INTRODUCTION

In common English parlance, the term property refers to things or objects such as a house, a land, a car, a table… etc. It also refers to the right of ownership of person.

However, the term, in its legal usage, refers to the rights a person may have in relation to things or objects that have economic value. The things or objects in relation to which property rights are exercised are called objects of property.

Hence, property refers to rights such as ownership, possession, usufruct, use, and rights of servitude, recovery, preemption and promise of sale.

In general, property law may be defined as a branch of private law regulating relations between persons with respect to things or objects.

UNIT ONE- GENERAL OVERVIEV OF PATRIMONY, PROPERTY AND PROPERTY LAW

RIGHTS PROTECTED UNDER THE CIVIL LAW AND THE CONCEPT OF PATRIMONY

Rights of a person that are recognized and protected by the civil law may be patrimonial rights, i.e., those that have a pecuniary value such as property rights over things and rights arising out of contractual relations or those arising out of extra-contractual relations. They may also be extra patrimonial rights, those that cannot be assessed in terms money such as family, political and civil rights.

Patrimonial rights that arise out of contractual or extra-contractual relations are generally governed and protected by the law of obligations, i.e., by the law of contracts when they arise out of contractual relations and by the law of torts when they arise out of extra-contractual relations.

These categories of patrimonial rights are also referred to as rights in-Personam / personal rights/ because they can be exercised against a specific person or persons. On the other hand, patrimonial rights over things/ property rights/ are governed by the law of property and they are also called rights in-rem/ real rights/ since they can be exercised against any person who may interfere with the right-holder’s enjoyment.

Extra-patrimonial rights, which are defined above, are governed and protected by family law, penal/ criminal law and other branches of law based up on the particular type of right in question.

The concept of patrimony is essential to explain the rules of universal succession. For instance, an heir or legatee by universal title shall succeed all patrimonial rights and obligations of the deceased person, in other words,

such an heir or legatee cannot succeed the rights only since the elements of patrimony are transferred to him as unit. /See Arts 826, 898 & 942 of the Civil Code. /

The characteristics of patrimony are to be sought in the nature of personality. Hence, it follows that:

Every patrimony presupposes a person who is its holder

Every person has a patrimony

A person can have only one patrimony

Patrimony is inseparable from the person of its holder.

THE CONCEPT OF PROPERTY

In ordinary English, it refers to ownership or title and you usually hear an owner claim that this or that thing is "his or her property", Sometimes, it also refers to the res or the thing over which ownership right is exercised such as a house, a car, a table.…

Furthermore, in its broad sense, property means everything that has material or moral value for human beings beginning with their own body, reputation, and freedom to think and act.

In its narrower and proper legal sense, property may be defined as an exclusive right to control, use, transfer… an object or a thing of economic importance and its fruits, exclude all other persons from its use and enjoyment and to follow the thing and its fruits in the hands of any person who might have unlawfully taken it. It is a name for a concept that refers to the rights and obligations, privileges and restrictions that govern the relations of persons with respect to things having economic or financial value.

Art 40/1/ of the FDRE Constitution which guarantees the right to property provides that Property right includes, unless restricted by law for public purposes, the rights to acquire, use, and transfer things/ tangible or intangible/ of financial value.

Property rights are rights in-rem in the sense that it creates an obligation, on all other persons, to refrain from any act of interference in the use and enjoyment of a thing one owns or possesses. It also entitles a possessor or an owner of a thing to pursue such thing in the hands of any person in to whose possession the thing might have come. It is important to note here that private property is guaranteed and protected not only against interference by the government and its agencies but also by individuals and other persons. In this regard, Art 1206 of the Civil Code provides for the right of an owner to claim and recover the thing owned from any person who, without his consent, possesses or holds it and to oppose and repel any act of usurpation.

DEFINITION AND SCOPE OF PROPERTY LAW

Like all other laws, property law seeks to articulate the principles, policies, and rules by which disputes are to be resolved and by which transactions may be structured so that disputes may be avoided. What distinguishes property law from other kinds of law is that the principles, policies, and rules of property law deal with the relationships between and among members of a society with respect to things. The things may be tangible, such as land, a factory, or a diamond ring or intangible, such as stocks and bonds or a bank account.

Property law deals with the allocation, use, and transfer of wealth and objects of wealth. As such, it reflects the economy of the society in which it is found.

THEORIES OF PROPERTY

“The right of property refers to the despotic dominion which is claimed by a person claims and exercises over external things of the world and to exclusion of all other persons in the universe. It is a right that is regarded highly by mankind

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

THEORIES REGARDING ORIGIN OF PROPERTY

THE POSITIVIST THEORY

Law is nothing but the command of the sovereign, that is, the rules promulgated by government officials for reasons of public policy, protection of individual rights, promote the general welfare, increase social wealth or maximize social utility.

The idea of property consists in an established expectation; in the persuasion of being able to draw such or such an advantage from the thing possessed. Now this expectation, this persuasion, can only be the work of law.

Property and law are born together and die together. Before laws were made, there was no! Property; take away laws, and property ceases.

Similarly, E. Jenks argues that private

property is a creation of the state and achieved only after a long struggle with the clan. If we consider as the essential characteristics of private property, the right to exclude others, the right to charge the thing for a debt, to alienate or leave by will, it is true that the state has provided the machinery by which these rights are enjoyed.

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

THE HEGELIAN THEORY

Hegelian Theory- Property is a part of the personality of the owner and the protections provided for property of the person are protections for the person. This, thus, the existence of the person and hence his/her property is just. Furthermore, some control of property is essential for the proper development of personality. The community has slowly evolved from status to contract, from group holding to individual property freedom liberty has grown in the process and it is the control of property that makes men free. However, the theory does not justify the present system, which allows the concentration of property in a minority of the community.

Occupation theory tries to justify the existence of private property on the ground that the first occupier should be rewarded and property acquired in such a manner is ethically justifiable

He who first reduces in to possession of a piece of property has the best of justifications for remaining in control, and hence the institution.

Labor theory -private property is the result of individual labor because industry (hard work) should be encouraged by granting to a worker the ownership of the res, which is created by his labor so that even greater productivity is achieved. Society needs labor and the occupations are still few where the intrinsic interest is so great that men will labor for the love of it. It enables the acquisition of means of production by those who can use them efficiently and achieve maximum productivity; it encourages independent and specialized risk taking. It encourages saving and reinvestment. The whole effect of these ensures economic growth.

The Utilitarian theory the function of the legislator/ state is to maximize the sum of human felicity (Utility) or happiness, and private property, which is the expectation of protection

provided by the state, is justifiable because it increases human felicity/ happiness.

Marxist Theory- According to the communists, the history of all societies in the world is the history of class struggles between the slaves and freemen, feudal lords and serfs or vassals, the bourgeoisie and the proletariat. These struggles are always between those who control the means of production and those who do not and hence that have to depend on the former for their livelihoods by selling their labor. These relations were not always based on equal or even fair exchange of labor and wages or other form of payments. The slave's labor was freely exploited, the serf /vassal was forced to toil for a meager reward and the products of his labor taken away by the feudal lord and the proletariat receives a wage that does not cover the bare minimum of his needs. In effect private property served and is serving as a means of exploitation of the slave by the slave owner, of the serf/vassal by the landowner of the proletariat by the bourgeoisie. Hence, private property is the evil that has to be abolished.

THEORIES REGARDING THE JUSTIFICATION OF PRIVATE PROPERTY

The theories discussed above in connection with the origin of private property are also used to justify or condemn the existence of the institution.

OBJECTS OF PROPERTY

The phrase 'objects of property' may be defined as the goods or things over which a right of property may be exercised. The French Civil Code uses 'choses' and 'beins' to refer to objects of property but without defining and distinguishing them.

John Austin argues that things are such permanent objects that can be perceived the senses. They are permanent in the sense that they can be perceived repeatedly. According to this definition and other common usages, for a certain matter to be considered as an object of property, it must have:

A certain element of permanence, as opposed to events and facts, for example a puff of smoke may not be considered as a thing since it lacks permanence. However, the precise degree of permanence required is difficult to determine.

A certain element of physical unity i.e. organic unity as in the case of an ox or a sheep, or inorganic unity as in the case of a house made of bricks.

In its legal usage, the term thing refers to some possible or potential mater of

rights and duties which, conceived as a whole and apart from all others, can be separately perceived by the senses.According to this definition, the term may refer to;

A thing, which is corporeal and tangible matter, which has an organic or physical unity, for example a horse, block of marble.

A thing, which is corporeal and tangible, but consists of specific things, for example, a flock of sheep, a house.

A thing, which is neither material/ corporeal/, nor tangible but which is an element of wealth, for example a copyright or a patent right, a claim for payment of sum of money…etc.

Accordingly, under Ethiopian law, objects of property, herein after called thing /good may refer to;

Things /goods which have material existence such as a car, an ox a house/ corporeal things/ (Art 1127), as well as claims and rights contained in securities to bearer which are incorporeal or intangible by nature but which are assimilated to corporeal things (Art 1128) and

Things which have no physical or material nature but which are perceptible by senses for example natural forces of economic value such as solar and wind powers which are mastered and put to use by mankind (Art 1129)

The terms goods and things are used interchangeably in the code to refer to the same concept (Articles 1126_1140).

INTRINSIC ELEMENTS OF THINGS

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

Trees and crops are considered as intrinsic elements of land until they are separated there from or until a contract for their separation is concluded.

The treatment of things as intrinsic elements other things will have the following effects.

Rights on or dealings relating to the principal thing shall include the intrinsic elements unless the parties have agreed expressly that such right or dealings shall not apply to them. For instance, a contract of sale of a land rights or mortgage of a land shall include the houses and trees that are considered as its intrinsic elements, unless the parties have expressly

agreed that the sale or mortgage relates only to the principal and not to the intrinsic elements. Art 1132/1/

A thing that becomes an intrinsic element of another thing ceases to exist as a distinct movable thing. Hence, the right, which third parties previously had on such thing, shall be extinguished; and an owner or a person who has any other right in relation to such thing cannot recover the object from the owner of the principal thing. However, such person may claim reimbursement of the value of such thing and compensation for damages based on the rules of unlawful enrichment. Arts 1134 and 2162-2163 of the Civil Code.

ACCESSORIES OF THINGS

Art. 1136 of the Civil Code defines an accessory as anything, movable or immovable, which the owner or the possessor / the Amharic version limits to the usufructory and not other possessors/ of the thing has permanently destined for the use of another thing.

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

In the absence of an express provision to the contrary, rights on and dealings relating to the principal thing shall apply to the accessory. Art 1135 of the Civil Code.

Temporary separation of the thing shall not, in any way, terminate the character of accessories. See Art 1137.

Rights of an owner or possessor of a thing, which is considered as an accessory of another thing shall not be affected by its treatment as such. Hence, the owner of the principal may not raise the treatment of a thing as an accessory to another thing against the owner or possessor of the accessory. Art 1138/1/. Note that this provision governs the relationship between the owner/possessor of the principal thing and the owner or other right holder of the thing treated as an accessory.

However, the owner or possessor of the accessory may not claim it from third parties in good faith who have acquired the principal together with the accessory unless his rights to the accessory are evidenced by a deed dated prior to date when it is so destined. Art 1138/2/.

Finally, the owner/possessor of a principal thing may terminate the character of accessory of such thing at any time, but he cannot do so if a third party has already acquired a right in relation to the principal thing with the belief that he will benefit from the accessory. Art 1139 of the Civil Code.

CLASSIFICATION OF OBJECTS OF PROPERTY

THE PURPOSE OF CLASSIFICATION

The economic and social values attached to things are not the same,

i.e., certain things are more important than others are. As a result, the rules governing the acquisition, transfer, proof and extinction of property rights over the various categories of objects are different. Articles 1723, 1195 and 1193 of the Civil Code/. This shows the degree of protection given by the law to the owners of various types objects of property varies depending on their importance or value, i.e., property rights over immovable things are given more protection than property rights over most movable objects.

The systematic classification of things in to various categories helps the legislator to enact special rules governing the particular category of things which will in turn enable students, judges and other legal professionals to easily understand the law and apply relevant rules to resolve various disputes involving the particular object of property.

CORPOREAL AND INCORPOREAL THINGS

This classification is based on the physical or material nature of things or objects, i.e., it is a classification of things into those that can be perceived by the senses and those which cannot be so perceived.

Corporeal things are things that have material or physical existence and unity and hence, can occupy space and can be seen or touched. According to Art 1127 of the Civic Code, corporeal things are things that have material or physical existence and that can be seen and touched.

Incorporeal things are things that do not have a material or physical existence, that cannot occupy space and hence that cannot be perceived by the senses. This category primarily include rights particularly those that have economic value and can be expressed in terms of money. Arts 715, 325, 345, 429-444, 570, 610 of the Commercial Code, and Arts 2806-2824 of the Civil Code.

The Ethiopian Civil Code under Art 1128 recognizes this classification by including claims and other right incorporated in {securities} to bearer in the realm of objects of property or things. In addition to these, natural forces of an economic value such as solar and wind powers used for generation of electricity are considered as incorporeal things from the moment they are controlled and put to his use. Though these things are incorporeal by nature the law, for the sake of convenience, regards them as corporeal things. / Art 1129 of the Civil Code/

Art. 1128 singled out claims and rights incorporated in securities to bearer and considered them as objects of property governed by property law. Securities are one type of negotiable

instruments particularly, documents containing rights for payment a certain amount of money. Shares or stocks and bonds or debentures issued by companies or treasury bills issued by the government through the national or central bank are the typical examples of securities. A person who is a holder of a share, for example, is entitled to receive a share of the companies annual profit/ if any/ and to share in the assets of the company at time when the company is dissolved. Securities to bearer, on the other hand, are securities that do not specify the name of the beneficiary of the rights, i.e., the person to whom the money is to be paid is not specified in the document. Rights contained in securities to bearer may be transferred by simple delivery of the document, and any person who holds the document is presumed as a lawful holder and payment shall be made to such person.

MOVABLE AND IMMOVABLE THINGS

The modern distinction is between movable and immovable things.

The basis of this classification is physical mobility or immobility and the value or importance attached to various types of property.

MOVABLE THINGS

Are things which can move by themselves or be moved by man without losing their individual character. Things that cannot move by themselves or cannot be moved by man unless they are first dismantled or demolished are not movable things. Art. 1127 of the Civil Code.

SPECIAL MOVABLE THINGS

These are movable things by nature but to which the law attaches characteristics of immovable things. The rules governing the acquisition, transfer and proof of rights over ordinary movable things/ also called chattels/ shall not apply to special movable things, because they are governed by the rules applicable to immovable. For instance, a right of ownership over a table is transferred by a simple delivery of the table, while owner ship of a special movable thing, such as a motor vehicle, is transferred in the same manner as a transfer of a building by registration of the act transferring the right, registration of transferee in the register kept by the relevant government organ and issuance of a title deed in the name of the transferee. /Art 1185 and 1186 of the Civil Code. /

MOVABLES BY ANTICIPATION

These are immovable things by nature but which the law considers as movable things.

According to Art 1133(2), trees and crops which are considered as intrinsic elements of land will be considered as distinct movable things or chattels where they are the subject to contracts

for their separation. For instance, where a contract for the sale of standing trees is concluded, the tress that are not yet cut are considered as movable objects starting from the date of conclusion of such contract. They are called movables by anticipation of their future removal from the land. The same is also true of component parts a building which is going to be demolished and its intrinsic elements such as the doors, windows, corrugated iron sheets, pipes and electrical appliances are considered as separate movable objects even before the house is demolished. Similarly, a contract for extraction and sale of products of quarry such as stone and sand shall have the same effect in relation to such things. Art 1133/2/ and 2268 of the Civil Code.

IMMOVABLE THINGS

The civil code does not provide definition for immivable properties it rather enumerates, under Art 1130, the things which are considered as immovable under Ethiopian law. Accordingly, land and buildings are considered as immovable things.

IMMOVABLES BY NATURE

One may define immovable things as things that cannot be moved from one place to another at all or that cannot be moved without being divided in to several parts.

From the acontrario reading of Art 1127 of the Civil Code, we may define immovable things as things that cannot move by themselves or be moved by man without losing their individual character.

The term ‘land’ refers to a space as much as it refers to the material of which that part of the land is made. In its spatial aspect, land is immovable, while in its material aspect it may be removed, at least partially, by removing the soil. A house attached to land is an immovable in law, but obviously, it may be moved in fact by demolishing. The nature of an immovable cannot be understood unless we realize that, starting from a physical test, the law has gradually extended the notion.

The following are special characters of land that distinguishes it from other properties.

Land is more enduring than other properties; hence, future interests in land have definite value.

It is important for purposes of security because of the fact that land cannot be moved and it is permanent as opposed to furniture or vehicles that may be easily hidden.

A risk of destruction of the land, for example, by storm or fire is minimal.

Land can be subdivided with out necessarily losing its value.

Land is still very necessary for expansion of industries, large farms and creation of means of transport.

IMMOVABLES BY DESTINATION

Are movable things that are placed permanently with an immovable thing for the latter's economic exploitation. In other words, these are movable things by their nature but which the law considers as immovable things because they are placed or attached to a land for its economic exploitation. For example, horses, cattle, tractors and other movable things, which are intended to facilitate the use and exploitation of a land, are considered as immovable things by their destination.

REAL AND PERSONAL PROPERTY

Real rights/ rights in-rem/ refer to either a power to recover a specific thing, or more often a right that may be exercised against any person, while personal rights or /rights in-Personam/ are rights that may be exercised against a particular person.

The Romans asked what the nature of the right asserted is. Hence, if it is a claim of title to a specific thing/ res/, the action is in-rem, for example, a claim of ownership of land or a sheep. However, if the claim is framed as an obligation, for instance, a claim for performance of a contract of sale of land or a ship, such right is personal. There was no difference between movables and immovable.

In the English law, on the other hand, a real action is one in which a thing /a res/ may be specifically recovered. However, land was the only res that could be recovered, because in case of movable things, the defendant might choose between returning the chattel or paying damages. Hence, land came to be described as real property and movable things as personal property.

This classification has the following important effects;

The rules of intestate succession are different for the two types of property. Compare the paterna-patternis materna-maternis rule under Art 849-851 of the Civil Code.

Only personal property can be owned absolutely, where as real property could be split up in to successive interests-tenancy, lease usufruct…etc.

Personal property was primarily liable for the payment of debts.

Special rules of transfer apply to immovable things. Compare Arts1723/1/, 1185, 2877 and 2878 of the Civil Code, contracts relating to immovable things have to be made in writing and registered.

MISCELLANEOUS CLASSIFICATIONS

CHOSE IN ACTION AND CHOSE IN POSSESSION

English law divides all personal property into chose /things/ in

possession and chose /things/ in action. A chose in action includes all personal right of property, which can only be enforced by action and not by taking physical possession. If A owes B ten pounds, B has a chose in action. An owner of a car has a chose in possession, because, even where another person is unlawfully using it, the owner has a right of retaking it. Art 1148 of the Civil Code. However, a creditor is confined to sue the debtor in court to recover his money. Patent rights, copyrights, probably right of action for breach of contract and right of action for damages are also chose in action.The growing importance of negotiable instruments and company stocks, the increase in the value copyrights and patents have increased the role chose in action plays in the economic life of the present day states.

FUNGIBLE AND NON-FUNGIBLE THINGS

Fungible things consist of movable things that, in ordinary dealings, are usually determined by number, measurement or weight and hence any unit is, from its nature or by mercantile usage, treated as the equivalent of any other unit. A contract for the delivery of fungible things is performed by delivering anything of the same nature. For example, a contract of sale of a kilo of butter is performed by delivering one kilo of butter of the quantity and quality that he desires and not by delivering a specific piece of butter. However, the person may require a specific piece of butter and in such cases; the debtor may perform the contract by delivering that specific butter, not another thing of same nature. Art 1745 and 1748 of the Civil Code. The creditor may not refuse delivery of fungible things on the ground that the quality or quantity offered to him does not exactly conform to the one agreed up on.

Non-fungible things, on the other hand, are movable or immovable things, which in ordinary dealings, are determined by their specific identity. A land or a vehicle is a non-fungible thing and contracts involving such a thing shall be performed by delivering that specific thing and not by delivering any vehicle or land.

Things may also be classified in to things that are used or enjoyed by consuming or alienating. For instance, food staffs are used or enjoyed by consumption. These types of things cease to exist after the use. Similarly, money is used by alienation or transferring it to other persons in exchange for goods and services.

The other class of things includes permanent things such as a car, house, land or other movable or immovable

things intended to be used or enjoyed by continual use. Arts 1327, 2471 and 2478 of the Civil Code.

UNIT TWO-POSSESSION

THEORIES OF POSSESSION

SAVIGNY'S/CLASSICAL/ THEORY OF POSSESSION

Savigny, a German jurist who based his theory on the text of Paulis, argued that possession consisted o f two ingredients, corpus possessions, i.e., effective control and animus domino, i.e., the intention to hold as an owner. The distinction between detention and possession follows from a proper analysis of the latter concept.

Possession is made up of two elements

 The corpus or element of physical control and

Animus or element of intent with which such control is exercised. Savigny thought that since the detentor and possessor have the same physical control the difference between these terms must be found in the mental element, the intent which distinguishes the possessor is the animals domino the desire to hold for one self and not on behalf of another.

However, this theory was faced with the difficulty that in certain cases Roman law gave a non-owner possessory right which savigny rejected as anomalies (exceptions) and termed them as derivative possession, i.e., possession derived from the owner. If so a detentors such as a borrower, depositee, a tenant etc… must also have derivative possession.

JEHRING'S THEORY OF POSSESSION

He started by posing the question why did Roman law protected possession by means of interdicts. He argued that they were devised to benefit owners by protecting their holding of property and so placing them in the advantageous position of being defendants in any action as to title. Persons who had property would be owners in majority of cases and possession was attributed to them in order to make the interdicts available. He held that whenever a person looked like an owner in relation to a thing, he had possession of it unless, based on special practical considerations, the law denied him possession. He contended that the animus element was simply an intelligent awareness of the situation or fact.

According to this theory a possessor is a man, who in relation to a thing, is in a position in which an owner of such thing ordinarily is, animus being merely an intelligent consciousness of the fact.

This theory explains those cases, which were difficult to Savigny such as the pledge and the usufructory that were given possession right. However, it fails to explain the cases where the law denies possessory right to those who

are in exclusive physical control of a thing such as a borrower, a tenant and a depositee. The anomaly in this theory is that not every detentor is a possessor and it fails to explain these exceptions.

SALMOND'S THEORY

He started by distinguishing between possession in fact and possession in law.

He claims that there is only one conception and that is possession in fact which is possession in truth and in fact, and possession in law is a legal fiction. He then distinguished between possession of physical objects, which he called corporeal possession and possession of rights, which he called incorporeal possession.

Corporeal possession is the continuing exercise of claim to the exclusive use of physical or corporeal things and the extent of this claim involves two ingredients corpus possessionis and animus posidendi.

Hence, corporeal possession is animus and corpus the animus possidendi is the intent to exclude others, i.e., to hold for ones own interest.

He further classified the corpus possessionis under two headings;

The relation of the possessor to the thing, which must allow him to put the thing to the use which accords with its nature. In this connection he said whether the possession of one thing would bring with it the possession of another thing that is connected with it depends up on the circumstances of the particular cases.

The relation of the possession to other persons. A person shall be considered to be in possession of a thing, where the facts of the case are such as to create a reasonable expectation of non-interference in the use of it.

This later condition of expectation of non-interference is one of the grounds on which Salmond’s theory is criticized. Critiques argue that expectation of non-interference is not necessary for the continuation of possession. For example, a man continues to possess his pocket book although pickpocket, who would interfere with his use of it in a few moments, is pursuing him. Nor is it necessary for its commencement, where for example a child or a ruffian may both make for a purse lying in the street, but if the child is the first to pick it up, he gets possession even though the ruffian is certain to interfere the very next moment.

The other point of criticism is the assumption that corpus and animus, which are only conditions for the acquisition of possession, are possession themselves.

DEFINITION OF POSSESSION

The term ‘possession’ may be defined as the detention and enjoyment of a thing by a person himself or through another person in his name.

It refers to the relation of person to a thing over which he may, at his pleasure, exercise such control as the character of the thing permits to the exclusion of other persons.

Possession in the narrow legal sense is the holding of a thing in the power of a person who intends to exercise, with regard to it, a property right. Refer to Art 1140 of the Civil Code.

The exercise of a right in relation to an object consists of either physical acts of use, enjoyment, or transformation, or legal acts of administration and disposal. Possession is, in the broadest sense, the state or relation of fact that gives a person the physical, actual and exclusive capacity with regard to a thing to carry out acts of use enjoyment or transformation. However, the exercise of the legal acts of administration or disposal does not necessarily require the fact of possession because an agent who is acting in the name of the actual possessor may perform such acts. The owner of a thing can sell or lease it even if it is occupied by or is in the possession of a third party.

If a person has a thing in his power, without intending to exercise to it a real right, the situation is more specifically called simple occupancy or holding, or detention.

Furthermore, if the mere holder has, in certain cases, the right to require restitution until he is reimbursed with whatever may be due to him in connection with the thing occupied, such right is not derived from the occupancy, but from a creditor’s right which has resulted in the occupancy.

The concept of possession first emerged to refer to the physical control of a thing by a person.

The distinction between detention and possession follows from a proper analysis of the latter concept, i.e., the fact that possession is made up of two elements

The Corpus or element of physical control

The Animus or element of intent with which such control is exercised.

Accordingly, though the holder and the possessor have the same physical control, the difference between them is found in the mental element, i.e., the intent of the possessor and what distinguishes the possessor from the mere holder is the animus domino or the desire to hold for one self and not on behalf of another. On the other hand, the mere holder holds the thing not for his own benefit but for the benefit of another person.

The following three situations became possible in relation to possession of a thing.

A man could have physical control without possession and its advantages.

He could have possession and its advantages without physical control.

He could have both, i.e., he may have physical control as well as the advantages attached to possession.

ACQUISITION OF POSSESSION

The acquisition of possession is realized if the two constitutive elements concur, i.e., where the present and exclusive power to act physically with regard to the thing (corpus) and the manifestations of an intention to keep the thing as owner (Animus) exist.

The action by which a person obtains the present and exclusive power to act physically with regard to thing is called seizing (apprehension). This power can result from various material circumstances or situations and suffices to acquire possession, without regard to the physical nature of the acts or means through which it was obtained. Thus, it is possible to take possession of a land without physically entering it or of a corporeal movable thing without touching it. However, acts which constitute criminal violation of property rights or which would have been enjoined judicially as affecting possession of a third party are not effective for acquiring possession.

As distinguished from exercising physical control, which can be exercised through third party, the intent to possess must internally exist in the person of the possessor himself and manifested by him. However, it may be manifested through a mandate given in advance to a third party to take possession. In such cases, the principal acquires possession from the time when the agent entered into a contract or other juridical act for his account.

DEFECTS OF POSSESSION

Possession may be affected by flaws either in the mental element/ the animus /or in the nature of the physical acts / the corpus / through which possession has been acquired or continued. A defective possession shall not produce the effects that are normally associated with possession. Similarly, Art 1146/1/ of the Civil Code also provides that defective possession shall not give rise to any right. The following are the grounds that can render a possession defective.

PRECARIOUS POSSESSION

Possession of a person is affected by the defect of precariousness if the person does not have a right of ownership in relation to the object he holds. According to French terminology, precarious possessions

refer to the possession of those who hold a thing for another on basis of an agreement or in such quality that, at the expiration of the agreement, or where they lose their quality, they must return the thing. Hence, the possession of a usufructory, a limited user /usage/, a tenant farmer, leaseholder or a pledgee, a creditor secured by antichresis, a tutor with regard to a minor's property is affected by the defect of precariousness.

Simple occupants lack the animus element (intent to hold for them selves). This presumption is tied to the origin of their possession and continues throughout its duration. Simple change of intention, that is the intention to hold henceforth for their own account, is not capable to change their occupancy in to a genuine possession.

However, those simple occupants who hold a real interest in the thing, such as a usufructuary, a holder of a use right, and a pledgee are considered as possessors in relation to all persons other than the person to whom they have the obligation to return the thing. The defect of precariousness can be healed only by change in the nature of the possession resulting from a legal ground originating in a third person or from the owner, or from a formal contest by the simple possessor against the person for whose account he has been holding.

CLANDESTINE POSSESSION

Possession is clandestine, that means not open, if the acts by which it was acquired and continued were not such as to be known to the outside, especially to those persons against whom they are to be claimed. This defect can be healed as soon as it is revealed by material acts openly carried out.

Possession, which is entered in to openly, does not become clandestine by the sole fact that it was not continued openly if the nature of the thing in possession does not imply acts of open enjoyment. In such a case, the possession could be considered clandestine only if the occupant took extraordinary precautions to hide the continuation of his enjoyment. Clandestineness is purely a relative defect that can be subject to claim only by those who could not have known about the possession.

VIOLENCE

A possession acquired or continued by acts involving physical or psychological violence is vitiated by a defect of violence.

The Ethiopian law does not clearly declare violence as a cause for defectiveness of possession. See Art 1146 of the Civil Code. However, we can deduce from the provisions of Art

1148, which allows a possessor to use force to recover a thing which has been taken away from him through violence, that a person who used force to acquire possession is not protected by the law as his action is unlawful and violates public interest for peace and order. Therefore, a possession that is acquired through violence or force is defective and cannot produce the effects of a lawful possession.

AMBIGUITY/ DUBIOUSNESS

Possession is said to be ambiguous where it is not clear whether the person is holding a thing in his own name or in the name of another person. According to Art 1146/3/, a possession is said to ambiguous or dubious where, in the circumstances, it is doubtful whether the thing belongs to the person who claims to be the possessor or whether he holds the thing on behalf of another person. This type of defect clearly related to the mental or animus element of possession. Arts 1146/1/, 1168 and 1150 of the Civil Code.

EFFECTS OF POSSESSION

Possession may create ownership either by occupation, i.e., by taking control of res-nullius/ a thing without an owner/ or through the expiration of a period of acquisitive prescription. Art 1151 and 1168 0f the Civil Code.

Possession is a prima facie evidence of ownership, and he who would disturb a possessor must show either title/ownership or a better possessory right and defense of lack of legal title by the possessor may not be set up him. Hence, even a wrongful possession is good against all persons except the true owner or one claiming through him or one claiming a prior possessory right. Art 1193 of the Civil Code.

Possession is the basis for certain remedies because the law protects a possessor, as it does not always know that a possession in question is unlawful. In times when proof of title was difficult and transfer of property required intricate formalities, it would have been unjust to cast on every man whose possession was disturbed the burden of proving a flawless title. The doctrine that in most eases possessors are the rightful owners may not be historically accurate, but it is convenient for the law to reward possession as well- founded, at least until a superior title is shown to exist. Hence, the law protects, even a wrongful possessor, from dispossession by the owner without due process of law and the owner has to institute legal action by proving his ownership right to recover the thing. Art 1206 of the Civil Code.

PROTECTION OF POSSESSION

The law protects possession for the following reasons,

It aids the criminal law by preserving the peace and order as the latter is best secured by protecting a possessor and leaving the true owner if there is one to seek his remedy in a court of law.

It is protected as part of the law of the fort since it is an extension of the protection, which the law throws around persons.

It is protected as part of law of property because it is difficult to know that the possession in question is unlawful. At times when proof of title is difficult and transfer of property require intricate formalities, it would have been unjust to cast on every man whose possession was disturbed the burden of proving a flawless title.

Hence, the law protects possession by presuming the possessor to be the owner until someone else proves a better right to the thing than the possessor

Two main types of protections provided by the law:

POSSESSORY ACTIONS

Possessory actions are those that are based exclusively on possession without touching the basis of the title. Possessory actions include actions to retain possession, actions in restraint of works by neighbors and actions to recover possession. Arts 1149 and 1206 of the Civil Code. In other words, possessory actions are legal actions or suits instituted by a possessor who has been disposed of his possession or whose possession is interfered with or whose possession is threatened by the actions of another person.

The action for recovery of possession (reintegrate) does not aim at the recognition of possession in favor of the plaintiff. It is an action by which the possessor, or even a simple holder, who has been dispossessed can claim that a state of things, which was changed or eliminated to his detriment by violence or otherwise, be restored.

Things and interests with regard to which a possessory action can be brought are corporal immovable, their usufruct, servitudes and immovable rights of enjoyment and use. However, since possession of corporeal movable things /chattels/ is equivalent to ownership, the action applicable to them is negatory actions, i.e., actions based on title or ownership and that are intended to recover the same.

Corporeal immovable things can be the object of possessory action bearing on possession of the land itself, only if they are in-commerce /private domain/ and are susceptible of being acquired by adverse possession/ acquisitive prescription. Hence, it shall not apply to things that are considered as part of the public domain. See Art 1444-1447 of the Civil Code.

Furthermore, where one private person brings against another private person a possessory action and where only private interests are contested between them, the defendant cannot plead the character of public domain possessed, according to him, by the immovable in issue. The possessor of land expropriated for public purposes such as construction of local roads can bring a possessory action against the municipality, which would contest his right to be compensated. This action does not aim at retention or recovery of possession, but at the recognition for the purpose of establishing his title to the compensation.

Immovable things in the private domain of the state, the departments and municipalities can be acquired by adverse possession; hence they can be the objects of possessory actions.

Immovable things which are found on a land belonging to another person but which can be possessed separately from it, can be a separate object of a possessory action.

Usufruct, use and habitation rights can be the object of possessory actions in as much as they are related to corporeal immovable things in-commerce/ belong to the private domain./. Since the facts that constitute the contents of these rights are by their nature contrary to any presumption of purely precarious enjoyment, they can give rise to a possessory action, without the plaintiff being required to show the title on which his right rests.

Legal servitudes or servitudes established by law can give rise to a possessory action provided that the plaintiff still is or was, at the time when the interference occurred, in possession of the servitude. Continuing conventional servitudes and apparent servitudes can be the subject of possessory action without the plaintiff having to show the title on which his possession is based. However, the exercise of discontinued servitudes cannot, in principle, serve as basis for possessory action without distinction as to whether the exercise is apparent or non-apparent.

According to Art 1149/1/ of the Civil Code, a possessor [or even a holder] who is dispossessed of his possession or whose possession is interfered with may institute an action for the restoration of the thing or cessation of the interference and claim compensation for damages resulting from the dispossession or interference. However, Arts 1210 and 1225/2/ of the code that impose an obligation on the holder of a land to refrain from acts that can damage or endanger buildings on a neighboring land such as excavations, digging wells, other underground works and planting trees

close to boundary line, imply that a possessor whose possession is affected by such acts may apply to a court for the enforcement of these obligations by the owner/holder. Furthermore, the court may interpret such actions as indirect interference in the peaceful enjoyment of possession by the plaintiff and may order the cessation of such works and payment of compensation for damages.

According to Art 1149/2/, a possessory action of any type shall be barred if not brought within a period of one year/ the Amharic version provides two years/ from the day of the usurpation or interference. This means that the possessor loses his right to require the restoration of the thing or cessation of interference where he fails to institute legal action within the period of two years. However, he may still recover the thing by instituting action for restitution/ nugatory action/ under Art 1206 of the Civil Code provided that he can prove his right of ownership and as long as he has not lost his ownership through extinctive prescription. Art 1168 and 1189 of the code.

Art 1149/3/ of the code provides that the court, provided that the plaintiff has proven his possession and the interference in such possession, shall order the cessation of interference or the restoration of the thing unless the defendant can prove forthwith and conclusively the existence of a right in his favor justifying his conduct.

USE OF FORCE

Use of force is the other means provided by the law for the protection of possession.

The law allows the possessor or holder to use force in order to repel violent actions of persons aimed at taking the thing under his control.

According to Art 1148 of the Civil Code, the possessor or holder has the right to defend his possession by using a reasonable force to prevent a person who intends to dispossess him or to retake possession of a thing which has been taken away from him by force or which has been stolen from him provided that the usurper is caught in the act or when running away.

The law, under Art 1148, entitles even a mere holder to this mode of protection of possession. This is because this mode of protection is more than a mere protection of property interests of a person; it rather intended to enable the person to take measures to protect his/her personal security.

TRANSFER OF POSSESSION

The transfer of possession may result from contracts such as sale, donation or operation of the law.

Possession may be transferred by the delivery or handing over the thing or documents representing the thing such

as a bill of lading, consignment note, a ware house goods deposit certificate. It may also be transferred through delivery bravemanue, i.e., an agreement between the holder and the person for the account of whom the former exercises possession and in which the holder ceases to hold in the name of another and begins to possess in his own name. Alternatively, it may be transferred through constructive possession in which the possessor agrees to cease to hold in his own name and to begin to hold for the account of another who is considered as the actual possessor. See Arts 1143-1145 of the Civil Code.

LOSS OF POSSESSION

Since both animus and corpus are necessary for possession, possession is lost when one of the two elements ceases to exist. The isolated continuation of one element does not suffice to maintain it.

However, a possessor shall not be considered to have lost his possession by the sole fact that, at a given time, he was not able to exercise physical control in relation to the thing or that he did not intend to hold it in his own name and for his own benefit.

Possession is lost only by deliberate abandonment or by a physical obstacle that makes it impossible to restitute, at any time the possessor desires, the state of affairs that construed the possession. Art 1142 of the Civil Code.

Under French law possession of movable things is lost as soon as they have ceased to be under the power or control of the possessor. Possession of wild animals is lost as soon as they have acquired their freedom.

Possession of tamed animas such as bees and pigeons is lost when they cease to return habitually to their hives or dovecotes, or when they lose their animus revertendi, i.e., 'their intention/habit to return'.

Possession of immovable things can be preserved solo-animo, i.e., it is not lost just because the possessor has voluntarily abstained, for a time, from material or physical acts of possession or has been incapable to exercise them because he was too far away, or because of the nature of the immovable, or because of some temporary obstacle. However, abnormally long intervals between acts of possession, taking in to account the nature of the thing, may be considered as a tacit renunciation. Art 1142 of the Civil Code.

Furthermore, possession is not necessarily lost just because a third person has occupied the immovable. It shall be lost only if he occupies the immovable for a year. / Arts 1142 and 1149 of the Civil Code/. If the former possessor lets this period elapse

without any act of enjoyment or any claim for return of possession, whether he did or did not know of the adverse occupancy, he shall lose his right of possession. This is true even if he manifested his intention to continue in possession by acts such as the payment of taxes.

UNIT THREE-OWNERSHIP

Right of ownership is the widest and the ultimate property right that may be had in relation to things or objects.

Ownership may be defined as legal relationship that gives rise to certain rights and obligations between persons in relation to an object.

Ownership is said to be absolute in the sense that the owner may do as he likes with the thing that is his own. The rights of an owner include;

The right of use and enjoyment, which includes the right to determine to what type of use the object may be put, to deal with the fruits of the thing as he likes, and even the right to destroy the thing or its fruits. Arts 1205/1/ and 1270-1271 of the Civil Code.

The right of possession that includes the right to exclude others. Property right is essentially a guarantee of the exclusion of other persons from the use and handling of the thing over which the right is exercised and the right to reclaim it from the hands of another. Arts 1204, 1148 and 1149 of the Civil Code.

The right to transfer the thing and its fruits for consideration or gratuitously which could be intervivos / while the owner is alive / or mortis causa/ up on his death/ and the right to charge them as security (mortgage or pledge). Arts 1205/2/ and 3049/2/ of the Civil Code.

The right to leave or abandon the thing or its fruits at will. Art 1189 of the Civil Code.

Some other sources also argue that a right of ownership is composed of the following main elements;

The right to use the object himself (the usus)

The right to collect and use fruits - such as crops or rents (the fructus)

The right to dispose of it and its fruits by alienation by destruction (abandonment) and the right to charge it with pledge or mortgage (the abuses)

Ownership is said to be 'exclusive' because these rights are in principle available only to the owner, and is "perpetual" since these rights are neither extinguished by non-usage nor limited by duration. See Art 1204 of the Civil Code.

The owner can, at will, use or enjoy his property, dispose it off, perform all the legal transactions to which the thing is susceptible, and to exclude all other persons from participating in the exercise of these rights. However, an

owner may not possess or exercise all the rights set out above and his rights may be restricted by law or by an agreement he has made with another person.

The fact that an owner may cede so many rights and still retain ownership raises difficulties of definition. From this we can consider ownership as the magnetic core which remains when all present rights of enjoyment are removed from it and which attracts to itself the various elements temporarily held by others as they lapse.

To understand the concept of ownership comprehensively, let us try to distinguish between:

Ultimate Ownership- in which other persons hold the rights of present enjoyment temporarily through contracts such as usufruct or lease and the residual magnetic core is left to the owner.

Complete or Beneficial Ownership- in which the owner enjoys all the rights and privileges emanating from it.

RESTRICTIONS ON THE RIGHT OWNERSHIP

Restrictions may be based on public interest, for instance the law orders that animals affected by or suspected of having contagious diseases be reported and isolated, that they not be sold or offered for sale. Arts 2369 and 2373 of the Civil Code.

Sale of miracle remedies may be prohibited, sale of medicines is reserved for pharmacists, and the sale of alcohol, narcotics, guns, tobacco, and matches is regulated.

Under French law historical monuments/ antiquities/ may not be sold, if they are owned by the state. And if individuals own them the state has a right of preemption upon their sale by public auctions.

Similarly, under Ethiopian law/ Research and Conservation of Cultural Heritages Proclamation No 209/2000/, defines cultural heritage as anything tangible or intangible which is the product of, in pre-history or history times, human creativity and labor and that reflects the evolution of nature and which has historical, cultural, scientific and artistic value provides for various restrictions on the right of ownership, exploration, discovery and study things that are classified as cultural heritages. For instance, cultural heritages discovered after the 27th of June 2000 may not be privately owned / Art 14/2/ and Art 35/3/ of the proclamation. Individuals who own or possess cultural heritages on the coming in to force this law are required to report their possession to the Cultural Heritages Conservation and Research Authority and get them registered. See Art 17 of the

proclamation. The state may confiscate any privately owned cultural heritages when it believes that they are not properly protected, repaired or restored or where they are exposed to damage or decay. See Art 25/1/ of the proclamation. The state can also expropriate, against payment of compensation, objects of historical, artistic or archeological interests where it finds it necessary to preserve them in a museum. See Art 25/2/. Furthermore, transfer of privately owned cultural heritages is subject to prior notification by both parties to Authority which has a right of preemption, i.e., a priority right to purchase the cultural heritage. However, transfer for commercial purposes and transfer out side the country are not allowed under all circumstances. See Arts 23, 24, and 27 of the proclamation.

The owner of a movable may be deprived of his property through requisition under conditions specified by law; similarly immovable things may be expropriated, against payment of compensation, where they are needed for public purposes. See Arts 1319/2/ 1460 and 1464 of the Civil Code.

The law may also require that an owner be prohibited completely from exercising certain powers naturally inherent in right of ownership, or allow him to exercise them only under specific conditions. Such restrictions or burdens that result from the law constitute statutory/legal servitudes, if they are established with relation to one estate for the immediate benefit of another estate with a character of a dominant estate. Outside this situation, these servitudes are considered as limitations on the exercise right of ownership.

Public interest or service includes construction of pre-determined public works such as public health, urbanization, conservation of historical or natural monuments and sites, reforestation and conservation forests.

The restriction on the right of ownership may also be based on considerations of mutual interest of neighboring estates. In other words, contiguity of land belonging to different persons creates conflicts if, either or both of them, wish to enjoy their holdings without any consideration of possible damages or annoyances caused to the other. Restrictions on the powers which ownership right usually involves can prevent these conflicts.

It is prohibited to undertake on ones estate works or operations that may materially endanger a neighboring estate for instance, excavations or ditches which may result in damages to

buildings or agriculture. See Arts 1210 and 1225 of the Civil Code.

The law prohibits owners from causing nuisances to a neighbor by noise, smoke, gases odor if it exceeds limits considered tolerable. See Art 1225

"Good neighborly behavior". The neighbor who is the victim of such nuisance may require repair of the damage caused or get an injunction/ a court order requiring suspension of such act/ and payment of compensation. See Art 1226.

The law prohibits an from directing water to another's holding waters other than proceeding from rain or a spring and flowing naturally from higher to lower grounds. For example, water from a well, or a shaft, waste or polluted water from industry, water used for irrigation may not be directed to the neighbors land. See Art 1246 (1) of the Civil Code.

The owner of a building must construct the roof so that rainwater falls in to the public road or on his own land. See Art 1245.

Under French law the owner of a wall or a building, which is not far enough from the neighboring estate is required to permit opening of direct or indirect view or access of light through windows with wired glass panes "picture windows" and iron grillwork with opening not larger than 10 cm.

The owner/holder of land is required by law to allow access to his land/ holding in some circumstances. Hence, he/she may not prohibit access to his/her land where it is necessary: -

To prevent or avoid eminent damage or danger to life or property (Art. 1217)

To repair of walls or buildings (Art 1218)

To recover lost things or animals (Art 1219)

To install of pipes (Arts 1220, 1252, 1253)

To allow right of way to a neighbor (Arts 1221-1224, 1249(2))

PROPERTY RIGHTS WITH REGARD TO LAND AND WATER

Under Art 40 of the FDRE Constitution land/ both rural and urban/ is declared to be the property of the state of Ethiopia and its peoples.

However, the constitution entitles Ethiopian farmers and pastueralists to obtain farmland/ pastureland free of charge and a right of use of such land. It also provides that investors in the agriculture sector may also obtain land in accordance with land use laws to be issued by the regions. The land use/ holding rights recognized by the constitution and the federal land administration law shall be implemented and administered by the states/ regions of the federation, which

shall issue specific laws for the implementation of these rights.

In urban areas, individuals and investors have the right to obtain land necessary for construction of buildings for residential or commercial purposes in accordance with the land lease law issued by the House of Peoples Representatives and City or Regional governments.

Regarding property rights in relation to water resources, Arts 1255 and 1447 of the Civil Code provide that waterways (rivers), lakes and underground accumulation of water shall be deemed to form part of a public domain, i.e., they can not be privately owned, alienated, or acquired through possession in good faith, occupation. See also Art 1454 and 1455.

Furthermore, according to Art 40(3) of FDRE Constitution water resources, which include both surface and underground water, are common property of the peoples and state of Ethiopia. Hence, the type of property right that may be had in relation to water resources is a use right provided by the Water Resources Management Proclamation No 197/2000. However, water shall be private property where it is collected in a man made reservoir, basin or cistern from which it does not flow naturally. Art 1229 of the Civil Code.

SCOPE OF RIGHT OF OWNERSHIP/USE OF LAND

The ownership/holding and use right/ of land includes what is above it. In other words, the air space is exclusively the owner's/ holder’s/ and he can erect in it structures, he may demand the destruction of works which, in any way infringes his air space, or the cutting of branches which grow in to it. See Art 1211 and 1212 of the Civil Code.

There is a presumption that the owner/holder of the land owns what is constructed on it. However, this presumption is refutable if the owner of a building is different from the owner/holder of the land on which it stands. See Art 1214 and 1200 of the Civil Code.

However, the natural proposition that ownership of the land implies the title to whatever is above it cannot be reversed to conclude that the ownership of works on it implies ownership/holding of the land. Nor does the ownership of the subsoil, for example, a cave or a subterranean quarry, carry a legal presumption that the owner owns/holds also the surface. See Art 1209, 1210 and 1214 of the Civil Code.

The ownership/holding of the land extends to a depth below, including all the objects located there. Art 1255(2)

limits this right to a depth of 100 meters.

ACQUISITION OF OWNERSHIP

Derivative Acquisition; Refers to the mode of acquisition right of ownership through transfer from one person to another. It is a mode of acquisition in which the right of the transferee is dependent on the right of the transferor. Hence, the governing principle here is that no one can transfer a better title or right than he has, and where the transferor is not an owner or if his right is defective, the transferee will not acquire right of ownership or will acquire a defective right. Derivative acquisition may result from contracts such as sale and donation/ Arts 2266-2426 and 2427-2470 of the Civil Code respectively or from the will of a deceased person/ testate succession/ or the operation of the law, in cases of in testate succession/ Arts 826-1125 of the Civil Code/.

Original Acquisition; this mode of acquisition involves the creation of new property a right, which is independent of any preexisting rights over the same thing. This mode acquisition differs from derivative acquisition of property rights in which an existing property right is transferred from the transferor to the transferee, and the latter's right depends on the right of the former. This mode of acquisition of ownership includes occupation, possession in good faith, accession and usucaption/ acquisitive prescription,

OCCUPATION

Is a mode of acquiring ownership by the sole fact of taking possession of a thing that does not have an owner with the intention of becoming an owner. This mode of acquisition is largely limited to chattels such as wild animals, birds, fish /res nullius/ and abandoned chattels /res derelicte/ and treasures. In the past, land could also be acquired by occupation or cultivation. Now a days, however, it is subject to license or grant by the state, which is supposed to hold title to all unclaimed land even in countries where land may be owned privately. By the same token, Art 1194 of the Civil Code also makes immovable things without an owner the property of the state and hence renders this mode of acquisition inapplicable to immovable things in Ethiopia even before the nationalization of all land in 1975 and the coming in to force of the FDRE Constitution which, under Art 40/3/, makes land and all natural resources the property of the state and the peoples of Ethiopia.

Hence, occupation or first possession as a mode of acquisition of ownership right is limited to the following cases.

Wild Animals; a person may acquire ownership right of wild animals living in natural freedom through the act of hunting and fishing in accordance with the relevant provisions of Wild Life Development and Conservation Proclamation. However, this cannot apply to semi-domesticated animals that customarily return to the same habitat, for example, pigeons, bee swarms. Art 1152 and1153 of the Civil Code. Art 850 of the FDRE Criminal Code penalizes a person who violates laws, regulations or directives for the protection of the national arbores cent species, flora and fauna with fine or arrest. See also Art 681 of the criminal code.

Treasures; anything hidden or buried to which nobody can show an ownership title and which is discovered by chance. According to Art 1159/3/ of the Civil Code, for a thing to be considered as a treasure it must be found buried or hidden, in an immovable or movable thing, for a period of at least 50 years on the date it is discovered and nobody can prove it belongs to him/her. The rule is that the owner of the immovable or movable thing in which a treasure is discovered shall acquire ownership to it by occupation or his discovery. However, where the treasure is discovered by a person who is not the owner of the thing in which it is found, the finder shall be entitled to half of the value of the treasure he discovered. However, a person shall not acquire ownership of archeological discoveries and antiques because of the historical importance attached to these categories of treasures. Furthermore, the thing must have been owned originally, and precious stones or gold grains found in their natural mining place are not considered as treasures. Ownership of natural resources belongs to state and a person must acquire a license to mine natural resources.

Lost things; lost things and misplaced things have an owner but the owner does not know where to find them. However, the law attributes ownership to the finder after a lapse of certain period of time, or completion of certain requirements such as announcement of the find or report to the authorities. Under Ethiopian law the finder of a lost thing has the duty to comply with rules requiring him to report the find. Depending on the particular circumstances of the case, the finder may have to make public announcements/ that may include local radios/ or post notices, at public places…etc, about the thing found. Art 1154/2/ of the code. A finder who has complied with this requirement shall have the right to keep the find in his possession and shall take all the necessary measures to preserve thing.

Art 1155 of the code. However, where the thing is vulnerable to rapid deterioration or where its custody or preservation is onerous, the finder may sale the thing at a public auction in which case the proceeds of the sale shall replace the thing sold. Art 1156 of the code. Art 680/1/ of the FDRE Criminal Code provides that a person who appropriates a lost object which he has found without notifying the authorities or taking the measures necessary to trace the owner shall be punishable, up on compliant, with fine not exceeding 5,000.00 Birr, or according to the gravity of the case, with simple imprisonment not exceeding one year. However, the owner retains the right to ask for its return as long as he has not lost his right of ownership, i.e., with in a period of ten years from the date of loss of the object. Arts 1157/1/ and 1192 the Civil Code. In such cases the owner shall have the obligation to reimburse the finder with the expenses the latter has incurred for the custody and preservation of the thing. Art 1157/2/ of the code. The finder may also apply to a court, with in a period of one year from the date of restitution of the thing to the owner, for payment of reward by the owner. Where the owner is in better financial position than the finder and where the owner has no or little chance of finding the thing himself, the court may order the owner a reward not exceeding 25% of the value of the thing found. Art 1158 of the code. Where the owner fails to claim the return a thing found within a period of ten years the thing shall become a thing without a master and the finder shall acquire its ownership through occupation. See Art 1192 cum 1151 of the Civil Code.

Abandoned things; are things to which the owner has clearly renounced his right of ownership and hence which are without a master or owner. Art 1191 of the Civil Code. The fact that a thing has been abandoned may be clearly expressed by the owner or may be presumed from acts such as finding the thing at a local rubbish or waste disposal area…etc. Hence, a person who finds and possesses an abandoned thing or a derelict thing with the intention of becoming an owner shall acquire ownership right through occupation. See Art 1151 of the Civil Code.

POSSESSION IN GOOD FAITH

Acquisition of ownership through possession in good faith is a mode of acquisition in which a person who purchases a corporeal movable thing from a person who is not an owner or who is not entitled to alienate or transfer a thing, becomes an owner of such thing originally as a result of his good faith. In other words, a person

who purchases a corporeal movable object from a finder or a thief, with the belief that he was purchasing it from the owner of the thing or a person who is entitled to alienate it, shall become the new owner of the thing where he purchased it in good faith, i.e., with the belief that the seller is the actual owner of the thing and took possession of the thing. Art 1161(1) and 1162(1) of the Civil Code.

Is based on practical considerations of impossibility of registration of all chattels /corporeal movable things/ and the consequent impossibility for the purchaser to ascertain the title of the seller of such goods. It is also intended to protect freedom of contract that helps the promotion of free transfer of goods and ensure security of transactions by enabling the bona fide purchaser to acquire a new right of ownership by protecting him from any claim by the true owner of such thing 1161(2). Otherwise, transactions involving chattels in respect of which registration and issuance of deeds is almost impossible, will result in uncertainty of contracts and business transactions and will hinder free circulation of goods.

The purchaser will acquire the ownership of the thing at the time when he takes of possession of the thing according to Art 1143-46 of the code. A purchaser is presumed to be in good faith in the absence of contrary evidence showing that the purchaser knew, at the time of taking possession, that the seller was not the owner of the thing. However, a proof that the purchaser discovered the fact that the seller was not the true owner of the thing after he took possession may not rebut this presumption. See Art 1163.

The good faith acquirer who bought such thing from a trader who sells similar things, or in a public auction, or in an open market / market overt / has the right to require the seller to reimburse him with the price he had paid for the thing. See Arts1166 of the Civil Code. However, this provision seems to imply that a good faith acquirer who purchased a stolen thing under other circumstances will not be able to claim reimbursement from the seller, which is contrary to the rules governing contracts of sale. See Art 2282 of the Civil Code.

This mode of acquisition is not applicable to immovable things and special movables such as vehicles in respect of which there is a requirement of registration and special mode of proof, i.e., production of title deeds, is required. This is because the purchaser is expected to ascertain the true owner of a thing he is about to purchase by referring to officials registers, which are open for any interested party and can not claim to have purchased the

thing in good faith, believing that he was dealing with the t rue owner.

ACQUISITIVE PRESCRIPTION (USUCAPTION)

The concept of prescription, in its broad sense ,includes both acquisitive prescription through adverse possession (usucaption) and extinctive prescription (statute of limitations).

Acquisitive prescription is a mode of acquiring ownership title or some real interest through possession that is free from defects, exclusive and continuous (see Art 1168 and1150 junction of possession). Furthermore, the possession must be adverse, i.e., contrary to the owners will, which means that where the possessor had acquired possession of the immovable with the consent of the owner the rules of usucaption or acquisitive prescription shall not apply.

Limitative/extinctive prescription is a defense through which it is generally possible to resist a claim on the sole ground that the claimant failed, for a certain period, to bring the action or to exercise the right on which it is based.

Acquisitive prescriptions, similar to limitative prescription provide a defense against an action for restitution by the former owner; and a restitution claim against any adverse possessor, including the former owner.

The rationale behind this principle is that owners must not leave their property unattended for a long period of time. In case where the owner leaves his property unattended and fails to claim its restoration with in the period of time determined, the law assumes that the owner does not need the property any more and hence decides to reward a person who can put the same to a better use for himself and the public.

According to Art 1168 of the Civil Code a person who has possessed an immovable belonging to another for a period of fifteen consecutive years and who has been paying taxes relating to ownership of such immovable shall become the owner of the immovable through acquisitive prescription or usucaption.

The main requirement in this mode of acquisition is that the possession should be adverse, i.e., the possessor must have a claim contrary to the right of the owner and persons who possesses an immovable thing on the permission of the owner may not acquire right of ownership to it. In addition, the possession should also be continuous /see also Art 1150 of the code/ and free from defects under Art 1146 of the code.

The other main requirement for the acquisition of ownership through adverse possession /usucaption/, is payment of taxes relating to the immovable for 15 consecutive years. A

person who is not able to acquire ownership of an immovable thing through adverse possession, for instance who possessed a thing for ten years or who failed to pay the taxes relating to the immovabl,e may still acquire a property right lesser than ownership.

Similarly, Art 11168/2/ of the Civil Code entitles the person who does not fulfill the requirements of Art 1168/1/ but who has fulfilled the requirements under Art 1146 and 1149/2 / to the right of possession and the protections provided for possessors. Hence, a person who possessed, for more than two years but lesser than fifteen years, an immovable belonging to another and whose possession is defect free shall be considered as a lawful possessor protected by the provisions of Art 1148 and 1149 of the code. The same shall be true of a person who did not comply with the tax requirements of Art 1168/1/ of the code.

However, where the immovable is a rural land which is subject to a communal /family/ land holding tenure /Rest Land/, a member of the family may not claim to have acquired individual ownership to the land through adverse possession and any other member of the family may claim at any time his right to such land. See Art1168/1/ second paragraph. In other words, the rules governing acquisition of ownership through ususcaption are not applicable to rural land in parts of the country where land is the common property of the family, /rest holding/. These requirements are cumulative and both must be fulfilled before a person can acquire right of ownership through adverse possession. However, note that the application of this mode of acquisition is restricted to immovable things and that an owner of a movable thing who failed to exercise his right of ownership /to claim restitution of the thing for a period of 10 years/ loses his right of ownership and the thing becomes a thing without an owner /res nullius/, which can be acquired by occupation. See Arts1192 and 1152.

ACCESSION

Accession is a mode of acquisition of ownership through the union of two or more things belonging to two or more persons. If the thing which is joined does not have a master before, a person acquires it by the sole fact that nobody can claim it. In other words, for a thing to be acquired through accession, the two things must belong to different persons.

In principle, when the two things now joined belonged to different persons before the union, each owner should be able to request their separation. However, in majority of cases such

separation cannot take place without deterioration of the things or often it is impossible. Hence, the solution is to attribute anything formed by such union to one person and compensate the other, based on the maxim "Accessio cedit principali, i.e., the owner of the principal owns the new thing, See Art 1183(2) or require it to be commonly owned by the owners of the component parts in certain proportion. See Art 1183(1)

Accession also applies to increase from breeding in case of animals/ accession by separation/. Hence, the owner of the mother shall become the owner of the calf. See Art 1171. Similarly, a person who owns a thing also owns its natural fruits, in cases of ownership of things capable of bearing fruits. See Art 1171 of the Civil Code.

ACCESSION OF MOVABLE THINGS TO IMMOVABLE THINGS

Crops sown on the land of another person who sows seeds on a land that belongs to another person against a clearly expressed objection of the owner/holder shall not become the owner of the crops. Where the crops have already harvested by the sower, the owner/holder of the land shall have the right to claim the whole harvest or the value of the crop harvested from his land. The same rule applies where the owner/holder of the land was aware of the act and wanted to object to the act but was not able to express his objection. For instance, he was far away or sick or prevented from objecting by any other reason, i.e., he was not aware of the act of sowing. Where the sower sows seeds with out the objection of the owner/holder or where he was aware of the act of the sower but failed to object to the act, the sower may be entitled to a fourth /25%/ of the crops provided that he sow the land in good faith or with the belief that the land belongs to him or has the right to sow the land. However, if the sower acted in bad faith, i.e., with the knowledge that the land does not belong to him or he does not have the right to sow seeds on the land, the whole crop will belong to the owner of the land. (See Art 1172 - 1174)

Plantations on a land belonging to another- Where a person plants trees on a land belonging to another person against a clearly expressed objection of the landowner/holder, the latter will acquire ownership to the trees and the former will not have the right to claim the trees or compensation. However, where the trees are planted with the permission of the owner/holder of the land, the two persons shall become joint owners of the trees. But the owner/holder of the land may terminate the joint ownership and may acquire the full ownership of the trees

by payment of compensation to be determined by the agreement of the parties or according to the provisions of Art 1177. (See Art 1175 - 1177)

Buildings on a land belonging to another person, where a person, against a clearly expressed objection of the owner/holder of the land, constructs a building on a land that does not belong to him, the owner/holder of the land shall acquire the ownership of the house through accession. The same rule applies in cases where the landowner/hoder was aware of the construction but was not able to object to it for any reason. Hence, the landowner/holder may, at any time, force the builder to leave the building or require him to demolish the building and clear the land without compensation. However, where the landowner/holder knew of the construction but failed to express his objection to the act, the builder shall acquire the ownership of the building. The owner/holder of the land is entitled to evict the builder by payment of compensation to be determined by the agreement of the parties or the provision of Art 1180. (See Art 1178 - 1180)

Using materials belonging to another- where a person uses materials belonging to another for building or other works, he shall become the owner of such material by accession, and the former owner of the materials cannot demand the return of the materials. However, the person who used materials belonging to another shall have the obligation to refund the value of the materials to the former owner. Where he acted in bad faith, i.e., he used the materials knowing that they do not belong to him; he may also be required to pay damages. See Art 1181. Also compare Art 1134 of the Civil Code.

ACCESSION OF MOVABLE THINGS TO MOVABLES

Accession of one movable to another can take place in one of the following forms:-

Adjunction: It is a union of two things belonging to different owners in which the things form a single whole though each is a distinct and recognizable part of the new thing formed by the union. In such cases, the owner of the principal thing shall become the owner of the new thing but will have to pay the value of the thing so joined to the owner of the accessory thing. For instance, where an owner of damaged vehicle / a wreck / uses parts of a wreck belonging to another, the owner of the new thing /the principal/ shall become the owner of such parts/ the accessory/. (See Art 1183(2)

Transformation (specification) - is the act of making anew thing with material belonging to some one else, the worker

shall become the owner of the new thing if the labor supplied is of great value than that of the material, for example, a painter who uses canvas and ink belonging to another person shall be the owner of the painting he has done. See Art 1182.

Commingling /fusion/ - occurs when two dry or liquid things /matters belonging to different owners are commingled or fused so that they cannot be separated with out difficulty. In such cases, the persons, in proportion to value of the material each owned, shall jointly own the new to thing so formed. For instance, where ink belonging to two different persons are mixed to form an ink with a different color, the new thing/ink/ shall be jointly owned by the persons in proportion to value of the ink each used to own. See Art 1183(2).

TRANSFER OF OWNERSHIP RIGHTS

According to Art 1184 of the Civil Code right of ownership may be transferred from the owner to another person by the agreement of the owner which may be a contract of sale (see Art 2266) or contract of donation (see Art 2427) or a contract of barter according to Art 2408 and 09 or by will.

It may also be transferred, in cases of in testate successions, by the operation of the law. For instance, the properties of the deceased person shall be transferred, according to Art 842, to his/her children.

In this regard the principle applicable is "nemo dat qoud non habate" which means that the transferor may not transfer a better right than he has on the object. Therefore, in order for a person to transfer a perfect right of ownership he/she must have a perfect right of ownership.

The right of ownership of ordinary corporeal movable things (chattels) is transferred by the transfer of possession, pursuant to the provisions of Art 1143-45. Possession may be transferred by delivery or handing over of the thing, or by delivery of document representing the thing such as bills of lading, way bills, warehouse goods' deposit certificates or constructively, i.e., by declaration of the possessor of a thing that from that time on he will hold the thing in the name of the creditor who failed or refused to take delivery.

However, in exceptional circumstances, ownership of chattels may be transferred at a different time than the time of transfer of possession. This is true in cases of sale with ownership right reserved (see Art 2387 of the code). In such cases, ownership will be transferred from the seller to the buyer at the time when the buyer pays the price, i.e., the transfer of possession shall not transfer ownership

to the buyer until the later pays the agreed price. However, the seller may not or the buyer may not raise such provision against third parties/ for instance, the creditors of either party who may want to attach such thing/ unless such third party accepts such provision or it has been publicized through registration in a public registry in accordance with law. See Art 1187 of the code.

Transfer of ownership right over immovable things and special movable things is effected by striking out of the name of the transferor and entering the name of the transferee in the registers of immovable things and special movable things respectively, and issuing a new title deed in the name of the transferee. See Art 1185 and 1189 of the code.

Tthe requirement of registration of contract with registers of immovable things (under Art 2878 of the Civil Code) is intended to give notice to third parties about the rights and charges that exist in relation to an immovable in question, while the authentication under Art 1723(1) is a mandatory requirement for validity of contracts relating to immovable things. Contracts relating to immovable things are subject to this additional requirement because of the fact that immovable things have special economic & social importance to the individual right holder and the society at rage and hence the law provides special protection through strict requirements for contracts relating to them. Furthermore, it argued that there is no contradiction between Art 1723(1) and Art 2877, rather the two provisions are complementary provisions that have to be interpreted and applied in a manner to give effect to the general goal intended to be achieved, i.e., providing special protection to immovable things and ensuring security of transactions/contracts.

Though motor vehicles are movable things, they are required, by special laws, to be registered and their ownership to be proven by producing title deeds. /Art 1186(2) and Pro N0 107/ 1969 and Legal Notice No 360/67/. Hence, the provisions of art 1195 -1198 regarding proof ownership of immovable things shall also be applicable to prove ownership of special movable things

According to Art 1195(1) the issuance of a title deed by the relevant administrative authority to the effect that a given special movable thing (motor vehicle) belongs to a given person shall raise a presumption that such person is the owner of such thing. One of the grounds up on which such presumption may be rebutted is a proof showing that another person has

acquired the motor vehicle after the title deed is used. See Art 1196/c/ of the Civil Code.

PROOF OF OWNER SHIP RIGHTS

The mode of proof of the existence of a right of ownership varies depending on the type of the object of the right.

The owner of an ordinary corporeal movable object / a chattel/ shall prove his right to the thing by the mere fact of possession. The same is also the case for rights contained in bearer negotiable instruments. See Art 1193 of the Civil Code and Art 721 of the Commercial Code. According to these provisions, the possessor of a chattel or a holder of a bearer instrument shall be presumed to be the owner thereof unless interested persons prove the contrary.

The owner of an immovable object or a special movable object may establish his ownership by producing a title deed, which is given by the keeper of register of immovable things or the organ registering special movable things. See Art 1593-1561 of the Civil Code.

According to Art 1195 the issuance of a title deed shall give rise to a presumption that the person named therein is an owner of the immovable mentioned. However, this presumption may be rebutted where:-

The title deed is not issued in accordance with the law, see Art 1553-1636

The title deed is issued by an authority having no jurisdiction, see Art 1553(1)

The title deed was issued on the basis of an invalid act, such as a void contract

The plaintiff acquired the ownership of the immovable after the day on which the title deed was issued.

Prior to issuing a new deed, the authorities issuing a title deed has to require the return of the deed previously issued to the previous owner and cancel it. Where the previous title deed is lost or destroyed, the authority has to require the person requesting issuance of new title deed to produce sufficient security to cover possible damages that may be caused to third parties as a result of non-cancellation of previous title deed. See Art 1197.

The state shall be liable to third parties who acquired title based up on deeds which was not issued in accordance with the law or which was issued by authority having no jurisdiction, or which the authority failed to cancel. See Art 1198.

All structures, crops, trees, buildings and other works on a land and caves, wells and other works under the surface are presumed to be owned by the owner/holder of the land. However, this presumption may be overcome by contrary evidence w/c may be

witnesses or other evidences. See Art 1200.

Party walls - any wall or fence, which lie on the boundary line separating two lands, shall be presumed to be jointly owned unless one parcel of land only is fenced in or unless the contrary is proved by evidence showing that they are individually owned. See Art 1201. This presumption shall not apply to ditches on boundary lines if the embankment is made on one side only. Ditches that lie on the boundary line are presumed to be owned by the owner/holder on whose land the embankment is made. This presumption may also be rebutted by proof to the contrary. See Art 1202.

Accessories; the ownership of a thing, movable or immovable, includes the ownership of the accessories, natural or artificial, which are necessary part of the thing. See Art 1203. Water, gas and electricity supply lines - are deemed to be accessories of the undertaking from which they emanate and which provides the service. See Art 1203, this presumption may be rebutted.

Ownership of fruits- the ownership of a thing includes the objects, which it is capable of producing, either by itself, or with human help, as well as of monetary benefits that can be gained from it. For example, crops, rents … See Arts 1170 and 1171 of the Civil Code.

EXTINCTION OF OWNERSHIP RIGHTS

Extinction of right of ownership may be absolute in the sense that the owner or another person may no longer exercise right of ownership in relation to that thing because the thing is destroyed, or it has lost its individual character. This is because property rights do not exist without a thing, which is the object of right. See Art 1188 of the Civil Code.

Ownership right may also be extinguished absolutely if the thing is expropriated for public purposes.

Ownership of wild animals will be extinguished absolutely if they regain their natural freedom and become res nullius. See Art 1152(1).

Extinction of ownership right may be relative, i.e., only in relation to the present owner, if it is acquired by another person through acquisitive prescription /usucaption, or transfer or waiver or renunciation.

The right of ownership shall also be extinguished where the owner, with the intention to have it acquired by the first finder or occupant, abandons the object. See Art 1191 of the Civil Code.

The owner of a corporeal movable object shall lose his right as an owner where he fails to exercise, for a period of ten years, the rights arising out of

ownership. See Art 1192 of the Civil Code. However, this does not apply to a person who has transferred the thing to another, for example, by a contract of loan for use Art 2767 of the Civil Code.

Ownership of immovable things and special movable things in respect of which there is a requirement of registration/ Art 1723, 1185 / shall be extinguished when the registration is cancelled / Art 1190 /. However, this is only a formal requirement to accomplish the transfer rather than a ground for the transfer of ownership.

UNIT FOUR- JOINT OWNERSHIP

Joint ownership or Co-ownership is the right of ownership exercised by two or more persons in relation the same object. In other words, it refers to the right of use and enjoyment, right of possession and exclusion of others and the right to transfer a thing or to charge it with pledge or mortgage exercised jointly by several persons. See Art 1257 (1) of the Civil Code.

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

The thing, which is jointly owned, is undivided and,

Each joint owner is considered as owner of each and every part of the thing.

THE SCOPE OF RULES GOVERNING JOINT OWNERSHIP

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

Furthermore, joint ownership of things is regulated primarily by the agreement entered into by the joint owners at the time of inception of joint ownership, where joint ownership arises from contracts, or by the agreement entered in to after the joint ownership is created and/or by the mandatory provisions of the rules contained in the Civil Code, i.e., Arts 1257-1308. In other words, the rights and duties of the joint owners, the use and administration of the thing are regulated by the agreements entered in to by the joint owners provided that the agreements are not defective/ invalid/ and are not contrary to mandatory provisions of the Civil Code mentioned above. See Arts 1264, 1265, 1266,

1267, 1268/2/, 1271 and 1274 of the Civil Code.

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

ADVANTAGES AND DISADVANTAGES OF JOINT OWNERSHIP

ADVANTAGES

The fact that a thing may be owned by two or more persons helps people to acquire certain property very important for their lives, which they would not have otherwise acquired because of lack of sufficient financial capacity by joining or contributing a lesser amount of money.

Joint ownership will also help in achieving efficient utilization of scarce resources.

DISADVANTAGES

The guiding principle is that joint owners shall, acting together, administer the thing jointly owned. Administration here may refer to how the thing is used, its repair and maintenance, bringing or defending legal actions, sale, lease, pledge or mortgage of the thing jointly owned and these decisions has to be made by joint owners acting together. Furthermore, certain decisions such as the decision to sale, or mortgage, or pledge the thing or a decision to change the purpose for which the thing is acquired /transformation of the thing/ has to be made by unanimous consent of all joint owners. See Art 1265 and 1266 of the Civil Code. It is generally accepted that a free and swift transfer of goods is an essential precondition for effective commercial transactions, which may bring about economic development to a country and benefit the public.However, it is usually difficult to obtain the agreement of all joint owners to reach a certain decision. Hence, joint ownership may hinder the free transfer of goods because joint owners may not have the opinion and understanding as to the importance of the proposed act to agree to the proposed act.

SOURCES OF JOINT OWNERSHIP

Joint Ownership Arising from Contracts- a contract is a common source of joint ownership. Two or more persons who intend to acquire and use a thing commonly or jointly may enter in to a contract creating joint ownership. In other words, the main purpose or object of a contract creating joint ownership is to create ownership right for two or more persons in relation to the same object or thing. For these contracts to be valid and enforceable, they have to fulfill all the requirements for the formation a valid contract, i.e., consent, capacity, object

and form. See Arts 1676/1/, 1768 and 1679-1730 of the Civil Code. No special form is required for validity of contracts of joint ownership and they can be made orally unless they are required to be made in writing by law or the agreements of the parties. Accordingly, contracts creating joint ownership over immovable things and special movable things have to be in writing. See Arts 1719-1730, 1282 and 1283 of the Civil Code.

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

A right of recovery is a right given by the law to certain group of persons to compel the buyer of a certain object to sell it back to them. The law grants such right because of the relation that exists between the seller and the persons to whom such right is granted. For instance, relatives of a seller of an immovable thing and joint owners have a right of recovery. See Arts 1386, 1388 and 1389 of the Civil Code. Arts 1176/1/ cum 1177/3/ and 1183/1/ of the Civil Code other instances of joint ownership arising from the provisions of the law.

RIGHTS AND DUTIES OF JOINT OWNERS

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

Right to Administer the Thing: No co-owner individually own specific part/unit of the thing. Therefore, no joint owner can exercise any right or physical act of causing material changes or modifications or change of purpose or exercise a right of creating legal acts such as usufruct, servitude lease, sale, mortgage, pledge of the

thing that implies the existence and exercise of complete individual ownership. Hence, the consent of the other joint owners is required in order to undertake any one of these acts in relation to the thing jointly owned. Generally, it can be said that jointly owned things are administered by the joint owners acting together and each joint owner has the right to participate in decisions regarding the administration of the thing jointly owned. See Art 1265 and 1266 of the Civil Code. Hence, decisions are made by majority vote of joint owners who represent majority share in the thing jointly owned. However, decisions regarding pledge, mortgage, sale, donation of the thing or decisions to change the purpose for which the thing is acquired or decisions to make material changes which cause interference with the right of other co-owners requires unanimous vote of all joint owners. See Arts 1265, 1266 and 1259 of the Civil Code. A co-owner may make material changes which do not interfere with the right of use of other joint owners or which is useful to all. According to Art 1267 each co-owner shall bear, in proportion to his/her share, the costs of administration, taxes… and necessary costs (costs incurred to avoid lose or damage to the thing). Each co-owner has right to force other co-owners to reimburse him with necessary expenses. In other words, a joint owner who incurred costs for the maintenance and preservation of the jointly owned thing has the right to demand reimbursement of the money he has paid in proportion to their shares. However, a joint owner may relieve himself of this obligation by surrendering his share in the thing to the joint owners. See 1268(3) and 1282(2).

Each joint owner has the right to dispose of his share of rights in the undivided interest in the thing jointly owned. See Art 1260 of the Civil Code. Hence, a joint owner may sale, donate, pledge or mortgage his share of right in the thing.

Each joint owner has the right to request termination of joint ownership. In other words, each co-owner has the right to request the court, at any time, for partition or division of the thing or the sale by auction of the thing and division of the proceeds of the sale. If the thing jointly owned is a movable thing, a joint owner may apply for sale by an auction. See 1271. This right cannot be waived by agreement.

If the thing jointly owned is an immovable thing such as a building, a joint owner may apply for division or sale by auction where division seriously reduce the value of the thing or is contrary to its nature or purpose (see

Art 1272 and 73). The court also has the power to decline the request for division or sale of the immovable jointly owned where the time for sale or division is not appropriate, for instance if sold now it would fetch a price which is way below its actual value.
However, the right to require termination of joint ownership of immovable things may be waived for a period not exceeding 5 years by the agreement creating the joint ownership or by subsequent unanimous agreement (see Art. 1274). Where the period fixed in the contract exceeds five years, the agreement not to require sale or division of the immovable jointly owned shall have no effect beyond five years and the joint owner may require termination of the joint ownership by division or sale. This is because allowing agreements that prohibit sale or division of the thing for a long period of time shall affect free transfer of goods and commerce, which is considered to have a huge effect public interest.

SPECIAL CASES OF JOINT OWNERSHIP

PERPETUAL JOINT OWNERSHIP

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

Perpetual/ continuous/ usually exists in relation to indispensable accessories of things intended for the common use of two or more estates belonging to different owners, for example, lanes, passages, yards, wells, sewer pits, paths, roads, dams, canals, party walls, and common portion of condominium houses, in which partition or division would not leave each house owner a separate space necessary for /his/her needs.

Similarly, the right to co-ownership to walls, ditches, hedges or other enclosures, which separate contiguous estates, called mitoyennete in French law, constitutes a perpetual joint ownership.

PARTY WALLS

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

Party Co-ownership of ditches: Any ditch separating two estates is considered party co-owned, unless only one of these estates is enclosed, or

there exists a documentary title or a prescriptive title or unless there exists a feature implying exclusive ownership, such as a dike or pile of excavated earth only on one side of the ditch which is then considered as belonging to the owner/holder of the land on which such dike or pile of earth rests. See 1202 of the Civil Code.

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

Other enclosures are also considered as party co-owned unless there exists a contrary documentary title, prescription title or feature contrary to the presumption.

CO-OWNERSHIP IN BUILDINGS IN WHICH FLOORS OR APARTMENTS ARE SEPARATELY OWNED

The ground, the structural walls, the roof, the staircases, the elevator…etc as indispensable accessories, are co-owned by all co-owners by a forced undivided title. In other words, parts of the building that are not intended for the exclusive personal use of one owner are presumed to be commonly owned.

For example, yards, walls, roofing, structural flooring, staircases and elevators, the janitors able, halls and corridors, heating and other ducts of all sorts, except those located within each house. In addition, walls separating two houses or rooms belong to both owners as party walls.

However, windows, shutters, and blinds, door so f the rooms and balconies are individually owned.

UNIT FIVE - USUFRUCT

Usufruct may be defined as a real right, temporary or for life, which entities a person called, the usufructuary, to possess, use and enjoy a thing, which belongs to another person called the bare owner, and its natural fruits, with the duty of preserving its substances and restitution to the bare owner up its termination. See Art 1309(1), 1328, 1347, 1348, and 1311 of the Civil Code.

Usufruct represents a case in which the constituent elements of a right of ownership are divided or partitioned among two or more persons, i.e., the owner of the thing, called the bare owner, and the person who has the present right of possession and use of the thing/uses/ and the right to collect and use its fruits /fructus/, called the usufructuary.

The things susceptible of usufruct, i.e., things in relation to which a right of usufruct may be created. Accordingly, a right of usufruct may be created in relation to

Incorporeal things

Corporeal things
Movable things
Immovable things

By its nature usufructs presupposes the possibility to use and enjoy a thing, which is its object, while preserving its substance. Hence, things that are consumed by their first use are not susceptible of usufruct in the proper sense of the term. However, French law admits things such as money, grains wine…etc. may be the object of a right called quasi usufruct. Art 1327 of the Civil Code of Ethiopia also recognizes this concept.

SOURCES OF USUFRUCT

Art 1310 of the Civil Code provides that, in the absence of provision to the contrary, the rules governing the acquisition, transfer, extinction of right of ownership shall apply to the acquisition, transfer or extinction of usufruct right.

Usufruct may arise from;

The law / as in the case of French law

Contract: Usufruct may be created by agreement or contract for consideration or without consideration. According to Art 2410 of the Civil Code, an owner may transfer the usufruct of a thing by contract for consideration. In such cases, the rules governing contracts of sale shall apply. The rules as to the form and publicity requirements for contracts shall also apply to contracts creating usufruct. Hence, contracts creating usufruct right on immovable things and special movable things shall be made in writing and registered with the organ registering immovable things or special movable things. See also Art 1723 of the Civil Code.

Will: Usufruct may also be created by a will of the deceased owner. The owner of a certain property may, by his last will, bequate on another person the right to possess, use and enjoy and collect the fruits of the thing after his death. See Art 912 and 929 of the Civil Code.

Usufruct can be created in favor of a single person, or jointly and simultaneously in favor of several persons. Usufruct may even be created in such a manner that several persons are called to enjoy it in succession, one following the other. It may be created for a limited period of time or for lifetime of the usufructory. See Art 1322(1) of the Civil Code.

It created in favor of bodies corporate or properties with specific destination shall terminate after 30 years or such shorter period provided by the contract or will creating it. Refer to Art 1322(2) of the Civil Code.

RIGHTS AND OBLIGATIONS OF THE USUFRUCTUARY

The Conservation of the Substance of the Thing: - The usufructory shall have the obligation to conserve the thing, its

form, structure and particular identify. For example, he/she cannot change a field in to a forest, a vineyard in to yard, or change the outer or interior layout of a house. See Arts 1309(1) and 1330(2) of the Civil Code. However, the usufructory can make changes that increase the value of the thing without changing its form. However, he may not claim payment of compensation, at the time of the extinction of the usufruct for improvements, for the improvement he has brought to the thing under usufruct. See Art 1336 of the Civil Code.

The usufructory has the right to use and enjoy the thing, and its fruits. However, he has an obligation to exercise due care and diligence like a diligent head of family and must use the thing following the pattern established by the owner and he must follow the prior use of the thing. Hence, the usufructuary cannot use a hotel for a different purpose, or a house as a hotel. Refer to Arts 1312, 1330/2/ and 1328 of the Civil Code. Furthermore, where the bare owner can prove that the usufructuaty is not performing his duties under these Arts, the court may order the latter to furnish security, in the form of pledge, mortgage or personal guarantee, to protect the interests of the former. See Art 1324 of the Civil Code.

The obligation to up-keep the thing: -

The usufructuary has an obligation to have regular maintenance and repair works done at his cost. See Art 1313 of the Civil Code. He also has an obligation to inform the bare owner where the thing requires major or considerable repairs where he is not at fault for such damage or deterioration of the thing that made such repair necessary. However, he will be liable for considerable or major repairs, if they became necessary because of deterioration due to his fault, i.e., damages resulting from failure of the usufructuary to have regular maintenance and repair works done. Considerable or major repairs are repairs that require expenses that are greater than the average annual income generated by the thing. See Arts 1337 and 1338(2) of the Civil Code.

The usufructuary has an obligation to pay all the charges encumbering the profits of the thing such as annual taxes such as land tax, building tax or income taxes and other charges that are normally payable out of the income derived from the thing. See Art 1314 of the Civil Code.

The usufractuary has an obligation to inform the bare owner about any act of interference by a third person in the rights of the bare owner. For instance, he must inform the bare owner of any person, whether in court or out side of

a court, challenging the right of ownership of the bare owner over the thing. Where a usufructuary fails to comply with this provision and the bare owner loses his right of ownership, he shall be liable to compensate the bare owner as if he himself caused the loss or damage of the rights of the bare owner. See Art 1342 of the Civil Code.
On the other hand, the usufructuary as a possessor of the thing, shall have a right to bring possessory action and to use force to protect his possession in case where any person, including the bare owner, interferes with his possession of the thing. See Arts 1341, 1148 and 1149 of the Civil Code. The usufructuary will also have the right of usufruct over the compensation paid in case where the thing is lost or destroyed 1319(2)
6. The usufructuary has an obligation, at the time of extinction of the usufruct, to restore or restitute the thing to the bare owner or his agent. He shall be liable for the loss or deterioration of the thing, where the loss or deterioration resulted from his fault, such as abuse of the thing or failure to exercise due care in the use of the thing or negligence in the use and management of the thing, failure to make necessary or normal repairs… See Arts 1317 of the Civil Code.
RIGHTS AND OBLIGATIONS OF THE BARE OWNER
He has the duty to refrain from any kind of interference with the right of the usufructuary to possess, use and enjoy the thing and collect and use its fruits. For example, he cannot change the thing, which is subject of the usufruct nor can he use or exploit the thing or interfere with the possession of the thing.
He must undertake major repairs as defined under Arts 1337 and 1338, which are not result of the usufructuary's fault.
He has an obligation to cover extra ordinary charges. Art 1315
EXTINCTION OF USUFRUCT
The right of usufruct shall be extinguished for either of the following reasons;
Death of the usufructuary- a right of usufruct is some times called a personal servitude because it depends on the life of the usufructuary. In other words, the right of usufruct shall terminate up on the death of the usufructuary. See Art 1322(1)
Lapse of the period for which it is created. For example, a usufruct created for a period of five years shall terminate at the end of the five years. Art 1322(1)
Extinctive prescription – lack of exercise of any of the usufruct rights or complete absence enjoyment, use possession by the usufructuary or by

his agent in relation to chattels/ ordinary corporeal movable things/ shall result in the termination of usufruct. See Art 1310 cum 1192 of the Civil Code.

The loss or destruction of the thing; Similar to the case of loss of ownership right, usufruct shall also be extinguished as a result of the loss or destruction of the object of property. See Arts 1319, 1310 cum 1188 of the Civil Code.

Consolidation or merger of the position of the bare owner and the usufructuary in one person shall also result in the extinction of usufruct right. This happens when the usufructuary acquires bare ownership (by contract or succession) or when the bare owner acquires the usufruct by contract. See Arts 1676/1/ cum 1842 of the Civil Code.

Forfeiture or waiver of right by the usufructuary; A right of usufruct of chattels shall be extinguished where the usufructuary expresses, clearly and unequivocally, his intention to waive his rights as a usufructuary. See Arts 1310 cum1191 of the Civil Code. Refer also to Art 1676/1/ cum 1825 of the Civil Code.

Acquisitive prescription in favor of a third party, the right of usufruct shall be extinguished as a result of acquisition of usufruct right on the thing in favor of another person. See Art 1310 cum 1168 of the Civil Code.

RIGHT OF USE AND HABITATION

RIGHT OF USE

Right of use is a temporary real right (for agreed period of time or for life the beneficiary) which entitles the beneficiary, called the user, to use a thing of another person and to receive its fruits such as profits or rents… but only with in the limits of his own and his family's needs.

Right of use may be created by an agreement, with or without consideration, or by will.

The right of use is not recognized under the Ethiopian Civil Code; hence we shall briefly see the rights and obligations of the user under the French Civil Code.

The rights and obligations of the user are governed by the instrument that created the use right, but in the absence of such provisions in the instrument the user will have the following rights and obligations.

The user has the right to the profits or fruits of the thing proportional to his and his family's needs. He can claim the various fruits or produce only in an amount in which each kind of produce will be consumed by him and his family, i.e., spouse, children and servants. However, collateral family members and ascendants are not included.

The user has the same duties as a usufructuary. Please, read the discussion regarding the duties of the usufructuary.

The user cannot transfer, assign or lease his right, or substitute a third party, hence, the right of use may not be seized by the creditors of the user, even if it was constituted for consideration. But he can sell a portion of the fruits, which he acquired in ownership by taking them directly or having them delivered.

The right of use is extinguished in the same manner as the right of usufruct is extinguished.

RIGHT OF HABITATION /OCCUPATION OF PREMISES/

This right is merely a particular type of right of use, i.e., a right of use exercised over residential houses or premises. Hence, the rules discussed in relation to usufruct and use rights are applicable to the right of habitation or right of occupation of premises.

Normally, the physical scope of the right of habitation is determined by the instrument creating it. Unless there are restrictions or reservations in the instrument, the right of habitation includes the whole house, which is its object and all its accessories. However, the beneficiary must not exercise his right beyond the needs of his and his family's residence.

Art 1353 of the Civil Code defines the right of habitation or right of occupation of premises as a right to live in a house or part of a house belonging to another person. The beneficiary of the right of habitation has the right to live in the house with his/her spouse, direct ascendants, descendants and servants.

The beneficiary of right of habitation whose right is limited to part of a house also has the right to use parts of the building/house and the compound that are intended for the common use of all occupiers of the building. See Art 1355 of the Civil Code.

The beneficiary of the right of habitation has an obligation to cover costs required for regular repairs and maintenance of the house in which he lives. However, where his right is limited to part of the building and the owner occupies the other part of the building such expenses are to be covered by the owner of the house. See Art 1356 of the Civil Code.

Similar to the rights of usufruct and use, a right of habitation is personal to the beneficiary and hence cannot be transferred and may not pass to his heirs. See Art 1357 of the Civil Code.

UNIT SIX- SERVITUDE

Servitude is a right in rem / real right/ over a definite plot of land, called the servient tenement and annexed to another plot of land, called the

dominant tenement. In other words, it is a property right vested in the owner/holder of one plot of land to use a land belonging to another for certain purposes.

Servitude is a right that can only exist in relation to two or more plots of land belonging to two or more persons. However, these lands are not required to be adjacent. French and German Laws do require that the servient and dominant tenements be adjacent. See Art 1359(1) (2) of the Civil Code.

Servitude may also be defined as an encumbrance or restriction on the right of ownership of the owner of the servient tenement for the benefit of the owner of dominant tenement.

Furthermore, it is held that the right of servitude may be created only for the benefit of another land. This is intended to prevent creation of servitude for the benefit if of an individual or group, which could consist of an obligation to perform positive acts. Note that an obligation to perform personal services or positive acts cannot be made the subject matter of servitude. See Art 1360 and 1373 of the Civil Code.

As any real right, not only the burden of servitude runs with the servient land its benefit also runs with the dominant land. This is the essence of a real right (servitude) as opposed to personal servitudes, such as the right of usufruct, use and habitation that are also called personal servitude. See Art 1361 of the Civil Code.

Servitude creates an obligation, on the owner of the servient tenement, only to refrain from preventing the owner of the dominant tenement to do certain acts that the latter would not have been able to do otherwise. In other words, servitude shall not create an obligation to perform positive acts on the owner of the servient tenement. See Art 1359/2/ of the code. One exception to this rule is provided under Art 1360 and 1373 of the Civil Code, which allows the parties to make an agreement in which the owner of the servient tenement undertakes to perform works necessary for the enjoyment and preservation of the right of servitude. Such works may be construction and maintenance of pavements used by the owner of the dominant tenement to exercise his right of way, installation or repair of pipelines to enable the owner of the dominant tenement to have access to water ...etc.

PURPOSE OF SERVITUDE

A person may be unable to make the most advantageous use of his land or building without some rights over the land belonging to his neighbors.

The main purpose of servitude is to enable the owner of the dominant tenement to derive the best possible

use and benefit from his land by giving him certain rights on the land belonging to another person, called servient owner. However, unless the servitudes that may be created on a land are restricted in number and extent, it may hamper the profitable use of the servient land and gravely diminish its value, and this will ultimately injure public interest. This is because the owner/holder of such land can not use his land in the manner he desires and other persons will not be interested to acquire such land as their right of ownership is limited or encumbered by the servitude or the right of another person.

Therefore, the law tries to restrict the number and extent of encumbrances or servitudes on the servient tenement in the following ways.

Servitude should be used exclusively for the purpose of using or exploiting the dominant land and it must be used exclusively for that purpose. In other words, the owner of the dominant tenement may not use the servient tenement for the purpose exploiting another land that is not part the dominant tenement. This is because servitude is created on one land for the purpose of using and enjoying another land/ the dominant tenement/, and not for the general benefit of the owner of the dominant tenement.

The law also limits the rights of the owner of the dominant tenement to use the servient tenement only to purposes for which the servitude was created at its inception. In other words, it cannot be used for new purposes that may arise after the creation of the servitude. For instance, a servitude of created to cross a land on foot cannot be used to use cars where the owner of the dominant tenement purchases a car, because this increases the burden of the owner of the servient tenement. See Art 1376 of the Civil Code. The law also imposes various obligations on the owner of the dominant tenement with the intention of the preventing him from increasing the burden of the servient tenement. Refer to Arts 1375, 1377, and 1380 of the Civil Code.

The owner of the servient tenement has the right to redeem the servitude where the benefits or advantages it provides to the dominant tenement are lesser than the inconveniences or damages it causes to the servient tenement. See Art 1383.

The owner of the servient tenement cannot be required to do positive acts; he may merely be required to abstain from doing something or to permit the owner of the dominant land to do something on the servient land. For instance, the owner of the servient tenement may be required;

To abstain from building or planting trees so as not to obstruct view from the dominant land, or

To allow the owner of the dominant tenement to walk or drive across his land, or

To allow the owner of the dominant tenement to take water or sand or chalk from his land.

In order to prevent unfair and excessive burden or damages to the servient tenement, the law under Art 1365 of the Civil Code, provides that where it is not clear as to whether the provisions of a contract create a servitude running with the land or a personal obligation on the owner of the land, such doubtful provisions shall be interpreted to have created a personal right or obligation and not a servitude. Also Art 1369.

SOURCES OF SERVITUDE

The right of servitude may arise from a contract, a will, acquisitive prescription or the provisions of the law.

Servitudes arising from contracts; According to Art 1362/1/ of the Civil Code, a servitude may be created by an agreement or contract concluded between the owner/holder of the dominant tenement and the owner of the owner/holder of the servient tenement.

Servitude may also arise from the will of the deceased person who divides his land holding between two or more persons. In other words, the testator who owns/holds a land may burden one of the lands with servitude of a certain type for the benefit of the legatee of another plot of land. See Art 1362/2/ of the Civil Code.

Acquisitive Prescription; According to Art 1366 of the Civil Code, servitude may arise from enjoyment of the servient tenement for a period of ten years. However, this mode of acquisition applies only to apparent servitude. An apparent servitude is a servitude that requires certain external and visible or apparent structures or means for its enjoyment or exercise, which also evidence its existence. In other words, non-apparent servitudes, i.e., servitudes whose enjoyment do not require installation or construction of external or apparent materials/structures may not be acquired by acquisitive prescription of ten years. The rational behind this rule seems to be clear, because in cases of apparent servitudes the owner of the servient tenement has the opportunity to see acts of interference by another person on his land and can object to the commission of the acts. Hence, the law does not protect a person who fails to do so for a long period. While in cases of the non-apparent servitude, the owner of the servient tenement

does not have an opportunity to object to such acts since he might have not known the acts of the owner of the dominant tenement. See Art 1366/2/ and 1367 of the Civil Code. However, a servitude acquired through acquisitive prescription shall not affect third parties unless its acquisition is registered in the register of immovable properties. For instance, the owner of the dominant tenement cannot exercise his right against the transferee of the servient tenement unless his rights are entered in the registers of immovable properties. See Art 1368 /2/ of the Civil Code.

Servitude arising out of the provisions of the law. The contiguity of land belonging to different owners or occupied by different persons creates conflict if either or both of them wish to enjoy their lands without any consideration for the damages or annoyance caused to the other. These conflicts can be eliminated only by limiting the powers that the right of ownership usually involves. Specific provisions of the Civil Code, which determine what is allowed and what is prohibited, are intended to prevent some of these potential conflicts. Refer to the provisions of Art 1217, 1218, 1219, 1220, 1221-1224, 1245-1254, 1372/2/ of the Civil Code.

RIGHTS AND DUTIES OF THE PARTIES

The rights and duties of the owner/holder of the servient tenement and the owner/holder of the dominant tenement shall be determined by the instrument creating the servitude, where the servitude is created by contract or will. However, where it is created by acquisitive prescription, the rights and duties of the parties shall be determined by the manner in which the servitude is created or enjoyed in good faith over a long period of time, i.e., usage. Furthermore, where the instrument creating the servitude does not contain provisions dealing with the rights and duties of the parties, or where such provisions are not valid or where the manner of its creation and enjoyment is not clear, the provisions of the Civil Code shall determine the rights and duties of the parties. See Art 1370 of the Civil Code.

RIGHTS AND DUTIES OF THE SERVIENT OWNER/HOLDER

The owner/holder of the servient tenement shall have the obligation to allow the owner/holder of the dominant tenement to use his land for the purpose for which the servitude is created and refrain from exercising certain rights such as the right to prevent other persons from entering his land or using his land. See Art 1359 of the Civil Code. He must also refrain from acts that reduce or impair the use of his land for the purpose required by

the owner/holder of the dominant tenement. For example, he may not construct buildings or plant trees that impair the view or way of the owner of the dominant tenement. See Art 1379 of the Civil Code.

He also has the obligation to perform works related to the construction, maintenance and repair of the means necessary for the exercise of rights of servitude by the owner of the dominant tenement, where under the instrument creating the servitude, he has undertaken such obligation. See Art 1373/2/

The owner/holder of the servient tenement has the right to redeem the servitude where he can prove that the damages or inconveniences caused by the servitude are way higher than the benefits or advantages derived by the owner of the dominant tenement. See Art 1383 of the Civil Code.

The owner/holder of the servient tenement may require that the servitude be exercised on such other part of the servient tenement as will be equally convenient to the owner of the dominant tenement. See Arts 1380,1220(3)

RIGHTS AND DUTIES OF THE DOMINANT OWNER/HOLDER

The owner/holder of the dominant tenement must exercise his rights in a manner, which causes minimum inconvenience or damage to the servient tenement. In addition to this, he may not make any alteration that would increase the burden of the servient tenement. See Art 1375

Where the dominant tenement is divided, the right of servitude shall continue for the benefit of the owners/holders of each parcel of land. However, such division shall not increase the burden of the servient tenement, and the owners/holders of the divided parcels of land shall exercise their rights, for instance right of way, using the same area or piece of the servient land. See Art 1377. Similarly, where the servient tenement is divided, the owner/holder of the dominant tenement shall have the right of servitude on each of the new parcels of land. See Art 1378.

TYPES OF SERVITUDE

URBAN SERVITUDES AND RUSTIC/ RURAL SERVITUDES

Urban servitudes are servitudes created and enjoyed in urban areas. They include right of view, right of way and the various other servitudes arising out of the law such as the right to install water, gas or electrical lines. On the other hand, rural or rustic servitudes are those types of servitudes created and enjoyed in rural areas such as right of way or right to cross a parcel of land on foot, with animals, during the dead season, across fields,

rights of pasture, watering animals, wood-cutting, irrigation. See Art 1371 of the Civil Code.

CONTINUOUS AND DISCONTINUOUS SERVITUDES

This classification is based on whether or not the right of servitude can continue without continuous human intervention.

A continuous servitude is a servitude that continues without continuous human intervention. For example, Servitudes of view and drawing water are considered as continuous servitudes.

Discontinuous servitude is a servitude that cannot exist without a continuous human intervention. Therefore, for such kind of servitude to continue to exist, the beneficiary must continue to use /exercise the right created by it. Servitudes of way or passage, pasturing cattle and servitude of extracting quarry are examples of discontinuous servitude. See Art 1382 of the Civil Code, which indicates that apparent servitudes are discontinuous servitudes since such servitude shall be extinguished if the owner of the dominant tenement fails to exercise his rights for a period of ten years.

APPARENT AND NON-APPARENT SERVITUDES

Apparent servitudes are servitudes that are manifested by external works such as ditches, pipelines or an aqueduct, roads (means of enjoyment). Servitude of drawing water, way… etc are examples this type of servitude. See Art 1366(1) and (2) of the Civil Code.

Non-apparent Servitudes are servitudes whose existences are not manifested by external works necessary for their enjoyment by the owner of the dominant tenement. Servitudes of pasturing animals, cutting wood, and extracting quarry… etc are examples of non-apparent servitudes. See Art 1367 of the civil Code.

EXTINCTION OF SERVITUDE

Waiver /release by the owner of dominant tenement. This ground of extinction is applicable to any kind of servitude. Waiver or release by the dominant owner/holder shall extinguish servitude only where it is made in writing and where the right that was registered in the register of immovable properties is cancelled or stricken out. See Art 1381(1) and (2) of the Civil Code.

Disappearance of the apparent signs in cases of apparent servitudes or failure to exercise the right arising out of the servitude, and the cancellation of the entry of the servitude in the register of immovable properties up on the application of the owner/holder of the servient tenement. See Art 1381(3) and (1) and Art 1366 of the Civil Code.

Redemption of the servitude by the owner of the servient tenement;
According to Art 1383 of the Civil Code, the owner/holder of the servient tenement may buy the servitude back where the continuation of the servitude damages the value of the servient tenement and, hence, is contrary to the national economy or public interest or where the benefits deriven by the owner/holder of the dominant tenement are lesser than the damages it causes to the servient tenement. See Arts 1384 and 1385 of the Civil Code.
Surrender of the servient tenement to the owner of the dominant tenement;
Servitude shall be extinguished where the owner/holder of the servient tenement has an obligation to perform positive works such as construction, maintenance and repair of means of enjoyment and is not able or willing to cover the costs, and surrenders the sevient tenement to the owner of the dominant tenement. See Art 1374.

UNIT SEVEN - RIGHT OF RECOVERY AND RESTRICTIONS ON THE RIGHT TO TRANSFER CERTAIN THINGS

RIGHT OF RECOVERY

Right of recovery is a right of a person to recover a thing sold by an owner from the buyer by paying the price and costs the latter has incurred. See Art 1386 of the Civil Code. In other words, right of recovery is a right where by its beneficiary can force the buyer of a thing to sell it to him.
The right of recovery is intended to keep things within a certain group of persons, such as a family or joint owners. It is intended to keep the thing among persons having a blood relationship because of the economic or social value immovable things have among the society.
It is also intended to keep a property among persons who have close relationship, in cases of joint owners, and keep strangers out there by securing peace and co-operation. Allowing strangers to acquire a share in a jointly owned thing may create problems in the administration of the thing, as almost all decisions have to be made by majority or unanimous vote of joint owners, which may become very difficult if a person who does not get along with the joint owners allowed to acquire a share in such things.
This right is always the result of legal provisions. Therefore, this right may not arise from contract, will or any other source. Furthermore, it is a right personal to the beneficiary and hence cannot be transferred to another person, nor can creditors of the beneficiary exercise it on his behalf. See Arts 1387 and 1397 of the Civil Code.

PERSONS HAVING A RIGHT OF RECOVERY

Relatives by consanguinity; According to Arts 1389 and 1394/2/ of the Civil Code relatives by consanguinity of the seller of an immovable thing have the right to force the purchaser of such immovable, against payment of the price he has paid, to sell it to them. In other words, the beneficiary of right of recovery may, against payment of the price and other costs, recover an immovable from a person who has bought it from a seller who is their blood relative. See also Arts 1124 and 1125 of the code. Such right shall be exercised according to the degree of relation they have with the seller. Hence, persons who have a first-degree relationship with the seller have a priority right over those having a second-degree relation ship. See Art 1391 and 842-851 of the Civil Code. Where the beneficiaries have the same degree of relationship, they shall exercise the right of recovery together and shall become joint owners of the immovable recovered. See Art 1393 of the Civil Code. However, among persons who are in the same degree of relationship, those who live on the land or participate by their personal work in its exploitation are given priority over others. See Art 1392 of the Civil Code. Furthermore, Art 1396 excludes right of recovery of relatives where the immovable transferred is situated in urban area/ town planning area/ or where it mainly consists of a dwelling house or some other building. These provisions also imply that the right of recovery relatives under is limited to cases where rural farmland communally held by a family/ rest land/ is transferred. Furthermore, only relatives from the paternal line have a right of recovery on an immovable which descended from the paternal line and only those from the maternal line can exercise a right of recovery on an immovable descending from the maternal line. See Arts 1390 and 849 of the Civil Code.

Joint Owners shall have a right of recovery where one of the joint owners sells his share of right in thing jointly owned. See Art 1260, 1261, 1388 and 1394 of the Civil Code. Joint owners exercise their right of recovery jointly and acquire equal rights in the share recovered. However, where one or more of the joint owners are not willing to exercise a right of recovery, such right shall accrue to the other joint owners. See Arts 1393 and 1262 of the Civil Code.

CONDITIONS FOR THE EXERCISE OF RIGHT OF RECOVERY

The beneficiary of a right of recovery must declare his intention to buy the thing or usufruct within two months from the date he is informed of the transfer of ownership or usufruct to a new owner or usufructary, (if he is

notified). See Art 1400. However, if he is not notified, then he may exercise his right with in a period of one month from the date the joint owners knew of the transfer. On the other hand, where the right is exercised by relatives, the beneficiary must declare his intention to exercise his rights within six months from the date of transfer of possession. Such declaration of intention to buy/ exercise a right of recovery/ must be accompanied by securities, which may be in the form of pledge, mortgage or personal guarantee to secure the payment of the price and other expenses. See Art 1403.

According to Art 1398 of the Civil Code, a right of recovery may be exercised where the owner sells the thing or where creditors of the owner attach the thing. In other words, the right of recovery may not be exercised where the owner transfers the thing gratuitously, for instance, where the owner donates the thing. However, Art 1407/1/ indicates that right of recovery may be exercised even where the thing is transferred without consideration. Furthermore, excluding right of recovery in cases where the thing is transferred gratuitously will also be against the purpose of granting right of recovery discussed above. Hence, it does not seem that the legislator intended to exclude right of recovery in such cases.

However, a right of recovery, whoever the beneficiary may be, cannot be exercised in the following circumstance;

Where the buyer is himself a beneficiary of right of recovery, i.e., where the property is sold to a blood relative of the seller or a joint owner. See Art 1395 and Arts 842-851 of the Civil Code.

Where the immovable sold is situated in a town planning area or it consists mainly of a dwelling house or building. This prohibition particularly applies in cases of the right of recovery of relatives. See Arts 1535, 1536 and 1396 of the Civil Code.

Where the thing is expropriated. According to Art 1399 of the Civil Code, a beneficiary of a right of recovery cannot force a public authority or any other organ that has a power to expropriate private property for public purposes. See Also Arts 1460-1488.

EFFECT OF RIGHT OF RECOVERY

The new owner or usufructuary shall transfer the thing or usufruct to the beneficiary of right of recovery up on of receipt of the price where he acquired the thing for consideration or the value of the thing where he acquired the thing on donation. See Arts 1406, 1407, 1408 and 1409 of the Civil Code.

The person who is forced to transfer a thing to the beneficiary of right of

recovery shall also have the right to be reimbursed with;

Expenses of purchase and legal interest. /Art 1408/1/

Legal interest on the price or value of thing from the date of payment of the price and or incurring of expense. /Art 1408/2/

LOSS OF RIGHT OF RECOVERY

The right of recovery shall be extinguished where the beneficiary fails declare his intention to exercise his right, to recover the thing, within two months from the date when he is informed of the transfer of ownership or usufruct, if he was informed, or within one month from the date he knew of the transfer, where the beneficiary is a joint owner. See Art 1401/1/ of the code.

Relatives who have a right of recovery shall lose their right where they fail to declare their intention to exercise the right within a period of six months form the date they knew of the transfer. See Art 1401 (2) of the code.

PROMISE OF SALE AND RIGHT OF PRE-EMPTION

DEFINITION AND REQUIREMENTS FOR VALIDITY

These restrictions are contractual, and they may be broadly classified in to three sections, i.e., promise of sale, right of pre-emption and prohibition of assignment or attachment of certain things.

A Promise of Sale- is a contract where by the owner of a thing undertakes to sell it to the promisee or another person specified if and when the promisee or such other person decides to buy it. (See Arts 1410 (1), 1416 and1417).

A promise of sale, constitutes a restriction on the right of the promisor / the owner/ to dispose of the thing because he is obliged to sell the thing, at the price fixed in the agreement creating the promise, only to the beneficiary of such right and when the latter whishes to buy it. In other words, the owner cannot sell the thing to another person who might have offered a better price, nor can he refuse to sell the thing to the beneficiary of the promise, which, an owner under normal circumstances is entitled to do, provided that the beneficiary has made his decision to buy the thing within the time agreed up on the contract.

Right of Pre-emption, on the other hand, is a right arising out of a contract where by the owner of a thing is obliged to sell it to a specified person if and when he/the owner/ decides to sell it. (Arts 1410(2) and 1418). Though the owner has the right not to sell the thing, his right to sell thing to any person who comes up with the best deal ceases to exist with the conclusion of the contract creating right of pre-

emption in favor of the beneficiary. In other words, if the owner decides to sell the thing with in the period agreed up on in the contract, he can sell it only to the beneficiary and at the price determined in the contract and his right to chose among potential buyers is restricted.

Promise of sale and Right of pre-emption represent a restriction on the right of ownership of a person and a property right of the beneficiary of the rights only if they are made in relation to immovable things or special movable things in respect of which there is a requirement of registration.

Contracts creating these restrictions in relation to chattels or ordinary movable things shall not constitute a restriction on a right of ownership of a person nor a property right /real right or right in-rem/ in favor of the beneficiary. Hence, the rights and duties arising from these contracts are governed by the law of contracts or obligations and not by property law. See Art 1411, 1426, 1427, 1428 and 1430 of the Civil Code.

The period with in which such right may be exercised cannot exceed a period of ten years. Where the period fixed in the contract exceeds ten years, it shall be reduced to the maximum period provided by the law, i.e., ten years. See Art 1413 of the Civil Code.

The rights arising from such agreements cannot be transferred by contract or inheritance and the creditors of the beneficiary cannot exercise them. See Art 1415 of the code.

RIGHTS AND DUTIES OF THE PARTIES

A. PROMISE OF SALE

The maker of the promise/ the owner of the thing/ may not alienate or sell the thing or charge it with real rights /rights in-rem/ such as usufruct in the period for which the promise is effective. However, he may pledge or mortgage it for an amount not exceeding the price fixed in the contract creating the promise. See Art 1416

Where the thing is attached by court order, the owner must notify the promisee of such proceedings. (See Art 1417)

Where the owner of the sells the thing to a person other than the beneficiary, the latter shall have the right to force the buyer of the thing to sell it back to him at the price agreed up on in the contract creating the promise.

B. RIGHT OF PRE-EMPTION

The owner has the right to create any kind of right in-rem on the thing, but he may not sell or transfer it to another person. Where he decides to sell the thing, he has the obligation to inform the beneficiary of his intention to sell the thing and the chargers/ such as mortgage, usufruct, and servitude

etc/ on the thing. See Art 1418 /1/ and/2/.

In case of attachment, the owner of the thing must notify the situation to the beneficiary. See Art 1418 (3)

The beneficiary must exercise his right within two months from the date he received the notice. However, this period of notice may be extended to a period not exceeding one year. Where the period is extended for more than a year, it shall be reduced to one year. See Art 1419.

The beneficiary must exercise his rights before the thing is sold by auction in case of attachment. See Art 1421.

In case the thing is sold to a third party in violation of the contract creating the right of pre-emption, the beneficiary may recover it from such third party against payment of the price determined in the contract creating right of pre-emption. See Art 1422.

EXTINCTION OF RIGHTS OF THE BENEFICIARY

Failure of the beneficiary to exercise the right within the period fixed by the contract or 10 years where no period is agreed upon in the contract. See Art 1413 of the Civil Code. The rights arising from a contract creating a right of pre-emption shall be extinguished if the beneficiary fails to exercise his right with in a period of two months form date of notice given by the owner or with in the period agreed up on in the contract. See Art 1419 and 1420.

Failure to buy the thing before it is sold by auction in case of attachment. See Arts 1417 (2), (3) 1419 (3), and 1421.

In cases where the thing is sold to a third party in violation of the contract, the right of the beneficiary will be lost if he fails to require such party to surrender the thing to him within six months of the date when the third party has taken possession of the thing. See Art 1425 (2)

PROHIBITION OF ASSIGNMENT OR ATTACHMENT

Prohibition of assignment or attachment arises from a contract or will where by certain things are transferred and where by the transferor prohibits the transferee from assigning or transferring the thing to another person. The producer, maker, seller or owner of such thing may impose these prohibitions. See Art 1426 of the Civil Code.

Such provisions may freely be made with respect to ordinary movable things (chattels). However, such restrictions will bind only the person who accepts them and hence, it does not create a real right that can be raised against third parties. See Art 1426/2/ of the Civil Code.

Prohibition of the right of attachment or assignment with respect to

immovable things is possible only in cases allowed by the law. According to Art 1427, 1428 and 929-936 of the Civil Code, the transferor or assignor of an immovable thing or the testator may prohibit the transferor or the holder in tail from assigning an immovable to another person. He may also stipulate that the thing shall not be attached in the hands of the transferee or the holder in tail. See also Art 2460 of the Civil Code.

Art 1416 (1), such restriction with regard to chattels will have no real effect on third parties, unless they knew of the restriction. It also tries to minimize the negative consequences of the restrictions by limiting the period for which it can be made. On the other hand, such restrictions can be made on immovable things with real effects in cases expressly allowed by the law for the purpose of protection of a serious interests, for instance, keeping an immovable with in a family.

FORMAL REQUIREMENTS

A provision prohibiting assignment or attachment shall be of no effect unless it is made in writing and it specifies the duration of the prohibition, which may not exceed 20 years or the life of the transferee. See Arts 1430, and 1431. It must also be registered in the register of immovable things where such provision is made in relation to immovable things. See Art 1432.

RIGHTS AND DUTIES OF THE PARTIES

A property that is subjected to a provision prohibiting assignment or attachment cannot be sold or transferred. If it is sold in violation of the provision, the person stipulating it may recover it form the buyer. See Art 1440 (2), 1442 and 1438.

The person making the provision may prohibit the acquirer from assigning or selling it for a period not exceeding 20 years. See Art 1431.

The person who made the provision prohibiting assignment has the right of recovery against the buyer. Such right has to be exercised within two years from date of the assignment or from the expiry of the period fixed in the contract. See Arts 1442 (1) and 1441.

In cases of attachment, the person making the provision must exercise his right prior to the attached immovable thing being sold by auction where he has been informed of the attachment. However, where he is not informed of the attachment, he must exercise his right with in a period of two years from the sale of the immovable by action. See Art 1437.

UNIT EIGHT-COLLECTIVE EXPLOITATION OF PROPERTY

DEFINITION AND NATURE OF PUBLUIC DOMAIN

Not all property of the state, and its various administrative units and the municipalities are subject to the same rules. Some of them form part of the public domain while others form the private domain of the state.

Things or property forming part of the private domain of the state are treated in the same manner as the private property of individuals and are governed by the rules governing privately owned property. On the other hand, property forming part of the public domain of the state are governed by the rules dealing with collective exploitation of property rather than the rules governing privately owned property.

Art 1445 of the Civil Code, defines public domain as a property belonging to the state or its various administrative units or organs and which is directly placed at the disposal of the public or which is destined to public service. Furthermore, Arts 1446, 1147 and 1148 enumerate things that are considered as public domain where they are owned by the state;

Roads, streets, canals and railways and public parks

Seashores, port installations and light houses

Buildings specially adapted for public services such as fortifications, bomb shelters, museums, halls, churches and mosques

Waterways, lakes and underground accumulations of water

Land and other natural resources/ Art 40 of the Constitution of the Federal Democratic Republic of Ethiopia/

Movable things that are placed at the disposal of the public by a public service or entrusted to the custody of a public service such as city buses, manuscripts, artifacts and various other chattels of historical and archeological importance kept in museums

National libraries and museums, manuscript collections, books, medal, stamps, paintings, statuses & other movables are also considered as public domain.

One of the basic characteristics of properties forming part of the public domain is that they are inalienable. In other words, they cannot be transferred by sale or inheritance or donation or any other mode of transfer unless they are declared that they no longer form part of the public domain. See Art 1454 of the Civil Code.

Properties forming part of the public domain may not be acquired by possession in good faith or usucaption or acquisitive or extinctive prescription. See Art 1455 of the Civil Code.

Properties forming part of the public domain may not be occupied by a

private person without the authorization of a competent public authority. See Art 1456 of the Civil Code.

EXPROPRIATION

Most Civil Law countries including Ethiopia use the term expropriation, while most Common Law countries including the US and the UK use terms such as eminent domain, compulsory sale or condemnation.

Generally, expropriation or eminent domain may be defined as the power of a sovereign state to take or authorize the taking of private property for public purpose or use without the owner's consent but conditioned up on payment of commensurate/just compensation in advance.

This power of the state is said to be the natural extension of its sovereignty and derived, according to the contractarians/ the proponents of the social contract theory of the state/, from the will of the people/ citizens which transferred some of their rights to the state for purpose of achieving peace, order and security of life and property.

Here it is important to distinguish expropriation from police power, which is a power of the state to make sure that private property is used /enjoyed in accordance with rules and regulations intended to ensure public safety, peace and health. In addition, this power is exercised without payment of compensations as opposed to expropriation, which presupposes compensation.

Art 1460 of the Civil Code defines expropriation as a proceeding whereby the competent authorities compel an owner [against payment of commensurate compensation in advance see Arts 1470-78 of the code] to surrender the ownership of immovable required for public purposes.

It can also be used to acquire or extinguish usufruct, servitude or other property rights /rights in rem/ on an immovable or it may be used for terminating, prior to the agreed term, a contract of lease relating to an immovable owned by public authorities.

According to Art 40(8) of the FDRE Constitution private property shall not be taken or expropriated by the state unless it is required for public purposes or use and unless compensation that is equal to the value of the property is paid in advance. This provision prohibits even equivalent exchanges unless the government is acting for a public use.

INDIRECT EXPROPRIATION

Where the work or project intended does not seriously impair the rights of

the owner or the possessor or does not notably reduce the value of the immovable, for example installation of underground pipes, aerial lines, electric or telephone poles, the competent authorities may use indirect expropriation. In other words, such authorities or service providers may undertake such works without the need to follow the procedures required for expropriation. However, the competent authorities may not use indirect expropriation to acquire or extinguish ownership of dwelling houses. The person whose right is affected by this procedure has the right to claim; with in a period of three years of the completion of the work, a compensation for the damages he suffered as a result. See Arts 1485-1488 of the civil code.

PUBLIC PURPOSE

Public purpose is a crucial element/requirement before the expropriation of private property. It is a requirement of due process of law in the context of expropriation, and failure to comply with it may render the taking of private property unlawful and unconstitutional. See Art 40/8/ cum 9/1/ of the FDRE Constitution. Taking of private property for purposes other than “public purposes” leads to violation of the right to property of individuals and abuse of the power by the government that in turn creates insecurity and ultimately discourages investment and commerce. This is because individuals will be discouraged from acquiring and improving property, expanding their holdings and investment if a government is free to force owners to surrender their properties for any purpose including, the benefit of another individual. Generally, there are two main views as to what the concept refers to. The first view holds that public purpose is equivalent to public benefit, utility or advantage. Hence, any taking which tends to enlarge resources, increase industrial energy and productive power of any substantial number of inhabitants or a section of the state or a purpose which leads to the growth of towns and creation of new resources for the employment of capital and/or labor, which contributes to the general welfare and prosperity of the whole community serves a public purpose and is justifiable. According to this view, expropriation of private property is justified if the undertaking for which the property is taken produces direct or indirect benefits to the public at large or to the section of the community. However, this view may open the way for unlimited interference by the government in the property right of citizens.

The second view holds that public purpose exists only where the undertaking for which the property is to be expropriated is to be directly used or enjoyed by the public, Such as schools, hospital, roads etc. Unlike the first view, this view proposes a strict interpretation of the concept and requires the public to be the direct beneficiary of the proposed undertaking and to which it shall have equal and direct access. In other words, expropriation for a purpose, which may indirectly benefit the public is not justifiable or is unlawful. Hence this view tends to limit the power of the government in expropriation private property.

When we examine the rules of the civil code in this regard, we find that the civil code does not provide the concept of public purpose. However, it clearly provides that the state may not expropriate private property solely for the purpose of generating income or financial benefits. Hence, generating revenue for the government does not constitute 'public purpose' and taking private property on this ground would be unjustifiable and unlawful. See Art 1464/1/ of the code. However, where the project for which the land is required would also benefit the local community/ the public/ by increasing the value of properties in the area the project shall be deemed to serve public purpose and expropriation is possible. See Art 1464/2/ of the code. It is also possible to argue that a proposed project would serve public purpose where it benefits the local community by creating job opportunities, creating market for raw materials…etc. In other words, indirect public benefit from the proposed project constitutes public purpose under the civil code.

According to Article 1463 of the Civil Code, the competent authorities must determine whether the project for which the land is required serves public purpose or not and a notice to this effect has to be published. In certain circumstances, public inquiry may be necessary before such declaration is made and published, i.e., the declaration will only be made after the public is consulted and interested person have expressed their views regarding the project. See Art 1465 of the code.

According to Art 2/5/ of the Expropriation of Landholdings for Public Purposes and Payment of Compensation Pro No 455/2005 a proposed project shall be deemed to serve public purpose where the appropriate body decides, pursuant to the urban structure or development plan; That it ensures the right of the public to benefit directly or indirectly from the use of the, land and That it helps to achieve and consolidate

sustainable socio-economic development.

Similarly, according to Art 2/7/ of the Re-enactment of Urban Land Lease Holding Pro No 272/2002, 'public interest' means that which an appropriate body determines as a public interest in conformity with the master plan or development plan in order to continuously ensure the direct or indirect usability of land by peoples, and to progressively enhance urban development.

EXPROPRIATION PROCEDURES UNDER THE CIVIL CODE

To determine as to whether the proposed project serves a public purpose or not as we have seen in the preceding section. The competent authorities that are authorized by law to expropriate private property make the determination or declaration of public purpose. The competent authorities may hold, where it appears necessary, a public inquiry as to whether the proposed project serves public purpose. See Arts 1463 and 1465 of the code.

According Article 1466, after the declaration of public interest, the competent authority shall determine the land required for the implementation of the project, and personal notice shall be given to the owners, bare owners, usufructuaries of the immovable he intended expropriation. They are entitled to express their views on the necessity of such expropriation within a reasonable period of time. Where there is no opposition or the opposition is not accepted, the competent authorities shall make or issue the expropriation order. The order shall transfer the ownership and other rights on the immovable, free of any charge o r encumberance, to the competent authority concerned. Art 1467 of the code.

Expropriation orders, issued by the competent authorities, must be served on the owner of the immovable and other persons, if any, whose rights on the immovable are entered in the register of the immovable to be expropriated, i.e., the dominant owners who have servitude rights over the immovable, the usufractuary, the mortgagee, lessee…etc. See Art 1468 of the code.

The person whose property right is affected by the expropriation shall notify the competent authority the amount of compensation he claims for such rights with in a period of one month from the date of service of the order. However, any interested person, such as a creditor, may object to the amount of compensation fixed below a certain amount or may oppose the payment of compensation in fraud of

his rights. This opposition or objection shall be made within the period of one month from the date of service of the order. See Arts 1470 & 1471 of the code.

If the competent authority does not agree with the amount of compensation claimed by the person entitled, the amount to be paid shall be fixed the Arbitration Appraisement Committee, which shall be constituted according to rules to be enacted. /Art 1472 and 1473/1/ of the code.

The committee will have the duty to fix the amounts of compensation but it cannot decide on disputes regarding the right giving rise to compensation.

The amount of compensation or the value of replacement land shall be equal to the actual damage, which shall be assessed on the day when it makes the decision. See Arts 1473-1474 of the code.The committee shall take in to account, in fixing the amount of compensation or the value of the land to be given replacement of the expropriated land, the claim or statement made by interested parties regarding the value of the properties or rights to be expropriated, and the increase of the value of the property as a result of construction of public works in the area. However, the committee shall not take in to consideration any improvement or buildings on the land, which are made after the service of the expropriation order and any speculation of increase in the value the immovable resulting from the proposed public work. See Art1475 and 1476 of the code.

The competent authority or/and the person who is entitled to payment of compensation may appeal to a court, with in a period of three months from date of service of the decision of the committee, against such decision. See Art 1477 of the code.

The authority shall take possession of the land only after paying the compensation. In case of appeal by the person entitled to the compensation against the amount fixed by the committee, it shall take possession of the immovable only after it has paid the fixed amount to the owner. See Arts 1478/1 & 2/ of the code. The court may not reduce the amount of compensation fixed by the committee. Where the court increases the amount of compensation, the competent authorities shall pay the additional amount. See Art 1478/3/ of the code.

Where the expropriated person is to be given a replacement land, with or without monetary compensation, the competent authority shall take possession of the land only after it hands over such land to the person.

Where the appeal is ledged by the authority, the owner shall remain in possession of the land until the court

gives the decision. If the decision is not given with in a period of one year from the date of appeal and compensation is not paid, the expropriation order shall be invalid and the owner is not required to comply with it. See Art 1478/4/ of the code.

The court may increase the amount of compensation or order payment of additional compensation, in cash in case the owner was given replacement land. Such additional payment has to be made within a period of one month from the date of judgment. See Arts 1478-1479 of the code.

EXPROPRIATION PROCEDURES UNDER PRO NO 455/2005

Art 3 (1) of the proclamation provides that only a woreda administration, where the land to be expropriated is situated in rural areas, and a city administration, where the land to be expropriated is situated in urban areas, shall have the power to expropriate land.

Generally, a land holding may be expropriated only where the project for the implementation of which the land is required serves public purpose. According to Art 2/5/ a proposed project is said to serve a public purpose where it is in accordance with urban structure plan or development plan, brings about a sustainable socio-economic development and, directly or indirectly, benefits the public.

Expropriation order may be made where a woreda or city administration or higher federal or regional government organs, decides that the land holding in question should be used for ‘ a better development project’ to be carried out by the government, public enterprises, private investors, co-operatives or other organs. Furthermore, expropriation order may be used to terminate a lease contract where the holder fails to comply with the obligations he under took in the contract of lease and the relevant laws. See Art 3/1/ and /2/.

The woreda or city administration, which decided to expropriate a land holding according to Arts 2/5/ and 3, shall notify, in writing, the landholder of the expropriation order. The notice must indicate the time when the holder must vacate the land and the amount of compensation to be paid to him. The period within which the holder must vacate the land may not be less than 90 days. The landholder who has been given notice of the expropriation shall vacate his land within 90 days of the date of payment of compensation or from the date of deposit of the compensation a blocked account to be opened in the name of the organ issuing the order where the holder refuses to accept the compensation. However, where there are no crops,

trees or other properties in the land to be expropriated, the holder must hand over the land within 30 days of receipt of the expropriation order. The expropriating body may use police force to vacate and take possession of the land. See Art 4.

The implementing agency, w/c may be a federal or state organ or public enterprise, private investor, cooperative or any other organ intending to implement the project must prepare data relating to the land required for its use, its exact location and send to the woreda or city administration at least one year before commencement of the project and obtain the permission to use the land. It shall also pay compensation to the person whose landholding is expropriated. See Art 5.

Where utility lines, such as water, sewerage, telephone, electric or gas lines cross over or under the land required for the project, the implementing agency shall request, in writing, the owner of the lines to remove them. The request must indicate the exact location of the lines. The owner of the lines who received the request must determine the cost of removal and reinstallation of the lines and send details of its evaluation to the implementing agency within a period of 30 days. The agency shall pay the compensation with in a period of 30 days from the date of receipt of valuation. The owner of the lines shall remove the lines and vacate the land within 60 days of receipt of compensation. See Art 6.

VALUATION OF COMPENSATION

Where the property to be expropriated is located in rural areas, the compensation to be paid shall be assessed by the committee consisting of not more than five experts having the relevant qualification and assigned by the woreda administration.

Where the land to be expropriated is situated in urban areas, a committee composed of experts with relevant qualification and assigned by the urban administration shall valuate compensation. Where the assessment of compensation requires special knowledge and experience, the woreda or urban administration shall experts having such special qualification. See Art 10.

A party dissatisfied with the amount of compensation determined by the committee may lodge his compliant to a tribunal established for the purpose or to a regular court having jurisdiction, where such tribunal does not exist in that urban center or where the land to be expropriated is situated in rural areas. The tribunal or the court before which such compliant is lodged shall give its decision within the period

of time to be determined by the region. Where a party is not satisfied with the decision of the tribunal or a court, he may appeal, within 30 days of the date of decision, to the regular appellate court. The decision of the appellate court shall be final. However, the person whose land is expropriated must prove that he has handed over the land to the woreda or city administration to be able to appeal. See Art 11.

PRINCIPLE AND AMOUNT OF COMPENSATION

A landholder whose holding is expropriated shall be entitled to, Compensation for the property he produced on the land by his finance, labor and for permanent improvements he has made to such land. Such compensation shall be equal to the replacement cost of the property. However, compensation for permanent improvement on the land shall be equal to value of capital and labor expended. The cost of removal, transfer and re-erection, where the property can be re-erected and resume its service such as floor mills, machinery and other type of property. See Art 7.

Displacement compensation, for a person whose rural landholding is permanently expropriated, which is equal to ten times the average annual income he earned during the last five years preceding the expropriation. However, where it is temporary expropriation of rural land holding or expropriation of communal holding, the displacement compensation shall be equal to the income he has lost because of the expropriation. The loss shall be calculated based on the average annual income he has earned during the five years preceding the expropriation. The compensation shall be payable for the period until the holding is returned to the holder. However, this compensation shall not exceed the amount payable in cases of permanent expropriation. Furthermore, where an appropriate replacement land, which can be easily cultivated and yield a comparable amount of produce, is granted to the holder displacement compensation shall be equal to the average annual income the holder generated during the five years before expropriation. See Art 8/1, 2 & 3/.

Displacement compensation for an urban holder shall be equivalent to the estimated annual rent of the house, or he shall be allowed to live in a comparable house, owned by the city administration, free of rent for a period of one year. He shall also be provided with replacement plot of land for the construction of a dwelling or business house. The size of replacement land shall be determined the urban

administration concerned. See Art 8/4 & 5/.

Displacement compensation for a person whose urban leasehold is expropriated is paid in the form of a replacement land/ leasehold/ for a remainder of the lease period under the original lease contract. Where the person is not willing to accept a substitute land, he shall receive the lease price he has paid minus the price of the period he has used the land. See Art 8/6/.

Displacement compensation is payable in addition to what is payable under Art 7.

UNIT NINE- REGISTRATION OF PROPERTY

NATURE AND TYPES OF REGISTRATION

Registration of properties refers to a system, established and managed by appropriate state organs, in which various property rights are entered. The main purpose of registration is to provide security to the right holder and to other persons to whom the property will be transferred.

Prior to the emergence of use of documents in contracts, people tried various techniques intended to ensure security of property rights. For instance, the seller of land used to transfer ownership and guarantee the buyer by handing over a handful of earth from the land to the latter in the presence of neighbors. Similarly, Owners of land used to declare their right to it using various signs, such as enclosures and inscriptions on trees.

With the emergence and prevalence of documents, people tried to ensure security by developing customs, which require the deposit of acts creating or transferring rights on immovable things.

The state, through its agencies, is responsible for its management and guarantees a person who may suffer financial loss due to lack of proper management of the system.

Property registration systems may be ‘documents or deeds’ registration system or ‘title or ownership’ registration system.

Under a documents registration system, documents or acts creating or transferring rights on immovable things are field or kept systematically to give notice interested parties a notice of the transactions involving the immovable concerned. However, registration of documents does not constitute a conclusive evidence of ownership on the immovable as the contracts or acts creating or transferring the right may be invalid, or the transferor may not be the true owner and cannot transfer a genuine right of ownership.

Ownership or title registration systems register ownership or other right, such

as usufruct, servitude or mortgage rather than the acts or contracts creating such rights. Registration under this system is a conclusive proof of the right unless the person registered as owner acted fraudulently. In other words, a person who, in good faith, acquired an immovable from a person who is registered as an owner and have his right registered will acquire a genuine right of ownership even where the transferor was not a true owner or the transferor acquired the immovable under an invalid contract.

PURPOSES OF REGISTRATION

Creating security of property rights by recording the rights and encumbrances relating to the thing and providing evidence to the right holders. The existence of a system of registration provides the owner of an immovable or a special movable thing with security or guarantee that his right of ownership is recognized and protected against any claim or interference by other persons. An owner of a thing whose right is registered can fend off any contrary claim of title by other persons by the mere fact of such registration and the deeds issued there under. See Arts 1195-1198 of the Civil Code.

Enables a potential buyer or mortgagee to ascertain that he or she is dealing with a person who is entitled to sell or mortgage the thing, i.e., the owner and acquire a legally enforceable right of ownership or mortgage. In the absence of a system of registration a person who intends to buy or secure his rights with mortgage will not be able know whether the person he is dealing with an actual owner and runs the risk of dispossession or eviction or inability to enforce his mortgage. See Arts 2884 and 3049 of the Civil Code.

THINGS REQUIRED TO BE REGISTERED

The requirement of registration applies to immovable things and special movable things, because of their high economic and social value and they are easily identifiable, and various acts, public or private, which are intended to recognize, create, modify, transfer or extinguish rights related to them. This is because registration of everything that can be the object of property is impossible and even if it is possible to do so, commercial transactions will be greatly affected as a buyer has to check registers to be sure that he is transacting with the owner of the thing. The law addresses this concern by presuming a possessor of a chattel to be a lawful owner and by allowing a person who acquires a chattel in good faith to become an owner even where the transferor was not the lawful owner

of such chattel. See Arts 1193 and 1161-1167 of the Civil Code.

IMMOVABLE THINGS

Art 1553 of the Civil Code provides that keepers of registers of immovable property shall keep registers of immovable property in Awradja Guzat. Each area of conservation and each district shall keep two types of registers, i.e., a register of property and a register of mortgages. However, where the district does not have a cadastral survey plan, which allows the adoption of such systems, there shall be a register of immovables. Furthermore, where there is no cadastral survey plan, which allows the adoption of register of immovables, the district shall have a register of owners. In other words, a register of property and a register of mortgages and register of immovables shall depend on the existence of appropriate type of a cadastral survey plan in the district. See Arts 1553-1558.

REGISTER OF PROPERTY

Register of property is a register in which all acts, i.e., contracts or wills, or judgments, or compromises, intended to recognize, create, transfer, modify or extinguish the right of ownership, usufruct, use, habitation, servitude of one or more persons on an immovable, are registered. Legal actions intended to obtain a judgment recognizing, transferring ownership or other property rights over an immovable shall also be registered in the register of immovable. It is also a register in which acts by which an heir accepts a succession or legacy, a contribution is made in a partnership, a dwelling house or apartment is leased for a period exceeding five years, creating restriction of right of ownership or usufruct…etc are registered. See Arts 1567-1572.

REGISTER OF MORTGAGES

This a type of register in which all acts intended to create, modify, or extinguish a right of mortgage, or to transfer a debt secured by a mortgage or assign the right of priority arising from mortgage are entered. Legal actions, by the mortgagee or any other creditor, for the attachment of immovable things shall also be registered in the register of mortgages. See Arts 1573 and 1574.

REGISTER OF IMMOVABLES

Is a register, which shall be kept where the district in question does not have a cadastral survey plan, which makes keeping register of property and register of mortgages possible. In other words, it is an alternative system of registration.

Under this type of registration, all immovable things situated in a district shall be registered in the register of immovables under its number in the

cadastral survey plan and a separate leaf shall be assigned to it. The register shall contain a summary of the description of the immovable in question on each of its leaf. The registration and descriptions should be in conformity with the indications and measurements of the immovable in the cadastral survey plan. It shall also contain a brief description of all acts, which are required to be registered. See arts 1575-1582.

REGISTER OF OWNERS

Is used where the district does not have a cadastral survey plan that is needed to implement the three types of registration discussed above.

It is a register that contains, in alphabetical order, the name of owners of immovable things situated in the district. Where several persons jointly own an immovable thing, a separate leaf shall be assigned to each owner in the register. On the hand, where a person owns several immovable things, separate leaves shall be drawn for each immovable he owns. The register shall also contain a brief description of the acts that are required to be registered and that involve the immovable in question. See Arts 1583-1386.

REGISTRATION PROCEDURES

Registers of property and mortgages shall consist of files made up of printed forms that are prepared and supplied, free of charge, by relevant state organ to the keepers of registers.

The forms are made available to persons requesting registration. Any interested person may make a request for registration up on payment of the prescribed fee. The request shall be made by filling out the forms, in two copies, with necessary information and signing it. Up on receipt of the completed and signed forms, the keeper shall assign a serial number to the request that corresponds to the register. The keeper shall countersign and seal the forms with the seal of the place of conservation and return one copy to the person requesting registration. The other copy of the form shall form part of the register to which it is related. The insertion of the forms in the register shall be made in the order in which they are made. See Arts 1587-1601.

However, Art 3363 of the Civil Code provides that the provisions of the civil code discussed so far shall not be operational until a date to be fixed by an order to be published in the Negarit Gazeta. Such order has not been issued yet and hence the provisions of the civil code dealing with registration of immovables, i.e., Arts 1353-1646 have not come in force. However, various municipalities have been registering immovables and issuing title deeds.

SPECIAL MOVABLE THINGS

Special movable things that are required to be registered by the law include ships, airplanes, motor vehicles, businesses and televisions.
Ships- According to Art 45/3/ of the Maritime Code, every Ethiopian ship should be registered at the port where her owner is domiciled or has his address for service. Registers shall be kept at ports designated by the Ethiopian government for the purpose of registration Ethiopian ship. See Arts 45-52 and 1-8 of the Maritime Code. Moreover, mortgages and rights in rem that may exist in relation to ships shall be entered in the register of ships. See Arts 36, 37 and 45 of the Maritime Code.
Vehicles- Art 3/9/ of the Road Travel and Transport Proclamation No 256/1967 defines a vehicle as any wheeled vehicle constructed or adapted for use and used primarily on roads and includes carriages, bicycles, motor vehicles, semi-trailers, trailers and trains.
A motor vehicle, according to Art 3/9/ of the same proclamation, is a vehicle propelled mechanical or electrical power and may be a commercial vehicle, motor cycle, private motor car, public service vehicle, hackney or truck tractor.
Art 6/1/ of the same proclamation provides that no vehicle, except a bicycle, may be driven or operated unless it has been registered at the Road Transport Authority.
Furthermore, the Motor Vehicles and trailers Identification, Registration and Inspection Regulations No 360/1969 as amended by Regulation No 74/2001 prohibits the use or operation of motor vehicles or trailers in Ethiopia without a valid annual registration sticker which has to be properly displayed on the motor vehicle or trailer. See also Art 42-45 of the same regulation.
Aircrafts- Art 7/14/ of the Civil Aviation Re-establishment Proclamation No 273/2002 provides that the authority shall have the power to register all civil aircrafts and any right related thereto. Art 20 the same proclamation provides that the Registration of Aircrafts Regulations No 306/1965 /as amended/ shall continue in force.
Businesses- Art 5 of the Commercial Registration and Business Licensing Proclamation No 67/1997 provides that a person may not engage in any commercial activity in the country without being registered in the commercial register and after receiving license from the Ministry of Trade and Industry/ where the business is undertaken at a federal level/ or the Trade and Industry Bureau /where the business is undertaken at a regional level/. See also Arts 3 and the following of the Federal Government Commercial Registration and Licensing Council of

Ministers Regulation No 13/1997. Art 171/3/ of the Commercial Code requires the registration of contracts creating mortgage on businesses. However, there is no clear provision requiring registration of other contracts in relation to businesses such as sale and lease. See Arts 142-147 and Arts 164-170 of the Commercial Code. Televisions are also treated as special movable things, which are required to be registered.

LEGAL AND ECONOMIC SIGNIFICANCE OF REGISTRATION

Creates security of property rights by recording the rights and encumbrances relating to the thing and providing evidence to the right holders. The existence of a system of registration provides the owner of an immovable or a special movable thing with security or guarantee that his right of ownership is recognized and protected against any claim or interference by other persons. An owner of a thing whose right is registered can fend off any contrary claim of title by other persons by the mere fact of such registration and the deeds issued there under. See Arts 1195-1198 of the Civil Code.

It also enables a potential buyer or mortgagee to ascertain that he or she is dealing with a person who is entitled to sell or mortgage the thing, i.e., the owner and acquire a legally enforceable right of ownership or mortgage. In the absence of a system of registration a person who intends to buy or secure his rights with mortgage will not be able know whether the person he is dealing with an actual owner and runs the risk of dispossession or eviction or inability to enforce his mortgage. See Arts 2884 and 3049 of the Civil Code.

Plays significant economic roles by facilitating commercial transactions and creating capital necessary for investment and economic development.