THE ERITREAN LAND TENURE SYSTEM

FROM HISTORICAL AND LEGAL PERSPECTIVES

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ABSTRACT

A land tenure system is a set of rules which govern social relations between peoples in respect to land. It defines the property rights in land of individuals or groups in a specific locality or society. The property rights, which are in effect bundles of rights, may include the right to use, lease, mortgage, transfer, and so on. The source of these tenurial rules can be either customs or enacted laws. This thesis examines in detail these aspects of land tenure systems in respect to Eritrea, a country situated in the Horn of East Africa. Accordingly, the indigenous systems of land tenure of the country, land reforms introduced by the country's colonizers, and land laws enacted by the country's Government after independence, are discussed and criticized.

RÉSUMÉ

Un système de tenure foncière se compose d'un ensemble de règles gouvernant les relations sociales entre des personnes à l'égard de la terre. Un tel système définit les droits de propriété dans la terre, pour les individus et les groupes présents dans un lieu ou une société particulière. Les droits de propriété, qui consistent en un faisceau de droits, incluent le droit d'user de la terre, de la louer, de l'hypothéquer, de la céder, etc. Ces règles de tenure foncière trouvent leurs sources dans la coutume ou dans la législation. La présente thèse examine en détail les systèmes de tenure foncière existant en Érythrée, un pays situé dans la Corne de l'Afrique. L'auteur y aborde, de façon critique, les systèmes indigènes de tenure foncière, les réformes foncières introduites par les puissances coloniales, de même que les lois foncières adoptées par le gouvernement depuis l'indépendance.

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INTRODUCTION

Eritrea is a newly independent African state situated in the Horn of Africa. It borders Sudan to the north and west, Ethiopia to the south, Djibouti to the south-east, and the Red Sea to the north and east. It has a total area of more than 46,000 square miles. In other words, it is approximately the size of England. Asmara is its capital city. Geographically, the country can be divided into three main climatic zones: the highlands, the western lowlands, and the eastern coastal lowlands.[1] The highlands are the most densely populated areas of the country. The people in these areas are mainly agriculturalists and urban dwellers. The people in the other areas are mainly pastoralists and agro-pastoralists.[2] Legally speaking, the country is divided into six administrative "zobas" (zones or regions) and, in turn, into 53 "nuus-zobas" (sub-zones), [3] pursuant to the *Proclamation for the Establishment of Regional Administration.* [4]

In terms of population, even though no population census has been conducted in the past decade since independence, the total population of Eritrea is estimated to be between 3.5 million and 4 million. According to linguistic classification, the Eritrean people is made up of nine different nationalities: Tigrigna, Tigre, Saho, Beja, Afar, Bilen, Kunama, Barya, and Rashaida. The first two, Tigrigna and Tigre, constitute about 75% of the total

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[1] B. Solomon & G.A. Asmerom, "Visitors' Information Page", online: <http://denbe.asmarino.com/asmarino/Eritrea/climate.htm> (date accessed: 7 September 2001).
[2] B.I. Abdalla, *Pastoral Nomadism: Opportunities and Threats - The Case of the Barka-Gash Region in Eritrea* (Paper 192) (Uppsala: Swedish University of Agricultural Sciences, 1998) at 2.
[3] J.M. Lindsay, *Creating a Legal Framework for Land Registration in Eritrea: Consolidated Final Report of the International Legal Consultant*, U.N. F.A.O., 1997, U.N. Doc. TCP/ERI/4554 at 10-11.
[4] *Proclamation for the Establishment of Regional Administration,* Proclamation No. 86/1996 (Eritrea).

population.[5] In terms of religion, the Eritrean people are mainly Christians and Muslims, but paganism also exists to some extent.[6]

We also need to examine briefly the historical background of the country. The present geographical boundaries of Eritrea as a single, separate political unit were created by Italy during the modern era of European colonization. By 1890, Italy controlled the entire territory of present-day Eritrea. On January 1, 1890, Italy declared the area to be its colony and named it "Eritrea". It is unnecessary to discuss here the pre-Italian history of Eritrea. It is, however, worth mentioning here that, for about three to four centuries before the arrival of the Italians, the present territory of Eritrea was never governed by a single ruler, but rather by various powers. For instance, the Turkish controlled the coastal plains of the Red Sea for about 300 years, until the second half of the 19th century, while the other areas were under other rulers. Italy governed the colony until 1941, when the Allies expelled the Italians from the region during the Second World War. The British Military Administration then replaced the Italians and administered the colony temporarily until 1952.[7] In the meantime, after a series of inquiries and meetings, on December 2, 1950, the United Nations (U.N.), by Resolution 390 A/V, decided that Eritrea would be federated with Imperial Ethiopia. Accordingly, on September 15, 1952, the Eritro-Ethiopian federation was established. After some time, the Ethiopian government started to oppress its opposition. For example, it banned opposition political parties and suppressed several peaceful demonstrations by force. In particular, it began to undermine the identity of Eritrea: it replaced the official Eritrean

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[5] Denbe.asmarino.com,"People", online: <http://denbe.asmarino.com/asmarino/Eritrea/People.htm> (date accessed: 7 September 2001).
[6] Denbe.asmarino.com,"History", online: <http://denbe.asmarino.com/asmarino.Eritrea.history.htm> (date accessed: 7 September 2001) [hereinafter "History"].
[7] *Ibid.*

languages, Tigrigna and Arabic, with the official Ethiopian language, Amharic, and in many instances replaced the Eritrean flag with that of Ethiopia. Finally, on November 14, 1962, the Ethiopian government officially annexed Eritrea by dismantling its parliament and declaring Eritrea to be the 14th province of Ethiopia.[8]

In the meantime, on September 1, 1961, the Eritrean Liberation Front (E.L.F.) fired the first shot in the struggle for independence. After thirty years of bitter and bloody war, on May 24, 1991, the Eritrean Peoples Liberation Front (E.P.L.F.), the major force, liberated the whole of Eritrea from Ethiopia. The Eritrean provisional government was then established. However, the Eritrean case had to be settled by peaceful and lawful means. Therefore, two years later, from April 23 to 25, 1993, a referendum of Eritrean citizens living both inside and outside Eritrea, which was sponsored and supervised by the U.N., was held to determine the fate of Eritrea and its people. As officially announced on April 27, 1993, 99.805% of the total voters, almost 100%, voted for the independence of Eritrea. Subsequently, Eritrean independence received *de jure* recognition by the U.N. and other international communities. The Eritrean people celebrate the national day of independence every year, not on the day the result of the referendum was officially announced, but on the day of liberation, May 24.[9]

Finally, we should examine the legal background of the country. Eritrea is a civil law system, despite the fact that its procedural laws are a mixture of both inquisitorial and adversarial systems. After independence, the Eritrean government adopted the Ethiopian codes with some amendments for the transitional period. The major sources for these

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[8]R. Iyob, *The Eritrean Struggle for Independence: Domination, Resistance, Nationalism 1941-1993* (Cambridge: Cambridge University Press, 1995) at 82-97.
[9] "History", *supra* note 6.

amendments included principles developed during the armed struggle, the E.P.L.F. *Civil Code*, which had been operating in the liberated areas during the armed struggle, and customary laws of the people. Another significant fact is that a Shari'a tribunal also provides for a separate chamber within the High Court for adjudicating matters of marriage, divorce, and successions as they relate to Muslims. More importantly, in 1997, the first national constitution after independence was ratified, although not yet implemented. In addition, most codes of law are now drafted and ready to replace the transitional codes.[10]

The aim of this thesis is not to introduce general geographical, social, historical, and legal backgrounds of Eritrea. Rather, its aim is to consider and discuss one aspect of the country's legal system among many. Accordingly, this thesis explores the land tenure system of Eritrea. It tries to examine the past and present systems of land tenure of the country from historical and legal perspectives. It attempts to discuss the indigenous systems of land tenure prevalent before the end of the 19th century, the land reforms undertaken during the modern colonization era, and the reforms which have taken place since independence.

The thesis is divided into three chapters. The first chapter begins by presenting a general introduction about indigenous systems of land tenure. It also discusses the current views and approaches relating to indigenous systems of land tenure. It then proceeds to examine the indigenous land tenure systems of Eritrea which were prevalent before the end of the 19th century.

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[10]Peoples' Front for Democracy and Justice, (Interview with Fozia Hashim, Eritrean Minister of Justice) online: <http://www.shaebia.com> (date accessed: 28 August 2001).

The second chapter studies the various land reforms undertaken by successive colonial powers of the country. These include the Italians, the British, and the Ethiopians. The time frame for this discussion is from 1890 (when Italy declared the area as its colony after having named it "Eritrea") up to 1991 (when Eritrea became *de facto* independent from Ethiopia by military force). The land reforms undertaken during the Eritro-Ethiopian federation of 1952-1962 are also presented in this chapter. The thesis also discusses land reforms introduced by the Eritrean liberation forces during the armed struggle of 1961-1991, as this period is within the timeframe of the colonial era.

The last chapter of the thesis attempts to examine land reforms introduced by the Eritrean government from 1991 onwards. It discusses land rights under the Eritrean Constitution and examines the constitutional bases of existing land rights. Discussing the primary land rights as provided under the Eritrean *Land Law Proclamation,* Proclamation No. 58/1994,[11] is the main focus of this chapter. Issues of land expropriation and the impact (both positive and negative) that the *Land Law Proclamation* will have on pastoralists are also areas of focus. The last part of this chapter discusses land registration in Eritrea. Finally, the thesis ends with a very brief conclusion on the contents of the whole thesis.

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[11] *Land Law Proclamation,* Proclamation No. 58/1994 (Eritrea) [hereinafter *Land Law Proclamation*].

CHAPTER ONE: THE INDIGENOUS LAND TENURE SYSTEM

1. INTRODUCTION: NATURE AND CHARACTERISTICS

There could be inconsistencies in defining the identity of indigenous peoples. There is a general understanding, however, that indigenous peoples are the peoples who were living in a specific location for a long time before the coming of European colonialism to that area. This definition of indigenous peoples applies well to African indigenous peoples, although it does not apply to Europeans who lived for centuries in some parts of Africa. These indigenous peoples of Africa and other places are governed by customary laws. Many authors in their books use various adjectives - customary, traditional, indigenous, native, chthonic, aboriginal - to describe either these peoples and their generations or their ways of life.[12] For example, by "indigenous laws" (and perhaps also "customary laws" or "traditional laws" or other descriptions of laws based on the various adjectives), they refer to the same legal system, which is a set of rules which members of one smaller or larger community use constantly and uniformly to regulate their conduct and relations since time immemorial without being sanctioned by a state. At the same time, they could have force of law and may be enforced by the courts of the country.[13]

The indigenous land tenure system is, therefore, a body of such rules which define the rights, duties, privileges, and powers of members of the group or community in relation to the land. It governs the ways and methods by which each individual or the group as a whole

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[12] H.P. Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (Toronto: Oxford University Press, 2000) at 56.

acquires, uses, or transfers land.[14] However, the rules adhered to in this system, as with other social devices and other customary laws, cannot be identical in all places and societies. They differ from village to village, from tribe to tribe, from one religion to another, and so on. Many factors are interwoven which could cause a different system of land tenure to exist and develop within a specific tribe, community, or locality. Some of these factors include "local climate and ecology, the quality of the land resource, population density, level of agricultural technology, crops, markets, kinship organization, inheritance patterns, settlement patterns, political organization, religious significance of land, and patterns of ethnic conquest, dominance and rivalry".[15] Hence, it would not be surprising that the continent of Africa, or even one country or community, has diverse types of land tenure systems due to its social, economic, political, cultural, and environmental diversity. A different type of land tenure develops to suit the specific situation.[16]

Taking into account these considerations, it is very dangerous to generalize about the indigenous systems of land tenure in Africa. The reason is that, though they are all regulated by customary laws, they are of manifold types. Others even suggest that the term "traditional", which is commonly used to describe African land tenure systems, is obfuscating and confusing since African land tenure systems were and still are subject to changes by colonialism, government policies and laws, and by their flexibility in the face of

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[13] R. Noranha & F.J. Lethem, *Traditional Land Tenure and Land Use Systems In The Design Of Agricultural products*, (Working Paper 561) (Washington, D.C: World Bank, 1983) at 7-8.
[14] *Ibid.* at 9.
[15] J.W. Bruce, "A Perspective on Indigenous Land Tenure Systems and Land Concentration" in R. Downs & S. Reyna, eds., *Land and Society in Contemporary Africa* (London, Hanover, N.H: University Press of New England, 1988) 23 [hereinafter "A Perspective"] at 23.
[16] *Ibid.* at 24.

new circumstances.[17] My impression is that expressing indigenous systems of land tenure of Africa as "communal" and/or "common property" would be greatly misleading. Such terms do not express the diverse types of traditional land tenure in Africa. I think such a misrepresentation is the result of attempting to reach one single generalization. I believe the discussion of "the Eritrean indigenous systems of land tenure" would provide adequate evidence that, traditionally in Africa, diverse systems of land tenure do exist – from systems of "private property" to systems of "common property". Nevertheless, some common features of most traditional systems of land tenure can be mentioned.

The main characteristic of most African customary systems of land tenure is their communality, though the term "communality" can be misleading. In the sense meant here, communality refers to a system where land is owned by the community. The social organization of the community could be as a family, clan, tribe, or village. The ultimate right to dispose of land is vested with the community or the group. The individual has only the right to use the land. In some instances of uses of land, such as in grazing, forests, and rivers, all individuals or members of the community have collective rights to use the land. In farming lands, however, individuals or members of one family have exclusive rights of use of the land against the whole community during the growing season. But, after harvesting, the community can have access to the land. Therefore, concurrent rights or subsequent individual or communal rights to land in different seasons can exist on a single parcel of land

[17] D.A. Atwood, "Land Registration in Africa: The Impact on Agricultural Production" (1990) 18:5 W. Dev. 659 at 661.

and this indicates that the individual rights are not usually exclusive. It does not mean either that the whole community as a group uses one parcel of land on a communal basis.[18]

Another characteristic of most African indigenous systems of land tenure is that individual entitlement to land is based on membership to the community or group. Membership can arise either from residing in the village of the community or descending from ancestors or members of the community.[19] In other words, strangers are not entitled to land of the community. Nevertheless, the people have developed mechanisms for accommodating the outsiders in using their land.[20] Share-cropping arrangements in a form of contractual relationship could be mentioned among those devices employed.

A third feature of most African native land tenure systems could be prohibition or restriction of land marketing as a commodity. In many cases, land transactions are not permitted or are restricted to large extent under the traditional laws.[21] In some places, land can be transferred to individuals by inheritance or gift. In many places, however, the land itself cannot be transferred between individuals in any absolute manner. Mentioning here Masai's proverb would be more illustrative: "sons and lands cannot be given away".[22]

Many traditional laws in Africa, however, do permit land transfers in other forms, such as renting, borrowing, and pledging. These transfers can be undertaken either with non-

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[18] M. Kaunda, " Land tenure reform in Zambia: some theoretical and practical considerations" (1987) 12:2 Cambridge Anthro. 29 at 32-33.
[19] "A Perspective", *supra* note 15 at 25.
[20] S. Berry, "Concentration without Privatization: Some consequences of changing patterns of rural land control in Africa", supra note 15, 53 at 63.
[21] E. Okon, "Land Law as an Instrument of Social Change" (1985) 17 Zambia L.J. 46 at 53.
[22] John G. Galaty, "Range Land Tenure and Pastoralism In Africa", in E. Fratkin *et al.*, eds., *African Pastoralist Systems: an Integrated Approach* (Boulder, Col: Lynne Rienner Publishers, 1994) 185 at 187.

members of a family, local group, tribe, or community, or might be restricted to members of the same grouping or community.[23] It is needless to say, however, that works on land or produces from land, such as buildings, planted or harvested fruits, trees, and crops could be subject to sale like other commodities as they are products of an individual's labor.[24]

The belief of the people towards land is also another characteristic of African customary land tenures. It is considered as sacred and as a gift from God so that all members of the community are entitled to use it.[25] According to their belief, the community consists of the dead, the living, and the yet to be born,[26] and therefore, the dead (ancestors) are regarded as the real owners of land.[27]

Another characteristic which exists in most customary systems is the security of a right of an individual to use the land. Once the individual is qualified to hold the land, his right is secure so long as he continues to use the land or so long as he behaves properly according to the rules of the society. For example, in some tribes, practicing witchcraft can result in deprivation of one's right to use land.[28]

Shifting cultivation is also one of the main characteristics of African indigenous systems of land tenure in agricultural practices that was widely practiced in Africa prior the coming of European colonialists. During that time, land at any place was available for any individual of the community who wished to use it. As a result, demarcating boundaries

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[23] Atwood, *supra* note 17 at 662.
[24] E. Sjaastad & D.W. Bromley, "Indigenous Land Rights in Sub-Saharan Africa: Appropriation, Security and Investment Demand" (1997) 25:4 W. Dev. 549at 552.
[25] Okon, *supra* note 21 at 53.
[26] S.R. Simpson, *Land Law and Registration* (New York: Cambridge University Press, 1976) at 224.

between joint lands or the issue of titling and land registration was of very small significance.[29]

The above mentioned characteristics of African traditional systems of land tenure should not be treated as applicable to all African traditional systems of land tenure. At the same time, they are not limitative – there are further characteristics that can be identified and explored. The section of this chapter concerning the Eritrean case will, therefore, examine in particular the patterns, types, and modes of acquisition of land in the Eritrean traditional systems of land tenure.

Lastly, we need to revisit the methods employed in African traditional systems of land tenure for obtaining control of land or access to land. They are also good grounds for justifying one's claims over a particular parcel of land. The methods could be either original: for example, an access obtained by being first settler; or derivative: for instance, an access obtained by rent or gift.[30] The following are among the multiple ways: "birthright, first settlement, conquest, residence, cultivation, habitual grazing, visitation, manuring, tree-planting, spiritual sanction, bureaucratic allocation, loan, rental, and cash purchase".[31]

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[27] Okon, *supra* note 21 at 53.
[28] Kaunda, *supra* note 18 at 33.
[29] Okon, *supra* note 21 at 53.
[30] M.P. Mvunga , *Land Law and Policy in Zambia* (Lusaka: University of Zambia Mambo Press, 1982) at 32-37.
[31] P. Shipton, "Land and Culture In tropical Africa: Soils, Symbols, And the Metaphysics Of The Mundane" (1994) 29 Ann. Rev. Anthro. 347 at 348.

2. VIEWS ON INDIGENOUS SYSTEMS OF LAND TENURE

There are different views and debates on the impacts of indigenous systems of land tenure and on the ways to handle them. Until the 1970's and 1980's, many have understood indigenous systems of land tenure as primitive modes of land exploitation. They were perceived as great constraints to agricultural production, development and modernization. The main reason given was that customary systems of land tenure do not provide mechanisms for land registration and titling. Consequently, land-users/owners do not have security to exploit their lands intensely. They do not encourage land transfers to enable efficient and willing land-users to have opportunities for control of and access to land. These systems do not create access to credit-providers, as land cannot be used as collateral security. Moreover, traditional land tenure systems, as they are communal in nature, are deemed to be inherently hostile to individualization of property which is believed to be the key to prosperity and development. In totality, indigenous systems of land tenure were thought to gravely impede growth of production, investments, and developments.[32] Also, the indigenous systems are blamed for greatly increasing environmental degradation. Hardin's theory, "the tragedy of commons", was based on this assumption. The thesis was hypothesized on practicing a common grazing pasture. According to him, the result was overstocking and thereby causing environmental degradation and he advocates the privatization of the indigenous landholding systems as a solution to that crisis.[33] International donor agencies and the World Bank were demanding land registration and land titling as part of the package of conditions of the release of aids and loans for the

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[32] Shem Migot-Adhola *et al*, "Indigenous Land Rights Systems In Sub-Saharan Africa: A Constraint On Productivity" (1991) 5:1 W. Bank Econ. Rev. 155 at 155.

introduction of land reform, which would include privatization of land. After independence, almost all African countries enacted laws abrogating customary laws, in the belief that they were the reasons for their underdevelopment. Nevertheless, the customary rules have continued to exist and govern patterns of the society.

Starting from the 1980's onwards, totally opposing views concerning the native laws of land tenure began to emerge. Authors such as John W. Bruce, Daniel W. Bromley, and others have written extensively on these issues. They advocate that the indigenous systems of land tenure are not the real constraints of agricultural production, investments, and developments. Rather, they are dynamic, flexible, and responsive to changing economic circumstances. They are evolutionary and are moving from communal type of tenures towards individualization. For instance, Shem Migo Adhola and others indicate, from their empirical studies conducted in Rwanda, Kenya, and Ghana, that customary landholding systems are not in fact great impediments for land transfers, access to credit, and investments.[34] Other studies from Kenya tell us there are no clear correlations between security, access to credit, investments, and production growth vis-a-vis land titling and registration.[35] For example, the studies mention that banks in Kenya are reluctant to give loans for small landholders despite of the fact that they have land-titling certificates.[36]

Espen Sisjaastad and Daniel Bromley argue that:

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[33] J.R. Wilson, "Eritrean Land Reform: The Forgotten Masses" (1999) 24:2 N.C.J. Int'l L. & Com. Reg. 497 at 510-512.

[34] Migot-Adhola, *supra* note 32 at 159-69.

[35] T.C. Pinckney & P.K. Kimuyu, "Land Tenure Reform in East Africa: Good, Bad or Unimportant?" (1994) 3:1 J. Afr. Econ. 1 at 8-9 and 25.

[36] H.P. Binswanger & K. Deininger, "World Bank Land Policy: Evolution and Current Challenges" D Umali-Deininger & C. Maguire, eds., *Agriculture in Liberalizing Economies: Changing Roles for Governments Proceedings of the Fourteenth Agricultural Sector Symposium* (Washington: the World Bank, 1995) 197 at 200.

> 1. Most African farmers do not face a high risk of eviction. 2. Continuous use in conspicuous investment in land-base resources will further reduce this risk. 3. Even if land is lost in, for instance, a dispute, the investment may be partially or completely recovered, and 4. The more feasible investment alternatives among farmers in Sub-Saharan Africa are inexpensive ones with modest absolute returns on at worst moderately degraded land. Under these conditions, indigenous tenures are likely to provide significantly higher investment incentives than freehold and very unlikely to provide significantly lower investment incentives. ...The fact that land-based investment is low in rural African communities is not, therefore, due to the incentive structure of the indigenous tenure regime but to the general lack of investment opportunities as determined by the cost and availability of agricultural technology.[37]

Others take a different view. They do not propose the fullest adherence to and preservation of indigenous systems. John Bruce, for instance, takes the following approach:

> An "adaptation" paradigm may be called for, rather than the "replacement" paradigm utilized in the many reforms which sought to replace indigenous tenure with tenure models from abroad. It will be necessary to try to work with these incremental processes of change rather than to supersede them. Legislatively, this will require "framework laws," under which local communities would determine how their practices should change, within some statutory parameters. The process of change would be monitored and managed through local dispute-settlement mechanisms, with appeals into the national judicial system.[38]

I support this approach. History in Africa has taught us that customary laws cannot be abolished by the stroke of a pen. The native systems do have in fact, good and bad qualities. We should, therefore, follow the "adaptation model" so as to make use of the good qualities. It should be remembered that attempts in the past to totally replace them or to superimpose other systems were not very successful. The desire to revitalize the traditional systems of land dispute resolution in Kenya by legislating the Land Disputes Resolution Tribunal Act of 1991 is one example that the position of customary laws is being reconsidered. The Act

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[37] Sisjaastad & Bromley, *supra* note 24 at 559.

[38] J.W. Bruce *et al.*, *After the Derg: An Assessment of Rural Land Tenure Issues in Ethiopia*, (Madison, Wisconsin: Land Tenure Center, University of Wisconsin – Madison, March 1994) [hereinafter *After the Derg*] at 76.

establishes "Councils of Elders" as tribunals for adjudicating land disputes according to customary laws.[39]

3. INDIGENOUS SYSTEMS OF LAND TENURE: THE ERITREAN CASE

The Eritrean situation is not very different from the experiences of other African countries. The nature, characteristics, and types of the Eritrean indigenous systems of land tenure will be discussed in this sub-section. The focus of the discussion will be on the highlands of Eritrea since many types of land tenure systems have existed there. The impacts of colonialism on the indigenous system will be, however, separately examined in the following chapter of this thesis.

The indigenous peoples of Eritrea have developed different types of customary systems in each locality and community for regulating their affairs. The "Adkeme-melga", "Adghene-tegelba", "Feteha-Mahari", "hegi shew'ate Anseba", and others could be mentioned as some of the customary systems that were dominant in Eritrea. Land tenure was one of the fields governed by customary laws.

According to the traditional systems, land and immovable property on the land are referred to as "resty". This term loosely denotes ownership, possession, occupation, and usufruct of the property. This word is used as prefix to distinguish different properties. For instance, "resty adi" means property or land of a village; "resty enda" means land or property of a family. Another term, "medry", is also loosely used as synonym for "resty". It literally

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[39] P. McAuslan, "Making Law Work: Restructural Land Relations in Africa" (January 1, 1998) 29:1 Dev. & Change 525 at 540.

means land or earth and is used as prefix denoting almost the same ideas. For example, "medry adi" means land of a village; "medry worki" means purchased land or literally, gold land.40 Others describe "resty" as a right attached to the land owned.[41] It is a unique form of land ownership which cannot be sold or alienated but is inheritable.[42] With the passage of time, however, "resty" refers to the ownership of land by an extended family which should pass from one generation to another. It is mainly a heritable right to land.[43] It is worth noting here that the people place special values on land and land ownership. They have a strong sense of attachment to their land. The following saying clearly expresses this belief. "Property should be defended. Women too should fight for it. Even an inch shall never be surrendered."[44] In fact, this translation does not reflect the exact meaning of the original saying in the tigrigna language. The word "property" in the above saying is a translation for the word "resty".

Having understood the people's mentality towards land and land ownership, we need to examine now in detail the main types of land tenure that traditionally existed throughout the country.

A. Village Land

In the traditional systems of Eritrea and in particular on the highlands, villages were the main political institution of the communities. They were autonomous and governed by

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[40] Z. Ambaye, *Land Tenure in Eritrea (Ethiopia)*, (Addis Ababa, Ethiopia: Addis Printing Press, 1966) at 5.
[41] A. Tesfai, *Communal Land Ownership in Northern Ethiopia and Its Implications for Government Development Policies*, No. 88 (Madison, Wisc: The Land Tenure Center University of Wisconsin, 1973) [hereinafter *Communal Land* Ownership] at 10.
[42] *Ibid.* at 11.
[43] *Ibid.* at 10.
[44] Ambaye, *supra* note 40 at 7.

customary laws. Having distinct boundaries, each village was headed by a village chief ("chiqa-adi").[45] He was elected by the village members or, during the period of Italian colonialism, was appointed by district chief ("misilene") for his lifetime. The title could be inheritabed and would pass to his eldest son after his death upon approval of the villagers. The village chief was a judge and administrator of the village. He presided over the village assembly, headed all decision making gatherings of all civic matters and disputes, including land administration, maintained peace, security, and order of the village. During Italian colonialism, he expedited tax collections and transmitted colonial orders to villagers. In his activities, he was supported by the council of elders ("shimagile adi"). The elders were either elected by members of the village or appointed by the village chief. The elders had many tasks among which were helping in redistribution of land, settling disputes and litigations through arbitration and reconciliation, marking inter-village land boundaries, and facilitating other affairs of the village.[46]

"This traditional land tenure is the oldest and predominant institution existing throughout the villages. It is evolved from individual ownership to family groups ownership, from clan to village ownership (maybet to enda)."[47] This system of land ownership was known in the former province of Akeleguzay as "shehnah" and in the former provinces of Hamasien and Serayie as "diesa". However, it was not widely spread in Serayie.[48] In general, under the village land ownership system, land was owned by the village. Individuals had only the right to use the land for their lifetime. However, the village could not terminate or deny

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[45] T.G. Gebremedhin, *The Economic Challenges of Agriculture and Development in Post-Independence Eritrea* (Lawrenceville, N.J.: The Red Sea Press, 1996) at 25.
[46] *Ibid.* at 36-38.
[47] Ambaye, *supra* note 40 at 13.
[48] S.F. Nadel, "Land Tenure on the Eritrean Plateau" (1946) XVI:I Africa 1 at 11.

a person's right to use land once he became entitled to that right. This does not mean that one individual used the same parcel of land for life in all cases of land sharing. That is to say, in the case of land used for farming purposes, the land was periodically redistributed, usually every five to seven years, to individuals of the village. Hence, such land could not be sold nor be subject to inheritance under this system. The village would reclaim the share of an individual after his death.[49] Tracts of land distributed to members of the village from the village land for habitation or housing purposes ("tisha"), nevertheless, were deemed as private property. Therefore, the tracts of land upon which the houses were built and the houses themselves could be disposed of by sale or inheritance. They were usually, however, subject to inheritance rather than to sale and hence, were good sources for proving one's descent.[50]

The two systems, "shehnah" and "diesa", differ mainly in one basic requirement which an individual had to satisfy in order to become entitled to the right to use land. Under the "diesa" system, to be entitled to land, a person had first to prove that he descended from the founders of the village. That is to say, the residents of the village were divided into two: descendants (those descended from the first founders of the village and hence, known as "deqi-abat") and outsiders (the new comers, known as "maekelay alet"). Therefore, immigrants, strangers, and outsiders in general would not be eligible to have rights to use land. They could, however, enter in to some arrangements, such as, sharecropping, lease, and so on, with the members of the village.[51]

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[49] Gebremedhin, *supra* note 45 at 25-26.
[50] Ambaye, *supra* note 40 at 29.
[51] Gebremedhin, *supra* note 45 at 25-26.

Under the "shehnah" system, all residents of the village, without regard to descent, were entitled to land so long as the other requirements were fulfilled. After a time, nevertheless, the "shehnah" resembled the "diesa" and started to exclude people not descended from the founders of the village from having such right on the land of the community.[52]

Under both "diesa" and "shehnah" systems, to be entitled to land either for habitation ("tisha") or farming, the male individual was required to marry and to establish his own house so as to become independent of his parents. He would then become a full member of the village ("gebar") and be entitled to his share of land for farming ("gebri"). The share of each household in a village would be of the same standard size regardless of the number of members of the family and its needs. It was also necessary that they should continue to reside in the village. Otherwise, the shares of absentees would be redistributed to other claimants in the next periodical distribution.[53] Gender discrimination was one particularly negative side of the village land ownership system since the societies in the Eritrean highland villages were patriarchal. Married women were entitled to land through their husbands and not in their own right. Hence, a daughter was not entitled to land in her father's village even though some localities had laws for accommodating claims of such persons.

Children and orphans had a right to a half share of farmland if their parents were dead. This half share was half the standard amount of land that would be allocated to a household

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[52] Nadel, *supra* note 48 at 12.
[53] *Ibid.* at 13.

consisting of a married couple.[54] Another notable aspect of the distribution of farm land shares under the village land ownership system was that widowers and widows would receive only one half share, although they were entitled to the full share when land was plentiful.[55] If the widow chose to reside in her father's village, she could get land on humanitarian grounds and not as of right.[56] So, in the cases where children's parents died or one member of a married couple died, the children or the surviving spouse would retain one half of the land that the household had held prior to the death, and the other half would revert back to the village.

One means which was employed by the villagers to minimize inequalities of land shares was refusing to give land to an individual who had a village-land-type share in another village; however, one individual could have two or more different types of land tenure side by side. For example, he could have a share in a village land in one village by being a resident or descendant of its founders and at the same time could have a family land as a "resty" in respect of other villages through inheritance from his ascendants from those other villages; or he could have other shares by purchase.[57]

In case of land distribution for farming, for the sake of fairness, the village elders would grade all land of the village as fertile, less fertile, and poor soil. Every household would receive at least one share of land of each of the three grades. In many villages, eligibility and redistributions of shares were determined by different groups of elders.

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[54] T. Abraham., "The Diesa Land Tenure System and the Land Proclamation No. 58/1994 in the Kebesa Rural Areas" (LL.B. Thesis, University of Asmara 1998) [unpublished] [hereinafter "Diesa Land" at 6-18.
[55] Nadel, *supra* note 48 at 13.
[56] Ambaye, *supra* note 40 at 16.
[57] Nadel, *supra* note 48 at 13-15.

Usually, village elders known as "ghelafo" would decide the eligibility of individuals to receive the right to use land. Other groups of village elders known as "acquaro" or "metaro" or "medabo" would determine the size of shares and who gets which, under the supervision of the village chief ("chiqa-adi"). This would be done by drawing lots, represented by wooden sticks ("echa"). The head of the "acquaro" was entitled to take his share at his choice or to claim extra land in addition to his share. The periodical redistribution was known as "wareda".[58] It:

> ...follows the cycle of cultivation and fallow. The changing hands of the village fields takes place after the fallow period. Villages which cultivate their fields for two years and leave them as fallow for one as a rule redistribute them every three years. Those which cultivate for three years with two years fallow, every five. The maximum period, especially in communities where the land is worked continuously, is seven years. It is usual to hold an annual 'wareda' each year for different fields. If it is for fallow fields, it is held in August and the land is sown in the winter or spring. If the 'wareda' is for fields worked continuously, it takes place at Easter in time for immediate sowing.[59]

In addition to the tracts of village land distributed for farming and habitation to every qualified member of the village on an individual basis for individual use, each village had tracts of land which were used collectively by all members of the village for various purposes. This land was open to all members of the village. The manner and time of their use were, however, governed by customary laws of each village. These include: 1. Pasture lands: all the villagers use these lands for grazing their animals. All members of the village have equal rights over the same parcel of pasture land. Members from the neighboring villages do not have access to pasture land like the other village lands. In addition to these lands, after the period of harvesting, the plots of arable land distributed to each individual of the village were

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[58] "Diesa Land", *supra* note 54 at 18-21.
[59] Nadel, *supra* note 48 at 13.

used as pastures for the village members until the sowing season.[60] 2. Forest and wood areas: They are sources for firewood, for making agricultural equipment, and for constructing houses.[61] 3. Rivers, springs, and other water bodies: All the villagers use them collectively for drinking and other domestic purposes. 4. Assembly places ("baito"): these areas were used for holding gatherings for discussing affairs of the village and also as a court for litigants. 5. Plains ("golgol"): these were places of the village for conducting sport and game activities, for holding cultural shows, and for conducting funeral services and other religious ceremonies. And 6. Refuse places ("goduf"): These places were used for waste disposal.[62]

To conclude, the rotational redistribution of land in the village land ownership system is strenuously criticized, for it discouraged land improvements and investments and hampers production by promoting severe fragmentation of land in each distribution period.[63] It cannot be ignored, however, that village land ownership system had an impressive mechanism for making new claimants, such as new younger members of the village and returning absentee villagers, eligible for land. The village land system also ensured an individual's right to use land for his life time and it greatly narrowed inequalities of landholding by providing to its members land of approximately equal size and quality. It also reduced disputes between members of one family ("enda") over land by putting them almost on an equal footing which entitled them to equal shares.[64] Yet, these positive features of the village land ownership system should not be over-emphasised, just because the system was more inclusive than other types of land tenure, as the system was not perfect. It is my belief

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[60] Ambaye, *supra* note 40 at 22-24.
[61] *Ibid.* at 27.
[62] *Ibid.* at 31-32.
[63] Gebremedin, *supra* note 45 at 26.
[64] *Ibid.* at 32.

that if gender discrimination had been abolished so that women's right to land was recognised and if the boundaries of the villages had been made subject to change as the need arose, the village land ownership system would have been more responsive to the growing demands of land-seekers. In words of Tesfa G. Gebremedhin, "There was unequal distribution of land in various regions because villages in the densely populated regions faced larger populations on a smaller area of land than those in less densely populated villages".[65] Finally, I need to comment on the issue of gender discrimination. It could be argued that married women's rights to land were implicitly recognized in village land systems since one of the main requirements for land entitlement was marriage of the male individual. In other words, the males could not be entitled to full share of village lands unless they entered into marriage partnership with the females. The fact that widowers and widows were entitled to a half share could substantiate my argument. Also, as it is mentioned above, the fact that children of dead parents had a right to a half share of village land regardless of their sex until they married would strengthen the argument. Hence, such problems of gender issues could have been solved simply by mere legal recognition of women's rights to land. This is also partially true in the system of an extended family land ownership (collective "resty").

B. Pasture Lands

We have already touched on pasture lands which were utilized collectively on an equal basis by members of a village. These were, however, different in the sense that they were used by different groups of people in Western and Eastern lowlands of Eritrea. The people were nomads and semi-nomads who moved from place to place in search of water and grass

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[65] *Ibid.* at 26.

for their animals.[66] Pasture lands were the common property of the groups of people of that specific locality. Some of such lands could be restricted only to the use of one tribe, while others could be openly accessed by more than one tribe within that particular territory. Outsider groups had no rights to use such pasture lands except with the consent of the groups of the specific locality. In other words, the area was used exclusively by limited tribes. As between themselves, the right to use the pasture lands was governed by the rules of the ethnic groups. In fact, the notion of ownership of pasture land by nomads and semi-nomads was not one of territorial exclusivity. Rather, it was a right of full access to water points and grazing lands.[67] Long before Italian colonialism it was the practice of the people of many villages in the highlands of Eritrea to seasonally migrate to eastern lowlands and northern escarpments for grazing and cultivation. On the basis of this long practice and in the belief that the eastern lowlands were not occupied, descendants of these seasonal migrators claimed those lands by occupation. But these lands were indeed occupied - by groups of nomads and semi-nomads who would, by coincidence, migrate away from the lands at the same time each year when the people from the highlands would migrate to them.[68]

C. Extended Family Land Ownership

This traditional land tenure was another type of communal ownership that was prevalent in Eritrean highlands. More particularly, it was dominant in the former provinces

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[66] *Ibid.* at 46.
[67] Wilson, *supra* note 33 at 501-502.
[68] Nadel, *supra* note 48 at 2.

of Serayie and Akeleguzay.[69] This land ownership system was originated by first settlement and occupation of one locality by an individual and passed through successive generations of the individual. Family land ownership system in general comprised of two main forms of land rights, "tselmi" and collective "resty".[70] As "tselmi" was not a group ownership pattern but rather purely a private property, I leave the discussion on it for the section below dealing with private property. The second form of group ownership by an extended family, collective "resty" is the focus of this section. I would refer to this collective ownership by an extended family as "extended family land ownership system" or collective "resty". As noted in the introductory part of section 3 above of this chapter, the term "resty" was too often used to denote the multiple forms of family land ownership systems. In the Tigrigna language the holder of a "resty" is called a "restegna" or "restegnatat" in the plural. Descendants of the owners of "resty" consider "resty" to be a fundamental right and a sacred possession. Hence, no matter what the size of the land, they were unwilling to lose even an inch of it.[71] "Restegnatat" have some prerogatives, collectively known as "rims", in the village over the other residents of the village. "The supervision and organization of communal labor, the care of the village church, the appointment of or the right to act as guardians of the village fields and pastures, and the right to act as arbitrators in land disputes, all devolve on the members of the "resty" owning "endas", on elders or young men according to the tasks involved".[72] They were also entitled to priority in religious ceremonies and feasts. More significantly, only a "restegna" could become a village chief.[73]

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[69] *Ibid.* at 9.
[70] *Ibid.* at 9.
[71] *Ibid.* at 7.
[72] *Ibid.* at 9.
[73] *Ibid.* at 9-10.

We should now return to the main discussion of the section relating to "an extended family land ownership system" (collective "resty"). Collective "resty" existed in two forms: in individual title and group title. In the individual title, members of one family consisting of father, wife, sons, and daughters, as a group within the extended family, received lands from the extended family ("enda") for the length of time the family first taking continued to have descendants. In other words, the shares of the specific family were devolved to the sons or other members of the family. However, after extinction of the smaller family, the land reverted back to the extended family ("enda"). Nadel explains that this kind of land was subject to sale but priority had to be given to members of the family and if they declined, to fellow village members and lastly to strangers. The confusing thing is that Nadel mentions that this kind of land was only for the lifetime of the family, but fails to explain under what conditions sale would be allowed. Nadel also explains that the land disputes in this first form of family ownership were on family ("enda") levels and not on individual levels.[74]

On the other hand, the second form of collective "resty", group title, was similar to village land ownership except it was of narrow dimension. In this type of land tenure, ultimate ownership of land was vested with the extended family ("enda") instead of with the village. Members of the extended family had only a usufructuary right on the land of the extended family. They could not sell or mortgage their shares. However, they could lease their shares for sharecropping after each periodical distribution. As in the village land ownership system, land was redistributed at regular intervals to qualified members of the extended family. Usually, the period of redistribution was shorter than in the village land

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[74] *Ibid.* at 7-8.

ownership system.[75] To qualify for land, as in the "diesa" system of village land system, first, one male individual had to establish his descent from the founders of the specific family ("enda") by going back several generations of ancestors. The second requirement was that the male individual must be married and become independent of his parents by establishing his own house. After the death of the individual, the land reverted back to the control of the extended family.

As in village land systems, there were inequalities of landholding of different "endas" within villages or throughout different villages, as some families were composed of larger "enda" members than other families. It was, however, economically beneficial since it accommodated the claims of all members of the family.[76]

D. Private Property

(i). "Tselmi"

This type of tenure could originate from first occupation, purchases, or grants from chiefs or rulers. It was very different from the tenures considered above as it was hereditary.[77] Land usually passed from fathers to sons. In the absence of sons, brothers or other male issue of a family had a right to inherit "tselmi" land. It was only in the absence of male issue of the family that daughters and sisters were entitled to inherit "tselmi" land either on behalf of themselves or their sons. Otherwise, in the presence of male offspring, daughters were not allowed to inherit their father's land except in omission of dowry.

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[75] *Ibid.* at 8.
[76] Gebremedhin, *supra* note 45 at 24.
[77] Ambaye, *supra* note 40 at 7.

Daughters who did not receive dowry from their father during their marriage had rights equal to those of their brothers to inherit from their father's. However, in some places, for example, in the district of Tedrer in the former province of Akeleguzay, daughters and sons were equally entitled to inheritance of "tselmi".[78]

One interesting feature of "tselmi" was that holders of that land could sell it, mortgage it, lease it, donate it or dispose of it by will without restriction. Consequently, sons could be disinherited, for example by will, if the land was donated to another person.[79] Once a "tselmi" land was obtained, however, "the right to that land could never be forfeited by absence from the land or failure to work it".[80]

Hence, one individual could have more than one "tselmi" land in two or more villages if he proved he was a descendant from the owners of "tselmi" in each village. "tselmi" land was widely spread in the former provinces of Hamasien and Serayie.[81] It was the main recipe for the majority of disputes in the highlands of Eritrea. For instance, 75% of civil disputes before court in the former province of Serayie during the Italian colonialism concerned "tselmi" land.[82]

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[78] Nadel, *supra* note 48 at 8.
[79] Ambaye, *supra* note 40 at 7.
[80] Nadel, *supra* note 48 at 9.
[81] *Ibid.*
[82] Gebremedhin, *supra* note 45 at 24.

(ii). Purchase Land ('Meret-Worki')

Literally, this means a land obtained by purchase. The value of the land varied with the quality and size of the land. There were various rules about the transfer of purchased lands. In the former province of Serayie, resale of purchased land was unrestricted and the buyer had a right to resell it to any interested person. On the other hand, in the former provinces of Hamasien and Akeleguzay, the purchaser of the land had to offer it first to the original owner of the land at its original price, or if he declined, to relatives of the original owner, before reselling it to strangers. The transactions of sale and resale were not recorded in written documents. Rather, they were always in the memory of the people.[83] Such transactions had to be entered into in the presence of three witnesses and two guarantors for each contracting party. If the purchased land was a "resty", the guarantor of the seller had to be one of his kinsmen so as to assure the full willingness of the seller. Otherwise, the sale could later be revoked by any descendant or kinsmen of the seller who was aware of the transaction by offering the price for which the land was originally sold.[84]

> Of the three witnesses, one must be a Coptic priest, one a man of Mohammedan faith, and a third a goldsmith or a blacksmith. The inclusion of the priest lends solemnity to this weighty transaction. The Mohammedan witness and the goldsmith or blacksmith represent the community of strangers in the Coptic highlands, that is, that class of landless foreigners which can never own 'resty'. Their inclusion ensures the unassailable testimony of persons of necessity disinterested in land deals[85]

Purchases of land were widespread in Eritrean villages in the 1880's due to expansion of trade and increasing need for money because of the drought and famine that struck the

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[83] Ambaye, *supra* note 40 at 12.
[84] Nadel, *supra* note 48 at 10-11.

region during that period.[86] Purchased lands were transformed into absolute private property of "resty tselmi", when they passed from generation to generation.[87]

On the other hand, it should be mentioned here that Zekarias Ambaye's description of purchased land ("Meret-worki") is very different from that of Nadel. According to Zekarias, "meret-worki" was a conditional sale of land. The seller of the land had a right to get back his land, even after many years, provided that he refunded the money to the buyer. At the same time, the buyer of the land could not resell or transfer the land to third parties and the seller could not make the sold land the subject of a mortgage.[88]

(iii). "Gulti" Land:

The term "gulti" is applied to lands obtained by charters or grants from kings or rulers. In return, the holders of "gulti" would pay tribute to the grantor of the lands. In ancient times, the grants were subject to revocation if the holder of the "gulti" failed to pay tributes to the king or committed a crime against the king.[89] Nevertheless, after a time, "gulti" land became hereditary and was changed into absolute private property which could be transferred with no limitations.[90] The grants to churches, which will be discussed later, were the exception.[91] Such type of tenure was introduced into the highlands of Eritrea by Ethiopian emperors in the sixteenth century. The Ethiopian emperors started to grant lands as a "gulti" for their

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[85] *Ibid.* at 11.
[86] "Diesa Land", *supra* note 54 at 10.
[87] Nadel, *supra* note 48 at 11.
[88] Ambaye, *supra* note 40 at 10.
[89] G. W. B. Huntingford, *The Land Charters of Northern Ethiopia* (Addis Ababa: The Institute of Ethiopian Studies and The Faculty of Law of Haile Sellassie University, 1965) at 12.
[90] Ambaye, *supra* note 40 at 8.
[91] Huntingford, *supra* note 89 at 12.

armies, supporters, and monasteries and convents.[92] There were three types of "gulti" land: 1. "gulti seb": a grant made to ordinary people like musicians, witches, dream interpreters, fortune tellers, and so on. 2. "gulti chewa": a grant to noblemen, and 3. "gulti tsadikan": a grant to saints, monasteries and convents.[93] With the coming of powerful regional chiefs and rulers in the midst of eighteenth century, "gulti" land in the form of territorial fiefs[94] or "gulti amets" (land appropriated by force)[95] started to emerge. When a territory fell under one lordship, all land holders within that territory, including owners of "resty tselmi", were demoted to the status of tenant farmers who would pay tributes to the local chief. These fiefs were, however, totally abolished during Italian colonialism, even though the chiefs appointed by Italians continued to amass many tracts of land by occupying "resty" of extinct families, by false claims of inheritance, and special favors from the Italian colonial government.[96] Still, the belief of the people regarding land ownership by chiefs, kings, or governments, was very interesting. It is relevant here to quote the speech of Eritrean elders reported by Contrisini, an Italian traveler of the 19th and 20th centuries, quoted by many authors. "The statement that the land belongs to the government is made in order to affirm that the earth belongs to the king in the same way as the heavens belong to God. We allude to this statement when we wish to enhance the power of the government, but we do not thereby intend to refer to the ownerships of the fields".[97]

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[92] "Diesa Land", *supra* note 54 at 8-9.
[93] Ambaye, *supra* note 40 at 8.
[94] Nadel, *supra* note 48 at 20.
[95] Ambaye, *supra* note 40 at 9.
[96] Nadel, *supra* note 48 at 20.
[97] Aster Akalu, *The Process of Land Nationalization in Ethiopia Land Nationalization and the Peasants* (Lund, Sweden: Publications of the Royal Society of Letters at Lund, 1982) at 49.

E. Church Land ("Meret-Betekiristian")

In the traditional system, holding/ownership of land was not restricted only to villages, families, tribes, and individuals. The church was also one of those organs which could own land. Here, the term, "church", refers to the Orthodox Coptic Church. The historical origin of church lands was from grants or charters made by kings or rulers to monasteries and convents. Historically, the Ethiopian Coptic Church was almost one branch of the government. Kings, rulers, and, in general, people in power in the past history of Ethiopia and on the highlands of Eritrea would grant lands to churches for their political goals.[98] In the old times, another source of church lands was donations made to churches and priests by owners of "tselmi" and "gulti" lands and by villages themselves from the village land.[99]

There were two types of church land. The first type was that of the monasteries and convents. Such land was perpetual and free of tributes so long as the monastery or convent continued to exist but could not be alienated by sale.[100] However, the monastery or convent could lease it for sharecropping to peasants of the surrounding villages. The sharing of the crops was such that one fifth would go to the monastery or convent and the other four fifths would go to the peasant.[101] Some churches did not own land except the graveyard and other holy places, including sources of mineral water ("tsebel" and "maychelot"). Instead they received contributions from each member of the village for maintenance of services.[102] The second type of church land was that of the individual clergymen and priests. In tigrigna, this

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[98] Ambaye, *supra* note 40 at 19.
[99] *Ibid.* at 10.
[100] Akalu, *supra* note 97 at 48.
[101] Nadel, *supra* note 48 at 20.
[102] Ambaye, *supra* note 40 at 19.

type of church land was called "grant kahnat" (meaning priest land).[103] This type of land was held only for the lifetime of the individual. He could farm, lease, and mortgage it temporarily during his lifetime.[104] In some villages, priests had privileges. For example, in some villages of former provinces of Serayie and Akeleguzay, priests used to hold land almost as "resty gulti". Once the priest obtained his share from the collective village land, his land was not subject to redistribution during his life. Or, in some other "shehnah" villages of the district of Sen'afe of the former province of Akeleguzay, priests could get extra land from the village in addition to their shares.[105]

F. Temporary Individual Rights

In general, the rights to land that would be discussed under this subsection are secondary individual rights. They are temporary in the sense that the right exists either for a short period of time or for an indefinite period of time. Such rights were enjoyed as a result of the other existing types of land tenure. In other words, they did not stand as primary land rights. Rather, they existed concurrently with one of the above discussed land tenure types. I have deliberately included these temporary rights as a separate section since this discussion provides evidence of how much land was transferable in the Eritrean indigenous systems.

1. Individual Lease ("Kiray"): These were leases of land, such as, agricultural land, pasture land, or houses, entered into by interested individuals for the payment of rent in cash or in kind for the duration of a specified period of time with the possibility of renewal. It

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[103] *Ibid.* at 10.
[104] Akalu, *supra* note 97 at 48.
[105] Nadel, *supra* note 48 at 20-21.

was universal throughout Eritrea. There was one exception in the province of Serayie. A Coptic landlord and a Muslim individual could not enter into a lease of agricultural land even though this was possible between relations and strangers.[106]

2. Free Loan of Land ("Grat-messah"): Literally in Tigrigna, this means, "free field". Such a transaction was concluded between friends and relations, usually, for three years with possibility of renewal. The purpose of the free loan of land was the promotion of friendship.[107]

3. Family lease ("Grat-tsedbi"): This was a form of alliance between families for enhancing their friendly relations. It was a form of lease concluded between Christian landlord families and the Muslim strangers. It was entered into for payment of nominal rent for indefinite period of time. It usually passed through several generations. It could not be easily terminated. The user of the land, however, could not sublet the land without consent of the landlord. At a later time, there was a tendency to terminate this form of agreement due to the growth of population pressures. One grave consequence of this tendency was religious conflicts between the parties of the pact. This form of pact was widespread in the former province of Akeleguzay where the Muslim Saho people were living.[108]

4. Tenant Farmer ("Halawi-resty"): In Tigrigna, "halawi-resty" means guardian of the land. Often absent landowners of considerable amounts of land (owners of "resty tselmi" and "resty gulti") would give their land into the care of one tenant who would be

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[106] *Ibid.* at 15.
[107] *Ibid.*
[108] *Ibid.* at 15-17.

required to guard the land. The guardian of the land would use some lands free of tributes and arrange tenancy agreements with other farmers on behalf of the landlord. This type of tenure was in practice only in the former province of Serayie where large-scale feudal landlordism existed widely.[109]

5. Métier ("Grat-fereqah"): In Tigrigna, "grat'fereqah" means half field. It is usually referred to as sharecropping arrangement. In fact, such naming can include all the above discussed arrangements as the collateral payment for the land could be either in cash or kind (e.g. crops). This kind of arrangement took place when the landlord had many tracts of land, or when he was ill, aged, unable to work, or had no capital, money or labor to work on his land.[110] It was widespread through out Eritrea, and was of two forms. In the first form, the landlord contributed land and half of the seeds and labor while the tenant contributed oxen and farming equipment and the other half of the seeds and labor. In this case, both parties shared the crops equally. In the second form, the landlord contributed only the land and all the other inputs – the seeds, labor, oxen, and farming equipment were provided by the tenant. In this case, depending on the quality and fertility of the land, the landlord's share of the produce would be one-half, one-third, or one-quarter.[111]

6. Squatters' right ("Kwah-mahtse"): In Tigrigna,

> the term, 'kwah-mahtse' means stroke of the axe and refers to the first clearing of virgin or long uncultivated land. This right could be exercised only on 'resty' land and by members of the 'enda' owning the 'resty'. No aliens could enjoy this land right.... The 'kwah-mahtse was for no fixed period.... If the squatter left

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[109] Nadel, *supra* note 48 at 17.
[110] Gebremedhin, *supra* note 45 at 26.
[111] *Ibid.* at 25-26.

> the land uncultivated for one agricultural season, the 'kwah-mahtse right would lapse in August of that year...[112]

CONCLUSION

The above discussion of the traditional systems of land tenure in general and of the Eritrean indigenous systems of land tenure in particular indicates the diversity of African indigenous systems of land tenure and show how varied they were in terms of their nature, types, and modes of acquisition from one place to another, and from one community to another. The discussion also noted that making generalizations about African indigenous systems of land tenure is incorrect and would lead to misleading conclusions, interpretations, and proposed solutions. Hence, it is suggested that African systems of traditional land tenure cannot, overall, be expressed as "collective" or "communal". Even in that sense, in the indigenous systems, with the exception of pasture lands, land is not utilized collectively by all members of the community. Rights to the use and produce of the land are allocated on an individual basis.

More importantly, by discussing and describing practices and customs of individual entitlements to land in the Eritrean indigenous systems of land tenure, this chapter has sought to disprove the inaccurate conception that in African systems of traditional land tenure individual entitlement to land in the indigenous systems of land tenure was a foreign element. In many instances, application of western terminology of property to describe the concepts and notions of indigenous systems of land tenure might misrepresent their real

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[112] Nadel, *supra* note 48 at 18.

meanings and applications and hence, they should be described in their own terms if they are to accurately define the systems.[113]

Lastly, it should be emphasized that the adaptation of indigenous systems of land tenure should be encouraged rather than trying to replace them with superimposed alien systems which, in the past, have usually failed.

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[113] K. Tornvoll & M. Weini, *A Highland Village in Eritrea: A Study of the People, their Livelihood and Land Tenure during Times of Turbulence* (Lawrenceville, N.J.: The Red Sea Press, 1998) at 190-193.

CHAPTER TWO: LAND REFORMS UNDERTAKEN BY COLONIZERS

The focus of the discussion in this chapter is on the main land reforms and policies introduced by the successive colonial governments of present Eritrea who gave rise to the emergence of Eritrea as a separate political and geographical entity. Moreover, land reforms undertaken during the Eritro-Ethiopian federation and those made by the Eritrean liberation movements during the Eritrean armed struggle are also discussed in this chapter.

1. LAND REFORMS UNDERTAKEN BY ITALIANS

After the Berlin Conference of 1884-1885 dividing Africa between the various colonial powers, there was an increase in European ambitions to control more territories in Africa for purposes of obtaining cheap human labor, low-cost raw materials for industries, and marketplaces for their finished and semi-finished products. Accordingly, the Italians intensified their efforts to achieve their imperial and colonial ambitions. Having purchased land in Assab in 1869 from the local chiefs in the name of "Rubantino", a private company established by Joseph Sapeto, the Italians continued to extend their control. By the end of 1889, they were able to control almost the whole territory of present-day Eritrea. On 1 January 1890,they named the consolidated territories as "Eritrea" and declared Eritrea to be an Italian colony in Africa.

After this period, the Italians started to enact legislation to govern the affairs of the colony. My concern here will be the legislation relating to land and land reforms. Some measures relating to land were undertaken prior the official declaration of Eritrea as a colony. For instance, by the Decree of 1 June 1888, occupation of land of any sort within the territories of the colony was prohibited unless it was permitted by the governor of the colony. By the Decree of 22 October 1889, land sale was forbidden and all land sale transactions prior to this Decree were declared null and void. Formal laws began to be promulgated after the official declaration of colony. The first was the Law of 1 July 1890. This Act gave the Italian government the power to legislate laws concerning the affairs of the colony including those relating to land.[114] In 1891, a Royal Commission of Inquiry was established and sent to Eritrea to assess settlement possibilities and study administration malpractice in the colony.[115] Accordingly, Governor Franchetti, chief of the colony until 1895, pursued the policy of settling Italian emigrants in the colony.[116] For this purpose, a land law for the expropriation of land was legislated. According to this Act, land became owned by the state (crown).[117] Hence, a new form of land ownership system, "Terre Demaniale" (state land or crown land), emerged with Italian colonialism along-side the indigenous types of land tenure. By 1895, as a result of the Law, 412,892 hectares in total (125,642 in the highlands and 287,250 in the lowlands), constituting over 20% of the arable land in Eritrea, had been expropriated. There was an intention to settle two million Italian emigrants, which comprised 10% of the Italian population at that time, in the next two generations. The lowlands, however, because of the harsh weather, were mainly reserved for

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[114] Ambaye, *supra* note 40 at 50.
[115] H.M. Larebo, *The Building of an Empire: Italian land policy and practice in Ethiopia, 1935-1941* (New York: Oxford University Press, 1994) at 14.
[116] *Ibid.* at 14-15.
[117] Ambaye, *supra* note 40 at 50.

capitalist agriculture.[118] Agricultural research centers were set up in several places in the colony soon after 1891 to study the soil type, productivity, and seeds of good quality.[119]

The expropriation carried out in the first two years was extensive on the highlands for many reasons. Many of the highland peoples migrated to other places due to wars, epidemic disease and famine that struck the region during that time. Hence, the Italians considered these abandoned places as unoccupied and could easily expropriate them. Moreover, the climate of the highlands was favorable for settlement.[120] When the migrated peoples returned back to their villages, they found their land expropriated by Italians. This led to discontent and to the peasant revolution of 1894, headed by Bahta Hagos. This was a clear indication for Italians of the strength of the people's attachment to their land.[121] In addition to the policy changes caused by the opposition of the people, the Italians' goal of expansion was further frustrated by their defeat by the Ethiopians at the Battle of Adowa in 1896. As a result the Italians opted to place greater emphasis on using the colony as a source of raw materials, markets, and for permanent settlement of Italians than pursuing their expansion policy towards Ethiopia. The expropriation policy was amended after 1895 to provide for the payment of compensation for expropriated lands, and the government started to create employment opportunities for the people by establishing industries and large farms so as to displace the people from their lands. However, they continued expropriating lands and around 70,000 hectares were expropriated in the next twelve years.[122]

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[118] N. Murtaza, *The Pillage Of Sustainability in Eritrea 1600s-1990s: Rural Communities and Crying Shadows of Hegemony* (Greenwood Press, 1998) at 57.
[119] Larebo, *supra* note 115 at 14.
[120] *Ibid.* at 13 and 17.
[121] *Ibid.* at 17-18.

The immediate consequences of land expropriations by Italy on the indigenous systems of land tenure were the abolition of lands belonging to religious institutions and "resty gulti" of chiefs (territorial fiefs).[123] For instance, the land belonging to Convent Bizen in the former province of Hamasien was expropriated in 1894. The abolition of "resty gulti" of chiefs, however, was less significant since, as is discussed in the previous section, the chiefs continued to amass lands in other forms.[124]

The Royal Decree of 31 January 1909 No.378 was issued by the Italian parliament and contained provisions for the general legal framework of land policy in the colony. This Decree declared almost all lands as state land ("terre demaniale"). Art.5 of this Decree declares the following lands as belonging to the crown or state:

> A. Land which, prior to the occupation, had belonged to former governments; B. Lands of extinct tribes, clans, and families; C. Lands abandoned by tribes or clans for over three years; D. Lands governed under traditional systems of land tenure; E. Confiscated lands; F. Wooden forests; G. Mines, quarries, and saline; H. Lands on lines of migratory and pastoral nomads. Use of grazing and water is allowed within limit; I. Gulti given as rewards to persons, families, and churches will be allowed provided they dwelled thereon and set up houses.[125]

It is confusing that, while Article 3 of the Decree stated that "rights of land of the indigenous population enjoyed by the ancient local systems are respected", Section D of Article 5 of the Decree declared lands governed under indigenous systems of land tenure as belonging to the state. With regard to pastoral rights, Section H of Article.5 of the 1909 Land Decree declared lands along lines of migratory and nomadic pastoralists as lands of the

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[122] Murtaza, *supra* note 118 at 57.
[123] L.G. Castellani, *Recent Developments in Land Tenure Law in Eritrea, Horn of Africa* (Working Paper 37) (Madison, Wisconsin: Land Tenure Center, University of Wisconsin – Madison, 2000) at 5.
[124] Nadel, *supra* note 48 at 19-20.

state. And accordingly, the Italian government continued expropriating lands in the lowlands of Eritrea[126] until its withdrawal in 1941.

The subsequent decree, the Royal Decree of February 7, 1926 No.269 consolidated the provisions of the previous decrees. However, it emphasized the granting of concessions mainly in the lowlands by abandoning peasant settlement policies in the highlands. This shows that the political will for land expropriations in the lowlands of Eritrea remained unabated. According to the law, land concessions could be granted either to individual Italian peasants or to major investors, companies and charities.[127] Even local chiefs and missionary institutions could get grants of land in exchange for the services they provided to the government.[128] Other laws for the establishment of autonomous loan services and agricultural credit were enacted subsequently to enhance agricultural investments and production of cash crops.[129]

The grants of concessions led to the creation of three types of land rights. 1. "Proprieta assoluta": this was a form of absolute private property. It was unconditional, transferable, and had to be registered. It was contractual and was acquired on cash payment or in exchange for meritorious services performed for the government. 2. "Affittuario ussofructo": it was a contractual lease (usually, for nine, twenty, or thirty years in each agreement), conditional, and renewable after expiry. It was obtained through application for the payment of annual tax and the grant had to be registered. And, 3. "Terre demaniale":

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125 Ambaye, *supra* note 40 at 41-42.
126 Murtaza, *supra* note 118 at 58.
127 Castellani, *supra* note 123 at 5.
128 *Ibid.* at 5.
129 Ambaye, *supra* note 40 at 42-46.

This was administered by the government and individuals could only use it through application for seasonal use.[130] This last type of state land should not be confused with the land which was appropriated by the government for reasons of military, economic, or public functions[131] for the sole reason that individuals could openly access such lands either for farming, grazing, or for other utilities if the situation allowed.[132] This open access was not protected by law. Such state lands were prohibited areas and hence, individuals were prohibited or restricted from accessing lands which they had traditionally had access to.[133]

Another major change introduced by Royal Decree No.269 of 1926 was on the effects of registration of transactions of land and other real estates. According to the changes introduced, registration of such transactions would serve only as evidence of the transactions and not as a requirement for the validity of the transaction.[134]

Squatters' rights to land were the other mode of land right acquisition which received attention from the Italians. The Decree of 1929 recognized the squatters' right to land after prescription of forty years' occupation of land. According to the Decree, this prescription rule could override "resty" rights on land. This gave rise to discontent among returnee "resty" owners and their descendants. The reason for its adoption was that it could easily pave the way for immigrants and outsiders in villages to have land rights. This rule of prescription of forty years' occupation of land as a ground for squatters' right to land was introduced in the highlands of Eritrea in the 1880's by Ras Alula, chief of the highlands

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130 *Ibid.* at 35-36.
131 Nadel, *supra* note 48 at 18.
132 K. Mengisteab, "Rehabilitation of Degraded Land in Eritrea's Agricultural Policy" in G.H. Tesfagiorgis, ed., *Emergent Eritrea: Challenges of Economic Development* (Trenton, N.J.: The Red Sea Press, 1992) 109 at 110.
133 Gebremedhin, *supra* note 45 at 29.

during the reign of Emperor Yowhannes of Abyssinia. However, during that time, and the following three decades, "resty" rights on land, as an exception, could not be overridden by such prescription rule of occupation of land since the people's feeling of attachment was stronger to this type of land right than other types of land rights.[135] Nevertheless, squatters' right to land, except the "kwah mahtse" which is discussed in the previous section of this thesis, was not developed as part of the indigenous systems. Rather, it was clearly a reform introduced by Abysinian and Italian colonialization.

Another attempt made by Italians to override "resty" land tenures was to favor the village land ownership system ("diesa" or "shehna") over "resty" tenures. The Italians imposed the "diesa" system in many villages by abolishing their "resty" systems either, as claimed by some authors, at the request of local peasants for redressing the uneven possessions of land among the "endas" (families) in villages,[136] or for accommodating land claims of outsiders, immigrants, and in fact of Italians themselves.[137] However, it is incorrect to assume that the "diesa" or "shehnah" land systems were introduced for the first time by Italians, as is claimed by some writers. Rather, such systems have existed side by side with the other indigenous systems of land tenure before the Italian colonialization[138] but were widely spread and in some cases, imposed in many villages by the Italians for their political goals.[139]

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[134] Castellani, *supra* note 123 at 5.
[135] Nadel, *supra* note 48 at 17-18.
[136] Castellani, *supra* note 123 at 5.
[137] Gebremedhin, *supra* note 45 at 27.
[138] Nadel, *supra* note 48 at 14-15.
[139] Castellani, *supra* note 123 at 5.

2. LAND REFORMS UNDERTAKEN BY BRITISH ADMINISTRATION

When the Italians were driven out of Eritrea in 1941 by the victorious powers of the Second World War, the British replaced them and administered the colony until 1952. The colony's British administration was very short and its mandate to administer the colony was temporary. Hence, the British were not encouraged to make significant reforms in all fields of activities. Needless to say, the British did not undertake significant land reforms in the colony.[140] During the short administration, however, the British continued to expropriate lands, especially in the lowlands, mainly for the purpose of settling Italians who were displaced by the war. Around 70,000 Italians remained in Eritrea when the colony was taken over by Britain. It is not, however, recorded how much land was expropriated by the British.[141] It is reported that the forceful evictions of landowners and land users espoused opposition and uprisings in the 1950's against the British rule.[142] In general, reversing the Italian land policies, the British were aiming to distribute lands to individuals as individual plots. The goal behind this regulation was to form individual ownership of land, though it failed to create a widespread land reform in Eritrea.[143] The attempts made show that the British favored individual ownership of land over the village land ownership, believing that the village land tenure system had promoted tenuous control of land and people. Still however, the village land ownership system continued to be dominant.[144]

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[140] S.F. Joireman, "The Minefield of Land Reform: Comments on the Eritrean Land Proclamation" (1996) 95:379 Afr. Aff. 269 at 271-272.
[141] Mengisteab, *supra* note 132 at 111.
[142] Gebremedhin, *supra* note 45 at 29.
[143] Wilson, *supra* note 33 at 504.
[144] Joireman, *supra* note 140 at 271.

3. LAND REFORMS UNDERTAKEN DURING THE ERITRO-ETHIOPIAN FEDERATION

Like the period of British administration, this period of Eritro-Ethiopian federation was also of a short duration. It lasted from 15 September 1952 (when the U.N. General Assembly decision of 390 A/V to federate Eritrea with Ethiopia became effective) to 14 November 1962 (when the Ethiopian Imperial government officially annexed Eritrea as its fourteenth province).[145] Hence, significant land reforms were not introduced. Some attempts could be mentioned however. The Eritrean Constitution of that time contained a provision to protect the property rights of the Eritrean citizens. Article 37 provided that property rights and rights of a real nature, including those on a state's land, established by custom or law exercised in Eritrea by the tribes, the various population groups, and by natural and legal persons shall not be impaired by any law of a discriminatory nature. This did not, however, guarantee the respect of the prescribed rights. For instance, the pastoralists in the lowlands continued to suffer from forceful land evictions as their lands were state lands which could be openly accessed by everybody.[146] Another attempt was the law of 1953 issued by the Eritrean government concerning village lands. The purpose of this law was to extend the existing period of redistribution of village lands (from five to seven years or whatever the period was) to twenty-seven years with the aim of encouraging investments and increasing production and security of landholding. Nevertheless, this law was not put into force for unknown reasons.[147] Another change was in the re-emergence of church lands. During the British administration in the 1940's the Unionist Party was

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[145] Iyob, *supra* note 8 at 83 and 96.
[146] Wilson, *supra* note 33 at 505.
[147] "Diesa Land", *supra* note 54 at 22.

established in Eritrea, with the goal to unite Eritrea with Ethiopia. Ethiopian emperor Haile Sellassie I, as his predecessors had done before him, clandestinely involved himself in Eritrea by using the Coptic Orthodox Church as a tool for preaching to the Eritrean people about unity with Ethiopia and for mobilizing the support of the Eritrean people. For these purposes, he promised restoration of all expropriated church land under his rule. After gaining control of Eritrean land following the federation, the Ethiopian emperor began to restore the expropriated church lands to their previous holders and also to grant new land to the church and the clergymen.[148]

4. LAND REFORMS UNDERTAKEN DURING ETHIOPIAN COLONIALISM

A. Land Reforms Undertaken by Ethiopian Governments

In the 1950's and 1960's, Ethiopia took steps to modernize its legal system and restructure its judiciary. Accordingly, with the help of foreign experts and drafters, the Ethiopian parliament promulgated several codes relating to civil, criminal, and procedural matters. The *Ethiopian Civil Code,1960* was one of the enacted codes.[149] Matters relating to land were dealt with in this *Code,* in the Book of Law of Property, relating to immovables. Issues, such as ownership, usufruct, servitudes, use of water, urban planning, formation of agricultural communities, expropriation of immovables, registration of immovables, and so on, are covered in detail. The provisions relating to agricultural communities were not put

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[148] J. Gebremedhin, *Peasants and Nationalism in Eritrea: A Critique of Ethiopian Studies* (Lawrenceville, N.J.: The Red Sea Press, 1989) at 67-68.

[149] Note: I put this text as an introduction in this sub-section since it is my belief that those reforms were undertaken more or less by Ethiopian government rather than by the Eritro-Ethiopian federal government despite the fact that they were undertaken during the timeframe of the Eritro-Ethiopian Federation.

into force throughout Ethiopia or Eritrea.[150] The goal of these provisions was to recognize the traditional collective ownership of land by a village or tribe.[151] Also, the sections relating to registration of immovables were effective only in urban areas.[152]

Under the Haile Sellassie regime, all land in principle belonged to the king. The Ethiopian Constitution (Revised Constitution of 1955) stated that:

> All property not held and possessed in the name of any person, natural or juridical, including all land in escheat and all abandoned properties, whether real or personal, as well as all products of the sub-soil, all forests and all grazing lands, water courses, lakes and territorial waters, are state domain.[153]

Despite the enactments made, the existing land tenure systems continued to be practiced unabatedly. In other words, the highlands of Eritrea remained dominantly under village land ownership and the lowlands under state land holding systems. With the outbreak and escalation of the Eritrean armed struggle for independence in the western lowlands, the impacts of the domination were not as great as in the highlands.[154]

The most significant land reform introduced by Ethiopian regimes was the land reform of 4 March 1975,[155] enacted by the Ethiopian government during Mengistu's regime. It was known as the *Proclamation of Land for the Tillers*, Proclamation No. 31/1975. According to this *Proclamation*, all land in Ethiopia was declared to be the collective property of Ethiopian peoples. The holder of the land had only a possessory or usufruct right to the land. That is,

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150 Castellani, *supra* note 123 at 5-6.
151 Art. 1489 Ethiopian Civil Code (1960).
152 Castellani, *supra* note 123 at 6.
153 Abdalla, *supra* note 2 at 15.
154 *Ibid.* at 15.

land could not be sold, mortgaged, leased, rented, or inherited.[156] In principle, every peasant had a right to equal shares of arable land, though this could vary from place to place depending on the availability of useable land. In any case, however, the share of one individual could not be more than ten hectares, though in practice the share of each family was not more than three hectares. As under the traditional village land system, land was to be distributed periodically over several years. Becoming a resident of one specific place was the main criterion for land entitlement in that locality. As a result, newcomers such as blacksmiths, artisans, and immigrants were given equal rights to land under the law as the other members of the village.[157] Unlike in the traditional village land system, the size of arable land distributed to each family varied with the size of the family. For example, a family with one, four, or seven members received land of different sizes. There was, however, a lot of malpractice in the selection of eligible land-users and in determining who should receive which land. This was mainly due to corruption and party favoritism.[158]

The *Proclamation of Land for the Tillers of 1975* also recognized full and equal rights of women to land. In practice, nevertheless, land was distributed to each family in the name of the husband as he was still the head of the family and hence, it seemed that wives' entitlement to land emanated from their marital relationship rather than from their own recognized rights. The law also abolished tenancy, and debts due to landlords from tenants were cancelled by law. However, the tenant was allowed to keep using the oxen and farm implements of the landlord that the tenant was previously using for only three years. After expiry of this period, either compensation had to be paid to the landlord or the tenant had to

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[155] *Proclamation of Land for the Tillers,* Proclamation No. 31/1975 (Ethiopia).
[156] U.N. F.A.O., *Land Reform, Land Settlement, and Cooperatives: Country Review Ethiopia,* No. 1-2 (1980) at 53-54.
[157] *After the Derg, supra* note 38 at 2-6.

give the resources back to the landlord. In fact, the peasants were not happy with this last provision as their belief was that such resources were products of their toil and work.[159] Another provision was that hiring labor was also prohibited except in special circumstances. That is, landholders who could not work themselves on their land, such as women, the elderly and the disabled, were allowed to hire labor for tilling their land. According to the *Proclamation*, three types of landholding were recognized for the purpose of farming: private holding, collective holding, and government farms.[160] Cooperative peasant associations and collectivization's were to be finally established throughout the country to implement the principles of socialism.[161]

Due to the continued liberation wars, influences of the traditional norms and systems, political attitudes of the people, and other factors, the impacts of this land reform in Eritrea had little significance. For instance, in the first three or four years, the *Land Law Proclamation* was not implemented in Eritrea as the Eritrean liberation movements managed to control almost all territories of Eritrea. Even after the Ethiopians recaptured the territories, the impacts of the land law were not as they were intended, or the impacts were very minimal compared with those felt in the other provinces of Ethiopia. To take an example, in the 1980's, there were only thirty-five peasant associations in the former Eritrean province of Serayie, and of the 213 state farms that were established in the combined country of Ethiopia and Eritrea (which was called Ethiopia), none of these were situated on Eritrean land.[162]

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[158] Castellani, *supra* note 123 at 6.
[159] Akalu, *supra* note 97 at 69-70.
[160] *Ibid.* at 69-71.
[161] *After the Derg, supra* note 38 at 3-4.

In March 1990, a new era was opened. Ethiopian president, Mengistu Hailemariam, being forced by many factors including spreading civil wars, deterioration of the economy, and the termination of Soviet economic assistance, declared that the Ethiopian government would abandoned socialism and adopt a mixed economy with small-holder agriculture.[163] Accordingly, the process of privatization was introduced. It was declared that the peasants were the sole owners of the crops, plants, and trees grown on their land. The usufruct rights of peasants to use land became inheritable. Restrictions on the sale of crops and duties to deliver quotas of crops were lifted. The peasant associations and cooperatives were given the right to dissolve themselves. Accordingly, in villages, the periodical land redistributions were stopped and the established peasant associations and producer cooperatives started to be dismantled.[164]

The reforms introduced during this time did not last long. Hence, assessments which could be given for such reforms would be premature. Moreover, the impacts of these reforms in Eritrea were insignificant as the Ethiopian government was losing more territories in Eritrea from time to time to the Eritrean liberation forces, which ultimately led to *de facto* Eritrean independence in May 1991.[165] Soon after, the victorious Eritrean Peoples Liberation Front (E.P.L.F.) established the Eritrean provisional government in Asmara, the capital of Eritrea. After few days, in Ethiopia, Mengistu's regime was overthrown and Ethiopian-based rebels came to power.[166]

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[162] R. Pateman, *Eritrea: Even the Stones Are Burning*, 2nd ed. (Lawrenceville, N.J.: The Red Sea Press, 1998) at 171-172.
[163] *After the Derg, supra* note 38 at 2-3.
[164] S. Pausewang "Forward" in S. Pausewang et al., eds., *Ethiopia: Options for Rural Development* (New Jersey: Zed Books Ltd, 1990) at 1.
[165] Joireman, *supra* note 140, at 269.
[166] R.A. Rosen, "Constitutional Process, Constitutionalism, and the Eritrean Experience" (1999) 24 N.C.J. Int'l L. & Com. Reg. 263 at 273.

B. Land Reforms Undertaken by the Eritrean Liberation Movements

Two principal liberation movements have participated in the history of Eritrean armed struggle for independence fought against the Ethiopian domination for thirty years since 1961.[167] They are the Eritrean Peoples Liberation Front (E.P.L.F.) and the Eritrean Liberation Front (E.L.F.). The Eritrean independence movements, though essentially aimed at achieving political independence through military and diplomatic efforts, were also agents of social change. They initiated and implemented many policies that had far-reaching consequences. In regard to land questions and problems, the two movements had different approaches.

Being directed by the notion of self-reliance, the E.P.L.F. established an agricultural commission in 1975 in order to be self-sufficient in food production for the army and the people by developing and introducing mechanisms for enhancing agricultural production.[168] To pave the way for undertaking more land reforms, the E.P.L.F. began to politicize the rural peasantry to obtain popular support and to generate commotions and emphasize dissatisfactions that could bolster their movement. In the liberated and semi-liberated areas, E.P.L.F.'s cadres set up clandestine village committees for educating the people. Within a short period of time, the traditional village-chief administration was abolished and replaced by challenge (resistance) committees consisting of fifteen members. The committees were finally replaced by democratically elected village assemblies with executive committees. The

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[167] Note: the Eritrean armed struggle was launched one year prior the official annexation of Eritrea by Ethiopia in 1961 and this creates an overlap between the periods of Eritro-Ethiopian federation and that of Ethiopian colonialism.

[168] E.P.L.F Agricultural Commission, "Problems, Prospective Policies and Programs for Agricultural Development in Eritrea", supra note 132, 89 at 90-91.

village assemblies controlled all land and were given the power to redistribute it fairly and equally to all adults of the village, married men and women. One great development in this village politics was that women were equally and actively participating for the first time in Eritrean history in the elections and the established committees and assemblies and were fighting for their rights to be respected. After the process of politicization, starting from the time when most territories of Eritrea were unchained from Ethiopian despotic rule, i.e., 1974-1975, the E.P.L.F. began to take measures to redistribute land to the peasantry pursuant to the rules of the traditional "diesa" system by taking control of lands belonging to the church and the land aristocrats. Surprisingly, between the years of 1976 and 1981, land was redistributed to all villagers regardless of ethnic origin, family descent, sex, or religion in 162 Eritrean villages, out of which 138 villages were under the "diesa" system and the remaining 24 villages were under "demaniale" system. In many of the villages with "diesa" systems, periodical land redistributions had not been held for decades and consequently, the landholding in such villages was developing into system of private property.[169] For instance, the last periodical land redistribution held in the village of Aziyien, a village near Asmara, was in 1922. The land redistribution of 1974 in Aziyien by the E.P.L.F. as a result benefited 1200 peasants residing in the village.[170]

Entitlement of women to land and recognition of their rights was the most radical change and revolutionary achievement of the armed struggle, though the majority of the peasantry did not support such reform since it was contrary to the traditional systems. Briefly, the E.P.L.F's reforms of land redistributions were based on the tenet of the

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[169] Pateman, *supra* note 162 at 160-162.
[170] *Ibid.* at 162.

modernization of the traditional village ('diesa') tenure system.[171] Another endeavor of the E.P.L.F. was the establishment of agricultural cooperatives in the lowlands and in particular around Tesene for teaching the public advantages of cooperatives. Here the Front was adhering to principles of socialism. However, these experiments failed as the results attained were very discouraging, causing such efforts to be abandoned.[172]

A land reform in respect of pastoralists is another aspect which needs to be discussed here. Though definite rules concerning pastoralists were not enacted, the E.P.L.F. was enticing pastoralists and nomads to settle and reside in villages. This emanated from social services, such as, the establishment of health centers for people and livestock, educational institutions, infrastructure, and other social facilities. Having recognized that forceful and involuntary sedenteralization and settlement of semi-nomads and pastoralists resulted in failure, the E.P.L.F. sought to achieve the successful settlement of nomads through measures conducted voluntarily and after intense educational campaigns to the concerned peoples, and through the provision of social services. The policy adopted at the Second Congress of the E.P.L.F. of 1987 was the result of this approach, even though the implicit policy of E.P.L.F. on pastoralists was to settle them in villages. The national program of the E.P.L.F. of 1987 stated the Front's policy towards pastoralists as follows: "Provide the nomads with livestock breeding, veterinary and agricultural education as well as advisors, experts and financial assistance to enable them to lead settled lives, adopt modern means of animal husbandry and agriculture and improve their livelihood".[173]

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[171] Castellani, *supra* note 123 at 6-7.
[172] E.P.L.F Agricultural Commission, *supra* note 132 at 90-91.

On the other hand, land reforms and policies introduced and adhered to by the other liberation front, the Eritrean Liberation Front (E.L.F.), were not uniform and were continually changing. In the first place, as the landlords were the principal supporters of the movement, the E.L.F. was not in favor of reforms of land redistribution. After time, however, the Front began to take measures for initiating and enforcing reforms of land redistribution similar to those undertaken by the E.P.L.F.[174] The land redistribution policy carried out by the E.L.F. varied from one place to another. For instance, unlike the E.P.L.F., the E.L.F. had in some instances consolidated several villages into one level for the purpose of land redistribution.[175] Again, the E.L.F.'s approach to land reforms relating to pastoralists was completely different from the E.P.L.F.'s. That is, the E.L.F. was in favor of pastoralists continuing to practice their traditional way of living and graze their stocks by moving from place to place. The Front was against policy of pastoral settlement in villages even though many said that the fact that the main supporters of the Front were pastoralists and the fact that most of its members were Muslims highly influenced the Front to adopt this approach.[176] The E.L.F.'s activities within Eritrea stopped at the beginning of the 1980's as it was forced into exile, having been defeated in the Eritrean civil war by the E.P.L.F. who ultimately achieved Eritrean *de facto* independence in May 1991.[177]

In general, both Eritrean liberation movements, the E.P.L.F. and the E.L.F., have brought about significant social changes in Eritrean society by enacting and implementing laws and policies in the liberated and semi-liberated areas during the armed struggle.

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[173] E.P.L.F Second Congress, Program, *National Democratic Programme Of The Eritrean People's Liberation Front*, (March 1987) at s.2-A(5).
[174] Castellani, *supra* note 123 at 6-8.
[175] "Diesa Land", *supra* note 54 at 28-30.
[176] Joireman, *supra* note 140 at 272-273 and 279.

To sum up, the different successive colonial powers in Eritrea have introduced and adhered to various laws, policies and reforms relating to land issues. Mainly, state land was introduced by the Italians to replace the indigenous types and was strengthened and expanded by the subsequent successive colonizers. As a result, areas under the control of pastoralists and many other pieces of land which were under the traditional systems were declared as state land and the denial of rights of indigenous peoples continued, especially in the case of pastoralists. The colonizers also attempted to dismantle the traditional land tenure systems even though it proved impossible to achieve this completely on the ground. However, all the reforms introduced during the colonial era should not be seen as negative. For instance, the land reform of 1975 by Ethiopian government was meant to redistribute land to all adult villagers without any discrimination even though women's rights to land was through their husbands as the husband remained to be head of the family. Again, women's entitlement to land with no discrimination even in practice was another significant reform and the most vigorous one introduced during the colonial era by the Eritrean Peoples Liberation Front (E.P.L.F.).

In general, despite numerous attempts made by the successive colonizers, multiple forms of land tenure continued to exist prior to the Eritrean independence.

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[177] Rosen, *supra* note 166 at 272-273.

CHAPTER THREE: LAND REFORMS AFTER THE INDEPENDENCE

1. INTRODUCTION

The *de facto* Eritrean government of 1991 inherited a devastated economy and diverse types of land tenure. Remnants of the traditional type of land tenure and the reforms introduced into by recent colonizers still existed and were believed to be a recipe for chaos and conflicts between and among the peoples.[178] Immediately after the *de facto* Eritrean independence of 1991, the established provisional Eritrean government was engaged in taking a wide range of general and specific measures in all fields with the goal of rebuilding and reconstructing the severely devastated economy, as the nascent state started on the long path of development. It adopted various laws and policies to achieve its goals. The government understood that the issue of land and land tenure was one of the cardinal polemical issues which required high priority and the implementation of real and concrete measures. A few months before the official independence of May 1993, a land commission was established with duties and powers to investigate land tenure issues and problems in Eritrea and to prepare a draft national land law proclamation.[179] This body was instituted first as an independent authority of the government. In 1996, however, the Land Commission was combined with a Housing Commission and formed the Land and Housing Commission. In early 1997, however, the Land Commission was separated from the Housing Commission and again restructured as a separate department within the Ministry of

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[178] M.Negash, "Investment Laws in Eritrea" (1999) 24:2 N.C.J. Int'l L. & Com. Reg. 313 at 364-365.
[179] Gebremedhn, *supra* note 45 at 237.

Land, Water, and Environment.[180] In this thesis I will use the phrase "Land Commission" to refer to this body in all its incarnations.

The land Commission began discussing the critical issues and problems relating to land in March 1993 and conducted various studies and investigations. The Commission reconsidered the possibilities for privatization, adoption of a modified type of traditional "diesa" land tenure system in which the periodical redistribution would be extended from five to seven years to twenty years, and maintaining the traditional "diesa" system. Finally, however the Commission rejected all of these alternatives and instead proposed a new system in which all land would be under state ownership and individuals would have a usufruct right to land for their lifetime. This system was adopted in the *Land Law Proclamation*, Proclamation No. 58/1994.[181] The contents of this *Proclamation* will be discussed in detail in the following sections of this thesis.

In the meantime, the Eritrean government issued a land policy as part of its *Macro-Policy* in 1994. This land policy has enshrined the basic guidelines and policies for the enactment of land laws and reforms. Section 10 sub-section 1 of the *Macro-Policy* stated the following as its main objectives in regard to land policy: "to establish a revised tenure system that encourages long term investments in agriculture and prudent environmental management; to ensure women's right to land on equal bases with men; and to promote commercial agriculture".[182] Its next sub-section further specifies in detail the main constitutive elements of the land policy as follows:

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[181] Negash, *supra* note 178 at 365.
[182] *Macro-Policy, 1994* (Eritrea). at s.10.

> Ownership of land in Eritrea is the exclusive right of the government and the other rights accruing to land must be recognized and specifically permitted by the government. Every Eritrean citizen and all foreign investors have the right of access to land for farming, for pasture, for housing and for development purposes. Law regulates the conditions under which these are permitted. Such rights are usufruct rights. Land granted in this manner is neither divisible nor inheritable. Nor can it be sold or otherwise disposed of. However, land may be leased or subjected to share cropping arrangements, etc. Usufruct rights to land are granted to every Eritrean upon attainment of majority age or legal year 18 or upon emancipation as provided by the *Transitional Civil Code of Eritrea* without regard to sex, religion, or marital status. The usufructuary has to utilize the land in order to maintain his or her rights.... Land taken away from holders of usufruct rights shall be compensated....[183]

In short, after we discuss the contents of the *Proclamation*, we will realize that the *Land Law Proclamation*, Proclamation No. 58/1994, was more or less a reiteration and reflection of the guidelines of land policy embodied with in the *Macro-Policy* of 1994.

2. LAND RIGHTS AND THE CONSTITUTION

It might seem ivory-towerish to discuss here the constitutional bases for land rights in Eritrea where the country is still without any written constitution on implementation and where all sources of land rights in the country are not derived from a constitution. However, this does not mean such a discussion is unnecessary, as the country is embarking on initiatives for implementing the Constitution after a draft was ratified in May 1997.[184] The country's National Assembly ratified with more than two-thirds majority vote the draft Constitution. This was the outcome of three years of debate and consultation with the Eritrean populace both within Eritrea and externally. No date was set during the ratification

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[184] *Ibid.*, at preamble.

process for when the Constitution would become effective.[185] As the body of the Constitution is complete, it is important to examine how land-rights and land-ownership issues are dealt with in this ratified Eritrean Constitution, as the discussion might help to understand conformity of the land laws with the Constitution.

The basis for property rights and in fact for land rights and interests in Eritrea under the Constitution is Article 23. Pursuant to this provision, every citizen has the right to own and dispose of any property except land and the natural resources below and above the surface of the land and may dispose of by will or by law his property to his heirs or legatees.[186] The exception to this rule is put in the next sub-section. It states that all land including all natural resources below and above the surface is under the ownership of the Eritrean state.[187] In other words, individuals cannot own land or its natural resources. However, the interests or rights that individuals can have on or to land are to be determined by law.[188] One cannot understand what interests he can have in land according to the Constitution. Fundamental rights of property and fundamental rights to land do not apply only in systems of individual land ownership. As land is the wealth of a country and is the main economic resource which supports an individual's life, especially where the main economic activity of a country is agriculture and pastoralism, it cannot be denied that individual interests or rights on or to land are fundamental rights which should be guaranteed by a constitution, even where the individual has no rights of ownership of the land. In this respect, the failure to define an individual's basic rights and interests to land in the

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[186] *Eritrean Constitution, 1997* art 23(1).
[187] *Ibid.*, art 23(2).
[188] *Ibid.*

Constitution and leaving them to be determined by ordinary laws casts a shadow on the constitutionality of those laws.

Other provisions of the Constitution do, however, support the claim that the Constitution enshrines sufficient guarantees for safeguarding the fundamental rights of all individuals which are embodied within the Constitution. Article 14(1) of the Constitution clearly guarantees "equality of all persons before the law" and hence, the grant or deprivation of any right based on any type of discrimination would be, with no argument, unconstitutional and unacceptable. The reason is that "No person may be discriminated against on account of race, ethnic origin, language, color, gender, religion, disability, age, political view, or social or economic status or any other improper factor".[189] The same is true in respect of rights and interests relating to land. Moreover, the government has the duty to ensure the abolition of existing inequalities[190]and to bring about a balanced level of development in all regions, since the Constitution imposes upon the state the responsibility to manage all land, water, air, and all its natural resources in a sustainable manner in the interests of present and future generations.[191]

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[189] *Ibid.*, art 14(2).
[190] *Ibid.*
[191] *Ibid.*, art. 8.

3. ISSUES OF LAND RIGHTS AND THE *LAND LAW PROCLAMATION*

A. General Principles

The *Land Law Proclamation*, Proclamation No. 58/1994, is the core body of law which defines and determines the types of rights to land which an individual may enjoy.[192] It also defines the powers, duties, and functions of the Land Commission, which is responsible for administering and allocating land, and empowers the Commission to establish an effective and modern system of land registration.[193] We need to examine first the general principles and guidelines enshrined in this *Land Law Proclamation* in order to have an overview of the law.

The *Land Law Proclamation of 1994* vests the ownership of all land in Eritrea in the state.[194] All other rights to land should derive from this source and can exist only by grants from the government or by recognition and approval of the government. The government can attach preconditions and criteria to these rights regarding the use and management of the land.[195] These rights may be in different forms, such as agricultural usufructs, land for housing ("tiesa"), leaseholds, and other subsidiary rights.[196] They will be discussed in detail in the next section. The government body which is entrusted with the power to grant land rights is the Land Commission or any other body delegated by it.[197] Every citizen who attains a majority age (18 years) or is a minor emancipated in accordance with the provisions of the

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[192] See *Land Law Proclamation, supra* note 11, art. 3-38.
[193] *Ibid.*, art. 55-57.
[194] *Ibid.*, art. 3(1).
[195] *Ibid.*, art. 3(4).
[196] *Ibid.*, art. 4.

Transitional Civil Code of Eritrea is entitled to land rights in a general sense,[198] even though additional criteria may need to be met for each specific right. No kind of entitlement to land can be based on any type of discriminatory criterion, such as sex, ethnic origin, religion, or locality. In particular, equality of women with men is fully guaranteed and protected.[199] In addition to citizens, foreigners can also obtain land for various purposes under a special authorization of the president of Eritrea.[200] As the state is the owner of all land, the government has "the right and power to expropriate land on which people have settled or land that has been used by others, for purposes of various development and capital investment projects aimed at national reconstruction or other similar purposes"[201] upon payment of a fair and adequate compensation commensurate to the loss suffered by the right-holder.[202]

B. The Basic Land Rights under the Law

(i). Agricultural Usufruct

According to Article 4(2) of the *Land Law Proclamation,* Proclamation No. 58/1994, as mentioned above, every Eritrean citizen who attains the majority age (eighteen years and above) or is a minor who is deemed as emancipated according to provisions of the *Transitional Civil Code of Eritred*[203] has a right to obtain a usufruct right land on land in the rural areas for agricultural purposes. The following criteria must be satisfied however. A. The citizen must be a permanent resident in the rural areas or have government permission to

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[197] *Ibid.*, art. 3(6).
[198] *Ibid.*, art. 7.
[199] *Ibid.*, art. 4(4).
[200] *Ibid.*, art. 8.
[201] *Ibid.*, art. 50(1).

settle in the rural areas; B. The citizen's means of livelihood must depend on farming activities;[204] and C. The citizen must fulfill his national service duties[205] and must apply for obtaining the usufruct right.[206] An agricultural usufruct is subject to payment of an annual tax.[207] One important and radical feature of the *Proclamation* is that, unlike in the traditional systems, wives are entitled to land in their own right and not merely through their husbands. In the case of entitlement to agricultural usufruct, for instance, both the wife and the husband can obtain land for farming as "individual rights".[208] The same is also true in the allotment of other land rights, as will be discussed in the following sections. Pursuant to Article 11 (1) of the *Proclamation*, the land to be allocated for farming is to be, as much as possible, of an equal size in all places of land allocation. The law does not, however, specify any standard size of land for allotment. Nevertheless, the practices of land allotment for refugee returnees and demobilized freedom-fighters show that the land size allotted for farming per family was two hectares[209] even though such allotments were not done in accordance of the provisions of the *Land Law Proclamation*.[210]

The eligible person who is granted a usufruct right has the right on the allotted farming land and may use the land for his lifetime.[211] I believe that this secures the means of livelihood of an individual for his lifetime. Upon the death of the individual, the land reverts

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[202] *Ibid.*, art. 50(4) and 51 (1).
[203] *Ibid.*, art. 7.
[204] *Ibid.*, art. 6(2).
[205] *Regulation to Provide for the Procedure of Allocation and Administration of Land*, Legal Notice No. 31/1997 (Eritrea) [hereinafter *Regulation of Allocation*], art. 3(10).
[206] *Ibid.* and *Land Law Proclamation, supra* note 11, art 14(4).
[207] *Regulation of Allocation, ibid.*, art. 3(6).
[208] *Land Law Proclamation, supra* note 11, art. 15(1).
[209] Lindsay, *supra* note 3 at 23.
[210] *Ibid.*
[211] *Land Law Proclamation, supra* note 11, art. 12(2).

back to the government.[212] It should be recalled here that the heirs of the deceased usufructuary have the right to inherit uncollected produce or accessories left behind by the deceased usufructuary.[213] Moreover, as will be discussed below, heirs of the deceased are also entitled to be compensated for the value of the improvements made on the reverting land by the deceased. In redistributing the reverting land, priorities for allotment may be given to surviving adult children of the deceased who wish to obtain a usufruct right over the land previously held by the deceased. Where the deceased has made substantial improvements on the reverting land, the priority is given more weight. Where a child chooses to retain the usufruct right of his parent, he is deemed to surrender his right to receive a usufruct right for farming. Alternatively, if he has already obtained such a usufruct right, he must surrender this back to the government.[214] The reason is that one person cannot have two usufruct rights for farming or housing purposes in more than one place.[215] Where the surviving adult children are more than one, they must agree who will retain the right since partitioning the land is prohibited. If priority for reallotment is not given to a surviving adult child after substantial improvements have been made, the value of such improvements made must be paid to the surviving children or heirs of the deceased. The onus of paying the value of the improvements made is on the new usufructuary. If the new usufructuary is unable to pay, the government must pay. In this case, the new usufructuary must reimburse the government for the amount paid through an installment payment

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[212] *Ibid.*, art. 13(5).
[213] *Ibid.*, art. 24(2).
[214] *Ibid.*, art. 24(3).
[215] *Ibid.*, art. 25(1).

scheme.[216] It should be noted here that compensation is due only for improvements made on the land are "substantial".[217]

On the other hand, if the individual is survived by a minor child or children, the land is transferred to them. This should not be confused with the pre-emption right to redistribution. The land is simply retained for the sake of the minor children's interests. The minor children can have a pre-emption right to redistribution of the land retained for them when they attain a majority age or are deemed emancipated according to law. The cases for retaining the land for the benefit of minors can be explained as follows. If one of the spouses is deceased being survived by one minor child or minor children, the living spouse retains the usufruct right of the deceased spouse and may use the land for the interests of the minor child or children. Again, if both spouses are dead and are survived by two or more minor children, the usufruct right of both parents is transferred to the children to be utilized for their interests. If only one minor child survives both parents, the usufruct right of only one of the parents transfers to the child to be used for his of her interests and the land of the other parent is repossessed by the government for redistribution.[218] Similarly, as stated in the above, if the land held by a deceased spouse reverts back to the government and is realloted to a new usufructuary, the minor children (as they are heirs of the deceased) have the right to inherit uncollected produce or accessories left behind by the deceased and have also the right to claim for the value of the improvements made by the deceased as compensation. The mode of payment of the compensation is the same as stated earlier.[219]

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[216] *Ibid.*, art. 24(3-4).
[217] *Ibid.*, art. 24(4).
[218] *Ibid.*, art. 12(3-4).
[219] See *Ibid.*

This type of land right, an agricultural usufruct, can encourage the right-holder to make investments and improvements and hence, land productivity should increase.[220] This is because the usufructuary should feel more secure, since the usufruct right will not terminate until his death, and, as stated in the above paragraphs, the law makes beneficial povision for his surviving minor or adult children.

On the other hand, the usufructuary of agricultural land does not have complete freedom in using and managing the land. He cannot use the land for any purpose other than agriculture. He cannot mortgage it.[221] Even in the cases where an agricultural usufruct can be transferred for arrangements of share-cropping pursuant to Article 26 of the *Proclamation* or where the agricultural usufruct could be leased pursuant to Article 27, the land administrative bodies (bodies responsible for distributing land) have full control in monitoring all those agreements. I believe that this government control and monitoring should be lessened to the minimum. Because of the burdensome government control the *Land Law Proclamation* imposes, one scholar called the created agricultural usufruct a "new version of small scale administrative concessions".[222]

This does not mean that the usufructuary of farmland is subject to unmanageable restrictions and obligations. He has the right to make improvements and enjoy the fruits of the land for his lifetime; he can fence his land; he can cut branches of trees springing from adjoining trees; he can prevent others from entering his land save in circumstances of necessity, for instance escaping from danger; and he can delimit the boundaries of his land.

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[220] K. Mengisteab, "Eritrea's Land Reform Proclamation: A Critical Appraisal" (1998) 2:2 Eri. Stud. Rev. 1 at 6.
[221] *Land Law Proclamation, supra* note 11, art. 25(1).
[222] Castellani, *supra* note 123 at 12.

More importantly, he also has the right to convert his right of usufruct into leasehold if he wishes to utilize the land in other manners.[223] The holder of the right can also enter into arrangements of sharecropping if he does not have the resources to use the land and also has the right to lease the farming land under lawful and acceptable terms and conditions.[224] According to Articles 22-23 of the *Proclamation*, on the other hand, the usufructuary has the duty to use the land properly and with due care, to allow installations of facilities for public use such as water-pipes and electric or gas lines, and not to obstruct the works and decisions of the land administrative bodies.

Lastly, we need to see the causes which would lead to termination of the right of an agricultural usufruct and restoration of the land to the government: 1. if the usufructuary ceases to use the allotted farming land for more than two years without good cause; 2. if the usufructuary leaves his place of permanent residence and settles in another place and stops using the land for two years; 3. if the means of livelihood of the usufructuary becomes other than farming; 4. if, as alluded to above, the usufructuary dies leaving no minor children; and 5. if the allotted farming land is required to be expropriated for reason of national reconstruction and development.[225] The first four reasons help to distribute land to those whose source of livelihood is farming and ensure that all land is continually cultivated. Importantly, the right itself cannot be extinguished. A person whose land is restored to the government can reapply for farmland allotment if he satisfies the criteria required by law, mentioned in the first paragraph of this section.

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[223] *Land Law Proclamation, supra* note 11, art. 18-22. The phrase "in other manners" is very general and is not illustrated in the Proclamation. It is my understanding that these other manners may include investment activities other than simple agriculture. Commercial farming could be one example. For detailed discussion, see sub section 3, "leaseholds" below.

[224] *Ibid.*, art 26-27.

(ii). "Tiesa" Land Right (Land for Housing in Rural Areas)

Pursuant to Articles 4 (2) and 6 (3) of the *Land Law Proclamation,* Proclamation No. 58/1994, every Eritrean citizen has the right to obtain land for housing in rural areas at his place of birth or in the rural area where he intends to live. Any citizen who attains the age of majority or is a minor emancipated according to law,[226] and who fulfills his national service duties,[227] can apply for "tiesa" land. No permanent residence is required. The law makes it simply a birth right. Hence, every Eritrean citizen has a right to obtain "tiesa" land.[228] Even though it is the government who finally determines the place and location of "tiesa" land to be allotted to applicants, the request of applicants can be taken in to consideration in screening their applications.[229] "Tiesa" land right is a usufruct right and is allotted subject to no tax or rent payment.[230] The principle of "equal size" also applies for all land allotted for "tiesa" (housing purposes in rural areas) even though no standard size is provided for in the laws. Nonetheless, allotments of "tiesa" land in several villages of Zoba Ma'ekel[231] in the past two years indicate that the size of "tiesa" land can range from 400 square meters to 600 square meters per person.[232] Like an agricultural usufruct, one individual cannot have "tiesa" land in more than one place.[233] The holder of a "tiesa" land right has the right to sell the house he erects on his "tiesa" land, or to mortgage it in whole or in part to secure a loan in

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[225] *Ibid.*, art. 13.
[226] *Ibid.*, art. 7.
[227] *Regulation of Allocation, supra* note 205, art.3(10).
[228] *Ibid.*, art. 6(1).
[229] *Ibid.*, art. 3(8).
[230] *Ibid.*, art. 9(5).
[231] Note: Zoba Ma'ekel is one of the six local administrative regions of Eritrea. This division is according to the recent *Proclamation for the Establishment of Regional Administration, Proclamation No. 86/1996, supra* note 4. Zoba Ma'ekel mainly consists of the capital city, Asmara, and the surrounding villages.
[232] Dehai, broadcast, online: <www.dehai.org/dimtsi_hafash> (last modified 15 July 2001).
[233] *Land Law Proclamation, supra* note 11, art. 25(1).

cash or property, to lease it, or to transfer it by inheritance to his heirs.[234] Nevertheless, if he sells the house he built upon the "tiesa" land he previously obtained, he cannot apply again for "tiesa" land. This is to avoid land speculations, reduce land scarcities, and ensure the right of every citizen for housing by securing land availability for all citizens. Besides, if this were not the case, people would be encouraged to apply again for "tiesa" land after selling their houses, since "tiesa" land is free from tax or any other payment, and this would eventually worsen the existing land scarcities. Any citizen does, however, have a right to purchase or rent a house in the rural areas either in addition to the "tiesa" land he is allotted or even after the individual sells his house built over his "tiesa" land.[235] We should remember here that selling, mortgaging, leasing, or transferring of a "tiesa" land right is absolutely prohibited by law.[236] This seems confusing as sale or transfer of houses built on it is allowed by the law. It is not meant to make the houses portable structures. It only affects the relationship between the buyer of the house and the land on which the house is built. In this regard, there is a contradiction between *Land Law Proclamation,* Proclamation No. 58/1994, and *Proclamation to Provide for the Registration of Land and Other Immovable Property,* Proclamation No. 95/1997 relating to the status of a buyer of a house erected upon "tiesa" land allotted to another. Article 31 (2) of Proclamation No. 58/1994 states that the buyer will have a usufruct right on the land whereas, Article 4 (5) of Proclamation No. 95/1997 states that the buyer (new owner of the house) will have a lease right on the land upon which the house is erected and must enter in to a lease contract with the state. According to rules of hierarchy of laws, the provisions of both proclamations are of the same level and neither can supersede the other, and hence, an amendment of the provision is needed even though

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[234] *Ibid.*, art. 31-34.
[235] *Ibid.*, art. 6(7).
[236] *Regulation of Allocation, supra* note 205, art. 3(12).

the intention of the drafters of the law was that of Proclamation No. 95/1997. According to the drafters' intention, the buyer of a house which is erected over a "tiesa" land will no longer have a usufruct right on the land as the transfer of the house converts the "tiesa" land right into leasehold. Hence, the rules relating to leaseholds will be applicable afterwards. I support the idea that the buyer of the house or the one who obtains a house erected upon "tiesa" land by donation or inheritance shall have a usufruct right, identical to the right in the original "tiesa" land, upon the land on which the house is built provided that he is not has not already been allotted "tiesa" land.[237]

On the other hand, married spouses have the right to obtain one "tiesa" land for housing for each as an individual right in their respective place of birth. For instance, if the wife lives together with her husband in her husband's place of birth, she has also a right to obtain "tiesa" land, as an individual right, in her place of birth. The same is also true for the husband. If each of them erects a house on the allotted "tiesa" land before they get married, the house is registered as personal property of the right-holder.[238] This rule clearly reflects and reiterates the determination and emphasis given to equality of women to men. Many criticize this law for it might bring about a tendency for disintegration of families in the long-run and would play its part in exacerbating scarcities of land, particularly in the densely populated areas of highland Eritrea.[239] I believe that it seems unnecessary to allot two "tiesa" land rights for married spouses where they live together. Protecting and guaranteeing rights of married spouses in cases of divorce would have been sufficient.

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[237] Lindsay, *supra* note 3 at 35-36.
[238] *Land Law Proclamation, supra* note 11, art.15 (2-3) and (5).
[239] "Diesa Land", *supra* note 54 at 44-45.

Finally, it is worth mentioning that an allotted "tiesa" land is restored to the government if the holder of the land fails, without good cause, to build a house on the land within three years. This rule could work against the interests of the poor unless reasons of poverty could be considered as good cause. However, the person whose "tiesa" land is restored has the right to apply again at later time.[240]

According to Article 35 of Proclamation No. 58/1994, the owner of a house has a duty not to disturb his neighbors "by causing excessive smoke, soot, unbearable smells, noise or nuisance". Also, where the owner of a house shares a common wall with a neighbor, he cannot raise, lower, or destroy the common wall, and cannot put structures into it or make an opening into it, without the consent of his neighbor.[241]

(iii). *Leaseholds*

A leasehold is also another basic right guaranteed under the *Land Law Proclamation,* Proclamation No. 58/1994, even though most provisions of the *Proclamation* deal with the above discussed land rights. Leaseholds can be created in both urban and rural areas whereas agricultural usufruct and "tiesa" land are only granted in rural areas. In rural areas, leaseholds are created for the purpose of commercial farming, businesses, industry, tourism and other capital investment activities. In urban areas, however, leaseholds may be granted for housing, business, and other activities of capital investment. Leasehold is a lease agreement concluded between the government and a person or persons to use a parcel of land for the duration of the lease agreement upon payment of rent. The *Proclamation* does not specifically deal with the terms and conditions for lease agreements. It can be said, however, that every

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[240] *Land Law Proclamation, supra* note 11, art. 29(4).

Eritrean citizen (who attains a majority age or a minor emancipated by law[242] and who fulfills his national service duties)[243] is entitled to obtain land as a leasehold for housing and/or business purposes in urban and rural areas.[244] Accordingly, it seems that a person who is allotted "tiesa" land in a rural area has a right to apply for land in an urban area and vice versa. This is significant if the leasehold is for purposes of development and capital investments. Where the leasehold is for dwelling purposes, however, such a double grant should be prohibited as it will greatly worsen land scarcities in the country.

Pursuant to Article 6 (2) of *Regulation to Provide for the Procedure of Allocation and Administration of Land,* Legal Notice No. 31/1997, not only Eritrean citizens but also foreigners and business organizations and associations with legal personality are entitled to have leaseholds. In regard to foreigners, Article 8 of *Land Law Proclamation,* Proclamation No. 58/1994, requires that they obtain special authorization from the president of Eritrea. It is my belief that, instead of leaving such vague power to the president, the conditions and terms for such entitlement should have been enshrined in the *Proclamation* or have been covered by other subsequent laws. One possibility could be to give a leasehold right to those investors whose investments are approved by an appropriate government body and whose plans require land allotment for implementation upon payment of a higher rent than the standard set for citizens (see below) for an agreed period of time.

As stated earlier, the duration of a lease is determined by agreement entered into by the government and the right-holder. The lease is renewable upon expiry of the agreed duration

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241 *Ibid.*, art. 36.
242 *Ibid.*, art. 7.
243 *Regulation of Allocation, supra* note 205, art. 3(10).

unless there are good causes for denying renewal. Generally, the duration of a lease can range from ten to sixty years, taking into account the type, extent, and location of investment. In particular, initial leases for dwelling houses, education, culture, sport, health, offices and the like are for fifty years.[245] It would have been more beneficial and encouraging if the maximum limit of duration of lease had been higher than sixty years. As a result, the heirs of the lessee, after his death, would have been more secure in inheriting the rights and obligations of the lessee without relying on the possibilities for renewal of the lease duration.

In regard to the payment of rent, the following can be said. Rent for leaseholds is paid annually.[246] The amount of rent payable varies from place to place depending on the location and use of land and on the type and extent of investment on the land. In general, however, the yearly rent for dwelling land could range across the country from a minimum of 0.10 Birr to a maximum of 0.25 Birr[247] per square meter and the yearly rent for businesses could range across the country from a minimum of 0.20 Birr to a maximum of 0.25 Birr per square meter. The yearly rate of rent for land allotted for commercial farming could range from 0.05 Birr to 0.10 Birr per square meter.[248]

The right-holder of a leasehold may not construct a dwelling house on land he is allotted for purposes of business activities unless the business is a hotel or a real estate housing development.[249] The great advantage of leaseholds is that a lessee's right is

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[244] *Land Law Proclamation, supra* note 11, art. 4(3).
[245] *Regulation of Allocation, supra* note 205, art. 7.
[246] *Ibid.*, art. 8(3).
[247] Note: the word "Birr" refers to Ethiopian national currency of that year (1997) and when the Eritrean national currency, Naqfa, was issued in November 1997, Birr had the same value as Naqfa. In terms of US dollars exchange rate, 1 Birr was equal to $0.15 U.S. in the year of 1997 with in Eritrea.
[248] *Regulation of Allocation, supra* note 205, art. 9.
[249] *Ibid.*, art. 3(5).

transferable. For example, if the lessee dies before expiry of the lease, all his rights and obligations are transferred to his heirs. Likewise, if the lessee sells or gives by donation the house or property he constructs on the land allocated to him on leasehold basis, the transferee succeeds to all rights and obligations of the lessee until expiry of the lease.[250] Housing markets, which are flourishing in the urban areas, especially in Asmara, clearly indicates the advantage of legal guarantees permitting free transfers of houses in both rural and urban areas. Probably, this trend could lead to land marketing in the future.

Finally, we need to see the legal grounds on which leaseholds may come to an end. A leasehold can be cancelled and the land restored to the government for the following reasons: 1. if the designated use of the land is not implemented in the prescribed time without good cause; 2. if the lessee uses the land for purposes other than the designated use without approval of the land administrative bodies; 3. if the duration of the lease expires and the lease cannot be renewed; or 4. if the land is expropriated for purposes of national reconstruction and development projects.[251]

(iv). Government Lands

It is stated several times in the above sections that the state of Eritrea owns all land in the country. The importance of this sub-section is to consider the government as a right-holder. This may mainly refer to land utilized by the government (its ministries or department agencies) for purposes of government works, offices, and other services. Hence, the law requires that land needed for such government purposes should be allocated to the concerned government ministries or agencies upon their application and the allocated land

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[250] *Ibid.*, art. 12.

should be registered in the name of the applicant government ministry or agency.[252] Unutilized land is also government land according to the principle, but no specific government department is registered as its right-holder. This includes all land left over after land distributions. This land is administered by the government.[253] The government distributes land to new applicants from the unutilized (unallotted) government land according to the provisions of *Land Law Proclamation,* Proclamation No. 58/1994, and decrees issued by the relevant government bodies.

We need to consider here one government action seen in practice. This is the government's attempt to distribute land to citizens by sale. In 2001 the government of Eritrea sold land in the city of Asmara and the suburbs to citizens living abroad for housing purposes, contrary to the provisions of the *Land Law Proclamation.* Although the government gave reasons for taking this action, these reasons did not justify the illegality of the action. Besides, the legal status of such land is not clear. This is an example of government arbitrariness and shows inconsistency between government practices and the laws enacted by that same government. Many might say that, as the state is the owner of all land, the government has the right and power to dispose of its land, including by sale. However, the *Land Law Proclamation,* Proclamation No. 58/1994, does not specifically provide to the government the power or right to sell land. It merely states that all land in Eritrea is owned by the state.[254] The power or right of sale should not necessarily follow from the fact of ownership. Moreover, the sale of land to citizens is not mentioned in any provision of the *Proclamation* as a means of enabling citizens or foreigners to obtain land from the

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[251] *Ibid.*, art. 11.
[252] *Ibid.*, art. 6(4).
[253] *Land Law Proclamation, supra* note 11, art. 6(6).

government.

Land allotted to citizens and foreigners is the last group of government land. The government is the ultimate right-holder of all this land as the law vests ownership in the state.

C. Classification and Allotment of Land

As stated in the introductory part of this chapter, the Land Commission is presently a department with in the Ministry of Land, Water, and Environment. This ministry is, therefore, the government body responsible for managing all land in Eritrea and monitoring the implementation of land laws and regulations.[255] The land administrative bodies are subordinate executive bodies[256] for implementing orders of the aforementioned ministry. These bodies are established in the sub-zone level and have responsibility for distributing land to applicants.[257] They consist of members from the village assembly and various governmental bodies of the locality.[258]

Before distributing land, the land administrative body of each sub-zone classifies all land to be distributed into arable and non-arable. Again, it classifies the arable land by its quality (into fertile and poor land if the distribution is for farming purposes) to ensure

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[254] *Ibid.*, art. 3(1).
[255] *Regulation of Allocation, supra* note 205, art.5.
[256] *Land Law Proclamation, supra* note 11, art. 10(2).
[257] *Regulation of Allocation, supra* note 205, art. 5.
[258] *Land Law Proclamation, supra* note 11, art. 10(1).

distribution of balanced land quality.[259] The land classified as arable is to be distributed for farming and other purposes, while the non-arable land is to be utilized for "housing and buildings and areas required for various social and development activities, such as a cemetery, a mosque, a church, a school, a village assembly hall, a road, forestry, pasture, and sites required by the Government for governmental works".[260]

Let us examine in detail the fairness envisaged during land allotment for farming. It is likely that the land to be distributed for farming would be as a single parcel. The advantage of this type of allotment is that the holdings of one right-holder would be consolidated and fragmentation of land could be avoided. On the other hand, it would be difficult to be fair and just in the distribution of parcels, as some parcels could be of low quality and others of high quality. Moreover, if consolidated, the individual would not have several types of land quality and texture for growing different kinds of cereals. It is, however, very important that some members of the local "kebabis" assembly are among the constituent members of the established land administrative bodies. In particular the elders could help a lot during land classifications since they would be rich in experience of these tasks.[261]

Another important aspect which should be mentioned at this juncture is the abolition of existing village boundaries. Article 40 of the *Land Law Proclamation,* Proclamation No. 58/1994, overrides the existing village boundaries for purposes of land allocation. *Proclamation for the Establishment of Regional Administration,* Proclamation No. 86/1996, which was issued in 1996, reiterates this principle. According to this *Proclamation,* Eritrea is divided

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[259] *Ibid.,* art. 9(1-2) and 11(4).
[260] *Ibid.,* art 9(3).
[261] "Diesa Land", *supra* note 54 at 49-51.

into six local administrative regions and these regions in turn are divided in to sub-zones, and the sub-zones are divided in to "kebabis" (the smallest administrative units). These smallest administrative units can consist of one village or of several villages. Therefore, old village boundaries do not have any relevance in land allocations. In cases of land scarcities in one locality, applicants can obtain land in other places.[262] I support this option as it would alleviate problems of land availability. Nevertheless, taking into account the strong land attachment sentiments that individuals have to their villages, intensive educational campaigns should be held to change the attitude of the people. After all, it is very difficult to achieve good performances without the consent of the people.

Lastly, we need to discuss the procedures for land allotment. For land allotment to be made, a person is required to apply to the land administrative body of the locality where he wishes to obtain land. Application processing fees must be paid. The land administrative body of that area determines the eligibility of the applicant according to law. If the application is approved, the body allots the land to the applicant upon payment of expenses incurred for land allocation and preparation, and upon issuance and registration of an allocation certificate or a lease contract, as the case may be. The right-holder has the duty to proceed to utilize the land without delay after the allotment.[263] The reason is that the allotment made can be cancelled if the land is not put to its designated use in the prescribed period without good cause.[264] To ensure this, the right-holder has the duty to report in writing, three times within two years after the allotment, to the cadastral office on further developments of his plan for the use of the land. On the other hand, if the application is

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[262] *Land Law Proclamation, supra* note 11, art. 6(5) and 14(3).
[263] *Regulation of Allocation, supra* note 205, art. 10(4-8).
[264] *Ibid.*, art. 11(1).

rejected, the administrative body is required to notify the applicant in writing of the reasons for the rejection. The applicant has, however, the right to reapply at later time.[265]

[265] *Ibid.*, art. 10(6) and (8).

D. Expropriation/Compensation

The issues of land expropriation and compensation are also central to the *Land Law Proclamation*, Proclamation No. 58/1994, and deserve thorough discussion, and attention. As alluded to many times in the above discussions, Article 50(1) of Proclamation No. 58/1994 gives the government the right and power to expropriate land from right-holders for reasons of national reconstruction and development. This power is enforceable only upon approval of the office of the president of Eritrea or of the body (agency) to which the decision is delegated by the president. The decision of the government or any other appropriate body to expropriate any allocated land is final and cannot be appealed. The right-holder is required simply to leave the land.[266] Hence, the right-holder whose land is expropriated has no right to appeal the decision of the government to court. This is clearly against the principle of the "right to appeal". It is known that decisions can be unfair, unjust, and can be made based on errors. Moreover, there could be misuse of power by the government officials. Some might say that Article 50(2) of the *Land Law Proclamation* guarantees that the government will undertake the necessary study to ascertain that the land to be expropriated is fit for the intended purpose. However, this is by no means a sufficient assurance for protecting people's rights to land.

The duty to pay compensation to the injured right-holder could be taken as a mitigating point and would remedy the loss and injury caused by the decision to expropriate. Article 50(4) of the same *Proclamation* imposes a duty upon the government to pay compensation to the aggrieved right-holder. The compensation can be in cash or by

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[266] *Land Law Proclamation, supra* note 11, art. 50(3).

provision of substitute land[267] and should be paid to the right-holder before he is required to leave his land.[268] If the expropriated land is "tiesa" land or an agricultural usufruct,[269] the extent of the compensation payable should be commensurate to the loss the right-holder sustains.[270] However, if the expropriated land is a leasehold, the amount of the compensation to be paid to the lessee should be "in proportion to the market value of the property built or erected over the land".[271] It seems that a substitute land may not be given to a lessee as compensation and that the compensation does not cover all losses accrued. Any loss sustained as a result of expropriation should be compensated with no discrimination.

The extent and type of compensation[272] can be settled by agreement reached between the government and the right-holder. In such a case, the settlement should be registered at the land registry after compensation is paid. However, if the parties fail to reach agreement on the extent or type of compensation, the dissatisfied party may lodge a suit at the High Court.[273] Because Article 54 of the *Land Law Proclamation,* Proclamation No. 58/1994, gives to the High Court exclusive power to adjudicate disputes involving compensation issues, the decision of the court is final.

There are some instances of expropriation or reversions of land to the government where no compensation is payable. These may include the reversion to the government of

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[267] *Ibid.*, art. 51(1).
[268] *Ibid.*, art. 52(1).
[269] *Regulation of Allocation, supra* note 205, art. 11(2).
[270] *Land Law Proclamation, supra* note 11, art. 51(1).
[271] *Regulation of Allocation, supra* note 205, art. 11(2).
[272] We should remember here that, as is clear from Article 11 (2) and (3) of *Regulation of Allocation No. 31/1997,* in cases of expropriation of leaseholds, only the extent of compensation is relevant, as it is always provided in the form of money. On the other hand, in cases of expropriation of "tiesa" land or agricultural usufruct, either the extent or type of compensation could be at issue, because compensation could be paid either in money or in the form of substitute land.

all land allotted explicitly contrary to the provisions of the *Land Law Proclamation.*[274] Article 53(1) of the *Land Law Proclamation,* Proclamation No. 58/1994, also states that all land illegally allocated in the past due to war or post-colonial regime is to be directly surrendered to the government with no compensation. The phrase "due to war and post-colonial regime" seems to refer to the period following the commencement of the Eritrean liberation struggle and thereby to all land allocations done in this period. Nevertheless, the law is vague and may cause complications during implementation of this rule.

E. The Fate of Pastoralists under the Land Law Proclamation

It is necessary at this stage to examine how the *Land Law Proclamation,* Proclamation No. 58/1994, treats nomadism and the rights of pastoralists in relation to land. As mentioned in the above sections, all land in Eritrea is owned by the state. In other words, the *Land Law Proclamation* simply reinstates the reforms introduced by colonial regimes in the pastoral regions, which were declared to be state land. But what rights of pastoralists are protected by the law?

Article 2(6) of Proclamation No. 58/1994 defines agricultural activities or farming as "agricultural activities including farming and pastoralism". It could be said, therefore, that the usufruct rights guaranteed to every Eritrean citizen with no discrimination under the *Land Law Proclamation* also applies equally to pastoralists. Moreover, Article 25(1) of the same *Proclamation* seems to protect the rights of pastoralists and agro-pastoralists to graze their cattle by utilizing land located in more than one place. Nonetheless, as we are used to

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[273] *Land Law Proclamation, supra* note 11, art. 51.

comparing an agriculturalist with a pastoralist, or an agriculturalist with an agro-pastoralist, the ordinary meaning of "agricultural activities or farming" does not usually include pastoralism, and I suppose most readers of the law will not understand the phrase "agricultural activities" or the word "farming" as including pastoralism unless they refer to the definition section of the *Proclamation.* Other than in the mentioned section, the *Proclamation* does not directly deal with either pastoralism or pastoralists; these activities are generally assimilated to other agricultural activities. The only time they are singled out is in relation to "pastures in villages" in Article 48 of the *Proclamation.* It states that all villages in Eritrea have the right to use their own pasture and woodland according to local customs.[275] More importantly, according to Article 6 (2) of the *Land Law Proclamation,* Proclamation No. 58/1994, and Article 6 (1) of the *Regulation to Provide for the Procedure of Allocation and Administration of Land,* Legal Notice No. 31/1997, one of the cardinal requirements to be entitled to an agricultural usufruct is that the citizen be a permanent resident of a village. Hence, it can be said that the right to an agricultural usufruct guaranteed by the *Land Law Proclamation* cannot apply to pastoralists, since pastoralists are not permanently settled in villages, unless they begin to reside in villages.

We can conclude from the above discussion that the *Land Law Proclamation* overlooks the rights of Eritrean pastoralists. To the maximum extent, like any other Eritrean citizen, the law treats the pastoralist as an individual, since he is entitled to an individual usufruct provided that the legal requirements for usufruct entitlement are satisfied. But it is unfortunate for him that his way of life prevents him from satisfying those legal requirements.

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[274] *Ibid.*, art. 50(5) and 53.

If this is the case, it is more likely that such a policy solution to problems of pastoralists is drawn from the philosophical foundation of the theory of "the tragedy of the commons". This is Harden's theory of 1968 which criticizes communal pastures. According to Harden, every herdsman wants to increase the number of his animals, even beyond the carrying capacity of the land, as the negative impacts of overgrazing caused by each increased herd are shared by the whole community. Hence, each increment in herd ultimately causes environmental degradation and over-utilization of resources. Privatization of pastoral lands is proposed as the solution to the problem, following the reasoning that privatization of property enhances proper management of resources.[276] Many countries have attempted to privatize pastoral lands by establishing either individual or group ranches. In many of them, the desired results suggested by Harden's theory could not be obtained. For instance, group ranches established in Botswana in the range land regions in the 1960s and 1970s could not bring about a reduction in the number of herds per land unit and paved the way for the elites (the few people in power) to be the main rich herd-owners in Botswana.[277] The Kenyan experience is another example. The group ranches instituted in the Masai pastoral regions after the enactment of the "Group Representative Act" of 1968 had the same results as in Botswana. The many ordinary Masai pastoralists were not the prime beneficiaries of these projects. The decision of Kenyan government in the late 1980s to divide the group ranches into individual ranches was one sign of the failure of group ranching. Even these individual

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[275] *Ibid.*, art. 48(1).
[276] G. Harden, "The Tragedy Of The Commons", in G. Harden & J. Baden eds., *Managing The Commons* (San Francisco: WH Fremen,1977) 16 at 20.
[277] C. Lane & R. Moorehead, *Who Should Own the Range? New Thinking on Pastoral Resource Tenure in Dryland Africa,* 2nd ed. (London: International Institute for Environment and Development, Drylands Programme, 1994) at 18.

ranches did not improve the welfare or serve the interests of the pastoral communities.[278] On the other hand, based on the same theory of "the tragedy of the commons", many other states, including Ethiopia, Tanzania, Mali and other African countries, have nationalized all land including pastoral range land regions as "state land". These bureaucratic controls are, however, criticized for not encouraging adequate and efficient management of land and natural resources and have exacerbated the problems of pastoralists.[279] Some other countries, such as Tanzania (in the 1970s and 1980s) and Ethiopia (in the 1980s), have also undertaken projects for settling their peoples in villages. Most of the projects were proven to be unsuccessful and largely encroached into the customary grazing areas of pastoralists. As a resul,t the pastoralists became more marginalized than ever before.[280]

In the past decade, a new rethinking has emerged contrary to Harden's theory of "the tragedy of the commons". Advocates of this thinking argue that Harden's theory does not work in communal pastures and assert that:

> Communities do regulate access to common holdings and provide social frameworks for conservation and investment, often more rationally over the long run than is the case under private or state property. Moreover, under dry land conditions, systems of common property usually can achieve a scale more appropriate for pastoral movement and other forms of extensive resource management than can individual holdings and can achieve higher levels of cooperation and coordinated management than can state holdings.[281]

It is my belief that this thinking does not innovate a concrete resolution for the

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[278] J.K. Asiema & F.D.P. Situma, "Indigenous Peoples And The Environment: The Case Of The Pastoral Maasai Of Kenya" (1994) 5 Col. J. Int'l Envt'l. L. & Pol. 149 at 161-163.
[279] Galaty, *supra* note 22 at 188.
[280] Lane & Moorehead, *supra* note 277 at 13-15.
[281] Galaty, *supra* note 22 at 199.

conflicts that have been occurring between pastoralists and other groups, which include other pastoralists, agriculturalists, private investors, and the government. It merely addresses the interests of pastoralists and issues of environmental conservation. On the other hand, based on the new rethinking of common property, some other scholars, like Bashir Ishag Abdalla, suggest a solution for reconciling the competing interests over control of land between pastoralists and agriculturalists. They propose that the land boundaries between farmers and pastoralists be determined by calculating the comparative advantage of income stream an agriculturalist and a pastoralist would obtain from a parcel of land. That is, if the income that the pastoralist would generate from the parcel of land would be greater than that of the agriculturalist, then the land would be allocated to the pastoralist, and vice-versa. Ultimately, a common property regime is maintained in the demarcated pastoral region.[282] However, the practicability of this suggestion is very unstable and questionable. Besides, it is not only farmers who fear encroachment of the pastoral region; this is also a concern of private investors and the government itself. Moreover, pastoralism by its nature requires very large territories of land and supports substantially fewer people per parcel of land than agriculture.[283] More importantly, as growth of population and expansion of urban areas continues irreversibly at a high rate and is impossible to curb,[284] pastoralism is unlikely to be favored over other activities, since it would not be compatible with such urgencies. That is to say, a system of communal pastures of pastoralists does not work well in a country where there are acute land scarcities, even though, I believe, it is the best suitable choice for pastoralists.

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[282] Abdalla, *supra* note 2 at 45-49.
[283] Galaty, *supra* note 22 at 186.
[284] *Ibid.* at 199.

I, therefore, support sedenterization of pastoralists and transformation of their economic activity. However, some conditions should be satisfied in order to successfully implement the sedenterization and transformation policies. First, we need to change the attitudes of pastoralists through education. For instance, education played a great role in the successful sedenterization of Bedouins in Jordan.[285] Contrary to this, history tells us that the main reason for the failures of sedenterization of pastoralists in many countries, such as in Tanzania and Ethiopia, was that most of the sedenterization projects were being undertaken by force and against the wishes of the people. Second, there should be adequate economic alternatives for pastoralists. For example, in Libya, by 1967, 38% of Bedouins were attracted to sedenterize because of the wage employment created by widespread economic development due to the inception of oil extraction.[286] Sedenterizing pastoralists having no other economic alternatives would only mean creating new problems for pastoralists. Third, efforts should be made to develop and enhance pastoralists' access to education. Education is one means for creating economic alternatives for the people and thereby transformation of pastoralists could become possible. For instance, most educated pastoralists do not wish to continue their pastoral lifestyle since they have other alternatives to sustain their lives.

In the meantime, however, in respect to Eritrea, as realization of the above illustrated conditions is far beyond imagination at this time, adoption of the traditional communal tenure of pastoralists would be the wise solution. Ignoring or overlooking the protection of the rights of pastoralists would be simply a recipe for conflicts and further marginalization of

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[285] K.S. Abu Jaber & F.A. Gharaibeh, "Bedouin Settlement: organizational, legal, and administrative structure in Jordan", in J.G. Galaty *et al.*, eds., *the Future of Pastoral Peoples* (Conference Proceedings, Nairobi, Kenya, August 1980) (Ottawa: International Development Research Centre, 1981) 294 at 294 and 301.

[286] W.G. Dalton, "Some Considerations in the Sedentarization of Nomads: The Libian Case", in Carl Salzman & J.G. Galaty, eds., *Nomads in a Changing World*, 139 at 146.

pastoralists. As Sandra Joireman explains, the failure to protect the rights of pastoralists in Eritrea under the *Land Law Proclamation*, Proclamation No. 58/1994, is a "landmine" which could explode into political violence in the future,[287] as the chances that competition for land will develop into conflicts are high. To support this, she discusses as an example the eruption of the Eritrean liberation struggle in 1961 by Muslim lowlanders who were mainly supported by pastoralists.[288] Therefore, any type of development project or activity contrived to be implemented in these areas should cause as little disruption to the traditional way of life of pastoralists as possible. For example, the settlement of returnee refugees and demobilized soldiers should be done meticulously in a way that it does not disturb the life of pastoralists, and the pastoral region should be considered as the last resort for settlement until the attitude of the people is changed and other economic alternatives for pastoralists are developed. The pastoralists should also be the primary benefactors of such projects of development undertaken in the region. To guarantee these benefits, the government should think of the possibilities to participate with the pastoralists as a "joint venture" in the implementation of these projects. Moreover, the pastoralists should be represented in the government so as to enable them to protect their interests and should actively participate in the making of policies and laws that would affect their affairs.[289]

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[287] Joireman, *supra* note 140 at 285.
[288] *Ibid.*, at 278-280.
[289] Abdalla, *supra* note 2 at 51.

4. LAND REGISTRATION IN ERITREA

A. Introduction

Land registration is the recording in a public place of the rights and interests enjoyed over a specific parcel of land. The records show who has what rights over which parcel of land. Hence, land registration does not narrowly imply individualization of land, as other diverse types of rights and interests in respect of land can be entered on the record. Three elements of information are essential in land registration: description of the parcel of land, identity of the right-holders, and identity of the types of rights or interests held.[290] There is also another terminology similar to land registration which is very useful as a tool for land registration. This is a cadastre. "A cadastre is a systematically organized database of property data within a certain jurisdiction. This information is based on a comprehensive survey of a property's boundaries".[291] Other means are, therefore, employed for obtaining, organizing, and recording all the information about land and its encumbrances in the life process of land registration. These may include a "cadastral survey," which is a survey of boundaries of land parcels, and a "cadastral map," which is a map indicating the boundaries of land parcels.[292] In general, the difference between a cadastral system and land registration is not obvious, since a cadastral system also consists of written records about land parcels and descriptions of the land parcels in the form of surveys and maps. It will suffice to say here that land registration is "the overall process of recording details about land parcels for the purpose of

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[290] Lindsay, *supra* note 3 at 5-6.
[291] T. Hanstad, "Designing Land Registration Systems for Developing Countries" (1998) 13 Am. U. Int'l L. Rev. 647 at 652.
[292] *Ibid.*

land ownership".[293] In other words, land registration refers to the legal aspects of recording land rights.[294]

The significance of land registration law cannot be denied. Basically, land registration law is a procedural law which is not intended to create land rights and interests. "The basic purpose of land registration law is to establish the administrative framework for a registration system, and to set forth the rules by which that administrative framework operates".[295] The whole system, which combines the procedural rules and laws, the land registers (recordings), and the institutions (land registries) which are responsible for keeping and administering the land registers, is referred to as "the land registration system".[296]

There are two main types of land registration system in the world. These are a deed registration system and a title registration system.[297] A deed system, also known as "land recordation" in the United States of America, is the registration of documents in a government-run registry which show that a land transaction has taken place.[298] It does not indicate exactly who owns the land parcel. The onus of determining ownership of the land parcel is left to the purchaser or any other interested person, and for that purpose, he or she should search and examine the entire transaction history of the specific land parcel. This is to say, the focus is on the documents, not on the legal status of the land parcel. The importance of this system is that the registration of the documents serves as evidence against third parties whose interests in land are unregistered and establishes priorities of claims

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[293] United Nations Centre For Human Settlements (Habitat), *Guidelines for the Improvement of Land-Registration and Land Information System In Developing Countries* (Nairobi: U.N.C.H.S., 1990) at 3.
[294] *Ibid.* at 14.
[295] Lindsay, *supra* note 3 at 42.
[296] *Ibid.* at 5.

among the registered interests in cases of dispute.[299] However, this system is criticized, for it is expensive, insecure, cumbersome, and time-consuming.[300] Moreover, a deed registration system is more costly to operate subsequent to its introduction, because of the need to search each title back and determine its validity. This is a cost that the private sector (the user) bears. A title registration system, also known as "the Torrens system" in Australia, is, on the other hand, the recording of titles to land parcels rather than deeds. The information entered in the registry can fully establish the legal status of the registered land parcel. Hence, anybody can determine who is entitled to the land parcel from the registry.[301] Unlike most deeds systems, in a title registration system the land parcel as a unit of registration has cross-references to a cadastral map of the land parcel. It shows the location and size of the parcel, and the names of the buyers, sellers and any other right-holders, and has full information on the nature of the rights, interests, or claims created on the parcel. Any subsequent transfers or alterations of rights, interests, or claims on the land parcel are also shown in the same single document. This makes it very easy for use by the whole public and hence, the system is said to be more secure, efficient, simple, and less costly. However, unlike a deed registration system, a title registration system is more costly to set up in the beginning (higher start-up costs) because of the need to make sure that the titles being registered are valid and up-to-date. This is a cost that the government must bear because it is the government that will be the guarantor of the validity of titles. In many countries, the government guarantees the accuracy of the information entered into the registry and pays compensation to the party who sustains damages in case of mistakes or errors of the recording. Due to financial

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[297] Habitat, *supra* note 293 at 4.
[298] Hanstad, *supra* note 291 at 651.
[299] Simpson, *supra* note 26 at 15.
[300] D.M. Da Costa *et al.*, *Property Law: Cases, Texts, and Materials*, 2nd ed. (Toronto : Emond Montgomery Publications Limited, 1990) at 9-6.

incapacities, however, some other countries do not provide provisions for compensation in their laws for mistakes in the system. In general, it should be recalled that, in practice, the two systems of land registration have so many variations in the world that sometimes their distinctions are unclear.[302]

B. Benefits and Drawbacks of Land Registration

Projects for the establishment of a land registration system are big public investments which could incur high costs and yield a great deal of benefits. Hence, as the costs and benefits of such investments could greatly vary depending on the type of land registration system adopted and on the peculiar situation of a specific country, each country seeking to establish a land registration system must assess the costs and benefits of establishing a land registration system prior to entering into the hefty investments.[303] Today, many developing countries put establishment of land registration as one of their main priorities of development. However, there are prerequisites and conditions that should be fulfilled if a land registration is to be fully beneficial, functional, and successful. Some of these could be:

> When, due to changing economic circumstances, a market in land rights is beginning to emerge, and land rights are increasingly seen as tradable commodities; where customary institutions governing land relations are losing strength and credibility; where, due to factors such as increasing population pressure, conflicts over land are increasing that are beyond the capacity of traditional institutions to manage, thus further eroding the authority of those institutions; and where national governments have decided, for one reason or another, to replace customary land tenure with land rights that derive from the state.[304]

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[301] *Ibid.*
[302] Lindsay, *supra* note 3 at 6-7.
[303] Hanstad, *supra* note 291 at 658.
[304] Lindsay, *supra* note 3 at 7.

Also, clearly defining property rights by law, training qualified survey and registry staff and giving full support to land users in particular and to the public in general throughout the introduction of the registration system would improve the chances of success of the registration system.[305]

It is true that land registration has many economic and social impacts. There is convincing evidence from the studies of Latin America, the Caribbean, and Asia that land registration has many economic benefits. It increases tenure security of the land-holder as the registration itself puts an end to disputes of entitlement and as such, reduces or eliminates fears of forceful dispossession and the risks of evictions. Hence, the landholder will be secure enough to make improvements and investments on his land. This in turn boosts total production of the land.[306] It also increases access to credit, for credit institutions will be encouraged to hold land as collateral security as a guarantee for repayment of debt. This makes the landholder creditworthy and thereby enhances his investing capacities and further increases land productivity.[307] It is also believed that land registration facilitates land marketing and conveying and makes the transfers more reliable, simple, and less expensive, since purchasers and other interested parties would feel secure as to the status of the land.[308]

Another benefit of land registration is that it reduces disputes and litigation over land because the register shows the identity of the right-holders. As a result, the likelihood of

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[305] Hanstad, *supra* note 291 at 657-657.
[306] G. Feder & A.. Nishio, "The Benefits of Land Registration and Titling: Economic and Social Perspectives" (1999) 15:1 Land Use Pol'y 25 at 28-34.
[307] *Ibid.* at 27.
[308] Simpson, *supra* note 26 at 271.

incurring high costs for litigation is reduced and the burden imposed on courts by land cases similarly decreases.[309] It is also believed that an efficient system of land information and the systematically organized cadastral maps greatly strengthen the government's land administration system and improve management of land and its uses. It also greatly assists in rural and urban development planning and plays an important role in evaluating the impacts of such planning on the environment and in controlling environmental variations.[310] Moreover, a land registration system improves a country's taxation system and expedites the collection of taxes and increases the revenue of the government by making the tax information coverage complete and providing the necessary information for identifying and prosecuting tax evaders.[311]

It should be remembered, however, that land registration cannot necessarily accomplish the above-mentioned benefits simply by its mere introduction. For instance, if the land law of a country prohibits the sale and transfer of land, land registration by itself cannot create and facilitate land marketing.[312] To take another example, land registration cannot enhance creditworthiness of the landholder unless the circumstances are suitable to establish efficient and easily accessible credit institutions. Alternatively, credit institutions might be unwilling to give loans unless they are assured that the borrower, the landholder, has the capacity in the future to repay the loans.[313] In other cases, the benefits derived could be unclear and the introduction of land registration might seem unnecessary and very costly

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309 Hanstad, *supra* note 291 at 664.
310 Habitat, *supra* note 293 at 6.
311 Hanstad, *supra* note 291 at 665.
312 Lindsay, *supra* note 3 at 8.
313 Feder & Nishio, *supra* note 306 at 37.

to some societies where their indigenous system functions well.[314] At the other extreme, some studies from Africa have shown that there is no correlation or a less significant correlation between land registration and access to credit, land improvements, and land productivity.[315] To sum up, "land registration is only a means to an end. It is not an end in itself. Much time, money, and effort can be wasted if that elementary truth be forgotten".[316]

C. The Eritrean Situation

In the past in Eritrea, there was no complete and comprehensive system of land registration. Almost all rights and interests on land were recorded traditionally in the memory of the people.[317] In fact, a single cadastral office, a type of "deed registration system", was established at Asmara, capital city of Eritrea, by the Italians during their colonization of the country. Its aim was to register deeds for immovable property. It still functions today. Until recently, the office operated on the basis of past practice rather than established rules of registration. A more comprehensive system of recording for buildings has been in operation at the technical department of Asmara Municipality since 1936. Construction plans and maps are also kept in this office though the recording is not complete and covers no more than half of the property in the city.[318]

After independence in 1997, the Eritrean government promulgated Proclamation No. 95/1997, *a Proclamation to Provide for the Registration of Land and Other Immovable Property*. As is

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[314] Lindsay, *supra* note 3 at 8.
[315] For more detail, see pages 12-13 of this thesis.
[316] Simpson, *supra* note 26 at 1.
[317] Lindsay, *supra* note 3 at 7.
[318] *Ibid.* at 15-16.

clear from the provisions of this *Proclamation*, the law opts for the adoption of land titling registration system in Eritrea. It requires registration of "all land, rights over land and duties that emanate from such rights, and transfer of property through sales, donation, succession or other manner".[319] Accordingly, "all tiesa land, agricultural usufructs and leaseholds, as well as land being utilized by the government and unutilized government land," and subsequent legal injunction, change or transfer must all be registered.[320] The *Proclamation* makes some further specifications as to what should be registered. The following are those which are required to be registered under the *Proclamation*: An agricultural usufruct converted into leasehold pursuant to Article 18 (3) of Proclamation No. 58/1994,[321] a "tiesa" land where the immovable property built upon it is transferred,[322] a sublease of agricultural usufruct of duration of one year or more as permitted under Article 27 of the *Land Law Proclamation*, Proclamation No. 58/1994,[323] "all transfers of immovable property erected over land",[324] and a mortgage of immovable property.[325] The law also recognizes some overriding interests (which the law calls "lawful restriction") which continue to exist even when they are not registered. These include, "[the right] to pass through adjoining land, install facilities such as electric lines, telephone lines, water pipes, ... the use of air, light, water, ...".[326]

Requiring registration of each and every land right allocated, especially where transfer of such right is prohibited by law or where the indigenous system functions well in governing such rights, would make the registration process very costly, ineffective, and time consuming.

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[319] *Proclamation to Provide for the Registration of Land and Other Immovable Property*, Proclamation No. 95/1997 (Eritrea) [hereinafter *Proc. 95*], art. 3(1).
[320] *Ibid.*, art. 3(3).
[321] *Ibid.*, art. 4(4).
[322] *Ibid.*, art. 4(5).
[323] *Ibid.*, art. 4(6).
[324] *Ibid.*, art. 5(1).
[325] *Ibid.*, art. 4(7).

For example, sale, exchange, or mortgage of agricultural usufruct is prohibited, but subleasing is not.[327] In these circumstances, requiring the registration of only subleases of agricultural usufruct or agricultural usufructs which are converted into leaseholds would be more beneficial. All the other allocated agricultural usufructs in one registration district (if there are many districts) or village could be registered in the registry as a single super parcel unit. On the other hand, since the law authorizes any sort of transfer of immovable property built upon allocated land,[328] requiring registration of such immovables in the single unit of registration is necessary and well-suited to the main purposes of a registration system. In relation to this, when a house erected on "tiesa" land is sold, the relationship between new owner and the state in respect of the "tiesa" land is one of lessee to landlord. Therefore, the lease contract with the state for the "tiesa" land should be registered.[329]

(i). Contents of a Register

The law requires that the registration system shall use the same standardized application forms and certificates of allocation throughout the whole of Eritrea.[330] This requirement makes the registration system uniform and simple. It also expedites the process of registration. The register at the relevant registration district must show the "identity of right holder, description of land and immovable property erected over the land, type of right and its restrictions and supporting documents".[331] An identification number is stated in the register for each registered parcel of land.[332] It is also essential that a map or plan clearly showing the features and boundaries of the parcel of land be produced and documented in

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[326] *Ibid.*, art. 6(2).
[327] *Regulation of Allocation, supra* note 205, art. 3(12).
[328] *Ibid.*, art. 3(13).
[329] *Proc. 95, supra* note 319, art. 4(5).
[330] *Regulation of Allocation, supra* note 205, art. 3(7).

the district register. The type and accuracy of the map or plan produced and documented could, however, vary according to the level and development of the area.[333] For instance, the type of boundary and the degree of accuracy of mapping should not be the same throughout the country. The reason is that requiring a very high degree of accuracy for demarcation and land description in all places would be very expensive, time consuming, unnecessary, and counterproductive. Therefore, it is advisable to require a relatively higher degree of accuracy for parcel mapping in urban areas as such maps would be necessary for providing and developing public services in those areas. It is also important in areas where increases in the number of transfers of land and immovable property are foreseeable.[334]

(ii). The Cadastral Office

For the purposes of registering all land and administering and monitoring registration districts, the law has established a cadastral office under the Ministry of Land, Water, and Environment with the power to issue regulations and directives for ensuring these goals. The office also has the duty to submit any information or document to the court when the court so requires. Any other interested person can also ask for copies of registers or information from the office upon payment of an appropriate service fee.[335]

As is stated in Article 3(1) and (2) of the *Proclamation to Provide for the Registration of Land and Other Immovable Property*, Proclamation No. 95/1997, even though the established cadastral office under the law is a single and central office, the law envisages the possibility of opening

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[331] *Proc. 95, supra* note 319, art. 3(4).
[332] *Ibid.*, art. 4(1).
[333] *Ibid.*, art. 3(5).
[334] Lindsay, *supra* note 3 at 54.
[335] *Proc. 95, supra* note 319, art. 3(1-6) and 6(5).

and consolidating additional registration districts throughout the country, if necessary. It would be very important to open branches of the cadastral office in the six administrative regions in order to make the registration process continuous and effective, to reduce traveling costs and inconveniences of the rural people, and to encourage the people to register their land rights and immovable property. However, at this time the system is still hampered by problems of shortage of qualified staff, inadequacies of logistics, and a dearth of financial sources.

Either as an alternative to the above idea or in addition to the regional registration districts, temporary registration offices could be opened seasonally, when necessary, even at the lowest levels of administrative regions. According to the law, a land administrative body, acting as the agent of the Ministry of Land, Water and Environment, is established in every sub-zone of each administrative region.[336] Hence, seasonal offices could be opened in conjunction with these branches. Alternatively, the land administrative bodies could also function as branches of the central cadastral office, to register not only allocated land but also immovable property. This would be in keeping with the *Land Law Proclamation*, which imposes a duty upon the land administrative bodies to keep a proper land register[337] when it allocates land to applicants. It should, however, be noted that the data at the central cadastral office, being the national reference for all land information, should be kept updated from time to time and there should be a network mechanism between the branches and the central office that ensures a quick flow of information. Taking into consideration the shortage of facilities, the non-marketability of agricultural usufructs and "tiesa" land rights, and contrasting this with the effectiveness of the indigenous system in regard to these land

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[336] *Regulation of Allocation, supra* note 205, art. 5.

rights, it is my view that, at least for the time being, the lowest unit of administration ("Kebabi") in the rural areas of the country should keep a simple register of the right-holders[338] of agricultural usufructs and "tiesa" land.

(iii). Legal Effects Of Land Registration

In Eritrea, by law, registration of land and immovable property is compulsory. The law requires that any allocated land and immovable property erected over allocated land should be registered.[339] This would help to keep the information of the registration system up-to-date. The law imposes the responsibility to register land and immovable property on the right-holder,[340] or in cases of transfers, on the transferee.[341] The legal effects of registration could vary from one type of registration system to another[342] and would depend on options adopted by each specific country. "In some, the register is definitive proof of the legal interests in a parcel of land, in others, it is only prima facie evidence".[343]

In Eritrea, the law does not specifically provide that registration is a pre-requisite for validating interests in or on land. As is stated earlier, it simply states that registration of land and immovable property is compulsory.[344] The legal effect of registration becomes significant in the event of disputes. The law provides that "In the event of dispute over rights, the rights

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[337] *Land Law Proclamation, supra* note 11, art. 17(1).
[338] "Diesa Land", *supra* note 54 at 48-49.
[339] *Proc. 95, supra* note 319, art. 4(1).
[340] *Regulation of Allocation, supra* note 205, art. 3(11).
[341] *Ibid.*, art. 3(13).
[342] See also the discussion on "Introduction to Registration" beginning on page 88 of this thesis.
[343] Lindsay, *supra* note 3 at 55.
[344] *Land Law Proclamation, supra* note 11, art. 3(2).

of an interest holder, once duly registered, shall override unregistered interests or interests registered subsequently".[345]

[345] *Proc. 95, supra* note 319, art. 6(1).

CONCLUSION

The thesis has discussed the land tenure system of Eritrea from historical and legal points of view. It has tried to share with the reader the development and evolution of existing land laws and land rights in present independent Eritrea. It has attempted to increase readers' knowledge and understanding of the Eritrean land tenure system by exploring the major traditional systems of land tenure of the country, the land reforms introduced by the colonial powers of the country during the modern era of colonialism, and the land reforms made by the government of post-independent Eritrea.

It noted that making a generalized statement that indigenous systems of land tenure are "communal" in nature is misleading, as indigenous systems are not fully communal. Even, where the ownership is "communal", the land is not always utilized collectively. In crop production for example, each qualified member has a usufruct right to the land on an individual basis. The Eritrean case, which is discussed in detail in this thesis, is a good illustration of the above statement. The Eritrean indigenous systems of land tenure were composed of a range of different types of ownership: from village, tribe, or family types of communal ownership through to individual types of ownership. As was seen, "meret-worki" and "resty-tselmi" were among the main individual types of ownership. It is also necessary to mention here that, besides the above societal organizations and individuals, the church (the Coptic Orthodox Church), including its monasteries and convents, was also one of the land-owners.

Having said this, on the other hand, many scholars have differing views and perspectives towards indigenous systems of land tenure. Many of them see the indigenous systems of land tenure as constraints for development and land productivity. Others argue that there is less or insignificant correlation between land titling registration (privatization of land) and land productivity. Their studies from some African countries show that land titling registration by itself does not bring about significant increases in land investments, access to credit, or in total land productivity. Some other scholars believe that indigenous systems of land tenure are responsive to changes in society and hence, will gradually evolve themselves into systems of land individualization.

During the era of colonization, like other African countries, the Eritrean indigenous systems of land tenure started to face the impact of land-reforms and policies adhered to by the successive colonial powers. In the 1890s, the Italians, who declared the controlled area as their colony and gave it the name "Eritrea", introduced a new type of land ownership, "terre demaniale" (state land), to the existing indigenous systems. Thousands of land tracts through out the country, mainly in the lowlands and church lands, were expropriated accordingly. This enabled the Italians to give land away as concessions and leases to Italian immigrants and private investors for agricultural, industrial, and other economic purposes. The Italians also introduced village land ownership in many villages and this system created the possibility of granting land rights to Italian immigrants and other settlers of a village. Moreover, the Italians established a land registry system in the capital city, Asmara, and set up agricultural research centers for boosting agricultural production. The successors to the Italians, the British, continued the policy of land expropriation. They also attempted to distribute land to individuals as individual plots, but this reform was not widespread.

During the Eritro-Ethiopian federation, the village land ownership system remained the dominant land tenure system in the highlands of Eritrea. Again, the situation in the lowlands continued unabated. The reason is that the Ethiopian Revised Constitution of 1955 declared all unoccupied land to be state land, although at the same time it declared respect and recognition of traditional land tenure systems. One change which occurred in this period was that the Haile Sellassie regime restored land to the church and, in pursuit of political ends, started to grant new land tracts to the church and clergymen. The greatest land-reform undertaken by Ethiopian regimes was that of 1975, by the Mengistu regime. This land law of 1975 declared all land in Ethiopia to be "land of the Ethiopian people" and entitled all peasants to use the land. Peasant associations, production and service cooperatives were to be established according to this law. The impact of this law in Eritrea was, however, limited to only a few provinces in the highlands, for the lowlands were under the control of the Eritrean freedom fighters. One radical change of this land law was that all women were entitled to land with no discrimination on equal bases with men. In the meantime, the Eritrean liberation forces were undertaking some land reforms in the liberated areas. For instance, the Eritrean Peoples Liberation Front (E.P.L.F.) was distributing land to all villagers with no discrimination criterion in many villages in the 1970s and 1980s.

After the *de facto* independence of Eritrea in 1991, undertaking a land reform was one of the main priorities of the established Eritrean government. A land commission was established in 1993 with the aim of drafting land laws and with the power to implement those laws. After thorough investigations and studies, a *Land Law Proclamation,* Proclamation No. 58/1994, was finally promulgated in 1994 by the Eritrean National Assembly. Also, in

1997, Proclamation No. 95/1997, *a Proclamation to Provide for the Registration of Land and Other Immovable Property,* and Legal Notice No. 31/1997, *a Regulation to Provide for the Procedure of Land Allocation and Administration,* were enacted.

According to the ratified Constitution of 1997, the formulated land policy, and the enacted land laws, the state is the owner of all land in Eritrea. Individuals have only usufruct rights and other similar rights upon government recognition and approval. They cannot sell, transfer, exchange, lease, or mortgage the land allotted to them. Agricultural usufructs are the exception, where the right-holder can lease his land, enter into share-cropping arrangements, or change his usufruct right into leasehold if he wishes to use the land in other manners. Individuals also have the right to sell, transfer, lease, or mortgage the immovable property they erect on their land.

As is provided in the land laws, three basic land rights are recognized if allotted upon government approval. They are: agricultural usufruct (land for farming purposes in the rural areas), "tiesa" land (land for housing purposes in the rural areas), and leaseholds (land for housing, farming, industry, tourism, and other purposes in both rural and urban areas). Every allotted land must be registered in the cadastral office by the right-holder. Both agricultural usufruct and "tiesa" land are granted only to Eritrean citizens, whereas leaseholds can be granted to both citizens and foreigners. Individuals who the attain age of majority or minors who are emancipated pursuant to provisions of the *Transitional Civil Code of Eritrea* and who fulfill their national service duties are entitled to apply for land.

Some positive aspects of the *Land Law Proclamation* can be mentioned here. First, it shows that the government has attempted to deal with land problems and issues. Second, it brings about improved land security, particularly in agricultural usufructs as the usufruct right is for the lifetime of the individual. Third, the recognition of women's rights to land in the *Land Law Proclamation* is really a radical and revolutionary change and underpins the priority and focus given to equality of sexes. It recognizes the individual rights of all individuals, even when they get married. This does not mean, however, that the *Land Law Proclamation* is without negative implications. As is provided in the preamble, the *Proclamation* utterly abolishes the traditional systems of land tenure and replaces them with a new land tenure system. History and experience from many African countries has demonstrated the failures of such attempts and that the customary systems have remained in *de facto* force. Hence, thorough studies should be made to incorporate them into the laws. The opportunities of pastoralists are also of deep concern. The *Land Law Proclamation* does not provide innovative solutions for protecting the rights of pastoralists. Another negative aspect is the issue of land expropriation. The *Land Law Proclamation,* Proclamation No. 58/1994, rules that government decisions to expropriate land allotted to right-holders are final and that no appeal lies to a court. Only the amount of compensation may be challenged on appeal to a court. This does not fully guarantee that government decisions are always just, fair, and lawful. We have also seen some cases in this thesis where the government acts outside the scope and spirit of the *Land Law Proclamation.* Cases of land selling can be raised here. The government should either abide by its own enacted laws or should revise the laws, if need be. government control, monitoring, and interference in land use, after allotment, should be reduced to the minimum.

To sum up, as the *Land Law Proclamation* is not yet implemented fully in practice, more time is needed to adequately assess its practical impacts on society, economy, and politics.

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