ETHIOPIAN PROPERTY LAW

A TEXT BOOK

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Chapter 1: Introduction

1.1 A brief discussion of the origins of Ethiopian property law

Ethiopia adopted six comprehensive western-oriented codes of law between 1957 and 1965.[1] The aim of these codes was to lay the foundation of a market economy, and more broadly, to assist the country`s endeavor to ``modernize`` itself. The Civil Code of Ethiopia (the Code) is one of the six codes the country promulgated in this period. The Code was adopted on the 5th day of May 1960. It came into force on 11th day of September, 1960. This Code is still in force, although it has been amended several times.

The Code consists of five books. These are: Book I (Persons), Book II (Family and Successions), Book III (Goods), Book IV (Obligations) and Book V (Special Contracts). The third book of the Code runs from Article 1126 to Article 1674. This is the property law portion of the Code, which is to a large degree still in force. During the Derg regime[2] these provisions were not applied because of the leftist orientation of the regime, the prevalence at the time of anti-private property feelings,[3] and the nationalization of key means of production. The drafter of the Code, Rene David, believed that the property rules included in Book III of the Code were based on customary rules. He said he selected the concepts in this portion of the Code from Ethiopian traditions and restated them in the conceptual forms developed in Europe. In his view the concepts of private ownership (of land, buildings and agricultural implements), possession and other notions articulated by the Code predate the Code and are rooted in the traditions of Ethiopia. What he felt was needed was a clear articulation of those customary rules. For him the substance of Book III is entirely home-grown:

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[1] Criminal Procedure Code, Proc. 1961, *Neg. Gaz.*, 21st Year Extraordinary Issue No. 1; Civil Procedure Code, Decree No. 52, 1965, *Neg. Gaz.* 25th Year Extraordinary Issue No. 1; Penal Code, Proc. No. 158, 1957, *Neg. Gaz.* 16th Year Extraordinary Issue No. 1; Commercial Code, Proc. No. 166, *Neg. Gaz.* 19th Year Extraordinary Issue No. 3; and Maritime Code, Proc. No. 164, 1960, *Neg. Gaz.*, 19th Year Extraordinary Issue No. 1.

[2] This regime stayed in power from 1974-1991. In this period, a series of laws which undermined private property were issued. These included laws which nationalized rural land, urban land, extra houses and privately owned businesses. These legislative measures were taken without compensation of any sort. These laws were issued in 1975. See Public Ownership of Rural Lands Proclamation No 31/1975, *Neg. Gaz.* Year 34 No 26. See Also Government Ownership of Urban Lands and Extra Houses Proclamation No 47/ 1975, *Neg. Gaz.* Year 34, No 41.

[3] Ibid.

> The most important accomplishment of the civil code in the areas of ...property...was clarity, rather than to change the customary rules, to clarify these rules, to distill their essence, and to unify them on the basis of those which appeared most reasonable. Our goal was to end an intolerable confusion and uncertainty by choosing the rule most in conformity with the Ethiopian sense of justice and Ethiopia's interests, economic and otherwise. ...the principal contributions of western legal systems relate to the critical process used to select those rules that appear best suited to Ethiopia and the techniques used to formulate the rules. Thus, the Code limits itself to suggesting some new approaches and solutions, sometimes inspired by western practices, sometimes different from these practices but judged desirable in the social context of Ethiopia.....[4]

While this may have been his intent, a review of the Code reveals wholesale importation of western property rules, both in terms of legal concepts and language. If one goes through Book III in search of provisions based on customary property rules, one finds few and insignificant references to custom.[5] One has also the sweeping repeal provision in the Code, that is, Article 3347/1.[6] The ability to reference and apply customary laws under the Code is extremely limited. At the time the Code was drafted state policy devalued and underestimated customary laws for they were thought to undermine the social, political and economic progress of the country.[7] This policy view is reflected in the writings of Rene David himself:

> While safeguarding certain values to which she remains profoundly attached, Ethiopia wishes to modify her structure completely, even to the way of life of its people. Consequently, Ethiopians do not expect the new code to be work of consolidation, the methodical and clear statement of actual customary rules. They wish it to be a program

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[4] Rene David, "Sources of the Ethiopian Civil Code", 4:2 *Eth. J. L. 341* (1967), at 345-346.

[5] Articles 1132/1, 1168/1, 1170/2, 1370, 1386-1409 and 3363-3367 of the Code assign some roles to customary rules.

[6] This sub-article in the Civil Code of the Empire of Ethiopia Proclamation No. 165/1960, *Neg. Gaz.* Year 19th No. 2, provides: "Unless otherwise expressly provided, all rules whether written or customary previously in force concerning matters provided for in this Code shall be replaced by this Code and are hereby repealed".

[7] George Krzczunowicz, "Code and Custom in Ethiopia", 2:2 *Eth. J. L. 425* (1965), at 429-430; see also John H. Beckstrom, "Transplantation of Legal Systems: An Early Report on the Reception of Western Laws in Ethiopia", 21:3 *Am. J. Comp. L. 557* (1973) at 570.

> envisaging a total transformation of society and they demand that for the most part, it set out new rules appropriate for the society they wish to create. Ethiopia cannot wait 300 or 500 years to construct in an empirical fashion a system of law which is unique to itself, as was done by the Romans and the English. The development and modernization of Ethiopia necessitate the adoption of a "ready-made" system; development and modernization force the reception of a foreign system of law in such a manner as to assure as quickly as possible a minimal security in legal relations. [8]

As the author has argued elsewhere, the drafter's lack of familiarity with the customs and traditions of the country, the virtual absence of a record of relevant customary rules, and the general policies of the state which favored large scale importation of foreign laws to the country all support the assertion that Book III of the Code has its origins in foreign rather than local Ethiopian law.[9] The implication is that a proper study of property law as embodied in the Code requires reference to foreign legal resources, be they cases, statutes or literature. In preparing this text the author has been limited by the lack of available foreign materials in English[10] in Ethiopia. Consequently this text does not purport to provide a comprehensive or exhaustive review of comparative and foreign law. Pertinent and available English sources are referred to throughout the text where they can illuminate the discussion.

1.2 Sources of property law in Ethiopia

While a primary source of property law in Ethiopia remains Book III of the Code other pieces of legislation also contain relevant and important provisions. The Federal Constitution and the Constitutions of the nine regional states contain rules vital to the governance of land and water. Federal proclamations such as the proclamation nationalizing rural and urban land, the proclamations governing water, land lease, land administration, expropriation, condominium, copyright and trademarks contain provisions which affect property. In addition some regions have enacted proclamations which pertain to rural land use and administration. There are also property rules in penal law, civil procedure law, family law and succession law. This book focuses upon the fundamental

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[8] Rene David, "A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries", 37:2 *Tul. L. Rev.* 187 (1963) at 188-89 & 193.

[9] Muradu Abdo, "Introduction to Legal History and Traditions", (Addis Ababa: Bahir Dar and Jimma universities, 2010) at 189.

[10] While some foreign civil law materials are in English, they are often written in French or German. The author does not have the requisite language proficiency to effectively reference those sources.

principles of property law in Ethiopia and consequently does not address the more specialized and advanced analysis of every aspect of property law. Specifically it does not cover land law, water law, property under customary legal systems, and intellectual property law. Readers are advised to refer to other more specialized resources for comprehensive treatment of these subject areas.

1.3 Jurisdiction over property law

Who has the power to enact laws with respect to property: the federal government or regional states or both? The Federal Constitution (the Constitution) apportions jurisdiction in three ways. The first is in regard to land, water and other natural resources where the federal government and regional states enjoy jurisdiction over different aspects of these same resources. In relation to land, the federal government can issue laws and formulate policies while the states have jurisdiction to make implementing legislation, which in turn entails the establishment of institutions.[11] Under Article 51/11, the federal government is given the power "to determine and administer the utilization of waters or rivers and lakes linking two or more States or crossing the boundaries of the national territorial jurisdiction". By operation of Article 52/1,[12] the regulation of bodies of water wholly within state boundaries is reserved to the states. Shared power over these resources makes sense as both levels of government have valid interests in the governance of these vital resources. The regulation of both land and water rights involve national politics, equity considerations and the existence of the country as a polity. For these reasons, it is not surprising that the federal government has taken a leadership role in determining how land and water should be used and regulated in Ethiopia. States involvement is equally important since usage and regulation is directly impacted by the peculiarities of local settings and local autonomy and water and land regimes are tested on the ground in specific localities.

Secondly the Constitution gives the federal government exclusive jurisdiction to enact and implement copyright and patent laws, and arguably, trademark and trade secret laws.[13] The need for uniformity and compliance with

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[11] See Articles 51/5 and 52/2 (d) of the FDRE Constitution Proclamation No. 1/1995, *Fed. Neg. Gaz.* Year 1, No. 1.

[12] Which provides: "All powers not given expressly to the Federal Government alone, or concurrently to the Federal Government and the States are reserved to the States."

[13] Article 51/19 of the FDRE Constitution: "It shall patent inventions and protect copyrights".

international law and standards appear to have dictated centralized control of intellectual property law.

Finally the Constitution gives the federal government jurisdiction over the creation and enhancement of a single economic community, which is one of the fundamental aspirations of the FDRE Constitution.[14] This gives the federal government power over property other than natural resources (chiefly land and water) and intellectual property. Thus if a given set of property rules is believed to promote a single economic community in the country, the jurisdiction to issue and as well as to apply them will lie with the federal government. Those that do not are within the jurisdiction of the regional states.

It is instructive here to reproduce what the Federal Constitution has to say on the matter. Article 55/6 states that the House of Peoples` Representatives "shall enact civil laws which the House of Federation deems necessary to establish and sustain one economic community". Living as one economic community is also stated in the preamble of the Constitution[15] as one of its central objectives. A plain reading of Article 55/6 reveals that the single most important requirement for a given civil law to be federal law is that it should be a law that which enables the enhancement and continuation of a single economic community. A national economic interest must underpin the issuance of such federal civil laws (e.g., federal contract, property, succession and family law). The determination of the existence of that interest is made by the House of Federation after conducting appropriate studies and it is only on the recommendation of the House of Federation that the federal government shall issue the legislation. Thus, property laws which advance the interests of a single economic community are within the jurisdiction of the federal government only when expressly authorized by the House of Representatives. Hence, property issues in Ethiopia do not automatically fall within the ambit of federal or state authority. Rather the Constitution has mandated the power to allocate jurisdiction over property issues to the House of Federation and the

[14]See Article 55/6 of the FDRE Constitution governing the powers and functions of the House of Representatives: "It shall enact civil laws which the House of the Federation deems necessary to establish and sustain one economic community."

[15]The Preamble provides ":...Convinced that to live as one economic community is necessary in order to create sustainable and mutually supportive conditions for ensuring respect for our rights and freedoms and for the collective promotion of our interests...".

House of Peoples` Representatives which are required to take the criterion of ` one economic community`` seriously.[16]

1.4 Style and methodology used in this book

This book is principally an exposition of the provisions of Book III of the Code. In drafting the book the author has adopted a version of positivist methodology which states that law is to be reasoned; a legal rule is not out there to be found.[17] It is the author's view that there may be multiple ways of appreciating a given legal rule. In this spirit the provisions of the Code as found in their Amharic and English versions have been read and are discussed in context. In considering the provisions the author has had reference to an expert translation of Book III from the French master text.[18] Each chapter draws insights from jurisprudence, pertinent foreign laws and other areas of Ethiopian law. Court cases serve to elucidate some rules and principles of the Code. But the cases, like the foreign sources are thinly distributed across chapters and issues. This is not because of want of effort but it results from the inadequacy or inaccessibility of resources in Ethiopia.

Readers of this book will benefit from having a copy of the Civil Code at hand, for not all provisions of Part III will be fully and completely reproduced in this text. Each chapter begins with an introduction, delves into the substance of the law, and closes with conclusions and review questions. The chapters provide commentaries on the articles of Book III that attempt to clarify

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[16]Yet it should be noted that legislative practice indicates the federal government is increasingly assuming the power to pass property laws without reference to the criterion of one economic community. Lack of expertise, the country`s governance history which hugely favors the concentration of power at the center and the existence of an essentially one party system at both the federal and regional levels have likely contributed to the centralization of civil laws, property law included. An example is the assumption of jurisdiction by federal institutions in relation to the administration of water resources of the country regulated under Water Resources Management Proc., 197/2000, *Fed. Neg. Gaz.* Year 6th, No. 25. This legislation, under Article 2 (4-6), gives pertinent federal institutions power over virtually every type of water, be it underground or surface or inter-regional or intra-regional.

[17]Mike McConville & Wing Hong Chui (eds), *Qualitative Legal Research in Research Methods for Law*, (Edinburgh: University Press, 2007) at 22.

[18]Bililligh Mandefro, Revised Unauthorized Unofficial Translation of Arts. 1126-1674 of Book III of the Ethiopian Civil Code (1960) From the French Original Draft (Addis Ababa University, Law Library Archive) (1973-1975).

ambiguities, establish interrelationships, identify gaps and inconsistencies and inquire into the current application of the provisions. The text also addresses the impact of legislative amendments on the provisions found in this part of the Code.

1.5 An overview of the contents of this book

This book attempts to answer five principal questions:

1. Who may be a subject (holder) of private property?

2. How are the objects of private property defined? How and on what basis are they classified?

3. What is the nature of property? What are the rights and responsibilities of private property holders (*rights in rem*)? How is private property acquired, transferred and extinguished?

4. What is the justification for the institution of private property?

5. What restrictions are imposed on private property?

With respect to the first of these questions we conclude that currently, though not historically, all persons, physical or juridical, are capable of holding property, though not necessarily capable of exercising property rights. For example, the law prohibits some persons such as minors and judicially interdicted persons from transferring their property rights because the law considers them to lack the capacity to understand the nature and consequences of these transactions. The question of who is entitled to hold and exercise property rights belongs to the domain of law of persons and is merely introduced here.

Three chapters are allotted to the question of the objects of property law. These chapters introduce the reader to basic legal concepts such as that a person cannot exercise property interests in the abstract and that there must be an object over which the rights of property are enjoyed.

The concept of corporeal versus incorporeal property is discussed in Chapter 3. A corporeal good is anything which can be perceived by human sense organs. Included within the purview of this generic term are things which can be seen, smelled, tasted and whose existence can be detected through touch. If the existence of a thing can be established through the five human sense organs, then it is a corporeal good. The existence of corporeal goods also implies the existence of things that are not capable of human perception. Thus, there are intangible matters which are the subject of property law even though they exist primarily in human imagination. These incorporeal/intangible properties are generally rights which have economic significance. They include things like

copyright, patent and commercial papers (i.e., cheques and bank drafts). Chapter 3 also discusses the concept of things in the public domain. Things in the public domain, as that chapter explains, are those corporeal goods that may not be held as property by any identifiable private person, that is, those resources which a given country dedicates to the use of the general public.

Chapter 4 dwells on considerations of how and for what ends the objects of property are classified and sub-classified by scrutinizing the principal division of things in the scheme of the Code. It is followed in Chapter 5 with a discussion of the subsidiary classification of objects of property contained in the Code. These two chapters explain the legal implications of division and sub-division of corporeal goods.

The third question raised is about the nature of private property. The book, following Book III of the Code, conceptualizes the nature of private property as *rights in rem* established over a corporeal thing. The question, in other words, relates to the rights and powers a person may enjoy in relation to an object capable of appropriation as well as her power to exclude, in respect of such thing, all other persons in the world. In the vocabulary of Book III of the Code, this series of prerogatives of a holder of property are known by such concepts as ownership, usufruct, servitude, preemption, promise of sale, right of recovery, pledge and mortgage. When these prerogatives co-exist in time and in subject matter in the hands of a single person, full ownership exists. When such rights are dismembered and located in the hands of several persons at the same time in respect of the same object, then there is the case of less than full ownership. The lion's share of this book is spent analyzing the Code's provisions on the nature and contents of property. Hence, Chapters 6, 7, 9, 10 and 11 are devoted, respectively, to the expositions of possession, of ownership, of joint ownership, of usufruct and of servitudes. The book also raises the broader question of the definition of the concept of property itself. To this end, Chapter 2 is devoted to the articulation of a foundation definition of property for use throughout the book.[19]

The Code has incorporated several provisions which address the modalities of obtaining, of proving and extinguishing property interests. Chapter 8 examines these provisions in depth. While these provisions focus upon private and individual ownership they are easily extended to other types of property ownership. These provisions articulate the requirements for enforceable property interests. Some provisions regulate the voluntary transfer of

[19]The treatment of the various conceptions of property found in Chapter 2 is restricted to private property, not communal or collective property.

property while others address situations of the involuntary flow of property rights from one person to another.

The fourth main question raised in the book is concerned with understanding the justification for the institution of private property. In answering this question various theories for or against private property are explored. A decision to assign to a person the right to enjoy a certain resource to the exclusion of all other persons in a world of scarcity raises the question of justification, as those excluded from interfering with the property are called upon to finance its protection via taxation and court systems.[20] Thus, a lot of ink has been split over the desirability of protecting the institution of private property. There are those who argue for the destruction of private holding of resources that matter, i.e., the means of production. Others zealously defend private property on the grounds of efficiency, utility and liberty. Still others express reservations about the excesses of private property, without arguing for its abolition. These theories are discussed, not in a single chapter, but throughout the text. Thus theories of private property are discussed in connection with conceptions of property (Chapter 2), possession (Chapter 6), ownership (Chapter 7), occupation and accession (Chapter 8) and expropriation (Chapter 13).

The fifth question raised in this book is what restrictions apply to the exercise of private property rights. The Constitution and the Code impose a number of restrictions. These limitations are justified on the basis of protecting the interests of others and the public. The book explores these limitations and argues that where warranted such limitations should not undermine or unnecessarily impinge on the contents of property interests. Chapters 12 and 13 cover topics like: What is a limitation? What are the different types of limitations? What are the sources of limitations? Do we have parameters to limit limitations? How can one justify limitations? Under what situations is the state liable to follow procedures and pay compensation when it seeks to interfere with private property? Chapter 12 deals with limitations on property in generic terms. Chapter 13 focuses on expropriation: the power of the state to take private property for public purpose upon payment of compensation.

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[20] J. Waldron, *The Right to Private Property*, (New York: Oxford University Press, 1988) at 8-9.

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Chapter 2: The Concept of Property

2.1 Introduction

The notion of property is ambiguous. This has naturally led to it being given a diversity of meanings. R. H. Tawney writes:

> Property is the most ambiguous of categories. It covers a multitude of rights which have nothing in common except that they are exercised by persons and enforced by the state. Apart from these formal characteristics, they vary indefinitely in economic character, in social effect, and moral justification. They may be conditional like the grant of patent rights, terminable like copyright, or permanent like a freehold, as comprehensive as sovereignty or as restricted as an easement, as intimate and personal as the ownership of clothes and books, or as remote and intangible as shares in a goldmine or rubber plantation.[1]

This chapter discusses various ways of defining the concept of property. The emphasis throughout is on private property as opposed to communal or collective property. The chapter explores the following concept of property: property as wealth, as physical thing, as a relationship between a person and a thing, as a legal right, as proprietary right, as sole ownership and as certain *rights in rem*. The chapter attempts to determine which conception of property is recognized in the property law of Ethiopia and includes a special section on the major features of rights *in rem*. The chapter concludes with a series of review questions.

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[1] R. H. Tawney, in an extract from the "The Sickness of an Acquisitive Society" reprinted in C. B. Macpherson (ed.) *Property: Mainstream and Critical Positions*, (Oxford: Basil Blackwell 1978) at 136, as cited in Jeremy Waldron, "What Is Private Property?", 5:3 *Oxford J. Legal Stud.* 313 (1985) at 318. In his article Waldron argues "that private property and private ownership are *concepts* of which many different *conceptions* are possible, and that in each society the detailed incidents of ownership amount to a particular concrete conception of these abstract concepts" (at 317). In his view those who make a case against concepts like private property often exaggerate the difficulties in their effort to indict the concept. He cites this excerpt from Tawney as a example of how this is done; arguing that while what is said therein incorrect, it raises a number of distinct issues about the concept of property, and our understanding of them does not gain from their simple juxtaposition (at 317-318).

2.2 Conceptions of property

Economists and some lawyers view property as a person`s wealth. In the 1930's Walton Hamilton defined property as "a euphonious collocation of letters which serves as a general term for the miscellany of equities that persons hold in the commonwealth."[2] While it may seem like commonsense to equate property and wealth, it may not be the case in fact. Professor Felix Cohen engaged his students in the following jurisprudential analysis of this question which arrives at the conclusion that property is not wealth for there may be property without economic value and value without property:

> C. [Professor Cohen]...Do you see any point in the suggestion of Hamilton that property is essentially an economic concept?
>
> E. [student Mrs. Evans] Yes it seems to me that when we are talking about property we are really talking about economic goods or wealth.
>
> C. I have here some personal papers that are of no possible value to anyone else in the world. If somebody took these papers from me and I brought suit to have them returned, do you think the court would require the return of these papers?
>
> E. Yes, I suppose it would.
>
> C. Would you then say that these papers are my property even though they have no economic value?
>
> E. Yes, I would.
>
> C. Or, let us suppose that I have an inalienable life estate in a piece of land for which I have no possible use. Economically, the land is a burden rather

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[2] Walton H. Hamilton & Irene Till, "Property", in Edwin R. A. Seligman & Avlin Johnson eds., *11 Encyclopedia of the Social Sciences* 528 (1937). See also Adam Mossoff, "The Use And Abuse Of IP At The Birth Of The Administrative State", 157:6 *U.Pa.L.Rev.* 2001 (2008-2009), wherein he credits Felix Cohen and other legal realists with articulating the "nominalist and positivist nature of legal-realist property theory, what is referred to by modern legal professionals as the "bundle of sticks" metaphor with its attendant emphasis on the right to exclude as the essential stick that defines a legal entitlement as property" (at 2008). Thus the "modern orthodoxy is that "property" refers to an aggregate set of social relations—various rights and obligations between citizens that are bundled together for social contingent policy reasons." These have been described as a bundle of disparate rights: the right to use, the right to exclude the right to transfer. (at 2009) Although for legal realists like Cohen "property was not defined by a single right or definitive trilogy of rights. Rather it is a "bundle of rights". Moreover, this bundle has no fixed core or constituent elements." (at 2012)

than an advantage to me. Still, if somebody trespassed on it I could get at least a nominal judgment. Would you call that estate my property?

E. Yes, I suppose we would have to call it private property.

C. Then there is such as a thing as valueless property, and economic value is not essential to the existence of legal property?

E. Yes, I suppose we would have to accept that conclusion.

C. What about the other side of Hamilton's equation between wealth and property? Could there be wealth that did not consist of private property? Suppose I discover a new form of exercise that increases the life-span of diabetics. Would that discovery add to the wealth of mankind?

E. Yes, I suppose it would, if put to use.

C. And to the extent that I was willing to communicate that discovery to individuals and charge them for the teaching, the discovery would be of value to me, would it not?

E. Yes, I suppose it would.

C. And yet this bit of knowledge which I could not prevent anyone else from using or discovering would not be property, would it?

E. No, I suppose not.

C. Then it seems to me we have come to the conclusion that there is also property less value.

E. I see no way of avoiding that conclusion.

C. Would you agree that air is extremely valuable to all of us?

E. Yes, of course.

C. Why then is there no property in air?

E. I suppose because there is no scarcity.

C. Suppose there were no scarcity of any material objects.

E. I suppose then there would be no property in material objects.

C. Would you say then that private property is a function of privation?

E. Yes I suppose it is, in the sense that if there is no possibility of privation there cannot be private property.

C. And would you also say that wealth is a function of plenty?

E. Yes, if we think of wealth broadly as covering the whole field of human goods, or utilities, or enjoyments.

C. Then, wealth and property are in some ways opposites rather than identical?

E. I am not sure what that means, practically.

C. Doesn't it mean, practically, that if we could create a situation in which no man lacked bread, bread would cease to be an object of property; and if conversely, we could create artificial scarcities in air or sunshine, and then relax these scarcities for a consideration, air and sunshine might become objects of property? Or, more generally, a society might increase the sum of its goods and enjoyments by eliminating one scarcity after another and thus reducing the effective scope of private property.

E. Yes, I suppose that is so. At least, I don't see how one can maintain that private property is identical with goods or wealth.

C. Well, that seems to leave us with a further point of general agreement. Property may exist without value; value may exist without property; private property as a function of privation may even have an inverse relation to wealth; in short, property is not wealth. But what is it? [3]

Property can be conceived of as an object over which rights are exercised. For Ahrens property is "a material object subject to the immediate power of a person".[4] Bentham considers it `metaphorical` and `improper` to extend the term to include rights other than those which relate to material things".[5] Blackstone and Hegel defined property in terms of external objects. Thus Blackstone reasons:

In the beginning of the world, we are informed by holy writ, the all-bountiful Creator gave to man "dominion over all the earth, and over the

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[3] Felix S. Cohen, "Dialogue on Private Property", (1954) *9 Rutgers L. Rev. 357* at 363-365. Students are encouraged to read this article in its entirety. The Socratic dialogue on property which this is excerpted from was intended to be included in a handbook on legal philosophy Professor Cohen was then preparing. In this article Professor Cohen posits the following "realistic" definition of property: "Private property is a relationship among human beings such that the so-called owner can exclude others from certain activities or permit other to engage in those activities and in either case secure the assistance of the law in carrying out his decision" (at 373).

[4] As quoted in P. J. Fitzgerald (ed.), *Salmond on Jurisprudence (12th ed.)* (London: Sweet & Maxwell, 1966) at 412.

[5] As quoted in Ibid.

fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth." This is the only true and solid foundation of man's dominion over external things, whatever airy metaphysical notions may have been started by fanciful writers upon this subject. The earth, therefore, and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the Creator.[6]

Hegel observes: "A person must translate his freedom into an external sphere, in order that he may achieve his ideal existence."[7] Hegel fuses external objects with the person of the property holder while Blackstone paints a person as possessing untrammeled sovereignty over external objects.

Most people understand property to be physical things owned by someone.[8] In ordinary conversations, a person points to her car or to her house as her property. In contrast, the law generally defines property as legally recognized rights held by one in relation to others with respect to a thing.[9] For instance, when people want to refer to their usufruct or mortgage rights in a house, they are not talking about the object mortgaged or given in usufruct which is constructed out of bricks and steel, rather they have in mind some legal entitlements to subject matter mortgaged or assigned in usufruct. The conception of property as a physical thing does not require the thing have an associated economic value, that is, the thing may or may not have economic value.[10]

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[6] Sir William Blackstone, *Commentaries on the Laws of England in Four Books. Notes selected from the editions of Archibold, Christian, Coleridge, Chitty, Stewart, Kerr, and others, Barron Field's Analysis, and Additional Notes, and a Life of the Author by George Sharswood. In Two Volumes.* (Philadelphia: J.B. Lippincott Co., 1893). Vol. 1 - Books I & II. Paragraph 3, Chapter 1: Of Property In General as reproduced by The Forum: at the Online Library of Liberty. http://oll.libertyfund.org/index.php?option=com_content&task=view&id=1278&Itemid=262 (accessed January 28, 2011).

[7] Op cit., Cohen, at 361.

[8] See John G. Sprankling, *Understanding Property Law, (*Newark N.J.: Lexis Nexis, 1999) at 1. Additionally, one may use the term property to mean the essential quality of a thing, and while this might be of use in the hard sciences. It is of little, if any, use in the law.

[9] Ibid., at 2.

[10] See Muireann Quigley, "Property and the Body: Applying Honoré", [2007] *Journal of Medical Ethics* 631, at 632, where it is stated: The exponential rise in the use, and uses, of human tissue by medicine, scientists, pharmaceutical companies and industry has given rise to a whole new way of looking at our bodies. Our bodies, along with their part and products, have acquired a value that is different from any

Fourteenth century scholastic metaphysics gave us materialism, a theory which conceived of property as things in space. This view holds that all reality is tangible and exists in space. Thus for example a materialist might argue that a mortgage is a piece of paper and if the paper is destroyed the mortgage disappears. Modern legal theorists have refuted this notion. As Professor Cohen ably argues: "Why should we assume that all reality exists in space? Do our differences of opinion exist in space? Why not recognize that spacial existence is only one of many realms of reality and that in dealing with the law we cannot limit ourselves entirely to the realm of special or physical existence?".[11]

Other jurists apply what Cohen calls a semi-materialism conception of property which sees property as the relationship between a person and a thing. This view of property assumes the existence of a material thing. However in modern society we know that there is property in incorporeal or non-material things. If pushed to its logical conclusion this way of seeing property would allow for the existence of property on an island occupied by a single man. In the view of legal realists like Professor Cohen the notion of property would be entirely unnecessary on this single-person island for there would be no one who could be excluded from the material bounty of such island. That is why Cohen, in his illuminating article, argues that the conception of property as a "dyadic or two-termed relation between a person and a thing" breaks down at two points. In the first place, there may be no thing in a property relationship. In the second place, there is no property so long as there is only one person. Thus he concludes property essentially involves relations between people.[12]

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traditional conceptions of value in the body. This change has been prompted by the commercial and quasi-commercial activities of people and industries. One of the results of these activities is that we are now, more than ever, concerned about questions of what can and cannot be done with our bodies and their parts and products. However, in order to explore and solve conflicts that arise in this area, we need an appropriate framework within which to work. Since the new concerns surrounding the body and its tissues are essentially about issues of control and of ownership. One approach might be to consider each of us as a self-owner and our bodies, and human tissue in general, as being subject to property, or at least quasi-property, right... I want to show that if, as Hillel Steiner maintains, self-ownership consists in our having "full liberal ownership of our bodies", and if, as Honoré claims, having "full ownership" consists in our holding most of the elements of ownership, then we can be said to be self-owners if we can be shown to hold most of these with regard to our bodies.

[11] Op. cit., Cohen, at 361.

[12] Op. cit., Cohen, at 378.

More modern theorists describe property as collection of rights. Mossoff describes this as the nominalist definition of property.[13] As Salmond posits, in its widest sense property includes all a person`s legal rights, of whatever description. "A man`s property is all that is his in law".[14] Hobbes and Locke link property with every legal entitlement a human person may possess in a civil society. Hobbes stated in his Leviathan:

> Again, every sovereign ought to cause justice to be taught, which, consisting in taking from no man what is his, is as much as to say, to cause men to be taught not to deprive their neighbours, by violence or fraud, of anything which by the sovereign authority is theirs. Of things held in propriety, those that are dearest to a man are his own life and limbs; and in the next degree, in most men, those that concern conjugal affection; and after them riches and means of living. Therefore the people are to be taught to abstain from violence to one another's person by private revenges, from violation of conjugal honour, and from forcible rapine and fraudulent surreption of one another's goods.[15]

Locke was also a proponent of the theory of property as rights. He writes:

> If man in the state of Nature be so free as has been said, if he be absolute lord of his own person and possessions, equal to the greatest and subject to nobody, why will he part with his freedom, this empire, and subject himself to the dominion and control of any other power? To which it is obvious to answer, that though in the state of Nature he hath such a right, yet the enjoyment of it is very uncertain and constantly exposed to the invasion of others; for all being kings as much as he, every man his equal, and the greater part no strict observers of equity and justice, the enjoyment of the property he has in this state is very unsafe, very insecure. This makes him willing to quit this condition which, however free, is full of fears and continual dangers; and it is not without reason that he seeks out and is willing to join in society with others who are already united, or have a mind to unite for the mutual preservation of their lives, liberties and estates, which I call by the general name - property.

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[13] Op. cit., Mossoff, at 2010.

[14] Op. cit., Salmond, at 411.

[15] Thomas Hobbes, *Leviathan*, Chapter XXX, "Of The Office Of The Sovereign Representative" (http://oregonstate.edu/instruct/phl302/texts/hobbes/leviathan-f.html accessed November 19, 2009)

> The great and chief end, therefore, of men uniting into commonwealths, and putting themselves under government, is the preservation of their property; to which in the state of Nature there are many things wanting.[16]

Madison held a similar view of property:

> This term in its particular application means "that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual."
>
> In its larger and juster meaning, it embraces everything to which a man may attach a value and have a right; and *which leaves to everyone else the like advantage.*
>
> In the former sense, a man's land, or merchandize, or money is called his property.
>
> In the latter sense, a man has a property in his opinions and the free communication of them.
>
> He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them.
>
> He has a property very dear to him in the safety and liberty of his person.
>
> He has an equal property in the free use of his faculties and free choice of the objects on which to employ them.
>
> In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.
>
> Where an excess of power prevails, property of no sort is duly respected. No man is safe in his opinions, his person, his faculties, or his possessions.
>
> Where there is an excess of liberty, the effect is the same, tho' from an opposite cause.

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[16] John Locke, "Two Treatises on Government", Book II, Chapter 9: *Of the Ends of Political Society and Government*, paragraphs 123 and 124 (http://oregonstate.edu/instruct/phl302/texts/locke/locke2/locke2nd-c.html accessed february 2, 2011). See also John Locke, *An Essay Concerning the True Original, Extent and End of Civil Government*, Chapter 5 "Of Property" (http://www.wjmi.org/docs/2dtreat.htm#5chap (accessed Feb/2, 2011) for Locke's arguments in support of his definition of private property.

> Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*....
>
> If the United States mean to obtain or deserve the full praise due to wise and just governments, they will equally respect the rights of property, and the property in rights: they will rival the government that most sacredly guards the former; and by repelling its example in violating the latter, will make themselves a pattern to that and all other governments. [17]

In some ways Salmond, Locke and Madison seem to have equated property with every legal right people possess including their fundamental human rights.[18] In civil law jurisdictions this is known as patrimony which means the totality of a person`s rights and obligations, which may or may not be assessed in monetary terms. The claim that property encompasses all legal rights does not help us to distinguish property from other legal relationship/rights. Salmond recognized this and refined the concept of property to include only the proprietary rights of a person:

> ...property includes not all a person`s rights, but only his proprietary as opposed to his personal rights. The former constitute his estate or property, while the latter constitute his status or personal condition. In this sense a man`s land, chattels, shares, and the debts due to him are his property, but not his life or liberty or reputation. [19]

One might associate property with the notion of sole ownership of material things. Individual ownership focuses on that which I own as opposed to that which is owned by others or the community as a whole. One may think of three objections to the characterization of property as sole ownership. First, the concept of property must encompass situations less than sole ownership. Second, there are other forms of ownership other than sole ownership such as collective ownership, joint ownership and communal ownership. Third, even if property is sole ownership, it is hardly acceptable to limit the objects of sole

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[17] The Founders' Constitution, *Vol.1, at 598.* http://press-pubs.uchicago.edu/founders/documents/v1ch16s23.html (accessed November 26, 2009).

[18] See George Whitecross Paton, *A Text-Book of Jurisprudence,* (3rd Ed.) (Oxford: The Clarendon Press, 1964) at 455.

[19] Op. cit, Salmond, at 412.

ownership to material things; obviously there are numerous intangibles which could be owned by a person.

Still others equate private property only with rights *in rem*,[20] claims which can be asserted against the whole world in respect of a determinate thing, be it corporeal or incorporeal. In Ethiopian property law, rights *in rem* fall within the domain of Book III of the Code. Thus, the term property in this sense excludes proprietary rights per se and only includes "those which are both proprietary and in rem. The law of property is the law of proprietary rights in *rem*, the law of proprietary rights in *personam* being distinguished from it as the law of obligations. According to this usage a freehold or leasehold estate in land, or a patent or copyright, is property, but a debt or benefit or a contract is not".[21]

Property as rights *in rem* connotes a series of relationships which are recognized and protected by government and that exists between individuals with respect to an object, whether it is tangible or intangible, with or without value. This allows us to understand property law as a bundle of rules that help us determine who may hold property, over which subject matter property may be established, the manner in which property may be obtained and lost and the limitations imposed on property. This definition permits us to see property law as an institution because the enforcement of property law requires the establishment procedures and a court system.

The characterization of property as rights *in rem* is a qualified one in the sense property refers to such rights which are linked to things which are appropriable.[22] Not all rights *in rem* are property. For example, if we define rights *in rem* to include rights which bind persons generally, a right of a person not to be defamed is a right *in rem* because all other persons in the world are precluded from tarnishing her name, if they do so, they will be subject to sanction. Thus, the right of a person not to be defamed by others is a right in *rem* but not property.

In this context right *in rem* is not used in its more limited sense of the power of a person to recover a specific thing.[23] This conception of property as real rights

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[20] All legal rights are said to be *in rem* or *in personam*. An *in personam* right is a personal right attached to a specific person, such as a contract or a license. Generally, in *rem* rights are property rights enforceable against the entire world, whereas *in personam* rights only bind the litigants. Thus a judgment will be said to be *in rem* when it binds third parties.

[21] Op. cit, Salmond, at 412.

[22] This will be elaborated further in Chapter 3.

[23] Op. cit., Paton, *Textbook*, at 455 & 464.

(right *in rem) includes* several rights of such kind, namely individual ownership (full or naked ownership), joint ownership, possession, usufruct (co-habitation), servitude, right of recovery, right of preemption, rights of promise of sale, pledge, mortgage, and *antichresis*[24].

2.3 The notion of property under the Code

An analysis of the text of the structure and origins of the Code reveals that it is permeated by a conception of property as a right *in rem.* Textually, we find the use of the phrase right *in rem* in many portions of the Code. For instance, Title VIII of Book III of the Code is worded: "Joint Ownership, Usufruct, and other Rights *in Rem*'. This wording is telling for the inclusion of the basket clause ``...other Rights *in Rem*`` appears to label all rights contained in Book III of the Code as real rights, rights to be asserted against the world generally. The ``other Rights *in Rem*`` referred to in Title VIII of the Code are servitude, right of recovery, preemption and promise of sale. [25]

A more implicit example of the use of a right *in rem* as an organizing notion in Book III of the Code is wording of Article 1411:

> (1)Ownership is the widest right that may be had on a corporeal thing.
>
> (2)Such right may neither be divided nor restricted except in accordance with law.

The prohibition against disaggregation of ownership pertains to the doctrine in property law of *numerus clausus*, which literally means the number is closed.[26] This doctrine encapsulates one of the central distinctions between rights *in rem* and rights *in personam*. Contract rights are *in personam* and property rights *in rem*.

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[24] Antichresis is a contract whereby a person borrowing money from another, hands over his immovable property to the creditor, allowing the use and occupation thereof, instead of paying interest on the money lent.

[25] See also Article 1411 which provides: (1) An agreement for promise of sale or right of preemption shall not constitute a restriction on ownership under this Section nor shall it give rise to a right in rem unless it relates to an immovable or a specific chattel. (2) The rights and obligations which it creates for the parties shall be as provided by Book IV of this Code. (3)The provisions of the following Articles shall only apply to rights in rem created by such agreement.

[26] Although this is a term used in civil law jurisdictions it has been argued that the doctrine of *numerus clausus* applies universally to all property law systems. See: Thomas W. Merrill and Henry E. Smith, "Optimal Standardization of the Law of Property: The *Numerus Clausus* Principle" 110 *Yale L.J.* 1 (2000) at 4.

> A central difference between contract and property concerns the freedom to "customize" legally enforceable interests. The law of contract recognizes no inherent limitations on the nature or the duration of the interests that can be the subject of a legally binding contract. Certain types of promises-such as promises to commit a crime-are declared unenforceable as a matter of public policy. But outside these relatively narrow areas of proscription and requirements such as definiteness and (maybe) consideration, there is a potentially infinite range of promises that the law will honor. The parties to a contract are free to be as whimsical or fanciful as they like in describing the promise to be performed, the consideration to be given in return for the promise, and the duration of the agreement.
>
> The law of property is very different in this respect. Generally speaking, the law will enforce as property only those interests that conform to a limited number of standard forms.[27]

Property rights exist in a fixed number of forms.

Further the entire Code seems to be organized around the civil law notion of patrimony, which refers to the sum total of a person's rights and obligations whether or not susceptible of quantification in monetary terms. This is clear from Article 1 of the Code which declares that "[t]he human person is the subject of rights from its birth to its death". In Article 9 the Code provides that the rights of personality and liberties guaranteed by the Constitution are *extra commercium* and limits on the exercise of those rights must be justified by a legitimate interest. One could characterize Book I and Book II of the Code as essentially dealing with rights acquired by a person as a matter of status (parental authority, family and spousal relationship), Book III as right *in rem*, Book IV and V as rights *in personam*.

In terms of the origin of the Code, in particular of Book III, we face an acute shortage of authoritative documents directing us to specific sources. The available documents do not tell us whether Book III was copied from or inspired by, for example, French or German property law. It is clear however that it has its origins in the civil law traditions. Therefore, the use of rights *in rem* as an organizing principle in the property law of Ethiopia is inevitable

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[27] Ibid, at 3. Also see Thomas W. Merrill and Henry E. Smith, "The Property/Contract Interface", *101:4 Colum. L. Rev. 771* (2001) wherein the authors examine the distinctions between *in personam* contract rights and *in rem* property rights.

because this notion is the time honored concept running through every property law of a country which belongs to the civil law family.[28]

It is important to note that while the property law of Ethiopia as embodied in Book III of the Code should be taken to define property to mean rights *in rem*. There are other laws of the country which conceive the notion of property to mean any interest having economic value or to mean patrimonial rights which can be converted into money. For example, the Criminal Code of Ethiopia extends the notion of property to both rights *in personam* and *rights in rem*, for it seeks, among others things, to protect the legitimate economic interests of a person through the invocation of criminal law. This is also true for the Commercial Code and the Revised Family Code which regulates any proprietary interests of a conjugal union. The Code also appears to transform certain *right in personam* to the status of *rights in rem*;[29] one may call these assimilated rights hybrid rights, i.e., a mixture of *rights in personam* and rights *in rem*.

2.4 Common features of rights *in rem*

The following are the common attributes of property defined in terms of real rights or rights *in rem*:

1. The right *in rem* should be obtained through legitimate means. Legitimate means include acquisition (which is unilateral and original) or transfer (which is bilateral and derivative). The means of obtaining rights *in rem* are acceptable when they comply with the requirements set forth in the system's property law. The Code specifies the modalities of obtaining property and more particularly ownership in Ethiopia as: occupation,

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[28] Articles 929, 1424 and 1844/ 2114, 2177, 2181, 2266 of the French Civil Code indicate that the concept of rights in rem is a central notion of its organization. See The French Civil Code (2004) (Trans. Georges Rouhette), http://195.83.177.9/code/liste.phtml?lang=uk&c=22 viewed July 12, 2010); Articles 197, 322b, 438, 481, 889, 945, 1059c and 1094 of the German Civil Code use the term real rights. See German Civil Code (2009), www.juris.de last viewed July 12, 2010). [see also http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html for an English translation of the German Civil Code.]

[29] For example, Article 1332/2, provides: "Leases made in respect of a land or building between the usufructuary and a farmer or tenant shall bind the owner and third parties for a period of three years from the termination of the usufruct". Here one sees lease contract in respect of land and building to have binding effect on third parties. See also Article 1571/1 of the Code, which requires registration of in rem rights like ownership, usufruct and servitude and also long term leases which are by their nature contracts and therefore create *in personam* rights.

possession in good faith, *usucaption*,[30] accession, juridical acts (testament, donation, sale, agreements creating pledge or mortgage or *antichresis*), and operation of law (e.g. intestate succession or expropriation). The emphasis created in the definition of private property found in Article 40/2 of the Constitution on the means of production is indicative of the importance of the legitimacy of the means in getting property, rights in rem. Article 40 of the Constitution, titled The Right to Property provides, in part:

> 1. 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.
> 2."Private property", for the purpose of this Article, shall mean any tangible or intangible product which has value and is produced by the labour, creativity, enterprise or capital of an individual citizen, associations which enjoy juridical personality under the law, or in appropriate circumstances, by communities specifically empowered by law to own property in common.

Requiring that property be obtained by legitimate means excludes obtaining property through illegitimate ways, defined and proscribed by the civil and criminal law. Reeds writes:

> ...the concept of property places limits on how one is permitted to acquire resources. Basically, this means that property does not protect resources acquired by coercion, theft, or deception, allowing victims of such acquisition to pursue the acquirer with civil remedies while the state exercises criminal enforcement sanctions.[31]

That this has long been the law of Ethiopia is reflected in the *Fetha Nagast* which commands the faithful: "...[d]o not take the wealth of anyone by violence, do not buy from him by force, either openly or by trick...".[32] The Federal Government issued a proclamation in 2010 (2003 E.C.) which requires

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[30] A concept found in civil law systems, also known as acquisitive prescription. It is a method of gaining ownership of property by lapse of time (acquiescence).

[31] O Lee Reeds, "What Is `Property?, *41: 4 Am. Bus. L. J., 459* (2004) at 497-8.

[32] Aba Paulos Tzadua, (Trans.), *The Fetha Nagast, The Law of the King*, (1968) at 273.

government officials to disclose and register their assets to prevent them from obtaining property through improper means.[33]

2. Once legitimately obtained, a right *in rem* confers upon the holder of such property a series of decision making powers. These powers cannot be exhaustively listed. They are described as ``self-regarding powers``. This is because they have to do with what the property holder himself or herself may do or direct be done with the property. Self-regarding powers carve out a space within which the property holder might move, though not with absolute freedom. They can be classified into inaction or taking positive action. As a positive action the property holder of a physical object may physically use it, construct or reconstruct or transform it. If the property is a plot of land, cultivate it, build a house or other structures on it or plant it or develop it in other ways. The positive action might create privileges in favor of others. For example the action of the property holder might result in the transfer of all or part of the holder`s right to another person during his life or upon her death, with or without consideration, for a while or for an indefinite period of time. The holder of the *right in rem* might also exercise his or her powers by inaction. For example, by keeping control of a tangible thing but letting it be unused, abandoning it or even wasting it; or by failing to exercise the right (for example copyright) in case of property over intangible things.

3. Real rights can be exerted against the whole world that is everyone other than the right holder including the state. Since real rights affect all others, they are dubbed as "other regarding" rights or powers. Understanding these other regarding powers helps make a good sense of the self-regarding powers exercised over property. For example, all persons (not just specific individuals) are required to refrain from interfering with a property holder's rights. Everyone requires permission to use the property or otherwise interact with it. Thus one other regarding right is the power to exclude others from the property. This right can be exercised individually or shared with others in cases where the property is held with others. Thus the world cannot, without permission, interfere with the holder's property even if it objects to its use or condition. It is widely agreed that the ability to exclude is one of the hallmarks of the concept of property. Reeds says: ``at the very heart of property lies its singular conceptual core, which is the private right of exclusion. If having `property` means anything, historically and legally, it is that the owner can exclude others from the resource owned and that others have a duty not to infringe this right. ``[34]

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[33] See Disclosure and Registration of Assets Proclamation No. 668/ 2010, *Fed. Neg. Gaz.* Year 16 No.18.

[34] Op.cit., Reeds , at 487-8.

Hobbes stated that: "[t]he property which a subject hath in his hands, consisteth in a right to exclude all other subjects from the use of them...".[35] Blackstone regarded property as: "that sole and despotic dominion which one man claims and exercise over external things of the world, in total exclusion of the right of any other individual in the universe".[36]

There is an intimate relationship between the self-regarding powers and the other regarding powers vested in a property right holder. The self-regarding powers are also rooted in the exclusive nature of property. That is because they can be exercised without the ability to legally exclude others from making decisions about the property without consent. Thus, it is said that:

> The positive `bundle` of rights like possession, use, and alienation can all be derived from the negative exclusionary right. For example, if an owner can legally exclude others from interfering with resources over her land, she can possess the land, use it in a myriad of ways that leave an equal right in others to use their resources, or transfer it through sale, lease, or gift to others.[37]

4. The extent of the capacity of persons to deal with private property is determined by the legal system in force. The question of who is entitled to be a holder of right *in rem* raises two important issues: the capacity to hold property rights and the ability to exercise those rights. Under Ethiopian law, in principle, all persons, physical or juristic, are capable of holding property rights. Foreign nationals of Ethiopian origin can own immovable property provided they can be regarded as domestic investors (in some cases involving foreign nationals of Ethiopian origin[38]) or foreign investors so long as the immovable property they own is necessary for their investment in the country.[39] Non-investor foreign nationals cannot own immovable property but can own other kinds of property.[40] Juristic

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[35] As quoted in Ibid at 487.

[36] As quoted in Ibid at 487.

[37] Ibid., at 488-9.

[38] See the Proclamation Providing for Foreign Nationals of Ethiopian Origin with Certain Rights to be Exercised in Their Country of Origin Proclamation, No 270, 2002. *Fed. Neg. Gaz.* Year 8th No 17.

[39] See Article 40 of the Ethiopian Investment Proclamation No. 280/2002, (as amended by Proc. No. 375/2003), *Fed. Neg. Gaz.* Year 8th No. 27.

[40] See Articles 390-393 of the Code: No foreigner may own immovable property situate in Ethiopia except in accordance with an Imperial Order. If he happens to be in good

persons, being devoid of a will of their own, even if they hold property interests, exercise those rights through the instrumentality of agency.[41] Ethiopian law presumes all physical persons to have the capacity to exercise their property rights. Minors and judicially interdicted persons (which include senile and insane persons) generally use the devices of guardianship and tutorship in exercising their property.[42] The law regards them as incapable of understanding and properly exercising their property rights because of their mental aliments or lack of age or maturity.

5.The holder of rights in *rem* can secure the assistance of the law and the state in exercising those rights. Thus the property holder can call upon the law and the state to assist in enforcing decisions to exclude or permit others the property. These rights only make sense when they are backed by the legal machinery of the society. The power to exclude emanates from the force of law, not personal might or mere custom or positive morality. If, for instance, someone invades your land to take it over from you without your consent or if someone makes it difficult for you to have quiet enjoyment of your property, your right to exclude others is infringed. This infringement of your property must be visited with some sort of sanction. A breach of the right of exclusion might entail a possessory action or a *petitory* action,[43] or it may entail self-help or criminal actions. The remedies could include recovery of the land, injunction, a finding of criminal responsibility, compensation or declaratory judgment. Actions against the transgressor will be viable if taken within the time limit imposed by law.[44]

The state must establish and maintain complex legal and administrative machinery to enforce private property. Enforcement of property is not

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faith, he is required to sell it to an Ethiopian. If he refuses to do so, the appropriate government authority will seize and sell it. Twenty percent of the proceeds of the sale will be retained by the government (10% in the case of succession).

[41] See Article 454 of the Code with respect to associations: (1) An association may perform all civil acts which are consistent with its nature. (2) It shall perform such acts through its organ of management.

[42] See Article 216 of the Revised Family Code Proclamation No. 213/2000, *Fed. Neg. Gaz.* Year 6th Extraordinary Issue 1. See also Article 351 and those following in the Code.

[43] A legal proceeding by which the plaintiff seeks to establish and enforce his or her title to property, as distinguished from a possessory proceeding, where the plaintiff's right to possession is the issue. Such petitory actions must be based on a claim of legal title to the property, as opposed to a mere equitable interest in it.

[44] The law will generally set a time limit within which such actions must be instituted.

without public costs. The justice machinery which might be called upon to protect the property holder upon the violation of her rights is costly. Laws must be passed and implemented with the attendant human and material resources and financial costs associated with maintaining the legislature and ministries and implementing agencies and bodies. Public and private resources are expended on the interpretation of law and jurisprudence and the adjudication of disputes. Admittedly, some of the expenses associated with the protection of property may be absorbed by the property holder; however taxpayers are expected to carry much of the financial and practical burden of the protection of property.[45]

The maintenance of a regime of private property requires the support of the community and society. As Waldron argues that "[e]very social institution requires justification if only because the energy and resources needed to sustain it could be used in some other way".[46] Members of the community need to agree that there are good reasons to support the existence of private property, else why would people stay away from the property of others even during times of acute need and privation? Waldron writes:[47]

> we look for a justification of private property, because it deprives the community of control over resources which may be important to the well-being of its members, and because it characteristically requires us to throw social force behind the exclusion of many members of our society from each and every use of the resources they need in order to live.... one effect of recognizing individual powers of transfer is that resources may gradually come to be distributed in a way that leaves a few with a lot, and a lot with a very little, and a considerable number with nothing at all. Private property involves a pledge by society that it will continue to use its moral and physical authority to uphold the right of owners, even against those who have no employment, no food, no home to go to, no land to stand on from which they are not at any time liable to be evicted.

It is not our intention to pursue issues of justification of private property in-depth in this text. However it is important to note the need to justify the existence of private property. The arguments in support of private property include that it expands personal liberty, brings about resource

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[45] Op. cit Waldron, *Right to Private Property,* at 8.

[45] Ibid.

[46] Ibid.

[47] Ibid., at 9.

efficiency or cultivates individual virtue. Some argue that is based on first occupation or based on annexation of labor with a natural resource (for example, land). Others argue that private property is the result of the projection of a person's personality on goods for the advancement of civilization or social stability.[48]

6. Rights *in rem* are not absolute. One may question the extent of property. Is the principle of exclusion absolute or are there occasions whereby a society may legitimately interfere with the property of its member? Property law does impose limits on the exercises of those rights. For example, an owner of a computer has a *prima facie* power to exclude all other persons in the world from using that computer without her consent. It is *prima facie* because the right of the owner of the computer to exclude others can be overridden by societal goals or in the interest of other persons.[49] These limitations are imposed by the law against the will of the owner of the computer. They may limit the use or disposition of the property or the collection of the fruits of the property. For instance, a car owner has to comply with certain regulations in the exercises of her ownership right over the vehicle. There are traffic regulations such as speed limits, restrictions on load amount and on the nature of things transported by the vehicle. An owner of a house in a residential zone of a town may be stopped from using it for a nightclub. The nature and range of limitations the law places on property rights are more fully discussed in Chapter 12.

2.5 Conclusion

Many conceptions of property have been proposed. The key features of property include that it is self-regarding and other regarding. Self-regarding in the sense that the property holder has decision making powers with respect to the property, other regarding in the sense that the property holder can exclude others from it. The law imposes reasonable limits upon the exercise of those decision making powers and exclusionary rights. Property is rights *in rem*, that is rights that are enforceable against the whole world and is governed by the doctrine of numerous clauses which means that there are limited and specific ways, established by law, in which it can be dealt with. It is good to keep in mind too the relative nature of the notion of property. It is relative to time,

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[48] Karl Kenner, "The Institution of Private Law in Law and Philosophy" in Edward A Kent (ed), *Readings in Legal Philosophy*, (New Jersey: Prentice-Hall, Inc., 1970) at 516-524 and Morris R. Cohen, "Property and Sovereignty in Law and Philosophy in the same text at 525-532.

[49] Frank Snare, "The Concept of Property", 9 *A. P. Q.* 200 (1972) at 202-4.

subject and subject matter and the ideological leanings of society. We will return to examine these concepts again in our analysis of the concept of ownership in chapter 7.

2.6 Review questions

1. Article 40 of the Constitution provides as follows:

Article 40

The Right to Property

1. 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.
2."Private property", for the purpose of this Article, shall mean any tangible or intangible product which has value and is produced by the labour, creativity, enterprise or capital of an individual citizen, associations which enjoy juridical personality under the law, or in appropriate circumstances, by communities specifically empowered by law to own property in common.
3. The right to ownership of rural and urban land, as well as of all natural resources, is exclusively vested in the State and in the peoples of Ethiopia. Land is a common property of the Nations, Nationalities and Peoples of Ethiopia and shall not be subject to sale or to other means of exchange.
4. Ethiopian peasants have right to obtain land without payment and the protection against eviction from their possession. The implementation of this provision shall be specified by law.
5. Ethiopian pastoralists have the right to free land for grazing and cultivation as well as the right not to be displaced from their own lands. The implementation shall be specified by law.
6. Without prejudice to the right of Ethiopian Nations, Nationalities, and Peoples to the ownership of land, government shall ensure the right of private investors to the use of land on the basis of payment arrangements established by law. Particulars shall be determined by law.
7. Every Ethiopian shall have the full right to the immovable property he builds and to the permanent improvements he brings about on the land by his labour or capital. This right shall include the right to alienate, to bequeath, and, where the right

of use expires, to remove his property, transfer his title, or claim compensation for it. Particulars shall be determined by law.
8. Without prejudice to the right to private property, the government may expropriate private property for public purposes subject to payment in advance of compensation commensurate to the value of the property.

Discuss how these provisions assist in defining property in Ethiopian law. From your reading, do these provisions reflect the views of the legal realists like Professor Cohen? How are they similar and how do they differ from that theoretical view of property.

It is common for states, like Ethiopia to restrict foreign ownership of immovable property (primarily land). This is the case under Ethiopian law. However foreign nationals of Ethiopian origin are given the status of an Ethiopian citizen for the purpose of acquiring interests in immovable property including land. What is the public interest in such restrictions? Why do they focus on land and other immovable property? Why might investment in land be treated differently than ownership of land?

The use and access of land is again differently regulated under Ethiopian law. While Ethiopian citizens, peasants and pastoralists are entitled to free access and use for specific purposes, private investors can only use the land if they pay under arrangements with the state. What interests are served by these distinctions? What do they tell you about the nature of property in Ethiopia?

Neither the *International Covenant on Civil and Political Rights* (ICCPR) nor the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) has a provision on property rights. *The Universal Declaration of Human Rights* (UDHR) has devoted one article in relation to this particular right, which reads: "Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property".[50] Considering this provision are states like Ethiopia free to restrict foreign ownership of and access to property within their boundaries? Bear in mind Article 13/2 of the Constitution which expressly provides: "The fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and International instruments adopted by Ethiopia".[51]

[50] See Belachew Mekuria, "Human Rights Approach to Land Rights in Ethiopia in Land Law and Policy in Ethiopia since 1991: Continuities and Changes", in Muradu Abdo (ed.), *Ethiopian Business Law Series Vol. III* (2009) at 46.

[51] Ethiopia has adopted this instrument.

2. Discuss the following observation made by Salmond regarding the search for a correct definition of the term property: "....in the case of a word having so many recognized varieties of usage it is idle to attempt to single out any of them as exclusively correct?".[52]

3. How does law distinguish property and contract?

4. Amselet Taeme attained the age of majority and sued her ex-tutors to force them to withdraw money from the bank. She had inherited money while she was a minor. The money was in the names of the ex-tutors in the Commercial Bank of Ethiopia. The court was asked to determine whether Amselet had a valid claim to the monies deposited. The court held that Amselet had a claim *in rem* for the return of the monies. The court said:

> ...the suit is directed against the money (property) deposited in a certain account with the bank. The plaintiff`s claim is that she is the owner of such property. To this end, it is pertinent to see the demand made by the plaintiff in her statement of claim. The statement of claim states that there is money deposited in the bank on behalf of the plaintiff and that the court should order the withdrawal and the payment of such money to her. The claim is not that the defendants are debtors of the plaintiff in respect of the money which is subject matter of the suit and that such defendants should be compelled to settle such money. In other words, the claim is not specifically directed at the defendants in person. The plaintiff`s strategy is to get the money deposited in the bank through the defendants; she did not sue the defendants as her debtors. Even if the defendants are named in the law suit, it is aimed at the money put in the bank in the names of the defendants. This means the claim of the plaintiff is a right in *rem*; it is not a right in *personam.*[53]

   Do you agree with the court`s analysis? Why? Why not? Without reading the decision, given the court's finding what do you expect the result in this case was? How do you arrive at that conclusion?

5. You have a used tissue in your hands. You intend to eventually deposit it into a waste basket. Before you do someone takes it from you without your consent. Do you regard the tissue paper as your property? Why? Why not? Would your answer differ if the object was an old book? A

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[52] Op. cit., Salmond, at 412.

[53] *Amleset Taeme v. Almaz Zewede et al*, Federal First Instance Court, Civil File No. 158/91, Tikemet 30, 1992 E.C. at 3-4 (unpublished, on file with the author).

garden tool? Would your answer be different if you had placed the object in the waste basket before it was taken? Why?

6. Draft an argument for and one against the following proposition: Scarcity of material resources in a society gives birth to private property.

7. Are the abilities to use or sell the hallmarks of property?

8. What characteristic of property are captured by the following statements?

   a. Ato K can use the computer and prevent others from using the computer.

   b. Ato K owns the computer and can ignore it and leave it unused.

   c. Ato K can agree to transfer the right to use the computer to others.

   d. Ato K can sell the computer.

   e. A person who uses Ato K's computer without his consent will be subject to sanctions.

   f. Ato K can insure the computer against damage or loss.

   g. Ato K can sue X for breaking his computer monitor.

   h. The police require a warrant to search or seize Ato K's computer.

   i. Ato K is legally responsible to ensure that the computer is used in accordance with Ethiopian and international law.

9. Does the following statement capture the essence of private property?

To the world: keep off X unless you have my permission, which I may grant or withhold. Signed: Private Citizen. Endorsed: The state. [54]

10. It is old law that there is no property in a corpse and well established law that a person's body cannot be dealt with without that person's consent, or the consent of a legally responsible other. But is there property in a human body, and if not should there be? Consider the following case reported by the BBC:

> A US man divorcing his wife is demanding that she return the kidney he donated to her or pay him $1.5m (£1m) in compensation.
>
> Dr Richard Batista told reporters that he decided to go public because he was frustrated at the slow pace of divorce negotiations with his estranged wife. He said he had not only given his heart to his wife, Dawnell, but donated his kidney to save her life.

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[54] Op cit, Cohen, at 374.

> But divorce lawyers say a donated organ is not a marital asset to be divided.
>
> Dr. Batista married Dawnell in 1990 and donated the kidney to her in 2001. She filed for divorce in 2005 and a settlement has still not been reached....
>
> Dr Batista's lawyer, Dominic Barbara, said his client was "asking for the value of the kidney" that he gave his wife.... [55]

Could a similar claim be brought in Ethiopia? If your client instructed you to bring such a claim what would your view be of the relevance and impact of Article 18 of the Code and Articles 70 and 573 of the Criminal Code of Ethiopia? In considering your position you may wish to have reference to the following articles: See Muireann Quigley, "Property and the Body: Applying Honoré", [2007] *Journal of Medical Ethics 631*, and J.K. Mason and G.T. Laurie, "Consent or property? Dealing with Body and its Parts in the Shadow of Bristol and Alder Hey", *(2001) 64 M. L. R. 710* at 728.

11. "Under a statute, the plaintiff and defendant enjoyed perpetual franchises of adjoining tracts under the waters of Long Island Sound for purposes of shell fish cultivation. The plaintiff, supposing the defendant's land to be his own, deposited oyster shells upon it so that young oysters in the free-swimming larval stage became attached to the shells and developed into marketable oysters. The defendant having taken these oysters was sued for conversion". [In *Vroom* v. *Tilly,* 91 N.Y. Supp. 51] the court held "that the plaintiff can recover, as the property is in him". [56]

> While it may be relatively easy to see that the accretions to the original oyster shells belonging to the plaintiff, even though located on the land of the defendant, could be the plaintiff's property it is more difficult to determine who if anyone has property in the eggs and larvae of the oysters. As the author of the referenced note suggests: " In view of the fact that one healthy, full-grown oyster produces eighty million (80,000,000) eggs a year, and that it takes a microscope to detect their presence in water, it would seem at least an impractical question to determine the character of the property (if any) one may have in them. The male egg and female egg float freely in salt water till they unite, when, their specific gravity being increased; they sink and attach to any

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[55] See http://news.bbc.co.uk/2/hi/americas/7818751.stm (accessed January 1, 2009).

[56] As cited in C. G. B. "Oysters--Title, Ownership, and Possession--Things Subject to Ownership as Property", in "Notes of Cases" 11 *Va. L. Register 58* (1905), at 61.

hard substance. Up to this point it would seem that there cannot be private property in eggs in public waters. [57]

Presuming you agree with both positions what does that tell you about the nature of property?

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[57] Op. Cit. "Oysters--Title, Ownership, and Possession`` 61.

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Chapter 3: Objects of Rights in *Rem***

3.1 Introduction

It is important to distinguish things which are the subject matter of private property interests from things which are placed beyond the scope of private holding. Some things are used commonly by all human beings.[1] Other things are placed outside commerce by the law. Things over which private property rights may be established fall within the purview of the law of property while those objects over which private property interests cannot be constituted are put beyond the reach of property law.

Defining things is also important in fields of private law other than property law.[2] A coherent definition of a thing in the context of property law obviously enhances clarity of thought in the study of property law. Without rules clearly defining an object of property, property rights would have "no starting point at all."[3]

The property laws of Ethiopia in general, and Book III of the Code in particular, use the terms `good,` a `thing,` `property,` `corporeal good,` `a corporeal thing,` and a `product` without defining any of these words. In seeking to understand these many terms one may wonder if they are synonymous with or distinct from each other, and raise issues related to their scope and boundaries.

This chapter examines these questions in order to illuminate the stance taken by Ethiopian law in relation to the meaning and scope of the objects which can be the subject of property rights. The first section examines how objects of property are defined by laymen and the law. The second section compares the

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**This chapter is a modified version of this writer`s article ``The Subject Matter of Property Rights: Naming and Meaning`` which appeared in 2:2 *Ethiopian Journal of Legal Education* 121 (2009).

[1] These are things (e.g. the air, the ocean and the heavenly bodies), which, according to medieval writers, God bestowed upon all human beings for common enjoyment. They are also called universal things. See A. Y. Yiannopoulos, *Civil Law Property (3rd ed.)* (USA, Thomson-West, 1991) at 23-23.

[2] In the private law of Ethiopia, the notion of a thing is relevant to the law of contract (e.g. fungible versus non-fungible things, generic versus specific things) and in some senses in the area of extra-contractual law.

[3] "Whether natural or legal, an object of property must be clearly identifiable; therefore, the rules that define it must be determinate. Otherwise, property rights would have no starting point at all". See Emily Sherwin, "Epstein`s Property", *19 QLR 697* (2000) at 703.

ways different legal systems address this issue. The third section considers relevant areas of Ethiopian law. The chapter concludes by trying to put all of that together followed by review questions.

3.2 Views on the meaning and scope of objects of property

Ordinary people think of a thing as a physical object and the thing itself as property, either theirs or someone else's.[4] This way of understanding property is not sufficient for the purposes of property law. First it does not capture the many incorporeal things which are the subject of property law. Secondly it does not adequately capture the five dimensions of property found in law namely: the rights bearer (the subject), the object over which property rights are exercised (the object), the sovereign right accorded to the subject over the object (content of the rights), the sphere beyond which a holder of property right cannot go (limitations) and justifications for bestowing semi-sovereign rights in respect of an object upon the subject (justification).[5]

A second approach defines things as property which can be potential objects of legal rights.[6] This view includes tangible and intangible things. Sherwin states that objects of property must be clearly identifiable:

> An object of property is simply the subject matter of the right. It may be a self-defined physical thing or a legal thing defined by means of determinate rules. Land, for example, is a physical thing, but a lease or a fee tail estate in land is a legal thing, defined by legal rules.[7]

However this makes the boundaries of property law too fluid. This definition encompasses objects that would not ordinarily be the subjects of property law. For example, it could include reputation as the object of a person's right not to be defamed (which is considered as an aspect of human personality rather than property). If a person tarnishes the name of another person, the right of the victim of defamation to claim compensation in a court of law lies against the person of the defamer not against the world. It is not a right in *rem* and thus not property. This definition identifies the seat of all legal rights; yet,

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[4] See Marcel Planiol, *Treatise on the Civil Law,* Vol. 1. Part II 12th Ed. (St. Paul; West Publishing Co; 1939) at 28. Planiol calls the subject matter of property rights "property". For example, he writes: property embraces "houses, lands, movable objects, credits, bonds, royalties, trademarks." The word 'property' therefore includes, besides material things, a certain number of kinds of incorporeal property which are rights, such as credits, income from investments, offices and trademarks.

[5] Craig Anthony Arnold, "The Reconstitution of Property: Property as a Web of Interests", *26 Harv. Envtl. L. Rev. 281* (2002).

[6] Op. cit Paton. *Text-Book,* at 456.

[7] Op cit. Sherwin, at 703.

what we are looking for is the seat of one of the legal rights, i.e., property rights, which belong to the domain of patrimonial rights (rights assessable in monetary terms). Austin defines a thing as "such permanent objects, not being persons, as are sensible or perceptible through the senses".[8] He employs the phrase `permanent objects` to mean objects that are repeatedly perceptible. The capacity to repeatedly perceive an object using the five senses means the thing must have a certain element of permanence. This distinguishes a thing from a fact or an event. For example a puff of smoke would not normally be regarded as a thing as it is too transient.

A thing must also have a certain element of physical unity. Austin views an object as property even if it does not have an owner or economic value. Austin's understanding of a thing excludes incorporeal property like copyrights, patent, industrial designs, trademarks and trade names which cannot be perceived but only conceived by the intellect. Austin's definition encompasses all physical objects in space (including the sun, the air and the sea) regardless of their pecuniary value and of their susceptibility to human appropriation. Austin's definition does not permit the treatment of aspects of human personality as objects of property interests. It excludes personal characteristics like appearance, physical strength, charisma, humor and talent, which at times are a source of wealth and power.[9] As an advocate of self-ownership, Nozik conceives the object of property as going beyond entitlement over external resources to encompass the body of the right bearer.[10] Besides, Locke

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[8] As cited in op. cit., Paton, at 457.

[9] Kenneth R. Minogue, "The Concept of Property and its Contemporary Significance" in Elizabeth Mensch and Alan Freeman (eds), *The International Library of Essays in Law and Legal Theory Areas: Vol. 1 Property Law. (*USA, Ashgate Dartmouth, 1992) In contrast Minogue calls these attributes passive property which can be used to advance a person's interests and can at times be more useful or valuable than material/tangible property. The objects of property may include personal attributes such as quick wits, strong hands and green eyes which might be as good as, at times even better than, owning a plot of land or a factory. Minogue calls these attributes passive property.

[10] James W. Harris, "Rights and Resources-Libertarians and the Right to Life", 15 *Ratio Juris*. 2(2002) at 118. Robert Nozick, as a proponent of particular version of liberalism called libertarianism, has advocated for a minimalist state where in relation to property an absolutist version of it prevails in a society. See also op. cit. Mason and Laurie, ``Consent or Property?" for the argument that there are good reasons and the time has come to recognize property rights in the human body. Some libertarians argue for full self-ownership enabling an individual to transfer himself by sale or gift. Others including Locke argue for limited self ownership in the sense there are necessary limits such as one is prohibited from enslaving himself. See: Peter Vallentyne, "Libertarianism", in Edward N. Zalta (ed.)*The Stanford Encyclopedia of*

conceives the subject matter of property broadly to include partial self-ownership as well.[11]

3.3 Laws of other jurisdictions

There is a resemblance between many of the concepts embodied in Book III of the Code and the property law notions found in Roman law and continental civil law. Roman law was the foundation of the legal systems of western countries such as France and Germany. The laws of France and Germany in turn, to a varying degree, have found their way into the Ethiopian legal system, its property law included.[12] This historical nexus is important to our understanding of the Ethiopian law of property.

Roman jurists grappled with the clarification of the concept of a thing, but were unable to avoid the ambiguity of the term. The Romans employed the term *res*[13] to convey two meanings, i.e., both physical objects in space and economic interests (rights having a pecuniary value protected by law). Sometimes *res* was used to mean physical objects and the rights which exist

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[11] See op. cit Locke, "Of Property", paragraph 26 "Though the earth and all inferior creatures be common to all men, yet every man has a "property "in his own "person". This nobody has any right to but himself. The "labour" of his body and the "work" of his hands, we may say, are properly his". See also op. cit. Arnold, "Web of Interests", who stated, in criticizing the bundle of rights approach to property, that: "...there is no reason to assume that recognition of property interests in intangibles makes all intangibles possible objects of property rights. For example, American law recognizes property interests in business goodwill, but not friendship; in love songs, but not love; in celebrity identity, but not personality; and in expressions of ideas, but not ideas themselves" at 292.

[12] As stated in Chapter 1, the drafter of the Civil Code, Rene David stated that the legal rules found in Book III of the Code were selected from Ethiopian traditions and restated using the legal concepts developed in Europe. In his view property law concepts like private ownership and possession of land, buildings, agricultural implements predated the Code and were merely included in the Code using western legal language and drafting. The law was not imported but rather selected and codified. George Krzeczunowicz disputes that and argues that the outlets for customary laws in the Code are extremely limited and that the then state policy viewed customary laws as undermining the social, political and economic progress of the country. Op. cit. George Krzeczunowicz , "Code and Custom". As argued in Chapter 1 there is ample evidence of the wholesale importation of property rules from civil law jurisdictions such as France and Germany into the Civil Code both in terms of legal concepts, principles and language as well as drafting techniques.

[13] In Latin, the word means things.

over them and other times *res* was used in a much broader sense to include tangible objects and intangible rights.

Since *res* referred solely to rights of a pecuniary value, the word did not apply to rights governed by the law of persons. For example, personal liberty and paternal authority were not *res*, since they were not susceptible of evaluation in money. It should also be mentioned that the word *res* was not always confined to *rights in rem* but was also applied to obligations, *i.e. rights in personam*.[14]

In Louisiana, under Article 448 of the Civil Code, the word estate applies to "anything of which riches or fortune may consist".[15] After careful analysis of that Code Yiannopoulos concluded the words "estate" and "thing" are synonymous under the Code. He examines Roman, German, French and Greek law and proposed that the word `things` should be "applied narrowly to physical objects and rights having a pecuniary value, susceptible of appropriation, and broadly physical objects in space regardless of their pecuniary value and their susceptibility of appropriation."[16]

In French law commentators distinguish between *biens* (estates) and *choses (things)*. The French Civil Code defines neither term and appears to use them interchangeably. It is now a settled view in French property law that the word `*choses*` applies "to anything existing in nature, whether or not susceptible of appropriation, while the word *biens* should be reserved to designate of "riches or fortune".[17] Domat has succinctly described *choses* as everything that God created for human beings.[18] Thus, "...all *biens* are *choses* while not all *choses* are *biens*. The sea, the air and the sun are *choses* but not *biens*. Objects susceptible of appropriation are *biens* not only when they belong to someone in particular, but also when they belong to no one.... *Biens* may be corporeal or incorporeal or movables or immovables".[19]

The German Civil Code treats the object of property rights in a different and arguably more coherent manner, perhaps because of the abstractionist element induced into it by the *pandectist* school (i.e., a school of thought which influenced the codification of the German Civil Code) and perhaps because it came later than both the Louisiana and French civil codes and thus

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[14] A. N. Yiannopoulos, "Introduction to the Law of Things: Louisiana and Comparative Law", *22 Louisiana Law Review* 756 (1961-1962) at 760.
[15] Ibid., at 756.
[16] Ibid., at 759.
[17] Ibid., at 761.
[18] Ibid.
[19] Ibid.

had the benefit of hindsight. In the German Civil Code, a distinction is made between an object and a thing. The former is a generic term which may be corporeal or incorporeal and includes anything that can be the subject matter of legal relationships, with the exception of personal relations. "Things" are only corporeal objects of the impersonal nature, which are subject of appropriation.[*sic*]".[20]

A thing in German law has three characteristics: corporeality, individuality and is subject of appropriation. Whereas in Roman law only tangible objects are corporeal, in German law an object is corporeal if it can be perceived by any of the human senses. Natural forces and energies (e.g., heat, light, sound, electricity, and radioactivity) are regarded as incorporeal and are thus not things. Rights, universalities, and aggregate of things are incorporeal objects and thus are not things.[21]

Things are only individual objects, having a well defined existence in space. Air, the sea, running water are not things. Fruits of trees are not things before separation because they are part of the tree. Gases, whether natural or artificially produced, acquire individuality and become things as soon as they are put in containers. Lands acquire individuality by the human activity of fixing boundaries.

Only objects which can be appropriated are "things". The sun, the stars, which no man can have as his own, are not "things". Living human bodies and parts thereof, are not "things" because these are expressions of man's moral personality rather than objects of pecuniary rights. Upon death, however, human bodies become "things". Parts of human body become "things" upon their separation.[22]

3.4 Ethiopian Laws

We now turn to an examination of how Ethiopian law defines the subject matter of property.

3.4.1 The Constitution

The Constitution provides a definition of private property. Article 40 (2) states:

> "Private property", for the purpose of this Article, shall mean any tangible or intangible product which has value and is produced by the labor, creativity, enterprise or capital of an individual citizen, associations which enjoy juridical personality under the law, or in appropriate circumstances,

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[20] Ibid, at 762.
[21] Ibid.
[22] Ibid., at 762-763.

by communities specifically empowered by law to own property in common.

The previous three constitutions of Ethiopia did not offer a definition of private property. They did not go beyond outlining in broad terms the idea that the right to private property was guaranteed and its limitation had to comply with due process of law. The 1987 Constitution explicitly rejected private ownership of productive assets.[23]

Sub-article 40/2 defines private property as a tangible or intangible "product" which is produced by persons or communities and has "value". It is unclear if the term `value', only means the economic value of a product or includes spiritual, historical, scientific sentimental or other values. To be property, tangible and intangible products must come from labor (physical or intellectual efforts), creativity, enterprise or capital (the products of business or generated by investment). Although the Constitution focuses upon the means of producing products which can be the subject of private property, it should not be read as excluding things obtained by a person without expending an ounce of labor or capital (e.g. through donation, testament, sheer chance, and the application of the law of lost and found objects) from private ownership.

The definition suggests that the framers did not consider land and natural resources to be private property as neither can be produced by man. The drafters adopted the sweat and brows doctrine of private property; that is, that which is attributed to your labor rightfully belongs to you; that which is not traceable to your labor is not yours. The FDRE Constitution, like the PDRE Constitution, completely departs from the Code, and removes land and natural resources from private property. They are instead collectively owned. However persons may use and access land and natural resources and the products they produce can be private property. It is ownership that is limited.

3.4.2 The Civil Code

The words "goods", "chattels" and "thing" are used in the Code to describe the object of property. They are not defined anywhere in the Code. The omission has left the definition of a central notion open to conjectures and conflicting

[23] See Articles 27 and 43 of the 1931 Constitution of Ethiopia. These provisions tended to equate property with `genzebe`, land and rights connected to land. Without being concerned about the definition of the object of property, Articles 43 and 44 of the Revised Constitution of 1955 elevated property to the status of life and liberty and envisaged the need for lawful limits on the right to property. Article 22/c, the 1952 Eritrean Constitution treats contractual rights as property. Articles 26, 136, 137 and 139 of the Draft Constitution of 1974 follow the pattern of the Revised Constitution in the sense that the object of property is not defined.

messages.[24] It is difficult to find a consistent and accepted definition of these terms in Ethiopian law.

Article 1126 helps us to identify the object over which property rights may be created. It states: All goods are movable or immovable. While the English version says ``all goods.`` the French version says ``corporeal goods.``[25] The governing Amahric version uses the words ``*gezufenet yalachew nebretoch,*" whose literal translation is corporeal properties. The title Book III is `Goods`. The title of Book III in the French master text is `*Biens*`. As noted above in French law the word *biens* means all objects, whether corporeal or incorporeal, movable or immovable, having economic value and capable of human appropriation.

The word "thing" is also used repeatedly in the Code.[26] Presuming the French interpretation applies to it as well the word thing would be equivalent to *choses*. In French law *choses* include anything existing in nature, whether susceptible of appropriation or not. However the word thing is used in the provisions of the Code which deal with possession and joint ownership of corporeal things and incorporeal things like ownership of intellectual property[27] and other economic interests not connected to any physical resource such as a share in a share company.[28] The numerous articles in Book III of the Code relating to intangible things should also be taken note of.[29] Thus

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[24] Some think that the term "good" is a synonym with "thing" in Book III of the Code. See for example, Fasil Alemayehu, *Teaching Material on Property Law of Ethiopia*, (On file with the author: Unpublished , 2008) at 22. Others think that the term "thing" refers to physical things which can be appropriated while the term "goods" is broader, referring to any subject matter of property rights, be it tangible or intangible thing. See also Aman Assefa, A *Module on Property Law of Ethiopia*, (On file with the author: unpublished, 2007) at 11.

[25] Bililligh Mandefro, Revised Unauthorized Unofficial Translation of Arts. 1126-1674 of Book III of the Ethiopian Civil Code (1960) From the French Original Draft (1973-1975).

[26] See for example the following articles: Article 1140: "Possession consists in the actual control which a person exercises over a thing"; 1188: "Ownership shall be extinguished where the thing to which it extends is destroyed or loses its individual character"; and 1257 (1) "A thing may be owned by several persons as joint owners thereof."

[27] See Article 1647/1 of the Code which bestows ownership upon an author on her artistic and literary works. Commonsense reveals that the ownership of an intangible asset such as a copyright is not the same as the ownership of tangible assets such as a computer. The former cannot be physically detected; the latter can be.

[28] See Article 1349 of the Code.

[29] See Articles 1128, 1167, 1309 and 1347-1352 of the Code. See also provisions relating to servitude, right of recovery, preemption and promise of sale as these are property rights connected to either movable or immovable objects.

while the Code when drafted may have been intended to apply to things as known in law at that time (some 60 years ago), the wording is flexible enough to enable it to encompass new and emerging forms of property rights. This is consistent with a view of the Code as an expression of the express aspiration that the Code regulates the proprietary relationships, whatever they may be, of future generations of Ethiopians.[30]

The organizational structure of the Code assists us in understanding the language used in it. Books I and II of the Code deal with legal personality and legal capacity of persons; and Book III is about rights in *rem* (property interests) held by a person that she might assert against the world in respect of a good, corporeal or incorporeal, while parts of the Code, Books IV and VI, are about rights in *personam*, claims which a person may assert against another person. This edifice of the Code is founded upon the core notion in civil law of legal rights as a dichotocomy of patrimonial and extra-patrimonial rights. Extra-patrimonial rights refer to all rights which cannot be quantified in terms of money while patrimonial rights relate to rights which can be assessed in monetary terms, be they located on a thing or not.[31] The civil law divides patrimonial rights into two, namely rights *in personam* (contractual claims against a person) and rights *in rem* (rights located on appropriable things). Book III of the Code is about rights *in rem* and rights *in rem* must bear upon a subject matter, which may be corporeal or incorporeal.

Much like the Louisiana Civil Code it seems, on a contextual reading of those provisions of Book III of the Code employing the terms `goods` and `things`, that they are used interchangeably. It is the view of the writer that one definition should apply to both and it should be the definition of goods. It is submitted that the word '*goods*' as used in Book III of the Code should, for the purpose of consistency and academic discourse on the Ethiopian property law, be taken to mean anything that is capable of appropriation.

What does the term 'goods' mean in the context of the Code? Under Article 1126 all goods are movables or immovable. Under Article 1130 lands and buildings are deemed to be immovables. Under Article 1127 movables are described as corporeal chattels: ``Corporeal chattels are things which have a

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[30]See Rene David, "A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries", 37 *Tul. L. Rev.* 187 (1962-1963) and Michael Kindred, "Reading on the Historical Development of Ethiopian Civil Law" (A Teaching Material, Addis Ababa University, Law Library Archive, Unpublished 1968-1969) at 108-109.

[31]For a detailed analysis of the concept of patrimony, see op. cit. Planiol, at 265-278. See also Charles Aubry and Charles Rau, *Droit Civil Francais, Vol. II, 7th ed. (An English Translation by the Louisiana Law Institute)*, (St. Paul Minn: West Publishing Co., 1966) at 1-8.

material existence and can move themselves or be moved by man without losing their individual character."

The word "chattel" is a term used in common law jurisdictions to describe movable items of personal property as opposed to real property (at common law immovable property namely land and buildings). Thus this article seems to be describing corporeal movable goods. The following two articles deem intangible or incorporeal types of things to be corporeal chattels.

> Article 1128. Unless otherwise provided by law, claims and other incorporeal rights embodied in securities to bearer shall be deemed to be corporeal chattels.
>
> Article 1129. Unless otherwise provided by law, natural forces of an economic value, such as electricity, shall be deemed to be corporeal chattels where they have been mastered by man and put to his use.

An overall reading of Book III of the Code reveals that goods are objects, tangible or intangible, over which property rights can be asserted. These property rights include individual or joint ownership and rights less than full ownership such as usufruct, servitude, rights of recovery, right of promise of sale and right of preemption.

3.4.3 Other Ethiopian Laws

The Commercial Code of Ethiopia does not propose to identify and define the subject matter of property. However, one can infer from the various provisions of the Commercial Code, movable and immovable things,[32] business,[33] intellectual property,[34] shares in the six types of business associations permitted by the Commercial Code,[35] insurance policies[36] and commercial instruments[37] are things over which property rights can be established. The Commercial Code seems to capture within its scope the protection of the commercial interests of all things which serve as the seat of commercial interest, be it a right *in rem or in personam.* If this is the case, the conception of a thing under the Commercial Code of Ethiopia is broader than the meaning attached to it under Book III of the Civil Code.

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[32] Articles 5/1&2, 35/2 and 561 of the Commercial Code.

[33] Article 124 and 127 of the Commercial Code.

[34] Articles 127/1a) and 148-149 of the Commercial Code .

[35] Articles 250, 274, 283, 302, 345, 522 & 523 of the Commercial Code.

[36] See Articles 654-712 of the Commercial Code which indicate the possibility of insuring interests established over movable and immovable corporeal assets as well as intangible assets including human life.

[37] Articles 715, 716 and 732 of the Commercial Code.

Book IV of the Criminal Code of Ethiopia, consists of seventy two articles and is entitled `Crimes Against Property`.[38] This portion of the Criminal Code divides property into movable property,[39] immovable property,[40] rights in property[41] (e.g., cheques and insurance), intangible property[42] (e.g., trademark, copyright and goodwill) and claims of creditors.[43] One can see that the Criminal Code uses the term `property` in its broadest sense as any appropriable subject matter which has pecuniary value. It encompasses tangible and intangible things. It also describes the claims of creditors directed solely against a person as property.[44] The purpose of criminal law is to safeguard the economic interests of persons in tangible and intangible assets including debts. Thus the Criminal Code protects, in relation to property, both rights *in rem* and rights *in personam*. In this sense, not all things, regarded as property in the Criminal Code, are things in Book III of the Civil Code.

Articles 57-73, and Articles 85-93 of the Revised Family Code are devoted to the treatment of matrimonial and personal property. Articles 57-73 of the Revised Family Code use various terms including `personal property,`[45] `common property,`[46] `immovable property,`[47] `movable property,`[48] `income`[49] and `debts.`[50] The term `property` includes tangible and intangible property over which property rights are established in favor of a husband and a wife commonly or in favor of one of them personally. It includes contractual rights. One does not expect the Revised Family Code to distinguish property rights from contract rights as its purpose is not to do that; rather it aims at

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[38] Also see Articles 849-862 of the Criminal Code "Petty Offenses", which deals with minor offenses directed against property.

[39] Articles 665-684 of the Criminal Code. Also see Article 665/3 which divides movable things in terms of value-those with `very small economic value`` and those with higher economic value. See also Articles 669/1 and 681/2 of the Criminal Code which deal with ``sacred or religious objects or objects of scientific, artistic or historical value...`

[40] Articles 985-688 of the Criminal Code.

[41] Articles 692-716 of the Criminal Code.

[42] Articles 717-724 of the Criminal Code.

[43] Articles 725-733 of the Criminal Code.

[44] This inference is substantiated by Article 662/1, one of the general provisions of Book IV of the Criminal Code, which employs the phrase: "Any interference with property and economic right or rights capable of being calculated in money forming part of the property of another.

[45] Article 57 of the Criminal Code.

[46] Article 63 of the Criminal Code.

[47] Article 68/1/a of the Criminal Code.

[48] Article 68/1/b of the Criminal Code.

[49] Article 62/1 of the Criminal Code.

[50] Articles 70-71 of the Criminal Code.

regulating the pecuniary relations of a husband and a wife as well as third parties in the course of marriage and after dissolution of the marriage, whatever that pecuniary relationship may be.

3.5 More on the meaning of the subject matter of property rights

It is the suggestion of this writer that 'a good' within the meaning of the Code should be understood to mean anything capable of human appropriation, be it tangible or intangible, that is, any appropriable corporeal or incorporeal thing.

A good is corporeal if it is capable of human perception meaning it can be touched, smelled, tasted, seen, or heard. Incorporeal property does not have those qualities. It exists in the human imagination as ideas or concepts. It includes intellectual property rights such a patent, trademark and copyright and the rights found in negotiable instruments like cheques and securities payable to bearer. They can also include forces of nature like electricity[51].

A person may acquire a good through any means permitted by law. For instance, a person may have an interest in a good after investing her time or money or labor in it. Or a person may come into possession of a good upon the death of her relative or by chance, for example, by finding an abandoned watch. A good may be appropriated collectively or privately. Some countries allow individuals to appropriate certain resources but do not permit them to appropriate others. In Ethiopia, for instance, private persons cannot have control over land in the sense of individual ownership; but individuals can have property interests in tracts of land short of individual ownership. How a good is acquired is not relevant to the determination of whether it is a good or not.

It is not necessary for a good to have an economic value to be property at law. The good may be invaluable, have negligible value or be worthless. Thus my handwritten notes are goods, the course textbook is property, the building where the class is taught is property. The object, from the point view of the holder, might have just a spiritual, historical, scientific[52] or sentimental value.[53]

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[51] See Article 1129 of the Code which reads: Unless otherwise provided by law, natural forces of an economic value, such as electricity, shall be deemed to be corporeal chattels where they have been mastered by man and put to his use.

[52] See Articles 669/1 and 681/2 of the Criminal Code which protect objects with historical, archeological, scientific value. These objects are owned by the nation as a whole and are seen as not commodities but as objects of special character.

[53] See Article 1094 of the Code which deals with family objects seen as having sentimental value to heirs.

A thing can be the object of property law even if its economic value ranges from that which has an insignificant economic value to that which is invaluable.

In the definition proposed here includes a requirement that the good be "capability of appropriation". Thus the good need not be appropriated but it must have the potential to be appropriated.[54] The term ``appropriation'' signifies exclusive control of a thing by a person or a group of persons. It normally refers to the physical and legal possibility available to a person to retain and enjoy such a thing and with the right to require others to abstain from doing the same. If a person cannot control an object, then the object is not a thing in property law.

A person may be precluded from appropriating a good because of legal impossibility or physical impossibility. In some cases, the appropriation of specific types of property is prohibited at law. For example, human slavery is prohibited. There is a universal consensus that a human being cannot be taken as property. The declaration in Article 1 of the Code that "the human person is the subject of rights from birth to death" is in line with the wider recognition of the proposition that persons are the subjects who have property rights, and things are the objects of those property rights in contemporary society.

> Persons own things, and things are owned by persons. There is an absolute divide between persons and things. If persons own persons, we would be back to the slave economy of the ancient past. Indeed, it is because persons and things are strictly opposed as subjects and objects of property right[s] that it is possible for two persons to exchange things they own in a market. A person and a person exchange a thing and a thing with one another—this is the elementary form of market exchange. [55]

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[54] See Article 1151 of the Code.

[55] Iawi Katsuhito, Persons, "Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance", *47 Am. J. Comp. L. 583* (1999) at 587. If human beings are put beyond commerce, some of their parts are not. People may with the full blessing of the law transact parts of their body. Contemporary legislation enables transactions of certain body parts. For example donations of blood or cornea are valid. Article 18/1 of the Code prohibits a person from disposing of parts of their own body before death where to do so would cause serious injury to the integrity of the human body. This and subsequent provisions are designed to enable appropriate and consensual medical procedures and surgeries to be carried out. The provision implies that a person may dispose of their dead body as they see fit. But see Article 573 of the Criminal Code of Ethiopia which makes it illegal to obtain money or other advantage from dealing with a corpse or body part. It is arguable that transactions relating to a dead human body or part thereof, or part of a live person is permissible if those transactions are entered into for free.

The law's view of what may not be the object of property rights is dynamic and varies with time, culture and place.[56]

Sometimes a person cannot appropriate a thing because it is practically impossible to do so. No one in the world can claim to have control over universal things like the sun and its rays in their entirety. Likewise, the air, the seas, the wind and other natural phenomenon/forces belong to humanity as a whole. In effect, their enjoyment by one does not exclude a similar use by another person, nor does their use by all human beings lead to their depletion. However with the aid of technology man has mastered some aspects of them. Thus for example man has appropriated a certain quantity of the sun's energy for heat and light. Oxygen is contained and used to treat the ill. Electricity is generated from water; air is compressed and used to fill a car's tires. [57]

There are those who argue that universal things could be made objects of human appropriation but as a matter of policy, giving control over these resources to a few is undesirable. According to this view, there is nothing upon this planet which by its nature cannot be appropriated for the profit of man.[58] An assumption is made that all things are by their nature susceptible of ownership and that considerations of public utility and convenience require certain things to be withdrawn, wholly or partly from the sphere of private relations. Otherwise, for example, a powerful nation could seek to force others to pay to use the sun's rays. This would amount to the appropriation of universal goods for the betterment of that nation or its rulers and to the detriment of others. Universal things are therefore withdrawn from private alienation because of their feature as public goods.

3.6 Conclusion

There are adequate reasons to name the object over which property rights are located in the Code as *goods*. The chapter conceives goods as corporeal or incorporeal things capable, in practical and legal senses, of appropriation by a person. The scope of the meaning of goods is not confined to things external to human beings. Under the conception of self-ownership (which is merely touched upon but not pursued in this chapter) parts of the human body may be the subject of property interests. Under other Ethiopian laws like the criminal, commercial and family law, the notion of goods may be broader than

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[56] Article 9/1 of the Code declares rights of personality (e.g. restriction on freedom, searches, domicile, thought, religion, freedom of action, marriage and divorce) to be out of commerce. But sub-article 2 of the same article indicates the possibility of putting these rights of personality in commerce if a legitimate interest requires it.

[57] See Article 1128 of the Code which deems mastered natural forces as movable things.

[58] Op. cit. Planiol, at 816.

objects of rights in *rem.* This justifies purpose-oriented approach in the definition of the notion which is pursued in this chapter.

3.7 Review questions

1. "A thing is such permanent object, not being persons, as are sensible or perceptible through the senses; permanent objects in the sense that they are perceptible repeatedly".[59] Using this definition which of the following are things?

   (a) My trousers; (b) a flower; (c) my name; (d) a field of teff; (e) my right to publish and sell this book; (f) my salary; (g) the sun, and (h) a puff of smoke.

2. This chapter has concluded that the seat of property rights as encapsulated in Book III of the Code should sensibly be termed as "goods", be they corporeal or incorporeal, which can be appropriated by a person. Which of these same things are also goods within the definition offered in question 1? What is the significance of the difference?

3. Article 573/1 of the Criminal Code of Ethiopia states: *Whoever, with intent to obtain money or another advantage:*

   a. Gives while alive his organ or a part of his body to another; or

   b. Enters into a contract with another person or institution to give his organ or a part of his body after his death is punishable with simple imprisonment or fine.

Do you think that this provision should lead to the prosecution of X who donates her natural hair to another person? What about a person who donates her blood to another person? Would the following provision make a difference? Article 70 of the same code prescribes: (1) A crime is not liable to punishment where it is punishable upon complaint and where it is done with the consent of the victim or his legal representative. (2) Without prejudice to the provision of Article 573 of this Code, when any person, having entered into a contract of his own free will without any commercial purposes, donates while alive or causes to be donated after his death, his body, a part of his body or one of his organs to another person for personal use or to a juridical person for appropriate and necessary scientific research or experiment, the recipient shall not be criminally liable.

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Chapter 4: Primary Classification of Goods**

4.1 Introduction

Book III of the Code divides goods into those which can be appropriated and those which cannot be.[1] The Code tacitly classifies those goods which can be appropriated into corporeal and incorporeal goods. Corporeal goods, that is, things which can be perceived using human senses, are further classified into movables and immovables.[2] Movables and immovables are comprised of the principal thing itself together with its intrinsic elements and accessories. All of these classifications are necessary to resolve issues of ownership, possession, transfer or other aspects of property rights when transactions occur and disputes arise.

Articles 1126-1139 of the Code which set out the primary classifications of the objects of property law suffer from inconsistent terminologies, mistranslations, vagueness and lacunas. In this Chapter we will closely review these provisions and seek to interpret them in a way that clarifies and makes sense of them.

4.2 Criteria of classification into movables and immovables

If a thing can normally move or be moved without losing its individuality then it is a movable thing. Movables are not fixed in place. Immovables are fixed in place. They cannot move or be moved. Lands and buildings are immovables.[3] Where there can be some dispute about the nature of objects the law deems certain things to be movable or immovable.

**This chapter is a modified form of an article written by the author and previously published as "Movables and Immovables under the Civil Code of Ethiopia: A Commentary``, 1:2 *Jimma University Law Journal* 245 (2008).

[1] Book III is entitled ``Goods``. It appears the drafter considered it obvious and thus unnecessary to explicitly divide goods into those which can and cannot be appropriated. This classification is sometimes referred to as the distinction between common, public and private things; or things that are in commerce or out of commerce. See op. cit Yiannopoulos, *Law of Things*, at 763-764.

[2] See Articles 1126 – 1139 of the Code. The English version of Article 1126 of the Code classifies "all goods" into movable and immovable indicating the major division of things in the Ethiopian property law.

[3] See article 1130: "Lands and buildings shall be deemed to be immovables".

4.3 Reasons for the classification

The first reason for the division of property into movables and immovables is to bring sense and coherence into the study of property law. The second is policy. Throughout history, societies have organized and classified goods according to their importance to the community. Thus a fishing community gives greatest value to its fishing grounds and implements, a pastoral community to grazing land and cattle or camels, an agrarian community to farmland, an industrial society to things in commerce including, and in the case of a technologically advanced society, intellectual property.

Before the sixth century, things, in Roman law, were divided in accordance with their economic and political significance. Over time land, cattle, and beasts of draft and burden achieved economic and political dominance.[4] Roman jurists began to view distinctions based on importance cumbersome and fluid and Emperor Justinian introduced the division of things into movables and immovables.[5] This classification was thought to bring greater legal certainty.[6]

During the Byzantine period, between the fourteenth and sixteenth centuries, jurists imported this distinction into the civil law tradition. German law still defines immovable as tracts of land and their essential component parts; and movables as things which are neither tracts of land nor essential component parts of tracts of land.[7] The distinction was adopted into other continental civil codes and from there it was transplanted to several countries in Asia and Africa including Ethiopia.[8]

Although common law jurisdictions do not use the words movables and immovables the underlying concepts are very similar. For example, in the United States, the subject matter of property rights is divided into "real property" and "personal property". In general terms, real property means anything that is part of the land or which is attached to the land and anything which is incidental or appurtenant to land or which is considered immovable by law whereas personal property means those items which are movable. Real

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[4] These early legal traditions focused upon durability and utility rather than whether an object was movable by nature.

[5] John H. Merryman & David S. Clark, *The Civil Law Tradition: Europe, Latin America and East Asia* (Virginia: The Michie Company Law Publishers, 1994) at 30.

[6] Ibid.

[7] See Articles 93-96 of the German Civil Code (as revised in April 19, 2007).

[8] Op. cit. Merryman & Clark, *Civil Law*.

property includes land and buildings.[9] In the civil law tradition of Ethiopia the equivalent of things incidental or appurtenant to land are referred to as accessories and intrinsic elements of land and buildings.

In 1922 the then USSR sought to abolish the concept of private ownership of property, particularly of land. The new civil code replaced the distinction between movable and immovable property and new divisions between personal property, state property, cooperative property and things of production and consumption were adopted.[10] The abolition led to state ownership and hence the removal of all land from commerce. Only one residential building could be owned. This was done to remove feudal concepts of social, political and economic status.

The Ethiopian Code came into force just one decade after the middle of the last century. Then Ethiopians gave, as perhaps they do now, greater value to immovable property than movable property.[11] A primarily agrarian economy, Ethiopia wished to give greater legal protection to interests over plots of land. Land ownership was an important status. In order to stand as a candidate for election a person must have been a land owner.[12] To be settled and be part of a community meant to have a home and land. Ownership of a plot of land, urban or rural, signified relationship with one's ancestors and their heritage. Political, social and economic alliances were forged and broken around land.[13] The church had a symbiotic relationship with the state via the acquisition and protection of land. The material foundation of the then existing feudal system was obviously land. The nobilities and landlords who dominated the two houses of parliament at the time of adoption of the Code had every reason to

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[9] See Geo P. Costigan, "A Plea for a Modern Definition and Classification of Real Property", 12 Yale L.R. 426 (1902-1903) at 426. "The broad distinction between real property and personal property was, and in general is, that between (I) immovable things and rights in them, and (II)movable things and rights in them".

[10] Articles 10-18 of the USSR Constitution (1977).

[11] Dessalegn Rahmato, *Land Tenure in Ethiopia: From the Imperial Period to the Present: A Brief Discussion in Topics in Contemporary Political Development in Ethiopia*, (Workshop Proceedings published by the Department of Political Science and International Relations, Addis Ababa University, 2000) at 84-5

[12] Yacob Arsano, *People's Choice and Political Power in Ethiopia: Elections and Representation During the Three Regimes in Electoral Politics, Decentralized Governance and Constitutionalism in Ethiopia* (Addis Ababa, Addis Ababa University Press, 2007) at 156-7.

[13] The central importance accorded to land ownership was expressed in local sayings like the one from northern Ethiopia that a person cannot be allowed to interfere with *rist* (one's rights in land) and wife.

ensure the inclusion of rules in the Code that were more protective of land rights. It is no wonder then that the Code, gave particular attention to immovable property. In fact eighty percent of the Code deals with immovable things, land in particular. In some ways it is fair to say that Book III of the Code is the law of immovable.[14]

One might be tempted to argue that the centrality of the division of corporeal goods to movables and immovable lost importance following the collectivization of land in Ethiopia in the aftermath of the 1974 Revolution.[15] After all, since 1974 land has been removed from private ownership in Ethiopia. The PDRE Constitution rejected the distinction between movable and immovable things and replaced it with socialist property and personal property.[16] Socialist property meant productive assets in the possession of government units, state enterprises, mass associations, cooperative societies and professional associations. Personal property was that held by private persons for survival and comfort. In order to prevent the accumulation of wealth by private persons under the guise of personal property, the PDRE Constitution envisioned constant taking (recurrent nationalization) of property via requisition.[17] Later the FDRE Constitution continued to relegate the categorization of things into movables and immovables to secondary importance. For example, Article 40/2 of the FDRE Constitution divides private property into tangible and intangible products having value and produced by labor, creativity, enterprise or capital.

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[14] The following articles in the Code apply exclusively to immovable property: Articles 1207-1256 (special rules applicable to immovable property and use and ownership of water), Articles 1359-1385 (servitude), Articles 1460-1488 (expropriation) and Articles 1553-1646 (registration of immovable property).

[15] Harrison Dunning appears to question the importance of maintaining this division even in pre-1974 context in Ethiopia. See Harrison C. Dunning, *Property Law of Ethiopia: Materials for the Study of Book III of the Civil Code* (HSIU, Faculty of Law: unpublished, 1967) at 7. Op. cit Paton, *Textbook*: "...though nothing may be eternal, land is more enduring. The fact that land cannot be moved makes it especially valuable as a security. Land can be subdivided without losing is value. In agricultural society, land is the main form of wealth. Land will still remain the essential foundation for most human endeavors even in industrial societies."

[16] See Articles 12-18 of the PDRE Constitution (1987).

[17] The term ``constant taking`` refers to when a socialist state nationalizes private property from time to time, the idea that nationalization of property in a state which follows a socialist ideology might be a recurrent affair. Requisition means the taking of movable property by the government with compensation, while expropriation applies to the taking of immovable property. Articles 1460-1488 of the Code provide for expropriation. Little is said about requisition in the Code.

It is submitted that the division of things into movable and immovable remains alive in Ethiopia. In the aftermath of the Ethiopian revolution land has continued to be the material foundation of Ethiopian society. At the time of the revolution, politics may have dictated a change of vocabulary in the classification of property in Ethiopia from movables and immovables to personal and socialist property. However that change in vocabulary while a change in form did not change what was actually occurring. It is possible to argue that this change in terminology merely reflected the aspiration of the revolutionary government to transform the society based upon their ideological emphasis on the centrality of labor and their distrust towards the past economic relationship around landed property. Although termed personal property, the exclusive control of land and ownership of buildings by individuals was permitted in the period between 1974 and 1991 in Ethiopia. Even though the PDRE Constitution seemed to abolish it, the Law Revision Committee, formed in late 1980`s, maintained the division of things into movable and immovable goods. It appears that the members of the Committee were able to appreciate the practical benefits of recognizing the fixed nature of immovables and the feeling that "certain things are more valuable than others as parts of individual estates and that, therefore, their conservation must be assured".[18]

The collectivization of land did not end private ownership of buildings. And with respect to land, people remain able to enjoy exclusive possession of land, can hold it in usufruct, lease it, donate it to a family member, mortgage their lease holdings, leave it to their heirs, testate or intestate, and enjoy other innumerable rights in land short of individual ownership.[19] Since 1974, in Ethiopia, what has been taken away from people with regard to land is that ultimate prize, i.e., sole ownership. People still have property rights in immovables. If things are to be classified in accordance with their economic and social importance, Ethiopia does not have assets more important than immovable property. Ethiopia is an agrarian society and immovable property still retains center stage in her economy. It is sensible to retain the division of corporeal goods into movables and immovables under Ethiopian property law. This division both in terms of form (language) but also in terms of its content

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[18] Op. cit. Dunning, *Property Law* at 6. See Articles 1-8, *Draft of Book III of the Civil Code*, Addis Ababa, Ministry of Justice, (Unpublished) (1987).

[19] It is not possible in Ethiopia currently to transfer ownership of land, be it by way of donation or sale, because of the prohibition at law on ownership and because a person cannot transfer a right more than she has.

(idea)[20] reflects practical day to day realities and makes the law intelligible to the ordinary man.

4.4 Consequences of the classification

The legal rules governing property found in the Code reflect the division of things into movable and immovable. The transfer of title over an immovable requires the completion of formalities like the authentication and registration of transfer documents.[21] Ownership of movable things can be acquired on the basis of possession in good faith. Immovables cannot be so acquired.[22] Possession is prima facie proof of ownership of ordinary movable things and ownership is transferred by a juridical act or agreement followed by delivery of possession.[23] The determination of who owns an accession[24] to a piece of land depends upon whether the accession was approved by or at least not objected to by the landowner. For example, crops planted on the landowners land without his permission become the landowners, whereas if he does not object to their planting they become the property of the planter. Different rules

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[20] See the Preface of the Code, which states in part: "No law which is designed to define the rights and duties of the people and to set out the principles governing their mutual relations can ever be effective if it fails to reach the heart of those to whom it is intended to apply and does not respond to their needs...".

[21] See Article 1185 of the Code. Under Article 1195 of the Code for a person to claim to be an owner of an immovable object, she must secure a title deed bearing her name from the concerned public authorities. See also Article 2878 of the Code. Under Articles 1723 and 2877 of the Code, any contract, even as between the contracting parties, whose object is the creation or transfer of rights in an immovable asset , must be in writing, while authentication is needed for the contract to have effect on third parties. Recently, the Cassation Division of the Federal Supreme Court has reaffirmed the legal effects of a written and authenticated contract on the parties and third parties. See Federal Supreme Court Cassation Division Decisions Vol. 4, *Gorfe Workneh v. W/ro Aberash Dubarge et al* (Fed. Sup. Ct., File No 21448, 1999 E.C.), at 40-48. Federal Supreme Court Cassation Division Decisions Vol. 4, *Kebede Argaw v. the Commercial Bank of Ethiopia et al (*Fed. Sup. Ct. File No. 16109, 1999 E.C.*)* at 70-75. See also Op. Cit., Authentication and Registration of Documents Proclamation No. 334/2003 especially Articles 2/1, 2/3 and 5.

[22] Articles 1161-1167 do exclusively apply to movable things.

[23] See Articles 1184, 1186/1 and 1193 of the Code. Here the term `ordinary movable is employed because there are some movables such as a motor vehicles, ships and business which are given the status of immovable property for the purpose of transfer of title.

[24] Accessions are dealt with in Articles 1170 to 1183 of the Code. An accession to property is the natural fruits of that property (e.g. calves from cattle, minerals in the soil) or the products that arise from using the thing for its purpose.

apply to accessions to movable property.[25] Mortgages and antichresis are available for immovables while pledges relate to movable property only.[26] In the case of movable things, ownership can be acquired by prescription and in the case of immovables usucaption.[27]

The legal effect of the division of corporeal goods into movable and immovable transcends property law. In succession law, the power of a liquidator to sell immovable property forming part of a succession is curtailed.[28] In contract law, to be valid, a contract concerning immovables must be in writing, signed by the parties and attested by witnesses.[29] In agency law, a special appointment made in writing is required for an agent to validly handle transactions relating to immovable property on behalf of the principal.[30] In civil procedure, there are special rules applicable to the attachment of immovable property. Once property is attached the method of organizing a public auction depends on the category of the thing to be auctioned.[31] The division has also an impact on the jurisdiction of the court; a court in the vicinity where the immovable is situated has jurisdiction over the immovable.[32] In commercial law, a manager is prohibited from selling and mortgaging immovable property without an express authorization to that effect.[33] In criminal law, there are special rules that apply to protect interests in immovable property.[34] The division of things into movable and immovable has a bearing on the capacity of foreigners to acquire ownership over immovable in Ethiopia. For example, non-investor

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[25] See Articles 1172-1181 versus Articles 1182 and 1183 of the Code.

[26] See Articles, 2829, 3047 and 3117. Some special movables such as businesses may be mortgaged.

[27] Article 1168/1 provides, in part: 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..." Article 1192 of the Code states: "The owner of a corporeal chattel shall lose his rights as an owner where he failed to exercise them for a period of ten years by reason of his not knowing where such chattel was or that he was the owner thereof."

[28] See Articles 1023 cum 1088 of the Code.

[29] See Articles 1723 and 1727 of the Code.

[30] See Article 2205 cum Article 1723 of the Code.

[31] See Articles of 439-455 of the Civil Procedure Code of Ethiopia (1965). Article 36/4 of this Code requires any occupants of an immovable thing, irrespective of the nature of his/her proprietary interest therein, to be made part of a suit where a plaintiff sues for the recovery of such immovable property.

[32] Ibid., Article 25.

[33] See Article 35/2 of the Commercial Code of Ethiopia (1960).

[34] See Articles 685 and 686/1(a) of the Criminal Code of Ethiopia (2005).

foreigners are not entitled to own immovables or exercise rights to or usage of immovable property for a period exceeding fifty years or a life interest.[35]

4.5 A Movable thing

In general terms, a movable thing is an object that can move or be moved by human agent without losing its essential features.[36] Animate things, like cattle, move by themselves. Inanimate things must be moved by human forces. In the case of things that are movables because they can be moved by human agent, such movement should not alter the nature of the thing moved. For instance, one can move a house from place ``X`` to place ``Y`` by demolishing it. But here one is not moving a house rather the ruins of a house are being moved from place ``X`` to place ``Y``. One can move a mature tree around normally only after cutting it off and thus depriving it of life. In these examples, after they have moved the house is a ruin of building materials and the tree is no longer a tree but wood. The house and the tree, in these examples, will lose their essence after the movement. The critical issue in order to appreciate the phrase ``loss of their individual character`` in Article 1127 of the Code is to ask the question: whether or not the quality of the thing is fundamentally altered after it is moved from place ``X`` to place ``Y``. Another pertinent test is whether the displacement changes the ordinary purpose of the thing.

Movable things are sub-divided into things that are movable by nature, become movable by virtue of their application/attachment to a movable object, movables by anticipation, incorporeal movables, intrinsic elements and accessories. Some of these sub-divisions of movable things are latent and the others are patent in the Code.

4.5.1 Movable by nature

Article 1127 of the Code provides that "corporeal chattels[37] are things which have material existence and can move themselves or be moved by man without losing their individual character". These things are by their nature movable. Both animate and inanimate objects can be movable. There are three requirements for a thing to be movable by nature, namely, the thing

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[35] See Articles 390-393, and Article 1089 of the Code. Foreign investors, be it in the form of sole proprietorship or business association, are entitled to acquire entitlements in immovable property including land for their investment purposes. See Article 40/6 of the Constitution of the Federal Democratic Republic of Ethiopia (1995). See also Article 8 of the Investment Proclamation No. 280/2003, *Fed. Neg. Gaz.* 8th Year, No 27.

[36] See Article 1127 of the Code.

[37] Or, as we discussed earlier, corporeal goods.

must have material existence or must be perceptible by the senses, such as a table, a chair and a book; it must be able to move itself (like an animal can) or be able to moved by man, such as a book, table or chair; and it must not lose its individual character when it is moved.[38]

A thing may be movable by nature although during its entire existence it may have a fixed place according to the wishes of its owner. For example, mobile homes and trailers are movables. Materials used for the purpose of constructing a building remain movables until actually incorporated into the building. Materials taken from a demolished building are also movables. Materials detached from an immovable building for repairs or additions and with the intention of replacing them do not thereby become movables, they preserve their immovable nature.[39]

4.5.2 Things which the law deems movable

Natural resources such as electricity which have economic value and have been mastered by human beings and used by them are deemed by law to be corporeal chattels and thus movables.[40] This removes any need to examine their characteristics or establish in fact that they move on their own or can be moved by man. In Ethiopia natural forces meeting the criteria set down in Article 1129 are movables as a matter of law. Similarly article 1128 deems "claims and other incorporeal rights embodied in securities to bearer" to be corporeal chattels and thus movables.[41] Thus these incorporeal rights are by law made corporeal goods and movable.[42]

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[38] Movable things which become intrinsic elements of an immovable can lose their character and become immovable. For example a door which when in the shop is a movable becomes intrinsic to and one with the immovable building once installed in it.

[39] See Article 470 (2) of the Revised Louisiana Civil Code (1978). The same is true in the case of French property law.

[40] See Article 1129. Unless another law provides otherwise.

[41] Under Article 721 of the Commercial Code, a security to bearer is one type of negotiable instrument which may be transferred by delivery of the instrument without any additional legal requirement. The holder of the instrument to bearer establishes her right to the entitlement as expressed in the instrument by the sole fact of presentment of the said instrument. Non-bearer shares follow a different mode of transfer

[42] Unless another law provides otherwise.

4.5.3 Intrinsic elements of movables

An intrinsic element is an essential or an integral aspect of a thing. An intrinsic element makes a thing complete. The engine, mirrors and the main tires of a motor vehicle are intrinsic elements of it because without them the machine would be incomplete. Intrinsic elements of a movable thing merge with it and become movable as well.

There are three kinds of intrinsic elements under the Ethiopian property law: one is elements customarily linked to the principal; a second, elements materially united with the principal; and the third are elements deemed intrinsic by operation of law.[43] Our discussion here will focus on the first two types. We will turn to the third when we discuss immovable property.

When determining whether a thing is intrinsic to an object by custom or material unity we are asked to separately examine the principle thing and the thing thought to be intrinsic. The determination is made using objective tests. In cases where a customary link is contended, the fact to be proved is the practice of the relevant community on the question of the relationship between these objects. In the case of material link the primary issues are the existence of a material union between the things and whether detachment of one of the objects from the other would cause destruction or damage to the principal.

Article 1132 (1) of the Code provides: "Anything which by custom is regarded as forming part of a thing shall be deemed to be an intrinsic element thereof". Custom means a practice habitually followed by majority members of a given community for a long period of time with the intention to be bound by such conduct. The practice is expected to be observed regularly, not on an on and off basis. The onus is on the person who alleges the link to prove it exists. This assertion as to burden of proof is based on the time honored principle of evidence: she who alleges the existence of a given fact in her favor must establish it.[44] The existence of such customary regard may be proven by the sworn testimony of witnesses and anthropological writings. The evidence must establish that repeated practice suggests that the concerned community regards a certain object as an essential part of a movable or an immovable thing. For example, a certain farming community might treat oxen as an

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[43] Intrinsic element as a matter of law applies to trees and crops and will be treated later in connection with intrinsic element of immovable things. Here, intrinsic element by virtue of custom and material link as applied to movable things will be described.

[44] Burden of proof is a general and well-settled principle. See *Black's Law Dictionary (8th Ed.)* (2004).

essential part of a plough. If this were the case, the oxen would be, even if there is no material connection between the plough and the oxen, an intrinsic element of the plough. A hayrack attached to a tractor may be regarded as forming part of the tractor in a farming community. The hayrack is customarily intrinsic to the tractor even though it can be detached from the tractor without damage and operate while attached to another tractor or motor. Thus, custom may regard things as intrinsic even where they can be detached from each another without damage.

Article 1132 (2) of the Code states that: "Anything which is materially united to a thing and cannot be detached there from without destroying or damaging such thing shall be deemed to be an intrinsic element thereof". In order for this article to apply an object must be physically connected to another object, called the principal thing. The cause of this union is not pertinent and the identity or conduct of the person who makes the linkage is also irrelevant. The attachment of the thing to the principal might be made accidentally or negligently or deliberately and by the person who is the owner of one or both of the things united or by a person having no proprietary interest in the two things. Even a thief or a burglar could establish the union of the two things. And secondly, separating the two objects must result in destruction or damage to the principle thing. For example, applying these criteria, nuts and bolts, if used, for the making of a table or wardrobe become intrinsic elements of such table or wardrobe or the four wheels of a car are intrinsic elements of the car

It is important to know whether a thing is intrinsic to or distinct from other things. As between the parties to a transaction involving goods article 1130 of the Code states that: "Unless otherwise provided, rights on, or dealings relating to goods shall apply to all intrinsic elements thereof". Thus, if a person sells a thing she is assumed to sell it together with all of its intrinsic elements and if a person pledges a thing, the law assumes that she has pledged the intrinsic elements thereof absent a contrary legal rule or agreement. In any transaction, the intrinsic elements form part of and follow the principal. It ceases to be a distinct thing.

Article 1134 of the Code extinguishes the interest of third parties in a thing which has become part and parcel of another thing. In the eyes of the law any property interests held by third parties to something which becomes an intrinsic element of a movable thing melt away. As the thing ceases to have a distinct existence, so do rights to it. This happens by operation of law and obviates the need to inquire into what lead to the merger of the property into another. While third parties in these cases no longer have a right to the property itself they may have a claim in contract or tort for damages

occasioned by the loss of the thing or may bring a claim of unjust enrichment against the holder of the principal thing. [45]

4.5.4 Accessories to movable property

In determining what constitutes an accessory in law it is important to answer the following questions: What may be an accessory? Who may establish principal-accessory relationship? What is the nature of the link between an accessory and the principal thing? Article 1136 provides: "Anything which the possessor or owner of a thing has permanently destined for the use of such thing shall be deemed to be an accessory thereto". There can be an accessory-principal relationship between two movable things[46] when a usufructuary or an owner intentionally and permanently destines a movable for the economic benefit of another movable it becomes an accessory. An accessory remains an accessory when it is temporarily separated from the principal object, it does not lose its own character as movable property and third parties maintain their rights to the accessory.[47] So for example, if I have an interest in a computer printer, even when it is used by the owner as an accessory to her desktop computer, I retain my interest in the printer. The printer is an accessory to the computer. It does not merge with it and become an intrinsic part of it.[48] I may assert my rights against it as an independent object. As is the case with all property an accessory may be a tangible or intangible.

4.5.5 Movable by anticipation

Pursuant to Article 1133 (1) of the Code, trees and crops are immovable intrinsic elements of the land until they are separated from the land. Article 1133 (2) of the Code states that: "Trees and crops shall be deemed to be distinct corporeal movables where they are subject to contracts made for their separation from the land or implying such separation". Thus, when they are planted with the expectation and understanding that they will be harvested, that is, removed from the land, they are characterized as movable by anticipation. Once removed these trees and crops become movables by nature. The distinction is that the trees and crops that are still affixed to the land become movable by anticipation when they are subject to an agreement to separate them from the land in the future. Thus the trees and crops are given, in the present time, the character that it is agreed they ultimately will

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[45] See Article 1134/3 of the Code.

[46] These issues will be analyzed later in relation to immovable things.

[47] See Article 1138 of the Code.

[48] See Article 1183/2 of the Code.

have. In making this rule the law seeks to facilitate market transactions in property interests.

By way of example, assume that W/ro Mulu owns some land upon which there are trees. She sells the trees to Ato Aberra with the agreement that he may harvest them at a future date. Ato Aberra, plans to cut the trees three years after the conclusion of the sale contract. The law considers the trees as movables (by anticipation) from the moment the sale is concluded.[49] If W/ro Mulu sells Ato Aberra a house located on her land on the understanding that it will be demolished and the debris collected for reuse by Ato Aberra three months following the sale. The law regards the house as movable by anticipation from the moment of the conclusion of the sale contract.[50]

Ethiopian law is silent on the issue of the interest of third parties in the principal or the movable by anticipation. However the answer is implicit in the proposition that under the Code for all intents and purposes movables by anticipation are to be treated as ordinary movables. Suppose Ato Dinsa sells his standing crops to Ato Aberra. Ato Dinsa then transfers the land on which the crops are grown (assuming that land is privately owned) to Ato Lipsa before Ato Aberra harvests the crops. The contract of sale of the crops precedes the contract of the sale of the plot. Assume as a third party, Ato Lipsa argues that he has purchased the plot together with the standing corps on the basis that the crops are intrinsic to the land. An application of the Ethiopian law would mean Ato Lipsa's claim over the standing crops would be dismissed as the crops became ordinary movables, distinct from the land, the moment they were subjected to an agreement that implied their separation from the ground even though the removal of the crops might take place several months later. French and Louisiana laws would require registration of the contract pertaining to the transfer of movables by anticipation in order to adversely affect the interests of third parties.[51] In those jurisdictions absent registration of the instrument implying the separation of immovable things, it can affect only the parties, not third parties.

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[49] If prior to Ato Aberra cutting down the trees W/ro Mulu sells the land to Ato Darara, Ato Darara will be bound by the terms of the sale contract and cannot take control/ownership over the trees.

[50] See Article 2268/1 which provides that: "The sale of intrinsic element parts of an immovable shall be deemed to be a sale of movables where such parts are, under the contract, to be separated from the immovable and transferred as a corporeal chattel to the buyer."

[51] A.N. Yiannopoulos, "Movables and Immovables in Louisiana and Comparative Law", *22 La L. Rev. 517* (1961-1962) at 562.

4.5.6 Incorporeal movables

Logically the distinction between movables and immovables should only apply to corporeal things since rights are always devoid of corpus.[52] But legal classification defies lay notions about the division of things; the law assumes its own logic. It is with this in mind that we discuss incorporeal movables.

The Code explicitly recognizes the existence of incorporeal goods. The Constitution refers to them as intangible products. Incorporeal things cannot be grasped by the senses. Incorporeal movables are certain types of rights which have economic value.

A business is an intangible thing with economic value. A business is a product of the organization of resources for the purpose of obtaining profit. The tangible and intangible resources assembled for purposes of making profit are taken as a distinct patrimony which is termed in the vocabulary of commercial law as a 'business'. For transaction purposes, the law assumes that a business is a movable thing.[53] Interests in any of the business associations, other than a joint venture, that are recognized by the Commercial Code including cooperative societies are incorporeal movables as long as such associations are in existence.[54] The interests in business associations are commonly called shares. A share is not the certificate representing the rights and duties of a member of a business organization; rather a share denotes a set of rights and obligations attached to a member of a business organization.[55] The certificate is evidence of the existence of those rights. Like a property interest in tangible assets, shares can be donated, sold, pledged, abandoned and given in usufruct.

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[52] Op. cit. Dunning, *Property Law*, at 4.

[53] See Article 127 of the Commercial Code: "A Business is an incorporeal movable consisting of all movable property brought together and organized for the purpose of carrying out any of the commercial activities specified in Art. 5 of this Code".

[54] In the French Civil Code and the Louisiana Civil Code, Articles 529 and 474, respectively, the interests of members of associations are deemed movables by operation of law while such associations are a going concern; but when the associations are dissolved and liquidated, residual assets are either movable or immovable depending on the type of residual property since after the legal existence of an association is brought to an end the former members now become joint owners of what property remains.

In the case of a joint venture, being devoid of legal personality, the partners jointly or severally own the property they contribute in order to materialize the objectives of the partnership. See Articles 210 and 273 of the Commercial Code.

[55] See Article 345 of the Commercial Code of Ethiopia which lists the rights of a shareholder.

The conditions under which shares may be transferred or otherwise dealt with are outlined in the various provisions of the Commercial Code of Ethiopia.[56]

Intellectual property is also classified as an incorporeal movable. Intellectual property is a generic term consisting of copyright, patent, industrial design, industrial models, trademark and trade secrets. Copyright, patent and industrial designs are temporary monopoly rights granted to authors or inventors.[57] Trademarks and trade secrets are pieces of information expressed in certain ways as described in the law and generally they are not curtailed by time limitations.

4.5.7 Real property rights which attach to movables

The Code does explicitly recognize of this class of things. Movable real rights are rights connected to physical movable objects.[58] A pledge established in relation to a corporeal movable thing is a moveable real right.[59] A usufruct created over a corporeal movable is a movable real right as well.[60] A right of recovery or preemption or promise of sale established in respect of a movable object is also a movable real right.[61] So too is the share of a person in a jointly owned corporeal movable thing. Though the Ethiopian property law is unclear on how to transfer these real rights a procedure analogous to that used to transfer of movables should be followed where a real right to movable property, other than sole ownership is transferred. That procedure will depend upon whether the thing is an ordinary or special movables.[62]

4.6 Immovables

Article 1130 of the Code lists the two most prominent immovable things: lands and buildings. As a matter of law and fact, lands and buildings are immovables. Generally they cannot move or be moved and are things of relative fixity. What is meant by land? Land may be defined as an individualized portion of

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[56] See Articles 250, 274, 282-3, 302, 333 and 522-3 of the Commercial Code.

[57] See articles 1647-1674 of the Code under Title XI Literary and Artistic Ownership. Article 1663/1 states: "The incorporeal ownership of the author shall be independent of the ownership of the material object which constitutes the protected work."

[58] They are also referred to as movables by the object to which they apply or movables by the operation of the law or movable real rights.

[59] See Articles 2825-2874.

[60] See Article 1309 for the definition of usufruct.

[61] Article 1386 defines a right of recovery. See also Article 1410 of the Code.

[62] This conclusion can be reached if Article 1310 of the Code is read in a broad manner.

the earth.[63] It includes the airspace directly above and below the surface of the land. Land does not extend upwards and downwards indefinitely. A provision is made in the Code to the effect that the rights of a person in a plot of land extend to the airspace and the subsurface only to the extent necessary for the use of the land.[64] Ordinarily, the term `land` in law also includes vegetation and buildings affixed to the land.[65] The Code states in Article 1133/1, that ``trees and crops`` are intrinsic to and therefore part of the land. Trees and crops refer to any vegetation having its roots in soil. The words ``trees and crops`` exclude a shrub in a pot.

A building is any man-made structure (with or without, a foundation, habitable or otherwise) placed or affixed onto earth. The definition includes tower houses, roads, tunnels, irrigation channels, dwelling houses, office buildings, and the like. The term ``building`` extends to works of all kinds, such as bridges, wells, ovens, dikes, dams, tunnels, and the like.[66] Buildings are immovables irrespective of the fact that they are not constructed to last forever. A building set up for an exhibition may be treated as an immovable even though it may be planned to be destroyed in several months or weeks. But portable constructions set up on the surface of the soil for several days, re-erected elsewhere and transported from place to place such as booths at fairs are not immovable.[67] This is because these light constructions do not have a fixed place. Currently, owing to technology, even, many storey buildings may be made movable.[68] A prefabricated house is an immovable even if it does not

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[63] See op cit Yiannopoulos, *Civil Law Property* at 138. At page 114 of the same text he states: "...tracts of land are not empty space: they contain organic as well as inorganic substances, such as soil, minerals, vegetation, and buildings or other constructions permanently attached to the ground. Minerals are part and parcel of a plot as minerals means any naturally occurring mineral substance of economic value forming part of or found on or within the earth's crust, including salt, mineral water, and geothermal deposits". See also Article 2/14 of Mining Proclamation No. 52, 1993, *Neg. Gaz.* 52 Year No. 42.

[64] See Articles 1209 and 1211.

[65] In common law, "Land is any ground, soil or earth whatever, together with everything on, in and over it that goes with it". Op.cit. Costigan, at 428. Ethiopian law does not have such a broad definition of land.

[66] Op. cit. Planiol, at 301-303.

[67] Ibid.

[68] In one case, a court held that "a three storey high permanent steel structure with a helicopter landing pad constructed above it, built at the cost of over 400,000USD and designed to house offshore workers was an immovable on the ground that immobility is a legal concept and not an inherent quality of a thing even if such

have its foundation in the soil and thus, it can be moved around; prefabricated houses are not light constructions such as tents and makeshift huts. Accessories to or intrinsic elements of a building are integral parts thereof.

The Ethiopian property law categorizes immovable things into: immovables by nature, real rights that have the status of immovables, intrinsic elements of immovables and accessories to immovables.

4.6.1 Immovables by nature

Under Ethiopian property law, immovable by nature comprises buildings and lands. As highlighted earlier on, buildings are any structures affixed onto earth. While they need not be constructed to last forever they should be permanent in nature. They should not be occasional structures. They should last for a relatively longer period of time. The purpose for which and the material out of which they are built are generally immaterial. They may or may not have a foundation and might be merely placed on the surface of the earth. A building is an immovable regardless of whether its foundation is integrated with the soil. Unlike accessories to immovables, immovables by nature cannot be moved by the act or intention of its owner because its status is fixed by law.[69]

In both Louisiana and French laws, buildings are susceptible to horizontal division, the building and the ground on which such building is erected may have different owners.[70] Yiannapoulos reasons that if buildings are immovable by nature

> they should be insusceptible of separate ownership and should, in all cases, follow the ground. Obviously, this result would afford excessive protection to landowners to the detriment of persons erecting edifices on the land of another, in good faith or with the consent of the landowner.
>
> In continental legal systems, inequitable results are avoided by code articles indicating that buildings are component parts of the ground and susceptible of separate real rights only when they belong to the owner of the ground. Buildings erected by lessees and other persons having a contractual or real right to do not belong to the owner of the ground; these buildings are regarded as movables.

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structure could be transported by a powerful crane". In op. cit. Yiannopoulos, *Civil Law Property,* at 139.

[69] Op. cit. Yiannopoulos, *Civil Law Property,* at 139.

[70] Op.cit Yiannopoulos, "Movables and Immovables", at 523

A similar approach is adopted by the property law of Ethiopia, however like in Louisiana, separately owned buildings retain their status as immovables by nature. Article 1200/2, creates a rebuttable presumption that ``all buildings...and works on land shall be deemed to have been made by the owner at his own expense and to be his property". Buildings constructed on land with the consent or without the objection of the owner are the property of the builder. Should the owner of the land wish to evict the building owner he will be obliged to pay compensation.[71] Article 1214 lays down the following principle:

> (1)Buildings and other works constructed above or below a parcel of land or permanently united therewith may have a distinct owner.
>
> (2)The rights of such owner shall be subject to the provisions relating to servitudes (Art. 1359-1385)

Thus separate ownership of buildings runs with the land[72] and may be registered in the register of immovables[73] and where this is done it will affect third parties.[74] Articles 1281 and 1282 expressly enable joint ownership of buildings and describe them as immovables. As immovables these buildings may be mortgaged or given in usufruct or leased or otherwise dealt with by the builder.[75] The importance of registering these interests is well stated by Yiannapoulos:

> Persons erecting edifices on another's land with the consent of the landowner apparently always enjoy the protection of real right vis-à-vis the owner of the ground, and, if their interests are recorded, with respect to third parties. The recognition of separate ownership in lands and buildings as distinct immovables has also affected the scope of the rule that buildings are included in the case of transfer or encumbrance of the land. Application of this rule is necessarily limited to buildings which belong to the owner of the ground and buildings which may be presumed to belong to him in the absence of recordation. Thus, unless recorded, a lease does not entitle a lessee to claim ownership of a building erected on the lessor`s land against

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[71] See Article 1214 of the Code.

[72] See Article 1361/1

[73] See Article 1361/2.

[74] See Article 1364.

[75] Op. cit. Yiannopoulos, "Movables and Immovables", at 524

third parties in case of sale or mortgage executed by the landowner, in these circumstances the title of the lessee is lost.[76]

4.6.2 Real rights that have the status of immovables

Some legal rights form part and parcel of the immovable thing themselves and are categorized as immovables in consequence. Because rights are not themselves capable of categorization as moveable or immovable the law determines the categorization and thus sometimes they are referred to as immovables by the operation of the law. They are rights that attach to the object itself and are real rights which can be asserted against the world at large as opposed to personal or contractual rights.

Both Louisiana and French laws have adopted this classification. In Louisiana, they are described as incorporeal immovables. Article 470 of the Louisiana Civil Code[77] states:

> Rights and actions that apply to immovable things are incorporeal immovables. Immovables of this kind are such as personal servitudes established on immovables, predial servitudes, mineral rights and petitory or possessory actions.

Some commentators are of the view that all fragments of ownership over physical immovable objects including ownership should be considered to be immovable.[78]

In Ethiopia the Code does not explicitly recognize this class of things. However the effect of its provisions is such that we can infer their existence. A mortgage established in relation to a corporeal immovable is an immoveable right. A usufruct created over a corporeal immovable is an immovable right as well. The right to habitation, that is, the right to possess and live in a dwelling house, should be seen as an immovable by the operation of the law.[79] A right of recovery, promise of sale or right of preemption established in respect of an immovable object is an immovable. Servitude is by definition an immovable

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[76] Ibid, at 525.

[77] Acts, 1978, No. 728

[78] Op. cit. Yiannapoulos, "Movables and Immovables", at 549-550.

[79] See Article 1353 of the Code. In Ethiopia, it appears that the exclusive right of a licensee to control a given piece of land for exploration and mining of minerals is an immovable because it attaches to minerals which are intrinsic to the land and therefore immovables by nature. See Articles 2/14, 8, 18, 22 and 32 Mining Proclamation No. 52/1993.

real right.[80] Similarly a joint owner's share of an immovable ought to be taken as an immovable real right, as should the interest of a member of a business association in a residual immovable asset upon the dissolution and liquidation of a business association.

The legal effects of the classification in question are not outlined by Louisiana and French codes. Failing clear legislative prescription it is opined by jurists in those jurisdictions that most provisions governing immovable property should apply by analogy to immovable real rights. Thus for example the procedural rule that the location of an immovable determines the place of litigation should apply to the exercise of these immovable rights. So too should the rules restricting transfer of an immovable by oral agreement, and those requiring that a transfer be registered before it can affect third parties.[81]

As mentioned earlier, in Ethiopia, the Code does not openly adopt this classification and thus one does not naturally expect it to deal with the consequences of this classification. Contrary to this expectation, in fact, there are a number of provisions in the Code which have assimilated immovable real rights, at least some of them, to the transfer of corporeal immovable. In this regard, some provisions in the Code concerning transfer of usufruct, constitution of servitude and registration of immovable property can be cited.[82]

4.6.3 Intrinsic elements of immovables

Those things that are permanently attached to land and buildings are considered to be immovable things. Intrinsic elements are things that are integral elements of land and buildings. There are three types of intrinsic elements of an immovable: intrinsic elements as a matter of law, custom and material attachment.

The first sub-type of intrinsic element of an immovable thing is an intrinsic element of land as determined by the law. The law provides that trees and crops are intrinsic elements of land. Article 1133 (1) of the Code reads: "Trees and crops shall be an intrinsic element of the land until they are separated therefrom". The legal effect of such relationship is that absent a contrary

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[80] See Article 1359 of the Code which provides in part "A servitude is a charge encumbering a land...".

[81] Op. cit. Yiannapoulos, "Movables and Immovables", at 556-557.

[82] See Articles 1310, 1362-1368 and 1567-1574 of the Code. The latter group of articles requires the registration of virtually all interests one has over an immovable property.

provision any transaction relating to land will include the trees or crops on that land.

When we discussed the intrinsic elements of movable things we noted that custom[83] sometimes considers certain things to be intrinsic to another movable. Likewise, custom may take certain parts of a building to be intrinsic to it. Custom may apply to join two objects despite the fact there is no material union or there is a material union between the two things but it is possible to separate them without destroying or causing major damage to the main thing in particular. In some cases the prevailing attitude of the community is such that the two things do unify.[84] Article 1132 (1) applies to movable and immovable things.[85] Like the case of intrinsic elements of movable things, any transaction relating to an immovable will apply to its intrinsic elements, absent a contrary provision.[86]

Certain parts of a building are integral to it. The lighting and heating systems of a house are intrinsic elements of it. A building is incomplete without the doors, windows, roofing, heating and cooling systems and other appliances attached to it. The building materials once used in construction are no longer bricks, pipes, building stones or lumber. Their integration into the building is

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[83] It is not the expectation of every citizen but that of a pertinent community which matters. For example, in metropolitan areas, the average buyer of a dwelling house would not expect to find electric bulbs and electrical lines were removed. This is an objective test to be established on case by case basis. See A.N. Yiannopoulos, "Of Immovables, Component Parts, Societal Expectations, and the Forehead of Zeus", 60 *La. L. Rev.* 1379 (1999-2000).

[84] In one case, it was held that chandeliers, although removed with the assistance of persons with sufficient knowledge of electricity and electrical wiring to separate the internal wires from the unit wires without risking harm to the worker, or damage to the house and fixtures by the touching of exposed wires or the shorting-out of circuitry, were intrinsic elements of the house on the ground of societal expectation. See Op. Cit. Yiannopoulos, *Civil Law Property*, at 106.

[85] Article 1132 states: "(1) Anything which by custom is regarded as forming part of a thing shall be deemed to be an intrinsic element thereof. (2) Anything which is materially united to a thing and cannot be detached therefrom without destroying or damaging such thing shall be deemed to be an intrinsic element thereof".

On the issue of whether a house can be an intrinsic element of the plot on which it is erected, see a recent Federal Supreme Court decision; *Yesewzer Yebeltal v. Negussie G/Sellasie*, Fed. Sup. Ct., Civil Appeal No 26731, 1999 E.C. (Unpublished). In this decision, the Court stated that a house cannot stand by itself; it is unthinkable to have a house without a plot of land on which it is built.

[86] See Article 1134(1) A thing which becomes an intrinsic element of a movable or immovable shall cease to constitute a distinct thing.

such that they cannot be detached without damage to any of them. A contract of sale relating to a building will, unless they are explicitly excluded, include the building and all of its intrinsic elements.

When determining whether a thing is intrinsic or not, who caused the material union between the two things and their state of mind at the time is irrelevant. What matters is the extent of physical attachment of the intrinsic element to the main thing. It is a fact to be proved on case-by case-basis. In this determination the cost and artistic value of the intrinsic elements and the complexity of the material union are also irrelevant factors.[87] The only decisive factors are whether or not there is a material union between them and whether or not it is possible to detach one from the other without causing damage or destruction to the main object.[88] It appears that the extent of damage or destruction to either object may not be relevant under Ethiopian law, otherwise the legislature would have given a hint to that effect. It is not clear whether or not the Code permits the owner of a principal thing to declare via recordation certain things as intrinsic elements of a building or other constructions.[89]

What happens to someone who has rights in a thing when it becomes intrinsic to another? Article 1134 Code provides:

> (1)A thing which becomes an intrinsic element of a movable or immovable shall cease to constitute a distinct thing.
>
> (2)All the rights which third parties previously had on such thing shall be extinguished.
>
> (3)Nothing shall affect the right of such third parties to make claims based on liability for damages or unlawful enrichment.

The property merges with and follows the principal. It loses its independent character as a thing and all rights on it end. Consequently, the property law remedy of restoration of the thing is lost. The remedies available consist of

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[87] A Louisiana Supreme Court decided on one occasion that such considerations are pertinent. Case as referred to in Yiannopoulos, *Civil Law Property,* at 109.

[88] The French version of Article 1132/2 as translated by Billilegn Mandefro is only concerned with the damage or destruction sustained by the main thing, while the official English text refers to damage sustained by either. (See op.cit Billilegn)

[89] See Article 467 of the Revised Louisiana Civil Code (1978) which provides "The owner of an immovable may declare that machinery, appliances, and equipment owned by him and placed on the immovable, other than his private residence, for its service and improvement are deemed to be its component parts. The declaration shall be filed for registry in the conveyance records of the parish in which the immovable is located".

claims for damages or unjust enrichment against the persons who receive the benefit. The intention of the one who caused the integration is irrelevant to a determination of where the property rights reside. Thus even if a person were to steal electric cable and incorporate it into his building once it has been put in the building it is part of the building and cannot be returned to the owner. The thief could still be held liable in criminal law for theft and the victim could sue the thief for damages caused by the misappropriation of his goods. Sometimes, considerations other than the promotion of the social policy of honesty such as convenience and certainty of property rights are preferred.

4.6.4 Accessories to immovables

Sometimes, for a given immovable thing to be used efficiently, it requires attachments or accessories. Articles 1135-1139 of the Code regulate cases where an accessory principal relationship is created.[90]

Accessories are those things the owner, usufructuary or possessor of the principal thing permanently destines for the use of the principal thing. Once a thing becomes an accessory it assumes the character of the thing it is an accessory to. Thus a movable upon becoming an accessory to an immovable becomes an immovable too. The accessory promotes the efficient and convenient use of the principal thing, which is an immovable by nature. The two things form economic unity. There is no material attachment within the meaning of Article 1132/2 of the Code. In fact Article 1137 provides that "No accessory shall lose its character of accessory where it is temporarily detached from the thing to which it is destined". There may be no customary link between the two objects.[91]

[90] It is difficult to imagine the case where an immovable could become an accessory to a movable thing, although the Code does not rule the possibility out. In France, the situation is unknown. In Louisiana these things are called immovables by destination. That is, the thing loses its own character as a movable and assumes the character of the immovable thing it is destined to be used with. In Ethiopian law these things are called accessories. See Op.cit. Yiannopoulos, "Movables and Immovables", at 532.

[91] In some cases both the principal and the accessory can be immovables. For example, under the urban land lease holding law of Ethiopia a surety (mortgage) of a lease over a plot of land (itself an immovable real right) covers the building (including accessories to such building) thereon in the absence of a contrary stipulation. See Article 13 of the Re-enactment of Urban Lands Lease Holding Proclamation No 272/2002, *Fed.Neg.Gaz.* No 8th Year 19.

For a thing to be an accessory the thing must be intended to be permanently destined for the principal thing.[92] Where the usufructuary,[93] possessor or the owner of the principal object destines the accessory for the use, improvement and exploitation of the principal object, be it land, industrial, commercial or manufacturing establishment, it can be said there is permanent destination and it in no way is to be measured by the service life of the thing alone. [94]

Pursuant to Article 1136 only a usufructuary, possessor or owner (or someone acting on their behalf) of a thing can destine it as an accessory. Thus a person who owns both the principal thing and the accessory can do so for she has a sovereign right over both. A person who is the owner of the principal thing but possesses no legitimate property interests in the proposed accessory cannot make it an accessory in law because she does not have legally recognized power over the latter. In Louisiana:

> [t]he courts have held consistently that immobilization by destination may occur only where the owner of a tract of land or building places on the premises things also owned by him. Personal action is not necessary; action on behalf of the owner will suffice. Thus, "improvements" made by a tenant, a hot water heater placed on the premises by a lessee, and an automatic sprinkler system or railroad tracks installed by persons other than the owner of the land, remain movable.[95]

Under French property law,[96] the owner of the accessory and the principal thing has to be the same. It is a requirement that the person making the dedication must be the owner of the movable and the immovable thing. Ownership of the movable and the immovable by a single person is called unity of ownership. The French system requires unity of ownership because it is

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[92] There are disparities between the English and Amharic versions of Article 1136. The Amharic version uses two critical terms, which do not appear in the former. These are usufructuary and intention.

[93] In the English version of Article 1136 of the Code, a possessor or an owner of the principal thing is given an entitlement to destine a movable thing to the former. Yet, the Amharic version as well as the master French version identifies a usufructuary instead of a possessor of the principal thing as having the power to make a destination, of course, in addition to an owner of the principal.

[94] See Yiannopoulos, "Of Immovables", at 1385.

[95] Op cit. Yiannopoulos, "Movables and Immovables", at 533.

[96] Louisiana abrogated the unity of ownership test in 1978. Now, even a person who does not own a potential accessory may make it an accessory of another thing. In the same system, as of 1978, the test of ``the use or convenience of an immovable property`` was abandoned.

only an owner who has a permanent interest in the immovable to which a movable is destined. As only an owner of an immovable property or another person on her behalf creates the destination of a thing as an accessory, only she can terminate the relationship between an accessory and a principal.[97] Thus movable things attached by lessees or borrowers or other persons to an immovable on their own account do not become immovables by destination; such things remain distinct movables.

To be an accessory the thing must be destined for use of the principal object and not for the mere convenience of the owner or the usufructuary of the principal object. The thing must serve the economic purpose of the principal thing to which it is destined. It must enhance the benefit obtained from the immovable thing. The act of creating accessory-principal connection between things must be deliberate; with the purpose of achieving the efficient utilization of the principal object.

The accessory must intentionally and permanently be destined for use with the principal. Factors to be considered in determining permanence include: the length of time the movable is used in the service of the immovable, overt acts by the owner or usufructuary or someone acting on their behalf evincing an intention of permanence, the importance of the movable thing to the immovable (economic considerations) and the practice in the community. For policy reasons the Code deems certain things to be accessories: namely, water and gas pipes, electrical and other lines are considered as accessories of the undertaking (enterprise) from which they originate; but contrary evidence can be produced.[98] Generally the party who asserts that a thing is an accessory must prove it. The element of permanent attachment under Article 1136 is not presumed. There are situations where an accessory-principal relationship may be established between two immovables[99] or between a movable principal and an immovable accessory[100] or even between a tangible thing and an intangible thing[101] or as stated elsewhere between two movable things.[102]

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[97] See Article 1139/1: "The owner of a thing may put an end to the character of accessory of such thing".

[98] See Article 1203 of the Code.

[99] See Article 1372 of the Code which envisages a right of way (which is an immovable right) as an accessory to a right to take water from a well, which, too, is an immovable right.

[100] See Article 1203 of the Code, which regards certain lines (gas, water, telephone and electrical lines) as accessories to an enterprise. Thus they are the property of the gas, water, electrical company that put them in place. Despite being immovable by nature, they do not attach to the building or land where they are located. Rather by virtue of Ethiopian commercial law these are businesses and thus both they are and

Unlike French law, German property law does not use the term `immovable by destination`. The preferred terminology is accessory. Under German law, accessories are movables that, without being parts of the main thing, are intended to serve the economic purpose of the main thing and are in a spatial relationship to it that corresponds to this intention. Section 98 of the German Civil Code provides:

> The following are intended to serve the economic purpose of the main thing:
>
> 1. in the case of a building that is permanently equipped for commercial operations, in particular a mill, a smithy, a brewery or a factory, the machinery and other equipment intended for the business,
>
> 2. in the case of a farm, the equipment and livestock intended for the commercial operations, the agricultural produce, to the extent that it is necessary to continue the farming until the time when it is expected that the same or similar produce will be obtained, and manure produced on the farm.

In relation to this list, proof of economic purpose is dispensed with; in other cases, the party who seeks to benefit by the finding of an accessory-principal association between things must prove it. A thing is not an accessory if it is not regarded as an accessory in business dealings.[103] In German law there must be two things, one is called the main thing and the other is called an accessory. The accessory must be a movable thing. The principal thing may be a movable or an immovable. Both the principal and the accessory must be physical

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the lines are movable things. See Article 1203 of the Code, which regard certain lines (gas, water, telephone and electrical lines) as accessories to an enterprise.

[101] See Article 127 of the Commercial Code of Ethiopia.

[102] Unlike French and German laws, it appears that in the Ethiopian Code, there can be an accessory to a movable thing.

[103] See the German Civil Code (last amended in April 19, 2006). Section 97 of which states: (1) Accessories are movable things that, without being parts of the main thing, are intended to serve the economic purpose of the main thing and are in a spatial relationship to it that corresponds to this intention. A thing is not an accessory if it is not regarded as an accessory in business dealings. (2) The temporary use of a thing for the economic purpose of another thing does not give it the quality of an accessory. The temporary separation of an accessory from the main thing does not deprive it of the quality of an accessory.

things.[104] The accessory should not be a component part of the main thing. The accessory must be intended, either by the owner or another person on her behalf, to serve the economic purpose of the principal permanently. Or it may be sufficient if the pertinent business community views a certain movable thing as an accessory of another thing. And finally there must be some spatial relationship[105] between the accessory and the principal thing. The temporary use of a thing for the economic purpose of another does not make it an accessory. The temporary separation of an accessory from the main thing does not stop it being an accessory.[106] In many ways Ethiopian property law has a striking similarity with the German law in respect of the law of accessory.

Article 1135 of the Code stipulates that: "In doubtful cases,[107] rights on, or dealings relating to, things shall apply to the accessories thereof". The effect of being an accessory is that rights and dealings relating to the principal thing are applicable also to accessories. For all legal purposes accessories to immovables become immovables. For instance, if a building is mortgaged, all its accessories are also subject to the mortgage. For example in a case where there is an accessory principal relationship between a farm plot and oxen, absent contrary contractual provision, any dealing relating to the farm will cover the oxen. However, it is possible to exclude accessories by agreement. In the presence of a contrary covenant the transaction covers only the principal, not the accessory. The principle that, absent a contrary agreement excluding an accessory, dealing with the principal means dealing with the accessory too is based on the expectation theory of contract law. The expectation theory (also called the reliance theory) states that legitimate

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[104] See Article 90 of the German Civil Code as revised in April 19, 2006. This provision states that ``Only corporeal objects are things as defined by law.`` Thus in Germany, intangible things may not have accessories nor can they be regarded as principals.

[105] Physical contact between the two is not required. Proximity is decided in each case as a matter of fact. The accessory need not be in its proper place so for example machinery brought in and left in the courtyard of a factory was an accessory since it was destined to replace worn-out parts. See op. cit. Yiannopoulos, "Movables and Immovables", 573.

[106] See Article 97 of the German Civil Code.

[107] The phrase `...in doubtful cases...` appears to suggest that Article 1135 is a fallback provision. In cases where there is a relationship between two things but it cannot be firmly established any doubt will be resolved by treating the thing as an accessory. Or the phrase means when the contract pertaining to the principal is ambiguous as to the exclusion or inclusion of the accessories, then Article 1135 will be used to settle the dispute. The phrase could mean either or both.

expectations of parties to a contract should be honored.[108] People transacting with a principal object believe, in the absence of a contrary term of contract, that they are dealing with the whole object including all of its parts. The same theory lurks behind the case of a contract covering a principal and its intrinsic elements.

The phrase "rights on or dealing with" in Article 1135 is broad enough to include a wide array of contractual and proprietary relationships with the principal thing (e.g., usufruct, mortgage, sale, testament, donation, servitude, preemption, right of recovery). It would also include expropriation and court order. Thus Article 1135 contemplates bilateral and unilateral acts, and decisions of competent public authorities affecting the principal object.[109]

Article 1138 of the Code states:

> (1)The rights which third parties may have on a thing shall not be affected by such thing being destined to the use of a movable or immovable.
>
> (2)Such rights may not be set up against a third party in good faith unless they are embodied in a written document dated prior to the thing having been so destined

Unlike, the case of an intrinsic principal relationship, where the rights of third parties on an intrinsic element are terminated, third party rights in accessories which have been reduced to writing survive. In the language of this sub-article, the rights third parties have on a thing that has become an accessory to another will be affected only when transactions evidencing such rights are made in writing, and authenticated[110] before the thing assumes the character of an accessory. Authentication is required to prevent predating or antedating of the agreement.

It is submitted that good faith, within the meaning of Article 1138/2 of the Code, means actual or constructive knowledge on the part of a person dealing

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[108] Peter Jaffey, A New Version of the Reliance Thoery, http://bura.brunel.ac.uk/bitstream/2438/4166/1/Reliance%20theory%20of%20contract.pdf (Accessed on August 11, 2011) at 2-3.

[109] The same conclusion is possible to reach in respect of Article 1131.

[110] See the Amharic version of Article 1138/2 of the Code. To authenticate an agreement means: witnessing by a public officer of the signing of the agreement by the parties or verify their signatures as affixed onto the agreement with a sample signature deposited in her office, sealing and registering and depositing a copy of the agreement.

with the accessory that another person has a right or claim to the accessory .[111] The extinguishment of pre-existing third party rights can only occur as a result of a subsequent transaction when those rights have not been properly recorded.[112] The formality required by Article 1132/2 means the existence of the right is made part of the public record. Generally, it is presumed that people know acts made part of public record. They cannot argue that they have not consulted those records. The existence of public records makes it legally impossible for persons dealing with such accessories to invoke good faith.

Article 1139 of the Code states:

> (1)The owner of a thing may put an end to the character of accessory of such thing.
>
> (2)Nothing shall affect the rights of third parties having had dealings with the owner on the faith of such character.

The Article assumes that the person who establishes an accessory principal relationship between two objects is the owner of the accessory. As an owner, she has several prerogatives including the right to terminate the accessory-principal nexus. The termination might be effected via sale or donation or mortgage or pledge or usufruct or destruction or transformation or some other act indicating the end of the close association of an accessory with the immovable.[113]

On the other hand, the law is also concerned with safeguarding the interests of innocent third parties and those of any mortgagee. The termination of the character of an accessory thus involves two interests: the right of an owner to dispose her property as she pleases and the interests of innocent third parties.[114] Here the law states that an owner of an accessory thing may end such relationship anytime and through any legitimate means provided the interest of innocent third parties is not adversely affected thereby.

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[111] The definition of good faith provided for under Article 1162 of the Code should be extended to the situations envisaged by Articles 1138/2 and 1139. Article 1162 states: "(1) Whosoever acquires a corporeal chattel shall be deemed to be in good faith where he believes that he is contracting with a person entitled to transfer the thing to him. (2) The good faith of the acquirer shall be presumed saving evidence to the contrary."

[112] This is an extended application of what is provided for under Article 1163/1 of the Code.

[113] Op. cit. Yiannopoulos, "Movables and Immovables", at 556.

[114] Ibid.

As an illustration, X owns a freestanding pump which he installs on the well on his farmland to improve his capacity to water his livestock. X sells the land to Y reserving usufruct for three years. Y buys the farmland believing that X will deliver together with the pump. Upon the expiry of the usufruct, X sells the pump to Z. In relation to the contract of sale of the pump all persons in the world including Y are third parities whose rights over accessories are protected by Article 1139. Does this effort by X to terminate the accessory nature of the pump affect the right of Y to require the delivery of the pump to him upon the expiry of the usufruct? Here, unlike the rights of third parties protected under Article 1138/2, the formality precondition is not necessary to the application of Article 1139. What matters is that Y obtained in good faith an ownership interest in the pump as an accessory to the land at the time the land was sold to him. X is no longer the owner of the accessory and therefore cannot change its character.[115]

An owner can assign or otherwise deal with accessories independently of the principal even if the principal immovable is encumbered with mortgage.[116] The law provides that a mortgage does not extend to accessories of the main thing mortgaged once those things are separated from the property and transferred to a third party even when that occurs after the mortgage is executed and even if the transfer reduces or endangers the value of the thing mortgaged.[117] The same rule applies to any object expressly specified as an accessory in the act creating the mortgage.

One may inquire whether or not the government should be obliged to pay separate compensation for accessories in the case of expropriation. The Code does not offer a solution to this issue.[118] Assuming that the target of the expropriation proceedings is the thing as a whole, not just the principal nor is the accessory in isolation, one approach to this question is that the property be

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[115] A requirement of good faith should be read into Article 1139 by application of Article 1163 of the Code.

[116] See Articles 3064/ which states "The mortgage shall charge the mortgaged immovable together with its intrinsic elements and accessories".

[117] See Articles 3065, 3073 and 3074 of the Code, which together provide that a mortgagee may not enforce rights on against separated and transferred intrinsic elements or accessories. Instead the mortgagee may; where such action reduces or endangers the value of the immovable and the action was done intentionally or negligently, demand new securities.

[118] See Articles 1460-1488 of the Code. Articles 1471-2 state that any interested person may express an objection to the amount of compensation offered by the competent authority. Interested persons include all those who have property interests in accessories or intrinsic elements of expropriated immovable property.

valued as a whole and no separate compensation provided for any part thereof because the distinct existence of the accessory ended the moment it became an accessory to the principal. The other approach would be (since accessories retain their individuality, and thus can be separated from the main thing without destruction or damage) that the authority should assess the accessories independently from the principal and effect compensation to the owner of the accessories. In the latter approach, if the owner elects to take the accessories away and if the competent authority undertaking the expropriation is not interested in having such accessories, then the owner should retain them and thus no compensation is due in relation to those accessories. On the grounds of practicality and the spirit of the law of accessories, it appears that the first approach should be followed if similar issues arise in the case of expropriation of things with accessory-principal relationship as well as the expropriation of things with intrinsic-principal relationship.

4.7 Accessories versus intrinsic elements

What is the difference then between an accessory and an intrinsic element?

(1)Intrinsic elements cannot be separated from the principal object without damaging or destruction, whereas accessories do not necessarily have physical connection with the thing destined to.

(2)Intrinsic elements lose their original character and assume that of the thing they are joined with. Once, intrinsic-principal relationship is established whether by custom, material link or law, the intrinsic element ceases to be a distinct thing at law.

(3)Accessories assume the character of the thing they are used with. However they can be separated from it and revert to their original state as separate things should the owner wish.

(4)Pre-existing third party rights in intrinsic elements are extinguished without exception. Third parties may however claim for damages or unjust enrichment.

(5)Third parties may protect and preserve pre-existing rights in accessories.

(6)Only an owner, possessor or usufruct may destine a thing as an accessory. Anyone may make a thing intrinsic to another.

(7)The state of mind of those dealing with things which become intrinsic to others is an irrelevant consideration, whereas only actions taken in good faith will extinguish third party rights to accessories.

4.8 Conclusion

The utility of a clear, coherent, comprehensive and contextualized division of things over which property rights are exercised cannot be overemphasized. A sound classification of things in property law enhances the determination of the rights of parties to a dispute by informing us about which things shall go with which other things and which procedure shall lead to a valid and effective flow of property rights in things from one party to another.

Classification of goods in law may or may not rely on the physical condition of things. A thing which is movable by nature may be immobilized by law; an immovable by nature may be mobilized by law; a thing that is devoid of any material existence might be clothed with corpus by the legislature. The student of property law should appreciate the import of such fiction as the lawmaker does not engage in the creation of fiction in vain.

A classification of things, however carefully crafted, cannot avoid open textures. When indeterminacy arises resort to case-by-case factual determination of the association of things is inevitable. There are numerous indeterminate aspects of some of the fourteen provisions treated in this chapter. The determination of the degree of material attachment, the content of customary practice envisaged under Article 1132 of the Code as well as the question of ascertaining the existence of economic unity between things under the law of accessory rests on subjective factors. The legal rules under consideration leave many unaddressed issues, for instances, in relation to the place and effect of moveable real rights and immovable real rights in the scheme of the Code. The English and Amharic versions of Articles 1126-1139 suffer from numerous material disparities and a reliance on the English version of these provisions alone might be quite misleading.

There is a need to reiterate what was said in the preceding chapter. There are different words used to describe movable and immovable objects of property rights in Articles 1126-1139 include a thing, a corporeal thing, a corporeal movable, a movable, a corporeal chattel. They may well be synonymous. It is a convention in legal drafting to employ a given term uniformly throughout that text so long as the drafter does not have a different meaning in mind, which must be made clear in the text. Usage of inconsistent terms in one legal text compounds the already muddy ground of legislative interpretation. In order to avoid surprises and enhance appreciation of this portion of the Code, it appears plain, those who study and teach property law should not just rely on the English version of the provisions under discussion; there is a need to look at the Amharic version of these rules.

4.9 Review questions

1. What are the differences between movables and immovables?
2. From time to time a conflict may arise between the provisions of dealing with intrinsic elements (Articles 1131-1134), those dealing with accessories (Articles 1135-1139) on the one hand, and the provisions dealing with possession in good faith (Articles 1161-1164). Consider the following scenario: X owns a saddle which he allows Y to use on her horse. Y sells the horse to Z. The contract of sale concerning the horse is silent about whether the saddle is included. Y delivers the horse together with the saddle to Z. At the time of receiving delivery of the two items, suppose Z believes that Y has the authority to sell both the horse and saddle. X seeks to recover the saddle. What arguments could X make to support his application? What arguments could Z make. If X does not recover the saddle, does he have any other legal remedies? If so against who?
3. Since land under the Ethiopian law is not subject to private ownership, is it possible to have accessories to it? Or is it sound to argue that currently in the country an accessory goes only with buildings, not with land?
4. Ato Birrratu sells his house to W/ro Meseret fulfilling the requirements of transfer of immovable property under the property law of Ethiopia. Before transferring the property to W/ro Meseret, Ato Birratu takes steps to remove the doors and windows from the house. Ato Birratu has entered into a contract to sell the doors and windows to W/ro Chaltu. W/ro Meseret brings a suit prohibiting the removal of the doors and windows. What arguments will she make in support of her suit? What remedy is available should she succeed. Does W/ro Chaltu have any recourse should the court prohibit the removal of the doors and windows? Against who? What arguments could she make in support of her position?
5. Ato Duguma steals ten quintals of cement from his neighbor, W/ro Meseret. He sells the cement to Ato Belachew. Ato Belachew uses the cement to construct his house. What can W/ro Meseret do? Has she any claim against Ato Belachew? If so, what is the nature of the claim and what arguments support it. What is the liability of Ato Duguma for his actions? What do you rely upon in coming to that conclusion?
6. X owns an ox and Y is a usufructuary of a plot of land. X assigns the ox to Y in the form of usufruct for four years. Y uses the ox to harvest the crops upon the land. After three years Y sells his usufruct rights to Z. Z is completely unaware of the agreement between X and Y regarding the ox. Z takes possession as usufructuary immediately and continues using the ox to harvest his crops. After 4 years X seeks to recover the ox. Can he? Why or why not? What arguments can you make in support of his claim? What arguments can you make in opposition to his claim? If X is not able to

recover the ox does he have any other recourse? If so, what is it? Would the answer to any of these questions change if the agreement between X and Y was formalized in writing and properly registered? Why or why not?

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Chapter 5: Subsidiary Classification of Goods**

5.1 Introduction

As explained in Chapter 3, the Code classifies goods into corporeals and incorporeals.[1] Corporeal goods, in turn, are divided into movables and immovables.[2] In Chapter 4 we discussed the primary classification of corporeal goods into movables and immovables in the Code. Numerous other classifications exist which complement this primary classification of corporeal goods. These other classifications can collectively be referred to as subsidiary classifications of goods. The subsidiary classifications of things includes corporeals and incorporeals, consumable and non-consumable goods, fungible and non-fungible goods, divisible and indivisible goods, principal things and their fruits, things in the public domain and those in the private domain, collective and personal assets, and ordinary and special movables.[3]

** This chapter is a modified form of a commentary published by this writer as ``Subsidiary Classification of Goods Under Ethiopian Property Law: A Commentary`` 2:1 *Mizan Law Review 52* (2008).

[1] The title of Book III of the Code which is headed as ``Goods`` as well as the implication of Article 1126 of the same implies that the subject matter of property rights under the Code is goods. In this chapter, I have employed the terms ``things`,` ``corporeal goods,`` ``property`` and `goods` interchangeably to mean the goods, tangible or intangible, over which property rights may be established. The Code uses these words rather inconsistently.

[2] The English version of Article 1126 of the Code classifies "all goods" into movable and immovable. A reading of the Amharic and French versions of Article 1126 of the Code reveals that what is divided into movable and immovable goods under this provision are only corporeal goods. See Billilegn Mandefro, Revised Unofficial Translation of Acts. 1126-1500, 1647-1674 of Book III, Civil Code (1960) From the French Original Draft, (AAU, Law Library, Unpublished, 1973-1975).

[3] There are other classifications with secondary importance under Ethiopian law. See Article 665/3 of the Criminal Code of Ethiopia (2005) which divides movable things in terms of value into those things with `very small economic value`` and those things which higher economic value. See also Article 669/1 and Article 681/2 of the same which deal with ``sacred or religious objects, or objects of scientific, artistic or historical value... See also Article 1094 of the Code which divides things with sentimental value (family objects) and those things without sentimental value. Discussions about intrinsic and accessories and elements as regulated in Articles 1131-1134, and Articles 1135-1139 of the Code are not made here since they are an aspect of the primary division of corporeal goods into movable and immovable under the Code and are fully discussed in Chapter 4.

There are a number of reasons we treat the classification of goods into movable and immovable as primary and different from other subsidiary classifications found in the Code. The division of corporeal goods into movables and immovables permeates the entire private and public law of Ethiopia generally and the Code particularly.[4] This classification of goods, which is based mainly on functional notions of mobility, is fundamental to the structure of the Code. It is based upon common sense notions and thus more readily accessible to non-lawyers. It indicates the past, present and future significance accorded to immovable property in Ethiopia. And importantly, the majority of the provisions of Book III of the Code are devoted to the regulation of the various aspects of movables and immovables goods.[5] Thus this primary classification has far-reaching legal consequences while the subsidiary classifications have comparatively limited legal effects.

This does not mean that the subsidiary classifications of things are trivial or unimportant in property law. The differences between the two groups of goods do simply imply the relatively greater importance given to immovable things in the Ethiopian property law.

The subsidiary classifications of things in the property law of Ethiopia are numerous. Understanding them is quite useful to fully grasp the basics of property law. It is essential to understand the subsidiary classification of goods in ordering property transactions and settling property disputes. Merely knowing whether something is a movable or immovable will not be enough to address certain issues of acquisition, transfer and extinction of ownership. In some cases resort to the subsidiary classifications will be required. Additionally, the uniqueness of certain goods (e.g., those in the public domain of the state) warrant specially designed rules.

Property law jurisprudence gives little coverage to the treatment of subsidiary classification of things. Moreover, the legal rules dealing with subsidiary classification of goods are scattered over the various sections of the Code and other laws, making a comprehensive treatment of such rules difficult. Apart

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[4] The law of movables and immovables affects the majority of the notions included in Book III of the Code, contract law, agency law, law of persons, mortgage, antichresis, civil procedure, criminal law and commercial law and other aspects of the law.

[5] For example, the following articles in the Code do exclusively apply to immovable property: Articles 1207-1256 (special rules applicable to immovable property and use and ownership of water), Articles 1359-1385 (servitude), Articles 1460-1488(expropriation) and Articles 1553-1646 (registration of immovable property).

from their wide distribution, many of the rules about subsidiary classifications of things are incorporated in the Code in a manner that makes it difficult to discern them. In consequence this topic may go unnoticed in some texts and discussions of property law in Ethiopia.[6]

In this chapter we will discuss the various subsidiary classification of property that exists in Ethiopia law. We will consider their nature, the criteria that must be met for their existence, and identify the significance and legal effects accorded those classifications to things under Ethiopian property law. It is hoped that this explanatory endeavor will make Ethiopian legal rules relating to the subsidiary classification of things more explicit, accessible and hence less obscure to a student of property law. This chapter relies on analysis of the pertinent legal provisions of the Code and the Commercial Code of Ethiopia as well as on comparative law.

5.2 Corporeal and incorporeal goods

The division of goods into corporeal goods and incorporeal goods is one of the many subsidiary classifications recognized in the property law of Ethiopia. A corporeal thing is any product a human person can perceive with their senses, whereas an incorporeal thing is any product that humans cannot perceive, but which has economic value.[7] Incorporeal things are rights of property that can only be claimed or enforced by legal action and not by taking physical possession such as bank accounts, shares, trademarks, trade secrets and copyrights. The critical test for classifying things into corporeal and incorporeal products is human perception.

Roman law classified objects (all things whether or not appropriable) into *res corporeals* and *res incorporeals*. To the Romans *res corporeals* meant physical objects (and included the right of ownership), which could be perceived by the senses. To them *res incorporeals* meant, on the other hand, objects without physical existence but having pecuniary value such as inheritance, obligations

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[6] Recently, the writer has gone through property law course outlines of five different law schools in Ethiopia in order to see if issues related to subsidiary classification of things are covered in property law classes in the country. Assuming that what is taught is what is included in a course outline, the result is that such course outlines have not included the various types of secondary classifications with the exception of the classification of things into private domain and public domain of the state, which appears to be included because it is included in the Code at a paragraph level.

[7] Article 40/2 of the FDRE Constitution. This sub-article defines private property as tangible and intangible products having value.

and all real rights with the exception of ownership,[8] which curiously were regarded as objects having existence in space. The Romans introduced these classifications because they believed only physical things could be possessed and owned.[9]

Article 461 of the Louisiana Civil Code divides things into corporeal and incorporeal. Corporeal things, under this Code, "are things that have a body, whether animate or inanimate, and can be felt or touched. Incorporeals are things that have no body, but are comprehended by the understanding, such as the rights of inheritance, servitudes, obligations, and right of intellectual property". The French Civil Code of 1804 did not provide for the division of things into corporeals and incorporeals. But authorities there have arrived at a slightly different version of this classification by way of inference from the joint reading of several articles of the French Civil Code, i.e., the division of estates (*biens*) into things (*choses, biens* corporeals) and rights (*droits, biens* incorporeal).[10] The classification has importance in relation to the rule under Article 2279 of the French Code that states that possession is equivalent to ownership in relation to movables as this rule only applies to corporeal movables.[11]

Under the German Civil Code of 1900, property interests such as ownership, usufruct and right of recovery may be established only over corporeal things. The law of property in that country does not govern incorporeal objects.[12]

In Ethiopian property law, the distinction between corporeal and incorporeal goods is important. There are numerous articles applicable to corporeal goods only;[13] and others which only apply to incorporeal things.[14] The relevance of the dichotomy also lies in the message of Article 1126 of the Code which classifies corporeal goods into immovables and movables. In addition, division of things on the basis of corporeality is implicitly recognized in, for example, Article 1128 and Articles 1347-1358 of the Code. One can also gather the

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[8] The Roman legal system and its jurists, conceived ownership not an intangible thing but as tangible thing because they were unable to distinguish the right established on an object from the object over which the right was constituted. See op. cit. Planiol, at 282.

[9] Ibid., at 341.

[10] See op. cit. Planiol, at 282.

[11] Ibid.

[12] See Yiannopoulos, "Law of Things" at 775.

[13] See Articles 1325-1346 of the Code which are exclusively applicable to things having corpus.

[14] See Articles 1347-1352 of the Code.

division of goods into corporeals and incorporeals from the title of Book III of the Code by way of inference. It is also enshrined in the FDRE Constitution.[15]

To enable the acquisition and transfer of property rights in incorporeal goods the Code equates them with corporeal goods. This is of some importance in the law of possession for since incorporeal goods cannot be physically controlled in the same way as material assets the Code has created the concept of quasi-possession. Thus, the possession of incorporeal things is expressed by the continued enjoyment of the right or by defending the right when the occasion calls for it. In the context of the law of usufruct, because the beneficiary cannot make physical use of incorporeal things her right is limited to the enjoyment of the fruits of the subject matter.

Corporeal goods are the potential seats of property rights only if they can be appropriated. Only those incorporeal things which are expressly designated by law as the objects of property rights can be regarded as such. For example, Articles 1128, 1309, 1310 and 1347[16] of the Code can be taken as some of such designations. Other legal rights fall within the domain of contract or tort law. For example a person's claim in negligence for injuries sustained in a car accident or a claim of specific performance of a contract are *in personam* rights and clearly beyond the scope of property law.[17]

5.3 Consumable and non-consumable things

Corporeal things may be consumable or non-consumable. The central test for the classification of things into consumable and non-consumable product is whether they are extinguished or intended to be extinguished by use.

> Extinction of consumable things may be the result of physical destruction (*e.g.*, consumption of foods or drinks) or the consequence of a juridical act (*e.g.*, alienation of money). In all cases a *disposition* takes place which cannot be repeated. Non-consumable things continue to exist in spite of prolonged use (*e.g.*, furniture, houses, utensils). [18]

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[15] See the reference to "any tangible or intangible product" in Article 40/2 of the Constitution.

[16] See for example Article 1128 which applies to claims and other incorporeal rights in securities to bearer and Articles 1309, 1310 and 1347 which apply to usufruct.

[17] Planiol, at 267-270.

[18] Yiannopoulos, "Law of Things", at 775.

Intention (*animus*) alone does not make a thing a consumable or non-consumable. It is ascertained by reference to objective criteria (consumption or alienation) and the prevailing notion in the pertinent trade.

The usufructuary of consumables is entitled to get ownership over the object the moment the usufruct is validly created and transfer procedures are finalized. Article 1327 does not require a beneficiary of a usufruct to restitute the object given in usufruct in the case of consumables. The usufructuary of consumable things is, however, under the obligation to pay the value of such things calculated at the time the usufruct was created.[19] In addition to such remedies, the possibility of returning things of comparable quantity and quality (to the bare owner) upon the extinction of the usufruct is available even if such option is not preferred under Ethiopian law. A bare owner who has subjected her consumable things to usufruct is thus entitled to certain special protections. On the other hand, a beneficiary of usufruct over a non-consumable is obliged to properly manage the property over the course of the usufruct and restitute the object when the right expires.

For practical reasons only consumable things can be the subject of a loan for use[20] or be let or hired.[21] A finder of perishable things may sell them out at a public auction and must keep the proceeds thereof for the owner.[22] Once consumed even a possessor who acquires goods in bad faith cannot be required to make restitution. "Depending upon characterization of things as consumable or not consumable, one may be under a duty to return either specific things or things of like quantity and quality".[23] A creditor may not invoke specific performance with regard to consumable things.[24]

The law of movables and immovables (the principal classification) leaves a gap covered by the law of consumables. Generally transfer of ownership of movables or immovables does not take place in the absence of cause implying transfer of ownership. However in the case of consumables transfer of ownership occurs upon delivery even if the parties have intended to create usufruct. The inevitability of such transfer arises out of the inherent nature of consumables. If usufruct is established on a movable thing, the usufructuary is normally required to restitute the very thing she gets in the form of usufruct to

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[19] See Article 1327/2.

[20] See Articles 2767-2778.

[21] See Articles 2727-2766.

[22] See Article 1156.

[23] Yiannapoulos, "Law of Things", at 777.

[24] See Article 1747.

the bare owner upon the termination of such usufruct; but the usufructuary of a consumable thing is not expected make restitution of the thing given to her in the form of usufruct. Under the primary classification, a true owner is entitled to recover her thing from the possessor in bad faith, which is not possible in the case of the law of consumables if the possessor in bad faith uses such thing up.

5.4 Fungible and non-fungible things

Another important distinction is between fungible and non-fungible things. The criterion for determining if a thing is fungible is the possibility of it can be replaced by or exchanged with another thing. Two or more things are fungible vis-à-vis each other if they belong to the same genre of things and if, by virtue of their physical characteristics or the intention of those who deal with them, they are interchangeable or can be substituted one for the other in view of the end for which they will be used.

A fungible thing is normally a movable that is capable of interchange. Normally, fungibles occur in trade in terms of number, weight or measure. Thus one can exchange the same quantity of white (*magna*) *teff* with the same quantity of another white (*magna*) *teff*. Likewise, an Ethiopian Ten Birr note can be exchanged with another Ethiopian Ten Birr note. One can do the same in connection with the same quality and quantity of butter.

The possibility of replacement of one thing by another is not the only test of fungiblity. French jurists do not agree whether the determination of a thing as fungible or non-fungible depends upon its nature or upon the intention of the parties. Some argue that intention controls. Others assert that while intention may be relevant, the thing must be inherently fungible, stating, for example, that the intention of the parties cannot make a house fungible. In German law the determination is made "by reference to objective criteria and notions prevailing in trade".[25] Thus, it may be argued that there are four ways for a thing to be fungible: its inherent nature, agreement, the law and notions prevailing in trade.

Sometimes fungibles are consumable:

> ...quite frequently, things which are fungible are also consumable. But this is not necessarily so, for there are things which are fungible without being consumable (e.g., books of the same edition) and things which are consumable without being fungible (e.g., wine of a particular vintage). In any case, as the two characteristics frequently

[25] Op. cit, Yiannopoulous, "Law of Things", at 779.

coincide, this confusion of concepts has not caused substantial practical difficulties.[26]

The distinction between fungibles and non-fungibles is important in the fields of property, contracts, law of succession[27] and civil procedure.[28] The possession and thus ownership of fungible things is transferred from a transferor to a transferee when, in addition to the conclusion of a juridical act, the seller individualizes the thing (picks it out) or weighs, counts or measures out the required quantity of thing from her stock of things of the same kind and makes a declaration to that effect. The use of the terms ``a particular thing`` and ``a specific chattel`` in the pertinent provisions of the Code suggest that only non-fungible things may be the subject matter of preemption, promise of sale and right of recovery.[29]

Article 1747[30] of the Code provides that where a contract relating to fungible things is silent about the quality of the fungible things due to the creditor, the debtor may opt to deliver an average quality of a thing, which conforms to the generic description of that fungible. In the case of non-fungible things the creditor may, under some conditions, require the debtor to deliver the thing agreed or pay her monetary compensation for subject matter of the contract cannot be replaced by another thing.[31]

5.5 Divisible and indivisible things

This concept is quite abstract. It is a legal concept that may not correspond with lay notions. Divisible things can be split into several units which can be assigned for individual ownership.

Under Roman law, things were divisible if they could be divided up into several parts of the same kind as the whole without thereby suffering diminution in value.[32] Article 1340 of the Civil Code of Louisiana (1870) stated that a thing is indivisible "when a diminution of its value, or loss or inconvenience of one of

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[26] Ibid

[27] See Article 1047.

[28] See Articles 225 and 226/3& 4 of the Civil Procedure Code of Ethiopia (1965).

[29] See Articles 1386 and 1411/1 of the Code.

[30] The application of Article 1778 of the Code also hinges on the distinction between fungibles and non-fungibles. See also Articles 1145/1, 1778, 1969, 1832, 2234, 2280, 2300, 2471-2489, 2490, 2782, 2810 and 2872.

[31] See Article 1745.

[32] Ibid. at 780.

the owners, would be the consequence of dividing it".[33] Article 752 of the German Civil Code envisages the possibility of partition of things in kind in relation to those things which, without diminution in value, can be divided in equal parts corresponding to the shares of the co-owners.[34]

It is said that a thing is indivisible if it cannot be physically divided into discrete parts or though it can be so divided, the parts cannot be used for the same purposes as the undivided thing, the parts are not of the same nature, the parts are not of the same value, or the aggregate value of the parts is significantly less than the value of the undivided thing.[35]

The Code and the Revised Family Code[36] each recognize divisible and indivisible things in the context of co-ownership of immovables. Article 1272/1 of the Code provides that each joint owner of an immovable may apply at any time to have the immovable divided. Under Article 1272/2 of the Code, a court to which a request for division is made is expected to make order for sale instead of division where it finds such property to be indivisible either because it would be contrary to the nature of or purpose of the immovable or would reduce its economic value or seriously impair the ability to use it.[37] Under Article 1276 "joint ownership may be perpetual where...division thereof is impossible or would be unreasonable".

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[33] Ibid. This Article has since been repealed.

[34] Section 752 reads: Cancellation of co-ownership occurs by division in kind if the joint object is or, if there is more than one object held jointly, the joint objects are capable of being divided into identical parts corresponding to the shares of the part owners without reducing their value. The distribution of identical parts among the part owners is effected by drawing lots. And Section 753(1) states: If division in kind is excluded, then the cancellation of co-ownership occurs by sale of the joint object according to the regulations on sale of a pledge, or in the case of a plot of land by compulsory auction, and by division of the proceeds. If disposal to a third party is inadmissible, then the object must be auctioned off among the part owners.

[35] See A. Precis, The Classification of Things, http://www.scribd.com/doc/36709322/The-Classification-of-Things-Property (accessed on January 10, 2008).

[36] Revised Family Code Proclamation No. 213/2000, *Fed. Neg. Gaz.* Year 6th Extraordinary Issue 1.

[37] In cases of matrimonial property upon the dissolution of marriage and ordinary joint ownership, the law gives the ex-spouses and the joint owners the right to insist on the division of the property. The division will be equal in the case of the former and pro rata in the case of the latter. See Article 91 of the Revised Family Code and Article 1272/1 of the Code.

As a general rule movables are indivisible except for those" whose value consists in their substance rather than form and those consisting of a mass of similar things" (for example: grain).[38] Article 1264 of the Code envisages the division of certain types of movables. It stipulates that each joint owner may at any time apply for the partition of fruits of a thing jointly owned. Thus, certain jointly owned movables can be partitioned (e.g. some meters of cloth or a certain quantity of maize). The Revised Family Code also indicates the possibility of dividing movable things in creating the rule of "partition in kind" of common property.[39] Article 92/1 of the Revised Family Code provides "that if there is a certain property which is difficult or impossible to be divided..., such property shall be sold..."

Read together, provisions of the Code and the Revised Family Code described above give us criteria to use to determine whether or not a given property is open to partition in kind namely: the possibility of division, whether division is contrary to the nature or purpose of the property, whether division would reduce economic value or impair usefulness of the property and finally the desirability of division. In respect of the latter it may be undesirable to, for example, partition a jointly owned thing for which the co-owners have developed sentimental attachment.

It is not economically feasibility to divide a thing when economic value of parts is significantly less than the value of the share of the whole property. It is not feasible to divide property when the divided part is, because of its size, manifestly useless, as compared with the undivided whole. Some things are too difficult or impossible to divide, like for example a family pet, a refrigerator, a motor vehicle and a pair of trousers. In these cases division would extinguish the original thing and/or make it unfit for its original purpose.

It is not possible to divide a plot of land on which a condominium is built during the life time of such condo.[40] Nor are parts of a condominium intended for common enjoyment open to division. A party wall cannot be partitioned.[41]

Determining whether a thing is divisible or not is important for determining how property that is owned by more than one person should be dealt with when one or more owners wishes to claim their share of the property. If the

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[38] Op. cit. Yiannapoulos, "Law of Things", at 781.

[39] See Article 92/1 of the Revised Family Code.

[40] See Article 2/1 of the Condominium Proclamation No 370/2003, *Fed. Neg. Gaz.* Year 9 No 95.

[41] Article 1201/1 defines party wall as opposed to private wall as `a wall or fence separating two parcels of land,` which may be argued by virtue of contextual reading to include buildings or parts thereof.

thing is divisible, then the solution adopted is physical partition of the thing and apportionment of the resulting units to each owner according to her share. If it is not possible to divide the thing then court will order the thing to be sold at auction with the proceeds divided among owners *pro rata*, which is called "licitation".[42] If the time for division or sale of the thing is not appropriate, it can be postponed for a certain period of time.[43]

5.6 Principal things and their fruits

Fruits are things derived from or produced by things. They can be corporeal things or incorporeal economic advantages.[44] The concept of fruits is useful in the application of some of the rules regarding acquisition of ownership (e.g. via possession in good faith[45] and accession[46]), joint ownership,[47] usufruct[48] and

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[42] It also may be possible for the parties to agree to sell the property privately and divide the proceeds themselves without seeking court order. In some cases the parties may agree to have the property valued and the remaining owner(s) buy out the share(s). For example: A and B own a painting, which by its nature is indivisible, the parties agree have it valued. The value is set at 100,000 ETB. They then agree that A may buy out B's share in the painting for 50,000 ETB becoming sole owner of the painting.

[43] See Articles 1271/2 and 1273 of the Code. In the case of movables, the court, upon the application of one of the joint owners, has the power to postpone the sale or division up to six months while, in the case of immovables, the court can postpone it for a maximum of two years. The request for postponement may be based on anticipated rise in the price in the thing or the thing is under construction or some issues of claim by a third party are anticipated. In the mean time, where necessary (e.g. the co-owners are in serious discord), the court may appoint a person who administers the property.

[44] Op. cit, Yiannopoulos, "Law of Things", at 785.

[45] See Articles 1161-1167 of the Code. Under this provisions, though nothing is stated about the fate of fruits obtained out of a thing delivered to a person in good (in the case of stolen things) or in bad faith, it appears sound to argue that the person in either case should return not only the principal but also the fruits which she has collected in the course of the possession of the thing. This is precisely because she is not the owner of the thing in her possession and absent a contrary stipulation she who owns the principal owns the fruits thereof.

[46] See Articles 1171-1283.

[47] See Article 1264 of the Code.

[48] See, for examples of, Article 1309, 1311, 1328 and 1331 of the Code. In relation to corporeal goods, a usufructuary has two rights: the right to use such thing given in

common property including personal property of one of the spouses[49] both in the course of marriage and after its dissolution. These rules trigger the question as to who, and as of when, shall be the owner of the increments (fruits) of the main thing (which is subject to joint ownership, usufruct, pledge and marital property). Merely knowing that a corporeal good is a movable or immovable may not answer this question.

According to several provisions of the Code, which need to be read together, 'fruits'[50] are increases of a thing in conformity with its purpose without diminution of the principal thing. Fruits are all that a thing produces at periodical interval without diminution of its own substance.[51]

> This definition distinguishes fruits from "products" (*produits*). In a technical sense, products are things derived from a principal thing

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usufruct and be the owner of the fruits thereof whereas in the case of incorporeal things (e.g. usufruct over trade secrets), the nature of the object of the usufruct dictates only the enjoyment of fruits.

[49] See Article 62/1 of the Revised Family Code which declares that all fruits regardless of their nature obtained out of both personal and common property shall be taken as matrimonial property.

[50] Article 1170 provides: "(1) Whosoever owns a thing shall own the natural fruits thereof. (2) Periodic products of a thing and anything which may according to usage be derived from a thing in conformity with its purpose shall be deemed to be fruits." Article 1171 deals with increases from breeding animals, Articles 1172-1174 with crops and see Article 1333.

[51] See Yiannopoulos, "Law of Things", at 785-786 wherein the author explores the definition of fruits in French, Louisiana, German and Greek Law. He states that the French Civil Code and Louisiana Civil Code do not fruits. In those Codes fruits are classified as natural fruits, civil fruits and fruits of industry. " *Natural* fruits are "the spontaneous product of the earth" and "the product and increase of cattle". *Fruits* of *industry* are those "obtained by cultivation" as a result of "industry bestowed on a piece of ground". *Civil* fruits are "rents of real property, the interest of money and annuities," as well as "all other kinds of revenue derived from property by the operation of the law or private agreement." In the two jurisdictions, writers and courts have inferred from their respective civil codes a definition of fruits which is "things produced periodically by a principal thing without diminution of its importance". The German Civil Code, on the other hand, under section 99, states that: (1) Fruits of a thing are the products of the thing and the other yield obtained from the thing in accordance with its intended use.(2) Fruits of a right are the proceeds that the right produces in accordance with its intended use, in particular, in the case of a right to extract component parts of the soil, the parts extracted.(3) Fruits are also the proceeds supplied by a thing or a right by virtue of a legal relationship.

whose substance is thereby diminished. Once separated, the products are not reproduced....This conceptual technique carries significant practical consequences in connection with the status of timber and mineral substances extracted from the ground. The French regard stones extracted from a quarry not regularly exploited and trees cut down without any plan of exploitation as "products". The products of a regularly exploited quarry or forest, however, are considered to be fruits.[52]

If things are not obtained at a regular interval or produced using the substance of the main thing, they are called *products*, which mark the distinction between fruits and products. The term `*regular interval*` means production of increases yearly or at a shorter interval.[53]

Products may be collected from a thing by adding something to the principal thing mainly in the form of labor and raw material, which consequently diminishes the substance of the principal thing. It can be difficult to determine whether a thing is a fruit or a product. The Code seeks to clarify the issue and in Article 1170/2 deems "periodical products of a thing and anything which may according to usage be derived from a thing in conformity with its purpose" to be fruits. In the context of usufruct, the Code enables the preparation of a working plan where the land would generate products (using the definition proposed in this text). That the section refers to products, and not fruits, is apparent from its wording as a whole. Admittedly the use of the word "fruits" in 1333 could confuse the issue. The Article reads:

> The owner or usufructuary may require that a working plan be prepared in respect of the thing where the usufruct extends:
>
> (a)To a thing such as a forest, the normal mode of exploitation of which does not consist in collecting fruits yearly or at shorter intervals; or
>
> (b)To a thing such as a quarry, the substance of which diminishes in consequence of exploitation.

Fruits can be divided into *natural fruits* and *artificial fruits*. Natural fruits are those fruits, which are the periodic increments of animals and plants.[54] Artificial fruits are classified into civil and industrial fruits. Civil fruits are incorporeal entitlements that arise either by virtue of law or agreement. Civil

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[52] Ibid, at 786.

[53] This is an inference from Article 1333 (a).

[54] Planiol, at 644-650

fruits do not come out of the body of the principal thing.[55] Examples include interest earned on sums of money invested, profits from a business association and rents. Fruits obtained by cultivation or working the soil are called industrial fruits (e.g., trees and crops).[56]

In terms of legal effects, natural and industrial fruits become property of the owner of the principal thing when separated from them. The general rule is that the person who owns the main thing also owns the fruits thereof. The ownership of fruits of breeding is given to the owner of the mother. Thus the owner of a cow owns her calf and the owner of the bull has no claim to the calf.[57] Joint owners of a thing are owners of the fruits or products of such thing proportionate to their share in the principal.[58] Under Ethiopian family law the fruits of both personal and common property are regarded as common property.[59] In principle, an owner who has been wrongfully deprived of possession of property should be entitled to claim the recovery not only of the main thing but also the fruits thereof precisely because the main thing belongs to the original owner.

There are exceptions to the rule that she who owns the principal is also the owner of the fruits thereof. A usufructuary, not the bare owner, is the owner of the fruits produced by the thing given in usufruct between the date of creation and date of extinction of such usufruct.[60] Where a person is required to make restitution of property, she is given the right to retain the fruits of the property she has received.[61] In the event of return of an absentee, the fruits of

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[55] Ibid.

[56] Ibid.

[57] See Article 1171/2 of the Code.

[58] See Article 1264 of the Code.

[59] See Article 62/1 of the Revised Family Code, which provides that: ``all income derived by personal efforts of the spouses and from their common or personal property shall be common property.`` The corresponding provision of the Code, Article 652/1, is not as explicit as, Article 62/1, in this regard. In the face of Article 649/2 of the Code, it might be argued that income (fruits) obtained out of the personal property of the spouses should not be not regarded as common property. Both the Revised Family Code and the Code use the term `income`. Using the criteria and definitions we have developed in this text, income generated from property would be classified as civil fruits of that property.

[60] See Article 1328 of the Code.

[61] See Article 2178/1.

her property collected by her presumptive heirs or legatee are given the option to retain such fruits.[62]

5.7 Things in the public and private domain

Every state, irrespective of the ideology it subscribes to, needs property. Of course, a state with a socialist ideology is likely to have more property than a state with a capitalist ideology. Property under state control enables the state to carry out its functions.[63] The state uses its property to discharge its roles.[64] Some of the property belonging to the state is described as being within the public domain. These include things like public roads, bridges and national museums which everyone has access to and can use. Property in the public domain may consist of immovables or movables. Things in the public domain may be under the control of private persons though usually such resources are put under the custody of public authorities.[65]

Thus far our discussion of the various categories of things has focused upon the qualities of the things themselves. The determination of whether goods are in the public domain or not, requires us to focus on whether the goods can be privately owned. That determination in many cases is one of public policy and not necessarily governed by the inherent characteristics of the specific pieces of property themselves. Articles 1444-1459 deal with property in the public domain.

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[62] See Article 171/2.

[63] These functions include the classic responsibilities such as defense, security and the administration of justice as well as the more modern ones such as redistributing and allocating wealth, and supporting economic and political stability.

[64] At present land, water and other natural resources, in Ethiopia, are collectively owned. These resources are automatically taken as part and parcel of public domain things. They may or may not be the case. It is a mistake to take them all as public domain resources. Public domain things are different from common things (e.g. the ocean) and public domain things are not the same as collective things (such as land and water in Ethiopia today).

[65] Articles of cultural heritage (e.g. an old spear and shield) may be possessed by a private person. The person in possession of such objects will have a limited ownership that enables the public to have access to these cultural heritages. The heading of Section I of (Book III, Title IX, Chapter 1) the Code reads just ``Public Domain,`` which implies that if the property should be dedicated to public use or public service, it is immaterial whether possession thereof lies in a private or public persons. Thus, all property owned by private persons does not necessarily belong to the private domain and all property owned by the public institutions does not fall within the ambit of its public domain.

5.7.1 The basis of the classification

Roman law recognized three kinds of public property namely: (a) public property not open to private ownership as property serving public purpose; or (b) things which were public only in the technical sense as destined to public use; and (c) property of the state or its political sub-divisions which was susceptible of private ownership and subject to the rules of civil law like any other property held by private persons.[66] Title to these things was not necessarily vested in the state. Hence, the Romans regarded those resources dedicated to public purpose or public use as property forming part of the public domain of the Roman state while some other resources held in the hands of the state but not so open to the public were taken as property forming part of the private domain of the state. Public use or dedication to public purpose was the distinguishing mark of property which formed part of the public domain of the state.

Article 1444 and 1445 provide:

> Art. 1444
>
> (1)Property belonging to the State or other administrative bodies shall be subject to the provisions relating to property privately owned.
>
> (2)Such property shall be subject to the provisions of this Section where it forms part of the public domain.
>
> Art. 1445
>
> Property belonging to the State or other administrative bodies shall be deemed to form part of the public domain where:
>
> (a)It is directly placed or left at the disposal of the public; or
>
> (b)It is destined to a public service and is, by its nature or by reason of adjustments, principally or exclusively adapted to the particular purpose of the public service concerned.

These provisions divide property (goods) into two broad classes, namely property in the public domain and property in the private domain. Property owned by the state that is not in the public domain is governed by the provisions of the Code dealing with private ownership. This property can be movable or immovable and might be held by political units at any level of the

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[66] See A.N. Yiannopoulos. "Common, Public, and Private Things in Louisiana: Civilian Tradition and Modern Practice", 21 *La. L. Rev* 697 (1960-1961) at 707.

Ethiopian Government, federal and state, and regardless of the type of property, be it movable or immovable.

Property which is subject to public use might be state property. In civil law systems state property is divided into property in the public domain and property of the private domain. Jurists disagree on the criteria for this distinction. One view is that the criterion is that property in the public domain is not susceptible of private ownership.[67] This view triggers the question: are there things, which are absolutely insusceptible of private appropriation?

A second view states that the true reason for the dichotomy is that things in the public domain are those that that are dedicated to public *service*. A third view is that property in the public domain has as its essential characteristic that it is dedicated to public *use*.[68] In this view the property is not susceptible of private ownership not because it is state property but because it is dedicated to public use. Thus there are certain things, tangible or otherwise, which are regarded as in the public domain of the state by virtue of their dedication to public use or purpose. It is also to be noted that things in the public domain can be commercialized while they are in the hands or under the control of the public authorities, though to a very limited degree.

The Code adopts the view that state property in the public domain is characterized by being dedicated to public service or use. It is not the inherent characteristics or attributes of a thing which qualify it for the category of property in the public domain, but it is rather the needs of a given community as reflected in its laws or practices or policy that makes a given thing part of public domain of the state. So virtually anything open to appropriation can fall within the scope of property in the public domain if so declared by a concerned community. The fact that a given property is inalienable or is not subject to prescription does not mean that it is inherently incapable of private appropriation but the inalienability or inability to prescribe may rather come out of dedication of such thing by law to the common good.

The Code does not give a clear-cut definition of the term public domain. Instead, the Code gives us guidelines and some examples of property which fall into the public domain. The basic guideline is whether property is held by the state and whether or not that property is accessible to everybody for use or destined to a public purpose or service.

Article 1445 of the Code provides that a thing is regarded as falling in the public domain of the state if "it is directly placed or left at the disposal of the public" or "it is destined to a public service and is, by its nature or by reason of

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[67] Ibid, at 704.

[68] Ibid, at 711-712.

adjustments, principally or exclusively adapted to the particular purpose of the public service concerned". Thus they are in the public domain if made available for public use or to provide a public service. The obvious implication of Article 1445 of the Code is that all goods, movable or immovable, in the hands of the state that meet the requirement of this Article fall within the ambit of public domain of the state and those the state controls and which do not meet the test of Article 1445 fall within the private domain of the state.

Articles 1446-1447 and Article 1255 of the Code deem certain property to be within the public domain. As regards these illustrations, there would be no controversy for the Code requires one to categorize them automatically into the public domain. Under Articles 1446-1447 and Article 1255, mention is made to antiques one finds in museums, roads, streets, canals, railways, seashores, port installations and lighthouses, churches, mosques, fortresses, waterways, lakes and underground accumulations of water. All of these fall within the public domain of the state.[69] It is submitted that there are many kinds of property that may be designated as property in the public domain of the state.[70] For instance, the period of protection of patent and copyrights is limited under Ethiopian law. Enjoyment of these rights is not for an indefinite period of time. After the lapse of a period determined by law, the public is free to use patented[71] and copyrighted materials whose duration has lapsed.[72]

Article 1445 is a fall back provision. That is, where property belonging to the state does not fall within the scope of Articles 1446-1447 and Article 1255 (or other proclamations); then, recourse should be made to the test set forth in Article 1445, i.e., public use (accessibility) or purpose of public service.

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[69] See also Article 130(a) and 130(d) the 1955 Revised Constitution of Ethiopia for a list of things in the public domain of the state at that time. These were probably reflected in the Code.

[70] For additional lists of property included in the public domain of the state, see Articles 2/7 and 2/8 of the Research and Conservation of Cultural Heritage Proclamation No. 209/ 2000, *Fed. Neg. Gaz. Year* 27 No 39; and also Artilce 2/20 of the Ethiopian National Archives and Library Proclamation No. 179/1999, *Fed. Neg.Gaz*. Year 29 No 63.

[71] See Inventions, Minor Inventions and Industrial Designs, Article 16, Proc., No 123, 1995, *Fed. Neg. Gaz*. Year 54th No 25. A patented invention falls within the public domain, perhaps becomes a common thing, twenty years after the issuance of certificate of patent in favor of the owner.

[72] See Copyright and Neighboring Protection, Article 20, Proc No 410, 2004, *Fed. Neg. Gaz*. Year 10th No 55. In broad terms, copyright expires fifty years after the death of the author.

5.7.2 Legal effects

Different legal rules apply to property belonging to state or other administrative bodies which is in the private domain and public domain. There are three ways state property in the public domain of the state could be regulated. Option one is to regulate them exclusively on the basis of private property rules. For example, in the German Civil Code, "state property is in all cases private property; however, exercise of ownership rights is limited in the interest of public use and public purpose. The power of the state to regulate public use and public purpose is not regarded as an incident of ownership but as authority deriving from the sphere of public law properly belonging to the state".[73]

The second approach is to treat things dedicated to public use or public service entirely under public law; here private law will have nothing to say about things that are not subject of private ownership. Article 714 of the French Civil Code appears to adhere to this pattern. Finally, the third approach is to govern public domain things partly under a civil code and partly under administrative law. According to Planiol, civil codes should to some extent treat things under public domain for a couple of reasons: private property everywhere comes in contact with the public domain and that the general classification of things belongs essentially to a civil code which should ``contain the basic principles of law``.[74]

The third hybrid approach is preferred under the Code. The mixed approach rests on the belief that both public law and private law should in different respects govern property forming part of the public domain of the state. Titles VI, VII and VIII of Book III of the Code govern property in the private domain of the state and property held by persons other than the state. This means Articles 1126-1443 of the Code govern state property in the private domain. This view is bolstered by Article 1444(2) which provides that "property belonging to the state or other administrative bodies shall be subject to the provisions relating to property privately owned".

The state owns property in its private domain in the same way as an individual or a company does. The consequence of this is that property forming part of the private domain of the state could be alienated (either freely or for consideration), acquired through possession in good faith, occupation, prescription and accession. However, if a certain property is categorized into the public domain of the state, Articles 1444-1459 of the Code govern it. These Articles are not comprehensive but provide a skeleton for a scheme of

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[73] Yiannopoulos, "Common, Public, and Private" at 771(?).

[74] Planiol, at 814.

regulation of property in the public domain. Articles 1454 and 1455 state that property which forms part of the public domain may not be alienated and cannot be acquired by possession in good faith[75] or usucaption.[76] The consequence of this is that state property in the public domain may not be alienated either freely or for consideration even by the state or its administrative units, which are merely regarded as custodians. Further, no one can acquire ownership over such property through possession in good faith or usucaption. Nor can one acquire property in the public domain through occupation and accession.

5.7.3 Possibility of limited marketability

Property forming part of the public domain of the state is not absolutely put beyond commerce. The public authorities in charge of the management of things in the public domain have certain powers from which we can infer that things in public domain under the Code can be subjected to limited private relations. Private persons may be given permanent or temporary concessions to property in the public domain. A concession, however, must not have the effect of altering the purpose of the property.[77] For example, private persons may be given concessions to artifact shops and restaurants in museums. A private company may be given a concession and be allowed to purchase the right to put up advertisements on public roadways. Public authorities can authorize private persons to occupy property in the public domain and construct works on them.[78] In order for an individual to build on property in the public domain, there must be authorization to undertake construction specifying the character of such construction as well as the time for which the authorization is granted and the fees chargeable.[79]

A public authority that gives an authorization or grants a concession is given the power to cancel the authorization or the concession if the private individual (beneficiary) fails to adhere to the conditions specified in the agreement.[80] Pursuant to Article 1459 of the Code, the public authority is empowered to order the destruction of any work or the cessation of any

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[75] See Articles 1161-1167 of the Code. .

[76] These provisions should be read as putting things in the public domain beyond the reach of attachment as well as prescription.

[77] See Article 1456 of the Code.

[78] See Article 1457 of the Code.

[79] See Article 1457 (2&3) of the Code.

[80] See Article 1458 of the Code.

activity which impairs the very existence or the purpose of the property forming part of the public domain. Public authorities charged with the custody of public domain property should have the right (of course on behalf of the public) to bring possessory and petitory actions.[81]

5.7.4 Enlargement of the public domain

Article 1450 of the Code envisions two means through which property in the public domain may increase or expand: expropriation and alignment.[82] Expropriation is the taking away of rights in immovable property for public purposes in return for an advance payment of compensation.[83] The property taken through expropriation may enter the public domain.[84] Alignment proceedings, on the other hand, help the competent authorities to widen, narrow or straighten crooked roads or lengthen short roads or streets.[85] Where an alignment proceeding reveals that an un-built upon plot of land falls within a public highways, it will be automatically incorporated into the roadway.[86] Alignments are commonly used in town planning.

5.7.5 Shrinkage of the public domain

There are three ways things in the public domain can cease to be in the public domain and re-enter the private domain. One way is declassification through declaration. According to Article 1454 of the Code, the pertinent public authority may alienate property forming part of the public domain after declaring it is no longer part of the public domain. The second way to withdraw things from public domain is non-use. If a thing in a public domain, for example, a street, is no longer in use, it may become open for private appropriation. If a fortress no longer serves its purpose, then it may fall within the private domain. The third way is as a result of natural causes. For instance, a building in the public domain may collapse as a result of earthquake or other natural disasters.

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[81] This is inferred from Articles 1148, 1149 and 1206 of the Code which recognize the right of a holder to file possessory action against a usurper.

[82] In addition to these two avenues, the state may acquire property falling within the ambits of its public domain through investments, donations, excavations, accession and inheritance in default of heirs. For the latter, see Article 852 of the Code. See also Article 1194 of the Code for the case of vacant immovables without a master.

[83] See Article 1460 and Article 1464. See also Article 40/8 of the FDRE Constitution.

[84] This will be true to the extent expropriation is invoked to expand the public domain of the state.

[85] See Article 1450.

[86] See Article 1451 of the Code.

5.8 Personal and collective things

Originally written with a view to the private ownership of the critical resources of the country, the Code could not envisage the division of things into personal and collective things. This subsidiary classification of things was added to the property law of Ethiopia after 1975. The distinction between personal and collective things is still relevant today because the FDRE Constitution has maintained collective ownership of natural resources including land as the legacy of the Ethiopian revolution. It helps us to identify things open to private ownership and those which are put beyond the reach of private ownership. This subsidiary classification is an attempt to link the wealth of an individual to her labor and to her material and spiritual needs.

5.8.1 Nature and basis of the classification

The term "personal things" is not used here to mean property owned by one of the spouses in the course of marriage;[87] nor is it used to connote human faculties which may be the sources of immense power and wealth.[88] Rather, the term is employed to mean personal as opposed to collective assets in the ideological sense. Personal things are resources owned by a person for her own and her dependents' survival, comfort, convenience and cultural needs.[89] Personal things are linked to the person who owns them.

The term "personal assets" implies that the owner should not be allowed to accumulate property which would permit her to hire and exploit the labor of others. It also implies that the principal source of personal things is the labor of the owner herself. The basis of the division of things into personal and collective is an ideological preference. Personal things can be transferred by sale, donation, inheritance and attachment. In order to ensure that the possessions of individuals do not grow into productive assets, legal mechanisms are devised to limit the size, the number and the magnitude of

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[87] See Articles 57-58 of the Revised Family Code.

[88] Op.cit. Minogue, "The Concept of Property", at 15. Here argues that all three categories of property: personal attributes (e.g., quick wits), personal property (e.g., the clothes on our back) and productive property (e.g., farms and factories) might be the source of immense influence on others.

[89] See Articles 10-18 of the Constitution of the USSR (1977), http://www.friends-partners.org/oldfriends/constitution/const-ussr1977.html (accessed July 16, 2011). In 1987. Ethiopia followed the footsteps of the USSR when it adopted a constitution which reproduced a verbatim copy of these provisions on the forms of property. See Articles 12-18 of the Constitution of the Peoples Democartic Republic of Ethiopia, Proc. No. 1, 1987, *Neg. gaz.* 47 Year No 9.

personal property. Constant nationalization of property is also employed. Personal property can include "a one-family house, a one-family apartment, household articles, clothing and motor vehicles, etc. The list of articles which may belong to a person varies according to her place within the social and economic stratification in her society".[90]

All resources, other than those permitted to be owned by private individuals, are regarded as productive assets. Productive assets are to be held and managed by the government on behalf of the public. Productive assets chiefly consist of natural resources, including land and water resources, and other key means of production.[91] As stated earlier on, intangible things such as patent and copyright may also enter into the domain of productive assets. The nature and size of things falling into the domain of productive assets obviously depend on the stage of the economic development of the society which adopts this classification of things.[92]

5.8.2 Reasons for the classification

It is argued by the proponents of socialism that some property is created by nature for the use of everyone and should not be owned privately. Some assets are produced by the capitalist class not as a result of its own innovative power but due to a monopoly over state power and years of merciless exploitation of the working class. These resources should be possessed by the state in the name of all its citizens so that all citizens will indirectly benefit from them. In relation to other natural property like land, citizens are given the right of access and proprietary rights short of ownership. No single person, be it an individual, an association or the government, can command these resources.[93] In socialist ideology collective things are seen as the heritage of nature and past generations, to be used for the common good by the present generation and then to be passed on to the future generation.

5.8.3 Implications of the classification

Personal and collective (or productive) property receive different protections at law. The property of the state, as the foundation of the social and economic order, calls for the highest degree of protection. For example, of the property in private (individual) ownership, only the property of working peasants and

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[90] Kazimierz Grzybowski, "Reform of Civil Law in Hungary, Poland and Soviet Union", *10 Am J. Comp. L. 2533* (1961) at 260.

[91] Ibid., at 262.

[92] Ibid.

[93] Ibid.

artisans enjoys the protection of the state. The motivation behind the varying degree of protection is to ensure that private property does not prejudice public interest. The special protection accorded socialist property is primarily reflected in the fact that the law makes it impossible to transfer the ownership of objects of socialist ownership. The transfer of property from one form of socialist ownership to another has little legal significance as the property always remains in the hands of the state, private persons "merely exercise the right of ownership vested in the state in their own name with regard to assets in their management".[94]

The state then is the sole owner of all state property, regardless of what it is or who manages or uses it. State organizations exercise, within the limits established by law, only the rights of possession, use, and disposal of state property in accordance with the aims and purpose of the property. State property is not subject to attachment by creditors. Only raw materials, fuels and other property included in the working capital of state organization are subject to execution.[95] State property is not open to prescription. While persons may by taking possession, acquire ownership of personal property that has no owner, but they cannot so acquire state property.[96]

Countries including Ethiopia that have adhered to Marxist doctrine in the past recognize the distinction between personal and productive assets. In those countries, the use of the term 'private things' was deliberately avoided as it was said to carry with it the connotation of unbridled accumulation of private holdings. The provisions of the PDRE Constitution (1987) dealing with property were a verbatim copy of Articles 10-18 of the Soviet Constitution of 1977. They merely restated the laws regarding ownership that had been passed since 1974. They were reflected in property law passed until 1986.[97] Articles 12-18 of the PDRE Constitution provided that:

> The forms of ownership of the means of production are socialist, that is, state and cooperative ownership, private ownership and other forms of ownership as determined by law. State ownership is public ownership. The Ethiopian State shall, through the ownership of key production, distribution and service enterprises, play the leading role in the economy. Natural resources, in particular land, minerals,

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[94] Ibid.

[95] Ibid.

[96] Ibid.

[97] The term `collective ownership` is not used consistently in Ethiopian statutes. The terms collective ownership, public ownership, government ownership and state ownership are used interchangeably.

> water and forest, are state property. Private ownership shall, guided by state policy, carry out activities beneficial to the national economy. The right to transfer private ownership in accordance with the law is guaranteed. Personal property is protected by law. The right to transfer personal property in accordance with the law is guaranteed. The state may, where public interest so requires, requisition by making appropriate payment, or nationalize upon payment of compensation, any property in accordance with the law. Labor is an honorable source of wealth and well being of the society. The social standing of any person shall be determined by his work.

When read together with other proclamations regulating the ownership of the means of production,[98] these constitutional prescriptions virtually abolished private ownership of property except in the trivialized sense of the term.[99] As the above quotation indicates, the mechanism of constant nationalization was built into the law to enable the state to nip any sign of increase in the size of personal assets in the bud.

5.9 Collective things versus common things, jointly owned property versus things in the public domain of the state

A description of things analogous to, yet different from collective things is needed. Collectively owned things are different from common things though there are many similarities. Common things also called universal things (e.g. the Sun, the Moon, the atmospheric air and the high seas) cannot be owned by any entity even by the state in their entirety though that may be possible as a matter of theory. Common things are described as:

> ...those which do not belong to any body and which may be used by all, e.g., the air, the sea, the river water, the solar heat. They are so

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[98] See Public Ownership of Rural Lands Proclamation No 31/1975, *Neg. Gaz.* Year 34 No 26; and Government Ownership of Urban Lands and Extra Houses Proclamation No 47/1975, *Neg. Gaz.* Year 34, No 41.

[99] Farmers could have usage rights over a plot of farmland the size of which was limited by legislation and practice. Urban dwellers could not own more than one dwelling house. When they elected to sell their house the state had a preemption right. Small businesses were permitted only during the so called transitional period and even then a capital ceiling was put in place. This approach was similar to that taken by the Soviet property law which abolished private property in principle and recognized small ownership in contrast with the Bulgarian property law approach which did permit private ownership in principle but prohibited large scale ownership. See N. Dolapchiev, "Law and Human Rights in Bulgaria", 29:1 *International Affairs* (1953) at 65.

> abundant, that every one may take of them what he needs without depriving anybody else.[100]

These are things available to all mankind whether such resources seen as, by writers of religious inclination, to the workmanship of God or taken as gift of nature as claimed by writers of secular orientation.

There are several commonalities between collective things and things in the public domain of the state. Both are controlled by the state indefinitely. Both are held and managed by the state in the name of the entire nation in order to avoid conflict of the wills of the multitude and high transaction costs. The state deploys both for the betterment of its citizens. Citizens are entitled without distinction to benefit either directly or indirectly from such resources. Moreover, in both cases one is not expected to buy her way in, for membership is open and free. The essential commonalities between collective assets and things in the public domain are understood if two questions are posed: who is entitled to have beneficial interests in such resources (all citizens) and in whom the power to make decisions regarding the same is vested (state authorities)?

Some scholars confuse collective things with things in the public domain. For example, a distinguished property treatise writer said:

> ...there is a common usage of collectively owned thing or there is a complete dedication of it to the general service, which in many cases can be had without any contact with the thing used; it is thus the entire nation that derives an advantage from its battleships and its forts, although the citizens themselves, individually, make no use of them and are not in possession of them and many have not even seen them...[101]

However collective things and things in the public domain differ in important respects. While this quotation might apply to things in the public domain of

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[100] Op. cit Aubry and Rau, *Droit Civil Francais,* at 45-46.

[101] As quoted in Op. cit. Planiol, at 800-801, another writer, M. Ducrocq made a similar confusion in writing: "If the citizens were the owners of the national or communal property, they would be entitled to ask for its partition, for they would be the owners of undivided property and nobody can be forced to remain in in-division...the result would be the spoliation of future generation and the destruction of the domain of the state in favor of the generation of then living. If the citizens cannot sue for partition, it is not because the national property is owned by a fictitious person, who would be a fantastic person, but it is because there are two ways of being owner. And collective ownership lasts as long as its dedication to the collectivity does not entail partition".

the state, it does not necessarily apply to collectively owned resources, because individual citizens have the opportunity to directly enjoy collectively owned property. For example, in Ethiopia, both urban and rural lands are collectively owned but, for instance, plots of land are allotted to each farmer who has exclusive possession of his plot.

Additionally one can imagine a thing in the public domain (e.g. an antiquity, perhaps a shield), in the possession of a private person. That person's ownership right is limited by virtue of the character of the thing she possessed. Technically speaking, heritage properties held by mosques and churches are within private domain as these institutions are not part of the state and are established and sustained by private initiatives. But, for all practical purposes, those items of cultural heritage property held by mosques and churches in Ethiopia are part of the public domain. In the case of collective assets, they are held by the state (or at least by association of persons mandated by the state) to manage a given resource to the common good.

Finally collective ownership is often, if not always, ideologically motivated. Collective assets, as history witnesses, usually result from nationalization. On the other hand, things in the public domain of the state can coexist easily with notions of private property and are not necessarily created by nationalization.[102] It is not possible or feasible or desirable to individualize and confer exclusive possession on individuals in respect of at least some of the things in the public domain. Yet, physical apportionment in order to bestow exclusive property rights on individuals in respect of a collective asset (e.g. land) may be seen as possible or feasible and even desirable, at least from the perspective of some people.

Collectively owned things are not the same as jointly owned things which have not been divided. Individuals who collectively own a thing cannot claim a share of the thing. An individual, even if she is considered to be an owner, cannot exercise the rights attached to ownership. On the other hand, joint owners each own a share of the property held jointly and can request division or sale and division of the proceeds.[103] Things owned collectively are not intended to become the subject matter of private ownership.[104]

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[102] Articles 1444-1458 of the Code were not affected by the laws passed by the military government of Ethiopia. See Admasu Tesema, *The Nature of Public Property in Pre- and Post-Revolutionary Ethiopia,* Addis Ababa University, Faculty of Law: unpublished LL.B. Thesis, 1990).

[103] Op. cit. Planiol.

[104] Ibid.

5.10 Ordinary movables and special movables

The same procedure of transfer does not apply to all kinds of movables. And not all movables are subject to the law of possession in good faith. Thus, a distinction among movables is necessary to identify the proper rules of transfer and acquisition of ownership. See Chapter 8 for a detailed discussion on this sub-classification.

5.11 Conclusion

The argument advanced in this chapter is that the primary classification of goods under the Code is complemented by additional subsidiary classifications of goods which are found in different parts of Book III of the Code and other laws. It is necessary to understand these subsidiary classifications to properly understand the property law of Ethiopia. The objects of property law are corporeal and incorporeal things. Whether a thing is consumable is relevant consideration under the law of usufruct and of loan. Whether something is fungible or not is an important consideration under the law of possession, accession and contract. The ability to divide property matters under the law of joint ownership and of matrimonial property. It is important to know whether a movable is an ordinary or special movable. It is also vital to know which property can be the subject of private ownership. Particularly in the Ethiopian context it is fundamentally important to know which property is private domain and public domain state property. In short, the subsidiary divisions are not meant to replace but to augment the dominant categorization of things by the Code into movables and immovables.

5.12 Review questions

1. Do market places fall within the public domain of the state under the Ethiopian property law? Explain your position.

2. Presently land in Ethiopia is a property in the public domain of the state. Do you agree? Why? Why not?

3. Things in the public domain are unsusceptible of private ownership. Comment.

4. "Nothing (no subject matter) on this earth is unsusceptible of private ownership. It is the desire of man, as expressed through law, which designates certain things as public, not their inherent character".[105] Comment.

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[105] Ibid.

5. Argue for or against each of the following assertions. Property in public domain: (a) is inalienable under any circumstances, (b) Is featured by its accessibility to the public, (c) Is necessarily be held by the government, (d) may be in possession of private citizens, (e) may be tangible or intangible, and (f) is regulated both by public law and private law.

6. Show the relevance of the following distinctions; indicate also the criterion used to classify each of the following sub-classifcations of property: (a) corporeal and incorporeal property, consumable and non-consumable property, fungible and non-fungible property, divisible and indivisible property, principals and their fruits, personal/ collective and common property.

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Chapter 6: Possession

6.1 Introduction

Much ink has been spilt on the exposition of the concept of possession, yet the notion of possession remains as ambiguous and as complex as it used to be.[1] However, this should not detract one from attempting to explain various aspects of the law of possession.

The possession of things is essential for the survival of human beings;[2] people need things to survive. This instrument for survival, possession, may, in general terms, be characterized as recognition of a relationship between persons where one has taken active dominion (control) over a thing and is protected in her enjoyment of it unless another person has shown to the contrary.[3]

People interact with property in different capacities. Not all of which result in possession. Sometimes people are mere custodians of things as, for example, when people, in the course of shopping, try on clothes in the presence of a shopkeeper. Sometimes people hold and control property for others. In some cases people are the sole owners of things. In some cases people control property on their own behalf and on behalf of others. The law itself may deem a person in possession of property she does not in fact control, or deny her possession of property within her control.[4] These latter situations will be explained with an illustration in due course in this chapter.

The current chapter is set out to explore the following and other subsidiary issues. Which of these situations constitute possession in the context of the Code? Over which subject matter may possession be established? What justifies possession? How is possession transferred and acquired? How is possession protected and lost? What are the legal consequences of possession?

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[1] See A. E. S. Tay, "The Concept of Possession in the Common Law: Foundations for a New Approach", 4 *Melb. U. L. Rev.* 476 (1963-1964) at 476-477; see G. W. Paton, "Possession", *1 Res Judicatae* 187 (1935-1938) at 187; and also Albert S. Thayer, 'Possession', 18 *Harv. L. Rev.* 196 (1904-1905) at 212.

[2] Ibid.

[3] Ibid.

[4] Op. cit., Paton, "Possession".

6.2 Defining possession

The classical analysis of property law, having its roots in Roman law, holds that possession requires corpus (control) and animus (intent). Thus the claim is that for possession to exist a person must have some degree of physical control over a thing with an intention to maintain such control. This section examines these two elements of possession as understood in the literature, the Code and laws of some civilian jurisdictions.

6.2.1 The corpus element

The corpus element of possession goes by different names in the literature: dominion, occupation, physical control and *de facto* possession. In Ethiopia the Code refers to it as control. Thus the term control will be used in our discussions.

What constitutes control of a thing? Article 1140 of the Code provides that "[p]ossession consists in the actual control which a person exercises over a thing". The degree of control one exercises over an object is relative. If a person has coins or documents in her pocket, one can say such coins or documents are under her control because she has the coins and the documents with her and on her person. If a person possesses a monkey and keeps it in a cage and the cage is miles away at this moment, the monkey may still be under her control. If a person owns a plot of land in a community thousands of miles away from where he ordinarily resides, he or she may still be in control of such plot. It is not necessary then for a person to be physically present together with the property to control it. When a person hires a safety deposit box from a bank, the delivery of the key by the banker gives control over the safe as well as the valuables therein. It is impossible to have physical control over intangible things like copyrights but one can possess such things. The law expects the person who claims to possess an incorporeal good to demonstrate control over it by for example a continuous exercise of the rights over such intangibles.[5] Thus, the type or degree of control a person is expected to command over a subject matter depends on several factors, chief among them include the size of the subject matter, the value of the subject, the risks attendants to loss of control and the custom of the community.[6] In this regard, Paton said:

> Even where possession is regarded purely as a matter of fact, the question as to the measure of actual control that is necessary is one that depends partly on the legal rules in force, partly on what

[5] Op. cit., Aubry and Rau, *Droit Civil Francais,* at 82-84.

[6] Op. cit., Thayer, "Possession", at 197.

> is usually sufficient in that community to indicate a possession that others will respect. Hence follows a seeming paradox. Occupation or control is a matter of fact, and cannot of itself be dependent on matter of law. But it may depend on the opinion of certain persons for the time being, or the current opinion of a multitude or a neighbourhood concerning that which is ultimately a matter of law. Though law cannot alter facts, or directly confer physical power, the reputation of legal right may make a great difference to the extent of a man's power in fact.[7]

Thus, relativity characterizes the control element of possession.

The law expects a person who has control of a thing to accomplish, in person or through others, physical acts. In the case of a plot of land these would include using it, enjoying its fruits, changing its form by building upon it, cutting the timber and clearing it.[8] It is to be noted however that legal acts are not an element of the corpus; without doubt the owner may perform these legal acts, whether they are of administration or of alienation.[9] A person who does not possess, for example, a non-possessor owner, can equally carry out these legal acts. Thus, in order to lease or sell a thing, one does not have to possess it.[10]

The Code, under Article 1140, uses the phrase "actual control". The French version of the article uses the term `effective` in lieu of the term `actual`.[11] In the literature one may find words like *de facto* possession, mere possession, active possession, domination and real possession.[12] By these words we are given to understand that physical control over a thing should be active or effective or real. These qualifiers have two messages. One is that the control should not be simply hypothetical; it must be real. If a person is in actual control of a tract of land, they should have the ability to carry on certain activities such as access the land, till the land and reap the fruits thereof. Yet, actual control does not require that the person in control maintain continuous physical contact or proximity to the subject matter. The other message of the requirement that control be actual connotes the need for the existence of some degree of mental awareness because it is difficult to envisage exercise of real as opposed to hypothetical control over a thing without the subject being aware of it.

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[7] Op. cit., Paton, "Possession", at 194-195.

[8] Op. cit. Aubry and Rau, *Droit Civil Francais.*

[9] Ibid.

[10] Ibid.

[11] See Article 1140 of the Code in op. cit. Billilegn Mandefro, Unofficial Translation.

[12] Op. cit., Thayer, "Possession", at 201-212.

Article 1141 of the Code, which states "[t]he possessor may exercise his control over a thing directly or through a third party who holds such thing", raises the issue of direct and indirect possession. The actual control a person has over things does not have to be direct and personal. This article allows a person to have control over a thing through other persons. One can have control over a thing through her servant, employee or agent. The servant, the employee and the agent, are third parties who control property in their master's name and for his benefit, not in their names and for their benefits. These third parties hold, but they do not possess, the property. The recognition that one possesses a thing while using or employing others to control it has two implications: (1)that the intention to control is central to the definition of possession and (2) that the law is interested in according possession to persons who drive economic interest from a thing.

Possession may be characterized in accordance with who has physical control of the property as direct possession, also called immediate possession and indirect possession, also referred to as mediate possession.[13] In the case of direct possession, the person having the intention to possess also has physical control of the property.[14] Thus, a person who is in the actual control of the thing would be a direct possessor unless she is a *detentor*.[15] A *detentor* is a person who exercises control over a thing for another by reason of the position she occupies in her household or business or when such person is subject to the instruction of another person in relation to the thing.[16] An example of direct possession is when the owner of a motorcycle is riding it.

In the case of indirect possession, the corpus and the animus are disintegrated. The indirect possessor is one who, while not in actual control of the thing, is entitled by virtue of some relationship to one exerting actual control to eventually recover control over it.[17] Indirect possession arises when possession is exercised over the same thing by different possessors in different manner as in the case of a bailment. In bailment the bailor (typically the owner of the property) gives the property to the bailee for a particular purpose, with an expectation the property or proceeds from its disposition will be returned to the bailor. While the property is in the possession of the bailee the bailee is responsible for its preservation. There are three categories of indirect possession. First there are situations where a person holds possession of a

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[13] Op. cit. Salmond, *Jurisprudence,* at 282-286.

[14] Ibid.

[15] Ibid.

[16] Ibid.

[17] Ibid.

thing solely for another person.[18] For example, all employees and agents are assumed to hold property acquired in the course of their employment or agency for the exclusive benefit of their employers and principals.[19] Secondly there are instances where a person holds direct possession of a thing and claims it for herself until sometime has elapsed or some condition has been met, but who acknowledges the title of another for whom she holds the thing, and to whom she is prepared to deliver it when her own temporary claim has come to an end. Examples of this type of indirect possession include a borrower for a fixed time and a pledgee.[20] Finally, there are cases where the direct possessor holds both for someone else's account and on her own, but who recognizes the other has a right to demand direct possession at any time. An example of this type of indirect possession is a person who borrows a tool from another on the understanding that they might keep it until its return is requested.[21]

Articles 1141 and 1147 of the Code both refer to those who possess property for another as mere holders. Article 1147/1 provides: "Unless the contrary is proved, he who began to possess on behalf of another person shall be regarded as a mere holder". Under these provisions, does the other person, the indirect possessor, meet the two elements of possession: the corpus and the animus? Assuming that the Code is inspired by the German approach to defining possession, the corpus is with the mere holder who controls for the indirect possessor; the indirect possessor controls her thing through the intermediary of the mere holder. However, the law treats the indirect possessor as if she was actually and physically controlling the thing which, as a matter of fact, is under the control of the mere holder.

The indirect possessor is presumed to have the intention to control the thing. How can we assume that the indirect possessor has the requisite animus? The answer lies in the legal relationship the indirect possessor has with the holder. Mere holders always have some legal relationship with the indirect possessor. The legal relation may be established by court order (e.g., administrator), the operation of law (e.g., .tutor), contract (e.g., agent) or testament (e.g., liquidator). The legal relationship creates a presumption that the holder holds the thing for another. Should the holder wish to claim a greater right it is incumbent on him or her to prove it. A change in the intention of the holder is not enough.[22] It cannot arise from a mere negation of the true possessor's

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[18] Ibid.

[19] Ibid.

[20] Ibid.

[21] Ibid.

[22] See Article 1147/3 of the Code

right, it must be backed by judicial or extrajudicial actions.[23] Examples of the kind of facts that may be asserted in support of a claim of possession include: the existence of a contract for the use (contract of letting) of the thing with the original possessor,[24] that the holder publicly declared in the presence of other persons that she is the owner of the thing, that the holder carried on acts of demolition and building upon the thing, that the holder refused to restore the thing to the owner, that the holder used force to prevent the owner from retaking the thing, or that the holder refused to pay rent by saying she is the owner or by notifying the owner in writing that she will not pay rent.

Classifying possession into direct and indirect possession means it is possible for two or more persons to possess the same thing at the same time. This might be for economic purposes. In those cases it could be argued that the intention to profit from the thing has replaced the intention to exclude others.[25] The law wishes to call she who is entitled to derive an economic interest in a given thing at a given point in time a possessor. Secondly the direct possessor, who has but temporary control over the thing has the right to exclude everyone from possession, whereas the mediate possessor having given up possession of the thing to the direct possessor can exclude everyone but the direct possessor from possession. It is important to note that direct and indirect possession can only be explained by reference to the concept of relative possession,[26] which envisages the possibility of multiple people possessing the same thing at the same time. The concept of absolute possession does not admit this can occur. If one opted for absolute possession, two absolute possessions would destroy each other since they tend to mutually exclude each other.[27] As we shall see below, the Code recognizes relative possession, i.e., the possibility of a given thing being under the control of several persons at the same time.

Can the scope of control of property go beyond material objects to include immaterial ones? In the civil law tradition, the development of the objects of possession has been removed from the domain of material objects to include real rights and then its extension to other rights.[28] Roman law formally prescribed that only material things could be possessed.[29] Roman jurists,

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[23] Ibid. See also Paton, *TextBook* , at 529-534.

[24] See Article 2698.

[25] K.W. Ryan, *An Introduction to The Civil Law,* (Australia, The Law Book Co. Of Australasia PTY LTD., 1962) at 150-151

[26] Op. cit. Salmond.

[27] Ibid.

[28] Op. cit., Ryan, at 152.

[29] Ibid.

however, recognized possession of rights such as servitude and usufruct. They described possession of such rights as quasi-possession.[30] Even today the German Civil Code provides that possession applies only to material things and not to rights, although such Code accords similar legal protections to those given to possession where certain rights are disturbed.[31] The French law, however, provides for the possibility of possession of rights because possession is defined in the French Civil Code as the detention or the enjoyment of a thing or the enjoyment of a right.[32] In French law, the rights over which possession can be exercised may be connected with material objects (e.g., right of way, access to light, usufruct, mortgage) or may not be linked to material things at all (such as trademark, patent, copyright and generally intellectual property.)

The concept of possession in Ethiopian law covers both tangible and intangible things. That this is the case is evidenced by Article 1140 which uses the term ``thing``. As we have discussed the term thing, when seen in light of Article 1126, should be construed to cover corporeal and incorporeal things.[33] Hence, under the Code, the scope of the subject matter of possession extends to tangible things and intangible things. The intangible things over which control is established may or may not have connection with material things. Possession of intangible things such as copyright and servitude involves the continuing exercise of a claim to the exclusive use of it.[34] One implication of stretching the subject matter of the law of possession to intangible things is that the possessor of such rights can avail herself of the remedies available through possessory action, not including use of force, though.

6.2.2 The animus element

The discussions about actual control and the permissibility of direct and indirect possession have implied the need for the intent element in the definition of possession. There are various theories about the nature of the intent element of possession. What follows is a discussion of three of those theories: the subjective theory, the objective theory and the realist theory followed by an inquiry into which theory guides the Ethiopian Code on this topic.

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[30] Ibid.

[31] Ibid.

[32] Ibid.

[33] For an interpretation of the term ``a thing`` in the Code see the discussions in Chapter 3 of this text.

[34] Op. cit. Salmond, at 291-292.

6.2.2.1 The subjective theory

To Savigny, who has developed this theory, possession exists when a person has *animus domini*, that is, the intention to exert dominion over the object, to exclude all other persons in the world. *Animus domini* means that for a possessor to exercise the real rights attached to the fact of possession, she must not only have physical detention of the thing, but also the intention to keep it as her own in the form of ownership.[35] Savigny`s theory is known in civilian literature as the subjective theory of possession because of its reliance on the determination of a person`s subjective intention to own a thing. Savigny contrasts *animus domini* with *animus detinendi*. *Animus detinendi* is the intention to detain a thing on behalf of another person (who has the intent to own and qualifies as possessor).[36] Thus, pledgees, usufructuaries, bailees, borrowers, servants, liquidators, administrators, servants, lessees, curators, employees, agents, tutors and carriers are not taken as possessors because they do not hold for themselves and as owners. French law, which subscribes to the subjective theory of possession, calls these persons precarious possessors.[37] What these people lack is the intent to possess the thing on their own account indefinitely; they accept the missions by law or by court or by virtue of a contract to restore the thing to the true possessor.[38] They hold the property in the name and on account of another person with a superior right.[39]

If one follows the subjective theory, it is not possible for two or more persons to possess the same thing at the same time (with the exception of the case of joint ownership). The subjective theory of possession emphasizes intention. When the corpus and the animus do exist together then that is an ideal circumstance for the existence of possession. Where the corpus and animus are located in different persons, one should give greater emphasis to the mental element when determining who is in possession. The requisite mental element is the wish to possess a thing for oneself as owner. For the subjective theory of possession, animus is not presumed. The one who claims the benefit

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[35] Oliver Wendell Holmes, "Lecture VI. Possession", http://biotech.law.lsu.edu/books/holmes/claw07a.htm (accessed July 6, 2010).

[36] Raffaele Caterina, "Concepts and Remedies in the Law of Possession", 8 *Edin L. R.* 267 (2004), at 267.

[37] Ibid. at 268.

[38] Ibid.

[39] Ibid.

of the intention bears the burden of proving intention.[40] The subjective theory of possession restricts the animus element to ownership. This theory seems to rule out the possibility of calling a person who merely intends to use but not to own a thing under her control a possessor.[41]

6.2.2.2 The objective theory

Rudolf von Jhering challenged Savigny`s conception of possession as too subjective and narrow.[42] Jhering also questions how the subjective theorists may explain the case where legal systems such as the Roman law give possession to those who control someone`s property (e.g., a pledge).[43] To Jhering, as the case for the Roman jurists, the critical factor should be the intention to possess.

Jhering sought to demonstrate that the subjective intent of the person who has physical control over a thing is implicit in his factual authority, but it is not determinative for the qualification of that authority as possession. Jherings's theory is known as the *objective* theory of possession, because any intentional exercise of physical control over a thing is possession.

Jhering distinguished between possession and detention, but he did not ground the distinction on the presence or absence of the intent to own the thing. Acorrding to Jhering, a person has detention rather than possession when the *causa possessionis* (the "cause of possession") is of a nature that implies exercise of physical control over a thing on behalf of another person. When this happens there can be no possession in the proper sense of the word, and the *causa possessionis* becomes a *causa detentionis*.[44]

Other authorities appear to follow Jhering in defining possession as a factual control over a thing for one's self, to the exclusion of others. Tay writes:[45]

> The crucial thing here is the emphasis on power and control. Possession is not mere physical detention—such detention in pristine form rarely confronts the law (people do not keep their belongings chained to their wrists); such detention readily shades off into forms of control ('detaining' in one's house or one's office for instance) and is practically useless as a fundamental concept on which to build a structure of rights and duties. Possession, one might say, is the present physical power to use, enjoy or

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[40] Ibid.

[41] Ibid at 267.

[42] Op cit, Ryan, at 149.

[43] Henry Bond, "Possession in the Roman Law", 6 *L. Q. Rev.* 259 (1890) at 273.

[44] A. N. Yiannopoulos, "Possession", 51 Louisiana L. R. 523 (1991), at 525.

[45] Op cit., Tay, at 490.

deal with a thing, on one`s own behalf and to the exclusion of all others. This definition ... comes close to accuracy, but misses one vital element: the requirement that a man should not only have the power, but should also will and intend it. The addition of the element of will and intent converts power into control, interpreted as a conscious, deliberate relation--a relation that requires us to know what we are doing in the same way as truly counting or speaking a language requires us to know what we are doing; a parrot can do neither. Our definition of possession, as fundamental and general concept in the law, thus becomes: *Possession is the present control of a thing, on one`s own behalf and to the exclusion of all others.*

This variant of the objective theory of possession, as articulated by Tay, emphasizes the fact of control.[46]Under the objective theory, control of a thing by a subject leads to an inference of animus. If X can prove that she is in control of a thing, it is presumed that she is the possessor of such thing. This presumption is rebuttable. In the objective theory, if A brings a possessory action, claiming that she is dispossessed by B (who has control over the thing), the only matter which A would be required to prove is the fact that B has held the thing in controversy for A under a lease, or by A`s permission, but the question of the animus with which B has held would not be in issue.[47]

According to Jhering, Roman jurists defined the concept of possession as an intention to possess a physical thing, a*nimus possidendi*. To these Roman juritst, *animus possidendi* implied two essential elements: the corpus and the animus. The animus meant a general 'not a particular, ` intention to possess a physical thing. It is, to the Roman jurists, immaterial whether a person having physical control of a material thing has the intention to hold for himself and as an owner or whether she has the intention to hold for another. The corpus element meant physical detention. The decisive factor was the intention to possess even if one presently has no physical control over an object. According to this theory, a pledgee, a custodian, a borrower and a servant may have possession in law.[48] [49]

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[46] Ibid., at 491.

[47] Op. cit. Ryan.

[48] However, Jhering notes that Roman law did not allow possession to lessees, borrowers, pledges and bailees. The explanation for the denial of possession to this class of people was not that they did not have the necessary control but rather that this category of people remained substantially under the control of the lessor and pledgor. If their enjoyment of the property was disturbed, it was the duty of the lessor or pledgor to protect it. But as commerce progressed and as mobility of

The objective theory of possession holds that possession is the exercise of factual authority over a thing. The intent to possess as owner is not a requirement for possession. Any one exercising factual authority over a thing is a possessor even if she exercises it on behalf of another. Thus the categories of persons who could be regarded as having possession in law are wider than under the subjective theory. The objective theory permits the existence of direct and indirect possession, that is, several persons possessing the same thing at the same time. The objective theory of possession tends to accept the idea that two or more persons may have economic interest in a single thing at the same time. Under this theory, since the intention to possess is presumed from having physical control of an object, the evidentiary obstacle that may be faced in applying the subjective theory is lessened.[50]

The German Code inclines to the objective theory. In Germany, the animus is a person's simple will to exercise upon the thing that physical power called possession. Possession should be voluntarily exercised over a thing.[51] From that physical power, the intent to control is presumed.[52]

6.2.2.3 Realist theory

As the preceding discussions show, the subjective and objective theories presume that there is possession when corpus and animus exist together and that in the absence of one or the other possession does not exist. Also seen above is that there is consensus on the appreciation of the corpus element by the two theories of possession and that the subjective theory marks on animus while the objective theory places accent on the corpus element. Yet possession once acquired may continue even though either corpus or animus or both are lost. The realist theory of possession, also called the functional theory of possession, depends on pragmatic considerations. The realist theory regards *a priori* definition of possession as futile. The definition of possession, to this theory, should be driven by policy and convenience. Especially, in the context of common law, as the nature of possession comes to be shaped by the need to give remedies, no single theory will explain possession.[53] Shartel says:

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people increased, denial of possession to this class of persons became manifestly unsuitable.

[49] A. S. Mathews, "The Mental Element in Possession", *79 S. African L. J. 179* (1962) at 188.

[50] Ibid.

[51] Ibid.

[52] Ibid.

[53] Burke Shartel, "Meaning of Possession", 16 *Minn. L.R.* 611 (1932).

> ...there are many meanings of the word "possession"; that possession can only be usefully defined with reference to the purpose in hand; and that possession may have one meaning in one connection and another meaning in another. [54]

The realist theory finds, in some cases, the application of the subjective theory, with its emphasis on animus, sounds while in other circumstances the objective theory, with its accent on control, holds valid. The realist theory of possession proceeds with an assumption that like an answer to any question, the question of the role of the intent element of possession cannot be and should not be defined in on-size-fits-all manner. In the common law context it is said:[55]

> The law does not always or necessarily attach the rights of possession to physical control; and in like manner, when physical and legal possession coincide, it does not necessarily follow that the loss of control in fact shall involve the loss of possession in law....The law would be much simpler than it is if it were held that actual control or custody invariably gives actual legal possession, whether the custodian exercises control on his own account or as the servant or otherwise on behalf of another. But no system of law, so far we know, has gone that length....We may find it convenient that a possessor shall not lose his rights merely by losing physical control, and we may so mould the legal incidents of possession once acquired that possession in law shall continue though there be but a shadow of real or apparent physical control, or no such power at all.[56]

Hence, the realist theory of possession calls for avoidance of a dogmatic definition in favor of a malleable and context-dependent definition of possession.

6.2.2.4 The Code`s position

Which of the above theories does the Code embraces? There are no background documents articulating this issue making it difficult to answer this question with any degree of certainty. But one can try to extrapolate an answer from the various provisions of the Code itself. It appears that the Code

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[54] Ibid., at 612.

[55] Fredrick Pollock and Robert Wright, *An Essay on Possession in the Common Law* (Oxford: Claredon Press 1888) http://free-law-books.troy.rollo.name/possession.pdf (accessed, July 9, 2010) at 9-10.

[56] Ibid., at 612.

is informed by the realist theory of possession. Many instances of the application of the realist theory can be cited from the Code.

First, the Code makes some holders, for certain ends, possessors. People such as tutors, agents, employees, bailees and repairers of articles control a thing belonging to another. These people are holders because they control the thing with the permission of and for the account of another person. The contract pursuant to which they hold another's thing is clear that they control the thing on behalf of another and not on their own behalf. Yet the law, under Articles 1148 and 1149, authorizes them to use force and to bring a possessory action to recover the thing from a usurper. These holders are regarded as possessors for the purpose of obtaining a remedy which ultimately benefits the person for whom they hold the thing. The purpose of these provisions is ensuring they can effectively protect the interests of the bailor, principal, minor and by using the remedies of self-help or possessory action.[57] These people may also have some economic interest to protect on their own right. It is important to note that for the purpose of the presumption of ownership based on possession, holders are obviously not owners.

Second, Article 1144[58] of the Code states that a person becomes a possessor of goods the moment she receives a document evidencing those goods. Suppose Y orders certain commodities from Kenya for and in the name of X. X is to receive the goods in four months time. In the meantime, X receives the bill of lading representing the goods. The law says that possession of specially printed papers describing goods is as good as taking physical control of the goods themselves. The literal application of both the subjective and objective theories of possession will not confer possession on X because X does not have control, in the physical sense of the term, over the goods even if it might be said that she has the intent to hold them in her name and to be an owner. This article is just a commercial policy device. The law wants the capital invested in the goods to be in the market even if the actual commodities have not arrived

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[57] Op. cit. Caterina, at 270-271 where it is said: "On a practical plane, it is not difficult to understand why all the legal systems mentioned also give the remedy to mere holders. This is advantageous to holders, but also to owners, who are spared the need to intervene in the defense of holders (who are usually in the best position to act, while owners may be absent). If the remedy is not available to holders this is advantageous only to the wrongdoers".

[58] This Article entitled ``Documents representing the thing`` reads: (1) Possession may be transferred to a new possessor by the delivery of the documents representing the thing and enabling him to dispose thereof. (2) Where a dispute arises between the holder of the documents and the person who has the actual possession of the thing, the latter shall be preferred unless his bad faith can be proved.

X`s place. The law wishes to enable X to deal with the thing represented by the bill of lading, just a special kind of commercial paper, well before X actually receives the goods.

Third, one can infer from Article 1145 of the Code an instance showing the adoption of a contextual definition of possession in the Code.[59] Sub-article 1145/1 deems possession to be transferred to a new possessor where the person who exercises actual control over the thing declares that she shall henceforth detain it on behalf of the new possessor. However, in Article 1145/2, it is provided that possession to the new possessor is not considered transferred when the old possessor goes bankrupt. In the event of bankruptcy, the original possessor is deemed to retain possession of those goods remaining in his actual possession and control.

An example can clarify the matter. X is a dealer in grains. She sells four quintals of maize to Y. Y has asked X to keep the maize for her for four weeks. After the conclusion of the contract of sale, X has individualized the four quintals of maize and put them separately for Y. Article 1145/1 provides that possession has been transferred to Y and that so far as the maize sold to Y is concerned the grain dealer, X, is transformed into a mere custodian. In other words, Y has come to meet the two requirements of possession as per the subjective and objective theories-corpus and animus. If X goes bankrupt[60] before Y collects the maize, Article 1145/2 considers the possession and thus ownership of the maize in question as never to have been transferred to Y. This provision assumes that X never parted with possession of the maize sold to Y. The law here presumes that X is trying to evade the principle enshrined in Article 1988/1, which provides that the assets of a debtor are the common security of her creditors. This example shows that the law sometimes may deprive a person of possession even if such person has fulfilled the intent and corpus element of possession.

Fourth, the Code adopts the test of control with the intent to be an owner to determine possession in relation to occupation, possession in good faith and

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[59] This Article entitled ``Constructive possession`` reads: (1) The possession of things which are certain and things pertaining to a generic species which have been individualized shall be deemed to be transferred to the new possessor where the person who exercises actual control over the thing declares that he shall henceforth detain it on behalf of the new possessor. (2) Nothing in this Article shall affect the rights of the creditors of the person exercising actual control over the thing in the event of his bankruptcy.

[60] See Articles 969-971 of the Commercial Code. Bankruptcy is a, lack of financial ability to satisfy the claims of her creditors, which is declared by a court of appropriate jurisdiction

usucaption.[61] Usucaption accrues in favor of a possessor who possesses as owner whereas those who control an immovable thing on account of another person cannot benefit from Article 1168/1. Under the Code, those who occupy, a movable thing without an owner, with intent to become its owner can obtain ownership thereof.[62] For possession in good faith to apply, taking delivery of the thing bought in good faith with an intention to be its owner is required.[63] Intent being at the forefront, the Code adheres, in these instances, to the subjective theory of possession.

Fifth, a reading of Articles 1140 and 1141, suggests the adoption of the objective theory of possession. Under Article 1140, possession is the exercise of actual control over things. There is not reference to animus in this provision. Implicit in Article 1140 is the mental element of awareness or knowledge for one cannot exercise actual or effective control over a thing without her knowledge. Some degree of awareness must be therefore be hidden in the sub-text of Article 1140. As per this provision, the person who exercises actual control over the subject matter should not automatically be presumed to have the intention to possess. It is not the business of the person who carries out activities in relation to a thing to show that she has the intention to possess; the person who disputes possession must establish the basis of their claim. Under Article 1140, the key element is the physical control a person exercises in respect of a thing. If the lawmaker had adopted the subjective theory of possession, we would expect to see words like exercise ``control for oneself and with the intention to be an owner thereof``[64] in the fashion of the French Civil Code in Article 1140. Applying the objective theory,

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[61] See the words ``to acquire the ownership of`` and ``relating to the ownership of`` in Article 1161/1 and Article 1168/1, respectively, of the Code.

[62] Article 1151 of the Code..

[63] Article 1161/1 of the Code.

[64] See Article 9 of the "Revised Draft Book III of the Code" (On file with the author: Ministry of Justice of Ethiopia, undated,) which would restate Article 1140 of the Code to include the requirements that the person control a thing in his name and to be an owner thereof. This would be an explicit adoption of the subjective theory of possession. Article 15 of the "Revised Draft Book III of the Code" (on file with the author: Justice and Legal System Research Institute, unpublished, 1997 E.C) is indecisive in adopting either the objective theory or subjective theory of possession. Abebe Mulatu, "Possession and Possessory Action under Article 1149 of the Civil Code", 3 *Hegawinet*, PDR Procurator General Professional Journal (in Amharic), (1983 E.C) at 47-49, says it is difficult to credit the position taken in the Code on the definition of possession to either the French or Swiss approach. The stance Ethiopian law has taken in this connection is the German approach, which rests on *animus possidendi, not animus domini.*

a person with actual control, (or effective control if we use the language in the French version of Article 1140), may hold the thing with the intention to be an owner or with the intention to control it for another. Her intention is irrelevant and in either case she has possession of the thing. As explained above, the intention to possess is the essence of the objective theory of possession and mental element in this theory is presumed from the factual relation a person has with a thing. Article 1140 is worded in the fashion of the German Civil Code which has adopted the objective theory of possession.[65]

6.3 Justifications

What is the rationale behind the law of possession? There are five competing theories on the justification for the law of possession: the public order theory, the will theory, the ownership protection theory, the entitlement theory and the convenience theory. Each will be discussed in order.

6.3.1 Public order theory

This theory states that the possession of property should be protected in order to maintain societal stability. The need to accord legal protection to possession emerges from the very purpose of the law, which is that it seeks to replace self-help in the majority of, if not all, cases with rules and institutionalized machinery of enforcement.[66] Human nature being what it is (i.e. the tendency to favor oneself), given scarcity of and competition for resources, without protection men would try to take the property of others. The resultant conflicts over property would lead to social disorder. The law of possession helps to prevent this sort of chaos from occurring in a society. Salmond says:

> ...An attack on a man's possession is an attack on something which may be essential to him, it becomes almost tantamount to an assault on the man himself; and the possessor may well be stirred to defend himself with force. The result is violence and disorder. In so far as legal system aims to replace self-help and private defense by institutional protection of rights and maintenance of order, it must incorporate rules relating to possession.[67]

6.3.2 Will theory

The will theory rejects the public order theory as a primary justification for the law of possession. The public order theory leads to the conclusion that relief is

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[65] Abebe Mulatu, "Article 1149".

[66] Op cit., Tay, at 482; and Whitecross, at 501.

[67] Op. cit., Salmond, at 265-266.

given merely because public order has been disrupted and not because the plaintiff has a protectable interest. The defect in this theory, it is argued, is that the disruption must be found in the unlawful or disruptive way a person is deprived of possession. However the law grants relief for loss of possession even in cases where dispossession occurs without violence or a breach of the peace, for example, when a person takes an others' hat by mistake. Besides, it is hard to see why public order should be protected by a civil action, rather than by administrative or police measures, if no one has suffered an injury to any protectable interest.[68]

In response the will theory proposes that the main reason for the protection of possession is respect for the will of the possessor.[69] Possession is a manifestation of an individual's will to control a thing. Under the will theory, to interfere with another's exercise of will is to interfere with her freedom or personality, or to violate the principle that each person is the equal of every other. The merit of this approach is that the victim is protected simply because the act of dispossession interferes with her will, not because the act that interferes is unlawful in any other respect.[70]

The problem with the will theory of possession is that the law of possession does not protect people against any interference with their will. The law of possession protects them against dispossession. If the possessor is acting without right, the law would be protecting the will to do something wrongful. Even if, in the abstract, the will should be protected, it is hard to see why the will to do wrong should be. Moreover, the law is not simply protecting the will of the possessor but settling a conflict among different people's will. By taking an object, a dispossessor allows her will to override that of the earlier possessor. By keeping it, the earlier possessor allows her own to override the will of all those come later. Respect for the will does not explain why physical possession matters. If the law was merely protecting a person's will to

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[68] James Gordley and Ugo Mattei. "Protecting Possession", 44 *Am J. Comp. L.* 293 (1996) at 296-297.

[69] Op. cit. Holmes, "Possession" wherein he states: "Why is possession protected by the law, when the possessor is not also an owner? That is the general problem which has much exercised the German mind....Possession is to be protected because a man by taking possession of an object has brought it within the sphere of his will. He has extended his personality into or over that object. As Hegel would have said, possession is the objective realization of free will. And by Kant's postulate, the will of any individual thus manifested is entitled to absolute respect from every other individual, and can only be overcome or set aside by the universal will, that is, by the state, acting through its organs, the courts".

[70] Op. cit., Gordley, at 297.

appropriate an object, it would protect that will however it was expressed, whether physical possession was taken or not.[71]

6.3.3 Ownership theory

Proposed by Jhering the ownership theory, holds that the rationale for the law of possession is to give more effective protection to ownership. By giving protection to possession, in effect, one is according security to ownership since in the vast majority of cases the possessor is in control of a thing either because she owns it herself or because the owner has confided to her control of it. To this theory, the protection given to those who are not owners is unavoidable consequence of or a price paid for protecting owners. The owner does not have to prove title when dispossessed; she merely shows the existence of possession and then her ownership is secured. Most theorists have rejected this approach.[72] It is pointed out that this theory does not explain why a possessor is protected when she clearly is not the owner and why she is sometimes protected even against the owner. Besides, the theory wrongfully assumes that the person dispossessed is most often the owner.[73]

6.3.4 Continuity of possession theory

Dernburg theorized that possession should be protected because it is the factual order of society. Possession grants the individual directly the instruments of her activity, the means for the satisfaction of her needs. He explained that the owner and not the possessor has the right to possess. Heck developing Dernberg's theory claimed that

> ...the law does not protect possession as such, but the continuity of possession. The law recognizes" the need to protect the continuity of the relationships in life where possible".... "Continuity is recognized as a good without regard to whether a definite right is present". "Everyone knows from her own experience that adjustment to the loss of the use of a thing can lead to difficulties and damage".

For Heck the difficulties and damage against which the possessor is protected are not the loss of thing itself but the consequences of interrupting its use.[74]Thus the law of possession seeks to avoid the inconvenience or damage that arises out of dispossession. Under this theory, possession is not protected

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[71] Ibid., at 298..

[72] Op. cit., Holmes, "Possession".

[73] Op. cit., Gordley, at 298-299.

[74] Ibid., at 299-300.

as an entitlement in itself. This theory is also criticized for failing to explain protection of a wrongdoer. As Wieling pointed out "the fact that everyone has an interest in keeping what she possesses does not explain why we protect it".[75]

6.3.5 The entitlement theory

Pollock reasoned that possession is and should be protected because the possessor has a protectable interest which in itself is a property right or a right which maximizes wealth or enhances economic efficiency. Possession is a property right for it can be assigned or inherited. Possession is worthy of protection itself. Under this theory possession is to be protected not with the view to advancing objectives such as the maintenance of public order, realization of the will of a possessor, the protection of ownership or securing continuity of possession but because it is a property right meriting protection on its own. Pollock defined possession in law as:

> When the fact of control is coupled with a legal claim and right to exercise it in one's own name against the world at large, we have possession in law as well as in fact. We say as against the world at large, not as against all men without exception. For a perfectly exclusive right to the control of anything can belong only to the owner, or to someone invested with such right by the will of the owner or some authority ultimately derived therefrom, or exceptionally, by an act of the law superseding the owner's will and his normal rights. Such a right is a matter of title.[76]

Pollock proposed that possessor had the same rights as the owner except the possessor could assert those rights against everyone except the owner. Pollock asserts:

> Further, possession in law is a substantive right or interest which exists and has legal incidents and advantages apart from the true owner's title. Hence it is itself a kind of title, and it is a natural development of the law, whether necessary or not, that a possessor should be able to deal with his apparent interest in the fashion of an owner not only by physical acts but by acts in the law, and that as regards everyone not having a better title those acts should be valid[77].

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[75] Ibid., at 300.

[76] Op. cit., Pollock, "An Essay on Possession", at 9.

[77] Ibid, at 10.

In this assertion, it is argued, he went too far.

> Pollock did not consider the logical consequences of that statement. They go beyond anything he or any English court would be likely to accept. If Pollock were right, a possessor would have a title which, like an owner's, would not be extinguished when he abandoned the property. Indeed, if Pollock were right, anyone who had been in possession, even for a day, could, until the statute of limitations ran, claim the property form any current possessor who could not trace title flawlessly from a prior possessor. If that is English law, one should spend one's next vacation taking brief possession of as many English houses as possible in hopes of returning years later and finding them occupied by someone who cannot prove title[78].

6.3.6 Law and economics perspective

Each of the foregoing theories has significant deficiencies. At the same time, there is something of merit in each of them. Modern writers building upon those theories have argued that "[p]ossession is also a property right whose protection by the legal system is simply less intense than that of ownership".[79] This is the law and economics paradigm. One of the followers of this perspective, Posner, when considering possession using a legal and economic paradigm, says that physical aspect of possession, control, ``communicates a claim`` or a ``right`` to the world.[80]

The sound stance to adopt is that the possessor has a right to possess but her right is not in all respects like that of an owner.[81]

> There may be conflicts to which the owner is not a party: between a possessor and a non-possessor, a former and a subsequent possessor, a party dispossessed and the party who dispossessed her. The owner may have an interest in how such conflicts are resolved. But none of them is a conflict between the owner and a non-owner about the use of the property. The principle that the owner would win if there were such a conflict does not tell us who should win if

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[78] Op. cit., Gordley, at 303. On the same page Pollock is quoted as saying: Possession conferred "a right in the nature of property which is valid against every one who cannot show a prior and better right".

[79] Ugo Mattei, *Basic Principles of Property Law: A Comparative Legal and Economic Introduction* (London: Greenwood Press, 2000) at 79. See also Albert S. Thayer, "Possession and Ownership", *23 L. Q. Rev. 175* (1907).

[80] Richard A. Posner, "Savigny, Holmes, and the Law and Economics of Possession", 86 *Va. L. Rev.* 535 (2000) at 561.

[81] Op. cit., Gordley, at 305.

there were not. There is nothing contradictory, then, about recognizing a right in the possessor, good against anyone else, to use the property until the owner appears and asserts his own rights.[82]

There are two reasons for recognizing a right in the possessor:

> ...the possessor's use may be the best use of the property. In a system of ownership, the owner has the right to decide its best use. But sometimes he is not actively exercising that right. It is better for this right to be exercised by someone else than no one at all. The other reason is that even if the possessor's use may harm the owner, it may cause less harm if the possessor's right is protected against non-possessors than if it is not protected at all.
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> In both cases, the law is not simply protecting the possessor against dispossession. It is protecting him so that he can benefit from his possession. Nevertheless, there is a difference. In the first case the possessor obtains the benefit without hurting the owner. His possession is protected because it is better that someone should benefit than that no one should. In the second case, the possessor is hurting the owner. He is protected only because otherwise the harm to the owner would be greater. His possession is protected to give him an incentive to protect the property from others and so minimize the harm the owner may suffer.[83]

6.4 Acquisition and transfer of possession

A person can acquire possession of property by delivery of the property or by taking the property.

Taking is the acquisition of possession without the consent of the previous possessor. The thing taken may or may not have been already in the possession of someone else, and in either case the taking of it may be either rightful or wrongful. Delivery, on the on the other hand, is the acquisition of possession with the consent and co-operation of the previous possessor.[84]

In some cases the law recognizes that possession is transferred when a person takes goods without the consent, or sometimes even the knowledge of the owner or previous possessor. One case where this occurs is when a person

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[82] Ibid., at 331.

[83] Ibid. at 332.

[84] Op. cit, Salmond, at paragraph 103.

takes possession of movable things[85] that do not have a master. The Code recognizes a number of other circumstances when lawful possession can be acquired by taking possession without consent. They will be discussed later in the context of our discussions of acquisition of ownership by possession in good faith[86] and *usucaption*.[87] It suffices here to say that upon the fulfillment of certain conditions laid down by the law, a person can acquire possession of both movable and immovable things in this way.

More commonly possession is obtained by delivery. Delivery ordinarily means the physical handing over by one person of a thing, its accessories and intrinsic elements to another person.[88] Delivery is the transfer of possession with the consent and cooperation of the previous possessor. Buyers, borrowers, lessees, usufructuaries, pledgees and donees get possession in this manner. Depending on the size and the nature of the object to be delivered, physical delivery may entail merely handing over items enabling control over the object such as a key to a room leased to the lessee. What is important is that whatever is delivered it enables the other person to have effective control over the object involved in the transaction.

Delivery can be divided up into actual delivery and constructive delivery. Actual delivery involves the physical handing over of the thing from the previous possessor to the new possessor whereas constructive delivery does not.

There are two types of actual delivery. The first is the situation where a thing is handed over without any reservation of indirect possession, (e.g. sale followed by delivery of its subject matter). The second concerns delivery of the object by way of loan or deposit with a reservation of indirect possession upon the transfer of direct possession.[89] The Code specifies ways possession can be transferred by actual delivery. The most common way is through contract. Article 1143 addresses the most common mechanism of transfer: contract. It states that "Any transfer of possession made by virtue of a contract shall be effective at the time when the thing is delivered." Here the flow of possession from one person to another in respect of a thing is achieved when two conditions exist together: a contract and delivery of the thing. Contract should

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[85] See Article 1194 of the Code, which ruled out the possibility of having immovables without a master in Ethiopia even prior to the nationalization of rural and urban land.

[86] Ibid.

[87] See Articles 1151-1168 of the Code.

[88] See Article 2274 of the Code.

[89] Op. cit., Salmond, at 288-289.

be understood, for the purpose of this provision, to mean any bilateral juridical act intending to transfer possession of property. The contract should be followed by delivery.

In constructive delivery, the object is not physically handed from one person over to another but there are interactions between the parties that manifest the intention to transfer possession. One type of constructive possession is called, *traditio brevi manu.* It requires the surrender of indirect possession of a thing to a person who is already in direct possession of it.[90] This would occur if you lent a watch to your neighbor and then later decided to give it to him. While it was lent you retained indirect possession, upon gifting you give up any intent to control or possess the watch, and the delivery is effected by telling him he may keep it as a gift.

Another type of constructive possession is called attornment. It relates to the case of transfer of indirect possession while the direct possession remains outstanding in some third person.[91] Assume X has goods in warehouse of Y, X sells them to Z, and subsequently Y agrees to hold them on account of Z. The sale and agreement of Y to hold the goods for Z are sufficient to transfer possession although nothing has actually changed in regards to the circumstances of the property and the goods have throughout remained in the direct possession of Y. Y has attorned to possession by Z.

Still another variety of constructive possession is constitutive *possessorium* (an agreement touching possession). Given recognition in Article 1145,[92] constitutive *possessorium,* turns a direct possessor to a mere holder on behalf of the new possessor. Suppose, as an illustration, X is a warehouse woman and Y buys fungible goods from her. They agree that she will continue to hold them for Y until he can take actual delivery of them. The goods remain under X's custody but possession in them has been transferred to Y. Under Article 1145 both certain and fungible things may be constructively possessed. The article requires a contract naming a new possessor (i.e., sale or donation or usufruct), identification of the goods transferred (individualization in the case of fungibles, perhaps by measurement), and a declaration by the person controlling the goods that she now detains them for another (i.e., expressing the intent to abandon, in unequivocal manner, the status of a possessor). The presumption of constructive transfer created by this article is defeated and no

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[90] Ibid.; and see Henry T. Terry, "Possession", 13 *Ill. L. R.* 312 (1918-1919).

[91] Ibid. Salmond.

[92] Ibid.

transfer occurs when the person having actual possession of the goods declares bankruptcy.[93]

Article 1144/1, provides that possession may be transferred by the delivery of the documents which represent a thing and permit the disposal thereof. It is submitted that the application of this stipulation requires four elements: contract of sale or donation, negotiable instrument (such as a bill of lading[94] and air way or truck way bill or a warehouse deposit certificate) corporeal movable things[95] (represented by such negotiable instrument) and delivery of the documents in the case of bearer negotiable instruments or endorsement followed by hand over in the case of negotiable instruments to order. When these conditions are present, transfer of possession is effected even if the goods represented by the negotiable instrument are under voyage to be actually received in several months time in the future. In the meantime, i.e., the time between the receipt of the negotiable instrument representing the goods and the receipt of the goods, the new possessor is allowed to dispose of the goods. Without this rule, the goods would be immobilized. This article is the reflection of the principle that property law in a capitalist system facilitates free movement of goods in the market.

There is an exception to Article 1144/1. Under Article 1144/2, when there is a conflict between a person in control of a thing and the person in possession of the document representing the thing, the person in actual control of the thing is favored provided she is in good faith. Suppose X orders goods from the Sudan and obtains possession of the bill of lading two weeks before the arrival of the goods. The carrier, Y, sells the goods to Z pretending that she is the owner. Z takes delivery of the goods from Y. At all times Z believed that the goods belonged to Y. In this case, the law favors Z in a dispute between her and X over entitlement to possession. In this case, it is immaterial whether Z

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[93] See Article 1145/2. If before the person in constructive possession actually receives the goods, the holder (or detentor) is declared bankrupt the law presumes that the goods are part of the patrimony of X. The law deems no transfer to have occurred. This rule reflects the time honored principle that the assets of a debtor are the common pledges of her creditor. The good faith of the parties to the constructive transfer of possession is not a defense to the claims of the creditors of the bankrupt trader. The bankruptcy changes the status of the parties. The constructive transferee may have a claim as a creditor in bankruptcy pursuant to the contract of sale but assumes a position inferior to secured creditors of Y.

[94] See Articles 715, 721-725 and 732 of the Commercial Code.

[95] Some people erroneously think that Article 1144/1 applies to immovable thing. Under the Code possession of immovable things cannot be transferred by mere delivery of a title certificate.

purchased the goods from the carrier or a person who stole them from the carrier. The reason for favoring Z is to protect the smooth flow of commercial transactions. To advance the security of commercial transaction the law ensures the security of ownership. The import of Article 1144/2 is similar to the purpose of the law of possession in good faith which we will examine later.

6.5 Protection of possession

Possession is protected through civil or penal action.[96] Civil action is of two types: possessory action and use of force. Possessory actions are filed in court. They must be supported by proof of disturbed possession. Thus you need to show that you have possession of a thing; that your possession is disturbed (interfered with or removed); that the time limit for bringing the action has not expired and that the person who has disturbed your possession has acted without authority. Disturbance of possession includes actions directed against the control of one's property. The disturbance can result from physical acts, or oral or written verbal communications. Dispossession occurs when the action results in partial or total usurpation of control over the property or merely prevents the quite and full enjoyment of the property. When enjoyment of the property is disturbed the possessory action would seek an order ceasing the disturbance. However when the disturbance is such that control over the property has been usurped the remedy sought will be restoration of possession. There is also narrowly circumscribed room for the use of self-help to defend one's possession.

6.5.1 Possessory actions

We can start this sub-section with a comparative note. In France, a possessory action affecting immovables is called *complainte.* A successful *complainte* must meet some requirements. First, the defendant must have acted so as to infringe the plaintiff's possession. If the defendant so acted, it is no defense that she acted in good faith, or that she had title to the property. Second, the plaintiff must have had legal possession of the immovable for at least a year, and her possession must be free from defects--it must be continuous, peaceful, public and unequivocal. In French property law, an action in *compainte* must

[96] See Articles 685-688 of the Criminal Code of Ethiopia Proclamation No. 414/2004. Under these articles the major differences between possessory claims in civil and criminal proceedings are that unlike in a civil action, in a criminal case the defendant must have carried out the disturbance with intent and criminal remedies are limited to a fine, which goes to the coffer of the state, and imprisonment.

be instituted within a year of the occurrence of the dispossession or infringement. [97]

In Germany, the starting point is the definition of unlawful interference. Unlawful interferences exist when anyone ousts from possession a direct possessor without her will or disturbs her possession except when the law permits the ouster or disturbance. The notion involves no element of culpability on the part of the one who has interfered with possession. Possession acquired through unlawful interference is defective. There are two types of actions. First, there is a claim for recovery of possession by one who has been deprived of direct possession through unlawful interference against a possessor in defective possession. Secondly, a possessor has a claim for removal of the disturbance and an injunction against further disturbance. In German property law, the two possessory claims exist even if the possession of the plaintiff is itself defective. The claims are excluded only when the possession of the plaintiff is defective in relation to the defendant or her predecessor in title, and such defective possession was acquired within a year prior to the deprivation or disturbance of possession complained of. Unlike French law, German law does not distinguish between movables and immovables as far as possessory actions are concerned. As in France, possessory actions must be instituted within one year of the occurrence of the dispossession or infringement. [98]

Articles 1148 and 1149 of the Code prescribe the remedies available in Ethiopian law for disturbance or interference with possession.[99] Possessory

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[97] Op. cit., Mattei, *Basic Principles*, at 174

[98] Op.cit., Ryan at 153-156.

[99] Article 1148 gives possessors and holders the ability to use justifiable force to prevent a disturbance of possession. It states:

(1) The possessor and the holder may use force to repel any act of usurpation or interference.

(2) Where the thing has been taken away from him either by violence or secretly, he may take it back forthwith, either by expelling the usurper or by seizing the thing from the hands of a usurper caught in the act or when running away.

(3) He shall refrain from any act of violence which is not justified in the circumstances.

Article 1149 sets out the legal actions available:

(1) The possessor or holder who is deprived of his possession or whose possession is interfered with may require the restoration of the thing or the cessation of the interference and claim compensation for damages.

(2) The action shall be barred if it is not brought within one year from the day of the usurpation or interference.

actions may be brought when one is ousted from possession (i.e. total or partial loss of control over the thing), or when possession is merely disturbed. Available remedies are the restoration of possession of the thing or cessation of the disturbance coupled with damages or both. To be successful the applicant must show actual or constructive possession of a thing without defect, that possession has been disturbed or deprived (wholly or partially) and that the action has been brought within the prescribed time limit. Cases of total or partial deprivation of possession are self-evident; the difficulties arise in determining what constitutes sufficient disturbance of possession to ground an action.

Disturbance of possession may be factual. It includes any physical act which prevents the possessor of the thing from enjoying her possession quietly or which presents an obstacle to that enjoyment.[100] In one case, X bought a plot of land, fenced it and built houses on it. The defendant Y forcibly entered X`s land to take measurements with objective of allotting the land to other persons. Y argued that he was acting pursuant to Minister's order and engaging in official duties. The court had no problem finding Y interfered with X's possession of the land.[101] In another case, X received a letter from a government authority advising that his house would be demolished in accordance with law. The authority asserted that X had not obtained proper authority to build on the land and thus, pursuant to the law it was to be demolished on a certain date. The costs of demolition and removal were to be borne by X. Again the court found interference with possession.[102] A letter by a lessor to her lessee of a house threatening eviction prior to the expiry of the lease could also constitute interference with possession.

The interference can be legal, meaning that it results from any judicial or extrajudicial act contradicting one's right to possession. Such as when, X being a mere holder of Y`s property, appears before public authorities for registration of herself as owner or any other right or the registration of any

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(3) The court shall order the restoration of the thing or the cessation of the interference unless the defendant can prove forthwith and conclusively the existence of a right in his favour justifying his conduct.

[100] See op cit. Aman Assefa.

[101] Beletu Aberash`s Petition, (Supreme Impiral Court, Criminal Appeal No 216, 1957 E.C.) in 3:2 Eth. J .L. (1967) at 358.

[102] See *Alemayehu Dest etal v. Wondyefraw Tarekg* cited below. In Addis Ababa the City Courts are empowered to handle possessory actions, and issues related to the issuance of permits and land use in enforcement of the Addis Ababa Master Plan. See Article 41/1/a of the Addis Ababa City Government Charter Proclamation No. 311/1997, (as amended in 2004) *Fed. Neg. Gaz.* 3rd Year No. 5.

deed showing the same. Similarly when X without authority poses as a seller of the property and draws up a contract for sale. It would also be the case if X, unknown to the owner, publicly proclaimed herself to be the owner or the possessor of the property.[103]

Not all disturbances of possession are illegitimate. However the onus is on the defendant to a possessory action to show forthwith the existence of a right in her favor justifying her conduct. For example a joint owner is entitled to the physical use of the thing jointly owned.[104] X and Y are joint owners of a property. If X files possessory action against Y with the view to preventing the latter from accessing that thing, Y can request the court to reject the suit based on the presumption that absent a contrary arrangement joint owners have concurrent possession of the property and one cannot disturb her own possession.[105] A similar conclusion ought to hold in the case of a possessory claim filed by a husband against a wife in relation to matrimonial property. Police in possession of a valid search warrant are entitled to search the place described in the warrant and take the articles indicated in the warrant. As long as the police have acted within the scope of the warrant any possessory action filed against them would be defeated. By virtue of the authority vested in them certain authorities may seize commodities unfit for human consumption or prohibited or untaxed items smuggled into the country and destroy or auction them. It would be futile to bringing a possessory action against them. Likewise, it is futile to file a possessory claim against authorities empowered to demolish buildings erected without permit.[106]

Generally, title is not relevant in a possessory action. Even a true owner, who interferes with the lawful possession by another of the owner's property may be forced to restore possession and will not be permitted to set up her own title to defeat it. To succeed in removing the person from possession she must first give up possession and then bring a legal action for the recovery of the possession of thing on the ground of her ownership. The sensible course of action to take is to adopt a rule that every possessor shall be entitled to retain and recover her possession until deprived of it by a judgment according to law.[107] In some jurisdictions (e.g., France and Louisiana), title is relevant in cases where there is doubt as to the extent of the possessory right, (for example, the extent of the area upon which the right can be exercised) which

[103] Op.cit., Aman Assefa.

[104] See Article 1263 of the Code.

[105] Op. cit., Abebe Mulatu, "Article 1149", at 55-56.

[106] See Article 16/2 of the Re-enactment of Urban Lands Lease-holding Proclamation No. 272/2002, *Fed. Neg. Gaz.* Year 8 No19.

[107] Op cit. Salmond, at 292-294.

may entail the presentation of documents evincing title. In one old Supreme Court case, the court having held that the defendant interfered with the possession of the plaintiff, reacted to the defendant's argument that the plaintiff did not have title to the land in dispute by stating:

> The question of ownership is not in issue; the plaintiff is only asking for an injunction restraining the authority from interfering with his possession. Article 1149, protects possession, independently of ownership. Any person who has possession of land cannot have that possession interfered with and if any person claims to have a better right than the possessor then that person must institute proceedings against the possessor to prove that he has a better right. It is not for the possessor to institute proceedings against those who claim to have a better right. If the authority claims to have a better right to the land in question than the plaintiff, then it is for the authority to bring action.[108]

In a recent case, the Cassation Division of the Federal Supreme Court ruled that a certificate of holding must be produced for one to succeed in a possessory action in respect of a plot of land. The court held:[109]

> The respondent did not produce an appropriate certificate of possession for the plot involved in the litigation. Without adducing this evidence, the respondent cannot be considered as having actual control, within the meaning of Article 1140 of the Code, over the plot even if the respondent had had possession over such plot. One cannot have right of possession without establishing the existence of actual control over the subject matter.

This ruling is contrary to the very purpose of possessory actions and diverges completely from the stances taken by different jurisdictions on the relevance of title in possessory actions.

A person who files a possessory action seeks the recovery of possession or the cessation of interference with her possession. She does not claim the recovery of ownership. Thus, the fact that a plaintiff fails in a possessory action does not mean that the defendant may then raise it as *res judicata* in a proceeding concerning ownership or contract. Suppose in an action filed by a lessee claiming that the lessor disturbs her possession, the court orders the lessor to

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[108] Op cit. ``Petititon``.

[109] *Ethiopian Islamic Affairs Council* v. *Amsalu Asemamaw Selam Fire Cattle Rearing General Partnership*, Cassation File No. 31113, Ginbot 19, 2000E.C. (unpublished, on file with this author).

goods. It will include listing the property and describing its condition. The cost of conducting an inventory is to be shared between the owner and the usufruct. The inventory is of the "goods to which the usufruct extends". Thus for example an inventory of land subject to usufruct would include all building and their contents, any equipment or machinery left on the land for the use of usufruct, the standing crops, fruits, trees, wells, fences and other things included in the usufruct.

It seems advisable for an owner to require an inventory before delivering the property to the usufructuary and for the usufructuary (or his heirs) to require one and at the end of the usufruct. The inventory can be an invaluable aid to resolving disputes that may arise during or upon the termination of the usufruct. Over time memories may fade, witnesses may die and other circumstances can arise which affect the parties' beliefs about the qualities, quantities and value of goods subject to the usufruct.

Article 1321 states

> (1)Unless otherwise agreed, an assessment of the value of the goods to which the usufruct extends made in an inventory or any other instrument shall not transfer the ownership of the goods to the usufructuary.
>
> (2)The usufructuary shall upon the termination of the usufruct restore the goods themselves to the owner and not the value at which they were assessed.

Often an inventory is conducted and property values assessed during the process of transferring ownership of property. It may be done as a condition of obtaining insurance (discussed below in more detail). It may be that the settlement of the estate of a deceased person requires the valuation of property. Article 1321 makes it clear that any assessment of the value of goods done by the usufruct or the owner, or them both together does not have the effect of transferring ownership to the usufructuary, unless they have agreed that it will. It also clarifies that the value that is ascribed to the thing does not matter at the time of termination; the obligation of the usufructuary is to return the things themselves and not the value at which they were assessed. However the valuation may assist in determining liability in the event goods have been lost, damaged or injured in a manner which is attributable to the actions of the usufructuary.

10.3.2.3 The ability to insure the usufruct

A usufructuary may insure her rights. Article 1320 of the Code states:

(1)The owner and the usufructuary may, where they think fit, insure their respective rights.

(2)Unless otherwise provided,[40] the insurance affected by the owner shall not benefit the usufructuary.

(3)Unless otherwise provided, the insurance affected by the usufructuary shall not benefit the owner.

Article 1320 covers three circumstances. The first is where the parties each take out insurance policies covering their respective rights independently. The usufructuary will insure her rights to use and to collect fruits. In the event, for example, of a crop failure the usufructuary would receive all compensation payable under the policy. The bare owner would receive nothing. Similarly, where the owner insures his right by for example, insuring the property against total loss by fire, in the event the risk manifests[41] the owner would recover under the policy. Finally the Article envisions that the usufruct or the owner could take out a policy on their interest and make the other a beneficiary of that policy.[42] A prudent usufructuary, exercising his duties to manage and administer the property will take steps to ensure there is sufficient insurance to protect the property from risk of loss or damage.

10.3.3 Use and enjoyment

The usufructuary has the right to use and collect fruits with fundamental and corresponding duty to preserve the substance of the thing given in usufruct. The words ``...subject to preserving their substance``, found in Article 1309/1, are meant to bring to our attention the obligation to preserve the substance of the object covered by usufruct. Normally, the beneficiary of usufruct does not have the right to transform, dispose, or destroy the thing given on the basis of a usufruct. She is expected to restore the thing at the expiry of the usufruct. Only the owner can dispose, transform, and destroy the thing.[43]

Article 1326 states:

(1) The usufructuary of a corporeal chattel may use it for normal purposes having regard to its nature.

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[40] The English version of Sub-Articles (1) and (2) employ the word "provided" while their corresponding Amharic version uses "agreed".

[41] In this circumstance the usufruct terminates: see Article 1319/1 of the Code.

[42] Such a unilateral stipulation would be operative only if the beneficiary agrees to it

[43] The exception to that rule is the case of imperfect or quasi usufruct of consumable goods discussed elsewhere in this chapter.

2) He shall not be liable to pay compensation for depreciation caused by ordinary wear and tear.

Both the Amharic and the English versions of Article 1326(1) refer to corporeal chattels. A closer reading of the Amharic version of Article1326 (2), the structure of section two (Articles 1325-1346) and the title of the English version of the same section of the Code indicates that that Article 1326 applies to both movable and immovables. Admittedly, the Amharic version of the title of this section of the Code reads *sele ge'zuf tenq'saqash habtoch yemitsena (yemifetsem) liyou denb*. However the Amharic version of Article 1326(2) which uses the words...*be'alaba be'tesetew habit*... could refer to both movables and immovables. The English version reads: *Special Rules Regarding Usufruct of Corporeal Goods*

Whether the thing given to the usufructuary is a moveable or an immovable she has the right to use it for the normal purpose allocated to it by the bare owner. The Code does not define the words "normal purposes". In the literature the phrase "normal purposes" means the manner of usage of the bare owner or owners in the locality. The words "normal purpose" means: the custom of the bare owner or the custom of owners of the same thing in the locality (or owners generally) or the purpose for which the thing has been produced or commonly destined for. It is not clear which of these standards applies under the Code. The usufructuary will generally not be liable for normal wear and tear of the thing as long as she uses the thing for its normal purposes.

10.3.3.1 Ownership of natural fruits

Article 1328 states:

> (1) The usufructuary shall become the owner of the natural fruits produced by the thing at the time when such fruits are in good faith separated from the thing according to its destination or custom.
>
> (2) Fruits collected in excess of his entitlement shall be returned to the owner.

This is the only time in the Code which the term "natural fruits" is used. Elsewhere the word used is simply fruits. As we have discussed earlier fruits may be natural fruits, civil or fruits of industry.

Natural fruits are the "spontaneous product of the earth" and "the product and increase of cattle." Fruits of industry are those "obtained by cultivation" as a result of "industry bestowed on a piece of ground." Civil fruits are the rents of real property, the interest of money, and annuities" as well as "all

other kinds of revenue derived from property by operation of the law or private agreement." [44]

A fruit is something collected from the thing at regular intervals without diminution of its substance in consequence of such collection, whereas the collection of products diminishes the substance of the principal thing.[45] Fruits must be collected at regular intervals; meaning yearly or in shorter intervals. Examples of products are harvesting of timber and the collection of substances from mines, pits, and quarries.[46] The special rules applicable to products will be discussed shortly.

The collection or separation of fruits must be made having regard to, according to the Amharic version of the Article *be'nege'ru allamana nege'ru bemisetew age'lgi'lot meseret...* meaning the purpose and the service of the thing. Thus when collecting the fruit the usufructuary must observe the purpose the bare owner intends for the thing. The English version of Article 1328 uses the word "custom" to capture this notion. It means that in collecting fruits, the usufructuary has to follow the habits of the bare owner or she must follow the habit of other owners of the same thing in the locality.

Sub-Article 2 of Article 1328 creates a few interpretative difficulties. Given that the usufruct becomes the owner of the fruits resulting from the usufruct from the moment the usufruct is created it is hard to understand what "in excess of his entitlement" refers to. As in the ordinary case there should be no limitation on the entitlement. The sub-article must be intended to apply to situations where the instrument creating the usufruct has imposed a limitation on the amount of fruits that may be claimed by the usufructuary.

10.3.3.1.1 Herds of animals in usufruct

According to well-established civilian doctrine, real rights have as their object individually determined things. However, by way of exception to the rule, the usufruct of a herd of animals...bears on the universality of the herd rather than on individual heads. This exception, in turn, results in modifications of the usufructuary's right of enjoyment.

The usufructuary is entitled to the fruits produced by the herd, *i.e.,* milk, manure, wool, and its natural increase. But contrary to the rules applicable to usufruct of individual things, if a number of heads perish without the fault of the usufructuary, he "is bound to make good the number of dead out of new born cattle, as far as they go." According to Frecnch doctrine and

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[44] Ibid at 670-671.
[45] See Article 1170 (1) of the Code.
[46] See Planiol, at 648-652.

jurisprudence, the usufructuary must apply to that end any increase he might have received since the commencement of the usufruct, or its price. Further, the usufructuary may dispose of heads which are incapable of reproduction subject to the obleigation of replacing them by new born animals. If the entire herd is destroyed without the fault of the usufructuary, he is "bound only to return to the owner the hides of such cattle, or the value of such hides".[47]

This is reflected in the Code. Article 1345 of which provides:

> (1)Where the flock to which the usufruct extends is a loss by reason of accident or disease without the usufructuary being at fault, the usufructuary shall return the hides to the owner or refund their value.
>
> (2)Where the flock is not a total loss, the usufructuary shall replace the animas lost out of the increase from breeding.

The word flock should be read as herd the latter being the proper English word to describe a group of animals that might produce hides. The right of the usufructuary extends to each and every individual animal in the herd. The usufructuary is the owner of the fruits of the herd: the manure, milk, and the increase through breeding. If the whole herd is lost because of disease or accident that is not attributable to the fault of the usufructuary then her only duty is to return the hides of the animals lost or the value of the hides to the owner. Again here the total loss of the herd extinguishes the usufruct.

Where some animals are lost from the herd the usufructuary is bound to replace those lost from the animals born to the herd. The extent of replacement required appears to differ in the English and Amharic versions of the provision. The Amharic version requires replacement to the extent possible through breeding. The corresponding English version appears to state that the usufructuary is obliged to replace all of the animals lost. To illustrate if the usufruct extends to 100 goats, and because of disease or accident 90 of them die, then pursuant to the English version, the usufructuary is obliged to replace all 90; whereas the governing Amharic version obliges usufructuary to replace the lost animals to the extent possible from breeding the remainder.

10.3.3.1.2 Products

While a usufructuary may collect the fruits of trees, he may not treat the trees themselves as the fruits of the ground. Generally because of their slow growth and value trees are treated as capital. By way of exception, however, when an owner regularly exploits them subject to a regular reforestation plan that guarantees a regular income they are given by law the status of fruits.[48] The

[47] Op. cit. Yiannopoulous, "Usufruct Rights", at 694-695.
[48] Ibid, at 680.

same is true of a thing like a quarry. The exploitation of these things diminishes their substance and they would ordinarily be regarded as products and not fruits. Under Articles 1333 to 1335 of the Code a usufructuary may be able to collect or harvest these substances for commercial purposes and keep the proceeds of their sale if certain conditions are complied with.

> Article 1333 The owner or usufructuary may require that a working plan be prepared in respect of the thing where the usufruct extends:
>
> (a)To a thing such as a forest, the normal mode of exploitation of which does not consist in collecting fruits yearly or at shorter intervals; or
>
> (b)To a thing such as a quarry, the substance of which diminishes in consequence of exploitation.
>
> Article 1334 (1)The working plan shall be prepared by agreement between the parties.
>
> (2)Failing agreement, it shall be prepared by one or more experts appointed by the court and shall be approved by the court.
>
> Article 1335 The working plan may be altered on the request of either party where exceptional circumstances prevent its being carried into effect or it appears for economic reasons desirable that it be altered.

While these provisions are optional it would seem prudent that an owner who grants a usufruct on land that has been exploiting these types of products require a working plan for continued exploitation by the usufruct. The plan should be designed to enable long term exploitation and avoid total exhaustion of the product and to protect the surrounding lands and environment. A usufructuary would also be wise to obtain such a plan given her obligation to restore the property in the condition it was received (subject to normal wear and tear) and liability for losses to the property.

As a distinct matter a usufructuary may be able to cut trees on the property for his own use and to enable cultivation of the land, and may be able to move surface soil for the same purposes as long as he acts as a prudent administrator in so doing and does not abuse his rights.[49]

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[49] Ibid.

10.3.3.1.3 No right to treasure found in or on the property

Articles 1329 states that: "The usufructuary shall have no right on a treasure that might be discovered during the currency of the usufruct". The person who has discovered a thing meeting these conditions will get half of the value of such thing; the owner of the thing in which the treasure has been discovered will be the owner of the treasure. Thus, the usufructuary will be entitled to half of the value of treasure, only if she herself has discovered such treasure. She will get half of the value of the thing because she is the finder of the thing, not by virtue of her being the usufructuary of the the thing in which the treasure is found.

10.3.3.1.4 Ownership of consumable goods given in usufruct

Article 1327 states that:

> (1)Where the usufruct relates to things which cannot be used without being consumed, the usufructuary shall become the owner thereof.
>
> (2)Upon the extinction of the usufruct, he shall pay the value of the things calculated at the time the usufruct was created.

Consumable goods are movable things that cannot be used without destroying or alienating them. Things which are useless unless consumed include wines, coal and foodstuffs and things which have to be alienated to be used include coins, banknotes and a shopkeeper's merchandises.[50] When a usufruct is established on a consumable thing, it is called an imperfect or quasi-usufruct. A quasi-usufruct is a deviation from normal case of usufruct because in the ordinary case of usufruct, the usufructuary is not the owner of the property and thus not entitled to destroy, alienate or transform its substance. However, because of the nature of consumable property it is not possible to use and enjoy them without destroying, alienating or transforming their substance. Thus the law deems the usufruct the owner of the subject matter of the usufruct and the grantor a debtor entitled to receive, at the termination of the usufruct, the value of the property calculated at the time the usufruct is created. Thus, it is strongly advisable to assess the value of such things at the beginning of the quasi-usufruct. Either of the parties particularly the bare owner ought to invoke his rights under Articles 1316 and 1321 to have the property valued at the commencement of the usufruct.

Ethiopian law in this regard has adopted a very simple solution to these unusual cases of usufruct. Other jurisdictions such as the French have adopted

[50] See Planiol, at 631.

provisions that increase the likelihood of disputes arising between the parties. For example French law says that the usufructuary may return the equivalence of what was given or pay the value of the goods calculated at the termination of the usufruct.[51] The simplicity of the approach the Code followed dispenses with all these questions like what constitutes an equivalent to the goods and how to calculate the value of goods sometime after they have already been consumed.

10.3 The obligations of usufructuary

10.4.1 Sound management of the property

Article 1312 requires the usufructuary to comply with the rules of sound management in the exercise of his rights. This duty is essential because the usufructuary is only interested in exploiting the property and could be inclined to neglect to properly care for the property as a whole.

The minimum standard of care to which the usufructuary must conform is the diligence which an attentive and careful man commonly exercises in the management of his own affairs.

The specific duties of the usufructuary which are derived from his general obligation to enjoy the property as a prudent administrator relate to a number of topics.[52]

They include the duty of the usufructuary to preserve the substance of things subject to perfect usufruct, to make necessary repairs, to pay the annual taxes and charges, to refrain from causing excessive wear and tear, to inform the bare owner of encroachments on the estate by third person, to ensure that others do not acquire all or part of the property by prescription to the prejudice of the owner and to insure against casualty and loss.

10.4.2 Duty to restore and preserve the property

The definition of usufruct found in Article 1309 is the right to use and enjoy things or rights "subject to the duty of preserving their substance"

With respect to corporeal goods the usufructuary may use them for their normal purpose and pursuant to Article 1326/2 is he not liable to pay compensation for depreciation caused by ordinary wear and tear.

Article 1317 stipulates that:

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[51] Ibid.

[52] A.N. Yiannopoulous, "Obligations of the Usufructuary; Louisiana and Comparative Law", 47 *Tul. L. Rev.* 1 (1967) at 17.

(1)The usufructuary shall restore the thing to the owner upon the termination of the usufruct.

(2)He shall be liable for the loss or deterioration of the thing unless he can show that such loss or deterioration occurred without any fault on his part.

When the usufruct comes to an end, the usufructuary is duty bound to return the thing to the bare owner or his heirs. He will be liable for deterioration to the property other than that which results from normal wear and tear.

The usufructuary, as a prudent administrator, must refrain from causing undue tear and wear and from subjecting the things to exhaustive or uneconomic exploitation. If he derives fruits or products as a result of wasteful methods of exploitation, these fruits or their value must be restored to the naked owner, and the usufruct itself may be terminated. But the usufructuary is not responsible for the deterioration, by normal use, of things which "are gradually impaired by wear and decay, such as furniture".[53]

If the loss or deterioration is because of the intentional or negligent conduct of the usufructuary or a person accountable to her, then she will be required to pay compensation for the loss. The determination of fault, of extent of compensation due and its assessment will be based on the provisions of the law of extra-contractual liability. The usufructuary is not liable if the loss or deterioration arises from a normal wear and tear or fortuitous circumstances or decay; in such cases the bare owner shall take the things as they are at the time of restitution.

Together with this duty is the responsibility of the usufruct to make repairs and to advise the owner of the need for major repairs and the total or partial loss of the property.

The usufructuary cannot compel the owner to make repairs needed at the commencement of the usufruct and must take the property has she finds it.[54] The usufructuary must inform the owner where considerable repairs to the property are required in order to be able to preserve the property.[55] The duty to inform arises when the property cannot be preserved without performing the repair. Considerable repairs are defined in Article 1337 as "repairs which entail an expense exceeding the average yearly income derived from the thing to which the usufruct extends". The usufruct must not make major repairs herself, unless he made them necessary, particularly by failing to properly

[53] Ibid. at 19.
[54] Article 1325 of the Code.
[55] Article 1338 of the Code.

maintain the property since the usufruct began.[56] In that case they are his responsibility and she must bear the expense of conducting the repairs. The owner is not obliged to make repairs when advised they are required. But if he does decide to make them he must consider the usufructuary's "interest and convenience" when planning and conducting them. The usufructuary in turn is obliged to accept any inconvenience resulting from the owner's decision to effect repairs.[57] The owner is not obliged to make considerable repairs to property subject to usufruct because a "usufruct is a real charge that can impose no obligation upon the owner".[58] Another reason is that considerable repairs are linked to the capital which is owned by the bare owner.

Neither the owner nor the usufructuary is bound to rebuild what collapses as a result of decay or has been destroyed as a result of accident.[59] When part of the property that is the subject of usufruct is lost the usufruct retains his claim on what remains.[60]

> According to Article 577(1) of the Louisiana Civil code of 1870, and corresponding Article 607 of the French Civil Code, "neither the owner nor the usufructuary is bound to build again what has fallen to ruin, owing to its antiquity, or has been destroyed by chance, when the ruin is total and entire; if it be only partial it forms the subject of [extra]ordinary repairs". Insofar as the usufructuary is concerned, this provision modifies the general obligation to maintain the things in good condition and to make the necessary maintenance repairs; but if the ruin is the result of fault or neglect of upkeep, in whole or in part, the usufructuary is bound to repair the damage".[61]

The Romans invented usufruct for the support and maintenance of needy relatives or friends.[62] As a benevolent institution it should not be onerous to the bare owner and the usufructuary should only receive the benefits the bare owner has decided to confer. However, where a usufruct is created by contract and for consideration there is no reason the parties cannot contract to have the owner responsible to put the property into good condition prior to delivery to the usufructuary or in fact be obliged to make considerable repairs when needed.

Article 1330 states:

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[56] Aricle 1338/2 of the Code.
[57] Article 1339 of the Code.
[58] Op.cit., Planiol, at 673.
[59] Article 1343 of the Code.
[60] Article 1344 of the Code.
[61] Op. cit., Yiannopoulous, "Usufruct Obligations", at 31.
[62] Op. cit., Planiol, at 635.

(1)The usufructuary may not abuse his rights.

(2)He may not substantially alter the thing to which the usufruct extends nor change its purposes.

(3)The owner may satisfy himself in a reasonable manner that the usufructuary complies with his duties under this Article.

As Planiol puts it abuse of right as applied to usufruct means that "there is abuse of enjoyment when the usufructuary damages the property or allows it run down through lack of upkeep" or a general failure to meet her obligations in such a manner that it seriously endangers the property. As special emphasis, she is duty bound not to "substantially" alter the thing or change its purpose. Note that all alternation is not prohited but only substantial alteration to the property that is the subject of the usufruct. What constitutes substantial alteration will depend upon the nature and purpose of the property and will be determined on a case by case basis. The bare owner is entitle to protect her interest in the property and as such has the ability to take reasonable steps to ensure that usufructuary is not abusing his rights, substantially altering the property or changing its purpose.

The usufructuary may make improvements to the property. However unless it is otherwise agreed by the owner she will not be compensated for any improvement made or building left on the property. The usufruct may however, upon termination of the usufruct remove a building that he added to the land and restore the land to its original condition.[63] The right to remove any installation made by him is barred one year from the return of the property to the bare owner.[64]

10.4.3 Payment of certain costs

Article 1313 provides that:

> The usufructuary shall bear the normal costs of upkeep of the thing and management expenses, as well as the payment of interest upon debts charged thereon.

The usufructuary is responsible for normal upkeep of the property and obliged to bear the costs associated with it. She is also responsible for any costs associated with managing the property. And if she incurs debts in so doing is responsible for repaying the debts plus all interest accruing on them. Normal maintenance is not defined in the Code. However it is directly related to the duty of the usufructuary to preserve the property for reimbursement to the

[63] Article 1336 of the Code.
[64] Article 1346/2 of the Code.

owner at the expiry of the usufruct. Thus the property must be kept clean, animals fed, machinery oiled and regularly serviced, walls painted periodically, roof leaks repaired and the like.

10.4.3.1 Payment of taxes and charges

Article 1314 of the code obliges the usufructuary to pay, when due, annual taxes and charges that are normally paid out of the income from the property. It is assumed that ordinarily the owner would derive income from the thing for paying these taxes and charges. The payment of taxes by the usufruct does not give rise to acquisition of ownership by usucaption of immovable property that is the subject of usufruct contrary to Article 1168. There is disparity between the Amharic version and the English version of Article 1314/1. The guiding Amharic version says the taxes and charges are to be paid in the name of naked owner while the English text is silent on this point.

10.4.3.2 Extraordinary charges

Article 1315 provides that:

> (1)Any extraordinary charge on the thing during the course of the usufruct shall be borne by the owner of the land.
>
> (2)Where the usufructuary does not lend him the necessary sums without interest, the owner may, in order to pay such charge, sell things or rights to which the usufruct extends.

Unlike the ordinary charges provided for by Article 1314, these charges are unanticipated and unusual.

> According to French doctrine and jurisprudence, extraordinary charges are unusual contribution, such as forced loans, war assessment imposed by an invading enemy, indemnities due for land reclamations, charges for the construction of ditches and pavements, and payments due for the compulsory fencing of an immovable. These are properly charges on "the ownership" rather than charges on the fruits. The naked owner is personally bound for these charges with his entire patrimony.[65]

The bare owner can request the usufructuary to lend him the required moneys without interest. If the usufruct does not lend him the money the owner may sell things or rights to which the usufruct extends. And when he does the usufruct will be extinguished as to those things.[66] The phrase "in order to pay such charges" suggests that the bare owner has the right to sell things or rights

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[65] Ibid., at 37.

[66] See Article 1315 together with Article 1323 of the Code.

subject to the usufruct only to cover the charges; she cannot sell more than is required to satisfy them. It is submitted that Article 1315 applies to anything which might be the subject matter of usufruct since the corresponding Amharic version contains the word "habete".

Article 1340 provides that:

> (1)The usufructuary shall not be liable for the debts under a mortgage charging the thing to which the usufruct extends.
>
> (2)Where he has been compelled to pay them, he may require the owner to reimburse him.

Generally the material scope of Article 1340 is immovable property,[67] although mortgages may be granted on special movables such as ships, aircrafts and business.[68] The bare owner may mortgage his ownership interest in the property prior to or during the currency of a usufruct. Article 3072 of the Code provides that "a mortgage charging bare ownership of on immovable shall upon the extinction of the usufruct, extend to the full ownership of such immovable".[69] Sub-article (1) Article 1340 relieves the usufructuary any obligation to pay mortgage debts on the property.

Sub-article (2) of Article 1340 envisages the situation where the usufructuary is forced to make mortgage payments. When this happens he may require the owner to reimburse him. It may be that an owner might compel a usufructuary to pay out a mortgage that was registered against the property prior to the commencement of the usufruct. Otherwise the mortgagee would be entitled to attach and sell the property and able to transfer full ownership in it. Article 3089 provides:

> (1)Registered rights in rem on an immovable mortgaged shall not affect the mortgagee where such rights have been registered after the mortgagee has registered his mortgage.
>
> (2) The mortgagee may cause the immovable to be sold as though such rights had not been created.

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[67] See Article 3047/1 of the Code, which speaks of the possibility of mortgaging special movables. The sub-article reads: "Nothing shall affect the provisions of this Code or special laws whereby certain kinds of movables may be mortgaged".

[68] See Articles 171-186 of the Commercial Code for the possibility of business mortgages and issues arising from them.

[69] Thus the mortgage only affects the bare owner's rights until the usufruct expiry thereafter the mortgage encompasses the full ownership interest in the property. Thus should the mortgagee attach the property prior to the extinction of the usufruct he may only transfer bare ownership of the property subject to the usufruct.

(3)Where the immovable is attached, the beneficiary of the right in rem may demand that the value of such right be paid to him in priority to creditors whose mortgage has been registered subsequently to his own right being register

The critical time is that of registration of the mortgage and the usufruct. The consequences are plain; a first registered mortgagee may cause the immovable to be sold "as though such [subsequently registered] rights had not been created". The implication of these two sub-articles is that a usufruct registered prior to the registration of a mortgage will not be affected by the mortgage. In fact the usufruct could operate as if the mortgage did not exist even where it was created (but not registered) before the establishment of the usufruct. Therefore, Article 3089 cautions the usufructuary to search the property register before entering into the usufruct for prior registered interests and to ensure the usufruct is properly registered. This should be commonplace in conventional usufructs created by inter vivos juridical acts. However, the usufructuaries who obtain conventional usufructs created by testamentary instrument and legal usufructs should also ensure the usufruct is registered to prevent its loss to a prior registered interest.

10.4.4 To protect the owner's interest in the property

Article 1318, titled rights in *rem*, reads:

(1)The usufructuary may not charge the thing to which the usufruct extends with any right in rem capable of impairing the rights of the owner.

(2)In particular, he may not give such thing in pledge to the prejudice of the rights of the owner.

(3)Where the usufructuary disregards the prohibitions laid down in this Article without the consent of the owner, the latter may terminate the usufruct without compensation.

The Article does not prohibit the creation of a right in *rem* on the thing in usufruct. However those rights must not be capable of impairing the rights of the bare owner. So a usufructuary may pledge, mortgage,[70] create servitude, or constitute another usufruct on a thing but only with the consent of the

[70] See, for example, Article 3111 of the Code entitled ``Mortgage of Usufruct`` which provides: "(1) Any interested party may require the cancellation of the registration of the mortgage of an usufruct, where such usufruct is extinguished. (2) The usufructuary may not renounce the usufruct to the detriment of the mortgagee".

owner.[71] Where the owner's rights are impaired without his consent he may terminate the usufruct without compensating the usufructuary for any damages or losses this occasions. The governing Amharic version of the article makes clear that the termination is immediate. While not expressly stated the article should be read as the owner may "require" immediate termination without compensation. The term 'require' invites the intervention of the court, and this ought to be so since unilateral termination of usufruct without indemnity is a drastic measure, and without some sort of oversight the owner may use this opportunity as a pretext to bring usufruct to an end.

Article 1324 states that:

> (1)An owner who can show that his rights are in jeopardy may require sureties from the usufructuary.
>
> (2)He may at any time require sureties prior to restoration where the usufruct extends to consumable goods.
>
> (3)Where the usufructuary fails on request to produce sureties within a reasonable period of time or where after the owner has objected he continues to make unlawful use of the thing the court shall order the thing to be vested in a curatory.

The bare owner has at her option to require the usufructuary to provide sureties only when the bare owner shows that her right is in jeopardy. The governing Amharic version uses a word that suggests a broader meaning than sureties (which mean personal guarantees). In Amharic what is required is any security, personal or real.

A clear case where the owner's interest is at stake is the case of an imperfect usufruct. By its nature the goods given in imperfect usufruct will be consumed or alienated. In such cases the bare owner is therefore entitled to require the usufructuary to post securities sufficient to cover their value at the date of the usufruct. Thus the bare owner can be assured he will be repaid at the expiry of the usufruct. In this case the bare owner is not duty bound to prove that her rights are in jeopardy. This is explicitly stated in the Amharic version of Article 1324(2) which contains the words "...masrejam saysete ..." Additionally the word "restoration" in the English version of sub-Article (2) is inaccurate. It would be more accurate to use the word 'surrender'. The Amharic version employs a very accurate word 'masrekeb'.

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[71] French jurists debate whether a usufructuary is absolved of her duties to a bare owner when she assigns the usufruct to another. For two approaches to this issue, see Planiol, at 658-660.

Examples of situations where the owner's interests may be at risk include: when the usufructuary pledges the thing to the prejudice of the owner`s rights without the latter`s consent; when products are subject to exploitation without an working plan; when the usufructuary leases the property to another; where the usufructuary has failed to properly preserve the property; when property has been partially destroyed or damaged through the fault of the usufructuary; when the usufruct has undertaken actions which may substantially alter the property or change its purpose; or any other circumstance in which the usufructuary has not lived up to her obligations and duties.

Generally, security shall be furnished either before or after delivery of the subject matter of non-consumable things to the grantee, but within a reasonable time after the request for such sureties. In the case of non-consumable goods the bare owner may not require the usufructuary to furnish securities unless he proves that her rights are at stake.

Failure to provide security within a reasonable time will not by itself automatically result in the extinction of the usufruct. Instead the court will appoint an administrator to manage the property. The court may also appoint an administrator when there is unlawful use of the property. Once the bare owner objects, continued use in violation of his rights is unlawful.

A thing covered by a usufruct may be put under the custody and administration of a curator or a court appointed agent.[72] The curator, as an agent of both the naked owner and the usufructuary, may enter into possession of the object of usufruct and carry out acts of management (e.g. leasing immovables investing cashes, etc).[73]

Article 1342 provides:

> (1)The usufructuary shall report to the owner any person who, during the currency of the usufruct, commits acts of usurpation or otherwise interferes with the rights of the owner.
>
> (2)Where he fails so to inform the owner, he shall be liable for any damage as though he had himself caused the damage.

This article is concerned with acts which may adversely affect the title of owner. For example the owner`s family members or others might act in such a way towards the usufruct so as to contest her ownership rights; neighbors

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[72] For the manner of appointment as well as rights and obligations of a curator, see Articles 2253-2256 of the Code.

[73] See Aubry and Rau, at 470-471.

might raise boundary disputes; there may be disputes as to the existence or use of a right of way; third parties might wish to enjoy servitude on the property subject to usufruct; or persons may be occupying or using part of the property as if they were the owner raising the risk of prescription or usucaption. In all of these cases or any other that interferes with ownership rights or places ownership at risk the usufructuary is obliged to advise the owner. Failure to do so makes her liable for any damages that result from the acts of these other persons. The duty to inform arises from the fact that the usufruct is in possession of the property and thus best placed to be aware of these threats to ownership rights.

10.5 Special rules regarding usufruct of credits and incorporeal rights

The heading of Section 3 of Chapter 3 of Title VIII of the Code reads: Special rules regarding usufruct of credits and incorporeal rights. Included in this section are six articles, Articles 1347-1352. The subject matter of usufruct in this section is incorporeal things including credits. The intangible nature of the subject matter impacts the rights the beneficiary might enjoy. They cannot be physically enjoyed or used. The right of a beneficiary of usufruct over intangibles relates to regular income generated by the incorporeal thing. A discussion of these provisons follows.

Article 1347 is titled `Income` and runs: *The usufructuary of a credit or an incorporeal thing shall acquire the interests, arrears due and dividends on the day on which they mature*. This article triggers many questions. What constitutes income under Article 1347? Does the word `credit` mean loan or debt? Does the phrase '... incorporeal thing...' mean business,[74] copyright, securities,[75]patent, trademark, industrial design and trade secret? Is the word 'interest' related to 'credit' or debt? Is the word arrears related to annuity? Does the word 'dividends' have connection with profits in a business organization? What is dividend? When is the usufructuary entitled to collect dividends, interests and arrears? Why is it necessary to have a time reference? Is it possible to put the gist of Article 1347 as follows: a usufructuary of credits, of annuity and of shares in a business association would collect, respectively, interests, arrears and dividends?

[74] See Article 124 cum Article 125/3, of the Commercial Code of Ethiopia, Proc. 166, 1960, *Neg. Gaz.* Year 19th No. 3, that considers business as an incorporeal movable which can be subject to usufruct. See Aubry and Rau, for the discussion of peculiar issues raised by usufruct of a business enterprise, *supra* note 12 at 514-516.

[75] Id., Articles 917/2 & 954.

Article 1348 says: *(1) The usufructuary shall not acquire the ownership of exceptional profits which may derive from the right to which the usufruct extends. (2) His right of usufruct shall extend to such profits.* Is the title of Article 1348 correct? Is the phrase 'Exceptional Fruits' proper? Why does the law deny the usufructuary of exceptional fruits? What if the exceptional fruit is secured during the currency of the usufruct? What is the meaning of exceptional profits? Can we consider distribution of reserves (arising out of net profits) other than legal reserves in a given share company as an exceptional fruit? Why does the law give the usufructuary the right to collect fruits of the exceptional profits, not the exceptional fruits themselves?

Article 1349 provides: *(1) Where a preferential right of subscription is granted in respect of a share to which the usufruct extends, the right to subscribe for the new shares shall belong to the owner of the share. (2) The usufructuary's right shall extend to the new shares subscribed for by the owner or to the proceeds of the sale of the subscription rights.* What is a preferential right of subscription? Is this a reference to one of the rights of shareholders in a share company? Why does the law deny the usufructuary of the right to replace the shareholder in subscribing to new shares? Supposing that the shareholder (bare owner) has subscribed for the new share the usufruct is to extend to such share, that is, the amount of the subject matter of the usufruct will show increment. In case where the shareholder-bare owner sold out her subscription right the usufruct also extends to the proceeds of such sale. One should read Article 1349 in conjunction with Article 329 of the Commercial Code.[76]

Article 1350 reads: *(1) Where the credit or right to which the usufruct extends is satisfied or discharged during the usufruct the principal shall not be paid to the usufructuary unless the owner has agreed thereto. (2) Where the owner does not authorize the payment of the sum to the usufructuary, the debt shall be validly discharged where the debtor deposits the sum. (3) The owner or usufructuary may demand that such deposit be made where the credit has matured.* Is Article 1350 referring to the case where the subject matter of

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[76] This provision reads: *(1)Where a share is pledged or subject to a usufruct, the right to vote at meetings shall, unless otherwise agreed, he exercised by the pledgee or usufructuary. (2) Where there is a preferential right subscription, such right shall he retained by the shareholder. If the right is not exercised, it shall he sold on behalf of the shareholder as provided in Art. 342. (3) The shareholder shall be liable for call on shares which have been pledged. If the calls are not met, the pledgee may sell the share under Art. 342. (4) A usufructuary shall he liable for calls on shares but may claim for repayment when the usufruct expires.* See also Article 406/3 of the Commercial Code which gives the usufructuary the right to inspect accounts of a share company whose share is given to her in the form of usufruct.

usufruct is a credit? What does the term 'satisfied' or 'discharged' mean? What would be the legal consequence if the debt were discharged before the expiry of the usufruct? Would it have the effect of terminating the usufruct? Suppose there is a contrary agreement to the effect that the principal be paid to the usufructuary. In the absence of authorization of payment to the usufructuary by the bare owner, what step should the third party-debtor take? Where is the third party supposed to deposit the capital? Supposing that the date of the discharge of the credit is mature and supposing that the period of the usufruct is still running, is the usufructuary entitled to compel the third party to deposit such debt?

10.6 Right of occupation of premises

The Code allocates six articles to the regulation of the in rem right of occupation of premises. We will briefly explain the right of occupation of premises and point out the distinctions between rights of occupation of premises and usufruct.

Article 1353[77] defines the right of occupation of premises as the right to live in a part or whole of a given house. It is a type of real right, which one can deduce from "Title VIII Joint ownership, Usufruct and Other Rights in *Rem*". Clarity would be enhanced if the article indicated that only physical persons can enjoy a right of occupation premises.

Article 1354[78] specifies the persons who may live with the beneficiary in the dwelling house to be: their spouse, direct ascendants and descendants and servants. If the beneficiary of the right of occupation is a married woman, the people who may live with her are her husband, her direct descendants, her ascendants and her servants. Thus, excluded by the Article are the ascendants, descendants and servants of the husband (where different from the wife's). The beneficiary and grantor may agree on who may live in the house and that agreement will govern.

Article 1355[79] provides that where the right relates to one floor, room or suit of rooms in a house the right of occupation extends to all facilities installed for common use. Such facilities might include latrines, bathroom and shower

[77] This Article states: "The right of occupation of premises is the right to live in a house or to occupy a part thereof".

[78] This provision of the Code reads: "Unless otherwise provided, whoever benefits by a right of occupation of premises may live in the house concerned with his spouse, his direct ascendants or descendants and his servants".

[79] This provision of the Code reads: "Where the right extends to part of a house, the beneficiary of such right may we all installations intended for common use".

facilities, wells, and telephone services. Where the whole house is occupied by the beneficiary alone it goes without saying that all of the facilities in the house are available for the use of the beneficiary (unless of course by agreement they are expressly reserved to the use of the owner or another).

Pursuant to Article 1356,[80] the cost of ordinary repair is to be borne by the beneficiary if a house or flat is being used by him alone. The term 'ordinary repairs' should be given the same meaning it has in the case of usufruct. Where the premises are shared with the owner the owner must pay the costs of ordinary maintenance.

Article 1357 states that a right of occupation cannot be alienated and cannot be inherited.

Article 1358 states that the provisions of Chapter 2 of the Code dealing with usufruct also apply with necessary changes to address any remaining issues. Some of the issues left out by this section include how a right of occupation is to be created and terminated and the duties of the occupant.

The right of occupation of premises is treated by the Code under a separate section since it has features which distinguish it from a usufruct. These are:

-Right of occupation of premises may only be given to physical persons, thus juristic persons are excluded. In the case of usufruct, any person, physical or juristic, may be a beneficiary. This is clear from the wording of Article 1354 which refers to attributes of a physical person such as family affiliation.

-Absent a contrary agreement, the beneficiary of the right of occupation of premises is expected to enjoy the right personally;[81] she cannot lease the property or let other persons occupy the premises while in the case of usufruct proper, the usufructuary is not duty bound to use the thing covered by the usufruct personally. In French law "he who has a right of habitation can neither lease nor cede his right. Habitation (a real and temporary right) is never granted by law".[82] Thus the right can only be created by conventional act: testamentary instrument or inter vivos judicial act. It cannot be acquired by operation law.

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[80] The article provides: "(1) The beneficiary shall bear the costs arising from ordinary maintenance repairs of a house or flat intended to be used by him only. (2) Where the right of occupation is exercised concurrently with the right of the owner, the latter shall bear such costs".

[81] See Article 1357 of the Code.

[82] Op.cit. Planoil, at 692.

-The object of a right of occupation is limited to residential houses or buildings[83] whereas the subject matter of usufruct extends to any appropriable thing, movables, immovables or intangible things.

-In a sharp contrast with ordinary usufruct, the right available to the beneficiary of a right of occupation of premises is only the right to occupy;[84] it does not include the right to collect fruits.

-The usufructuary is duty bound to make and pay for ordinary repairs. In the case of the beneficiary of the right to occupy premises, she is not expected to bear expenses of ordinary maintenance under certain situation, i.e., the case where the beneficiary resides in the house concurrently with the grantor.[85]

-The right of occupation of premises may not be assigned either freely or for consideration. Nor can the right be inherited.[86] In contrast, there is no express provision, which precludes a usufructuary from transferring her rights (albeit a usufruct ordinarily terminates with the death of the usufructuary).[87]

10.7 Termination of usufruct

There are several events which terminate a usufruct. As stated above, usufruct is essentially a life estate; it is inseparably linked to the person vested with the two aspects of the right a usufruct gives, that is, the right to use the thing and to collect the fruits from such thing.[88] A usufruct is there to maintain or support the usufructuary. Usufruct is not inheritable. Thus, the death of a person who benefits from a usufruct will always lead to the extinction of usufruct.

A usufruct will terminate when the period specified in an original or a subsequent usufruct agreement expires. And in cases where a period is fixed and the usufructuary dies before such fixed period expires, the usufruct comes to an end.[89] In the case where the usufructuary is a legal person, the usufruct terminates at the expiry of 30 years or at a shorter period.[90] The law fixes a

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[83] See Article 1353 of the Code. See also Aubry and Rau, at 520-521.
[84] Ibid.
[85] See Article 1356/2 of the Code.
[86] See Article 1357 of the Code.
[87] It appears from Articles 1318(1), 1386, 1398(1) and 1407(1) of the Code that a usufruct may be assigned for consideration.
[88] See Ryan, at 179
[89] See Article 1322/1 of the Code.
[90] Article 1322 of the Code.

certain period because legal persons may exist forever unlike physical persons and risks nullifying the right of the bare owner who might never be reinstated in her position of a full owner.

When the government expropriates immovable property or requisitions movable property the usufruct applies to the monies paid in compensation. The usufructuary's right is transferred to those monies, it is not terminated. The challenge this will present is how to value the usufruct. Given that most usufructs expire with the death of the usufructuary it can be difficult to accurately assess the value to the usufructuary of his right to possession, use and enjoy the property that has been taken.

There are other grounds for the extinction of usufruct. Consolidation is the merger of the person of the bare owner with the person of the usufructuary. In consolidation, in the course of usufruct, the bare owner donates[91] or sells her bare ownership to the usufructuary. Another instance of consolidation occurs when the usufructuary succeeds the bare owner perhaps as a result of the terms of the owner's will.

Article 1318 of the Code enables an owner to terminate a usufruct when the usufructuary has impaired his ownership rights by charging the property with rights in rem without his consent. The abuse of her rights by a usufructuary may trigger the owner to terminate the usufruct.[92]

Total loss of the subject matter of the usufruct, whatever its cause might be, extinguishes the usufruct.[93] This might occur when the bare owner exercises his right to sell things covered by usufruct for the purpose of meeting extra-ordinary charges.[94]

The sale of the property that is the subject of the usufruct will otherwise only terminate the usufruct where the usufructuary expressly waives his right to have the usufruct continue unaffected pursuant to Article 1323 of the Code. This may make the property difficult for the owner to dispose of. This immobilization of property might be avoided if the usufructuary consents to renounce her rights. The usufructuary may expressly permit the purchaser to take possession and full ownership of the property. Alternatively, the usufructuary may renounce her right in favor of the bare owner so that the owner might sell the thing for better price by virtue of being able to transfer full ownership in it. Whether the usufructuary has renounced in favor of a

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[91] Under Article 2453, the donor may reserve for himself the usufruct of property donated by him.

[92] Article 1330.

[93] Article 1344. .

[94] Article 1315/2 of the Code

third party or the bare owner, if she does renounce her usufruct freely, this amounts to donation. The waiver of rights must be express, not tacit, or it risks being found invalid. The law does not require the waiver be in writing, unless one chooses to read the formalities required with respect to immovable property into Article 1323/2 of the Code in relation to waiver of usufruct over immovable goods.

10.8 Effects of extinction of usufruct

The consequences of extinction of usufruct have already been discussed above, though in a diffused manner, in explaining the various usufruct provisions of the Code. Usually, though not always, there are two main effects of extinction of usufruct: restoration of the subject matter of the usufruct and a settlement of account.[95] One exception is a case where the usufruct is extinguished by consolidation for consolidation has the effect of merging usufruct and bare ownership over the same subject matter and in the same person. Secondly, for obvious reason, there is no restitution nor is there settlement of account in the case of extinction of usufruct by reason of total loss of the subject matter of usufruct which is not attributable to the conduct of the usufructuary or persons answerable to her.

The usufructuary must cease using the thing given in usufruct immediately after its extinction. She is no longer entitled to enjoy the property or collect its fruits. The usufructuary must return the property in its condition at termination to the bare owner. She must also hand over intrinsic elements and accessories of the property. In the event she does not turn over the property without delay the bare owner can file a reclamation suit against the usufructuary or her heirs.

If the property has be lost, damaged or deteriorated due to the failure of the usufructuary to properly maintain the property or due to the fault of her or those responsible to her, the usufructuary or her heirs are bound to compensate the owner for the damage.[96]

Once the usufruct expires the property is restored to the owner. Any claim the owner may have as a result of changes made or damages occasioned to the property must be brought within one year from the date of return of the thing to him or it will be barred.[97] As noted earlier the usufructuary has one year from that same date to remove any installations made by him.

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[95] Op.cit. Planoil, at 684.
[96] See Article 1317/2 of the Code.
[97] Article 1346 of the Code.

10.9 Conclusion

Ryan says:[98]

> The modern law of usufruct possesses three major characteristics. First, usufruct is regarded by modern civilians as a pars domini, a modification of ownership. Its constitution or reservation results in a dissociation of the usus and fructus from the abusus, the former being vested in the usufructuary, and the latter in the owner. The usufructuary thus has the right to derive the full economic benefit from the property. He is entitled to its possession and to the profits to be gained from its exploitation, but he has no power to dispose of the property itself. Secondly, the object of the right of usufruct may be a corporeal or incorporeal thing, a movable or an immovable, a patrimony or a single object. Thirdly, the usufruct is inseparably linked to the person vested with it....

Ryan`s characterization of usufruct in this quotation captures the classic case of a usufruct, which is usufruct over non-consumable corporeal things whereby the beneficiary is entitled to the right to use and enjoy and collect fruits of the property. It does not apply to imperfect or quasi usufruct over consumables which because of their nature are transferred to the usufructuary as owner, nor does it apply to a usufruct over intangibles which are because of their nature incapable of being physically used.

As has been alluded to throughout the chapter the "bare owner`s only obligation is not to do anything that could in any way interfere with the usufructuary`s rights".[99] The bare owner may sell bare ownership (not full ownership), donate the property, mortgage it, insure it, subject it to servitudes, take action to conserve it, may compel the usufructuary to carry out her obligations, may undertake major repairs to the property, can sell some of the things given in usufruct to cover extraordinary charges attributed to it and may bring all claims and actions available to an owner in her situation.[100]

10.10 Review questions

1. Discuss the similarities and the differences between the right to use land available under the current land laws of Ethiopia and usufruct as incorporated in the Code.
2. Ato Birru owns a house which is about to collapse. He has recently given the house to W/rt Konjit in usufruct. On the delivery date, W/rt Konjit argues that Ato Birru is obliged to repair the house at his own cost. Is she

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[98] Id., at 178-179.
[99] See Aubry and Rau, at 499.
[100] Ibid., at 500-501.

right? Should she undertake the repairs herself? If she does can she claim reimbursement for her expenses in so doing from Ato Birru? What would you advise her to do with the house?

3. Government X is at war with Government Y. Government Y invaded some of the territory of government X. Government Y has started charging peasants in the occupied territory Birr 5 per camel, goat, sheep or head of cattle as a compulsory war contribution. W/ro Birkinesh is living in the invaded territory and is compelled to pay 30 Birr since she has 6 camels in usufruct. Should she pay the levy or should she require the owner, Ato Birru, to cover the 30 Birr charged by the enemy state?
4. A building originally used as a chicken house is given in usufruct to Ato Birru. The woreda has banned the keeping of chickens in the area where the building is kept. Ato Birru decides to make some changes to the building to enable it to be used as storage facility for wood. Has he abused his rights as a usufruct? As a result of this decision the revenue generated from the building has increased. If the usufruct is terminated early by the owner is Ato Birru entitled to compensation for lost revenues?
5. Ato Abebe has given his car to his brother, Ato Birru until the latter's child Yeshi attains the age of 16. When will the usufruct terminate supposing that the child dies at the age of 10?
6. A building subject to usufruct is in a fire and partially destroyed. As a result of the fire it can no longer be used as a workshop as was originally intended. Is the usufructuary entitled to use the wood and other materials comprising the building to build a new workshop on the same site? Is the usufructuary able to sell the materials that compose the remainder of the building to third persons for profit? Would your answer be different if the building had merely collapsed due to old age?
7. Does a bare owner under Ethiopian law have the right to create successive usufructs on a given property without breaking the rule that makes usufruct a life estate?
8. W/ro Tsion owns a building. She has granted Fasil usufruct on the building for ten years. Five years after the commencement of the usufruct the building was expropriated and a Birr 300,000.00 expropriation award was ready to be paid to W/ro Tsion. Does Fasil have a claim to any of that award? Can he object to it being paid the owner? Can he require the owner to post securites to protect his interest in the monies? How much is Fasil entitled to claim? What factors are relevant to that calculation?
9. W/ro Tsion has given her car to Ato Fasil until he wins a lottery prize exeeding Birr 10,000.00. Three years after the creation of such usufruct, Fasil won a lottery prize of Birr 15,000.00. W/ro Tsion claimed the

restitution of the car. Should the usufruct come to an end? Which provisions support your answer?

10. W/ro Tsion is a usufructuary while W/rt Yeshi is a bare owner of a certain number of ordinary immovables. W/rt Yeshi believes she cannot deliver the property until after an inventory has been conducted. W/rt Tsion argues she should deliver the property immediately. Does an inventory need to be conducted before the property is delivered? Is your answer different if W/rt Yeshi has required the posting of security a precondition for delivery of the movables?
11. W/ro Selam is a usufructuary of a certain building owned by Ato Tamrat. She has mortgaged the biulding. She has also leased it. Ato Tamrat objects to these transactions made by W/ro Selam contending they constitute an abuse of her rights. Advise Ato Tamrat on the effect of his objection and on whether one or both of them may be validly maintained.
12. W/ro Alem in her testament has stipulated that Ato Birru may use and enjoy her car for five years and at the end of five years full ownership shall vest in Ato Mandefrot. Has she created a usufruct? At the time of her death the car requires major repairs before it can be driven. Who is responsible for the cost of those repairs? What are the consequences if Ato Birru makes the repairs?
13. Ato Birru dies and in his will states that his brother Mikias may live in his house until he dies and then it must be sold and the proceeds divided among his heirs. Can Mikias lease the house out to a third party? If Mikias moves into the house who can live there with him? Can Mikias operate a business out of the house?

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Chapter 11: Servitudes

11.1 Introduction

Roman law established two types of servitudes: personal and predial. Personal servitudes like usufruct, use and habitation may burden moveable and immovable property. They are established in favor of a person. Personal servitudes terminate with the life of the person in whose favor they are established. Predial servitudes also known as real or landed servitudes only bind land and are established in favor of an immovable. Predial servitudes are perpetual in nature. In France and in Ethiopia the word servitude standing alone refers to a predial servitude.[1]

Servitudes are situations where at least two immovable things are linked by law. The legal nexus established between these immovables is designed to ensure that one immovable thing renders economic service to another. The former is called the servient tenement while the latter is referred to as the dominant tenement. Articles 1359-1385 of the Code are crafted to enable the economic use of a dominant tenement without hampering the profitable use of the servient tenement. In an attempt to elucidate the law of servitude under the Code, this chapter considers the features and purposes of servitude, how it differs from other related concepts, how it is created and extinguished.

11.2 Current applicability

Some may suggest that Articles 1359-1385 of the Code, which deal with servitude, are tacitly repealed because these provisions assume pre-1975 private ownership of land. They might argue that servitude has no place in the laws of a country that has collective ownership of land. This line of argument, if accepted, would render the provisions respecting servitude in the Code part of the history of Ethiopian property law.

However, there are strong arguments in support of the retention and applicability of these provisions in modern Ethiopia. The law of servitude does not exclusively apply to two or more plots of land owned by different owners. The law of servitude also applies to two or more buildings owned by different persons. The abolition of private ownership of land does not necessarily eliminate the need for law of servitude. Servitude can exist in relation to publicly owned land. Servitude is not innately fused with private ownership of land. In fact, one may say that where there is private access to land, be it in

[1] A.N. Yiannopoulous, "Predial Servitudes; General Principles: Louisiana and Comparative Law", 29 La. L. Rev 1 (1968-1969) at 1-3.

collective ownership scheme or otherwise, there is and should be the need for laws of servitude. One can envisage functioning servitude rules and principles even in the context of collective ownership of land. The fact that land in Ethiopia is put beyond private ownership does not do away with the issue of servitude among land users. Land users still need to walk on another's land to access to publicly used resources such as market places, roads and wells. People may still need to prevent their neighbors from building beyond a certain height. It is precisely for these reasons that these provisions have not been repealed in fact, there are recently proclaimed laws that recognize the continued validity and importance of the law of servitude.[2] Finally, the justifications for servitude, i.e., good neighborhoods and economic efficiency did not vanish with the nationalization of land. The existence of servitudes demonstrates the willingness of neighbors to help each other and fosters in them an attitude of mutual accommodation and tolerance. Behind servitude, there lies a desire to use resources (immovable property) efficiently and it facilitates the wise exploitation of lands and the proper utilization of buildings.

Servitude has its downsides too. It tends to hinder the smooth circulation of immovable property. Land or buildings may be simultaneously charged with several servitudes (e.g. right of way, a right to take away water and a right to pasture) and purchasers could be reluctant to buy burdened property. On the whole, the positives outweigh the negatives. On balance servitude continues to be useful even in the context of collectively owned land.

The legal provisions that deal with servitude in Ethiopia need to be read to reflect existing realities. This means changing of the term ``land owner`` employed in the servitudes portion of the Code into the word ``land holder``.

11.3 Attributes of servitude

Servitude should be differentiated from certain concepts. Servitude shares some features with usufruct. Both are property rights. Both are rights in rem constituted over another person`s property. Yet, servitude is distinct from usufruct. Usufruct can apply to movable and immovable property, servitude only applies to immovable property. Usufruct benefits a person, the

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[2] See Articles 23 and 24 of the Water Resources Management Proclamation, Proclamation No 197/2000, *Fed. Neg. Gaz.* Year 6th No. 25. which regulate legal servitude in connection with irrigation. See also Articles 20 and 21 of the Electricity Proclamation No. 86/1997, *Fed. Neg. Gaz.* Year 3rd No 50, which provides compensation for granting access to land to entities supplying electricity. Similar provisions exist in the Articles 18 and 20 of Telecommunication Proclamation No. 49/ 1996, *Fed. Neg. Gaz.* Year 3rd No. 5.

usufructuary; servitude, binds the immovable. Usufruct is time limited, servitude perpetual. Servitude is different from ownership. Ownership benefits the owner. Servitude exists for the benefit of another immovable. All types of property may be owned, servitudes only apply to immovables. Ownership can be independently assigned or attached while this is not the case in relation to servitude. In terms of number of entitlements, ownership normally confers greater entitlements than servitude does, servitude being a subset of ownership.

French law regards,[3]servitude as a separate category of right in *rem*. Servitude is not subsumed under limitations of ownership.[4] Aubry and Rau regard servitude as limitation on individual ownership, not a separate category of property:

> Dismemberment of ownership is the creation of real or quasi-real rights of enjoyment with regard to a thing the ownership title to which is held by another person...this right of enjoyment may be, and normally is, perpetual, but gives a partial enjoyment. This is a servitude.[5]

Ethiopian property law places some aspects of servitude under the rights and duties of owner, that is, as a kind of legal limitation imposed on an owner.[6] Other provisions pertaining to servitude are found in the ownership and use of water[7] section of the Code, and a large chunk are placed in their own separate chapter and regarded as a distinct brand of *rights in rem*.[8] The placement of servitude and its kindred in the Ethiopian Code is not off the mark because servitude may correctly be characterized in many ways. Servitude is a type of right in rem; it is a limb of sole ownership; it is also a limitation on the ownership of a servient tenement. The diffuse manner in which these provisions are inserted in the Code emanates from the fact that it has these multiple facets and thus is not objectionable.

Article 1359 defines servitude as:

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[3] See Articles 633-710 of the French Civil Code at www.legifrance.gouv.fr. (Trans by Georges Rouhette) (2004) (last viewed April 2010)

[4] Marcel Planiol's *Treatise* devotes six chapters to the discussion of servitudes, (Op.cit Planiol, *Treatise* at 695-763) as opposed to Aubry and Rau who merely touch upon the hallmarks of servitude in one paragraph in connection with discussions of usufruct, (Op. cit. Aubry and Rau, at 461ff).

[5] Ibid., Aubry and Rau at 461.

[6] See Articles 1214, 1218, 1220-1224, and 1227; see also Articles 916-924 and 1018-1029 of the German Civil Code at www.juris.de. (trans. Langenscheidt Translation Service) (2009) (Last viewed, April 2010).

[7] See Articles 1246-1247.

[8] See Articles 1359-1385, which are the subject of discussion in this chapter.

(1) A charge encumbering a land, hereinafter called the servient tenement, for the benefit of another land, hereinafter called the dominant tenement.

(2) Servitude imposes on the owner of the servient tenement 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.

This article encapsulates the fundamental aspects of servitude. Since servitude is a type of right connected to immovable things, it cannot be created on movables and incorporeal things. Although servitude can exist on land and buildings,[9] it is essentially and originally limited to land. The several plots tied together by the notion of servitude must belong to several persons. Servitude cannot exist in relation to two or more immovable things owned by the same person.[10] The two plots owned by two or more persons do not have to be always adjacent; they may or may not touch each other. There may be a servitude imposed upon a certain plot in favor of another plot even if the two plots are separated by considerable distance.[11]

Servitude is a limitation on the ownership of a servient tenement whereas it is an addition to the ownership of the dominant tenement. The owner of a servient tenement has to tolerate or allow certain acts of use of her immovable by the owner of the dominant tenement.[12] Or the owner of the servient tenement has to refrain from doing certain things which she could naturally have done on her immovable.[13] If the servitude is, for example, a right of passage, then she has to allocate a portion of her land to the exercise of such right by the owner of the dominant tenement. The owner of the servient tenement must refrain from undertaking activities which impede the right of way on the portion of her land so allocated. If the type of servitude is a right of view, she has to refrain from undertaking constructions which will block the view of the dominant tenement.

Servitude is a perpetual. While there are conditions which terminate servitude, in principle, the owner of the servient tenement can no more free her plot

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[9] See Harrison C. Dunning, *Property Law of Ethiopia: Materials for the Study of Book III of the Civil Code* (HSIU Faculty of Law: unpublished, 1967) at 107.

[10] Op. cit. Ryan,. at 180-181.

[11] Ibid.

[12] See Article 1373/1: The dominant owner may take any steps and construct any works necessary for the enjoyment and preservation of the servitude.

[13] See Article 1379: The servient owner may do nothing to reduce or impair the use of the servient tenement.

from the charge by offering compensation to the owner of the dominant land; she must suffer the servitude.[14]

Servitude is established for the benefit of dominant immovable, not for the benefit of the person of the owner of such immovable. Servitude must be advantageous to the dominant tenement, not to the person of the owner of the dominant tenement. There can be no servitude in gross.[15]

The words "for the benefit of the dominant tenement' in Article 1359 have two meanings. The first is that a servitude cannot be created unless it serves the dominant tenement, if by its nature it offers no advantage for the exploitation and use of the dominant tenement it is not a servitude. It also means that servitude may not be imposed on or in favor of a person; it must be in favor of land or buildings.

The statement servitude should benefit the land and not a person, means there must be a natural relationship between the object of the servitude and the use of the dominant estate.[16] The dominant tenement has to be linked to the servient tenement. The justification for this rule lies in the desire to facilitate the free circulation of property.[17] The fewer the encumbrances on a piece of property the greater is its chance to circulate in the market. Another reason is that the obligation to perform personal service means enslaving the owner of the servient tenement; it assumes the inferior personal status of the owner of the servient tenements. The law aims at reversing the old saying: "every inheritance is burdened with servitude, the freedom of a piece of land is accident".[18] In its place the law wants to promote: "every inheritance is free and exempt from servitude".[19]

The following are two applications of the rule that servitude should benefit the dominant tenement, not the owner of the dominant tenement. The right to walk on and to collect fruits or flowers upon the lands of another cannot be seen as servitude but merely as a right of use because the beneficiary of this right could get all the advantages even if she were the owner of no immovable.[20] Second, the right to take clay from neighboring lands may be considered to be servitude if it is customary in that place to sell fruits and wine

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[14] Op. cit., Planiol, at 700.
[15] Ibid.
[16] Ibid, at 726-727.
[17] Ibid.
[18] Ibid.
[19] Ibid. See also Boris Kozolchyk, "On Predial Servitudes, Civil Law Institutions and Common Law Attitudes-Apropos of Yiannopoulos' Predial Servitudes (Book Review)" 59 *Tul. L. Rev.* 517 (1984).
[20] Ibid. Planiol.

in clay vases.[21] But a potter who could require clay for the manufacture of vases made for sale could acquire such a right only as a usufruct not as servitude.[22]

The words 'benefit' or 'service' means the various advantages the dominant tenement may get from the servient tenement. The diversity of servitudes (thus, the use of servitudes in plural than in singular) emanates from the innumerable kinds of services the servient tenement might be made to render to the dominant tenement. One cannot exhaustively list down the types of services one immovable may give to another. Light, view, passage, pasture, wood collecting, drawing water from a well or spring, the right to require a neighbor not to build at all or beyond a certain height or width, building a certain distance off the street line and not building a wall are some instances covered by the word ``benefit``.[23] The service to be given to the dominant tenement has to be specified and the service so specified should not be expanded because of new needs of the dominant tenement.[24] The urging by the law of servitude for parties to specify the type of service the servient tenement is to provide to the dominant tenement is to ensure that the latter gets benefits which make its use efficient without rendering the former inefficient with excessive encumbrances.

There is an exception to the rule that servitude may not be imposed on the owner of the servient tenement: an obligation can be imposed on the owner of the servient tenement to carry out a positive act provided the act is not the main objective of the servitude but it is only accessory to the main object. An obligation to do must form part of the content of the servitude. An obligation to do may accompany servitude as an accessory to its principal object. An example is when the owner of the servient tenement undertakes obligation to fence in or to keep in order a path on which servitude of passage exists. This exception is found in Article 1360 of the Code: "A servitude may only accessorily cast upon the servient owner the burden to commit any act". If it happens that servitude is imposed upon a person, then, the assumption is that it is a mere obligation and as such it will last for a limited period of time and does not follow the land. In fact, if there is an agreement between owners of two plots and if the provisions of any agreement are open to interpretation,

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[21] Ibid, at 728-729.

[22] Ibid.

[23] Ibid.

[24] See Article 1376 stipulates: New needs occurring for the dominant tenement shall not increase the burden of the servitude.

then a court is duty bound to interpret doubtful provisions as imposing a mere personal obligation, not servitude.[25]

Servitudes are considered as accessory rights of the dominant tenement.[26] That is, servitude passes with the transfer of the dominant tenement. Similarly, the transfer of the servient tenement means the transfer of the burden imposed on it. Or more broadly, any transaction relating to either the servient or dominant tenement affects the servitude constituted thereon. For example, if either of the two tenements-the dominant or servient tenement- is mortgaged, then the mortgagee must also assume that the charge will follow her security.[27] When a dominant tenement is given in usufruct, it means that the servitude attached to it is also given in usufruct. Since servitude is an accessory right, it cannot be separately assigned or sold.[28] Said otherwise, servitude, as a burden, runs with the servient tenement, as a benefit, it runs with the dominant tenement.[29]

Servitude is an indivisible right inherent in the dominant tenement and in every portion of it so that if the land should come to be divided the servitude remains attached to each portion, without, however, the condition of the servient tenement being made worse. Seen from another aspect, servitude is a charge touching upon each and every atom of the servient tenement. So if the servient estate is divided, the resulting units must suffer the servitude, of course, without increasing the burden of such units unduly.[30]

A servitude carries with it rights necessary for its use; without it, we would have a nominal servitude. For example, the right to draw water implies a right of passage. In this example, the right to passage is a *sin qua non* for the enjoyment of the right to draw water. The servitude of aqueduct carries with

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[25] See Article 1365 which states: Where it is doubtful whether a provision in an instrument creates a servitude running with the land or imposes a personal obligation on the owner of such land, such equivocal provision shall be deemed to impose a personal obligation and not to create a servitude.

[26] Op.cit., Ryan, at 181.

[27] See Article 1361: (1) A servitude shall run with the land notwithstanding that the servient or dominant owner changes. (2) Servitudes which have been registered in accordance with law shall follow the land into whatever hands it may pass.

[28] The only exception to this may be the case of surface rights; surface rights, also called constructions right, can be transferred or mortgaged independently of the servient tenement. See Article 1214/1 which provides that: (1) Buildings and other works constructed above or below a parcel of land or permanently united therewith may have a distinct owner (2) The rights of such owner shall be subject to the provisions relating to servitudes (Art. 1359.1385).

[29] Op.cit., Dunning, *Property Law*, at 107.

[30] See Articles 1377-1378.

it the right to pass by its margin for installation, supervision and maintenance purpose. This right exists simply by virtue of the principal servitude: accessory to servitude must disappear upon the termination of the main servitude. It is to this end that Article 1372 states:

> (1) The existence of servitude shall entail the existence of the means necessary for the enjoyment of such servitude.
>
> (2) Whosesoever benefits from a right to draw water from a well shall enjoy a right of way to such well.

11.4 Sources and types of servitude

On the basis of origin, servitude could be divided into three types. They are: natural servitude, legal servitude[31] and conventional servitude. Natural servitude comes from the natural or geographical lay of the dominant and servient tenements.[32] For example, the obligation of the owner of a lower piece of land to receive the water that naturally flows from the higher piece of land. The law simply gives recognition to natural servitude. Article 1246 (1) provides that: "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". For the existence of a natural servitude, no formalities are required (that is, written form and registration). Legal servitude comes from the law; the law creates it for public purposes. An example is the right of an owner of an enclave land or whose outlet to highways is insufficient to get out let (access). So is the installation of facilities such as electric, water telephone and gas lines. Legal servitude is created by Articles 1221 and 1246/1 of the Code. Article 1221 provides that: "An owner whose land constitutes an enclave or whose access to pubic way is not sufficient to enable him to exploit his land may demand right of way from his neighbor". For a legal servitude to exist it is not necessary to observe the formalities of registration and written form. The parties may not wajve legal servitudes pursuant to an agreement.[33]

The third type of servitude is conventional (juridical) servitude. Article 1362 provides that:

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

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[31] See also Articles 1221-1227 of the Code. For detailed discussions about servitudes necessitated by land enclavement; see C.G. Van Der Merwe, "The Louisiana Right To Forced Passage Compared With The South African way Of Necessity", 73 *Tul. L. Rev.* 1363 (1999); see also A. N. Yiannopoulos," The Legal Servitude Of Passage", 71 *Tul. L. Rev.* 1 (1996).

[32] Op.cit., Planiol, at 706-708.

[33] See Article 1227 of the Code.

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

Article 1363 states that:

> The creation of servitude shall be of no effect unless it is evidenced by writing.

Article 1364 states that:

> A servitude shall be of no effect on third parties unless it has been entered in the register of immovables at the place where the servient tenement is situate.

As is clear from these provisions of the Code, conventional servitude emerges from a testamentary instrument or by contract. In order to have effect, even upon the parties to it creation, it must to be made in writing. A conventional servitude must be registered to effect third parties. However even if unregistered it will continue to bind the parties to its creation.

On the basis of their mode of exercise, there are three kinds of servitude. The first is apparent servitude and non-apparent servitude. Apparent servitude is a type of servitude manifested by visible works (e.g. windows, doors or channel or pipes above ground and aqueduct).[34] Non-apparent servitude means a servitude having no external manifestations such as servitude not to build or not to build to a certain height.[35] Under the Code, the legal effect of this distinction is that only apparent servitude can be acquired through prescription.[36] Once an apparent servitude has been enjoyed for ten years it is acquired, although it must be registered in order to have effect on third parties.[37] Once an apparent servitude is acquired through prescription it is advisable to have it reduced to writing and registered even though this is not strictly required.[38]

The second class of servitude is continuous versus discontinuous servitudes. The former refers to a servitude requiring no human intervention or activity for

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[34] Op cit. Planiol, at 704.

[35] Ibid.

[36] See Article 1367, which reads: A servitude which is not apparent may not be acquired by prescription.

[37] Article 1368/2 says: A servitude acquired by prescription shall not affect third parties unless it has been entered in the register of immovables.

[38] See the language of Article 1368/1 that reads: Whosoever has acquired an apparent servitude by prescription may require that the existence of the servitude be evidenced by an instrument specifying the extent of the servitude and that such servitude be entered in the register of immovables.

them to function.[39] Examples are pipes of water, sewerage and servitude not to build or not to build beyond a certain height. Non-continuous servitude relates to those, which demand current human act for their exercise.[40] Rights of way, drawing water, grazing and extracting materials from earth (the right to dig for gravel or to cut turf) are examples of non-continuous servitude. The Code does not give explicit recognition to this second type of servitudes.

The third type of servitude is negative versus positive servitudes. Negative servitudes assume the dominant tenement is drawing benefits from abstention imposed upon another's immovable. Here the owner of the servient tenement is duty bound not to carry out certain activities inherent in ownership.[41] An example is servitude not to build beyond a certain height or not to build at all. Positive servitudes, on the other hand, entail incursion into the land of another. The owner of the dominant tenement is given the right to carry out certain activities over the servient estate, which would have been tantamount to interference in the rights of the owner of the latter had it not been the existence of servitude.[42] Right of way and right of drawing water are illustration of positive servitude.

11.5 Extinction of servitude

The conditions which lead to the extinguishment of servitude can be inferred from Articles 1359-1385 of the Code.[43] But these provisions are not exhaustive.[44] They include the destruction of either one or both tenements and prescription. Dividing the dominant tenement or servient tenement can sometimes lead to the partial extinction of servitude.[45] Abandonment of the servient tenement is an express renunciation of servitude when followed by cancellation from the register of immovables.[46] Confusion, lapse of term and non-use for ten years are also grounds for extinction of servitude.[47]

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[39] Op. cit., Planiol, at 702.

[40] Ibid., at 703.

[41] See Articles 1359/2 and 1379.

[42] See Article 1359/2.

[43] Apart from these Code provisions, see Op.cit. Aubry and Rau, *Droit Civil Francais*, at 757-763.

[44] A recent revised draft version of Book III of the Code, in its servitude section, provides for a complete list of factors leading to the termination of servitude. See Article 257 of Final Draft Property Law of Ethiopia prepared by the Justice and Legal System Research Institute, Tikemet 1997E.C. (unpublished, on file with the author.)

[45] Op. cit. Planiol, at 757-763.

[46] Ibid.

[47] Ibid.

11.6 Conclusion

When one tries to question the present day relevance of the servitude provisions of the Code, one should not lose sight of the main end of the law of servitude, which is enhancement of the economic efficiency of immovable resources. The law can realize this economic objective if it endeavors to balance the burdens of the servient tenement and the benefits which accrue to the dominant tenement. The multiple characteristics of servitude warrant its treatment in the Code as a right in rem, a restriction on ownership and a dismemberment of ownership. Finally, Topping illustrates the unsatisfactory nature of relying on private dealings (rights in personam) to secure economic benefits for a dominant tenement from a servient tenement:

> If my neighbor sells his land, I shall have no right against the buyer: I shall have to make a new bargain with him, and he will be in a position to dictate the terms...if I sell my land, I shall not be able to pass on my rights to the buyer, and the price I shall get will be correspondingly lower. To solve this problem, the real or predial servitude was evolved.[48]

This quotation emphasizes the important role servitudes play in property law.

11.7 Review questions

1. There is a stream on Ato Birru's land. Ato Abebe has been taking water from the stream for domestic consumption for a long period of time. Ato Birru recently sold his land to Ato Yohannes. The purchaser has since prevented Ato Abebe from using the stream. Does Ato Abebe have any right to take water from the stream? Advise Ato Abebe on his legal rights and remedies in this case.
2. For 20 years, Ato Abebe has been collecting firewood from the nearby forest, which belongs to Ato Yohannes. Two months ago Ato Yohannes said to Ato Abebe: "You may keep on collecting fire wood from my forest land, but you cannot traverse on my farmland." Presume that in order to get to the forest lands Ato Abebe has routinely crossed Ato Yohannes farmland. Advise Ato Abebe. Can he continue as he has been or does he need to find a new way to get wood from the forest?
3. In 1972 Ato Birru constructed a building bordering a plot belonging to Ato Yohannes. All the windows of this house are facing Ato Yohanne's field. In 1999, Ato Yohannes began constructing a six-story building situated on his plot such that it will prevent sunlight from flooding into the windows of Ato Birru's house as it had these many years. Ato Birru is upset and wants

[48] Op. cit. Topping, Roman Law, at 50-51.

an injunction preventing Ato Yohannes from continuing with the planned construction. What arguments support such an application? How would Ato Yohannes' legal counsel respond to those arguments?

4. W/ro Alem and W/ro Meseret each own different plots of land. According to an agreement entered between them, W/ro Meseret is entitled to extract 50 cubic meters of gravel from W/r Alem's land each month for a period of five years. As the five year period comes to an end W/ro Meseret argues that she can continue to collect gravel perpetually as she has created a servitude on W/ro Alems land? What would she have to prove to establish such a claim? Suppose the contract lasted for 20 years. Would that make a difference?

5. Ato Obang has a plot of land. He produces sugar cane. He has obtained the right to construct railroad lines over a piece of land seven meters wide on Ato Abebe's land. Ato Obang has concluded a contract with a company which processes cane into sugar to buy the cane produced by Ato Obang. Ato Obang has started to buy sugar cane from other growers to satisfy the high demand of his client company. Ato A objects to the transport over his land by Ato Obang of cane grown on other plots. The court to which the dispute between Ato Obang and Ato Abebe has decided that[49] what is prohibited is that the defendant, in extending or in repairing the railroad should occupy a greater area of land of servient tenement or deposit excavations or building materials outside of the area of 7 meters, because in the first case the servient tenement will be altered, and in the second the servitude would become more burdensome. Therefore Ato Abebe cannot prohibit Ato Obang from transporting in the wagons passing on the rail road cane purchased from other growers. Do you agree with the position of the court? Why?

6. Abebe and Birru each owner adjoining tracts of land.[50] Birru's land borders on a lake and he has granted a right of way over a described portion of his land to enable Abebe his heirs and assigns to reach the lake and enjoy its waters. Abebe has now divided his land into fifty small building lots and is advertising them for sale stating that each will have access to and from the lake over the right of way on Birru's land. Birru wants to ensure that purchasers of these lots are prevented from using the right of way and asks you to get an injuction. What factors are pertinent to the court in either allowing or disallowing the injunction?

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[49] This case has been inspired by my reading of Kagu K, "The Nature of Servitudes and the Association of Usufruct with Them", 22*Tul L. Rev* 94 (1947-48) and *Louisiana Power & Light Co.* v. *Holmes*, 422 So. 2d 684 (La. App. 3rd Cir. 1982).

[50] Ibid.

7. Ato Birru built a dwelling house in front of Lake Hawassa in 1984. In 1989, he converted the house into a hotel and the view it provides of the lake has made it very attractive to prospective guests. Business is very good. Ato Abebe has a large plot of land located between Ato Birru's hotel and the lake. Ato Abebe plans to construct a ten-story building and open a recreational center. If he does this the new building will completely block the view now enjoyed by Ato Birru. What can Ato Birru do? Advise Ato Abebe as to whether he may build the building as planned.
8. Ato Birru has been traversing on Ato Abebe's plot of land for 20 years to get to and from his own land. Recently Ato Birru has installed a flourmill on his land and is now finding the passage he has been using to cross Abebe's land to be too narrow to allow the truck he uses for transporting grain to the mill to pass. He has requested Ato Abebe to increase the width of the passage. He has refused. Ato Birru has come to you for your advice? What rights does he have? How should he proceed?
9. W/rt Konjit and W/rt Birkinesh each own adjoining plots. Three years ago, the two verbally agreed that Birkinesh could pass through Konjit's land to get to and from the local well. The two have a disagreement on an unrelated matter and Konjit refuses to continue to allow Birkinesh to cross her land. She argues that since nothing is in writing there is nothing compelling her to allow Birkinesh to pass. Is there merit to her position? Would your opinion be different if the arrangement had been in place for thirteen years?
10. W/ro O owns a large fishing pond.[51] Thirty years ago, she concluded an agreement with 15 people living in her locality. Pursuant to the contract, the 15 people were allowed to fish the pond if they gave half of their weekly catch to her. The arrangement has continued without interruption since then. Recently she has decided that instead of a share of the catch she wishes the 15 people to pay her an annual fee to continue to use the pond. If only one of the 15 people using the pond is a land holder did the arrangement create a servitude? What is the legal consequence to the fifteen people of W/ro Q's decision? Do you have all the information you need to fully answer the question? If not what additional information should you obtain?
11. Using examples argue for and against the following propositions:
    a) Under Ethiopian law, a servitude having its principal objective as an obligation to do may be created.
    b) Under Ethiopia law, servitude must be made in writing and registered regardless of the way in which it is created.

[51] Ibid.

c) Articles 1370 and 1376 do not permit any change in the character of use of a dominant tenement.
d) The servitude envisaged by Articles 1214 and 1215 is unique in the sense that it can be independently transferred unlike the servitudes provided for by Articles 1359ff.
e) The owner of the dominant tenement, when making works necessary for the use and preservation of the servitude, cannot alter the servient tenement, nor make the servitude more burdensome.
f) The owner of a servient tenement may establish new servitudes which may impair pre-existing servitudes.
g) It is possible for a dominant tenement to at the same time also be a servient tenement (and vice versa).

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Chapter 12: Restrictions on Ownership

12.1 Introduction

Even the sole ownership of private property is not an absolute right. There are external limitations placed upon ownership by the law. The owner and others dealing with the property can also place limitation on ownership. We will call the latter internal limitations. Property law regulates both kinds of limitations. It imposes limitation on how individuals can restrict ownership or other interests in private property. It also imposes a legal framework which defines and restricts the way in which private property is created and dealt with.

In this chapter we will explore each type of limitation. We will first examine aspects of the external limitations on private property by defining them, discussing theoretical views about the justifications behind legislatively imposed limitations on private property. The second part of the chapter discusses three examples of *rights in rem* which can be imposed by the parties to a property transaction themselves. These are the right of preemption and right of promise of sale, which the Code regulates under Articles 1410-1425,[1] and restraint on disposition of ownership, which is governed by Articles 1426-1443. This second part of the chapter first explains the unique features of preemption and promise of sale and then proceeds to point out their affinities, followed by analysis of cases of restraints on assignment and attachment of property. The chapter closes with a conclusion and review questions.

12.2 External restrictions

A limitation is the state of being restricted by a principle or a rule; it is being constrained from taking a course of action in respect of something, say a piece of property.[2] The extent of the restriction can range from minor (like the exercise of a regulatory power over a piece of property) to severe (like the expropriation of property). The extent and type of limitations vary from object to object. For example, one might expect greater limitations to be placed on objects of historical, cultural and sentimental value than ordinary objects. In agrarian societies like Ethiopia it is not surprising that there may be greater restrictions placed on farm and grazing land than on other kinds of immovable property. Thus current rural land laws assign a plot of land to a landholder who must use it for agricultural purposes, cannot leave it unused beyond a

[1] There are other provisions in the Code dealing with the right of preemption and promise of sale, Articles 1442, 1524, 1604, 1616, 2893, 2895, 2896 and 3365 of the Code.

[2] Black`s Law Dictionary (8th ed.) (2004).

certain period of time, must take appropriate land conservation measures, cannot cut down indigenous trees upon it, cannot lease it as a whole, cannot lease a portion beyond a certain period of time, and who cannot leave the land to anyone she wishes. Farm land holders must submit the land for redistribution (particularly irrigable land)[3] and risk expropriation of their land by the state.

12.2.1 Theoretical perspectives on limitations on ownership.

Different legal and political theories posit different justifications for the imposition of external limitations on the ownership of private property. Two theories will be discussed here.

One approach springs from the libertarians. Robert Nozick, a American political philosopher prominent in the 1970's and 1980s, advocates this view. He posits the existence of absolute property rights:

> Everyone has an absolute right to be free from coercion and an absolute right to acquire and dispose of his property. Each person is entitled to his talents and abilities and to whatever he can make, get or buy with his own efforts, with the help of others or with plain luck. Anyone is entitled to whatever he ends up with as a result of the repetition of this process.[4]

Adriana Lukasova states that

> Nozick's property rights are not created or licensed by the state. Individuals have them independently of the social institutions in which they live. But how does Nozick justify them? He invokes the right of non-aggression, which prohibits "sacrificing one person to benefit another". He doesn't want anyone to be forced to contribute to the welfare of another person who has no right to this contribution. The chief among the other rights that an individual is entitled to is the property right. If a person is deprived of something to which he has acquired title in accordance with the three principles of justice [the principle of initial acquisition, the principle of transfer, and the principle of rectification] then his property right has been violated.[5]

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[3] See Articles 10-11, and Article 13 of Rural Land Administration and Use Proc. No 456, 2005, *Fed. Neg. Gaz.* 11th Year No 44

[4] Adriana Lukasova, "Nozick's Libertarianism: A Qualified Defence", 32 *Philosophical Notes* (1995).

[5] Ibid.

He leaves little space for the state to visit private property with restrictions. Nozick creates a linkage between private property, self-ownership and individual liberty.

> Nozick asserts that the individual may freely dispose of his holdings even if this results in massively unequal distribution of income and opportunity. He offers the principle of 'self ownership', which is a particular interpretation of the Kantian principle of treating people as 'ends in themselves'....Nozick argues that if I own myself, then I own my talents and that if I own my talents, I own the products of my self-owned talents. The notion of self-ownership has a reflexive significance—what owns and what is owned are one and the same, the whole person. That is why, as a self-owning person, I have absolute rights over my property....Second, self-ownership and property rights are necessary to enable an individual to pursue his conception of the good and his self-determined way of life. By taking away his property we are decreasing his options and limiting his possibilities. This violates his freedom and is therefore morally unjustified.[6]

Sir William Blackstone the noted British jurist described property in his *Commentaries on the Laws of England* as:

> the sole and despotic dominion which one man claims and exercises over external things of the world, in total exclusion of the right of any other individual in the universe.[7]

He goes on to say:

> In the beginning of the world, we are informed by the Holy Writ, the all-bountiful Creator gave to man dominion which one man claims over the earth; and over the fish of the sea, and over the fowl of the air, and over every living thing that moveth on the earth. This is the only true and solid foundation of man`s dominion over external things, whatever airy metaphysical notions may have been stated by fanciful writers upon the subject.[8]

In contrast Jhering, as Cohen attributed to him, said :

> An absolute right of property would result in the dissolution of society, which means society could not exist without laws of taxation, eminent domain, public nuisances, etc., and if any property owner could really do anything he pleased with his own property,

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[6] Ibid.

[7] As quoted in op.cit. Cohen, "Private Property", at 362.

[8] Ibid.

> the rights of all his neighbors would be undermined. ...In fact, private property as we know it is always subject to limitations based on the rights of other individuals in the universe. These limitations make up a large part of the law of taxation, the law of eminent domain, the law of nuisances, the obligations of property owners to use due care in the maintenance and operation of their property, and so on. Property in the Blackstonian sense doesn't actually exist either in communist or in capitalist countries.[9]

Paton, in support of this second view of restrictions on private property, argues:[10]

> No individual, however powerful he may be, can today create wealth without the help of the social framework and the cooperation of his fellows, and therefore society can well demand that, once created, wealth should be used for those purposes which will be of greatest benefit to the community. Duguit, however, goes too far in suggesting that there has been a complete revolution in the legal approach to property...who would put it that property ceases to be a right and becomes a duty; the owner is no longer free to exercise his arbitrary will but must perform a social function...The owner still has many `sovereign` rights, though the area of complete freedom is being gradually restricted....What is apparent is that absolute rights are ceasing to exist, if they ever did exist, and are being replaced by qualified rights the exercise of which is limited by philosophy and needs of the community in question.

Those who support a degree of limitation on private property also differ in their views of the appropriate nature and duration of such limitations. One theory considers limitations on private property as intrinsic and permanent while another sees limitations as extrinsic and temporary. The first model which sees limitations on private property as inherent and permanent states:

> Private ownership is supposed to create a private enclave of individual freedom and while that enclave should be protected vigorously under the Constitution, it should be done within the limits of its original scope, which is defined by the meaning of ownership for the development of the individual personality. Outside that enclave individual rights must make room for social or public interests. In effect this would mean that different spheres of ownership must be distinguished according to the nature of each object and its proximity to the individual personality so that the

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[9] Ibid.

[10] Op. cit, Paton, *A Textbook*, at 488-489.

> state's power to encroach upon property rights would vary according to the sphere in which it is exercised. The idea is to constitute a just balance between the interests of the individual and the interests of society, with the common good serving as point of orientation and as limit for the restriction of ownership.[11]

The theory that sees limitations on private property as extrinsic, exceptional and temporary assumes that:

> ownership is the unlimited right to use property as one sees fit and that limitations and restrictions of this basically unlimited right must be seen as exceptions laid down by the state in the interests of weaker citizens and for the promotion of social order. With regard to its essence, ownership is regarded as static, formal and abstract, while changes, restrictions, limitations and diversities which characterize the specific content of ownership in any given context are seen as unessential, temporary, and exceptional. [12]

Both models would like to see limitations on private property fulfill certain conditions. These conditions, as one might gather from the Siracusa Human Rights Principles of 1984, are that: they must be defined by specific and express legislation, they must be proportionate to the interest sought to be promoted, and there must be a pressing need before placing limitations on private property.[13] The bottom line in both theories is that whatever necessitates limitations, they should not eat away the very essence of private property.

12.2.2 Grounds for limiting ownership in Ethiopian law

As already suggested in some of the above quotations, there can be good reasons for imposing limits on private property. The Ethiopian Constitution says private property can be limited to protect the public interest and the rights of all citizens.[14]

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[11] A. J. Van Der Walt, *Property Rights, Land Rights and Environmental Rights, in Rights and Constitutionalism: The New South African Legal Order* (USA: Oxford University Press, 1996) at 471.

[12] Ibid., at 470.

[13] UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4, available at: http://www.unhcr.org/refworld/docid/4672bc122.html [accessed 10 April 2010]

[14] See Article 40/1 of the FDRE Constitution.

In the public interest, the legal sources of limitations on ownership extend beyond property law and emanate from constitutional law, tax law, criminal law, family law and inheritance law. The concept of public interest is not difficult to illustrate even if it is elusive to define. Economic efficiency, health and safety and equity may be some of the justifications invoked in the name of public interest. Thus the law imposes standards and authorizes authorities to confiscate sub-standard products and have them destroyed. Town zoning laws require builders to use materials of a certain type and of quality in construction. The state may expropriate property to, for example build a power station, for the common benefit of the people. Customs authorities can prevent goods from entering or leaving the country, in the public interest. The examples are limitless.

The law may impose limitations on property for the protection of the rights of others. Thus a landholder may be required to demolish a structure that extends over a neighboring plot, or to cut off branches or roots of trees impinging on a neighboring plot, or to tolerate the placement of public utilities' lines (e.g. power and telephone)[15] on her land, or to grant another a right of way over her property,[16] or to grant access to her property to a person in distress.[17]

Roman law aspired to absolute ownership where all the incidents of ownership over a thing reside undivided and unfettered in a current owner.[18] Ryan succinctly puts the position of German and French property law as:[19]

> In German law, you cannot impose restraints upon alienation, permanent or temporary, with real effects; a transferee will not be affected even if he has notice of the restraint. In French law, you cannot impose permanent restraints with either real or obligatory effects; if you do, then as in German law a transferee will be unaffected by them. You can however impose temporary restraints; and then the transferee will be affected, whether he has notice or not.

It is said in relation to English property law, that it "too stringently strikes down attempts to deprive the owner of power to dispose of his property, whether the tying up takes the form of remoteness of vesting or restrictions on the right

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[15] See Article 1212, 1218-1210 of the Code.

[16] Article 1221 of the Code.

[17] Article 1217/1 of the Code.

[18] Op. cit., Ryan, *Civil Law,* at 165.

[19] Ibid. at 166-167.

of alienation. The general action of the courts has been to remove or lessen all restraints". [20]

The reason property law is in principle opposed to restraining the alienation of ownership is evident in one case decided by the French Cour de Cassation in 1853. One person had agreed to render military service instead of another in return for a payment of money. The person in whose stead military service was to be rendered inserted a clause in the agreement which restrained the alienation of the money. The case concerned the validity of this restraining clause. In rendering its decision that the clause was invalid, the court said that the:[21]

> free disposition of goods was a maxim of public order and interest, resulting from the spirit and the text of the Code...whereas the maxim cannot yield to the will of man; and whereas no property whatever can be declared inalienable except in the cases provided by the law, in which it has seen fit to permit a formal derogation to the fundamental principle of the free disposition of goods, an attribute and an essential character of ownership; and whereas a clause against assignment...tends to modify, outside the conditions and cases determined by the law, the free circulation of goods and thus remove from commerce things which, in the present state of legislation, should remain in commerce...

English law also has regard to this maxim:

> The policy underlying the action of the English courts was precisely that of the civil law...the system of rules disallowing restraints on alienation, and the rule against perpetuities, are the two modes adopted by the common law for forwarding the circulation of property which it is its policy to promote. [22]

Likewise the Ethiopian Civil Code limits and regulates restraints on transfer of ownership. The promotion of the free circulation of property, movable or immovable, underpins the Code. Article 1204/1 of the Code, expressly provides:"[s]uch right (individual ownership) may neither be divided nor restricted except in accordance with the law. Thus owners are prohibited from multiplying rights in *rem* as the phrase "...neither be divided..." indicates. And an owner is prohibited from restricting her rights as she pleases; she can curtail her rights as an owner only in accordance with the law.

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[20] Ibid. at 167.

[21] Ibid., at 166.

[22] Ibid at 167.

anticipation -

12.3 The right of pre-emption

A right of pre-emption limits the owner's dealing with certain categories of his property. In Article 1410(2) of the Code states that:

> A right of preemption is a right deriving from an agreement whereby the owner of a thing undertakes to sell such thing in preference to a specified person, should the owner decide to sell it.

It is only effective when it relates to an immovable or a specific movable. Article 1411 stipulates that:

> An agreement for a promise of sale or right of preemption shall not constitute a restriction on ownership...nor shall it give rise to a right in rem unless it relates to an immovable or a specific movable.

Here the tem ``specific movable`` calls for explanation. A specific movable means that the movable intended to be the object of the right has to be described and specified. The movable has to be identified or singled out from the other property of the owner. If this condition is missing, the agreement will simply produce a personal contractual right, not a property right.

A right of preemption is also known as a right of refusal. It is an agreement between the owner of a thing (the grantor)and another person called the beneficiary (the grantee)in which the grantor agrees to give the grantee the right to buy the property ahead of any other prospective buyers once it is offered for sale. It is not a contract to purchase but one to sell. The grantee is not obliged to buy the property when it is offered for sale, but must be given the first chance to purchase it by the grantor. It arises because there may be many prospective buyers. The right of preemption is a preferential right to purchase the property, should the grantee wish to, ahead of any other buyer.

A right of preemption can be created by agreement or in some cases by operation of law. Pursuant to the Government Ownership of Urban Lands and Extra Houses Proclamation[23] the government retained a right of preemption on the sale of any dwelling house in cities. Under this legislation, every person wishing to sell a house was obliged to notify the authorities who would then decide if they wished to purchase the property for the state. The justification for the legislation was the enforcement of the then existing government's one person one dwelling house policy, and to prevent the accumulation of wealth in the form of urban properties. It also provided a counterbalance to the nationalization of urban land and its withdrawal from commerce by enabling private transfers to occur with the consent of the government. Yet the law had

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[23] Government Ownership of Urban Lands and Extra Houses, Proc. No 47/1975, *Neg. Gaz.* Year 34, No 41.

been observed more by breach than observance since, for example, people developed a practice of building shanties and poor quality properties and selling them informally to buyers at inflated prices. At any rate, at present, this law seems to have fallen into disuse both as a matter of policy and practice.

A second example of legal preemption is found in Article 1483 of the Code which deals with the expropriation of immovable property. The Article gives owners a right of preemption when the competent authority abandons the project that triggered the expropriation of their property. They are entitled to purchase the property back at the same price that was given to expropriate it. The right can be exercised against anyone within one year from the date the property is offered for sale. This preferential right is effective even when it has not been registered.[24] From these provisions we can infer an obligation on the authorities to advise the former owner that they have abandoned the project and the property will be offered for sale.[25] Assuming that the beneficiary has succeeded in invoking her right of preferential right, she will be obliged to pay the amount of compensation she received at the time of expropriation regardless of price fluctuations.[26]Generally, it is sound to assert that Articles 1483 and 1484 of the Code, which recognize a legal right of preemption, are incomplete and they should be supplemented by the preemption provisions of the Code. Again, in the absence of an equivalent provision in the current expropriation law of the country, Articles 1483 and 1484 of the Code should step in to fill this void.[27]

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[24] See Article 1484 of the Code

[25] Article 1483 should be read in conjunction with the preemption provisions of the Code. The joint reading of Article 1483 and the preemption provisions, for instance, will lead to the application of Article 1418/2, which would require the competent authority to inform the beneficiary of the right of preemption and its intention to sell the immovable property.

[26] Id. Article 1483/3

[27] These provisions must be read together with those of Expropriation of Landholdings for Public Purposes and Payment of Compensation Proclamation No. 455/2005. One might think that Article 8/2 of the Expropriation of Landholding Proclamation is analogous to Articles 1483 and 1484 of the Code. There are quite noticeable distinctions between the two. It might be useful to reproduce part of Article 8/2 "A rural landholder or holders of common land whose landholding has been provisionally expropriated shall, in addition to the compensation..., be paid until repossession of the land, compensation for lost income based on the average annual income secured during the five years preceding the expropriation of the land; provided..." One conspicuous distinction is that Article 8/2 deals with the restitution of land provisionally expropriated to the right holder; it does not deal with the situation of permanently expropriated land which is to be returned to the right holder as a result of the abandonment of the project. Second, Article 8/2 is

The right of preemption differs from a right of recovery. A right of preemption can arise from contract or operation of law, while a right of recovery only arises from the law. A right of recovery is exercised after property has been acquired by a third party while a right of preemption is to be exercised at the moment the property is offered for sale.

A right of preemption restricts the owner's right to sell her property to the person of her choice at any time. As already said above, under the Code, an owner of a thing has several rights, one of which is her right to sell her thing to the person of her choice at any time. However, once a right of preemption is established the owner must sell her thing to the beneficiary and within the time fixed in the agreement. When the preemption arises out of agreement it is self imposed, when preemption imposed by law it is an externally imposed limitation.

An agreement creating a right of preemption is of no effect unless made in writing and sets out the time and price for which the person may require it be performed.[28] It can only be effective for a maximum period of ten years.[29] Where it is in regard to an immovable it has no effect on third parties unless registered in the register of immovables or the court registry at the place where the immovable is situate, except as against third parties who knew or ought to have known they exist.[30] A right of preemption on movables only affects third parties who knew or ought to have known they exist.[31]

A right of preemption and a promise of sale cannot be exercised against property that has been expropriated.[32] The English version of Article 1414 contains errors. The Code supplies a corrigendum to this Article so that it should be deleted and read:

> (1) Agreements under this Section shall not be enforced where they related to property which is expropriated.
>
> (2) The beneficiary may not claim damages on the ground that the agreement could not be enforced as a result of expropriation.

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limited to cases involving rural land. The right of preemption created in the Code should also apply in cases under this proclamation where the project for which a given tract of land is tentatively expropriated is abandoned.

[28] Article 1412 of the Code.

[29] Article 1413 of the Code.

[30] Articles 1422 and 1423 of the Code.

[31] Article 1424 of the Code.

[32] Article 1414 of the Code.

The governing Amharic version contains no errors. The Amharic version of Article 1414(1) contains an additional idea (see the phrase *...nibret sile hizb tikim yetewosede endehone woim legizew yeteyaze endehone ferashoch yihonallu* [emphasis added]. There is a question as to whether the underlined words lead to the inclusion of the notion of the state requisition of movable property and the temporary taking of an immovable for a public purpose into the provision. If so then the rights are of no effect when movable property is requisitioned or provisionally expropriated.

Article 1415 of the Code states:

> (1)Unless otherwise agreed, rights granted by agreements (a right of preemption and promise of sale)... shall attach solely to the person in whose favor the agreement was made.
>
> (2)Such rights may not be alienated by such person nor shall they pass to his heirs.
>
> (3)The creditors of such person may not exercise his rights in his stead.

This article applies both to a right of preemption and a promise of sale. Both are inseparably linked to the beneficiary. They cannot be transferred either freely or for consideration during her life. Upon the beneficiary's death, the right will cease to exist; it will not pass to her heirs. The beneficiary's creditors cannot seize or exercise these rights. However, the parties to the agreement may otherwise agree. Thus they may be assigned or attached or stipulated in favor of third parties when there is a contrary agreement between the owner and the beneficiary to this effect. When a right of preemption is created by law, this provision does not apply.

The creation of a right of preemption limits how the owner may deal with the property. Article 1418(1) states that:

> (1) Unless otherwise agreed, whosoever has granted a right of preemption on a thing may create rights in rem on such thing.
>
> (2) Where he intends to sell the thing, he shall inform the beneficiary of the right of preemption of all the charges existing on such thing.
>
> (3) Where the thing is attached, the owner shall give notice thereof to the beneficiary of the right of preemption.

Unless the parties reach a contrary agreement the owner has the right to create rights in *rem* on the thing subject to right of preemption. Thus, for example she is entitled to create servitudes, usufruct or a right of occupation on the property. If she decides to sell the property she is obliged to inform to the beneficiary of that fact and of all the real rights charged against the

property. If the property is attached by creditors the person who has the right of preemption has the right to be notified and to exercise his right prior to the thing being sold by auction.

When must a right of preemption be exercised? Article 1419 provides:

> (1) A right of preemption shall be exercised within two months from the beneficiary being informed of the owner's intention to sell.
>
> (2) The parties may by agreement extend this period to one year.
>
> (3) Where a period exceeding one year has been agreed, it shall be reduced to one year.

The right must be exercised within two months from the date the owner informs the beneficiary of his intention to sell. The parties can agree to extend that time period but the time period can only be extended to a maximum of one year from the date of being informed of the seller's intention to sell.

In addition, Article 1420, states:

> (1) The beneficiary shall lose his right where he fails to exercise it within the time laid down in Article 1419.
>
> (2) The owner may thereupon freely alienate the thing.
>
> (3) He may also retain the ownership thereof.

If the beneficiary does not exercise the right within the time period specified she loses the right. Thereafter the owner may sell the property to anyone he wishes, or can choose to retain ownership.

Article 1421/ states:

> Where the thing to which the right relates is attached, the beneficiary shall lose his right where he fails to exercise it prior to such thing being sold by auction.

If the property is seized by creditors, the beneficiary has to exercise her right before the property is sold at auction. If she does not she will lose the right. The parties cannot abrogate this provision by agreement.

If the owner has failed to advise the beneficiary of the fact of attachment of immovable property and the property has been sold at auction, or failed to advise of the intention to sell the property now sold, it might be argued that Article 1425 applies to give the beneficiary the right to pursue the third party and recover the property. The article states:

> (1)Where an agreement under this Section may be set up against third parties, the beneficiary may require any third party who has acquired the ownership of an immovable in violation of the rights of the beneficiary to surrender such immovable to him on the

conditions laid down in the agreement creating the right of pre-emption.

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

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

Thus creditors seizing immovable property are well advised to ascertain the existence of valid rights of pre-emption prior to auctioning seized property.

Alternatively, where the property is movable specific property[33] or where the time limit in Article 1425 has expired, the beneficiary could bring suit against the grantor for damages occasioned by the loss of the right of presumption occasioned by the failure to give notice of attachment (or intention to sell the property).

12.4 Promise of sale

Article 1410 (1) provides that:

> A promise of sale is an agreement whereby the owner of a thing undertakes to sell such thing to a specified person should such person wish to buy it.

A promise of sale, also called an option, is a contract in which the owner of a thing agrees to sell the thing to a specified person if they want to buy it. So the contract comes into force when the beneficiary makes a decision to buy the thing subject to a promise of sale agreement. The owner has the intention to sell the property at the time when the agreement is made.

It has the same requirements as to formalities as a right of preemption. It is only effective when it relates to an immovable or a specific movable.[34] An agreement creating a promise of sale is of no effect unless made in writing and sets out the time and price for which the person may require it be performed.[35] It can only be effective for a maximum period of ten years.[36] It

[33] The English version of Article 1425 does not mention of movables. So does the corresponding Amharic version. It is sensible to extend the application of this provision to movables because Article 1425 is a follow up of Articles 1422, 1423 and 1424; Article 1425 is a logical culmination of these three articles, as evident from the numbering of these articles. One could say that this contextual construction warrants one to conclude that Article 1425 must also extend to movables.

[34] Article 1411 of the Code.

[35] Article 1412 of the Code.

has the same effect on third parties as well. Where it is in regard to an immovable it has no effect on third parties unless registered in the register of immovables or the court registry at the place where the immovable is situate, except as against third parties who knew or ought to have known they exist.[37] A promise of sale of movables only affects third parties who knew or ought to have known they exist.[38] A promise of sale is of no effect where the property is expropriated or requisitioned; thus the beneficiary, like the case of preemption, is not entitled to claim compensation on the ground that their rights could not be enforced because of expropriation proceedings.[39]

A promise of sale limits the rights of the owner. While it is in effect, the owner may not alienate the property or charge it with a right in rem. Although she may mortgage or pledge property for an amount not exceeding the price fixed in the promise of sale. Article 1416 stipulates:

> (1) Whosoever has promised to sell a thing to another may not alienate such thing nor charge it with a right in rem for so long as the promise is effective.
>
> (2) Notwithstanding the provisions of sub-article (1), the thing may be pledged or mortgaged but for an amount not exceeding the price fixed in the agreement whereby the promise was made.

Article 1417 states:

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

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[36] Article 1413 of the Code.

[37] Articles 1422 and 1423 of the Code.

[38] Article 1424 of the Code.

[39] See discussion supra regarding Article 1414. Notice that the English version of Article 1414 is quite erroneous. The Code supplies Corrigendum to this Article. The corresponding Amharic version is correct there is not typographical error, though. The Amharic version of Article 1414(1) contains an additional idea (see the phrase *...nibret sile hizb tikim yetewosede endehone woim legizew yeteyaze endehone ferashoch yihonallu* [emphasis added]. What do the underlined Amharic words mean? Do these words mean requisition that is, the tentative taking away of movables the state? This hardly seems the case because the title of the Article says "expropriation" and expropriation under the Code relates to immovables, but not to movables. The underlined Amharic phrase tends to bring into Ethiopian law of expropriation, as embodied in the Code, an alien idea since it tends to say that even a temporary taking of an immovable for public purpose, amounts to expropriation while expropriation in its strictest sense leads to deprivation of ownership. Should one extend Article 1414 to requisition by analogy?

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

As with a right of preemption the owner must notify the beneficiary of a promise of sale when the property is attached by creditors. The beneficiary must then exercise her right prior to the property being sold at auction. Again recourse may be had to the remedies found in 1425 in the case of immovable property, otherwise failure to inform should lead to extra-contractual liability pursuant to 2035 of the Code.

A right of pre-emption is ordinarily created in circumstances where the owner does not presently intend to sell the property but the prospective buyer wishes to be able to purchase the property in the event it goes on sale. Thus the agreement gives the beneficiary the first right to buy the property when and if the owner decides to sell it. The right of preemption depends upon the action of the owner to activate it. In contrast a promise of sale is ordinarily created when the owner has decided to sell his property and wishes to give a person the option to purchase it. Once granted the option to purchase depends upon the action of the beneficiary to activate it.

12.5 Restraints on assignment and attachment

Articles 1426-1443 impose limits on the assignment and attachment of property. Article 1426 states:

> (1)Provisions whereby the producer, maker, seller or owner of a corporeal chattel limit its assignment or attachment shall affect such persons only as accept them.
>
> (2)They shall not affect third parties unless they are expressly permitted by law.

As we have seen the law treats movable and immovable property differently. As this article demonstrates it is much less tolerant of restriction on the assignment or attachment of movables. Article 1426 ensures that limitations on assignment or attachment of movables only affect those who agree to them and never affect third parties unless expressly permitted by the law.[40]

[40] One good example where the Code explicitly allows a person to impose restraints on the transfer or attachment of a movable property is the case of the principle of entails of estates: Articles 929-936 of the Code. Others include donations and trusts. Trusts are expressly permitted to operate outside the parameters of this section of the Code. See Article 1443 which refers to Articles 516-544 of the Code.

In the case of immovable property, Article 1427 provides:

> The owner of an immovable may not except in the case provided by law stipulate that it may not be assigned or attached.

Legal permission is offered, in the next article which states:

> (1)Whosoever assigns an immovable may prohibit the person acquiring it from accepting such immovable or may subject any further assignment to specific conditions.
>
> (2) He may stipulate that the immovable shall not be liable to be attached in the hands of the person who acquires it.

The law cautions adjudicators, be they judges or arbitrators, to narrowly construe clauses restraining attachment or assignment of immovable property. This principle is supplied in Article 1429 which provides:

> (1)Any prohibitive or restrictive provision as defined in Art. 1428 shall be interpreted in a restrictive manner.
>
> (2)A provision prohibiting assignment shall thus not be deemed to prohibit attachment.
>
> (3)Any such provision shall only be valid on the conditions laid down in the following Articles.[41]

A sound argument can be made for the extension of Article 1429 to clauses which restrain the assignment of movable property. The law of donation section of the Code permits the donor to place a restraint on alienation in connection with donated property, be it movable or immovable.[42]

The only article in this section of the Code that applies to restraints on assignment or attachment of movables is Article 1426. All the other articles (Articles 1427-1443) apply to agreements or legal provisions restraining the assignment or attachment of immovable property.

For a prohibition clause respecting immovable property to be valid or to adversely affect third parties it must be made in writing and specify the duration of the prohibition:[43] The provision cannot endure for more than twenty years from the date the property is transferred to the new owner made subject to it (or the life of the person who acquires the property).[44] It will only affect third parties if registered in the register of immovable property where it

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[41] This sub-article is found in the Corrigenda portion of the Code.

[42] See 2460/3 of the Code, which provides, in part:"... stipulation for the return of property shall have the same effect as a provision prohibiting assignment..."

[43] Article 1430. of the Code.

[44] Article 1431 of the Code.

relates to a registered immovable or if unregistered in the registry of the court of the place where the immovable is situate.[45]

Pursuant to Articles 1433 and 1434 a court may order the attachment of an immovable in disregard of a prohibition clause when the claim relates to the payment of alimonies due to the owner of the immovable or to another person to whom the owner is bound by an obligation of maintenance or the claim arises from a criminal offense committed by the owner.[46] A court of law may authorize assignment despite the existence of prohibition clause when it is of the opinion that the interest of the owner requires that the immovable be assigned and the person who required the prohibition is dead or alive but not capable of expressing her will. The power of the court to make an order under Article 1434 can be aside by an express agreement.[47]

Who may invoke restraints on attachment, against whom, and under what conditions? Articles 1435-1439 answer these questions. In the first place, the current owner of an immovable subject to restraint of attachment can invoke the clause against creditors. It must be done before the property is sold at auction. And where she failed to advise the creditors of the prohibition in time, she may be liable for all costs associated with the attachment. An anticipated waiver of the prohibition is of no effect and does not bar enforcement of the clause.[48]

The previous owner or her designate is allowed to invoke the clause against creditors when the current owner does not propose to do it herself. The owner must be notified by the current owner and the creditor.[49] Once given notice the right to invoke the clause must be exercised before the property is sold at auction or it is lost. If not informed of the attachment she may exercise her right within two years of the sale of the immovable by auction. This period of two years cannot be extended.[50]

The party enforcing a prohibition on attachment has the right to require the person who obtains the property at the auction to transfer the immovable to her. In turn she is required to pay the third party the price indicated in the prohibition clause or where no price is fixed in it, the price that the third party paid to acquire the property. The lawful enrichment provisions apply and

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[45] Article 1432 of the Code and see the Corrigenda for changes to this Article.

[46] Article 1433 of the Code

[47] Article 1434.of the Code.

[48] Article 1435 of the Code.

[49] Article1436 of the Code.

[50] Article 1437 of the Code.

enable an alteration to the compensation as a result of the deterioration of or improvements to the immovable while in the hands of the purchaser at auction.[51]

If the third party purchaser assigns the immovable to another person it cannot be recovered unless the person who obtained it obtained gratuitously or with knowledge of the prohibition. Should a property be recovered in this circumstance the assignee stands in the shoes of the person who purchased at auction. [52]

Prohibitions against assignment must be enforced within two years from the date of the prohibited assigned and in every event within the time period specified in Article 1431. They may only be enforced by the original owner of the property or his appointee. They cannot be invoked by the owner who has assigned in violation of the prohibition. It grants the person who stipulated it a right of preemption with respect to the property on the conditions as to time and price or otherwise as are laid down in the prohibition. Article 1440 states:

> (1)The owner who has assigned an immovable in violation of a provision prohibiting assignment may not invoke such provision to the detriment of the buyer.
>
> (2)The said provision may only be enforced by the person having stipulated the prohibition or by a third party appointed by such person to ensure compliance with such provision.

Article 1441 provides:

> A provision prohibiting assignment may not be enforced except within two years from the assignment of the immovable and prior to the expiry of the period fixed in Article 1431

Article 1442:

> (1) The person who stipulated the prohibition or such other person as is entitled to do so under the instrument providing for prohibition may, within the period fixed in Article 1441, exercise a right of pre-emption on the immovable on the conditions laid down in the instrument providing for prohibition.
>
> (2) Nothing shall affect the right of the purchaser to bring an action against the person from whom he bought the immovable.

Assuming that the instrument that provides for prohibition of assignment is silent about the conditions of restitution such as price, the Articles of the Code

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[51] Article 1438/2 of the Code.

[52] Ibid., Article 1439 of the Code.

governing rights of preemption (in particular Article 1425) should apply. The purchaser retains a right to sue the person he bought the property from for damages occasioned as a result of the enforcement of the prohibitive clause.

The right of preemption against immovables will bind all third parties in the event it complies with the formalities required under the Code. Thus it will affect subsequent owners providing that the beneficiary exercises his rights within the prescribed time periods. Adversely affected third parties retain their right to bring an action against the person from whom they acquired the property.

It may also be possible to invoke of Article 1439, which allows the beneficiary to go against a subsequent owner in the case of transfer of an immovable in violation of attachment prohibition clause. It would be necessary to satisfy the court that this provision applies to violation of prohibitions on assignments as well as attachment. Ultimately it is wise to recall that courts are directed to interpret prohibitive provisions in a restrictive manner under Article 1429. Restraint provisions are exceptions to general property rules and as such should only apply where the law expressly permits them to.

12.6 Conclusion

The law restrains the imposition of limitations on the exercise of ownership rights to enable the free movement of property in the economy. This chapter has discussed four permitted types of limitations: the rights of preemption and promise of sale and prohibitions on assignment and on attachment.

12.7 Review questions

1. Ato Birru owns a car. He enters into a written agreement with W/rt Birkinesh to sell his car to her for Birr 45, 000.00 if he decides to sell it within five years. What if any kind of right has been created. Can W/rt Birkinesh sell her right to another? Can her creditors attach this right? After three years Ato Birru advises W/rt Birkinesh that his creditors have attached the car and propose to sell it at auction. She takes no action and the car is sold to Ato Abebe. Can she recover the car from Ato Abebe? Does she have any claim against Ato Birru?

2. Ato Birru owns a car and wishes to sell it. He promises to sell it to W/rt Birkinesh on July 1 of this year. In the interim Ato Birru borrows money from Ato Abebe equivalent to the agreed sale price in the promise to sell. On June 15 Ato Abebe attaches the car to satisfy the debt. What is Ato Birru's obligation to W/rt Birkinesh? Does she have any claim against the car?

3. Ato Birru owns a car. He creates a right of preemption in favor of W/rt Birkinesh. Ato Birru sells the car to Ato Abebe and does not inform W/rt Birkinesh of his intention to sell the car. Can W/rt Birkinesh claim the car from Ato C? If she wants to enforce the right of preemption what must she do and when must she do it? What if anything is the consequence to Ato Birru of his actions?

4. Is it possible to establish right of preemption and promise of sale at the same time on the same object? If so, what conditions would be necessary to make it happen?

5. Suppose two persons hold a right of preemption over the same subject matter and at the same time. The property is about to be offered for sale, how would you resolve the matter?

6. Which one of the following is false/true?

   a. Promise of sale is a self-imposed limitation on one`s property rights.

   b. Right of preemption may emanate either from agreement or law.

   c. A promise of sale is a property right that may be inherited.

7. What are the distinctions between prohibitions on attachment and on assignment?

8. In one case,[53] the first respondent agreed with the appellant to enter into a definite agreement of sale of unknown amount of land, which the former owned by virtue of inheritance jointly with his brother and sister (the second and third respondents, respectively). He agreed to persuade his brother and sister to join in the agreement. His brother signed the agreement his sister did not. During the course of the ligation, which started at the High Court and ended in the Imperial Supreme Court, the land in dispute was transferred to a third party. Does this fact pattern give rise to a promise of sale as envisaged in the Code? Why? Why not? Assuming that the facts could lead to the creation of a promise of sale is it possible for the sister to invoke it to recover the property, if not who could?

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[53] *Tsigha Wayne Tasfa Mariam v. Tadesse Ambaye et al,* (Imperial Sup. Ct. Div. A) 1:2 *Eth. J.L 171* (1964).

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Chapter 13: Expropriation

13.1 Introduction

The involuntary loss of ownership or possession of property can occur in a number of ways. We have discussed some of those in earlier chapters. They include situations where the property becomes an intrinsic element or accessory to another property and when property is seized and sold by creditors.

The state controls private property in a number of ways. It imposes positive obligations on citizens regarding their private property, thus motor vehicles have to be licensed and registered to operate on roads and shops can only be open at certain hours. It imposes restriction on private property as well, thus only certain property can be imported and exported, inheritance is regulated, property that is a proceed of crime can be seized, dangerous properties can be condemned and demolished.[1] It imposes a legal regime that governs property. It determines that some property is collectively owned, other property is public property and yet other property can be privately owned. It determines who may own property within state boundaries. It imposes and collects taxes on businesses, upon salaries, and other forms of private property.

All states from time to time need to acquire property to enable them to perform their functions and serve the public interest. One way which they do this is by expropriating and requisitioning property from individual private owners. The law seeks to provide private owners with accessible, precise and clear rules for the taking of land by the state. It is a general principle of expropriation law that the taking of property by the state should be governed by the rule of law and that the law should provide adequate safeguards against arbitrary taking of property. It is also understood that when the state takes property the owner should be adequately compensated for the loss.

This final chapter deals with expropriation or the state seizure of immovable property. In it we will explore the various proclamations which have been passed in Ethiopia to regulate expropriation.

13.2 Distinguishing expropriation from related concepts

Expropriation differs from ideological concepts like nationalization, policies like land redistribution and the exercise of the powers of taxation and the police power of the state. It is also different from the requisition of property.

[1] Ali Riza Coban, Protection of Property Rights within the European Convention on Human Rights, (Aldershot, England: Ashgate Publishing, 2004) at 180-183.

Understanding these differences will help us appreciate the nature of expropriation itself.

Nationalization is more often than not linked to Marxist ideology even if capitalist states do also undertake nationalization.[2] Socialist ideology promotes state ownership of the means of production on behalf of the people, in order to redistribute wealth from the rich to the poor. However even non Marxist states may from time to time nationalize some industries or property rights in the public interest. Nationalization of property results in the transfer of ownership to the state. At least theoretically nationalization is carried out without compensation since the idea is to take away property from wealthy people and since it is one method of minimizing wealth disparity between the rich and the poor in a society.[3] However, it can happen with or without compensation. Regardless of ideology every state exercises its power to expropriate property; in fact, it is said that expropriation is inherent in the nature of the state. Nationalization only affects privately owned property whereas national governments can and do expropriate properties held by government bodies as well as privately owned property. For example the federal government may expropriate property held by a municipal government. Nationalization has its eye on private property, not on property already in the hands of the public.

Expropriation and taxation are specific expressions of the sovereign powers of states. Expropriation puts the state and the individual whose property is expropriated in a debtor-creditor relationship since the individual is entitled to compensation.[4] In relation to taxation, generally, there is no such relationship; the individual may not expect any direct reward in return for the tax she must pay. Public finance writers say that the state is duty bound to give something in return for the tax it collects from its citizens generally. This duty of the state is related to the provision of public goods and services. Yet the distinction is still maintained since the benefit from taxation is indirect and at times remote. Tax burdens are there to meet the state need for revenues so that it may perform its many functions.[5] Expropriation asks a specific person to shoulder the burden of the state's extraordinary need to meet a particular public interest by parting with her property, her use and enjoyment of that property and her plans and dreams for it. It is thus said the person whose property is

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[2] Ibid, at 79 ff.

[3] Ibid.

[4] Ibid., at 81-82.

[5] Taddese Lencho, *The Ethiopian Tax System* (on file with the author: unpublished Article, 2010) at 9-10.

taken by the state should not be made to shoulder more burden than necessary and that is why expropriation should be preceded by compensation. A person is taxed on what she owns and what she earns while expropriation results in a loss of property, *rights in rem* and sometimes *rights in personam.*

Expropriation differs from state confiscation of property. The state may confiscate property from individuals convicted of crime.[6] The property may be forfeited as immorally and unlawfully obtained proceed of crime. When confiscated it becomes the property of the state. While expropriation also results in the transfer of private property to the state it does not imply wrongdoing on the part of the individual who is deprived of her property; in fact, the property of the most innocent or law-abiding citizen may be subject to expropriation.

Expropriation differs from the police power of the state.[7] In the case of the regulatory power of the state, the state imposes limitations on property and positive obligations on property owners, and takes actions which may result in the loss or destruction of private property for the public good.[8] For example, when the state destroys infested buildings that pose a public health hazard or destroys contaminated foodstuffs it may adversely affect the property rights of persons. However the law may provide no remedy in these cases. Some acts of interference with private property by the units of the state may look like expropriation particularly where, for example regulatory action taken by the state has the effect of substantially undermining the economic value or use of the property of private persons.[9] The determination of when the exercise of regulatory power of the state over private property becomes expropriation is a thorny issue in many jurisdictions.

In the Ethiopian context, expropriation should also be distinguished from land redistribution. All land is owned by the state in Ethiopia. People and businesses are given the right to use land. The redistribution of land is an exclusively rural phenomenon. Land redistribution was introduced in 1975. Its goal is the redistribution of wealth and achievement of equity among land users. The redistribution of rural land is seen as one way to fulfill the promise that every Ethiopian willing to earn her livelihood from farming will have access to farmland free of charge.[10] Land redistribution is compulsory where it relates to

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[6] See Articles 98-100 and 140 of the Criminal Code 2004.

[7] Op.cit. Coban at 113-118.

[8] Ibid.

[9] Ibid. and see also Article 1485 of the Code which enables indirect expropriation.

[10] Article 40/4 of the FDRE Constitution provides that all peasants have a right to obtain land without payment and be protected from eviction from possession. Article 40/5

irrigable land and in principle consensual in relation to rain-fed land.[11] In some regional states, in the case of irrigable land redistribution, the beneficiary farmer is to compensate the affected farmer.[12] The compensation relates to the property on the land and permanent improvements made to the land, not for the land. Expropriation is the acquisition of any private property. The power to expropriate seems to be as old as the Ethiopian state itself. It allows the state to, for a public purpose, to take away a citizen's right to own private property. While compensation is payable in both cases, it is compensation for much different losses and in the case of land redistribution the beneficiary may be required to pay compensation, not the state. The state pays compensation in cases of expropriation.

Expropriation differs from requisition.[13] Both are extraordinary institutions invoked for public purposes.[14] Requisition may extend to movables as well as immovables and personal services,[15] it can extend to the entire property or merely the rights to use the property. Generally expropriation is directed to the acquisition of the whole property in an immovable.[16] The procedures in place for requisition tend to be more expeditious and less cumbersome with the compensation provided after the property has been taken, whereas expropriation proceedings are more leisurely and complex and generally result in advance payment of compensation. The prime difference between them, argues Wise, is the degree of urgency faced by the state:

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gives pastoralists the right to free land for grazing and cultivation and not to be displaced from their own lands. Both provisions are to be implemented in a manner specified by law. See also Article 5/1 of the Federal Rural Land Administration and Land Use Proclamation.

[11] Article 9 of the Federal Rural Land Administration and Land Use Proclamation.

[12] See Article 14 of the Oromia Rural Land Administration and Use Proclamation No. 130/2007, *Megeleta Oromia*, Year 15th No. 12. See also Article 8 of the Revised Amhara National Regional State Rural Land Administration and Use Determination Proclamation No/133, 2006, *Zikre Hig*, Year 11, No. 18 which does not indicate as to who shall pay compensation to a farmer whose land has been taken as a result of land redistribution, which is stated in this law as an exception.

[13] Government power to requisition and issue requisition orders is referenced in Articles 1319/2, 3175, 3195, 3252, 3257, 3258, 3260, 3266, 3278 and 3287 of the Code.

[14] Maurice K. Wise, "Juridical Nature of Requisition", 6 *U. Toronto L.J.* 58 (1945-1946) at 77.

[15] By way of example see Article 3195 of the Code which allow the requisition of public service personnel to end a strike, and Article 3266 which speaks to issuing requisition orders to supply supplementary services.

[16] Op.cit. Wise, at 79.

> Both satisfy a public interest but there is a broad difference of intensity and degree. Expropriation provides for lasting needs with a character of utility; requisition provides for transitory needs with a character of urgent necessity. Imperative necessity brooks no delay; it is better that the individual should bear a restriction of his rights even in the few cases where it could have been avoided than that the existence of the state should be endangered by many delays. [17]

Thus while they are theoretically similar they are different from each other and it is wrong to refer to requisition as a species of expropriation. They are each different ways of mandating contributions to the state in the public interest.[18]

13.3 The origin and nature of the state's power to expropriate property

What is the source of state power to expropriate private property? The jurisprudence reveals two primary theories for the source of this power. The first that it is inherent to the existence of the state and the second is that it is a power that the state reserved to itself when it permitted private property to exist.

The inherent power theory considers expropriation as an inherent attribute of the state. By the term ``inherent`` the approach means the authority to expropriate private property is intrinsic to state power. To this approach, the power to expropriate emerged with the birth of the state itself. The positive law simply recognizes and gives effect to this innate power of the state. This approach admits that the law may impose limits on the state's exercise of its power to take property without the consent of its owner.[19] Hence, in this connection, it is asserted:[20]

> Government has the sovereign power to enact any regulation affecting persons or property located within its border, subject to such limitations as might be imposed by its constitution; the source of power of expropriation is equated to similar powers of the state such as police powers and power to levy taxes, which are inherent

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[17] Ibid, at 80.

[18] Ibid, at 85.

[19] See Daniel W/Gebriel ``Compensation during Expropriation`` cited below at 98-100. For discussion about the power of the state to take property, see W.B. Stoebuck, A General Theory of Eminent Domain, *47Wash. L. Rev.4* (1972).

[20] Daniel W/Gebriel, "Compensation during Expropriation in Land Law and Policy in Ethiopia since 1991" in Muradu Abdo (ed), *Ethiopian Business Law Series Vol. III* (2009) at 98-100.

powers founded in the primary duty of government to serve the common needs and advance the general welfare of the people.

The reserved power approach is a less favored theory in contemporary society. At heart this argues that:

> ...a citizen`s possession of property was dependent on a grant by the sovereign and his continued enjoyment of it was subject to an implied reservation that the state might retake the property at any time for a public purpose. In this view, an individual`s ownership of property is limited to a mere possessory right, at least with respect to the government. [21]
>
> The right to hold property is, therefore, subject to a tacit agreement between the citizen and the sovereign that the property might be reclaimed by the latter to meet public necessity, and the citizen holds his land with such awareness and cannot complain of injustice when it is lawfully exercised.[22]

The reserved power approach has been criticized because it gives unrestrained power to the state. It undermines the concept of private property and allows a state to refuse to pay compensation and shove aside procedural guarantees that it is agreed must be observed in the course of expropriation.[23]

Under either theory it is clear that the state cannot be deprived of its power to expropriate. If the protection of private property were supreme there would be as many absolute sovereigns as the number of persons residing in the territory of the state. This would be as good as having no sovereign at all. The state would then find it difficult, if not impossible; to access the resources needed to ensure the public good is met. However the exercise of that power should not be arbitrary but governed by the rule of law and balanced against the individual's rights to private property.

This is reflected in the constitutional law of Ethiopia. The power of the Ethiopian government to expropriate private property is enshrined in the Constitution.[24] Article 40/1 of the Constitution provides the right of every Ethiopian citizen to own private property. Private property is defined for the purposes of Article 40 to mean a "tangible or intangible product" which has value and is produce by the labor, creativity, enterprise or capital of

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[21] Ibid., Daniel W/Gebriel, at 197

[22] Ibid., at 198.

[23] Ibid.at 198. See also op.cit. Stoebuck.

[24] This is also the case in Italy and France and many other jurisdictions. Op.cit. Wise, at 76-77

individuals, legal persons, associations and communities empowered to hold property in common. Article 40/3 removes rural and urban land and all natural resources from private property. Article 40/7 gives the builder full rights to immovable property he builds and to permanent improvements he brings about on land by his labor and capital. Article 40/8 states:

> Without prejudice to the right to private property, the government may expropriate private property for public purposes subject to payment in advance of compensation commensurate to the value of the property.

The power to expropriate given in the Constitution is to be exercised in accordance with the legislative framework. That framework reflects the limitations imposed upon the power by the Constitution. That is the government must respect the right to private property, must have a valid public interest to expropriate and must pay compensation in advance of the expropriation and the compensation must be "commensurate to the value of the property".

13.4 What is expropriation?

Generally the Expropriation of Landholdings for Public Purposes and Payment of Compensation Proclamation No. 455/2005 (hereinafter the "Expropriation Proclamation") and its accompanying regulations govern expropriation in Ethiopia today. The provisions of the Code that apply to expropriation, so long as they are not inconsistent with the Expropriation Proclamation, continue to apply and may be resorted to assist in interpreting or addressing lacunae in the Expropriation Proclamation.[25]

The Expropriation Proclamation does not define expropriation. The preamble states "the government needs to use land for development works it carries out for public services" and that the federal government has deemed it necessary to" regulate in detail, based on the requirement of advance payment of compensation for private property expropriated for public purpose" provided under Article 40(8) of the FDRE Constitution. Article 1460 of the Code provides that: "Expropriation proceedings are proceedings whereby the competent authorities compel an owner to surrender the ownership of an immovable required by such authorities for the public purposes".

We need to read this definitional article of the Code to reflect the language and the spirit of current laws of Ethiopia. One adaption that needs to be made is to read the word "owner" as "landholder who owns property situated upon

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[25] See Article 15/2 of the Expropriation Proclamation.

the land". This is in accord with the relevant provisions of the Constitution and Article 2 of the Expropriation Proclamation. The word landholder must be understood to mean a person who has lawful possession of the land but rights less than ownership in it. Again this is in accord with the law. However the owner of immovables other than land is also entitled to compensation and this too must also be understood by our definition. And finally both the Constitution and the Expropriation law make clear that any taking of private land for a public purpose is subject to a requirement of advance payment of compensation. Thus we propose that Article 1460 should read: Expropriation proceedings are proceedings whereby the competent authorities, subject to the requirement of advance payment of compensation, compel a landholder who owns property situated upon the land subject to expropriation to surrender his private property rights in the land and property situated upon it to such authorities for the public purposes.[26]

13.4.1 Who may exercise the power to expropriate property?

Only competent authorities may expropriate private property. We ascertain the competency of an authority by reference to its establishing statute or other statutes. For instance, the proclamation re-establishing Ethiopian Road Authority enables the road authority to expropriate for the purpose of construction and maintenance of highways, storage of equipment and other services.[27] Analogous power is given to the Ethiopian Electric Agency.[28] Article

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[26] See also Article 2/18 of the Rural Land Administration and Use Proclamation of the Amhara National Regional State, Proc. No. 133, 2006, *Zikre Hig*, Year 11, No. 18. It applies only to the taking of rural land and in that context defines expropriation as: 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.

[27] Sub-articles 6/ 17 & 6/18 of the Ethiopian Road Authority Reestablishment Proclamation No, 80/ 1997, *Fed. Neg. Gaz.* No 43 Year 3rd, state that the Authority shall: 17) determine the extent of land required for its activities in the adjacency as well as surrounding of highways, and the conditions of use of such land by others; 18) use, free of charge, land and such other resources and quarry substances required for the purpose of construction and maintenance of highways, camp (sic), storage of equipment and other required services; provided, however, that it shall pay compensation in accordance with the law for properties on the land it uses.

[28] The Electricity Proclamation, Proc. 86, 1997, *Fed. Neg. Gaz.* No 50 Year 3rd. Article 20 provides: 1) A licensee may enter land or premises in the holding of any person and carry out activities required to connect, repair, upgrade, inspect or remove electrical lines. 2) The licensee may have the right to cut and lop trees or to remove crops, plants and other things that obstruct the construction or operation of electrical

3/1 of the Expropriation Proclamation states that woreda or urban administration has the power to expropriate rural or urban lands. An urban administration is defined in Article 2 to be an organ to which urban administrative powers have been given or delegated. In urban land areas the power to expropriate property resides in sub-cities. As more often than not expropriation is an aspect of land management, the empowerment of woreda administrations to undertake expropriation is consistent with the FDRE Constitution, which assigns the power to administer land to the national regional states.[29]

Sometimes, private individuals (usually business entities) may carry out expropriation proceedings. For this to take place there must be concession between the relevant authority and the individual. A concession is an agreement concluded between state and a commercial entity wherein the former delegates the latter the power to undertake an expropriation. The concession secured by such person must expressly enable her it to carry out expropriation. To this effect, Article 1462 of the Code stipulates that: "Persons who have been granted concessions of whatever nature by the competent authorities may not use expropriation proceedings unless they are entitled to do so under the concession". Additionally two recent statutes authorize private persons licensed to provide telecommunication or electricity services to undertake expropriation.[30]

Prior to the passage of the Expropriation Proclamation there were multiplicities of municipal actors authorized to carry out expropriation. The Expropriation Proclamation has remedied that problem to an extent. Article 5/1 provides that the implementing agency is responsible to prepare "detail data pertaining to the land needed for its works and send same...to the organs empowered to expropriate land...and obtain permission from them; and pay

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works or may cause danger to electrical lines 3) Where the licensee desires to act under sub-Article (I) or (2) of this Article, he shall notify the holder of such land in advance thereof. Article21. The licensee shall pay compensation, in accordance with relevant law, for damages caused to the property of a land holder while acting under Article 20 herein. Article 22: Where public interest so justifies, a licensee may be made the beneficiary of an expropriation measure, taken in accordance with the law, over private land holdings. See also Article 21 of the Telecommunication Proclamation No. 49/1996, Proc, *Fed. Neg. Gaz.* No. 5, Year 3rd; (as amended by the Telecommunications (Amendment) Proclamation No.281, 2002, *Fed. Neg. Gaz.* No. 28 Year 8).

[29] See Article 52/2/d of the FDRE Constitution.

[30] Article 22 of the Electricity Proclamation and Article 21 of the Telecommunications Proclamation.

compensation...." The implementing agency is defined in Article 2/7 to mean a "government agency or public enterprise undertaking or causing to be undertaken development works with its own force or through contractors". In this rearrangement, the woreda administration, receives plans from the implementing agency, approves those plans, expropriates and furnishes the required land to the implementing agency. This approach may contribute to a more uniform implementation of the expropriation laws of the country. One major benefit is that the implementing agency is able to concentrate on the development work it is undertaking and is not necessarily encumbered with the additional responsibility of undertaking the expropriation.

13.4.2 Types of expropriation

The Code describes four types of expropriation, complete, partial, conditional and indirect. Complete expropriation is a taking of the whole property. Partial expropriation is described in Article 1469. Where only part of a building is expropriated the owner and usufructuary is entitled to demand the whole thing be expropriated. Where only part of the land is expropriated but what is left is rendered useless the owner and usufructuary may demand it all be expropriated. Conditional expropriation is described in Article 1480 of the Code as an expropriation for the purpose of determining the cost of the project.

The Code also enables something it calls indirect expropriation in Article 1485. This Article enables competent authorities to set up installations or construct works on private land without expropriating the land, if the installations or work do not seriously impair the rights of the owner or notably reduce the value of the immovable. Actions which would impair a right on a dwelling house are prohibited.

Where the state takes action that has the effect of impairing the rights of the landholder to the land or property upon it, or which notably reduces the value of the property it is akin to expropriation. Article 1485-1488 of the Code make it clear that indirect expropriation is an exception to the rule and only allowed when it will result in minimal interfere with the property, for a short time. It allows the competent authority to act without following the cumbersome and lengthy procedures required to effect an expropriation. Compensation may be sought by the injured property owner but there is no requirement to pay compensation before beginning the work. More often than not, indirect expropriation is carried out by the state authorities or their agents in constructing works or setting up permanent installations (e.g. underground pipes, aerial lines, poles or pylons) on land privately held. The Code authorizes the authorities to invoke indirect expropriation in case where there are public

works which have to be executed within less than one month and where such works can be carried out without impairing the normal exploitation of the affected immovable. This provision reflects the reality that sometimes, the state must urgently undertake a public work on private property for such a short period of time that compliance with normal expropriation procedures might not even make sense. In which cases the public interest clearly outweighs the interests of the private property holder.

However this provision should be narrowly construed to prevent the state from depriving private property owners of their right to use their property as they see fit without providing compensation or following proper procedures. The general principle laid down in Article 1485 of the Code is that indirect expropriation shall not seriously impair the rights of the owner or notably reduce the value of the immovable. Thus where the actions of the state do seriously impair the rights of the owner or notably reduce the value of the property the state is required to adhere to the law respecting expropriation and directly expropriate the property. The determination of what constitutes serious impairment of the rights of the owner or notable reduction of the value of the immovable may in many cases be a matter of considerable controversy.

These provisions are not replicated in the Expropriation Proclamation. The proclamation describes two types of expropriation in Article 8: permanent and provisional. It appears that a provisional expropriation is one made with the expectation that the landholder will eventually repossess the land.[31] The law is silent on how the landholder is dispossessed and regains possession of the land in that case. In the Code, when works are abandoned the owner has a right of preemption when the land is sold by the expropriating authority.[32] Clearly this is not an option in the current land regime in Ethiopia. The land will not be made available for sale but will be reallocated. Perhaps Article 1484 might apply mutatis mutandi to grant the landholder the right of first refusal to a regranting of the land. More likely the original expropriation order would be styled as a provisional order containing words to the effect that the possession of the land is taken by the competent authority only until such time as the work is complete at which point it is to be returned to the landholder.

In addition to compensation for loss of property on the land occasioned by the provisional expropriation a rural landholder who is the subject of a provisional expropriation is entitled to displacement compensation "until repossession of the land" for lost income. The proclamation also envisages a mixture of compensation in cash and kind, when it states that reduced displacement

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[31] See Article 8/2 of the Expropriation Proclamation.

[32] See Article 1484 of the Code.

compensation is payable when the *woreda* administration confirms that a substitute land which can be easily ploughed and generate comparable income is available to the land holder.[33]

13.4.3 What can be expropriated?

As we have already discussed the power to expropriate in Article 40/8 of the FDRE Constitution is limited to private property. Private property is defined in Article 40/2 of the FDRE Constitution as "any tangible or intangible product" produced by "labour, creativity, enterprise or capital". It includes all property except land and natural resources by virtue of Article 40/3. Consequently, under the Constitution, the government can expropriate corporeal and incorporeal property. The latter would include business interests, patents, copyrights and the like. It is important to note that the Expropriation Proclamation does not give a woreda or urban administration power to expropriate every type of private property. It is restricted to the taking of land and private property upon the land. For example, the taking of copyright and patent through compulsory license is governed by the Ethiopian intellectual property laws. Competent authorities may undertake an activity similar to expropriation in relation to copyright, which is done via compulsory license scheme.[34] A similar arrangement is envisaged in respect of patent.[35]

Under Articles 1460-1488 of the Code, expropriation is used to compel to surrender ownership of immovables and to acquire or extinguish *in rem* rights on an immovable and to terminate lease contracts (an *in personam* right) affecting immovable property belonging to public authorities. These rights in rem include the right of recovery, of right of preemption, of mortgage, promise of sale, of usufruct, and of servitude. Thus expropriation proceedings may be used to take ownership of private immovable property, or to acquire or

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[33] Article 8/3 of the Expropriation Proclamation. It is only equivalent to the one year's average annual income. If no land it is available the landholder will receive compensation for lost average income in each year until possession is returned to a maximum of ten years income.

[34] Pursuant to Article 17 of the Copyrights and Neighboring Rights Protection Proclamation No. 410/2004, Fed. Neg. Gaz. No. 55 Year 10th the Ethiopian Intellectual Property Office is authorized to grant over the objection of the copyright holder, her heirs and legatees a license to authorize the reproduction, translation or broadcasting (but not alteration) of a published work, subject to payment of compensation as determined in the regulations.

[35] See Articles 29-38 of the Proclamation Concerning Inventions, Minor Inventions and Industrial Designs, No. 123, 1995, *Neg. Gaz.* Year 54th No 25.

extinguish in rem or select in personam rights related to an immovable property.

The Expropriation Proclamation deals specifically with land leases and provides in Article 3/2 that land lease holdings may not be expropriated unless the lessee has failed to honor the obligations assumed under the Lease Proclamation, or the land is required for development works undertaken by the government. Thus the expropriation procedures may be invoked to terminate a land lease for non-compliance with obligations even where no development works are planned.

The Expropriation Proclamation lists the following as potentially subject to expropriation: the land over or under which utility lines pass,[36] land holdings and land lease holdings, property situated on the land,[37] permanent improvements to such land.[38]

The Expropriation Proclamation does not view the taking of undeveloped land from a landholder as an expropriation. Thus if, for example, the state requires land held by a landholder, and that land does not contain any property belonging to the landholder or improvements made by her, then no compensation is payable and therefore no expropriation required. The lost right to use and enjoy the property is not compensable under the proclamation, nor are any other rights less than ownership. The proclamation assumes that the state is merely retaking public land in this case, not taking private property. Its scope is limited to the taking of tangible immovable property belonging to the landholder situated on the land. This is a rather materialist (object-based) notion of property.

The proclamation does not address the possibility of taking movable property. Cases of movable property are governed by the expropriation provisions of the Code, i.e., Articles 1460-1488. Although these provisions do not direct themselves to the potential to expropriate movable property the FDRE Constitution does permit the state to expropriate any sort of private property encompassed within the definition of private property found therein.

13.4.4 Who may be affected by expropriation?

This query is relevant to determining who has a right to compensation in the event of expropriation and identifying interested parties should the competent authority be obliged to undertake pre-expropriation consultations. Correct

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[36] See Article 2/6 and Article 6 of the Expropriation Proclamation.

[37] Articles 2/1 and 3/2 of the Expropriation Proclamation.

[38] Article 7/1 of the Expropriation Proclamation.

identification of the affected parties will minimize post-expropriation litigation against the authority or person who receives compensation

The Expropriation Proclamation provides that compensation is paid to a person for "his property situated on his expropriated landholding".[39] The power is to expropriate urban and rural landholdings and compensation is paid for losses occasioned by that expropriation.[40] The person referenced is the landholder. A landholder is a person who has lawful possession of the land to be expropriated and who owns property on it. As such it may include a usufructuary of the landholder. It includes any organ that has legal personality particularly individuals, government or private organizations.[41] We often tend to think that expropriation is invoked by the state to take property only from private persons. But expropriation may be invoked to take property from the private domain of the state, which means property held by various sub-divisions of the state in their capacity as a private person. Under Article 1444/1 of the Code, property belonging to the state or administrative bodies will be governed by rules applicable to private property (including expropriation rules) if they do not fall within the scope of the public domain.[42]

Compensation is also payable to a person whose land lease has been terminated early pursuant to the Article 3/1 of the Expropriation Proclamation.

It might be correct to state that the *woreda* administration may take property from any person. But the proclamation does not state the matter in this broad manner. For example, the Expropriation Proclamation does not say anything about the possibility of compensating persons other than the landholder or land lease holder where they own immovable property situated on the land. In that event they would have to claim through the holder or they should resort to the relevant provisions of the Code to claim compensation on their own.

13.5 Limits on the use of expropriation

Expropriation is a forced taking of property without the consent of the owner. The state unilaterally takes private property for public purposes subject to a requirement to pay the owner compensation. In some countries expropriation is called a compulsory sale. Should a person agree to transfer her property to the state for any purpose, she may do so voluntarily by way of donation, sale, exchange, or otherwise as she sees fit. In that case an expropriation is not

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[39] Article 2/1 of the Expropriation Proclamation.

[40] Article 3/1 of the Expropriation Proclamation.

[41] Article 2/3 and Article 5/2 of the Expropriation Proclamation.

[42] See Chapter 5 for a discussion about the nature of property in the public domain.

required. However if she does not want to part with it and the state requires it for a valid public purpose it may take it from her using force if required.[43] However the state's power to expropriate is not left unrestrained.

There are essentially three limits on the expropriation power of the state. These limitations are: public purpose, compliance with lawful procedure and compensation.[44] All three are explicit in Article 40 of the FDRE Constitution.

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[43] See for example Article 4/5 of the Expropriation Proclamation which allows the competent authority to use police force to take over land that the landholder refuses to handover.

[44] Past laws which dealt with expropriation more or less endorsed these conditions. See The Fetha Nagast (Law of the King) which provided: "Do not take the wealth of anyone by violence; do not buy from him by force, either openly or secretly in order not to be afflicted by God in this world and in the future". Op. Cit, Richard Pankhrust, which reproduces, the 1907 Urban Land Decree of Emperor Menelik II. This decree in Parts 25 and 27 empowerd the state to expropriate urban land and houses `` for urban welfare purposes,`` subject to payment of in kind or cash compensation as valued by experts. See also the following provisions of the 1931 Constitution of Ethiopia. Article 27: Except in cases of public utility determined by law, no-one shall be entitled to deprive an Ethiopian subject of the movable or landed property which he holds. Article 29: The provisions of the present Chapter (Chapter III) shall in no way limit the measures which the Emperor, by virtue of his supreme power, may take in the event of war or of public misfortune menacing the interest of the nation. Article 76: It is determined by law that land and property hitherto in the hands of the Emperor and of members of the Imperial family, and all land which they may acquire in future by purchase like any ordinary citizen, shall, subject to the observance of the established regulations concerning land, be confirmed to them and shall be heritable by their descendants. Article 77: It is determined by law that similarly princes and territorial governors and all other Ethiopian citizens, who commit any sort of crime, shall be punished according to the provisions of the law, but landed property which they have hitherto held, or which they may acquire in future by purchase, shall not be confiscated. Article 78: Nevertheless, if it is necessary for the Government to construct on another person`s land installations for the public welfare, such as forts, roads, markets, churches, schools, hospitals, townships or any of this kind, it is determined by law that if the deliberative Chambers have declared it necessary, the land owner shall be given a fair price as determined by law, or, subject to the landowner`s consent to surrender the property; but except in a case of this kind where the public welfare is involved, a person`s land may not be taken from his with a view to benefiting an individual.

The Eritrean Constitution as ratified on 11th of September 1952 stated in Article 22(c) All residents in Eritrea have the right to own and dispose of property. No one shall be deprived of property, including contractual rights, without due process of law and without payment of just and effective compensation. Article 37: property rights: Property rights and rights of real nature, including those of state lands, established

Article 40/1 grants every Ethiopian citizen the right to ownership of private property unless prescribed by law on account of public interest. Article 40/8 states:" ...the government may expropriate private property for public purposes subject to payment in advance of compensation commensurate to the value of the property". The Constitution grants the power to expropriate

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by custom or lad and exercised in Eritrea by tribes, the various population groups and by natural or legal persons, shall not be imposed by any law of a discriminatory nature. See the Revised Constitution (1955) of Ethiopia which provided as follows: Article 43: No one within the Empire may be deprived of life, liberty or property without due process of law. Article 44: Everyone has the right, within the limits of the law, to own and dispose of property. No one may be deprived of his property except upon a finding by ministerial order issued pursuant to the requirements of a special expropriation law enacted in accordance with the provisions of Articles 88, 89 or 90 of the present Constitution, and except upon payment of just compensation determined, in the absence of agreement, by judicial procedures established by law, Said ministerial order, to be effective, shall be approved by the Council of Ministers and published in the Negarit Gazeta.

See also Draft Constitution of Ethiopia Hamle 30, 1966 E.C (Unpublished: on file with the author) which under Article 26 states that "No one shall be deprived of his life, liberty and property without due porces of law." The PDRE Constitution under Article 17 stipulates that: The state may, where public interest so requires, purchase, requisition by making appropriate payment, or, any property in accordance with the law. See the following theses for discussions about these steps including some practices in this regard. Amdemariam Tessema, *Expropriation under the Ethiopian Law and the Case of Lalibela-Sekota Road*, (Ethiopian Civil Service College Law Library, Unpublished LL. B Thesis, 2000); Bereket Bashura, *The Law of Compensation Applicable upon Expropriation of Rural Landholdings Rights in the Regional State of SNNPR,* (Addis Ababa University, Law Library: Unpublished LL.B Thesis, 2006.) Dagnachew Asrat, *Compensation for Expropriated Property under International Law: Standards of Compensation and Method of Valuation,* (Addis Ababa University Law Library, Unpublished LL.B Thesis, 2006.) Getachew Desta, *Expropriation Law and Practice in Ethiopia,* (Addis Ababa University, Law Library: Unpublished LL.B Thesis, 1978.) Hailemariam Moges, *New Proclamation No. 401/2004 on Appropriation and Compensation: its Departure from the Existing Laws of Expropriation*, (Addis Ababa University, Law Library: Unpublished LL.B Thesis, 2005.) Hailemicheal Likey, *Public Domain and Expropriation: Law and Practice in Yem Special Woreda*, (Ethiopian Civil Service College Law Library, Unpublished LL. B Thesis, 1999); Miftah Kemal, *Expropriation Procedures under the Ethiopian Law with Special Reference to Gilgel Gibe Project,* (Ethiopian Civil Service College Law Library, Unpublished LL. B Thesis, 2001); Rebecca Nigusse, *Expropriation Law and Practice in Ethiopia*, (Addis Ababa University, Law Library: Unpublished LL.B Thesis, 1994); Woldu Abebe, *Restitution and Adequate Compensation as Remedies for Expropriation under Public International Law,* (Addis Ababa University, Law Library: Unpublished LL.B Thesis, 1996.)

which power must be exercised in accordance with law and with due respect to the right to private property. The rules governing the exercise of this right are found in the Code, the Expropriation Proclamation and other specific pieces of authorizing legislation like the Telecommunications Proclamation.

13.5.1 The public purpose limitation

The FDRE Constitution, the Expropriation Proclamation and the Code all provide that expropriations are carried out for a public purpose.[45] The public purpose is dynamic and relative to place, time, community, ideology and the role of the government in the economy. This term ``public purpose`` is a legal standard which can have a number of different meanings. It has been described as an unruly horse to show its fluidity.

One way of looking at public purpose is to see it as requiring that the taking of private property through expropriation must benefit the public good. It cannot be done for private benefit. Article 1464 of the Code reflects this view. It states that a competent authority cannot initiate expropriation for the exclusive aim of obtaining money:

> (1) Expropriation proceedings may not be used for the purpose solely of obtaining financial benefits.
>
> (2) They may be used to enable the public to benefit by the increase in the value of land arising from works done in the public interest.

Expropriation may ultimately bring money to the treasury but that must not be its sole purpose.

The Amharic version of the title of that section of the Code which deals with expropriation reads: ``le hizbe agelgelot ymitqemu nebrtoch sele maseleqeqe``, which suggests that the state authority is supposed to construct facilities accessible to the public in place of the property it expropriates. This suggests that the public purpose of expropriation as envisaged in the Code is that it is to be used to enlarge property in the public domain of the state.

Some other proclamations have adopted a more restrictive conception of public purpose. Article 17/1 of the Public Ownership of Rural Lands Proclamation No. 31/1975 provides that: "The Government may use land belonging to peasant associations for public purposes such as schools, hospitals, roads, offices, military bases and agricultural projects".[46] A recent

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[45] Article 40/8 of the FDRE Constitution, Preamble to the Expropriation Proclamation and Article 146 of the Code.

[46] *Neg. Gaz.* No 26, Year 34th. See also Article 8 of the Government Ownership of Urban Lands and Extra-houses, Proclamation No. 47/1975, *Neg. Gaz.* Year 26th, No.

proclamation, now abrogated, offered this stringent definition of the word ``works`` for the purpose of expropriation: "the construction or installation as appropriate for public use of highway, power generating plant, building, airport, dam railway, fuel depot, water and sewerage telephone and electrical works and the carrying out of maintenance and improvement of these and related works and comprises civil, mechanical and electrical works".[47]

The literature proposes two broad conceptions of public purpose. They can be described as the minimalist and maximumist views of public purpose. The minimalist view would prohibit state authorities from undertaking expropriation to shrink the patrimony of one person in order to increase the patrimony of another person (even if the latter is a business person). The test of public purpose under this conservative view is: what is done with the expropriated property. If it is used to benefit one or few persons then the expropriation cannot be said to have been done for a public purpose.

The maximalist thinks that public purpose includes:

> ...anything which tends to enlarge the resources, increase the industrial energies and promote the productivity of any considerable number of inhabitants or a section of the state, or which leads to the growth of towns and creation of new resources for the employment of capital and labor, contributes to the general welfare and prosperity of the whole community.[48]

The Urban Land Lease Holding Proclamation No. 80/1993[49] reflected this view. The proclamation stated that the public interest would not be violated by the state expropriating property solely to generate money. According to the preamble, urban areas must be permitted to lease lands so that they can obtain sufficient revenues to provide much needed social facilities and

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4, which states that: "Where a person, family or an organization fails to utilize his or its urban land within the period to specified by the Ministry, the Ministry may take back such land and put it to appropriate use. The Ministry shall, by giving compensation in kind, expropriate for public purposes urban land held by a person or family or an organization". This provision does not define `public purpose`. It seems to allow the Ministry to take back land that is not being appropriately used, without compensation at all.

[47] Art. 2/2 of the Appropriation of Land for Government Works and Payment of Compensation for Property Proc. No. 401/2004, *Fed. Neg. Gaz.* No. 42 Year 10th. Repealed by Article 15/1 of the Expropriation Proclamation.

[48] Bin Cheng, "The Rationale of Compensation for Expropriation", 44 *Transactions of Grotius Society* 267(1958), at 292.

[49] *Neg. Gaz.*, Year 53rd No. 40.

infrastructure.[50] Its successor is even more explicit about this broad notion of public purpose. Article 2/7 of the Re-enactment of the Urban Lands Lease Holding Proclamation No. 272/2002 (hereinafter the Urban Lease Proclamation 2002), defines public interest as:

> ...that which an appropriate body determines as a public interest in conformity with Master Plan or development plan in order to continuously ensure the direct or indirect usability of land by peoples, and to progressively enhance urban development.

The Urban Planning Proclamation No 574/2008 describes public purpose in Article 2/5 as that which "continuously ensures direct or indirect utilization of land by people and thereby enhances urban development".[51]

The Expropriation Proclamation adopts both the minimalist and maximalist approaches, but in different contexts. In the bid to attract investment, the minimalist approach is followed when it comes to expropriating the property of an investor (land lease holder) while the maximalist stance is taken when the state expropriates the property of other persons (landholders). It is more difficult to expropriate leased land held by an investor than that held by a private person. Article 2/5 of the Proclamation defines public purpose to mean

> the use of land defined as such by the decision of the appropriate body in conformity 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.

And Article 3/1 says a woreda or an urban administration has the power to expropriate rural or urban land for the public purpose:

> ...where it believes that it should be used for a better development project to be carried out by public entities, private investors, cooperative societies or other organs, or where such expropriation has been decided by the appropriate higher regional or federal government organ for the same purpose.

After adopting this broader definition of public purpose, the same proclamation under Article 3/2 provides that:

> ...no land lease holding may be expropriated unless the lessee has failed to honor the obligations he assumed under the Lease

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[50] Ibid. The earlier lease proclamation also followed the same pattern. See also Misganaw Kifelew, "The Current Urban Land Tenure System of Ethiopia, in Land Law and Policy in Ethiopia since 1991: Continuities and Changes" in Muradu Abdo, (ed.) *Ethiopian Business Law Series Vol. III* (2009) at 187-8.

[51] *Fed. Neg. Gaz.*, No 29 Year 14.

Proclamation and Regulations or the land is required for development works to be undertaken by government.

13.5.2 Must not be arbitrary

As the reader may recall, Article 1204(2) of the Code provides that any restriction on the ownership of property must comply with the law. Expropriation results in the forced extinguishment of ownership and other rights in property. This legitimate state interference with a citizen's constitutional right to private property must be carried out in accordance with accessible, precise and clear rules that enable the property holder to protect his rights and ensure that he receives compensation commensurate with the value of the property taken. They are designed to prevent arbitrary takings of private property by the state. In Ethiopia the rules and procedures are found in the Code, the Expropriation Proclamation and the Urban Land Lease Proclamation 2002 (as well as other specific enabling legislation like the Telecommunications Act).

What follows is a description and comparative analysis of the procedural protections found in each of these three pieces of legislation. In reading these laws, we need to keep in mind that the expropriation procedures currently in force are the ones embodied in the Expropriation Proclamation. The other two pieces of legislation are discussed here as well because there are certain gaps in the Expropriation Proclamation (pointed out here and there in this chapter) which should be addressed by reference to the procedures stated in the Code and the Urban Land Lease Proclamation 2002.

13.5.2.1 Expropriation procedures under the Civil Code

The following steps must be followed to expropriate property under the Code.

1. The first step is consulting the public and seeking their views on whether the proposed project serves the public interest (Article 1465). Any interested person may express their views or opposition to the proposed project. A consultation is not mandatory and is only required where it appears to the competent authority to be necessary (Article 1465/1).[52]
2. Once the consultation is complete (or if none is conducted then before proceeding) the competent authority must declare the project to serve the public interest and post a notice to that effect. The Code does not specify the content nor the medium to be used to give notice. Nor does it indicate the purpose of giving notice (Article 1463).

[52] Article 1465(1) of the Code.

3. The next procedure is identifying the immovable subject to expropriation, providing personal notice of the contemplated expropriation to the owner and giving them a reasonable opportunity to express their views on the need for the expropriation (Article 1466).
4. Once that is done expropriation orders are made. The making of the order effects the expropriation and transfers ownership to the expropriating authority free of encumbrances such as servitude, usufruct, right of preemption, promise of sale and right of recovery. The claims of third parties continue to apply to the compensation paid and third parties may still bring claims against the authority where appropriate (Article 1467). This provision should continue to apply in cases of expropriation under the Expropriation Proclamation as it does not address this issue at all. Thus applying this Article would not be inconsistent with or contradict the Proclamation. Do you think that the preceding and subsequent steps should continue to operate where the Expropriation Proclamation does?
5. The orders are served on the owner and any person whose interests in the immovable are registered, or whom the owner says has an interest in it (Article 1469).
6. The persons served then advises the authority what compensation they seek (Article 1470 and 1471).
7. If the authorities do not agree to the amount claimed the amount is set by an arbitration assessment committee. (Article 1472) The expenses associated with the committee and incurred in fixing the amount are to be born by the authority (Articles 1473 and 1482). The decision of the committee can be appealed to the court within three months (Article 1477). The court can increase but not decrease the amount of compensation fixed. If the authority appeals the committee's decision they may not take possession of the property until the decision of the court is rendered.
8. Once the authority pays the compensation that has been fixed it can take possession of the property. If on appeal the compensation is increased the authority has a month from the order to pay the additional amount.(Article 1479)

13.5.2.2 Expropriation procedures under the Land Lease Proclamation 2002

The following are the steps involved in taking lawfully[53] possessed urban land together with the improvements thereon.

1. The appropriate body[54] decides on the existence of public interest as defined in this proclamation.[55]
2. The appropriate body issues a clearance order in writing to the concerned person and publicizing the clearance order in other ways (Article 16/1). The clearance order shall state that the affected person shall remove the property described therein within a certain period of time. The clearance likely indicates the amount (if any) of compensation that shall be paid to the person whose land shall be taken. The clearance order has the effect of transferring the possession, though not automatically, of the land in question to the concerned public authority. The purpose of making the clearance order public under this proclamation is not clear. It may be to give an opportunity to persons who might be affected to object or participate in the process. Or it may enable receipt of comments and criticisms from any interest members of the public.
3. The person served with the clearance order or any person alleging an infringement of their rights may raise objections about any matter including the amount of compensation[56] by bringing them to the appropriate body together with evidence and reasons (Article 17/1). This is called pleading. It is a request to the body to review its own decision. It is possible to argue lack of public interest. The administrative body is obliged to give the parties the right to be heard and maintain a record of its proceedings, including its reasons for its decisions (Article 17/3). This requirement contributes towards better institutional memory, which in turn contributes to accountably and efficient disposition of cases on appeal. It may decide to pay compensation or

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[53] In case of squatters on urban land, the pertinent body of a city administration may clear urban land together with the property situated thereon by "serving a written notice warning the person having illegally held it to move away and without any need of giving him clearance order and compensation in accordance with this Proclamation. It may take over the land illegally held by clearing it from the holder and, where it finds it necessary by using the police force". See Article 16/2.

[54] Article 2/6: An appropriate body means a body of a region or city administration unit empowered to clear, lease and administer land.

[55] Article 16/1and Article 2/7 (defines public interest)

[56] Note the phrase "any justifiable claim relating to a clearance order" Article 16/3

increase the amount of compensation disputed or confirm its earlier decisions both on the appropriateness of the payment of compensation and the amount of compensation (Article 17/2). It is not clear if it can reduce the amount of compensation offered.

4. The decision taken on the pleading may be appealed to the Urban Land Clearance Order Appeals Commission (the Commission), which has the power to approve or revoke or amend the matter submitted to it.[57] Any person who is a party to, or who was denied permission to be a party to, the previous proceeding can appeal to the Commission. The Commission can consider any matter considered by the appropriate body earlier. An applicant who disputes the decision rendered by the appropriate body within 30 days as of the date of the decision (Article 18/4). If she has failed to file her application within this period of time, she is deemed to have accepted the decision of the appropriate body (Article 18/4). The Commission shall hear the matter and render a decision within a short period of time determined by Regulations to be issued by Region or City Government (Article 18/2). The Commission delivered its decision in writing to the parties. The Commission's decisions on matters of fact and law are final. Its decision on the amount of or availability of compensation can be appealed further (Article 18(3).
5. The property is handed over to the appropriate body if no pleading is filed or appeal brought to the Commission within the prescribed time limits and where she has accepted the compensation fixed in the clearance order served on her. (Article 20/ and 20/2). Any appeal of the Commission's decision may only be brought after she hands the land over to the body issuing the clearance order thereon and has attached with her appeal a document of receipt given by the body receiving the land in question.

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[57] Article 18/1 cum 19/1. Article 19 (3-8) respectively provide that: The Commission is accountable to the Council of the Region or the City Government as the case may be. The Commission must have not less than five members coming from different relevant bodies. The Commission may order the police to execute its decrees if it finds it necessary. The Commission may, wherever it finds it necessary, order any person to give it professional opinion or evidence from a concerned body. The Commission shall be free of any influence except the law. The Commission is not be governed by the Civil Procedure Code in the conduct of matters before it but is governed by expedient procedures which shall be determined by Regulations to be issued by Region or City Government.

6. The final step available is appealing the decision of the Commission to the court.[58] The appeal must be filed within 30 days from the date of the decision.[59] The appeal is confined to matters related to the amount of compensation. The decision rendered by the regular court is final (Article 18/4).[60]

13.5.2.3. Expropriation procedures under the Expropriation Proclamation

The steps in expropriation this proclamation envisages are:

1. The implementing agency[61] prepares detail data pertaining to the land needed for its works and sends same, at least one year before the commencement of the project, to the *woreda* or urban administration for approval (Article 5). This appears to entail the identification of the property to be expropriated.
2. Decision made to expropriate land holding by a *woreda* or an urban administration justified by public purpose (Article 4/1).
3. Compensation is fixed by property valuation committees (Article 10). Where the things to be covered by expropriation are utility lines, the owner of such utility lines determines the compensation (which basically means compensation for removable and relocation of those lines) (Article 6/2). In other cases, the authority to fix compensation resides in the *woreda* or urban administration (Articles 9 and 10).

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[58] See articles 39-43 of the Addis Ababa City Government Revised Charter Proclamation No. 311/2003, *Fed. Neg. Gaz.* Year 9th No. 24.

[59] Article 18/5 states that this period shall not include the time taken by the court to produce and submit a copy of the decision to the petitioner.

[60] Is cassation possible? What about cassation over cassation? One can sensibly argue that review by way of cassation, be it a single or double cassation, is possible. This is so because Article 80/3 (a & b) of the FDRE Constitution provides that review by way of cassation is possible provided there is a final court decision which contains a *prima facie* case of the existence of a fundamental error of law. Is the issue of determination of the amount of compensation always a question of fact? Perhaps not, one may envisage cases where the parties are challenging: (a) the absence of procedural due process of law at any stage below or the expropriating authority's moves to pay compensation to the affected person on installment basis or the authority's decision to dispossess first and pays compensation later. These could be considered as raising questions of basic error of law.

[61] The term implementing agency is defined in Article 2/7 as covering any a government agency or, public enterprise, undertaking or causing to be undertaken development works with its own force or through contractors.

4. The *woreda* or urban administration notifes the landholder in writing, indicating the time when the land has to be vacated (minimum of 90 days) and the amount of compensation to be paid (Article 4/2).
5. Compensation is paid or offered to the landholder by the implementing agency (Article 5/2).[62] If payment is refused it is deposited in a blocked bank account in the name of the woreda administration (Article 4/3) The landholder may file a complaint about the compensation offered to either: an administrative organ established to hear grievances related to urban land holdings or in the regular court having jurisdiction where such administrative organ is not yet established (Article 11). There is no explicit prohibition against lodging a compliant with the woreda or urban administration directly. It is not clear whether it is possible to challenge the decision on the basis of the absence of public purpose although it is not expressly prohibited. The lodging of a complaint does not delay or stop the execution of the expropriation order (Article 11/7).
6. The holder of the land removes her property from the land and hands over the land to the woreda or administration within 90 days as of the date of payment of compensation or 30 from the date of deposit of the compensation in blocked account (Articles 4/3-4/5).
7. The woreda or urban administration takes over the land and it hands it over to the implementing agency. [63]
8. Appeals to the regular courts with jurisdiction, which must be lodged within 30 days from the date of the decision of the administrative tribunal or the lower court shall be final (Article 11/4). One of the conditions of appeal at this level is for the appellant to hand over the land to the administration and attach proof to this effect to her statement of appeal (Article 11/6).[64]

13.5.3 Subject to payment of compensation

Article 40/8 of the FDRE provides that the government may expropriate private property "subject to payment in advance of compensation commensurate to the value of the property". In relation to expropriation, the issue is thus not

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[62] Article 13/1 stipulates that the *woreda* or urban administration may also be responsible for paying compensation to the person affected.

[63] Can the implementing agency, woreda or administration complain against the valuation set by the committee or the court? There is no express provision permitting it to do so.

[64] Article 11/5, which states that the time it takes to give a copy of this decision to the intending appellant shall not be taken into account in calculating this period.

whether compensation is to be paid, but how to calculate the amount of compensation to be paid. Expropriation without compensation is confiscation. The issues we will discuss here include: What justifies the payment of compensation? What are the principles that should be taken into account in determining the amount of compensation to be paid? What test should be used to determine the existence of just compensation? What form can compensation take? Who determine compensation? Who pays compensation and to whom? Are there non-compensable rights *in rem*? When and how should compensation be paid?

13.5.3.1 Justifications for compensation

There are good reasons to require the state to compensate for the coerced taking of private property. One is respect for the right to private property enshrined in the FDRE Constitution. Another has to do with the time honored principle that no one (not even the state) shall be permitted to enrich herself at the expense of another. Thus we require the government to pay compensation because the public should not be permitted to unjustly enrich itself at the expense of those affected by expropriation. Additionally if the state were not required to compensate private property holders for taking their property people would be unlikely to invest their time, labor, energy and resources in developing and improving their property and investors would be discouraged from investing in the country both of which would adversely affect economic development. And finally the constitutionally enshrined requirement to pay compensation prevents wanton, destructive and arbitrary taking of private property.

13.5.3.2 Principles determining compensation

There are two conflicting principles of compensation: the indemnity principle and the taker's gain principle. The indemnity principle focuses upon what the property owner has lost as a result of the act of the expropriator. Factors relevant to the determination of compensation are viewed from the point of view of the owner or landholder. In this view he is entitled to be put in "as good a pecuniary position as he would have been if his property had not been taken".[65]

This principle assumes that dispossessed owner would go out into the market and purchase with his compensation money a property roughly

[65] Op. cit. Daniel W/Gebriel, at 201.

similar to that which had been acquired, any incidental loss or expense being met from the proceeds of the disturbance claims.[66]

Taking what the expropriated has lost into account might lead to the payment of compensation which includes, "in addition to the market value of the deprived property, loss of rent, trading loss, moving expenses, dismissal benefits, severance damages and the like".[67]

The taker`s gain principle, as the name suggests, views the calculation of compensation from the standpoint of the gain or advantage the expropriator has obtained as a result of the expropriation. Thus,

> the government should pay only for what it gets. It stems from the fear that to allow compensation for such items as disturbance of a business on the land [expropriated]... would impose an inordinate drain on the public purse because of the discrepancy between the value of the thing obtained and the losses suffered. Thus it has been observed that to make the owner whole for losses consequent on the taking of...land occupied by a going business would require compensation for future loss of profits, expense of moving removable fixtures and personal property, and loss of goodwill that inheres in the location; yet compensation must be denied for such "consequential" damage...when the government takes only the land, having no use for the business operated thereon, it should pay only for what it gets, namely, the market value of the land. [68]

13.5.3.3 Extent of compensation

The goal of payment of compensation should ideally be to put the affected person into the position she would have been had the expropriation not been undertaken. Both over and under compensation should be avoided. This is the ideal goal of all situations which entail payment of compensation. It may be instructive to consider the issue of extent of compensation both under the Code and under the Expropriation Proclamation.

Article 2090 of the Code dealing with tort liability provides:

> Unless otherwise provided, the damage shall be made good by awarding the victim an equivalent amount in damages.

Article 2091:

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[66] C. E. Ndjovu, *Compulsory Purchase in Tanzania* (Stockholm Royal Institute of Technology: Doctoral Thesis, 2003) at 20.as quoted in Daniel W/Gebriel, at 201.

[67] Ibid, at 201-02; see also R. Kratovil, and F. J. Harrison Jr., "Eminent Domain-Policy and Concept", 42 *Cal. L. Rev.*596 (1954) at 615.

[68] Ibid., Kratovil and Harrison.

> The damages due by the person legally declared to be liable shall be equal to the damage caused to the victim by the act giving rise to the liability.

The party who has suffered at the hands of the tortfeasor shall be put into her previous material position. She shall get what she lost as result of the act which caused the damage assuming "that the harm complained of is sustained by the plaintiff, the interest harmed is not illegitimate, the harm is reasonably certain and the harm is suitably caused".[69] Were it applied to expropriation the purpose of determining the amount of compensation would be to arrive at an amount which would neither permit the public to enrich at the cost of the affected person nor the latter to enrich at the detriment of the public. It would be to put the affected person into the position that would have existed had the expropriation not taken place. As the words "unless otherwise" in Article 2090/1 of the Code indicate, the equivalence principle suffers from exceptions of different nature, which may entail the award of compensation which is less or more than the harm incurred by the plaintiff.[70] Expropriation is one of the exceptions. The law of expropriation as embodied in the Code does deviate from the rule of equivalence between damage and compensation. This is a compulsory departure in the sense that it is the legislature which planted this exception in the law; the judges do not have discretion to set aside the exception in order to award equivalent compensation. The ability to award compensation that is less than the damage sustained in expropriation cases is envisaged by Articles 1474-1476 of the Code.

The Code creates a body known as Arbitration Appraisement Committee to determine the amount of compensation which to be paid to the affected person when the competent authority rejects the amount of compensation they have requested. The English version of Article 1474/1 provides:

> The amount of compensation or the value of the land that may be given to replace the expropriated land shall be equal to the amount of the actual damage caused by expropriation.

The French version of this sub-article partly states:

> the compensation...is equal to the amount of the *present* and *certain* damage caused by the expropriation.[71]

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[69] See George Krzeczunowicz, *The Ethiopian Law of Compensation for Damage* (Addis Ababa University, Faculty of Law, 1977) at 20-32 for an analysis of these preconditions.

[70] Ibid, at 79-251.

[71] Ibid, at 172.

Two crucial words, namely present and certain, appear only in the French rendition. Since the value of the land to be given in lieu of the expropriated land or the amount of compensation to be paid has to be equal to actual damage caused as a result of the expropriation, consequential damage is disregarded. As a result, loss of profit and cost of transportation are not considered. In rendering its decision, the Committee, under Article 1475, takes into account *inter alia:* "any statements which the parties concerned may have previously made regarding the value of the property or rights expropriated". Such statements can be secured from tax authorities or mortgagees. The increase in value of the immovable being expropriated on account of the construction of public works has to be taken into consideration to prevent the owner and other third parties from enriching themselves at the expense of the public at large. On the other hand, the Committee is prohibited from considering some things, like any construction or improvements made after the order is made, and any speculative increase of value arising from the announcement that public works are to be constructed.[72] The amount of compensation to be fixed by the Committee is that which is assessed on the day when the order is made.[73]

Thus a person whose property is taken by the state through expropriation will be entitled to recover less compensation than if the loss was sustained otherwise. Krzeczunowicz writes:

> The limitation of compensation to present and certain damage (under Article 1474/1) implies that: (i) Future loss is not compensable although certain to occur, and (ii) Uncertain harm (e.g. loss of likely opportunity for a higher price sale) is not compensable although presently incurred. While the second of the above restrictions makes no change in the law, the first one constitutes a serious curtailment of the right to compensation. Indeed, the owner of property which is leased out or used for a business (lease or use terminated by (Art. 1467 2)) cannot claim compensation for the future lucrum cessans (prevention of a gain, non-increase of estate) harm from its loss by expropriation. Nevertheless, the suitability of a building (or premise) for rent or business use can properly be considered by the Appraisement Committee (Art. 1473) or the Court (Art. 1477) as objectively increasing its present value. Only the building`s subjective value to the owner, who would have continued to derive exceptionally high rents or business profits from it, cannot be considered in its ``present`` valuation for expropriation purposes.

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[72] Article 1476 of the Code.

[73] Article 1474(2) of the Code. .

> In its valuation, the Committee takes into account the party's prior declaration to the Administration regarding the value of the property or rights expropriated. If, therefore, in prior declarations made to the Administration the claimant valued his property at less than its normal price, he is no more entitled to the latter.
>
> It (the Appraisement Committee) takes no account of the speculative appreciation of the property caused by the announcement of the public works. After a ``declaration of public utility`` (Art. 1463) is made with respect to a public works project requiring expropriation (e.g. for building a road), the price of contiguous properties often increase before the condemned immovables are determined (Art. 1466), expropriated (Art. 1467) and appraised (Art. 1473). Nevertheless, it is on the immovable's value before the initial declaration announcing the public works that the compensation of the expropriated owner is based. The latter thus loses the added value which the non-expropriated contiguous owners retain[74].

The FDRE Constitution describes the compensation due as 'commensurate' with the value of the property lost. Other laws use words like 'full' or 'fair' and 'adequate' compensation. The dictionary meaning of 'commensurate' is: ``equal in measure or extent or corresponding in size, extent, amount, or degree``[75] or in a correct and suitable amount compared to something else.[76] The Amharic version of this constitutional term is ``temetatagn`` (not ``equle``) which means equivalent, not equal. Thus commensurate compensation is an amount which is equivalent to the value of the property expropriated. Mathematical equality between the compensation award given and the value of the property lost as a result of the expropriation proceeding is not expected.

Under the Expropriation Proclamation compensation for a permanent improvement to land must be equal to the value of the capital and labor expended on the land.[77] Where the expropriation is related to property situate on urban land, the amount of compensation to be paid may not, in any way, be less than the current cost of constructing a single room low cost house in accordance with the standard set by the concerned region. The cost of

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[74] Op cit. Krzeczunowicz, *Compensation,* at 172-174.

[75] See http://www.merriam-webster.com/dictionary/commensurate (accessed August 11, 2011); see also www.wordnetweb.princeton.edu/perl/webwn (accessed January 1, 2010).

[76] See www. http://dictionary.cambridge.org/define.asp?key=15350&dict=CALD (accessed January 1, 2010).

[77] Article 7/4 of the Expropriation Proclamation.

removal, transportation and erection shall be paid as compensation for a property that could be removed, relocated and continue its service as before.[78]

In case of a rural land holder whose land has been expropriated permanently and where substitute farm land in the sense of Article 8/3 is unavailable, displacement compensation shall be paid. Compensation for displacement must be equivalent to ten times the average annual income she secured during the five years preceding the expropriation of the land.[79] In case of a rural land holder whose land has been expropriated provisionally and substitute farmland in the sense of Article 8/3 is unavailable, displacement compensation for lost income shall be paid until repossession of such land, which shall based on the average annual income secured during the five years preceding the expropriation of the land;[80] provided, however, that such payment shall not exceed ten times the average annual income she secured during the five years preceding the expropriation of the land.[81] The displacement compensation to be paid to rural land holders who have lost their land either permanently or provisionally shall only be equivalent to the average annual income secured during the five years preceding the expropriation of the land where the *woreda* administration confirms that a substitute land which can be easily ploughed and generate comparable income is available for the land holder.[82]

An urban landholder whose landholding has been expropriated shall be provided with a plot of urban land, the size of which shall be determined by the urban administration, to be used for the construction of a dwelling house; and she shall also be paid a displacement compensation equivalent to the estimated annual rent of the demolished dwelling house or be allowed to reside, free of charge, for one year in a comparable dwelling house owned by the urban administration.[83]

Where the house demolished is a business house (not defined but perhaps any building which serves as a place of work rather than a residence),[84] the

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[78] Article 7/3 of the Expropriation Proclamation.

[79] Article 8/1 of the Expropriation Proclamation.

[80] Such displacement compensation should in the first place be the average annual income of such provisionally taken property times the number of years for which the property is taken. See Article 18 of Regulations No. 135/2007.

[81] Article 8/2 of the Expropriation Proclamation.

[82] Article 8/3 of the Expropriation Proclamation.

[83] Article 8/4 of the Expropriation Proclamation.

[84] The word `business house`` seem to include every building other than residential houses, be it located in urban or rural areas. See the corresponding Amharic version, which says ``meseria bête``

provisions governing payment of displacement compensation to an urban land holder apply, with the necessary changes.[85] This essentially means providing a plot of land for the purpose of reconstructing the business house. This is in addition to the monetary payment equivalent to an annual rent of the demolished business house. Where the state is unable to effect monetary payment to the owner of the business, it will provide a comparable house it owns, in the form of lease, for one year, free of charge.

When an urban land lease holding is expropriated prior to its expiry date, the lease holder will:[86]

> -Be compensated for her property situate on the land expropriated;
>
> -Be compensated for permanent improvements, if any, made to such land (in an amount equal to the value of capital and labor expended);
>
> -Be compensated for the cost of removal, transportation and erection of property from the expropriated landholding to a new location, where the property can continue its service as before; and
>
> -Be provided with a similar plot of land to use for the remaining lease period. She shall be allowed to use the new plot of land for a longer period if its rent is less than was charged on the expropriated land or the lease holder receive a refund of the remaining lease price paid to the authorities if she does not want to take the offered land.

13.5.3.4 Methods of property valuation

There are four applicable methods of property valuation namely: comparable sales approach, income capitalization approach, replacement cost approach and original cost approach. Each approach is described below.

The comparable sales approach,

> requires searching for similar properties that have been sold in the marketplace within a reasonable time period preceding the taking date, and then adjusting the sales price of those comparable properties to reflect differences between the comparable and the subject property. The comparable sales method is considered the preferred method of ascertaining the fair market value of land taken by expropriation.[87]

The income capitalization approach is a method of

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[85] Article 8/5 of the Expropriation Proclamation.

[86] Article 8/6 of the Expropriation Proclamation.

[87] Op cit. Daniel W/Gebriel, at 208.

determining a property's fair market value taken by expropriation. It gives value to the land in relation to the income it produces. The capitalization of income approach is generally used to value income producing property when it is completely taken. It usually consists of arriving at an independent value of the underlying land involved, and adding to it the value of improvements, by converting reasonable or actual income at a reasonable rate of return (capitalization rate) into an indication of value. The land and improvements may be capitalized together in a single process. The capitalization of income is not used to project future profits or to compensate the owner for lost profits, but rather, to calculate the fair market value of the land at the time of the taking. The income capitalization approach is an accepted method for determining market value when there are no available comparable sales data, and the income is directly attributable to the land.[88]

The replacement cost approach

values the expropriated property by determining the replacement or reproduction cost of improvements, less depreciation, plus the market value of the land. Hence, this predominantly serves to value buildings as well as utilities, but not the land itself. It is especially considered one of the better methods for determining a utility's fair market value. Generally, it is assumed that landowners may be compensated fully by other approaches, especially where the property is not shown to be both unique in nature and location and also indispensable to the conduct of the landowners' business operations on the site from which a part is taken. So, mostly, buildings of a unique character are valued using this method. This approach can be used in countries where the market value of real property is not developed. The method develops the value in terms of current labor and materials required in assembling a similar asset of comparable utility.[89]

The original cost approach refers to all the expenditures incurred at the time of setting up the asset subject to expropriation.[90] If the cost of reproduction approach takes the present market values of materials out of which the subjected property is made, the original cost approach takes the past (the time of building the property covered in the expropriation) as point of reference.

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[88] Ibid., at 208-9.

[89] Ibid.

[90] Ibid.

For example, if the property covered by the expropriation proceeding is a residential house, the question the evaluator should ask is: what expenses did the owner incur in building this house? The reference point is not at the time of the taking; it is at the time of the construction of the house.[91] If the property taken is a machine, then the question would be: how much did the affected person buy this machine for and how much did she spend to transport it to the place of installment and to install it? This can be obtained from the books of account of the person or by ascertaining the market values of the construction materials plus costs of labor at the time of the construction.[92]

The Expropriation Proclamation and its regulations mainly adopt[93] the cost replacement approach. Article 7/2 of the proclamation stipulates that the "amount of compensation for property situated on the expropriated land shall be determined on the basis of replacement cost of the property". Article 6/2, states that "the owner of utility lines shall determine a fair compensation required to replace the lines to be removed". These two sub-articles of the proclamation are fleshed out in Article 3-13 of Regulations No 135/.

What test shall be used to determine the existence of just compensation? The literature treats the market value of the expropriated property as the measure of the justness of compensation. The term market value, in relation to land, is:

> the most probable price, as of a specified date, in cash or in terms equivalent to cash, or in other precisely revealed terms, for which the specified property rights should sell after reasonable exposure in a competitive market under all conditions requisite to a fair sale, with the buyer and seller each acting prudently, knowledgeably, and for self-interest, and assuming that neither is under undue duress.[94]

This quotation enunciates one approach to the market value test, which is known as the willing buyer-willing seller parameter. Market value is the value in monetary terms of the property at the time of expropriation which a willing buyer would decide to offer to a willing and prudent seller. In short, the

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[91] Ibid.

[92] Ibid. Should it reflect costs at the start or at completion or an average of costs? Suppose it took years to complete it; suppose a number of improvements were made over a long period of time; should devaluation in the value of money between the time of production of the thing and the time of determination of compensation be taken into account?

[93] "Mainly" because there are indications of adoption of the comparable sales approach and income capitalization approach, too. For this, see Article 6/2, Article 7/1, Article 16/3(c) of Regulations No. 135/2007.

[94] Op. cit., Daniel W/Gebriel, at 203-04.

question is what would the owner have been paid if he had offered the property for sale to a willing buyer at the relevant time? The other version of the market approach test is "the price offered to the expropriated shall be what a reasonable buyer would pay for the highest and best use of the land". This is referred to as `the highest and best use` rule.[95]

Where part of the land is taken, it is calculated as:

> ...fair market value of the portion taken plus damages to the part not taken less any special benefits to the land not taken. This is the `value plus damages` rule. The measure may also be the difference between the market value of the entire tract before the taking and the market value of the remainder after the taking; this is the `before and after` rule.[96]
>
> The idea is that if the highest and best use of the land is, for example, for urban housing, even though the land is currently undeveloped, the valuation must be based on the value of urban housing development. Thus, if farm land on the borders of a city is to be valued, the fact that it could be profitably subdivided into lots is relevant.[97]

13.5.3.5 Types of compensation

As stated in Article 2090 of the Code, the preferred mode of compensation is the payment of money. In kind compensation is an exception and last resort. When ordered judges have to provide reasons for departure from pecuniary compensation. The reason for this in cases of extra-contractual liability is simplicity of administration and to avoid the risk that in-kind compensation may infringe the rights of others.[98] The expropriation provisions of the Code prefer pecuniary compensation although in kind compensation is contemplated in some cases.[99] The Expropriation Proclamation recognizes both cash and in-kind payments to the expropriated with the emphasis upon the former.[100]

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[95] Ibid.

[96] R.W. Wright, and M. Gitelman, *Land Use in a Nut Shell*, (4th ed.) (West Group, St. Paul, Minn., 2000) at 157 as quoted in Ibid, at 204.

[97] Ibid., at 204.

[98] Op. cit., Krzeczunowicz, *Compensation*, at 33-37.

[99] See the use of the words "fixed" and "amount" in many articles of the Code and also see the word "land" used under Article 1478/3 and Article 1479/2.

[100] See Article 2/1 of the Expropriation Proclamation. See also Article 2/2 of the Urban Planning Proclamation No. 574, 2008, *Fed. Neg. Gaz.* Year 14 No 29. which defines

13.5.3.6 Who shall fix compensation?

The Expropriation Proclamation envisages a committee of experts will be set up by the pertinent administration to fix compensation. Article 10 states in part:

> 1/Where the land to be expropriated is located in a rural area, the property situated thereon shall be valued by a committee of not more than five experts having the relevant qualification and to be designated by the woreda administration.
>
> 2/Where the land to be expropriated is located in an urban center, the property situated thereon shall be valued by a committee of experts having the relevant qualification and to be designated by the urban administration.
>
> 3/Where the property situated on a land to be expropriated requires specialized knowledge and experience, it shall be valued by a separate committee of experts to be designated by the woreda or the urban administration.

Compensation can also be fixed by an owner of utility lines. Article 6/2 provides:

> The owner of the utility lines ...shall... determine a fair compensation required to replace the lines to be removed...

These are provisional arrangements; the preferred approach is to have this task carried out by certified persons. In this connection, this legislation provides in Article 9 that" the valuation of property situated on land to be expropriated shall be carried out by certified institutions or consultants on the basis of valuation formula adopted at the national level".

13.5.3.7 Who pays compensation?

The Expropriation Proclamation gives this responsibility to the Implementing agency under Article 5/2 and in Article 13/1 provides in part that the " ...woreda and urban administration shall have the responsibilities and duties to pay or cause the payment of compensation to...". Thus the woreda or administration might in some cases assume the duty to pay compensation to the expropriated in addition to facilitating the payment of compensation by the implementing agency.

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compensation as payment in cash, in kind or both pursuant to the law of compensation, to a proprietor who suffers material loss as a result of urban planning implementation and development activities.

13.5.3.8 Who and for what is entitled to receive compensation?

Both under Article 5/2 and Article 13/1 of the Expropriation Proclamation compensation shall be paid to "holders of expropriated land". It defines a holder in Article 2/3 as "an individual, government or private organization or any other organ which has legal personality and has lawful possession over the land to be expropriated and owns property situated thereon". Is compensation limited to lawful possessors of land who own property situated thereon? What about other rights *in rem* lost as a result of expropriation? What are compensable interests?

In theory, the answer to this question is simple and straightforward. The loss of any right in rem should be compensable if it is lost due to expropriation.[101] However, under the law, the answer may not that clear. Article 1461, Article 1466/2, Article 1468/1 and Article 1471 of the Code when read together suggest that any interest in an immovable might be compensable, even though the emphasis in those provisions appears to be on ownership, servitude and usufruct. The expropriation provisions of the Code do not speak to the expropriation of movable property and incorporeal property. The Code explicitly denies any compensation for some interests.[102]

The FDRE Constitution is both broad and narrow when it comes to the determination of compensable property. It is broad because the combined reading of sub-articles 2 and 8 of Article 40 the Constitution sends a clear message that the expropriation of any sort of private property is compensable, regardless of whether it is movable or immovable or tangible or intangible. Conversely the FDRE Constitution seems to narrow the scope of compensable property interests by adopting the labor theory in the sense that individuals are entitled to have private property interests in property on land which is linked to their labor. The attitude reflected in the Constitution appears to be

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[101] See Article 19 of Regulations No. 135/2007, which states that there shall be no payment of compensation with respect to any construction or improvement of a building, any crops sown, perennial crops planted or any permanent improvement on land, where such activity is done after the possessor of the land is served with the expropriation order.

[102] The French version of Article 1414 as translated by Bililign Mandefro states: "(1) The promise of sale, and the contractual right of preemption lapse where the thing to which the relate is expropriated for the purpose of public utility, or is requisitioned. (2) No indemnity is due to the beneficiary for the loss of these rights." Notice that the material scope of this article extends to both movables and immovables. Article 1399 of the Code also results in terminating the right of recovery, without indemnity, when the immovable over which this right is constituted is expropriated.

this: you will only be compensated for the value you have added to lawfully possessed land that has been expropriated.[103] In terms of the scope of compensable interests, the recent Urban Planning Proclamation No 574/2008 has, in the context of urban areas of the country, adopted a very broad approach. In Article 2/4 it defines expropriation as "an action exercised by a chartered city or an urban administration to take *any property*" [emphasis added].

Finally, under the Expropriation Proclamation, compensable interests are: utility lines,[104] permanent improvements to such land;[105] property situated on the land which can be removed and relocated; property which can be removed for consumption (e.g. standing crops); and property which cannot be relocated,(e.g., a house).[106] The proclamation takes the clear stand that a mere right to hold the land (quasi-usufruct right over a tract of land) lost as a result of expropriation is not compensable unless the administration is able and willing to give land in the form of displacement compensation to the affected person. The proclamation is silent about the compensability of any other types of lost interest. Thus the proclamation can result in a high degree of non-compensable interference with private property.[107]

13.5.3.9 When is compensation paid?

Article 40/8 of the FDRE Constitution, under Article 40/8 says the government may expropriate private property "subject to payment in advance of compensation". This is understood to mean compensation must precede dispossession. The property remains in the possession of and under the control of the owner/landholder until compensation is paid to him (or should he refuse to accept it, paid into a secure account on him behalf). Thus the compensation must be paid by the government but does not have to have been received by the beneficiary for possession and /or ownership to transfer.

The requirement of an advance payment raises the question of when compensation is to be fixed. The Expropriation Proclamation does not address the issue, that is, the relevant date on which compensation shall be fixed. But the Code in Article 1472/2 does. It provides that the amount of compensation due to be determined on the day when it makes its decision to expropriate.

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[103] See Article 40/2 cum 3 *cum* 7 of the FDRE Constitution.

[104] Article 2/7 of the Expropriation Proclamation.

[105] Article 7/1 of the Expropriation Proclamation.

[106] Ibid.

[107] Compare the stance taken in the Expropriation Proclamation with that articulated in Article 1485 of the Code.

Another related issue is what is the effect of the payment of compensation? Is it merely dispossession or extinguishment of ownership? The Code utilizes both dispossession and extinction of ownership in different senses. Under the Code, extinction of ownership of expropriated immovable property takes place at the time of the issuance of an expropriation order which is when ownership is transferred.[108] Articles 1478/2 and 1478/5 of the Code oblige the competent authority to take "possession of the property after having paid such amount to the owner or having deposited the amount to which the dispute or objection relates". Under the Code which it must be remembered predates the FDRE Constitution, compensation may be paid after the transfer of ownership but before dispossession.

13.6 Conclusion

Expropriation is the taking of private property by the state without the consent of the owner or landholder. Competent government authorities may expropriate private property for a public purpose upon tendering in advance compensation commensurate with the value of the property taken. The Ethiopian law has constructed the standard of public purpose stringently in relation to expropriation of property from investors and loosely in respect of the expropriation of property from other persons. The state in exercising this power is bound to follow the time consuming and complex procedures prescribed by law. The law does not clearly articulate the concept of compensable interest. In rem rights over land which may fall short of possession are likely to be terminated by expropriation, but their loss is not compensable on the face of the law. The existence of several overlapping statutes issued to regulate expropriation over many decades, without a clear legislative guidance as to which of these statutes is repealed, has created confusion and uncertainty in the area.

13.7 Review questions

1. In the case between *Medehanialem Catholic Church v. Private Owners,*[109] the defendant requested the Municipality of the City of Addis Ababa to give it the land adjacent to its existing possessions for the purpose of constructing a rehabilitative institution for the poor. The Municipality accepted the request and proceeded to grant the church the land occupied by several people. The dwellers refused to evacuate

[108] See Article 1467/2.

[109] See High Court of Region 14 (Addis Ababa City), 1982 E.C. Civil Case No. 4/85 (unpublished, on file with the author).

and they petitioned to regular court for the cessation of interference on the ground that a church is a private institution and the purpose of the expropriation was not public interest. Write a decision in favor of the dweller. Use the Expropriation Proclamation as the governing law.

2. In *Worku Kumbi v. the Municipality,*[110] the defendant, in the course of construction of the Ring Road of Addis Ababa City, sought to take plaintiff's land. The plaintiff objected on account of absence of public purpose. In your view was the construction for a valid public purpose? Consider the issue from the minimalist and maximalist point of view.
3. What are the main differences between the procedures governing expropriation under the Code, The Expropriation Proclamation and the Urban Lease Proclamation 2002? What guarantees of procedural fairness are found in each of these Proclamations? Does the landholder/owner have adequate input into the government decision taken to expropriate under the Expropriation Proclamation?
4. Article 13/1 of the Expropriation Proclamation states that landholders whose land is expropriated might be provided with rehabilitation support to the extent possible. Is this in addition to compensation for their expropriated property? What type of support might be offered and why would it be beneficial?
5. Article 21 of the Regulations to the Expropriation Proclamation obliges any person claiming compensation to produce proof of legitimate possession of the land holding and ownership of the property entitled compensation. If Abebe has lived on the land and paid taxes on it for 20 years can he establish possession as required? What evidence might he present in support of his claim?
6. Article 21 of the Investment Proclamation No. 280/2002 states:" 1) No investment may be expropriated or nationalized except when required by the public interest and then, only in compliance with the requirements of the law. 2) Adequate compensation corresponding to the prevailing market value shall be paid in advance in case of expropriation or nationalization of an investment for public interest. 3) Any foreign investor may remit compensation paid to him, pursuant to this Article out of Ethiopia in convertible foreign currency." What procedures would apply to the expropriation of an investment?
7. In *the Ethiopian Roads Authority (Authority) v. Ato Issa Mohammed,*[111] Ato Issa obtained a license from the concerned government authority to

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[110] See High Court of Region 14 (Addis Ababa City), 1986 E.C, Civil Case 2981/86, Unpublished, (on file with the author).

[111] This case is a modified version of the case decided by the Fed. Sup. Ct. (Cassation File No. 30461) on Hidar 3, 2000 E.C. (published in 3 Mizan Law Review 2 (2009) at

extract sand and gravel from quarries on a tract of land, described in this license, for thirty years. The Authority was constructing a road contiguous to the plot assigned to Ato Issa Mohammed and took four truckloads of sand Ato Issa had quarried and readied for sale but piled on his own land. The Authority also took over the quarry land leased to Ato Issa Mohammed in its entirety for its own use for a period of five years, for camping and for quarrying purposes. The Authority has refused to pay compensation to Ato Issa either for the sand it took or for the loss of the lease. It has invoked the following provision: The Authority shall use, free of charge, land and such other resources and quarry substances required for the purpose of construction and maintenance of highways, camp, storage of equipment and other required services.[112] In this case, the Cassation Division of the Federal Supreme Court held that:[113]

> ...considering that the applicant (the Authority) is established for the purpose of expanding infrastructure

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379) between the two parties mentioned here. See also two similar cases, through disposed on different grounds. In the *Ethiopian Roads Authority* vs. *Ato Kebede Tadesse* (Fed. Sup. Ct., Cassation File 34313, Megabit 25, 2000 E.C., Unpublished, on file with the author), the respondent (the latter) alleged that the applicant took away 10,859 cubic meter sand and occupied the quarry land leased by him from the Oromia National Regional State Mining and Energy Bureau, causing an interruption of current and of future income therefrom. The Cassation Division disposed of the case on procedural grounds. Also in the *Ethiopian Roads Authority* vs. *Genene W/Yohannes* (Oromia Sup. Ct. File No. 57593, Hamle 18, 2000E.C., Unpublished, on file with the author), the respondent claimed that he had a license to extract sand and gravel; that he applicant took the quarry land from him for the purpose of a road project. He sought compensation for the expenses incurred in connection with making the quarry land ready for extraction of materials as well as for a certain quantity of sand, mined and readied for sale, taken by the applicant from him. The Oromia Supreme Court decided partly in favor of the respondent and partly rejected his claim on the ground of lack of evidence.

[112] The Ethiopian Road Authority Reestablishment Proc. No, 80, 1997, Art. 6/18, *Fed. Neg. Gaz.* No 43 Year 3rd). This refusal of the Ethiopian Roads Authority to pay compensation for quarry lands it takes has a long standing history. For an excellent review of the law and practice in respect of expropriation by the authorities during the Imperial Regime, see Harrison Dunning, "Expropriation by the Imperial Highway Authority", *5:1 Eth. J. L. 217*(1968). The various regional state roads authorities do the same. See op.cit. Daniel W/Gebriel at 23-25 for the law and the practice in connection with expropriation by the Amhara National Regional State Rural Roads Authority.

useful for the public, the law permits it to use earth and gravel related materials free of charge. Article 6/18 of Proc. No 80/1997 states that where the applicant makes use of earth and gravel related materials for free, it shall pay compensation for the property on such land and is not bound to pay compensation for sand and gravel thereon. From this one can understand that earth and rock related materials, as they are natural resources and as natural resources are owned by the people and state, the people and state may use these resources without any payment. Therefore, even if the respondent has been granted by the relevant regional authority lease right to extract sand and gravel, as sand is a natural resource and as thus the respondent cannot have ownership over sand, and as the respondent claimed in his pleading not for the price of extracting the sand but the price of the sand itself and since this claim has no legal basis, the decision of the Illubabur Zonal High Court and that of the Oromia National Regional State Supreme Court in favor of the respondent to obtain the price of the sand suffers from basic legal error and is hereby reversed.

Write a dissenting opinion.

8. Argue for or against each of the following assertions: (a) public interest is one of the most important aspects of expropriation, (b) expropriation should not lead to dispossession without prior compensation.
9. "Serategna Sefer" and 'American Gibi' are areas in Addis Ababa. Houses in these sections of the city are shanties, clustered and unplanned. The owners of these houses are low-income people. Addis Ababa City Administration plans to remove these people from the land and lease the area to investors who have offered very attractive prices. The inhabitants are not willing to accept the administration's proposal on the grounds that the expropriation is not for a public purpose.
    a. The Dire Dawa City Administration plans to construct a stadium which will occupy the entire portion of the city known as Number One Sefer. The inhabitants of this part of the city have argued that a stadium is not property in a public domain; it is a private domain and object to expropriation for that purpose.
    b. In these cases what are the strengths and weaknesses of the people's argument? Under the Urban Lease Proclamation and Expropriation Proclamation how can they make their views known?

10. The Ethiopian National Museum recently conducted research that reveals that there are innumerable valuable historic artifacts in the hands of private owners, both citizens and foreigners. It plans to expropriate them. Can it do that? Why or why not? What law/s applies?
11. A certain Chinese company is presently constructing roads in Addis Ababa under concession it has obtained from the Federal Government. This company has found it necessary to remove some 200 buildings through expropriation. The owners of such buildings have argued that the company does not have authority to undertake expropriation proceedings. Prepare an opposing argument.
12. Using the provisions of the Expropriation Proclamation refute the argument that persons other than the landholder or land lease holder are not entitled to compensation even if they own immovable property situated on the land. In that event they would have to claim through the holder.

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[1] Unless otherwise noted all cases are on file with the author and unpublished.

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