DEBRE MARKOS UNIVERSITY

INSTITUTE OF LAND ADMINISTRATION

DEPARTMENT OF LAND ADMINISTRATION AND SURVEYING

Course Title: - Land Law

Course Code: - LaAd2064

Credit Hours: - 3

Target group: 2nd Year Land Administration and Surveying students

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May, 2020

Debre Markos University

ABOUT THE HANDOUT

Handout Description

Land Law is one of the central subjects in the curriculum of the Institute of Land Administration. Its main aim is to examine critically the different rules, regulations, and other legislations that define the rights, duties and procedures relating to **land**. **Land**, for the purpose of this course, includes the **ground** and **buildings**. So, it represents **immovable**.

Dear students! In this course, you will get the opportunity to investigate critically the rules and regulations in relation to both urban and rural lands. It investigates the relations between the kinds of rights and/or obligations and the individuals. Moreover, it addresses the procedure required in immovable property transactions and types and relevance of mortgage.

Handout Objectives

Upon the completion of the course, you should be able to:

- Understand the meaning, features and scope of Land Law;
- Know the objects of Land Law; and
- Grasp the existing and future legislations formulated to govern or regulate real property matters both in rural and urban areas

UNIT ONE

1 INTRODUCING THE BASIC ESSENCES OF LAND

1.1 Introduction

This course deals rules and laws that are applicable to land. Land as a real property was not suitably lectured in the legal curriculum of our country and hence in this material a time will be taken to include wide range of subject matters starting from simple concepts of land to concepts of rights and practices such as land register, cadaster, mortgage, lease, and the like. But recently, Land Law has started to be treated as a separate specific subject of law although its paramount importance remained always. Land Law consists of rules regarding real property, i.e. land and buildings or immovables as used in the Ethiopian legal system.

In a wider sense, Land Law affords a great importance to society, since all activity in one way or another is dependent on the land. This is the case regardless if it is a question of a direct exploitation of the natural resources like woods and other natural assets or if this usage only is indirect possession of a building or similar. It is therefore, daring to say that the system of Land Law is an essential precondition for a well-functioning market economy.

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

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

The General Land Law and the Special Land Law have many common areas and hence are to be treated as being supplementary to each other as they deal with similar object-real property. In this material, more attention is towards the General Land Law regulated by the Civil Code. However, the Special Land Law will also be treated in a quite fair degree, as

many provisions of the Civil Code are either suspended or inadequate and obsolete in light of the many new circumstances that arose in the country after the adoption of the Civil Code.

1.2 Nature and Scope of Land in General

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

Different disciplines define "land" differently, in a manner that suits their objectives. In legal documents, it is considered as the surface of the earth and any fixtures on it, such as buildings, fence, tree plants, and improvement to the land. The English Land Act definition is, of course, too broad that includes also the rights, which is not common in continental legal systems. A hybrid of the continental and the common law, the Swedish Land Code, divides land into "property units" and each "property unit" includes a building, conduit, fence, and other facility constructed in or above for permanent use; standing trees and other vegetation; natural manure; and easements destined to serve the land."

Articles 552-554 of the French Civil Code also shows that ownership of land "involves ownership of what is above and below it." Unless restricted by statutes, the owner of land is considered as owning also the minerals inside the land and the airspace above the land. The common feature of the above examples is that the term "land" signifies not only the surface of the earth, the ground, but also things found beneath the surface and fixtures above, and sometimes the airspace, above the ground. Of course, the details of ownership beneath and above the ground may be limited by different legislations. However, fixtures, such as trees and buildings are always considered as part of the land.

1.3 Property Rights to Land

Dear students! Before we proceed to property rights to land, it is better to recall the meaning of property as you have already seen it in your real property law course.

Hence, what is property to you?

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Have you tried? That is nice! As some books define it, property is "everything that has material or moral value for human beings... and guaranteed and enforced by law." Whereas, for legal scholars, "property" refers to entitlements to resources protected by formal legal institutions. Property in the sense of legally protected entitlements comes in a variety of forms. The typical legal property right would be full title to a parcel of land or an object like a car, real property and personal property (or "chattels"), respectively. However, the law also affords legally enforceable claims to intangible resources. Intellectual property, chiefly, patents, copyrights, and trademarks, are regarded as property despite the fact that they are not a right to any physical thing. Intellectual property right is intangible rights.

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

Property provides different types of rights to the holder of an object. Therefore, property right is not the object itself, but the right one gets as a holder of the object. There are many types of rights emanating therefrom, ownership being the most complete and important form of property right.

Dear students! However, what is ownership?

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

First, there must always be a rule that regulates the distribution and access of property rights, and it is based on this rule that a person's rights and duties as owner may be determined. Ownership rights can truly exist where the prevailing legal system protects and enforces such rights. Without legal recognition, private property rights would be unenforceable. Nothing this fact, Jeremy Bentham had once said, "Property and Law are born together, and die together. Before laws were made there was no property; take away the laws, and property ceases."

Second, the society should respect the individual's choice of the use of the thing. The individual will have a final say on the fate of the object. Honoré conceives ownership as "the greatest interest in a thing which mature systems of law recognize." By examining existing legislations, one can find a similar expression in the renowned French Civil Code. The Code under article 544 describes "Ownership" as "the right to enjoy and dispose of things in the most absolute manner, provided they are not used in a way prohibited by statutes or regulations." Similarly, the Ethiopian Civil Code under article 1204 describes ownership as "the widest right that may be had on a corporeal thing;" and "such right may neither be divided nor restricted except in accordance with the law." In other words, of all property rights a person has over an object, ownership is the widest and most complete one; and yet, this right may be restricted for different reasons by law.

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

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

1. **The right to possess:** The right to possess, namely, to have exclusive physical control of a thing, or to have such control as the nature of the thing admits, is the foundation on which the whole superstructure of ownership rests. It may be divided into two aspects, the right (claim) to be placed in exclusive control of a thing and the right to remain in control, namely, the claim that others should not without permission interfere. Unless a legal system provides some rules and procedures for attaining these ends it cannot be said to protect ownership.
2. **The right to use:** On a narrow interpretation, 'use' refers to the owner's personal use and enjoyment of the thing owned. The right (liberty) to use the thing at one's discretion has rightly been recognized as a cardinal feature of ownership, and the fact that, certain limitations on use also fall within the standard incidents of ownership does not detract from its importance.
3. **The right to manage:** The right to manage is the right to decide how and by whom the thing owned shall be used. This right depends, legally, on a cluster of powers, chiefly powers to license acts, which would otherwise be unlawful, and powers to make contracts: the power to admit others to one's land, to permit others to use one's things, to define the limit of such permission, to contract effectively about the use and exploitation of the thing owned.
4. **The right to the income:** To use or occupy a thing may be regarded as the simplest way of deriving an income from it and enjoying it. A tax obligation for instance may be imposed on rent-free use or occupation of a house by considering it as a form of income. Though it would be even more inconvenient and unpopular to assess and collect such a tax, the same principle must extend to movables. Income in the more ordinary sense (fruits, rents, profits) may be thought of as a surrogate of use, a benefit derived from forgoing the personal use of a thing and allowing others to use it for reward; as a reward for work done in exploiting the thing; or as the brute product of a thing, made by nature or by others.
5. **The right to the capital:** The right to the capital consists in the power to alienate the thing and the liberty to consume, waste, or destroy the whole or part of it. Clearly, it has an important economic aspect. The liberty to destroy need to be restricted.

However, a general provision requiring things as far as they are not consumed by use to be conserved in the public interest would be inconsistent with the liberal idea of ownership. Most people do not wilfully destroy permanent assets. Hence, the power of alienation is the more important aspect of the owner's right to the capital of the thing owned. This comprises the power to alienate during life or on death, by way of sale, mortgage, gift, or other mode.

6. **The right to security:** An important aspect of the owner's position is that he should be able to look forward to remaining owner indefinitely if he so chooses and if he remains solvent. His right to do so may be called the right to security. Legally, this is in effect, an immunity from expropriation, based on rules, which provide that, apart from bankruptcy, and execution for debt, the transmission of ownership is consensual. However, a general right to security, availing against others, is consistent with the existence of a power in the state to expropriate or divest. From the point of view of security of property, it is important that when expropriation takes place adequate compensation should be paid. Nevertheless, a general power to expropriate, subject to paying compensation, would be fatal to the institution of ownership…unless its application is restricted to some public purpose activities.
7. **The right to transmitting:** It is often said that one of the main characteristics of the owner's interest is its duration. What is called unlimited duration comprises at least two elements: (i) that the interest can be transmitted to the holder's successors, and so on ad infinitum, and (ii) that it is not certain to determine at a future date. No one, as Austin points out (Austin, Jurisprudence (4^{th} ed., 1873), p. 817), can enjoy a thing after he is dead, except vicariously, so that, in a sense no interest can outlast death. Nevertheless, an interest, which is transmissible to the holder's successors, is more valuable than one, which stops when he dies.
8. **The absence of any term on possession:** This is the second part of what is called 'duration'. The rules of a legal system usually provide for determinate, indeterminate, and determinable interests. The first are certain to determine at a future date or on the occurrence of a future event, which is itself certain to occur. In this class come leases for however long a term, copyrights, etc. Indeterminate interests are those, such as ownership and easements, to which no term is set. Should the holder live forever, he would, barring insolvency, etc., be able to continue in the enjoyment of them forever. Since human beings are mortal, he will practice them for a limited period only, after which the fate of his interest depends on its transmissibility. Again, given human

mortality, interests for life, whether of the holder or another, are indeterminate. The notion of an indeterminate interest in the full sense, therefore, requires the notion of transmissibility, but if the latter were not recognized, there would still be value to the holder. In the fact that his interest was not due to determine on a fixed date or on the occurrence of some contingency, like a general election, which is certain to occur sooner or later. …On reflection, it will be found that what I have called indeterminate interests are determinable. The rules of legal systems always provide for some contingencies such as bankruptcy, sale in execution, or state expropriation on which the holder of an interest may lose it… The notion of indeterminate interests can only be saved by regarding the purchaser in insolvency or execution, or the state, as continuing the interest of the previous owner. This is an implausible way of looking at the matter, because the expropriation and executability of a thing is not an incident of value to the owner, but a restriction on the owner's rights imposed in the social interest

9. **A duty to prevent harm:** An owner's liberty to use and manage the thing owned as he chooses is subject to the condition that not only may he not use it to harm others, but also, he must prevent others using the thing to harm other members of society.
10. **The liability to execution:** Of somewhat similar character is the liability of the owner's interest to be taken away from him for debt, either by execution for a judgment debt or on insolvency. Without such a general liability, the growth of credit would be impeded and ownership would be an instrument by which the owner could freely defraud his creditors. This incident, therefore, which may be called executability, constitutes one of the standard ingredients of the liberal idea of ownership. It is a question whether any other limitations on ownership imposed in the social interest (e.g. Tax and expropriation) should be regarded as among its standard incidents.
11. **Some sort of expectation:** when rights that other people have in X come to the end of their term or lapse for any reason, those rights will, as it were return naturally to him.

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

1.4 Nature and Scope of Land Rights in Ethiopia

Dear students! In this section, the overall essences of land according to the existing Ethiopian laws will be discussed.

1.4.1 Scope and objects of Land Rights

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

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

Dear students! In which attributes of land that most scholars agree?

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Have you tried? That is awesome! Lawyers, economists, sociologists, and geographers have a common understanding of the attributes of land:

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

Dear students! What is property according to the Ethiopian law?

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Have you tried? That is awesome! Under Ethiopian law, property is either movable or immovable (art. 1126 of the Civil Code, here under cited as CC.) Land and buildings are considered as immovables (art. 1130 CC). Hence, unlike other legal systems such as English, Swedish or French, where "land" includes "the ground and any fixture on the ground", the Ethiopian Civil Code treats "land" and "buildings" as two separate types of immovables. Whether a building should be considered as part of the land is not as clearly mentioned as is done in the above foreign laws. Ethiopian law follows the French Civil Code article 518, which says, "Land and building are immovable by their nature." However, as we already saw above, in another section of the law, the French Civil Code declares that ownership of surface of land means ownership of all things above and below the land. In Ethiopia, though, there is no such kind of encompassing provision in the Civil Code. On top of that, today, as envisaged under Article 40(3) & (7) of the Federal democratic Republic of Ethiopia Constitution (hereinafter FDRE Constitution), ownership of land is vested in the state and the people, while ownership of building is given to the individual. It means the land surface and the building over the land are owned by two different bodies. The civil code also adds another issue such that unless and until they are separated from the land, trees and crops are considered as part of the land (art. 1133 CC). In other words, "land" signifies the ground and other fixtures to the land such as trees, grass, crops and so on, excepting buildings and other similar erections.

Although land and buildings are one form of property (immovables), because of the importance attached to them, some formality requirements are needed for their possession and transferability. Some of these are:

- Ownership of immovable property cannot be claimed based on mere possession.
- Owners need to be registered as owners and should show certificate of ownership of the land or the building, and
- Any transaction (arising out of contract or will) on the immovable should be made in writing and registered before a court of law or notary (read arts. 1185, 1195, 1723, 2878 CC.)

Dear students! What do you think the extents of the rights an owner can have on his land?

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Have you tried? That is awesome! ***Cujus est solum, ejus est usque ad coelum;*** He who is a proprietor of land is a proprietor of everything on it. All buildings, all-natural fruits, and everything above as well as below the surface belong to the owner of the land. The English judge Lord Coke also reaffirmed this Latin maxim when he said *cujus est solum ejus est usque ad coelum ad inferno*, the owner of the surface of the real estate has property rights in the air above the surface and in below soil. Hence using this medieval time concept of land some writers try to show the scope of land property:

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

Dear students! What do you think the extents of the rights an owner can have on his land?_____

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

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

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

1.4.2 Ownership of Land in Ethiopia and the Recurrent Debates

Dear students! Who owns land in Ethiopia?

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Have you tried? That is awesome! The source of ownership of land is the FDRE Constitution. The Constitution under article 40(3) envisages that the right to ownership of rural and urban land, as well as natural resources, is exclusively vested in the State and in the peoples of Ethiopia. Land is a common property of the Nations, Nationalities and Peoples of Ethiopia and shall not be subject to sale or to other means of exchange.

The provision apparently includes two contradictory claims: on the one hand, it declares that all land and natural resources (hereafter, land) are owned by the Ethiopian people and the state; and on the other, it asserts that land is the common property of the Ethiopian people. While in the first clause/aliena, the state, together with the people, is depicted as a co-owner of the land, in the second clause of the provision the state is oddly excluded from being a co-owner.

Dear students! Assuming that the intention of the law is the joint ownership of land by the state and the people, what is the significance of the joint ownership of land property? Does it mean that both the state and the people decide together? Moreover, what are their respective rights as joint owners? Please think over these key questions by yourself?_____

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

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

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

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

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

When the 1960 Ethiopian Civil Code was drafted, the general assumption was that land would also be owned privately. Although the majority of the Civil Code in general and property law in particular is still intact and operational, the part concerning land ownership is suspended

and replaced by dual land legislations, governing rural and urban land holdings. Hence, as already shown above, land is no longer owned privately. The state and the Ethiopian people own it jointly, and is not subject to sale or other means of exchange. What about the building erected on the land? Although for the sake of academic discussion we said land law refers to both the ground and the building laws, remember that land (ground) and building are treated differently.

Accordingly, when we say land, here, we are referring to the ground not the building. This means, buildings are privately owned and can be transferable freely. To avoid this confusion, the FDRE Constitution has also emphasized that every Ethiopian shall have "full right to the immovable property he builds and to the permanent improvements he brings about on the land by his labor or capital."

1.4.3 Governing Land law in Ethiopia

Dear students! In the so far, we have tried to define land and other immovables both from a wider and local context. We have defined real property. Now, we are going to see the different types of laws under the regime of 'Land Law'. Land Law should somehow have some understandable, if not watertight legislative limits and should not be conceived as a boundless subject. Hence, we shall see the fundamental laws which we believe are to be addresses by the subject.

i.Code on Immovable Property: Land Law in Prospect

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

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

Starting from the careful conceptual analysis, real property or immovable property, on which quite much of our life is dependent especially in our agrarian society, must be dealt with comprehensively, covering all subjects of importance about the subject. Even a slight confusion in this regard means a lot in terms of the implication in the economy and life. Because, in the absence of simple and complete legislation, land administration in Ethiopia at all levels will simply be impossible thus curtailing the effort towards sustainable economic development.

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

Dear students! What do you think of the advantages of having a systematically arranged immovable legislation in Ethiopia?

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Have you tried? That is awesome! Some of the advantages of having a systematically arranged legislation on immovable are:

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

ii.Real Property Registration Legislation

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

iii.Planning and Building Legislation

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

Art. 1535. - Creation of area.

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

Art. 1536. - *Plan.*

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

Art. 1537. - Contents of plan.

(1) The plan shall, where necessary, divide each area into sub-areas.
(2) It shall fix in a general manner the restrictions and servitudes which it may be necessary to impose on the rights of the owners within each sub-area.

Art. 1538. - Carrying out of plan.

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

Art. 1539. - Compensation.

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

Art. 1540. - Building permit.

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

Dear students! What do we understand from the reading of the above provisions?

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

The present basic law on urban planning is the Urban Planning Proclamation No. 574/2008, adopted at national level and repealing the Preparation and Implementation of Urban Plans Proclamation No. 315/1987. As usual, this law gives the states powers and duties to implement it which is commonly accomplished by adopting a similar legislation.

Dear students! What are the reasons for the adoption of Urban Planning Proclamation No. 574/2008 as a national urban planning law? _____
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Have you tried? That is nice! The reasons compelling the adoption of this law are:

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

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

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

a. Conformity with hierarchy of plans,
b. Sharing the national vision and standards as well as capable of being implemented,
c. Consideration of inter-urban and urban linkages,
d. Delineation of spatial frame for urban centers in view of efficient land utilization,
e. Ensuring the satisfaction of the needs of society through public participation, transparency and accountability,
f. Promotion of balanced and mixed population distribution,
g. Safeguarding the community and environment,
h. Preservation and restoration of historical and cultural heritages,

i. Balancing public and private interests, and
j. Ensuring sustainable development.

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

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

Dear students! What are the elements of any structural urban plan?_____

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Have you tried? That is nice! Any structure plan shall indicate at least the following:

a. the magnitude and direction of growth of the urban center,
b. principal land use classes,
c. housing development,
d. the layout and organization of major physical and social infrastructure,
e. urban development intervention areas of the urban center,
f. environmental aspects, and
g. industry zone

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

- zoning of use type, building height and density,
- local streets and layout of basic infrastructure,

- organization of transport system,
- housing typology and neighborhood organization,
- urban renewal, upgrading and reallocation of intervention areas, and
- green areas, open spaces, water bodies and places that might be utilized for common benefits, and
- Any other locally relevant planning issues.

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

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

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

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

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

iv.Environmental Legislations

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

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

3. Establishment

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

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

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

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

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

pollution, management of hazardous waste, chemical and radioactive substance, and management of municipal waste.

The Environmental Impact Assessment Proclamation No. 299/2002 is the third legislation of importance to us. The main objectives of this legislation are:

- To help predict and manage the environmental effects which a developmental activity entail.
- To provide an effective means of harmonizing and integrating environmental, economic, cultural, and social considerations into a decision-making process in a manner that promotes sustainable development.
- To foster the implementation of the environmental rights and objectives enshrined in the constitution, and
- To bring about administrative transparency and accountability, and involve the public in planning and decision making.

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

v.Forestry Legislations

Normally, in the Civil Code, trees are intrinsic elements of the land on which they stand and, as a result, are immovable properties. Historically, there were a number of legislations on forests. These include the State Forest Proclamation No.225/1965, Private Forest Conservation Proc. No.226/1965, and Putative Forest Proclamation No.227/1965. At present, all these laws are repealed. The main legislations which regulate forest conservation, development and utilization are the Convention on Biological Diversity, 1994, to which Ethiopia is a party, the Forestry Conservation, Development and Utilization proclamation No.94/1994 and the Trade of Saw Logs and Veneer Logs Regulation No. 351/1968.

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

> *"A forest which is to be demarcated by a regulation to be issued by the Council of Ministers upon the recommendation of the Ministry of Agriculture and that are given*

special consideration so as to protect the genetic resources, or conserved to keep the ecosystem with a programme that covers more than one region."

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

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

vi.Cultural Heritage/Antiquity Legislations

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

- Works of craft-such as tools, poetry, crosses, inscriptions, coins, weapons, jewelry, etc.
- Items of artistic interest-planting and drawings, produced entirely by human hand on any support and in any unilateral original prints and posters, and photographs, original artistic assemble, ages and montages in any material, works of statutory art and sculpture, etc.
- Manuscripts and incunabula-codes, books, documents or publication of special interest.
- Items of numismatic (medals and coins) and philatelic interest.
- Archives including textual records, map and other cartographic materials, sound recordings and machine recordable records,

- Ancient palaces, religious buildings such as ancient churches, monasteries, mosques, castles, obelisks, etc.
- Products of archaeological excavations conducted on land, underground, in the sea bed including the sites of such exploration and excavations.
- Places associated with historical events such as battle fields.
- Items resulting from the dismemberment of historical monuments,
- -Materials of anthropological, pathological and ethnological interest, etc.

UNIT TWO

2 RURAL LAND LAW

2.1 Introduction

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

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

2.2 Ethiopian Tenure History in Brief

2.2.1 The pre-1974 Revolution era

i.Northern Ethiopia

Dear students! Did you know the tenure history of Ethiopia in the northern part?

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Have you tried? That is nice!

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

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

As discussed above *gult* lands were lands derived by imperial grants and unlike *rist* lands, which were not subject to sale and exchange, *gult* lands were sold and donated freely. Donald Crummey, in his book, Land and Society in the Christian kingdom of Ethiopia, has recorded the sale, inheritance, and donation of *gult* land especially during the Gonderian period of the 16^{th} and 17^{th} century of Ethiopia.

The land grant condition reached its apex during the twentieth century. During Menelik's period, the emperor had been giving a vast amount of *gult* land to the ruling elite as a reward

for loyal service to the régime, and to religious institutions as endowments. The individual or institution that held such land had the right to collect taxes from those who farmed it, and also exercised judicial and administrative authority over those who lived on it. Thus, a single estate of *gult* land, comprising perhaps one or two square miles, often included within its boundaries strip-fields, held as *rist* by scores (50-150) of farmers.

ii. Southern Ethiopia

Dear students! Did you know the tenure history of Ethiopia in the southern part?

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Have you tried? That is nice! The pattern of land allocation in the southern territories incorporated into the empire by Emperor Menelik II, differed in important ways from the pattern in the north. The *gult* system was introduced in the southern part of the country in the 19th century, following Menelik's expansion to the region. From the 1870's under Menelik to the 1970's under Haile Selassie, the crown alienated land which was occupied by local tribes in common. It was distributed to members of the imperial family, the clergy, and members of the nobility, Menelik's generals, soldiers, and local agents of the state. Unlike the condition in the north, here most of the land was occupied not by peasants, but by the people of the upper ruling class. These people, by means of land grants, became absolute land owners. This kind of land ownership system was called *gult*. Peasants on such land became tenants (*gabar*) of the grantee and paid rent in addition to the usual taxes and fees. Those who received government land grant need not farm it themselves but could rent it under quite profitable arrangements to tenant farmers or lease it out to large-scale mechanized producers. After the Second World War and the expulsion of the Italian forces from Ethiopia, Emperor Haile Selassie also continued this process.

In the south, land measurement and property registration for tax purposes was introduced. This promoted private ownership and land sale. In northern Ethiopia, traditional land tenure had had a communal character, with peasants enjoying only usufructuary rights over the land *rist* land. In the southern part, especially, in the twentieth century, the steady process of

privatization set in, with its implication of sale and mortgage. Some land lords even forced their peasants to buy the land. The historian Bahiru Zewde observes:

> *The privatization process had a number of consequences. At the conceptual level, it was attended with changes in the connotation of some important terms. Rist, in origin of the usufructuary rights enjoyed under the kinship system, now denoted absolute private property. Likewise, the term gabar lost its exploitive associations and assumed the more respectable connotation of taxpayer. Absolute private ownership rights to land above all entailed unrestricted freedom to dispose of it, most significantly through sale.*
>
> *This process was not without negative impact to the indigenous society, however. The renowned sociologist and expert on Ethiopian tenure system, Markakis, has concluded that the effects of the land grants and alienation were "eviction of a large number of peasants, the spread of tenancy, and emergence of absentee landlordism." Generally speaking, private tenure was recognized as the most dominant system during the final days of the Imperial regime, affecting some 60 percent of peasants and 65 percent of the country's population. Under this system, land was sold and exchanged; however, given that all the land was originally state property and that private holders had no absolute rights, this was different from the general concept of a freehold system. Serious land concentration, exploitative tenancy and insecurity have characterized the private tenure system.*

iii. Urban Land Tenure

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

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

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

iv. The Civil Code

The civil code was introduced in 1960, and enshrined the prevailing pattern of an almost unlimited exploitation of land by the owners (Art.1205). It attempts to regulate under articles 1489 and the following "agricultural communities"-presumably *rist, desa*, and nomadic tenures-and agrarian tenancies, but made few changes in the traditional arrangements, and was largely ignored. In other words, although the code in principle recognizes private ownership of farm lands, the government had not taken practical measures to attain this goal, such as reforming the land holding system so that poor tenant farmers should get their own private land. It is said that there had been strong resistance for land reform from the landed parliament members. The provisions dealing with tenancies relied upon a freedom of contract which, given gross inequalities in property inequalities in property distribution and bargaining position, could only be exercised by landlords. If the parties were aware of these provisions and if they wanted them to govern their relationship, feudal or patron-client tenure relations could have continued under the guise of neutral facilitative law. Under article 2991 of the code, for example, the large maximum for rents paid in kind was *three-fourths* of the crop, while the traditional rental was half. Besides to the civil code there were attempts by the government to legislate laws regarding the rural lands.

Paul Brietzke, in his article, Land Reform in Revolutionary Ethiopia, concludes:

> *"Traditional tenures remained largely unaffected by the laws enacted, with great fanfare, from 1944 to 1974. Government investment in land reform, in terms of monetary and legal resources, were minimal, and legal maneuvers, far from*

promoting rural change, seemed to solidify further peasant suspicions of government intentions. As a result, rural people continued to rely on traditional land laws."

2.2.2 Rural Land Tenure during Dreg Era

In 1975, the military council, *Derg*, comprised of representatives of the different armed forces in the country, became successful in ousting the Imperial regime from power. As mentioned above the Emperor was criticized for the failure to implement a land reform. The Derg hence come with the slogan "land to the tiller". Following its assumption of power, the Derg had undertaken fundamental changes to the Ethiopian socio-economic and political arrangements. Among the many radical measures, the land reform proclamation of February 1975 was said to be the predominant one. Cited as Proclamation No. 31 of 1975, it was a proclamation providing for the "public ownership of rural lands" and generated a great deal of support for the regime, especially from the peasantry population. This is because the land had in essence been given to the tiller. All tenants or hired laborers had acquired possessory rights over the land they tilled. At one stroke, the law abolished all forms of landlordism and tenant-ship, and thereby liberated tenants from any kind of serfdom or payments of rent or debt to the previous land owner (article 6(3)).

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

Since the fundamental tenet of the proclamation was the equalization of land holdings among the rural peasants and "transformed rural Ethiopia into a society of self-laboring peasants," it was stated that each farming family should be allotted with 10 hectares of land and any kind

of hired labor should be prohibited, except under few circumstances. For example, Article 4 (5) of the proclamation states that this rule did not apply to a woman with no other adequate means of livelihood or where the holder dies, is sick, or old, to the wife or the husband or to his or her children who have not attained majority.

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

Dear students! Did you know the objective policies of the Derg Proclamation No. 31 of 1975? _____

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Have you tried? That is nice!

The policy objectives of the proclamation were mainly two:

a. To provide the broad urban dweller with credit facilities and urban lands for the construction of dwelling and business houses

b. To appropriately allocate disproportionately held wealth and income as well as the inequitable provision of services among other dwellers.

Concerning urban land, as stated above, the proclamation put all land in the hand of the state.

No urban land was to be transferred by sale, antichresis, mortgage, succession, or otherwise (Art. 4(1).) a person requiring land for the purpose of building a dwelling house was to be

granted free of charge up to 500m^2 in accordance with the directive of the ministry of public works and Housing (Art. 5(1).)

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

2.3 The Current Rural Land Tenure System

2.3.1 Access to Rural Land

Dear students! How can you acquire rural land in Ethiopia today? _____

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Have you tried? That is nice!

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

This principle of free access to rural land has also been reproduced in the regional land laws. The conditions attached to this right are first, the person must want to engage in agricultural activities. In other words, agriculture must be his/her main means of livelihood or profession. Secondly, s/he must reside in the area where the agricultural land is located. Although this principle is not clearly seen in the FDRE RLAUP, Regional RLAUPs have clearly envisaged it. And thirdly, the person requesting land must attain majority, 18 years and above

(Art.5(1)(b). As exception, however, children may get land from their parents through inheritance and donation. Thus, age, residency and profession are the three important conditions to get rural land in Ethiopia. The reason seems that since there is shortage of agricultural land in rural areas, because of population pressure, it is not advisable to give land to those who live elsewhere (absentee owners) and those who earn income from other professions.

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

2.3.2 Nature and Duration of Land Right

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

2.3.3 Modality of Land Acquisition

Dear students! Do you know the possible methods of acquiring rural land in Ethiopia today? _____

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Have you tried? That is nice! There are different ways through which a person may acquire rural land in Ethiopia. The law recognizes the following ways for a person to get rural land:

a) Land provision: as mentioned above, the constitution and the subsequent RLAUPs have created a free access to rural land to whomever who wishes to engage in agricultural activities. Any person who is 18 years and above and has the desire to engage in agriculture has the right to get rural land. The government, through its different land administration apparatuses, is empowered to grant land to those who are in need of it. The sources of the land that should be provided to the landless are unoccupied government lands, communal lands, land left without heirs, land claimed back by the state because the holder abandoned or neglect the land, and finally by conducting land distribution. Land redistribution, as discussed above, has less appeal to land holders who are supposed to give consent for its distribution (Art. 5(2) Proc 456/2005; Art. 7 of ANRS RLAUP). Land may also be granted to "non-governmental organizations and social and economic institutions" (Proc. 456/2005, Art. 5(4) (b).
b) The second means of acquiring land is inheritance or donation. Any person who is a member of peasant family may have the right to get rural land from his/her family through inheritance or donation (Art. 5(2) of Proc 456/2005). A family member is defined as "any person who permanently lives with holder of holding right sharing the livelihood of the latter" (Art. 2(5) of Proc. 456/2005). Unlike the family members who are recognized by the FDRE Revised Family Law (RFC) as those who are related by marriage, blood and adoption, the Federal RLAUP follows a slightly different path. As can be inferred from the above cited provision, a family member is one who "lives" with the peasant who holds the land and "shares" his "livelihood." The requirements are two: residency and management. It means, first, he must permanently live with the farmer under the same roof (residency element); and second, he must totally rely on the peasant farmer for his life and have no other income of his own. He is under the control and administration of the farmer (management element). This means, the law does not specifically require marital or blood relations for a person to be considered as a family member. Hence, a labourer who has no alternative income of his own and lives with the farmer without salary under the same roof may be

considered as family member and eligible for inheritance. The Amhara RLAUP even goes one step further by allowing inheritance of land by will to any farmer engaged in agriculture. By contrast, it is not possible to inherit or donate rural land to one's children who live elsewhere or are engaged in other professions. The rationale behind such rule seems that since land belongs to the state and the people and not a private one, it has to be transferred to those who need it, irrespective of their blood relations. Yet, the FDRE RLAUP, except the possibility of inheriting one's land to family members, presumably through an expressed testament (will), doesn't state the situation of inheritance during intestate succession. The assumption is that in the absence of a legitimate will left by the deceased landholder, the rules of the RLAUP and the Civil Code succession part would be applied. Looking into this problem, the Amhara and the Benishangul Gumz RLAUPs included provisions to settle the issue. Regulation 51/2007 of the ANRS, for example, under article 11(7) puts the beneficiaries of intestate succession in the following priorities: minor children, if not, family members; children of full age who have no land of their own; children of full age who have their own landholding; parents. In order to be a legitimate beneficiary to the intestate succession, all the above people must show interest to engage in agricultural activities.

c) The third modality to acquire land is a government land transfer to private investors through a lease contract (Art. 5.4.a). This is the base for the current large-scale agricultural land transfer practice carried out in the country. Ethiopia is one of the countries that attract the interest of investors and sovereign states from different countries. In the past almost three decades, millions of hectares of land have been transferred to many foreign and domestic investors ventured in the flowering industry, bio-fuel, sugar, cotton, palm oil, tea production etc.

2.3.4 Transferability of Land Rights

Dear students! Do you know the possible methods of transferring rural land in Ethiopia today? _____

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Have you tried? That is nice! The land transferability ways can be best summarised as permanent and temporary. Permanent land right transfers could be done through inheritance and donation. Whereas, temporary land right transfers could be done through rent and lease. They may be termed as commercial land transactions to differentiate them from inheritance and gift. Sale and mortgage are not yet permitted. The FDRE RLAUP provides a general provision that allows rent and lease the details of which shall be decided by regional rural land laws. It generally states that peasants and pastoralists can "lease to other farmers or investors land from their holding of a size sufficient for the intended development in a manner that shall not displace them, for a period of time to be determined by rural land administration laws of regions based on particular local conditions (Art. 8(1) of Proc. 456/2005.) It means that the law provides the discretion to determine the duration of the lease period and the amount of land to be leased to regional governments. Another point is that the law uses only the term "lease", and excludes the word "rent" whereas regional land laws give different meaning to the two terms. Regional RLAUPs do not follow a similar approach in the size of land to be leased and the duration of the lease period. For instance, in Tigray, the peasant is allowed to rent out up to 50 percent of the size of his land for 20 years if the lessee uses modern technology, and 3 years if he/she uses traditional means of production (Art. 6 (1), (3) of Tigray RLAUP). In the Amhara Region, renting land is allowed for a maximum of 30 years, although the size is not mentioned. There are practices in the region where farmers rented out the whole of their holdings to small scale investors. The argument for deviating from the Federal one (which says in a manner that shall not displace them) is one that depends on recognizing the rationality of the farmers; that farmers know better for themselves. The Oromia Land law follows the Tigray approach in terms of size and duration. The SNNPRS RLAUP follows somewhat different approach. According to article 8(1) of Proclamation No. 110/2007 of SNNPRS, the duration of land rented to a peasant by a peasant is 5 years, by a peasant to investor is 10 years, and by a peasant to those who cultivate perennial crops is up to 25 years.

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

firstly, the land rented from peasants is too small to provide it for mortgage, and secondly, the peasant may not agree that his land be given as collateral to banks.

2.3.5 Termination of Rural Land Rights

Dear students! Do you know the possible reasons that rural land right can be terminated in Ethiopia today?_____

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Have you tried? That is good! Rural land rights are not immune from government intervention Hence, a farmer may be required by law to use his rights in some fashion rather than another. For instance, a farmer may not cultivate land with a 30-degree slope without placing terraces on the land (Art. 13.4). Such restrictions are made for various reasons, such as environmental, equity, health and others. Violation of such obligations may render the loss of the land itself. Concerning the reasons of loss of the land rights, the proclamation does not give a coherent list. But one may locate them in different parts of the proclamation. For instance, it is stated that a holder of rural land "shall be obliged to use and protect his land. When the land gets damaged, the user of the land shall lose his use right (Art. 10.1). In general, a review of the Federal as well as Regional RLAUPs reveals the following as reasons for the loss or termination of rural land rights:

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

UNIT THREE

3 URBAN LAND LAW

3.1 Introduction

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

3.2 Brief History of Governing Urban Land Tenures

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

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

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

3.3 Current Urban Land Laws

Dear students! What do you understand about the current urban land laws of Ethiopia? _____

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Have you tried? That is good! As you may recall from 1.4.31.4.3 above, we have already discussed the governing laws of land and real property in Ethiopia. Due to the bifurcation of land into urban and rural in the country, the focus of these laws is also different. i.e., they are categorized into urban and rural land laws. Some of the laws that focus in urban areas include the urban land lease proclamation, real property registration legislation in urban areas, planning and building legislations. In this unit, details on the lease proclamations are provided.

3.4 Lease as A Major Urban Land Governing Law

3.4.1 Scope and Definition of Lease

Dear students! What is lease? Define it using your own words in the space provided, please!_____

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

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

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

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

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

3.4.2 Nature and Advantage of Lease System

Dear students! What are the merits or advantages of introducing a lease system?

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Have you tried? That is nice! Lease is another means of landholding system. Lease may be of private or public one. For both the state and private individuals lease is a means of income for it is also another form of land market. The income from land lease has significant part in the overall GDP of a country in general and in the real estate transaction income in

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

3.4.3 Overview of Previous Lease Proclamations

After the downfall of the Derg in 1991, the Transitional Government of Ethiopia (TGE) came up with a new urban land law. Unlike the permit system operational before it, the new urban land law follows a lease system. So, for the ***first*** time a lease system was introduced in Ethiopia as a mode of urban land holding when the new law was adopted in 1993. Since the lease system was enacted before the adoption of the Constitution, and since the constitution does not explicitly say anything about urban land allocation, it can be argued that this proclamation was the base for the current urban land holding system, although its constitutionality is questionable.

Compared to the permit system of the Derg era, a significant characteristic of this proclamation is that it allowed a free transfer of lease right in the form of sale, mortgage and contribution in Share Company (Article 10.1of Proc. 80/1993). Yet, according to sub-3 of same Article, the "lessee may not, on transferring his right of lease, collect income which is higher than the rent of land he paid; nor may he mortgage such right at a value which is higher than the rent." Where the lessee collects or gains higher than what he actually paid as ground rent, he has the duty to pay back the difference to town administration (Article 10 .4). The idea was that the increment in land value would be captured by the government rather than individuals.

Proclamation 80/93 was repealed and replaced by the Revised Urban Land Lease Proclamation (Proc. 272/2002) in 2002. The objectives of Proclamation No. 272/2002 were mainly two: to collect income from land lease in order to assure fair share from urban land wealth, and to transform the holding system (permit system of the Derg era) into a lease system. Compared to its predecessor, the objectives of the revised proclamation 272/2002 were few. Proclamation 272/2002 offers two methods to get access to urban land, unlike its predecessor which says nothing about the subject. Article 4(1.a) of the proclamation recognizes "auction" and "negotiation" as the two modalities to acquire urban land. Nevertheless, sub-Article (1) (b) of the same Article empowers regional cities to come up with additional means of land acquisition. Accordingly, besides the two systems mentioned above, the Addis Ababa City Government and other regions came up with three additional methods: namely, lot, assignment and award. Like its predecessor, this proclamation also allows the free transfer of lease right (Article 13). But as a significant development, unlike proclamation 80/1993, the revised proclamation did not require the repayment of an enhanced land value gained by the leaseholder during transfer of the lease right.

Ten years after the adoption of Proclamation 272/2002, the Ethiopian government was reconsidering the revision and change of the lease proclamation on account of reasons discussed hereunder. Accordingly, the FDRE parliament adopted a new lease proclamation in October 2011.

3.5 Details of the current Urban Land Lease

3.5.1 Background, Justifications and Objectives of the Proclamation

Dear students! What are the justifications and objectives of the current Ethiopian urban land lease proclamation?_____

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Have you tried? That is nice! Compare your answers with the following details.

Justifications for Proclaiming by Repealing

The reasons offered for the revision of the existing lease proclamations are enshrined under Article 4 of the proclamation as "Fundamental Principles of Lease". The first principle

Article4.1 note that it should be the government, and by extension, the people, who should be benefiting from the lease system. One way to do this is by capturing the enhanced urban land value instead of allowing speculators to reap it. One of the arguments forwarded by government in the aftermath of the adoption of the proclamation was that speculators and urban brokers were the beneficiaries of the lease system. Urban speculators have been profiting by selling bare land (only lease right) without adding value to it in the past lease laws. The other point addressed by Article 4 (2) and (3) is that urban municipalities became corrupt and inefficient in land delivery. Corruption, non-transparency and injustice were reined in the system which created a safe haven for few urban speculators and brokers. The modalities of land delivery such as negotiation, award and lot were considered as non-transparent and sources of corruption. Lack of detailed rules in tender processes was also cited as another reason for corrupt behavior. Thus, the proclamation is also expected to be instrumental in efficient land transfer (Article 4(4). It has been argued that demand for land in urban areas has been much greater than the supply of land made by the land authorities.

Objectives of the Lease System

As given at the preamble of the proclamation, the objectives of the lease policy are:

- To provide for the utilization of urban land to satisfy the needs of the various sections of the population
- To address the problems associated with a high rate of urban population growth which resulted in the expansion of urban centers
- To address the inadequacy of the financial capacity of urban centers to finance the building of infrastructure and the provision of social services to urban dwellers
- The need to implement the free market principles of the government by creating conditions where by the right to use urban land can have market value
- The need to control loopholes, corruption and appropriation of unjustified gains realized during the transfer of the right to use urban land whose value has appreciated
- The need to lay down a frame work with in which Ethiopian investors can participate in the economic development of urban centers in accordance with the economic policy of the country.

3.5.2 Application of Lease System

Transfer of land holding into lease system means that all land in urban areas, after being identified and registered by the municipality, shall be known as lease land, and the holder shall enter with the government a lease contract that, among others, includes lease period and lease price to be paid (Article 16). The lessee will then be given a "Lease Holding Certificate" that shows the name of lessee, land size, location, land use purpose, lease price, lease period and so on (Article 17). The important effect of converting a possession to leasehold is through the payment of a specified amount of ground rent to the government. In the event of the above three situations, the lessee will pay "lease benchmark price" (minimum lease price), which shall be set by every urban center, multiplied by the area of the land size (Article 6.7). The calculation of this

"lease benchmark price" takes into "account the cost of infrastructural development, demolition cost as well as compensation to be paid to displaced persons in case of built up areas, and other relevant factors" (Article2.11). The initial payment will not be less than 10% (Article20.2) and the remaining will be paid over long period of time which will be decided in the contract. This is also true of land plots granted by "allotment" to those organs specified under Article 12. For others, the amount of payment shall be determined by the tender (auction) process.

3.5.3 Modalities of Urban Land Acquisitions

Dear students! Do you know the possible methods of acquiring urban land in Ethiopia today? _____

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Have you tried? That is nice! Since most of the modalities are categorized as bad practices that opened the door for corruption, the government argued, the law recognizes only tender (auction) and allotment (land lease transfer without auction) as the two-basic means of lease transfer from government to citizens (Article7.2 of Proc. 721/2011).

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

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

a. office premises of budgetary government entities,
b. social service institutions run by government or charitable organizations,
c. places of worship,
d. public residential housing construction programs and government approved self-help housing constructions,
e. use of diplomatic missions and international organizations,
f. manufacturing industries, and
g. projects having special national significance and considered by the president of the region or the mayor of the city administration and referred to the cabinet (Article12.1).
h. A person who is displaced from his house/land (an old possession or leased one) as a result of urban renewal (like incase of expropriation) shall get a replacement plot by allotment. Under the FDRE Expropriation proclamation, one of the components of a compensation package is provision of replacement land (Article 8(4) (a) of Proc. 455/2005) for the person to build his house, and it will not be logical to expect payment of lease price for such land.

3.5.4 Transfer of Lease Rights

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

- **Unrepeated transfer right: -** But, first of all the proclamation prevents people who repeatedly transfer leasehold right, without completion of construction, in anticipation of speculative market benefit, from participation in a future bid (Article 24.7). This means, the city administration can prevent selected people, who are identified in selling lease right or unfinished properties repeatedly from participating in future auctions. The reason behind such restriction is to discourage speculators who are engaged in the sale and transfer of unfinished properties; instead, the government wants to encourage them to complete the constructions before selling, and thereby alleviate the housing problems. The proclamation does not tell as to how many times people are supposed to transfer unfinished property before they get banned.

- **Sale by Supervision: -** Second, as per Article 24 (2) of the proclamation, "If a lessee, with the exception of inheritance, wishes to transfer his leasehold right prior to commencement or half completion of construction, he shall be required to follow transparent procedures of sale to be supervised by the appropriate body." Note that this requirement is not necessary for the sale and transfer of fully completed properties. The implication of this provision is understood only after reading the next sub Article of this provision. The sub Article points out that since the seller of the lease will not be entitled to the full profit of unfinished construction, it is necessary to involve a government agent to assess the value of construction and current land lease price.
- **Limited transferability of unfinished property: -**Third, transferring only leasehold right (bare land) or leasehold right with only half completed construction gives no benefit at all to sellers. Previously, completed or not, lease holders used to reap the

full benefit of enhanced land value during transfer of the lease right. Now, however, as a strategy to encourage completion of construction, to avoid rent seeking activities, and to rather capture the benefit by the state, the sale and transfer of half completed properties is not attractive. "Half completed construction" is defined under the proclamation (Article 2.16) differently for different types of constructions as follows:

- *In the case of a villa, completion of foundation, columns and top beam;*
- *In the case of a multi-story building, completion of foundation and 50% of the total number of floor slabs;*
- *In the case of a real estate development, completion of the construction phase referred to, as the case may be, in paragraph (a) or (b) of sub- Article (1) of this*

  Article relating to the entire blocks.

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

So far as the first two conditions are concerned, there is no problem in understanding the amount of lease price paid (plus the bank-based interest rate), and the amount of money expended for the construction made.

Dear students! How do we determine the transfer lease value? Are the lessee and the new beneficiary (e.g. buyer) supposed to deal in the open? What is the role of the municipality agent at this point? _____

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Have you tried? That is nice! To make it clearer, let's assume that Ms. A has bid 200 m2 of land from the city municipality for 4000 birr per square meter (total 800,000 birr). Let us again assume that she has made a 10% advance payment of 80,000 birr as lease price. Let's further assume that she constructed a foundation at a cost of 40,000 birr. Her total cost at this point amounts to 120,000 birrs. For some reason, however, she now wants to sell the property after one year. The bank interest is 5%. A further assumption that is made is that the current lease value of land in a similar location is 5000 birr per square meter and this sums up to a total value of 1,000,000 birr.

Decision (Average value is 900,000)

- *The buyer shall pay birr 900,000*
- *The seller (lessee) will get the following:*
    - *80,000 birrs (lease price paid)*
    - *4000 (5% of 80,000)*
    - *40,000 (construction cost)*
    - *5,000 (5% of 100,000-birr profit (900,000-800,000)*
    - *Total =129,000 (net Profit for seller =9000).*
- *Government profit = 95,000 birr*

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

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

sharing the profit from the appreciation of land value? Of course, the justification is to encourage people to put a building on the land before they sell it, and to add value to their holdings, but this should not be done by violating the constitutional right of property which, among others, gives the right to collect the increment in property value.

Mortgaging leasehold right

As stated above, leasehold right is subjected to any form of transaction including sale, lease/rent, inheritance, donation, mortgage, and as capital contribution to a company. But again, as mentioned previously, the right to mortgage is limited to the "extent of lease amount already paid" (Article 24.1). This "already paid lease amount" may be the initial down payment and the yearly installment, if the lease agreement was made before a year and more. Under Article 24(4) the proclamation further introduces, as a fourth strategy, the following:

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

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

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

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

To further elaborate this provision, let us closely look into the different sub- Article s of Article 24 mentioned in this section. Based on Article 24(1), as a matter of principle, lease right may be used as collateral when borrowing from banks or creditors in general. But, the amount of money the lessee may borrow against mortgaging his lease right is restricted to the amount of money s/he has paid so far, as lease price. This lease price includes the down payment paid at first (e.g. 10%) and the following yearly installments. In other words, the land cannot give the lease holder a value which he had not made on it; what one can get from

the land is what he "sows" on it. This is a radical shift from the previous practice where banks used to give higher amount of value to location (to the land only.) 250 Thus, for example, a person who had made a total of 100,000-birr lease payment may not borrow more than this amount by mortgaging his lease right. Of course, if there is a construction, banks may also consider the value/cost of such construction in their loan calculation.

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

3.5.5 Obligations of the Lessee

Dear students! What are the obligations of the lessee after signing a lease contract?

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Have you tried? That is nice! Obligations are confined up to the extents of the terms and conditions of the lease agreement, since lease is a contract. Therefore, for instance, the following can be mentioned:

- Not using the land other than its purpose
- Not using the land in contrary with the urban plan
- Paying the lease amount as per the contract
- Returning the leased land upon the expiry of the lease period
- Applying to the appropriate body to convert the use of the land
- Commencing and completing construction within the specified period.

3.5.6 Formation, Renewal and Terminations of Lease Contract

Formation of contract

Dear students! How lease contract is formed? _____

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Have you tried? That is nice! Any person permitted urban land lease holding in accordance with this Proclamation shall conclude a contract of lease with the appropriate body (Article 16.1). The lease contract shall include the construction start-up time, completion time, payment schedule, grace period, rights and obligations of the parties as well as other appropriate details (Article 16.2). The assumption is that the general provisions of contract law envisaged under the civil code will be applied here as well. Chief among the elements of a lease contract is the lease period. The lease proclamation has set different lease periods for residential and other activities. As in the case of the previous proclamation, 99 years has been set for residential purposes and 70 years for industry, 60 years for commerce, and 15 years for urban agriculture (Article 18.)

Termination of contract

Dear students! Can you try how a lease contract may terminated? _____

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Have you tried? That is nice! The proclamation introduces three situations that may lead to the termination of the lease contract (Article 25.1):

- failure to use the land in accordance with Article 21(1), (violation of contract)
- expropriation of the leased land, and
- expiry and non-renewal of contract

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

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

The "land use" obligation is mandatory to follow since the permit of the lease was made by considering the master plan of the city. Of course, if the master plan accommodates/permits, the land use may be converted upon the application of the lessee and an approval by the concerned organ (Article 21.2 & 3). It must be noted that one of the purposes of leasehold is to manage urban growth through the enforcement and implementation of urban land use regulations. The effect of violating land use, as prescribed under Article 25(3) of Proclamation 721/2011, is retaking of the land and returning a paid-up land lease price, after deduction of costs and penalty.

The use of the land within the agreed time implies three things: commencement and completion of construction and use of land for the intended purpose. The first two has to do with the construction, while the third is concerned with the operational activities, such as starting the industry, business, agriculture, etc. Any lessee must commence construction within the agreed time. This is not an innovation to this proclamation; it was also included in the previous proclamation. The difference is that; the current proclamation contains harsher measures against those who contravene the lease contract. For example, if one fails to start construction on time, the land will be reclaimed by the city administration and some penalty or fee may be imposed on the lessee (Article 22).

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

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

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

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

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

What will happen after the expiry of the lease contract? The lease right may be renewed upon the application of the lessee, using the prevailing benchmark lease price of the time (Article 19). It seems the discretion of renewing the contract is given to the city administration; the city municipality may renew or refuse to renew the contract. Whether or not the city is required to give good reasons for not renewing the contract is not known.

The effect of non-renewal of contract is that the land will be taken after the removal of any property erected on the land by the owner. There shall be no payment of compensation for any property loss caused to the owner. The municipality is empowered to "take over the land together with the property thereon without any payment where the lessee has failed to remove

the property within the period" given (Article 25(5) & (6)). The possible problem or criticism that may be forwarded against such provision is that it may create tenure insecurity and hysteria when the expiry date approaches.

3.6 Others Forms of Urban Land Possession

3.6.1 Old Possession

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

Dear students! What could be the fate of old possessions while no urban land is held without a lease system? _____

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Have you tried? That is nice! An "old possession" is "a plot of land legally acquired before the urban center entered into the leasehold system, or a land provided as compensation in kind to persons evicted from old possession" (Art 2.18). Thus, all land acquired and held during the imperial era, Derg era, and after that, outside lease system will be considered as old possession. Besides, replacement land given to owners whose land was expropriated may also be considered as old possession since the land was given without lease contract.

As a matter of principle, all land in urban areas shall henceforth be transferred into lease system (generally see Article5.) But, concerning old possessions, it is said that their fate will be decided by the Council of Ministers upon detailed study to be made in the future (Article 6.1). In other words, all "old possessions" will not be converted in mass at once to leasehold.

The law, however, requires the conversion of old possessions into lease system in one of the following events:

- Where a property attached on an old possession is transferred to a third party through any modality other than inheritance (Article 6.3)
- Informal settlements that have been regularized pursuant to the regulations of regions and urban administrations (Article 6.4)
- Where an application to merge an old possession with a lease hold is permitted, (Article 6.6)

Property transfer in this case includes sale, exchange or donation, excepting inheritance. It must be noted that since land is not saleable, the subject matter of "transfer" is not the land itself but the immovable on the land, i.e. building. Hence, whenever a house rested on old possession is sold, exchanged, or donated, the new owner shall possess the land on lease basis. The other situation is the "regularization" of informally held possessions. Land may be held and construction of houses may be carried out without the permission of the urban land administration offices. In many urban city centers, there are lots of houses constructed in such a way. The usual measure taken in such cases is demolition of the informal settlement. But, sometimes, urban centers or regional governments may pass a specific regulation to regularize, formally register, the informal settlements. If an informal settlement is now regularized, then the new possession arrangements must be changed to lease system. The third case in which an old possession should be converted to lease system is where old possession is to be merged or amalgamated with leased land. It means the old possession and the leased land must have been bordering each other and now have changed into one property. What about amalgamation of two old possessions? The law does not say anything about it, and the assumption is that unless it is clearly required by the law, it is not mandatory to convert them to lease system.

3.6.2 Informal Settlements

Dear students! Have you heard about the term 'informal settlement'? _____

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Have you tried? That is nice! Informal Settlements are defined as residential areas of the

urban poor more often in the cities of the developing world. They are found on public, private or customary land accessed by invasion or developed against planning, building and ownership regulations. They lack basic social services and infrastructure facilities. Some writers classify informal settlements as those settlements:

- Occur due to unauthorized invasion and development of public and private land,
- Are through subdivision that are not registered officially or subdivisions that do not conform to planning regulations,
- Are within areas covered by customary tenure which have been made part of the city through cities expansion,
- Are built without permits from the local authorities.

Informal Settlements are therefore unauthorized residential areas.

The UN Habitat categorizes informal settlements into two:

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

In Ethiopian context these types of settlements are known as “Chereka Bet”. The term Chereka bet in its Literal Translation means “house of the moon” implying the illegal construction of houses overnight using moon light, thus, they are defined as a settlement built on land occupied or used without the consent of the city council and without having any construction permit grantee by the city council. Informality is generally considered to be the characteristics of low-income settlement both caused by poor and beneficiaries:

- Illegal appropriation of land
- Illegal subdivision
- Built with inappropriate materials or non-serviced land etc.

The definition of informal settlement has never been available under Ethiopian laws. However, we can gather its nature from the reading of the current Urban Planning legislation. Proclamation 574/2007, which concerns urban planning, under Article 25(1), provides “no

development activity may be carried out in an urban center without a prior development authorization." And according to Article 24 of the proclamation "development" means…*the carrying out of building, engineering works, mining or other operations on or below ground, or the making of any substantial change in the life of any structures or neighborhoods.* The urban land administration which is empowered with the issuance of the development permit shall ensure that the applicant has a legitimate right to the land to which she applied for. This means the requirements of a legitimate building are basically two: one the land on which the development activity (building) is going to be erected must be acquired through legal means (such as government grant, lease contract…) as per the existing laws; second, in order to execute the building activity, she needs a building permit (development authorization). This authorization is needed not only for the erecting of new buildings but also for modifying and demolishing them as well.

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

UNIT FOUR

4 HOUSING TENANCY AND CONDOMINIUMS

4.1 Introduction

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

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

4.2 Right to Housing

4.2.1 Lease of Houses/Tenancy

Dear students! What is lease of houses or tenancy? Try to explain by your own terms in the space provided below! _____

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

i. General Principles

Lease of immovable is a contract (Art. 2896) and hence the general rues of Contract in general (Arts. 1675-2026) may be applied whenever necessary, especially concerning formation and effect of contract, as indicated under Art. 1677. A combined reading of articles 1723 and 2898 reveals that a lease contract needs not to be made in writing. Moreover, articles 1571 and 2899 strengthen this fact by dictating that lease agreements made for more than five years and do not enter into registry may not affect third parties. Article 2946 stipulates that the municipality may prepare a model contract form for the lease of houses within its jurisdiction. Yet it is not mandatory for the parties to follow it. It seems, the option is left to the contracting parties.

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

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

4.2.2 Rights and Obligations of Lessees/Lessors

Dear students! What are the rights and duties of a lessee/lessors? Try please!

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Have you tried? That is nice! Compare your answer with following detail.

i. Delivery of property and warranty of peaceful enjoyment

The lease imposes on the lessor various obligations all of which spring from a single principle: the lessor is bound to procure for the lessee the enjoyment of the premises for the

duration of the lease. This principle is embodied in our civil code under articles 2900 (Delivery) and 2911(peaceful enjoyment of immovable). The lessor shall deliver the lessee the immovable given on lease and its accessories, in a state to serve for the use for which it is intended in terms of the contract or according to its nature (Art. 2900). The lessor has also the obligation to deliver the house in good condition or free of defect. As per article 2904(1) "where at the time of delivery, the thing has defects of such nature that its normal use is appreciably diminished, the lessee may demand the rescission of the contract." Besides to the rescission of the contract, the lessor may also be subject to liability of payment of damages as envisaged under articles 2905-06. However, if the defect was apparent, means if the defect on which the lessee's claim is based is apparent or where he knew or should have known of the defect on the making of the contract, he may not revoke the cancellation of contract and or payment of damages. Read article 2907. In other words, the lessee must first look in to the house and ensure whether it is suitable and ok. An exception to the apparent rule is provided in the next article 2908(1) which states: "Where the thing is in such a state as to constitute a serious danger to the life or health of the lessee or of those who reside with him or of his employees, the lessee may require the rescission of the contract even in a case of an apparent defector of a defect of which the lessee knew at the time of the contract." And sub article (2) emphasizes: "Any stipulation to the contrary shall be of no effect."

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

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

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

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

Peaceful enjoyment of the leased house is the main interest of the lessee. Our civil code (under articles 2912-2915) provides rules which guarantee this enjoyment. First point is that the lessor must refrain from any personal act which would interfere with the lessee's enjoyment of the property. For example, the law provides that the lessor may not make alterations in the house without the consent of the lessee (art.2912) since it disturbs his peaceful enjoyment. Another one is that the lessor warrants that the lessee will not be disturbed by third parties who have legitimate claims on the leased property. This concept is envisaged under article 2913. The general point made in this article is that third party claimant of the leased property should made their claims against the lessor not the lessee. The lessee shall be entitled to reduction of rent in case of molestation by such party.

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

ii.Repairs

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

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

1) The repairs which in the contract of lease are placed at the charge of the lessee shall be deemed to be repairs incumbent upon him.
2) Unless otherwise agreed, repairs necessary to the doors, windows, floorboards, tiling, taps and water drains shall be deemed to the repair's incumbent upon the lessee.

3) The works of cleaning and maintenance which become necessary by the enjoyment of the thing shall also he deemed to be repairs incumbent upon the lessee.

Art. 2955. - *Old age* or *force majeure.*

1) No repairs which are deemed to be incumbent upon the lessee shall be at the charge of the lessee where they are occasioned only by old age or force majeure.

2) The contract of lease may derogate such rule by an express stipulation

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

4.2.3 Obligations of the Lessee

i.Necessary Care

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

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

ii.Payment of Rent

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

4.2.4 Comparative Perspectives on Leaseholds

i. Germany

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

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

ii. Cuba

The housing market in Cuba is tightly controlled. Under the Urban Reform Act of 1960, leaseholds were converted from private to state ownership and the occupants were given usufructuary interests by the state. Existing rental agreements were declared illegal and the government worked to define the leasehold arrangements. Under Article 50 of Cuba's 1988

Housing Law, a scale for rent pricing was established. Normally, rent is capped at twenty percent of an individual's income. However, for lower income residents, rent cannot exceed ten percent of household income; and, in the "cuarterias" Slums), individuals live rent free. Rent is fixed by the municipal government and is paid monthly to the people's Saving Bank.

iii. France

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

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

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

4.3 Condominium

4.3.1 Nature of Property

Dear students! What is condominium as a real property? Try please!

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Have you tried? That is nice! Condominium housing is a recent phenomenon to the Ethiopian real property ownership. As a common interest ownership, this type of real property ownership was started during the 1950s in the USA and earlier in Europe. Lack of adequate

housing units and urban decay that is characterized by the deterioration of the existing houses can be considered as the two main reasons for government to venture into the construction of high rising condominium houses in Ethiopia. A new legal regime that governs the ownership and administration of such properties was necessary, and as a result, the Federal Government adopted a proclamation in 2003 (Proc. No. 370/2003)16.

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

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

What is condominium? What makes it different from other types of properties? Condominium is defined in the proclamation as: "A building for residential or other purpose with five or more separately owned units and common elements, in a high-rise building or in a row of houses, and includes the land holding of the building (Art.2.1)" [emphasis added].

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

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

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

4.3.2 Ownership of Condominium Buildings

Dear students! Who owns condominium in Ethiopia? Try please!

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

In some countries, there is a similar type of common interest real property called cooperatives; physically cooperatives resemble condominiums. Despite their physical resemblance, condominium and cooperative housing developments have very different legal structures.

Both condominiums and cooperatives can be found in detached buildings, garden apartments, or high-rise towers. The owner of the condominium, however, possesses a different legal interest than the owner of the cooperative. The condominium owner owns his or her unit in private ownership and shares an undivided interest in the common elements (for example, sidewalks, hallways, pools, clubhouse, storage place) as a tenant in common with the other condominium owners. In contrast, the owner of the building in a housing cooperative is the cooperative corporation. Each shareholder of the cooperative corporation is entitled to a proprietary lease granting him or her right to occupy a unit within the building for a significant period (typically 99 years). Thus, the owner of a cooperative apartment is technically both the owner of shares in the cooperative corporation and a tenant of that corporation.17

Articles 8 and 9 of the FDRE Condominium Proclamation are dedicated to ownership right in a condominium building. It is clearly declared that unit owners are entitled to the ownership of the units in the building (Art. 8.1). This right gives the unit owner a full right to transact the unit (Art. 8.2). This means unit owners are at liberty either to use and enjoyment, lease/rent, mortgage, donate, inherit or sale, subject to limitations dictated by law. The owners or by extension the owner's association, have no say on the use and enjoyment as well as transfer of the unit by the owner. As opposed to this system, in cooperatives the entity owns the building that decides on transfer of such rights. Individual as shareowner and a lessee of the unit has to submit his intention to the board of the cooperative entity.

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

The right to the use of the common facilities is undivided and attached to the ownership (Art.9.2). In here, there are two points to discuss, the first being the fact that the right to the common elements is undivided. Generally speaking, jointly owned entities are indivisible in nature. In property arrangement, where owners have joint ownership over a thing, each owner has a use and enjoyment right to the whole thing. Although the size of their ownership right

may be described in terms of percentage and dividends, it is not possible to show by dividing the thing physically and restrict the use to some specific area only. For example, the unit owner's right of walk, play and use of the kitchens may not be possible to demarcate. The second point worth discussing in association with this sub-article is that the use of common elements is attached to the ownership right of units. This means that the use of the common elements is an extension of the unit ownership. It is a kind of principal-accessory relationship of properties as understood in property law. An accessory is anything, which the owner of the principal thing (e.g., unit in condominium) has permanently destined to the use of such thing (Art. 1136 of CC.) This, of course, is clearly shown under Art. 9(4), which emphasizes, "the percentage of the undivided interest in the common elements shall be a part of the unit ownership and any legal act on a unit shall also be effective upon the undivided share of interest." The sale and transfer of the unit entails the transfer of the commons dedicated to the unit as well.

The size and extent of right of use in the common facilities is to be determined based on the amount of share one has over the units. This is clearly envisaged in the proclamation: "The percentage of the undivided share of interest in the common elements attached to the unit ownership shall be determined in the declaration" (Art. 9.3). With due regard to the possibilities of adopting other alternatives by the owners, the usual method to determine the percentage of use of common facilities by the owners is determined based on the number of units they owned. For example, in a condominium building with six units, suppose one person owns three units and the remaining are owned by three other persons. In this case, it is logical and fair to allow half of the common facilities to the use of one person who happens to own half of the units in the building. As already mentioned above, sometimes, however, it may be impossible to define clearly his right on the ground over the use of certain common parts such as corridors, pathways, and playgrounds. Nevertheless, in other cases, such as parking lots and garages, it is possible to divide and allocate them to a particular unit. It must also be noted that it is not only the rights to the commons but also obligations arisen therefrom that are based on the proportion to the size of ownership of units.

4.3.3 Rights and Obligations of Unit Owners

Dear students! What are the rights and duties of a unit owner in condominiums? Try please!_____

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

4.3.4 Unit Owners Association

Dear students! Who is the unit owner's association? What is its role? Try please!

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

- Manage the condominium on behalf of unit owners;
- Ensure the peace and security of residents in the Condominium;

- Ensure that unit owners, occupiers of units, lessees of the common elements comply with rules;
- Perform other necessary activities in the interest of unit owners' mutual benefit.

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

- Determine the conditions on the use of common elements;
- Lease, subject to security, and transfer the common elements;
- Determine fines, fees and contributions;
- Own, subject to security, and transfer property; and
- Enter into contracts, sue or be sued.

UNIT FIVE

5 REAL PROPERTY TRANSFER

5.1 Introduction

Dear students! In the previous units, we have dealt with a number of important concepts. These include the defining real property, lease, holding rights, and so on. In this unit, we will discuss about the nature and implications of various types of real property transfers, namely, sale, inheritance, donation, rent, court decision, and prescription.

Objectives

Having gone through this unit, you will be able to:

- Explain the nature and meaning of various types of real property transfer/transactions.
- Indicate the possible legislations that address various real property transactions, o Evaluate the advantages and disadvantages of private/public ownership of land, and
- Appreciate the economic significance of property transactions.

5.2 Sale in General

Together with the end of transitional period in Ethiopia, the issue of land came to be settled by the newly adopted constitution in, 1995. Actually, private ownership of land was abolished in March 1975, and land belongs to the public as of that time. Farmers are given use right but not ownership. The present constitution reaffirmed what the previous regime has established by institutionalizing the state ownership of all rural land.

In article, 40 of the FDRE constitution (which is about property right) it is provided that the right to ownership of rural, urban land as well as ownership of all-natural resources is exclusively vested in the state and the peoples of Ethiopia. Land is a common property of the nation nationalities and peoples of Ethiopia and hence not subject to sale, exchange or mortgage. This signifies the state and the people have equal right in relation to the right to ownership of land. The landholders have other rights than sale or purchase right mainly usufructuary right.

Usufruct is the right which is derived from the two Latin words" Usus" and 'Fructus" which eventually became one (Usufruct). It is a real right to enjoy a thing belonging to another the same goes for holding right too. Usus (use right) refers to the right to avail ones of physically a thing for one pleasure or personal profit in accordance with the nature of the thing (Planiol).

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

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

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

5.3 Sale of Immovable

5.3.1 Formality Requirements of Sale of Immovable

5.3.2 Rights and Duties of the Seller

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

i.Obligation to Transfer unassailable Rights over the Immovable

When we say transfer of ownership, the transferor has to be the true owner of the thing. The common law maxim *nemo dat quod non habet* perfectly applies here because a seller cannot transfer a right (ownership) he himself does not have. In the first place the seller must have

unassi1ilable right - a right that cannot be defeated, questioned or disputed· A sel1er should have a perfect title to transfer on an immovable property to a purchaser. Art. 2281 of the Civil Code states, "a seller shall take necessary steps to transfer unassailable right over the thing." The obligation to transfer unassailable right relates to the obligation as to title and one can say unassailable right means perfect title.

The seller has to show a good title, that is, to state a11 the matters essential to the title contracted to be made. A good title exists when the seller shows that he alone or with the concurrence of some person or persons whose concurrence he can require, can convey to the purchaser the whole legal estate and equitable interest on the thing sold. We can extend the unassailable right concept to warranty of title where the seller covenants that he has a good and marketable title so that no one comes and dispossesses or evicts the purchaser from his enjoyment and right of ownership.

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

The sel1er is assumed to be selling his whole interest in the thing he is required to convey that estate free of encumbrances. But this is true in the absence of any stipulation to the contrary. This is because the purchaser is deemed to know all encumbrances affecting the immovable property. Usua11y acts whether public or private purporting to recognize, transfer, nullify the right of ownership of an immovable shal1 be registered in the register of property.

Any serious defect of the title will allow the purchaser to repudiate the contract and sue for the return of his money. A seller to hold the purchaser to the contract must disclose defects of the title unless it is shown that the purchaser knew at the time of the contract that the former had only a defective title. So here there is warranty given by the law that the purchaser, if he will be evicted, will hold the seller. Moreover, according to Art. 2880, the seller is required to declare to the buyer rights of third parties on the immovable sold where such rights may be set up against the buyer independently of registration of in the registers of immovable property. But those third parties' rights on the immovable which are registered may not be required to be declared by the seller because they are open to the public.

However, the contract may compel the seller to declare these rights even though they are registered.

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

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

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

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

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

ii.Obligation to Furnish Necessary Documents

This is the most important obligation of the seller in the transfer of ownership of immovable properties. Its great importance is stated under Ethiopian law as being mandatory. Art. 2879 says, "The seller shal1 furnish to the buyer all the documents necessary to enable the buyer to cause the transfer of the immovable to be registered in the register of immovable property".

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

Now what are the necessary documents which need to be delivered to the buyer so that the buyer can make or cause the transfer of the immovable property?

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

Title deeds are means whereby interests in immovable arc evidenced. In case of transfer of ownership, they serve the purpose of ascertaining that the transferor has the title or interest to be transferred, that he is entitled to make transfer, and also that the transferee has the right to receive it. The agency which is authorized to affect the transfer of ownership of immovable may not register or recognize the right of the buyer without the furnishing of title deeds of the previous owner to it. This is because the basis for registration of transfer of ownership of an immovable property is the former registration. So, delivery of title deeds is one of the obligations of the sel1er and then title deeds are necessary documents.

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

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

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

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

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

iii.Obligation to Deliver

In contract of sale, delivering the subject of sale is one of the main obligations of the seller. The seller of a thing is bound to deliver such thing, and to cause the ownership thereof to be vested in the purchaser. The delivery of the immovable can be made in any manner the

parties wish. However, in some countries, most of the time delivery is affected by remission of the keys or titles.

Under Ethiopian law delivery of the thing is a prerequisite in contract of sale. Unlike movables, immovables are fixed by their nature and it may not be easy to handover them physically.

Under Ethiopian law, we have an authenticated contract of sale of immovab1es. And the scl1er by delivering the authenticated contract of sale and his title deed to the buyer effects his obligation of delivery of the immovable in the transfer of ownership of the immovable.

So, it is through the means of the authenticated contract of sale and the title deed that delivery of an immovable property can be affected. All these show us that natural physical delivery of an immovable properly is impossible. So, the obligation to deliver has to be seen in the light of the obligation to furnish the necessary documents.

When we say actual physical delivery is impossible, it does not mean that the seller should remain in possession of the immovable properly. It is because of his own will that he sold his property. As a result, once he sold his property, the buyer must be placed into the enjoyment and effective possession of the immovable.

iv. Right to Take the Payment of Price

The seller transfers the ownership right to the buyer for value or consideration. If this is so he has to get the purchase money as exchange of the thing. Subject to agreement otherwise, delivery of the thing by means of documents and payment of price shall be simultaneous. That is at the time when the seller delivers the thing by means of instruments that transfer ownership rights over immovable, he should be paid the price of the thing. It is his right to take the payment of price. It is with the expectation of receiving money that he sells the property he owned. Thus, the seller's obligation to give the thing and the right to take the purchase money are the two faces of the same coin.

The parties may, however, agree in their contract as to the payment of price, that is, when and where to pay. The simultaneity rule applies if nothing is agreed upon in the contract on such matters. The right to demand the payment of price of the thing sold by the sel1er is an

extension of the widest right he has over the thing. As a result, he has to take money in return so that he will have the ownership right of the money.

v.Right to Retain Necessary Documents

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

In the preceding section it is stated that the sel1er should be paid the purchase money of his property sold. Now, what remedy does he have if he is not paid the price? Unlike movable properties, immovable properties are not subject to physical delivery. Their delivery is done by executing documents and then delivering them to the buyer. And hence we cannot say the seller can have the right to retain the thing.

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

So, when it comes to immovable properties, we can extend the application of Article 2278(2) of the civil code to retain necessary documents and can say the seller can retain the documents if he is not paid the price until the payment is done. The ownership right will not be transferred to the buyer unless and until the necessary documents are delivered to him.

5.3.3 Rights and Duties of the Buyer

i.Obligation as to the Payment of Purchase Money

The buyer's chief obligation in a contract of sale is to pay the price at the time agreed, or if no time has been agreed, concurrently with delivery. He must transfer the ownership of the money to the seller. The civil code clearly puts the payment of price by the buyer as a mandatory obligation; Art.2303 (cum. Art. 2875) says, “The buyer shall pay the price”.

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

As a rule, payment of purchase money is executed at the time of delivery of the thing. But this does not mean that agreement otherwise is impossible. Buyers do not most of the time pay the price in whole at the time of conclusion of the contract. Rather they pay some amount at the conclusion of the contract and the rest at a later time usually when ownership is completely transferred to the buyer.

ii.Obligation to Take Delivery of the Thing and Documents

The buyer is required to take and come into possession of things which he bought. This may be because of conservation expenses and risk purposes. But in immovable properties it seems the buyer may not be required to take the thing. Rather he would be expected to come into possession of the thing or he could be required to take possession. But for transfer of ownership cases, possession of the thing is irrelevant. What is relevant and important is possession of an authenticated contract of sale and the seller's title deed.

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

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

5.4 Inheritance

Inheritance is the passage of title and ownership of property from the one who dies to people

whom the law designates because of blood or marriage relation as the deceased heir by operation of the law or by will of the deceased. In other words, it is the devolution of the property of the deceased to persons on the basis of close blood relation to the deceased.

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

> *Art. 2410. - Transfer of usufruct.*
>
> *(1) The provisions applicable to contracts of sale shall apply where a person transfers for consideration the usufruct of a thing.*
>
> *(2) The obligation of the seller to transfer the ownership of the thing shall in such case be replaced by the obligation to transfer the usufruct of such thing*.

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

Intestate succession is a branch of succession that devolves the estate of the deceased by the operation of the law. The law devolves the estate in a way that reflects the presumed intent of the deceased, which is to distribute it to those persons more closely related to the deceased. When we look at the law of succession, it first focuses at whether the deceased person was survived by children or grandchildren (see Art. 842 CCE) and provides most, if not total, distribution of the estate to them. Then the next focus is on the ascendant and if not to col1aterals and the State.

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

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

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

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

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

In the ANRS rural land proclamation No.133/2006, transfer of land holding right in inheritance is recognized under art. 16. Any person who holds land may transfer his right in will to any farmer engaged in agricultural works. To be valid, however, this action may not disinherit the minor child of the testator or family member from inheritance; nor may it harm the spouse. In the absence of will, the right shall be transferred to his child or family engaged in agricultural works. In the absence of a child or family member, his parents who are residents of the region, engaged in agriculture and priory have land holding less than the maximum holding area.

On the other hand, in Oromia the cumulative reading of art, 6(1) and 10(1) of the rural land proclamation no: 56/20002 indicates that peasants/ pastoralists are guaranteed, while the right remains in effect, the right to bequeath or the right to transfer the land holding to their family member(s) through inheritance.

The other salient features of the regions' land laws in relation to inheritance are: If inheritance causes fragmentation of farm plots to be inherited beyond the minimum lot size, the heirs are obliged to use the plot jointly or by other means other than splitting of the plot. The laws provide the specific size beyond which parcellation of land is prohibited. For example, inheritance should not take place in the manner that results in parcellation of land below quarter (0.25) and (0·75) hectares in Tigray and Oromia respectively.

5.5 Donation

Another method whereby land holding right is transferred is donation. Donation is regulated under Title XV, Chapter Three of the Civil Code as well as the rural land laws.

As per Art. 2427 of CCE, donation is a contract whereby a person, the donor, gives some of his property or assumes an obligation with the intention of gratifying another person, the donee. Donation is a voluntary transfer of title to property without payment or consideration by the donee.

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

The person who wants to donate may make either an *intervivos* or mortis cause donation to the donee (see Art. 1205).

A donation is *intervivos,* if **it** is between living donor and donee; and if the donor intends the donation (gift) to take effect immediately or on agreed date. On the other hand, \a donation is *mortis causa* if the donor makes in anticipation of his/her her imminent death.

5.6 Rent

Rent is entering into a contract with the tenant for a certain period to use a real property. Rental agreement is signed for short term. There's no particular accounting standard that is followed in renting agreement. The rent contract is b/n the landlord and tenant. The landlord can change the agreement anytime s/he chooses. In a deep philosophical understanding, rent is not similar with that of lease.

5.7 Court Order

It is also possible to have transferred real property through court judgment. The Civil Procedure Code in Art.402 provides that where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the decree-holder, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property. Transferring real property through court judgment. When a decree held about the transferring of an immoveable, the court may give decisions.

Whenever there is an interference of a court or when judicial acts are brought to the court and if an immoveable is transferred to another party through the decision of the court.

Examples:

- When a real property is transferred to heirs/Intestate succession,
- When a case related with the lapsed of mortgage period is brought to the court by the creditor due to the failure of the debtor to pay the money he borrowed and when the mortgaged property is transferred to the debtor through the decision of the court.

5.8 Acquisitive Prescription

This method of having a right on an immovable is determined by possession of a property for a fixed period of time. The Civil Code on Art. 1168. Provides that the possessor who has paid for fifteen consecutive years the taxes relating to the ownership of an immovable shall become the owner of such immovable provided that no land which is jointly owned by members of on family in accordance with custom may he acquired by usucaption and any member of such family may at any time claim such land.

UNIT SIX

6 MORTGAGE

6.1 Introduction

Mortgage is common in many legal systems and it is one of the oldest legal practices. In this unit, we will see the specific details of mortgage as a real right. Thence, ranging from its definition and feature, through the types, effects, up to extinctions of mortgaging right are the parts of the discussion.

6.2 Definition and Features of Mortgage

Dear students! What is mortgage? _____

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Have you tried? That is nice! The legal theories that underpin mortgage and its application vary from one legal system to another legal system. These differences among legal systems on the essences and nature of mortgage make providing a universally agreed definition a difficult task. For this reason, some legal systems provide their own statutory definition of mortgage. Unfortunately, Ethiopian Civil Code provides no definition for the term mortgage therefore what we can do is to read the articles that regulate the civil code and provide a definition that capsulate the features of mortgage as they are enshrined in Civil Code.

Accordingly, for purpose of this module we may define mortgage as a legal instrument that creates a real security rights on immovable properties or special movables for the payment of a debt or the performance of an obligation without affecting the possessory and ownership rights of the mortgagor. From the definition, we can infer that mortgage gives the creditor a stronger right than what he/ she gets under the general law that creates the primary obligation. Under the general contract law, for example we can see that the law provides that the rights of creditors be protected by all assets of the debtor. This is in line with the legal maxim that provides “the property of the debtor is the common pledge of his creditors”. However, if one creditor has a mortgage on one of the assets of the debtor, he will have a priority right to be paid first from the proceedings of the mortgaged property. In addition to this other contract

entered by his debtor after the creation of the mortgage would not be set up against the claims of the mortgagee.

6.3 Types of Mortgage

Dear students! Did you know about the different types of mortgage contract? Try please!

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Have you tried? That is nice! ***Dear students!*** Mortgage can be a result of a contractual agreement or it can be created by law or courts. Article 3041 of Ethiopian Civil Code provided that mortgage can be created by contract, by judgment, by law or by a private agreement. Hereunder we will discuss the sources of mortgage as they are stipulated under Ethiopian Civil Code.

6.3.1 Legal Mortgage

Dear students! What is legal mortgage? Try please!

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Have you tried? That is nice! The law of a given country may envisage certain social and economic interactions that create special relations among parties and provide special privilege for those who engaged in that special relationship. Among others, the law creates a legal mortgage to protect individuals that have invested in different forms on an immovable when their interest is at stake. The Ethiopian Civil Code enunciates three scenarios that create legal mortgage; to protect unpaid seller, to protect co- owner and to protect contractors and suppliers that helped the construction of the immovable. Let's discuss the three grounds of legal mortgage one by one.

i.The right of the seller

The law provides that, the seller has a mortgage right on the immovable he sold for the payment of unpaid price without any contract of mortgage.

The law by creating a legal mortgage entitles the seller to exercises all rights that emanate from having a mortgage on a given property. The seller of an immovable has a right to be paid and his right to be paid is protected by the legal mortgage in addition to the sales contract. The law assumes that a seller that transfers ownership to the buyer without being fully paid needs some kind of protection by the law as to the payment of the agreed price. The Civil Code provides no condition or any additional requirement for the creation of a legal mortgage for the protection of unpaid seller however it seems that the formality requirements that are provided under the civil code are also applicable for a legal mortgage for unpaid creditor. Therefore, the contract of sale of an immovable shall indicate the existence of unpaid balance and the amount the unpaid price. Furthermore, the fact that the price of the immovable has not been fully or partially paid shall be entered in the registry sales contract.

Dear students! What formalities do you think are needed for creation of a legal mortgage for unpaid seller? _____

_____

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_____

Do you think that indicating the unpaid balance in the register of the sales of the immovable is important? why_____

_____

_____

ii.The right of the co- owner

The second important legal protection under our civil code is for the co- owners. That is if the co- ownership ended for different reasons, the parties would have priority right against each other for any compensation that is due based on the previous common property. Dear students for simple understanding of this scenario we can take this example; if 'A' 'B' and 'C' were the co- owners of a school and they decided to divide the school among themselves, accordingly each took two blocks of the school buildings. However, latter if 'A' dispossessed one block due to the ownership claim raised by their neighbour, he would have a mortgage

right over the blocks allotted to 'B' and 'C' for the compensation claim he would possibly bring against them. Dear students for further clarity please read the following provisions

Art.3043. legal mortgage of co- practitioner.

1. A co- partitioner shall have a legal mortgage on such immovable allotted to his co-partitioners in accordance with the act of the partition.
2. Such mortgage shall secure the payment of any compensation in cash that may be due to him for such other compensation as may be due by the co- practitioners where he is disposed of any property allotted to him.

iii.The Contractor and the Supplier.

The Civil Code does not expressly stipulate that contractors and suppliers who helped the construction of the immovable acquire a legal mortgage. However, the Civil Code provides protection to individuals who build the immovable and those who provided the necessary materials for the construction of the immovable property. The contractor and the supplier essentially resemble the seller of the immovable as they have added to the asset of the debtor. The Civil Code indirectly recognizes a legal mortgage to protect contractors and suppliers. Roman law and the French and German laws also create a legal mortgage in favour of contractors and suppliers. However, our law mentions only the contractor and the supplier therefore the status of the consulting engineer and the architect is not clear.

Art. 3067. Prior rights of the contractor and suppliers

1. The contractor who build the buildings or made the improvements mentioned in art. 3066 and the suppliers who supplied the materials, plants seeds or fertilizers used in the improvements buildings plantations or crops shall have priority over the mortgagees on such part of the proceeds of the sale mortgaged immovable as it necessary to cover the costs of the improvements, buildings plantations and or crops made by them.

Dear students! Would you please give justifications that support the need for legal mortgage?

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6.3.2 Judicial Mortgage

Dear students! What is judicial mortgage? Try please!

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Have you tried? That is nice! As you have learned in your contract law, a creditor can attach and use the properties of the debtor to satisfy his claim. To refresh your memory, it would be good if you read article 1988 of the Civil Code. As immovable properties cannot be an exception to this general rule, the creditor may as well request the court to attach the immovable property of the person for the satisfaction of his claim. Therefore, judicial mortgage is a general mortgage, which the law attaches to every judgment that orders a debtor to execute his obligation. The reason for the existence of this mortgage is the necessity of assuring, in the most efficacious way possible, the execution of judicial decisions.

Comprehensive understanding of the concept and application of judicial mortgage demands clarity on article 3044 of the Civil Code and articles 151and 414 of the Civil Procedure Code. Article 414 regulates attachment of immovable property for sake of execution of judgment. However, as this article imposes restriction on the judgment debtor's right to transfer the ownership or from entering into any contract that creates a real right one can argue that what is provided under article 414 creates a priority right that is somehow different from the concept of mortgage provided under the Civil Code. Hence, article 414 of the Civil Code would not be considered as a judicial mortgage that is envisaged by article 3044 of the Civil Code.

Under article 151 of the Civil Procedure Code Attachment before judgment is stipulated as one of the possible provisional remedies. Request for attachment can be initiated at any stage of the suit including at the time of the lodging of the statement of claim. However, it is not possible to request for attachment before lodging the statement of claim. Attachment before judgment can be granted when the following two criteria are fulfilled. Firstly, the court must be sufficiently satisfied that the defendant is about to dispose the whole or part of his property

or he/she is preparing to remove his/her property out of the jurisdiction of the court. Secondly, it must be established that the defendant had the intention to obscure or delay any degree that may be passed against him. The most important requirement for attachment of the property of the defendant is the establishment of the existence of an intention on the part of the defendant to avoid justice or to interfere with the court system. Preparing to dispose his property or preparing to remove his property out of the jurisdiction of the court is not sufficient for attachment order. It must be also sufficiently established that there is an intention on the part of the defendant to render possible judicial remedies less effective or unhelpful unless the court interferes and stops the defendant form his malicious intentions.

The Cassation Court has also decided that judicial mortgage creates a priority right and it has the same effect with other forms of mortgage. The Cassation court has also decided that all formal requirements should be fulfilled for the judicial mortgage to have any legal effect.

Dear students! What formal requirements are needed for formation of a valid mortgage?

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6.3.3 Contractual Mortgage

Dear students! What is contractual mortgage? Try please!

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Have you tried? That is nice! The third type of mortgage, the most prevalent in various forms of business transactions, is contractual mortgage. Contractual mortgage arises from clear/express agreement between the mortgagor and the mortgagee. Mortgage creates real right on an immovable property. Parties can create mortgage to protect an existing, a future or a conditional contract. It is also possible to enter into a mortgage contract to protect third parties' contractual obligations. A person can mortgage an immovable for his own debts if he can dispose the immovable for consideration however to create a mortgage for another person's debt, he must have a right to dispose the immovable gratuitously. The mortgagor

must have the right to dispose the property at the time of the creation of the contract. Acquiring the right to dispose the property after the formation of the mortgage contract would not make the mortgage contract valid because the law does not allow future rights to be given as securities.

A mortgage contract can be created only in relation with immovable property and with some special movables. In Ethiopia land is a public property and it is not allowed to be owned privately. That means individuals cannot sale or dispose land as they have only possession right not an ownership right. This has led some in the past to ask whether it is possible to mortgage a land under the current legal framework in Ethiopia; however, the question is partially answered by the very popular urban land lease proclamation. The proclamation expressly allowed land acquired by lease to be mortgaged to the extent of the paid lease price. That means a person who acquired a lease right over a land can mortgage the land to the extent of the lease price he has paid not for the unpaid lease price he would pay in future. This is a logical approach to control speculation in the land market as well as to promote a healthy financial market. Furthermore, this is also in harmony with the civil Code's disallowance of mortgaging a future ownership right. However, it is still arguable whether it is possible to mortgage a right over a land that is not acquired by the lease system such as lands occupied under the permit system. What about a rural land; can it be mortgage?

Dear students we have said that a right to dispose is a condition to mortgage a property. However, sometimes a person may a quire a title deed mistakenly and his rights might be invalidated latter on.

What do you think the fate of the mortgage created by the invalidated title deed? _____

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Article 3051 of the civil code has enunciated that the mortgage contract will remain valid unless the mortgagee is in bad faith. The Cassation Court delivered on this issue that the cancellation of an ownership certificate by government bodies would not invalidate a mortgage contract duly formed.

6.4 Effects of Mortgage

Dear students! In this section, we will examine how the Ethiopian laws articulated the rights and privileges that emanate from contract of mortgage.

6.4.1 The Right to Be Paid in Priority

i.Properties included within the scope of mortgage contract

Article 3059 of the Civil Code provided two important effects of a mortgage contract. The first is the right to be paid in priority and the second is the right to follow the immovable. The law clearly enunciated that the mortgagee may be paid in priority to other creditors from the proceedings of the mortgaged property. The right of the mortgagee to be paid first extends to intrinsic parts of the immovable however the mortgagee cannot exercise his right over an intrinsic element that has been detached and transferred to third parties. This is in line with what is provided under article 1131 of the Civil Code that provides that "unless otherwise provided, rights on, or dealings related to goods, shall apply to all intrinsic elements thereof" Dear students, what is an intrinsic element? We have to refer article 1132 of the Civil Code that deals about Goods in general to get the definition of an intrinsic element.

Article 1132 Definition

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

The Civil code also particularly mentioned that trees and crops are intrinsic elements of the land until they are separated therefrom. This implies that a mortgage right over a land will give the mortgagee a right to be paid first from the trees and crops notwithstanding that the crops and trees planted after the registration of the mortgage and whosever planted them.

Dear students, we have said that the law allowed the mortgagee to use his right to be paid first on intrinsic elements only as far as intrinsic elements are not detached and transferred to third parties. Then one may question that what would be the remedy for the mortgagee if the most important intrinsic elements of the immovable detached and transferred to third parties?

The Civil Code provides that the mortgagee can demand new securities if such detachment reduces the value of the immovable and affects the interest of the mortgagee.

Dear students! When it comes to accessories, the law has followed a different path that is the mortgage has no right over accessories of an immovable unless it is clearly mentioned in the contract of mortgage that the thing is an accessory to the mortgaged immovable. This provision has to be read in correlation with article 1135 of the Civil Code that provides that "in doubtful cases, rights on or dealings in relation to, things shall apply to accessories thereof". Hence, whenever there is a doubt as to whether the accessories are included in the mortgage contract or not the benefit of doubt should be given to the mortgagee.

Dear students! It is a common practice that the mortgagor may increase the value of the immovable by improving the buildings, by building new blocks or rooms, or by planting trees. Hence, it is logical to ask whether the mortgagee can exercise his rights on new improvements made after the contract of the mortgage. One possible argument in this scenario is that the mortgagee accepts the immovable as it stands at the time of the contract of mortgage estimating the value of the mortgaged immovable; therefore, he could not claim any priority form other creditors on new improvements made after on. a fortiori to this argument is the fact that a future property cannot be mortgaged under the Ethiopian law; therefore, as the improvements were not inexistence at the time of the mortgage contract the mortgagee has no whatsoever rights on the improvements. The second possible argument is that as far as the mortgagee established a real right on the mortgaged property and his rights have been known to third parties by the act of registration an increase in the value of the immovable should benefit it to the extent of the maximum amount stipulated in the mortgage contract. The real conflict of interest in this case is not between the mortgagor and mortgagee as the mortgagee can benefit from the new improvements as an ordinary creditor even if the improvements could not constitute part of the mortgage contract. The real conflict is rather between the mortgagee and other creditors who would like to avert the mortgagee from being paid in priority from the price increment obtained because of the new improvements.

The Civil Code supports the cause of mortgagee in this scenario. It provided that an improvement that is made later on would constitute part of the mortgaged immovable and the mortgagee can use it to settle his claim in priority to other creditors. However, the law makes it clear that suppliers and contractors that build the building or the improvements or supplied materials for the improvement have a priority right to be paid first even before the mortgagee.

We have said that an improvement in the value of the immovable would benefit the mortgagee then in the same line of argument a reduction in the value of the immovable may also hurt the interest of the mortgagee. According to the law, the mortgagee cannot demand new security if the value of the mortgagee decreases unless it can prove that the reduction of the value is due to an intentional action or negligence of the mortgagor or a third party who has acquired the immovable form the mortgagor. Thus, if the value of the immovable decreases for reasons that cannot be attributed to the mortgagee and the value of the mortgaged property becomes below the maximum amount stipulated in the contract of mortgage the creditor becomes partially unsecured creditor.

However, the law protects the interest of the mortgagee by extending the mortgage contract to apply to insurance payments and other damage payments that may due in cases of damage of loss of the mortgaged property. Further, the mortgagee has the right to be paid in priority from payments made because of expropriation. The law clearly stipulated that the mortgagor cannot legally receive the compensation payments without a prior permission from all mortgagees and he has the obligation to inform all mortgagees the amount of compensation, the reason for the compensation and the person who is liable for the payments. The law imposes the burden of reviling the facts that relate with the payment of compensation on the mortgagor. The mortgagees have to express their objection to the payment within thirty days and failure to do so would be considered as permission given for mortgagor to collect the payment. The law is not clear whether the mortgagees shall declare their objection to the mortgagor or to the person who is under the legal obligation to pay the compensation. Both from practical point of view and from what can be inferred from the sprite of the law, it is more advantageous to express the objection for both the payer and the mortgagee. However, it seems that to satisfy the legal requirements it may sufficient to inform either the payer or the mortgagor. If the mortgagor collects payment after it was informed the objection, then it is breaching his contractual and legal obligation. The mortgagees can legally force the mortgagor to give the money to them or to be given to the trusty or as an alternative they may demand new securities to the extent of the damage or the loss on the immovable according to articles 3073, 3074 and 3107. The same remedy may be also used in case the mortgagor collected the compensation payment without informing mortgagees. when the payer pays to the mortgagor without being informed about the objection, the payment to the mortgagor is a valid payment as far as the payer concerned and it exonerates the payer from its liability

because the law imposes no obligation on it to investigate the existence of a mortgage right on the immovable.

Dear students! What would be the consequence on the payer who paid the compensation payment to the mortgagor after it received the objection from mortgagees not to pay to the mortgagor? (Hint you may refer to general contract law and extra contractual laws of Ethiopia)._____

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Notwithstanding that the law in principle empowered mortgagees to control compensation payments that related with a mortgaged immovable; still the mortgagor has three rights under the law. The first right is that he can collect any compensation payment that is not more than a thousand without a need to gain permission from mortgagees. The second important right of the mortgagor is that it can demand that the compensation should be paid to it with a proviso that it undertakes that the compensation money would be used to rebuild or to repair the damaged immovable and it offers new securities to the mortgagees or it provides a security that it would use the compensation money to rebuild or repair the immovable. The third right of the mortgagor regarding the compensation money is that it can request the money to be deposited in the hands of a trustee appointed by the court.

ii.Rights protected by mortgage contract

The mortgage contract gives the mortgagee a priority right over other creditors to be paid the registered amount of capital claim from the proceedings of the immovable. It is important to notice here that the priority right is limited only to the maximum amount registered in the mortgage contract therefore the amount of claim that is more than the maximum amount is not considered as a secured credit and the creditor has no right to demand to be paid first. To clarify the concept let us illustrate it with the following example.

Mengesha has agreed to mortgage his house for his debt from New Generation Bank (NGB). The Loan is two million birrs however the mortgage contract provided that the maximum amount of claim protected by the mortgage is one million birrs. In this case New Generation Bank can claim to be paid one million birrs in priority from other creditors form the proceedings of the house but for the remaining one million birr he cannot claim a priority

right because the mortgage contract gives him the right to be paid first only for the amount registered in mortgage contract. NGB is a secured creditor only for one million Birr and for the remaining one million birr it is unsecured creditor.

In addition to the capital claim the mortgagee has also a right to be paid in priority the interest amount that is stipulated in the contract as far as it is not above the maximum amount stipulated in the contract of mortgage. However, the mortgagee can claim only two years interest to be paid in priority from the proceedings of the mortgaged immovable. The law has put a mandatory restriction that only two years of interest should be covered by the mortgage contract and parties cannot agree to include more than two years interest payments within the protected debt amount. What are the approaches banks use to avoid or minimize the effect of this restriction on the amount of interest claim protected by mortgage?

In addition to capital claim and interests for two years the mortgagee has also a right to be paid in priority expenses it incurred for the maintenance of the mortgaged immovable, insurance premiums and cost of attachments.

6.4.2 The Right to Follow Immovable

We have already reached into a conclusion that the Ethiopian law of mortgage is based on a lien theory therefore the mortgage contract will not preclude the mortgagor from transferring the ownership of the immovable to a third party or from creating a right in rem on the mortgaged immovable. The law even goes to the extent of prohibiting any agreement that restricts the right of the mortgagor to transfer the ownership of the mortgaged property. It is also not possible to enter into agreements that restrict the right of the mortgagor to create a usufruct, servitude or any other right in rem on the mortgaged property.

The right of the mortgagor to transfer ownership of the mortgaged immovable however should not affect the right of the mortgagee to attaché and use the mortgaged immovable to satisfy his claim protected by the mortgage contract. Mortgage contract creates a right in rem in the mortgaged immovable. The mortgagee has a right to exercises his mortgage rights notwithstanding that other third parties obtained rights on the immovable as far as these rights are registered after the mortgage contract. The law has given the mortgagee a right to attach the mortgaged property in the hand of a third-party buyer whose rights has been registered subsequent to the registration of the mortgage. It is important to recognize that the transfer of the ownership of the mortgage would not relieve the original debtor from his obligation

unless the person who acquired the mortgaged immovable undertakes to pay the debt and the creditor does not object to the release of the original debtor within one year since he has been informed about the agreement between the original debtor and the third person to release the original debtor form his obligation.

Illustrative example

Kebede mortgaged his house as security to the three-million-birr loan he received from Megersa that is payable on July 28, 2014. The mortgage contract was registered on July 28th, 2010 and the maximum amount that is protected by the mortgage contract is three million birrs. On August 27, 20013 Kebede sold the house to Abrhet and the transfer of ownership from Kebede to Abrhet was registered on the same day. In this case if Kebede failed to pay the money back to Megersa, Megersa can attach the house in the hand of Abrhet and the fact that the ownership of the house transferred to Abreht would not prevent Megersa from exercising his right as a mortgagee to attaché and use the proceedings of the house to satisfy his debt. The fact that the ownership of the mortgaged house transferred From Kebede to Abrhet would not release Kebede (the original debtor) from his responsibility and Megersa can still take all possible actions against him. However, if Abrhet agreed to pay the debt and Megersa did not demand that Kebede should remain liable for his debt within one year after he was informed the agreement between Kebede and Abrhet. That means Kebede can be released from his obligation only when the creditor agreed to his release by an express agreement or by silence.

Another important point that demands explanation is the fact that a mortgage is indivisible obligation. That is in case a mortgaged immovable is partly alienated or the ownership of the immovable is divided among different persons each part of the immovable remains mortgaged for the whole debt. Taking our previous example, assume Kebede transferred the ownership of only two rooms to Abrhet. According to the indivisibility of mortgage both rooms that are transferred to Abrehet and Rooms that remain under the ownership of Kebede protect the whole debt. That is Megersa can attach the rooms transferred to Abrehet for the whole three million birr and Abrehet cannot demand that the mortgage claim against the rooms owned by her should be proportionally reduced.

6.4.3 The Rights of The Third Party Who Acquired A Mortgaged Immovable

We have said that the mortgagee can attach the mortgaged immovable at the hand of third party who acquired a right on the immovable after the creation of the mortgage. However, the law has provided some protections and privileges for persons who obtained a right in rem on mortgaged immovable. We will discuss these rights as follows:

1. The person who acquired the immovable has the rights of the guarantor.
2. The person who acquired the immovable and added value to the immovable by improving the immovable, by adding buildings, by planting trees or crops or in any other means has the right to be paid out of the proceedings of the immovable. To explain with an example. Assume in our previous example Abrehet added three more rooms after she acquired the immovable from Kebede. Later on, Megersa attached the immovable at Abrhet's hand and the immovable was sold Abrehet has the right to be paid first the price increment obtained due to the new three rooms constructed by her.

1. The person who acquired the mortgaged immovable has also a right to collect fruits and become an owner thereof. Generally, it enjoys all rights that emanate from ownership. It can transfer the immovable further to third party or it can create a right in rem on the immovable by entering into usufructs agreements, servitude agreements or by leasing the immovable. His right of ownership would be limited only when the immovable is attached by the mortgagee.
2. A third party whose immovable has been attached because of the mortgage created by the previous owner can demand warranty from the previous owner who transferred the immovable to him though he acquired the ownership gratuitously.
3. The right to be surrogated. Dear students, we have discussed under general contract law that there are two kinds of subrogation; contractual subrogation that results from contract and legal subrogation that results from the law. Accordingly, a person whose immovable was attached because of the previous owner who transferred the immovable would be legally subrogated to the rights of the mortgagee who attached the immovable. Referring our previous example, when Megersa made the house to be attached and sold in the hands of Abrehet to satisfy his claim, Abrehet would be subrogated into the rights of Megersa. That means Abrehet can claim from Kebede all rights of Megersa that emanate from the original obligation that was protected by the mortgage. It is important to emphasis here that Abrehet has two options in this

scenario, to exercise the right she obtained by the legal subrogation or her right as a purchaser of the immovable.

4. Another very important privilege of the third party who acquired a mortgaged immovable is that he can pay the creditor who has a mortgage right over the immovable and set free the immovable. The creditor cannot refuse payment from the third party who acquired the immovable and attaché the immovable. The third party who paid the creditor would be subrogated in to the rights of the creditor.
5. A right to redeem the immovable: the third party has a right to offer to redeem the mortgaged immovable from the mortgagee. The mortgagee can make the offer unless a proceeding for the attached is started. The person who offered to redeem the immovable shall remain bind for sixty days and he cannot withdraw its offer before sixty days. The mortgagee has the right to reject the offer to redeem the immovable within sixty days. Silence of the mortgagee would amount to an acceptance of the offer therefore if the mortgagee wants to reject it should expressly reject the offer. A mortgagee who rejected the offer of the third party to redeem the immovable should advance the cost of the public auction. With regard to the question who should pay the cost of the auction the law has designed very effective mechanism that provides a good incentive for all parties to act rationally. The mortgagee who rejected the offer would bear the cost of the auction unless they obtain a price that exceeds by 10% the price offered by the third party who acquired the immovable. This indicates that the mortgagee should make a rational calculation considering the price offered, the cost of auction and the current price of the immovable. To reject the offer, they should rationally be convinced that the offered price is less than the estimated price minus the cost of auction or the estimated current price of the immovable is greater than the offered price by 10+ %.

Parties generally fix the time duration of their contracts; however, when the contract fails to fix the contract period, they can terminate the contract by giving a notice that is acceptable by usage and custom. Contract may also extinguish by cancellation, invalidation, by agreement of parties or due to laps of period of limitation.

In addition to what is generally applicable to contract in general there are some requirements for mortgage contract to be extinguished. The first requirement is that the registration shall be concealed only by the order of the court and the court orders cancellation when the creditor

agrees in writing. However, the creditor cannot refuse the cancellation unless he has a good cause that justifies his refusal. If the creditor refuses without good cause then he would be liable to pay damages. It is also important to underscore that cancellation that is made even by mistake cannot revive. Once the mortgage cancelled the mortgage needs to be registered again the registration will be considered as a new registration and it will be effective only from the date it is registered again. The only remedy that is available to the person whose interest is affected by the wrong cancellation is to claim damages from the person who caused the cancellation without good cause.

The Civil Code has mentioned some grounds that may cause the cancellation of the mortgagee. Mortgage as a collateral contract in principle extinguishes when the original debt that is protected by the mortgage extinguishes. Therefore, cancellation can be requested when the original debt protected by the mortgage extinguished.

Dear students! Can you envisage a situation when the mortgage contract may outlive the original debt? Hint see articles 3049, 3106, 1923 and 2026) _____

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Another ground to request cancellation of the mortgage could be the creditor renunciation of the mortgage. However, the law sets some strict requirements to assure that the renunciation by the creditor is intended to have the effect of cancellation. The law requires that the creditor has a clear intention to renounce the mortgage thus anything that is not clearly said and that is not in written will not entitle the mortgagor to require cancellation of the mortgage. The requirement of a written agreement for cancellation of a mortgage is also supported by articles 1722 and 2006 in the part that regulates contracts in general.

The fact that the creditor makes subrogation impossible for the mortgagor who is not personally liable to the original debt can be also ground to request the cancellation of the registration of mortgage.

6.5 Extinction of Mortgage

In principle, as per Art.3109 of the civil code, a mortgage shall be extinguished where the registration of the mortgage is cancelled in the registers of immovable property. The cancellation may be required by interested party where:

a. the claim secured by the mortgage is extinguished; or
b. the mortgagee has renounced his mortgage; or
c. the immovable mortgaged has been sold by auction and the proceeds of the sale have been distributed among the creditors; or
d. the amount accepted by the creditors in cases of an offer of redemption has been distributed among the creditors.

UNIT SEVEN

7 LAND USE RESTRICTIONS

7.1 Introduction

Dear students! Ownership right of a property provides the owner the widest and most complete rights. As discussed in different parts of this material, it includes the right of use and enjoyment, lease, mortgage, inheritance, sale, exchange and so on. For example, article 1204 deals ownership as the widest right that may be held and this right may not be neither be divided nor restricted except in accordance with the law. Now the phrase "...except in accordance with the law" is the subject matter of our discussion here. It means ownership right of a thing may be freely and fully exercised without any limitation except as may be stipulated by law for public purpose. Look also article 40 (1) of the constitution

> *Every Ethiopian citizen has the right to the ownership of private property. Unless prescribed otherwise by law on account of public interest, this right shall include the right to acquire, to use and, in a manner compatible with the rights of other citizens, to dispose of such property by sale or bequest or to transfer it otherwise.*

Well, of course, this is a general principle which may not include the ownership of land which is not subject to sale or exchange. But within the ambit of the other rights the possessor or the lessee has full right to enjoy these rights. As can be gathered from the reading of the above two important laws, however, private ownership can be restricted or limited on account of public interest. Indeed, such restrictions are found in different legislations, especially those related to land and building.

Dear students! In this small unit we shall briefly discuss those restrictions made on land or building in the form of limitations on use right because of master plan, environment, public health etc.; secondly those rights related to servitude, and finally expropriation rules shall be discussed.

Objectives

After reading this unit students are expected to:

- Define the concepts of expropriation and servitude

- Understand the justifications and nature of the different land use controls
- Understand the limits of private property

7.2 Nuisance Laws

Dear students! What is nuisance? How nuisance laws restrict land use right? Try please! _____

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Have you tried? That is nice! Nuisance is an activity that arises from unreasonable, unwarranted or unlawful use by a person of his on property. It is mostly related with the abuse of right of an immovable. The lists of activities that can cause nuisance are not exhaustive. This type of activity is prohibited by many laws including our civil code. Hence, as one form of restrictions owners of an immovable, mostly building, may not use their property in a way that disturbs their neighbors. This principle is also included in our civil code under article 1225:

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

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

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

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

7.3 Planning and Building Regulations

Dear students! Can an owner of a building change the plan of the building? Can he build a new building on the land leased or demolished it whenever he wishes it? _____

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Have you tried? That is good! A study of planning and building legislations of different countries of course reveal some difference between them. One fundamental principle, however, is distinguishable, including Ethiopia. A change the use of such building requires a permit. Basically, change can be divided in to three categories: construction of new building, work on existing building, and demolition of the building. This means use of land d building becomes under extensive official control.

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

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

The other point is that owner of a building may not demolish it without a permission as envisaged under article 32 of the proclamation.

7.4 Environmental and Other Concerns

Dear students! What environmental concerns restrict land use? Try please!

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Have you tried? That is nice! Other legislation which relate to environment (proc. No. 300/2002), provides different restriction on property owners concerning management and release of dangerous and hazardous activities that may damage the environment. It among

others prohibits people from emitting or releasing, toxic substances, chemical, or radioactive substance from their property that harms human health and wellbeing, the biota and the aesthetic value of nature.

7.5 Expropriation

Dear students! How expropriation restrict land use? Try please! _____

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Have you tried? That is nice! Expropriation is another form of restriction on land owners or holders. Expropriation is a means of land acquisition for the state. It is forced taking of land from the owner against his wish but on payment of fair compensation. This is an inherent power of the state which was recognized from time immemorial. It goes even to the roman and biblical periods where states used to take private land for public purpose development activities. The issue of expropriation was formerly treated in the civil code, but now there is a new proclamation No. 455/2005 and an implementation regulation No.135/2007 at federal level and different other regulations at state level. The subject is a wider one, and here we shall discuss it only briefly so as to give students an insight to the subject.

The concept of public acquisition of land without the consent of the owner is known by different names. In most common law countries, either "eminent domain" (USA) or "compulsory purchase" (UK & other commonwealth countries) is used. On the other hand, in civil law countries, "expropriation" is the most utilized terminology. Expropriation is a process whereby the state may take privately owned or leasehold land without the consent of the owner\possessor for a public purpose accompanied by payment of fair compensation. This concept has not been properly defined in the present expropriation proclamation. But for comparison purpose here we shall provide a definition from the civil code and from the Amhara Region Rural land legislation.

The Code, under Article 1460, provides:

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

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

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

Another definition from the *Corpus Juris Secondum,*

> …...it is the right of the nation or state, or of those to whom the power has been lawfully delegated, to condemn private property for public use, and to appropriate the ownership and possession of such property without the owner’s consent on paying the owner a due compensation to be ascertained according to law.

The space doesn’t allow us to have a hair-splitting interpretation of the subject. The important elements in any expropriation process and practice are, however:

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

Many writers argue that expropriation was an inherent right of the state and the purpose of the constitution is just to recognize such right or power of the state. As a state the government has the duty to construct infrastructures such as roads, dams, schools, hospitals, etc. and whenever it needs a certain land for such purpose it can take the land. Such practice can be traced to the biblical period, to the Roman times as well as to middle age European and English practices. In Ethiopia, it gets recognition during the Menelik era. Today the constitution under article 40(8) recognizes the right of the state to take any private property against payment of commensurate compensation.

Expropriation is one means of land acquisition. The government or other developers can get land, besides to negotiation and other purchasing mechanisms, by way of expropriation

without the consent of the owner. The justification usually given in favor of expropriation is one related with the need of development. It is said that unless we forced to surrender his land, the landowner would otherwise, due to his monopolistic position, be able to block development when refusing voluntary transfer of his land or claiming for an unrealistically high compensation. Another reason for expropriation is the need to ensure the efficiency of land acquisition. Efficiency means the most productive use of resources to satisfy competing material wants. Hence a plot of land may be expropriated if the new owner can develop it and makes it more profitable to the society.

Similarly, the justification for expropriation given in Ethiopia is that of land acquisition. The preamble of the present expropriation legislation (Proclamation No. 455/2005) justifies expropriation on the fact that:

> *"urban centers of the country have, from time to time, been growing and the number of urban dwellers has been increasing and thereby land redevelopment for the construction of dwelling houses, infrastructure, investment and other services has become necessary in accordance with their respective plans as well as preparation and provision of land for development works in rural areas has become necessary."*

The other element in expropriation is the payment of fair compensation. Owners/holders/leaseholders of the land should be compensated for the development or change they bring about on the land. In most legal systems people are compensated for the ground itself and the fixtures (building, excavation, trees etc.) on the ground. As we shall see it later on in Ethiopia, in urban areas, instead of compensating for the value of the ground people are given replacement land.

The other element is the requirement of "public purpose/use." The idea is that state may not take a private land arbitrarily; it must be justified on public purpose. It means that the taking of the land must be for public interest. What constitutes public interest is not a settled argument. In its traditional concept, public interest includes the traditional state responsibilities: Construction of roads, schools, dams, bridges, etc. Modern interpretation of the concept however even includes that the taking of the land for private development activities, malls, hotels etc. may amount to public interest.

A good example in this regard is a broad and narrower definition of the term given by US courts. The broad view holds that "public use/purpose" means advantage or benefit to the public. Nichols puts this definition in the following way:

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

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

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

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

Now compare the following Ethiopian legislations with the above two definitions

Article 2(5) of proc. No. 455/2005

> *"Public purpose" means the use of land defined as such by the decision of the appropriate body inconformity with urban structure plan or development plan in order to ensure the interest of the peoples to acquire direct or indirect benefits from the use of the land and to consolidate sustainable socio-economic development;*

Article 2(15) of Zikre Hig, Proclamation No. 133/2006

> *"Public Service" means a service given to the public directly or indirectly, such as government office, school, health service, market service, road, religious institutions, military camps, and the likes, and includes activities assumed important to the*

development of people by the Regional Government and to be implemented on the rural land.

7.6 Servitude

Dear students! ` Assume that you have a house in one area but for some reason that you have no way out to the next street? Or that your house must be connected to the water pipeline or the sewerage service? What will you do?_____

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Have you tried? That is awesome! Such related problems are solved by the concept of servitude. The solution is that the neighboring land must provide you or your house with a right of way, a right of passing over it the pipelines or the sewerage tubes. Servitude is defined as "a charge encumbering a land (servient tenement) for the benefit of another land (the dominant tenement.)" And the type of obligation or encumbrance made on the burdened land, that is the servient land is "the obligation to submit to the commission of some acts by the owner of the dominant tenement or to refrain from exercising some rights inherent in ownership." Read article 1359 of the civil code.

This means the servient land is burdened with some obligation for the purpose of the advantage of the dominant tenement. This type of right is right in rem or real rights which are related to the properties. Hence, servitude may only accessorily cast upon the servient owner the burden to commit any act (1360). The burden of servitude shall transfer with the land irrespective of the change of the owner.

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

Servitude can emanate from contract, will, the law or custom. In case of contractual servitude, the agreement may be made between owner of the dominant and servient lands. On the other hand, servitude that emanates from a will shall be made by the will of the deceased when it divides a property in to two or more parcels (1362.) Like any real rights servitude must also be made in writing. And in order for it to be defense against a third party

it must be registered. The third method of creation of servitude is acquisition by prescription. According to article 1366 an apparent servitude may be acquired by enjoyment for ten years. Apparent servitude is one which is visible and conceivable to a third party. Sometimes rights of way across another's land on foot or with animals can be determined by the custom of the place (1371.)

For instance, in our civil code, there are instance of servitude on different things. In Art.1220 about pipes, an owner shall, against full payment in advance of compensation for the damage thereby caused, allow the installation on his land of water, gas or electrical lines or similar works to the benefit of other lands. Since the right of way is categorized under a servitude rights, there is a provision on Art.1221. It reads as an owner whose land constitutes an enclave or whose access to public ways is not sufficient to enable him to exploit his land may demand right of way from his neighbor against payment of compensation proportionate to the damage that may be caused there by. There is also an encumbrance on land owners that found below the other as stipulated on Art.1246. In this regard, the owner of land on a low level shall accept the flow of water from land on a higher level where such water flows naturally and not artificially. To this effect, the owner of the land below may not set up a dike to prevent such flow.

About drainages, as indicated on Art.1247, where the owner of the land above constructs drainage works on his land, the landowners below shall accept without compensation the water flowing there from.

About taking water from neighboring land through the application of servitude, Art.1249. envisages as an owner who requires water bordering his land for irrigation or other purposes may build on the neighboring riparian's land the works necessary for the taking of water. Besides, he shall have access to such neighboring land for the purpose of constructing or maintaining such works.

About taking water using aqueduct for irrigation purposes through the application of servitude, Art.1252 provides that an owner who wishes to make use for domestic or irrigation or other purposes of water which does not cross or border his land may apply to the court to be allowed to bring such water through other persons land against payment in advance of a fair compensation.

Art.1371 also provides the right of way in rural areas. It reads as rights of way such as the right to traverse a parcel of land on foot, with animals, during the dead season, across fields or out of a wood shall be of such extent as is recognized by local custom. In addition to this, rights of pasture, wood-cutting, watering animals, irrigation, other rural servitudes shall have the same extent.

Servitude are formal rights that could be enjoyed and practiced. In this regard, Art.1372 provides the means necessary for the enjoyment of servitude. The existence of a servitude shall entail the existence of the means necessary for the enjoyment of such servitude. Whoever benefits by a right to draw water from a well shall enjoy a right of way to such well.