Wolkite University

School of Law

Land Law lecture Note

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I. Sources of Land Law

There are different conceptions of source of law in general.[1] However, for this course, we are only dealing with legal material source of law-sources which court bases its decision on as of right. They are authoritative sources of law. Constitutions, proclamations, regulations, directives, manuals and cassation decision are binding source of law under Ethiopian legal system.

1. The FDRE Constitution

According to article 9/1 of the Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution or the Constitution hereafter) is the "supreme law of the land." That means the Constitution is the source of all other laws in the country. Being brief and very general, the Constitution has provisions that deal with land law matters. Basically arts. 39, 40, 89, 97 and 105 (1) deal with land law matters.

2. Regional Constitutions

Ethiopia is a multinational federation that consists of nine regional states[2] and two city administrations. Pursuant to article 50/5 of the FDRE Constitution the regional states have the power to "draft, adopt and amend state constitutions" through their regional councils. Accordingly, all regional states have adopted their own constitution and the city administrations have charters of their

[1] For more information please read Sir John William Salmond, Jurisprudence, (London: Stevens & Haynes Bell Yard, Temple Bar, 1902), P. 99

[2] Regional states are officially called variously as "National Regional States", "Regional States," "Regions", or simply "States,".

own. It is said that the content of land rights recognized in constitutions of the regions has similarity with the FDRE Constitution. If they are similar, why do the constitutions replicate the rights granted by the FDRE Constitution? Do they give better protection than the FDRE Constitution?

Generally, regional constitutions are legal material source of land law in Ethiopia.

3. Proclamations and code

There are different proclamations at the federal and regional levels that deal with land issues. The following are some of them:

- Urban Land Lease Holding Proclamation No. 721/2011
- Federal Rural Land Administration and Use Proclamation No. 456, 2005 and other regional rural land administration and use proclamations.
- Expropriation of Landholdings for Public Purposes and Payment of Compensation Proclamation No. 455, 2005
- Investment Proclamation, 2012, Article 25,
- Urban Planning Proclamation No, 574, 2008
- Urban Landholding Registration Proclamation No. 818, 2014
- Civil Code of the Empire of Ethiopia, Proclamation No. 165, 1960

4. Regulation

You can find different regulations passed regional governments.

5. Directives
   - Are issued by different ministries and government agencies
6. Cassation decisions are another source of land law.

II. The Five Questions of Land Law[3]

[3] This is adopted from Muradu Abdo, Ethiopian Property Law a Textbook (American Bar Association: 2012) P. 7.

1. Who may be a subject (holder) of private property?
2. How are the objects of private property defined? How and on what basis are they classified?
3. What is the nature of property? What are the rights and responsibilities of private property holders *(rights in rem)?* How is private property acquired, transferred and extinguished?
4. What is the justification for the institution of private property?
5. What restrictions are imposed on private property?

A. The subject of land: this issue will answer the question “who will own a land. “Is everyone allowed to own a land?”
B. What is land by itself? This issue will also define what the land is in the sense of law. Land might have its own definition in different courses. Geography can have its own definition, geology as different field of study can have its own definition and law too. The answer of this question will be given in terms of law. How does the law define a land?
C. The rights of the owner of land: since land is a property interest, we need to know the nature of the right (how the owner acquired the property interest over land?) by this issue, we will answer the question “can we specify the owners property interest?” (Is he/she the owner, usufructure or mortgager?).
D. Restriction of rights over the property interest of land: are the owners enjoying absolute property interest over the object (plot of land)?
E. Justification: The fifth issue will be the justification issue. Why the Ethiopian government does allow property interest over plot of land and prevent ownership right?

Part I. The subject of Land right

A subject of land right deals with “who can be a bearer of property interests on land under Ethiopian law?” Mainly it answers the question regarding who is entitled to have access to or retain land under current Ethiopian land policy and different land laws including proclamations. So, the focus here is on the question of “who” (bearers of land right).

1. Subject of Rural Land
    1.1. Peasants and pastoralists

The very general answer to the above question regarding who can be subject of rural land is “every Ethiopian citizen is entitled to have agricultural land for a living.” This is a kind of Constitutional promise to offer a tract of plot of agricultural land to every Ethiopian citizen who needs it for a living. This very broad egalitarian principle should be a kind of the aspiration of the framers of the Constitution.

There are different legal authorities for this principle. Art. art.40 [4 and 5] of the FDRE Constitution states the following:

> (4). *Ethiopian peasants* have right to obtain land without payment and the protection against eviction from their possession…
>
> (5). *Ethiopian pastoralists* have the right to free land for grazing and cultivation as well as the right not to be displaced from their own lands.

A quick glance at the above mentioned provisions shows that you can have access to agricultural land free of payment if you are Ethiopian-the requirement of citizenship and live on agriculture as main source of livelihood. Those sub-articles of the Constitution contain terms like Ethiopian peasants (4) and Ethiopian pastoralists (5). Sub-article 4 of the same article gives to every Ethiopian peasant the right to have agricultural land and sub-5 gives the same to pastoralists. This kind of Constitutional entitlement is something we get for free (without payment). So, an Ethiopian citizen, who does not have other means of earning and want to live on agriculture, will have a piece of land, and will get that piece of land for free (without payment) from the government authorities.

Our authorities for the above broad principle is not only limited to the FDRE Constitution, but also other land proclamations like The Federal Democratic Republic of Ethiopia Rural Administration and Land Use Proclamation (Federal Land Administration and Land Use

Proclamation hereafter) No. 456/2005, regional rural land use and administration proclamations and etc. as per article 5/b of the Federal Rural Land Administration and Land Use Proclamation, “Any citizen of the country who is 18 years of age or above and wants to engage in agriculture for a living shall have the right to use rural land.” Accordingly, “Peasant farmers/pastoralists engaged in agriculture for a living shall be given rural land free of charge.” The Proclamation further entitles women to get land free of payment if they want to engage in agriculture. That is legal aspiration to avoid gender based discrimination on rural land access. So, anyone can be a subject of rural land as long as he/she engages in agriculture for a living. Discrimination based on gender and other grounds is prohibited under the FDRE Constitution (article 25) and Federal Land Use and Administration Proclamation.

1.2. Agricultural Investors

As can be seen from the provisions of the Constitution, peasants and pastoralists are given priority right on rural land. Investors come next as they are required to pay to access rural land. Article 40/6 of the Constitution states:

> “Without prejudice to the right of Ethiopian Nations, Nationalities, and Peoples to the ownership of land, government shall ensure the right of private investors to the use of land on the basis of *payment arrangements* established by law…” (Italic mine)

As can be seen from this provision, private investors are required to effect payment arranged by government to access rural land.

In addition to constitutional promise, there are subsidiary laws that give private investors the right to access rural land. As per article 4/a of the Federal Land Administration and Land Use Proclamation, “Private investors that engage in *agricultural development*

activities shall have the right to use rural land in accordance with investment policies and laws at federal and regional levels."

Investors can be either domestic or foreign. Both can access rural lands in accordance with relevant laws of the country. It does not matter whether the investor is foreign or domestic, Ethiopian or otherwise.

The rationale for giving priority to Peasants and Pastoralists

The purpose of giving land to peasants and pastoralists is primarily for survival. This does not mean they should use land only for subsistence or survival, but it should be their primary reason to access land. It goes without saying that we expect them to produce surplus to the market for consumption, industry and export. However, land is primarily given to peasants or pastoralists for subsistence or survival.

The purpose of giving land to investors is for capital formation: the issue is not subsistence. Investors have to generate income more than subsistence or survival. Here, we are talking about asset building and capital formation. Since land is obviously a means of production, we need to have labor and knowhow to create capital.

1.3. Foreigners of Ethiopian Origin

Foreigners of Ethiopian origin A.K.A Diaspora can also be subject of land rights in Ethiopia. This right is conferred upon them by virtue of *Providing Foreign Nationals of Ethiopian Origin with Certain Rights to be exercised in their Country of Origin Proclamation No. 270/2002.* As per this proclamation, foreign nationals of Ethiopian origin can acquire immovable property (see art. 5/4) despite the prohibition set by article 390-393 of the Civil Code of Ethiopia.

Thought these people are foreign nationals, they have original links or they are originally Ethiopians, but acquired foreign nationality.

Now they are no more Ethiopians for they have gained a foreign nationality or technically speaking, they are foreigners. In spite of that however, Diasporas are equally treated with any citizens of the country especially for the purpose of land acquisition. Whether they are investors or not, it doesn't matter: the requirement is just having an Ethiopian origin. Here, what we need to prove is the foreign nationality of the person and having Ethiopian origin (route). If the two requirements are proven, the person is similar to any other Ethiopian citizen. These can be proven by acquiring an identification card, commonly called "yellow card", issued in accordance with the proclamation.

What is the rationale behind allowing the Diaspora to acquire land in Ethiopia? The rationale can be found in the preamble of the proclamation. The first reason for granting this right is to facilitate the strengthening of tie between the Diasporas and their country of origin, Ethiopia. The second reason is to enable the Diasporas "contribute to the development and prosperity of the peoples and country of origin…" Even if they got a foreign nationality, their ancestors' are living here and their blood tie put them equal with any Ethiopian citizen.

Mind you, foreign nationality of Ethiopian origins is not allowed "participation in public office". They can neither elect nor be elected for the public or political office. In relation to other spheres of life, e.g. acquiring property including land and other immovable properties, they are put in an equal footing with all Ethiopian.

1.4. Foreigners pure and simple

Foreigners who are neither investor nor of Ethiopian origins cannot acquire an immovable property (see articles 390-393 of the Civil Code). However, they can acquire immovable property including

land “in accordance with an Imperial Order.[4]” (See article 390 of the Civil Code).

The general principle is that foreigners cannot acquire immovable property of permanent nature. The reasons for such prohibition includes: colonial history, lack of stability, prevalence of justice in the precision of natural resource.

1.5. Governmental/inter-governmental/non-governmental entities

By governmental entities, we are referring to embassies: Inter-governmental entities are organizations that reside as a result of treaties between two or more states whereas, non-governmental entities are to mean some humanitarian and developmental entities. These entities can have accesses to both urban and rural land. Unlike those of foreigners pure and simple, the exception (prohibition of immovable properties of permanent nature) does not apply to these entities. The justification for this might include: international laws, international diplomacy, prosperity, etc.

1.2. Subjects of Urban land

In short, except peasants and pastoralists, all of the above can be subjects of urban land. Investors, foreign nationals of Ethiopian origin, foreigners (by some executive discretion), and different government, intergovernmental and nongovernmental organizations can have access to urban land through lease hold system. There is no prioritization of subjects of land right under urban land lease arrangement.

Mind you, there is no constitutional provision regarding who can access urban land, how can it be done. This is due to the precedence of lease hold system to the current Constitution. It is argued that the Constitution silently approved the law that precedes it.

[4] I don’t know what that means at this time.

1.3. Principle that governs subject of rural land

The guiding principle of subject of land right in Ethiopia is “every Ethiopian citizen is entitled to have access to agricultural land for living.” (Land for all): let’s try to analyze this principle on the basis of different issues:

A. Justification for the principle of “Social equity[5]”

The first justification is ensuring land distribution in an equitable manner in the country. Historically, there was no equitable land distribution in the rural area. Land lords, the nobility and gentries sent from the central government used to amass large tracts of land and make the majority, the peasants, tenants. Thus, the current system legally avoids that kind of social and economic domination by a few.

The second rationale is efficiency. According to this rationale there has to be no idle labor. Land and labor are paired by this principle. This pairing of land with labor is with the context of house-hold labor. The peasants and pastoralists are given a chance to be self-employed. Since they have access to land, control process of production and become the owner of that production, then, the peasants and pastoralists are a master of their production.

B. Issues

1. Is this right justiciable?

This issue should be seen in light of article 37 of the FDRE Constitution. It’s a justiciable right for it is the legal or Constitutional commitment and the bearer of the duty is the government. Nevertheless, the government or state might fail to enforce that right due to other defects. The main important thing, then, is we have to enforce our right through legal means. The state will fulfill the principle when circumstance work-out. The

[5] This term is deployed by Dessalegn Rahmatto. See

implementation of this principle is contingent on some conveniences on the part of the state.

2. Implementation of this principle

The question of implementation is the “how question?” i.e. How is this principle going to take place? There is a policy of distribution and redistribution. Distribution takes effect when the land is unoccupied, while redistribution of land takes effect when the land is controlled by another individual. We will deal with land redistribution under restrictions on land rights.

3. A mere aspiration or realizable plan?

Is this principle implementable? Land is a fixed property. That means you cannot produce more of it as demand increases and arable land decreases because of different reasons from time to time: erosion, land degradation, flooding, the expansion of town and cities, etc. Therefore, the competition over land is stiff. Demand on land can increase because of two reasons: population growth and technological development.

Take for instance the case of Ethiopia. We have 2.9 % annual rate of rural population growth. The population of the country is projected to reach 129 million in the year 2030 out of which 30 million will be urban.[6] So, the question is, will this be realizable with this population growth rate?

As the economic capacity of individuals increases they want more land. Take for instance: Mr. Kutu had the capacity of ploughing one hectare land before 5 years. But, he has now the capacity of ploughing more than 8 hectares of land. Therefore, he has the need to compete with stakeholders in land to increase the size of his land.

[6] Report of Ethiopia`s 2007 Population and Housing Censes, Population Census Commission of Ethiopia (hereafter
the 2007 Censuses) (Addis Ababa, 2008) p. 10.

In any case, real properties (land in this case) are always subject to competition for the demand and supply does not match with increase in population and employment of advanced technology to develop such resources. Thus, the question that whether this principle can be realizable remains to be an issue.

Part II. Object of land (right)

This section deals with the question “What is land under the law?” various definitions are out there given by different fields of study. Geography, biology, economics, law have different definitions. Nevertheless, our concern here is to define land according to Ethiopian laws. That means we need the legal definition of land.

Generally, in defining property, there are two approaches. They are object approach and right approach. According to object approach, property refers to any resources (things) on which the property right of the interested person is exercised, while in the case of the right approach, property is conceived to be a right or a bundle of rights. So, land in our context can mean either rights that are exercised on a given portion of the earth or a certain demarcated surface of the earth. That means the seat of land right is land itself. So, our approach under this section is the thing-land. So, what is land?

One sources of defining land law are proclamations like rural land administrations and use proclamation. Federal Rural Land Use and Administration Proclamation no.456/2005 and regional rural land administration and use proclamations: is there a definition of land in this proclamation?

There is no legal definition for the term “land” in these laws. The above mentioned Proclamation talks about types of rural land holdings, not the definition of land. Most regional proclamations came to divide land holding in to private land holdings, communal land holdings and state land holdings. Art.2, 10 and 11 of proclamation no.456 dealt with this classification of land holdings.

A. Private land holding

Private holding can also be further divided in to free, lease and squatter private holdings. These are essentially holdings of peasants and pastoralists or holdings which could be gained without payments. We may find these holdings in urban areas but they are massively found in rural areas for they are agricultural and pastoralist land to some extent.

Squatter private holders are legal and illegal right holders at the same time. These squatter holdings are land holdings which are not acquired through lawful means. To squat means to take-over someone's property. It is just an acquiring land without the permission of a legal holder.

We can think of a mixture of these three classifications of private land holdings. Land holding can be free, squat and lease land at the same time. We might have a plot of land which is acquired from a free system, can annex land by a lease system and then we can try to expand our land by squatting others land without their permission. This specific situation of our own act can show us the presence of mixture of the three classifications of private land holdings. So, in relation to a single person's holding, we can have these three sub-categories. This act of holding land is prevalent and common especially in towns and cities.

B. Communal landholding

This is mostly the holding of land by communes. When we go through rural area especially in the settled part of the country, which accounts for 2/3rd of the population of the country, we find the grazing areas and each peasant having his own farm. Apart from that there are also open areas used for variety of purposes including grazing. When we move out of this settled part of the country and move to the population who based their livelihood on shifting cultivation or pastoralist livelihood, the main mode of land

holding is a communal. Communal, in a sense that in certain communities, the whole members have the right to access that resource (land) concurrently. One member of the society cannot say “this is mine, I’m going to face you at, going to enclose it for my own end and etc”. Everybody can have an access to for certain purpose.

C. State land holding

The proclamations we are dealing with are proclamations which are talking about rural land areas. But we are expanding our conceptual thinking to urban lands too. In fact, the state owns land both in urban and rural areas for variety of purposes.

We can sub-classify state land holding in to land in public domain, land for public services and land used by the state for commercial purposes. Some lands held by the state belong to the public. They hold land in the public domain. The typical examples are streets and highways. They consume land without land holdings. But the fact is that these streets and highways are accessible for everyone. They are managed by the state using public expenditure (tax). The accessibility to everyone without distinction is the concern of state land in the public domain. So, state land in the public domain means that land under the control and management of the state but nobody can be kept out. It has no restriction in terms of citizenship. Whether we are Ethiopian citizens or not, we can have access to state land in the public domain so long as we find ourselves in the Ethiopian soil.

There are also state lands which are provided for public services: those of government institutions. We can simply take universities as an example of state land for the public service as one government institution. They have consumed a lot of land. These kinds of institutions’ facilities are not open to everyone. There are a lot of requirement: being a student, being a seeker of some sorts of

services and etc. all ministries and government institutions having land holdings fail under this sub-category.

Land held by government for commercial purposes: these are simply state enterprises like share companies and public enterprises. In the first sub-classification of state land holding (land for the public domain), the state's responsibility is managing a common resource or it's a custodian of the public resource a resource common to everyone on the Ethiopian territory. In the second sub-classification (land for the public service), the state is acting as a sovereign: enacting laws, implementing those laws, imprisoning people, training them, teaching the society, providing services, etc, for that land is obviously important. In the third case (land for the commercial purpose), the state is acting as a trader/investor in that capacity to hold land.

After all, "what is land?"

As we have tried to assess it, this proclamation (proc.no.456) does not define land. It has basically classified and sub-classified land holdings. What is defined in this proclamation is "land holding" under art.2 [13] but not "land". But there are other parts of the proclamation which tend to imply some sorts of elements of the definition of land. Still they did not give as a definition rather than elements. This failure of defining land is not only limited to proclamation number 456/2005 but the other proclamation like the lease did not also define what the land is than referring land in there provision when they deal with issues like measuring and surveying of land. While dealing with the measuring and surveying of land, the proclamations did not still expressly define what the land is.

But we simply infer that for the capable thing to be measured is land than land holding. Then the next question we should raise here is that "will the civil code help us at defining land?"We cannot

really find the single article which could in satisfactorily manner defines land. But we can read and put certain provision together to come-up-with an inferential definition of land in the context of Ethiopian property law. For managing the case, we have articles like art.1126-38 and art.1209-1212 of book three of the Ethiopian civil code. The result of that inference lead us to a definition of land which could be expressed in the following way: “Land” is an individualized/isolated/demarcated portion of the earth which includes the surface, sub-surface, directly below that individualized space (below is to mean to the extent necessary for the exploitation and use of that space) and directly above a space (above is to mean to the extent necessary for the exploitation and use of that space). In law, this seems to be what land means.

The elements of this definition:

1. First the land should be individualized. The individualization might be carried-out through a modern or traditional means. It is not a movable thing and can’t move to somewhere but we are trying to treat as if this space is a movable thing and susceptible to transaction. Specially using a modern technique as mentioned earlier, people of knowledge go to the field, measure it and survey it, they register what was measured and surveyed and they issue a paper that signifies or represents that measured place. We might call that paper entitlement or a certificate of possession. Whatever the name may be, the point is we should carry that paper around. Because the land is represented by that paper. After all, individualization is an important thing.
2. “It also includes the surface or sub-surface”: of course this is a surface or sub-surface of that demarcated land. This surface is also qualified by the phrase “directly below”. We cannot expand to encroach on the neighbor’s land. It must be directly below.

3. “To extent necessary for the exploitation or use of the space”: this direct below should be to the extent necessary for the use. We cannot go down indefinite. The downward movement has its own limit which is “to the extent necessary for the exploitation and use of the land”. This phrase is mostly used in articles 1209-1212 of the Ethiopian civil code. The rule “to the extent necessary for the exploitation and use of the land” is applicable for upward movement which is directly above too.
4. Accessories and intrinsic elements of land:

There are things which are attached to the land by law physically. These things are treated as part and parcel of the land. Some of these things might be movable things. But they are said to be immovable things because of the special relationship to the plot of land, they are immobilized. In the eyes of the law, these things are treated as if they are immovable things even if they can be movable things.

Rationales for Classification of Landholdings

The legal effects of these classifications of land holdings:-the general point that we should keep in mind before going deep in to the legal effects of these classification is that the rules which are applied to the three classifications are not similar. The rule which is applied to private land holding is different from that of communal land holding and the rule which is applied to communal land holding is different from that of state land holding and etc. but the difference may not necessarily be 100 percent: there might be some sorts of similarities in the nature or application of the rule but they are not also completely similar.

I. Nature of rights: the type of right we obtain as a lease holder is different from the rights we obtain from free holder. Eg. Use right can be mortgaged if we have the

right of lease holder. If our land holding falls under sub-classification of lease holding, mortgage will be our use right. But if our land holding falls under the free holding, we cannot collateralize our land use right.

II. Duration of the right: in the lease holding, the duration is defined, might be 10, 15, 20 and etc. but in relation to free holding (if we are peasant), it's for the indefinite period of time.

III. Payment: we are obliged to pay in a lease holding. Whereas in the case of free holding as we are a peasant, we are not expected to pay anything. We get a holding for free.

IV. Expropriation: in relation to expropriation, there is difference in the treatment of these 2 sub-classification (lease and free) land holding.

V. Land redistribution: land redistribution might be relevant in relation to free land holding. It might also be relevant in communal land holding.

Part III. The Nature of property right on Land

"What constitutes property rights?" will be addressed in this section. There are several approaches crafted by legal scholars to address this question.[7] Two approaches are selected for discussion for this class. They are: exclusive right approach and bundle of rights approach.

a) Exclusive right approach

Property right is a right exercised against the whole world. "…it consists in the attribution of a thing to a given person to the exclusion of all other others".[8] Further, "The existence of an exclusive right to

[7] See Murado Abdo, as cited in note 3 above, Pp. 163 and ff for detailed discussion.
[8] Planiol, as cited in Murado Abdo, cited above.

enjoy and dispose of a thing and to draw from it the benefits it can yield."

So, an exclusive property right is said to exist when someone has control over a thing and can do certain things with that property. S/he can make certain decisions over that property without interference from outside. For instance, if the person has the exclusive right owner of a chair, he has the right to break in to pieces, leave it unused, burnt-down, etc. the point is he can do whatever he wants over that property since he is the exclusive right owner of the chair. We cannot exhaustively list the things a person may do with his property "chair" in the above example. In the case of land, it is doing certain things by the person himself or authorizing some other person to use a land. So, this involves some sorts of physical interaction/involvement with the object "land". And it can also be inaction or doing nothing (leaving the thing "land" idle). Generally, the exclusive right approach gives a person three important things over his property:

A. to subject it to juridical act (donate, sell, rent it and etc), B. to take-out certain activities and C. non-interference (all persons in the world including the state other than him have no right over that property.

Open ended nature of exclusive approach

In this approach, the rights cannot be exhaustively listed-down specially to do or not to do certain things, to deal with in certain way on the land etc. Under this approach, the core rights might be mentioned.

Shrinkage of the land

In an exclusive approach, shrinking of the land (right) is limited. Shrinkage or contraction by the state through practices, legislation and policies is in principle prohibited. If the country adopted an

exclusive right approach, the state is prohibited from contracting, diminishing, minimizing or reducing the content of property rights through the enactment of legislations, formulation of policies and endorsement of practices. To some extent, the state has a room. But the state does not have a wide legislative room to limit the rights. Generally, this is the freedom zone of an individual which is exercised in relation to things, land in our case and that freedom zone cannot be undermined by anyone.

b) **A Bundle of Rights Approach**

[In) Bundle of rights approach it is possible to conceive of ownership as a bundle of rights to control a thing. These rights include the right to use the thing (*usus*), the right to appropriate the returns or fruits of a thing *(fructus)*and the right to change the location, substance, appearance and dispose of the thing (*abusus).* Salmond says: "...the right of ownership is a right to the aggregate of the uses of ...a material object".

An owner of a thing normally has the right to use, enjoy and manage it. The owner is not obliged to use it, and he may exclude others from using or interfering with it. The owner may use, exploit or dispose of her property any way that she thinks fit and that is permitted by law. To use the thing, the owner needs to have direct or indirect possession of it. Or the owner may permit another to use or possess her property. As we have already seen this does not necessarily divest her of ownership.[9]

According to this approach, property rights are bundles of rights over things, including land. It is a metaphor: “sticks tie together.” A bundle might be a thick, a lot of sticks in it. It might also be a thin, a few sticks in it. Whatever the rights are (thin or thick) the rights are close ended in this approach. They are exhaustively listed. What a person can do with a thing is limited. We know for sure our right: A, B C or D. the peculiar feature of this approach which

[9] See Murado Abdo, cited above, p. 165

makes it different from the previous one is that shrinkage and expansion is possible, so is contraction of the right.

Which one of the two approaches does the Ethiopian land law currently follow?

A. Land right under the FDRE Constitution

Is land right human or democratic right? Who owns land under the Constitution?

As per article 40/3 of the Constitution *the right to ownership of rural and urban land, as well as of all natural resources, is exclusively vested in the State and in the peoples of Ethiopia.Land is a common property of the Nations, Nationalities and Peoples of Ethiopia and shall not be subject to sale or to other means of exchange.*

Is there discrepancy between the Amharic and English versions? Does that obligate the government to always consult and get the assent (consent) of the people (through referendum for instance) to give land to investors, at least, on big projects? What is the legal effect of the second statement?

As it is possible to easily understand from this article, the state and the peoples of Ethiopia are given the right to own a land. The land is to be held in custody by the "government" on behalf of the people (article 89/5 and 40/6). Generally, the Constitution of FDRE gave the ownership of land to the state, peoples of Ethiopia and nations, nationalities and peoples.

The state assumes the existence of government, people, territory and sovereignty. Among these four elements, the most important one is the people because we can have people without territory, government, effective and realizable sovereignty. We do have different states without government for a government of that state may fail at certain occasion and fail to come-back again.

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Art.40 [3] of FDRE Constitution can have two possibilities by giving the ownership of the land to the state and peoples, anyways. The first possibility is state land ownership or people land ownership as the people is the fundamental thing in the notion of the state. It's owned collectively without specifying as to that and these citizen, these and that generation and etc. By just saying the "PEOPLE", It should include both the past, current and future generations. The second possibility is the "state" will be one or distinct entity and the "peoples" is different communities for people is used in the article in its plural form "peoples": the communities that came together in accordance with the Constitution to establish the federal government.

Generally, the possibility of understanding art.40 [3] of FDRE Constitution is either peoples state ownership of land or state+peoples ownership of land (if we have 90 comunities in Ethiopia+state equals 91, then, we will have 91 entities owning land.) if we take the second possibility for the matter of our purpose, the type of ownership the Constitution is giving for the people is communal ownership. This type of ownership could be authorized by the second line of art.40 [3] of the FDRE Constitution saying "land is a common property". So, the people own the land within Ethiopian territory in common.

Then, how did this form of common ownership over land by people and state came to being? We cannot own something without a block. We have 91 entities owning Ethiopian territories. The naturally growing plants, minerals and the land itself are given in the form of common ownership to these entities. The common ownership of Ethiopian land by both state and peoples is the result

of partnership agreement by virtue of which they confirm upon themselves this form of ownership over the Ethiopian territory by using the 1995 FDRE Constitution as a legal document. So, this is an important Constitutional analytic. By that Constitution, they had said “before the adoption of this Constitution, we use to own exclusively our own territory. But at the time of the signing/ratification of this Constitution, we have agreed to join our astrictive resources for the realization of the cause of partnership. As a result 91 of us will use the land which is found in Ethiopian territory in common”. From this agreement of the state, it is easy to understand that the agreement is the free will or full consent of those 90 comunities+a state for the partnership by itself presupposes the existence of consent. It is also possible to know as the communities are willing to be treated equally with each other for they are eager of owning the resources (land in our case) commonly or together.

Individual Assignment: Discuss the merits and demerits of having public land ownership system. Should Ethiopia amend the constitution after two decades or should it remain the same? (Not more than three pages.)

Important Points about Land right under FDRE Constitution

Generally, the following are the features of ownership: 1. Exclusivity, 2. Inalienability, 3. Indivisibility and 4. Nullity.

Proportionality/equality: as a general principle, the land is owned by the commoners. Their share may be equal or unequal. It depends upon their agreement. But if they did not agree, the law will determine their share based upon the principles of presumption.

What is the importance of knowing the share of or the amount of the land at stake when several persons jointly own? In the case of land as well as in corporation, one can't say "I own the land" rather he only says "I have a share on it."

For this reason, determining the share of the commoners from the land at stake is the main important task. Generally, determining the share of the commoners serve 2 interrelated purposes: (1) to determine profit and (2) vote. The more share the more the vote will be. What is the size of their share? Is it proportional or equal? For answering this question, we need to see ar.3 [2], 47 [2], 62 [4] and 88 [2] of FDRE Constitution Verses art.55 [1-3], 62 [2] of the same Constitution.

Perpetuity: the covenant is a perpetual agreement, and it cannot be easily brought to an end. In principle, it seems that it is not a perpetual arrangement. Opting out is allowed through: amendment and secession (articles 39 and 104-105 of the FDRE Constitution).

Agency: it requires at least the involvement of two individuals: principal and agent. Obligation of an agent is acting on behalf of the principal.

As one can easily understand from the reading of article 89 [2] of the FDRE Constitution, the phrase "on behalf" is used to symbolize agency by a clear agency language. "On behalf" in the same article may represent common benefit. From the reading of different provisions of the Constitution, one can also conclude that the mandate of agency is given for both federal and regional governments. The following are possible questions which can be raised here: "Why not for one of them?", "What are the considerations that are taken into account in allocating federal, regional or regional federal powers? Let's assume region X want to enact a Constitution regarding land matters solely. This power

can’t be exercised exclusively by X. Because land is both local due to its location and also a national importance for land is fundamental to national economy. It conditioned security, foreign trade, etc.

A land has both local and federal content. To the extent it has local content it should be given for regional governments, to the extent it has a national content, and it should be left to the federal government. In short, we allocate agency or power based on whether the matter is local, national or both.

Land right less than ownership

Land rights are divided in to two: ownership and right less than ownership.

Nomenclature of the Right under the Constitution

Is there any term in the Constitution that describes land rights less than ownership? Yes there is: possession art.40 [4], art.40 [5]-, grazing cultivation implies use+fruit=usufruct art.35 [7] use, administration…of land. Art.40 [6] the use of land. See 40 [7]. We don’t have a single name adopted for ownership land right less than ownership. Generally, either implicitly or expressly, after the reading of art.40 [4-7] of the FDRE Constitution, one can find terms like use, control, possession and management of land which are deemed to be land rights less than ownership.

Art.89 [5] have also used the term “hold” which could also represent land rights less than ownership like the above terms. But this term (hold) is a weak term by its nature, because we might hold something which does not belong to us. We will act as an agent or we don’t have a right to derive certain interest from what we hold, because we are holding on behalf of somebody else.

A very strong term is used in art.97 [2] of the FDRE Constitution which is “usufractuary”. This sub-article of the Constitution reads

as: “states shall determine and collect fees for land usufractuary rights.” Of course this article deals with taxation. We need to extend the application of this provision which is relevant to taxation to other matters including land. This article is a very general one to infer the point at hand anyways.

The term “usufractuary” is important for our purpose. What is a “usufractuary”? Usufractuary is a person who will be benefited by using something’s or a beneficiary of usufruct. We may have a usufruct right over something. If we have usufruct right over something, then we will also have the right to collect and own the fruits thereof. E.g. If we are a usufructure of a house, we can use that house for certain purpose and can also rent it out to collect the rent. The rent of that house is a fruit. So, the term “usufruct” is binding concept: it combines two things: using something+collecting fruit out of it. Having a general background of usufruct enables us to easily understand the confusion of the term “beneficiary” with the “right” in this Constitution particularly in this provision. The appropriate term should have been here (art.97 [2]) “usufruct”. Collect fees for land use is a land usufruct not usufractuary right because usufractuary is not a right rather a person.

Contents of the Right under the Constitution

1. Freedom from eviction: this term has horizontal and vertical damage. Horizontal damage: eviction/dispossession or displacement might come from entities other than the state or person other than the states. This means that fellow members and even our neighbor can evict us. Foreseeable eviction might also come from corporation or private actors. They might violently try to take our land as a peasant because they knew the land for their own purpose. This is the first threat.

The next and the most important threat is government. Government might also dispossess our land by using actions (we mean by “action” practices, laws, and policies). The government might issue policies, pass legislations and generate practices having the implication of eviction without resorting to expropriation.

Art.40 [4] and [5] of the FDRE Constitution deal with both dimensions of dispossession. This obligation having the Constitutional status is imposed on government. In other words, what these Constitutional provisions say is that (1) the government, whether the federal or regional, cannot take actions in this form which lead to the dispossession or displacement of land which is deemed to be the negative one for it supposes that the government will refrain from taking any kind of action and 2. The government has to also stop horizontal eviction which is positive obligation on the government.

(2) The right to receive fair price for the produce: this feature of right is authorized by art.41 [8] of the Constitution. This article reads as: “Ethiopian farmers and pastorals have the right to receive fair prices for their products that would lead to improvement in their conditions of life and to enable them to obtain an equitable share of the national wealth commensurate with their contribution. This objective shall guide the State in the formulation of economic, social and development policies.” If we produce something as a farmer and if the fruit is foresee ably taken-away from user if the products are sold below the average market price, then, this act will be a form of indirect expropriation. Under this article, we should assume a Constitutional obligation not to restore those earlier exploitative relationships which we had experienced in history. Not only this, we will assume a positive obligation to make sure that certain systems and institutions are put in place so that

these social groups (the producers) would get not only market price for their product but also ***fair price***.

Fair in a sense, that they cannot get more than they deserve. Because if they do so, the urban or towns will suffer. They should not also get less than what they deserve because if that is the case, the rural population will also suffer in return and the urban population too. Therefore, article 41 [8] is a central article that links the economy with politics.

Constitutional Restriction on the Rights of Pastorals and Peasants

1. The first restriction comes from art.40 [8] of the Constitution which is expropriation clause.

2. Secondly art.44 of the Constitution which is the environmental clause for protection of environment can imply the limitation on land right.

3. Art.40 [4 and 5] redistribution. Why these 2 sub-articles imply land redistribution? By “land redistribution” we mean that taking a part of farmer’s land to give it to somebody without land or somebody with insufficient land. This is what we call “partial dispossession of land”. These 2 sub-articles of the Constitution refer to those who reside in the countryside who might be called peasant or pastoralist today and in the future. Both the present and future pastoralists and peasants are entitled to get rural land without payment (for free). So the implication will be obvious by raising the question “what will be the source of land for the state to give to these future peasants and pastoralists?” the first source could be a state land: land held by the state, The second source is the communal land: taking land from a community and the third source will be land from existing rollers. The point is art.40 [4 and 5] definitely suggest the possibility of land redistribution.

4. We have also restrictions coming from art.97 [1 and 2] which a land use fees. These land users are supposed to pay a land use fees.

5. Art.41 [8] also imposes an obligation on farmers to make a contribution to the national economy.

To which category of right do we categorize usufruct right? A. human or B. democratic?

One of the unique features of the FDRE Constitution is introducing the dichotomy of dividing the human and democratic right in to two parts. As we can easily see from the structure of the FDRE Constitution, chapter three of the Constitution is divided in to two parts. Some of the rights are put under the human right umbrella and some other are under democratic right umbrella. The possible answer which could be drawn for the above question is emanated from this structure of the Constitution. Usufruct or land right of the FDRE Constitution fall under the democratic right box. This is because of the very structure of article 40. Article 40 falls under part two of chapter three. Generally the place of article 40 of the FDRE Constitution leads us to conclude that art.40 in general and land right (usufruct) in particular is a democratic right.

What is the effect of assigning property right as democratic right? Can you see any difference between the protections given under art. 10 of the Constitution? According to Tsegaye Regassa, "…all categories of rights are coequally to be respected without one having any superior claim to the other in terms of being prioritized or subordinated."[10] However, Gedion Temotheos disagrees with this understanding. He asserts that:

> *Two things can be inferred tentatively from Article 10. The first tentative inference is that human rights and freedoms are derived from the nature of man and as such are universal. This is to mean that human rights are the rights of all human*

[10] Tsegaye Regassa, (2009), Making Legal Sense of Human Rights, Mizan Law Review, Vol. 3, No. 2. P. 303.

beings simply and merely by virtue of their humanity, as opposed to democratic rights which are the rights of citizens and 'peoples' derived from their juridical and political status. So this would seem to mean that in terms of the bearers of the right, human rights and democratic rights are different, the former being more inclusive than the later[11].

So, what is the effect?

Suspensions of land right

the main important question that will be addressed in this sub-topic is, "is it possible to suspend land rights?"Since art.93 of the FDRE Constitution exhaustively lists-down the right which could not be suspended by state of emergency, answering this question could not be a difficult task for us. As clearly stated in art.93 [4] C of FDRE Constitution, only art.1, 18, 25, and 39 [1 and 2] of the Constitution could not be suspended. Since art.40 of the Constitution is not listed here, it can be suspended and land right are a subject of suspension at the time of state emergency.

Land rights less than ownership not addressed in the Constitution:

1. Duration: duration of the right is not addressed in the Constitution. If so, "for what long does one use a "usufruct?"
2. Purpose: purpose of the right is not also addressed. Then, "for what purpose this right (usufruct) is given to certain groups?" is it for subsistence or…
3. Nature of the usufruct right: "Are we supposed to continuously and actively use a land?" suppose Mr. X has failed to use his farm land for 3 or 4 years. He will say that "this is my farm land". But he is not tilling or farming it. Then, "would the government take-away from Mr. x that farm land?".It is not still answered by the Constitution.

[11] Gedion Temotheos, (2010), Freedom of Expression in Ethiopia: the Jurisprudential Dearth, Mizan Law Review, Vo. 4, No. 2, P. 208. This argument is back up by the Constitutional Commission.

4. Dispute settlement: if dispute arises relating to the use of land, “how are we going to solve it?”.Are we going to use customary law, courts, both or… suppose Mr.X’s usufruct right is infringed by Mr. y. Mr. Y without Mr. x’s authorization has interfered with his usufruct right which is given by the Constitution. What recourses are available to Mr.X? Will be a burning question which is left unanswered by the FDRE Constitution.
5. Transfer: can we transfer our usufruct right??

After all, the point here is that these detail things imply that the state has legislative space to play a role. So, from time to time different issues could be addressed in legislations. In other words, these are areas left for legislative intervention.

B. Land Rights Less than Ownership Addressed In Different Subordinate Legislations

Under this topic, we will mainly focus on two proclamations which are proclamation no.456/2005 and 721/2011 lease proclamation. These proclamations are basically a representative of the two sects/parts of the country one stands for rural (proc no.456/2005) and the other stands for urban (proc no.721/2011).

Naming: this sub-topic will answer the question “what name is given to land rights under these subordinate legislations?” If we go through these and other regional legislation, we find terms like “land holding” and “possession” to represent land right. E.g. The Federal Rural Land Proclamation and the SNNPR rural land proclamation use the term land holding. But the Oromia rural land proclamation use different term which is “possession”. Even ifthere are two different names in different federal and regional legislations, it does not matter that much because the point is we have two names as an indicator of land right in those subordinate legislations. After getting the names which were given to the land

rights, the next question will be “what this naming represent?” which is the content.

Content: normally, we have three things as the content of land right in these subordinate legislations. These contents are:

1) **Use for agricultural purpose**: use can be one content but there are conditions for that use. We cannot use rural land for any purpose but for specified purpose. We can use land for different purposes other than agriculture. But this use right in these proclamations is limited only to agricultural purpose.
2) **Transfer** in the form of donation and inheritance: we have the right to bequeath/inherit/donate that use right (not the property on the land but the use right) When we either inherit or donate, there is no consideration to that effect.
3) **Ownership of property on the land**: this property is not any property on the land but the property on the land which is related to either capital or labor. This means that any mineral resource or wild animals could not be part of our claim. Because wild animals and mineral resources are not traceable to our effort rather they are traceable to their nature: they exist in their natural condition on our land.

Even if there are some differences between different federal and regional rural land proclamations in terms of naming (nomenclature), their content is more or less similar in nature. So, in all federal and regional rural land proclamations, there are 3 dimensions as to content: use, transfer and ownership dimension.

Under these subsidiary laws, we have generally two problems as to naming:1. Lack of a uniform term in naming: because as we said it above we have at least two names for the same content of land which are holding and possession. This creates some sort of confusion in academic aspects. Because we are talking about the

same thing but using different names (designation).And 2. Confusing land right with property on the land: because the use and transfer right are related to land use right but the ownership aspect is related to the property on the land not the land. This means that there are two things: land+property on the land. Because our right in or over the land is conceptually different from our right over the property on the land. So the point is, despite there is such kind of conceptual difference between the two, they were fallen under the same holding right. So, ideally, when we talk about land right, we should exclude the right of the property on the land for it has its own field of study which is general property's subject matter.

When we see proclamation no. 721/2011, the term used for land right is lease right. This name is given for this proclamation for it covers urban land than that of rural land. Under art.2 (1) of this proclamation, lease is defined as a system of land tenure by which a right of use of urban land acquired under contract of definite period. This definition of lease tells us that in relation to urban land, what we get as a right is use right. This is what makes this definition better than the definition of land rights given by the other proclamations like 456/2005 because it does not talk about the property on the land. Whether these two things are conceptually coherent or not, it is not a business of land law. The other point what this definition signifies to us is that the use right will be gotten by the lease system and we have to pay for it.

Conditions/restrictions under use right

A) Continuity: as clearly elaborated in different regional land laws/proclamations, the use of that land must be continuous. We have to normally use the land without interruption for agricultural purpose. The maximum time to be tolerated for unused of land is 3 years normally between 2 and 3 years. This means that we should

not leave-out the land unused for more than 3 years let's say several decades.

B) Proper use (Art. 10 of the Proclamation): In addition to continuous use of the land, our use should also be proper.

So, the conditions are: use for agricultural land, use continuously and use it properly. Generally, improper use and non-use of the land might lead to the loss of that land.

Then the basic question we need to ask with regards to these three conditions is that "why do we need these 3 conditions for the use of land?" or "what is the justification behind these conditions?"

In relation to proclamation no.721/2011 or urban land proclamation, the conditions are use for the purpose specified in the contract of lease. The purposes might be manufacturing, residence, etc. the issue is what is specified or indicated in the lease contract? If we want to change the purpose of the land from what was specified in the contract to anything else, we should apply and need to the amendment of the lease contract. B. We have to make the necessary payment. The payment might be once or installments. We have to pay the installment when the time is due. C. we have to complete the project within the time frame indicated in the lease contract. In fact we have to commence the project within a time indicated in the lease contract and complete it within a time as well. So, commencement and completion of a contract within a time specified in the lease contract was a third condition for urban land's right. The same question of justification for these conditions will also be raised here.

The regular notion of land rights would say "these conditions would not make sense." If A acquires land through lease, He may use or may not use it. It is Mr.X's frame either to use the land for these and that purpose or late it unused. Either to use in a time or not is not determined by the authorities rather by the master who is the lease owner Mr.X in our case.

Content of land rights (continued)…Lease and rent

These two concepts are included in the law. E.g. Proclamation 456/2005 uses these two terms in its different provisions. Proclamation no.456/2005 allows small scale farmers to lease-out their land to investors and other farmers (article 8). They are also allowed to rent their land (Oromia Rural Land Use and Administration Proclamation No. 130/2007 see other Regional Proclamations too). However, there are conditions attached to these transactions (see article 8 of Proclamation No. 456/2005). Rent and lease are forms of transfer. The transfer is transfer of use right for certain periods of time.

Under proclamation no.721/2011, sub-lease is possible (article 24). A lessee of an urban land can sub-lease his land.

Mortgage

Are the peasants allowed to mortgage their land under the proclamations? the peasants are not allowed to mortgage land under proclamation no.456/2005 and other regional and rural proclamations. But investor's especially agricultural investors can sell-out their land use right. They can either mortgage or sell-out it.

In relation to urban land, whether the lessee is an investor or non-investor, he can mortgage or sell-out that lease right which is time bound and payment based freely without any distinction.

Contribution of land use right

The question which will be addressed in this sub-topic will be "Is it possible to contribute land use right to business?". If you want to be a member of a given business association whether it is cooperative or share company where at least two individuals are involved intending to engage in a profitable activity, you will have three possibilities:

A. contribution in cash in return of membership, B. Contribution of labor intellectual or physical if you have some expertise in

managing some of the affairs of that business. Since you don't have money or any other asset, then you would say "I would contribute my skill/knowledge in managing the business." C. you may make in kind contribution or property. It might be intellectual property, land or some other property. D. the last possibility might be the combination of all the three possibilities mentioned above; some cash, labor and assets. The whole point behind this is that what you get in return by all these contribution is membership which brings about rights and obligations. Let's suppose that Mr. X who is a peasant who has no cash/money to be contributed, no quality labor that needed for a business and no assets except land use right. Now, Mr. X is intending to join a given business association with other fellows. Then the question is "is it possible for (Mr. X) in our case or any (Farmer) make this kind of contribution (the land use right) to become a member of that business association?" yes; it is possible for a small scale farmer to develop his land jointly with an investor or other individuals.

This is a form of land alienation of land use right because after the formation of the business, the business association gets its own legal personality distinct from the members. The land use right is being transferred from the small scale farmer (peasant) to the association. After the formation of that business partnership and the necessary requirements for acquiring legal personality, the holder of that land becomes the business association. The farmer has exchanged the land use right with membership right. That membership right brings about voting, participation in management and getting profits.

So, in relation to proclamation no.721 (urban land proclamation article 24), yes it is possible; land use right obtained through lease can be contributed to a business association. This is trading of land use right with a set of rights and obligations to be enjoyed and held

in that business association or it's a tradability of land use right to a certain need even in relation to rural land like share-cropping.

share-cropping is a situation where a person who has a land use right on certain plot of land lacks certain agricultural inputs other than land.For instance when he does not have seeds, fertilizers, labor, etc and agrees with another person to produce those agricultural inputs other than land to till the first person's land for a certain period of time and then shares the fruit of that land proportionally or in accordance to their agreement.

Whatever the arrangement may be, the land is still controlled by the land holder who is the original holder of the use right or who is still possessing a land. It is only the management aspect which is compacted-out for a given period of time. The major difference that could be drawn in relation to this between lease and share cropping is that; in the case of lease, the possession right is transferred to the lessee. the land is put under the control of the lessee till the period of time which is specified in the lease contract expires, but it is not the case in share cropping.

Out grower arrangement: in case of share cropping, the arrangement is an ordinary arrangement between farmers. But in the case of out-grower arrangement, it's a relationship between peasants and pastoralist and agricultural investors. Here you have a company in the picture. The point is, the company has a limited amount of land. It cannot produce sufficient enough for its need. The company cannot obtain an additional land due to several reasons. If not, the next possible resort for the company will be approaching farmers and interring in to an out-grower agreement. That agreement might essentially state "these farmers will produce these quantity and quality of a product" and that would be at certain time interval be delivered to that company at a certain price. But they will do all these on their own land. The obligation of company will be to pay price for the quality and quantity delivered

and to train those farmers' scientific techniques of production and supply certain inputs like pesticides, fertilizers, selected-seeds and etc.

This is basically a mechanism whereby a company controls the production of certain agricultural products by farmers. This kind of practice is increasingly visible in rural parts of Ethiopia. E.g. In relation to Sugar factories, there are certain farmers undertaken to produce sugarcane to that factory. Dashen Beer factory has also came with this sort of arrangement.

Generally, the point here is, this is not something which is hypothetically stated in the law rather it is a developing evolution in a rural areas.

Land consolidation

To consolidate means to bring together or to merge together certain scattered things. In relation to land, if X have 4 plots of land in different places which are far away from the other let us say in 10 Kilo meters, if Y have the same plots of land in different places and Z too, now the question is "Can X, Y and Z somehow inter in to an arrangement so that their plots of land consolidated and the distance among different plots will be reduced?" first, what is the problem with X's four different plots of land located indifferent Kebeles? Surely, it involves some sort of costs. Because if X wants to use a plots with 10 kilo meters away from the other plots, he has to transport seeds, labor or generally inputs. In order to take good care of the plots throughout the season, he has to travel several times to that place. So, this distance imposes cost. So, there has to be mechanism in which this cost is minimized. One way of minimizing this cost is plot consolidation which involves land exchange or trading land (land for land) because selling land is not possible.

After all, “Is this kind of land arrangement possible in different federal and regional land proclamations?” yes; proclamation no.456 of federal rural land use and administration proclamation under art.11 (2) recognizes such kind of land consolidation. This article signifies for as the tradability of land. Because price is not involved but **in kind** consideration is involved.

Factors for dispersion of one farmers land: A. market consideration, B. water availability, C. security, D. infrastructure availability and E one of the most important factor among other is agro ecology which is linked to fertility.Agro-ecology is the suitability of climate, fertility of a given location to different kinds of crops. So, in broadly speaking, this way of having different plots of land in different places is risk reduction venture for farmers. The underlying reason behind this deliberate plot dispersion is risk reduction or a mechanism in which the rural population use to cope up with changing weather (drought).

Land exchange

Is it possible to exchange land for land other than for the purpose of land consolidation and undertaking some sort of business in the two proclamations (456/2005 and 721/2011)?If Mr. A has a plot of land in Addis and Mr. B has another land elsewhere outside of Addis in rural areas. In this case, if Mr. X wants to go to live in rural areas and Mr. B wants to come to the urban areas, can they exchange or switch their land for one another?Art.40 (3) of the FDRE Constitution states that “land shall not be subject to sale or to other means of exchange.” This article is tending to ban in addition to sell other means of exchange. Because sell implies some sorts of consideration like money; when it say other means its implication is just to ban other sorts of land exchange other than some consideration of money for you can trade land without using money. Even if there are some restriction or conditions attached to it, both inheritance and exchange of land is possible in both

proclamation no.456 or 721 urban and rural lands. One of the instances from the proclamations is, art.11 (3) of proclamation no.456. This article states that “In order to make small farm plots convenient for development, farmers are encouraged to voluntarily exchange farmlands.”

In my opinion, exchanging rural land for urban land is not possible because there is no arrangement in land laws.

Land Management

The power to manage the land is given to the land user. One who has a land use right can also has a management right. In relation to rural land, “managing land” is taking care of the land. This care of the land might answer the questions like “what kind of crops to be grown?, When to grow?, what type of inputs shall be used? Etc.” of course, there are some restrictions imposed by authorities. These questions are questions which needs some sorts of decision by the land use right owner.

Conditions to management include: you cannot grow whatever plant you want like marijuana. You cannot fail to undertake conservation measures that use to protect land from erosion. If you fail to do so, you might lose that land. The authorities might come and say “you are not taking good care of the land and you are going to get it back.”At getting back, they might use different procedures. But the decision making power basically lies on the land users.

What is the purpose of land right? Our first focus will be on rural land. Since the use right cannot be an end by itself, there is another end for use right. That end is explicitly mentioned in subordinate laws. Those laws specify the purpose of use right by saying “for a living”. Proclamation no.456/2005 says that “land use right is given to peasants and pastoralists for a living.” Land use right is primarily a subsistence asset. The law is saying to citizens “you are better, you cannot give you pension or an employment

benefit rather you can give you what you have which is this natural asset [land use right] and you give you this natural asset primarily forsubsistence or survival."

In relation to urban land, land use right is not a survival asset. That is why the Constitution fails to guarantee land for urban dwellers. The urban population can subsist on something else not on agricultural production the reason for a Constitution to single out the two social groups (peasant and pastoralist) for land use right for free primarily for subsistence is this one. The two social groups do not get only the land use right for free primarily for subsistence but they are also awarded immunity against eviction by the Constitution.

Land use right is the base for the continuity of the two social groups (pastoralists and peasants) life. This purpose of land use right for the groups is extended to survival as autonomous being which means the right to life. Survival by itself symbolizes to exist in life. For physical existence, you need some basic necessities. So, the point here is, the law states "for a living" but you are ultimately tracing it to the right to life. Land use right can reasonably extended to right to life which means you can move out the land use right arguably from section 2 of chapter three and put it in section one of chapter three of the FDRE Constitution. If you look at section one of the third chapters of the Constitution, the rights put in those sections are rights which are endowed in nature. Then, such kind of artificial distinction between section one and two of chapter three might disappear if you read it in this way.

This land use rights for living is explicitly put in subsidiary laws. All the regional rural land laws and federal rural land administration proclamation explicitly put why land is given for land users. But the Constitution is implicit. Of course, singling out these small scale rural producers tells us a lot. The land use right is not given to urban dwellers or these and that social groups rather it is given to

poor people in rural areas who live without alternative means of livelihood. So, instead of focusing on the absence of the term “survival” or the phrase “for living” in the FDRE Constitution, you have to contextually read two sub-articles of art.40 (4 and 5) which confirm land right for free and which also gives non-eviction right to similar purposes with subsidiary laws.

What are the implications of this way of reading land use right?

A. the first thing is alienation is not possible. Alienation “in a market place” of this land use right is impossible because land use right is foundation of existence. The distinction should be made here; alienation is “tradability” or “donation” and “inheritance” is not included in alienation. Generally, it implies that the land use right is put beyond the reach of the market, but not the ownership because the ownership belongs to nobody. It is put beyond the reach of any actor in the country. So, you cannot talk about transfer of something which you do not have. What you can talk about is the land use right which you have in our hand.

B. You will get the land use right, if you don’t have a permanent means of income other than agriculture. If you do, you are no longer entitled to retain keep-on the land use right. Because you don’t need it for survival for you have another permanent source of income which can assure your existence. The right is linked to the right to life or survival and that link is broken for you become a trader, government employee, self-employed, etc., and the government assured that you have a permanent means of earning. Then, you have to leave that land or you cannot say “it is my ancestral land.” Generally, this is not a personal value judgment but the implication of the FDRE Constitution in art 40 [4 and 5].

C. Joint right: The use right which is given to rural producers is not in principle given to an individual rather the right is given to household. It is a household property. It is not the property of one

of the members of that household. That is why you say it is a joint use right property. Simply speaking, it is a family property. In a family, you might have 5, 6, 7 or 8 individuals, but the point is, it doesn't matter; it is to the household. In Ethiopia, you have 5 individuals per family in average. So, the land use right is given to them jointly.

What is the implication of understanding this land use right not as individual but as a joint property? The implications are;

A. inter household distribution is possible. One of the family members might come-out when he/she is of age and demand a piece of land. He/she is entitled to make such kind of claim. So, land distribution is obligatory under custom and arguably feasible under the law. Because land use right is a joint right.

B. Consent is important; the consent of all the family members is important when key decisions relating to land is made. The husband or the wife considering themselves as a head of the family cannot legally alienate the land without the consent of the other family members. So, if the land is to be leased out, the consent of all of them is necessary the reason is that they have a property stake in the land. So, if that consent is absent, the agreement is subject to invalidation.

C. it creates a kind of fixation/dependency; the tradition of fixation might be generated. People would say "if I am entitled to have a portion of this land, why I take my education seriously? Why I am tired of searching other means of income?, etc. because I've this land."

Non-interference in the Land Use Right

The land laws did not deal with the idea of non-interference. Land use right gives rise to demanding non-interference for the land right users. All other person other than the land right user is

supposed to respect the right by abstaining (not acting). If they try to act in relation to that land by moving to the land, totally taking the land, making difficult to land user to use the land or obstruct his land use right, then these infringements lead to “self-help” which is indicated in 1148 of the civil code. The article empowers the property owner to use lawful force when there is an infringement of his right. So, some of this interference’s might under narrow circumstances able the land use right holder to repel them. Some others might entail to mobilize a civil action or possessory action as provided under 1149 of the civil code. Some other may also entail penal action under the criminal code. So the point is simply to mean, “this is my territory the land user is declaring and I have land use right over this plot of land, this means among others, all of you without my consent are legally prevented from interfering with my land. If you interfere, I am going to mobilize the different rights given to me by law to prevent my property from others; it could be penal action, self-help, pituitary action or civil action.”

Modes of getting, losing and proving land rights

This topic will try to answer questions like “what are different modes of getting land rights?”,“how do these rights get extinguished?” and “how do you establish these right if they are contested in a court room?”

Acquisition: there are different modalities of getting land rights: among others, the following are a widely used ways of getting it:-

A. Administrative allocation: in this modality, the source of the land is the authorities. For getting land from the authorities, you need to fulfill certain requirements specified in the regional land administration proclamations and regulations.
B. Social transfer mechanisms: these include donations and inheritance. You call these transfer mechanisms “social”,

because of the non-involvement of consideration. Social relation is the underlying purpose behind certain land transfer mechanisms including donations and inheritance.

C. Market mechanisms: this includes lease, mortgage and etc. Mortgaging and leasing land use right is allowed under the existing Land Laws.

Extinction of land rights

Simply all modes of getting land use rights could also be a means of loss the right. In the first place, the authorities might take- back the land use right if you are not using it appropriately or through expropriation. When someone transfers his land use right to another via donation or inheritance, his right will be extinguished. The same is true, in the market mechanisms, when the one who possesses land through lease or mortgage get the land use right, the one who leased or mortgaged his land is losing it at the same time.

Proof of land right

Proving is essential when dispute arises between individuals over the possession of the same plot of land. The answer as to the question of proving property including land is derived from the whole reading of book 3 of the 1960 civil code.

Historical development of land use right

The 1960 civil code of Ethiopia tried to eliminate some aspects of a feudal land law which had existed before the coming in to force of the code. But it was not able to eliminate them. When you say land right under the feudal land law, you are referring those rightlike“Rist land”, “Gult land”,lease, tenancy and land ownership. “Rist land” is a kind of customary land right. “Gult land” is a kind of feudal form of tenure. Tenancy is a right of tenant or “Gebbar”. So, you had variety forms of land rights under a feudal land regime. But then, the civil code came up with its own notion of land rights which are primarily founded on private ownership of land.

Then, you have proclamation 31/1975. To refer to land rights which are recognized, it used the term “possessory right”. It states, “Ownership over land is vested in the peoples of Ethiopia.” Rights less than ownership are given to different social forces under that proclamation and that right was called “possessory” right. That possessory right could not be transferred through any means. Generally, transfer was prohibited under that proclamation (31/1975). This transfer contains both the social and the market transfer. So, in principle, the land use right under that proclamation could not be leased-out, donated, inherited, sold-out, etc.

Then brief period of mixed economy came in to role. Land rights are a little bit relaxed; for instance, renting-out and leasing-out of land rights were allowed in the mixed economy. This type of mixed economy was adopted just in 1990 and lasted for the next one year and ended-up with the coming in to power of “EPRDF”. There are some laws which were enacted in this year (1990) tending to relax the rigid nature of land rights by then.

Since 1991, Ethiopians have been talking about land rights under the Constitution and various laws. As you know, different kinds of land rights have emerged after 1991. The replacement of Proclamation 31/1975 by other laws has resulted in some sorts of expansion or shrinking in land rights. “why?” is the question. First, you have to find-out a land rights by considering different laws including civil code.

Categorization of our land rights either in bundle or exclusive land right approach:

we have identified two approaches of land rights at the beginning of the third issue. Now, the question is, after considering our third major issue in the course, “which approach is envisaged under the FDRE Constitution and other subsidiary laws?”“Is it a bundle of right approach, exclusive right approach or something else which is difficult to describe?”

Informal land rights

So far, we have considered formal land rights-land rights that are given to different individuals under the state laws. It is a legal right which was emanating from the state law.

But people also generate land rights based on social practices. They give land rights to themselves through informal social arrangements-not necessarily compatible with what is written in the law, in fact, in contradiction with what is written in the Constitution or subsidiary laws.

For instance, donation of usufruct rights over land: the law says “if you are a farmer, you cannot lawfully donate your land use right up to a family member who was not dependent on the land.” It should be donated to somebody else who is dependent on a land. The law also states that you can neither sell nor mortgage your land use right if you are a peasant.

In practice, these provisions of the laws are massively disregarded by social practice. Either these people are unaware of the existence of such law with such kinds of restriction or even if they are aware they disregard the laws. They may even trade a land.

In informal land rights, a person acquires land in a lawful manner or in accordance with the state law. So, access to the land is lawful but afterwards that person deals with a land in a way contrary to the state law. So one instance of informal land right is, lawful access to a land plus unlawful social or market transactions. The second instance is even if the land might be acquired through unlawful manner. The state calls such kinds of individuals act “illegal possession”. Once the land is acquired unlawfully, the transfer will also be unlawful there to.

There are two perspectives on what to deal with these situations. The first perspective is enforcing the law no matter what. So, there is a violation of the law that undermines the rule of law and you have to crack-down the activity of these peoples (informal land right holders). The second perspective holds the view that these

illegal possessors should be regularized. Regularization is a process of issuing title deeds to the possessors.

Group Assignment

Identify the differences between usufruct right under the Civil Code on general property and Land laws.

The distinction between usufruct right over land in the civil code and usufruct in the existing laws: here, the question is, “is their distinction between usufruct under the code and usufruct over land under the existing land laws?”There is one chapter in the civil code which deals with usufruct and the nature of usufruct is articulated there. Now you have an emerging concept of usufruct especially after 1975. So, you have to find out those distinctions if there any.

Securing land rights of usufruct

The question here is, “how do we secure our right of usufruct over a plot of land?” “What do you mean by land insecurity or security?”.Security of land use right, in the first place, implies non-eviction or the right not to be evicted from our land. Land use right insecurity, on the other hand, implies that the existence of unlawful restrictions. Even if it is difficult to give one acceptable definition for land insecurity, it is the existence or absence of unlawful restrictions as to land use rights of an individuals.

People might feel insecure even if there is no actual dispossession. The authorities are not dispossessing as a matter of fact or there are no significant unlawful dispossessions in a given community. But people may still fear as they are insecure because of their past history or bad memories of ineffective protection in the past.

People might also feel secure in their possession despite the fact that there are significant unlawful dispossessions. They might think that it is just what happens once and it is not something which is going to be repeated. But the point is, land tenure insecurity, generally, property insecurity is a matter of feeling. Of course, a feeling must have a general foundation either present or past.

Factors contribute to tenure insecurity: these factors can be classified as legal and non-legal factors.

Legal factors:

A. Absence of non-eviction principle;
B. Absence of land certification; land certification involves the surveying of the plot: the land should be measured through either traditional means or modern technology.
C. Registration of the plot: what has been measured and surveyed should be registered. The essence of this land certification is that serving as a prove in a court of law when dispute arises between two individuals over that registered plot.
D. The absence of effective land dispute settlement system: this land settlement system could be either the traditional/customary or state law dispute settlement mechanisms or adopting a mixture of the two.
E. Administrative measures: administrative measures might undermine security of usufruct right over land. They may also enhance depending on the way they set those policy measures. Administrative authorities here have something to do with land.

You can mention three points of contact which emerge from the laws. The first point of contact will be in relation to expropriation: in such system, compensation is determined by the administrative authorities. The executive branch fixes the amount of compensation in course of expropriation. Furthermore, the existence of public purpose in relation to expropriation is also determined by administrative authorities. Before they take land, they have to decide whether there is public purpose.

The second point of contact will be the taking over of individuals land when there is disuse for certain period of time. If, for instance, a farmer fails to use his land over a certain period of time, the administrative authorities might take his land.

The third point of contact is the misuse of the land: the land is being used but not being used properly. This might also led to the take-over of individual's right by administrative authorities. So, the point is, if there is a good governance of administrative authorities on the basis of land laws, there will be secured land tenure. But, if not, the reverse will be true.

F. Land redistribution; there are legal basis for a government to undertake land redistribution. The existence of land redistribution in itself may not inherently cause insecurity.
G. Good land law; the laws which govern land should not be poor.
H. Communal landholding; "how could communal landholding be responsible for land security or insecurity?" this communal landholdings are not recognized by the law. If the law allows the state to take such communal resources easily in disregard of the interest of the local population, it could be one source of insecurity. The federal rural administration and land use proclamation defines Communal land-holding as "rural land which is given by the government to local residents for common grazing, forestry and other social services under art.2 (12). The one and the most important elements which need an emphasis from this article is that the giver of the land. As clearly stated in this article, the communal landholding is given to pastoralist by the "government". This means that, pastoralists as local residents may use land for common grazing as communal holding only upon the authorization of the "government". Here one possible question that should be raised with regards to this point is, "given the customary and historic rights of pastoralists to grazing land, why such authorization of the government is required as prerequisite to use land for common grazing as communal holding only upon the authorization of the

> government?”Here, the confusion arises from the customary nature of this pastoralist’s right. Since they are already empowered by customs and traditions to use such land commonly, what is the importance of government intervention as to authorization of the land?.The legislators should have been confused with the terms “giver or granter” and “recognizer”. Here the question is, is the government acting as a “granter” or “recognizer” of communal landholding? These concepts are totally two different concepts. When you recognize something, you are saying that it has been there under tradition or culture. But if you consider ourselves as “granter”, you can deny it or you can give to the extent you want to give.

The recognition of land as the property of the state and the people is broken in art.5 (3) of the federal rural land proclamation. This sub article states that “government being the owner of rural land, communal rural landholdings can be changed to private holdings as may be necessary.”

From this article, the first main important element is “government being the owner of rural land”. As clearly stated in art.40 (3) of the FDRE Constitution, whether the land is rural or not, it is owned by the state and people together. So, by this article, the federal rural administration and land use proclamation is violating the Constitutional recognition of communal landholding. If it is so, it will be responsible for land insecurity.

In this article, the government can change the communal landholding in to private. When the government deems necessary, they can turn the communal resource in to private land. They might turn it to investors, rural residents; it is not specified. But the central message of this sub-article is that it is the overriding discretionary power of the government.

Non-legal factors of usufruct right insecurity over land

A. Awareness: if the people are aware of different land laws or their rights in those laws, they could challenge the unlawful practices of the administrative authorities to their usufruct right over land. If they don't know the content of their land in those laws, it will be difficult for them to defend their rights.

B. Political power: if they have a connection with local and national politics, they could able to defend their right.

Effects of land insecurity

One of the major effects of land insecurity would be:-

Less improvement of the land: the users of the land might say "if I'm insecure for my land might be taken at anytime, why should I develop or improve the land?" because it might be taken with the improvement at anytime.