ETHIOPIAN LAND LAW

Textbook

Daniel Weldegebriel Ambaye



Institute of Land Administration

Bahir Dar University

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Daniel Weldegebriel Ambaye

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Preface

This textbook is about land law in Ethiopia. Land law is the least investigated and known area of law in the Ethiopian legal system. There has been an attempt to prepare a land law textbook for the Ethiopian law schools by the Ethiopian Justice and Legal Research Institute few years back, where the author was also participated. Yet, land law in Ethiopia is a very dynamic area of law and it is prepared afresh in a different way for the students of the Institute Land Administration.

It is hoped that many people starting from land and law students and researchers to judges and practitioners will benefit from this material. For practical reasons, certain aspects of land law (such as real property registration) are not included in this book. This and the other issues will be definitely addressed in the second edition of the work.

Many people contributed to the completion of this work starting from encouragement to editing the English and the substance. Bahir Dar University in general and the Institute of Land Administration (ILA) in particular are instrumental in the preparation of this textbook. The preparation and publication of this textbook is covered by ILA. The Institute is supported by the Swedish International Development Agency (Sida). Thanks BDU, ILA and Sida.

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About the Author

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Abbreviations

FDRE: Federal Democratic Republic of Ethiopia
EPRDF: Ethiopian People's Revolutionary and Democratic Front
Derg: Military Junta assumed power during the 1974 Ethiopian Revolution.
ANRS: Amhara National Regional State
CC: Ethiopian Civil Code
RLAUP: Rural Land Administration and Use Proclamation
SNNPNRS: Southern Nations and Nationalities Peoples National Regional State
BDU: Bahir Dar University
ILA: Institute of Land Administration
Woreda: Administrative sub-district
Kebele: the last administrative arrangement

ETHIOPIAN LAND LAW

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INTRODUCTION

The purpose of this textbook is to examine and demonstrate rules and laws applicable to land in Ethiopia. Land is one form of property and hence it is also natural to discuss briefly about the nature and the philosophical backgrounds of property. Land law examines a wide range of subjects starting from simple concept of land to concepts of rights in land and practices relating to land such as land register, cadastre, mortgage and lease. Although inherently part of any standard land law textbook, this material will not delve into issues of land registration and cadastre since they will be treated under different course.

Land has and remains of great importance to Ethiopia. In recent years, land law has been offered as a separate subject in Ethiopian law schools in general. With the establishment of the Institute of Land Administration at Bahir Dar University, land law was initially treated as part of Civil Law. However, because of its central place in the program, land law was set as a separate course during the revision of the curriculum. In this course, land law addresses rules and regulations related to the ground and fixtures such as building and other natural and manmade erections. In many countries, land is considered as real property and includes land and any fixtures permanently attached to the ground. Under Ethiopian law, land refers only to the ground (see details under chapter one) but for the purpose of this course, land law is understood as real property law

Land law is of great importance to society. In a wider sense, all human activity in one way or another is dependent on the Real Property. This is the case regardless of a direct exploitation of the natural resources like woods and other natural assets or the direct or indirect use and possession of a building. It is possible to say that the system of land law also called real estate law in common law tradition and in some civil law tradition, is a fundamental prerequisite for a well- functioning market economy

This material contains five chapters that are related to land. The first chapter discusses basics of land and property laws. Many are confused about property, ownership, and property rights, and this chapter will clear the confusion. Of great importance, the nature and scope of ownership in Ethiopia is addressed.

The second chapter is about the nature of rural land laws in Ethiopia. The rural land laws are relatively recent. This chapter briefly describes land tenures of the past and focuses on a legal analysis of the current rural land laws. The current federal arrangement of the country enables regional governments to develop local rural land legislation that compliments the federal proclamation. This provides regions, in some areas of the law, discretion to deviate from considerations necessary in their local area. This chapter also examines the pastoral land tenure environment in Ethiopia, which is outside of the jurisdiction of the formal system.

Urban land law is investigated in chapter three. Urban land was privately owned in Ethiopia until the nationalization of all land by the Derg in 1975. Although urbanization is a recent phenomenon, it has an impact on the nature of landownership in urban areas. This chapter, after a brief discussion on urbanization patterns in Ethiopia, analyses the urban land nationalization legislation of the socialist era. Details of the current lease system will also be addressed. After examining the advantages and disadvantages of the lease system, the discussion will test and analyze the current lease proclamation.

The discussion on urban land continues in chapter four addressing housing policies and legislations. In this chapter, housing policy of the current government, urban housing tenancy laws, and condominium housing rules are investigated.

The final chapter, chapter five, is dedicated to the discussion of different land use restrictions imposed by law. In this chapter, different types of land use restrictions are addressed starting with nuisance rules, planning laws, environmental concerns and other concepts such as expropriation and servitude. Expropriation is an important area of land law that deserves a detail treatment. But, since in this program it is to be considered as a separate course it is provide only a modest examination.

CHAPTER

1

INTRODUCING OWNERSHIP OF LAND

Introduction

Most people consider the words "property" and "ownership" as synonyms. Although this might have some truth, they also have many differences. In this chapter, key concepts in land law such as property, ownership, private ownership, land, and the different types of land ownership regimes are defined and explained. This chapter also introduces the nature and scope of land ownership in Ethiopia.

1.1 Ownership of Land Property

1.1.1 What is Property?

Of the legal subjects, property is the least known and investigated area of law. Indeed, scholars argue that it is impossible to define private property. And yet, in this section, a working definition to the subject is provided and explored. Property is "everything that has material or moral value for human beings... and guaranteed and enforced by law."[1] For legal scholars, "property" refers to entitlements to resources protected by formal legal institutions.[2] Property in the sense of legally protected entitlements comes in a variety of forms. The typical legal property right would be full title to a parcel of land or an object like a car, real property and personal property (or "chattels"), respectively. But, the law also affords legally enforceable claims to intangible resources. Intellectual property, chiefly, patents, copyrights, and trademarks, are regarded as property despite the fact that they are not a right to any physical thing. Intellectual property rights are rights in intangibles. Debt can and is owned as is the same with an account at a bank or other financial institution. These too are property rights in intangibles.

The concept of property is the concept of rules governing access to and material resources. Something is regarded as a material resource if it is a material object capable of satisfying some human need or want. At all times and places with which we are familiar, material resources are scarce relative to the human demands. Scarcity, as philosophers from Hume to Rawls have pointed out, is a presupposition of all sensible talk about property.[3] If this assumption were to

fail (if resources were abundant), then there would be no need for property systems aiming at allocation of resources. As Harold Demsetz from the School of Law and Economics noted, "In the world of Robinson Crusoe, property rights play no role."[4] Scarcity of resources creates conflict among people, when they compete for exclusive control. What we lack in this system is a method of "allocation" that determines who is to have access to which resource, for what purpose, and when. The system of rules, otherwise known as property, is a way of solving that problem.

Property law is therefore designed to allocate and determine the distribution and access of resource materials. These resource materials may be corporeal or incorporeal, or movable or immovable. In other words, property law governs the relations of people in respect of a specific material object such as land. Unlike some expressions described by lay persons, property law does not govern the relationship between things and people; it does not govern the relationship between a person and an object, but between and among people concerning the use, control and disposal of an object.

1.1.2 What is Ownership



There is nothing which so generally strikes the imagination and engages the affections of mankind, as the right of property; or that 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'[5]

Property provides different types of rights to the holder of an object. So, property right is not the object itself, but the right one gets as a holder of the object. There are many types of rights emanating therefrom, ownership being the most complete and important form of property right. In legal history, it was the Romans who developed the nature of ownership, although they failed to define it. The Romans were not concerned with theoretical definitions. Johnston in his valuable book, *Roman Law in Context*, observed that, "Ownership (*dominium*) in Roman law is difficult to define, and the Romans themselves did not trouble to do this. The best approach seems to deal with the main ingredients of ownership and from that allow the meaning of the term to emerge."[6] The attributes of ownership, according to the Roman law, are *usus*-the right to use the thing, *fructus*- the right to benefit of the profit offered by a thing, *abusus*-the right to dispose of the thing either physically (destruction), or from a legal point of view (alienation-transfer gratuitously or for consideration).[7] Ownership is conceived as an "absolute" right in most Roman law influenced countries, while in the Anglo American system, ownership is treated as a "bundle of rights" where it is possible to constitute property right over the same thing by multiple bodies. While in the "absolute" ownership model it is not possible to think of multiple owners (there is only one owner or joint owners), in the "bundle of rights" theory a specific object may be owned by one person but its use and possession may be transferred to others.

In reality, though, the two differences are exaggerated and the commonality is rather bigger. In the first place, ownership is and has never been absolute; there is and was always restriction on its use and enjoyment. Secondly, even in Roman law influenced countries, ownership is not something indivisible. The use and enjoyment right can be transferred to others by way of rent/ lease or usufruct while the bare owner keeps the sole right of disposition. A mortgagee or creditors in general, may have prevailing right over the owner regarding the disposition of the property under default. By understanding and appreciating the commonality of both theories, these days, many writers prefer to define ownership as a bundle of rights.

But what is ownership? Most writers and legislations do not define it. Yet, some have attempted to define it. According to Jeremy Waldron, "Ownership expresses the abstract idea of an object being correlated with the name of some individual, in relation to a rule which says that society will uphold that individual's decision as final when there is any dispute about how the object should be used."[8] The contents of this definition are discussed in more detail below.

First, there must always be a rule that regulates the distribution and access of property rights, and it is based on this rule that a person's rights and duties as owner may be determined. Ownership rights can truly exist where the prevailing legal system protects and enforces such rights. Without legal recognition, private property rights would be unenforceable. Noting this fact, Jeremy Bentham had once said: "Property and Law are born together, and die together. Before laws were made there was no property; take away the laws, and property ceases."[9] The second element in the definition is that society will respect the individual's choice of the use of the thing. The individual will have a final say on the fate of the object.

Honoré conceives ownership as "the greatest interest in a thing which mature systems of law recognize."[10] By examining existing legislations one can find a similar expression in the renowned French Civil Code. The Code under article 544 describes "Ownership" as "the right to enjoy and dispose of things in the most absolute manner, provided they are not used in a way prohibited by statutes or regulations." Similarly, the Ethiopian Civil Code under article 1204 describes ownership as "the widest right that may be had on a corporeal thing;" and "such right may neither be divided nor restricted except in accordance with the law." In other words, of all property rights a person has over an object, ownership is the widest and most complete one; and yet, this right may be restricted for different reasons by law. This conception is indeed universal as is inferred from the following quotation from Honoré:

> There is indeed a substantial similarity in the position of one who 'owns' an umbrella in England, France, Russia, China and any other modern country one may care to mention. Everywhere the 'owner' can, in the simple uncomplicated case...use it, stop others using it, lend it, sell it, or leave it by will. Nowhere may he use it to poke his neighbour in the ribs or knock over his vase. Ownership, *dominium, propriete, Eigentum* and similar words stand not merely for the greatest interest in a particular system but for a type of interest with common features transcending particular systems."[11]

What does it mean when it is said that ownership is the widest right? Property right can be established over other minor rights such as lease, mortgage and possession. All these provide to the lessee, mortgagee or possessor a benefit or protection. For example, the lessee will have an exclusive right to use and enjoy the property in his/her possession for the period of time under the agreement. The mortgagee has a priority over other creditors to sell the property in the event of defaulted. Comparing to the owner, all these subsidiary rights are inferior. Although the list and depth of rights given to the owner are different from country to country, it is interesting to examine the detailed list provided by Honoré.

Honoré suggests eleven "incidents" associated with ownership.[12] Please note that Honeré's intention is not to provide a list of complete features of ownership interests, but offers basic features of ownership of a mature legal system.

- *The right to possess:* The right to possess, namely, to have exclusive physical control of a thing, or to have such control as the nature of the thing admits, is the foundation on which the whole superstructure of ownership rests. It may be divided into two aspects, the right (claim) to be placed in exclusive control of a thing and the right to remain in control, namely, the claim that others should not without permission interfere. Unless a legal system provides some rules and procedures for attaining these ends it cannot be said to protect ownership.

- *The right to use:* On a narrow interpretation, 'use' refers to the owner's personal use and enjoyment of the thing owned. The right (liberty) to use the thing at one's discretion has rightly been recognized as a cardinal feature of ownership, and the fact that, certain limitations on use also fall within the standard incidents of ownership does not detract from its importance.

- *The right to manage***:** The right to manage is the right to decide how and by whom the thing owned shall be used. This right depends, legally, on a cluster of powers, chiefly powers to license acts which would otherwise be unlawful and powers to make contracts: the power to admit others to one's land, to permit others to use one's things, to define the limit of such permission, to contract effectively in regard to the use and exploitation of the thing owned.

- *The right to the income:* To use or occupy a thing may be regarded as the simplest way of deriving an income from it and enjoying it. A tax obligation may, for instance, be imposed on rent-free use or occupation of a house by considering it as a form of income. Though it would be even more inconvenient and unpopular to assess and collect such a tax, the same principle must extend to moveables. Income in the more ordinary sense (fruits, rents, profits) may be thought of as a surrogate of use, a benefit derived from forgoing the personal use of a thing and allowing others to use it for reward; as a reward for work done in exploiting the thing; or as the brute product of a thing, made by nature or by others.

- *The right to the capital:* The right to the capital consists in the power to alienate the thing and the liberty to consume, waste, or destroy the whole or part of it. Clearly, it has an important economic aspect. The liberty to destroy need not be unrestricted. But a general provision requiring things so far as they are not consumed by use to be conserved in the public interest would be inconsistent with the liberal idea of ownership. Most people do not, in any case, willfully destroy permanent assets. Hence, the power of alienation is the more important aspect of the owner's right to the capital of the thing owned. This comprises the power to alienate during life or on death, by way of sale, mortgage, gift, or other mode.

- *The right to security*: An important aspect of the owner's position is that he should be able to look forward to remaining owner indefinitely if he so chooses and if he remains solvent. His right to do so may be called the right to security. Legally, this is in effect, an immunity from expropriation, based on rules which provide that, apart from bankruptcy and execution for debt, the transmission of ownership is consensual. However, a general right to security, availing against others, is consistent with the existence of a power in the state to expropriate or divest. From the point of view of security of property, it is important that when expropriation takes place adequate compensation should be paid. But a general power to expropriate, subject to paying compensation, would be fatal to the institution of ownership…unless its application is restricted to some public purpose activities.

- *The right to transmitting*: It is often said that one of the main characteristics of the owner's interest is its duration. What is called unlimited duration comprises at least two elements: (i) that the interest can be transmitted to the holder's successors, and so on *ad infinitum*, and (ii) that it is not certain to determine at a future date. No one, as Austin points out (Austin, Jurisprudence (4th ed, 1873), p. 817), can enjoy a thing after he is dead, except vicariously, so that, in a sense no interest can outlast death. But an interest which is transmissible to the holder's successors is more valuable than one which stops when he dies.

- *The absence of any term on possession:* This is the second part of what is called 'duration'. The rules of a legal system usually provide for determinate, indeterminate, and determinable interests. The first are certain to determine at a future date or on the occurrence of a future event which is itself certain to occur. In this class come leases for however long a term, copyrights, etc. Indeterminate interests are those, such as ownership and easements, to which no term is set. Should the holder live forever, he would, barring insolvency, etc., be able to continue in the enjoyment of them forever. Since human beings are mortal, he will in practice only enjoy them for a limited period, after which the fate of his interest depends on its transmissibility. Again, given human mortality, interests for life, whether of the holder or another, are indeterminate. The notion of an indeterminate interest in the full sense, therefore, requires the notion of transmissibility, but if the latter were not recognized, there would still be value to the holder in the fact that his interest was not due to determine on a fixed date or on the occurrence of some contingency, like a general election, which is certain to occur sooner or later. …

> **…**On reflection, it will be found that what I have called indeterminate interests are really determinable. The rules of legal systems always provide for some contingencies such as bankruptcy, sale in execution, or state expropriation on which the holder of an interest may lose it… The notion of indeterminate interests can only be saved by regarding the purchaser in insolvency or execution, or the state, as continuing the interest of the previous owner. This is an implausible way of looking at the matter, because the expropriability and executability of a thing is not an incident of value to the owner, but a restriction on the owner's rights imposed in the social interest

- *A duty to prevent harm:* An owner's liberty to use and manage the thing owned as he chooses is subject to the condition that not only may he not use it to harm others, but he must prevent others using the thing to harm other members of society.

- *The liability to execution:* Of somewhat similar character is the liability of the owner's interest to be taken away from him for debt, either by execution for a judgment debt or on insolvency. Without such a general liability the growth of credit would be impeded and ownership would be an instrument by which the owner could freely defraud his creditors. This incident, therefore, which may be called executability, constitutes one of the standard ingredients of the liberal idea of ownership. It is a question whether any other limitations on ownership imposed in the social interest (eg. Tax and expropriation) should be regarded as among its standard incidents.

- Some sort of expectation: when rights that other people have in X come to the end of their term or lapse for any reason, those rights will, as it were return naturally to him

Honeré's list is the types of rights an owner of a property may have. Obviously, as compared to a lessee, mortgagee, usufructuaree etc, the owner has more rights. That is why ownership is described as the "widest" and "most complete" type of right.

1.1.3 What is Land?

English Property Act of 1925, section 205(1)(ix)

Land includes land of any tenure, and mines and minerals . . . buildings or parts of buildings and other corporeal hereditaments; also a manor, an advowson, and a rent and other incorporeal hereditaments, and an easement, right, privilege, or benefit in, over, or derived from land.[13]

Land is the source of all material wealth; it provides us with all our needs to sustain. It is also a major economic asset from which people and nations get significant profit. In the past and even today, in many countries, land has been considered as an important social asset where the status and prestige of people is determined. Because of such a high importance given to land, as compared to other properties, movables, the legal protection accorded to land is always strict in nature. And land law is concerned with land, rights in or above, and the processes whereby those rights and interests are created and transferred. This course is designed to treat these kinds of properties.

Different disciplines define "land" differently, in a manner that suits their objectives. In legal documents, it is considered as the surface of the earth and any fixtures on it, such as buildings, fence, tree plants, and improvement to the land. The English Land Act definition is, of course, too broad that includes also the rights, which is not common in continental legal systems.

A hybrid of the continental and the common law, the Swedish Land Code, divides land into "property units" and each "property unit" includes a building, conduit, fence, and other facility constructed in or above for permanent use; standing trees and other vegetations; natural manure; and easements destined to serve the land."[14] Articles 552-554 of the French Civil Code also shows that ownership of land "involves ownership of what is above and below it." Unless restricted by statutes, the owner of land is considered as owning also the minerals inside the land and the airspace above the land.[15] The common feature of the above examples is that the term "land" signifies not only the surface of the earth, the ground, but also things found beneath the surface and fixtures above, and sometimes the airspace, above the ground. Of course, the details of ownership beneath and above the ground may be limited by different legislations. But fixtures, such as trees and buildings are always considered as part of the land.

THE LAND DICOTOMY IN ETHIOPIA

As mentioned above, in most legal systems land signifies the surface of the earth and fixtures on the land. Under Ethiopian law, property is either movable or immovable (art. 1126 of the Civil Code, here under cited as CC.)[16] Land and buildings are considered as immovables (art. 1130 CC). Hence, unlike other legal systems such as English, Swedish or French, where "land" includes "the ground and any fixture on the ground", the Ethiopian Civil Code treats "land" and "buildings" as two separate types of immovables. Whether a building should be considered as part of the land is not as clearly mentioned as is done in the above foreign laws. Ethiopian law follows the French Civil Code article 518 which says "land and building are immovable by their nature." But, as we already saw above, in another section of the law, the French Civil Code declares that ownership

of surface of land means ownership of all things above and below the land. In Ethiopia, though, there is no such kind of encompassing provision in the Civil Code. On top of that, today, as envisaged under Article 40(3) & (7) of the Federal democratic Republic of Ethiopia Constitution (hereinafter FDRE Constitution), ownership of land is vested in the state and the people, while ownership of building is given to the individual. It means, the land surface and the building over the land are owned by two different bodies. On the other hand, unless and until they are separated from the land, trees and crops are considered as part of the land (art. 1133 CC). In other words, "land" signifies the ground and other fixtures to the land such as trees, grass, crops and so on, excepting buildings and other similar erections.



In Gorfe Gebre Hiwot v. Aberash Dubarge and Getachew Negga (Civ. File No. 21448) the Ethiopian Cassation Court held that a contract of sale of an immovable can only be valid if the two requirements as to form are satisfied; these formal requirements being that it be made in writing, and that it be registered with a court or notary.

Although land and buildings are one form of property (immovables), because of the importance attached to them, some formality requirements are needed for their possession and transferability. One such example is that ownership of immovable property cannot be claimed based on mere possession of the thing. Owners need to be registered as owners and should show certificate of ownership of the land or the building, and any transaction (arising out of contract or will) on the immovable should be made in writing and registered before a court of law or notary (read arts. 1185, 1195, 1723, 2878 CC.) For good understanding, read the case of *Gorfe Gebre Hiwot v. Aberash Dubarge and Getachew Negga* (Civ. File No. 21448)[17]

1.1.4 Régimes of Land Ownership

- How do we determine ownership of things in general, and land in particular?
- Who should own the grazing land and forest land?
- Who should own the roads, mountains and rivers?
- What about farming plots or residential lands?

There is no as such uniformity around the world in allocating these properties. Depending on the legal systems of different countries, some of the land properties are owned privately, while others are held in ownership either by the state or the community. Yet, there is another one which may be open to all, namely, open access property. As Stevenson noted, the physical characteristics of the natural resource, social circumstances, technology change, or population growth dictate one of the above forms of property ownership solution.[18] The idea is to own some land in one form (e.g. private, common or state) may be more appropriate perhaps from

ensuring economic efficiency, conservation/management of resource, avoidance of conflict (ensuring justice) or other reasons.

For instance, to hold grazing land in common may be wise than using it privately (to avoid conflict and ensure justice) or in open access (to conserve the resource). Assume the grazing land in a village is owned by one individual while other villagers have no access or alternative food for their cattle. People will feel that the arrangement is unjust and they may resort to violence to gain access. As Anthony Scott noted, "The mere existence of the institution of private property is not sufficient to ensure the efficient management of natural resources; the property must be allocated on a *scale* sufficient to ensure that one management has complete control of the asset."[19] As argued by most property right theorists, the cost of preserving the asset (grazing land) may be higher than the benefit gained from it, and this makes the ownership unworthy.

On the other hand, if the land is open to all, then the result will be the immediate depletion and exhaustion of the resource, in this case the grass. In a word, there is always some kind of rationality behind some form of property ownership arrangement. In the following sub-topic, the nature of the above four types of property regimes is examined. Based on the current FDRE Rural Land Administration and Use Proclamation (RLAUP) and the Civil Code, we shall also identify what kind of land falls under which regime in Ethiopia.

Private Ownership

Private ownership is an ownership arrangement in which full and exclusive rights to decide about the property are given to a single person (natural or artificial) or group of persons. The owner shall have the right to use, possess, receive income from it, or alienate it gratuitously or for consideration. As mentioned earlier, in countries following the Roman law system, the usual way to describe ownership rights is of *usus, fructus*, and *abusus*. Modern writers add one important element to these rights, the right to exclude others from using and possessing the property. Based on the legislation of a country, the list of rights and duties given by Honoré may be used to describe private ownership right.

The institution of private ownership has many supporters and opponents. Chief among those who oppose the institution of private ownership are Marxists. Their argument is based on the injustice of property distribution: private ownership of the means of production causes increasing concentrations of wealth in the hands of a few. And the solution, as depicted in the quotation, taken from the Communist Manifesto, is the total abolition of private ownership and replacing it with communism or an egalitarian form of property. Communism expects from each according to his ability and to each it gives according to his needs.

You are horrified at our intending to do away with private property. But in your existing society, private property is already done away with for nine-tenths of the population; its existence for the few is solely due to its nonexistence in the hands of these nine-tenths. You reproach us, therefore, with intending to do away with a form of property the necessary condition for whose existence is the non existence of any property for the immense majority of society. In one word, you reproach us for intending to do away with your property. Precisely so; that is just what we intend. (Marx and Engels, Communist Manifesto, p. 98)

The French nineteenth century anarchist, Proudhon, declared private property as "theft" since, according to him, unjust holding and accumulation of private property gives undeserved power to the owner over others. Hence, for him every interest on loan, a rent on a house, or the mere exclusion of others from using one's property is a robbery made against the original common ownership of property.[20]

The same position was also held by the influential European philosopher Rousseau, who considered private property as a trick by the rich and powerful over the poor and claimed private property enslaves.

> *"The first man who, having enclosed a piece of land, got the idea of saying 'This is mine,' and found people simple enough to believe him, was the real founder of civil society. What crimes, what wars, what murders, what miseries and horrors would someone have spared the human race who, pulling out the stakes or filling in the ditch, had cried out to his fellows, "stop listening to this imposter. You are lost if you forget that the fruits belong to everyone and the earth belongs to no one."*[21]

For him, man was born free but property systems enslave and freedom is lost.

In contrast, there are other dominant philosophical beliefs which glorify the institution of private property as superior to other modes of property regimes. Economists generally tend to consider private property as a *sine qua non* for economic development[22] and the absence of its protection as a reason for under development.[23] One earlier example is that of Aristotle's *Politics.* Aristotle asks, "What is the proper system of property for citizens who are to live under an ideal constitution?...Is it a system of communism or one of private property?"[24] Aristotle had foreseen the problem of the Marxist arrangement of property as mentioned above, by saying: "Accusations against those who enjoy or get a lot but toil little will necessarily arise from those who toil more but take less."[25] Such social conflict is avoided, according to Aristotle, if each person gets his own plot of land. To this, he adds the suggestion that the net product of privately owned land is likely to be greater than that of commonly owned land since man cares more for what is his own rather than for a common one:

> *People care most about what is their own and less about what is common, or only as much as it touches them. For, among other things, they are more neglectful of what is common because they think someone else is looking after it, as happens, for instance, in domestic chores, where many servants sometimes give worse assistance than fewer would.*[26]

Aristotle's view is obviously based on human behavior in which people are less careful about what is held in common since they think that other would take care of it.

A similar conclusion, but based on a different premise, is reached by modern property right theorists. One such modern economic theorist is Harold Demsetz. He argues that people give less care to what is common property since the cost of taking care is higher than the benefit gained. The primary function of private property becomes a guiding incentive to achieve a greater "internalization of externalities."[27] In this way, individuals are made to bear the costs and benefits of their own activities and to absorb the costs of inflicting spillover effects upon others. According to Demsetz, if land is held in common, it is likely that each user will not feel the full impact in terms of the benefits but particularly the costs of its use. When, for example, many individuals use a forest to produce wood, no one has an incentive to increase the forest population (e.g. by replanting when a tree is cut) since the benefits of his doing so will redound to others as well as himself. In other words, while he internalizes (suffers from or is burdened with) the costs of planting trees, it will be others who will reap the benefit. If this is the case, any rational person will not invest his money and time for the care of the forest land, unless he is sure that the benefit of his doing is by far greater than the cost he incurred; or at least that he is sure that others will also do the same. In the absence of such assurance, the common property will be depleted quickly and will face what Hardin called "The Tragedy of the Commons", a situation where common or open access resources exhausted quickly by unregulated overexploitation.[28] That is why privatizing the land is preferable, since individuals in the expectations of the benefit that they would gain in the future will care for and conserve the land resource today.

The experiences of many countries concerning land show that farming plots, residential plots, buildings, easements (streets to serve the land property) are owned privately. In western countries, forest land, small lakes, streets and rural roads are subject to private ownership.

Private Holdings in Ethiopia

What about land properties categorized under private ownership in Ethiopia?

As we shall see here under, the current governing land legislations in Ethiopia are mainly the FDRE RLAUP 456/2005 and the Urban Land Lease Proclamation 711/2011, which are in place to govern rural and urban lands respectively. Besides, the FDRE Constitution and the Ethiopian Civil Code are relevant. Based on the above review, in Ethiopia the ground (surface earth) is not subject to private ownership (see art. 40(3) of FDRE Constitution.) Land belongs to the state and the people, and is not subject of sale and exchange. This means that it is futile to classify the land paradigms in Ethiopia from ownership perspective. Rather, the land right provided, as termed in the RLAUP, is known as "holding right." It is less of ownership in that it lacks the power of sale and exchange[29] (details are presented in the next chapters.)

Based on the above information, when we look into the FDRE RLAUP 456/2005, we find under article 2(11) "private holdings" referring to private farming plots given to peasant farmers, pastoralists and semi-pastoralists. It is not clear about the private plots to be given to pastoralists, though. But, the

assumption is that the plots may be those which the pastoralists will use for settlement or housing, rather than for grazing, which is communal in nature. Private land plots provided for peasants in the highlands are used for farming and housing. In urban area, land that is acquired through lease or government grant is considered as a private possession.

Communal Property

As opposed to private ownership, communal ownership is a property right allocation made in the interest of group of users. Here, there is no single individual in a privileged position to control and have command over all of the resources. In a system of communal property, rules governing access to and control of material resources are organized on the basis that each resource is, in principle, available for the use of every member alike. As noted by Clark and Kohler, "The defining characteristic of communal property is that every member of the community has the right not to be excluded from the resource."[30] In principle, the needs and wants of every person are considered, and when allocative decisions are made they are done on the basis that is in some sense fair to all.[31]

The most usual types of properties owned in common are grazing lands, forest lands, fisheries, irrigation systems, underground water, water wells, village roads, neighborhood streets, and so on. The common feature of such properties is that they are not destined to an exclusive use of an individual person; every member of the community has them equally. The other feature is that most of them are exhaustible, if left to anybody as open or free access. Even in case of allocation of such properties to specific groups, the resources may be quickly depleted and individual members may not be encouraged to conserve unless the use and enjoyment is regulated by an internal sets of rules.

For all practical purposes, communal property is like private property in that it "has a definable set of users who have the right to exclude others from possession, use, and enjoyment of benefits. Excluded persons have the duty to observe the rights of the included users to extract the resource…Under communal property, the right to use, manage, income, immunity from expropriation, the power to bequeath, and the absence of any term of ownership rights all often reside to varying degrees with the individual or the group."[32] The only difference between private ownership and communal ownership is that while in the former case the owner can sell his property, in the latter case, owner members may not be able to transfer their right by way of sale.

Furthermore, in a well-functioning communal property situation, the users have certain rights and duties among themselves with respect to possession, use, and enjoyment of benefits from the resource. For example, in a regulated irrigation system, all participants have the right to divert water for a specific time. They also have a duty to use their assigned rate and cannot interfere with the others' water flow. Although the internal rules governing the use of the common property are prepared by the members themselves, their enforcement or implementation may need state intervention.

There are well known communal properties around the world that have survived for many generations. The forest land of the Swiss Alps and the renowned Spanish irrigation systems are good examples. By studying the success and failure stories of different systems, the Nobel Laureate, Elinor Ostrom, developed an eight "design principles" that characterize all the robust "common pool resource" (CPR), otherwise known as communal property, around the world. These designs are influential and have been applied in many later studies. The idea of a sustainable and robust communal property must fulfill the following requirements.[33]

1. *Clearly defined boundaries:* individuals or households who have rights to withdraw resource units from the CPR must be clearly defined, as must the boundaries of the CPR itself; members and their common property must be identifiable.
2. *Congruence between appropriation and provision rules and local conditions:* appropriation rules restricting time, place, technology, and/or quantity of resources units are related to local conditions and to provision rules requiring labor, material, and/or money. This means clear internal rules and regulation are needed to determine the use and enjoyment of the property; how much to take, for how much time, using what technology, and so on. This is in a bid to ensure equity in benefiting.
3. *Collective-choice arrangement:* most individuals affected by the operational rules can participate in modifying the operational rules. The rules and regulations should not be as such static and rigid; members must able to modify and change them when the need arise. This enables the system to continue for longer periods.
4. *Monitoring:* monitors, who actively audit CPR conditions and appropriator behavior, are accountable to the appropriators or are the appropriators. There must be a control and audit system that ensures that members are using it in accordance with the rules and the auditors should report to the general members.
5. *Graduated sanctions*: appropriators who violate operational rules are likely to be assessed graduated sanctions by other appropriators, officials accountable to appropriators, or both. The idea is if one member violates the rules and, say, takes for his use more than his quota, then any member, or a guard or village elder may penalize him. Strong CPRs are those who have effective enforcement mechanism.
6. *Conflict resolution mechanisms*: appropriators and their officials have rapid access to low-cost local arenas to resolve conflicts among appropriators or between appropriators and officials. In other words, member users must develop a conflict resolution mechanism that enables them to resolve disputes locally by themselves without the need to go to court.
7. *Minimal recognition of rights to organize*: the right of appropriators to devise their own institutions is not challenged by external governmental authorities. This means, government should first allow members to develop their own internal rule and then give recognition to the rules. It is like any contractual agreements made between and among people.

8. *Nested enterprises*: appropriation, provision, monitoring, enforcement, conflict resolution, and governance activities are organized in multiple layers of nested enterprises. Speaking otherwise, the members need to be organized in the form of association and if possible get legal personality.

Communal Land in Ethiopia

What type of land properties are considered as communal in Ethiopia? Once again when we see the FDRE RLAUP 456/2005, under article 2(12) it says, "communal holding" means "rural land which is given by the government to local residents for common grazing, forestry and other social services." It seems the government has also the right to take back what it gives as common land and convert it to private holdings (see Art. 5.3). This list is just an illustrative one and what are given are only examples. The government may allocate additional land as communal one, if the local society needs it for some social or economic activities. Thus, land necessary for religious ceremonies, cultural festivities, or social gatherings may be permanently allocated to the village community. Besides grazing and forest land, one may also add irrigation systems (although the irrigable land may be private holding), water wells (especially in pastoralist areas), small rivers, hills, etc to the list of communal lands. What about religious sites such as churches or mosques? Can we say the land is communal property? Who owns, for example, a church in a village area? Is it the local community or the Ethiopian Orthodox Church located at Addis Ababa? Think also as to who funds the churches? Who pays the salary? Who appoint the administration? Such things may help to determine its ownership.

⚖ *In Jijiga St. Michael church v. Adanech Mengistu, Cass. Civ. No. 22469, dated 5-11-99 E.C., The Federal Supreme Court Cassation Division decided that a church was a public (community) property destined for public use and as per article 1578 of the Civil Code no need of registration to prove ownership of the church by the people.*
Supreme Court Decision, Vol. 6, pp. 173-75

State Ownership of Land

To describe "state ownership" of land**,** terms such as "public ownership", "collective ownership" or "government ownership" are employed. Under the 1960 Ethiopian Civil Code, the term "public domain" which is not common in literatures is used. In any case, in this material, they shall be used interchangeably.

In order to give additional explanation on the subject, it is proper to see the usage of the terms in the literature. The terms "state or government ownership" seems to denote the ownership of land by a political body, a central or municipal level, while "public or collective ownership" seems to signify the ownership of land by all the people or by the local community. It does not

mean, however, that the above definitions are fully acceptable; one has to rely on the legislation of the respective country to decide the actual meanings. Some writers on property and land ownership use the above terms interchangeably.[34] Equally, others give different meanings. For example, the Chinese Land Law treats "collective ownership" and "state ownership" differently. Collective is understood as a village land committee, and farmers are forced to lease farm lands from these committees:

> *According to the 1982 Constitution, natural resources such as waters and streams, forest, mountains, grassland, and wasteland are state-owned, unless defined by law as collectively owned... By contrast, suburban and rural land (including the 'private plots' for villagers), are collectively owned unless state ownership has been proved. Urban land is by definition state-owned; there can be no urban land owned by the collective. The structure of land ownership seems relatively clear: in principle, natural resources and urban land are state-owned, while suburban and rural lands are collectively owned.*[35]

In any case, what is important is to know that material resources are answerable to the needs and purposes of society as a whole, irrespective of the fact that the decision maker is the central government, a special national committee, or a village committee. The assumption is that even though it is the state which owns the land, the objective is to use it in the best interest of society in general. For example, in many countries urban land owned by city municipalities or local governments is used to benefit society, such as the provision for low cost housing.

Practically, there are no real differences between the dichotomy of the "state or government" on one hand and the "collective or public" ownership of land on the other. The argument is that since the government, as a political body, puts itself as the representative of the people, the power of administration and allocation of land property is most of the time vested in the hands of the state, and hence the state becomes the sole decision maker. If, for example, we look into the land ownership system in former socialist countries, land was owned by the collective or the public, but the state was the real decision maker; citizens had use right only.[36] Compare articles 40(3) and 89 (5) of the FDRE Constitution where the "state" and the "people" are considered as two joint owners of land and natural resources in Ethiopia.

Public ownership of land is closely dependent on political ideology, and it may vary from comprehensive state ownership (nationalization) through to selective, and perhaps temporary, state or municipal involvement. In Western countries, this kind of land ownership mainly started after the introduction of communism. In all the former socialist countries, all means of production, including land and natural resources, were nationalized and put under state/public ownership. Individuals were given only inheritable use rights. In non-socialist Western countries, influenced by the socialist ones, governments started to collect more urban lands in a bid to benefit society such as the provision of low cost houses, stabilization of urban land price, and generation of urban revenue for urban infrastructure. A higher level of public intervention in land ownership occurs in those countries where government or municipal bodies are heavily involved in the land development process. The trend was that in countries, which were led by socialist political parties (e.g. Sweden for long time and England under the labor party), state

ownership of land has been huge. According to Kivell, during the government of the Labor party in England, most urban land spaces were transferred to state ownership. Outside of Britain, many other European countries operate systems of public land ownership for development purposes. In German cities, for example, both municipal and provincial governments maintain land banks for future urban development. In Scandinavia and The Netherlands, municipal authorities are extensively involved in land ownership, often acting as a middle man between farmers and developers. In Stockholm, a widespread system of municipal leasehold has long been in use, and as a result the city now owns three-quarters of the land within its boundary.[37]

Besides urban bare land, highways, urban main streets, urban main sewerage systems are held by municipalities. Parks and walking paths may be open to the public and are considered in some countries as open access (open to all) and in others as public/state properties. Further, mountain ranges, forest lands, natural resources, minerals, rivers, lakes, unoccupied rural vast lands may also be owned by the state.

State Lands in Ethiopia

The FDRE RLAUP identifies, under article 2(13), "forestlands, wildlife protected areas, state farms, mining lands, lakes, rivers and other rural lands," as state holding lands. In this case, "other rural lands" means all land which is not held privately or communally. State land in Ethiopia means, land held by Federal or Regional government or by city municipalities. Rural land held by Regional governments is administered by woredas, while urban land is administered by respective city/town administrations. This means woredas and city administrations have the power to give and take land. The Federal Government holds vast tracts of land found in rural areas of the country, especially the low lands, destined to be transferred for large scale agricultural investments.

All urban land which is not occupied by private lessees is owned by the government/ municipality. Although it is not mentioned in the current lease proclamation, one can assume that all city streets, sewerage systems, parks, highways, and empty spaces must belong to the state.

One question that may be raised is that what can be done if the new land proclamations (urban and rural) fail to address all the issues? Definitely, we go to the Civil Code. It must be stressed that the land legislations must be considered as supplements or modifications to the Civil Code., Since the Civil Code is not clearly abrogated, as far as its provisions are not contrary to the later land legislations, it must continue its function. The concept of state property, both in the Civil Code and the current land legislations is basically similar. Based on this argument, we may apply the Civil Code provisions on "public domain" to determine the situation of public/state lands in urban areas.[38]

The Ethiopian Civil Code under articles 1444-1459 presents the nature and status of public lands in urban areas. To see the details, all [urban] lands owned by the state or administrative bodies are to be treated as "private lands" or as "public domains" (1444). Although the provision lacks clarity, it must be understood as follows. All land owned by the state (centrally or through its various branches) is treated either as "private" or as "public". "Private" means the state organ that owns (holds in today's situation) land will have the right to exclude others from access and use. For example, take state business enterprises (such as, banks, insurances, transport companies, telecom companies or energy companies) or administrative bodies (such as ministry of agriculture, ministry of finance etc) may happen to hold land and buildings. There is no reason that they should make their property open to all, and such land holdings will be treated as private holdings and governed by the civil code part that governs private property.

Art. 1444. - Provisions applicable to State property.

1) *Property belonging to the State or other administrative bodies shall be subject to the provisions relating to property privately owned.*
2) *Such property shall be subject to the provisions of this Section where it forms part of the public domain.*

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.*

On the other hand, there are other types of state lands whose use and enjoyment are put at a "public disposal" or by their nature they are "destined to a public service". These are the type of land or buildings that are termed as "public domain," and the law tries to define their character. Since the definition of their character is not enough to identify them, the code, under article 1446, provides an example of such properties: roads, streets, canals, railways; seashores, port installations and lighthouse; buildings specially adapted for public services such as fortifications and churches. Thus, roads, streets, railways, canals are examples of properties put at public disposal.

ARTICLE 130 of the 1955 Revised Ethiopian Constitution

(A) The natural resources of, and in the sub-soil of the Empire including those beneath its waters, are State Domain. (B) The natural resources in the waters, forests, land, air, lakes, rivers and ports of the Empire are sacred trust for the benefit of present and succeeding generations of the Ethiopian people. The conservation of the said resources is essential for the preservation of the Empire. The Imperial Ethiopian Government shall accordingly take all such measures as may be necessary and proper, in conformity with the Constitution, for the conservation of said resources. (C) None of the said resources shall be exploited by any person, natural or juridical, in violation

of the principles of conservation established by Imperial Law. (D) All property not held and possessed in the name of any person natural or juridical, including all land in escheat, and all abandoned properties, whether real or personal, as well as all products of the sub-soil, all forests and all grazing lands, water courses, lakes and territorial waters are State Domain.

Open Access

Although not commonly found in Ethiopia, in some countries there is a fourth type of property regime known as "open access". In this type of arrangement, every person has access to use and enjoy the property. Neither other members of society nor the state can prohibit a user from entering or accessing the property. Good examples of this use are public parks, walking paths, and access to lake or sea shores where every person has the right to enter or walk by without any form of restriction. In its pure form, the rights to air and sun light may be considered as open access properties. The problem is that, unless it is dictated by law, it is not easy to differentiate open access land from public land. In the latter case as well, people are allowed to have access although there is, in theory, the possibility that the state can restrict the access and use. Take for instance, a park in a city. Who owns and operates it? Are there restrictions? Can a person challenge restrictions imposed by, say, a municipality? Or, is it open to all members of society? Who finances it?

Open access property differs from public/state property in two ways. First, in the case of open access property, the facility is not necessarily provided by or owned by the state, or by any other public body. So, for example, a public right of way (which is open access property) may lie over private land just as it may over the pavement of a road provided by the highways authority.[40] The fact that every member of the public is free to use it and has a right not to be excluded from it does not make the thing (or the right) a state property.

Yeraswork Admassie provides us a case of Tragedy of Commons about a guassa (common grass or grazing land) that was converted from common property to open access. This was happened in Menz (Shoa) during the Derg era. The following was told by an elderly resident of the place:
"After taking over, the Derg said that there is no difference between people and opened the guassa to everybody. People of Gidim started coming and using it, and here it is now its foundation has been destroyed. Now we have nothing to sell and earnings. The guassa is no longer protected. It is left open at all times. The guassa grass is uprooted, destroyed. The guassa grass that has survived throughout the times is now destroyed. We have lost. Ethiopia has lost. This is that has happened, if you care to listen."[39]

The second distinction lies in the nature of the relationship between the state and the member of the public, in respect to the facility provided by the state. If the user has the right not to be excluded from use by the state (i.e. the state cannot prohibit the use by that individual without changing the law) then we can usefully categorize this as open access property rather than as state property. If, on the other hand, the state provides the facility and merely licenses users to use it by permission revocable by administrative action, then we can call this state property. Adopting this last distinction, library books in public

libraries would be categorized as state property, whereas public highways would be classified as open access property.

Clarke and Kohler identified two additional limitations of open access properties. They argued that in two important respects, open access property does not provide a guarantee of use for every member of the community. First, a right of every member of the public to unimpeded use of a public park, or the pavement of a public road (the privilege to use and the right not to be excluded), does not connote a correlative duty on the owner of the site to provide the park or pavement in the first place, or to continue to provide existing ones. The provision of public parks by local authorities is regulated by statutes which give them no power to divert the land to other uses except in specified circumstances and by following prescribed procedures, but this does not mean that the right of members of the public to use public parks puts local authorities under a duty to provide them. Similarly, private landowners over whose land public rights of way are exercisable have a duty not to obstruct the way, but they have no duty to maintain it or otherwise ensure that it is available for use.

Secondly, one's privilege to use and the right not to be excluded from open access property are subject to the like privilege and right of everyone else. In other words, what a member has is not an exclusive right to use but a right to use in common with everyone else. One may no more interfere with others' right than they may with his. This robs one of any right to complain if someone else is already sitting on the bench in the park where you wanted to sit, or standing on the bit of pavement you wanted to stand on.[41]

1.2 Nature and Scope of Land Right in Ethiopia

1.2.1 Scope of Land Rights

Cujus est solum, ejus est usque ad coelum,

He who is a proprietor of land is a proprietor of everything 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 try to show the scope of land property:

> *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 everything 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.*[42]

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.

The question of the extent of ownership of land is treated in Ethiopia by the 1960 Ethiopian Civil Code. Articles 1207-1211 generally express that ownership of land is limited beneath and above the land "to the extent necessary for the use of the land." It means, a person who constructs a house shall own the land beneath the earth to the extent that is necessary to put the foundation, and above the ground to the extent of constructing the house. It seems the limitless height above the earth and down beneath is not working in Ethiopia as well.

Modern urban infrastructure and housing also triggered a need to a limit the scope of land rights in dimension. Today it is not unusual to see rules concerning three dimensional (3D) properties where the land is delimited in three dimensions, horizontally (width and length) and vertically (height). Traditional land or building property has been defined in two dimensions. For example, condominium housing properties are delimited not only in length and width, but also in height. In other words, owners cannot claim property rights not only beyond the walls (width and length) but also beyond roofs and floors.

Assume a railway company wants to dig an underground tunnel in a city to place rails and establish railway stations. Assume also the line will tunnel under the land on which buildings are erected. In a legal system where the scope of ownership of the land is not clearly delimited, a dispute may arise between the Railway Company and landowners. Land owners may claim ownership rights to the underground even though the tunneling may not affect the stability of the buildings. In mature legal systems where they have complex land ownership, such kind of ownership is governed by 3D property rules.

1.2.2 Ownership of Land in Ethiopia

THE CIVIL CODE

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 gratuitously, inter vivos or mortis causa
Art. 1206. - Right to reclaim property.
The owner may claim his property from any person who unlawfully possesses or holds it and may oppose any act of usurpation.

Before showing who owns land in Ethiopia today, it is appropriate to show how ownership is understood and the rights arise therefrom. Although an attempt is made to define ownership in the Civil Code of Ethiopia, in actuality, it is not a definition. Rather it is a description of ownership. As sated earlier, ownership is conceived as "the widest right" that may be exercised over a corporeal thing. Note that the word "corporeal thing" does not explain all types of things. This is a translation error.

The types of rights we examined above that an owner can enjoy are listed under article 1205 CC. These are rights of use (also possession), exploits (getting fruits or "the right to the income" to use Honoré's terminologies), disposal for consideration (sale, lease, rent, mortgage), or disposal gratuitously *inter vivo,* while alive (such as gift/donation) or disposal gratuitously *mortis causa,* after death (such as inheriting the property to heirs or legatees).

Ownership also includes the right to get security. The phrase *such right may neither…nor restricted except in accordance with law,* under article 1204(2) CC shows this security given to the owner. This means, a property owned by a person may not be arbitrarily taken or expropriate contrary to the law (such as without compensation.) The owner may not be restricted from using and enjoying his property or deriving income from it unless it is restricted by other laws. Article 1206 is also another addition to security aspect. This is especially a security given against any interference by another person rather than the state. Speaking otherwise, the security is the right to exclude others from using or possessing one's property without the owner's consent.

Although the exclusionary right makes ownership a superior type of property right, it none the less, has never been absolute in the sense that it cannot be interfered with. Rather, ownership right may be restricted for different reasons such as public safety, public health, public interest, urban beautification, and other private property protection rights reasons. For the sake of convenience, examples of restrictions associated with land property are listed hereunder (see details in chapter five):

1. Land or building may be expropriated by state for public purpose activities and upon payment compensation. (Art. 40(8) FDRE Constitution, FDRE Expropriation Proclamation 455/2005, FDRE Compensation Regulation No. 133/2007)

2. A land holder may not construct or demolish a building without securing planning consent (that is in line with the urban plan) and construction permit from city administration (FDRE Building Proclamation No. 624/2009, FDRE Urban Planning Proclamation No.574/2008).
3. A person may not use his property, e.g. Factory, in a way that pollutes the environment (FDRE Environment Proclamation No. 300/2002), nor may he commence a project on a land without carrying out environmental impact assessment (EIA), if needed by law (FDRE EIA Proclamation No. 299/2002).
4. A highlight of the Civil Code, especially concerning land, reveals the following restrictions:
    - It is prohibited to undertake on ones land works or operations that may materially endanger a neighboring land for instance, excavations or ditches which may result in damages to buildings or agriculture. See Arts 1210 and 1225 CC.
    - The law prohibits owners from causing nuisances to a neighbor by noise, smoke, gases, or odor if it exceeds limits considered tolerable. See Art 1225 "Good neighborly behavior". The neighbor who is the victim of such nuisance may require repair of the damage caused or get an injunction/ a court order requiring suspension of such act/ and payment of compensation. See Art 1226 CC.
    - The law prohibits an owner from directing to another's holding waters other than proceeding from rain or a spring and flowing naturally from higher to lower grounds. For example, water from a well, or a shaft, waste or polluted water from industry, water used for irrigation may not be directed to the neighbor's land. See Art 1246 (1) CC.
    - The owner of a building must construct the roof so that rainwater falls into the public road or on his own land. See Art 1245CC
    - The owner/holder of land is required by law to allow access to his land/ holding in some circumstances. Hence, he/she may not prohibit access to his land where it is necessary:
        - ✓ to prevent or avoid eminent damage or danger to life or property (Art. 1217)
        - ✓ to repair walls or buildings (Art 1218)
        - ✓ to recover lost things or animals (Art 1219)
        - ✓ to install pipes (Arts 1220, 1252, 1253)
        - ✓ to allow right of way to a neighbor (Arts 1221-1224, 1249(2))
5. A looking into the current FDRE Rural Land Administration and Use proclamation (RLAUP) reveals that there are multiple restrictions imposed on the holder of the land as we shall discuss them soon.

WHO OWNS LAND IN ETHIOPIA?

Although this subject matter is discussed in detail in Chapter three and four, in this section we shall briefly review ownership of land in Ethiopia as it is today. The source of ownership of land is the FDRE Constitution. The Constitution under article 40(3) envisages:

> *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.*[43]

The provision apparently includes two contradictory claims: on the one hand, it declares that all land and natural resources (hereafter, land) are owned by the Ethiopian people and the state; and on the other, it asserts that land is the common property of the Ethiopian people. While in the first clause/*aliena* the state, together with the people, is depicted as a co-owner of the land, in the second clause of the provision the state is oddly excluded from being a co-owner. This provision of the constitution is somehow confusing unless it is read in reference to its background. It is said that the joint ownership of land by the state and the people was reflected during the making of the constitution.[44]

Now, assuming that the intention of the law is the joint ownership of land by the state and the people, what is the significance of the joint ownership of land property? Does it mean that both the state and the people decide together? And what are their respective rights as joint owners?

The Constitution under article 89(5) devises a means by which the administrative power of the land is given to the state:

> *Government has the duty to hold, on behalf of the People, land and other natural resources and to deploy them for their common benefit and development.*

Under this administrative delegation, the state is empowered to use land in the best interest of the people. Like any good agent, the state shall administer the land property of the people with the prudence and zeal of a "bonus *pater familias*."[45] For example:

- *from an equity perspective*, the state has the duty to transfer the land to users in just and equitable manner, in a manner that would not affect the interests of future generation, in a way that would not affect the environment;
- *from security perspective*, the state has the duty to register all land property holdings and provide security of tenure in a bid to avoid conflict over land holdings;
- The state has also the duty to *control* the proper land use among others that common lands and state lands such as forest lands, lakes, rivers, natural and historical reserves, and unoccupied lands are not affected or abused.

As joint owners of the land, do the Ethiopian people currently enjoy their co-ownership right over the land? As we shall see in the next chapters, this is currently governed by the existing rural land and urban land laws.

When the 1960 Ethiopian Civil Code was drafted, the general assumption was that land would also be owned privately. Although the majority of the Civil Code in general and property law in particular is still intact and operational, the part concerning land ownership is suspended and replaced by dual land legislations, governing rural and urban land holdings. Hence, as already shown above, land is no longer owned privately. The state and the Ethiopian people own it jointly, and is not subject to sale or other means of exchange. What about the building erected on the land? Although for the sake of academic discussion we said land law refers to both the ground and the building laws, remember that land (ground) and building are treated differently. Thus, when we say land, here, we are referring to the ground not the building. This means, buildings are privately owned and can be transferable freely. To avoid this confusion, the FDRE Constitution has also emphasized that every Ethiopian shall have "full right to the immovable property he builds and to the permanent improvements he brings about on the land by his labor or capital."[46]

1.2.3 Governing Land Laws in Ethiopia

Laws governing the acquisition, possession and transfer of land property are found in different legislations. For example, the Civil Code contains general principles pertaining to acquisition, possession (under property law) and transfer of land either for consideration (Contract and sales) or gratuitously (law of succession). Although it is out of the scope of this discussion, registration of immovables was also addressed by the Civil Code. The Civil Code, by the time of its codification, contained all the necessary rules concerning immovables. But with the coming of the revolution and abolition of private ownership of land in Ethiopia, in 1974, most of the rules pertaining to land and buildings were suspended.

Today, besides the Civil Code (applicable if relevant and as far as it does not contradict the latter laws), there are other legislations adopted at federal and state levels. Rural land is governed by the current FDRE RLAUP 456/2005 and the different implementing regional rural land proclamations. Urban land is administered by the Urban Land Lease Proclamation No. 711/2011 and other similar urban land lease regulations adopted by regional states. The current Expropriation Proclamation No. 455/2005 along with its implementing Regulation No. 135/2007 is other piece of laws applicable to both urban and rural laws. The current urban and rural land legislations are generally dealing with acquisition, possession and the use of the land. Partly, the rural land proclamations of the Federal and Regional governments have also sections on transfer of land by gift and inheritance. Although they have also sections that give the right of transfer of land by lease and rent, the details of the contract (validity) shall be determined based on the general contract section included in the Civil Code. Similarly, the urban land lease proclamation deals with the modality of acquisition, and use of the land. It also provides a

general principle that allows the free transfer of urban land and buildings. Likewise, the details of the transfer (sale, lease, mortgage, inheritance, and gift) shall be governed by the different provisions of the Civil Code. Hence, in a way, the legislations must be considered as supplements to the Civil Code.

There are also other proclamations dressing urban planning, building construction, property registration and cadastre adopted or being drafted to be applied to urban or rural lands.

Summary

In this chapter it has been emphasized that defining property and ownership is troublesome and rather describing the features was easy. Land ownership regimes around the world are different, and the four best known systems are depicted as private, communal, state/public, and open access. What is to be noted is that there must be always some reason or justification as to why one form of land ownership is preferred instead of the others. Among the many reasons, conservation, equity, and efficiency may be some for allocation of land to private owners, community or to the state. In Ethiopia, the scant information is found in the current rural land proclamation that tries to address the three different types of land holdings. While private holdings are clearly defined, community and state holdings are somehow mixed and lack clarity. For instance, whether hills and mountain areas should be put under the hands of local community or the state is not clear. Having clear and secure property rights encourage to invest on it and protect it from destruction.

Review Questions

1. The Ethiopian government has adopted a model of ownership of land in which the use right of state controlled mountains and hills have been transferred to local community. The rational is that the people will protect the natural resource (forest) of the land while benefiting from it at the same time. The transfer is made on contractual basis wherein the people agree to conserve forest and to care for the land. What type of holding right do you observe from this arrangement? What do you think the advantage of this arrangement?
2. In one village the church becomes rich because of the high level of pilgrimage it hosted. When its fame and wealth become famous, the Ethiopian Orthodox Church Synods wants to make some decisions concerning the church's property. Among others, the Synods wishes to take half of the income while leaving the rest to the local church. It also proposes the conversion of part of the church land into housing. But the priests and the people of the locality refused to this proposal. The Synods' argument is that since the church belongs to the Orthodox Church and since the Synod is the supreme decision maker, its decisions are binding concerning the property administration as well. Comment.
3. How do you understand the terminology "real property" and its application in the Ethiopian property law?

End Notes: Chapter One

[1] AUBRY&RAU 1966. *Droit Civil Francis -Property-,* Translated by the Louisiana State Law Institute West Publishing Co.Vol.II, p.1.

[2] MERRILL, T. W. & SMITH, H. E. 2010. *The Oxford Introductions to U.S. Law: Property,* New York, Oxford University Press. P. 3.

[3] WALDRON, J. 1988. *The Right to Private Property,* Oxford, Clarendorn Press. P. 31

[4] DEMSETZ, H. 1967. Toward a Theory of Property Rights. *The American Economic Review,* 57**,** 347-359. P. 347.

[5] BLACKSTONE, W. 1825. *Commentaries on the Laws of England,* London, A. Strahan Law Printer. Book II, Chap. 1, p. 2

[6] JOHNSTON, D. 1999. *Roman Law in Context,* Cambridge, Cambridge University Press. P. 22.

[7] MUNTEANU, C. 2005. Historical Remarks on the Legal Notion of Property. *Acta Universitatis Lucian Blaga,* 54. P. 58

[8]WALDORON, supra note 3, p.47.

[9] HEPBURN, S. J. 2001. *Priniples of Property Law,* Sydney and London, Cavendish Publishing. P. 3.

[10] HONORÉ, A. M. 1961. Ownership. *In:* A.G.GUEST (ed.) *Oxford Essays in Jurisprudence.* Oxford: Oxford University Press. P. 108.

[11] Ibid.

[12] Id. p. 165-179.

[13] GOO, S. 2002. *A Source Book on Land Law,* London, Cavendish.P. 27.

[14] The Swedish Land Code (SFS 1970 :994), under Chapter 1, section 1 provides: "Real property is land. This is divided into property units." And Chapter 2 section 1 further provides: " a property unit includes a building, conduit, fence, and other facility constructed in or above for permanent use; standing trees and other vegetations; natural manure." Besides, facilities and easements destined to serve the property unit, although constructed outside of the land, are also considered part of the land.

[15] AUBRY & RAU, supra note 1, p. 182

[16] 1960. THE CIVIL CODE OF ETHIOPIA. *Negarit Gazeta: Gazette Extraordinary.* Proclamation No. 165/1960. Hereinafter Civil Code.

[17] MEKBEB-TSEGAW 2008. Contracts Relating to Immovables and Question of Form (Amharic). *Ethiopian Bar Review,* 2**,** 181-190.

[18] STEVENSON, G. G. 1991. *Common Property Economics: A General Theory and Land Use Applications,* Cambridge, Cambridge University Press. P. 4.

[19] SCOTT, A. D. 1955. The Fishery: The Objectives of Sole Ownership. *Journal of Political Economy* 63**,** 116-124. P. 116

[20] PROUDHON, P. J. 1970 (original 1840 translated by Benj. R. Tucker). *What is property? an Inquiry into the Principle of Right and of Government,* New York, Dover Publications.

[21] Rousseau, J.J., *Discourse on the Origin and Foundations of Inequality. pp142-43,* as cited in SCHULTZ, D. 2009. *Evicted! Property Rights and Eminent Domain in America*, Praeger. P. 18.

[22] See for example NORTH, D. C. & THOMAS, R. 1973. *The Rise of the Western World. A New Economic History,* Cambridge, Cambridge University Press

[23] See generally DE-SOTO, H. 2000. *The Mystery of Capital: Why Capital Triumphs in the West and Fails Everywhere Else,* London, Black Swan.

[24] ARISTOTLE 1997(Translated by Peter L. Phillips Simpson). *The Politics of Aristotle,* Chapel Hill and London, University of North Carolina Press.No. 1262b37.

[25] Ibid. 1263a8

[26] Ibid. 1261b32.

[27] DEMSETZ, supra note 4, p. 348.

[28] HARDIN, G. 1968. The Tragedy of the Commons. *Science,* 162**,** 1243-1248. The concept has further been used to explain overexploitation in fisheries, overgrazing, air and water pollution, abuse of public lands, population problems, extinction of species, fuel-wood depletion, misallocation in oil and natural gas extraction, groundwater depletion, wildlife decline, and other problems of resource misallocation.

[29] Art. 2(4) defines "holding right" as "the right of any peasant farmer, semi-pastoralist and pastoralist… to use rural land for' purpose of agriculture .and natural resource development, lease and bequeath to members of his family or other lawful heirs, and includes the right to acquire property produced on his land...by his labour or capital and to sale, exchange and bequeath same."
[30]CLARKE, A. & KOHLER, P. 2005. *Property Law: Commentary and Matrials,* Cambridge, Cambridge University Press. P. 36.

[31] WALDRON, supra note 3, p. 41.

[32] STEVENSON, supra note 18, p. 52.

[33] OSTROM, E. 1990. *Governing the Commons: The Evolution of Institutions for Collective Action,* Cambridge, Cambridge University Press. P. 90.

[34] For instance Philip Kivell, in his writing on the English and other European countries land ownership by central or municipal governments, uses the term "public ownership" of land to replace "state ownership" of land. (see generally KIVELL, P. 1993. *Land and the City: Patterns and processes of urban change,* London, Routledge.; KIVELL, P. 1988. Public Ownership of Urban Land. *Transactions of the Institute of British Geographers, New Series,* 13.) Similarly Jeremy Waldron, fuses both "collective ownership" and "state ownership" as giving the same meaning when he comments: "sometimes, collective property is presented as special type of private ownership with the state as the equivalent of a private owner." (WALDRON, supra note 3. P. 40.) Further in her critical work on *Property*, Margaret Davies, employed "government" and "public ownership" equivalently (DAVIES, M. 2007. *Property: meanings, histories, theories,* New York, Routledge-Cavendish , p. 64.)

[35] HO, P. 2005. *Institutions in Transition: Land Ownership, Property Rights, and Social Conflict in China,* New York, Oxford University Press. P. 28.

[36] See generally WEGREN, S. K. (ed.)1998. *Land Reform in the Former Soviet Union and Eastern Europe,* London, Routledge . For example it is said that in Ukraine, like any other place in the then Soviet Union, In theory, land farmed by agricultural collectives was owned by the collective. In reality, because Ukrainian farms were subject to the USSR land code and the Model Charter for collective farms, land was state-owned and workers on these farms assumed the same role as wage labor in industrial enterprises. P. 49.
[37] KIVELL: 1993, supra note 34, p. 34.

[38] See Civil Code, Articles 1444-1459.

[39] YERASWORK-ADMASSIE 2000. *Twenty Years to Nowhere: Property Rights, Land Management and Conservation in Ethiopia* Asmara, The Red Sea Press, Inc. p. 113.

[40] A good example is the open access in Sweden. In Sweden, every person has the right to free walk over all the country whether the path lies on private or public lands. One may walk through forest lands owned by private people or companies or the state without any restriction of trespass unless he cuts woods and things like that. Every person has also the right to get access to lake and sea shores; in other words property owners adjacent to the sea or lake may not close the path or deny access.

[41] CLARKE & KOHLER, supra note 30, p. 38.

[42] SIEDEL, G. J., AALBERTS, R. J. & CHEEZEM, J. K. 2003. *Real Estate Law,* New York, THOMSON South-Western West. P.
[43] SCHILL, M. H., VOICU, I. & MILLER, J. 2007. The Condominium versus Cooperative Puzzle: An Empirical Analysis of Housing in New York City. *The Journal of Legal Studies,* 36. Art. 40(3)
[44] MELLESE-DAMTIE 2009. Land Ownership and its Relations to Sustainable Development *In:* MURADU-ABDO (ed.) *Land Law and Policy in Ethiopia since 1991: Continuities and Changes.* Addis Ababa: Law Faculty, Addis Ababa University. P. 32.

[45] The concept of "bonus *pater familias*" (as good father or owner would otherwise do) has been expressed in the Civil Code of Ethiopia in different areas. Look, for example, articles 168(1), 280(2), 1010 (1), 2211 (1), and 2261 (1).

[46] Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995. *Negarit Gazeta.* Year 1 No.1.(Hereinafter FDRE Constitution), Art. 40(7).

CHAPTER

2

RURAL LAND LAW

Introduction

In this chapter, the current rural land laws are reviewed in detail. Rural land has been a center of discourse over the past hundred years of Ethiopian history. Since the annexes/re-annexes of the southern territories to the Ethiopian empire in the second half of nineteenth century by Emperor Menelik II, discussion of rural land has been one part of the country's socio-economic history. During the twentieth century, the issue and question of rural land assumed a political dimension and attempts to liberalize the landless tenants of the southern territories reached a climax by the 1974 Ethiopian revolution. The revolution was rallied under the slogan "Land to the Tiller." Following the assumption of power, the Military Junta, Derg, that was led by socialist principles, nationalized all rural land and distributed same to all tenants and farmers under use right. After the overthrow of the Derg in 1991, the Ethiopian People's Revolutionary Democratic Front (EPRDF) led government has maintained the "public ownership of land" principle of the Derg.

In this chapter, first, the tenure history of rural land in Ethiopia is briefly discussed; then an attempt is made to see the policy rational of today's land law in Ethiopia; finally an analysis of the central issues of the contents of the current rural land laws is made. In this part, the current FDRE as well as Regional RLAUPs are the basis of the discussion.

2.1 Ethiopian Tenure History in Brief

2.1.1 The Pre 1974 Revolution Era

What is tenure? The word "tenure" is defined by Black's Law Dictionary as "a right, term or mode of holding or occupancy,"[1] and the term "land tenure" has been well defined by FAO as "a relationship, whether legally or customarily defined, among people, as individuals or group, with respect to land."[2] Hence, land tenure is a legally or customarily defined type of relationships among and between people in respect to land. This is what we call "property right" under chapter one. In this section, attempt is made to examine the land holding arrangement which existed in Ethiopia before the 1974 Ethiopian revolution. For the sake of clarity, this era is classified in to two parts: pre Menelik and Post Menelik eras.

Pre Menelik Era

Since time immemorial, land was controlled in Ethiopia by the king and the ruling elite. As a result of the expansionist war of the ancient Ethiopian rulers with their neighboring tribes, the state could manage to annex vast territories to its rule. The land of the tribes then transferred to the imperial control and its use was distributed to the favorites and supporters of the king over a time. As recorded by many historians and others documenting Ethiopian history, the land remained under imperial ownership. The power of the kings to allocate and revoke land was uncontestable.[3] Over time, the character of the Ethiopian property rights to land assumed the form of private *rist*, church land, and state land.

RIST VS. *GULT*

Most writers[4] prefer to describe the land tenure system from two important tenure perspectives: *rist* and *gult*. The natures of *rist* and *gult* rights are fully encompassed by the definition that Hoben gives to the terms in his widely read book. Hoben writes that *gult* rights entail "fief-holding rights" whereas *rist* rights confer "land-use rights."[5] *Gult* (fief) rights confer on the ruling class rights of collecting tribute, judicial and administrative powers as well as military mobilization over the people occupying the land. It means that a lord, who was provided with vast tracts of land (3-4 square miles according to Hoben) as a *gult,* administered the people occupying it as holders of *rist*, collected tribute from them, adjudicated disputes arising among them, and used the able bodies as soldiers during war times. He would retain part of the tribute as a fee for his services and fully use fees and fines he imposed in his power as a judge. However, the *gult* holder had no rights to produce over the land although he may cultivate part of the land for his private purpose using free local labor.

Quoting a 1917 anonymously written book, *Handbook of Abyssinia,* about the *gult* system in *Tigray*, the Northern part of Ethiopia, Shiferaw Bekele describes the job description of *gult*-holder as follows.

> *The gult-holder, assisted by the local official (shum-adi), fixes the proportion of the state due which each adi (parish) must pay; he also acts as a court of appeal in civil and criminal matters from judgments of the shum-adi; he is responsible for peace and order in his gult and is, of course, the military chief of the district. In return for this he (a) has his land cultivated free of charge by the ristenyatat (rist holders); (b) receives all of the fines which he may impose in his judicial capacity; keeps a part, generally one-tenth, of the tribute collected by him; and (c) receives certain presents, example a sheep from each parish at Easter.*[6]

Rist rights in contrast to *gult* rights were land-use rights. In principle, they were hereditary and could be held by lords and peasants alike. *Rist* rights were land use rights claimed by a member of a kin from his/her generations of same ancestor. As described by Hoben, a single estate of *gult* land, comprising a few square miles, included within its boundaries strip fields held as *rist* by scores or even hundreds of farmers. The *gult* holder might also hold some fields as *rist* within his estate of *gult* land.[7]

For all practical purposes, *rist* land was like private ownership except the holder lacked the right to sell the land. The peasant could be able to use, rent, and inherit the land to family members. In exchange, peasants were obliged to make payment for variety of land related taxes.[8] Selling the land to non-family members was prohibited. Land was transferred in the form of bequeath from family to children for generations. This *ad infinitum* land inheritance from one generation to the other highly reduced the size of the farm lands.

CHURCH LAND

Land was also provided to the Church which was considered a major ally to the imperial power. The Church was a major possessor of material wealth not only because by selling salvation in return for treasure and land, but also by perpetuating imperial power over the people. The Church played a major role in propagating the masses to obey the king. Obedience to the king was justified in many of the Christian writings and in the day to day teachings. Monarchs who disagree with the church or fell out of favor, found themselves in the middle of disastrous wars.[9] Church land was distributed to the clergy, including priests, deacons, church heads, teachers, and the lay people supporting and protecting the interests of the church at the royal court. The name given to this type of land was known as *Samon* land.

The traditional practice was for the sovereign to endow cathedrals, churches and monasteries with land as well as to give land to the ecclesiastics in attendance upon them.[10] The historical records also show that such grants continued well into the 21 century. Until the coming of the revolution in 1974, the church was said to have controlled one third of the land in the country.

This generous benefaction of the state to the church was incorporated in the *Fitha Negest* (Law of the Kings), which in Ethiopian legal history, was considered as the first written legal document.[11] Concerning land grants and the waiver of tribute/land tax, Section 40, No. 1540 cum. 1541 of the *Fitha Negest* reads as follows:

> *Let the king give honor to the order of the clergy, as did Constantine the Elect, faithful and righteous king; and as did others who followed him. Let the king be generous with his wealth. Let he give to each of them according to their ranks. First of all, the king shall give presents to the bishops; then to the priests, next to the deacons, and then to those who are below them. He shall exempt them from tributes, presents, and the other favors to be paid to the rulers. Let him assign something to the churches for the maintenance of the widows, the orphans and the poor, so that they may entreat God to reaffirm the true faith with the benefit in the Holy Trinity...*[12]

Church lands were thus the most privileged since they were free from payments of tributes and land taxes.[13] This isn't meant, however, that the cultivators of the land would be exempted from payment of land tax, they rather were equally responsible like any other peasant. Taxes and tributes collected from the person cultivating the land were going to the church coffer instead of the government's. In return churches were expected to support themselves.

Usually, the land given to the churches and monasteries, as *gult* land, was vast[14] and the church was not expected to cultivate it. In fact, church land was distributed among the people serving the church. Those people were from among the clergy or lay men supporting and serving the church in different capacities. Just as the peasant paid to the government, they paid their taxes to the church. The general name used for such type of tenure arrangement was *Samon* Land. Such land use was, however, as emphasized by Shiferaw, conditional in that they had to continue to serve the church by themselves or through a proxy. In most cases, priestly families had to see that one of the children became a priest. As Alvarez, the sixteenth century Portuguese traveler to Ethiopia observed: "the sons of the priests are for most part priests…"[15] This fact has survived even in modern history as summarized by Markakis as follows:

> *There is a tendency among the clergy to preserve continuity and privilege within the family by passing on the priestly office from one generation to the next. A priest family will normally train one of its sons to enter the service of the church. Since the church provides traditional education, it is not difficult to get it. In this manner, the family preserves its rights over church land. Even if a family does not produce a priest from among its members, it seldom surrenders the land it holds under Samon rights; it simply arranges for a priest to discharge its obligations to the church, or may even pay a certain amount regularly to the administrator of the church in lieu of services.*[16]

Concerning the proxy service, Shiferaw, in his study of land grants from five big churches in Addis Ababa discussed some interesting facts. Six of the holders of *Samon* land provided by the church of *Enteto Mariam* were Moslems.[17] This means that the original holders of the land were Christians (probably priests) but their descendants changed their faith to Islam. However, they continued to own the land since they fulfill their obligation to the church through proxy service.

GOVERNMENT LAND

Land owned by the government was distributed to different people with the condition of serving the state at different levels. Such land might be reverted to the state in the event of non fulfillment of an obligation by the holder of the land. For example, land was given to civil servants and war veterans (*maderia* land) in lieu of salary or pension for their service to the state. Since the state couldn't manage paying servants in cash, land was distributed to various people for specific service they rendered to the state. This was known as *ginde bel* land. For example, land given to soldiers; people who carry tents, cannons, or brought horses and mules to war fronts; people who serve the palace as masons, prison guards, gardeners were qualified under this type of land tenure.

Shiferaw Bekele[18] argues that the whole land tenure arrangement was designed on some kind of implicit condition. Peasants were obliged to pay tax and to render manual services to the local gentry in exchange for the land rights they received. A peasant who failed to pay tax would lose the land. Church land had been distributed among members of the clergy and lay people on the condition that they would serve the church in different capacities. Failure to fulfill these obligations would cause the forfeiture of the land. Government land had also been distributed among different people on the condition that they would continue to serve the state. The grand

design of the whole property arrangement was that land served as a means to run the state functionary. In the past when gold and silver were not found in abundance,[19] the government relied heavily on the land under its control to run the state.[20] This was done in two ways, by giving land in lieu of salary to those who directly serve the state and by collecting tax tributes in kind from those who farmed the land.

Post Menelik Era

PRIVATE OWNERSHIP OF LAND

During the second half of the nineteenth century, the Ethiopian empire was further expanded to the present south, south eastern and south western parts of the country. The emperor (Menelik II) and his military commanders crushed any resistance attempted by the natives and confiscated all of their land. In places where the native chiefs accepted the dominance of the Ethiopian empire, the people were allowed to keep their lands intact.[21] A vast territory of land was added again to the Ethiopian empire during this period. All the land which was confiscated by the northern forces was distributed to different groups of the society. One part was given to Menelik soldiers to settle thereon and as a reward for their loyal service during the expansion process. A second part (*siso gult*) was given to the local chiefs (gentry) to maintain their support. A third part was given to the church for distribution to the clergy in the same fashion as in the north. Another share, held by the state, was distributed to different people on the condition of serving the state at different levels. Northern people were encouraged to settle in the south in the hope that they, together with the existing soldiers, would create an effective control over the new territories. As a result of this military expansion, the most native people became landless, *gabbars*.[22] Native farmers who held the land in common had lost their land.

This name, *gabbar,* given to them does not connote the same meaning as in the north. In the north, the name was given for a landed peasant who paid taxes. In the south, the person was landless. The *gabbars* in the south rather became the servants of those who took their land. Quoted by Pankhurst, C.F. Ray, a contemporary traveler, reflected that "The nobles and their followers had considerable dependents upon them. The *gabbar* was a tenant subjected to more onerous burdens than existed elsewhere. The *gabbar* was obliged to look after the settlers by cultivating their land, providing labor, building houses and so on for free."[23] The general practice was that a person who got land in the south reserved some part of the land for private use (cultivated by the *gabbars* for him), and distributed the rest to his *gabbars*. In exchange, the owner collected tribute (one third for himself) and tithe (to the government) from the *gabbars* and allowed them to subsist on the remaining produce. A study made by Markakis on Kembata district in the Southern provinces vividly demonstrated the circumstances that existed at the time:

> *Kenyazmach (commander of right wing) Arado was allotted forty gashas (1600 ha) of land for his service in Kambata district. He kept twelve gashas and distributed the rest among his lieutenants and soldiers. One of these, a man from Gojam named Ayele, was given a total of four gashas. The native people who found themselves on the land granted to Ayele became his gabbars (the total family member was 40 people). Ayele settled in the nearby town of Hosana, the capital of Kembata district. Ayele divided his land into*

> *hudad (good land reserved for him) and other which was distributed among the gabbars. The gabbars cultivated the hudad and delivered the entire produce to Ayele. Ayele also collected a third of the produce from the other land as a tribute for himself, and another tenth which he turned over to the state as tithe. The gabbars were also required to provide Ayele with firewood, to grind his share of the grain and deliver it to his home in town, and to repair his house and warehouses. In addition, they had to offer him obligatory gifts on Christmas, Easter, and Maskal. Ayele acted as the judge for his gabbars, and in his capacity imposed fines and collected fees. Whenever he visited his land, the gabbars were obliged to provide him with a feast*[24].

On the other hand, the rights of local gentries were remained unaffected because of Menelik's decree passed in 1905 (1897 E.C), which declares that in every land allocation to northern nobles, a third or in some cases half of it should be kept to the local *balabat,* gentry.[25] This is, as already mentioned above known as *siso-gult.*

The other characteristic of the southern land tenure was that the introduction of private ownership of land tenure. It is generally held that private land ownership in the south evolved out of Menelik's expropriation and redistribution of land after his conquest.[26] Much evidences and the wordings of the laws from that time show that land was transacted through sale from the state to individuals and between individuals. Emperor Menelik also introduced new land measurement (*qelad)* and tax systems in the southern regions. The new land taxes imposed on *siso* land, *maderia* land and *rist* land were paid by the actual cultivator, the *gabbars,* instead of the owner of the land. This increased the burdens of the *gabbars* and tenants.

MODERNIZATION AND THE DECLINING ROLE OF TRADITIONAL LAND TENURE SYSTEM

The coming of Emperor Haileselassie I, in 1930, to the throne in the early twenty first century and his modernist approach of governance started to contribute to the declining role of the traditional land tenure system, especially to the abolition of the *gult* system in 1966. The traditional tax collection system (in kind) did not enable to generate enough money to the state to create the much needed modern state, with modern salaried military and bureaucracy. As discussed above, land tax in the form of tribute and tithe was collected by the *gult* holder in the northern provinces and the land owner/holder in the southern parts. Because it was difficult to find enough gold and dollars, tax was paid in kind[27] (grain, salt, honey, cattle and so on). As a result, government agents were forced to take it to market to change it to cash money. The system was not efficient and there was no strong bureaucracy to control its proper collection; land owners used to squander it. Studies show that the share of land tax was declining compared to indirect taxes (customs tax) throughout the 1940s to 1970s.[28] To rectify such problem and in order to collect enough money from land, successive decrees concerning land tenure and land tax were promulgated well up to the 1970s.

Further other measures were also taken to weaken the traditional power base of the *gult* holders. Traditionally local *gult* holders controlled local power and in some cases undermined central power. Hoben provides four reasons that weakened the traditional power of *gult* holders:[29] the growth of

bureaucracy that replaces their administrative power, tax reform that demands the direct payment of tax to government rather than to *gult* holders, emergence and establishment of modern court system that replaces their adjudication power, and finally the establishment of modern military that took away their power as collectors of local soldiers. In here, we will briefly look into the tax reform that had directly affected the land tenure system.

Before the Italian invasion and occupation of Ethiopia (1936-41), the government tried to come up with two decrees[30] that tried to reduce the burden of the *gabbars* of the southern people. Especially, a decree promulgated on May 9, 1935 tried to reduce the burden of the peasantry by replacing all duties with payment of 30 thalers per *gasha*.[31] But, of course, this was the eve of the Italian invasion and the rule was not implemented. The government came up with series of laws related to land tax after the expulsion of the Italian forces (after the Second World War) which we shall see hereunder. The Italians, during their five years occupation, had abolished all informal taxes and burdens except the land tax (tribute) and the tithe (*asrat*). After liberation, the government took advantage of this situation and continued the process without restoring the previous system. The major laws enacted after this period are discussed below.

The 1941 Land Tax Decree

Shortly after he restored his power, Emperor Hailesellassie passed a land tax decree[32] in 1941 that mainly contains three things: first, the law entitled all government officials and agents to salaries; second, all the taxes paid by the *gabbars* were to be sent directly to government treasury. In other words, it abolished the intermediary role of land owners and *gult* holders.[33] Land tax was to be collected by government agents rather than landlords. Thirdly, it abolished all 'manual labor, firewood, grass and miscellaneous dues and taxes' imposed on the cultivators. This did not include, however, *ginda bel* and *desta* in which tax was paid in the form of manual labor.

The Land Tax Proclamations of 1942 and 1944

Proclamation 8 of 1942,[34] promulgated on 30th of March 1942, but had been put in to effect starting from 11 October 1941, brought one important change to the Ethiopian land tax system; it proclaimed that henceforth all land tax should be paid in Ethiopian printed dollars rather than in kind. Article 3 (ii) of the proclamation put the amount of taxation based on the size of land area in *gasha* and its fertility rate. It classified the land into fertile, semi-fertile and poor, and imposed 15, 10, and 5 Ethiopia dollars respectively for each *gasha* land holding.

This proclamation lacked clarity in that it was confusing whether or not it replaced the previous two land taxes (tribute and tithe). In any case, a second proclamation (proc. No. 70/ 1944) that repealed this proclamation was promulgated in 1944. This was also known as Land Tax Proclamation. This proclamation[35] under Article 4 provided a different tax rate for each of the three types of land fertility. Besides, it provided tax payments in lieu of tithe and tribute tax. For example for some provinces (Shoa, Arusi, Harar and Wollo) the amount set for fertile land was

$35 in lieu of tithe and $15 in lieu of tax, for semi fertile land $30 in lieu of tithe and $10 in lieu of tax, and for poor land $10 in lieu of tithe and $5 in lieu of tax. In effect, this law had doubled the tax obligations of peasants as compared to the previous law. The other character of this proclamation was that it did not impose same tax rate for all parts of the country. The Northern provinces were even allowed to continue with their old system as their land was not yet measured in *gashas*. Once again, the law under Article 4 repealed "any other taxes, services and fees heretofore payable".

Education Tax and Health Tax

In spite of the state efforts, the above two proclamations could not greatly enhance the revenues of the central government, although they did effectively eliminate the possibility of tax collection by organs other than the state. Hence, to increase the revenue from the land the government introduced Education Tax in 1947 (Proc. No. 94/1947) and Health Tax in 1959 (Decree No. 37/1959)[36] based on the amount and fertility of land holdings. This shows that the state was desperate to increase its tax collection from the land, which in turn aggravated the burdens of the peasant.

Abolition of Gult and Tithe and Introduction of Income Tax

The government took things one step further to their logical conclusion, in 1966 and 1967, with proclamations which abolished both secular *gult* and tithe.[37] Proclamation 230/1966 that amended the previous land tax, proclamation 70/1944, clearly declared those people who cultivate on lands subject to *rist gult* or *siso gult* directly to pay their tax to the Government treasury.[38] The same amendment eliminated the special tax status of those holding *rist gult* or *siso gult* rights with respect to land which they also own.[39] Since traditionally *gult* provides tribute collection power over *gult* holders, the transfer of the tribute collection power to other body eliminates the traditional institution of *gult* system. If a person whose land has been subject to *rist gult* rights had henceforth to pay the land taxes directly to the Government treasury, there was nothing left for the *gultenga*, the holder of the *gult* rights. His rights had, at a stroke, been eliminated. *Gult* holders were allowed to change certain part of their holding to private tenure and the remainder was divided among the *gabbars*.

The next step taken by the government was to amend the income tax in 1967 by introducing agricultural income tax. One of the characteristics of this proclamation was that it abolished the payment of tithe. As discussed before, cultivators used to pay a tenth of their produce to the government through the *gult* holder. Now the removal of this tax meant again eroding the power base of the *bala gults* and thereby reducing the burdens of the peasantry.

Although it cannot be denied that all these steps to some extent alleviated (especially the last two proclamations) the burdens of the peasantry of the south, they were not equally appreciated in the northern part of the country. For example, among the three peasant rebellions that took place in between the 1940s and 1960s, the two that happened in the northern provinces of Tigray and

Gojam were made against tax and land measurement activities of the state. Generally, the land tax proclamations and land measurements which were meant to enhance the amount of tax, initiated peasant rebellions in Tigray (1943), in Bale (1967-70) and in Gojam (1968).[40]

THE QUESTION OF LAND REFORM AND INADEQUATE GOVERNMENT RESPONSE

Over the years, the land holding in the southern provinces had slowly changed into private (freehold) holdings through different decrees. As opposed to the north, land in the south was freely transferable by way of sale. Like his predecessor, Haile Sellassie also continued to grant land to different groups. Immediately after the Italian war, he granted extensive land to patriots, exiles, soldiers and civil servants as private property. This policy, however, was of little benefit to tenant *gabbars*. Indeed, from the nearly 5 million hectares of land allocated after 1941, only a few thousand reached the landless and the unemployed *gabbars*.[41] The concept of *rist*, as lineage land property, was not known in this part of the country. Hence, in the 1950s and 1960s extensive land sale was witnessed, especially the transfer from land owners to new investors.[42] But the effect of such measures made the existing *gabbars* once and for all landless tenants. Tenants, thus, were forced to cultivate on share-cropping arrangement which was said to be unjust in that it claimed 75% of the produce to the landlord.[43]

As already mentioned above, in spite of the fact that the government passed laws that forbid other burdens, tenants were subjected to feudal dues like working on the landlord's farm and giving him presents on special occasions for fear of eviction. Powerful lords of the land continued to confiscate peasant's property at will and to evict tenants arbitrarily even on the eve of the Revolution.[44] In addition to the fact that the system was seen as unjust, it was considered inefficient and unproductive for it did not give the tenants incentive to produce more because, it was alleged, they lost a lot of the increased produce to the landlord.[45] The most radical criticism of the land-tenure system came from the student movement, which, since the middle of the 1960s, made the slogan "Land to the Tiller" its main rallying call and the attainment of land reform its main target. When, as of 1969, the issue surfaced concerning whether the southern part of the country was not a case of settler colonialism by people from the north, and whether, therefore, the southern tenants were reduced to this status on land which had once been their own, land reform acquired a much greater political poignancy than ever before.[46] Also, academics, foreign governments and aid agencies were very critical of the existing land-tenure system and urged for some kind of reform to be adopted.

One of Haile Sellassie's government responses to these criticisms was the establishment of a Ministry of Land Reform and Administration to deal with the matter.[47] One notion promoted by that ministry, well before 1974, was the redistribution of individually owned land in excess of 20 hectares. A draft proposal to that effect was shelved for lack of support in government circles. The fact that the government officials and members of parliament had their economic and hence political power based on land was often attributed as a cause for the obstruction of the adoption of

the draft proposal. Harold Marcus, a prominent historian on Ethiopia, claims that after the 1960 *cope d'état,* the Emperor was forced to "rely increasingly on overt military power for authority and on the aristocracy and oligarchy for administrative support. Since the last two represented the property-owning classes, Haile Sellassie was unable to implement significant land reform, in the absence of which the intelligentsia and the students, at first quietly and then stridently, opposed the regime."[48]

The emperor was generally said to be slow in taking a radical and important land reform that would have a socio-political effect. A contemporary researcher and professor at the then Faculty of Law at the Haile Sellassie I University, Harrison Dunning observed that:

> *Beyond the elimination of personal services, it is difficult to name an objective related to land and designed to improve the social and political position of the Ethiopian peasantry toward which even partial action has been taken in the past quarter century. Even public discussion of such objectives has not occurred. With guidelines so unclear, it is fruitless to attempt to evaluate the contribution which land reform could make in these areas of national development.*[49]

By way of conclusion, it can be said that the resistance of the peasantry population (because of ignorance on the advantage of land measurement and registration), internal resistance for land reform from the landed aristocrats, most of whom sate in both chambers of the parliament,[50] and the lack of action by the government[51] itself to bring about change in the tenure system were the reasons for absence of meaningful change in the property right arrangement during the eve of the downfall of the imperial regime.

2.1.2 Rural Land Tenure during Derg Era

After the 1974 Ethiopian revolution, a military junta (a.k.a. *Derg*) controlled state power by ousting the emperor from his throne. The Derg immediately passed a proclamation that nationalized all rural land and transferred the same to state ownership. This proclamation (Proclamation No. 31/1975)[52] had overnight abolished the age old property system and left the land owners empty handed without any compensation. In this section, some of the salient provisions of this proclamation are discussed.

The main reasons for the nationalization of rural land from the previous owners/holders and its transfer to state ownership are incorporated in the preamble of the proclamation. Without the need to reproduce the whole preamble, the main essence is quoted below:

> *Whereas, in countries like Ethiopia a person's right, honor, status, and standard of living is determined by his relation to land;… that several thousands gashas of land was grabbed by insignificant number of feudal lords while the masses live under serfdom; … that it is necessary to change the past injustices and lay a base upon which Ethiopians may live in equality, freedom and fraternity;…that development could be achieved through the abolition of exploitation of many by the few;…In order to increase productivity by making the tiller the owner of the fruits of his labour;…to provide work for all rural people;…it becomes necessary to*

> *distribute land and increase rural income and thereby laying the basis for the expansion of industry.*(Preamble of proc. 31/1975).

Article 3 of the proclamation clearly states that: "all rural lands shall be the collective property of the Ethiopian people," and it prohibits any person, business organization (company) or any other organization from holding rural land in private ownership.[53] By doing so, the law eliminated any private ownership of rural land which had started to flourish in the southern part of the country. Further, the law denied any compensation for the loss of land and any forest and tree-crops thereon. But, it did provide for fair compensation for movable properties and permanent works on the land.[54] When it came to practice, however, the Derg paid no compensation at all to such properties across the country.

The proclamation, on the other hand, created free access to land to the many rural landless and tenants. Without discrimination of any kind, the law provided opportunity for any person, who was willing to cultivate, to get rural land sufficient for his maintenance.[55] The amount of land allocated for a household was made equal, and allowed for a maximum of ten hectare. (Art. 4(3). No person was allowed to use hired laborers to cultivate his land (except the weak, the sick, widows, and minors (Art. 4(5).

Until land distribution took place, it was stated that all "tenants or hired laborer shall have possessory right over the land they till;" on the other hand, "a resident landowner who has leased out all his lands shall have the right to equally share the land with his tenants."[56] The law also abolished any landlord-tenant relationship and the tenant was made free from any rent, debt or any other obligation. Likewise, a landowner who gave his land as antichresis to his tenants was freed from payment of the debt.[57] All large scale farms, held by private investments, were transferred to state ownership.

Since the land became state/public property, it was important to delimit the scope of the rights given to individual peasants. In this case it did not give much. Under a title "Prohibition of Transfer of Land," article 5 of the proclamation declared:

> *No person may by sale, exchange, succession, mortgage, antichresis, lease or otherwise transfer his holding to another; provided that upon the death of the holder the wife or husband or minor children of the deceased or where these are not present, any child of the deceased who has attained majority, shall have the right to use the land.*

Thus, the proclamation completely prohibited any sale, mortgage, antichresis,[58] lease/rent, inheritance (outside of family), donation, or exchange of any sort that affects the land. It seems the government was cautious not to create controversy with the church and the northern land holders since the law did not say anything about church lands, and provided separate provisions related to "communal lands", specifically *rist* lands. According to some studies, the total amount of land held by the church by the time was estimated to be 20 percent of all arable land and 5 percent of all the

land in the country.[59] Concerning *rist* land, the law under article 19 provides "peasants in *rist* and *dessa* areas shall have possessory rights over the lands they presently till." It denies any claimant thereafter to come up with new claims. However, unlike the southern parts, in the north, since every plot of land was held by peasants, there was no need for the law to come up with such different provision.

In any case, articles 3 and 5 had restricted the rights of transfer of the holders of land very much and this had a devastating effect to all the previous land owners in the south or *rist* holders in the north. This proclamation was, therefore, received with mixed sentiments across the country. For tenant farmers and landless peasants, especially of the southern part of the country, the abolition of land ownership removed a major source of exploitation in one case, and provided guaranteed access to land in the other.[60] Peasants of the north who owned their own *rist* land that gave them effective control over it were threatened by a measure which required their security and put them on equal basis with the landless.[61] The *rist* holders of the north who considered their right to the land as coming from their family and no one else, considered it as an encroachment to their God given rights. According to some studies made, in Tigray, farmers refuted the proclamation and a war ensued immediately, supported by the peasantry.[62] Rebellious conflicts were also rose in Gonder and Wollo.[63]

The management and distribution of land was given to peasant associations (PA) which were formed to cover a minimum area of 800 hectare (20 *gashas*) of land.[64] The functions of the peasant associations were mainly to redistribute land, maintain common assets, resolve land dispute conflicts, enable development activities and implementing villagization programs.[65]

The system, in a way, looked like the Chinese model whereby land was owned by the state and collectives and every village-collective was given the power to own, administer, and lease out land to individual peasants.[66] This fact was alsoo observed by Dessalegn when he said: "the post reform agrarian policies were modeled in part on the experience of China and Vietnam."[67] Of course, in Ethiopia, it was not the peasant association that would give land by way of lease. The right was life time in that peasants were allowed to use it for life and even to pass it as an inheritance to their spouses and children. In the Chinese model peasants get the land on lease basis for 15 years (later on amended to 30 years) and the village collective should renew the contract after its expiry.

Assessments of the land reform carried out in the years that followed the proclamation were made by many writers. The general agreement can be summarized as follows in the work of Dessalegn Rahmato:

- Erroneous state policies (villagization, grain requisitioning, resettlement, agricultural, collectivization) which were not discussed with the people at grassroots level cost the country lots of energy and money.

- The PAs which were given authority to redistribute land, maintain, common assets, resolve conflicts and enable development activities taking place in their areas were captured/hijacked by the state to do its dirty work, such as tax collection, maintaining order, channeling propaganda, requisiting grain, and recruiting young men for the war.

- The land reform was successful in that it abolished the landlordism and tenant-ship in the country and created free access to land to all the landless, but it failed because 1) it defined land rights as usufractuary rather than private 2) the mandate given to the PA encouraged them to practice periodic land distribution, in consultation with local government agents, created tenure insecurity.

- By and large, it replaced the landlord with the state, providing the latter with direct and uncontrollable access to the peasantry. "In conclusion, the end product of the land reform was it failed where it succeeded."[68]

2.2 The Current Rural Land Tenure System

2.2.1 Current Land Policy: two debates on ownership of land

Ethiopia has no separate land policy as with other policies such as water, agriculture, and environment. Rather, the policy intention is found in the FDRE Constitution and other policies such as economic and development policies. After the downfall of the Derg, in May 1991, the Transitional Government adopted a free market-based economic policy whereby the government disbanded all collectivization and villagization programs based on the consent of the people. Yet, concerning land ownership, it declared that until a new constitution was created, land would remain under state ownership.[69]

Judging from the process of the 'post-socialist transition' that had been carried out by the Transitional Government, and above all, the free market economy type of policy that it embraced, many hoped that the new constitution would allow private ownership of land. However, when it was finally adopted in 1995, it was decided to keep all rural and urban land under public ownership. As already discussed in chapter one, the FDRE Constitution placed all urban and rural land under state and people's ownership. Accordingly, sale, exchange and mortgage of land are prohibited. As one scholar commented, "by inserting the land policy in the constitution, the current government has effectively eliminated the possibility of flexible application of policy."[70]

In many countries land ownership is not a constitutional issue, but in Ethiopia, because of its socio-economic importance, its ownership goes beyond being a mere policy matter. Rather, it is inserted in the Constitution and the issue of land ownership has become a settled subject. The argument forwarded by the ruling party for the continuation of land as public/state property rests mainly on two policy objectives: social equity and tenure security.[71] In a bid to ensure social equity, as we shall see soon, the FDRE Constitution as well as other Federal and Regional Rural Land Laws (RLAUPs) ensure free access to agricultural land. The amount of land to be provided to peasant farmers, as far as possible, is made equal. In this way the policy objective is to ensure equality of citizens in using the land. However, the weakness of this policy objective is that first, it does not address the urban land; article 40 of the FDRE Constitution that deals with property talks only about rural land. Second, it is argued that since there is lack of arable land in the highlands of the country, equality of access to land is ensured through transfer of land from large holders to small holders and/or to new comers. The result is diminution of holding plots (0.5-1 ha as compared to other African countries.) Social equality in Ethiopia is thus a costly one in that "equality in privilege is tantamount to equality in poverty."[72]

Tenure security is the other policy objective and concern of the state. As mentioned above, the FRDE Constitution prohibits any sale or exchange of land. State ownership of land is considered to be the best mechanism to protect the peasants against market forces. In particular, it has been argued that private ownership of rural land would lead to massive eviction or migration of the

farming population, as poor farmers would be forced to sell their plots to unscrupulous urban speculators, particularly during periods of hardship.[73] The justification is that for large-scale modern farms, there is an abundant idle arable land in the low lands; both for rain fed and irrigation farming. Most of the farmers, on the other hand, live in the highlands where there is scarcity of land but large amount of accumulated human power due to high population density. Allowing the farmer to sell land here, would lead either to displacing the farmers or converting them to tenants. In both ways, large amount of capital and labor are wasted.[74] This argument of the government is criticized as a mere hypothesis, not corroborated with evidence. Some researches show otherwise. Some conclude that farmers would not sell their land wholly or partially if given the right to own their plots.[75] 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.[76] 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.

This land policy of the government has been attacked by researchers and international donors who favor neo liberal economic thinking. The usual argument forwarded by those who hold views against the state/public ownership of land is one that centers on lack of tenure security. They argue that state ownership of land creates insecurity of tenure. Absence of tenure security for land users in turn

- provides little or no incentive to improve land productivity through long-term investment,
- increases transaction cost because of land dispute, and
- hinders the emergence of dynamic land market such as, lease, and credit availability/land mortgage.

Another fear of the critics is, among other things, that government may use the land as political weapon by giving and taking it away.

However, the government rejects such fears as groundless. On the contrary, it claims that the government provides better 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, Oromia, and the Southern regions which enable farmers to have a land certificate for their holdings. This gives protection and security to the holder.

The current practice of land registration and certification provides tenure security, according to a recent study made by the World Bank.[77] Others, though, still do not have confidence on the land registration and certification process and conclude that the process has not brought about the feeling of tenure security. For example, Dessalegn argued that since the land laws do not avoid completely the possibilities of future land distribution and since the government still possesses the

power of taking land by way of expropriation, farmers could not feel secure with their holdings.[78] In general, the debate seems to be based on ideological differences rather than empirical studies. The private vs. state ownership of land by itself is not as such a decisive factor. What is important is whether or not there are adequate measures and regulations in place to guarantee tenure security, such as land certification, just compensation in the event of expropriation, long duration of rights, good governance, absence of corruption, and availability of courts. In the next section, highlights demonstrating the rights provided to land holders and judge from there the protections accorded to the individual land holders.

Extract 2.1: Debate concerning private vs. public ownership of land was made during the drafting of the FDRE Constitution and an extract of which is reproduced by Belachew Mekuria[79] as follows:

One of the most debated parts of the Constitution during its drafting periods as well as after its coming into effect is the one on the form of ownership of land. During the drafting process, there were two major positions. The arguments in support of those two positions are listed below. These arguments were obtained from the discussions of the sub-committee in charge of the land question of the Constituent Assembly. First, those who were arguing in favour of the current arrangement had presented a long list of justifications in response to their opponents among which the most important ones are summarized as follows.

1. The underdeveloped nature of the country's present agriculture sector renders private ownership of land a non-viable option. The supporting facts for this assertion are:
   - More than 85% of the Ethiopian population lives in the rural areas and is dependent on subsistence agriculture. At present, this same agriculture takes up more than 50% of the country's GDP.
   - Taking these facts into account coupled with the underdeveloped industrial and service sectors of the country, letting the agrarian poor sell the land and migrate to the nearby towns will have the effect of escalating unemployment since those sectors are absolutely unable to accommodate the expected influx of migrants. To draw analogy with other countries of the world as examples is a misnomer for in most of those countries, for instance, in the USA and most European countries, the agriculture sector forms 2-5% of their economy while the industrial, service and other sectors are very much developed. Thus, there is a difference in context as far as the property rights to land are concerned.
2. There exists a large portion of the Ethiopian land which is not yet cultivated and occupied. Thus, the government will have the opportunity to let investors cultivate those areas and the benefits to be reaped from such centralized measures will tremendously outweigh the harm that will ensue from unwanted migration of peasants after selling their piece of land. When asked to support their assertion with facts they had the following that were put on record:
   - The whole country is with an area of about 111.5 million hectares out of which only 66% is arable while only 16.5 million hectares has so far been used for agriculture,

which is only 14.8% of the total area of the country. In one farming season, it is only 7 million hectares of land which is ploughed. This shows that only a very insignificant portion of the land is currently used and private property rights to land would do nothing but to mobilize those who are working on these 7 million hectares of land.

- Thus, it is preferable for the state to have control of the land and create conducive environment for investors in those areas which are not used or underutilized rather than letting the poor farmer sell his small plot.

3. In Ethiopian context, even if we go for privatization, uniform private property rights to land across the country may not be possible to realize. In this regard the discussant had raised the case of the pastoralists who are in a continuous mobility in search of the seasonally varying water sources and cattle foods.
4. Since land is a resource which is limited by nature in line with the ever increasing demands from new comers it is rather preferable to leave it under the government control with the possibility of distribution and redistribution to have it equitably shared among the whole members of the needy society.
5. Politically, letting the sell and free transfer of land rights will have the effect of destroying the identity of few minorities within the country.

On the other hand, the arguments in support of private ownership of land in the country have many dimensions, i.e., economic, social and rights-based grounds. The arguments are summarized as follows.

1. The private ownership of land must be considered as a human rights question as provided under the UDHR. The struggle made in mid 20th century by students with the motto 'land to the tiller' can adequately be answered if private ownership is guaranteed. It was meant to emancipate the tenant from the landlord's control and not for replacing the then landlord by another landlord-the government, not for contractual tenancy and not for distribution of land through auction.
2. It would be very difficult to establish a democratic society and state if private ownership of land is not guaranteed.
3. Free market economy and public ownership of land are diametrically incompatible. The latter was a socialist conception that only proved to be ineffective for most of the former socialist countries which have made policy shifts with regard to land ownership.
4. The American 3% farmers succeed to produce beyond what is enough for local consumption and are able to provide agricultural products through aid to the developing world because, among others, they are guaranteed with private ownership and have sense of belongingness to the land they are farming.
5. The productivity of land is inextricably linked with individual effort/labor and capital. The exertion of effort can be made possible if the farmer is made to develop sense of belongingness which in turn necessitates a guarantee by the constitution of private ownership of land.
6. Particularly, with respect to rural land, the farmer should be given the choice of either remaining on the land or to transfer it to others and migrate to town if she/she wishes to. If not, then it would tantamount to say 'as you are born a farmer so should you remain without education and betterment of life styles.' Moreover, this would be imposing a restriction on his right of movement.

7. The fear of unprecedented influx of rural people to towns cannot be a justification for public ownership because so long as the relevant infrastructures such as roads, health care services, education, etc are fulfilled, the farmer may not decide to leave his plot to which he would have not only economic linkage but also psychological attachments

The whole debate had been resolved after the Constitutional Assembly's decision of 8 December 1994 which voted for the approval of the current Constitution. Though the public-private ownership debate has been disputed more vigorously, there are other critical problems overcoming of which would have addressed the society's problems irrespective of the ownership type. In other words, it is the writer's belief that whether the country has public or private ownership would not have as much significance as addressing the critical problems mentioned herein below by way of conclusion. Moreover, the adoption of the human rights approach to land rights is neutral to the choice that a state makes with regard to types of ownership.

2.2.2 Basic Contents of Current Rural Land Laws

Ethiopia is a Federal State constituting two special administrative cities (Addis Ababa and Dire Dawa) that are accountable to the Federal Government and nine other national regional states, which are autonomous in the administrative affairs of their people. The powers and functions of the Federal and Regional Governments are provided in the FDRE Constitution. The power to "enact laws for the utilization and conservation of land and other natural resources, historical sites and objects" is provided under the constitution to the Federal Government.[80] Accordingly, the Federal Government enacted a "Rural land administration and Use Proclamation (RLAUP)" in 1997 (Proc. 87/1997) and then replaced it with the current RLAUP, proclamation No. 456/2005. Proclamation 456/2005 delegates regional states with the power to "enact rural land administration and land use law, which consists of detailed provisions necessary to implement this Proclamation,"[81] which is consistent with the federal land administration and use proclamation. Besides, there are other legislations in Ethiopia related to land matters among which the Urban Land Lease Proclamation (Proc. 721/2011) and the Expropriation Proclamation (Proc. 455/2005) are the main ones. Further, almost all the regional states have adopted their own rural land administration and use proclamations and urban lands holding lease regulations in order to implement the federal rural and urban land related proclamations.

FDRE Constitution

The FDRE Constitution under article 40, that deals with "Right to property", provides details about land rights in Ethiopia. Article 40 (3) of the constitution answers the core question of land ownership issue in Ethiopia:

> *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.*

Regarding its means of acquisition, sub-article 4 states that Ethiopian peasants have the 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. Although the peasant is denied private ownership rights to the land itself, he is guaranteed a "full right to the immovable property he builds and to the permanent improvements he brings about on the land by his labor or capital. This right includes 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."[82] Thus, unlike the Derg era, peasants have the full right to their produce and can sell it at market value. Moreover, the Constitution guarantees peasants against arbitrary eviction by the state. The Constitution clearly says: "… the government may expropriate private property for public purposes subject to payment in advance of compensation commensurate to the value of the property."[83]

Rural Land Laws

ACCESS TO RURAL LAND

Two years after the adoption of the FDRE Constitution, the Federal government enacted a Rural Land Administration and Use proclamation (Proc. 87/1997) that replaced the 1975 (Proc. 31/1975) rural land proclamation. Proclamation 87/1997 was again itself repealed and replaced by a new rural land administration and use proclamation (proc. 456/2005) in 2005. This proclamation (herein after called Federal RLAUP) follows the constitutional principle that creates free access to rural land. It declares that "peasant farmers and pastoralists engaged in agriculture for a living shall be given rural land free of charge" (Art. 5(1(a). A person, above the age of 18 years may claim land for agricultural activities. Women who want to engage in agriculture shall also have the right to get and use land (Art. 5(1) (b) &c(c).[84]

This principle of free access to rural land has also been reproduced in the regional land laws.[85] The conditions attached to this right are first, the person must want to engage in agricultural activities. In other words, agriculture must be his/her main means of livelihood or profession. Secondly, s/he must reside in the area where the agricultural land is located. Although this principle is not clearly seen in the FDRE RLAUP, Regional RLAUPs have clearly envisaged it.[86] And thirdly, the person requesting land must attain majority, 18 years and above (Art.5(1)(b). as exception, however, children may get land from their parents through inheritance and donation. Thus, age, residency and profession are the three important conditions to get rural land in Ethiopia. The reason seems that since there is shortage of agricultural land in rural areas, because of population pressure, it is not advisable to give land to those who live elsewhere (absentee owners) and those who earn income from other professions.

The criticisms raised against this rule are first, the principle of free access to rural land does not, in reality, work for shortage of land in rural areas and because the laws restrict redistribution of land.[87] Second, because of the residency requirement in the law, peasant farmers are locked down on their land instead of searching for additional income by staying in urban areas for longer periods.

NATURE AND DURATION OF LAND RIGHTS

Concerning the nature of the right provided to the farmers, the Federal and Regional RLAUPs uphold the constitutional principle that denies private ownership to land. Rather, the RLAUPs provide farmers with a right termed as "holding right." The Federal RLAUP defines the term "holding right" as the right of peasants and pastoralists "to use rural land for purposes of agriculture and natural resource development, lease and bequeath to members of his family or other lawful heirs, and it includes the right to acquire property produced on his land thereon by his labour or capital and to sale, exchange and bequeath same" (Art. 2(4) of Proc. 456/2005). Similar definitions have also been included in the other Regional RLAUPs. The general understanding today is that peasant farmers will have all the rights of an owner except sale and mortgage. They can use the land for agricultural production, have full ownership to the produce collected there from, have the right to rent to fellow farmers (share cropping), can lease to investors, and may inherit and donate (as a gift) to family members. As compared to Proc. 31/1975, there is significant development in terms of allocation and liberalization of land rights.

Peasants have such rights for a life time and beyond, since they can donate and inherit it to others. It has been declared that "…rural land use rights of peasant farmers, semi-pastoralists and pastoralists shall have no time limit" (Art. 7(1) of Proc. 456/2005).[88] In a way, this gives tenure security to the holder of the land as the right of using the land and the investments made thereon will not be threatened by a time limitation. It must be noted that the longer the duration of rights of using land is the better in terms of ensuring tenure security.

The missing element in the Federal Rural land Law is, though, the issue of pastoralist lands. The pastoralists are people who live in the lowlands of the country depending on animal husbandry. They do not have a plot of land like the highland farmers in which to settle. They are always on the move in search of food and water for their animals. Now the point is how their right of grazing over vast territories of the lowland could be defined as a "holding right", a right that includes lease, rent and donation? The type of property regime dominating the areas is more of communal rather than private holding. The remedy would be for the lowland regions to come up with their own rural land laws that take into consideration the regional reality.

MODALITIES OF LAND ACQUISITION

There are different ways through which a person may acquire rural land in Ethiopia. The law recognizes the following ways for a person to get rural land:

a. **Land provision**: as mentioned above, the constitution and the subsequent RLAUPs have created a free access to rural land to whomever who wishes to engage in agricultural activities. Any person who is 18 years and above and has the desire to engage in agriculture has the right to get rural land. The government, through its different land administration apparatuses, is empowered to grant land to those who are in need of it. The sources of the land that should be provided to the landless are unoccupied government lands, communal lands, land left without heirs, land claimed back by the state because the holder abandoned or neglect the land, and finally by conducting land distribution. Land redistribution, as discussed above, has less appeal to land holders who are supposed to give consent for its distribution (Art. 5(2) Proc 456/2005; Art. 7 of ANRS RLAUP). Land may also be granted to "non-governmental organizations and social and economic institutions" (Proc. 456/2005, Art. 5(4) (b).)

b. The second means of acquiring land is inheritance or donation. Any person who is a member of peasant family may have the right to get rural land from his/her family through inheritance or donation (Art. 5(2) of Proc 456/2005). A family member is defined as "any person who permanently lives with holder of holding right sharing the livelihood of the latter" (Art. 2(5) of Proc. 456/2005). Unlike the family members who are recognized by the FDRE Revised Family Law (RFC) as those who are related by marriage, blood and adoption, the Federal RLAUP follows a slightly different path. As can be inferred from the above cited provision, a family member is one who "lives" with the peasant who holds the land and "shares" his "livelihood."

The requirements are basically two: residency and management. It means, first, he must permanently live with the farmer under the same roof (residency element); and second, he must totally rely on the peasant farmer for his life and have no other income of his own. He is under the control and administration of the farmer (management element). This means, the law does not specifically require marital or blood relations for a person to be considered as a family member. Hence, a laborer who has no alternative income of his own and lives with the farmer without salary under the same roof may be considered as family member and eligible for inheritance. The Amhara RLAUP even goes one step further by allowing inheritance of land by will to any farmer engaged in agriculture.[89]

By contrast, it is not possible to inherit or donate rural land to one's children who live elsewhere or are engaged in other professions. The rationale behind such rule seems that since land belongs to the state and the people and not a private one, it has to be transferred to those who are in need of it, irrespective of their blood relations. Yet, the FDRE RLAUP, except the possibility of inheriting one's land to family members, presumably

through an expressed testament (will), doesn't state the situation of inheritance during intestate succession. The assumption is that in the absence of a legitimate will left by the deceased landholder, the rules of the RLAUP and the Civil Code succession part would be applied. Looking into this problem, the Amhara and the Benishangul Gumz RLAUPs included provisions to settle the issue. Regulation 51/2007 of the ANRS, for example, under article 11(7) puts the beneficiaries of intestate succession in the following priorities: minor children, if not, family members; children of full age who have no land of their own; children of full age who have their own landholding; parents. In order to be a legitimate beneficiary to the intestate succession, all the above people must show interest to engage in agricultural activities.

c. The third modality to acquire land is a government land transfer to private investors through a lease contract (Art. 5.4.a). This is the base for the current *large-scale agricultural land transfer* practice carried out in the country. Ethiopia is one of the countries that attract the interest of investors and sovereign states from different countries. In the past two decades, millions of hectares of land have been transferred to many foreign and domestic investors ventured in the flowering industry, bio-fuel, sugar, cotton, palm oil, tea production etc. The Ethiopian government has favorable investment policy that attracts foreign direct investment in such sectors. It has been claimed that about 3.5 million hectares of land has been transferred to both types of investors, and the government has a plan to transfer the same amount of land in the coming five years.[90] The government, on the other hand, puts the figure at about 2.6 million[91] (2.2 million given by regional states and 380,000 given by the Federal Government.) However, recent press and other reports[92] about actual or proposed large farmland acquisition by big investors has raised serious concerns about the danger of neglecting local rights and other environmental concerns. They have also raised questions about the extent to which such transactions can provide long-term benefits to local populations and their contribution to poverty reduction and sustainable development.

TRANSFER OF LAND USE RIGHTS

As already mentioned above, land rights could be transferred permanently through inheritance and donation. Besides, there are other modalities through which land use rights may be transferred temporarily to others. They may be termed as *commercial land transactions* to differentiate them from inheritance and gift. To be specific, the law recognizes rent and lease as the two possible ways to transfer land use rights temporarily. Sale and mortgage are not yet permitted. The FDRE RLAUP provides a general provision that allows rent and lease the details of which shall be decided by regional rural land laws. It generally states that peasants and pastoralists 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 [emphasis added]" (Art. 8(1) of Proc. 456/2005.) It means that the law provides

the discretion to determine the duration of the lease period and the amount of land to be leased to regional governments. Another point is that the law uses only the term "lease", and excludes the word "rent" whereas regional land laws give different meaning to the two terms.[93]

Regional RLAUPs do not follow a similar approach in the size of land to be leased and the duration of the lease period. For instance, in Tigray, the peasant is allowed to rent out up to 50 percent of the size of his land for 20 years if the lessee uses modern technology, and 3 years if he/she uses traditional means of production (Art. 6 (1), (3) of Tigray RLAUP). In the Amhara Region, renting land is allowed for a maximum of 25 years, although the size is not mentioned. There are practices in the region where farmers rented out the whole of their holdings to small scale investors. The argument for deviating from the Federal one (which says *in a manner that shall not displace them*) is one that depends on recognizing the rationality of the farmers; that farmers know better for themselves. The Oromia Land law follows the Tigray approach in terms of size and duration. The SNNPRS RLAUP follows somewhat different approach. According to article 8(1) of Proclamation No. 110/2007 of SNNPRS, the duration of land rented to a peasant by a peasant is 5 years, by a peasant to investor is 10 years, and by a peasant to those who cultivate perennial crops is up to 25 years.

Investors who rent land either from the government or peasant farmers have the right to mortgage their lease right as security to banks (See Art. 8.4 of Proc. 456/2005.) Regional states have also reproduced this right in their respective proclamations. This implies that an investor may lease land from two sources: first from individual farmers, and second from the government. When we examine the practice, it is the land which is rented from the government that is given as collateral to banks; not the one rented from peasant farmers. The reasons are firstly, the land rented from peasants is too small to pass it as mortgage, and secondly, the peasant may not agree that his land be given as collateral to banks.

TERMINATION OF LAND RIGHTS

Rural land rights are not immune from government intervention (see details in chapter 5.) Hence, a farmer may be required by law to use his rights in some fashion rather than another. For instance, a farmer may not cultivate land with a 30 degree slop without placing terraces on the land (Art. 13.4). Such restrictions are made for various reasons, such as environmental, equity, health and others. Violation of such obligations may render the loss of the land itself. Concerning the reasons of loss of the land rights, the proclamation does not give a coherent list. But one may locate them in different parts of the proclamation. For instance, it is stated that a holder of rural land "shall be obliged to use and protect his land. When the land gets damaged, the user of the land shall lose his use right (Art. 10.1).

In general, a review of the Federal as well as Regional RLAUPs reveals the following may be considered as reasons for the loss or termination of rural land rights:

- Permanent employment of the farmer that brings in him an average salary determined by government,
- Engagement in professions other than agriculture and for which tax is paid,
- Absence of a farmer from the locality without the knowledge of his whereabouts and without renting the land for more than 5 years,
- Fallowing the land for three consecutive years without sufficient reasons,
- Failure to protect land from flood erosion,
- Forfeiting land right upon written notification,
- Voluntary transfer of land through gift,
- Land distribution (the loss will be partial), and
- Expropriation of land without replacement of another land.

DISPUTE SETTLEMENT MECHANISM AND TYPES OF DISPUTES

Rural land disputes in Ethiopia are rife and they arise from different reasons and between and among different rural residents. Informal inquiries made in courts show that land dispute claims more than 80 percent of woreda courts' time in many regions in the country. For instance, in Amhara, 90 percent of civil and 48 per cent of criminal cases in woreda courts are associated with land issues. Disputes are mainly associated with inheritance (upon will or without will), adjudication process, boundary conflict in places where land certification has not yet effected, encroachment over community lands, issuance of double or triple certificates over the same land, divorce and partition of the land, rural informality, unfair compensation during expropriation etc.

Disputes are encouraged to be settled by the agreements of the parties or by arbitteral body elected by the diputants or as the case may be by another body as decided by regions. This is clearly envisaged under article 12 of the proclamation as follows:

> *"Where dispute arises over rural landholding right, effort shall be made to resolve the dispute through discussion and agreement of the concerned parties. Where the dispute could not be resolved through agreement, it shall be decided by an arbitral body to be elected by the parties or be decided in accordance with the rural land administration laws of the region."*

Hence, what the FDRE RLAUP provides is a guideline on which regions are supposed to embark. For this reason, regional states follow different approaches resolving rural land disputes. For example, in Tigray, if the parties fail to agree by themselves or by arbiters, they may take it formally to the kebele LA committee, and by appeal to the woreda court (Art. 28 of Tigray RLAUP); in Amhara disputants are supposed to finish their case by arbitration. The judges in the arbitration are selected from LA committee, and their decision is appealable to woreda courts. (Art. 28 of ANRS RLAUP & Art. 35&36 of ANRS RLAU regulation No. 51/2007); in Oromia, the case must first be filed in the local Kebele administration which will setup an arbitration (chosen by the parties) committee to hear the case, and

the aggrieved party may appeal to woreda court (Art. 16 of Oromia RLAUP.) Other regions also follow more or less the same procedure. Yet, some regions, after looking into the corrupt practices of the arbitration committees revoked this power and gave it to courts. For instance, the Amhara region decided all land matter issues to be adjudicated by regular courts (ANRS Proc. 148/2007.)

Table 1: Rural Land Rights in the Federal and different National Regional States

	Federal	**Tigray**	**Amhara**	**Oromia**	**SNNPRS**	**Benishangul Gumz**
Rent Farmer-farmer	-Amount should not be all -Period not mentioned	-50% of land -3 yrs traditional -20 yrs modern	-No specific amount -25 years	50% 3 years-Traditional 15-years modern	-No specific amount -5 yrs fmr-fmr -10, 25 yrs farm-investor	-50% of holding -2 yrs traditiona -10 yrs modern
Lease Gov.-investor	Amount not specified	50 yrs for Agri investment	25 years	No mention	No mention	40 years subject to renewal every 5yr
Mortgage of lease right	Allowed	Allowed	Allowed	Allowed	Allowed	Allowed
Donation	Allowed	-	To any farmer	To family member	To family members	To any person
Inheritance	Family members	-Children -Parents -Dependants (With no land)	**-To any farmer by will** -Minor children -Children no land -Children land -Parents	To family members (includes dependants)	To family members	**-To any farmer by will** -Minor children -Children no land -Children land -Parents

Source: Federal and State Rural land use and administration proclamations (as reproduced in Daniel W. Ambaye, *Land Rights in Ethiopia*")[94]

2.3 Pastoralist Land Tenure

Unlike many African countries, Ethiopia has, at least in theory, eliminated a diversified land ownership systems because of the nationalization of all land during the Derg era. This is to say all land is controlled by the state. However, in reality there are some areas in the country where customary land ownership and chieftain leadership is still dominant. The pastoralist areas of Afar and Somali regions are the two known areas where land is controlled and administered by clan chiefs rather than government authorities. Nevertheless, despite land remains equally central in the livelihoods of both Ethiopian pastoralists and Ethiopian peasants (farmers), the land tenure discourse in Ethiopia is dominated by the agrarian land tenure rather than the pastoralists as well.

In the Somali Regional State, for example, the role of government rural land administration authority is minimal since all rural land is controlled and administered by the clan chiefs. Hence, it is claimed that even when the government wants land for public purpose activities, such as an airport, it must approach clan chiefs and pay compensation for the leaders. Those who live in urban areas first receive land from their clan and then go to the municipality for registration and recognition. Clan leaders usually use the compensation money for some publicly needs activity, such as water wells.

Pastoralist land areas are given recognition under the constitution in an equal manner with the peasant lands, and yet the FDRE RLAUP is highly dominated by the highland peasantry tenure style than the pastoralist one. The FDRE RLAUP was written down with the "private land holding" as a dominant tenure system in mind while the reality in the lowlands is the contrary. Land is perceived as common property given by God and passed to the next generation.

Extract 2.2: Following excerpts from Kabtamu Neguse's thesis[95] shade light on the pastoral customary land tenure system of the Somali region. Pp. 52, 53, 54

One important element of customary tenure system elsewhere is community's adherence to its norm. This means, customary tenure systems in the world share one single powerful principle: they are community based in their reference and adherence. As all the norms of a customary tenure system emanate from the custom of the communities themselves, all customary rights holders are the voluntary participants of this system, unlike state dictated formal tenure systems or feudal land tenure systems. Thus, the customary land tenure system is the main fabric that ties together the local communities that share common resources. Another feature of a customary tenure system is that it mostly functions around resource poor areas where resource sharing and cooperation with the participants is indispensible.

…….

Nevertheless, despite its social legitimacy and compatibility with the pastoral mode of production, this form of tenure system has been under constant pressure in Ethiopia since the formation of the modern state of Ethiopia as elsewhere in Africa…. However, the customary tenure system

continuous operating *'de facto'* despite the neglect and constant attempt by successive Ethiopian governments to replace it with formal tenure system.

In the Somale regional state, virtually all rural and urban lands are under the control of different clans and to this extent, the customary tenure system is still operative in this region despite the presence of a formal tenure system at least at the federal level. The following text, which is quoted from the draft rural land policy of Somale regional state, capitalizes that:

> *Article 40 sub Articles 3 of the Constitution of Federal Democratic Republic of Ethiopia states that ownership of land and its natural resources are property which belong only the government and people, and being common properties of nations and nationalities of Ethiopian land can neither be sold nor exchanged. On the contrary, land in the rural as well as urban land in Somali region is held by clans, and as result the right of the inhabitants in the Somali regional state to own land and its resource had not been yet realized. In the region, there exist traditional rural land administrations that use customary law, which has been in the region for centuries[sic].*

Extract 2.3: Following excerpts from *The Ethiopian Reporter* Amharic by-weekly, Sunday 28, Oct. 2012
http://www.ethiopianreporter.com/news/293-news/8289-2012-10-27-14-01-29.html

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በአፋር ክልል መሬት የተያዘው በጎሳዎች መሪዎች በመሆኑ ኢንቨስተሮች ከባንክ ብድር ለማግኘት የዋስትና ችግር ያጋጥመናል አሉ:: ችግሩ አሳሰቢ ደረጃ ላይ በመድረሱ መንግሥት መፍትሔ እንዲሰጣቸው ጠይቀዋል...ኢሕአዴግ አገሪቱን ከተቆጣጠረ በኋላ የወጣው ሕገ መንግሥት መሬት የመንግሥትና የሕዝብ መሆኑን ይደነግጋል ..የአፋር ክልል ይህንን ተግባራዊ ባለማድረጉ፣ በክልሉ ውስጥ በግብርና የተሰማሩ ኢንቨስተሮች መቸገራቸውን ይናገራሉ:: በክልሉ መሬት የተያዘው በጎሳ መሪዎች በመሆኑ ኢንቨስተሮች መሬትን በሚመለከት ስምምነት እያደረጉ ወደ ሥራ የሚገቡት ከጎሳ መሪዎች ጋር ነው:: ኢንቨስተሮቹ በአካባቢው ኢንቨስት በሚያደርጉበት ወቅት ከባንኮች ፋይናንስ እንደማያገኙ ተጠቁሟል:: የጥጥ አምራቾች ማኅበር ባለፈው ረቡዕ ለጠቅላይ ሚኒስትር ኃይለ ማርያም ደሳለኝ እንደገለጸው፣ ኢንቨስተሮች መሬቱን የሚያገኙት ከጎሳ መሪዎች በመሆኑ ባንኮች አመኔታ በማጣታቸው ብድር አይሰጧቸውም:: ማኅበሩ እንደሚለው፣ ኢንቨስተሮች ለሥራቸው ብድር የሚያገኙት ቤታቸውን ጨምሮ የተለያዩ ንብረቶቻቸውን እያስያዙ ነው:: የአፋር ክልላዊ መንግሥት ሕገ መንግሥቱ ከፀደቀ ከ16 ዓመታት በኋላ ባለፈው ዓመት በሕገ መንግሥቱ ድንጋጌ መሠረት የክልሉን መሬት የሕዝብና የመንግሥት ሚድረግ ያስችላል ያለውን አዋጅ አውጥቷል::አዋጁንም ለማስፈጸም የሚያስችል ደንብ በወቅቱ መውጣቱን ሪፖርተር መዘገቡ ይታወሳል:: ነገር ግን ክልሉ ይህንን ተግባራዊ ለማድረግ በሞከረበት ወቅት ከጎሳዎች ጋር መግባባት ባለመቻሉ እንዲቆም ተደርጓል:: የሪፖርተር ምንጮች እንደሚጠቁሙት፣ የአፋር ክልል የጎሳ መሪዎች ከመሬት ከፍተኛ ገቢ ያገኛሉ:: ለኢንቨስተሮች መስጠትና መንጠቅ የሚችሉት የጎሳ መሪዎች ናቸው:: በክልሉ በመሥራት ላይ ያሉ ኢንቨስተሮች ያላቸውን የእርሻ ምርት ወይም ከጎሳ መሪ ጋር የተዋዋሉበትን ውል ባንክ በዋስትና ስለማይቀበላቸው የብድር ተጠቃሚ አልሆኑም:: ...በኢትዮጵያ በአጠቃላይ ከሚመረተው ጥጥ 40 በመቶ ያህሉ የሚመረተው በአፋር ክልል ነው:: ከማዕከላዊው የአገሪቱ ክፍል የሚነሳው የአዋሽ ወንዝ ዓመቱን ሙሉ የሚፈስበት የአፋር ክልል 96,707 ካሬ ኪሎ ሜትር ሰፋት አለው::

The content of this article is that investors have presented their complaint to the Prime Minister on the issue of access to land in the Afar Region. They are in problem in getting loan from banks, since the land is owned by the clan chiefs. Although the FDRE Constitution declared that all land belongs to the people and the state, this does not work in the Afar. Investors are forced to make contracts for land acquisition with clan heads instead of the government. Since the land deals are made with clan heads, they could not get the trust of banks, and hence, investors are forced to put their private assets as collateral to get finance to develop the land for cotton production. Forty per cent of the country's cotton is produced from Afar region. The region, after 16 years, has passed a rural land proclamation and regulation that affirmed the state and people's ownership of land in the region. When government tried to implement these laws, though, resistance surfaced and government stops to use them. Clan heads are said to get lots of money from the land transfers and they are the ones who have the de facto power of giving and taking land.

Summary

The Imperial era was better in terms of provision of land rights although the system was in general inequitable since land was controlled by the elites. The Derg's land tenure system was equitable since it created access to land for all people. But, it restricted the freedom of using one's land property rights. Now the mission for the current government, when it came to power in 1991, should have been how to solve the problems encountered by its predecessors: how to ensure equity in land holding while at the same time liberalizing the land rights of the people. The current rural land laws provide peasants with lifetime rights (holding right) to the land. This land right includes use, lease/rent, donation and inheritance rights. Sale, exchange (barter) and mortgage are not allowed. The rights of lease/rent, donation and inheritance are however, restricted for different reasons. The rural land laws also create (at least in principle) the free access to rural land although, because of land shortage and restriction on land distribution, this right is not realized.
From the foregoing discussion it can be concluded that the current laws should do more in creating access to land rights, especially by encouraging people to settle in lowlands, and in liberalizing the land use rights in the country within the given constitutional arrangement (state and public ownership of land.)

Review Questions

1. How do you view the equitability of land ownership in the northern and southern parts of pre-1974 Ethiopia?
2. What was the significance of the land tenure system in pre Hailesellassie Ethiopia?
3. Emperor Hailesellassie is criticized for his slowness in taking land reform measures in Ethiopia. What were the reasons?
4. As compared to the Proc. 31/1975, what are the significant developments of the current rural land proclamation 456/2005?
5. What are the restrictions introduced in the current rural land legislation?
6. Proclamation 456/2005 creates free access to rural land? do you think this is absolutely free? What are the restrictions?
7. The above proclamation on the one hand allows dependants (not related by blood and marriage) to inherit, but on the other, forbids children who have their own income from benefiting. What do you think is the policy reason that the RLAUP follows in respect of inheritance?

Endnotes Chapter Two

[1] BLACK, H. C. 1991. Black's Law Dictionary. 6th ed. St, Paul, Minn.: West Group.

[2] FAO 2002. *Land Tenure and Rural Development,* Rome, United Nations Food and Agriculture Organization. P. 7.

[3] During his stay in Ethiopia in the 16th century, the Portuguese priest Francisco Alvarez testifies that the power of the king was absolute (ALVAREZ, F. 1970 (Orinally translated by John Stanley in 1881). *Narrative of the Portuguese Embassy to Abyssinia During the Years 1520-1527,* New York, Burt Franklin, Publisher.) A hundred years latter Almeida (a Jesuit priest) said "the Emperor confiscates and grants all the lands as and to whom he chooses." (see PANKHURST, R. 1966. *State and Land in Ethiopian History,* Addis Ababa, The Institute of Ethiopian Studies and the Faculty of Law, Haile Sellasie I University.p.121.) As mentioned by Taddesse Tamrat (TADDESSE-TAMRAT 1972. *Church and State in Ethiopia, 1270-1527,* Oxford, Clarendon Press.)The idea of royal ownership of all land in Ethiopia was documented by royal chroniclers of different kings. For example, upon the purchase of land by king Lalibela (1200-1250) to construct his well known rock hewn churches in Roha, his hagiographer asked rhetorically to show the traditional power of the monarch in the distribution of lands: "who would have forbidden the king had he decided to take the land [without purchase]?" In his famous conflict with the monastic leaders, Emperor Amda-Sion (1314-1344) is said to have demanded their absolute obedience to him because they lived 'on the land of the king'. His son and successor Sayfe-Arad (1344-72) is also said to have made the claim that 'God gave (all the) land to me.' James Bruce a 17th century Scottish traveler to Ethiopia has also declared that "all the land is the king's; he gives to whom he pleases during pleasure and resumes it when it is his will; but the crown makes no violent use of its power in that respect."(PAUL, J. C. N. & CLAPHAM, C. 1972. *Ethiopian Constitutional Development I, a Source Book,* Addis Ababa, Haile Sellassie I University and Oxford University Press. p. 290) An Ethiopian writer and Minister during the Imperial period also noted: "the Ethiopian Emperor has an uncontested and boundless power over the territories he rules. He is both the temporal and spiritual ruler."(Id. p. 58)

[4] See for example HOBEN, A. 1973. *Land Tenure Among the Amhara of Ethiopia: The Dynamics of Cognatic Descent* Chicago, University of Chicago Press.; CRUMMEY, D. 2000. *Land and Society in the Christian Kingdom of Ethiopia: From the Thirteenth to the Twentieth Century,* USA, University of Illinios Press.;MARKAKIS, J. 2006. *Ethiopia: Anatomy of a Traditional Polity,* Addis Ababa, Shama Books.

[5]HOBEN, supra note 4, p. 5.

[6] SHIFERAW-BEKELE 1995. The Evolution of Land Tenure in the Imperial Era. *In:* SHIFERAW, B. (ed.) *An Economic History of Ethiopia: The Imperial Era 1941-1974*. Dakar: CODESRIA. , p. 97.

[7] HOBEN, supra note 4, p. 5.

[8] The main ones were tribute (one-fifth) and tithe (one-tenth) of total produce and usually paid in kind.

[9] A good example in this case is Emperor Susenyos (1606-32) who tried to change his faith from the official Orthodox Christianity to Catholicism and was excommunicated by the church and forced to resign from power after a civil war. Beside Emperor Tewodros II (1855-1868) who tried to confiscate church land was clashed with the clergy and widespread conflict and civil war was ensued.

[10] PANKHURST, supra note 3, p. 22.

[11] The *Fitha Negest* (Law of the Kings) is a sophisticated compilation of legal prescriptions concerning both religious and secular matters written in approximately the 13th century in Egypt as a guide to Christian population living within the Moslem society. Originally written in Arabic, and incorporating laws from Old and New testament, Roman law, and some Moslem principles and the proceedings of the early councils of Nicaea and Antioch, it is believed that it was translated to *Geez* (official state and church language of ancient Ethiopia) in the 15th century, during the reign of Emperor *Zera Yaqob* (1434-1468).

[12] Fitha Negest (Amharic and Geez Version). Addis Ababa: Tesfa-Gebre-Sellassie Printing Press. Sec. 44: 1540-41, P. 380

[13] Of course, this right was revoked in 1942 by Decree for the Administration of all Church Lands (Decree No. 2 of 1942), which ordered that church lands should pay tax (to the government) at the same rate as secular lands. See the full text in MAHTEME-SELASSIE, W. M. 1957. The Land System of Ethiopia. *Ethiopia Observer,* 1. Pp.300-01

[14] For example according to Crummey and Shumet, Emperor Iyasu II (1730-1755) and Etege Mentewab the dowager empress granted to the Quesquam church in Gonder a sum of 755 *gashas* (1 *gasha* is 40 hectare) of land to be distributed among 260 *debteras* (church scribes). (CRUMMEY, D. & SHUMET-SISHAGNE 1991. Land Tenure and the Social Accumulation of Wealth in Eighteenth-Century Ethiopia: Evidencefrom the Qwesqwam Land Register. *The International Journal of African Historical Studies,* 24**,** 241-258.

[15] ALVAREZ, supra note 3, p. 57.

[16] MARKAKIS, supra note 4, P. 123

[17] SHIFERAW, supra note 6, pp. 93-94.

[18] Ibid.

[19] GEBRE-WOLD-INGIDA, W. 1962. Ethiopia's Traditional System of Land Tenure and Taxation. *Ethiopia Observer,* 5**,** 302-39.

[20] SHIFERAW, supra note 6

[21] For detail see PANKHURST, supra note 3.

[22] See for details MARKAKIS, supra note 4, and CRUMMEY, supra note 4.

[23] PANKHURST, supra note 3, p. 137.

[24] MARKAKIS, supra note 4 , pp. 162-63

[25] See as reproduced in MAHTEME-SELLASSIE, W. M. 1970. *Zekre Neger,* Addis Ababa, 2nd ed.MAHTEME-SELLASSIE: 1970, p. 109.

[26] PAUSEWANG, S. 1982. *Peasants, Land and Society: a Social History of Land Reform in Ethiopia,* Munchen, Weltforum-Varlag., p. 36.

[27] GEBRE-WOLD-INGIDA, *supra* note 19, pp. 302-303.

[28] See for example GILKES, P. 1975. *The Dying Lion: Feudalism and Modernization in Ethiopia,* London, Julian Friedman Publishers.; Also see CRUMMEY: 2000, *supra* note 4, p. 239.

[29] HOBEN, *supra* note 4, pp. 205-209

[30] These are the law of September 1930 that deals with tax concerning excess land, and the law of May 1935 that established single land tax. Both are reproduced in GEBRE-WOLD-INGIDA, *supra* note 19, p. 295-98.

[31] MAHTEME-SELLASSIE: 1957, *supra* note 13, p. 297.

[32] As reproduced in GEBRE-WOLD-INGIDA, *supra* note 19, p. 325.

[33] For example an Order passed by the Emperor after a year or two reads: "The Ministry of Finance has submitted that the Asrat and trade or marketing tax which has hitherto been collected by *rist-gult* holders shall in future be collected by officers of the Ministry of Finance, and that the *rist-gult* holders shall give to the Ministry of Finance any money they hold at present. These *rist-gult* holders must also submit in writing the amount left in their hands." GEBRE-WOLD-INGIDA, *supra* note 19, p. 331.

[34] Full text is reproduced in GEBRE-WOLD-INGIDA, *supra* note 19, p. 327

[35] Land Tax Proclamation, Proclamation No. 70/1944. *Negarit Gazeta.* Year 4, No.2. Also available in EWING, W. H. (ed.) 1972. *Consolidated Laws of Ethiopia, V. I,* Addis Ababa: The Law Faculty of Haile Sellassie I University. Pp. 538-43

[36] Both are reproduced in EWING, Ibid, p. 473 and 477 respectively.

[37] CRUMMEY: 2000, *supra* note 4, p. 241.

[38] 1966. A Proclamation to Amend the Land Tax Proclamation of 1944. *Proclamation No. 230/1966*. Negarit Gazeta: Year 25, No. 9. Article 2(a)

[39] Id. Article 2(b)

[40] For more discussion on the subject, see GEBRU-TAREKE 1991. *Ethiopia: Power and Protest: Peasant Revolts in the Twentieth Century,* Cambridge, Cambridge University Press.

[41] BAHRU-ZEWDE 1991. *A History of Modern Ethiopia, 1855-1974,* Addis Ababa, Addis Ababa University Press. p.191.

[42] DESSALEGN-RAHMATO 2006. From Hetrogeneity to Homogeneity: Agrarian Class Structure in Ethiopia since the 1950s. *In:* DESSALEGN-RAHMATO & TAYE-ASSEFA (eds.) *Land and the Challenge of Sustainable Development in Ethiopia.* Addis Ababa: Forum for Social Studies p. 9. During the 1960s land was transferred by sale to civil servants, small scale traders and the like who anticipate profit from export of agricultural products.

[43] For example, according to different studies, the tenancy rate was 75% in Hararge, 67% in Showa, 62% in Kaffa, all from the south. On the contrary, in the north was 15% in Begemder, 20% in Gojam and 25% in Tigre.

[44] DESSALEGN RAHMATO: 2006, *supra* note 42, p. 8

[45] ANDARGACHEW-TIRUNEH 1993. *The Ethiopian Revolution, 1974-1987: A Transformation From an Aristocratic to aTotalitarian Autocracy,* New York, Cambridge University Press. P. 97

[46] Ibid. P. 98

[47] Ibid.

[48] MARCUS, H. G. 1994. *A History of Ethiopia,* Los Angeles, University of California Press. p. 173.

[49] DUNNING, H. C. 1970. Land Reform in Ethiopia: A Case Study in Non-Development. *UCLA L. Rev,* 18. P. 306.

[50] See SHIFERAW, *supra* note 6, p.128, who told us that bills concerning land reform tabled to parliament in 1963, 1970 and 1972 were rejected by both parliaments.

[51] DUNNING, *supra* note 49, at foot note 152, for example says: "Three draft proclamations had been submitted to the Council of Ministers by July 1, 1969: a Proclamation to provide for the Registration of Immovable Property; a Proclamation to provide for the Regulation of Agricultural Tenancy Relationships*;* and a Proclamation to provide for a Tax on Unutilized Land. As of October 1, 1970, none of these drafts had been submitted to Parliament."

[52] Public Ownership of Rural Lands, Proclamation No. 31/1975. *Negarit Gazeta.* Year 34, No. 26.

[53] Id. Art. 3(2) of Proc. 31/1975

[54] Ibid., Art. 3(3)

[55] Ibid., Art. 4(1)

[56] Ibid., Art. 6(1)

[57] Ibid., Art. 6(3)

[58] Antichresis is like a mortgage except that the former is created by contract. The main difference is that in case of antichresis the immovable (land or building) will be temporarily delivered/transferred to the creditor, while in case of mortgage it has to stay in the hand of the debtor

[59] COHEN, J. M. 1977. Rural and Urban Land Reform in Ethiopia. *Afri. L. Stud.,* 14. P. 14.

[60] CLAPHAM, C. 1988. *Transformation and Continuity in Revolutionary Ethiopia,* Cambridge, Cambridge University Press. P, 47.

[61] Ibid.

[62] See generally for example YOUNG, J. 1997. *Peasant Revolution in Ethiopia The Tigray People's Liberation Front, 1975-1991,* New York, Cambridge University Press.

[63] See DESSALEGN-RAHMATO 2009a-a. Land and Agrarian Unrest in Wollo: From the Imperial Regime to the Derg. *In:* DESSALEGN-RAHMATO (ed.) *The Peasant and the State: Studies in Agrarian Change in Ethiopia 1950s-2000s* Addis Ababa: Addis Ababa Univrsity Press. Pp. 111-182.

[64] Art. 8 of Proc. 31/1975.

[65] See the detail under Art. 10 of Proc. No. 31/1975.

[66]See for example, HO, P. 2005. *Institutions in Transition: Land Ownership, Property Rights, and Social Conflict in China,* New York, Oxford University Press. Pp. 5-10

[67] DESSALEGN-RAHMATO 1993. Agrarian Change and Agrarian Crisis: State and Peasantry in Post-Revolution Ethiopia. *Africa: Journal of the International African Institute,* 63**,** 36-55. P. 36.

[68] Id., pp, 36-40.

[69] ታምራት-ላ ይኔ 1983. የ ኢትዮጵያ የ ሽግግር ወቅት የ ኢኮኖሚዎ ሊሲ ረ ቂቅ . አ ዲስ አ በ ባ : ጠቅላ ይ ሚኒ ስ ቴር ቢሮ ፡ገፅ 15

[70] SAMUEL-GEBRESELASSIE 2006. Land, Land Policy and Smallholder Agriculture in Ethiopia: Options and Scenarios. *Future Agricultures Consortium meeting.* the Institute of Development Studies. P. 4

[71] Generally see MOIPAD 2001. Federal Democratic Republic of Ethiopia Rural Development Policies, Strategies and Instruments (Amharic). Addis Ababa: Ministry of Information, Press and Audiovisual Department.

[72] DESSALEGN-RAHMATO 2009b. An Assessment on the Ethiopian Agricultural Policy. *In:* TAYE-ASSEFA (ed.) *Digest of Ethiopian National Policies, Strategies and Programmes (Amharic).* Addis Ababa: Forum for Social Studies and The European Union. P. 149.

[73] MOIPAD, supra note 71, pp. 67-90.

[74] Ibid.

[75] See EEA/EEPRI 2002. A Research Report on Land Tenure and Agricultural Development in Ethiopia. Addis Ababa: Ethiopian Economic Association/Ethiopian Economic Policy Research Institute.

[76] Deininger, K. And 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. Cited *Ibid.*

[77]See DEININGER, K., DANIEL-AYALEW, HOLDEN, S. & ZEVENBERGEN, J. 2007. Rural Land Certification in Ethiopia: Process, Initial Impact, and Implications for Other African Countries. *World Bank Policy Research Working Paper 4218*. World Bank.

[78] See DESSALEGN-RAHMATO 2009a-b. Land Registration and Tenure Security: A Critical Assessment. *In:* DESSALEGN-RAHMATO (ed.) *The Peasant and the State: Studies in Agrarian Change in Ethiopia 1950s-2000s.* Addis Ababa: Addis Ababa Univrsity Press.

[79] BELACHEW-MEKURIA 2009. Human Rights Approach to Land Rights in Ethiopia. *In:* MURADU-ABDO (ed.) *Land Law and Policy in Ethiopia since 1991: Continuities and Changes.* Addis Ababa: Law Faculty, Addis Ababa University. P. 65-68.

[80] FDRE Constitution, Article 51(5).

[81] 2005. West's Encyclopedia of American Law. *In:* LEHMAN, J. & ET.AL (eds.) *Eminent Domain.* Vol.4, 2nd ed. San Francisco, London and Munich: Thomson Gale. Art. 17.

[82] FDRE Constitution, Art. 40 (6)

[83] Id. Art. 40(8).

[84] See also Art.5(1) of Oromia Rural Land Law that says "Any resident of the region, aged eighteen years and above, whose livelihood depends on agriculture and/or wants to live on, have the right to get rural land free of charge ."

[85] See The Revised Tigray National Regional State Rural Land Administration and Use Proclamation, Proclamation No. 136/2007. *Tigray Negarit Gazeta.* Year 16 No.1.Art. 5(1); The Revised Amhara National Regional State Rural Land Administration and Use Proclamation, Proclamation No. 133/2006. *Zikre Hig.* Year 11, No.18.Art. 5(2);Oromia Rural Land Use and Administration, Proclamation 130/2007. Art. 5(1); The Southern Nations, Nationalities and Peoples Regional State Rural Land Administration and Utilization Proclamation, Proclamation 110/2007. *Debub Negarit Gazeta.* Year No.Art. 5(1). (also called as SNNRS)

[86] See for example the Amhara National Regional State Rural Land Administration and Use Proclamation (hereinafter called ANRS RLAUP) that uses the phrase "any person residing in the region…" as a condition to get agricultural land (Art.5(2), 6(1), 7(1); The Tigray National Regional State (hereinafter called Tigray RLAUP) uses similarly words like "any resident of the region" (Art. 5(1)

[87] The FDRE RLAUP simply says that upon the wish of the people land may be redistributed (art. 9); the ANRS RLAUP puts if 80% of the people agree (art. 8); the Oromia RLAUP completely prohibits redistribution (art. 14).

[88] See also Art. 5(3) of Amhara; Art. 5(1)(b) of Tigray RLAUPs

[89] See Art. 16(1) of ANRS RLAUP. Whether or not this contravenes with the Federal Rural Land Law is debatable

[90] DESSALEGN-RAHMATO 2011. Land to Investors: Large-Scale Land Transfer in Ethiopia. *FSS Policy Debate Series.* Addis Ababa: Forum for Social Studies. P.5.; Author. 2004 **ሰፋፊ የግብርና ኢንቨስትመንት ለኢትዮጵያ ምን ይፈይዳል**? *ሪፖርተር*.accessible at http://www.ethiopianreporter.com/component/content/article/303-commentary/4934-2012-01-21-08-27-41.html; See also an article published on Fortune News paper, http://www.addisfortune.com/Published%20On.htm

[91] Interview with Ato Essayas Kebede, Director of the Agricultural Investment Directorate, Ministry of Agriculture, 2011.

[92] See for example, HORNE, F. 2011. Understanding Land Investment Deals in Africa: Country Report Ethiopia. Oakland, USA: The Oakland Institute.

[93] For example in the Amhara and Oromia Rural Land laws "rent" is understood as "transfer of land to fellow farmers for shorter period of time", while "lease" is "transfer of land from farmers to investors or from government to investors for longer period of time."

[94] DANIEL-W.-AMBAYE 2012. Land Rights in Ethiopia: ownership, equity and liberty in land use. *FIG Regional Conference.* Rome: Federation of International Surveyors p.13. http://www.fig.net/pub/fig2012/papers/ts02d/TS02D_ambaye_5521.pdf

[95] KABTAMU-NIGUSE. 2012. *Land Tenure and Tenure Security Among Somali Pastoralists: Within the Context of Dual Tenure System.* LL.M thesis, Bahir Dar University, School of Law.

URBAN LAND LAW

Introduction

In this chapter an attempt is made to discuss the current governing urban land law, the existing lease proclamation. By raising some controversial provisions we will consider the pros and cons of such an approach. But, before that, it is proper to highlight the urbanization and urban land ownership pattern in the country before the revolution and the situation after the revolution. Since the Derg proclamation that nationalized urban land (Proc. 47/1975) is still applied by courts we will see it in some detail.

3.1 Urbanization and Pattern of Urban Land Ownership

3.1.1 Pre-Code Era

Urbanization in Ethiopia is a recent phenomenon because of historical factors in the country. Many of the middle sized towns in Ethiopia were founded during the nineteenth century for political-military reasons.[1] According to Donald Crummey, three major institutions shaped Ethiopian towns during the 19th and 20th centuries: palace, market and church. These institutions played three roles: political, economic and cultural.[2] The establishment of the current capital, Addis Ababa, in 1886, is the third in line following Axum and Gonder in the ancient and middle age Ethiopian history respectively. Throughout most of its history, Ethiopia remained a land of small villages and isolated homesteads.[3] The reason for the absence of large settlement of urban areas in Ethiopia for a long time, according to Richard Pankhurst, is the continuous move of the royal camp. Middle age royal court was composed of immense agglomerations of population which consisted of not only of courtiers and warriors, but also numerous non-combatants, among them wives, servants and slaves, armourers, tent-carriers, muleteers, priests, traders, prostitutes, beggars, and even a few children.[4] On the other hand, some argued that there was a little need for urbanization, since it contradicted the existing self sufficient peasantry life-style. Urbanization by its nature needs to transfer more land away from agricultural production to urban settlement.[5] And yet, it can be concluded that modern Ethiopian urbanization flourished during the twentieth century because of political stability (especially during the reign of Emperor Haile Selassie I), and

the modernization of the country. Most cities in the country flourished around some economic center such as railway, factory, or trade route.

> *Evidence that cities were absent in Ethiopia was absolute after European travelers reached the high plateau during and following the fifteenth century. They commented not only upon the tent encampments, but also upon the total lack of urbanism in Ethiopia. One such commentary is Francisco Alvares' narrative of the Portuguese embassy to Ethiopia in 1520 which includes: 'In all the country there is no town which exceeds 1,600 households, and of these there are few, and there are no walled towns or castles, but villages without number.' (The estimate of houses would put the population of the largest town between 8,000 and 10,000.) Accounts written after Alvares' time were not anywhere nearly so generous with their estimates of the population and number of towns. Jerome Lobo, visiting Ethiopia during the early 1600s, noted that the Ethiopians did not have cities or houses since they lived in tents and in cottages only rarely built of stone. Visiting Ethiopia between 1624 and 1633, Manoel de Almeida said: 'Apart from the Emperor's camp there is no settlement in the whole empire that deserves the name of city, or even of town. They are all villages, some larger, some smaller, but such that no other name suits them.' In the seventeenth century, a German scholar, Job Ludolf, wrote: 'Besides Axuma, there are no Cities in Habessinia, and but few towns.... The Habessines wonder to hear of so many great Cities among us ... [and] . . . the Habessines choose rather to live after the manner of Villagers... .' Ludolf believed that there had been a general regression in the technology of construction after the Ethiopian monarchs left Aksum.*[6]

Addis Ababa was established in 1886 by Emperor Menelik II, and it is said that in the beginning it was a collection of camps where the royal camp was located in a tent at the center of the high ground. The imperial camp was surrounded by the Emperor's servants, and other nobility were granted land for their own and their followers to construct houses. Over time, because of the insecurity they felt, the lords and foreign embassies made a request to Menelik for some kind of security over their holdings. Accordingly, the emperor promulgated an edict[7] in 1907 that recognized private ownership of land and allowed its free transfer through sale (Art. 3). The law also created land cadastre system which enabled the registration of every sale of land and the giving of land ownership certificates to owners (Arts. 5, 10, 11, and 14.) Further, it gave a guarantee against arbitrary confiscation of land by providing compensation in the event of land expropriation for public purpose activities (Art. 25 and 26). This gave property holders greater security and a stake in the fate of the city. Not only did the land charter become the most prized certificate of any urban household but it also contributed to activating the urban economy through sales and mortgages.[8]

A detailed study of earlier land tenure in urban Gonder also shows that land was held in private hands and subject to free sale and exchange.[9] Thus, urban land in Ethiopia, from the beginning was held in private ownership.[10] During the eve of the revolution, Addis Ababa was by far the biggest city and center of economy and politics. The city grew fast, inhabiting a considerable population which was estimated to be between 60 and 100 thousand in 1910[11] to about 1.1 million during the revolution in 1974.[12] Other towns had insignificant number of population compared to the capital. For example, according to a 1970's estimate, out of the registered 268 towns, the eight biggest towns had a population of 25,000 each, while Addis Ababa at that time registered 800,000 inhabitants (one third of all urban inhabitants in the country).[13] Much of the land in the city was

controlled by insignificantly few elites. Pankhurst has provided the figures based on the first reliable survey of the city's 212 square kilometers made in 1961 as follows:

> *This survey showed that 58 percent of the total area was owned by 1,768 large proprietors each with more than 10,000 square meters, or an average of 71,000 square meters per owner, whereas 24,590 small proprietors owning less than 10,000 square meters had only 7.4 percent of the total, the average size of such plots being 150 square meters. 12.7 percent of the land belonged to the Government and foreign embassies. A further 12 percent belonged to the Church, while the remaining, 9.9 percent...was a royal land*[14].

It means 58 percent of the surveyed land was held by 6.7 percent of the population. An estimate made five years later, in 1966, shows that five percent of the population in Addis Ababa owned 95 percent of the land in the city.[15] Almost all the elites who controlled the land ventured in the construction of rental houses, which was an attractive investment at that time.[16] This ranged all the way from the appalling hovels (slums) of the urban poor to elegant villas which found a ready market among diplomats and expatriate experts in a city that headquarters international organizations.[17] Land value rose alarmingly from 0.25 birr in the 1950s to 200-300 birr per square meter in the 1970s.[18]

3.1.2 Governing Urban Land Law before the Revolution

After the promulgation of the 1907 Menelik's Addis Ababa Land Charter and before the adoption of the Civil Code in 1960, there was no significant legislation passed in Ethiopia dealing with the acquisition, use and disposal of urban land. Of course, both the 1931 and the revised 1955 Ethiopian Constitutions provided general provisions concerning sanctity and protection of private property. Both emphasized that land would not be arbitrarily taken (expropriated) from owners without compensation, and even then only if it was necessary for public purpose activities. For example, the 1931 Ethiopian Constitution declares under article 27: "*Except in cases of public necessity determined by the law, no one shall have the right to deprive an Ethiopian subject of any movable or landed property which he owns."* Supplementary articles (see endnote) were also provided to elaborate and embolden this article.[19] The 1955 Revised Constitution on its part declares:

> *Everyone has the right, within the limits of the law, to own and dispose of property. No one may be deprived of his property except upon a finding by ministerial order issues pursuant to the requirements of a special expropriation law enacted … and except upon payment of just compensation determined in the absence of agreement, by judicial procedures established by law"*[20]

The 1960 Ethiopian Civil Code allocated Book III, Title VI-X to property in general and they may equally apply to urban land and buildings as well. Besides, Title XVIII under Book V (special contracts) is about "contracts of immovables" where the issues of lease of immovables, mortgage, and antichresis are addressed. The respective titles under Book III are: Title VI- Goods in General and Possession; Title VII- Individual Ownership; Title VIII- Joint Ownership, Usufruct and other

Rights *in rem*; Title IX- collective exploitation (public domain and expropriation); Title X-Register of Immovable Property.

3.2 Nationalization

As we discussed in the preceding chapter, when the Derg came to power, it nationalized not only all rural lands and natural resources but also all urban lands and extra houses. The preamble of Proclamation 47/1975 that nationalized "all urban land and extra houses", justifies its nationalization of urban land on three main counts: to abolish the shortage of land and the soaring of prices caused by the concentration of land into the hands of a few feudal lords, aristocrats, high government officials and capitalists; to abolish the exploitation of the many by the few (through uncontrolled rent); and to abolish tax evasion. The law also aimed to create credit access to the poor once they got the land and built their houses.[21]

Like its rural counterpart, Proclamation 47/1975 under article 3(1) declares that as of the effective date of the proclamation, all urban lands should be property of the Government, and no person, family or organization was allowed to hold urban land in private ownership (Art. 3.2). Besides, all extra houses, houses other than one residential house and another business house were nationalized (Art. 13). Houses owned by minors were immediately nationalized (Art. 15) unless his/her parents did not own their own residential house. It further declares that no person would be compensated for the loss of urban lands (Art 3.3) although the loss of houses through nationalization were said to be compensable (Art. 18.1).

In Amelework Gelete v. Bishaw Ashame (Cass. Civ. File No. 19479 (2001, vol. 4 p. 68) the Federal Cassation Court underlines that any court decision or application that demands the separate valuation and transfer of the land without the building erected over it is against the principle of state ownership of land dictated under proclamation 47/1975.

(Fed. Sup Court Decisions, Vol.4. pp. 67-71)

A similar argument is also applied in G/Egziabher Kebedew v. Selemawit W/Gebriel (Cass. Civ. File No. 26130, dated 4-6-2000)

(Fed. Sup. Court Decision, Vol. 6, pp. 188-91.

Since all urban land became the property of the Government, it was prohibited to transfer urban land through sale, antichresis, mortgage, succession or otherwise (Art. 4.1). As an exception, however, a widow/widower or children are given the right to inherit the land. Instead of ownership, urban residents were given lifetime use right (usually referred as *permit system)* to the urban land, except that holders of the land were obliged to pay urban land rent (Art. 9) and housing tax (Art, 11.4). Also those who used to live in private rental houses were allowed to continue possessing the houses but made to continue paying a reduced rent to the state. It seems the state once again replaced the urban land owners in controlling urban land and houses and exacting rent therefrom. Landless people were guaranteed to get not more than 500 square

meters of land to construct a single dwelling house (Art. 5.1). People became full owners of the houses they built on the granted land, and thus were allowed to transfer it by way of sale, succession or barter provided that the government would have pre-emption right in case of sale (Art.12.1).

In the same fashion as had been done with the rural land, in here as well, any relationship that existed between urban landlords and tenants was abolished, and the tenant was made free from payment of rent, debt or any other obligation arising from the relationship to the landlord (Art. 6.1). Further, the law allowed any tenant without any dwelling house to possess or retain the land he used to rent before the enactment of the law (Art. 7). Creditors who possessed buildings as security for a loan were denied any right of attachment to a house. The house was either to be returned to the debtor (if he has no other dwelling house) or to be nationalized by the state. The creditor was just expected to search other ways to collect his money (Art. 17). There is no doubt that creditors, who lent money on this basis must have lost their money.

In Teshager Astatke v. Awil Awu Abdu (Cass. Civ. File No. 15270) The Ethiopian Federal Cassation Court held that urban land can be used or held only if permission is granted by relevant government body. In this case the plaintiff demanded recovery of land based on inheritance of rist land made in 1945 EC. But, the land was granted later to defendant upon municipal permission. Former rist right was abrogated by the land nationalization proclamation 47/1975.

Upon the effective date of the proclamation, all people were prohibited from renting out their houses and receiving any rent accruing therefrom (Art. 20.1)). The state was the only legitimate organ allowed to let properties and receive rent. The arrangement set in the proclamation was for the state to replace all former landlords and to receive rent from the lessees. Of course, the amount of rent was reduced, ranging from 15 to 50 percent, depending on the value of the properties. For instance, houses, which were rented out for 25 birr, had a 50 percent reduction in rent, while for those houses rented out for 300 birr the reduction was 15 percent (Art. 20.4)). The administration of houses which rented 100 birr and below was given to local cooperative societies (later on known as *Kebeles*), while the administration of those houses that rented above 100 birr per month was given to the Ministry of Public Works and Houses (later became Housing agency) (Art. 20.5); Art. 2.15).

The low rental charges, however, left little room for investment in the *Kebele* houses resulting in physical and structural deterioration owing to the lack of appropriate management and maintenance.[22] The idea is that people were encouraged to live in *Kebele* houses (because they were cheap) rather than constructing their own houses. Secondly, since all the rental revenue was transferred to central government, there was not much left for maintenance and construction by the *Kebeles*.[23] Further, new land provision for construction was highly restricted, halting the expansion of the city which only led the inner city to be densely populated. Later, squatter

settlements and illegal land transactions intensified, and this forced the Derg to adopt self-help housing cooperatives that helped to tackle the problem.[24]

3.3 Leasehold Policy and Past Lease Proclamations

3.3.1 Nature and Advantage of Lease System

GENERAL

Leasing is a very old form of land holding system and continues to be used in a wide variety of circumstances. It goes by a variety of names: leasing, leaseholds, renting, tenancies, landlord-tenant relations, and all are essentially synonymous. We will refer to the relationship between lessor and lessee as "leasing," the specific contractual undertaking between the lessor and lessee that governs their relationship as the "lease," and the property rights the lessee acquires under the lease as the "leasehold."

The essence of leasing is simple. A property owner, the lessor or landlord, agrees to transfer possession of property to another person, the lessee or tenant, for some time period. In return, the lessee agrees to pay the lessor rent, nearly always at periodic intervals. Leasing covers a wide variety of situations and includes both real and personal property. In Ethiopia, lease of personal chattels is known as hiring. There are very long so-called ground rent leases of 99 years or more for land on which tenants construct and own their own buildings; leases of agricultural land; leases of commercial space in office buildings or shopping centers; leases of unfurnished houses and apartments; short-term month-to-month leases of furnished apartments; and leases of computers, automobiles, airplanes, and machinery. But the subject matter of this chapter is lease of ground land, and leasing of housing shall be treated in the next chapter.

WHAT IS LEASE?

Generally lease is defined as a right in land which endures for a fixed period of time such that its maximum duration is known before the term begins. In many legal systems "lease" is understood as a contract emanating from the mutual agreements of the owner of property (lessor) to transfer the use and occupation of a thing to the other party (lessee) for fixed period of time and upon payment of money (rent). Referring into Ethiopian sources, the Ethiopian Civil Code under article 2896 defines *lease* as "[lease of 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*." The essential elements of this definition are firstly, lease right emanates from contractual agreements; secondly, the right transferred to the lessee (tenant) is the use and occupancy of the property; and thirdly, this interest is transferred for consideration-that the lessee must pay in the form of rent.

In relation to transfer of urban land, the Civil Code provisions are not relevant for our purpose. Rather, the governing urban land law is the lease proclamation functional at this moment. This proclamation under article 2(1) defines "lease" as a "*means of system of land tenure by which the right of*

use of urban land is acquired under a contract of a definite period."[25] This definition considers lease as means of land acquisition for fixed period of time. What we miss in the definition is that it is to be made for consideration, that there is always payment/rent attached to the system. Secondly, although we say that the right to be transferred is right of use and occupation, most systems also allow other rights such as sale, mortgage, inheritance and so on. The assumption is that, government as owner of public lands, retains the title of land and leaseout the right to use, transfer, develop, inherit and benefit from land to private entities. These private lessees can enjoy the assigned land rights only for a specific time and as stipulated in their lease contracts. Based on the legal regimes of different countries, the bundle of rights given may be different; while in some, a lessee is enjoing all the bundle of rights, in others it may be restricted (for instance mortgage and sale of lease right may be forbidden).

Indeed, in systems where the lease right is completely free to use, enjoyment, and transferred by way of sale, mortgage, inheritance, and donation, the difference between leasehold and private ownership is immaterial. The only difference is that while private ownership provides perpetual property rights to the land, leasehold provides timely limited property rights.

There is a misconception about public leasehold that considers the system as absolute state ownership of land.[26] Absolute state ownership may assume first, the complete control of land dealings by the government that excludes private actors; second, all land in the country is owned by the state; and third, the lease rights are only restricted to use and occupation. But the study of various lease systems including ours, in Ethiopia, reveals that this is not the case.

As discussed above (1.1.4), dealing with state ownership of land, even in Western market economies, government may control significant part of city land for different urban related policy reasons. Hence, if the general sentiment of the population, local tradition or market conditions favor public leasehold, the government may buy privately owned land, put in public infrastructure and lease the development rights of serviced sites to private individuals. Conversely, if public demand so prevails, publicly held land may be converted to private ownership by selling out the leased lands to the lessees. Hence, private ownership of land and public leasehold can coexist side by side.

The second point associated with the misconception is that public leasehold signifies complete control of state in the land transfer. But, a study made in different countries, such as Canberra (Australia) and Hong Kong shows "despite the fact that the two city governments hold all land titles, there exist vibrant private markets that facilitate the transactions of leasehold rights among private entities."[27]

Finally, the claim which is inferred from the above misconception that public leasehold transfers use right only, may not be true. In many countries, and partly in Ethiopia, lessees are free to sell or transfer their lease rights to other parties and to use their leasehold land as collateral to obtain

mortgage loans. These arrangements are far from the types of public land ownership found in the previous communist regimes. In other words, if government holds all land rights except for temporary use rights assigned to private parties, such a leasehold system would more closely resemble absolute public land ownership. Compare, for example, the permit system of the Derg era with the current lease system.

ADVANTAGES OF LEASEHOLD

Public land leasing is one of urban land management tools which may allow a government to reach multifaceted policy goals by incorporating a set of relevant and enforcible contractual agreements into land leases. The following may be some of the most common advantages of a leasehold system. As we shall see in the next section, most of them were incorporated in the first Ethiopian urban land lease proclamation 80/1993 as its objectives.

Goals or objectives of a public leasehold system:[28]

- *Retain the public's share of land value increments for infrastructure investments*
  In most situations a land value increment is a product of both public and private investments. For instance, the value of a privately owned house does not depend solely on its owner's investments in land and building, but also on the overall government investments in public infrastructure and social services, as well as property maintenance and improvement undertaken by all property owners in the area. As all experienced developers acknowledge, the three key factors that influence the value of a piece of real estate are location, location and location. Moreover, general population and economic growth that have little to do with private property investments could increase real estate price. In principle, therefore, because the intrinsic value of a location depends on collective investments and other external factors, rises in land value of an individual property, unrelated to its owner's investments, should be recaptured by the government on behalf of the community at large.
- *Facilitate urban development or redevelopment*
  Since land is controlled by the state, it is easier for the state to accelerate the development of a city by leasing out more lands in its occupation to private developers. Similarly, if land is under public ownership, during redevelopment of part of the city, government may re-take or expropriate the land for a cheaper price, since it may not be forced to pay compensation for the land. This is, for example, currently the case in Ethiopia.
- *Manage urban growth*
  Although government may use other tools such as building code and urban land planning to control and manage urban growth and sprawling, land leasing is also found to be an important mechanism to accomplish this purpose. Usually, city governments, by incorporating important land use elements, such as building height, building typology, planning permit etc. into the lease contract, can enforce and manage urban growth.

Secondly, by focusing on one part of the city (city center or periphery) and transferring land, lease systems can aid and lead the growth of a city.

- *Reserve land for public purposes, such as government building and green areas*
  Since land is under its control, it is up to the state to allocate part of the land in its hands for public purpose activities. It is easier and cheaper to allocate land from its land bank instead of collecting land through expropriation from private owners. For example, the reason why most African nations hesitate to transform their capitals, as is being done in Ethiopia, is because private ownership of land in the cities makes it expensive for the governments to expropriate.
- *Stabilize land and housing prices and provide affordable housing to the population*
  By offering land at a lower and subsidized price, the state can stabilize the high price of real estate in a city. In addition, in socialist or former socialist countries, where the state is still burdened with provision of housing to the public, leasehold system is employed to provide affordable housing to society. This can be done by the state either by constructing houses on its own land and then transferring the houses by subsidizing the value of land, or by granting land for cheaper price or no price at all. These are common practices in Ethiopia as we shall see later on.
- *Provide a transitional mechanism for raising public funds when an effective system of property taxation is not in place*
  In countries which lack effective land taxation, one of the means by which local governments increase revenues is through public land leasing. Indeed, in some countries, this income assumes more than half of the city's total revenue.
- *Facilitate investment in property by foreign entities when a country's constitution prohibits ownership of land by foreigners*
  In some countries, like China and Ethiopia where it is forbidden to own land privately, the source of land for foreign investors is public leasing. It has been repeatedly told that the Chinese leasehold was one reason for the attraction of huge foreign investment to the country.
- *Speed up transfer of property from public ownership to private uses*
  There are also situations in which parties perceive the adoption of public leasehold as an intermediate step toward private ownership. Public officials in some former socialist countries have deployed a public leasehold as a means only to elude the constitutional restriction on private land ownership. When the constitution is amended, replacement of public leasehold-an option considered by many private property advocates as only second best-by private ownership will be the inevitable outcome
- *Encourage investment*
  Leasehold is said to be attractive to investors because, first they can get land in a location of their choice in a relatively short period of time, and secondly, since they are not required to make whole upfront payment of the value of land, it allows them to invest their money in alternative ventures. In other words, since the initial investment will be small, it gives the investor additional capital to invest on construction. However, if the individual has to buy

land, he will have to pay the whole price and after the purchase, he will have less or nothing for the project.

Extract 3.1: In his famous book, *Progress and Poverty (1879),* the American writer Henry George challenged the fairness and rationality of the increase of land value gained by landowners. Eric T Freyfogle (pp. 128-129)[29] summarizes the core ideas of Henry George's argument as follows.

According to George, land values escalated as cities and economies expanded. Part of the rise in value came from improvement landowners made, but raw nature itself was also increasing in value. Landowners were getting rich for doing nothing. When a person lived alone in isolation, land has no value. Value came only later, when other people show up, when population became denser, regions prospered, and cities arose. All the while, the original landowners watched their lands gain value. As for where that value came from, it arose from the city itself: from the people who settled there, from their labor on surrounding lands, and from the land scarcity they induced. As prices rose, rents increased. As rents rose, the landless paid greater portions of their incomes to live, and they took home in wages a falling percentage of what their labors created. Much of the rents paid by the tenants, in fact, was rent paid on the land itself, on nature which no owner created. The producer's right to the fruits of his labor, so lucidly endorsed by Locke, was being frustrated by the landowning class.

George questioned the fairness of the entire idea that people could own nature individually. Nature was a gift to humankind in common, George asserted. Locke was right in acknowledging the ownership claims that people had in their improvements. But the land itself in real world of scarcity remained the common property of all people. The labor-owner merely had the right to use the land. Rents attributable to the land itself still belonged to the public.

George was pragmatic enough to recognize that truly common ownership of land was impractical in a complex world. Individuals had to have the right to control land and make decisions about it. What would work, he believed, and what would fairly protect the public's interest was for the public to claim all income attributable to land itself. Rent from an office building would be divided between return on the building and return on the land, with the land portion going to the common fund. The same rule would apply to all lands, urban and rural. No one's labor would be disrupted or upset. No one would be discouraged from investing more labor. So considerable would this revenue be, George estimated, that all other taxes could be eliminated. Government would live off a single tax…

George's book remained popular for decades, particularly in Europe. It influenced public policies toward land, land-use regulation, and real estate taxation. Because of practical problems and widespread opposition, George's single-tax scheme never came to fruition, but his reasoning remained alive, awaiting application in ways that could work.

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3.3.2 Overview of Previous Lease Proclamations

TGE URBAN LAND AND HOUSING POLICY

It has been discussed above that urban land was administered by Proclamation 47/1975 which was adopted by the Derg in 1975 and the legacy of that system was the shortage of urban housing and the decay and deterioration of the many houses under *Kebele* administrations. Thus, it is logical to assume that a new government with liberal attitude would come up with improved urban land policy. It seems, considering the acute shortage of urban housing and the locked urban land provision, the new government, immediately after assuming power, came up with a new type of urban land and housing policy as well as legislation.

The Transitional Government of Ethiopia (TGE) adopted a new economic policy in 1992 which under section 8 deals with the *Transitional Period Urban and Housing Construction Policy* and emphasizes the need to encourage the participation of private investors in housing construction and the general people in condominium constructions, while maintaining the state ownership of urban land. It also pointed out the need for secure ownership right over the houses constructed that enable people to use and enjoy, transfer, and use them as security for loans. In this respect, it is said that the role of government would be limited to equitable allocation of land to those who wish to construct houses, prepare rules and regulations, and ensure the availability of loans.[30]

PROCLAMATION NO.80/1993

The TGE, immediately after assuming power and adopting a new economic policy, passed a new urban land governing law in 1993. Unlike the permit system operational before then, the new urban land law follows a lease system. So, for the first time a lease system was introduced in Ethiopia as a mode of urban land holding when the new law was adopted in 1993. Since the lease system was enacted before the adoption of the constitution, and since the constitution does not say anything about urban land, it can be argued that this proclamation was the base for the current urban land holding system.

The objectives of the proclamation, as indicated in its preamble, are summarized as follows: to create equitable distribution of land, to control the growth of city centers, to increase urban revenue to finance urban infrastructure, to expedite construction of urban houses to alleviate the existing shortage, to provide land utilization value[market value of urban land] which was not in existence, to ensure transparency in land transfer and avoid land speculation, to promote the economic development of urban centers through involvement of investors, and to ensure tenure security by providing land rights of longer durations.[31]

The application of the proclamation was said to be limited to new types of land acquired or to newly transferred lands from old holders to new owners. This, it seems, was made with the intent of avoiding any discontent or complaint that might come from holders of the permit system, but the intention is to change gradually all urban land holding to leasehold. Because of its similarity to current leasehold system, here we reproduced it as follows:

The regulations of urban land holding for private dwelling houses which were in force prior to the enactment of the present proclamation shall continue to be in force, provided, however, that where a dwelling house is transferred to another person in any manner other than inheritance, the person to whom the said house is transferred shall hold the land in accordance with the lease holding system provided for in this proclamation.(Art. 3.2)

It is said that this very provision was difficult to work with and, as a result, was the main reason for the revision of the proclamation and replacement by the subsequent revised leasehold Proclamation 272/2002.[32] As compared to the permit system, a significant characteristic of this proclamation is that it allowed a free transfer of lease right in the form of sale, mortgage and contribution in Share Company (Art. 10.1). Yet according to sub-3 of same article the "lessee may not, on transferring his right of lease, collect income which is higher than the rent of land he paid; nor may he mortgage such right at a value which is higher than the rent." Where the lessee collects or gains higher than what he actually paid as ground rent, he has the duty to pay back the difference to town administration (Art. 10.4). By using this rule, government's aspiration was to capture any increase in land value. But it is not difficult to imagine how difficult for city and town administrations to enforce such a rule, especially in relation to transfer of lease right by sale. It is common for the buyer and seller to connive and hide the true value of the transaction.

THE REVISED PROCLAMATION NO.272/2002

Proclamation 80/1993 was repealed and replaced by Proclamation 272/2002 in 2002.[33] The objectives of the new urban land lease holding Proclamation No. 272/2002 were mainly two: to collect income from land lease in order to assure fair share from urban land wealth, and to transform the holding system into a lease system.[34] The idea behind the first objective is that urban land cannot be distributed to all for free; only those who can afford must get it and the income collected from them shall be re-invested in the urban infrastructure and so on. Thus, unlike rural land, at least in principle, urban land would not be granted for free.

The revised urban lands leasehold proclamation provided two methods to get access to urban land, unlike its predecessor which said nothing about the subject. Article 4(1.a) of the proclamation recognized auction and negotiation as the two modalities to acquire urban land. Nevertheless, sub article (1)(b) of the same article empowered regional cities to come up with additional means of land acquisition. Accordingly, besides the above two mentioned systems, the Addis Ababa City Government came up with three additional methods: namely, lot, assignment and award.[35] All regional states have also adopted all the five methods of land acquisition mechanisms in their respective urban land lease regulations or proclamations. Starting from the last, "award" was the least utilized method of land transfer by urban land authorities. It happened usually when people contributed extraordinary accomplishment to their country. A good example in this case was the Ethiopian long track athletes who won and brought Olympic medals to their country. Land may be assigned by city authorities to civic associations, charitable organizations, embassies, international organizations and so on as a sign of good will. Lot was used to provide land to the majority of urban dwellers to construct single residential houses. The point is that urban dwellers

should get land to build their own homes and in all the cities this was done free of charge. Auction and negotiation had been the two important methods for cities to collect income from land lease agreement. In bigger cities auction was the most utilized method to transfer land from municipalities to investors.

In determining the maximum lease period of urban land lease agreement, the law classified the cities into two grades: Addis Ababa and towns with same grade with Addis Ababa, and towns which are not designated as the grade of Addis Ababa. In both types of grades, the maximum lease period set for a land to be used for urban residential housing was 99 years. The same period also applied for housing to be used for science, technology, research and study, government office, non-profit making philanthropist organization, and religious institution. Besides, 60 years and 50 years were assigned for industry, and commerce/others respectively (Art. 6.1.a). In other towns not designated as of the grade of Addis Ababa the duration was slightly longer: The law provided up to 99 years for education, health, culture, sports; 80 years for industry; 70years for commerce; and 70 years for others (Art. 6.1.c).

The next logical question is what will happen after the expiry of the lease period? As a matter of principle, the law says that the agreement would be renewed, "*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"* (Art. 7.1).

The important points one can gather from the above provision are that lease agreement, as matter of principle, is renewable. However, if the land is needed for some other higher purposes, like in expropriation, the contract may not be renewed. Unlike expropriation, though, the holder of the land will not be compensated for any property/fixtures thereon. The assumption is that the person who leased the land would construct houses and buildings and in the event of expiry and non-renewal of contract, s/he will not be compensated for such properties on the land; the law even demands him/her to remove the fixtures at his/her own cost or else the city may take or demolish them. This glaring truth is also supported by Article 15 that deals with 'termination of lease-hold and payments of compensation.' It says that lease agreement may be terminated for three reasons: failure to commence work on the land within the agreed time, expropriation of the land for public purposes, and the expiry and non-renewal of lease contract (Art. 15.1). When the lease agreement is terminated and land be taken back by city government on account of the first two reasons, the holder of the land will be compensated, paid lease price will be repaid (Art. 15.2 & 3). On the other hand, "where the lease-hold of urban land is terminated" on account of the third reason, "the lease-hold possessor must hand over the land to the body which gave it by removing within one year the property he has on the ground" (Art. 15(4). City officials "may take over the land, together with the property thereon without any payment, where the latter has failed to remove the property on the ground within the period of time set forth." This approach of the law obviously raised many criticisms as it takes away all the security of tenure on urban properties.

Like its predecessor, this proclamation also allows the free transfer of the lease right (Art. 13). But as a significant development, unlike Proclamation 80/1993, the revised proclamation did not require the repayment of an enhanced land value gained by the leaseholder during transfer of the lease right.

3.4 The Current Lease Proclamation

3.4.1 Background, Justifications and Objectives of the Proclamation

Ten years after the adoption of Proclamation 272/2002, the Ethiopian government was reconsidering the revision and change of the lease proclamation on account of reasons discussed hereunder. Accordingly, the FDRE parliament adopted a new lease proclamation in October 2011.[36] The proclamation was one of the most contentious legislations ever proclaimed as it sparked intense public debates following its adoption, and public officials were forced to give explanations almost every day for more than three months without interruption.

The reasons offered by government officials for the revision of the existing lease proclamations are in effect reflected in what was later enshrined under Article 4 of the proclamation as "Fundamental Principles of Lease":

1. *The right to use of urban land by lease shall be permitted in order to realize the common interest and development of the people.*
2. *The offer of lease tender and land delivery system shall adhere to the principles of transparency and accountability and thereby preventing corrupt practices and abuses to ensure impartiality in the process.*
3. *Tender shall reflect the prevailing transaction value of land.*
4. *The urban land delivery system shall give priority to the interests of the public and urban centers to ensure rapid urban development and equitable benefits of citizens and thereby ensure the sustainability of the country's development.*

The first principle (Art.4.1) was represented, as we shall see soon, in different parts of the proclamation. The idea is that it should be the government, and by extension, the people who should be benefiting from the lease system. One way to do this is by capturing the enhanced urban land value instead of allowing speculators to reap it. One of the arguments forwarded by government in the aftermath of the adoption of the proclamation was that speculators and urban brokers were the beneficiaries of the lease system. Urban speculators have been profiting by selling bare land (only lease right) without adding value to it. As we discussed above, Proclamation 272/2002, as opposed to Proclamation 80/1993, allowed free transfer of lease right with the full advantage of capturing the enhanced value of the leased plots. Proclamation 80/1993, on the contrary, required the lessee to pay back the difference in profit between what he paid as lease rent and the sale price. But, later on, when it was replaced by Proclamation 272/2002, this very provision was deleted. Because of this privilege allowed in Proclamation 272/2002, in the past ten years, lessees and urban speculators were able to reap the benefit of enhanced urban land value,

while the government was limited to insignificant tax premium. Government has been complaining that although it expected to generate adequate income for urban infrastructure from the lease system, it was somebody else who reaped that. For this reason, as we shall see below, the defunct rule of Proclamation 80/1993 that provides the enhanced value of urban land to government has been reinstalled in the new proclamation.

The other argument addressed by Article 4 (2) and (3) is that urban municipalities became corrupt and inefficient in land delivery. Corruption, non transparency and injustice reigned in the system which created a safe haven for few urban speculators and brokers. The modalities of land delivery such as negotiation, award and lot were considered as non-transparent and sources of corruption. Lack of detailed rules in tender process was also cited as another reason for corrupt behavior. Thus, the proclamation is also expected to be instrumental in efficient land transfer (Art. 4.4). It has been argued that demand for land in urban areas has been much greater than the supply of land made by the land authorities.

These principles are also encompassed in the objectives of the proclamation. The objectives of this new proclamation, as envisaged in the preamble, are two: to satisfy the growing urban land demand which resulted from the fast economic growth of the country; and to ensure good governance in the development of efficient land market and a transparent and accountable land administration system (Preamble of Proclamation 721/2011).

3.4.2 Application of Lease System

OLD POSSESSIONS

Lease is the only means of land holding system in urban Ethiopia, and except for those lands which were acquired before the coming of lease system in 1993, it is prohibited to acquire land through other modalities other than lease system (Art. 5.1). However, as an exception, regional governments may identify urban centers to which this rule may not be applicable, although this may not be longer than five years (Art. 5.4). In other words, as a matter of principle, lease shall be the cardinal tenure system for urban land holding, but in small towns where it is not yet possible to place leasehold system, other modalities of tenure system (perhaps permit system or rural holding system) may be used temporarily, for a maximum of five years.

What about old possessions? An "old possession" is "a plot of land legally acquired before the urban center entered into the leasehold system, or a land provided as compensation in kind to persons evicted from old possession" (Art 2.18). Thus, all land acquired and held during the imperial era, Derg era, and after that, outside lease system will be considered as old possession. Besides, replacement land given to owners whose land was expropriated may also be considered as old possessions since the land was given without lease contract. Although it is difficult to put the exact figure, the number of old possession in Addis Ababa, for example, may constitute half of the total properties in the city. So what will be the fate of such properties?

As a matter of principle, all land in urban areas shall henceforth be transferred into lease system (generally see Art.5.) But, concerning old possessions, it is said that their fate will be decided by the Council of Ministers upon detailed study to be made in the future (Art. 6.1). In other words, all "old possessions" will not be converted in mass at once to leasehold. The law, however, requires the conversion of old possessions into lease system in one of the following events:

- *Where a property attached on an old possession is transferred to a third party through any modality other than inheritance (Art. 6.3)*
- *Informal settlements that have been regularized pursuant to the regulations of regions and urban administrations (Art. 6.4)*
- *Where an application to merge an old possession with a lease hold is permitted, (Art. 6. 6)*

Property transfer in this case includes sale, exchange or donation, excepting inheritance. It must be noted that since land is not saleable, the subject matter of "transfer" is not the land itself but the immovable on the land, i.e. building. Hence, whenever a house rested on old possession is sold, exchanged, or donated, the new owner shall possess the land on lease basis. The other situation is the "regularization" of informally held possessions. Land may be held and construction of houses may be carried out without the permission of the urban land administration offices. In Addis Ababa and many other urban city centers, there are lots of houses constructed in such a way. The usual measure taken in such cases is demolition of the informal settlement. But, sometimes, urban centers or regional governments may pass a specific regulation to regularize, formally register, the informal settlements. If an informal settlement is now regularized, then the new possession arrangements must be changed to lease system.

Issue: Sometimes, a person who possesses large size of urban land wishes to make a partition of the land and transfer (donate) part of it to other person. Is this possible?

18.2.4 ነባር የመኖሪያ ቤቶች ሲቀላቀሉ በነባር ሰሪት የሚተዳደሩ ይሆናል።

19. ይዞታን ስለመከፈል

19.1 ለመኖሪያነት የተያዘ ይዞታን ከፍሎ የተለያዩ የይዞታ ማረጋገጫ ካርታ መስጠት የሚቻለው የሚቀረውም ሆነ ተከፍሎ የይዞታ ማረጋገጫ ካርታ የሚሠራለት ቢታ...[37]

The third case in which an old possession should be converted to lease system is where old possession is to be merged or amalgamated with leased land. It means the old possession and the leased land must have been bordering each other and now have changed into one property. What about amalgamation of two old possessions? The law does not say anything about it, and the assumption is that unless it is clearly required by the law, it is not mandatory to convert them to lease system. In relation to this and also to another directive of the Addis Ababa City Administration says, "where old possessions are to be merged, they will be administered according to old possession tenure."

EFFECT OF LEASE

What is the effect of a land being administered by lease system? Transfer of land holding into lease system means that all land in urban areas, after being identified and registered by the municipality, shall be registered as lease land, and the holder shall enter with the government a lease contract that, among others, includes lease period and lease price to be paid (Art. 16). The lessee will then be given a "Lease Holding Certificate" that shows the name of lessee, land size, location, land use purpose, lease price, lease period and so on (Art. 17). The important effect of converting a possession to leasehold is through the payment of a specified amount of ground rent to the government. In the event of the above three situations, the lessee will pay "lease benchmark price" (minimum lease price), which shall be set by every urban center, multiplied by the area of the land size (Art. 6.7). The calculation of this price takes into "account the cost of infrastructural development, demolition cost as well as compensation to be paid to displaced persons in case of built up areas, and other relevant factors" (Art.2.11). The initial payment will not be less than 10% (Art.20.2) and the remaining will be paid over a long period of time which will be decided in the future. This is also true of land plots granted by allotment to those organs specified under Article 12. For others, the amount of payment shall be determined by the tender (auction) process.

When an old possession is converted to lease system, there is no guarantee that the old possession will be maintained as it had been in the past. It means the land use (residential, business, building height, etc.), land size, land shape, land rent/tax, initial lease payment, and so on shall be determined based on the current or existing rules (such as structural and local plans, land lease regulations etc.)[38] This will, no doubt, cause a fluctuation in land size (large size of lands may be reduced and small plots may be enlarged) and the lessee will be compensated for any fixture on the land in case his land is reduced, and he is obliged to make lease payment for the addition in case his possession is enlarged (see Art. 6.2 of Proc. 721/2011).

The other argument that can be inferred from this change is that this law will have an impact on the urban land market. The general idea is that the market price of urban land and housing will increase or decrease. For example, the price of urban real properties will be too much for the buyer (since he shall pay both the purchase price and the lease price) if sellers continue to demand the usual price; or it may be too small for the seller since the buyer, by considering the lease price which he is supposed to pay, will make a smaller offer for the property. On the other hand, the state will be in a safe position since its revenue will be increasing from every transaction and change made on the lease right.

OLD POSSESSIONS SUBJECT TO NO CONVERSION

Besides inheritance, which is not subject of conversion to lease system, subsequent regulations (e.g. see Art. 8 of the Model Lease Regulation of the FDRE Ministry of Construction and Urban Development and Art. 7 of Regulation 49/2004 E.C of Addis Ababa City Administration) also add other events in which lease conversion is not a mandatory requirement. Accordingly, the

following cases are identified in the regulations cited above:

- When an old possession is divided among heirs/legatees upon their request
- When divorced couples who hold old possession divide it in accordance with relevant laws
- When one of the divorced husband and wife or some of the heirs/legatees, upon payment of its value to the other/s, agree to take over the whole of the old possession
- A replacement land provided to holders of old possession whose land was lost by expropriation
- When land possessions without documentations are decided to be certified by a directive of relevant region or city administration.[39]

A detailed directive of Addis Ababa City Administration (Directive No. 11/2004 E.C that implements Proc. 721/2011 and Regulation 49/2004EC of AA) provides additional scenarios:

- Old possessions which are allowed by the administration to continue in this system (Art. 7.5)
- Old possessions nationalized outside of Proc. 47/1975 and now returned to their old right holders (Art. 7.6)
- Old possessions transferred to third parties (outside inheritance) before the promulgation of the lease proclamation but the transfer is not yet completed (7.7):
    - Those transactions which were under process (Art. 7.7.a)
    - Foreclosed properties due to defaulted loan provided by banks and those properties transferred to banks after a failed foreclosure sale. (Art. 7.7.b)

3.4.3 Modalities of Land Acquisition

TENDER

Previously, as mentioned above (3.3.2) and stipulated by the federal and state lease laws, there were five modalities of urban land acquisition: auction, negotiation, assignment, award, and lot. Auction and negotiation were the two most important methods for cities to collect income from land lease transfers. In bigger cities, auction is still the most utilized method to transfer land from municipalities to investors. Land was also assigned to civic associations, charitable organizations, embassies, and international organizations. Award was the least utilized method of land transfer by urban land authorities to those who contribute extraordinary accomplishments. Lot or lottery was a mechanism by which urban land had been distributed to low and middle income citizens. This method was an extension to what had been exercised by the permit system during the Derg era.

Now, however, since most of the modalities are categorized as bad practices that opened the door for corruption, the government argued, the law recognizes only tender (auction) and allotment (land lease transfer without auction) as the two basic means of lease transfer from government to

citizens (Art.7.2 of Proc 721/2011). As a matter of principle, every land needed for residential, commercial (agriculture, industry, or service), and other purposes will be transferred by tender. Bidders will use the minimum lease price as a base to offer their price and the highest bidder will be identified based on the "bid price and the amount of advance payment he offers" (Art. 11.5). To make it more transparent, accessible and free from corruption, the law allocates more detailed provisions (Art. 8-11) to the tender process.

ALLOTMENT

As exception, however, city municipalities may give land by allotment to selected bodies which have paramount importance to society. "Allotment" is defined in the proclamation as "a modality of land use right transfer applied for providing urban lands by lease to institutions that could not be accommodated by way of tender" (Art. 2.10). Whether or not allotment requires payment of the minimum lease bench price is not known. But, at least, in some cases (such as replacement land given to expropriated person, land required for religious worship and so on) it is not feasible to expect payment. What is clear is, though, those listed under Article 12 (3) & (5) are expected to pay a lease bench mark price, as we shall see below. The following list includes entities or persons eligible to get land by allotment (Article 12 of the proclamation):

1. a)office premises of budgetary government entities, b) social service institutions run by government or charitable organizations, c) places of worship, d) public residential housing construction programs and government approved self-help housing constructions, e) use of diplomatic missions and international organizations, f) manufacturing industries, and g) projects having special national significance and considered by the president of the region or the mayor of the city administration and referred to the cabinet (Art.12.1).

   What is interesting among the list is "d". Under Article 12(1) (d) the beneficiaries are government condominium housing projects and "government approved self-help housing constructions." As discussed above, the land assignment to self-help construction is something that is maintained from the past. This is the same with the lot (lottery) type of land allocation that had been applied. This is the only provision that accommodates the cheaper and/or equitable land transfer to urban residents. The idea is that since low income group people may not be able to compete in bidding for urban plots with higher income groups, a special land allocation system that accommodates their interest is fair and realistic. As mentioned above, whether or not the beneficiaries under this list are required to pay lease bench mark price is not known. But the assumption is that, in the absence of such clear requirement, payment should not be expected.

2. In addition to what we have under (1) above, a person who is displaced from his house/land (an old possession or leased one) as a result of urban renewal (like in case of expropriation) shall get a replacement plot by allotment. Under the FDRE Expropriation proclamation, one of the components of a compensation package is provision of

replacement land (Art. 8(4)(a) of Proc. 455/2005) for the person to build his house, and it will not be logical to expect payment of lease price for such land.

3. A lawful tenant of government or *Kebele* owning residential house outside Addis Ababa shall be entitled to allotment of residential plot of land at bench mark lease price if displaced due to urban renewal program. In Addis Ababa, he is entitled to purchase of condominium housing unit (Art. 12.3&4).

The criticism that one may raise against this modality of land acquisition is that it will defeat the very purpose of the proclamation, discouraging speculators. This is because, it will be again the rich people who can afford to pay the highest lease bid price and sell it at profit in the future. The majority of the poor will be excluded from the system. For example, as already mentioned previously, in the land lease bid floated on the 31st of October 2012, residential land area whose benchmark (floor value) was fixed at 191 birr fetched exaggerated prices ranging from 10,000-14,000 birr per square meter.[40]

3.4.4 Transfer of Lease Right

Like any other property right, lease right is also freely transferable. The new lease proclamation declares: "a lessee may transfer his leasehold right or use it as collateral or capital contribution to the extent of the lease amount already paid" (Art. 24.1). The phrase "*to the extent of lease amount already paid"* refers to the collateral and capital contribution, and partly, as we shall discuss below, to the sale of uncompleted constructions. Caution is necessary, though, in understanding its implication.

In the previous Proclamation No. 272/2002, there was no limit or restriction to such right. Lessees who had been transferring either the lease right (bare land) or lease right with construction (complete or incomplete) on it were getting the full profit of the transfer without any restriction. Lots of urban speculators were said to be benefiting by capturing the full enhanced land value over the years, and even abused it and became "rent collectors." In other words, it is said that the absolute freedom, introduced by the previous proclamation, has created the problem of "rent seeking" activities. This means that speculators were encouraged to transfer lease right only, without any construction made on it. This generally did benefit neither the economy nor the people, since its purpose was filling the pocket of some people rather than alleviating the housing shortage that exists in the country. The value of urban land was unreasonably inflated for no reason other than speculation and confusion. There were ample experiences which show that in recent years, in the capital as well as in regional cities and towns, land value (bare land) has been increasing twofold every year without any value added on it.

For this reason, the government has been complaining that speculators purchase and transfer land without adding value to it. Among others, even real estate companies were said to have been transferring bare land (lease right to the space only) without building the necessary construction

over it. Because of this, in 2010, the city of Addis Ababa had reclaimed more than one million square meters of land from real estate developers on the ground that they had been transferring land without adding value thereto (Addis Fortune, Vol. 11 No. 539.) To fight this practice, the new proclamation introduces four strategies that limit the free transfer of lease right. The government argues, of course, that they were made with the intention of curbing speculative activities and boosting the state revenue.

BARRING REPEATED TRANSFER

First, the proclamation prevents people who repeatedly transfer leasehold right, without completion of construction, in anticipation of speculative market benefit, from participation in a future bid (Art. 24.7). This means, the city administration can prevent selected people, who are identified in selling lease right or unfinished properties repeatedly from participating in future auction activities. The reason behind such restriction is to discourage speculators who are engaged in the sale and transfer of unfinished properties; instead, it wants to encourage them to complete the constructions before selling, and thereby alleviate the housing problems. The proclamation does not tell as to how many times people are supposed to transfer unfinished property before they get banned. The FDRE Model Lease Regulation (Art. 43.1) and Addis Ababa City Directive, however, provide a clue in this regard. According to Article 56(1) of the directive "if the person transfers unfinished properties three times within three years, he may be barred from any future bidding in lease for two years".

SUPERVISION OF SALE

Second, as per Article 24 (2) of the proclamation, "If a lessee, with the exception of inheritance, wishes to transfer his leasehold right prior to commencement or half-completion of construction, he shall be required to follow transparent procedures of sale to be supervised by the appropriate body." Note that this requirement is not necessary for the sale and transfer of fully completed properties. The implication of this provision is understood only after reading the next sub article of this provision. The sub-article points out that since the seller of the lease will not be entitled to the full profit of unfinished construction, it is necessary to involve a government agent to assess the value of construction and current lease price.

TRANSFER OF UNFINISHED PROPERTY

Third, transferring only leasehold right (bare land) or leasehold right with only half-completed construction gives no benefit at all to sellers. Previously, completed or not, lease holders used to reap the full benefit of enhanced land value during transfer of the lease right. Now, however, as a strategy to encourage completion of construction, to avoid rent seeking activities, and to rather capture the benefit by the state the sale and transfer of half completed properties is not attractive. "Half completed construction" is defined under the proclamation (Art. 2.16) differently for different types of constructions as follows:

a) *In the case of a villa, completion of foundation, columns and top beam;*

b) In the case of a multi-story building, completion of foundation and 50% of the total number of floor slabs;
c) In the case of a real estate development, completion of the construction phase referred to, as the case may be, in paragraph (a) or (b) of sub-article (1) of this Article relating to the entire blocks.

What will happen if a lessee wants to transfer half completed construction or bare land? The first requirement, as we already saw above is to invite a municipal agent to oversee the sale process. Besides, the amount of money collected by the lessee has certain limitations. According to the law, a lessee who wishes to transfer his leasehold rights before commencement of construction or half-completed constructions will get first, the effected lease payment including interest thereon, calculated at bank deposit rate; second, the value of the already executed construction; and third, 5% of the transfer lease value (Art. 24.3). This 5% relates to the difference between the lease purchase price paid and the sales price; in effect, it must be referred to the gain or profit made by the transfer.[41]

So far as the first two conditions are concerned, there is no problem in understanding the amount of lease price paid (plus the bank based interest rate), and the amount of money expended for the construction made. The difficulty lies in understanding the third point: how do we determine the *transfer lease value*? Are the lessee and the new beneficiary (e.g. buyer) supposed to deal in the open? What is the role of the municipality agent at this point? Details, similar in content, are provided in the Model Lease Regulation and the Addis Ababa City Administration Lease Regulation and Addis Ababa City Administration Lease Directive.

The Addis Ababa City Administration Lease Directive No. 11/2004 provides details as described below. As a matter of principle, it is the government, through the supervisor mentioned above, that can decide the amount of transfer value (Art. 51.1). The lease transfer value shall be the average value of the current/market tender value of the locality and the lease value by which transfer was made to the current lessee (Art. 51.2). The government supervisor will take the average price of current lease price of the area and the actual lease price for which the lessee got the land. In the absence of an offer by the buyer, this average value will be the binding transfer value (Art. 51.4). If, on the other hand, the buyer makes an offer that is equal or less than the average value calculated above, then the transfer is acceptable (Art. 51.3). When the average value is less than the previous lease price, then the relevant body may either take one of the better values (either the previous or the current one) as transfer value (Art. 51.5) or put the lease land on auction [to get better price] (Art. 51.6).[42]

Assumption 1.
To make it clearer let's assume that Ms. A has bid 200 m² of land from the city municipality for 4000 birr per square meter (total 800,000 birr). Out of it, assume that she has made a 10% advance payment of 80,000 birr as lease price. Let's further assume that she constructed a foundation at a cost of 40,000 birr. Her total cost at this point amounts to 120,000 birr. For some reason, now however, she wants to sell the property after one year. The bank interest is 5%

Assumption 2.
The current lease value of land in similar location is 5000 birr per square meter and that gives a total value of 1,000,000 birr.

Decision *(Average value is 900,000)*
1. The buyer shall pay birr 900,000
2. The seller (lessee) will get the following:
2.1. 80,000 birr (lease price paid)
2.2. 4000 (5% of 80,000)
2.3. 40,000 (construction cost)
2.4. 5,000 (5% of 100,000 birr (900,000-800,000)
3. Total =129,000 (Profit=9000).
4. Government profit = 95,000 birr.
5. Note also the new owner will pay the remaining 700,000 lease price transferred to him from the seller.

On the other hand, if the construction is completed or becomes more than half, then there is no limitation as to the value of the sale price. Hence, the whole purpose behind limiting the right to the transfer of half-completed properties seems to encourage owners to complete construction and thereby solve the housing shortage.

The flaw of this provision is that it will not stop the connivance that might be made between buyers and sellers. It means that it would not be possible to avoid an under table (internal) agreement that might be carried out between the two. Secondly, even if it is possible to control the buyer and the seller from conniving, people will shift radically from selling unfinished properties to finished ones. For instance, for residential houses, half completed construction refers to the construction of foundation, columns and top beam. Thus, if one puts a roof to the house, then it is considered as a complete one. As compared to sale price, the difference in cost is indeed very small. In this way, speculators will shift to this new way of trading properties. Thirdly, constitutionally speaking, this practice is against the property rights of property holders. Once the government gets its money from the lease price, why is it that it again insists on sharing the profit from the appreciation of land value? Of course, the justification is to encourage people to put a building on the land before they sell it, and to add value to their holdings, but, this should not be

done by violating the constitutional right of property which, among others, gives the right to collect the increment in property value.

MORTGAGE OF LEASEHOLD RIGHT

As stated above, leasehold right is subject to any form of transaction including sale, lease/rent, inheritance, donation, mortgage, and contribution as capital to a company. But again, as mentioned previously, the right to mortgage is limited to the "*extent of lease amount already paid*" (Art. 24.1). Under Article 24(4), the proclamation further introduces, as a fourth strategy, the following:

> *"…where a lessee uses his leasehold right as collateral prior to commencement of construction, the collateral value may not exceed the balance of the lease down payment after considering possible deductions to be made pursuant to sub-article (3) of Article 22 of this Proclamation."*

The deductions mentioned under Art. 22(3) are *"…7% of the total lease price in addition to a lease amount that covers the period from the date he took possession of the land."*

The contents of the above articles may be summarized as follows:

- Lease right may be mortgaged to the extent of lease payment already made (that includes down payment and yearly installments.)
- If the lease right is without any construction on it, the mortgage value will be equal to lease payment already made, minus 7% penalty and unpaid yearly installments.

To further elaborate, let us closely look into the different sub-articles of Article 24 mentioned in this section. Based on Article 24(1), as a matter of principle, lease right may be used as collateral when borrowing from banks or creditors in general. But, the amount of money the lessee may borrow against mortgaging his lease right is restricted to the amount of money s/he has paid so far, as lease price. This lease price includes the *down payment* paid at first (e.g. 10%) and the following yearly *installments*. In other words, the land cannot give him a value which he had not made on it; what one can get from the land is what he sows on it. This is a radical shift from the previous practice where banks used to give higher amount of value to location (to the land only.)[43] Thus, for example, a person who had made a total of 100,000 birr lease payment may not borrow more than this amount by mortgaging his lease right. Of course, if there is a construction, banks may also consider the value/cost of such construction in their loan calculation. In other words, the market based location value which was used for calculation by banks during loan agreement (e.g. up to 4000 birr per square meter in *Piazza* and *Mercato*, prime locations in Addis Ababa, the capital city) will be reduced to a much smaller amount.[44]

The other point that is incorporated in relation to mortgaging of lease right is envisaged in sub-article 4, which declares that if the lessee used his right *as collateral prior to commencement of construction,* then the amount of loan will be a much lesser one. It is declared that, this time, from the loan to

be extended, a reduction of 7% of the total lease price agreed in the contract and the total lease price unpaid (if any) starting from the time the land was delivered to the lessee shall be made.

To support this with an example, assume the lessee has got the land for a total of birr 1.2 million. He made a down payment of 10% (120,000 birr) and continued to pay for the next three years, an annual lease rent of 40,000 (total of 120,000) birr. So far the total lease price paid is birr 240,000. Suppose also that there is no construction activity made on the land. If he wants to mortgage the lease right, what he can get is only birr 223,200 (i.e. 93% of the total lease price paid.) What about if a construction of some value is made on the land? Then the calculation will be completely different. He will get the whole lease price paid, i.e. 240,000 birr. The above calculation is mandatory. Concerning the valuation of the construction, complete or incomplete, made on the land, the right is given to the lending banks to make the valuation.[45]

This rule will immediately cut down the amount of loan to an insignificant level. After the adoption of the proclamation, one of the stern complaints made on the proclamation was by the business community. Even though their properties (buildings) might be sold in the open for tens of millions for their location's sake, banks will not consider the market value of the property. The kind of valuation banks follow now is cost replacement; that is, construction value of the building only, which probably may be 10-20 % of the market value of the property. This means the difference between the sales value and the mortgage value of the property is extremely big, and this raises the question of sanity of the system.

3.4.5 Formation and Termination of Lease Contract

FORMATION OF CONTRACT

Any person permitted urban land lease holding in accordance with this Proclamation shall conclude a contract of lease with the appropriate body (Art. 16.1).The lease contract shall include the construction start-up time, completion time, payment schedule, grace period, rights and obligations of the parties as well as other appropriate details (Art. 16.2). The assumption is that the general provisions of contract law envisaged under the civil code will be applied here as well. Chief among the elements of a lease contract is the lease period. The lease proclamation has set different lease periods for residential and other activities. As in the case of the previous proclamation, 99 years has been set for residential purposes.

TERMINATION OF CONTRACT

The proclamation recognizes three situations that may lead to the termination of the lease contract (Art. 25.1):

1. failure to use the land in accordance with article 21(1), (violation of contract)

2. expropriation of the leased land, and
3. expiry and non-renewal of contract

The proclamation confirms that except in the case of the above three situations "no leasehold land right may be terminated and the lessee cleared from the land (Art. 26.3). A brief analysis of the three situations is given below.

Violation of contract: According to 21(1)(a) "a lessee shall use the land for the *prescribed purpose* within the *period of time* stated in the lease Contract" (emphasis added). The law is concerned about two things: that the land must be used for the intended purpose (land use issue), and that construction must be started within the agreed time (avoiding delay). This means, if he fails to use the land for the purpose for which it was designated (e.g., constructing commercial building instead of residential, building a house contrary to the agreed plan, use the land for agriculture rather than industrial etc.), then the city municipality may terminate the contract. Similarly, failure to commence or finish construction and commencement of the business (for which the land was provided) may also be another reason for terminating the contract.

The "land use" is mandatory to follow since the permit of the lease was made by considering the master plan of the city. Of course, if the master plan accommodates/permits, the land use may be converted upon the application of the lessee and permission of concerned organ (Art. 21.2 & 3). As we mention above (Sec. 3.3.1), one of the purposes of leasehold is to manage urban growth through enforcing and implementing urban land use regulations. One may also further study the contents of the FDRE Building Proclamation No. 624/2009 and FDRE Urban Planning Proclamation No. 574/2008 to see the land use regulations included. The violation of land use, as prescribed under Article 25(3) of Proc. 721/2011, leads to retaking of land and returning paid land lease price after deduction of costs and penalty.

The use of the land within the agreed time implies three things: commencement and completion of construction and use of land for the intended purpose. The first two have to do with the construction, while the third is concerned with the operational activities, such as starting the industry, business, agriculture etc.

Any lessee must commence construction within the agreed time. This is not an innovation to this proclamation; it was also included in the previous proclamation. The difference is that the current proclamation contains more harsh measures against those who contravene the lease contract. For example, if one fails to start construction on time, the land will be reclaimed by the city administration and some penalty or fee may be imposed on the lessee (see Art. 22)

Moreover, a lessee who got land by tender or allotment shall complete the construction according to the agreement. The law provides 24, 36 and 48 months to complete construction for small, medium and large scale construction activities respectively. Depending on the type of construction and regulation to be issued by each city administration, the period may be extended from 6 to 12

months. Where the lessee fails to complete construction within the agreed time, the contract shall be terminated and the land will be retaken by the city administration. The lessee is also obliged to remove any construction activity at his own cost from the land, or else the city may transfer it by tender to another person or remove the property on the land and then claim the cost from the lessee (Art. 23).

Expropriation: Art. 21(1)(b) introduces taking of land for other public purpose activities (expropriation) as the second reason to terminate a lease contract. Unlike the above cases, the lease shall be compensated based on the relevant laws (Art. 25.4). The details of expropriation of leasehold right are discussed below.

Expiry and Non-renewal of Contract: the "non-renewal of the lease period in accordance with sub-article (1) of Article 19" of the proclamation was given as a third ground to terminate a lease contract (Art. 25.1.c). The lease period provided is different for different purposes for Addis Ababa and other cities/towns. In determining the maximum lease period of urban land lease agreement, the law classifies the cities into Addis Ababa and other urban centers. In both Addis Ababa and others urban centers, a maximum of 99 years is set for the use of land for residential housing, science and technology, research and study, government office, charitable organizations, and religious institution purposes. Besides, for all types of urban centers the maximum period given for urban agriculture is 15 years (Art. 18.1.a).

In the case of other land use purposes, in Addis Ababa the duration given is 90 years for education, health, culture and sports, 70 years for industry, 60 years for commerce, and 60 years for others(Art. 18.1.b.) In other urban centers, a slightly higher period is arranged: 99 years for education, health, culture, sports; 80 years for industry; 70 years for commerce; and 70 years for others (Art. 18.1.c.)

What will happen after the expiry of the lease contract? The lease right may be renewed upon the application of the lessee, using the prevailing benchmark lease price of the time (see Art. 19). It seems the discretion of renewing the contract is given to the city administration; the city municipality may renew or refuse to renew the contract. Whether or not the city is required to give good reasons for not renewing the contract is not known. But, the reading of the Model Lease Regulation gives a clue which may be used by city centers. Article 48(2) of the Model Lease Regulation provides three events in which the lease contract may not be renewed: change of structural plan, the need of the land for other public purposes, or the inability of change of the land to current land use purpose.

The effect of non-renewal of contract is that the land will be taken after the removal of any property erected on the land by the owner. There shall be payment of compensation for any property loss caused to the owner. The municipality is empowered to "take over the land together with the property thereon without any payment where the lessee has failed to remove the property

within the period" given (Art. 25.5 & 6)). The possible problem or criticism that may be forwarded against such provision is that it may create tenure insecurity and hysteria when the expiry date approaches.

3.4.6 Expropriation of Lease Right

Expropriation refers to the taking of someone's immovable property for public purpose and upon payment of compensation. The details of the concept and nature of expropriation are discussed in Chapter Five, and it is sufficient to mention here that "*the appropriate body shall have the power, where it is in the public interest, to clear and take over urban land upon payment of commensurate compensation, in advance, for the properties to be removed from the land*" (Art. 25.1). The two most important points one may gather from this provision are that land may be taken *for public purpose* activities and upon payment of *commensurate amount of compensation*. Urban center may take urban land and any property thereon, if the land is needed for public purpose activities. A good example, of *public purpose* in urban areas may be roads, private investments such as hotels, commercial and industrial buildings. During such takings, the government is required to pay *compensation* commensurate to the loss of property on the land. This includes the replacement cost of buildings of any sort on the land and the market value of any other fixtures such as trees and fruits. The valuation and assessment of such properties shall be made based on the expropriation proclamation (455/2005) and regulation (135/2007). Besides the compensation that is made in terms of cash money for the properties found on the land, the person who lost the land will also be provided a "substitute plot of land within the urban center" (Art. 25.2).

The first procedure in the process of expropriation is the provision of clearance notice to the holder of the land. According to Article 27(1) of the lease proclamation, "the possessor of the land shall be served with a written clearing order stating the time the land has to be vacated, the amount of compensation to be paid and the size and locality of the substitute plot of land to be availed." And this notice should be served upon the possessor of the land in not less than 90 days before the appropriation of the land by the city administration. Any person who believes that his interest is infringed as a result of the notice has the right to submit a grievance within 15 days to the appropriate body (Art. 28.1). This person may be the owner of the property who has grievance on the amount of compensation or another third party who may claim the ownership of the land. The appropriate body (most probably the administrative body itself) will give its decisions after considering the application and evidences (Art. 28.3).

The proclamation further provides an opportunity for the aggrieved person to make an appeal if he is not satisfied by the decision of the appropriate body. The appeal will be made to an appellate tribunal which shall "be established by regions or city administrations" (Art. 30.1). Thus, this body is outside the hierarchy of regular courts and is rather affiliated to the administration, since its accountability is to the region or urban center (Art. 30.3). Its power seems restricted to "urban land clearing and compensation" cases and "decisions of the Tribunal, except relating to compensation, on issues of law and facts including claims for substitute land shall be final" (Art. 29.3). So the only appealable issue to regular courts is the complaint on the inadequacy of

compensation, which for many critics is strange since issue of law is always appealable to higher court far up to the cassation court itself.

3.5 Informal Settlement

3.5.1 Nature and Definition

A clear definition of informal settlement is hardly available. Many synonymous words have been used in literature to refer to informal settlements. These include spontaneous, irregular, unplanned, marginal, and squatter settlements.[46] Some literatures have used the term slums and informal settlements interchangeably.[47] While a clear definition for informal settlement is still elusive, some organizations have given description of informal settlements and slums.

The UN Habitat categorizes informal settlements into two.[48]

- Squatter settlements- settlements where land and/or building have been occupied without the permission of the owner.
- Illegal land development- settlements where initial occupation is legal but where unauthorized land developments have occurred (e.g. Change of land use that breaches zoning plans, building extensions without building permit, subdivisions without regard to services and infrastructure, etc.).

Informal settlements (often referred to as squatter settlements, slum areas, or shanty towns) are dense settlements comprising communities housed in self-constructed shelters under conditions of informal or traditional land tenure. They are common features in developing countries and are typically the product of an urgent need for shelter by the urban poor. As such they are characterized by a dense proliferation of small, makeshift shelters built from diverse materials, degradation of the local ecosystem and by severe social problems. In Ethiopia, they are known as illegal settlements or commonly "moon shine houses" (since people squat on the land during the dark hours of the night).

Informal settlement has never been defined under Ethiopian laws. However, one can gather its nature from the reading of the current Urban Planning legislation. Proclamation 574/2007,[49] which concerns urban planning, under Article 25(1), provides "no development activity may be carried out in an urban center without a prior development authorization." And according to Article 24 of same proclamation "development" means:

…the carrying out of building, engineering works, mining or other operations on or below ground, or the making of any substantial change in the life of any structures or neighborhoods.

The urban land administration which is empowered with the issuance of the development permit shall ensure that the applicant has a legitimate right to the land to which she applied for. This means the requirements of a legitimate building are basically two: one the land on which the

development activity (building) is going to be erected must be acquired through legal means (such as government grant, lease contract…) as per the existing laws; second, in order to execute the building activity, she needs a building permit (development authorization). This authorization is needed not only for the erecting of new buildings but also for modifying and demolishing them as well.[50]

Hence, based on this premise, we can conclude that informal settlement in Ethiopia covers houses which are built on government, communal or privately held land against the will (explicit or implicit) of the holder and/or without having a development authorization (building permit). While the former focuses on the absence of a right to the bare land on which the house is built, the latter focuses on the need of proper planning and building permits.

The Addis Ababa Development and Improvement Project office (AADIPO) adopts the following working definition for informal settlement.

> *Informality/illegality includes any form of construction (such as houses, fence, notice board, sewerage lines, containers, temporary/movable kiosks, etc…) which have been erected or built on public lands without having legal basis. Furthermore, it also includes any unauthorized expansion/ encroachment made on public rental houses. However, the degree of informality/illegality varies: some can be totally informal where as others can only be partially informal. Based on this working definition, therefore, the whole forms of informality is divided into two major groups: Group 1: includes those informal settlements which have been occupied and built without having any legal bases or evidence accepted by the law (such as title deed/ book and building permit). These settlements are commonly called as "squatter settlements" and mainly found at the expansion areas of a city. Group 2: includes settlements which are partially illegal/ informal. The illegality comes from so many sources. For example, they can have legal right (title deed/ book) but not building permit or having both the title deed/book and building permit but built, expand, upgrade, change the shape and size etc without the proper legal procedures/permit. Such settlements are mainly found in the inner part of a city.*[51]

Although this study was conducted well ahead of the Urban Planning Proclamation, it seems the definition confirms with the proclamation and we can apply it as well for this work.

3.5.2 Cause and consequence

Literatures show different causes for the creation of informal settlement although the consequences are more or less similar. It is true that informal settlements occur when the current land administration and planning system fails to address the needs of the whole community. When the system fails to address social housing needs, then people use their own paths in settling on somebody else's land. Such settlements are characterized by rapid, unstructured and unplanned development.

Population growth

A century ago, only 4% of the world's population was urban. Today, cities are home to half of its inhabitants. The explosive growth of urban populations in developing countries over the past several decades can be attributed both to natural increase and to migration.[52] Population growth and increased migration from rural to urban areas in developing countries have far surpassed available urban housing facilities for middle and low income citizens. City authorities are unable to solve this problem based on the demand of land by the people. The result has been that a variety of types of squatter colonies have grown up on vacant lands in the central areas and on the outskirts of major cities.[53] The overall population trend shows that the urban population growth will continue to grow and the housing demand will also grow in the same fashion.

The Failure of Governance

According to the UN-Habitat report on global human settlement, slums and urban poverty are not just a manifestation of a population explosion and demographic change, or even of the vast impersonal forces of globalization. Slums must be seen as the result of a failure of housing policies, laws and delivery systems, as well as of national and urban policies.[54]

The report summarizes that the failure of policy is at all levels – global, national and local. At the global level, policies that have weakened national governments without any countervailing central control appear to be leading to an unrestrained globalization that is accommodating greater inequality and marginalization. At the national level, liberalization and the sectoral fragmentation of policy and analytical and institutional frameworks have failed to support the urban–rural and cross-sectoral dynamics that are critical both to sustainable economic growth and to the distribution of its opportunities. At the local level, a startling lack of capacity to cope with, or manage, the situation has left many slum citizens in a no-man's land of illegality, insecurity and environmental degradation.

Institutional and legal failure

The urban poor are trapped in an informal and 'illegal' world– in slums that are not reflected on maps, where waste is not collected, where taxes are not paid and where public services are not provided. Officially, they do not exist. Although they may reside within the administrative boundary of a town or city, their local authority may well be a slumlord or mafia leader, rather than city council staff, who often no longer attempt to assert their jurisdiction or even enter the slums. As illegal or unrecognized residents, many of these slum dwellers have no property rights, nor security of tenure, but instead make whatever arrangements they can in an informal, unregulated and, in some respects, expensive parallel market.

The institutions that are failing slum dwellers are not just those of government and law, but also the private and commercial systems. Slum dwellers' 'life chances' are low; they are rarely able to obtain formal-sector jobs because of their lack of social capital, including lack of education, lack of patronage and contacts, and a general exclusion from 'regular society' that is mediated by signifiers of social class and a lack of empowerment. Slum dwellers are also not able to access regular sources of finance to develop their own businesses. Banks do not usually have branches in slums, and if they do, the lack of legally registered collateral will exclude all but the most well-off slum dwellers from obtaining loans.[55]

CONSEQUENCES

Informal settlements in a city are causes for health problems, environmental deterioration, social distress, economic destruction (fire), and urban violence.

Generally the consequences of informal settlements in many countries are similar. The first result of informal settlement is associated with health problems. Literatures show that living in these settlements often poses significant health risks. Sanitation, food storage facilities and drinking water quality are often poor, with the result that inhabitants are exposed to a wide range of pathogens and houses may act as breeding grounds for insect vectors. Cooking and heating facilities are often basic, with the consequence that levels of excessive exposures to indoor pollution may occur. Access to health and other services may be limited; overcrowding can contribute to stress, violence and increased problems of drugs and other social problems. Together, these pose special risks to children both during the prenatal period and after birth. This indicator provides a general measure of these risks.

The other problem is related to insecurity of holdings. Since people occupy mostly government land they live in perpetual state of fear that one day the government would evict them from the area. Hence, they tend to make no investment on the houses or the land, which leads again to poor condition of living and environmental deterioration.

Since government authorities prefer to ignore informal settlements, mostly they are administered by criminal gangs and mafias. Studies consistently show that such settlements are good shelters for criminals of cities, since no law officer and police force is able or wants to penetrate it.

Informally settled areas are known for their unplanned and low quality houses. People settle without any building permit or plan, and the materials they use are mostly makeshift of plastics, wood and mud, and so on, which is easy to catch fire and be destroyed by it. The streets and paths within the settlements are so narrow as to disallow any help from fire extinguishing authorities, if any.

Extract 3.2: Daniel W. Ambaye, Informal Settlement in Ethiopia: the case of two kebeles in Bahir Dar City,[56] pp. 14-21(the author made investigation in places called Woramit and Addis Alem).

1. Conditions of the Settlement (Woramit)

1.1 Tenure

As discussed above, land in Ethiopia is owned by the people and the state and it is not subject to sale or exchange. The settlers illegally purchased land from the holders of the land, meaning the local farmers. Farmers subdivided a plot of farming area and sold that to different squatters for housing purposes. The people confided to us that the land value for square meter is ranging from 250-300 birr. For example, a woman who claimed living in the city center for more than 14 years was forced to purchase an 80 square meters of land for 5 thousand birr, while others bought half of the size for the same price. The land occupied by the people does not belong to the state but to private holdings. Farmers have sold their farming plots piece by piece to the squatters. The holding of the land is therefore illegal since it is used for purposes other than the intended function, which is agriculture. It is also illegal in that it contravenes the constitutional principle that prohibits land sale and may be punishable by criminal law as stated in the national and regional land laws. By and large, the possession and contract of the settlers is void. Because, according to our contract rules under the Civil Code, any contractual agreement which is based on illegal or immoral object (in this case sale of land) is invalid (Civil Code Art. 1716). Hence, the possession of the settlers is precarious and they live in perpetual fear of eviction.

1.2 Structure

All the housing structures in the area are sub-standard and do not comply with local building and planning codes. Most of the structures in the study area are temporary shelters constructed from mud walls and roofs of iron sheets or mud walls and plastic roofs. Some of the worst are made from plastic and the local split bamboo wood, *Satara.* An average of four family members lives in an average land size of 20-30 square meters.

1.3 Infrastructure and Service

The people of the informal settlement are not recognized by public authorities as an integral part of the city. A query made on the city administration, rural administration, police, the closest *kebele* and the health authorities show that none of the above recognized the settlement as it existed. A local elder, actually vice chairman of the *edir,* an association of residents, told the researcher that once the local people had prepared a party in which they invited authorities from the *kebele*, city administration and the police. Nobody appeared except one police officer. The fear of the authorities is that if they approach the people or respond to any question by the people, it may be considered as recognition to their cause. Most importantly, settlers insisted on paying land tax for their holdings, since, they believe, that might give them some leverage later on. But, to their frustration, the *kebele* and the city administration refused to accept any land tax from such areas.

Because of this total ignorance of their existence, we saw no roads and streets, water and sewerage, telephone or electricity services. They use water wells for drinking which are not clean, and as a result there are cases of water-borne diseases. Some people try to carry water from the city for about 5 kilometers. We witnessed no road at all and the narrow streets are like lines that divide properties instead of serving as walking paths. A road leading from and to the northern part of the settlement is covered by water (during our visit), and during rainy seasons it is totally impossible to cross the area. Absence of electricity forced some of the people to connect electricity from the

nearest line illegally. According to the settlers, last year they bought electric wires and poles for 15000 birr only to have it stolen within few days. Theft is a common phenomenon and the group discussion held with five women in one neighborhood reveals that all the women were left home just to protect their homes from thieves while their husbands travel to the city center in search of daily work. Recently, they constructed a community policing building but no presence of police was observed. Similarly, they claimed that they do not receive any health or educational service. They send their children to school which is found 30 minutes to one hour foot walk distance. In case of health emergency, they carry their sick to the city hospital. As to normal health treatments, they do not even get vaccinations for their children which are customarily provided by health officers to the remotest area of the country.

Addis Alem

The Addis Alem area is located on the southeastern part of Bahir Dar. It is on the way to the famous tourist destination Tis Abay (*Tis esat*) waterfall on the river Abay (Blue Nile). This settlement was recently occupied by squatters. The number of the houses constructed within a few days in August 2009 was 150. The nature of the houses constructed and the infrastructure were not different from the Woramit area except the Addis Alem area houses are no longer there. According to city officials, an immediate action of demolition took place only to be constructed again during the night. There were repeated demolition actions and construction activities thereafter; the people are struggling to maintain their holdings. Now the case is forwarded to police and justice bureau for criminal prosecution.

2. Causes of informal settlement

As mentioned above, different reasons have been given for the emergence of informal settlement areas in different countries. Although the information gathered from the municipality is not satisfactory, here are some assumptions.

2.1 Population growth and inefficient land provision

The major cause of informality has been the failure by many to get access to land assets. The population of the city has excessively increased to more than 230,000 people currently from merely 96,000 in 1994. The land supply in the city municipality is, however, tragically inefficient. The city municipality is currently unable to meet the demand of all the land requests. For example, the evidence from *Shumabo kebele* shows that the number of people registered for land grant 5 years ago, which is the last time land was granted by lot, was 3000. The number of people who got the chance from that *kebele* was 171. Over all, in that year, 1500 people got a chance to get land from the whole city. Now if we assume a similar number of people in each of the 9 *kebeles* would apply (27,000 people) for land and the land supplied was only 1500 lots, this shows only 5.5% of the demand was met.

Now, this is only an assumption that says because of the shortage of land supply in the urban area, people may be forced to construct houses illegally. Indeed, from the interviews and group discussions we came to understand that there are some people who came to such a place only after they lost hope in getting land in the city. On average one has to wait for more than five years to get land. Although lease auctions may be floated from time to time, poor people cannot afford them. Besides, some people occupy or purchase land from peasant farmers to hold land for their children.

2.2 Urban poverty

The incomes of informal settlers are mostly too low for formally regulated markets to provide them with any kind of permanent housing. One of the inhibiting factors is that the poor have a low propensity to save and hence a low propensity to borrow money from lending institutions. This situation has also been compounded by the increases in inflation levels. Hence, they have acted to solve their own problems by building their own dwellings, or by building informal rental accommodation for each other. Indeed, the majority of the people (60%) interviewed or who participated in group discussion fall under this category. For example, one woman who has been living in the city for more than 10 years claimed that after she received a chance to buy a condominium house from the government, because of her inability to pay the down payment, she forfeited her right and came to this area and purchased land illegally for a cheaper price. She said the down payment she was asked was 15000 birr, and she just came to this place and purchased the land for 5000 birr. Similarly an elderly member of the community who gave an interview claimed similarly that he could not afford to pay the first installment for the condominium house and thereby was forced to come here.[57]

The other related issue is non-affordability of rental houses within the city. Most of the people also complained that the non regularized rental practice in the city forced them to search for whatever type of shelter they could find. Those people with family members are especially forced to pay a rent higher than their income. Moreover, the behavior and conduct of landlords are beyond one's ability to accept. Excessive restrictions were made on their use right in different ways, such as restriction on the use of water, electricity, toilet services and even receiving and entertaining of relatives.

2.3 Land Grabbing

The authorities in the city administration associated the formation of the informal settlements with the land grabbing activities of urban speculators. Urban speculators, who wish to sale a land illegally grab or purchase it on the outskirt of the city, which at this moment is another reason for squatting. In the Woramit area it is estimated 20-30% of the houses constructed are either occupied by non owners or vacant. The opinion provided by the members is that some people purchase land from farmers just to sale it back or to hold it in the hope of changing it to legitimate holding.

2.4 Owner peasants

In both study areas, the original holders of the farm land also have been participating in the construction of the informal settlements. Their intention was to rent it out to other settlers or to hold it as a house like any other settler for good or for bad. According to the regional expropriation and compensation rules, farmers whose land holding is expropriated for city expansion would be, among others, provided with a plot of land for housing if there was a residential house on the expropriated land. Now the point is that by constructing a shanty house, they hope that they would get an urban land on the spot when their land is included in the city boundary. Urban land is more valuable and they made constructions based on such speculations.

3. Consequences of the Settlement

The sprawling of poorly controlled settlement developments has resulted in many environmental and health related problems. Uncontrolled settlement development is causing physical disorder, uneconomical land utilization, and excessive encroachment of settlements into good agricultural land, environmental degradation and pollution risks. Besides, informal settlements cause huge economic and social costs. At this moment it is difficult to conclude about the consequences of the settlement for it is only established recently. And yet, from personal observation as well as the interviews and group discussions made, the following possible threats are forwarded as consequences:

3.1 Environmental degradation

Environmental degradation in this case may be associated with pollution of water bodies, deforestation, and pollution of the environment. Both study areas, especially the Woramit area is covered with forest. Part of the western part of the Woramit area is covered with houses in the middle of the forest and there is a threat of deforestation by the settlers. Another worry is that about waste disposal practices. Residents do not have proper toilet holes and they prefer to use the natural forest. In some areas, we observed that rotten fish brought from the city was disposed in the area, and truly the women were complaining of some asthmatic problems because of the smell.

3.2 Encroachment to agricultural and common land

The land the settlers have settled was originally held by peasant farmers and the land use purpose was agriculture. There is shortage of agricultural land in the region and yet farmers are selling land illegally. The uncontrolled expansion of human settlements will lead to conversion of the best agricultural land into settlements. The other problem is that peasants encroached into and subdivided a nearby grazing land. Actually, according to local farmers, they have taken the case to courts for this restricts their access to the grazing land.

3.3 High economic cost

The construction of the informal settlement takes a huge amount of money which is considered as wastage. The place will be demolished one day taking with it all the money invested. That is what happened in the Addis Alem area. According to information gathered from the settlers, it costs them about 6-7 thousand birr to construct one simple two-room house. Assuming that the municipality has demolished, at least once, 150 houses in the Addis Alem area, the total amount of money wasted was about 1 million birr. Another point is that, such informally occupied land would lose its potential value for investors who would not prefer it. City administration will not collect all land tax which should be collected otherwise.

3.4 High social cost

The residents of the area are living in isolation from the city and they have no contact in its legal meaning with the authorities. They have no identity papers, address numbers, bank accounts and so on. They are simply citizens of nowhere. A simple story told by the settlers was that during the past 2007 election, authorities refused them their right to vote by denying them the right to set up electoral post in the settlement. Some of the people voted in their former residential areas and some remained without voting. It will take only some time before such settlements would be manipulated by criminal gangs and other speculators. The story of *Kitel Sefer* discussed hereunder shows that the place was serving for many years as a hideout for dangerous criminals. Besides, such places are usually characterized as sources of fire, diseases, crimes, and urban violence.

4. Measures being taken

The measures taken and being taken by the city municipality lack harmony and uniformity because of absence of developed regulations to govern the matter. Currently there are at least three types of responses to informal settlements identified by the researcher:

a. demolishing the houses and expelling the squatters from the area without any compensation for the land or the house
b. demolishing the house and giving land replacement in other areas
c. regularizing the rights and changing same from informal to formal ones

4.1 Demolition and eviction

Demolition or bulldozing was a common measure taken against illegal or informal settlement activities in many countries. This type of response has, however, been changed over time. Eviction and demolition of informal settlements have been followed by new curative and preventive practices. Over the years, legalization, physical upgrading, and later on, the integration of informal settlement in the urban fabric (normalization) have become common responses to informal settlement. The above trend has actually been practiced in Ethiopia as well, specifically in the city of Addis Ababa.

In Bahir Dar, the main response to newly established informal settlements and constructions is demolition. The Addis Alem area is a case in point. The city administration has demolished and evicted the residents although it is not successful in total cessation of the construction. Moreover, in the northern part of Woramit area, which was incorporated into the city administration, there are evidences of demolition of newly built houses on residential plots. According to city officials, currently this measure is the most utilized one compared to the others.

The fear of the municipality seems that if it allows, or simply does not oppose the construction of illegal settlements, tomorrow they will bring excessive cost in case of expropriation. Secondly, it would be a bad precedent for others would, most likely, follow the practices of the squatters.

4.2 Demolition with land substitute

This is a rare practice, of course, in the city. The only evidence known in the city is the case of the *Kitel Sefer*, a well known slum and informal settlement in the city. The people in the area had been living there for the past 20-30 years without any legal basis. But, they constructed a neighborhood of makeshift known for its bad examples, such as criminal activities. When the city administration finally decided to use that particular place for the construction of a stadium, there arose a controversy as to the fate of the squatters. It was argued that since they were illegal settlers, without any legal evidence of occupation and permit of construction, no compensation should be paid. The expropriation law simply does not simply include such areas in its compensation package.

On the other hand, it was alleged that it was the fault of the municipality in allowing them to live there in the false hope of regularizing their holdings one day. It has been argued that had it not been for such false hope, the people would by now have constructed their own houses. The people in this area were relatively in good financial position since they have small businesses in the

city center. The solution given was, therefore, a political rather than a legal one; the municipality gave them plots of land in one area so that they would construct houses. But, no compensation was paid for the demolished houses.

4.3 Regularization

This is not possible in principle. Of course, the Addis Ababa city administration has regularized informally or illegally constructed houses. The houses were standard ones constructed not by urban poor but by middle class dwellers and free of any congestion. The squatters have paid land tax; hence, it was easy to regularize them instantly.

Coming to Bahir Dar, the possibility of regularization of houses constructed illegally would not be used soon in the study areas. This does not mean, however, that there are no sporadic practices in the city. The Regional Works and Urban Development Bureau has issued a regulation/guideline about regularization of houses which were constructed before 1991 and provided that the holder can show some legal basis on the holding.

_____//_____//_____

Summary

Leasehold as a system of land allocation and administration is a well known system in many other countries. As far as the lease right is freely transferable, its status is not different from private ownership. Lease has many advantages for the city government, such as collecting revenue and managing urban development. Since 1993, Ethiopia has witnessed three lease proclamations and still the policy objectives are not clear. When the current lease proclamation was promulgated a wide array of popular discontent followed. Although, in principle, this proclamation allows the free transfer of lease right, in reality its enjoyment has been restricted with the intention to fight speculation and "rent seeking activities." Further, whether the lease system serves the best interest of the majority of the society is not a settled issue. The current lease proclamation permits land transfer only through lease or allotment. It is obvious that lease will benefit only those who have the ability to pay. The law tries to incorporate one sub-article where it is declared that city administrations may allot land for self-help housing associations as well, but whether or not they are supposed to pay a lease bench mark payment is not known.

This chapter also envisages that inefficient urban land administration system is the primary reason for the flourishing of informal settlements. The poor, who cannot afford either to buy or rent houses, and the other, who cannot get land from the city are those who are forced to settle on the informal settlements. In Ethiopia, informal settlement is not defined and the measure taken lacks clarity and consistency. Although in principle demolition is the most utilized one, sometimes regularization of the houses are also used.

Review Questions

1. Ato Abebe owns a house in the middle of the city. He built the house before he met his wife and the house was identified in their marriage contract as private property. Now, however, the municipality decides to expropriate the land and the house to construct a road over the land. The municipality wants to be certain about ownership matters. Should the compensation money be paid to Abebe or to both husband and wife? If replacement land to construct another house is to be made, in whose name should it be registered?

2. What are the advantages/objectives of a lease system? Do you think these advantages are used as policy objectives in the current leasehold system?

3. What is the basic similarity between Proc. 80/1993 and Proc. 721/2011 on the one hand and the difference between both the above proclamations and Proc. 272/2002 on the other?

4. What is "rent seeking" activity? What is speculation? In what way does the lease proclamation try to fight them?

5. Some people argue that the fact that lease becomes the predominant (if not the only) means of land acquisition will encourage increase in land lease price and informal land settlement. Comment.

6. Article 24 of the current lease proclamation demands 95% of profit from sale of unfinished properties to go the state. How do you see its constitutionality?

7. Do you think the "common ownership" of land in Ethiopia by the people and the state has been reflected in the current urban land lease legislation? Comment on it by comparing it to the land rights of rural peasants.

8. What are the pros and cons of using "regularization" as solution to informal settlements?

Endnote Chapter 3

[1] MARKAKIS, J. 2006. *Ethiopia: Anatomy of a Traditional Polity,* Addis Ababa, Shama Books., p. 197.

[2] BAHRU-ZEWDE 2008. The City Center: A Shifting Concept in the History of Addis Ababa. *In:* BAHRU-ZEWDE (ed.) *Society, State and History: Selected Essays.* Addis Ababa: Addis Ababa University Press. P.486.

[3]PANKHURST, R. 1990. *A Social History of Ethiopia,* Addis Ababa, Institute of Ethiopian Studies, Addis Ababa University. P.275.

[4] Ibid.

[5] MOLLA-MENGISTU 2009. The Ethiopian Urban Landholding System: An Assessment of the Governing Legal Regime. *In:* MURADU-ABDO (ed.) *Land Law and Policy in Ethiopia since 1991: Continuities and Changes.* Addis Ababa: Law Faculty, Addis Ababa University.

[6] GAMST, F. C. 1970. Peasantries and Elites without Urbanism: The Civilization of Ethiopia. *Comparative Studies in Society and History,* 12**,** 373-392. P. 379.

[7]See the full edict in Amharic in MAHTEME-SELLASSIE, W. M. 1970. *Zekre Neger,* Addis Ababa, 2nd ed., pp.166-171; or an English version in PANKHURST, R. 1966. *State and Land in Ethiopian History,* Addis Ababa, The Institute of Ethiopian Studies and the Faculty of Law, Haile Sellasie I University. pp.156-158.

[8] BAHRU ZEWDE, supra note 2, p. 490.

[9] For good explanation see CRUMMEY, D. 2000. *Land and Society in the Christian Kingdom of Ethiopia: From the Thirteenth to the Twentieth Century,* USA, University of Illinios Press.

[10] For detail argument see MOLLA-MENGISTU, supra note 5.

[11] PANKHURST, supra note 3, p. 154.

[12] LAPISO-G-DELEBO 1983 EC. *Ye Ethiopia Ye Gebar Sireat-na Jimir Capitalism: 1900-1966 (Ethiopian Gabar System and the Begining of Capitalism: 1908-1974),* Addis Ababa. **267.**

[13]MARKAKIS, supra note 1, pp, 198-99. This was based on the second census of the city.

[14] Pankhurst, supra note 3, p.154.

[15]MESFIN-WOLDE-MARIAM. Year. Problems of Urbanization. *In:* Proceeding of the Third International Conference of Ethiopian Studies, 1970 Addis Ababa. Institute of Ethiopian Studies, Haile Sellassie I University. P. 28; COHEN, J. M. 1977. Rural and Urban Land Reform in Ethiopia. *Afri. L. Stud.,* 14., p. 25.

[16] For example, during the late 1960s, 60 percent of the occupied houses in Addis Ababa were rental ones. (Ibid, p.25).

[17] CLAPHAM, C. 1988. *Transformation and Continuity in Revolutionary Ethiopia,* Cambridge, Cambridge University Press. p. 50.

[18] 1978. Urban Land and Extra House: From Yesterday to Today (Amharic). Addis Ababa: Committee established for the Fourth Anneversary of the Revolution

[19] The 1931 Ethiopian Constitution as reproduced in PAUL, J. C. N. & CLAPHAM, C. 1972. *Ethiopian Constitutional Development I, a Source Book,* Addis Ababa, Haile Sellassie I University and Oxford University Press. Pp. 326-336. See also Mahteme-Sellassie-SELLASSIE, supra note 7, pp. 771-789. The other supplementary provisions go as follows:
Art. 74: It is determined by law that land and property hitherto in the hands of the Emperor and of members of the Imperial family, and all lands which they may acquire in future by purchase like any ordinary citizens shall, subject to the observance of the established regulations concerning land, be confirmed to them and shall be heritable to their descendants
Art. 75:It is determined by law that similarly princes and territorial governors and all other Ethiopian citizens, who commit any sort of crime, shall be punished according to the provisions of the law, but landed property which they have hitherto held, or which they may acquire in future by purchase, shall not be confiscated.
Art. 76:Nevertheless, if it is necessary for the Government to construct on another person's land installations for the public welfare, such as forts, roads, markets, churches, schools, hospitals, townships or any work of this kind, it is determined by law that if the Deliberative Chambers have declared it necessary, the land owner shall be given a fair price as determined by law, or, subject to the

landowner's consent, he shall receive some other similar compensation, and he shall be compelled to surrender the property; but except in a case of this kind where the public welfare is involved, a person's land may not be taken from him with a view to benefiting an individual.

[20] http://www.angelfire.com/ny/ethiocrown/Constitution.html

[21] Preamble of Proc. 47/1975.

[22] UN-HABITAT 2010. The Ethiopia Case of Condominium Housing: The Integrated Housing Development Programme. Nairobi: United Nations Human Settlements Programme.;

[23] UN-HABITAT 2008. Ethiopia:Addis Ababa Urban Profile. Nairobi: United Nations Human Settlements Programme. P. 12.

[24] FEYERA-ABDISSA & TEREFE-DEGEFA 2011. Urbanization and Changing Livelihoods: The Case of Farmers' Displacement in the Expansion of Addis Ababa. *In:* TELLER, C. & HAILEMARIAM, A. (eds.) *The Demographic Transition and Development in Africa: The Unique Case of Ethiopia.* London: Springer. P. 217.

[25] FDRE Urban Lands Lease Holding Proclamation, Proclamation No. 721/2011. *Negarit Gazeta.* Year 18, No. 4.

[26] HONG, Y.-H. & C.BOURASSA, S. 2003. Why Public Leasehold? Issues and Concepts. *In:* C.BOURASSA, S. & HONG, Y.-H. (eds.) *Leasing Public Land: Policy Debates and International Expriences.* Cambridge, Massachusetts: Lincoln Institute of Land Policy. P. 5.

[27] Ibid. p. 6.

[28] The list is adapted from Ibid.

[29] FREYFOGLE, E. T. 2003. *The Land We Share: Private Property and the Common Good,* Washington DC, Island Press.

[30] ታምራት-ላ ይኔ 1983. የ ኢትዮጵያ የ ሽግግር ወቅት የ ኢኮኖሚ ፖሊሲ ረቂቅ. አዲስ አበባ: ጠቅላይ ሚኒስቴር ቢሮ p. 32-33. Section 8.1 says: "Ensuring rapid urban development and alleviating housing problems can be realized only through the active participation of private investors in housing construction by providing them secure rights and incentives. It is, therefore, necessary to provide investors with secure ownership right of houses that gives rights of sale, lease, inheritance, and so on. Besides, an encouragement should be made for people to construct condominium houses with the support of the state. In this respect, government, by making rules and regulation in line with this policy, and banks, by improving their working procedures, would create a situation where low income people would be able to construct houses separately or in common with others (8.1.)" (Translated by author).

[31] The Preamble of Urban Lands Lease Holding Proclamation, Proclamation No. 80/1993. *Negarit Gazeta.* Year 53, No. 40.

[32] MESGANAW-KIFELEW 2009. The Current Urban Land Tenure System in Ethiopia. *In:* MURADU-ABDO (ed.) *Land Law and Policy in Ethiopia Since 1991: Continuities and Changes.* Addis Ababa: Ethiopian Business Law Series, Faculty of Law, Addis Ababa University. P. 171.

[33] Re-enactment of Urban Lands Lease Holding Proclamation, Proclamation No.272/2002. *Negarit Gazeta.* Year 8, No. 19.

[34] MISGANAW-KIFELEW, supra note 32, p. 171; Also, see Preamble of Proc. 272/2002.

[35] Ibid, p. 173.

[36] FDRE Urban Lands Lease Holding Proclamation, Proclamation No. 721/2011. *Negarit Gazeta.* Year 18, No. 4.

[37] በአዲስ አበባ ከተማ አስተዳደር የይዞታ አስተዳደር አገልግሎት አሰጣጥ መመሪያ ቁጥር 12/2004

[38] See details under article 6 of Regulation No. 49/2004 E.C of Addis Ababa City Administration; Article 7 of Model Urban Land Regulation of Ministry of Urban Development and Construction.

[39] Ibid, Art. 7 and Art. 8 respectively.

[40] See the weekly *Capital,* Sunday, 4, October 2012, Year 14, No. 726. The paper expresses its worry that the poor would be excluded from future dealings of such nature because of this unheard type of prices offered.

[41] Look to this type of argument in መካሻ አበራ 2004 ዓ.ም. *የ ኢትዮጵያ መሠረታዊ የ ሊዝ ሕግ ሀሳቦችና የ ሚየስከትላቸውችግሮች,* አዲስ አበባ. p. 79. "የሊዝ ሙቡቱ በመተላለፉ የተገኘው የሊዝ ዋጋ ሻጩ ሊዝ ከመንግስት ጋር ሲገባ ከከፈለው የበለጠ ሆኖ ከተገኘ በመበለጥ ከተገኘው ዋጋ 5 በመቶ የሚሆነውን ቀንሶ ለሻጭ በመክፈል ቀሪው መንግስት እንዲወስድ ይደረጋል።"

[42] Ibid. Art. 41 and Art.44 respectively.

[43] See for example DANIEL-WELDEGEBRIEL-AMBAYE 2009a. Land Valuation for Expropriation in Ethiopia: Valuation Methods and Adequacy of Compensation *7th FIG Regional Conference*. Hanoi, Vietnam, 19-22 October 2009 FIG (http://www.fig.net/pub/vietnam/papers/ts04c/ts04c_ambaye_3753.pdf). It is said that before the coming of this lease legislations, banks used to give location value in the capital up to 4000 birr per square meter.

[44]See details for example Ibid. P. 30.

[45] See Art. 59.3 of the Addis Ababa Lease Directive.

[46] LAMBA, A. O. 2005. *Land Tenure Management Systems in Informal Settlement: the case of Nairobi.* Masters, ITC, Netherland. P. 2.

[47] UNHSP 2003. Slums of the World: the face of urban poverty in the new millennium. Nairobi: United Nations Human Settlement Program.

[48] UN-HABITAT 2003. The Challenge of Slums: Global Report on Human Settlements 2003. Nairobi: The United Nations Human Settlement Program.

[49] FDRE Urban Planning Proclamation. *Negari Gazetta*. Year 14, No. 29.

[50] Id. Articles. 27& 32 respectively.

[51] AADPO 2003. Informal settlement in Addis Ababa. Addis Ababa: Addis Ababa Development and Improvement Project Office.

[52] ULACK, R. 1978. The Role of Urban Squatter settlements. *Annals of the Association of American Geographers,* 68. P. 538.

[53] MANASTER, K. A. 1968. The Problem of Urban squatters in Developing Countries: Peru. *Wis. L. Rev.,* 23. P. 24

[54] UN-Habitat, supra note 45, p. 5.

[55] Ibid.

[56] DANIEL-W.-AMBAYE 2011. Informal Settlement in Ethiopia: the case of two kebeles in Bahir Dar City. *FIG Working Week*. Marrakech, Morocco.

[57] Currently the Ethiopian government has followed a policy that helps the low and middle level income urban residents to be home owners. To this end, a massive construction condominium houses across the country is taken place. Critics, however, raised a concern that the urban poor is not yet made a beneficiary. Among others, the down payment requested by the state does not consider their income and saving.

Chapter

HOUSING TENANCY AND CONDOMINIUMS

Introduction

Housing is the major concern and policy component of urban administration systems. Shelter or housing is one of the basic problems in urban Ethiopia. To solve this problem, government uses at least two policy instruments: one being the lease policy which aims to collect and deliver cheaper and free lands, and the second one is the Integrated Housing Development Program (IHDP) that aims to build and transfer affordable houses to low and middle income urban residents. The massive condominium housing construction and transfer of same to such groups is a case in point.

In this chapter an attempt is also made to look into the tenancy laws as incorporated in the Civil Code and the condominium proclamation.

4.1 Right to Housing

The provision of shelter is probably the most fundamental aspect of affordable housing policy. Among the obvious ones are the provision of shelter and the potential creation of wealth. Perhaps less obvious goals are the growth in psychological well-being due to a resident's sense of "home" and its resulting stability, the improved physical health of the homeowner's family, the resident's increased participation in civic society, and the improved educational performance of their children. Another goal might be to achieve racial and economic integration in order to allow a wider tolerance.

Ethiopia is a signatory to the international Human Right Instruments such as the UN Universal Declaration of Human Right (Art. 17) and African Charter on Human and Peoples' Rights (Art. 14) which guarantee property right of citizens, and other UN conventions on the right of the people to "adequate housing". Specially, the International Covenant on Economic, Social and Cultural Rights recognizes the right of all individuals to 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

Some Facts about the 2007 Ethiopia Population and Housing Census
Total Population: 73, 302,305
Households (No. of Houses): 15,634,370
Household Size: 4.7

a reasonable cost. Ratifying parties are required to report their housing policies and their success in meeting housing needs every four years. Finally, Ethiopia also has accepted and is working towards the fulfillment of the Millennium Development Goals, of which Goal 7, Target 11 aims that "b*y 2020, to have achieved a significant improvement in the lives of at least 100 million slum dwellers".*

To fulfill this obligation Ethiopia adopted an Integrated Housing Development Program (IHDP) which aims to alleviate the urban housing shortage through massive construction of affordable houses, targeting the poor and middle income group of urban society. According to the 2007 National Population and Housing Census, more than 50% of the housing units are used for rental purposes and by extension more than half of urban population lives in rental houses.[1]

Table 4.1: Distribution of Rental among different owners

Case	Owner Occupied %	Rent Free %	Rented From Kebele %	Rented From Rental Agency %	Rented From Organs %	Rented From Private %	Different Rentals %
Country	81.46	6.73	2.4	0.16	0.16	9.03	0.06
Urban	39.31	6.94	11.92	0.79	0.57	40.06	0.12
Rural	91.47	6.68	0.14	0.01	0.06	1.59	0.05
AA	32.62	5.93	23.63	1.81	0.52	35.36	0.13

Source: Population and Housing Census: 2007.

According to existing studies, construction of 225,000 housing units per annum until the year 2015 is necessary to fulfill the Millennium Development Goal mentioned above.[2] Studies made in the last five years also conclude that currently there is a housing shortage of between 900,000-1,000,000 in urban centers, and only 30% of the existing urban housing stock is in good or fair condition.[3] During the previous economic plan (PASDEP) 2004/2005-2009/2010, it was planned to construct 396,000 new houses, and by the end of the plan period 213,000 houses had been built all over the country.[4] The Addis Ababa City Administration that started housing construction in 2004 was said to have completed and transferred 97,000 houses (up to 2012) to residents, while around 350,000 people are still awaiting their chance.[5] This shows that the performance of the past 8 years in construction and distribution of housing was not satisfactory. Many people still live in shanty government and private rentals. While Ethiopia is still struggling, a Swedish housing policy that accomplished the construction of one million houses within 10 years may be a lesson worth looking into.

Extract 4.1: Debora Kenn argues the Swedish reality in housing construction and provision is the dream of other countries.[6] Pp. 70, 80, 80-82, 90-91, 93-96.

Sweden bears the banner as the international leader of affordable housing policy success…. The Swedish Constitution guarantees descent housing to all citizens….

The initial goal of Swedish housing policy was alleviation of the extreme housing shortage. The large-scale production of housing which was needed could only be accomplished by removing housing distribution from the profit making vagaries of the capitalist market. Creating a socialist housing market involved curtailing speculation on the cost of land and on the cost of housing on the land. In 1947, legislation gave municipalities the right to expropriate land and to control land sale by a first right of refusal. Municipal land banking provided a generous source of affordable land upon which to build nonmarket housing. Also in 1947, the Building Act legislated municipal control over the location and density of development.

Fueled by national government subsidies and municipal planning, housing development charged ahead. The capitalist system of housing production continued with private enterprises constructing housing. Social democratic principles governed distribution with nonmarket principles dominating the sale and leasing of houses. With cost controls and nonprofit markets in place, the national government committed significant financial resources to housing production, mostly in the form of below-market, fixed-rate loans. More than 90% of all houses built in Sweden since World War II have been funded by state loan subsidies.

The combination of government loans and municipal control of land and development proved a successful formula for curtailing the housing shortage. By the 1960s, Sweden boasted the highest rate of housing development in the world. In 1965, Sweden launched its "Million Dwelling Programme," ambitiously planning to build one million dwellings within ten years. The goal was truly remarkable considering the population of Sweden at the time was 7.5 million people. However, it was not considered enough merely to create dwellings. Those dwellings had to constitute descent, quality housing. Equally as important, they had to be affordable.

While the similar intent expressed in the United States Housing Act of 1949 still remains but a dream, Sweden happily achieved its stated target. By 1975, Sweden gloried in one of the highest ratios of dwellings to inhabitants in the world, at a comfortable 430 dwellings for every 1,000 people. Within its specific ten-year time frame, Sweden reaches its aspirations of ending the housing shortage, improving housing conditions, and bringing into the realm of affordability. Gone were the days of overcrowded, unhealthy conditions for Sweden's residents. Housing standards now included realistic occupancy limits, adequate sanitation and plumbing, central heating, and modern utilities. Sweden's housing supply, in addition to being in good condition, became affordable to people. A national system of housing allowance guaranteed that a person's contribution to rent would be no more than 25% of their income….

The governmental division of labor for affordable housing in Sweden proves extremely efficient. The national government legislates and administers housing policy while regional and local governments implement it. In addition to formulating housing policy, the national government provides the funds for affordable housing production and distribution. At the national level, the Ministry of Housing and Physical Planning administers and coordinates the allocation of funds among regions. There are 24 designated counties with regional governmental entities called County Administrative Boards. The County Boards act as intermediaries between the National Housing Board and municipal governments, overseeing the municipal housing plans. This dominance of regional control proves

vastly superior in efficiency, fairness, and effective resource allocation than the city/suburb competition in the United States….

The national and municipal governments of Sweden fund affordable housing through three different systems. Sweden has an extensive system of land banking which preserves undeveloped, affordable land for development purposes. The initial outlay of government dollars is spent on land purchases. Next, the government funds affordable housing by providing construction loans. Finally, the national and local governments bankroll housing subsidy programs to make the houses affordable to all individuals and families.

Over the years, legislation was enacted to strengthen municipalities' capabilities to buy, sell, and lease land. The Housing Provision Acts of 1947 legitimized land banking by entrusting municipalities with the right of expropriating and the right of first refusal on land for sale… In 1973, municipalities were given the right to expropriate substandard rental housing. If a municipality desires a parcel of land, a private owner must sell it at the market value ten years prior to the time of sale….

Thus, in Sweden, affordable housing begins with governmentally-controlled land costs. Most developable land is removed from the speculative market by the land banking system. Having acquired land at extremely reasonable cost, the municipality can sell it for current value plus the value of any improvements. Or, as is usually the case, it can enter long term leases for the lands with developers. By owning vast amount of developable land, municipalities can control development. Enhancement of this power draws from the municipalities' ownership of profit housing companies and from the legislative requirement that municipal governments create and administer master development plans. State subsidies for development are contingent upon housing developers complying with master plan which give the municipal governments considerable enforcement power….

Housing tenure in Sweden is a choice between three basic forms. People looking for housing can choose to be renters, cooperative dwellers, or homeowners. The rental sector comprises 43% of the housing market, divided about equally between private and public housing. Homeowners account for 42% of housing consumers and cooperative owners represent 15% of all housing dwellers…

Although rental housing occurs in both the private and public housing operates under the control of public housing. In terms of setting rents, meeting housing standards, and determining security of tenure, the public sphere leads the way. This domination by the public housing market results from the existence of Municipal Housing Corporations (MHC) which have acted as vehicle of the state, managing public housing since 1935…

Since private rents are pegged to public rents, the ability of public sphere to supply quality housing on a nonprofit basis results in affordable rents for both the public and private housing markets. Private landlords have to buy into the state's system of rent-setting because their ability to seek state-subsidized housing loans depends on their adherence to that system…

Rents are determined on annual basis pursuant to negotiations between the municipal housing corporations and tenants' associations. A complicated system of rent-averaging and cost-pooling forms the basis of rent-setting. To arrive at the cost of maintaining one of its rental dwellings, the MHC determines the cost of funding and maintaining its entire stock of housing, and the cost of constructing any new housing, and then divides this figure by the number of public housing rental

units. This average cost is adjusted based on individual characteristics of the dwelling, in negotiation with tenants' unions. In addition, the tenants' unions participate in this process by having access to and reviewing the records of the MHC. If any unreasonable dispute occurs in the negotiations, the National Committee on the Rental Market hears and decides appeals. Since rents are negotiated yearly to reflect the actual cost of maintaining houses and, at times, expanding the supply of housing, the nonprofitability of the housing endures.

Once rents are resolved with the MHCs, the tenants' unions must negotiate with the private landlords. The "use value" determination for apartment dwellings is applied to private housing market to achieve comparable rents. Private rental dwellings are compared to public housing dwellings in terms of their size and amenities and are priced accordingly. Comparable dwellings should have comparable rents, and all rents should be reasonable due to the nonprofit nature of the entire system. The most controversial aspect of the rent-setting system addresses the reality that older apartments are priced the same. The use value system does not adjust for dwelling age. Since most public housing is relatively recent and most private housing stock is older, private housing tenants subsidize public housing tenants in their rental payments…

In contrast to the United States, where private landlords can evict tenants for any but discriminatory reasons, Swedish landlords cannot evict tenants except for good reasons, such as nonpayment of rent, serious tenant misconduct, or a legitimate need by the landlord for personal use of the apartment. In addition, tenants in public housing have gained considerable power over housing management decisions.

The MHCs must also provide equal opportunity housing under national policy. In Sweden, this goal means that public housing becomes available to middle income families as well as to families with limited financial means. Consequently, class barrier are broken down, with many middle income tenants residing in public housing. Single-parent households comprise a majority proportion of the overall population of public housing tenants….

_____ _____ //_____

4.2 Lease of Houses/Tenancy

In any society, people want shelter. But all members of society may not be able to afford to have houses of their own while others own more than what they need, and it is clear that the law has to devise institutions to allow a person the use and enjoyment of another's houses without the need to purchase them. One such legal mechanism is the institution of rent/lease that transfers the right of occupancy, use and enjoyment of the house to the lessee/tenant while the owner/landlord/lessor keeps the bare ownership right.

Here we shall discuss lease of housing. The housing that we are talking about may be residential or commercial. In countries where the real property market has flourished, lease/rent is a common system of conveying one's house to another renter. Yet for public purpose and social welfare reasons, most countries 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 has inherited a lot of urban houses which were nationalized by the Derg using Proc. 47/1975. The Rental Agency or *Kebeles* administer these houses. Government assigns 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 set the market price for rent. This is a contract that is totally governed by the Civil Code. The purpose of this section is to discuss the rental contract of houses controlled by the private market, not by government (Art. 2896-3018).

4.2.1 General principles

Lease of immovable is a contract (Art. 2896) and hence the general rules of Contract in general (Arts. 1675-2026) may be applied whenever necessary, especially concerning formation and effect of contract, as indicated under Article 1677. A combined reading of Articles 1723 and 2898 reveals that a lease contract needs not to be made in writing. Moreover, Articles 1571 and 2899 strengthen this fact by dictating that lease agreements made for more than five years and not entered into registry may not affect third parties. Article 2946 stipulates that the municipality may prepare a model contract form for the lease of houses within its jurisdiction. Yet it is not mandatory for the parties to follow it; it seems the option is left for 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. In this section while the word lessor means landlord of the houses, lessee signifies the tenant or renter of the house and we may use both terms interchangeably. 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 made for more than 60 years shall deemed to have been made for 60 years (Art.2927).

4.2.2 Obligations of Lessor (landlord)

A. DELIVERY OF PROPERTY AND WARRANTY OF PEACEFUL ENJOYMENT

The lease imposes on the landlord various obligations, all of which spring from a single principle: the landlord is bound to procure for the tenant 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, meaning 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 into the house and ensure whether it is suitable and up to the standard. 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 to those who reside with him or to 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 crack on the wall which is visible apparent? What about a leacking 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 pointed out that to the extent that one might speak of a duty to inform, this is not as general as regarding the duty of examination 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. The 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 make his 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).

B. REPAIRS

A rented house 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 that is 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 be 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 its urgent nature cannot be repaired without delay by the lessor, the lessee may repair it at his cost and may retain the cost from the rent (Art. 2920).

4.2.3 Obligations of the Lessee

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 (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 the 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 who lives on the second floor of an apartment uses firewood to cook his food. The apartment was not equipped with traditional *midija.*
- A lessee emits high volume sounds from his tape recorder during party hours at midnight.

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 the second important obligation of the lessee. The time for payment and amount of rent shall be decided by the free agreement of the parties in their contract (Arts. 2923, 2950). As we mentioned above, the ceiling of rent in many countries is fixed and controlled for economic, social and moral reasons. Rent control allows landlords to receive, through administratively controlled increases, a regulated pre-set economic rate of return. This disallows speculated increases and certain non-price behaviors that would otherwise displace current residents and destroy communities. Our Code simply adopts the principle of freedom of contract and allows the parties to decide about the amount.

Rent Control

What are the justifications for rent ceiling/control? Although it is an economic truism that the price of any commodity in a free-market economy is determined by the interaction of the forces

of supply and demand, state intervention in economic activities has become a pervasive fact of life in many market-oriented economies.[7] The justification for such action is often the perceived need to rectify undesirable results produced by the market mechanisms. Excess demand for any commodity in the absence of a corresponding increase in supply will in a free economy lead to an increase of the price of commodity. In such a situation, the government may feel justified (and sometimes even obliged) to impose direct controls, which may include a ceiling on the price charged for commodity. Rent control is a prime example of such action, and it usually originates when war or emergency conditions suspend the normal operation of market forces. Although the detail of rent control legislation may differ substantially from country to country, or even within particular country, the common denominator is that some limitation is imposed on the freedom of lessors to set rent levels.[8]

Rent control may be a freezed one or one which increases on a regulated basis. For example, the rent for *Kebele* houses in Ethiopia is a freezed one since the maximum amount was determined by Proclamation 47/1975. In some countries, a regulated amount of rent is increased from year to year based on national increase on cost of construction and maintenance of houses.

What are the pros and cons of controlling rent ceilings? One set of conflicting goals that can be raised here is the competition between the provision of decent, affordable shelter and the creation of wealth for homeowners. While each of these goals is laudable, they cannot each be maximized in any particular project. To the extent society seeks to preserve an affordable housing unit for the long term, it must restrict the wealth that an owner can derive from rental of that property. To the extent the owner is able to demand full market value for the unit, it would likely be too expensive as a rental for a low income resident. However, if the owner is restricted from deriving maximum financial benefit from the property, that owner's wealth creation is restricted, often severely.

Hence, one visible advantage of rent control is that it provides tenure security to the lessee since his obligation of rent is predictable and there are no surprises of frequent or exaggerated rent increases. Secondly, it contributes to less expansion of informal settlements. A study made in Bahir Dar city informal settlements shows that most of the people informally settled in the study area were forced to do so because of the non-affordability of rents in the city.[9] On the contrary, the usual criticism raised against rent control is that it may create a housing shortage over a long period of time since controlled rent will not encourage people to construct rental houses.

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.

Extract 4.2: John Sprankling & et.al (pp.61-63) provides comparative examples of laws of some countries that put rent ceiling in their housing tenancy.[10]

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 months 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.

Extract 4.3: P. Goldstein & B.H. Thompson, *Property Law : Ownership, Use, and Conservation,*[11] *describes the rent control exprience in the USA pp.708710*

Approximately 140 cities and other local governments in the United States currently limit the rent that landlords can charge to residential tenants. Rent control is not a modern idea. Dating back at least to medieval Europe, more than one hundred countries have employed rent control at one time or another. In the United States, rent control ordinances first arose during the First World War to deal with wartime housing shortage and soaring rents. […Most States] phased out their war-time rent control ordinances during the 1950s. In 1960s, growing pressure from tenants' organizations and scores of major rent strikes led to a "second generation" of rent control laws.

Although rent control provisions vary considerably from jurisdiction to jurisdiction, they share some common features. First, while a number of older laws set fixed rents that did not change over time, most modern rent control ordinances permit rents to increase over time in response to inflation. Some jurisdictions tie permitted rent increases to national or local inflation indices; others set fixed annual percentage increases; yet others allow landlord to increase rents in response to demonstrated increases in property taxes, operating expenses, and other costs. Second, rent control laws often permit landlords to increase rents when current tenants move out. Because such provisions obviously can give landlords an incentive to get rid of existing tenants, most rent control laws permit tenants to remain for as long as they want in their current rental units; landlords can evict a tenant only for a material breach of the lease.

Rent control has generated heated debate over its wisdom. Most of the debate has centered on the economics of rent control. Proponents of rent control make a number of arguments. One is that the structure of the rental housing market and the continued scarcity of rental housing puts landlords in a superior position, effectively disabling tenants from negotiating on price. Controlled rents, it is argued, will approximate the price upon which landlord and tenant would have agreed had they been able to bargain freely. A connected argument is that housing, like water and electricity, is necessity of life and, like these other necessities, should be treated as a public utility, regulated in all respects including price.

Opponents of rent control argue that there is nothing in the normal structure of rental housing markets to give landlords the ability to set price substantially over cost. Rent control makes sense only during wartime and other unusual situations where the "demand for rental units rises sharply at the same time that new construction of such units has been legally restricted in order to conserve resources." In the view of opponents, housing scarcity is often the result-and not the justification for-rent control. If investors have the opportunity to receive unregulated returns they will quickly build additional housing. Rent control makes shortage worse by suppressing the construction of new rental housing.

Note: Should Ethiopia need similar policy that favors lessees? Should our Civil Code be revised in such a way that creates a forum in which both landlord and tenants should be treated equally, if not favoring the tenant? Read the following two newspaper articles published in the Reporter Amharic (**የውል ነፃነትና የኪራይ ጣርያ እንዴት ይጣጣሙ**?)[12]-(Freedom of Contract and Rent control: how do they reconcile) and English version (Housing Policy and Housing Rent control).[13]

4.2.4. 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 possible in principle. 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 subleases 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 (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.

4.2.5 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)

Extract 4.4: Concerning the lease of premises and the general rules of lease, France and Germany have similar rules. K.W. Ryan (pp. 97-101) provides an exemplary brief analysis comparing the two systems with that of the common law.[14]

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.

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4.3 Joint Ownership

4.3.1 General Character

In this section, we shall discuss joint (co-ownership) which is part of private ownership but with its own features. The concept of joint ownership implicates the ownership of a thing by two or more people to the exclusion of others. All the persons will have equal and undivided right over the whole property. Since condominium is also one form of joint ownership, a preliminary discussion on the generality of joint ownership is important to fully understand condominiums. This section is, therefore, intended to acquaint readers with the concept of joint ownership or co-ownership in general and the Ethiopian laws in particular. The general discussion helps one to differentiate co-ownership from common ownership or private ownership discussed previously.

Extract 4.5: Alison Clarke and Paul Kohler[15] discusses the nature of joint ownership by comparing it to common ownership as follows, pp. 339-342.

Only legal entities can hold private property interests. Human beings, corporations and partnerships come within the category of legal entity, but many other socially recognized groupings (for example, married couples, families, parent and subsidiary companies, and unincorporated associations) do not, even though there may be a legally recognized relationship between the members of the group. However, it is possible for two or more legal entities to hold the same private property interest simultaneously, through private co-ownership.

Private co-ownership must be distinguished from public ownership and communal ownership. We considered the differences between private ownership, public ownership and communal ownership [and] in the case of communal property rights, as a member of the community you cannot be excluded from use and benefit by any other member of the community but you do not have any separate or separable property right that can be sold or bequeathed to anyone else: the only way in which any person can become or cease to be entitled to use and benefit is by joining or leaving the community. Private co-ownership resembles communal ownership in that no co-owner can be excluded from use and benefit by any other co-owner, and no co-owner has a separate interest during the co-ownership. However, it differs from communal ownership in that, in general (subject to exceptions explained below), in private co-ownership each co-owner has a separable share in the co-owned property, and, once it has been notionally separated off, that share can be sold or bequeathed to someone else, who thereby becomes a new member of the co-ownership group. By the same token, every private co-owner continues to have a proprietary entitlement unless and until it is positively transferred to someone else…

It will be apparent from the above that, in this jurisdiction we do not recognize private co-ownership where the right to participate is defined by reference to status. In other words, the co-owners must comprise a fixed (as opposed to a fluctuating) group of ascertained legal entities. In fact, the only types of co-ownership that we now recognize are ownership in common and joint ownership.

In ownership in common, each co-owner has a defined but not yet separated off (and not necessarily equal) share in the co-owned interest. For example, you and I might own a car in common, with me having a one-fifth and you having a four-fifths share. We are each equally entitled to the use and benefit of the car, in the sense that neither of us can exclude the other from any part of it. Neither of us can sell nor otherwise deal with the car except with the co-operation of the other. If, however, the car is hired out or sold, I will be entitled to a one-fifth share in the hire fee or sale price and you will take the other four-fifths. Although I cannot sell the car itself without your co-operation, I can at any time sell or give my one-fifth share in it to anyone else (in which case of course I will take the whole of any sale proceeds of my share) and you can do the same with your four-fifths. And, if either of us dies, our respective share will go to our personal representatives, to be passed on to whoever becomes entitled to inherit our property.

Joint ownership differs from ownership in common in one crucial respect. Instead of each co-owner having a defined but not yet separated off share, as in ownership in common, each joint owner is fully entitled to the whole of the co-owned interest, subject only to the exactly similar entitlement of each of the other joint owners. Furthermore, no individual joint owner can sell or give away his joint ownership interest. However, what he can always do (subject to the exceptions below) is to convert his joint ownership interest into an interest in common, which he can then either keep as a separable but as yet unseparated share in the co-ownership, or sell or give away, as he chooses. He can do this unilaterally at any time provided (if he is an individual) it is done before he dies. If he dies without having converted his joint interest into an interest in common (and an attempt to do so by will is too late) then on his death his interest expires, and the other joint interests are correspondingly enlarged. If during his lifetime he attempts to deal

separately with his own interest under the joint ownership (for example, by purporting to sell or mortgage it) this will automatically of itself sever his interest from the joint ownership – i.e. convert his joint interest into an interest in common – and the purported sale or mortgage or whatever will take effect over what is now his interest in common.

In practical terms, therefore, joint owners can separate off their interests as easily as can tenants in common, except in the cases considered below where the joint tenancy is made unseverable by statute. This leaves only two differences between joint ownership and ownership in common which are of any importance in practice. First, in any joint ownership, the entitlements of each joint owner are necessarily equal, so if there are five joint owners and one severs (i.e. converts her joint interest into an interest in common) she will now hold a one-fifth share and the other four will jointly hold a four-fifths share (her action has no effect on the relationship between the other four – they remain joint owners of their share). Secondly, as already explained, when a joint owner dies, her interest expires and the entitlement of the survivors is correspondingly enlarged, whereas, when an owner in common dies, he dies owning a share which is passed on to whoever inherits his property and the entitlements of the other owners in common are not affected in any way. In technical terms, joint owners have a right of survivorship (as each dies, the survivors' entitlements enlarge, until the last survivor takes everything) whereas owners in common do not.

In all other respects, however, joint ownership and ownership in common are identical in effect. Like owners in common, joint owners can only dispose of or deal with the jointly owned asset by acting in unison, and any proceeds of any dealing or disposition are divisible rateably between them (in the case of joint ownership, necessarily in equal shares). Meanwhile, however, just as in the case of ownership in common, no joint owner can be excluded from the use and benefit of the jointly owned asset or any part of it by any other joint owner.

It will be apparent from the above that, in practice, private co-ownership, whether by ownership in common or by joint ownership, would often be unworkable without mechanisms for resolving disputes and enforcing co-operation between the owners. … one of the mechanism, applicable only to co-owned interests in land, must be briefly mentioned here. This is the automatic imposition of a trust on all co-owned interests in land. Specifically, when co-owners acquire an interest in land, it automatically vests in them as trustees, to hold on a special statutory trust – the trust of co-owners.

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4.3.2 Concept and Scope in Ethiopia

CONCEPT

Joint ownership or co-ownership is the right of ownership exercised by two or more persons in relation to the same object. In other words, it refers to the right of use and enjoyment, right of possession and exclusion of others and the right to transfer a thing or to charge it with pledge or mortgage exercised jointly by several persons. See Art 1257 (1) of the Civil Code. For instance, if A, B and C purchase a tractor for the purpose of tilling the land they hold, they are considered as joint owners of the tractor who share the right of use and enjoyment, the right of possession, the right to exclude other persons from using the tractor, the right to mortgage it or transfer it to other persons through sale or other ways.

The following are the main characteristics or natures of joint ownership:

- The thing, which is jointly owned, is undivided, and
- Each joint owner is considered as owner of each and every part of the thing.

Thus, if for example, four individuals A, B, C and D jointly own a building having four rooms and each joint owner occupies one room, the building shall remain undivided and each room belongs to all the joint owners and not to the particular person who occupies and uses it. Note that the share joint owners have in the thing is determined by the agreement entered in between them. However, where there is no agreement as to the share of joint owners, the law presumes that they have equal share.

THE SCOPE OF RULES GOVERNING JOINT OWNERSHIP

The rules on joint ownership are developed and applied to cases where the relations between the co-owners are simple relations of common interest in a thing. Hence they do not apply to things held jointly as a result of a partnership agreement, i.e., an agreement to join resources with the purpose of undertaking commercial activities and earning a profit. Though such cases represent special cases of joint ownership, they are governed by the law governing businesses and business organizations rather than by the rules of joint ownership under Property Law. Compare Arts 211 and 228 of the Commercial Code.

Similarly, in case of common property within marriage, even though marriage results in creating community of property of spouses, such type of property of spouses is governed by special body of law, i.e. Family Law, not by the law of property (see Art. 63-71 of the FDRE Revised Family Code.)

Furthermore, joint ownership of things is regulated primarily by the agreement entered into by the joint owners at the time of inception of joint ownership, where joint ownership arises from contracts, or by the agreement entered into after the joint ownership is created and/or by the mandatory provisions of the rules contained in the Civil Code, i.e., Arts 1257-1308. In other words, the rights and duties of the joint owners, and the use and administration of the thing are

regulated by the agreements entered into by the joint owners, provided that the agreements are not defective/invalid and are not contrary to mandatory provisions of the Civil Code mentioned above. See Arts 1264, 1265, 1266, 1267, 1268/2/, 1271 and 1274 of the Civil Code.

The permissive provisions of the Civil Code shall apply where there is no agreement or a provision governing the various aspects of joint ownership or where such agreement or provision is defective or invalid, in other words, the law comes as gap filler. See Arts. 1263, 1275, 1260 1268/3/ of the Civil Code.

4.3.3 Advantages and Disadvantages of Joint Ownership

ADVANTAGES

The fact that a thing may be owned by two or more persons helps people to acquire certain property very important for their lives, which they would not have otherwise acquired because of lack of sufficient financial capacity, by joining or contributing a lesser amount of money. For example, two neighbors who cannot afford to buy and use a private automobile may contribute a certain amount of money and buy an automobile to be used as service. Similarly, as is practiced these days, two or more farmers who do not have a sufficient amount of money to purchase a water-pump motor individually may contribute money and buy a water pump which they can jointly use to cultivate their lands. Or persons who want to build their own homes may establish an association and build a condominium/an apartment building (See Proc. 370/2003).

Joint ownership will also help in achieving efficient utilization of scarce resources. For example, construction of individual houses for twenty households requires a substantial amount of money since it needs a large area of land and a large amount of construction materials such as cement, sand, bricks, reinforcement iron bars and corrugated iron sheets, while a condominium building that can accommodate the same number of households may be constructed at a much lesser cost because the foundation, the main walls and the roof are common.

DISADVANTAGES

The guiding principle is that joint owners shall, acting together, administer the thing jointly owned. Administration here may refer to how the thing is used, its repair and maintenance, bringing or defending legal actions, sale, lease, pledge or mortgage of the thing jointly owned and these decisions have to be made by joint owners acting together. Furthermore, certain decisions such as the decision to sell, or mortgage, or pledge the thing, or a decision to change the purpose for which the thing is acquired (transformation of the thing) has to be made by unanimous consent of all joint owners (Arts. 1265 and 1266 of the Civil Code). It is generally accepted that a free and swift transfer of goods is an essential precondition for effective commercial transactions, which may bring about economic development to a country and benefit the public.

However, it is usually difficult to obtain the agreement of all joint owners to reach a certain decision. Hence, joint ownership may hinder the free transfer of goods because joint owners may not have same opinion and understanding on the importance of the proposed act to agree to the proposed act.

4.3.4 Sources of Joint Ownership

Joint ownership may arise from a contract, a will or the provisions of the law.

JOINT OWNERSHIP ARISING FROM CONTRACTS

A contract is a common source of joint ownership. Two or more persons who intend to acquire and use a thing commonly or jointly may enter into a contract creating joint ownership. In other words, the main purpose or object of a contract creating joint ownership is to create ownership right for two or more persons in relation to the same object or thing. For these contracts to be valid and enforceable, they have to fulfill all the requirements for the formation of a valid contract, i.e., consent, capacity, object and form (Arts. 1678 of the Civil Code ff.) However, you have to note that no special form is required for validity of contracts of joint ownership and they can be made orally unless they are required to be made in writing by law or the agreements of the parties. Accordingly, contracts creating joint ownership over immovable things and special movable things have to be in writing (Arts. 1719-1730, 1282 and 1283 of the Civil Code).

JOINT OWNERSHIP ARISING FROM THE LAW

Joint ownership may also arise from the provisions of the law. For instance, Article 1060 of the Civil Code provides that a succession shall remain in common between the heirs until it is partitioned or divided among them, and the provisions of the Civil Code, i.e., Arts. 1257-1308 shall govern the rights and duties of co-heirs. Similarly, Article 1393 of the Civil Code, which deals with a right of recovery exercised by two or more persons of the same standing, provides that they will be considered as joint owners of the thing recovered.

A right of recovery is a right given by the law to certain group of persons to compel the buyer of a certain object to sell it back to them. The law grants such right because of the relation that exists between the seller and the persons to whom such right is granted. For instance, relatives of a seller of an immovable thing and joint owners have a right of recovery (Arts 1386, 1388 and 1389 of the Civil Code).

4.3.5 Rights and Duties of Joint Owners

Joint owners have the following rights and duties:

Right to Use and Enjoy the Undivided thing/Property, and its Fruits:

Each joint owner has the right to use the thing jointly owned in accordance with its contractual or legal/natural purpose. However, he must exercise such rights without preventing other joint owners from using it. Furthermore, the fruits produced by the thing jointly owned, such as agricultural products of a land, increases from breeding of animals, and incomes generated from jointly owned things shall belong to all joint owners jointly and each joint owner has the right to demand the partition of the such fruits or the proceeds of the sale of the fruits at any time (Arts. 1263 and 1264 of the Civil Code).

Right to Administer the Thing:

As we have tried to see above, the rights/interests of the co-owners in the jointly owned thing do not constitute a specific material unit. In other words, no co-owner individually owns a specific part/unit of the thing. Therefore, no joint owner can exercise any right or physical act of causing material changes or modifications or change of purpose or exercise a right of creating legal acts such as usufruct, servitude lease, sale, mortgage, or pledge of the thing that implies the existence and exercise of complete individual ownership. Hence, the consent of the other joint owners is required in order to undertake any one of these acts in relation to the thing jointly owned.

Generally, it can be said that jointly owned things are administered by the joint owners acting together and each joint owner has the right to participate in decisions regarding the administration of the thing jointly owned (Arts. 1265 and 1266 of the Civil Code). Hence, decisions are made by majority vote of joint owners who represent majority share in the thing jointly owned. However, decisions regarding pledge, mortgage, sale, donation of the thing or decisions to change the purpose for which the thing is acquired, or decisions to make material changes which cause interference with the right of other co-owners, require unanimous vote of all joint owners. See Arts 1265, 1266 and 1259 of the Civil Code. A co-owner may make material changes which do not interfere with the right of use of other joint owners or which are useful to all.

Bearing costs:

According to Article 1267 each co-owner shall bear, in proportion to his/her share, the costs of administration, taxes... and necessary costs (costs incurred to avoid loss or damage to the thing). Each co-owner has the right to force other co-owners to reimburse him for necessary expenses. In other words, a joint owner who incurred costs for the maintenance and preservation of the jointly owned thing has the right to demand reimbursement of the money he has paid in proportion to their shares. For example, where a joint owner pays for the maintenance of a house jointly owned thereby preventing further damages, the other joint owners have the duty to contribute an amount of money in proportion to the amounts of share they have in the house. See Art 1268 of the Civil Code. However, a joint owner may relieve himself of this obligation by surrendering his share in the thing to the joint owners (Art. 1268.3 and 1282.2).

Freedom to transfer shares:

Each joint owner has the right to dispose of his share of rights in the undivided interest in the thing jointly owned. See Art 1260 of the Civil Code. Hence, a joint owner may sell, donate, pledge or mortgage his share of right in the thing. Here you have to distinguish between the rights to dispose of the thing, which require unanimous decision of all co-owners, and the right to dispose of one's share in the thing jointly owned. However, other co-owners have the right of recovery, i.e., to force the third party buyer to sell it back to them. This is a departure from the French law, which is the source of Ethiopian Civil Code, and which does not provide for the right of recovery to other co-owners. See Art 1261 of the Civil Code.

Right to request termination:

Each joint owner has the right to request termination of joint ownership. In other words, each co-owner has the right to request the court, at any time, for partition or division of the thing or the sale by auction of the thing and division of the proceeds of the sale. If the thing jointly owned is a movable thing, a joint owner may apply for sale by an auction (Art. 1271). This right cannot be waived by agreement. If the thing jointly owned is an immovable thing, such as a building, a joint owner may apply for division or sale by auction where division seriously reduce the value of the thing or is contrary to its nature or purpose (Art. 1272 and 1273). The court also has the power to decline the request for division or sale of the immovable jointly owned thing where the time for sale or division is not appropriate, for instance, if sold now it would fetch a price which is below its actual value.

However, the right to require termination of joint ownership of immovable things may be waived for a period not exceeding 5 years by the agreement creating the joint ownership or by subsequent unanimous agreement (see Art. 1274). Where the period fixed in the contract exceeds five years, the agreement not to require sale or division of the immovable jointly owned shall have no effect beyond five years and the joint owner may require termination of the joint ownership by division or sale. This is because allowing agreements that prohibit sale or division of the thing for a long period of time shall affect free transfer of goods and commerce, which is considered to have a huge effect on public interest.

4.3.6 Special Cases of Joint Ownership

Perpetual joint ownership

Perpetual joint ownership represents a joint ownership in which joint owners do not have the right to demand termination. This kind of joint ownership exists where continued joint ownership is in accordance with the nature or purpose of the thing or where sale or partition is impossible or unreasonable (Art. 1276 of the Civil Code).

Perpetuity (continuity) usually exists in relation to indispensable accessories of things intended for the common use of two or more estates belonging to different owners; for example, lanes, passages, yards, wells, sewer pits, paths, roads, dams, canals, party walls, and common portion of condominium houses, in which partition or division would not leave each house owner a separate space necessary for his/her needs. For instance, it would be impractical and crazy to divide or sell the foundation or staircases of an apartment building separately. Similarly, the right to co-ownership of walls, ditches, hedges or other enclosures, which separate contiguous estates constitutes a perpetual joint ownership.

Party walls

A party wall is a wall placed on the boundary line between two estates, and belonging in common to their owners, including the land on which it rests. A wall is any masonry work, one made of materials bonded with cement, plaster or limestone mortar. Any wall corresponding to this definition is subject to rules governing party walls (Arts. 1201 and 1278-80 of the Civil Code).

Party Co-owned Ditches

Any ditch separating two estates is considered property co-owned, unless only one of these estates is enclosed, or there exists a documentary title or a prescriptive title, or unless there exists a feature implying exclusive ownership, such as a dike or pile of excavated earth only on one side of the ditch which is then considered as belonging to the owner/holder of the land on which such dike or pile of earth rests Art. 1202 of the Civil Code).

Party Co-owned hedges

Any hedge, live or dry, which serves to separate two estates, is presumed to be party co-owned, unless one of the estates is enclosed or unless there exists a documentary title or prescription.

4.4 Condominium

4.4.1 Nature of Property

Condominium housing is a recent phenomenon to the Ethiopian real property ownership. As a common interest ownership, this type of real property ownership was started during the 1950s in the USA and earlier in Europe. Lack of adequate housing units and urban decay that is characterized by the deterioration of the existing houses can be considered as the two main reasons for government to venture into the construction of high rising condominium houses in Ethiopia. A new legal regime that governs the ownership and administration of such properties was necessary, and as a result, the Federal Government adopted a proclamation in 2003 (Proc. No. 370/2003)[16].

The rationales behind the adoption of the condominium proclamation in 2003, as envisaged in the preamble were to create alternative urban land use in addition to plot based houses, to improve and maintain the beauty of urban areas, to accommodate more people on smaller size of land, and to assist the development of private developers and co-operatives.

Although condominiums are joint properties, a different proclamation that reflects the existing policy seems preferred. The second rationale, mentioned above, has to do with urban beautification and efficiency of land use. Condominium houses, high rise or in rows, are more beautiful as compared to the urban slums which are common in urban Ethiopia. Besides, previously a land allocation made to one person (say 500 m2) may accommodate now 10-100 people, and this helps urban centers to save land and serve more people. The third reason given in the preamble is of an economic nature. The construction and transfer of condominium houses greatly help the development of real estate companies (developers for sale) and housing cooperatives (for rental) in the country.

What is condominium? What makes it different from other types of properties? Condominium is defined in the proclamation as:

> "A building for residential or other purpose with *five or more separately owned units* and *common elements*, in a *high-rise building or in a row of houses*, and includes the land holding of the building (Art.2.1)"[emphasis added].

Now the basic elements of a condominium building gathered from this definition are analyzed as follows:

1. A condominium is a building for residential or other purposes (such as commercial) which includes five or more housing units. This is one form of joint ownership of a building by at least five people.
2. The construction may be of a high-rise or in row buildings, and there must be at least five or more owners. The idea behind this is that condominium signifies attached house (not detached ones like villa houses) that allows people to own part of the building and to share the rest in common.

3. The people own their "units" separately and the "common elements" in common. In this definition "unit" means "a part of the building consisting of one or more rooms and designated for a specific purpose in a declaration and description (Art. 2.12)." In short, it means the different rooms in the building. On the other hand, "common elements means all that are part of the condominium except the units" (Art. 2.2). In this case, walls, stairs, corridors, roof, parking space, the external walls, pillars, etc. may be considered as common elements or in short, common properties owned and administered by all or their association. This means individual members will have complete ownership only to the room which is delimited in three dimensions (height, width, and length).
4. Condominium houses also by definition include the land provided for the purpose of resting the building, and other facilities, such as, play ground, garage, parking space, and so on. Of course, since this is an implicitly known fact, its inclusion in the definition has no significant implication.

4.4.2 Ownership of Condominium Buildings

In a condominium, each owner holds individual title to a condominium unit while sharing ownership of common facilities. In other words, the units are held in private ownership and the common elements in common by all. Unit owners are typically required to be members of a condominium association, which governs the common facilities. The key characteristic of a condominium, that which distinguishes it from other forms of property ownership, is that in addition to owning the apartment (condominium unit) the unit owner owns an undivided interest with other unit owners in the common elements. The commonly owned property, which belongs to the units need not be contiguous to (touching or near) the unit.

In some countries, there is a similar type of common interest real property called cooperatives; physically cooperatives resemble condominiums. Despite their physical resemblance, condominium and cooperative housing developments have very different legal structures. Both condominiums and cooperatives can be found in detached buildings, garden apartments, or high-rise towers. The owner of the condominium, however, possesses a different legal interest than the owner of the cooperative. The condominium owner owns his or her unit in private ownership and shares an undivided interest in the common elements (for example, sidewalks, hallways, pools, clubhouse, storage place) as a tenant in common with the other condominium owners. In contrast, the owner of the building in a housing cooperative is the cooperative corporation. Each shareholder of the cooperative corporation is entitled to a proprietary lease granting him or her right to occupy a unit within the building for a significant period of time (typically 99 years). Thus, the owner of a cooperative apartment is technically both the owner of shares in the cooperative corporation and a tenant of that corporation.[17]

Articles 8 and 9 of the FDRE Condominium Proclamation are dedicated to ownership right in a condominium building. It is clearly declared that unit owners are entitled to the ownership of the units in the building (Art. 8.1). This right gives the unit owner a full right to transact the unit (Art.

8.2). This means unit owners are at liberty either to use and enjoyment, lease/rent, mortgage, donate, inherit or sale, subject to limitations dictated by law. The owners or by extension the owners association, have no say on the use and enjoyment as well as transfer of the unit by the owner. As opposed to this system, in cooperatives it is the entity that owns the building that decides on transfer of such rights. Individual as share owner and a lessee of the unit has to submit his intention to the board of the cooperative entity.

By operation of being unit owner, the unit owner shall also have a right to use the common elements (Art. 9.1). This means unit owner in the condominium building will have rights to use and enjoyment of the common facilities. Thus, it can be said that in Ethiopia the unit owner will have the right to park his car in the parking lot, play with his children in the play ground, use the common kitchens, and pass through corridors and stairs, etc. Note that unit owners' rights to the common elements are restricted only to the use and enjoyment; they do not have rights of transfer, lease or mortgage of such rights separately from the units. Such actions require the joint agreement of all unit owners.

The right to the use of the common facilities is undivided and attached to the ownership (Art. 9.2). In here, there are two points to discuss, the first being the fact that the right to the common elements is *undivided*. Generally speaking, jointly owned entities are indivisible in nature. In property arrangement, where owners have joint ownership over a thing, each owner has a use and enjoyment right to the whole thing. Although the size of their ownership right may be described in terms of percentage and dividends, it is not possible to show by dividing the thing physically and restrict the use to some specific area only. For example, the unit owners right of walk, play and use of the kitchens may not be possible to demarcate. The second point worth discussing in association with this sub-article is that the use of common elements is *attached* to the ownership right of units. This means that the use of the common elements is an extension of the unit ownership. It is a kind of principal-accessory relationship of properties as understood in property law. An accessory is anything which the owner of the principal thing (e.g., unit in condominium) has permanently destined to the use of such thing (Art. 1136 of CC.) This, of course, is clearly shown under Art. 9(4), which emphasizes "the percentage of the undivided interest in the common elements shall be a part of the unit ownership and any legal act on a unit shall also be effective upon the undivided share of interest." The sale and transfer of the unit entails the transfer of the commons dedicated to the unit as well.

The size and extent of right of use in the common facilities is to be determined based on the amount of share one has over the units. This is clearly envisaged in the proclamation: "The percentage of the undivided share of interest in the common elements attached to the unit ownership shall be determined in the declaration" (Art. 9.3). With due regard to the possibilities of adopting other alternatives by the owners, the usual method to determine the percentage of use of common facilities by the owners is determined based on the amount of units they owned. For example, in a condominium building with six units, suppose one person owns three units and

the remaining are owned by three other persons. In this case, it is logical and fair to allow half of the common facilities to the use of one person who happens to own half of the units in the building. As already mentioned above, sometimes, however, it may be impossible to clearly define his right on the ground over the use of certain common parts such as corridors, pathways, and playgrounds. But in other cases, such as parking lots and garages, it is possible to divide and allocate them to a particular unit. It must also be noted that it is not only the rights to the commons that are based on the proportion to the size of ownership of units but also obligations arisen therefrom.

4.4.3 Rights and Obligations of Unit Owners

The primary duty of a unit owner is to be a member in the unit owners' association (Art. 12). It is mandatory for the owner to be enlisted as a member. And as a member, he/she has the duty also to follow the decisions of the association as well as the general meeting of the owners. In some cases, some important decisions will need the unanimous agreement of owners while others passed on simple majority (50+1) vote of the general meeting of all members. Another obligation of the unit owner is to contribute to the general expenses of the building such as maintenance, security and property tax. Although such activities are to be carried out by the association (the legal person), the expenses must be borne by members in proportion to the right they have in the building. In conjunction with that, one may also consider sharing of information during property transfer. It specifically means, whenever the unit owner sells or leases his unit to a third person, he/she shall notify this to the association by providing a copy of the contract (Arts. 21 & 22).

4.4.4 Unit Owners' Association

The common elements in a condominium building will be owned by the unit owners jointly. The effective administration (maintenance, lease, etc.) of the common elements necessitates an establishment of the unit owners' association which shall have an independent legal personality (Art.6.3). The establishment of the association is mandatory and its very objective is not to get profit. Rather, as envisaged under Art. 11 of the proclamation, the objectives are

- Manage the condominium on behalf of unit owners;
- Ensure the peace and security of residents in the Condominium;
- Ensure that unit owners, occupiers of units, lessees of the common elements comply with rules;
- Perform other necessary activities in the interest of unit owners' mutual benefit.

Among the powers and duties of the association (Art. 13), the following are worth citing:

- Determine the conditions on the use of common elements;
- Lease, subject to security, and transfer the common elements;

- Determine fines, fees and contributions;
- Own, subject to security, and transfer property; and
- Enter into contracts, sue or be sued.

Summary

Housing is one of the existing urban problems in Ethiopia. Because of the restricting policy followed by the Derg, the number and qualities of urban housing in urban centers was deteriorating. One of the policy measures to alleviate housing shortage and improve the quality thereof was to build condominium houses or cause other private companies to do so. But the performance of urban housing construction is not satisfactory, taking into consideration the number of people still waiting for condominium units. On top of that, the new lease proclamation also may be considered as a factor towards the reduction of housing units in the country. This chapter has also given an overview of the tenancy rules enshrined in the Civil Code. This chapter also made discussion of joint ownership based on the Civil Code provisions. The principles of joint ownership serve readers to understand the nature of condominium property, for it is one form of joint ownership.

Review Questions

1. What is the basic characteristic of a joint ownership as in the case of condominium houses?
2. What is the need of constructing condominium houses as opposed to giving plots of land for detached houses?
3. How do you view the current lease proclamation's effect in the current housing policy?
4. What were the reasons or factors contributing to the success of the Swedish million housing program? What lesson can be learnt by Ethiopia?
5. It is said that condominium unit is one form of 3D properties. Explain.
6. What are the similarities/differences between Joint ownership(Co-ownership) and Common/communal ownership?
7. What would be the pros and cons if Ethiopia were to introduce a rent ceiling?
8. Which of the following is warranted by the lessor?
    a) A third party brings a possessory action against the lessee/tenant;
    b) A neighborhood hooligans disturbs the lessee;
    c) 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.

Endnote Chapter Four

[1] See an article by Daniel W. Amabye Author. 2004 ዓም. የውል ነፃነትና የኪራይ ጣርያ እንዴት ይጣጣሙ? (Freedom of Contrac vs. Rent Ceiling). ሪፖርተር.http://www.ethiopianreporter.com/component/content/article/303-commentary/4664-2011-12-31-08-48-49.html

[2] MWUD 2008. Integrated Housing Development Program of the Federal Democratic Republic of Ethiopia. *African Ministerial Conference on Housing and Urban Development.* Abuja, Nigeria. P. 4.

[3] Ibid. p. 2.

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CHAPTER

LAND USE RESTRICTIONS

Introduction

As already discussed in Section 1.2.2, ownership (or holding right) is not as such absolute since it may be restricted for public safety, public health or security reasons. In chapter one, some of the restriction of ownership were discussed. In this chapter, we shall focus on those restrictions made on land use or ownership (pertaining to building) in Ethiopia. Such restrictions range from limiting the use and enjoyment, lease, mortgage, and transfer of rights to the complete taking of the real property as in the case of expropriation. A wide variety of legislations that relate to expropriation, urban planning, building code, environment, nuisance, servitude, natural resource, and national heritage shall be reviewed.

Land use control refers to the body of laws and regulations which restrict the use, enjoyment and disposal rights of a land and buildings. These restrictions are found in the Civil Code itself or in other bodies of legislations such as urban planning, building legislation, forestry, water laws, and environmental laws. Except for the nuisance law in the Civil Code, 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 is taken wholly or partially, while in the case of controlling laws, the laws simply limit the owner's use right while leaving the corpus in the hand of the owner/possessor. In the following a highlight of some of those limitations is made.

5.1 Land Use Restrictions

5.1.1 Nuisance Law

Nuisance is an activity that arises from unreasonable, unwarranted or unlawful use by a person of his/her own 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 restriction, owners of an immovable 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.

5.1.2 Planning Law

GENERAL

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 in Ethiopia. A change in the use of such building requires a permit. Basically change can be divided into three categories: construction of new building, work on existing building, and demolition of the building. This means use of land and building becomes under extensive official control.

At Federal level a proclamation that provides for urban plans was adopted under Proclamation No. 574/2008 which governs the above types 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 under Art. 24 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." Further, the law under Art. 32 declares: "Demolition of any structure or neighborhood in an urban area shall require permit." Therefore, owners are not at liberty to construct, make substantial changes to an existing one, or demolish it without proper permission from appropriate government authorities.

WHAT IS A PLAN

A plan is a general scheme about the future development of an urban area that distinguishes different zones with different development activities such as, roads, parks, streets and buildings. Zones are roughly known as residential, commercial and industrial. Under Ethiopian law, there are three types of plans. The details are shown in the following three articles (Art. 7-9):

Art. 7 Hierarchy of Plans

1. National urban development scheme;
2. Regional urban development plan;
3. Urban plans.

Art.8 Urban Plans: the following types of urban plans are hereby recognized:

1. City wide structure plan; and
2. Local development plan.

Art. 9. Definition and Content of a Structure Plan

1. A structure plan is 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 fulfillment of which could produce a coherent urban development in social, economic and spatial spheres.

2. Any structure plan shall indicate mainly the following:
   a. the magnitude and direction of growth of the urban center;
   b. principal land use classes;
   c. housing development;
   d. the layout and organization of major physical and social infrastructure;
   e. urban redevelopment intervention areas of the urban center;
   f. environmental aspects;
   g. industry zone.

Art. 11. Definition and Content of Local Development Plan

1. 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.
2. A local development plan shall prescribe the functions, development objectives, implementation strategies, role of implementing bodies, required institutions, local economic dynamism, urban design principles, concrete standards, spatial framework, budget and time of the implementation of a structure plan.
3. Any local development plan shall state, as may be appropriate:
   a. zoning of use type, building height and density;
   b. local streets and layout of basic infrastructure;
   c. organization of transport system;
   d. housing typology and neighborhood organization;
   e. urban renewal, upgrading and reallocation intervention areas;
   f. green areas, open spaces, water bodies, and places that might be utilized for common benefits;
   g. any other locally relevant planning issues.
4. A local development plan shall have a detailed implementation scheme which specifies the institutional setup, resource and regulatory prescriptions needed for the implementation in a concerned area.

5.1.3 Building Regulation

Any construction, for residential or other uses, may not be carried out without a prior building permit even if the building is carried out by a public institution. A building permit is necessary to ensure a minimum standard for the construction or modification of buildings or alterations of their use in order to ensure public health and safety (preamble). For this reason, the Ethiopian government adopted proclamation 624/2009 with the aim of creating and establishing a national standard for building construction.

Hence, the proclamation requires any person who wishes to construct a building to secure a "planning consent" and "building permit" before starting construction (Art. 5). "Plan" means any model or design that shows the architectural structure, materials to use, and the designs of the electrical and water systems (Art. 2.15). A building officer, after looking into the plan and the legality of the land holding, approves and provides permission for construction. The general purpose of such restrictions and regulations is to ensure urban beauty, public safety and health.

5.1.4 Environmental and Other Concerns

Environment

Another legislation which relates to the environment is Proc. No. 300/2002. It provides different restrictions on property owners concerning the management and release of dangerous and hazardous emissions which may damage the environment. It, among others, prohibits the emission or release of toxic, chemical, or radioactive substances from a property that could harms human health and wellbeing, the biota and the aesthetic value of nature.

The Use of non-cultivated lands

In Ethiopia, the rural land proclamation, and by extension the regional rural land proclamations put a set of obligations on the farmer about the use and enjoyment of the land. Chief among which is that the use of land for its designated purpose and cultivation of the land. Article 10 of proclamation 456/2005 emphasises that the holder of land should use the land without causing damaged (sub-1) or abandonment (sub-4). In other words, fallowing the land for some years (e.g. 3-5 years in different regions) may result in loss of land.

Land consolidation and distribution

Privately held rural lands may be either consolidated or redistributed with an agreement from the majority of the landholders. In other words, where the interest of the majority so requires, private holdings may be consolidated or distributed. For example, a resettlement or villegization programme needs to consider the consolidation programme (Art. 11.5 of Proc 456/2005). Consolidation may also occur based on the free will of private landholders in a bid to increase productivity and save resources. Further, when the majority of landholders in a village agree (e.g. 80% in Amhara) the land may be redistributed (Art. 9.3). It is also said that, "distribution may be undertaken on irrigable land in order to use irrigable land properly and equitably" (Art. 9.2). The practice shows that in cases of massive irrigation projects, forced redistribution may be made to accommodate those who lost their land to the dam construction.

Rural Land Use Restrictions

In Ethiopia there is not yet a rural land use plan developed. Proclamation 456/2005 under article 13.1 says:

> *A guiding land use master plan, which takes into account soil type, land form, weather condition, plant cover and socio economic conditions and which is based on water shed approach, shall be developed by the competent authority and implemented.*

But this land use master plan has not yet come into light and we faced different problems as a result. For example, when there is speculation for land prices (as a result of inclusion of the land to urban territory), rural farmers construct houses and sell them. In other words, farm lands are transformed to residential plots. The government cannot stop such measures without adequate land use laws.

In the meantime the Proclamation (Art. 13 (2-10) provides some restrictions for rural land use. For example, the law provides that:

- Equitable water use should be created between upper and lower water shed communities;
- Free grazing in areas where soil and water conservation have been taken place should be restricted;
- Harvesting of crops on lands with 31-60 degree slops will be conditional on construction of terraces;
- Rural land of any slope which is highly degraded shall be restricted from any interference until it is recovered;
- Rural lands with gullies should be rehabilitated by community before use; and
- Wetlands should be used in a way that does not affect the biodiversity.

5.2 Expropriation

5.2.1 Nature and Justification of Expropriation

NATURE AND DEFINITION

Expropriation is a forced taking of property by the state for a public purpose and with the payment of fair compensation. It is an inherent power of the state like taxation, police power, and the power to ensure peace and security. It is a legal procedure undertaken by the state to acquire the land. It is recognized and applied everywhere in the world. Expropriation as a means of land acquisition by sovereign governments is exercised as a matter of right under two fundamental conditions: (1) it is for public purpose and (2) the landholder receives compensation. These two stipulations are survived and strengthened in the modern world legislations although there are still contentious debates on the expansive nature of public purpose and the fairness of compensation.

Expropriation assumes different names in the different legal systems. While in the United States it is known as "Eminent Domain", in the United Kingdom and the continental Europe it is termed as "Compulsory Purchase" and "Expropriation" respectively. Ethiopia, being a follower of the continental legal system, uses the name "expropriation". Hence, throughout this section we shall employ the word "expropriation" with due regard to the possibility of mentioning the other terminologies as well.

Black's Law Dictionary defines eminent domain as "the power to take private property for public use by the state, municipalities, and private persons or corporation authorized to exercise functions of public character."[1] Eminent domain is also defined in Nichols as: "the power of the sovereign to take property for 'public use' without the owner's consent."[2]

In Ethiopia, although the issue of expropriation was introduced in the 1908 Menelik's Addis Ababa Land Charter, the first systematic definition of the concept in the Ethiopian legal system is given in the Civil Code of Ethiopia, which 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" (Art. 1460). The Civil Code dedicates a significant number of provisions to the expropriation of land. Following the demise of the imperial era and assumption of power by the Derg, the expropriation rules were suspended as all land in Ethiopia was transferred to state ownership.

The current FDRE Expropriation Proclamation No. 455/2005 does not define expropriation. And yet, some regional states give an expropriation definition in their rural land administration proclamations. For example, the Amhara National Regional State RLAUP defines it as:

> *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.*(ANRS Proclamation No. 133/2006 Art. 2(18).

Without undermining the above definition, viewing another definition given by the widely quoted legal treatise, *Corpus Juris Secondum*, may be of interest:

> *…..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 without the owner's consent on paying the owner a due compensation to be ascertained according to law.*[3]

This definition seems more complete since it includes all the basic elements. First of all, expropriation or eminent domain is a right that is exercised by the state itself or its sub-branches such as municipalities or other public/private entities legally authorized by the state/legislature. The government may use alternative land acquisition mechanisms such as purchasing to secure land for public purpose. But, it is not feasible to rely solely on land markets as individuals may create a *holdout* on projects. In addition, the land required may involve the interests of more owners

that warrant the exercise of expropriation power. It in the next section, a discussion of expropriation power as an inherent right in the state is reviewed..

PROCEDURE

The second element is that the state or its sub-branches, authorized to take such lands, must follow some procedures. In the United States, the action exercised is known as a "condemnation proceeding". In other countries, mainly European, it is referred to as an "expropriation procedure." The main idea is that the state must ensure due process of law before appropriating the property. In the US, courts are involved in the proceeding and the process usually consists of two phases: (1) the proceedings demonstrate the public purpose to justify the taking, and (2) the proceedings establish the amount of compensation to be paid for the property taken.[4] The state or an authorized organ shall first petitions to the court for appropriation of the property. Next the owner is given the right to be heard in court or the appropriate authorities. At this time, the owner can negotiate the terms, conditions and the compensation. Finally, the court approves or modifies the agreement. In other countries, expropriation procedures are either purely administrative procedure or a hybrid of the court and administration. The procedures, followed in general, avoid arbitrary takings of land by the state without fair compensation. In Ethiopia, the process is purely administrative one.

PUBLIC PURPOSE

The third point of this discussion is the issue of "public purpose." The doctrine of expropriation stands in opposition to the right of private property. Thus, expropriation requires to find a balance between the public need for land on the one hand, and the protection of private property rights on the other hand. In seeking this balance, the principle of expropriation includes the requirement of "public purpose" as one limitation on the state power of expropriation. This limitation is known by different names in different countries, such as public use, public benefit, public good, public interest, public purpose or public welfare.[5] The idea is that, there may be exceptional times and places in which the very foundations of public welfare cannot be laid without requiring concessions from individuals to give up their private property in the interest of the common good.

What constitutes public interest is not a settled argument. In its traditional concept, public interest includes the traditional state responsibilities, such as construction of roads, schools, dams, bridges, etc. Modern interpretation of the concept, however, expands the activities to includes the transfer of land for other private development activities, such as malls, hotels etc.

A good example in this regard is a broad and narrower definitions of the term given by the 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.[6]

The second, and narrower, 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 stated:

> The indirect contribution to 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.[7]

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.*

APPROPRIATION

Appropriation or taking, mentioned in the definition above, is also an important aspect or stage in the expropriation process. There are several major types of appropriations which can occur through expropriation: total appropriation, partial appropriation, temporary appropriation, and easement are the main ones. Under the Ethiopian Civil Code, the defunct expropriation rules envisage that expropriation may be used either to acquire or terminate rights *in rem* such as servitude, usufruct or lease.[8] Expropriation differs from such similar concepts like police power (termed in the USA) or regulations that limit the use rights of the property owner to protect the health, safety, welfare etc of the people in that it involves the loss of the core

constituent right of disposal. In the latter case, what the owner loses is some part of his use right over his property, while in the former case, he loses the entire or part of the property.

CONSENT

The fifth point embodied in the definition is the absence of consent on the part of the owner. The power of eminent domain/expropriation is a sovereign power of the state to take private land without the consent of the owner. What makes expropriation different from other consensual types of land acquisition mechanisms is the complete absence of consent on the part of the property owner. It is true that many public and private organs do also collect land through purchase or similar types of transactions which are based on the willingness of the owner. But it is unrealistic to rely on the consent of the owner to get land for public purpose reasons. The state, hence, resorts to such coercive proceedings for two main reasons: first, owners may create a holdout on public development activities either by refusing to sell the land at any price or requesting an unrealistic price for the property; and second, public development projects which demand long and continuous land holdings involve the interest of many owners. This can cause a difficulty reaching an agreement with all owners. In both ways, owners try to impede the public welfare that could be attained by using their land.

COMPENSATION

The last principle included in the definition of expropriation is the obligation of payment of fair compensation. This principle is the most important guarantee to individual owners on their lawful possession. All major legal systems and constitutions include this concept as a guarantee to the owner and as a limitation to the expropriation power of the government. The just compensation rule requires that the state reimburse the owner for the value of the property or a portion thereof taken and place the latter in as good a pecuniary position as if the property had not been taken. The assessment of compensation is extremely complicated, and different countries use different valuation methods. Nevertheless, the existence of compensation makes expropriation tolerable, and this differentiates it from other government actions that are devoid of required compensation, such as confiscation, nationalization, and eviction.

5.2.2 Justification

Sustainable development requires governments to provide public facilities and infrastructure that ensure safety and security, health and welfare, social and economic enhancement, and protection and restoration of the natural environment.[9] An early step in the process of providing such facilities and infrastructure is the acquisition of appropriate land. The government may use alternative land acquisition mechanisms such as purchase, to secure land for public purpose activities. But, it is impossible to rely on land market as individuals may create a holdout on the projects or the land required may involve the interest of more owners that warrants the exercise of expropriation power. In Ethiopia, where the land is solely owned by the state, private investors and state organs have to rely on the land provision by the state for their respective projects. The

only means from which the state can transfer land for the intended purpose is to expropriate it from private holders or the community.

Efficient land use and holdout are often raised as fundamental economic reasons to exercise the power of expropriation. The inherent right of the state's eminent domain power can be explained by what economists called market failure. Market failure is a concept within economic theory describing when the allocation of goods and services by a free market an inefficient. In simple terms, the market does not always allocate sufficient resources efficiently to achieve positive impact on social welfare. The solution in the case of market failure is the intervention of the state to allocate an appropriate supply of the goods. Considering this, land is chiefly acquired from the market through voluntary or consensual transactions, such as purchase, lease, easement/servitude and etc. In many cases, a voluntary transaction of land is cheaper than a forced transaction and in fact about eighty percent of federal land acquisitions in the United States use the market.[10] But this does not always work for sometimes individual owners of land may either create a holdout or completely refuse to transfer their land voluntarily which increases the transaction cost.[11] As Merrill noted, market mechanisms do not always yield optimal land assembly when very large tracts are needed.[12] Some large-scale projects require the assembly of several contiguous parcels of land whose ownership is dispersed. For instance, pipeline, railways, highways, urban redevelopment projects, a mining area need large amount of contagious land. The problem facing providers in these cases is that, if a large number of landowners know about the intended purchase ahead of time, they will all want to be the last individual to sell in order to be in a monopoly position and extract the highest possible price. Such strategic behavior on the part of sellers would result in unexpected transactions costs for the buyer being so high that she gives up the effort and the potentially welfare enhancing development is never undertaken.[13] Thus, economists generally suggest that in order to break the strategic bargaining (holdout) problems and thereby ensuring public welfare through the construction and implementations of public works, the state is justified to intervene by using its expropriation power.

Another justification for expropriation is the need to ensure the efficiency of land use. Efficiency means the most productive use of resources to satisfy competing material wants.[14] Hence a plot of land may be expropriated if the alternative use can bring about higher benefit to society. For example, land currently used for agriculture may be expropriated and converted to mining fields, or a blighted urban center may be changed to a vibrant commercial district by expropriating the land and demolishing the older buildings. In each of these cases, we may assume that society is acting rationally in the sense that the new conditions of resource employment will produce a greater amount of welfare in society than the old one did. One effect of the decision to reallocate resources will have been to redistribute welfare among the members of society. The economic benefit is assumed to be higher enough to put the old and new owners in better offs.[15]

Applying these theories to Ethiopian, where there is limited land market especially for sale, market based land acquisition methods do not offer the necessary land required for a project activity. This

means that land sale and purchase is completely prohibited, expropriation of land from users or lessees is left as the only alternative to collect and transfer land necessary for public or private projects as needed to benefit to society.

5.2.3 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 for the public use." The compensation requirement under the law demands the reimbursement of the expropriated property or interest. The owner should be placed 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 provided to the expropriated party. Commensurate means equivalent. In some legal systems, the word commensurate is 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, it is added merely to give emphasis.

But how does one ensure whether or not certain compensation is commensurate, fair, or just? In other words, how do we know whether the compensation valued is appropriate one?

In all western countries and, as shown in Kitay,[16] in most developing countries, the fundamental principle that guides valuations under expropriation 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.*[17]

If this explanation is not clear, in order to better understand the market value of a property, imagine the sale of a house by an owner after negotiating with buyers. Here, the buyer and seller know what similar types of properties are sold in the market, and hence, the seller under normal circumstances desires the highest price possible that the buyer can afford. By the same token, the buyer offers the best of his price for the house as compared to other comparable houses in the market at that time.

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 in the process. This is because it is the way to reach just compensation. Although the constitutions of most countries contain "just compensation" phrasing, they do not give any clue as to how value is determined. However, market value is usually suggested as compensation appropriate. 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 an administrative organ. 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 the experts, it will accept the report as the value for the expropriation case. In both situations,, the court may be an administrative or regular court.

VALUATION METHODS

Generally, there are three primary valuation methodologies to determine fair market value:

- comparable sales,
- income capitalization, and
- cost approach.

Since all methods are designed to reach fair market value, various countries use them differently. Courts do not favor any one 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 a specific methodology for condemned properties. The courts require that the method must be reasonable. The reasoning behind this position is each property use, location, and situation is unique. Different situations call for one or more of the valuation techniques for a property.

Comparable Sales Approach

The comparable sales approach requires the expert valuator to search the market for similar properties that have sold in the marketplace most recently. The expert is then needs to adjust the sales price of those comparable properties to reflect differences between them and the subject property. The comparable sales method is considered the preferred method for ascertaining the fair market value of land taken by expropriation.

Income Capitalization Method

Income capitalization is another recognized method for determining a property's fair market value taken by expropriation. It provides value for income producing properties. It consists of arriving at

an independent value of the underlying land involved using the sales comparison approach when appropriate or needed to assess a separate value for the land.
The actual income is estimated based on a reasonable rate of return (or what is referred to as the capitalization rate). The land and improvements are capitalized as a single unit (land and building). The capitalized 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 property at the time of the taking. Besides, 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.

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

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 (Please 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 matters a lot, that values of same buildings can be varied because of the difference of the location of the land.

In rural areas besides houses, if any, and plants (grass, trees, crops, fruit etc) thereon, farmers should be compensated for the land they lost. 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 of price of annual harvest shall be paid until the replacement farm is given. On the other hand, if

the loss is permanent, means if replacement land is not to be found, then the amount is to be in the form of displacement compensation, "which shall be equivalent to ten times the average annual income he secured during the five years preceding the expropriation of the land" (Article 8 of same proclamation.) It must be clear that the displacement compensation is not as such compensation to the loss of the land. Rather, as it can be understood from the naming, it is "displacement compensation", a kind of compensation given to the farmer to help him to resettle and rehabilitate in different environment and modes of life. The Constitution generally (Art. 40) denies ownership of land and hence land has no sale price and expropriated of land has no value for compensation. In any case, in calculating the displacement compensation, the proclamation uses the average value of produces collected in the past five years and then multiplies that by ten. The usual criticism raised in relation to this one is that the ten years compensation is baseless. Further taking five years produce average is unfair for it will consider neither the inflation not the current market[18]

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.

5.3 Servitude

5.3.1 Concept

Servitude is a right *in rem* / real right/ over a definite plot of land, called the "servient tenement" and annexed to another plot of land, called the "dominant tenement." In other words, it is a property right vested in the owner/holder of one plot of land to use a land belonging to another for certain purposes. Assume that you need a passage to the main road over your neighbors land, or you want to dig irrigation canal or putting a pipe to pass water to your land from the river over several plots of land belonging to several people. In this case the law of servitude permits you to do that while encumbering the other land owners with such obligation. Servitude is defined in Ethiopia as "a charge encumbering a land hereinafter called servient tenement for the benefit of another land hereinafter 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" (Art. 1359). This, for example, means allowing your neighbor to pass over your land and refraining from blocking the passage. Note also that it is not necessary for the two lands need to be adjacent.

Servitude may also be defined as an encumbrance or restriction on the right of ownership of the owner of the servient tenement for the benefit of the owner of dominant tenement. Furthermore,

it is held that the right of servitude may be created only for the benefit of another land. This is intended to prevent creation of servitude for the benefit of an individual or group of individuals, which could consist of an obligation to perform positive acts. Note that an obligation to perform personal services or positive acts cannot be made the subject matter of servitude. Speaking otherwise, servitude is an obligation imposed on one land or the owner for the benefit of another land. The obligation is *in rem (*real right*)* for that follows the property rather than the owner. Irrespective of change of owners, the servitude continues. See Art 1361of the Civil Code.

Servitude creates an obligation, on the owner of the servient tenement, only to refrain from preventing the owner of the dominant tenement to do certain acts that the latter would not have been able to do otherwise. In other words, servitude shall not create an obligation to perform positive acts on the owner of the servient tenement. See Art 1359/2/ of the code. For example, besides to allowing my neighbor to pass over my land, I am not obliged to construct road for his convenience. One exception to this rule is provided under Art 1360 and 1373 of the Civil Code, which allows the parties to make an agreement in which the owner of the servient tenement undertakes to perform works necessary for the enjoyment and preservation of the right of servitude. Such works may be construction and maintenance of pavements used by the owner of the dominant tenement to exercise his right of way, installation or repair of pipelines to enable the owner of the dominant tenement to have access to water ...etc.

5.3.2 Purpose of Servitude

A person may be unable to make the most advantageous use of his land or building without some rights over the land belonging to his neighbors. For example;

- My land may not have quarry or water sources while my neighbor's land has it in plenty. Hence, I cannot construct on my land because of shortage of construction materials such as stones and sand or I may not irrigate my land because my land does not have a water source or is not adjacent to a water source.
- The most convenient access to the high way from one part of my land may lie across the land of my neighbor. Hence, I cannot have a convenient short cut unless I have the right of way on my neighbors land.
- I may wish to be sure that if I build up to the boundary of my land, my neighbor will not subsequently darken my window by building up to the boundary on his side or by planting trees.

I may achieve these goals by concluding a contract to this effect with my neighbor, but this would create a personal right between the parties to the contract, which do not bind the future owner of such land. Hence, the law provides, under certain circumstances, the owner of one land a real right/ right in rem/ on the land belonging to another. The law also gives a status of a right in rem to servitudes arising from other sources including those arising from contracts.

Therefore, the main purpose of servitude is to enable the owner of the dominant tenement to derive the best possible use and benefit from his land by giving him certain rights on the land belonging to another person, called servient owner. However, unless the servitudes that may be created on a land are restricted in number and extent, it may hamper the profitable use of the servient land and gravely diminish its value, and this will ultimately injure public interest. This is because the owner/holder of such land cannot use his land in the manner he desires and other persons will not be interested to acquire such land as their right of ownership is limited or encumbered by the servitude or the right of another person.

Therefore, the law tries to restrict the number and extent of encumbrances or servitudes on the servient tenement in the following ways.

1. Servitude should be used exclusively for the purpose of using or exploiting the dominant land and it must be used exclusively for that purpose. In other words, the owner of the dominant tenement may not use the servient tenement for the purpose of exploiting another land that is not part of the dominant tenement. This is because servitude is created on one land for the purpose of using and enjoying another land/ the dominant tenement/, and not for the general benefit of the owner of the dominant tenement.
2. The law also limits the rights of the owner of the dominant tenement to use the servient tenement only to purposes for which the servitude was created at its inception. In other words, it cannot be used for new purposes that may arise after the creation of the servitude. For instance, a servitude created to cross a land on foot cannot be used to use cars where the owner of the dominant tenement purchases a car, because this increases the burden of the owner of the servient tenement. See Art 1376 of the Civil Code. The law also imposes various obligations on the owner of the dominant tenement with the intention of preventing him from increasing the burden of the servient tenement. Refer to Arts 1375, 1377, and 1380 of the Civil Code.
3. The owner of the servient tenement has the right to redeem the servitude where the benefits or advantages it provides to the dominant tenement are lesser than the inconveniences or damages it causes to the servient tenement. See Art 1383.
4. The owner of the servient tenement cannot be required to do positive acts; he may merely be required to abstain from doing something or to permit the owner of the dominant land to do something on the servient land. For instance, the owner of the servient tenement may be required to abstain from building or planting trees so as not to obstruct view from the dominant land, or to allow the owner of the dominant tenement to walk or drive across his land, or to allow the owner of the dominant tenement to take water or sand or chalk from his land.
5. In order to prevent unfair and excessive burden or damages to the servient tenement, the law under Art 1365 of the Civil Code, provides that where it is not clear as to whether the provisions of a contract create a servitude running with the land or a personal obligation on

the owner of the land, such doubtful provisions shall be interpreted to have created a personal right or obligation and not a servitude. Also refer to Art 1369.

5.3.3 Sources of Servitude

The right of servitude may arise from a contract, a will, acquisitive prescription or the provisions of the law.

Servitudes arising from contracts: According to Art 1362/1/ of the Civil Code, servitude may be created by an agreement or contract concluded between the owner/holder of the dominant tenement and the owner/holder of the servient tenement.

Will: Servitude may also arise from the will of the deceased person who divides his land holding between two or more persons. In other words, the testator who owns/holds a land may burden one of the lands with servitude of a certain type for the benefit of the legatee of another plot of land. See Art 1362/2/ of the Civil Code.

Acquisitive Prescription: According to Art 1366 of the Civil Code, servitude may arise from enjoyment of the servient tenement for a period of ten years. However, this mode of acquisition applies only to apparent servitude. An apparent servitude is a servitude that requires certain external and visible or apparent structures or means for its enjoyment or exercise, which also evidence its existence. For Example, servitude of way or view may be considered as apparent because it may require construction of a lane or a window by which the servitude is enjoyed. In other words, non-apparent servitudes, i.e., servitudes whose enjoyment do not require installation or construction of external or apparent materials/structures may not be acquired by acquisitive prescription of ten years. The rationale behind this rule seems to be clear, because in cases of apparent servitudes the owner of the servient tenement has the opportunity to see acts of interference by another person on his land and can object to the commission of the acts. Hence, the law does not protect a person who fails to do so for a long period. While in cases of the non-apparent servitude, the owner of the servient tenement does not have an opportunity to object to such acts since he might have not known the acts of the owner of the dominant tenement. See Art 1366/2/ and 1367 of the Civil Code.

However, a servitude acquired through acquisitive prescription shall not affect third parties unless its acquisition is registered in the register of immovable properties. For instance, the owner of the dominant tenement cannot exercise his right against the transferee of the servient tenement unless his rights are entered in the registers of immovable properties. See Art 1368 /2/ of the Civil Code.

Servitude arising out of the provisions of the law: The contiguity of land belonging to different owners or occupied by different persons creates conflict if either or both of them wish to enjoy their lands without any consideration for the damages or annoyance caused to the other. These conflicts can be eliminated only by limiting the powers that the right of ownership usually involves.

Specific provisions of the Civil Code, which determine what is allowed and what is prohibited, are intended to prevent some of these potential conflicts. Refer to the provisions of Art 1217 (Trespass necessary), 1218(Repair of walls), 1219 (Lost things or animals), 1220 (pipes), 1221-1224 (right of way), 1245-1254 (flow of rainwater, ditches and water works), 1372/2/ of the Civil Code. According to these provisions, an owner of a land has right to enter into the neighboring land to repair his house, to install pipes, to capture animals, and so on against payment of compensation for property damage he may cause on the neighboring property.

5.3.4 Rights and Duties of the Parties

The rights and duties of the parties shall be as specified in the instrument creating the servitude and as entered in the register of immovable properties. In other words, the rights and duties of the owner/holder of the servient tenement and the owner/holder of the dominant tenement shall be determined by the instrument creating the servitude, where the servitude is created by contract or will. However, where it is created by acquisitive prescription, the rights and duties of the parties shall be determined by the manner in which the servitude is created or enjoyed in good faith over a long period of time, i.e., usage. Furthermore, where the instrument creating the servitude does not contain provisions dealing with the rights and duties of the parties, or where such provisions are not valid or where the manner of its creation and enjoyment is not clear, the provisions of the Civil Code shall determine the rights and duties of the parties. See Art 1370 of the Civil Code.
With this introduction in mind, let us discuss the rights and duties of the parties.

Rights and Duties of the Servient Owner/Holder

The owner/holder of the servient tenement shall have the following rights and duties;

1. The owner/holder of the servient tenement shall have the obligation to allow the owner/holder of the dominant tenement to use his land for the purpose for which the servitude is created and refrain from exercising certain rights such as the right to prevent other persons from entering his land or using his land. See Art 1359 of the Civil Code. He must also refrain from acts that reduce or impair the use of his land for the purpose required by the owner/holder of the dominant tenement. For example, he may not construct buildings or plant trees that impair the view or way of the owner of the dominant tenement. See Art 1379 of the Civil Code.
2. Where irrigation canals are constructed, the holder shall have the obligation to allow the construction of irrigation lines and other infrastructures if they cross his land holding (Proc. 456/2005, Art.10(2))
3. An owner has the obligation to perform works related to the construction, maintenance and repair of the means necessary for the exercise of rights of servitude by the owner of the dominant tenement, where under the instrument creating the servitude, he has undertaken such obligation. See Art 1373/2/

4. The owner/holder of the servient tenement has the right to redeem the servitude where he can prove that the damages or inconveniences caused by the servitude are way higher than the benefits or advantages derived by the owner of the dominant tenement. See Art 1383 of the Civil Code.
5. The owner/holder of the servient tenement may require that the servitude be exercised on such other part of the servient tenement as will be equally convenient to the owner of the dominant tenement. See Arts 1380,1220(3)

Rights and Duties of the Dominant Owner/Holder

1. The owner/holder of the dominant tenement must exercise his rights in a manner, which causes minimum inconvenience or damage to the servient tenement. In addition to this, he may not make any alteration that would increase the burden of the servient tenement. See Art 1375
2. Where the dominant tenement is divided, the right of servitude shall continue for the benefit of the owners/holders of each parcel of land. However, such division shall not increase the burden of the servient tenement, and the owners/holders of the divided parcels of land shall exercise their rights, for instance right of way, using the same area or piece of the servient land. See Art 1377.
3. Similarly, where the servient tenement is divided, the owner/holder of the dominant tenement shall have the right of servitude on each of the new parcels of land. See Art 1378.

5.3.5 Types of Servitude

Urban Servitudes and Rural Servitudes

Urban servitudes are servitudes created and enjoyed in urban areas. They include right of view, right of way and the various other servitudes arising out of the law such as the right to install water, electricity, gas lines. On the other hand, rural servitudes are those types of servitudes created and enjoyed in rural areas such as right of way or right to cross a parcel of land on foot, with animals, during the dry season, across fields, rights of pasture, watering animals, wood-cutting, irrigation. See Art 1371 of the Civil Code.

Continuous and Discontinuous Servitudes

This classification is based on whether the right of servitude can continue without continuous human intervention or not. Hence, a continuous servitude is a servitude that continues without continuous human intervention. For example, Servitudes of view and drawing water are considered as continuous servitudes.

On the other hand, a discontinuous servitude is a servitude that cannot exist without a continuous human intervention. Therefore, for such kind of servitude to continue to exist, the beneficiary must continue to use /exercise the right created by it. Servitudes of way or passage, pasturing cattle and servitude of extracting quarry are examples of discontinuous servitude. See Art 1382 of the Civil Code, which indicates that apparent servitudes are discontinuous servitudes since such servitude shall be extinguished if the owner of the dominant tenement fails to exercise his rights for a period of ten years.

Apparent and Non-Apparent Servitudes

Apparent servitudes are servitudes that are manifested by external works such as ditches, pipelines or an aqueduct, roads (means of enjoyment). Servitude of drawing water, way… etc are examples of this type of servitude. See Art 1366(1) and (2) of the Civil Code.

Non-apparent Servitudes are, on the other hand, servitudes whose existences are not manifested by external works necessary for their enjoyment by the owner of the dominant tenement. Servitudes of pasturing animals, cutting wood, and extracting quarry… etc are examples of non-apparent servitudes. See Art 1367 of the civil Code.

German Law classifies servitudes into positive and negative servitudes based on the content of the right of servitude. Accordingly, a servitude is considered positive where it entities the owner of the dominant tenement to use the servient tenement for a specified purpose. Servitude of way, extracting quarry, drawing water are examples of this type of servitude. On the other hand, servitude is considered a negative servitude where it imposes on the owner of the servient tenement the obligation to refrain from doing certain activities on his land, for example, from erecting certain kinds of buildings or planting trees. The owner of the dominant tenement does not have right to perform positive acts on the servient tenement. See Art 1359(2). Right of view is a very good example of a negative servitude.

5.3.6 Extinction of Servitude

Rights of servitude shall be extinguished for any one of the following reasons.

1. Waiver /release by the owner of dominant tenement. This ground of extinction is applicable to any kind of servitude. Waiver or release by the dominant owner/holder shall extinguish servitude only where it is made in writing and where the right that was registered in the register of immovable properties is cancelled or stricken out. See Art 1381(1) and (2) of the Civil Code.
2. Disappearance of the apparent signs in cases of apparent servitudes or failure to exercise the right arising out of the servitude, and the cancellation of the entry of the servitude in the register of immovable properties up on the application of the owner/holder of the servient tenement. See Art 1381(3) and (1) and Art 1366 of the Civil Code.

3. Redemption of the servitude by the owner of the servient tenement; According to Art 1383 of the Civil Code, the owner/holder of the servient tenement may buy the servitude back where the continuation of the servitude damages the value of the servient tenement and, hence, is contrary to the national economy or public interest or where the benefits deriven by the owner/holder of the dominant tenement are lesser than the damages it causes to the servient tenement. See Arts 1384 and 1385 of the Civil Code.
4. Surrender of the servient tenement to the owner of the dominant tenement; Servitude shall be extinguished where the owner/holder of the servient tenement has an obligation to perform positive works such as construction, maintenance and repair of means of enjoyment and is not able or willing to cover the costs, and surrenders the sevient tenement to the owner of the dominant tenement. See Art 1374.

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 reason why we have merged these two types of limitations are to show that private ownership is not an absolute one. The rationale behind such limitation may be economic, social, safety, or health. It means, the use and enjoyment right of a certain immovable property may be limited for public health, security, good neighborhood, town planning, etc reasons. In most cases, the limitation is imposed on the use and enjoyment right while in case of expropriation it takes away the whole property. But, the common characteristic of both situations is that ownership cannot be free from the interference of public interest or the state. The difference is, though, while the property right restriction imposed by the first types of regulations is non-compensable, restriction arise out of expropriation is compensable.

Review Questions

1. Private property has never been absolute. Comment
2. In Ethiopia, land has no value to the possessor/holder. Comment.
3. An owner of a building, which was erected during the reign of Emperor Menelik, is restricted from making any change on the building because of its historical significance. Living in the building becomes dangerous for its walls and roof might be collapsed one day because of old age. When he wanted to sell it, nobody is interested. The banks neither could lend money by securing it as collateral. On the other hand, had he been allowed to demolish and change the building, it could be sold for good price. Do you think the restriction on his property right is compensable? Is it different from expropriation?
4. An owner of a cement factory is told to make some safety measures to reduce environmental pollution. According to newly enacted regulation, he is required to make

some adjustments so that the cement dust should be subsiding. This costs him lots of money and he wants to know whether this is compensable.

5. An owner of flour mill in the city center was told to stop his work because of the noise and smell caused by the mill. The house constructed has no value or purpose other than the mill business. It means, if he stops he lost his income that used to be generated from the mill. Does this amount to expropriation?
6. What is market value? Does it work in Ethiopia?
7. Is "displacement compensation" a compensation in its proper sense paid for the loss of rural land? Why?
8. What are the things in relation to which a right of servitude may exist? Explain
9. Servitude may be considered as a right of property from the point of view of the dominant tenement and a restriction or limitation on the right of property from the perspective of the servient tenement. Explain
10. What are the types of servitude recognized by the Ethiopian civil code? Discuss.
11. Is the right of servitude relevant and applicable in the current land holding system of Ethiopia? Why? Why not?

End Note Chapter Five

[1] BLACK, H. C. 1991. Black's Law Dictionary. 6th ed. St, Paul, Minn.: West Group.

[2] NICHOLS, P. 2007 (Sackman J. & et.al (eds)). *1 Nichols on Eminent Domain* Matthew Bender & Company, Inc., § 1.1

[3] AMENDOLA, F. C. & et.al. (eds.) 2006. Eminent Domain *Corpus Juris Secondum*. 29A C.J.S: Thomson West.

[4] 2005. West's Encyclopedia of American Law. *In:* LEHMAN, J. & ET.AL (eds.) *Eminent Domain*. Vol.4, 2nd ed. San Francisco, London and Munich: Thomson Gale. (Hereinafter West Encyclopedia), p. 125.

[5] FAO 2008. Compulsory Acquisition of Land and Compensation. *FAO Land Tenure Studies 10*. Rome: Food and Agriculture Organization of the United Nations.

[6] BERGER, L. 1977. The Public Use Requirement in Eminent Domain. *Or. L. Rev.,* 57. P. 212.

[7] COMMENTS 1948-1949. The Public Use Limitation on Eminent Domain: An Advance Requiem. *Yale L. J.,* 58**,** 599-614. P. 603.

[8] See Ethiopian Civil Code *,* Articles 1460-61

[9] FAO, supra note 4, p. 1.

[10] MUNZER, S. R. 1990. *A Theory of Property,* New York, Cambridge University Press. P. 423.

[11] Transaction costs are costs associated with the transfer of the land such as costs paid to brokers, formation and enforcement of contracts, negotiation, notary, registration and so on.

[12] MERRILL, T. W. 1987. The Economics of Public Use. *Cornell Law Review,* 72**,** 61-116. P. 77

[13] BENSON, B. L. & BROWN, M. 2010. Eminent Domain for Private Use: Is it Justified by Market Failure or an example of Government Failure? *In:* BENSON, B. L. (ed.) *Property Rights: Eminent Domain and Regulatory Takings Re-Examined*. New York: The Independent Institute. P. 150

[14] KALBRO, T. 2000. Compulsory Purchase and Restrictions on Land Use: Principles of Compensation in Swedish Law. *Property Development and Compulsory Purchase*. Stockholm: Royal Institute of Technology (KTH). P. 126.

[15] This is similar to what economists called *Pareto Efficiency,* which explains that efficiency is obtained when a distribution strategy exists where one party's situation cannot be improved without making another party's situation worse.

[16] KITAY, M. G. 1985. *Land Acquisition in Developing Countries: Policies and Procedures of the Public Sector,* Boston, Oelgeschlager, Gunn & Hain, Publishers, Inc.

[17] APPRAISAL-INSTITUTE 2001. *The Apprisal of Real Estate,* Chicago, Apprisal Institute. P. 22.

[18] See for details DANIEL-W-AMBAYE 2009b. Compensation During Expropriation. *In:* MURADU-ABDO (ed.) *Land Law and Policy in Ethiopia Since 1991: Continuities and Changes*. Addis Ababa: Ethiopian Business Law Series, Faculty of Law, Addis Ababa University.; DANIEL-W-AMBAYE 2009a. Land Valuation for Expropriation in Ethiopia: Valuation Methods and Adequacy of Compensation *7th FIG Regional Conference*. Hanoi, Vietnam, 19-22 October 2009 FIG (http://www.fig.net/pub/vietnam/papers/ts04c/ts04c_ambaye_3753.pdf).

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