point regarding facilitating and supporting land exchange is the potential means of land consolidation.

Land Exchange as an Alternative Means of Land Consolidation

Land exchange is the common tradition in the study area. Many farmers have an experience from it informal or traditional way (making verbal or written agreement in front elders are a primary condition to land exchange). The formal way of land exchange is a new experience, and some farmers did land exchange legally/formally with the clear intention of hopefully securing their land use rights. As an example, secondary data from Mecha and Achefer woreda shows that about forty two farmers did land exchange legally and eighty five farmers carried out in Achefer woreda. Land exchange is traditional effort under taken by farmers to reduce distances between plots and from farmstead.

The traditional way of land exchange has no legal protection and was not registered in Woreda Land Administration offices. After some time passed the person who needs his former plot can break the agreement through reasoning different situations. These conditions forced farmers to prefer legal/formal land exchange, which has additional advantage to reduce dispute and saving time from litigation. If we consider all land exchange that was employed in traditional as well as legal ways, the exact number will far exceed than frequencies articulated here. The reason is all traditional land exchanges are not registered.

The data collected during the study indicates that farmers have different motivation to employ land exchange. Some of the points indicated by farmers are

- *distance from farmstead to plot and distance from plot*

- *for house construction*
- *to grow eucalyptus*

Out of eighty five respondents thirty-five farmers did land exchange and fifty-five did not. Seventeen farmers did land exchange because, their plot is far from homestead, five farmers did it to grow eucalyptus (eucalyptus used as a cash crop in the area), four farmers did to construct dwelling house (tukul), two farmers to grow Niger seed (oil crop) and five farmers doing so for unknown reason.

The farmers who are not interested to apply land exchange give reasons like the following causes, the plots are near to home stead (up to 30 minutes walking is near according to target farmers perception), they have more fertile land than others and they grow permanent crop. They mention payment for more fertile land and perennial crop from the other party is not sufficient.

To analyze land exchange accomplishments here, distance is one of the best reasons. The other reasons such as for house construction occur often and eucalyptus plantation is the growing interest in the area. As it is indicated in the previous chapter, Ambomesk kebele is located on the main road from Addis Ababa to Bahir Dar and it is known for eucalyptus tree plantation for fuel wood and other construction. According to experiences of farmers land exchange can produce a prominent positive impact on land size and reducing distances... To facilitate land exchange it need full support from the government technically and financially besides recording the incidence to cover with legal protection.

The study has a message to concerned bodies, to be success in rural development, land consolidation in irrigable lands and is crucial and there is a potential means to apply simple land consolidation in rain fed agric based on voluntariness of farmers. According to findings from the study area reasons applied for land exchange is mostly to reduce distance. However, table 6 displays some of the reason pointed out by respondents

Reasons for land exchange	*Number of H*	*percentage*

Distance from homestead and between plots	*17*	
To grow eucalyptus	*5*	
To grow Niger seed	*2*	
To collect crop residue/feed for cattle	*2*	
To construct house	*4*	
Unknown reason	*5*	
Total number of farmers participated in land exchange	*35*	

Table 5.13Respondents gross income versus

Source Tenagne 2007

The Duration of Land Grouping/Consolidation

The core idea of this paper is to express the view of land grouping/consolidation which is proposed to be applied on Koga Irrigation Project. Since problems/fragmentation was forced to apply land grouping/consolidation in the project until the project run energetic, it will remain successful.

The law doesn't indicate any time limitation for land consolidation/grouping. Therefore to secure the activity it is necessary to identify the time. The time should be flexible based on the land tenure system, policy, and the so called concerned factors, but it should not less than 5-10 years to observe the impact. There may be a need to readjustment, to make clear understanding of the plot size to be consolidated this may need to identify.

Plot size in hectare	*Amount of income in Birr*	*Total number of respondent*
0.25-0.75	*1054*	
1.0-1.50	*2836*	
1.75-2.25	*3913*	
2.5-3.0	*5225*	
		85

Influence of Land Fragmentation on Incomes of Farmers

Incomes earned by the respondents are displayed on Table (8). From the table the reader can recognize that one who has a better size of land has better income. According to respondent farmers in the study area, there is an opportunity of non farm activity (harvesting and preparing eucalyptus tree for fuel wood and similar purpose).

As per some young farmers, not only fragmentation is problem, but the reduction of land size becomes a major trouble, that influences their income negatively. The non existence of off farm employment access, land less and small size of land holders forced them to use crop sharing, renting of land or immigrating to nearest town. As an example the landholder with a size of 0.25 earn annual income of about 1000 Birr. During group discussion respondents indicate, that those farmers who earned small amount of income from their undersized land were forced to work as a daily laborer in Bahirdar and the surrounding small towns.

Compensation

Proposal for compensation should include fertility and some aspect that may vary land qualities. The methodology used in valuing losses to determine the replacement cost, compensation for losses of properties and for temporary losses of land should have the same way of application.

Respondents complain the application of different methodology to compensate the same value of property and temporary loss of land. According to them the farmers compensated at the first round obtained adequate amount of money that can support their livelihood. Where as the second round compensation follow another form of valuation and compensation method. The problem here is there is no approved method of valuation

and compensation confirmed by the land law.

The other point on compensation as indicated by farmers is the deliance of payment due to unknown reason (some farmers are not compensated for the temporary loose of land until finalized the study). However the inception report part ii indicated 'before construction of all infrastructures looser will be fully compensated'. But the accomplishment is not performed according to the proposed document.

Summary

Land consolidation has always been regarded as an instrument or entry point for rural development. Concepts of rural development have become much broader and have expanded to include increased environmental awareness and a wide range of nonagricultural applications. Accordingly, the emphasis of land consolidation projects has shifted from a focus on restructuring agriculture to one of achieving more efficient multiple use of rural space by balancing the interests of agriculture, landscape, nature conservation, recreation and transportation, especially when land is required for the construction of major roads.

Among other things, land consolidation leads to improved agriculture and management of natural resources. It also improves rural development, and better land administration systems in many ways.

The most effective consolidation instrument of rural development is comprehensive land consolidation but at times other approaches such as simplified consolidation, voluntary group consolidation, and individual consolidation initiatives can bring benefits. This section provides an overview of these different approaches.

Land consolidation is best undertaken through the use of pilot project. A land consolidation pilot project is a way to lay the foundation work to be carried out under a

long-term programme. A pilot project pioneers new approaches and techniques, and thus its initiation, design and implementation may differ from the operations of later projects.

Finally, a number of conditions should be in place before a land consolidation project can be undertaken. For example, stakeholders should be willing to participate actively in the decision-making process of a project; and the process should be demand driven and a project site must be identified where local citizens and community authorities are interested in land consolidation.

Summary Questions

I. Multiple Choice Questions

1. Which of the following can be improved by land consolidation activity?

    A. Agricultural production
    B. Environmental safety
    C. Recreation and transportation
    D. Village resettlement
    E. All of the above

2. A type of land consolidation undertaken together with a broad range of other measures to promote rural development is called:
    A. Comprehensive land consolidation
    B. Simplified land consolidation
    C. Voluntary group consolidation
    D. Individual consolidation
    E. None of the above.

3. Which of the following best describes an individual land consolidation?
    A. The state is not directly involved
    B. It is based on mutual agreement
    C. It does includes supply of major public infrastructure
    D. It involves construction of rural roads
    E. None of the above

4. Which of the following conditions should be in place before a land consolidation project can be undertaken?

    A. Ensuring the interests of the community.
    B. Conformity with development and agricultural policy.
    C. Appropriate legislation.
    D. Adequate supply of land.
    E. All of the above

II. True/False Questions

1. Simplified land consolidation projects are often combined with the provision of major facilities.
2. In individual land consolidation, the state can never be involved.
3. Land consolidation is the only means to reduce disparities between urban and rural areas.
4. One strategy of land consolidation is implementation of same by steps or phases.
5. A private body is better suited to assume overall legal responsibility for land consolidation.

CHAPTER SIX

REAL PROPERTY TRANSACTIONS

Introduction

In the previous chapters, we have dealt with a number of important subjects. These include the defining real property, lease, registration of real property, land consolidation, and so on. In this chapter, we will discuss about the nature and implications of various types of real property transactions, namely, sale, inheritance, donation, barter/exchange, court decision, and prescription.

Objectives

Having gone through this chapter, you will be able to:

- Explain the nature and meaning of various types of real property transfer/transactions.
- Indicate the possible legislations that address various real property transactions,
- Evaluate the advantages and disadvantages of private/public ownership of land, and
- Appreciate the economic significance of property transactions.

Sale/Purchase

Overview

Sale is one of the most important transactions in the area of real property. Currently, land is not subject to sale; but buildings are. In this section, we shall see the limits of sale of real property, and when it is possible, the entitlements and responsibilities of the parties to a sale transaction.

Objectives:

Upon completion of reading this section, the students will be able to:

-Demarcate the bounds of sale today.

-Point out the constitutional provisions on sale of real property and analyze same.

-List down the rights and duties of seller.
-List down the rights and duties of buyer.
-Explain the nature of promise of sale, and
-Explain the nature of preemption.

6.1.1 Scope of Sale Today

Together with the end of transitional period in Ethiopia the issue of land came to be settled by the newly adopted constitution in, 1995. Actually private ownership of land was abolished in March 1975, and land belongs to the public as of that time. Farmers are given use right but not ownership. The present constitution reaffirmed what the previous regime has established by institutionalizing the state ownership of all rural land.

In article, 40 of the FDRE constitution (which is about property right) it is provided that the right to ownership of rural, urban land as well as ownership of all natural resources is exclusively vested in the state and the peoples of Ethiopia. Land is a common property of the nation nationalities and peoples of Ethiopia and hence not subject to sale, exchange or mortgage.This signifies the state and the people have equal right in relation to the right to ownership of land. The land holders have other rights than sale or purchase right mainly usufructuary right.

Usufruct is the right which is derived from the two Latin words" Usus" and 'Fructus" which eventually became one (Usufruct). It is a real right to *enjoy* a thing belonging to another the same goes for holding right too. Usus (use right) refers to the right to avail ones of physically a thing for one pleasure or personal profit in accordance with the nature of the thing (Planiol).

Generally the usufructuary enjoys all rights to which the owner himself could enjoy. Nevertheless there are some limitations to it i.e. the usufractuaries are not permitted to destroy or consume the thing itself which in other words mean the usufractuary has no

right of abuses. Like wise under holding right both farmers and pastoralists have only the right to use the land while the right to ownership of land remains in the hands of government. They have no right to abuses i.e. holding right lacks the right to dispose the land as one thinks fit except through the mechanisms enumerated under the law in this case.

When we come to the other element of usufruct; fruits; strictly speaking fruits are products which a thing may produce at regular interval with out diminution of it substance (Planiol).

In the like manner, the holder of use right over land has the right to use the land or to derive revenue from it by leasing it to another person or investor. In short, usufruct confers double right on their holders i.e. the right to use the thing (usus) and the right to receive the fruit (fructus).

6.1.2 Rights and Duties of Seller and Buyer

As we have seen above, sale of land is legally prohibited in Ethiopia. But this does not mean that all immovables or real properties are not subject to this type of transaction. Buildings are capable of being sold. It is in this context that we shall discuss this section.

Sale of immovables is provided for under Tilte XVIII, Chapter 1 of the civil code. Today, this part is repealed by the constitution as regards land but active as regards buildings.

a. Obligations and Rights of the Seller

In a contract of sale, obviously there would be at least two parties, that is, the seller and the buyer. And there are obligations which should be performed by the· seller to effect

the complete transfer of ownership of the immovable sold. There are also rights.

i. Obligation to Transfer unassailable Rights over the Immovable

When we say transfer of ownership, the transferor has to be the true owner of the thing. The common law maxim NEMO DAT QUOD NON HABET perfectly applies here because a seller can not transfer a right (ownership) he himself does not have. In the first place the seller must have unassi1ilable right - a right that can not be defeated, questioned or disputed. A sel1er should have a perfect title to transfer on an immovable property to a purchaser. Art. 2281 of the Civil Code states, "a seller shall take necessary steps to transfer unassailable right over the thing." The obligation to transfer unassailable right relates to the obligation as to title and one can say unassailable right means perfect title.

The seller has to show a good title, that is, to state a11 the matters essential to the title contracted to be made. A good title exists when the seller shows that he alone or with the concurrence of some person or persons whose concurrence he can require, can convey to the purchaser the whole legal estate and equitable interest on the thing sold. We can extend the unassailable right concept to warranty of title where the seller covenants that he has a good and marketable title so that no one comes and dispossesses or evicts the purchaser from his enjoyment and right of ownership.

Normally when a purchaser signs a contract of sale he expects full ownership of the thing for exchange of his money. Obviously he wants the physical possession of the thing but this will do little to him. More than this he wants to have marketable title.

The sel1er is assumed to be selling his whole interest in the thing he is required to convey that estate free of encumbrances. But this is true in the absence of any stipulation to the contrary. This is because the purchaser is deemed to know all encumbrances affecting the immovable property. Usua11y acts whether public or private purporting to recognize, transfer, nullify the right of ownership of an immovable shal1 be registered in the register of property.

Any serious defect of the title will allow the purchaser to repudiate the contract and sue for the return of his money. A seller to hold the purchaser to the contract must disclose defects of the title unless it is shown that the purchaser knew at the time of the contract that the former had only a defective title. So here there is warranty given by the law that the purchaser, if he will be evicted, will hold the seller.

Moreover, according to Art. 2880, the seller is required to declare to the buyer rights of third parties on the immovable sold where such rights may be set up against the buyer independently of registration of in the registers of immovable property. But those third parties rights on the immovable which are registered may not be required to be declared by the seller because they are open to the public. However, the contract may compel the seller to declare these rights even though they are registered.

Now what may be rights of third parties on the immovable that are independent of registration? According to article 1567 of the civil code "all acts ... purporting to recognize, transfer, modify or extinguish the right of one or more persons over an immovable shall be entered in the register of property." When we say a third party has an interest on a certain immovable property, it is to mean that we are recognizing his interest. This recognition in turn has to be made in a certain act (like a contract) and this should also be registered in the register of immovable. So it may be difficult to assume that third parties may have interests or rights on an immovable independent of the registration.

Probably, third party rights over an immovable property which the seller is required to declare may be those payments to be made to the government like taxes of dwelling houses, debt of the owner he might have borrowed from a bank to build the house. These are encumbrances of the property which may not be registered but should be declared to the buyer.

When a seller agrees to sell an immovable property, the law imputes to him a covenant that he will convey a marketable title unless the purchaser stipulates to accept something less. The phrase the law imputes to him a covenant implies he will give a good title unless such a covenant is expressly excluded by the terms of the agreement. What is stated under Articles 2282 and 2283 of the civil code is similar to the above point. Because, the seller warrants the buyer against any eviction which may be suffered by the latter. But this is true as far as the buyer does not have the knowledge as to the defects of the title or he does not risk eviction.

Even when the conveyance or transfer is to be made without warranty, still the immovable property is to be transferred if and only if the transferor has title to the property, otherwise he can not transfer it. If the ownership right is subject to a right which may take away part of the property the transferor does not in the full legal sense transfer the property because there is an outstanding interest which the transferor's title does not cover.

Generally, one of the important and basic obligations of the seller is to transfer unassailable right over the immovable sold to the buyer. Failing this, the buyer can't be owner of the thing.

iii. Obligation to Furnish Necessary Documents

This is the most important obligation of the seller in the transfer of ownership of immovable properties. Its great importance is stated under Ethiopian law as being mandatory. Art. 2879 says, "The seller shal1 furnish to the buyer all the documents necessary to enable the buyer to cause the transfer of the immovable to be registered in the register of immovable property”.

Please look at Art. 2301 of the Civil Code and compare it with Art. 2879. What differences do you see? Of the two provisions which one should prevail if there is inconsistency?

Now what are the necessary documents which need to be delivered to the buyer so that the buyer can make or cause the transfer of the immovable property?

As we know, ownership right of an immovable property is proved by a certificate of ownership. It is to this effect that title deeds are issued by the administrative authorities to show that a given immovable belongs to a certain person. And the buyer would not have entered into a contract of sale had he known that the seller had no title deed. Because how can the buyer be sure, or at least presume that the seller is the owner? If title deeds are very important for claiming ownership in transfer of ownership cases, they should be delivered to the buyer as they are necessary documents. So when article 2879 says necessary documents title deeds are surely amongst them.

Title deeds are means whereby interests in immovable arc evidenced. In case of transfer of ownership they serve the purpose of ascertaining that the transferor has the title or interest to be transferred, that he is entitled to make transfer, and also that the transferee has the right to receive it. The agency which is authorized to effect the transfer of ownership of immovable may not register or recognize the right of the buyer without the furnishing of title deeds of the previous owner to it. This is because the basis for registration of transfer of ownership of an immovable property is the former registration. So delivery of title deeds is one of the obligations of the sel1er and then title deeds are necessary documents.

The other important document to be delivered to the buyer is an authenticated contract of sale. As it is stated under article 1723 of the civil code, contract of sale of an immovable property shall be in writing and registered with a court or notary. If an owner wants to transfer his right over an immovable, he has to conclude a separate contact with the one to whom ownership is to be transacted.

If it were the case that only the seller was to be given the authenticated contract (deed), it would be the obligation of the seller to furnish this document as it is one of the necessary documents to cause register and the transfer of the immovable.

The competent authority to register the transfer of an immovable property needs to know the consent of the two parties. Their consent is expressed by the contract of sale which is certified by the notary who ascertains whether the legal requirements like capacity, consent, legality, morality, etc are fulfilled . Since the contract of sale of an immovable is a document which is necessary to cause the transfer of ownership of immovable property it is one of the obligations of the seller to deliver it to the buyer.

The other necessary documents which are required to be delivered to the buyer are certificates as to the payment of tax, clearance certificates from Construction and Business Bank, usually known as Mortgage Bank, etc. The offices in which a given house is situated demand taxes from owners of urban houses. Such taxes have to be paid by owners of the houses before the conclusion of the contract of sale of a given house. The owner, to sell his house, has to get a king of certificate which assures him that he has already paid money borrowed from the banks.

Mortgage Bank loans money to individuals so that the latter would build houses. Individuals after they have built houses will get title deeds which guarantee their ownership right. But when they are to exercise their widest right, that is , alienation by contract of sale, donation or will, they have to get a clearance from the Mortgage Bank whether they have paid all the money they borrowed. That clearance is a document and it should be delivered to the buyer.

iv. Obligation to deliver

In contract of sale, delivering the subject of sale is one of the main obligations of the

seller. The seller of a thing is bound to deliver such thing, and to cause the ownership thereof to be vested in the purchaser. The delivery of the immovable can be made in any manner the parties wish. However, in some countries, most of the time delivery is affected by remission of the keys or titles.

Under Ethiopian law delivery of the thing is a prerequisite in contract of sale. Unlike movables, immovables are fixed by their nature and it may not be easy to handover them physically.

Under Ethiopian law, we have an authenticated contract of sale of immovab1es. And the scl1er by delivering the authenticated contract of sale and his title deed to the buyer effects his obligation of delivery of the immovable in the transfer of ownership of the immovable.

So, it is through the means of the authenticated contract of sale and the title deed that delivery of an immovable property can be effected. All these show us that natural physical delivery of an immovable properly is impossible. So the obligation to deliver has to be seen in the light of the obligation to furnish the necessary documents.

When we say actual physical delivery is impossible, it does not mean that the seller should remain in possession of the immovable properly. It is because of his own will that he sold his property. As a result once he sold his property, the buyer must be placed into the enjoyment and effective possession of the immovable.

iv. **Right to Take the Payment of Price**

The seller transfers the ownership right to the buyer for value or consideration. If this is so he has to get the purchase money as exchange of the thing. Subject to agreement otherwise, delivery of the thing by means of documents and payment of price sha11 be simultaneous. That is at the time when the seller delivers the thing by means of instruments that transfer ownership rights over immovable, he should be paid the price of

the thing. It is his right to take the payment of price. It is with the expectation of receiving money that he sells the property he owned. Thus the seller's obligation to give the thing and the right to take the purchase money are the two faces of the same coin.

The parties may, however, agree in their contract as to the payment of price, that is, when and where to pay. The simultaneity rule applies if nothing is agreed upon in the contract on such matters. The right to demand the payment of price of the thing sold by the sel1er is an extension of the widest right he has over the thing. As a result he has to take money in return so that he will have the ownership right of the money.

v. Right to Retain Necessary Documents

As we have mentioned, the necessary documents are instruments which help the buyer to cause the transfer of ownership of the immovable property. If the buyer cannot or does not have these instruments, it will be difficult for him to get registered the right transferred to him by the contract of sale.

In the preceding section it is stated that the sel1er should be paid the purchase money of his property sold. Now, what remedy does he have if he is not paid the price? Unlike movable properties, immovable properties are not subject to physical delivery. Their delivery is effected by executing documents and then delivering them to the buyer. And hence we cannot say the seller can have the right to retain the thing.

The law has to crate a means whereby the seller will be protected when he is unpaid. The seller cannot guarantee his right of payment of price by retaining the possession of the immovable he sold. This is because once he entered into a contract and that contract is authenticated and delivered to the buyer, whether the seller retains the thing or not, the buyer can cause to transfer the ownership of the thing to himself.

So when it comes to immovable properties, we can extend the application of Article 2278(2) of the civil code to retain necessary documents and can say the seller can retain the documents if he is not paid the price until the payment is effected. The ownership right will not be transferred to the buyer unless and until the necessary documents are delivered to him.

b. **Obligations and Rights of the Buyer**

i. Obligation as to the Payment of Purchase Money

The buyer's chief obligation in a contract of sale is to pay the price at the time agreed, or if no time has been agreed, concurrently with delivery. He must transfer the ownership of the money to the seller. The civil code clearly puts the payment of price by the buyer as a mandatory obligation; Art.2303 (cum. Art. 2875) says, "The buyer shall pay the price".

The obligation to pay price includes the obligation to take steps provided by the contract or by custom to arrange for a guarantee of the price. The buyer may be required to open a credit account so that when time as to payment reaches he can pay easily. The contract may also provide that payment will be effected by installments. He may also pay the price in cheques. Such kinds of activities are to mean taking steps as to the payment of the price.

As a rule payment of purchase money is effected at the time of delivery of the thing. But this does not mean that agreement otherwise is impossible. Buyers do not most of the time pay the price in whole at the time of conclusion of the contract. Rather they pay some amount at the conclusion of the contract and the rest at a later time usually when ownership is completely transferred to the buyer.

ii. Obligation to Take Delivery of the Thing and Documents

The buyer is required to take and come into possession of things which he bought. This may be because of conservation expenses and risk purposes. But in immovable properties it seems the buyer may not be required to take the thing. Rather he would be expected to come into

possession of the thing or he could be required to take possession. But for transfer of ownership cases, possession of the thing is irrelevant. What is relevant and important is possession of an authenticated contract of sale and the seller's title deed.

The obligation to take delivery of documents is not clearly stated under the civil code. But the acontrario reasoning of article 2309 (3) of the civil code indicates that as long as documents concerning the thing conform to the terms of the contract as to these documents, the buyer will be obliged to accept them.

Title deeds arc written certificates which are issued by the administrative authorities which indicate that a certain named individual is presumed to have ownership right of a given immovable property. It is these instruments which help the buyer to cause register the transfer of ownership in to his name. If the seller has a marketable title and if the buyer has entered into a valid contract of sale, authenticated by the concerned Office, then he will be required to accept them when they arc delivered to him by the seller.

iii. Obligation to Have the Instruments and Title Registered In the Relevant Office

Registration of interests in immovable is the most important requirement in the transfer of ownership that is why evidencing interests in immovable by some public record has long been acknowledged. For the transferee's right to be recognized, he must have registered the right transferred to him. Article 1185 of the civil code says an entry in the registers of immovable property is required for the purpose of transfer of ownership of immovable property. Contract of sale between parties is in the first place a requirement not a cause. Entering into a valid contract is not enough. There is additional requirement of registration; the effect of registration is to bar third parties from claiming that same property. And it is for publicity purpose.

iv. Right to have the Issuance of New Title Deed

The buyer having fulfilled his obligations as to the transfer of ownership of an immovable property will be entitled to have rights. It is said that ownership right transferred to him by the contract of sale has to be registered in the registers of immovable property. The effect of this is to vest in the transferee the legal estate or interest, in this case the ownership right, expressed or created by the disposition.

Before the sale transaction, the right of ownership over a certain immovable property was vested in the seller. But after the contract of sale, the ownership right has to be in the name of the buyer. Thus according to the application made by the buyer for title transfer, the registration office will cancel the title deed of the seller and a new title deed will be issued to the transferee. Accordingly, transfer of ownership over immovable is effected by the issuance of a new certificate to the transferee upon the surrender of transferor's certificate.

As a result the new owner’s name is entered in the owner's register of the register's office with all details and in the register of cotracts in the concerned agency. An owner's file is also opened with all documents in the previous owner's file being transferred to the new file.

Now, after he has secured the issuance of new title deed, ownership right is transferred to him. The sale of the immovable will affect third parties as it is registered in the buyer's name. So in the transfer of ownership of immovable properties, the buyer has the right to have the issuance of a new title deed in his name.

vi. Right to Retention of the Payment of Purchase Money

The buyer pays the purchase money so long as ownership over the thing is transferred to him. Those requirements which are expected to be fulfilled by the seller like delivery of documents are important in the transfer of ownership. Thus if the buyer is not given such

documents, he is not obliged to pay the price. Hence he has the right to retain the payment of price until the seller gives the necessary documents to him.

Retention of price may also be because of fear that the buyer will be disturbed from his exercise of ownership. There may be a mortgage encumbrance over the properly he has bought. Because of such kinds of encumbrances the law accords to him by way of security a sort of right of retention on the price which is still in his hands. The buyer may fear that he will be evicted from his ownership. Of course, the seller is required to transfer unassailable right. But the sel1er after he has taken the price may not be in a position to refund the money in case of eviction. So the buyer may retain the purchase money at least provisionally.

Please read Articles from 2875-2895 under the Civil Code and try to see the obligations of the seller and buyer.

6.2.3 Promise of Sale and Preemption

Promise of sale and preemption are considered as restrictions to the owner's right to sale an immovable. The following provisions of the Civil Code tell us, among other things, the nature and definition, scope of application and restrictions regarding these transactions.

Art. 1410. - *Definition.*

(1) A promise of sale is an agreement whereby the owner of a thing undertakes to sell such thing to a specified period, should such person wish to buy it.

(2) A right of pre-emption is a right deriving from an agreement whereby the owner of a thing undertakes to sell such thing in preference to a specified person, should the owner decide to sell it.

Art. 1411. - Scope *of this* Chapter ;

(1) An agreement for a promi8e of sale or right of preemption shall not constitute a restriction on ownership under this Section nor shall it give rise to a right in rem unless it relates to an immovable or a specific chattel.

(2) The rights in obligations which it creates for the parties shall be as provided by Books IV and V of this Code.

(3) The provisions of the following Articles shall only apply to rights in rem created by such agreement.

Art. 1412. - *Conditions for validity.*

An agreement under this Section 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.

Art. 1413. - *Maximum time limit.*

(1) No agreement under this Section shall be effective for more than ten year.

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

Art. 1414. - *Expropriation.*

The beneficiary of a right of recovery may not exercise his right with regard to immovable property which is expropriated.

Art. 1415. - *Right not transmissible.*

(1) Unless otherwise agreed, rights granted by agreements under this Section shall attach solely to the person in whose favour the agreement was made.

(2) Such rights may not be alienated by such person nor shall they pass to his heir.

(3) The creditor of such person may not exercise his rights in his stead.

Art. 1416. - *Promise of sale.* - 1. *Creation of rights in rem.*

(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-art. (1), the thing may be pledged or mortgaged but for an amount not exceeding the price fixed in the agreement whereby the promise was made.

Art. 1417. - 2. *Attachment of thing.*

(1) Where the thing to which the promise relates is attached, the owner shall give notice thereof to the person in whose favour the promise was made.

(2) Such person shall lose his right if he fails to exercise it prior to the thing being sold by auction.

Art. 1418. - *Right of preemption.* - 1. *Creation of rights in rem.*

(1) Unless otherwise agreed, whosoever has granted a right of pre-emption on a thing may create rights in rem on such thing.

(2) Where he intends to sell the thing, he shall inform the beneficiary of the right of pre-emption of all the charges existing on such thing.

(3) Where the thing is attached, the owner shall give notice thereof to the beneficiary of the right of preemption.

Art. 1419. - 2. *Time for exercising right.*

(1) A right of pre-emption shall be exercised within two months from tile beneficiary having been informed of the owner's intention to sell.

(2) The parties may by agreement extend this period to one year.

(3) Where a period exceeding one year has been agreed, it shall be reduced to one year.

Art. 1420. - 3. *Failure to exercise right.*

(1) The beneficiary shall lose his right where he fails to exercise it within the time laid down in Art. 1419.

(2) The owner may thereupon freely alienate the thing.

(3) He may also retain the ownership thereof.

Art. 1421. - 4. *Attachment.*

(1) Where the thing to which the right relates is attached the beneficiary shall lose his right where he fails to exercise it prior to such thing being sold by auction.

(2) Any provision to the contrary shall be of no effect.

Art. 1422. - *Effect on third parties.* - 1. *Conditions.*

Agreements under this Section which relate to registered immovables shall not affect third parties unless they have been entered in the register of immovables.

Art. 1423. - 2. *Other immovables.*

(1) Agreements under this Section which relate to other immovables shall not affect third parties unless they have been registered in the registry of the court of the place where the immovable is situate.
(2) Failing registration, such agreements shall only affect such third parties as knew or should have known them.
Art. 1424. - 3. *Movables.*
Agreements under this Section which relate to movables shall only affect such third parties as knew or should have known them.
Art. 1425. - 4. *Right of beneficiary.*
(1) Where an agreement under this Section may be set up against third parties, the beneficiary may require any third party who has acquired the ownership of an immovable in violation of the right of the beneficiary to surrender such immovable to him on the conditions laid down in the agreement creating the right of pre-emption.
(2) Notwithstanding any agreement to the contrary, the beneficiary shall lose his right where he fails to exercise it within six months from the third party having taken possession of the immovable.
(3) Nothing shall affect the right of such third party to bring an action against the person from whom he acquired the immovable.

6.3 Other Modes of Transfer

Overview

In the last section, we have seen sale as the major means of transaction with buildings. As we said, this type of transaction does not apply to land. In this section, we shall discuss about the transactions applicable both to land and buildings, namely, land inheritance, donation, and barter or exchange, court order, and prescription.

Objectives:

Having gone through this section, you will be able to:

- Explain the meaning of inheritance and its application to real property.
- Explain the meaning of donation and its application to real property.
- Explain barter/exchange,
- Explain court order and prescription, and
- Indicate the laws applicable to these kinds of real property transactions.

6.3.1 Land Inheritance

Inheritance is the passage of title and ownership of property from the one who dies to people whom the law designates because of blood or marriage relation as the deceased heir by operation of the law or by will of the deceased. In other words, it is the devolution of the property of the deceased to persons on the basis of close blood relation to the deceased.

Save the case of buildings, in our case it is the passage of land use right from the deceased land holder to his/ her heirs. With respect to rural land, the farmers in Ethiopia are given the power to transfer their holding right through in heritance. Referring to the possibility of transferring use rights as opposed to transfer of ownership, the Civil Code provides:

Art. 2410. - *Transfer of usufruct.*

(1) The provisions applicable to contracts of sale shall apply where a person transfers for consideration the usufruct of a thing.

(2) The obligation of the seller to transfer the ownership of the thing shall in such case be replaced by the obligation to transfer the usufruct of such thing.

On the other hand, in the Ethiopian law of successions there are two types of successions that are regulated by different laws i.e. intestate and testate succession.

Intestate succession is a branch of succession that devolves the estate of the deceased by

the operation of the law. The law devolves the estate in a way that reflects the presumed intent of the deceased, which is to distribute it to those persons more closely related to the deceased. When we look at the law of succession, it first focuses at whether the deceased person was survived by children or grand children (see Art. 842 CCE) and provides most, if not total, distribution of the estate to them. Then the next focus is on the ascendant and if not to col1aterals and the State.

On the other hand, in the case of testate succession, it is devolution and transmission of the estate of the deceased person in accordance with his/ her will (see Art.857(1)). Will is a document that is drawn up and signed by persons: during their life time providing for the distribution of their properties up on death. In this case the succession of the deceased will be undertaken on the basis of the whim of the testator in the will unless the will is subject to invalidation because of different defects.

The farmers though they do not have ownership right over their holding, have the right to transfer their holding right through inheritance.

Who is an heir eligible to inherit the land use right of the deceased farmer? The heir as stated by the new federal rural land use and administration law are both family members which are defined as "any person who permanently living with the holder of land use right sharing the livelihood of the later" and lawful heir. The strict interpretation of this article indicates or includes not only those persons who have relation by consanguinity or affinity to the holder of the right but also any body provided they are living permanently with the holder and share the means of the livelihood of the holder. Here, the major criterion is not blood or affinity relationship but whether the person concerned is living with and by the income of right holder.

The other persons who are competent to inherit the deceased are his/her lawful heirs. The meaning of lawful heir is not provided in this same proclamation mentioned here above. Thus we need to go to the civil code so long as the latter law has not repealed it expressly. The code instead of giving definition of lawful heir it rather stated the

condition that needs to be fulfilled in order to be lawful heir. These are, close blood relation, surviving the deceased and lastly not found to be unworthy. Thus anyone who fulfills these conditions is said to be lawful heir.

In Tigray, the right to inherit is provided in construed manner .It is only the immediate descendant or in absence the immediate ascendant who can inherit each other (Proc.23/1997, Art.16(2)). Moreover, it is those who live with the right holder and share his livelihood that can inherit the deceased's holding right. It expressly excluded those descendants who have their own sufficient means of living and persons who have their own rural land holding and repealed the provisions governing succession in the civil code expressly. From this it is clear that the Tigray rural land administration law partly excluded Persons who are embraced under the federal law (lawful heirs).

In the ANRS rural land proclamation No.133/2006, transfer of land holding right in inheritance is recognized under art. 16. Any person who holds land may transfer his right in will to any farmer engaged in agricultural works. To be valid, however, this action may not disinherit the minor child of the testator or family member from inheritance; nor may it harm the spouse. In the absence of will, the right shall be transferred to his child or family engaged in agricultural works. In the absence of a child or family member, his parents who are residents of the region, engaged in agriculture and priory have land holding less than the maximum holding area.

On the other hand, in Oromia the cumulative reading of art, 6(1) and 10(1) of the rural land proclamation 56/20002 indicates that peasants/ pastoralists are guaranteed, while the right remains in effect, the right to bequeath or the right to transfer the land holding to their family member(s) through inheritance.

The other salient features of the regions' land laws in relation to inheritance are:

If inheritance causes fragmentation of farm plots to be inherited beyond the minimum plot size, the heirs are obliged to use the plot jointly or by other means other than splitting of the plot. The laws provide the specific size beyond which parcelization of land is prohibited. For example, inheritance should not take place in the manner that results in parcellization of land below quarter (0.25) and (0·75) hectares in Tigray and Oromia respectively.

6.3.2 Donation

Another method whereby land holding right is transferred is donation. Donation is regulated under Tilte XV, Chapter Three of the Civil Code as well as the rural land laws.

As per Art. 2427 of CCE, donation is a contract whereby a person, the donor, gives some of his property or assumes an obligation with the intention of gratifying another person, the donee. Donation is a voluntary transfer of title to property with out payment or consideration by the donee.

Donation is very important in connection with ownership because to some extent it represents absolute power of an owner over his/her property. However, having ownership right over property is not a necessary requirement to transfer his/her interest through donation. Although, this is not the usual case; one can equally donate servitude or usufruct. The same goes for Ethiopian farmers and pastoralists holding right.
The person who wants to donate may make either an *intervivos* or mortis cause donation to the donee (see Art. 1205).

A donation is *intervivos,* if **it** is between living donor and donee; and if the donor intends the donation (gift) to take effect immediately or on agreed date. On the other hand, \a donation is *mortis causa* if the donor makes in anticipation of his/her her imminent death.

The following table summarizes the inheritance and donation provisions of the land laws.

	Federal 2005	Amhara 2006	Oromia 2002	South 2003	Tigray 1997 and its amendment 2002
Inheritance		The holder has the right to transfer land through inheritance to (a) to any rural resident involved in agricultural activities, (b) to persons living in towns engaging in low income generating activities to support their rural livelihood. Note this does not affect the right of minors or family member or the interest of surviving spouse.	The holder has the right to transfer land to his family member living any where through inheritance.	Has the right to transfer land to his family, but the land to be transferred should not be less than the minimum size. A family member is defined as any one who is permanently living with the holder by way of sharing the means of livelihood.	Children and adopted children who depend on their parents land can inherit land use rights from their parents. But those (a) who earn sufficient income to maintain normal standard of living and (b) who has the right to use their own land do not have the right to inherit land. Parents can inherit their children's land if the latter did not have their own children. Inheritance cannot go beyond second generation, but if their parents do not have land

					children can inherit from their grand parents. If there are no children then a wife who does not have her own land can inherit from her husband and vice-versa.
Gift	Any person who is a member of peasants'/pastor alists family may get rural land from his family by donation…	The holder can transfer land by way of gift to a child or grand child or family member who is a resident of the region who does not have any land, or who uses leased land due to the smallness of the size of his possession. But spouse approval required in case of joint ownership. It should be in a written form and			

		should be registered at the woreda and kebele level.			

7.3.3 Barter/Exchange

It is also possible to conduct real property transaction by means of barter. In this regard, the Civil Code provides:

Art. 2408. - Differences *from sale.*

(1) Each of the exchangers shall, as regards the things subject to the exchange, have the same rights and obligations as a seller.

(2) The exchanger who is bound by the barter contract to pay a balance shall, as regards the payment of such balance, have the same obligations as a buyer.

(3) Unless otherwise agreed, the exchangers shall share equally in the expenses of the barter contract.

Art. 2409. - *Reference to provisions regarding sale.*

The provisions applicable to contracts of sale shall for the remainder apply to barter contracts.

What do you understand from the above provisions? We see that people can exchange things including immovables. Further we can see that the provisions of the Civil Code relating to the general contract of sale are of much relevance to regulate exchange of things.

7.3.4 Court Order

Needless to say, it is also possible to have transferred real property through court judgment. The Civil Procedure Code in part provides:

Art. 402. The Decree for Immovable Property

1. Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the decree-holder, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property…

What do you understand from the above provision?

7.3.5 Prescription/Adverse Possession

This method of having a right on an immovable is determined by possession of a property for a fixed period of time. The Civil Code provides:

Art. 1168. - *Principle.*
(1) The possessor who has paid for fifteen consecutive years the taxes relating to the ownership of an immovable shall become the owner of such immovable Provided that no land which is jointly owned by members of on family in accordance with custom may he acquired by usucaption and any member of such family may at any time claim such land.
(2) Nothing in this Article shall affect the provisions of Title VI, Chapter 2, of this Code (Art. l140-l150).

From the above provision, what are the elements required for adverse possession/usucaption? And what are the exceptions?

Summary

Under the current legislations, land is a common property of the nation nationalities and peoples of Ethiopia. Hence, it shall not be subject to sale or exchange. The state and the people have equal right in relation to the right to ownership of land.

However, this is not true for buildings. Buildings are subject to sale. In this case, the seller and buyer have rights and duties. The seller has the following obligations: obligation to transfer unassailable rights over the immovable, obligation to furnish

necessary documents, and obligation to deliver the property. Besides, the seller has some rights: right to take the payment of price, and right to retain necessary documents.

With respect to the buyer, the obligations include: obligation as to the payment of purchase money, obligation to take delivery of the thing and documents, and obligation to have the instruments and title registered in the relevant office. In addition, the buyer has some rights including the right to have the issuance of new title deed and right to retention of the payment of purchase money.

Promise of sale and preemption are considered as limitations to the owner's right to sale a real property.

Finally, there are transactions applicable both to land and buildings. These are inheritance, donation, barter or exchange, court order, and prescription.

Summary Questions

Part I. Case

1. Ato A agrees to sell his house to Ato B at 1 million Birr and they put this in a written form. Ato B pays half the price during the contract on 01/02/2006. The remaining half, he gives to the seller after a year as their agreement. However, Ato A refuses to receive the money, to deliver the house and also he tells Ato B that they have not concluded any valid contract as they have not registered their contract before the concerned body.

Do you support Ato A's argument that 'registration of contract influences its validity'? Support your answer by the appropriate provisions or laws.

In the above case, suppose B went to the nearest office for the purpose of transferring the house to him. The officer, however, refused to help stating that the presence at the same time of the seller, buyer and all witnesses is mandatory for him to give service. Is the officer's position justified? Why? Why not?

Part II. Essay type questions

2. Mention and explain at least three duties of a seller and buyer of real property.
3. Why are promise of sale and preemption considered as restrictions to sell of real property? Elaborate.
4. What are other methods of conducting real property transaction than sale? Mention briefly the nature and meaning of each.

CHAPTER SEVEN

DISPUTE RESOLUTION MECHANISMS ON REAL PROPERTIES

Introduction

It is a common knowledge that land and building related disputes constitute a significant proportion of case compilation in courts. This is especially so due to lack of efficient property registration systems (cadastre and land register). The dispute may, for instance be related to boundary conflict, mortgage cases, parcel trespassing, flooding, shading, grazing land encroachment, forest land encroachment, road side encroachment, and so on. The main laws regarding the dispute resolution mechanisms and institutions are the Civil Procedure Code, Federal Courts establishment Proclamation No.25/96 and even the Civil Code, not to mention regional instruments.

Objectives

Having studied this chapter, you will be able to:

-Explain the various methods of land dispute settlement.

-Indicate and interpret legislations about land dispute resolution, and

-Tell the difference between formal dispute settlement mechanisms and informal dispute settlement methods.

7.1 At Federal Level

Overview

At the federal level, there are three major levels of courts dealing with dispute resolution including dispute relating to real property. In addition, there are two major laws governing this matter. In this section, we shall discuss the powers of these courts and describe related parts of the major laws.

Objectives:

At the end of this section, you will be able to:

-Mention the courts having jurisdiction to resolve land dispute at the federal level.

-Explain the jurisdiction of the different federal courts, and
-Indicate and analyze the pertinent laws and provisions regulating dispute resolution.

The constitution provides for three levels of Federal Courts: the Federal Supreme, High, and First Instance Courts. Each of them has their own jurisdictional limits with regard to the kind of case they entertain both in civil and criminal cases.

The Federal First Instance Court shall have first instance jurisdiction over civil cases involving an amount not in excess of 500,000 (five hundred thousand) Birr. Therefore, per Art – 14 of the Proc., Federal subject matter cases that involve an amount of less or equal to five hundred thousand birr will be within the jurisdictional limit of the Federal First Instance Court.

The Federal High Court has original civil jurisdiction over cases involving an amount in excess of Birr five hundred thousand (500,000). The Federal High Court, in addition to its first instance or original jurisdiction, has appellate jurisdiction over decisions of the Federal First Instance Court per Art 13 of the proclamation.

Excepting application for change of venue from one Federal High Court to another or itself, the Federal Supreme Court does not have first instance or original jurisdiction over civil cases. It only has appellate and cassation jurisdiction. Pursuant to Art 9 of the Proc., the Federal Supreme Court shall have appellate jurisdiction over decisions of the High Court rendered in its original jurisdiction, and over decisions of the High Court rendered in its appellate jurisdiction in variation of the decision of the Federal First Instance Court.

Moreover, according to Art. 10 of the proclamation, where they contain fundamental error of law, the Federal Supreme Court has the power of cassation over:

a) final decisions of the Federal High Court rendered in its appellate jurisdiction;
b) final decisions of regular division of the Federal Supreme Court;
c) final decisions of the Regional Supreme Courts rendered in a regular division or in its appellate jurisdiction.

7.2 At State Level

Overview

At the state level, there are different judicial institutions dealing with dispute resolution relating to real property. In addition to ordinary or formal courts, there are social courts and other methods of dispute settlement especially the use of local elders. In this section, attempt will be made to elaborate these matters.

Objectives:

At the end of this section, you will be able to:

-Mention the courts having jurisdiction to resolve land dispute at the state level.

-Explain the jurisdiction of the different state judicial institutions, and

-Indicate and analyze the pertinent laws and provisions regulating dispute resolution in the states.

The Federal Courts Establishment Proclamation, Proc. 25/96, provides only for the jurisdictional limits of Federal Courts. It lists matters which fall under the jurisdiction of Federal Courts. This in effect means that all matters or cases which are not listed under the proclamation to be federal matters are left to be within the jurisdiction of states. From this point of view, therefore, states have residual jurisdiction.

With regard to matter falling within the jurisdiction of Federal matters, since the material jurisdiction is determined by the Proclamation, provisions of the Civil Procedure Code dealing with material jurisdiction are impliedly repealed by Art 37(2) of Proc. 25/96. Matters falling within the jurisdiction of States, however, are not within the ambit of this Proclamation. Therefore, the jurisdictional limit of State Courts is determined on the basis of pertinent provisions of the Civil Procedure Code. Accordingly, the States' High Courts shall have jurisdiction over all cases regarding immovable property where the amount involved exceeds 10,000 (ten thousand) birr, (see Art. 14(b) of CPC).

Woreda Courts, on the other hand, have jurisdiction in claims that involve cases up to 1,000 Birr for cases regarding immovable property (see Art. 13(b) CPC).

State Supreme Courts do not have first instance or original jurisdiction in civil cases. This means that all cases in state courts must start either in Woreda or High courts. Hence, the States Supreme court has only appellate jurisdiction and final cassation power over state matters. But it does not cancel its first instance jurisdiction over federal matters in its constitutional delegated power.

Some states have by legislation, established social courts to reduce the congestion of cases in Woreda Courts. For instance, the Amhara National Regional State Council has enacted a Proclamation to provide for the Power of Social Courts. By this Proclamation, Social Courts are empowered to entertain civil cases the amount of which is not more than 1500 Birr.

The following table summarizes the land dispute resolution mechanism at federal and state levels as found in the land administration and use laws.

	Federal 2005	Amhara 2006	Oromia 2002	South 2003	Tigray 1997 and its amendment 2002
Land dispute resolution		Mutual agreements and local elders can be used to resolve land related conflicts. The detail of the formal institutions is not provided in the proclamation.	Land disputes can be resolved by (a) local social court, (b) then appeal to the ordinary woreda court, and (c) then appeal to the higher court. Note that mutual agreements and local elders can	Land related disputes will be seen (a) first by the woreda and kebele land administration and use committee, (b) if not satisfied, can apply to the kebele social court, (c) then can appeal to the woreda	There is nothing on land disputes and resolution.

			be used to resolve conflicts.	court, and (d) finally, has the right to apply to the higher court. Note that mutual agreements and local elders can be used to resolve conflicts.	

7.3 Informal Dispute Resolution Mechanisms

Overview

In the last sections, we have discussed about the various kinds of formal dispute resolution mechanisms. In the present section, we will see the nature and meaning of the informal ways of dispute resolution and the laws governing them.

Objectives:

Having completed reading this part, you will be able to:

-Define each informal methods of land dispute resolution mechanism.

-Explain the major types of informal dispute resolution mechanisms, and

-Indicate the legal framework for each of these methods.

Aside from the formal mechanism of dispute settlement normally called litigation, informal methods are used. They are called Alternative Dispute Resolution (ADR) mechanisms and if used widely and properly can help achieve good results. Under the Civil Code, Title XX, and in the Civil Procedure Code Chapter 4 of Book 4, are devoted to these mechanisms. They are compromise, conciliation, and arbitration.

As per Art. 3307 of the Civil Code, a compromise is defined. A compromise is a contract whereby the parties, through mutual concessions, terminate an existing dispute or prevent a dispute arising in the future. It is also called negotiation. In negotiation the parties reach a joint decision on matters of common concern in situations where they are in actual or potential disagreement.

By virtue of Art. 3325 of the Civil Code, arbitration is a contract whereby the parties to a dispute entrust its solution to a third party, the arbitrator, who undertakes to settle the dispute in accordance with the principles of law. In other words, arbitration is a process by which a dispute between two or more parties is submitted to panel pf impartial third parties for resolution on the merits based on the evidence presented at a hearing. The procedures for arbitration are provided for under the Civil Procedure Code.

According to Art. 3318 of Civil Code, conciliation is a mechanism whereby the parties entrust a third party with the mission of bringing them together and, if possible, negotiating a settlement between them. Stated otherwise, conciliation also called mediation is a process whereby a neutral and impartial third party facilitates communication between negotiating parties which may enable the parties to reach settlement.

In a recent study made by Sayeh in a few sample Woredas of Eastern Gojam Zone about the use of the various methods of land dispute resolution, alternative dispute resolution mechanisms have proved to be frequently used methods. Respondents have prioritized the commonly used conflict resolution mechanisms based on their impact in resolving disputes as follows:

No.	Conflict resolution models	Addressed by(respondents)		Priority order								Rank
				first		second		third		fourth		
		F	RF (%)	F	RF (%)	F	RF (%)	F	RF (%)	F	RF (%)	

1	Negotiation	120	100	20	16.67	23	19.17	32	26.67	45	37.5	4
2	Mediation	120	100	36	30	61	50.83	17	14.17	6	5	2
3	Arbitration	120	100	78	65	39	32.5	3	2.5	-	-	1
4	Litigation	120	100	12	10	27	22.5	56	46.7	25	20.83	3

According to the priority order made by the respondents, arbitration is ranked first by about 65% of the respondents. Mediation ranked second by more than half percent of the respondents. Litigation with a relative frequency of about 47% and negotiation with 38% are at the third and fourth ranks respectively.

Summary

The main laws regarding the dispute resolution mechanisms and institutions include the Civil Procedure Code, Federal Courts establishment Proclamation No.25/96 and the Civil Code. This is, however, different from the federal level to state level.

At the federal level, the constitution provides for three levels of Federal Courts: the Federal Supreme, High, and First Instance Courts. Each of them has their own jurisdictional limits with regard to the kind of case they entertain both in civil and criminal cases.

At state level, Proc. 25/96 is not applicable. Therefore, the jurisdictional limit of State Courts is determined on the basis of pertinent provisions of the Civil Procedure Code. Moreover, some states have by legislation, established social courts to reduce the congestion of cases in Woreda Courts.

Aside from the formal mechanism of dispute settlement, i.e. litigation, informal methods are used. These are called Alternative Dispute Resolution (ADR) mechanisms. They are compromise, conciliation, and arbitration and some provisions of the Civil Code and the Civil Procedure Code are applicable to them.

Summary Questions

1. What are the courts that settle disputes over real property at federal level? What is the material jurisdiction of each? Explain with the support of legal provisions.

2. What are the courts that settle disputes over real property at state level? What is the material jurisdiction of each? Are there other institutions of dispute resolution? Explain with the support of legal provisions.
3. What are alternative dispute resolution mechanisms recognized under our law? Explain each with the support of legal provisions.

CHAPTER EIGHT

LAND USE RESTRICTIONS

Introduction

Ownership right of a property provides the owner the widest and most complete rights. As discussed in different parts of this material, it includes the right of use and enjoyment, lease, mortgage, inheritance, sale, exchange and so on. In the roman conception of the concept ownership is indivisible, it is just one whole, while in the common law it can be used separately as we discussed in the bundle of sticks metaphor part. And yet, in all the legal systems, whether ancient Romans, common law or modern liberal laws, this ownership is not something untouchable. Of course it is provided with the widest protection. See for example article 1204 which contains the above two concepts. According to this article "ownership is the widest right that may be held" and this "right may not be neither be divided nor restricted except in accordance with the law."

Now the phrase "...except in accordance with the law" is the subject matter of our discussion here. It means ownership right of a thing may be freely and fully exercised without any limitation except as may be stipulated by law for public purpose. Look also article 40 (1) of the constitution

> *Every Ethiopian citizen has the right to the ownership of private property. Unless prescribed otherwise by law on account of public interest, this right shall include the right to acquire, to use and, in a manner compatible with the rights of other citizens, to dispose of such property by sale or bequest or to transfer it otherwise.*

Well, of course, this is a general principle which may not include the ownership of land which is not subject to sale or exchange. But within the ambit of the other rights the possessor or the lessee has full right to enjoy these rights. As can be gathered from the reading of the above two important laws, however, private ownership can be restricted or limited on account of public interest. Indeed such restrictions are found in different legislations, especially those related to land and building.

Hence in this small chapter we shall briefly discuss those restrictions made on land or building in the form of limitations on use right because of master plan, environment, public health etc; secondly those rights related to servitude, and finally expropriation rules shall be discussed.

Objectives

After reading this chapter students are expected to:

- Define the concepts of expropriation and servitude
- Understand the justifications and nature of the different land use controls
- Understand the limits of private property

8.1 Land Use Restrictions

8.1.1 General

Land use control refers to the body of laws and regulations which limits the use rights of a land and a building. These laws can be found in the civil code itself and in different other legislations such as urban planning, building legislation, forestry, water laws, and environmental laws and so on. Except the nuisance law in the civil code, the other limitations are not well developed in Ethiopia. The basic difference between these types of laws and expropriation is that in case of expropriation the property shall be taken wholly or partially, while in the case of controlling laws, they simply limit the owner's use right while leaving the corpus in the hand of the owner/possessor. In the following we shall highlight some of those limitations.

Additional reading

Students may wonder why after all we need to restrict owner's use right. Concerning the basic justification of using such restrictions **Thomas Kalbro, Compulsory purchase and Restrictions on Land Use, *Papers on Property Development and Compulsory purchase*, KTH, Stckholm, Sweden pp. 26-27** gives us an economic and legal explanation.

How can compulsory purchase and restrictions on land use be justified?

We may begin by briefly considering why the law makes it possible in certain cases to regulate land use and to acquire land and property rights by compulsory purchase (expropriation). Cannot property owners settle these matters among themselves through voluntary agreements in "the market?"

Heilbrum indicates two central criteria to be taken into account in decisions concerning land use:

> Efficiency and equity are two of the general criteria to be applied in comparing alternative (economic) policies. To the economist, efficiency means the most productive use of resources to satisfy competing material wants. The term equity in economics

usually refers to fairness in the distribution of income or wealth, or more broadly, "welfare."

There is no doubt that in many respects that market operates quite excellently, but the system has shortcomings connected with both efficiency and equity. In order for the market to function efficiently, certain conditions have to be satisfied. In reality, unfortunately, they are not, and instead we have a number of *market failures.*

- The existence of limited competition plays an important role in the case of real property and land use, since each piece of land is unique. In principle, every property owner is monopolist.
- Some goods, termed *public goods,* will not be supplied by the market, or if possible, will not be supplied in sufficient quantity. This problem refers, for example, to the provision of roads, recreational areas, water supply, sewerage facilities, street lightning etc.
- There are many cases where we affect other individuals without having to pay for causing to pay for causing negative effects, or getting paid for positive effects, through a market transaction. A negative externality can, for example, take the form of pollution, noise or smell from the commissioning of a factory. There are the wider effects of the land use, effects which are not reflected in the market price and cost of the development. Externalities are sometimes referred to as *spill-over* or *neghbourhood* effects and in the context of land use typically include visual intrusion, increased traffic, pedestrian and resident inconvenience and congestion of existing public facilities.

These market failure, then, mean that the market cannot, unaided, guarantee the efficient management of resources. In other words, they justify public intervention with a view to correcting malfunctions of the market and to *co-ordinate* land-use activities.

In addition to the market not always operating with total economic efficiency, it is a well-known fact that the market does not necessarily lead to a fair distribution of wealth, income, land etc. among citizens in a society. This fact can justify public intervention

with a view to reallocating resources between people e.g. in order to protect "weaker interests."

8.1.2 Restrictions

Nuisance law

Nuisance is an activity that arises from unreasonable, unwarranted or unlawful use by a person of his on property. It is mostly related with the abuse of right of an immovable. The lists of activities that can cause nuisance are not exhaustive. This type of activity is prohibited by many laws including our civil code. Hence, as one form of restrictions owners of an immovable, mostly building, may not use their property in a way that disturbs their neighbors. This principle is also included in our civil code under article 1225:

Art. 1225. - Abuse of ownership. - 1. Principle

(1) The owner shall not cause nuisance or damage to his neighbor.

(2) He shall not cause smoke, soot, unpleasant smells, noise or vibrations in excess of good neighbourly behaviour.

(3) Regard shall be had to local custom, the position of the lands and the nature thereof.

Planning law

Can an owner of a building change the plan of the building? Can he build a new building on the land leased or demolished it whenever he wishes it? A study of planning and building legislations of different countries of course reveal some difference between them. One fundamental principle, however, is distinguishable, including Ethiopia. A change the use of such building requires a permit. Basically change can be divided in to three categories: construction of new building, work on existing building, and demolition of the building. This means use of land d building becomes under extensive official control.

At Federal level a proclamation that provides for urban plans has been adopted under Proc. No. 574/2008 which governs the above kind of regulations. Among others it

empowers municipalities to control land use in urban areas. According to article 25 of the proclamation, “no development activity may be carried out in an urban center without a prior development authorization.” In this case the word “development” is defined as, “carrying out of building, engineering works, mining or other operations under the ground, or the making of any substantial change in the life of any structure or neighborhood (Art. 24)”

The above article hence includes the two aspects, i.e., constructing a new construction and making a change on it. So as you may know, people after getting a plot of land must get a building permission to construct a new building. Since, the law also provide that urban plans must contain rules about zoning, height of building, housing typology etc (art.11(3)) owner of a house may not the type and design of the house in a way that violates the planning laws, and as a result owner must secure prior permit.

The other point is that owner of a building may not demolish it with out a permission as envisaged under article 32 of the proclamation.

Environmental concerns

Other legislation which relate to environment (proc. No. 300/2002), provides different restriction on property owners concerning management and release of dangerous and hazardous activities that may damage the environment. It among others prohibits people from emitting or releasing, toxic substances, chemical, or radioactive substance from their property that harms human health and wellbeing, the biota and the aesthetic value of nature.

8.2 Expropriation

Introduction

Expropriation is another form of restriction on land owners or holders. Expropriation is a means of land acquisition for the state. It is forced taking of land from the owner against

his wish but on payment of fair compensation. This is an inherent power of the state which was recognized from time immemorial. It goes even to the roman and biblical periods where states used to take private land for public purpose development activities. The issue of expropriation was formerly treated in the civil code, but now there is a new proclamation No. 455/2005 and an implementation regulation No.135/2007 at federal level and different other regulations at state level. The subject is a wider one, and here we shall discuss it only briefly so as to give students an insight to the subject.

Objective

After reading this section students will be able to:

- Define the concept of expropriation
- Know the purpose and elements of expropriation
- Understand the basics of compensation and valuation systems

8.2.1. Nature and Purpose of Expropriation Practice

The concept of public acquisition of land without the consent of the owner is known by different names. In most common law countries, either “eminent domain” (USA) or “compulsory purchase” (UK & other commonwealth countries) is used. On the other hand, in civil law countries, “expropriation” is the most utilized terminology. Expropriation is a process whereby the state may take privately owned or leasehold land without the consent of the owner\possessor for a public purpose accompanied by payment of fair compensation. This concept has not been properly defined in the present expropriation proclamation. But for comparison purpose here we shall provide a definition from the Civil code and from the Amhara Region Rural land legislation.

The Code, under Article 1460, provides:

> Expropriation proceedings are proceedings whereby the competent authorities compel an owner to surrender the ownership of an immovable required by such authorities for public purposes.

Amharan Rural Land proc. 133/2006 Art. 2(18).

> ‘‘Expropriating land holding’’ means taking the rural land from the holder or user for the sake of public interest paying compensation in advance by government bodies, private investors, cooperative societies, or other bodies to undertake development activities by the decision of government body vested with power.’’

Another definition from the *Corpus Juris Secondum*

> …..it is the right of the nation or state, or of those to whom the power has been lawfully delegated, to condemn private property for public use, and to appropriate the ownership and possession of such property with out the owner’s consent on paying the owner a due compensation to be ascertained according to law.

The space doesn’t allow us to have a hair splitting interpretation of the subject. The important elements in any expropriation process and practice are, however:

- Expropriation is a taking of private real property
- It is an inherent right of the state
- It is done against the consent of the owner/possessor
- Fair compensation must be paid
- The taking must be made for public interest/use

Many writers argue that expropriation was an inherent right of the state and the purpose of the constitution is just to recognize such right or power of the state. As a state the government has the duty to construct infrastructures such as roads, dams, schools, hospitals, etc and whenever it needs a certain land for such purpose it can take the land. Such practice can be traced to the biblical period, to the Roman times as well as to middle age European and English practices. In Ethiopia, it gets recognition during the Menelik era. Today the constitution under article 40(8) recognizes the right of the state to take any private property against payment of commensurate compensation.

Expropriation is one means of land acquisition. The government or other developers can get land, besides to negotiation and other purchasing mechanisms, by way of expropriation without the consent of the owner. The justification usually given in favor of expropriation is one related with the need of development. It is said that unless we forced to surrender his land, the landowner would otherwise, due to his monopolistic position, be able to block development when refusing voluntary transfer of his land or claiming for an unrealistically high compensation. Another reason for expropriation is the need to ensure the efficiency of land acquisition. Efficiency means the most productive use of resources to satisfy competing material wants. Hence a plot of land may be expropriated if the new owner can develop it and makes it more profitable to the society.

Similarly the justification for expropriation given in Ethiopia is that of land acquisition. The preamble of the present expropriation legislation (Proclamation No. 455/2005) justifies expropriation on the fact that:

> "urban centers of the country have, from time to time, been growing and the number of urban dwellers has been increasing and thereby land redevelopment for the construction of dwelling houses, infrastructure, investment and other services has become necessary in accordance with their respective plans as well as preparation and provision of land for development works in rural areas has become necessary."

The other element in expropriation is the payment of fair compensation. Owners/holders/leaseholders of the land should be compensated for the development or change they bring about on the land. In most legal systems people are compensated for the ground itself and the fixtures (building, excavation, trees etc) on the ground. As we shall see it later on in Ethiopia, in urban areas, instead of compensating for the value of the ground people are given replacement land.

The other element is the requirement of "public purpose/use." The idea is that state may not take a private land arbitrarily; it must be justified on public purpose. It means that the taking of the land must be for public interest. What constitutes public interest is not a

settled argument. In its traditional concept, public interest includes the traditional state responsibilities: Construction of roads, schools, dams, bridges, etc. Modern interpretation of the concept however even includes that the taking of the land for private development activities, malls, hotels etc may amount to public interest.

A good example in this regard is a broad and narrower definition of the term given by US courts. The broad view holds that "public use/purpose" means advantage or benefit to the public. Nichols puts this definition in the following way:

> ''Public use'' means ''Public advantage,'' and that anything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the state (or which leads to the growth of towns and the creation of new resources for the employment of capital and labor), manifestly contributes to the general welfare and the prosperity of the whole community constitutes a public use.

The second, and narrow, view defines 'public use' as actual use or right to use of the condemned property by the public. This constitutes a public purpose in which the public has a right of use. To this effect one New York court has said:

> The indirect contribution the prosperity of the entire community resulting from activities from which only some individuals would profit was not sufficiently to justify the exercise of eminent domain. It is necessary that the public possess a 'right' to use the facility or service for which the property was desired.

In this regard, expropriation of private land was limited to traditional state activities, such as defense, highway, and education.

Now compare the following Ethiopian legislations with the above two definitions

Article 2(5) of proc. No. 455/2005

"public purpose" means the use of land defined as such by the decision of the appropriate body inconformity 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;

Article 2(15) of Zikre Hig, Proclamation No. 133/2006

"Public Service" means a service given to the public directly or indirectly, such as government office, school, health service, market service, road, religious institutions, military camps, and the likes, and includes activities assumed important to the development of people by the Regional Government and to be implemented on the rural land.

8.2.2 Valuation and Compensation

Compensation

Expropriation is a forced sale and is distinguished from confiscation in that the owner will be compensated for the property taken. Compensation is defined under the *Corpus Juris Secondum* as "full indemnity or remuneration for the loss or damage sustained by the owner of the property taken or injured for the public use." The compensation requirement under the law demands that the expropriator reimburses the expropriated for the property interest taken and place the latter in as good a pecuniary position as if the property had not been taken. In Ethiopia, the constitution and other land related legislations underline that a commensurate amount of compensation should be paid to the expropriated person. Commensurate means in this case literally equivalent. In some legal systems the word commensurate may be replaced by words like "fair" or "just". But the addition of such adjectives doesn't create any change in the basic definition of compensation itself, they are added merely to give emphasis.

But how do we ensure whether a certain compensation is commensurate, fair, just or not? In other words how do we know whether the compensation valued is appropriate one?

In all Western countries and, as shown in Kitay, in most developing countries, the fundamental principle that guides valuations under expropriation laws is the payment of "fair market price" or market value. Market value is generally taken as a test for the existence of just compensation. Market value, as defined in *Appraisal of Real Estate*, is:

> *the most probable price, as of a specified date, in cash, or in terms equivalent to cash, or in other precisely revealed terms, for which the specified property rights should sell after reasonable exposure in a competitive market under all conditions requisite to a fair sale, with the buyer and seller each acting prudently, knowledgeably, and for self-interest, and assuming that neither is under undue duress.*

Well if this explanation is not clear enough, in order to understand the market value of a property imagine the sale of a house by the owner after negotiating with buyers and may be involving brokers. Here the buyer and seller know what similar types of properties are sold at market, and hence the seller puts the highest price that his property can have and a buyer can afford. By the same token the buyer offers the best of his price for the house comparing that house to other comparable properties.

Valuation

The valuation process, whereby compensation is fixed according to law, is generally the most difficult, time consuming, and litigated part of the expropriation process. A proper valuation process is the most important step for the land owner. This is because it is the way to reach just compensation. Although the constitutions of most countries contain "just compensation" phrases, they do not give any clue as to how to determine it. However, market value is usually suggested to calculate the amount of compensation. Hence, just compensation has also been sometimes defined as "the fair market value of the property as of the date of the taking, determined by what a willing buyer and a willing seller would agree to, neither being under any compulsion to act."

Valuation may be ordered either by the court or the administrative organ, as the case may be. In countries where the administrative organ facilitates the valuation process, an owner of land may dispute its validity and appeal to the courts. On the other hand, if it is the court that organizes and selects experts, then it will accept the valuation report as evidence to give its final expropriation decision. In both cases, the court may be an administrative court or a regular court.

Valuation Methods

Generally, there are three primary valuation methodologies for arriving at the fair market value of real property taken by way of expropriation: the comparable sales method; the income capitalization method; and, the replacement cost method. Since all are methods designed to reach fair market value, different countries use them alternatively, as the case may be, and courts do not tend to favor any of them, for they equally serve the purpose and are technical methods which need the opinion of expert valuators. For example, the US practice shows that although courts have approved of each of these methodologies, they have consistently refrained from mandating that a specific methodology be used when appraising condemned property, requiring only that the method used be reasonable. The reason is that because of the peculiar features of the property expropriated, appraisers may tend to use one or different methodologies at a time.

a. Comparable Sales Approach

The comparable sales approach simply requires searching for similar properties that have been sold in the marketplace within a reasonable time period preceding the taking date, and then adjusting the sales price of those comparable properties to reflect differences between the comparable and the subject property. The comparable sales method is considered the preferred method of ascertaining the fair market value of land taken by expropriation.

b. Income Capitalization Approach

Income capitalization is one of the recognized methods of determining a property's fair market value taken by expropriation. It gives value to the land in relation to the income it produces. The capitalization of income approach is generally used to value income producing property when it is completely taken. It usually consists of arriving at an independent value of the underlying land involved, and adding to it the value of improvements, by converting reasonable or actual income at a reasonable rate of return (capitalization rate) into an indication of value. The land and improvements may be capitalized together in a single process. The capitalization of income is not used to project future profits or to compensate the owner for lost profits, but rather, to calculate the fair market value of the land at the time of the taking. The income capitalization approach is an accepted method for determining market value when there are no available comparable sales data, and the income is directly attributable to the land.

c. Replacement Cost Approach

The replacement cost method values the expropriated property by determining the replacement or reproduction cost of improvements, less depreciation, plus the market value of the land. Hence, this predominantly serves to value buildings as well as utilities, but not the land itself. It is especially considered one of the better methods for determining a utility's fair market value. Generally, it is assumed that landowners may be compensated fully by other approaches, especially where the property is not shown to be both unique in nature and location and also indispensable to the conduct of the landowners' business operations on the site from which a part is taken. So, mostly, buildings of a unique character are valued using this method. We can also add that this approach can be used in countries where the market value of real property is not developed. The method develops the value in terms of current labour and materials required in assembling a similar asset of comparable utility.

Valuation method in Ethiopia today

The valuation system that we follow today in Ethiopia is the reflection of the land holding tenure policy itself. Generally speaking we have two different systems we follow in urban and rural areas. In urban areas compensation is paid for the improvement made

on the land in the form of building, tree, and other excavations or structures. The compensation is based on replacement cost of similar property. Means in Ethiopia, we follow the third valuation method. Read article 7 of Proc. No. 455/2005. In addition property owners shall be paid for transportation, removal of things from the place, fence, etc and shall also be given a replacement land to construct the house. But what misses in the Ethiopian case is the location value of the property. For any modern market based valuation system, location maters a lot, that values of same buildings can be varied because of the difference of the location of the land.

In rural areas besides to the houses, if any, and plants (grass, trees, crops, fruit etc) thereon, farmers should be compensated for the land they lose. In principle a replacement land would be given to the farmer. In that case the compensation is based on annual income of the farmer, and an amount f price of annual harvest shall be paid until the replacement farm is given. On the other hand if the lose is permanent, means if replacement land is not to be found, then the amount is to be in the form of replacement compensation "which shall be equivalent to ten times the average annual income he secured during the five years preceding the expropriation of the land." Read article 8 of same proclamation. The usual criticism forwarded against this approach is why should it be calculated based on the income secured before five years? Why not it to take or based on current market prices of produces.

By way of summary, what we can say is that expropriation is an important concept and practice related to land. In times like today where Ethiopian urban areas are under heavy massification and expansion the issue of expropriation would be a usual issue. There are unsettled and unfair practices like amount of compensation, the valuation methods we follow, and absence of role of courts which could be fertile areas for further research works.

8.3 Servitude

Introduction

Assume that you have a house in one area but for some reason that you have no way out to the next street? Or that your house must be connected to the water pipeline or the sewerage service? What will you do? Such related problems are solved by the concept of servitude. The solution is that the neighboring land must provide you or your house with a right of way, a right of passing over it the pipelines or the sewerage tubes. Servitude is defined as "a charge encumbering a land (servient tenement) for the benefit of another land (the dominant tenement.)" And the type of obligation or encumbrance made on the burdened land, that is the servient land is "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." Read article 1359 of the civil code.

This means the servient land is burdened with some obligation for the purpose of the advantage of the dominant tenement. This type of right is right in rem or real rights which are related to the properties. Hence, servitude may only accessorily cast upon the servient owner the burden to commit any act (1360). The burden of servitude shall transfer with the land irrespective of the change of the owner.

The purpose of discussing servitude is just to show that it is a limitation or restriction on one's land, in this case the servient property. Students are expected to explore the details of the system.

8.3.1 Means of creation and types of servitudes

Servitude can emanate from contract, will, the law or custom. In case of contractual servitude the agreement may be made between owner of the dominant and servient lands. On the other hand servitude that emanates from a will shall be made by the will of the deceased when it divides a property in to two or more parcels (1362.) Like any real rights servitude must also be made in writing. And in order for it to be defence against a third

party it must be registered. The third method of creation of servitude is acquisition by prescription. According to article 1366 an apparent servitude may be acquired by enjoyment for ten years. Apparent servitude is one which is visible and conceivable to a third party. Some times rights of way across another's land on foot or with animals can be determined by the custom of the place (1371.)

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, 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.

8.3.2 Termination of Servitude

The law provides examples of servitude rights in the code, although the list may not be exhaustive. Here are some of them.

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

Summary

What we have seen so far is a brief analysis of the different types of limitations or restrictions made on a real property. The rational behind such limitation may be

economic, social, or the master plan. In any case the use right of a certain immovable property may be limited because if health, public security, good neighborhood, town planning, etc. in most cases, the limitation is imposed on the use and enjoyment right while in case of expropriation it takes away the whole property. The reason why that me merged these two types of limitations are to show that private ownership is not an absolute one.

1. References

Books

Appraisal Institute (2001). *The Appraisal of Real Estate.* Appraisal Institute, Chicago, Illinois, 12th ed. ISBN 0-922154-67-8.

Campbell, H. B. (1991).*Black's Law Dictionary*. Sixth edition, ST. PAUL, MINN. WEST PUBLISHING CO. USA. ISBN 0-314-88536-6

Crummey, Donald (2000) *Land and society in the Christian kingdom of Ethiopia, from the thirteenth to the twentieth century*, AAu press.
De Soto, Hernando(2000) *The Mystery of Capital*

Enemark, S. (1997) Cadastral Systems-the Nordic Approach.

FIG (1991) Surveyor's Contribution to Land Management, Pub. No. 4.

FIG (1995) The FIG Statement on the Cadastre, Pub. No. 11.

FIG, UN(1999) Land Tenure and Cadastral Infrastructures for Sustainable Development

Hager, Richard (2005) *Introduction to Real Estate Law*

Kaufmann, Jurg, and Steudler, Daniel, (1998) Cadastre 2014: A Vision for Future Cadastral System, FIG

Kitay, M.G. (1985). *Land Acquisition in Developing Countries: Policies and Procedures of the Public Sector.* A Lincoln Institute of Land Policy Book. Oelgeschager, Gunn & Hain, Publishers, Inc. USA. ISBN0-89946-192-1.

K. W. Ryan, *An introduction to the Civil Law,* the law book of Australasia PTY Ltd, 1962.

Land Policies for Growth and Poverty Reduction: A World Bank Policy Research Report (2003)

Larsson, Gerhard, *Land Registration and Cadastral Systems*: Tools for Land Information and Management(2000), Stockholm

Markakis, J. (1974). *Ethiopia: Anatomy of a Traditional Polity*. Oxford: Oxford University Press.
Olsson, O. (1995) Cadastral Mapping in Sweden

Ostberg, T. (1997) Cadastral Systems in Developing Countries-Legal Options

Perrins Bryn (1995). *Introduction to Land Law,* Cavendish Publishing Limited, London ISBN 1-85941-029-4

Simpson, S.R. (1976) Land Law and Registration

Smith, R.J. (2006). *Property Law.* 5th edition. Pearson Longman, Longman Law Series. London. ISBN-13:978-1-40580-114-0. PP. 31-32.

Siedel G., Aalberts, R.J. & Cheezem, J.K (2003). *Real Estate Law,* Thomson, south west, 5th ed.

Swedish Land and Cadastral Legislation (2004), Stockholm

Thomas Kalbro, *Real Estate Planning and Development: Papers on Property Rights* (2007), 2nd ed., KTH, Stockholm

Zewde, B. (2000). *A History of Modern Ethiopia:1855-1974.* Addis Ababa University Printing Press, Addis Ababa. ISBN 0-85255-067-7. P 14.

Journals

Deininger, K. & Binswanger, H. (1999).The evolution of the World Bank's land policy: principles, experience, and future challenges. *In Research Observer*, Vol. 14, No. 2. Washington, DC, World Bank.

Hallowell, *The Nature and Function of Property as a Social Institution*, J. Leg. & Polit. Soc. 115 (1943)

Cohen, J.M. (1973). Ethiopia after Haile Selassie: The Government Land Factor. In *African Affairs*, Vol. 72, No. 289. P. 370.

Paul Brietzke **Land Reform in Revolutionary Ethiopia** *The Journal of Modern African Studies*, Vol. 14, No. 4. (Dec., 1976), pp. 637-660.

Farvacque Catherine and McAuslan Patrick, 1990, "*Reforming urban land policies and institutions in developing countries*", Washington DC USA.

Laws

The FDRE Constitution, Proc. No. 1, 1995.

The Civil Code of Ethiopia, Proc. No.165, 1960.

The Revised ANRS Rural Land Administration and Use Proclamation, Proc. 133/2006.

A Proclamation to provide for the Public Ownership of Rural Land. Proclamation 31/1975. *Negarit Gazeta Year 31*

A proclamation to provide for Government Ownership of Urban Land and Extra Houses, 1975, proc. No. 47, Neg. Gaz., year 34, no. 41

Federal Democratic Republic of Ethiopia Rural Land administration and Land Use Proclamation. (2005). Proclamation No. 456/2005. *Negarit Gazeta.* Year 11, No.44.

Re-Enactment of Urban Lands Lease Holding Proclamation. (2002). FDRE Proclamation No. 272/2002. *Negarit Gazeta.* Year 8 No. 19

Proclamation provided for Expropriation of Landholdings for Public Purposes and Payment of Compensation Proclamation (2005) proc. No. 455/2005, Neg Gaz. Year 11, No. 43.
Payment of Compensation for Property Situated on landholding expropriated for public purposes, Council of Ministers Regulations No. 135/2007.

Urban Planning Proclamation, Proc. No. 574/2008, Neg Gaz, Year 14 No. 29

Electronic sources

Gebresellasie, S.(2006). *Land, Land Policy and Smallholder Agriculture in Ethiopia: Options and Scenarios.* Paper prepared for the Future Agricultures Consortium meeting at the Institute of Development Studies 20-22 March 2006. P.4. Retrieved on Jan. 18, 2007 from http://www.future-agricultures.org/pdf file/SG_paper_2.pdf

Nega, B. and Gebre Sellasie, S. **Current Land Policy Issues in Ethiopia**. FAO CORPORATE DOCUMENT REPOSITORY. Retrieved on Jan. 12, 2007 from http://www.fao.org/docrep/006/y5026e/y5026e08.htm

Mersha, G. and Githinji, M.W. (2005). Untying the Gordian knot: The Question of Land Reform in Ethiopia. ISS/UNDP 'Land Policies, Poverty Reduction and Public Action' Research Project Rural Development, Environment and Populations Studies Group Institute of Social Studies (ISS). Retrieved on Jan. 12, 2007 from http://www.google.com.et/search?q=proclamation+31%2F75+of+ethiopia&btnG=%E1%8D%88%E1%88%8D%E1%8C%8D&hl=am

Rahmato, D. (1993). Agrarian Change and Agrarian Crisis: State and Peasantry in Post-Revolution Ethiopia. In *Journal of the International African Institute*, Vol. 63, No. 1. P. 40 Retrieved on May 5, 2006 from http://links.jstor.org/sici?sici=0001-9720%281993%3A1%3C36%3AACAACS%3E2.0.CO%3B2-X

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የፌዴራል ጠቅላይ ፍርድ ቤት
የሰበር ሰሚ ችሎት

አመልካች፡- ወ/ሮ ጮርፌ ገብረሕይወት

መልስ ሰጭዎች፡- 1. አበራሽ ዱባርጌ
2. አቶ ጌታቸው ነጋ

የመ.ቁ. 21448

የማይንቀሳቀስ ንብረት ውል፡- ሊከተለው ስለሚገባ ፎርም ውሉ በጽሁፍ አለመደረጉ ስለሚያስከትለው ውጤት ውሉ በፍርድ ቤት ወይም በሕዝብ አዋዋይ ዘንድ አለመመዝገቡ የፎርም ጥያቄ መሆን ስላለመሆኑ የሕጐች አተረጓጐም ልዩ ሕግ ከአጠቃላይ ሕግ ቅድሚያ ይሰጠዋል የሚለው የአተረጓጐም መርህ አፈጻጸም፡- የፍ.ብ.ሕ.ቁ. 1720, 1723, 2877 እና 2878፡፡

ይግባኙ የቀረበው የፌዴራል ከፍተኛው ፍ/ቤት በአመልካችና በመልስ ሰጭዎች መካከል የተደረገው የቤት ሽያጭ ውል ይፀናል በማለት የሥር ፍ/ቤት የሰጠውን ውሳኔ ስላፀናው ይህንኑ በመቃወም ነው፡፡

<u>ውሣኔ፡-</u> **የበታች ፍ/ቤቶች የሰጡት ውሣኔ ተሽሮአል፡፡**

1. **ከአንቀጽ** 1723/1/ **ይዘት ለመገንዘብ እንደሚቻለው፣የማይንቀሳቀስ ንብረትን የሚመለከቱ ውሎች በሕግ ፊት የሚፀኑ ለመሆን ሁለት መስፈርቶችን ማሟላት ይጠበቅባቸዋል፡፡ የመጀመሪያው መስፈርት ውሉ በጽሁፍ መሆኑ ሲሆን ሁለተኛው መስፈርት ውሉ በአዋዋይ ወይም በፍርድ ቤት መዝገብ ፊት መከናወን ነው፡፡ እነዚህ ሁለት መስፈርቶች የማይንቀሳቀስ ሀብት ባለቤትነትን ለማቋቋም ወይም ለማስተላለፍ የሚደረጉ ውሎችንም የሚመለከቱ ናቸው፡፡ የሽያጭ ውል የንብረት ባለቤትነት ከሚተላለፍባቸው መንገዶች አንዱ በመሆኑ**

በዚህ ድንጋጌ ውስጥ የሚጠቃለል ነው፡፡ በመሆኑም በዚህ ድንጋጌ መሠረት ቤትን የሚመለከት የሽያጭ ውል በሕግ ፊት የፀና የሚሆነው በጽሁፍ ሲደረግ ብቻ ሳይሆን ይኸው የጽሑፍ ውል ሥልጣን በተሰጠው አዋዋይ ክፍል ወይም በፍርድ ቤት የተከናወነ ሲሆን ነው፡፡

ፍርድ

ዳኞች፡- መንበረ ፀሐይ ታደሰ፣ፍስሐ ወርቅነህ፣መስፍን ዕቁበዮናስ፣ ሂሩት መለሰ፣ ተሻገር ገ/ሥላሴ፡፡

በዚህ መዝገብ የቀረበው ክርክር የማይንቀሳቀስ ሀብት/ቤት/ ሽያጭን የሚመለከት ነው፡፡ ለክርክሩ ምክንያት የሆነው ጉዳይ የተጀመረው በፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት የአሁን አመልካች አቅርበውት በነበረው ከወራሽነት ጋር የተያያዘ የንብረት ክፍፍል ክስ ነው፡፡ አመልካች አባታቸው አጋዝ ገ/ሕይወት ወልደየስ ከአንደኛዋ መልስ ሰጪ ጋር በጋብቻ አብረው ሲኖሩ ያፈሩትና በወረዳ 24 ቀበሌ 09 የሚገኝ፣ቁጥሩ 011 የሆነ ቤት የጋራ መሆኑን በመግለጽ የሚቹን የአባታቸውን ድርሻ ያካፍሎኝ የሚል ክስ ለፍርድ ቤት አቀረቡ፡፡ ፍርድ ቤቱም ተጠቃሹ ቤት የጋራ ነው በማለት አመልካች በቤቱ ላይ ግማሽ ባለድርሻ ናቸው በማለት ውሳኔ ሰጠ፡፡ ከዚህ በኋላ የአሁኑ 2ኛ መልስ ሰጪ አቶ ጌታቸው ነጋ ፍርድ ቤቱ የሰጠው ይኸው ውሳኔ የኔን ይዞታ የሚያጠቃልል በመሆኑ ውሳኔው ይለወጥልኝ በማለት በፍትሐ ብሔር ሥነ ሥርዓት ሕግ ቁ.358 መሠረት ያደረጉት በ1985 ፈፀምኩ የሚሉት የሽያጭ ውል ነው፡፡ 2ኛ መልስ ሰጪና ባለቤታቸው አጋዝ ገ/ሕይወት ወልደየስ በ23/03/85 በተፃፈ የሽያጭ ውል አንድ ጅምር ቤትና 400 ካሬ ሜትር ቦታ በብር 16,500.00 (አስራ ስድስት ሺህ አምስት መቶ ብር) የሸጡላቸው መሆኑን በመግለጽ ፍርድ ቤቱ ቀደም ሲል የሰጠውን ውሳኔ እንዲለውጥ ጥያቄ አቅርበዋል፡፡

የአሁን አመልካች 2ኛ መልስ ሰጪ ባቀረቡት መቃወሚያ ላይ መልስ እንዲያቀርቡ ተደርገው 2ኛ መልስ ሰጪ ገዛሁ የሚሉት ቤት የቤት ቁጥር ባልተገለፀና ደብተር ከሌለው ገዝቻለሁ ሊሉ እንደማይችሉ፣ክርክር በተነሳበት ቤት ላይ በ1985 ዓ.ም ጀምር ቤት ያልነበረ መሆኑን፣ ሟች ውሉ በተፈፀመበት ወቅት በእድሜ የገፉና

ሕመምተኛ ስለነበሩ ውሉ ተቀባይነት እንደሌለው፣ ተፈረመ በተባለው ውል ላይ ያለው የጣት ፊርማ የሚች አለመሆኑን፣የፍርድ አፈጻጸም መምሪያ መሃንዲስ በ1992 ክርክር የተነሳበት ቤት ማህደር በማስቀረብ የ2ኛ መልስ ሰጪ መሆኑን የሚያመለክት ሰነድ አለማግኘቱን መግለጹን በመዘርዘር ውሉ ተቀባይነት የለውም ሲሉ ተከራክረዋል፡፡ የአሁንዋ አንደኛ መልስ ሰጪ በሌላ በኩል ከባለቤታቸው ጋር በመሆን ውሳኔ ያረፈበትን ቤት በከፊል ለአሁን 2ኛ መልስ ሰጪ ሸጠው በውሉ መሠረት ለ2ኛ መልስ ሰጪ ያስረከቡ መሆናቸውን በመግለጽ ወደ ክርክሩ ቢገቡ ተቃውሞ እንደሌላቸው ገልጸዋል፡፡

ጉዳዩ የቀረበለት ፍርድ ቤት በ2ኛ መልስ ሰጪ በቀረበው የሽያጭ ውል ላይ ያለው ፊርማ የሚች የአጋዝ ገ/ሕይወት መሆን አለመሆኑን ለማጣራት ጉዳዩን ለፖሊስ የቴክኒክ ምርመራ ከላከ በኋላ ተመርማሪው የጣት ፊርማ በውስጡ በቂ ዝርዝር ማስረጃ የለውም በማለት ለመለየት መቸገሩን እንደገለፀለት በፍርዱ መዝግቧል፡፡ ይህ ሪፖርት ከቀረበለት በኋላ በግራ ቀኙ የቀረቡትን ምስክሮች ሰምቶ በ2ኛ መልስ ሰጪ የቀረበው የሽያጭ ውል ተቀባይነት ያለው ነው በማለት ቀደም ሲል የሰጠውን ውሳኔ በከፊል አሻሽሏል፡፡

የአሁን አመልካች በዚሁ ውሳኔ ቅር በመሰኘት ለፌዴራል ከፍተኛ ፍርድ ቤት ይግባኝ ቢያቀርቡም ፍርድ ቤቱ ይግባኙን ውድቅ አድርጐታል፡፡ የሰበር አቤቱታ የቀረበውም ይህን ውሳኔ ለማስለወጥ ነው፡፡ የአሁን አመልካች ባቀረቡት የሰበር አቤቱታ የስር ፍርድ ቤት የሽያጭ ውሉ ይፀናል ሲል የሰጠው ውሳኔ እንዲሻርላቸው ጠይቀዋል፡፡

መልስ ሰጪዎች የአመልካች የሰበር አቤቱታ እንዲደርሳቸው ከተደረገ በኋላ በዚህ ችሎት ፊት የቃል ክርክር ተካሂዷል፡፡

በዚህ በቀረበልን ጉዳይ መፍትሄ የሚፈልገው ዋነኛ ጥያቄ የማይንቀሳቀስ ሀብት ሽያጭ ሊከተለው የሚገባው የውል አጻጻፍ ፎርም ምን ዓይነት ነው የሚለው ነው፡፡ በዚህም መሠረት ይህ ችሎት የቤት ሽያጭን በሚመለከት በኢትዮጵያ ሕግ ማዕቀፍ

አግባብነት ያላቸውን ድንጋጌዎች ዳስሷል፡፡ የማይንቀሳቀስ ሀብትን የሚመለከቱ የአጻጻፍ ፎርም ድንጋጌዎች በፍትሐ ብሔር ሕጉ የተለያዩ ክፍሎች የሚገኙ በመሆናቸው የነዚህን ድንጋጌዎች ግንኙነትና ልዩነትም ተመልክቷል፡፡

ለዚህ ሰበር አቤቱታ መነሻ የሆነው ውሳኔ የተሰጠው የቤት ሽያጭ ውል በጽሑፍ መሆኑ በቂ ነው ከሚል አጠቃላይ መንደርደሪያ የተነሳ መሆኑ ከውሳኔው አጠቃላይ ይዘትን ለመገንዘብ ችለናል፡፡ ጉዳዩ የቀረበለት የመጀመሪያ ደረጃ ፍርድ ቤት ውሉ በእርግጥ ተፈጽሟል ወይስ አልተፈፀመም የሚለውን ጥያቄ ለማጣራት ማስረጃ እንዲቀርብ ከማድረጉ በስተቀር ውሉ በእርግጥ ሕጉ የሚጠይቀውን መስፈርት አሟልቷል ወይስ አላሟላም የሚለውን የሕግ ነጥብ አልተመለከተም፡፡ በመሆኑም ፍርድ ቤቱ የቤቱን ሽያጭ በሚመለከት በሁለቱ ወገኖች መካከል መስማማት ነበር ወይስ አልነበረም የሚለውን ፍሬ ነገር ጉዳይ ከማጣራት አልፎ በመካከላቸው መስማማት አለ እንኳን ቢባል ሕጉ የሚፈቅደውን ሥርዓት ተከትሎ የተፈጸመ ውል ነው ወይስ አይደለም የሚለውን ዋነኛ ነጥብ አልተመለከተም፡፡ ይህ የሰበር ችሎት ለፍርድ ቤቱ ቀርቦ የነበረውን የጣልቃ ገብነት ጥያቄ ለማስተናገድ ጣልቃ ልግባ ብሎ የጠየቀው 2ኛ መልስ ሰጪ በሕግ የሚፀና የሽያጭ ውል ነበረው ወይስ አልነበረውም የሚለው የሕግ ነጥብ ይበልጥ አግባብነት የነበረው መሆኑን ተገንዝቧል፡፡ ይህን የሕግ ነጥብ ለመፍታት ደግሞ ውሉ ላይ የነበሩ ምስክሮችን አስቀርቦ ከመስማት ይልቅ ሕጉ የሚስቀምጠው መስፈርት መሟላት አለመሟላቱን ማጣራት ትክክለኛው አካሄድ ነው፡፡ በመሆኑም ፍርድ ቤቱ በ2ኛ በአንድ በኩል በ1ኛ መልስ ሰጪ እና በሚቹ ባለቤታቸው በሌላ በኩል ተፈፀመ የተባለውን የቤት ሽያጭ ውል ሕልውና ጠቀሜታ መመርመር ነበረበት፡፡ በዚህ ረገድ የፌዴራል መጀመሪያ ደረጃ ፍርድ ቤት የተከተለው አሠራር ትክክለኛ አልነበረም፡፡

የፌዴራል መጀመሪያ ደረጃ ፍርድ ቤት በ2ኛ መልስ ሰጪ የቀረበውን መቃወሚያ መሠረት በማድረግ ቀድሞ የሰጠውን የአመልካች የወራሽነት ጥያቄ ያሻሻለው ኅዳር 23 ቀን 1985 ዓ.ም ተፈፀመ የተባለው የቤት ሽያጭ ውል የሚፀና ነው በማለት ነው፡፡ በመሆኑም የቤት ሽያጭ ውል የሚፀናው ምን ምን መስፈርት አሟልቶ ሲገኝ ነው የሚለውን ጥያቄ ከዚህ ቀጥሎ እንመለከታለን፡፡

ለመቃወሚያው መሰረት የሆነው የቤት ሽያጭ ውል በመሆኑ በቅድሚያ የፍትሐብሔር ሕጉ የቤትን ሽያጭ ውል በማስመልከት ያሰፈረውን ድንጋጌ እንመለከታለን፡፡ ቀጥሎ ደግሞ በሽያጭ ሕጉ ያለው መስፈርት ከአጠቃላይ የውል ሕግ ካለው መስፈርት ጋር ያለውን ግንኙነት እንመለከታለን፡፡ የቤት ሽያጭን አስመልክቶ የሚቀርቡ ክርክሮችን በአግባቡ ለማስተናገድ አግባብነት ያላቸውን የሕጉን ድንጋጌዎች እንደነገሩ ሁኔታ የአማርኛም የእንግሊዝኛም ትርጉም እንጠቅሳለን፡፡ የማይንቀሳቀስ ሀብት ሽያጭን በሚመለከተው የፍትሐብሔር ሕግ ክፍል የሚገኙት አንቀጽ 2877 እና አንቀጽ 2878 እንደሚከተለው ይደነግጋሉ፡፡

2877 የውል ፎርም

የማይቀሳቀስ ንብረት ሽያጭ ውል በጽሑፍ ሳይደረግ የቀረ እንደሆነ ፈራሽ ነው፡፡

2877 Form of contract

A contract of sale of an immovable shall be of no effect unless it is made in writing.

2878 በማይንቀሳቀስ ንብረት መዝገብ ስለመፃፍ

አንድ የማይንቀሳቀስ ንብረት ሽያጭ ውል ንብረቱ ባለበት አገር በሚገኘው በማይንቀሳቀስ ሀብት መዝገብ ካልተፃፈ በቀር በሶስተኛ ወገኖች ዘንድ ውጤትን ሊያስገኝ አይችልም፡፡

2878 Registration in registers of immovable property

The sale of an immovable shall not affect third parties unless it has been registered in the registers of immovable property in the place where the immovable sold is situated.

ከድንጋጌዎቹ ይዘት ለመገንዘብ እንደሚቻለው አንቀጽ 2877 በተዋዋዮቹ መካከል በሕግ የሚፀና ውል እንዲኖር መሟላት የሚገባውን መስፈርት የሚመለከት ሲሆን አንቀጽ 2878 በሌላ በኩል ይኸው ውል ሶስተኛ ወገኖችን በሚመለከት ውጤት እንዲኖረው መሟላት ያለበትን መስፈርት የሚመለከት ነው፡፡ በአንቀጽ 2877

መሠረት የሚፀና ውል አለ ለማለት በሻጩና በገዢው መካከል የጽሑፍ ውል መኖሩ በቂ ነው፡፡ ይህ መስፈርት ከውል ሕግ አጠቃላይ ድንጋጌዎች ተያይዞ ሲታይ በሻጭና በገዢ መካከል የተከናወነው የሽያጭ ውል በጽሑፍ እንዲሆንና ግዴታ ያለባቸው ተዋዋዮች እንዲፈርሙበትና ሁለት ምስክሮች እንዲያረጋግጡት የሚጠይቅ ነው/አንቀጽ 1727/፡፡ በተዋዋይ ወገኖች መካከል የፀና ውል እንዲኖር የዚህ መስፈርት መሟላት አስፈላጊነት እንደተጠበቀ ሆኖ አንቀጽ 2878 3ኛ ወገኖች ላይ ውጤት እንዲኖረው ለማድረግ ተጨማሪ የምዝገባ ሥርዓት መከናወን እንዳለበት ያስገነዝባል፡፡ ይህ የምዝገባ ሂደት መከናወን ያለበት ንብረቱ በሚገኝበት የማይንቀሳቀስ ሀብት መዝገብ መሆኑንም ድንጋጌው ይገልጻል፡፡

የማይንቀሳቀስ ሀብት ሽያጭን በሚመለከተው የፍትሐብሄር ሕጉ ክፍል ያለው የውል አፃፃፍ ፎርምን እና ምዝገባን የሚመለከተው መሠረታዊ የሕግ ማዕቀፍ ከላይ የተመለከተውን የሚመስል ሲሆን በውል ሕግ በጠቅላላ የሚገኘው መስፈርት ግን ከዚሁ የተለየ ነው፡፡ አግባብነት ያለው የሕጉ አንቀጽ 1723 ድንጋጌ የሚከተለው ይዘት ያለው ነው፡፡

<u>1723 የማይንቀሳቀሱ ንብረቶችን የሚመለከቱ ውሎች</u>

1. የማይንቀሳቀሱ ንብረቶችን ባለቤትነት ወይም ባንድ በማይንቀሳቀስ ንብረት ላይ የአላባ ጥቅም መብት ወይም መያዣ መብት ወይም የሌላ አገልግሎት መብት ለማቋቋም ወይም ለማስተላለፍ የሚደረጉት ውሎች ሁሉ በጽሑፍና በሚገባ አኳኋን በፍርድ ቤት መዝገብ ወይም ውል ለማዋዋል ሥልጣን በተሰጠው ፊት መሆን አለባቸው፡፡

2. እንዲሁም የማይንቀሳቀስ ንብረትን በሚመለከቱ የክፍያ ወይም የማዛወር ስምምነቶች ሁሉ በጽሑፍና በሚገባ አኳኋን በፍርድ ቤት መዝገብ ወይም ውል ለማዋዋል ሥልጣን በተሰጠው ፊት መሆን አለባቸው፡፡

<u>1723 Contracts relating to immovable</u>

(1) A contract creating or assigning rights in ownership or bare ownership on an immovable or an usufruct, servitude or mortgage of an immovable shall be in writing and registered with a court or notary.

(2) Any contract by which an immovable is divided and any compromise relating to an immovable shall be in writing and registered with a court or notary.

ከአንቀጽ 1723/1/ ይዘት ለመገንዘብ እንደሚቻለው በርካታ ውሎች በሕግ ፊት የሚፀኑ ለመሆን ሁለት መስፈርቶችን ማሟላት ይጠበቅባቸዋል፡፡ የመጀመሪያው መስፈርት ውለ በጽሑፍ መሆኑ ሲሆን ሁለተኛው መስፈርት ውለ በአዋዋይ ወይም በፍርድ ቤት መዝገብ ፊት መከናወን ነው፡፡ እነዚህ ሁለት መስፈርቶች የማይንቀሳቀስ ሀብት ባለቤትነትን ለማቋቋም ወይም ለማስተላለፍ የሚደረጉ ውሎችንም የሚመለከቱ ናቸው፡፡ የሽያጭ ውል የንብረት ባለቤትነት ከሚተላለፍባቸው መንገዶች አንዱ በመሆኑ በዚሁ ድንጋጌ ውስጥ የሚጠቃለል ነው፡፡ በመሆኑም በዚህ ድንጋጌ መሠረት ቤትን የሚመለከት የሽያጭ ውል በሕግ ፊት የፀና የሚሆነው በጽሑፍ ሲደረግ ብቻ ሳይሆን ይኸው የጽሑፍ ውል ሥልጣን በተሰጠው አዋዋይ ክፍል ወይም በፍርድ ቤት የተከናወነ ሲሆን ነው፡፡ የአንቀጽ 1723 ድንጋጌ አንቀጽ 2778 ካስቀመጠው መስፈርት የተለየ ተጨማሪ መስፈርት ያካተተ መሆኑ ድንጋጌዎቹን በማነፃፀር መገንዘብ የሚቻል ነው፡፡ የሽያጭ ሕጉን በተለይ የሚመለከተው ድንጋጌ የሚጠይቀው የውሉን በጽሑፍ መከናወን ብቻ ሲሆን የውል ሕግ በጠቅላላው ግን የጽሑፍ መስፈርት እንደ አንድ አስፈላጊ መስፈርት እንጂ እንደ ብቸኛ መስፈርት አይወስደውም፡፡ በመሆኑም በሽያጭ ሕግ የሚፀና የማይንቀሳቀስ ንብረት የሽያጭ ውል ለማከናወን የሚጠየቀው መስፈርት በውል ሕግ ከሚጠየቀው መስፈርት የተለየ ነው፡፡ ይህ ልዩነት አንድ የሽያጭ ውል በሕግ ፊት የሚፀና መሆን አለመሆኑን ለመወሰን ገዢው ድንጋጌ መሆን ያለበት የትኛው ነው የሚለው ጥያቄ እንዲነሳ ያደርጋል፡፡ ይህን ጥያቄ ከመመልከታችን በፊት በአንቀጽ 1723 የሰፈረው ተጨማሪ መስፈርት በአንቀጽ 2878 ከሚገኘው የምዝገባ መስፈርት

ጋር ያለውን ግንኙነት፣ተመሳሳይነት እና ልዩነት በአጭሩም ቢሆን መመልከት አስፈላጊ ነው። የአንቀጽ 1723/1/ የእንግሊዝኛው ትርጉም ''registration'' የሚለውን ቃል ከመጠቀሙ በስተቀር በሁለቱም ድንጋጌዎች መካከል ያለው ይዘት ሰፊ ልዩነት ያለው ነው። በመጀመሪያ ደረጃ አንቀጽ 2878 ምዝገባ እንዲከናወን የሚጠይቀው ውሉ በሶስተኛ ወገኖች ላይ ውጤት እንዲኖረው ለማድረግ ሲሆን አንቀጽ 1723/1/ አዋዋይ ወይመ ፍርድ ቤት ፊት መቅረብን የሚጠይቀው በተዋዋዮች መካከል በሕግ ፊት የሚፀና ውል እንዲኖር ለማድረግ ነው። በመሆኑም የአንቀጽ 2878 መስፈርት መሟላት አለመሟላት ሦስተኛ ወገኖችን የሚመለከት ሲሆን የ1723/1/ መስፈርት መሟላት አለመሟላት ግን በተዋዋዮች በራሳቸውም ላይ የውል መኖር ወይም አለመኖር ውጤት የሚያስከትል ነው። በሁለተኛ ደረጃ፣በአንቀጽ 1723/1/ የሚከናወነው ተግባር የሚፈፀመው አዋዋይ ወይም ፍርድ ቤት ፊት በመቅረብ ሲሆን በአንቀጽ 2878 ያለው የምዝገባ ተግባር የሚከናወነው ንብረቱ በሚገኝበት ቦታ ነው። በአንቀጽ 1723/1/ የሚከናወነው ሂደት ተዋዋዮች አዋዋይ ፊት ቀርበው መዋዋላቸውን የሚያረጋግጡበት(authentication) ሂደት ሲሆን በ2878 የሚከናወነው ምዝገባ ሌሎች ሰዎች አንድን የማይንቀሳቀስ ንብረት በማስመልከት የተከናወኑ ሕጋውያን ተግባራትን (juridical acts) ማወቅ እንዲችሉ ተግባራቱ ንብረቱ ባለበት ማህደር እንዲያያዙ በማድረግ የሚከናወን ነው። አዋዋይ ፊት ቀርቦ የመዋዋሉ መስፈርት ውሉ በተፈፀመበት ቦታ በሚገኝ አዋዋይ/ፍርድ ቤት በመቅረብ መከናወን የሚችል ሲሆን በ2878 መሠረት የሚከናወን ምዝገባ ግን የግድ ቤቱ በሚገኝበት ቦታ ባለ መዝገብ በማስገባት የሚከናወን ነው።

ከዚህ ቀጥሎ የምንመለከተው የአንድን የማይንቀሳቀስ ንብረት የሽያጭ ውል በሚመለከት ገዢው ድንጋጌ የትኛው ነው የሚለው ነው። አሁን ከቀረበልን ጉዳይ አንፃር ዋናው ጥያቄ የአንቀጽ 2877ን የጽሑፍ መስፈርት ያሟላ ሰነድ በአንቀጽ 1723/1/ መሠረት አዋዋይ ወ ይም ፍርድ ቤት ፊት ሳይደረግ ቢቀር በሕግ ፊት እንደሚፀና ውል ይቆጠራል ወይስ አይቆጠርም የሚለው ነው። በዚህ ረገድ ሽያጭን የሚመለከተው የሽያጭ ሕግ ድንጋጌ አንድ መስፈርት ብቻ በቂ ነው ሲል ጠቅላላ የውል ሕግ ሁለት መስፈርት አስፈላጊ ነው ስለሚል በሁለቱ ድንጋጌዎች መካከል ያለውን አለመጣጣም ለመፍታት የሽያጭ ሕግ ልዩ ሕግ ስለሆነ አጠቃላይ ጉዳዩችን

የሚመለከተው በውል ሕግ መሠረት መዳኘት አለበት የሚለውን አማራጭ እንደ መጀመሪያ አማራጭ መፍትሄ መውሰድ ይቻላል፡፡ ይህ አማራጭ የተለመደውን ልዩ ሕግ ከአጠቃላ ሕግ ቅድሚያ ይሰጠዋል(the special prevails over the general) የሚለውን የሕግ ትርጉም መርህ የሚከተል ነው፡፡ ይህን መርህ በመከተል ጉዳዩን ካስተናገድን የማይንቀሳቀስ ንብረት ሽያጭ በጽሑፍ እስከተከናወነ ድረስ የጽሑፍ ውሉ አዋዋይ ፊት ወይም ፍርድ ቤት ፊት ባይቀርብም ተዋዋዮቹን በሚመለከት የፀና የሽያጭ ውል ለመመስረት በቂ ነው ወደሚለው መደምደሚያ እንደርሳለን፡፡

በሌላ በኩል ይህ የአተረጓጎም ስልት ተግባራዊ የሚሆነው ሁለት የሕግ ድንጋጌዎች የሚጋጩ ሲሆንና ሁለቱም ድንጋጌዎች አንድ ላይ ተግባራዊ ማድረግ ሳይቻል ሲቀር ብቻ ተፈፃሚነት የሚኖረው የአተረጓጎም ዘይቤ በመሆኑ ይህን ዘይቤ ለመምረጥ በቅድሚያ በሁለቱ መካከል ሊታረቅ የማይችል ቅራኔ መኖሩን ማረጋገጥ ይጠይቃል፡፡ የሽያጭ ሕግ በሚፀና የሽያጭ ውል ጽሑፍ ያስፈልጋል ማለቱ፣ የውል ሕግ ለሚፀና የማይንቀሳቀስ ንብረት ሽያጭ ውል ከጽሑፍ በተጨማሪ አዋዋይ ፊት መከናወኑ አስፈላጊ መሆኑን ከሚገልፀው ጋር ይጋጫል; ሁለቱን ማጣጣምስ አይቻልም; የሕጉ አንቀጽ 2877 የሽያጭ ውል በጽሑፍ ካልሆነ በቀር አይፀናም ከማለት ሌላ በአዋዋይ ፊት መከናወን አያስፈልግም የሚል ድንጋጌ የለውም፡፡ በመሆኑም የሽያጭ ሕግ በውልም ሕግ ለተጠቀሰው የጽሑፍ አስፈላጊነት አፅንኦት ከመስጠቱ ሌላ የመረጋገጥን (authentication) አስፈላጊነት አላስቀረም በማለት የሁለቱን ድንጋጌዎች ላይ ላዩን የሚታይ ቅራኔ (apparent contradiction) ማስታረቅ ይቻላል፡፡

ከዚህ በተጨማሪ የፍትሐ ብሔር ሕጉን አደረጃጀት፣ ዓላማና ወጥነት ግምት ውስጥ ማስገባት አሁን ለተያዘው ጉዳይ የሚበጅ ነው፡፡ የፍትሐ ብሔር ሕጉ አደረጃጀት በተለያዩ መጽሐፎች የተከፋፈሉት ርእሰ ጉዳዬች አንድን ዓላማ የሚያሳኩ፣ ከተመሳሳይ መሰረተ ሃሳብ የሚንደረደሩና እርስ በርሳቸው የሚደጋገፍ መሆናቸውን የሚያሳይ ነው፡፡ ይህ አደረጃጀት ሕጐቻቸውን በኮድ መልክ የሚያደራጁ አገሮች (codified system) የተለመደና የሕግ ሥርዓቱ መገለጫ ባሕርይ ነው፡፡ በመሆኑም በተለያዩ የሕጉ ክፍሎች በሚገኙ ድንጋጌዎች መካከል ቅራኔ ከማፈላለግ ይልቅ

ተደጋጋፊ ሆነው የጋራ ዓላማ የሚያሳኩበትን የሕግ ትርጉም መሻት የሕግ ባለሙያዎች ሊመርጡት የሚገባ የሕግ አተረጓጎም ዘይቤ ነው፡፡ ስለዚህ ልዩ ሕግ ጠቅላላ ዓላማ ካለው ሕግ ቅድሚያ ይሰጠዋል የሚለውን ዘይቤ ተከትሎ ውሳኔ ላይ ከመድረስ በፊት በእርግጥ የማይታረቅ፣ ምክንያታዊ የሆነ፣በላቀ የሕግ አውጪው ፍላጐት የተደገፈ ግጭት መኖሩን ማረጋገጥ ያስፈልጋል፡፡

ይህ ችሎት ለማይንቀሳቀስ ንብረት ሽያጭ የውል ሕግ አንቀጽ 1723/1/ የተለየና ጥብቅ መስፈርት ያስቀመጠበት ምክንያት ለአተረጓጐሙ መነሻ መሆን ያገባዋል ከሚል መንደርደሪያ ይነሳል፡፡ የፍትሐ ብሔር ሕጉ መነሻ መሠረተ ሀሳብ በመርህ ደረጃ ለውል መመስረት የተዋዋዮች ስምምነት ብቻ በቂ ነው የሚል ሆኖ ሳለ /በአንቀጽ 1719/ የማይንቀሳቀሱ ንብረቶችን በሚመለከት ግን ጠበቅ ያለ ፎርም እንዲከተሉ ይደነግጋል፡፡ የማይንቀሳቀስ ንብረትን በሚመለከት ተዋዋይ ወገኖች ስምምነታቸውን በጽሑፍ ከማስፈራቸው በተጨማሪ አዋዋይ ፊት ወይም ፍርድ ቤት ፊት ቀርበው እንዲፈጽሙ መደንገጉ ሕጉ ለማይንቀሳቀስ ንብረት ልዩ ትኩረት መስጠት መፈለጉን የሚያመለክት ነው፡፡ ይህ የሕግ አውጪው ፍላጐት የማይንቀሳቀስ ንብረት ለአንድ አገር በአጠቃላይም ሆነ ለአንድ ግለሰብ በተለይ ካለው ጠቀሜታ ጋር የተያያዘ ነው፡፡የማይንቀሳቀስ ንብረት ካለው ማህበራዊ ጠቀሜታ አንፃር ውሎቹ ሥልጣን ባለው አካል እንዲረጋገጡ በመጠየቅ ረገድ የኢትዮጵያ ሕግ የተከተለው ሥርዓት ከሞላ ጐደል ሁሉም የሕግ ሥርዓት የተቀበለው ነው፡፡ የማይንቀሳቀሱ ንብረቶችን በማስመልከት የሚፈፀሙ ውሎች ከሌሎች ውሎች ለየት ባለ ሁኔታ ሥልጣን በተሰጠ አካል ቀርበው እንዲረጋገጡ ማድረግ በአብዛኞቹ የሕግ ሥርዓቶች የሚፈፀም አካሄድ ነው፡፡ የማረጋገጡ (authentication) ሂደት ተዋዋዩቹ ትልቅ ጠቀሜታ ባለው ንብረት ላይ የሚፈጽሙት ውል ፈቅደው የሚፈጽሙት መሆኑን ከማረጋገጥ ባሻገር፣ የሚሸጠው ሰው ባለንብረት መሆኑን ለማጣራት፣ ውሉ የተፈፀመበትን ትክክለኛ ቀን ለማረጋገጥ እድል በመስጠት የንብረት መብትን ለመጠበቅ፣ የውሎችን ዋስትና(security of legal transactions) ለማረጋገጥ ትልቅ ጠቀሜታ ያለው ነው፡፡ የፍትሐ ብሔር ሕግ አንቀጽ 1723/1/ የማይንቀሳቀስ ንብረት ላይ የሚከናወኑ ዓበይት ሕጋውያን ተግባራት በተለይም ባለሀብትነትን (ownership)፣ አላባን (usufruct) እና

የአገልግሎትን መብት (servitude) ለማቋቋም ወይም ለማስተላለፍ የሚደረጉ ውሎች የተጠቀሰውን ፎርም እንዲከተሉ የግድ ይላል፡፡ በዚህ አንቀጽ ውስጥ ከተጠቀሱት መብቶች ባለቤትነት ከሁሉም የሰፋ መብት ነው፡፡ ባለቤትነትን ማቋቋምም ሆነ ማስተላለፍም አላባን ወይም የአገልግሎት መብትን ከማቋቋም የበለጠ ጠቀሜታ እና ጥንቃቄ እንደሚያስፈልገው እሙን ነው፡፡ ባለቤትነትን ማስተላለፍ ከሌሎች በአንቀጽ 1723/1/ ከተጠቀሱት ሕጋውያን ተግባራት የበለጠ ጥንቃቄና ጥበቃ የሚሻና የሚገባው እንደመሆኑ ሕግ አውጪው የባለቤትነት መብትን ለሚያስተላልፍ የሽያጭ ውል አላባን ወይም የአገልግሎት መብትን ለማቋቋም ከሚደረጉ ውሎች ያነሰ ጥበቃ ያደርጋል ተብሎ አይገመትም፡፡ የሕጉን አንቀጽ 2877 በተናጠል በመመልከት የሽያጭ ውል በጽሑፍ ብቻ መደረጉ በቂ ነው፣አዋዋይ ወይም ፍርድ ቤት ፊት መከናወን አያስፈልገውም ወደሚል መደምደሚያ መድረስ ከሁሉም በላይ ጥንቃቄ የሚያስፈልገው የባለቤትነት ማስተላለፍ ጉዳይ ልል በሆነ ፎርም እንዲከናወን ማድረግን የሚያስከትል በመሆኑ ከሕጉ አጠቃላይ ዓላማ ጋር የሚጣጣም ነው አንልም፡፡ በመሆኑም የማይንቀሳቀስ ንብረትን በሚመለከት የሚደረጉ የሽያጭ ውሎች በጽሑፍ ብቻ ሳይሆን አንቀጽ 1723/1/ በሚጠይቀው መሠረት አዋዋይ ወይም ፍርድ ቤት ፊት መከናወን ይገባቸዋል፡፡ ከላይ እንደተጠቀሰው በአንቀጽ 1723/1/ የሰፈረው የማረጋገጥ (authentication) መስፈርት ውሉ በሦስተኛ ወገኖች ላይ ውጤት እንዲኖረው ብቻ መከናወን ያለበት ሳይሆን ውሉ በተዋዋይ ወገኖች መካከል ላይ ውጤት እንዲኖረው ጭምር መከናወን ያለበት ነው፡፡ የማይንቀሳቀስ ንብረትን የሚመለከት የሽያጭ ውል የአንቀጽ 1723/1/ መስፈርት የማይሟላ ከሆነ በሕጉ አንቀጽ 1720/1/ መሠረት ውሉ እንደረቂቅ ብቻ ሆኖ ከሚቆጠር በቀር የሚፀና ውል አይሆንም፡፡ የፍትሐ ብሔር ሕጉ አንቀጽ 1720/3/ የውልን ጉዳይ የሚመለከቱ የማስታወቂያ ድንጋጌዎች አለመፈፀም ውሉን ፈራሽ አያደርገውም በማለት እንደሚደነግግ ተመልክተናል፡፡ ሆኖም ይህ ድንጋጌ ውሉ ከተመሠረተ በኋላ መፈፀም የሚገባቸው የማስታወቂያ ክንውኖችን የሚመለከት እንጂ ለውሉ መመስረት አስፈላጊ የሆኑትን ጉዳዮች የሚመለከት አይደለም፡፡ ከላይ እንደተገለፀው የቤት ሽያጭ ውል አዋዋይ ፊት ከመከናወኑ በተጨማሪ በአንቀጽ 2878 መሠረት ንብረቱ ባለበት ቦታ የሚገኝ መዝገብ ውስጥ መጻፍ አለበት፡፡ የሕጉ አንቀጽ 1720/3/ የሚመለከተው በአንቀጽ 2878 የተጠቀሰውን ዓይነት ውሉን

የማስታወቅ ጉዳይ እንጂ ለውሉ ህልውና መሠረት የሆነውን በአዋዋይ ወይም ፍርድ ቤት ፊት ውል የመፈረሙን ጉዳይ አይደለም። የሽያጭ ውል በአንቀጽ 1723/1/ መሠረት አዋዋይ ፊት መከናወን ያለበት የሚፀና ውል በተዋዋዩች መካከል ለመመስረት እንዲቻል እንጂ የማሰታወቂያ ድንጋጌዎችን ግዴታ ለመወጣት አይደለም። በመሆኑም በአንቀጽ 1723/1/ የተጠቀሰው አዋዋይ ወይም ፍርድ ቤት ፊት ውል የመፈፀም ሁኔታ እንደ ማስታወቂያ ግዴታ ተቆጥሮ ሁኔታው ባይሟላ ውሉ የውሉን ሕልውና የሚነካ አይደለም ሊባል አይገባውም።

አሁን በቀረበልን ጉዳይ 2ኛ መልስ ሰጪ አለኝ የሚሉት የሽያጭ ውል በጽሑፍ መሆኑ ተረጋግጧል። ሆኖም የሽያጭ ውሉ በአዋዋይ ፊት ያልተከናወነ በመሆኑ ውሉ መፈፀሙ ራሱ አከራካሪ ሆኖአል። ሕግ አውጪው ቤትን የሚመለከቱ መሠረታዊ ውሎች በ1723/1/ የተጠቀሱ ውሎች አዋዋይ ፊት እንዲከናወኑ የሚፈልገውም የኋላ ኋላ የሚነሱትን የዚህ ዓይነት አለመግባባቶች ቀድሞውኑ ለማስወገድ ነው። ውሉ በአዋዋይ ፊት ወይም በፍርድ ቤት ቀርቦ ያልተረጋገጠ መሆን ሲገነዘብ ፍርድ ቤቱ ውሉን እንደረቂቅ በመቁጠር ነበሩ የተባሉትን ምስክሮች በመስማት በሕግ ሕልውና የሌለው ውል ተቀባይነት እንዲያገኝ ማድረጉ መሠረታዊ የሕግ ስሕተት ነው።

የአሁን 2ኛ መልስ ሰጪ በፍትሐ ብሔር ሕግ አንቀጽ 1723/1/ መሠረት አዋዋይ ፊት ወይም ፍርድ ቤት የተረጋገጠ የቤት ሽያጭ ውል ባለማቅረቡ ፍርድ ቤቱ ቀደም ሲል የሰጠውን ውሳኔ ለመቃወም የሚያበቃ ሕጋዊ መብት የለውም። ፍርድ ቤቱም ይህን መሠረት በማድረግ የቀረበለትን ኑዛዜ በከፊል ማሻሻሉ ትክክለኛ አይደለም። በዚህም ምክንያት የመጀመሪያ ደረጃ ፍርድ ቤት የሰጠው ውሳኔ ሊሻር የሚገባው ነው። የከፍተኛው ፍርድ ቤት ይህን ስሕተት ማረም ሲገባው የቀረበለትን ይግባኝ አያስቀርብም በማለት መዝጋቱ ትክክል አልነበረም።

ው ሳ ኔ

1. የፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት በመዝገብ ቁጥር 09823 ሐምሌ 14 ቀን 1996 የሰጠው ውሳኔ እንዲሁም የፌዴራል ከፍተኛ ፍርድ ቤት በመዝገብ ቁጥር 33751 ሰኔ 14 ቀን 1997 የሰጠው ውሳኔ ተሽሯል፡፡
2. የአሁንዋ አመልካች በወረዳ 24 ቀበሌ 09 በቤት ቁጥር 011 ላይ እኩል ባለድርሻ ናቸው በማለት በ16/3/92 ተሰጥቶ የነበረው ውሳኔ የአሁን 2ኛ መልስ ሰጪ በ23/3/85 ፈፀመኩ በሚለው የሽያጭ ውል ምክንያት ሊሻሻል አይገባም ብለናል፡፡ ይህ ፍርድ ዛሬ ሚያዝያ 30 ቀን 1999 ዓ.ም ተሰጠ፡፡