



The Asia Foundation

Stanford
LawSchool

INTRODUCTION TO PROPERTY LAW IN TIMOR-LESTE

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Preface to *Introduction to Property Law in Timor-Leste*

This book was produced by the Timor-Leste Legal Education Project (TLLEP). The book seeks to critically engage the reader in thinking about the property laws and legal institutions of Timor-Leste, and is based on a model of educational writing first introduced in TLLEP's *Introduction to Professional Responsibility in Timor-Leste* textbook, published in 2011. Founded in March of 2010, TLLEP is a partnership between The Asia Foundation and Stanford Law School. Working with local actors in the Timor legal sector, the project's goal is to positively contribute to the development of domestic legal education and training in Timor-Leste.

This book represents the dedicated efforts of many individuals. Stanford Law School students authored the text and subjected each chapter to an extensive editing process. The authors of this book are Cynthia Barmore, Zach Koslap, Nikki Marquez, Ashlee Pinto, and Keny Zurita, all Class of 2015. Executive Director of the Rule of Law Program Megan Karsh ('09) provided comments on all chapters.

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The most recent versions of all published texts are available for download online free of charge on TLLEP's website: <http://tllep.stanford.edu/publications/>.

CHAPTER 1: INTRODUCTION TO PROPERTY LAW

CHAPTER OBJECTIVES

- To introduce property, property rights, and the differences between immovable and movable property
- To identify the sources of property law and the hierarchy of laws
- To explore the importance of property law and the history of property law in Timor-Leste

1. INTRODUCTION

Imagine you are walking through a field. You smell the scent of rain. The sun is beginning to shine through the clouds. You continue to walk and notice there are plants in the ground. It looks like this may be the start of a garden. What crop is planted here? You start to explore. Is this the start of a sweet potato? You think that you may be walking on sweet potato vines. You stand up and look around. You notice tall plants to your right. Is that maize? As you approach you see that the plants are maize. What type of maize is this? Could it be Sele? Maybe Suwan? Or Noi Mutin?

You find maize that looks ready to eat. It is Sele. You are hungry and want to eat the maize. Is this your maize now? You found it. Can you eat it? Can you share it with your family? This maize does not grow unless someone plants it. Who planted the maize? Does that person own the maize? Are you stealing the maize if you take it? What if they are hungry, too? Should you ask to take it? Should you ask to buy it?

Maize is valuable. People are hungry and need food like maize to survive. You are hungry and want to eat the maize. But the farmer planted the maize. The farmer worked to create it. The farmer controls the land that the maize grows on. But now you control the maize in your hand. Who owns that maize? Who owns the rest of the maize growing in the ground? Who owns the land you are walking on?

All of these questions are important. These are all questions about the law of **property**. Property is something of value that people own or use. Throughout this textbook, we will explore the answers to these questions using **sources of law** about property. Sources of law are the legal

resources that we study to learn what the laws are. Together, these sources of law create the rules about property that everyone must follow.

The maize in your hand, the maize growing in the ground, and the land are three examples of property. They are all valuable things to you and the farmer. This means that the maize in your hand, the maize growing in the ground, and the land are **assets**. An asset is a useful or valuable thing. Property is an example of an asset, because people value property. This chapter introduces the basic concepts of property under Timorese law.

There are many different kinds of property. The land, the maize growing in the ground, and the maize in your hand illustrate two categories of property: immovable and movable property. The land and the maize growing on it are **immovable property**. Immovable property is land and anything permanently attached to it, such as houses or bushes. The maize in your hand is **movable property**. Movable property is property that can be moved, such as automobiles or furniture. The law governs many different types of property, but this textbook primarily explores ownership of immovable property: land, houses, and anything else growing or built on land.

“Property” can refer to things, like the Sele maize, or to the **property rights** that people have to property. Property rights refer to the powers, guaranteed by law, that people have to property. Some people have property rights to the property around them. For example, the farmer has certain rights to the maize in your hand, the maize growing in the ground, and the land. The law protects property rights, and people can have their rights enforced by the courts. We will explore different kinds of property rights and why property rights are important. Finally, we will explore the history of property law and the governmental institutions that regulate property.

This chapter is only an introduction to property and property law. The next chapter will explain what immovable property ownership means and the different ways to own immovable property. The third chapter will discuss what it means to possess property but not own it, and how the law restricts what owners can do with their property. The fourth chapter will address how these ownership or possessory rights are acquired or transferred, such as by buying, selling, or inheriting property. The final chapter will explore how ownership rights can be legally or illegally taken from an owner by another person or by the government. This chapter will establish the basic framework for understanding property and property law in Timor-Leste.

2. SOURCES OF PROPERTY LAW

In this textbook, we will study the sources of law that define property rights. As we just learned, sources of law are the legal resources that we study to learn what the laws are. We will primarily study **formal law**. Formal laws are written laws that the government creates through formal procedures, such as a statute that Parliament approves. Formal laws about property include the Constitution of the Democratic Republic of Timor-Leste, the Civil Code of the Democratic Republic of Timor-Leste, and other laws passed by the National Parliament. We will also study **customary law**. Customary law refers to practices and beliefs that a community accepts as legal rules, even without a statute or legal decree.

Throughout this textbook, it is important to remember that property law is changing in Timor-Leste. The National Parliament is writing new laws about property, but those laws have not yet been passed. Therefore, although the Constitution of Timor-Leste, the Civil Code, and other laws provide the foundation of property law, the precise rules about property rights may change soon. The National Parliament's draft laws are not yet sources of law, but we will study them here so that you know how the law might change.

In the following sections, we will introduce the sources of law that are relevant to property law. We will begin with formal law and end with customary law.

2.1. Hierarchy of Laws

Before we introduce the sources of property law, it is useful to know that some laws are more important than others. There is a **hierarchy of laws** that refers to the order of legal authority. This means that sources of law at the top of the hierarchy have more power than laws at the bottom. If there is a conflict between a law at the top of the hierarchy and a law at the bottom of the hierarchy, you should follow the law at the top of the hierarchy. For example, the Constitution of Timor-Leste is the highest law and everyone must follow it, even if it conflicts with a different law. As we study property law, we will first read laws at the top of the hierarchy, and then read laws lower in the hierarchy.

The hierarchy of laws in Timor-Leste is as follows:

- The Constitution of Timor-Leste
- The Civil Code
- Laws passed by the National Parliament or by the government exercising its powers under Section 96 of the Constitution of Timor-Leste
- United Nations Transitional Administration in East Timor (UNTAET) Regulations
- Indonesian Law (applied before 25 October 1999)
- Customary Law
- Adopted National Policies

2.2. The Constitution of the Democratic Republic of Timor-Leste

The Constitution of Timor-Leste is the first and most important legal authority in the hierarchy of laws. A **constitution** represents the formal creation of an independent republic. It contains the basic rights that all citizens have. It also expresses commitment to the rule of law. The Preamble to the Constitution of Timor-Leste includes many of the country's goals:

Constitution of Timor-Leste

PREAMBLE (excerpt)

Ultimately, the present Constitution represents a heart-felt tribute to all martyrs of the Motherland.

Thus, the Members of the Constituent Assembly, in their capacity as legitimate representatives of the People elected on the 30 of August 2001,

Fully conscious of the need to build a democratic and institutional culture proper appropriate to a State based on the rule of law where respect for the Constitution, for the laws and for democratically elected institutions constitute its unquestionable foundation;

Solemnly reaffirm their determination to fight all forms of tyranny, oppression, social, cultural or religious domination and segregation, to defend national independence, to respect and guarantee human rights and the fundamental rights of the citizen, to ensure the principle of the separation of powers in the organisation of the State, and to establish the essential rules of multi-party democracy, with a view to building a just and prosperous nation and developing a society of solidarity and fraternity.

The National Parliament cannot pass a law that violates the Constitution of Timor-Leste, and if there is a conflict between the Constitution and another law, a court must enforce the Constitution. The Constitution of Timor-Leste protects property rights. Later chapters will explore the property rights that the Constitution of Timor-Leste grants to all citizens. Because the Constitution does not define all property rights, however, we must also look to other laws passed by the National Parliament.

2.3. The Civil Code of the Democratic Republic of Timor-Leste

The Civil Code is the second highest law in the hierarchy of laws. The Civil Code contains many rules about private and public property. The National Parliament passed the Civil Code in 2011. Under the Constitution of Timor-Leste, the National Parliament has the power to make laws, including the Civil Code. These laws define property rights and can be enforced in court.

2.4. Binding Non-Statutory Laws

Other laws passed by the National Parliament are the third highest in the hierarchy of laws. The National Parliament writes and passes legislation about many topics, including immovable property. These laws can sometimes help explain what the Civil Code requires. These laws are:

- Law 1/2003: Juridical Regime of Real Estate
- Law 12/2005: Leasing Between Individuals
- Law 19/2004: Leasing Property of State
- Regulation 229/2008 on Cadastre

Currently, the National Parliament is drafting new laws about property. In particular, one of these laws – Special Regime for the Determination of Ownership of Immovable Property – intends to clarify the legal status of immovable property. Other draft laws are also relevant to the future of property law. As of February 2014, the draft laws about property are:

- Draft Base Law on Environment, 20 September 2011
- Draft Law on Expropriation, 2010
- Draft Law on Establishing the Property Fund
- Draft Law on Petroleum Fund Revision, 2010
- Special Regime for the Determination of Ownership of Immovable Property

This textbook will not analyze the 2010 Draft Law on Petroleum Fund Revision. Instead, a working paper about it is available online at <http://www.stanford.edu/group/tlelp/cgi-bin/wordpress/wp-content/uploads/2013/10/Timor-Leste-Petroleum-Fund-Law.pdf>.

These draft laws would provide a framework for the future development of property law. It is important to remember, however, that they are not yet the law as of February 2014. They are only drafts, and will not be law until they are passed by the National Parliament. The relevant chapters in this textbook will analyze these laws to show how the law may change.

2.5. United Nations Transitional Authority in East Timor (UNTAET) Regulations

Regulations passed by the United Nations Transitional Authority in East Timor (UNTAET) are the fourth highest source of law. These regulations remain the law until the National Parliament replaces them with new laws. Generally, these regulations reinforced Indonesian property laws within Timor-Leste. Thus, those regulations maintain the status quo of property laws until Timor-Leste develops its own laws.

2.6. Indonesian Law Pre-1999

Laws passed by Indonesia before 25 October 1999 are the fifth highest source of law. These Indonesian laws remain the law until the National Parliament revokes them or replaces them with new laws. This rule was established by the National Parliament through Law 10/2003 on the Interpretation of Article 1 of Law 2/2002. These Indonesian laws reflect themes of private property and development of land.

2.7. Customary Law

Customary law is the sixth highest source of law. As we learned earlier, customary law refers to practices and beliefs that a community accepts as legal rules, even without a statute or legal decree. The Constitution of Timor-Leste requires the government to respect customary law, which is also known as non-state law. Under Section 2(4) of the Constitution, the government must recognize cultural values unless they violate the law. Many people in Timor-Leste follow customary law. New draft laws recognize that customary law remains an important source of law in the country.

The Constitution of Timor-Leste outlines the following principles about customary law:

Constitution of Timor-Leste

Section 2(4): (Sovereignty and constitutionality)

The State shall recognise and value the norms and customs of East Timor that are not contrary to the Constitution and to any legislation dealing specifically with customary law.

Section 138: (Economic organisation)

The economic organisation of East Timor shall be based on the combination of community forms with free initiative and business management

Section 59(5): (Education and culture)

Everyone has the right to cultural enjoyment and creativity and the duty to preserve, protect and value cultural heritage.

Section 61(3): (Environment)

The State should promote actions aimed at protecting the environment and safeguarding the sustainable development of the economy.

2.8. Adopted National Policies

Adopted national policies are the seventh highest source of law. Adopted national policies are broad policies that a national government pursues. These policies are not really “laws” like the previous six sources of law. A national policy is a broad program that the national government uses to pursue its goals. The government follows a national policy by choice, but the law does not require the government to follow it. Adopted national policies can, however, help shape laws passed by the National Parliament. They can also illustrate the government’s goals. Timor-Leste has several adopted national policies that the United States Agency of International Development (USAID) helped write. Some of these policies include:

- Dili Rental and Valuation
- Land Administration in East Timor
- Land Valuation and Taxation Policy
- Policy Framework for a Transitional Land Law for East Timor
- Proposal for Land Expropriation

In this section we introduced the sources of property law in Timor-Leste. We considered the hierarchy of these laws. We will analyze these sources of law more in the following chapters.

The following exercises ask you to think critically about the sources of law that are relevant for property law:

Application Exercises

Question 1: What is the source of law that ranks highest in authority?

Question 2: Is the government required to follow adopted national policies?

Suggested Answers

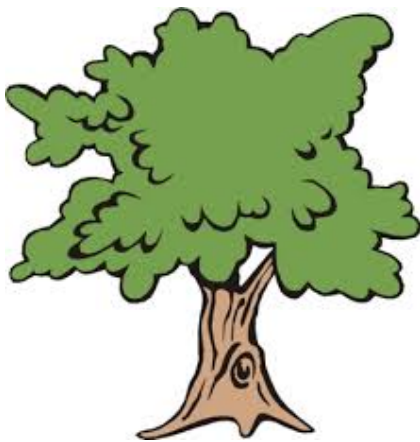
Answer 1: The Constitution of Timor-Leste is the highest source of law.

Answer 2: No. Adopted national policies are broad policies that a national government pursues. The government willingly follows them, but it is not required to.

3. PROPERTY IN TIMOR-LESTE

Imagine a piece of land in the district of Liquica. A river crosses that land. An avocado tree grows on the land. After swimming in the river, you see the avocado tree. After exploring it, you consider taking some avocados. You can put six avocados in your bag to bring home. The avocados are movable property. You can actually move the avocados. The river, the land, and the avocado tree are immovable property. You cannot move these. In this section, we will explore the differences between immovable and movable property.

IMMOVABLE PROPERTY



MOVABLE PROPERTY



3.1. Categories of Property

It is important to be able to identify which types of property are immovable property and which are movable property. This will help you better understand property law, because different laws apply to different categories of property.

3.1.1. Immovable Property

Think about your home. Consider the building, the land it is built on, and features of the land. Are there trees? Is any fruit growing on the trees? Is there water on the land?

Immovable property is an immovable object. It is property that cannot be moved without destroying or changing it. Immovable property is always **tangible property**. This means immovable property is a physical thing that can be touched. Another name for immovable

property is **real property**. Like immovable property, real property refers to land and anything permanently attached to it, such as houses or bushes.

Article 195 of the Civil Code provides examples of immovable property, such as land, water, and trees:

Civil Code
Article 195: (Immovable Things)
1. The following are immovable things:
a) Land and town property;
b) Waters;
c) Trees, bushes, and natural fruits, as long as these are planted in the land
d) Inherent rights of the immovable things mentioned in the previous clauses
e) Integral parts of land and town property

3. Every movable thing attached to the building permanently is an integral part thereof.

The National Parliament defined immovable property in more detail in Law 2003/1: Juridical Regime of Real Estate. Section 1 says that immovable property includes the ground, things growing out of the ground, and things permanently attached to the ground.

There are many examples of immovable property. When we refer to things attached to the soil, we most often refer to buildings, like houses. Houses and garages are immovable property because they are permanently attached to the ground. They are built on the ground. Immovable property also refers to the land on which a home or building stands. An avocado tree growing in the ground is also immovable property.

3.1.2. Movable Property

Now consider your favorite shirt. That shirt is your movable property. Property that is not land or attached to land is movable property. Movable property is something you can move, such as automobiles or furniture. Another name for movable property is **personal property**. Like

movable property, personal property refers to items that are not immovable property, such as bicycles or books. Movable property also includes things detached from the land, like a flower you cut. Therefore, immovable property can become movable if separated from the land. For example, an avocado tree becomes movable property when it is cut down.

Article 196 of the Civil Code defines movable property as everything that is not immovable property:

Civil Code

Article 196: (Movable Things)

1. Movable things are all those not included in the previous article

Movable property can be divided into two categories: tangible and intangible. As we learned, tangible property is a physical thing that has value. **Intangible property** includes creations of the mind that have value but do not necessarily have a physical form. Intangible movable property is also called **intellectual property**. Intellectual property refers to creations of the mind. In other words, intellectual property refers to intangible assets. Intangible assets can include musical, literary, or artistic works. According to Section 61 of the Constitution of Timor-Leste, intellectual property is intended to “protect the creation, production and commercialization of literary, scientific and artistic work, including the legal protection of copyrights.” Intellectual property law is still developing.

Consider an example of intellectual property. Juan designs a logo for an oil company. Juan’s logo is an example of intellectual property. This logo is a picture used to represent the company and its products. Juan created this logo. It is an original work. The logo is intangible movable property, and it is Juan’s intellectual property.

Together we analyzed the differences between immovable and movable property. An important lesson of this chapter is that property can be immovable or movable, as well as tangible or intangible. Being able to identify types of property is the first step to understanding the property laws that apply. The remainder of this textbook will focus on immovable property.

The following exercises ask you to think critically about how to identify immovable and movable property.

Application Exercises

Question 1: Carla is sitting on a bench outside her parents' house. Her parents own one car. They also own a garden next to the house. Carla wants to know which of these things is immovable property. Of the bench, house, car, and garden, which is immovable property? There is more than one correct answer.

Question 2: Juan owns a workshop in Dili where he builds chairs. Juan owns a saw that he uses in his workshop. Does Juan own any movable property?

Answers

Answer 1: The house and garden are immovable property.

Answer 2: Yes. The saw that Juan owns is movable property.

3.2. Introduction to Property Rights

We have discussed that property is something that has value. Property is an asset. For immovable property, people often want to benefit from that value by living on or otherwise using the property. They want to have property rights in land, buildings, or other immovable property. As we discussed, a property right is a right recognized by law. Property rights give people power, often to act in a certain way. Another name for a right to property is a **claim**. A claim is a legal recognition that one has power protected by the laws of the country. People want a claim to their property so the law protects their property rights.

This section introduces the property rights of ownership and possession of immovable property. Ownership and possession will be explored in-depth in the following chapters.

Property ownership is a system of rules that determines the property rights that people in society have over the things around them. The law protects the rights of property ownership, and property owners can have their rights enforced by the courts. Article 1225 of the Civil Code

defines property ownership as having “the rights of use, enjoyment and disposition of the things that belong to him, within the limits of the law and in observance of any restrictions it imposes.” These are all concepts that the second chapter of this textbook will define and explore.

For now, you can think of property ownership as a collection of these rights. To illustrate, imagine property ownership as a basket of fruit. Inside the basket is an apple, a banana, an orange, and a pear. Ownership is the basket. The rights to use, enjoy, and dispose of the property are the fruit within the basket. Ownership is the basket that holds all the rights that a property owner has to his or her property.

There are two types of immovable property ownership. The first is **private property**. Private property is property owned by one or more people. Consider an example of private property. Francisco owns a house, shirt, and truck. Everything Francisco owns is his private property. The house is Francisco’s immovable private property, and the shirt and truck are Francisco’s movable private property. Francisco has a legal right to all his private property.

The second type of immovable property ownership is **public property**. Public property is property that the government owns. Consider the Cristo Rei of Dili. This property is public property. People have permission to visit the Cristo Rei, but the government always owns it. The next chapter explores private and public property ownership in depth.

Ownership is not the only way to have property rights. Some people do not own property, but they have the right to use the property. This right is called a **possessory interest**. A possessory interest is the power to occupy and control immovable property. A possessory interest is the **right of use** of the property. The right of use is the owner’s right to do what he wants on his property, within the limits of the law. Examples of use include housing, business, farming, and construction. The law protects possessory interests and possessors can also have their rights enforced by the courts. The third chapter will discuss possessory rights in depth.

Consider an example of possession. You buy a house. You own that house. But, suppose you let Lucia borrow your house. Now Lucia has possession of the house, and she can use it. But, you still own that house. Your house does not become Lucia’s house when she starts to use it. You keep a right, or claim, to the house. Thinking about the fruit basket metaphor, you still hold the

basket of ownership, and you are only lending one fruit to Lucia. Possession is one fruit in the ownership basket.

This example shows that multiple people can have rights in a single property. Because property ownership includes many different rights, an owner can give some of these rights to another person. In our example, Lucia has a possessory right in the house, at the same time that you have an ownership right in the house.

When multiple people have different property rights in the same property, they may have disagreements about the property. For example, consider the scenario above. Suppose you decide to sell your house. But, Lucia wants to continue to use the house. Lucia does not want you to sell the house because she enjoys living there. Suppose Lucia refuses to leave the house, even though you own the house. This is a disagreement about property.

Because of the potential for disagreement, it is important to have property laws. Those laws create rules for how to solve property disagreements. For example, if Lucia refuses to leave your house, you can go to a court and ask it to solve the disagreement. The court would decide based on property law whether you have the right to sell your house because you own it, or whether Lucia has the right to continue living there because she has possession.

In this section, we introduced the concept of owning immovable property. We began exploring the differences between private property and public property. We also introduced ownership as the “basket” that holds multiple property rights and explored the property right of possession. To better understand why immovable property rights are important, we will now consider the goals of property law.

4. GOALS OF PROPERTY LAW

Why are property rights important? The main purpose of property law is to provide security for people who have property rights. Consider a piece of land where Roselia lives. On that land, Roselia built a house, planted trees, and grows crops. Imagine Anita does not have a house but she wants one. Anita walks into Roselia's house and says it belongs to Anita. If the law did not protect property rights, Roselia would not be able to ask the court to protect her right to her house. Anyone, like Anita, would be able to take Roselia's house. Her neighbors could eat her crops and cut down her trees to use as firewood. Other people could take Roselia's property.

Property law protects people from these problems. Property law is necessary because more than one person might want to have the same piece of property. Consider Anita. Anita wanted Roselia's house, because she did not have one. If there were no property laws, courts could not stop Anita from taking Roselia's house. Disagreements about property could cause violence, which is intolerable in a democratic society. Property law protects people and their rights.

Property law also supports businesses. Consider a business example. Suppose a company operates a basket factory. The factory is built on land that could be used for farming sweet potatoes. One day, a sweet potato farmer destroys the factory to clear the land. After the factory is destroyed, the farmer says the land is his to farm, and he plants sweet potatoes. If there were no property rights, businesses would not be able to ask a court to protect their property.

In Law 1/2003: Juridical Regime of Real Estate, the National Parliament warned there would be conflict, social instability, and paranoia without property rights. These problems would delay the development of Timor-Leste. There are also many other goals of property law. For example, Section 58 of the Constitution of Timor-Leste gives everyone the right to an adequate house to promote the goal of decent living conditions. The National Parliament is currently writing a new law, Special Regime for the Determination of Immovable Property, that includes four other objectives:

- Regularize the legal status of immovable property in Timor-Leste
- Promote tenure security
- Distribute property equitably among citizens
- Ensure secure access to land by all

Additionally, the preamble to Law 12/2005: Leasing Between Individuals states the following objectives:

- Facilitate decent living standards for citizens
- Develop economic activities
- Use clear rules and legal security in property to guarantee investment
- Promote social peace

In summary, goals of political stability, economic growth, and social peace are reasons to support the development of property law in Timor-Leste. You should think about these goals when reading about property law throughout this textbook. This will help you think about and answer difficult legal questions about property.

In this section we considered why property laws are important. Now we will introduce the property laws of Timor-Leste.

5. HISTORY OF PROPERTY LAW IN TIMOR-LESTE

In this section, we will explore the history of property law in Timor-Leste. That history is long and complex because Timor-Leste has had many stages of governance. Each governing power had different legal systems that established property rights in different ways at different times.

Today, property law is complicated because of that history. Some people historically have owned property under the customary law system. Other people owned property under Portuguese law during the 500 years of Portuguese rule. Others owned property under Indonesian law during the 25-year occupation. Still other people owned property under rulings by the United Nations Transitional Administration in East Timor. These different systems created a complicated system because two people might think they own the same property, but based on different systems. For example, Miguel may think he owns a field because he owned it under Portuguese law. At the same time, Manuel may think he owns that same field because he owned it under Indonesian law. This confusion is still being resolved today.

In this section, we will consider the history of property law and how that history has created today's property law situation.

5.1. Customary Systems

As we learned, customary law refers to practices and beliefs that a community accepts as legal rules, even without a statute or legal decree. Before the Portuguese period, customary law controlled property. Depending upon tribe, different property rights belonged to different communities and people. Typically, exercise of customary law was facilitated by community leaders. Those leaders helped to resolve conflicts and address concerns. These customary systems of law, recognized and respected by the Constitution of Timor-Leste, are intact and legitimate today. Considerations about customary law continue to influence the development of property law. Despite the continued importance of customary law, it is sometimes difficult for outsiders to determine what the governing customary laws are.

5.2. Portuguese and Indonesian Involvement

The Portuguese began to trade with the island of Timor in the early 16th century and colonized it mid-century. Portugal battled with the Dutch for control in the region, which eventually resulted

in an 1859 treaty where Portugal ceded the western portion of the island. Imperial Japan occupied Timor-Leste from 1942 to 1945, but Portugal resumed colonial authority after the Japanese defeat in World War II. At this time, Portuguese land law and customary law influenced property law in Timor-Leste. These influences include concepts of private property and ownership as well as using land for development.

Timor-Leste declared independence from Portugal on November 28, 1975 and was invaded and occupied by Indonesia nine days later. Timor-Leste was then incorporated into Indonesia in July 1976 as the province of East Timor. Once Timor-Leste became part of Indonesia, Indonesian law became law in Timor-Leste. Indonesian law determined property rights. But, during the Indonesian occupation, land ownership was administered to benefit Indonesian interests. Therefore, Indonesia often gave to people property that someone else already owned under Portuguese law. As a result, multiple people often claimed ownership to the same property. Similar confusion remained throughout international intervention as well.

5.3. International Intervention

On August 30, 1999, Timor-Leste voted for independence from Indonesia. Between that vote and the arrival of a United Nations peacekeeping force in September 1999, anti-independence Timorese militias—organized and supported by Indonesia—undertook large-scale destruction. The majority of the country’s infrastructure was destroyed, including homes, irrigation systems, water supply systems, schools, and the electrical grid. Records of land ownership were also destroyed. This destruction has made property administration very difficult. People are confused about who owns what property today, partly because those records of land ownership were destroyed.

In October 1999, the United Nations Transitional Authority of Timor-Leste (UNTAET) was established. The United Nations, through Security Council Resolution 1272, gave UNTAET responsibility to “provide security and maintain law and order throughout Timor-Leste.” UNTAET had the power to act as both the National Parliament and the Prime Minister, passing and enforcing new laws.

UNTAET’s first regulation outlined the laws that apply in Timor-Leste. According to Section 3 of Regulation No. 1999/1, the laws before October 25, 1999 (when UNTAET gained

administrative power) applied until replaced by UNTAET regulations or later laws. However, these laws could not violate international human rights standards, UNTAET's regulations and directives, or UNTAET's goals. UNTAET also established that Indonesian property laws were valid in Timor-Leste until new laws were passed. It did not clarify what to do when two people claimed ownership to the same property.

Today, international actors are still **stakeholders** in supporting the development of property law. A stakeholder is a person or group that has an interest in something. Two outside actors involved in the development of property law are the United Nations Development Programme and the United States Agency for International Development. These stakeholders continue to influence property law.

5.4. Post-Independence

On March 22, 2002, the Constituent Assembly approved the Constitution of Timor-Leste. As we learned, the Constitution of Timor-Leste is the most important law in the country. The international community recognized the independence of Timor-Leste on May 20, 2002.

Since independence, the National Parliament passed several other laws about property. As we learned earlier, the Civil Code is the most important source of law after the Constitution of Timor-Leste, and the National Parliament passed it on September 14, 2011. The National Parliament later passed specific property laws and decrees, as we explored above. The first of these was Law 01/2003: The Juridical Regime of Real Estate. This law attempted to resolve the historical problem of competing property systems and gave ownership of property that was previously controlled by Portugal and Indonesia to the government of Timor-Leste. Despite sounding straightforward, it has been difficult to determine which land the 2003 law affects.

Today, property law is continuing to develop. The government, citizens, professors, non-governmental organizations, international scholars, politicians, and businesses are all interested in the development of property law. Much progress has been made, but there is still much to do. We will explore the development of property law throughout this textbook.

In this section we considered the history of Timorese property law. All of these influences affect property law today. Knowing the history of property law in Timor-Leste will help you understand and solve the problems that remain today.

6. PROPERTY-REGULATING INSTITUTIONS WITHIN TIMOR-LESTE

As we learned, there are several laws about property. The government implements these laws. There are many institutions within the government, and each one is responsible for implementing different laws. This is because some parts of the government know more than others about different areas of property law. For example, there is a Forestry Department within the Ministry of Agriculture. Because the Forestry Department has expertise in forests, it is partially responsible for implementing property laws about forests.

As of February 2014, the government includes several land-related agencies. These are the Land and Property Unit within the Ministry of Justice; the Urban Planning Department within the Ministry of Public Works; the Forestry Department within the Ministry of Agriculture; and the Mapping-Cadastral Department within the Ministry of Agriculture.

In addition, several other departments in the government, including the Ministry of Justice, the Ministry of Public Works, and the Ministry of Social Solidarity, have responsibilities related to property law, such as planning, building permits and control, land taxation, and expropriation processes. It is important as a lawyer to understand administrative agencies. This is because different agencies might have the power to approve or forbid what your client wants to do. It can be difficult to identify which agency has that power, however, because there are not always clear laws about which government agency or department is responsible for different aspects of property law. Nevertheless, this section will give you a basic understanding of the agencies involved.

6.1. Regulating Private Property

The **Ministry of Justice** is responsible for regulating many aspects of private property. As we learned earlier, private property is property that belongs to individual people. Private property includes things that people own that cannot be illegally taken from them, either by the government or their neighbors.

Within the Ministry of Justice, there is the **Direcção Nacional de Terras e Propriedades e Serviços Cadastrais (DNTPSC)** (National Office for Land and Property Title Registration). All governmental departments that have projects involving land are supposed to coordinate with the DNTPSC. This office is responsible for creating a system to register property ownership.

Because the system for registering property ownership is still in the early stages of being created, this textbook will not explore the details of property registration. It is important to know, however, that the government is currently working on a new system to register property. Thus, the DNTPSC created the National Property Cadastre. A **cadastre** is a database that has information about land ownership. The National Property Cadastre, if completed, would provide clear information about who owns what land.

There is also the **Fundo Financeiro e Imobiliário** (Finance and Real Estate Fund). The role of this fund is still developing. It is intended to aggregate and manage financial resources from various sources and help manage immovable property in Timor-Leste. Additionally, it may help advise other agencies on funding decisions.

6.2. Regulating Public Property

Many parts of the government are responsible for regulating public property. As we learned earlier, public property is property that private individuals do not own. Instead, the government owns public property. Different government agencies manage the government's property.

The government agencies involved with regulating public property are:

- **Ministry of Justice**
 - The Direcção Nacional de Terras e Propriedades e Serviços Cadastrais (DNTPSC) within the Ministry of Justice also regulates public property.
- **Ministry of Agriculture and Fisheries**
 - This ministry has responsibility for property issues that affect agriculture and fisheries. It maintains control over historical and ritual sites and intends to protect them. It is also involved in projects about forests.
- **Ministry of Petroleum and Mineral Resources**
 - This ministry has responsibility for property issues that affect petroleum and minerals. It is a powerful part of the government. It is also responsible for mapping and consultation.

- **Ministry of Tourism**
 - This ministry has responsibility for property issues that affect tourism. Often, this ministry is involved when there are economic development issues that affect sacred sites.
- **Ministry of Public Works**
 - This ministry has responsibility for property issues that affect public construction. It issues construction licenses. It is unclear what the criteria are to issue a license, or what legal authority gives this ministry the power to issue those licenses.
- **Ministry of Commerce, Energy, and the Environment**
 - This ministry has responsibility for property issues that affect business, energy, and the environment. This ministry is also responsible for incorporating businesses and collects license costs.
- **Ministry of Social Solidarity**
 - This ministry has responsibility for regulating evictions from land that the government owns. It is responsible for paying people when the government takes their land. The final chapter of this textbook will explore such takings, also known as expropriation, in depth.

Because these governmental agencies are relatively new, they are still learning how to divide the responsibilities of land administration in practice. Accordingly, land administration is sometimes inconsistent, and the rules can be difficult to determine. The new draft laws, if passed, may also change which agencies have power to regulate different aspects of public and private property.

7. CONCLUSION

This chapter has been an introduction to property law in Timor-Leste. We began this chapter by introducing the sources of property law that we will learn about and the hierarchy of these laws. We reviewed the Constitution of Timor-Leste, which is the most important source of law. We also introduced the Civil Code, other laws passed by the National Parliament, draft laws currently being written, regulations passed by the United Nations Transitional Authority in East Timor (UNTAET), pre-1999 Indonesian law, and customary law. We also discussed adopted national policies, which are not laws but can shape future laws and help identify the government's goals. All of these sources of law are ways to learn the rules of property ownership and possession.

We next analyzed different categories of property. We explored immovable property and its unique characteristics. Immovable property includes land and everything permanently attached to land. Another name for immovable property is real property. Immovable property most often refers to land and buildings such as houses.

We also explored movable property. Movable property refers to property that can be moved, such as automobiles or furniture. Another name for movable property is personal property. Like movable property, personal property refers to things that are not immovable property, such as bicycles or books. Movable property can be a tangible item like a shirt, or an intangible item like intellectual property. The remainder of this textbook will only discuss immovable property. It will not discuss movable property.

We then introduced the concept of property rights. These rights are recognized by law and give people power, often to act in a certain way. We also discussed the difference between private property and public property. As we learned, private property is property that one or more people own. Public property is property that the government owns. We briefly introduced the difference between property ownership and possession. Property ownership is like a basket of fruit, where the basket is ownership and the fruit are the rights that property owners have. Property ownership gives the owner many different rights to property, and the next chapter will explore ownership rights in depth. Possession gives someone only the right to use property, and the third chapter will explore possessory rights in depth.

Next, we considered the goals of property law. Overall, themes of political stability, economic growth, and social peace support the development of property law.¹ Broad goals of property law include clearly defining property rights and creating ways to identify who has those property rights.

We then reviewed the history of property law in Timor-Leste. We introduced the competing systems of property law in Timor-Leste, including customary law, Portuguese law, Indonesian law, and UNTAET rulings.² This history is a large reason why property law is complicated today.

Finally, we considered governmental institutions that regulate property. We framed this discussion by identifying the institutions that regulate private property and those that regulate public property. In doing this, we began to learn how to navigate administrative processes.

In this chapter we established the basic framework for understanding property and property law. In the next chapter, we will learn more about what immovable property ownership means and the different ways to own immovable property. The third chapter will explore possession and discuss limitations on property ownership, including how the law restricts what owners can do with their property. The fourth chapter will address how these ownership or possessory rights are acquired and transferred, such as by buying, selling, or inheriting property. The final chapter will explore expropriation, or how ownership rights can be lost.

Think back to the Sele maize we discussed at the beginning of this chapter. Although it is unclear now who owns the Sele maize you saw growing in the ground, you have already started building the skills necessary to answer that question.

¹ Policy Framework for a Transitional Land Law for East Timor, p.3

² See http://www.tetrachintdev.com/index.php?option=com_k2&view=item&id=125%3Aeast-timor-land-law-program-llp-i-in-timor-leste&Itemid=226&lang=us.

CHAPTER 2: PROPERTY OWNERSHIP

CHAPTER OBJECTIVES

- To understand the basic principles and rights of property ownership
- To learn how property ownership is different for individuals, the government, and communities

1. INTRODUCTION

This chapter explores the basic principles of **property ownership**. Property ownership is one system of rules that determines the **property rights** that people in society have over the resources around them. As we learned in the last chapter, property rights refer to the powers, guaranteed by law, that people have over property. Stated most simply, owning property is having the right to use, manage, and enjoy property, including the right to transfer ownership to someone else. The law protects the rights of property ownership, and property owners can have their rights enforced by the courts.

This is an exciting time to study property ownership. Disputes about property ownership are a common problem that people ask their lawyers to solve. For readers who want to work on land issues one day, it is necessary to understand property ownership as the foundation of all property rights. Some readers may also own or want to own a home, and it is important to learn the benefits and obligations of ownership. For all readers, land issues are critical across Timor-Leste and affect many different aspects of life. As of 2014, the National Parliament is drafting new laws about property ownership and property rights. These laws may change the rights that property owners have and the rules that they must follow. This chapter explores the current laws on property ownership and how the draft laws might change those rules.

This chapter investigates ownership of **immovable property**. As the Introduction discussed, immovable property refers to land and anything permanently attached to it, such as soil, buildings, or trees. The law governs many different types of property, but this chapter only explores ownership of immovable property—land, houses, and anything else growing or built on land.

This chapter will explore the two main types of immovable property ownership in Timor-Leste. The first is **private property**, which we already learned is property that belongs to individual people. Private property includes things that people own which cannot be taken from them without their permission, either by the government or their neighbors. The National Parliament is also writing a law to allow communities to own property. This would create a new kind of private property in Timor-Leste. This chapter begins by exploring general principles of private property ownership and the different ways that people can own private property.

The second type of immovable property ownership is **public property**. We already learned that public property is property that private individuals do not own. This is property that the government owns for the benefit of all people in Timor-Leste. Public property does not belong to any single person, and there is no individual owner who controls public property. This chapter discusses what it means for immovable property to be owned by the government, what types of immovable property are publicly owned, and reasons why there is public property in Timor-Leste.

In sum, the objectives of this chapter are to explain what immovable property ownership means and the different ways to own immovable property. This chapter will answer these questions using the **sources of law** that define the rules of property ownership. As we learned earlier, sources of law are the legal resources that we study to learn what the laws are. Together, these sources of law create the rules of property ownership that everyone must follow. To learn the rules of property ownership, we will study the Constitution of the Democratic Republic of Timor-Leste, the Civil Code of the Democratic Republic of Timor-Leste, other laws passed by the National Parliament, and draft laws currently being written. Property ownership affects our lives in a variety of ways. This chapter will establish the basic framework for understanding the legal rules governing property ownership.

2. PRIVATE OWNERSHIP OF IMMOVABLE PROPERTY

Private ownership of immovable property is an exciting and complex topic. We will first discuss where we can learn the rules of private property ownership. Next, we will study these sources of law to discover basic rights of private property ownership. Then, we will explore the different ways that people own private property. Finally, we will conclude by learning about a new kind of private property that the National Parliament might create to allow communities to own property.

2.1. General Principles of Private Property Ownership

2.1.1. Sources of Law

The Constitution of Timor-Leste is the first and most important source of law that protects the right to private property ownership. Section 54 gives private property rights to every individual. Section 115 also requires the government to protect individual rights to private property. Similarly, Section 161 makes it a crime to steal immovable property that someone else owns.

While the Constitution of Timor-Leste grants all national citizens the right to private property and land ownership, it does not define what private property rights mean. We know that private property generally refers to property that belongs to individual people. We also know that private property includes things that people own which cannot be taken from them without their permission, either by the government or their neighbors. But how can we discover what else private property means?

In addition to the Constitution of Timor-Leste, there are several sources of law that govern private property ownership. First, the Civil Code broadly defines private property ownership rights. Second, the National Parliament passed Law 01/2003, The Juridical Regime of Real Estate, to create more detailed rules about immovable property ownership. Finally, the National Parliament is drafting a new law called the Special Regime for Determination of Ownership of Immovable Property to clarify remaining questions about immovable property. In this chapter, we will explore these sources of law to discover the rules of private property ownership.

2.1.2. Basic Ownership Rights

Before we explore the details of private property rights, we first must determine who has the right to own private property. The Constitution of Timor-Leste in Section 54 grants private

property rights to all individuals. Only national citizens, however, may own land. This means that while all people in Timor-Leste may use property, *only* citizens of Timor-Leste may own property. The National Parliament's Law 01/2003, The Juridical Regime of Real Estate, provides more detail. Under Section 2, only the government or national private persons may own immovable property, and these "persons" may be individuals or corporations. The draft law, Special Regime for Determination of Ownership of Immovable Property, proposes that only Timorese citizens and legal entities owned by Timorese citizens be allowed to own immovable property. It also proposes that men and women have equal rights to own land.

To illustrate who may own immovable private property, suppose Fernando would like to buy a house and rice field near Dili. Fernando is a citizen of Timor-Leste. Because Fernando is a citizen of Timor-Leste, he may buy the house and rice field. Fernando also owns a rice-packaging corporation. He wants to buy a factory near the rice field to package and sell the rice. He can buy the factory himself, or his corporation can buy the factory in the corporation's name. Fernando has a friend in Portugal named José who would also like to buy a house, rice field, and factory in Timor-Leste. José, however, is a citizen of Portugal. He may not buy any of these properties, because he is not a citizen of Timor-Leste.

People who own immovable property, like Fernando in this example, enjoy many different rights over their property. As we explored in the Introduction, property ownership is like a basket of fruit. In this analogy, the basket represents property ownership and each fruit represents a different right that accompanies ownership. These rights are all the things that owners can do with their property.

The Civil Code gives property owners three primary rights: use, enjoyment, and disposition. Together, these rights are the basket of fruit that property owners can have enforced in court under Article 1232. Owners of immovable property have these rights over the land and buildings they own, including the subsoil and the air over their land, under Article 1264. It is helpful to think about each of these rights separately.

Civil Code

Article 1225: (Content of Property Rights)

The property owner fully and exclusively enjoys the rights of use, enjoyment and disposition of the things that belong to him, within the limits of the law and in observance of any restrictions it imposes.

First, the Civil Code grants property owners the **right of use**. The right of use is the owner's right to do what he wants on his property, within the **limits of the law**. The limits of the law are activities that the law prohibits. For example, Hugo has the right to grow cassava on land that he owns. This is because he has the right to use his private property as he wants, and it is legal to grow cassava.

The Civil Code creates rules to regulate the many ways that property owners often want to use their land. These rules help define the limits of the law for property owners' right of use. For example, Articles 1280 and 1281 allow owners to construct buildings on their land. If an owner builds a window or door that faces his neighbor's property, he must leave at least one metre and a half of distance between his and his neighbor's property. This limitation only applies if there is not a government road between the properties. Suppose Julio owns a large field without any buildings, and he later builds a house in the middle of the field. Julio may add a window or door anywhere on his house, because the closest neighbor's property is more than one metre and a half from his house.

One example of "use" is **excavation**. The right to excavate allows owners to dig mines or wells on their property. Article 1268 permits owners to excavate their land. Owners may not, however, dig holes that deprive neighboring properties of the support they need. This is another "limit of the law." If the owner's excavation causes sinkholes or landslides on his neighbor's property, he must compensate his neighbor for the damage. This is true even if the damage was accidental and he acted carefully. For example, suppose Carla needs water for her house, and she digs a well on her property to find water. Unfortunately, she digs a big hole that causes a sinkhole on her neighbor Cecilia's property. Carla only dug on her own land, but she still must pay Cecilia for the damage caused by the sinkhole she created.

Another example of “use” is **demarcation**. When an owner demarcates his property, the boundaries between his property and his neighbor’s property are determined. Demarcation makes clear to an owner what land he owns and what land he does not own. Article 1273 allows owners to demarcate their property. Owners can require neighbors living next to them to cooperate in demarcation. If it is impossible to prove which neighbor owns which piece of land, the land is divided equally between them during demarcation, under Article 1274. Suppose Joana wants to demarcate her land to show who owns the garden between her house and her neighbor Maria’s house. If it is impossible to prove who owns the garden, Joana and Maria each will receive half of the garden.

A final example of “use” is **enclosure**. By enclosing their property, owners physically mark the boundaries of their property. Articles 1276 to 1279 allow owners to enclose their property. For example, owners may enclose their property by building a wall, digging a ditch, or planting a hedge around their property. Like excavation, however, enclosure must be done within the limits of the law. If an owner builds a trench, drain, or ditch around his property, he must create mounds of dirt as wide as the trench’s depth. He may not damage his neighbor’s property by digging too deeply or building a trench without drainage.

In addition to the right of use, the Civil Code gives property owners the **right of enjoyment**. The right of enjoyment is the right to benefit from property use. In practice, the right of enjoyment enables owners to stop other people from behaving in ways that prevent them from enjoying their property. For example, suppose Joaquina’s neighbor builds a large sign that blocks the sun from reaching Joaquina’s rice plants and the rice plants die. Joaquina can ask the court to make her neighbor remove the sign. This is because the sign prevents Joaquina from receiving the benefits of using her property to grow rice. This concept is explored in more detail in Chapter 3, under the discussion of limitations on property use.

The Civil Code also grants property owners the **right of disposition**. The right of disposition is the right to transfer property ownership from one person to another. For example, Maria may sell her house to her friend Marquita, who is a citizen of Timor-Leste. Maria may also give her house to Marquita as an inheritance when she dies. The laws governing disposition are explored in Chapter 4.

The Civil Code specifies that property owners “exclusively” enjoy the rights of use, enjoyment, and disposition. An **exclusive right** is a right that only the property owner has. No one but the owner has the right to use, enjoy, or dispose of the property. This means that if someone else tries to use, enjoy, or dispose of the property, the property owner has the right to stop that person. For example, exclusive rights give the property owner the **right of exclusion**. This right allows the property owner to stop other people from entering or using his property. The property owner can enforce these rights in court.

To illustrate the concept of exclusive rights, suppose Roselia owns a house. Roselia may use, enjoy, and dispose of the house she owns. Roselia’s neighbors, friends, and family, however, may not use, enjoy, or dispose of Roselia’s house without her permission. If Roselia’s neighbor tries to enter Roselia’s property without her permission, Roselia can exclude her neighbor and prevent him from entering.

The following exercises ask you to think critically about these rights and what exclusivity means in practice.

Application Exercises

Question 1: Leopoldo plants rice on land that he owns. His neighbor, Manuel, sees Leopoldo's rice plants and decides growing rice is a great idea. The next day, Manuel plants rice on Leopoldo's land, too. May Leopoldo use his land to grow rice? May Manuel use Leopoldo's land to grow rice?

Question 2: Santana owns a house in Dili, and she enjoys living in the city. Her brother Ruel lives in Bazartete, and Ruel wants Santana to move closer to him. Ruel decides to sell Santana's house to convince Santana to move to Bazartete. Ruel finds a buyer, Joana, who is a citizen of Timor-Leste. Ruel signs a document to transfer the house to Joana and accepts money for the house. When Joana tries to enter Santana's house, Santana learns what Ruel did, and she is very angry. Can Santana keep her house?

Answers

Answer 1: Leopoldo may grow rice on his land. Because Leopoldo owns the land, he has the right to use the land. Manuel, however, may not grow rice on Leopoldo's land without permission. Leopoldo's right to use his land is exclusive, meaning only Leopoldo has the right to use Leopoldo's land. Leopoldo can go to court to enforce his exclusive right of use.

Answer 2: Santana may keep her house. Because Santana owns her house, she has the right to sell it to Joana, a citizen of Timor-Leste. The right of disposition, however, is exclusive. This means Ruel cannot sell Santana's house. It does not matter that Ruel signed a document and accepted money from Joana. Santana can go to court to enforce her exclusive right of disposition.

2.2. Types of Private Property Ownership

There are different ways that people can own private property. People can own property individually, or people can own property together. Because the latter has more complicated rules, this section will spend more time explaining how more than one person can own a single piece of property at the same time.

2.2.1. Individual Ownership

The simplest way to own property is through **individual ownership**. Individual ownership is when only one person owns a piece of property. Suppose, for example, Monrique owns a house

and is the only owner of the house. In this example, Monrique individually owns his house. He has all the ownership rights discussed in the previous section, including rights to use, enjoyment, and disposition. He does not share those rights with anyone. This is the type of ownership that many people first imagine when thinking about property ownership.

2.2.2. Co-ownership

Co-ownership is one way for more than one person to own a single piece of property. In co-ownership, two or more people have ownership rights to the same piece of property. **Property in common** is another name for property that is co-owned. For example, if Vincente and his wife Odete co-own their house, they own their house in common. This means Vincente and Odete each have all the legal rights of ownership for the same house.

As you may imagine, there are more limits of the law on the rights of co-owners than individual owners. This is because when multiple people own the same property, one person's use of the property affects the other owner or owners. In this section, we will explore rules about use, management, and improvement of property in common. We will also discover the rights that co-owners have when they disagree with each other. Laws about selling property in common are discussed in Chapter 4.

Two basic principles underlie co-ownership. First, Article 1323 of the Civil Code gives co-owners **qualitatively equal rights**. Qualitatively equal rights mean that co-owners have the same rights to use, enjoy, and dispose of the property they own in common. Under Article 1326, each co-owner has the right to use the entire property, unless the co-owners form a different agreement. For example, suppose Antonio and Fernando co-own a house with two levels. They each have the right to live in the house, because they have qualitatively equal rights to use the entire property. Imagine now, however, that they agree that Antonio will have exclusive rights to the first level and Fernando will have exclusive rights to the second level. Because Antonio and Fernando formed that agreement, Fernando may not use the first level and Antonio may not use the second level. While they originally had qualitatively equal rights to use the entire property, they formed a different agreement.

The second principle of property in common is that co-owners may have **quantitatively different rights** under Article 1323. This means that one owner may own a greater percentage of

the property than another owner. In practice, owners with different shares of a property receive costs and benefits in proportion to their ownership, under Article 1325. If there is no evidence that co-owners own different percentages of the property, the law presumes they own equal shares.

To illustrate the difference between qualitative and quantitative rights, suppose Hugo and his brother José co-own a house that they rent to Ruel. Hugo owns 70% of the house and José owns 30%. Hugo owns a quantitatively larger share of the house than José. When Ruel pays rent each month, Hugo receives 70% of the money and José receives 30%. Hugo and José, however, have qualitatively equal rights to the house. They both have the right to use the entire property that they own in common. In our example, suppose Ruel moves to a new city, leaving the house empty. Hugo and José each have the right to live in the entire house, even though José only owns 30% of the house.

There are two primary limitations on co-owners' right of use under Article 1326. First, co-owners may only use the property for its normal purpose. Suppose, for example, Carla and Cecilia own a house in common. Carla or Cecilia may live in the house, because habitation is a house's normal purpose. Carla may not, however, start a furniture-making shop inside the house without Cecilia's permission. This is because making furniture is not the normal purpose of a house.

The second limitation on use is that one co-owner may not use the property in a way that prevents another co-owner from using the property. This is because co-owners have qualitatively equal rights to the property. Suppose, for example, Leopoldo and Maria own a house in common. Leopoldo lives in the house, and he builds a large fence around the property that prevents Maria from entering the house. While Leopoldo has the right to live in the house, he may not stop Maria from entering the house. This is because Maria has the same right as Leopoldo to use the house.

Similarly, all co-owners have the right to manage the property, under Article 1327. Managing a property involves making decisions and doing things to preserve the property. If a co-owner disagrees with the way another co-owner manages the property, he may oppose what the other co-owner is doing. Such disputes are resolved by **majority** decision. A majority is a group of co-

owners who own shares of the property that are worth at least half of its value. If a majority opposes a co-owner's management decision, the majority wins. If the losing co-owner ignores the majority decision, his actions can be undone, and he is responsible for any damage. If it is impossible to form a legal majority, any co-owner can ask the court to decide the disagreement.

To illustrate this rule, suppose Manuel, Vincente, and Maria co-own an apartment building. Manuel owns 30% of the building, Vincente owns 30% of the building, and Maria owns 40% of the building. Manuel wants to hire someone to clean the building every week. Vincente and Maria disagree. They think they should clean the building without help. Vincente and Maria are a majority, because together they own 70% of the building. They can prevent Manuel from hiring someone to clean the building, because they own a majority of the property value.

There are also rules about improving co-owned property. In general, under Article 1331, all co-owners must pay for **necessary improvements** to the property, in proportion to the shares they own. Necessary improvements are expenses that are necessary to maintain or enjoy property in common. To illustrate, suppose Carla and Joana own a house in common. Carla owns 70% of the house and Joana owns 30% of the house. There is a hole in the roof, and it is almost rainy season. Joana hires someone to fix the roof. Carla must pay 70% of the cost to fix the roof, because fixing the roof is a necessary improvement. Otherwise, the rain will ruin the house and prevent both co-owners from enjoying the property. Suppose Joana also wants to paint the house blue because she thinks the house will look more beautiful. Joana cannot force Carla to pay for any of the painting, because it is not necessary to maintain or enjoy the property.

If a co-owner does not want to pay for necessary improvements to the property, he may avoid paying by **renouncing** his ownership rights, under Article 1331. If a co-owner renounces his ownership rights, he does not own the property anymore. In our earlier example, suppose Carla does not want to pay to fix the hole in the roof of the house that she co-owns with Joana. Carla renounces her ownership of the house. Because Carla does not own the property anymore, she is not required to pay for roof repair. Carla's renunciation means that Joana now owns the entire house by herself. While Carla avoided paying to repair the roof, she also lost her ownership rights.

When people own property in common, they sometimes disagree about how it should be used. For example, suppose José and Julio own a field in common. José wants to grow rice on the field, but Julio wants to plant cassava. They cannot agree which is the better idea. What can José and Julio do?

Article 1332 gives co-owners the right to demand **division** of the property. Division changes property ownership from co-ownership to individual ownership. Through division, each co-owner gains exclusive rights to his share of the property. In our example, José or Julio can ask the court to divide the field that they own in common. José will individually own his share of the field, and he can plant rice on his land. Julio will individually own his share, and he can plant cassava on his land. They will not co-own the field anymore.

The only reason that a co-owner would not be able to divide the property is if the co-owners initially agreed that the property would remain undivided. This type of agreement may not be longer than five years. Co-owners may, however, make a new agreement after five years to keep the property undivided. For example, suppose José and Julio bought their field in 2010 and agreed to not divide the property for five years. The court will not allow the field to be divided before 2015.

The following exercises ask you to think critically about the rights and limitations of co-ownership.

Application Exercises

Question 1: Antonio and Hugo decide to buy property together. They don't know exactly how they want to use the property, but they want to earn money. They find a small house with a large garden, and they buy the property in common. The next day, Antonio moves into the house. Hugo tells Antonio he must leave the house, because they cannot earn money from the property while Antonio is living there. Antonio refuses to leave. Does Hugo have a legal basis for making Antonio leave the house? If not, does he have any other options?

Question 2: Ruel and Marquita are brother and sister. They co-own a hotel in Dili. Ruel owns 30% of the hotel and Marquita owns 70% of the hotel. One day, Ruel hires a weekly gardener, and he pays a company to build a swimming pool in the hotel. Ruel then tells Marquita about the gardener. He also tells Marquita that she owes him for 70% of the cost of the swimming pool, because she owns 70% of the hotel. Marquita is very angry. She likes gardening herself, and she thinks a swimming pool is too expensive. What can Marquita do?

Answers

Answer 1: Hugo does not have a legal basis for making Antonio leave the house. Antonio has a right to live in the house, because he is a co-owner and every co-owner has the right to use the property. Antonio's use of the house is acceptable because houses are normally used as places where people live. Antonio is also not preventing Hugo from entering the house or using it. Hugo's only option is to ask the court to divide the property.

Answer 2: Marquita can fire the gardener. Remember that Marquita owns 70% of the hotel. This is a majority of the property value, which allows her to undo Ruel's management decisions. Marquita also is not required to pay Ruel for any of the swimming pool. She is only required to pay her share of necessary improvements, and a swimming pool is not necessary to conserve or enjoy the property.

2.2.3. Horizontal Property

Horizontal property, described in Articles 1334 to 1361, is another form of ownership that enables multiple people to share ownership of a single piece of property. For horizontal property, people individually own the property's private areas and co-own the property's **common areas**. Common areas are the parts of a property that two or more co-owners share. People can own property horizontally only if the property has private areas and common areas, with separate exits for each private area. Article 1341 provides examples of common areas in a building: these include the ground, roof, terraces, hallways, staircases, electricity, water pipes, gardens, elevators, and garages. Common areas are always owned in common, but one co-owner can have exclusive use of some common areas. For example, a co-owner might have exclusive use of a terrace that can only be accessed from her apartment.

This is an exciting time to study horizontal property. Many people are moving from rural to urban areas where they live in horizontal property. For example, apartment buildings are often owned as horizontal property. In the building, there are apartments, hallways, and stairways. The apartments are private areas, and the hallways and stairways are common areas. Tenants individually own their apartments, and they co-own the hallways and stairways.

The rules that we explored about co-ownership generally apply to horizontal property under Article 1342. For example, owners share the cost of necessary expenses for co-owned common

areas, in proportion to the value of their share of the property, under Article 1345. This includes expenses required to conserve common areas and for services that benefit all owners. There are some exceptions to this rule for horizontal property. First, owners can agree to change how expenses for services are divided. Second, if only some owners use a common area, such as stairs or elevators that only reach some apartments, only those owners must pay expenses for those areas.

Co-owners of horizontal property must also pay their proportionate share of **innovations** under Article 1347. Innovations are changes to a property that make it better. These changes are also known as improvements to the property. Owners may refuse to pay for innovations only if they have a “well-founded” reason. One example of a well-founded reason is if the innovation is recreational, or used for fun, such as a swimming pool. A second example is if the innovation is too expensive relative to the building’s value. If an owner refuses to pay his share, he may use the innovation if he later pays a reasonable amount for its construction and maintenance. For example, suppose Manuel refuses to pay for his apartment building’s new swimming pool. He may refuse to pay his share because the swimming pool is a recreational innovation. He may use the swimming pool, however, if he later pays to use it.

There are also limitations under Article 1342 on how owners can use the private areas of the horizontal property that they individually own. These limitations exist because how owners use their private areas affects other owners in the same building. First, owners may not harm the building’s safety, architectural design, or appearance. For example, an owner may not remove a wall in his apartment that is necessary for the building not to collapse. Second, owners may not use their individual areas in ways that offend good manners or are not the intended purpose. For example, an owner may not open a furniture-making shop inside his apartment, because the apartment’s intended purpose is for living, not manufacturing.

What happens when owners of horizontal property disagree about how to use the property’s common areas? Recall that owners of property in common have the right to demand division of the property. Under Article 1344, owners of horizontal property do not have this right. Although owners of horizontal property co-own the building’s common areas, they may not demand division of common areas.

Instead, owners may sell their shares of horizontal property. If owners sell their horizontal property, they must transfer their co-ownership of common areas with their individually owned private areas, under Article 1340. For example, suppose Julio sells his apartment in a horizontally owned building to Joaquina. Now, Joaquina individually owns the apartment and co-owns the common areas that Julio used to own. Julio cannot keep his co-ownership of common areas once he sells his apartment. Chapter 4 explores this process of disposition.

Suppose there is a disagreement but an owner does not want to sell his property. What can he do? Owners often ask the **assembly of owners** for help resolving problems. All of the property's owners constitute the assembly of owners. The assembly is responsible for managing the building's common areas, under Article 1351. The assembly makes decisions about the property by voting, and each owner has a number of votes proportionate to his ownership of the building. Typically, the assembly elects a manager who is paid to do necessary jobs. Article 1358 provides examples of the jobs that a manager does: organize assembly meetings, prepare the annual budget, monitor insurance issues, pay necessary expenses, and require owners to pay their share of the expenses.

The Civil Code gives the assembly of owners the power to change the rules that co-owners must follow. For example, if the assembly of owners forbids an activity and no one objects, Article 1342 states that all owners must follow the decision. The assembly also may change the rules to grant requests from owners. An assembly of owners with at least two-thirds of the building's value can approve two types of requests. First, the assembly can approve changes to the building's architectural design or appearance. Second, the assembly can often approve changes to the way owners use the property. If no one objects, the assembly can approve division of private areas into new separate fractions, under Article 1343. Approval is not needed for owners to legally combine neighboring private areas into one combined area.

To illustrate this process, suppose Leopoldo wants to build a new door from his apartment to the street. He wants to change his apartment in ways that alter the building's appearance. Leopoldo must obtain permission from the assembly of owners before he builds the door. The assembly of owners who approve his request must own at least 67% of the building.

The following exercise asks you to think critically about the rights and limitations of horizontal property ownership.

Application Exercise

Odete owns an apartment in a building owned as horizontal property. Her brother Monrique lives in the apartment next to Odete in the same building. Odete and Monrique want to combine their apartments into one apartment that they will own in common. This will require construction to add windows, changing the building's architectural design and appearance. They also want to start a store in their new combined apartment. What can Odete and Monrique do now without permission, and what do they need permission for from the assembly of owners?

Answer

Odete and Monrique can legally combine their apartments without asking permission from the assembly of owners. They can combine their apartments because they own apartments next to each other. This means that Odete and Monrique will co-own the property as one apartment. Before they change the building's architectural design and appearance, however, they need approval from the assembly of owners. This means that a group of people who own at least two-thirds of the building must give them permission to do the construction work. Otherwise Odete and Monrique cannot physically combine their apartments, even though they can legally treat them as one property. Approval from the assembly of owners is also needed to build furniture in the apartment, because that is not the normal use of the apartment.

2.3. Community Ownership of Immovable Property

As of 2014, the National Parliament is considering a law to create new categories of property ownership for land that communities share. People living in communities often share land, such as fields or forests. Currently, the law does not create specific rules for how communities own the land that they share. While communities often share land now, there are not legal rules that formally protect their shared ownership. The draft law, Special Regime for Determination of Ownership of Immovable Property, would be the first law to give communities ownership of land. This law would allow communities to collectively own property and it would create rules about that property.

2.3.1. Community Property

The draft law would create new rules about **community property**. Community property is immovable property that the community owns. The national government and private individuals do not own community property. Rather, this is property that the community acknowledges is shared by multiple people in the community. Sometimes a group of individuals or families use the property. Local customs determine the rules for how people share community property. This form of property ownership can be important for reducing poverty in rural areas, where communities often share land. Community property is not the same thing as **traditional land**. Traditional land refers to property that was used by a community's ancestors. Instead, "community property" is a technical term that refers to certain areas that the community shares and uses today.

To illustrate the concept of community property, imagine a community like Bazartete in the district of Liquiçá. Because Bazartete is in the rainforest, many people who live in Bazartete use the forest. For example, people gather plants from the forest to make medicine. They share the forest. People in Bazartete agree that everyone in the community may use the plants they find there. The forest is an example of community property.

The Constitution of Timor-Leste, the Civil Code, and current laws do not discuss community property. Instead, as discussed in the Introduction, the Constitution of Timor-Leste contains principles about customary law that are the basis for community property:

Constitution of Timor-Leste

Section 2(4): (Sovereignty and constitutionality)

The State shall recognise and value the norms and customs of East Timor that are not contrary to the Constitution and to any legislation dealing specifically with customary law.

Section 138: (Economic organisation)

The economic organisation of East Timor shall be based on the combination of community forms with free initiative and business management

Section 59(5): (Education and culture)

Everyone has the right to cultural enjoyment and creativity and the duty to preserve, protect and value cultural heritage.

Section 61(3): (Environment)

The State should promote actions aimed at protecting the environment and safeguarding the sustainable development of the economy.

First, an important principle in the Constitution of Timor-Leste is respect for customary law. As discussed in the Introduction, customary law refers to practices and beliefs that a community accepts as legal rules, even without a statute or legal decree. Under Section 2(4), the government must recognize cultural values unless they violate the law. This means the government must respect how communities legally share property. Second, the Constitution of Timor-Leste provides that people will use a variety of community forms, or ways to own property as a group, to manage their property. Section 138 recognizes that communities organize their property in different ways. One of these ways may be to share common spaces like forests. Third, Section 59(5) gives everyone the right to cultural enjoyment and the duty to preserve cultural heritage. Community property is important to protect cultural activities because it protects the ability of communities to continue to share property as they want. Finally, Section 61(3) urges the government to promote environmental protection and responsible economic development. Recognizing community property is one way the government can protect the environment and promote development.

The draft law, Special Regime for Determination of Ownership of Immovable Property, would create specific rules about community property. First, local communities would own community property in the name of the community. For example, consider the forest around Bazartete that

the community uses. The forest would belong to the community of Bazartete. It would not belong to any specific person who lives in Bazartete.

The draft law would also forbid anyone from selling community property. Once property belongs to a community, it would always belong to the community. For example, suppose Bazartete owns the forest as community property. Manuel, a developer from Dili, visits Bazartete. He would like to start a business selling medicine made from plants in the Bazartete forest. Manuel offers the elders of Bazartete money to buy the forest. Even if the elders would like to sell the forest to Manuel, they cannot because the forest is community property. The forest will always belong to the community of Bazartete.

There are several questions that the draft law does not answer. For example, who can represent the community if a question arises about community property? Also, what is a “community” that can own land? Some countries, like Mozambique, define “community” broadly. In Mozambique, like Timor-Leste also a former Portuguese colony, a community is a group of families and individuals who have common interests related to shared areas that are necessary for the group’s survival. Other countries, like Indonesia, define “community” more narrowly. In Indonesia, a “community” must be a group that is united by customary law. In Indonesia, therefore, a community can only own community property if the community has practices and beliefs that it treats as legal rules, even if there are no statutes or legal decrees about those practices and beliefs. This question about what elements comprise a community may create confusion for lawyers and property owners.

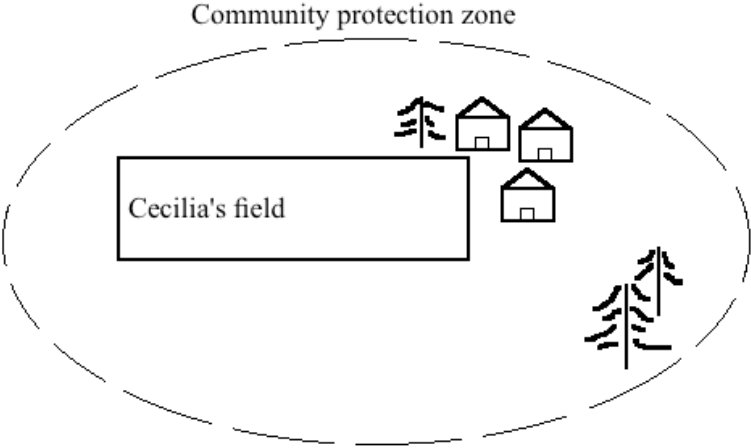
2.3.2. Community Protection Zones

The draft law, Special Regime for Determination of Ownership of Immovable Property, would also be the first law to create **community protection zones**. Like community property, community protection zones would be a new way to recognize land that communities use and share. A community protection zone is an area that the government protects to benefit communities. These are areas that people share and need to survive. Individuals, families, and groups in a community protection zone can use the land. Their use must be respected by the community and protected by the government.

The purpose of creating community protection zones is to encourage communities to participate in decisions about local development projects. The draft law lists types of areas that could be community protection zones. These include places people live, agricultural areas, forests, cultural sites, pastures, water, or areas with natural resources. Timor-Leste’s draft rules about community protection zones come from Mozambican law.

Unlike community property, community protection zones do not change who owns the land. Private people, the government, and the community may own property in a community protection zone. Instead, there are rules about how owners may use land in a community protection zone. They may not use the property in ways that harm the community, since the government must protect this property to benefit communities.

To illustrate, suppose Cecilia individually owns a field in a community protection zone. In the image below, everything inside the large oval is in the community protection zone. The rectangle is Cecilia’s field. The field is Cecilia’s private property, and her field is in the community protection zone. Suppose Cecilia wants to build a large building on the field, but the community uses the field to grow food. Because the field is in a community protection zone, Cecilia may not build the large building. This is because the community needs to grow food on the field to survive. The draft law would require the government to protect the field to benefit the community.



The draft law would give the government responsibility to protect community protection zones. This responsibility includes several duties. First, the government would be required to ensure that customary practices follow the Constitution of Timor-Leste, encourage participation by

everyone in the community, do not discriminate against people in the community, and treat men and women equally. For example, the government must ensure that people in communities decide together how to use property in community protection zones. The government must also ensure that men and women have equal rights to use the property.

Second, the government would be responsible for promoting environmental, social, and cultural sustainability. This applies to how natural resources are used and how communities behave. The government would be required to ensure natural resources are used in ways that allow communities to maintain their cultural practices. The government would also need to ensure communities do not use property in the community protection zone in ways that harm the environment. For example, the government could prevent people from harvesting too many plants from a forest in a community protection zone. This is because harvesting too many plants damages the environment.

Finally, the government would have responsibility for protecting immovable property in the community protection zone from **speculation**. Speculation is when people buy property because they expect its price will increase. For example, someone might buy land where coffee is grown if he thinks that coffee prices will increase, because that land would become more valuable. If speculation causes land prices to increase, some government officials worry that there will be unfair property sales and social problems. This provision would require the government to prevent people from buying land in community protection zones for the purpose of speculation.

The draft law would also create rules about how people from outside the community can use property in a community protection zone. These rules primarily affect **developers**. A developer is someone who wants to do economic activities, like start a business or build a factory. Before a developer can begin an economic activity in a community protection zone, he must consult with the local community. This means he must talk about his plans with the community before he begins. The purpose of community consultation is to encourage discussion between developers and communities.

To illustrate the consultation process, suppose Odete owns a field in a community protection zone, and the community is not using the field. Odete sells the field to José, a developer from Dili. José wants to grow cassava there and sell the cassava in Dili. Before José begins his cassava

farming business, he must talk about his plans with the community near the field. Consulting with the community allows José to hear the opinions of the local community before he begins growing cassava. This also allows the community to learn about José's plans before they begin. The community may convince José to change his plans. For example, the community might convince José to only grow cassava on part of the field.

The draft law would also give the government responsibilities when people from outside the community want to do economic activities in the community protection zone. First, the government must ensure those activities benefit the local community. Benefits must be non-discriminatory, helping the community in general rather than specific groups. Second, the government must ensure economic activities are environmentally, socially, and culturally sustainable. This requires the government to prevent people from outside the community from doing activities that severely harm the environment, the social order, or the local culture. For example, the government would be responsible for stopping someone from entering the community and cutting down all the trees in the forest. Third, the government must ensure economic activities respect the ways that local communities live and preserve their access to natural resources. For example, the government may not allow someone to use all the water in a community protection zone. Otherwise, the local community would not have access to the natural resources it needs. Finally, if economic activities would use community property inside the community protection zone, the government must help the community negotiate and ensure the community's rights are respected.

3. PUBLIC OWNERSHIP OF IMMOVABLE PROPERTY

Not all property is privately owned. There is also public property, which private people do not own. As we learned in the Introduction, public property does not belong to any single person. There is no private owner with exclusive rights over public property. Instead, the government owns public property. As we analyze these concepts, think about why some types of property are privately owned and others are publicly owned.

3.1. Public Domain

Section 115(k) of the Constitution of Timor-Leste requires the government to protect the **public domain**. The public domain is immovable property that the government owns and that, by its “nature,” may not be sold. This is the language that the National Parliament used in Law 01/2003, the Juridical Regime of Real Estate, to define “public domain.” Under Section 139(1) of the Constitution of Timor-Leste, the government owns soil and subsoil that are “essential to the economy,” and it must use them “in a fair and equitable manner in accordance with national interests.” The National Parliament has also forbidden the government from selling the public domain to private people. Section 3 of Law 01/2003 includes this limitation. Instead, the public domain always belongs to the government. The government owns this property so it can be used to benefit all the people of Timor-Leste.

What property is part of the public domain? What kind of property has a “nature” that cannot be sold under Law 01/2003? The Civil Code mentions the public domain in Articles 1281, 1317, and 1446, but it does not define it. Section 3 of Law 01/2003 prevents the government from selling the public domain. That law, however, does not say what types of property are in the public domain. As of 2014, the National Parliament is drafting a new law to answer these questions. The draft law, Special Regime for Determination of Ownership of Immovable Property, would define the public domain. If passed, it would clarify that the public domain is property that is necessary to protect the public interest.

The draft law would identify specific types of property that are always part of the public domain. First, water would be in the public domain, including coastal waters, rivers, lakes, lagoons, and wet sand on beaches. For example, Timor-Leste owns part of the Timor Sea, and that property would be in the public domain. The Comoro River and the Tasitolu Lake would also be in the

public domain. Consider the Arbiru beach near Dili. There are parts of the sand that become wet when the tide rises, and there are parts of the sand that are always dry. The parts of the beach that become wet would be in the public domain. The parts that are always dry would not be in the public domain.

Most air would also be in the public domain. The draft law would state that air high above private property and air that radio waves move through are in the public domain. For example, suppose Miguel owns a house. He owns the air close to the ground as his private property. The air high above his house, where airplanes fly, would be in the public domain.

Natural resources would be in the public domain, including oil, natural gas, minerals, geothermal resources, and natural underground caves. For example, the petroleum in the Greater Sunrise field in the Timor Sea would be in the public domain. Other laws establish detailed rules about petroleum. You can learn more about the law governing petroleum by reading the Petroleum Fund Act, Law 09/2005, and amendments contained in Law 12/2011. You can also learn more about this law by reading *Introduction to the Laws of Timor-Leste: Petroleum Fund Law*, available online at <http://www.stanford.edu/group/tlep/cgi-bin/wordpress/wp-content/uploads/2013/10/Timor-Leste-Petroleum-Fund-Law.pdf>. Since 2010, the National Parliament has been drafting a new law to govern natural resources. This draft law is called the Law on Expropriation, which is explored in more depth later in this textbook.

The public domain would also include transportation and energy infrastructure. This includes railroads, most airports and ports, highways, and public utility dams. For example, the Avenida Presidente Nicolau Lobato would be in the public domain. The Presidente Nicolau Lobato International Airport and the Dili Port would also be in the public domain.

The public domain would also include public areas like cemeteries and monuments. For example, the Cristo Rei of Dili would be in the public domain. The Dili Rock and the Cemitério de Santa Cruz would also be in the public domain.

Finally, national defense areas would be in the public domain. These include military areas and borders. For example, the land immediately between East Timor and West Timor would be in the public domain. The Metinaro Training Base east of Dili would also be in the public domain.

As you read about the different types of property that would be in the public domain, you may have noticed that these are all types of property that benefit the public. This is property that the government owns to benefit all people of Timor-Leste. For example, the government owns military bases to protect the whole population. The government owns the Dili Airport and the petroleum in the Greater Sunrise field in the Timor Sea to improve the national economy. All property in the public domain has a “nature” that cannot be sold under Law 01/2003, because its purpose is to benefit everyone, not one private person.

3.2. Private Real Estate of the Government

Section 115(k) of the Constitution of Timor-Leste also requires the government to protect “property of the State.” Law 01/2003 calls this property **private real estate of the government**. Under Section 4 of Law 01/2003, this is immovable property that the government owns and may sell. Most public property is the private real estate of the government. That law explains that the primary difference between the private real estate of the government and the public domain is that the government may sell its private property. If the government sells its private property, the buyer individually owns it as his private property. The government’s private real estate includes all immovable property in Timor-Leste owned by Portugal on December 7, 1975. It also includes immovable property that the government legally acquires.

The current law gives the government ownership of unclaimed private land. The government’s private real estate includes immovable property if the private owner is not known, under Section 12 of Law 01/2003. If a private person believes he owns the land, he may protest the government’s claim and prove he individually owns the land. The important part of this rule, however, is the **presumption** of government ownership. This means that if property does not clearly belong to a private person, it is assumed to belong to the government. If a private owner does not object, the government will own the property. This is a common rule in property law that empowers the government. Chapter 5 discusses the process that the government uses to claim ownership of private land, whether the owner is known or unknown.

The draft law would clarify several aspects of the government’s private real estate. First, it would clarify the status of property that the Portuguese and Indonesian administrations controlled. Consider immovable property that was used by the Portuguese administration (until December 7, 1975) or the Indonesian administration (until October 19, 1999), but is not currently used by

Portugal or Indonesia. This property would become the property of the government of Timor-Leste. The draft law would also clarify the status of abandoned property. If the owner of private land is not known, that land would be the government's private real estate.

The following exercise asks you to think critically about the difference between the public domain and the government's private real estate.

Application Exercise

Fernando is a good boat builder. He would like to create a company that builds boats and sells them to fishermen in Dili. Fernando decides he can make the most money if he operates his business near the water. He finds a building for sale on the Avenida Salazar near the Dili Port. He discovers that the building's previous owner abandoned it, and now the government owns it. Fernando would like to buy the building and build boats there. He would also like to buy the Dili Port, where he would display his boats for sale. Can Fernando buy the building and the Dili Port?

Answer

Fernando may buy the building, but he may not buy the Dili Port. The government owns the building because the previous owner abandoned it. The building is the private real estate of the government, and the government may sell its private real estate. The building is not in the public domain, because the building does not have a "nature" that cannot be sold. Unlike public roads or borders, the building is not essential to the economy and its purpose is not to benefit everyone. If Fernando buys the building, it becomes his private property, and he individually owns it. The Dili Port, however, is in the public domain. The Dili Port exists to benefit all people in Timor-Leste. The government may not sell property in the public domain.

4. CONCLUSION

In this chapter, we explored the basic principles of ownership of immovable property. We discovered the differences between private property and public property. We learned that people can own private property individually or together. Finally, we identified the different types of public property ownership. These include the public domain, the private real estate of the government, and community property.

When we studied private property, we first explored the property rights that private property owners have. We found these rights by examining sources of law, including the Constitution of Timor-Leste, the Civil Code, laws passed by the National Parliament, and draft laws. Private property owners have rights of use, enjoyment, and disposition. People who own property also have exclusive rights to their property. As we learned, this means that only the property owner has the right to use, enjoy, and dispose of her property. We also discovered that private property owners may not do anything they want with their property. Instead, property owners may only use, enjoy, and dispose of their property within the limits of the law.

We next explored ways that private people own property. The simplest way to own property is individually. In individual ownership, only one person has exclusive ownership rights to the property. We also learned about ways that private people own property together. These types of ownership, including co-ownership and horizontal property, allow people to share ownership of a single piece of property.

Through co-ownership, also called property in common, multiple people own the same piece of property. As we discussed, co-owners have qualitatively equal rights to the property. This means that all owners may use the entire property. Co-owners, however, can have quantitatively different rights. This means that co-owners may own different percentages of the property. The practical effect is that co-owners enjoy the benefits and pay the costs of ownership in proportion to their ownership. For example, imagine Antonio co-owns a house that he rents to Hugo, and Antonio owns 30% of the house. Antonio will receive 30% of the money that Hugo pays, and Antonio will pay 30% of the cost to repair the window if it breaks.

Co-owners also have obligations to each other. They may only use the property for its normal purpose, and they may not prevent other co-owners from using the property. They must also pay

their share of necessary improvements, unless they renounce their ownership rights. Finally, we learned that co-owners may demand division of the property. Division ends co-ownership of the property, giving the owners individual ownership of their shares.

We also learned that private people share ownership through horizontal property. In horizontal property, people individually own the private areas of the property. They co-own the building's common areas. A typical example of horizontal property is an apartment building. Owners of horizontal property have obligations to each other that are similar to those we learned about in co-ownership. Owners of horizontal property also must pay their share of innovations, or improvements, to the property.

We next learned about the rules that limit how owners of horizontal property may use their private areas and the building's common areas. First, owners may not harm the building's safety, architectural design, or appearance. Second, owners may not use their individual areas in ways that offend good manners or are not the intended purpose. An interesting aspect of horizontal property is that many rules can change. The assembly of owners has power to change the rules that all owners must follow.

The National Parliament is also writing a new law, Special Regime for Determination of Ownership of Immovable Property, that would create another type of property: community property. Community property is immovable property that belongs to the community. This is property that community members share, such as forests. Community property cannot be sold. Instead, this property always belongs to the community to benefit all community members.

The new law would also create community protection zones. In a community protection zone, owners would be required to follow special rules limiting how they may use their land. A community protection zone would not change who owns property within a community protection zone. For example, private individuals, the government, or the community may own property within a community protection zone. The main purpose of creating community protection zones is to encourage discussion with the community if someone wants to begin a new economic activity in the community protection zone.

After studying private property, we explored different types of public property. The government owns two types of property: the public domain and the government's private real estate. The

government owns the public domain to benefit all people of Timor-Leste. Examples of the public domain include coastal waters, natural resources, roads, and other areas that benefit the entire country. The public domain cannot be sold. In contrast, the government's private real estate includes immovable property that may be sold. Unclaimed land is assumed to belong to the government as its private real estate.

Property law is an exciting topic with important implications for all people in Timor-Leste. After reading this chapter, hopefully you better understand the basic principles of property ownership. Together, we explored the laws governing different types of property ownership. This chapter showed how property ownership is different for individuals, the government, and communities. This foundation will help you read the rest of this textbook to learn more detailed rules about immovable property. Next, we will explore the limits imposed by the law on the use of immovable property.

CHAPTER 3: LIMITATIONS ON USE

CHAPTER OBJECTIVES

- To distinguish between possessory and non-possessory interests in immovable property
- To study the different types of non-possessory interests outlined in the Civil Code of Timor-Leste
- To learn how to establish and terminate non-possessory interests

1. INTRODUCTION

A person's right to enjoy the property he owns or possesses sometimes conflicts with the rights of others or the public interest. In this chapter, we will explore how property law can help settle disputes that arise when different people have competing rights to the same **immovable property**. As we previously explained, immovable property refers to land and anything permanently attached to it, such as soil, buildings, or trees.

To understand why this is an important area of the law, consider the following example. Manuel owns a large piece of land and decides to dig a well on his property. He tells his neighbor José that the well will be near the boundary between their two properties. After the well is built, José worries that the digging moved soil and caused sinkholes on his property. Did Manuel have a right to build that well, because he dug only on his property? Can José ask his neighbor to pay for any harm caused by the project?

As we will explore in this chapter, an owner's right to property is **not absolute**. This means that ownership rights have limitations or restrictions. Ownership rights cannot be enjoyed without considering the interests of others. As a result, Manuel must consider the effect on José's land and may be required to pay him for any harm caused by the project. We will explore the **limits of the law** placed on property ownership and use. As we discussed in the last chapter, the limits of the law are activities that the law prohibits.

Property owners, however, are not the only people who have rights to property. As we discussed in the Introduction, some people have **possessory rights** to immovable property. Possessory rights are the powers enjoyed by a person who occupies and controls immovable property. A

possessory interest is the **right of use** of the property. The right of use is the owner's right to do what he wants on his property, within the limits of the law. Examples of use include housing, business, farming, and construction. The law protects possessory interests and possessors can also have their rights enforced by the courts. For example, a person who rents an apartment from a building owner has possessory rights to the apartment.

In this chapter, we will compare possessory and ownership rights with the rights that non-possessors have to immovable property. A **non-possessory right** is the power to use immovable property that is possessed by another person. We will examine the different types of non-possessory rights and explain how those rights are established and ended. We will also explore the public and private limitations on ownership and use. There are many limits of the law for immovable property ownership and possession, and we will begin to explore them here.

2. CATEGORIES OF RIGHTS

Multiple parties can claim rights to one piece of land. Property law helps us to weigh these claims against each other. A field owned by one person but used by two farmers to plant crops is an example of land with competing claims. The owner may want to ensure that his land is preserved while the farmers may want to plant as many crops as they can. Property law allows us to resolve conflicts between owners and others that have interests in the same land. First, we will outline the sources of the different legal rights to property. Then, we will contrast the different rights enjoyed by owners, possessors, and non-possessors of immovable property.

2.1. Sources of Law

As we discussed earlier, the Constitution of the Democratic Republic of Timor-Leste is the most important source of law about property rights. Section 54 of the Constitution grants private property rights to all national citizens. It also indicates that those rights are not absolute. For example, private property cannot be used to the “detriment of its **social purpose**.” Social purpose refers to the objectives that society wants to advance. The use of private property should promote the well-being of all citizens, and not just the well-being of its owners. The Constitution of Timor-Leste also establishes that entry into a person’s home against his or her wishes is prohibited. Additionally, Section 58 of the Constitution guarantees the right to adequate housing for all, and Section 36 protects the privacy of individuals and families.

The Constitution of Timor-Leste grants owners great control over their property but also establishes that there are limits to that power. Yet, the Constitution does not explain how and in what way ownership rights are limited. To explore these limits, we must consider other sources of law. The main source of law that governs this area of property law is the Civil Code. Local laws and regulations can also affect how owners use and enjoy their property. In this chapter, we will study these sources of law to learn about the limitations on the use of immovable property.

2.2. General Principles

2.2.1. Property and Possessory Rights

In the last two chapters, we learned that **property rights** are the powers, guaranteed by law, that people have over property. Ownership rights are one type of property rights. Ownership resembles a basket of fruit, with ownership as the basket and property rights as the fruit. These

rights include the right to use, manage, and enjoy property, as well as the right to transfer ownership to another person. Meanwhile, possessory rights, as we also previously discussed, are the powers enjoyed by a person that occupies and controls immovable property. Ownership and possessory rights can be held by the same person or held separately by more than one person. People who have possessory rights cannot sell the property unless they also have ownership rights.

For example, suppose Monrique is renting a house in Comoro from Rosario. Rosario owns the house and has been renting it to Monrique since she moved to Quelicai. Monrique, as the renter, has possessory rights to the house. He can live in it and exclude others from entering it. But Monrique cannot transfer ownership of the house to another person because he does not own the house. In contrast, Rosario has ownership rights to the house. She can receive rental payments from Monrique and she can sell the house. But Rosario cannot prohibit Monrique's friends from entering the house because she does not have possessory rights. If Monrique moves to Dili and Rosario returns to her house in Comoro, she will have both ownership and possessory rights. Both ownership and possessory rights would allow Rosario to use the land as she wants, so long as she remains within the limits of the law. These limits include those created by non-possessory rights, which we explore next.

2.2.2. Non-Possessory Rights

Unlike ownership and possessory rights, non-possessory rights do not require a person to own or control immovable property. These rights are powers held by a person to use property, even if that property is owned, possessed, and occupied by others. Non-possessory rights impose limits on what the owner and possessor can do with the property. Non-possessory rights do not allow holders to transfer ownership of property.

Under Article 1437 of the Civil Code, non-possessory rights are traditionally granted through a **contract**. A contract is an agreement between two or more parties creating duties that are enforceable by law. An agreement to establish non-possessory rights is made between the owner of the land and the person who wants to use the land for a specific purpose. The following chapter discusses contracts in more detail. If you would like more information about general contract law now, please read pages **XX-XX** of this textbook. The rest of this chapter will assume a basic understanding of contract law.

Consider an example of non-possessory rights. Antonio wants to use land owned by his neighbor Santana to park his car. If he asks Santana for permission and she agrees, she has given Antonio a non-possessory right to her land. Antonio now has a non-possessory right to park his car on Santana's land.

Article 1437 of the Civil Code also allows non-possessory rights to be established by a court order. For example, a court might establish a non-possessory right if an owner's property is **landlocked**. Landlocked property refers to property that is surrounded by land on all sides. An owner cannot leave landlocked property without crossing someone else's land. A court may grant the landlocked owner the right to build a path, over a neighbor's land, to the nearest road. In doing so, the court grants the landlocked owner a non-possessory right to his neighbor's land.

A common non-possessory right is an **encumbrance**. An encumbrance is a right to immovable property that may decrease the value of the property. When land is encumbered, or burdened, by a non-possessory right, possessors and owners still have possessory and ownership rights. But the possessor cannot use the entire property as she wishes. The encumbrance creates a new limit of the law. The rights of the non-possessor limit the possessor's use.

The best way to understand encumbrances is through an example. Imagine that Ruel owns a large farm outside of Dili. Julio, his brother, lives in Dili. Julio buys three horses from another farmer. Because Julio lives in Dili, he does not have space for the horses. He asks Ruel if he can use a stable on Ruel's farm to shelter the horses. Ruel agrees and allows the horses on the farm. Julio now has a non-possessory right to Ruel's property and an encumbrance has been created. The rights Ruel has given Julio will limit how Ruel can use his own farm.

Non-possessory rights, including encumbrances, are important because they can change the **market value** of immovable property. Market value is the amount of money a seller would receive for his property if he sold it. Non-possessory rights typically decrease the market value of property. These rights can remain attached to a property even after it is sold. As a result, non-possessory rights may make property less desirable to potential buyers. Consider the previous example. If Ruel decides to sell his farm and Julio's rights cannot be terminated, buyers will want to pay less money for land burdened by Julio's right to use the stable to store his horses. If the rights of a non-possessor restrict the use of the land, buyers expect to pay less money.

There are two types of limitations on use in Timor-Leste. The first is **private limitations on use**. These are non-possessory rights that are created by contract. This is when people agree to create a non-possessory right, like Ruel and Julio in the example above. The second is **public limitations on use**. These are non-possessory rights that are created by the government, including local governments and courts. The next two sections explore each of these limitations on the use of immovable property.

3. PRIVATE LIMITATIONS ON USE

Studying private limitations on use will help us understand how property owners can enable other people to benefit from land that they do not own or occupy. We will learn about three kinds of private limitations on use: (1) property easements, (2) usufruct, and (3) superficies. These are all types of non-possessory rights. We will study what these rights are, how they are created, and how they are ended.

3.1. Property Easements

Property easements are a common type of private limitation on use. A property easement is a non-possessory right to enter or use the immovable property that another person owns. But someone who has a property easement does not have the right to sell the property.

Civil Code

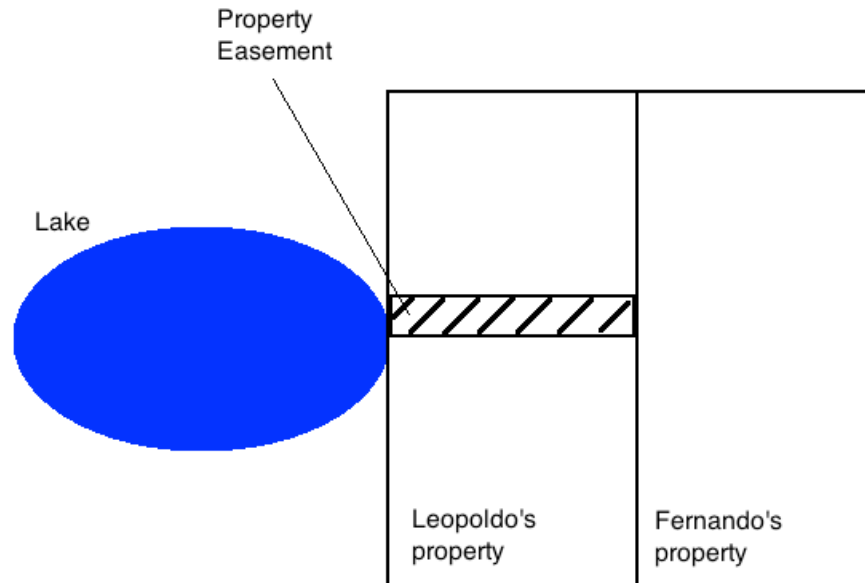
Article 1433: (Concept)

A property easement is the charges imposed on a property for the exclusive benefit of another property belonging to a different owner; servient tenement refers to the property which is subject to the easement and dominant tenement refers to the property which benefits from the easement.

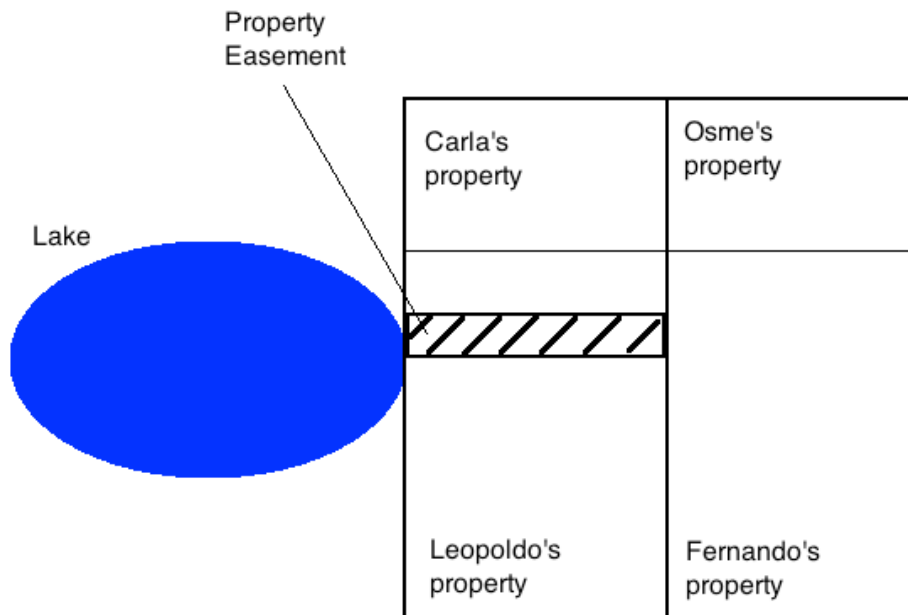
A typical property easement involves two property owners. The property easement gives one property owner the right to access the other owner's property. The property owner who gains the right to access that property has the **dominant tenement**. The other property owner must give access to his property. The property owner who must give someone else the right to access his property has the **servient tenement**.

To illustrate how property easements work, suppose that Leopoldo and Fernando own land in a village near Dili. The two properties are located next to each other. There is a lake in the village that Fernando wants to access. Leopoldo, however, lives between Fernando and the lake.

Leopoldo agrees that Fernando may walk over his land to go to the lake. This agreement creates a property easement. Fernando gains the right to enter land he does not own, and Leopoldo allows Fernando to benefit from his land. Fernando's property is the dominant tenement, and Leopoldo's property is the servient tenement. Fernando cannot sell Leopoldo's property. Only Leopoldo can sell Leopoldo's property.



Property easements are **indivisible** under Article 1436 of the Civil Code. This means that they cannot be divided. Even if the land is divided, the property easement remains the same. To use the example above, suppose that Leopoldo divides his land, the servient tenement. He gives part to his sister Carla. Fernando still has the right to enter that land. Both Leopoldo and Carla must continue allowing Fernando to enter the land, even if Carla never agreed to. Similarly, if Fernando sells part of his land to Osme, the property easement remains the same. Both Fernando and Osme may cross Leopoldo's property to reach the lake.



Property easements can be created in different ways under Article 1437 of the Civil Code. First, they can be created by a contract, as we discussed earlier. This is an agreement voluntarily made by the dominant and servient tenements. Second, property easements can be created by a **will**. This is a document that says what to do with a person's property after he or she dies.

Third, property easements can be created by **acquisitive prescription**. Acquisitive prescription is a method of gaining the right to access property by doing so openly and for a long time without being stopped. To illustrate, suppose that Fernando never asked Leopoldo for permission to cross his property in the earlier example. Instead, Fernando simply walked over Leopoldo's land for the past three years, three times a week. Fernando has walked there during the day and has not tried to hide his actions. Leopoldo has seen Fernando cross his land many times and never tried to stop him. Because Fernando has accessed Leopoldo's land openly and for a long time without being stopped, Fernando can claim an easement was created by acquisitive prescription.

There are many types of property easements that people can create through contracts. A property owner can give to other people the right to use the property in any way that does not violate other laws. For example, an owner of a field can create a contract with his neighbor to allow the neighbor's children to play soccer on the property. That contract will create a property easement for the children to play soccer on the field.

A contract that creates a property easement includes rules about the property easement, under Article 1454 of the Civil Code. The person who has a property easement must follow those rules. For example, suppose that Atina gives Boni the right to enter her property and pick guavas from her fruit trees. To create the property easement, Atina and Boni created a contract. In that contract, they agreed that Boni can enter the property only during the day. Boni cannot enter the property during the night, because a rule of their agreement is that he will enter the property only during the day.

Property easements are also **permanent**. This means that once a property easement is created, it exists indefinitely. A property easement may not exist forever, but it will exist until it is ended. There are five ways to end a property easement under Article 1459 of the Civil Code.

First, a property easement ends when the servient and dominant tenements become the property of the same person. For example, if the owner of the dominant tenement buys the servient tenement, the easement ends. This is because a property easement gives someone permission to access land that he does not own. Someone does not need an easement to use land he owns.

Second, a property easement ends when it has not been used for twenty years. For example, consider a property easement that allows the owner of the dominant tenement to park a car on the servient tenement. Now imagine the owner of the dominant tenement does not have a car for twenty-one years. Because he has not parked a car on the servient tenement in more than twenty years, he has not used the property easement during that time. The property easement ends because it was not used for twenty years.

Third, a property easement ends when the owner stops someone from accessing his property and that person does not object. This is the reverse of acquisitive prescription, which we learned is a method of gaining the right to access property by doing so openly and for a long time without being stopped. If the owner of the servient tenement opposes the easement and the owner of the dominant tenement is silent, the easement will end. In the earlier example, if the owner of the servient tenement builds a fence on his property that prevents the car owner from parking, and the car owner does not complain or try to park there anyway, the easement ends.

Fourth, a property easement ends when the dominant tenement **waives** it. This means the person with the right to access the property can voluntarily give up the right. For example, suppose Ruel has a property easement to walk across his neighbor's land. If Ruel tells his neighbor that he will not walk across the land anymore, he waives the property easement, and the property easement ends. After, Ruel cannot walk across his neighbor's land without permission.

Lastly, an agreement to establish a property easement can have an end date. This means that the owners of the servient and dominant tenements agree, when the property easement is created, that the easement will only exist for a specific amount of time. For example, suppose Ruel and his neighbor agree that Ruel may walk across the neighbor's land for five years. Ruel has a property easement to walk across the land for five years, but after five years, the easement will end. After, Ruel cannot walk across his neighbor's land without permission.

The following exercises ask you to think critically about the rights granted by property easements, and how property easements are created and ended.

Application Exercises

Question 1: Francisco buys a car but does not have space on his property to park it. His neighbor Hugo owns a large field. They agree to create a property easement. The easement gives Francisco the right to park his car on the field. Two years later, Hugo divides his land into three sections and sells two of them to Anita. Now, Francisco cannot park his car on Hugo's property unless he crosses Anita's land. Can Francisco cross Anita's land to park on Hugo's field?

Question 2: Manuela creates a property easement that allows her neighbor Joana to use a path on her land. The path allows Joana to quickly reach her job at the local store. They agree that the easement will end in five years. Manuela agrees to buy Joana's property in three years. When will the property easement end?

Answers

Answer 1: Francisco can cross Anita's land to park on Hugo's field. Property easements are indivisible. They are not changed or ended when the servient tenement is divided. When Anita bought the land from Hugo, the property easement did not change. The property easement still allows Francisco to enter Hugo's and Anita's property to park his car.

Answer 2: The property easement will end in three years. Property easements end when the same person owns the servient and dominant tenements. When Manuela buys Joana's property in three years, she will own the servient and dominant tenements. This means the property easement will end before the five-year end date in the original agreement.

3.2. Right of Usufruct

The **right of usufruct** is similar to a property easement. Like property easements, the right of usufruct is a non-possessory right to enter or use property that another person owns. The right of usufruct, however, gives many more rights than a property easement. As we just learned, property easements typically give someone the right to use land in a very specific way. Two examples we explored were the right to walk across a neighbor's land or park a car on a neighbor's land. The right of usufruct, in contrast, generally gives someone all the benefits of ownership except the right to sell or destroy the property. That person has the right to use the land, including the right to rent it to third parties.

The right of usufruct is important in Timor-Leste because there are many traditional communities that share property. For example, suppose a community shares a large field, forest, and lake, but individual members of the community have the right of usufruct to certain parts of the land. This means they can use those parts of the land, even though they do not own it. The right of usufruct can be created for all types of property, including personal property like animals and vehicles. This chapter, however, explores the right of usufruct only for immovable property, such as land and buildings.

Consider an example of the right of usufruct. Aldo is 50 years old and owns a farm in Bobonaro. He wants to stop managing the farm, but wants to still own the farm. Aldo has a younger brother named Joao. Aldo and Joao create a usufruct agreement that allows Joao to manage the farm. Joao now can use the farm and operate it. He can sell the farm's products and keep money from the sales. Aldo can use the farm how he wants.

The person who has the right of usufruct is called the **usufructuary**. In our example, Joao is the usufructuary. While the right of usufruct lets the usufructuary use the property in many ways, there are some limits on what the usufructuary can do. The usufructuary must preserve the property and prevent damage to it. Even if the usufructuary gives the right to someone else, he is still responsible for any damage caused by the new rights holder, under Article 1367 of the Civil Code. Suppose Joao gives the right of usufruct to his son, Fernando, and Fernando destroys the property. Joao must pay to repair the damage that Fernando caused.

The usufructuary must follow any rules created in the usufructuary agreement, under Article 1368 of the Civil Code. The usufructuary also cannot transfer ownership of the property to another person. Joao can use the property in many ways, but he must follow the rules in the usufructuary agreement that he and Aldo created, and he cannot sell or destroy the farm.

Civil Code

Article 1362: (Concept)

Usufruct is the right to temporarily and fully enjoy a third party's thing or right without changing its form or substance.

There are many similarities between property easements and the right of usufruct. Articles 1363 and 1364 of the Civil Code contain many of these similarities. Like property easements, the right of usufruct can be created through contract, will, or acquisitive prescription. Also, one or more people can have the right of usufruct at the same time.

One difference between property easements and the right of usufruct is that to have a right of usufruct, the person must have been alive when the right was first created. To illustrate, suppose a father owns a home. He and his wife have three children. When he dies, his will creates the right of usufruct to allow his wife's children to use his home. Those three children can use the home. After he dies, his widow has another child. The child born after the husband's death does not have the right of usufruct. This is because the child was not alive when the right of usufruct was created.

Another important difference between property easements and the right of usufruct is that the right of usufruct is **temporary**. This means that the right of usufruct ends after a period of time. Under Article 1366 of the Civil Code, the right cannot last more than thirty years. It also ends when the usufructuary dies.

The right of usufruct can also be given **consecutively**. This means one person can have the right of usufruct for a period of time and then another person will have it after. For example, suppose Manuel gives his friend Rosario the right of usufruct in his home for five years. He also says that after five years, Rosario's right of usufruct will end, and his other friend Fernando will have the right of usufruct. This is a consecutive transfer.

The right of usufruct can also end. When the right of usufruct ends, it **lapses**. This means the right returns to the property owner. Article 1399 of the Civil Code summarizes how and when the right of usufruct lapses. First, the right lapses if the usufructuary dies. For example, suppose Manuel owns a farm and gives Odete the right of usufruct to the farm. Odete is the usufructuary. When Odete dies, her right of usufruct lapses. The right of usufruct returns to Manuel because he owns the farm.

Second, the right of usufruct lapses on the end date stated in the usufruct agreement. Suppose Manuel and Odete agree that Odete will have the right of usufruct to Manuel's farm for three

years. After three years, the right lapses and returns to Manuel. After three years, Odete is not the usufructuary.

Third, the right of usufruct lapses when the same person has the right of usufruct and owns the property. This is similar to how a property easement ends when the same person owns the servient and dominant tenements. A person does not need permission to use land that she owns. Suppose Manuel gives Odete the right of usufruct to his farm. Odete is the usufructuary. Then, Odete buys the farm from Manuel. Odete is now the owner and has the right of usufruct. The right of usufruct lapses, because Odete does not need Manuel's permission to use her land.

Fourth, the right of usufruct lapses when the usufructuary does not use the right for twenty years. Suppose Manuel gives Odete the right of usufruct to his farm. Odete is the usufructuary. She moves to a new city and does not use Manuel's farm for many years. After twenty years, the right of usufruct lapses. The right of usufruct returns to Manuel, and Odete is not the usufructuary anymore.

Fifth, the right of usufruct lapses when the usufructuary ends the right. The usufructuary can end the right at any time, even if the owner does not agree. Suppose Manuel gives Odete the right of usufruct to his farm. Odete uses the farm for five years, but then she decides she does not want to use the farm anymore. Odete tells Manuel that she is returning the right of usufruct to him. Manuel wants Odete to keep the right of usufruct. Even though Manuel disagrees, the right of usufruct still returns to Manuel. Odete is not the usufructuary anymore.

Lastly, the right of usufruct lapses when the property is completely lost or destroyed. Suppose that Cecilia is a usufructuary. Her grandmother gave her the right of usufruct to a house in the Manatuto district. Her grandmother owns the house. The house is next to a river, and one day the river rises and covers the land permanently. The right of usufruct lapses because the land is completely destroyed.

The right of usufruct does not lapse, however, if the land is not *completely* lost or destroyed. Suppose a landslide destroys the house that Cecilia's grandmother owns. Cecilia's right of usufruct does not lapse because the property is not completely lost. Under Section 1402 of the Civil Code, Cecilia can use the land on which the house was built. She also has the right to use the materials that are on the land after the landslide destroys the house.

The following exercises ask you think carefully about the right of usufruct and how it is different from a property easement.

Application Exercises

Question 1: Joana gives Marquita the right of usufruct to her land. The next day, Marquita leaves Timor-Leste to work in Australia. During her time in Australia, Marquita never visits or uses Joana's property. After 22 years of living in Australia, Marquita returns to Timor-Leste and decides to rent Joana's property to her sister. Can Marquita's sister rent the property from Marquita?

Question 2: Alfredo and Donato are cousins and they own homes next to each other. Alfredo plans to build a fence around his land. Alfredo owns less land than his cousin. Because Donato has more land, Alfredo wants to build his fence on land that Donato owns. Alfredo knows that the right of usufruct gives non-owners the right to use another person's land. Alfredo asks Donato to give him the right of usufruct to build his fence on Donato's property. Should Donato give Alfredo the right of usufruct? Does Donato have a better option?

Answers

Answer 1: No, Marquita's sister cannot rent the property from Marquita. The right of usufruct gives the usufructuary the right to rent the property to someone else. But Marquita is not the usufructuary anymore. Marquita's right of usufruct lapsed because she did not use it for more than 20 years. Marquita left Timor-Leste for 22 years. She did not use the right during that time. The right of usufruct returned to Joana. Now, Joana is the only person who can rent the property to someone else.

Answer 2: The right of usufruct is not the best option. A usufructuary has many rights to the property, including the right to rent the property to someone else. These are more rights than Alfredo wants. Alfredo wants to use Donato's property for a specific purpose: to build a fence. A property easement is a better option. A property easement would allow Alfredo to enter Donato's land and build a fence, but Donato would not give Alfredo any other rights.

3.3 Right of Superficies

Like property easements and the right of usufruct, the **right of superficies** is a non-possessory interest in the property of another person. A person who has a right of superficies can build structures or grow plants on land owned by someone else.

Civil Code

Article 1414: (Concept)

The right of superficies consists in the authority to build or keep, perpetually or temporarily, a work in a third party's plot of land or to make or keep plantations therein.

A person who has a right of superficies is called a **tenant**. A tenant can build and grow on land without owning the land. A tenant is a person who has a right to use land that he or she does not own. A tenant usually pays the landowner for the right to use the land. The right of superficies can also include the right to use buildings that are already built on the land, or use crops that are already planted, under Article 1418 of the Civil Code. The right of superficies is a limit of the law on how the property owner can use the land. If there is a tenant, the tenant's right to use the land restricts how the owner can use the land.

For example, suppose that Maria wants to grow coffee to sell, but she does not own any land. She could buy land, or she could create a right of superficies in the coffee-growing region of Ermera. She agrees with Rodrigo, a landowner in Ermera, that she will grow coffee on his land. Rodrigo gives Maria the right of superficies in a contract. The right of superficies allows Maria to plant coffee trees on Rodrigo's land. She will own the crops that she grows. If that land already has coffee trees, Maria's right of superficies will permit her to sell the coffee produced by those trees.

Creating a right of superficies is similar to how property easements are created. Under Article 1418 of the Civil Code, the right of superficies can be created by contract, will, or acquisitive prescription. Under Article 1424, a tenant can also give the right to someone else, either before or after the tenant's death.

Article 1420 of the Civil Code explains an important part of a contract for a right of superficies: the **rental price**. The rental price is the amount of money the tenant must pay the owner to use the property. The owner and the tenant must agree on that price. The tenant can pay the rental price once, or the tenant can pay it every year that he has the right of superficies. Annual payments must be paid in cash. If the tenant does not pay the annual amount when he is required to, the owner can demand that the tenant to pay three times the regular amount.

To illustrate, suppose that Maria has a right of superficies to grow coffee on Rodrigo's land. Maria is the tenant. She agreed to pay Rodrigo, the owner, one hundred dollars per year for the right to grow coffee on his land. One hundred dollars is the rental price per year. She also agreed to pay the rental price on the first Monday of every year. Three years later, Maria is still growing coffee on Rodrigo's land. But suppose it is the third week of January, and Rodrigo still has not received the annual rental payment. Rodrigo can demand that Maria pay three hundred dollars in cash, because that is three times the amount she owes.

Like the right of usufruct, the right of superficies can also lapse. This means the right returns to the owner. Article 1426 of the Civil Code summarizes how and when the right lapses. First, the right lapses if the tenant does not build or plant within the time required by the original agreement. For example, suppose that a superficies agreement requires the tenant to build a house on the land six months after it is signed. A year later, the tenant has only purchased the materials to build the house, but has not built it yet. Because the tenant did not build the house within the time required by the agreement, the right lapses. Now the owner has the right of superficies, and the former tenant does not.

Second, the right of superficies lapses if the tenant does not properly maintain the property. If the agreement requires the tenant to protect structures or plants, and those structures or plants are destroyed, the tenant must rebuild or re-plant them. If the tenant does not rebuild or replant them, the right of superficies lapses. The agreement typically specifies when the tenant must rebuild or replace them. For example, suppose that a superficies agreement requires the tenant to protect a house on the land. The agreement says that if the house is destroyed, the tenant must rebuild the house within two years. Suppose the house is destroyed in a storm. Two years later, the tenant still has not rebuilt the house. This causes the right of superficies to lapse. Now the owner has the right of superficies, and the former tenant does not.

Third, the right of superficies lapses if the parties agree that it will lapse on a certain day. An agreement to create the right of superficies can have an end date. The right lapses when the date passes. For example, suppose Vicente and Rodrigo agree that Vicente will have the right of superficies to land that Rodrigo owns. The agreement also says that the right of superficies will lapse after two years. Vicente is the tenant and has the right of superficies for two years. After

two years, the right of superficies lapses. Now Rodrigo has the right of superficies, and Vincente does not.

Fourth, the right of superficies lapses when the owner of the land has the right of superficies. For example, suppose Odete and Helena agreed that Odete will build a house on Helena's property and Odete will live there. Odete has the right of superficies to property that Helena owns. After the house is built, Odete buys the land from Helena. Because Odete now has the right of superficies and ownership of the land, the right of superficies lapses. This is because someone who buys property does not need permission to use that land.

Fifth, the right of superficies lapses when the land disappears or when the land cannot be useful anymore. This means the person who has the right of superficies cannot use the land in the way he intended when the right of superficies was created, because the land changed. For example, imagine that Rodrigo has a right of superficies to land that Odete owns. He created the right of superficies because he wanted to grow maize on the land. Suppose the land floods permanently. That flood causes the right of superficies to lapse and return to Odete. This is because the land cannot be used to grow maize anymore.

Finally, the right of superficies lapses if the government takes the land from the owner. Chapter 5 will explore the law about when the government can take property.

The following exercises ask you think critically about the right of superficies and the responsibilities that tenants have.

Application Exercises

Question 1: Francisca owns a grocery store. She wants to grow tomatoes to sell. She does not own any land, but her friend Vincente owns land. She wants to grow tomatoes on Vincente's land. Francisca asks Vincente if she can have the right of superficies to his land. Vincente tells her that he already grows tomatoes on all of his land, and there is no room to plant more tomato plants. Does this mean Francisca cannot create a right of superficies to Vincente's land?

Question 2: Domingos creates a right of superficies to build a garage on land that Roselia owns. Domingos and Roselia agree that the garage must be built within six months. Domingos also must rebuild the garage within one year if it is destroyed. Domingos then builds the garage within six months. A year later, a fire destroys the garage. Domingos does not have money to build a new garage. Will Domingos be able to keep the right of superficies?

Answers

Answer 1: No. Francisca can still create a right to superficies on Vincente's land. The right of superficies does not only allow a tenant to grow crops on another person's land. A tenant can also use crops that already grow on another person's property. Francisca can ask Vincente to create a right of superficies to allow her to use the tomato plants that already grow on his land. Francisca can offer a single payment or agree to pay an annual amount while she uses the tomato plants.

Answer 2: The right of superficies lapses if the tenant does not rebuild a building after it is destroyed. Domingos must rebuild the garage within one year, as their agreement requires. If Domingos cannot rebuild the garage within one year, the right returns to Roselia.

4. PUBLIC LIMITATIONS ON USE

We just learned about three kinds of private limitations on use: property easements, usufruct, and superficies. We will now learn about public limitations on use. Public limitations on use are non-possessory rights that the government creates, including local governments and courts. Studying public limitations on use will help us understand how the government can limit the rights of owners and enable neighbors or the general public to use land that they do not own or occupy.

We will examine four types of public limitations on use: (1) legal easements, (2) encroachments, (3) private nuisances, and (4) spatial planning. These public limitations on use all limit how people can use the property that they own. These limitations exist to ensure that owners of immovable property consider the interests of their neighbors. They are all ways that the law limits the rights of property ownership.

4.1. Legal Easements

One type of public limitation on use is a **legal easement**. Like a property easement, a legal easement is a permanent non-possessory right to enter or use the immovable property that another person owns. Legal easements are very similar to property easements. What you learned about property easements in Section 3.1 will be helpful to understand legal easements.

The difference between property easements and legal easements is how they are created. As we learned, a property easement is created when people voluntarily agree to it. In contrast, a court creates a legal easement under Article 1437 of the Civil Code. A court can create a legal easement even when there is no voluntary agreement between people. Usually when a court creates a legal easement, someone does not want it to exist.

We will learn about two typical legal easements: (1) legal passage easements, and (2) legal water easements.

4.1.1. Legal Passage Easements

A **legal passage easement** gives someone the right to walk across land that the person does not own. Courts typically establish legal passage easements to allow owners of landlocked property to access a public road. Without the legal passage easement, the property owner would not be able to walk to the road. Like property easements, legal passage easements allow the owner of the dominant tenement to enter and walk across the servient tenement. If the dominant

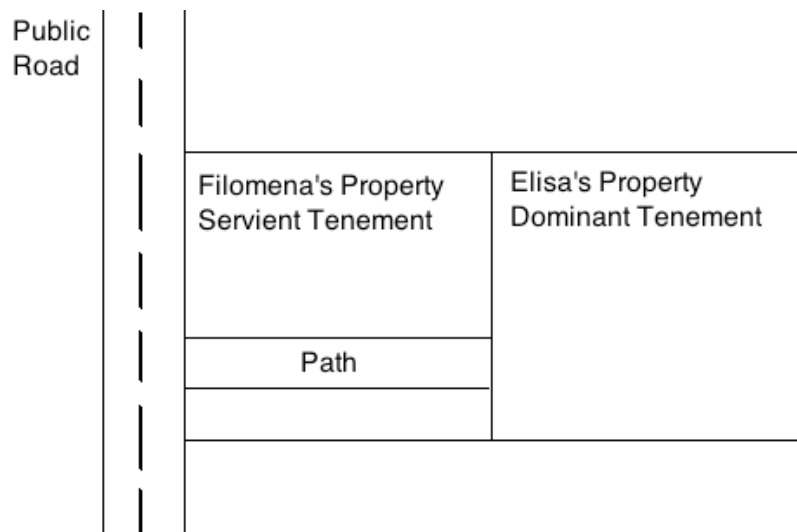
tenement's owner does not want to create a property easement, the court may establish a legal passage easement if it does not cause large costs or problems.

Civil Code

Article 1440: (Easement for benefit of land-locked property)

1. Owners of properties with no access to a public road or with no conditions allowing for the establishment of such access, without causing major inconveniences or incurring major expenses, may require that passage easements be established on abutting land properties.

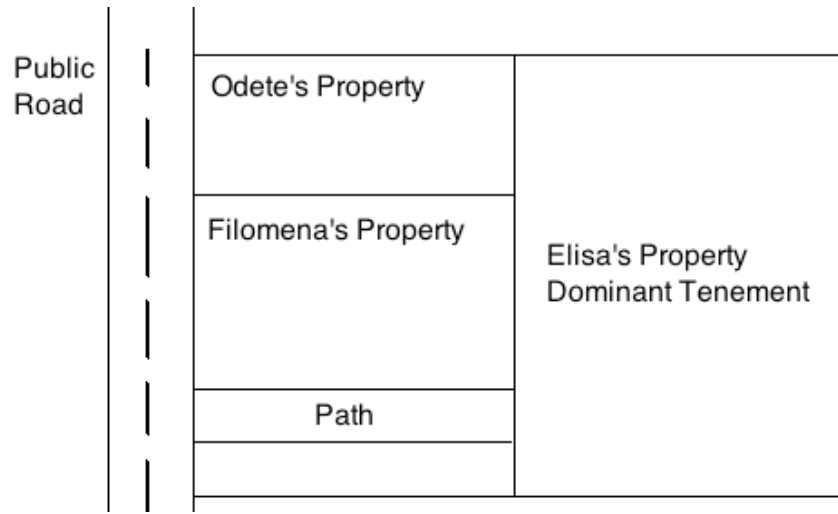
For example, Elisa and Filomena own land next to each other. Elisa's property is landlocked. Cars cannot reach her property from the nearest public road. There is a path on Filomena's property that Elisa could use to easily reach the road. She asks Filomena to create a property easement to let her use the path to access the road. Filomena refuses. Elisa then asks the court to create a legal passage easement. Because Elisa could use Filomena's path to easily reach the road, the court creates a legal passage easement to give Elisa the right to use the path.



Sometimes a legal passage easement could be created on more than one property to access a public road. In that circumstance, Article 1443 of the Civil Code says the court should choose to create a legal passage easement on the property that would be the least damaged by the easement.

For example, suppose Elisa wants to access the public road. There are two properties that she could walk across to access the road, but neither property owner will agree to a property

easement. She goes to court to ask for a legal passage easement. Filomena's property is an option, and there is already a path on it. The second property belongs to Odete. Odete's property does not have a path, and one would need to be built if the court creates a legal passage easement on it. The court would probably create the legal passage easement on Filomena's property. This is because a legal passage easement would cause more damage to Odete's property than to Filomena's property.



When the court creates a legal passage easement, it can require owner of the dominant tenement to pay the owner of the servient tenement for **damages**. Damages are the money that someone who causes a loss must pay to the person who suffers that loss. Article 1444 of the Civil Code creates rules about damages. In our example, suppose the court creates a legal passage easement that allows Elisa to use Filomena's path to access the public road. Elisa walks on the path every day and damages the path. The court can require Elisa to pay Filomena to repair the path.

Article 1445 of the Civil Code creates another rule about legal passage easements. If the owner of the dominant tenement wants to sell the property, the owner of the servient tenement has the option to buy the property. This means that the owner of the dominant tenement cannot sell the property to someone else without first allowing the owner of the servient tenement to buy the property. Suppose Elisa has a legal property easement to walk across Filomena's property. Elisa has the dominant tenement and Filomena has the servient tenement. Elisa decides to sell her property. Filomena can buy Elisa's property. If Filomena does not want to buy Elisa's property, only then can Elisa sell it to someone else.

4.1.2. Legal Water Easements

A **legal water easement** is a type of legal passage easement that allows non-possessors to use water they do not own. Courts create legal water easements like they create legal passage easements. Under Article 1448 of the Civil Code, legal water easements allow people to use public fountains, wells, and reservoirs to obtain water from neighboring land they do not own. This water can be used for home use or farming.

Civil Code

Article 1447: (Water exploitation for household consumption)

1. When it is not possible for the owner, without causing major inconveniences or incurring major expenses, to obtain water for his or her household consumption as indicated in the previous article, neighbouring owners may be compelled to allow, through compensation, for the exploitation of the remaining waters from their fountains or reservoirs to the extent indispensable for such consumption.

A court can create a legal water easement only if the person who wants water cannot easily get water from a different source. This means someone can get a legal water easement only if other alternatives would be very costly or cause major problems. For example, suppose Gaspar owns a rice farm. Last year, a nearby river dried up. Gaspar does not have enough water to grow rice. He could build an irrigation system, but it would be expensive and many of his neighbors oppose it. Gaspar's neighbor, Hugo, has a water reservoir on his property. Gaspar asks a court for a legal water easement to use Hugo's water reservoir. Gaspar argues that the easement is necessary for him to grow rice. The court gives Gaspar a legal water easement, because Gaspar's alternative – building an irrigation system – would be very expensive and anger his neighbors.

The following exercise asks you think critically about legal easements and about how property owners may prevent courts from creating them.

Application Exercise

Question: Herbert sold half of his property to Jacinto. Now, Herberto's farm is landlocked and his car cannot reach the nearest public road. Without asking for permission, Herberto begins to drive through Jacinto's land to reach the road. Jacinto becomes angry. He does not want Herberto to drive on his land. Jacinto builds a fence around his farm to stop Herberto from driving through it. Herberto responds by asking a court to establish a legal passage easement on Jacinto's land. Can Jacinto stop the court from creating a legal passage easement?

Answer

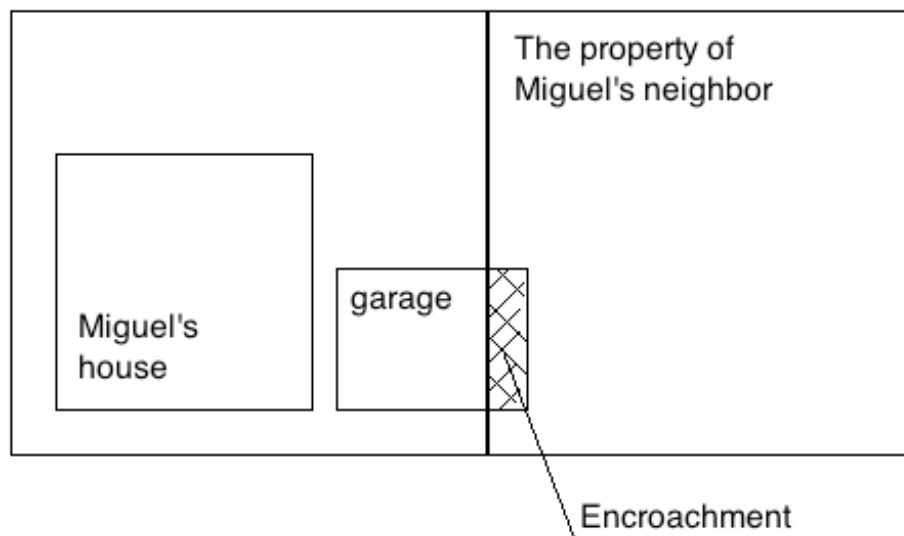
Answer: Jacinto can stop the court from creating a legal passage easement by buying Herberto's property. This is his only option. Otherwise, a court will likely create a legal passage easement on Jacinto's farm because Herberto's farm is landlocked. Herberto cannot access the public road without accessing Jacinto's property.

4.2. Encroachments

Encroachment laws are another public limitation on use. Encroachment laws prohibit one property from interfering with another property. Encroachment involves **direct interference**.

This means that someone's immovable property physically and unlawfully occupies the property of another person.

For example, suppose Miguel is a property owner who wants to build a garage next to his house. Miguel wants to build a large garage that is seven metres wide. He owns land next to his house, and he can build a garage there. When Miguel measures the land for the garage, however, it is only six metres wide. If he builds a seven-metre-wide garage, part of the garage will be on his neighbor's land. A garage that is seven metres wide would encroach on his neighbor's property. The law forbids this.



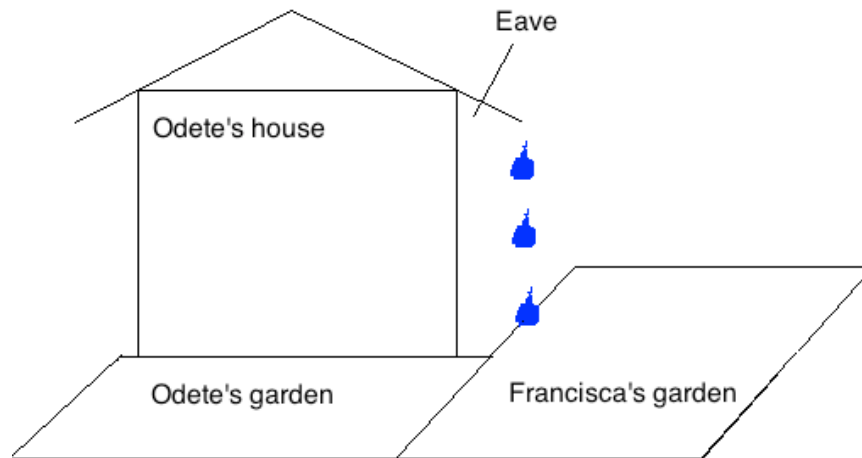
Property owners commonly encroach on their neighbor's property through **eaves**. An eave is the edge of a roof that prevents rainwater from falling on a house's walls. The Civil Code regulates eaves and says that eaves cannot interfere with the property of another person. Property owners cannot build eaves that cause rainwater to fall on a neighbor's building. If the dripping cannot be prevented, the eave must be built at least half a meter from a neighbor's building.

Civil Code

Article 1285: (Eaves)

1. An owner must build in such a way that the edge of the roof or other cover does not drip on the neighbouring building, leaving a space of at least five decimetres between the building and the edge if this cannot be avoided in any other way.

For example, suppose Odete owns a house and a garden. Odete lives next to Francisca. Odete's house has a roof with eaves that prevent the rainwater from falling on her house's walls. The eaves, however, are very large. They are so large that the eaves make the rain fall on Francisca's garden. This is prohibited by Article 1285 of the Civil Code.



Plants can also cause encroachments. As we learned in Chapter 2, a property owner can plant trees and shrubs on property that she owns. Sometimes when plants grow, the branches or trunks encroach on a neighbor's property. Under Article 1286 of the Civil Code, a neighbor can ask the owner to remove the overhanging parts of plants. If the owner refuses, the neighbor has the right to remove the encroaching parts of the plants on her own.

In these examples, the purpose of encroachment laws is to require an owner to consider how his use of land affects his neighbors. Encroachment laws limit how a property owner can use his property. Owners can build and plant on their land, but only if they do not interfere with someone else's use of their land.

4.3. Private Nuisances

Private nuisance laws are a similar type of public limitation on use. Like encroachment laws, private nuisance laws prohibit activities that prevent other people from using their property. A private nuisance is an activity that harms or annoys neighbors. Unlike an encroachment, however, a private nuisance involves **indirect interference**. Indirect interference is an intrusion on someone's property that is not obviously physical. Examples include a loud noise or a bad smell. A property owner may ask a neighbor who is violating these rules to change his behavior. A property owner may also ask a court to order a neighbor to comply with these rules.

Articles 1266 to 1270 provide examples of private nuisances. First, an owner cannot store dangerous substances on his property that can damage a neighbor's property. For example, suppose Fernando has a large bucket of dangerous chemicals in his garage. Those chemicals can cause explosions. His neighbor Juan can ask him to remove the chemicals, because they could cause an explosion that would damage Juan's property.

Second, an owner cannot cause a sinkhole or landslide on his neighbor's property. While an owner can build a well or a mine on his land, he must be careful not to damage his neighbor's property. For example, suppose Julio digs a large well on his property. He digs so deeply that he causes a sinkhole on his neighbor's property. This is prohibited.

Third, an owner of an unstable building must fix the building to prevent collapse, if the building's collapse would damage a neighbor's property. For example, suppose Miguel owns an old building next to Maria's house. The building is old and unstable. It could collapse any day. If it collapses, it will fall on Maria's house, and it will damage Maria's house. Miguel must fix the building to prevent it from collapsing.

Finally, an owner cannot release smoke, soot, vapors, heat, odors, or noise if it significantly damages his neighbor's property. One exception is if this smoke, soot, vapors, heat, odors, or noise are caused by the normal use of the property. In that case, the person can continue to release them. For example, suppose Isabel lives next to a meatpacking business. Isabel does not like the strange smells that the business releases. Isabel says that she and her family must stay inside the house because of the unpleasant smells. She asks a court to order the meatpacking business to stop releasing those smells. Although the smells are unpleasant, the court will likely deny Isabel's request. Meatpacking businesses commonly release strong smells from the normal use of the property.

The following exercise asks you to think analytically about encroachment and private nuisance laws.

Application Exercise

Question 1: How are encroachment and private nuisance laws similar? How are they different?

Answer

Answer 1: Encroachment and private nuisance laws both restrict an owner's enjoyment of his or her property. These laws prohibit uses of land that harm the interests of neighbors. Encroachment and private nuisance laws are different because they prevent different types of harms. Encroachment laws prevent direct interference with property. They prevent an owner from physically and unlawfully occupying a neighbor's property. In contrast, private nuisance laws prevent indirect interference with property. They prevent activities that indirectly harm and annoy neighbors, like bad smells or smoke.

4.4. Spatial Planning

Up until now, we have studied ways that property laws can limit one person's use of his land. We will now consider how laws limit property rights on a broader scale. **Spatial planning** is a type of public limitation on use that restricts what many people can do with property. Spatial planning creates rules about building construction and other human activity. These rules affect what people can do with land, transportation systems, and the environment. The goal of spatial planning is to create rules that benefit society, the economy, and the environment. Without spatial planning, people might use their property in ways that harm the public.

Spatial planning typically divides land and regulates what people can do in different places. For example, suppose the government passes a law that divides Dili into four districts. The law says that only residential buildings can be built in the first district, only factories can be built in the second district, residential buildings or stores can be built in the third district, and no buildings can be built in the fourth district. The government decided that Dili would benefit from this spatial planning. The city needs factories for economic development, but many people do not want to live next to factories. By limiting where people can live or build factories, the government promotes both economic development and the community's quality of life.

Dili

District 1: Only residential buildings	District 2: Only factories
District 3: Only residential buildings or stores	District 4: No buildings

Spatial planning remains an underdeveloped area of the law in Timor-Leste. Several proposed laws – including the Special Regime for Determination of Ownership of Immovable Property, the Law on Expropriation, and the Property Fund Law – do not address spatial planning. This is a topic for future legislation.

The government of Timor-Leste is currently beginning to develop spatial planning laws. In October 2013, the National Procurement Commission requested project proposals for the spatial planning of the entire country. The government intends to create a foundation to guide future development and construction. The government is also creating a **master plan** to guide urban development in Dili. A master plan is a long-term and detailed strategy for achieving a city’s development goals. The details of Dili’s master plan are unknown. Examples of potential development goals could be improving health and public safety in the city, maintaining clean beaches, and encouraging economic development. Examples of strategies that could support those goals include laws that regulate drainage systems, the maximum height of new buildings, and construction near beaches.

5. CONCLUSION

In this chapter, we explored the limits of the law on property ownership. We began by distinguishing between the rights of owners, possessors, and non-possessors of property. First, we reviewed that ownership rights allow owners to use, manage, and enjoy property, as well as transfer ownership to someone else. Second, we explored how possessory rights allow possessors to occupy and control property, but not transfer ownership. Finally, we described how non-possessory rights enable people to use property that they do not own or possess.

We then explored the types of private and public limitations on use that non-possessory rights create. We examined the forms that non-possessory rights take and explained how they are created and ended. Private limitations on use are usually created when people agree through a contract. They include property easements, the right of usufruct, and the right of superficies. A property easement is a permanent right to enter or use the immovable property that another person owns. The right of usufruct is a temporary non-possessory right to enter or use the property that another person owns. The right of superficies allows a tenant to build or grow plants on land without owning it.

Meanwhile, public limitations on use are created by the government. They include legal easements, encroachment laws, private nuisance laws, and spatial planning. A legal easement, created by a court, is the permanent right to enter or use the immovable property that another person owns. Encroachment laws prohibit one property from directly interfering with another property. Private nuisance laws prohibit activities that indirectly interfere with a neighbor's property, like loud noises or bad smells. Spatial planning is a method of guiding land use by regulating the construction of buildings and other human activity.

Studying private and public limitations on use has helped us understand the rights that property owners have and the responsibilities that they owe to other people. These limitations on use also illustrate the benefits that property owners can give to their neighbors. Next, we will explore how people can transfer property rights to other people.

CHAPTER 4: DISPOSITION OF PROPERTY

CHAPTER OBJECTIVES

- To understand the basic principles of possession and transfer of property ownership
- To review the main concepts in contract law and how contract law and property law interact
- To explore the difference between revocable and irrevocable transfers of property rights
- To identify and examine the different ways to transfer of immovable property

1. INTRODUCTION

This chapter explores the basic principles of possession and transfers, or disposition, of **immovable property**. As you now know, immovable property refers to land and anything permanently attached to it, such as buildings or trees. In Chapter 2 we learned about **property ownership**, or the system of rules that determine the property rights people in society have over the resources around them. You were asked to think about ownership as a basket of fruit where each fruit represents a separate but related right. The three primary “fruit,” or rights, under Article 1225 of the Civil Code of the Democratic Republic of Timor-Leste are use, enjoyment, and disposition.

This chapter focuses on **disposition** of immovable property. The right of disposition is the right to transfer property ownership from one person to another. In this chapter, we will learn about the transfer of property rights for private property. As in Chapter 2, this chapter will answer these questions using **sources of law** that define the rules of property ownership. The same sources of law that we learned about in Chapter 2 govern the transfer of property rights. The sources of law that govern the transfer of property rights including the Constitution, the Civil Code, other laws passed by the National Parliament, ministerial regulations, and customary law.

In this chapter, we will also explore the difference between **revocable** and **irrevocable** transfers. The transfer of property rights can be revocable or irrevocable. Revocable means the decision can be changed. The transfer is not permanent, and it can be ended. In contrast, an irrevocable transfer is a permanent transfer of property rights. An irrevocable transfer cannot be changed, and it cannot be ended.

Consider the difference between buying a home and renting an apartment. Buying a home is an irrevocable transfer of property rights. When you buy a home, you obtain permanent rights to it. The seller gives up all of his rights forever. Renting an apartment is a revocable transfer of property rights. When you rent an apartment, you do so for a specified period of time, perhaps a year. At the end of the year, you no longer have a right to live in the apartment. The property transfer is temporary. The owner of the apartment let you take possession of the property but maintained ownership.

Before we begin our look at transfers of property rights, we will first review basic contract principles. Understanding contracts is very important for property transfers, because most transfers happen with a contract.

2. OVERVIEW OF CONTRACT LAW

In property law, people who want to use their property rights, such as selling land or renting an apartment, will often use contracts. A review of contract law is important because it is how people are able to transfer property ownership and possession. This contracts primer is an overview of contract law in Timor-Leste. The primer will cover the basic concepts of contract law, but it does not replace a more in-depth study of contract law. For a more comprehensive analysis of contract law, the Timor-Leste Legal Education Program offers a free contracts law book. It is available in English, Portuguese, and Tetum. The book is available at <http://tlllep.stanford.edu/publications/>.

2.1. Introduction to Contracts

A **contract** is a type of promise or agreement that the law can **enforce**. This means that the courts can force the person who made the promise to either do what they promised or pay money, called **damages**, to make up for not doing what they promised to do. More technically, a contract is a promise or multiple promises, normally between two or more people or organizations, called **contracting parties**. Contracting parties are the people who accept certain legally enforceable obligations in exchange for certain legally enforceable rights. Courts generally require contracting parties to fulfill their promises to one another if it was the parties' intent to make their promises the kind of promises that neither party can avoid. These types of promises are called **legally binding**. If the courts did not enforce contracts, then contracts would not have any value. The value of contracts is that they are legally guaranteed.

To illustrate, suppose Miguel and Lorenzo have a contract. In the contract, Miguel promises to build Lorenzo a fence around his home. In return, Lorenzo will pay Miguel for his work. If Miguel builds the fence but Lorenzo does not pay him, Miguel can ask the court to force Lorenzo to pay Miguel for his work.

Contracts are important because they allow individuals and businesses to plan for the future. In property law, contracts are important and necessary for the transfer of possession and ownership. Contracts significantly reduce the risk of broken promises by penalizing people who break their promises. Even if they do break the promise, the victim of the broken promise benefits from a contract. This is because the court will force the person or organization that broke the promise to

do what they said they would do or pay money as compensation. In our example above, even though Lorenzo broke his promise, Miguel benefits from having the contract because he can get damages from Lorenzo.

There are several important goals of contract law:

- To increase the security and reliability of business investments and transactions
- To ensure that government agreements are secure and reliable
- To avoid contract disputes by promoting clear communication between individuals
- To make it easier to enforce all types of agreements
- To save time and increase the efficiency of agreements by discouraging the breaking of contracts, known as a **breach**
- To establish a process where the victim of a breach of contract can get their agreement fulfilled or be compensated for the damages created by the breach. This solution to a breach is known as a **remedy**.

2.2. Contract Formation

Before thinking about enforcing contracts, you must first understand how to create a contract. Creating effective contracts requires careful planning, but it is not necessarily a complex task. Forming contracts can be easy and exciting once you learn the basic rules for writing contracts, called **drafting**, how to take the steps necessary to make the contracts legally enforceable, known as **perfecting** a contract, and how to avoid common drafting mistakes.

For a valid contract to be formed, it must be drafted correctly and perfected. The term **perfected** is a legal term meaning three things: (1) that the parties have an agreement and they all understand each of the details and terms without any misunderstandings, (2) that each party agrees to be required to fulfill their part of the agreement, and (3) that all formal legal requirements for contract formation have been met. The legal rules that apply to all contracts are called the “General Theory of Contract Law” and include: (1) rules that regulate who can form a contract, (2) rules that govern how contracts are formed, and (3) rules that specify what happens after a contract is formed.

Who can form a contract?

To form a contract, one must have **legal capacity** to participate in contracts and to exercise legal rights. Put simply, legal capacity is the ability to reason and make competent, reasonable, and informed decisions about one's rights and obligations. A contract with a person lacking legal capacity is **voidable**, meaning it can be canceled, under the law of Timor-Leste. For example, a young child or someone who is intoxicated may lack legal capacity. So if you are considering making a contract with someone potentially unable to make competent decisions, you will want to make sure that person has legal capacity to make a contract with you. Otherwise, you may have a voidable contract. Additionally, parties can arrange for representatives to make contracts for them. Someone who can make a contract for someone else has a **power of representation**. This allows lawyers, and even friends and family members, to make contracts on behalf of someone else. In a case where someone is having a representative make a contract for them it is important to be especially careful about the powers of representation. It is not always easy to tell if the person entering the contract has sufficient powers to represent the legally incapable person. To summarize, all people who have legal capacity, and their representatives, can make contracts under Timorese law.

How are contracts formed?

A contract is formed when two parties make **declarations of willingness** that show they want to be bound by that contract. A declaration of willingness is the showing of a party's desire to undertake certain legal obligations under certain legal conditions. However, declarations of willingness can fail to form a legally enforceable contract if the parties making the declaration lack actual willingness to be bound by the contract. For example, if Luz jokingly tells Tomas that he can have her house, a legal obligation is not created because Luz does not actually want to give Tomas her house.

You can also include **conditions** in contracts. Conditions are optional **clauses**, or pieces of contracts, that make a contract's validity, or part of a contract's validity, depend upon an uncertain event. Conditions are helpful because they allow you to make agreements about uncertain things in the future and can help protect you from being harmed if something bad

happens. For example, an uncertain event could be changes in the weather or availability of a product or supply.

When you make certain types of contracts, the law requires that you use a particular **form**. A form is a set of rules that specify how a declaration of willingness is to be made. For example, some types of contracts must be made in writing. When making a contract, it is important to ask if the law requires it to be in a certain form.

What happens when a contract is formed?

The Civil Code contains specific rules for when a contract proposal, or **offer**, is considered **effective**, or open to be accepted. This is important, because after a contract proposal becomes effective, the person or organization typically has a limited amount of time to accept the proposal before it expires. Sometimes the person who was offered the agreement has a limited time to reject the proposal before it is accepted through their silence. Silence is considered acceptance when parties have entered into contracts before and it is customary for silence to be treated as acceptance, when both parties have agreed that silence will be considered acceptance, or when the silent party acts on the agreement. For example, Rosa, a clothing maker, delivers new clothes to a store. If the store manager uses the merchandise and sells Rosa's clothing, that will be considered acceptance.

Once a contract becomes **effective**, the parties to the contract are obligated to perform their responsibilities under the contract. In other words, the parties must do what they promised to do in the agreement. Most of the time, parties perform their responsibilities under the contract as expected. In some cases, however, one or more parties fail to perform and a dispute occurs.

When contract disputes occur, the party that did not perform often argues that the contract is void and unenforceable, meaning that he did not have any legal responsibilities to perform. A common argument is that there was an error in the formation of the contract. For example, a defendant might argue that she did not voluntarily consent to a contract's terms. She might claim that she misunderstood the purpose of the contract, and that there was thus a "will-related fault," meaning that she did not "will," or want, the contract as it actually existed. Instead, she thought that she was agreeing to something else.

For example, suppose Carolina needed a new bicycle. She went to the bicycle store and pointed to the red bicycle to buy. It needed a new tire and the store said it would fix the tire and she could pick up the tire later. When Carolina returned, a different red bicycle was ready. Carolina thought she was buying one red bicycle but the store thought she was buying a different one. This is a will-related fault because this is not the contract that Carolina wanted or thought she was agreeing to.

Parties to contracts can also seek to **nullify or annul** a contract before a dispute occurs. To nullify or annul a contract means to cancel it and undo its legally binding power. It is very important to know that there is a difference between nullifying a contract and annulling a contract.

Nullify: If you nullify a contract, the contract is considered **null and void**. This means the contract must be made in such a way that it could never be legally valid. For example, a contract to sell a person into slavery would be null and void because such a contract is completely illegal, immoral, and was never binding at all. Even if all of the people involved in the contract wanted the contract to be binding and legally enforceable, the court would not let them and would declare the contract null and void. For these cases, the contract has never been valid and has never had legal force. With contracts that can be nullified, anyone can tell the court to nullify the contract or the court can decide on its own to nullify the contract. With contracts that can be nullified, it does not matter how long the contract has existed. It can be nullified many, many years in the future. Contracts that are declared null and void by courts should not have produced any legal effects. Courts can nullify every effect that the contract has produced, re-establishing the situation before the formation of the contract. It should be just as if the contract had never existed. For instance, if a child has purchased a car in installments and a court declares this contract is null and void because the child lacks legal capacity, the installments paid so far should be reimbursed to the child.

Annulment: If a contract is annulable, it means that it could be a normal contract, but that it has problems and can be cancelled in some circumstances. If no one objects to the contract or tries to cancel it, it might eventually become binding like a normal contract and can no longer be cancelled. How long someone has before they can cancel, or annul, a contract depends on the type of contract, but it is normally a year. An example of an annulable contract is a contract

where one party tricks the other party into agreeing to the contract by lying about what the responsibilities and obligations in the contract are. In this case, the person who is tricked has the choice to annul the contract, but also has the choice to stay in the contract if he or she wants to. Also, if he or she waits too long to annul the contract, the law will eventually not let him or her annul it because he or she waited too long. Finally, the only people who can ask to annul a contract are the parties or a third party affected by the contract. The court is never allowed to annul a contract on its own. When a contract is annulled, the effects that were produced so far may be considered valid and only the effects to be produced in the future are cancelled.

To make contract enforcement predictable, the Civil Code creates rules for how courts should interpret declarations of willingness, and thus contracts. For example, courts are allowed to **incorporate**, or include in the contract, the meaning of missing provisions. When they do this, the courts try to include only provisions that the parties would probably have included when they first made the contract if they had realized that they needed them. This is most often done in cases where complete cancellation of a contract would either be costly or unnecessary. For this reason, the Civil Code gives parties the ability to either remove the bad part of the contract, or change the contract into an acceptable form.

Depending on the type of contract, there may be extra rules for forming certain types of contracts. Before entering into a contract, you should review the Civil Code to see if there are any special legal rules that apply.

2.3. Contract Performance

Contract **performance** is the fulfillment of contract obligations. The most fundamental rule for contract performance is that the parties always must act in good faith, as stated in Article 696 of the Civil Code. As a general rule, debtors and creditors must have legal capacity for performing their respective obligations.

It is first important to clarify the terms **debtor** and **creditor**. These terms are normally used when talking about loans. In the case of a loan, the person who loans his or her money to someone who then must pay back the money later is called a **creditor**. Also in the case of a loan, the person who has money lent to them that they must later pay back is called a **debtor**. These terms have a slightly different meaning when we are talking about contracts. In a contract,

someone who owes a duty or responsibility is called a debtor, and someone who has a duty or responsibility owed to them is called a creditor. It is similar to a loan because a debtor owes the loan money to the creditor, and the creditor is owed the loan money. In contracts, the parties are often both debtors and creditors to each other. For example, imagine that two people agree to trade a horse for a motorcycle. In this case, the person who owns the horse is a debtor, because he owes a horse to the man with the motorcycle. But he is also a creditor, because the man who owns the motorcycle owes him the motorcycle. The owner of the motorcycle is also a debtor and a creditor: he is a debtor because he owes the other man his motorcycle, and he is a creditor because the other man owes him his horse.

Most contract rules have a **default** rule, which is the way that the law wants the contract to be done unless there is a good reason, or an agreement between the parties, to do it differently. This means that while not all contracts must be done the default way, they often should be.

Here is an example of some default rules:

- Most contract obligations should be fulfilled completely at one time, not in parts.
- The creditor has a right to demand **performance**, or what he is owed, at any time and it should be given to him.
- The debtor can give performance at any time and it should be accepted.

Article 341 of the Civil Code discusses the basic principle that parties should comply with contracts on time. Furthermore, changing or ending the contract generally requires all parties to agree, unless nullification or annulment is possible for the reasons discussed earlier.

Must a debtor fulfill the contract completely or can they do it in parts?

In Article 697 of the Civil Code, the term **consideration** means the same thing as performance. It means doing the things or giving the objects that the party is obligated to give under the promises they made in the contract. A debtor generally must fulfill the contract all at once. There are three exceptions to this rule when: (1) the law says otherwise, (2) the contract permits fulfillment in parts, and (3) when local custom supports contract fulfillment in parts. This means that the debtor does not have to fulfill all his obligations at one time when it is customary not to or if the law allows him not to. The debtor can also not fulfill contract obligations all at once if the

contract says they do not have to. While the general rule requires performance completely at one time, a creditor can request partial performance. If the creditor requests only partial performance, however, the debtor is still allowed to do the full performance at one time if they want to.

The purpose of a rule of full performance is to ensure that the agreements of the contract are fulfilled in a quick and complete way. This rule is good for the creditor. Because this is a rule that is supposed to benefit the creditor, the creditor is allowed to not use it completely and to allow the debtor to start with only partial performance. If the creditor asks for partial performance, the debtor still must fulfill the whole contract, but the debtor has more time to complete it.

As the default rule, the creditor does not have to accept anything except full performance of the debtor's duties and obligations. For example, if a businessperson needs a delivery of magazines to sell at an event, and the delivery is late, then the delivery of magazines is inadequate to help the businessperson increase sales at the event. Thus, Article 697 protects the businessperson. The businessperson does not have to allow partial performance, because it does not fulfill the contract obligations.

The exceptions in Article 697, however, are designed to allow flexibility. Parties to a contract can design the timing of performance in any way they want if they include it in the contract. The default is full performance, not performance in parts, but if the circumstances are better for performance in parts, the parties can allow it by putting it that way in the contract.

Does the contract need to be fulfilled by a certain time or date?

Articles 711-716 of the Civil Code address the timing of contract fulfillment. Unless the contract or a legal rule gives a specific time for the performance, the creditor can request performance at any time and the debtor can fulfill the contract obligation at any time. If a specific timeframe for performance is necessary, then the parties should try to agree on a possible timeframe in advance and put it in the contract. If the parties are unable to agree on a date but a timeframe is necessary, then the courts should help decide the timeframe.

2.4. Non-Performance and Enforcement

Non-performance occurs when one party in a contract does not perform an obligation under the

contract. According to Article 732 of the Civil Code, the party who unjustifiably fails to perform his contractual obligations, performs the obligations in a defective way, or performs at a later time than what they agreed to, will be liable for all the loss caused to the other party.

Additionally, under Article 747 of the Civil Code, a party is liable when he does not accept performance by the other party without a good cause for rejecting it.

For example, imagine that Veronica and Marco create a contract that says Marco will build a walking path outside of Veronica's house. Marco builds the path, but the tiles he uses are cracked, injuring anyone who touches them. This means that the walking path is defective and that Marco is liable for non-performance under Article 732 of the Civil Code. Veronica can ask a court to make Marco pay her compensation. Imagine instead, however, that Marco completed the path without any defects. Veronica refuses to pay him for his services, and she does not have a good reason. In that case, Veronica is liable for non-performance under Article 747 of the Civil Code, and Marco can ask a court to make Veronica pay him compensation.

What does a judge do if someone like Veronica or Marco appears in court? A judge considering non-performance must make a legal determination about whether the non-performing party is at fault for not performing, or if they have a legally acceptable reason for not performing. If the judge decides that the non-performing party does not have a good reason for not performing, then the court will order that person to pay compensation. The judge will provide legal notice under Article 739 of the Civil Code, informing the party of the decision.

Without legal notice from the court, the person at fault generally does not have to pay compensation. There are three exceptions to this rule. Someone must pay compensation even without legal notice when: (1) the obligation has a specific deadline that has passed, (2) the obligation arises from an illicit act or fact, or (3) the debtor blocks the notification. In these three cases, Article 739 of the Civil Code states that the party is legally liable even if he does not receive notice.

When is non-performance excused?

Under Article 734 of the Civil Code, the parties can agree that the non-performing party is not liable. If such an agreement does not exist, however, a party will be excused from performance of a contractual obligation only if (1) it is impossible to perform, and (2) that impossibility is not

the fault of the non-performing party. This is a valid excuse under Article 724 of the Civil Code, a valid excuse establishes that the non-performance is not the party's fault, and therefore the obligation of the party is extinguished and the party is free from the contract. However, if consideration becomes impossible through some fault of the party, the party is still liable.

For example, suppose Veronica contracted with Marco to build a walking path outside her house within two weeks. The next day, a large storm destroys most of the road leading to Veronica's house. Because the road is destroyed, Marco cannot reach Veronica's house, and he cannot build the walking path. The storm is a valid excuse for Marco to not perform his contractual obligations, and he is not liable. It is not Marco's fault that he cannot complete the walking path within two weeks. Now, suppose the storm did not damage the road, but Marco decided to go on vacation because he hates the rain. As a result, Marco did not complete the walking path. Marco is still liable because the contract is valid and he is obligated to do as he promised.

Introduction to Remedies

When non-performance of a contractual obligation is not excused by impossibility, the injured party may ask a court to enforce the contract. This does not mean, of course, that the victim of non-performance will always go to court. Non-performance is usually settled by negotiation or traditional mediation. Very often, the victim may decide not to go to court because the contract involves a small amount of money, or because the non-performing party has no money to pay any judgment that may be won in court. Lawyers should always think about the possibility of cheaper solutions than going to court. This is because the cost of litigation and the problems with implementing the court's judgment often mean that it is better for your client to resolve the dispute another way. Sometimes, however, it is a good idea to go to court.

Even if going to court is not the best option, it is helpful to know what will probably happen if you did go to court. This is because knowing what the judge is likely to decide about your client's rights and obligations helps your client decide what is the best option. Accordingly, this section will focus on the principles that the court will use to govern the choice of **remedy** for non-performance. The remedy is the solution that the court would choose. It will also look at the way that the court decides the amount of compensation to be awarded.

If the injured party decides to go to court and succeeds in showing that non-performance has occurred, the injured party will then argue for the judge to award one or more of the remedies that are possible in the law. Sometimes more than one remedy will be awarded in combination by the court; though some types of remedies cannot be awarded together. Below we will first discuss the goals of remedies. After that, we will begin to look at the different remedies available and explain the criteria, exceptions, and unique rules that apply to each.

The Basic Goal of Remedies

A valid contract allows each party to have expectations about what will happen in the future. Both parties should be able to expect that the other party will honor their promises and do what they said they would do. If one of the parties fails to perform an obligation, then the expectations of the other party will be damaged. The basic goal of the law in providing a remedy is to cure the injury created by a broken promise. To do this, the victim of non-performance is given what they were promised under the contract or the equivalent value in money. Therefore, the ideal goal of remedies is to place the injured party in the position that they would have been in had the contract been fully performed.

For example, suppose Veronica and Marco created a contract in which Marco promised to build Veronica a walking path. Marco did not complete the walking path, and Veronica asks a court to solve the problem. There are two ideal remedies: the court orders Marco to finish the walking path, or the court orders Marco to pay Veronica the money she gave him so that she can hire someone else to finish the walking path.

Contract Remedies Principles

Generally the most direct way to enforce the injured party's expectations under the contract is for the court to require **specific performance**. Specific performance is an order by the court requiring the non-performing party to perform exactly as it promised. Sometimes, however, it is impossible or a bad idea to demand specific performance.

For example, suppose Jorge contracted for a restaurant in Dili to bake a big chocolate cake for his birthday party on July 9th. If the restaurant fails to bake the cake, Jorge is disappointed by their non-performance. However, it would not be a good idea for the court to order the restaurant

to bake the cake on a different day. Jorge will not want the cake anymore since his birthday has already passed. Because Jorge wanted the cake only on a special day for a special occasion, specific performance will not be the best solution. Instead, Jorge might ask a court to require the restaurant to return his money to him, a remedy called **monetary damages**. There are several types of remedies that may be available:

- **Monetary damages:** Monetary damages means returning money to the injured party. The goal is to create a situation as if the breach never happened. To do this, the party that breaches must pay all of the damages that the breach caused, and also to pay all of the benefits that the non-breaching party expected to get from the contract. For example, suppose Andrea owns a bakery, and she promises to sell Miguel a cake this week. Andrea has a contract with a local farm to buy milk and eggs for her baked goods. The farm did not deliver any milk or eggs this week so Andrea could not bake Miguel's cake. The farm did not perform its contractual obligations. The farm owes Andrea the money she paid for the milk and eggs, as well as the profit she lost by not being able to bake Miguel's cake.
- **Withholding performance:** Withholding performance is when a person does not perform contractual obligations until the other party performs. The performance that is withheld must be reasonable. For example, suppose Andrea gives bread to the farm in exchange for their milk and eggs. Because the farm did not deliver milk and eggs, Andrea can withhold her payment of bread.
- **Reduction in price:** The injured party can reduce the amount they will pay the breaching party proportionate to, meaning the same percentage as, the decrease in the value of the performance caused by the defect. Suppose the farm delivers milk and eggs to Andrea every seven days, but this week they delivered them one day late. Andrea can reduce her payment by 1/7th of the price. Andrea did not have milk and eggs for one day out of the seven-day week.
- **Termination:** Termination means cancelling the contract and any remaining obligations that either party has. This would end the contract between the farm and Andrea. The farm would no longer deliver milk and eggs, and Andrea would no longer pay the farm in either money or bread.

The goal of remedies is to provide **expectation damages**. Expectation damages provide the

amount of value that was damaged and lost by the breach compared to what was expected from the contract. For Andrea, this would be the lost profit from not being able to bake Miguel's cake. It is important to realize, however, that the remedies courts actually award do not always achieve this goal. There are many things that can stop the law from achieving the same result that full performance of the contract would have achieved. These include:

- **Foreseeability:** It is not always fair for the defendant to be responsible for costs that it was not reasonable to predict, or **foresee**, at the time of contracting. If there were damages that could not have been foreseen, then the court would likely decide that they should not be awarded. For example, suppose Daniel rented Odete's car for the day, and he did not refill the gas in the car after he used it like he said he would. When Odete drives the car, it runs out of gas on a hill, and she has a car accident. It would not be fair to make Daniel pay for the costs of the car accident, because Daniel could not have thought that not refilling the gas would cause a car accident. The accident was strange and unexpected.
- **Injured Party's Fault:** The injured party is responsible not to increase the amount of losses that they suffer. That means that the injured party must do things to make sure that the amount that they lose because of the breach is as small as possible. If the injured party does not do this, and instead increases his losses expecting the other party to pay for these extra losses, then the court will not make the party who breached pay these extra costs. Under Article 501 of the Civil Code, the defendant will not be liable for losses caused by the injured party. Suppose Odete knew there was no gas in the car and drove it until it stopped in the city. Odete then walked home, and she paid someone to bring her car back from the city. Daniel is not liable for the costs of bringing the car back to the city, because Odete knew the car did not have gas, and she increased the losses.
- **Causation:** Under Article 497 of the Civil Code, the non-performance must be the cause of the losses for the court to require compensation. That means that the party who breached the contract is responsible for losses only if they happened mostly because of his non-performance. Suppose Odete's car is stolen after Daniel returns it to her. Daniel is not responsible for that loss. The empty tank of gas did not cause the car to be stolen.
- **Reasonable Certainty:** To recover damages, the injured party must be able to convince the judge that he has suffered or will suffer an injury. In addition, the amount of the losses must

be based on proof that is fair to the defendant. Articles 500 and 501(3) of the Civil Code require damages to be limited to those that are already proven. This means that some damages that are difficult to prove may never be compensated, even if the court tries to compensate everything. If Odete is angry about filling the gas tank, but Daniel's action did not cause other problems, Odete will not be able to convince the judge that she suffered an injury. Daniel will not have to pay damages.

The following exercises ask you to think critically about basic principles of contract law.

Application Exercises

Paulina's only grandchild Marco is turning one. For the big celebration, Paulina is inviting her family and friends to her house for a party. She hires Andrea to bake a birthday cake and hires Odete to deliver the cake. The cake never arrives at the party.

Question 1: Suppose Andrea never baked the cake. What type of damages can Paulina recover, from whom, and why?

Question 2: Suppose Andrea knew a week ago that she would not have enough milk and eggs for Paulina's cake. If Andrea told this to Paulina, how does this change Paulina's damage award?

Question 3: Suppose Andrea baked the cake and gave it to Odete, but Odete could not deliver it because she did not have gas in her car. Daniel borrowed her car last week, and he did not fill the gas tank like he promised. How does this change Paulina's damage award? Should Daniel pay?

Answers

Answer 1: Paulina may recover monetary damages from Andrea. It was not Odete's fault that Andrea did not bake the cake, so she cannot be liable for the cake. It is foreseeable and reasonably certain that not baking the cake would cause Paulina harm. Paulina would most likely get and want monetary damages to pay her back for the cost of the cake and any other damages that she suffered. Specific performance would not be appropriate because the party has ended.

Answer 2: Paulina also has a responsibility not to increase the harm she suffers as a result of Andrea's breach of contract. If Paulina knew in advance that Andrea could not make the cake, Paulina could have hired someone else or planned on not having a cake. As a result, Andrea is not liable for any additional harm suffered that Paulina could have prevented.

Answer 3: Odete would pay damages to Paulina for not delivering the cake. Daniel may also pay damages to Odete. If Daniel knew that Odete's job is to deliver things, then he should have known the consequences of not filling the gas tank. But if Daniel returned the car to Odete a few days before the delivery date and told Odete that the car did not have gas, then Daniel would not be liable because Odete could have filled up the gas tank and avoided the problem.

2.5. Conclusion

This contract primer covered some basic concepts in contract law that will be helpful as you learn about the transfer of property ownership and possession. The primer was not an in-depth analysis of contract law, so if you need additional resources as you read this book, please consult the Timor-Leste Legal Education Program's free contract law book. It is available in English, Portuguese, and Tetum. The book can be downloaded at <http://tlep.stanford.edu/publications/>.

3. IRREVOCABLE TRANSFER OF PROPERTY RIGHTS

One of the main property rights that a property owner has is disposition. As we discussed, property ownership is like a basket of fruit, where the basket is ownership and the fruit are property rights. Disposition is one of the primary fruits in that basket. Once ownership has been transferred, the new property owner has all of the rights in the basket. These rights include possession and **easements**, or the right to use another person's land in a particular way. All of these property rights are transferred to the new owner when land is sold.

For a property owner, there are multiple ways to dispose of, or transfer, property. This also means that for someone who does not own property, there are multiple ways to purchase property or get property rights. We will first look at the different ways people can permanently dispose of property, which we call **irrevocable disposition**. Revocable means to change, so irrevocable means that an act is permanent and cannot be changed.

For example, suppose Carla owns her house and rents it to Juliao. Carla is the property owner, and Juliao has the right of possession. If Carla disposes of her house, she transfers ownership of her house to someone else. Suppose Carla sells her house to Juliao. This is an irrevocable, or permanent, transfer of property rights from Carla to Juliao. Now, Juliao has ownership and possessory rights.

3.1. Purchase and Sale Contracts

Property ownership can be transferred from one person to another through a contract under Article 808 of the Civil Code. To transfer ownership of property, people use a **purchase and sale contract**. A purchase and sale contract transfers property ownership from one person to another. As we learned earlier in this chapter, a contract is a legally enforceable promise between two people. In this type of contract, property rights are given to one person in return for money or other forms of compensation. This is a contract, and the articles of the Civil Code that apply to contracts also apply to purchase and sale contracts.

3.1.1. Basic Rules

When a buyer and a seller create a purchase and sales contract, they agree to transfer property ownership. By transferring the property rights, the contract creates two obligations under Articles 813 and 871 of the Civil Code. First, the seller must give up the property rights by transferring

the **property title** to the buyer. Property title is a concept that refers to legal ownership of property. It is the link between the person who owns property, and the property itself. Second, the buyer must pay the price of the property to the seller.

For example, suppose Juan owns a house and he sells the house to Domingo. Juan and Domingo use a purchase and sale contract. Under that contract, Juan must give property title to Domingo. This is different from other types of contracts, because Juan cannot physically give the house to Domingo. Because the house cannot be moved or physically delivered, he instead must give property title to Domingo, and that title represents the house. Property title will give Domingo legal ownership of the house and will link Domingo to the house. In return, Domingo must pay Juan the purchase price of the house. When Juan and Domingo fulfill these two obligations, ownership of the property will be transferred from Juan to Domingo.

While property title refers to legal ownership, that ownership is often recorded in a document. That document is proof that the property owner really owns the property. This document is called a **public deed**. Under Article 809 of the Civil Code, a purchase and sale contract for immovable property must be in the form of a public deed that lists the proper owner. In practice, there is no system to track and transfer public deeds. This is an area of property law that is still being developed in Timor-Leste. When this process is implemented, Juan and Domingo will need to record their purchase and sale contract in a public deed to transfer property ownership.

When the property rights are transferred, the property must be in the same condition it was in at the time of sale, under Article 816 of the Civil Code. For example, suppose when Juan agreed to sell his house to Domingo, the house had two good doors. They created a purchase and sale contract in which Domingo agreed to pay for the house in one month. This was the time of sale. One month later, Domingo paid for the house and Juan transferred property title to Domingo. This was the time that the property rights were transferred. When Domingo arrived, he saw that Juan had taken the two doors off the house. Juan was not allowed to take the doors, because the property was in a different condition when he sold it to Domingo than when he transferred property rights to Domingo.

Like other contracts, a purchase and sale contract is **enforceable** in court. This means that if the buyer or seller does not fulfill their obligations under the contract, a court can force the person

who made the promise to either do what they promised or require them to pay money. As we learned above, these remedies are called specific performance and damages. For example, suppose Juan agreed to sell his house to Domingo in a purchase and sale contract. Juan, however, changes his mind and does not want to sell his house anymore. The court could order specific performance, which would require Juan to sell his house to Domingo. Alternatively, the court could order damages, which would require Juan to pay Domingo for not selling the house.

Another problem could arise if the seller transfers property title, but the buyer refuses to pay. After ownership has been transferred, the buyer has an obligation to pay the seller. If the buyer does not pay the seller, the seller cannot end the contract unless it was agreed upon in the contract, under Article 820 of the Civil Code. This means that the seller must enforce the contract through the courts to regain his property rights. For example, suppose Pedro sells his land to Carlos and Pedro transfers property title to Carlos. Carlos is now the property owner, but he does not pay Pedro. To get paid or regain his property rights, Pedro must ask a court to solve the problem, unless the contract said Pedro could cancel the contract if Carlos did not pay.

Sometimes a purchase and sale contract is not enforceable in court because the buyer or seller was not allowed to buy or sell the property. In this case, the contract is invalid. As we learned, when a contract that is otherwise valid has problems, it can be annulled or made null and void. One example is if a non-citizen tries to buy land. As we learned in Chapter 2, only citizens of Timor-Leste can own immovable property, so only citizens of Timor-Leste can create a purchase and sale contract. If a non-citizen tries to buy property through a middleman, the sale is not valid and the non-citizen may owe damages under Article 810 of the Civil Code. For example, suppose Bobby, an Australian, wants to open a dive shop in Atauro. Bobby cannot buy land in Timor-Leste, but his friend Luís is Timorese and can buy land. It is illegal for Luís to buy land for Bobby, and Luís may get in trouble if he tries to buy land for Bobby.

Another situation where a purchase and sale contract is invalid is when a parent or grandparent sells property to their children or grandchildren without the consent of the other children or grandchildren, under Article 811 of the Civil Code. Children or grandchildren can ask the court to annul the contract, which we learned makes the contract null and void. This ends the contract and the property is not sold. They can ask for an annulment for up to one year after they learned of the sale. An exception, however, is if a parent or grandparent owes a debt to the child or

grandchild. In that case, they can give the property to a child or grandchild without the consent of other children to pay that debt.

For example, suppose Celia has three grandchildren and she wants to sell her house to her eldest grandchild, Bernardo. Celia needs the consent of her two other grandchildren, Cruz and Angelo, to sell the house to Bernardo. If Celia sells the house to Bernardo without Cruz and Angelo's consent, Cruz and Angelo have one year to annul the sale after they learn about it. After one year, the sale is final and Cruz and Angelo cannot request the sale to be annulled. But, suppose Bernardo had sold his car to Celia, and Celia could not pay for the car. She could give her house to Bernardo as payment for that debt without Cruz's and Angelo's consent.

A final problem that commonly arises is when there is uncertainty whether the seller really owns the property. If a buyer purchases property and it is uncertain if the seller owns the property, the buyer must still pay for the property if the contract mentions the uncertainty, under Article 815 of the Civil Code. The buyer must pay for the property even if the seller does not own the property. If, however, the contract does not acknowledge the uncertainty of ownership, the sale is null and void and only the buyer can nullify the contract under Article 826 of the Civil Code.

For example, suppose Mario lives in a house and he knows that he does not own it. If he tries to sell the house, any purchase and sale contract he creates will be null and void. Suppose he creates a purchase and sale contract anyway with Teresa, the buyer, and he told her that he definitely owns the house. Teresa can annul the contract if she wants to.

Suppose instead, however, that Mario thinks he owns his house. Mario's family has lived in this house for generations, but they left the country during the Indonesian occupation. Mario returned and moved into his family home, but he has no document about property title, and he is uncertain if his family still owns the home. Mario wants to sell the house and enters into a purchase and sale contract with Teresa. The contract says that Mario is uncertain if he owns the house. Teresa must pay for the house even if they discover later that Mario does not own the house. If Teresa buys the house and Mario does not own it, Teresa may be able to recover some of her losses. If the buyer acted in **good faith**, or honestly, she has the right to full **restitution**, which is the money she paid for the house. Restitution is compensation to pay the buyer for her losses.

3.1.2. Mortgages

When a person buys or sells a property, a **mortgage** may be involved. A mortgage is a loan from the bank that enables someone to buy property, even if they do not have enough money to pay for the property. The bank provides the mortgage to the buyer, and the buyer must repay the loan. As the buyer pays, he slowly pays for and owns more and more of his house. The seller might also have a mortgage on the house if he has not yet paid the full price of the property. The mortgage belongs to the property owner and he can reduce the mortgage whenever he wants by paying money to the bank, under Articles 649 and 653 of the Civil Code.

A mortgage uses property as **collateral**. Collateral is security to ensure repayment of the loan. If a buyer gets a mortgage from the bank and cannot pay it back, the bank can take the collateral for the loan. Thus, if a buyer gets a mortgage from a bank to buy a house, the house is collateral. If the buyer stops repaying the loan, the bank can sell the house to recover the loan. Under Article 659 of the Civil Code, the bank can also force the property owner to repay the loan if he does something to make his credit less secure.

A mortgage can end in several ways under Article 664 of the Civil Code. First, the mortgage ends if the property owner pays the full amount of debt owed on the mortgage or sell the property. Second, the mortgage ends if someone acquires the property by prescription, which we discuss in detail later in this chapter. Third, the mortgage ends if the property is destroyed. Lastly, the mortgage ends if the creditor waives the remaining amount owed on the mortgage.

3.2. Gifts

A **gift** is a type of contract where an owner disposes of his property without receiving any compensation in return. A gift is like a sale, except the person who receives the property does not pay for the property. “Gift” can also be used as a verb. When an owner gifts property, he transfers ownership to someone else. The person who gives a gift is called a **donor**. Gifting property creates an obligation on the donor to deliver property title to the new owner. A gift is generally irrevocable, meaning it is permanent, but sometimes a gift can be reversed. In the Civil Code, Article 664 and many of the articles between 874 and 891 address gifts. Like a purchase and sale contract, a gift must be done with a public deed, but there is no system yet to do this.

Anyone who can contract and dispose of property can give property as a gift. This means the owner must have legal capacity to gift property. Most importantly, the donor must own the property. Otherwise the contract is null and void and the donor may be responsible for paying damages to the gift recipient. A person cannot gift property that belongs to someone else. This is true even for legal representatives. If someone is incapacitated, his or her legal representative cannot give the property of the incapacitated person to anyone else.

For example, suppose Antonio lives in a house that he would like to gift to his sister, Adriana. Antonio can only gift the house if he owns it. If Antonio is from Portugal, he does not own the house, because only citizens of Timor-Leste can own property. In that case, Antonio cannot gift the property to Adriana because he does not own the house. Similarly, suppose Antonio's brother Fernando owns the house. Antonio cannot gift the house to Adriana, because he does not own it. Even if Antonio is Fernando's legal representative and Fernando is incapacitated, Antonio cannot gift Fernando's house to Adriana.

There are also rules about who can accept property as a gift. First, anyone can accept a gift unless the law prohibits it. For example, because the Civil Code prohibits a non-Timorese citizen from owning land, a non-citizen cannot receive a gift of immovable property. Many other people, however, can receive gifts. Even unborn children can receive gifts, if their parent was alive when the gift was made. In that case, the law presumes the donor can use the property until the child is born. For example, suppose Carla has a sister named Manuela. Manuela is pregnant, and Carla wants to help her sister. Carla decides to give a house to Manuela's daughter. Even though Manuela's daughter is not yet born, Carla can gift the house to Manuela's daughter. The law presumes that Carla can use the house until Manuela's daughter is born.

Additionally, there are rules about how people can accept gifts. A gift can be accepted only when the donor is alive. For example, suppose Antonio gives his farm to his cousin, Lara. But Lara is very busy and she does not respond to Antonio's offer for one week. During that week, Antonio unfortunately died in an accident. The gift contract was not completed because Lara did not accept the gift while Antonio was alive. Lara does not receive the farm.

If a person cannot create a contract because he is incapacitated, he may not accept a gift of immovable property except through his legal representative because of the duties that the

immovable property would create. This is a difference between who can accept a gift and who can give a gift. While a donor cannot give property through a legal representative, someone *can* receive a gift through a legal representative. For example, Carla can give her house to Manuela's unborn daughter. Manuela accepts the gift for her baby, because the baby is not able to accept the gift yet. Manuela acts as the baby's legal representative.

A person may also gift the same property to multiple people. When this happens, the property is donated in equal parts to each gift recipient. The property is co-owned as we discussed in Chapter 2. For example, suppose Antonio gives his house to his two aunts, Brenda and Sonia. Brenda and Sonia receive equal share of the property, so each receives half of the property.

Generally, a gift of property is assumed to include all property rights. For example, the owner has the right of usufruct to his property, or the right to use property, which we learned about in Chapter 3. When the owner gives his property to someone else, the law assumes that he also gives the right of usufruct to that person. The donor can avoid this, however, by saying in the contract that he keeps the right of usufruct.

Sometimes, a donor will gift property that has problems with it. For example, a house might have a broken door, or electricity that does not work. If there is a defect with the property, the donor does not have to pay money to fix the property, unless he has taken responsibility for that defect or acted **fraudulently**. Fraudulently means deceptively.

For example, suppose Antonio donated a house he owns to a shelter for orphans, and there is a problem with the plumbing, Antonio is not responsible for those problems because he did not know about them. But, if Antonio knew about the plumbing problems but told the shelter there were no problems, then Antonio would be responsible for any costs.

If someone accepts a gift but then discovers these problems, that person can annul the gift if it was accepted in good faith. For example, suppose the orphanage receives Antonio's house as a gift. It then discovers there are problems with the plumbing, electricity, and foundation. The orphanage can annul the gift and return it to Antonio.

One reason that there are rules about gifting is that a gift may have certain duties attached to it. A gift can include many different duties, but these duties cannot be impossible or immoral. A

common duty is a mortgage. A donor may give someone a property that has a mortgage. The gift could require the gift recipient pay the remaining mortgage, or the donor and recipient can agree that the recipient will pay a certain percentage of the mortgage. The donor can end the gift if the gift recipient does not fulfill his duties that were specified in the gift contract.

For example, suppose Eva owns a house and there is a mortgage on the house. She gifts the house to Sergio. They agree that Sergio will pay the remaining mortgage. This is a duty that is attached to the gift. Sergio now owns the house and Eva will not pay the mortgage. Eva can take the house if Sergio does not pay the mortgage like he promised.

Application Exercises

Question 1: Ana owns several apartments in Dili. Ana does not like to care for the apartments, so she decides to gift an apartment to her daughter, Maria. Can she give Maria an apartment? Can Ana give Jim, her friend from Australia, an apartment?

Question 2: Suppose Ana gave her apartment to Maria, but Ana regrets that decision and wants to own the apartment again. Can she undo the gift? What if the gift required Maria to pay the taxes on the apartment, but does not?

Answers

Answer 1: Yes, Ana can give Maria an apartment, assuming that Maria is a Timorese citizen. But if Ana has other children, they will need to approve this gift. If they do not, the other children will have one year to request an annulment. Ana cannot give Jim an apartment because he is an Australian citizen. Jim cannot own property in Timor-Leste.

Answer 2: No, Ana cannot undo the gift just because she wants it. But, if Maria does not pay the taxes like she is required to, Ana can terminate the gift. Under Article 898 of the Civil Code, payment of a future debt is a duty that was included in the gift contract.

3.2.1. Reversion of Gifts

A donor can include a **reversion** clause in the gift contract. Reversion is when the property returns to the donor or original property owner who gifted the property. Under Article 894 of the Civil Code, reversion happens when the gift recipient and all of his **descendants** die before the donor. Descendants are the children, grandchildren, and similar people who are born from

someone. For example, suppose Maria has a child named Julio. Julio has a child named Domenico. Domenico has a child named Odete. Julio, Domenico, and Odete are all the descendants of Maria. If Odete has children who have children, all those people will also be Maria's descendants.

A gift contract can limit when reversion happens. For example, the gift contract can specify that there will be reversion if the gift recipient dies before the donor, even if the gift recipient's children are alive. To limit when reversion happens, the gift contract needs to say those limits in the contract. For example, suppose Antonio gifts his house to his sister, Adriana. The gift contract says that if Adriana dies before Antonio, the house returns to Antonio even though Adriana has a child. This is an effective reversion clause, because it is in the contract.

3.2.2. Revocation of Gifts

A gift contract has the same requirements as a regular contract, except the recipient does not pay for the gift. To make the contract, the gift recipient must accept the contract. Until the gift recipient accepts the gift, the donor can revoke the gift, under Article 903 of the Civil Code. A gift offer is valid until the gift recipient accepts the gift or until the donor revokes his offer. Until the recipient accepts the gift, the donor always has the right to revoke the offer. Under Article 908 of the Civil Code, that right to revoke cannot be waived.

For example, suppose Antonio would like to give his property as a gift to Joana. He offers the property as a gift to Joana, and she wants to think about it for a week. The gift contract is not completed until Joana accepts the gift. Joana can think about this gift for as long as she wants. While she thinks, however, Antonio can decide not to give the property to Joana whenever he wants.

Articles 904 to 907 of the Civil Code provide more rules about revoking gifts. After the gift offer is accepted, the gift can still be revoked if the gift recipient is ungrateful. A gift cannot be revoked when it is gifted for marriage or if the donor has forgiven the gift recipient. Another limitation on the ability to revoke a gift is timing. After the gift recipient or donor dies, the gift cannot be revoked because the recipient is unworthy of the gift until one year after the death. The one-year requirement is waived if the gift recipient murdered or prevented the donor from revoking the gift. If there is a legal action pending to revoke the gift, and either the donor or gift

recipient dies, the **heirs** of the deceased can continue the legal action. Heirs are people who receive someone's property when that person dies, which the next section discusses.

Once the gift has been revoked, the effects of the revocation are **retroactive**, under Article 909 of the Civil Code. This means the effects go back in time, to the date when the donor tried to revoke the gift. After the gift is revoked, the property returns to the donor or his heirs. If the property cannot be returned, the recipient must pay the donor or his heirs the value of the property. For example, a property cannot be returned if it was sold. In that case, the gift recipient must give the donor or his heirs the money he received when he sold the property.

3.3. Inheritance and Succession

A common way that property is transferred is when a property owner dies. When a property owner dies, ownership of his property is transferred to his **successors**. Successors are also called heirs. Successors are people who receive the property that belonged to a deceased person. Similarly, **succession** is when ownership is transferred from the owner to the successors when the owner dies. Article 1888 of the Civil Code defines succession as someone's right to receive a deceased person's property based on the legal relationship between the people. An example of succession is when a child receives his father's farm after his father dies.

Succession creates a type of gift called an **inheritance**. Inheritances are gifts that happen when the donor dies. When a father dies and gives his farm to his child, the child is his successor and the farm is the child's inheritance. An inheritance is legal because the donor makes the gift while the donor is still alive, but property ownership transfers when the donor dies, under Article 880 of the Civil Code. An inheritance must follow the formalities required for **wills**. A will is a document that expresses a person's wishes about the use of his property after death. In this section, we will first review the typical timeline of inheritance and then we will learn about the three different types of succession.

The law of succession is separate from property law. It creates a legal framework to decide who owns a person's property, rights, and obligations if that person dies. This section provides an overview of succession law related to the transfer of property ownership. The terms, concepts, and rules discussed in this section can be found in Book V of the Civil Code. For more

information, you can also read a working paper on succession law, written by the Timor-Leste Legal Education Project. The paper is available for free at <http://tllep.stanford.edu/publications/>.

3.3.1. Timeline of a Typical Inheritance Assignment

The Early Stages: Opening & Summoning

A succession technically **opens**, or begins, when the owner dies and where he last lived, under Article 1895 of the Civil Code. The person who dies is called the **author** or the deceased. The author is the person who gives his property as an inheritance to his heirs. The author decides what will happen to her assets when he dies. This is true even if the author does not write instructions about what to do with his property. For example, suppose Leopoldo has lived in Dili his whole life, but he dies while on vacation in Maubisse. Leopoldo is the author. His succession opens when he dies in Maubisse, but the succession happens in Dili because Dili is the last place he lived.

Once the succession opens, the heirs or the successors must be gathered. Heirs cannot be identified until the author dies. Before the author dies, they are called **heir apparents**. This means that the person could become an heir if he lives longer than the author. For example, suppose Leopoldo wants his daughter Odete to inherit his property when he dies. While Leopoldo is alive, Odete is his heir apparent. When Leopoldo dies and Odete inherits his property, Odete is his heir.

Determining the Successor's Capacity

Determining a potential successor's **capacity** means to discover whether the person can legally be a successor. The government, all people, newborns not yet conceived, legal persons, and corporations can all be successors, under Article 1897 of the Civil Code. The most complicated of these provisions is the idea that a successor can be a child who is not yet conceived, but who is the child of a person who is alive when the succession opens. This means that unborn children can be a successor if one of their parents is alive when the author dies.

Sometimes a person cannot be a successor because he does not have capacity to be a successor. Articles 1896 to 1902 of the Civil Code detail the types of people who cannot be successors.

First, a non-Timorese citizen cannot be a successor to immovable property, because a non-Timorese citizen cannot own immovable property. If a will gives a non-Timorese citizen immovable property, that person cannot accept it, and the next heir will receive the property. A non-citizen can, however, inherit moveable private property. For example, suppose Alejandro is from Colombia. When his friend Mario dies, Alejandro can inherit Mario's car but not his house. If Mario's will tried to give his house to Alejandro, Alejandro cannot accept it, and the next heir will be contacted. This continues until a Timorese heir is found.

Second, a person who is considered "unworthy" cannot be a successor. A person is unworthy when he has threatened or harmed a property owner or his family, or acted in some way to ensure he inherited the property in the will. For example, suppose Miguel threatened to kill José's daughter if José's will did not give his house to Miguel. José is scared of Miguel and writes in his will that Miguel will inherit his house. When José dies, José's daughter goes to court and explains that Miguel is unworthy to inherit the house, because of the threats he made. The court will not let Miguel inherit the house.

It is possible, however, for Miguel to inherit the house after he threatened José, if he is **rehabilitated**. To be rehabilitated, the person must undo the threat he made. Suppose Miguel threatened José, but then he regretted the threat. Miguel apologizes to José and José forgives him before he dies. José and Miguel become good friends. José then changes his will to say that Miguel has been rehabilitated and will inherit his house. When José dies, Miguel will inherit the house.

Determining Whether a Right of Representation Exists

Heirs also include descendants of people who would be heirs, but who cannot accept the inheritance, usually because of death. For example, imagine that an elderly widow had four children. Her will says that her children inherit all of her property. When she dies, three of her children are still alive. Her fourth child, Vincente, died many years before the widow died. Before Vincente died, he had a child named Fernando. Fernando has a right to Vincente's share of the widow's property. The widow's property is divided equally among the children. Each of the four children receives $\frac{1}{4}$ of the property. Fernando receives $\frac{1}{4}$ of the widow's property.

Acceptance

After all heirs are identified and their capacity is verified, each person must accept or repudiate the inheritance. Under Article 1914 of the Civil Code, **acceptance** is how an heir acquires ownership of the property, even if the heir does not physically take the property. Acceptance gives the heir the right to the property. Acceptance is important; physical possession is not. Once the heir accepts the property, the transfer of ownership is irrevocable.

Repudiation

The law does not require a person to accept an inheritance. Sometimes a person does not want property. It is possible that an inheritance could create a burden, or that the person thinks someone else deserves the property. That person can **repudiate** an inheritance, which means to not accept the property. Regardless of the reason, every person can repudiate an inheritance.

One restriction is that a person can only repudiate an inheritance entirely. This means that successors cannot repudiate some parts of the inheritance while accepting other parts. For example, suppose Maria wants to give her house to her son, Fernando, when she dies. The house has a big garden. Fernando would like to accept only the house, but he does not want to own a big garden. He cannot, however, accept only the house. He must either accept the house and garden together, or repudiate both.

Addressing Any Inheritance Challenges

Sometimes people are unhappy when someone else inherits property. These people often feel that they should inherit the property instead. After an heir has accepted or repudiated an inheritance, other people can challenge the decision. Under the law, these challenges to succession are known as **petitions for inheritance**. If a challenger can show that he is the true heir, the law will transfer the inheritance to him.

3.3.2. Rights and Responsibilities of Successors

Liabilities of Successors

When a successor inherits valuable property, the successor may be responsible for liabilities. For example, someone who inherits property must pay for the author's funeral and other costs of

death. Accepting the inheritance also means accepting all burdens attached to the property, under Article 1932 of the Civil Code. If the successor can prove that the cost of the burdens is greater than the value of the inheritance, however, the successor is not required to pay them. For example, imagine Manuela inherited a small house from her brother. Before her brother died, he received a large mortgage from the bank. That mortgage creates a debt that is larger than the house's value. Manuela does not have to pay the bank for the part of the mortgage that is greater than the value of the house.

Distributing the Inheritance

It is usually easy to distribute inheritances that have only one successor. Many inheritances, however, involve many people, and even groups or organizations. Making decisions about who owns what can be difficult and costly.

These distributions can happen in two ways. First, people can create private agreements about distribution. This is called **extra-judicial distribution**. Second, the Office of the Public Prosecutor can determine distribution if the government thinks that an heir will be treated unfairly.

The law generally allows private agreements to distribute the inheritance in any way that the successors want. There are, however, some requirements. For example, if a surviving spouse lives in the inherited home, he or she can live there for the rest of his or her life. Suppose that Fernando and Odete are married and live in Fernando's house. Fernando dies, and in his will, he says that their children will inherit the house. Even though the children inherit the house, Odete has the right to live in the house until she dies.

Once distributions are made, each heir owns the property that he inherited. Each heir is the only successor of that part of the inheritance. For example, suppose Mario dies and his successors agree that Izabel, his wife, will receive the house. The house is Izabel's part of the inheritance. The house is now Izabel's property and the other heirs do not own any part of the house.

3.3.3. Legitimate Succession

The first type of succession we will explore is **legitimate succession**, which is very common in Timor-Leste. Legitimate succession occurs when the deceased did not write a will. This means

the deceased did not plan for how his property would be disposed of when he died. In these cases, the law must decide who owns the deceased's property.

Consider a typical example in a family. The father, Hugo, dies. Hugo had a wife, children, and brothers and sisters. Hugo's parents are also still alive. Hugo's death was unexpected, and he never wrote a will.

Why Is It Important that Hugo Never Drafted a Will?

In our example, Hugo never wrote a will. This fact is important because if Hugo had written a will, the family would have to follow testamentary succession rules (which we will explain later). Because he did not write a will, the family will follow legitimate succession rules.

Who Is a "Legitimate" Heir?

Hugo has a large family, and there are many people who could be heirs. The first thing the law determines is who in Hugo's large family has the strongest legal claim to Hugo's property.

Article 2000 of the Civil Code describes the hierarchy of claims:

- Spouse and descendants;
- Spouse (no children together) and ascendants;
- Siblings and their descendants;
- Other collaterals up to the fourth degree; and
- The government

What this "order" means is that the law first asks, "Does the deceased have a spouse and descendants?" If so, the entire estate goes to the spouse and descendants (if they want it). If not, the law moves to the next type of heirs down the list.

First, a spouse and descendants have the strongest right to the deceased's estate. This refers to the deceased's husband or wife and children. For example, imagine that Hugo's wife and three children are still alive after his death. His wife is named Odete, and his three children are named Fernando, Manuel, and Carla. The law of succession says that Odete and her children receive Hugo's estate in equal parts. Odete, Fernando, Manuel, and Carla will each receive $\frac{1}{4}$ of Hugo's property.

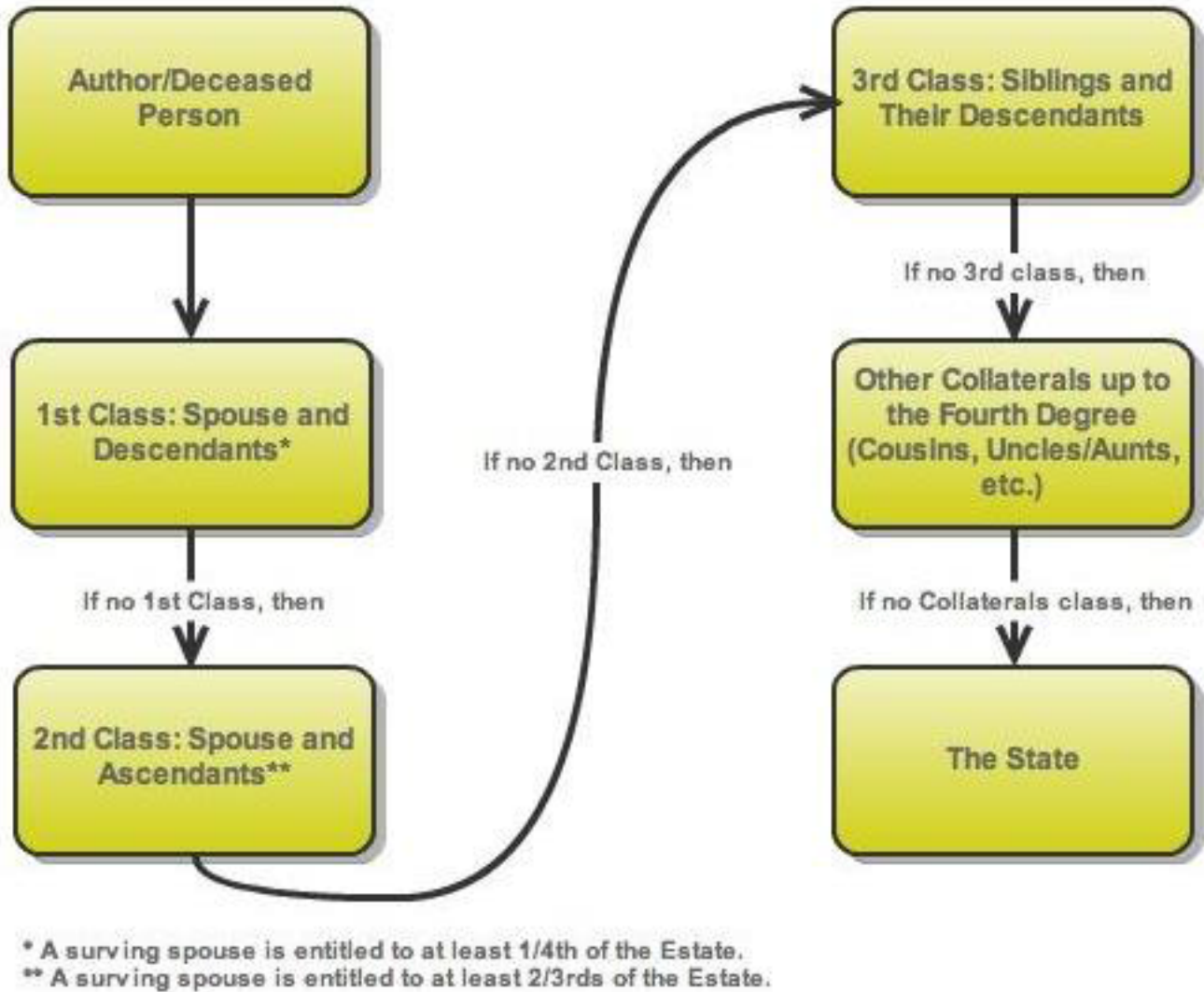
If Hugo and Odete never had children, then the law looks to the second group of heirs in the hierarchy. Odete would be considered with Hugo's **ascendants**, or his parents. Odete, Hugo's mother, and Hugo's father would each inherit part of Hugo's property. This means a spouse can only be part of the first class if the couple had children. If Hugo never married and never had children, his parents would inherit all of Hugo's property.

Most legitimate succession occurs through the first two groups in the hierarchy of claims. When the deceased does not have a spouse, children, or living parents, or none of these people want the estate, we move to the third group in the hierarchy. This includes siblings and their descendants. Siblings may include full or half brothers and sisters.

The fourth group in the hierarchy refers to **collaterals**. Collaterals are more distant relatives, such as aunts or cousins. Finally, if no legitimate heirs can be identified, or if none of the heirs want the estate, the government inherits the property.

The following picture illustrates the order of legitimate succession:

Legitimate Succession



3.3.4. Compulsory Succession

Compulsory succession is the second type of succession. Compulsory succession refers to property that is automatically given to someone. Accordingly, this part of the deceased's estate cannot be disposed of through a will. Certain family members are entitled to inherit property, even if the deceased does not want that. Compulsory succession protects heirs who are traditionally closest to the deceased individual. Only spouses, descendant, and ascendants are

eligible. Compulsory succession recognizes that many spouses, descendants, and ascendants rely on the deceased's estate for financial security.

For example, consider the Da Silva family. Julio is the father. He recently died at age eighty-six after a very happy life. Julio was a thoughtful man, and he updated his will every couple years. One day, however, he became angry with his wife, and he wrote in his will that she would not inherit any of his property. The rules of compulsory succession forbid this. Compulsory succession promises certain parts of Julio's estate to certain family members, regardless of what he writes in his will.

Families can avoid compulsory succession, however, in some cases. There is flexibility for families who want to fulfill their family members' wishes. For example, suppose that in his will, Julio left his house to a local school to be used as a classroom. The law would protect his wife and not require that she leave her home. But, if Julio and his wife had planned for this and his wife will live with their son, the law will allow the property to be gifted to the local school.

3.3.5. Testamentary Succession

The final type of succession is **testamentary succession**. Testamentary succession is when a will determines how property is inherited. Testamentary succession governs the construction, interpretation, and application of a person's written will. Many people want to create a will to communicate their wishes after they die. Rules about testamentary succession help interpret and enforce these wishes. Testamentary succession is the final title in the Civil Code's book on succession laws, and it is the most complex.

A will is a very personal document that expresses a person's wishes after they have died. Therefore, the author must write the will carefully to ensure it says what he wants. The author can receive technical assistance from other people, but the author must decide who he wants to inherit his property. Under Article 2044 of the Civil Code, a will must express the author's wishes "clearly and completely" to be effective. This means the will cannot be written by another person, it cannot be vague or confusing, and it cannot make secret promises or use unauthenticated documents. A will cannot include grants to unidentifiable, unknown, or unspecified people. Any part of the will that violates these rules is invalid. An invalid part of the will is not enforceable.

In addition to being clear and complete, a will can be executed only when the author has the capacity to do so. This means the author must understand what he or she is writing. The author must be a competent adult and cannot have a mental disorder. There are also rules about writing a will when the author has limited capacity, such as when the author is sick.

During these times, it is important to consider whether the author is too sick to knowingly write a will, and whether the person receiving the will has an improper interest in what the will says. Usually, someone should not receive property from the will if they helped the author write the will or gave the author professional care when the author was writing the will. There is an exception, however, if the person is a close family member.

Types of Wills

The most common types of will are: (1) **public wills**, and (2) **sealed wills**. These types of wills are defined in Articles 2068 and 2069 of the Civil Code. Public wills are written by a notary in a register book. Because of their public nature, public wills are the most secure type of will.

Sealed wills are written and signed by the author, or written by someone else at the author's request and signed by the author. Like a public will, a sealed will must be approved by a notary, but it does not need to be written in the register book. There are also **special wills**. Special wills address unusual situations where an author cannot write a more common will. For example, special wills may be necessary in war, when the author is at sea, or when the author is in a foreign country.

Dispositions

The contents of a will are called **dispositions**. Dispositions are how the author divides the estate. An author can usually make dispositions to any group or individual, and he can attach **conditions** to a disposition. Conditions are something that someone has to do to inherit the property. For example, the author may request that if property given in the disposition is later sold, it will be sold to a particular person. Another example is if the author requires that the property be managed in a way that does not ruin it for future successors.

There are, however, some restrictions on conditions. Conditions are invalid if they are impossible to perform or offend public policy. For example, the author cannot compel an individual to marry, move cities, or commit a crime as a condition to receive the inheritance.

For example, suppose Justino has a house with a large garden. Justino cares about the garden. In his will, Justino gives his house to his son, but he includes the condition that his son must care for the garden. A court will require Justino's son to fulfill this condition only if it is fair under the circumstances. When thinking about conditions, it is important to ask whether the condition compels another person to do something, and if it is fair. You should also consult the Civil Code.

Substitutions & Trusts

The law allows authors to design a will that says what will happen if an heir does not accept the inheritance. A common way to do this is through **substitution**. Substitution is the act of replacing an heir who does not or cannot accept the inheritance. For example, suppose Odete writes a will, and she says that her sister will inherit her house when she dies. Odete also writes that if her sister does not accept the house, her brother will inherit her house. Identifying her brother is an example of substitution.

An author can also use **trustee substitution**, which is sometimes called a **trust**. In a trust, the author chooses an heir, or heirs, to manage the inheritance for someone else. The heir or heirs managing the trust have certain duties they must fulfill. A typical duty is to ensure that the inheritance is not squandered and can benefit future heirs. These future heirs are called **trustees**.

Challenging a Will: Null, Annul, Revoke, or Expire

Every will can be challenged. An author cannot prevent a legal challenge to a will. A challenge can undo a will entirely, or part of it. This is done by demonstrating that the will, or part of it, does not meet the requirements of the law and is invalid. An author may also revoke his or her will, either expressly in writing, or by creating a new will that conflicts with the prior will. Finally, a particular disposition of a will can simply expire if the disposition becomes impossible or the disposition is not accepted by the intended heir.

Executing the Will: the Testamentary

After someone dies, the will must be executed. The person or people who ensure the will is fulfilled are called the **testamentary**. Under Article 2181 of the Civil Code, the testamentary must be legally competent to perform these duties, and agree to perform them. Responsibilities may include organizing the funeral, making dispositions, and possibly selling property. The author can define the responsibilities of a testamentary in the will.

3.4. Acquisitive Prescription

We just studied three typical ways that people irrevocably transfer property ownership: purchase and sales contracts, gifts, and inheritance. These property transfers usually involve one owner choosing to transfer the property to another person. We will now study a different type of property transfer that does not involve that kind of choice. Instead, someone can acquire property ownership just by using the property. This is called **acquisitive prescription**. A person acquires property ownership through acquisitive prescription by using land openly and without interruption for a specified period of time. In acquisitive prescription, land can be irrevocably transferred even if the original owner never agreed to transfer it. Articles 1207 to 1217 of the Civil Code discuss acquisitive prescription.

For example, suppose Fernando and his family do not have a house, and they see an empty house in Dili. The house is in bad condition and it looks like no one has lived there for many years. Fernando and his family move into the house and they repair it. Fernando and his family now possess the house. They openly live there for many years. Their neighbors see them living in the house, and no one ever prevents them from living in the house. Their stay in the house is uninterrupted. After enough years pass, Fernando and his family will own the house through acquisitive prescription.

There are many rules about how to acquire property through acquisitive prescription. Some of the most important rules are about the number of years that someone must possess property, openly and without interruption, to acquire ownership of it. Someone must possess property for a long time to gain ownership. If the person mistakenly believes that he owns the property, he must live on it for ten years before he will own it, under Article 1214 of the Civil Code. If the person knows that he does not own the property, but he lives on it anyway, he must live on it for fifteen

years before he will own it. The time is counted from the beginning of when the person first possessed the property. Possession also must be public and non-violent. If someone uses violence to take property, or if he takes property in secret, the time is counted from the beginning of when the violence stops and the possession is public.

There are also rules about who can acquire property through acquisitive prescription. First, only someone who can acquire land in other ways can acquire it through acquisitive prescription. For example, someone who is not a citizen of Timor-Leste cannot acquire land through acquisitive prescription, because only citizens of Timor-Leste can own land. Similarly, an incapacitated person acting through a legal representative can acquire property through acquisitive prescription. A joint owner can also acquire immovable property through acquisitive prescription. In that case, the other owners equally own the property.

There are several limitations on acquisitive prescription. If someone has permission to use property that another person owns, he cannot acquire ownership rights through acquisitive prescription. For example, suppose Odete tells her sister Maria that she can live in Odete's house. Even if Maria lives in Odete's house for many years, she will not own it. This is because Maria has Odete's permission to live there. If a property owner transfers ownership to someone else, however, the person who originally had permission to live there can acquire property ownership through acquisitive prescription. For example, suppose Odete tells her sister Maria that she can live in Odete's house. Odete then sells her house to someone else. Maria lives in the house for many years, and the new owner never objects to Maria living there. Eventually, Maria will acquire ownership through acquisitive prescription.

Acquisitive prescription can be controversial, because it can involve **illegal occupation**. Illegal occupation happens when someone uses another person's land and the property owner does not want that person to use it, under Section 6 of Law 1/2003: The Juridical Regime of Real Estate. If the property owner complains, a court may require the person illegally occupying the land to pay a fine. Someone who is illegally occupying land, however, cannot be imprisoned. Someone is only an illegal occupier—and only has to pay a fine—if he knows that he does not own the property. If the person mistakenly believes that he owns the property, he is not an illegal occupant, and he does not have to pay a fine. In either case, if a property owner complains that

someone is living on his land before the time needed for acquisitive prescription, the occupier will not acquire property ownership.

For example, suppose Fernando and his family left Dili during the Indonesian occupation. They returned to Dili in 2000. When they returned, they moved into a house in the neighborhood where his family lived before the Indonesian occupation. Fernando believes that it is the same house where his family lived, but he is mistaken. Five years later, the owner of the house arrives and tells Fernando and his family that they must leave. They go to court, and the court decides that Fernando does not own the property. Fernando is not required to pay a fine, because he believed that he owned the house. But he will not acquire property ownership through acquisitive prescription.

Application Exercises

Question: Diego moves from Dili to Aileu. He plans to grow rice and vegetables on a small farm. Diego finds a good land, builds a fence, and begins to farm. Diego lives on his farm for twenty years uninterrupted. Can Diego use acquisitive prescription to acquire property ownership of the land? What might be some reasons that Diego could be unable to own the land?

Answers

Answer: Yes, Diego can use acquisitive prescription to acquire property ownership of the land. Diego has lived on and openly used the land for twenty years, which is more than the time required for acquisitive prescription. But if Diego is not a Timorese citizen, then he cannot acquire property ownership.

4. REVOCABLE TRANSFER OF PROPERTY RIGHTS

Not all transfers of property rights are permanent. Some are revocable. As we learned, a revocable transfer is a decision that can be undone. When a property owner allows someone to use his property temporarily, it is a revocable transfer of property rights. A revocable transfer can change who has the right to possess or use the property, but there is no change in property ownership. To use our earlier analogy to a fruit basket, the property owner still has the basket that represents ownership, but he gives the fruit of possession or use to another person for a temporary period of time.

We will learn about four kinds of revocable transfers: leasing, loaning, renting in perpetuity, and lifetime renting. Revocable transfers are very common in Timor-Leste. Because many people and businesses do not own the property that they use, it is important to understand revocable transfers.

4.1. Leasing

Leasing is one of the most important types of revocable transfers. Leasing allows someone to live in and use property that someone else owns. For example, people who live in an apartment typically lease the apartment. They do not own the property, but they have the right to live in and use the apartment. A lease allows someone to pay a property owner for the right to use the property for a certain period of time. Many rules about leasing are in Law 12/2005: Leasing Between Individuals.

There are two people involved in a lease. The first person is the **lessor**. The lessor is the property owner who allows someone else to use the property. He is allowed to lease the property to someone else. Only the property owner can create a lease to allow someone else to use the immovable property that he owns. The lessor gives the right of possession to someone else, but the lessor keeps property ownership. Co-owners can also lease their property, but all of the owners must agree to the lease agreement, under Article 956 of the Civil Code. For example, suppose Brenda and Sonia own land as co-owners. Brenda wants to lease the land to someone else, but Sonia does not want to. Brenda cannot lease the land to someone else until Sonia agrees.

The second person in a lease is the **lessee**. The lessee is the person who takes the property under the lease agreement. The lessor rents his property to the lessee in return for payment, under

Article 953 of the Civil Code. For example, suppose Domingo owns an apartment. Domingo and Manuel create a lease that allows Manuel to live in the apartment. Domingo is the lessor, and Manuel is the lessee.

A **lease agreement** is the contract that establishes when one person allows another person to use his property in return for payment. The lease agreement is similar to a sales contract, but instead of ownership, someone buys the right to use property. Like with property sales, a contract is the basis of a lease between a property owner and the person buying the temporary right of possession. Contract law governs the rules of a lease, such as formation and cancellation. For example, just as people can cancel other contracts if there is fraud or mistake, they can cancel a lease if there is fraud or mistake. Leases should be in writing, and the property owner should register the property with the National Directorate of Land and Property. The Civil Code applies to all lease agreements, even those leases that were created before the Civil Code was adopted, under Article 8 of the Civil Code.

The lease agreement creates obligations between the lessor and lessee. Both people must follow the rules that they write in the lease agreement. The lessor and lessee can agree to the terms of the lease, but if the property is used for housing the minimum lease is one year. The law also establishes certain minimum obligations between lessors and lessees, even if they are not written in the lease. For example, the lessor must maintain the property and pay taxes, and the lessor is responsible to the lessee if the lessor did not actually own the property. The lessee must pay the rent when he agreed to pay it, use the property as agreed to use it, and tell the lessor about any repairs.

There are also rules about what happens if the lessor or lessee becomes someone else, under Articles 988 to 990 of the Civil Code. If the property is sold, the new property owner becomes the lessor. The new lessor has the same rights and obligations that the original lessor had. The lessee can also change. If the lessee dies, the lease can be transferred to another lessee if the lease agreement allows for that in writing. The content or duration of the lease does not change if the lessor or lessee becomes someone else.

There are many types of lease agreements. We will now learn about some of the most common types.

4.1.1. Rental Agreements

One type of lease is a **rental agreement**. Rental agreements are a type of lease that usually lasts for a short amount of time. Like a lease, a rental agreement involves two people. The first is the **landlord**. A landlord is the person who owns the property and creates a rental agreement that allows another person to use it. A landlord is a type of lessor. The second person is the **tenant**. As we learned in Chapter 3, a tenant is a person who has a right to use land that he or she does not own. A tenant is a type of lessee. Rental agreements can be for many different types of properties. There are different laws about rental agreements that govern different types of properties. Articles 1015 to 1022 of the Civil Code discuss rental agreements.

Many of the rules about rental agreements are the same as the rules for all types of leases. First, a rental agreement must be for a specific amount of time. Second, a rental agreement should be in writing. Third, the tenant should use the building or rental property for its intended purpose. Fourth, except for rural rental agreements that we will discuss later, rent should be paid monthly and in money. Finally, the end of the agreement is the end of the tenant's residence or use of the property.

To illustrate a rental agreement, suppose Lucio rents an apartment from Marianna. Lucio is the tenant and Marianna is the landlord. The rental agreement is for one year, and the agreement is in writing. While he lives there, Lucio should live in the apartment, because that is the apartment's intended purpose. He should not, for example, have a store in the apartment, because business is not the intended purposes of the apartment. Lucio must give money to Marianna every month as payment to rent the apartment. After one year, the rental agreement ends, and Lucio cannot use the property anymore.

There are many reasons that a landlord can end the rental agreement. For example, when a tenant does not pay rent when he should, the landlord can end the rental agreement. The landlord can also end the agreement if the tenant uses the property not for its intended use or for illegal purposes. The tenant is also not allowed to substantially change the structure of the building or use it in a way that significantly harms it.

For example, suppose Lucio rents an apartment from Marianna. Marianna can end Lucio's rental agreement if he stops paying rent. She can also end the rental agreement if Lucio uses the

apartment for a clothing store, because that is not the intended use of the building. The apartment is a home, not a business location. Similarly, Marianna can end the rental agreement if Lucio destroys walls in the apartment. This because destroying walls substantially changes the structure of the building.

While a rental agreement has an end date, it can be **renewed**. This means that the tenant and landlord can agree that the tenant will continue to live in the apartment. A rental agreement is usually renewed for one year. A rental agreement can also be renewed if the tenant continues to enjoy the property for one year and the landlord does not oppose. Once renewed, the landlord cannot end the agreement for another year.

4.1.2. Residential Lease Agreements

Residential lease agreements are for property where people live. Articles 1024 to 1028 of the Civil Code provide additional rules for these types of agreements. For example, if a house is furnished, the lease must specify how much the tenant pays for the furniture and how much the tenant pays for the building. There are also limitations on who and how many people can live in the building with the tenant.

There are also rules about what to do when there are unexpected problems. If the tenants are married and apply for divorce, the spouses can decide who will keep the residential lease agreement. If the spouses cannot agree, the court will decide depending on the circumstances of the couple and the divorce. If a tenant dies, the residential lease agreement does not end. Instead, it can be given to another family member.

It is also possible to end a residential lease agreement before the agreed time. The tenant can end the residential lease agreement by telling the landlord 90 days before leaving. In exchange, the landlord receives one month's rent, unless the rental agreement specifies a different amount. In any case, the tenant cannot be required to pay more than two months' rent to end the lease early.

4.1.3. Rural Lease Agreements

Rural lease agreements are lease agreements for land that is used for agricultural, cattle breeding, or forestry purposes. Articles 1034 to 1040 provides rules about rural lease agreements.

While rural lease agreements are similar to other types of lease agreements, there are some special rules.

First, rent is not required to be a specific amount of money. While it can be, it can also be a percentage of the profits from the use of the land. Second, rent related to agriculture or cattle breeding is not required to be paid in money. It can also be paid with other products. If the rent is paid in products other than money, the products must relate to the farm. Third, rent is not required to be paid every month. Instead, if rent is paid through farm products, it can be paid according to the harvest season. The landlord and tenant can also agree in the rural lease agreement to pay money at a different time than every month. Finally, the rural lease agreement cannot require the tenant to pay any costs that do not directly benefit the property or any extraordinary costs not included in the rent.

For example, suppose a rice farmer has a rural lease agreement for land to grow rice. The farmer is the tenant. He can pay the property owner in rice or in money. The farmer is not required to pay the property owner every month, but instead can pay a larger amount around rice harvesting season. The farmer and property owner could also agree that rent will be paid in cash after the harvest. They could not agree, however, that the farmer will pay to maintain the property owner's car. This is because the car does not directly benefit the property.

Sometimes the rental price can be reduced, even after the rural lease agreement is completed. For example, if a natural disaster or severe weather cause the property to produce less than half of its normal production, the tenant may be entitled to a reduction in rent. The reduction in rent cannot be more than half the rental amount. The lease agreement can also be ended or changed if production levels remain low for a long period of time following the event.

There are also rules about how a tenant can change the property while living on it. First, a tenant may make useful or luxury improvements to the land. These improvements can be made without the property owner's consent if they do not affect the natural use of the land. The tenant can take the improvements at the end of the rural lease agreement, but only if taking them does not affect the quality of the property. If they were useful improvements, the tenant may have a right to compensation for them. For example, suppose a farmer installed an irrigation system on the land during the rural lease agreement. The irrigation system is a useful improvement to the land. The

farmer can take the irrigation system with him when he leaves the land at the end of the lease agreement.

Finally, the tenant has obligations during the end of the rural lease agreement. The tenant must maintain the property to ensure the future productivity of the land, and allow the landlord to take needed measures. For example, suppose Felix has a rural lease agreement to use land for farming. Three months before the lease agreement ends, the landlord tells Felix that he will not renew the lease agreement when it ends. Felix can continue to use the property for farming for the next three months. During that time, he must continue to maintain the property, such as continuing to irrigate the fields.

4.1.4. Commercial Lease Agreements

Commercial lease agreements are lease agreements for property used for a commercial purpose. Commercial lease agreements are special because they are between a company and a landlord, rather than between two individual people. Even if the company is represented by a person, the tenant is really the company. This is why if the business owner dies, the lease agreement does not end. Because the company still exists, the business owner's heirs receive the lease agreement for the company. The heirs can decide not to continue the commercial lease agreement by telling the property owner in writing or by returning the property within sixty days. A commercial lease agreement can also be transferred when the company is sold. The landlord does not need to authorize the sale of the company. Articles 1030 and 1031 of the Civil Code discuss commercial lease agreements.

4.1.5. Sublease Agreements

Sometimes a tenant does not want to use a property for a short amount of time. For example, suppose Manuela leases an apartment from Maria in Dili where she attends the university. She signed a one-year lease, which means she agreed to pay rent each month in exchange for living in the apartment for twelve months. She finds a great job for three months during the summer in Australia. She has already agreed, however, to lease her apartment in Dili during the summer. She does not want to pay for an apartment in Dili and an apartment in Australia at the same time. Fortunately, there is a solution for Manuela.

Manuela can **sublease** her apartment. A sublease is a lease agreement between the original lessee and a new lessee. The new lessee is called the sub-lessee. The original lessee becomes a temporary lessor and is called the sub-lessor. For example, suppose Manuela's friend Odete wants to live in Manuela's apartment during the summer. Manuela and Odete can create a sublease that allows Odete to live in the apartment. Odete is a sub-lessee, and Manuela is a sub-lessor. Odete pays to live in the apartment in Dili while Manuela lives in Australia. Articles 991 and 996 of the Civil Code discuss subleases.

There are important rules about subleases. First, the property owner must agree to or acknowledge the sublease. If the lessee sublets without permission from the lessor, the lessor may end the lease agreement, under Law 12/2005: Leasing Between Individuals. Second, the lessee cannot ask the sub-lessee to pay more than 120% of the rent charged by the property owner without the property owner's approval.

To illustrate, suppose Manuela asks her landlord if she can sublease the apartment. The landlord approves, and Manuela subleases her apartment to her friend Odete for the summer. If the landlord did not approve or did not know about the sublease, she could end Manuela's lease when she discovered the sublease. Manuela pays \$200 per month to rent the apartment. She cannot ask Odete to pay more than \$240 per month without asking the landlord's permission.

The sublease will end when the lease agreement ends. For example, if a lease agreement is for two years, the lease and sublease will end after two years. If the lease ends before it was supposed to end, however, the sublease will continue. For example, if a lease agreement is for two years but the landlord ends the lease after one year, the sublease will continue. In that case, the sub-lessee becomes the lessee.

To illustrate, suppose Odete has lived in the apartment for the summer while Manuela is in Australia. Manuela decides to stay six more months in Australia. Manuela's lease agreement ends in two months, so Odete's sublease will end in two months. Suppose Manuela's landlord did not know about the sublease, and she ends the lease agreement when she discovers the sublease. This happens one month before the lease agreement was agreed to end. For the last month of the lease agreement, Odete will be the lessee.

4.1.6. Leasing of Private Property of the Government

Similar to private people, the government can also lease its private property. As we learned in Chapter 2, the government owns two types of property: public domain and private real estate of the government. The government can allow other people to use the private real estate of the government through a lease. Law 19/2004: The Juridical Regime of Property: Official Allocation and Leasing of Private Property of the State limits government leases. Government property should be leased following principles and goals that benefit the country, such as helping with housing, economic development, and generating revenue. For example, if the government leases land to a company to build a gravel factory, the factory will create jobs that help the economy.

The obligations of the government and the lessee are similar to a lease between private individuals. For example, like individual private property, private property of the government can be subleased and the contract can be ended early. Unlike the rules about leases between private individuals, however, Law 19/2004 outlines a more detailed procedure to create a lease, acceptable uses and priorities for property, and the determination of rental value. There are also additional requirements and restrictions for subleases. For example, the Ministry of Justice must approve the sublease in writing. There are maximum lengths of time that the government's private property can be leased, depending on the type of property.

The following application exercises ask you to think critically about leasing.

Application Exercises

Question 1: Suppose Luis rents a small warehouse in Dili. He wants to start a business manufacturing tables. Luis starts making tables but decides he wants to study law at UNTL. He converts the small warehouse into an apartment where he can live and study while studying at UNTL. If Luis pays his rent, can the landlord end his lease agreement?

Question 2: Now suppose Luis moves to an apartment in Dili with plans to study at UNTL. He decides he really wants to build tables, and he converts his apartment into a warehouse. Luis is still paying his rent. Can the landlord end the lease agreement?

Question 3: Neither Luis nor his landlord ended the lease agreement early. The agreement was for one year. After one year, Luis continues to pay rent and live on the property. Can the property owner end the lease agreement?

Answers

Answer 1: Yes, the landlord can end the lease agreement, because Luis is not using the warehouse for its intended purpose. This is one reason to end a lease agreement under Article 1015 of the Civil Code.

Answer 2: Yes, the landlord can end the lease agreement, because Luis is still not using the warehouse for its intended purpose. Building furniture in an apartment is also probably causing significant harm to the apartment, which is also a reason to end a lease agreement.

Answer 3: No, the landlord usually will be able to end the lease agreement only after another year. But if Luis is using the property not for its intended purposes as in the two previous questions, the landlord could end the lease agreement.

4.2. Loan for use

The second type of revocable transfer that we will study is a **loan for use**. A loan for use is when a property owner allows another person to use his or her property temporarily, under Article 1049 of the Civil Code. A loan for use is similar to a gift, except it is not permanent. A loan for use is a type of contract without payment in return. The property owner allows the user to use the property for free. The person who owns the property and allows someone else to use it is called the **lender**. The lender is similar to a donor in the context of gifts. The person who receives the loan for use is called the **borrower**.

To illustrate, suppose Manuel owns a house. He allows his sister Odete to live in the house through a loan for use agreement. Odete can live in the house, and she does not have to pay Manuel to live there. In this example, Manuel is the lender. Odete is the borrower. Manuel still owns the house, but he temporarily gives Odete the right to use it.

Articles 1053 and 1054 create rules for lenders. The lender should not try to prevent or restrict the borrower from using the property as he wants. The lender is not, however, responsible for ensuring the borrower is able to use the property. If the lender does restrict the borrower's use, the borrower can defend his possession of the property, and the lender may be fined. The lender is not responsible for any problems with the property, unless the lender has willfully done something wrong.

Under a loan for use contract, the borrower has several responsibilities under Articles 1055 and 1056 of the Civil Code. The borrower must maintain the property, not misuse the property, and

tell the lender about any problems. If the property deteriorates and the borrower could have avoided it, the borrower is responsible. If the property deteriorates because it was misused or used by someone who did not have permission to use it, the borrower is responsible unless he can show the deterioration would have happened anyway. Additionally, the lender can examine the property when he wants and make improvements to the property. The borrower cannot allow other people to use the property without the lender's permission. This is different from full possessory rights, which we learned allow someone to invite other people to the property. Finally, the borrower must return the property in the same condition as when he received it, except for wear from normal use, under Article 1009 of the Civil Code. Unless documented otherwise, it is assumed the property was returned in a good state.

To illustrate, suppose Carla owns a house. She allows her brother Juliao to live in the house through a loan for use agreement. When Juliao was living in the house, he saw the roof leaked, but he did not fix the roof or tell Carla about the leaks. When the leaks damage the house, Juliao must pay for that damage, because Juliao could have avoided the damage. If Juliao could not have avoided the damage, he would not be responsible. For example, if a tsunami destroyed the entire roof, he would not be responsible because that damage is unforeseeable.

It is also possible for more than one person to borrow the same property. The borrowers are like co-owners, discussed in Chapter 2. If there are multiple borrowers, they are all responsible for any obligations under the loan for use contract, under Article 1059 of the Civil Code. This means that if one borrower causes damage to the property, the lender can require any of the borrowers to pay for the damage.

A loan for use can be for a specific period of time or for a specific use. When the time is over or the use completed, the borrower must return the property to the lender, even if the lender does not ask for it to be returned, under Article 1057 of the Civil Code. If no time or use is specified, the borrower must return the property whenever the lender asks him to return the property. The property owner can also end the contract early if he has a good reason, under Article 1060 of the Civil Code. If the borrower dies before the end of the contract, the contract will end and the property will return to the property owner.

4.3. Rent in Perpetuity

Rent in perpetuity is a third type of revocable transfer. Rent in perpetuity is a rental with no end date and is valid until the contract is ended, under Articles 1151 to 1156 of the Civil Code. Like leases and loans for use, rent in perpetuity is also a kind of contract that determines the relationship between the property owner and someone else who uses the property. Rent in perpetuity is like a lease with no limit on how long it will exist.

Rent in perpetuity must be created through a public deed. Once the rent in perpetuity contract is created, the renter must pay the rental amount. The property owner can end the contract if the renter has not paid the rent for two years. If the renter pays his overdue rent and interest owed on late payments, however, he can renew the contract. The renter always has the right to do this, but there are limits on when he can renew a contract after not paying rent.

4.4. Lifelong Rent

The last type of revocable transfer that we will study is a **lifelong rental contract**. A lifelong rental contract is a rental contract that lasts for the duration of the life of the property owner or another person. Articles 1158 to 1162 of the Civil Code discuss lifelong rental contracts. The rental contract must be in writing and with a public deed if the value of the rental is more than \$2500. A rental contract can last for one or two lifetimes. Similar to rent in perpetuity, a lifelong rental contract can be ended by the owner if the renter has not paid the rent for two years.

The following exercise asks you to distinguish between irrevocable and revocable transfers.

Application Exercise

Question: Assume Patricio sells his house in Dili and moves to Atauro. After living in Atauro for a few months, Patricio wants to move back to Dili. Can he take his house back after he sold it?

Answer

Answer: Patricio sold his ownership rights. This is an irrevocable transfer and cannot be undone. If he had rented his house in Dili to someone else, this would have been a revocable transfer and could be undone. A revocable transfer only temporarily transfers possessory rights and not ownership rights.

5. CONCLUSION

This chapter explored the different ways ownership and possession of immovable property can be transferred. We looked at the differences between irrevocable and revocable transfers of ownership and possession. We learned that irrevocable transfers permanently change who owns property. We also learned that revocable transfers only temporarily change who can use or possess property, but they do not change who owns property. Then we looked at the different types of irrevocable transfers and the different types of revocable transfers.

When we looked at irrevocable transfers of property, we first discussed purchase and sale contracts. A person can sell his or her property, usually with a mortgage, to any Timorese citizen. This transfers property ownership to the buyer, and the buyer now has all of the property rights that are included in property ownership. Once a buyer pays the seller, the seller loses all property rights to the sold property.

Another way to irrevocably transfer property rights is through a gift. As we saw, gift contracts are similar to purchase and sale contracts. The main difference with a gift is that the seller does not receive any payment for the property. But, unlike a purchase and sale contract, sometimes ownership of the property can return to the donor. This can happen when the gift recipient dies, or if the gift recipient is ungrateful.

We next learned about irrevocable changes in ownership when a property owner dies. We first explored inheritance, which is a type of gift that happens when the donor dies. We then learned about succession, which transfers property rights to a deceased's heirs. Unlike inheritance, succession is considered to be the continuation of ownership. The Civil Code has certain protections to prevent someone from using threats or violence to be named a successor.

The last form of irrevocable or permanent transfer of property rights is acquisitive prescription. A person can acquire property ownership through acquisitive prescription by openly using the land for a specified period of time. But the person using this method risks being fined for being an illegal occupant, and the person has to wait many years before acquiring property rights.

After irrevocable transfers of property rights, we explored the different ways that property rights can be transferred temporarily. We discussed leases, which give possession and use rights to a

lessee in return for paying the lessor a determined amount of money. Rentals are similar to leases, but for a shorter period of time. There are a number of different types of lease agreements. We looked at residential lease agreements, rural lease agreements, commercial lease agreements, leases of the government's private property, and subleases. The agreements are very similar, but the Civil Code creates some differences that consider the different property characteristics.

Next, we talked about loans for use. Similar to gifts, loans for use are contracts that allow a person to temporarily use property that someone else owns for free. These contracts still create rights and obligations, even though there is no payment.

Finally, we examined rent in perpetuity and lifelong rent. Rent in perpetuity is a rental contract that lasts indefinitely until either the renter or landlord ends it. A lifelong rental agreement lasts for the duration of one or two lifetimes. Both types of agreements create long-term rental agreements.

This chapter explored disposition, one of the primary rights of property ownership that we introduced in Chapter 2. Hopefully this chapter has helped you understand the right of disposition that all property owners have. Together, we looked at the different ways that people, corporations, and the government can transfer rights of property ownership and possession. In the next chapter, we will look at expropriation

CHAPTER 5: EXPROPRIATION

CHAPTER OBJECTIVES

- To understand the basic principles of expropriation
- To learn how the law of expropriation operates in Timor-Leste

1. INTRODUCTION

In previous chapters, you learned about ownership and possession of property. The property owner has certain rights, such as the right to use the property and the right to sell it to someone else. In some situations, however, the government may have the power to legally take privately owned property. The power to legally take privately owned property is called **expropriation**. In this chapter, you will learn about expropriation, which is any legally permissible deprivation of private property rights.

More specifically, expropriation is the process by which the government may expropriate, or take, private property from individual owners for public use. Usually, the property taken is immovable property. As noted earlier, immovable property is land and anything permanently attached to it, such as houses or bushes. The government does not have unlimited power to take private property, however. In Timor-Leste, the government may only take private property for **public purposes**. Public purpose is undefined in the law, but we can think of it as an action with a purpose to benefit the whole community. Furthermore, the government must provide **fair compensation**, or the value of the property, to the property's original owner. As this chapter will show, the government's power to take private property may only be used in exceptional circumstances.

Why might the government want to expropriate property? In one example, the government may want to build a new road connecting two villages. This road may allow people to travel more easily between the villages. Trucks may be able to more easily deliver goods to the villages. Thus, the road could help people in the two villages by developing commerce and making travel much safer. But the only land available to build the road may be privately owned. If the property

owner will not voluntarily sell the land to the government, the laws of expropriation attempt to regulate how the government can expropriate the land in this example.

From where does the government's power of expropriation come? The power comes from Article 141 of the Constitution of the Democratic Republic of Timor-Leste. Article 141 gives the government the power to regulate ownership, use, and development of land that is used for economic purposes, such as the production or distribution of goods or services. Although the Constitution recognizes the government's power to expropriate property, it also gives rights to private property owners. Article 54 of the Constitution states that property may be expropriated, but only after fair compensation is given to the original owner. This power represents the idea that the government has power over all land within the country. This power includes the ability to expropriate land for public purposes.

In 2013, the government passed the Law of Expropriation. The law more specifically defines the ways the government may expropriate property based on the Constitution of Timor-Leste. This chapter will review the Law of Expropriation, and discuss in further detail (1) the government's power to expropriate property, (2) the meaning of fair compensation, (3) and the meaning of public purpose.

2. THE POWER TO EXPROPRIATE PROPERTY

As introduced above, the Law of Expropriation defines expropriation as any legally permissible deprivation of private property rights. The taking of private property is a powerful right.

Remember earlier when we considered the government taking private land from individual owners to build a new road connecting two villages. But, the owners of the land may be families who lived on the land for many years. Though the villages may benefit from the new road, the families could have nowhere to live. In this section you will learn about the origins and rationales for expropriation, how the right for the government to expropriate land is a limited right, and how expropriation happens in Timor-Leste.

2.1. Origins and Rationales for Expropriation

The power of expropriation has existed for a long time. In fact, governments have been expropriating property since ancient Rome, where property could be taken for public projects, such as new roadways, water systems, and government buildings. One theory for the power of expropriation was that the government owned all property before its own citizens. Thus, the citizens of Rome possessed the land based on grants from the government. The government could take land from the citizens if it chose.

In Timor-Leste, the most recent expropriation law existed during the Indonesian occupation. The Indonesian Law of Expropriation was valid since 2002, but it has not been used since Timor-Leste gained independence. The most recent Law of Expropriation was passed in 2013 after many revisions.

There are many reasons why countries expropriate private property from individuals. A major reason is for **economic efficiency**. Economic efficiency is the concept of using resources to maximize the production of goods and services. Land is an important resource, and unused or underused land can stop economic growth. In our example of the road between two villages, the privately owned land may be uninhabited without any economic activity. Using that land for a road to connect two villages may increase trade. Thus, in cases like these, the government may decide to take unused land from the owner to give it a more productive use to benefit the whole country.

The argument for economic efficiency is more difficult, however, when the land is being used. Suppose the land is a large farm that provides crops for the region. Is trade between the villages more important, and more economically efficient, than a farm that provides crops for the region? How should the government determine the value of the land for the farmer? As you read through this chapter, you will learn more about the payment of just compensation to individual property owners.

Another major reason for expropriation is fairness. A community may have unmet needs, such as insufficient medical care or housing. Suppose there is not enough housing in a community, and the government plans to build affordable apartments to meet the community's needs. If the only available land is unused, privately owned land, the government may argue that taking the land and using it for affordable housing is fairer for the community than to have the land stay unused and privately owned. But, again, suppose the land is a place of spiritual worship. Is it fairer to use the land for the community's housing needs rather than spiritual needs? How do we balance these different needs? As you will learn below, buildings with high cultural or spiritual value have special protection from expropriation.

The last major reason for expropriation is to better serve the public interest. You will learn more about public interest later in the chapter. But, generally, unused land that is expropriated and used may better serve the public. In fact, the law in Timor-Leste states that expropriated land must serve a public purpose. Suppose the government expropriates unused, privately owned land so that a private company can build a clothing factory on the land. There may be an economic efficiency reason to expropriate the land—the land is unused and perhaps the economy could improve with the new factory. But is there a public purpose? Typically, a privately owned business would have a private purpose, and not a public purpose. You will learn more about these situations later in the chapter.

2.2. Limits of Expropriation

Article 5 of the Law of Expropriation provides important principles that limit the government's expropriation power. The law recognizes that expropriation should only be used when other property cannot be used for the government's intended purpose. Furthermore, the law recognizes that expropriation should only be used if the project cannot be changed to achieve its intended

purpose without expropriating property. Let's consider how these principles limit the use of expropriation by analyzing them with our example of a planned road between two villages.

As the government plans the road's route connecting the two villages, the government planners find an alternative route. In this route, the road could easily be built on land already owned by the government. The government now has two options: build the road on government land, or expropriate private property to build the road on that land. May the government still expropriate the privately owned land? This could depend on a number of factors. In our simplified example, the government might be able to easily change the route of the road, and to use its own land rather than private land from individual owners. Thus, the government would probably be required to use its own land before expropriating private land.

There are additional limits on the use of expropriation. Expropriation must be limited to only what is necessary to fulfill its purpose, under Article 6 of the Law of Expropriation. More simply, the government can only expropriate property for the stated purpose of the expropriation. The government may not expropriate more property than is necessary to carry out the purpose of the expropriation. For example, suppose the government wants to expropriate land to build a new airport. During the expropriation, the government cannot take additional land to use for another purpose. Of course, the government could expropriate that additional land by using the proper process, which you will learn about later in the chapter. This limit ensures that if the government expropriates land, it will not take more land than is necessary.

Other limits to expropriation are more specific. Article 5 of the Law of Expropriation provides special protection to buildings that have high cultural and spiritual value. These buildings are highly valued when considering the proportionality of expropriation. In practice, this means that it is more difficult to expropriate property that has a building of high cultural or spiritual value.

In our example of an airport, the government was expropriating private land. Only the government has the power to expropriate private property. A party other than the government, such as a business, cannot expropriate property. A **beneficiary** of expropriation, the entity receiving the expropriated property, must be an entity under direct administration of the government. This limit is contained in Articles 4 and 9 of the Law on Expropriation. Usually, the beneficiary is easily identifiable as an entity of the government. The Ministry of Justice, for

example, could be a beneficiary. In some cases, however, it can be more difficult. A national energy company, for example, operates like a business, but could be under the direct control of the government. In such a case, the energy company can be a beneficiary of expropriation.

Those groups owning or having other formal rights to the property originally are **stakeholders**. A stakeholder is a person or group that has an interest in the property being expropriated. A stakeholder can be the owner of the property or one who has other rights to the property, such as leasing, grazing, planting, and rights of sharing crops, under Article 8 of the Law of Expropriation. Lastly, a stakeholder can be someone who occupies a family home even if he or she does not own the home.

The following exercises ask you to identify who is and who is not a stakeholder.

Application Exercises

Question: Are the following people stakeholders in the context of the Law of Expropriation?

1. A neighbor who has an easement to walk across property that is being expropriated.
2. A friend of a tenant who stays in the tenant's house for only a few weeks.
3. Farmers in a community who have the right to share a well for water.

Answers

1. Yes. The neighbor has an easement, which is formal right to use the property.
2. No. A stakeholder must own the property or have another formal right to the property, such as a lease or an easement. A stakeholder may also be a resident of a family home while ownership of the home was given to someone else. In this case, the friend of the tenant simply stayed in a house for a few weeks without ownership or another formal right to the property.
3. Yes. The farmers have a recognized legal right, or a formal right to the property.

2.3. Full and Partial Expropriations

The Law of Expropriation gives some flexibility to the beneficiary when expropriating property. Specifically, the law allows for partial expropriations. A beneficiary, for example, does not have to expropriate the full amount of property from a private owner. If the government needs to expropriate land to build a road, and it only needs part of a large privately owned field, it may expropriate only the portion of land it needs from the larger field.

The option of a partial expropriation also protects the private owner of the property. As mentioned above, a principle of expropriation is to ensure that the beneficiary only expropriates the amount of land that is necessary for the intended purpose. A partial expropriation, at the very least, leaves the stakeholder with some remaining property. And as mentioned earlier and explored further below, stakeholders are to be fairly compensated for the portion expropriated.

On the other hand, stakeholders may request a total expropriation of their property. A partial expropriation of the property may damage the full value of the property. Articles 71 and 72 of the Law of Expropriation describe the process. Imagine a situation where the government wants to expropriate two floors of an old apartment building to create a hospital. The two floors do not have any tenants, but the owner of the building is worried that a partial expropriation of those two floors will reduce the value of the rest of the building. The owner thinks that no one would want to live in the same building as a noisy hospital. Articles 71 and 72 state that if the remaining property has no economic value to the owner, the owner may request that the beneficiary expropriate the entire property. This is to protect the owner, to ensure that he is not economically harmed by the expropriation.

An expropriation may also take the form of an easement. We learned in Chapter 3 that an easement is a right to enter or use property that another person owns. Suppose a large privately owned field was blocking access to a public beach. Rather than expropriate the entire property, the government could create an easement on part of the property. The easement could allow the public to walk across a small part of the field to access the beach. In such a case, Article 12 of the Law of Expropriation states the terms of using an easement for the purpose of expropriation. Generally, an easement works the same way as any other method of expropriation. There must be a public purpose for the easement. Furthermore, the stakeholders affected by the easement are entitled to fair compensation for the value of the easement.

The following exercises ask you to think critically about what types of actions are expropriations.

Application Exercises

Question: Are the following scenarios examples of expropriation in the context of the Law of Expropriation?

1. Maria operates a small shop along a busy road. She has leased the land from the government for many years. This year, Maria's lease ends, and the government has decided not to renew her lease. Instead, the government will use the land to widen the road. Maria must stop operating her shop and leave the land at the end of her lease.
2. Manuel lives in an apartment owned by Joana. He has a one-year lease to live in the apartment. Four months into his lease, Manuel learns that he must leave his apartment, because a government agency needs the land to build a new military base.

Answers

1. No, this is not an expropriation. The government owns the land, and has decided not to renew the lease with Maria when the lease ends. Maria, however, is a stakeholder of the land, because she is a tenant. Suppose Maria owned the land. If the government decided to take the land to widen the road, then this would be an example of expropriation.
2. Yes, this is an expropriation. Although Manuel does not own the apartment, in most cases this basic example would be an expropriation. The military is the beneficiary, and Joana and Manuel are the stakeholders. Joana is the owner of the apartment, and she must give the property to the military. Manuel, unfortunately, will have to leave the apartment. However, both Manuel and Joana are entitled to receive fair compensation, which you will learn about in later sections.

2.4. The Expropriation Process

The taking of privately owned land can have significant consequences for the private property owner. A landowner may depend on the land for farming, for example. Without the land, the landowner may not have any income. Thus, many countries have protections for private landowners throughout the expropriation process. These protections are to ensure that the expropriation process is fair and orderly for the people losing their property. As we will see throughout this chapter, Timor-Leste has many stages in the process of expropriation. The first stages of expropriation are examined below.

The first stage of expropriation begins with the beneficiary planning the project, under Articles 15 to 17 of the Law of Expropriation. The law states that planning an expropriation project must include identification of the property, a study of the social impact of the expropriation, a resettlement plan, and a report of project alternatives. The **social impact study** is an attempt to measure the positive and negative effects of the expropriation. The **resettlement plan** is based partly on the social impact study. The resettlement plan considers the results of the social impact study and consultations with the stakeholders of the expropriated property. It then states alternatives to relocate the stakeholders, the costs of these alternatives, and ways to restore the income and livelihoods lost by stakeholders.

The next stage of the process is **public consultation**, under Articles 18 to 20 of the Law of Expropriation. As you learned, the law states that land can only be expropriated for public purposes. Therefore, it is a good idea to determine what the public thinks about the intended project on the expropriated land. During this stage of the process, the beneficiary offers a draft of the project for public consultation. After, the beneficiary conducts a public hearing, where the beneficiary describes the project and the results of the planning phase of the project. All of the people affected by the project must be told about the public consultation and have the opportunity to rule on it. At least one of the public consultation sessions must be at the place of the affected property. Furthermore, **notice** of the consultation must be given. Notice is a formal announcement of an action, which is usually made publicly, such as in newspapers or other public postings. In this case, notice must be published by the beneficiary in the Gazette, in two national newspapers, and in media local to the expropriated property. The public consultation must be presented fairly. The consultation must be conducted so that the participants are aware of the advantages and disadvantages of the project. The participants must have adequate time to submit comments, questions, or alternative proposals for the project.

At the end of the public consultation period, the beneficiary must prepare a report, under Article 21 of the Law of Expropriation. The report must describe each of the public consultations, including the events and discussions of the consultations. It must also describe the ways chosen to publicize the public consultations. Furthermore, the report must review the comments, questions, and alternative proposals from the stakeholders, and describe any changes to the project as a result of public consultation. The report must identify the expropriated property and

the property rights of the affected stakeholders. Stakeholders can read the report and can compare the stated purpose of the expropriation against the impact to the stakeholders. This attempts to ensure accountability in the expropriation process. Once the report is finished, the report must be presented in another public consultation.

After the public consultation and reporting stage, the beneficiary will conduct a survey of the property, under Articles 22 and 23 of the Law of Expropriation. Here, all relevant information about the property to be expropriated is collected. The beneficiary must notify the stakeholders at least 15 days in advance of the time and place of the start of the survey.

Next, the beneficiary must prepare a final report, under Article 24 of the Law of Expropriation. The report must include a specific description of the property to be expropriated. This description must include the legal and property rights of stakeholders affected by the expropriation. Furthermore, the report must assess the value of each stakeholder's rights affected by the expropriation. These stakeholders will be given fair compensation based on the value of their property rights. You will learn more about fair compensation in the next section of this chapter. After completion of the report, the interested parties of the expropriated property must be notified.

The process of expropriation involves multiple stages. As mentioned above, these stages attempt to protect the stakeholders by ensuring a fair and orderly expropriation process. Multiple stages in the expropriation process may slow the expropriation. As a result, there is more opportunity for all of the parties involved to be informed about the expropriation. The stakeholders, for example, have greater opportunity to learn what the beneficiaries intend to do with the property. At the same time, the beneficiaries have the opportunity to ensure that their plan for expropriation is created properly and addresses any public concerns about the project.

Summary of the Expropriation Process: Steps 1-4

Stages in Expropriation	Process Activities	Articles
1. Planning the Project	<ul style="list-style-type: none"> • Identify the property • Social impact study • Resettlement plan • Report alternatives 	Articles 15-17
2. Public Consultation	<ul style="list-style-type: none"> • Offer draft of project • Notice of public hearing • Inform stakeholders of consultation • Conduct public hearing • Prepare report of public consultation 	Articles 20-21
3. Survey of the Property	<ul style="list-style-type: none"> • Notify stakeholders 15 days in advance • Collect relevant information about property 	Article 23
4. Final Report	<ul style="list-style-type: none"> • Describe property • List all stakeholders and rights • Give assessment of value of stakeholder rights • Notify stakeholders of completed report 	Article 24

3. FAIR COMPENSATION

As mentioned above, a critical component of expropriation is fair compensation. Article 2 of the Law of Expropriation states that the government may expropriate property if it pays fair compensation to the original property owner. This section will further define the meaning of fair compensation, the origins and rationales behind it, and how fair compensation operates during an expropriation.

3.1. Market Value

Fair compensation is given to the stakeholders of expropriation. Under Article 56 of the Law of Expropriation, fair compensation is based on the property's market value at the time of expropriation based on international best practices. Generally, market value of the property is the price at which the property would normally be sold. For example, if someone tries to sell his or her land in Dili, the market value of the land is the price at which the land will eventually be sold. Thus, when the government expropriates land, it has to pay compensation in the amount of which the land would have sold. For example, if the fair market value of a property is \$2,000, then the government must pay \$2,000 in fair compensation.

The law cites a particular best practice method of determining market value, the *Handbook of Valuation Standards of International Valuation Standards Council*. This method further defines the proper market value for fair compensation. The market value for fair compensation is the amount that a willing buyer and willing seller would agree on for the property. A willing buyer and willing seller in a regular market transaction would both have all of the information about the property, and would know the property well.

These market transactions are the types of transactions that happen every day. When you buy rice at the market, you are a willing buyer, purchasing the rice from a willing seller. You know the rice you are getting; you may have eaten that type of rice before. The seller knows also, and the seller probably has sold that type of rice before. You know how much you are willing to pay for the rice; it is probably the amount that many people pay for the rice. This is the market value of the rice. It is the amount that you and everyone else pay for the rice. If the government expropriated the rice from the market, it would have to pay the seller this same amount.

One of the main goals of expropriation is to leave stakeholders in an economically equal situation as if the land had not been expropriated. Fair compensation is the way the beneficiary ensures that the stakeholders are in an equal position. Specifically, Article 56 of the Law of Expropriation states that payment of compensation is to ensure that stakeholders are not in a worse situation than that in which they would be if the expropriation had not been performed. For example, if a farmer received \$1,500 in compensation for land with a market value of \$2,000, then the farmer would be \$500 poorer than if he had kept the land. He would be in a worse situation than if the expropriation had not happened. This would not be fair compensation.

The Law of Expropriation provides two methods of fair compensation payment under Article 63. First, cash can be used to pay fair compensation, and it must be paid in one payment, not multiple payments. Second, **in-kind payments** may also be made. An in-kind payment is a payment of something equivalent, which would be other property. This means that instead of paying cash, the beneficiary could find alternative property or housing for certain stakeholders.

3.2. Limitations in Determining Fair Compensation

It is important to recognize that fair compensation is based on the market value of the property, and not the personal value the stakeholders have for the property. The market value of a house might be significantly less than the total value of the house to the owner. Perhaps the owner's family has lived in the home for many generations. Or perhaps the owner of farmland values the property much more than the market value. Unfortunately, the stakeholders in these cases can only be compensated for the fair market value of their property.

Market value can also be difficult to determine. Immovable property is not a commodity like rice. Each piece of land is unique and different from another. Thus, it can be difficult to value land because there might be no other similar piece with which to compare. Additionally, in a market transaction, a willing buyer and willing seller may be able to find and agree on a price. But a beneficiary and stakeholder involved in an expropriation may have greater difficulty agreeing. As you will see later in this section, the Law of Expropriation provides a process for beneficiaries and stakeholders to agree to a fair market price.

The following exercises ask you to think critically about the rationales behind using market value or personal value to determine fair compensation.

Application Exercises

Question 1: Can you think of any reasons why stakeholders should receive compensation based on their personal value of the property?

Question 2: Can you think of any reasons why market value, instead of personal value, is more appropriate for compensation?

Answers

Answer 1: You might argue that one of the principles of the Law of Expropriation is to ensure that stakeholders are not in a worse position than they were before the expropriation. If a stakeholder values his family home much greater than the amount of compensation he is entitled to receive, then the stakeholder would be in a worse position after losing his home and receiving compensation based on the market value.

Answer 2: You might argue that compensating a stakeholder based on personal value rather than market value is not an efficient way to have a system of expropriation. The beneficiary may have difficulty estimating the compensation it is required to give based on the stakeholder's unique personal value of the property. Furthermore, there is incentive for stakeholders to claim, perhaps untruthfully, that their personal value of the property is much greater than the market value. Such a claim might unjustly reward the stakeholders with even greater compensation, or stop the expropriation entirely.

3.3. Origins and Rationales of Fair Compensation

The origins of paying fair compensation to the stakeholders of expropriated property are unclear. There is little evidence about the historical motivations to fairly compensate private property owners for expropriation. Today, however, fair compensation is a necessary component of expropriation in many countries.

There are many reasons why governments offer fair compensation to the original owner of expropriated land. One of the main reasons is to promote economic efficiency. People might be less willing to own land or to make improvements to the land if they know the government can take the land without offering compensation. For example, a factory owner might need to make

repairs. If the owner knows that the government can take his property without giving fair compensation, the owner may decide not to make any repairs because it is a risk. It is a risk because the repairs are a costly investment for which the owner may not be compensated. Thus, fair compensation protects people who want to own land or make improvements to the land. It gives people certainty that they will be compensated for their improvements if the government expropriates their land.

Another reason for fair compensation is that it protects people against the overuse of expropriation. Expropriation can be costly. Not only does the government have to pay fair compensation for the expropriated land, but the lengthy procedure to expropriate land requires government resources. The government may be less willing to expropriate land if the cost to expropriate it is significant.

The following exercise asks you to think critically about why the government is required to fairly compensate stakeholders when it expropriates private property.

Application Exercise

Question: Can you think of any other reasons to provide fair compensation?

Answer

Answer: The state provides fair compensation to the original landowners for reasons of fairness. Providing just compensation for expropriated land ensures the original landowner retains property equal in market value. This is especially true with less powerful groups or people, who may have no other way to recover the value of their property.

3.4. Fair Compensation Applied: An Example of Expropriation

Thus far, we know that the owner of expropriated property is entitled to the market value of his property as fair compensation. We also know that other stakeholders are also entitled to fair compensation, and cannot be worse off than before the expropriation. Let's look at a more complicated scenario to illustrate some other concepts of fair compensation in the Law of Expropriation.

Atina owns one square kilometer of land outside Dili. Additionally, Atina owns an apartment building on the land and a farm. The government wants to expropriate Atina's land, but it only wants to expropriate the apartment building and a small part of the farm. The government intends to use the apartment building and a small part of Atina's farm for a government building. Must the government pay Atina as fair compensation the market value for his entire property, or just the property the government is expropriating? If Atina's farm suffers a loss in income as a result of the expropriation, must the government compensate Atina for the loss? What would happen to the families living in the apartment building after the land is expropriated?

To begin, we know that the Law of Expropriation allows for partial expropriations of property. Similarly, the law addresses the amount of fair compensation to be provided for partial expropriations. Article 58 states that after the total market value of the property is calculated, fair compensation is to be given only for the parts of the property expropriated. Thus, in our example, Atina will be given fair compensation for the property the government is expropriating, and not for the entire property.

Next, we consider the loss of income to Atina's farm. Article 60 states that when stakeholders engage in commercial activity, such as farming, the government should compensate for the losses that occur as a result of the interruption of that commercial activity. This relates to one of the principles of just compensation—to leave the stakeholder no worse than if the land had not been expropriated. Thus, Atina is entitled to receive compensation for the loss of farm income.

Finally, we must consider what should happen to the tenants of the apartment building. The tenants are stakeholders of the property, as they probably have a lease for their apartments. Article 59 states that tenants of expropriated property must be compensated. The tenants required to vacate the property may choose a home or land with similar characteristics of the expropriated land as compensation. Any improvements that the tenants made to their apartments are to be compensated also. Thus, the tenants of the apartment building will receive similar housing as compensation.

3.5. Process of Determining Fair Market Value

As mentioned earlier, an assessment of fair market value must be given in the final report that describes the property to be expropriated. This assessment can change, however. Before the

beneficiary may expropriate the property, the beneficiary must attempt to acquire the property from the stakeholders privately. Articles 25 to 30 of the Law of Expropriation describe this part of the expropriation process. This step of the process occurs after the beneficiary prepares the final report.

The purpose of a private agreement between the beneficiary and stakeholders is to set the amount of compensation. The compensation amount can be in cash or other goods, such as property. The agreement also explains how the compensation will be paid, such as in installments. Such an agreement is legally binding and can be enforced in court.

During this stage, where the beneficiary attempts to acquire the property privately, the beneficiary must notify the stakeholders. Specifically, the beneficiary must state the valuation of the property, and give the location, date, and time of a proposed negotiation between the beneficiary and stakeholders. The location, date, and time of the proposed negotiation must cause the least possible disturbance to stakeholders. The valuation of the property must be based on the assessment of fair market value mentioned above. If stakeholders are unknown, the proposed negotiation must be advertised in two national newspapers and local media.

The negotiations between the beneficiary and stakeholders are public, and the events of each session are recorded. Interested parties may comment on the proposal and state counterproposals based on different valuations. There may be multiple negotiation sessions if the parties cannot agree initially.

If the government and private property owner agree on a price, a public notary will formalize the sale through a public deed. However, if there is no agreement, then the expropriation process will continue. If the parties cannot agree on a price within 45 days of the beginning of negotiations, the beneficiary may request a declaration of expropriation for public purpose. Such a declaration continues the expropriation process. We will look at public purpose in the next section.

The Law of Expropriation also accounts for situations where new stakeholders appear during the middle of an agreement. For example, suppose that during the process of a private agreement, where the beneficiary and stakeholders have reached an agreement, new stakeholders appear. Does the agreement change if a new owner appears, showing proof that the property being expropriated is jointly owned by two owners, rather than one owner? Article 29 of the Law of

Expropriation states that the agreement remains the same as if the new stakeholders had participated in the agreement, as long as there is no misconduct from the beneficiary.

Why might it be a good idea for the beneficiary and stakeholders to reach an agreement privately rather than continue through the expropriation process? For the stakeholders, there is a chance that the beneficiaries will agree to a higher price than they otherwise would if they continued the expropriation process. Expropriation can be expensive for the beneficiary. The cost of expropriation includes the payment of fair market value to the stakeholders, and the time that the expropriation process requires. In that time, the beneficiary’s plans to use the property may have stalled. Furthermore, the beneficiary needs public workers to represent the beneficiary in the expropriation process. All of this is an added cost to the beneficiary. Rather than follow a lengthy expropriation process and incur these costs, the beneficiary might offer more than the fair market value for the property in negotiations. This offer might ultimately save the beneficiary costs. Furthermore, the stakeholders will benefit from receiving a higher price than they otherwise would. Thus, a private agreement can help both the beneficiaries and stakeholders.

Summary of the Expropriation Process: Step 5

Steps in Expropriation	Process Activities	Articles
5. Private Acquisition Negotiations	<ul style="list-style-type: none"> • Notify stakeholders • Publicize negotiations • Negotiate between stakeholders and beneficiary • If agreement reached, make public deed 	Articles 26-28

4. PUBLIC PURPOSE

The last major component of expropriation is public purpose. Article 3 of the Law of Expropriation states that the property to be expropriated must be for a public purpose. The law does not define public purpose, but we can think of public purpose as an action from the government to benefit the whole community. In this section we will look at how public purpose operates in practice, its origins and rationale, and the expropriation processes involved.

4.1. Public Purpose in Practice

Article 3 of the Law of Expropriation gives an expansive list of examples of activities that may have a public purpose. These examples include public roads, hospitals, energy infrastructure, social housing, public schools, and many other examples. The list is not presumptive, however, meaning that the public purpose requirement is not automatically satisfied whenever the property is used for one of the mentioned purposes. Even if a beneficiary is expropriating property for one of the listed activities, the beneficiary must still justify that the expropriation has a public purpose. The list also does not include all possible activities with a public purpose. Instead, the law states that other activities may have a public purpose provided for by special laws.

The Law of Expropriation does not further define public purpose. How, then, will a beneficiary justify that a potential expropriation will satisfy public purpose? A beneficiary could justify an expropriation based on our definition of public purpose mentioned above. But the laws of expropriation in other countries may help to better define whether an expropriation is for a public purpose. The Constitution of Germany, for example, allows for expropriation if it is in the public interest. This has been interpreted to mean that an expropriation cannot be solely for the government's commercial interests or the interests of a private person. It is possible, however, for a private person to benefit from an expropriation, if the expropriation is for a public need. This definition of public interest closely aligns with the definition of public purpose above.

4.2. Origins and Rationales of Public Purpose

The meaning of what constitutes a public project for expropriation has changed over time. There are two main views about what activities have a public purpose. One view claims that a public project for expropriation must be used by the public. An example based on this view would be expropriating property for a public park, a project that citizens use. Another view interprets the

public requirement more broadly. This view claims that the public must only benefit from the expropriated property's use. Expropriating property for a coalmine, for example, is an example based on this view. The public does not use the mine, but the public will benefit from the coal that the mine produces.

The following application exercise asks you to think critically about Timor-Leste's approach to public purpose.

Application Exercise

Question: Which of the two views above does Timor-Leste's Law of Expropriation incorporate?

Answer

The Law of Expropriation incorporates mostly the broader view, that the expropriation must pursue a public purpose. The public, then, does not have to directly use the property for there to be a public purpose. Some of the activities considered in Article 3 include cases where the public would directly use the property, like social housing, public schools, and public roads. For other activities, however, the public would benefit from the use, like electricity distribution, exploration of oil and minerals, and waste treatment.

One rationale for the requirement of public purpose is the idea that the government exists to protect private property. This idea states that one of the reasons people give their government power is so the government can protect the people's private property. For example, the government protects people's private property through its use of police power. The police enforce the laws of the state, which include laws that protect people's private property, like laws against theft, vandalism, and many others. If the government were allowed to take private property without a public purpose, then the government could transfer one person's private property to another private citizen. Requiring the property to be used for the public's benefit ensures that the government is still protecting the public's interest. The government takes private property, but it then gives the property back to the public, in the form of something that has a public purpose.

4.3. Process of Determining Public Purpose

These next stages in the process of expropriation occur after the failure to reach a private agreement. These stages are important, because they identify the first time where the government may evict stakeholders, or force stakeholders to leave, from the expropriated property. As you read about these stages, consider the types of protections available to stakeholders.

If a private agreement cannot be reached between the beneficiary and stakeholders, then the expropriation process continues with a declaration of public purpose under Articles 30 to 33 of the Law of Expropriation. In this stage, the beneficiary files an application stating the public purpose of the expropriation, the property to be expropriated and its intended use, and the need for expropriation. The application must also include other elements, such as a study of the environmental impact. The application must be filed with the Ministry of Justice. The Minister has 15 days to act on the application. Then, the Minister sends the request and his or her opinion to the Cabinet. The Council of Ministers retains the responsibility to declare public purpose. Such a declaration is treated as a **resolution** by government, which is an official government decision about the status of the expropriated property.

Next, the beneficiary must publish the declaration of public purpose in the National Gazette. Publication requirements are included in Articles 35 and 36 of the Law of Expropriation. The publication must identify the property being expropriated and the names of any stakeholders of the property, such as owners or holders of **liens**, which are legal claims that someone or something has on the property of another person until a debt has been paid. During this process, the stakeholders have a duty to notify the beneficiary of any change of residence. This is to ensure that the beneficiary knows how to contact the stakeholders during the expropriation process. Failure to notify the beneficiary of a change of residence is not a reason that a court would order the beneficiary to repeat any parts of the expropriation process.

The declaration of public purpose is not permanent. The declaration expires within one year if expropriation of the property has not continued, under Article 39 of the Law of Expropriation. Specifically, if the beneficiary does not act or make progress in expropriating the property within one year, the declaration of public purpose will expire. It is possible, however, for the beneficiary to renew the declaration of public purpose within one year from the date it expires.

Once the beneficiary publishes the declaration of public purpose and notifies stakeholders, the beneficiary may pursue **administrative ownership** of the property under Articles 40 and 41 of the Law of Expropriation. Administrative ownership is the process that forces stakeholders and those living on the property to leave the property. In addition to publishing the declaration of public purpose and notifying stakeholders, the beneficiary must do several things before taking administrative ownership. The beneficiary must notify the stakeholders of the date and time of its administrative ownership. Furthermore, the beneficiary must have implemented a resettlement plan for the stakeholders, and have delivered the required fair compensation to stakeholders, whether in cash or replacement property. Those living on the property must be given notice to vacate no less than 90 days from the start of administrative ownership.

Remember that the broad principles in Article 5 of the Law of Expropriation still apply. The beneficiary must respect principles of legality, justice, equality, proportionality, fairness, and good faith during the expropriation process. This concept is especially important during the administrative ownership process, which marks the first moment when residents must leave the property. The law provides for extending the deadline for leaving the property when the relocation or loss of livelihoods of stakeholders is involved. Further protections are provided in Article 42 of the Law of Expropriation when eviction is necessary. Eviction cannot be done in a way that violates the dignity, human rights, or security of the evicted. Furthermore, force may not be used in eviction, except in exceptional circumstances warranted by law enforcement.

The following application exercise asks you to think about ways that the expropriation process protects stakeholders.

Application Exercise

Question: What are some stages in this part of the expropriation process that protect stakeholders?

Answer

Some protections are broad and affect the entire expropriation process. These include the protections found in Article 5 of the Law of Expropriation, requiring the beneficiary to respect principles of legality, justice, equality, proportionality, fairness, and good faith. Other protections might be less noticeable. Consider the one-year expiration of the declaration of public purpose. This requirement forces the beneficiary to have a plan to develop the property quickly. A beneficiary cannot, for example, take the property without developing it. This ensures that the government must have an actionable plan, and cannot take property and plan to develop it later in the future.

Summary of the Expropriation Process: Steps 6-8

Steps in Expropriation	Process Activities	Articles
6. Apply for Declaration of Public Purpose	<ul style="list-style-type: none"> • State the public purpose and need for expropriation • List the property • Include environmental impact study • File with Ministry of Justice 	Article 33
7. Publish Declaration of Public Utility	<ul style="list-style-type: none"> • Publish in National Gazette 	Article 36
8. Take Administrative Ownership	<ul style="list-style-type: none"> • Implement resettlement plan • Deliver fair compensation to stakeholders • Notify stakeholders and give notice to those living on property • Take administrative ownership 	Article 41

5. CHALLENGING AN EXPROPRIATION

5.1. Opportunities for Appeal

There are many opportunities during the expropriation process for stakeholders or the beneficiary to challenge an expropriation. First, stakeholders may challenge the amount of fair compensation given for the expropriation. Sometimes the stakeholders or beneficiary will be unhappy with the amount that is determined for fair compensation. Articles 44 to 53 of the Law of Expropriation explain the process to challenge a fair market value determination.

If the stakeholders or beneficiary of the property are not satisfied with the fair market value offered for the property, they may appeal the decision through **arbitration**. Arbitration is a process where a dispute is resolved outside the courts by an independent person. The independent person who resolves the dispute is called the **arbitrator**. If a party is not satisfied with the compensation determination, the Ministry of Justice will ask for the appointment of an arbitrator. The district court that has jurisdiction over the property to be expropriated will appoint the arbitrator. Then, the arbitrator will determine the amount of fair compensation. The arbitrator has power to order the repeat of steps in the expropriation process if necessary to determine the amount of fair compensation. When giving the final decision, the arbitrator must give reasons for the decision, such as how he or she calculated the compensation.

The stakeholders of the expropriated property or beneficiary may appeal the arbitrator's decision. Either must do so within 30 days of the notification of the arbitrator's decision. Regardless of who appeals the arbitrator's decision, the beneficiary pays the legal fees for the appeal. The judicial process in this case is like any other trial, with rules contained in the Code of Civil Procedure. At the end, the judge will determine the amount of compensation that the beneficiary must pay. Once the decision is communicated to the parties, either may appeal again.

Appealing the arbitration decision of the fair market value of compensation does not stop the process of expropriation. Article 50 of the Law of Expropriation states that judicial review of the arbitration award does not suspend the expropriation of the property. One reason why the expropriation process continues is to discourage appeals that may attempt only to slow the expropriation process. The process focuses only on determining the value of fair compensation.

Those owners only interested in preserving their land or slowing the expropriation process cannot pursue those goals through this appeals process.

Stakeholders may also challenge the expropriation for lack of public purpose or breach of the principles and processes of expropriation, under Article 55 of the Law of Expropriation. For example, a stakeholder could challenge an expropriation because it did not comply with the requirements of taking administrative ownership, or for failing to recognize a stakeholder. These challenges are brought directly to the district court of the location of the property to be expropriated. Depending on the challenge, it must be submitted within 90 days of the notification of expropriation, the notification for taking administrative ownership, or knowledge of the failure to recognize a stakeholder. The judicial review does not necessarily stop the expropriation process, unless an injunction is issued.

Why might the Law of Expropriation offer many opportunities for stakeholders to appeal the determination of fair market value, public purpose, or other decisions? First, making these decisions can be difficult. For example, consider fair market value. An expropriation is not a free market exchange, but rather the government taking property and offering its best estimate of fair market value. In case the beneficiary errs in its determination of fair market value, the law gives stakeholders multiple chances to correct these potential errors.

Another reason to offer many appeal opportunities to stakeholders is to limit potential abuse of the expropriation power. As mentioned before, the power of expropriation is a limited right. Giving the prior owners of expropriated property multiple chances to appeal their valuation of fair compensation ensures that the government will not take property without giving fair market compensation.

5.2. Right of Reversal of Expropriation

Another way to challenge an expropriation is through **reversal** under Articles 67 and 68 of the Law of Expropriation. A reversal will undo the expropriation and return the property to its original owner. A stakeholder may request reversal of property through judicial notice. Stakeholders may request reversal when the beneficiary does not use the expropriated property or uses the property for purposes not specified in the declaration of public purpose. In these cases, the property can revert, or return, back to the original stakeholders. If the stakeholders and

beneficiary cannot reach agreement on reversal within 60 days of the request, either party may appeal to the district court with jurisdiction.

There are restrictions on the use of the right of reversal, however. If the property has been expropriated for less than two years, or greater than ten years, then there is no right of reversal. In other words, there is no right of reversal if ten years have passed from the date the beneficiary took possession of the expropriated property. Additionally, if the property is not being used in accordance with its public purpose, but it is within two years after the date of taking administrative ownership, then there is no right of reversal. Furthermore, if the declaration of public purpose is renewed within one year of the date of its expiration, there is no right of reversal.

Some property is expropriated in phases. For example, a project to build two buildings may begin by building the first building, and then the second building, rather than both at the same time. As long as the beneficiary is performing work on a zone of the property according to the expropriation plan, then there is no right of reversal. If, however, the work has stopped for at least two years, then the right of reversion remains. In that case, stakeholders may request a reversion of the property.

In cases where reversal is agreed upon, an agreement between the beneficiary and stakeholders should state the reversals terms. Specifically, the stakeholders and beneficiary must agree to the amount to be paid to the beneficiary, under Article 70 of the Law of Expropriation. The value to be paid is compensated based on the current market value of the property, not simply a return of the amount of compensation previously paid to the stakeholders, under Article 67. Thus, if the beneficiary made improvements to the property, it is possible that the stakeholders would pay more in compensation than they received. The law repeats, however, that the principles of expropriation set out in Article 5 must be followed. This includes respecting the rights of stakeholders, upholding principles of legality, justice, equality, proportionality, fairness, and good faith.

The following application exercise asks you to think critically about the process of reversal.

Application Exercise

Question: Your client is the former owner of property that has been expropriated. He requested that the property revert back to him. The beneficiary started building on the property, but stopped building over four years ago. The property, however, is worth much more now than when it was expropriated, and your client cannot afford to pay the compensation based on the new market value. What arguments can you make for your client to receive the property and not pay the full market value?

Answer

You can argue based on Article 5 of the Law of Expropriation that your client should not have to pay the full value of compensation to receive the reverted property. Article 5 states that the beneficiary must respect the rights of stakeholders, noting in particular the principles of fairness and good faith. It is not fair or in good faith, you may argue, for the government to take property from your client, decide not to use the property, and then charge your client for its return more than the government paid.

6. CONCLUSION

In this chapter, we learned about expropriation, or the government's power to take private property for public purposes. The power to expropriate is a limited right, to be used only when no other options are feasible. The Law of Expropriation limits this right by providing basic protections for people with private property rights. For example, expropriation must leave stakeholders in a standard of living equal to or higher than they were before the expropriation. Furthermore, the beneficiary of expropriation must respect principles of legality, justice, equality, proportionality, fairness, and good faith. The process to begin an expropriation also provides protection to stakeholders. The beneficiaries must create detailed reports and provide an opportunity for public comment on the expropriation.

Beneficiaries are required to deliver fair compensation to stakeholders of expropriated property. A stakeholder is a person or group who has an interest in the property being expropriated, such as an ownership interest or a lease. The fair compensation given to stakeholders must be based on the fair market value of the property interest. The concept of fair compensation enforces a critical principle of expropriation: stakeholders must be left in a position equal to or higher than they were before the expropriation.

Beneficiaries and stakeholders have an opportunity to agree privately to the terms of the expropriation and the amount of fair compensation. The law mandates negotiations for a private acquisition to take place. There, the beneficiary and stakeholders may agree on the transfer of property and compensation. If both parties can agree, a public deed will be created to record the legal exchange. If an agreement cannot be reached, then the beneficiary may continue pursuing expropriation.

Stakeholders have an opportunity to appeal the decision on the amount of fair compensation. The first stage of the appeals process is for the beneficiary and stakeholder to do arbitration. An arbitrator will decide the amount of fair compensation to be awarded. Either party can appeal the arbitrator's decision. In that case, the appeal will enter the court system of Timor-Leste, where a judge will determine the amount of fair compensation.

The last major component of expropriation is the concept of public purpose. The beneficiary may only expropriate property if it is for a public purpose. The Law of Expropriation lists many

examples of uses of property that may satisfy a public purpose, such as public roads, hospitals, social housing, and public schools. Even if the purpose of the expropriation is included in the Law of Expropriation’s list, the beneficiary must still justify the public purpose of the expropriation.

The beneficiary must apply for a declaration of public purpose to the Ministry of Justice. The beneficiary then publishes the declaration, and begins the last stages of the expropriation process. The beneficiary must deliver fair compensation to the stakeholders and implement any resettlement plan. Then, it is allowed to take administrative ownership of the property.

In addition to challenging the amount of fair compensation, the stakeholders may appeal the expropriation by challenging the declaration of public purpose or claiming that the beneficiary breached a step in the expropriation process. These challenges must be brought to the district court that has jurisdiction over the property being expropriated. Furthermore, the stakeholders may challenge the expropriation based on a right of reversal. If the beneficiary has failed to use the property for its intended public purpose, under some circumstances the property may revert back to the original stakeholders.

Summary of the Expropriation Process: All Steps

Stages in Expropriation	Process Activities	Articles
1. Planning the Project	<ul style="list-style-type: none"> • Identify the property • Social impact study • Resettlement plan • Report alternatives 	Articles 15-17
2. Public Consultation	<ul style="list-style-type: none"> • Offer draft of project • Notice of public hearing • Inform stakeholders of consultation • Conduct public hearing • Prepare report of public consultation 	Articles 20-21
3. Survey of the Property	<ul style="list-style-type: none"> • Notify stakeholders 15 days in advance • Collect relevant information about property 	Article 23
4. Final Report	<ul style="list-style-type: none"> • Describe property • List all stakeholders and rights • Give assessment of value of stakeholder rights • Notify stakeholders of completed report 	Article 24

5. Private Acquisition Negotiations	<ul style="list-style-type: none"> • Notify stakeholders • Publicize negotiations • Negotiate between stakeholders and beneficiary • If agreement reached, draw up public deed 	Articles 26-28
6. Apply for Declaration of Public Purpose	<ul style="list-style-type: none"> • State the public purpose and need for expropriation • List the property • Include environmental impact study • File with Ministry of Justice 	Article 33
7. Publish Declaration of Public Utility	<ul style="list-style-type: none"> • Publish in National Gazette 	Article 36
8. Take Administrative Ownership	<ul style="list-style-type: none"> • Implement resettlement plan • Deliver fair compensation to stakeholders • Notify stakeholders and give notice to those living on property • Take administrative ownership 	Article 41

Together, we have studied the basic elements of property law: ownership, limitations on use, disposition, and expropriation. You now have the foundation to understand the many challenges and opportunities that surround property law. This will be useful whether you are helping your clients resolve property disputes, thinking about your own rights and responsibilities as a property owner, or working to develop new property laws. As property law continues to evolve, you now have the knowledge to help build a well-functioning property system in Timor-Leste.

GLOSSARY

Absolute: free from limitation or restriction.

Acceptance: when an heir agrees to the ownership of the property he inherited.

Acquisitive prescription: a method of gaining the right to access property by doing so openly and for a long time without being stopped.

Administrative ownership: a status of property in the expropriation process indicating that those residing on the property must vacate.

Annul: the act of making the contract null and void.

Arbitration: a process where a dispute is resolved outside the courts by an independent person.

Arbitrator: the independent person who resolves a dispute in an arbitration.

Ascendants: in succession law, the deceased's parents.

Assembly of owners: in horizontal property, all of the property's owners constitute the assembly of owners. The assembly is responsible for managing the building's common areas and creating rules that govern what the owners may do.

Asset: a useful or valuable thing.

Author: in succession law, the person who dies and gives his property as an inheritance to his heirs.

Beneficiary: an entity under direct administration of the government receiving expropriated property.

Borrower: a person who receives the loan for use.

Breach: the breaking of a contract.

Bundle of rights: things that owners can do with their property.

Claim: a legal right recognized and protected by the laws implemented by the state.

Cadastre: a database that has information about land ownership.

Clauses: pieces of a contract.

Common areas: the parts of a property that two or more co-owners share.

Community property: immovable property that the community owns. The national government and private individuals do not own community property. Rather, this is property that the community acknowledges is shared by multiple people in the community.

Community protection zone: a way to recognize land that communities use and share. A community protection zone is an area that the government protects to benefit communities.

Conditions: 1) in contract law, clauses that make a contract's validity, or part of a contract's validity, depend upon an uncertain event; 2) in succession law, something that someone has to do to inherit the property.

Consecutively: means one person can have the right of usufruct for a period of time and then another person will have it after.

Consideration: something of value, like money or services, that is promised in return for another form of consideration

Constitution: the formal creation of an independent republic

Contract: an agreement between two or more parties creating duties that are enforceable by law.

Collateral: 1) the property a borrower promises to give to a creditor if he or she is unable to repay a loan; 2) in succession law, the deceased's more distant relatives, such as aunts or cousins.

Commercial lease agreements: lease agreements for property used for a commercial purpose that are between a company and a landlord.

Common areas: parts of a property that two or more co-owners share.

Community property:

Compulsory succession: when property that is automatically given to someone after the owner dies.

Consideration: or performance, is the fulfillment of contract obligations.

Contract: an agreement between two or more parties creating duties that are enforceable by law.

Contracting Parties: the people who accept certain legally enforceable obligations in exchange for certain legally enforceable rights.

Co-ownership: one way for more than one person to own a single piece of property. In co-ownership, two or more people have ownership rights in the same piece of property.

Creditor: a person or company that makes loans; in contract law, the person who is owed a duty or responsibility of performance under a contract.

Customary law: practices and beliefs that a community accepts as legal rules, even without a statute or legal decree.

Damages: the money that someone who causes a loss must pay to the person who suffers that loss.

Deed: the formal document, signed and delivered, illustrating title. A deed can recognize ownership or possession. A deed is necessary to represent the legitimacy of property rights.

Debtor: in contract law, the person who owes a duty or responsibility of performance under a contract.

Declarations of willingness: the showing of a party's desire to undertake certain legal obligations under certain legal conditions.

Default rule: in contract law, the way that the law wants the contract to be done unless there is a good reason, or an agreement between the parties, to do it differently.

Demarcate: when the boundaries between a property owner's property and his neighbor's property are determined. Demarcation clarifies who owns what land.

Descendants: the children, grandchildren, and similar people who are born from someone.

Developer: someone who wants to do economic activities, like start a business or build a factory.

Direct interference: when someone's immovable property physically and unlawfully occupies the property of another person.

Dispositions: the contents of a will and how the author divides the estate.

Division: changes property ownership from co-ownership to individual ownership. Through division, each co-owner gains exclusive rights to his share of the property.

Dominant tenement: the property owner who gains the right to access a property upon the creation of an easement.

Donor: the person who gives a gift.

Draft: to write a contract.

Easements: the right to cross another person's land.

Eave: the edge of a roof that prevents rainwater from falling on a house's walls.

Economic efficiency: the concept of using resources to maximize the production of goods and services.

Effective: when a contract is open to be accepted and the parties to the contract are obligated to perform their responsibilities under the contract.

Enclose: to physically mark the boundaries of property.

Encroachment laws: laws that prohibit one property from interfering with another property.

Encumber: to burden.

Encumbrance: a right to immovable property that may decrease the value of the property.

Enforce: when the courts can force a person to fulfil a contract or promise to either do what they promised or pay money to make up for not doing what they promised.

Excavate: when owners dig mines or wells on their property.

Exclusive right: a right that only the property owner has.

Expectation damages: a remedy that provides for the amount of value that was damaged and lost by the breach compared to what was expected from the contract.

Expropriation: any legally permissible form of deprivation of private property rights.

Extra-judicial distribution: in succession law, private agreements about distribution of property in a will.

Fair compensation: the market value of expropriated property that is required to be paid to the stakeholders of the property.

Foreseeable: predictable at the time of contracting.

Form: in contract law, a set of rules that specify how a declaration of willingness is to be made.

Formal law: written laws that the government creates through formal procedures

Fraudulently: deceptively.

Gift: type of contract where the person disposes of his property without receiving any consideration on return.

Good faith: honestly.

Heirs: the people who receive someone's property when that person dies.

Heir apparent: in succession law, an heir before the author dies who could become an heir if he lives longer than the author.

Hierarchy of laws: the order of legal authority

Horizontal property: a form of ownership that enables multiple people to share ownership of a single piece of property. For horizontal property, people individually own the property's private areas and co-own the property's common areas.

Illegal occupation: utilising someone else's real estate or acting as its possessor against the owner's will.

Immovable property: refers to land and anything permanently attached to it, such as soil, buildings, or trees.

Incorporate: include in a contract.

Inheritance: a type of gift that is created by succession when the donor dies.

In-kind payment: a payment of something equivalent in value to the property being expropriated.

Indirect interference: an intrusion on someone's property that is not obviously physical

Individual ownership: when only one person owns a piece of property.

Indivisible: cannot be divided.

Inheritances: gifts that take effect upon the death of the donor.

Innovations: improvements to the property.

Intangible property: creations of the mind that have value but do not necessarily have a physical form.

Intellectual property: intangible property created from the human mind, such as songs or inventions.

Irrevocable: a decision or transfer of property that cannot be changed or ended.

Landlocked property: property that is surrounded by land on all sides.

Landlord: a lessor or a person who owns a property and creates a rental agreement that allows another person to use the property.

Lapse: this means the right returns to the property owner.

Lease agreement: an agreement where one person allows another person the use and enjoyment of his real estate in return for payment.

Legal easement: a permanent non-possessory right to enter or use the immovable property that another person owns.

Legal capacity: the ability to reason and make competent, reasonable, and informed decisions about one's rights and obligations, and required to enter into contracts.

Legal passage easement: gives someone the right to walk across land that the person does not own.

Legal water easement: a type of legal passage easement that allows non-possessors to use water they do not own.

Legally Binding: the ability of the courts to enforce or require a contract to be fulfilled by the contracting parties.

Legitimate succession: when the deceased did not write a will and the law must decide who owns the deceased's property.

Lender: a person who owns a property and allows someone else to use it through a loan for use.

Lessee: the person who takes the property under the lease agreement.

Lessor: the property owner that leases out the property.

Lifelong rental contract: a rental contract that lasts for the duration of the life of the property owner or another person.

Lien: a legal claim that someone or something has on the property of another person until a debt has been paid.

Limits of the law: activities that the law prohibits.

Loan for use: is when a property owner allows another person to use his or her property temporarily without payment in return, similar to a gift except it is not permanent.

Majority: a group of co-owners who own shares of the property that are worth at least half of its value.

Market value: the amount of money a seller would receive for his property if he sold it.

Master plan: a long-term and detailed strategy for achieving a city's development goals.

Monetary damages: a remedy by the court requiring the non-performing party to return money to the injured party.

Mortgage: a loan from the bank that enables someone to buy property, even if they do not have enough money to pay for the property.

Moveable property: property that can be moved, such as automobiles or furniture. Also known as personal property.

Necessary improvements: expenses that are necessary to conserve or enjoy property in common.

Non-performance: when one party in a contract does not perform an obligation under the contract.

Non-possessory right: the power to use immovable property that is possessed by another person.

Not absolute: means that ownerships rights have limitations or restrictions.

Notice: a formal announcement of an action, which is usually made public, such as in newspapers or other public postings.

Nullify: to make the contract null and void because the contract was made in such a way that it could never be legally valid.

Offer: a contract proposal.

Opens: in succession law, when the owner dies.

Own: See “Property ownership”

Perfect: the steps necessary to make the contracts legally enforceable.

Perfectd: in contract law, a legal term meaning three things: (1) that the parties have an agreement and they all understand each of the details and terms without any misunderstandings, (2) that each party agrees to be required to fulfill their part of the agreement, and (3) that all formal legal requirements for contract formation have been met.

Performance: the fulfillment of contract obligations.

Permanent: existing indefinitely.

Personal property: tangible property that is not real property, such as automobiles or furniture.

Petitions for inheritance: challenges to succession.

Possessory rights: the powers enjoyed by a person who occupies and controls immovable property.

Power of representation: the ability of a person, such as a lawyer, friends, and family members, to make contracts on behalf of someone else.

Presumption: Applies to government ownership of property. If property does not clearly belong to a private person, it is assumed to belong to the government.

Private limitations on use: non-possessory rights that are created by contract.

Private nuisance laws: laws that prohibit activities that prevent other people from using their property.

Private property: property that belongs to individual people. Private property includes things that people own which cannot be arbitrarily taken from them, either by the government or their neighbors.

Private real estate of the government: immovable property that the government owns and may sell.

Property: something of value that people own or use

Property easement: a non-possessory right to enter or use the immovable property that another person owns.

Property in common: another name for property that is co-owned.

Property ownership: the system of rules that determine the property rights that people in a society have over the resources around them. The right to use, manage, and enjoy property,

including the right to transfer ownership to someone else. The law protects the rights of property ownership.

Property rights: the powers, guaranteed by law, that people have over property.

Property title: a concept that refers to legal ownership of property that is the link between the person who owns property and the property itself.

Public deed: a document that is proof that the property owner really owns the property.

Public domain: immovable property that the government owns that, by its “nature,” may not be sold.

Public consultation: a public hearing where the beneficiary of an expropriation gives a description of the expropriation project and the results of the planning phase.

Public limitations on use: non-possessory rights that are created by the government, including local governments and courts.

Public property: property that private individuals do not own. Public property does not belong to any single person, and there is no private owner with exclusive rights over public property. The law designates some types of public property as belonging to the government, while other types belong to communities.

Public purpose: an action from the government for the benefit of a community as a whole.

Public wills: wills written by a notary in a register book that are public.

Purchase and sale contract: the contract that transfers property ownership from one person to another.

Qualitatively equal rights: co-owners have the same rights to use, enjoy, and dispose of the property they own in common.

Quantitatively different rights: when one owner owns a greater percentage of a piece of property than another owner.

Real estate speculation: when people buy property because they expect its price will increase.

Real property: land and anything attached to it, such as soil, buildings, or trees, also known as immovable property.

Reduction in price: when the injured party can reduce the amount they will pay the breaching party proportionate to or the same percentage as the decrease in the value of the performance caused by the defect.

Rehabilitated: in succession law, when the person who makes a threat or acts in bad faith undoes his threat and makes amends.

Remedy: a solution to a broken promise that was legally enforceable or a breach of contract.

Renew: with lease agreements, when the tenant and landlord agree that the tenant will continue to live in the apartment.

Renouncing ownership rights: an act that makes a property owner not own the property anymore.

Rent in perpetuity: a rental contract with no end date and is valid until the contract is ended.

Rental agreement: a type of lease that usually lasts for a short amount of time.

Rental price: the amount of money the tenant must pay the owner to use his property.

Repudiate: in succession law, when a person does not accept the inherited property.

Resettlement plan: a plan in the context of an expropriation that states the alternatives to relocating stakeholders, the costs of implementing these alternatives, and ways to restore income and the livelihoods lost by stakeholders.

Residential lease agreements: lease agreements for property where people live.

Resolution: an official government decision about the status of an expropriated property.

Restitution: compensation for his loss to restore the buyer to his original state.

Retroactive: when the effects go back in time, to the date when the donor tried to revoke the gift.

Reversion: the property returns to the donor or original property owner who gifted the property.

Revert back: when a right returns to the previous owner of the right.

Reversal: undoing the expropriation to return the property back to the original owner.

Revocable: a decision that can be changed or a transfer that is not permanent and can be ended.

Right: (generally) a right to the land is a right recognized by law. Another name for a right to the land is a **claim**. A claim is a legal right recognized and protected by the laws implemented by the state.

Right of disposition: the right to transfer property ownership from one person to another.

Right of enjoyment: the right to benefit from property use. In practice, the right of enjoyment enables owners to stop other people from behaving in ways that prevent them from enjoying their property.

Right of exclusion: allows the property owner to stop other people from entering his property.

Right of superficies: a non-possessory interest in the property of another person.

Right of use: the owner's right to do what he wants on his property, within the limits of the law.

Right of usufruct: a non-possessory right to enter or use property that another person owns

Rural lease agreements: lease agreements for land that is used for agricultural, cattle breeding, or forestry purposes.

Sealed wills: wills written and signed by the author, or written by someone else at the author's request and signed by the author that are sealed and approved by a notary, but not written in the register book.

Seizure: the taking of an owner's property by a court.

Servient tenement: the property owner who must give someone else the right to access his property upon the creation of an easement.

Specific performance: a remedy by the court requiring the non-performing party to perform exactly what was promised in the contract.

Social impact study: a measurement of the positive and negative impacts of an expropriation.

Social purpose: the objectives that society wants to advance.

Sources of law: the legal resources that we study to learn what the laws are. Together, these sources of law create the rules of property ownership that everyone must follow.

Sovereign power: the power of a state or country to do everything necessary to govern itself.

Spatial planning: a type of public limitation on use that restricts what many people can do with property.

Special wills: wills that address unusual situations where the author cannot write a more common will.

Speculation: when people buy property because they expect its price will increase.

Stakeholder: a person or group that has an interest or holds rights in property being expropriated.

Sublease: a lease agreement between the original lessee and a new lessee.

Substitution: the act of replacing an heir who does not or cannot accept the inheritance.

Successors: the people who receive the property that belonged to a deceased person, and are also called heirs.

Succession: when ownership is transferred from the owner to his successors when the owner dies.

Tangible property: a physical thing that can be touched

Temporary: ending after a period of time.

Tenant: a person who has a right to use land that he or she does not own.

Termination: the cancellation of the contract and any remaining obligations that either party has.

Testamentary: the person or people who ensure a will is fulfilled.

Testamentary succession: when a will determines how property is inherited.

Title: the formal recognition of the ownership rights a person has in a property. A formal claim to property is illustrated by a title to the property.

Titling system: the way that people acquire legal evidence that they own property. By recording who owns which property, the government maintains records that identify ownership of private and public property. The titling system provides the legal link between a person and the property he owns.

Traditional land: Property that was used by a community's ancestors. Different from "community property."

Trust or Trustee Substitution: in a will where an author chooses an heir, or heirs, to manage the inheritance for someone else.

Trustees: future heirs that benefit from a trust that are designated in a will.

Usufruct: the right to enjoy another person's property as long as the property is not damaged.

Usufructuary: the person who has the right of usufruct is called the usufructuary.

Voidable: when a contract can be canceled.

Waive: to voluntarily give up a right.

Water rights: the legal right to use water from streams or other water sources.

Well-grounded fear: a fear that is based on strong evidence, facts, and reasoning.

Will: a document that says what to do with a person's property after he or she dies.

Withholding performance: when a person does not perform contractual obligations, within reason, until the other party performs.