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Introduction

Dear readers, this 2-credit hour module aims to provide a general understanding of contemporary land law in Ethiopia through the examination and analysis of the legal concepts, principles and rules governing land use and property rights. That general understanding will underpin more detailed investigation of the legal machinery which regulates the creation and transfer of land use rights and interests in land. The module will consider how that machinery works in the light of recent reform.

As you may know module preparation is demanding and it needs the utmost diligence and commitment. Especially, when it serves as the sole reference material like what is happening in the distance program; extraordinary care and watchfulness is strictly required.

Needless to say, usually modules may lack completeness and authoritative source so it is inadvisable to use them as the sole reliable reference material. However, this has become the common scenario in our country. On the other hand, it would be unreasonable to level blindly all modules as being below standard. Likewise, some teaching materials or modules are much more credulous and plays a significant role in the effective teaching and learning process. For instance, modules prepared under the auspices of the Legal Reform and Justice Institute can be cited as the best example. This is to mean that such materials have been prepared in text form so that to be used as uniform text material for the new legal education curricula of the country. Accordingly, the BDU Law School and the BDU Extension and Distance Education Coordinating Office have agreed that modules prepared for the Distance Education Program must be prepared in line with such teaching materials to maintain uniformity and avoid unnecessary duplication of resources.

In the same view, even if I have tried to accommodate new developments, basically I have condensed the teaching material prepared by Ato Daniel Weldegebriel and Melkamu Belachew in a way suitable for distance students. Thus, I am heartily thankful to Daniel and Melka and other scholars for their tremendous effort and quality work.

Finally, I regret to say that I have not dealt with the new lease legislation thinking that the legislation process is ongoing so it would be untimely and unwarrantable to comment on unfinished work.

Chapter One: Land Law in General

1 Introduction

Land law is the subject which has traditionally haunted generations of law students with an undeserved reputation for being difficult, dry and dull. That reputation has come about for several reasons to do with its language, conceptual framework and subject matter. I believe, however, that if you approach the subject with an open mind, you will find it stimulating and rewarding.

Equally, if you can remain patient and accept that your understanding of the language and conceptual framework of the subject will develop gradually as you work your way through the syllabus you will find that land law is not so much difficult as different. And as your understanding grows so will your ability to apply land law's, principles and rules to the analysis of property problems and disputes. Once you begin to do that effectively you will then discover that land law, far from being dull, is intellectually challenging and interesting.

1.2. Property in General

Dear distance learner, the concept property may be defined in different ways by using different terms or expressions however; the essence may be the same. With this in mind, let see some of the commonly used definitions of the concept. In common English parlance, the term property refers to things or objects such as a house, a land, a car, a table... etc.. It also refers to the right of ownership of the person. Hence, you commonly hear a person claiming that a certain thing or object is his property, that somebody took his property... etc.. However, the term, in its legal usage, refers to the rights a person may have in relation to things or objects that have economic value.

Similarly, the Roman law defined property as the right to use and abuse one's own within the limits of the law — *jus utendi et abutendi re suâ, quatenus juris ratio patitur*. Dear student, I am sure that you will be surprised by the term 'abuse' contained in the definition; however, a justification of the word abuse has been attempted, on the ground that it signifies, not senseless and immoral abuse, but only absolute domain. The proprietor may, if he chooses, allow his crops to rot under foot; sow his field with salt; milk his cows on the sand; change his vineyard into a desert, and use his vegetable-garden as a park: do these things constitute abuse, or not? Concerning property, use and abuse are necessarily indistinguishable.

Code Napoléon, article 544: "Property is the right to enjoy and dispose of things in the most absolute manner, provided we do not overstep the limits prescribed by the laws and regulations."

Dear learner, the expression or the terms used in the above mentioned definitions are not the same but there is no any fundamental distinction in essence of such definitions. Thus the later definition does not differ from that of the Roman law: all give the proprietor an absolute right over a thing; and as for the restriction imposed by the code, — provided we do not overstep the limits prescribed by the laws and regulations, — its object is not to limit property, but to prevent the domain of one proprietor from interfering with that of another. That is a confirmation of the principle, not a limitation of it.

The things or objects in relation to which property rights are exercised are called objects of property. Hence, property refers to rights such as ownership, possession, usufruct, use, and rights of servitude, recovery, preemption and promise of sale. Dear learner, I hope you are familiar with the concepts: possession, ownership, usufruct, servitude etc., With your property course and I cordially advise you to refer such concepts just to refresh your knowledge; so for the time being let me focus on possession and ownership.

Ownership is the dominant and seigniorial power over a thing; Possession, “Possession,” says Duranton, “is a matter of fact, not of right.” Toullier: “ownership is a right, a legal power; possession is a fact.” For instance, a tenant (who rents a house) is the possessor; conversely the owner who lets the house is an owner or proprietor. If I may venture the comparison: a lover is a possessor, a husband is a proprietor.

From the distinction between possession and ownership of property arise two sorts of rights: the *jus in re*, the right in a thing, the right by which one may reclaim the property which he has acquired, in whatever hands he finds it; and the *jus ad rem*, the right to a thing, which gives someone a claim to become a proprietor. Dear student, can you illustrate an exam for *jus in re* and *jus ad rem*? I hope you can!

Chapter Objectives

This unit is devoted or intended to deal with the concept of property, objects of property /things or objects/, classification of property and the purpose of classifying things into various categories. On top of this it provides students with the basic features of the different categories of property.

At the end of this chapter students will:

- Know the concept of property
- Identify different categories of property
- Know the distinguishing features of each type of property
- Understand the rationales behind classification of things in various categories.

- Classify things into various categories and the significance /purpose of classification,
- Identify the various theories regarding the origin, justifications and condemnation of private property.

1.3 Some Major Concepts: Land, Real Property and Real Estate

I. Land

Dear student, there is an obvious natural distinction between land, which is immovable, and all other tangible property, which is movable. The unique nature of land, notably in its permanence, specific uses and relationship to surrounding land, has produced the unique combination of different property rights which can co-exist in a single piece of land. This multiplicity of different property rights constitutes land law.

What is then the legal meaning of 'land' for instance in English and Welsh law? The statutory definition of land is set out in the Law of Property Act 1925 (LPA 1925) s. 205 (1) (ix). This describes the physical attributes of land, the material things which can be owned as part of it, and goes on to include property rights in land as part of the definition of land. The essential point is that if you own land you own the physical thing itself and all the rights that go with it. As an owner of land you will therefore own any buildings, fixtures, trees, plants and minerals in it and in it (subject to exceptions like oil, gas and coal) and any rights that go with it (e.g., a right of way over a neighbor's land: the right of way is part of your land just as much as any building on it).

Dear student, the following are special characters of land that distinguishes it from other properties.

1. Land is more enduring than other properties; hence, future interests in land have definite values.
2. It is important for purposes of security because of the fact that land cannot be moved and it is permanent as opposed to furniture or vehicles that may be easily hidden.
3. A risk of destruction of the land, for example, by storm or fire is minimal.
4. Land can be subdivided without necessarily losing its value.
5. Land is still very necessary for expansion of industries, large farms and creation of means of transport.

II. Real property

Real Property and Personal Property: Classification

The traditional classification of property in English and Welsh law makes a primary distinction between real property (realty) and personal property (personality). Traditional terminology is outmoded and misleading, but since it still pervades the law we still need to be able to interpret it.

The distinction between real property and personal property derives from the historical importance of land ownership. Originally, feudally, only a freehold estate was considered sufficiently important for legal action for the specific recovery of the property itself to be available, as of right, to a dispossessed freehold estate owner. Such an action was in rem for recovery of the thing (res) itself. The property so recoverable, through a real action, became known as real property. Hence real property is, strictly speaking, freehold interests in land. All other property was personal only; i.e., an owner could only bring a personal action when dispossessed of such property and a personal action gives no automatic right to the return of the property itself; the defendant can choose either to compensate the plaintiff or return the property.

Leasehold property began life as personal property and only later became specifically recoverable. Today the leasehold estate is a hybrid form of property, quaintly and oxymoronically known as the 'chattel real'. 'Chattel' because technically still classified as personal; 'real' because specifically recoverable.

The different types of property can be classified as follows:

Land = real property (freehold interests) + chattels real (leasehold interests)

Personality = chattels real + pure personality

Pure personality = personal property excluding leasehold property.

Tangibles and Intangibles

Personal property is further sub-divided into tangible property (called 'chattels', i.e. movable physical objects, and 'choses (things) in possession', i.e. things capable of physical possession) and intangible property (known as 'choses in action', which cannot be physically possessed but carry enforceable ownership rights) such as debts, shares and the various forms of intellectual property, like copyrights and patents.

Property Rights and Personal Rights Today

For property law in general, and land law in particular, the distinction between real rights and personal rights remains fundamental. Real rights are rights in or against a thing (rights in rem), personal rights are rights in or against a person (rights in personam).

Real rights are proprietary or property rights, which give their owner control over property and are therefore enforceable against anyone who unlawfully interferes with that control. Real rights are ownership rights in property. Personal rights are much more limited; they merely give their owners the right to enforce them against the specific persons who have assumed legal obligations towards them.

The importance of this distinction in property law is best illustrated by example. It may be convenient, useful or even essential to me to have access to my land over my neighbor's land. My right to such access, if I have one, could take the form of a personal right or a proprietary right. If my neighbor gives me informal permission to cross his or his land, or enters into a purely personal contractual arrangement with me, all I will have, in either case, is a personal right, a type of license. If I have a permit license, he can withdraw his permission at any time, on giving me reasonable notice. If I have a contractual license and he breaches the contract by stopping my access I will have contractual rights enforceable against him. But those rights will be personal rights only. For example, I may only get financial compensation for the breach, rather than restoration of the access itself. And if she transfers her land to a new owner I will certainly have no right of access enforceable against him, because all I have is a personal right against her based on the obligation she has assumed towards me.

On the other hand, I may have a right of way over my neighbor's land for the benefit of my land in the form of a proprietary right known as an 'easement'. If I have this kind of right and she blocks my access I will be entitled to a court order restoring that access. If she transfers her land to a new owner I will not lose my right of way. If I transfer my land to a new owner, the new owner will get the benefit of the right of way. That is because it is a property right, a right in the land itself, not a personal right, a right against a specific person.

III. Real Estate

Real estate is the modern for land and anything that is permanently affixed to it, such as appurtenances, buildings, fences, fixtures, improvements, roads, shrubs and trees (but not growing crops), sewers, structures, utility systems, and walls. Title to real estate normally includes title to air rights, mineral rights, and surface rights which can

be bought, leased, sold, or transferred together or separately. Real estate is often considered synonymous with real property (sometimes called realty), in contrast with personal property (sometimes called 'chattels' or 'personality' under 'chattel law' or 'personal property law'). The terms 'real estate' and 'real property' are used primarily in common law, while civil law jurisdictions refer instead to immovable property. However, sometimes the term 'real estate' refers to the land and fixtures thereon together, as distinguished from 'real property', referring to the ownership of land and its appurtenances, including anything of a permanent nature such as structures, trees, minerals, and the interest, benefits, and inherent rights thereof. Real property is typically considered to be immovable property.

1.4. Theories of Property Rights

The right of property refers to the despotic dominion which is claimed by a person claims and exercises over the external things of the world and to the exclusion of all other persons in the universe. It is a right that is regarded as core or key right by humanity; however, only a few go into the trouble of asking themselves about its origin and foundation. Most of us are pleased with our possession and seem to be afraid to look to the means by which it was required as we fear the defect in our title or at best we rest satisfied with the decision of the court in our favor without examining the reason or authority on which those laws have been built.” William Blackstone.

Dear student, it is very important to know the origin of property, unless our knowledge of property could not be complete. In the same view, the origin and foundation of private property will be discussed hereunder.

There are two main groups of theories of property; the first group attempts to explain how private property came to exist, i.e. It describes the facts, which purports to show the origin of private property. It attempts to explain how things came to be owned privately. On the other hand, the other group of theories is concerned with passing a judgment on the institution of private property and attempts to justify or condemn the institution. In other words, it tries to explain the economic and social reasons behind the recognition and protection or condemnation of private property. Sometimes, however, those two aims are combined; for example a writer may argue that property arose to reward private enterprise and that therefore it is ethically justifiable.

1.4.1 Theories Regarding Origin of Property

I. The Positivist Theory

According to the positivist theory, law is nothing but the command of the sovereign, that is, the rules promulgated by government officials for reasons of public policy, protection

of individual rights, promote the general welfare, increase social wealth or maximize social utility. According to Jeremy Bentham, one of the prominent utilitarian political philosophers, property is the basis of expectation of deriving certain advantages from a thing which we are said to possess, in consequence of the relation in which we stand towards it.

The idea of property consists in an established expectation; in the persuasion of being able to draw such or such an advantage from the thing possessed. Now this expectation, this persuasion, can only be the work of law. I cannot count on the enjoyment of that which I regarded as mine, except through the promise of the law that guarantees it to me. It is law alone that permits me to forget my natural weaknesses. It is only through the protections of law that I am able to enclose a field, and to give myself up to its cultivation with the sure though distant of harvest.

Property and law are born together and die together. Before laws were made, there was no! Property; take away laws, and property ceases. Similarly, E. Jenks argues that private property is a creation of the state and achieved only after a long struggle with the clan. If we consider as the essential characteristics of private property, the right to exclude others, the right to charge the thing for a debt, to alienate or leave by will, it is true that the state has provided the machinery by which these rights are enjoyed.

However, this theory is criticized on the ground that the state and private property are the results of the same social and economic forces and we can hardly say one is the creation of the other. John Locke argues that the state is the result of a social contract in which the society transferred some of their rights to the state for protecting their rights including the right to property.

II. The Hegelian Theory

According to George Wilhelm Friedrich Hegel, a human person is merely an abstract unit of free will or autonomy that does not have a concrete existence until that will act on the external world. The person must give its freedom an external sphere to live as an idea. This external sphere, capable of embodying the person's freedom, consists of the rest of the world, everything that is distinct from the person. From the need to embody the person's free will from the abstract realm to the actual, Hegel concludes that the person becomes a real self only by engaging in a property relationship with something external. Such a relationship is the goal of the person.

Hence, private properties originated in the person's attempt to actualize his/her free will, i.e., when someone extends his will to external things he makes that thing a part of himself.

Hegel clearly makes the claim that a human being can only become properly developed-actualize her freedom- in the context of a community of others. Thus, though he speaks of the person in the sphere of abstract right only in the Kantian sense of abstract rationality, he implicitly claims that personhood in the richest sense of self-development and differentiation presupposes the context of human community.

Similarly, Professor Margaret Jane Radin has argued that to be a person, an individual needs some control over resources in the external world. She explores the relationship between property and personhood, a relationship that has commonly been both ignored and taken for granted in legal thought. The premise underlying the personhood perspective is that to achieve proper self-development-- to be a person--an individual needs some control over resources in the external environment. The necessary assurances of control take the form of property rights. Although explicit elaboration of this perspective wants in modern writing on property, the personhood perspective is often implicit in the connections that courts and commentators find between property and privacy or between property and liberty. Besides its power to explain certain aspects of existing schemes of property entitlement, the personhood perspective can also serve as an explicit source of values for making moral distinctions in property disputes, and hence for either justifying or criticizing current law. It is not surprising that personhood has played a part in property theories all along the political spectrum. Conservatives rely on an absolute conception of property as sacred to personal autonomy. Communitarians believe that changing conceptions of property reflect and shape the changing nature of persons and communities. Welfare rights liberals find entitlement to minimal level of resources necessary to the dignity of persons even when the entitlement must curtail the property rights of others.

Locke says that "every man has a property in his own person," from which it immediately follows that "the labour of his body, and the work of his hands... are properly his." Though Locke elsewhere considers the person as reflective consciousness and memory, he may well mean here that one literally owns one's limbs and hence must win their product. If not, perhaps property in one's person should be understood to mean simply that an individual has an entitlement to be a person or to be treated as a person. This would probably include the right to self preservation on which Locke bases the right to appropriate.

If it makes sense to say that one owns one's body, then, on the embodiment theory of personhood, the body is quintessentially personal property because it is literally

constitutive of one's personhood. If the body is property, then objectively it is property of personhood. This line of thinking leads to a property theory for the tort of assault and battery. Interference with my body is interference with my personal property. Certain external things, for example, the shirt off my back may also be considered personal property if they are closely enough connected with the body.

The idea of property in one's body presents some interesting paradoxes. Sometimes, body parts can become fungible commodities, just as other personal property can become fungible with a change in its relationship with the owner: Blood can be withdrawn and used in a transfusion, hair can be cut off and used by a wig-maker; organs can be transplanted, on the other hand, body parts may be too "personal" to be property at all.

Finally, let us consider the view that what is important in personhood is a continuing character structure encompassing future projects or plans, as well as past events and feelings. The general idea of expressing one's character through property is quite familiar. It is frequently remarked that dogs resemble their masters; the attributes of many material goods, such as cars and clothes can proclaim character traits of their owners. Of course, many would say that becoming too enthralled with property takes away time and energy needed to develop other faculties constitutive of personhood. However, for example, if you express your generosity by giving away fruits that grow in your orchard, then if the orchard ceases to be your property, you are no longer able to express your character. This at least suggests that property may have an important relationship to certain character traits that partly constitute a person.

This view of personhood also gives us insight into why protecting people's "expectations" of continuing control over objects seems so important. If an object you now control is bound up in your future plans or in your anticipation of your future self, and it is partly these plans for your own continuity that make you a person, then your personhood depends on the realization of these expectations.

III. The Occupation /first possession/Theory

In the beginning of the world The Creator gave to man dominion /ownership/ over all the earth and over the fish of the sea and over the fowl of the air and over every living thing that moves up on the earth. This is the only solid foundation of man's dominion over external things.

However, this communion of goods had never been applicable, even in the earliest stage, to the substance of the thing nor could it be extended to east the use of it. This is because by the law of natural and reason acquired there in a kind of transient property that lasted so long as he was using it and no longer, i.e., the right of possession continued only for the time only the act of possession lasted. Thus the land was in common, and no part of it

was the permanent property of any man in particular, yet whoever was in occupation of a determined spot, for rest, shade or the like acquired for the time being a sort of ownership, from which no one can derive him by force, for this would have been unjust and contrary to the law of nature. However the instant he has quitted the use or occupation of it, another reason might seize it without injustice. Thus also a vine or other tree might be said to be in common, as all men were equally entitled to its produce/ fruits/ and yet any private individual might get the sole property of the fruit which he had gathered for his own repast.

However, when mankind increased in number, craft and ambition, it became necessary to entertain conceptions of more permanent dominions and to appropriate to individuals not the immediate use of the thing only but the very substance of the thing to be used. Otherwise, innumerable tumults must have arisen and the peace and order of the world be continually broken and disturbed while persons were striving on who should get the first occupation of the same thing or disputing which of them had actually gained it. As human life also grew more and more refined means of convenience were devised to render it more easy, commodious and agreeable such as habitations for shelter and safety and raiment/ incentives for warmth and decency. However no one would be at the trouble to provide either so long as he had only the usufructuary property in them, which was to cease at the instant he quitted possession. If of habitations in particular, it was natural that even the brute creation to which everything else is in common maintained a somewhat permanent property in their dwellings, especially for the protection of their young, the invasion of which they esteemed a very flagrant injustice and would sacrifice their lives to preserve them. Hence a property was soon established in every man's house and homestead, which seem to have been originally mere temporary huts or moveable cabins suited to the design of providence for more speedily peopling the earth and suited to the wandering life of their owners before any extensive property in the soil or ground should be established.

Then, moveable things come to be more appropriate than the permanent /substantial subsoil, partly because they are more susceptible of long occupancy which might be continued for months without sensible interruption and partly because few of these things could be fit for use unless until improved and ameliorated by the bodily labour of the occupant, this bodily labour is universally allowed to give the fairest and most reasonable title to an exclusive property therein.

Hunting, and animal rearing (for milk, meat and their skins and hides) the latter is more secure than hunting and digging water wells even where the land and hedges still belonged to all in common represent the most common way of creating property right.

As the world grew more populated it became more difficult to find new spots to inhabit without encroaching on former occupants. Furthermore, constantly occupying the same particular spot depleted the fruits and spontaneous produces of the earth and it, therefore, became necessary to pursue some regular method of providing a constant subsistence and this necessity resulted in or at least encouraged the art of agriculture. The art of agriculture, by regular connection and consequence introduced and established a more permanent property in the soil /land. Clearly the land would not produce sufficient quantities and qualities without the assistance of tillage, but who would be at the pain of tilling it if another might watch an opportunity to seize up on and enjoy the product of his industry art and labor? Therefore, had it not been for a separate property inland and movables vested in some individuals, the world should have continued a forest and men must have been mere animals of prey. Hence, necessity begat property and to insure that property recourse was had to civil society which brought along with it along a train of inseparable concomitants: states, governments, laws, punishment and the public exercise of religions duties.

As observed earlier, occupancy gave the right to the temporary use of the soil. So it is agreed up on all hands, that occupancy also gave to the original right to the permanent property in the substance of the earth itself, which excludes everyone else but the owner from the use of it. There is of course some difference among the writers on natural law concerning the reason why occupancy should convey this right, and invest someone with this absolute property; Grotious and Puffendorff insisted that this right of occupancy was based on the tacit/ implied assent of all humanity that the first occupant should become the owner; and Barbeyrac, Titius and Locke argued that there is no such implied assent; nor was necessary that there should be; since the very act of occupancy alone being a degree of bodily labor, is from a principle of natural justice, without any consent or compact, sufficient of itself to gain a title.

Property, both in lands and movables, being thus originally acquired by the first taker, which taking amounts to declare that he intends to appropriate the thing to his own use, it remains in him, by the principle of natural law, till such time as he does some other act which shows his intention to abandon it; for then it becomes, naturally speaking, *publici juris* once more, and is liable to be appropriated by the next occupant.

However, what become inconvenient or useless to one man was highly convenient and useful to another person, who is ready to give something in exchange that was equally desirable to the former. This natural convenience introduced commercial traffic and the reciprocal transfer of property b y sale, grant or conveyance; which may be considered as the continuation of the original possession of the first occupier or as an abandonment of the thing by the present occupant/owner and an immediate successive occupancy of the same by the new proprietor. /William Blackstone, Commentaries on English Law/

In the late 17th century, Samuel von Pufendorf refined a theory of the origins of property rights that had been in existence since ancient times. Property, he said, is founded in the physical power manifested in seizing the object of property /occupation/. In order, however, to convert the fact of physical power into a right, the sanction of the state is necessary. However, the state cannot make a property right where physical possession is not present. Thus, both occupation and state sanction are necessary conditions for legitimacy of property.

The acceptance of the divine right of grab is not widespread today as it was once. Maine suggests that this doctrine is probably the result of later thought. It is only when the right of property has gained a sanction from long practical inviolability, and when the vast majority of the objects of property has been subjected to private ownership that mere possession is allowed to invest the first possessor with ownership or dominium over commodities in which no prior right has been asserted. In a crowded world, occupation applies only to a relatively unimportant degree; less often does the vacant forest await the tiller. The theory of occupation hardly provides a reasonable account of the origin of property, and it is even less satisfactory as justification of property. Why should he who is lucky enough to seize a thousand acres become an owner?

In the common law, first possession / occupancy is the root of title or property. This raises two main questions;

1/ what constitutes possession? And

2/ why should it be the basis of property?

In *Pierson V. Post* [New York Supreme Court 1805], Post was hunting a fox on an abandoned beach and almost had it in his gun sight when an interloper appeared to kill the fox and run away with the Caracas. The indignant Post sued the interloper for the value of the fox on the theory that his pursuit of the fox had established his property right to it.

The court disagreed, and held that possession or occupancy went to the one who killed the animal, or who at least wounded it mortally or caught it in a net. These acts bring the animal within the certain control that causes the possession and hence a claim of property/ ownership.

Possession thus means a clear act whereby the entire world understands that the pursuer has “an unequivocal intention to appropriating the thing to his individual use”. A clear rule of this sort should be applied because it prevents confusion and quarrelling among persons.

The case presents two great principles for defining possession. First, notice to the world through a clear act and second, reward to a useful labour. The latter principle, of course, suggests a labor theory of property, which implies that the person gets the prize when he mixes his labor with the thing by hunting, collecting, occupying etc... On the other hand, the former principle suggests at least a weak form of the consent theory, i.e., the community requires clear act so that it has the opportunity to dispute the claim or to acquiesce in or to acknowledge individual ownership where the claim is clear and no objection is raised.

Why, then, is it so important that property owners make and keep their communication clear? Economists have an answer: they argue that clear title eases commerce and minimize resource wastage on disputes.

If I am careless about who comes on to the corner of my property, I invite others to make mistakes and to waste their labor and resources to make important improvements to what I have allowed them to think is theirs. I thus encourage contention, insecurity and litigation, which wastes everyone's time, energy and resources. However, if I keep my property claims clear, everyone will know that they should deal with me directly if they want to use my property. We can bargain, rather than fight; through trade, all items will come to rest in the hands of those who value them most. If property lines are clear, then anyone who can make better use of my property than I can will buy or rent it from me and turn it to his better use. / Carole M. Rose, *Possession as the Origin of Property*/

IV. Labour or Entitlement Theory

John Locke argues that natural reason tells us that men, being once born, have a right to their preservation, and consequently to food, drink, and such other things nature affords for their subsistence. Revelation, when giving an account of those grants God made of the world to Adam, and Noah and his sons, states that God has given the earth to humankind in common. How men have come to have property in several parts of that which God given to humankind in common?

God, who has given the world to men in common, has also given them reason to make use it to the best advantage of life and convenience. The earth and all that is there in is given to men for the support and comfort of their being.

Though the earth and all the creatures are common to all men, every man has a property in his own person to which nobody has any right to but himself. The labor of his body and the work of his hands, we may say, are properly his. So where a person appropriates a land or any one of its fruits, he has mixed his labor with, and joined to it, such thing is his own and thereby makes it his property. This is because he has removed it from the common state of nature and has placed it in to something which is exclusively his own.

It is this labor that puts a distinction between those that are appropriated and those which are common. In other words, the difference between things owned privately and those, which are commonly owned by all human kind, lies in the fact that one's labor has been added to on.

However, this theory has certain problems, first, without prior theory of ownership, it is not self-evident that one owns even his/her own labor that is mixed with something, second, the labor theory does not provide guidance in determining the scope of the right that one establishes by mixing one's labor with something else. Robert Nozick described this problem as follows, "suppose I pour a can of tomato juice in to the ocean: do I now own the sea?"

Several writers, about contemporary to Locke proposed another theory of the basis of ownership / property. They argued that the original owner got title through the consent of the rest of humanity who were, taken together, the first recipients of the earth and its resources from God. However the problem with this theory involve what Law and Economics writers would call "administrative costs"; how does everyone get together to consent to the division of thing among individuals?

1.5 Types of Land Ownership

Dear learner, ownership of land can be classified in to four categories: private, communal, public joint and community ownership. The details of each type of ownership will be provided as follows.

1.5.1 Private Ownership

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

1.5.2 Communal Ownership

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

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

1.5.3 Public Ownership

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

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

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

1.5.4 Joint Ownership

In some systems it is a type of ownership of land by two or more persons in which each owns an undivided interest in the whole. This kind of system, based on the kind of rules

adopted by each country, may include starting from simple joint ownership of plot of land by two people up to ownership rights of hundreds of people in condominiums. In Ethiopia, the principle of joint ownership right is governed by the civil code or other land related recent laws as the case may be. Under the civil code (articles 1257 ff.) it is stated that joint ownership right may be determined by agreement of the parties. Without such agreement the law presumes an equal right to the thing. The right can also be freely exchanged, subject to the limitation of pre-emption, however. As a special case, a joint wall of two real properties is considered as a joint property in the code. In condominium or other such related buildings, common walls, roofs, parking lots, stairs and corridors are jointly owned and administered by the users of the building or their association.

1.5.5 Common Ownership

Property owned in common by husband and wife each having an undivided one-half interest by reason of their marital status. Common property in the FDRE Family law is the category of property within the marriage other than private property of one of the spouses. The nature of common property is that it cannot be divided and each of the spouses has equal right to the whole property. Hence the law demands joint consent and agreement for the sale, exchange, mortgage or donation of common property. In today's Ethiopia husband and wife commonly possesses urban and rural land. Especially in rural areas, during divorce the farmland is being equally divided between the man and the woman.

Review Questions

1. Discuss the basic distinction between real property and real state.
2. Discuss which type of land ownership exists in Ethiopia and the possible justification why this type of ownership is preferred to others.
3. List the distinguishing features of the land
4. Discuss the basic difference between communal ownership and joint ownership of land

Chapter Two: History of Tenure System in Ethiopia

Introduction

First I would like to heartedly acknowledge to IFPRI for the reputed article from which I have reproduced most part of it. When I come to the basic concept, I hope you are familiar with the concept “Land Tenure”. **Land tenure** is the institutional (political, economic, social, and legal) structure that determines:

- How individuals and groups secure access to land and associated manage land resources. Resources, including trees, minerals, pasture, and water.
- Who can hold and use these resources -- for how long and under what conditions. Land tenure may also have both spatial and temporal dimensions and are typically defined through statutory or customary law.

In other words, land tenure is an institution, i.e., rules invented by societies to regulate behavior. Rules of tenure define how property rights to land are to be allocated within societies. They define how access is granted to rights to use, control, and transfer land, as well as associated responsibilities and restraints. In simple terms, land tenure systems determine who can use what resources for how long, and under what conditions.

Land tenure is an important part of social, political and economic structures. It is multi-dimensional, bringing into play social, technical, economic, institutional, legal and political aspects that are often ignored but must be taken into account. Land tenure relationships may be well-defined and enforceable in a formal court of law or through customary structures in a community. Alternatively, they may be relatively poorly defined with ambiguities open to exploitation.

Land tenure thus constitutes a web of intersecting interests. These include:

- Overriding interests: when a sovereign power (e.g., a nation or community has the powers to allocate or reallocate land through expropriation, etc.)
- Overlapping interests: when several parties are allocated different rights to the same parcel of land (e.g., one party may have lease rights, another may have a right of way, etc.)
- Complementary interests: when different parties share the same interest in the same parcel of land (e.g., when members of a community share common rights to grazing land, etc.)

- **Competing interests:** when different parties contest the same interests in the same parcel (e.g., When two parties have independently claimed rights to exclusive use of a parcel of agricultural land. Land disputes arise from competing claims.)

Dear student, let see the common classifications of land tenure:

- **Private:** the assignment of rights to a private party who may be an individual, a married couple, a group of people, or a corporate body such as a commercial entity or nonprofit organization. For example, within a community, individual families may have exclusive rights to residential parcels, agricultural parcels and certain trees. Other members of the community can be excluded from using these resources without the consent of those who hold the rights.
- **Communal:** a right of commons may exist within a community where each member has a right to use independently the holdings of the community. For example, members of a community may have the right to graze cattle on a common pasture.
- **Open access:** specific rights are not assigned to anyone and no-one can be excluded. This typically includes marine tenure where access to the high seas is generally open to anyone; it may include rangelands, forests, etc., where there may be free access to the resources for all. (An important difference between open access and communal systems is that under a communal system non-member of the community is excluded from using the common areas.)
- **State:** property rights are assigned to some authority in the public sector. For example, in some countries, forest lands may fall under the mandate of the state, whether in a central or a decentralized level of government.

Having said this much about what is all about land tenure in general, let see the historical development of land tenure system in our country, Ethiopia.

Dear student, Ethiopia has a long legacy of state intervention inland tenure relations. The Ethiopian state has exerted considerable influence on local land tenure regimes throughout different political regimes. The country also differs in some respects from several other African countries in its property rights system. As Ethiopia has not been colonized (with a very brief exception of Italian occupation in the 1930s and 1940s), there is no a kind of colonial heritage or legacy pertinent in other sub-Sahara African countries and societies that resulted inland grabbing by European settlers, which contributed to the formalization of private property right to land (Novati 2002). The colonial legacy in Ethiopia confers to an imperial colonialism in the second half of the 19th century with the expansion of the empire, starting from its heartland in Abyssinia

towards the South and the imposition of an exploitative land tenure system in those newly occupied territories (Donham and James 1986). Overall, this imperial history of occupation of autochthonous ethnic groups and a certain regional and temporal variation in imperial governance modes of these newly occupied areas resulted in a diversity of land tenure systems across the country.

A redistributive land reform in 1975, which only transferred usufruct rights to the rural peasantry, endured some form of continuing state ownership. As a consequence, in the last three decades since the Derg took power, the Ethiopian state and its local representatives have been the dominating force in the highland areas in defining access, distribution, and tenure terms of user rights. This legacy has weakened or largely crowded out not only the remains of customary institutions, but also the imperial land use institutions, which were superimposed on the diverse traditional land holding systems. Furthermore, there is no real “go- back-to-customary-rules” type of perspective since the pre-1975 land tenure system under imperial rule has been widely conceived as unjust among the rural peasantry as much as among the most progressive urban elites: land was concentrated in the hands of absentee landlords, tenure was highly insecure, and arbitrary evictions posed serious threats to tenant farmers.

The antagonisms celebrated in the recent Ethiopian land debate fail to grasp this regional and temporal diversity of land tenure systems in Ethiopia not only during the imperial regime, but also during the Derg regime with very different bundles of rights attributed to the tillers in different places and different production systems. This diversity continues even today in regional land regulations that differentiate bundles of rights for different types of land use and plot holders, and in different regions of the country.

In the following sections, we will analyze the bundles of rights for different rights holders across three different ruling regimes: the imperial regime in the 20th century (pre-revolutionary period), the Derg regime that has overthrown the imperial regime in 1975 (post-revolutionary period), and the developments after the fall of the Derg. This analysis is based on a reading of the available scholarly literature. Overall, there is an imbalance in the depth of research covering the northern, often called “central,” parts of the empire and the occupied areas what is

called the “South” (Joireman 2000). Scholarly research on the imperial land tenure systems in the (pastoral) semi-arid lowlands of East, Southeast, and southwestern Ethiopia (the so-called periphery) is scarce. There is particularly little knowledge on the pre-imperial, customary land tenure systems in the periphery, which often remained in place below a layer of land rights superimposed by newly arriving settlers from the centre.

2.1 Before the Revolution

Dear distance learner, the Ethiopian empire accommodated a land tenure system that is described as one of the most complex compilations of different land use systems in Africa (Joireman 2000). The terminology that has become the commonly used classification of the pre-revolutionary land tenure types does not reflect this plethora of local land tenure systems but refers mainly to the imperial administrative classification. It is commonly distinguished between communal (rist), grant land (gult), freehold, or sometimes called private (gebbar tenures), church (samon), and state (maderia mengist) tenure regimes. Unfortunately, there is no comprehensive and commonly accepted definition of these different types of land tenure thus different land tenure relations are summarized under one term. These differences are significant. The most central terms used to explain Ethiopian land tenure systems, such as gebbar, have had differing meaning across space and time in some regions of the country and during different time periods, at times opposite to its use in official tax nomenclature. However, the latter was frequently adopted by scholars of the Ethiopian land tenure system. Contradictory interpretations are also found for the term rist, which most writers denote it as collective property, but which is also described as “rigorously individualistic”.

Dear learner, different land tenure systems were usually associated with a spatial distribution between the North and the South or, put differently, the central core and the semiarid lowlands of East, Southeast and Southwestern Ethiopia (the so called periphery) of the Ethiopian empire. Most of the literature on land tenure during the imperial regime concentrates on the historical heartland – the old centre - of the Abyssinian Empire, which comprises mainly the northern and northwestern part of Ethiopia. Only few authors cover the occupied areas of the South as well – those areas occupied during military campaigns under emperor Menelik (1889-1913), and they do this, with some exceptions, mostly at a rather general level. Generally, the literature describes land tenure in the northern areas as an “ancient communal” tenure system (Aberra Jemberre 2000, 131) of rist where occasionally renting and sharecropping occurred. The historical “southern” land tenure regimes are delineated as a mixture of private land tenure, “pastoralist” communal regimes (Joireman 2000, 9), and government tenure (Hussein Jemma 2001), which were strongly affected by an exploitative tax and tribute system (gult) that Northern settlers had imposed on the indigenous population.

In the following section, the most dominant interpretations of the principles of each of the different types of land tenure system will be discussed.

I. Rist Tenure

Dear learner, save the above mentioned limitations, the rist system was a somewhat corporate ownership system based on descent that granted usufruct rights (the right to appropriate the return from the land). In the rist system, all male and female descendants of an individual founder or occupier were entitled to a share of land. The allocated usufruct rights did not refer to a specific plot of land, and, since it was often difficult for rights claimants to trace the pedigree to an ancestral landholder, harshly competitive bargaining over access to land occurred. Claims to land were usually accepted or rejected by the representative of the rist corporation who consulted other members of the kinship group. The number and sizes of families varied over time, and in many localities redistribution of land within the kinship group occurred regularly. Rist rules aimed at maintaining continuity in the possession of land to both individually operated and clan lands; that is why rist rights holders usually lacked the right to sell their share outside the family, mortgage, bequeath or transfer it as a gift as the land belonged to the descent group, not the individual. Rist is burdened with some ambiguity in the literature. It is usually conceptualized as a genuine Abyssinian collective land tenure system. Since other land tenure types are less well researched, it is better to refer to rist as a variant of communal land tenure in Ethiopia.

Even though the rist system provided for general tenure security, it granted only very insecure property rights to a particular plot of land. It continuously endangered the security of an individual's effective rights to use a specific plot of land and encouraged fragmentation and successive reduction in individual plot size. At the same time, it sustained and privileged most the rural peasantry with direct access to land through its distributive role, and guaranteed that the bulk of the land was under peasant control.

II. Gult and Rist Gult

Dear distance learner, now let see the other traditional land tenure of the imperial Regime of Ethiopia.

Superimposed on the rist system was a type of fief right that required the rist holding peasants (or those who held other types of traditional land rights) to pay tribute and taxes in cash, kind, or labor to landlords– this was called the gult right. In the Abyssinian center of Ethiopia, these gult holders were largely an aristocratic group, whereas in the southern periphery, it was civil and military servants of the imperial regime who had received gult rights as compensation for their services (Aberra Jemberre 2000, Dejene Aredo 1999, Pausewang 1983). Gult rights were also vested to organizations, in particular the Orthodox Church. Even though most scholars consider gult to be a right to land, it has also been characterized as a right to the person power of the peasants living on the land. Gult was usually linked to an office, and while the

gult lords had several duties towards the crown such as administration, maintenance of security in the region, and military services, they also had the right to oversee other administrative personnel in the granted area. Gult rights were not inheritable or not necessarily hereditary, and since formal land ownership was vested in the state, the gult right could be withdrawn by the crown at any time, although this did not happen frequently. However, many local gult holders (local nobles) were at the same time rist holders.

Besides these gult rights, there existed a system of heritable rist gult rights that vested the gult lord with the right to independently exact taxes in cash, kind, and labor for the landlords own burse – a system that increased the independence of landlords from the imperial power. Initially, only granted to the royal family and provincial nobles, the granting of heritable rist gult rights became the rule in the regions of the newly occupied South areas.

III. Gebbar or Private Property Rights

There is some confusion in the literature regarding the meaning of the terms gebbar and the existence of private property rights during the imperial rule. Before an administrative reform in 1941, the term gebbar - which existed in the center but was then, transferred to the South - characterized “tribute-paying peasants” who were controlled by gult lords or local elites (balabbat), and suffered from burdensome tributes and services to be delivered to these authorities.

There are different interpretations of the gult system to be found in the literature. Different from much of the literature, Berhanu Abegaz (2005), for example considers land under gult rights to be “freehold”.

Again, there is disagreement in the literature about the nature of these rights. Some authors assume it was granted as gult or rist gult, Pausewang (1983), for example, writes that those rights were given as heritable gult rist rights with high security of tenure for the landlord, but Bereket Kebede (2002) insists that the rights distributed under Menelik II were limited since the landlords lacked alienation rights, could be replaced by the emperor, and had to accept governmental provisions that granted usufruct rights to local peasants on this land. Because of land granting to imperial favourites, lands belonging to the indigenous land users are reported to have been expropriated, although some emphasize that they were given usufruct rights to their plots and large-scale peasant eviction only emerged after some landlords started investing in large-scale agriculture or rented out land in the 1950s.

The literature identifies two processes that led to the emergence of private property in Ethiopia. First, after the return of Emperor Haile Selassie from exile in 1942, land tenure (what is termed 'freehold') was granted to selected individuals such as soldiers and civilian victims of the Italian occupation. Second, a tax reform in 1941 defined the land for which tax had been paid to the government as the property of the taxpayer. As a consequence, taxpaying gebbar became the legal owners of their land. As some researches witness, the term gebbar was henceforth used to refer to private property during the Ethiopian. All land, for which no tax had been paid to the government (or put differently - land for which land lord's hat pocketed tax payments made by farmers, instead of forwarding it to the government), was converted into government land thereby depriving pastoralists of their communal rights. This tax reform limited the influence of the local landlords and abolished all gult and rist gult rights, including those of the Orthodox Church. The farmers therefore were no longer required to pay tribute to the local overlords, but directly to the representatives of the Ethiopian crown.

The tax reform increased tenure security, in particular for rist rights holders in the North who had paid land tax and at the same time improved the situation of a class of taxpaying peasants in the South. Overall, these reforms, even though poorly implemented, meant the juridical recognition of some kind of private property rights for individual rights holders, including ownership rights.

However, many peasants had, under the tribute system imposed on them, lost their land or had lived on the land of the new class of taxpaying gebbar owners. In addition, many landlords had registered formally as taxpayers and thereby deprived those farmers of their land rights. These farmers then became tenants who practiced sharecropping. Dear student, sharecropping demanded from the tenant to deliver a large share of up to half of the produce to the landlords to maintain the right to use the land for subsistence production. The tenant was also subject to arbitrary demands for gifts and labour services. Scholars of the Ethiopian land tenure system claim that rist gult rights already had the quality similar to those of private property.

Dear learner, gebbar tenure is a particularly difficult terminology since it not only experienced a transformation in meanings over time, but its interpretation varies from region to region. Some authors describe gebbar farmers as holders of most complete private property rights including the right to rent and sell their land, whereas others describe the gebbar as a particularly exploitative status, turning a farmer into a slave. Pausewang notes that, starting with the rule of the settlers from the North, in the South the formerly proudly-carried name gebbar changed its meaning to that of a dependent tenant and even a slave. There is some disagreement whether gebbar can be qualified

as a kind of private property during the imperial period. Some emphasize that *gebbar* is not private property in the sense as defined by Western conceptions and that such conception was alien to customary tenure regimes where it emerged. Others add that the formal ownership of land by the crown prohibited real private land tenure. This is contested by a third group that argues that the formal ownership of the crown does not necessarily imply the absence of private property during Haile Selassie the I's rule. Some authors claim that sharecropping relations differed between the North as the contracts had been of less exploitative character than in the South.

2.2 During the Derg Regime

Dear students, I hope that at least some of you may know in general the Derg Regimes' land tenure system. As you may know, on 4 March 1975, the "Provisional Military Administrative Council" – also known as the Derg (the council) – after it had overthrown the imperial regime of Haile Selassie, announced an agrarian reform program known as Proclamation No.31/1975 "Proclamation to Provide for the Public Ownership of Rural Lands." This proclamation declared all rural land to be the property of the state (Article 3) – without any compensation to previous rights holders – and prohibited all tenancy relations (Article 4.5). The Proclamation provided the legal basis for the distribution of usufruct rights to many rural families who had been working under exploitative tenancy contracts for a small group of landlords. The reform hence implemented the "land to the tiller" approach that was popular in the 1970s. Derg justified the land reform program on two principles: (1) historical justice – to overcome the exploitative character of imperial agrarian relations; and (2) justice as egalitarianism – providing each farm family with equal access to cultivation land according to their needs.

The Proclamation made several provisions. Farmers were not allowed to transfer their usufruct rights by sale, mortgage, or lease, and bequeathing of allocated usufruct rights was limited to primary family members like spouse and children on death of the rights holder. The plot size per family was restricted to a maximum of 10 hectares, and the use of hired agricultural labour was prohibited [Article 5]. The reform was the first uniform tenure system imposed on Ethiopia as a whole. Considering the difference in agrarian relations that had existed in the North and South before the reform, the changes were more radical for tenant cultivators (and landlords) in the South than for *rist* rights holders in the North. In the *rist* system, land distribution had already been relatively egalitarian.

The Derg brought about major changes in organizational structures and institutions to implement "agrarian socialism", including the quest for collectivization of small-scale farms and the establishment of state farms. The state thereby effectively abolished the

remains of traditional institutions of rite and cult, and took over the control to distribute access to land through Peasant Associations (PA). Membership in Peasant Associations was established as the central element of the state's rural bureaucracy and became obligatory for all farmers. The leadership of the Peasant Associations was entitled to expropriate land from the landholders and distribute it equally among its members, which made the collectivity of the members of the Peasant Association proprietors of the land.

In the initial phase of the reform, especially in the South, a considerable proportion of the rural peasantry supported land redistribution. Most of the redistribution seems to have been completed as early as 1976. The proclamation ruled out the option of migration because usufruct rights were tied to the membership in the Peasant Association of origin. Thus, many Peasant Associations gradually faced scarcity of land to be distributed to new claimants. In some regions of Ethiopia, Peasant Associations therefore had to redistribute land not only of those who had married out or left but also that which had been assigned to farming families. Defer Abate (1994, 1995) reports that this redistribution was often insufficient to meet growing demands due to land scarcity. The scale and frequency of redistribution differed in the various places and regions. Redistribution occurred frequently in some densely populated districts in Amhara region, but in other localities, the Peasant Association leadership allocated the land only once during the initial distribution of 1975-1976.

Towards the end of the 1970s, the Derg intensified the collectivization program with the promotion of Agricultural Producer Cooperatives (**APC**) and the establishment of large-scale state farms. APC were to be formed by members of a Peasant Association by pooling their land, draught animals, and farm implements. The head of the cooperative automatically became the head of the Peasant Association and thereby could exert substantial political control and power over all association members. Officially, the peasants should enter APCs at their free will, but some authors report more forceful implementation of cooperatives. Still, in 1984, only two percent of Peasant Association members were engaged in APCs, and the productivity of cooperatives remained significantly lower than that of small-scale. Dear student, regardless of the weak economic performance of collectivization, "the single most important feature of the revolution" was the mass organization in the rural areas and the capture of the peasantry into a system of state control. Access to land was largely discriminatory to women, although this was not primarily due to the legislation, since men and women enjoyed equal rights to land. But women's rights depended on marriage and were not registered separately – they therefore lacked control of agricultural land. According to Zembeworke Tadesse and Yared Amare (2000), the specific position of women also differed across various ethnic groups.

Even though land rights were granted to households, in practice they were given to the registered member of the Peasant Association, usually the male head of the household, so that married women held only indirect rights to land. The widows were also landholders as primary heads of households.

Overall, the Derg regime failed to increase agricultural productivity with its agrarian reforms. At the same time, the 1975 Proclamation ensured that a much larger number of rural farm families received access to land. Tenure security under the Derg was clearly limited.

Sources of insecurity included the redistribution of land (for example, due to establishment of cooperatives or population growth), forcefully implemented producer co-operatives, which required peasants to pool their land, and compulsory resettlement. Dessalegn Rahmato (1984) observed that in many of the villages, initial redistribution occurred within the first two years after the proclamation. During this period, farm families had particularly insecure effective rights to individual plots, although they had a general entitlement to an undefined share of the Peasant Association's land endowment.

This system resembles the rist tenure of the North, but was extended from rist right holders to all members of the Peasant Associations. Broadly speaking, landless, wage labourers, tenant cultivators, and poor, powerless rist rights holders are often considered as the winners of the Derg reforms; however, we also need to note that bribery of officials was a regular practice to ensure that the better-endowed farmers would get access to a better quality or a larger parcel of land. Losers of the reform were the gult and rist gult lords as well as peasants with gebbar rights.

2.3 Under the Current System

After the fall of the Derg (military socialist) regime of Colonel Mengistu in 1991, privatization of farm collectives took place rapidly, and many international observers expected that in this process of "post-socialist transition," a transformation of land institutions towards a privatization and registration of land titles would follow, which was regarded as a means to increase productivity of Ethiopia's smallholder agriculture. However, these expectations were soon disappointed. The new constitution of 1995 approved and confirmed the state ownership of land in Ethiopia (Federal Democratic Republic of Ethiopia 1995). Article 40 of the 1995 Ethiopian constitution states that:

"the right to ownership of rural land and urban land, as well as of all natural resources is exclusively vested in the state and the peoples of Ethiopia. Land is a common property of the nations, nationalities and peoples of Ethiopia"

(Federal Democratic Republic of Ethiopia 1995, Article 40).

The article further specifies a “right to obtain land without payment” for “Ethiopian peasants” for grazing and cultivation purposes as well as a right to be “[protected] against eviction from the possessions” (sections 4 and 5 of Art. 40). The article further stipulates that any transfer of land is prohibited and “shall not be subject to sale or other means of exchange” (Ibid, section 3).

Dear student, different arguments have been advanced against, and for the recent approach. I encourage you to take a reasonable position. Some scholars have questioned if the 1995 constitution provided any differences to the land reform proclamation of 1975. There are, nevertheless, some notable differences between the rules of 1975 and 1995. The 1975 proclamation prohibited the lease of land and the hiring of labour and concealed the maximum land size per individual to 10 ha; such provisions are absent in the 1995 document (Yigremew Adal 2001, 56). Furthermore, Article 40, section 7 specifies the rights to the compensation payments for investment on land in case the “right to use expires,” also newly introduced:

“Every Ethiopian shall have the full right to the immovable property he builds and to the permanent improvements he brings about on the land of his labour or capital. This shall include the right to alienate, to bequeath, and where the right of use expires, to remove his property, transfer his title, or claim compensation for it” (Federal Democratic Republic of Ethiopia 1995, Article 40.7)

At the same time, there are serious omissions that leave tenure security unclear. In particular, the proclamation does not state the duration of usufruct rights for landholders. Broadly speaking, while the 1995 constitution and the subsequent Proclamation 89/1997 largely confirm state ownership of land as a continuation of the previous regime’s policies, they also provide some specifications that seek to take account of the necessity for a rural land and labour markets to emerge.

Several regional governments have made use of the powers vested in them in the 1995 constitution and Proclamation 89/1997 to formulate their land policies, among them Tigray Region (1997, amended 2002), Amhara Region (2000), Oromia Region (2002), and Southern Regional State (2003). According to the constitution, regional land policies need to be in accordance with federal law; all regional policies therefore validate state ownership of land and farmers only receive usufruct rights to plots of land without transfer rights, such as sale or mortgage. All regional proclamations confirm at least formally that land rights are to be granted to men and women, including the right to lease out land, although most regions restrict the period of the lease and limit leasing rights to only a share of the farmland.

Only one out of the four regional policies mentioned above rules out future land redistribution

Oromia), one does not specify (Tigray), and two other regions make it conditional on the demand

of the community and a scientific assessment of its effects on land productivity (Amhara Region,

and Southern Nations, Nationalities, and Peoples Regional State). In three out of four regional states, landholders need to comply with several user rules and management obligations to secure their usufruct and access rights.

In Tigray and Amhara regions, Proclamation 89/1997 “Federal Rural Land Administration Proclamation” transfers the authority for land administration, including rights to distribute land, to the regional governments and vests them with the power over the “assignment of holding rights and the execution of distribution of holdings” (Article 2.6). It is worth mentioning that most pastoral peripheral regions (for example, Afar, Somali) have not yet produced a regional land tenure policy. Mohammed Abdulahi outlines that the 2005 Proclamation makes it easier for federal and regional states to appropriate communal land of pastoralists to encourage private investment and simplify state-driven development projects (Mohammed Abdulahi 2007, 122).

Dear student I think we cannot go into depth on this here, but note that this is likely to increase the peripheral status of pastoralist land tenure systems and practices.

The right to use land depends on the residence in the kebele, a restriction already in place under the derg regime. At the same time, some regions formulate the aim to introduce certificates designed to increase tenure security and to reduce border conflicts. Inheritance rights have also been specified and in some case been extended beyond the core family: for example, in the Amhara region, it is allowed for land to be bequeathed to people outside the family if those helped the rights holders in times of need.

The “Oromia Rural Land Use and Administration Proclamation 56/2002” (Regional Government of Oromia 2002) grants higher levels of tenure security than the other three regional policies because it rules out a redistribution of land plots (Regional Government of Oromia 2002, Article 14.1). The proclamation grants “lifelong usufruct rights” (Article 6.1) to agricultural land “free of payment” to all male and to female residents whose livelihoods depend on agriculture (Article 5.1). However, there are

three important restrictions formulated in the proclamation that allow the state to expropriate land use rights from plot holders. Article 6.4 grants the right of expropriation if the land is required for “more important public uses”, but the rights holder needs to be compensated and can remove investments thereon. Article 14.4 specifies that “irrigation land” is excluded from the prohibitions of land redistribution, which is allowed subject to the “participation and consensus of the user community.” Those losing irrigation lands are entitled to compensation with “reasonable rain fed land.” Third, land can be expropriated if needed for irrigation infrastructure. In the latter case, even the compensation to the former rights holder is limited.

Furthermore, the “Oromia Rural Land Administration and Use Regulation No. 39/2003” (Regional Government of Oromia 2003, hereafter called the regulation) states that if land users fail to use their land in every production season (except for restoring fertility), the land use rights can be ended (Regulation, Article 3.5). According to the regulation in Article 22.1, after a period of three years without cultivation, the land will be expropriated; for irrigated land, this can be applied already after two years. In addition, the regulation imposes several obligations on land management practices (for example, Article 17).

Dear learner, in some, despite of these contradictions and limitations, the provisions laid out in the proclamation and the regulation constitute a significant improvement in tenure security compared to the situation under the Derg, at least on paper. Thus, many land rights holders in Oromia now enjoy a larger bundle of rights than under the derg and can be regarded as owners, in principle. This holds particularly for married and non-married women who also received individual rights titles. Oromian peasants now have improved exclusion rights through a relaxation of inheritance limitations and the abandoning of redistribution programs, which is accompanied by the right to rent out a share (up to half) of the landholding.

However, there are severe limitations of these rights for some rights holders. Divorced women still lack secure land rights since numerous exceptions severely limit these rights. Owners of very small plots may experience intervention by others such as co-heirs and holders of irrigation land who share the management right of ‘making improvements of the resource’ in the community where they live. At the same time, some provisions in the proclamation and in particular in the regulation attenuate this tenure security by imposing limitations on lifelong tenure (for example, by defining management obligations) or linking land rights to social status (such as denying effective equal rights of widows and divorced women). Given the number of exceptions and prohibitions, and the lack of clear specifications of responsibilities and decision criteria, the current legal framework allows for an enduring influence of the state bureaucracy on land distribution and land rights. This may offer potential spaces for corruption, political interference, and bureaucratic

arbitrariness (Dessalegn Rahmato 2004, 6).

In 2005, the federal government issued a revised proclamation, the Rural Land Administration and Land Use Proclamation No. 456/2005. Not surprisingly, the revised proclamation underscores “the right to land is exclusively vested in the state and in the people” and grants only “holding rights” to users. Holding rights include leasing rights and inheritance rights. The proclamation is designed to increase subjective tenure security of individual rights holders (peasants) and therefore emphasizes the importance of land measurement, registration, and certification of those holding rights, but the rights remain restricted. It defines certain obligations for the user, in particular restrictions of land use on highly sloped territories. It also opens the possibility for the “government being the owner of rural land to change communal rural land holdings to private holdings” (paragraph 5.3) --for example, for private investors--, which weakens pastoral communal land tenure rights significantly. The regional states are now expected to revise their regional proclamations according to the revisions in the 2005 Proclamation, but Mohammed Abdulahi suggests that the new proclamation mirrors many provisions set out in the Amhara and Tigray regional policies, that were written before the proclamation - an observation that lets him conclude that “the land tenure laws of these two states seem to be the foundations for the 2005 Proclamation” (Mohammed Abdulahi 2007, 123).

Review Questions

1. Discuss the basic features of land tenure system during the imperial regime.
2. What is the difference between the land tenure system of the Military Regime and the current system?
3. Explain the concepts of ‘Rist’ and ‘Gult’thereby show beneficiaries of such systems.
4. On one hand the FDRE constitution underscores that land is the property of the state and public so it is unsalable. On the other hand the government sales on lease tens of thousands of hectares to investors and private individuals. How could be such practice and the law be reconciled?

Chapter Three: The Objects of Real Estate Law

Introduction

Dear student, before directly dealing with the specific contents or features of the property, it is preferable to explain the concept.

Property" or the "ownership of property" is generally defined as a bundle of rights which includes, among others, the exclusive right to possess, use, and dispose of objects or rights having economic value. Thus "property" may refer to an object having a physical existence; it may refer to the legal rights growing out of such an object; or it may refer to rights which have no connection at all with a physical object. A piece of land, a copyright on a book and a patent of an idea are all property and subject to being owned.

Property is commonly divided into "real" and "personal" property. Real property consists of the earth's crust and all things firmly attached to it; personal property consists of all other objects and rights that are capable of ownership. However, what is personal property today may be converted into real property tomorrow by annexation to real property, and what is real property today may be converted into personal property tomorrow by being severed from the real property. For example, a growing tree is considered to be part of the real property on which it grows; if it is cut down and saved into lumber it would become personal property; and if the lumber is used to build a house, then it would again become part of real property.

Property is sometimes divided into other classes using a different set of qualifications. It may be classified as "tangible" or "intangible." It is tangible property if it has a physical existence, such as a building or a watch; it is intangible property if it has no physical existence, such as a patent right. And property may be classified as "public" or "private" depending on whether the government owned it or a political subdivision of the government or whether it is owned by an individual or a business organization.

The ownership of personal property may be acquired in a variety of ways. The most common ways are: (1) capture or taking possession; (2) production or purchase; (3) gift; (4) finding; and (5) accession.

I. Capture or taking possession.

Ownership of previously unowned taking possession obtained property of the unowned property. The person who captures wildlife, such as fish or game, becomes the owner of it. And if the property is abandoned - that is, the previous owner voluntarily parted with the property with the intent of relinquishing ownership - then the first person to reduce

the abandoned property in his or her possession with the intent of claiming ownership is considered to be the owner of it.

II. Production or purchase

Unless a person has agreed to produce for another person, one owns the product of one's own labours. Thus, the artist or the craft worker becomes the owner of that which s/he produced unless the artist contracted to produce it for someone else, in which case the employer becomes the owner of it. By far the most common way of obtaining ownership in our society today is by purchasing it, and an extensive body of law exists regarding the purchase and sale of personal property.

III. Gift

A gift is a voluntary transfer of personal property from one person to another person without any consideration being given for the transfer. A valid gift requires: (1) intent on the part of the donor that s/he relinquish ownership, (2) delivery as an unconditional transfer of possession from the donor to the donee, and (3) acceptance of the gift by the donee.

Gifts may be either inter vivos or causa mortis. An inter vivos gift is a present unconditional gift which, once made, cannot be revoked by the donor. On the other hand, causa mortis is a gift made in contemplation of death which is conditional and may be defeated if the donor is delivered from the sickness or peril under fear of which s/he made the gift, or if the donor revokes the gift before death, or if the donee dies before the donor. For example, suppose that Uncle Harry who is about to undergo a very serious operation gives his watch to his nephew with the implied understanding that it be returned if Uncle Harry survives the operation. This is a gift causa mortis which can be defeated if any of the three conditions mentioned above occurs.

IV. Finding

When lost property is found, the finder obtains the best right to it as against anyone except the real owner. However, some courts have distinguished between lost and mislaid property. Thus, if a property is found on the counter in a business establishment where it might be assumed that the real owner had intentionally placed it down, then the property is considered to be mislaid property and the owner of the business establishment is given the better right to it than the finder and becomes an involuntary bailee of the property for returning it to the real owner. However, if the property is found in a place that suggests it was not intentionally placed, it is lost property and the finder has a better right to it than the owner of the business establishment.

V. Accession

Usually the owner of property the addition improved that of labour or material becomes the owner of the improved property. However, occasionally someone substantially enhances the value of property or substantially changes the form or nature of the property which actually belongs to someone else, even though the improver does not realize that it belongs to that other person. In such a case, the improver obtains good title to the improved property by "accession," even though s/he must reimburse the original owner of the property for its fair market value at the time s/he converted it by improving it without the owner's consent.

VI. Creation

A bailment exists when possession of property belonging to one person is delivered to another person who intends to assume custody or control over the property and who expressly or implicitly promises to return it to the owner or to dispose of it as directed by the "owner." A bailment is a contractual situation, although that contract may be implied from the facts and circumstances surrounding the transaction as well as an express contract. Thus, a bailment may exist often where the parties do not realize it exists; for example, if you borrow your neighbor's car there has been a bailment of the automobile. In such a situation, the owner of the automobile is the bailor while the person who has temporary possession and custody is the bailee.

3.1 Real Property

Dear student, what is real property? I hope you have answered the question rightly.

Real property refers to all land, structures, firmly attached and integrated equipment (such as light fixtures or a well pump), anything growing on the land, and all "interests" in the property which may be the right to future ownership (remainder), right to occupy for a period of time (tenancy or life estate) the right to drill for oil, the right to get the property back (a reversion) if it is no longer used for its current purpose (such as use for a hospital, school or city hall), use of airspace (condominium) or an easement across another's property. Real property should be thought of as a group of rights like a bundle of sticks which can be divided. Real property is a very important type of property in property law and there are several laws which concern the handling of this type of property. Laws vary by region, with different areas having different legal standards. Anything that is not real property is personal property and personal property is anything that isn't nailed down, dug into, or built onto the land. A house is real property, but a dining room set is not that which consists of land, and of all rights and profits arising from and annexed to land, of a permanent, immovable nature. To make one's interest inland, real estate, it must be an interest not less than for the party's life, because a

term of years, even for a thousand years, perpetually renewable, is a mere personal estate. It is usually comprised under the words lands, tenements, and hereditaments.

As a general rule, the land and any somewhat immovable improvements made are treated as real property. By contrast, things like equipment or personal property because they can be moved. Rights over minerals and other deposits under the property may also be reassigned, as when someone sells the mineral, but keeps the land. Sometimes people use contracts such as sales of mineral or oil rights to generate an income from their real property without having to sell the property itself. Real property is corporeal, or incorporeal.

I. Corporeal property

Corporal chattel consists wholly of substantially, permanent objects, which may all be comprehended under the general denomination of land. There are some chattels which are so annexed to the inheritance that they are deemed a part of it, and are called heir looms. Money agreed or directed to be laid out inland is considered as real estate.

II. Incorporeal property

Incorporeal property consists of certain inheritable rights, which are not, strictly speaking, of a corporeal nature, or land, although they are by their own nature or by use, annexed to corporeal inheritances, and are rights issuing out of them, or which concern them. The most common incorporeal hereditaments, are, 1. Commons 2. Ways. 3. Offices. 4. Franchises. 5. Rents.

Dear student, the opposite of real property, personal property, roughly speaking, is private property that is moveable, as opposed to real property or real estate. In the common law systems personal property may also be called chattels or personality. In the civil law systems personal property is often called movable property or movables - any property that can be moved from one location to another. This term is in distinction with immovable property such as land and buildings. Movable property on land, that which was not automatically sold with the land, included for example larger livestock (wildlife and smaller livestock like chickens, by contrast, was often sold as part of the land). In fact the word cattle is the Old Norman variant of Old French chatel (derived from Latin capitalis, "of the head"), which was once synonymous with general movable personal property.

3.2 Fixtures

Dear learner, the term **fixture** is a legal concept that includes any physical property that is permanently attached or **fixed** to real property which once removed will cause

[permanent] damage to the real property, usually land. If the property is not affixed to real property it is considered chattel property. Fixtures are treated as a part of real property, particularly for a security interest. A classic example of a fixture is a building, which without language to the contrary in a contract of sale, is considered to be part of the land itself and not a separate piece of property. Generally speaking, the test for deciding whether an object or an article is a fixture or a chattel turns on or depends on the purpose of the attachment. If the purpose was to enhance the land the article is likely a fixture. If the article was affixed to enhance the use of the chattel itself then the article is likely a chattel. To avoid ambiguity, let see what is the relationship between fixtures and chattels.

Chattel property is converted into a fixture by the process of attachment. For example, if a piece of lumber sits in a lumber yard it is a chattel. If the same lumber is used to build a fence on the land it becomes a fixture of that real property. Often, the determination of whether the property is a fixture or a chattel turns on how much the property is attached to the land. For example, this problem arises for a trailer home. Here the characterization of the home as chattel or realty will depend on how permanently it is attached--such as, whether the trailer has a foundation.

The characterization of property as a fixture or as chattel is important. In most jurisdictions, the law respecting the registration of security against debt, or proof that money has been lent on the collateral of the property, is different for chattels than it is for real property. For example, in the province of Ontario, Canada, mortgages against real property must be registered in the county or region's land titles office. However, mortgages against chattels must be registered in the province-wide registry set up under the Personal Property Security Act.

For a trailer home, whether it is a fixture or chattel has a bearing on whether a real property mortgage applies to the trailer. For example, most mortgages contain a clause that forbids the borrower from removing or demolishing fixtures on the property, which would lower the value of the security. However, there have been cases where lenders lend money based on the value of the trailer home on the property, where that trailer is later removed from the property. Similarly, a chattel mortgage granted to allow a person to purchase a trailer home could be lost if the trailer is later attached to real property.

The law regarding fixtures can also cause many problems with property held under a lease. Fixtures put in place by the tenant belong to the landlord if the tenant is evicted from the property. This is the case even if the fixture could have legally been removed by the tenant while the lease was in good standing. For example, a chandelier hung by the tenant may become the property of the landlord. Although this example is trivial, there

have been cases where heavy equipment incorporated into a plant has been deemed to have become fixtures even though it was sold as chattels.

Because the value of fixtures can often exceed the value of the land on which they were affixed, lawsuits to determine whether a particular item is a chattel or a fixture are common. In one case in Canada, a provincial government argued that a huge earth dam was a chattel, as it was only held in place by gravity and not by any type of affixation (the claim was rejected).

In a sale of land, fixtures are treated as part of the land, and may not be removed or altered by the seller before the transfer of the land.

3.2.1 Intrinsic Elements

Dear student, an **intrinsic** property is an essential or inherent property of a system or of a material itself or within. It is independent of how much of the material is present is independent of the form the material, e.g., one large piece or a collection of smaller pieces. Intrinsic properties are dependent mainly on the chemical composition or structure of the material. To put differently, an intrinsic property is a property that is internal in the sense that whether an object has it depends entirely on what the object is like in itself. Also we can explain the concept as an "intrinsic property" is one whose possession by an object at a time involves nothing other than the object (and its parts) at that time; oppositely an "extrinsic property" is one whose possession at a time involves something else.

Dear student now let's see how our law defines intrinsic elements of an object. Art 1132 of the Civil Code defines intrinsic elements of goods as things, movable or immovable, which are regarded by custom as forming part of a thing, or which is materially united to a thing and cannot be detached there from without destroying or damaging such thing. For instance, a hay-tucker attached to a tractor may be considered by farmers as forming part of the tractor /custom of the farming community/. A house in a farm may also be considered as forming part of the land (custom).

A windshield of a vehicle is materially united with the latter and cannot be separated from it without damaging the use of the car, as the vehicle is incomplete without a windshield. Water pipes in a building cannot be detached from the building without damaging the floor in which they are buried.

Trees and crops are considered as intrinsic elements of land until they are separated there from or until a contract for their separation is concluded. The treatment of things as intrinsic elements other things will have the following effects.

1. Rights on or dealings relating to the principal thing shall include the intrinsic elements unless the parties have agreed expressly that such right or dealings shall not apply to them. For instance, a contract of sale of a land rights or mortgage of a land shall include the houses and trees that are considered as its intrinsic elements, unless the parties have expressly agreed that the sale or mortgage relates only to the principal and not to the intrinsic elements. Art 1132/1/
2. A thing that becomes an intrinsic element of another thing ceases to exist as a distinct movable thing. For instance, a water pipe fitted in a building or a newly bought windshield glass fitted to a vehicle ceases to exist as a separate thing or object of property. Hence, the right, which third parties previously had on such thing, shall be extinguished; and an owner or a person who has any other right relative to such thing cannot recover the object from the owner of the principal thing. However, such person may claim reimbursement of the value of such thing and compensation for damages based on the rules of unlawful enrichment. See Arts 1134 and 2162-2163 of the Civil Code.

3.2.2 Accessories of Things

Art. 1136 of the Civil Code defines an accessory as anything, movable or immovable, which the owner or the possessor / the Amharic version limits to the usufructuary and not other possessors/ of the thing has permanently destined for the use of another thing. For instance, if an owner of a car puts a jack permanently for the use of his car the jack shall be considered as the accessory of the car.

A tractor, or a pair of oxen, or a horse put by the owner/possessor of a land for the use of his land is considered as accessory. Similarly, a plot of land adjacent to a certain farm that is intended for the use of the farm or a private water well outside a certain farm and which the owner/possessor of the farm has destined for the use of such farm as a source of water is considered as an accessory to the principal thing, the farm.

The treatment of things as accessories of another thing shall have the following effects.

1. Without an express provision to the contrary, rights on and dealings relating to the principal thing shall apply to the accessory. See the examples given relative to intrinsic elements above. See Art 1135 of the Civil Code.
1. Temporary separation of the thing shall not, in any way, end the character of accessories. See Art 1137.
2. Rights of an owner or possessor of a thing, which is considered as an accessory of another thing shall not be affected by its treatment as such. Hence, the owner of the

principal may not raise the treatment of a thing as an accessory to another thing against the owner or possessor of the accessory. See Art 1138/1/. Note that this provision governs the relationship between the owner/possessor of the principal thing and the owner or other right holder of the thing treated as an accessory.

3. However, the owner or possessor of the accessory may not claim it from third parties in good faith who have acquired the principal together with the accessory unless his rights to a deed evidenced the accessory dated before the date when it is so destined. See Art 1138/2/.
4. Finally, the owner/possessor of a principal thing may end the character of the accessory of such thing at any time, but he cannot do so if a third party has already acquired a right relative to the principal thing with the belief that he will benefit from the accessory. See Art 1139 of the Civil Code.

Review Questions

1. Define the concepts: accessories and intrinsic elements and draw their distinction
2. Explain fixtures and show what is the difference between fixtures and accessories
3. Define corporal and incorporeal chattels.
4. Discuss the basic features of real property and then illustrate it with sufficient examples.

Chapter Four: Leasehold

4.1 Introduction

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

The “lease” in its simplest terms a lease demises or grants the ownership of the accommodation (often called the demise) to a named party. This grant is for a term of years (i.e. it is finite) and the lease gradually expires throughout its term until there are no more years of the originally granted term left. At the end of the term, the rights to the land revert to the Freeholder.

In theory lease can be granted for any term of years as agreed between the parties. However, what is generally known as a 'long leasehold flat' is a lease granted initially for more than 21 years. Until relatively recently leases initially granted for 99 years were customary, albeit the modern lease now tends to be 125 years, and on higher value flats leases of 999 years are common. Dear student, what is the longest duration of the lease contract in Ethiopia?

While at the end of the lease the ownership of the flat reverts to the Freeholder (usually called the Freeholder Version), the Landlord & Tenant Act 1954 protects the Leaseholders' rights and grants them security of tenure i.e. they are permitted to stay in the property even after their lease has ended but by a tenancy agreement at a market rent.

Chapter Objectives

At the end of this chapter students will be able to:

5. Understand the concept of leasehold
 - Understand the difference between freehold and leasehold
 - Understand the Ethiopian tenancy laws
 - Understand the Ethiopian Rural and Urban

4.2 Lease in General

Scope and Definition

When we come to the definition of the concept lease, it is defined in different ways by different scholars or documents but the basic essence may be almost the same. Now let us see common definitions offered to the concept. It can be defined as: “a written agreement under which a property owner allows a tenant to use the property for a specified period of time and rent”. This definition is synonymous to the typical definition of the concept offered by Planiol which states lease as: “A contract whereby one person engages himself to furnish to another person the temporary enjoyment of a thing for a price proportional to the time.”

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

The above mentioned definitions share some elements in common. First, lease right emanates from contractual agreements. Secondly, the right transferred to the lessee (tenant) is the use and occupancy of the property. Thirdly this interest is transferred for consideration- that the lessee must pay as rent. And fourthly, in both systems lease right provides only personal rights to the lessee, not real rights for the lease right generally may not be sold or mortgaged. The basic difference one can observe from the definitions however Planiol’s definition of lease can encompass movable and immovable, for the word “thing” can connote both movable and immovable. In the common law as well as under the Lease proclamation no. 272/2003 leases are applied to real property or land. A systematic search and analysis of the civil code also shows that the code follows the common law approach.

4.3 Lease of Houses/Tenancy

Dear learner, the word house may refer to residential or commercial. In countries where the real property market is flourishing these are very common systems 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 owns a lot of urban houses after it nationalized them using Proc. 47/1975, a proclamation to provide for the ownership of urban land and extra houses. The Rental Agency administers these houses. It puts a regulated and mostly fixed rate of rent for its tenants. On the other hand, private owners of residential and commercial houses are at liberty to put the market price for rent. This is a contract that is totally controlled by the

civil code. In this section a discussion will be made based on the civil code tenancy provisions (2896-3018).

General principles

As clearly stated in Article 2896, lease of immovable is a contract so the general provisions of the contract (Arts. 1675-2026) *mutatis mutandis* apply to the contract of lease. The applicability of these rules may be dominant in the formation and effect of the contract, as showed under Art. 1677. Regarding form of contract, 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 do not enter 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 to the contracting parties. Dear student, have you noticed what is happening on the ground? Please try to refer some lease contracts concluded between investors and the government.

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

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

1. Obligation of Parties to the Lease Contract

II. Obligations of Lessor

a. Delivery of property and warranty of peaceful enjoyment

Dear learner, as already mentioned lease is a contract and hence the parties to the contract have their own respective rights and duties. In the same view the lessor shall deliver the lessee the immovable agreed 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). Equally, at the time of delivery the house should be in good condition or free of defect. However, Article 2904 (1) defect is qualified; which reads as: “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.” The phrase in italics implies that minor defects may be excusable. If the damage or defect is serious, besides rescission of the contract, the lessor may also be subject to liability of payment of damages as envisaged under articles 2905-06. On the other hand, if the defect was apparent, means if the defect on which the lessee’s claim is based is apparent or where he knew or should have known of the defect on the making of the contract, he may not revoke the cancellation of the contract and, or payment of damages; refer Art. 2907. Nevertheless, the apparent rule is not without exception, and the exception is provided under 2908 (1) “Where the thing is in such a state as to constitute a serious danger to the life or health of the lessee or of those who reside with him or of his employees, the lessee may require the rescission of the contract even in a case of an apparent defect or 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.”

Regarding the peaceful enjoyment, Article 2911 states that: The lessor shall warrant to the lessee the peaceful enjoyment of the immovable during the currency of the lease. This obligation bounds the lessor to refrain from making unnecessary interferences that may affect the peaceful and personal enjoyment of the leased 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 the third party claimant of the leased property should make their claims against the lessor not the lessee. The lessee shall be entitled to a reduction of the rent in case of molestation by such party. Please refer to article 2912-2915 of the civil code that guarantee the protections availed for the lessee.

Dear student it should be noted that, the lessor’s duty towards the lessee is not unfettered and hence 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).

Dear student, discuss with your colleague which of the following should be warranted by the lessor.

- A. A third party brings a possessory action against the lessee/tenant.
- A neighborhood hooligans disturbing the lessee

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

b. Repairs

The other duty imposed on the lessor is that the lessor shall maintain and undertake necessary periodic maintenance or repair so that the leased house is suitable 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 repaired incumbent on the lessee (2916). the duty to repair a house leased may be determined by the contract of lease. Hence, based on the contractual agreements both the lessor and the lessee are duty bound to repair the house (Read Arts. 2916, 2919, 2953). Without such a clause in their contract, however, the code comes up with a solution under article 2954.

Art. 2954. - 2. Which repairs are incumbent on lessee.

- 1) The repairs which in the contract of lease are placed in the charge of the lessee shall be deemed to be repaired incumbent on him.
- (2) Unless otherwise agreed, repairs necessary to the doors, windows, floorboards, tiling, taps and water drains shall be deemed for the repairs incumbent on the lessee.
- (3) The works of cleaning and maintenance which become necessary by the enjoyment of the thing shall also be deemed to be repaired incumbent on the lessee.

Art. 2955. - Old age or force majeure.

- (1) No repairs which are deemed to be incumbent on the lessee shall be at the charge of the lessee where they are occasioned only by old age or force majeure.
- (2) The contract of lease may derogate such rule by an express stipulation

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

B. Obligations of the Lessee

a. Necessary Care

Dear student, there is no right without concurrent obligation the lessee does have several obligations towards the lessor. In the same view, the lessee can do nothing which diminishes the usefulness or agreeableness of the premise let. Article 2921 underscores

that the lessee should use the property with “care” and for the “purpose” it is intended to be used. On top of this, the lessee may not make alterations in the immovable or its mode of exploitation that would extend beyond the period of the lease. In particular, the lessee is duty bound to furnish the house in a way that suits its nature and purpose (read art. 2949).

The other interesting obligation duty required of the lessee is giving concern for neighbours. The lessee shall have the consideration which is due to the other persons who dwell in the house a part of which has been given to him or lease (art. 2948(1)). So this applies to co-tenants who share same building or premises. However, what about the neighbours? 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 neighbours. This may happen by sending smoke, soot, unpleasant smell, noise or vibration more than good neighbourhood.

Examples: Comment

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

b. Payment of Rent

As mentioned before lease is a contract and it does have a preparatory nature so it may serve as a tool of income generation. Accordingly, the lessee is obliged to pay the amount of rent agreed on in the contract of lease. Hence payment of rent is the second important obligation of the lessee. The time and amount of rent shall be decided by the free agreement of the parties in their agreements (Arts. 2923, 2950). Dear student, do you think that there is any limit as to the maximum amount of rent determined by law for social or policy reasons? These days, several countries limit the ceiling of lease rent for different reasons (economic, social and moral) whereas our law leaves this concern for the discretion of the parties according to the principle of freedom of contract.

4.4 Termination of Lease Contract

Dear student, a contract of lease is not an ever lasting agreement and hence it may be ended for different reasons which of the common ones are provided hereunder:

- Total loss or destruction of the property 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 on notice, for indeterminate lease agreements Art. 2966

4.5 Rural Land Lease

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

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

4.5.1 Types of Rural Land Lease Arrangements

In general, rural land lease takes three forms. This can be inferred from the reading of the Federal Rural Land Proclamation:

- Leasing farmland to other farmers
- Leasing farm land to investors
- The state leases land to investors
- Leasing to fellow farmers

Necessary conditions

It is common to notice that farmers lease rural land to other farmers because of share cropping or on cash base. Relatively renting because of share cropping is the prevalent one. Farmers may rent the land as the source income or as the result of incapacity to farm the land (because of old age, widow or divorced woman, sickness, poorness, large area, a temporary departure from the area etc.). Dear student, there is a legal limitation as to the size of the rural land subject to rent which is “a size sufficient for, the intended

development in a manner that shall not displace them...” It means, at least, the farmer should not rent all his land or a significant part of which would leave him with insufficient produce for his livelihood.

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

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

Regarding duration of lease, even if it is not mentioned in the Federal Proclamation, the maximum lease period is fixed in the regional proclamations. According to article 10(2) of the Oromian law, “duration of the agreement shall not be more than three years for those who apply traditional farming, and fifteen years for mechanized farming.” The Tigray legislation agrees with the three year period concerning the traditional farming mechanism but prescribes 20 years for the modern farming mechanism one (Art. 6(3).

I. Leasing Farmland to Investors

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

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

II. State lease of land to investors

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

Selected Readings from the Federal and Oromian Rural Land Proclamation

Art.8. Transfer of Rural Land Use Right

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

1. The rural land lease agreement to be concluded in accordance with Sub-Article (1) of this Article shall secure the consent of all the members who have the right to use the land and be approved and registered by the competent authority,
2. A landholder may, using his land use right, undertake development activity jointly with an investor in accordance with the contract he concludes. Such contract shall be approved and registered by the competent authority.

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

Oromia

Art. 10. Renting of Private Holding

4. Without prejudice to Article 7 (1) any peasant, pastoralist or semi pastoralist has the right to rent out up to half of his holding.
1. Duration of the agreement shall not be more than three years for those who apply traditional farming, and fifteen years for mechanized farming.
2. Land renting shall be valid before the law, if, and only if it is registered and approved by Oromia Agricultural and Rural development Bureau. The agreements made before this Proclamation shall be treated according to this proclamation.

3. Necessary support shall be made to make the valuation of land for renting coincide with the prospective return of that land.
4. Any organ who rented rural land is obliged to apply proper preservation and conservation for the duration he holds the land.
5. Any agreement made on land renting shall bear the consent of all individuals who have rights to that land.
6. For any rented land, the land tax shall be paid by the name of the landholder.
7. Any land-holder, having the right to use land, can make a special agreement with any investor to develop his holding. The agreement shall be registered and approved by Agricultural and Rural development office in the vicinity.

Art. 11. Land Renting by Government

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

Art. 12. Investment Land

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

4.6 Urban Land Lease

Nowadays, in our country the most predominant system of Urban land possession is lease. Hence, unlike the housing sector, urban land is governed by a special legislation, the Lease Holding of Urban Lands Proclamation No. 272/2002. And yet the civil code

may be applied whenever necessary. The scope of application of the law is “to an urban land held by the permit system, or by leasehold system or by other means before the coming of the proclamation “as well as to an urban land permitted hereafter”.

When we come to specific provisions of the urban landholding lease proclamation, under article 4 of the, an urban land shall be permitted to be held by lease:

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

The Amharic version of sub-c is different from the English one in that the former is applicable to urban dwelling houses. Means the regional government may approve directive which allows urban dwellers to get land for housing free of charge, without negotiation etc. This is sad because in practice this is happening in all urban centres of the country. The lease regulation of the city of Addis Ababa and other regions clearly show that urban dwellers may get a fixed land for residential houses free of charge. This is one character this lease legal framework shares with the proc. 47/1975.

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

It must be noted that this right shall be enjoyed so long as some form of construction/activity has been taken place; in other words bare land is not subject to all the above rights. This point is also understandable from the reading of Article 12 and Article 13 (2) (3) of the proclamation. Article 12 requires the leasehold possessor to “begin to use the land for the prescribed activity or service within the period of time set...” The time set for commencement of activities may vary from 18-30 months as the case may be as emphasized in different municipal regulations. The second point is that

the concept of real estate that we discuss in the beginning, that land constitutes the ground and the building, is reemphasized once again under article 13. This article in short says that mortgaging a use right of the land includes a building constructed on it and the accessories thereto, and conversely the mortgage of a building and its accessories includes the use right of the land. Similarly, sub 3 of the same article says that land right and the construction on it are inseparable in that during default of payment both right should be transferred to the creditor.

As one can clearly observe that leasehold right provides all the rights and privileges that private land can do. The only difference is the degree of security and restriction.

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

4.7 Lease periods

Dear student, lease is a temporary enjoyment right which is totally different from private ownership because its enjoyment right is limited in time. As the name so shows, urban land is granted to urban dwellers and investors on the bases of restriction. The enjoyment right is provisional and the state rents the land for a specific period (it could be for 15 or 99 years) through ground rent payment. Therefore the land ownership and use rights are separated and make the state out of full control over the land. Article 6 of the proclamation provides different periods of years for different types of ground leases.

Art. 6: Period of Lease

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

a) In any town:

- I. Up to 99 years for housing (personal and leasable), science, technology; research , and study, government office, nonprofit-, making philanthropist organization, religious institution;
1. Up to 15 years for urban agriculture;

2. As per government agreement for diplomatic missions and international organizations;

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

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

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

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

4.8 Renewal and Termination of lease permit

Dear student, lease holding right may be ended for good reasons; thus, the state has no right to revoke this right arbitrarily. Like any contractual agreement the expiry of the lease contract may be a reason for termination of the leasehold right. However, unlike a lease of housing, the lessee has a better position. The municipality may not take back the land whether before or on the expiry of the lease agreement unless the land is needed for public interest based works.

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

Art.7: Renewal of Period of Lease

1) Period of lease may, on the termination thereof, be renewed for the leasehold possessor as per the agreement to be reached, unless the urban land is wanted for public interest. Where the lease period is not renewed on termination because of the land being wanted for public interest however, compensation shall not be paid to the leasehold possessor.

2 Period of lease shall be renewed for the leasehold possessor in pursuance with the stipulations of Sub-Article (1) of this Article if only he has applied in , writing to the

appropriate body, to that effect within 10 years and not exceeding 2 years before the termination of the period of the lease.

3 The appropriate body must notify to the applicant in writing its decision within 1 year after the application has been lodged with it. It shall be deemed as though it has agreed to the renewal if it fails to do so within 1 year after the receipt of the application

Art. 15. Termination of Leasehold and Payment of Compensation

1) The leasehold of urban land shall be ended:

4. Where the leasehold possessor has failed to use the land in accordance with Sub-Article (1) of Article 12;
 1. Where it is decided to use the land for a public interest; or
 2. Where the period of the lease is not renewed

As it is clearly stated in the above provision, the lease proclamation provides three basic reasons for the termination of the lease contract. The cause of termination can be categorized into two: the one which is resulted due to the failure of the leasehold possessor himself. The second reason is however, accountable to the state, and as a result the leasehold possessor shall be “paid equal compensation” for his loss of the property. In case of the first and third cases however there is no any compensation to be paid.

Review Questions

3. Discuss the fundamental difference between Urban lease and rural lease in Ethiopia.
1. What are the common grounds for the termination of the lease contract in Ethiopia?
2. Explain the duties of the lessee and that of the lessor.
3. Explain the concept of lease thereby compare and contrast with the concept of freehold.
4. Identify the necessary conditions that must be satisfied where farmers lease rural land to other farmers.

Chapter Five

Registration of Immovable Property

Introduction

Dear student, land use rights are the most sensitive and their management needs the utmost prudence. Thus, there must be modern and well organized data about the specified units of immovable property. Furthermore, data concerning ownership and other property rights, boundaries, areas, land uses, market and assessed values, buildings, etc., Are all interrelated. When we come to the focal point of this chapter, it will principally deal with the problem of developing efficient information systems based on such land units by way of putting in place efficient land registration and Cadastre. It offers the meaning and nature, types, and purposes of Cadastre and land register. Additionally, discusses the types of institutions of Cadastre and land registration.

Chapter Objectives

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

5. Define the concept of cadastring
 - Explain the purpose of registration of immovable properties.
 - Explain the significance of Cadastre and land register.
 - Discuss different types of Cadastre and land registration.
 - Specify the types of institutions of registration of immovable property.

5.1 Cadastre and Cadastral surveying

Dear student, it may be your first time to hear of the term or the concept Cadastre. It is one of the most well-known means of land information systems. So what is Cadastre all about? It is a system of writing or recording individual land parcels or real properties. This chapter is devoted to the elaboration of the concept and meaning of Cadastre, cadastral agencies and its essential contribution to our legal system and economic growth.

5.1.1 Meaning of Cadastre and Cadastral Surveying

Dear student, as already mentioned here above, Cadastre is just a “system of writing or recording individual land parcels or real properties”. In other words, it is a systematic of description of the land units within a given area. If you ask me how this technical description is made, it is just made of the cadastral maps which represent the graphical

indices of the individual parcels showing the relative location of all parcels in a given region, and by written or textual records which represent the attribute files of the Cadastre, in parallel. The most essential information in the text files is the identification number and the area of the unit, usually differentiated by the type of land use.

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

Dear student, it should be noted that the definition of Cadastre is dynamic and has varied from time to time depending on the increased improvement it witnesses. A very authoritative definition, which is Cadastre 2014, is provided hereunder.

Cadastre 2014 is a methodically arranged public inventory of data concerning all legal land objects in a certain country or district, based on a survey of their boundaries. Such land objects are systematically identified by some separate designation. They are defined either by private or public law. The outlines of the property, the identifier together with descriptive data, may show for each separate land object the nature, size, value and legal rights or restrictions associated with the land object.

Cadastre 2014 can give the answers to the questions of where and how much and who, and how.

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

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

in the system, which also simplifies the linking of data within the system with other land related data.

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

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

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

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

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

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

Boundaries are the main object of cadastral surveying. Normally other features, such as roads, watercourses, land use boundaries, buildings, etc. Are included, but the primary purpose of cadastral surveying is to define the land unit both on the ground and in the Cadastre and land register. Cadastral surveys involve the determination of the boundaries

on the ground, the survey of the boundaries, and the demarcation of the boundaries. What then is demarcation?

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

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

5.1.2 Classification of Cadastre

Save the ultimate purpose of is the same, there are different forms of managing Cadastre among countries all over the world and even within a country. The factors that influence the format and management of Cadastre are the variations in history, culture, pre-existing land tenure arrangements, area, physical and economic geography, population size and distribution, the level of technology, traditional institutional arrangements, land and property law arrangements, and land policy priorities.

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

5.1.3 Purposes of Cadastre and Sustainable Development

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

First, a Cadastre helps a society to ensure its sustainable development in many ways the most common advantages are provided hereunder.

I. Cadastre brings about a guaranteed ownership and secured land tenure.

The compilation of land information in the Cadastre should provide formal identification and, in some systems, legal proof of ownership. All interested persons should be certain as to which people have interests in the land parcel and to what extent (limitations).

II. Cadastre provides security for credit and improves investment.

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

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

III. Cadastre helps develop and monitor land markets.

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

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

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

IV. Cadastre highly enhances real estate taxation.

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

V. Cadastre is an effective tool to protect State lands.

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

VI. Cadastre helps reduce land disputes.

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

VII. Cadastre plays a significant role in formulating, simplifying and monitoring land reform or policy.

It provides excellent opportunities for identifying problems associated with the development and implementation of land policies. The FIG Statement on the Cadastre

identifies many matters which can be monitored and controlled with the assistance of Cadastre:

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

VIII. Cadastre can effectively ease urban planning and infrastructure development.

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

5.1.4 Features of Effective Cadastre

Dear student, it is advisable to put some guidelines as to what an effective or modern Cadastre should consider. The first thing is that of scope. Geographically, it should be set at a countrywide level to meet fully its goals and avoid some unwanted results such as economic inequality. It should have permanent continuity. Second, it must be of an official nature run by a trusted and independent administrative agency. Third, a Cadastre must function based on sound, detailed and practical legislation. Fourth, a Cadastre should be available to any interested users through well developed procedures that are

well publicized, simple to follow, inexpensive and responsive to customer needs (user - driven). A fifth, a good Cadastre should develop a well-functioning financial regime. While the cost of initially establishing the Cadastre is usually fully borne by the government investment, its subsequent maintenance should be based on cost recovery system, or even could be designed to generate additional revenue for the government. A sixth, a good Cadastre should develop a career structure that ensures that staffs are well motivated and trained in their respective tasks.

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

The propensity in some countries to squeeze the issues related to property into the departments of mapping and information technology has obscured the real nature of property. Property is not really part of the physical world: its natural habitat is legal and economic. Property is about invisible things, while maps are resemblances of physical things on the ground. Maps capture the physical information of assets but miss the big picture. Without the pertinent institutional and economic information about extralegal arrangements (and then replace these by the law and formal property system) they cannot capture the reality outside the bell jar. They are thus unable to do their real job, which is to help anchor the property aspects of assets in physical reality to keep the vitality and physically in sync.

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

5.2 Meaning and Importance of Land Register

Dear student, the relationship of land registration and Cadastre is a bit confusing concern. The broad application of Cadastre includes land registration. In a narrower sense, it does not include land registration as it is understood to mean simply a systematic description of the land units within a given area. Now we should be interested to identify land registration from this narrow meaning of Cadastre.

Some writers refer Cadastre as 'land register' but this is clearly confusing as the term 'land register' is used to denote the register of title, i.e., Land registration. Hence, if at all

distinct terminology is apt to be used, we should never use a land register or land registration to refer to Cadastre. It has been suggested by some that land registration be called 'legal Cadastre'. This term seems to be interesting as it shows the traditional focus of land registration, as will be explained below. Gerhard Larsson prefers to use the term '(legal) land register'. However here we prefer to use the term 'land register' or land registration at least for precision. However what is land register all about and how does it differ from Cadastre?

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

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

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

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

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

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

5.2.1 Classification of Land Register

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

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

5.3 Ethiopian Legislation on Immovable Registration

Dear student, this section is committed to how is the registry of immovable property carried out, its limitations and available legal framework. The significance of a certain Cadastre may be determined by whether it is based on well founded and practical legal framework. All systems depend on a sound legal framework of land laws and specific laws on land registration and Cadastre. Land laws must establish an effective Cadastre and show registrable rights including those other than ownership. In this regard, governments must play the role of easing the operation of a land and property market,

enable a mortgage market to function and ensure that citizens enjoy security of tenure by providing particular laws.

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

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

In despite of its limited applicability, in our country the predominant legal framework for the registration of real property is the Civil Code. One title, Title X, is devoted for this purpose and is entitled as “Registers of Immovable Property”. The title includes 93 articles governing this important area of high economic significance. These provisions are contained in 4 chapters. The Code does not provide different chapters or sections for Cadastre and land register; it regulates Cadastre and land registration in an unified approach.

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

Art. 3363. - Registers of immovable property.

(1) Title X of this Code relating to registers of immovable property shall not come into force until a date to be fixed by Order published in the Negarit Gazeta.

(2) Until such date has been fixed, the provisions of the following Articles in this Chapter shall apply in lieu of the provisions of Title X.

Art. 3364. - Transfer or extinction of ownership.

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

Art. 3365. - Easements and restrictions of ownership.

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

Dear student, what did you perceive from the wording of the aforementioned legal provisions? I am sure that you have noticed that they are not binding instead they stipulate that customary law will be applicable to govern different situations. It is true that even these provisions are not complete and up-to-date due to the various changes that occurred in Ethiopia after their adoption, however, it is undeniable that they meet the minimum standards for Cadastre and land registration and could, if applied, contribute irreplaceable to the country's development. Nevertheless, the government and all stakeholders should take all necessary measures to come up with the up-to-date and comprehensive legal framework.

When we come to the focal point of our discussion, chapter 1 of Title X regulates “keeping of registers and publicity”. The principle of registration of real property is provided under Art. 1553:

Art. 1553. Principle

Registers of immovable property shall be kept, in each Awradja Guezat(currently equivalent to zone) of the Empire of Ethiopia, by the keepers of registers of immovable property.

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

Art. 1556. - Principal registers.

In each place of conservation and for each district, a register of property and a register of mortgages shall be kept.

Art. 1557. - Register of immovable.

Where the state of the Cadastre allows the adoption of such system, a register of immovables shall be kept in each district.

Art. 1558. - Register of owners.

Where the state of the Cadastre does not allow the drawing up of a register of immovables, a register of owners shall be kept in each district instead of such register.

Art. 1559. - Other registers.

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

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

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

5.4 Register of property

Here, the term property stands for the interests or rights attached to an immovable object, i.e. Land or buildings. What is then register of property? For better understanding, let look in the following legal provisions

Art. 1567. Register of property. - 1. Principle.

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

Dear student, register of property means registration or record of acts such as contracts which establish, transfer, modify or extinguish ownership right over land or building. But we should understand that the interest or right over an immovable is not only ownership;

it can also be other such as use right and possession. This definition conforms to what is normally called land registration as we saw earlier.

Art. 1568. 2. Particular acts concerning the property.

In particular, the following shall be entered the register of property in conformity with Art. 1567:

- (a) Acts of sale, donation, contribution in a partnership, partition compromise and contracts creating joint ownership, where such acts have an immovable as their subject-matter; and
- (b) Acts by which a heir or a legatee accepts a succession or a legacy relating to an immovable; and
- (c) Judgments which pronounce the annulment, revocation or dissolution of the acts above mentioned; and
- (d) Judgments which give a decision as to the ownership of an immovable on an action for the recovery thereof; and
- (e) Judgments which pronounce the sale by auction of an immovable because an attachment effected by the creditors.

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

The following shall also be entered the register of property:

- (a) All acts purporting to create, recognize, transfer, modify or extinguish a right of bare ownership or usufruct or a right of habitation over an immovable; and
- (b) All acts purporting to create, recognize, modify or extinguish a servitude; and
- (c) All acts purporting to create, transfer, modify or extinguish a contractual restriction of a right of ownership or of usufruct relating to an immovable.

Art. 1570. - 4. Legal actions.

Legal actions which aim at obtaining a judgment recognizing, transferring, dissolving or extinguishing the right of ownership or other right in rem over immovable shall also be entered the register of property.

Art. 1571. - 5. Leases and acts concerning rents haven't fallen due.

The following shall be entered the register of property:

- (a) Leases relating to a dwelling-house or apartment, concluded for a period of more than five years; and
- (b) Assignments of rents not fallen due, covenanted for a period of more than three years; and
- (c) Discharges for rents not fallen due given in advance to a lessee or farmer tenant for a period of more than three years.

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

5.4.1 Register of Mortgages

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

Art. 1573. - Register of mortgages. - 1. Principe.

The following shall be entered the register of mortgages:

- (a) All acts purporting to create, modify or extinguish a right of mortgage or antichrists; and
- (b) All acts purporting to transfer a debt secured by a mortgage or a right of antichrists or purporting to assign the benefit of priority attributed to such right by the law.

Art. 1574. - 2. Attachment

Applications for the judicial sale of an immovable on the initiative of a creditor, whether enjoying a right of the mortgage on such immovable, shall also be entered the register of mortgages.

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

I. Register of Immovable

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

Art. 1575. - Register of immovables. - 1. Principle.

(1) Every immovable existing within the district shall be registered in the register of immovable under its number in the Cadastre, and a leaf be assigned to it.

(2) The register shall contain, on each of its leaves, a summary description of the immovable made with the object of its individualization.

(3) All acts subject to registration which concern the immovable shall be mentioned on the leaf with an indication of their reference number in other registers and of their date.

Art. 1576. - 2. Conformity with cadastral survey plan.

(1) The registration and the description of each immovable in the register of an immovable shall be made according to the measurements and indications of the cadastral survey plan.

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

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

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

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

II. Register of Owners

If a register of immovable is not feasible in the circumstances, then register of owners shall be kept. However what does register of owners mean?

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

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

Art. 1584. - 2. Immovable owned in common

(1) Where an immovable belongs to several owners a leaf shall be drawn up in the name of each joint owner.

(2) The position of each one shall be mentioned in the leaflet relating to him.

Art. 1585. - 3. Ownership of several immovables.

Where a person owns several immovables in a district, there shall be drawn up in his name as many leaves as he has separate immovables. Register of owners involves the registration of the names of the persons who are showed as owners of a real property according to acts relating to register of property or register of mortgages. It does not matter whether a single real property is owned or possessed by several persons or a single person owns or possesses several immovable objects.

III. Effects of Registration

Dear student, the point that needs a special attention is that what the effect of registration is. Undoubtedly, registration of real property comes up with its own effects. The notable effects are provided in provisions provided hereunder.

Art. 1637. - The duty to register acts.

(1) The keepers of registers of immovable property may not decide the validity of acts which are presented to them for registration in the registers.

(2) They shall register such acts without delay when the formalities required by the law have been performed by the interested persons.

(3) The registration of an act in the registers of immovable property shall not constitute a decision about validity.

Art. 1638. - Certain date.

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

Art. 1640., - Ignorance of a registration.

(1) No person may take advantage of the fact that he did not know of a registration entered the registers of immovable property.

(2) Nothing shall affect the liability of the keeper of the registers and of the State, where such ignorance is due to a fault in the functioning of the service.

Art. 1641. - Conflict between two registrations.

(1) Where two persons have required from the same person a right subject to registration, the one whose right has been registered first in the registers of immovable property shall be preferred.

(2) The right of the second shall be extinguished insofar as it is in opposition to the right which has been registered first.

(3) Nothing shall affect the rights of such second person against the person from whom, he has acquired the immovable.

Art. 1642. - Rights registered on the same day.

(1) Where two rights which are incompatible with each other are entered the register on the same day, preference shall be given to the person whose title is the older.

(2) Where the titles are equally old or the priority of one relative to the other cannot be established, preference shall be given to that number of the registration which in the register comes before.

Art. 1644. - Bad faith.

(1) The bad faith of the person who has requested the registration or required the right to which the registration relates, shall not affect the validity of the registration.

(2) In such case the person to whom registrations is prejudicial may claim damages by proving in a clear manner the bad faith of the defendant.

Art. 1646. -- Notice of registration to the owner.

(1) The person who has registered a right in the registers of immovable property shall, within eight days, serve on the owner of the immovable to which such right relates a copy, certified by the keeper of the registers, of the form which has been entered the registers.

(2) He shall be liable for the prejudice that may be caused to the owner of the immovable or to third parties by reason of his failing to comply with such formality.

The worth mentioning issue here is that whether registration is a validity requirement. Some believe that no registration, no validity however, registration has nothing to do with the validity of the contract/act.

In other words, “The registration of an act in the registers of immovable property shall not constitute a decision about validity.” If so, legally speaking, what has registration to do with? It has to do with publicity. Please read the following provisions of the Civil Code:

Art. 1561. - Publicity of registers. 1. Principle.

The registers of immovable property are public.

Art. 1562. 2. Registers of immovables and of owners.

(1) Keepers of registers shall, on request, deliver a certified true copy of the leaf concerning a particular immovable which is to be found in the registers of immovables.

(2) They shall, on request, deliver a certified true copy of the leaf or leaves concerning a particular owner which are to be found in the register of owners.

(3) They shall, where necessary, deliver a certificate showing that the leaf of an immovable does not contain any registration or that no leaf concerning a particular owner exists in the register.

Art. 1563. - 3. Principal registers or supporting documents.

(1) Keepers of registers of immovable property shall on request deliver certified true copies of the acts which are registered in the registers of property or of mortgages.

(2) They shall on request deliver certified true copies of the supporting documents kept by them.

Art. 1564. - 4. Form of copies or certificates.

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

Art. 1565. – Fees to be charged.

(1) The Ministry of Agriculture shall fix the fees to be charged in respect of the various registrations in the registers of immovable property.

(2) It shall fix the fees to be charged in respect of the delivery of copies or certificates by the keepers of registers.

What we understand is that the registration of real property is open to the public and that the registration authority or officer has the primary task or duty of giving any requested information as to the various types of register-property register, register of mortgages, register of immovables and register of owners. Any interested party has the right to have access to this land related information for any purpose or transaction with owners, possessors, or immovables. The government will in return get considerable income by charging fair fees for the important service it is rendered through efficient supply of immovable information. Dear student, this is actually just the most important operation of Land Information Systems in almost all parts of the world today.

Once the registration is kept public and accessible to the public, no one can argue on the ground of lack of knowledge about any information contained in the register of any type. In fact, the real property registration officer can be held liable for any professional fault committed relating to the task.

Have you now seen that by virtue of the Civil Code provisions just mentioned here, registration does not affect the validity of the contract as between the contracting parties? But we should mention here that today on the part of the courts this issue is very controversial and that the Federal Supreme Court has recently decided that registration affects the validity of the contract on a real property. What is your position? Please read the attached case?

5.4.1. Registration of Rural Land

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

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

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

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

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

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

After 1997 some policy initiatives are made towards establishing sound land management and land administration system through rural land registration and certification in Oromia, Amhara, Tigray and Southern Nation Nationalities and People Regional States. Accordingly, several of these states have adopted rural land

administration laws. For example, ANRS has endorsed its own land law proclamation no. 46/ 2000. This proclamation enables the state to determine the administration and use of the rural land. Article 6 (3) of the same states that, “so long as the land users use the land according to the established rules, this proclamation assures and secures their holding and use rights” It further states that “The objectives of the rural land administration and use policy and proclamation are directed towards enabling the peasant to work for sustainable development and making the same the beneficiary of such development by ensuring tenure security” To implement the objectives of this law the state enacted proclamation no. 47/2000 that established the agency called Environmental Protection, Land Administration and Use Authority (EPLAUA).

The Regional Council of ANRS later replaced the Rural Land Administration and Use Proclamation no. 46/2000 by proclamation no. 133/2006 for several reasons. This law dictates that, “any Rural Land given to the right users shall be measured and the cadastral maps get prepared by the authority in a traditional way or modern tool. Hence, a system of unique identifier shall be designed and implemented to understand clearly each parcel of land. The demarcation that shows the boundary shall, also, be made on the land”

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

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

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

5.4.2. Registration of Urban Land

Dear student, it was already mentioned that the Civil Code provisions on registration of real property do not make a distinction as between rural and urban land. Apart from that,

while there are emerging laws regarding rural land registration, urban real property registration, if at all exists, is done without legislations; there are different customary activities here and there.

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

5.4.3 Real Property Registration Authorities

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

Art. 1553. - Principle.

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

Art. 1554. - Organization of the places of Conservation of registers.

(1) The appointment and the status of the keepers of registers of immovable property and of their assistants shall be as prescribed by the Ministry of Agriculture.

(2) The same Ministry shall prescribe the material organization of the places of conservation of the registers of immovable property and ensure the regularity of their functioning.

(3) It shall take the necessary measures for the keeping and the conservation of registers of immovable property.

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

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

Authority was established in 2000 by proclamation. The same is true for other regional states.

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

However, since 2004, the data collection and updating activities had stopped, which hampered the completion of the intended project. That means the real property registration process had ceased to operate. The reasons for this are: lack of general awareness of Cadastre, lack of understanding the significance of Cadastre on the part of the administrators in the municipality, operating the system by simple guess without clear guidelines and procedures (e.g., No regulations), lack of correct attribute and socioeconomic data, lack of fairness and independence where the powerful people were advantaged at the cost of the weaker people, non-conformity with the physical planning and resulting in such as closing roads. These problems in turn resulted in division of opinion among the task force themselves- whether it should continue or not in that way; and chaos in the urban people. Only in 2006, a new project was designed to begin the stopped real estate registration system. Time will reveal if the new project is going to be successful.

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

Review Questions

- I.** What is the significance of registration of immovable property?
- II.** Discuss the concept of cadastre and its practical applicability in Ethiopia.
 - 1. Explain the dominant defects of our law that deals with immovable properties.
 - 2. Identify the responsibilities of authorities established for the registration of immovable property.

Chapter Six: Transaction of Real Property

Introduction

Dear distance learner, so far we have dealt with that are devoted to several crosscutting issues. Equally, this chapter is devoted to deal with the transaction of real property which may be the most sensitive area in our country and may also be globally. In particular, this chapter will discuss in detail sale of real property, corresponding obligations of the seller and the buyer, the legal formalities need to be satisfied, and legal framework that governs the transaction of real property.

Chapter Objectives

At the end of this chapter students will be able to:

3. Explain how does transaction of real property undertaken,
 4. Discuss the corresponding duties of seller and buyer,
- Explain the nature and meaning of various types of real property transfer/transactions.
 - Show the possible legislations that address various real property transactions,
 - Evaluate the advantages and disadvantages of private/public ownership of land, and
 - Appreciate the economic significance of property transactions.

General Overview of Sale

Sale is the act of selling a product or service in return for money or other compensation. It is an act of completion of a commercial activity. Sale of real property is one of the most interesting transactions; however, all real property is not subject to sale. In fact, the case may vary from country to country, for example, land is not salable in Ethiopia.

6.1 Scope of Sale Today

Dear student, the sale of real property is not a free ride transaction. As already mentioned, there are several legal limitations. The nature and scope of limitation may vary from time to time. Nowadays in Ethiopia land is not subject to sale, in fact the private ownership of land was abolished since March 1975, and land belongs to the public since then. In the same view, the legal possessors of land are entitled to usufruct

right instead of ownership. The 1995 FDRE constitution has reaffirmed what the previous regime has established by institutionalizing the state ownership of all rural land. Accordingly, Art. 40 of the Constitution it is stated as:

The right to ownership of rural, urban land as well as ownership of all natural resources is exclusively vested in the state and the peoples of Ethiopia. Land is a common property of the nation nationalities and peoples of Ethiopia and hence not subject to sale, exchange or mortgage. This signifies the state and the people have equal right relative to the right to ownership of land. The land-holders have other rights than sale or purchase right mainly usufructuary right.

Dear student, by now I hope you are familiar with the concept, usufruct. It is the right which is derived from the two Latin words "Usus" and "Fructus" which eventually became one (Usufruct). It is a real right to enjoy a thing belonging to another same goes for holding right too. Usus (use right) refers to the right to avail ones of physically a thing for one pleasure or personal profit in accordance with the nature of the thing (Planiol).

Generally the usufructuary enjoys all rights to which the owner himself could enjoy. Nevertheless, there are some limitations to it i.e. the usufructuaries are not permitted to destroy or consume the thing itself which in other words mean the usufructuary has no right of abuses. Likewise, under holding right both farmers and pastoralists have only the right to use the land while the right to ownership of land remains in the hands of government. They have no right to abuses i.e. holding right lacks the right to dispose the land as one thinks fit except through the mechanisms enumerated under the law here.

When we come to the other element of usufruct; fruits; strictly speaking fruits are products which a thing may produce at regular interval without diminution of its substance (Planiol).

In the like manner, the holder of use right over land has the right to use the land or to derive revenue from it by leasing it to another person or investor. In short, usufruct confers double right on their holders i.e. the right to use the thing (usus) and the right to receive the fruit (fructus).

6.2 Rights and Duties of Seller and Buyer

Dear student, sale is a special contract and parties to contract have corresponding rights and obligations. Under this section the duties of the parties (seller and buyer) will be discussed.

1. Obligations and Rights of the Seller

In a contract of sale, obviously there would be at least two parties, that is, the seller and the buyer. And there are obligations which should be performed by the seller to effect the complete transfer of ownership of the immovable sold. There are also rights.

I. Obligation to Transfer unassailable Rights over the Immovable

When we say transfer of ownership, the transferor has to be the true owner of the thing. The common law maxim NEMO DAT QUOD NON HABET perfectly applies here because a seller cannot transfer a right (ownership) he himself does not have. In the first place the seller must have unassailable right - a right that cannot be defeated, questioned or disputed. A seller should have a perfect title to transfer on an immovable property to a purchaser. Art. 2281 of the Civil Code states, "a seller shall take necessary steps to transfer unassailable right over the thing." The obligation to transfer unassailable right relates to the obligation as to title and one can say unassailable right means perfect title.

The seller has to show a good title, that is, to state all the matters essential to the title contracted to be made. A good title exists when the seller shows that he alone or with the concurrence of some person or persons whose concurrence he can require, can convey to the purchaser the whole legal estate and equitable interest on the thing sold. We can extend the unassailable right concept to warranty of title where the seller covenants that he has marketable title so that no one comes and dispossesses or evicts the purchaser from his enjoyment and right of ownership.

Normally, when a purchaser signs a contract of sale he expects full ownership of the thing for exchange of his money. Obviously he wants the physical possession of the thing but this will do little to him. More than this he wants to have marketable title.

The seller is assumed to be selling his whole interest in the thing he is required to convey that estate free of encumbrances. However this is true without any stipulation to the contrary. This is because the purchaser is deemed to know all encumbrances affecting the immovable property. Usually acts whether public or private purporting to recognize, transfer, nullify the right of ownership of an immovable shall be registered in the register of property.

Any serious defect of the title will allow the purchaser to repudiate the contract and sue for the return of his money. A seller to hold the purchaser to the contract must disclose defects of the title unless it is shown that the purchaser knew at the time of the contract that the former had only a defective title. So here there is warranty given by the law that the purchaser, if he will be evicted, will hold the seller.

According to Art. 2880, the seller is required to declare to the buyer rights of third parties on the immovable sold where such rights may be set up against the buyer independently

of the registration of in the registers of immovable property. However those third parties' rights on the immovable which are registered may not be required to be declared by the seller because they are open to the public. However, the contract may compel the seller to declare these rights even though they are registered.

Now what may be right of third parties on the immovable that are independent of registration? According to article 1567 of the civil code "all acts ...Purporting to recognize, transfer, modify or extinguish the right of one or more persons over an immovable shall be entered the register of property." When we say a third party has an interest on a certain immovable property, it is to mean that we are recognizing his interest. This recognition in turn has to be made in a certain act (like a contract) and this should also be registered in the register of immovable. So it may be difficult to assume that third parties may have interests or rights on an immovable independent of the registration.

Probably, third party rights over an immovable property which the seller is required to declare may be those payments to be made to the government like taxes of dwelling houses, debt of the owner he might have borrowed from a bank to build the house. These are encumbrances of the property which may not be registered but should be declared to the buyer.

When a seller agrees to sell an immovable property, the law imputes to him a covenant that he will convey a marketable title unless the purchaser stipulates to accept something less. The phrase the law imputes to him a covenant implies he will give a good title unless such a covenant is expressly excluded by the terms of the agreement. What is stated under Articles 2282 and 2283 of the civil code is similar to the above point. Because, the seller warrants the buyer against any eviction which may be suffered by the latter. However, this is true as far as the buyer does not have the knowledge as to the defects of the title or he does not risk eviction.

Even when the conveyance or transfer is to be made without warranty, still the immovable property is to be transferred if and only if the transferor has title to the property, otherwise he cannot transfer it. If the ownership right is subject to a right which may take away part of the property the transferor does not in the full legal sense transfer the property because there is an outstanding interest which the transferor's title does not cover.

Generally, one of the important and basic obligations of the seller is to transfer unassailable right over the immovable sold to the buyer. Failing this, the buyer can't be owner of the thing.

II. Obligation to Furnish Necessary Documents

In the transaction of real property, transfer of ownership of immovable properties has paramount importance. In the same view, Art. 2879 of the Ethiopian Civil Code states that, the seller does have a responsibility to make available the necessary documents. The legal obligation is stated as: "The seller shall furnish to the buyer all the documents necessary to enable the buyer to cause the transfer of the immovable to be registered in the register of immovable property".

Please look at Art. 2301 of the Civil Code and compare it with Art. 2879. What differences do you see? Of the two provisions which one should prevail if there is inconsistency?

The issue here is that what are those necessary documents which need to be delivered to the buyer so that the buyer can make or cause the transfer of the immovable property?

Dear student, the means of proving ownership of movables and immovables are different. For example, ownership right of an immovable property is proved by a certificate of ownership, which may not be the case frequently of movable property. It is to this effect that the title the administrative authorities issued deeds to show that a given immovable belongs to a certain person. And the buyer would not have entered a contract of sale had he known that the seller had no title deed. Because how can the buyer be sure, or at least presume that the seller is the owner? If title deeds are very important for claiming ownership in transfer of ownership cases, they should be delivered to the buyer as they are necessary documents. So when article 2879 says necessary documents, title deeds are surely amongst them.

Title deeds are used as a tool whereby the interests in immovable are evidenced. If of transfer of ownership they serve the purpose of determining that the transferor has the title or interest to be transferred, that he is entitled to make transfer, and that the transferee has the right to receive it. The agency which is authorized to effect the transfer of ownership of immovable may not register or recognize the right of the buyer without the furnishing of title deeds of the previous owner to it. This is because the basis for registration of transfer of ownership of an immovable property is the former registration. So the delivery of title deeds is one of the obligations of the seller and then title deeds are necessary documents.

The other important document to be delivered to the buyer is an authenticated contract of sale. As it is stated under article 1723 of the civil code, contract of sale of an immovable property shall be in writing and registered with a court or notary. If an owner wants to transfer his right over an immovable, he has to conclude a separate contract with the one to whom ownership is to be transacted.

If it were the case that only the seller was to be given the authenticated contract (deed), it would be the obligation of the seller to furnish this document as it is one of the necessary documents to cause register and the transfer of the immovable.

The competent authority to register the transfer of an immovable property needs to know the consent of the two parties. Their consent is expressed by the contract of sale which is certified by the notary who determines whether the legal requirements like capacity, consent; legality, morality, etc are fulfilled. Since the contract of sale of an immovable is a document which is necessary to cause the transfer of ownership of immovable property it is one of the obligations of the seller to deliver it to the buyer.

The other necessary documents which are required to be delivered to the buyer are certificates as to the payment of tax, clearance certificates from the Construction and Business Bank, usually known as Mortgage Bank, etc. The offices in which a given house is situated demand taxes from owners of urban houses. Such taxes have to be paid by owners of the houses before the conclusion of the contract of sale of a given house. The owner, to sell his house, has to get a kind of certificate which assures him that he has already paid money borrowed from the banks.

Mortgage Bank lends money to individuals so that the latter would build houses. Individuals after they have built houses will get title deeds which guarantee their ownership right. But when they are to exercise their widest right, that is , alienation by contract of sale, donation or will, they have to get a clearance from the Mortgage Bank whether they have paid all the money they borrowed. That clearance is a document and it should be delivered to the buyer.

III. Obligation to deliver

In contract of sale, delivering the subject of sale(the sold property) is one of the main obligations of the seller. The seller of a thing is bound to deliver such thing, and to cause the ownership thereof to be vested in the purchaser. The delivery of the immovable can be made in any manner the parties wish. However, in some countries, remission affected usually delivery of the keys or titles.

Under the Ethiopian law, delivery of the thing is a prerequisite in contract of sale. This is to mean that the contract of sale cannot be performed unless; the subject of the contract is delivered to the buyer. Unlike movables, immovables are fixed by their nature and it may not be easy to handover them physically.

Under Ethiopian law, we have an authenticated contract of sale of immovables. And the seller by delivering the authenticated contract of sale and his title deed to the buyer

effects his obligation of delivery of the immovable in the transfer of ownership of the immovable. Dear student, what do you understand by this statement?

So, it is through the means of the authenticated contract of sale and the title deed that delivery of an immovable property can be effected. All these show us that natural physical delivery of an immovable property is impossible. So the obligation to deliver has to be seen in the light of the obligation to furnish the necessary documents. Apparently, when we say the actual physical delivery is impossible, it does not mean that the seller should remain in possession of the immovable property. It is because of his own will that he sold his property. As a result once he sold his property, the buyer must be placed into the enjoyment and effective possession of the immovable.

B. Rights of the Seller

I. Right to Take the Payment of Price

Dear student, the seller transfers the ownership right to the buyer for consideration. Accordingly, the seller has the right to be paid the payment which is the price of the property sold. Unless agreed to the contrary, delivery of the thing by documents and payment of price shall be simultaneous. That is when the seller delivers the thing by instruments that transfer ownership rights over immovable; he should be paid the price of the thing. It is his right to take the payment of price. It is with the expectation of receiving money that he sells the property he owned. Thus the seller's obligation to give the thing and the right to take the purchase money are the two faces of the same coin.

The parties may, however, agree in their contract as to the payment of price, that is, when and where to pay. The simultaneity rule applies if nothing is agreed on in the contract on such matters. The right to demand the payment of price of the thing sold by the seller is an extension of the widest right he has over the thing. As a result he has to take money in return so that he will have the ownership right of the money.

II. Right to Retain Necessary Documents

As we have mentioned, the necessary documents are instruments which help the buyer to cause the transfer of ownership of the immovable property. If the buyer cannot or does not have these instruments, it will be difficult for him to get registered the right transferred to him by the contract of sale.

In the preceding section it is stated that the seller should be paid the purchase money of his property sold. Now, what remedy does the seller have if he is not paid the price? Unlike movable properties, immovable properties are not subject to physical delivery. The delivery of the sold property is effected by executing documents and then delivering

them to the buyer. Then if once the documents are delivered, we cannot say that the seller can have the right to retain the thing.

The law has to create a means whereby the seller will be protected when he is unpaid. The seller cannot guarantee his right of payment of price by retaining the possession of the immovable he sold. This is because once he entered a contract and that contract is authenticated and delivered to the buyer, whether the seller retains the thing or not, the buyer can cause to transfer the ownership of the thing to himself.

So when it comes to immovable properties, we can extend the application of Article 2278(2) of the civil code to retain necessary documents and can say the seller can retain the documents if he is not paid the price until the payment is effected. The ownership right will not be transferred to the buyer unless, and until the necessary documents are delivered to him. Dear student can you think of an example for this kind of transaction?

2. Rights and Obligations of the Buyer

1. Obligation as to the Payment of Purchase Money

Dear student, the buyer's core obligation in a contract of sale is to pay the price at the time agreed, or if no time has been agreed, concurrently with the delivery of the property. He must transfer the ownership of the money to the seller. The civil code clearly states the payment of price by the buyer as a mandatory obligation; Art.2303 cumulative with Art. 2875 says, "The buyer shall pay the price".

The obligation to pay the price includes the obligation to take steps provided by the contract or by custom to arrange for a guarantee of the price. The buyer may be required to open a credit account so that when time as to payment reaches he can pay easily. The contract may also provide that payment will be effected by installments. He may also pay the price in cheques. Such kinds of activities are to mean taking steps as to the payment of the price.

As a rule payment of purchase money is effected at the time of delivery of the thing. Nevertheless this does not mean that agreement otherwise is impossible. Buyers do not usually pay the price in whole at the time of conclusion of the contract. Instead they pay some amount at the conclusion of the contract and the latter usually when ownership is completely transferred to the buyer.

II. Obligation to Take Delivery of the Property and Documents

The buyer is required to take and come into possession of things which he bought. This may be because of conservation expenses and risk purposes. Nevertheless, in immovable

properties it seems the buyer may not be required to take the thing. Instead he would be expected to come into possession of the thing or he could be required to take possession. However, for transfer of ownership cases, possession of the thing is irrelevant. What is relevant and important is possession of an authenticated contract of sale and the seller's title deed.

The obligation to take delivery of documents is not clearly stated under the civil code. However, the *acontrario* reading of article 2309 (3) of the civil code shows that since documents concerning the thing conform to the terms of the contract as to these documents, the buyer will be obliged to accept them.

Title deeds are written certificates which are issued by the administrative authorities which show that a certain named individual is presumed to have ownership right of a given immovable property. It is these instruments which help the buyer to cause register the transfer of ownership into his name. If the seller has a marketable title and if the buyer has entered a valid contract of sale, authenticated by the concerned Office, then he will be required to accept them when they are delivered to him by the seller.

III. Obligation to Have the Instruments and Title Registered In the Relevant Office

Registration of interests in immovable is the most important requirement in the transfer of ownership that is why evidencing interests in immovable by some public record has long been acknowledged. For the transferee's right to be recognized, he must have registered the right transferred to him. Article 1185 of the civil code says an entry in the registers of immovable property is required for the transfer of ownership of immovable property. Contract of sale between parties is in the first place a requirement not a cause. Entering a valid contract is not enough. There is additional requirement of registration; the effect of registration is to bar third parties from claiming that same property. And it is for publicity purpose.

IV. Right to have the Issuance of New Title Deed

The buyer having fulfilled his obligations as to the transfer of ownership of an immovable property will be entitled to have rights. It is said that ownership right transferred to him by the contract of sale has to be registered in the registers of immovable property. The effect of this is to vest in the transferee the legal estate or interest, here the ownership right, expressed or created by the disposition.

Before the sale transaction, the right of ownership over a certain immovable property was vested in the seller. However, after the contract of sale, the ownership right has to be in the name of the buyer. Thus according to the application made by the buyer for title transfer, the registration office will cancel the title deed of the seller and a new title deed

will be issued to the transferee. Accordingly, transfer of ownership over immovable is effected by the issuance of a new certificate to the transferee upon the surrender of transferor's certificate.

As a result the new owner's name is entered the owner's register of the register's office with all details and in the register of contracts in the concerned agency. An owner's file is also opened with all documents in the previous owner's file being transferred to the new file.

Now, after he has secured the issuance of new title deed, ownership right is transferred to him. The sale of the immovable will affect third parties as it is registered in the buyer's name. So in the transfer of ownership of immovable properties, the buyer has the right to have the issuance of a new title deed in his name.

2. Right to Retention of the Payment of Purchase Money

The buyer pays the purchase money so long as ownership over the thing is transferred to him. Those requirements which are expected to be fulfilled by the seller like delivery of documents are important in the transfer of ownership. Thus if the buyer is not given such documents, he is not obliged to pay the price. Hence he has the right to retain the payment of price until the seller gives the necessary documents to him.

Retention of price may also be because of fear that the buyer will be disturbed from his exercise of ownership. There may be a mortgage encumbrance over the property he has bought. Because of such kinds of encumbrances the law accords to him by way of security a sort of right of retention on the price which is still in his hands. The buyer may fear that he will be evicted from his ownership. Of course, the seller is required to transfer unassailable right. But the seller after he has taken the price may not be in a position to refund the money in case of eviction. So the buyer may retain the purchase money at least provisionally.

Please read Articles from 2875-2895 under the Civil Code and try to see the obligations of the seller and buyer.

I. Promise of Sale and Preemption

Promise of sale and preemption are considered as restrictions to the owner's right to sale an immovable. The following provisions of the Civil Code tell us, among other things, the nature and definition, scope of application and restrictions regarding these transactions.

Art. 1410. - Definition.

(1) A promise of sale is an agreement whereby the owner of a thing undertakes to sell such thing to a specified period, should such person wish to buy it.

(2) A right of pre-emption is a right deriving from an agreement whereby the owner of a thing undertakes to sell such thing in preference to a specified person, should the owner decide to sell it.

Art. 1411. - Scope of this Chapter;

(1) An agreement for a promise of sale or right of preemption shall not constitute a restriction on ownership under this Section nor shall it cause a right in rem unless it relates to an immovable or a specific chattel.

(2) The rights in obligations which it creates for the parties shall be as provided by Books IV and V of this Code.

(3) The provisions of the following Articles shall only apply to rights in rem created by such agreement.

Art. 1412. - Conditions for validity.

An agreement under this Section shall be of no effect unless it is made in writing and specifies the time within which price for which the person in whose favor the agreement is made may require its performance.

Art. 1413. - Maximum time limit.

(1) No agreement under this Section shall be effective for more than ten year.

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

Art. 1414. - Expropriation.

The beneficiary of a right of recovery may not exercise his right regarding immovable property which is expropriated.

Art. 1415. - Right not transmissible.

(1) Unless otherwise agreed, rights granted by agreements under this Section shall attach solely to the person in whose favor the agreement was made.

(2) Such rights may not be alienated by such person nor shall they pass to his heir.

(3) The creditor of such person may not exercise his rights in his stead.

Art. 1416. - Promise of sale. - 1. Creation of rights in rem.

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

(2) Notwithstanding the provisions of sub-art. (1), the thing may be pledged or mortgaged but for an amount not exceeding the price fixed in the agreement whereby the promise was made.

Art. 1417. - 2. Attachment of thing.

(1) Where the thing to which the promise relates is attached, the owner shall give notice thereof to the person in whose favor the promise was made.

(2) Such person shall lose his right if he fails to exercise it before the thing being sold by auction.

Art. 1418. - Right of preemption. - 1. Creation of rights in rem.

(1) Unless otherwise agreed, whoever has granted a right of pre-emption on a thing may create rights in rem on such thing.

(2) Where he intends to sell the thing, he shall inform the beneficiary of the right of pre-emption of all the charges existing on such thing.

(3) Where the thing is attached, the owner shall give notice thereof to the beneficiary of the right of preemption.

Art. 1419. - 2. Time for exercising right.

(1) A right of pre-emption shall be exercised within two months from the beneficiary having been informed of the owner's intention of selling.

(2) The parties may by agreement extend this period to one year.

(3) Where a period exceeding one year has been agreed, it shall be reduced to one year.

Art. 1420. - 3. Failure to exercise right.

(1) The beneficiary shall lose his right where he fails to exercise it within the time laid down in Art. 1419.

(2) The owner may thereupon freely alienate the thing.

(3) He may also retain the ownership thereof.

Art. 1421. - 4. Attachment.

(1) Where the thing to which the right relates is attached the beneficiary shall lose his right where he fails to exercise it before such thing being sold by auction.

(2) Any provision to the contrary shall be of no effect.

Art. 1422. - Effect on third parties. - 1. Conditions.

Agreements under this Section which relate to registered immovables shall not affect third parties unless they have been entered the register of immovables.

Art. 1423. - 2. Other immovables.

(1) Agreements under this Section which relate to other immovables shall not affect third parties unless they have been registered in the registry of the court of the place where the immovable is situated.

(2) Failing registration, such agreements shall only affect such third parties as knew or should have known them.

Art. 1424. - 3. Movable.

Agreements under this Section which relate to movable shall only affect such third parties as knew or should have known them.

Art. 1425. - 4. Right of beneficiary.

(1) Where an agreement under this Section may be set up against third parties, the beneficiary may require any third party who has acquired the ownership of an immovable in violation of the right of the beneficiary to surrender such immovable to him on the conditions laid down in the agreement creating the right of pre-emption.

(2) Notwithstanding any agreement to the contrary, the beneficiary shall lose his right where he fails to exercise it within six months from the third party having taken possession of the immovable.

(3) Nothing shall affect the right of such third party to bring an action against the person from whom, he acquired the immovable.

6.5. Other Modes of Transfer

I. Land Inheritance

Dear student, inheritance is the passage of title and ownership of property from the one who dies to people whom, the law designates because of blood or marriage relation as the deceased heir by operation of the law or by will of the deceased. In other words, it is the devolution of the property of the deceased to persons because of close blood relation to the deceased.

Save the case of buildings, in our case it is the passage of land use right from the deceased land-holder to his/ her heirs. With respect to rural land, the farmers in Ethiopia are given the power to transfer their holding right through inheritance. Referring to the possibility of transferring use rights as opposed to transfer of ownership, the Civil Code provides:

Art. 2410. - Transfer of usufruct.

(1) The provisions applicable to contracts of sale shall apply where a person transfers for consideration the usufruct of a thing.

(2) The obligation of the seller to transfer the ownership of the thing shall in such case be replaced by the obligation to transfer the usufruct of such thing.

On the other hand, in the Ethiopian law of successions there are two types of successions that are regulated by different laws i.e. intestate and testate succession.

Intestate succession is a branch of succession that devolves the estate of the deceased by the operation of the law. The law devolves the estate in a way that reflects the presumed intent of the deceased, which is to distribute it to those persons more closely related to the deceased. When we look at the law of succession, it first focuses at whether children survived the deceased person or grand children (see Art. 842 CCE) and provides most, if not total, distribution of the estate to them. Then the next focus is on the ascendant and if not to collaterals and the State.

On the other hand, for testate succession, it is devolution and transmission of the estate of the deceased person in accordance with his/ her will (see Art.857 (1)). Will is a document that is drawn up and signed by persons: during their lifetime providing for the distribution of their properties up on death. Here the succession of the deceased will be undertaken by the whim of the testator in the will unless the will is subject to invalidation because of different defects.

The farmers though they do not have ownership right over their holding, have the right to transfer their holding right through inheritance.

Who is heir eligible to inherit the land use right of the deceased farmer? The heir as stated by the new federal rural land use and administration law are both family members who are "any person who permanently living with the holder of land use right sharing the livelihood of the later" and lawful heir. The strict interpretation of this article shows or includes not only those persons who have relation by consanguinity or affinity to the holder of the right but also anybody provided they are living permanently with the holder and share the means of the livelihood of the holder. Here, the major criterion is not blood or affinity relationship but whether the person concerned is living with, and by the income of right holder.

The other persons who are competent to inherit the deceased are his/her lawful heirs. The meaning of lawful heir is not provided in this same proclamation mentioned here above. Thus we need to go to the civil code so long as the latter law has not repealed it expressly. The code instead of giving definition of lawful heir; it stated the condition that needs to be fulfilled to be lawful heir. These are, close blood relation, surviving the deceased and lastly not found to be unworthy. Thus anyone who fulfills these conditions is said to be lawful heir.

In Tigray, the right to inherit is provided in construed manner .It is only the immediate descendant or in absence the immediate ascendant who can inherit each other (Proc.23/1997, Art.16 (2)). Moreover, it is those who live with the right holder and share his livelihood that can inherit the deceased's holding right. It expressly excluded those descendants who have their own sufficient means of living and persons who have their own rural land holding and repealed the provisions governing succession in the civil code expressly. From this clearly the Tigray rural land administration law partly excluded Persons who are embraced under the federal law (lawful heirs).

In the ANRS rural land proclamation No.133/2006, transfer of land holding right in inheritance is recognized under art. 16. Any person who holds land may transfer his right in will to any farmer engaged in agricultural works. To be valid, however, this action may not disinherit the minor child of the testator or family member from inheritance; nor may it harm the spouse. Without will, the right shall be transferred to his child or family engaged in agricultural works. Without a child or family member, his parents who are residents of the region, engaged in agriculture and priory have land holding less than the maximum holding area.

On the other hand, in Oromia the cumulative reading of art, 6(1) and 10(1) of the rural land proclamation 56/20002showss that peasants/ pastoralists are guaranteed, while the

right remains in effect, the right to bequeath or the right to transfer the land holding to their family member(s) through inheritance.

The other salient features of the regions' land laws in relation to inheritance are:

If inheritance causes fragmentation of farm plots to be inherited beyond the minimum plot size, the heirs are obliged to use the plot jointly or by other means other than splitting of the plot. The laws provide the specific size beyond which parcelization of land is prohibited. For example, inheritance should not take place in the manner that results in parcellization of land below quarter (0.25) and (0.75) hectares in Tigray and Oromia respectively.

II. Donation

Dear student, donation is one of the other modes of transferring land holding right. The point here is that what is donation? according to Art. 2427 of the Civil Code donation is a contract whereby a person, the donor, gives some of his property or assumes an obligation with the intention of gratifying another person, the donee. The underlining point is that donation is a voluntary transfer of title to property without payment or consideration by the donee. It is regulated under Title XV, Chapter Three of the Civil Code as well as the rural land laws.

Donation is very important concerning ownership because to some extent it represents absolute power of an owner over his/her property. However, having ownership right over property is not a requirement to transfer his/her interest through donation. Although, this is not the usual case; one can equally donate servitude or usufruct. The same goes for Ethiopian farmers and pastoralists holding right.

Dear student, donation is of two types: *intervivos* or *mortis causa*. Thus, the donor may use one of the modes to cause donation to the donee (see Art. 1205).

A donation is known as '*intervivos*' if **it** is made between living donor and donee; and if the donor intends the donation (gift) to take effect immediately or on an agreed date. Conversely, *mortis causa* donation is made where the donor makes the donation in the anticipation of his/her imminent death.

III. Barter/Exchange

The term barter refers to the mode of transaction undertaken in kind, for instance exchange of property for another property. Thus, it is common to conduct real property by using this type of transaction. There are legal provisions(see the provisions provided hereunder) that deal with this system.

Art. 2408. - Differences from sale.

(1) Each of the exchangers shall, about the things subject to the exchange, have the same rights and obligations as a seller.

(2) The exchanger who is bound by the barter contract to pay a balance shall, about the payment of such balance, have the same obligations as a buyer.

(3) Unless otherwise agreed, the exchangers shall share equally in the expenses of the barter contract.

Art. 2409. - Reference to provisions regarding sale.

The provisions applicable to contracts of sale shall for the remainder apply to barter contracts. As already mentioned, the core message of the provisions is that it is also possible exchange things including immovables. On top of that, barter is contract so the provisions relating to the general contract of sale are of much relevance to regulate exchange of things.

IV. Court Order

It may not be something odd to you that transfer of real property takes place through court order. In this regard Art. 402 of the Civil Procedure Code provides that:

Art. 402. The Decree for Immovable Property

- I.** Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the decree-holder, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property...

Dear student, what do you understand by the term decree contained in this provision?

V. Prescription/Adverse Possession

This type of transfer of right on an immovable property is dependent on the satisfaction of a specific time limit and payment of tax. Thus, one could have a right on an immovable where he/she has possessed the property and pay tax for fifteen consecutive.

Art. 1168. - Principle.

(1) The possessor who has paid for fifteen consecutive years the taxes relating to the ownership of an immovable shall become the owner of such immovable Provided that no

land which is jointly owned by members of on family in accordance with custom may he acquired by usucaption and any member of such family may at any time claim such land.

(2) Nothing in this Article shall affect the provisions of Title VI, Chapter 2, of this Code (Art. 1140-1150).

Review Questions

1. Discuss the modes of transfer of ownership of immovables thereby explain the difference between mode of transfer of ownership movables and immovables.
- I. List down the requirements which must be satisfied to transfer ownership title through prescription.
 1. Explain the duties of the parties to contract of sale.
 2. Ato Asmara has become fatally sick thereby he donated his house to his elder son which will take effect one year after his death. Which type of donation does this case represent? Why?
 3. What do you think the rationale behind the delivery of immovable takes different form from that of the movable property?

Chapter Seven: Dispute Resolution Mechanisms of Real Properties

Introduction

Dear student, dispute is unavoidable so long as there is social interaction, however, dispute should be and can be managed by using different mechanisms dispute settlement. Real properties are susceptible to dispute for they involve significant economical interest. This is the basic reason that land and building related disputes constitute a significant proportion of case compilation in courts. However, this may not be the sole reason for multiplicity of real property disputes. For instance, inefficient property registration system aggravates the problem. The common disputes related to real property are: boundary conflict, mortgage cases, parcel trespassing, flooding, shading, grazing land encroachment, forest land encroachment, road side encroachment, and so on. The basic issue here is that whether there are laws that help to settle such disputes. The answer is 'YES' and the most fundamental laws are: the Ethiopian Civil Procedure Code, Federal Courts Establishment Proclamation No.25/96 and the Civil Code. There are also regional laws.

Chapter Objectives

At the end of this chapter students will be able to:

- identify the various methods of land dispute settlement mechanisms and their respective advantages and disadvantages.
- understand and interpret the laws related to land dispute resolution, and
- explain the significance of informal dispute settlement mechanism in handling real property disputes.

7.1. At Federal Level

Dear students, courts are organs that are constitutionally empowered to interpret the law and entertain disputes which are brought before them by disputants. Real property disputes constitute part of such disputes brought before the courts. At the federal level parties may refer their cases to one of the three major levels of courts: the First Instance Court, High Court and Supreme Court. Evidently, this does not mean that a case which was referred to one court may not be seen by another court. For instance, a court decided by the lower court may be reconsidered by the higher court through appeal. When we come to specific laws, at federal level there are two major laws which govern the issue at hand.

As already said the FDRE Constitution has established three levels of courts at federal and regional level. Each of them has its own jurisdiction regarding the kind of case it may entertain both civil and criminal cases.

Likewise, the Federal First Instance Court shall have first instance jurisdiction over civil cases involving an amount not exceeding 500,000 (five hundred thousand) Birr. Therefore, in line with Art – 14 of the Proclamation(Proclamation No. 25/96, hereinafter, the proc.), Federal subject matter cases that involve an amount of less or equal to five hundred thousand birr will be within the jurisdictional limit of the Federal First Instance Court.

The Federal High Court has original civil jurisdiction over cases involving an amount more than Birr five hundred thousand (500,000). The Federal High Court, besides its first instance or original jurisdiction, has appellate jurisdiction over decisions of the Federal First Instance Court per Art 13 of the proclamation.

Regarding the Federal Supreme Court, except in case of application for change of venue that may take place between two federal high courts, it does not have first instance or original jurisdiction over civil cases. It only has appellate and cassation jurisdiction. Under Art 9 of the Pro., the Federal Supreme Court shall have an appellate jurisdiction over decisions of the High Court rendered in its original jurisdiction, and over decisions of the High Court rendered in its appellate jurisdiction in variation of the decision of the Federal First Instance Court.

Furthermore, Art. 10 of the proc. where they contain fundamental error of law, the Federal Supreme Court has the power of cassation over:

4. final decisions of the Federal High Court rendered in its appellate jurisdiction;
5. final decisions of regular division of the Federal Supreme Court;
 - a. Final decisions of the Regional Supreme Courts rendered in a regular division or in its appellate jurisdiction.

7.2. At State Level

Dear student at the regional level besides the three major levels of formal court structure there are different judicial institutions dealing with dispute resolution relating to real property. For instance, social courts and other traditional methods of dispute settlement can be cited as the common examples the informal court dispute settlement institutions.

The Federal Courts Establishment Proclamation, No. 25/96, provides only for the jurisdictional limits of Federal Courts. It lists matters which fall under the jurisdiction of

Federal Courts. This in effect means that all matters or cases which are not listed under the proclamation to be federal matters are left to be within the jurisdiction of states. From this point of view, therefore, states have residual jurisdiction.

Regarding matters falling within the jurisdiction of Federal matters, since the material the Proclamation determined jurisdiction, provisions of the Civil Procedure Code dealing with material jurisdiction are impliedly repealed by Art 37(2) of Proc. No. 25/96. Dear student, the most essential point here is that matters falling within the jurisdiction of States, however, are not within the ambit of this Proclamation. Therefore, the jurisdictional limit of State Courts is determined by pertinent provisions of the Civil Procedure Code. Accordingly, the States' High Courts shall have jurisdiction over all cases regarding immovable property where the amount involved exceeds 10,000 (ten thousand) birr, (see Art. 14(b) of CPC).

Woreda Courts, on the other hand, have jurisdiction in claims that involve cases up to 1,000 Birr for cases regarding immovable property (see Art. 13(b) CPC).

State Supreme Courts do not have first instance or original jurisdiction in civil cases. This means that all cases in state courts must start either in Woreda or High courts. Hence, the States Supreme court has only appellate jurisdiction and final cassation power over state matters. But it does not cancel its first instance jurisdiction over federal matters in its constitutional delegated power.

Some states have by legislation, established social courts to reduce the congestion of cases in Woreda Courts. For instance, the Amhara National Regional State Council has enacted a Proclamation to provide for the Power of Social Courts. By this Proclamation, Social Courts are empowered to entertain civil cases the amount of which is not more than 1500 Birr.

The following table summarizes the land dispute resolution mechanism at federal and state levels as found in the land administration and use laws.

	Federal 2005	Amhara 2006	Oromia 2002	South 2003	Tigray 1997 and its amendment 2002
Land dispute resolution		Mutual agreements and local elders can be used to resolve land related conflicts. The	Land disputes can be resolved by (a) local social court, (b) then appeal to the ordinary	Land related disputes will be seen (a) first by the woreda and kebele land administration and use committee, (b) if not satisfied, can	There is nothing on land disputes and resolution.

		detail of the formal institutions is not provided in the proclamation.	woreda court, and (c) then appeal to the higher court. Note that mutual agreements and local elders can be used to resolve conflicts.	apply to the kebele social court, (c) then can appeal to the woreda court, and (d) finally, has the right to apply to the higher court. Note that mutual agreements and local elders can be used to resolve conflicts.	
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7.3. Informal Dispute Resolution Mechanisms

In the preceding sections we have tried to highlight the formal dispute settlement institutions and the applicable laws. Under this section we are going to deal with informal dispute settlement mechanism. The term ‘informal dispute settlement’ refers to the dispute settlement mechanism exercised outside the ordinary judicial system. Now let see the most common types of the informal mechanisms and their nature as well the laws governing them.

Dear student, besides the formal mechanism of dispute settlement normally called litigation; informal methods are also used widely. They are called Alternative Dispute Resolution (ADR) mechanisms and if used widely and properly can help achieve good results. Under the Civil Code, Title XX, and in the Civil Procedure Code Chapter 4 of Book 4, are devoted to these mechanisms. They are compromise, conciliation, and arbitration.

Art. 3307 of the Civil Code, a compromise defined as a contract whereby the parties, through mutual concessions, terminate an existing dispute or prevent a dispute arising in the future. It is also called negotiation. In negotiation the parties reach a joint decision on matters of common concern in situations where they are in actual or potential disagreement. Here the parties to the dispute have freedom to settle or prevent the dispute by their own.

By virtue of Art. 3325 of the Civil Code, arbitration is a contract whereby the parties to a dispute entrust its solution to a third party, the arbitrator, who undertakes to settle the dispute in accordance with the principles of law. In other words, arbitration is a process by which a dispute between two or more parties is submitted to panel of impartial third parties for resolution on the merits based on the evidence presented at a hearing. The procedures for arbitration, almost similar to that of the litigation, are provided for under the Civil Procedure Code. Unlike compromise or negotiation, in arbitration disputes are

settled by the involvement of neutral third normally known as arbitrator/s; the decision is binding in the latter case.

Art. 3318 of the Civil Code, conciliation is a mechanism whereby the parties entrust a third party with the mission of bringing them together and, if possible, negotiating a settlement between them. Stated otherwise, conciliation also called mediation is a process whereby a neutral and impartial third party facilitates communication between negotiating parties which may enable the parties to reach settlement.

In a recent study made by Sayeh in a few sample Woredas of Eastern Gojam Zone about the use of the various methods of land dispute resolution, alternative dispute resolution mechanisms have proved to be frequently used methods. The details are provided hereunder.

According to the priority order made by the respondents, arbitration is ranked first by about 65% of the respondents. Mediation ranked second by more than half percent of the respondents. Litigation with a relative frequency of about 47% and negotiation with 38% are at the third and fourth ranks respectively.

Review Questions

- b. The formal and informal dispute settlement mechanisms.
- c. Discuss the enforcement mechanism of decisions rendered by arbitrators.
- 1. Explain the advantages and limitations of informal dispute settlement mechanisms from the view point of litigation.
- 2. Discuss the laws applicable to entertain the real property disputes at the federal level.
- 3. What are the courts that settle disputes over real property at federal level? What is the material jurisdiction of each? Explain with the support of legal provisions.
- 4. Explain the alternative dispute resolution mechanisms recognized under our legal system and the compare and contrast their effectiveness in the view point of litigation.

Chapter Eight: Land Use Restrictions

Introduction

As already mentioned ownership is the widest right one can ever imagine. Accordingly an owner of a property does have the right to use to transfer/alienate or even he has the right to destroy it without affecting the right of others. On the other hand, there is no absolute right without reasonable legal limit. Accordingly, there are restrictions imposed against the free use of land and other real property. The restrictions serve justified legal objectives. The common restrictions imposed on the real property rights are: servitude, expropriation, nuisance law environmental concern, and planning law. The concepts are very broad so I have got it difficult to provide you with the complete details of the concepts thus, the restrictions are discussed in brief so now again I kindly advice you to refer additional reading materials.

Chapter Objectives

At end of this chapter students will be able to:

5. Identify the rationale behind the restrictions on land use
6. Define the concepts of expropriation and its purpose
 - Understand servitude and its sources
 - Understand the justifications and nature of the different land use controls
 - Understand the limits of private property

8.1 Land Use Restrictions

8.1.1 Nuisance law

Nuisance is an activity that arises from unreasonable, unwarranted or unlawful use by a person of his 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 restrictions owners of an immovable, mostly building may not use their property in a way that disturbs their neighbors. This principle is also included in our civil code under article 1225:

Art. 1225. - Abuse of ownership. - 1. Principle

(1) The owner shall not cause nuisance or damage to his neighbor.

(2) He shall not cause smoke, soot, unpleasant smells, noise or vibrations in excess of good neighborly behavior.

(3) Regard shall be had to local custom, the position of the lands and the nature thereof.

8.1.2. Planning law

Amazingly an owner of a building cannot change the plan of his own building arbitrarily. There are a number of legislations that govern the issue at hand and these legislations contain strict rules on planning. Never the less, there is a wide discrepancy among and between the laws and practice of different countries. One fundamental principle, however, is distinguishable, including Ethiopia. Therefore, change of plan of a building requires permit in advance. Change can be divided in to three categories: construction of new building, work on existing building, and demolition of the building.

When we come specifically to our country's case, at federal level a proclamation that provides for urban plans has been adopted under Proc. No. 574/2008 which governs the above kind of regulations. Among others it empowers municipalities to control land use in urban areas. According to article 25 of the proclamation, "no development activity may be carried out in an urban center without a prior development authorization." In this case the word "development" is defined as, "carrying out of building, engineering works, mining or other operations under the ground, or the making of any substantial change in the life of any structure or neighborhood (Art. 24)"

The above article includes the two aspects, i.e., constructing a new construction and making a change on it. So as you may know, people after getting a plot of land must get a building permission to construct a new building. Since, the law also provide that urban plans must contain rules about zoning, height of building, housing typology etc (art.11(3)) owner of a house may not the type and design of the house in a way that violates the planning laws, and as a result owner must secure prior permit.

Regarding the third aspect, Art.32 of the proclamation states that an owner of a building may not demolish it without securing permission from the concerned authority.

8.1.3. Environmental Concerns

Nowadays environment is a crosscutting issue throughout the word. Thus there are different movements and initiatives working on of environmental protection. In the same view, Ethiopia has been taking exemplary actions worldwide. Regarding the focal point property owners or possessors cannot use their property rights in detriment to the environment. Accordingly, Proc. No. 300/2002, provides different restriction on property owners concerning management and release of dangerous and hazardous activities that

may damage the environment. For instance it strictly prohibits emitting toxic substances, chemical, or radioactive substance from their property that harms human health and wellbeing, the biota and the aesthetic value of nature.

8.1.4. Expropriation

Introduction

Dear student, expropriation is the other restriction imposed on the use of land rights. Expropriation is a means of land acquisition for the state. It is forced taking of land from the owner against his wish but on payment of fair compensation. This is an inherent power of the state which was recognized from time immemorial. It goes even to the roman and biblical periods where states used to take private land for public purpose development activities. The issue of expropriation was formerly treated in the civil code, but now there is a new proclamation No. 455/2005 and an implementation regulation No.135/2007 at federal level and different other regulations at state level. As already mentioned, expropriation is the forced taking of land for the public use against the payment of fair compensation. In general the concept public use denotes that state may not take a private land arbitrarily; it must be justified on public purpose. To put it differently, the taking of the land must be for public interest. However, what constitutes public interest is not a settled argument. In its traditional concept, public interest includes the traditional state responsibilities: Construction of roads, schools, dams, bridges, etc. on the other hand, modern interpretation of the concept includes that the taking of the land for private development activities, malls, hotels etc may amount to public interest. Anyways, there are some elements that must be fulfilled to undertake an act of expropriation and these are:

- Expropriation is a taking of private real property
- It is an inherent right of the state
- It is done against the consent of the owner/possessor
- Fair compensation must be paid
- The taking must be made for public interest/use

Dear student, save the controversy as to the definition and scope of public purpose, there are a number of definitions offered to the concept. Likewise, some define or interpret the concept broadly and others to the vice versa. Now let see the broad and narrow definition of the term given by US courts. The broad view holds that “public use/purpose” means advantage or benefit to the public. Nichols puts this definition in the following way:

“Public use” means “Public advantage,” and that anything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the state (or which leads to the growth of towns and the creation of new resources for the employment of capital and labor), manifestly contributes to the general welfare and the prosperity of the whole community constitutes a public use.

The second, and narrow, view defines ‘public use’ as actual use or right to use of the condemned property by the public. This constitutes a public purpose in which the public has a right of use. To this effect one New York court has said:

The indirect contribution the prosperity of the entire community resulting from activities from which only some individuals would profit was not sufficiently to justify the exercise of eminent domain. It is necessary that the public possess a ‘right’ to use the facility or service for which the property was desired.

In this regard, expropriation of private land was limited to traditional state activities, such as defense, highway, and education.

Our domestic law offers the definition of expropriation and let compare and contract ours with that of the abovementioned 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.

I hope you have suggested the similarities and differences between theses definitions. Dear student, expropriation is a wider concept, and here I have tried to provide you only with the general overview of the concept so it is advisable to consult additional reading

materials. There a number of legal provisions that govern expropriation and some of them are provided hereunder.

Relevant provisions

The Code, under Article 1460, provides:

Expropriation proceedings are proceedings whereby the competent authorities compel an owner to surrender the ownership of an immovable required by such authorities for public purposes.

Amharan Rural Land proc. 133/2006 Art. 2(18).

“Expropriating land holding” means taking the rural land from the holder or user for the sake of public interest paying compensation in advance by government bodies, private investors, cooperative societies, or other bodies to undertake development activities by the decision of government body vested with power.”

Another definition from the Corpus Juris Secundum reads as:

“.....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.

8.1.5 Servitude

Introduction

I hope you are already familiar with the concept servitude. Any ways, just to remind you the concept, servitude is defined as “a charge encumbering a land (servient tenement) for the benefit of another land (the dominant tenement.)” And the type of obligation or encumbrance made on the burdened land, that is the servient land is “the obligation to submit to the commission of some acts by the owner of the dominant tenement or to refrain from exercising some rights inherent in ownership.” Read article 1359 of the civil code.

Have you refreshed your memory? I hope so. In servitude the servient land is burdened with some obligation for the purpose of the advantage of the dominant tenement. This type of right is right in rem or real rights which are related to the properties. Hence, servitude may only accessorially cast upon the servient owner the burden to commit any act

(1360). The burden of servitude shall transfer with the land irrespective of the change of the owner. This is to mean that the new owner cannot terminate the right to servitude.

The purpose of discussing servitude is just to show that it is a limitation or restriction on one's land, in this case the servient property. Students are expected to explore the details of the system.

8.1.5.1 Means of creation and types of servitudes

Dear student, the right to servitude may result from different interactions: contract, will, the law or custom. In case of contractual servitude the agreement may be made between owner of the dominant and servient lands. On the other hand servitude that emanates from a will shall be made by the will of the deceased when it divides a property in to two or more parcels (1362.) Like any real right, servitude must also be made in writing. And in order for it to be defense against a third party it must be registered. The third method of creation of servitude is acquisition by prescription. According to article 1366 an apparent servitude may be acquired by enjoyment for ten years. Apparent servitude is one which is visible and conceivable to a third party. Sometimes rights of way across another's land on foot or with animals can be determined by the custom of the place (1371.)

Art.1220 pipes

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

Art.1221. Right of way-principle

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

Art.1246. Duties of Land owners below

(1) The owner of land on a low level shall accept the flow of water from land on a higher level where such water flows naturally and not artificially.

(2) The owner of the land below may not set up a dike to prevent such flow.

Art.1247 Drainage

(1) Where the owner of the land above constructs drainage works on his land, the

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

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

Art.1252. Acqueduct-1. Right of owners

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

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

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

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

Art.1371. Right of way and rural servitude

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

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

Art.1372. Means necessary from the enjoyment of servitude

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

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

8.1.5.2 Termination of Servitude

Dear student the right to way or servitude may be terminated for different justified reasons and the common grounds recognized as cause of termination of servitude are:

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

Review Questions

- Discuss the ultimate goal of expropriation and the precognitions that must be fulfilled.
 - Identify the conditions where the right to servitude is created and terminated.
1. Discuss common problems observed in the practical applicability of expropriation.
 2. Do you think that our legal system addresses the issue of expropriation sufficiently?
 3. Explain what constitutes nuisance, the law that governs nuisance and the scope of its practical applicability in our country.

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