

The Legal Status of the Communal Land Holding System in Ethiopia: The Case of Pastoral Communities

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1. *Introduction*

Numerous researchers have said a great deal about private and/or state landholding systems in Ethiopia. Many laws and policies have been issued throughout the history of the Ethiopian state concerning regulation of the land tenure system. Researchers and policy-makers in Ethiopia generally favour either a private or state landholding system. Most researchers and policies usually ignore or at least do not prioritise issues of communal landholding systems, which are practiced in over 61 per cent of the total landmass of this country by pastoralists and other indigenous communities. Communal landholding is no longer a theoretical and academic exercise; it is today a question of either respecting or ignoring the rights of indigenous communities, which have moved from moral obligations to state obligations both under international law and the national laws of many countries. This paper explores the legal status of communal landholding systems of the pastoral communities in Ethiopia, in an informative way for researchers and policy-makers of this country. It informs policy-makers that land tenure is not simply private versus state since it is also communal. It attempts to clarify the status of communal landholding of the pastoral communities under Ethiopian constitutional law, thereby adding a third dimension to the debate on land tenure issues in the country. The paper argues that the various pastoral groups in Ethiopia are 'indigenous communities' according to international law, and as such, they have unique relations to their land and their rights to communal landholding should be recognised and respected. It also argues that while the 1995 Federal Democratic Republic of Ethiopia (FDRE) Constitution as well as various international instruments and theories have recognised the communal

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landholding of pastoralists, other laws and state practices in Ethiopia have denied the legal existence of their tenure system. The paper concludes that such laws and state practices are against the constitutional rights of pastoralists and that such inconsistencies in the legal system need to be rectified.

Thus, the paper, in its second part following this introduction, briefly assesses the situation of pastoral communities in Ethiopia. Even though pastoral groups are different in their way of life, in their culture and in their customary resource management systems, they have certain common features. In the third part, the paper clarifies that communal land rights of traditional communities are recognised by international legal and non-legal instruments as part of the collective dimension of human rights protection. Being traditional communities that are marginalised, the pastoralists are minority and/or indigenous communities (for all purposes within the meaning of international instruments) who are entitled to protection and rights under those instruments. After discussing the conceptual perspectives of communal landholding and common property rights, in the fourth part, the paper then identifies the position of the FDRE Constitution, in the fifth part, and, in the sixth part, how other domestic laws of the country address their communal landholding rights.

2. General Overview of the Ethiopian Pastoralists

Ethiopia is situated in northeast Africa (the so-called 'Horn of Africa') with a total area of 1,109,800 square kilometres.¹ Its population is now above 70 million with an estimated mean density of 58 people per square kilometre.² It is the second most populous country in sub-Saharan Africa and has a highly diversified ethnic society. According to various policy documents and statistics, more than 80 per cent of the population live in rural areas and derive their livelihood from agriculture.³ The climate of Ethiopia varies, mainly according to elevation, and it possesses diverse agricultural environments. The central highlands rise up to an altitude of 4000 metres, while the lowland altitude is as low as 100 metres below sea level.⁴

The highlands of the country vary from semi-humid to humid and are home to nearly all of the important areas for cultivation and mixed crop-livestock systems. For this reason, sedenterisation-based crop cultivation is the base for livelihood in these areas. The lowlands, in contrast, are dominated by arid to

¹ World Bank, *World Development Report (1994–96)*.

² Note that according to the 2002 UN Development Programme (UNDP) Human Development Report, the Ethiopian population will be 71 million by the year 2003. Now, some unofficial information reveals that it exceeds 76 million.

³ See Poverty Reduction Strategy of Ethiopia (2002) and Rural Development Policy and Strategy of the Federal Democratic Republic of Ethiopia (FDRE) (2002).

⁴ D. L. Coppock, *The Boran Plateau of Southern Ethiopia: Synthesis of Pastoral Research, Development and Change, 1980-91* (International Livestock Center for Africa (ILCA), Addis Ababa, Ethiopia, 1994) p. 4.

semi-arid climatic zones and are characterised by uncertainties in rainfall.⁵ Such climatic conditions, in these areas, necessitate mobility as an essential characteristic of the pastoralists' livelihood.⁶ The delineation of the highlands and the lowlands is based on the approximate threshold elevation of 1500 metres.⁷ The highlands, where rainfall, temperatures and soil types are more favourable to crop production than in the lowlands, constitute about 40 per cent of the total land-mass of the country and support more than 85 per cent of the rural population.⁸

Unlike the highlands, the Ethiopian lowlands have a small population, account for more than 60 per cent of the total landmass of the country and are home to pastoral communities.⁹ The Ethiopian lowlands have certain unique features that make the area different from the highlands of Ethiopia: it forms the borderlands and frontiers of the country and also part of the communities that are divided by colonially imposed international borders in the Horn of Africa.

For the pastoralists living in the Ethiopian lowlands, pastoralism is extensively practiced. In other words, the trans-human way of life of pastoralists is the mode of production best suited to the unsuitable and harsh environment. Pastoralism enables the pastoralists to strategically exploit seasonally available pastures and water resources. Pastoralism is, thus, one of many socio-economic strategies based on herding domesticated livestock on grazing lands communally owned and used by the communities and their members.¹⁰ Pastoralism is practiced, in its traditional form, as the main mode of subsistence, and in some circumstances, is combined with cultivation. Thus, pastoralists are among the African 'indigenous communities'¹¹ who derive most of their means of livelihood from raising

⁵ J. Markakis, 'Pastoralism on the Margin', *Minority Rights Group International* (2004) p. 4.

⁶ Coppock, *supra* note 4.

⁷ *Ibid.*

⁸ It is important to note that the high population density in the highlands of Ethiopia is now beyond the carrying capacity of the lands, putting significant pressure on the lowlands of Ethiopia. Most of the areas now planned by the state for resettlement are in the lowlands of Ethiopia, which pastoralists are using for their livelihood.

⁹ R. Hogg, 'Changing Land Use and Resource Conflict Among Somali Pastoralists in the Haud of Southeastern Ethiopia', in R. Hogg (ed.), *Pastoralists, Ethnicity and the State in Ethiopia* (Haan Publication, 1997) p. 125 and S. Homann *et al.*, 'Potentials and Constraints of Indigenous Knowledge for Sustainable Rangeland and Water Development in the Pastoral Land Use System of Africa: A Case Study in the Borena Lowlands of Southern Ethiopia' (GTZ, Eschborn, Germany, 2004) pp. 34, 35.

¹⁰ Homann, *ibid.*

¹¹ Note that the African Commission on Human and Peoples' Rights (ACHPR) has categorised pastoral groups in Africa as indigenous communities and a Working Group on Indigenous Populations/Communities was established that is mandated to work on and study the problems of African indigenous communities. Conceptually, the term 'indigenous' is not understood in its 'first people in the land' sense as far as Africa is concerned. The Commission recognised the existence of indigenous communities including pastoralists in the sense that "there are communities whose way of life, attachment to particular land, and social and political standing in relation to other more dominant groups in a country has resulted in their substantial marginalization", and the term 'indigenous communities' used throughout this article must be understood in this way.

domestic livestock in conditions and systems where most livestock feed comes from natural forage on communally possessed land.¹²

The pastoralists in Ethiopia are also tribal communities with a structure of tribes, clans and sub-clans. They are minorities representing more than 20 different ethnic groups belonging to *Cushitic* and *Nilotic* speakers.¹³ The major pastoral ethnic groups in Ethiopia are the *Somali* in eastern and southeastern Ethiopia, the *Afar* in northeastern Ethiopia and the *Borena-Oromo* in southern Ethiopia. There are also other ethnic groups who are pastoralists, such as the *Karayu* in *Oromia* and *Hamer* and *Baakko* in the state of Southern Nations, Nationalities and Peoples (SNNP). Although these groups have many things in common, there are many differences in their systems and ways of life. Even within one group of pastoralists, there can be differences, where, as Markakis pointed out, the segmented character of their social organisation endows smaller units with virtual autonomy to manage their own affairs.¹⁴ In Afar, for instance, clan is the lowest social unit to which communal property rights over land and other natural resources are defined.¹⁵ Clan land in Afar includes grazing areas, water points, communal graveyards, settlement areas (*metaro*) and ritual sites managed by village councils consisting of a clan leader, elders (*the feima*) and local wise-men and where individual members have rights to use the land subject to the rules of the collective management system of their clan.¹⁶ Another important feature of Afar's resource management is *isso* rights—a kind of right to access—by each clan to the land of another clan and based on long-term reciprocity. The Boran pastoralists of southeastern Ethiopia are also known for exceptionally efficient land resource management.¹⁷ In fact, scarcity of water was, according to Helland, one of the key variables that determined the activity of pastures,¹⁸ which were considered the best rangelands in eastern Africa.¹⁹ Moreover, their distinct indigenous institutions enable the Boran pastoralists to

¹² Hogg, *supra* note 9 and Coppock, *supra* note 4.

¹³ See G. Kassa, 'Resource Conflict Among the Afar of Northeast Ethiopia', in M. Salih *et al.* (eds.), *African Pastoralism: Conflicts, Institutions and Government* (Pluto Press, London, 2001) p. 3. See also Markakis, *supra* note 5, p. 16.

¹⁴ Markakis, *supra* note 5, p. 5.

¹⁵ Kassa, *supra* note 13 and B. Hunde, *Property Rights Among Afar Pastoralists of Northeastern Ethiopia: Forms, Changes and Conflicts*, paper prepared for Humboldt University of Berlin, 2004, p. 3.

¹⁶ *Ibid.* For instance, when rainfall is normal for successive seasons, clan members are informed not to use reserve pastureland (*ibid.*).

¹⁷ J. Helland, 'Land Alienation in Borana: Some Land Tenure Issues in Pastoral Context in Ethiopia', in M. Babiker (ed.), *Resource Alienation, Militarisation and Development* (OSSREA, Addis Ababa, Ethiopia, 2002).

¹⁸ J. Helland, 'Development Interventions and Pastoral Dynamics in Southern Ethiopia', in Hogg, *supra* note 9, pp. 60–75.

¹⁹ Coppock, *supra* note 4.

match the needs of livestock with the management of available grazing and water resources during times of plenty as well as scarcity.²⁰

From the perspective of formal administration, Ethiopia has nine constituent states in its more or less ethnic-based federal system adopted by the 1995 FDRE Constitution.²¹ Among the nine states, pastoralists are living in the Somali, Afar, and Borena zones (provinces) of the state of Oromia. There are also some pastoral communities in the state of Tigray, the state of Southern Nations Nationalities and Peoples, the state of Benishangul-Gumuz, and the state of Gambella. The Horn of Africa is said to be home to the largest remaining aggregation of traditional livestock producers in the world.²² In fact, pastoralists occupy substantial parts of sub-Saharan Africa, including Ethiopia. According to some literature, an estimated 25 million people in this region derive their livelihood directly from pastoralism and agro-pastoralism.²³

Now let us explore some features of the way of life of pastoral communities. It is very important to note from the outset that their traditional systems have survived many centuries in a difficult and harsh natural environment. One of the basic features of their traditional systems is mobility and efficient use of various and fluctuating resources in their environment based on the principles of flexibility, complementarity, multi-functionality, reciprocity and sustainable communal use.²⁴ Their way of life is generally characterised by daily, seasonal or yearly movement of livestock in response to fluctuating weather conditions and with a view to reduce risks associated with the use of resources. Thus, as John Markakis has pointed out, the defining features of the pastoralists' mode of production is extensive land use and freedom of movement.²⁵

Their system of production has, for the most part, been traditionally based on mobility that evolved in response to their diverse natural environment—arid, semi-arid and sub-humid zones with varying temperatures, altitudes, soil types and natural vegetation. However, their mobility for search of pasture and water is not random. Rather, it is a result of complex traditional rules and regulations that relate to when and where different ethnic groups or clans or even families may graze.²⁶ For most Ethiopian pastoralist communities, the concerned community normally

²⁰ Homann, *supra* note 9, p. 2.

²¹ Article 47 of the FDRE Constitution, *Federal Negarit Gazeta* (1st Year No. 1), 1995.

²² Markakis, *supra* note 5, p. 15. Ten to 12 per cent of the total population in Ethiopia, 25 per cent in Kenya, 40 per cent in Uganda and more than 80 per cent in Somalia are pastoral communities.

²³ A. B. Kamara, 'Ethiopian Case Study', in N. McCarthy *et al.* (eds.), *Property Rights, Risk and Livestock Development in Africa* (International Food Research Institute, Washington DC, 1999) p. 396.

²⁴ Markakis, *supra* note 5, p. 5.

²⁵ *Ibid.*

²⁶ T. McCabe, 'Mobility and Land Use Among African Pastoralists: Old Conceptual Problems and New Interpretation', in M. Salih *et al.*, *supra* note 13, pp. 69–76.

sends a group of assessors to investigate the status of pasture and water at different places before moving.²⁷ For the most part, every pastoral community in Ethiopia tries to avoid staying in a certain area for a long period for various reasons, such as allowing for the ecological recovery of plants, avoiding the outbreak of disease and minimising conflicts with other groups. In this regard, a traditional pastoralist once said: “because the pasture is running low around our home-stead, my father told me to bring our herd of camels to this area. Camels take a lot, so if we stay near home, they wouldn’t leave enough to eat for our cattle, goat, and sheep.”²⁸

The socio-economic and cultural systems of pastoralist communities in the Horn of Africa and Ethiopia are based on communality. Land, for instance, is held traditionally under the collective possession and ownership of their community. Their communal land tenure arrangements have traditional rules and regulations that aim at harmonising ecological, economic and social benefits. In contrast to the communality of land holding, livestock ownership and management is for individual households.²⁹ In line with the principle of utilisation of different ecological niches, pastoralists classify their livestock herds into grazers and browsers. They also categorise their livestock into young and old, female and male, etc. in accordance with the water demands of livestock species. In fact, the fodder demand of different species of livestock is complementary rather than competitive as each species favour a feed resource not favoured by other species of livestock. For instance, cattle enjoy grass while camel and goat favour leaves of trees and bushes. Thus, compared to the single-species-herding system of modern ranching, the Ethiopian traditional pastoralists have a mixed herding system aimed at minimising production risks and environmental impact.³⁰

Such classifications of herds are also important for the proper management of grazing resources, which are communally owned and administered by traditional elders. For instance, in Borena pastoral land there can be *Warra* grazing areas, *Foora* grazing areas or areas for calf-enclosure. *Foora* grazing areas are designated for grazing bulls and non-lactating cows in which *Madda* elders prohibit permanent settlement.³¹ *Warra* grazing areas are for lactating cows for milking and sick and weak animals that need close supervision. In Somali and Afar pastoral land, camels are

²⁷ For instance, with regard to Borana pastoralists the assessment is called *abuuru* and Somali pastoralists call it *sahan*.

²⁸ A. A. Husien, *On the Move: Understanding Pastoralism in Ethiopia* (Pastoralist Concern Association Ethiopia, Addis Ababa, Ethiopia, 2006) pp. 8–13. As Markakis, *supra* note 5, has said: “being dependent for survival on a sparse natural resource base, pastoralists are obliged to be efficient managers of it, and theirs is one of the very few surviving civilisations that have claimed to have lived in harmony with nature.”

²⁹ Markakis, *supra* note 5, p. 24.

³⁰ *Ibid.*

³¹ Kamara, *supra* note 23, p. 407.

not allowed to stay around the homestead during the dry-season so that other herds not able to move far can have enough pastures and water. Traditionally, pastoralists also classify water resources into natural reservoirs free to all, traditional ponds with some excavation and constructed water-harvesting ditches, traditionally named *birka*. Natural reservoirs such as rivers are traditionally considered as God-given-water where every member of the community has free access. In contrast, ponds and ditches involve human labour; hence, only those who contribute their labour have free access.

Ethiopian pastoralists also have their own traditional or indigenous institutions. In fact, with regard to communal natural resources management, the role of indigenous institutions is immense. In this regard, traditional elders are at the core of communal natural resources management. They are the traditional bodies that formulate rules on resource use, including land, and they administer rule enforcement, and ensure that sanctions and penalties are implemented. Due to the absence of any practical application of formal laws at the grass-root level in most pastoral areas, traditional elders play a great role in every aspect of the community. Thus, most community conflicts (almost 85–90 per cent) are resolved not by formal state institutions but by traditional elders and traditional rules.³² They are also involved in conflict resolution between clans and sub-clans of their communities. The clan-based social network and the mutual support and reciprocal arrangements among the clans that reflect their communal feature are the solid foundations for sustainable development in Ethiopian pastoral areas.

Generally, from the above discussions on the basic features of the indigenous systems of the pastoralists in Ethiopia, one can understand how essential the communal land holding system is for their livelihood. They are, in most cases, able to stand by the very systems that distinguish them from the larger society of the country. Their culture, traditional institutions, rules and systems still dominate the life of their members. It is also important to note that pastoralists in Ethiopia can be regarded as indigenous and minorities within the meaning of international documents.³³ Their communal landholding system is, however, facing many problems, which is causing serious shrinkage of their lands upon which their livelihood depends. Ethiopia has generally seen a steady increase in its cultivating population that encroach upon the communal lands of pastoralists. Since the 1960s, the government has seized the communal lands of the pastoralists for investment, national parks and other purposes. This is detrimental to

³² M. A. Hussien, *Training Needs Assessment Report for SC/US Conflict Prevention Training*, Save the Children US Ethiopia Office, IR4, STI LEAP Project (2005), pp. 6–13.

³³ See Kassa, *supra* note 13, Markakis, *supra* note 5, and International Labour Organisation (ILO) Convention 169. It is also important to note that the ACHPR Report (2003) on issues of indigenous communities in Africa consider pastoralists as indigenous due to their marginalisation.

pastoralists since they are losing prime grazing lands. Unfortunately, this is also resulting in problems such as improperly handled decentralisation and violent conflicts among pastoralists as well as between farmers and pastoralists becoming common and widespread in pastoral areas of Ethiopia. In my view, these problems have roots in the legal status of rights of indigenous communities and the communal landholding system in Ethiopia, which are the focus of this article.

3. International Instruments Related to the Rights of Indigenous Communities

This section focuses on international instruments related to the rights of indigenous communities to their communal land and environment. As indicated in the previous section, the major problems facing the communal landholding system of pastoralists are primarily rooted in the status given to such a system in the legal framework of the country. That is why this status is the core focus of this article. However, before addressing the legal status of communal landholding in Ethiopia, I believe it is appropriate to first assess relevant international instruments and then the concept of communal property rights. The former is the focus of this section while the latter will be dealt with in the next section of this article. Due to the special relationship that indigenous communities have to their lands, many international instruments on human rights and environmental protection provide for collective or group rights of indigenous communities, including the right to their communally possessed lands, which they have special relations to. Thus, this section will assess the position of international instruments on the rights of indigenous communities, including the pastoralists, to such land.

The protection of group rights within a state has been a concern of the United Nations since its inception. On 28 March 1947, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities (the Sub-Commission) was established.³⁴ Then, the Universal Declaration of Human Rights (UDHR) was adopted in 1948 followed by the two human rights Covenants of 1966. These, and other international legal instruments provide for both aspects of human rights—individual and collective/group. The focus of this study is on the collective aspect of human rights. United Nations human rights organs have proclaimed collective rights as rights that collectivities should have as a collectivity in order to protect their threatened collective interests.³⁵ Indigenous

³⁴ S. K. Kapoor, *Human Rights under International Law and Indian Law (First Edition)* (Central Law Agency, Allahabad, India, 1999) p. 16. The Sub-Commission was established at the First Session of the UN Commission on Human Rights. In its 40th Session held in August 1988, the Sub-Commission called for better protection of the human rights of indigenous peoples.

³⁵ M. Galenkam, *Individualism Versus Collectivism: the Concept of Collective Rights*, Ph.D. thesis, Rotterdam, 1993, p. 13.

peoples have suffered due to violations of their collective rights. The UN has recognised this and is now trying to protect their rights. Thus, the United Nations General Assembly decided to declare 1993 the '*Year of Indigenous Peoples*' and 10 December 1994 to 9 December 2004 as the '*International Decade of the World Indigenous People*'.³⁶ Also, the 1989 International Labour Organisation (ILO) Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries and other treaties on the environment address group rights. All these reflect efforts to encourage greater recognition of group rights, which were neglected in the past. Even though the practice of and approach to human rights protection in the past gave undue emphasis to individual rights, collective rights are gradually getting proper attention and currently designated as 'third generation rights'³⁷ that may be invoked against the state and demanded of it.

The concept of collective rights has been developed gradually in the human rights system for various reasons that include the following: *First*, increasing global problems such as pollution and depleting natural resources have resulted in the gradual emergence of the 'right to environment' and the 'right to the common heritage of mankind'. *Second*, challenging social and economic issues faced by newly independent states during the post-decolonisation period, such as widespread poverty, gradually brought about the concept of the 'right to development'. The policy-makers of these states have argued that fighting poverty is their first priority and use it as an excuse for their failure to enforce individual human rights protection. They have argued that the 'right to development' is part of human rights since individuals cannot live a decent life without development.³⁸ *Third*, atrocities committed by some ruthless leaders during the Second World War, racism and racial discrimination happening thereafter and the plight of minority and marginalised groups as well as increasing concern related to globalisation have led to the emergence of collective rights to preserve one's own identity. The 1978 UN Educational, Scientific and Cultural Organisation (UNESCO) Declaration on Race and Racial Prejudice, which provides that "all individuals and groups have the rights to be different and to be considered as such", is the best example in this regard. These are some of the major reasons for the emergence and development of collective rights and as such

³⁶) UN General Assembly resolution 48/163 of 21 December 1993.

³⁷) 'Third generation' human rights reflect the evolutionary development of various aspects of human rights and include the right to peace, the right to self-determination, the common heritage of mankind principle, the right to development, minority rights and the right to a clean environment. Many human rights scholars argue that civil rights are 'first generation' human rights while social rights, such as the right to education, are considered 'second generation' human rights. The rights of indigenous and/or minority groups are 'third generation' human rights.

³⁸) Judge K. M. Baye's 1972 address to the Institute of Human Rights, as cited in Galenkam, *supra* note 35, p. 14.

have given human rights protection a new dimension.³⁹ The idea of accepting communities as collective bearers of rights and duties⁴⁰ has also emerged. Now, the concept of collective rights include in its content the collective right to development, to a healthy environment, to peace, to co-ownership of the common heritage of mankind, and to preserve one's cultural identity.

With regard to the subject (bearer) of collective rights, various international instruments use different names such as 'indigenous peoples', 'tribal peoples', 'local community', 'traditional community', 'minority group' and others. For instance, the ILO uses the names 'indigenous', 'tribal' and 'semi-tribal' peoples⁴¹ while the African Commission on Human and Peoples' Rights (ACHPR) uses the terms 'indigenous population/communities'.⁴² However, a detailed discussion of these notions, with no standard legal meanings, is beyond the scope and purpose of this article. Consequently, for the purpose of this article and with all due regard to the complexity of these notions, I have chosen to use the definition provided in ILO Convention 169. In this Convention, the term 'people' is defined as "[t]ribal peoples whose social, cultural, and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions."⁴³ The Convention goes further and includes peoples "who are regarded as indigenous on account of their descent from the populations which inhabited the country . . . and who, irrespective of their legal status, retain some or all of their own social, economic, and political institutions."⁴⁴ There is no doubt, in my view, that this definition is applicable to pastoralist communities in Ethiopia and elsewhere. It is also important to note that the concept of 'indigenous' in Africa is not understood in its '*first peoples in a land*' sense. Rather, the concept of indigenous people in Africa refers to those peoples whose ways of life, attachment to particular lands and social and political standing in relation to other more dominant groups have resulted in their substantial marginalisation within modern African states.⁴⁵ It

³⁹ One can see, for instance, the arguments and positions taken regarding the 'relativity' and 'universality' of individual human rights among the scholars and politicians of the West and the East.

⁴⁰ V. Dyke, 'The Individual, the State and Ethnic Communities in Political Theory', in D. P. Kommers and G. D. Loescher (eds.), *Human Rights and American Foreign Policy* (University of Notre Dame Press, London, 1979) p. 60.

⁴¹ Article 2(1) of the 1957 ILO Convention 107 on the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries.

⁴² ACHPR resolution on the Rights of Indigenous Populations/Communities, OAU Rev. 1., 28th Ordinary Session, Cotonou, Benin, 6 November 2000.

⁴³ Article 1(1)(a) of ILO Convention 169.

⁴⁴ Article 1(1)(b) of *ibid.*

⁴⁵ ACHPR resolution on the adoption of the report of the African Commission's Working Group on Indigenous Population/Communities', Ref. ACHPR/Res.65(XXXIV)03. This resolution, which was adopted by the 53 signatory states of the ACHPR, provides that "certain marginalized groups are

is within the meaning of such a definition that I have used phrases such as 'indigenous communities' in this article. Pastoral communities in Ethiopia can be regarded as indigenous due to their descent from the rest of the Ethiopian population. There is no doubt that pastoralists in Ethiopia have retained, at least, some of their socio-economic, cultural and political systems and institutions.

Part Two of ILO Convention 169, which is related to land rights of indigenous communities, has special relevance to this study. The Convention provides that governments shall respect the special importance land has for indigenous communities' cultural and spiritual values as well as their collective relationships to their lands and territories.⁴⁶ It is important to note that the use of the term 'land' in this Convention includes the concept of territories, which legally covers the areas that traditional communities occupy or otherwise use.⁴⁷ In particular, Article 14 of the Convention provides the following important rights:

1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. *Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.*
2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.
3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

Thus, ILO Convention 169 underlines the importance of recognising the rights of indigenous communities to own and possess their lands. It also makes clear that pastoralists are 'people' for the purpose of the Convention and hence entitled to rights to land under it.⁴⁸ Moreover, the rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded, including the right to participate in the use, management and conservation of these

discriminated in particular ways because of their particular culture, mode of production and marginalized position within the state; a form of discrimination that other groups within the state do not suffer from. The call of these marginalized groups to protection of their rights is a legitimate call to alleviate this particular form of discrimination."

⁴⁶ Part Two of ILO Convention 169.

⁴⁷ Article 13(2) of ILO Convention 169. It is important to note that the Convention recognises the rights of indigenous communities to their communal land in a territorial sense, which is the essential characteristic of the landholding system of pastoral communities, and not just in the sense of a piece of land.

⁴⁸ Article 14(1) of ILO Convention 169. This Article legally anchors the rights of the people to their land in a territorial sense and provides, in its last sentence, that "particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect."

resources⁴⁹ as well as the right not to be removed or displaced from the lands they occupy.⁵⁰ If removal is inevitable, the Convention requires the free and informed consent of the people.⁵¹ But, unfortunately, no African country, including Ethiopia, is party to this Convention;⁵² more than half of the states parties to this Convention are from Latin America. This entails that the Convention is not binding upon non-members. However, there are some scholars who argue that the rights in the Convention have acquired the status of customary international law and are thus legally binding on every state other than persistent objectors.⁵³

The Declaration on the Rights of Indigenous Peoples, which was prepared by a Working Group on Indigenous Peoples (WGIP) and adopted by the UN Human Rights Commission this year (2006), is another important international instrument. The Declaration provides collective rights, among others, rights to maintain and develop one's ethnic characteristics and identity; to protection against any deprivation of their ethnic identity and characteristics and forced assimilation; to their traditional economic structures and ways of life; and to be secured in the enjoyment of their own traditional means of subsistence and to engage freely in their traditional activities.⁵⁴

Though the UDHR, the two Covenants of 1966 and the 1965 UN Convention on Racial Discrimination do not refer specifically to indigenous communities or indigenous peoples, some provisions contained in these documents address minority rights with a collective dimension. For instance, Article 27 of the 1966 ICCPR provides: "[i]n those states in which ethnic, religious or linguistic minorities exists, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to their own culture, to profess and practice their own religion or to use their own language." The Human Rights Committee (HRC) has recognised the collective dimension of minority rights provided under these Covenants. In its General Comment on Article 27 of the ICCPR, the Committee said: "[w]ith regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples."⁵⁵

⁴⁹ Article 15 of the 1989 ILO Convention 169.

⁵⁰ Article 16(1) of ILO Convention 169.

⁵¹ Article 16(2) of ILO Convention 169.

⁵² A list of the states that have ratified ILO Convention 169 is available on the website <www.ilo.org/indigenous>, visited on 20 December 2005.

⁵³ F. Makay, *From Concept to Design: Creating an International Environmental Ombudsperson* (Nautilus Institute for Security and Sustainable Development, California, 1998) p. 3.

⁵⁴ Article 8 of the Draft Declaration on the Rights of Indigenous Peoples (1994), UN Doc. E/CN.4/Sub.2/1994/2/Add.1.

⁵⁵ Australian Human Rights and Equal Opportunity Commission, *International developments in the Recognition of the Rights of Indigenous Peoples, Social Justice Report*, 2002, chapter 6,

In addition to human rights instruments, there are also international environment documents, such as the 1992 Rio Declaration on Environment and Development, Agenda-21 and the Convention on Biological Diversity. Recent literature on the environment also demonstrates show how the concept of land and environment is inextricably linked with the perspectives of indigenous communities, which has also been recognised in international environmental instruments. For indigenous communities, land and environment have both cultural and functional values. Their values in indigenous culture are based on a holistic vision of their territory where the entire flora and fauna acquire a particular meaning.⁵⁶ Thus, environmental threats that could destroy their territories and degrade their system of survival jeopardise fundamental human rights such as the right to life and the right to physical integrity and the security of person. The recognition of indigenous communities' rights is functional to environmental protection, and this has been reflected in various international instruments. The 1987 Brundtland Commission Report, for instance, provides that "these communities are the repositories of a vast accumulation of traditional knowledge and experience that links humanity with its ancient origins."⁵⁷ According to the Report, the disappearance of indigenous communities is a loss for the larger society, which could learn a great deal from their traditional skills on sustainable management of a very complex ecological system.

Generally, Ethiopia actively participated in the development processes of most of the international documents discussed above. It is also party to all the documents mentioned above except ILO Convention 169. For instance, Ethiopia signed and ratified the Convention on Biological Diversity on 10 June 1992 and 5 April 1994 respectively, which under the 1995 FDRE Constitution became national law.⁵⁸ Moreover, as we shall see later, Ethiopia has incorporated most collective rights recognised under various international instruments in its constitutional law. The right of various groups in Ethiopia to self-determination and the right of the people to development are among the various collective rights provided for under the FDRE Constitution. The people as a whole and each

<www.hreoc.gov.au/social_justice/sjreport_02/Social_justice_Report02.pdf>, visited on 6 January 2006. See also Aboriginal and Torres Strait Islander Social Justice Commissioner, *An Australian Perspective on Self-Determination*, UN Doc. E/CN.4/2002/WG.15/WP.1, 21 October 2002.

⁵⁶ Discussion with Mr. Martin, the Colombian indigenous peoples rights activist and Director of GAIA Amazonas in Bogota, Colombia, on November 2004 and ICARRD, *Agrarian Reform in the Context of Food Sovereignty, Right to Food and Cultural Diversity: Land, Territory and Dignity, Issue Paper 5*, ICARRD 2006/IP/5, 2006, p. 19.

⁵⁷ World Commission on Environment and Development, The Brundtland Commission Report, UN Doc. A/42/427, 4 August 1987, pp. 24–26.

⁵⁸ Article 9 of the 1995 FDRE Constitution provides that "all international agreements ratified by Ethiopia are an integral part of the law of the land."

nation and nationality in particular have/has the right to sustainable development,⁵⁹ which in the case of pastoral communities is closely tied with their rights over their communal lands. The right to development for indigenous communities includes: (a) the right of access to resources on their territories and (b) the right to seek development on their own terms.⁶⁰ This entails, under the guise of development activities or conservation works, that these communities should not be denied the right to exploit local resources. Under no circumstances may a people be deprived of their means of subsistence,⁶¹ which in the case of pastoralists is their communal rangeland. Generally, being groups whose cultures are mainly based on communality and who have suffered marginalisation by the state throughout the history of the country, pastoralists in Ethiopia fulfil the definition of the term 'indigenous peoples' provided in various international conventions such as ILO Convention 169. More importantly, the African Commission on Human and Peoples' Rights has recognised and categorised pastoralists in Africa as 'indigenous communities'.⁶²

4. Communal Land Holding System: Conceptual Perspective

As reflected in the previous section, many international legal instruments have clearly recognised the rights of indigenous communities (including pastoralists) to their communal land in a territorial sense and not just in the sense of a piece of land. One can safely say that the communal landholding systems of indigenous communities have their own conceptual perspectives; consequently, it is important to assess these conceptual perspectives before addressing the position of the Ethiopian legal system. Hence, this section focuses on the concept of 'property rights', 'common property' and the legal status of 'common property rights' in Africa and elsewhere.

Land is property, which is an object that can be owned and in which the owner enjoys many rights over. The owner has rights to possess, to use and enjoy and the right to consume, destroy and alienate.⁶³ Land can be held with or without having ownership of title by an individual or a group of peoples. While early Western jurists assumed that the origin of the concept of property was 'the occupation of a land by a single proprietor and his family', it actually originated in ancient times where societies held most property rights (mainly land) in

⁵⁹ Article 43(1)(2) of the 1995 FDRE Constitution.

⁶⁰ D. A. Possy *et al.*, *Cultural and Spiritual Values of Biodiversity* (UN Environment Programme (UNEP), London, 1999) p. 513.

⁶¹ *Ibid.*

⁶² ACHPR resolution, *supra* note 45.

⁶³ P. J. Fitzgerald, *Salmond on Jurisprudence (12th Edition)* (N. M. Tripathi Private Limited, Bombay, 1966, reprinted in 1997) pp. 246, 247.

common.⁶⁴ As clearly indicated by Ostrom, such misguided views have provided strong justification to issue laws eliminating collective landholding rights in favour of individual property rights.⁶⁵ The history of property rights has been beautifully articulated by writers such as Ostrom and Bromley; however, it is beyond the scope of this article to provide a detailed elaboration of the history of property rights. In its dictionary meaning, the term ‘property right’ is a generic term that refers to any type of right to a specific property.⁶⁶ Commons considers property rights as enforceable authority to undertake particular actions in a specific domain.⁶⁷ In fact, there are many ways to define property right, none of which are capable of claiming universality and optimality as each definition is the result of socio-cultural processes within a wide range of economic and ecological factors. That is why Ostrom indicated that “the world of property rights is far more complex than simply government, private, and common property.”⁶⁸

According to Ostrom, in any property regime, there are various rights that may be held by different persons. The possible holders of such rights can be: ‘authorised entrants’, who only have the right to enter the resource; ‘authorised users’, who have the right to access and use the resource units; ‘proprietors’, who possess rights to access, use, manage the resources and the right to exclude others; and ‘owners’, who hold all the above mentioned rights including the right to alienate it.⁶⁹ These various holders of property rights can be individuals or collectivities. When groups of individuals have formed an organisation that exercises ‘collective-choice’ rights of management and exclusion in relation to some

⁶⁴ P. Grossi, *An Alternative to Private Property: Collective Property in the Juridical Consciousness of the Nineteenth Century* (University of Chicago Press, Chicago, 1981), as cited in E. Ostrom, ‘Private and Common Property Rights’, in B. Bouchaert and G. De Geest (eds.), *Encyclopedia of Law and Economics, Volume II* (Edward Elgar, Cheltenham, UK, 2000) p. 333.

⁶⁵ *Ibid.* See also D. Fitzpatrick, ‘Evolution and Chaos in Property Rights Systems: The Third World Tragedy of Contested Access’, 115:996 *Yale Law Journal* (2006) pp. 996–1048. In his essay, Fitzpatrick provides an explanation for the failure of private property rights to ensure sustainable management of scarce resources in many developing countries. He posits that the attempt to privatise resources will fail where local norms on communal resource ownership are particularly strong or appropriate for management and where government lacks the authority to enforce such rights. This will lead, according to him, to situations where open access and chaos characterise resource management.

⁶⁶ H. C. Black *et al.*, *Black’s Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence—Ancient and Modern* (West Publishing Co., St. Paul, Minnesota, 1990) p. 1218.

⁶⁷ J. Commons, *Legal Foundation of Capitalism* (University of Wisconsin Press, Wisconsin, 1968), as cited in Ostrom, *supra* note 64, p. 339.

⁶⁸ Ostrom, *supra* note 64, p. 342.

⁶⁹ *Ibid.*, p. 340. See also E. Ostrom and E. Schlager, ‘Property Rights Regimes and Natural Resources: A Conceptual Analysis’, 68 *Land Economics* (1991), pp. 249–262, same authors, ‘The Formation of Property Rights’, in S. Hanna *et al.* (eds.), *Rights of Nature* (Island Press, Washington DC, 1996) pp. 127–156, and J. W. Bruce *et al.*, ‘Tenures in Transition, Tenures in Conflict: Examples from Zimbabwe Social Forests’, 58 *Rural Sociology* (1993), pp. 626–642. These writers mainly contribute in showing the different bundle of rights within common property systems.

defined resource system and the resource units produced by that system, then we can conclude, in Ostrom's view, that there are communal property rights.⁷⁰ Thus, communal property rights are simply group property rights. Bromley stated this by saying that 'common property' represents private property for the group.⁷¹ But sometimes, common property is logically extended to public property or state property—with the community being the country as a whole. Because the common property right regime of African traditional societies is alien to Western legal tradition, it is wrongly assumed that their communal systems are based on a complete freehold for everybody that causes the tragedy of the commons in relation to resources.

As Wily rightly reflects, the tragedy of the commons perception highly influenced the position of most formal land tenure laws in Africa, where the state largely appropriated lands communally held by African indigenous communities.⁷² Even though this is the case mostly in Africa, it does not mean the concept of common property rights is always extended to the state or vests an exclusive ownership right in the state. To mention an example, the resources that are considered as the '*common heritage of mankind*' under international law cannot be owned and possessed by a state or individuals, and yet, it is not a complete freehold for all. Moreover, the common property situated within a state is not always owned by the state or an exclusive private holding. The domestic law of a country may grant the rights over a common property to an entity other than a state, as in the case of the Colombia's '*indigenous territories*' where the concerned community (not the state of Columbia) owns, possesses and even administers its own territory.⁷³

As many authors⁷⁴ have clarified, the common property regimes of indigenous communities in Africa and elsewhere provide a bundle of rights both for the community and individual members, with certain necessary limitations. The community can, through its institutional and legal structures, decide on the

⁷⁰ Ostrom, *supra* note 64, p. 340.

⁷¹ D. W. Bromley, 'The Commons, Common Property, and Environmental Policy', 2 *Environmental and Resources Economics* (1992) pp. 1–17.

⁷² L. A. Wily, 'Land Tenure Reform and the Balance of Power in Eastern and Southern Africa', 58 *Natural Resource Perspectives* (June 2000) p. 3.

⁷³ Articles 63, 286, 329 and 330 of the 1991 Colombian Political Constitution. See also R. R. Ortega, *Indigenous Peoples of Colombia and the Law: A Critical Approach to the Study of Past and Present Situations*, ILO Project, 2000, pp. 38–48.

⁷⁴ Ostrom, *supra* note 64, Bromely *supra* note 71, H. W. Wabnitz, *Mauritania's Code of Pastoral, Return to the Sources: Reviving Traditional Nomads' Rights to Common Property Resources*, Presentation for the World Bank's Social Development Forum, Washington DC, 1999, p. 6, P. Rosset, *Access to Land: Land Reform and Security of Tenure*, <www.landaction.org/display.php?article=179>, and J. K. Carino, *Ancestral Land, Food Sovereignty and the Right to self-determination: Indigenous Peoples Perspectives on Agrarian Reform*, contribution to the *Civil Society Issue Paper* 'Land, Territory, Dignity' for the International Conference on Agrarian Reform and Rural Development, Brazil, 7–10 March 2006.

allocation of such rights and their regulation. Thus, their communal property regime does not imply that the entire bundle of rights is exclusively given to the group with complete freehold. It may allocate the right to produce crops on a particular plot of land to an individual member but give grazing rights on that land to the group after he harvests his crop. This is the case, for instance, in communities practicing shifting cultivation where individual members are entitled to have such rights due to the investment he/she made in the land based on their rules that allow individual rights to reap what they have sowed and to enjoy the fruits of their labour.⁷⁵

Optimal property rights in land for pastoral communities are rights that capture the full income streams of livestock grazing on communal land. These rights have, in the views of Wabnitz, taken the form of access rights to land for grazing with key features of communal landholding and non-exclusive rights that can accommodate the rights of other users.⁷⁶ Communal landholding was a common feature of most African indigenous communities before intervention by formal state systems. For more than a century, due to persistent penetration by Western-legal-tradition oriented ideology, laws have been adopted by most African states to the detriment of communal land tenure by communities. Based on the system inherited from their predecessors—Western colonial powers—African states took measures to quickly reconstruct customary rights over land and to subordinate them to states' interests.⁷⁷ As a result, various African communities have found themselves as non-owner occupants of their ancestral lands—the state being the sole owner that can do whatever it pleases.

Irrespective of such approaches by African states in their formal legal systems, customary communal tenure has persistently worked side by side with the formal system, resulting in various forms of empirical legal pluralism. In fact, customary tenure is by far the dominant practiced form of tenure, which has compelled African states to revisit the issue. Most African states now legally recognise (at least in theory) the customary tenure regime of the communities in their formal laws. African countries, such as South Africa, Uganda and Tanzania, enacted laws allowing both individuals and communities to hold lands.⁷⁸ In

⁷⁵ Walta Information Centre, Documentary Film: *A Story on the Life of a Traditional Community in Benishangul-Gumuz Regional State*, Addis Ababa, Ethiopia, 2005. For instance, a farmer engaged in shifting cultivation, which was practiced mainly on communally owned lands in Western Ethiopia, sows maize and harvests, and he owns the harvest not the land.

⁷⁶ Wabnitz, *supra* note 74.

⁷⁷ G. Krzeczunowicz, 'Code and Custom in Ethiopia', 2:1 *Journal of Ethiopian Law* (1966) p. 425. In this journal entry, he said: "[i]t is now generally admitted in Africa that the diversity and the communal features of tribal custom in the fields of land tenure, . . . hamper trade, investment and social progress." This was a clear reflection of the position of scholars and states of the day.

⁷⁸ Wily, *supra* note 72.

Tanzania, the 1999 tenure law directly designates the elected government of each village as a land tenure administrator and provides that each village community is to undertake adjudication, registration, entitlement and resolution of land disputes.⁷⁹ In 1999, Mauritania enacted the *Code of Pastoral* for the pastoralists, which legally protects their tribe-based communal land holding and use.⁸⁰ In Uganda, the 1995 Constitution and the 1998 Land Act recognised community land tenure in which the state no longer holds absolute title to land.⁸¹ The position of the 1995 FDRE Constitution, which will be discussed below, can, in my view, be considered to reflect these changes in Africa. Thus, as Wily correctly states, communal holding is now emerging as a new form of tenure in the formal laws of most African states.⁸² I shall argue, at this juncture, that all these changes in Africa regarding communal landholding are mainly driven by a vague ‘decentralisation policy’ advocated by international monetary institutions and donors since the 1990s as well as the increasing recognition of the rights of traditional communities in relation to their lands at the international level.⁸³ However, this paradigm shift among African states is not complete and hesitantly put into practice.

5. *The Constitutional Position of Communal Land Holding Systems in Ethiopia*

As part of the shifting paradigm among African states towards customary landholding systems, the 1995 FDRE Constitution has taken a new path on what are truly complicated issues. The constitutional recognition of ‘nations’, ‘nationalities’, and ‘peoples’ seeking sovereignty as their own right has opened a place in the Ethiopian legal system for legal pluralism.⁸⁴ This has led to the particular potential for

⁷⁹⁾ *Ibid.*

⁸⁰⁾ Wabnitz, *supra* note 74.

⁸¹⁾ R. Mwebaza, *How to Integrate Statutory and Customary Tenure: The Uganda Case*, International Institute of Environment and Development (IIED), *Dryland Program, Issue Paper No. 83*, June 1999, pp. 3, 4.

⁸²⁾ Wily, *supra* note 72. See also C. Hess and T. Pippa, ‘Who’s Managing the Commons? Inclusive Management for a Sustainable Future’, IIED, *Securing the Commons No. 1*, London, May 2000, p. 5. They said: “[c]entral Government in the Sahel are trying to implement the rhetoric of local participation by reforming legislation and passing laws to allow a greater involvement of civil society in the management of natural resources.”

⁸³⁾ S. L. Barraclough, *Land Reform in Developing Countries: The Role of the State and Other Actors*, UN Research Institute in Social Development (UNRISD), *Discussion Paper No. 101*, Geneva, 1999; T. Besley and B. Robin, ‘Land Reform, Poverty Reduction and Growth: Evidence from India’, *Quarterly Journal of Economics* (2002); J. Borras and M. Saturnino, ‘Questioning Market Led Agrarian Reform: Experience from Brazil, Colombia, and South Africa’, 3:3 *Journal of Agrarian Change* (2003) pp. 367–394; J. Borras and M. Saturnino, ‘Questioning the Pro-Market Critique of State Led Reform’, 15:2 *European Journal of Development Research* (2003) pp. 105–120.

⁸⁴⁾ E. Tsegaye, *Federalism and the Rights to Self-determination as a Constitutional Legal Solution to the Problems of Multi-ethnic Societies*, unpublished LL.M Thesis, University of Amsterdam (Law Faculty), 2001.

enhanced legal recognition of customary land tenure systems in Ethiopia, including that of pastoralists. This section focuses on the constitutional position on communal landholding in Ethiopia, which is one of the core themes of this article. With the above in mind, it is important to first examine the general background of the land tenure system in Ethiopia and then to assess the relevant provisions of the FDRE Constitution. To clearly understand the constitutional position on communal landholding in Ethiopia, two key issues will be provided for: namely, the constitutional status of rights of indigenous communities, which are recognised and guaranteed in various international instruments, and how the FDRE Constitution addresses land tenure, which, as stated above, is one of the core theme of this article.⁸⁵

5.1. General Background of Land Tenure in Ethiopia

Until 1974, the Ethiopian land tenure system was complicated by its geophysical and historical background as well as the ethnic and cultural diversity of the people. These factors produced highly varied forms of land utilisation and ownership. During this period, a variety of classifications and approaches were used to describe the land tenure system in the country. These were: a kinship (*rist*) land tenure system, which was dominant in the north; a communal system, which was dominant in the lowlands; and a village (*diessa*) system and private holding system, both existing mainly in the highlands of Ethiopia.⁸⁶ There were also state and church land tenure systems. The church (Orthodox Christianity being the state religion during this period) was entitled to own lands almost everywhere state machinery existed. In the formal system, however, the most commonly recognised land tenure systems were *kinship*, *private*, *church* and *state* holding systems. Most of the traditional communal landholdings in the lowlands (part of the captured territories in the state's expansion to the south)⁸⁷ formally belonged solely to the state, which the Crown granted to members of the army and those who were loyal in the captured territories.⁸⁸ Barnes in this regard said:

"In old Abyssinia, the oscillation of frontier in relation to centre was a function of the relationship between the crown, aristocracy and peasant, and the economic basis of this

⁸⁵ Other laws related to land tenure are going to be discussed in the sixth section of this paper.

⁸⁶ B. Nega *et al.*, *The Current Land Policy Issues in Ethiopia, Land Reform, Land Settlement and Cooperatives Bulletin*, Special Edition (2003/3) pp. 105, 106.

⁸⁷ With regard to the state's expansion to the south, various arguments have been raised: some said this was consolidation of its territories; others said this was colonisation; others argued that this was unification of the Abyssinian people. But one thing is very clear: the culture, way of life and system of the then state-dominated group were quite different from the local people in those captured territories. And, the expansion was driven by the increasing land demand of highland cultivators.

⁸⁸ B. Zewde, *A History of Modern Ethiopia 1855–1991 (Second Edition)* (Addis Ababa University Press, Addis Ababa, 2002) p. 87. S. F. Joireman, 'Property Rights and the Role of the State: Evidence from the Horn of Africa,' 38:1 *Journal of Development Studies* (October 2001) p. 6.

society, namely ox-plough agriculture. Simplistically, the battle between crown and aristocracy to gain sovereignty over the produce of the peasant ox-plough farmer meant that the state always sought new land in order to extract tribute from a production regime with an already inherent hunger for land.”⁸⁹

The introduction of land measurement (the *qalad*) and registration towards the end of the 19th century, to facilitate taxation and private ownership, had a profound impact on the communal landholding system in Southern Ethiopia.⁹⁰ This, in fact, resulted in privatisation of communal land of indigenous communities in addition to appropriation by the state of large areas of their communal land for the benefit of the state and for that of individuals and institutions (such as the Ethiopian Orthodox Church) it wished to reward.⁹¹ In fact, the pattern of land tenure in Ethiopia since this time has been largely determined by this policy approach. Therefore, state expansion in the 18th and 19th centuries from the central highlands of Ethiopia in every direction, particularly under the last two emperors—Emperor Menelik II and Emperor Haile Selassie I—put most communal land of Ethiopian pastoralists under the central control of the state. During the monarchical period, particularly due to the consolidation of the ‘Ethiopian territory’ under the last two emperors, the lands of Ethiopian pastoralists were virtually considered as ‘no man’s land’ and they were denied rights to their communal land holding system. The result was the constitutional and legal recognition of this assumption during the 1950s and 1960s. In fact, this was the time the pastoralists were marginalised in all aspects of their life; they were not even considered citizens of Ethiopia. This policy of denial was clearly reflected, for instance, in the 1955 Revised Constitution of the monarchical regime. This 1955 Revised Constitution made all lands occupied by the Ethiopian pastoralists state property by declaring: “[a]ll property not held and possessed in the name of any person . . . including all land in escheat, and all abandoned properties . . . as well as all products of the sub-soil, all forests and grazing lands, water courses, lakes and territorial waters, are state domain.”⁹²

From this provision, it is clear that this Constitution considered grazing lands as land not held and possessed in the name of any person. Pastoral lands, in my view, were, legally speaking, vacant and without owner. Based on this status of grazing land of the pastoralists under the 1955 Revised Constitution, some provisions of the 1960 Ethiopian Civil Code have serious implications on their rights. Under

⁸⁹ C. R. Barnes, *The Ethiopian State and Its Somali Periphery Circa 1888–1948*, a Doctoral Thesis submitted to the Faculty of History, Trinity College, Cambridge, 2000, p. 5.

⁹⁰ Zewde, *supra* note 88, p. 88.

⁹¹ *Ibid.*, pp. 89, 90.

⁹² Article 31 of the 1955 Revised Constitution of Ethiopia. This Constitution was suspended by the military regime in 1974 and was repealed and replaced by the 1987 FDRE Constitution, which was repealed by the 1991 Transitional Charter.

Article 1194 of the Code, it is provided that “immovable [property] situated in Ethiopia which are vacant and without master shall be the property of the state.” In fact, this Article provides one of the basic principles of property law found in most countries, but the constitutional position which considers grazing land as vacant and without owner also makes Article 1194 applicable to pastoral lands and puts them under state control. This encouraged the proliferation of private holdings and encroachment on pastoral communal lands in Ethiopia. As a result, private tenure was particularly dominant towards the end of the monarchical regime.⁹³

A system called the *gabbar* was also practiced, mainly in the highlands of Southern Ethiopia, which was the result of the expansion and the capture of territories during this regime. According to the well-known Ethiopian historian Bahru Zewde, the *gabbar* was of a diverse nature. It included: land tax and rent valued according primarily to the productivity of the land; tith (*asrat*), which is equal to one-tenth of a peasant’s harvest; and obliged peasants to supply provisions for officials and their ‘overlords’.⁹⁴ This system was more or less continued until the end of the monarchical regime.

In 1975, with the coming to power of a small military junta called the *Derg*, a radical land reform based on socialist ideology was introduced that abolished tenant-landlord relationships in Ethiopia. This reform was designed to fundamentally alter previous agrarian relations, to make those working the land the owners, to distribute land, to provide a basis for agricultural expansion, etc.⁹⁵ Thus, Land Proclamation No. 31/1975 was introduced. The Proclamation included: public/state ownership of all lands; distribution of private lands to the tiller; and the prohibition of transfer of possession rights by sale or exchange. In the case of communal lands, possession rights over land were guaranteed for “those working on the land at the time of the reform.” Even though this seems to imply the recognition of communal land possession by pastoralists, their communal lands were often appropriated by private persons and mechanised state farms.⁹⁶ The large amount of Afar pastoralist communal land appropriated to introduce mechanised state farms during the 1970s and 1980s without due consideration to the rights of the people⁹⁷ clearly reflected this assertion.

The power of administering land was given, by the 1975 Land Proclamation, to the Ministry of Land Reform and Administration (MLRA) through peasant

⁹³) Nega, *supra* note 86. Professor R. David, who was one of the drafters of the 1960 Ethiopian Civil Code said that “the development and modernization of Ethiopia necessitate the adoption of a ready made system in such a manner as to assure as quickly as possible a minimal security in legal solutions.”

⁹⁴) Zewde, *supra* note 88.

⁹⁵) *Ibid.*, p. 107.

⁹⁶) One can see what has happened to the Afar pastoralists during this regime due to mechanised state farms.

⁹⁷) Kassa, *supra* note 13.

associations at the grass-root level.⁹⁸ Thus, the 1975 Land Proclamation made one thing very clear: the right to own land was vested exclusively to the state. Since the lands communally possessed by pastoralists were formally state owned, even during the monarchical regime, in my view, nothing had changed in regard to land ownership by pastoralists. The policy of forced sedenterisation of pastoralists in the past, mainly during the military regime, was also a major feature of land tenure policy in the lowlands of Ethiopia.⁹⁹ Immediately after the fall of the military regime in 1991, the course the new government would take seemed clear, at least in regard to the communal land of Ethiopian pastoralists, because the right to self-determination was declared in the Transitional Charter.¹⁰⁰ The government did not address the persistent question of choosing between private and public (state) land ownership. But, it declared that this question would be settled in the process of adopting the Federal Democratic Republic of Ethiopia (FDRE) Constitution,¹⁰¹ which was adopted in 1994. Though not forced, a kind of voluntary sedenterisation of pastoralists has been the policy approach of the government in the lowlands of Ethiopia. Generally, both the past forced and the current voluntary sedenterisation policies towards Ethiopian pastoralists have significantly negatively impacted their communal landholding system.

5.2. The 1995 Ethiopian Constitution

5.2.1. Traditional Communities and the FDRE Constitution

As stated above, Ethiopia adopted a new constitution in 1994 known as the FDRE Constitution, which entered into force in 1995. One of the most important features of the Constitution is decentralisation of government power based substantially on ethnic federalism. In fact, this is a clear departure from the past state tradition of a highly centralised state structure.¹⁰² One prominent Ethiopian scholar, discussing the FDRE Constitution said:

“Since 1991, Ethiopia has embarked upon a bold experiment in the conduct of public life. The hallmark of experiment is a readiness to face the fact of ethnic diversity. New

⁹⁸) Article 6 of Land Reform Proclamation No. 31/1975, *Negarit Gazeta* (No. 3), 1975.

⁹⁹) Kassa, *supra* note 13 and Coppock, *supra* note 4.

¹⁰⁰) See Article 2 of the Transitional Charter of Ethiopia, *Negarit Gazeta* (50th Year, No. 1), 22 July 1991 and Proclamation No. 7/1992, a Proclamation to provide for the establishment of national/regional self-governments, *Negarit Gazeta* (51st Year, No. 2), 14 January 1992. See also A. Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study* (Wolf Legal Publishers, Nijmegen, The Netherlands, 2005/2006) pp. 45–47.

¹⁰¹) Zewde, *supra* note 88, p. 108. The position of the military regime was very clear as its choice was public (state) ownership. But, with coming to power of the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF) in 1991, the policy position on land ownership of the Transitional Government was not clear until the adoption of the 1995 FDRE Constitution.

¹⁰²) Fiseha, *supra* note 100, p. 46.

political arrangements aim to shape the Ethiopian identity around the country's constituent nations and nationalities . . . Even in this era of politics of identity, Ethiopia's resolve to extend full public recognition to her varied national communities is unique. It [the right to self-determination including secession] is now a constitutional entitlement. All cultural communities are entitled to fair representation in the institutions of state and federal government. Territorially based nationalities exercise wide powers of self-government in political, economic, cultural and educational affairs. The result is a political order open to cultural diversity, self-expression and autonomy."¹⁰³

Thus, in its preamble, the Constitution begins with "[w]e, the Nations, Nationalities and Peoples of Ethiopia [NNPE] [are] strongly committed, in full and free exercise of our rights to self-determination . . . convinced by continuing to live with our rich and proud cultural legacies . . . [h]ave, therefore, adopted this constitution." In fact, most of the provisions of the Constitution reflect the above preambular statement. For instance, one of the basic constitutional principles in the FDRE Constitution is the principle of sovereignty of the people. In this regard, Article 8 provides that "[a]ll sovereign powers reside in the Nations, Nationalities, and Peoples of Ethiopia",¹⁰⁴ enjoyed through elected representatives and direct democratic participation, in which the Constitution itself is the expression of such powers.¹⁰⁵ Thus, unlike the constitutions of other countries, the FDRE Constitution uses the term 'people' not in its generic sense but intersectionally as 'nations', 'nationalities' and 'peoples'. This is not surprising for one who has seen the first paragraph of the preamble that recognises the existence of 'nations', 'nationalities' and 'peoples' (communities) seeking sovereignty in their own right.¹⁰⁶ As a result, the manner in which the principle of popular sovereignty is articulated in the Constitution influences the rights of communities as reflected in various provisions such as those related to federal structure¹⁰⁷ as well as the supremacy of the Constitution.¹⁰⁸

Constitutional laws normally guarantee rights and freedoms and are thus considered as 'rights documents'. The FDRE Constitution is no exception, and almost one-third of its provisions are designated to 'Fundamental Rights and

¹⁰³) E. Andreas, *Ethnic Federalism: New Frontiers in Ethiopian Politics*, in proceedings of the First National Conference on Federalism, Conflict and Peace Building, Ministry of Federal Affairs of the Government of the FDRE, Addis Ababa, 2003, p. 142.

¹⁰⁴) Note that the terms 'nation', 'nationality' and 'peoples' in the Constitution are applicable to almost all traditional communities in Ethiopia. Thus, Ethiopian pastoralists are among the 'nations', 'nationalities' and 'peoples' of Ethiopia that 'own' the Constitution.

¹⁰⁵) The FDRE Constitution, *supra* note 21, Article 8.

¹⁰⁶) Tsegaye, *supra* note 84.

¹⁰⁷) *Ibid.* See also Articles 1 and 45–48 of the FDRE Constitution.

¹⁰⁸) Article 9(1) of the FDRE Constitution. This Article provides that "any law of the country, customary practice or a decision of an organ of state or a public official which contravenes the Constitution shall be null and void."

Freedoms'.¹⁰⁹ It is, however, important to note that the Constitution incorporates not only individual rights but also collective rights of Ethiopian communities. In light of the diversity of Ethiopian communities who 'own' the Constitution (as reflected in its preamble and mentioned under Article 8), it is not surprising that collectivity rather than individuality has been emphasised throughout its provisions. It is my contention that the various groups of Ethiopian pastoralists are among the 'nations', 'nationalities' and 'peoples' that are beneficiaries of collective rights guaranteed under the Constitution. Moreover, it is important to note that most Ethiopian pastoralists are anything but 'indigenous communities' in the sense of international instruments and under any criteria provided by international law.¹¹⁰

Therefore, it is clear that the 1995 FDRE Constitution recognises a wide range of collective rights of traditional communities. The traditional communities of Ethiopia, including the various groups of pastoralists, being internally sovereign,¹¹¹ have the right to self-determination under the Constitution. In relation to issues of self-determination, the Constitution provides, in particular, the following collective rights of 'nations', 'nationalities' and 'peoples', including the pastoralists:¹¹²

- Rights to self-determination including the right to secession;
- Right to speak, to write and to develop their languages;
- Right to express, to develop and to promote their cultures;
- Right to preserve their history; and
- Right to a full measure of self-government.

As a corollary to the rights mentioned above, the Constitution has imposed a duty upon the state (positive measure) to protect and preserve historical and cultural legacies¹¹³ and to respect the identity of 'nations', 'nationalities' and 'peoples'.¹¹⁴ Thus, the basic principles of sovereignty under the FDRE Constitution that underpins the collective rights of people, including the Ethiopian indigenous communities, under Article 39 and the way the member states under Ethiopian federalism are constituted under Articles 45–48 are all reflections of the constitutional recognition of the rights, cultures and way of life of various groups of Ethiopian pastoralists. A close examination of these clearly reflects that

¹⁰⁹ Note that out of the 106 Articles of the Constitution, Articles 13 to 44 are designated to the Chapter on Fundamental Rights and Freedoms.

¹¹⁰ See, for instance, Article 1 of ILO Convention 169.

¹¹¹ This is very clear from the cumulative reading of Articles 8 and 39 of the FDRE Constitution. See also Tsegaye, *supra* note 84.

¹¹² Article 39 of the FDRE Constitution.

¹¹³ Article 41(9) of the FDRE Constitution.

¹¹⁴ Article 88(2) of the FDRE Constitution.

the constitutional drafters were highly influenced by an increasing recognition of collective rights of traditional communities.¹¹⁵ In this regard, it is said:

“The right to self-determination, as recognized by the FDRE Constitution, is a bunch of rights which includes: the right to a full measure of self-government, such as the right to establish institutions of government in the territory that the indigenous peoples inhabit; the right to equitable representation in the regional as well as the central government; the right to ecological self-determination, such as the right to manage the ecosystem using their traditional ecological knowledge (TEK); the right to maintain their identity; etc.”¹¹⁶

The FDRE Constitution has, as its national policy principles and objectives, imposed duties on the government to also support the growth and enrichment of cultures and traditions that are compatible with fundamental rights, human dignity, democratic norms and ideals as well as provisions of the Constitution.¹¹⁷ The rights of Ethiopian pastoralists to ecological self-determination and customary management of natural resources are thus inalienable fundamental rights that impose a duty on the government to take positive measures in ensuring the enjoyment of these rights. The FDRE Constitution can, in my view, be cited as a unique constitution in recognising collective or group rights of ‘indigenous communities’ in Ethiopia. In fact, one can safely conclude that the Constitution has gone far beyond what is provided under international legal instruments as far as collective rights of ‘indigenous communities’ are concerned. In the face of the communal and solidaristic outlook of the communities being generally ascribed as the key features of collective rights reflected under Article 39, it is now believed that such rights are the sources of other collective rights, such as the right to development, right to environment and rights to their communal lands.¹¹⁸ However, it is still my contention that the collective rights mentioned under Article 39 can effectively be exercised (particularly in the case of pastoralists and other indigenous communities) only if their rights to own, possess and manage their communal lands using their own system are also addressed.¹¹⁹ As we shall see later on, it was from this perspective that most of the arguments forwarded by members of the Constitutional Assembly were made during the adoption of this Article.

¹¹⁵ One can see, for instance, the similarity between Articles 39(2) and 88(2) of the FDRE Constitution and Article 8 of the 1994 UN Draft Declaration on the Rights of Indigenous Peoples, which was adopted in 2006.

¹¹⁶ D. Mellese and A. Mohammud, *The Legal and Institutional Framework for the Protection of Forest Resources in Ethiopia: The Case of Sheka Forests in Southwest Ethiopia*, presentation on a consultative workshop on forest protection in *Sheka*, organised by MELCA, Mahiber, Wabeshebele Hotel, Addis Ababa, 28 November 2005.

¹¹⁷ Article 91(1) of the FDRE Constitution.

¹¹⁸ Note that these rights are guaranteed, expressly or implicitly, in various provisions of the FDRE Constitution, such as Articles 40, 43 and 44.

¹¹⁹ See Government of Ethiopia, ‘Constitutional Assembly Minutes’, Compilation No. 3, November 1994.

The right to a full measure of self-government of the Ethiopian pastoralists is further strengthened by Article 50(4) of the Constitution, which provides that adequate “power shall be granted to the lowest units of government to enable the people to participate directly in administration of such units.”¹²⁰ Chapter 10 of the Constitution also provides policy-guiding principles designed to guide the government in formulating and implementing policies, programs and strategies on social, economic, political and cultural issues. Related to issues of self-rule, Article 88(1) under Chapter 10 provides for the duty of the government to “promote and support the peoples’ self-rule at all levels” in its policies, programs and strategies. Moreover, the government has, under Article 89(6), the duty, at all time, to “promote the participation of people in the formulation of national development policies and programs, and support the initiatives of the people in their development endeavours.” Furthermore, “peoples have the right to full consultation and to the expression of views.”¹²¹ Therefore, the basic goal of the Constitution related to rights of indigenous communities, as reflected in its preamble and guided by the basic principles provided under its Chapter 2, is achieved through the above discussed articles. However, with some exceptions, most of the provisions of the Constitution, as indicated by Vangham and Tronvol,¹²² have little to do with the daily reality of Ethiopian politics for various reasons. Generally, in my view, the constitutional position regarding communal landholding can be very clear only if we assess the provisions of Article 40 in light of the above mentioned constitutionally guaranteed collective rights of communities in Ethiopia.

5.2.2. Communal Landholding and the FDRE Constitution

Although Ethiopia is not a signatory of ILO Convention 169, I would like to argue that the FDRE Constitution has recognised the rights of Ethiopian pastoralists to their land in almost exactly the same way as provided in this Convention. The principle of sovereignty as well as other collective rights under the Constitution must be seen not only from a community rights perspective but also from the perspective of land tenure issues in Ethiopia. In fact, the conventional debate on the Ethiopian land tenure system has been public versus private, which has become a critical issue in current Ethiopian politics.¹²³ However, the issue of communal land tenure has been totally absent in political debates on land tenure.

¹²⁰ Take note of what is provided under Article 8: sovereignty is expressed through elected representatives and direct democratic participation.

¹²¹ Articles 43 and 92(3) of the FDRE Constitution.

¹²² S. Vangham and K. Tronvol, *The Culture of Power in Contemporary Ethiopian Political Life*, *SIDA Studies*, No. 10., Stockholm, 2003.

¹²³ In the third national election campaign, both the ruling and opposition parties had land tenure as the major platform of their socio-economic and political programs.

According to the FDRE Constitution, land is common property of the nations, nationalities and peoples of Ethiopia and shall not be subject to sale or other means of exchange.¹²⁴ Article 40(3) of the Constitution also provides that the right to ownership of rural and urban land, as well as of all natural resources, is exclusively vested “*in the state and in the people of Ethiopia*” (emphasis added). Thus, land ownership is vested in both the state and the people of Ethiopia. Due to the long debate on public (state) versus private land ownership, the state has claimed exclusive rights to land ownership to the exclusion of all others including nations and nationalities. As Brink has correctly said, common property including land is simply the property of a group.¹²⁵ Though the concept of common property is sometimes logically extended to public property or state property,¹²⁶ it does not mean that common property is always state property.

Therefore, one may pose the following question: can the state under the FDRE Constitution claim exclusive ownership rights to land? The understanding that has dominated the current debate in favour of public/state land ownership is the argument that the terms ‘state’ and ‘people’ used in Article 40(3) of the Constitution¹²⁷ are the same because people are normally represented by their state. This argument is, in my view, very dangerous and not in the spirit of the constitutional framework because it implies that all ‘peoples’ rights’ under the Constitution are the rights of the state. For instance, based on the above argument, the state has already made clear, on many occasions, that land is public property and can only be owned by the state. The recently enacted FDRE Rural Land Administration and Land Use Proclamation No. 456/2005¹²⁸ clearly illustrates this position taken by the Ethiopian government. Because this rule is included in the new land law with the support of the above-mentioned argument, it is important to address whether ‘peoples’ rights’ really means ‘state’s rights’ under the FDRE Constitution.

If we look briefly at this issue in an international law context, ‘state’s rights’ are normally expressed through sovereignty and territorial integrity.¹²⁹ Until recently,

¹²⁴ Article 40(3) of the FDRE Constitution.

¹²⁵ R. van den Brink, *Land Policy and Land Reform in Sub-Saharan Africa: Consensus, Confusion and Controversy*, World Bank Paper, 2003, p. 4.

¹²⁶ Bromely, *supra* note 71.

¹²⁷ This Article provides the following: “[t]he right to ownership of rural and urban land, as well as of all natural resources, is exclusively vested *in the state and in the peoples of Ethiopia*.”

¹²⁸ Article 5(3) of the FDRE Rural Land Administration and Land Use Proclamation No. 456/2005. This Article provides that “*government being the owner of rural land*, communal rural landholding can be changed to private holdings as may be necessary.” One can imagine the implication of Article on the customary communal landholding system of pastoral communities of Ethiopia that occupy about 61 per cent of the country’s total landmass.

¹²⁹ P. Malanczuk (ed.), *Akehurst’s Modern Introduction to International Law* (Routledge, London, 1997) and R. M. MacLean (ed.), *Public International Law Textbook (17th Edition)* (HLT Publications, London, 1995).

states were considered as the only subjects of international law having sovereignty in its absolute sense. But, in the face of increasing globalisation, with its interdependence and integration of the international community, the concept of sovereignty in its traditional absolute sense is now becoming obsolete¹³⁰ and devolved to include other national and international entities. The increasing power of international institutions as well as efforts to enforce human rights protection and international norms has compelled some scholars to introduce the idea of 'internal' and 'external' sovereignty—an idea which has already entered into constitutional law's realm and influences the domestic laws of many countries. As Tsegaye has indicated, the 'internal' sovereignty bestowed upon 'sub-national' entities under the FDRE Constitution¹³¹ is a clear example of this assertion and, of course, is the base for 'peoples' rights' as distinct from 'state's rights'.

'Peoples' rights' under international law have much to do with the concept of self-determination—a concept recognised for the first time under the 1966 human rights Covenants,¹³² which in my view are a reflection of 'internal sovereignty'. Even though there is no definition of the term 'people' under international law, theoretically, at least, it denotes a broad collection of subjects, varying from oppressed groups, populations, communities, nations and ex-colonies.¹³³ In actual state practice, however, it refers only to those peoples who have been under Western colonial rule¹³⁴ and looking for independence, and excludes other groups from being the bearer of the right to self-determination. One can see, for instance, the position of the African Charter of Human and Peoples' Rights that makes only colonised and oppressed peoples the sole possessors of this right.¹³⁵ Such a restrictive tendency in state practice, for reasons of fear of dismemberment, has gradually led to an equation of 'people' with 'state'. It is thus said that most of the proclaimed peoples' rights are in fact rights of states in disguise.¹³⁶

As Crawford clearly put it: since current state practice under international law considers rights of peoples as that of the state and exercised through its government,¹³⁷ it is not surprising that the Ethiopian state claims to be the sole owner of land. However, this position of the Ethiopian state is surprising because the FDRE Constitution has challenged this assumption together with state practice

¹³⁰ M.G. Kohen, 'Is the Notion of Territorial Sovereignty Obsolete?', in M. Pratt and J. A. Brown (eds.), *Borderlands Under Stress* (Kluwer Law International, The Hague, 2000) p. 35.

¹³¹ Tsegaye, *supra* note 84.

¹³² Article 1 of both the 1966 human rights Covenants.

¹³³ Galenkam, *supra* note 35, p. 46.

¹³⁴ V. Dyke, 'Self-Determination and Minority Rights', 13:3 *International Studies Quarterly* (1969) p. 252.

¹³⁵ Article 20(1) and (2) of the 1982 African Charter of Human and Peoples' Rights.

¹³⁶ A. Critescu, *The Right to Self-Determination: Historical and Current Development on the Basis of the UN Instruments*, E/CN.4/Sub.2/404/Rev. 1 (1981), p. 279.

¹³⁷ J. Crawford (ed.), *The Rights of Peoples* (Oxford University Press, Oxford, 1988) p. 159.

under international law and constitutionally guaranteed peoples' rights—including the right to self-determination¹³⁸—as distinct from state's rights. It is here where the issue of 'internal' sovereignty as mentioned by Tsegaye as well as the difference between 'peoples' rights' and 'state's rights' meet under the FDRE Constitution. It is important to note that the FDRE Constitution, unlike most modern constitutional laws in the world, vested sovereignty in 'nations', 'nationalities', and 'peoples' in which the right to self-determination is given to them. Thus, these three terms—'nations', 'nationalities' and 'peoples'—are different from the generic term 'people' used in the constitutions of other countries. In defining what these terms mean, the FDRE Constitution provides:

"Nations, Nationalities, and Peoples, for the purpose of this Constitution, is a group of people who have or share a large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit on identifiable, predominantly contiguous territory."¹³⁹

This definition obviously does not give us a very clear meaning of the term 'people', but it does not merely refer to the people of Ethiopia as a whole. Rather, it refers to the various groups of people in Ethiopia, including the pastoralists. Of course, all pastoralists cannot *per se* be equated with the notion of 'ethnic groups' as defined under Article 39 of the Constitution. But, when we see pastoralists in Ethiopia in terms of their various groups, such as the Afar, the Somali and the Boran, they definitely fall under the definition provided by the Constitution. Thus, the term 'people' in Article 40(3) of the Constitution that has exclusively vested the right to land ownership "*in the state and in the peoples of Ethiopia*" has to be understood in this way. In fact, the Constitution is a general law and it could be difficult to understand the specific modality of ownership of land by the state and by the people of Ethiopia. But, the important point is the recognition of communal land holding, including ownership rights to the traditional communities of Ethiopia. Moreover, unlike state practice under international law in respect to the right to self-determination, which restrictively equates 'peoples' with 'state' and vests peoples' rights in the state, the FDRE Constitution recognises this right of the people including secession. Article 39 of the Constitution does not vest the rights of the Ethiopian people in the state and thus cannot lead to an equation of 'peoples' with 'state'. In order to obtain a clearer picture on this issue and of the constitutional position on communal landholding, it is important to further assess the background of the provisions of Article 39 and 40 of the Constitution. For

¹³⁸) Article 39 of the FDRE Constitution. It is important to note that though the 1966 human rights Covenants provide self-determination in the sense of quest for independence, there are other treaties such as ILO Convention 169 that provide self-determination minus independence for various groups of people as a reflection of the emerging concept of internal sovereignty.

¹³⁹) Article 39(5) of the FDRE Constitution.

example, if the debate in the Constitutional Assembly on these two provisions is assessed, one can safely conclude that the Constitution recognises communal landholding in Ethiopia. As the late Dr. Abdulmajid and Abate indicated, the rights under Article 39 are not rights guaranteed to individuals nor are they rights of the state; rather, they are rights of 'nations', 'nationalities' and 'peoples' irrespective of their size.¹⁴⁰ Moreover, most justifications forwarded in favour of Article 39 relate to land security. In this regard, Ukuware stated that the land in Gambella belongs to the Gambella people themselves; the land is not donated to them by anyone and Article 39 gives security to their land.¹⁴¹ As indicated by the Secretary of the Assembly:

"The oppressors in the past went to the South [Ethiopia] to appropriate for themselves the land of that people. There is no way, today, for someone to invade and possess the land and property of others. Now the land and property of the people of the South belong to the people themselves. By the same token, the land of Oromo people are the property of the Oromo people themselves."¹⁴²

Ato Alemseged G/Amlak, who was a member of the Assembly, similarly said that it is difficult to separate the question of land from that of the people; hence, the land of the Oromo people, for instance, solely belongs to the Oromo people.¹⁴³ I am not proposing that everything said in the Assembly was perfectly genuine. Even though somewhat emotionally affected by the politics at the time and the dominance of the Ethiopian Peoples Revolutionary Democratic Front (EPRDF) in the process, there are several truths in the arguments and ideas of the Constitutional Assembly's debate that are helpful to understand the background of the provisions of the Constitution. Moreover, in any investigation that assesses rules and their purposes, a key tool for clarification is normally the minutes of the body that has adopted them. Since it is particularly important to clarify the intention of the body that adopts a rule, the minutes of the Assembly have been assessed. In fact, most of the arguments forwarded in the Assembly in favour of 'peoples' rights' under Article 39 focused on the security of collective rights, including rights over land and are similar to the description of self-determination developed by UNESCO in 1999. The UNESCO description includes guarantees of cultural security, forms of self-governance and autonomy, economic self-reliance, effective participation, land rights and the ability to care for the natural environment and the free expression and protection of collective identity in

¹⁴⁰ *Constitutional Assembly Minutes*, *supra* note 119, pp. 68–78.

¹⁴¹ *Ibid.*, p. 100.

¹⁴² *Ibid.*, pp. 108, 109. The then Secretary of the Assembly, Addisu Legesse, is now the Deputy Prime Minister and Minister of the Ministry of Agriculture and Rural Development.

¹⁴³ *Ibid.*, p. 113. Ato Alemseged G/Amlak was one of the top EPRDF party officials and elected to the Assembly from the self-government of Tigray.

dignity.¹⁴⁴ In particular, recognition of self-determination as a process for the achievement of human security and the fulfilment of human needs is essential for indigenous communities such as the pastoralists. In the words of the UNESCO Conference:

“Peoples and communities strive to gain control over the means to satisfy the human needs for their members. The most important of these are the needs for human security and welfare. By security, in this view, is included economic, health, environmental and food security as well as security of persons from physical violence, communal security, and political security, meaning respect for human rights and freedoms. Thus, a variety of means, political structures and arrangements can be conceived which would satisfy the human needs of communities and their members.”¹⁴⁵

Hence, culture, for instance, being a core element of distinctiveness of peoples, is often at the core of claims for self-determination when the cultural identity and ability of a community to express itself is suppressed or threatened.¹⁴⁶ As Daes notes, it is important that we try to guard against a kind of false consciousness with respect to achieving the true spirit of indigenous self-determination.¹⁴⁷ The true test of self-determination is not just whether the peoples have their own institutions, legislative authorities, laws, police and judges; rather, it is whether the peoples themselves actually feel that they have choices about their way of life. Therefore, in the face of the definition of the term ‘peoples’ under the FDRE Constitution, it is important to evaluate the provisions of Article 40 in light of the above arguments. Article 40(3) of the Constitution makes land the common property of ‘nations’, ‘nationalities’ and ‘peoples’ and vests land ownership “*in the state and in the peoples of Ethiopia*.” Closely surveying the debates in the Constitutional Assembly on this Article, one can easily see that the arguments and justifications were made from the perspective of group rights mentioned under Article 39.¹⁴⁸ In fact, most of the arguments were for or against the private sale of lands. A member of the Assembly argued that “those who favour the private ownership of land want to return the oppressed nations and nationalities back to their past sufferings that resulted in mass displacement.” Thus, the justifications for the adoption of Article 40(3) were dominated by the link that the Assembly established between land issues and the rights of peoples to

¹⁴⁴ UN Educational, Scientific and Cultural Organisation (UNESCO), ‘Conclusions and Recommendations of the Conference’, in M. van Walt van Praag (ed.), *The Implementation of the Right to Self-determination as a Contribution to Conflict Prevention* (UNESCO Centre of Catalonia, Barcelona, 1999) p. 19.

¹⁴⁵ *Ibid.*, p. 28.

¹⁴⁶ *Ibid.*

¹⁴⁷ E. Daes, ‘Striving for Self-Determination for Indigenous Peoples’, in Y. Kly and D. Kly (eds.), *In Pursuit of the Right to Self-Determination* (Clarity Press, Geneva, 2000) p. 58.

¹⁴⁸ See the debate on land in *Constitutional Assembly Minutes*, *supra* note 119, pp. 5–51.

self-determination. In fact, it is said that for peoples who have been disenfranchised, oppressed, etc. the need for security can be a prime objective in the struggle for self-determination.¹⁴⁹ This has also been the basis for the debate in the Ethiopian Constitutional Assembly on Article 40(3). It was argued, in the Assembly that “the issues of land security had been the driving force for the ‘nations’ and ‘nationalities’ in Ethiopia to fight for their rights to self-determination they have now achieved”,¹⁵⁰ at least in theory. Clearly reflecting the nexus between the right to self-determination and land, a member during the debate said:

“Nations and nationalities of Ethiopia, mainly the ‘people of South’ and the Oromo people had been fighting for their rights considering security to their land as part of defending their dignity and integrity. The issues of land have been part of the nations and nationalities struggle for their right to self-determination. Security for their lands is the essential condition for the full enjoyment of right to self-determination. Right to self-determination without security of land means a head with half shaved. Self-determination cannot have a strong base without security to land.”¹⁵¹

Therefore, the making of Article 40(3) does not exclude the communal landholding of the pastoralists in Ethiopia. There are some other provisions of the Constitution with the effect of recognising communal land holding systems. Article 40(5) of the Constitution provides that “Ethiopian pastoralists have the right to free land for grazing and cultivation as well as the right not to be displaced from their own lands.”¹⁵² Thus, the reading of this Article clearly shows that the Constitution recognises not only the private landholding of cultivators but also the communal landholding systems of the pastoralists—the two dominant land tenure systems practiced in Ethiopia. In fact, the incorporation of Article 40(5) is a historical landmark for Ethiopian pastoralists.¹⁵³ The right of Ethiopian pastoralists under the Constitution is nothing less than the right to their communal lands. Even in the debate of the Constitutional Assembly, Article 40(5) was praised for addressing the long-standing question of pastoralists in Ethiopia to their communal land. Most members of the Assembly from pastoral areas emphasised the impact of the sale and exchange of land on pastoralists and stated that that this had affected pastoralists more than

¹⁴⁹ UNESCO, *supra* note 144.

¹⁵⁰ See the arguments of Abebe, Aghali and Ahmed in *Constitutional Assembly Minutes*, *supra* note 119, pp. 24–34.

¹⁵¹ The argument of Alemseged in *ibid.*, p. 49.

¹⁵² Article 45 of the FDRE Constitution.

¹⁵³ Note that Article 40(5) was not there in the Draft prepared by the Constitution Drafting Commission. The Committee of Property and Economic Rights in the Constitutional Assembly incorporated it, for the first time, in the Draft. The argument forwarded by the Committee to incorporate the Article was “since sub-Article 4 of Article 40 guarantees rights of Ethiopian farmers, then the rights of the Ethiopian pastoralists must also be constitutionally guaranteed.”

anything else.¹⁵⁴ Moreover, in mentioning the existence of indigenous communities such as hunter-gatherers and pastoralists in Ethiopia who communally manage their lands and natural resources, Prof. Jemal Abdulkadir underlined the importance of the communal landholding systems in these communities:

“[These communities] possess communal lands that can never be privatised. The role of their systems of land and resource management is now globally recognised as sustainable and the best way of protecting natural environment. We also heard [from other members of the Assembly] how these communities suffered whenever the attempt to privatise such land was made. Even in areas of cultivators, mainly in the South, private holding was a recent history introduced without the will of the people.”¹⁵⁵

Thus, taking into account the justifications for the adoption of Article 39 and Article 40(3) together with the close assessment of the debate in the Constitutional Assembly in adopting Article 40(5), one can safely conclude that the FDRE Constitution has recognised and guaranteed the communal land holding system of the pastoralists in Ethiopia. It is important to note that the rights guaranteed under Article 40(5) to the pastoralists are also collective rights. As mentioned in the first part of this paper, Ethiopian pastoralists are indigenous communities whose culture, socio-economy and way of life are based on livestock herding on communally held land with non-exclusive common property rights. If one argues that the rights of Ethiopian pastoralists under Article 40(5) of the Constitution are rights guaranteed to individual pastoralists, then one does not understand these communities and their relationship to their land and their way of life. But the drafters of the Constitution understood these communities. There were a significant number of their representatives in the Constitutional Assembly that played a significant role in making the incorporation of Article 40(5) a reality.

6. The Position of Other Ethiopian Laws

The FDRE Constitution is the supreme law of the land and provides not only the fundamental rights and freedoms but also the distribution of governmental power—legislative, executive and judicial. Thus, it provides that the federal government “shall enact laws for the utilization and conservation of land and other natural resources”,¹⁵⁶ while the government of every constituent state has the duty “[t]o administer land and other natural resources in accordance with the

¹⁵⁴ See the argument of Mohammed from Afar in Constitutional Assembly Minutes, *supra* note 119, pp. 41–43. His argument was based on the suffering of the Afar pastoralists due to state development projects in the past two regimes that encroached upon their communal lands. But, take note that such state sponsored development projects continue to affect Afar pastoralists due to shrinkage of their prime grazing lands.

¹⁵⁵ *Ibid.*, p. 46. See also Zewde, *supra* note 88.

¹⁵⁶ Article 51 of the FDRE Constitution.

Federal laws.”¹⁵⁷ Based on this constitutional provision, the FDRE Rural Land Administration Proclamation No. 89/97 was adopted in July 1997, in addition to the Environmental Policy of Ethiopia, which was adopted the same year. According to the 1997 Ethiopian Environmental Policy document, the policies of the government regarding tenure and access rights to land include recognition that “the constitution ensures the rights of land users to a secure and uninterrupted access including grazing lands”¹⁵⁸ as well as the recognition and protection of customary rights over land.¹⁵⁹ Particularly, the policy is to protect such customary rights as far as they are “constitutionally acceptable, socially equitable and are preferred by local communities.”¹⁶⁰ The aim of the 1997 Proclamation was to implement the provisions of the Constitution that vested the right to land ownership exclusively in the state and in the people of Ethiopia. In fact, this law was designed to enable state governments to administer rural land, considering their wide and diversified land tenure systems. Thus, the principle upon which the Proclamation was issued is the one provided under Article 40(3) of the FDRE Constitution.¹⁶¹

The 1997 Proclamation emphasised the security of private landholders while it said almost nothing about the security of communal landholding systems. But, the positive with this Proclamation was that it provided a general framework and left the details of the law to state governments.¹⁶² State governments were required to ensure that their rural land laws conformed with environmental laws and federal land utilisation policies as well as providing for gender equality in land use rights.¹⁶³ Article 6(6) opened a window for communal landholding: “a land administration law enacted by Regional Council shall provide that demarcation of land for . . . grazing, forests, social services and such other communal use shall be carried out in accordance with the particular conditions of locality and through communal participation.”¹⁶⁴

Based on this, some state governments have issued their own rural land tenure laws that take into consideration the peculiar circumstances of their own localities. For instance, the Oromia state government issued its own land tenure law that recognises the communal landholding system of pastoralists. Thus, the

¹⁵⁷ Article 52 of *ibid.*

¹⁵⁸ Paragraph 4(3)(a) of the 1997 Environmental Policy, which was adopted by the House of Peoples' Representatives in the same year.

¹⁵⁹ Paragraph 4(3)(b) of *ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ Article 4 of the FDRE Rural Land Administration Proclamation No. 89/1997, *Federal Negarit Gazeta* (3rd Year No. 54).

¹⁶² Article 5(1) and (2) of *ibid.*

¹⁶³ Article 5(3) and (4) of *ibid.* Take note that until now there was no formal document of land policy in Ethiopia.

¹⁶⁴ Article 6(6) of *ibid.*

Oromia land tenure law provides that the customary rights of access to land for communal uses such as grazing, ritual ceremonies and public activities shall be maintained for both peasants and pastoralists.¹⁶⁵ In addition to the state of Oromia, other states such as the Southern Nations, Nationalities, and Peoples, the Amhara, and the Tigray have issued their own land laws. All these states have enacted laws based on the general framework provided by the 1997 Proclamation, a law that was repealed and replaced in 2005 by the recently issued FDRE Rural Land Administration and Use Proclamation No. 456/2005. In fact, in its preamble, the 2005 Proclamation encourages purposes that include:

- The exclusive ownership of land is vested in the state and in the people;
- The necessity to conserve and develop natural resources and pass them over to future generations;
- Implementation of sustainable rural land use planning based on the different agro-ecological zones of the country;
- Having information systems to identify the size and use rights of different types of land holdings in the country; and
- Overcoming the problems encountered by individuals, farmers, pastoralists and agricultural investors.

Moreover, the 2005 Proclamation aimed to establish a rural land administration to promote the conservation and management of natural resources and “to encourage private investors in pastoral areas having tribe-based communal land holding systems.”¹⁶⁶ These purposes, as they are included in the preamble of the Proclamation, have no binding effect. They simply show why the legislature has enacted the Proclamation. However, they reflect the policy behind the enactment of it and are helpful in interpreting its provisions. As these Proclamations are statutes made under the Constitution, which is the supreme law of the land, they must fully conform to the latter. Here, given the policy statements behind the provisions of the 2005 Proclamation, it is worthwhile to closely look at its provisions with a view to identify its position on the communal land holding system of Ethiopian pastoralists.

Although the FDRE Constitution has recognised the communal land ownership right of the ‘nations’, ‘nationalities’ and ‘peoples’ of Ethiopia, in my view, the 2005 Proclamation has failed to address in a sufficient and clear manner this very important right. The policy statement in its preamble that states the law is designed to “establish a conducive system of rural land administration that encourages private investors in pastoralists areas where there is tribe-based

¹⁶⁵) Article 5(3) of the Oromia Rural Land Use and Administration Proclamation No. 56/2002.

¹⁶⁶) Preamble of the FDRE Rural Land Administration and Use Proclamation No. 456/2005.

communal landholding system” has made very clear its position on communal landholding. Moreover, this Proclamation defines ‘communal holding’, under Article 2(12), as “*rural land which is given by the government to local residents for common grazing, forestry and other social services.*”¹⁶⁷ It also defines ‘state holding’, under Article 2(13), as “rural land demarcated and those lands to be demarcated in the future at federal or regional states holding; and includes forest lands, wildlife protected areas, state farms, mining lands, lakes, rivers and other rural lands.” From a close look at some of the definitions provided in various provisions of this Proclamation, including those mentioned above, it is evident that it is designed to ensure the security of private land holders. For instance, ‘holding right’ is defined, under Article 2(4), as “the right any peasant farmer or pastoralist shall have to use rural land for the purpose of agriculture and natural resources development, lease and bequeath to members of his family or other lawful heirs.” The term ‘pastoralist’ is also defined, under Article 2(8), as “*a member of a rural community that raises cattle by holding rangeland and moving from one place to the other, and the livelihood of himself and his family is based on mainly the produce from cattle.*”¹⁶⁸ In fact, there was significant pressure from some sections of the federal government to include in the 2005 Proclamation a provision providing that (for the first time) a landholding certificate should also be applicable to pastoral areas. The issue at this juncture is whether an individual pastoralist, who is a member of a community with communal rangeland holding, can possibly privately hold a rangeland and at the same time move from place to place. It is important to note that individual pastoralists do not hold rangelands privately in pastoral communities. As such, how can an individual pastoralist be entitled to possess rangeland and a holding certificate? This is a clear reflection of the ignorance or total disregard by lawmakers of the rights of pastoralists and their way of life.

As clearly indicated by Article 2(12) of the 2005 Proclamation, it is the state that endows communal rural land to Ethiopian traditional communities. This law sets aside the Constitution’s recognition of communal land holding systems. Under the Constitution, the state and the ‘nations’, ‘nationalities’ and ‘peoples’ of Ethiopia own land. The Constitution did not give more rights to the state than the ‘nations’, ‘nationalities’ and ‘peoples’. In the Constitution, states on the one hand and communities on the other have equal or ‘balanced’ rights of land ownership. However, the 2005 Proclamation denies the communal land ownership of the Ethiopian traditional communities. In addition to the right to

¹⁶⁷ Note that the approach to the definition under this Article is similar with the *diessa* (village) system of pre-1974 Ethiopia in the areas of highland farmers where the villagers used such land communally for their domestic animals and other purposes.

¹⁶⁸ Note that the right of Ethiopian pastoralists under Article 40(5) of the FDRE Constitution is a collective and not an individual right.

communally hold land, the Constitution recognises the rights of these communities to self-determination, including secession. It is, therefore, absurd for a country that recognises the right of these peoples to secede to deny their right to communal landholding and make it an exclusive right of the state.

The 2005 Proclamation has also failed to consider communal land as it is prescribed under ILO Convention 169, in the territorial sense. According to ILO Convention 169, the rights of ownership and possession of the peoples concerned over the lands they traditionally occupy shall be recognised. Moreover, the rights of these communities to use lands not exclusively occupied by them but to which they have traditionally had *access* for their subsistence and traditional activities must be respected. This is the territorial right of peoples, which is not merely restricted to the land that is occupied by them. The 2005 Proclamation, however, treats communal lands essentially from the perspective of the interests and rights of settled cultivators.¹⁶⁹ A close look at the provisions of the 2005 Proclamation clearly reflects that the land given by the government to local communities for grazing, forestry and other social services is fragmented rather than continuous.¹⁷⁰ Small, pocketed lands in farming areas (as opposed to the territorial, communally held land of pastoralists) are used by settled cultivators for various purposes. This is, however, not the case in lowland Ethiopia where the pastoralists live. In the dry harsh environment of lowland Ethiopia, a communally held fragmented land system would not be sustainable. Rather, continuous territorial land, as reflected in most international instruments and the FDRE Constitution, is an integral part of the communal landholding system of pastoralists.

In addition to defining communal land to be given by the government to local communities,¹⁷¹ the 2005 Proclamation also empowers the government to change communal land “to private holdings as may be necessary.”¹⁷² The *Amharic* version of this provision is clearer than the English one and permits the government, if it deems necessary, to change communally owned or possessed lands into privately held lands since the government is the sole owner of rural lands. At least by implication, this law totally denies the constitutionally guaranteed communal

¹⁶⁹ Preamble of the FDRE Rural Land Administration and Use Proclamation No. 456/2005.

¹⁷⁰ Fragmented communal land can really work in the case of the Ethiopian highland cultivators they permanently settle in a place. Also, as most Ethiopian highland cultivators rely on a mixed agricultural system, they need some open uncultivated land to be used as grazing land for their cattle together with privately held land for cultivation.

¹⁷¹ Article 13(9) of the Federal Rural Land Proclamation provides that: “Rural lands that have gullies and are located on hilly areas shall be *rehabilitated* and developed communally and as appropriate by private individuals.” From this provision of the law, it can be understood that degraded lands, for the purpose of rehabilitating them, are given to communal holding and taken away from communities and given to individuals once they have retained their fertility. See also Article 2(12) of *ibid*.

¹⁷² Article 5(3) of *ibid*. This Article begins saying: “[g]overnment being the owner of rural land, communal rural land holdings can be changed to private holdings as may be necessary.”

landholding rights of Ethiopian traditional communities. The rationale behind the 2005 Proclamation is that the communal landholding system of pastoralists hinders private investment and thus, in order to encourage investment, such a tribe-based traditional system of landholding should, at best, be eliminated or at least be denied legal recognition. In my view, this betrays the Constitution drafters' vision to empower people and allow communities to decide over their own affairs. As such, the 2005 Proclamation should be held unconstitutional and thus null and void.

In addition to contradicting the Constitution, such provisions of the Proclamation can be interpreted as prejudicing the right to communal land possession of indigenous communities. Fuelled by an erroneous belief by the government and the public at large that the Constitution exclusively vests land ownership in the state, the 2005 Proclamation creates a favourable environment for the state to easily appropriate the communal land of pastoralists in order to encourage investment and facilitate state driven development projects. The definition of the term 'pastoralist' together with the term 'holding rights' to mean the rights of an individual pastoralist¹⁷³ and the fact that a holding certificate¹⁷⁴ is the legal base to claim land use rights have numerous implications upon the rights of pastoralists to their communal land. The fact that individuals (as opposed to communities) are the major landholders recognised under the 2005 Proclamation together with its silence on holding certificates for collective landholders clearly reflects that the communal landholding systems of pastoralists have no place in this law.¹⁷⁵ It seems this law abruptly shifts from the previous position reflected in some government documents, such as the Pastoral Community Development Project (PCDP) document. This document states that "*there is a growing consensus within Government with respect to recommending community/clan certification of rural land to ensure access [for pastoral communities] subject to concurrence from the Regional (State) governments.*"¹⁷⁶ This view is reflected in the FDRE Constitution. Even though the state considers itself as the sole owner of land, the PCDP does not rule out the possibility of recognising the communal landholding system in land tenure laws, and the land tenure issue is among the sectoral issues addressed by the PCDP. In this regard, the PCDP states:

¹⁷³ Article 2(13) of *ibid.*

¹⁷⁴ Holding certificate is defined as a certificate of title issued by a competent authority as proof of a rural land use right under Article 2(14) of *ibid.*

¹⁷⁵ See Article 6. This Article also mentioned a joint holding certificate for a husband and a wife that jointly possess land. But, nothing is mentioned with regard to a holding certificate for communal landholding systems. In my view, the 2005 Proclamation formally denies and even abolishes existing traditional, communal landholding systems.

¹⁷⁶ The World Bank, *Pastoral Community Development Project: Project Appraisal Document on a Proposed Grant to the Federal Democratic Republic of Ethiopia, PCD Program, World Bank Report*, No. 25227-ET, 2003, p. 7.

“Government will be encouraged to formally recognize sustainable pastoral land-use as a land management practice analogous to sustainable cultivation and move to ensure the land-use rights of pastoralists, if necessary through the specific zoning of pastoral lands . . . The Project will assist Government and pastoralist communities to integrate these concepts into new and innovative strategies for the peaceful, efficient and sustainable use of rangelands.”¹⁷⁷

The PCDP reflects the position of Ethiopian policy-makers in regard to the communal landholding system of pastoralists prior to the adoption of the 2005 Proclamation. This was, in my view, an indication that both the government and donors recognised the enduring importance of customary communal tenure systems and sought to integrate them into sustainable arrangements for the allocation and management of land rights in pastoral areas of Ethiopia. But, the enactment of the 2005 Proclamation, which does not recognise communal landholding, clearly reflects a total shift in government policy towards communal landholding in this country.

As mentioned earlier, some state governments among the nine constituent states of the FDRE have issued land tenure laws. The states of Amhara and Tigray were the first two to enact their own land tenure laws. After the 1997 Proclamation was repealed and replaced in 2005, state governments are expected to re-adjust their land tenure laws in conformity with the 2005 Proclamation. The provisions of the 2005 Proclamation appear to have substantial similarities with the provisions of the Amhara and Tigray rural land laws, which were issued prior to the former. Thus, one can safely conclude that the land tenure laws of these two states (in which communal landholding system has no place as such) are the foundations for the 2005 Proclamation. However, the land law of the state of Oromia and the state of Southern Nations, Nationalities and Peoples are at the forefront of trying to address issues of communal land. The SNNP Land Administration Proclamation recognises communal holding, which is defined as “*a land out of government or individual possessions and is being under the common use of the local community as common holding for grazing, forest and other social services.*”¹⁷⁸ This is a positive provision since it recognises the possibility of communal land holding. However, there are some problems with this provision: although all communal holdings are lands that are outside government holding, government holding is “land demarcated and held and could be held by government and includes large forestlands, wild animals, parks, mining, lakes and rivers.”¹⁷⁹ The latter has many implications on customary communal land.

¹⁷⁷) *Ibid.*, p. 14.

¹⁷⁸) Article 2(16) of the Southern Nations, Nationalities and Peoples (SNNP) Land Administration Proclamation No. 53/2003.

¹⁷⁹) Article 2(17) of *ibid.* It is important to note that most of the lands occupied by pastoralists in this state are already designated as national parks, such as the *Netch-Saar* National Park.

Communal landholding, in this sense, is far from the communal land ownership rights recognised by the FDRE Constitution and international instruments, including ILO Convention 169. In other words, the land tenure law of the SNNP does not consider the territorial concept of land ownership by traditional communities. However, the definition of the term ‘pastorals’, in its collective sense, makes this law stronger than the 2005 Proclamation as far as the rights of pastoralists to their communal lands are concerned.¹⁸⁰

Oromia is another state in Ethiopia that has issued a rural land tenure law.¹⁸¹ This law is stronger than the SNNP Proclamation in regard to the former’s recognition of the communal landholding rights of indigenous communities. According to the Oromia rural land tenure law, the customary right of access to land for communal use such as grazing, ritual ceremonies, etc. shall be maintained for both peasants and pastoralists. Although it is currently difficult to calculate how strongly this provision will be enforced, including such a provision is a step in the right direction. The paradox in this regard is that the regional states with the highest percentage of mobile pastoralists (the states of Afar, Somali, Gambella and Benishangul-Gumuz) have, up to now, failed to adopt specific land laws suitable to preserve the way of life of these communities. However, most of the laws issued by state governments were enacted prior to the enactment of the 2005 Proclamation. The danger is that state governments are now legally obliged to ensure that their land laws conform with the 2005 Proclamation, which results in the reversal of the recognition that some of the states once made to communal land holding systems in their rural land tenure laws.

7. The Way Forward

Pastoralists are among the African indigenous communities who are highly dependent upon communal land for their means of livelihood. It is now beyond any reasonable doubt that the recognition of the rights of such communities under various international instruments includes recognition of their right to their communal land. Property rights to land—private, state, or community—should be defined by the community or the state in a way that is enforceable, understood and accepted by all. It is only in this way that property rights to land become legitimate. The way these rights are defined in Ethiopian laws on land tenure, primarily the newly issued 2005 Proclamation, cannot be said to be enforceable, understood and accepted in relation to Ethiopian

¹⁸⁰) Article 2(11) of the SNNP Land Administration Proclamation No. 53/20003: “pastorals means part of the rural society who hold grazing land in the lowland areas of the Region and whose livelihood is mainly based on the product they get from the animal resources they are rearing by moving from place to place.”

¹⁸¹) Oromia Rural Land Use and Administration Proclamation No. 56/2002.

indigenous communities with communal landholding systems. Logically, no landholding rights in pastoral areas that totally ignore the communal systems of the pastoralists can ever be legitimate.

Pastoralists in Ethiopia want property rights that match their activities: access rights, rules that prevent encroachment upon their communal grazing lands as well as rules that prevent over-use of resources. Even though, the FDRE Constitution grants them rights over their communal lands, the 2005 Proclamations denies them their constitutional rights and fails to recognise the existence of communal landholding in this country. Pastoralists are not asking the state to create new property rights to their land through law as they have their own traditional property rights to their land. Rather, pastoralists would like their historic, socio-economic and cultural rights over their communal lands to be respected by the state, investors and others. Of utmost importance for sustainable development is that property rights are secure, which, in my view, can never be achieved by enacting laws unless the rights contained therein are acceptable and understood by those who must follow them. Laws ought to be enacted with consideration of the pre-existing cultures, traditions and behavioural patterns among their addressees, which influences the reception and application of laws. It is also important to note that only intimate knowledge of the type of institution capable of enforcing the law and preserving its content can render the law truly useful. The assessment of Ethiopian laws in regard to pastoral land tenure demonstrates that there is consistency and continuity in the approach of the central government from the monarchical to the Marxist to the present day government.

The concept of law in the history of the Ethiopian state illustrates the state's illusion that enacting laws, and backing them up with state power will solve problems and develop the legal system in a consciously planned way. But it is important to note that we need a law that will be adhered to by conviction, not by mere obedience to state power. Thus, there is a need to enhance participation so that a law is respected and applied not because of powerful state enforcement machinery but because it is considered just and right by the majority of people who are its addressees. The imported doctrine of the 2005 Proclamation holds that every sector has to be in exactly the same way across the entire national territory, and that all land rights and obligations are the same for everyone. This principle of 'one size fits all', which is dominant in almost all the laws and policies of this country, needs to be changed in light and in the interest of its diversified society. More importantly, in a country with its Constitution based on respect for the rule of law, it is necessary to revise the new 2005 Proclamation so that it is consistent with the Constitution's rights of Ethiopian pastoralists to their communal lands.

